COURT OF APPEALS OF GEORGIA: JURISDICTION

The purpose of this memorandum is to provide a historical perspective of the jurisdiction of the Court of Appeals of Georgia, so that an effective review of the Court's current jurisdictional bases may be undertaken.

GENERAL HISTORY

The Court of Appeals was created in 1906 out of necessity to relieve the Supreme Court's oppressive work load at the time. The Court's creation was about one decade in the making.

Some of the first discussions concerning the creation of an intermediate appellate court took place during the 1895 annual meeting of the Georgia Bar Association. Discussions for relieving the Supreme Court also included establishment of two supreme courts (one for criminal cases and the other for civil cases), restricting the right to appeal, and limiting the class of cases that could be appealed to the Supreme Court. There was even a proposal to create district courts of appeal. Ga. Bar Assn. Reports, Vol. XII, Appendices 10 and 11.

Nothing resulted from those discussions at that time, but in 1897 the Supreme Court was increased to six judges. By 1902, the organized bar resumed discussions of ways to provide some relief

for the Supreme Court's heavy work load. Various proposals included limiting oral arguments, disposition of certain cases by synopsis and limiting the number of written opinions, increasing the number of justices, limitations as to the monetary amount, and restricting that court's jurisdiction. The proposal of the establishment of district courts of appeal was even reiterated.

The bar association designated a committee to study the problem and draft proposed solutions. At the 1903 annual meeting, the committee suggested two constitutional amendments, one to set a $500 jurisdictional threshold in civil appeals before the Supreme Court and the other to establish a court of appeals. The committee's report generated no immediate changes. However, in 1906 legislative efforts succeeded in establishing the Court of Appeals, and on October 3, 1906, the Georgia electorate ratified the constitutional amendment providing for the creation of the Court of Appeals and generally prescribing the Court's jurisdiction.

Under that constitutional amendment, the jurisdiction of the two appellate courts in civil cases depended upon the lower court in which the case arose. The Court of Appeals had "jurisdiction for the trial and correction of errors in law and equity from the superior courts in all cases in which such jurisdiction is not conferred by this Constitution on the Supreme Court, and from the city courts of Atlanta and Savannah, and such other like courts as have been or may be hereafter established in other cities. . . ." The Supreme Court had exclusive jurisdiction over capital offenses,

and was to answer questions certified to it by the Court of Appeals. The Court of Appeals was mandated to certify all state and federal constitutional questions, and was authorized to certify any other question for which it sought Supreme Court instruction. Ga. L. 1906, pp. 24-26. The original composition of the Court of Appeals consisted of three judges.

The constitutional amendment also provided that the decisions of the Supreme Court were binding upon the Court of Appeals, but each court was a court of final jurisdiction. During the first 10 years of the Court of Appeals' existence, there was no review of its decisions by the Supreme Court.

However, the existence of two final appellate courts generated problems. Some dissatisfaction developed over occasional conflicts between the decisions of the two courts, and the heavy case load of the two appellate courts remained a chronic concern. Within the first decade of the Court of Appeals' creation, there was discussion of giving exclusive jurisdiction of criminal cases to the Court of Appeals and exclusive jurisdiction over civil appeals to the Supreme Court, and even some suggestion of abolishing the Court of Appeals. 1914 Ga. Bar Assn. Reports, pp. 216-26.

Changes were finally made in 1916. The General Assembly rejected the notion of assigning all civil cases to the Supreme Court and all criminal cases to the Court of Appeals, and instead enacted a constitutional amendment delineating the class of cases over which the Supreme Court had jurisdiction and generally expanding that of the Court of Appeals. The electorate ratified

the amendment that same year. Anticipating the increased case load of the Court of Appeals resulting from the division of jurisdiction between the two appellate courts, the General Assembly also increased the number of Court of Appeals judges from three to six, and directed that the Court would consist of two divisions, one panel to hear criminal appeals and one to hear civil appeals. (In 1960 the General Assembly added another judge to the Court of Appeals; in 1961 it added two more judges; and in 1996, it added a tenth judge to the Court. The assignment of criminal cases to one division on the Court of Appeals was eliminated in 1967.)

Under the 1916 amendment, the Supreme Court was given jurisdiction over "the trial and correction of errors of law from the superior courts and the City Courts of Atlanta and Savannah, and such other like courts as have been or may hereafter be established in other cities; in all cases that involve the construction of the Constitution of the State of Georgia or of the United States, or of treaties between the United States and foreign governments; in all cases in which the constitutionality of any law of the State of Georgia or of the United States is drawn in question; and, until otherwise provided by law, in all cases respecting titles to land; in all equity cases; in all cases which involve the validity of, or the construction of wills; in all cases of conviction of a capital felony; in all habeas-corpus cases; in all cases involving extraordinary remedies; in all divorce and alimony cases, and in all cases certified to it by the Court of Appeals for its determination." Ga. L. 1916, p. 19.

The Court of Appeals was given jurisdiction "for the trial and correction of errors of law from the superior courts and from the City Courts of Atlanta and Savannah, and such other like courts as have been or may hereafter be established in other cities, and in all cases in which such jurisdiction has not been conferred by this Constitution upon the Supreme Court, and in such other cases as may hereafter be prescribed by law." Ga. L. 1916, p. 20.

