Domestic Relations

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The new discretionary appeal procedure in Georgia accomplished its intended effect of reducing the caseload of Georgia's appellate courts.[1] This new procedure, which has apparently caught many attorneys by surprise when their appeals have been dismissed, must clearly be understood by the practitioner. The purpose behind this legislation

> was to give the appellate courts (the Supreme Court in divorce and alimony cases and the Court of Appeals in child custody cases) the discretion not to entertain an appeal where the superior or juvenile court had made a decision as to divorce, alimony, child custody or contempt, the latter three of which are in large part discretionary and yet frequently appealed by the losing spouse.[2]

This procedure applies to all appeals in the subject areas, whether the judgment be final, interlocutory, or summary.[3]

Illustrative of the trap set for the unwary is *Walters v. Walters*,[4] in which the former husband, having been found in contempt of court for his failure to comply with certain terms of a domestic relations decree, filed a notice of appeal from the contempt judgment. His appeal was dis-

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1. Georgia Code Ann. section 6-701.1 (Supp. 1981) requires all appeals in the following cases to be made by application in the nature of a petition enumerating the errors to be urged on appeal: "[j]udgments or orders granting or refusing a divorce or temporary or permanent alimony, awarding or refusing to change child custody, or holding or declining to hold persons in contempt of such alimony or child custody judgment or orders." GA. CODE ANN. § 6-701.1(a)(2) (Supp. 1981).
2. Citizens & S. Nat'l Bank v. Rayle, 246 Ga. 727, 730, 273 S.E.2d 139, 142 (1980).
3. *Id.* at 730, 273 S.E.2d at 142.
4. 245 Ga. 695, 266 S.E.2d 507 (1980).

missed since he failed to secure the prerequisite application for appeal. Similarly, in *Chandler v. Cochran*,[5] after the former husband had been found in contempt of a divorce decree, he moved to set aside the contempt judgment after the time limit to perfect an appeal had expired. The trial court granted the former wife's motion for summary judgment. Predictably, the husband's appeal was dismissed because he failed to file an application for appeal. The court noted that although this was an appeal of a summary judgment concerning a motion to set aside a contempt judgment, "[f]or legal purposes, this is the same as an appeal from an order holding the appellant in contempt. . . ."[6] In *Reno v. Reno*,[7] plaintiff appealed after defendant was given a directed verdict following a hearing on jurisdiction and venue in plaintiff's complaint for divorce. In dismissing the appeal, the supreme court noted that the granting of a directed verdict to defendant concluded the litigation and, therefore, amounted to a refusal to grant a divorce.

In *Bedford v. Bedford*,[8] the supreme court affirmed the grants to appellee of a partial summary judgment on the issue of a settlement agreement and a summary judgment on other issues including property division. Appellant argued that jurisdiction was not based on divorce, but was actually founded on equity because of the theory of equitable division of property.[9] The court rejected that argument, stating that the theory of equitable division of property arises from the marital relationship.[10] In *Dunn v. Dunn*,[11] the court ruled that divorce is also the underlying subject matter when a common-law marriage is alleged, even though the issue of whether such a marriage existed was never reached because of the granting of a motion for summary judgment to the other party based on an equitable defense.

An exception to the discretionary appeal requirement is a habeas corpus order that a child be returned to its lawful custodian. This order is not an order awarding child custody within the meaning of Georgia Code Ann. section 6-701.1(a)(2).[12]

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5. 247 Ga. 171, 275 S.E.2d 657 (1981).

6. *Id.* at 172, 275 S.E.2d at 657; *accord*, Hanes v. Hanes, 247 Ga. 305, 276 S.E.2d 4 (1981), Fields v. Fields, 247 Ga. 437, 276 S.E.2d 614 (1981).

7. 245 Ga. 792, 267 S.E.2d 221 (1980).

8. 246 Ga. 780, 273 S.E.2d 167 (1980).

9. *See* text accompanying note 70 *infra*.

10. 246 Ga. at 781, 273 S.E.2d at 168.

11. 247 Ga. 327, 277 S.E.2d 241 (1981).

12. Bryant v. Wigley, 246 Ga. 155, 269 S.E.2d 418 (1980) (interpreting GA. CODE ANN. § 6-701.1(a)(2) (Supp. 1981)).

I. DIVORCE

The rule in *Hardwick v. Hardwick*,[13] established that when a defendant fails to file defensive pleadings, the divorce is uncontested and the failure to file constitutes a waiver of notice and hearing on the taking of the final decree.[14] This rule was extended in *Herring v. Herring*[15] to apply to claims for divorce arising by way of counterclaim. In *Herring*, the wife had filed for separate maintenance and her husband had counterclaimed for divorce. The court granted an uncontested divorce. Approximately seventeen months after the wife learned of her husband's remarriage, she filed a motion to set aside the judgment of divorce as void for improper venue. Although venue requirements cannot be waived,[16] the supreme court followed the rule that

> where the record shows that the parties affirmatively conceded and confirmed the jurisdiction of the court with respect to the person and subject matter, and the court rendered a divorce decree in the case, neither party can thereafter attack the decree as being void for lack of jurisdiction over the person or the subject matter.[17]

The court found that since the wife had submitted herself to the court's jurisdiction regarding her main claim and had elected not to contest her husband's counterclaim for divorce, she had submitted herself, at least passively, to the court's jurisdiction regarding the counterclaim for divorce. Furthermore, the wife failed to proceed promptly following the decree to set aside the divorce. Finally, her affirmative course of conduct, which her husband relied upon, worked as an estoppel.

The question of estoppel was also considered in *Crowe v. Crowe*,[18] in which the trial court found that the parties' actions constituted a fraud upon the court by obtaining a decree when the court had no jurisdiction, and that neither was entitled to relief since both parties had unclean hands. The trial court, however, granted the moving party relief, in effect, by setting aside the judgment of divorce. The supreme court reversed, holding that the movant was not entitled to relief because she had unclean hands, and that the trial court did not have any inherent authority to set aside the judgment after its term of court.

