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Domestic Relations

by Barry B. McGough*
and Elinor H. Hitt**

This survey period¹ saw continued evolution of domestic relations law.² Legislation passed during the 2010 and 2011 Regular Session of the Georgia General Assembly took effect during this survey period, and the Georgia Supreme Court continued to accept nonfrivolous appeals in divorce cases, which provide guidance to those interested in domestic relations law.

I. PATERNITY AND LEGITIMATION

In *Venable v. Parker*,³ a final paternity judgment was challenged. Parker executed a voluntary acknowledgment of paternity, and a final order establishing paternity and child support was entered. Several months later, Parker filed a motion to set aside the final order on the grounds of fraud and mistake.⁴ The trial court found that Parker did not meet the statutory requirements for disestablishing paternity under section 19-7-54 of the Official Code of Georgia Annotated (O.C.G.A.),⁵

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1. This Survey chronicles developments in Georgia domestic relations law from June 1, 2010 to May 31, 2011.

2. For an analysis of Georgia domestic relations law during the prior survey period, see Barry B. McGough & Elinor H. Hitt, *Domestic Relations, Annual Survey of Georgia Law*, 62 MERCER L. REV. 105 (2010).

3. 307 Ga. App. 880, 706 S.E.2d 211 (2011).

4. *Id.*

5. O.C.G.A. § 19-7-54 (2010).

and Parker's motion was denied.⁶ However, the parties were ordered to undergo genetic testing to establish paternity of the child.⁷

The Georgia Court of Appeals held that, because Parker's motion to set aside the final order was denied, the trial court lacked authority to order genetic testing.⁸ Until the paternity order is reversed, genetic testing cannot be ordered.⁹ Judge Dillard filed a concurring opinion and identified that a final paternity judgment may be challenged by either "a motion to set aside paternity pursuant to [O.C.G.A.] § 19-7-54 [or by] an extraordinary motion for new trial based on newly discovered evidence."¹⁰

The court of appeals also addressed issues related to legitimation actions. In *Baker v. Lankford*,¹¹ Mark Baker moved to intervene in a legitimation action filed by Robert Lankford regarding a child, K.B., who Kristen Baker (Ms. Baker) gave birth to in December 2006 while married to Mark Baker (Mr. Baker). In June 2008, Ms. Baker told Mr. Baker that K.B. was Lankford's biological child. In February 2009, Mr. Baker filed for divorce. Before the divorce was finalized, Lankford filed a petition to legitimate K.B., and Kristen Baker consented to the legitimation. DNA tests showed a 99.997% likelihood that Lankford was the father. Mr. Baker moved to intervene and dismiss the legitimation proceeding. However, while the petition to intervene was pending, Lankford's legitimation petition was granted. Mr. Baker's motion to intervene was later denied, and his motion to dismiss was found to be moot.¹²

The court of appeals held that the trial court erred in denying Mr. Baker's motion to intervene.¹³ The requirements to intervene in an action are three-fold: "[(1)] interest, [(2)] impairment resulting from an unfavorable disposition, and [(3)] inadequate representation [by existing parties]."¹⁴ Mr. Baker was K.B.'s legal father and had parental and custodial rights to the child; thus, he clearly had an interest in the legitimation proceeding.¹⁵ The court held that Mr. Baker could also

6. *Venable*, 307 Ga. App. at 882-83, 706 S.E.2d at 213.

7. *Id.* at 883, 706 S.E.2d at 213.

8. *Id.*

9. *Id.*

10. *Id.* at 884 n.4, 706 S.E.2d at 214 n.4 (Dillard, J., concurring).

11. 306 Ga. App. 327, 702 S.E.2d 666 (2010).

12. *Id.* at 327-28, 702 S.E.2d at 667.

13. *Id.* at 328, 702 S.E.2d at 667.

14. *Id.* at 329, 702 S.E.2d at 668 (quoting *Kubler v. Goerg*, 197 Ga. App. 667, 668, 399 S.E.2d 229, 230 (1990)); see also O.C.G.A. § 9-11-54(a)(2) (2006).

15. *Baker*, 306 Ga. App. at 329, 702 S.E.2d at 668 (quoting *In re White*, 254 Ga. 678, 679, 333 S.E.2d 588, 589 (1985)); see also O.C.G.A. § 19-7-20 (2010).

suffer impairment from an unfavorable disposition because if, in an unappealed order, K.B. was declared to be the legitimate child of someone other than Mr. Baker, that man would take Mr. Baker's place as K.B.'s legal father.¹⁶ Further, given the fact that Ms. Baker consented to the legitimation, neither she nor Lankford could adequately represent Mr. Baker's interests.¹⁷ Therefore, the court of appeals reversed the trial court's denial of Mr. Baker's motion to intervene.¹⁸