The division of jurisdiction implemented by the 1916 constitutional amendment was significant and enduring, with only a few changes in the subject matter jurisdiction of the two appellate courts having since been effected. In the aftermath of 80 years and three state constitutions later, most of the development in the law on jurisdiction has been by case law, in which the Supreme Court or the Court of Appeals decides the issue of which appellate court has jurisdiction over a particular case. That individual case determination results in some mutability in the law.

SUBSEQUENT SUBJECT MATTER CHANGES

The 1945 and 1976 Georgia Constitutions made no changes in the division of appellate jurisdiction between the Supreme Court and the Court of Appeals, but the 1983 Georgia Constitution subdivided the Supreme Court's jurisdiction into two classes: exclusive appellate jurisdiction and original appellate jurisdiction.

Ga. Const. 1983, Art. VI, Sec. VI, Par. II assigns the Supreme Court <u>exclusive</u> jurisdiction over (1) cases involving the construction of the Georgia or United States Constitution, (2)

cases involving the constitutionality of a law, ordinance, or constitutional provision, and (3) all cases of election contest. Ga. Constitution 1983, Art. VI, Sec. VI. Par. III directs that, unless otherwise provided by law, the Supreme Court has original jurisdiction over all cases involving title to land; all equity cases; all cases involving wills; all habeas corpus cases; all cases involving extraordinary remedies; all divorce and alimony cases; all cases certified to it by the Court of Appeals; and all cases in which the death penalty was imposed or could be imposed (which is somewhat more limited than the former constitutional provision assigning the Supreme Court jurisdiction over cases involving conviction of a capital felony.)

The 1983 Georgia Constitution provides that "[t]he Court of Appeals shall be a court of review and shall exercise appellate and certiorari jurisdiction in all cases not reserved to the Supreme Court or conferred on other courts by law."

One notable phrase in the above constitutional divisions of appellate jurisdiction is "unless otherwise provided by law." That phrase was included in the 1916 constitutional amendment and has remained in all subsequent constitutions. Although that single phrase authorizes the reassignment of the non-exclusive subject matter jurisdiction of the Supreme Court, in 80 years it scarcely has been utilized.

One instance of note in which the General Assembly enacted such a reassignment was Act No. 299, Ga. L. 1977, p. 710. In that Act (currently codified, in part, at OCGA § 15-3-3), the General

Assembly assigned the Court of Appeals jurisdiction over "the trial and correction of errors of law in cases involving the crimes of armed robbery, rape, and kidnapping wherein the death penalty has not been imposed."

In Collins v. State, 239 Ga. 400 (236 SE2d 759) (1977), the Supreme Court had the opportunity to review the Act and conceded the legislature's authority for that particular reassignment of appellate jurisdiction granted by the Georgia Constitution. At the same time, however, the Supreme Court invalidated the General Assembly's assigning the Supreme Court appellate jurisdiction over all cases involving state revenues, contested election cases, and the validity of municipal legislative enactments, because the legislature had no power to enlarge the Supreme Court's limited jurisdiction under the Georgia Constitution. Nevertheless, in the interest of orderly administration, the Supreme Court exercised its inherent power and ordered that all appeals in state revenue cases, election cases, and cases involving the constitutionality of municipal county ordinances be first docketed with the Court of Appeals and then transferred to the Supreme Court. Id. at 403.

The Supreme Court revisited this issue in 1995, in light of the changes contained in the 1983 Georgia Constitution. Noting that the 1983 Constitution gave the Supreme Court exclusive jurisdiction over challenges to the constitutionality of ordinances and election cases, two of the categories of cases over which it had assumed jurisdiction in Collins, the Supreme Court concluded that the omission of revenue cases in the assignment of exclusive

jurisdiction indicated that "it was the intent of the legislature in drafting the new constitution that this court not have appellate jurisdiction over cases involving revenues of the state." Collins v. A. T. & T. Co., 265 Ga. 37 (456 SE2d 50) (1995). The Supreme Court then ordered that the Court of Appeals had jurisdiction over all future appeals in revenue cases. Id. at 38.

SUBJECT MATTER DETERMINATIONS: ILLUSTRATIVE CASES

The subject matter jurisdiction of the Court of Appeals is largely defined by determining what type of cases over which the Supreme Court has declined to exercise jurisdiction. As demonstrated by the two Collins cases above, the Supreme Court is the final arbiter of its own jurisdiction under the Georgia Constitution and pertinent statutes, and at times exercises its inherent power to redefine its jurisdiction. Consequently, there is some uncertainty in the practical demarcation of subject matter jurisdiction between the two appellate courts. Any attempt to define the Court of Appeals's subject matter jurisdiction necessarily entails reference to the case law construing the constitutional provisions limiting the Supreme Court's jurisdiction. (All subsequent references are to the 1983 Georgia Constitution.)

