Domestic Relations

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The customary flood of domestic cases inundated the appellate courts during the survey year. Only the most significant are reported here, and for convenience they have been categorized as follows: divorce, alimony, custody, adoption and legitimation. An increasing number of cases are dealing in whole or in part with questions concerning disposition of marital property. For this reason, a section summarizing the most significant of such decisions has been included in this article. A brief section on legislation concludes the article.

I. Divorce

Several cases dealt with procedural aspects of divorce during the survey year. In *Tanis v. Tanis*,[1] the complaint failed to allege the plaintiff's place of residence. The appellate court refused to disturb the final judgment and decree since the defendant had failed to object to lack of subject matter jurisdiction in the trial court and the issue apparently was tried by consent of the parties.

A somewhat different aspect was presented in *Johnson v. Johnson*[2] when the defendant introduced evidence showing a prior undissolved marriage of the plaintiff, thereby shifting the burden to her to disprove the existence of that union. Oral testimony by the wife that she had signed a document consenting to a divorce from her first husband, was divorced from him in another state on a given date, and "had seen the divorce papers" but had never read nor received a copy of the decree, was held sufficient to carry that burden.[3]

Two cases reached apparently irreconcilable results concerning the application of the rules of default to divorce proceedings. The wife in *Staten v. Staten*[4] failed to answer her husband's complaint for divorce within thirty days after service, and final judgment and decree was entered by the judge, sitting without a jury. The next day the wife moved to vacate the

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1. 240 Ga. 718, 242 S.E.2d 71 (1978).
2. 239 Ga. 714, 238 S.E.2d 437 (1977).
3. *Id.* at 715, 238 S.E.2d at 438.
4. 240 Ga. 478, 241 S.E.2d 237 (1978).

judgment under the provisions of Ga. Code Ann. §81A-155 (1977), and the motion was granted. The supreme court affirmed on the ground that the issue was controlled, in non-jury cases, by the rule permitting revision of judgments during the same term of court. In *Simpson v. Simpson,*[5] however, the court affirmed the denial of a motion to open a default filed nine days after entry of final judgment. The court observed that Ga. Code Ann. §81A-155 does not apply to divorce proceedings. Therefore, divorce litigants may not, upon payment of costs, invoke the automatic reopening provisions of §81A-155(a) during the fifteen days following the default. It is unclear from the opinion whether the trial court in *Simpson* was acting within the same term.

After several years of struggle, the Supreme Court of Georgia appears to be in harmony on the treatment to be given motions for summary judgment and judgment on the pleadings in cases where divorce is sought on grounds that the marriage is irretrievably broken.[6] The beachhead was established in *Dickson v. Dickson*[7] which, in essence, held that the respondent was entitled to trial on the issue of divorce upon the filing of his affidavit averring that the marriage was not irretrievably broken and that possibilities for reconciliation existed. Again and again the court returned to the *Dickson* rationale in decisions rendered during the survey year, as in *Rogers v. Rogers.*[8] There the court held that it was error to grant a motion for summary judgment which was opposed by an affidavit that stated the defendant's opinion that the marriage was not irretrievably broken. In *Sims v. Sims,*[9] failure to file a counter-affidavit led to the granting of summary judgment based on the converse of that same rationale. However, in *Kitchens v. Kitchens,*[10] it was held error to grant a motion for judgment on the pleadings, even though no affidavits were filed, since the complaint alleged the no fault ground and cruel treatment, but the answer denied both grounds.

A different twist occurred in *Strickland v. Strickland,*[11] in which both the husband and wife asked for divorce; the husband used the irretrievably broken ground, and the wife alleged a fault ground. The husband filed a motion for summary judgment and both parties filed affidavits. The supreme court affirmed the grant of the motion, stating that *Dickson* did not require a contrary result if *both* parties sought a divorce. Similarly, when the complaint and counterclaim both allege cruel treatment, and the

5. 240 Ga. 543, 242 S.E.2d 145 (1978).

6. GA. CODE ANN. §30-102 (Supp. 1978) provides: "The following grounds shall be sufficient to authorize the granting of a total divorce . . . (13) [t]he marriage is irretrievably broken."

7. 238 Ga. 672, 235 S.E.2d 479 (1977). *See* McGough and McGough, *Annual Survey of Georgia Law: Domestic Relations,* 29 MERCER L. REV. 103, 106-107 (1977).

8. 239 Ga. 550, 238 S.E.2d 87 (1977).

