

**DETERMINING AND DIVIDING**  
**MARITAL ASSETS IN GEORGIA**

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## V. **DETERMINING AND DIVIDING MARITAL ASSETS**

Before you divide the assets, you must determine what the assets are. Proving income and finding the assets are perhaps the two most important parts of discovery in any divorce case. There are numerous methods of formal and informal discovery that can be used to prepare for trial. Of course, banks and other financial institutions sometimes charge an expensive fee to respond to subpoenas. However, there are other ways to find information without paying the bank all the client's funds.

### A. **Use of Financial Statements**

Financial statements given to a bank or financial institution can often obtain important information. First, a financial statement may have information that would contradict the Financial Affidavit required by Uniform Superior Court Rule 24.2. Any such changes can be inquired into during a deposition or on cross-examination at trial. Most attorneys know the old trick of obtaining a financial statement from a party who states that his income is inflated, when that party is trying to make his financial circumstances appear better to qualify for a loan. In situations where more than one financial application has been inflated, you may be able to convince a jury that the party makes more money than he or she is stating on their financial affidavit. However, do not hang your hat on this because many judges or jurors would not be convinced that this admission, even if proven, is significant enough to make a finding based on the inflated value. Also, some individuals may disclose only what is necessary to meet a particular lender's requirement.

Obtaining bank statements that show deposits is of equal importance. A chart can be utilized to show that the deposits exceed the amount reported on a financial affidavit or tax return. You may even get lucky and the statements may come remarkably close to the amounts reported on an inflated financial statement or application to a bank. Of course, showing that the party put false information in his affidavit can be very helpful because the jury or judge may consider this to be an affront. Make sure you question the witness about how the affidavit was prepared and conclude the preliminary questions with an admission from the witness that he or she stands by the figures in the affidavit. Once this is done the cross-examiner can point out the inconsistencies between the affidavit and the financial statements.

One additional measure that can be taken to obtain financial information is an internet search on ChoicePoint at [www.choicepointonline.com](http://www.choicepointonline.com). This service allows members of the

legal profession to search records of individuals and businesses to identify and verify financial assets. Hidden assets can be found on this website and you can avoid a situation where the client learns that his or her spouse has an asset that was not disclosed. The client may wonder why his attorney did not utilize every available resource to discover the other party's financial information. A simple internet search can make your client much happier and allow you to avoid a problem with your client criticizing you for not finding an asset.

Another good place to look for information is through the website administered by the Social Security Administration. Start early because it takes some time to get the information. Also, you may request specific information and receive the wrong information. You must be persistent. You may even need to visit the local Social Security Office in person after a couple of unsuccessful attempts. The website can be found at <http://www.ssa.gov/>. Attached to this paper is form SSA-827 which can be used to obtain 1) medical records and information if the person is disabled, 2) the monthly social security benefit amount, 3) monthly supplement security income payment amounts, and other information. Of course, medical records can have admissions or facts that lead to other evidence. It is a good idea to have the party sign the document at his deposition. If he refuses, you may be on to something.

The Social Security Statements that have been prepared by the Social Security Administration can be valuable evidence. The request form for the Statement can be obtained from the same website. They make good exhibits because most jurors have seen them before. A sample statement is attached to this paper. They may appreciate you being able to explain the information in the form while you reference a chart. An illustration of how to use such a statement with the jury is as follows:

Suppose a wife of 35 years is telling the jury that she must have \$1,500.00 per month for the rest of her life in alimony in order to live after the divorce. Suppose she is 60 years old (not 41 as in the sample form). In two years she can retire and receive \$861.00 per month in Social Security. At age 67 she can earn \$1,257.00 per month. At age 70 she would collect \$1,153.00 per month. In her deposition she stated that she would love to retire at age 67 but she will not be able to afford it because of the divorce. Suppose you have decided to argue to the jury that your client should pay \$1,000.00 per month (with a plan that the jury may award \$1,250.00 per month or \$15,000.00 per year so you do not exceed the front loading requirements). You further argue that the alimony should be eliminated once she receives social security or when she turns age 67,

whichever first shall occur. This fits well. The jury may want the parties to meet each other halfway. The jury may feel that they have given the wife a reasonable amount to live on and the husband will not be unfairly treated.

It is important to make sure, from an evidentiary standpoint, that all these documents can be used at trial. I highly recommend using a Request for Admissions to authenticate the documents prior to their admission at trial. However, you may not want to send the opposing party a request for admission with a financial statement that has the party's signature on it. A better approach would be to show him the document at trial where he may not have an opportunity to explain the discrepancy. If his signature is on the document it can be authenticated in that manner without a request for admission. Of course, opposing counsel should have already requested any documents you have in his or her discovery requests to you.

