POST-DECREE LITIGATION

by

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SUPPORT MODIFICATIONS

The inherent problem with establishing a support award is that the award is established to reflect a finite need for an indefinite period of time; the intention of such an award is to address the needs of a former spouse and/or children in the future – sometimes many years in the future. To predict the future is a skill that even the best jurists have yet to develop. Thus, the law provides a procedure to absorb the unpredictability of lost jobs, a child's extraordinary needs, or an increase in ability to provide support.

Modification of Child Support

Child support awards can be increased or decreased by showing a change in the income ***and*** financial status of either parent or in the needs of the children. O.C.G.A. § 19-6-15(k)(1). For example, if the noncustodial parent receives an increase in salary or the needs of the children dramatically increase, then it may be appropriate to increase the amount of child support. Likewise, if the noncustodial parent suffers a reduction in earnings or one of the children graduates high school, it may be appropriate to decrease the amount of child support. It has been held that a ten (10%) percent change in a party's income is sufficient to warrant a modification of a child support award. Odom vs. Odom, 291 Ga. 811, 733 S.E.2d 741 (2012). However, this is not a "hard and fast" rule; a nine (9%) percent change in a part's income may be sufficient and an eleven (11%) percent change may not be.

Once an order for child support is first issued, child support can be modified at any time thereafter. McAlpine vs. Leveille, 258 Ga. 422, 369 S.E.2d 907 (1988). However, once a party receives an order of modification of child support, that party cannot file another modification for two (2) years, from the date of such order, except due to an involuntary loss of income or a greater (or lesser) amount of visitation being exercised by the noncustodial parent than what is provided in the court order. O.C.G.A. §19-6-19(a). Once the requisite "change" has been proven, then a new child support calculation is made, pursuant to O.C.G.A. § 19-6-15.

To determine a presumptive amount of child support requires a series of calculations that begins with a determination of the monthly gross income of each parent. O.C.G.A. §§ 19-6-15 (b), (f); 19-6-15 (a) (12). Nothing in O.C.G.A. § 19-6-15 authorizes a court to consider the income or other resources of a parent's new spouse as a part of the calculation of his/her child support obligation. A parent's new spouse has no legal obligation to contribute, directly or indirectly, to the support of a parent's children from his/her prior marriage. Wood vs. Wood, 166 Ga. 519, 143 S.E. 770 (1928). Accordingly, even if a parent's new spouse reduces living expenses, contributed to a better lifestyle, or enabled him/her to devote more of his/her income to child support, it is

error for the trial court to use the income of the new stepparent to calculate his/her gross income under O.C.G.A. § 19-6-15.

Modification of Alimony

The law in the State of Georgia provides a special procedure for modification of permanent alimony which is required to be paid in periodic installments. O.C.G.A. § 19-6-19. Periodic alimony may be modified based upon a showing of a change in the "income" ***and*** "financial status" of either former spouse. In a proceeding strictly for modification, the court may only modify the decree as to the "amount" of future installments of alimony and not retroactively to the date of the filing of the modification action; an award of periodic alimony for a specified number of years may not be modified by extending the "term" of years. Temples vs. Temples, 262 Ga. 779, 425 S.E.2d 851 (1993). There is no absolute right to a change in alimony, even upon proof of a change in income and financial status of a former spouse; the decision is within the discretion of the trier of fact. Culberson vs. Culberson, 237 Ga. 269, 227 S.E.2d 265 (1976). In proceedings for the modification of alimony for the support of a spouse, the court may award attorney's fees, costs, and expenses of litigation to the prevailing party as the interests of justice may require. O.C.G.A. § 19-6-19(d). Once a party receives an order of modification of alimony, the requesting party cannot file another modification for two (2) years, from the date of such order, except in the case of modification due to a "live-in-lover". O.C.G.A. §19-6-9 (a); Sims vs. Sims, 245 Ga. 680, 266 S.E.2d 493 (1980). Lump sum alimony is not modifiable. McLendon vs. McLendon, 262 Ga. 657, 424 S.E.2d 283 (1993).

