MARITAL OR SEPARATE

PROPERTY POST LERCH

Kelly Anne Miles
Smith, Gilliam, Williams, & Miles, P.A.
Gainesville, Georgia
kmiles@sgwmfirm.com

Table of Contents

APPENDICES

I. INTRODUCTION

There is a reason it is called the "practice of law." Just when the family lawyer is certain that he or she knows for sure what the law dictates, it changes. Such was the case when the Supreme Court of Georgia issued its opinion in Lerch v. Lerch, 278 Ga. 885, on January 24, 2005. Until then the law in Georgia was crystal clear that transfer of separate property of one spouse into jointly titled property of both spouses created only a rebuttable presumption of a gift. Now, that long standing principle has been put in a lurch by Lerch. Or has it???

II. GIFTS IN DIVORCE

O.C.G.A. Section 44-5-80 sets out the criteria for making a valid gift in Georgia.

(1) The donor must intend to give the gift;

(2) The donee must accept the gift (O.C.G.A. Section 44-5-81 states that the law assumes acceptance if the gift is of substantial benefit); and

(3) The gift must be delivered or some act which under law is accepted as a substitute for delivery must be done. (The delivery of a valid deed is an acceptable delivery of the property itself. McLemore v. Wilborn, 259 Ga. 451 (1989)).

Georgia cases specific to gifts in divorce have consistently established the following rules:

Rule #1: A gift made to only one spouse by a third party during the marriage will be considered the separate property of the recipient spouse. Bailey v. Bailey, 250 Ga. 15 (1982).

Rule #2: A gift given to the marital couple by a third party is deemed to be marital property absent evidence of a contrary intent by the donor. Braly v. Braly, 244 Ga. 773 (1979).

Rule #3: A gift between spouses of property acquired during the marriage will remain marital property subject to equitable division. McArthur v. McArthur, 256 Ga. 762 (1987).

And now Lerch has added a fourth rule:

Rule #4: A gift of separate property by a spouse to the marital unit will result in the entire property becoming marital subject to equitable division.

The 1979 case of Braly v. Braly involved a tract of land deeded to husband and wife by husband's parents. The land was sold and the proceeds were deposited into a joint account. A portion of the proceeds from the account were later used to buy a home and the home was titled solely in the husband's name. The jury found that there had not

been a gift from the wife to the husband of the funds used to buy the house. The Supreme Court upheld the verdict and stated that: "... a gift will not be presumed from the wife to the husband, the evidence to support a gift to the husband must be clear and unequivocal, and the intention of the parties must be free from doubt." 244 Ga. at 774.

III. LERCH v. LERCH (*Appendix A*):

A. **Facts:**

Donald and Barbara married on December 16, 1994. Nine days before they married, they entered into a prenuptial agreement. This marriage would be the second for Donald and the third for Barbara. Donald had a house on Skidaway Island in Savannah that he brought into the marriage which was encumbered by a first deed to secure debt. However, in listing his separate assets for the prenuptial agreement, Donald failed to list his house. The house was titled solely in Donald's name for the first five years of the marriage. Then on November 15, 1999, Donald executed and recorded a gift deed conveying the house to him and Barbara as joint tenants with right of survivorship. (See *Appendix B* for Deed of Gift). In 2002, Donald executed a second deed to secure debt against the property for $72,000 (which he claims was necessary in order to pay for expenses of the marriage!) but Barbara

never signed this deed. Then on March 21, 2003, both Donald and Barbara executed a promissory note and new deed to secure debt refinancing the original first mortgage. This refinance resulted in an increase in the first mortgage balance while the second mortgage stayed in place. A few months later on May 23, 2003, Donald gave Barbara his personal financial statement reflecting that the house was a "joint" asset. The marriage came to an end less than two months later on July 7, 2003, when they separated. Donald filed for divorce on July 11th. Both parties filed Motions for Partial Summary Judgment. Donald claimed that one half of the equity in the house was his separate property and that the other half was marital property subject to equitable division. Barbara claimed that the deed of gift resulted in the entire house being marital and subject to equitable division. The Court bought Donald's argument and determined that half of the house remained the separate property of Donald and the other half was marital. The Court then proceeded to award Donald all of the marital half as his portion of the equitable division of marital property. Barbara was left with the $100,000 from Donald which was the amount due to her pursuant to the terms of the prenuptial agreement. Barbara appealed and the Supreme Court reversed and remanded the case back to the trial court. Eight months later on August 1, 2005, Donald and Barbara entered into a Final Consent Order agreeing that Donald

keeps the house but that he must pay Barbara $25,000 immediately plus another $45,000 payable monthly as alimony. (Brief of Appellant is attached as *Appendix C* and Brief of Appellee is attached as *Appendix D*).

B. **Supreme Court's Holding**:

The *entire* house should have been treated as marital property (emphasis added). Once Donald executed the gift deed to himself and Barbara, the property ceased to qualify as Donald's separate property. The act of deeding the house to himself and Barbara manifested an intent to transform Donald's own separate property into marital property.

C. **Questions Created by Lerch**:

So what effect does Lerch have on the litigants and attorneys advocating his or her case? Many questions are now posed by this case.

Question #1: Does Lerch eliminate the rebuttable presumption of a gift?

Under a long line of case law, a gift can be rebutted with clear and convincing evidence of a contrary intent by the donor. While the Supreme Court in Lerch does not

expressly overrule this case history, Lerch does present the argument that there is no longer an opportunity for a gift to be rebutted. Instead, the transferred asset *automatically* becomes a marital asset subject to equitable distribution. The effect of Lerch may in fact be that broad. Under this interpretation, the party who originally held the property as his or her separate asset will have to rely on the principles of equitable division in order to receive any credit for his or her separate property contributions (as discussed later in this paper).

On the other hand, did the Supreme Court intend for the Lerch ruling to be narrowly construed to only apply to real estate whose transfer can clearly be evidenced by a deed? The Supreme Court stated that when Donald deeded the home to both he and his wife, he "manifested an intent to transform his own separate property into marital property." There was no evidence that Donald intended to do anything other than convey the entire property to the marital unit. By the very terms of the deed, Donald and Barbara each received an undivided one-half interest in the entire property. Therefore, the trial court erred in determining that Donald retained any separate property interest in the property. In Lerch, the act of executing and delivering the deed was evidence of intent to make the gift. The Court does not discuss whether any parol evidence was presented by Donald in an effort to rebut the intention of making a gift. Nor does the Court even use the words "clear and convincing evidence" as a standard in

Lerch. In Georgia, parol evidence as to the nature of the transaction, the circumstances, or the conduct of the parties is admissible to rebut the presumption of a gift by clear and convincing proof. Jackson v. Jackson, 150 Ga. 544 (1920). Other states have held that when a deed clearly and unambiguously states that the conveyance is a gift, the deed cannot be impeached by parol evidence. See Utsch v. Utsch, 266 Va. 124, 581 S.E.2d 507 (2003) as an example. Is the Court in Lerch taking the position of other states now on parol evidence?

Would the same have been true if the asset had not been real estate but instead had been an account held only in Donald's name which he brought into the marriage as his separate property but which he later transferred into a joint account? Does Lerch tell us that the act of depositing separate funds into a joint account is an act in and of itself which "manifests an intent to transform" the separate property into marital property? Or is there still the opportunity for the trier of fact to determine if there is clear and convincing evidence to the contrary? For instance, suppose the separate funds were deposited into the joint account solely for estate tax planning purposes or solely to enable the stay at home spouse to be able to pay the subcontractors doing renovations to the home? If the client's position is to narrowly apply Lerch, then an inference can be made that the Court's reference to Goldstein v. Goldstein, 310 So.2d 361, 366 (Fla.App. 1975) is evidence that the Lerch Court did not intend to totally eliminate the opportunity

to rebut the presumption. The Goldstein case held that a gift from the husband to the marital unit raised a presumption that the property qualified as marital. Therefore, if the Lerch Court meant to do away entirely with the rebuttable presumption standard, then certainly it would not have cited this Florida case. See Avera v. Avera, 268 Ga. 4 (1997) for a good overview of gift law in the context of a divorce. Avera is discussed at length later in this paper.

Question #2: Who now has the burden of proving the gift?

Once again, for years Georgia law has been clear that the burden of proof is on the party seeking to prove title by gift and that proof must be done by clear and convincing evidence. Mashburn v. Wright, 204 Ga. App. 718 (1992). The burden is on the person claiming the gift to prove all essential elements. Whitworth v. Whitworth, 233 Ga. 53 (1974). Under the old law, Barbara would have the burden of proving the gift of the entire home in the Lerch case. Does Lerch now shift the burden? Is the burden now on the party disputing the gift rather than on the one receiving the gift? If this is the case, then Donald would have the burden of proving that he did not intend to make a gift of the entire home to himself and his wife.

If Lerch did intend to shift the burden, then what is that burden? Is it still by clear and convincing evidence? The Supreme Court gives no guidance on the burden of

proof but it does appear that once the deed was executed and delivered, the burden of proving the gift had been met by that act. The Court did not leave room for it to even be argued that no gift of the entire property was intended, so Donald never had the opportunity to rebut the gift, thereby making the burden of proof irrelevant under the particular facts in Lerch.

Question #3: Did the fact that the deed was a "gift deed" influence the Supreme Court's decision such that the ruling should be limited to this type of conveyance only?

When Donald conveyed his separate property in its entirety to the marital unit, he did so by a gift deed which reflected the deed's consideration as being "love and affection". Suppose the consideration had been "ten dollars and other good and valuable consideration" or in consideration of "the mutual benefits flowing to all parties through estate planning." Would the Court have ruled the same way? It appears that the right of survivorship language included in the deed by Donald did not influence the decision of the Court. In fact, footnote 4 of the opinion notes that: "We make no decision regarding the effect of the survivorship language as it is not necessary to do so for any issue in this appeal."

Question #4: Should the other distinguishing facts in Lerch limit its application?

For instance, did the fact that Donald failed to list the house as his separate property in the prenuptial agreement matter? Or is it a significant fact that the parties jointly refinanced the mortgage? Or that after conveying the property to the marital unit, Donald referred to the house as "joint" property on a financial statement he gave to Barbara? All of these are facts that can be used to argue that Lerch should not be applied in all cases but only in those containing similar facts.

Question #5: Can Lerch be applied in reverse?

If a separate asset of one party later conveyed to the marital unit becomes entirely a marital asset subject to equitable division in divorce, does it necessarily follow that an asset owned by the marital unit later conveyed to only one party then becomes that party's separate asset? If Lerch had occurred in the reverse and Donald and Barbara had received the property from a third party by a gift to both of them and then later Donald and Barbara executed a gift deed conveying title solely to Donald, does the property then become Donald's separate property? If so, under Lerch, the entire property is treated as Donald's separate property. All of a sudden, how property is titled becomes extremely relevant in divorce cases!

Question #6: Can the source of the funds rule be argued to get a larger distribution of the marital property that was once separate property?

As an advocate for the client who at one time had a separate property interest, the lawyer should argue that his client is entitled to a larger percentage of the equitable division to compensate for the separate property contribution. While the asset itself may now be deemed marital under Lerch and placed into the marital pot for division, the contribution to that marital pot by that spouse is greater. Thus, under the public policy established by Thomas v. Thomas, 259 Ga. 73 (1989), the spouse who contributed his separate property to what is now marital property through a gift, should be entitled to an interest in the ratio of the separate property investment to the total investment in the property. The source of the funds rule may still be argued.

Of course if the source of the funds rule may still be a valid argument on assets converted from separate to marital under Lerch, then the appreciation of that asset also becomes relevant. Any appreciation in the value of the separate property portion during the marriage may or may not be separate property depending on the circumstances giving rise to the appreciation. Crowder v. Crowder, 281 Ga. 656 (2007). If the fact-finder determines that the appreciation is due solely as a result of market forces, then the appreciation is the owner's separate property; but, if the appreciation is the result of

the efforts of either or both spouses, then the appreciation is marital. Bass v. Bass, 264 Ga. 506 (1994). If there are both types of appreciation, the source of the funds rule would be applied. Horsley v. Horsley, 268 Ga. 460 (1997).

For instance, if the value of the separate asset was $100,000 at the time it was conveyed from the spouse to the marital unit, and the asset is now worth $300,000 of which the appreciation is due $50,000 solely to market forces and the balance is due to the labor of the parties, then there would be an argument under Thomas that not only is the $100,000 the amount the conveying spouse should get, but also that spouse should get the $50,000 of the appreciation due to market forces leaving the remaining value of $150,000 to be split equitably between the parties. Under this scenario, the only real effect Lerch has had is the classification of the property as marital and it has had no effect on the actual division of the property. It is simply treated as a mixed separate and marital asset. Hubby v. Hubby, 274 Ga. 525 (2001). Also see Avera discussed below.

On the other hand, a gift is a gift and once the separate property is "gifted" to the marital unit, there is no more separate property interest to even do a source of the funds analogy.

IV. LERCH AND EQUITABLE DIVISION

Obviously, if the client is not the one who converted the separate property into marital property under the Lerch ruling, then Lerch is fantastic!!! But if the client is the one whose separate property is now dumped into the marital pot to be divided as a marital asset, then remember that phrase of "equitable division."

An equitable division of marital property does not necessarily mean an equal division. Wright v. Wright, 277 Ga. 133 (2003). While the easiest ruling for the trial court or jury to make is to split the marital assets 50-50, it is the lawyer's job to educate the trier of fact as to why a 50-50 split is not the fair thing to do in a case involving Lerch issues.

