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Domestic Relations

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Of the appellate cases decided during the survey period,[1] eighteen are digested here. While the legislature continued to focus on the collection of child support, the appellate courts tackled a wide range of issues.

I. DIVORCE PROCEDURE

The appellate courts issued several decisions affecting parties' procedural rights when seeking a divorce. In *Holtsclaw v. Holtsclaw*,[2] the supreme court held it was error for a trial court to decline jurisdiction over a resident's claim for divorce.[3] The parties moved to Georgia from Mississippi with their child. Approximately two months later, the wife returned to Mississippi. After residing in Georgia for six months, the husband filed for divorce and sought custody of their minor child.[4] The trial court dismissed the husband's action, finding that Georgia was an inconvenient forum[5] for the custody dispute, and the parties would be "better served" by having the divorce and custody matters handled at the same time.[6] The supreme court reversed, holding the doctrine of

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1. This survey chronicles developments in Georgia domestic relations law occurring between June 1, 1997 and May 31, 1998.
2. 269 Ga. 163, 496 S.E.2d 262 (1998).
3. *Id.* at 165, 496 S.E.2d at 264.
4. *Id.* at 163, 496 S.E.2d at 263.
5. *Id.* (citing O.C.G.A. § 19-9-47(e)(1) (1991)).
6. *Id.*

"forum non conveniens" applies to custody actions but not to actions for divorce.[7]

In *Matthews v. Matthews*,[8] the supreme court reversed a divorce judgment entered after a bench trial in which the wife had timely filed a jury demand.[9] At the first calendar call, the court granted the wife a continuance and reset the case for a bench trial on November 25th.[10] Five days before the case was to be tried, the wife demanded a jury trial.[11] When the wife did not appear for the calendar call on November 25th, the trial court conducted a bench trial in her absence.[12] A party may demand a jury any time before the call of the case and before it is determined that the case is ready for trial.[13] Because the trial court initially granted the wife a continuance, the trial court did not determine the case was ready for trial until November 25th.[14] Because the wife had already filed a jury demand by then, her demand was timely, and the case should have been submitted to a jury.[15] The court overruled *Easterling v. Easterling*[16] to the extent it stated a party waives a jury demand by failing to appear for a nonjury trial calendar.[17]

In *DeGarmo v. DeGarmo*,[18] the wife claimed she contributed separate assets to start a business with her husband and a third party. She claimed her husband and the other individual incorporated the company and caused all of the stock to be put into their names, thus excluding her.[19] The court denied her motion to add the business and other stockholder.[20] The supreme court reversed, holding that when factual determinations must be made to resolve the proper ownership of a marital asset, joinder of the necessary third parties is mandatory.[21]

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7. *Id.* at 164, 496 S.E.2d at 264.
8. 268 Ga. 863, 494 S.E.2d 325 (1998).
9. *Id.* at 864, 494 S.E.2d at 362 (citing O.C.G.A. § 9-11-39; McLarin v. McLarin, 224 Ga. 675, 163 S.E.2d 914 (1968)).
10. *Id.* at 863, 494 S.E.2d at 326.
11. *Id.*
12. *Id.*
13. *Id.* (citing Ivey v. Ivey, 264 Ga. 435, 445 S.E.2d 258 (1994)).
14. *Id.* at 864, 494 S.E.2d at 326.
15. *Id.*
16. 231 Ga. 889, 204 S.E.2d 610 (1974).
17. 268 Ga. at 865, 494 S.E.2d at 327.
18. 269 Ga. 480, 499 S.E.2d 317 (1998).
19. *Id.* at 481, 499 S.E.2d at 318.
20. *Id.* at 480, 499 S.E.2d at 318.
21. *Id.* at 481, 499 S.E.2d at 318 (citing Roberts v. Roberts, 226 Ga. 203, 173 S.E.2d 675 (1970)).

