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Domestic Relations

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

This survey period¹ saw domestic relations law continue to evolve through new legislation and new case law. The 2006 Georgia legislature made dramatic changes to the child support calculations that took effect in 2007. The 2007 Georgia legislature has turned its focus to child custody issues, including passing laws requiring parenting plans in custody, allowing attorney fee awards, and allowing for direct appeals in child custody cases. The Georgia Supreme Court continued to accept nonfrivolous appeals in divorce cases, and as a result, the appellate courts have been able to give guidance to those interested in domestic relations law.

I. DIVORCE: PROCEDURE

The Georgia Supreme Court decided a variety of cases involving procedural issues in family law cases. In *Hammack v. Hammack*,² the supreme court affirmed the entry of a divorce decree prior to the expiration of forty-five days from the filing of the acknowledgment of service.³ The husband filed for divorce in January 2005. The wife signed an acknowledgment of service on March 17, 2005; however, the husband did not actually file the document until April 29, 2005. The wife served the husband with an answer on June 13, 2005, but the husband then informed the wife that the trial court had entered a decree

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1. This Survey chronicles developments in Georgia domestic relations law from June 1, 2006 to May 31, 2007.

2. 281 Ga. 202, 635 S.E.2d 752 (2006).

3. *Id.* at 202-03, 635 S.E.2d at 752-53.

on June 6, 2005.⁴ The trial court declined to set aside the decree under Georgia Uniform Superior Court Rule ("U.S.C.R.") 24.6 (B),⁵ finding that the decree was entered more than forty-six days after service was perfected.⁶

The supreme court determined that the Georgia Civil Practice Act⁷ allows for the entry of divorce decrees at any time more than thirty days after service is perfected.⁸ Where U.S.C.R. 24.6 (B) requires parties to wait until after forty-five days have lapsed in unanswered divorce cases,⁹ the rule conflicts with statutory law, and the statutes must govern.¹⁰

Certain defenses must be raised in the initial pleadings; however, reconciliation is not one of them.¹¹ When a divorce is sought on the grounds that the marriage is irretrievably broken, reconciliation is a defense to the pending action, but it is not a ground to have a decree set aside.¹² In *McCoy v. McCoy*,¹³ the parties resumed cohabitation and sexual relations while the trial court had taken the divorce case under advisement. During the period of cohabitation, the husband continued to request the trial court to enter a decree; however, the husband did not inform the trial court of the parties' cohabitation.¹⁴ The supreme court held that the failure to raise the defense prior to the entry of the judgment amounted to a waiver.¹⁵

In *Howington v. Howington*,¹⁶ the supreme court also held that a party's inaction constituted a waiver.¹⁷ The parties had been separated for six years when the wife filed for divorce in 1997 in DeKalb County,

4. *Id.* at 202, 635 S.E.2d at 752.

5. GA. UNIF. SUPER. CT. R. 24.6(B).

6. *Hammack*, 281 Ga. at 202, 635 S.E.2d at 752-53. The trial court appeared to have determined that service was perfected on the date that the acknowledgment of service was signed; however, U.S.C.R. 24.6(A) indicates that the date the acknowledgment is actually filed is the relevant date. *Id.*; GA. UNIF. SUPER. CT. R. 24.6(A).

7. O.C.G.A. §§ 9-11-1 to -133 (2007).

8. *Hammack*, 281 Ga. at 203, 635 S.E.2d at 753 (citing O.C.G.A. §§ 9-11-12(a), -40(a) (2006)).

9. GA. UNIF. SUPER. CT. R. 24.6(B). Rule 24.6(A) allows for judgments to be entered after more than 30 days have expired when the parties have given written consent for the trial court to do so. *Id.*

10. GA. UNIF. SUPER. CT. R. 1; *Russell v. Russell*, 257 Ga. 177, 177, 356 S.E.2d 884, 885 (1987).

11. O.C.G.A. § 9-11-12(b).

12. *Southworth v. Southworth*, 265 Ga. 671, 672-73, 461 S.E.2d 215, 217 (1995).

13. 281 Ga. 604, 642 S.E.2d 18 (2007).

14. *Id.* at 604-05, 642 S.E.2d at 19.

15. *Id.* at 606, 642 S.E.2d at 20.

16. 281 Ga. 242, 637 S.E.2d 389 (2006).

17. *Id.* at 244, 637 S.E.2d at 390-91.

where she resided. Even though the husband resided in North Carolina, the wife served the complaint on the husband's adult son, a resident of Fulton County. When the husband did not respond to the complaint, the trial court entered a divorce decree, which awarded the wife fifty percent of the husband's pension benefits. Over six years later, the husband filed a motion to set aside the decree based on lack of service, which the trial court granted in December 2004. Despite the decree being set aside, the wife continued to receive one-half of the husband's pension benefits. The husband filed a counterclaim, and the trial court conducted a new trial. At the trial, the husband requested the court to order the wife to pay him back for the pension payments she had received since the original divorce decree was set aside. Although the husband's counterclaim did not contain his request, the wife allowed the issue to be litigated at trial without objection.¹⁸ Therefore, the supreme court held that the wife waived her right to complain.¹⁹ "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."²⁰

II. ALIMONY

The Georgia Supreme Court considered the propriety of an alimony award in *Rieffel v. Rieffel*.²¹ In *Rieffel* the husband challenged the trial court's award of alimony as excessive.²² Unlike with child support,²³ there are no mathematical guidelines to control the amount of alimony awarded to a spouse.²⁴ Georgia law does, however, provide a list of factors that the finder of fact "shall" consider in determining the amount of alimony.²⁵ In making its alimony award to Mrs. Rieffel, the trial court specifically referenced several of these factors, including the duration of their twenty-seven year marriage, the wife's absence from the workforce to raise the parties' six children, and the difficulty the wife will have in reentering the labor force after such a lengthy absence.²⁶ Where the record shows that the trial court had evidence of the parties'

18. *Id.* at 242-44, 637 S.E.2d at 389-90.