The primary goal of equitable division is to fairly divide the parties' assets. Payson v. Payson, 274 Ga. 231 (2001). The equitable division of property is an allocation to the parties of the assets acquired during the marriage based on the parties' respective equitable interests. Byers v. Caldwell, 273 Ga. 228 (2000). The purpose behind the doctrine of equitable division of marital property is to assure that property accumulated during the marriage be fairly distributed between the parties. Campbell v. Campbell, 255 Ga. 461 (1986). The division of marital property will be upheld as long as it falls within the broad discretion of the fact finder. Wright at 134. In determining the manner in which marital property is to be equitably divided, the fact-finder is

authorized to exercise its discretion after considering all the relevant factors, including each party's contribution to the acquisition and maintenance of the property (which would include monetary contributions and contributions of a spouse as a homemaker), as well as the purpose and intent of the parties regarding ownership of the property. Stokes v. Stokes, 246 Ga. 765 (1980); Rooks v. Rooks, 252 Ga. 11 (1984); Courtney v. Courtney, 256 Ga. 97 (1986).

For example, suppose land was acquired by wife from her parents as a gift. The land was undeveloped so the parties needed a construction loan to build their home. To get the loan, title to the property was required to be held jointly so the wife conveys title to the marital unit. The house is built and the parties live there until their divorce. The wife's father was the contractor and gave his labor free of charge. In advocating for the wife, one could argue that the land is her separate property. The land was gifted just to her by her parents and the only reason she conveyed title to the marital unit was to qualify for the construction loan. Therefore, she had no intent to make a gift of the property to her husband. Title was simply a formality. Thus, any claims under Lerch that the *entire* property was a gift to the marital unit was rebuttable. In advocating for the husband, one would cite Lerch and clearly under its rationale, the *entire* property, land and home, would be deemed marital.

While the court struggles with these two opposing principles of law, reads all of the case law on the subject of classifying property as separate versus marital, and re-familiarizes itself with Georgia gift law, the court's time and patience are rapidly fading. Perhaps the wife would be better off and gain the appreciation of the court by simply acknowledging that under Lerch there is a good argument that the *entire* property is a marital asset and then proceed to set forth all of the arguments as to why the entire equity should not be divided 50-50. For instance, the fair and equitable division of this asset is that, from the total equity, the wife should first be awarded the current value of the land (not the value of any improvements) plus the value of the labor her father did with any remaining equity in the property to be divided equally between the parties. Of course, evidence will need to be presented supporting these values but the argument that this is "fair" is compelling and is not contrary to law. Plus, the wife has averted the focus of the Court away from the deep dark hole Lerch creates for her and has shifted the focus to principles of fairness and justice....which are much easier concepts for the trier of fact to grasp and appreciate.

In Avera v. Avera, 268 Ga. 4 (1997), (see *Appendix E*), the court gives a good overview of gift law in the context of a divorce involving property titled solely in the wife's name. In this case, wife acquired title from an irrevocable trust set up by the husband. The husband was the trustee of the trust. The property was conveyed from the trust to the wife as a result of the joint effort of husband and wife to further the

financial security of their family. Most of the improvements to the land were made while the property was in the name of the trust rather than in wife's name. The Supreme Court addresses the issue of whether the conveyance of the property from the trust to the wife was a gift from a third party and thus, the separate property of the wife. The Court found that the deed from the trust to the wife was a gift thus making the property the separate property of the wife as of the time title was conveyed to her. The Court vacated and remanded the case instructing the trial court to determine whether any portion of the property was paid for with marital funds after the trust had conveyed the property into wife's name. If so, then a proportional share of the property may be a marital asset subject to equitable division. Regardless of whether any portion of the purchase price was found to be a marital asset, the Supreme Court instructed the trial court to not end its inquiry there. If the home had appreciated in value during the marriage since the time title was conveyed from the trust to the wife, and the appreciation was the result of the efforts of both or either spouse, then this amount of appreciation would be marital property subject to equitable division.

V. THE EFFECT OF LERCH ON ALIMONY

Do not forget about alimony claims. While periodic alimony is the most commonly known and used form of alimony, lump sum and in kind alimony can be the Lerch Loser's best friend.

Alimony is an allowance out of one party's estate for the support of the other party when they are living separately. O.C.G.A. Section 19-6-1(a). Alimony is to be awarded to either spouse in accordance with the needs of the spouse and the ability of the other spouse to pay. O.C.G.A. Section 19-6-1(c). O.C.G.A. Section 19-6-5(a) sets forth the factors to be considered in determining permanent alimony.

(1) The standard of living established during the marriage;

(2) The duration of the marriage;

(3) The age and the physical and emotional condition of both parties;

(4) The financial resources of each party;

(5) Where applicable, the time necessary for either party to acquire sufficient education or training to enable him to find appropriate employment;

(6) The contribution of each party to the marriage, including, but not limited to, services rendered in homemaking, child care, education, and career building of the other party;

(7) The condition of the parties, including the separate estate, earning capacity, and fixed liabilities of the parties; and

(8) Such other relevant factors as the court deems equitable and proper.

Several of the above factors can be argued by the Lerch Loser to seek all or only a portion of the property itself that was once the Lerch Loser's, but is now marital, or to seek monetary compensation for the value of their separate property lost to the marital unit.

Alimony can be the use, ownership, or possession of any property owned by the other spouse, real or personal. Jones v. Jones, 220 Ga. 753 (1965); Johnson v. Johnson, 220 Ga. 461 (1964). The power to draw permanent alimony from the other spouse's separate estate is virtually unlimited. Tolbert v. Tolbert, 221 Ga. 159 (1965); Moseley v. Moseley, 214 Ga. 137 (1958). This can include fee simple title to real property. Elrod v. Elrod, 231 Ga. 222 (1973).

For instance, in the earlier example given where the wife received land by gift from her parents which she later conveyed to herself and her husband in order to get the construction loan, under the Lerch ruling, the entire property would be a marital asset subject to equitable division. Assume the trial court then awards one half on the equity in the entire property to each party under principles of equitable division. The court could then award the husband's one half share of the equity to the wife as in kind alimony. Wife would then receive full title and possession of the property. Wife's argument for this award would focus on the alimony factors rather than principles of equitable division. These arguments would be even more successful if the husband had

a large separate estate from which wife could argue he had the ability to pay this in kind alimony award.

Of course the alimony argument for the Lerch Loser will not work if that client has committed adultery and that adultery is shown to be the cause of the separation between the parties. Adultery alone does not work as an automatic bar. O.C.G.A. Section 19-6-1 and Clements v. Clements, 255 Ga. 714 (1986).

VI. RESULTING TRUST

Less than a month after the Supreme Court of Georgia rendered its decision in Lerch, it addressed a divorce case involving a resulting trust argument in Brock v. Brock, 279 Ga. 119 (2005). (See *Appendix F*). In Brock, the parties lived throughout their marriage in a home bought by husband prior to the marriage. The home was titled in husband's name until sometime in the marriage when he transferred ownership to his wife in consideration for her "love and affection." The wife contends that this was a gift to her and the husband contends that the wife simply held title to the home in an implied resulting trust for husband. Husband claimed that the conveyance to wife was done solely for the purpose of protecting the home from potential future creditors. The trial court found that the property was held as an implied resulting trust for Husband.

The Supreme Court reversed this portion of the trial court's ruling. A good discussion is given on an implied trust within the Court's opinion. (See also O.C.G.A. Section 53-12-91 on resulting trusts.) In this case, the Court found that the husband had not presented clear and convincing evidence to rebut the presumption of a gift to the wife. Under O.C.G.A. Section 53-12-92(c), a gift will be presumed if the payor of consideration and transferee of the property are husband and wife. To rebut this presumption, the husband was required to prove by clear and convincing evidence that a resulting trust was contemplated by both parties by way of an understanding or agreement. There was no evidence of mutual intent to create a trust and there was no evidence of any mutual understanding or agreement between husband and wife of a trust at the time the deed was executed. Therefore, the trial court erred in finding a resulting trust and awarding the home to the husband. See Ford v. Ford, 243 Ga. 763 (1979) and Scales v. Scales, 235 Ga. 509 (1975), which both found that the evidence presented was insufficient to rebut the presumption of a gift.

Although Lerch was not cited in the Brock case, the Brock case can be interpreted to be persuasive authority for the position that Lerch does not abolish the opportunity to rebut a gift. However, the burden to overcome the presumption of the gift is extremely difficult which makes proving a resulting trust problematic.

VII. POST LERCH CASE LAW

Since Lerch v. Lerch was decided on January 24, 2005, there has only been one appellate case that addresses any of the issues raised in Lerch. In Grissom v. Grissom, 282 Ga. 267 (2007), (see *Appendix G*), the parties executed a prenuptial agreement just as they did in Lerch. Unlike Lerch, the two items in dispute on appeal, a home and a brokerage account, were listed as the husband's separate property in the prenuptial agreement. During the marriage the home was refinanced and conveyed to both parties as joint tenants with right of survivorship. Also, during the marriage, the brokerage account was transferred into another account which listed both parties as account holders. The husband claims that the changes in the title to the home and the brokerage account occurred without his knowledge and that he did not intend to convey any interest to his wife. The trial court declined to reach the husband's claims of accident, mistake or fraud regarding the transfer of title of these assets. Rather the trial court looked to the terms of the prenuptial agreement and found that its terms were plain and unambiguous. The intent of the parties could be found clearly in the terms of the prenuptial agreement and therefore, there was no need to look any further to determine the parties' intent at the time of executing the prenuptial agreement. According to the trial court, the plain language of the agreement stated that "the ownership of any real or personal property acquired by the parties in the future shall be determined in reference to the legal title to said property." However, the home and brokerage account were not

acquired "in the future" but were acquired by the husband prior to the marriage and identified as his separate property in the prenuptial agreement. Therefore, the trial court ruled that the wife had waived any claims she had to them in the prenuptial agreement.

On appeal, the wife argues that the change in ownership of these two assets from being titled solely in husband's name to being titled jointly results in a gift of these two assets to the marital unit, and thus, the assets are entirely marital. She relies on Lerch to support her position. Wife further argues that the prenuptial agreement stated that each party had the right "to transfer, give or convey to the other any property or interest therein" and that any property so transferred "shall become the separate property" of the recipient. The Supreme Court reversed the trial court and remanded the case stating that if the transfers of the title from the husband to the marital unit were found to be legitimate transfers, then the treatment of these two assets for purposes of distribution under the prenuptial agreement would change. However, without findings of fact regarding the transfers of title, the appellate court could not determine if they were legitimate.

So it appears from Grissom that the Supreme Court is following Lerch to the extent that a deed from one spouse to the marital unit manifests an intent to transform the transferor's separate property into marital property. But Grissom makes it clear that the circumstances surrounding the actual transfer are relevant in determining if the transfer was legitimate. If it was legitimate, then the ruling of Lerch would prevail.

VIII. PRACTICE TIP!!!

In the case of Mathis v. Mathis, 281 Ga. 865 (2007), the husband brought a house into the marriage, among other assets. That house was sold and another home was bought. On appeal, the husband argued that the trial court should have awarded him a greater interest in the marital home because he had used premarital assets to pay for it. While this argument could have been persuasive, the Supreme Court was unable to conclude that the trial court's equitable division of marital property was improper due to the fact that there were no findings of fact contained in the final judgment and decree. Since the issue being appealed was dependent on the factual determinations made by the trial court and those determinations were not reflected in the decree, nor were they required to be, the Supreme Court could only affirm the ruling. This case underscores the importance of the lawyer requesting the trial court to make its finding of facts prior to the entry of the written judgment pursuant to O.C.G.A. Section 9-11-52(a) (see *Appendix H*). This is especially wise if there are Lerch assets involved in the case. See also Crowder v. Crowder, 281 Ga. 656 (2007).

HLerch v. Lerch
Ga.,2005.

Supreme Court of Georgia.
LERCH
v.
LERCH.
No. S04F1963.

Jan. 24, 2005.

Background: A petition for divorce was filed. The Superior Court, Chatham County, Bass, J., granted the divorce and awarded husband the marital home and awarded wife $100,000. Wife appealed.

Holdings: The Supreme Court, Fletcher, C.J., held that:
(1) the trial court was required to treat entire home as marital property, and
(2) the parties prenuptial agreement did not preclude wife from making a claim for the marital home.

Reversed and remanded.

West Headnotes

[1] Divorce 134 ⇐252.5(1)

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k252.5 Homestead or Residence, Disposition of
134k252.5(1) k. In General. Most Cited Cases
The trial court was required to treat entire home as marital property during divorce proceeding; during the parties' marriage, husband deeded the home to both wife and himself as "tenants in common" with a right of survivorship.

[2] Divorce 134 ⇐252.3(3)

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k252.3 Particular Property or Interests and Mode of Allocation
134k252.3(3) k. Separate Property and Property Acquired Before Marriage. Most Cited Cases
Normally, a gift to one spouse becomes the separate property of the recipient spouse; when a gift is given to the marital couple, however, the property will become marital property absent evidence of a contrary intent by the donor.

[3] Divorce 134 ⇐249.2

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k249.2 k. Stipulations and Agreements of Parties. Most Cited Cases
The parties' prenuptial agreement, which provided that wife would not make any claims against husband's property, did not preclude wife from making a claim for the marital home, during divorce proceeding, where husband executed a gift deed that transferred the marital home to both wife and himself as "tenants in common" with a right of survivorship.