The supreme court, in *Joiner v. Joiner*,[19] refused to extend the rule of

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13. 245 Ga. 570, 266 S.E.2d 184 (1980).
14. *Id.* at 571, 266 S.E.2d at 185; *see* GA. CODE ANN. § 81A-105(a) (1977).
15. 246 Ga. 462, 271 S.E.2d 857 (1980).
16. Buford v. Buford, 231 Ga. 9, 12, 200 S.E.2d 97, 99 (1973).
17. 246 Ga. at 462, 271 S.E.2d at 859 (quoting Johnson v. Johnson, 230 Ga. 204, 206, 196 S.E.2d 394, 396 (1973)); *accord*, Crowe v. Crowe, 245 Ga. 719, 267 S.E.2d 14 (1980).
18. 245 Ga. 719, 267 S.E.2d 14 (1980).
19. 246 Ga. 77, 268 S.E.2d 661 (1980).

Lindsay v. Lindsay,[20] which held that subsequent reconciliation and cohabitation will terminate the action in a no-fault divorce. *Joiner*, in contrast to *Lindsay*, involved a situation in which the former husband did not embark on the reconciliation in good faith; therefore, the divorce action remained viable.[21] In *Joiner*, the supreme court noted that *Lindsay* "presupposes that cohabitation was entered into freely and voluntarily" and that "[t]he physical resumption of martial relations is not the factor which nullifies the divorce petition", but is "the indication . . . that the marriage is not, after all, irretrievably broken."[22] The court declined to reach the question of whether the *Lindsay* rule would apply when both parties approached the reconciliation in good faith but the reconciliation later failed.[23]

In *Whittington v. Whittington*,[24] the supreme court followed its rule in *Dickson v. Dickson*[25] that summary judgment should be denied when one party in a divorce action moves for summary judgment on the question of a no-fault divorce, and the other party opposes by filing an affidavit which expresses that party's opinion that the marriage is not irretrievably broken and that there are genuine prospects for reconciliation.

II. ALIMONY

A. *The Obligation*

During the survey period, most domestic relations cases concerned the obligation of child support. In *James v. James*,[26] the supreme court considered whether a trial court may order the custodial parent to pay for the minor children's support while they are visiting with the other parent. The custodial parent argued that the trial court's order of support to the noncustodial parent for visitation days was an unauthorized child support

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20. 241 Ga. 166, 244 S.E.2d 8 (1978).

21. There was uncontradicted evidence before the trial court that the husband, the defendant in the divorce action, stated to his wife that the only reason for his enticing her to his county of residence was to obtain his child and to divorce the wife in his home county. 246 Ga. at 77, 268 S.E.2d at 662.

22. 246 Ga. at 78, 268 S.E.2d at 663.

23. The *Lindsay* requirement of filing a new complaint after a good faith reconciliation makes a legal game out of a no-fault divorce action. *See* Woods v. Woods, 241 Ga. 393, 393-94, 345 S.E.2d 651, 652 (1978) (Hill, J., dissenting). A practical application of the rules of civil procedure would allow the complainant to amend her complaint along with an affidavit setting forth new facts, and provide notice to the other party; the amendment would then relate back to the filing of the action. GA. CODE ANN. § 81A-115(c) (1977).

24. 247 Ga. 79, 274 S.E.2d 333 (1981).

25. 238 Ga. 672, 235 S.E.2d 479 (1977).

26. 246 Ga. 233, 271 S.E.2d 151 (1980).

award to the noncustodial parent. The supreme court held that the trial court, in the exercise of its discretion concerning the best interest of the child, may provide that the child's best interest requires money to be paid to the noncustodial parent to insure proper visitation.[27]

When a noncustodial parent is required to support the minor children pursuant to a decree, that party is allowed a credit for social security disability payments received by the custodial parent for the benefit of the children, according to the court in *Perteet v. Sumner*.[28]

In *Wimpey v. Pope*,[29] the supreme court considered whether certain payments pursuant to a divorce agreement constituted alimony or child support. The obligor, in addition to agreeing to a monthly amount for child support, had agreed to be equally responsible for the monthly payments on the mobile home where his wife and children lived. The parties had agreed that when full payment of the mobile home was made, title to it would be placed in the children's names. The supreme court affirmed the lower court's holding that the obligor's share of the mobile home payments were not terminated upon the obligee's remarriage,[30] because the payments were made to provide the children a place to live.[31]

A spouse is barred from testifying to any tendencies toward, or admissions or instances of, adulterous behavior on the part of the other spouse.[32] Since homosexual relations constitute adultery,[33] evidence of

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27. The court noted that Georgia Code Ann. section 30-207 (1980) does not specify that only noncustodial parents are required to pay child support. 246 Ga. at 233, 271 S.E.2d at 152.

28. 246 Ga. 182, 269 S.E.2d 453 (1980). The court reasoned that "[o]ne of the prime purposes of the Social Security Act is to provide a means for a disabled worker to meet his obligations during a period of disability." *Id.* at 182, 269 S.E.2d at 454. The court overruled *Kight v. Kight, 242 Ga. 563, 250 S.E.2d 451 (1978), to the extent that it contradicted Horton* v. Horton, 219 Ga. 177, 132 S.E.2d 200 (1963).

29. 246 Ga. 545, 272 S.E.2d 278 (1980).

30. The obligor asserted that these payments constituted alimony and were terminated upon the obligee's remarriage pursuant to Georgia Code Ann. section 30-209 (1980). The court noted that even if these payments were to benefit the obligee, they would constitute a property settlement because they were a fixed and an ascertainable amount. 246 Ga. at 546, 272 S.E.2d at 279. *See* Nash v. Nash, 244 Ga. 749, 262 S.E.2d 64 (1979). *See also* Cheeley & Cheeley, *Domestic Relations*, Annual Survey of Georgia Law, 1979-1980, 32 MERCER L. REV. 51, 55-56 (1980).

