

Domestic Relations

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This survey period¹ saw continued evolution of domestic relations law through changes in legislation and case law.² Legislation passed in the 2009 Session of the Georgia General Assembly took effect during this survey period, and the Georgia Supreme Court continued to accept nonfrivolous appeals in divorce cases, which provides guidance to those interested in domestic relations law.

I. PRENUPTIAL AGREEMENTS

During this survey period, the supreme court clarified which prenuptial agreements are subject to section 19-3-63 of the Official Code of Georgia Annotated (O.C.G.A.).³ This statute provides in pertinent part that “[e]very marriage contract in writing, made in contemplation of marriage . . . must be attested by at least two witnesses.”⁴ In *Dove v. Dove*,⁵ the supreme court determined that the trial court erred in finding a prenuptial agreement unenforceable because it was not attested by two witnesses.⁶ The trial court held that the agreement, which addressed issues of alimony, was made in contemplation of

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1. This Survey chronicles developments in Georgia domestic relations law from June 1, 2009 to May 31, 2010.

2. For an 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*, 61 MERCER L. REV. 117 (2009).

3. O.C.G.A. § 19-3-63 (2010).

4. *Id.*

5. 285 Ga. 647, 680 S.E.2d 839 (2009).

6. *Id.* at 647, 680 S.E.2d at 840.

marriage and subject to the dual attestation requirement in O.C.G.A. § 19-3-63.⁷ On appeal, the supreme court held the trial court's determination was erroneous for two reasons.⁸ First, it is well settled that prenuptial agreements that address alimony issues "are made in contemplation of divorce, not marriage."⁹ Further, the definitive criteria articulated by the supreme court for lower courts to use in determining whether a prenuptial agreement made in contemplation of divorce is valid are as follows:

the party seeking enforcement bears the burden of proof to demonstrate that: (1) the antenuptial agreement was not the result of fraud, duress, mistake, misrepresentation, or nondisclosure of material facts; (2) the agreement is not unconscionable; and (3) taking into account all relevant facts and circumstances, including changes beyond the parties' contemplation when the agreement was executed, enforcement of the antenuptial agreement would be neither unfair nor unreasonable.¹⁰

Similarly, in *Lawrence v. Lawrence*,¹¹ the wife challenged the enforceability of the parties' prenuptial agreement because it was attested by only one witness.¹² The supreme court held that the agreement in issue, which addressed alimony and referred to the possibility of divorce, was a contract made in contemplation of divorce, not in contemplation of marriage.¹³ The court reasoned that a contract made in contemplation of divorce "is not subject to the dual attestation requirement of [O.C.G.A.] § 19-3-63."¹⁴

On the other hand, in *Sullivan v. Sullivan*,¹⁵ when faced with a prenuptial agreement that did not address divorce or alimony but did include language waiving each spouse's rights in the other's property either before or after marriage, the supreme court determined that the agreement was made in contemplation of marriage; therefore, the agreement was subject to O.C.G.A. § 19-3-63.¹⁶ However, the agreement in issue had only one witness and was rendered unenforceable

7. *Id.*

8. *See id.* at 647-51, 680 S.E.2d at 840-42.

9. *Id.* at 647, 680 S.E.2d at 840.

10. *Id.* at 650, 680 S.E.2d at 842 (quoting *Blige v. Blige*, 283 Ga. 65, 67, 656 S.E.2d 822, 824 (2008) (internal quotation marks omitted) (citing *Scherer v. Scherer*, 249 Ga. 635, 641, 292 S.E.2d 662, 666 (1982)).

11. 286 Ga. 309, 687 S.E.2d 421 (2009).

12. *Id.* at 311, 687 S.E.2d at 423.

13. *Id.* at 311-12, 687 S.E.2d at 423-24.

14. *Id.* at 312, 687 S.E.2d at 424.

15. 286 Ga. 53, 684 S.E.2d 861 (2009).

16. *Id.* at 53-54, 684 S.E.2d at 862.

because an unattested marriage contract is not effective between the signatories.¹⁷

In *Lawrence* the wife also challenged the enforceability of the prenuptial agreement on a second basis.¹⁸ The wife argued there was not complete disclosure of the husband's financial status as mandated by the first prong of the three-part test articulated in *Scherer v. Scherer*,¹⁹ which requires that "(1) the antenuptial agreement was not the result of fraud, duress, mistake, misrepresentation, or nondisclosure of material facts."²⁰ It was undisputed that the wife never saw a financial statement or any formal documentation before signing the antenuptial agreement.²¹ The supreme court ultimately held that the wife had sufficient knowledge of the husband's business dealings and personal financial condition to support the trial court's ruling that there was full and fair disclosure prior to the execution of the agreement.²² However, the court noted "that attaching to the antenuptial agreement financial statements showing both parties' assets, liabilities, and income, while not necessary, 'is the most effective method of satisfying the statutory [disclosure] obligation in most circumstances,' thereby deterring protracted and expensive litigation if the antenuptial agreement is later invoked."²³

II. PLEADINGS

In *Ellis v. Ellis*,²⁴ the supreme court ruled against a woman who argued the lower court erred in conducting the final hearing in her divorce without her being present.²⁵ The husband filed for divorce in June 2008. At the time, the wife acknowledged service of the husband's complaint but was not represented by counsel and did not file any response. The wife later retained counsel who filed an entry of appearance but no responsive pleadings. The husband's attorney notified the wife's attorney of the final hearing date, which was continued, and depositions were set for February 2009. The wife's

17. *Id.* at 54, 684 S.E.2d at 862.

18. *See Lawrence*, 286 Ga. at 312-13, 687 S.E.2d at 424.

19. 249 Ga. 635, 292 S.E.2d 662 (1982).