**223*886 Duffy & Feemster, Dwight T. Feemster, Savannah, for appellant.
Barr, Warner & Pine, Karen D. Barr, Savannah, for appellee.
*885FLETCHER, Chief Justice.
Donald and Barbara Lerch were married in 1994, and divorced in 2004. The Superior Court of Chatham County awarded the marital home to Husband, and, in accordance with the couple's prenuptial agreement, awarded Wife $100,000. Wife appeals, contending that the trial court erred in its decision to award the home to Husband. Because the trial court failed to properly treat the entire home as marital property, we reverse and remand to the trial court for a new equitable division of property.

During the marriage, the couple lived in a home on Skidaway Island in Savannah, Georgia that Husband had purchased prior to the marriage. In 1999, Husband

executed and recorded a gift deed transferring ownership in the home property to both parties as "tenants in common" with right of survivorship. The trial court determined that as a result of the gift, half of the home qualified as marital property and the other half remained the Husband's separate property. The court then awarded the entire home to Husband, giving the portion of the home qualifying as marital property to Husband as his portion of the equitable division of marital property.

[1][2] 1. Normally, a gift to one spouse becomes the separate property of the recipient spouse.[FN1] When a gift is given to the marital couple, however, the property will become marital property absent evidence of a contrary intent by the donor.[FN2] In this case, **224 the Husband deeded the home to both his wife and himself, to be held as "tenants in common" with right of survivorship. In so doing, Husband manifested an intent to transform his own separate property into marital property.[FN3] Because both Husband and Wife then owned an undivided one-half interest in the property,[FN4] the entire home should have been treated as marital property. Accordingly, the trial court's decision to treat only one-half of the home as marital property must be reversed.

FN1. *Bailey v. Bailey*, 250 Ga. 15, 295 S.E.2d 304 (1982).

FN2. See e.g. *In re Marriage of Vrban*, 359 N.W.2d 420 (Iowa 1984) (where gift was given by husband's parents to the husband and wife "as a unit," gift is considered marital property). See also *Braly v. Braly*, 244 Ga. 773, 262 S.E.2d 94 (1979) (property acquired from proceeds of sale of property that was gifted from husband's parents to the marital couple is marital property).

FN3. See *Goldstein v. Goldstein*, 310 So.2d 361, 366 (Fla.App.1975) (gift from husband to husband and wife raised presumption that property qualified as marital). Compare *McArthur v. McArthur*, 256 Ga. 762, 353 S.E.2d 486 (1987) (interspousal gift of marital property remains marital property subject to equitable division).

FN4. We make no decision regarding the effect of the survivorship language as it is not necessary to do so for any issue in this appeal.

[3] 2. Husband contends, in the alternative, that Wife is precluded from making a claim for the marital home by virtue of the prenuptial agreement. In that agreement, Wife promised not to make any claims against Husband's property in the event of a divorce. Even if that agreement might have precluded Wife's claim before Husband executed the gift deed, however, it certainly did not preclude such a claim afterwards. Once Husband deeded the property to the marital couple, the property ceased to qualify as his separate property. Thus, Wife's claim against the property is not foreclosed by the prenuptial agreement.

Judgment reversed and case remanded.

All the Justices concur.
Ga.,2005.
Lerch v. Lerch
278 Ga. 885, 608 S.E.2d 223, 05 FCDR 211

END OF DOCUMENT

FILED FOR RECORD

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CLERK SUP. CT. CHATHAM COUNTY, GEORGIA

BOOK 208A PAGE 116

PLEASE RECORD AND RETURN TO:
Ellis, Painter, Ratterree & Bart LLP
ATTN: Randall K. Bart
2 East Bryan Street, Suite 1001
Savannah, GA 31401

STATE OF GEORGIA)
)
COUNTY OF CHATHAM)

DEED OF GIFT

THIS INDENTURE made and entered into this 9 day of November, 1999 by and between DONALD J. LERCH, of the first part, and DONALD J. LERCH and BARBARA C. LERCH, of the second part;

WITNESSETH:

WHEREAS, first party holds fee simple title to the hereinafter described property and desires to give an undivided one-half interest in and to the following described property to his wife so that they hold same as tenants in common with certain survivorship rights as set forth below.

NOW, THEREFORE, first party, for and in consideration of natural love and affection, has given, granted and conveyed and does hereby give, grant and convey unto second parties as tenants in common for and during their joint lives, and, upon the death of either of them, then to the survivor of them, in fee simple, together with every contingent remainder and right of reversion, and to the heirs and assigns of said survivor, the following described property, to-wit:

ALL that certain lot, tract or parcel of land situate, lying and being in Chatham County, Georgia, on Skidaway Island, in Phase II of the Subdivision known as THE LANDINGS ON SKIDAWAY ISLAND, shown and designated as Lot 1725 on Plat Number 6 of Phase II recorded in Subdivision Map Book 2-S, folio 52-53 of the records of Chatham County, Georgia, to which reference is hereby made for a complete description.

[45886.1]

16280222 11/15/99TOTAL 12.00

APPENDIX B

BOOK 2084 PAGE 117

SUBJECT, however, to certain restrictions, covenants and easements of record.

TO HAVE AND TO HOLD said property, together with all and singular the rights, members, improvements, hereditaments, easements and appurtenances to the same being, belonging or in anywise appertaining, to the only proper use, benefit and behoof of second parties as tenants in common for and during their joint lives, and, upon the death of either of them, then to the survivor of them, in fee simple, together with every contingent remainder and right of reversion, and to the heirs and assigns of said survivor.

IN WITNESS WHEREOF, first party has hereunto set his hand and seal the day and year first above written.

Signed, sealed and delivered
in the presence of:

Robin D. Rogdon
Unofficial Witness

Donald J. Rerch (Seal)
DONALD J. ERCH

Shannon A. Seng
Notary Public

[Affix Notary Seal]

SHANNON A. SENG
Notary Public, Charleston County, SC
My Commission Expires July 1, 1998

My Commission expires: _____

SHANNON A. SENG NOTARY PUBLIC CHARLESTON COUNTY, S.C.

(45806.1)

Westlaw.
2004 WL 3314511 (Ga.)

For Opinion See 608 S.E.2d 223

Supreme Court of Georgia.
Donald J. LERCH, Plaintiff/Appellee,
v.
Barbara C. LERCH, Defendant/Appellant.
No. S04F1936.
August 23, 2004.

Chatham County Superior Court Civil Action No.DR03-0995BA
On Appeal from Superior Court of Chatham County, State of Georgia Case No. DR03-0995-BA

Brief of the Appellant

Dueey & Feemster, LLC, Dwight T. Feemster, Esquire, Georgia Bar No. 257253, Attorney for Appellant, Post Office Box 10144, Savannah, Georgia 31412, Telephone No. (912) 236-6311, Facsimile No. (912) 236-7641.

*1 *ENUMERATIONS OF ERROR*

I. *The Trial Court erred in concluding that the interest in the residence that the appellee gifted to the appellant was an interspousal gift of marital property.*
II. *The trail court erred in granting the appellee the gifted portion of the residence as an equitable property division.*
III. *The trial court erred in refusing to recognize the gift of the property and subsequent pledging on the property by the appellee as a written modification of the prenuptial agreement.*
IV. *The trial court erred in failing to rule that the appellant's interest in the residence in question was not encumbered by the second mortgage.*
*2 V. *The trial court erred in failing to grant the appellant attorney fees.*

COMES NOW, BARBARA C. LERCH and shows the Court the following:

STATEMENT OF JURISDICTION

This matter is a divorce case. This Court has jurisdiction of all appeals in divorce cases pursuant to Ga. Const. 1983, Art. VI, Sec. § VI ¶ III.

JUDGMENT APPEALLED FROM

The Final Judgment and Decree of Divorce dated March 15, 2004. R-190-197.

INTRODUCTION AND PROCEDURAL HISTORY

The underlying case is a divorce action. This Petition revolves around the

APPENDIX C

parties' residence on Skidaway Island in Savannah, Georgia. Mr. Lerch ("Appellee") purchased the house before the marriage. R-143. It was therefore non-marital property at the time of the marriage. *Moore v Moore*, 249 Ga. 27 (1982). It was part of the appellee's separate estate. After the parties were married, he transferred the residence by a gift deed from himself individually to himself and Ms. Lerch ("Appellant") as tenants in common with rights of survivorship. R-91-92. After he delivered the gift deed, the parties jointly executed a Promissory Note and a deed to secure debt to refinance their mortgage. R-102-116. Appellee also attempted to pledge the equity in the residence as collateral for a second mortgage without the appellant's signature on the deed to secure debt. R-93-101.

The appellee filed for divorce on July 11, 2003. After a temporary hearing and entry of a temporary order Appellant and Appellee both filed Motions For Partial Summary Judgment (R-126 & R-143) concerning their interest in this house. Appellee contended that he was entitled to the house under the 'source of funds rule" alleging that he bought the house before the parties were married and that Appellant had not contributed to the cost of the residence before or after the marriage. R-143-152. The Trial Court apparently agreed, granting Appellee's summary judgment motion and denying Appellant's motion in an opinion that did not contain findings of fact or conclusions of law. R-153. Following Appellant's Motion for Reconsideration, R-*3 160-165, and after receipt of Appellee's Response to the Motion for Reconsideration, R-175-178 and Appellant's subsequent Response to Appellee's Response, R-186-189, the Trial Court issued a Final Judgment and Decree finding that Appellee was entitled to the residence. R190-197. In the Final Judgment and Decree the trial court reasoned that as a result of the Gift Deed the appellee retained a one-half undivided interest in the residence as non-marital property since he owned the entire residence before the marriage and that the one-half interest gifted to the appellant was an interspousal gift of marital property. As a result, the trial court awarded the appellee the interest he had gifted to the appellant under an equitable property division. The trail court has never addressed the appellant's position that the execution and delivery of the Gift deed and the acceptance of the same by the appellant and the refinancing of the mortgage on the property by both parties was a written modification of the prenuptial agreement. The Trial Court's Final Judgment also denied Appellant's request for attorney fees.

*4 *FACTS*

The parties in this action were married on or about December 16th, 1994. R-3. it was the third marriage for the Appellant and the second marriage for the Appellee. R-190.

Just before the marriage, the parties entered into a pre-nuptial agreement ("Agreement"). R-79-90. Pertinent here, the Agreement provided that neither would make any claim against the other for any funds, assets, property (real, personal or mixed) of the other including certain derivative assets. R-83, ¶ 5. However,

the marital residence in question is not specifically listed on Appellee's schedule of assets attached to the Pre-nuptial Agreement. R-189.

The Agreement also restricted the parties from making claims against the other's estate upon the death of the other party (R-83-84, ¶ 5) except for any provision that either may voluntarily make for the other in his or her will (R-84, ¶ 5) However, paragraph seven provided a contrary provision.
"If the parties are married and living together at the time of his death, Don [Appellee] agrees to:
(1) leave to Barbara [Appellant] in his will any interest he may own at the time his death in *5 his personal residence free and clear of any indebtedness secured thereby; and
(2) designate an irrevocable trust of which Barbara is life beneficiary as the designated beneficiary of $400,000 from his IRA accounts."

R-85, ¶ 7.

The Agreement also provided that it could be modified. It placed no restrictions upon the procedure for modification other than providing that any modification had to be in writing and signed by the parties. R-86, ¶ 12.

On November 15, 1999, the Appellee executed a Gift Deed, placing ownership of the parties' personal residence at 25 Coventry Close, Savannah, Georgia 31411 in the Appellant and the Appellee "as tenants in common with rights of survivorship". R-91-92. This document was recorded in the Office of the Clerk of the Superior Court of Chatham County, Book 208A, p. 116. R-91.

On March 21, 2003, both parties signed a Promissory Note and a Deed to Secure Debt to effectuate a re-finance of the first mortgage on the property in the amount of $72,836.00. R-102-103. The deed to secure debt affirms that Appellant and Appellee were "lawfully seised of the estate hereby conveyed". R-104. This document was signed under *6 seal by both parties and was witnessed and notarized. R-114. On or about February 26, 2002 the Appellee also executed a Deed to Secure Debt to Bank of America for a second mortgage line of credit on the residence. R-93-101. The Appellant however did not sign that document granting any of her interest in the property. R-93-101. The line of the credit at the time of the filing of the divorce had a balance of approximately $72,000.

On May 23, 2003 the Appellee submitted to the Appellant a financial statement which designated certain assets as (h) presumably meaning ownership in husband and other assets with a (j) beside them presumably meaning that they were jointly owned. R-117-118. The residence in question has (j) beside it, designating this property as jointly held. R-118.

Both parties filed Motions For Partial Summary Judgment regarding the issue of the ownership of the residence. R-126 & R-143. The Appellant filed the first Motion For Summary Judgment with a statement of facts as required by Rule 6.5, to which

Appellee did not reply. R126-142.[FN1] The appellee then filed his Motion for Summary Judgment, which contained an affidavit from the Appellee *7 that he had purchased the residence before the marriage and that the appellant had not contributed to the payment of the cost of the residence during the marriage. R-148-149. The affidavit did not aver that the income from the appellee's work as a consultant did not pay for the mortgage payments during the marriage nor did it negate the fact that the appellant signed a promissory note and deed to secure debt when then property was refinanced. It also did not negate appellant's financial statement (R-117-118) that indicated that the residence was jointly owned and did not negate the fact that the prenuptial agreement did not list the residence as an asset of the appellee. R-79-90.

FN1. The exhibits that were attached to the appellant's Motion for Partial Summary Judgment were introduced into evidence at the temporary hearing.

