Mercer Law Review

Volume 65
Number 1 *Annual Survey of Georgia Law*

Article 10

12-2013

Domestic Relations

Barry B. McGough

Elinor H. Hitt

Domestic Relations

by Barry B. McGough*
and Elinor H. Hitt**

This Article addresses significant case law that arose during the survey period.[1] There were no statutory changes specific to domestic relations during this period, though substantial changes were made to the evidence code.[2]

I. DISCOVERY

Both appellate courts have recently reviewed the case of *Rutter v. Rutter*,[3] a case which initially appeared as if it would have a significant impact on the way evidence is obtained in divorce and custody litigation.[4] During the parties' divorce, the wife installed surveillance cameras in the marital residence.[5] The husband's motion to exclude evidence derived from these cameras was denied.[6]

The husband turned to the Georgia Court of Appeals arguing that the wife's use of these cameras violates section 16-11-62(2)[7] of the Official Code of Georgia (O.C.G.A.), which makes it generally unlawful for one

---

* Partner in the firm of Warner, Bates, McGough, McGinnis & Portnoy, Atlanta, Georgia. University of California at Berkeley (A.B., 1963); University of California (LL.B., 1966). Member, State Bar of Georgia.

** Associate in the firm of Warner, Bates, McGough, McGinnis & Portnoy, Atlanta, Georgia. University of Georgia (B.S.Ed., 1993); University of Georgia (M.S.W., 1996); Georgia State University (J.D., 2007). Member, State Bar of Georgia.

1. For an analysis of Georgia domestic relations law during the prior survey period, see Barry B. McGough & Elinor H. Hitt, *Domestic Relations, Annual Survey of Georgia Law*, 64 MERCER L. REV. 121 (2012).

2. O.C.G.A. tit. 24 (2013).

3. No. S12G1915, 2013 Ga. LEXIS 779, at *1 (Ga. Oct. 7, 2013); 316 Ga. App. 894, 730 S.E.2d 626 (2012), *rev'd by* 2013 Ga. LEXIS 779, at *1, *reconsideration denied by* 2013 Ga. LEXIS 904 (Ga. Nov. 4, 2013).

4. *See Rutter*, 316 Ga. App. at 894, 730 S.E.2d at 628.

5. *Rutter*, 2013 Ga. LEXIS 779, at *1.

6. *Id.*

7. O.C.G.A. § 16-11-62(2) (2011).

to conduct video surveillance of another in a private place, out of public view and without his consent.[8] The wife argued that the statute subsection, O.C.G.A. § 16-11-62(2)(C), provides an exception to a general prohibition and provides that it is lawful "[t]o use for security purposes, crime prevention, or crime detection any device to observe, photograph, or record the activities of persons who are within the curtilage of the residence of the person using such device."[9]

As a threshold matter, the court of appeals considered whether based on legislative history, subparagraph (2)(C) of O.C.G.A. § 16-11-62 had been repealed by a more recent legislative enactment, an issue briefed by the parties, the Attorney General and the Office of Legislative Counsel as *amici curiae*.[10] After a lengthy review, the court of appeals determined that subparagraph (2)(C) was still good law, and then affirmed the lower court, finding that subparagraph 2(C) was properly applied in denying the husband's motion to exclude.[11] Based on this opinion, the wife's act of installing surveillance cameras in the marital residence was allowable in this circumstance, and the evidence derived therefrom, potentially admissible.[12]

Shortly thereafter, the Georgia Supreme Court granted certiorari and came to a different result.[13] The supreme court determined that subparagraph (2)(C) of O.C.G.A. § 16-11-62 did not survive a subsequent amendment to the statute, and that the court of appeals erred in ruling otherwise.[14] Thus, there is no exception to the general prohibition against conducting video surveillance of another in a private place, out of public view and without his consent. The wife's surveillance cameras are arguably no longer allowable, and similarly, neither is any evidence obtained therefrom.

II. CHILD CUSTODY, MODIFICATION

Two court of appeals cases speak to jurisdiction of custody modification proceedings. In *Hammonds v. Parks*,[15] the father had been awarded primary physical custody of the parties' child by the Superior Court of DeKalb County in 2009.[16] In 2011, the father filed a petition for

8. *Rutter*, 316 Ga. App. at 894, 730 S.E.2d at 628.
9. *Id.* at 899, 730 S.E.2d at 631 (quoting O.C.G.A. § 16-11-62(2)(C)).
10. *Id.* at 894-95, 730 S.E.2d at 628-29.
11. *Id.* at 898, 902, 730 S.E.2d at 631, 633.
12. *Id.* at 901, 730 S.E.2d at 633.
13. *Rutter*, 2013 Ga. LEXIS 779, at *1, *4.
14. *Id.*
15. 319 Ga. App. 792, 735 S.E.2d 801 (2012).
16. *Id.* at 792, 735 S.E.2d at 803.

