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Domestic Relations

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This Article addresses significant case law during the survey period from June 1, 2016 through May 31, 2017.[1]

I. PRENUPTIAL AND POSTNUPTIAL AGREEMENTS

The Georgia Supreme Court reviewed two cases involving a prenuptial agreement or a postnuptial agreement.[2] In *Vakharwala v. Vakharwala*,[3] an alimony waiver found in a prenuptial agreement was at issue. The parties married in 2012. Prior to marriage, the husband and the wife executed a prenuptial agreement, which stated, in pertinent part, that "in the event of a marital separation or dissolution, it is agreed and understood that neither party shall seek or obtain any form of alimony or support from the other."[4] The husband filed for divorce in 2014 and a final decree was entered September 23, 2015, reserving the issue of legal fees. During the pendency of the litigation, the trial court entered orders

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1. For an analysis of domestic relations law during the prior survey period, see Barry B. McGough, Elinor H. Hitt & Katherine S. Cornwell, *Domestic Relations*, *Annual Survey of Georgia Law*, 68 MERCER L. REV. 107 (2016).

2. *See generally* Vakharwala v. Vakharwala, 301 Ga. 251, 799 S.E.2d 797 (2017); Murray v. Murray, 299 Ga. 703, 791 S.E.2d 816 (2016).

3. 301 Ga. 251, 799 S.E.2d 797 (2017).

4. *Id.* at 251–52, 799 S.E.2d at 798–99.

requiring the husband to pay the wife $24,000 in temporary support before temporary support was suspended upon the prenuptial agreement being enforced. The trial court also entered orders directing the husband to pay the wife's counsel $25,000 in temporary attorney's fees.[5]

After the divorce was granted, pursuant to section 9-15-14(b) [6] of the Official Code of Georgia Annotated (O.C.G.A.), the trial court entered an order "finding [the] [h]usband's conduct had unnecessarily expanded the litigation" and awarded the wife $98,385 in attorney's fees.[7] Pursuant to O.C.G.A. § 19-6-2,[8] the wife was awarded an additional $60,000 in attorney's fees. The husband appealed, arguing that the attorney's fees awarded were not proper and, even if they were proper, the trial court erred in failing to offset against the final attorney's fees award the amount the husband previously paid as temporary support and attorney's fees.[9]

The order granting the wife's motion for attorney's fees, pursuant to O.C.G.A. § 9-15-14(b), was based on findings of fact supported by the record that the husband engaged in numerous acts of improper conduct throughout the litigation. These acts included delay, harassment, and represented a blatant abuse of the discovery process, highlighted by the husband's on-the-record statement that he would, "spend whatever it takes to win." After reviewing the record, the appellate court rejected the husband's assertion that the award of attorney's fees was unsupported by evidence and affirmed this portion of the fee award.[10]

The order granting the wife's motion for attorney's fees, pursuant to O.C.G.A. § 19-6-2, was based upon the disparity in the parties' financial situations, the husband's depletion of the parties' joint bank accounts of $170,000 one day before he filed the complaint, and that the wife had to spend excessive funds defending herself against the husband's baseless allegations.[11] In reversing this portion of the attorney's fees award, the appellate court determined that due to the alimony waiver in the parties' prenuptial agreement, the trial court erred in awarding attorney's fees pursuant to O.C.G.A. § 19-6-2.[12] Fees awarded under this section are considered to be part of temporary alimony because they are awarded to

5. *Id.* at 251–52, 799 S.E.2d at 798.
6. O.C.G.A. § 9-15-14(b) (2017).
7. *Vakharwala*, 301 Ga. at 252, 799 S.E.2d at 798–99.
8. O.C.G.A. § 19-6-2 (2017).
9. *Vakharwala*, 301 Ga. at 252, 799 S.E.2d at 799.
10. *Id.* at 253–54, 799 S.E.2d at 799–800.
11. *Id.* at 253, 799 S.E.2d at 800.
12. *Id.* at 254, 799 S.E.2d at 800.

enable the spouse to contest issues in an action covered by the statute.[13] Further, misconduct of a party does not provide a basis for attorney's fees under O.C.G.A. § 19-6-2, though in this case, the misconduct authorized an award under O.C.G.A. § 9-15-14(b).[14]

The husband also asserted that amounts he paid to the wife for temporary support and temporary attorney's fees should be offset against a final fee award.[15] However, fees awarded under O.C.G.A. § 9-15-14(b) are unrelated to alimony and are not subject to offset for amounts the husband paid as temporary support and attorney's fees.[16] Pursuant to O.C.G.A. § 19-6-2, the court reversed and vacated the attorney's fee award, therefore the argument for offset is rendered moot.[17] In addition, this issue was not raised in a previous motion or proceeding, and it cannot be considered for the first time on appeal.[18]

