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# Domestic Relations

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This survey period<sup>1</sup> saw continued evolution of domestic relations law through changes in legislation and caselaw. Legislation passed by the 2007 Georgia General Assembly took effect during this survey period. The Georgia Supreme Court continued to accept nonfrivolous appeals in divorce cases that offer guidance to those interested in domestic relations law.

## I. ACCEPTING BENEFITS OF A FINAL JUDGMENT

In a plurality opinion,<sup>2</sup> the Georgia Supreme Court overturned prior caselaw by holding that even when a party accepts benefits under a final judgment and decree, there is still a right to appeal.<sup>3</sup> In *Grissom v. Grissom*,<sup>4</sup> the wife filed for divorce in May 2005, and a decree was entered in January 2006. The wife appealed the trial court's determination that certain assets were the husband's separate property. The husband argued that the wife waived any right to appeal when she accepted the benefits of the final judgment and decree, including a lump

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1. This Survey chronicles developments in Georgia domestic relations law from June 1, 2007 to May 31, 2008.

2. *Grissom v. Grissom*, 282 Ga. 267, 647 S.E.2d 1 (2007). The plurality opinion was written by Presiding Justice Hunstein and concurred in fully by Chief Justice Sears and Justice Benham. *Id.* at 267, 270, 647 S.E.2d at 2, 4. Justice Thompson concurred in the judgment only. *Id.* at 270, 647 S.E.2d at 4.

3. *Id.* at 268, 647 S.E.2d at 2.

4. 282 Ga. 267, 647 S.E.2d 1 (2007).

sum payment, an interest in real property, an income tax refund, and child support payments.<sup>5</sup>

The supreme court affirmed the wife's right to appeal and overruled earlier cases "to the extent that [they could] be read to hold that the acceptance of any benefit under a final judgment and decree of divorce results in an automatic waiver of the right to appeal any aspect of that judgment."<sup>6</sup> The court favored an approach that looks to the specific circumstances of the case, including whether the nonappealing party disputes the appealing party's right to the benefits accepted.<sup>7</sup>

The dissent asserted that the plurality had overruled more than one hundred years of precedent which required that "one . . . who accepts a benefit conferred by a divorce decree[] cannot challenge the judgment in any respect unless and until those benefits have been returned."<sup>8</sup> The dissent argued that adherence to the principle of stare decisis would mandate summary affirmance of the trial court's judgment because the wife clearly accepted and retained certain benefits from the divorce decree that she was now attempting to challenge.<sup>9</sup>

## II. ATTORNEY FEES

Two significant cases were decided this year regarding attorney fees, one in the Georgia Court of Appeals and the other in the Georgia Supreme Court. In *Cothran v. Mehosky*,<sup>10</sup> the former husband filed an action to set aside a finding of paternity in the divorce decree and to modify child support. He also obtained a court order requiring the former wife to submit to DNA testing. He then filed a contempt motion against the former wife after she refused to comply with the order. Prior to the contempt hearing, the parties entered into an agreement, leaving unresolved the issue of the former husband's request for attorney fees.<sup>11</sup> Pursuant to Official Code of Georgia Annotated (O.C.G.A.) § 19-6-2 (a),<sup>12</sup> which authorizes attorney fees in "alimony, divorce and alimony, or contempt" proceedings, the trial court awarded \$3,705 in attorney fees to the former husband and the wife appealed.<sup>13</sup>

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5. *Id.* at 267, 647 S.E.2d at 2.

6. *Id.* at 268, 647 S.E.2d at 2.

7. *Id.*, 647 S.E.2d at 3.

8. *Id.* at 271, 647 S.E.2d at 4 (Carley, J., dissenting). The dissent was written by Justice Carley on behalf of himself and Justices Hines and Melton. *Id.* at 270, 647 S.E.2d at 4.

9. *Id.*

10. 286 Ga. App. 640, 649 S.E.2d 838 (2007).

