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Domestic Relations

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This Article addresses significant case law and statutory changes[1] that arose during the survey period.[2] Legislation passed by the Georgia General Assembly in 2011 regarding the appellate procedure and in 2012 regarding grandparent visitation rights took effect, and the Georgia Supreme Court continued to accept nonfrivolous appeals in divorce cases, providing guidance regarding domestic relations law.

I. CHILD CUSTODY, JURISDICTION

The Georgia Court of Appeals considered questions of jurisdiction between courts and jurisdiction between states. In *Dunbar v. Ertter*,[3] the Juvenile Court of Coweta County found A.J., a minor child whose parents were deceased, to be deprived, and in an order dated October 19, 2008, gave Dunbar, the child's maternal grandmother, long-term custody (subject to periodic review) of A.J. until the child's eighteenth birthday.[4] On June 17, 2010, the Superior Court of Cobb County entered an order granting the Errters, A.J.'s maternal aunt and uncle, permanent custody

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1. 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*, 63 MERCER L. REV. 137 (2011).

2. This Article focuses on developments in Georgia domestic relations law from June 1, 2011 to May 31, 2012, though it includes a small number of cases decided in April and May 2011.

3. 312 Ga. App. 440, 718 S.E.2d 350 (2011).

4. *Id.* at 440, 718 S.E.2d at 351; *see also* O.C.G.A. § 15-11-58(i) (2012).

of the child based on the best interests of the minor child. Dunbar appealed the superior court's order.[5]

The Georgia Court of Appeals reversed the superior court's grant of permanent custody of A.J. to the child's aunt and uncle when the prior order granting long-term custody that was issued by the juvenile court, which had exclusive jurisdiction in the matter, was unchallenged and still in effect.[6]

In *Delgado v. Combs*,[7] the court of appeals held that, pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA),[8] the Georgia trial court lacked subject-matter jurisdiction to modify a Kansas custody decree and grant the father's motion for sole physical custody.[9] The father failed to meet his burden of proof and show either that Kansas had been divested of exclusive, continuing jurisdiction over subject matter or that the Kansas court had made a determination that Georgia provided a more convenient forum, and that there was no evidence to support a finding that none of the parties resided in Kansas when, in fact, the mother continued to reside in Kansas.[10]

II. CHILD CUSTODY, MODIFICATION

In *Avren v. Garten*,[11] the trial court was upheld in its dismissal of the mother's action to modify custody and to hold the father in contempt while she, the legal guardian, was withholding the father's visitation rights.[12] A legal guardian is prohibited "from bringing an action for modification of child custody or visitation rights or any application for contempt of court so long as visitation rights are withheld by the legal guardian in violation of the custody order."[13]

In *Gallo v. Kofler*,[14] the Georgia Supreme Court upheld and found no error on the trial court's part in modifying custody and awarding the father custody of the parties' minor child based on the mother's planned move to New York.[15] In determining it was in the child's best interest to change primary custody to the father, the court considered the following: (1) in violation of the standing order which provided that

5. *Dunbar*, 312 Ga. App. at 440-41, 718 S.E.2d at 351.
6. *Id.* at 441-42, 718 S.E.2d at 351-52.
7. 314 Ga. App. 419, 724 S.E.2d 436 (2012).
8. O.C.G.A. §§ 19-9-40 to -104 (2010).
9. *Delgado*, 314 Ga. App. at 425, 724 S.E.2d at 441.
10. *Id.* at 426-28, 724 S.E.2d at 441-43.
11. 289 Ga. 186, 710 S.E.2d 130 (2011).
12. *Id.* at 187, 710 S.E.2d at 134.
13. *Id.*; *see also* O.C.G.A. § 19-9-24(b) (2010).
14. 289 Ga. 355, 711 S.E.2d 687 (2011).
15. *Id.* at 355, 711 S.E.2d at 688.

neither party take the child from the State of Georgia during the pendency of the litigation, the mother took the child to New York for visits and moved some of the child's belongings to New York; (2) the child had been thriving in Georgia; (3) when comparing the child's living arrangements in Georgia and in New York, the child had better quality of life in Georgia; (4) the child's relationship with the father would be harmed by moving to New York; and (5) the mother showed a lack of financial stability.[16]