In *Grim v. Grim*,[22] the trial court allowed the husband to testify on the support he provided the wife during the separation so long as that support was characterized as "voluntary" and he did not mention the interlocutory order.[23] He also introduced an earlier Domestic Relations Financial Affidavit showing the amount of the payments as one of his monthly expenses.[24] The supreme court held this evidence was improperly admitted.[25] Post-separation support is generally inadmissible[26] because it is a ruling based on less than a full hearing and has the potential for being confusing and misleading to a jury.[27] The creation of an exception to allow the introduction of evidence of voluntary payments could dissuade parties from settling the temporary issues themselves.[28] Post-separation payments are only admissible to prevent a fraud upon the court.[29]

II. DIVORCE SETTLEMENT

The court of appeals decided two cases dealing with written agreements not incorporated into the divorce decree. In *Arnold v. Arnold*,[30] the parties entered into two contracts on the same day. The first was called "Contract of Settlement" and was incorporated into the divorce decree. The second contract had more specific terms than the first, but it was not incorporated into the divorce decree. The husband sued the wife for breach of contract concerning terms in the second contract. The wife claimed she was not bound by the contract because it was not incorporated into the divorce decree.[31] The court denied her motion for directed verdict, and she appealed from an adverse jury verdict.[32] The court of appeals affirmed the trial court's ruling, finding the parties' second written agreement was enforceable when the terms were not inconsistent with the divorce decree.[33] The court of appeals reached a

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22. 268 Ga. 2, 486 S.E.2d 27 (1997).
23. *Id.* at 2-3, 486 S.E.2d at 27.
24. *Id.* at 3, 486 S.E.2d at 27.
25. *Id.*, 486 S.E.2d at 27-28.
26. *Id.*, 486 S.E.2d at 27 (citing McEachern v. McEachern, 260 Ga. 320, 394 S.E.2d 92 (1990)).
27. *Id.*
28. *Id.*
29. *Id.*, 486 S.E.2d at 27-28 (citing McEachern v. McEachern, 260 Ga. 320, 394 S.E.2d 92).
30. 227 Ga. App. 152, 489 S.E.2d 65 (1997).
31. *Id.* at 152-53, 489 S.E.2d at 66.
32. *Id.*, 489 S.E.2d at 67.
33. *Id.* at 153-54, 489 S.E.2d at 67; *but cf.* Cabaniss v. Cabaniss, 251 Ga. 177, 304 S.E.2d 65 (1983) (oral agreements not enforceable when not incorporated in divorce decree).

similar holding in *Sheppard v. Sheppard*.[34] The parties entered into a settlement agreement that was not incorporated into the divorce decree.[35] The court held the evidence supported a finding the husband was in breach of a valid contract.[36]

III. ALIMONY AND CHILD SUPPORT

In *Hawkins v. Hawkins*,[37] the trial court ordered the husband to pay the wife periodic alimony for five years and to maintain an insurance policy on his life to secure the obligation.[38] The supreme court affirmed, holding the insurance requirement was a valid form of periodic alimony.[39] The husband claimed the divorce judgment impermissibly required payments beyond his death.[40] The court rejected the husband's argument because the decree did not impose any obligations on his estate.[41] Any premiums would be paid during the husband's life.[42] If the husband were to die, the insurance company, not the husband's estate, would pay the benefits to the wife.[43]

The decision in *Hawkins* returns clarity to Georgia law regarding alimony. As the decision states, "[n]early two decades ago, this Court concluded that a trial court may order a spouse to carry life insurance for the benefit of the other spouse."[44] In 1994, however, the court held an insurance policy to secure a child support obligation was not permissible.[45] The court's stance opened the question of whether it was legal to secure an alimony obligation with a life insurance policy. Although the legislature responded to allow insurance to be required for child support,[46] no legislative enactment covered alimony for a spouse.