11. *Id.* at 640, 649 S.E.2d at 839.

12. O.C.G.A. § 19-6-2(a) (2004).

13. *Cothran*, 286 Ga. App. at 640-41, 649 S.E.2d at 839-40.

The court of appeals stated that “although contempt proceedings arose when [the former wife] later failed to comply with the court’s order for DNA testing, these proceedings did not arise out of the original divorce case, as required by OCGA § 19-6-2, but arose instead out of the paternity and modification action.”<sup>14</sup> Therefore, the court held that the trial court lacked authority to award the former husband attorney fees for his counsel’s work in preparation for the contempt hearing.<sup>15</sup>

The supreme court considered the propriety of an attorney fees award in *Padilla v. Padilla*.<sup>16</sup> After filing two previous divorce actions, each dismissed without prejudice, the wife filed an action for divorce in April 2006. A final order granting the divorce was entered on June 14, 2006, and among other matters, the order awarded the wife attorney fees. The award of attorney fees included fees paid to her current counsel, fees paid to an attorney who represented the wife in a prior divorce proceeding, and fees paid to an attorney who represented the wife in proceedings before the Internal Revenue Service (IRS) related to tax debt from the husband’s business.<sup>17</sup> The husband appealed, alleging that “the trial court lacked the necessary statutory basis to award the \$7,200 in fees incurred in the separate proceedings.”<sup>18</sup>

The wife argued that such an award of attorney fees was proper under O.C.G.A. § 19-6-2(a), which “authorizes an award of attorney fees ‘as a part of the expenses of litigation . . . [in an] action . . . for alimony, divorce and alimony, or contempt of court arising [therefrom].’”<sup>19</sup> The supreme court reversed the award of attorney fees incurred in the litigation occurring prior to and separate from (though related to) the divorce action.<sup>20</sup> The court noted that “neither the plain language of OCGA § 19-6-2(a), nor its purpose of ensuring the adequate representation of the respective needs of both spouses in a divorce, supports the inclusion of fees from separate litigation in a fee award under OCGA § 19-6-2(a).”<sup>21</sup>

### III. CHILD CUSTODY

The 2007 Georgia General Assembly made several changes pertaining to child custody that came into effect during this survey period. Section

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14. *Id.* at 642, 649 S.E.2d at 840-41.

15. *Id.*, 649 S.E.2d at 841.

16. 282 Ga. 273, 646 S.E.2d 672 (2007).

17. *Id.* at 274, 646 S.E.2d at 673-74.

18. *Id.*, 646 S.E.2d at 674.

19. *Id.* (alterations and ellipses in original) (quoting O.C.G.A. § 19-6-2(a)).

20. *Id.* at 275, 646 S.E.2d at 674.

21. *Id.*

19-9-1.1 of the O.C.G.A.<sup>22</sup> was amended to allow “the parents of a child to agree to binding arbitration on the issue of child custody and matters relative to visitation, parenting time, and a parenting plan.”<sup>23</sup>

An amendment was also made to O.C.G.A. § 19-9-3<sup>24</sup> to make clear that in cases between two parents in which the custody of a child is at issue, “[t]here shall be no presumption in favor of any particular form of custody, legal or physical, nor in favor of either parent.”<sup>25</sup> Further, the amendment to subsection (a)(2) ensures that determinations regarding custody of a child shall be made by a judge, not a jury.<sup>26</sup> Finally, subsection (a)(3) was amended to provide a list of relevant factors the judge hearing an issue of custody may consider in determining the best interests of the child.<sup>27</sup>

#### IV. CHILD SUPPORT

Child support was the issue in cases brought before both the Georgia Supreme Court and the Georgia Court of Appeals during this survey period. The case considered by the court of appeals was initiated after the current Georgia Child Support Guidelines<sup>28</sup> became effective on January 1, 2007.<sup>29</sup> In *Hamlin v. Ramey*,<sup>30</sup> the father appealed a denial of a downward deviation in the presumptive amount of child support.<sup>31</sup> The father’s proportional share of parenting time was determined by the trial court to be 35.8% annually.<sup>32</sup> The father argued that “because his share of the annual total parenting time [was] far more than the ‘normal’ amount of annual custodial time upon which the child support guidelines are based,” he should have been awarded a downward deviation in the amount of support owed.<sup>33</sup>