The trial court issued a ruling on the parties' motions for summary judgment within 5 days of the appellee filing his motion for summary judgment (See R-143 & R-153) and therefore the appellant was not afforded the right to respond to the appellee's affidavit regarding the failure of the appellant to contribute to the payment of the expenses of the mortgage. This was obviously not true as the appellant was jointly responsible for the payment of the mortgage during the marriage after the execution of the refinance documents. See R-102-116.

*8 The Appellee's failure to abide by the unambiguous terms of the parties' Pre-Nuptial Agreement forced Appellant to incur attorney fees. R-122.

ENUMERATIONS OF ERROR-ISSUES PRESENTED

I. *The Trial Court erred in concluding that the interest in the residence that the appellee gifted to the appellant was an interspousal gift of marital property.*

II. *The trail court erred in granting the appellee the gifted portion of the residence as an equitable property division.*

III. *The trial court erred in refusing to recognize the gift of the property and subsequent pledging on the property by the appellee as a written modification of the prenuptial agreement.*

IV. *The trial court erred in failing to rule that the appellant's interest in the residence in question was not encumbered by the second mortgage.*

V. *The trial court erred in failing to grant the appellant attorney fees.*

**9 ARGUMENT AND CITATION OF AUTHORITY*

I. *The Trial Court Erred In Concluding that the interest in the residence that the appellee gifted to the appellant was an interspousal gift of marital property*

The property at issue on summary judgment was the parties' marital residence commonly known as 25 Coventry Close, Savannah, Georgia 31411. Appellee admits that he transferred a one-half undivided interest in the property to the Appellant well before divorce proceedings began. R-146. This is undisputed.

This fact notwithstanding, Appellee argued that he was entitled to full ownership of the property as a matter of law. The basis for this argument is unclear. However, he appears to claim full right and title under the "source of funds" rule discussed in *Thomas v. Thomas,* 259 Ga. 73 (1989) and its progeny. The trial court apparently accepted this argument, when it granted the appellee's motion for summary judgment. But after the appellant's motion for reconsideration the trial court ruled that the transfer of the one half interest to the appellant was an interspousal gift of marital property. This is clearly erroneous. The property was non-marital to begin with; the appellee acquired the residence before the marriage. it cannot be marital property. ***10***Moore v Moore,* 249 Ga. 27,28 (1982). The court concluded that the transfer of a one half interest from the appellee to himself was a transfer of non-marital property, but the transfer of a one half interest to the appellant was a transfer of marital property.

Neither the "source of funds" rule nor the "interspousal gift of marital property rule" is relevant to the issue here. Appellant is the owner of a one half undivided interest in the house as her separate asset. When she received this interest as a gift from her husband, it became her separate property. Numerous cases explain "property acquired during the marriage by one spouse by gift...remains the separate property of the recipient spouse". *See e.g. Avera v. Avera,* 268 Ga. 4 (1997).

Appellee, relying upon *McCarthur v. McCarthur,* 256 Ga. 762 (1987), asserts that a gift between spouses renders the property marital. But that case does not apply here. There the interspousal gift was a *marital asset* before the gift. *Avera* explicitly recognizes this limitation in McArthur and similar cases when it explained the holding of the case:
If, however, the property is acquired by one spouse as the result of an interspousal gift of *marital property,* the property retains its status as marital property. *McCarthur v. McCarthur,* 256 Ga. 762, 763 (1987).

***11** *Avera,* 268 Ga. at 4 (emphasis added). in this case, Appellant was given a gift of non-marital property by her husband. Her interest is therefore her separate property.

However, assuming that the gift transformed Appellant's one- half interest in the property into marital property, the source of funds rule is then irrelevant. The rule is used to trace assets to determine the marital and non-marital interests in mixed property. *Thomas v. Thomas,* 259 Ga. 73, 75 (1989); *Hubby v. Hubby,* 274 Ga. 525 (2001). These cases have never been used to change marital property into non-marital property and they do not stand for this proposition.

Here, if the gift rendered Ms. Lerch's one-half interest marital as appellee argued, those interests are already established. The source of funds rule is then irrelevant. Appellee cannot then use this case law to "undo" the marital property status. Appellee cannot have it both ways. If the property interest became marital by virtue of the gift, the gift cannot be ignored and components of that interest transformed back into nonmarital assets.

II. The trial court erred in granting the appellee the gifted portion of the residence as an equitable property division.

*12 A. *The trial court did not have jurisdiction over the residence.*

Lack of subject matter jurisdiction can be raised at any time, as the parties cannot waive it. *Williams v Goss,* 211 Ga. App. 195 (1993); Apparel Resources, *Inc. V. Amersig Southeast,* 215 Ga. App. 483 (1994). The Georgia courts have long held that non-marital property is not subject to an equitable property division. *Stokes v Stokes,* 246 Ga. 765 (1980); *Moore v Moore,* 249 Ga. 27 (1982); *Bailey v Bailey,* 250 Ga.15 (1982) The other theories by which a party in a divorce case can be awarded a spouses property is by an implied or constructive trust theory. *Harrell v Harrell,* 249 Ga. 170 (1982). None of these theories have been asserted here by the appellee nor have any facts been presented that would support such a theory or award of the appellant's property to the appellee. The trial court had no more jurisdiction over this Gift Deeded property than if the property had been gift deeded to the appellee's children.

The superior courts have jurisdiction over marital property because it is property accumulated during the marriage and the jurisdiction over marriage and the property of the marriage is in rem jurisdiction or quasi in rem jurisdiction. See *13*Abernathy v Abernathy,* 267 Ga., 815 (1997). If the property is not marital property the courts have no jurisdiction to make an equitable property division or impose an implied, constructive or equitable trust on the property. See *Goodman v Goodman,* 257 Ga. 63(1987)(held that the Georgia courts did not have jurisdiction over property acquired by one party after a separate maintenance order was entered because it was not acquired as a result of the joint efforts of the parties). The same reasoning applies to property acquired prior to the marriage. The appellee wants the court to undo a valid gift he made to his wife because he no longer wants to be married to her. The court has no jurisdiction to undo a valid gift.

B. *The trail court erred in relying on the appellee's affidavit in deciding its equitable property division.*

The court erred in relying on the affidavit of the appellee for support of its ruling in dividing the "marital", property. The court accepted the appellee's position that the appellant did not contribute to the improvement of the residence or the payment of the mortgage. R-150. The affidavit was submitted in support of the Plaintiff's Motion for Summary Judgment and the Motion was granted within 5 days

of the Plaintiffs Motion being filed. The appellant was not given an opportunity to refute *14 the affidavit as provided by Uniform Superior Court Rule 6.2. Also, the affidavit by itself does not establish that the appellant did not contribute to the preservation of the marital residence. By signing a Promissory Note and a security deed as part of the refinancing of the home the appellant became legally responsible to repay the mortgage on the residence. R-102-116.

Furthermore the affidavit-did not establish that the mortgage payments were not paid from funds earned by the appellee during the marriage. It also did not negate appellee's financial statement that implied that the residence was jointly owned. R-118. Finally, the temporary order did require, at the appellee's request, that the appellant pay a portion of the mortgage while the divorce was pending, although the court did require the appellee to reimburse her for those payments. (T-32, lines 7-10; R-124; R-196). Accordingly, the trail court erred in awarding the appellee the marital portion of the gifted residence. These facts created a genuine issue of material fact that required that the court to deny the summary judgment on that issue. O.C.G.A. 9-11-56

III. *The Trial Court. Erred In Refusing To Recognize The Gift Of The Property And Subsequent Pledging On The Property By The Appellee As A Written Modification Of The Prenuptial Agreement.*

*15 To the extent the Court relied upon the prenuptial agreement to bar Appellant's interest in the property, this was likewise error. First, whether the Agreement covered this property is doubtful. Appellee's schedule of property attached to the Agreement does not specifically list the house. R-189. Moreover, the agreement indicates that the marital residence is a unique asset. It provides that if the parties were married and living together at the time of Appellee's death, he was required to leave to Appellant in his will any interest he had in the personal residence free and clear of any indebtedness secured thereby. R-184, ¶7.

But more importantly, even assuming the property at issue was originally covered by the agreement, the parties modified that agreement as it related to the property. Mr. Lerch voluntarily deeded a one-half interest in the property to Ms. Lerch by a valid and recorded deed. R-9191. Then on March 21, 2003, both parties signed a Promissory Note and a Security Deed to effectuate a refinance of the first mortgage on the property in the amount of $72,836. R-102-116. The deed to secure debt affirms that Appellant and Appellee were "lawfully seised of the estate hereby conveyed". R-104. This document was signed under seal by both parties and was witnessed and notarized. R-114.

*16 The Agreement provided that it could be modified. It placed no restrictions upon the procedure for modification other than providing that any modification had to be in writing and signed by the parties. R-185, ¶12. Here not only was there a signed written instrument transferring interest in property but also a subsequent debt deed signed by all parties to the Agreement certifying joint ownership.

Clearly these documents modified the original Agreement as to this property. Furthermore, a modification of a contract may be accomplished by a subsequent mutual agreement of all the parties thereto. *Thomas v. Garrett,* 265 Ga. 395 (1995); *McMurray v. Bateman,* 221 Ga. 240, 253 (1965). These two transactions constitute a mutual modification of Prenuptial Agreement and must be recognized.

IV. *The Trial Court Erred In Failing To Rule That The Appellant's Interest In The Residence In Question Was Not Encumbered By The Second Mortgage.*

The Deed to Secure Debt to Bank of America, purporting to secure the second mortgage is of no force as to Appellant. The facts of the case clearly indicate that the Appellee acquired an interest in the property on November 15, 1999. R-91-92. The second mortgage was secured by a Deed to Secure Debt payable to the Bank of America on December 26, 2002. R-93-101. Only the Appellee executed the ***17** Deed to Secure Debt after the Gift Deed was recorded. R-100 The Appellant did not sign this Deed to Secure Debt. Therefore, the deed to Secure Debt does not serve to encumber the Appellant's one-half undivided interest in this property at all.

A Security Deed is first of all a conveyance of land, and must meet all the standards of validity that are applicable to Deeds generally, which includes the naming of a Grantor and Grantee, sufficient words of conveyance or grant, a valid description of the property that is conveyed, proper execution and attestation, and an effective delivery O.C.G.A.§'s 44-5-30 and 44-14-63. In this particular case the Appellant is not named as the Grantor nor did she deliver any documents granting a security interest to the bank. Therefore, the Deed to Secure Debt does not transfer any security interest of the Appellant to the bank. See *Jones v. Phillips,* 237 Ga. App. 24 (1999).

V. *The trial court erred in failing to grant the appellant attorney fees.*

The Pre-Nuptial Agreement between the parties provided upon the filing of divorce between the parties that the Appellant would be entitled to $100,000. R-184. Despite the ***18** terms of the agreement the Appellee filed his petition for divorce and did not deliver to the Appellant the $100,000 that is called for by the agreement. The Appellant had to file an answer and counterclaim and go to a temporary hearing before the Appellee would agree that he owed he $100,000 pursuant to the Pre-Nuptial Agreement. R-122. The sums were not paid by the following Saturday as ordered by the Court and the Appellant had to expend more attorney fees to obtain the funds she was entitled to per the agreement.

Conclusion

Appellee deeded Appellant a one-half undivided interest in the marital residence. Appellant also signed a Deed to Secure Debt and a Promissory Note relating to that property. Appellant's one half interest is her separate property. The filing of the divorce can have no more effect or. this Gift Deed than it would on a Gift Deed from the Appellee to his children.

Also, the execution of the Gift Deed and Promissory Note and Deed to Secure Debt and the re-financing of the mortgage on the residence constitute a written change to the Pre-nuptial Agreement, rendering it immaterial to the issue at hand.

*19 In addition, the Deed to Secure Debt signed only by the Appellee was ineffective to transfer any security interest of the Appellant's one-half undivided interest in this property.

Finally, Appellant ought to have recovered attorney's fees for the expenditures she made in attempting to enforce the provisions of the Pre-Nuptial Agreement.

Appellant respectfully requests that this Court grant an appeal of the Superior Court's Final Judgment and Decree of March 15, 2004 and correct the errors shown herein which have impaired important and established rights of the Appellant.

Donald J. LERCH, Plaintiff/Appellee, v. Barbara C. LERCH, Defendant/Appellant.
2004 WL 3314511 (Ga.)

END OF DOCUMENT

Westlaw
2004 WL 5537247 (Ga.)

For Opinion See 608 S.E.2d 223

Supreme Court of Georgia.
Donald J. LERCH, Plaintiff/Appellee,
v.
Barbara C. LERCH, Defendant/Appellant.
No. S04F1963.
September 13, 2004.

