

# Domestic Relations

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This Survey chronicles developments in Georgia domestic relations law from June 1, 2008 to May 31, 2009.<sup>1</sup> This survey period saw continued evolution of domestic relations law through changes in legislation and case law. Legislation passed by the 2008 Georgia General Assembly took effect on July 1, 2008. The Georgia Supreme Court continued to accept nonfrivolous appeals in divorce cases, which provide guidance to those interested in domestic relations law.

## I. CHILD CUSTODY

In *Rumley-Miawama v. Miawama*,<sup>2</sup> the Georgia Supreme Court disapproved of language it interpreted to be a self-executing material change in visitation.<sup>3</sup> Following a bench trial, the trial court entered a final judgment and divorce decree that awarded the parties joint legal custody of the minor child. The trial court awarded the wife visitation on alternate weeks, giving the parents equal amounts of time with the child. However, the trial court alternatively ordered that if the wife moved out of Georgia, she would be entitled to visitation on three-day federal holidays, Thanksgiving, part of Christmas break, and for two months in the summer. After the trial court denied the wife's motion for

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1. For analysis of Georgia domestic relations law during the prior survey period, see Barry B. McGough & Elinor H. Hitt, *Domestic Relations, Annual Survey of Georgia Law*, 60 MERCER L. REV. 121 (2008).

2. 284 Ga. 811, 671 S.E.2d 827 (2009).

3. *Id.* at 814–15, 671 S.E.2d at 829–30.

a new trial, the wife appealed, contending that the trial court erred in establishing the alternate visitation schedule.<sup>4</sup>

With regard to this alternate visitation provision, the Georgia Supreme Court held that a self-executing material change in visitation violates the public policy of this state because it does not necessarily consider the best interest of the child.<sup>5</sup> The court further stated that such a provision should only be implemented when there is evidence

that one or both parties have committed to a given course of action that will be implemented at a given time; . . . how that course of action will impact upon the best interests of the child . . . ; and the provision is carefully crafted to address the effects on the offspring of that given course of action.<sup>6</sup>

Further, such provisions “should be narrowly drafted to ensure that they will not impact adversely upon any child’s best interests.”<sup>7</sup>

Here, the supreme court determined that the alternate visitation provision was material because it substantially reduced the amount of time the wife and her child would have together.<sup>8</sup> The evidence at trial did not establish that the wife had committed herself to an out-of-state move. Also, the provision contained no time limitation restricting its application.<sup>9</sup> Therefore, the court struck the provision because it improperly authorized an open-ended, automatic, and material change in visitation.<sup>10</sup>

## II. CHILD SUPPORT

During this survey period, both Georgia appellate courts reviewed cases in which child support was an issue. These cases were initiated after the Georgia Child Support Guidelines<sup>11</sup> became effective on January 1, 2007. In *Hampton v. Nesmith*,<sup>12</sup> the trial court awarded the mother an upward modification in child support from her daughter’s father, the mother appealed the ruling that delayed the initiation of the father’s increased obligation for fifteen months.<sup>13</sup>

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4. *Id.* at 811–12, 671 S.E.2d at 828.

5. *Id.* at 814, 671 S.E.2d at 829.

6. *Id.* at 813, 671 S.E.2d at 829.

7. *Id.*

8. *Id.*

9. *Id.* at 813–14, 671 S.E.2d at 829.

10. *Id.* at 814, 671 S.E.2d at 829–30.

11. O.C.G.A. § 19-6-15 (Supp. 2009).

12. 294 Ga. App. 514, 669 S.E.2d 489 (2008).

13. *Id.* at 514, 515, 669 S.E.2d at 490, 491.

The parties, who had never married, were the parents of a minor child. In 2003 the father legitimated the child and was ordered to pay \$525 a month in child support. In March 2006 the father filed a petition seeking, in part, a downward modification of his child support obligation. The mother filed an answer and a counterclaim seeking unpaid child support and an upward modification in the father's child support obligation.<sup>14</sup>

In July 2007 the trial court held a bench trial. The father was found in contempt for failing to pay \$3990 in child support, and the trial court ordered him to pay the arrearage at a rate of \$300 per month beginning in October 2007. The court also found that the father's income had increased; thus, the court ordered an upward modification of his child support obligation to \$800 per month. However, the court delayed this increase until October 2008 to allow the father to first pay the arrearage due.<sup>15</sup>

The Georgia Court of Appeals agreed with the mother's contention that the trial court erred in delaying the effective date of the father's increased child support obligation for fifteen months.<sup>16</sup> The court pointed to the Georgia Child Support Guidelines, which provide as follows:

If there is a difference of [thirty] percent or more between a new award and a Georgia child support order entered prior to January 1, 2007, the court may, at its discretion, phase in the new child support award over a period of up to two years with the phasing in being largely evenly distributed with at least an initial immediate adjustment of not less than [twenty-five] percent of the difference and at least one intermediate adjustment prior to the final adjustment at the end of the phase-in period.<sup>17</sup>

The court concluded that even though the full implementation of an upward modification may be delayed via a phase-in, the trial court "must provide for some amount (not less than [twenty-five] percent) of the new award to take effect immediately."<sup>18</sup>

In the instant case, the upward modification was more than a fifty percent increase of the original child support award, but the trial court completely delayed the increase for fifteen months instead of ordering a

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14. *Id.* at 514–15, 669 S.E.2d at 490.

