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Domestic Relations

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The survey year produced forty-two family law appellate decisions. Of that number, sixteen are digested here. Three cases and new legislation require strict application of the child support guidelines. Two decisions refine the theory of equitable division of property. Grandparents can no longer seek judicially proscribed visitation rights. Parents can now be directed to insure their lives for the benefit of their minor children.

I. DIVORCE

A. *Equitable Division*

In *Bass v. Bass*[1] the jury awarded Mrs. Bass a portion of her husband's interest in a family corporation. Because Mr. Bass had been given his fifty-one percent interest in the enterprise, he argued that the property was separate and the issue of its division was erroneously submitted to the jury.[2] The Supreme Court of Georgia held that the question of whether the husband's interest was marital property was a mixed question of law and fact and affirmed the lower court's decision.[3] Retreating somewhat from its reasoning in *Goldstein v. Goldstein*,[4] the court stated:

> [T]he classification of property as either marital or non-marital is not always exclusively a question of law. What items of property can legally constitute a marital or nonmarital asset is a question of law for the court. However, whether a particular item of property actually

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1. 264 Ga. 506, 448 S.E.2d 366 (1994).
2. *Id.* at 506, 448 S.E.2d at 367.
3. *Id.* at 508, 448 S.E.2d at 368.
4. 262 Ga. 136, 414 S.E.2d 474 (1992).

> constitutes a marital or nonmarital asset may be a question of fact for the trier of fact to determine from the evidence.[5]

In the instant case, the plaintiff failed to allege that the appreciation in the value of the husband's interest arose solely from market forces.[6] Accordingly, the question of what portion of that interest was marital was for the jury.[7] *Janelle v. Janelle*[8] applied the rule in *Bass*[9] to the issue of alleged appreciation in a premarital corporation and the marital residence.[10] The court noted that contentions regarding time of acquisition of the residence and funds used for its purchase were within the province of the source of funds rule.[11]

B. Alimony

The trial court, sitting without a jury, entered a divorce decree awarding the wife permanent alimony in *Allen v. Allen*.[12] The decree, "provided that the 'alimony payments shall not terminate upon the remarriage of the Plaintiff or upon her cohabitation in a meretricious relationship . . . .'"[13] The supreme court held that the trial court had not exceeded its authority but construed the cohabitation clause "to mean that such cohabitation does not create a self-executing termination of the alimony obligation."[14] Since the decree did not prohibit future

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5. 264 Ga. at 507-08, 448 S.E.2d at 367-68.
6. *Id.* at 508, 448 S.E.2d at 368.
7. *Id.* By way of dicta, the supreme court stated:

> So as to provide the jury with the applicable legal guidelines in making this determination, it would have been proper for the trial court to have instructed the jury: that it should first find whether appreciation, if any, in Husband's interest in the corporation during the marriage was attributable to his or Wife's individual or joint efforts or to market forces; that any appreciation found to be attributable to market forces would not be a marital asset subject to equitable division, but would remain his separate non-marital asset; that any appreciation found to be attributable to his or Wife's individual or joint efforts would be a marital asset subject to equitable division; and, that, as a marital asset, any appreciation found to be attributable to his or Wife's individual or joint efforts should be equitably divided between them. We believe that, in all cases involving appreciation of otherwise non-marital assets, such instructions would be helpful to the jury and the litigants.

Id.

8. 265 Ga. 116, 454 S.E.2d 133 (1995).
9. *See generally* 264 Ga. 506, 448 S.E.2d 366.
10. *See* 265 Ga. 116, 454 S.E.2d 133.
11. *Id.* at 117, 454 S.E.2d at 133. *See* Thomas v. Thomas, 259 Ga. 73, 377 S.E.2d 666 (1989).
12. 265 Ga. 53, 452 S.E.2d 767 (1995).
13. *Id.* at 53, 452 S.E.2d at 767.
14. *Id.* at 54, 452 S.E.2d at 768.