In *Murray v. Murray*,[19] fraud rendered a postnuptial agreement unenforceable.[20] In early 2014, after a thirty-four-year marriage, the parties began discussing divorce. The husband wanted to divorce, though the wife wanted to save the marriage. The wife wrote the husband an apology letter renouncing her rights in the marital estate. The wife said the letter was written at the husband's request and said what the husband wanted the letter to say. The husband then had counsel draft a formal postnuptial agreement, providing for the disposition of the couple's marital estate upon dissolution of the marriage by divorce or death, which was favorable to the husband. The agreement was signed on June 5, 2014.[21]

In October 2014, after unsuccessful marriage counseling, the wife filed for divorce, and the husband moved to enforce the agreement. The wife, whom the trial court found credible, testified that the "[h]usband had induced her to sign the [a]greement with the promise that he would tear it up as soon as she signed it, making her believe her execution of the [a]greement was merely a symbolic gesture of love and devotion that would have no practical effect."[22] After determining the husband procured the wife's signature on the agreement under the pretense that

13. *Id.* at 255, 799 S.E.2d at 801.
14. *Id.*
15. *Id.* at 255, 799 S.E.2d at 801.
16. *Id.*
17. *Id.* at 255–56, 799 S.E.2d at 801.
18. *Id.* at 256, 799 S.E.2d at 801.
19. 299 Ga. 703, 791 S.E.2d 816 (2016).
20. *Id.* at 706, 791 S.E.2d at 819.
21. *Id.* at 703, 791 S.E.2d at 817.
22. *Id.* at 703–04, 791 S.E.2d at 817.

the agreement would be destroyed and never enforced, the trial court found the agreement to be unenforceable based on the husband's fraud.[23] The husband appealed the trial court's order.[24]

The Georgia Supreme Court affirmed the lower court because it determined the evidence supported the trial court's conclusion that the agreement was unenforceable because the husband's promise to tear up the agreement amounted to fraud.[25] Georgia law defines "fraud" as an action that "may be consummated by signs or tricks, or through agents employed to deceive, or by any other unfair way used to cheat another."[26] The record showed, however, that while the husband did not file for divorce, he did not destroy the agreement as he had promised. Instead, the husband retained the document for nearly six months, during which time the parties were attempting to reconcile their marriage, and produced it for enforcement when the wife later sought a divorce.[27] The husband's prolonged retention of the agreement that he promised to destroy as soon as the wife signed it, coupled with the subsequent attempt to enforce it, was sufficient to establish the existence of fraud, especially in light of the confidential relationship that exists between spouses, which entitles them to repose confidence and trust in each other.[28]

II. MARRIAGE

In *Russell v. Sparmer*,[29] Russell sued Sparmer to dissolve their domestic and business partnerships.[30] The wife's claim for divorce arose from an unlicensed ceremonial and self-solemnized marriage, which the parties entered into in Greece. They bought matching rings, exchanged vows in front of a church, and later held themselves out to be married. The claim was not based on common law principles. The trial court granted summary judgment to Sparmer on the divorce claim and awarded attorney's fees under O.C.G.A. § 9-15-14.[31] The Georgia Court of Appeals held that Russell's claim for divorce was neither frivolous nor interposed for delay.[32] Additionally, the court noted that the parties had

23. *Id.* at 705, 791 S.E.2d at 818.
24. *Id.* at 704, 791 S.E.2d at 818.
25. *Id.* at 705, 791 S.E.2d at 818.
26. *Id.* (quoting O.C.G.A. § 23-2-56 (2017)).
27. *Id.* at 705–06, 791 S.E.2d at 818.
28. *Id.* at 706, 791 S.E.2d at 818–19.
29. 339 Ga. App. 207, 793 S.E.2d 501 (2016).
30. *Id.* at 207, 793 S.E.2d at 502.
31. *Id.* at 208, 793 S.E.2d at 503.
32. *Id.* at 213, 793 S.E.2d at 507.

the capacity to contract, consented to marry each other, and possessed a present intention to be married to each other.[33] Neither self-solemnization of the marriage, the officiant's lack of authority, nor the lack of a license rendered the marriage invalid.[34] In terminating her business partnership with Sparmer, Russell "did not want to leave open the possibility that she and Sparmer might be legally married."[35]

