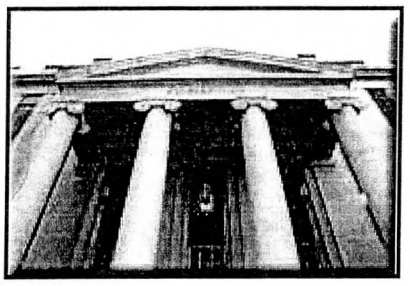

The Appellate Review

The Newsletter of the Appellate Practice Section *State Bar of Georgia*

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Dodging Minefields in the Application Process: A Primer for the Road

Filing an application for discretionary or interlocutory appeal to our state appellate courts is fraught with traps for the unwary and uninformed. A thirteen-year veteran of the Georgia Court of Appeals Central Staff offers some guidance. Part I of II.

by M. Katherine Durant

So your client is unhappy with an order of the trial court and wants you to pursue an appeal on his or her behalf. The road to filing an appeal, however, is winding and full of minefields, pitfalls, potholes – and even manholes – which you will want to avoid. Here are some matters to consider along the path.

Which Appellate Procedure to Use: To "begin at the beginning"[1] of your journey, you must first determine which avenue of appeal to pursue, and to that end, you must review the order you seek to appeal and ask, "Is this order subject to direct appeal?" Most frequently, that question is answered by determining whether the order is a "final judgment" under OCGA § 5-6-34 (a) (1), meaning, "it leaves no issues remaining to be resolved, constitutes the trial court's final ruling on the merits of the action, and leaves the parties with no further recourse in the trial court."[2] But the order may otherwise be subject to direct appeal by statute[3] or case law.[4]

The Discretionary Application. Even if the order you seek to appeal is a final judgment or is seemingly directly appealable for other reasons, that is not the end of your inquiry. In order to reduce the caseload of our courts, the Georgia legislature determined that, in the types of cases listed in OCGA § 5-6-35 (a), you must petition the appropriate state appellate court for permission to appeal. These include appeals to review:

(1) Orders of the superior courts reviewing decisions of lower courts, auditors, and state or local administrative agencies,[5] including the State Board of Workers' Compensation,[6] the Board of Education, and local zoning authorities.[7] The statute, however, specifically

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excludes from the discretionary application requirement appeals from superior court orders reviewing Public Service Commission rulings and probate court decisions, as well as orders in ad valorem tax and condemnation cases.

(2) Domestic relations orders,[8] except (possibly) for those in child custody cases.[9]

(3) Distress or dispossessory warrants where the only issue is the amount of rent due and such amount is $2,500 or less.[10]

(4) Garnishment or attachment orders.[11]

(5) Probation revocation cases.[12]

(6) Orders in actions for damages in which the judgment is $10,000.00 or less,[13] unless the judgment is "zero."[14]

(7) Denials of extraordinary motions for new trial.[15]

(8) Orders denying motions to set aside a judgment under OCGA § 9-11-60 (d) or denying relief upon a complaint in equity to set aside a judgment under OCGA § 9-11-60 (e).[16]

(9) Orders granting or denying temporary restraining orders.[17]

(10) Orders awarding or denying attorney fees under OCGA § 9-15-14,[18] unless the underlying case is currently pending on direct appeal.[19]

(11) State court orders reviewing decisions of magistrate courts by de novo proceedings.[20]

(12) Orders terminating parental rights.[21]

In addition, the Prisoner Litigation Reform Act of 1996 requires that an appeal of any civil action filed by an indigent prisoner must comply with the discretionary appeal provisions of OCGA § 5-6-35.[22]

When deciding whether you must file an application for discretionary appeal, it is important to remember that the "underlying subject matter" is dispositive of whether OCGA § 5-6-35 is applicable, even when a particular judgment or order is procedurally subject to a direct appeal under OCGA § 5-6-34 (a).[23] Thus, for example, OCGA § 5-6-34 (a) (2) provides that contempt orders are directly appealable; nonetheless, you must file a discretionary application from a contempt order in a *domestic relations* case,[24] because OCGA § 5-6-35 (a) (2) requires it.[25]