31. The decision was premised on the fact that at the time of the divorce the children held title to the land on which the mobile home was situated. The court also held that the *lower court erred in ordering the obligor to pay a share of the psychologist's bill* (the obligor had agreed to pay one-half of the medical expenses), because a psychologist does not provide medical care. 246 Ga. at 547, 272 S.E.2d at 280. *See* Rodgers v. Rodgers, 234 Ga. 463, 216 S.E.2d 322 (1975).

32. Bryan v. Bryan, 242 Ga. 826, 830, 251 S.E.2d 566, 569 (1979); *see* GA. CODE ANN. § 38-1606 (Supp. 1980).

33. *See* Owens v. Owens, 247 Ga. 139, 274 S.E.2d 484 (1981). "A person commits adul-

adulterous homosexual conduct of either spouse is admissible under Georgia Code Ann. section 30-201[34] only if it is offered through evidence other than the testimony of the parties.[35]

When part of a property settlement agreement, a party's consent to produce his income tax returns in the future (ostensibly to determine whether there is a need for modification of his or her obligation) does not violate the privilege against self-incrimination.[36] This privilege "can be voluntarily waived by property settlement agreement as to future income tax returns and financial information covering future financial events unknown at the time of entering into the contract."[37] Moreover, express notice of, or reference to, this waiver is not required when a party is represented by counsel.[38]

B. *Enforcement of the Obligation*

The original judgment of divorce in *Sanchez v. Pritchard*[39] made no mention of the disposition of certain items of personalty that were retained by the former wife. She subsequently brought a contempt action when her former husband failed to pay sums under the original decree. The supreme court ruled that the trial court had erred in conditioning payment upon the wife's returning the personalty to her husband.[40]

Contempt is not the only remedy available to enforce the obligor's obligation. In fact, garnishment and contempt may be pursued simultaneously according to the court of appeals in *Brodie v. Brodie*.[41] In *Brodie*, the trial court had determined in the contempt action that the obligor was in arrears by a certain amount and ordered him to purge himself by payments of a sum per month in addition to his regular payments. The obligee then began garnishment proceedings, and the obligor traversed, contending that the contempt order was res judicata to the amounts due and was still pending.[42] The supreme court held that the trial court erred in dismissing the garnishment action, because the contempt order that

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tery when he or she has sexual intercourse with a 'person' other than his or her spouse." *Id.* at 140, 274 S.E.2d at 485. *See also* GA. CODE ANN. § 26-2009 (1977).

34. Georgia Code Ann. section 30-201 (1980) provides, in pertinent part, that "[i]n all cases in which alimony is sought, the court shall receive evidence of the factual cause of the separation. . . ."

35. 247 Ga. at 140-41, 274 S.E.2d at 486.

36. Feig v. Feig, 246 Ga. 763, 272 S.E.2d 723 (1980).

37. *Id.* at 764, 272 S.E.2d at 724.

38. *Id.* at 764-65, 272 S.E.2d at 724.

39. 247 Ga. 26, 273 S.E.2d 613 (1981).

40. *Id.* at 26, 273 S.E.2d at 614; *see* Lindwall v. Lindwall, 242 Ga. 13, 247 S.E.2d 752 (1978).

41. 155 Ga. App. 593, 271 S.E.2d 725 (1980).

42. GA. CODE ANN. §§ 3-601, -607 (1975).

required certain payments on the arrearage did not preclude the independent garnishment remedy to collect the indebtedness.[43]

Although garnishment is an effective enforcement tool, the garnishing plaintiff must face the possibility that another creditor has priority. The court of appeals provided an excellent discussion of this situation in *Cale v. Cale*.[44] After the divorce decree obligated the husband to pay alimony and child support to the wife, a creditor obtained a judgment against the husband before the wife began her garnishment action. After the wife received her *fi. fa.* in the garnishment action, the judgment creditor filed her claim to a percentage of certain funds the garnishee had paid into the court.[45] Although the wife's *fi. fa.* was held to have related back to the date of the original judgment, thereby giving her priority over the judgment creditor,[46] she could take priority only in that portion of the garnishment fund which represented the husband's arrearage on the date of the judgment creditor's judgment, because she did not have a lien at that date for alimony installments that were not yet payable.[47]

C. *Modification of the Obligation*

The impact of inflation on alimony and support orders can be seen in the flood of modification cases that reached the Georgia appellate courts. The supreme court's decision in *Summerlin v. Summerlin*[48] contains a brief history of actions for alimony and support modification in Georgia. In *Summerlin*, Georgia's 1955 modification statute was upheld over a gender-based discrimination challenge. The court held that even though the statute was unfair in that it was tied only to a change in the situation of the former husband, it was not unconstitutional since the "restriction bore a rational relationship to the purpose of the modification statute, i.e., to provide relief to either party according to the ability of the provider of alimony to pay."[49]

A Georgia trial court is not required to give full faith and credit to the judgment of a foreign court that lacked personal jurisdiction in a modifi-

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43. *See* GA. CODE ANN. § 30-204 (1980). Since the obligor disputed the amount due, however, and the garnishment trial court failed to resolve the question of the balance due on the judgment pursuant to Georgia Code Ann. section 46-403(a) (1978), that court was directed to hold a further hearing. 155 Ga. App. at 594, 271 S.E.2d at 726.

44. 157 Ga. App. 412, 277 S.E.2d 770 (1981).

45. *See* GA. CODE ANN. § 46-404 (1978).

46. "The creditor with the older judgment takes priority over the junior creditor in the distribution of garnishment funds." 157 Ga. App. at 412, 277 S.E.2d at 771-72 (following Citizens & S. Nat'l Bank v. Wray, 144 Ga. App. 769, 242 S.E.2d 365 (1978) and GA. CODE ANN. § 110-507 (1973)).

47. Chero-Cola Co. v. May, 169 Ga. 273, 149 S.E. 895 (1929).

48. 247 Ga. 5, 274 S.E.2d 523 (1981).

49. *Id.* at 6, 274 S.E.2d at 524.

cation action, according to the Georgia Supreme Court opinion in *Veazey v. Veazey*.[50] After the parties were divorced in Mississippi, a Mississippi trial court purported to retain jurisdiction for modification of alimony by serving defendant by publication after a "diligent inquiry" revealed that defendant could not be located within that state.[51] The Georgia defendant was neither personally served nor had she waived personal service in the Mississippi court and, consequently, that court's judgment was not entitled to full faith and credit in Georgia.

