Mercer Law Review

Volume 55
Number 1 *Annual Survey of Georgia Law*

Article 8

12-2003

Domestic Relations

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Fourteen of the domestic relations appellate cases decided during the survey period[1] are digested here. Georgia law requires that appeals of domestic relations cases occur through the discretionary application process.[2] A party wanting to appeal an order in a domestic relations case must first file an application to obtain the appropriate appellate court's permission to file an appeal.[3] As part of a pilot project, the Georgia Supreme Court announced it would accept all "non-frivolous" applications filed in domestic relations cases during the calendar year 2003.[4] The pilot project does not include cases that would be appealed first to the court of appeals,[5] writs of certiorari,[6] or interlocutory appeals.[7] While the domestic relations bar hopes the pilot project will be extended or made permanent, no decision has been announced. The

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1. This survey chronicles developments in Georgia domestic relations law from June 1, 2002 to May 31, 2003.

2. O.C.G.A. § 5-6-35(a)(2) (Supp. 2003).

3. *Id.* § 5-6-35(b).

4. Wright v. Wright, S03F1141, 2003 Ga. LEXIS 784, at *1-2 (Ga. Sept. 22, 2003).

5. GA. CONST. art. VI, § 6, para. 2 lists those appeals for which the supreme court has original jurisdiction, including any questions as to the constitutionality of a statute. GA. CONST. art. VI, § 6, para. 3 lists those appeals for which the supreme court has general appellate jurisdiction, including judgments for alimony and divorce. GA. CONST. art. VI, § 5, para. 3 vests the court of appeals with jurisdiction in those appellate cases not reserved to the supreme court or other courts.

6. O.C.G.A. § 5-6-15 (1998).

7. O.C.G.A. § 5-6-34(b) (1998).

pilot project, however, has enabled the courts to address a variety of domestic relations issues.

I. DIVORCE: PARTIES

The supreme court addressed the issue of who may be named as parties to a divorce case other than the spouses. In *Gardner v. Gardner*,[8] the supreme court affirmed the trial court's joinder of two corporate entities in the parties' divorce case.[9] The husband, who filed for divorce, listed corporate stock in three entities as the only marital assets of the parties. The husband was the sole stockholder and director of the three companies, but the corporations held title to the assets that the parties used, including the marital home and vehicles. Therefore, the wife filed a counterclaim and a motion to have two of the corporations joined as parties, claiming joinder was necessary to enable the parties to obtain a complete equitable division of the marital assets.[10] Both the trial court and the supreme court agreed.[11]

> O.C.G.A. § 9-11-13(h) provides: "When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim . . . the court shall order them to be brought in as defendants as provided in this chapter, if jurisdiction of them can be obtained."[12]

O.C.G.A. section 9-11-19(a)(1) states that "'[a] person who is subject to service of process shall be joined as a party in the action if: (1) [i]n his absence complete relief cannot be afforded among those who are already parties.'"[13] Because the husband's companies held title to many of the parties' assets, the supreme court determined that "complete relief" could only be achieved by joining the corporations as parties to the divorce action.[14] However, the supreme court emphasized that the joinder must be limited to the division of the parties' marital assets.[15]

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8. 276 Ga. 189, 576 S.E.2d 857 (2003).
9. *Id.* at 190-91, 576 S.E.2d at 859.
10. *Id.* at 189-90, 576 S.E.2d at 858.
11. *Id.* at 190-91, 576 S.E.2d at 858-59.
12. *Id.* at 190, 576 S.E.2d at 859 (quoting O.C.G.A. § 9-11-13(h) (1993)).
13. *Id.* (quoting O.C.G.A. § 9-11-19(a)(1) (1993)).
14. *Id.* at 190-91, 576 S.E.2d at 859.
15. *Id.* at 191, 576 S.E.2d at 859.

