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Barry B. McGough

Elinor H. Hitt

Andrew B. McClintock

Allison C. Kessler

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Domestic Relations

by Barry B. McGough*

Elinor H. Hitt**

Andrew B. McClintock***

and Allison C. Kessler****

I. INTRODUCTION

This Article addresses significant case law and legislative updates to Georgia domestic relations law that arose during the survey period from June 1, 2018 through May 31, 2019.¹

II. CONTRACT RULES

A series of amendments to O.C.G.A. §§ 19-3-60 through 66² went into effect during the survey period. Effective July 1, 2018, the amendments statutorily define “antenuptial agreement”³ and require that such agreements be “in writing, signed by both parties who agree to be bound, and attested by at least two witnesses, one of whom shall be a notary public.”⁴ However, the statute provides “[a]ntenuptial agreements shall be liberally construed to carry into effect the intention

*Partner, Warner Bates. University of California at Berkeley (A.B., 1963); University of California (LL.B., 1966). Member, State Bar of Georgia.

**Partner, Warner Bates. University of Georgia (B.S.Ed., 1993); Georgia State University (J.D., 2007). Member, State Bar of Georgia.

***Associate, Warner Bates. University of Georgia (B.A., 2012); University of Georgia (J.D., 2016). Member, State Bar of Georgia.

****Associate, Warner Bates. University of Georgia (B.S., B.A., 2011); Georgia State University (J.D., 2018). Member, State Bar of Georgia.

1. For analysis of Georgia domestic relations law during the prior survey period, see Barry B. McGough, Elinor H. Hitt & Abigail M. Herrmann, *Domestic Relations, Annual Survey of Georgia Law*, 70 MERCER L. REV. 81 (2018).

2. O.C.G.A. §§ 19-3-60–19-3-66 (2019).

3. O.C.G.A. § 19-3-60(a) (2019).

4. O.C.G.A. §§ 19-3-62–19-3-63 (2019).

of the parties, and no want of form or technical expression shall invalidate such agreements.”⁵

The Georgia Supreme Court faced a question concerning the effect of a divorce decree on a joint tenancy with the right of survivorship in *Cahill v. United States*,⁶ which was certified to Georgia’s high court by the United States District Court for the Northern District of Georgia. Cathleen M. Cahill and her then-husband Robert A.E. Hall, Jr., owned real property as joint tenants with the right of survivorship. They divorced, and their settlement agreement provided that as part of the division of property, Cahill would have exclusive use and possession of the property until age sixty-six, at which time it would be placed on the market for sale. Both parties would remain on the title until sale and would equally share the net proceeds thereafter.⁷

The former husband failed to pay federal taxes and the IRS placed a lien on the jointly-titled property. Subsequently, Cahill turned sixty-six but passed away before the residence was placed on the market for sale. Cahill’s estate filed a quiet title action against the United States, seeking to clear title to its one-half interest in the residence.⁸ The district court certified the case to the Georgia Supreme Court to determine whether the parties’ settlement agreement, as incorporated into the final judgment and decree, had severed the right of survivorship from the joint tenancy.⁹ The Georgia Supreme Court interpreted the language in question to be ambiguous, and applied “well-settled rules of contract construction” to ascertain the intent of the parties.¹⁰ Applying the well-settled rules in the context of the decree as a whole, the court determined that the parties intended to sever the right of survivorship along with their marriage.¹¹ The court did not directly declare that divorce severs the right of survivorship as a matter of law, but as a practical matter, parties wishing to retain such a right in real property through a divorce would do well to clearly state such in settlement agreements and divorce decrees.¹²

5. O.C.G.A. § 19-3-62 (2019).

6. 303 Ga. 148, 810 S.E.2d 480 (2018).

7. *Id.* at 148, 810 S.E.2d at 481.

8. *Id.*

9. *Id.* at 149, 810 S.E.2d at 481–82.

10. *Id.* at 150–51, 810 S.E.2d at 482.

11. *Id.* at 150–51, 810 S.E.2d at 483.

12. *Id.* at 152, 810 S.E.2d at 483–84.

III. ALIMONY

Perhaps the most important legislative action during the survey period is a matter of federal law. The Tax Cuts and Jobs Act of 2017 (TCJA)¹³ eliminated the alimony deduction from the Internal Revenue Code.¹⁴ Previously, alimony payments were deductible from the payor's income and taxed as income to the recipient under 26 U.S.C. §§ 71 and 215.¹⁵ Effective January 1, 2019, however, Internal Revenue Code sections 71 and 215 were repealed in their entirety.¹⁶ As a result, alimony payments are no longer tax deductible by the paying spouse and are no longer treated as income taxable to the recipient.¹⁷ The changes are not retroactive and apply only to divorce decrees or separation instruments executed after December 31, 2018.¹⁸ If a decree or instrument establishing an alimony obligation executed prior to January 1, 2019, is modified after that date, it will be "grandfathered" in, and the pre-amendment tax treatment will continue to apply unless the modification expressly provides that the amended rules will take effect.¹⁹

IV. CHILD SUPPORT

The legislature made a series of revisions during the survey period aimed at clarifying the child support guidelines.²⁰ As amended and effective July 1, 2018, O.C.G.A. § 19-6-15(b)(12)²¹ provides that when a child is likely to become ineligible for support within two years of the date of the final order, the court may permit separate worksheets to be filed for each child showing the adjusted amount to be paid as each child becomes ineligible.²² The statute now requires that "[a] court's final determination of child support shall take into account the obligor's earnings, income, and other evidence of the obligor's ability to pay[.]" and that "[t]he court or the jury shall also consider the basic subsistence needs of the parents and the child for whom support is to be provided."²³ The legislature further clarified the guidelines for determining imputed

13. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2089 (2017).

14. *Id.* § 11051.

15. 26 U.S.C. §§ 71, 215 (repealed 2017).

16. Tax Cuts and Jobs Act § 11051.

17. 26 U.S.C. § 152(d)(5)(A) (2019).