The Interlocutory Application. If the order is not a final judgment or does not otherwise fall into one of the exceptions to the final judgment rule,[26] what procedure must you follow to appeal? The answer is found in OCGA § 5-6-34 (b), which describes the procedure for filing an application for interlocutory appeal. Be aware that where both the discretionary appeal statute, OCGA § 5-6-35, and the interlocutory appeal statute, OCGA § 5-6-34 (b), are both applicable, the more stringent requirements of OCGA § 5-6-34 (b) prevail, and you must file an application for interlocutory appeal.[27]

Also note that if you choose not to challenge an interlocutory ruling by application under OCGA § 5-6-34 (b) on a particular issue, you lose nothing: your decision not to file an application for interlocutory appeal – or even a defective attempt to seek interlocutory review – will not make that interlocutory judgment *res judicata* of that issue if and when you later appeal the final ruling.[28]

Bungling the Procedure. What happens if you follow the wrong appellate procedure? It depends. If you file a direct appeal when you should have filed an application for interlocutory or discretionary appeal, your appeal will be dismissed.[29] Likewise, if you file an application for discretionary appeal when you were required to follow the interlocutory appeal procedure, your application will be dismissed.[30] But what is the result if you file a discretionary application when you were required to file a notice of appeal? These cases were previously dismissed by the appellate courts. The Legislature, however, stepped in to provide some relief to those in this situation. With the enactment of OCGA § 5-6-35 (j), the appellate courts of this state are now required to grant timely applications for discretionary appeal where the party is entitled to a direct appeal.[31] And apparently in response to the enactment of OCGA § 5-6-35 (j), the appellate courts

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[23] *Brown & Co. Jewelry, Inc. v. Fulton County Bd. of Assessors*, 248 Ga. App. 651, 654-655 (548 SE2d 404) (2001)

[24] *Watson v. State*, 283 Ga. App. 635, 637 (642 SE2d 328) (2007)

[25] See, for example, *Atlanta Independent School System* , supra, 266 Ga. at 659, stating that meaning of current statute could be ascertained from "settled judicial interpretation" of predecessor statute, since wording was the same, and legislature is deemed to have incorporated language with knowledge of its interpretation.

[26] The Supreme Court's rulings in the *City of Decatur* essentially make the dissenting opinion in *Oswell v. State*, 181 Ga. App. 35, 36-37 (351 SE2d 221) (1986) the law. The dissenting judges, one of whom wrote the *City of Decatur* opinion, argued that even applying federal law on the Fourth Amendment to interpret an identical provision in the Georgia constitution was "construction" of the provision, and therefore outside the jurisdiction of the Court of Appeals.

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now afford equal treatment to those who file an interlocutory application when they are entitled to a direct appeal. The courts will a grant a timely application under these circumstances,[32] although they refused to do so previously.[33]

Presumably, if you follow the interlocutory appeal procedure of OCGA § 5-6-34 (b) when you were required to merely follow the discretionary appeal procedure of OCGA § 5-6-35, the appellate courts will simply ignore the extra paperwork and will treat your submission as an application for discretionary appeal.

Where to File. The next stop along the application road is to determine where to file your application for appeal. Applications for appeal – both discretionary and interlocutory – are filed in either the Georgia Supreme Court or Court of Appeals.[34] Our state constitution specifies which is the appropriate appellate body by delineating the types of cases the Georgia Supreme Court hears and leaving the rest to the Court of Appeals.[35] Under our constitution, the Georgia Supreme Court has exclusive jurisdiction to determine:

(1) the construction of a provision of a treaty or of the federal or Georgia constitutions, or the constitutionality of a law, ordinance or constitutional provision,[36] but only if the issue is raised before the trial court, and the court distinctly ruled on it.[37]
(2) election contests.[38]

The Supreme Court has also has general appellate jurisdiction to determine:

(1) cases involving title to land.[39] For purposes of determining its appellate jurisdiction, the Supreme Court has determined that "[c]ases involving 'title to land,' as that term is used in the Constitution . . ., refer to and mean actions at law, such as ejectment and statutory substitutes, in which the plaintiff asserts a presently enforceable legal title against the possession of the defendant for the purpose of recovering the land."[40]
(2) equity cases.[41] Note, however, that cases in which the grant or denial of equitable relief is "merely ancillary to underlying issues of law, or would [be] a matter of routine once the underlying issues of law [are] resolved," do not fall within the Supreme Court's jurisdiction over "equity cases."[42] Moreover, an appeal from a decree granting equitable *relief* is not, for that reason alone, within the Supreme Court's jurisdiction.[43] At this juncture, the net effect is that the Supreme Court rarely – if ever – assumes jurisdiction on this grounds.