A. Art. VI, Sec. VI, Par. II.

1. Constitutional construction. Construction of the Constitution contemplates "construction where the meaning of some

provision of the Constitution is directly in question and doubtful either under its own terms or under the decisions of [the Supreme Court] or the decisions of the Supreme Court of the United States. [Cits.]" Woodside v. City of Atlanta, 214 Ga. 75, 76-77 (103 SE2d 108) (1958).

Where the Supreme Court has already addressed and answered the constitutional question, the Court of Appeals has jurisdiction over subsequent cases involving that question. In such a case, rather than construing the constitutional provision at issue, the Court of Appeals applies established constitutional principles. See, e.g., Oswell v. State, 181 Ga. App. 35 (351 SE2d 221) (1986). However, as the divided decision in Oswell suggests, whether consideration of a case involves application as opposed to construction is not always an easy question to determine.

2. Constitutional challenges. Generally, the Supreme Court will review challenges as to the constitutionality of a law or ordinance only where (a) the challenge was timely raised at the earliest opportunity before the trial court, (b) the challenge identified the objectionable statute and the pertinent constitutional provision, and demonstrated how the former violated the latter, and (c) the trial court actually ruled upon the challenge. Blackston v. State of Ga., 255 Ga. 15, 18 (334 SE2d 679) (1985); Marr v. Ga. Dept. of Education, 264 Ga. 841 (452 SE2d 112) (1995).

If any of the above requirements are not satisfied in a case, the constitutional challenge is not properly before the Supreme

Court, and the Court of Appeals has jurisdiction over the case.

Several older cases note that it is well settled that the Court of Appeals has jurisdiction over appeals in which the constitutionality of a municipal ordinance is questioned. See Rogers v. Mayor and Board of Aldermen of the City of Atlanta, 219 Ga. 799 (136 SE2d 342) (1964). However, those cases involved older versions of the Georgia Constitution which gave the Supreme Court exclusive jurisdiction over attacks on the constitutionality of state law. The 1983 Constitution changed that and assigned the Supreme Court exclusive jurisdiction over appeals involving the constitutionality of ordinances as well as state laws. See Au v. The State, 258 Ga. 419 (369 SE2d 905) (1988).

B. Art. VI, Sec. VI, Par. III.

3. Title to land. For purposes of determining its jurisdiction, the Supreme Court has defined "cases respecting title to land" to 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." (Punctuation omitted.) Graham v. Tallent, 235 Ga. 47, 49 (218 SE2d 799) (1975).

As suggested above, whether a case involves title to land often must be determined by the Supreme Court itself. In Graham v. Tallent, the Supreme Court provided some illustrations as to what does not constitute a case involving title to land. Specifically, it noted that it had found to have not been cases involving title

to land: suits to foreclose materialmen's lien on real estate, suits to confirm sale of land under power of sale, an application by a widow for approval of sale of her property set aside as year's support, suits to condemn land, boundary line disputes, suits for breach of warranty of title contained in deed to land, and a suit by a grantee for declaratory judgment that the grantor in a warranty deed was sane at the time of the conveyance. Id. at 49. Where the title to land is only incidentally involved, jurisdiction over the appeal lies with the Court of Appeals. Miller v. Ray, 208 Ga. 27 (64 SE2d 449) (1951).

4. Equity cases. What constitutes an "equity case" currently presents one of the most problematic determinations of subject matter jurisdiction. In Beauchamp v. Knight, 261 Ga. 608, 609 (409 SE2d 208) (1991), the Supreme Court attempted to define "equity cases" as "those in which a substantive issue on appeal involves the legality or propriety of equitable relief sought in the superior court---whether that relief was granted or denied. Cases in which the grant or denial of such relief was merely ancillary to underlying issues of law, or would have been a matter of routine once the underlying issues of law were resolved, are not 'equity cases.'" See also, Pittman v. Harbin Clinic, 263 Ga. 66 (428 SE2d 328) (1993). If not equity cases, then the Court of Appeals has jurisdiction over such appeals.

Appeals in cases in which injunctive relief was sought are now routinely transferred to the Court of Appeals, on the basis that the equitable feature was merely ancillary to the legal issues in

the case. Since almost any appeal in an equity case can be characterized as primarily involving legal issues, this approach causes uncertainty to litigants and the appellate courts and results in delay. But it does not jeopardize any appeal, because an appeal filed with the wrong appellate court is transferred to the proper court.

5. Cases involving wills. The Supreme Court has interpreted the phrase "all cases involving wills" to mean all cases in which the will's validity or meaning is in question. In re Lott, 251 Ga. 461 (306 SE2d 920) (1983). The Court of Appeals has jurisdiction over cases involving other aspects of wills, such as disputes over executors and beneficiaries.

6. Cases involving extraordinary remedies. Extraordinary remedies include suits in mandamus and quo warranto. Recently, the Supreme Court has begun to transfer appeals in mandamus actions on the grounds that the extraordinary remedy was ancillary to the legal issue in the case.