9. 239 Ga. 451, 238 S.E.2d 32 (1977).

10. 239 Ga. 643, 238 S.E.2d 429 (1977).

11. 239 Ga. 448, 238 S.E.2d 30 (1977).

plaintiff amends to allege that the marriage is irretrievably broken, it is error to deny a motion for judgment on the pleadings.[12] In a later case,[13] the supreme court used the same reasoning to hold that the trial court properly denied a divorce when the husband's complaint alleged the irretrievably broken ground, and the wife answered alleging cruel treatment. During argument on the husband's motion for judgment on the pleadings, the wife's counsel abandoned her prayer for divorce, thus creating an issue for the jury.

Although the decisional law may now be harmonious, the price for this peace may well be frustration of the basic legislative purpose underlying the thirteenth ground for divorce. If an affidavit setting forth a mere opinion can force a trial, the new ground will not produce fast results. Moreover, most trial judges will probably not limit counsel to presenting the jury with bare conflicting opinions on the viability of the marriage. Once evidence is offered to support spousal opinions, we have come a full circle with the ironic twist that proof of fault will be the means by which "no fault" is proven.

Not all distinctions between "fault" and "no fault" divorce have vanished. In *Lindsay v. Lindsay*,[14] the court held that a divorce action premised on the irretrievably broken ground was terminated by the resumption of cohabitation by the parties. The result is different in "fault" divorces where cohabitation is considered resumed on the implied condition that the conduct complained of will not recur. The court suggested that such a condition is not logically possible in the case of "no fault" divorce.

Finally, in *Smith v. Smith*,[15] the supreme court held that an order which granted a divorce upon motion on the irretrievably broken ground but which did not reserve other issues for trial was interlocutory and did not extinguish a pre-existing temporary alimony order.

II. ALIMONY

A. *The Obligation*

Perhaps the most arresting decision this survey year is the case of *Wilbanks v. Wilbanks*,[16] an appeal from a temporary alimony order. The court first stated that a prayer for temporary alimony, child support, and child custody in a pending divorce action is deemed to be a *motion* under the Civil Practice Act. Therefore, findings of fact and conclusions of law are not required, except under the provisions of Ga. Code Ann. §81A-141(b) (1977) which pertains to motions to dismiss the action or the claim. Since the merits of the pending action are not in issue, such cases are not

12. Lindsey v. Lindsey, 238 Ga. 685, 235 S.E.2d 6 (1977).
13. McMillian v. McMillian, 240 Ga. 278, 240 S.E.2d 65 (1978).
14. 241 Ga. 166, 244 S.E.2d 8 (1978).
15. 239 Ga. 38, 235 S.E.2d 526 (1977).
16. 238 Ga. 660, 234 S.E.2d 915 (1977).

subject to the rule of Ga. Code Ann. §81A-152 (1977). The court then observed that the trial court in temporary alimony hearings was permitted to use relaxed standards of evidence. The appellate court did not go so far as to say that the rules of evidence did not apply in temporary hearings, but clearly indicated that the function of the trial judge was to get to the heart of the controversy in an attempt to do substantial justice pending a final determination of the issues.

The court, however, did not stop there. The opinion concludes with a virtual command to counsel not to appeal temporary alimony or custody cases "unless it can be clearly shown by the appellant that the trial court committed grievous error or a gross abuse of discretion."[17]

With the trial courts thus given *carte blanche* to handle temporary hearings, the practitioner must present his best case when he is typically least prepared; moreover, such a presentation requires a full trial. Furthermore, experienced counsel are well aware that temporary orders have a way of becoming permanent if the final trial comes before the same judge or even another judge of the same court sitting without a jury. Therefore, it would appear to be good practice to demand a jury trial in almost all divorce cases.

Several cases dealt with the question of a wife's entitlement to alimony. In *Leitzke v. Leitzke*,[18] in which the wife's second marriage to the appellee was declared invalid because of a previous undissolved marriage, the court held that it was error to dismiss that portion of her divorce complaint which sought temporary and permanent child support on the grounds that it failed to state a claim upon which relief could be granted. The appellate court found inapposite pre-Civil Practice Act cases holding that where the divorce is not granted, the court loses jurisdiction to award child support. The court reasoned that under Ga. Code Ann. §74-105, (1973) the father has a duty to support his children until majority.[19] Since the parties had been previously married and divorced, the court added in dicta that if the prior decree had contained child support provisions they would still be effective. Since there existed a set of facts under which a claim for child support could be valid, it was error to grant the motion to dismiss.[20]