III. PROCEDURE

In *Devlin v. Devlin*,[36] a case of first impression, the court of appeals held that pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA),[37] it is within the discretion of the trial court to allow a party to present telephonic testimony.[38] In June 2014, following the death of her son, the grandmother, through a Pennsylvania court, was awarded limited grandparent visitation with her grandchildren.[39]

In February 2014, the mother and children moved to Georgia, and in December 2014, the mother filed an action in Georgia to enforce and modify the custody and visitation order entered by the Pennsylvania court. In a hearing limited to the issue of jurisdiction, the court allowed the grandmother to participate *pro se* in a limited manner by telephone.[40]

Two months later, the trial court scheduled mediation for the parties to take place in Georgia. The trial court denied the grandmother's request to participate by telephone, and the grandmother did not appear at mediation. The grandmother then filed a motion for an emergency hearing regarding her request for two weeks of unsupervised visitation with the children in Pennsylvania each year, and requested to testify telephonically. The trial court scheduled a final hearing on the grandmother's request and ordered the grandmother "to appear in person at the hearing, if she wishe[d] to be heard on this motion."[41] The grandmother did not appear for the final hearing and pursuant to O.C.G.A. § 19-7-3, [42] the trial court denied her request for grandparent

33. *Id.* at 211, 793 S.E.2d at 505.
34. *Id.* at 212, 793 S.E.2d at 506.
35. *Id.* at 211, 793 S.E.2d at 505.
36. 339 Ga. App. 520, 791 S.E.2d 840 (2016).
37. O.C.G.A. §§ 19-9-40–104 (2017).
38. *Devlin*, 339 Ga. App. at 524, 791 S.E.2d at 842.
39. *Id.* at 521, 791 S.E.2d at 840.
40. *Id.* at 521, 791 S.E.2d at 840–41.
41. *Id.* at 522–23, 791 S.E.2d at 841.
42. O.C.G.A. § 19-7-3 (2017).

visitation. The grandmother appealed claiming it was error for the trial court to deny her request to testify telephonically.[43]

The UCCJEA provides that "[a] court of this state *may* permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court or at another location in that state."[44] Other states have concluded that this portion of the UCCJEA permits, but does not require, a trial court to allow telephonic testimony.[45] In Georgia, a trial judge has broad discretion in regulating the conduct of counsel, parties, and witnesses, and in prescribing the manner in which business shall be conducted.[46] A witness's personal appearance in court serves important policies and purposes assisting the trier of fact, including the following: evaluating the witness's credibility by allowing his or her demeanor to be observed firsthand; helping establish the identity of the witness; impressing upon the witness the seriousness of the occasion; assuring that the witness is not being coached or influenced during testimony; assuring that the witness is not referring to documents improperly; and providing for the right of confrontation of witnesses.[47] Here, the trial court allowed the grandmother to appear by telephone in a hearing to determine its jurisdiction. After allowing the grandmother to appear by telephone, the trial court denied the grandmother's subsequent requests to appear by telephone for mediation and the final evidentiary hearing on the issue of grandparent visitation. Given the numerous reasons that a personal appearance is preferable, the trial court did not abuse its discretion in requiring the grandmother to travel to Georgia.[48] While the grandmother contended the trial court should have determined that she was able to travel to Georgia without financial harm before denying her request, Georgia law does not mandate that the trial court make such a finding. [49] Further, the grandmother failed to provide the trial court with the necessary evidence to make such a determination, and when she ultimately provided it in connection with the costs of her appeal, the trial court determined that she was not indigent.[50]

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43. *Devlin*, 339 Ga. App. at 523, 791 S.E.2d at 841–42.

44. *Id.* at 524, 791 S.E.2d at 842 (quoting O.C.G.A. § 19-9-50(b) (2017) (emphasis added)).

45. *Id.*

46. *Id.*

47. *Id.* at 525, 791 S.E.2d at 843.

48. *Id.*

49. *Id.*

50. *Id.* at 525–26, 791 S.E.2d at 843.

IV. CHILD CUSTODY

The supreme court addressed issues relating to the court's power and child custody.[51] First, the supreme court clarified its authority under O.C.G.A. § 31-10-9(e)(3)[52] as it relates to the child's surname.[53] In *Denney v. Denney*,[54] the child was born after separation but before the divorce was finalized. The child was given the mother's maiden name and the birth certificate did not list the father's name. The trial court found that the father was the "legal and biological father," but concluded it was without authority to correct the child's surname.[55] According to O.C.G.A. § 31-10-9(e)(3), "the surname of the child shall be entered on the certificate of birth in accordance with the finding and order of the court."[56] The supreme court, in interpreting the plain language of the statute, ruled that the trial court had authority to change the child's surname and when doing so should consider the best interest of the child when making a finding regarding the minor's surname.[57]