II. EQUITABLE DIVISION

In *Barolia v. Pirani*,[16] the court of appeals reversed the trial court's determination that it did not have jurisdiction to award an equitable division of certain marital property.[17] The parties were divorced in Texas, but the decree specifically stated that the now ex-wife did "not waive her right to an action on the division of property which should be brought in the state of Georgia."[18] The ex-husband brought an action in Georgia to domesticate the Texas decree and to divide the Georgia property. The ex-wife admitted jurisdiction and filed a counterclaim for equitable division of the property. On the ex-husband's motion for summary judgment, the trial court held that entry of the divorce decree prevented the Georgia court from having jurisdiction to equitably divide the parties' marital property. The trial court relied on the proposition that title to property not addressed in the decree remains unaffected by the entry of the decree, and title remains with the party or parties having title at the time of the decree.[19] The court of appeals reversed, holding that while the trial court correctly stated the law, that proposition does not apply when the property is addressed in the divorce decree, and a decision is reserved for later determination.[20]

III. CHILD CUSTODY: STANDARD

While trends seem to place reduced importance on spousal misconduct, particularly in custody cases, the supreme court held that a trial court could consider such misconduct.[21] In *Patel v. Patel*,[22] the supreme court affirmed the trial court's consideration of the cause of the parties' separation in awarding sole physical custody of the minor children to the mother.[23] The father's adulterous relationship with an employee/patient resulted in the father losing his job and the wife filing for divorce. The trial court awarded joint legal custody to the parties, but it awarded sole physical custody to the mother subject to the father's liberal visitation rights. The father's visitation rights were not restricted

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16. 260 Ga. App. 513, 580 S.E.2d 297 (2003).
17. *Id.* at 513, 580 S.E.2d at 297.
18. *Id.*
19. *Id.* at 513-14, 580 S.E.2d at 297-98. *See* Newborn v. Clay, 263 Ga. 622, 436 S.E.2d 654 (1993).
20. 260 Ga. App. at 514, 580 S.E.2d at 299.
21. Patel v. Patel, 276 Ga. 266, 268, 577 S.E.2d 587, 589 (2003) (citing Mock v. Mock, 258 Ga. 407, 369 S.E.2d 233 (1988)).
22. 276 Ga. 266, 577 S.E.2d 587 (2003).
23. *Id.* at 268, 577 S.E.2d at 590.

in any manner to prevent contact between the father's paramour and the children.[24]

While visitation rights will not be deprived unless a parent is unfit,[25] custody may be deprived based merely on the "best interests of the child" standard.[26] In applying the best interests standard, the trial court is authorized to consider the parties' conduct during the marriage,[27] even when the divorce is granted on no fault grounds.[28] Construing O.C.G.A. section 19-9-1(a)(1)[29] with O.C.G.A. section 19-9-3(a)(2),[30] the supreme court[31] held that Georgia law "confers a prima facie right on the party not in default[32] such that the trial court should award custody to that party, in the absence of proof of circumstances showing that the children's welfare will be better served by entry of a different award."[33] The supreme court, therefore, held that the evidence of the father's adultery was relevant to the trial court's custody determination.[34]

IV. CHILD CUSTODY: MODIFICATION

While the state legislature has yet to pass a bill about the impact of a parent's relocation on custody arrangements, the supreme court began addressing the issue. In *Scott v. Scott*,[35] the supreme court held that an automatic change of custody based on the custodial parent's future relocation is invalid.[36] When the parties divorced in 2001, the trial

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24. *Id.* at 266-68, 577 S.E.2d at 587-89; *Cf.* Brandenburg v. Brandenburg, 274 Ga. 183, 551 S.E.2d 721 (2001) (prohibiting trial court from restricting visitation in the presence of certain individuals without a showing that the exposure would harm the child).

25. 276 Ga. at 267, 577 S.E.2d at 589 (citing Woodruff v. Woodruff, 272 Ga. 485, 531 S.E.2d 714 (2000)).