20. *Lawrence*, 286 Ga. at 312, 687 S.E.2d at 424 (quoting *Blige v. Blige*, 283 Ga. 65, 67, 656 S.E.2d 822, 824 (2008)) (internal quotation marks omitted) (citing *Scherer*, 249 Ga. at 641, 292 S.E.2d at 666).

21. *Id.* at 313, 687 S.E.2d at 424.

22. *Id.* at 313-14, 687 S.E.2d at 425.

23. *Id.* at 313, 687 S.E.2d at 424 (alteration in original) (citations omitted) (quoting *Blige v. Blige*, 283 Ga. 65, 69 n.12, 656 S.E.2d 822, 826 n.12 (2008)).

24. 286 Ga. 625, 690 S.E.2d 155 (2010).

25. *Id.* at 625, 690 S.E.2d at 156.

attorney later testified that the husband's attorney agreed to give him notice of the final hearing once it was scheduled by the court.²⁶

Prior to the depositions, a new attorney entered an appearance on behalf of the husband and "moved the trial court to enter a final judgment of divorce on the pleadings without holding an evidentiary hearing."²⁷ After the trial court granted the husband's motion, the wife filed a motion for new trial, relying on the supposed agreement made by the husband's first attorney to provide the wife notice of the date of any final hearing. The trial court denied the motion, finding that notwithstanding any outside agreement between the parties' counsel, the wife waived notice by failing to file a response.²⁸ The wife appealed.²⁹

Generally, "[w]hen a defendant in a divorce action fails to file defensive pleadings, the divorce is, by definition, uncontested. Failure to file defensive pleadings constitutes waiver of notice of the hearing on the final decree."³⁰ Further, O.C.G.A. § 9-11-5(a)³¹ provides that

the failure of a party to file pleadings in an action shall be deemed to be a waiver by him or her of all notices, including notices of time and place of trial and entry of judgment, and all service in the action, except service of pleadings asserting new or additional claims for relief.³²

The supreme court held that the wife waived any final hearing notice in this case and that the trial court did not err in denying the wife's motion for new trial.³³

III. CHILD CUSTODY

In *Mongerson v. Mongerson*,³⁴ following entry of the final judgment and decree of divorce, the husband appealed the trial court's ruling in part, arguing the trial court abused its discretion in prohibiting him "from exposing the children to his homosexual partners and friends."³⁵ Public policy in Georgia encourages divorced parents to participate in

26. *Id.*

27. *Id.*

28. *Id.* at 625-26, 690 S.E.2d at 156-57.

29. *See id.* at 625, 690 S.E.2d at 156.

30. *Id.* at 626, 690 S.E.2d at 157 (alteration in original) (quoting *Hardwick v. Hardwick*, 245 Ga. 570, 571, 266 S.E.2d 184, 185 (1980)) (internal quotation marks omitted).

31. O.C.G.A. § 9-11-5(a) (2006 & Supp. 2010).

32. *Id.*; *Ellis*, 286 Ga. at 626, 690 S.E.2d at 157.

33. *Ellis*, 286 Ga. at 627, 690 S.E.2d at 157-58.

34. 285 Ga. 554, 678 S.E.2d 891 (2009).

35. *Id.* at 555, 678 S.E.2d at 894 (internal quotation marks omitted).

the raising of their children.³⁶ At the same time, a trial court may, at its discretion, terminate the visitation rights of a noncustodial parent in the presence of certain individuals if the evidence shows that exposure to the prohibited individuals would have an adverse affect on the children or that the children were exposed to inappropriate conduct involving the individuals specified.³⁷ In this case, the supreme court held there was no evidence in the record that any member of the gay and lesbian community “ha[d] engaged in inappropriate conduct in the presence of the children or that the children would be adversely affected by exposure to any member of that community.”³⁸ The supreme court further held that the trial court’s “prohibition against contact with any gay or lesbian person acquainted with [the h]usband assumes, without evidentiary support, that the children will suffer harm from any such contact” and that “[s]uch an arbitrary classification based on sexual orientation flies in the face of our public policy” and therefore is an abuse of discretion.³⁹

IV. CHILD SUPPORT

Effective September 1, 2009, the child support guidelines found in O.C.G.A. § 19-6-15⁴⁰ were amended to include cost of life insurance as a deviation subtracted from or added to the presumptive amount of child support.⁴¹ The guidelines were further amended as they relate to a noncustodial parent’s request for a low-income deviation.⁴² If a noncustodial parent requests such a deviation from his or her presumptive child support obligation, that “parent shall demonstrate no earning capacity or that his or her pro rata share of the presumptive amount of child support would create an extreme economic hardship for such parent.”⁴³ In considering this request, the fact finder “shall examine all attributable and excluded sources of income, assets, and benefits available to the noncustodial parent and may consider all reasonable expenses of the noncustodial parent.”⁴⁴ Among other things, the fact finder shall also consider “the relative hardship that a reduction in the

36. *Id.*; see O.C.G.A. § 19-9-3(d) (2010).

37. *Mongerson*, 285 Ga. at 555, 678 S.E.2d at 894.

38. *Id.* at 556, 678 S.E.2d at 894-95.

39. *Id.* at 556, 678 S.E.2d at 895.

40. O.C.G.A. § 19-6-15 (2010).

41. Ga. H.R. Bill 145, § 2, Reg. Sess., 2009 Ga. Laws 96-97 (codified at O.C.G.A. § 19-6-15(b)(8)).

42. *Id.* at § 4, 2009 Ga. Laws at 97 (codified at O.C.G.A. § 19-6-15(i)(2)(B)).

43. *Id.* (codified at O.C.G.A. § 19-6-15(i)(2)(B)(i)).