19. *Id.* at 244, 637 S.E.2d at 391.

20. *Id.*, 637 S.E.2d at 390 (quoting O.C.G.A. § 9-11-15(b)).

21. 281 Ga. 891, 644 S.E.2d 140 (2007).

22. *Id.* at 891, 644 S.E.2d at 141.

23. See O.C.G.A. § 19-6-15 (2004 & Supp. 2007).

24. *Farrish v. Farrish*, 279 Ga. 551, 552, 615 S.E.2d 510, 511 (2005) (citing *Worrell v. Worrell*, 242 Ga. 44, 47, 247 S.E.2d 847, 850 (1978)).

25. O.C.G.A. § 19-6-5(a) (2004).

26. *Rieffel*, 281 Ga. at 892-93, 644 S.E.2d at 142.

financial position and the required factors in Official Code of Georgia Annotated ("O.C.G.A.") section 19-6-5,²⁷ the appellate court will not disturb the wide discretion given to the finder of fact.²⁸

III. CHILD CUSTODY

The Georgia Supreme Court accepted two appeals in which each of the fathers alleged that the trial court erred in awarding the mother physical custody of the parties' children in lieu of joint custody.²⁹ In *Cook v. Cook*,³⁰ the trial court was presented with evidence that showed both parties to be fit parents.³¹ Trial courts are authorized to award joint physical or joint legal custody.³² Georgia appellate courts have held that when both parties are fit and equally capable of caring for the child, it is error not to consider joint custody as an option.³³ A trial court, however, is not required to order joint physical custody.³⁴ The record showed that the trial court did consider joint custody; however, the trial court determined that joint physical custody was not in the child's best interests due to the parties' lack of communication.³⁵ The supreme court "will not interfere with the decision of the trial court to award custody of a child to one fit and proper parent over another, unless the trial court abused its broad discretion."³⁶ The supreme court reached an identical holding in *Jones v. Smith*,³⁷ where the court awarded the mother physical custody.³⁸ The father's appeal did not include a trial transcript; therefore, the appellate court was required to presume that the evidence supported the trial court's decision.³⁹

27. O.C.G.A. § 19-6-5 (2004).

28. *Rieffel*, 281 Ga. at 892-93, 644 S.E.2d at 142.

29. *Cook v. Cook*, 280 Ga. 768, 632 S.E.2d 664 (2006); *Jones v. Smith*, 280 Ga. 872, 632 S.E.2d 663 (2006).

30. 280 Ga. 768, 632 S.E.2d 664 (2006).

31. *Id.* at 768, 632 S.E.2d at 665.

32. O.C.G.A. § 19-9-3(a)(5) (2004 & Supp. 2007). Effective January 1, 2008, O.C.G.A. section 19-9-3 will be amended so that the current subsection (a)(5) will be found at O.C.G.A. section 19-9-3(a)(1) (Supp. 2007).

33. *Baldwin v. Baldwin*, 265 Ga. 465, 465, 458 S.E.2d 126, 127 (1995); *see also Steed v. Deal*, 225 Ga. App. 35, 35, 482 S.E.2d 527, 528 (1997); *Graham v. Holmes*, 218 Ga. App. 796, 798, 463 S.E.2d 513, 515 (1995).

34. *Baldwin*, 265 Ga. at 465, 458 S.E.2d at 127.

35. *Cook*, 280 Ga. at 768, 632 S.E.2d at 665.

36. *Id.* (citing *Urquhart v. Urquhart*, 272 Ga. 548, 549, 533 S.E.2d 80, 81-82 (2000)).

37. 280 Ga. 872, 632 S.E.2d 663 (2006).

38. *Id.* at 872, 632 S.E.2d at 663-64.

39. *Id.*

IV. CHILD CUSTODY: NON-PARENTS

Cases between parents and non-parents continued to reach the appellate courts. Under O.C.G.A. section 19-7-1(b.1),⁴⁰ the court may award custody to a close relative⁴¹ of the children if clear and convincing evidence shows that parental custody would harm the children physically or emotionally and that custody by the non-parent would promote the children's health, welfare, and happiness.⁴² The statute, however, does not include a step-parent as a relative.⁴³

In *Veal v. Veal*,⁴⁴ the husband and wife married the month after the wife gave birth to another man's child. Although the husband signed the child's birth certificate and treated the child as his own, the husband did not formally adopt the child. When the husband and wife divorced, the decree was silent with respect to the child born before the parties' marriage. The husband successfully moved to set aside the decree for failing to address the custody of the child.⁴⁵ The supreme court reversed, holding that the husband's failure to adopt the child left him without standing to seek custody of the child.⁴⁶ Because the husband was not the child's biological parent, the legitimation statute⁴⁷ could not provide any relief to the husband.⁴⁸

In Georgia, courts may grant visitation only to grandparents.⁴⁹ The grant of visitation to grandparents is conditioned on a finding that (1) the health or welfare of the child would be harmed unless the court grants such visitation and (2) such visitation would serve the best interests of the child.⁵⁰ In *Luke v. Luke*,⁵¹ the court of appeals held that the paternal grandfather's testimony alone sufficed to show that the children would be harmed if he were not granted visitation rights.⁵²

40. O.C.G.A. § 19-7-1(b.1) (2004 & Supp. 2007).

41. *Id.* Under O.C.G.A. section 19-7-1(b.1), close relatives are limited to grandparent, great-grandparent, aunt, uncle, great aunt, great uncle, sibling, or adoptive parent. *Id.*

42. *Clark v. Wade*, 273 Ga. 587, 598-99, 544 S.E.2d 99, 107-08 (2001).

