

## Commingled Separate and Marital property

By Allen F. Harris  
Peterson & Harris  
www.petersonharris.com  
404-239-0026  
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Georgia is not a community property state. *Brown v. Little*, 227 Ga. App. 484, 489 S.E.2d 596 (1997). Rather, this state has extensive case law on treating assets as either separate or marital for the purposes of equitable division. Only the property acquired during the marriage is subject to equitable division. *Payson v. Payson*, 274 Ga. 231, 552 S.E.2d 839 (2001). O.C.G.A. § 19-3-9 provides that separate property of each spouse shall remain the separate property of that spouse, except as specifically provided by other laws. Property brought into the marriage by one of the parties is not marital property subject to equitable division as it was not generated by the marriage. Property acquired by gift, inheritance, bequest or devise during the marriage is separate property. The last date on which property may be acquired and considered marital is the date of the final decree of divorce or separate maintenance. *Friedman v. Friedman*, 259 Ga. 530,532, 384 S.E.2d 641 (1989) overruled on other grounds.

If real property was owned by one party prior to the marriage and marital funds have been used to reduce the debt, the property is considered both separate and marital under a "source of funds" analysis. The "source of funds" rule considers the property separate and marital in proportion to contributions provided. *Thomas v. Thomas*, 259 Ga. 73, 377 S.E.2d 666 (1989). Under the "source of funds" rule, a house is considered two separate units, one marital and one separate. The court determines the contribution of the party bringing the house to the marriage and weighs it against the total marital and separate investment in the property.

In *Maddox v. Maddox*, 278 Ga. 606, 604 S.E.2d 784 (2004), the Supreme Court of Georgia approved the jury charge that if the properties increased in value as a result of the efforts of either or both parties during the marriage, then the increase would be subject to an equitable division but that if any increase in value was not as a result of the efforts of either or both parties, then that increase would not be subject to an equitable division. The court found that the charge

as a whole was a correct statement and adequately explained how the jury should deal with the appreciation of properties.

The question of whether "a particular item of property actually is a marital or non-marital asset may be a question of fact for the trier of fact." *Bloomfield v. Bloomfield*, 282 Ga. 108, (2007) quoting *Payson v. Payson*, 274 Ga. 231, 552 S.E.2d 839 (2001). On appeal the standard by which findings of fact are reviewed is the "any evidence rule". In *Bloomfield*, an account was established by Wife's grandfather and father for benefit of Wife prior to the marriage. The Husband claimed to have managed the property but it did not increase in value. Instead, the Husband had removed money, diminishing its value. Thus, the court concluded that the trial court did not err in determining that it was the separate property of the Wife.

In *Bloomfield*, Husband also argued that a gift of \$10,000 Wife received from her father was marital property. Husband argued that the sum became marital when it was placed into a joint account with Husband. The appellate court noted the trial court's finding that at the time the Wife received the gift, Husband would not allow her to hold an individual account and she had no other account in which to place the funds. Family law attorneys have speculated about the significance of the Wife not having an individual account to place the gift. Would the outcome have been different if she had an individual account but chose to put the sum in the joint account?

The Georgia Supreme Court's decision in *Lerch v. Lerch*, 278 Ga. 885 92005), sparked a great deal of discussion among family law attorneys. In *Lerch*, Husband purchased a home prior to the marriage. During the marriage Husband deeded the home to both Wife and himself, to be held as "tenants in common" with right of survivorship. The trial court determined that as a result of the gift, half of the home qualified as marital property and the other half remained the Husband's separate property. The trial court then awarded the entire home to Husband, giving the portion of the home qualifying as marital property to Husband as his portion of the equitable division of marital property. The supreme court reversed finding the trial court erred by treating only one-half of the home as marital property. The supreme court explained that when a gift is given to the marital couple, the property becomes marital property absent evidence of a contrary intent by the donor. By deeding the home to Wife and himself as "tenants in common", Husband manifested an intent to transform his own separate property into marital property. Since

Husband and Wife owned an undivided one-half interest in the property, the entire home was marital property. Some practitioners warn that the decision in *Lerch* could lead to further erosion of the separate property distinction. Funds that are clearly separate property may become transformed into marital property if they are commingled even briefly with marital funds. In *Lerch*, the trial court could have reached the same result by treating the entire home as marital property and still, awarding the home in its entirety to Husband.

In *Wood v. Wood*, 283 Ga. 8 (2008), the Woods were divorced for a second time. A home that was determined to be the separate property of the Wife was an issue. The home in question was originally purchased by Wife. Subsequently, both the names of Husband and Wife were placed on the security deed. Prior to the second marriage between the parties, Wife requested that Husband quitclaim any interest in the property on the good advice of her attorney in order to ensure that the home did not become marital property. Husband agreed and signed the quitclaim deed. Husband argued the home should nonetheless be considered marital property because he performed upkeep to it during the second marriage. The Husband, however, also contributed significantly to the amount of debt secured by the property, ultimately diminishing its worth. The Supreme Court of Georgia concluded that under the circumstances, the trial court did not abuse its discretion in determining that the home was Wife's separate property. Would the result have been different if both the names of Husband and Wife had remained on the security deed?