44. *Id.* (codified at O.C.G.A. § 19-6-15(i)(2)(B)(ii)).

amount of child support paid to the custodial parent would have on the custodial parent's household."⁴⁵

Both the Georgia Court of Appeals and the Georgia Supreme Court dealt with issues related to child support during this survey period. In *Grenevitch v. Grenevitch*,⁴⁶ the supreme court reversed the trial court's dismissal of the former husband's petition to modify child support.⁴⁷ The parties were divorced in December 2007 pursuant to a final judgment and divorce decree that incorporated the parties' settlement agreement. Under the divorce decree, the husband was required to pay \$1,614.70 per month in child support for his four children.⁴⁸ This obligation would continue

until such time as the youngest minor child dies, marries, enters the military, attains the age of eighteen, or is otherwise emancipated, whichever first occurs; *provided, however*, that in the event that *any* of the minor children turn 18 years of age *while still in high school*, [the husband's] child support obligations shall continue for *that* child until such time as the child graduates from high school, but in no event to extend past the child's twentieth birthday.⁴⁹

The husband filed a complaint to modify his child support obligation, alleging that the parties' eldest child had turned eighteen and that his obligation to pay child support for the child had ceased, and his former wife filed a motion to dismiss. At the hearing on the wife's motion, the husband's counsel pointed out that one of the children turned eighteen and was not in high school any longer. However, the trial court dismissed the husband's complaint.⁵⁰

The supreme court noted that "[a] motion to dismiss should not be granted unless the averments in the complaint disclose with certainty that a party 'would not be entitled to relief under any state of facts that could be proven in support of the claim.'"⁵¹ Thus, the trial court erred in dismissing the husband's complaint without allowing him to present evidence.⁵² If the trial court had allowed the husband to present evidence showing that the eldest child had turned eighteen and was no longer in high school, then "a state of facts could have been proven that

45. *Id.* (codified at O.C.G.A. § 19-6-15(i)(2)(B)(iii)).

46. 285 Ga. 509, 678 S.E.2d 87 (2009).

47. *Id.* at 509, 678 S.E.2d at 88.

48. *Id.*

49. *Id.* at 509-10, 678 S.E.2d at 88.

50. *Id.* at 510, 678 S.E.2d at 88-89.

51. *Id.* at 509, 678 S.E.2d at 88 (quoting *Ledford v. Meyer*, 249 Ga. 407, 408, 290 S.E.2d 908, 909 (1982)).

52. *Id.* at 510, 678 S.E.2d at 89.

would have ended [the h]usband's obligation to pay child support for the eldest child who had turned eighteen . . . and was no longer in high school."⁵³

In *Turner v. Turner*,⁵⁴ the parties reached agreement on all issues in their divorce action except child support and division of extracurricular expenses. These two issues were submitted to the trial court for determination. After an in-chambers conference, the trial court entered a final judgment and decree of divorce, which ordered the husband to pay \$552.09 in monthly child support and two-thirds of the expenses for the children's extracurricular activities.⁵⁵

The husband appealed the trial court's ruling regarding extracurricular expenses. He argued that the trial court's ruling required him to pay the costs of extracurricular expenses twice because the costs were included in the presumptive child support amount.⁵⁶ The supreme court noted that "the basic child support obligation is intended to cover average amounts of special expenses for raising children, including the cost of extracurricular activities."⁵⁷ When the special expenses involved "exceed[] seven percent of the basic child support obligation, the 'additional amount of special expenses shall be considered . . . a deviation . . . ' [and] included in Schedule E of the Child Support Worksheet."⁵⁸

Instead of making a provision in Schedule E for a special expenses deviation, the trial court apportioned the entire cost of extracurricular expenses between the parties, which is prohibited under O.C.G.A. § 19-6-15(i)(2)(J)(ii).⁵⁹ Therefore, the trial court erred in making a separate child support award, and its judgment was reversed on appeal by the supreme court.⁶⁰

In *Henry v. Beacham*,⁶¹ the court of appeals considered the validity of a court-ordered child support trust.⁶² Following the entry of a final judgment of paternity and legitimation, the trial court found the father's gross monthly income was \$49,583.33 and ordered that \$9000 be

53. *Id.* at 510, 678 S.E.2d at 88-89.

54. 285 Ga. 866, 684 S.E.2d 596 (2009).

55. *Id.* at 866, 684 S.E.2d at 597.

56. *Id.* at 867, 684 S.E.2d at 598.

57. *Id.*; see O.C.G.A. § 19-6-15(i)(2)(J)(ii).

58. *Turner*, 285 Ga. at 867-68, 684 S.E.2d at 598; see also O.C.G.A. § 19-6-15(i)(2)(J)(ii).

59. *Turner*, 285 Ga. at 868, 684 S.E.2d at 598.

60. *Id.*

61. 301 Ga. App. 160, 686 S.E.2d 892 (2009).

62. *Id.* at 160-61, 686 S.E.2d at 893.

deducted from his paychecks during football season⁶³ to fulfill an annual child support obligation of \$36,000. The trial court also directed the father to establish a \$250,000 trust to fund future child support payments in the event that he failed to pay child support as ordered.⁶⁴ The father appealed, “argu[ing] that the child support guidelines codified in [O.C.G.A.] § 19-6-15 do not authorize” the trial court to create a trust in addition to monthly child support payments.⁶⁵

In upholding the trial court’s ruling, the court of appeals pointed out that the child support guidelines allow the trial court to deviate from the guidelines when the trial court determines that a deviation is in the best interest of the children.⁶⁶ The language of the statute “directs that a court applying the guidelines ‘shall not abrogate its responsibility in making the final determination of child support based on the evidence presented to it at the time of the hearing or trial.’”⁶⁷ The court of appeals also noted that the supreme court has historically given the trial courts “wide latitude” in “fashioning support awards” by approving “lump sum child support payments and the creation of trust funds for future payments . . . , even though the guidelines in force at the time did not expressly provide for such payment structures.”⁶⁸

In *James-Dickens v. Petit-Compere*,⁶⁹ the trial court denied the mother’s request for a contempt hearing regarding the father’s failure to pay child support pursuant to a temporary protective order. The trial court rejected the mother’s request on the ground that the twelve-month protective order would expire before the hearing date. The mother appealed.⁷⁰

The child support order was initially entered pursuant to O.C.G.A. § 19-13-4(a),⁷¹ which provides the process for entering protective orders.⁷² The statute governing continuing enforceability of child support orders, O.C.G.A. § 19-6-17(e),⁷³ provides that “[a]ny payment or installment of support under any child support order is, on *and after*

63. The father was a professional football player “with the Denver Broncos of the National Football League.” *Id.* at 161, 686 S.E.2d at 894.