18. Tax Cuts and Jobs Act § 11051(c)(1).

19. *Id.* § 11051(c)(2).

20. Ga. S. Bill 427, 2018 Ga. Laws 475 (codified at O.C.G.A. § 9-6-15 (2018)).

21. O.C.G.A. § 19-6-15(b)(12) (2019).

22. *Id.*

23. O.C.G.A. § 19-6-15(d) (2019).

income by adding a non-exhaustive list of fifteen factors courts may consider in determining how much income to impute.²⁴ When one parent is incarcerated, the court is directed not to assume earning capacity based on pre-incarceration wages or income, but instead to consider only the income and assets actually available to that parent,²⁵ and not to consider a parent willfully or voluntarily unemployed or underemployed when that employment status is a result of the parent's incarceration.²⁶

The Living Infants Fairness and Equality Act (LIFE Act)²⁷ was signed into law during the survey period and is scheduled to go into effect on January 1, 2020. A full discussion of the LIFE Act is outside the scope of this Article, but in brief, the Act revises various provisions of the Official Code of Georgia, Annotated, to include unborn children within the definition of a "natural person"²⁸ and to provide further that unborn children with a "detectable human heartbeat" as defined therein "shall be included in population based determinations."²⁹ In addition to sweeping revisions to the portions of the Code regulating abortion, the LIFE Act amends O.C.G.A. § 19-6-15(a)(4)(a.1)³⁰ to include unborn children within the definition of "child" such that unborn children with a detectable human heartbeat shall be eligible for child support; additionally, "the maximum amount of support which the court may impose on the father of an unborn child . . . shall be the amount of direct medical and pregnancy related expenses of the mother of the unborn child."³¹ After the child is born, the Act provides that "the provisions of this Code section shall apply in full."³² It is unclear at this time how the courts will approach calculating "direct medical and pregnancy-related expenses[.]"³³ whether revisions will be made to the Georgia Child Support Calculator, or whether a modification action will need to be filed upon the child's birth. Additionally, once the LIFE Act goes into effect, Georgia will consider an unborn child with a detectable

24. O.C.G.A. § 19-6-15(f)(4)(A) (2019).

25. *Id.*

26. O.C.G.A. § 19-6-15(f)(4)(D) (2019).

27. Ga. H.R. Bill 481, 2019 Ga. Laws 234 (to be codified at O.C.G.A. §§ 1-2-1, 16-12-141, 19-6-15, 19-7-1, 48-7-26, and select provisions of tit. 31).

28. O.C.G.A. § 1-2-1(b) (2019).

29. O.C.G.A. § 1-2-1(d), (e)(1).

30. Ga. H.R. Bill 481, Reg. Sess., 2019 Ga. Laws 284 § 5 (to be codified at O.C.G.A. § 19-6-15(a)(4)(a.1) (2020)).

31. *Id.* (amending O.C.G.A. § 19-6-15(a)(4)(a.1)(2) (2019)).

32. *Id.*

33. *Id.*

human heartbeat to qualify as a dependent minor for purposes of Georgia state income tax calculations.³⁴

V. CUSTODY AND VISITATION

A. Paternity and Legitimation

In *Brumbelow v. Mathenia*,³⁵ a biological father sought to legitimate his child after the biological mother voluntarily relinquished her parental rights on the day following the child's birth and decided to put the child up for adoption. During the pregnancy, the mother was admittedly hostile towards the father and ceased all communication with him. Accordingly, the father provided no support for the mother during the pregnancy. The father filed his legitimation petition shortly after the child's birth, upon learning that the child had been placed with a third-party family for adoption.³⁶ The Georgia Court of Appeals determined that the correct standard when evaluating an unwed father's potential abandonment of his opportunity interest is not whether he could have done more for the child, but whether he "has done so little as to constitute abandonment."³⁷ It follows that a biological father who has not abandoned his opportunity interest and is seeking a relationship with his biological child should typically prevail over strangers who seek to adopt the child.³⁸ Once a biological father is found to have retained his opportunity interest in a child, the standard that should be used is the parental fitness standard.³⁹ If the father is found to be a fit parent, "he must prevail."⁴⁰

In *Hill v. Burnett*,⁴¹ the petitioner wished to legitimate the biological children of her former same-sex partner, as well as to establish custody and parenting time.⁴² The trial court denied both requests, and under O.C.G.A. § 9-15-14,⁴³ awarded the respondent all attorney's fees incurred in defending the action.⁴⁴ The court of appeals reversed the fee award for the request for custody and parenting time because the

34. *Id.* § 12(a) (amending O.C.G.A. § 48-7-26(a)).

35. 347 Ga. App. 861, 819 S.E.2d 535 (2018).

36. *Id.* at 861–63, 819 S.E.2d at 537–38.

37. *Id.* at 868, 819 S.E.2d at 542 (emphasis omitted).

38. *Id.* at 878, 819 S.E.2d at 547.

39. *Id.* at 879, 819 S.E.2d at 547.

40. *Id.* at 878, 819 S.E.2d at 547.

41. 349 Ga. App. 260, 825 S.E.2d 617 (2019).

42. *Id.* at 260, 825 S.E.2d at 618.

