Domestic Relations

Barry C. McGough

Lucy S. McGough

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DOMESTIC RELATIONS  
By Barry B. McGough* and Lucy S. McGough**

Since there was no article in last year's Survey covering developments in the area of family law, this report will include significant appellate decisions of the past two years. There continues to be a substantial volume of appellate decision-making in the area of domestic relations law, although there have been only minor changes effected by legislation during the survey years. To facilitate understanding of developments in this substantive area, this discussion has been divided into seven basic topics: marriage, custody, divorce procedure, alimony, enforcement procedures, adoption (including legitimation and change of name), and legislation.

I. Marriage

The doctrine of common law marriage received an unusual amount of attention during the survey years by occupying center stage in three appellate decisions. In Hiter v. Shelp, the court of appeals found critical to the application of the family purpose doctrine the existence of a bona fide family relationship and held the cohabitation in the case at bar inadequate to meet that burden. The evidence, which was not discussed by the court, was found sufficient to establish a binding common law marriage, but the existence of a previous undissolved marriage of one of the parties prevented the arising of a valid marriage due to incapacity to contract.

In Roberts v. Roberts, the court found a divorce complaint sufficient to withstand a motion to dismiss made on the theory that the parties were not married. There was testimony by the wife that she and her husband had cohabited, reared four children, and held themselves out to be husband and wife; there was also documentary evidence showing the parties had filed joint income tax returns and procured insurance policies naming the wife beneficiary of the insured husband. This evidence, if believed, was sufficient to show the existence of a common law marriage. On the other hand, the trial court's ruling in Shepherd v. Shepherd was not error. There the court held that statements by the defendant-husband that the wife had said she had lived with her former husband, had charged items to the former husband's account, that he had helped her borrow money, and that they had retained a joint bank account, did not conclusively establish a common law marriage.

* Member of the firm of Stack & O'Brien, Atlanta, Georgia. University of California at Berkeley (A.B., 1963; LL.B., 1966). Member of the State Bar of Georgia.
** Associate Professor of Law, Emory University Law School. Agnes Scott College (A.B., 1963); Emory University (J.D., 1966); Harvard University (LL.M., 1970). Member of the State Bar of Georgia.

One case dealt with the obligations of the wife to the husband that arise out of the marriage relationship. In *Department of Human Resources v. Williams,* the husband was a recipient of aid to the permanently and totally disabled and had contracted with his wife for her services as an attendant. The court held that the personal care services rendered to the husband by the wife were not included in the normal household duties he might expect of her. The wife's surrendering of her statutory right to earn and retain wages was a legal detriment which provided sufficient consideration for the contractual arrangement between the spouses, and the existence of a valid agreement prevented the state from reducing its assistance grant to the husband by the amount he paid his wife.

In *Andrews v. Willis,* it was undisputed that although the parties entered into a ceremonial marriage, the wife's former spouse was alive and no divorce had been granted dissolving that marriage. Indeed, the parties stipulated in the trial below that the seven children born of the second “marriage” were illegitimate. These children, by next friend, brought an action for the tortious death of their father; summary judgment for the defendant was granted because the trial court followed decisional law holding that illegitimate children may not maintain such an action. While Judge Clark agreed that illegitimate children may not sue under Ga. Code Ann. § 105-1302 (Rev. 1968), he noted that in the instant case, these children were still entitled to a presumption of legitimacy. Despite the situation where children are born of a void marriage, they are to be considered legitimate and able to maintain an action for the tortious death of their father until there has been a judicial ruling that the marriage is invalid. Thus, there is a legal distinction between children born out of wedlock and those who are born after a marriage which appears certain to be considered invalid. Furthermore, the stipulation of illegitimacy by the parties, as a conclusion of law rather than fact, was erroneous and not binding upon a court.

II. Custody

A. Jurisdiction

In several related cases decided during the past two years, the Georgia appellate courts have attempted to clarify jurisdictional problems inherent in custody disputes. One situation which rather frequently occurs involves a parent who has legal custody of children under a divorce decree, confronting a former spouse with rights only to visitation who refuses to return the children. Where the custodian-parent is a non-resident of Georgia, does

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he open himself to a re-litigation of custody by Georgia courts when he seeks by habeas corpus to regain the children? Despite dissents from Justices Ingram and Gunter, it now appears well settled that the non-resident custodian bringing habeas corpus is vulnerable to a cross-action by the non-custodian to modify the original custody decree where a substantial change in circumstances since the entry of the original decree can be shown.7

Similarly, the Georgia Supreme Court has held that a non-resident who comes to this state to retrieve his children submits himself to re-litigation of the custody issue if he is personally served while here with a petition for habeas corpus or petition to modify custody.8

The appellate courts have refused, however, to find jurisdiction to reconsider custody where the non-resident custodian has not instituted legal proceedings or where the child in controversy is neither domiciled nor physically present within this state. The child's domicile follows that of its father or its legal custodian. However, the mere physical presence of the child in this state may confer jurisdiction on the Georgia courts to determine the custody issue, provided the non-resident custodian-parent is personally served with process in this state.9 The limitation upon re-litigation is perhaps best illustrated by Moss v. Buhrman,10 in which the non-custodian resident of Georgia kept one of three children after the period of visitation had ended. The mother, the non-resident custodian, brought a petition for habeas corpus seeking return of the child, and the father cross-claimed to modify the custody award as to all three children. The trial court dismissed the cross-claim insofar as it pertained to the two children not in the state, and the supreme court affirmed, holding that

A petition for modification of a custody order for change in condition cannot and should not be entertained where the res (the children involved) are neither domiciled in this state, nor present within the confines of this state . . . .12

The cross-claim concerning the child retained by the non-custodian was, of course, viable.

Issues of venue follow the same general pattern. In Vines v. Hibdon,13 the father who was the custodian of minor children, filed an action in equity in the superior court of the county of the mother's residence to restrain her from harassing him and from interfering with his custody. By such action, the supreme court ruled, the father subjected himself to the

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12. Id. at 290, 201 S.E.2d at 473.
jurisdiction of that court to determine the mother’s counterclaim for modification of the original custody decree.

Usually the redetermination of custody is accomplished by the filing of a petition for habeas corpus, or by an equitable petition entitled, variously, petition to modify custody or petition to change custody, which, according to the supreme court, is an action “in the nature of habeas corpus.” Indeed, the court has now ruled that custody cannot be reopened in a contempt proceeding. In Henderson v. Henderson,14 the husband had sought by contempt proceedings instituted in 1972 to enforce visitation rights awarded him by a divorce decree. The parties had entered a consent judgment in that action altering the original visitation plan, and the present motion for contempt was based on that judgment. The trial court had dismissed the complaint on the theory that the consent judgment was void for lack of subject matter jurisdiction in the rendering court. The supreme court affirmed, holding that a modification of custody or visitation must be accomplished by new proceedings based upon evidence showing a change in circumstances and could not be done in a subsequently filed contempt action. The court further observed that jurisdiction could not be conferred by consent of the parties.

The superior courts of Georgia have exclusive jurisdiction over custody controversies within divorce actions and cannot transfer such issues of custody to the juvenile courts for resolution or advice. However, the superior court may transfer the issue of custody where raised by habeas corpus petitions or petitions to modify.15 Until recently it was thought that juvenile courts, pursuant to the 1971 Juvenile Court Code, as amended in 1973,16 had concurrent original jurisdiction with the superior courts to entertain petitions for habeas corpus. In re J.R.T.,17 now makes the juvenile court’s custody jurisdiction plain: It has original jurisdiction over custody controversies only when it is alleged that the child is “deprived” within the meaning of Ga. Code Ann. §24A-401(h) (Supp. 1974). Its jurisdiction is thus limited only to consideration of custody of deprived children or upon a transfer of jurisdiction, where authorized by the superior court.

