Domestic Relations

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The law of domestic relations is an attempt to manage the lives of numerous, divergent family members who more than likely differ in their familial values. Much of this body of law is the result of history, but today the marital relationship seems to be changing in a revolutionary manner. In Georgia in 1978 there was approximately 1 divorce for every 2.16 marriages.[1]

This survey of domestic relations law covers cases from 149 Ga. App. 595 to 153 Ga. App. 742, and from 243 Ga. 436 to 245 Ga. 628. However, only the most noteworthy are discussed here, and for analytical purposes they have been categorized as follows: divorce, alimony, custody and adoption. A section on legislation concludes the article.

I. Divorce

What is an uncontested divorce? In *Hardwick v. Hardwick*,[2] the supreme court answered this question by ruling that an uncontested divorce is by definition a divorce granted when a defendant fails to file defensive pleadings. Furthermore, the failure to file defensive pleadings constitutes a waiver of notice of the hearing on the final decree under Georgia Code Ann. section 81A-105(a).[3]

Several cases have presented the issue as to whether a judgment of a foreign jurisdiction was entitled to full faith and credit in Georgia. Perhaps the most noteworthy of these cases is *Cannon v. Cannon*,[4] wherein the supreme court held that the foreign judgment was entitled to full

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1. Total number of 1978 Georgia marriages and divorces was 68,171 and 31,554, respectively. Source: State of Georgia Dept. of Vital Records.
2. 245 Ga. 570, 266 S.E.2d 184 (1980).
3. Ga. Code Ann. § 81A-105(a) (1977).
4. 244 Ga. 299, 260 S.E.2d 19 (1979).

faith and credit, notwithstanding the fact that a provision in the marriage settlement agreement contained a provision not to contest a later divorce. Although such a provision is void as against the public policy of Georgia,[5] the court held that the foreign judgment was nevertheless entitled to full faith and credit, since "local policy considerations must give way to this constitutional provision."[6]

II. ALIMONY

A. *The Obligation*

Georgia's recently amended alimony statute[7] now places an obligation upon either party for the other party's support when living separate. No longer is alimony the unilateral obligation of the husband. If it is established by a preponderance of the evidence that the separation was caused by a party's adultery or desertion, that party is not entitled to alimony. Moreover, evidence of one party's conduct toward the other party must be considered by the court in determining whether or not to grant alimony. Thus, the factual cause of the separation must be reviewed by the court if either party is seeking alimony, regardless of the grounds upon which the divorce is sought.[8]

The trial court in *Davidson v. Davidson*[9] provided in its consent order that the wife was entitled to alimony, with the amount to be determined later. However, the court also provided that no evidence as to fault would be offered or admitted. Upon the wife's exception to the latter portion of the order, the supreme court reversed on the basis of its holding in *Bryan v. Bryan*.[10] *Bryan* was found applicable despite the fact that it was decided prior to the elimination of gender in Georgia Code Ann. section 30-201.[11] Three considerations *vis a' vis* alimony and conduct, according to *Bryan* and *Davidson*, must be considered:

> 1. [I]s [A] barred entirely by adultery or desertion?
> 2. [I]f not, the decision whether to grant [A] alimony should be made considering the factual cause of the separation and considering [B's] conduct toward [A]; and finally
> 3. the amount of alimony should be set considering the factual cause of the separation, the [obligee's] need and the [obligor's] ability to pay.[12]

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5. Birch v. Anthony, 109 Ga. 349, 34 S.E. 561 (1899).
6. 244 Ga. at 299, 260 S.E.2d at 20.
7. GA. CODE ANN. § 30-201 (Supp. 1979).
8. *Id.*
9. 243 Ga. 848, 257 S.E.2d 269 (1979).
10. 242 Ga. 826, 251 S.E.2d 566 (1979).
11. GA. CODE ANN. § 30-201 (1979).
12. 242 Ga. at 827, 251 S.E.2d at 568.

