Mercer Law Review

Volume 3 | Number 1 Article 12

12-1951

Domestic Relations

John L. Westmoreland

DOMESTIC RELATIONS

By JOHN L. WESTMORELAND*

During the past year, there have been several significant developments by statutes and by court decisions in the field of domestic relations.

STATUTES

The General Assembly of Georgia, during the 1951 regular session, enacted five statutes dealing with divorce and domestic relations.

Divorce—Grounds—Incurable Insanity.—The 1951 legislature amended Section 30-102 of the Georgia Code by adding thereto an eleventh ground for divorce in Georgia—incurable insanity.[1] This amendment substantially provides that the divorce can be obtained on the ground of incurable insanity if: (a) the insane party shall have been legally adjudged insane, (b) the party has been continuously confined in an institution for the insane for a period of at least three years immediately preceding the commencement of the action, and (c) a certified statement is obtained from the superintendent of the asylum and from the physician appointed by the court, that the person is hopelessly and incurably insane.

Notice of the proceedings for divorce must be served upon the nearest blood relative or guardian of the insane person and the superintendent of the institution. The amendment further provides that the status of the parties as to support and maintenance of the insane person shall not be affected in anyway by the granting of the divorce.

Premarital Examination.—This act[2] amends Section 2 of the earlier act,[3] which provides for serologic tests for syphilis approved by the Georgia Department of Public Health and certain other designated agencies, by adding to the list of agencies the following: District of Columbia, New York City, United States Armed Services and United States Veterans Administration laboratory or laboratory approved by these agencies. The public health department of any other state and the United States Public Health Service are included in the approved list of agencies by the original act.

Another change in Section 2 removes the restriction that the physician's certificate be on a form provided and distributed by the Georgia Department of Public Health, thus authorizing the use of other forms, provided, they are *approved* by the Georgia Department of Public Health.

Adoption—Certificate by Clerk of Court.—This act[4] substantially provides that the adopting parents can obtain a certificate of adoption from the clerk of the court granting the adoption. This act further provides that the clerk of the court shall forward a copy of the final order of

---

*Member Atlanta Bar; A.B., 1914, Mercer University; LL.B., 1915, University of Georgia; Member American and Georgia Bar Associations.

1. Ga. Laws 1951, p. 744.
2. Ga. Laws 1951, p. 674.
3. Ga. Laws 1949, p. 1054.
4. Ga. Laws 1951, p. 679.

adoption and any subsequent orders or revocations to the State Department of Public Welfare.

Aid to Dependent Children.—This act[5] amended the Aid to Dependent Children Act of 1937 by providing that no grant of assistance or money shall be made by any county welfare department or the State Department of Public Welfare for more than *one* illegitimate child of the same mother.

Uniform Support of Dependents Act.—The legislative purpose of this act[6] is to secure by civil action support for certain dependents by persons legally responsible. The act defines "dependent" as follows: a wife, child (this includes a child of any age), mother, father, grandparent, and grandchild who is in need of and entitled to support.

Persons legally responsible under the act: (a) husband (as to any dependent, if the husband is able to furnish the support), (b) mother (as to any child under seventeen years of age, if the father is dead, cannot be found, or unable to support the child, or if the mother is able to furnish the support), (c) parents severally (as to any child over seventeen years of age, if the child is unable to maintain himself and likely to become a public charge).

The procedure to be followed generally as provided in the act is for the plaintiff (dependent) to file a verified petition in the local state court. The judge of that court will certify that the petition was filed and will request summons in the jurisdiction wherein the defendant is found, whether a resident of this state or not. If the defendant is a nonresident and the petition is denied by the defendant, the file is then transmitted back to the initiating state, where proof and evidence are taken by that court, and the transcript thereof and the recommendation of that judge are forwarded to the responding state. The defendant shall then present his proof and evidence, and the responding state court will thereafter make its findings and issue an appropriate order of support thereon. Failure of the defendant to comply with the order of the court shall be punishable as in other instances of contempt.

It is important to note that the provisions of the act will apply, if the responsible person resides, or is found in the same state as that in which the proceedings are instituted by the dependent, or resides, or is found, in a state having "substantially similar or reciprocal laws."

At the time of the introduction of the act in the Georgia legislature, it was said that twenty-three states had adopted a similar law.