7. All divorce and alimony cases. Exactly what constitutes a divorce and alimony case is another subject matter that is in flux, particularly in regards to actions to enforce a property settlement arising out of a divorce. Generally, an appeal in an action to enforce a property settlement incorporated in a divorce decree is properly directed to the Supreme Court as a divorce case. See Millner v. Millner, 260 Ga. 495 (397 SE2d 289) (1990). But in Eickhoff v. Eickhoff, 263 Ga. 498, 499 (435 SE2d 914) (1993), the Supreme Court held that an action to enforce a property settlement

not incorporated in the divorce decree "is simply a contract action in which the parties thereto happen to be former spouses." Subsequently, by unpublished order, the Supreme Court has extended the Eickhoff rule to appeals in an action to enforce a property settlement that was incorporated in the divorce decree. See Crotty v. Crotty, 219 Ga. App. 408 (465 SE2d 517) (1995).

Other types of cases that arise from divorce but do not constitute divorce or alimony cases within the general appellate jurisdiction of the Supreme Court, include actions to enforce the child custody provisions of a divorce decree, and actions to modify child custody provisions of a divorce decree. Ashburn v. Baker, 256 Ga. 507 (350 SE2d 437) (1986); Munday v. Munday, 243 Ga. 863 (257 SE2d 282) (1979).

8. Death penalty cases. The Supreme Court has jurisdiction over appeals in criminal cases in which the death penalty was imposed or could have been imposed. But the Court of Appeals generally has appellate jurisdiction over all other criminal appeals, and there is no constitutional impediment to the Court of Appeals also entertaining appeals from murder convictions in which the death penalty was not imposed or could not have been imposed (such as where the State fails to give timely notice of the intent to seek the death penalty.) State v. Thornton, 253 Ga. 524 (322 SE2d 711) (1984). The holding in Thornton resulted from the construction placed on the phrase "or could be imposed." Nevertheless, despite the Court of Appeals's subject matter jurisdiction to consider that limited type of murder cases, the

Supreme Court ordered that all appeals in murder cases must be transferred to and decided by that Court. Id.

In one isolated instance where the Court of Appeals failed to transfer a non-capital murder case as required in Thornton, the Supreme Court noted that under our Constitution the Court of Appeals was not without jurisdiction to consider the merits of the appeal. Rhyne v. State, 264 Ga. 176 (442 SE2d 742) (1994).

TRANSFER OF CASES BETWEEN THE APPELLATE COURTS

As observed above, filing an appeal with the appellate court that does not have subject matter jurisdiction over the particular case is not a pitfall fatal to the appeal, as the two appellate courts transfer such cases to the appropriate court. The constitutional amendment establishing the Court of Appeals provided that the Supreme Court would transfer to the Court of Appeals any cases over which the latter had jurisdiction (Ga. L. 1906, pp. 24-25), and the 1916 constitutional amendment further specified that "[a]ny case carried to the Supreme Court or to the Court of Appeals, which belongs to the class of which the other court has jurisdiction, shall, until otherwise provided by law, be transferred to the other court under such rules as the Supreme Court may prescribe. . . ." Ga. L. 1916, pp. 19-20.

The current Georgia Constitution does not contain that all-inclusive direction to transfer any case to the appellate court where jurisdiction is proper, but Art. VI, Sec. 1, Par. VIII provides that any court shall transfer to the appropriate court any

civil case in which it determines that jurisdiction lies elsewhere. Both the Supreme Court and the Court of Appeals maintain rules regarding the transfer of applications or appeals to the proper appellate court, and both courts have central staff attorneys who review appeals and applications for appeal as they are docketed in order to detect such cases and effect a prompt transfer so that briefing and oral argument can be made before the proper court.

Transfer of cases is usually accomplished by an unpublished order of the transferring court. That method is efficient, but it has the potential disadvantage of affecting the law of jurisdiction, and the respective case loads of the two appellate courts, in a way such that only the appellate courts and the parties to the particular cases are aware because such transfers are not officially reported to the general bench and bar.

Perhaps the most common basis for transfer of appeals from the Supreme Court to the Court of Appeals involves equity cases wherein the Supreme Court determines that the equitable features of the cases are merely ancillary to legal issues which the Court of Appeals can and should decide. Beauchamp v. Knight, supra. See discussion above.

Within the last few years, there has been a recent trend for the Supreme Court to transfer appeals in other types of cases over which the Supreme Court generally has jurisdiction, employing the same rationale used in equity cases, i.e., that the type of case was merely ancillary to the legal issues presented. Specifically, the Supreme Court has recently transferred to the Court of Appeals

cases involving title to land, and appeals from decisions in mandamus actions, on that basis. (Copies of sample transfer orders attached.) As discussed above, the Supreme Court has also transferred an appeal involving the enforcement of a property settlement incorporated in a divorce decree, a type of appeal which formerly was always heard by that Court as arising from a divorce. See Crotty v. Crotty, supra at 409-10.

According to the Supreme Court's docketing records, the number of cases transferred to the Court of Appeals is not insignificant. The following chart regarding the Supreme Court's transfer of direct appeals may illustrate a growing trend in the number of cases transferred.