The effect of remarriage by one spouse upon that party's right to recover periodic payments or a lump sum alimony award was considered in *Gladney v. Bearden*[13] and *Edwards v. Edwards.*[14] In *Gladney,* the wife had remarried after entry of the final judgment and decree of divorce but before the denial of the husband's motion for new trial. The husband, relying on *Coleman v. Coleman*[15] and *Kristensen v. Kristensen,*[16] contended that her remarriage at this time barred her right to recover periodic payments of the lump sum award of alimony as provided for in the final judgment and decree. The court held that the wife's remarriage at that time did not bar her right to receive alimony. *Coleman* and *Kristensen* were distinguished as pertaining only to remarriage *before* the entry of the final judgment and decree, and hence were inapplicable where the decree had already been entered before the wife's remarriage. A similar question was presented in *Edwards,* wherein the wife was awarded as alimony a small portion of a larger tract of land. Since a delay for a survey of the land was necessary, the divorce decree was not entered until some fifteen months later. During this period the wife remarried. The supreme court, in affirming the lower court's ruling that the wife's subsequent remarriage was invalid because the divorce decree had not been signed, held that the wife was entitled to her alimony.

Whether or not both parties may be allowed to receive alimony is likely to be the subject of future litigation. In this regard, *Reaves v. Reaves*[17] is of particular significance. Previous decisions have been to the effect that alimony should be awarded to one spouse on the basis of the other spouse's ability to pay. However, in *Reaves* the supreme court upheld an award to the husband of a monetary amount plus the wife's one-half undivided interest in the residence as an equitable division of property.[18] Many attorneys are presently including in divorce complaints a prayer for an equitable division of property in addition to alimony. Furthermore, many trial courts are now submitting verdict forms to the jury whereby the jury may deny alimony to either party, but may still equitably divide the jointly owned property.

Construction of language found in marriage settlement agreements has become a major source of controversy at the appellate level. Language designating minor children as beneficiaries under life insurance policies was the subject faced by the court in *Curtis v. Curtis.*[19] The agreement

13. 244 Ga. 208, 259 S.E.2d 462 (1979).
14. 244 Ga. 17, 257 S.E.2d 524 (1979).
15. 240 Ga. 417, 240 S.E.2d 870 (1978).
16. 240 Ga. 670, 242 S.E.2d 132 (1978).
17. 244 Ga. 102, 259 S.E.2d 52 (1979).
18. The court expressly stated that this was not alimony. *Id.* at 103, 259 S.E.2d at 53.
19. 243 Ga. 611, 255 S.E.2d 693 (1979).

required the father to list the three minor children as beneficiaries on his group life insurance that he had in effect at the time the agreement was executed. The problem arose because there was no provision in the agreement requiring the father to obtain equal or equivalent insurance in the event he changed employers or insurance companies. His employer changed the group life insurance carrier and the father listed his mother as the beneficiary on the new policy prior to his death. The court properly extended the language in the marriage settlement agreement to hold that when a policy of life insurance replaces the policy or amount specified in the agreement, the minor's vested interest in the prior policy applies to the replacement policy.

In *Shure v. Shure*,[20] the court construed language in an agreement obligating the father to pay for the child's college education when the college was mutually agreed upon by the child and the father as including expenses incurred by the child at a technical school. The court found the father liable for the child's expenses incurred in attending a dental assistant school because the father had discussed this choice with the child and had helped her gain admission. Likewise, in *Hancock v. Hancock*,[21] a liberal construction was applied to a settlement agreement obligating the father to pay for a child's attendance at a private school. The court construed the language as requiring the father to pay for the child's lunch and transportation expenses, despite the fact that the wife's attorney's office typed the agreement in final form. This latter fact was considered to make no difference because both parties were represented by counsel.

B. Enforcement of the Obligation

While most trial courts use civil contempt as a method of enforcing compliance, many courts are resorting to the remedy of criminal contempt. The latter remedy was used in *Hopkins v. Hopkins*,[22] where the father was jailed for two successive weekends for his failure to make timely payments of alimony and child support after having been ordered to do so. At the time of the contempt hearing the father was current in his support payments. The supreme court noted that the device of criminal contempt with unconditional imprisonment may be used to preserve the authority of the trial court and to punish the contemnor for disobedience of its orders. Full payment at the time of the hearing was therefore not a defense because the trial court was punishing the father for his past failure to comply with its order.

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20. 243 Ga. 695, 256 S.E.2d 375 (1979).
21. 243 Ga. 524, 255 S.E.2d 45 (1979).
22. 244 Ga. 66, 257 S.E.2d 900 (1979).