Chatham County Superior Court Civil Action No. DR03-0995-BA

Plaintiff/Appellee's Response to Defendant/Appellants Enumerations of Error Barr, Warner & Glisson, Karen Dove Barr, State Bar No. 227575, 5859 Abercorn Ext., Bldg. 2, Savannah, Georgia 31405, Tel: (912) 352-8053, Fax:(912) 352-7140, Attorney for Appellee.
COMES NOW, DONALD J. LERCH, Appellee in the captioned case and files this response to Defendant/Appellant's Enumerations of Error and shows as follows:
1. The Plaintiff/Appellee denies that the trial court erred concluding that the interest in the residence that the Appellee gave to Appellant was an inner spousal gift of marital property. The deed states on its face that it was a deed of gift from the husband to the husband and wife as tenants in common and during their joint lives and upon the death of either of them then to the survivor of them in consideration of natural love and affection. The deed further states that first party holds fee simple title to the hereinafter described property, and desires to give an undivided one-half interest in and to the following described property to his wife. No evidence was offered at trial to show that the wife gave any consideration for the gift, nor that the parties were not married at the time of the gift.
2. Plaintiff/Appellee denies that the trial court erred in re-vesting Appellee with his premarital residence as equitable division as the same was within the court's power, and also the terms of the prenuptial agreement required that the premarital home be re-vested in the Plaintiff/Appellee.
3. The Plaintiff/Appellee denies that the trial court erred in refusing to re-construe the gift deed to be a modification of the prenuptial agreement when the prenuptial agreement prohibited modifications without both parties making a formal modification of the prenuptial agreement, and no modification of the prenuptial agreement was addressed in the body of the gift deed.
a. 4. Plaintiff/Appellee denies that the trial court erred in ruling on the validity of the second mortgage on Plaintiff's premarital home when the same was not a material issue of the proceedings when the prenuptial agreement clearly required that the property be returned to the Plaintiff/Appellee.
5. The Plaintiff/Appellee denies that the trial court erred in failing to grant

APPENDIX D

Defendant/Appellant attorney fees when the Defendant/Appellant in the prenuptial agreement specifically relinquished any claim to attorney fees, and any and all other claims whatsoever for payment of one hundred thousand dollars ($100,000), and when Appellant demanded and accepted the one hundred thousand dollars ($100,000) after the filing of the divorce and prior to the entry of the judgment and decree.

APPELLEE'S BRIEF

COMES NOW, *DONALD J. LERCH*, as Appellee, and shows the Court as follows:

STATEMENT OF JURISDICTION

This matter is a divorce case. This Court has jurisdiction of all appeals in divorce cases pursuant to Ga. Const. 1983, Art. VI, Sec. VI paragraph III.

JUDGMENT APPEALED FROM

The final judgment and decree of divorce dated March 15, 2004. R-190-197.

INTRODUCTION AND FACTS

The parties were married on December 16, 1994. it was the second marriage tor the husband and the third marriage for the wife. There are no children the issue of the marriage. On December 7, 1994, prior to the marriage, the parties entered into a prenuptial agreement which disposed of all claims of premarital property division and alimony. The agreement provided in pertinent part as follows:

2. Both parties agree that upon the filing of the divorce by either party, neither party shall make any claim againsf the other for alimony, separate maintenance or support and each party waives any right he or she may have to seek alimony, separate maintenance or support of any type or nature other than child support from the other party. Each party fully understand that his or her income and/or financial circumstances at the time of any separation or termination of the marriage may be different from his or her income and/or financial circumstances at the time of execution of this Prenuptial Agreement and nevertheless agrees to relinquish and waive any right of any type or nature to alimony, separate maintenance or support of any type or nature other than child support.

3. DON agrees that in the event that either of the parties files for divorce, he will not make any claim of any kind or nature against BARBARA or any funds, assets, property(real, personal, or mixed), or income of BARBARA, including, without limitation of the foregoing, the funds, assets, property (real, personal or mixed) and income described on *Schedule A* hereto and all proceeds, profits, rents, income, increases and appreciation of whatever nature derived from or to said funds, assets, property or income and all property in which any of the said funds, assets, property or income shall be invested or reinvested.

4. BARBARA agrees that in the event that either of the parties files for divorce, she will not make any claim of any kind or nature against DON or any funds, as-

sets, property (real, personal, or mixed) or income of DON, including, without limitation of the foregoing, the funds, assets, property (real, personal or mixed) and income describe in *Schedule B* hereto and all proceeds, profits, rents, income, increases and appreciation of whatever nature derived from or to said funds, assets, property or income and all property in which any of the said funds, assets, property or income shall be invested or reinvested.

5. Anything herein to the contrary notwithstanding, if BARBARA shall survive DON, she shall not make any claim to or against any part of the estate which DON may own or in which he may have any interest at the time of his death, except for such provision, if any that DON may voluntarily make for BARBARA in his Will, and BARBARA in consideration of the covenants and agreements herein contained, hereby relinquishes and waives her right of election under the laws of any state or country, to take against any Will of DON, and further waives and relinquishes all right, title and interest in and to the real property and personal estate which DON may own or in which she shall have any interest at the time of his death, whether as surviving spouse, heir at law, or otherwise according to the laws of any jurisdiction to which the parties of any of their property may be subject, including without limitation of the foregoing, any right to year's support (or any common law or statutory substitute therefore) dower, curtesy (or any common law or statutory substitute therefore), homestead, widow's award or any other right in and to said real or personal estate which DON may own or in which he may have any interest at the time of his death, except for such provisions, if any, that DON may voluntarily make in his Will.

6. Anything herein to the contrary notwithstanding, if DON shall survive BARBARA, he shall not make any claim to or against any part of the estate which BARBARA may own or in which she may have any interest at the time of her death, except for such provision, if any, that BARBARA may voluntarily make for DON in her Will and DON, in consideration of the covenants and agreements herein contained, hereby relinquishes and waives his right of election under the laws of any state or county, to take against any Will of BARBARA, and further waives and relinquishes all right, title and interest in and to the real property and personal estate which BARBARA may own or in which he shall have any interest at the time of her death, whether as surviving spouse, heir at law, or otherwise, according to the laws of any jurisdiction to which the parties or any of their property may be subject, including, without limitation of the foregoing, any right to year's support (or any common law or statutory substitute therefore), dower, curtesy(or any common law or statutory substitute therefore), homestead, widows award or any other right in and to said real or personal estate which BARBARA may own or in which she may have any interest at the time of her death, except for such provisions, if any, that BARBARA, may voluntarily make in her Will.

7. Anything herein to the contrary notwithstanding the following additional agreements will control:

(a) Should a party file for divorce before the death of one of the parties, DON agrees to:

(1) pay to BARBARA the lump sum of $50,000.00; and

(2) pay to BARBARA the further sum of $10,000.00 per year for each year of the marriage up to five years.
(b) If the parties are married and living together at the time of his death, DON agrees to:
(1) leave to BARBARA in his Will any interest he may own at the time of his death in his personal residence free and clear of any indebtedness secured thereby; and
(2) designate an irrevocable trust of which BARBARA is life beneficiary as the designated beneficiary of $40,000.00 from his IRA accounts.
(c) Any asset in the name of the party such as a stock or checking account shall contain only the assets of that party and each agrees that in the event a divorce is filed by either party the party in whose name that account is held shall be the owner of all assets contained therein.
12. Any modification of this Agreement shall be unenforceable unless in writing and signed by both parties.

On January 20,1999 as soon as her rights pursuant to the parties' prenuptial agreement vested in fill, the wife had her attorney demand the amount of the prenuptial agreement, as the wife wanted out of the marriage. On November 15, 1999 she persuaded the husband to give her a half interest in the home which he owned prior to the marriage by Gift Deed. Subsequent to giving the undivided one-half interest to the wife the parties refinanced the first mortgage increasing the balance, and later pledged the house as collateral for a second mortgage to pay for expenses of the marriage. The parties finally separated for the last time on July 7, 2003 and the divorce which is the subject of this appeal was filed.

Upon the filing of the divorce the wife demanded and received payment in full for all of the husband's obligations pursuant to the prenuptial agreement The trial court found the prenuptial agreement to be valid, and enforced it, returning sole title to the husband's premarital home to the husband in exchange for the one hundred thousand dollars ($100,000) agreed to by the parties in the prenuptial agreement

APPLICABLE RULES OF LAW

The trial court reviewed the case in light of the parties' prenuptial agreement. Pursuant to O.C.G.A. 19-3-62, a prenuptial agreement may be enforced by court of equity at the instance of a spouse at any time during the life of the other spouse. This is particularly true in light of the wife's insistence and receipt upon the full benefit of the prenuptial agreement, to wit: One Hundred Thousand Dollars ($100,000) immediately upon the filing of the divorce.

It has been well settled since 1883, case of *Maxwell v. Hoppie*, 70 Ga. 152, that a prenuptial agreement cannot be voided by a deed. As late as 1998 in the case of *Degarmo vs. Degarmo*, 269 Ga. 480; 499 S.E.2d 317, the court held that a trial court does not have the authority to modify a prenuptial agreement Pursuant to the prenuptial agreement the home, which was owned by the husband prior to the mar-

riage, would be returned to the husband in the event of any divorce.

In the instant case the wife contends that the trial court erred in not construing that a deed signed by the husband after the marriage should prevail over a prenuptial agreement, which the wife also insisted was valid and enforceable, and from which she received full benefit

The trial court found that the gift by the husband of a half interest in his premarital home to the wife constituted an inner spousal gift of marital property. McArthur v. McArthur, 256 Ga. 762, 353 S.E.2d, 486(1987). Considering McArthur and the receipt of Appellee of the one hundred thousand dollars (S 100,000) which she demanded under the prenuptial agreement, the court returned the property to the husband as equitable division.

Based on either theory the result is the same. The husband retains his premarital property in exchange for one hundred thousand dollars (S100,000).

The attorney fees requested by the wife violate the terms of the prenuptial agreement which waived any and all claims whatsoever in consideration of payment of one hundred thousand dollars ($ 100,000).

CONCLUSION

Therefore there was no error by the trial court and the judgment and decree of divorce between the parties should be affirmed

Donald J. LERCH, Plaintiff/Appellee, v. Barbara C. LERCH, Defendant/Appellant.
2004 WL 5537247 (Ga.)

END OF DOCUMENT

HAvera v. Avera
Ga.,1997.

Supreme Court of Georgia.
AVERA
v.
AVERA.
No. S97A0558.

May 5, 1997.

In divorce action, the trial court, Glynn County, E. M. Wilkes, III, J., determined that entire value of home in wife's name was **marital property** subject to **equitable division**, and wife's application for interlocutory discretionary review was granted. The Supreme Court, Benham, C.J., held that: (1) home was wife's **separate property**, but (2) any appreciation as result of efforts of both or either spouse would be **marital property** subject to **equitable division**.

Vacated and remanded with directions.

West Headnotes

[1] **Divorce 134 ⇐252.3(3)**

134 Divorce
134V Alimony, Allowances, and Disposition of **Property**
134k248 Disposition of **Property**
134k252.3 Particular **Property** or Interests and Mode of Allocation
134k252.3(3) k. **Separate Property** and **Property** Acquired Before Marriage. Most Cited Cases
Only real and personal **property** and assets acquired by parties during marriage are subject to **equitable property division**.

[2] **Divorce 134 ⇐252.3(3)**

134 Divorce
134V Alimony, Allowances, and Disposition of **Property**
134k248 Disposition of **Property**
134k252.3 Particular **Property** or Interests and Mode of Allocation
134k252.3(3) k. **Separate Property** and **Property** Acquired Before Marriage. Most Cited Cases
Property acquired during marriage by one spouse by gift, inheritance, bequest or devise remains **separate property** of recipient spouse, and is not subject to **equitable division**.

[3] **Divorce 134 ⇐252.3(1)**

134 Divorce
134V Alimony, Allowances, and Disposition of **Property**
134k248 Disposition of **Property**
134k252.3 Particular **Property** or Interests and Mode of Allocation
134k252.3(1) k. In General. Most Cited Cases
If **property** is acquired by one spouse as result of interspousal gift of **marital property**, **property** retains its status as **marital property**.

[4] **Divorce 134 ⇐252.3(3)**

134 Divorce
134V Alimony, Allowances, and Disposition of **Property**
134k248 Disposition of **Property**
134k252.3 Particular **Property** or Interests and Mode of Allocation
134k252.3(3) k. **Separate Property** and **Property** Acquired Before Marriage. Most Cited Cases
Should **separate property** of one spouse appreciate in value during marriage solely as result of market forces, appreciation is not **marital** asset subject to **equitable division**; however, if **separate property's** appreciation in value during marriage is result of efforts of either or both spouses, appreciation becomes **marital** asset subject to **equitable division**.

[5] **Trusts 390 ⇐188.1**

390 Trusts

390IV Management and Disposal of Trust **Property**
390k188 Sale and Conveyance
390k188.1 k. In General. Most Cited Cases
Irrevocable trust established by husband with himself as trustee was valid entity **separate** from husband, and therefore, trust, and not husband, was transferor of trust **property**.

[6] **Gifts 191** ⇐17.1

191 Gifts
191I Inter Vivos
191k17 Delivery
191k17.1 k. In General. Most Cited Cases
When real **property** is subject of gift, delivery of valid deed is acceptable substitute for delivery of **property** itself. O.C.G.A. § 44-5-80.

[7] **Divorce 134** ⇐252.5(1)

134 Divorce
134V Alimony, Allowances, and Disposition of **Property**
134k248 Disposition of **Property**
134k252.5 Homestead or Residence, Disposition of
134k252.5(1) k. In General. Most Cited Cases

Divorce 134 ⇐252.5(3)

134 Divorce
134V Alimony, Allowances, and Disposition of **Property**
134k248 Disposition of **Property**
134k252.5 Homestead or Residence, Disposition of
134k252.5(3) k. Attendant Expenses and Liabilities; Compensating Payments. Most Cited Cases
Transfer of trust corpus, a home, to wife constituted gift from third party, not subject to **equitable division**, except to extent home's purchase price was paid with **marital** funds after conveyance to wife; time, effort, and funds expended by husband prior to transfer did not transform gift to wife into **marital property** when there was no plan at time of his efforts for trust to convey home and lot to wife. O.C.G.A. § 44-5-80.