64. *Id.*

65. *Id.* at 162, 686 S.E.2d at 894.

66. *Id.* at 163, 686 S.E.2d at 895; *see also* O.C.G.A. § 19-6-15(c)(1).

67. O.C.G.A. § 19-6-15(d); *Henry*, 301 Ga. App. at 163, 686 S.E.2d at 895.

68. *Henry*, 301 Ga. App. at 164, 686 S.E.2d at 895 (referring to cases that arose under the former version of the child support guidelines).

69. 299 Ga. App. 519, 683 S.E.2d 83 (2009).

70. *Id.* at 519, 683 S.E.2d at 84.

71. O.C.G.A. § 19-13-4(a) (2010).

72. *James-Dickens*, 299 Ga. App. at 519, 683 S.E.2d at 84.

73. O.C.G.A. § 19-6-17(e) (2010).

the date due: (1) [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.”⁷⁴ Thus, even though the child support was awarded pursuant to a temporary rather than permanent order, each child support installment is itself an enforceable order.⁷⁵

Further, the court of appeals has previously held that in a civil contempt proceeding, the trial court does not have the “authority to modify the terms of a child support order,” and “a trial court may not forgive any child support in arrears.”⁷⁶ For these reasons, the court of appeals reversed the ruling of the trial court and remanded the matter for further proceedings.⁷⁷

V. ALIMONY

During the survey period, the supreme court ruled on several questions related to alimony awards, including proper venue, factors to be considered, and evidence required to support an award. In *Parris v. Douthit*,⁷⁸ the court reiterated the current law that absent a valid waiver, “proper venue in an alimony-modification action is the county of residence of the . . . defendant in the modification action.”⁷⁹ In December 2008 the parties divorced in Cobb County. The former wife, Parris, filed a contempt action in Cobb County on February 12, 2009. Afterward, Douthit, Parris’s former husband, filed a petition for alimony modification, which was also filed in Cobb County. Parris answered the modification action by special appearance and moved to dismiss the action. Parris argued that because she had become a resident of Cherokee County, the venue was improper. The trial court denied her motion and temporarily modified Douthit’s alimony obligation.⁸⁰

On appeal, after holding that proper venue in an alimony modification is the county in which the defendant in the modification action resides, the supreme court articulated two ways in which venue can be conferred by consent.⁸¹ First, venue can be waived by conduct if a defendant fails to raise the defense through responsive pleadings or by motion.⁸²

74. *James-Dickens*, 299 Ga. App. at 519-20, 683 S.E.2d at 84.

75. *Id.* at 520, 683 S.E.2d at 85; see O.C.G.A. § 19-6-17(e)(1).

76. *James-Dickens*, 299 Ga. App. at 520, 683 S.E.2d at 84 (quoting Ga. Dep’t of Human Res. v. Gamble, 297 Ga. App. 509, 510, 677 S.E.2d 713, 715 (2009)).

77. *Id.* at 520, 683 S.E.2d at 85.

78. 287 Ga. 119, 694 S.E.2d 655 (2010).

79. *Id.* at 119, 694 S.E.2d at 656 (quoting *Davis v. Davis*, 259 Ga. 151, 151, 377 S.E.2d 850, 850 (1989)); GA. CONST. of 1983, art. VI, § 2, para. 6.

80. *Parris*, 287 Ga. at 119, 694 S.E.2d at 656.

81. *Id.* at 120, 694 S.E.2d at 656-57.

82. *Id.*; see also O.C.G.A. § 9-11-12(h)(1) (2006 & Supp. 2010).

Second, venue can also be waived “where the defendant voluntarily, clearly and specifically, by affidavit, waives any objection to venue.”⁸³

Here, Parris did not waive venue by either conduct or written affidavit.⁸⁴ Even though Douthit argued, and the trial court found, that Parris orally consented to venue, her consent was neither in writing nor transcribed, and such alleged oral consent is not sufficiently comparable to the waivers the court of appeals has previously approved.⁸⁵ Thus, the trial court’s judgment was reversed.⁸⁶

In *Sprouse v. Sprouse*,⁸⁷ the husband appealed the trial court’s alimony determination, arguing that the trial court improperly considered the length of time the parties lived together prior to marriage. The parties entered into a common law marriage in Alabama in 1996, which was terminated by a divorce decree in 2001. Soon after their 2001 divorce, the parties resumed cohabitation and on March 5, 2005, were ceremonially married. On January 2, 2007, the husband filed a divorce action.⁸⁸

Following a bench trial, the trial court entered a final divorce decree and awarded the wife alimony for approximately thirteen years in varying amounts.⁸⁹ The trial court stated that the parties “have been together for 13 years and she doesn’t appear to have anything. I’m going to do [it] that way and then it stops.”⁹⁰

O.C.G.A. § 19-6-5(a)⁹¹ articulates factors relevant to the determination of alimony.⁹² When the husband argued that “palimony”⁹³ is not recognized in Georgia, the trial court explained that while the length of the marriage is one factor to be considered, it is not dispositive.⁹⁴ The finder of fact has “broad discretion to consider [s]uch other relevant factors as the court deems equitable and proper.”⁹⁵ In looking to case law from other jurisdictions, the supreme court held “that[] under the catchall provision of [O.C.G.A.] § 19-6-5(a)(8), the trial ‘court is free to

83. *Parris*, 287 Ga. at 120, 694 S.E.2d at 657.