In *Martin v. Martin*,[23] the supreme court held that a trial court may exercise its contempt powers for acts occurring prior to the domestication of a foreign divorce decree. The court noted that contempt will lie for the failure to pay an alimony award even though the decree contains no specific command to pay,[24] and even though the violation of the foreign decree occurred prior to its domestication in Georgia.[25]

C. *Modification of the Obligation*

During the survey period there was an unusual amount of activity in the modification area. The two year limitation of Georgia Code Ann. section 30-220(a)[26] provided the battleground for several interesting cases. In *Harrison v. Speidel*,[27] the former husband had filed a petition for declaratory judgment against his former wife in DeKalb County, and the wife's counterclaim for modification of child support was dismissed for lack of jurisdiction. However, before the counterclaim was dismissed the wife had filed an original action in Fulton County, the husband's residence. The husband sought to have the latter action dismissed under the two year limitation inasmuch as it was filed within two years of the counterclaim for modification. The supreme court held that the two year limitation did not apply presumably due to the fact that the dismissal of the counterclaim for lack of jurisdiction related back to the time of filing, so that the filing of the counterclaim was treated as having never been made.

The two year limitation by its terms does not prohibit the bringing within two years of a Uniform Reciprocal Enforcement of Support Act (URESA)[28] revision of a prior URESA revision, since the URESA provisions are outside the applicable code sections,[29] according to *Konscol v. Konscol*.[30] However, the limitation does prohibit a revision petition under Georgia Code Ann. sections 30-220 to 225.1[31] within two years of a prior URESA action which had sought the same relief.[32]

In *Nash v. Nash*,[33] the court was asked to determine "whether the original award to the wife of $700.00 per month for eighty-four months was

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23. 244 Ga. 68, 257 S.E.2d 903 (1979).
24. *See* Griggers v. Bryant, 239 Ga. 244, 236 S.E.2d 599 (1977).
25. *See* Baker v. Baker, 243 Ga. 689, 256 S.E.2d 370 (1979).
26. "No petition may be filed by either former spouse under this law (GA. CODE ANN. §§ 30-220 to -225.1 (Supp. 1979)) within a period of two years from the date of the filing of the previous petition by the same former spouse."
27. 244 Ga. 643, 261 S.E.2d 577 (1979).
28. GA. CODE ANN. ch. 99-9A (Supp. 1980).
29. GA. CODE ANN. §§ 30-220 to -225.1 (Supp. 1979).
30. 150 Ga. App. 696, 258 S.E.2d 326 (1979).
31. GA. CODE ANN. §§ 30-220 to -225.1 (Supp. 1979).
32. Lamb v. Lamb, 241 Ga. 545, 246 S.E.2d 665 (1978).
33. 244 Ga. 749, 262 S.E.2d 64 (1979).

permanent alimony payable periodically and hence subject to revision under Georgia Code Ann. section 30-220, or was an award from the corpus of the husband's estate (payable periodically) and hence not subject to such revision."[34] Justice Hill announced the following formula for deciding whether a revision is permitted where the decree or alimony trial transcript does not show to the contrary:

> (a) A decree specifying periodic payments for an uncertain time (*e.g.*, until death or remarriage) with no indication of gross amount is alimony and is revisable;
> (b) A decree specifying periodic payments for a given time with no indication of gross amount other than by multiplying the amount due by the number of the payment periods is alimony and is revisable;
> (c) A decree specifying periodic payments to be made until a given sum (*i.e.*, an amount stated) has been paid is division of property or payment of corpus and is not revisable (citations omitted).[35]

Since *Nash* fell within category (b), the original award was revisable even though the gross amount ($58,800.00) could be readily determined so as to be the equivalent of a category (c) award. However, the court found that

> the express inclusion of the given sum or gross amount in category (c) is indicative of the intent of the fact finder, or parties as the case may be, that the recipient of the award receive the sum stated without termination in the event of remarriage, etc., whereas the contrary intent is indicated when no gross amount is given.[36]

The practitioner would be well advised to have the court inquire as to the intent of the jury before the jury is dispersed if an award by the jury does not show the gross amount. The court in *Nash* further held that a group award ($800.00 per month for all the children) could properly be modified into a per capita award according to the recipients' needs as an incident of the alimony modification proceeding.[37]

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34. *Id.* at 749, 262 S.E.2d at 65. Awards from the corpus of the estate are not subject to revision. GA. CODE ANN. § 30-222 (Supp. 1979).