(3) cases involving wills,[44] meaning, "those cases in which the will's validity or meaning is in question."[45]

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(4) habeas corpus cases.[46]
(5) cases involving extraordinary remedies,[47] including "mandamus, prohibition, quo warranto, and the like."[48]
(6) divorce and alimony cases,[49] but not any other domestic relations cases, including child custody matters.[50]
(7) cases certified to it by the Court of Appeals.[51]
(8) cases in which a sentence of death was imposed or could be imposed.[52]

The constitution provides that the Court of Appeals has appellate jurisdiction in all cases not reserved to the Supreme Court of Georgia.[53] If an appellate court determines that your application is not properly before that court, it will simply transfer the application to the other appellate court.[54] Note that because the Supreme Court has exclusive appellate jurisdiction to construe provisions of the state constitution, including those relating to jurisdiction,[55] and because decisions of the Supreme Court bind all other courts as precedents, including the Court of Appeals,[56] the ultimate responsibility for determining appellate jurisdiction rests with the Supreme Court and "results in a binding and conclusive determination of the jurisdiction of the Court of Appeals."[57] Thus, if you are seriously stumped about which appellate court has jurisdiction to rule on your application, file it with the ultimate jurisdictional arbiter, the Supreme Court, which will simply transfer the case if it determines it does not have jurisdiction.[58]

"[W]hatever you do, do *not* file your application in both courts! Although it is not fatal to your application to do so, it is a "pothole" along the way that you will want to avoid."

But whatever you do, do *not* file your application in both courts! Although it is not fatal to your application to do so, it is a "pothole" along the way that you will want to avoid, potentially creating docketing nightmares and terrible confusion between the two appellate court clerks' offices.

When To File: The appellate courts dismiss applications filed out of time;[59] untimeliness is in fact the primary reason that applications – discretionary and interlocutory – are dismissed. Both the Supreme Court and Court of Appeals, however, have made it easier for you to meet your application filing deadlines. Both courts now allow you to file by regular mail or courier service, and the application is deemed to be filed on the date you mailed your application or the date you tendered it to the courier.[60] (Word to the wise: *keep your receipt.*) The Supreme Court also allows applications to be submitted by facsimile, but only with prior approval; the application is then filed as of the date of receipt of the fax, but only after the original has been received by mail.[61] The Court of Appeals never allows fax filing.[62]

Discretionary: You must file a discretionary application within thirty days of entry[63] of the order being appealed.[64] A discretionary application involving a dispossessory action must be filed within seven days of the entry of the trial court's order.[65] Although a trial court may grant extensions of time for filing notices of direct appeal and other documents relating to appeals,[66] it has no authority to grant an extension of time to file a discretionary application.[67] The filing of a motion for new trial, in arrest of judgment, or for judgment notwithstanding the verdict extends the time for filing a discretionary application,[68] but the filing of a motion for reconsideration does not;[69] moreover, an order denying a motion for reconsideration is not itself an appealable judgment.[70] Remember: nomenclature does not control:[71] If a document captioned, for example, as a "motion for new trial" is in substance a motion for reconsideration, it will not extend the time for filing a discretionary application.[72] The converse is also true: a discretionary application would be permitted if timely filed from the denial of a motion denominated as one for reconsideration but which, for

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example, raised the grounds for a motion to set aside under OCGA § 9-11-60 (d).[73]