15. *Id.* at 515, 669 S.E.2d at 490–91.

16. *Id.* at 516, 669 S.E.2d at 491.

17. *Id.* (emphasis omitted) (internal quotation marks omitted) (quoting O.C.G.A. § 19-6-15(k)(3)(B)).

18. *Id.*

phase-in of the modification.<sup>19</sup> The court of appeals vacated the portion of the lower court's ruling that delayed the upward modification of support for fifteen months.<sup>20</sup>

Both Georgia appellate courts considered cases that addressed questions regarding income and deviations under the current Georgia Child Support Guidelines. In *Appling v. Tatum*,<sup>21</sup> the father appealed the trial court's inclusion of income from his K-1 schedule in its determination of his adjusted gross annual income for purposes of calculating child support.<sup>22</sup>

At trial, the father's accountant testified that \$198,000 of the father's adjusted gross annual income constituted K-1 income he did not actually receive because it was used to operate his business.<sup>23</sup> Section 19-6-15(f)(1)(B) of the Official Code of Georgia Annotated (O.C.G.A.)<sup>24</sup> directs,

In general, income and expenses from self-employment or operation of a business should be carefully reviewed by the court or the jury to determine an appropriate level of gross income available to the parent to satisfy a child support obligation. Generally, this amount will differ from a determination of business income for tax purposes.<sup>25</sup>

Relying on this statute, the father argued that the income on his K-1 was not "available" to him and should not have been used to calculate his child support payments.<sup>26</sup> However, the father cited no authority in support of his position. Even his accountant conceded that the Internal Revenue Service treats K-1 income as ordinary income.<sup>27</sup> Additionally, the income reflected on a K-1 is not statutorily excluded from gross income for the purposes of calculating child support.<sup>28</sup> The Georgia Court of Appeals held that the K-1 reflected income in this case and that the trial court did not abuse its discretion when it included the K-1 income in its child support calculation.<sup>29</sup>

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19. *Id.*

20. *Id.* at 518, 669 S.E.2d at 492.

21. 295 Ga. App. 78, 670 S.E.2d 795 (2008).

22. *Id.* at 79, 670 S.E.2d at 797.

23. *Id.*, 670 S.E.2d at 798.

24. O.C.G.A. § 19-6-15(f)(1)(B) (Supp. 2009).

25. *Id.*

26. *Appling*, 295 Ga. App. at 80, 670 S.E.2d at 798.

27. *Id.*

28. *Id.* (citing O.C.G.A. § 19-6-15(f)(2) (Supp. 2009)).

29. *Id.* at 80–81, 670 S.E.2d at 798.

In *Evans v. Evans*,<sup>30</sup> the mother appealed the trial court's decision not to include overtime payments received by the father in its calculation of his child support obligation. The trial court refused to include this income because the overtime payments were not guaranteed income.<sup>31</sup> On review, the Georgia Supreme Court relied on O.C.G.A. § 19-6-15(f)(1)(A),<sup>32</sup> which provides that in setting the presumptive amount of child support, the gross income of each parent "shall include all income from any source, before deductions for taxes and other deductions . . . , whether earned or unearned, and includes, but is not limited to, . . . [o]vertime payments."<sup>33</sup> Because the child support guidelines "are mandatory and must be considered by a trier of fact setting the amount of child support," the supreme court reversed the lower court's ruling.<sup>34</sup>

The supreme court also heard cases involving the denial of deviations to the presumptive amount of child support. In *Rumley-Miawama v. Miawama*,<sup>35</sup> the supreme court upheld a lower court's decision not to apply a parenting time deviation to reduce the amount of child support owed by the mother, even though the parents had equal parenting time with the children.<sup>36</sup> Similarly, in *Johnson v. Johnson*,<sup>37</sup> the supreme court upheld the lower court's decision not to include a deviation for the children's private school tuition as extraordinary educational expenses in its child support calculations.<sup>38</sup> In both cases, the supreme court pointed out that such deviations are within the court's discretion.<sup>39</sup>

Effective July 1, 2008, the Georgia General Assembly amended O.C.G.A. § 19-6-15,<sup>40</sup> in part, to change and clarify certain provisions relating to gross income.<sup>41</sup> As amended, the statute makes clear that income for a parent who is on active military duty includes: "(i) Base pay; (ii) Drill pay; (iii) Basic allowance for subsistence, whether paid directly to the parent or received in-kind; and (iv) Basic allowance for

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30. 285 Ga. 319, 676 S.E.2d 180 (2009).

31. *Id.* at 319, 676 S.E.2d at 180–81.