35. *Id.* at 750, 262 S.E.2d at 65.

36. *Id.* at 750-51, 262 S.E.2d at 65-66.

37. *Id.* at 752. 262 S.E.2d at 66-67. Trial courts as a result of *Nash* "will have the authority in Code § 30-220 modification proceedings, where a change in financial condition has been shown, to revise the amount of periodic alimony payments and to change a group award into a per capita award." *Id.* at 753, 262 S.E.2d at 67. The trial court may not add in the modification proceeding a condition that was not part of the original decree. Ausbon v. Ausbon, 231 Ga. 679, 203 S.E.2d 484 (1974).

D. Property Division

The supreme court addressed the resulting or implied trust theory in three significant cases during the survey period. In *Ford v. Ford*,[38] the issue was whether the grantor must show that a resulting trust was contemplated by way of an agreement between the parties, or whether the payor-grantor's intent was sufficient, in order to rebut the presumption of a gift under Georgia Code Ann. section 108-116.[39] Relying on *Talmadge v. Talmadge*,[40] the husband had contended that the intent of the parties at the time of the transaction was a jury question, and therefore the trial court had erred in directing a verdict that the parties' residence, titled in the wife's name, was a gift to the wife which she held in fee simple. The husband had testified that the residence was so titled to protect the property from prospective creditors, and that it was his intention to maintain a joint interest in the property. The court, after distinguishing *Talmadge* as a case involving evidence establishing a prior course of dealing between the parties, followed the test announced in *Scales v. Scales*[41] and *Adderholt v. Adderholt*[42] that there must be shown an agreement between the parties to establish a resulting trust.[43]

In *Woodward v. Woodward*,[44] the supreme court noted the conflicts between Georgia Code Ann. section 108-116[45] and Georgia Code Ann. section 53-506.[46] A portion of the proceeds from the sale of a prior, jointly titled home were used to purchase a condominium, which was titled in the husband's name. The question presented was whether the trial court's $3,600.00 award to the wife as "her interest in the condominium" was appropriate under the implied trust theory. The trial court had apparently found Georgia Code Ann. section 108-116 inapplicable. After exam-

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38. 243 Ga. 763, 256 S.E.2d 446 (1979).

39. GA. CODE ANN. § 108-116 (1979) provides:

> As between husband and wife, parent and child, and brothers and sisters, payment of purchase money by one, and causing the conveyance to be made to the other, shall be presumed to be a gift; but a resulting trust in favor of the one paying the money may be shown and the presumption rebutted.

40. 241 Ga. 609, 247 S.E.2d 61 (1978).

41. 235 Ga. 509, 220 S.E.2d 267 (1975).

42. 240 Ga. 626, 242 S.E.2d 11 (1978).

43. A strong dissent by Hall, J., and Nichols, C.J., correctly argued that the proper inquiry should focus on the payor's intent in establishing a resulting trust. The dissent pointed out that the majority confuses the requirements for an express trust with those for a resulting trust. *See* RESTATEMENT (SECOND) OF TRUSTS § 443 (1959).

44. 245 Ga. 550, 266 S.E.2d 170 (1980).

45. *See* note 39 *supra*.

46. GA. CODE ANN. § 53-506 (1974) provides: "A wife may give property to her husband, but a gift will not be presumed. The evidence to support it must be clear and unequivocal, and the intention of the parties must be free from doubt."

ining the code sections' respective common law origins, the court affirmed the lower court's ruling because the husband used the wife's one-half interest in the money to take in *his own name,* rather than placing title in *another's* name as would be required under Georgia Code Ann. section 108-116.