However, Georgia courts will recognize and give effect to a foreign state's consent decree concerning child support as a matter of comity when jurisdiction over the parties in the foreign state has been conceded. In *Gilbert v. Gilbert*,[52] the parties originally were divorced in Georgia, and the husband was ordered to pay child support. The parties thereafter resumed cohabitation and moved to Alabama where the wife filed for divorce and alleged a common-law marriage. Both parties then filed an agreement with an Alabama trial court that provided for reduced child support payments. The wife then brought a contempt action in Georgia to enforce the Georgia decree, which had awarded a greater amount of child support. In reversing the trial court's decision to refuse to enforce the Alabama decree, the Georgia Supreme Court found that Georgia Code Ann. section 30-225.1(a)[53] was inapplicable because the Alabama court had exercised jurisdiction after the parties were no longer Georgia residents. Similarly, Georgia Code Ann. section 30-225.1(b)[54] was found inapplicable because the supreme court construed that section to apply only to those situations in which the party against whom the permanent alimony judgment was rendered remains domiciled in Georgia.[55]

A valid claim for modification may be asserted as a counterclaim in an action to domesticate and enforce a foreign divorce decree according to the decision in *Sovern v. Sovern*.[56] In *Sovern*, however, the former hus-

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50. 246 Ga. 376, 271 S.E.2d 449 (1980).

51. MISS. CODE ANN. § 13-3-19 (1972).

52. 245 Ga. 674, 266 S.E.2d 490 (1980).

53. Georgia Code Ann. section 30-225.1(a) (1980) provides:

> So long as a party against whom is rendered a permanent alimony judgment remains or is domiciled in this State, the exclusive procedure for the modification of such judgment shall be by a proceeding instituted for such purposes in the superior court of the county in which venue is proper.

54. Georgia Code Ann. section 30-225.1(b) (1980) provides: "No judgment of any other State or foreign jurisdiction by which it is attempted to modify a Georgia judgment awarding permanent alimony for the support of a party, or child or children, or both, will be recognized or enforced by the courts of this State."

55. 245 Ga. at 675-76, 266 S.E.2d at 491. *See* Blue v. Blue, 243 Ga. 22, 252 S.E.2d 452 (1979).

56. 156 Ga. App. 752, 275 S.E.2d 791 (1980).

band's counterclaim failed to state a claim because in 1968, the year of the foreign divorce decree, the only basis for modification of alimony was a change in the income and financial status of the *husband*.[57] Unfortunately for the husband, his counterclaim was based solely on the income and financial status of the wife.[58]

Once again, the two year limitation of Georgia Code Ann. section 30-220(a)[59] raised its ugly head, and this time the alleged victim was the "live-in-lover statute".[60] The supreme court in *Sims v. Sims*,[61] however, held that the two year limitation did not apply to modifications of alimony based upon Georgia Code Ann. section 30-220(b)[62] since the limitation was contained only in the subsection based upon income and financial changes.[63] The court also upheld the constitutionality of the "live-in-lover statute" on equal protection and due process grounds.[64]

The "live-in-lover statute" was also discussed in *Hathcock v. Hathcock*.[65] The husband sought a modification of payments to his former wife of 2000 dollars per year for ten years, irrespective of either party's remarriage or death. The trial court denied the former wife's motion for summary judgment when the husband opposed with his own affidavit and with the deposition of the alleged third party. On appeal, the supreme court decided four issues. First, the court held that the husband did not waive future modification of alimony by virtue of the waiver language in

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57. *See* GA. CODE ANN. § 30-221 (1969).

58. 156 Ga. App. at 752-53, 275 S.E.2d at 792. The court further held that the statute of limitations did not bar the former wife's claim for unpaid alimony (the former husband had underpaid her by as much as $100 per month since the spring of 1969), because she had the right to apply the alimony payments subsequently made to the oldest amounts owing. The doctrine of laches also did not bar her claim for the unpaid amounts, because this equitable defense does not apply to legal actions on a debt of record. *Id. See* Jacoby v. Jacoby, 150 Ga. App. 725, 258 S.E.2d 534 (1979).

59. Georgia Code Ann. section 30-220(a) (1980) provides, in pertinent part: "No petition may be filed by either former spouse under this law [§§ 30-220 through 30-225.1] within a period of two years from the date of the filing of a previous petition by the same former spouse."

60. Georgia Code Ann. section 30-220(b) (1980) provides, in pertinent part:

> Subsequent to a final judgment of divorce awarding periodic payment of alimony for the support of a spouse, the voluntary cohabitation of such former spouse with a third party in a meretricious relationship shall also be grounds to modify provisions made for periodic payments of permanent alimony for the support of such former spouse. As used herein, the word cohabitation shall mean dwelling together continuously and openly in a meretricious relationship with a person of the opposite sex.

61. 245 Ga. 680, 266 S.E.2d 493 (1980).

62. *See* note 60 *supra*.

63. GA. CODE ANN. § 30-220(a) (1980).

64. 245 Ga. at 681-83, 266 S.E.2d at 495-96.

65. 246 Ga. 233, 271 S.E.2d 147 (1980).

the settlement agreement, since the right to terminate alimony under the "live-in-lover statute" was not known in 1975 when the agreement was made a part of the decree. Second, the court concluded that the trial court erred in denying summary judgment to the wife. The wife contended that the payments were a property settlement;[66] however, the court held that the labeling of the payments as alimony for income tax purposes did not control. Third, the court held that voluntary cohabitation with a third party was an issue for the jury and, therefore, the trial court did not err in denying summary judgment on this point. Finally, the word "cohabitation" found in Georgia Code Ann. section 30-220(b) was held not to be so vague that it is unconstitutional since it is clearly defined by the statute.[67] The court reasoned that the meaning of "meretricious" could simply be found in a dictionary.