Next, in *Bales v. Lowery*,[58] the supreme court reversed the trial court's denial of the mother's habeas corpus petition for the return of her daughter.[59] The mother and the father shared joint legal and physical custody; however, the divorce decree specified that the children were to live with the mother during the school year. The older daughter resided with the father for the last two school years. When the mother requested the daughter return to live with her for the upcoming school year, the father refused. The mother filed a petition for writ of habeas corpus in Baldwin County. In response, the father stated he filed a petition for modification in Henry County. In reality, the father had not filed a modification. Relying on the father's inaccurate statement that he filed a modification and the daughter's interview, the trial court denied the mother's petition.[60]

In reversing the trial court, the supreme court determined that because the father did not allege the mother lost her right to custody, nor

51. *See generally* Denney v. Denney, 300 Ga. 622, 797 S.E.2d 456 (2017); Bales v. Lowery, 299 Ga. 200, 787 S.E.2d 166 (2016); Altman v. Altman, 301 Ga. 211, 800 S.E.2d 288 (2017).

52. O.C.G.A. § 31-10-9(e)(3) (2017).

53. *Denney*, 300 Ga. at 624, 797 S.E.2d at 457.

54. 300 Ga. 622, 797 S.E.2d 456 (2017).

55. *Id.* at 623, 797 S.E.2d at 457.

56. *Id.* at 623–24, 797 S.E.2d at 457 (quoting O.C.G.A. § 31-10-9(e)(3)).

57. *Id.* at 624, 797 S.E.2d at 457.

58. 299 Ga. 200, 787 S.E.2d 166 (2016).

59. *Id.* at 200, 787 S.E.2d at 167.

60. *Id.* at 200–01, 787 S.E.2d at 167–68.

did the father claim that custody had been transferred to him, the trial court was unable to disregard the custody provision in the decree.[61] The correct remedy for changing custody would require filing a petition for modification.[62]

In *Altman v. Altman*,[63] the supreme court vacated a trial court's custody order and reversed a sealing order.[64] Before the trial court made a final custody decision, there was a psychological evaluation of the family, where the evaluator said the father should have primary custody, as the mother had some psychological issues. Upon further therapy and evaluation, another report was submitted also identifying the father as the parent who should have primary custody. At the final hearing, the trial judge interviewed the children without counsel or the parties present and over objection from the father. After allowing the father's court reporter to take down the transcript of the interview, the trial court ordered the transcript to be sealed as "FOR [THE COURT'S] EYES ONLY." This transcript was never published to the parties. The trial court then entered an order granting the mother primary physical custody, referring specifically to her interview with the children.[65] The supreme court, in vacating this order, held that the trial court did in fact rely on the interviews, which were not available to the parties, and thus, it was improper for the court to take them under consideration.[66]

Procedurally, the supreme court determined that the actions of the trial court did not conform to the requirements of the Georgia Uniform Superior Court Rules 21–21.6[67] and the interview transcript was improperly sealed.[68] Records may be sealed according to these rules "upon motion of a party or on the trial court's own motion and 'after hearing, the court may limit access to court files respecting that action.'"[69] The trial court did not hold a proper hearing after reasonable notice according to the enumerated rules; instead, the trial court issued an order that did not make the necessary findings to support a restriction of public access as to the transcripts.[70]

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61. *Id.* at 202-03, 787 S.E.2d at 169.
62. *Id.* at 203, 787 S.E.2d at 169.
63. 301 Ga. 211, 800 S.E.2d 288 (2017).
64. *Id.* at 212, 800 S.E.2d at 289–90.
65. *Id.* at 212–15, 800 S.E.2d at 291.
66. *Id.* at 217, 800 S.E.2d at 293.
67. Ga. Unif. Super. Ct. R. 21–21.6 (2017).
68. *Altman*, 301 Ga. at 216, 800 S.E.2d at 292.
69. *Id.*
70. *Id.* at 217–18, 800 S.E.2d at 293.