Alimony paid to a former spouse who is voluntarily cohabitating with a third party in a meretricious relationship, is subject to termination and/or modification. O.C.G.A. §19-6-9(b). In order for a modification to be granted on this basis, the relationship must be more than a periodic sexual relationship, it must be continuous and open. Reiter vs. Reiter, 258 Ga. 101, 365 S.E.2d 826 (1988). Additionally, even if a meretricious relationship is established, the modification is not automatic and remains

within the discretion of the trier of fact. Hurley vs. Hurley, 249 Ga. 220, 290 S.E.2d 70 (1982).

DISAGREEING OVER AGREEMENTS

"The minute you read something that you can't understand, you can almost be sure that it was drawn up by a lawyer." - Will Rogers

Given that a large portion of divorcing couples cannot agree upon the color of the sky, or the time of day, it should be no surprise that they often cannot agree upon what they previously agreed upon. Accordingly divorce attorneys often are faced with arguing in support of, or in opposition to, the enforcement of purported settlement agreements based upon their client's particular set of circumstances. Since this is not an uncommon occurrence, there is a distinct set of laws and procedures that practitioners should be familiar with in order to best advocate for their clients.

Prenuptial Agreements

A prenuptial (or antenuptial) agreement is a contract entered into by prospective spouses, prior to marriage, in which the property and other financial rights of the prospective spouses are determined; such contracts can address issues concerning alimony, division of property, and allocation of debt. It was that not long ago that prenuptial agreements were not enforceable, as they were believed to be contrary to the public policy of the State of Georgia by promoting the procurement of divorces. Reynolds vs. Reynolds, 217 Ga. 234, 123 S.E.2d 115 (1961). In 1982, the Supreme Court of Georgia reversed its position on prenuptial agreements in the case of Scherer vs. Scherer, 249 Ga. 635, 292 S.E.2d 662 (1982). However, the Supreme Court of Georgia held that prenuptial agreements should not be given "carte-blanche" enforcement; it created three (3) criteria for trial courts to employ in its determination as to whether to enforce a prenuptial agreement, commonly referred to as the "Scherer Test".

Contesting Prenuptial Agreements on Substantive Grounds

To determine whether the substance of a prenuptial is valid requires an analysis of the three (3) criteria set forth in Scherer to the particular facts and circumstances of the client's case, to-wit:

(1) Was the agreement obtained through fraud, duress, or mistake, or through misrepresentation or nondisclosure of material facts?

(2) Is the agreement unconscionable?

(3) Have the facts and circumstances changed since the agreement was executed, so as to make its enforcement unfair and unreasonable?

If the answer to any of the Scherer questions is "yes" then the prenuptial agreement can be successfully voided. However, determining when the answer to one of the questions is "yes" is a highly fact-intensive question, without a great deal of clear-cut answers in the case law. Additionally, it is important to remember that it is the trial judge who will determine the enforceability of a prenuptial agreement, and that the trial court has broad discretion as to whether an agreement is enforceable in light of the criteria set forth in Scherer. Adams vs. Adams, 278 Ga. 521, 603 S.E.2d 273 (2004).

1. Fraud, duress, or mistake; misrepresentation or nondisclosure of material facts.

The first criteria set forth in Scherer provides the most fertile ground for litigating the validity of a prenuptial agreement. As stated above, the trial court has broad discretion in this area; the case law does not flesh-out hard and fast rules given the wide array of factual scenarios that could fall under this rule. However, there are some guiding principles to help practitioners navigate the first prong of the Scherer test.

Mallen vs. Mallen, is a good test-case because this decision painstakingly breaks down each prong of the Scherer test into its subsections. 280 Ga. 43, 622 S.E.2d 812 (2005). In Mallen, the parties had lived together for four (4) years when the wife became pregnant. The husband called the wife when she was at the clinic about to terminate the pregnancy; he asked her to marry him and have the child. The wife agreed. The parties

entered into a prenuptial agreement ten (10) days prior to the wedding. They were married for approximately eighteen (18) years and had four (4) children together. The husband filed for divorce and sought to enforce the prenuptial agreement. The trial court found the prenuptial agreement enforceable.

i. Fraud.