A joint discovery conference between the attorneys can be very useful and the Judge will appreciate a more efficient trial if the documents are already identified and ready to be tendered into evidence. Even if you do not meet with opposing counsel it is a good idea to have your exhibits marked before trial. I always have an exhibit sticker on all anticipated documents but usually I do not number them until I am actually questioning the witness. If I have prepared an outline to question the witness I usually know the order of the exhibits. An Exhibit Log is also very important to ensure that you have tendered all the documents and other exhibits. There is a sample exhibit log attached to the end of this paper. I wonder how much time is wasted while attorneys have exhibits marked and show them to opposing counsel before the document is shown to the witness. A jury appreciates an attorney that appears prepared with all exhibits marked while the other attorney takes up the time. Nothing disturbs the flow of testimony more than a cross-examiner waiting for the opposing attorney to review a document before it can be given to the witness.

If you are like me, you use checklists to remember certain tasks that should be considered or performed in every case. Attached to this article is a sample discovery checklist. Having a litigation plan that your client is involved in and approves of is vital. The client then feels that he or she is a part of a partnership or a team, with consistent goals. When that happens, your client considers you not only his attorney, but his friend. In this business, we could all use that.

## B. Interpretation and Use of Tax Returns

Any investigation into marital assets should involve a thorough review of tax returns. I would recommend reviewing the returns for at least the last 5 years for important information. Sometimes a spouse may claim that he or she does not have tax returns in his possession. I had one case where the husband claimed that Hurricane Floyd destroyed his tax returns.<sup>1</sup> Fortunately, there is a very convenient way to obtain past tax returns. The IRS has a great website at [www.irs.gov](http://www.irs.gov) with downloadable forms. Form 4506, a request for a copy of a previously filed tax return, can be downloaded at [www.irs.gov/pub/irs-fill/f4506.pdf](http://www.irs.gov/pub/irs-fill/f4506.pdf). I recommend having this document at a deposition and asking the deponent to sign the document in your presence. I have sent these to opposing counsel but it usually takes at least three phone calls to get the document signed and returned. The cost for each tax return is \$23.00 for each period requested. The availability of this service is very valuable if a party is claiming they have lost a tax return. Such a claim should raise suspicion as to what evidence may be available on that return. Even if it does not lead to any damaging evidence, your client will likely appreciate that you made the effort to collect all potential evidence.

Tax returns provide a great deal of information and are a good starting place for discovery. With small businesses, look closely for personal expenses and try to match the expenses with credit card statements. Many small businesses use American Express or Visa cards for purchases. Find out if there is another authorized user. It may not be an employee, it could be a boyfriend or girlfriend. Obviously, it is extremely helpful to show that a spouse deducts business expenses on his or her tax return, when those expenses are really expenses related to a boyfriend or girlfriend. Receipts for gasoline, restaurant, entertainment that are deducted as a business expense can lead to important evidence of an extramarital affair. These credit cards often produce a summary of charges to aid a business. Ask for the party to produce this document. It makes a good document for use at trial.

This analysis can affect business valuations as well. If the personal expenses are not paid by the business, the business earns more of a profit. Therefore, the business is worth more and the marriage has a more valuable asset.

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<sup>1</sup> Hurricane Floyd hit the North Carolina coast in 1999. I practice in Georgia. Some people will say anything.

Do not forget the value of scrutinizing W-2 forms closely. There may be deductions for health insurance, life insurance, 401-K's, IRA's that may add to the party's income. If the deductions for these items are \$5,000.00 a year, that would add \$5,000.00 to the amount of income reported on the W-2 form.

C. **Cash Flow: Bank Records vs. Financial Records**

A cash flow analysis should be undertaken in almost every case. You can take the financial affidavit and the tax returns to produce an exhibit demonstrating cash flow.

Example:

Mr. Smith's affidavit states that he has 30,000.00 cash in a bank account.

Income on tax return: 120,000.00

Mr. Smith salary: 80,000.00

Ms. Smith salary 40,000.00

Other:

Credit Card Withdrawal: 7,500.00 (vacation)

Expenses:

Living Expenses on Affidavit 65,000.00

Income Taxes: 40,000.00

Vacation: 6,400.00 (actual amount spent)

After the expenses are deducted there is \$16,100.00 left. Mr. Smith says he has \$30,000.00 in his bank account. The bank statement on the checking account shows there was only \$3,500.00 in the account at the beginning of the year. There must be some other source of income to account for the \$12,600.00 increase accrued during the year. Possible sources could be a second job, a side business, or bonuses from his current job. A chart such as the one above is extremely helpful on cross-examination when you have found the discrepancy. The demonstrative chart brings home the failure of the witness to include this fact in his testimony or affidavit. Of course, it might also mean that the party is depositing assets into another account to avoid distribution. This is another instance where using a resource like ChoicePoint could help uncover hidden assets and accounts.

In sum, it is critical to have an organized approach to discovery. You can work extremely hard at something but you will not be as effective if you do not keep the end result in

mind. Early in the discovery process we typically meet with the client to develop a discovery plan. A checklist is a great way of keeping up with the work. It also helps prevent last minute discovery attempts. There is nothing more stressful than to have a trial date looming in the near future with very little time to complete needed discovery. A checklist will help eliminate stress and your client and secretary or paralegal will all be on the same page. Attached to this paper is a basic discovery plan. The form has a place for witness statements. Obviously, it is important to get a statement from a witness before trial. Using the checklist will ensure that you have the names of witnesses that your client thinks will be important.

