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Domestic Relations

by Barry B. McGough*
and Gregory R. Miller**

This survey period¹ saw continued changes to domestic relations law in Georgia. The Georgia General Assembly completed its sweeping revisions of the child support guidelines. The electorate passed an amendment to the Georgia Constitution defining “marriage.” The Georgia Supreme Court extended its 2003 pilot project for the third year, agreeing to accept all “non-frivolous” applications filed in divorce and alimony cases during the 2006 calendar year.² As a result, all persons interested in domestic relations law have benefited from many more substantive decisions from the appellate courts.

I. DIVORCE: PROCEDURE

While a trial court is not authorized to grant a default judgment in a divorce case, the trial court is vested with wide latitude to oversee its docket and enforce its orders. In *Bayless v. Bayless*,³ the husband failed to appear at a rule nisi hearing he had requested and failed to comply with two separate discovery orders. The husband also failed to personally appear at a mediation session as ordered by the trial court. When the husband failed to appear at the final trial, the trial court

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1. This survey chronicles developments in Georgia domestic relations law from June 1, 2005 to May 31, 2006.

2. The pilot project does not apply to all domestic relations cases, only to those arising out of divorce or alimony. For instance, the pilot project does not encompass appeals of contempt cases, interlocutory appeals, or writs of certiorari. Furthermore, the pilot project does not cover cases appealable to the court of appeals.

3. 280 Ga. 153, 625 S.E.2d 741 (2006).

rejected the motion for continuance made by his counsel and dismissed the husband's counterclaim. The trial court allowed the husband's counsel to make arguments and cross-examine the wife's witnesses; however, the husband's counsel was not permitted to offer witnesses on the husband's behalf.⁴ The supreme court acknowledged that Uniform Superior Court Rule 10.4⁵ neither requires a party to appear at trial nor authorizes the trial court to punish a party who does not appear.⁶ Nevertheless, the supreme court noted that the trial court does have statutory authority to "compel obedience to its orders and to control the conduct of everyone connected with a judicial proceeding before that court."⁷

Looking at the husband's conduct as a whole rather than the husband's single act of failing to appear for trial, the supreme court held that the trial court was within its discretion to strike the husband's answer and counterclaim.⁸ As a result, the trial court acted properly in barring the husband's presentation of witnesses while allowing the husband's attorney to participate in all other aspects of the trial.⁹

II. ALIMONY

The supreme court addressed a variety of issues involving the payment of alimony. In *Benton v. Benton*,¹⁰ the court addressed whether a party was estopped from requesting alimony.¹¹ During the litigation, the wife filed a Chapter 7 bankruptcy proceeding. When the wife filed her bankruptcy action, she included a "Statement of Financial Affairs," which included the divorce action as litigation to which she was a party.¹² On another required document, the wife was asked if there was any "[a]limony, maintenance, support, and property settlements to which [she] is or may be entitled."¹³ The wife responded, "None."¹⁴

After the wife's debts were discharged, the husband filed a motion for partial summary judgment based on the application of the doctrine of federal judicial estoppel. This doctrine is most commonly used to bar debtors from pursuing claims that were not disclosed during the

4. *Id.* at 153-54; 625 S.E.2d at 741-42.

5. GA. UNIF. SUPER. CT. R. 10.4.

6. *Bayless*, 280 Ga. at 155, 625 S.E.2d at 742-43.

7. *Id.*, 625 S.E.2d at 743 (citing O.C.G.A. §§ 15-1-3(3), (4) (2005)).

8. *Id.* at 155-56, 625 S.E.2d at 742-43.

9. *Id.*

10. 280 Ga. 468, 629 S.E.2d 204 (2006).

11. *Id.* at 468, 629 S.E.2d at 206.

12. *Id.*

13. *Id.* (brackets in original).

14. *Id.*

bankruptcy. The husband argued that because the wife failed to disclose to the bankruptcy court that she was seeking alimony and property division in the divorce action, she should be barred from doing so after the bankruptcy discharge.¹⁵

In response to the husband's motion for partial summary judgment, the wife filed a motion to reopen the bankruptcy action to allow her to amend the bankruptcy schedule in dispute. The bankruptcy court granted the motion, and the wife amended her bankruptcy documents.¹⁶

Generally, judicial estoppel is inapplicable when a plaintiff has successfully amended his or her bankruptcy petition to include any claim against the defendant as a potential asset because then it cannot be said that the position in the trial court is inconsistent with the position asserted by the plaintiff in the bankruptcy proceeding¹⁷

The supreme court, however, held that additional factors existed that supported the trial court's refusal to apply federal judicial estoppel.¹⁸ First, the wife did disclose the existence of the pending divorce action in her petition.¹⁹ Second, there was no evidence that the wife derived any actual benefit from the alleged nondisclosure.²⁰ Finally, the application of federal judicial estoppel to divorce cases should be met with hesitation.²¹ The court reasoned that a spouse's right to financial support and a division of the marital estate should not be discarded lightly.²²

In *Farrish v. Farrish*,²³ the supreme court addressed the propriety of the amount of a spousal support award.²⁴ Unlike awards of child support,²⁵ the Official Code of Georgia Annotated ("O.C.G.A.") provides no guidelines regulating the amount of alimony awards.²⁶ In *Farrish* the court ordered the husband to pay the wife \$2000 per month as

15. *Id.*

16. *Id.* at 469, 629 S.E.2d at 206.

17. *Id.* at 470, 629 S.E.2d at 207.