The court of appeals addressed the question of when a father's opportunity interest begins in the case of *In re V.B.L.*¹⁹ Ten years after Lucius Christian had a brief encounter with Brandy Smith, he found out he fathered a child with her. The maternal grandmother, Donna Smith, sought to adopt the child (V.B.L.), who had been in her custody for six years. After Christian learned of his child, he filed a motion to intervene in the adoption and to determine the paternity of V.B.L. Once DNA testing confirmed the child was his, Christian sought to legitimate. The juvenile court granted Christian's legitimation petition after finding he had not abandoned his opportunity interest in developing a relationship with V.B.L., but the court refused to consider Christian's actions during the ten-year period before he learned he was the child's father.²⁰

The court of appeals determined that Christian's opportunity interest began when he had unprotected sex.²¹ Thus, the juvenile court should have considered Christian's actions not only "since he learned of his parentage, but also since the time that he engaged in a nonmarital sexual relationship with [the child's mother] in 1999."²²

II. CHILD CUSTODY

During the survey period, the Georgia Court of Appeals and the Georgia General Assembly both addressed issues related to child custody. In *Price v. Wingo*,²³ the maternal grandparents, the Wingos, were awarded custody of their two-year-old grandson following his parents 2008 divorce. Ten months later, the father filed an action to modify custody, which the trial court denied.²⁴ The court of appeals began its opinion by acknowledging that

16. *Baker*, 306 Ga. App. at 330, 702 S.E.2d at 668.

17. *Id.* at 330, 702 S.E.2d at 668-69.

18. *Id.* at 330, 702 S.E.2d at 669.

19. 306 Ga. App. 709, 709, 703 S.E.2d 127, 128 (2010).

20. *Id.* at 710-11, 703 S.E.2d at 128-29.

21. *See id.* at 713, 703 S.E.2d at 130.

22. *Id.*

23. 306 Ga. App. 283, 701 S.E.2d 904 (2010).

24. *Id.* at 283, 701 S.E.2d at 905.

[o]nce a third party has been awarded permanent custody of a child in a court proceeding to which a parent was a party, . . . the third party [then] has the prima facie right to custody as against the parent who has lost the right to custody. The parent can regain custody upon showing by clear and convincing evidence his or her present fitness as a parent and that it is in the best interest of the child that custody be changed.²⁵

Here, the trial court found that the father established his present fitness as a parent but that he failed to show the change in custody was in the child's best interest.²⁶ The trial court noted the father's short remarriage as the primary change in circumstance.²⁷

The father asserted that the trial court erred in considering evidence relating to matters that took place before the 2008 custody award—namely, testimony about the father's two prior short marriages. The court of appeals agreed that in determining the father's present fitness, evidence as to unfitness must be confined to matters transpiring after the divorce.²⁸ However, “[i]n determining the best interests of the child, the judge may consider *any relevant factor*[,]” which includes past performance of parenting responsibilities.²⁹ Thus, the trial court was allowed to consider the short duration of the father's two previous marriages and find that, because of the father's remarriage, the father did not establish by clear and convincing evidence that the best interests of the child required a change in custody.³⁰

During this survey period, two cases were reviewed that involved grandparents bringing original actions for visitation rights with their grandchildren. In *Lightfoot v. Hollins*,³¹ the child at issue was born in 2002. Following the parents' 2004 divorce, the mother was awarded primary custody, but she died a few months later. Following her death, the father obtained primary custody and limited the Hollins's, the maternal grandparents, access to the child. The father remarried in September 2006, and his wife adopted the child in April 2007.³²

25. *Id.* (quoting *Durden v. Barron*, 249 Ga. 686, 687, 290 S.E.2d 923, 924 (1982)).

26. *Id.* at 283-84, 701 S.E.2d at 905.

27. *Id.*

28. *Id.* at 284, 701 S.E.2d at 905.

29. *Id.* at 284, 701 S.E.2d at 905-06 (first alteration in original) (internal quotation marks omitted); O.C.G.A. § 19-9-3(a)(3) (2010 & Supp. 2011).

30. *Price*, 306 Ga. App. at 284, 701 S.E.2d at 906.

31. 308 Ga. App. 538, 707 S.E.2d 491 (2011).

32. *Id.* at 538, 707 S.E.2d at 491-92.