In a factual pattern similar to *Woodward,* the court in *Braly v. Braly*[47] noted the different standards of proof required under Georgia Code Ann. section 108-116 and Georgia Code Ann. section 53-506. Under the latter cited code section, the evidence to support a gift to the husband[48] "must be clear and unequivocal, and the intention of the parties must be free from doubt,"[49] while the proof necessary to rebut the presumption of a gift from husband to wife and establish an implied trust is controlled by *Adderholt*[50] and *Talmadge.*[51]

III. CUSTODY

A. *Parent v. Parent*

Under Georgia Code Ann. section 30-126[52] a trial judge may modify visitation rights once in each two year period following the date of the entry of the judgment without any showing of a change in conditions or circumstances.[53] Moreover, a trial court may provide that the custodial parent has forfeited his right to custody by his subsequent conduct.[54] Finally, since the enactment of the Uniform Child Custody Jurisdiction Act,[55] the trial courts have the authority to enforce custody provisions and to allow recovery of attorney's fees and traveling expenses of the custodial parent.[56]

In *Gambrell v. Gambrell,*[57] the supreme court held that full faith and credit will not be given to a foreign decree where custody of the child was

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47. 244 Ga. 773, 262 S.E.2d 94 (1979).

48. Even through *Braly* appeared to have been based on the sex of the donor of the alleged gift, its decision was reaffirmed by the court in Woodward v. Woodward, 245 Ga. 550, 554, 266 S.E.2d 170, 170 (1980).

49. GA. CODE ANN. § 53-506 (1974).

50. Adderholt v. Adderholt, 240 Ga. 626, 242 S.E.2d 11 (1978).

51. Talmadge v. Talmadge, 241 Ga. 609, 247 S.E.2d 61 (1978). *See* discussion of Ford v. Ford at text accompanying n. 38 for the applicable standard of proof.

52. GA. CODE ANN. § 30-126 (1979).

53. Stephens v. Stephens, 244 Ga. 467, 260 S.E.2d 864 (1979).

54. For a bizzare factual situation in this regard, *see* Fortson v. Fortson, 152 Ga. App. 326, 262 S.E.2d 599 (1979).

55. GA. CODE ANN. ch. 74-5 (Supp. 1980).

56. GA. CODE ANN. § 74-516(b) (Supp. 1980); Harvey v. Harvey, 244 Ga. 199, 259 S.E.2d 456 (1979).

57. 244 Ga. 178, 259 S.E.2d 439 (1979).

awarded without the child's presence in the foreign state and service was made by publication. The foreign state had awarded custody to the mother, although the child was not present there. In the mother's habeas corpus action in Georgia, the trial court granted the father's counterclaim for custody. Because the mother was not the child's legal custodian, the rule requiring that suits for change of custody be litigated in the custodial parent's domicile[58] did not apply, and the habeas court therefore had authority to entertain the father's counterclaim for custody.

B. Parent v. Third Party

In many cases the custodial parent may by written contract or oral agreement grant temporary custody of a minor child to a third party, who most often are grandparents. After surrendering temporary custody, conflicts usually arise and the courts are called upon to determine whether or not the agreement is enforceable. In *Harbin v. Sandlin*,[59] the supreme court ruled that in order to find the custodial parent to have relinquished all of her parental rights, the agreement must be certain and definite. Moreover, the court of appeals has recently held that the issue of child custody may be reopened as a "change in circumstance" where the custodial parent has voluntarily relinquished custody to a third party for a period of three years.[60]

In *Salim v. Salim*,[61] a highly publicized case, the mother had obtained a temporary order (presumably entered *ex parte*) which enjoined the husband from removing the parties' minor child beyond the court's jurisdiction. On the same day that the order was signed, the husband took the child to his relatives in Pakistan. Thereafter, the wife's petition for habeas corpus along with the temporary hearing resulted in an order confining the husband to jail until the child was returned to the wife. The supreme court noted that venue in habeas corpus actions under Georgia Code Ann. section 50-103[62] is proper in "the circuit where the illegal detention exists,"[63] which has been construed to mean the circuit where control over the child is exercised.[64] The court held that since the husband "exercised ultimate control over the child by virtue of the agency of the family in Pakistan, venue was proper in" the county where he lived.[65]