YEAR	Direct Appeals	Transfers	Percentage
1995	525	94	17.9 %
1994	559	120	21.4 %
1993	611	94	15.3 %
1992	513	59	11.5 %

APPELLATE PROCEDURES: DIRECT, INTERLOCUTORY, DISCRETIONARY

While the formal division of subject matter jurisdiction between the two appellate courts has not been modified extensively since 1916, the opposite is true for the procedures necessary to secure appellate review. The most significant procedural developments have been the enactments of the Appellate Practice Act of 1965 and the discretionary appeal statute in 1979 (current OCGA

§ 5-6-35).

A. Direct. Before enactment of the Appellate Practice Act, a party could instigate an appeal of a final judgment generally by filing a bill of exceptions with the trial court within 20 days of the decision in certain types of cases, and within 30 days in other cases in which the trial court had adjourned. In the event the court did not adjourn within 30 days of the opening of the court, the bill of exceptions could be tendered to the trial court within 60 days of the decision. Code of Georgia 1933, §§ 6-902, 6-903.

However, in 1965, the General Assembly enacted the Appellate Practice Act to modernize appellate practice in civil and criminal cases. Ga. L. 1965, p. 18. The purpose of that Act was to simplify the procedure for bringing cases to the appellate courts. Taylor v. ROA Motors, 114 Ga. App. 671 (152 SE2d 631) (1966). The Act abolished bills of exception and instead provided that an appeal from a final judgment was begun by filing a notice of appeal within 30 days after entry of the judgment, or within 30 days after entry of an order disposing of a motion for new trial, motion for judgment notwithstanding the verdict, or motion in arrest of judgment that was filed within 30 days of the appealable judgment. By now it is axiomatic that the timely filing of a notice of appeal is an absolute requisite to confer appellate jurisdiction. Jordan v. Caldwell, 229 Ga. 343 (191 SE2d 530) (1972).

The right of direct appeal of final judgments is the norm, but occasionally the General Assembly has determined it necessary to limit that right. The history of appellate review of

administrative agency determinations provides an example of such.

The year before it modernized appellate practice, the General Assembly enacted the Georgia Administrative Procedure Act to modernize and establish uniform procedures for administrative agency determinations. Ga. L. 1964, p. 338, § 1 (effective April 1, 1995). Prior to that Act, judicial review of administrative decisions was limited and uncertain. Some specific statutory provisions existed, such as those allowing judicial review of workers' compensation awards (Code Annot. § 114-710) and decisions of municipal zoning boards (Code Annot. § 69-836), but generally judicial review of an inferior judicatory was afforded only when the tribunal was found to have exercised judicial or quasi-judicial powers. Brockett v. Maxwell, 73 Ga. App. 663 (38 SE2d 176) (1946). The courts declined to review an agency decision that exercised an administrative or executive power. Id.; see also, Mayor of Union Point v. Jones, 88 Ga. App. 848 (78 SE2d 348) (1953).

In addition to establishing uniform procedures for administrative agencies, the Administrative Procedure Act provided for superior court review of contested administrative cases and for appeal of a final judgment of the superior court to the Court of Appeals or Supreme Court. That new availability of direct appeal from administrative agency decisions, coupled with the expanding regulatory role of administrative agencies, resulted in a significant increase in the appellate court case load. The General Assembly eventually determined it necessary to relieve that additional burden to some extent with the enactment of the

discretionary appeal statute in 1979, generally requiring an application for appeal from a superior court decision reviewing an administrative agency decision. Ga. L. 1979, p. 619.

B. Interlocutory. The 1968 amendment to the Appellate Practice Act introduced the interlocutory appeal procedures requiring (1) certification of the need for immediate review of a non-final judgment entered by the trial court within 10 days of the order for which appeal is sought; (2) filing an application for interlocutory appeal within 10 days of entry of the certificate of immediate review; and (3) filing a notice of appeal with the trial court within 10 days after the appellate court grants the application. The appellate courts require strict compliance with the interlocutory procedures (currently codified at OCGA 5-6-34 (b)), and where an appealing party fails to comply with them, the appeal must be dismissed as premature. Bowers v. Price, 168 Ga. App. 125 (308 SE2d 420) (1983).

Case law has carved out some exceptions to the types of cases that require the interlocutory appeal procedures. In Patterson v. State, 248 Ga. 875 (287 SE2d 7) (1982), the Supreme Court held that the denial of a criminal defendant's pretrial plea of former jeopardy shall be directly appealable. This exception, combined with the ingenuity and persistence of the defense bar, can significantly impact the appellate courts' case load. For example, in 1995 and 1996 the Court of Appeals entertained a flood of direct appeals in DUI cases contending that an administrative proceeding by the Department of Public Safety to suspend driver's licenses

bars a subsequent criminal prosecution for the predicate DUI offense, even long after this Court rejected that contention in Nolen v. State, 218 Ga. App. 819 (463 SE2d 504) (1995).