The wife raised the defense of fraud by claiming that the husband had told her that the prenuptial agreement was just a formality, and that he would "always take care of her". The Supreme Court of Georgia held that the husband's alleged statements did not constitute fraud because the wife had access to the clear terms of the prenuptial agreement. Additionally, the Supreme Court of Georgia held that a promise regarding a future act did not amount to actionable fraud.

ii. Duress.

The wife raised the defense of duress, claiming that because the husband would not marry her without the prenuptial agreement, she was faced with being left unmarried and pregnant if she refused to sign. The Supreme Court of Georgia held that insisting on a prenuptial agreement as a condition of marriage is not duress, and that duress must consist of

> "*threats of bodily or other harm, or other means amounting to coercion, or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will*."

As additional evidence that the wife's free will had not been overcome, the Supreme Court of Georgia pointed to the fact that the wife had successfully refused to sign the first version of the prenuptial agreement that had been presented to her, and had effectively negotiated a better position for herself. Some of the other key factors that the Supreme Court of Georgia seemed to come back to frequently in determining the validity of agreements throughout this line of cases, is the time between the signing of the agreement

and the wedding, as well as the opportunity of both parties to have counsel to advise them.

iii. Nondisclosure of material facts.

The wife raised the defense of nondisclosure of material facts by arguing that the failure of the financial disclosure forms to include the parties' incomes rendered the agreement unenforceable. The Supreme Court of Georgia disagreed and found that while the financial disclosures did not specifically include income, they did accurately present the husband's financial circumstances, making it clear that the husband was a "wealthy individual". Moreover, the Supreme Court of Georgia noted that the parties had lived together for four (4) years prior to their marriage and accordingly, the wife was aware of the standard of living the parties enjoyed. It is noteworthy, however, that three (3) Justices dissented as to this issue, finding that the lack of income disclosure was a material nondisclosure that should have rendered the agreement unenforceable. (*See* Lawrence vs. Lawrence, 286 Ga. 309, 687 S.E.2d 421 (2009).)

However, before making an argument regarding nondisclosure of material facts on behalf of your client, it would be prudent to compare the analysis in Mallen with Blige vs. Blige, 283 Ga. 65, 656 S.E.2d 822 (2008). In contrast to Mallen, the prenuptial agreement in Blige was on appeal after being found *unenforceable* by the trial court. In Blige, the parties did not live together prior to the marriage. The husband had hidden One Hundred Fifty Thousand ($150,000.00) Dollars in cash that he planned to use to build a house after the wedding. The husband was a truck driver and the trial court found that nothing in the Husband's standard of living reflected the undisclosed cash; thus, the wife was justified in not knowing or expecting that it existed at the time she entered into the prenuptial agreement. The Supreme Court of Georgia upheld the trial court's holding that the prenuptial agreement was unenforceable due to this nondisclosure. The Supreme Court of Georgia specifically stated that its holding in Mallen did ***not*** create a "duty of inquiry" which would "turn Scherer's disclosure requirement on its head", and was never intended to overrule the first portion of the Scherer test which imposes an affirmative

duty of full and fair disclosure of all material facts by the parties before entering into a prenuptial agreement.

2. Is the agreement unconscionable?

The second prong of the Scherer test explores the issue of unconscionability. This is a very high bar, and is unlikely to be the sole reason a prenuptial agreement will be held to be unenforceable; to reach this level of unenforceability, it is likely that there was some fraud or misrepresentation in the procurement of the agreement, and thus, the first prong of Scherer would work in conjunction with this second prong.

Looking again to the Mallen case, the wife also claimed that her prenuptial agreement was unenforceable because it was unconscionable. However, the Supreme Court of Georgia found that

> "*an unconscionable contract is one abhorrent to good morals and conscience . . . where one of the parties takes a fraudulent advantage of another, an agreement that no sane person not acting under a delusion would make and that no honest person would take advantage of*."

