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Domestic Relations

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by Barry B. McGough*

Of the forty-six cases decided during the survey year, fifteen are digested in this Article. Two custody cases are of special importance, one dealing with application of federal law and the other with joint custody. The remaining cases address smaller points across a familiar judicial landscape. This Article also highlights amendments to the child support guidelines.

I. DIVORCE

A. *Settlement Agreements*

Van Dyck v. Van Dyck[1] again occupied the appellate stage. The Georgia Supreme Court held the trial court erred by admitting parol evidence to contradict the language of Item 3(b) of the parties' divorce decree.[2] The former husband filed a modification petition which alleged that Item 3(b) was ambiguous on classification of payments as alimony or child support.[3] The husband argued the parties intended all payments to be child support, and he should be allowed to present parol evidence concerning the parties' intent. The husband further contended his payments should terminate because one child had reached the age of majority and the other child had elected to reside with him.[4] Item 3(b) required the husband to make payments to the wife as "'alimony for her support and the support . . . of the children'."[5] The court held that parol evidence was inadmissible to prove the payments were all child

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1. 263 Ga. 161, 429 S.E.2d 914 (1993).
2. *Id.* at 161, 429 S.E.2d at 915.
3. *Id.* at 162, 429 S.E.2d at 915.
4. *Id.*
5. *Id.* at 161-62, 429 S.E.2d at 915.

support because the evidence would directly contradict the language of Item 3(b).[6] The court concluded that the agreement was for the support of the wife and the children and that it was not subject to proration based upon contingent events concerning the children.[7] The court stated that parties to a contract are presumed to act with knowledge of relevant laws and their effect on the subject matter of the contract.[8] "Here, the agreement did not provide for automatic proration based upon the contingent events urged by the appellee, and may not now be construed to contain such provisions."[9] The court further observed that "evaluating the agreement as a whole . . . we conclude that the parties did not contemplate proration upon the happening of the contingent events urged by the appellee."[10] The opinion is further proof that the appellate courts are committed to application of the rules of construction to divorce agreements.

In *Eickhoff v. Eickhoff*,[11] the parties entered into a settlement agreement requiring the husband to pay retirement benefits to the wife within one week after he received them.[12] The settlement agreement was not incorporated into the divorce decree. The husband ceased paying one-half of his gross pension and social security benefits to the wife, and she brought an action to enforce the settlement agreement. The husband answered and asserted the settlement agreement was void. After the parties filed cross motions for summary judgment, the trial court held the settlement agreement imposed a valid contractual obligation upon Mr. Eickhoff to pay Mrs. Eickhoff one-half of the gross amount of his pension and social security benefits.[13] The supreme court affirmed but held that Mrs. Eickhoff was entitled to summary judgment only under a breach of contract theory.[14]

B. Alimony

In *Guntin v. Guntin*,[15] the supreme court reversed the trial court and held that a husband's alimony obligation, which was based upon his

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6. *Id.* at 163, 429 S.E.2d at 916.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 164, 429 S.E.2d at 917 (citation omitted).
11. 263 Ga. 498, 435 S.E.2d 914 (1993).
12. *Id.* at 498, 435 S.E.2d at 916.
13. *Id.*
14. *Id.* at 504, 435 S.E.2d at 920. The appellate court rejected theories of specific performance, contempt and domestication and correction of the foreign divorce decree. *Id.* at 502-03, 435 S.E.2d at 918-19.
15. 263 Ga. 241, 430 S.E.2d 6 (1993).

salary, did not cease at his retirement.[16] The court further held that retirement benefits are "salary" within the meaning of his alimony obligation.[17] The court stated "though the retirement benefits are paid to him after termination of employment, such benefits are part of the consideration supporting the employment contract and are deferred compensation for services rendered during the term of his employment."[18] Salary, however, did not include interest on savings, social security benefits, and dividends from investments.[19]

C. *Enforcement*

In *Baer v. Baer*,[20] the husband counterclaimed for setoff in response to the wife's application for contempt based on alimony and child support arrearages.[21] The supreme court initially restated the rule that a counterclaim cannot be filed in response to an application for contempt.[22] The supreme court then held that a setoff of the husband's expenses that was not addressed in the divorce decree was not allowable against alimony and child support because of the "unique nature of the support obligation" in Georgia.[23] The court found no equitable exceptions present that justified setoff.[24]

D. *Modification*

In *Honey v. Honey*,[25] the supreme court held that a divorce decree entered before July 1, 1992 could not be modified under the provisions of the Official Code of Georgia Annotated ("O.C.G.A.") sections 19-6-15(e) and (f).[26] The supreme court considered whether a decree which