contempt in DeKalb County, alleging that the mother violated the custody order. At the hearing, the mother orally requested the court to award her custody of the child. The father objected, stating that the superior court could not hear a change-in-custody petition brought against him because he was not a resident of DeKalb County. Nevertheless, the superior court heard the oral motion and found the mother in contempt, but awarded her temporary custody of the child.[17]

The court of appeals held that the superior court was without jurisdiction to change custody because such a proceeding should have occurred in the father's county of residence.[18] The mother failed to bring the motion in the correct county and also failed, under O.C.G.A. § 19-9-23,[19] to request the change in custody in a separate action.[20] The superior court erred in holding that the father waived his right to contest the change-in-custody request by bringing a contempt petition against the mother in DeKalb County because the father never consented to the inclusion of custody matters in the action for contempt.[21] The mother's motion for change in custody was improper, and the court of appeals reversed the superior court's order.[22]

A different result occurred in *Colbert v. Colbert*.[23] A Fulton County divorce decree granted primary physical custody of the children to the mother. The mother later filed a petition in the Superior Court of Clayton County, where the father resided, seeking modification of child support and a motion to hold the father in contempt. The father counterclaimed for modification of custody, and the superior court granted his motion, giving him primary physical custody and requiring the mother to pay child support. The mother appealed, arguing lack of jurisdiction with regard to the superior court's ruling on custody.[24] Although O.C.G.A. § 19-9-23 does not allow custody modification to be made as a counterclaim to a motion seeking to enforce a child custody order, the court of appeals held that the mother had effectively waived the defense of lack of personal jurisdiction because there was no record that the mother objected to the superior court's consideration of the

17. *Id.* at 793, 735 S.E.2d at 803.
18. *Id.* at 794, 735 S.E.2d at 804.
19. O.C.G.A. § 19-9-23 (2010).
20. *Hammonds*, 319 Ga. App. at 794, 735 S.E.2d at 804 (citing O.C.G.A. § 19-9-23).
21. *Id.* at 794-95, 735 S.E.2d at 804.
22. *Id.* at 795, 735 S.E.2d at 804.
23. 321 Ga. App. 841, 743 S.E.2d 505 (2013).
24. *Id.* at 841, 743 S.E.2d at 507.

father's counterclaim for custody before or during trial.[25] The court of appeals affirmed the trial court's ruling.[26]

Several cases discuss whether evidence is required to authorize a change in custody. In *Andersen v. Farrington*,[27] the Georgia Supreme Court upheld a judgment of the Superior Court of Forsyth County holding that the mother's failure to pay child support and failure to communicate with the children was sufficient evidence to authorize a change in custody.[28] The supreme court also upheld the requirement that the mother cover the costs of a custody evaluation before it would consider how she could visit with the children.[29] "Reasonable" restrictions on visitation are within the court's discretion.[30]

In *Fifadara v. Goyal*,[31] the court of appeals upheld the Superior Court of DeKalb County's holding that the mother's repeated interference with the father's court-ordered parenting time, including the filing of a false police report to prevent the father's visitation, was sufficient to award the father legal and physical custody of the child.[32]

In *Smith v. Curtis*,[33] the father sought to reduce his child support obligation.[34] During the hearing, the father stated that he would surrender his parental rights if he could. The Superior Court of Gwinnett County reduced the father's child support obligation and modified the final order so that the father did not have custody or parenting time of any kind. On appeal, the father argued that his parental rights were impermissibly terminated by the superior court.[35] The court of appeals held that the father's request to relinquish custody could be deemed a material change in condition sufficient to modify custody and that the lower court modified, but did not terminate, the father's parental rights.[36] When considering the father's "blind obsession [with] attacking the mother," the court held that the superior court did not err in modifying custody.[37]

---

25. *Id.* at 841-43, 743 S.E.2d at 507-08 (citing O.C.G.A. § 19-9-23).
26. *Id.* at 843, 743 S.E.2d at 508.
27. 291 Ga. 775, 731 S.E.2d 351 (2012).
28. *Id.* at 776, 731 S.E.2d at 352.
29. *Id.* at 777, 731 S.E.2d at 352-53.
30. *Id.* at 777, 731 S.E.2d at 353.
31. 318 Ga. App. 196, 733 S.E.2d 478 (2012).
32. *Id.* at 201, 733 S.E.2d at 482.
33. 316 Ga. App. 890, 730 S.E.2d 604 (2012).
34. *Id.* at 891, 730 S.E.2d at 606.
35. *Id.* at 890-91, 730 S.E.2d at 606.
36. *Id.* at 892-93, 730 S.E.2d at 607.
37. *Id.* at 893-94, 730 S.E.2d at 608 (alteration in original) (quoting trial court record).