84. *Id.*

85. *Id.* at 120, 694 S.E.2d at 656-57.

86. *Id.* at 120, 694 S.E.2d at 657.

87. 285 Ga. 468, 678 S.E.2d 328 (2009).

88. *Id.* at 468, 678 S.E.2d at 329.

89. *Id.*

90. *Id.* at 469, 678 S.E.2d at 329-30 (internal quotation marks omitted).

91. O.C.G.A. § 19-6-5(a) (2010).

92. *Id.*

93. Palimony is a court-ordered allowance paid by one member to the other of an unmarried couple that formerly cohabitated. BLACK’S LAW DICTIONARY 1219 (9th ed. 2009).

94. *Sprouse*, 285 Ga. at 469-70, 678 S.E.2d at 330.

95. O.C.G.A. § 19-6-5(a)(8); *Sprouse*, 285 Ga. at 470, 678 S.E.2d at 330 (alteration in original).

consider the parties' entire relationship, including periods of premarital cohabitation,' in determining alimony."⁹⁶

In *Coker v. Coker*,⁹⁷ the husband was ordered to pay the wife \$36,500 lump sum alimony within three-and-a-half months following a bench trial.⁹⁸ The husband appealed. The undisputed evidence at trial showed the marital estate was a mobile home, appraised several years prior for \$4000,⁹⁹ and that the husband's separate estate consisted of an 8.34% interest in a family-owned limited liability company,¹⁰⁰ which could not be converted or transferred to cash, and \$500 a week in income from his employment.¹⁰¹

While the finder of fact is usually given wide latitude in determining the alimony amount to be paid,¹⁰² "[O.C.G.A.] § 19-6-1(c) provides that alimony is to be awarded in accordance with the needs of the party to whom it is awarded *and with the ability of the other party to pay*."¹⁰³ In determining the trial court's award of lump sum alimony to the wife to be erroneous, the supreme court held there was no evidence that the husband had the financial ability to pay the amount as ordered.¹⁰⁴

VI. DIVISION OF PROPERTY

During this survey period, the supreme court faced cases involving division of military retirement benefits and stock options, transmutation of separate property into marital property, and several cases regarding modification of final judgments and divorce decrees. In *Michel v. Michel*,¹⁰⁵ the trial court denied the wife an interest in the husband's military retirement benefits pursuant to their divorce.¹⁰⁶ The trial court found that because the parties had been married less than ten

96. *Sprouse*, 285 Ga. at 470, 678 S.E.2d at 330 (quoting *Harrelson v. Harrelson*, 932 P.2d 247, 250 (Alaska 1997)). Cf. *Rehak v. Mathis*, 239 Ga. 541, 238 S.E.2d 81 (1977) (holding that when plaintiff brought an action to recover the money she invested in a house with defendant and the comparable value of the services she rendered him during eighteen years of cohabitation, the fact that the parties were unmarried while cohabitating constituted immoral consideration that barred plaintiff from recovery).

97. 286 Ga. 20, 685 S.E.2d 70 (2009).

98. *Id.* at 20-21, 685 S.E.2d at 70-71.

99. *Id.* at 20-21, 685 S.E.2d at 70.

100. *Id.* at 20, 685 S.E.2d at 70. The LLC's sole asset was a 154-acre parcel of land with an appraised value of \$1.2 million. *Id.*

101. *Id.* at 21, 685 S.E.2d at 71.

102. *Id.*

103. *Id.* (quoting *Duncan v. Duncan*, 262 Ga. 872, 873, 426 S.E.2d 857, 859 (1993)); see O.C.G.A. § 19-6-1(c) (2010).

104. *Coker*, 286 Ga. at 22-23, 685 S.E.2d at 72.

105. 286 Ga. 892, 692 S.E.2d 381 (2010).

106. *Id.* at 893, 692 S.E.2d at 382.

years, pursuant to 10 U.S.C. § 1408(d)(2),¹⁰⁷ it was without authority to award the wife an interest in the husband's military retirement account.¹⁰⁸

The wife appealed, arguing that the Uniformed Services Former Spouses' Protection Act (Act),¹⁰⁹ which encompasses § 1408(d)(2), "affirmatively grants state courts the power to treat military retirement benefits as marital property that is subject to equitable division upon a divorce."¹¹⁰ The Act was passed by Congress directly in response to *McCarty v. McCarty*,¹¹¹ "in which the Supreme Court of the United States held that federal statutes governing military retirement pay prevented state courts from treating such pay as marital property that is divisible upon divorce."¹¹² Subsequently, the Supreme Court held that "[i]t is clear from both the language of the [Act], and its legislative history, that Congress sought to change the legal landscape created by the *McCarty* decision."¹¹³

The Act provides a direct payment mechanism that requires the federal government to "make direct payments to a former spouse who presents . . . a state-court order granting her a portion of the military retiree's disposable retired or retainer pay."¹¹⁴ However, "only a former spouse who was married to a military member 'for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired . . . pay[]' . . . is eligible to receive direct . . . payments."¹¹⁵

The Georgia Supreme Court determined that the trial court erred in finding that the ten-year requirement of § 1408(d)(2) prevented the trial court from awarding a portion of the husband's military retirement pay to the wife.¹¹⁶ The requirement limits the direct payment mechanism, but it does not limit the state court's power to determine that military

107. 10 U.S.C. § 1408(d)(2) (2006).