26. *Id.* (citing O.C.G.A. § 19-9-3(a)(2) (1999)).

27. *Id.* at 268, 577 S.E.2d at 589 (citing Mock v. Mock, 258 Ga. 407, 369 S.E.2d 255 (1988)).

28. *Id.*, 577 S.E.2d at 589-90 (citing O.C.G.A. § 19-9-1(a)(1) (1999) and Harris v. Harris, 240 Ga. 276, 240 S.E.2d 30 (1977)).

29. O.C.G.A. § 19-9-1(a)(1) (1999).

30. O.C.G.A. § 19-9-3(a)(2) (1999).

31. All justices concurred in the majority opinion, except Justice Carol Hunstein, who wrote a special concurrence wherein she agreed that the trial court was within its discretion to consider the evidence of the father's adultery. She disagreed, however, with the majority's holding that a presumption exists in favor of either party in a custody case, and that the best interests of the child standard governs. 276 Ga. at 269, 577 S.E.2d at 590 (Hunstein, J., concurring).

32. The supreme court, as in past decisions, seems to equate the phrase "in default" with the phrase "at fault." *Id.* at 268, 577 S.E.2d at 589.

33. *Id.*

34. *Id.* at 268-69, 577 S.E.2d at 590.

35. 276 Ga. 372, 578 S.E.2d 876 (2003).

36. *Id.* at 372, 578 S.E.2d at 877.

court awarded primary physical custody to the mother, but the divorce decree stated that if the mother relocated outside of the county of her current residence, custody would revert to the father. The trial court found that such a move would be a material change of circumstances affecting the welfare of the parties' child. The provision was to be "self-effectuating" and required no further court action.[37]

Ordinarily, custody provisions are only modifiable by court action.[38] However, the appellate courts have approved self-effectuating custody changes in the past. In *Weaver v. Jones*,[39] the supreme court approved an automatic change based on the minor child reaching at least fourteen years of age and making an election to reside with the noncustodial parent.[40] In *Pearce v. Pearce*,[41] the supreme court enforced an automatic change when the children were not expressly required to reach age fourteen prior to making the election.[42]

The supreme court reaffirmed these two decisions, finding them consistent with existing law.[43] Children over the age of fourteen may elect the parent with whom they choose to reside, and their election will be binding unless the selected parent is determined to be unfit.[44]

Prior to deciding *Weaver* and *Pearce*, the supreme court in *Holder v. Holder*[45] approved a self-effectuating change if the mother remarried.[46] In *Carr v. Carr*,[47] the court of appeals approved a provision changing custody if the mother moved to a different city or state.[48] In *Scott* the supreme court held that the decisions in *Holder* and *Carr* were not appropriate extensions of the decisions in *Weaver* and *Pearce*.[49] The supreme court repudiated its holding in *Holder* and disapproved of the court of appeal's decision in *Carr*.[50]

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37. *Id.* at 372-73, 578 S.E.2d at 877-78.
38. O.C.G.A. § 19-9-1(b) (1999); O.C.G.A. § 19-9-3(b) (1999).
39. 260 Ga. 493, 396 S.E.2d 890 (1980).
40. *Id.* at 494, 396 S.E.2d at 891.
41. 244 Ga. 69, 257 S.E.2d 904 (1979).
42. *Id.* at 70, 257 S.E.2d at 905.
43. *Scott*, 276 Ga. at 373-74, 578 S.E.2d at 878. The dissent points out that the children in *Pearce* were under the age of fourteen when the decree was entered, and thus the case does not fit squarely within the majority's rationale for upholding *Weaver* and *Pearce* but not upholding *Holder* and *Carr*. *Id.* at 378-79, 578 S.E.2d at 878-79 (Sears, P.J., dissenting).
44. O.C.G.A. § 19-9-1(a)(3)(A) (1999); O.C.G.A. § 19-9-3(a)(4) (1999).
45. 226 Ga. 254, 174 S.E.2d 408 (1970).
46. *Id.* at 255, 174 S.E.2d at 409.
47. 207 Ga. App. 611, 429 S.E.2d 95 (1993).
48. *Id.* at 611, 429 S.E.2d 96-97.
49. 276 Ga. at 374-75, 578 S.E.2d at 879-80.
50. *Id.* at 377, 578 S.E.2d at 881.