18. *Id.* at 471, 629 S.E.2d at 208.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 471-72, 629 S.E.2d at 208 (citing *Southworth v. Southworth*, 265 Ga. 671, 675, 461 S.E.2d 215, 219 (1995) (Fletcher, P.J., concurring specially); *Brady v. Brady*, 228 Ga. 617, 618, 187 S.E.2d 258, 259 (1972); *Dial v. Adkins*, 265 Ga. App. 650, 651, 595 S.E.2d 332, 334 (2004); *Suarez v. Halbert*, 246 Ga. App. 822, 825, 543 S.E.2d 733, 736 (2000)).

23. 279 Ga. 551, 615 S.E.2d 510 (2005).

24. *Id.* at 551, 615 S.E.2d at 510-11.

25. See O.C.G.A. § 19-6-15 (Supp. 2006) (providing guidelines governing awards of child support).

26. See *Worrell v. Worrell*, 242 Ga. 44, 45, 247 S.E.2d 847, 849 (1978).

alimony and \$3000 per month as child support for the parties' five children.²⁷ The husband's gross income was \$10,374 per month.

While Georgia does not have statutory "alimony guidelines," Georgia law does provide a list of factors that may be considered by the trier of fact in determining whether to award alimony and how much to award.²⁸ In this case, the trial court properly considered "[t]he condition of the parties, including the . . . earning capacity . . . of the parties."²⁹ The court noted that the wife was unemployed and would need training to obtain any job that paid more than minimum wage.³⁰ The court determined that the trial court was also within its discretion to consider the husband's resources beyond his income.³¹ For example, during the parties' separation, the husband took \$55,000 in marital assets without accounting for the appropriated assets.³² The trial court was also authorized to consider the husband's conduct during the marriage, including his amassing debt and paying the expenses of his paramour and her family.³³ Consequently, the supreme court concluded that there was no abuse of the wide discretion vested in the trial court to determine the amount of alimony.³⁴

The supreme court decided two cases concerning the award of alimony from one spouse's separate property. In *Smelser v. Smelser*,³⁵ the trial court determined that the marital home was the husband's separate property; however, the trial court awarded as alimony to the wife exclusive use of the home until she remarried or until the youngest child reached age twenty. The trial court further ordered the husband to pay the mortgage, taxes, insurance, and fifty percent of all repairs over \$200. The trial court also allowed the wife to sell the residence at any time and receive fifty percent of the net proceeds from the sale.³⁶ "[A]limony may be awarded either from the [H]usband's earnings or from the corpus of his estate, as by granting to the [W]ife the title or use of property in the possession of the [H]usband."³⁷ Therefore, the supreme court

27. *Farrish*, 279 Ga. at 551, 615 S.E.2d at 510.

28. O.C.G.A. § 19-6-5 (2004).

29. *Id.* § 19-6-5(7).

30. *Farrish*, 279 Ga. at 551, 615 S.E.2d at 511.

31. *Id.* at 551-52, 615 S.E.2d at 511; *see also* O.C.G.A. § 19-6-5(4).

32. *Farrish*, 279 Ga. at 552, 615 S.E.2d at 511.

33. *Id.* at 551-52, 615 S.E.2d at 511; *see also* O.C.G.A. § 19-6-1(c) (2004); *Hand v. Hand*, 244 Ga. 41, 41-42, 257 S.E.2d 507, 507 (1979).

34. *Farrish*, 279 Ga. at 552, 615 S.E.2d at 511.

35. 280 Ga. 92, 623 S.E.2d 480 (2005).

36. *Id.* at 92, 623 S.E.2d at 481.

37. *Hipps v. Hipps*, 278 Ga. 49, 50, 597 S.E.2d 359, 361 (2004) (quoting *Jones v. Jones*, 220 Ga. 753, 755, 141 S.E.2d 457, 460 (1965)); *see also* O.C.G.A. § 19-6-5.

confirmed that the trial court did not err in making the alimony award.³⁸

Similarly, in *Searcy v. Searcy*,³⁹ the supreme court affirmed the wife's right to seek an alimony award from the husband's interest in his deceased parents' unprobated estates.⁴⁰ The supreme court, however, held that the wife was not entitled to join the co-executors of the estates as parties.⁴¹ The property controlled by the co-executors was not marital property,⁴² and there was no evidence that either the husband or the executors had acted in a manner to defraud the wife.⁴³

In *Findley v. Findley*,⁴⁴ the supreme court considered the issue of when a spouse's alimony obligation terminates.⁴⁵ Absent an expressed intent otherwise, alimony automatically terminates upon the death of the payor.⁴⁶ When the parties divorced in 1975, the husband agreed to pay \$500 per month in alimony to the wife until she died or remarried, whichever occurred first. The agreement did not expressly state the parties' intent should the husband predecease the wife. The husband died in 2004, and his estate refused to continue making the alimony payments. The wife sued the husband's estate, and the trial court dismissed the action.⁴⁷

At the time of the parties' divorce, the prevailing case law was *Ramsay v. Sims*.⁴⁸ In *Ramsay* the Georgia Supreme Court held that language similar to that contained in the Findley's agreement was sufficient to express an intent that alimony was to continue beyond the husband's death.⁴⁹ The alimony terminated only upon those conditions specifically set forth in the agreement.⁵⁰ In *Dolvin v. Dolvin*,⁵¹ a 1981 case, the supreme court overruled *Ramsay*, holding that agreements stating that

38. *Smelser*, 280 Ga. at 92, 623 S.E.2d at 481.

39. 280 Ga. 311, 627 S.E.2d 572 (2006).

40. *Id.* at 313, 627 S.E.2d at 574.

41. *Id.*

42. *Id.* at 312, 627 S.E.2d at 574; *cf.* *Gardner v. Gardner*, 276 Ga. 189, 191, 576 S.E.2d 857, 859 (2003).