32. O.C.G.A. § 19-6-15(f)(1)(A) (Supp. 2009).

33. *Id.* § 19-6-15(f)(1)(A)(v).

34. *Evans*, 285 Ga. at 319, 676 S.E.2d at 180–81 (quoting *Swanson v. Swanson*, 276 Ga. 566, 567, 580 S.E.2d 526, 527 (2003)).

35. 284 Ga. 811, 671 S.E.2d 827 (2009).

36. *Id.* at 812–13, 671 S.E.2d at 828 (citing *Hamlin v. Ramey*, 291 Ga. App. 222, 227, 661 S.E.2d 593, 597 (2008)).

37. 284 Ga. 366, 667 S.E.2d 350 (2008).

38. *Id.* at 367, 667 S.E.2d at 352.

39. *Id.* (citing O.C.G.A. § 19-6-15(i)(2)(J)(i) (Supp. 2009)); *Rumley-Miawama*, 284 Ga. at 813, 671 S.E.2d at 828–29 (citing O.C.G.A. § 19-6-15(i)(2)(F) (Supp. 2009)).

40. O.C.G.A. § 19-6-15 (2004 & Supp. 2009).

41. See 2008 Ga. Laws 272, 276.

housing, whether paid directly to the parent or received in-kind.”<sup>42</sup> However, unless otherwise determined by the court or jury, “special pay or incentive pay, allowances for clothing or family separation, and reimbursed expenses related to the parent’s assignment . . . shall not be considered income for the purpose of determining gross income.”<sup>43</sup>

### III. DOMICILE

In *Kean v. Marshall*,<sup>44</sup> the Georgia Court of Appeals considered the question of domicile under the Uniform Interstate Family Support Act (UIFSA).<sup>45</sup> Waco Kean and Gina Marshall were the unmarried parents of a child born in November 1996. In November 1997 an Alabama court ordered Kean to pay support for the child. Pursuant to the UIFSA, Marshall filed an action in April 2006 to record the Alabama order and to request an upward modification in the amount of Kean’s child support payments. Marshall’s complaint contended that Kean resided in Henry County, Georgia, and thus was subject to Henry County’s jurisdiction.<sup>46</sup>

Kean moved to dismiss the action based on lack of jurisdiction, arguing that he was domiciled in Alabama because Alabama was the state where he was born and reared, attended school, enlisted in the Army, was registered to vote, paid income taxes, had a driver’s license, registered his vehicles, and lived with his wife and their children. Even though he was stationed in Fort Gillem, Georgia, for military duty and had an apartment in Stockbridge, Georgia, for occasions when he could not return to Alabama, Kean alleged that he commuted daily to work from Alabama and never intended to move to or remain in Georgia.<sup>47</sup>

After reviewing evidence that cast doubt on Kean’s claim that he generally commuted from Alabama to Fort Gillem, the trial court concluded that Kean intended to remain at the Stockbridge apartment indefinitely and was therefore subject to jurisdiction in Georgia. In denying Kean’s motion to dismiss, the trial court stated that Marshall needed to show that Kean had minimum contacts with Georgia to establish jurisdiction, and Marshall was not required to prove that Georgia was Kean’s domicile. The trial court determined that to exercise jurisdiction over Kean pursuant to UIFSA, the court needed to find that all parties resided in Georgia and that the child did not live in Alabama, which was the issuing state. The trial court noted that the term *reside*

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42. O.C.G.A. § 19-6-15(f)(1)(E).

43. *Id.*

44. 294 Ga. App. 459, 669 S.E.2d 463 (2008).

45. O.C.G.A. §§ 19-11-100 to -191 (2004 & Supp. 2009).

46. *Kean*, 294 Ga. App. at 459, 669 S.E.2d at 463–64.

47. *Id.* at 459–60, 669 S.E.2d at 464.

is not defined by UIFSA but determined that *reside* meant domicile for purposes of the statute.<sup>48</sup> Kean appealed the decision.<sup>49</sup>

The court of appeals reversed,<sup>50</sup> holding that “[t]o acquire a domicile in a particular jurisdiction, one must actually reside there with the intention of remaining permanently or for an indefinite time, and a domicile once established continues until a new domicile is acquired.”<sup>51</sup> Based on the evidence in the record, Kean did not reside in Georgia for purposes of UIFSA.<sup>52</sup> His domicile continued to be in Alabama because there was no evidence he intended to remain in Georgia.<sup>53</sup>

#### IV. GARNISHMENT

In *Stoker v. Severin*,<sup>54</sup> the Georgia Court of Appeals clarified garnishment procedures pursuant to O.C.G.A. § 18-4-60,<sup>55</sup> O.C.G.A. § 19-6-17(e)(1),<sup>56</sup> and O.C.G.A. § 19-6-15(h)(3).<sup>57</sup> In *Stoker* the former wife filed a garnishment action against her former husband for \$2350, which represented one month of child support arrearages, and \$6536, which represented the former husband’s share of health care expenses and the cost of extracurricular activities. After a hearing, the trial court granted the traverse filed by the former husband, and the former wife appealed.<sup>58</sup>

The court of appeals agreed with the former wife that the portion of the alleged debt representing unpaid child support is governed by the procedure for postjudgment garnishment.<sup>59</sup> The court stated,

Under Georgia law, a judgment for periodic child support that fixes the amount of the installments and when they are due is a money judgment subject to collection by postjudgment garnishment. This is because a court can determine the amount due from the terms of the decree with no more than a mathematical computation.<sup>60</sup>

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48. *Id.* at 460, 669 S.E.2d at 464.