Another case-law exception to the interlocutory appeal requirements is the collateral order exception. In Scroggins v. Edmondson, 250 Ga. 430 (297 SE2d 469) (1982), involving an appeal from an interlocutory order cancelling a lis pendens, the Supreme Court observed that it had adopted a collateral order exception to the final judgment rule in Patterson v. State, supra, and that there was no reason to confine such an analysis to criminal cases. It then concluded that because (1) nothing with respect to the cancellation of the lis pendens was unfinished, (2) the cancellation was separate from the basic issues presented in the complaint which sought to impose a trust on the subject property, and (3) the propriety of the cancellation may be effectively unreviewable on appeal because the property could be sold before conclusion of the action, the interlocutory order should be directly appealable. In Dept. of Transp. v. Hardaway Co., 216 Ga. App. 262 (454 SE2d 167) (1995), the Court of Appeals extended that collateral order exception to discovery orders where they meet the above criteria.

Statutory exceptions also exist, allowing direct appeal of an otherwise interlocutory order. Direct appeal also is proper from any of the types of judgments delineated at OCGA § 5-6-34 (a) (2)-(8), without regard to the finality of the judgment in the matter. Westberry v. Saunders, 250 Ga. 240 (296 SE2d 596) (1982). OCGA §

9-11-56 (h) allows direct appeal of the grant of partial summary judgment, and where a trial court directs entry of final judgment for fewer than all of the claims or parties in an action and expressly determines that there is no just reason for delay pursuant to OCGA § 9-11-54 (b), direct appeal is proper. There were 478 applications for interlocutory appeal filed in 1995, 441 filed in 1994, and 439 in 1993. The Court granted approximately one third of those applications.

C. Discretionary. With regard to managing the work load of the appellate courts, the most significant procedural development has been the enactment of the discretionary appeal statute in 1979, currently codified at OCGA § 5-6-35. That statute requires a party to file an application for permission to appeal certain types of final judgments. The purpose of the statute was to alleviate the massive work load of the appellate courts by giving them the discretion not to entertain certain types of appeals. C & S Nat. Bank v. Rayle, 246 Ga. 727 (273 SE2d 139) (1980).

Since 1979, as the work load of the appellate courts has increased, the statute has been amended to supplement the types of cases for which the discretionary appeal procedures are required. As originally enacted, the statute required applications to appeal (a) the decision of a superior court reviewing the decision of a lower tribunal or administrative agency, such as workers' compensation cases; and (b) judgments in divorce, alimony, and child custody cases, and orders holding or declining to hold persons in contempt of such judgments. However, appeals from

decisions of the Public Service Commission and probate courts, and cases involving ad valorem taxes and condemnations, were exempted from the application of this statute. Ga. Laws 1979, p. 619.

In 1984 the list of discretionary appeals was expanded to include appeals in dispossessory actions in which the sole issue was the amount of rent due and that amount was $2500 or less; garnishment or attachment actions; probation revocation cases; actions for damages in which the judgment was $2500 or less; appeal from the denial of an extraordinary motion for new trial, when separate from an original appeal; denials of motions to set aside under OCGA § 9-11-60 (d) or § 9-11-60 (e); and orders granting or denying temporary restraining orders. The 1984 amendment also expanded the provision regarding appeal of judgments in divorce, alimony , or child custody cases, to require the discretionary procedures for appeals in "other domestic relations" cases. Ga. Laws 1984, p. 599. In 1986, appeals from awards of attorney's fees or expenses of litigation under OCGA § 9-15-14 were added to the list, and in 1988, appeals from decisions of state courts reviewing decisions of magistrate courts were added. Ga. Laws 1986, p.1591; Ga. Laws 1988, p. 1357. In 1991, the threshold amount for appeals in actions for damages was increased to $10,000. Ga. Laws 1991, p. 412.

Most recently, the enactment of the Prison Litigation Reform Act of 1996 has added appeals by prisoners in civil actions to the list of cases for which application for discretionary appeal is required. OCGA § 42-12-8. In doing so, the General Assembly

specifically noted its intent to relieve the burden placed on courts caused by nonmeritorious lawsuits filed by "prisoners who view litigation as a recreational exercise." OCGA § 42-12-2 (1).

There have also been some recent legislative proposals to retreat from the application of the discretionary appeal statute in certain types of cases. In 1995 the General Assembly considered but failed to enact an amendment that provided for direct appeal of judgments in child custody actions and related matters to the Supreme Court. (H. B. No. 191)

In 1996 the General Assembly also considered a proposed amendment to OCGA § 5-6-35 adding a subsection (j) to provide that in the event a party filed an application for discretionary appeal in a matter that was directly appealable, the appellate court would grant the application and the appeal would proceed as provided in OCGA § 5-6-35 (g). That proposed amendment was approved by the Senate (S. B. No. 644), but it never got on the House Rules calendar and was not enacted.

There were 574 applications for discretionary appeal filed with the Court of Appeals during the 1995 calendar year, 611 applications in 1994, 475 in 1993, 471 in 1992, 430 in 1991, and 394 in 1990. The Court of Appeals only granted approximately 30 percent of those applications, and the impact of the discretionary appeal statute thus is readily apparent. An application for discretionary appeal must be filed with the appropriate appellate court within 30 days after entry of the judgment complained of. There are no provisions for extensions of time to file an

application. Rosenstein v. Jenkins, 166 Ga. App. 385 (304 SE2d 740) (1983). Upon the appellate court's grant of an application, the party must file a notice of appeal within 10 days. As with applications for interlocutory appeal, the failure to comply with the requisite discretionary appeal procedures deprives the appellate court of the jurisdiction to consider the case, necessitating dismissal of the application. Fabe v. Floyd, 199 Ga. App. 322 (405 SE2d 265) (1991).