III. CHILD CUSTODY, DISPUTES INVOLVING THIRD PARTIES

Three custodial disputes arose involving third parties during this survey period. In *Hastings v. Hastings*,[38] the parties' older child was the biological child of the father and the adopted child of the mother, while the younger child was the biological child of both parties.[39] In 2011, the parties divorced, and the Superior Court of Putnam County awarded primary physical custody of both children to the mother. The husband appealed the court's placement of his older child with the wife, the child's adoptive mother.[40] The husband argued that as a specified third party under O.C.G.A. § 19-7-1(b.1),[41] the wife was required to prove by clear and convincing evidence that the older child would suffer physical or emotional harm if custody was awarded to the husband.[42] Disagreeing with the husband, the Georgia Supreme Court held that adoption creates the relationship of parent and child as if the adopted child were the biological child of the adopting adult.[43] As such, between the biological parent and the adoptive parent, the only showing required pursuant to O.C.G.A. § 19-7-1(b.1) is what is in the best interest of the child.[44] The superior court did not err in awarding the wife custody of both children because it was in the best interest of the children to stay in the same household.[45]

In *Phillips v. Phillips*,[46] a stepfather sought custody.[47] When the parties married in 2006, the wife had one son, and the husband was neither the legal nor biological father of the child. During the marriage, the parties had a daughter. The parties filed for divorce in 2011, and a temporary order provided that the parties share joint physical and legal custody of the daughter. The order also awarded the wife primary physical custody of the son while the husband was granted joint legal custody and visitation.[48] The Superior Court of Cobb County ordered that the children "not be around" the wife's boyfriend.[49] The husband filed a petition for contempt and change of custody, alleging the children

---

38. 291 Ga. 782, 732 S.E.2d 272 (2012).
39. *Id.* at 782, 732 S.E.2d at 273.
40. *Id.* at 782-83, 732 S.E.2d at 273.
41. O.C.G.A. § 19-7-1(b.1) (2010 & Supp. 2013).
42. *Hastings*, 291 Ga. at 783, 732 S.E.2d at 273 (citing O.C.G.A. § 19-7-1(b.1)).
43. *Id.* at 784, 732 S.E.2d at 274 (citing O.C.G.A. § 19-8-19(a)(2) (2010)).
44. *Id.* at 784-85, 732 S.E.2d at 274-75 (interpreting O.C.G.A. § 19-8-19(a)(2)).
45. *Id.* at 785, 732 S.E.2d at 274-75.
46. 316 Ga. App. 829, 730 S.E.2d 548 (2012).
47. *Id.* at 829, 730 S.E.2d at 549.
48. *Id.*
49. *Id.* (quoting the trial court's temporary order).

were living with the wife and her boyfriend, and had been exposed to domestic violence. Following a hearing, the superior court granted primary physical custody of the daughter to the husband as well as continued joint custody and visitation with the son. This order remained in effect following a second hearing. After a third hearing, at which the children's *guardian ad litem* testified, the husband was awarded sole legal and physical custody of both children. The mother appealed.[50]

Suggesting the need for legislative action, the court of appeals held that, even though the superior court "went to great efforts" to determine the son's best interests, a stepparent with no formal, legal ties to the child cannot be awarded greater parental power than the child's biological mother.[51] A stepfather is not given the same status as certain specified relatives under O.C.G.A. § 19-7-1(b.1).[52] The court of appeals reversed the award of custody to the husband.[53]

In *Stone-Crosby v. Mickens-Cook*,[54] an aunt and a grandmother were at odds.[55] The minor children were orphaned by a murder-suicide. Their aunt brought an action in the Superior Court of Fulton County seeking custody. Twelve days later, the paternal grandmother answered the aunt's petition and moved to intervene. Simultaneously, the grandmother filed a deprivation petition in juvenile court and a motion to dismiss the superior court action for lack of jurisdiction. The motion to dismiss was denied, but the motion to intervene was granted. The superior court awarded custody of the children to the grandmother.[56]

On appeal, the aunt argued that the superior court lacked jurisdiction over the custody matter because no statute provided guidance on custody following the death of both parents.[57] While true, the Georgia Constitution states that "[t]he superior courts shall have jurisdiction in all cases, except as otherwise provided in this Constitution."[58] The superior court has jurisdiction over child custody actions "between parents, parents and third parties, or between parties who are not parents," as in this case.[59] While the superior court's jurisdiction to hear custody matters may be concurrent with that of the juvenile court

50. *Id.* at 829-30, 730 S.E.2d at 549.
51. *Id.* at 831-32, 730 S.E.2d at 550.
52. *Id.* at 831, 730 S.E.2d at 550 (interpreting O.C.G.A. § 19-7-1(b.1)).
53. *Id.* at 832, 730 S.E.2d at 550.
54. 318 Ga. App. 313, 733 S.E.2d 842 (2012).
55. *Id.* at 313, 733 S.E.2d at 843.
56. *Id.* at 313, 733 S.E.2d at 843-44.
57. *Id.* at 314, 733 S.E.2d at 844.
58. GA. CONST. art. VI, § 4, ¶ 1.
59. *Stone-Crosby*, 318 Ga. App. at 314, 733 S.E.2d at 844 (citations omitted) (quoting Dunbar v. Ertter, 312 Ga. App. 440, 441, 718 S.E.2d 350, 351 (2011)).