43. *See* O.C.G.A. § 19-7-1(b.1).

44. 281 Ga. 128, 636 S.E.2d 527 (2006).

45. *Id.* at 128, 130, 636 S.E.2d at 528, 530.

46. *Id.*

47. O.C.G.A. § 19-7-22 (2004 & Supp. 2007).

48. *Veal*, 281 Ga. at 128-29, 636 S.E.2d at 529.

49. O.C.G.A. § 19-7-3 (2004).

50. *Id.* § 19-7-3(c).

51. 280 Ga. App. 607, 634 S.E.2d 439 (2006).

52. *Id.* at 611-12, 634 S.E.2d at 443-44. *But cf.* *Hunter v. Carter*, 226 Ga. App. 251, 485 S.E.2d 827 (1997) (holding there was no evidence that the child would be harmed when the grandparents had not seen the child in two years).

V. CHILD CUSTODY: MODIFICATION

Both the appellate courts and the legislature have contributed to development of the law pertaining to child custody modifications. In *Upchurch v. Smith*,⁵³ the Georgia Supreme Court considered a venue case of first impression.⁵⁴ The parties were divorced in Fulton County, where the court awarded the parties joint legal and physical custody of the parties' minor children with the mother designated as the primary physical custodian. The father filed a complaint to modify custody in Cobb County, where the mother had relocated; however, the trial court denied the petition. The mother later relocated to California, and the father filed a new complaint to modify custody in Fulton County. The case was transferred to Cobb County, where the new complaint was denied.⁵⁵ The supreme court affirmed the change of venue.⁵⁶ Even though the trial court in Cobb County declined to modify the Fulton County decree, the supreme court held that the Cobb County court had rendered a decision on the merits in conformity with the Uniform Child Custody Jurisdiction and Enforcement Act.⁵⁷ Therefore, Cobb County retained continuing exclusive jurisdiction.⁵⁸

In *Moses v. King*,⁵⁹ the supreme court held that parties seeking a custody modification must not only show a change of conditions, but they must also show a change of conditions substantially affecting the interests and welfare of the children involved.⁶⁰ The father brought his action wherein he made various allegations against the mother; however, the trial court based its modification solely on the mother's current cohabitation in a meretricious relationship with another woman and the mother's several previous relationships with women who were allowed to spend the night in the mother's residence while the child was present. The trial court emphasized that it routinely applied the same rule to heterosexual parents who engage in meretricious relationships as it applied in the instant case. As a result, the court indicated that it would enter an order awarding custody to the father and requiring the mother to pay child support. The trial court granted the mother's motion for a new trial to the extent that the child would be allowed to testify on the

53. 281 Ga. 28, 635 S.E.2d 710 (2006).

54. *Id.* at 29, 635 S.E.2d at 711.

55. *Id.* at 28-29, 635 S.E.2d at 710-11.

56. *Id.* at 29, 635 S.E.2d at 711.

57. *Id.*; O.C.G.A. §§ 19-9-40 to -104 (2004 & Supp. 2007).

58. *Upchurch*, 281 Ga. at 29, 635 S.E.2d at 711; see O.C.G.A. § 19-9-62.

59. 281 Ga. App. 687, 637 S.E.2d 97 (2006).

60. *Id.* at 692, 637 S.E.2d at 101.

record.⁶¹ The twelve-year-old child testified that she would like to divide her time equally between her parents. The trial court entered a new written order dividing the child's time with each parent equally and eliminating any obligation of the parties to pay child support to the other parent.⁶² The order did not include any provision restricting the mother from having guests in the presence of the child.⁶³

The mother appealed the modification order, arguing that no evidence supported the trial court's rationale that the mother's relationships, past or current, had any negative impact on the child. In fact, the evidence indicated that the child loved the mother's partner, performed well in school, and had close relationships with her extended family.⁶⁴ Relying on precedent, the supreme court held that the lack of any evidence showing that the material change resulted in any substantial effect on the child required reversal of the modification order.⁶⁵

The supreme court did not address whether the twelve-year-old child's testimony amounted to an election pursuant to O.C.G.A. section 19-9-1⁶⁶ and O.C.G.A. section 19-9-3,⁶⁷ but the election of a child under the age of fourteen cannot be the sole basis of a modification action.⁶⁸ The court of appeals, however, ruled in a later case that such an election from a fourteen-year-old child would not be valid.⁶⁹

In *Sharpe v. Perkins*,⁷⁰ the fourteen-year-old minor child signed an election requesting that her parents share joint legal and physical custody of her and that she be allowed to divide her time equally between her parents.⁷¹ The trial court found that the election was invalid, and the court of appeals agreed.⁷² O.C.G.A. sections 19-9-1 and 19-9-3 allow for children age fourteen or older to elect which parent the

61. *Id.* at 688-89, 637 S.E.2d at 99. The trial court had interviewed the parties' child off the record at the initial custody hearing. *Id.* at 689, 637 S.E.2d at 99.