Ultimately, the Supreme Court of Georgia held that the prenuptial agreement did not rise to this level, in part because there had been no finding of fraud, and no suggestion that the wife had been under any delusion. It also reiterated its position in Adams vs. Adams, that stands for the proposition that an agreement is not unconscionable by virtue of perpetuating an existing disparity of financial positions. 278 Ga. 521, 603 S.E.2d 273 (2004).

3. *Have the facts and circumstances changed since the agreement was executed, so as to make its enforcement unfair and unreasonable?*

The final prong of the Scherer test may be the most elusive in rendering a prenuptial agreement unenforceable. The holding in Mallen was a case of first impression on this issue. In Mallen, the husband's net worth had increased by Fourteen Million ($14,000,000.00) Dollars during the marriage. The Supreme Court of Georgia held that the key element to be considered in determining this prong was whether the change in financial circumstances was *foreseeable* at the time of the execution of the prenuptial agreement. The Supreme Court of Georgia cited a South Carolina case where a wife had become totally disabled, and that appellate court found that this was foreseeable because the prenuptial agreement made reference to the wife's health issues; thus, it was foreseeable that those health issues would worsen. Hardee vs. Hardee, 355 S.C. 382, 585 S.E.2d 501 (2003). The Supreme Court of Georgia similarly analogized that the prenuptial agreement made reference to the husband's financial circumstances, including his significant wealth, thus it was foreseeable that this wealth would increase throughout the marriage.

An interesting factual scenario would arise if the tables were turned and a party who was in a strong financial position at the time an agreement was executed, lost all (or a substantial amount) of his or her wealth during the term of the marriage, and the prenuptial agreement obligated him or her to pay sums of support on par with the level of wealth that was held prior to the marriage. Would the formerly wealthy spouse be able to have the prenuptial agreement held to be unenforceable based on a change of facts and circumstances? Wouldn't it be equally fair to assume that it was foreseeable that the wealth would decrease during the marriage due to bad investments or turns in the financial markets?

Such a query should assist practitioners representing a party who is seeking to protect assets through a prenuptial agreement. Such clients should also be advised that the classification of property may not be static during the marriage. An example of this arose in Lerch vs. Lerch, where a husband's separate property was protected under a

prenuptial agreement. 278 Ga. 885, 608 S.E.2d 223 (2005). Part of his separate property was a house that he owned prior to the marriage. However, during the marriage, the husband transferred the house into both parties' names; thus, he gifted the house to the marital estate. The Supreme Court of Georgia held that this gift removed the house from the category of separate property, which was protected under the prenuptial agreement, to martial property, which was not protected against a claim for equitable division.

Contesting Prenuptial Agreements on Technical Grounds

Agreements involving marriage issues often invite controversy as to whether they were adequately witnessed. A contract contemplating marriage, as opposed to a contract contemplating divorce, must be attested by two (2) witnesses. O.C.G.A. § 19-3-63. The question arises as to whether a prenuptial agreement is a contract made in contemplation of divorce, or in contemplation of marriage, and if a prenuptial agreement that is not attested by two witnesses may be properly set aside upon having failed the signature requirement.

In Dove vs. Dove, the Supreme Court of Georgia addressed this issue. 285 Ga. 647, 680 S.E.2d 839 (2009). In Dove, the Court unambiguously clarified that "*prenuptial agreements settling alimony issues are made in contemplation of divorce, not marriage*", and would not fail for lacking two (2) witness signatures. However, in Sullivan vs. Sullivan, the Supreme Court of Georgia ruled that the subject prenuptial agreement did not mention either alimony or divorce, and held that it was a contract in contemplation of marriage requiring two (2) witnesses, pursuant to O.C.G.A. § 19-3-63. 286 Ga. 53, 684 S.E.2d 861(2009). Thus, while as a practical matter, most prenuptial agreements would be drafted so that, under Dove, it is clear that the provisions of O.C.G.A. § 19-3-63 do not apply, the strong dissenting opinion in Dove as well as the holding in Sullivan should act as a signal to practitioners that this issue may not be entirely settled. It is the best practice to have any prenuptial agreements attested by two (2) witnesses.