In its analysis, the court of appeals stated,

[T]he current child support guidelines are premised on a rebuttable presumption that each parent should contribute to the financial support of their child in the same proportion as that parent’s income

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22. O.C.G.A. § 19-9-1.1 (Supp. 2008).

23. *Id.*

24. O.C.G.A. § 19-9-3 (Supp. 2008).

25. *Id.* § 19-9-3(a)(1).

26. *See id.* § 19-9-3(a)(2).

27. *See id.* § 19-9-3(a)(3).

28. O.C.G.A. § 19-6-15 (Supp. 2008).

29. *See Hamlin v. Ramey*, 291 Ga. App. 222, 661 S.E.2d 593 (2008).

30. 291 Ga. App. 222, 661 S.E.2d 593 (2008).

31. *Id.* at 222, 661 S.E.2d at 594.

32. *Id.* The father calculated his share of the parenting time to be 42.35% annually. *Id.* at 222 n.1, 661 S.E.2d at 594 n.1.

33. *Id.* at 222, 661 S.E.2d at 594.

relates to the sum of the parents' incomes, *without* regard to the amount of time the child spends with each parent.<sup>34</sup>

A deviation from the presumptive amount is discretionary and is only allowed "when the child resides with both parents equally or when special circumstances exist and such a deviation serves the best interest of the child."<sup>35</sup> The court of appeals held that the father failed to prove that the proportional amount of his parenting time constituted a special circumstance which made the presumptive amount of child support excessive and that the child's best interest would be served by a downward deviation.<sup>36</sup> Therefore, the father failed to show that the trial court abused its discretion in denying the parenting-time deviation.<sup>37</sup>

In *Scarborough v. Scarborough*,<sup>38</sup> the Georgia Supreme Court reviewed a case regarding social security retirement benefits paid on behalf of a child as an offset to child support payments.<sup>39</sup> On May 4, 2001, the parties reached a settlement agreement obligating the husband to pay the wife child support of \$1,000 per month. The agreement was incorporated into a final decree of divorce on October 15, 2001. On October 10, 2001, the husband turned sixty-five and began receiving social security retirement benefits. Simultaneously, the wife began receiving social security retirement benefits on behalf of the parties' minor children, and the husband ceased his child support payments.<sup>40</sup> "Neither the separation agreement nor the divorce decree addressed the receipt of future social security retirement benefits . . ."<sup>41</sup> On February 11, 2005, the wife filed a petition for contempt, alleging that the husband was in arrears in child support payments. The trial court ordered the husband to pay the accumulated arrearage, and he appealed.<sup>42</sup>

The supreme court reversed the lower court, recognizing that a parent is generally entitled to a credit against his support obligation for social security disability payments paid for the benefit of the child and retirement benefits received on behalf of the child.<sup>43</sup> The wife argued

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34. *Id.* at 224, 661 S.E.2d at 595-96 (emphasis in original).

35. *Id.*, 661 S.E.2d at 596; see O.C.G.A. §§ 19-6-15(i)(1)(A)-(B), (i)(2)(K).

36. *Hamlin*, 291 Ga. App. at 225, 661 S.E.2d at 596.

37. *Id.*

38. 282 Ga. 427, 651 S.E.2d 42 (2007).

39. See *id.* at 427-30, 651 S.E.2d at 43-45.

40. *Id.* at 428, 651 S.E.2d at 43.

41. *Id.*

42. *Id.*, 651 S.E.2d at 43-44.