In *Zobrist v. Bennison*,[47] the supreme court held that if the obligor fails to maintain a life insurance policy as required by a decree, an action lies against the obligor's estate and the actual beneficiaries, if any.[48] Here, the father was required to maintain two insurance policies

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34. 229 Ga. App. 494, 494 S.E.2d 240 (1997).
35. *Id.* at 494, 494 S.E.2d at 242.
36. *Id.* at 495, 494 S.E.2d at 242-43.
37. 268 Ga. 637, 491 S.E.2d 806 (1997).
38. *Id.* at 637, 491 S.E.2d at 807.
39. *Id.* at 638, 491 S.E.2d at 807.
40. *Id.*
41. *Id.*; *see also* Ragland v. Ragland, 266 Ga. 643, 469 S.E.2d 658 (1996).
42. 268 Ga. at 638, 491 S.E.2d at 807.
43. *Id.*
44. *Id.* (citing Ritchea v. Ritchea, 244 Ga. 476, 260 S.E.2d 871 (1979)).
45. Gardner v. Gardner, 264 Ga. 138, 441 S.E.2d 666 (1994).
46. O.C.G.A. § 19-6-34 (Supp. 1998).
47. 268 Ga. 245, 486 S.E.2d 815 (1997).
48. *Id.* at 247, 486 S.E.2d at 817.

for his children. After he remarried, he named his new wife the beneficiary of one of the policies and his estate the beneficiary of the other. His will left the children the insurance proceeds from the one policy after payment of the estate's debts, including a substantial mortgage.[49] The court held the children had a cause of action not only against their father's estate, but also against their stepmother.[50]

IV. MODIFICATION OF SUPPORT

One of the most talked about decisions of the year was *Williams v. Williams*.[51] When the parties divorced, they reached a settlement that allowed the husband to retain ownership of his minority interests in certain limited partnerships obtained through the husband's employment. Both parties had experts evaluate the partnerships. After the divorce, the husband sued his employer for $9.5 million for interfering with his partnership rights. The husband and his employer reached a confidential agreement that apparently involved the liquidation of the husband's partnership interests. The wife petitioned for an increase in alimony and child support, arguing the litigation settlement increased the former husband's financial status.[52] The trial court denied the wife's petition, and the supreme court affirmed.[53]

The supreme court held the "[c]onversion of an asset awarded in the dissolution decree will not be considered income for the purpose of assessing whether there has been a change in the financial status of the obligor spouse."[54] The majority saw the action as an attempt to relitigate the equitable division settled by the parties' own agreement after each party had financial experts review the parties' holdings.[55] The majority held the husband had been "awarded the partnership interests (along with any future gain or loss in their value) as property in the dissolution decree."[56]

If the majority had held the value of the partnership interests were unknown at the time of divorce and the settlement merely determined the market value that existed all along, family law practitioners would

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49. *Id.* at 245-46, 486 S.E.2d at 816.
50. *Id.* at 247, 486 S.E.2d at 817.
51. 268 Ga. 126, 485 S.E.2d 772 (1997).
52. *Id.* at 126-27, 485 S.E.2d at 773-74.
53. 268 Ga. at 126, 485 S.E.2d at 772 (4-3 decision).
54. *Id.* at 128, 485 S.E.2d at 774.
55. *Id.*, 485 S.E.2d at 774-75. The wife was not seeking title to any asset awarded the husband during the divorce; she sought an upward modification of periodic support payments.
56. *Id.*, 485 S.E.2d at 774.

not have been too surprised if the court had found that the husband's financial status had not changed. The majority, however, held the partnership interests had increased in value, but the increase could not be considered a change in the former husband's financial status.[57]

The dissent[58] and many family law practitioners have interpreted the majority opinion as creating an exception to the modification statute.[59]

> The plain and unambiguous language of O.C.G.A. section 19-6-19(a) focuses upon a change in income or financial status, not upon the source of that change. Nothing in the statute expressly or implicitly exempts from a modification action those changes in income or financial status resulting from post-divorce appreciation in marital assets awarded one spouse in the equitable division of property . . . . It thus appears that the majority's opinion imposes an unwarranted marital-asset exemption upon a modification proceeding under O.C.G.A. section 19-6-19(a).[60]