In November 2009, the Hollins filed an action for visitation pursuant to O.C.G.A. § 19-7-3,³³ alleging that the father only allowed them to see the child twice since the mother's death.³⁴ The father filed a motion for summary judgment, arguing that the Hollins's rights had been extinguished when the stepmother adopted the child. Moreover, the father argued, the maternal grandparents failed to provide clear and convincing evidence that the child's health or welfare would be harmed if visitation was not permitted and that it was in the child's best interest for visitation to be granted.³⁵

The Hollins asked the court to appoint a guardian ad litem and claimed discovery needed to be done so they could meet their evidentiary burden.³⁶ "[T]he trial court held that [O.C.G.A.] § 19-7-3 provide[d] a basis for the grandparents' claim despite any alleged adoption, a determination that [the father] does not contest."³⁷ Thus, the court denied the father's motion and appointed a guardian ad litem.³⁸

The court of appeals affirmed and held that, under O.C.G.A. § 19-7-3 and O.C.G.A. § 19-8-19,³⁹ a grandparent's rights are not affected by stepparent adoption.⁴⁰ Furthermore, pursuant to O.C.G.A. § 9-11-56(f),⁴¹ even if the respondent cannot present facts in opposition to a motion for summary judgment, the trial judge has discretion to either deny the motion, allow the case to go forward, allow further discovery, or take other action.⁴²

The following month, the court of appeals reviewed another grandparent visitation case, with a seemingly different result. In *Bailey v. Kunz*,⁴³ the mother and father divorced in 2002 while the mother was pregnant. In 2006, the mother remarried, the biological father surrendered his parental rights, and the mother's current husband adopted the child. After the parties disagreed about visitation, the biological father's parents filed a petition for visitation with the minor child. The mother and adoptive father filed a motion to dismiss, which the trial court denied.⁴⁴

33. O.C.G.A. § 19-7-3 (2010).

34. *Lightfoot*, 308 Ga. App. at 538-39, 707 S.E.2d at 492.

35. *Id.* at 539, 707 S.E.2d at 492; *see also* O.C.G.A. § 19-7-3(c).

36. *Lightfoot*, 308 Ga. App. at 539, 707 S.E.2d at 492; *see also* O.C.G.A. § 19-7-3(d)(1).

37. *Lightfoot*, 308 Ga. App. at 539, 707 S.E.2d at 492.

38. *Id.* at 539-40, 707 S.E.2d at 492.

39. O.C.G.A. § 19-8-19 (2010).

40. *Lightfoot*, 308 Ga. App. at 540, 707 S.E.2d at 493.

41. O.C.G.A. § 9-11-56(f) (2006).

42. *Lightfoot*, 308 Ga. App. at 541-42, 707 S.E.2d at 493-94; O.C.G.A. § 9-11-56(f).

43. 307 Ga. App. 710, 706 S.E.2d 98 (2011).

44. *Id.* at 711, 706 S.E.2d at 99.

Pursuant to O.C.G.A. § 19-7-3(b), a grandparent does not have the right to file an original action for visitation rights “where the parents of the minor child are not separated and the child is living with both of the parents.”⁴⁵ On appeal, the mother and the stepfather argued that the trial court erred by not treating the stepfather as a parent for purposes of the statute.⁴⁶

Although the word “parent” is undefined in O.C.G.A. § 19-7-3(b), the adoption statute,⁴⁷ specifically O.C.G.A. § 19-8-1,⁴⁸ defines the word parent to include the “legal father” of a child.⁴⁹ The court of appeals held that the adoptive father was now the parent within the meaning of the statute, and, thus, the biological father’s parents had no standing to file petition.⁵⁰

In *Roberts v. Kinsey*,⁵¹ the father took issue with the parties’ final divorce decree, which provided that he and his former wife would share legal and physical custody of their five-year-old son, the child would be enrolled in the Henry County school district, and “[a]ny change or relocation by husband should be agreed upon by the parties, and if not, [it] will be circumstance to trigger reevaluation of custody by court.”⁵² Soon after the divorce was final, the father took the child to Maryland and refused to return him to Georgia. The mother filed numerous actions, including a petition for a change of custody, contending that the father absconded with the child, and that refusing to enroll him in Henry County schools created a substantial change in circumstances necessary for a change of custody. The mother was awarded sole legal and physical custody of the minor child.⁵³

On appeal, the father argued that the lower court erroneously relied on a “facially invalid self-executing custody provision” in the divorce decree—if the father moved out of state without the mother’s agreement, custody would be reevaluated.⁵⁴ The court of appeals disagreed, finding

45. *Id.*; O.C.G.A. § 19-7-3(b).

46. *Bailey*, 307 Ga. App. at 711, 706 S.E.2d at 99.

47. O.C.G.A. tit. 19, ch. 8 (2010 & Supp. 2011).

48. O.C.G.A. § 19-8-1(6), (8) (2010 & Supp. 2011).

49. *Bailey*, 307 Ga. App. at 712, 706 S.E.2d at 100 (internal quotation marks omitted); O.C.G.A. § 19-8-1(6), (8).

50. *Bailey*, 307 Ga. App. at 713, 706 S.E.2d at 100-01.

51. 308 Ga. App. 675, 708 S.E.2d 600 (2011).

52. *Id.* at 675, 708 S.E.2d at 601.