III. CHILD CUSTODY, GRANDPARENT'S RIGHTS

During the survey period, both appellate courts and the state legislature dealt with grandparents' right to seek custody of or visitation with their grandchildren. In *Scott v. Scott*,[17] the paternal grandparents sought custody of their two granddaughters, asserting that on March 4, 2008, the children's father was murdered by the mother, and that the mother was set to be tried for the murder on the same date the grandparents filed their petition.[18] The grandparents asserted standing to seek custody pursuant to sections 19-7-1(b.1)[19] and 19-9-2[20] of the Official Code of Georgia Annotated (O.C.G.A.).[21]

The trial court granted the mother's motion to dismiss the grandparents' petition, concluding that additional facts should have been alleged and were required to survive the motion to dismiss.[22] The Georgia Court of Appeals disagreed, holding that the grandparents' petition gave fair notice that they sought custody under O.C.G.A. §§ 19-7-1(b.1) and 19-9-2 based on the mother's alleged murder of the father.[23] The court observed, "[M]urder of one parent by another can be considered as evidence of parental unfitness," so these allegations were enough to survive a motion to dismiss.[24]

The mother also argued that because another court denied the grandparents' request for visitation two years prior, their current petition for custody was barred by the doctrine of collateral estoppel, which "precludes the re-adjudication of an issue that has previously been litigated and adjudicated on the merits in another action between the

16. *Id.* at 356-57, 711 S.E.2d at 689.
17. 311 Ga. App. 726, 716 S.E.2d 809 (2011).
18. *Id.* at 726-27, 716 S.E.2d at 810.
19. O.C.G.A. § 19-7-1(b.1) (2010).
20. O.C.G.A. § 19-9-2 (2010).
21. *Scott*, 311 Ga. App. at 727, 716 S.E.2d at 810.
22. *Id.* at 728-29, 716 S.E.2d at 811.
23. *Id.* at 729, 716 S.E.2d at 811.
24. *Id.* (citing *In re* J.L.M., 204 Ga. App. 46, 47, 418 S.E.2d 415, 417-18 (1992)).

same parties or their privies,"[25] and by res judicata pursuant to the UCCJEA,[26] which states,

> A child custody determination made by a court of this state that had jurisdiction under this article binds all persons . . . who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to those persons, the determination is conclusive as to all decided issues of law and fact except to the extent the determination is modified.[27]

In the prior visitation action, the grandparents were required to show that the children would be harmed unless visitation was granted and that the interests of the children would be best served by such visitation.[28] However, in the court of appeals decision, a third-party custody action, the grandparents were required to show by clear and convincing evidence that the children would suffer physical or emotional harm if custody were awarded to the mother, and that an award of custody to the paternal grandparents was in the children's best interests by promoting the children's welfare and happiness.[29]

"[D]ifferent issues were actually and necessarily decided in the visitation action" than were to be decided in the court of appeals custody case; therefore, collateral estoppel did not prevent the grandparents from seeking custody of their grandchildren after they failed to have visitation rights established.[30] Similarly, res judicata did not bar the grandparents' current custody action because O.C.G.A. § 19-9-45 only applies to issues actually decided in a prior action.[31] The prior order related to the grandparents' right to visitation, not custody, which was at issue in this action.[32]

The case of *Kunz v. Bailey*,[33] reviewed by the Georgia Supreme Court in January 2012, was originally decided by the court of appeals in 2011.[34] The biological parents of the child at issue divorced in June 2002, and the mother soon remarried. In 2006, the biological father

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25. *Id.* at 730, 716 S.E.2d at 812 (quoting Matherly v. Kinney, 227 Ga. App. 302, 304, 489 S.E.2d 89, 92 (1997)).

26. O.C.G.A. § 19-9-40 to -104 (2010).

27. *Scott*, 311 Ga. App. at 731, 716 S.E.2d at 813; *see also* O.C.G.A. § 19-9-45.

28. *Scott*, 311 Ga. App. at 730-31, 716 S.E.2d at 812; *see also* O.C.G.A. § 19-7-3(c) (2012).

29. *Scott*, 311 Ga. App. at 731, 716 S.E.2d at 812 (citing Clark v. Wade, 273 Ga. 587, 599, 544 S.E.2d 99, 108 (2001)); *see also* O.C.G.A. § 19-7-1(b.1).

30. *Scott*, 311 Ga. App. at 731, 716 S.E.2d at 812-13.

31. *Id.* at 731-32, 716 S.E.2d at 813; *see also* O.C.G.A. § 19-9-45.

32. *Scott*, 311 Ga. App. at 732, 716 S.E.2d at 813.