43. O.C.G.A. § 9-15-14 (2019).

44. *Hill*, 349 Ga. App. at 262, 825 S.E.2d at 619.

petitioner cited various precedents from other states granting custody and parenting time to the non-biological parent in a former same-sex couple.⁴⁵ Accordingly, the petitioner's argument fell under the statutory exception for "a good faith attempt to establish a new theory of law in Georgia . . . based on some recognized precedential or persuasive authority."⁴⁶ The merits of the petitioner's lawsuit were not reviewed by the court of appeals.⁴⁷ In contrast, the petitioner's legitimation claim wholly lacked merit because, statutorily, "biological father" is defined as "the male who impregnated the biological mother resulting in the birth of a child[.]"⁴⁸ and "only a biological father may bring a legitimation action."⁴⁹ The court of appeals remanded the attorney's fees issue regarding custody and parenting time but affirmed the award of attorney's fees for the legitimation claim.⁵⁰

B. Modification

Plummer v. Plummer,⁵¹ discussed in 2018's case update,⁵² was reversed by the Georgia Supreme Court during this year's survey period.⁵³ The court of appeals previously ruled that in a custody modification case where the mother and child moved to Florida, and the father moved to Virginia shortly after filing the petition, Georgia lacked jurisdiction to modify child custody under O.C.G.A. § 19-9-62(b),⁵⁴ and therefore the father's modification petition filed in Georgia should be dismissed.⁵⁵ The supreme court specifically evaluated "whether the court later lost its jurisdiction to consider the petition to modify custody after neither the parents nor the child remained in the state."⁵⁶ The applicable provision of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA),⁵⁷ O.C.G.A. § 19-9-62, provides:

Except as otherwise provided in Code Section 19-9-64, a court of this state which has made a child custody determination consistent with

45. *Id.* at 263, 265, 825 S.E.2d at 620, 621.

46. *Id.* at 262, 825 S.E.2d at 620 (emphasis omitted); O.C.G.A. § 9-15-14(c) (2019).

47. *Hill*, 349 Ga. App. at 264, 825 S.E.2d at 620.

48. *Id.* at 265, 825 S.E.2d at 621 (quoting O.C.G.A. § 19-7-22(a)(1) (2019)).

49. *Id.* (quoting *Veal v. Veal*, 281 Ga. 128, 129, 636 S.E.2d 527, 529 (2006)).

50. *Id.* at 265–66, 825 S.E.2d at 622.

51. 342 Ga. App. 605, 804 S.E.2d 179 (2017).

52. McGough et al., *supra* note 1, at 90.

53. *Plummer v. Plummer*, 305 Ga. 23, 823 S.E.2d 258 (2019).

54. O.C.G.A. § 19-9-62(b) (2019).

55. *Plummer*, 305 Ga. at 24, 823 S.E.2d at 259.

56. *Id.* at 25, 823 S.E.2d at 260.

57. O.C.G.A. §§ 19-9-40–19-9-104 (2019).

Code Section 19-9-61 or 19-9-63 has exclusive, continuing jurisdiction over the determination until . . . (2) A court of this state or a court of another state determines that neither the child nor the child's parents or any person acting as a parent presently resides in this state.⁵⁸

The supreme court reviewed precedents from various states, all of which concluded that “the jurisdictional question is determined as of the time a child custody modification action is filed.”⁵⁹ Additionally, the official comments to the UCCJEA § 202, which is equivalent to O.C.G.A. § 19-9-62, state that “[j]urisdiction attaches at the commencement of a proceeding.”⁶⁰ The court considered the plain meaning of the statute, legislative intent, and the context of the statute.⁶¹ Further, the supreme court cited the general rule that, “in the context of domestic relations cases . . . jurisdiction, whether subject-matter or personal, is dependent upon the state of things at the time that an action is filed[,]”⁶² and found the instant case to be no exception.⁶³ In short, jurisdiction attaches at the time the petition is filed and does not disappear if the petitioner subsequently moves out of the state.⁶⁴

C. Grandparent Visitation

Georgia's beleaguered “grandparent visitation statute” suffered another setback in *Patten v. Ardis*,⁶⁵ in which the Georgia Supreme Court declared O.C.G.A. § 19-7-3(d)⁶⁶ unconstitutional.⁶⁷ In 1995, the supreme court held that the Grandparent Visitation Act of 1988⁶⁸ violated the constitutional rights of parents “to the extent that it authorized courts to award child visitation to a grandparent over the objection of fit parents and without a clear and convincing showing of harm to the child.”⁶⁹ The legislature tried again with the Grandparent

58. O.C.G.A. § 19-9-62(a)(2) (2019).

59. *Plummer*, 305 Ga. at 25, 823 S.E.2d at 260.

60. *Id.* at 26, 823 S.E.2d at 261.

61. *Id.* at 27, 823 S.E.2d at 261.

62. *Id.*

63. *Id.* at 29, 823 S.E.2d at 263.

64. *Id.*

65. 304 Ga. 140, 816 S.E.2d 633 (2018).

66. O.C.G.A. § 19-7-3(d) (2019).

67. *Patten*, 304 Ga. at 145, 816 S.E.2d at 637.

68. O.C.G.A. § 19-7-3 (1988).

69. *Patten*, 304 Ga. at 140, 816 S.E.2d at 634 (citing *Brooks v. Parkerson*, 265 Ga. 189, 194, 454 S.E.2d 769, 774 (1995)).

Visitation Rights Act of 2012,⁷⁰ which contains a provision authorizing the courts to award visitation to grandparents over the objection of a fit parent and without a finding of harm if, after the death or incarceration of a parent, the court determines such visitation to be in the best interests of the child.⁷¹

Robert Shaughnessy and Katie Patten married and conceived a child in 2015, but Shaughnessy passed away before the child was born. After birth, Patten permitted Shaughnessy's mother, Mary Jo Ardis, to visit with the child occasionally, but the relationship soured and Ardis filed a petition for visitation under O.C.G.A. § 19-7-3(d). Patten challenged the constitutionality of the statute and moved to dismiss her mother-in-law's petition, but the trial court found it constitutional and granted visitation under the statutory "best interest" standard. Patten appealed.⁷² After an extensive discussion of both Georgia and federal law emphasizing the fundamental importance of the liberty interest of parents to rear their children free of state interference, the Georgia Supreme Court unanimously held the provision in question to be violative of the Georgia Constitution of 1983 under substantially the same rationale as in *Brooks v. Parkerson*,⁷³ decided fourteen years previously.⁷⁴ No amendments to the stricken provision are pending in the legislature at the time of this writing, but any future revisions would do well to require a finding of harm to the child if such visitation is denied.