The court of appeals had two decisions tailored to third party custody arrangements.[71] First, in *Sheffield v. Sheffield*,[72] the court of appeals reversed the trial court's grant of joint legal custody between a mother and a grandmother, with the grandmother having primary physical custody.[73] The mother appealed and argued the trial court erred in granting joint legal custody of the child to the mother and the grandmother after finding the mother was fit to parent. The grandmother was the child's primary caretaker since birth, while the mother proved unwilling to participate in the child's specialized care. The trial court found that it was in the best interest of the child to remain in the care of the grandmother and further concluded that the child would suffer long-term emotional harm if she were to be in the mother's care. However, the court still made the finding that the mother was fit under Georgia law.[74]

The standard to grant a third party custody of a child requires a showing that awarding custody to the parent would cause physical harm or significant, long-term emotional harm to the child through clear and convincing evidence.[75] However, this is not applicable if one or both of the parents are suitable for custody.[76] As a result, although the trial court likely found that the grandmother met the requirement for third party custody, joint custody with a third party is not proper because the mother was also found fit.[77]

Second, the court of appeals, in *Marks v. Soles*,[78] addressed several issues outside of custody, but for the purposes of this section the focus is on the decision as it related to third party custody. In *Marks*, the mother had three children who were removed from her custody. The oldest two children's father was Jason Soles. The trial court granted Soles and the mother joint legal custody of the oldest two children, with Soles having primary physical custody. Brad Lane was the father of the youngest child. The trial court awarded joint legal custody of the youngest child to the mother, Lane, and the paternal grandparents, with the grandparents having primary physical custody.[79] The mother appealed, arguing that

71. *See generally* Sheffield v. Sheffield, 338 Ga. App. 667, 791 S.E.2d 428 (2016); Marks v. Soles, 339 Ga. App. 380, 793 S.E.2d 587 (2016).

72. 338 Ga. App. 667, 791 S.E.2d 428 (2016).

73. *Id.* at 667, 339 Ga. App. at 429.

74. *Id.* at 667–68, 791 S.E.2d at 429.

75. *Id.* at 668, 791 S.E.2d at 430.

76. *Id.* at 669, 791 S.E.2d at 430.

77. *Id.*

78. 339 Ga. App. 380, 793 S.E.2d 587 (2016).

79. *Id.* at 380, 793 S.E.2d at 589.

the trial court erred in granting the grandparents primary physical custody, and the court of appeals agreed.[80]

The court of appeals vacated and remanded the trial court's decision by relying on the supreme court's emphasis that "joint custody arrangements do not include third parties when one or both parents are suitable custodians."[81] The trial court failed to make a finding regarding the mother's or Lane's fitness as a parent and thus was not authorized to award the paternal grandparents primary physical custody or joint legal custody.[82]

The Georgia General Assembly enacted several changes to O.C.G.A. § 19-7-3 during the 2017 Georgia Legislative Session as it relates to grandparent visitation. The General Assembly expanded what used to be "grandparent" into "family member," which includes grandparents, great-grandparents, and siblings of the parent effective as of July 1, 2016.[83] Additionally, the evidentiary standard the court should apply to determine whether such "family member" visitation is required is enumerated as "clear and convincing evidence."[84] Finally, the General Assembly added that "the mere absence of an opportunity for a child to develop a relationship with a family member" will not meet the threshold, unless there is a substantial pre-existing relationship between the child and such family member.[85] This also applies to the definition of "family member" in O.C.G.A §§ 19-8-13[86] and 19-8-15[87] relating to the petition for adoption and when objections to adoptions may be filed, respectively.[88]

The Georgia General Assembly also enacted several changes during the 2017 Georgia Legislative Session that impact voluntary acknowledgment of legitimation, acknowledgment of paternity, and hospital procedures and responsibilities for establishing paternity. Effective July 1, 2017, under O.C.G.A. § 15-11-2,[89] the definition of "legal father" no longer includes a person determined to be the father of a child by a final paternity order, meaning that an unwed father needs to

80. *Id.* at 385, 793 S.E.2d at 592.
81. *Id.* at 385-86, 793 S.E.2d at 592–93.
82. *Id.* at 386, 793 S.E.2d at 593.
83. O.C.G.A. § 19-7-3(a).
84. O.C.G.A. § 19-7-3(c)(1).
85. *Id.*
86. O.C.G.A. § 19-8-13 (2017).
87. O.C.G.A. § 19-8-15 (2017).
88. O.C.G.A. §§ 19-8-13, 19-8-15.
89. O.C.G.A. § 15-11-2 (2017).

legitimate the child in order to be considered the "legal father."[90] Additionally, the entirety of the code section relating to acknowledgment of legitimation was repealed effective July 1, 2016.[91] The General Assembly amended O.C.G.A. § 19-7-22,[92] effective July 1, 2016, to distinguish between "legal father" and "biological father" as it relates to a petition for legitimation. Also, there were some accompanying procedural changes involving both the biological and legal father in legitimation.[93]