In *Wright v. Wright*,[68] the supreme court examined the common situation of an obligor's increased expenses resulting from a new spouse and child. Defendant's former wife filed for modification of child support, and defendant counterclaimed for a downward modification. The obligor's discretionary income (gross income less expenses, including child support) had decreased from 2666 dollars in the year of divorce to a negative 4384 dollars, although his income for the same period had increased by over 13,000 dollars. The supreme court found that the trial court did not abuse its discretion by doubling the amount of support, since the obligor's income had increased and the increased expenses resulted from his new spouse and child. Furthermore, since the husband's counterclaim for downward modification was denied, the trial court's award of attorney fees to the wife for defending the action was authorized, because the counterclaim was considered an "application" for purposes of Georgia Code Ann. section 30-223.[69]

D. Property Division

Clearly, the monumental decision during this survey period was rendered by the supreme court in *Stokes v. Stokes*.[70] The court held that each spouse has an equitable right to a division of the marital property, regardless of any claim for alimony, or any theory of trust or fraud. Prior

66. Factors considered by the court to be important were that there were provisions in the agreement specifically allowing for weekly payments of alimony, and that the funds were to be paid to the wife irrespective of death or remarriage of either party. 246 Ga. at 235, 271 S.E.2d at 149.

67. GA. CODE ANN. § 30-220(b) (1980).

68. 246 Ga. 81, 268 S.E.2d 666 (1980).

69. GA. CODE ANN. § 30-223 (1980).

70. 246 Ga. 765, 273 S.E.2d 169 (1980).

to *Stokes*, a spouse could only obtain property titled solely in the other spouse's name only by an award of alimony or by showing that the property was held in trust or obtained by inceptive fraud.[71]

The supreme court derived this equitable right by implication based upon three statutory provisions. First, Georgia Code Ann. section 30-105 requires the petition in a divorce action to state the property and earnings of the parties "where alimony or support or *division of property* is involved".[72] Second, Georgia Code Ann. section 30-118 provides that "the verdicts of juries *disposing of the property* in divorce cases shall be carried into effect by the courts, by entering up such judgment or decree, or taking such other steps usual in courts of equity, as will effectually and fully execute the same."[73] Finally, Georgia Code Ann. section 53-502 provides that "[t]he separate property of each spouse shall remain the separate property of that spouse except as provided in Code Title 30 and except as otherwise provided by law."[74] While *Stokes* represents a significant departure from the longstanding position taken by Georgia courts concerning the ownership of property by a husband and wife, many questions were raised by the decision for which there are no readily available answers.

Perhaps the most difficult question left for the trier of fact to wrestle with is the time at which an interest vests. Does the interest vest once the property is accumulated during the marriage, or does it vest only upon the entry of a divorce decree? Unfortunately, the opinion suggests two contradictory answers. One approach, relying on the provisions of Georgia Code Ann. section 53-502, suggests that all property not separately owned, but accumulated during the marriage, should be considered jointly owned by negative implication. "If that is the logical underpinning of the *Stokes* case, then it would appear that each spouse acquires a property interest in all property accumulated during the marriage *as the property is accumulated,* as in community property states."[75] Alternatively, if the majority's decision is based upon Georgia Code Ann. section 30-118, it could be argued that the untitled spouse holds a mere expectancy until the entry of *the final decree of divorce.*[76]

In his concurring opinion,[77] Justice Hill sought to provide a workable

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71. Hargrett v. Hargrett, 242 Ga. 725, 251 S.E.2d 235 (1978); Byrd v. Byrd, 238 Ga. 569, 233 S.E.2d 799 (1977). The contrary statements in *Hargrett* and *Byrd* were overruled by *Stokes*. 246 Ga. at 771, 273 S.E.2d at 173-74.

72. GA. CODE ANN. § 30-105 (1980) (emphasis added).

73. GA. CODE ANN. § 30-118 (1980) (emphasis added).

74. GA. CODE ANN. § 53-502 (Supp. 1980).

75. Bennett, *Georgia Becomes a Quasi Community Property State,* 17 GA. ST. B.J. 134, 136 (1981) (emphasis added).

76. *See* GA. CODE ANN. § 30-118 (1980).

77. 246 Ga. at 771-72, 273 S.E.2d at 174-75 (Hill, J., concurring).

model that could be used to assist the fact finder in its difficult task of equitably distributing the marital assets. Justice Bowles, in a strong dissent,[78] examined the same cases relied upon by the majority and opined that those cases did not provide a basis for a theory of equitable division of property, but were based, in fact, upon other theories of property division and were distinguishable on their facts.

III. CUSTODY

A. *Parent v. Parent*

In *Gambrell v. Gambrell*,[79] plaintiff failed to include the statutory custody language in her divorce complaint,[80] and the trial court entered a temporary order providing for child support. She then amended her complaint to supply the necessary language. Nevertheless, the court held that it had no jurisdiction to rule on the question of child support at the time of its temporary order, and, therefore, vacated that portion of the order. The supreme court reversed and held that the failure to include the statutory language in the complaint was an amendable defect; the amendment would relate back to the filing of the complaint, which gave the court subject matter jurisdiction to award child support.[81]

In *Seymour v. Seymour*,[82] the custodial parent was sued for contempt after the divorce decree and later was served with a complaint in the same court for modification of visitation rights. The custodial parent had moved to another county after the divorce. As a result, the court of appeals held that the trial court erred in modifying visitation rights since the actions were separate and, therefore, were required to be filed in the county of residence of the child's legal custodian.[83]

Evidence that the custodial parent is living together with a person of the opposite sex without benefit of marriage can be sufficient in and of itself to change custody of the child to the other parent in the child's best interest, under the any evidence rule, according to the court of appeals in *Bell v. Bell*.[84] This evidence was sufficient to change custody in *Bell* even

78. *Id.* at 773, 273 S.E.2d at 175-77 (Bowles, J., dissenting).
79. 246 Ga. 516, 272 S.E.2d 70 (1980).
80. GA. CODE ANN. § 74-510 (1981).
81. GA. CODE ANN. § 81A-115(c) (1977). The court reasoned that this requirement was merely procedural and could be cured by amendment even though Georgia Code Ann. section 81A-112(h)(3) (1977) would require dismissal for lack of subject matter jurisdiction. 246 Ga. at 518, 272 S.E.2d at 72-73.
82. 156 Ga. App. 293, 274 S.E.2d 690 (1980).
83. GA. CODE ANN. § 24-304b (1981).
84. 154 Ga. App. 290, 267 S.E.2d 894 (1980).

though the custodial parent, upon advice of counsel, decided not to get married pending the outcome of the custody action.