modification of the alimony obligations, the trial court had not abused its discretion.[15] A divorce jury awarded the wife no alimony, but did equitably divide property in *Andrews v. Whitaker*.[16] The husband was required to pay the wife one half of his retirement pay, to purchase an annuity for her, and to provide her with two tickets to the Masters Golf Tournament every odd-numbered year. The wife remarried and the husband brought a declaratory judgment action, contending his obligations were periodic alimony payments which were terminated by her remarriage. The trial court denied the husband relief.[17] The appellate court affirmed as to the retirement pay but found the other obligations to be of an indefinite duration, and accordingly, alimony which was terminated by the wife's remarriage.[18]

C. *Enforcement*

In *Bryant v. Employees Retirement Systems*,[19] a divorce decree which ordered a nonparty state agency to pay to the wife a portion of her husband's retirement benefits was not enforceable against the agency.[20] Pension plans for employees of state governments are not subject to the Retirement Equity Act of 1984.[21] Although state retirement benefits which are marital property are divisible at divorce, there is no statute permitting transfer of the employee's rights to another person.[22] The employee spouse can be ordered to pay the benefits to the nonemployee spouse after receipt.[23] In *Parker v. Eason*,[24] the former wife sought to enforce a ten-year-old child support judgment by citation for contempt. The former husband defended on the ground that the judgment was dormant.[25] The contempt pleadings did not seek revival of the judgment.[26] The court reversed the trial court's holding that the contempt

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15. *Id.*
16. 265 Ga. 76, 453 S.E.2d 735 (1995).
17. *Id.* at 76, 453 S.E.2d at 735.
18. *Id.* at 76-77, 453 S.E.2d at 736. The court overruled Fisher v. Fredrickson, 262 Ga. 229, 416 S.E.2d 512 (1992), to the extent it held payment of retirement benefits was an alimony obligation. The *Andrews* court found the benefits to be deferred compensation for services performed during the marriage. Accordingly, the benefits were property to be divided.
19. 216 Ga. App. 737, 455 S.E.2d 839 (1995).
20. *Id.* at 738, 455 S.E.2d at 841.
21. *Id. See* 29 U.S.C. §§ 1003(b)(1), 1002(32) (1985 & Supp. 1995).
22. 216 Ga. App. 738-39, 455 S.E.2d at 841.
23. *Id.* at 738, 455 S.E.2d at 841.
24. 265 Ga. 236, 454 S.E.2d 460 (1995).
25. *Id.* at 236-37, 454 S.E.2d at 460. *See* O.C.G.A. § 9-12-60 (1991).
26. 265 Ga. at 236-37, 454 S.E.2d at 460. *See* O.C.G.A. § 9-12-61 (1991).

citation was an action for revival.[27] The court remanded the case for determination of which unpaid amounts were more than seven years old and therefore unenforceable.[28] The majority opinion is unclear as to whether a prayer for revival would suffice. However, the special concurrence stated that only an action for revival or an application for a writ of scire facias is legally sufficient.[29] In *Paul v. Paul*,[30] the reach of the long-arm statute[31] was not long enough to hold on to the former wife's contempt action for past due alimony.[32] The trial court erred in denying the former husband's motion to dismiss for lack of personal jurisdiction where the parties had lived in Georgia for less than a year before they ended their twenty-two year marriage and where neither party was a Georgia resident at the time of the filing of the contempt proceeding.[33]

II. CHILDREN

A. *Child Support*

The child support guidelines[34] were repeatedly underscored during the survey year. In *Ehlers v. Ehlers*,[35] the supreme court remanded an order modifying downward the former husband's child support obligation.[36] The trial court found a substantial decrease in the former husband's income and a substantial increase in the income of the former wife but made no finding of special circumstances in setting the new award.[37] The supreme court held that the trial court must make written findings of special circumstances in order to deviate, up or down, from the child support guidelines.[38] Moreover, the court found that "indirect payments," such as insurance premiums, can only be used to vary the guideline's required support award which is ascertained by multiplying the applicable statutory percentage by the obligor's gross