[8] **Divorce 134** ⇐252.3(3)

134 Divorce
134V Alimony, Allowances, and Disposition of **Property**
134k248 Disposition of **Property**
134k252.3 Particular **Property** or Interests and Mode of Allocation
134k252.3(3) k. **Separate Property** and **Property** Acquired Before Marriage. Most Cited Cases
If home, which was wife's **separate property**, appreciated in value during marriage and appreciation was result of efforts of both or either spouse, such appreciation would be **marital property** subject to **equitable division**.

**731 *7 Roy J. Boyd, Jr., Killian & Boyd, P.C., Brunswick, for Sandra Wise Avera.
Grayson P. Lane, Lane & Crowe, Brunswick, for J. Wray Avera.
*4 BENHAM, Chief Justice.
Appellant Sandra Avera and appellee J. Wray Avera, II were married in July 1984, and have two minor children. Wife filed a **732 complaint for divorce in June 1993, and listed the home in which the family resided as her property. Husband filed an answer and counterclaim for divorce in which he contested Wife's sole ownership of the home. It is undisputed that title to the home is in Wife's name and that it was transferred to her in 1990 by a third party, an irrevocable trust established by Husband in 1967, with himself as the trustee of the trust.[FN1] Wife filed a motion for partial summary judgment asserting that the home was not subject to **equitable division** as **marital property** because it was her sole **property**. The trial court denied Wife's motion on the ground that the conveyance of the home to Wife was the result of the joint effort of the spouses to further the financial security of their family. This court granted Wife's application for interlocutory discretionary review of the trial court's order.

FN1. The trust created by Husband was the subject of appellate litigation during Husband's 1983-84 divorce from his second wife. See *Avera v. Avera*, 253 Ga. 16, 315 S.E.2d 883 (1984).

[1][2][3][4] 1. "[O]nly the real and personal **property**

and assets acquired by the parties during marriage is subject to **equitable property division**. [Cit.]" *Moore v. Moore*, 249 Ga. 27(2), 287 S.E.2d 185 (1982). However, **property** acquired during the marriage by one spouse by gift, inheritance, bequest or devise remains the **separate property** of the recipient spouse, and is not subject to **equitable division**. *Bailey v. Bailey*, 250 Ga. 15, 295 S.E.2d 304 (1982). If, however, the **property** is acquired by one spouse as the result of an interspousal gift of **marital property**, the **property** retains its status as **marital property**. *McArthur v. McArthur*, 256 Ga. 762, 763, 353 S.E.2d 486 (1987). Should the **separate property** of one spouse appreciate in value during the marriage solely as a result of market forces, the appreciation is not a **marital** asset subject to **equitable division**; however, if the **separate property's** appreciation in value during the marriage is the result of efforts of either or both spouses, the appreciation becomes a *5 **marital** asset subject to **equitable division**. *Bass v. Bass*, 264 Ga. 506, 507, 448 S.E.2d 366 (1994). The issues for determination in the case at bar are identification of the transferor of the **property** to Wife, the nature of that transfer and, if the **property** is Wife's **separate property**, the source of the appreciation in value, if any, of the **property** since its acquisition by Wife.

[5] 2. The warranty deed which conveyed the **property** to Wife identified the grantor as the trustee of the J. Wray Avera II Trust. The validity of the trust was upheld by this court in *Avera v. Avera*, 253 Ga. 16, 315 S.E.2d 883 (1984). In the trustee's unsuccessful attempt to have the deed to Wife set aside, the conveyance of the property by the trust to Wife was ruled a transaction authorized by the trust, and that decision was affirmed by this court without opinion. *Avera, Trustee, v. Avera*, 266 Ga. XXV, 469 S.E.2d 33 (1996).[FN2] That legal title to the property was held by the trustee (OCGA § 53-12-2 (11)) who happened to be Husband does not diminish the fact that Wife received the property from the trust and not from Husband.

> FN2. In ruling that the deed was not subject to being set aside, the trial court noted that the trust agreement authorized the Trustee, in his discretion, to expend sums out of the principal of the trust "[i]f at any time because of misfortune, illness, accident, or infirmity, Grantor or any child or wife of his is in need of funds in excess of any funds reasonably available to such person...." The trial court found that the Averas "had experienced considerable financial problems from the time of their marriage ... and had been required to sell personal property to supplement their income to meet their usual living expenses." The trial court concluded that the trustee acted consistent with his authority when he deeded the house to Wife in response to Wife's concern "about the financial welfare and security of their small children, as well as her own situation, in the event of [Husband's] death." *Id.* This court affirmed without opinion the trustee's appeal which contended that the trial court erred when it determined that Wife's concern about financial security was tantamount to the "misfortune, illness, accident, or infirmity" that was required by the trust agreement before the corpus could be invaded.

3. The trial court recognized that the transferred **property** was not the **property** of Husband, but found the transfer from the trust to Wife was **marital property** because **733 Husband and Wife agreed it was in their family's best interest to have the trust convey the **property** to Wife, and both spouses participated in the conveyance: Husband executed the deed of conveyance on behalf of the trust and Wife accepted delivery thereof. We disagree with the trial court's analysis.

The trustee, as was found by the trial court in the action to set aside the deed, executed the deed of conveyance in performance of duties authorized by the trust: in his discretion, he withdrew property from the principal of the trust because beneficiaries of the trust, the grantor and his wife, were in need. See *Avera, Trustee, v. Avera*, 266 Ga. XXV, 469 S.E.2d 33. In effect, the trial court in the action at bar ruled that the transfer to Wife from the trust was an interspousal transfer from Husband to Wife because Husband was the trustee of the trust. In so *6 doing, the trial court overlooked the valid separate status of the trust. See *Avera v. Avera*, supra, 253 Ga. 16, 315 S.E.2d 883. We reiterate what has been held before with regard to this trust and this transaction: the trust is a valid entity separate from Husband and the transfer of trust corpus to Wife was a conveyance authorized

by the terms of the trust.

4. As stated earlier, property inherited by or given to, bequested to, or devised to one spouse during a marriage by a third party is the separate property of that spouse and is not subject to equitable division. *Bailey v. Bailey*, supra, 250 Ga. 15, 295 S.E.2d 304. Wife did not receive the property by means of inheritance, bequest, or devise. The issue then, is whether the valid distribution of trust corpus to Wife constitutes a "gift" from a third party. If so, the property is the separate property of Wife.

[6][7] A valid gift must meet the requirements of OCGA § 44-5-80: the donor must intend to give the gift; the donee must accept the gift; and the gift must be delivered, or some act which the law recognizes as a substitute for delivery must be done. When real property is the subject of the gift, delivery of a valid deed is an acceptable substitute for delivery of the property itself. *McLemore v. Wilborn*, 259 Ga. 451, 383 S.E.2d 892 (1989). It is clear that the donor/trust had the intent to make a gift of the property since it irrevocably transferred a present, immediate interest. *Tucker v. Addison*, 265 Ga. 642(1), 458 S.E.2d 653 (1995). The law presumes acceptance if the gift is of substantial benefit (OCGA § 44-5-81), and Wife accepted the deed of conveyance executed by the trustee. We conclude that the conveyance of the property from the trust to Wife was a gift; therefore, the corpus of the gift, the property at issue, is Wife's separate property.

5. While acknowledging that the land upon which the house is built was purchased with funds from the trust and that the deed of conveyance from the seller named the trust as grantee, Husband maintains that the house is marital property because he and Wife built the house together. In an affidavit executed in July 1996 and filed in opposition to Wife's motion for partial summary judgment, Husband explained that construction of the house began shortly after the Sea Island Company conveyed the lot to the trust and continued into 1987. During that time, Husband, with Wife's assistance, acted as general contractor and paid subcontractors between $100,000 and $155,000 with trust income. He recalled that Wife spent a $7,000 inheritance on improvements for the home, and that both Husband and Wife contributed approximately $15,000 to $35,000 of "sweat equity" to the construction of the home. Two years after the home was completed, Husband secured a "personal mortgage" with the property, through which mortgage he obtained funds for business purposes. A year later, approximately three years after the house was completed, the trust conveyed the property to Wife, subject to the existing deed to secure debt. There is no evidence that, after the conveyance to the Wife, improvements were made to the home or funds were spent to pay off the home's purchase price, although Husband asserted he had made "interest only" payments on the personal mortgage he had obtained while the house was the property of the trust.

All of the expenditures listed by Husband, except the post-transfer "interest only" loan payments, occurred when the property belonged to neither spouse. In effect, Husband **734 and Wife expended time, effort, and funds to build a home for a third entity, the trust which owned the property on which the house was built and from which came a great percentage of the funds used for construction. Husband's voluntary efforts on behalf of the trust cannot transform the gift to Wife into marital property when there was no plan at the time of Husband's efforts for the trust to convey the home and lot to Wife. However, if the trial court can determine that a portion of the home's purchase price was paid with **marital** funds after the conveyance to Wife, then a proportional share of the home may be a **marital** asset subject to **equitable division**. See *Thomas v. Thomas*, 259 Ga. 73, 75-76, 377 S.E.2d 666 (1989).

[8] 6. The determination that the house is Wife's **separate property** does not end the inquiry into whether the home represents **marital property**. As stated earlier, if the home has appreciated in value during the marriage since Wife received it and the appreciation is the result of the efforts of both or either spouse, the appreciation is **marital property** subject to **equitable division**. *Bass v. Bass*, supra. We conclude that the trial court correctly denied Wife's motion for summary judgment, but incorrectly determined that the entire value of the home was **marital property** subject to **equitable division**. Accordingly, we vacate the trial court's judgment and remand the case to the trial court for further consideration in light of what has been determined herein.

Judgment vacated and case remanded with direction.

485 S.E.2d 731
268 Ga. 4, 485 S.E.2d 731, 97 FCDR 1507
268 Ga. 4, 485 S.E.2d 731

Ga.,1997.
Avera v. Avera
268 Ga. 4, 485 S.E.2d 731, 97 FCDR 1507

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HBrock v. Brock
Ga.,2005.

Supreme Court of Georgia.
BROCK
v.
BROCK.
No. S04F2054.

Feb. 21, 2005.
Reconsideration Denied March 28, 2005.

Background: Husband brought divorce action. After bench trial, the Superior Court, Whitfield County, Jack Partain, J., entered final judgment and decree dividing marital property, awarding joint legal custody of the minor children and awarding to husband the children's physical custody. Wife filed application for discretionary review of property division and custody award.

Holdings: On grant of review, the Supreme Court, Hunstein, J., held that:
(1) husband failed to overcome presumption that conveyance of house was a gift to wife;
(2) payment of $400,000 was marital property; and
(3) award of primary physical custody of minor children to husband was not abuse of discretion.

Affirmed in part and reversed in part.

West Headnotes

[1] Husband and Wife 205 ⇐49.2(9)

205 Husband and Wife
205III Conveyances, Contracts, and Other Transactions Between Husband and Wife
205k49 Gifts
205k49.2 Gift by Husband to or for Wife
205k49.2(9) k. Presumptions and Burden of Proof. Most Cited Cases
Husband failed to prove that a resulting trust was contemplated by husband and wife by way of an understanding or agreement, as required to overcome presumption that husband's conveyance to wife of residence purchased by husband prior to marriage was gift, even though husband claimed that purpose of conveyance was to protect home from potential future creditors; record was devoid of any evidence of mutual intent to create a trust and husband offered no evidence of mutual understanding or agreement at time conveyance was made. West's Ga.Code Ann. §§ 53-12-91, 53-12-92(c).

[2] Gifts 191 ⇐47(1)

191 Gifts
191I Inter Vivos
191k46 Evidence
191k47 Presumptions and Burden of Proof
191k47(1) k. In General. Most Cited Cases
The burden is on the person claiming a gift to prove all essential elements of a gift.

[3] Divorce 134 ⇐252.3(3)

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k252.3 Particular Property or Interests and Mode of Allocation
134k252.3(3) k. Separate Property and Property Acquired Before Marriage. Most Cited Cases
Payment of $400,000 to husband through corporation owned by his father was not a gift, but compensation that was marital property subject to division in divorce proceeding, even though father testified that payment was intended as a gift; father and corporate accountant admitted that money was paid to husband by corporation as compensation, no gift taxes were paid on payment, and husband accepted payment as compensation and listed the payment as compensation on his tax return.

[4] Child Custody 76D ⇐48

76D Child Custody
76DII Grounds and Factors in General
76DII(B) Factors Relating to Parties Seeking Custody
76Dk48 k. Behavior of Parties in General.

Most Cited Cases

Child Custody 76D ⇐51

76D Child Custody
76DII Grounds and Factors in General
76DII(B) Factors Relating to Parties Seeking Custody
76Dk51 k. Relative Fitness. Most Cited Cases
Trial court did not abuse its discretion in awarding primary physical custody of children to husband in divorce proceeding, even though husband admitted hitting wife and crashing into her car after learning of her extramarital affair; testimony from final hearing demonstrated that both parents were fit and proper parents who each had a loving relationship with the children. West's Ga.Code Ann. § 19-9-3(a)(3).

[5] Child Custody 76D ⇐921(1)

76D Child Custody
76DXIII Appeal or Judicial Review
76Dk913 Review
76Dk921 Discretion
76Dk921(1) k. In General. Most Cited Cases
Where a trial court exercises its discretion and awards custody to one fit parent over the other fit parent, Supreme Court will not interfere with that decision unless the evidence shows the trial court clearly abused its discretion.

[6] Appeal and Error 30 ⇐946

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k944 Power to Review
30k946 k. Abuse of Discretion. Most Cited Cases
If there is any evidence to support the decision of the trial court, Supreme Court cannot say there was an abuse of discretion.