33. 290 Ga. 361, 720 S.E.2d 634 (2012).

34. Bailey v. Kunz, 307 Ga. App. 710, 706 S.E.2d 98 (2011).

surrendered his parental rights, and the stepfather adopted the child. Following a dispute about an ongoing grandparent visitation, the biological paternal grandparents filed a petition for visitation pursuant to O.C.G.A. § 19-7-3.[35] The mother and adoptive father filed a motion to dismiss; thereafter they appealed the court's denial of the motion.[36]

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 child are not separated and the child is living with both parents.[37] The Georgia Supreme Court upheld the court of appeals, finding error in not treating the stepfather as a parent for the purposes of the statute.[38] Although the word "parent" is undefined in O.C.G.A. § 19-7-3, the adoption code defines the word "parent" to include "legal father" of a child[39] and defines "legal father" as "a male who . . . [h]as legally adopted a child."[40]

Once the biological father surrendered his parental rights, the child became a legal stranger to the biological father's family.[41] The adoptive father became the parent within the meaning of the statute, not the biological father, and thus the biological paternal grandparents had no standing to seek visitation under O.C.G.A. § 19-7-3.[42]

In *Hudgins v. Harding*,[43] a case decided in January 2012, the biological paternal grandmother's request for visitation with her youngest grandchild, K.H., was at issue. Barbara Harding and Christopher McCurry were the natural parents of three children. In May 2000, Barbara Harding married Wesley Harding. In 2003, McCurry's parental rights were terminated, and Mr. Harding adopted the three children. Hudgins subsequently filed a petition for visitation rights with the children pursuant to O.C.G.A. § 19-7-3. The trial court determined that Hudgins was not entitled to seek visitation rights in light of Mr. Harding's adoption of K.H.[44]

The adoption of a minor child generally extinguishes any visitation rights of the child's former grandparents;[45] however, O.C.G.A. § 19-7-

35. O.C.G.A. § 19-7-3 (2010 & Supp. 2012).
36. *Kunz*, 307 Ga. App. at 711, 706 S.E.2d at 99.
37. *Kunz*, 290 Ga. at 362, 720 S.E.2d at 635; *see also* O.C.G.A. § 19-7-3(b).
38. *Kunz*, 290 Ga. at 362, 720 S.E.2d at 635.
39. O.C.G.A. § 19-8-1(8) (2010 & Supp. 2012).
40. O.C.G.A. § 19-8-1(6)(A); *Kunz*, 290 Ga. at 362, 720 S.E.2d at 635.
41. *Kunz*, 290 Ga. at 363, 720 S.E.2d at 635.
42. *Id.* at 363, 720 S.E.2d at 635-36.
43. 313 Ga. App. 613, 722 S.E.2d 355 (2012).
44. *Id.* at 613-14, 722 S.E.2d at 356.
45. O.C.G.A. § 19-8-19(a)(1) (2010).

3(b) sets forth a limited exception.[46] A grandparent of a minor child may seek visitation rights "whenever there has been an adoption in which the adopted child has been adopted by the child's blood relative or by a stepparent, notwithstanding the provisions of [O.C.G.A. §] 19-8-19."[47] However, an original action is not authorized "where the parents of the minor child are not separated and the child is living with both parents."[48]

Relying on an obsolete version of the statute, the trial court concluded that Hudgins was not entitled to visitation rights with the child, because the child had been adopted by a stepparent who was not a blood relative of the child.[49] It was improper for the trial court to deny Hudgins's petition based on an outdated version of the statute; however, a grandparent's original action for visitation rights is not authorized "where the parents of the minor child are not separated and the child is living with both parents."[50] The term "parents" includes both biological and adoptive parents.[51]

K.H. was adopted by her stepfather, Mr. Harding, but "[t]his fact alone . . . did not automatically preclude Hudgins from seeking visitation rights with K.H. . . . and the trial court erred by dismissing Hudgins's petition on such ground."[52] To determine whether Hudgins's petition was authorized under O.C.G.A. § 19-7-3(b), the trial court was required to, but did not, make findings of fact concerning whether Barbara and Wesley Harding were separated and whether K.H. was living with them both.[53] The record included contradictory evidence on this issue; thus, the case was remanded "for the trial court to reconsider Hudgins's petition for visitation rights . . . in light of the appropriate factual findings and the correct legal analysis."[54]

Effective May 1, 2012, the Georgia legislature significantly changed grandparents' rights to seek visitation with their grandchildren pursuant to O.C.G.A. § 19-7-3.[55] Historically, where a grandparent files an original action or intervenes in an existing action regarding custody of

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46. *Hudgins*, 313 Ga. App. at 614, 722 S.E.2d at 356 (alteration in original); *see also* O.C.G.A. § 19-7-3(b).