Finally, the General Assembly amended O.C.G.A. § 19-7-27[94] as it relates to hospitals' program for establishing paternity.[95] The amendment requires hospitals that offer labor and delivery services to provide to the mother and alleged father the following: information on administratively establishing paternity; the differences between paternity and legitimation; the duty to support a child upon acknowledgment of paternity; and availability of judicial determinations of paternity.[96] The hospital must also provide the opportunity to execute a voluntary acknowledgement of paternity if a notary is available at the hospital, file the signed acknowledgement with the State Office of Vital Records within thirty days of its execution, and provide the parents with copies.[97]

V. CHILD SUPPORT

The supreme court analyzed the construction and application of a section of the child support guidelines that provides the trial court a remedy when a party to a child support modification action is uncooperative in providing reliable financial evidence.[98] In *Jackson v. Sanders*,[99] the trial court granted the mother's upward child support modification. The father was uncooperative and did not provide sufficient information to the court to enable determination of the amount of the modification. The trial court found the father's evidence to be "incomplete, inconsistent, inaccurate, and not credible" as it related to

90. O.C.G.A. § 15-11-2(43) (2017).

91. O.C.G.A. § 19-7-21.1 (2008), *repealed by* Ga. S. Bill 64, 2016 Ga. Laws 404, § 2 (effective July 1, 2016).

92. O.C.G.A. § 19-7-22 (2017).

93. O.C.G.A. § 19-7-22(a).

94. O.C.G.A. § 19-7-27 (2017).

95. *Id.*

96. O.C.G.A. § 19-7-27(a)(1), (3), (4).

97. O.C.G.A. § 19-7-27(c)(1)–(3).

98. O.C.G.A. § 19-6-15(f)(4)(B) (2017).

99. 299 Ga. 332, 788 S.E.2d 387 (2016).

calculating his gross income.[100] The trial court, in its discretion, applied the remedy provided to the court under the applicable statute. The remedy may be applied if the case is a modification and two conditions precedent are met:

> [The court] may increase the child support of the parent failing or refusing to produce evidence of income by an increment of at least [ten] percent per year of such parent's gross income for each year since the final child support order was entered or last modified and shall calculate the basic child support obligation using the increased amount as such parent's gross income.[101]

The two conditions precedent are as follows: (1) the parent has failed to produce, and (2) there is not otherwise available, credible evidence establishing a significant portion of the parent's total gross income as defined in the statute. Upon finding the two conditions had been met, the trial court applied an increase of 4% instead of "at least 10 percent" per the statute.[102]

On appeal, and affirmed by the supreme court, the court of appeals determined that it was within the trial court's discretion to apply the statute.[103] However, if the court uses its discretion and applies the discretionary statute, the court is bound to follow the mandatory percentage provisions within the statute.[104]

In *Wynn v. Craven*,[105] the issue was the applicability of the doctrine of laches to the collection of unpaid child support. The parties divorced in 2000 and the divorce decree ordered the father to pay the mother child support of 20% of his weekly income, but not less than $100 per week. The mother sought to collect arrearages twice, calculating the amounts at $100 per week, and the father paid the amounts requested.[106]

In 2014, the father sought a change in custody and the mother filed a motion for contempt, saying that the father had not been paying the agreed upon 20% of his gross weekly income. The mother provided evidence that the father was over $72,000 in arrears. The trial court found that the mother had accepted the payments of $100 per week for over a decade and she did not exercise due diligence in calculating the amount of child support owed by the father. The court further found that

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100. *Id.* at 332, 788 S.E.2d at 389.
101. *Id.* at 332–33, 788 S.E.2d at 389 (citing O.C.G.A. § 19-6-15(f)(4)(B)).
102. *Id.* at 333, 788 S.E.2d at 389.
103. *Id.* at 337, 788 S.E.2d at 392.
104. *Id.* at 335, 788 S.E.2d at 391.
105. 301 Ga. 30, 799 S.E.2d 172 (2017).
106. *Id.* at 30–31, 799 S.E.2d at 173.

the doctrine of laches precluded the mother's claim, and calculated the amount the father owed at $100 per week.[107]

The supreme court reversed, reasoning that child support obligations are not subject to the doctrine of laches, and cannot be waived retroactively.[108] The right to child support is the child's right, not the mother's right.[109] The obligation, therefore, could not be waived by the mother's failure to request the full 20% of the father's income. The trial court was without authority when it attempted to alter the clear language of the divorce decree awarding child support of 20% of the father's income, and forgave the father's child support arrearage.[110]