**30 Clifton M. Patty, Jr., Ringgold, for Appellant.
McDonald Kinnamon & Thames, E. Crawford McDonald, Dalton, for appellee.
*119 HUNSTEIN, Justice.
Gregory Brock (Husband) brought this divorce action against Elizabeth Brock (Wife). After a bench trial, the trial court entered a final judgment and divorce decree awarding them joint legal custody of their three minor children with Husband to be the primary physical custodian. Wife filed an application for discretionary appeal challenging on various grounds the trial court's property division and custody award. We granted her application pursuant to this Court's pilot project. See *Wright v. Wright*, 277 Ga. 133, 587 S.E.2d 600 (2003).

1. Throughout the marriage, the parties lived in a home purchased by Husband prior to the marriage. In April 2000, Husband executed and recorded a warranty deed transferring ownership in the home to Wife in consideration for her "love and affection." At the final hearing, Husband claimed and the trial court agreed that Wife held the property in an implied resulting trust for Husband because he conveyed the property to Wife for the purpose of protecting it from potential future creditors. We disagree.

[1] An implied trust is "a trust in which the settlor's intention to create the trust is implied from the circumstances, and which meets the requirements of Code Sections 53-12-90 through 53-12-93." OCGA § 53-12-2(3). An implied resulting trust may arise where: (1) an express trust is created but fails for any reason; (2) a trust is fully performed without exhausting all of the trust property; or (3) a purchase money resulting trust is established. OCGA § 53-12-91. In this case, Husband presented no evidence that an express trust was created or that a trust was fully performed without exhausting all of the trust property. Thus, to prove his claim that the conveyance of the marital home to Wife gave rise to a resulting trust, Husband must overcome the presumption under Georgia law that the conveyance *120 was a gift. See OCGA § 53-12-92(c) (gift presumed if payor of consideration and transferee are husband and wife). To rebut the presumption, Husband was required to prove by clear and convincing evidence, inter alia, that a resulting trust was contemplated by both parties by way of an understanding or agreement. See *Ford v. Ford*, 243 Ga. 763(1), 256 S.E.2d 446 (1979) (testimony that husband placed house in wife's name to protect property from prospective creditors but intended to maintain joint interest therein insufficient to overcome presumption in absence of understanding or agreement with wife); *Scales v. Scales*, 235 Ga. 509, 220 S.E.2d 267 (1975) (evidence husband conveyed property to wife to protect it from potential

creditors insufficient to rebut presumption of gift). The record in this case is devoid of any evidence of mutual intent to create a trust and Husband offered no evidence of a mutual understanding or agreement at the time the conveyance was made. Accordingly, the trial court erred in finding that Wife held the property in trust for Husband and awarding the marital home to Husband.

**31 2. Wife also challenges the trial court's classification of a $400,000 payment from Husband's employer to Husband as a gift, thus excludable from the marital estate. During the marriage, Husband was employed by Quality Finishings, Inc., the sole shareholder and president of which was Husband's father, Charles Brock. In tax year 2000, Quality Finishings paid Husband, in addition to his regular salary, a $400,000 payment which the corporation classified on its tax return as compensation and deducted as a business expense. At trial, Husband's father testified that despite having paid the $400,000 through the corporation and taking a $400,000 deduction on the corporate tax return, the payment was intended as a gift from father to son. Relying solely on Mr. Brock's testimony, the trial court held that the $400,000 was a gift.

[2] To constitute a valid gift under OCGA § 44-5-80, the donor must intend to give the gift, the donee must accept the gift, and the gift must be delivered. *Avera v. Avera*, 268 Ga. 4(4), 485 S.E.2d 731(1997). The burden is on the person claiming the gift to prove all essential elements. *Whitworth v. Whitworth*, 233 Ga. 53(2)(c), 210 S.E.2d 9 (1974); *Hise v. Morgan*, 91 Ga.App. 555(7), 86 S.E.2d 374 (1955).

[3] Under the facts of this case, Husband failed to satisfy his burden of proving that the payment was intended as a gift. It is undisputed that Mr. Brock, after consultation with an accountant, intentionally caused the corporation to pay $400,000 to Husband as compensation from the corporation. Although at the time of the final hearing Mr. Brock testified that the $400,000 payment was a gift from father to son, both he and the corporate accountant admitted that the money *121 was paid to Husband by the corporation as compensation, the corporation prepared a Form 1099 identifying the payment as compensation, and Mr. Brock signed the applicable corporate tax return taking a $400,000 tax deduction for the monies paid to Husband. At no time did Mr. Brock or the corporation pay gift taxes on the $400,000 payment nor was a gift tax form prepared or filed reflecting the payment. It is also undisputed that Husband accepted the $400,000 as compensation, listed it as compensation on his year 2000 federal and state joint income tax returns and paid the taxes due thereon. Thus, the overwhelming evidence in this case, including the actions of Husband, his father, and the corporation, establishes that the $400,000 was not intended as a gift to Husband and the trial court erred in holding otherwise.

[4][5][6] 3. Wife contends the trial court erred in awarding primary physical custody of the children to Husband because Husband previously entered a plea to specific acts of family violence. Where a trial court exercises its discretion and awards custody to one fit parent over the other fit parent, this Court will not interfere with that decision unless the evidence shows the trial court clearly abused its discretion. *Urquhart v. Urquhart*, 272 Ga. 548(1), 533 S.E.2d 80 (2000). If there is any evidence to support the decision of the trial court, this Court cannot say there was an abuse of discretion. *Jackson v. Jackson*, 230 Ga. 499, 500, 197 S.E.2d 705 (1973). Here, testimony from the final hearing demonstrates that both parents were fit and proper parents and each had a loving relationship with the children. Although Husband admitted hitting Wife and crashing into her car after learning of her extramarital affaire, the trial court properly considered such evidence under OCGA § 19-9-3(a)(3) in its custody determination. Inasmuch as there was evidence supporting the trial court's finding, we cannot say the trial court abused its discretion in awarding primary physical custody of the children to Husband.

4. We find no abuse of discretion in the trial court's decision not to award attorney fees to Wife. See OCGA § 19-6-2(a).

Judgment affirmed in part and reversed in part.

All the Justices concur.
Ga.,2005.
Brock v. Brock
279 Ga. 119, 610 S.E.2d 29, 05 FCDR 469

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HGrissom v. Grissom
Ga.,2007.

Supreme Court of Georgia.
GRISSOM
v.
GRISSOM.
No. S07F0132.

June 4, 2007.
Reconsideration Denied July 12, 2007.
Substituted dissenting opinion July 13, 2007.

Background: Wife sought divorce. The Superior Court, Fayette County, Christopher C. Edwards, J., granted divorce, awarded payment in lieu of alimony or equitable division of property, awarded fifty percent interest in four parcels of land and income tax refund, awarded monthly child support, but found waiver of interest in husband's separate property as result of prenuptial agreement. appealed. Wife's application for appeal was granted.

Holdings: The Supreme Court, Hunstein, P.J. held that:
(1) acceptance of any benefit under a final judgment and decree of divorce does not result in an automatic waiver of the right to appeal any aspect of that judgment;
(2) former wife's acceptance of benefits under divorce decree did not result in waiver of right to appeal the unrelated issues of her claimed interest in former husband's real property and brokerage account; and
(3) additional findings were required on former wife's claims.

Reversed and remanded.

Thompson, J., concurred in the judgment only.

Carley, J., dissented and filed opinion joined by Hines and Melton, JJ.

West Headnotes

[1] Divorce 134 ⇐178

134 Divorce
134IV Proceedings
134IV(O) Appeal
134k178 k. Right of Review. Most Cited Cases
(Formerly 134k184(2))
Acceptance of any benefit under a final judgment and decree of divorce does not result in an automatic waiver of the right to appeal any aspect of that judgment. (Per Hunstein, P.J., with two justices concurring and one justice concurring in result).

[2] Divorce 134 ⇐281

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k278 Appeal
134k281 k. Right of Review. Most Cited Cases
(Formerly 134k286(1))
Former wife's acceptance of benefits under divorce decree did not result in waiver of right to appeal the unrelated issues of her claimed interest in former husband's real property and brokerage account; she accepted child support, and former husband did not cross-appeal to dispute former wife's entitlement to lump sum payment or fifty percent interest in certain real property and an income tax refund. (Per Hunstein, P.J., with two justices concurring and one justice concurring in result).

[3] Husband and Wife 205 ⇐31(6)

205 Husband and Wife
205II Marriage Settlements
205k31 Construction and Operation
205k31(6) k. Disposition of Husband's Property or Interests in General. Most Cited Cases
Under provision of prenuptial agreement stating that the ownership of any real or personal property acquired by the parties in the future would be determined in reference to legal title, former wife did not acquire ownership interest in former husband's separate real property and brokerage account when the real estate was refinanced and conveyed to husband

and wife as joint tenants with right of survivorship and when wife was listed as co-account holder upon transfer of brokerage account; the provision only applied to properties acquired "in the future," i.e., during the marriage. (Per Hunstein, P.J., with two justices concurring and one justice concurring in result).

[4] Divorce 134 ⇐253(4)

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k253 Proceedings for Division or Assignment
134k253(4) k. Verdict or Findings. Most Cited Cases
Determination in divorce action of former wife's interest in former husband's separate real estate and brokerage account under provision of prenuptial agreement stating that the ownership of any real or personal property acquired by the parties in the future would be determined in reference to legal title could not be made without findings of fact concerning conveyance of real estate to husband and wife as joint tenants with right of survivorship and listing of wife as co-account holder upon transfer of brokerage account; former husband claimed that changes in ownership occurred without his knowledge. (Per Hunstein, P.J., with two justices concurring and one justice concurring in result).

**2 Robert A. Moss, Moss & Rothenberg, Atlanta, for Appellant.
Richard W. Schiffman, Jr., David Neil Marple, Davis, Matthews & Quigley, P.C., Atlanta, for Appellee.
HUNSTEIN, Presiding Justice.
*267 Appellant Daphne Darice Grissom ("Wife") and appellee Marquis Dean Grissom ("Husband") executed a prenuptial agreement prior to their marriage in July 2000. The agreement incorporated Exhibits A and B, wherein Wife and Husband listed their respective separate property, and various provisions of the agreement addressed the disposition of this property in the event of the termination of the parties' marriage. At issue here are two items listed as Husband's separate property on Exhibit B: a home located at 110 Fiddlers Ridge in Fairburn, Georgia, valued at two million dollars (the " Fiddlers Ridge property"); and a Merrill Lynch brokerage account valued at four million dollars.

Wife filed for divorce in May 2005 and a final judgment and decree was entered in January 2006. The trial court found that, pursuant to the terms of the prenuptial agreement, Wife waived any interest in the Fiddlers Ridge property or in an American Express brokerage account into which the funds from the Merrill Lynch account had been transferred during the marriage. We granted Wife's application to appeal this ruling pursuant to this Court's pilot project for divorce cases. See *Wright v. Wright*, 277 Ga. 133, 587 S.E.2d 600 (2003).

[1] 1. Relying on *Curtis v. Curtis*, 255 Ga. 288, 336 S.E.2d 770 (1985), Husband argues that Wife has waived the right to appeal by accepting the benefits of the final judgment and decree, i.e., a payment of $150,000 in lieu of alimony or equitable division of property pursuant to paragraph 14 of the parties' prenuptial agreement; a fifty percent interest in four parcels of real property; fifty percent of an income tax refund; and monthly child support payments. Although *Curtis* accurately states the general rule that an appellant cannot accept the benefits of a judgment and then seek to have it set aside, "[p]ublic policy ... requires that divorce be treated differently because of the **268** unique and important issues involved, including the severing of the marital relationship, custody and support of minor children, support of spouses, and division of property." *Southworth v. Southworth*, 265 Ga. 671, 675, 461 S.E.2d 215 (1995) (Fletcher, P.J., concurring specially). We have long found an exception to the estoppel rule in situations where the acceptance of child support is at issue, reasoning that the benefit belongs to the child rather than the appealing spouse. See *Coley v. Coley*, 128 Ga. 654, 656(1), 58 S.E. 205 (1907). We also find persuasive the approach taken by other states that have carved out exceptions to the estoppel rule in recognition of the realities of divorce and the policy considerations involved. See *Liming v. Liming*, 272 Neb. 534, 723 N.W.2d 89, 96-97 (2006) (no waiver of right to appeal where spouse's right to benefits accepted is conceded by other spouse; spouse entitled as matter of right to benefits accepted such that outcome of appeal could have no effect on right to those benefits; or benefits accepted pursuant to severable award not subject to appellate review); 5 Am.Jur.2d, Appellate Review, § 636 (rule precluding appeal by party who has accepted benefits of judgment

applied less strictly in divorce cases, depending on factors such as whether amount received was small portion of total judgment; party's right to benefit accepted was undisputed; acceptance of benefits was due to financial distress; paying spouse has suffered prejudice; and only issue on appeal is whether award will be increased); Annot., *Spouse's Acceptance of Payments under Alimony or Property Settlement or Child Support Provisions of Divorce Judgment as Precluding Appeal Therefrom*, 29 A.L.R.3d 1184. Thus, to the extent that *Curtis* and other cases can be read to hold that the acceptance of any benefit under a final judgment and decree of divorce results in an automatic waiver of the right to appeal any aspect of that judgment, they are hereby overruled.