47. *Hudgins*, 313 Ga. App. at 614, 722 S.E.2d at 356; *see also* O.C.G.A. § 19-7-3(b)(1).

48. O.C.G.A. § 19-7-3(b)(2).

49. *Hudgins*, 313 Ga. App. at 615, 722 S.E.2d at 356-57.

50. *Id.* at 615, 722 S.E.2d at 357; *see also* O.C.G.A. § 19-7-3(b)(2).

51. *Hudgins*, 313 Ga. App. at 615, 722 S.E.2d at 357 (citing *Kunz*, 290 Ga. at 362, 720 S.E.2d at 635); *see also* O.C.G.A. § 19-7-3(b).

52. *Hudgins*, 313 Ga. App. at 615-16, 722 S.E.2d at 357 (citation omitted).

53. *Id.* at 616, 722 S.E.2d at 357.

54. *Id.*

55. O.C.G.A. § 19-7-3; Ga. H.R. Bill 1198, Reg. Sess. (2012).

the child, the grandparent may be awarded reasonable visitation rights if the court finds the health or welfare of the child would be harmed unless visitation is granted and the best interests of the child would be served by such visitation.[56] In considering whether the health or welfare of the child would be harmed without the visitation requested by a grandparent, the amended statute now provides:

> [T]he court shall consider and may find that harm to the child is reasonably likely to result where, prior to the original action or intervention: (A) The minor child resided with the grandparent for six months or more; (B) The grandparent provided financial support for the basic needs of the child for at least one year; (C) There was an established pattern of regular visitation or child care by the grandparent with the child; or (D) Any other circumstance exists indicating that emotional or physical harm would be reasonably likely to result if such visitation is not granted.[57]

Language that previously indicated no presumption in favor of visitation by any grandparent was removed,[58] and a rebuttable presumption was created that a child who has minimal or no opportunity for contact with a grandparent may suffer emotional injury that is harmful to the child's health.[59] Further, when the failure to provide contact with grandparents would result in emotional harm to the child, the parent's decision regarding such visitation will be given deference but is not conclusive.[60] In effect, the burden of proof has now shifted from the grandparent seeking visitation to the parent seeking to deny the visitation request.[61]

Further, notwithstanding the above language, "if one of the parents of a minor child dies, is incapacitated, or is incarcerated, the court may award the parent of the deceased, incapacitated, or incarcerated parent of such minor child reasonable visitation" with the child, if the court finds "such visitation would be in the best interests of the child."[62] Again, the custodial parent's judgment regarding their child's best interest is given deference, but is not conclusive.[63]

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56. O.C.G.A. §§ 19-7-3(b)(1), -3(c)(1).
57. O.C.G.A. § 19-7-3(c)(1).
58. Ga. H.R. Bill 1198 § 1.
59. O.C.G.A. § 19-7-3(c)(3).
60. *Id.*
61. *Id.*
62. O.C.G.A. § 19-7-3(d).
63. *Id.*

Where grandparent visitation is awarded, such time shall not be less than twenty-four hours in any one-month period.[64] Moreover, even if visitation is not awarded to a grandparent, the court can order the parent to notify the grandparent of every performance of the minor child, which is open to the public.[65]

IV. CHILD SUPPORT MODIFICATION

The case of *Bagwell v. Bagwell*[66] looked at the two-year limitation on child support modification actions found in O.C.G.A. § 19-6-15(k)(2).[67] In May 2010, the father filed a petition to modify his child support obligation downward, claiming a substantial decrease in income and financial status since the divorce was final in 2006. After the father, an attorney, failed to respond to discovery, the trial court dismissed his modification action as a sanction.[68]

Fourteen days after the trial court announced its intention to dismiss the modification petition, the father filed a second petition to modify his child support obligation downward, again claiming a substantial decrease in income and financial status since the divorce was final in 2006. The mother moved to dismiss the second modification action on the basis that it was time-barred under O.C.G.A. § 19-6-15(k)(2).[69] The trial court allowed the modification action to proceed, stating, in part, that its dismissal of the father's first modification action "was not an adjudication on the merits, but simply a sanction."[70]