The Georgia juvenile courts, however, do have exclusive jurisdiction over actions to terminate parental rights under Ga. Code Ann. §24A-3201 (Supp. 1974). Within the past year, the court of appeals decided the first two cases interpreting the provisions of the termination statute. In the case of In re Levi,18 the court was called upon to construe the meaning of the statutory ground authorizing termination where “the child is a deprived child and . . . the conditions and causes of the deprivation are likely to continue or will not be remedied and by reasons thereof the child is suffer-

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ing or will probably suffer serious physical, mental, moral, or emotional harm." On a petition brought by the Fulton County Department of Family and Children Services seeking termination of parental rights in order to pave the way for adoption of a sixteen-month-old infant, the juvenile court judge ruled that he lacked power to grant termination on this ground unless "deprivation is due to physical impairment due to some physical retardation."

In a lengthy opinion befitting the seminal nature of this case, Judge Bell observed:

The [termination of parental rights] Act is to be liberally construed toward the protection of the child whose well-being is threatened. [Citation omitted.] Deprivation of love and nurture is equally as serious as mental or physical disability. [Citation omitted.] "A termination hearing seeks above all else the welfare of the child, with due regard for the rights of the natural and adoptive parents. [The judge] will realize that the natural parents must be cautioned, informed, counseled, and protected; he will realize that the adoptive parents must likewise be protected, that their reliances and expectations should be strongly considered. And, after considering the interests of these parties, when the judge is faced with the final decision in the adoption [or termination] case, he will ponder again that ancient question, 'Is it well with the child?'" 

After reviewing the facts of this particular case, the court reversed and directed the entry of an order terminating parental rights.

In Spence v. Levi, the court of appeals affirmed the termination of parental rights in another fact situation. However, the court reversed the juvenile court’s finding concerning the effect such a termination has upon a child’s inheritance rights. When termination of parental rights is granted pursuant to Ga. Code Ann., ch. 24A-32 (Supp. 1974), the child loses any right of inheritance from its natural parents. In cases of adoption under Ga. Code Ann. §74-414 (Rev. 1973), the child may inherit both from his natural parents as well as from his adopting parents. The court of appeals recognized the anomaly of treating such similarly situated children differently, but stated that a resolution of such an inequity would have to be accomplished by the legislature. The court of appeals in Spence also approved the exclusion of a parent from the court when testimony from the child concerning his desires and feelings about the parent is received. Where the parent was represented by counsel, his temporary exclusion from the proceedings was within the discretion of the juvenile court.

Aside from issues of jurisdiction, the remaining cases included in this discussion of custody may be divided into two groupings: those in which

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20. 131 Ga. App. at 348, 206 S.E.2d at 83.
21. Id. at 352, 206 S.E.2d at 85.
natural parents are litigating against each other and those in which a natural parent is vying for custodial rights against a more distant relative.

B. Parent V. Parent

The initial determination of which parent is to have custody of a minor child is usually made in divorce proceedings and is almost exclusively controlled by consideration of the best interests of the child. The determination of custody is a question for the judge rather than the jury, and one case during the survey years indicates that the court’s decision should not be rendered until the jury has retired for deliberation on all other matters in the case. Although the judgment of the case was here affirmed, the supreme court warned that under other circumstances the award of custody in the presence of the jury prior to their deliberation “might well constitute substantial error.”

The father of an illegitimate child who has rendered his offspring legitimate by compliance with Ga. Code Ann. §74-103 (Rev. 1973) has the same standing as any other parent to litigate the custody of his child, and, in Mitchell v. Ward, the court declared it reversible error to prohibit the father from introducing evidence pertaining to the child’s best interest even though he did not contend the mother was unfit.

Most litigation which reaches the appellate courts, however, arises out of an attempt by the non-custodian parent to seek a redetermination of the question of custody. Unlike most judgments in civil actions, a determination of child custody is subject to review at any time upon the showing of changed circumstances materially affecting the welfare and interests of the child, and the decision to change custody rests largely in the discretion of the trial judge. Robinson v. Ashmore is a significant, full-blown opinion by Justice Gunter which purports to “establish some semblance of order in this area of the law” regarding changed conditions affecting the welfare of a child. In essence, however, the opinion notes that every case will turn on nuances of fact defying generalization and if there is “reasonable evidence” in the record in support of the trial court’s decision, it will not be disturbed on appeal. Traditionally, cases have proceeded upon allegations of a deterioration in the fitness or ability of the custodian to continue to have the care of a child. However, in Robinson, the supreme court also approved a showing of an improvement in the circumstances of a non-custodian as sufficient to support a modification.

29. Id. at 500, 207 S.E.2d at 486.
30. It should be noted, however, that limited strictly on its facts, the Robinson case
In *Hight v. Butler*, the court held that testimony that the custodian and his new wife were attempting to teach the children that their step-mother was their natural mother and to encourage them to refer to the latter by her given name rather than "Mother" would support a modification of custody. Evidence showing that the custodian had voluntarily relinquished custody to the mother was held sufficient to authorize the trial court to consider anew the issue of custody in *Lodge v. Lodge*.

Failure of the custodian to encourage acceptable hygienic standards and to provide an acceptable environment for the child supported the modification of the decree in *Padgett v. Penland*. In *Hilliard v. Atkinson*, the court held sufficient to support a verdict of modification evidence that the remarriage of the custodian was filled with turmoil and instability, that her financial condition had deteriorated, that she no longer took part in the children's school and church activities, that she was openly hostile and obscene toward the father and his new wife in the presence of the children, and that a planned move of the family would be detrimental to the children's academic and emotional welfare.

Quite obviously, issues of visitation are subsumed under a determination of custody. In order to support a change in the exercise of visitation privileges, there must likewise be a showing of material change in conditions affecting the welfare of the child. The illustrative visitation rights cases decided during these survey years are difficult to harmonize. About the only clear principle of law which emerges is that the trial court, in modifying visitation rights, has wide discretion which will rarely be disturbed by the appellate courts. Thus, in an extreme case recently decided, *Davis v. Coggins*, apparently a non-custodian can lose all visitation rights by not consistently choosing to exercise them. Although the father was granted reasonable visitation rights under the divorce decree, he visited the child only twice during the 18 months immediately thereafter. As a consequence, the mother refused to honor future requests for visits because the child was "becoming emotionally injured by the long periods between the visits of his father." At trial on the father's petition for habeas corpus, it was noted that the mother had remarried and that she and the child's step-father could maintain a happy and stable home for the child. The trial court dismissed the writ and made no further rulings, thus implicitly ruling against any visitation rights. The supreme court simply affirmed, noting that the court would have been authorized to fix specific visitation periods but was not required to do so.

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involved a custody controversy between mother and paternal grandparents.

36. Id. at 508, 207 S.E.2d at 491.
In *Taylor v. Taylor*, it was alleged that the custodian was physically violent when the father attempted to visit the children, made threats in the children's presence, removed the children to another county against their wishes, conducted a hate campaign against the father with the children, and frustrated all visitation since she would allow no one else to pick up the children. The court held that as a matter of law, these assertions would not support modification and reversed the lower court order broadening the father's visitation privileges. The court noted that the non-custodian did not contend that the character, habits, or conduct of the custodian had changed nor that her home had worsened.

In *Garrett v. Garrett*, the court affirmed the granting of the custodian's motion to dismiss the father's complaint for modification of visitation on the ground that he had changed employment and was no longer able to visit the children on the days specified in the original decree. Three justices dissented without opinion.

Finally, the supreme court took the opportunity afforded in *Heard v. Vegas* to expound upon the right of a custodian under a divorce decree to move with the child to another jurisdiction. Here the parties' agreement, incorporated into the decree, provided that the custodian would remain in Georgia. Such prohibition was ruled void pursuant to a line of cases holding that the court may not attempt to retain jurisdiction after the entry of a final order. However, the court borrowed a term from property law and observed that if the original custody grant were made defeasible upon any condition, such as the removal of a child from the state, such a provision would be given full effect to bind the parties. Thus, apparently a decree may provide that, for example, a mother will have custody unless she later decides to settle elsewhere, at which time custody will automatically pass to the father. How the first amendment right to travel or the best interests of the child in remaining with a custodian are affected by this decision is not at all clear.