53. *Id.* at 675-77, 708 S.E.2d at 601-02.

54. *Id.* at 677-78, 708 S.E.2d at 602-03; *see also* *Scott v. Scott*, 276 Ga. 372, 375, 578 S.E.2d at 876, 879-80 (2003) (holding “self-executing change of custody provisions . . . that fail[] to give paramount import to the child’s best interests in a change of custody as between parents violates . . . public policy . . .”).

the language in the decree did not create a self-executing custody provision but provided for reevaluation of custody and the best interests of the child by the court in the event the father moved out of Henry County.⁵⁵

In 2011, the Georgia General Assembly passed the Military Parents Rights Act,⁵⁶ which became effective May 11, 2011.⁵⁷ The Act provides protection in child custody disputes to members of the armed forces, especially as it relates to a military parent's deployment.⁵⁸

III. CHILD SUPPORT

Numerous cases were reviewed involving child support. The first three cases clarified provisions of the revised child support guidelines found in O.C.G.A. § 19-6-15.⁵⁹ In *Holloway v. Holloway*,⁶⁰ the Georgia Supreme Court held that, even where there is a nominal \$18 difference between the amount of child support owed using the child support guidelines and the amount set forth in the parties' final decree, findings of fact are mandatory regarding reasons for the deviation, amount of child support required if there was no deviation, how the presumptive amount of child support would be unjust or inappropriate, and how the best interest of the child for whom support is being determined is served by the deviation.⁶¹ The order, which did not include these findings, was reversed.⁶²

In *Willis v. Willis*,⁶³ the supreme court held the trial court did not abuse its discretion when it did not allow a parenting time deviation for a shared custody arrangement and ordered the father to pay \$961 per month in child support.⁶⁴ The trial court considered each party's income and payments made by each party on behalf of the child and specifically found it would not be in the best interest of the child for the husband to be allowed a downward deviation of child support.⁶⁵

55. *Roberts*, 308 Ga. App. at 677-78, 708 S.E.2d at 602.

56. Ga. S. Bill 112, Reg. Sess., 2011 Ga. Laws 274 (codified at O.C.G.A. §§ 19-9-1, -3, -6 (Supp. 2011)).

57. O.C.G.A. §§ 19-9-1, -3, -6 (Supp. 2011).

58. *Id.*

59. O.C.G.A. § 19-6-15 (Supp. 2011).

60. 288 Ga. 147, 702 S.E.2d 132 (2010).

61. *Id.* at 149, 702 S.E.2d at 134; O.C.G.A. § 19-6-15(c)(2)(E).

62. *Holloway*, 288 Ga. at 149, 702 S.E.2d at 134.

63. 288 Ga. 577, 707 S.E.2d 344 (2011).

64. *Id.* at 577-79, 707 S.E.2d at 346.

65. *Id.* at 578-79, 707 S.E.2d at 346; *see also* O.C.G.A. § 19-6-15.

Finally, in *Stowell v. Huguenard*,⁶⁶ the trial court erred when it set the father's monthly child support obligation based on his gross salary, then ordered an annual payment of 25% of any gross commissions or other irregular income the father received above his base salary.⁶⁷ The supreme court determined that requiring this annual payment as additional child support amounted to a deviation from the presumptive amount without any findings of fact to support the deviation as required by statute.⁶⁸

In *Herrin v. Herrin*,⁶⁹ the evidence required to base a child support award on a party's earning capacity was addressed by the supreme court.⁷⁰ Per a 2005 child support order, the mother was ordered to pay \$300 in child support beginning January 15, 2007. The mother had obtained her real estate license, and the trial court determined she was able to earn \$2,064 per month. In 2006 and part of 2007, the mother earned \$3,100 per month, but by late 2007, the mother was not employed by the same company.⁷¹

In April 2008, the father filed petitions to modify child support and for contempt. At a hearing, the trial court found the following: (1) the mother was employed by a dental group earning \$13 per hour working four days a week, (2) she was underemployed, (3) she had given birth to an illegitimate child but had not sought child support in an effort not to lose the downward adjustment on her child support obligation, and (4) she did not have certain living expenses because she lived in her parents' basement. The trial court issued an order finding the mother in contempt, finding her income had increased, and ordered her to pay \$975.74 in monthly child support and \$2,500 of the father's attorney fees.⁷²

In reversing the trial court's judgment, the supreme court determined that, by the time of the 2008 hearing, "the mother's income and earning capacity had [actually] decreased from what was noted and projected in the 2005 order and what actually occurred in 2006 and 2007."⁷³ Most of the mother's salary paid her infant's day care bills; her hours at the dental office could not be increased; and she was unable to pursue a real estate career due to the depressed real estate market and her inability

66. 288 Ga. 628, 706 S.E.2d 419 (2011).