Postnuptial Agreements

A postnuptial (or reconciliation) agreement stands on the same footing at a prenuptial agreement. Curry vs. Curry, 260 Ga. 302, 392 S.E.2d 879 (1990). Therefore, the same analysis under the Scherer test is applied to a postnuptial agreement. However, pragmatically speaking, the circumstances surrounding the preparation and execution of prenuptial and postnuptial agreements can be different and need to be considered in the drafting of a postnuptial agreement (e.g., addressing how marital property, in existence at the time of the post-nuptial agreement, should be divided, etc.). Though, it is clearly evident that postnuptial agreements are ***not*** made in contemplation of marriage, and do ***not*** require two (2) witness signatures.

Settlement Agreements

Prior to a settlement agreement being incorporated into a Final Judgment and Decree (or other order of the court), it is viewed under the same rules of any contractual agreement (i.e., offer; acceptance; consideration; mutuality of obligation; and competency and capacity) and is governed by O.C.G.A. § 13-2-1 *et seq*. This section addresses a contest to a settlement agreement ***before*** it is incorporated into an order of the court. As an initial matter, it is important to note that in a divorce action, the court has the discretion to approve or reject any agreement between the parties, in whole or in part, before it becomes the judgment of the court itself. Franz vs. Franz, 268 Ga. 465, 490 S.E.2d 377 (1997). In Franz, an agreement was reached between the parties and the husband filed a motion to enforce the agreement which the wife opposed. At the hearing on the motion to enforce, the evidence revealed that the husband had concealed from the wife that he was retiring from the military to take significantly higher paid job in the private sector. Thus, the child support figure agreed upon was legally insufficient, and the trial court was justified in rejecting the agreement. It is important to note that the trial court's discretion in accepting or rejecting an agreement is most crucial as it related to custodial matters, as it is the trial court's duty to always look out for the best interest of child, irrespective of the wishes or desires of the parents. In awarding custody, the best

interest of the child are paramount; the wishes of the parents do not control. Crisp vs. McGill, 229 Ga. 389, 191 S.E.2d 836 (1972).

However, the trial court's discretion to approve or reject an agreement is not absolute, and can be abused. It must be limited to acceptance or rejection of the agreement; the trial court cannot "accept" an agreement but exempt one part to change *sua sponte*. For example, in Hodges vs. Hodges, a trial court rejected a couple's agreement as to an alimony award. 261 Ga. 843, 413 S.E.2d 191 (1992). In Hodges, the parties had agreed that the husband would transfer a car to the wife, with a value of approximately Twelve Thousand ($12,000.00) Dollars. The trial court rejected the agreement with the transfer, and without allowing evidence as to the issue of alimony, awarded the wife a lump sum award of Seventy-Five Thousand ($75,000.00) Dollars. The Supreme Court of Georgia held that this was an abuse of the trial court's discretion and reversed the ruling.

Further, a divorce decree should accurately reflect a settlement reached by the parties, and the trial court cannot make substantive additions or changes; such a policy is in part to promote the State of Georgia's strong public policy of encouraging negotiations and settlements. Robinson vs. Robinson, 261 Ga. 330, 404 SE2d 435 (1991). Finally, an important rule to note in drafting settlement agreements, is that a severability clause that provides that remaining provisions continue in full force and effect if a provision is held to be invalid, is wholly inappropriate in a judicial decree resolving a case before a court. Kauter vs. Kauter, 286 Ga. 16, 685 S.E.2d 266 (2009).

Looking to ways to set aside a settlement agreement, it is helpful to keep the primary contractual defenses in mind. Mistake can be a defense to a contract. Mistake is a defense if the mistake is mutual and related to consideration under the contract, or if one party is aware of the mistake by the other party, and thus knew that there was not mutual assent as to an element of the contract. O.C.G.A. § 13-3-1; Werner vs. Rawson, 89 Ga. 619, 15 S.E. 813 (1892). However, the power to relieve mistakes shall be exercised with caution; to justify it, the evidence shall be clear, unequivocal and decisive as to the mistake. O.C.G.A.§ 23-2-21.