The Georgia Court of Appeals disagreed with the trial court.[71] Unless specified otherwise in the trial court's order of dismissal, the dismissal of the first modification action as a sanction for the father's failure to comply with discovery was an adjudication on the merits.[72] There was no such limiting language in the trial court's dismissal; thus, it was a final order.[73] The Georgia Supreme Court noted, "Once an order of dismissal is entered[,] it may not be modified by the trial court outside the term of court in which it was issued in order to specify that it was without prejudice."[74]

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64. O.C.G.A. § 19-7-3(c)(4).
65. O.C.G.A. § 19-7-3(g).
66. 290 Ga. 378, 721 S.E.2d 847 (2012).
67. *Id.* at 379, 721 S.E.2d at 849; *see also* O.C.G.A. § 19-6-15(k)(2) (2010 & Supp. 2012).
68. *Bagwell*, 290 Ga. at 378-79, 721 S.E.2d at 849.
69. *Id.* at 379, 721 S.E.2d at 849.
70. *Id.* (internal quotation marks omitted).
71. *Id.*
72. *Id.* at 380, 721 S.E.2d at 850.
73. *Id.*
74. *Id.*

Apart from three specific statutory exceptions, "[n]o petition to modify child support may be filed by either parent within a period of two years from the date of the final order on a previous petition to modify by the same parent . . . ."[75] As this was a final order, the two-year rule was triggered.[76]

The father insisted that since his modification was based on an involuntary loss of income as set forth in O.C.G.A. § 19-6-15(j)(1),[77] he should have been able to proceed despite the two-year rule.[78] However, this exception was not invoked in the father's petition, and even if it had been, the relevant time frame for such alleged loss of income was from the date of the prior modification ruling (fourteen days before the second action was filed), not the original divorce decree.[79]

V. ALIMONY

In *Hammond v. Hammond*,[80] the husband's pension was the only significant marital asset to be divided in the parties' divorce case.[81] Pursuant to statute, this pension could not be attached, subjected to process, or assigned.[82] At trial, the wife urged the court to adopt the time-rule formula, which can be used to determine the equitable distribution of a pension plan "by dividing the number of marital years that the employee spouse earned toward the pension by the number of years of total service toward the pension."[83] In lieu of adopting the time-rule formula, "the trial court ordered husband to pay wife alimony in the amount of $1,250 per month, starting the first month husband receives his monthly pension benefit."[84]

The wife appealed, arguing that this determination was erroneous as it did not bear any relation to the correct valuation of the pension.[85] Nevertheless, the record demonstrated that "it was at [the] wife's urging that the trial court chose to evaluate and 'distribute' the pension . . . as alimony[,and that a] trial court is 'given a wide latitude in fixing the

75. O.C.G.A. § 19-6-15(k)(2).
76. *Bagwell*, 290 Ga. at 381, 721 S.E.2d at 850.
77. O.C.G.A. § 19-6-15(j)(1) (2010 & Supp. 2012).
78. *Bagwell*, 290 Ga. at 381, 721 S.E.2d at 850.
79. *Id.* at 379-81, 721 S.E.2d at 849-51.
80. 290 Ga. 518, 722 S.E.2d 729 (2012).
81. *Id.* at 518, 722 S.E.2d at 730.
82. O.C.G.A. § 47-3-28(a) (2010); *Hammond*, 290 Ga. at 518, 722 S.E.2d at 730.
83. *Hammond*, 290 Ga. at 519, 722 S.E.2d at 731 (citing *In re* Hunt, 909 P.2d 525, 531 (Colo. 1995)).
84. *Id.* at 518, 722 S.E.2d at 731.
85. *Id.* at 519, 722 S.E.2d at 731.

amount of alimony.'"[86] The court further stated that "a party will not be heard to complain of error induced by their own conduct, nor of error expressly invited during the course of trial."[87]

VI. CLASSIFICATION OF ASSETS AND EQUITABLE DIVISION

In *Highsmith v. Highsmith*,[88] the trial court's judgment was partially reversed.[89] Where the wife brought the investment account into the marriage, no marital funds were placed in the account during the marriage, and the account value only rose or fell with the market, it was error for the trial court to find that the approximately $74,000 left in the account at the end of the marriage was marital property subject to equitable division.[90]