B. *Parent v. Third Party*

In *Carvalho v. Lewis*,[85] the supreme court held that "[t]he ability of a parent to raise his or her child may not be compared to the superior fitness of a third person."[86] In so holding, the supreme court reversed the court of appeals[87] because the opinion of the court of appeals had implied that a trial judge, in the exercise of his legal discretion, may compare the relative merits of a parent to those of a third party. According to the supreme court, this implication arose from the court of appeals' erroneous definition of the phrase "parental unfitness,"[88] which made it indistinguishable from the much more discretionary determination of the "best interest of the child," a standard used in determining custody contests between two parents. Once a parent is found to be unfit, however, and custody is awarded to a third party, the unfit parent is not precluded by the doctrine of res judicata from asking for a modification of that prior custody order based upon a change of condition.[89]

In *Bryant v. Wigley*,[90] the supreme court held that in a habeas corpus petition brought by a surviving parent, the trial court has

> the discretion to consider whether the child ha[s] been abandoned by the surviving parent, or subjected to cruel treatment by the surviving parent, or to suspend the proceeding to enable the juvenile court to consider termination of the parental rights of the survivor (Code Ann. § 24A-3201), or to consider whether the surviving parent is shown by clear and satisfactory proof to be unfit to have custody of the child.[91]

Before the trial court can exercise this discretion, however, one of these factors must be shown.[92]

The visitation rights of grandparents were considered in *Houston v. Houston*.[93] The trial court had denied the grandfather's motion to set

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85. 247 Ga. 94, 274 S.E.2d 471 (1981).

86. *Id.* at 95, 274 S.E.2d at 472. *See* Larson v. Gambrell, 157 Ga. App. 193, 276 S.E.2d 686 (1981).

87. Lewis v. Lewis, 154 Ga. App. 853, 269 S.E.2d 919 (1980).

88. "[I]n a contest between one or both parents and a third party 'unfitness' must be shown by evidence and found to exist by the court, and . . . amounts to circumstances which justify the court in acting for the *best interests and welfare* of the minor." *Id.* at 855, 269 S.E.2d at 921 (emphasis added).

89. Durden v. Barron, 155 Ga. App. 529, 271 S.E.2d 667 (1980).

90. 246 Ga. 155, 269 S.E.2d 418 (1980).

91. *Id.* at 157, 269 S.E.2d at 420; *see* GA. CODE ANN. § 74-106 (1981).

92. 246 Ga. at 157, 269 S.E.2d at 420.

93. 156 Ga. App. 47, 274 S.E.2d 91 (1980).

aside an adoption proceeding or, in the alternative, to grant visitation privileges, because he lacked standing to sue.[94] The court also dismissed his separate action for visitation rights because no question concerning custody or guardianship was before the court.[95] Twelve days after the trial court's orders, Georgia Code Ann. section 74-112 was amended[96] to grant grandparents the right to file an original petition for visitation rights if the grandparents' child had died. The court of appeals determined that the amended statute should be applied retroactively[97] and, accordingly, the judgment dismissing the separate petition for visitation rights was reversed. The statutory change had no effect, however, on the motion for visitation rights in the adoption proceeding.

C. *Enforcement of Custody Awards*

In *Price v. Gibson*,[98] the supreme court ruled that the trial court had authority to hold a minor's temporary custodian in criminal contempt when the custodian wilfully allowed a noncustodial party to take the child after permanent custody was awarded to another. The temporary custodian's confinement in jail until the child was produced in court was held not to be error since this was a continuing contempt under Georgia Code Ann. section 50-115.[99]

A tremendous amount of activity occurred during the survey period concerning the Uniform Child Custody Jurisdiction Act (UCCJA).[100] In *Goldfarb v. Goldfarb*,[101] the supreme court distinguished *May v. Anderson*[102] and *Kulko v. Superior Court*,[103] and held that a person's due process rights are not violated when, with full notice, a foreign state adjudicates his right to custody without personal jurisdiction over him. Therefore, section 3 of the UCCJA[104] was upheld under constitutional attack because, consistent with the overall policy of the Act, it allowed "an

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94. The child's mother was living and consented to the adoption. GA. CODE ANN. § 74-411 (1981).

95. *See* GA. CODE ANN. § 74-112 (Supp. 1979) (amended 1980).

96. 1980 Ga. Laws 936, 937 (current version at GA. CODE ANN. § 74-112(2) (Supp. 1981)).

97. The court applied the law as it existed "at the time of *its* judgment rather than the law prevailing at the rendition of the judgment under review," because no person had "a vested right in the custody of" the minor child. 156 Ga. App. at 48, 274 S.E.2d at 92, (quoting George v. Sizemore, 238 Ga. 525, 528, 233 S.E.2d 779, 782 (1977) and City of Valdosta v. Singleton, 197 Ga. 194, 208, 28 S.E.2d 759, 767 (1944).

98. 246 Ga. 815, 272 S.E.2d 716 (1980).

99. GA. CODE ANN. § 50-115 (1979).

100. 1979 Ga. Laws 258 (codified at GA. CODE ANN. §§ 74-501 to -525 (1981)).

101. 246 Ga. 24, 268 S.E.2d 648 (1980).

102. 345 U.S. 528 (1953).

103. 436 U.S. 84 (1978).