After discovery, and at trial, organization remains important. Judges and juries are much more impressed with an attorney who is clearly very prepared. Fumbling through a stack of documents makes the attorney look less organized. A notebook with the financial documents is very helpful. You may not know all the exhibits you are going to use but you can use a notebook for the financial exhibits and start the label with Plaintiff's Exhibit F-1, etc. Have a copy for opposing counsel and the witness. It looks awkward for the attorney to stand there waiting for the other attorney to review the document before giving it to the witness. Also, nothing disturbs the flow of testimony, especially cross examination, like silent waiting periods.

#### D. **Pension and Retirement Plans**

##### 1. **Equitable Distribution of Property**

Georgia follows the equitable distribution of property method. The purpose behind this doctrine is to assure a fair distribution of property accumulated during the marriage between the parties.<sup>2</sup> Only the property and assets acquired by the parties during the marriage are subject to equitable division. Property acquired during the marriage by either party by gift, inheritance, bequest or devise remains the separate property of the party that acquired it. Such property is not subject to equitable division unless the appreciation in the value was caused by the efforts of the other party during the marriage.<sup>3</sup> Georgia courts hold that pension and retirement plans earned during the course of the marriage are subject to equitable distribution.

##### 2. **Vested Pension and Retirement Plans**

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<sup>2</sup>Campbell v. Campbell, 255 Ga. 461, 339 S.E.2d 591 (1986).

<sup>3</sup>Bailey v. Bailey, 250 Ga. 15, 295 S.E.2d 304 (1982).

Vested pension and retirement plans can be marital property subject to equitable division.<sup>4</sup> After a specified period of employment, an employee's interest in the retirement plan vests. After vesting, his interest in the plan is not subject to forfeiture if the employee later quits or is fired. Georgia courts recognize that pension plans can be quite valuable and may be the only real asset for a divorcing couple. As such, vested benefits can be divided upon divorce.

### 3. Unvested Pension and Retirement Plans

Unvested retirement benefits are considered marital property subject to equitable division insofar as they are acquired during the marriage.<sup>5</sup> While the plan beneficiary may claim that unvested retirement benefits are speculative at best, and other jurisdictions agree with that argument, the Georgia Supreme Court had held that a retirement plan is an important contractual right that will become a reality upon satisfaction of certain conditions.<sup>6</sup> In apportioning unvested retirement benefits, the following are matters of evidence for consideration: actual contributions of the spouse who is not earning the retirement benefits, the number of years the marriage in which such contributions were made, the degree to which there has been reliance on the expectation of these future benefits and other factual variables.<sup>7</sup>

### 4. State and Federal Employee Retirement Benefits

The rule for a state or federal employee's retirement benefits is a bit different. Although such benefits are marital property, state and federal employee retirement benefits are not assignable and can only be collected from the ex-spouse after he receives them.<sup>8</sup> Under O.C.G.A. §47-2-332, a State employee's retirement benefits are exempt from attachment. The Georgia Court of Appeals has held that §47-2-332(a) cannot be read as a spendthrift provision to protect an employee's benefits from his creditors only. The language is broad and prohibits any transfer of property rights in benefits, whether voluntary or by legal process.<sup>9</sup> In addition, the

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<sup>4</sup>White v. White, 253 Ga. 267, 319 S.E.2d 447 (1984).

<sup>5</sup>Courtney v. Courtney, 256 Ga. 97, 344 S.E.2d 421 (1986).

<sup>6</sup>Id.

<sup>7</sup>Id.

<sup>8</sup>Bryant v. Employees Retirement System of Ga., 216 Ga. App. 737, 455 S.E.2d 839 (1995).

<sup>9</sup>Id.

Employees Retirement System of Georgia (ERS) is not authorized to make a transfer of a portion of an employee's benefits. The ERS is an administrative body created by the legislature and only has those powers specifically granted it by the legislature. The power to transfer an employee's benefits to another is not expressly granted or necessary to carry out the ERS's purpose.<sup>10</sup> There are other jurisdictions in which state retirement systems have been ordered to pay benefits to a non-employee spouse directly.<sup>11</sup> These jurisdictions can be distinguished from Georgia because they are community property states. There, the spouse's benefits are jointly owned as soon as they come into being during the marriage. No transfer of property rights is required to order the retirement system to pay the spouse directly.

#### 5. Military Retirement Benefits

Military retirement pay, however, is subject to equitable distribution.<sup>12</sup> Military retirement benefits constituting deferred compensation for services rendered during the term of employment and during the course of the marriage are subject to division.<sup>13</sup>

#### 6. Qualified Domestic Relations Order

A Qualified Domestic Relations Order, or QDRO, is a court order that legally allows a retirement plan to distribute money to someone other than the plan participant. QDROs were created by the Retirement Equity Act of 1984 and are found under Section 206(d) of ERISA and Section 414(p) of the Internal Revenue Code. All companies that sponsor ERISA-governed pensions or 401(k) plans are required under federal law to administer QDROs. A QDRO is usually drafted after the divorce has been finalized. The QDRO must first be approved by the retirement fund administrator and then entered by the Court as an order. That order is then registered with the plan administrator.