43. *Searcy*, 280 Ga. at 313; 627 S.E.2d at 574; *cf.* *Brown v. Brown*, 271 Ga. 887, 888, 525 S.E.2d 359, 360 (2000); *Roberts v. Roberts*, 226 Ga. 203, 209, 173 S.E.2d 675, 679-80 (1970).

44. 280 Ga. 454, 629 S.E.2d 222 (2006).

45. *Id.* at 454, 629 S.E.2d at 223-24.

46. *See Schartle v. Trust Co. Bank*, 239 Ga. 248, 249, 236 S.E.2d 602, 603 (1977).

47. *Findley*, 280 Ga. at 454-55, 629 S.E.2d at 224.

48. 209 Ga. 228, 71 S.E.2d 639 (1952).

49. *Id.* at 237-38, 71 S.E.2d at 644-45.

50. *Id.*

51. 248 Ga. 439, 284 S.E.2d 254 (1981).

alimony terminated on the death or remarriage of the recipient were insufficient to create an obligation on the payor's estate.⁵²

Case law is typically applied retroactively.⁵³ However, Georgia appellate courts will not apply a decision retroactively (1) where the decision is intended only to be applied prospectively, (2) where the retroactive application would cause substantial inequities, or (3) where the retroactive application would unjustly impact parties that justifiably relied on the prior case law.⁵⁴ In applying the test to the facts of this case, the supreme court first noted that the decision in *Dolvin* did not expressly address prospective application; however, the court applied its own decision retroactively.⁵⁵ Additionally, while the wife would be injured by the retroactive application, the injury would not be the type of "substantial inequitable results" contemplated by the test.⁵⁶ Furthermore, the potential class that would be adversely impacted by retroactive application would be small.⁵⁷ As a result, the supreme court affirmed the trial court's dismissal of the wife's action.⁵⁸

Some courts have eliminated the need to have alimony extend beyond the death of the payor by requiring life insurance as part of the alimony agreement.⁵⁹ In *McReynolds v. Prudential Insurance Co.*,⁶⁰ the parties included a provision in their agreement requiring the husband to maintain the wife as a beneficiary to \$250,000 in life insurance. Before the husband died, he changed the beneficiary designation to his new wife. The first wife sued the second wife and the insurance company to recoup the insurance proceeds and other damages.⁶¹ The insurance company was granted summary judgment, and the wife appealed.⁶² The supreme court determined that the insurance company's contract was with the husband; as a result, the company owed no duty to investigate claims questioned by the wife.⁶³ Additionally, the prior communications between the wife and the insurance company did not

52. *Id.* at 440-41, 284 S.E.2d at 255 (affirming *Schartle*, 239 Ga. 248, 236 S.E.2d 602 (1977)).

53. *See Banks v. ICI Americas, Inc.*, 266 Ga. 607, 609, 469 S.E.2d 171, 174 (1996).

54. *Findley*, 280 Ga. at 459-60, 629 S.E.2d at 227.

55. *Id.* at 461-62, 629 S.E.2d at 228-29.

56. *Id.* at 462, 629 S.E.2d at 229.

57. *Id.*

58. *Id.*

59. *See, e.g., Hawkins v. Hawkins*, 268 Ga. 637, 638, 491 S.E.2d 806, 807 (1997).

60. 276 Ga. App. 747, 624 S.E.2d 218 (2005).

61. *Id.* at 749, 624 S.E.2d at 220. The second wife was sued as both the beneficiary of the insurance policy and as the executrix of the husband's estate. *Id.*

62. *Id.* at 747, 624 S.E.2d at 219.

63. *Id.* at 751-52, 624 S.E.2d at 222.

create any enforceable promises.⁶⁴ The supreme court noted, however, that the first wife's remaining claims against the second wife could have merit under Georgia law.⁶⁵

III. CHILD CUSTODY

The Georgia Supreme Court addressed two cases concerning the trial court's exercise of discretion in child custody cases. In *Bull v. Bull*,⁶⁶ the supreme court affirmed the trial court's award of primary physical custody to the mother.⁶⁷ Although the mother had a history of problems with substance abuse and depression, the trial court determined that the mother had sought treatment and appeared to have her life in order at the time of the trial.⁶⁸ Where, as here, there is evidence in support of the trial court's finding that the parent was fit to have custody, the appellate courts will not disturb the decision.⁶⁹

In *Taylor v. Taylor*,⁷⁰ the supreme court reversed the trial court's decision, concluding that the trial court failed to exercise its discretion.⁷¹ The parties had reached an agreement wherein the father agreed to relinquish his parental rights and the mother agreed to relinquish her claim to child support from the father. When the father reneged on the agreement, the mother filed a motion to enforce the agreement. The trial court expressed its displeasure with the agreement and stated that the agreement was not in the child's best interests. Nonetheless, the trial court believed it was compelled to approve the parties' negotiated agreement.⁷² The supreme court held that contrary to the trial court's belief, the trial court had the authority to either approve or reject the agreement in part or in its entirety.⁷³ Furthermore, the supreme court held that where the trial court believes an

64. *Id.* at 750-51, 624 S.E.2d at 222.

65. *Id.* at 752 n.6, 624 S.E.2d at 222-23 n.6 (citing *Curtis v. Curtis*, 243 Ga. 611, 255 S.E.2d 693 (1979) (action for breach of implied trust against newly named beneficiary); *Brooks v. Jones*, 227 Ga. 566, 188 S.E.2d 861 (1971) (action against decedent's estate for breach of divorce decree)).

66. 280 Ga. 49, 622 S.E.2d 326 (2005).

67. *Id.* at 50, 622 S.E.2d at 327.

68. *Id.*

69. *See, e.g.*, *Urquhart v. Urquhart*, 272 Ga. 548, 549, 533 S.E.2d 80, 81-82 (2000).