in some cases, that does not apply here.[60] In the absence of a previously filed action in juvenile or probate court, the superior court was first to take jurisdiction, and jurisdiction was properly retained.[61] As such, the court of appeals affirmed the superior court.[62]

IV. TERMINATION OF PARENTAL RIGHTS AND LEGITIMATION

In *Brine v. Shipp*,[63] a question of jurisdiction as between the juvenile court and the Superior Court of Paulding County came up again.[64] The mother married William Brine in 1997, weeks after a relationship between the mother and Shipp ended. Upon learning that the mother was pregnant, Shipp asked if he was the father, and the mother said no. The child was born during the Brines's marriage, and William Brine was listed as the father on the child's birth certificate. Soon after, Shipp again inquired as to paternity of the child, and the mother denied that Shipp was the father. Shipp did not question paternity for ten more years. After William Brine filed for divorce, the mother told Shipp that she thought he was the child's father, and DNA testing confirmed Shipp's paternity. In 2011, Shipp intervened in the divorce action and filed a petition to legitimate the child, which was granted. In the divorce decree, Brine's rights as the legal father were terminated, and Shipp was awarded primary physical custody. Brine appealed.[65]

Whether the superior court had subject matter jurisdiction to sever Brine's rights depended on whether the issue before the court primarily involved legitimation, which is in the jurisdiction of the superior court, or primarily involved termination, which is in the jurisdiction of the juvenile court.[66] Granting the legitimation petition first required the superior court to terminate Brine's parental rights, and therefore, the primary subject of this case was termination.[67] As such, the supreme court reversed the superior court's judgment.[68] This decision overruled *Ghrist v. Fricks*[69] and *Matthews v. Dukes*[70] to the extent the court of appeals in those cases determined that the superior court had jurisdic-

60. *Id.* at 314-15, 733 S.E.2d at 844.
61. *Id.* at 315, 733 S.E.2d at 845.
62. *Id.*
63. 291 Ga. 376, 729 S.E.2d 393 (2012).
64. *Id.* at 376, 729 S.E.2d at 394.
65. *Id.* at 376-77, 729 S.E.2d at 394.
66. *Id.* at 379, 729 S.E.2d at 396.
67. *Id.* at 380, 729 S.E.2d at 396.
68. *Id.* at 380, 729 S.E.2d at 397.
69. 219 Ga. App. 415, 465 S.E.2d 501 (1995).
70. 314 Ga. App. 782, 726 S.E.2d 95 (2012).

tion to sever parental rights because the issue of termination was ancillary to the biological father's petition for legitimation of the child.[71]

V. CHILD SUPPORT, INITIAL DETERMINATION

The appellate courts provided guidance regarding what is considered income for the purpose of determining child support. In *Dodson v. Walraven*,[72] the father testified that, while living at home with his parents and temporarily away from home, he received assistance with child support payments, cash, a car, meals, and housing among other things.[73] No testimony was offered as to the value of these gifts. The Superior Court of Cobb County, however, attributed $3000 per month in gift income to the father and included this figure when calculating the father's support obligation.[74] Gifts of cash or cash equivalents can be included in a parent's income for the purpose of determining child support.[75] The court of appeals determined that it was nevertheless error to include the gift income because there was no evidence to support the $3000 value as assigned by the superior court.[76]

In *Hendry v. Hendry*,[77] the husband's employer reimbursed the husband for the cost of the family's health insurance premium.[78] The Superior Court of Gwinnett County included this reimbursement in the husband's gross income for purposes of calculating child support. The employer identified the payment as a benefit, not salary.[79] Quoting O.C.G.A. § 19-6-15(h)(2)(A)(ii)[80] and O.C.G.A. § 19-6-15(f)(1)(C),[81] the supreme court held that the superior court erred in including the reimbursement as part of the husband's gross income and remanded the case for recalculation of the husband's gross income.[82]

Questions about military compensation were answered during this survey period. In *Eldridge v. Eldridge*,[83] the supreme court upheld the Superior Court of Camden County's decision to exclude the husband's

---

71. *Brine*, 291 Ga. at 380, 729 S.E.2d at 396-97.
72. 318 Ga. App. 586, 734 S.E.2d 428 (2012).
73. *Id.* at 588, 734 S.E.2d at 430.
74. *Id.* at 588-89, 734 S.E.2d at 430-31.
75. O.C.G.A. § 19-6-15(f)(1)(A)(xvii) (2010 & Supp. 2013).
76. *Dodson*, 318 Ga. App. at 588-89, 734 S.E.2d at 431.
77. 292 Ga. 1, 734 S.E.2d 46 (2012).
78. *Id.* at 1, 734 S.E.2d at 47.
79. *Id.*
80. O.C.G.A. § 19-6-15(h)(2)(A)(ii) (2010 & Supp. 2013).
81. O.C.G.A. § 19-6-15(f)(1)(C) (2010 & Supp. 2013).
82. *Hendry*, 292 Ga. at 1-4, 734 S.E.2d at 47-49 (quoting O.C.G.A. §§ 19-6-15(h)(2)(A)-(ii), (f)(1)(c)).
83. 291 Ga. 762, 732 S.E.2d 411 (2012).