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16. *Id.* at 241, 430 S.E.2d at 6-7.
17. *Id.* at 242, 430 S.E.2d at 7.
18. *Id.*
19. *Id.*
20. 263 Ga. 574, 436 S.E.2d 6 (1993).
21. *Id.* at 574-75, 436 S.E.2d at 7.
22. *Id.* at 575, 436 S.E.2d at 7.
23. *Id.*
24. *Id.*
25. 263 Ga. 722, 438 S.E.2d 87 (1994).
26. *Id.* at 722, 438 S.E.2d at 88. O.C.G.A. § 19-6-15(e) provides in part that

> in any temporary or final order for child support with respect to any proceeding for divorce, separate maintenance, legitimacy, or paternity entered on or after July 1, 1992, the trier of fact, in the exercise of sound discretion, may direct either or both parents to provide financial assistance to a child who has not previously married or become emancipated, who is enrolled in and attending a secondary school and who has attained the age of majority before completing his or her secondary school education, provided that such financial assistance shall not be required after a child attains 20 years of age.

provided that child support continue until the child turned eighteen could be modified to require the parent to support the child until age twenty.[27] Since the divorce decree in question was entered in 1987, O.C.G.A. sections 19-6-15(e) and (f) as revised did not apply.[28]

The divorce decree in *Bunnell v. Rogers*[29] provided that the husband's child support obligation would increase yearly in direct proportion to the increase in his gross wages from all employment sources during the preceding twelve month period.[30] The trial court found the automatic increase provision too vague and refused to enforce it.[31] The supreme court disagreed and remanded the case to the trial court for the former wife to "establish by evidence the amounts of income to which the increase provision applies, whereupon she shall be entitled to judgment for the arrearages established by calculations pursuant to the increase provisions . . . ."[32]

In *Thomas v. Whaley*,[33] the Georgia Court of Appeals held that the statutory rule prohibiting the filing of petitions to modify child support more frequently than once every two years applies only to actions filed in Georgia.[34]

The former wife in *Keeler v. Keeler*[35] sought to modify the child support award in a divorce decree.[36] The jury increased child support from zero to $575 per month. The jury awarded less than the husband offered in settlement negotiations.[37] The trial court awarded attorney fees to the ex-husband based on the argument that he was the prevailing party pursuant to O.C.G.A. section 19-6-19(d).[38] Mr. Keeler contended that since the jury award for child support was an amount less than the

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O.C.G.A. § 19-16-15(f) provides:

> The provisions of subsection (e) of this code section shall be applicable only to a temporary order or final decree for divorce, separate maintenance, legitimation, or paternity entered on or after July 1, 1992, and the same shall be applicable to an action for modification of a decree entered in such an action entered on or after July 1, 1992, only upon a showing of a significant change of material circumstances.

27. 263 Ga. at 722, 438 S.E.2d at 88.
28. *Id.* at 722-23, 438 S.E.2d at 88.
29. 263 Ga. 811, 440 S.E.2d 12 (1994).
30. *Id.* at 812, 440 S.E.2d at 12.
31. *Id.*
32. *Id.* at 813, 440 S.E.2d at 13.
33. 208 Ga. App. 362, 430 S.E.2d 655 (1993).
34. *Id.* at 364, 430 S.E.2d at 657. *See* O.C.G.A § 19-6-19(a) (Supp. 1994).
35. 263 Ga. 151, 430 S.E.2d 5 (1993).
36. *Id.* at 151, 430 S.E.2d at 5.
37. *Id.*
38. *Id.* at 151-52, 430 S.E.2d at 5.

amount he had offered in settlement negotiations, that he was actually the prevailing party. The supreme court held that the trier of fact determines who is the prevailing party.[39] In this case, the former wife prevailed because the jury increased child support, and the award of attorney fees to the former husband was erroneous.[40]

E. Equitable Division

The equitable division portion of the jury award in *Wagan v. Wagan*[41] consisted of a $25,000 sum ostensibly held in escrow by Mr. Wagan's attorney.[42] The trial court directed Mr. Wagan "'to cause his attorney . . . to pay to [Mrs. Wagan] the sum of $25,000 held in escrow . . . .'"[43] Mr. Wagan subsequently retained another attorney who demanded that the original attorney deliver the $25,000 to Mrs. Wagan. However, Mr. Wagan's original attorney apparently had converted the $25,000 before committing suicide. Mrs. Wagan moved to hold Mr. Wagan in contempt and asked for clarification of the final divorce decree. The trial court ordered Mr. Wagan to pay $25,000 to Mrs. Wagan within ten days of the date of the court's order.[44] Mr. Wagan appealed and the supreme court held that the $25,000 was not alimony, but was a particular $25,000 fund.[45] Since the fund no longer existed, there was nothing to turn over to Mrs. Wagan.[46] The court's rationale was that "[a]ppellee's failure to [receive] the $25,000 was not the result of appellant's willful disobedience, but of the fiduciary's apparent misappropriation of the fund."[47] The court further stated that the jury's award was an in rem judgment, which the trial court erroneously attempted to make an in personam judgment.[48]