67. *Id.* at 632, 706 S.E.2d at 423.

68. *Id.*; see also O.C.G.A. § 19-6-15(b)(8).

69. 287 Ga. 427, 696 S.E.2d 626 (2010).

70. *Id.* at 427, 696 S.E.2d at 627.

71. *Id.* at 427-28, 696 S.E.2d at 627.

72. *Id.* at 428, 696 S.E.2d at 627-28.

73. *Id.* at 429, 696 S.E.2d at 628.

to fund out-of-pocket costs. The mother had limited education and no specialized training or marketable skill other than her real estate license and training in dental assisting.⁷⁴

There was no evidence that the mother had means to acquire future education or training, that she was able to earn in excess of her salary, that she was willfully underemployed, or that she was suppressing her income.⁷⁵ The supreme court held that “to sustain an award of child support premised upon earning capacity, there must be evidence that the parent then has the ability to earn an amount sufficient to pay the award of support”⁷⁶

In *Mullin v. Roy*,⁷⁷ the supreme court considered whether a trial court has the authority to order a lump-sum child support award.⁷⁸ During the divorce proceedings, the husband pled guilty to child pornography charges and was sentenced to time in prison. At the time of the divorce trial, the husband was living off a \$422,000 inheritance. After acknowledging that, as a registered sex offender, the husband’s future earning ability would be impaired, the trial court ordered the husband to pay his total child support obligation in a single lump-sum payment.⁷⁹

On appeal, the supreme court determined that nothing in O.C.G.A. § 19-6-15 precluded a lump-sum award.⁸⁰ In fact, “the statute . . . explicitly authorizes trial courts to exercise discretion in setting the manner and timing of payment,” and requires trial courts to “[s]pecify . . . in what manner, how often, to whom, and until when the support shall be paid.”⁸¹

In *Smith v. Carter*,⁸² the child support guidelines were applied to actions for actual expenses incurred prior to an initial child support award.⁸³ The parties’ son was born in 1994. After the couple separated in 1997, the mother retained custody of the child. Over the next twelve years, the father contributed only \$100 towards his support. At the same time, the father married and adopted five children. In 2009, the mother sued for past and future child support. The trial court found the father’s monthly income to be \$2,222.80 and the mother’s to be \$6,384.20

74. *Id.*

75. *Id.* at 429, 696 S.E.2d at 628-29.

76. *Id.* at 428-29, 696 S.E.2d at 628.

77. 287 Ga. 810, 700 S.E.2d 370 (2010).

78. *Id.* at 810, 700 S.E.2d at 371.

79. *Id.*

80. *Id.* at 811, 700 S.E.2d at 372.

81. *Id.* (alteration in original); O.C.G.A. § 19-6-15(c)(2)(B).

82. 305 Ga. App. 479, 699 S.E.2d 796 (2010).

83. *Id.* at 482, 699 S.E.2d at 798.

and ordered the father to pay future child support of \$115 per month. The trial court also found that the mother spent \$83,600 to care for the child during the previous twelve years. After crediting the father for parenting time, the court ordered him to pay the mother \$70,224 in back child support.⁸⁴

The court of appeals vacated the back award of child support because the trial court failed to consider O.C.G.A. § 19-6-15.⁸⁵ The child support guidelines must be considered in setting child support and “shall apply as a rebuttable presumption in all legal proceedings involving the child support responsibility of a parent.”⁸⁶ Both parties’ income and the father’s other support responsibilities should have been considered in determining what portion of the actual expenses must be borne by the father.⁸⁷

In *Simmons v. Simmons*,⁸⁸ the supreme court affirmed that a trial court can order a parent who is obligated to pay child support to obtain a life insurance policy, disapproving *Mongerson v. Mongerson*,⁸⁹ to the extent it could be read otherwise.⁹⁰

IV. EVIDENCE FROM TEMPORARY HEARING

Both the court of appeals and the supreme court reviewed cases that addressed the use of evidence from a temporary hearing at a final hearing. In *Carroll v. Carroll*,⁹¹ the court of appeals found no error but confirmed that, at a final hearing, the trial court was required to rule on the evidence presented at that final hearing and not on knowledge gleaned from affidavits submitted in anticipation of a temporary hearing.⁹²

In *Pace v. Pace*,⁹³ the supreme court found error when, at a final hearing, the trial court relied substantially on testimony adduced at the temporary hearing without putting the parties on notice that such testimony would be considered.⁹⁴

84. *Id.* at 479-80, 699 S.E.2d at 797.

85. *Id.* at 481, 699 S.E.2d at 798.

86. *Id.* (emphasis added); O.C.G.A. § 19-6-15(c)(1).

87. *Carter*, 305 Ga. App. at 482, 699 S.E.2d at 798.

88. 288 Ga. 670, 706 S.E.2d 456 (2011).