A QDRO must meet a specified set of criteria of the Internal Revenue Service. With a properly prepared QDRO, a former spouse can be eligible to receive all or a portion of a plan

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<sup>10</sup>Id.

<sup>11</sup>Koelsch v. Koelsch, 148 Ariz. 176, 713 P.2d 1234 (1986).

<sup>12</sup>Stumpf v. Stumpf, 249 Ga. 759, 294 S.E.2d 488 (1982). Attorneys should also be aware that evidence of military retirement benefits already being collected by the spouse is relevant and admissible on the issue of alimony.

<sup>13</sup>Andrews v. Whitaker, 265 Ga. 76, 453 S.E.2d 735 (1995).

participant's plan benefits. One should note, however, that an IRA is not a qualified plan. An IRA can be transferred tax-free pursuant to a divorce, but it cannot be assigned under a QDRO.

There are two basic types of retirement plans for which a division pursuant to a QDRO may be made. The first is a defined contribution plan. Under a defined contribution plan, the employer sets the contribution on the front end. A separate account is maintained for each employee. Periodic contributions are made to the account pursuant to a prescribed formula. The employee's benefit includes contributions from the employer and/or employee, plus investment earnings and losses. The contributions are invested by the plan administrator, and the earnings and losses accumulate in the account. Under a defined contribution plan, the aggregate amount in an employee's account can be determined at any time. When the employee retires, the benefit received is the annuity that can be purchased at that time with the aggregate amount in the defined benefit account.<sup>14</sup>

The second retirement plan is a defined benefit plan. Here, the employer sets the benefit on the back end. A separate account is not maintained for each employee, but rather the employer maintains one giant retirement account. The employer uses a retirement benefit formula to tell the employee what he will be entitled to at retirement. Using the formula, the monthly benefits due the employee are computed. The benefit formula often contains variables, usually including the employee's length of service and the highest monthly salary. Contributions to this type of plan are almost always made by the employer. An employee normally must work a certain period of time before he can become vested in a defined benefit plan.<sup>15</sup>

There is a third category of retirement plans, known as hybrid plans, usually found in government pensions. These plans are mixes of defined contribution and defined benefit plans. For example, the plan may require the employee to make contributions, but the benefits from the plan are computed pursuant to a defined benefit formula.<sup>16</sup>

Sample QDROs for both defined contribution and defined benefit plans are included at the end of this section.

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<sup>14</sup>J. Thomas Oldham, *Divorce, Separation and the Distribution of Property*, §7.10(2)(a) (1999).

<sup>15</sup> *Id.* at §7.10(2)(b).

<sup>16</sup> *Id.* at §7.10(2)(c).

## 7. Stock Options

Another key asset in many retirement plans today are stock options. While possibly not as lucrative today as two or three years ago, many companies use stock options as a major component of the employment contract. Most stock options are non-assignable and non-transferable by the employee spouse to the non-employee spouse, even pursuant to a court order entered in connection with a divorce. The area of law concerning stock options is very complex. It is advisable that both parties seek the advice of a qualified tax specialist so as to avoid the tax consequences associated with such options.<sup>17</sup>

The Georgia Supreme Court has held that stock a former spouse received after exercising stock options brought into the marriage is not marital property subject to equitable division, as the stock options were not generated by marriage or accumulated during the marriage.<sup>18</sup> Similarly, stock purchased during a marriage as the result of stock options obtained by one spouse before the marriage is not divisible marital property, even if some marital funds were used to purchase the stock.<sup>19</sup>

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<sup>17</sup>Chason Harrison, Jr. and Elizabeth Green Lindsey, The Art of Draftsmanship, in Family Law Newsletter, March/April 2000, p. 23.

<sup>18</sup>Payson v. Payson, 274 Ga. 231, 552 S.E.2d 839 (2001).

<sup>19</sup>Thomas v. Thomas, 259 Ga. 73, 377 S.E.2d 666 (1989).

**Sample Qualified Domestic Relations Order  
Defined Contribution Plan**

IN THE SUPERIOR COURT OF \_\_\_\_\_ COUNTY  
STATE OF GEORGIA

Plaintiff, vs. Defendant.	CIVIL ACTION NO.
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**QUALIFIED DOMESTIC RELATIONS ORDER**

As part of the final judgment in this matter, pursuant to Section 414(p) of the Internal Revenue Code (the “Code”) and Section 206(d)(3) of the Employee Retirement Income Security Act of 1974 (“ERISA”), it is hereby ordered as follows:

1.

The Plan to which this order applies is the (name of plan).

2.

The Participant is (name of participant), whose address is (address of participant), and whose social security number is (Social Security number of participant).

3.

The Alternate Payee is (name of alternate payee), whose address is (address of alternate payee), and whose social security number is (Social Security number of alternate payee).

4.

Once the Plan Administrator determines that this order constitutes a qualifying domestic relations order within the meaning of the aforementioned section of the Code and ERISA, the Plan Administrator shall cause to have distributed from the Plan, in a single payment to the Alternate Payee, at the time and in the amount determined under Section 5 below.

5.