The appellate courts during the survey period were fiercely protective of parental rights vis-à-vis non-parent visitation. The Georgia Court of Appeals took another opportunity to discuss the constitutional deference to parental decision-making in *Elmore v. Clay*.⁷⁵ In *Elmore*, the child's stepmother petitioned to adopt the child and terminate the parental rights of the biological mother, and two grandparents—one maternal, and one paternal, and incidentally married to one another—moved to intervene under O.C.G.A. § 19-7-3(b)(1)(B).⁷⁶ The trial court terminated the biological mother's rights and granted visitation to the intervening grandparents pursuant to O.C.G.A. § 19-7-3(c),⁷⁷ which, in contrast to the provision at issue in

70. Ga. H.R. Bill 1198, 2012 Ga. Laws 860 (codified at O.C.G.A. § 19-7-3 (2012)).

71. *Id.* § 1.

72. *Patten*, 304 Ga. at 140–41, 816 S.E.2d at 634.

73. 265 Ga. 189, 454 S.E.2d 769 (1995).

74. *Patten*, 304 Ga. at 145, 816 S.E.2d at 637.

75. 348 Ga. App. 625, 824 S.E.2d 84 (2019).

76. *Id.* at 625, 824 S.E.2d at 85; O.C.G.A. § 19-7-3(b)(1)(B) (2019).

77. O.C.G.A. § 19-7-3(c) (2019).

Patten, requires the court to find that the child will be harmed if the visitation is not granted.⁷⁸ In reviewing the grant of visitation, the court of appeals cited to the supreme court's discussion in *Patten* about the constitutional considerations when a non-parent seeks visitation over the wishes of a fit parent.⁷⁹ Subsection (c) of the grandparent visitation statute does not suffer the same constitutional infirmity as the provision at issue in that case, but ultimately the Georgia Court of Appeals remanded the order in *Elmore* with direction for the trial court to exercise discretion in applying the statutory factors before awarding grandparent visitation.⁸⁰

D. Equitable Caregivers

Georgia's new "equitable caregiver" statute, O.C.G.A. § 19-7-3.1,⁸¹ was passed and signed into law during the survey period and went into effect on July 1, 2019.⁸² This new provision authorizes the court to "adjudicate an individual to be an equitable caregiver."⁸³ O.C.G.A. § 19-7-3.1(d)⁸⁴ provides that a petitioner may establish standing to be adjudicated an equitable caregiver if the court finds by clear and convincing evidence that he or she has:

- (1) Fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life;
- (2) Engaged in consistent caretaking of the child;
- (3) Established a bonded and dependent relationship with the child, the relationship was fostered or supported by a parent of the child, and such individual and the parent have understood, acknowledged, or accepted or behaved as though such individual is a parent of the child;
- (4) Accepted full and permanent responsibilities as a parent of the child without expectation of financial compensation; and

78. *Elmore*, 348 Ga. App. at 626–27, 824 S.E.2d at 86.

79. *Id.* at 627–28, 824 S.E.2d at 86.

80. *Id.* at 629, 824 S.E.2d at 87.

81. O.C.G.A. § 19-7-3.1 (2019).

82. Ga. H.R. Bill 543, Reg. Sess. (codified at O.C.G.A. § 19-7-3.1).

83. O.C.G.A. § 19-7-3.1(a) (2019).

84. O.C.G.A. § 19-7-3.1(d) (2019).

(5) Demonstrated that the child will suffer physical harm or long-term emotional harm and that continuing the relationship between such individual and the child is in the best interest of the child.⁸⁵

The court may also grant standing to an individual following consent from the child's parent or a written agreement between the petitioner and the child's parent indicating "an intention to share or divide caregiving responsibilities for the child."⁸⁶

After finding standing, the court may enter an order establishing "parental rights and responsibilities . . . including, but not limited to, custody or visitation."⁸⁷ Child support is likely one of the "parental responsibilities" that may be established, but the statute makes no explicit mention of the establishment of support obligations from equitable caregivers to legal parents or from legal parents to equitable caregivers with custodial rights. The statute does not authorize a petition for adjudication as an equitable caregiver if the parents are not separated and the child lives with both parents,⁸⁸ and the adjudication of a person as an equitable caregiver "does not disestablish the parentage of any other parent."⁸⁹

With this bipartisan legislation,⁹⁰ Georgia joins a growing number of states across the nation⁹¹ that provide avenues for parents and parental figures in nontraditional situations to establish parental and custodial rights to children with whom they would otherwise have no formal legal relationship. Individuals like the plaintiff in *Hill v. Burnett*,⁹² discussed *supra*, will presumably have recourse that has been denied to them prior to the enactment of this statute. However, the appellate courts

85. *Id.* § (d)(1)–(5). This provision specifically incorporates the harm standard enunciated by the Supreme Court of Georgia in *Clark v. Wade*, 273 Ga. 587, 544 S.E.2d 99 (2001).

86. O.C.G.A. § 19-7-3.1(f) (2019).

87. O.C.G.A. § 19-7-3.1(g) (2019).

88. O.C.G.A. § 19-7-3.1(h) (2019).

89. O.C.G.A. § 19-7-3.1(j) (2019).

90. HB 543 was sponsored by Rep. Chuck Efrstration (R-Dacula) and co-sponsored by Rep. Mary Margaret Oliver (D-Decatur), Rep. Mike Wilensky (D-Dunwoody), and Rep. Bonnie Rich (R-Suwanee).

91. Delaware (Del. Code Ann. tit. 13 § 8-201(c)), Indiana (Ind. Code § 31-9-2-35.5), South Carolina (S.C. Code Ann. § 63-15-60), Maine (Me. Rev. Stat. tit. 19 § 1891), and Hawaii (Haw. Rev. Stat. § 571-46(a)(2)), for example, recognize "de facto" parenthood or custodianship by statute. A limited number of other states recognize common law doctrines of equitable or de facto parenthood. *See generally* In re Custody of B.M.H., 315 P.3d 470 (Wash. 2013); In re Custody of H.S.H.-K, 533 N.W.2d 419 (Wis. 1995); Conover v. Conover, 146 A.3d 433 (Md. 2016).