89. 285 Ga. 554, 678 S.E.2d 891 (2009).

90. *Simmons*, 288 Ga. at 672 & n.4, 706 S.E.2d at 460 & n.4.

91. 307 Ga. App. 143, 704 S.E.2d 450 (2011).

92. *Id.* at 144, 704 S.E.2d at 451.

93. 287 Ga. 899, 700 S.E.2d 571 (2010).

94. *Id.* at 901, 700 S.E.2d at 573.

V. TRANSMUTATION OF SEPARATE PROPERTY INTO MARITAL PROPERTY

In *Miller v. Miller*,⁹⁵ the supreme court addressed the transmutation of separate property into marital property.⁹⁶ The trial court entered a divorce decree that found the parties' marital residence and a lot on Amelia Island to be marital property.⁹⁷ On appeal, the husband argued the trial court erred in failing to find that "the source of funds used for acquiring the marital residence and the Amelia Island lot was his separate property."⁹⁸ He maintained that both properties were purchased with proceeds from a prior residence, which was purchased with premarital funds prior to marriage. However, after the marriage, the prior residence was deeded into both parties' names, which the wife testified was to reflect her contributions to the household.⁹⁹

Evidence also showed that both parties sold the prior residence, the proceeds were deposited into the parties' joint account (and thus commingled with the funds therein), and the husband conveyed the marital residence to both parties the day it was purchased.¹⁰⁰ Thus, the supreme court held that the trial court was authorized to find that the prior residence had been transformed into marital property.¹⁰¹

VI. EXPERT TESTIMONY

In *Miller v. Miller*,¹⁰² the supreme court also addressed valuing a professional practice.¹⁰³ The trial court accepted the \$331,214 value placed on the husband's medical practice by the wife's expert, who used a combination of the asset approach, market approach, and income approach. The husband challenged the trial court's valuation of his business.¹⁰⁴

In affirming the trial court, the supreme court held there is no one best way to value a professional practice—multiple methods may be used, and experts weigh each approach differently based on the specific business at issue.¹⁰⁵ The facts upon which an expert bases their

95. 288 Ga. 274, 705 S.E.2d 839 (2010).

96. *Id.* at 279-80, 705 S.E.2d at 845.

97. *Id.* at 274, 705 S.E.2d at 841.

98. *Id.* at 279-80, 705 S.E.2d at 845 (internal quotation marks omitted).

99. *Id.* at 280, 705 S.E.2d at 845.

100. *Id.*

101. *Id.*

102. 288 Ga. 274, 705 S.E.2d 839 (2010).

103. *Id.* at 274, 705 S.E.2d at 841.

104. *Id.* at 274, 705 S.E.2d at 841-42.

105. *Id.* at 275-76, 705 S.E.2d at 842.

opinion are admissible.¹⁰⁶ The fact finder then determines the weight given to the valuation techniques used by an expert.¹⁰⁷

Regarding two issues of first impression in *Miller*, the trial court found, and the supreme court affirmed, that (1) the use of all of the husband's income, including both his salary and business income from his medical practice, when determining his gross income for child-support purposes, does not constitute "double-dipping,"¹⁰⁸ and (2) the professional practice's enterprise goodwill is included in the value of a practice.¹⁰⁹

VII. SETTLEMENT AGREEMENT

During the survey period, disagreements arose regarding waiver language found in a settlement agreement. In *DeRyke v. Teets*,¹¹⁰ the question was whether the former husband, Teets, had an interest in the former wife's employment benefits plan, including a life insurance benefit and securities. Five days after the parties' divorce was finalized, the former wife died intestate. The parties' settlement agreement, incorporated into their divorce decree, included language wherein each party waived their interest in the employee benefit plans of the other; however, the parties were not prohibited from voluntarily providing the other with benefits.¹¹¹

After his former wife's death, Teets made a claim for her General Electric Company employee benefits. While married, the former wife had identified Teets as a beneficiary and did not remove his name as beneficiary before her death. A few weeks later, Henry DeRyke, the former wife's father and estate administrator, applied for the same benefits.¹¹² After extensive litigation, the supreme court granted review.¹¹³

The court determined the settlement agreement was an unambiguous waiver of Teets's interest in the former wife's benefit plan.¹¹⁴ It was noted that the former wife had limited opportunity to make a beneficiary

106. *Id.* at 275, 705 S.E.2d at 842.

107. *Id.* at 276, 705 S.E.2d at 842.

108. The husband asserted that the trial court "count[ed] his income twice by awarding portions of his business in the support awards and again in the property division . . ." *Id.* at 277, 705 S.E.2d at 843.

109. *Id.* at 277-78, 705 S.E.2d at 843-44 (quoting *Steneken v. Steneken*, 843 A.2d 344, 351 (N.J. Super. Ct. App. Div. 2004)).