Fraud may also render a contract voidable at the election of the injured party. O.C.G.A. § 13-5-5. Fraud may be actual or constructive. Higginbottom v. Thiele Kaolin Co. sets out the two (2) ways that fraudulent inducement can be made out. 251 Ga. 148, 304 S.E.2d 365 (1983). The first way is to

> "[s]how that 'the [respondent] made a false, material representation of an existing fact with knowledge that it was false or with reckless disregard as to whether it was true and that it was [made] with the intent that it be acted upon by the [movant]; and, further, that the [movant] acted upon the misrepresentation in reasonable reliance of its truth in a manner reasonably foreseeable by the [respondent] and to the [movant's] proximate injury." (Internal citations omitted.)

The second way is to

> "[s]how that the [respondent], instead of misrepresenting an existing fact, made promises as to future events with the present intention not to perform or with the knowledge that the future event would not occur." (Internal citations omitted.)

Ultimately, the Supreme Court of Georgia found that the moving party did not carry the burden to show that the elements of fraudulent inducement had been met through either of the possible tests. It is key to remember that a contract that is procured by fraud is merely voidable, not void and may be ratified by the defrauded party, or said party can also waive the fraud, thereby creating a binding contract. Manning vs. Wills, 193 Ga. 82, 17 S.E.2d 261 (1941).

Other contractual defenses include duress, undue influence, or the inability to contract (e.g., in the case of involuntary intoxication; in the case of a person being unauthorized to bind another to a contract). O.C.G.A. § 13-5-1 *et seq*.; Spikes vs. Spikes, 89 Ga. App 139, 79 S.E.2d 21 (1953). The essential question is whether there was some defect in place that would remove one party's ability to freely assent to a contract. Similar to the factors to consider in determining when a prenuptial agreement is valid, it will be important to determine whether each party was represented by counsel, (or

afforded the ability to consult with counsel), what time restrictions may have been in place, or whether the party had been able to successfully negotiate terms to his or her benefit.

PROCEDURE TO CONTEST / ENFORCE AGREEMENTS:

There are three primary tools for practitioners to utilize in resolving the enforceability of an agreement: (1) motion for summary judgment, (2) motion to enforce, or (3) motion to set aside agreement. At first blush it may appear to be an issue of semantics as to which motion to file; however, it is actually an important substantive decision. The differences between these motions are vast, carrying different burdens and considerations. A motion for summary judgment is a motion at law; a motion to enforce and a motion to set aside are motions at equity. Quarles vs. Quarles, 285 Ga. 762, 683 S.E.2d 583 (2009). Again, this is more than an issue of semantics!

In Quarles, the Husband, seeking to enforce the parties' prenuptial agreement, filed a motion for partial summary judgment as to the enforceability of the agreement. The trial court granted the husband's motion for partial summary judgment, finding the agreement to be enforceable. The wife appealed, and the Supreme Court of Georgia reversed the trial court's order granting partial summary judgment. The Supreme Court of Georgia held that the standard of review for summary judgment requires not only a *de novo* review, but it also requires it to view the evidence in the light most favorable to the non-movant; the burden is squarely on the movant's shoulders to show that even with the evidence so construed, that there still remains no genuine issue of material fact.

In Quarles, the wife's testimony at the hearing on the motion for summary judgment was that she did not recall whether the husband had disclosed his income, and the husband testified that he had. The Supreme Court of Georgia found that on a *de novo* review (with the requirement of having to view the evidence in the light most favorable to the Wife), a genuine issue of material fact existed as to the enforceability of the agreement. The Supreme Court of Georgia specifically contrasted how the matter may well have been viewed differently had a motion to enforce been filed, stating:

> "[husband] could have moved to enforce the prenuptial agreement. See Alexander vs. Alexander, 279 Ga. 116, 610 S.E.2d 48 (2005). In such instances, the trial court essentially sits in equity and has discretion to 'approve the agreement in whole or in part, or refuse to approve it as a whole.' On appeal, the trial court's disposition of a motion to enforce a prenuptial agreement is evaluated under the abuse of discretion standard of review. See also Blige vs. Blige, 283 Ga. 65, 656 S.E.2d 822 (2008) (where wife moved to have antenuptial agreement set aside and trial court conducted a pre-trial evidentiary hearing). However, instead of moving to enforce the parties' agreement, husband 'moved for [partial] summary judgment. On summary judgment, a trial court is not authorized to resolve disputed issues of material fact. A trial court is authorized only to determine whether disputed issues of material fact remain.' Georgia Canoeing Assn. vs. Henry, 263 Ga. 77, 428 S.E.2d 336 (1993)." (Internal citations omitted/edited.)

Thus, presumably under an abuse of discretion standard on an equitable issue, the Supreme Court of Georgia may have upheld this same agreement. It concluded this option with a resounding edict on the matter, to-wit:

> "[b]ecause of the differences between appellate review for abuse of discretion and review of the grant or denial of summary judgment, as outlined above, we remind the bench and bar that, 'while summary judgment may be a prompt, inexpensive, and fair means of resolving many controversies at law, it can become otherwise' in matters of equity. Georgia Canoeing Assn. vs. Henry, supra at 79, 428 S.E.2d 336."

Therefore, unless the issues are so overwhelmingly clear, it appears that under Quarles, the better course of action is to file a motion in equity (i.e., motion to enforce or motion to set aside) so that the trial court judge is empowered to utilize discretion in weighing evidentiary issues to resolve the enforceability of a prenuptial agreement.

PROCEDURE TO CONTEST A JUDGMENT:

Once an agreement is officially approved (i.e., incorporated) by the trial court, it becomes a judgment. O.C.G.A. § 9-11-58(a). At that point, the judgment may only be directly "attacked" by the filing of a motion for new trial or a motion to set aside; these motions are required to be filed with the court that rendered the judgment. O.C.G.A. § 9-11-60(b). However, it should be noted that a trial court, during the term of court in which the judgment is rendered, possesses the authority, or inherent power, to reverse, correct, revoke, modify, or vacate a judgment. Allstate Ins. Co. vs. Clark, 186 Ga.App. 58, 366 S.E.2d 394 (1988) (overruled on other grounds).

Motion for New Trial

O.C.G.A. § 9-11-60(c) states, in pertinent part, that

> "[a] motion for new trial must be predicated upon some intrinsic defect which does not appear upon the face of the record or pleadings."

A motion for new trial goes only to the verdict, and reaches only such errors of law and fact as contributed to rendition thereof. Alexander vs. Blackmon, 129 Ga.App. 214, 199 S.E.2d 376 (1973). It is an application for a retrial of the facts of the case. Buchanan vs. James, 134 Ga. 475, 68 S.E. 72 (1910). Thus, in cases in which an agreement is incorporated into a court's judgment, a trial was not conducted and this vehicle for attacking the judgment will rarely, if ever, be employed. However, it must be noted that ***only*** the filing of a motion for new trial will toll the time to file for appellate review; the filing of a motion to set aside does ***not*** toll the time to file for appellate review.

Motion to Set Aside

The other vehicle to attack a judgment which incorporates the parties' agreement is a motion to set aside. O.C.G.A. § 9-11-60(d) provides, in pertinent part, that

> "a motion to set aside may be brought to set aside a judgment based upon:
>
> (1) Lack of jurisdiction over the person or the subject matter;
>
> (2) Fraud, accident, or mistake or the acts of the adverse party unmixed with the negligence or fault of the movant; or
>
> (3) A nonamendable defect which appears upon the face of the record or pleadings. Under this paragraph, it is not sufficient that the complaint or other pleading fails to state a claim upon which relief can be granted, but the pleadings must affirmatively show no claim in fact existed."