27. 265 Ga. at 237, 454 S.E.2d at 460.
28. *Id.*, 454 S.E.2d at 461.
29. *Id.* at 238, 454 S.E.2d at 461 (Carley, J., concurring).
30. 264 Ga. 234, 444 S.E.2d 770 (1994).
31. O.C.G.A. § 9-10-91(5) (1991 & Supp. 1995).
32. 264 Ga. at 435, 454 S.E.2d at 771.
33. *Id.* at 434, 454 S.E.2d at 771. The former husband had not lived in Georgia since 1979 and the former wife had been a Florida resident for more than four years.
34. O.C.G.A. § 19-6-15(b) (1991 & Supp. 1995).
35. 264 Ga. 668, 449 S.E.2d 840 (1994).
36. *Id.* at 671, 449 S.E.2d at 843.
37. *Id.* at 668, 449 S.E.2d at 842.
38. *Id.* at 669, 449 S.E.2d at 842.

income.[39] Finally, the support obligation is to be based on the number of children for whom support is to be ordered in the proceeding.[40] If the obligor has additional children, such obligations can vary the final award.[41] In *Faulkner v. Frampton*,[42] the court remanded the trial court's upward modification of child support for the determination of the obligor's gross income and a calculation of the required support award.[43] In *Pearson v. Pearson*,[44] the trial court approved an oral settlement agreement which increased the obligor's child support obligation.[45] Because the order did not find that changed financial circumstances existed, did not review the agreement in light of the child support guidelines, and did not contain written findings of special circumstances, the case was reversed and remanded for further consideration.[46] *Miller v. Tashie*[47] shifted the focus away from the guidelines.[48] In that case, the trial court dismissed the former husband's petition for downward modification. Since the divorce of the parties, the former husband's income had increased.[49] The supreme court held the increase in income was only part of the financial circumstances which might justify a modification and did not alone bar the action.[50]

B. Child Custody

In the divorce action in *Ivey v. Ivey*,[51] the custody of two minor children was at issue. The wife had adopted the oldest child who came from the husband's previous marriage. The trial court awarded custody of both children to the wife.[52] The supreme court rejected the father's argument that the biological parent should be rebuttably presumed entitled to custody.[53] The court found the test in such a case to be "the same as in any child custody case, i.e., what is in the best interest of the

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39. *Id.* at 670, 449 S.E.2d at 842-43. *See* O.C.G.A. § 19-6-15(c) (1991 & Supp. 1995).
40. 264 Ga. at 670, 449 S.E.2d at 843. *See* O.C.G.A. § 19-6-15(b)(5) (1991 & Supp. 1995).
41. 264 Ga. at 670-71, 449 S.E.2d at 843.
42. 216 Ga. App. 785, 456 S.E.2d 88 (1995).
43. *Id.* at 785, 456 S.E.2d at 89.
44. 265 Ga. 100, 454 S.E.2d 124 (1995).
45. *Id.* at 100, 454 S.E.2d at 125.
46. *Id.* at 101, 454 S.E.2d at 125.
47. 265 Ga. 147, 454 S.E.2d 498 (1995).
48. *Id.* at 147, 454 S.E.2d at 498.
49. *Id.* at 147-48, 454 S.E.2d at 498-99.
50. *Id.* at 149 n.2, 454 S.E.2d at 499 n.2.
51. 264 Ga. 435, 445 S.E.2d 258 (1994).
52. *Id.* at 435, 445 S.E.2d at 258.
53. *Id.* at 437, 445 S.E.2d at 260.