In the same case, the trial court was upheld in its application, and lack of application, of the source-of-funds rule, which "is a method of equitable distribution of marital property."[91] Under this rule, the "trial court 'must determine the contribution of the spouse who brought the [property] to the marriage, and weigh it against the total non-marital and marital investment in the property.'"[92] On appeal, the wife maintained that the trial court erred in applying the source-of-funds rule to the husband's office property but not to her investment account funds.[93]

After the parties married, the wife withdrew $210,000 from her pre-marital investment account and placed it in a joint account held by the parties to invest in rental properties. The trial court found that the source-of-funds rule could not be applied as there was simply not enough evidence presented regarding the joint account at the time of deposit or how much of the $210,000 was spent versus marital funds spent on the purchase of real estate for the parties' rental business. At the same time, the trial court did take into consideration this "proposed credit" of up to $210,000 in awarding the wife significantly more of the marital estate than was awarded to husband.[94] In light of recent case law regarding transmutation of separate assets into marital assets, it is

86. *Id.* (quoting Farrish v. Farrish, 279 Ga. 551, 552, 615 S.E.2d 510, 511 (2005)).
87. *Id.*
88. 289 Ga. 841, 716 S.E.2d 146 (2011).
89. *Id.* at 844, 716 S.E.2d at 150.
90. *Id.* at 842-43, 716 S.E.2d at 148-49.
91. *Id.* at 843, 716 S.E.2d at 149.
92. *Id.* (alteration in original) (quoting Windham v. Araya, 286 Ga. 501, 502, 690 S.E.2d 168, 169 (2010)).
93. *Id.*
94. *Id.* at 841-43, 716 S.E.2d at 148-49.

interesting that the Georgia Supreme Court did not hold that the character of the $210,000 was changed from the wife's separate asset to a marital asset via a gift to the marital estate evidenced by the wife's deposit of these monies into a jointly held account.[95]

The source-of-funds rule was applied to real estate held by the husband.[96] Evidence showed that soon after the parties married, the husband used $70,000 to purchase and renovate an office.[97] Approximately $20,000 of the renovations were from the the husband's premarital funds, and the remaining $50,000 used to purchase the property and complete the renovations were marital funds.[98] The trial court's decision was upheld in finding that twenty-nine percent of the equity in the building was the husband's separate property, with the remaining seventy-one percent being classified as marital property subject to equitable division.[99] From the text of the opinion it is unclear how this real estate was titled, though given that the property was purchased during the marriage with marital funds, is the treatment of the husband's $20,000 renovation investment as his separate property consistent with recent case law?[100]

In *Shaw v. Shaw*,[101] the lower court's decision was upheld in finding that assets inherited during the marriage were subject to equitable distribution of property.[102] During the marriage, the husband inherited monies and land in Florida from his mother. Upon receipt of the monies, the husband established two investment accounts in the names of the husband and wife jointly, as joint tenants with rights of survivorship. When the husband inherited the Florida property, he directed that the land be deeded to the wife and him as tenants in common, giving each an undivided one-half interest in the property.[103] These acts on the husband's part evidenced his intent to transform his separate property into marital property.[104]

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95. *Id.* at 842, 716 S.E.2d at 148. *See, e.g.*, Miller v. Miller, 288 Ga. 274, 277-78, 280, 705 S.E.2d 839, 843-45 (2010); Bloomfield v. Bloomfield, 282 Ga. 108, 110, 646 S.E.2d 207, 211 (2007).

96. *Highsmith*, 289 Ga. at 843, 716 S.E.2d at 149.

97. *Id.* at 843 n.1, 716 S.E.2d at 149 n.1.

98. *Id.*

99. *Id.*

100. *Id. But see Miller*, 288 Ga. at 280, 705 S.E.2d at 845; Coe v. Coe, 285 Ga. 863, 864-65, 684 S.E.2d 598, 600-01 (2009).

101. 290 Ga. 354, 720 S.E.2d 614 (2012).

102. *Id.* at 357, 720 S.E.2d at 617.

103. *Id.* at 355, 720 S.E.2d at 615-16.

104. *Id.* at 355, 720 S.E.2d at 616.