110. 288 Ga. 160, 702 S.E.2d 205 (2010).

111. *Id.* at 161, 702 S.E.2d at 206.

112. *Id.*

113. *Id.* at 160, 702 S.E.2d at 206.

114. *Id.* at 162-63, 702 S.E.2d at 207.

change before her death, and speculation of her reason for failure to act should not substitute for the settlement agreement, which was “concrete action on the part of the [e]x-[w]ife.”¹¹⁵

Similar waiver language was addressed in *Alcorn v. Appleton*.¹¹⁶ The court of appeals held that, where the former wife received the former husband’s ERISA¹¹⁷ benefits in contravention of express waiver language contained in their settlement agreement, federal law governing distribution of ERISA benefits did not preclude the decedent’s heirs from bringing a state law breach-of-contract action against the former wife.¹¹⁸

VIII. JURISDICTION

Effective July 1, 2010, the Georgia legislature amended provisions of O.C.G.A. § 9-10-91¹¹⁹ by expanding grounds for exercise of personal jurisdiction over nonresidents involved in domestic relations cases.¹²⁰ During the survey period, the Georgia legislature removed some of the language that was added via the 2010 amendment.¹²¹

IX. NOTICE

In *Sherrington v. Holmes*,¹²² the issue before the court was whether the mother had proper notice of the father’s claim seeking custody resolution.¹²³ B.J.S. was born in December 2008, and the biological father filed an unopposed petition in March 2009, asking the trial court to legitimate the child, to set his child support obligation, to award him visitation rights, and to “grant such other and further relief as the court deemed proper.”¹²⁴ Four days prior to the hearing, the father amended the petition, requesting that the child have his last name and that the trial court determine custody.¹²⁵

At the hearing, the trial court entered an order granting the petition to legitimate, changing the child’s last name, and awarding joint legal

115. *Id.* at 164, 702 S.E.2d at 208.

116. 308 Ga. App. 663, 708 S.E.2d 390 (2011).

117. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in 29 U.S.C. §§ 1001-1461 (2006 & Supp. III 2009)).

118. 308 Ga. App. at 664-65, 708 S.E.2d at 391-92.

119. O.C.G.A. § 9-10-91 (2007 & Supp. 2011).

120. *Id.* § 9-10-91(5)-(6).

121. *See* Ga. S. Bill 139, § 3, Reg. Sess. (codified at O.C.G.A. § 9-10-91(5)-(6) (Supp. 2011)).

122. 306 Ga. App. 270, 701 S.E.2d 906 (2010).

123. *Id.* at 270, 701 S.E.2d at 907.

124. *Id.* at 270, 701 S.E.2d at 906 (internal quotation marks omitted).

125. *Id.* at 270, 701 S.E.2d at 906-07.

custody and primary physical custody to the father with visitation to the mother. On appeal, the mother argued she was entitled to at least fifteen days notice to respond to the father's custody claim.¹²⁶ The father contended that the mother waived her right to notice by not answering his petition to legitimate and that the language of the original petition asking for "such other and further relief" raised the issue of custody.¹²⁷

The court of appeals held that the general prayer for relief in the father's petition was insufficient notice that the trial court was being asked to decide custody in the legitimation action.¹²⁸ Further, the mother's failure to answer the father's original petition did not waive her right to respond to his later request for a determination of custody.¹²⁹ Because a party is generally entitled to fifteen days to respond to such an amendment, the trial court acted prematurely in addressing custody at the legitimation hearing without giving the mother a reasonable opportunity to respond to this new prayer for relief.¹³⁰

X. MODIFICATION OF THE FINAL JUDGMENT AND DECREE

In *Morgan v. Morgan*,¹³¹ the supreme court held that the trial court erroneously modified the parties' final divorce decree.¹³² The decree provided that, upon the husband's retirement from the Navy, the "[wife] shall be entitled to receive from his retirement benefits only such portion of such benefits as the Navy requires be paid to her."¹³³ After the divorce was final, the parties discovered that the "Navy did not 'require' any division of [the] [h]usband's benefits and in fact had no legal authority to determine the allocation of retirement pay between ex-spouses."¹³⁴ Even so, the wife sought the husband's agreement to a domestic relations order under which the wife would receive 50% of the marital portion of his military retirement benefits. When the husband refused, the wife filed a contempt action seeking clarification of her entitlement to the military survivor benefits or to set aside the divorce decree based on mutual mistake.¹³⁵

126. *Id.* at 270, 701 S.E.2d at 907.

127. *Id.* (internal quotation marks omitted).

128. *Id.* at 271, 701 S.E.2d at 907.

129. *Id.*

130. *Id.*; see also O.C.G.A. § 9-11-15(a) (2006) (stating that a party "shall plead within 15 days after service . . .").