VI. EQUITABLE DIVISION

During this survey period, the supreme court reviewed two cases which involved determinations of whether certain payments were in the nature of equitable division of marital property or alimony.[111] The issue in *Coursey v. Coursey*[112] arose during a post-divorce contempt proceeding. At the conclusion of the underlying divorce case, based on the jury's verdict regarding the division of property, the divorce decree required the husband to pay the wife one-third of the gross of his pension funds until the wife remarried, though a portion of the pension funds payable to the wife was to be withheld for the payment of taxes. The jury declined to award alimony to the wife. Neither party appealed the jury's verdict nor the final decree of divorce.[113]

The wife later moved for contempt when the husband failed to pay her the proportionate increase in the pension funds. Shortly after the wife filed her motion for contempt, the husband filed a motion for termination of alimony because he alleged the wife was remarried and that he made overpayments of the pension funds to the wife. After conducting an evidentiary hearing, the trial court found the husband in contempt of the divorce decree, concluded that he owed the wife $8,490.25 in unpaid pension payments, and ordered the husband to repay the amount owed in monthly installments. In its final order on the contempt action, the trial court incorporated a previous order, in which it reiterated the

107. *Id.* at 31, 799 S.E.2d at 173.

108. *Id.* at 32, 799 S.E.2d at 173–74.

109. *Id.* at 32, 799 S.E.2d at 174.

110. *Id.* at 33–34, 799 S.E.2d at 175.

111. *See generally* Coursey v. Coursey, 299 Ga. 203, 787 S.E.2d 199 (2016); Frost v. Frost, 299 Ga. 278, 787 S.E.2d 693 (2016).

112. 299 Ga. 203, 787 S.E.2d 199 (2016).

113. *Id.* at 203, 787 S.E.2d at 200.

language in the final divorce decree, that the pension fund payments to the wife were marital property.[114]

On appeal, the husband maintained that the payments at issue were not marital property, but rather constituted periodic alimony; and because the jury expressly denied alimony to the wife, the husband contended he did not owe the wife and could not be held in contempt. The appellate court held this to be incorrect.[115] Alimony is "an allowance out of one party's estate, made for the support of the other party when living separately."[116] Periodic alimony is characterized by an indefinite number of payments, may be contingent, may be indeterminable as to the total amount, and typically terminates on the death of the surviving spouse or the remarriage of the receiving spouse.[117] Marital property has been defined as "assets acquired from the labor and investments of the parties during the marriage."[118] Marital property is subject to equitable division.[119] The law is well settled that retirement benefits acquired during the marriage are marital property subject to equitable division.[120]

At the time of the divorce, the husband was retired and receiving his pension benefits in monthly installments. The pension benefits were not transformed into periodic alimony because they were paid to the wife on a monthly basis. The trial court did not err when it determined that the pension payments to the wife constituted marital property, and it did not err in holding the husband in contempt.[121] As to the limitation that the pension benefit payments end upon the wife's remarriage, this was an error made by the jury and reinforced by its incorporation into the divorce decree, insofar as remarriage of the receiving spouse does not typically terminate an obligation that is the result of the equitable division of marital property. However, since neither party sought appellate review or modification of the divorce decree, the limitation was valid.[122]

Two weeks later, in *Frost v. Frost*,[123] the supreme court again addressed equitable division of assets versus alimony, and also dealt with clergy-penitent privilege. After a bench trial in this divorce action, as part of the alimony award, the trial court granted the wife one-half of the

114. *Id.* at 203–04, 787 S.E.2d at 200–01.
115. *Id.* at 204, 787 S.E.2d at 201.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 205, 787 S.E.2d at 201.
122. *Id.*
123. 299 Ga. 278, 787 S.E.2d 693 (2016).

husband's military retirement pay until the wife dies or remarries.[124] On appeal, the appellate court determined that the lower court erred in making the award of alimony as opposed to treating it as a marital asset subject to equitable division.[125]

Retirement benefits, if acquired during the marriage, are marital property subject to equitable division.[126] Because one spouse's retirement pay acquired from the spouse's employment during the marriage is marital property subject to equitable division, an award of a portion of such periodic payments does not terminate upon the remarriage of the party to whom it is awarded. Accordingly, that portion of the trial court's order declaring that payment of the husband's military retirement benefits shall continue until the wife dies or remarries was an error.[127]

At trial, the wife sought to admit into evidence an audio recording she made of a meeting between the parties and their church pastor held after the complaint was filed and while the parties were attempting to reach a settlement of their claims. The wife sought to admit the recording as evidence the husband agreed at the meeting to a settlement of financial issues raised in the action.[128] The recording was made without the knowledge or consent of the other parties to the conversation, and the husband objected to its admission on the ground that the conversation with the pastor was privileged, pursuant to O.C.G.A. § 24-5-502,[129] which creates a privilege for any communication made by any person seeking counseling to any minister of the Gospel or similar functionary.[130] The supreme court held that given the totality of the admitted circumstances surrounding the meeting, the trial court did not err in finding the meeting was a marriage counseling session with the parties' minister, and did not err in excluding the recording of the meeting pursuant to the clergy-penitent privilege.[131]

VII. CONTEMPT

The boundaries of the remedy of contempt were clarified in several cases during the survey period.