DECISIONS

During the past year there have been several cases construing and attempting to clarify the amendment enacted in 1946 of Section 30-101 of the Georgia Code, which provides for some person at interest to file a motion to set aside and vacate within thirty days a verdict or judgment granting a total divorce, or granting a total divorce and alimony.[7]

5. Ga. Laws 1951, p. 692.
6. Ga. Laws 1951, p. 107.
7. Purser v. Purser, 207 Ga. 335, 61 S.E.2d 503 (1950) (a brief of the evidence must be filed with a motion to vacate, modify and set aside a judgment of divorce, alimony and custody); Champion v. Champion, 207 Ga. 431, 61 S.E.2d 822 (1950) (a motion for new trial is not an available remedy to attack a verdict granting a divorce and permanent alimony); Thompson v. Thompson, 207 Ga. 376, 61 S.E.2d 834 (1950) (a verdict or judgment in a divorce case will not be reversed when the motion to

Harper v. Martin[8] is another case dealing with appellate procedure. In this case, the Court of Appeals held that the judgment of a justice of the peace discharging the defendant in a bastardy proceeding is not subject to review by certiorari.

In the cases of *Patterson v. Patterson*[9] and *Brown v. Sheridan*,[10] our appellate courts held that a foreign divorce decree is entitled to full faith and credit in this state; however, the decree may be attacked on the ground that a fraud was perpetrated upon the court rendering the same and on the ground that the court did not have jurisdiction of the parties. The latter case also held that where the judgment in a divorce decree prohibits the guilty party from marrying again, the same is without effect outside the territorial limits of that state.

The case of *Peck v. Peck*[11] held that the verdict rendered in favor of the husband on the ground of cruel treatment by the wife had some evidence to support it and therefore could not be reversed.

During the past year, two cases have been decided concerning the validity of a marriage. In the case of *Graves v. Carter*,[12] the Supreme Court held that a *nunc pro tunc* order of a California court making a divorce decree effective retroactive to a date prior to a second marriage in Georgia could not validate an otherwise void marriage in Georgia, since the previous undissolved marriage rendered the parties unable to contract the second marriage in Georgia.

In the case of *Mims v. Hardware Mutual Casualty Co.*[13] the Court of Appeals held that a marriage contracted by a person under the statutory age is voidable, subject to ratification after attainment of the required age, and that the burden of proof is upon the party seeking to prove that the marriage was ratified by continued cohabitation after the disability was removed. It was also held in this case that upon the introduction of a marriage certificate into evidence, a presumption arises that the marriage is valid, and the burden of proving its invalidity is on the party attacking the marriage.

The case of *Parker v. Parker*[14] held that it was mandatory for the trial judge to grant a stay of the proceedings where the plaintiff was in the army and in Korea under the provisions of Section 201 of the Soldiers and Sailors Civil Relief Act of 1940.[15]

In the case of *Chambers v. Chambers*[16] the Supreme Court held that

---

modify or set aside is not specified as part of the record, nor incorporated in the bill of exceptions, nor substantially set forth in the record); Harrison v. Harrison, 207 Ga. 393, 61 S.E.2d 837 (1950) (the motion failed to set forth sufficient grounds for modifying or setting aside the verdict for divorce and alimony, there being no complaint of the admission of testimony or of the charge of the court); Guthas v. Guthas, 207 Ga. 177, 60 S.E.2d 370 (1950) (a final judgment for divorce will not be set aside on the ground that the petition does not set forth a cause of action where the deficiency in the petition is amendable and cured by verdict).

8. 83 Ga. App. 688, 64 S.E.2d 464 (1951).
9. 208 Ga. 7, 64 S.E.2d 441 (1951).
10. 83 Ga. App. 725, 64 S.E.2d 636 (1951).
11. 207 Ga. 72, 60 S.E.2d 138 (1950).
12. 207 Ga. 308, 61 S.E.2d 282 (1950).
13. 82 Ga. App. 210, 60 S.E.2d 501 (1950).
14. 207 Ga. 588, 63 S.E.2d 366 (1951).
15. 54 STAT. 1178, 1181 (1941), 50 U.S.C. APP. § 521 (1946).
16. 207 Ga. 582, 63 S.E.2d 358 (1951); see also earlier case in 206 Ga. 796, 58 S.E.2d 814 (1950).

a person who is *non compos mentis,* though not legally adjudged to be an insane person, is incapable of being legally served with a petition for divorce.

Lott v. Lott[17] held that service of a divorce suit on a nonresident defendant by publication was invalid because the publication was defective for the reason that the defendant did not have *two months* notice of the complaint filed against him before he was required to appear and answer the same; nor was there a waiver to the jurisdiction by appearance of counsel for defendant on a plea to the jurisdiction, there being no written pleading to the merits.