43. *Id.*, 651 S.E.2d at 44 (citing *Horton v. Horton*, 219 Ga. 177, 178, 132 S.E.2d 200, 200-01 (1963)).

that the social security benefits were intended to augment, not supplant, the child support obligation and cited *Koch v. Martin*<sup>44</sup> as authority.<sup>45</sup>

In *Koch* the supreme court held,

[c]hild support obligations cannot be offset by pre-existing social security disability benefits paid for the benefit of dependent children where the non-custodial parent's disability . . . benefits were presently being paid on behalf of children at the time that the parties entered a settlement agreement and that agreement did not make any special provision regarding receipt of those disability payments.<sup>46</sup>

In *Koch* the court assumed that because the social security benefits were being paid at the time the agreement was written and the noncustodial parent's child support obligation was calculated, the parties took these benefits into account.<sup>47</sup> In *Scarborough*, however, social security benefits were not being paid at the time the parties entered into the agreement.<sup>48</sup> In the absence of a provision otherwise, the court noted that it could not be assumed that the parties considered the future possibility of these payments.<sup>49</sup> Further, the recently enacted O.C.G.A. § 19-6-15(f)(3)(A)<sup>50</sup> provides, "Benefits received under Title II of the federal Social Security Act by a child on the obligor's account shall be counted as child support payments and shall be applied against the final child support order to be paid by the obligor for the child."<sup>51</sup>

The wife further contended that absent a petition for modification, the husband was precluded from terminating his support obligation.<sup>52</sup> However, the court had previously held that "social security benefits can be credited to satisfy the support obligation without obtaining a modification of the original decree."<sup>53</sup>

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44. 270 Ga. 419, 510 S.E.2d 520 (1999).

45. *Scarborough*, 282 Ga. at 429, 651 S.E.2d at 44.

46. *Id.* (citing *Koch*, 270 Ga. at 419-20, 510 S.E.2d at 520-21).

47. *Id.*

48. *Id.*

49. *Id.*

50. O.C.G.A. § 19-6-15(f)(3)(A) (Supp. 2008).

51. *Scarborough*, 282 Ga. at 429, 651 S.E.2d at 44 (quoting O.C.G.A. § 19-6-15(f)(3)(A)).

52. *Id.* at 429-30, 651 S.E.2d at 44.

53. *Id.* at 430, 651 S.E.2d at 44 (citing *Perteet v. Sumner*, 246 Ga. 182, 183, 269 S.E.2d 453, 454 (1980)).

## V. FAMILY VIOLENCE

The Family Violence Act<sup>54</sup> governs the issuance and scope of protective orders.<sup>55</sup> The Georgia Court of Appeals heard a case involving the entry of a mutual protective order in which no counter petition had been filed.<sup>56</sup> In *Williams v. Jones*,<sup>57</sup> Williams filed a petition for a protective order charging Jones with family violence. Although they lived together with their infant child, the parties were unmarried. Williams's petition alleged a history of verbal and physical abuse on the part of Jones and also acknowledged her own history of criminally damaging Jones's property in reaction to his abuse. Jones was promptly served with a copy of the petition. Jones filed no pleadings, but he appeared at the hearing on the petition and represented himself pro se.<sup>58</sup>

Following a hearing, the trial court entered a protective order finding Jones had committed acts of family violence upon Williams; however, the order "enjoin[ed] and restrain[ed] both Jones *and* Williams from doing, or attempting or threatening to do, any 'act of injury, maltreating, molesting, following, harassing, harming, or abusing the other and/or the minor child/ren in any manner.'"<sup>59</sup> Both parties were ordered to stay away from each other, to have no contact with each other, and not to interfere with each other's movement or communication for purposes of harassment or intimidation. Both parties were also required to undergo psychological treatment and to surrender all firearms. Williams appealed.<sup>60</sup>

The court quoted the Family Violence Act, stating,

[T]he court shall not have the authority to issue or approve mutual protective orders concerning paragraph (1),<sup>[61]</sup> (2),<sup>[62]</sup> (5),<sup>[63]</sup> (9),

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54. O.C.G.A. § 19-13-1 to -56 (2004).