Similarly, in *Riddle v. Riddle*,[21] the husband defended a contempt action brought by his former wife on the ground that his prior undissolved marriage to another party rendered void the divorce decree upon which the former wife was basing the contempt action. The trial court granted the husband's motion for summary judgment but the supreme court reversed. The court noted that it was in fact true that the marriage between the parties was void. However, the Annulment Act of 1952[22] prohibits annul-

17. *Id.* at 663-64, 234 S.E.2d at 918.
18. 239 Ga. 17, 235 S.E.2d 500 (1977).
19. *Id.* at 18, 235 S.E.2d 501.
20. *Id.* at 19, 235 S.E.2d at 502.
21. 240 Ga. 515, 241 S.E.2d 214 (1978).
22. GA. CODE ANN. ch. 53-6 (1974).

ment when children are born of a void marriage. Divorce, therefore, was the only available remedy, and the court reasoned that child support should be awarded since the purpose of the annulment statute was to protect the legitimacy of children born of such marriages.[23]

Georgia law will not protect parties to illicit unions according to the opinion handed down in the case of *Rehak v. Mathis.*[24] In *Rehak*, the plaintiff and defendant were unmarried, but had cohabited for eighteen years. The plaintiff filed a divorce action which was dismissed by the trial court on the ground that there was no marriage. She then filed an equitable action seeking $100 per month for services rendered to the defendant during the term of their cohabitation and also seeking title to the jointly owned house in which they had resided. The defendant's motion for summary judgment was granted. The appellate court held that since the "contractual" relationship of the parties was based on an immoral consideration, it was not enforceable.[25] Justices Hall and Hill dissented, noting that there was no evidence that sex was any part of the consideration for the plaintiff's services to the defendant and that the appellate court should not assume facts which were not in evidence.[26]

Two cases during the survey period decided the issue of a wife's right to alimony when she remarries after divorce has been granted on motion on the irretrievably broken ground, but before the alimony hearing is held. In *Coleman v. Coleman,*[27] the court held that the wife was not entitled to either lump sum or periodic alimony after remarriage. *Kristensen v. Kristensen*[28] reached the same result as *Coleman,* but noted that the wife did not lose her right to attorney's fees since these were a part of temporary alimony, nor did she lose her right to division of the property.

The *Coleman* case also dealt with the duration of the husband's child support obligation. In that case, a trust was ordered established to provide for the education of the children, which would have been paid up by the time they reached their sixteenth birthday. The corpus would have reverted to the husband if the children were not enrolled in an institution of higher learning by age twenty-two. The court found this to be an attempt to require the husband to support his children past their eighteenth birthday and it therefore was void.[29]

Two declaratory judgment actions also addressed the question of duration of the husband's alimony obligations. In *Bache v. Bache,*[30] the decree provided that alimony should cease if the wife became self-supporting. The trial court held as a matter of law that gross monthly earnings of $600

23. 240 Ga. at 516, 241 S.E.2d at 214.
24. 239 Ga. 541, 238 S.E.2d 81 (1977).
25. *Id.* at 543, 238 S.E.2d at 82.
26. *Id.* at 544, 545, 238 S.E.2d at 82, 83 (Hill, J., dissenting).
27. 240 Ga. 417, 240 S.E.2d 870 (1977).
28. 240 Ga. 670, 242 S.E.2d 132 (1978).
29. 240 Ga. at 422, 423, 240 S.E.2d at 874, 875.
30. 240 Ga. 3, 239 S.E.2d 677 (1977).

constituted self-support. The appellate court reversed, holding that the question of self-support is factual, and is to be determined by a jury. The court expressly approved the use of a declaratory judgment as an appropriate remedy to ascertain rights under a contract and noted that the husband did not have to use the modification procedure set forth in Ga. Code Ann. §30-220 (1969). In *Schartle v. Trust Company Bank*,[31] the executor of the husband's estate brought a declaratory judgment action to determine if periodic alimony survived his death and was a charge upon his estate. The court held that "[a]bsent a clear expression of intent to extend payments beyond the death of the husband,"[32] the duty terminates on his death. This rule is applicable both to separation agreements and decrees of divorce.

Several unrelated cases dealing with the alimony obligation were decided during the survey period. In *Johnson v. Johnson*,[33] the court held that an award of attorney's fees to the wife was authorized when that had been reserved by the judge, even though the divorce had already been granted on motion.