During the past year there have been several decisions dealing with granting or denying alimony to the wife.[18]

During recent months there have been several court decisions concerning citations for contempt for violations of orders of the court.[19] In the case of *Kenimer v. State,*[20] Kenimer was found guilty of criminal contempt of court for violation of an order of court for removing the minor child previously awarded to the wife from the jurisdictional limits of the state for a period of 238 days. The trial judge found the defendant husband guilty of 238 separate acts of contempt and imposed a fine of $50 and imprisonment of five days on each of the 238 contempt charges against the husband, or a total of $11,900 fine and confinement in jail for over three years. On appeal to the Court of Appeals, it was held that the cumulative result and effect of the judgment was excessive, cruel, and unusual, and contrary to the spirit of the law of the state, and against the policy of the law of the state, and directed that the sentence be set aside and the defendant be resentenced. The trial judge then adjudged the defendant husband guilty of 238 separate acts of contempt and imposed a fine of $20 and imprisonment of two days on each of the 238 contempt charges, or a total of one year, three months, and twenty-one days imprisonment, and a fine of $4,760.

The defendant again appealed from the judgment of the trial judge and the Court of Appeals again reversed the trial judge on the ground that the sentence was still excessive. The Court of Appeals conditionally affirmed

---

17. 207 Ga. 34, 59 S.E.2d 912 (1950).
18. Robertson v. Robertson, 207 Ga. 686, 63 S.E.2d 876 (1951) (the verdict for permanent alimony under the facts was grossly excessive); Boozer v. Boozer, 207 Ga. 52, 60 S.E.2d 150 (1950) (permanent alimony in this case was held not to be excessive); Brannen v. Brannen, 208 Ga. 88, 65 S.E.2d 161 (1951) (the award of temporary alimony by the trial judge was not an abuse of the discretion of the judge and was upheld); Johnson v. Johnson, 207 Ga. 508, 62 S.E.2d 908 (1951) (the trial judge did not abuse his discretion in refusing to modify the order allowing temporary alimony).
19. Moore v. Moore, 207 Ga. 335, 61 S.E.2d 500 (1950) (an award of temporary alimony may be enforced by contempt proceedings even after a final verdict is rendered disallowing permanent alimony); Simmons v. Simmons, 208 Ga. 51, 64 S.E.2d 896 (1951) (judgment of lower court holding defendant in contempt for failure to comply with the judgment awarding alimony was affirmed by the Supreme Court, it not being conclusively shown that defendant was not able to comply); Johnson v. Johnson, 207 Ga. 509, 62 S.E.2d 909 (1951) (judgment of lower court holding defendant in contempt for nonpayment of temporary alimony was reversed where the uncontradicted evidence showed the inability of the husband to comply with the order).
20. 81 Ga. App. 437, 59 S.E.2d 296 (1950).

the judgment of the trial court on the condition that the maximum sentence be set at forty days in jail and the maximum fine be set at $400.[21]

The question of custody of minor children is usually the most contested issue between the parties in a domestic relations case, and the determination of custody of minor children must be decided on the basis of what is in the best interest of the children and what will best promote their welfare and happiness.[22]

In the case of *Savannah Bank & Trust Co. v. Hanley*,[23] it was held that a contract between a third person and a mother that the third person would leave her entire estate by will to the mother in consideration of the allowance of the adoption of the child of the mother by the third person was void as against public policy.

The case of *Burton v. Furcron*[24] is an interesting case concerning the finality of a custody award of children. In this case, even though the decree provided that it was "for the present" and that "this court retains jurisdiction for the purpose of determining permanent custody of the children," such provisions did not divest the award of custody of its finality, and the court did not retain exclusive jurisdiction over the custody of the children where a change of condition affecting their welfare occurred.

In the case of *Briggs v. Briggs*[25] the court held that service by publication upon the nonresident defendant in an equitable proceeding seeking to modify a custody decree was insufficient to subject the nonresident defendant to the jurisdiction of the court.

The case of *Brinson v. Jenkins*[26] is an interesting case dealing with custody of children and jurisdiction of further proceedings in regard to custody. In this case, a suit was brought for divorce, alimony and custody, and on the interlocutory hearing custody of the minor child was awarded to the wife. Upon the final judgment granting a divorce and alimony, no mention was made of custody of the minor child, however, the decree provided that the husband shall pay to the wife a certain sum of money as permanent alimony and support of the minor child. It was held that the final decree was construed to have granted the permanent custody of the minor child to the wife, and that any further proceedings involving the custody of the child must thereafter be brought in the county of the residence of the defendant.