49. *Id.* at 459, 669 S.E.2d at 463.

50. *Id.* at 460, 669 S.E.2d at 464.

51. *Id.* at 461, 669 S.E.2d at 465 (citing *Williams v. Williams*, 191 Ga. 437, 438, 12 S.E.2d 352, 353 (1940)).

52. *Id.* at 462, 669 S.E.2d at 465–66.

53. *Id.*, 669 S.E.2d at 466.

54. 292 Ga. App. 870, 665 S.E.2d 913 (2008).

55. O.C.G.A. § 18-4-60 (2004).

56. O.C.G.A. § 19-6-17(e)(1) (2004).

57. O.C.G.A. § 19-6-15(h)(3) (Supp. 2009).

58. *Stoker*, 292 Ga. App. at 870–71, 665 S.E.2d at 915.

59. *Id.* at 871–72, 665 S.E.2d at 916 (citing O.C.G.A. §§ 18-4-60 to -66 (2004 & Supp. 2009)).

60. *Id.* at 872, 665 S.E.2d at 916 (citations omitted).

The court also noted that O.C.G.A. § 19-6-17(e)(1) “specifically provides that [a]ny payment or installment of support under any child support order is, on and after the date due[,] [a] judgment by operation of law, with the full force and effect and attributes of a judgment of this state, including the ability to be enforced.”<sup>61</sup> Accordingly, a plaintiff may collect unpaid periodic child support under the postjudgment garnishment procedure without additional proceedings to first reduce the debt to a money judgment.<sup>62</sup> However, at the hearing on the traversed garnishment, the former wife testified that the former husband was no longer in arrears on child support.<sup>63</sup>

The former wife also argued that pursuant to O.C.G.A. § 19-6-15(h)(3), she was entitled to collect the former husband’s share of healthcare expenses and extracurricular costs through garnishment without first obtaining “a separate or discrete judgment or a contempt order concerning these claims.”<sup>64</sup> The court noted that in O.C.G.A. § 19-6-15(h)(3), which became effective on January 1, 2007, the collection of uninsured health care expenses is specifically addressed.<sup>65</sup> The court noted that O.C.G.A. § 19-6-15(h)(3)(B)(i) directs that “[w]here child support services pursues enforcement of payment of such unpaid expenses,” collection by garnishment “is permitted pursuant to the postjudgment garnishment procedure, if the debt has been reduced to a money judgment, or pursuant to the prejudgment garnishment procedure, if the debt has not been reduced to a money judgment.”<sup>66</sup> When a parent “seeks to collect the other parent’s share of uninsured health care expenses, the collecting parent ‘may enforce payment of the expense by any means permitted by law.’”<sup>67</sup> However, the court of appeals disagreed with the former wife’s contention that this provision authorized garnishment for uninsured health care expenses that were not reduced to a money judgment without complying with the more restrictive prejudgment garnishment procedure.<sup>68</sup> Accordingly, the court of appeals ultimately upheld the traverse of garnishment because the child support arrears had been paid and because the amount claimed

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61. *Id.* (alterations in original) (quoting O.C.G.A. § 19-6-17(e)(1)).

62. *Id.*

63. *Id.* at 873, 665 S.E.2d at 916.

64. *Id.*, 665 S.E.2d at 917.

65. *Id.* (citing 2006 Ga. Laws 583, 600).

66. *Id.* at 873–74, 665 S.E.2d at 917 (citing O.C.G.A. § 19-6-15(h)(3)(B)(i)).

67. *Id.* at 873, 665 S.E.2d at 917 (quoting O.C.G.A. § 19-6-15(h)(3)(B)(i)).

68. *Id.* at 874 n.9, 665 S.E.2d at 917 n.9.

to be owed for health care and extracurricular activities had not been reduced to a judgment.<sup>69</sup>

#### V. JURISDICTION

Jurisdictional issues were addressed in several cases before both the Georgia Court of Appeals and the Georgia Supreme Court. In *Morris v. Surges*,<sup>70</sup> the trial court found the former husband in contempt of a provision of the divorce decree that awarded funds for the equitable division of marital property.<sup>71</sup> The Georgia Supreme Court granted review primarily to decide whether the supreme court or the court of appeals had jurisdiction over the former husband's application for discretionary appeal.<sup>72</sup>