108. *Michel*, 286 Ga. at 893, 692 S.E.2d at 382.

109. 10 U.S.C. § 1408 (2006).

110. *Michel*, 286 Ga. at 893, 692 S.E.2d at 382; see 10 U.S.C. § 1408(c)(1).

111. 453 U.S. 210 (1981).

112. *Michel*, 286 Ga. at 893, 692 S.E.2d at 382.

113. *Id.* (citations omitted) (quoting *Mansell v. Mansell*, 490 U.S. 581, 587 (1989)) (internal quotation marks omitted).

114. *Id.* at 894, 692 S.E.2d at 382 (quoting *Mansell v. Mansell*, 490 U.S. 581, 585 (1989)); see 10 U.S.C. § 1408(d).

115. *Michel*, 286 Ga. at 894, 692 S.E.2d at 382 (citations omitted) (quoting *Mansell v. Mansell*, 490 U.S. 581, 585 (1989)); see 10 U.S.C. § 1408(d)(2).

116. *Michel*, 286 Ga. at 894, 692 S.E.2d at 382-83.

retirement benefits are marital property and therefore subject to equitable division.¹¹⁷

In *Newman v. Patton*,¹¹⁸ the former wife had 140,750 stock options from her employer when the parties married on September 1, 2002. Some of the options vested prior to the marriage, and some vested during the marriage. In the final divorce decree, the trial court found that the wife's premarital stock options that vested during the marriage were marital property and awarded the husband an equitable share.¹¹⁹ Relying on Virginia case law,¹²⁰ the trial court opined that the stock options were marital property because they were similar to deferred compensation and had vested during the marriage.¹²¹ The wife appealed.¹²²

In Georgia, "property is subject to equitable division if it is acquired as a direct result of the labor and investments of the parties during the marriage."¹²³ Based on this principle, the supreme court concluded that the trial court should have determined whether vesting of the previously awarded stock directly resulted from the parties' investments and labor during their marriage.¹²⁴ If it did, then the stock options were marital property.¹²⁵ If it did not, then they were the wife's separate property.¹²⁶

In making this inquiry and in any subsequent decision regarding equitable division, trial courts should consider factors such as the following:

whether the marital or premarital funds were used to exercise the options; the employer's purpose for granting the option. . . ; the best formula for apportioning the marital share of the options based on the purpose and timing of the options in relation to the time of the marriage; a method of distribution to [the spouse who was not granted stock options]; and the parties' tax obligations resulting from distribution.¹²⁷

117. *Id.* at 894, 692 S.E.2d at 383.

118. 286 Ga. 805, 692 S.E.2d 322 (2010).

119. *Id.* at 805-06, 692 S.E.2d at 323.

120. *See Ranney v. Ranney*, 608 S.E.2d 485 (Va. Ct. App. 2005).

121. *Newman*, 286 Ga. at 805-06, 692 S.E.2d at 323.

122. *Id.* at 805, 692 S.E.2d at 323.

123. *Id.* at 806, 692 S.E.2d at 323 (quoting *Payson v. Payson*, 274 Ga. 231, 232, 552 S.E.2d 839, 841 (2001)) (internal quotation marks omitted).

124. *Id.* at 806-07, 692 S.E.2d at 324.

125. *Id.* at 807, 692 S.E.2d at 324.

126. *Id.*

127. *Id.* (footnotes omitted).

The supreme court held that the trial court erred in concluding without any further analysis that because the previously awarded stock options vested during the marriage, the options were a marital asset.¹²⁸

In *Coe v. Coe*,¹²⁹ the supreme court implied that when an asset is purchased with one spouse's separate property, if that purchased asset is jointly titled, the separate asset investment is presumed to be a gift to the marital estate.¹³⁰ In 1990, shortly after the parties' married, they purchased a home that was titled in both of their names.¹³¹ The husband testified that the home was purchased with monies he received from a personal injury settlement.¹³² During the parties' divorce trial, the husband argued that because the home was purchased with his separate assets, it was his separate property. However, the wife argued the monies received were gifts to the marital unit.¹³³

The trial court gave the jury the following instructions:

Gifts of property between a husband and a wife during the marriage do not vest title in the other spouse so as to exclude that property from being divided in an equitable division of property. And, in that regard, I will tell you that if the payer of consideration and transferee of the property are a husband and a wife, a gift shall be presumed, but this presumption may be rebutted.¹³⁴

The jury verdict stated that the marital home needed to be equally divided. After the husband's motion for a new trial was denied, he appealed.¹³⁵

The husband argued that the trial court erred by instructing the jury that a gift given during marriage between spouses is subject to equitable division.¹³⁶ In upholding the trial court's ruling, the supreme court referred to *Lerch v. Lerch*,¹³⁷ which stands for the proposition "that a spouse can make a gift of non-marital property to the marital unit,

128. *Id.* at 808, 692 S.E.2d at 324-25.

129. 285 Ga. 863, 684 S.E.2d 598 (2009).

130. *See id.* at 864-65, 684 S.E.2d at 600.

131. *Id.* at 863, 684 S.E.2d at 599.

132. *Id.* at 864, 684 S.E.2d at 600. There was conflicting testimony on this issue. *Id.* The wife denied that the husband's separate monies were used to purchase the house. *Id.* at 864-65, 684 S.E.2d at 600.

133. *Id.* at 864-65, 684 S.E.2d at 600.

134. *Id.* at 864, 684 S.E.2d at 600.

135. *Id.* at 863, 684 S.E.2d at 599.

136. *Id.* at 864, 684 S.E.2d at 600.