child."[54] In *Villenueve v. Richbourg*,[55] custody had been awarded to the paternal great grandmother when the parents divorced. Ten years later the mother sought to modify the award contending that the third-party custodian had the burden of proof because the mother had never been found to be unfit. The trial court denied the mother's petition and the appellate court affirmed.[56] The parent's prima facie right to custody was lost upon the award of permanent custody to a third party, thereby reversing the roles of the parties.[57] The absence of findings of the mother's unfitness in the original custody order did not change the result because the mother waived those findings.[58] In another case, the trial court changed the mother's joint physical custody to primary physical custody where the weekly shuttling between the homes of the parents was confusing and distressing the child.[59] The appellate court affirmed, applying the any evidence rule.[60] In *Turner v. Wright*,[61] the father of an illegitimate child was held to have lost his "opportunity interest" to develop a relationship with the child.[62] Although the father brought his petition to legitimate one month after the child's birth, the court was clearly influenced by his lengthy criminal record, history of drug and alcohol involvement, and inability to hold a job.[63] The court's finding that the father lost his right to establish a family relationship by reason of his criminal conduct is significant.[64] The court stated, "[i]n the present case, after Turner was aware he was to be a father, he voluntarily committed criminal acts .... [His] disregard of his opportunity interest during Wright's pregnancy is as significant as such a disregard after the child is born."[65]

C. Visitation

The grandparent visitation statute was held unconstitutional in *Brooks v. Parkerson*.[66] The maternal grandmother brought an original

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54. *Id. See* O.C.G.A. § 19-8-19(a)(2) (1991).
55. 217 Ga. App. 354, 457 S.E.2d 821 (1995).
56. *Id.* at 354, 457 S.E.2d at 822.
57. *Id.* at 355, 457 S.E.2d at 823.
58. *Id.*
59. In the Interest of S.D.J., 215 Ga. App. 779, 779-80, 452 S.E.2d 155, 156 (1994).
60. *Id.* at 780-81, 452 S.E.2d at 157.
61. 217 Ga. App. 368, 457 S.E.2d 575 (1995).
62. *Id.* at 369, 457 S.E.2d at 576.
63. *Id.* at 370, 457 S.E.2d at 577.
64. *See id.*
65. *Id.* at 369, 457 S.E.2d at 576.
66. 265 Ga. 189, 194, 454 S.E.2d 769, 774, *petition for cert. filed*, 63 U.S.L.W. 3908 (1995).

action for visitation under the provisions of O.C.G.A. § 19-7-3.[67] Both of the child's parents opposed the action. The trial court denied the parents' motion to dismiss which challenged the constitutionality of the statute.[68] The supreme court struck down the statute holding that it neither clearly promoted the health or welfare of children nor required a showing of harm to children before state interference in their parent-child relationship.[69] The court observed the absence of a body of evidence which shows that the relationship of grandparent and child is always or even predominantly beneficial to the child.[70]

III. LEGISLATION

Once again the General Assembly amended the child support guidelines. This year the changes were more extensive than usual but primarily were designed to ensure strict compliance with the statute. The General Assembly revised O.C.G.A. § 19-6-15(b)[71] to require written findings of the gross incomes of the father and mother and the presence or absence of special circumstances per O.C.G.A. § 19-6-15(c) in the final verdict or judgment and in agreements of the parties.[72] As a corollary to the amendment to the guidelines statute, the legislature revised O.C.G.A. § 19-5-12[73] to change the form of the final judgment and decree of divorce and to require juries to answer special interrogatories when child support is being determined.[74] A new statute was passed authorizing the court to order either or both parents to obtain and maintain insurance on their lives for the benefit of their minor children in child support cases.[75] The obligation to maintain insurance is terminable on the same conditions as other child support obligations.[76]

67. 265 Ga. at 189-90, 454 S.E.2d at 770.
68. *Id.*
69. *Id.* at 194, 454 S.E.2d at 774.
70. *Id.*, 454 S.E.2d at 773.
71. O.C.G.A. § 19-6-15(b) (1991 & Supp. 1995).
72. *Id.*; O.C.G.A. § 19-6-15(c) (1991 & Supp. 1995).
73. O.C.G.A. § 19-5-12 (1991 & Supp. 1995).
74. *Id.*
75. *Id.* § 19-6-34 (Supp. 1995).
76. *Id.*