**C. Parent V. Third Party (Non-parent)**

Georgia law has long declared that the party, usually a parent, with the prima facie legal right to custody of a child should be made the permanent legal custodian unless he or she is unfit to be entrusted with the care and

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37. 231 Ga. 742, 204 S.E.2d 129 (1974).
38. The trial court had attempted to reserve a final decision on modification until a later date. The supreme court held the reservation of jurisdiction a nullity and treated the order as a final judgment. *Id.* at 744-45, 204 S.E.2d at 132-33.
control of the child. However, the courts, until recently, have refused to award custody to a non-parent as against a parent except under the most extreme circumstances. Indeed, until the decision in Perkins v. Courson in 1964, the only ways in which a parent could forfeit his or her right to custody were as denominated in Ga. Code Ann. §§74-108, 74-109, and 74-110 (Rev. 1973). The Perkins case first enunciated that “unfitness” was an additional ground available in custody disputes between parents and non-parents, but that doctrine seems to have been more strictly construed in such controversies. However, the recent cases, although it is too early to discern a clear trend, seem to portend a relaxation in the rules and show a general gravitation toward a uniform concern for the best interests of the child as the paramount consideration in all custody battles.

In temporary awards of custody, the trial court apparently has unlimited discretion to do what it considers best for the child without regard to the litigating parties. In Foster v. Foster, a divorce action, the supreme court, with two justices dissenting, affirmed the award of custody to the husband’s sister, even though the trial court found both parents to be fit. The court observed that temporary and permanent custody were not governed by the same rules of law. In Mathey v. Matheus, the trial court was held authorized to modify, on motion for contempt, its temporary custody order and transfer custody to the maternal grandparents, pending final resolution of the divorce action between the natural parents.

In three cases, the court construed portions of Ga. Code Ann. §74-108 (Rev. 1973). In Williams v. Ferrell, the court upheld a custody order in favor of the paternal grandmother in a habeas corpus proceeding brought by the natural mother. The child had been left with the grandmother since she was thirteen-months-old with only occasional visits by the mother, who resided out of state. The fifteen-year-old girl elected to remain with her grandmother, and there was medical testimony to the effect that the child suffered from acute leukemia and had a life expectancy of approximately one year. The court held these facts to constitute a voluntary relinquishment of parental rights by the mother pursuant to Ga. Code Ann. §74-108(1) (Rev. 1973). The supreme court, however, reversed the trial court’s award of custody to the paternal grandmother in Shaddrix v. Womack.

The court found no evidence of any contract between the mother and grandmother for the former to relinquish her parental rights to the latter.

44. Williams v. Crosby, 118 Ga. 296, 45 S.E. 282 (1903).
An agreement between the mother and a children's home was not a relinquishment under the code since the parent was required to agree to take the children back immediately if the home deemed it advisable. The evidence was further insufficient to establish an abandonment of the children within the meaning of Ga. Code Ann. §74-108(3) (Rev. 1973) since the mother sent $25 per week to the children whenever she was able, and the grandmother had not requested assistance. Moreover, the evidence showed that the mother, when employed, bought the major part of the children's clothing, provided their school lunch money, and paid for summer camp and recreational activities. Finally, the evidence relating to the mother's present unfitness to have custody was unconvincing, as it was undisputed that she now owned her own home and earned sufficient income from her employment and from social security and child support payments to care adequately for the children.

Petitford v. Mott35 followed the rule that the physical custodian's failure to provide necessaries when they were neither requested nor needed was not abandonment. Further, the court held there was only general evidence that the mother "gave" the child to the paternal aunt and there was positive evidence demonstrating that the mother had told the paternal grandmother and the father of the illegitimate child in question that she would never "sign any papers" permitting either of them to have the child. Finding the evidence inadequate to support the trial court's order remanding custody to the paternal aunt, the supreme court reversed.

Every term of court seems to produce at least one baffling opinion, and Bennett v. Clemens54 occupies that position in 1973. The natural mother had been awarded custody of her minor daughter by divorce decree and the paternal grandparents sought to wrest custody from her by petition for habeas corpus. Since the issue of standing to contest custody was not raised at the trial, the appellate court bypassed it summarily and essentially decided the case on fitness grounds without citation to authority. The evidence in the case was voluminous and showed that the mother had lived in a variety of locations since her divorce, had worked for an underground newspaper, had been arrested for possession of marijuana and on a plea of nolo contendere been given a probated two-year sentence, had left Atlanta to attend the out-of-state funeral of her mother, leaving the child with four friends, and thereafter had gone to California to pursue her vocation as a writer and a poet. There was evidence that the female friends

55. Had the issue of standing been raised by counsel for the mother, the court presumably would have had to reconcile two of its precedents. In Harper v. Ballensinger, 226 Ga. 828, 177 S.E.2d 693 (1970), the court held that a sister had standing to bring a "petition for change of custody" against the father who had custody of her younger sibling; however, Bennett v. Schaffer, 228 Ga. 59, 183 S.E.2d 760 (1971) represents a long chain of cases ruling that maternal grandparents could not maintain an action for habeas corpus because they were neither parents nor legal parent-substitutes by adoption, contract, or court order.
with whom the child had been left smoked "pot," engaged in sexual acts with men and with each other in the presence of the child, and otherwise taught the child about "the gay life." On the side of the mother, the evidence showed that both parents were National Merit Scholars and were graduates of Harvard University. There was no evidence that the child's physical needs were not met, that it was neglected, abused, or in any way mistreated. There was evidence that the child attended school and church regularly. Finally, the testimony of a psychiatrist established that the child had "felt love," and "had been living in a 'healthy environment.'

Whether the facts supported the majority opinion that there had been changed circumstances since the divorce that justified the trial court's order modifying the original decree, or whether, as the dissent argued, the majority had simply substituted its "standard of morality" for that of the natural parents, cannot further be resolved. What appears clear, however, is that the question of parental fitness was close in this case, and, in the past, close questions were weighed in favor of the parents. The standard applied by the majority — parental fitness, best interest of the child, or some other — was not articulated, and we are left to wonder if the rules governing child custody disputes between parents and non-parents are undergoing yet another transformation.

III. Divorce Procedure

Perhaps the single most significant decision in this area is Friedman v. Friedman which construed the term, "irretrievably broken marriage," Georgia's recently added no-fault ground. The wife originally filed an action for separate maintenance, and temporary alimony and child support were awarded. The husband then filed a complaint for divorce on the "irretrievably broken" ground, and the wife responded with an answer and cross action on the alternative grounds of cruel treatment and irretrievably broken marriage. The husband filed an answer admitting the marriage had ended but denying cruel treatment; thereafter, by affidavit, he moved for a judgment on the pleadings. Without hearing oral evidence, the court found that because of the admissions of the parties as to the existence of the no-fault ground, there was no genuine issue of fact requiring further proceedings. The court granted the divorce.

The Friedman case has been interpreted in some quarters to mean that a new era for pro se divorces has been ushered in; that individuals may simply file a divorce petition and await the return of a judgment by mail after a month or so. Indeed, capitalizing upon an envisioned trend toward relaxed divorce procedures, at least one enterprising non-lawyer in the

56. 230 Ga. at 319, 196 S.E.2d at 843.
57. Id. at 320, 196 S.E.2d at 844 (dissenting opinion of Gunter, J.).
state has openly advertised “do-it-yourself” divorce kits. The majority opinion written by Justice Jordan holds that, where the complainant seeks a divorce on the no-fault ground, she will not be heard to complain because the court granted her wish, despite the fact that she also contended in the alternative that she had grounds of cruel treatment. According to Justice Jordan, the enactment of the no-fault ground altered the public policy of Georgia which would require the taking of oral testimony in proof of the allegations of a complaint. Presumably the public policy regarding any of the twelve fault-oriented grounds remains intact and oral testimony is still required.

The interaction of title 30, which specifically governs divorce and alimony, and the Civil Practice Act continues to prompt appellate construction. Clearly, Ga. Code Ann. §81A-140 (Rev. 1972) now controls the time for trials, including divorce actions: “[D]ivorce . . . cases, shall be triable any time after the last day upon which defensive pleadings were required to be filed. . . .” Although such actions are thus ripe for trial after 30 days, in Todd v. Todd the supreme court held that it was an error to deny the filing of defensive pleadings in a divorce action even though more than 30 days had elapsed since service of the complaint.