137. 278 Ga. 885, 608 S.E.2d 223 (2005).

which transforms the separate property into marital property, subject to equitable division.”¹³⁸

However, the ruling in *Coe* seems to expand the decision in *Lerch* because in *Lerch* the husband recorded and executed a gift deed during the marriage that transferred property ownership he held prior to the marriage to both himself and his wife as “tenants in common” with survivorship rights.¹³⁹ In *Coe* the husband did acknowledge that the marital home was titled in the name of both parties from its purchase, but he took no similar affirmative step evidencing his intent to make a gift of his separate assets to the marital estate.¹⁴⁰

The ruling in *Coe* also seems to ignore the decision in *Thomas v. Thomas*,¹⁴¹ which adopts the source of funds rule as a means to classify as marital or nonmarital certain property that has characteristics of both.¹⁴² As in *Coe*, in *Thomas* the issue was each party’s interest in a home that had been purchased with separate assets of one party. In *Thomas* the wife purchased the home prior to the marriage with her separate assets, and the home was titled in the wife’s name.¹⁴³ While it was not clear who paid the mortgage in *Coe*,¹⁴⁴ in *Thomas* the home had a mortgage balance which had been reduced by marital funds.¹⁴⁵

In *Thomas* the supreme court determined that a spouse’s contribution of separate property entitles that spouse to an interest in the property in the ratio of the separate property investment to the total separate and marital investment in the property, with the remaining property categorized as marital property subject to equitable distribution.¹⁴⁶ Thus, the wife retained a separate property interest in the home, and the home’s equity was apportioned between the marital estate and the wife’s separate estate,¹⁴⁷ whereas in *Coe* the husband was given no credit for his separate property investment.¹⁴⁸

138. *Coe*, 285 Ga. at 864, 684 S.E.2d at 600.

139. *Lerch*, 278 Ga. at 885, 608 S.E.2d at 223 (internal quotation marks omitted).

140. *See Coe*, 285 Ga. at 864-65, 684 S.E.2d at 600.

141. 259 Ga. 73, 377 S.E.2d 666 (1989).

142. *Id.* at 76, 377 S.E.2d at 669.

143. *Id.* at 73, 377 S.E.2d at 667.

144. *See Coe*, 285 Ga. at 863, 684 S.E.2d at 599. The opinion implies there was at least one loan on the home but made no mention of the source of monies used to satisfy that debt. *See id.*

145. 259 Ga. at 73, 377 S.E.2d at 667.

146. *Id.* at 76, 377 S.E.2d at 669 (quoting *Harper v. Harper*, 448 A.2d 916, 929 (Md. 1982)).

147. *See id.* at 73, 377 S.E.2d at 667.

148. *See* 285 Ga. at 865, 684 S.E.2d 600.

Three cases involving modification of divorce decrees were taken up by the supreme court during this survey period. In *Leggette v. Leggette*,¹⁴⁹ the supreme court ultimately determined that on remand the trial court exceeded its authority in modifying the parties' final judgment and decree of divorce.¹⁵⁰ Following the original trial, a divorce decree was entered between the husband and the wife. The husband appealed, the verdict was affirmed in part and reversed in part, and the matter was remanded back to the trial court on the issue of attorney fees.¹⁵¹

On remand the trial court considered attorney fees but also "awarded [the] wife 40[%] of the parties' retirement plans' value as of January 24, 2006," the day the final divorce decree was entered.¹⁵² However, the original decree only "awarded [the] wife 40 percent of the retirement plans' value, plus or minus the gains or losses on the amount awarded from the date of the verdict, December 10, 2004," until the funds were transferred.¹⁵³

After the term in which a final divorce decree is entered, trial courts no longer have the authority to amend or modify the decree in any substantive matter or in any way that will affect the merits of the decree.¹⁵⁴ Further, when a judgment is affirmed by the supreme court, "it is error for the trial court to modify the . . . judgment solely upon consideration of the evidence presented at the previous hearing, or . . . after the expiration of the term [of court] at which the decree was entered."¹⁵⁵ The supreme court agreed with the husband, concluding that the trial court exceeded its power in modifying the original judgment, and reversed.¹⁵⁶

In *Killingsworth v. Killingsworth*,¹⁵⁷ the parties divorced in late 2006, and the wife was awarded "one-half (1/2) of the Husband's retirement account as of November 13, 2006, together with any gains or losses accruing on said amount subsequent to the hearing."¹⁵⁸ Following an evidentiary hearing on December 12, 2008, the former husband

149. 286 Ga. 323, 687 S.E.2d 585 (2009).

150. *Id.* at 323, 687 S.E.2d at 585-86.

151. *Id.* at 323, 687 S.E.2d at 585 (citing *Leggette v. Leggette*, 284 Ga. 432, 668 S.E.2d 251 (2008)).

152. *Id.*

153. *Id.*

154. *Id.* at 323-24, 687 S.E.2d at 586.

155. *Id.* at 324, 687 S.E.2d at 586.

156. *Id.*

157. 286 Ga. 234, 686 S.E.2d 640 (2009).

158. *Id.* at 235, 686 S.E.2d at 642 (internal quotation marks omitted).

was held in contempt of court and ordered to pay his former wife \$1850 for her one-half interest in his 401(k).¹⁵⁹

The husband appealed, arguing that the order was an impermissible modification of the parties' divorce decree.¹⁶⁰ The supreme court noted that a trial court may clarify prior judgments or orders or interpret divorce decrees while resolving contempt issues.¹⁶¹ The trial court may also ensure compliance with its decrees.¹⁶² Nonetheless, a trial court may not "modify the terms of a divorce decree in a contempt proceeding."¹⁶³ The test is "whether the clarification [or interpretation] is reasonable or whether it is so contrary to the apparent intention of the original order as to amount to a modification."¹⁶⁴

In this case, the trial court transmuted the former wife's award of a one-half interest in her former husband's 401(k) to a presently due cash obligation.¹⁶⁵ In reversing the trial court, the supreme court held this transmutation "was 'so contrary to the apparent intention of the original order as to amount to a modification.'"¹⁶⁶