55. *Id.*

56. *See Williams v. Jones*, 291 Ga. App. 395, 662 S.E.2d 195 (2008).

57. 291 Ga. App. 395, 662 S.E.2d 195 (2008).

58. *Id.* at 395-96, 662 S.E.2d at 195.

59. *Id.* at 396, 662 S.E.2d at 195-96.

60. *Id.*, 662 S.E.2d at 196.

61. Subsection (a)(1) provides the court with authority to direct the respondent to refrain from acts of family violence. O.C.G.A. § 19-13-4(a)(1) (2004).

62. Subsection (a)(2) provides the court with authority to grant one party possession of the parties' residence or household and exclude the other party from the same. O.C.G.A. § 19-13-4(a)(2) (2004).

63. Subsection (a)(5) authorizes the court to evict one party from the residence or household and assist the victim in returning to it, or assist in retrieving personal property of the victim if the respondent's eviction has not been ordered. O.C.G.A. § 19-13-4(a)(5) (2004).

[<sup>64</sup>] or (11)[<sup>65</sup>] of this subsection, or any combination thereof, unless the respondent has filed a . . . counter petition pursuant to Code Section 19-13-3 no later than three days . . . prior to the hearing and the provisions of Code Section 19-13-3 have been satisfied.<sup>66</sup>

The court of appeals held that the superior court improperly entered a mutual protective order when it enjoined and restrained the activity of Williams as well as Jones.<sup>67</sup> Because Jones failed to file a counter petition, O.C.G.A. § 19-13-4(a) deprived the lower court of the authority to include such mutually protective provisions in the order.<sup>68</sup> The appellate court stated,

If the acts of domestic violence to which [Williams] admitted in her petition were to be used as the basis for issuance of a protective order against her, or if she had engaged in other or different acts warranting such relief, OCGA § 19-13-4(a) and the requirements of due process entitled her to notice and an opportunity to prepare a defense before appearing at the hearing.<sup>69</sup>

The trial court's order was reversed in part and affirmed in part, and the case was remanded for entry of a new order.<sup>70</sup>

## VI. INSURANCE PROCEEDS

In *Sparks v. Jackson*,<sup>71</sup> the Georgia Court of Appeals addressed whether distribution of life insurance proceeds is governed by a final judgment and decree of divorce or the beneficiary designation on an insurance policy.<sup>72</sup> When the former spouses divorced in 1998, their settlement agreement provided that the husband would maintain life insurance in the amount of \$220,000, "with Wife being named as the irrevocable beneficiary for the benefit of the children until such time as the children obtain the age of 18 years."<sup>73</sup> When the husband died in

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64. Subsection (a)(9) authorizes the court to order the respondent to refrain from harassing or interfering with the victim. O.C.G.A. § 19-13-4(a)(9) (2004).

65. Subsection (a)(11) authorizes the court to order the respondent to receive appropriate psychiatric or psychological services to prevent the recurrence of family violence. O.C.G.A. § 19-13-4(a)(11) (2004).

66. *Williams*, 291 Ga. App. at 397, 662 S.E.2d at 196 (quoting O.C.G.A. § 19-13-4(a) (2004)).

67. *Id.*

68. *Id.*

69. *Id.* at 398, 662 S.E.2d at 197.

70. *Id.*

71. 289 Ga. App. 840, 658 S.E.2d 456 (2008).

72. *See id.* at 840-44, 658 S.E.2d at 458-60.