70. 280 Ga. 88, 623 S.E.2d 477 (2005).

71. *Id.* at 89, 623 S.E.2d at 478.

72. *Id.* at 88, 623 S.E.2d at 478.

73. *Id.* at 89-90, 623 S.E.2d at 478-79; *see also* O.C.G.A. § 19-9-5(b) (2004); *Pekor v. Clark*, 236 Ga. 457, 458-59, 224 S.E.2d 30, 30-31 (1976); *Stanton v. Stanton*, 213 Ga. 545, 552, 100 S.E.2d 289, 295 (1957); *Amos v. Amos*, 212 Ga. 670, 671-72, 95 S.E.2d 5, 6 (1956).

agreement contravenes the child's best interests, approving the agreement is error.⁷⁴

In *Braynon v. Hilbert*,⁷⁵ the court of appeals addressed the appropriate legal standard to be applied in a custody case.⁷⁶ The parties in this case entered into a mediated settlement agreement allowing the father to legitimize the parties' child. While the agreement also addressed the father's child support obligation, it did not address custody. The father filed a subsequent action seeking custody.⁷⁷ The trial court denied the father's action because the father could not show any material change of circumstances affecting the welfare of the child. Because the issue of custody was not addressed in the legitimation action, the father argued that he only had to show that awarding him custody was in the child's best interests.⁷⁸ The court of appeals agreed, reasoning as follows:

In a case, where the father seeks custody after legitimation, the trial court should apply the best interest of the child standard set forth in O.C.G.A. [section] 19-9-3(a). As there has been no previous adjudication of the custody issue in such a case, the change in conditions analysis should not be used.⁷⁹

IV. CHILD CUSTODY: NON-PARENTS

During the survey period, cases between parents and grandparents continued to reach the appellate courts. Georgia law grants grandparents standing to intervene in divorce cases in order to seek visitation rights.⁸⁰ The trial court is authorized to grant visitation to the grandparents where it finds by clear and convincing evidence that the children's health or welfare would be harmed by the denial of visitation and where the visitation would be in the children's best interests.⁸¹ In *Ormond v. Ormond*,⁸² the parents of two children were divorcing, and the maternal grandparents, who reside in Texas, filed a motion to intervene. The parents reached a settlement agreement naming the father as the primary physical custodian and giving the mother

74. *Taylor*, 280 Ga. at 90, 623 S.E.2d at 479.

75. 275 Ga. App. 511, 621 S.E.2d 529 (2005).

76. *Id.* at 511-12, 621 S.E.2d at 529.

77. *Id.* at 512, 621 S.E.2d at 530. The father's pleading was actually titled "petition for change of custody." *Id.*

78. *Id.*; see also O.C.G.A. § 19-9-3 (2004).

79. *Braynon*, 275 Ga. App. at 512, 621 S.E.2d at 530 (citing *Kennedy v. Adams*, 218 Ga. App. 120, 122, 460 S.E.2d 540, 543 (1995)).

80. O.C.G.A. § 19-7-3 (2004).

81. *Clark v. Wade*, 273 Ga. 587, 599, 544 S.E.2d 99, 108 (2001).

82. 274 Ga. App. 869, 619 S.E.2d 370 (2005).

visitation rights. The trial court approved the parties' agreement and then considered the grandparents' motion. The trial court awarded visitation to the grandparents during one of the mother's allotted weekends for visitation. While the trial court made written findings that the grandparents' visitation was in the best interests of the children, the court did not make a finding that the children would be harmed by a denial of visitation with the grandparents.⁸³ According to the court of appeals, the failure to make all of the required findings demanded a reversal.⁸⁴

V. CHILD CUSTODY: MODIFICATION

Relocation and jurisdiction continue to be the issues dominating the child custody modification cases coming before the appellate courts. In 2003 the Georgia Supreme Court held that a custodial parent's relocation could be considered a material change in circumstances that would warrant a modification of custody if the modification was also in the child's best interest.⁸⁵

In *Hardin v. Hardin*,⁸⁶ the court of appeals affirmed a judgment modifying custody to the party remaining in Georgia.⁸⁷ When the mother announced she was moving to Minnesota to seek employment, the father filed a modification action. When the trial court entered a temporary order modifying custody in the event of either party's relocation, the mother remained in Georgia, and custody was not modified in the final order.⁸⁸ Subsequently, the mother announced that she was taking a job in Nashville, Tennessee, and she relocated with the children without giving the requisite notice to the father. After the father filed a second modification action, the trial court awarded the father primary physical custody. The mother then returned to Georgia and filed a motion for new trial. The trial court revised the mother's visitation schedule in light of her return to Georgia but did not revisit the custody issue.⁸⁹

83. *Id.* at 869-70, 619 S.E.2d at 371-72.

84. *Id.* at 871, 619 S.E.2d at 372.

85. *Bodne v. Bodne*, 277 Ga. 445, 446-47, 588 S.E.2d 728, 729 (2003) (overruling *Ormandy v. Odom*, 217 Ga. App. 780, 459 S.E.2d 439 (1995)).

86. 274 Ga. App. 543, 618 S.E.2d 169 (2005).

87. *Id.* at 545, 618 S.E.2d at 171.

88. *Id.* at 543, 618 S.E.2d at 170. The temporary order was entered prior to the supreme court decision in *Scott v. Scott*, 276 Ga. 372, 578 S.E.2d 876 (2003), which prohibited courts from utilizing self-effectuating change of custody provisions. *Hardin*, 274 Ga. App. at 543 n.1, 618 S.E.2d at 170 n.1.

89. *Hardin*, 274 Ga. App. at 543-44, 618 S.E.2d at 170.