In its consideration of a motion to set aside, the trial judge is the finder of fact. Herringdine vs. Nalley Equipment Leasing, Ltd., 238 Ga.App. 210, 517 S.E.2d 571 (1999). The trial judge determine how evidence is to be presented, either by affidavit, deposition testimony, live witnesses, or any combination thereof. O.C.G.A. § 9-11-43(b). It should be noted that whether a hearing on a motion to set aside is conducted is purely within the discretion of the trial judge; therefore, all necessary arguments and evidence supporting the client's position should be included in the motion, in the event that the trial judge does not grant a hearing. Uniform Superior Court Rule No. 6.3. In addition, a party who has accepted benefits under a divorce decree is estopped from seeking to set aside that decree without first returning the benefits. Smith v. Smith, 281 Ga. 204, 636 S.E.2d 519 (2006).

Lack of jurisdiction over the person or the subject matter.

A motion to set aside based on a lack of jurisdiction over the person or the subject matter may be brought at ***any*** time. O.C.G.A. § 9-11-60(f). However, in the case of adoptions pursuant to O.C.G.A. § 19-8-18(b), there is a six (6) month limitation to raise a challenge, irrespective of jurisdictional issues. Williams vs. Williams, 312 Ga. App. 47, 717 S.E.2d 553 (2011).

In divorce cases, a trial court in the State of Georgia has subject matter jurisdiction if a valid marriage exists and one of the spouses was domiciled in the State of Georgia for six (6) months prior to the filing of the divorce action. Doke vs. Doke, 248 Ga. 514, 284 S.E.2d 419 (1981). In order to obtain personal jurisdiction, service of process must be accomplished pursuant to O.C.G.A. § 9-11-4. With regard to the less common case where the spouses are not both living in the State of Georgia, personal jurisdiction can be obtained through the long-arm statute, pursuant to O.C.G.A. § 9-10-94. However, a trial court can set aside a judgment based on a lack of minimum contacts with the State of Georgia. Riersgard vs. Morton, 267 Ga. 451, 479 S.E.2d 748 (1997).

Fraud, accident, or mistake or the acts of the adverse party unmixed with the negligence or fault of the movant

A motion to set aside based on a fraud, accident or mistake must be brought within three (3) years of the entry of the subject order. O.C.G.A. § 9-11-60(f). A court's mistake as to the application of law is not a "mistake" under O.C.G.A. § 9-11-60(d)(2) to allow for a judgment to be set aside. Furthermore, a mistake by a party as to the legal effect of an agreement or act is not grounds for setting aside a judgment. In re M.O., 233 Ga.App. 125, 503 S.E.2d 362 (1998). A judgment cannot be partially set aside to correct a portion of the judgment; it is an "all or nothing" proposition and the entire judgment must be set aside. Porter-Martin vs. Martin, 280 Ga. 150, 625 S.E.2d 743 (2006).

A nonamendable defect which appears upon the face of the record or pleadings.

A motion to set aside based on a nonamendable defect must also be brought within three (3) years of the entry of the subject order. O.C.G.A. § 9-11-60(f). It is not sufficient that the complaint or other pleading fails to state a claim upon which relief can be granted, but the pleadings must affirmatively show no claim in fact ever existed. Barnes vs. Williams, 265 Ga. 834, 462 S.E.2d 612 (1995).

The failure of counsel or a party acting *pro se* to receive notice of a hearing constitutes such a defect as will authorize the setting aside of a judgment. Anderson vs. Anderson, 264 Ga. 88, 441 S.E.2d 240 (1994).

CONCLUSION:

Clearly, a signed agreement, and sometimes even a signed judgment, is not the end of the line. It is an important reminder to practitioners to be mindful in drafting agreements, and not to rush through the process simply in an attempt to finalize a difficult case. If it is clear to you that the agreement is likely to fall prey to a challenge, it is better to keep working to secure a strong agreement that is able to withstand future challenges. On the other hand, if you are presented with a client who is experiencing justifiable "buyer's remorse" after entering into an unfair agreement, remember that given the right facts, an equitable argument might be able to convince a judge to look at the issues one more time!