62. *Id.* at 689, 637 S.E.2d at 99-100.

63. *Id.* at 692, 637 S.E.2d at 101.

64. *Id.* at 690-92, 637 S.E.2d at 100-01.

65. *Id.* at 692, 637 S.E.2d at 101; see *Brandenburg v. Brandenburg*, 274 Ga. 183, 551 S.E.2d 721 (2001); *Hayes v. Hayes*, 199 Ga. App. 132, 404 S.E.2d 276 (1991); *Livesay v. Hilley*, 190 Ga. App. 655, 379 S.E.2d 557 (1989).

66. O.C.G.A. § 19-9-1 (2004).

67. O.C.G.A. § 19-9-3 (2004).

68. *Moses*, 281 Ga. App. at 692, 637 S.E.2d at 101 (citing O.C.G.A. § 19-9-3(a)(4.1) (2004)).

69. *Sharpe v. Perkins*, 284 Ga. App. 376, 377, 644 S.E.2d 178, 180 (2007).

70. 284 Ga. App. 376, 644 S.E.2d 178 (2007).

71. *Id.* at 377, 644 S.E.2d at 180.

72. *Id.*

child wants to have custody; the specific language does not provide that the child can select both parents.⁷³

The Georgia legislature was also concerned about children being able to elect their custodial parents. Originally, the legislature amended O.C.G.A. sections 19-9-1 and 19-9-3 to allow children over the age of fourteen years to make an election concerning their custodial parent, and the election was binding on the trial court unless the selected parent was deemed unfit.⁷⁴ The legislature later added a provision allowing children over the age of eleven years but under the age of fourteen years to make custodial elections; trial courts had to consider such elections but were not bound by them.⁷⁵ In 2007, however, the legislature dramatically changed its course.⁷⁶ Effective January 1, 2008, the elections of a child age fourteen or older will only be considered to be "presumptive."⁷⁷ To disregard the election, the trial court will only have to find that the election would not be in the child's best interests, a much easier standard to meet than having to find a parent unfit.⁷⁸ Furthermore, the new statute gives the trial court wide discretion to determine what weight it will give to an election of a child over the age of eleven years but under the age of fourteen years.⁷⁹

VI. CHILD CUSTODY: PARENTING PLAN

The 2007 legislature redrafted O.C.G.A. section 19-9-1⁸⁰ to require all child custody orders after January 1, 2008 to incorporate a parenting plan.⁸¹ If the parties cannot agree on a consolidated parenting plan, then each party must submit his or her own parenting plan on or before the trial date.⁸² If a party fails to submit a proposed parenting plan, that party runs the risk of the trial court adopting the plan submitted by the other parent.⁸³

Unless otherwise ordered by the trial court, the parenting plan shall include the following statements: (1) "[C]lose and continuing parent-child relationship and continuity in the child's life will be in the child's best

73. *Id.* at 377-78, 644 S.E.2d at 180-81 (citing O.C.G.A. § 19-9-3(a)(4)-(5) (2004)).

74. O.C.G.A. §§ 19-9-1(a)(3)(A), -3(a)(4) (2004).

75. O.C.G.A. §§ 19-9-1(a)(3)(B), -3(a)(4.1) (2004).

76. *See* Ga. H.R. Bill 369, Reg. Sess. (2007).

77. O.C.G.A. § 19-9-3(a)(5) (Supp. 2007).

78. *Id.*

79. *Id.* § 19-9-3(a)(6).

80. O.C.G.A. § 19-9-1 (Supp. 2007).

81. *Id.*

82. *Id.* § 19-9-1(c).

83. *Id.*

interest;⁸⁴ (2) “[T]he child’s needs will change and grow as the child matures[,] and . . . the parents will make an effort to parent that takes this issue into account so that future modifications to the parenting plan are minimized;”⁸⁵ (3) “[A] parent with physical custody will make day-to-day decisions and emergency decisions while the child is residing with such parent;”⁸⁶ and (4) “[B]oth parents will have access to all of the child’s records and information, including, but not limited to, education, health, extracurricular activities, and religious communications.”⁸⁷

The parenting plan must also include the following information unless the court orders otherwise: (1) a detailed schedule containing which parent will have physical care of the child each day of the year;⁸⁸ (2) a detailed schedule of each parent’s parenting time for holidays, birthdays, vacations, school breaks, and other special occasions;⁸⁹ (3) transportation arrangements;⁹⁰ (4) the terms of supervision if any are required;⁹¹ (5) the terms of legal custody, including how to resolve any disputes between the parties;⁹² and (6) the terms of any restrictions placed on either party’s parenting time with the child or access to information relating to the child.⁹³

VII. CHILD SUPPORT: GUIDELINES

The new income shares model of Georgia’s Child Support Guidelines went into effect beginning January 1, 2007.⁹⁴ Even though the appellate cases decided during the survey period interpreted the old guidelines, some of the opinions relate to issues that can and will arise under the new guidelines.

In *Sharpe v. Perkins*,⁹⁵ the court of appeals affirmed a child support modification award which considered the noncustodial parent’s income from capital gains for the purposes of calculating the child support obligation.⁹⁶ The pre-2007 Child Support Guidelines⁹⁷ defined “gross

84. *Id.* § 19-9-1(b)(1)(A).

85. *Id.* § 19-9-1(b)(1)(B).

86. *Id.* § 19-9-1(b)(1)(C).

87. *Id.* § 19-9-1(b)(1)(D).

88. *Id.* § 19-9-1(b)(2)(A).