In Bradberry v. Bradberry, a wife sought, within six months after the entry of a divorce decree, to set aside the decree claiming that duress had been exerted to force her to execute the underlying agreement. The wife urged that she was within her rights under Ga. Code Ann. §30-133 (Rev. 1969) which provides:

> All verdicts and judgments hereafter rendered in any divorce case . . . at the appearance term shall be . . . legal and binding . . . as if rendered at the trial terms . . . unless the defendant . . . shall move to set the same aside within six months from the date thereof.

The supreme court rejected this authority noting that motions to set aside any judgment are not all governed by the time limitations set out in the Civil Practice Act and thus, Section 30-133 has now been impliedly repealed.

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60. The following classified advertisement was published in the Atlanta Journal:

NO FAULT, DO IT YOURSELF DIVORCE FORMS. Be your own attorney. Order now. Receive forms and easy to follow instructions on how to prepare, file for and obtain a Georgia divorce for $21. Recommended for cases wherein both parties are in agreement. Send $25.75 to Atlanta Journal at ____, col. ____ (January 11, 1975).


63. Apparently only Chief Justice Grice would do away with the requirement of appearance and oral testimony in all divorce proceedings, where appropriate, regardless of the specific grounds of the pleadings. See 233 Ga. at 257, 210 S.E.2d at 755 (concurring opinion of Grice, C.J.)

64. 231 Ga. 647, 203 S.E.2d 480 (1974).


However, the supreme court refused to approve the use of less than personal service of process in divorce proceedings. Provisions of the Civil Practice Act, permitting perfection of service by leaving process at the defendant's most notorious place of abode, apply only to actions seeking recovery of a principal sum less than $200; since divorce proceedings are equitable in nature, observed the court, personal service is required.

In *Ivey v. Ivey,* the wife sought a divorce on cruel treatment. In his answer, the husband denied such acts and asserted that his wife had abandoned him "without just cause in the dead of night," although he did not formally plead desertion as a ground until an amendment was filed over two years later and less than two months before the jury trial began. The wife claimed that the statutory period for desertion was governed by the time it was formally plead. The supreme court rejected this view noting that divorce pleading was governed by the Civil Practice Act, and thus, the allegations of the original complaint were sufficient to put the wife on notice of the husband's claims.

The supreme court ruled, in *Trulove v. Trulove,* that, once a demand for a jury trial is made by a defendant who counterclaims in a divorce action, the right to a jury trial is not divested by any subsequent act of the plaintiff. Here the plaintiff dismissed his complaint and claimed that this action left no issues of fact unresolved. The court rejected this argument, noting that the question of whether the husband had fraudulently obtained a Nevada divorce remained even though there was some indication that there need not be any issuable defense at all in order to preserve a demand for a jury trial.

The venue provisions of the Georgia Constitution continue to plague domestic relations litigants. In *Buford v. Buford,* the wife filed a complaint for child custody and alimony in the county of the husband's residence as required by the general, catch-all venue provision of the state constitution. The husband counterclaimed for divorce and custody in the same action, but unfortunately, the wife had acquired a separate domicile in a different county. The supreme court affirmed the dismissal of the husband's counterclaim noting that his action seeking divorce was governed by the special venue provision of the constitution which requires that divorces must be brought in the county of the defendant's residence. Thus persists an anomaly, noted by the court and lamented by Justices Jordan and Ingram, which permits the court of one county to decide the issues

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71. The court cited as support for this proposition, Flournoy v. Flournoy, 228 Ga. 224, 184 S.E.2d 822 (1971).
73. GA. CONST. art. VI, §14, ¶6, GA. CODE ANN. §2-4306 (Rev. 1973).
74. GA. CONST. art. VI, §14, ¶1, GA. CODE ANN. §2-4901 (Rev. 1973).
75. See 231 Ga. at 12, 200 S.E.2d at 99 (special concurring opinion of Jordan, J.).
of custody and alimony and the court of another to retry immediately and, theoretically at least, to determine differently the same questions.

Venue requirements, as the court observed in the Buford case, are non-waivable. However, in Bradley v. Dockery,76 the supreme court has reiterated the principle that despite clearly erroneous venue, a party who originally acknowledged venue may later be estopped to challenge the error.77

Similarly, the court used the doctrine of estoppel to thwart a husband's attempt to reopen a divorce judgment in Bradley v. Bradley.78 The husband filed an extraordinary motion for a new trial based upon allegations of newly discovered evidence of his wife's adultery. The court found the husband's allegations insufficient under the two-pronged test governing such motions: (1) that the evidence would likely have produced a different result; and (2) that such evidence could not have been secured by dint of ordinary diligence before the original verdict was entered.79

In contrast, Schlicht v. Bincer80 held that a Georgia superior court which rendered a decree of divorce had jurisdiction of an equitable complaint to vacate the decree, on the grounds that it was fraudulently obtained, even though the adverse party no longer resided in the state and had to be served by publication. The court did not consider the action to be in personam in nature, but concluded that judgment would be rendered on a res within the jurisdiction of the court, i.e., the divorce decree.

A most significant case development in the law of evidence should perhaps also be noted in the context of domestic relations law. The husband in Simpson v. Simpson,81 charged his former wife with adultery in a controversy over her continued custody of their child. Both the wife and her alleged paramour declined to testify concerning their relationship claiming both the fifth amendment guarantee against self-incrimination and the statutory privilege.82 In a case of first impression in this state, the supreme court held that the inference against interest may be drawn by the court as a matter of law when the privilege is invoked. Quoting from a recent opinion of the Wisconsin Supreme Court,83 Justice Ingram noted in summation:

"Since the inference is irresistible and logical in such circumstances, the court may as a matter of law draw the inference. Such an inference is based upon an implied admission that a truthful answer would tend to prove that the witness had committed the . . . act . . . .” This is particularly true in a child custody contest heard by a trial judge with broad
discretion when the inference corroborates other proof of alleged illicit conduct between the parties which affects the welfare and interests of minor children.\textsuperscript{84}

The \textit{Simpson} decision will undoubtedly produce an enormous impact upon trial tactics and strategy in the domestic relations area.

Of final interest in the area of divorce procedure is a triad of cases which deal with the procedure available to parties seeking a subsequent construction of respective responsibility under a divorce decree. In \textit{Brown v. Brown},\textsuperscript{85} the wife filed a pleading denominated “Motion for Reconsideration” in which she sought, among other things, additional instructions concerning certain insurance policies which the husband had been required to keep in force; in \textit{Rosenberg v. Rosenberg},\textsuperscript{86} the husband filed a motion for a declaratory judgment concerning his continued liability under the decree to pay alimony upon the emancipation of their children; and in \textit{Herring v. Herring},\textsuperscript{87} the husband filed simply a petition which prayed for an order seeking a declaration of a child's emancipation which, as a consequence, would relieve him from the obligation of making further child support payments.

In each case, the majority of the supreme court explicitly reserved decision on the question of whether or not such a procedure was appropriate since none of the parties in any of the three cases raised the issue by way of illustration. As Justice Nichols pointed out in the \textit{Herring} case, which contains the most amplified discussion of the problem:

\begin{quote}
The question of whether such proceeding [seeking a declaration of the husband's responsibility under the original decree] is properly permitted was not raised in this court in this case. Accordingly, the question of whether such procedure is proper where objected to is not passed upon.\textsuperscript{88}
\end{quote}

Certainly there could hardly be a more clear warning served by the majority of the Georgia Supreme Court. The three dissenters, Justices Gunter, Hall, and Ingram, vigorously asserted that there was no reason why parties bound by a divorce decree should not be able to use the \textit{Declaratory Judgments Statute}\textsuperscript{89} when they assert that a controversy persists as a result of an ambiguous decree. Many situations can be envisioned in which parties do not seek modification and indeed, could not in good faith seek modification until some adjudication of their rights and liabilities is first pronounced. Currently the only corollary of this procedural issue upon which all members of the supreme court agree is that there is no statutory authorization for the payment of a wife's attorney fees and expenses of

\begin{thebibliography}{99}
\bibitem{84} 233 Ga. at 21, 209 S.E.2d at 614.
\bibitem{85} 233 Ga. 581, 212 S.E.2d 378 (1975).
\bibitem{86} 232 Ga. 725, 208 S.E.2d 824 (1974).
\bibitem{87} 232 Ga. 464, 207 S.E.2d 452 (1974).
\bibitem{88} \textit{Id.} at 465, 207 S.E.2d at 453.
\bibitem{89} \textit{GA. CODE ANN.} §110-1101 (Rev. 1974).
\end{thebibliography}
litigation in defense of a husband’s motion for declaratory judgment.  