During the past year, there have been two cases decided concerning

21. 83 Ga. App. 264, 63 S.E.2d 280 (1951).
22. Cons v. Wipert, 207 Ga. 621, 63 S.E.2d 370 (1951) (the trial judge did not abuse his discretion in awarding the child to the foster parents); Carney v. Franklin, 207 Ga. 39, 59 S.E.2d 909 (1950) (the court can only consider the change of circumstances or conditions affecting the welfare of the child occurring subsequent to the decree awarding the custody. The judgment of the lower court changing the custody of the minor child was unauthorized and was reversed); McLain v. Smith, 207 Ga. 641, 63 S.E.2d 663 (1951) (the father lost his parental control over the children where he failed to provide them with necessaries); Everett v. Sharpe, 207 Ga. 502, 63 S.E.2d 1 (1951) (it was erroneous for the trial judge to base his judgment in part upon documents which were excluded and which were not in evidence).
23. 208 Ga. 34, 65 S.E.2d 26 (1951).
24. 207 Ga. 637, 63 S.E.2d 650 (1951).
25. 207 Ga. 614, 63 S.E.2d 371 (1951).
26. 207 Ga. 218, 60 S.E.2d 440 (1950).

liability of husband and wife on contracts with third persons. In the case of *Garrard v. McCaskill*[27] the Court of Appeals held that the wife became liable as an original undertaker where she voluntarily entered into a contract with another to render nursing services for her husband. In the case of *Bland v. Davison-Paxon Co.*,[28] the court held that the husband was liable for necessaries furnished by a third person to the wife while living together, or after they were separated, without the husband making provision for the wife's support and prior to the award of temporary alimony to the wife.

The case of *Bowers v. Bowers*[29] was a proceeding to partition real estate. Defendant and her husband were previously divorced, and the agreement, that was made the order of the court, provided that if either party desired to sell his interest in certain joint property owned by the defendant and her husband, that the other would have the right to purchase the same. Thereafter, the plaintiff acquired by deed of gift the one-half interest of the husband, and brought a suit to partition the real estate. The court held that the plaintiff took the land with notice of the contract and the judgment of the court in regard to the property and denied the petition of the plaintiff to partition the real estate, and required the plaintiff, however, to sell her one-half interest to the defendant.

In the case of *Combs v. Spurling*[30] the Court of Appeals held that where a husband and wife are living together, and there is no legal separation at the time of her death, the right to the possession of the household effects is in the husband. An alleged parol gift of the household furnishings by the wife shortly prior to her death to her brother, there being no delivery thereof to the brother, was not sufficient to establish title to the property in the brother as against the husband.

The case of *Harrison v. Harrison*[31] is a very interesting case involving the award of attorney's fees for representing the wife in a suit for divorce and alimony. In this case, the Supreme Court held that after a divorce is granted and permanent alimony awarded to the wife, and a final decree entered, which, on review, is affirmed by the appellate court, the trial court is thereafter without jurisdiction to award additional attorney's fees for services rendered by her counsel in the prosecution and preparation of her motion to set aside the verdict and decree and of a writ of error in the Supreme Court to review the judgment overruling such motion.

In *Thomas v. Hubert*[32] the plaintiff brought a rule for contempt against his client, who was plaintiff in a divorce and injunction proceeding, and against another member of the bar who had appeared for the plaintiff in the trial of that case. The Supreme Court transferred the case to the Court of Appeals, holding that the rule for contempt was not part of the divorce and injunction suit and therefore, the Supreme Court did not have jurisdiction of the writ of error.

---

27. 83 Ga. App. 572, 64 S.E.2d 210 (1951).
28. 83 Ga. App. 468, 64 S.E.2d 350 (1951).
29. 208 Ga. 85, 65 S.E.2d 153 (1951).
30. 83 Ga. App. 854, 65 S.E.2d 63 (1951).
31. 208 Ga. 70, 65 S.E.2d 173 (1951).
32. 208 Ga. 72, 65 S.E.2d 155 (1951).

During the past year the Court of Appeals decided two cases involving guardians and wards.[33]

In the case of *Binford v. Reid*[34] the Court of Appeals held that the trial judge did not abuse his discretion in granting the petition to change the name of the minor child of the plaintiff and defendant, where the defendant had remarried and had possession and custody of the child.

---

33. Wimberly v. Wimberly, 82 Ga. App. 539, 61 S.E.2d 508 (1950) (it is a question for the jury whether affidavits supporting petition for appointment of a guardian were those of respectable and disinterested persons); Tucker v. Lea, 83 Ga. App. 207, 63 S.E.2d 252 (1951) (objections to final settlement account of guardian by ward must show which items of the returns are incorrect and grounds therefor).
34. 83 Ga. App. 280, 63 S.E.2d 345 (1951).