**3 [2] Here, Wife's acceptance of child support payments is subject to our well-settled exception to the estoppel rule. As for the other accepted benefits at issue, Husband has not cross-appealed to dispute Wife's entitlement to the lump sum payment or the fifty percent interest in certain real property and an income tax refund. Under these circumstances, we find no waiver by Wife of her right to appeal the unrelated issues of her claimed interest in the Fiddlers Ridge property and the American Express account.

2. Neither party challenges the trial court's finding that the prenuptial agreement is enforceable. Paragraphs 6, 7 and 9 of the agreement provide, inter alia, that Husband retains "sole and exclusive ownership of all of his separate property as set forth in Exhibit 'B' " during his lifetime; that Husband and Wife each retain "free and clear of the other party any substitutions, transmutations and replacements of any assets set forth in Exhibits 'A' and 'B' "; and that *269 Wife waives "all right, title and interest in and to any and all of [Husband's] separate property as set forth in Exhibit 'B.' "

[3] During the parties' marriage, the Fiddlers Ridge property was refinanced and conveyed to the parties as joint tenants with right of survivorship. When the American Express account was opened, Wife was shown as "Co-account holder." Wife claims that these changes entitle her to an ownership interest in the properties, relying on language in paragraph 11 of the parties' agreement providing that "the ownership of any real [or personal] property acquired by the parties in the future shall be determined in reference to the legal title to said property." But because the provision only applies to properties acquired "in the future," i.e., during the marriage, and both the Fiddlers Ridge property and the predecessor to the American Express brokerage account were acquired prior to the marriage, as established by their inclusion on Exhibit B of the prenuptial agreement, we agree with the trial court's conclusion that this language does not afford Wife an ownership interest in these assets.

[4] Although the presence of Wife's name on the title to or registration of these properties gives Wife no rights in the assets under paragraph 11, paragraph 15 states that, notwithstanding any other provision of the agreement, each party has the right "to transfer, give or convey to the other any property or interest therein" and that any property so transferred "shall become the separate property" of the recipient. Wife relies upon this paragraph, along with *Lerch v. Lerch*, 278 Ga. 885, 608 S.E.2d 223 (2005), in support of her argument that Husband's conveyance to himself and Wife jointly of the Fiddlers Ridge property and the American Express account changed them from separate property to marital property. In *Lerch*, the parties had a prenuptial agreement in which the wife promised not to make any claims against the husband's property in the event of a divorce. Id. at 886(2), 608 S.E.2d 223. Although the marital home had been purchased by the husband prior to the marriage, we held that the husband manifested an intent to transform his own separate property into marital property by transferring ownership of the home during the marriage to both himself and the wife as tenants in common. Id. at 886(1), 608 S.E.2d 223. Here, however, Husband has claimed that the changes in ownership of the Fiddlers Ridge property and the brokerage account occurred without his knowledge and that he did not intend to convey any interest to Wife.

A review of the final judgment and decree in this case reveals that the trial court expressly declined to reach Husband's claims of accident, mistake and fraud before rendering its ruling.

> In any situation involving the construction of a domestic or non-domestic contractual agreement, the goal is to look for *270 the intent of the parties. [Cits.] We look first to the language employed in the agreement to determine the intent of the parties. If the language is plain and unambiguous and the intent may be clearly gathered therefrom, we need

look no further. [Cits.]

Carlos v. Lane, 275 Ga. 674, 675, 571 S.E.2d 736 (2002). The agreement should be construed in a manner that will allow it to be upheld as a whole and not make any provision meaningless. OCGA § 13-2-2(4); **4*Dohn v. Dohn*, 276 Ga. 826, 828, 584 S.E.2d 250 (2003). Here, the plain language of paragraph 15 in the prenuptial agreement is clear that the legitimate conveyance of the Fiddlers Ridge property and the brokerage account from Husband to Husband and Wife jointly would change the treatment of these assets for purposes of distribution in accordance with the terms of the agreement. Without findings of fact regarding the circumstances surrounding the changes at issue, however, it is not clear that the conveyances were legitimate. Thus, we reverse and remand for the trial court to make such findings and to construe the parties' agreement as a whole in accordance with its findings.

Judgment reversed and case remanded.

All the Justices concur, except THOMPSON, J., who concurs in the judgment only, and CARLEY, HINES, and MELTON, JJ., who dissent.

CARLEY, Justice, dissenting.

Whatever the rule may be in other states, the law of Georgia "is well settled [that] one who has accepted benefits such as alimony under a divorce decree is estopped from seeking to set aside that decree without first returning the benefits. [Cits.]" *White v. White*, 274 Ga. 884, 885(1), 561 S.E.2d 801 (2002). If the Court had applied this clearly established principle in this case, Wife would have been estopped from attacking the divorce decree, because she has accepted, but not returned, benefits that were awarded to her thereunder. However, the three-Justice plurality opinion, 282 Ga. at 268, 647 S.E.2d at p. 2, finds "persuasive the approach taken by other states that have carved out exceptions to the estoppel rule in recognition of the realities of divorce and the policy considerations involved" and, for that reason, dispenses with the Georgia rule and addresses the merits of Wife's contentions.

However, the rule in Georgia is not only well-settled, it is also one of long standing. At least as early as *Coley v. Coley*, 128 Ga. 654, 655-656(1), 58 S.E. 205 (1907), this Court unanimously recognized that, in a divorce action, "[i]f a judgment is rendered in favor of the plaintiff, which she thinks too small, she may except and have the question tested, or she may suppress her dissatisfaction and collect *271 the judgment. She can not do both. [Cit.]" As recently as *Smith v. Smith*, 281 Ga. 204, 207(2), fn. 11, 636 S.E.2d 519 (2006), Justice Hines, writing for a unanimous Court, held "that a person who has accepted benefits under a divorce decree is estopped from seeking to set aside that decree without first returning the benefits. [Cit.]" When referring to the decisions which must be overruled to reach the merits of this appeal, the plurality opinion simply mentions on 282 Ga. at p. 268, 647 S.E.2d at p. 2"*Curtis [v. Curtis*, 255 Ga. 288, 336 S.E.2d 770 (1985)] and other cases...." In fact, over the nearly 100 years that separate the decision in *Coley* from the decision in *Smith*, this Court has repeatedly and consistently adhered to the rule that one, such as Wife, who accepts a benefit conferred by a divorce decree, cannot challenge the judgment in any respect unless and until those benefits have been returned. See *White v. White*, supra; *Curtis v. Curtis*, supra at 289, 336 S.E.2d 770; *Guess v. Guess*, 242 Ga. 786, 251 S.E.2d 528 (1979); *Wilkinson v. Wilkinson*, 241 Ga. 303, 304, 245 S.E.2d 278 (1978); *Vickery v. Vickery*, 237 Ga. 702, 229 S.E.2d 453 (1976); *Sikes v. Sikes*, 231 Ga. 105, 108, 200 S.E.2d 259 (1973); *Booker v. Booker*, 217 Ga. 342, 122 S.E.2d 86 (1961); *Burnham v. Burnham*, 215 Ga. 57, 58, 108 S.E.2d 706 (1959); *Thompson v. Thompson*, 203 Ga. 128(2)(a), (b), 45 S.E.2d 632 (1947); *Davis v. Davis*, 191 Ga. 333(a), 11 S.E.2d 884 (1940).

Thus, it is undisputed that adherence to the principle of stare decisis in this case would mandate a summary affirmance of the judgment on the ground that Wife, having accepted and retained benefits from the underlying divorce decree, cannot now attack it. See *Wilkinson v. Wilkinson*, supra.

> "The application of the doctrine of stare decisis is essential to the performance of a well-ordered system of jurisprudence. In most instances, it is of more practical utility to have the law settled and to let it remain so, than to open it up to new constructions, as the personnel of the court may change, even though grave doubt may arise as to the correctness of the interpretation originally given to it. (Cits.)" [Cit.]

**5 *Etkind v. Suarez*, 271 Ga. 352, 357(5), 519 S.E.2d 210 (1999). The plurality does not present a

convincing rationale to support its assertion that foreign authority is more persuasive than our own established rule. Therefore, I respectfully dissent.

The only reason the plurality offers as authority for overruling a century-old line of cases is that divorce should be treated differently because the dissolution of a marriage involves unique and important issues. However, divorce has always been different for that reason, but until today that difference has never been recognized as a basis for permitting a former spouse to retain benefits awarded by a decree, *272 while contemporaneously seeking the reversal of another portion of the judgment. "Having accepted the amount awarded by the judgment as alimony, [a former spouse] was estopped, while retaining it, from prosecuting [a] petition to set aside the decree of divorce as contained in the same judgment. [Cits.]" *Thompson v. Thompson*, supra. Compare *Coley v. Coley*, supra (no estoppel where accepted and retained award was for child, rather than spousal, support). The plurality does not cite any interest of an ex-spouse which has been compromised by our previous adherence to the principle of estoppel under the circumstances which exist here or any interest which might be advanced by a decision to dispense with it. Estoppel does not necessarily have an adverse financial effect, since, in Georgia, a former spouse can keep receiving any award of temporary alimony, the right to which

> " 'continues in full force and effect until a final judgment in the case, until the termination of the litigation in all courts, and as long as the case is pending, including litigation in the Supreme Court. [Cits.] The judgment cannot be treated as final so long as either party has the right to have it reviewed by the Supreme Court. [Cit.]' "

McDonald v. McDonald, 234 Ga. 37, 39(3), 214 S.E.2d 493 (1975). Thus, although any Georgia ex-spouse who appeals only a portion of a divorce decree must decline to accept and retain benefits awarded thereby, he or she can continued to receive any temporary alimony awarded until such time as the rights of both parties are finally resolved.

The plurality's precipitous attempt at rejection of the well-established principle of estoppel is not only unnecessary to protect the right of a former spouse to pursue an appeal, that sea change in Georgia law would actually have a deleterious effect on the appellate process. Under our century-old rule, an ex-spouse who did not receive all that he or she sought in the divorce proceeding would be required to weigh the likelihood of success on appeal against his or her right to immediately receive the benefits conferred by the award. Under today's plurality opinion, however, there would be no reason not to seek appellate review, because an ex-spouse could retain benefits and also file an application for discretionary appeal which, even if meritless, would be granted under our pilot project unless frivolous. Thus, the net effect of today's decision, if it was controlling precedent for future cases, would be to delay the final resolution of divorce proceedings.

In that regard, however, our prior decisions cannot be overruled unless and until "a majority of this [C]ourt determines that stability *273 must give way...." *Hall v. Hopper*, 234 Ga. 625, 632(3), 216 S.E.2d 839 (1975). Insofar as today's decision is concerned, only three Justices have concurred fully in its holding and one Justice has concurred in the judgment only. Under Rule 58 of this Court, a concurrence in judgment only signifies that a Justice does "not agree with all that is said in the opinion." Accordingly, although today's opinion purports to overrule the long-standing line of cases, it does not achieve that goal because only a plurality, not a majority, of this Court has determined that those cases must "give way." Thus, the bench and bar should be apprised that Curtis and all of the other cases which apply estoppel under the circumstances of this case remain controlling authority for the present and that the holdings in those cases should be followed as accurate statements of the applicable law of Georgia.

Therefore, notwithstanding the plurality's attempt to evade the principle of stare decisis, only the parties to this case will be impacted by today's decision. However, the **6 limited impact of the plurality's holding is not justification for failing to apply the Georgia rule of estoppel here, just as it has been applied in similar cases for 100 years. The fact that other states may follow a different rule is not, in my opinion, a valid basis for dispensing with the principle of stare decisis and overruling a well-established and long-standing line of Georgia cases. So, in accordance with the settled law of this state, the judgment in this case should be affirmed based upon the principle of estoppel and, therefore, I dissent to the reversal of the

judgment on the merits.

I am authorized to state that Justice HINES and Justice MELTON join in this dissent.

Ga.,2007.
Grissom v. Grissom
282 Ga. 267, 647 S.E.2d 1, 07 FCDR 2278, 07 FCDR 1708

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9-11-52. Findings by the court.

(a) In ruling on interlocutory injunctions and in all nonjury trials in courts of record, the court shall upon request of any party made prior to such ruling, find the facts specially and shall state separately its conclusions of law. If an opinion or memorandum of decision is filed, it will be sufficient if the findings and conclusions appear therein. Findings shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

(b) This Code section shall not apply to actions involving uncontested divorce, alimony, and custody of minors, nor to motions except as provided in subsection (b) of Code Section 9-11-41. The requirements of subsection (a) of this Code section may be waived in writing or on the record by the parties.

(c) Upon motion made not later than 20 days after entry of judgment, the court may make or amend its findings or make additional findings and may amend the judgment accordingly. If the motion is made with a motion for new trial, both motions shall be made within 20 days after entry of judgment. The question of the sufficiency of the evidence to support the findings may be raised on appeal whether or not the party raising the question has made in the trial court an objection to findings or a motion for judgment. When findings or conclusions are not made prior to judgment to the extent necessary for review, failure of the losing party to move therefor after judgment shall constitute a waiver of any ground of appeal which requires consideration thereof. (Code 1933, § 81A-152, enacted by Ga. L. 1969, p. 645, § 1; Ga. L. 1970, p. 170, § 1; Ga. L. 1987, p. 1057, § 1.)

Cross references. — Amendment of judgment to conform to verdict, § 9-12-14. Provision that judgment may not be set aside for any defect that is amendable as matter of form, § 9-12-15.

U.S. Code. — For provisions of Federal Rules of Civil Procedure, Rule 52, see 28 U.S.C.

Law reviews. — For annual survey of recent developments, see 38 Mercer L. Rev. 473 (1986).