sea pay in calculating his income.[84] The husband, who was in the Navy, testified that sea pay was incentive pay that he would lose following a planned relocation to Connecticut.[85] Under O.C.G.A. § 19-6-15(f)(1)(E),[86] incentive pay is not considered income for child support.[87]

In *Black v. Black*,[88] the wife claimed the Superior Court of Houston County erred in excluding from the husband's gross income additional amounts he received during deployment, such as hazardous-duty pay, family-separation pay, and tax-free pay.[89] The supreme court upheld the superior court's opinion that these payments received by the soldier during deployment amounted to "special pay or incentive pay" properly excluded under O.C.G.A. § 19-6-15(f)(1)(E).[90]

In *Jackson v. Irvin*,[91] a deviation based on the fathering of another child was questioned.[92] In this paternity and legitimation action, the father testified that several months before the final hearing he fathered a child with another woman, though he was currently not under a court order to provide support for the child. Neither evidence regarding the other woman's financial status nor evidence regarding the father's financial support of the child was offered. Regardless, the Superior Court of Richmond County reduced the father's presumptive child support obligation by $907 per month based on (among other things) the existence of the father's second child. The mother claimed it was error to deviate from the presumptive amount of child support for her child based on the birth of the father's second child who was not supported by the father.[93] The appellate court agreed, holding that sufficient evidence to support such a deviation was not presented.[94]

VI. CHILD SUPPORT, MODIFICATION

The child support guidelines must be applied in support modification actions. In *Wetherington v. Wetherington*,[95] the parties' October 2007 settlement agreement was incorporated into their final divorce decree in

84. *Id.* at 763, 732 S.E.2d at 413.
85. *Id.*
86. O.C.G.A. § 19-6-15(f)(1)(E) (2010 & Supp. 2013).
87. *Id.*
88. 292 Ga. 691, 740 S.E.2d 613 (2013).
89. *Id.* at 699, 740 S.E.2d at 621.
90. *Id.* (interpreting O.C.G.A. § 19-6-15(f)(1)(E)).
91. 316 Ga. App. 560, 730 S.E.2d 48 (2012).
92. *Id.* at 560, 730 S.E.2d at 49.
93. *Id.* at 560-63, 730 S.E.2d at 49-50.
94. *Id.* at 563, 730 S.E.2d at 50-51.
95. 291 Ga. 722, 732 S.E.2d 433 (2012).

January 2008.[96] The final decree stated that the husband's income was $25,000 per month, and his presumptive child support obligation was to be $2884 per month, though the parties deviated upward and agreed that the husband's child support obligation would be $7000 per month. In October 2008, the husband filed a petition to modify child support based on a reduction in income. At the final hearing in February 2011, the husband testified that his $300,000 income listed in the 2007 agreement included a $60,000 signing bonus, a $180,000 salary, and a $60,000 performance bonus that was never actually earned. The husband lost his job in 2009, and his new job paid only $152,388 a year. The Superior Court of Fayette County gave the husband "credit" for his actual income in 2007, which was $240,000, and because $240,000 is 80% of $300,000, the husband's child support was reduced in accordance with the 80%, from $7000 to $5600 a month.[97] The supreme court reversed in part and held that the superior court failed to consider whether there had been a substantial change in the husband's financial circumstances between the time of the divorce decree and the modification hearing, and further failed to apply the child support guidelines in calculating the new amount.[98]

In *East v. Stephens*,[99] the parties' 2002 divorce decree incorporated a settlement requiring the father to pay $125 per week in child support and one-half of the children's miscellaneous school expenses.[100] In 2011, this obligation was modified, and the new order required the father to pay $904 per month in child support.[101] The order did not expressly mention miscellaneous expenses but specified that all provisions of the incorporated settlement "not modified herein shall remain in full force and effect."[102] Soon after, the mother filed a motion for contempt against the father for not paying half of the children's miscellaneous expenses, which the Superior Court of Gordon County granted.[103] The supreme court held that the 2011 modification order discontinued the father's obligation to reimburse one-half of the miscellaneous expenses, explaining that such an obligation would be a deviation from the presumptive child support amount, and if the superior court had intended to continue the father's obligation to pay

96. *Id.* at 722, 732 S.E.2d at 435.
97. *Id.* at 722-24, 732 S.E.2d at 435-36.
98. *Id.* at 722, 726, 732 S.E.2d at 435, 437.
99. 292 Ga. 604, 740 S.E.2d 156 (2013).
100. *Id.* at 604, 740 S.E.2d at 156.
101. *Id.*
102. *Id.* at 604-05, 740 S.E.2d at 156 (quoting the modified divorce decree).
103. *Id.* at 605, 740 S.E.2d at 156.