92. 349 Ga. App. 260, 825 S.E.2d 617 (2019).

during the survey period repeatedly emphasized the profound importance of the constitutional liberty interest of parents to rear their children free of undue state interference and made clear that they will apply a high level of scrutiny to statutes and trial court decisions awarding custody or visitation rights over the objection of fit parents.⁹³ It seems, therefore, highly likely that contested custody or visitation awards under this statute will be challenged in the appellate courts during the 2019–2020 survey period.

VI. EQUITABLE DIVISION

The appellant–husband in *Phillips v. Phillips*⁹⁴ was a retired member of the United States Army. The husband appealed the trial court’s determination that the wife was entitled to a portion of his military disability retirement income.⁹⁵ The Uniformed Services Former Spouses’ Protection Act⁹⁶ has been interpreted by the Supreme Court of the United States to mean that “a State may treat as community property, and divide at divorce, a military veteran’s retirement pay,” but “exempts from this grant of permission any amount that the [g]overnment deducts ‘as a result of a waiver’ that the veteran must make ‘in order to receive’ disability benefits.”⁹⁷ Accordingly, when a spouse “waives . . . all or any portion of his entitlement to his military retirement pay for any reason[.]” the waived pay—and the disability benefits acquired as a result of waiver—may not be classified as marital property.⁹⁸ It was error for the trial court to classify the husband’s disability benefits as marital property and to award a portion thereof to the wife.⁹⁹

VII. ENFORCEMENT

Legislative revisions¹⁰⁰ to O.C.G.A. § 15-6-77(e)(1)¹⁰¹ requiring that “[a]ny postjudgment proceeding filed more than 30 days after judgment

93. See, e.g., *Borgers v. Borgers*, 347 Ga. App. 640, 820 S.E.2d 474 (2018); *Patten v. Ardis*, 304 Ga. 140, 816 S.E.2d 633 (2018).

94. 347 Ga. App. 524, 820 S.E.2d 158 (2018).

95. *Id.* at 528, 820 S.E.2d at 162.

96. 10 U.S.C. § 1408 (2019).

97. *Phillips*, 347 Ga. App. at 528, 820 S.E.2d at 162 (quoting *Howell v. Howell*, 137 S. Ct. 1400, 1402 (2017)).

98. *Id.* at 530, 820 S.E.2d at 163.

99. *Id.*

100. Ga. H.R. Bill 239, 2019 Ga. Laws 271, § 6-3 (codified at O.C.G.A. § 15-6-77(e)(1) (2019)).

101. O.C.G.A. § 15-6-77(e)(1) (2019).

or dismissal in an action shall be considered as a new case for the purposes of this Code section and shall be given a new case number by the clerk of the superior court”¹⁰² went into effect on May 7, 2019.¹⁰³ This provision applies to “all actions, cases, proceedings, motions, or filings civil in nature, including but not limited to actions for divorce, domestic relations actions, modifications on closed civil cases, [and] adoptions”¹⁰⁴

In *Johnson v. Johnson*,¹⁰⁵ the parties were divorced in 2013. In 2015, the wife filed a motion for contempt, alleging that the husband was in contempt of the divorce decree by not exercising his allotted parenting time and not financially supporting the parties’ shared child with Down syndrome.¹⁰⁶ The parenting plan provided that “[t]he Husband shall be entitled to parenting time with [the child] on alternating weekends The Husband shall be entitled to parenting time with [the child] on each Wednesday (or other mutually convenient weekday) afternoon for dinner.”¹⁰⁷

Because the plain language of the parenting plan did not require that the husband spend parenting time with the child but merely “entitled” him to the time, the trial court erred when it found the husband in contempt of this provision.¹⁰⁸ Accordingly, any parenting plan using the language “entitled to” does not compel the visiting parent to spend the designated time with the child and the parent cannot be found in contempt for failing to do so.¹⁰⁹ The wife’s request for a “frivolous appeal penalty” was therefore dismissed by the court.¹¹⁰

The Georgia Court of Appeals reversed the trial court’s order in *Borgers v. Borgers*,¹¹¹ a post-divorce contempt proceeding, requiring the mother to enroll the parties’ youngest child in private school.¹¹² The divorce decree awarded the parties joint legal custody of the three minor children and delegated primary physical custody and final decision-making authority to the mother, including educational decision-making.¹¹³ Unusually, the trial court explicitly “expressed

102. *Id.*

103. *Id.*

104. *Id.*

105. 349 Ga. App. 99, 825 S.E.2d 487 (2019).

106. *Id.* at 99, 825 S.E.2d at 488.

107. *Id.* at 99–100, 825 S.E.2d at 489.

108. *Id.* at 100, 825 S.E.2d at 489.

109. *Id.*

110. *Id.* at 101, 825 S.E.2d at 489–90.

111. 347 Ga. App. 640, 820 S.E.2d 474.

112. *Id.* at 640, 820 S.E.2d at 475.

113. *Id.* at 641, 820 S.E.2d at 475.

concern as to whether home-schooling [was] in the best interests of [the] children” in the divorce decree itself, but made no provision preventing the mother from doing so.¹¹⁴ Subsequently, the father filed a series of contempt motions alleging, *inter alia*, violations of the parenting plan and visitation schedule and alienation of the children, and requesting a modification of his child support obligation. The father also referenced the divorce court’s disapproval of the mother’s home-schooling the children but did not explicitly request a modification of custody. Following a temporary hearing on child support, the father filed another contempt petition, once more alleging violations of the parenting plan; again, the father did not request a modification of custody. Another hearing was held, and the court issued a final order purporting to resolve both contempt petitions.¹¹⁵ Therein, the court opined that it was “a shame” that the mother had not “taught her children to be independent” and found that the children struggled in school as a result of home-schooling, but expressly stated that custody would not be changed because a modification had not been requested.¹¹⁶ Then, following a status and compliance hearing approximately two months later, the trial court entered a compliance order which found that the parties had complied with its previous order but nevertheless ordered the mother to enroll the youngest child, who was home-schooled at the time, at a local Montessori School.¹¹⁷

The mother appealed the compliance order on the basis that it constituted an improper modification of custody during a contempt proceeding; while trial courts may interpret and clarify the meaning of a divorce decree, the court in a contempt proceeding may not modify a final judgment and decree.¹¹⁸ The court of appeals first analyzed whether the compliance order, requiring the parent with final decision-making on educational issues to enroll the child in a school against that parent’s own wishes, constituted a modification of custody.¹¹⁹ The court of appeals did not identify any cases directly stating such, but a survey of similar cases involving parental decision-making led the court to conclude that it did.¹²⁰ “Whether the trial court effectively granted the father the right to make decisions

114. *Id.* at 641, 820 S.E.2d at 475–76.