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39. *Id.* at 152, 430 S.E.2d at 5.
40. *Id.*
41. 263 Ga. 376, 434 S.E.2d 475 (1993).
42. *Id.* at 376, 434 S.E.2d at 475.
43. *Id.*
44. *Id.* at 377.
45. *Id.* at 376-77, 434 S.E.2d at 476.
46. *Id.* at 376, 434 S.E.2d at 476.
47. *Id.* at 378, 434 S.E.2d at 476.
48. *Id.* at 378, 434 S.E.2d at 477.

II. CHILDREN

A. *Child Support*

In *Coxwell v. Matthews*,[49] the supreme court addressed the question of whether birth and pregnancy-related medical expenses create a support obligation the biological father can be ordered to pay.[50] In *Coxwell*, the birth mother, Matthews, filed a petition to establish Coxwell's paternity of her son. She also sought $15,458.98 in pregnancy and birth-related medical expenses. The parties entered into a consent order resolving all issues except liability for birth-related expenses.[51] The trial court found the mother was entitled to birth-related expenses and ordered payment of these expenses by the father.[52] The court of appeals denied the father's application to appeal, but the supreme court granted certiorari to determine whether pregnancy and birth-related medical expenses incurred by the mother are recoverable from the father in a paternity action.[53] Citing O.C.G.A. section 19-7-24,[54] Justice Clark held that such expenses are the obligation of the father and the mother may recover them in a paternity action.[55] Three justices dissented, in effect, accusing the majority of judicial legislation.[56] The dissenters also noted the criminal abandonment statute specifically imposed the duty that the majority grafted unto the paternity statute.[57]

In *Department of Human Resources v. Brandenburg*[58] and *Department of Human Resources v. Chappell*,[59] the court of appeals held that the income deduction order requirement set forth in O.C.G.A. section 19-

49. 263 Ga. 444, 435 S.E.2d 33 (1993).
50. *Id.* at 445, 435 S.E.2d at 34.
51. *Id.* at 444, 435 S.E.2d at 33.
52. *Id.* at 444-45, 435 S.E.2d at 34.
53. *Id.* at 445, 435 S.E.2d at 34.
54. O.C.G.A. § 19-7-24 (1988) provides:
> It is the joint and several duty of each parent of a child born out of wedlock to provide for the maintenance, protection, and education of the child until he reaches the age of majority, except to the extent that the duty of one parent is otherwise or further defined by court order.
55. 263 Ga. at 446, 435 S.E.2d at 34.
56. 263 Ga. at 447-48, 435 S.E.2d at 35-36 (Hunt, J., dissenting).
57. *Id.* at 447, 435 S.E.2d at 35-36.
58. 211 Ga. App. 715, 440 S.E.2d 498 (1994).
59. 211 Ga. App. 834, 440 S.E.2d 722 (1994).

6-32(a)(1)[60] is mandatory and that the trial court had erroneously refused to enter income deduction orders.[61]

B. Custody

The supreme court in *Wilson v. Gouse*[62] held that the Parental Kidnapping Prevention Act[63] ("PKPA") applies to all interstate custody disputes regardless of whether a parent has abducted the child.[64] The PKPA is designed to ensure application of uniform guidelines in determining jurisdiction in such cases.[65] Applying PKPA standards to the case before it, the supreme court agreed with the court of appeals that Georgia had subject matter jurisdiction to modify an Ohio divorce decree.[66] A provision in the Ohio decree purporting to retain exclusive and continuing jurisdiction over the children in this action was contrary to the PKPA,[67] "and neither the PKPA nor the UCCJA ["Uniform Child Custody Jurisdiction Act"][68] permit subject matter jurisdiction to be conferred by stipulation, agreement, or consent of the parties."[69]

In the Interest of A.R.B., a child,[70] is a strong judicial endorsement of joint custody.[71] This case involved an appeal from an award of sole custody of the parties' only son to the mother. The father made an application for discretionary appeal from the order of the juvenile court.[72] Justice Beasley, writing for the court of appeals, held that the trial court failed to give proper consideration to the joint custody provisions of O.C.G.A. section 19-9-6.[73] The court of appeals remanded

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60. O.C.G.A. § 19-6-32 (Supp. 1994).

61. *Brandenburg*, 211 Ga. App. at 715, 440 S.E.2d at 499; *Chappell*, 211 Ga. App. at 834, 440 S.E.2d at 722-23.

62. 263 Ga. 887, 441 S.E.2d 57 (1994).

63. 28 U.S.C. § 1738A (1988).