The mother argued that the relocation benefited the children because the mother had been unable to find employment in Georgia and the increased income associated with the out-of-state employment would directly benefit the children. Despite the mother's arguments, the trial court also heard evidence that the move interfered with the children's relationship with their father and other family members. Other evidence showed that while the children were living in Nashville, they had problems in school, including excessive tardiness.⁹⁰ Due to the conflicting evidence on whether the move was in the children's best interests, the court of appeals could not hold that the trial court abused its discretion.⁹¹ Furthermore, the court of appeals held that the mother's return to Georgia did not require the custody modification to be vacated.⁹² The trial court had evidence before it—the mother's willingness to interfere with the children's familial relationships, her inability to get the children to school on time, and her willingness to violate a court order—that supported the decision not to restore the original custody decision.⁹³

Similarly, in *Curtis v. Klimowicz*,⁹⁴ the court of appeals held that the trial court did not abuse its discretion.⁹⁵ Despite a joint physical custody arrangement in the divorce decree, the child resided primarily with the father, who was enlisted in the U.S. Army and had moved to Kansas. When the father was deployed to Iraq for approximately four months, the child stayed with the father's current wife. After the father returned, the mother filed her modification action, and the father filed a counterclaim for primary physical custody.⁹⁶ The trial court, having been presented with evidence of the mother's drug use and poor care of the child, awarded the father primary physical custody; however, it prohibited the father from moving outside of the United States with the child.⁹⁷ The court of appeals held that the trial court acted within its discretion.⁹⁸ While the trial court prohibited the father from moving the child outside of the country, the trial court did not attempt to divest the father of custody if the father moved; hence, the order was not an

90. *Id.* at 544, 618 S.E.2d at 170-71.

91. *Id.* at 544-45, 618 S.E.2d at 171.

92. *Id.* at 545, 618 S.E.2d at 171.

93. *Id.*

94. 279 Ga. App. 425, 631 S.E.2d 464 (2006).

95. *Id.* at 425, 631 S.E.2d at 465.

96. *Id.*, 631 S.E.2d at 465-66. The appellate court did not address the requirement in O.C.G.A. section 19-9-23 (2004) that custody modification actions must be filed as separate actions and not filed as counter-complaints.

97. *Curtis*, 279 Ga. App. at 425-26, 631 S.E.2d at 465-66.

98. *Id.* at 428, 631 S.E.2d at 467.

illegal self-effectuating change of custody.⁹⁹ While trial courts may not attempt to secure continuing jurisdiction over finalized custody cases by prohibiting the child from being removed from the state court's jurisdiction,¹⁰⁰ the prohibition of a child's removal from the country does not attempt to maintain jurisdiction over the parties and child.¹⁰¹ The appellate court further noted that the trial court considered the negative effects that relocating outside the United States would have on the child and the child's relationship with her mother.¹⁰²

The Georgia Supreme Court addressed the issue of jurisdiction in modification cases. When Georgia adopted its version of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"),¹⁰³ the Act included a provision that allowed Georgia to retain exclusive jurisdiction over custody cases where either parent or the child has remained a resident of Georgia.¹⁰⁴ In *Devito v. Devito*,¹⁰⁵ the mother moved after the divorce from Georgia to Louisiana with the parties' child. The father, who remained a resident of Georgia, filed a modification action in Georgia and served the mother in Louisiana. The mother challenged the constitutionality of the continuing exclusive jurisdiction provision.¹⁰⁶ According to the court, the Georgia Constitution requires that civil cases not addressed by other constitutional provisions "shall be tried in the county where the defendant resides."¹⁰⁷ The supreme court held that this provision does not apply to cases where the defendant is a non-resident.¹⁰⁸ Thus, the trial court properly exercised jurisdiction over the non-resident mother.¹⁰⁹

VI. CHILD SUPPORT: GUIDELINES

Although the Legislature passed sweeping changes to Georgia's Child Support Guidelines¹¹⁰ in 2005, additional changes were made in 2006, and the effective date of the new guidelines was pushed back to January

99. *Id.* at 426-27, 631 S.E.2d at 466-67; see *Scott v. Scott*, 276 Ga. 372, 578 S.E.2d 876 (2003).

100. See *Anthony v. Anthony*, 212 Ga. 356, 357-58, 92 S.E.2d 857, 858 (1956).

101. See *Mitchell v. Mitchell*, 252 Ga. 46, 48-49, 311 S.E.2d 456, 458-59 (1984).

102. *Curtis*, 279 Ga. App. at 427, 631 S.E.2d at 467.

103. O.C.G.A. §§ 19-9-40 to -102 (2004 & Supp. 2006).

104. O.C.G.A. § 19-9-61.

105. 280 Ga. 367, 628 S.E.2d 108 (2006).

106. *Id.* at 367, 628 S.E.2d at 109.

107. *Id.* at 368, 628 S.E.2d at 109 (quoting GA. CONST. art. VI, § 2, para. 6).

108. *Id.*

109. *Id.*

110. O.C.G.A. § 19-6-15 (Supp. 2006).

1, 2007.¹¹¹ Instead of calculating child support based on the non-custodial parent's income, the new "income shares" model is designed to have the child support divided between the parties on a pro rata basis.¹¹²

To calculate child support under the new guidelines, O.C.G.A. section 19-6-15(b) enumerates seven basic steps:¹¹³ (1) determine the Adjusted Gross Income ("AGI") of each party;¹¹⁴ (2) add the parties' respective AGIs to get the parties' Combined Adjusted Income ("CAI");¹¹⁵ (3) calculate each party's "income share" by dividing that party's AGI by the CAI;¹¹⁶ (4) using the statutory tables, determine the Basic Child Support Obligation ("BCSO") by finding the amount listed for the parties' Combined Adjusted Gross Income ("CAGI") based on the correct number of children involved;¹¹⁷ (5) determine the existence of any healthcare insurance or work-related childcare expenses and how the expenses are actually to be paid;¹¹⁸ (6) determine the presumptive child support amount by adjusting the BCSO upward for that party's underpayment of any health insurance or work-related childcare expenses or downward for that party's overpayment of any such expenses;¹¹⁹ and (7) determine if any discretionary deviations are warranted, while considering the child's best interests.¹²⁰