Another case dealt with the question of whether an award of alimony was excessive, and the standard for determining that award. In *King v. King*,[34] the court held that an alimony and child support award of $1,000 per month, plus the house and furnishings and a lot, as well as $6,500 attorney's fees was not excessive. The court reached this result even though the husband testified that he was in debt and had lost money in his business. The wife testified that the husband had unusual abilities as a salesman and that the parties had enjoyed a luxurious standard of living prior to their separation. The supreme court held that, in fixing its award, the jury was authorized to consider the ability of the husband to earn a living, even though he might be temporarily impoverished.[35]

The admissibility of evidence to set alimony payments was discussed in two supreme court cases. In *Dubois v. Dubois*,[36] the testimony of an economist concerning the amount of money spent on children by families of defined income ranges was held properly excluded as irrelevant since it was based on facts unlike those of the parties to the cause. The inference is that such evidence may be proper if based upon facts which are in evidence. In *Kosikowski v. Kosikowski*,[37] the court held that although the husband was not responsible for a retarded child once it reached the age of majority, it was error to exclude evidence of how much the wife spent for the child's care since that information reflects on her financial condition.

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31. 239 Ga. 248, 236 S.E.2d 602 (1977).
32. *Id.* at 249, 236 S.E.2d at 603.
33. 239 Ga. 637, 238 S.E.2d 425 (1977); *accord*, Hatchett v. Hatchett, 240 Ga. 103, 239 S.E.2d 512 (1977) (which also awarded 10% damages for delay where the only issue appealed was the right of the wife to receive attorney's fees.)
34. 239 Ga. 15, 235 S.E.2d 502 (1977).
35. *Id.* at 16, 235 S.E.2d at 503.
36. 240 Ga. 314, 240 S.E.2d 706 (1977).
37. 240 Ga. 381, 240 S.E.2d 846 (1977).

Finally, in *Solomon v. Solomon,*[38] a jury verdict requiring the husband "to pay [the wife] $350.00 per month for a period of (5) years" was held to be alimony, when the trial judge made the payment contingent upon the wife's death or remarriage. The court found that the trial judge had the right to mold the decree since the jury had not specified any total sum to be paid by the husband.

B. Enforcement of the Obligation

Several appellate court decisions during the survey year attempted to fashion more useful enforcement devices for domestic litigants.

In *Ensley v. Ensley,*[39] one of several contempt cases, the court held that *civil and criminal contempt* were available to enforce alimony or child support awards. Civil contempt is remedial in purpose and is conditional in form. The contemner can escape the sanction by paying his obligation. Criminal contempt, however, is penal in nature and is appropriately invoked when the contemner has a present ability to pay, but refuses to do so. The court again insisted that the use of this remedy is not imprisonment for debt, but instead, is for refusal to obey the order of a court. *Ensley* overrules two previous decisions which had reached contrary results.[40] In *Nolan v. Moore,*[41] the court found that a requirement that the father pay "reasonable child support . . . in accordance with his financial status . . ."[42] was not too vague to be enforceable by contempt. In *Anthony v. Anthony,*[43] the court affirmed an order holding in contempt a non-party to a divorce action for willful violation of an order issued in that proceeding. The contemner had actual notice of the order and purposefully sought to obstruct it. He was ordered arrested, but was not incarcerated, and was given an opportunity to be heard prior to the trial court's ruling. The court in *Anthony* also affirmed forfeiture of a bond required of the defendant husband in lieu of an injunction and appointment of a receiver to manage a trailer park. The court noted that liability of the surety or the defendant may be enforced without notice to either and without the institution of an independent action.

Two cases dealt with the effect of bankruptcy proceedings on enforcement of the alimony obligation. The court in *Manuel v. Manuel,*[44] held that if the property settlement was intended for the support and maintenance of the wife or children, it was not dischargeable in bankruptcy under Georgia law. Intent of the parties in reaching the settlement was the key, and,

38. 241 Ga. 188, 244 S.E.2d 2 (1978).
39. 239 Ga. 860, 238 S.E.2d 920 (1977).
40. Mathews v. Mathews, 222 Ga. 311, 149 S.E.2d 666 (1966); Brown v. Brown, 237 Ga. 122, 227 S.E.2d 14 (1976).
41. 241 Ga. 156, 244 S.E.2d 10 (1978).
42. *Id.*
43. 240 Ga. 155, 240 S.E.2d 45 (1977).
44. 239 Ga. 685, 238 SE.2d 328 (1977).

at least in this case, parol evidence was admissible on that question to explain a latent ambiguity in the agreement. In *Graves v. Graves*,[45] the supreme court held that the contemner was not entitled to a stay of the state court enforcement proceedings if the debt in question was not dischargeable in bankruptcy. In close cases, the court said, the trial court should consider the effect that an inability to collect immediately would have on the former wife.