104. GA. CODE ANN. § 74-504 (1981).

interested state with the requisite nexus with the subject of a child custody suit to hear the action and make a determination."[105]

The supreme court, in *Webb v. Webb*,[106] was confronted with the task of resolving two conflicting trial court orders concerning the custody of a minor. Under the original divorce decree rendered by a Georgia court, custody of the child was given to the mother. Subsequently, she moved to Florida, taking the six year old child with her. The mother, thereafter, went away for the weekend and left the child in the care of his thirteen year old step-sister. The mother's cousins, who lived in an adjacent house, were to look after both children until the mother returned. Upon being notified by the Florida police, the father, at the time a resident of Georgia, traveled to Florida to take possession of the child.

The mother then filed an action in Florida to enforce the original decree. However, prior to the entry of a permanent order in the Florida action, the father filed suit in Georgia asking that the original Georgia decree be modified to award him custody of the child. Thereafter, the Florida trial court entered a final order establishing the original divorce decree as its judgment and ordered the child to be returned to his mother. The Georgia trial court subsequently entered an order changing custody to the father. Although both trial courts had notice of the pending action in the other state, neither court exercised its duty to determine the appropriate forum by conferring with the other court.[107]

In upholding the action of the Georgia trial court, a divided Georgia Supreme Court based its decision upon a somewhat weak foundation. Instead of finding that the Georgia trial court had acted improperly in rendering a decision on the custody of the child in light of the prior Florida ruling, the court found that the pendency of the Florida action at the time the Georgia action was filed did not preempt the jurisdiction of the Georgia trial court. The court reached this result even though the purpose of Georgia Code Ann. section 74-507 is to avoid simultaneous proceedings with other jurisdictions.[108] Furthermore, the supreme court found that the evidence authorized the Georgia trial court to find that the father retrieved the child in the face of an emergency situation created by the mother, which was sufficient to afford jurisdiction to a Georgia court.[109] Based upon the facts in the opinion, however, there is no indication that there was an emergency or an abandonment situation, since the child was

105. 246 Ga. at 28, 268 S.E.2d at 651.

106. 245 Ga. 650, 266 S.E.2d 463 (1980), *cert. dismissed*, ___ U.S. ___, 101 S. Ct. 1889 (1981).

107. GA. CODE ANN. § 74-507 (1981).

108. GA. CODE ANN. §§ 74-502, -507 (1981).

109. *See* GA. CODE ANN. § 74-504(a)(3) (1981).

left under adult supervision, albeit next door, for only one weekend.[110]

In *Yearta v. Scroggins*,[111] the supreme court was concerned with whether a Missouri court's modification of custody was void for lack of personal jurisdiction over the custodial parent. The custodial parent was a resident of Georgia. The noncustodial parent, while exercising visitation rights in Missouri, filed a motion in that state for change of custody and served the custodial parent by certified mail pursuant to the UCCJA in effect in that state.[112] When the custodial parent did not answer the action, custody was modified as requested. Later, when the former custodial parent refused to return the children after visitation, the newly found custodial parent filed a habeas corpus action in Georgia. The supreme court determined that it was proper, as a matter of comity under the UCCJA, to return the children to their newly found custodial parent because Georgia Code Ann. section 74-514[113] mandates that Georgia courts recognize and enforce an initial or modification decree of a foreign state court that had assumed jurisdiction under similar statutory provisions. The court went on to announce the state's public policy that Georgia courts "will continue to refuse to provide a forum for relitigating custody except where the legal custodian resides."[114]

In *Morris v. Mosley*,[115] the supreme court affirmed the trial court's decision to deny jurisdiction of a counterclaim for change of custody, on the ground that Georgia was an inconvenient forum.[116] Although the trial court may have been authorized to accept jurisdiction under Georgia Code Ann. section 74-504,[117] it had the discretion to refuse to do so.

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110. Subsequent cases have limited the court's holding in *Webb* to the "situation in which an extreme emergency exists authorizing conduct of the noncustodial parent which otherwise would be contrary to the public policy of this state." Bishop v. Bishop, 247 Ga. 56, 57, 273 S.E.2d 394, 395 (1981); *See* Yearta v. Scroggins, 245 Ga. 831, 268 S.E.2d 151 (1980). The court declined to find an abandonment situation in Etzion v. Evans, 247 Ga. 390, 276 S.E.2d 577 (1981).

111. 245 Ga. 831, 268 S.E.2d 151 (1980).

112. MO. REV. STAT. § 542.455 (1979). For the Georgia statute governing notice to persons outside the State and their submission to jurisdiction, see GA. CODE ANN. § 74-506(a)(1981).

113. GA. CODE ANN. § 74-514 (1981).

114. 245 Ga. at 832-33, 268 S.E.2d at 153. "This is an incisive statement of the public policy of this state." Douse v. Douse, 157 Ga. App. 524, 526, 277 S.E.2d 807, 810 (1981); *see also,* Burton v. Bishop, 246 Ga. 153, 269 S.E.2d 862 (1980).

115. 246 Ga. 749, 272 S.E.2d 705 (1980).

116. GA. CODE ANN. § 74-508 (1981).

117. GA. CODE ANN. § 74-504 (1981).

IV. ADOPTION AND LEGITIMATION

A particularly important case is *Davey v. Evans*,[118] in which the court of appeals held that the residence or domicile of a child in Georgia is not a jurisdictional prerequisite to an adoption when the adoption proceeding is brought in the county of the adopting parents' residence pursuant to Georgia Code Ann. section 74-401.[119] The court stated that this section was silent on the child's residence and that additional terms would not be implied by the court.[120] The court also held that there is no *requirement* for an adoption petition to state whether the child has a guardian of its person before the action is permissible.[121]

Other adoption cases decided during the survey period typically dealt with termination of parental rights by conduct obviating the necessity for consent to adoption. In *Chandler v. Cochran*,[122] the supreme court held that it was harmless error for the trial court to fail to have the Department of Human Resources perform an investigation, required by Georgia Code Ann. section 74-409(a),[123] in view of that section's grant of discretion to take other appropriate action to have the matter investigated when a report is unavailable.