The supreme court held that an application for contempt is a motion and not a complaint.<sup>73</sup> Thus, contempt actions to enforce divorce decrees are "ancillary to the divorce action and not a new civil action."<sup>74</sup> Therefore, the supreme court has jurisdiction to hear an appeal of this nature.<sup>75</sup> The court noted,

The only recognized qualification of this principle is that the jurisdiction of the Court of Appeals "over appeals involving child custody but not a judgment for divorce and alimony, carries with it jurisdiction over" appeals in actions for contempt for violation of a child custody provision in a divorce decree.<sup>76</sup>

Accordingly, "an appeal from a judgment in a contempt action seeking to enforce any portion of the divorce decree other than child custody is ancillary to divorce and alimony and falls within [the supreme court's] jurisdiction over divorce and alimony cases."<sup>77</sup> The court concluded that this principle is consistent with the general rule that "the appellate court with subject-matter jurisdiction of the appeal from a judgment has appellate subject-matter jurisdiction of a contempt action in which enforcement of the judgment is sought."<sup>78</sup>

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69. *Id.* at 875, 665 S.E.2d at 918.

70. 284 Ga. 748, 670 S.E.2d 84 (2008).

71. *Id.* at 749, 670 S.E.2d at 85–86.

72. *Id.*, 670 S.E.2d at 86.

73. *See id.* at 750, 670 S.E.2d at 86.

74. *Id.* (quoting *Brown v. King*, 266 Ga. 890, 891, 472 S.E.2d 65, 66 (1996)).

75. *Id.*

76. *Id.* (quoting *Ashburn v. Baker*, 256 Ga. 507, 508, 350 S.E.2d 437, 438 (1986)).

77. *Id.* (internal quotation marks omitted) (quoting *Rogers v. McGahee*, 278 Ga. 287, 288, 602 S.E.2d 582, 584 (2004)).

78. *Id.* (quoting *Rogers*, 278 Ga. at 288 n.1, 602 S.E.2d at 584 n.1).

The Georgia Court of Appeals considered the General Assembly's recent amendment to O.C.G.A. § 5-6-34,<sup>79</sup> which addressed appeals to modifications of child custody orders.<sup>80</sup> In *Moore v. Moore-McKinney*,<sup>81</sup> the father filed a petition in February 2008 to modify the divorce decree's visitation schedule. Following a hearing, the trial court issued a final order of modification, and the father appealed.<sup>82</sup>

The mother claimed that the father's direct appeal of the trial court's order was improper.<sup>83</sup> The mother argued that the father was required to follow the discretionary appeal procedure set forth in O.C.G.A. § 5-6-35,<sup>84</sup> and his failure to do so required that his appeal be dismissed for lack of jurisdiction.<sup>85</sup> The court of appeals disagreed, reasoning that the recently amended O.C.G.A. § 5-6-34(a)(11) provides that all modifications of child custody orders filed on or after January 1, 2008, are directly appealable.<sup>86</sup> Therefore, it is unnecessary for appellants in child custody cases to comply with the discretionary appeal procedures of O.C.G.A. § 5-6-35.<sup>87</sup>

The mother also argued that the father's petition to modify the divorce decree's visitation schedule was not a child custody case, and therefore, it did not fall within the purview of O.C.G.A. § 5-6-34(a)(11).<sup>88</sup> As it is well established that a change in visitation amounts to a change in custody in legal contemplation, the court of appeals concluded that the father's petition was a child custody case for purposes of O.C.G.A. § 5-6-34(a)(11) and was therefore directly appealable.<sup>89</sup>

The question of jurisdiction over the termination of parental rights was examined in *Amerson v. Vandiver*.<sup>90</sup> In this case, the parties' settlement agreement, dated March 2004 and incorporated into their final divorce decree, provided that the father's parental rights would be terminated and that such termination was in the best interests of the children.<sup>91</sup>

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79. O.C.G.A. § 5-6-34 (1995 & Supp. 2009).

80. 2007 Ga. Laws 554, 554-55.

81. 297 Ga. App. 703, 678 S.E.2d 152 (2009).

82. *Id.* at 703, 678 S.E.2d at 154.

83. *Id.* at 704, 678 S.E.2d at 154.

84. O.C.G.A. § 5-6-35 (1995 & Supp. 2009).

85. *Moore*, 297 Ga. App. at 704 & n.1, 678 S.E.2d at 154 & n.1.

86. *Id.* at 704, 678 S.E.2d at 154.

87. *Id.* at 707, 678 S.E.2d at 156.

88. *Id.* at 704-05, 678 S.E.2d at 154.

89. *Id.* at 705, 678 S.E.2d at 154-55.

90. 285 Ga. 49, 673 S.E.2d 850 (2009).

91. *Id.* at 49, 673 S.E.2d at 850.