The minority found the appreciation of the partnership interests after the divorce met the threshold question of whether there had been a substantial change in the husband's financial status.[61] When the obligor's ability to provide support has increased, the receiving spouse should be able to seek a modification of support.[62] The source of the increased ability to pay should not matter.[63] Because O.C.G.A. section 19-6-19 does not make any distinctions based on the source of the increase,[64] the dissenting opinion seems more appropriate.

In *Early v. Early*,[65] the supreme court held the trial court does not have discretion to decline jurisdiction over a child support modification action even when a custody modification action is pending in another jurisdiction.[66] After the parties divorced in Georgia, the mother and the parties' minor child moved to California. The father filed suit in California to modify visitation and custody. He then filed an action in Georgia to modify child support, successfully requesting the Georgia court to decline jurisdiction so the matter could be combined with the

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57. *Id.* at 129, 485 S.E.2d at 775.

58. Justice Carol Hunstein wrote the dissent, which was joined by Justices Leah Sears and George Carley.

59. O.C.G.A. § 19-6-19(a) (1991).

60. 268 Ga. at 130, 485 S.E.2d at 776.

61. *Id.* at 131, 485 S.E.2d at 777.

62. O.C.G.A. § 19-6-19(a).

63. 268 Ga. at 130, 485 S.E.2d at 776.

64. *Id.*

65. 269 Ga. 415, 499 S.E.2d 329 (1998).

66. *Id.* at 418, 499 S.E.2d at 331.

custody action in California.[67] The supreme court held the trial court was without authority to decline jurisdiction over the mother's objections.[68] Acknowledging that litigation in both California and Georgia would be inconvenient and expensive for both parties,[69] the question of jurisdiction was mandated by the Full Faith and Credit for Child Support Order Act ("FFCCSOA").[70] Under FFCCSOA, both parties must consent to a jurisdiction other than Georgia.[71]

In *Scott v. Perkins*,[72] the court of appeals held the obligor was not barred from seeking a downward modification of support payment because he has not complied with the terms of the decree.[73] The parties' divorce decree required the father to pay periodic child support and to provide insurance for the minor child. Citing a decrease in his income and financial position, the father sought to have his support obligations reduced.[74] When the father admitted at trial he had not been providing insurance for the child, the court dismissed the father's modification action, holding the father had "unclean hands."[75] The court of appeals reversed, holding strict compliance with a divorce decree is not a prerequisite for a modification action.[76] A modification action is based on a change in either party's income or financial status or a change in the child's needs.[77] The father's noncompliance with the insurance provisions of the decree did not directly relate to any criterion for seeking a modification; therefore, the doctrine of "unclean hands" was inapplicable.[78] A wilful failure to comply with the decree, however, would be grounds for contempt sanctions.[79]

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67. *Id.* at 415-16, 499 S.E.2d at 329-30.
68. *Id.* at 418, 499 S.E.2d at 331.
69. *Id.* at 417-18, 499 S.E.2d at 331.
70. 28 U.S.C. § 1738B (1994).
71. *Id.*
72. 230 Ga. App. 496, 497 S.E.2d 21 (1998).
73. *Id.* at 497, 497 S.E.2d at 23.
74. *Id.* at 496, 497 S.E.2d at 22.
75. *Id.*
76. *Id.* at 497, 497 S.E.2d at 23.
77. O.C.G.A. § 19-6-19 (1991).
78. 230 Ga. App. at 496-97, 497 S.E.2d at 22 (citing Pryor v. Pryor, 263 Ga. 153, 429 S.E.2d 676 (1993)).
79. *Id.* at 497-98, 497 S.E.2d at 23.