these expenses, it was required to find a deviation from the presumptive child support amount and specifically address the miscellaneous expenses.[104]

VII. PRENUPTIAL AND POSTNUPTIAL AGREEMENTS

In *Fox v. Fox*,[105] the parties divorced in 2000.[106] By 2002 they planned to remarry and, without legal counsel, signed a "Premarital Agreement" with the notary as the only witness. The parties remarried three months later. In 2010, the wife filed for divorce and sought to enforce the Premarital Agreement. The Superior Court of Fulton County held that the document was a contract made in contemplation of marriage but was void since it was not attested to by the requisite two witnesses.[107] The supreme court affirmed, holding that while the parties' contract mentioned the potential of divorce, it did not mention alimony or property division as would a contract made in contemplation of divorce.[108] A clause of the agreement stating that the wife would receive monthly compensation of $2500 per month for fifteen years if the marriage failed was properly viewed as more of a liquidated damages clause, because compensation was provided in exchange for the wife's "hardship" of being married to the husband.[109] Such facts are relevant because a contract made in anticipation of divorce does not require two witnesses.[110] The superior court properly deemed the premartial agreement a contract in anticipation of marriage, and the agreement therefore required two attesting witnesses to be valid.[111]

Ambiguity was the issue in the next two cases. In *Newman v. Newman*,[112] the parties added a handwritten provision to their prenuptial agreement stating that "there are certain ambiguities contained [within] the body of this document [that] each party agrees to clarify and re-write within [thirty] days of the date of execution hereof."[113] During the parties' divorce, the wife moved to enforce the agreement, while the husband argued that the parties had an unenforceable "agreement to agree."[114] In affirming the Superior Court of Newton County's deci-

104. *Id.* at 605-07, 740 S.E.2d at 156-58.
105. 291 Ga. 492, 731 S.E.2d 676 (2012).
106. *Id.* at 492, 731 S.E.2d at 677.
107. *Id.* (referencing O.C.G.A. § 19-3-63 (2010)).
108. *Id.* at 492-94, 731 S.E.2d at 677-78.
109. *Id.* at 494-95, 731 S.E.2d at 679.
110. *Id.* at 493, 731 S.E.2d at 678.
111. *Id.* at 495, 731 S.E.2d at 679.
112. 291 Ga. 635, 732 S.E.2d 77 (2012).
113. *Id.* at 635, 732 S.E.2d at 78 (first alteration in original).
114. *Id.* (quoting Kreimer v. Kreimer, 274 Ga. 359, 363, 552 S.E.2d 826, 829 (2001)).

sion, the supreme court found that the agreement itself contained no language indicating that it was incomplete upon execution and that the husband failed to identify any essential term to be decided at a future date.[115] That a provision of the agreement indicated ambiguities did not render the agreement unenforceable, as it contained all essential terms.[116] As such, the prenuptial agreement was complete and enforceable.[117]

The Superior Court of Fulton County found ambiguity in *Eversbusch v. Eversbusch*,[118] where the alimony and child support terms of the parties' handwritten postnuptial agreement (1) provided for payment of a percentage of the husband's total annual income but did not explain the method of calculating the total annual income; and (2) assumed the children would attend and graduate college but provided no alternative basis for determining alimony if this did not occur.[119] The supreme court affirmed that such ambiguity rendered the postnuptial agreement unenforceable.[120]

VIII. ALIMONY

In *Hardigree v. Smith*,[121] the Georgia Supreme Court defined the nature of an alimony obligation.[122] The parties' 2010 final divorce decree provided, with no further restrictions, that the "[h]usband [would] pay to [the] wife monthly alimony of [$2000] per month for 120 consecutive months beginning April 1, 2010."[123] The wife remarried on June 12, 2011, and the husband ceased making alimony payments. The wife filed a motion for contempt based on the husband's failure to pay lump sum alimony.[124] The Superior Court of Hart County ruled in the husband's favor, finding that his "alimony obligation was for permanent periodic alimony that terminated upon [the] [w]ife's remarriage."[125] The appellate court reversed, holding where "the alimony provision set forth in the trial court's order 'state[s] the exact amount of each payment . . . without other limitations, conditions or statements of intent, the obligation is one for lump sum alimony payable

115. *Id.* at 636, 732 S.E.2d at 78-79.
116. *Id.* at 636, 732 S.E.2d at 79.
117. *Id.* at 637, 732 S.E.2d at 79.
118. 293 Ga. 60, 743 S.E.2d 418 (2013).
119. *Id.* at 62, 743 S.E.2d at 420.
120. *Id.* at 62-63, 743 S.E.2d at 420.
121. 291 Ga. 239, 728 S.E.2d 633 (2012).
122. *Id.* at 239, 728 S.E.2d at 634.
123. *Id.* (quoting the parties' settlement agreement).
124. *Id.*
125. *Id.*

in installments,' rather than permanent alimony."[126] This obligation was a lump sum alimony award and did not terminate upon the wife's remarriage.[127]