In March 2008 the father moved to set aside the divorce decree on the ground that the superior court did not have subject matter jurisdiction to terminate his parental rights. Even though the agreement was a voluntary contract between the parties, the father argued that it could be construed to terminate his parental rights because the trial court set aside so much of the final judgment.<sup>92</sup> The case was transferred to the juvenile court for final disposition on all issues regarding “termination of parental rights, custody, visitation, child support, and all ancillary matters necessary for the entry of a final judgment.”<sup>93</sup> The Georgia Supreme Court granted the mother’s application for interlocutory appeal.<sup>94</sup>

The supreme court noted that “judicial approval of a parent’s voluntary agreement for the termination of his parental rights [is authorized] when it is in the best interest of the child.”<sup>95</sup> However, under O.C.G.A. § 15-11-28(a)(2)(C),<sup>96</sup> the juvenile court has exclusive jurisdiction to initiate an action involving the termination of parental rights, except in connection with adoption proceedings.<sup>97</sup> The court concluded that a “superior court judge, upon hearing a divorce and child custody case, does not have jurisdiction to terminate parental rights,”<sup>98</sup> and “parties cannot ‘confer subject-matter jurisdiction on a court by agreement or waive the defense by failing to raise it [at] trial.’”<sup>99</sup> However, the supreme court held that the father in this case failed to exercise “utmost promptness” in bringing his motion to set aside.<sup>100</sup> The father’s delay to act, coupled with his “acts and omissions . . . prior to the divorce decree,” constituted behavior that when relied on by the mother, estopped the father from attacking the decree as void.<sup>101</sup>

Finally, the court of appeals addressed the question of jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)<sup>102</sup> in *Hall v. Wellborn*.<sup>103</sup> In December 2003, as part of a divorce proceeding in Bibb County, Georgia, between Elizabeth Hall and her former husband, the court awarded temporary custody of J.H. (a

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92. *Id.*, 673 S.E.2d at 850–51.

93. *Id.*, 673 S.E.2d at 851.

94. *Id.*

95. *Id.* (citing *Taylor v. Taylor*, 280 Ga. 88, 89, 623 S.E.2d 477, 478 (2005)).

96. O.C.G.A. § 15-11-28(a)(2)(C) (2008 & Supp. 2009).

97. *Amerson*, 285 Ga. at 50, 673 S.E.2d at 851.

98. *Id.* (quoting *Cothran v. Cothran*, 237 Ga. 487, 487, 228 S.E.2d 872, 872 (1976)).

99. *Id.* (quoting *Abushmais v. Erby*, 282 Ga. 619, 622, 652 S.E.2d 549, 552 (2007)).

100. *Id.*

101. *Id.*

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

103. 295 Ga. App. 884, 673 S.E.2d 341 (2009).

minor child) to Hall and ordered paternity testing. In May 2004 Jack Wellborn was determined to be J.H.'s father, and the former husband was relieved of any obligation to the child. Wellborn was not a party in the prior custody proceeding nor was he served. In July 2006 Wellborn filed a paternity action in the circuit court of Walton County, Florida, where the child and the parties then lived, seeking sole custody of J.H. In December 2006 the court awarded Wellborn primary custody and granted Hall visitation rights.<sup>104</sup>

In October 2007 Hall challenged the Florida court's jurisdiction in light of the initial custody award in Bibb County, and she moved to abate the December 2006 order. In January 2008 the Florida court denied Hall's motion. She then filed suit in the Superior Court of Stewart County, Georgia, and sought enforcement of the original Bibb County order that awarded her custody of the child instead of her former husband. The Stewart County court ruled that it could not exercise jurisdiction on account of the Florida court's exclusive, continuing jurisdiction. Hall appealed.<sup>105</sup>

The court of appeals held that under the UCCJEA, adopted by Georgia in 2001,<sup>106</sup> the Georgia court that makes an initial determination of child custody generally has exclusive, continuing jurisdiction over custody matters except when

- (1) [a] court of this state determines that neither the child nor the child's parents . . . has a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or
- (2) [a] court of this state or a court of another state determines that neither the child nor the child's parents or any person acting as a parent presently resides in this state.<sup>107</sup>

Hall argued that exclusive, continuing jurisdiction over the custody of J.H. was vested with the court in Bibb County when that court made its initial custody award to her.<sup>108</sup> However, the court noted that both parents admitted in the Florida action that they resided in Florida with the child, and the Florida court determined it had jurisdiction based on this fact.<sup>109</sup> Because the Florida court determined that neither the child nor its parents resided in Georgia, the court of appeals held that

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104. *Id.* at 884, 673 S.E.2d at 342.

105. *Id.*

106. 2001 Ga. Laws 129.

107. *Hall*, 295 Ga. App. at 885, 673 S.E.2d at 343 (second alteration in original) (internal quotation marks omitted) (quoting O.C.G.A. § 19-9-62(a)).