IV. ALIMONY

Probably no case in the area of domestic relations law has generated more publicity and public interest than *Murphy v. Murphy*, which ruled on the constitutionality of the Georgia alimony statutes. The husband challenged constitutionality on the basis that such statutes providing alimony only to wives denied husbands due process and equal protection of the law. The Georgia Supreme Court rejected the challenge. Citing the recent United States Supreme Court decision in *Kahn v. Shevin*, the court held that there was a rational basis for treating husbands and wives differently inherent in statutes which authorize alimony only for the wife upon the dissolution of the marriage. While certainly the feminist movement, the increase of married women in the labor force, and the campaign to ratify the equal rights amendment are undoubtedly signposts of change in the traditional marital roles, the Georgia Supreme Court has left it to the General Assembly to make adjustments reflecting public policy, if any, in the alimony laws.

Equally significant, but less publicized, were the court’s two decisions, which were handed down the same day, regarding the waivability of child support by a mother. There has long been a controversy in this state concerning whether a mother may waive all rights to alimony, including child support. Uncertainty has been finally put to rest in *Lanning v. Mignon*. The wife purported by agreement, incorporated later into the divorce decree, to relinquish “any right to claim alimony or support or child support, past, present, or future for herself or her minor children . . .” However, subsequently finding herself incapable of carrying the full burden, the wife filed a complaint seeking child support. In a brief opinion belying the significance of the pronouncement, the supreme court held that unless a father relinquishes all parental rights in return for a mother’s waiver of child support, the purported waiver will not block a subsequent attempt to seek support from him.

The situation was quite different in *Johnson v. Johnson*. Although the mother had received under the divorce decree both custody and the right to child support, she later sought modification. According to the trial order, the mother stated at the hearing that she did not desire to have child support since the father had been denied future visitation rights; the father, apparently relieved to have the duty to pay support ended, stated

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90. 232 Ga. at 467, 207 S.E.2d at 454 (dissenting opinion per Gunter, J.).
92. 416 U.S. 351 (1974). The Supreme Court upheld the constitutionality of a Florida statute which afforded widows a tax exemption of $500.
94. Id. at 666, 212 S.E.2d at 834.
that he would not oppose the refusal of visitation rights. However, the Georgia Supreme Court reversed, noting that the modification statute
does not allow a mother to barter away child support in return for an elimination of visitation privileges awarded to a father. . . . The right to child support belongs to the child, not the mother, and after the award has become part of the court's judgment she has no authority to waive it.64

Implicit in the court's decision in Johnson is a ruling that a denial of all future visitation rights is not tantamount to a severance of parental rights. Here the refusal of visitation rights was affirmed and the requirement for child support from the father was reinstated.

At issue in Holloway v. Holloway97 was the correctness of the jury verdict equally dividing all monies in a safety deposit box and savings account between husband and wife. Under Georgia law, all income accruing to a wife after her marriage is her separate estate;88 relying upon this right, the wife in Holloway, claimed that allocating half of these funds, which in substantial part derived from her earnings, constituted an award of alimony to the husband. The supreme court found sufficient evidence to support the jury award as an equitable division of jointly held property. This opinion serves notice that if a wife wants to preserve the right to any separate estate, she should not establish a custom of commingling funds for joint use and treating her earnings as a part of one family "lump salary."

Given the wide latitude accorded triers of fact on all issues, especially the fixing of alimony, it is a rare case which is reversed on grounds of inadequacy of support. However, this survey period produced such a rarity. Despite proven needs of a minimum of $225 per month for the care of three children, excluding medical and dental expenses even though one child was under a psychiatrist's care, and despite the husband's income of nearly $10,000 per year, the jury awarded the wife only $37.50 per week in child support. The supreme court reversed the award as per se inadequate in Harrison v. Harrison.99 Justice Ingram spoke for the court:

Regardless of the cause of the separation between the parents, their children are entitled to be supported by the father during their minority commensurate with their proven customary needs and the father's financial ability to provide for them. Awards which are substantially disproportionate to these factors, whether excessive or inadequate, should not be permitted to stand. This duty of the father is not an abstract or frivolous obligation. It is rooted deeply in the natural responsibility of a father to provide realistic financial assistance, within his means, to defray the actual expenses of the care, maintenance and education of his minor chi-
dren. These needs are collectively referred to as necessaries and include all material and educational expenses shown to be appropriate to the children's situation and needs in their experience as a part of the family of their parents and not merely funds for those needs regarded as the minimum requisites of a bare subsistence.\textsuperscript{100}

Six cases were decided during the survey years which confronted the issue of the duration of a father's obligation to support his children. The 1972 act which changed the age of majority from 21 to 18\textsuperscript{101} had a potentially enormous effect upon the parental obligation to provide support, especially regarding college or other post-high school education or training. In both Choquette \textit{v.} Choquette\textsuperscript{102} and Jenkins \textit{v.} Jenkins,\textsuperscript{103} the supreme court had before it decrees requiring support until age 21 which were entered prior to the enactment of the lower age of majority. The court in both cases ruled that the statute had no effect upon prior decrees, thus rejecting a claim of equal protection and due process. However, the court did flatly state for the first time in the Jenkins case that a father may be ordered to provide a college education at least until the child is emancipated. As Justice Hall observed for the court:

"Until majority it is the duty of the father to provide for the maintenance, protection and education of his child." [Citation omitted.] While there is an obligation to provide an education for the child, no means are provided to enforce this requirement beyond the terms of the compulsory attendance law. . . . However, once a divorce decree is entered awarding custody of the child to the mother, the husband's obligation of support for the child can be made a requirement of the decree. [Citation omitted.] The trial court therefore has jurisdiction to include in the decree a provision for education funds including expenses for attending a college during minority where the circumstances of the case warrant it. [Citation omitted.] However, any such obligation imposed by the decree terminates when the child reaches majority or marries.\textsuperscript{104}

However, since most individuals will have reached 18 before entering college, the inclusion of college expenses within the parental duty to support will be of little pecuniary solace to children seeking funds from an unwilling father. Apparently legislation will be needed to remedy the situation on a broad scale, but in the interim, several appellate decisions are useful in contemplating alternative methods for securing parental support after majority.

In \textit{Fitts v. Fitts},\textsuperscript{105} the supreme court approved a provision of the final

\begin{footnotes}
\item[100] Id. at 14-15, 209 S.E.2d at 699-10.
\item[103] 233 Ga. 902, 214 S.E.2d 368 (1975).
\item[104] Id. at 903-04, 214 S.E.2d at 370.
\item[105] 231 Ga. 528, 202 S.E.2d 414 (1973).
\end{footnotes}
decree, based upon the jury verdict, which directed the husband to set aside in trust the sum of $13,500 for the anticipated expenses of a college education for a child of the marriage. The husband challenged this provision because it was an attempt to require him to support a child past majority. The opinion shrugged off this claim by noting that under the decree, a present obligation was created to deposit the sum in trust, even though the sum was to cover a future expense. Moreover, the court emphasized a special predisposition to approve college education expenses where granted as part of the alimony award: "In this day and time a college education is no longer a luxury but a necessity."106

The judgment in Collins v. Collins107 required the husband to pay a specific sum of weekly support and, in addition, to "transfer title to the following described real estate, to a trustee for the use, benefit, education and support of the child."108 All the members of the supreme court concurred in finding that this judgment was valid and enforceable against the husband. First of all, the court held that such a trust was not void for vagueness or uncertainty because a court could fix its duration by construing the judgment to intend that the trust property was to be used for the use, benefit, education and support of the child until he becomes 18; however, the opinion observed that a court is without authority to give the trust corpus to the children after they have reached majority. By implication, the court reasoned, the trust corpus reverts to the husband upon his child's attaining majority.109

In contrast, in Clark v. Clark,110 upon a jury verdict, the decree provided for a specific sum in child support per month and also for certain real property to be turned over by the husband to the wife "in trust for the two minor children as tenants in common."