The 2006 changes restored the right to have a jury decide child support.¹²¹ However, the jury must first determine the parties' AGI before being charged with the remainder of the guidelines' calculation.¹²² The child support amount is no longer automatically adjusted based on the amount of visitation, but the amount of visitation still may

111. *Id.* The 2005 Act required a commission to review the financial needs of families and to create a table to be used in the guidelines. The effective date originally was to be January 1, 2006; however, the commission took longer than expected, and the legislature decided to make significant changes to the 2005 Act. As a result, the effective date was postponed until January 1, 2007. *Id.*

112. *See id.*

113. *Id.* § 19-6-15(b).

114. According to O.C.G.A. section 19-6-15(b)(2), a party's gross income may be adjusted for fifty percent of self-employment taxes; the amount paid under pre-existing child support orders; and, with court approval, theoretical child support orders. *Id.* § 19-6-15(b)(2).

115. *Id.* § 19-6-15(b)(3).

116. *Id.* § 19-6-15(b)(5).

117. *Id.* § 19-6-15(b)(4).

118. *Id.* § 19-6-15(b)(6).

119. *Id.* § 19-6-15(b)(7).

120. *Id.* § 19-6-15(b)(8).

121. *Id.* § 19-6-15(c)(4).

122. *Id.*

be a basis for a discretionary departure.¹²³ The new guidelines apply to both temporary and final child support orders.¹²⁴

VII. CHILD SUPPORT

The Georgia Supreme Court decided three cases concerning the application of the child support guidelines. In *Dial v. Dial*,¹²⁵ the supreme court held that the trial court erred in ordering the husband to pay child support for a child for which the wife had assumed a temporary legal guardianship.¹²⁶ In *Blue v. Blue*,¹²⁷ the supreme court affirmed the trial court's departure from the guidelines.¹²⁸ The trial court cited the parties' comparable earning capacities and a joint physical custody arrangement as bases for not ordering either party to pay child support to the other.¹²⁹ Because the hearing was not transcribed, the appellate court had to presume that the evidence supported the trial court's findings;¹³⁰ therefore, it could not hold that there was an abuse of discretion.¹³¹

In *Bullard v. Swafford*,¹³² the parties' decree included a provision that extended child support beyond the child's eighteenth birthday in the event the child had not graduated from high school but remained a full-time student. Due to excessive absences and tardiness, the parties' child did not graduate by his eighteenth birthday in May 2004. The child did not attend summer school as planned, but he did register for classes for the following fall. The trial court agreed with the father, holding that the child support terminated when the child ceased to be a full-time student at the end of the 2003-2004 school year.¹³³ The supreme court, reversing the trial court's decision, held that the child's voluntary absences and tardiness did not change the child's full-time enrollment to something less.¹³⁴ Similarly, the court concluded that there was no

123. *Id.* § 19-6-15(b)(8)(K).

124. *Id.* § 19-6-15(c)(1).

125. 279 Ga. 767, 621 S.E.2d 461 (2005).

126. *Id.* at 767, 621 S.E.2d at 462.

127. 279 Ga. 550, 615 S.E.2d 540 (2005).

128. *Id.* at 550, 615 S.E.2d at 540.

129. *Id.*

130. *Id.*, 615 S.E.2d at 541 (citing *Leitzke v. Leitzke*, 239 Ga. 17, 18, 235 S.E.2d 500, 501 (1977)).

131. *Id.*

132. 279 Ga. 577, 619 S.E.2d 665 (2005).

133. *Id.* at 577-79, 619 S.E.2d at 666.

134. *Id.* at 580, 619 S.E.2d at 667.

requirement that the child attend summer sessions to remain a full-time student.¹³⁵

VIII. EQUITABLE DIVISION

The Georgia Supreme Court addressed a variety of cases concerning equitable division. In *Rabek v. Kellum*,¹³⁶ the husband worked as an air traffic controller for the Federal Aviation Commission. Through his employment, he participated in a Civil Service Retirement System pension plan instead of social security. The wife, however, was employed in the private sector. She had a pension, but she also participated in social security. The trial court divided the two pensions. The husband appealed, claiming the trial court should not have equitably divided the portion of his pension plan, which was in lieu of social security payments.¹³⁷ The supreme court recognized that this was a case of first impression and that foreign jurisdictions were divided on the issue.¹³⁸ However, the court chose not to decide the issue because the husband had failed to provide the trial court with any evidence on the amount of the pension that was in lieu of social security.¹³⁹

In *Hayes v. Hayes*,¹⁴⁰ the supreme court reviewed the trial court's determination that certain contributions to the equity in the marital home were the husband's separate property.¹⁴¹ During the parties' marriage, each of the husband's parents gave each party a check for \$10,000 to be used for improvements to the marital residence. After hearing the husband's father testify that the intent was to gift the husband the entire \$40,000, but that half of the checks were made payable to the wife to avoid certain income tax consequences, the trial court found that the \$40,000 was the husband's non-marital contribution.¹⁴² The supreme court held that because the husband and his parents engaged in a "sham transaction" to defraud the Internal Revenue Service, the divorce court would not relieve them of their

135. *Id.* at 581, 619 S.E.2d at 667.

136. 279 Ga. 709, 620 S.E.2d 387 (2005).