108. *Id.*

109. *Id.* at 885–86, 673 S.E.2d at 343.

the Bibb County court lost continuing, exclusive jurisdiction.<sup>110</sup> Ultimately, the court of appeals upheld the Stewart County trial court, ruling that it correctly dismissed the petition for lack of jurisdiction.<sup>111</sup>

#### VI. LEGITIMATION

During this survey period, the Georgia Court of Appeals was presented with an issue of first impression: “[C]an a father who has fully paid child support and demonstrated at least some interest in developing a relationship with his child be deemed to have legally abandoned that child?”<sup>112</sup> In *Binns v. Fairnot*,<sup>113</sup> the parties were unmarried, though engaged in a three-year relationship, when the mother became pregnant and gave birth to a daughter in July 2003. In January 2007 the father filed a petition to legitimate the child and for visitation rights. The trial court denied this petition because it found that the father had abandoned his opportunity to develop a relationship with the child. The father subsequently appealed.<sup>114</sup>

The court of appeals stated that the first issue to be addressed when considering a petition to legitimate a child is “whether the biological father has abandoned his opportunity interest to develop a relationship with the child.”<sup>115</sup> Next, the trial court must determine whether the legitimation is appropriate based on either a test of the father’s fitness or the best interest of the child standard, “depending on the nature of the [biological] father’s relationship with the child and other surrounding circumstances.”<sup>116</sup>

Following the birth of his daughter, the father was initially involved in the child’s life, including purchasing items for the child, keeping the child overnight, and paying child support after paternity was established. The paternal grandmother came to Georgia to provide childcare when the mother returned to work. In 2005 the mother, who served in the military, was deployed to Iraq for one year. During this time, the child resided with the maternal grandmother in Florida. The mother admittedly did not notify the father that the child was in Florida. When the mother returned from duty, she and her new husband obtained a

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110. *Id.* at 886, 673 S.E.2d at 343.

111. *Id.*

112. *Binns v. Fairnot*, 292 Ga. App. 336, 338, 665 S.E.2d 36, 39 (2008).

113. 292 Ga. App. 336, 665 S.E.2d 36 (2008).

114. *Id.* at 336–37, 665 S.E.2d at 37–38.

115. *Id.* at 336, 665 S.E.2d at 38 (citing *Jones v. Smith*, 250 Ga. App. 486, 486, 552 S.E.2d 112, 113 (2001)).

116. *Id.* at 336–37, 665 S.E.2d at 38 (alteration in original) (quoting *Jones*, 250 Ga. App. at 486, 552 S.E.2d at 113).

new address in Georgia and again did not notify the father of the child's return to Georgia or provide the father with an address or phone number.<sup>117</sup>

In making its determination, "the trial court focused on what [the father] did not do."<sup>118</sup> Specifically, he had no contact with the child after August 2004.<sup>119</sup> However, the court of appeals minimized this fact by noting it was undisputed that the mother did not apprise the father of the child's whereabouts after 2005.<sup>120</sup> The trial court "faulted the father for failing to do more to locate [or] contact the child during this time."<sup>121</sup> However, the court of appeals held that even if the father could have done more, the evidence did not support finding that he did so little as to constitute abandonment.<sup>122</sup> The court of appeals concluded that the father's "constant payment of financial support coupled with his avowed interest in establishing and maintaining a relationship with the child mitigate against a finding of abandonment, and the trial court abused its discretion in holding otherwise."<sup>123</sup>

Further, the court of appeals noted that "in finding that [the father] abandoned his opportunity interest, the trial court failed to ascertain whether legitimation was in the child's best interest."<sup>124</sup> Therefore, the court of appeals reversed the trial court's ruling and remanded for a determination about the second prong of the legitimation inquiry.<sup>125</sup>

Effective July 1, 2008, O.C.G.A. § 19-7-21.1<sup>126</sup> provides that "[p]rior to the child's first birthday, a father of a child born out of wedlock may render his relationship with the child legitimate when both the mother and father have freely agreed, consented, and signed a voluntary acknowledgment of paternity and an acknowledgment of legitimation."<sup>127</sup> However, the "[v]oluntary acknowledgment of legitimation [does] not authorize the father to receive custody or visitation until there is a judicial determination of custody or visitation."<sup>128</sup>

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117. *Id.* at 337, 665 S.E.2d at 38.

118. *Id.* at 338, 665 S.E.2d at 39.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* (citing *Bowers v. Pearson*, 271 Ga. App. 266, 270–71, 609 S.E.2d 174, 177–78 (2005)).

124. *Id.* at 339, 665 S.E.2d at 39 (citing *Jones*, 250 Ga. App. at 486, 552 S.E.2d at 112).

125. *Id.* (citing *In re M.K.*, 288 Ga. App. 71, 74, 653 S.E.2d 354, 357 (2007)).

126. O.C.G.A. § 19-7-21.1 (Supp. 2009).

127. *Id.* § 19-7-21.1(b).

128. *Id.* § 19-7-21.1(e).