115. *Id.* at 641, 820 S.E.2d at 476.

116. *Id.* at 642, 820 S.E.2d at 476.

117. *Id.*

118. *Id.* at 642, 820 S.E.2d at 477 (quoting *McCall v. McCall*, 246 Ga. App. 770, 772, 542 S.E.2d 168, 170 (2000)).

119. *Id.* at 643, 820 S.E.2d at 477.

120. *Id.* at 643–44, 820 S.E.2d at 477–78.

regarding the child's education or took it upon itself to make this particular decision, the result is the same: the final decision-maker . . . lost her right to make the final decision about the youngest child's education."¹²¹ Having determined that the compliance order modified the mother's custodial rights, and that no valid custody modification was ever initiated by either party, the court of appeals reversed the order.¹²² Chief Judge Dillard concurred specially to emphasize that, while the trial court's order was reversed because the court lacked authority to modify custody in a contempt action, the trial court's substitution of its own judgment for that of the mother represented a potential violation of her parental rights under both the federal and Georgia Constitutions.¹²³ Judge Dillard cautioned trial courts to be mindful of the fundamental liberty interest of parents to rear their children free of state interference, and affirmed that the higher courts "will not hesitate to remind our trial courts of the solemn obligation they have to safeguard the parental rights of all Georgians."¹²⁴

The availability of jury trials in contempt proceedings was the primary issue on appeal in *Bernard v. Bernard*.¹²⁵ Following the parties' divorce, the former wife filed a series of contempt motions against the former husband for repeated failures to pay his alimony and child support obligations. Following a March 1, 2017 hearing, the former husband was ordered immediately incarcerated until he paid \$20,000 to purge himself. He did so and was released. The following August, the former wife initiated another contempt proceeding, alleging yet again that the former husband's support obligations were in arrears. In his answer, the former husband requested a jury trial and moved to set aside one of the prior contempt judgments. After a hearing, the trial court denied both requests, found that the former husband had willfully failed or refused to pay an arrearage of \$107,056.76, and ordered him incarcerated until he purged himself by paying the full amount. The former husband then filed a motion for supersedeas and was released on the condition that he obtain a supersedeas bond. He failed to acquire the bond and instead initiated an appeal. While the discretionary appeal was pending, the trial court revoked his supersedeas and ordered him incarcerated again until he purged himself or posted bond.

121. *Id.* at 644, 820 S.E.2d at 478.

122. *Id.* at 645, 820 S.E.2d at 478.

123. *Id.* at 645–46, 820 S.E.2d at 478–79 (Dillard, C.J., concurring fully and specially).

124. *Id.* at 650–51, 820 S.E.2d at 482 (Dillard, C.J., concurring fully and specially).

125. 347 Ga. App. 429, 819 S.E.2d 688 (2018).

The former husband then filed a second application for discretionary review, which was consolidated with the first.¹²⁶

On appeal, the former husband claimed that the trial court erred in denying his request for a jury trial under O.C.G.A. § 15-1-4(b),¹²⁷ which provides in pertinent part that “[n]o person shall be imprisoned for contempt for failing or refusing to pay over money under any order, decree, or judgment . . . when he denies that the money ordered or decreed to be paid over is in his power, custody, or control until he has a trial by jury.”¹²⁸ The court of appeals concluded that despite the straightforward-seeming language of the statute, decades of binding Georgia Supreme Court precedent holds that jury trials are simply not available as a matter of right in civil contempt proceedings arising from failure to pay alimony.¹²⁹ Accordingly, the trial court did not err in denying the former husband’s request.¹³⁰ The supreme court denied certiorari on May 20, 2019.¹³¹

VIII. ATTORNEY’S FEES

*Reid v. Reid*¹³² addressed attorney’s fees under O.C.G.A. § 19-6-2¹³³ and O.C.G.A. § 9-15-14 awarded subsequent to the “lengthy and contentious litigation” of a divorce case.¹³⁴ The purpose of attorney’s fees under O.C.G.A. § 19-6-2 is to ensure both parties are adequately represented.¹³⁵ The statute does not require a finding of reasonableness of the fees but only requires that the court consider the relative financial circumstances of the parties.¹³⁶

“An award under [O.C.G.A. § 9-15-14] must be supported by ‘sufficient proof of the actual costs and the reasonableness of those costs.’”¹³⁷ The amount of attorney’s fees awarded under O.C.G.A. § 9-15-14 must be attributed to the sanctionable conduct and limited to

126. *Id.* at 429–31, 819 S.E.2d at 689–91.

127. O.C.G.A. § 15-1-4 (2019).

128. *Bernard*, 347 Ga. App. at 433, 819 S.E.2d at 692 (quoting O.C.G.A. § 15-1-4(b) (2019)).

129. *Id.* at 433–34 nn.13–16, 819 S.E.2d at 692–93 nn.13–16.

130. *Id.* at 436, 819 S.E.2d at 694.

131. *Bernard*, 347 Ga. App. 429, 819 S.E.2d 688, *cert. denied* (May 20, 2019).

132. 348 Ga. App. 550, 823 S.E.2d 860 (2019).