"[T]he (wife) herein shall have the right to live herein and use said property for the home of her and the two minor children until (she) remaries. Upon the two minor children, both reaching the age 21, the title to said property [shall be] vested in said children as tenants in common."

The majority literally construed Ga. Code Ann. §30-207 (Rev. 1969) to...
require a father to contribute only a "specified amount" for support and not to include a liability for a non-cash estate for dependent children. The majority decision, vitiating this provision of the decree, relied simply upon treatise law that a husband's responsibility for the support of his children does not extend to awarding them title to his property. Neither the majority nor the dissenting opinion mentions a possible distinction between a trust which purports to simply produce income during dependents' minority, vis a vis the additional provision in Clark which purported to vest title to such property in fee upon the dependents' attaining the age of majority.

During the survey period, the supreme court reviewed several cases presenting questions about the authority of trial courts to impose certain restrictions upon parties to a divorce action. Barnett v. Barnett\textsuperscript{112} presented a wife's challenge to the validity of a temporary order which, among other things, enjoined both parties "'from creating any new or additional indebtedness by the use of charge cards, charge accounts or other extension of credit to them. . . .'"\textsuperscript{113} The supreme court held that the attempted prohibition of the wife's incurring debts in her individual capacity was void. While the trial court would be authorized to prohibit the wife from using the credit of her husband for necessaries, it could not impinge upon her statutory right to contract as a femme sole. Likewise, in Maloof v. Maloof,\textsuperscript{114} the trial court was held to have gone too far in enjoining each party from "'discussing the other party with either of the children; except in the most unusual and most unlikely circumstance that the child's morals and welfare require any such discussion.'"\textsuperscript{115} While the court might properly have required the parties not to make disparaging remarks about each other, it could not forbid discussion altogether.

Swindell v. Swindell\textsuperscript{116} is a case of first impression in Georgia which presents the issue of whether a litigant can rely upon that part of a verdict with which he is satisfied and yet at the same time challenge another part of the same verdict. The jury had granted a divorce to the husband but granted certain specified property to the wife as permanent alimony. The husband filed what the court termed a "motion for a partial new trial" seeking review of the award of alimony granted his wife. In an unusually lengthy opinion, the supreme court approved the use of such a novel procedural action insofar as the issues can be shown by the movant to be severable. Unfortunately, the husband's victory in Swindell was pyrrhic: his new procedural device was approved, but, upon review, the grounds urged upon appeal were found to be without merit.

As has been the recent trend in decisions regarding alimony, many cases

\textsuperscript{112} 231 Ga. 808, 204 S.E.2d 168 (1974).
\textsuperscript{113} Id. at 810, 204 S.E.2d at 169.
\textsuperscript{114} 231 Ga. 811, 204 S.E.2d 162 (1974).
\textsuperscript{115} Id. at 812, 204 S.E.2d at 163. The court reversed a contempt citation against the husband for a violation of this prohibition.
during this survey period arose with the framework of petitions for modification. Until *Garcia v. Garcia*,\textsuperscript{117} there was great conflict in opinion concerning the language in an agreement or decree which was essential to preserve the right of the parties to seek future modification; specifically, it was not at all certain whether, if a judgment were silent on the issue of modification, the parties by failing to specifically reserve the right had thereby waived it. In the course of the *Garcia* opinion, Justice Jordan gave a very helpful summary of past precedents and held that the right of modification must be "clearly and expressly waived."\textsuperscript{118}

*Whitley v. Whitley*\textsuperscript{119} is a valuable opinion on the effect of parties' agreement to modify custody arrangements of a divorce decree. In this case the parties entered into a written agreement stipulating that a change of conditions had occurred and that the best interests of the child would be served by a change of the child's custody to his father. The parties also stipulated that a petition seeking modification was envisioned and waived the right of further notice of and presence at a hearing on the issue. Five months later the father duly filed a petition to modify, attached a copy of the agreement, and was awarded custody of the child by the court. The mother later changed her mind and filed a habeas corpus for the child's return asserting that the modification order was invalid because she was not personally served, and, in addition, challenged that there had been a change in circumstances necessary to support the modification order. Although the supreme court noted that a mere agreement between parties is ineffective to change custody, where the court either hears evidence or has before it unequivocal and undisputed allegations within a petition which assert a change in condition effecting the child, the order is valid and effective to modify a prior judgment. Furthermore, observed the court, a voluntary relinquishment of custody is per se sufficient to show a change in condition affecting the welfare of a child.

Of interest are lawyers' attempts to avoid the rigors of future modification litigation altogether and yet still protect their clients' interests against economic reverses. One most ingenious attempt by counsel to avoid future periodic petitions for modification through the judicial process was, however, disallowed by a majority of the supreme court in *Fitts v. Fitts*.\textsuperscript{120} Built into the terms of the parties' separation agreement and approved by the trial court, was a provision that the terms of support would be adjusted biennially based upon changes reflected in the Consumer Price Index as compiled by the United States Department of Labor. The majority simply termed the reference to the Price Index "an attempt to provide for an illegal modification of alimony" with no discussion of any rationale. The two dissenters, Justices Jordan and Gunter, related the extensive use of the

\textsuperscript{117} 232 Ga. 869, 209 S.E.2d 201 (1974).
\textsuperscript{118} Id. at 871, 209 S.E.2d at 202.
\textsuperscript{120} 231 Ga. 528, 202 S.E.2d 414 (1973).
Index in computing retirement and pension plans and cited the court’s own recent precedent in *Golden v. Golden*.\(^{121}\)

In *Golden*, the supreme court had approved future periodic adjustments based upon a percentage of the husband’s income to be computed upon any change in his “net compensation after taxes.” The use of the Consumer Price Index may perhaps be distinguished from the *Golden* standard in that the Index measures buying power mirrored in increased costs of living to the dependent wife; it has been repeatedly held by the supreme court that the question of dependents’ needs is not reached until the threshold showing of an increase or decrease in the husband’s income has been accomplished.\(^{122}\)

*McCoy v. Pinnell*\(^{123}\) is a significant modification case in which the wife claimed that, given the fact that the husband’s hourly wages had doubled in the interim since the decree, the trial court had abused its discretion by simply ordering an increase in payment from $20 to $30 per week and hospitalization insurance coverage for their child. In affirming the trial court decision, the supreme court cited as justification the fact that the husband had remarried and thus had new and additional responsibilities, as well as the fact that part of his additional income was attributable to overtime work. Although the case was not cited or distinguished in the court’s opinion, previously the court has ruled that remarriage of the husband would not justify a reduction.\(^{124}\)

Finally, worthy of note in the area of alimony are two cases construing the Uniform Reciprocal Enforcement of Support Act (URESA), that little-used but often quite effective means of securing support from a father who has moved to another jurisdiction.\(^{125}\) Although this statute is primarily an interstate compact, it clearly intends to provide also a means for compelling support where both parties are residents of Georgia but of different counties.\(^{126}\) Accordingly, in *Haire v. Branch*\(^{127}\) the wife filed a petition for support in the county of her residence, and, under the statute, the proceedings were transferred to the superior court of the county of the husband’s residence for a hearing. The husband raised the defense of lack of jurisdiction as well as the defense that since, in essence, the wife was seeking a modification of a previous decree, the petition was fatally defective in failing to show there had been a material change in the husband’s financial position. In affirming the case, the court of appeals rejected the husband’s arguments.