The Plan Administrator shall designate a Distribution Date as of which the lump sum distribution shall be made. The amount distributed as of such date shall be determined by the Plan Administrator as follows:

a. Determine the aggregate balance of the Participant's accounts under the Plan as of the \_\_\_ day of \_\_\_\_\_, \_\_\_ (the "Allocation Date"). Such balance shall include the principal amount payable by the Participant to the Plan as of the Allocation Date under any outstanding loan.

b. Allocate for the benefit of the Alternate Payee an amount equal to \_\_\_\_\_ percent (\_\_\_%) of such aggregate account balance as of such Allocation Date.

c. Adjust such allocated amount to reflect a \_\_\_ percent (\_\_\_%) annual rate of interest for the period from the Allocation Date through the Distribution Date.

The amount determined under this Paragraph shall be paid to the Alternate Payee on the Distribution Date or as soon as reasonably practicable thereafter, consistent with the processing of other distributions under the Plan.

6.

Should the Participant die after the Order is issued but before payment to the Alternate Payee of the amount determined under Paragraph 5, such amount shall be paid to the Alternate Payee as a death benefit.

7.

Notwithstanding any other provisions of this Order, this Order cannot:

1. Require the Plan to provide any type or form of benefit, or any option, not otherwise provided under the Plan;
2. Require the Plan to provide increased benefits;
3. Require the payment of benefits to an Alternate Payee which is required to be paid to another Alternative Payee under another order previously determined to be a QDRO.

8.

This Order is intended to satisfy and not conflict with any other requirements specified in regulations or other interpretations of general applicability promulgated by the Secretary of Labor.

9.

This Order is intended to be a QDRO made pursuant to Section 414(p) of the Internal Revenue Code of 1986, as amended and its provision shall be administered and interpreted in conformity with said Code. In the event that the Code is amended or the law regarding QDROs

is otherwise changed or modified, then the parties hereto shall immediately take such steps as are necessary to amend this QDRO to comply with any such changes, amendments and/or modifications, or, if permissible under any such change, amendment, or modification to the Code or laws regarding QDROs, the Administrator must elect to treat this QDRO as a Qualifying Order.

10.

The Court retains jurisdiction over this matter to amend this Order in order to establish and/or maintain its qualification as a QDRO under the Code.

SO ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_.

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Superior Court Judge

\_\_\_\_\_ County, Georgia

**Qualified Domestic Relations Order  
Defined Benefit Plan**

IN THE SUPERIOR COURT OF \_\_\_\_\_ COUNTY  
STATE OF GEORGIA

Plaintiff, vs. Defendant.	CIVIL ACTION NO.
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**QUALIFIED DOMESTIC RELATIONS ORDER**

As part of the final judgment in this matter, pursuant to Section 414(p) of the Internal Revenue Code (the "Code") and Section 206(d)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), it is hereby ordered as follows:

1.

The Court finds and concludes that the Defendant, (Defendant's name), is a participant and has an interest in a certain defined benefit plan known as (Name of Plan) (hereinafter the "Plan"). The Plaintiff, (Plaintiff's name), her heirs and assigns forever, is hereby designated as an Alternate Payee of a portion of Defendant's interest in the Plan pursuant to Sections 401(a)(13) and 414(p) of the Code.

2.

The Plan will pay the Alternate Payee \_\_\_\_ percent of the benefits that would be payable to the Participant.

3.

Payments to the Alternate Payee shall be made at the same time as payments are made to the Participant.

4.

Under the Plan, the Participant shall elect a benefit form that provides a survivor benefit. The survivor benefit shall be at least \_\_\_ percent of the benefit provided to the Participant during the Participant's life. The Participant shall designate the Alternate Payee as the beneficiary of this survivor benefit. The Alternate Payee shall be treated as the Participant's spouse for all purposes under the Plan. As the surviving spouse, the Alternate Payee shall be entitled to any pre-retirement survivor annuity. The Alternate Payee's consent shall be required for any election of benefits by the Participant other than the qualified pre-retirement and retirement joint and survivor annuity as provided under I.R.C. '417, as amended.

5.

Distribution from the Plan to Plaintiff shall be construed as an equitable division of marital property and not as alimony income to her under Section 71 of the Code.

6.

The Participant is (name of participant), whose address is (address of participant), and whose social security number is (Social Security number of participant).

7.

The Alternate Payee is (name of alternate payee), whose address is (address of alternate payee), and whose social security number is (Social Security number of alternate payee).

8.

The assignment of benefits contained here does not require the Plan to provide any type or form of benefit, or any option not otherwise provided under the Plan. This assignment does not require the Plan to provide increased benefits determined on the

basis of actuarial value. The assignment does not require the Plan to provide benefits to the Alternate Payee, which are required to be paid to another alternate payee under another Order previously determined to be a Qualified Domestic Relations Order.

9.

From the date of this Order and thereafter, the Alternate Payee shall have with respect to the Alternate Payee's interest in the Plan, the exclusive right as follows, to the extent permitted by the Plan:

(a) To designate the beneficiary of survivor benefits from the Alternate Payee's interest after the Alternate Payee's death. This designation shall be made without regard to any designation by the Participant of any beneficiary of the participant's interest.