133. O.C.G.A. § 19-6-2 (2019).

134. *Reid*, 348 Ga. App. at 550, 823 S.E.2d at 862.

135. *Id.* at 552, 823 S.E.2d at 864.

136. *Id.* at 553, 823 S.E.2d at 864.

137. *Id.* at 553, 823 S.E.2d at 865 (emphasis omitted) (quoting *Cohen v. Rogers*, 341 Ga. App. 146, 152, 798 S.E.2d 701, 706 (2017)).

the amount incurred as a result of said sanctionable conduct.¹³⁸ Evidence presented in support of O.C.G.A. § 9-15-14 must specifically show exactly which fees were caused by the conduct¹³⁹ and how the court reached the exact dollar amount awarded “as opposed to any other [dollar] amount.”¹⁴⁰ When a trial court fails to apportion the fees properly, the correct course of action is to “vacate the fee award and remand for further proceedings.”¹⁴¹

Also, of note, the court of appeals held that evidence of settlement offers exchanged throughout the litigation may be admissible for purposes of the amount of attorney’s fees to be awarded to the wife, by ascertaining if the husband’s conduct “constituted delay or abuse of process.”¹⁴²

In *Ford v. Ford*,¹⁴³ the trial court awarded the wife attorney’s fees under O.C.G.A. § 19-6-2, and the husband appealed.¹⁴⁴ The parties’ settlement agreement contained a provision stating:

Neither party shall pay any alimony to the other. Each party does forever waive all rights to receive any alimony from the other party, including periodic, lump-sum, alimony in-kind, or any other claims of any nature whatsoever each may have against the other for any payment in the nature of alimony under existing or future laws or status of the State of Georgia or any other state or country in which the parties may be residing. Each accepts this Agreement as settlement of all past, present, and future claims of modification of alimony as provided by O.C.G.A. § 19-6-19 (a), (b), (c), (d), and any amendments thereto, and any and all future laws regarding modification of alimony as may be enacted in this or any other state¹⁴⁵

The agreement namely referenced the seminal case of *Varn v. Varn*.¹⁴⁶ The parties also agreed to have the assigned judge determine the issue of attorney’s fees through letter briefs subsequently submitted by the parties. The wife filed her letter brief asking for attorney’s fees, and the husband replied stating that she was not entitled to said fees

138. *Id.* at 554, 823 S.E.2d at 865.

139. *Id.*

140. *Id.* at 555, 823 S.E.2d at 866.

141. *Id.*

142. *Id.* at 556, 823 S.E.2d at 866.

143. 349 Ga. App. 45, 825 S.E.2d 449 (2019).

144. *Id.* at 45, 825 S.E.2d at 450.

145. *Id.* at 45–46, 825 S.E.2d at 451.

146. 242 Ga. 309, 248 S.E.2d 667 (1978).

but did not allude to the alimony waiver provision.¹⁴⁷ However, the court of appeals allowed the husband to assert the waiver argument first advanced in his motion for reconsideration, relying on the principal that, “[w]here the party obtains the judgment without meeting the burden of proof, the opposing party may challenge the judgment on that ground, and in doing so may assert arguments not made to the trial court.”¹⁴⁸ Accordingly, the husband could assert that the wife did not “meet her burden of showing her entitlement to the award of attorney fees” because the trial court had determined that the wife met this burden simply by awarding fees.¹⁴⁹

In an enumeration of errors, an appellant is “only required to set forth the legal ruling that he is challenging[,]” not definite arguments.¹⁵⁰ The husband’s argument that the terms of the settlement agreement prohibited the award of attorney’s fees was not a legal ruling required in his enumeration of errors.¹⁵¹ The court then analyzed whether the alimony provision of the parties’ settlement agreement prevented the wife from recovering attorney’s fees.¹⁵² “Attorney fees awarded to a spouse pursuant to O.C.G.A. § 19-6-2 . . . are considered to be part of alimony[,]”¹⁵³ and the court of appeals ultimately determined that the alimony waiver precluded an award of attorney’s fees to the wife under that Code section.¹⁵⁴ The court of appeals declined to review extrinsic evidence in making that determination, but rather relied on ordinary rules of contract construction and the text of the agreement; extrinsic evidence may only be used to decipher an agreement where the “text is so ambiguous that its meaning cannot be determined through application of the ordinary rules of textual construction.”¹⁵⁵

In *Boley v. Miera*,¹⁵⁶ the father sought a reduction in child support, and the mother counterclaimed for an increase. The father was granted a reduction and the mother was awarded attorney’s fees. The father

147. *Ford*, 349 Ga. App. at 46, 825 S.E.2d at 451.

148. *Id.* at 47, 825 S.E.2d at 452.

149. *Id.* at 48, 825 S.E.2d at 452.

150. *Id.* at 48, 825 S.E.2d at 453 (citing *Felix v. State*, 271 Ga. 534, 539, 523 S.E.2d 1, 6 (1999)).

151. *Id.* at 49, 825 S.E.2d at 453.

152. *Id.*

153. *Id.* (quoting *Vakharwala v. Vakharwala*, 301 Ga. 251, 254, 799 S.E.2d 797, 800 (2017)) (punctuation omitted).

154. *Id.* at 48, 825 S.E.2d at 453.

155. *Id.* at 51, 825 S.E.2d at 454 (quoting *Atlanta Dev. Auth. v. Clark Atlanta Univ.*, 298 Ga. 575, 581, 784 S.E.2d 353, 358 (2016)).