Interlocutory: OCGA § 5-6-34 (b) requires that within ten days of entry of the order you seek to appeal, you must obtain a certificate of immediate

review from the trial court, which certifies that the order "is of such importance to the case that immediate review should be had."[74] The appellate courts may allow some wiggle room with this language, but it is best to track it exactly to be certain that the certification process complies with the statute. Failure to obtain the certificate within ten days of the order you seek to appeal will result in dismissal;[75] moreover, the denial of an application for a certificate of immediate review is not an appealable judgment.[76] The certificate of immediate review must also be "stamp filed" with the date it is filed in the lower court clerk's office, and you must file the application in the appeals court within ten days of that date in order to avoid dismissal.[77]

Unlike a discretionary application, the denial of a motion for reconsideration of an interlocutory order may serve as the basis for an application for interlocutory review.[78] This is, of course, because the denial of the motion for reconsideration is simply another interlocutory order – there is no concern about extending the time for filing an appeal, as there would be from a final judgment.

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Endnotes

[1] Lewis Carroll, *Alice's Adventures in Wonderland.*

[2] *Spring-U Bonding Co. v. State*, 200 Ga. App. 533 (408 SE2d 831) (1991) (citation and punctuation omitted).

[3] See, e.g., OCGA § 5-6-34 (a) (2)-(11) (orders subject to direct appeal other than final judgments); OCGA § 9-11-56 (h), and *Culwell v. Lomas & Nettleton Co.*, 242 Ga. 242, 243 (248 SE2d 641) (1978) (grant of complete or partial summary judgment on any issue or as to any party); OCGA § 9-9-16 (arbitration confirmation); OCGA § 9-11-54 (b) (trial court dismisses fewer than all of claims or parties and expressly determines that there is no just reason for delay); OCGA § 9-11-23 (g) (order certifying or refusing to certify a class for class action). **Note:** this list is not exhaustive.

[4] See, e.g., *In re: T.L.C.*, 266 Ga. 407 (467 SE2d 885) (1996) (adjudication of delinquency and disposition in juvenile court); *Patterson v. State*, 248 Ga. 875 (287 SE2d 7) (1982) (denial of plea in bar on double jeopardy grounds); and *Hubbard v. State*, 254 Ga. 694 (333 SE2d 827) (1985), and *Callaway v. State*, 275 Ga. 332 (567 SE2d 13) (2002) (violation of speedy trial rights); **Note:** this list is not exhaustive.

[5] OCGA § 5-6-35 (a) (1).

[6] But note that no discretionary application is required for appeals in workers' compensation cases involving OCGA § 34-9-11.1, where the employee's injury "is caused under circumstances creating a legal liability against some person other than the employer."

[7] *O S Advertising Co. of Georgia, Inc. v. Rubin*, 267 Ga. 723, 724 (1) (482 SE2d 295) (1997) *overruled on other grounds*, *Ashkouti v. City of Suwanee*, 271 Ga. 154 (516 S.E.2d 785) (1999); but see *Sprayberry v. Dougherty County*, 273 Ga. 503 (543 SE2d 29) (2001) (no discretionary application need be filed in zoning cases not involving superior court review of an administrative decision); *overruled in part*, *Ferguson v. Composite State Board of Medical Examiners*, 275 Ga. 255 (564 SE2d 715) (2002) (overruled *Sprayberry* to the extent it held that a litigant is not seeking "review" of an administrative decision by filing a mandamus action in superior court to attack or defend that decision).

[8] OCGA § 5-6-35 (a) (2).

[9] See OCGA § 5-6-34 (a) (11). This provision suggests that the Legislature intended to take child custody matters outside of the discretionary appeal requirements of OCGA § 5-6-35 (a). The language of OCGA § 5-6-34 (a) (11), however, does not actually achieve this end. OCGA § 5-6-35 (a) (2) would have to be amended to allow for it. There has apparently been discussion of addressing this obvious oversight in the 2009 General Assembly.

[10] OCGA § 5-6-35 (a) (3).

[11] OCGA § 5-6-35 (a) (4).

[12] OCGA § 5-6-35 (a) (5).

[13] OCGA § 5-6-35 (a) (6). Note that this provision is equally applicable where the trial court awards damages of $10,000 or

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less in judgments on a *counterclaim*. An appeal of the counterclaim judgment will be dismissed for failure to comply with these procedures, when this is the only ruling challenged in the appeal. *Harpagon Co., LLC v. Davis*, 283 Ga. 410 (658 SE2d 633) (2008).