(b) To direct the Plan Administrator to transfer or roll over the Alternate Payee's interest to a new plan that the Alternate Payee will establish or to an Individual Retirement Account established for the Alternate Payee's benefit or to the administrator, trustee, or custodian of such plan or account.

(c) To borrow from the Plan to the maximum extent permitted by the Plan.

10.

The Participant, the Alternate Payee and the Court intend this Order to be a QDRO as defined in Section 414(p) of the Code.

11.

It is intended that the terms of the within Order shall be interpreted and performed in a manner consistent with the Code and regulations promulgated thereunder, so as to avoid any action or interpretation which disqualifies either this Order or the Plan.

12.

The parties agree that their mutual intent is to provide the Alternate Payee with a benefit that fairly represents a marital share of the benefit as defined in Paragraph 2. If any order submitted to the Administrator of the Plan is held not to be a QDRO within the meaning of IRC Section 414(p), the parties agree to request a court of competent

jurisdiction to modify the order to make it a QDRO that reflects the parties' intent, said modification order to be entered nunc pro tunc if permissible.

13.

It is further ordered that a true copy of this Order shall be served upon the Administrator of the aforesaid Plan, and this Order shall take effect immediately and be binding on the parties, as well as on the Trustees and the Administrator of the Plan, according to law. The name and address of the Administrator of the Plan is (name and address of Plan Administrator).

14.

This Order is issued pursuant to Georgia law which relates to the provision of child support, alimony payments, or marital property rights, as defined therein between spouses and former spouses in actions for divorce.

15.

The parties are ordered to comply with the terms and spirit of the within Order.

SO ORDERED this \_\_\_ day of \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_  
Superior Court Judge,  
\_\_\_\_\_ County, Georgia

### **E. New Law Update – Equitable Distribution of Property**

#### **Barolia v. Pirani, 260 Ga. App. 513, 580 S.E.2d 297 (2003).**

**Facts:** Former Husband filed a complaint against former Wife in the Superior Court of Cobb County, seeking to domesticate a Texas divorce decree and to adjudicate the parties' property distribution. In a section entitled "Division of Marital Estate," the Texas divorce decree provided that Wife did not waive her right to bring an action regarding property division, and that the action should be brought in the state of Georgia. The divorce decree was signed by both parties. Wife, a Texas resident, counterclaimed for an equitable division of property.

The trial court dismissed the complaint and counterclaim with prejudice, holding that the existence of the Texas divorce decree prohibited the parties from pursuing property division in Georgia.

**Issue:** Whether the Georgia court had authority to domesticate the Texas divorce decree and adjudicate the parties' property distribution.

**Holding/Rationale:** *Reversed.* The trial court had the authority to adjudicate the Husband's claims seeking to domesticate the Texas decree and to adjudicate the parties' property distribution. The trial court also had the authority to decide the non-resident Wife's counterclaims for equitable division of property, where neither party contested jurisdiction or venue. The parties did not seek to have the trial court alter their previous divorce decree, but instead sought to have the court decide issues that were specifically reserved by the Texas court. Trial courts in Georgia also follow the practice of granting a final decree while reserving issues of property division.

#### **Baldwin v. Vineyard, 275 Ga. 134, 562 S.E.2d 174 (2002).**

**Facts:** Husband and Wife were divorced in May of 2001. Under their final decree, Husband was ordered to pay wife \$87,500 as equitable division of property. After Wife testified at the final hearing, a discussion over whether Husband fraudulently transferred property prior to the filing of the divorce petition arose. Husband stated he wanted to put on evidence, but the trial court continued to outline its judgment and terminate the

hearing. The trial court also included in the final order a clause adjudicating Husband in automatic contempt and requiring incarceration if he failed to pay a future amount to Wife. The only requirement under the order for holding Husband in contempt was the filing of an affidavit by Wife stating that the required payment had not been made.

**Issue:** Whether the trial court erred in not allowing Husband to present evidence on his behalf and whether the automatic contempt provision in the decree was valid.

**Holding/Rationale:** *Vacated and remanded.* The record demonstrated that the trial court improperly terminated the hearing without allowing Husband to present evidence. In addition, the automatic contempt clause was invalid. In Georgia, “a trial court cannot order incarceration pursuant to a self-effectuating order, regarding future acts, without benefit of a hearing.” The court held that the portion of the order adjudging Husband in automatic contempt for non-payment based on Wife’s affidavit and mandating his incarceration without a hearing improper.

**Hubby v. Hubby, 274 Ga. 525, 556 S.E.2d 127 (2001).**

**Facts:** Wife sought an equitable division of property. Husband moved for partial summary judgment, asserting that marital home was his separate property because he made the down payment with his personal funds. The trial court granted the motion, holding that Husband was entitled to all subsequent appreciation in value attributable to market forces. The Supreme Court remanded for the trial court to hold an evidentiary hearing to determine what role marital assets played in increasing the equity in the house and what percentage of the appreciation was subject to distribution. The trial court concluded on remand that marital assets played no role in increasing the equity, and that there was no appreciation in the house subject to equitable division. The trial court again awarded the home to the Husband. The Supreme Court again granted a discretionary appeal to determine whether the trial court properly applied the source of funds rule.