IX. EQUITABLE DIVISION

In *Jones-Shaw v. Shaw*,[128] the Superior Court of Gwinnett County denied the wife's claim for an equitable division of a non-profit corporation started by the husband prior to the parties' marriage, and further found there was no appreciation in the corporation's value during the marriage as a result of the wife's efforts.[129] On appeal, the supreme court affirmed, stating that for the superior court to determine an asset's appreciation during the marriage, there must be evidence of the asset's worth at the time of the marriage and at the time of the divorce.[130] Such evidence was not presented in this case—no expert witnesses testified, and the parties only testified to the asset's worth in general terms.[131]

In *United Community Bank v. Pack*,[132] the court of appeals determined whether a divorce decree divested the former wife of her interest in real property.[133] The parties' 2000 divorce decree awarded the wife three specifically described parcels of land and awarded the husband "all right, title and interest in any property jointly owned by the parties not herein awarded to [the wife]."[134] The husband used the property as security for loans and subsequently defaulted. The lender brought a declaratory judgment action asking the court to find that the husband was the sole owner of the property.[135] The court of appeals held that the divorce decree did not have the force and effect of a deed as to the subject property because it did not describe the property with the requisite specificity, and the parcel was still jointly owned by the former husband and wife.[136]

---

126. *Id.* at 240, 728 S.E.2d at 634 (first alteration in original) (quoting Patel v. Patel, 285 Ga. 391, 392, 677 S.E.2d 114, 116 (2009)).
127. *Id.*
128. 291 Ga. 252, 728 S.E.2d 646 (2012).
129. *Id.* at 252, 728 S.E.2d at 647.
130. *Id.* at 252-53, 728 S.E.2d at 647-48.
131. *Id.* at 253-54, 728 S.E.2d at 648.
132. 320 Ga. App. 484, 740 S.E.2d 228 (2013).
133. *Id.* at 484, 740 S.E.2d at 229.
134. *Id.* at 484-85, 740 S.E.2d at 229.
135. *Id.* at 485, 740 S.E.2d at 229-30.
136. *Id.* at 485-87, 740 S.E.2d at 230-31.

In *Arthur v. Arthur*,[137] the supreme court reversed the Superior Court of Decatur County's judgment requiring the wife to pay the husband $20,000 if and when she refinanced or sold the marital home.[138] The supreme court held that an obligation regarding the equitable division of marital property cannot be extended for an indefinite time period.[139]

X. CONTEMPT

In *Baker v. Schrimsher*,[140] the parties divorced in 1998, and the final divorce decree "required [the] [h]usband to refinance in his name the mortgages for the marital home and the automobile loan," and to assume all payments on the property within sixty days.[141] The husband failed to comply with the terms of the decree, and a default judgment for the car loan was entered against the wife in 2002. In 2009, the mortgage company sent a demand letter to the wife seeking collection of the outstanding balance of $25,177.44 due on the mortgage. The wife filed a contempt action in 2009.[142] The husband moved to dismiss, pursuant to O.C.G.A. § 9-12-60,[143] claiming that the judgment was dormant.[144] The Superior Court of Cobb County denied the husband's motion, and the supreme court affirmed, holding that the dormancy statute only applies to judgments or decrees ordering the payment of money, not to those that require performance of an act or duty.[145] Here, the husband was required to perform a specific act.[146]

In *Ford v. Hanna*,[147] a question of proper jurisdiction for a contempt action arose.[148] The parties divorced in Gwinnett County and the husband later moved to DeKalb County. The wife filed a petition in the Superior Court of DeKalb County to modify child support and visitation, and simultaneously filed a motion for contempt, alleging that the husband failed to comply with his child support obligations under the divorce decree. The husband moved to dismiss the motion for contempt

137. 293 Ga. 63, 743 S.E.2d 420 (2013).
138. *Id.* at 63, 66-67, 743 S.E.2d at 422, 424.
139. *Id.* at 67, 743 S.E.2d at 424.
140. 291 Ga. 489, 731 S.E.2d 646 (2012).
141. *Id.* at 489, 731 S.E.2d at 647.
142. *Id.* at 490, 731 S.E.2d at 647-48.
143. O.C.G.A. § 9-12-60 (2006).
144. *Baker*, 291 Ga. at 490, 731 S.E.2d at 648.
145. *Id.* at 490-91, 731 S.E.2d at 648 (interpreting O.C.G.A. § 9-12-60).
146. *Id.* at 491, 731 S.E.2d at 648.
147. 292 Ga. 500, 739 S.E.2d 309 (2013).
148. *Id.* at 500, 739 S.E.2d at 310.

for lack of jurisdiction, which the superior court granted.[149] The supreme court reversed and held that when a court acquires jurisdiction to modify a divorce decree by the filing of a proper petition to modify, it also obtains jurisdiction to punish for contempt of the divorce decree.[150]