137. *Id.* at 709-10, 620 S.E.2d at 387-88.

138. *Id.* at 710 n.2, 620 S.E.2d at 388 n.2. The court noted that Ohio and Pennsylvania have excluded portions of pensions from the marital estate. *Id.* (citing *Walker v. Walker*, 677 N.E.2d 1252, 1253-54 (Ohio 1996); *Cornbleth v. Cornbleth*, 580 A.2d 369, 371 (Pa. Super. Ct. 1990)). Utah and West Virginia have not. *Id.* (citing *Jefferies v. Jefferies*, 895 P.2d 835, 837-38 (Utah Ct. App. 1995); *Loudermilk v. Loudermilk*, 397 S.E.2d 905, 909-10 (W. Va. 1990)).

139. *Id.* at 711, 620 S.E.2d at 388.

140. 279 Ga. 741, 620 S.E.2d 806 (2005).

141. *Id.* at 741-42, 620 S.E.2d at 807.

142. *Id.* at 741-42, 742 n.4, 620 S.E.2d at 807 & n.4; see also I.R.C. § 2503 (2000).

agreement.¹⁴³ Because the parents made gifts to each spouse, the trial court erred in finding that the entire \$40,000 was the husband's separate property.¹⁴⁴

The supreme court addressed several challenges to the fairness of the trial court's equitable division of marital assets. In *Harmon v. Harmon*,¹⁴⁵ the supreme court held that "an award is not erroneous simply because one party receives a seemingly greater share of the marital property. An equitable division of marital property does not necessarily mean an equal division."¹⁴⁶ In *Fuller v. Fuller*,¹⁴⁷ the award to the husband of seventy-five percent of his retirement was not determined to be inequitable.¹⁴⁸ Similarly, in *Waters v. Waters*,¹⁴⁹ the award of seventy-five percent of the cash value of an insurance policy to the wife was upheld.¹⁵⁰

IX. FAMILY VIOLENCE

Both appellate courts heard cases involving the Family Violence Act ("FVA").¹⁵¹ In *Anderson v. Deas*,¹⁵² the court of appeals affirmed the dismissal of a family violence case based on lack of jurisdiction.¹⁵³ The mother and child resided in Georgia, but the father was a resident of Maryland, where custody litigation remained pending. During a telephone conversation between the father and the child, the father allegedly made threats to physically harm the child. When the mother got on the line, the father allegedly threatened the mother's life.¹⁵⁴

143. *Hayes*, 279 Ga. at 741-42 n.4, 620 S.E.2d at 807 n.4 (citing *Whitley v. Whitley*, 220 Ga. 471, 473-74, 139 S.E.2d 381, 383 (1964)).

144. *Id.* at 742, 620 S.E.2d at 807-08.

145. 280 Ga. 118, 622 S.E.2d 336 (2005).

146. *Id.* at 118, 622 S.E.2d at 336 (citing *Wright v. Wright*, 277 Ga. 133, 134, 587 S.E.2d 600, 601 (2003); *Goldstein v. Goldstein*, 262 Ga. 136, 136, 414 S.E.2d 474, 475 (1992); *Mitchely v. Mitchely*, 237 Ga. 138, 139, 227 S.E.2d 34, 35 (1976)).

147. 279 Ga. 805, 621 S.E.2d 419 (2005).

148. *Id.* at 808, 621 S.E.2d at 422.

149. 280 Ga. 477, 629 S.E.2d 233 (2006).

150. *Id.* at 478, 629 S.E.2d at 235.

151. O.C.G.A. §§ 19-13-1 to -56 (2004).

152. 273 Ga. App. 770, 615 S.E.2d 859 (2005). The Georgia Supreme Court granted the mother's writ of certiorari and remanded the case to the court of appeals for further consideration. *Anderson v. Deas*, No. S05C1751, 2005 Ga. LEXIS 773, at *1 (Ga. Nov. 7, 2005). On remand, the court of appeals adhered to its original decision, again affirming the trial court's dismissal of the action. *Anderson v. Deas*, 279 Ga. App. 892, 892, 632 S.E.2d 682, 683 (2006).

153. *Anderson*, 273 Ga. App. at 770, 615 S.E.2d at 860.

154. *Id.*

The mother sought a restraining order, and the father filed a motion to dismiss for lack of jurisdiction.¹⁵⁵ The mother argued that the trial court was authorized to exercise jurisdiction under the UCCJEA,¹⁵⁶ the Parental Kidnapping Prevention Act ("PKPA"),¹⁵⁷ or the FVA.¹⁵⁸ Both the UCCJEA and PKPA allow courts to assume emergency jurisdiction where the child is present in Georgia and the child is either abandoned or in need of protection from abuse.¹⁵⁹ Because the child was in the mother's custody, the court of appeals held that the trial court was within its discretion to find there was no emergency requiring it to assume jurisdiction.¹⁶⁰

Under the FVA, a court must have personal jurisdiction over the defendant.¹⁶¹ Personal jurisdiction exists where (a) the defendant commits the act of family violence in Georgia, or (b) where the defendant commits a tortious injury in Georgia and the defendant has certain contacts with the state.¹⁶² The court of appeals held that the father's alleged threats were committed in Maryland.¹⁶³ Because the injury occurred in Georgia, personal jurisdiction over the non-resident father could not be exercised unless the father also had the requisite contacts with Georgia, which he did not.¹⁶⁴

X. ATTORNEY FEES

The Georgia Supreme Court decided several cases regarding attorney fee awards. In *Groover v. Groover*,¹⁶⁵ the supreme court held that a court errs when it admits evidence relating to attorney fee expenses in a jury trial.¹⁶⁶ An award of attorney fees is in the discretion of the trial judge, not the jury.¹⁶⁷ In this case, however, the supreme court held that the error did not warrant the grant of a new trial.¹⁶⁸

155. *Id.*, 615 S.E.2d at 859.