Unlike in *Weaver* and *Pearce*, the bases for modifications in *Holder* and *Carr* were contrary to Georgia law. A modification of child custody must be predicated upon the finding of a material change in circumstances affecting the welfare of the child.[51] The appellate courts have repeatedly held that the remarriage or relocation of the custodial parent alone is not a change of circumstances.[52] The supreme court further noted that such events may impact children positively or negatively.[53] The custodial election of a child over the age of fourteen, on the other hand, is a proper basis for modifying custody.[54]

A modification must be based on the facts and circumstances at the time of modification.[55] Because the trial court in *Scott*, like those in *Holder* and *Carr*, based the self-effectuating modification provision on the facts and circumstances as they existed at the time of the divorce, and not the time of the modification, the modification violated public policy.[56]

V. CHILD SUPPORT: GUIDELINES

Georgia's Child Support Guidelines ("Guidelines")[57] were the subject of several appellate decisions. In *Georgia Department of Human Resources ("DHR") v. Sweat*,[58] the supreme court determined that the Guidelines were constitutional, reversing the trial court's order finding otherwise.[59] In *Sweat* the father was awarded custody when the parties divorced in 1998, and the mother was not required to pay child support. In 2000 DHR sought child support on behalf of the father. The mother successfully argued to the trial court that the Guidelines were unconstitutional.[60]

The supreme court held that the trial court erred in concluding that the Guidelines violated the Georgia and United States Constitutions' guarantees of substantive due process.[61] Finding that the Guidelines do not infringe upon any fundamental rights of the mother, and that the mother is not a member of any suspect class, the supreme court

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51. O.C.G.A. § 19-9-1(b) (1999); O.C.G.A. § 19-9-3(b) (1999).
52. *Scott*, 276 Ga. at 374, 376, 578 S.E.2d at 878, 880 (citing Mercer v. Foster, 210 Ga. 546, 81 S.E.2d 458 (1954); Ofchus v. Isom, 239 Ga. App. 738, 521 S.E.2d 871 (1999)).
53. *Id.* at 376, 578 S.E.2d at 880.
54. O.C.G.A. § 19-9-1(b) (1999); O.C.G.A. § 19-9-3(b) (1999).
55. Mallette v. Mallette, 220 Ga. 401, 139 S.E.2d 322 (1964).
56. 276 Ga. at 375, 578 S.E.2d at 879-80.
57. O.C.G.A. § 19-6-15 (1999).
58. 276 Ga. 627, 580 S.E.2d 206 (2003), *cert. denied,* 124 S. Ct. 432 (2003).
59. *Id.* at 628, 580 S.E.2d at 210.
60. *Id.* at 627-28, 580 S.E.2d at 209.
61. *Id.* at 628, 580 S.E.2d at 210.

determined that the statute need only be rationally related to a legitimate government concern.[62] The supreme court classified the provision of child support to children of divorce as an "important and highly reasonable objective."[63] Further, the Guidelines' consideration of the payor's income and various enumerated factors warranting departures from the Guidelines counters the mother's claim that the Guidelines are arbitrary.[64]

Next, the supreme court determined that the Guidelines did not violate the Equal Protection Clauses of the state and federal constitutions.[65] Custodial and noncustodial parents are not similarly situated parties.[66] The custodial parent generally has more involvement in the day-to-day care of the child than the noncustodial parent.[67] Furthermore, the custodial parent's financial contribution is generally defined by the needs of the child, whereas the noncustodial parent's contribution is generally limited by the child support order.[68]