89. *Id.* § 19-9-1(b)(2)(B).

90. *Id.* § 19-9-1(b)(2)(C).

91. *Id.* § 19-9-1(b)(2)(D).

92. *Id.* § 19-9-1(b)(2)(E).

93. *Id.* § 19-9-1(b)(2)(F).

94. O.C.G.A. § 19-6-15 (2004 & Supp. 2007).

95. 284 Ga. App. 376, 644 S.E.2d 178 (2007).

96. *Id.* at 379, 644 S.E.2d at 182.

97. O.C.G.A. § 19-6-15 (2004) (amended 2007).

income" as "100 percent of wage and salary income and other compensation for personal services, interest, dividends, net rental income, self-employment income, and all other income, except need-based public assistance."⁹⁸ The appellate court determined that the statutory language "other income" encompassed capital gains from real estate transactions.⁹⁹ The new Child Support Guidelines expressly define "income" to include capital gains.¹⁰⁰

The supreme court considered whether the noncustodial parent had waived his rights to modify child support.¹⁰¹ In *Jones v. Jones*,¹⁰² the parties had agreed that the father would pay twenty-eight percent of his gross income as child support but not less than \$1,657.86 per month. The agreement also required the father to pay spousal support to the mother.¹⁰³ The agreement also contained a provision that the parties "hereby waive their statutory right to future modifications, up or down, of the alimony payments provided for herein."¹⁰⁴

The father sought to modify the child support provisions in 2002; however, the trial court declined to modify the support provisions in its 2004 decision. The father lost his job and filed a motion for reconsideration during the same term of court. The trial court granted the motion and after a new hearing changed the child support to \$1,562.50 per month.¹⁰⁵ The supreme court,¹⁰⁶ however, held that the term "alimony" has historically included both support for children and support for spouses.¹⁰⁷ Therefore, where parties waive their rights to modify alimony payments, the waiver applies to both spousal support and child support unless expressly stated otherwise.¹⁰⁸

98. *Id.*

99. *Sharpe*, 284 Ga. App. at 379, 644 S.E.2d at 181-82.

100. O.C.G.A. § 19-6-15(f)(1)(A)(xii) (Supp. 2007).

101. *Jones v. Jones*, 280 Ga. 712, 632 S.E.2d 121 (2006).

102. 280 Ga. 712, 632 S.E.2d 121 (2006).

103. *Id.* at 712-13, 632 S.E.2d at 122-23.

104. *Id.* (internal punctuation omitted).

105. *Id.* at 713-14, 632 S.E.2d at 123.

106. Justice Carol W. Hunstein wrote the plurality opinion. *Id.* at 712, 632 S.E.2d at 122. Justices P. Harris Hines and Robert Benham dissented. *Id.* at 717, 632 S.E.2d at 126 (Hines, J., dissenting).

107. *Id.* at 716, 632 S.E.2d at 125 (majority opinion); see O.C.G.A. §§ 19-6-4, -17, -18(a), -22, -27 (2004); *Smith v. Smith*, 254 Ga. 450, 330 S.E.2d 706 (1985); *Eskew v. Eskew*, 199 Ga. 513, 34 S.E.2d 697 (1945); *Rochester v. Rochester*, 124 Ga. 993, 53 S.E. 399 (1906).

108. *Jones*, 280 Ga. at 716-17, 632 S.E.2d at 125; cf. *Beard v. Beard*, 250 Ga. 449, 449, 298 S.E.2d 495, 495 (1983) (waiver language expressly limited to "alimony for wife").

VIII. EQUITABLE DIVISION

The Georgia Supreme Court was presented with several cases in which the trial court entered orders that gave little rationale behind the division of marital property. In two separate cases, the supreme court held that the success of a party's appeal may be contingent upon whether it requested findings of fact at the trial level.¹⁰⁹ In *Crowder v. Crowder*,¹¹⁰ the trial court heard conflicting evidence regarding whether the appreciation on certain assets was marital or nonmarital.¹¹¹ The trial court entered a judgment dividing the assets between the parties, but it did not distinguish whether it awarded the appreciation on the assets to a party as part of the separate asset or as part of the equitable division of marital property.¹¹² A trial court is not required to make findings of fact unless requested to do so by either party.¹¹³ The Georgia Supreme court stated,

Inasmuch as the issues on appeal depend upon the factual determinations made by the trial court as fact-finder and neither party asked the trial court to make factual findings, [the appellate courts] are unable to conclude that the trial court's equitable distribution of marital property was improper as a matter of law or as a matter of fact.¹¹⁴

A month later, the supreme court reached an identical result in the factually similar case of *Mathis v. Mathis*.¹¹⁵

In *Stanley v. Stanley*,¹¹⁶ the supreme court was asked to address a case where the trial court entered a generic form divorce decree that did not award either party an equitable division of marital property.¹¹⁷

"[T]itle to property, including jointly owned property, not described in the verdict and judgment is unaffected by the divorce decree and remains titled in the name of the owner or owners before the decree was entered. Any future issues as to the management, division or disposal of [any] jointly owned property should be treated as they arise,

109. *Crowder v. Crowder*, 281 Ga. 656, 642 S.E.2d 97 (2007); *Mathis v. Mathis*, 281 Ga. 865, 642 S.E.2d 832 (2007).

110. 281 Ga. 656, 642 S.E.2d 97 (2007).

111. *Id.* at 656-57, 642 S.E.2d at 98.

112. *Id.* at 658, 642 S.E.2d at 99.