**Issue:** Whether the trial court correctly applied the source of funds rule in resolving the issue of the equitable division of the appreciation in the value of the marital home.

**Holding/Rationale:** *Reversed.* In applying the source of funds rule to the equitable division of a home brought into the marriage, the trial court must determine the contribution of the spouse who brought the home into the marriage, and weigh it against the total marital and non-marital investment in the property. Husband may have made the down payment with personal funds, but payments on both the original and subsequent mortgages were made from marital funds. Since marital funds were used to make mortgage payments, the increase in the net equity was subject to equitable division.

Husband's initial down payment represented 94.6% of the net equity in the marital home. The remaining 5.4% represents equity attributed to marital funds. That 5.4% is marital property subject to an equitable division between Husband and Wife. The court called the purchase of a house an on-going process. The trial court erroneously focused only on the increase in the indebtedness and consequent reduction in equity attributable to the refinancing of the parties' residence. Since marital funds were used to reduce the indebtedness, Wife was entitled to an equitable share of the net increase in the equity, whether resulting from those payments or indirectly from market sources.

**Byers v. Caldwell, 273 Ga. 228, 539 S.E.2d 141 (2000).**

**Facts:** Pursuant to their divorce decree, individual awards of items like houses and cars were made to the parties. Husband was also ordered to pay as equitable division of marital property the sum of \$200,000 from the other assets of the parties. The decree stated that in order to secure the payment, Wife would have a special lien on all of Husband's interests and partnership shares and benefits, including but not limited to, several shopping centers. Husband filed a motion to clarify the meaning of "other assets" as used in the decree. Contending that the reference was limited to his interest in the shopping centers, he sought a ruling that he did not have to pay Wife until the shopping center partnerships distributed funds to him or until he sold his interests. The trial court concluded that "other assets" was a clear and unambiguous reference to his partnership interests.

**Issue:** Whether the trial court correctly interpreted the term “other assets” in the divorce decree.

**Holding/Rationale:** *Reversed.* The term “other assets” was used in connection with the equitable division of marital property. If funds from a specified source are awarded to one spouse as part of the equitable division, the other spouse cannot be required to make payment from a completely different marital asset. Had the divorce decree denominated the partnerships as an in rem award to Wife, the Husband could not be compelled to satisfy that obligation from any other source. However, the decree did not designate the partnerships or any other particular fund from which Husband was to pay the \$200,000. This money was to be funded from other unidentified marital assets not awarded specifically to one of the parties in the other provisions of the decree. The reference to the partnerships only meant that Husband’s personal interest in the partnerships would be security for his obligation to pay the \$200,000. The source of funding for the payment was not restricted to the partnership interests. If the intention was for other assets to refer solely to the partnership interests, the decree would have provided for the payments to start upon Husband’s sale of those interests or some other related event. The partnership interest clause was only to secure the obligation to pay the equitable division. It was not the required source of the funds.

**McGinn v. McGinn, 273 Ga. 292, 540 S.E.2d 604 (2001).**

**Facts:** Husband filed suit for divorce, and Wife counterclaimed, both seeking equitable division of property. Husband was the beneficiary and co-trustee of a trust, the sole asset of which was stock in a company owned by members of his family. Wife served a subpoena on the company, seeking testimony and documents regarding the value and financial records of the trust, and the compensation and benefits that Husband received from the company. Company moved for a protective order, and Husband filed a motion in limine. Wife filed a motion to compel discovery. The trial court held that the trust principal was not subject to Wife’s claims, granted the motions filed by company and Husband, and denied Wife’s motion.

**Issue:** Whether the corpus of the trust was subject to Wife's claims for alimony and distribution of property, and whether Wife was entitled to discovery of matters relating to the value of the company's stock.

**Holding/Rationale:** *Reversed and remanded.* Husband was not the sole beneficiary of the trust, nor was he the sole trustee of the trust. As such, the corpus of the trust was not subject to Wife's claims for distribution of property and alimony. However, the Husband's separate estate was relevant. In determining alimony and property division, the fact finder must consider the condition of the parties, including the assets and financial resources of all types that make up their separate estates. Even though the stock was not itself a part of Husband's estate, his interest in the trust was an asset relevant to the determination of his obligations in the divorce. Furthermore, Husband would be able to use the portion of the company's income which he ultimately received due to his interest in the trust as a means of payment. By excluding all evidence relating to the value of the stock and the company's financial position, the trial court foreclosed all proof regarding the value and earnings potential of the trust corpus. The company was not traded on the open market, so to be able to prove the value of the trust's share in the company, Wife needed to be able to introduce evidence of the company's financial records. The trial court's ruling effectively prevented the fact finder from considering Husband's interest in the trust as a separate asset and from undertaking a calculation of his potential income therefrom.

**Payson v. Payson, 274 Ga. 231, 552 S.E.2d 839 (2001).**

**Facts:** In the court's equitable division of property in its final divorce decree, Wife was awarded a stock account which contained Home Depot stock Wife had owned prior to marriage, Home Depot stock she had received after exercising stock options that had vested prior to the marriage, Home Depot stock that was marital property, and the appreciation on the entire account. Wife contested the trial court's classification of this account as marital property subject to equitable division.