A contempt order also arose out of a divorce decree in *Darroch v. Willis*.¹⁶⁷ The parties' 2007 divorce decree awarded Darroch, the husband, the marital residence and required Darroch to remove Willis's, the wife's, name from the marital residence mortgage within thirty days of remarriage. On August 10, 2008, Darroch remarried but failed to remove Willis's name from the mortgage.¹⁶⁸ On March 6, 2009, Darroch was held in contempt, and the trial court ordered Darroch "to purge the contempt either by completing a pending refinancing or by listing the marital residence for sale and accepting any cash offer for at least 95% of the list price."¹⁶⁹ Darroch appealed, arguing that the order was an improper modification of the parties' final judgment and decree of divorce.¹⁷⁰

159. *Id.*

160. *Id.* at 236, 686 S.E.2d at 643.

161. *Id.*

162. *Id.* (quoting *Cason v. Cason*, 281 Ga. 296, 297, 637 S.E.2d 716, 718 (2006)).

163. *Id.*

164. *Id.* (alteration in original) (quoting *Cason v. Cason*, 281 Ga. 296, 297, 637 S.E.2d 716, 718 (2006)) (internal quotation marks omitted).

165. *Id.*

166. *Id.* (quoting *Cason v. Cason*, 281 Ga. 296, 297, 637 S.E.2d 716, 718 (2006)).

167. 286 Ga. 566, 690 S.E.2d 410 (2010).

168. *Id.* at 566, 690 S.E.2d at 411.

169. *Id.*

170. *Id.* at 569, 690 S.E.2d at 413.

As the supreme court similarly concluded in *Killingsworth*,¹⁷¹ the supreme court determined in *Darroch* that in ordering Darroch to sell the house he had been awarded pursuant to the final judgment and decree, the trial court erroneously modified the decree.¹⁷² The supreme court reasoned that “in response to willful contempt of a divorce decree, a trial court has broad discretion to enforce the letter and spirit of the decree, but the court must do so without modifying the original judgment that is being enforced.”¹⁷³

VII. ADOPTION

The Option of Adoption Act¹⁷⁴ became effective July 1, 2009.¹⁷⁵ The Act allows for the relinquishment of rights to an embryo and provides that a child born from such relinquishment shall be the legal child of the recipient.¹⁷⁶ The Act also allows for expedited adoption prior to or following the birth of the child.¹⁷⁷

VIII. TRUSTS

The issue in *Phillips v. Moore*¹⁷⁸ was whether the corpus of a trust established by Phillips was part of his bankruptcy estate. In 1996 Phillips created a trust to hold real estate for the benefit of his family and himself. Per the trust instrument, Phillips received the net income from the trust during his lifetime, but he did not have the right to the trust corpus during that period. Phillips did have testamentary power to appoint the trust property to anyone, including his estate or creditors. In the event Phillips failed to exercise his power of appointment, specific beneficiaries of the trust corpus were named in the instrument. The trust instrument also contained a “spendthrift provision” that protected both the principal of the trust and income from creditors.¹⁷⁹

In 2007 Phillips filed for bankruptcy. Following a motion by the bankruptcy trustee, the bankruptcy court held the trust corpus was the property of the bankruptcy estate.¹⁸⁰ On appeal, the following question was certified to the supreme court by the district court:

171. See *Killingsworth*, 286 Ga. at 234, 690 S.E.2d at 642.

172. *Darroch*, 286 Ga. at 566, 690 S.E.2d at 411.

173. *Id.* at 570, 690 S.E.2d at 414.

174. O.C.G.A. §§ 19-8-40 to 19-8-43 (2010).

175. *Id.*

176. O.C.G.A. § 19-8-41.

177. O.C.G.A. §§ 19-8-42 to 19-8-43.

178. 286 Ga. 619, 690 S.E.2d 620 (2010).

179. *Id.* at 619, 690 S.E.2d at 621 (internal quotation marks omitted).

180. *Id.*

Whether a settlor of a trust is a sole beneficiary, such that creditors may reach the corpus of the trust, when the trust instrument gives the settlor no right to the corpus during his lifetime but provides him with a general power to appoint the trust corpus as he sees fit in his will and names specific beneficiaries to receive the corpus of the trust in the event that the settlor does not exercise his power of appointment?¹⁸¹

Relying on its decision in *Speed v. Speed*,¹⁸² the supreme court held the spendthrift provision of the trust was unenforceable.¹⁸³ In *Speed* the supreme court held that

[t]he invalidity of self-settled spendthrift trusts stems from the idea that no settlor . . . should be permitted to put his own assets in a trust, of which he is the sole beneficiary, and shield those assets with a spendthrift clause, because to do so is merely shifting the settlor's assets from one pocket to another, in an attempt to avoid creditors.¹⁸⁴

In *Phillips* the supreme court explained that “*Speed* . . . stands for the proposition that the settlor should not be able to use a power of appointment to shield his own trust assets from his creditors.”¹⁸⁵ Here, Phillips “retain[ed] a general power of appointment enabling him to dispose of the trust property to anyone, including his estate or his creditors.”¹⁸⁶ Thus, he was the sole beneficiary of the trust, and the spendthrift provision was not enforceable.¹⁸⁷ The question posed was answered in the affirmative.¹⁸⁸

181. *Id.*

182. 263 Ga. 166, 430 S.E.2d 348 (1993).

183. *Phillips*, 286 Ga. at 620, 690 S.E.2d at 622.

184. *Id.* at 620, 690 S.E.2d at 621 (quoting *Speed*, 263 Ga. at 167, 430 S.E.2d at 349).

185. *Id.* at 620, 690 S.E.2d at 622.

186. *Id.*

187. *Id.*

188. *Id.*