[14] *Whitley v. Bank South*, 185 Ga. App. 896, 897 (1) (366 S.E.2d 182) (1988).

[15] OCGA § 5-6-35 (a) (7).

[16] OCGA § 5-6-35 (a) (8); see also *Okekpe v. Commerce Funding Corp.*, 218 Ga. App. 705 (463 SE2d 23) (1995) for further elucidation of this provision.

[17] OCGA § 5-6-35 (a) (9).

[18] OCGA § 5-6-35 (a) (10).

[19] *Haggard v. Board of Regents*, 257 Ga. 524, 426 (4) (a) (360 SE2d 566) (1987). Note that this provision only applies to appeals of attorney fee awards under OCGA § 9-15-14, and not to those awarded under other Code sections, such as OCGA § 13-6-11 (expenses of litigation in contract actions) or OCGA § 19-6-2 (attorney fees in alimony and child support cases).

[20] OCGA § 5-6-35 (a) (11). This code specifically states that "***so long as the subject matter is not otherwise subject to a right of direct appeal***," appeals from state court orders reviewing magistrate court decisions by de novo proceedings must be brought by discretionary application. (Emphasis supplied.) No cases have construed the italicized language, but it appears to be extraneous, signifying nothing, since no law removes cases outside the scope of OCGA § 5-6-35 – the statute instead takes directly appealable orders and renders them subject to appeal by application.

[21] OCGA § 5-6-35 (a) (12). Note: on September 22, 2008, the Supreme Court granted certiorari to determine "[w]hether the Court of Appeals erred in interpreting the effective date of the legislative enactment that amended OCGA § 5-6-35 to require a discretionary application to appeal from orders terminating parental rights. See Act 264, H.B. No. 369." *In re K. R. et al., children*, S08C1611.

[22] OCGA §§ 42-12-3; 42-12-8. But see *In re K. W.*, 233 Ga. App. 140 (503 SE2d 394) (1998) (if the action was not filed while appellant was imprisoned, or was filed by a party other than appellant, direct appeal is proper).

[23] *Rebich v. Miles*, 264 Ga. 467, 468 (448 S.E.2d 192) (1994). See also *Ferguson v. Composite State Bd. of Med. Examiners*, 275 Ga. 255, 257 (1) (564 SE2d 715) (2002) ("Where both the direct and discretionary appeal statutes are implicated, it is always the underlying subject matter that will control whether the appeal must be brought pursuant to OCGA § 5-6-34 or § 5-6-35....Were our precedent to hold otherwise, litigants could avoid OCGA § 5-6-35's discretionary application requirements by seeking relief in the trial court that triggers the right to direct appeal, regardless of the underlying subject matter at issue. Our precedent has repeatedly emphasized that this is not permitted, as litigants cannot under any circumstances dictate the procedural or jurisdictional rules of this Court. [Cits.]")

[24] But see OCGA § 5-6-34 (a) (12), which purportedly allows for direct appeals from contempt orders in cases involving child custody; and see n.9, supra.

[25] *Russo v. Manning*, 252 Ga. 155 (312 SE2d 319) (1984).

[26] See, e.g., OCGA § 9-11-56 (h) (allowing a direct appeal from the grant of partial summary judgment); OCGA § 9-11-54 (b) (where trial court directs entry of final judgment as to a party or an issue); OCGA § 9-4-2 (a), and *Sunstates Refrigerated Svcs. v. Griffin*, 215 Ga. App. 61, 62 (1) (449 S.E.2d 858) (1994) (appeal from non-final order in declaratory judgment action). **Note:** this list is not exhaustive.

[27] *Scruggs v. Ga. Dept. of Human Resources*, 261 Ga. 587, 589 (408 SE2d 103) (1991).

[28] See *Mitchell v. Oliver*, 254 Ga. 112, 113 (1) (327 SE2d 216) (1985). Note, however, that the same is not true if you defectively attempt a direct appeal from the partial grant of summary judgment under OCGA § 9-11-56 (h): "[A] losing party on summary judgment who puts the machinery of immediate appellate review under OCGA § 9-11-56 (h) into motion, yet commits a procedural default fatal to his appeal, is foreclosed from thereafter resubmitting the matter for review on appeal of the final judgment." *Mitchell v. Oliver*, 254 Ga. at 114 (1).