V. CUSTODY

In *Rozier v. Berto*,[80] the court of appeals held Georgia lacked subject matter jurisdiction over a change of custody action.[81] The father, a Georgia resident, went to the mother's home in Virginia to retrieve the parties' child for an extended visitation period. He claimed the child was in a state of neglect. After returning to Georgia, the father petitioned the Georgia court to assume emergency jurisdiction of the child and award him custody.[82] An ex parte order was entered.[83] The trial court later dismissed the custody petition, finding it did not have personal jurisdiction over the mother.[84] The father appealed, but the court of appeals was more concerned with the exercise of subject matter jurisdiction.[85] Emergency jurisdiction in Georgia cannot be triggered when the emergency situation occurred in another state and was no longer occurring at the time of the petition.[86]

In *Scott v. Scott*,[87] the court of appeals held public policy does not forbid an award of joint legal custody with one of the parents having the final decision-making power.[88] The court's power to determine who will have the final decision-making power in a joint custody arrangement is expressly provided by statute.[89]

In the *Interest of S.K.R., a child*,[90] the court of appeals held attorney fees cannot be awarded under O.C.G.A. section 19-6-2 in a custody modification action even when child support is being requested.[91] The statute only allows fee awards in divorce cases, alimony and divorce cases, or contempt actions arising out of divorce and alimony cases.[92] Even though child support was requested, it was not alimony.[93] Alimony must arise from an existing marriage.[94] Because the parties

80. 230 Ga. App. 427, 496 S.E.2d 544 (1998).
81. *Id.* at 428, 496 S.E.2d at 546.
82. *Id.* at 427-28, 496 S.E.2d at 544-45 (citing O.C.G.A. § 19-9-43(a)(3)(B) (1991)).
83. *Id.* at 428, 496 S.E.2d at 545.
84. *Id.*
85. *Id.*
86. *Id.* at 430, 496 S.E.2d at 545-46.
87. 227 Ga. App. 346, 489 S.E.2d 117 (1997).
88. *Id.* at 350, 489 S.E.2d. at 121.
89. O.C.G.A. § 19-9-6(2) (1991).
90. 229 Ga. App. 652, 494 S.E.2d 558 (1997).
91. *Id.* at 654, 494 S.E.2d at 560.
92. O.C.G.A. § 19-6-2 (1991).
93. 229 Ga. App. at 653, 494 S.E.2d at 559.
94. *Id.* (citing Allen v. Baker, 188 Ga. 696, 4 S.E.2d 642 (1939)).

were already divorced, the support obligation was not alimony but arose from the statutory obligation to support one's children.[95]

VI. EQUITABLE DIVISION

The supreme court ruled upon two cases concerning separate property. In *Avera v. Avera*,[96] the court held assets transferred to the wife from a trust are the wife's separate property even when the husband created the trust and was the trustee.[97] Long before the parties married, the husband created a trust. After the marriage, the trust transferred real estate, including the marital home, to the wife. During the parties' divorce, the wife claimed the property was her separate property and moved for partial summary judgment.[98] The trial court held the transfer was an interspousal gift, and therefore, the property was marital.[99] The supreme court reversed, holding that because the transfer was made by the trust and not by the husband as an individual, the transfer was a gift from a third party, and thus, the wife's separate property.[100] The court held the spousal contributions made by both parties to the property when held by the trust were gifts to the trust.[101] However, the court remanded the case to the trial court to consider whether any appreciation since the transfer was marital.[102]

In *Horsley v. Horsley*,[103] the supreme court held the trial court improperly applied the "source of funds" rule.[104] The husband had a home when the parties married. The parties reduced the mortgage during the marriage.[105] When determining the husband's separate share of the home, the trial court determined a percentage based on the amount of the mortgage paid before the marriage compared to the amount paid during the marriage.[106] The supreme court held this was error because the trial court did not determine the fair market value of the home either at the time of the marriage or at present.[107] Recogniz-