73. *Id.*

2005, his life insurance proceeds totaled \$238,644.16. However, prior to his death, the husband's new wife, Sparks, was designated as the beneficiary under the policy. After her husband's death, Sparks filed a petition against the deceased's insurer and the deceased's former wife, requesting a determination of who was entitled to the insurance proceeds. The widow and former wife both filed cross-motions for summary judgment. The trial court granted summary judgment to the former wife and ordered that the insurance proceeds be paid to her for the benefit of the deceased's minor children. The widow appealed.<sup>74</sup>

The court of appeals held that for the benefit of the deceased's minor children, the former wife had a vested interest in the policy by virtue of the settlement agreement that was made part of the divorce decree.<sup>75</sup> At the same time, her interest was limited to the amount of insurance the deceased agreed to maintain in the settlement agreement.<sup>76</sup> Thus, the former wife, for the benefit of the minor children, was entitled to \$220,000 of the proceeds, leaving the remainder for the widow.<sup>77</sup>

#### VII. MEDIATION

The Georgia Supreme Court accepted a case regarding governance of a private mediation and the propriety of a mediator testifying given the confidential nature of mediation.<sup>78</sup> In *Wilson v. Wilson*,<sup>79</sup> the wife filed for divorce on April 14, 2006, in the Coweta Judicial Circuit (the circuit), which had adopted an alternative dispute resolution (ADR) program governed in part by the Model Court Mediation Rules<sup>80</sup> enacted by the Georgia Commission on Dispute Resolution.<sup>81</sup> The circuit had a standing order requiring the parties in all contested divorce cases to participate in mediation.<sup>82</sup>

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74. *Id.* at 840-41, 658 S.E.2d at 458.

75. *Id.* at 843, 658 S.E.2d at 459-60 (citing *Reeves v. Reeves*, 236 Ga. 209, 211, 223 S.E.2d 112, 115 (1976) (holding that the minor children held a vested interest in the life insurance contracts because those contracts existed on the date of the entry of the divorce decree); *Whitehead v. Whitehead*, 191 Ga. App. 330, 331-32, 381 S.E.2d 757, 758 (1989) (holding that the wife acquired a vested interest in the husband's policy named in the judgment of divorce notwithstanding that the husband later changed the beneficiary to his estate, and that the wife's vested interest continued in a successor policy).

76. *Id.*, 658 S.E.2d at 460.

77. *Id.*

78. *See Wilson v. Wilson*, 282 Ga. 728, 653 S.E.2d 702 (2007).

79. 282 Ga. 728, 653 S.E.2d 702 (2007).

80. MODEL CT. MEDIATION R. (Ga. Comm'n on Dispute Resolution 2005).

81. *Wilson*, 282 Ga. at 729, 653 S.E.2d at 703.

82. *Id.* at 728, 653 S.E.2d at 703-04.

On December 22, 2006, without their attorneys, the parties privately mediated and reached a settlement agreement. Five days later, the husband's attorney notified the wife's attorney that the husband objected to the agreement. Subsequently, the husband claimed he was not mentally competent to bind himself to an agreement. The trial court upheld the agreement, finding that the mediation was private and not court connected or bound by the rules of the court-connected ADR program, and finding that the husband had the mental capacity to enter into the agreement.<sup>83</sup>

On appeal, the supreme court held that the trial court erred in determining that the mediation was not a court-connected mediation.<sup>84</sup> Because the circuit had adopted a standing order referring all parties in contested divorce cases to mediation, the parties met with the mediator after being referred to the court-connected ADR center, and even though the mediator was not on the county's approved list of mediators, he was registered with the Georgia Office of Dispute Resolution and the parties had a right to choose him under the rules governing the mediation.<sup>85</sup> The husband, however, did not properly object to the mediation agreement; under these same rules he had three days to notify the program coordinator, not his wife's attorney, of his objection.<sup>86</sup>

The husband claimed it was error to allow the mediator to testify to his impressions of the husband's competence to engage in mediation due to the confidentiality of mediation sessions.<sup>87</sup> The court acknowledged the significance of confidentiality in mediation and urged caution in calling mediators to testify.<sup>88</sup> In this case, however, the mediator was the only person in a position to testify regarding the husband's mental competence during the mediation because the mediator was the only person to interact with the husband through most of the process.<sup>89</sup>

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83. *Id.* at 729-30, 653 S.E.2d at 703-04.