113. O.C.G.A. § 9-11-52(a) (2007).

114. *Crowder*, 281 Ga. at 658-59, 642 S.E.2d at 99.

115. 281 Ga. 865, 642 S.E.2d 832 (2007).

116. 281 Ga. 672, 642 S.E.2d 94 (2007).

117. *Id.* at 672, 642 S.E.2d at 95.

without regard to the previous status of the parties as husband and wife."¹¹⁸

The supreme court held that such a disposition falls within the trial court's broad discretion and in this case, it was not erroneous.¹¹⁹

IX. APPELLATE PROCEDURE

For many years, domestic relations attorneys and other interested parties have tried to restore the right to direct appeals. Currently, all appeals of domestic relations cases must adhere to the discretionary review process.¹²⁰ As a result, appellants must file an application for discretionary review.¹²¹ The movement for direct appeals began to gather momentum when the supreme court unveiled its pilot project wherein it agreed to grant all nonfrivolous applications for discretionary review in divorce and alimony cases.¹²² The supreme court has renewed the project each year since the project began. In 2007 the legislature joined the movement by amending O.C.G.A. section 5-6-34,¹²³ effective January 1, 2008, to include the right to direct appeals in all cases involving child custody orders, modification of custody orders, and contempt of court orders arising from custody orders.¹²⁴

X. CONTEMPT

Although the Georgia Supreme Court's pilot project did not include automatic acceptance of contempt cases, the supreme court did accept a large number of applications for discretionary review of contempt cases. In *Jacob v. Koslow*,¹²⁵ the supreme court clarified the venue rules for a contempt proceeding.¹²⁶ The parties were divorced in Fulton County; however, both parties subsequently relocated to Cherokee County. The wife filed a petition in Cherokee County seeking to have the husband held in contempt of the parties' Fulton County divorce decree.¹²⁷

118. *Id.* at 673-74, 642 S.E.2d at 96 (brackets in original) (quoting *Cale v. Cale*, 242 Ga. 600, 601, 250 S.E.2d 467, 468 (1978)).

119. *Id.* at 673, 642 S.E.2d at 95-96.

120. O.C.G.A. § 5-6-35(a)(2) (1995 & Supp. 2007).

121. *Id.* § 5-6-35(b).

122. *See Wright v. Wright*, 277 Ga. 133, 587 S.E.2d 600 (2003).

123. O.C.G.A. § 5-6-34 (1995 & Supp. 2007).

124. *Id.* § 5-6-34(a)(11) (Supp. 2007).

125. 282 Ga. 51, 644 S.E.2d 857 (2007).

126. *Id.* at 51-52, 644 S.E.2d at 857.

127. *Id.* at 51, 644 S.E.2d at 857.

Generally, parties must file contempt petitions in the court of rendition.¹²⁸ The appellate courts have made an exception where the parties file the contempt petition in conjunction with a modification action in a different county either as a second claim by the movant¹²⁹ or as a counterclaim by the respondent.¹³⁰ In either case, the courts have held that the filing of the modification action vested the new county with jurisdiction over the subject matter of the decree and warranted “a flexible approach to contempt jurisdiction.”¹³¹

In *Jacob* the trial court found that Cherokee County would have jurisdiction over a modification case had one been filed; therefore, it concluded that venue of a contempt case would be proper in Cherokee County.¹³² The supreme court disagreed.¹³³ While the trial court correctly stated that Cherokee County would assume jurisdiction over a modification action by virtue of both parties residing within that county, the trial court erred in its finding that it could assume such jurisdiction prior to a modification action actually being filed.¹³⁴

In *Gowins v. Gary*,¹³⁵ the court of appeals held that a trial court had the authority to enforce provisions in settlement agreements even when the action was required to take place before the entry of the order.¹³⁶ The parties negotiated a child support amount for the father to pay beginning July 2002. The agreement was not made an order of any court until April 2005. In August 2006 the mother obtained a hearing on her request to have the father held in contempt for nonpayment of support.¹³⁷ The trial court found that it did not have jurisdiction to enforce the agreement in a contempt case for the payments that accrued prior to the entry of the April 2005 order.¹³⁸ Once parties reach an agreement and incorporate it into a court order, the trial court has the authority to enforce all of the terms contained therein.¹³⁹

In the majority of the cases in which the supreme court addressed contempt issues, the court considered whether the trial court properly

128. *Goodrum v. Goodrum*, 202 Ga. 135, 135, 42 S.E.2d 450, 451 (1947); *Rockwood Int'l Sys. Supply, Inc. v. Rader Cos.*, 255 Ga. App. 881, 882, 567 S.E.2d 104, 106 (2002).

129. *E.g.*, *Corbett v. Corbett*, 236 Ga. App. 299, 300-01, 511 S.E.2d 633, 634 (1999).

130. *E.g.*, *Buckholts v. Buckholts*, 251 Ga. 58, 60, 302 S.E.2d 676, 678 (1983).

131. *Jacob*, 282 Ga. at 53, 644 S.E.2d at 858.

132. *Id.* at 52, 644 S.E.2d at 858.

133. *Id.*

134. *Id.* at 53, 644 S.E.2d at 858.

135. 284 Ga. App. 370, 643 S.E.2d 836 (2007), *cert. granted*.

136. *Id.* at 372, 643 S.E.2d at 838.

137. *Id.* at 370, 643 S.E.2d at 837.

138. *Id.* at 372, 643 S.E.2d at 838.

139. *Id.*; *see also* *Graves v. Graves*, 239 Ga. 869, 869, 239 S.E.2d 35, 36-37 (1977).

interpreted the provisions of the decree or improperly modified the existing terms.