Although the discretionary appeal statute overall has reduced the appellate courts' work load, the statute itself has generated a considerable body of case law concerning its application to particular cases. It is possible that a judgment is the type listed in OCGA 5-6-34 (a), for which a direct appeal generally lies, yet the subject matter is covered in the discretionary appeal statute. In such a situation, "the underlying subject matter generally controls over the relief sought in determining the proper procedure to follow to appeal." Rebich v. Miles, 264 Ga. 467, 469 (448 SE2d 192) (1994). Occasionally, parties have found it difficult to determine within which category their case falls, and file both direct appeals and applications for discretionary appeal in order to avoid the consequences of following the incorrect procedure.

There were 2884 direct appeals filed with the Court of Appeals in 1995, 2842 appeals in 1994, 2601 in 1993, 2455 in 1992, and 2265 in 1991. Considering that regularly increasing number of direct appeals, the discretionary appeal statute is crucial to the Court

of Appeals' ability to manage its work load.

SUMMARY

From the above, it may be observed that the constitutional and statutory assignments of subject matter jurisdiction provide only a starting point for evaluating the jurisdictional limits of the two appellate courts. The current Georgia Constitution assigns the Supreme Court exclusive appellate jurisdiction over a few subjects and original appellate jurisdiction over several other subjects, and assigns the Court of Appeals appellate jurisdiction over all other cases not reserved to the Supreme Court. The Supreme Court historically has construed that constitutional assignment narrowly, and exact demarcation of the two appellate courts' subject matter jurisdiction is difficult. The determination often depends upon the particular facts and issues involved in the case on review.

By any measure, however, the Court of Appeals' appellate jurisdiction is broad. The Court has jurisdiction over most types of civil actions, and over all criminal cases except those in which capital punishment was or could be imposed. (Although in State v. Thornton, supra, the Supreme Court instructed that it shall decide appeals in all murder cases, it acknowledged that the Court of Appeals has the constitutional power to review non-capital murder cases.)

Certain types of cases cannot easily be characterized for purposes of determining which appellate court has subject matter jurisdiction, particularly cases involving equity or title to land.

Recently, by an evaluative process which looks beyond the general class of case to the specific issue, other types of cases over which the Supreme Court has original appellate jurisdiction have been determined to involve only legal issues that the Court of Appeals should decide.

The general subject matter jurisdiction of the two appellate courts assigned by the Georgia Constitution has not changed extensively since 1916. However, significant changes in trial and appellate procedure, such as the advent of discretionary appeals, have been enacted to establish uniformity and order to the disposition of cases. The purpose and the effect of that development of procedural law has been to provide some means by which the appellate courts can manage their respective case loads.

Atlanta July 16, 1996

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

JESSE L. GOODMAN v. LAKE BUCKHORN ESTATES HOMEOWNERS SSOCIATION, INC.

From the Superior Court of Carroll County.

It appearing that this case does not involve title to land, and that the grant of equitable relief was merely ancillary to an underlying issue of law, jurisdiction is properly in the Court of Appeals. Pittman v. Harbin Clinic, 263 Ga. 66 (428 SE2d 328) (1993). The case is hereby transferred to the Court of Appeals.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia
Witness my signature and the seal of said court hereto affixed the day and year last above written.

Lynne M. Stinchcomb, Chief Deputy Clerk

SUPREME COURT OF GEORGIA

Case No. S95A1177

A95A 1380

Atlanta September 11, 1995

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

JAMES CROTTY v. ROBERTA CROTTY.

It appearing that this is not a divorce case within the meaning of the 1983 Ga. Const., Art. VI, Sec. VI, Par. III, inasmuch as the issues on appeal are matters of contract defense and entitlement to attorney fees under OCGA § 13-6-11, jurisdiction of the appeal is in the Court of Appeals. It is hereby ordered that appellant's motion to transfer is granted and that the case be returned to the Court of Appeals.

SUPREME COURT OF THE STATE OF GEORGIA,

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Chief Deputy Clerk

SUPREME COURT OF GEORGIA
Case No. S96A0215

Atlanta December 1, 1995

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

BOARD OF TRUSTEES OF THE FULTON COUNTY EMPLOYEES RETIREMENT SYSTEM ET AL. v. HERBERT H. MABRY.

It appearing that the mandamus relief sought in this action is ancillary to the underlying issues of law raised on appeal, the appeal is transferred to the Court of Appeals. See Pittman v. Harbin Clinic Professional Association, 263 Ga. 66 (428 SE2d 328) (1993); Beauchamp v. Knight, 261 Ga. 608 (409 SE2d 208) (1991).

All the Justices concur, except Carley, J., who dissents.

SUPREME COURT OF THE STATE OF GEORGIA,

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

Lynn M. Stinchcomb, Chief Deputy Clerk

Atlanta July 12, 1996

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

CHARLES DAVID MANLEY v. THE STATE.