## VII. PARTITION

In *Harvey v. Sessoms*,<sup>129</sup> the Georgia Supreme Court faced the issue of partition. In this case, the parties divorced in 1970 by a final judgment and divorce decree that awarded the wife “permanent possession” of the marital home and kept title to the property remaining in both the husband and the wife. The wife lived in the home until 2004 when she moved out and rented the home to a third party, retaining the rental income. The husband then filed a petition for statutory partition, claiming that the wife gave up possession of the marital home when she moved out. The husband also sought an accounting of the rental income and profits. The trial court determined that the 1970 final judgment and divorce decree placed the property of the tenants in common in the exclusive possession of one tenant and worked as an impediment to partitioning. The trial court granted summary judgment to the wife, and the husband appealed.<sup>130</sup>

As a result of the divorce decree, the parties were tenants in common with regard to the property, and each owned a one-half undivided interest thereto.<sup>131</sup> Therefore, as a tenant in common with no direction regarding how the property must be divided, the husband was authorized under O.C.G.A. § 44-6-160<sup>132</sup> to petition for a statutory partitioning.<sup>133</sup>

The court stated that the “right of partition may be surrendered by contract.”<sup>134</sup> Additionally, when a party agrees to relinquish his right to partition, either expressly or impliedly, partition will not be granted.<sup>135</sup> In this case, the court determined that the husband did not execute an agreement by which he surrendered his right to partition.<sup>136</sup> The supreme court disapproved of *Blalock v. Blalock*<sup>137</sup> and *White v. White*<sup>138</sup> to the extent they could be read as finding a relin-

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129. 284 Ga. 75, 663 S.E.2d 210 (2008).

130. *Id.* at 75, 663 S.E.2d at 211.

131. *Id.* at 76, 663 S.E.2d at 211.

132. O.C.G.A. § 44-6-160 (1991).

133. *Harvey*, 284 Ga. at 76, 663 S.E.2d at 211 (citing *Mansour Prop. L.L.C. v. I-85/Ga. 20 Ventures, Inc.*, 277 Ga. 632, 633–34, 592 S.E.2d 836, 837 (2004)).

134. *Id.* at 77, 663 S.E.2d at 212 (quoting 1 DANIEL F. HINKEL, PINDAR’S GEORGIA REAL ESTATE LAW AND PROCEDURE § 7-103 (6th ed. 2004)).

135. *Id.* (citing *Mansour Prop.*, 277 Ga. at 634, 592 S.E.2d at 837–38).

136. *Id.*

137. 250 Ga. 862, 301 S.E.2d 876 (1983).

138. 253 Ga. 388, 320 S.E.2d 757 (1984).

quishment of the right to partition in a judicial decree unsupported by an agreement.<sup>139</sup>

#### VIII. PROMISSORY ESTOPPEL

The Georgia Supreme Court granted discretionary review in *Garcia v. Garcia*,<sup>140</sup> and it took the opportunity to clarify its previous application of the doctrine of promissory estoppel to require the payment of child support by a man who was neither the biological nor the adoptive father of a child.<sup>141</sup> In this case, Christopher Garcia appealed a final judgment and divorce decree that ordered him to pay support for a child who was not his biological daughter and who was eight years old when Garcia married the child's mother in 2002.<sup>142</sup>

In reversing the judgment of the trial court, the court distinguished *Wright v. Newman*,<sup>143</sup> a case in which the court had applied the doctrine of promissory estoppel to require the payment of child support by a man who was neither the biological nor the adoptive father of a child.<sup>144</sup> In making this distinction, the court pointed out that in *Wright*,

the evidence showed the man had promised the child and the child's mother that he would assume all obligations and responsibilities of fatherhood, including providing support; had held himself out as the father of the child and allowed the child to consider him as the biological father; and the evidence showed that the mother and child relied upon the promise to their detriment.<sup>145</sup>

The court acknowledged that there was evidence that Garcia sought to amend the child's birth certificate when he knew that he was not the biological father and that he promised to assume the obligations and responsibilities of fatherhood, including providing support.<sup>146</sup> However, the court reasoned that this case differed from *Wright* because there was no evidence in this case showing that the mother's reliance upon Garcia's promise caused the mother to forego a valuable legal right to her detriment—specifically, her legal right to seek child support from the

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139. *Harvey*, 284 Ga. at 77, 663 S.E.2d at 212.

140. 284 Ga. 152, 663 S.E.2d 709 (2008).

141. *See id.* at 152–53, 663 S.E.2d at 709–10.

142. *Id.* at 152, 663 S.E.2d at 709–10.

143. 266 Ga. 519, 467 S.E.2d 533 (1996).

144. *Garcia*, 284 Ga. at 152, 663 S.E.2d at 710 (citing *Wright*, 266 Ga. at 520–21, 467 S.E.2d at 534–35).

145. *Id.* at 152–53, 663 S.E.2d at 710 (citing *Wright*, 266 Ga. at 520–21, 467 S.E.2d at 534–35).

146. *Id.* at 153, 663 S.E.2d at 710.

child's biological father.<sup>147</sup> Thus, the elements of the promissory estoppel doctrine were not fulfilled, making the trial court's application of it in this case improper.<sup>148</sup>

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147. *Id.* at 153–54, 663 S.E.2d at 710.

148. *Id.* at 154, 663 S.E.2d at 711.