In *Johnston v. Johnston*,¹⁴⁰ the supreme court held that the trial court properly exercised its authority to interpret the decree.¹⁴¹ The wife sought to have the husband held in contempt for failing to pay her fifty percent of the value of the "marital home."¹⁴² The parties differed on how to define the term "home."¹⁴³ The husband claimed that he owned the land prior to the marriage; therefore, he argued that the term home only referred to the value of the mobile home that was on the land. The wife argued that the term home encompassed the land as well. The trial court agreed with the husband's definition and did not find him in contempt.¹⁴⁴ Because a trial court has the authority to interpret divorce decrees in the context of contempt cases¹⁴⁵ and because the appellant did not include a transcript of the hearing in the record on appeal, the supreme court could not hold that the trial court abused its discretion in interpreting the term home.¹⁴⁶

In *Page v. Baylard*,¹⁴⁷ the supreme court held that the trial court did not properly interpret the terms of the decree.¹⁴⁸ The parties were required to equally divide any medical expenses for their child that were not covered by insurance. The agreement obligated the mother to consult with the father prior to incurring any major non-emergency medical expense. Due to the child's substance abuse and behavioral problems, the mother, upon the advice of one of the child's psychological counselors, enrolled the child in a long-term residential treatment facility that included a high school curriculum and individual counseling. Although the facility charged \$2750 per month, the mother did not consult with the father during the months in which she was selecting a facility, and she did not consult with him for over a year after the child had been placed in the facility.¹⁴⁹ The plurality opinion¹⁵⁰ held that the language of the decree made consultation with the father a condition

140. 281 Ga. 666, 641 S.E.2d 538 (2007).

141. *Id.* at 668, 641 S.E.2d at 541.

142. *Id.* at 666, 641 S.E.2d at 539.

143. *Id.* at 666-67, 641 S.E.2d at 540.

144. *Id.*

145. *Millner v. Millner*, 260 Ga. 495, 497, 397 S.E.2d 289, 291 (1990).

146. *Johnston*, 281 Ga. at 668, 641 S.E.2d at 540-41.

147. 281 Ga. 586, 642 S.E.2d 14 (2007).

148. *Id.* at 587, 642 S.E.2d at 16.

149. *Id.* at 586-87, 642 S.E.2d at 15-16.

150. Justice Hugh Thompson wrote the majority opinion. *Id.* at 586, 642 S.E.2d at 15. Justice Harold Melton dissented. *Id.* at 588, 642 S.E.2d at 16 (Melton, J., dissenting).

precedent for the father's obligation to share in the medical expense.¹⁵¹ Because the mother failed to consult with the father prior to incurring the expenses, the trial court erred in holding the father in contempt.¹⁵²

The supreme court did determine that the trial courts went beyond mere interpretation in a host of cases during the survey period. In *Norris v. Norris*,¹⁵³ the parties' agreement was silent about how many semesters of the child's undergraduate education the father was obligated to pay. The mother filed a contempt action when the father stopped paying the college expenses. The trial court determined that a reasonable duration would be eleven semesters.¹⁵⁴ The supreme court¹⁵⁵ held that the terms were not ambiguous and did not require interpretation.¹⁵⁶ The parties agreed that the father would pay for the expenses of a college education and only limited the amount to an amount equivalent of attending the University of Georgia.¹⁵⁷ The court determined that if the parties had wanted additional limitations, they could have negotiated those terms, but they did not.¹⁵⁸ The trial court's imposition of a time limit substantively changed the decree and required reversal.¹⁵⁹

In *Roquemore v. Burgess*,¹⁶⁰ the agreement required the wife to quitclaim her interest in the marital home in favor of the husband. The agreement further required the husband to pay the wife the sum of \$15,000 upon the sale of the home or earlier upon his election. The husband was also required to maintain life insurance, covering the \$15,000 obligation, until he paid the amount in full. When nearly three years had passed without payment, the wife filed a contempt action. The trial court ordered the residence to be sold and set forth the terms of the sale.¹⁶¹ The Georgia Supreme Court has stated, "While the trial court has broad discretion to determine whether the decree has been violated and has authority to interpret and clarify the decree, it does not

151. *Id.* at 587, 642 S.E.2d at 16 (majority opinion).

152. *Id.*

153. 281 Ga. 566, 642 S.E.2d 34 (2007).

154. *Id.* at 566-67, 642 S.E.2d at 35.

155. Justice Carol W. Hunstein wrote the majority opinion. *Id.* at 566, 642 S.E.2d at 35. Justice Harold Melton wrote a special concurrence. *Id.* at 568, 642 S.E.2d at 36 (Melton, J., concurring). Chief Justice Leah Sears and Justice Hugh Thompson dissented. *Id.* at 569, 642 S.E.2d at 36 (Sears, C.J., dissenting).

156. *Id.* at 567, 642 S.E.2d at 35 (majority opinion).

157. *Id.*

158. *Id.*

159. *Id.*

160. 281 Ga. 593, 642 S.E.2d 41 (2007).