VII. PROCEDURE

A procedural issue arose in *Gresham-Green v. Mainones*.[105] The wife argued on appeal "that the trial court erred in relying on the report of a guardian ad litem that had not been admitted into evidence."[106] The Georgia Supreme Court held that no error existed where the guardian ad litem actually testified at the final hearing, and the wife could not show that the trial court improperly relied on the guardian ad litem's report in any way.[107]

VIII. APPEAL

The supersedeas effect on the trial court's authority to act was at issue in *Avren v. Garten*.[108] On appeal, the mother complained that the trial court erred when it entered an attorney fee award in favor of the father after she filed her notice of appeal and application for discretionary review.[109] The Georgia Supreme Court noted that "[t]he filing of an application for appeal shall act as a supersedeas to the extent that a notice of appeal acts as a supersedeas."[110]

The Georgia Court of Appeals held that supersedeas upon appeal does not preclude the trial judge from entering an attorney fees award arising out of an appealed case, explaining that

> the supersedeas that results from the filing of an application to appeal or a notice of appeal deprives the trial court of jurisdiction to take action in the case that would affect the judgment on appeal, but it does not deprive the trial court of entering an order that might be affected by the outcome of the appeal of the underlying judgment, "subject to the peril that any decision reached which conflicts with the decision of the appellate court when rendered will thereby be made nugatory."[111]

Effective July 1, 2011, O.C.G.A. §§ 5-6-34[112] and 5-6-35[113] were amended to provide that "[w]here an appeal is taken pursuant to [O.C.G.A. §§ 5-6-34 and 5-6-35] for a judgment or order granting nonmonetary relief in a child custody case, such judgment or order shall

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105. 290 Ga. 721, 725 S.E.2d 277 (2012).
106. *Id.* at 722, 725 S.E.2d at 278.
107. *Id.*
108. 289 Ga. 186, 710 S.E.2d 130 (2011).
109. *Id.* at 189-90, 710 S.E.2d at 136.
110. *Id.* at 190, 710 S.E.2d at 136; *see also* O.C.G.A. § 5-6-35(h) (1995 & Supp. 2012).
111. *Avren*, 289 Ga. at 190-91, 710 S.E.2d at 136 (quoting Se. Wholesale Furniture Co. v. Atlanta Metallic Casket Co., 84 Ga. App. 271, 276, 66 S.E.2d 68, 72 (1951)).
112. O.C.G.A. § 5-6-34 (1995 & Supp. 2012).
113. O.C.G.A. § 5-6-35 (1995 & Supp. 2012).

stand until reversed or modified by the reviewing court unless the trial court states otherwise in its judgment or order."[114] Thus, the filing of an application for appeal or notice of appeal shall not act as supersedeas to prevent the trial court's custody ruling from going into effect, unless the trial court provides otherwise.[115]

Appellate procedure was the subject of appeal in *Brabant v. Patton*.[116] Patton filed a petition for declaratory judgment and a petition for citation of contempt, which Brabant moved to have dismissed. The trial court's ruling, issued on September 23, 2010, resulted in an interim custody order. Brabant timely appealed this order.[117] On Patton's motion, the trial court dismissed Brabant's appeal "on the ground that all appeals in domestic relations cases are discretionary pursuant to [O.C.G.A.] § 5-6-35," and "that because the order was interlocutory, Brabant was required to obtain a Certificate of Immediate Review before she filed an appeal" pursuant to O.C.G.A. § 5-6-34(b).[118]

The court of appeals held that Brabant had a right of direct appeal.[119] Under O.C.G.A. § 5-6-34(a)(11), direct appeals may be taken from "[a]ll judgments or orders in child custody cases including, but not limited to, awarding or refusing to change child custody or holding or declining to hold persons in contempt of such child custody judgments or orders."[120] This section has been interpreted "as permitting 'a direct appeal of an order in a child custody case regarding which parent has custody regardless of finality,' and thus such orders are not subject to the interlocutory or discretionary appeal procedures."[121]

After a series of extensions since the Domestic Relations Pilot Project was first initiated, Rule 34 of the Georgia Supreme Court was amended to add subsection (4), the standard for granting applications to appeal final divorce decrees.[122] An application filed by an attorney seeking to rely on the standard set forth in Rule 34(4) must be accompanied by a certificate of good faith.[123] If the court finds that an application is