124. *Id.* at 278, 787 S.E.2d at 694.
125. *Id.* at 278–79, 787 S.E.2d at 694.
126. *Id.* at 279, 787 S.E.2d at 694.
127. *Id.*
128. *Id.*
129. O.C.G.A. § 24-5-502 (2017).
130. *Frost*, 299 Ga. at 279, 787 S.E.2d at 694.
131. *Id.* at 280–81, 787 S.E.2d at 695.

A. Nature of the Remedy

The primary purpose of civil contempt is to force compliance with an order.[132] Criminal contempt exists to preserve the court's authority and to punish for disobedience of an order.[133] Criminal contempt may be direct—in the presence of the court—or indirect—out of the court's presence.[134] Both remedies can be used to enforce a child support or alimony order, but civil contempt cannot be used to enforce a money judgment.[135] The difference is that O.C.G.A. § 19-6-4[136] specifically authorizes the former, but no statute authorizes the latter.[137]

In *Shooter Alley, Inc. v. City of Doraville*,[138] a civil contempt sanction for each future violation of a civil injunction was held to be a valid civil contempt order.[139] In that case, an injunction prohibiting certain conduct was entered against Shooter Alley, Inc. In a subsequent contempt proceeding, Shooter Alley, Inc. was found to have violated the injunction and found guilty of criminal contempt for which it was fined. The trial court also found the respondent guilty of civil contempt and set a prospective fine for each future violation of the injunction.[140] This was not an award of civil contempt based on an anticipatory breach of the injunction.[141] Rather, civil enforcement was awarded after violation of the injunction and thus, was a valid civil contempt award.[142] Query: Would such an award be sustained for repetitive failure to pay court ordered support or repeated refusals of visitation ordered by a divorce decree?

B. Limits of the Contempt Power

A divorce decree directed the former husband to "timely" quitclaim property to the wife and ordered the wife to be responsible for all debt service and repairs to the property after a specified date.[143] The court's finding that the husband was in contempt for failure to execute the deed

132. Ensley v. Ensley, 239 Ga. 860, 861, 238 S.E.2d 920, 921 (1977).

133. *Id.* at 861, 238 S.E.2d at 921.

134. Dogan v. Ga. Dep't of Human Res., 278 Ga. App. 905, 906, 630 S.E.2d 140, 142 (2006).

135. McKenna v. Gray, 263 Ga. 753, 755, 438 S.E.2d 901, 902–03 (1994).

136. O.C.G.A. § 19-6-4 (2017).

137. *McKenna*, 263 Ga. at 756, 438 S.E.2d at 903.

138. 341 Ga. App. 626, 800 S.E.2d 588 (2017).

139. *Id.* at 628, 800 S.E.2d at 590–91.

140. *Id.* at 626–27, 800 S.E.2d at 590–91.

141. *Id.* at 628, 800 S.E.2d at 592.

142. *Id.*

143. Sponsler v. Sponsler, 301 Ga. 600, 601, 800 S.E.2d 564, 566 (2017).

was upheld, but the portions of the order directing the husband to pay the repairs to the property and to share in the debt service after the date for which the wife was responsible for those payments was an impermissible modification of the decree.[144]

C. Parties Within the Reach of the Contempt Power

In *Sullivan v. Bunnell*,[145] the husband was ordered to send his retirement account payment to the wife by their divorce decree.[146] The husband, who had moved to California while the Georgia divorce was ongoing, later gave his adult daughter power of attorney to act on his behalf. The husband developed dementia and the daughter was a California resident who assisted the husband in communications with his lawyer in the divorce proceedings and had knowledge of the decree's provisions.[147] When the daughter later told the former wife the retirement payment would not be made, she became the target of a contempt citation. Since the daughter had actual notice of the allegedly violated order and acted as a representative of her father, she could be held in contempt of the order.[148]

144. *Id.* at 603, 800 S.E.2d at 567.
145. 340 Ga. App. 283, 797 S.E.2d 499 (2017).
146. *Id.* at 284, 797 S.E.2d at 501.
147. *Id.* at 284–85, 797 S.E.2d at 501.
148. *Id.* at 290–91, 797 S.E.2d at 505.