161. *Id.* at 593-94, 642 S.E.2d at 42.

have the power in a contempt proceeding to modify the terms of the agreement or decree."¹⁶² The parties' decree provided three means by which the husband could satisfy the \$15,000 obligation: (1) through his own funds if he so elected, (2) through life insurance proceeds if he died, or (3) through the proceeds of the sale of the house.¹⁶³ "The fact that two of those sources are independent of any sale of the marital home contradicts the assertion by [the wife] and the assumption by the trial court that [the husband] was required by the . . . decree to sell the house and pay [the wife] from the proceeds."¹⁶⁴

In *Smith v. Smith*,¹⁶⁵ the trial court entered a decree based on the jury's verdict of alimony and property division. The husband filed a motion for new trial, which the trial court denied. The husband's application for appeal was granted; however, the court later dismissed it when the husband failed to pay the costs. When the husband failed to divide the assets according to the judgment, the wife filed a contempt action. The trial court declined to hold the husband in contempt.¹⁶⁶ The trial court found that the husband could not divide the individual retirement account ("IRA") as required because he had previously depleted the account; therefore, the trial court ordered payment of the value of the IRA in "an alternate form."¹⁶⁷ The trial court found that the husband could not transfer certain stocks because the stocks were not owned by the parties or did not have any value; thus, the court struck those provisions. The trial court found that the husband never had the resources to satisfy a \$291,000 lump sum award as required; therefore, the court required the husband to pay the amount over a period of time with interest. The trial court found that the \$2000 award of supplemental alimony was for the support of the parties' disabled adult daughter and was unenforceable child support beyond the age of majority. The trial court also struck a provision requiring the husband to place certain stocks in trust for the minor child. Finally, the trial court offset its award of attorney fees to the wife by an earlier award.¹⁶⁸ The supreme court held that the trial court, in striking provisions, reducing the fee award, and altering payments, substantially

162. *Dohn v. Dohn*, 276 Ga. 826, 828, 584 S.E.2d 250, 253 (2003) (citing *Blair v. Blair*, 272 Ga. 94, 95, 527 S.E.2d 177, 178 (2000)).

163. *Roquemore*, 281 Ga. at 595, 642 S.E.2d at 43.

164. *Id.*

165. 281 Ga. 204, 636 S.E.2d 519 (2006).

166. *Id.* at 204-05, 636 S.E.2d at 520-21.

167. *Id.* at 205, 636 S.E.2d at 521.

168. *Id.* at 205-06, 636 S.E.2d at 521.

and improperly modified the decree in the context of a contempt case.¹⁶⁹

XI. ATTORNEY FEES

Although trial courts have broad discretion to award attorney fees in divorce, alimony, or contempt cases ancillary to divorce or alimony judgments, the appellate courts have continued to insist that the evidence support the fee awards. Under O.C.G.A. section 19-6-2,¹⁷⁰ trial courts must consider the financial circumstances of both parties in determining awards of attorney fees.¹⁷¹ In *Rieffel v. Rieffel*,¹⁷² the supreme court upheld an award of \$4000 to the wife when the trial court considered evidence of the parties' respective financial conditions.¹⁷³ In *Anderson v. Svard*,¹⁷⁴ the supreme court reversed the award because the record was devoid of evidence of the parties' financial circumstances.¹⁷⁵

"As a general rule, Georgia law does not provide for the award of attorney fees even to a prevailing party unless authorized by statute or by contract."¹⁷⁶ Where a trial court makes an award of attorney fees sustainable on appeal, the statutory basis for the award must be referenced in the order or be discernible from the record.¹⁷⁷ In *Webb v. Watkins*,¹⁷⁸ the court determined that the father was in contempt of a paternity order requiring the payment of child support.¹⁷⁹ The order and the record were silent regarding the basis for the award of attorney fees; therefore, the court of appeals reversed and remanded the case for further findings.¹⁸⁰

During the survey period, no statutory basis existed for awarding attorney fees in custody cases beyond divorce cases.¹⁸¹ In April 2007,

169. *Id.* at 206-07, 636 S.E.2d at 522; see *Collins v. Billow*, 277 Ga. 604, 605, 592 S.E.2d 843, 845 (2004).

170. O.C.G.A. § 19-6-2 (2004).

171. *Id.* § 19-6-2(a)(1).

172. 281 Ga. 891, 644 S.E.2d 140 (2007).

173. *Id.* at 893, 644 S.E.2d at 142.

174. 282 Ga. 53, 644 S.E.2d 861 (2007).

175. *Id.* at 53, 644 S.E.2d at 861.

176. *Suarez v. Halbert*, 246 Ga. App. 822, 824, 543 S.E.2d 733, 735 (2000) (citing *Indus. Distrib. Group, Inc. v. Waite*, 268 Ga. 115, 116, 485 S.E.2d 792, 793 (1997)).

177. *Wehner v. Parris*, 258 Ga. App. 772, 773, 574 S.E.2d 921, 922-23 (2002).

178. 283 Ga. App. 385, 641 S.E.2d 611 (2007).

179. *Id.* at 385, 641 S.E.2d at 612.

180. *Id.* at 386, 641 S.E.2d at 613.

181. See O.C.G.A. § 19-6-2.

however, the Georgia legislature amended O.C.G.A. section 19-9-3¹⁸² to allow trial courts to determine whether to award attorney fees and other costs associated with child custody cases, including guardian ad litem fees.¹⁸³

XII. CONCLUSION

This survey period has been a busy time for domestic relations law. After several delays, the new child support guidelines went into effect, dramatically changing the litigation of child support cases. The Georgia legislature, however, did not stop there, and major changes to child custody cases were passed and will go into effect in January 2008. The appellate courts have continued their role of interpreting the laws and giving guidance to domestic relations litigants and attorneys.

182. O.C.G.A. § 19-9-3 (2004 & Supp. 2007).

183. *Id.* § 19-9-3(g) (Supp. 2007).