In *Thibadeau v. Thibadeau*,\(^{128}\) the parties were divorced in DeKalb

\(^{121}\) 230 Ga. 867, 199 S.E.2d 796 (1973).
County, and the husband was granted visitation rights and ordered to pay $100 per month. Subsequently the wife moved with the children to California and sought to enforce rights of child support by filing a URESA action in DeKalb County where the husband still resided. The husband filed a counterclaim whereby he sought custody of the children and modification of the original decree. Citing precedent from Florida, the court of appeals held that counterclaims are impermissible in URESA actions because the party seeking support does not subject himself to the jurisdiction of the court to hear related claims. The court affirmed that part of the trial order which required the mother to reveal her current address in California and required that the transmittal of support under the order be withheld until she furnished such information.

V. ENFORCEMENT PROCEDURES

There was an important decision during this survey period which considered the issue of the constitutionality of Ga. Code Ann. §30-204 (Rev. 1969) which provides that an alimony judgment may be enforced by a writ of fieri facias. Based upon recent successful due process challenges to summary procedures resulting in a taking of property, the husband in Wood v. Atkinson challenged the Georgia procedure whereby his former wife, relying upon an alimony judgment, applied for and received an execution against him for the amount of arrearage claimed in her affidavit. The court, upholding this statute's constitutionality, noted that no "taking" of property occurred until after levy and sale, and that the Georgia procedure which provides for an affidavit of illegality, would fully protect any defense concerning either amount owed, or defects in the execution issued, and would afford a party an opportunity to be heard on the merits of his claims.

In Bryant v. Bryant, the supreme court overruled prior decisions and placed alimony judgments in conformity with other types of judgments, subjecting all to the same rules of dormancy and the statute of limitations. Thus, a lump sum alimony judgment is dormant after seven years and barred in toto after ten years. However, judgments exacting alimony in installment payments will be treated somewhat differently: all installments unpaid and due are collectable through execution for the seven years preceding the recording of the execution and only those payments due in the period of seven to ten years prior to the recording of an execution may be revived.

The supreme court, in *Hilltop Auto Salvage, Inc. v. Mason*, rejected a modern challenge to rather hoary precedent. The court confirmed that it is still the law in this state that a garnishment action for unpaid alimony is not subject to the usual statutory exemptions and thus, in theory at least, a husband’s entire wages are subject to enforcement of alimony claims by garnishment.

*Cleveland v. Tully* concerned an action by a wife’s administrator to force the sale of the former marital domicile with a division of the proceeds and all child support payments due and unpaid at the time of the wife’s death. Under the terms of the divorce decree, the wife was given exclusive use of the home until she married or elected to move out; upon the occurrence of either contingency, the property was to be sold and divided equally. The court held that since neither specified contingency had occurred prior to the wife’s death, the former husband was entitled to the property free from any claim of the wife’s estate. The court also denied recovery of any past due child support payments reasoning that any such payments would have been due the wife as trustee for the child; since the former husband became, upon her death, the child’s custodian, it would be preposterous to exact recovery from him immediately payable to himself on behalf of the child. Any monies the deceased mother might have been forced to expend because of the father’s non-support were considered voluntary payments.

In *McDonald v. McDonald*, under the terms of the divorce decree, the husband was ordered to pay off in full a promissory note owed by him and his wife to the husband’s parents. The parents subsequently brought suit on the note against both their son and his former wife, and the wife obtained an injunction against the pursuit of the action against her, claiming that she had been held harmless under the divorce decree. The supreme court vacated the injunction, noting that a divorce decree may not affect the rights of strangers to its judgment. As a maker of the note, the wife’s only remedy was against her former husband for contempt of the decree.

Several significant cases during the survey period dealt with the nature of cognizable issues in actions seeking contempt. Although the court was divided, in *McNeal v. McNeal* a majority ruled that provisions of the Civil Practice Act authorizing permissive counterclaims arising “out of the transaction or occurrence that is the subject matter of the opposing party’s claim” have no applicability to contempt actions. Thus, the court rei-

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136. See *Huling v. Huling*, 194 Ga. 819 22 S.E.2d 832 (1942); *Bates v. Bates*, 74 Ga. 105 (1884). Because the Georgia courts had not recently ruled on this issue, there was doubt as to the continued vitality of the rule.
137. See *GA. CODE ANN.* §46-208 (Rev. 1974).
142. *Cf.* *White v. White*, 233 Ga. 289, 210 S.E.2d 817 (1974) in which treating a counter-
terated that the sole issue for adjudication at a contempt hearing strictly concerns the existence of contempt.

Similarly, although it now appears clear beyond question that in a contempt action a trial court is without authority to discharge arrearages or to alter the terms of the support obligation as originally imposed,144 apparently the trial courts continue to attempt to make such modifications. In Anderson v. Anderson,144 the supreme court reiterated that the exclusive procedure for seeking adjustments in the terms of a divorce judgment is by a petition for modification under Ga. Code Ann. §§30-220 through 30-225 (Rev. 1969) and reversed an order relieving the husband from paying a portion of the arrearage. In Mann v. Malone,145 as a partial defense to a contempt action, the husband introduced an agreement signed by his former wife on August 31, 1972, which purported to relieve him of arrearages due between the decree in 1971 and that date. In the order adjudging the husband in contempt, the trial court apparently included all arrearages, including those accruing prior to August 31, 1972, in computing as a finding of fact the arrearages owed. The trial court, in its judgment, then excused the arrearages purportedly released by the wife in the agreement. The supreme court reversed and ordered stricken that part of the contempt judgment which relieved the husband of liability for the 1971-73 arrearages, although the opinion's rationale is not at all clear.146

In Roberts v. Roberts,147 the supreme court held that where a husband had been held in contempt of court for failing to make child support payments under a decree, the husband was not relieved of his obligation even where the two older children had chosen to reside with their father. There had been no hearing on modification and the tacit recognition by the wife that she could not force her children, both out of high school, to live with her did not amount to a consent to the change in circumstances.

There were three cases dealing with the specificity of language in a divorce judgment which is necessary to support later actions for enforcement by contempt. It takes so little draftsmanship to insure future enforceability on behalf of clients that it is difficult to understand why this aspect

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146. The decision may have been based upon the internal inconsistencies between findings of fact and conclusions of law in the trial court's opinion; in contrast, the supreme court might be denying the power of the wife to execute a release aside from any issue whether such a release would be binding upon a court. Although the Mann opinion recognizes that a wife holds child support funds in trust for the children, the court still declined to rule absolutely that as a trustee, a wife may not in her individual capacity release a former spouse from child support obligations. However, the court's more recent decisions in Johnson v. Johnson, 233 Ga. 664, 212 S.E.2d 835 (1975) and Lanning v. Mignon, 233 Ga. 665, 212 S.E.2d 834 (1975) unequivocally deny a mother the right to waive child support unless the father has relinquished all parental rights to the child.
of domestic relations practice continues to trouble lawyers. Bowen v. Bowen feels amply illustrates how little, by way of specific provision in a judgment, is required. The supreme court approved the following catch-all sentence as sufficient to support a later action for contempt of visitation rights as established in an agreement between the parties: "'The court awards custody of the child as follows: In accordance with that certain agreement of the parties which is attached hereto and made a part hereof, and the parties are ordered to comply with all the terms thereof.'" Similarly, in Maloof v. Maloof, an order requiring the husband to "'timely make all required payments in order to satisfy and keep current all mortgages and encumbrances existing against the parties' said residence,'" thereafter citing its address, was held sufficiently direct and precise to support a later adjudication of contempt where the husband became delinquent in making such payments.

However, in Bailey v. Bailey, the decree which provided simply that "'[t]he household furnishings located at 425 4th Street, Shannon, Georgia is awarded to the plaintiff,'" was held inadequate either to compel a husband to make payments upon the furniture to avoid its repossession or to support a citation for contempt.