64. 263 Ga. at 889, 441 S.E.2d at 59. The court of appeals found abduction necessary to invoke the PKPA in Gouse v. Wilson, 207 Ga. App. 574, 428 S.E.2d 571 (1993). *See* Barry McGough, *Domestic Relations* 45 MERCER L. REV. 215, 221 (1993) [hereinafter "McGough"].

65. *Wilson*, 263 Ga. at 890, 441 S.E.2d at 59-60. *See* McGough at 221. The PKPA thus corrects the defects created by state modifications to the Uniform Child Custody Jurisdiction Act ("UCCJA"). O.C.G.A. §§ 19-9-40 to -64 (1991).

66. *Wilson*, 263 Ga. at 895, 441 S.E.2d at 63.

67. *Id.* at 894-95, 441 S.E.2d at 63.

68. O.C.G.A. §§ 19-9-40 to -64 (1991).

69. *Wilson*, 263 Ga. at 895, 441 S.E.2d at 63.

70. 209 Ga. App. 324, 433 S.E.2d 411 (1993).

71. *Id.* Justice Beasley authored the opinion. Justice Cooper and Justice Murray concurred in the judgment only.

72. *Id.* at 324, 433 S.E.2d at 412.

73. *Id.* at 326, 433 S.E.2d at 413-14.

the case for the trial court to make findings and conclusions that give effect to O.C.G.A. sections 19-9-3(d) and 19-9-6.[74] Justice Beasley referred to the 1983 Georgia Constitution[75] and emphasized that its purpose was to "'promote the interest and happiness of the citizen and of the family . . . .'"[76] Justice Beasley stated that joint custody "afford[s] greater equality between parents in fostering relationships with their children so that the best interests of each child can be served."[77] She referred to O.C.G.A. sections 19-7-2 and 19-9-6 and stated the policy reasons favoring "equally shared parenting obligations and opportunities which places children first in the constellation of individual desires . . . ."[78] She also cited the 1990 amendment to O.C.G.A. section 19-9-3(a) and its codification of shared parenting as it relates to custody of minor children.[79]

The court dismissed the notion that joint physical custody as well as joint legal custody is untenable.[80] The court observed that with cooperation the parties could make both joint physical custody and joint legal custody a viable solution to divorce.[81] In *A.R.B.*, the evidence was clear that both parents had been actively involved in the child's life, providing emotional support to the child. The court stated:

> [I]nherent in the express public policy is a recognition of the child's right to equal access and opportunity with both parents, the right to be guided and nurtured by both parents, the right to have major decisions made by the application of both parents' wisdom, judgment and experience. The child does not forfeit these rights when the parents divorce.[82]

The trial court changed custody in *Templeman v. Earnest*[83] because the parents were "warring," the mother's income was different, and the living conditions of the father were different as compared to the prior actions.[84] Moreover, the court awarded joint custody with physical custody alternating annually because that was the parties' practice,

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74. *Id.* at 327, 433 S.E.2d at 414.
75. GA. CONST. pmbl. (1983).
76. 209 Ga. App. at 326, 433 S.E.2d at 413.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 327, 433 S.E.2d at 414.
81. *Id.*
82. *Id.*
83. 209 Ga. App. 557, 434 S.E.2d 106 (1993).
84. *Id.* at 557, 434 S.E.2d at 107.

although not the court's preference.[85] The court of appeals reversed the trial court because the circumstances did not meet the criteria for a material change of condition.[86] Moreover, the court struck down the joint custody award because "[t]he trial court has an independent duty in these cases to make an award of custody that is in the best interest of the children . . . and *is not authorized to merely ratify the practices of the parties.*"[87]

III. LEGISLATION

The General Assembly amended the child support guidelines codified in O.C.G.A. section 19-6-15[88] to create a rebuttable presumption that the support award amount is the correct amount.[89] A written finding or specific finding on the record is sufficient to rebut this presumption if the finding states the support amount that would have been required by the guidelines and justifies the variance.[90]

The General Assembly also imposed an affirmative duty on trial courts to order the child support obligor to provide accident and sickness insurance for minor children if available through the obligor's employment, unless it is cost prohibitive or available through the support obligee.[91] If insurance coverage is unavailable or cost prohibitive, the court may order the obligor to acquire insurance when it becomes available, to pay the obligee's cost of insurance, or to pay for uncovered expenses.[92]

85. *Id.*
86. *Id.* at 558, 434 S.E.2d at 107-08.
87. 209 Ga. App. at 558, 434 S.E.2d at 108 (emphasis supplied) (citations omitted).
88. O.C.G.A. § 19-6-15 (Supp. 1994).
89. *Id.* § 19-6-15(b)(5).
90. *Id.*
91. *Id.* § 19-6-15(a).
92. *Id.*