[29] *Rivera v. Housing Authority of Fulton County*, 163 Ga. App. 648 (295 SE2d 336) (1982) (failure to follow interlocutory appeal procedure of OCGA § 5-6-34 (b) results in dismissal of direct appeal); *Georgia Water Resources, Inc. v. Department of Labor*, 193 Ga. App. 252 (387 SE2d 374) (1989) (failure to follow discretionary appeal procedure where required results in dismissal of appeal).

[30] See n.27, supra.

[31] OCGA § 5-6-35 (j) provides, "When an appeal in a case enumerated in subsection (a) of Code Section 5-6-34, but not in subsection (a) of this Code section, is initiated by filing an otherwise timely application for permission to appeal pursuant to

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subsection (b) of this Code section without also filing a timely notice of appeal, the appellate court shall have jurisdiction to decide the case and shall grant the application. Thereafter the appeal shall proceed as provided in subsection (g) of this Code section."

[32] See *Spivey v. Hembree*, 268 Ga. App. 485, 486 n.1 (602 SE2d 246) (2004): "This Court will grant a timely application for interlocutory review if the order complained of is subject to direct appeal and the applicants have not otherwise filed a notice of appeal." See also *Threatt v. Rogers*, 269 Ga. App. 402, 403 (604 SE2d 269) (2004).

[33] See, e.g., *Artis v. Gaither*, 199 Ga. App. 114 (404 SE2d 322) (1991).

[34] OCGA § 5-6-34 (b); OCGA § 5-6-35 (d).

[35] Ga. Const. of 1983, Art. VI, § V, ¶ III

[36] Ga. Const. of 1983, Art. VI, § VI, ¶ II (1).

[37] *Grice v. State*, 199 Ga. App. 829 (1) (406 S.E.2d 262) (1991). Note also that the exclusive appellate jurisdiction of the Supreme Court does not extend to questions concerning the constitutionality of an administrative regulation. *Ga. Oilmen's Assn. v. Ga. Dept. of Revenue*, 261 Ga. App. 393, 394 (582 SE2d 549) (2003).

[38] Ga. Const. of 1983, Art. VI, § VI, ¶ II (2).

[39] Ga. Const. of 1983, Art. VI, § VI, ¶ III (1).

[40] (Citation and punctuation omitted.) *Cole v. Cole*, 205 Ga. App. 332 (1) (422 SE2d 230) (1992).

[41] Ga. Const. of 1983, Art. VI, § VI, ¶ III (2).

[42] *Beauchamp v. Knight*, 261 Ga. 608, 609 (409 S.E.2d 208) (1991).

[43] *Saxton v. Coastal Dialysis & Medical Clinic*, 267 Ga. 177, 178-179 (476 SE2d 587) (1996).

[44] Ga. Const. of 1983, Art. VI, § VI, ¶ III (3).

[45] *In re Estate of Lott*, 251 Ga. 461 (306 SE2d 920) (1983).

[46] Ga. Const. of 1983, Art. VI, § VI, ¶ III (4).

[47] Ga. Const. of 1983, Art. VI, § VI, ¶ III (5).

[48] *Spence v. Miller*, 176 Ga. 96, 99 (167 SE 188) (1932).

[49] Ga. Const. of 1983, Art. VI, § VI, ¶ III (6).

[50] *Eickhoff v. Eickhoff*, 263 Ga. 498, 499 (1) (435 SE2d 914) (1993), overruled on other grounds, *Lee v. Green Land Co.*, 272 Ga. 107, 108 (527 SE2d 204) (2000).

[51] Ga. Const. of 1983, Art. VI, § VI, ¶ III (7).

[52] Ga. Const. of 1983, Art. VI, § VI, ¶ III (8). In *State v. Thornton*, 253 Ga. 524 (1) (322 SE2d 711) (1984), the Supreme Court directed, as a matter of policy, that the Court of Appeals transfer appeals from all cases in which either a sentence of death or of life imprisonment has been imposed upon conviction of murder, and all pre-conviction appeals in murder cases, whether or not the district attorney gave timely notice that he was seeking the death penalty.