The supreme court further illuminated its views on the enforceability of orders ambiguous as to a husband's liability in Ramsey v. Ramsey. The judgment in the divorce action there provided that the wife was to remain in possession of their mobile home for a year and if, within that time, the wife elected to assume the monthly mortgage payments and become responsible for the balance, the husband would transfer his equity to her. The judgment was silent concerning who would be responsible for making the mortgage payments until such time as the wife decided whether or not she wanted the property. Since no express language bound the husband to make the payments on the mortgage, the supreme court refused to imply such and reversed the order finding him in contempt.

The Ramsey decision also resolves a long-standing conflict about when a contempt order becomes appealable. Overruling previous decisions indicating that an appeal could be taken only upon a denial of an application for discharge upon a contempt conviction, the supreme court has now held that an appeal is ripe upon the entry of a contempt order for violation

149. Id. at 671, 198 S.E.2d at 863 (emphasis added).  
151. Id. at 812, 204 S.E.2d at 163.  
153. Id. at 854, 204 S.E.2d 630.  
155. According to Ga. CODE ANN. §6-701 (Rev. 1975), appeals are authorized "'from all judgments involving applications for discharge in bail trover and contempt cases.'" The ambiguity created by this statute was whether the phrase "applications for discharge" modifies both contempt actions and bail trover actions or only its direct antecedent, "bail trover" cases.
either of a temporary order or final judgment.

Perhaps the single most important contempt case is *Parker v. Parker*, in which the supreme court overruled precedent to join Georgia with other states in the trend permitting foreign alimony decrees to be enforced by the same equitable remedies, including contempt, that are applicable in enforcement of a Georgia decree. When a divorce decree from another state is domesticated in Georgia, it is entitled to the same full faith and credit in this state as it has by law and usage in the courts of the state in which it was rendered. Appeals from an order domesticating a foreign decree lie in the Georgia Court of Appeals.

In *Crocker v. Crocker*, the wife filed a motion for a special hearing alleging that the husband "'had failed and refused to abide the order of the Court and has absconded with the child . . . .'" Under the terms of the previous court order, all parties were under an express duty not to take the child out of state, and the grandparents were specifically restrained from interference and harassment of either party in the custodial arrangement. The paternal grandfather was subpoenaed by the wife although he was not joined as a party in the special hearing. The trial court subsequently found the grandfather to be in contempt of its prior order, but the court of appeals reversed. In yet another legal *tour de force* by Judge Clark, it was held that in such cases of constructive or indirect contempt, the contemnor must be given personal notice by rule nisi and an opportunity to be heard before he can be adjudicated in contempt.

Of final interest to practicing attorneys is the case of *Berman v. Berman*. There the trial court awarded a wife's attorney $1,800 in fees for his 45 hours of work on various aspects of the parties' contempt litigation. Noting that this current action was the fifth appeal in this divorce case, the supreme court affirmed, refusing to find the award excessive.

### VI. Adoption, Legitimation And Name Change

There were four adoption cases decided during the survey period which turned on the issue of parental consent for the adoption. In *Perry v. Thomas*, the mother objected to the adoption of her illegitimate child, alleging that she was misled concerning her purported consent, that she had been denied access to the investigative report made by the local department of family and children services, and that one of the petitioners had been absent from the hearing. The trial court's order of adoption was reversed by the court of appeals for several reasons. The court first noted

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160. *Id.* at 588, 208 S.E.2d at 603.
that the absence of one of the petitioners from the final hearing was not
grounds for reversal, but that the trial court’s failure to examine that party
under oath prior to entry of its order was. The appellate court also con-
cluded that the requirement of Ga. Code Ann. §81A-152 (Rev. 1972) that
separate findings of fact be set forth in the final order, was mandatory in
adoption proceedings. Since the evidence raised issues of improperly ob-
tained consent and the moral fitness of the petitioners (they were not
legally married), the court’s findings on these points became essential to
review. Finally, the trial court’s ruling that the investigative report was,
as a matter of law, for the court’s eyes only, was error. Whether the particu-
lar application to see the report set forth good cause or might have, in the
court’s discretion, been refused was not decided.

In Fulton v. Schneider163 the court of appeals sustained the trial court’s
refusal to enter an order of adoption on the grounds that it was not in the
best interest of the child. The mother had consented in writing to adoption
about six months after the infant’s birth. She had had a difficult preg-
nancy and was separated from her husband because of his drinking prob-
lems. About one week after signing the consent, the mother changed her
mind. Based largely on this change of heart, the welfare department’s
investigative report disapproved the adoption. The appellate court noted
that the report of the department of family and children services, because
of that agency’s experience and study, was entitled to great weight. The
court also concluded that the mental and physical stress that was on the
mother was sufficient to defeat the necessary “unequivocal” nature of the
consent. The supreme court, in Smith v. Berry,164 affirmed a verdict setting
aside the adoption of an illegitimate child on the theory that material
misrepresentations of fact made by the adoptive parents to the mother
invalidated the latter’s consent. The evidence showed that the maternal
grandmother had told the mother that her consent was the only way to
keep the child in the family and that the parent-child relationship would
not be altered. Although this testimony was brought out on direct exami-
nation of the mother, it was corroborated by the maternal grandfather.

Finally, in Ehrhart v. Brooks,165 the court held the consent of minor
parents to the adoption of their child to be as binding as if they were in
all respects sui juris. The court found the legislative authorization of minor
parents to consent to adoption contained in Ga. Code Ann. §74-403(5)
(Rev. 1973) was not a denial of equal protection or due process of law.
When construed in pari materia with Ga. Code Ann. §74-408 (Rev. 1973),
the two sections also permitted waiver of service of notice of further pro-
ceedings. In the case at bar, the court applied the doctrine of laches to
prohibit the natural mother from proceeding to set aside the adoption of
her child some two years after entry of the final order. The proceedings had

been instituted almost three years earlier, while the mother was yet a minor.

*Best v. Acker*\(^{166}\) is an unusual case in which legitimation of a child sought by its putative father was denied and affirmed. Under the legitimation statute,\(^{167}\) a mother may file objections to a petition to legitimate her child, and in at least two cases in the past, her objections have been held sufficient to block the legitimation.\(^{168}\) Here the mother had released her rights to custody of the child to the Georgia Department of Human Resources for adoptive placement; however, the court of appeals held that she still had standing to object to attempts by the father to legitimate the child. The mother objected to the legitimation, asserting that it was simply a ploy upon which to seek custody later for the paternal grandparents and that the action was brought merely to embarrass and humiliate her in the community. The sole allegation regarding the interests of the child was that the father, age nineteen, had no means to support the child. The court of appeals found no abuse of discretion in denying the petition, although the opinion reiterates that the standard governing legitimations is the best interest and welfare of the child.

*Tolbert v. Tolbert*\(^{169}\) is an en banc decision of the Georgia Court of Appeals which produced three separate opinions which collectively form the best analysis of the rights of minor children to a change of name under Ga. Code Ann., ch. 79-5 (Rev. 1973); unfortunately, the case is now moot. Section 79-501 was amended by the legislature in 1973, after the trial court decision in *Tolbert*, to require the written consent of parents to a name change unless they are dead or have abandoned the child.

### VII. Legislation

In keeping with the increased use of drivers’ licenses for a myriad of identification purposes, the General Assembly has now authorized their use as proof of age for individuals seeking marriage licenses.\(^{170}\) Ga. Code Ann. §53-206 (Supp. 1975) now permits proof of age upon a showing of birth certificate, driver’s license, or baptismal certificate.

Three legislative acts amended the Uniform Reciprocal Enforcement of Support Act.\(^{171}\) Residents of the Dominion of Canada owing a duty of support to dependents residing in Georgia can now be reached by a URESA action initiated here; Canada now joins the fifty states in the support compact.\(^{172}\) The legislature has now designated the Department of Human

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Resources as the State Information Agency responsible under URESA to maintain a register of cooperating courts within Georgia and in other states and to approve all requests for payment issued by Georgia district attorneys who have initiated URESA actions.\textsuperscript{173} In addition, each district attorney is now required, in a URESA action, to represent a plaintiff who is either an applicant, or recipient of public assistance, or a dependent child.\textsuperscript{174}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{173} Ga. Laws, 1975, p. 1141.
\item \textsuperscript{174} Ga. Laws, 1975, p. 781.
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