Similarly, the supreme court rejected the argument that the Guidelines violated the mother's right to privacy.[69] The court determined that the mother did not have any privacy rights in the manner in which her child support was calculated.[70] All child support orders, including modifications, are subject to the discretion of the appropriate trial courts, and public policy dictates that children of divorce receive sufficient support from the parents.[71]

Finally, the supreme court held that the Guidelines do not result in an "illegal taking" from the mother.[72] The Georgia Constitution prohibits government taking of private property for public purposes without just compensation.[73] However, the Guidelines are not a government taking but are instead the means to ensure that children of divorce receive adequate support from the noncustodial parent.[74] Furthermore, child

62. *Id.*
63. *Id.* at 629, 580 S.E.2d at 210.
64. *Id.*, 580 S.E.2d at 210-11.
65. *Id.*; *see* GA. CONST. art. I, § 1, para. 2 (1998); U.S. CONST. amend. XIV (1990).
66. 276 Ga. at 630, 580 S.E.2d at 211.
67. *Id.*
68. *Id.*
69. *Id.* at 631, 580 S.E.2d at 212.
70. *Id.*
71. *Id.*
72. *Id.*
73. GA. CONST. art. I, § 3, para. 1(a).
74. *Sweat*, 276 Ga. at 631, 580 S.E.2d at 212.

support is not a public purpose because it is unique to the individual child.[75]

Compliance with the Guidelines was the subject of *Swanson v. Swanson*.[76] The parties reached a mediated settlement of the issues in their divorce case, including provisions that the mother would accept less alimony but not be required to pay child support. When the father refused to have the mediation agreement incorporated into a settlement agreement, the mother filed a motion to enforce the parties' mediated agreement. The trial court determined that the parties had reached an agreement, so it granted the motion to enforce.[77] The supreme court determined that the agreement for the father to receive no child support in exchange for a reduced alimony payment to the mother was an impermissible waiver of child support.[78] Therefore, the mediated agreement was void.[79] Further, the supreme court reminded trial courts of their duty of oversight regarding the sufficiency of the support amount.[80]

The court of appeals also addressed compliance with the procedural aspects of the Guidelines. In *Eldridge v. Ireland*,[81] the trial court issued a child support order in a legitimation action. The father worked for a business owned and run by members of the father's immediate family. Evidence showed that the father's annual income had decreased from $50,000 in 1988 to $22,000 at the time of trial. The trial court determined that the father had an earning capacity of $45,000 per year. Finding that special circumstances existed, including the father's suppression of income, the father's reduction of income, and the father's responsibilities at his family-owned business, the trial court ordered the father to pay $750 per month[82] in child support.[83]

The court of appeals held that the trial court erred in failing to make a determination of the father's actual income.[84] Once gross income has been determined, the trial court is required to determine the amount of support that is appropriate based on the percentages set forth in the

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75. *Id.*
76. 276 Ga. 566, 580 S.E.2d 526 (2003).
77. *Id.* at 566-67, 580 S.E.2d at 527.
78. *Id.* at 567, 580 S.E.2d at 527.
79. *Id.*
80. *Id.*
81. 259 Ga. App. 44, 576 S.E.2d 44 (2002).
82. The guidelines for one child are 17-23% of the payor's gross income. O.C.G.A. § 19-6-15 (1999). The support award of $750 per month is equal to 20% of the amount the court determined as the father's earning capacity.
83. *Eldridge*, 259 Ga. App. at 45, 576 S.E.2d at 45.
84. *Id.*

Guidelines.[85] Finally, the trial court is required to determine if there are any special circumstances and whether those circumstances should affect the amount of the child support.[86] Because the trial court did not make a finding as to the father's actual income, the case was remanded to the trial court for further findings.[87]