**Issue:** Whether the trial court erred in classifying Wife's appreciated shares of Home Depot stock as a marital asset for purposes of the equitable division of property.

**Holding/Rationale:** *Reversed and remanded.* Only property acquired as a result of the labor and investments of the parties during the marriage is subject to equitable division. Property brought into the marriage by one spouse is not subject to equitable division because it was not generated by the marriage. It is a question of law whether a category of property may constitute a marital asset, but whether a particular item of property actually is a marital asset may be a question of fact. The appreciation in value of a non-marital asset during the marriage is a marital asset subject to equitable division if the appreciation is the result of the efforts of either spouse or both spouses. If the appreciation is only the result of market forces, it is a non-marital asset and not subject to division. Whether the appreciation is due to market forces or to the parties' efforts is a question of fact. Wife's property interest in the stock was not marital property subject to division because it was not generated by the marriage or accumulated during the marriage. In order to reach the conclusion that all the appreciation on the non-marital stock property is marital property subject to division, the fact-finder had to determine that all the appreciation was attributable to the efforts of the spouses and none of the appreciation was due to market forces, since any appreciation found to result from market forces is not a marital asset. There was no dispute that some of the appreciation in value of the stock was due to market forces, making it erroneous to include all the appreciation in value as marital property. The case was remanded for the trial court to reallocate the marital property and determine the amount of appreciation in value due to market forces and the amount due to the efforts of one or both parties to the marriage.

**Gardner v. Gardner, 276 Ga. 189, 576 S.E.2d 857 (2003).**

**Facts:** Husband filed for divorce, seeking equitable distribution of property. His verified complaint stated that the only property acquired by the parties during the marriage consisted of: Corporate stock in SGF, Inc.; corporate stock in State Line Cooler, Inc.; [and] corporate stock in Sowega Cotton Gin, Inc. Husband listed the stock in the

corporations as his only assets on his financial affidavit. The non-liquidated value of the stock was stated to be just under five million dollars. Wife filed an answer and counterclaim for divorce. She then sought an order allowing her to join two of the three corporations listed in the complaint as defendants in the counterclaim. She alleged she learned that the corporations held title to all of the assets of the parties, including the marital residence, and that husband was the sole stockholder and director of the corporations. She claimed that joinder was required to grant complete relief on the counterclaim so as to allow an equitable division of property. The trial court granted the joinder order.

**Issue:** Whether joinder of the corporations was proper in order to adjudicate the marital claims.

**Holding/Rationale:** *Affirmed.* Joinder of parties is allowed if necessary to grant complete relief to the parties. Husband acknowledged that the marital assets in this case were the corporate stock. The stock was wholly owned by Husband, and Wife held no assets in her own name. Here, any property that could be determined to be marital property was inextricably commingled with the property of the corporations. Joinder of the corporations was proper to ensure a fair division of marital assets. The court noted that in these instances, the trial court should make it clear that the corporations are only joined for the limited purpose of reaching the marital property. The court held it was proper to add the corporations as party-defendants to the counterclaim for the limited purpose of finding the marital property and dividing it properly. A contrary result would allow a party to shield marital assets and defeat equitable division by titling those assets in a wholly owned corporation, leaving the other party with nothing.

**Anderson v. Anderson, 274 Ga. 224 (2001).**

**Facts:** Husband and Wife entered into a premarital agreement in which the parties agreed that all assets and income derived from the date of the marriage forward would be the assets of both parties and subject to a 50/50 division between the parties. The Wife also acknowledged that Husband had a trust agreement from his first marriage pertaining to

the marital assets of the first marriage and that those assets were not subject to equitable distribution between Husband and Wife. Wife filed for divorce and asserted that the 50/50 division clause applied to the parties' gross income, undiminished by taxes or marital expenditures, regardless of the source, including Husband's salary and the interest earned on certificates of deposit held in his name, but owned by the trust created prior to his divorce from his first wife. The trial court held that Wife was not entitled to one-half of the interest earned on the certificates.

**Issue:** Whether the trial court erred in holding that the certificates of deposit were not subject to equal division under the agreement.

**Holding/Rationale:** *Affirmed.* Wife contended that the agreement for equal division of all assets necessarily included the certificates of deposit. The court noted, however, that the division clause had to be read in conjunction with the entirety of the agreement. The trust agreement provided that the trust was the owner of the income from the certificates and that receipt by Husband was solely in his fiduciary capacity. The certificates were not owned by Husband, but by the trust. In the premarital agreement, Wife conceded that any asset of the trust would not be subject to equitable division. The certificates were not an asset acquired after the parties' marriage, and were not subject to equitable division under the premarital agreement.

The interest earned on the certificates would not be subject to equitable distribution unless the interest was earned by and payable to one of the parties. The evidence showed that the interest paid to Husband was remitted to the trust and was not reported as income on the tax returns filed by the parties during the marriage. Neither Wife nor Husband considered the interest to be their income. The trial court correctly held that Wife was not entitled to one-half of the interest as an equitable division of property.