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95. O.C.G.A. § 19-7-2 (1991).
96. 268 Ga. 4, 485 S.E.2d 731 (1997).
97. *Id.* at 6, 485 S.E.2d at 733.
98. *Id.* at 4, 485 S.E.2d at 732.
99. *Id.*; *see also* McArthur v. McArthur, 256 Ga. 762, 353 S.E.2d 486 (1987).
100. 268 Ga. at 6, 485 S.E.2d at 733.
101. *Id.* at 7, 485 S.E.2d at 734.
102. *Id.* (citing Bass v. Bass, 264 Ga. 506, 488 S.E.2d 366 (1994)).
103. 268 Ga. 460, 490 S.E.2d 392 (1997).
104. *Id.* at 460, 490 S.E.2d at 393 (citing Thomas v. Thomas, 259 Ga. 73, 377 S.E.2d 666 (1989)).
105. *Id.*
106. *Id.*
107. *Id.*

ing that assets do not appreciate at a constant rate, the court determined these calculations were necessary to accurately calculate the husband's share of the asset and appreciation.[108]

VII. RELIEF FROM JUDGMENTS

In July 1996 the legislature enacted O.C.G.A. section 7-4-12.1 which entitles the recipient of child support to simple interest of twelve percent per annum on any arrearage older than thirty days without the necessity of a subsequent order. In *Reid v. Reid*,[109] the court of appeals held this code section was both mandatory and retroactive.[110] In November 1996 the mother amended her garnishment action to seek interest on a child support arrearage that accrued up to and throughout 1995.[111] The trial court refused to apply the statute retroactively and did not award any interest.[112] The appellate court reversed, holding O.C.G.A. section 7-4-12.1 was remedial and, therefore, retroactive.[113] The statute did not affect a party's substantive right to pay or receive child support; it affected only the remedy available to an aggrieved party.[114] Because the statute eliminated the trial court's discretion on whether to award interest, the trial court erred in not awarding interest.[115]

VIII. ADOPTION

In *Baum v. Moore*,[116] the court of appeals held grandparents do not have a legal right under O.C.G.A. section 19-7-1 to intervene in a third party adoption to which both parents consented.[117] The juvenile court had determined the children were deprived and awarded temporary custody to the maternal grandparents.[118] Seven months later, the children were returned to the parents. Four months later, the parents consented to having the children adopted by third parties.[119] The trial court denied the grandparents' petition to intervene.[120] Holding

108. *Id.*
109. 232 Ga. App. 304, 502 S.E.2d 269 (1998).
110. *Id.* at 307, 502 S.E.2d at 272.
111. Id. at 305, 502 S.E.2d at 270.
112. *Id.*
113. *Id.* at 306, 502 S.E.2d at 271.
114. *Id.*
115. *Id.* at 307, 502 S.E.2d at 272.
116. 230 Ga. App. 255, 496 S.E.2d 307 (1998).
117. *Id.* at 257, 496 S.E.2d at 309.
118. *Id.* at 255, 496 S.E.2d at 308.
119. *Id.* at 255-56, 496 S.E.2d at 308.
120. *Id.* at 256, 496 S.E.2d at 308.

O.C.G.A. section 19-7-1 does not create a right to intervene in adoption cases, the court of appeals found the case was controlled by O.C.G.A. section 19-8-15, which expressly sets forth those instances when grandparents may object in adoption cases.[121] As consensual adoption between both parents and third parties was not set forth in O.C.G.A. section 19-8-15, the trial court correctly denied the grandparents' petition.[122]

IX. LEGISLATION

The General Assembly enacted legislation authorizing a child support registry managed by the Department of Administrative Services.[123] When child support is in arrears, liens may be filed against the obligor's motor vehicles.[124]

121. *Id.* at 257, 496 S.E.2d at 309.
122. *Id.*
123. O.C.G.A. § 19-11-9.2(a) (Supp. 1998).
124. *Id.* § 19-11-18(b)(3)(C).