VI. CHILD SUPPORT: MODIFICATION

The supreme court emphasized the importance of the income determination made in the divorce decree. In *Hulett v. Sutherland*,[88] the parties divorced in 1997 after settling their case. The decree that incorporated the parties' settlement agreement included a finding that the father's monthly income was $4000, and it required the father to pay $450 per month as child support. In 2002 the mother sought to increase the child support obligation partially based on the father's increase in income since the divorce. At trial, the father's income tax returns convinced the trial court that the father's 1997 income was actually $81,500. Because the father's annual income at trial was approximately $74,500, the trial court did not modify the child support award.[89]

The supreme court held that the $48,000 annual income found in the parties' divorce decree was binding on the parties, and the father was not entitled to relitigate the issue.[90] "A judgment . . . shall be conclusive between the same parties . . . as to all matters put in issue . . . until the judgment is reversed or set aside."[91] This rule applies to divorce judgments.[92] The case was remanded for further proceedings.[93]

In *Chung-A-On v. Drury*,[94] the supreme court held that the trial court properly exercised extraterritorial jurisdiction over the nonresident father in a child support modification action brought by the mother.[95] Due process requires that a nonresident be compelled to answer a Georgia action only if the nonresident has minimum contacts with the state, and the exercise of personal jurisdiction "does not offend 'tradition-

85. *Id.*
86. O.C.G.A. §§ 19-6-15(b)(1)-(5) (1999).
87. *Eldridge*, 259 Ga. App. at 46, 576 S.E.2d at 46 (following recent supreme court decisions in Urquhart v. Urquhart, 272 Ga. 548, 533 S.E.2d 80 (2000); Eleazar v. Eleazar, 275 Ga. 482, 569 S.E.2d 521 (2002)).
88. 276 Ga. 596, 581 S.E.2d 11 (2003).
89. *Id.* at 596-97, 581 S.E.2d at 11-12.
90. *Id.* at 597, 581 S.E.2d at 12.
91. O.C.G.A. § 9-12-40 (1993).
92. Cotton v. Cotton, 272 Ga. 276, 528 S.E.2d 255 (2000).
93. *Hulett*, 276 Ga. at 597, 581 S.E.2d at 12.
94. 276 Ga. 558, 580 S.E.2d 229 (2003).
95. *Id.* at 558, 580 S.E.2d at 230.

al notions of fair play and justice.'"[96] In the instant case, the father obtained a divorce decree from Georgia in 1990. Four years later, the father initiated an action to obtain custody of one of his children and to eliminate his child support obligation for another of the parties' children.[97] Finding a relationship between the father's previous modification action and the current action brought by the mother, the supreme court determined that it would be appropriate for the father to expect that he would be brought back to Georgia to address future issues surrounding his children.[98]

VII. ATTORNEY FEES

The award of attorney fees in modification cases continues to be a common subject for the court of appeals. In *Wehner v. Paris*,[99] the court of appeals reversed an award of attorney fees and remanded the issue for a hearing at the trial court level.[100] The father sought to reduce his child support obligation, and the mother filed a motion for summary judgment. The mother sought attorney fees from the father under O.C.G.A. sections 9-15-14[101] and 19-9-22.[102] Although the father amended his complaint to seek a modification of child custody, the trial court granted the mother's summary judgment motion as to the modification action and awarded the mother $7500 in attorney fees.[103]

The court of appeals held that the trial court erred in awarding attorney fees without a hearing and without setting forth the award's statutory basis.[104] The mother had the burden to prove that the attorney fees claimed were in fact incurred and were reasonable.[105] Further, the father had a right to "confront and challenge the value and the need for the legal services claimed."[106] However, the appellate court rejected the father's claim that attorney fees could not be granted in the case because there was a request to modify child custody.[107] Because the case began as a modification of child support, attorney fees