84. *Id.* at 730, 653 S.E.2d at 704.

85. *Id.* at 730-31, 653 S.E.2d at 704-05 (citing Rule 4(a)(3) of the Model Court Mediation Rules: "once the case is ordered to an ADR process, parties are still allowed to choose their own neutral . . . provided the neutral chosen is registered with the Georgia Office of Dispute Resolution." MODEL CT. MEDIATION R. 4(a)(3)).

86. *Id.* at 731, 653 S.E.2d at 705 (citing Rule 12(d)(2) of the Model Court Mediation Rules: "If any party is . . . represented by an attorney who is not present, the agreement should be reduced to writing by the mediator and signed by the mediator and parties at the end of the mediation conference . . . . If there is no objection to the agreement within 3 calendar days following signing, the program coordinator will file the agreement with the court." MODEL CT. MEDIATION R. 12(d)(2)).

87. *Id.* at 731-32, 653 S.E.2d at 705-06.

88. *Id.* at 732, 653 S.E.2d at 706.

89. *Id.* at 733-34, 653 S.E.2d at 706-07.

## VIII. ANTENUPTIAL AGREEMENTS

The Georgia Supreme Court clarified the duty of both parties entering into an antenuptial agreement to provide a full and fair disclosure of all material facts.<sup>90</sup> In *Blige v. Blige*,<sup>91</sup> the husband appealed a trial court ruling setting aside the parties' antenuptial agreement for nondisclosure. The husband argued that even though he failed to make a complete disclosure of his income, assets, and liabilities to his wife prior to signing the antenuptial agreement, as required under the first prong of the test articulated in *Scherer v. Scherer*,<sup>92</sup> the agreement should have been enforced under the court's 2005 decision in *Mallen v. Mallen*.<sup>93</sup> In *Mallen* the court held that "persons planning marriage are not in a confidential relationship that will excuse a party from the duty to 'exercise ordinary diligence in making an independent verification of contractual terms and representations.'"<sup>94</sup>

The husband in *Blige* interpreted *Mallen* to require the spouse resisting enforcement to have "exercise[d] reasonable diligence in ascertaining the assets" of the other spouse prior to the execution of the antenuptial agreement.<sup>95</sup> The supreme court disagreed and affirmed the trial court's decision, stating that "*Scherer* imposes an affirmative duty of full and fair disclosure of all material facts on parties entering into an antenuptial agreement," and that *Mallen* does not impose a "duty of inquiry."<sup>96</sup>

## IX. RETIREMENT BENEFITS

In *Plachy v. Plachy*,<sup>97</sup> the Georgia Supreme Court likened the receipt of retirement benefits as equitable division of property to obtaining title

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90. See *Blige v. Blige*, 283 Ga. 65, 656 S.E.2d 822 (2008).

91. 283 Ga. 65, 656 S.E.2d 822 (2008).

92. 249 Ga. 635, 292 S.E.2d 662 (1982). In *Scherer* the supreme court adopted the following test to determine whether to enforce an antenuptial agreement in a particular case: "(1) was the agreement obtained through fraud, duress or mistake, or through misrepresentation or nondisclosure of material facts? (2) Is the agreement unconscionable? (3) Have the facts and circumstances changed since the agreement was executed, so as to make its enforcement unfair and unreasonable?" *Id.* at 640, 292 S.E.2d at 666.

93. *Blige*, 283 Ga. at 69, 656 S.E. at 825; *Mallen v. Mallen*, 280 Ga. 43, 622 S.E.2d 812 (2005).

94. *Mallen*, 280 Ga. at 47, 622 S.E.2d at 816 (quoting *Hubert v. Beale Roofing, Inc.*, 158 Ga. App. 145, 146, 279 S.E.2d 336, 338 (1981)).