156. O.C.G.A. §§ 19-9-40 to -102.

157. 28 U.S.C. § 1738A (2000).

158. O.C.G.A. §§ 19-13-1 to -56.

159. O.C.G.A. § 19-9-64(a); 28 U.S.C. § 1738A.

160. *Anderson*, 273 Ga. App. at 771 n.5, 615 S.E.2d at 860 n.5 (citing *Rozier v. Berto*, 230 Ga. App. 427, 429, 496 S.E.2d 544, 545-46 (1998)).

161. *See* O.C.G.A. § 19-13-2 (Supp. 2006).

162. *Id.*

163. *Anderson*, 273 Ga. App. at 773, 615 S.E.2d at 862.

164. *Id.*

165. 279 Ga. 507, 614 S.E.2d 50 (2005).

166. *Id.* at 508, 614 S.E.2d at 52.

167. *See* O.C.G.A. § 19-6-2 (2004).

168. *Groover*, 279 Ga. at 508, 614 S.E.2d at 52.

In *Williams v. Cooper*,¹⁶⁹ the supreme court reversed the fee award against the husband's attorney.¹⁷⁰ In the wife's contempt petition, she sought relief including an award of attorney fees. After a hearing, the trial court required the husband to pay the wife \$500 under O.C.G.A. section 19-6-2. The trial court then ordered the husband's attorney to pay \$5,278.53 in fees under O.C.G.A. section 9-15-14(b).¹⁷¹ However, the wife had not filed any motions seeking attorney fees under O.C.G.A. section 9-15-14 from the husband or his attorney.¹⁷² The form scheduling the hearing did not provide any notice that attorney fees might be awarded under O.C.G.A. section 9-15-14 or that the attorney might be held liable.¹⁷³ Due to the differing statutory rationales¹⁷⁴ for attorney fee awards, the supreme court held that notice and conduction of a hearing under O.C.G.A. section 19-6-2 cannot sustain an award under O.C.G.A. section 9-15-14(b).¹⁷⁵ Furthermore, the individual being assessed fees under O.C.G.A. section 9-15-14 must have received notice of the proper hearing.¹⁷⁶ The supreme court overruled *Cohen v. Feldman*¹⁷⁷ to the extent that the court of appeals in *Cohen* had interpreted O.C.G.A. section 9-15-14 to allow trial courts to award fees sua sponte without notice or a hearing.¹⁷⁸

Similarly, in *Fox-Korucu v. Korucu*,¹⁷⁹ the supreme court held that the trial court erred in awarding attorney fees under O.C.G.A. section 9-15-14.¹⁸⁰ The wife had filed a motion for a new trial and a motion for reconsideration after the entry of the divorce decree. After considering the wife's new evidence, the trial court denied the motion for a new trial but partially granted the motion for reconsideration by altering the visitation schedule. The trial court then granted the husband a fee award under O.C.G.A. section 9-15-14 without an evidentiary hearing.¹⁸¹ While the failure to hold an evidentiary hearing was alone a

169. 280 Ga. 145, 625 S.E.2d 754 (2006).

170. *Id.* at 147, 625 S.E.2d at 756.

171. *Id.* at 145, 625 S.E.2d at 755; *see also* O.C.G.A. § 9-15-14(b) (2006).

172. *Williams*, 280 Ga. at 146, 625 S.E.2d at 755; *see also* O.C.G.A. § 9-15-14.

173. *Williams*, 280 Ga. at 146, 625 S.E.2d at 755.

174. The court noted that the purpose of a fee award under O.C.G.A. section 19-6-2 is to allow each party to have effective representation; the purpose of an award under O.C.G.A. section 9-15-14 is to compensate a party who incurred needless attorney fees due to the other party's misconduct. *Id.*

175. *Id.*

176. *Id.* at 147, 625 S.E.2d at 755-56.

177. 219 Ga. App. 90, 464 S.E.2d 237 (1995).

178. *Williams*, 280 Ga. at 147, 625 S.E.2d at 756.

179. 279 Ga. 769, 621 S.E.2d 460 (2005).

180. *Id.* at 770, 621 S.E.2d at 461.

181. *Id.* at 769, 621 S.E.2d at 460-61.

reversible error,¹⁸² the supreme court held that the trial court also abused its discretion in assessing fees against the wife under O.C.G.A. section 9-15-14 when the trial court granted some of the requested relief to the wife.¹⁸³

The right to an evidentiary hearing on attorney fees, however, may be waived. In *Bulat v. Bulat*,¹⁸⁴ the parties agreed to a less formal procedure, submitting the attorney fees issue to the trial court for decision.¹⁸⁵ The supreme court held that the parties were bound by their agreement.¹⁸⁶

XI. CONCLUSION

This survey period saw the area of domestic relations law continue to change and evolve. Based on bills passed by the legislature and approved by the governor, the state will have new child support guidelines and direct appeals for child support issues. The Georgia Supreme Court, which has continued to voluntarily grant all non-frivolous appellate applications, has also continued to issue opinions on important domestic relations issues. Members of the domestic relations bar persist in hoping that the Georgia Supreme Court will continue its pilot project and that the Georgia Court of Appeals will institute a similar project.

182. *Id.* at 770 n.2, 621 S.E.2d at 461 n.2 (citing *Green v. McCart*, 273 Ga. 862, 863, 548 S.E.2d 303, 304 (2001)).

183. *Id.* at 770, 621 S.E.2d at 461.

184. 280 Ga. 310, 626 S.E.2d 504 (2006).

185. *Id.* at 310, 626 S.E.2d at 505.

186. *Id.*