[53] Ga. Const. of 1983, Art. VI, § V, ¶ III.

[54] Georgia Supreme Court Rules 32, 35; Georgia Court of Appeals Rules 11 (b) & (c); 32 (c).

[55] Ga. Const. of 1983, Art. VI, § VI, II (1).

[56] Ga. Const. of 1983, Art. VI, § VI, ¶ VI.

[57] *Saxton v. Coastal Dialysis & Medical Clinic*, 267 Ga. supra at 178.

[58] Georgia Supreme Court Rules 32, 35.

[59] *Hill v. State*, 204 Ga. App. 582 (420 SE2d 393) (1992).

[60] OCGA § 5-6-35 (a) (7).

[61] Georgia Supreme Court Rule 2.

[62] Georgia Court of Appeals Rule 1 (e).

[64] OCGA § 5-6-35 (d); Supreme Court Rule; Court of Appeals Rule 32 (b).

[63] "The filing with the clerk of a judgment, signed by the judge, constitutes the entry of a judgment" for purposes of the Appellate Practice Act. OCGA § 5-6-31.

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[65] OCGA § 44-7-56; Court of Appeals Rule 32 (b). Note that as long as the issue of possession is unresolved, an appeal in a dispossessory action must be filed within seven days after entry of the order appealed from. *Ray M. Wright, Inc. v. Jones*, 239 Ga. App. 521 (521 SE2d 456) (1999); compare *America Net, Inc. v. U.S. Cover, Inc.*, 243 Ga. App. 204 (532 SE2d 756)

(2000) (seven-day time limitation of OCGA § 44-7-56 for filing an appeal does not apply in an action begun as a dispossessory proceeding, where the issue of possession was resolved prior to appeal).

[66] OCGA § 5-6-39 (a). Although the Supreme Court Rule 12 and Court of Appeals Rule

[67] *Rosenstein v. Jenkins*, 166 Ga. App. 385 (304 SE2d 740) (1983). Supreme Court Rule 12 provides that "[e]xtensions of time for filing . . . applications . . . will be granted only in unusual circumstances and only if the request is filed before the time for filing the pleading has expired." This provision is apparently rarely, if ever, utilized by the Court. Note, however, that the Supreme Court recently granted certiorari to consider the following: "Did the Court of Appeals err in dismissing as untimely petitioner's application for discretionary appeal from the order revoking his probation where the trial court had granted petitioner's motion for out-of-time appeal finding that he had been deprived of his original appeal by the ineffective assistance of counsel." *Demarcus Marshall v. State*, S08C1549 (September 22, 2008).

[68] OCGA § 5-6-35 (d).

[69] *Harris v. State*, 278 Ga. 280, 282 n.3 (600 SE2d 592) (2004); *Cheeley-Towns v. Rapid Group*, 212 Ga. App. 183 (441 SE2d 452) (1994).

[70] *Savage v. Newsome*, 173 Ga. App. 271 (326 SE2d 5) (1985); *Bell v. Cohran*, 244 Ga. App. 510 (536 SE2d 187) (2000).

[71] *Howell Mill/Collier Assoc. v. Pennypackers*, 194 Ga. App. 169 (1) (390 SE2d 257) (1989).

[72] For example, a "motion for new trial" is an improper vehicle for challenging the grant of summary judgment because the motion is in reality a motion for reconsideration; the denial of the motion does not extend the time for filing an appeal. See *Pillow v. Seymour*, 255 Ga. 683, 684 (341 SE2d 447) (1986).

[73] See *Ferguson v. Freeman*, 282 Ga. 180, 181 (1) (646 SE2d 65) (2007).

[74] OCGA § 5-6-34 (b).

[75] *Van Schallern v. Stanco*, 130 Ga. App. 687 (204 SE2d 317) (1974).

[76] *Price v. State*, 237 Ga. 352 (227 SE2d 368) (1976).

[77] *Id.*; *Genter v. State*, 218 Ga. App. 311 (460 SE2d 879) (1995).

[78] *Ferguson v. Freeman*, 282 Ga. at 181 (1).