95. *Blige*, 283 Ga. at 70, 656 S.E.2d at 826.

96. *Id.*

97. 282 Ga. 614, 652 S.E.2d 555 (2007).

to and ownership of property.<sup>98</sup> The parties' settlement agreement, incorporated into their divorce decree, equally divided the husband's Civil Service Retirement System benefits between the parties as an equitable division of property. When the trial court entered a court order acceptable for processing (COAP), the order provided that payments were to continue to the wife for the husband's lifetime and to the wife's estate should she predecease the husband. The husband appealed, arguing it was reversible error to enter the COAP because the COAP's provision of payment of benefits to the wife's estate was not part of the incorporated settlement agreement.<sup>99</sup>

The supreme court held,

While the settlement agreement did not expressly state that the benefits were to survive the death of Wife, because the retirement benefits acquired during the marriage were marital property, and Wife received a share of the retirement benefits as equitable distribution of marital property, which had the effect of awarding title to the property, Wife owned her share of the retirement benefits.<sup>100</sup>

#### X. UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT

The Georgia Court of Appeals confronted a dilemma inherent in the Uniform Child Custody Jurisdiction and Enforcement Act (UCC-JEA).<sup>101</sup> In *Daniels v. Barnes*,<sup>102</sup> the paternal grandparents filed for modification of their visitation rights with their grandchildren and sought an order for contempt against the mother for failing to adhere to the visitation order. The mother was personally served with the summons and petition in Rhode Island, where she lived with the children. The mother filed a motion to dismiss on the grounds that the Georgia court lacked personal jurisdiction over her. The trial court denied the motion and found the mother in criminal contempt. The mother appealed.<sup>103</sup>

The mother and her former husband were divorced in 2001 in the Eastern Judicial Circuit of Georgia. The divorce decree awarded custody to the mother and prohibited the father from contact with the children, but it did not terminate his parental rights. The decree incorporated a 2000 order in which the paternal grandparents were awarded visitation

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98. *Id.* at 615, 652 S.E.2d at 556.

99. *Id.* at 614-15, 652 S.E.2d at 556.

100. *Id.* at 615, 652 S.E.2d at 556 (citations omitted).

101. O.C.G.A. § 19-9-40 to -104 (2004).

102. 289 Ga. App. 897, 658 S.E.2d 472 (2008).

103. *Id.* at 897, 658 S.E.2d at 473-74.

rights with their grandchildren.<sup>104</sup> Under the UCCJEA, enacted on July 1, 2001, a Georgia court may exercise jurisdiction and make an initial custody determination if Georgia is the home state of the child on the date of the commencement of the proceedings.<sup>105</sup> The court may then exercise exclusive continuing jurisdiction until it is shown that “neither the child nor the child’s parents or any person acting as a parent presently resides in this state.”<sup>106</sup> In such a circumstance, “personal jurisdiction over the parties for a modification of custody is not required.”<sup>107</sup>

The court of appeals held that pursuant to the UCCJEA, the trial court did have subject matter jurisdiction over the grandparents’ petition seeking modification of their visitation rights, and for that action, personal jurisdiction over the mother was not required.<sup>108</sup> However, the UCCJEA provides no specific provision allowing the trial court to exercise personal jurisdiction over the nonresident mother with respect to the motion for contempt.<sup>109</sup> Thus, the lower court’s custody determination was affirmed, but the contempt order was reversed.<sup>110</sup>

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104. *Id.*, 658 S.E.2d at 474.

105. *Id.* at 899, 658 S.E.2d at 474-75 (citing O.C.G.A. § 19-9-61(a)(1) (2004)).

106. O.C.G.A. § 19-9-62(a)(2) (2004).

107. *Daniels*, 289 Ga. App. at 899, 658 S.E.2d at 475 (citing O.C.G.A. § 19-9-61(c) (2004)).

108. *Id.*

109. *Id.* at 901, 658 S.E.2d at 476.

110. *Id.*