96. Smith v. Smith, 254 Ga. 450, 453, 330 S.E.2d 706, 709 (1985) (adopting the federal standard set forth in Int'l Shoe v. Washington, 326 U.S. 310, 316 (1945)).
97. 276 Ga. at 558-59, 580 S.E.2d at 229-30.
98. *Id.* at 559, 580 S.E.2d at 230.
99. 258 Ga. App. 772, 574 S.E.2d 921 (2002).
100. *Id.* at 773, 574 S.E.2d at 922.
101. O.C.G.A. § 9-15-14 (1998).
102. O.C.G.A. § 19-9-22 (1998).
103. 258 Ga. App. at 772, 574 S.E.2d at 922.
104. *Id.* at 773, 574 S.E.2d at 922.
105. *Id.*
106. *Id.*, 574 S.E.2d at 922-23.
107. *Id.* at 774, 574 S.E.2d at 923.

were authorized under O.C.G.A. section 19-9-22, a fact unchanged by the father's amending his complaint to seek child custody.[108]

Similarly, in *Monroe v. Taylor*,[109] the court of appeals held that O.C.G.A. section 19-6-19[110] permits an award of attorney fees when the child support modification action is brought as a counterclaim in a custody modification action.[111] A counterclaim "stands upon the same footing as an original claim."[112] The appellate court further held that the statute applies to modifications of all child support orders, not only to the modification of divorce decrees.[113] Although the statute expressly applies to "petitions filed by either former spouse,"[114] the appellate court held that Georgia's public policy treats children born outside of marriage the same as those born during marriage.[115] Applying the statute equally to all modification cases, regardless of the existence of a marriage, as other statutes in Article 6 of Title 19 are applied, furthers Georgia's public policy.[116]

VIII. LEGITIMATION

More constitutional questions were posed to the supreme court concerning the legitimation statutes. In *Holmes v. Traweek*,[117] the supreme court held that the provision of O.C.G.A. section 19-7-22(a)[118] allowing the putative father to file a legitimation action in the county of his own residence was unconstitutional.[119] While the legitimation statutes do not refer to the mother as a defendant, the mother has most of the rights afforded to a defendant in a civil case.[120] The mother has rights that will be infringed upon by the relief sought in a legitimation action;[121] the mother is entitled to notice of the action;[122] the mother has the right to object to the legitimation action;[123] the mother can

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108. *Id.*
109. 259 Ga. App. 600, 577 S.E.2d 810 (2003).
110. O.C.G.A. § 19-6-19 (1998).
111. 259 Ga. App. at 603, 577 S.E.2d at 812.
112. *Id.* at 602, 577 S.E.2d at 812 (quoting Raza v. Swiss Supply Direct, Inc., 256 Ga. App. 175, 178, 568 S.E.2d 102, 105 (2002)).
113. *Id.*
114. *Id.*
115. *Id.* at 601, 577 S.E.2d at 811.
116. *Id.* at 601-02, 577 S.E.2d at 811-12.
117. 276 Ga. 296, 577 S.E.2d 777 (2003).
118. O.C.G.A. § 19-7-22(a) (1998).
119. 276 Ga. at 296, 577 S.E.2d at 777.
120. *Id.* at 297, 577 S.E.2d at 779.
121. *Id.* (citing O.C.G.A. § 19-7-25 (1998)).
122. *Id.* (citing O.C.G.A. § 19-7-22 (b) (1998)).
123. *Id.* (citing *In re* Application of Ashmore, 163 Ga. App. 194, 293 S.E.2d 457 (1982)).

demand a jury trial on the issue of child support;[124] and the mother can appeal the rulings of the court.[125] The supreme court concluded that the mother is a defendant in a legitimation case and held that the statute's authorization of venue in the county of the putative father's residence violated the Georgia Constitution's provision that venue shall be in the county of the defendant's residence.[126] The venue provision of the statute, therefore, was unconstitutional and was severed from the remainder of the statute.[127]