114. O.C.G.A. §§ 5-6-34(e), -35(k).
115. O.C.G.A. §§ 5-6-35(h), -35(k).
116. 315 Ga. App. 711, 712-13, 728 S.E.2d 244, 245 (2012).
117. *Id.* at 711-12, 728 S.E.2d at 244-45.
118. *Id.* at 712, 728 S.E.2d at 245.
119. *Id.* at 713, 728 S.E.2d at 245.
120. O.C.G.A. § 5-6-34(a)(11).
121. *Brabant*, 315 Ga. App. at 712, 728 S.E.2d at 245 (citation omitted) (quoting Edge v. Edge, 290 Ga. 551, 552, 722 S.E.2d 749, 751 (2012)).
122. GA. SUP. CT. R. 34.
123. *Id.*

frivolous and denies the application, the attorney who filed the application may be assessed a penalty of up to $2,500.[124]

IX. IMPERMISSIBLE MODIFICATION OF FINAL DECREE

In two cases reviewed by the Georgia Supreme Court, *Doane v. LeCornu*[125] and *Greenwood v. Greenwood*,[126] the trial courts were found to have impermissibly modified the parties' final decrees of divorce.[127] In *Doane*, the trial court found the husband in contempt for failing to remove the wife's name from the mortgage on the lake house and for failing to "buy out" his wife's interest in the lake house through a series of payments, both of which were obligations required by the parties' final decree.[128] To purge his contempt, the husband was ordered to sell the lake house that had been awarded to him by the final decree and satisfy his financial obligations to his wife with the proceeds.[129] This was error.[130] The trial court was not allowed "to compel a party who was awarded a specific asset to sell or otherwise convert that asset in order to comply with some other provision of the decree."[131] To order the husband to sell the lake house and pay the wife "from the proceeds 'amounted to a modification.'"[132]

In *Greenwood*, the husband was obligated to remove the wife's name from the mortgage associated with the marital residence on or before October 1, 2009, either through refinancing the debt or selling the residence. If this obligation was not completed by October 1, 2009, the husband was obligated to pay the wife a penalty of $10,000 on October 2, 2009.[133] Following a hearing on the wife's motion for contempt, the trial court converted the monetary penalty into a lien on the marital residence and extended the time by which the husband was to have sold the marital residence from a certain date to a "reasonable period of time" due to "market conditions."[134]

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124. *Id.*
125. 289 Ga. 379, 711 S.E.2d 673 (2011).
126. 289 Ga. 163, 709 S.E.2d 803 (2011).
127. *Doane*, 289 Ga. at 381, 711 S.E.2d at 675; *Greenwood*, 289 Ga. at 165, 709 S.E.2d at 805.
128. *Doane*, 289 Ga. at 379-80, 711 S.E.2d at 674.
129. *Id.* at 380, 711 S.E.2d at 674.
130. *Id.* at 380-81, 711 S.E.2d at 674.
131. *Id.* at 381, 711 S.E.2d at 675 (quoting Darroch v. Willis, 286 Ga. 566, 570-71, 690 S.E.2d 410, 414 (2010)).
132. *Id.* (quoting *Darroch*, 286 Ga. at 571, 690 S.E.2d at 415).
133. *Greenwood*, 289 Ga. at 163, 709 S.E.2d at 804.
134. *Id.* at 165, 709 S.E.2d at 806.

The court held that "[t]he test to determine whether an order is clarified or modified is whether the clarification is reasonable or whether it is so contrary to the apparent intention of the original order as to amount to a modification."[135] The trial court's conversion of the monetary penalty into a lien to be paid some time in the future and the extension of time by which the husband had to sell the marital residence was so contrary to the intent of the original order as to amount to a modification.[136]

X. ATTORNEY FEES

In *Abt v. Abt*,[137] the trial court found that the wife improperly expanded the litigation by causing the children to "vacillate in their respective custodial elections," by exposing the children to a problematic boyfriend, and by otherwise creating circumstances that led to the need for procedural safeguards such as a guardian ad litem, a restraining order, and emergency hearings.[138] The trial court's award of fees to the husband under O.C.G.A. § 9-15-14(b)[139] was upheld.[140]

135. *Id.* at 164-65, 709 S.E.2d at 805 (quoting Cason v. Cason, 281 Ga. 296, 297, 637 S.E.2d 716, 718 (2006)) (internal quotation marks omitted).

136. *Id.* at 165, 709 S.E.2d at 805 (quoting Cason v. Cason, 281 Ga. 296, 297, 637 S.E.2d 716, 718 (2006)).

137. 289 Ga. 166, 709 S.E.2d 806 (2011).

138. *Id.* at 167, 709 S.E.2d at 807.

139. O.C.G.A. § 9-15-14(b) (2006).

140. *Abt*, 289 Ga. at 167, 709 S.E.2d at 807-08.

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