156. 347 Ga. App. 161, 817 S.E.2d 823 (2018).

appealed the attorney's fees award.¹⁵⁷ The plain language of O.C.G.A. § 19-6-15(k)(5),¹⁵⁸ under which the award was granted, states that the party awarded fees must be the prevailing party.¹⁵⁹ The father was the prevailing party since he obtained a reduction in child support, and therefore the trial court erred when it granted the mother attorney's fees pursuant to O.C.G.A. § 19-6-15(k)(5).¹⁶⁰

In *Bishop v. Goins*,¹⁶¹ the Georgia Supreme Court reviewed the court of appeals' decision¹⁶² regarding attorney's fees awards for appeals of stalking-related protective orders.¹⁶³ The court clarified that an attorney's fees award typically must be specifically authorized by statute.¹⁶⁴ A plain reading of O.C.G.A. § 16-5-94(d)¹⁶⁵ illustrates that fees must be related to the "order or agreement" entered in the stalking protective order action and therefore may not be granted during appellate proceedings.¹⁶⁶ The court of appeals' decision to approve such an award was reversed.¹⁶⁷

In *Chalk v. Poletto*,¹⁶⁸ the father filed a petition to legitimate his two biological children. The trial court denied the petition and awarded the mother's motion for directed verdict for attorney's fees, litigation costs, and guardian ad litem fees.¹⁶⁹ The father appealed, and the court of appeals affirmed.¹⁷⁰ The mother and father had two children together and lived together until the children were roughly two and four years old. The mother evicted the father, and the father filed for legitimation.¹⁷¹ The court found compelling the facts that the father could not articulate the amount of support he claimed to have given the children, had no documentary evidence reflecting the purported support, and had previously pled guilty to "the felony of making false statements to receive benefits."¹⁷² Moreover, the father declared no

157. *Id.* at 161, 824 S.E.2d at 824.

158. O.C.G.A. § 19-6-15(k)(5) (2019).

159. *Boley*, 347 Ga. App. at 161, 817 S.E.2d at 824.

160. *Id.* at 162, 817 S.E.2d at 824.

161. 305 Ga. 310, 824 S.E.2d 369 (2019).

162. *Bishop v. Goins*, 344 Ga. App. 174, 809 S.E.2d 280 (2017).

163. *Bishop*, 305 Ga. at 310, 824 S.E.2d at 369–70.

164. *Id.* at 311, 824 S.E.2d at 370.

165. O.C.G.A. § 16-5-94(d) (2019).

166. *Bishop*, 305 Ga. at 312, 824 S.E.2d at 371.

167. *Id.*

168. 346 Ga. App. 491, 816 S.E.2d 432 (2018).

169. *Id.* at 491, 816 S.E.2d at 434.

170. *Id.*

171. *Id.* at 491–92, 816 S.E.2d at 434.

172. *Id.* at 492, 816 S.E.2d at 434.

assets, but had taken multiple extensive international trips, and “had paid for indoor skydiving, laser hair removal, college classes, and renewal of his private pilot’s license.”¹⁷³ He also did not attempt to legitimate the children until they were ages two and four and previously consented to a protective order which forbid communication with the children.¹⁷⁴ Therefore, the court held that the father had abandoned his opportunity interest and denied his petition to legitimate.¹⁷⁵

O.C.G.A. § 19-9-3(g)¹⁷⁶ authorizes the court to use “wide discretion . . . to award reasonable attorney’s fees and expenses in child custody actions.”¹⁷⁷ Even though custody was not addressed because the petition for legitimation was denied, the trial court was authorized to grant the mother an attorney’s fees award under O.C.G.A. § 19-9-3(g) because the father prayed for joint legal custody and parenting time.¹⁷⁸ The trial court could have granted the father parenting time and custody under O.C.G.A. § 19-7-22(g)¹⁷⁹ and, therefore, was entitled to grant attorney’s fees and expenses to the mother under O.C.G.A. § 19-9-3(g).¹⁸⁰

IX. APPELLATE PRACTICE

In *Ford v. Ford*,¹⁸¹ the court of appeals affirmed and clarified the sometimes-challenging rules of appellate domestic relations practice.¹⁸² There, the parties were divorced and the father filed a direct appeal challenging only the award of custody of the parties’ minor children to the mother.¹⁸³ The court of appeals dismissed the appeal for lack of jurisdiction;¹⁸⁴ while the direct appeal procedures set forth in O.C.G.A. § 5-6-34¹⁸⁵ do allow for direct appeal of “[a]ll judgments or orders in child custody cases[.]”¹⁸⁶ that provision is limited to cases exclusively

173. *Id.* at 492–93, 816 S.E.2d at 434–35.

174. *Id.* at 495, 816 S.E.2d at 436.

175. *Id.*

176. O.C.G.A. § 19-9-3(g) (2019).

177. *Chalk*, 346 Ga. App. at 496, 816 S.E.2d at 436.

178. *Id.* at 496, 816 S.E.2d at 436–37.

179. O.C.G.A. § 19-7-22(g) (2019).

180. *Chalk*, 346 Ga. App. at 496, 816 S.E.2d at 437.

181. 347 Ga. App. 233, 818 S.E.2d 690 (2018).

182. *Id.* at 233, 818 S.E.2d at 691.

183. *Id.*

184. *Id.*

185. O.C.G.A. § 5-6-34 (2019).

186. O.C.G.A. § 5-6-34(a)(11) (2019).

concerning child custody.¹⁸⁷ When the custody determination under appeal is ancillary to a divorce action—even if custody is the only issue raised on appeal—the discretionary appeal procedures of O.C.G.A. § 5-6-35(a)(2)¹⁸⁸ must be followed.¹⁸⁹ Failure to do so will prevent the reviewing court from acquiring jurisdiction and result in the dismissal of the appeal.¹⁹⁰

X. CONCLUSION

The 2018–2019 survey period saw relatively few developments to the common law in the areas of equitable division, alimony, and child support, but the appellate courts offered significant guidance regarding custody and visitation rights, post judgment enforcement, and the rules governing attorney’s fees awards. Legislative action during the survey period was dramatic, and among others the LIFE Act and equitable caregiver statute each represent major alterations to longstanding principles of Georgia law, which may generate appellate litigation in the coming years.

187. *Ford*, 347 Ga. App. at 234, 818 S.E.2d at 691.

188. O.C.G.A. § 5-6-35(a)(2) (2019).

189. *Ford*, 347 Ga. App. at 234, 818 S.E.2d at 691.

190. *Id.*