131. 288 Ga. 417, 704 S.E.2d 764 (2011).

132. *Id.* at 419, 704 S.E.2d at 766.

133. *Id.* at 417, 704 S.E.2d at 765 (internal quotation marks omitted).

134. *Id.* at 417, 704 S.E.2d at 765-66.

135. *Id.* at 417-18, 704 S.E.2d at 766.

The trial court found there was “a mutual misunderstanding that Navy regulations defined a former spouse’s share of military retirement pay.”¹³⁶ But rather than set aside the decree, the trial court purported to exercise its “inherent powers to interpret[,]” determining the parties had intended to divide the marital portion of the husband’s retirement benefits on an equal basis and awarded the wife 50% of the husband’s retirement benefit accrued during the marriage.¹³⁷ The court held that in defining a percentage allocation of the husband’s retirement benefits, the trial court went beyond clarifying imprecise language and impermissibly modified the decree.¹³⁸

XI. APPEAL

During this survey period, the supreme court clarified the issue of when, after an appeal of a final judgment, a temporary order ends and a permanent order begins. In *Robinson v. Robinson*,¹³⁹ there was a temporary order regarding child support and alimony, which differed from the permanent order.¹⁴⁰ The supreme court determined that, because the purposes of temporary and permanent alimony are different, temporary alimony should continue throughout the contest of the divorce, and it is at the termination of the litigation that the permanent award prevails.¹⁴¹ Thus, temporary alimony continues until entry of the remittitur in the trial court.¹⁴² The court overruled any cases that have held otherwise.¹⁴³

In *Thompson v. Thompson*,¹⁴⁴ the supreme court overruled *Grissom v. Grissom*¹⁴⁵ and reiterated “the long-standing principle that one who has accepted benefits such as spousal support or equitable division of property under a divorce decree is estopped from seeking to set aside that decree without first returning the benefits.”¹⁴⁶ The court made clear that this ruling does not invalidate the line of cases that hold “a former spouse may collect an award of child support and still repudiate a final judgment, as those benefits belong to the child.”¹⁴⁷

136. *Id.* at 418, 704 S.E.2d at 766.

137. *Id.* (internal quotation marks omitted).

138. *Id.* at 420, 704 S.E.2d at 767.

139. 287 Ga. 842, 700 S.E.2d 548 (2010).

140. *Id.* at 842, 700 S.E.2d at 549.

141. *Id.* at 846, 700 S.E.2d at 552.

142. *Id.* at 846-47, 700 S.E.2d at 552.

143. *Id.* at 847, 700 S.E.2d at 552.

144. 288 Ga. 4, 700 S.E.2d 569 (2010).

145. 282 Ga. 267, 647 S.E.2d 1 (2007).

146. *Thompson*, 288 Ga. at 5-6, 700 S.E.2d at 570-71.

147. *Id.* at 6, 700 S.E.2d at 571.

Effective July 1, 2011, the Georgia legislature amended provisions of O.C.G.A. § 5-6-34¹⁴⁸ and O.C.G.A. § 5-6-35¹⁴⁹ to provide that, where an appeal involves nonmonetary relief in child custody cases, the “judgment or order shall stand until reversed or modified [on appeal,] unless the trial court states otherwise in its judgment or order.”¹⁵⁰

XII. ATTORNEY FEES

In *Klardie v. Klardie*,¹⁵¹ at issue was the propriety of awarding attorney fees based on earning capacity.¹⁵² The parties’ final divorce decree imputed \$2,000 per month in income to the husband, found the wife earned \$7,093 per month, and, pursuant to O.C.G.A. § 19-6-2,¹⁵³ awarded attorney fees to the wife.¹⁵⁴ The husband contended the trial court erred in awarding attorney fees to the wife based on earning capacity. However, the trial court found the husband was underemployed or unemployed by his own doing and clearly capable of earning more income.¹⁵⁵ The supreme court held that “[i]n certain domestic cases, earning capacity is an appropriate means to determine an award of attorney fees pursuant to [O.C.G.A.] § 19-6-2.”¹⁵⁶

148. O.C.G.A. § 5-6-34 (1995 & Supp. 2011).

149. O.C.G.A. § 5-6-35 (1995 & Supp. 2011).

150. Ga. S. Bill 139, §§ 1-2, Reg. Sess. (codified at O.C.G.A. §§ 5-6-34(e), -35(k) (Supp. 2011)).

151. 287 Ga. 499, 697 S.E.2d 207 (2010).

152. *Id.* at 502-03, 697 S.E.2d at 210.

153. O.C.G.A. § 19-6-2 (2010).

154. *Klardie*, 287 Ga. at 499, 502, 697 S.E.2d at 208, 210.

155. *Id.* at 502-03, 697 S.E.2d at 210.

156. *Id.* at 503, 697 S.E.2d at 210.