Although the words "without justifiable cause" were omitted in the 1979 amendment to Georgia Code Ann. section 74-405,[124] that omission does not deprive the trial court of discretion in determining whether the actions of the parent were, in fact, legally justifiable, according to the court of appeals' decision in *Burch v. Terrell*.[125] Thus, evidence of a foreign state's amended decree cancelling the obligor's support obligation could be considered by the lower court in determining whether to terminate his parental rights.[126] Similarly, the word "significantly," as it exists in Georgia Code Ann. section 74-405(b),[127] was interpreted by the court in

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118. 156 Ga. App. 698, 275 S.E.2d 769 (1980).

119. GA. CODE ANN. § 74-401 (1981). The court noted that the domicile of the child requirement was a vestige of former Georgia Code Ann. section 74-402 (1933), which was amended in 1941. 156 Ga. App. at 699, 275 S.E.2d at 770-71.

120. Contrary views of Huff v. Moore, 144 Ga. App. 668, 242 S.E.2d 329 (1978) and Carpenter v. Forshee, 103 Ga. App. 758, 120 S.E.2d 786 (1961), *inter alia*, were overruled. Whether a child must be physically present in Georgia in order to grant the adoption was not decided.

121. Georgia Code Ann. section 74-407(a)(1981) requires only that the adoption petition state whether the child has a guardian.

122. 247 Ga. 184, 275 S.E.2d 23 (1981).

123. GA. CODE ANN. § 74-409(a) (1981).

124. GA. CODE ANN. § 74-405 (1981).

125. 154 Ga. App. 299, 300, 267 S.E.2d 901, 902 (1980).

126. *Accord*, Moser v. Ehrman, 244 Ga. 112, 259 S.E.2d 112 (1979).

127. GA. CODE ANN. § 74-405(b) (1981).

Prescott v. Judy[128] to require more, or significant, support and care or communication with the child before parental consent would be required.[129] Consequently, a seventy-five dollar support payment, out of a total amount of 1300 dollars owed for a year, was determined to be an insignificant amount of support, thus warranting the termination of parental rights in *Hayslip v. Williams*.[130]

The court of appeals, in *Chancey v. Department of Human Resources*,[131] noted that there had been considerable conflict in the case law on what constitutes proof that a child is "deprived" enough to authorize termination of parental rights pursuant to Georgia Code Ann. section 24A-3201(a)(2).[132] The court attempted to resolve this conflict by reaffirming the standard of review announced in *Ray v. Department of Human Resources*[133] that

> it is not proper to consider the question of termination of parental rights based solely upon a "welfare of the child" test, without some required showing of parental unfitness, caused either by intentional or unintentional misconduct resulting in abuse or neglect of the child, or by what is tantamount to physical or mental incapability to care for the child.[134]

In so holding, the court ruled that the evidence below was insufficient as a matter of law to authorize termination of the parental rights of a sixteen year old unemployed woman who had no prospects for future employment or stable living arrangements. Although a finding of unfitness is necessary to terminate the rights of a parent to his child under *Chancey*, the juvenile court, in its discretion, may decide not to terminate those rights. Accordingly, one's parental rights are not automatically forfeited by his actions, even if he should murder his spouse.[135]

In *Hinkins v. Francis*,[136] the court of appeals held that when a legitimation petition is properly filed[137] by a putative father and it fails, the putative father loses all rights to the child and may not thereafter object to the adoption. Furthermore, the court in *Mabry v. Tadlock*[138] held that a natural father does not have an absolute right to the grant of legitima-

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128. 157 Ga. App. 735, 278 S.E.2d 493 (1981).
129. The phrase "'failed significantly' . . . allows a degree of latitude for the trial judge's discretion. . . ." Chandler v. Cochran, 247 Ga. 184, 187, 275 S.E.2d 23, 27 (1981).
130. 156 Ga. App. 296, 274 S.E.2d 692 (1980).
131. 156 Ga. App. 338, 274 S.E.2d 728 (1980).
132. GA. CODE ANN. § 24A-3201(a)(2) (1981).
133. 155 Ga. App. 81, 270 S.E.2d 303 (1980).
134. *Id.* at 88, 270 S.E.2d at 309.
135. Painter v. Barkley, 157 Ga. App. 69, 276 S.E.2d 850 (1981).
136. 154 Ga. App. 716, 270 S.E.2d 33 (1980).
137. *See* GA. CODE ANN. § 74-406(d) (1981).
138. 157 Ga. App. 257, 277 S.E.2d 688 (1981).

tion for the purpose of obtaining visitation rights, because an illegitimate's mother is his only recognized parent, and, therefore, she exercises all parental power.[139] Consequently, the trial court has inherent discretion to look to the best interest and welfare of the child when denying a natural father visitation rights.

IV. LEGISLATION

One of the most significant laws enacted during the survey period is the amended version of Georgia Code Ann. section 30-209.[140] This section provides new factors that must be considered in determining the amount of alimony, if any, to be awarded: the standard of living established during the marriage;[141] the duration of the marriage;[142] the age, physical, and emotional condition of both parties;[143] the financial resources of each party;[144] when applicable, the time necessary for either party to acquire sufficient education or training to enable him or her to find appropriate employment;[145] and the contributions of each party to the marriage, including homemaking, childcare, and career building services of the other party.[146]

Finally, Georgia Code Ann. section 74-112 was also amended to authorize the grant of visitation rights to grandparents when the parents of their grandchildren have obtained a divorce or are engaged in proceedings for divorce, and to provide for proceedings for revocation or modification of grandparents' visitation rights.[147]

139. *See* GA. CODE ANN. § 74-203 (1981).
140. GA. CODE ANN. § 30-209 (Supp. 1981).
141. GA. CODE ANN. § 30-209(a)(1) (Supp. 1981).
142. GA. CODE ANN. § 30-209(a)(2) (Supp. 1981).
143. GA. CODE ANN. § 30-209(a)(3) (Supp. 1981).
144. GA. CODE ANN. § 30-209(a)(4) (Supp. 1981).
145. GA. CODE ANN. § 30-209(a)(5) (Supp. 1981).
146. GA. CODE ANN. § 39-209(a)(6) (Supp. 1981).
147. GA. CODE ANN. § 74-112 (Supp. 1981).