From the Superior Court of Newton County.

It appearing to the extent any constitutional issues are raised in this appeal, those issues involve the application of well-settled principles of constitutional law, this case is transferred to the Court of Appeals. See *Patterson v. The State*, 248 Ga. 875(1982).

SUPREME COURT OF THE STATE OF GEORGIA,

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Chief Deputy Clerk

Case No. S96A0823

Atlanta March 4, 1996

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

A96A1966

FLOYD A. JOHNSON v. JO KAPLAN et al.

From the Superior Court of Fulton County.

It appearing that this appeal involves whether or not appellees are in contempt of a 1990 order of Fulton County Superior Court, that the injunctive relief sought is ancillary to resolution of this issue, see Pittman v. Harbin Clinic, 263 Ga. 66 (1993), and that no other bases for exercise of this Court's jurisdiction are present in the record, this case is hereby transferred to the Court of Appeals.

SUPREME COURT OF THE STATE OF GEORGIA,

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Chief Deputy Clerk

Court of Appeals

Memorandum

To: Holly Sparrow

From: John Pilgrim, Central Staff

Subject: Committee Report

Date: August 13, 1996

1. I have made some attempt to discover the appellate route for administrative decisions prior to the enactment of the Administrative Procedure Act in 1964 (Ga. Laws 1964, p. 338, § 1), but have not been able to reach a comprehensive answer except for workers' compensation cases. Under former Code Annot. § 114-710, a party could appeal the decision of the Department of Industrial Relations to the superior court, and then could seek appeal of the superior court's decision in the Court of Appeals by fast bill of exceptions (which had to be tendered to the superior court within 20 days of the judgment).

I have looked through the 1933 Code for other administrative agencies and boards, and found some provisions for superior court enforcement of agency determinations by contempt proceedings, but nothing regarding appellate procedures. That doesn't mean such provisions didn't exist; I just haven't found them so far.

Under the Administrative Procedure Act, but before the enactment of the discretionary appeal statute in 1979, a party could appeal an administrative agency decision to the superior court, and then could

directly appeal an adverse final judgment of the superior court to the Court of Appeals or Supreme Court. Code Annot. § § 3A-120, 3A-121.

2. I have attached a copy of the proposed revision to OCGA § 5-6-35 proffered by a segment of the bar that thinks it would improve appellate procedure. The truth of the matter is that the proposed revision would make it easier for practitioners by eliminating the pitfalls that currently exist for those who follow the wrong appellate procedure.

(The Court of Appeals dismissed such cases, but it is my understanding that the Supreme Court declines to dismiss applications for discretionary appeal where the matter really was directly appealable. If that is so, the Supreme Court is failing to apply the requirements of OCGA § 5-6-38 (a) at least in some cases, but that is that Court's business.)

In any event, the above proposed revision, or a proposed revision essentially similar, was submitted to the General Assembly in 1995 and possibly 1996, but was tabled. The revision would substantially weaken the statute.

CHRISTOPHER J. MCFADDEN

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TELEPHONE: 404/371-5062

FACSIMILE: 404/378-0152

January 24, 1995

William L. Martin, III, Esq.
Clerk and Court Administrator, Georgia Court of Appeals
334 State Judicial Building
Capitol Square
Atlanta, Georgia 30334

Re: Revision of the Appellate Practice Act

Dear Mr. Martin:

Per our conversation yesterday afternoon, I enclose a copy of the proposed legislation to bridge the direct and discretionary appeal procedures, which was discussed at the Georgia Bar Convention.

After our conversation, I reviewed my file. An earlier proposal did impose on your office the burdens we discussed. I was assigned to revise the proposal to address those concerns. The thinking behind the revised proposal is to allow an incorrectly-initiated appeal to proceed without switching tracks, but still be treated if it had been initiated correctly. I respectfully submit that this approach would not be an addditional burden on your office.

As we discussed, I'll follow up in a week or ten days.

Once again, thank you for your patient assistance with my appellate practice book.

With best personal regards, I am

Very Truly Yours

Christopher J. McFadden

cc. Linda A. Klein, Esq.

Encl.

A new Code Section 5-6-35 (j) to read as follows:

(j) Where 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 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.

A new Code Section 5-6-35 (k) to read as follows:

(k) Where an appeal in a case enumerated in subsection (a) of this Code section is taken by filing an otherwise timely notice of appeal without first filing an application for permission to appeal as required by subsection (b) of this Code section, the appellate court shall have jurisdiction to decide the case but shall have discretion to dismiss the case at any time, either with or without motion, on the basis that an application for permission to appeal would have been denied. In aide of its discretion, the appellate court may at any time order that the appellant thereafter file an application for permission to appeal within 15 days or within such other time as the appellate court may specify by rule or order. The appellate court shall not dismiss an appeal pursuant to this subsection until the appellant has had an opportunity to file either an application to appeal or an appellant's brief. Where in the opinion of the appellate court the application procedure was circumvented for delay only, the greater of $500 damages or 10 percent damages upon any judgment for a sum certain which has been affirmed may be awarded by the appellate court. Such an award shall be entered in the remittitur.