XI. APPEAL

In *Collins v. Davis*,[151] the mother filed (1) a petition for modification of custody, visitation, and child support; (2) a motion for contempt; and (3) a demand for attorney fees.[152] The father counterclaimed, seeking to reduce his child support obligation. The Superior Court of Walton County entered a final order enforcing a new visitation schedule and reducing the father's child support. The father filed an application for discretionary review, challenging the court's order of child support.[153] The court of appeals considered whether the father was limited to a discretionary review or if he was entitled to a direct appeal.[154] The court stated that the right to a direct appeal in child custody and visitation cases under O.C.G.A. § 5-6-34(a)(11)[155] extends to cases where a party only appeals the child support award, so long as the order also involves child custody or visitation.[156] Thus, even though the appeal here dealt only with the child support award, because the award was given in the same order as child custody, it was directly appealable.[157]

In *Cloud v. Norwood*,[158] the mother directly appealed an order by the Superior Court of DeKalb County that legitimated her child, incorporated a parenting plan, and continued a child support award from a previous order.[159] The mother specifically appealed the trial court's legitimation order. Although the order expressly incorporated a parenting plan, the underlying subject matter of the appeal was legitimation.[160] The court of appeals dismissed the appeal, holding that a legitimation action required an application for appeal under

149. *Id.* at 501, 739 S.E.2d at 310-11.
150. *Id.* at 501, 503, 739 S.E.2d at 311.
151. 318 Ga. App. 265, 733 S.E.2d 798 (2012).
152. *Id.* at 265, 733 S.E.2d at 798.
153. *Id.* at 265, 733 S.E.2d at 798-99.
154. *Id.* at 265, 733 S.E.2d at 799.
155. O.C.G.A. § 5-6-34(a)(11) (2013).
156. *Collins*, 318 Ga. App. at 267, 733 S.E.2d at 799-800 (interpreting O.C.G.A. § 5-6-34(a)(11)).
157. *Id.* at 268-69, 733 S.E.2d at 801.
158. 321 Ga. App. 218, 739 S.E.2d 93 (2013).
159. *Id.* at 218, 739 S.E.2d at 93.
160. *Id.*

O.C.G.A. § 5-6-35(a)(2),[161] and the court therefore did not have jurisdiction to hear the appeal.[162]

XII. ATTORNEY FEES

In *Horn v. Shepherd*,[163] the husband was held in contempt for failing to pay $8,408.03 in past due support, medical expenses, and attorney fees.[164] The trial court ordered the husband to be incarcerated until he purged himself of the contempt by paying the amount he had been previously ordered to pay, as well as $2500 in attorney fees associated with the contempt action.[165] Because a "trial court does not have the authority to make payment of a new attorney fees award a condition for purging contempt of a previous order," the Georgia Supreme Court held that the Superior Court of Coweta County erred in requiring the husband to pay the $2500 to purge the contempt order.[166] However, the order requiring the husband to pay the new attorney fees remained valid, thus he would be subject to a future contempt action if he failed to do so.[167]

In *Jarvis v. Jarvis*,[168] the husband contended the Superior Court of Forsyth County abused its discretion in considering gift income received from his mother to determine his financial status pursuant to O.C.G.A. § 19-6-2[169] for the purpose of awarding attorney fees.[170] The husband testified that his mother had provided financial support during the marriage, and while she was no longer providing financial support, she was, at the time of trial, helping him make "payments."[171] The supreme court held that there is no statutory limit on the type of financial circumstances the court may consider in an attorney fees award, and therefore, the superior court did not err in considering this gift income.[172]

In *Fedina v. Larichev*,[173] the Superior Court of Cobb County's award to the former husband of $12,000 in attorney fees pursuant to O.C.G.A.

---

161. O.C.G.A. § 5-6-35(a)(2) (2013).
162. *Cloud*, 321 Ga. App. at 218, 739 S.E.2d at 93 (interpreting O.C.G.A. § 5-6-35(a)(2)).
163. 292 Ga. 14, 732 S.E.2d 427 (2012).
164. *Id.* at 14, 21, 732 S.E.2d at 429, 433.
165. *Id.*
166. *Id.* at 21, 732 S.E.2d at 433.
167. *Id.*
168. 291 Ga. 818, 733 S.E.2d 747 (2012).
169. O.C.G.A. § 19-6-2 (2010).
170. *Jarvis*, 291 Ga. at 818, 733 S.E.2d at 748.
171. *Id.* at 820, 733 S.E.2d at 749.
172. *Id.* (interpreting O.C.G.A. § 19-6-2).
173. 322 Ga. App. 76, 744 S.E.2d 72 (2013).

§ 9-15-14[174] was vacated.[175] The court of appeals held that the award may have been reasonable, but the superior court's order was nevertheless deficient because it did not indicate how the court apportioned its award of fees based on the former wife's sanctionable conduct.[176]

174. O.C.G.A. § 9-15-14 (2006).
175. *Fedina*, 322 Ga. App. at 81, 744 S.E.2d at 77.
176. *Id.* (interpreting O.C.G.A. § 9-15-14).

***