58. *See* Matthews v. Matthews, 238 Ga. 201, 232 S.E.2d 76 (1977).
59. 243 Ga. 677, 256 S.E.2d 360 (1979).
60. Thompson v. Thompson, 153 Ga. App. 80, 264 S.E.2d 558 (1980).
61. 244 Ga. 513, 260 S.E.2d 894 (1979).
62. GA. CODE ANN. § 50-103 (1979).
63. 244 Ga. at 514, 260 S.E.2d at 896, *quoting* GA. CODE ANN. § 50-103 (1979).
64. *See* Fielder v. Sadla, 193 Ga. 268, 18 S.E.2d 486 (1942).
65. 244 Ga. at 514, 260 S.E.2d at 896. The trial court was also authorized to incarcerate the husband until the child was returned to the wife, pursuant to GA. CODE ANN. § 50-115

C. *Enforcement of Custody Awards*

Appellate courts have continued to uphold a trial court's enforcement of custody awards.[66] In *Andrews v. Cromer*,[67] the wife had held the child beyond her visitation period and had failed to return the child. The supreme court, relying on *Fields v. Fields*,[68] affirmed the trial court's decision holding the wife in criminal contempt of court for retaining the child beyond the visitation period.

IV. ADOPTION

Department of Human Resources v. Ledbetter,[69] dealt with interim custody after termination of the father's parental rights. After the mother's death, the three minor children were "virtually adopted" by her aunt and uncle, who acted as "grandparents." When the father sought voluntarily to release his parental rights to the Department of Human Resources, the "grandparents" sought to intervene and have the children placed in their permanent custody. The trial court construed the phrase "other suitable measures for the care and welfare of the child" in Georgia Code Ann. section 24A-3204(a),[70] as giving the court power to place the children directly with an adopting family, and effectually allowed the "grandparents" the right to intervene. However, the trial court did not rule finally to terminate the father's parental rights or to allow adoption by the "grandparents." The court of appeals in reversing the trial court concluded that the "court should seek to place custody first with the Department of Human Resources, then with a licensed child-placing agency, then in a foster home, and lastly in some other undesignated receiver."[71] The court noted that if the trial court's order were taken literally, the latter would be making itself, rather than the Department of Family and Children Services, the adoption-placing authority, which is contrary to

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(1979).

66. *See* cases cited in McGough and McGough, *Annual Survey of Georgia Law: Domestic Relations*, 30 MERCER L. REV. 59, 71 (1978).

67. 243 Ga. 472, 255 S.E.2d 18 (1979).

68. 240 Ga. 173, 240 S.E.2d 58 (1977).

69. 153 Ga. App. 416, 265 S.E.2d 337 (1980).

70. GA. CODE ANN. § 24A-3204(a) (1976). This code section provides in pertinent part:

> (a) If, upon entering an order terminating the parental rights of a parent, there is no parent having parental rights, the court shall commit the child to the custody of the *Division of Children and Youth* or a *licensed child-placing agency*, willing to accept custody for the purpose of placing the child for adoption, or in the absence thereof in a *foster home* or take *other suitable measures* for the care and welfare of the child. . . .

(emphasis supplied).

71. 153 Ga. App. at 418, 265 S.E.2d at 339.

statute.[72]

V. LEGISLATION

Effective April 1, 1980, Georgia Code Ann. Chapter 74-3[73] provides for the determination of paternity. Jurisdiction is vested concurrently in the state and superior courts in all proceedings for the determination of paternity of a child who is a resident of this state,[74] and proceedings may be held in closed courts in the interest of confidentiality.[75] The child must be made a party to the action and must be represented by a guardian ad litem.[76] Of significance is the fact that the court may order the parties to submit to blood tests, including human leucocyte antigen (HLA) testing, and this order is enforceable by contempt.[77] Medical test results are admissible in the same manner as other expert testimony.[78] Finally, the court's decree on the paternity issue may in addition include an order for support payments and may specify visitation privileges,[79] which may be enforced or modified as in divorce proceedings.[80]

72. GA. CODE ANN. §§ 99-211 to -214 (1976).
73. GA. CODE ANN. ch. 74-3 (Supp. 1980).
74. GA. CODE ANN. § 74-301 (Supp. 1980).
75. GA. CODE ANN. § 74-314 (Supp. 1980).
76. GA. CODE ANN. § 74-305(a) (Supp. 1980).
77. GA. CODE ANN. § 74-306 (Supp. 1980).
78. GA. CODE ANN. § 74-307 (Supp. 1980).
79. GA. CODE ANN. § 74-312 (Supp. 1980).
80. GA. CODE ANN. § 74-313(b) (Supp. 1980).