IX. MARITAL TORTS

The combination of tort claims with divorce cases is becoming more common. In *Beller v. Tilbrook*,[128] the supreme court reviewed a case to determine if the wife's personal injury claim against the husband was barred by the statute of limitations.[129] When the parties were dating, the woman insisted that the man be tested for sexually transmitted diseases before she would have sexual relations with him. After the man insisted that he had been tested and was free of any disease, the woman consented to having sexual relations. Prior to the parties' marriage, the woman discovered that she had contracted a sexually transmitted disease. The man denied having the disease or transmitting the disease to the woman. For years, and well into the parties' marriage the man continued to deny infecting the woman. Eventually, the man admitted that he did have the disease and had been the person that infected the woman. The woman filed for divorce and sought damages for personal injury.[130] The man claimed that the personal injury suit was barred by the two-year[131] statute of limitations.[132] The trial court rejected the man's defense because the parties were in a confidential relationship.[133]

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124. *Id.* (citing O.C.G.A. § 19-7-22(f) (1998)).

125. *Id.* (citing Adamavage v. Holloway, 206 Ga. App. 156, 424 S.E.2d 837 (1992)).

126. *Id.* at 296-97, 577 S.E.2d at 778-79.

127. *Id.* at 297, 577 S.E.2d at 779.

128. 275 Ga. 762, 571 S.E.2d 735 (2002).

129. *Id.* at 762, 571 S.E.2d at 735.

130. The transmission of a sexually transmitted disease is actionable in a personal injury suit. *See* Long v. Adams, 175 Ga. App. 538, 333 S.E.2d 852 (1985).

131. The statute of limitations for the tort of transmitting a communicable disease is two years from the time the disease is contracted. Dalrymple v. Brunswick Coca-Cola Bottling Co., 51 Ga. App. 754, 181 S.E. 597 (1935).

132. *Beller*, 275 Ga. at 762, 571 S.E.2d at 735.

133. *Id.*

On appeal, the supreme court held that the man's false representations amounted to fraud, which tolled the statute of limitations.[134] The confidential relationship of spouses justified the woman's reliance on the man's representations.[135] Because the woman filed her case within two years of the date that the man admitted the truth, the supreme court held that the statute of limitations had not expired and affirmed the trial court's judgment.[136]

X. FAMILY VIOLENCE

The court of appeals reversed a finding of family violence in *Buchheit v. Stinson*.[137] The child's parents were involved in a custody dispute, and the court appointed a guardian ad litem. The guardian, acting on conversations she had with the child, filed a family violence action on the child's behalf against the mother. In the petition, the guardian alleged that the mother had hit the child, slapped the child, pulled the child's hair, and threatened the child. The trial court entered an ex parte order instructing the sheriff to place the child in the father's custody. At the contested evidentiary hearing, the child testified that there was only one slap to her face and three hits on her leg. The mother testified that the slap was to the child's leg and not to the face. Both witnesses' testimony indicated the slap was predicated on a disrespectful statement made by the child. The trial court found that the slap constituted an act of simple battery and entered a six-month restraining order.[138]

The statutory definitions of "family violence"[139] and "simple battery"[140] expressly exclude acts of reasonable corporal punishment.[141] The appellate court determined that there was no evidence that the mother's slap in response to the child's disrespectful behavior was outside the scope of reasonableness and reversed the finding of family violence.[142]

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134. *Id.* at 762-63, 571 S.E.2d at 735-36 (citing *Dalrymple*, 51 Ga. App. at 755, 181 S.E. at 597).
135. *Id.*, 571 S.E.2d at 735.
136. *Id.*
137. 260 Ga. App. 450, 579 S.E.2d 853 (2003).
138. *Id.* at 450-52, 579 S.E.2d at 854-55.
139. O.C.G.A. § 19-13-1 (1999).
140. O.C.G.A. § 16-5-23 (2003).
141. 260 Ga. App. at 453-54, 579 S.E.2d at 856.
142. *Id.* at 456, 579 S.E.2d at 857-58.

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