In the first of two dormancy cases, the court in *Zerblis v. Zerblis*[46] held that the rules concerning dormancy of judgments applied to alimony and child support judgments, regardless of the method of enforcement, which in this case was contempt. Therefore, the court reasoned, the most recent payments would not be applied to installments barred by the dormancy statute, but only to installments due within the seven year period immediately preceding initiation of enforcement proceedings.[47] However, in *Wood v. Wood*,[48] the court stated in dicta that the dormancy statute of limitation was an affirmative defense which would be waived by failure to plead it.

Several cases dealt with miscellaneous enforcement questions. In *Benefield v. Harris*,[49] the court held that an Alabama alimony decree was improperly domesticated by a Georgia court when the decree on its face showed that service on the Georgia defendant was by registered mail. Since Alabama law on the question of proper service was not introduced, it was presumed to be the same as Georgia law. Georgia does not permit rendition of *in personam* judgments unless personal service is shown.

Another issue addressed during this period was that of abandonment. The crime of abandonment is established by proof of two elements: desertion by the father and dependency of the child. Proof of destitution is not required. Thus, even though the mother supports the child and the father partially complies with a decree of divorce, the offense is made out. The questions of partial support and the father's present inability to do more are to be resolved in the discretion of the trier of fact.[50]

Welfare recipients who seek to enforce child support awards against their former spouses should join the Department of Human Resources as a party plaintiff. The Department has the duty to prosecute the action actively and has the right to recover payments it has made to the extent of the requirements in the divorce decree. However, the state must reimburse the recipient for costs incurred in bringing the action and must pay reasonable attorney's fees if approved by the trial court.[51]

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45. 239 Ga. 869, 239 S.E.2d 35 (1977).

46. 239 Ga. 715, 238 S.E.2d 381 (1977).

47. Payments could also be applied to installments due in the period between seven and ten years preceding the enforcement action if revived by appropriate action.

48. 239 Ga. 120, 236 S.E.2d 68 (1977).

49. 143 Ga. App. 709, 240 S.E.2d 119 (1977).

50. McCullough v. State, 141 Ga. App. 840, 234 S.E.2d 678 (1977).

51. Department of Human Resources v. Bagley, 240 Ga. 306, 240 S.E.2d 867 (1977). *See also* Department of Human Resources v. Bagley, 142 Ga. App. 353, 235 S.E.2d 734 (1977).

C. *Modification of the Obligation*

There was less activity than usual in the modification area during this survey year, although there were a few decisions of interest to the practitioner.

The court in *Forrester v. Buerger*[52] held that a father is not barred by the public policy considerations from waiving his right to seek a reduction of periodic child support payments. The language "and the same shall not be subject to modification" in a settlement agreement incorporated in the final decree was sufficient to accomplish the waiver.[53] Three justices dissented, noting that it is best for the child if a father is not over-taxed to the point of being unwilling to pay.[54]

In *Lynn v. Nabors*,[55] the court held that a trial court was without authority to modify *temporarily* (in a rule nisi hearing) a permanent child support judgment and was without authority to restrain the enforcement of such a judgment. A permanent child support judgment is enforceable until it is vacated, set aside, or modified after trial of the issues. The court in *Wilde v. Wilde*[56] held that a child support modification proceeding was not barred or otherwise affected by the filing of a petition for modification of *custody* by the same party. Another child support ruling in *Hasty v. Duncan*[57] held that termination of the child support obligation (where custody had changed) was not governed by Ga. Code Ann. §30-220 (1969).

Finally, in a case carefully limited to its facts, the supreme court approved an agreement between a former husband and wife which, in essence, freed the husband from a child support obligation imposed by the final decree.[58]

D. *Property Division*

One of the more peculiar decisions this year is *Gorman v. Gorman*.[59] There, the court affirmed a non-jury decision dividing the marital assets in essentially equal shares. Each party received title to property which had formerly been jointly held, *e.g.*, the husband was awarded property which had been in the wife's name and conversely, the wife took property which

52. 241 Ga. 34, 244 S.E.2d 345 (1978).

53. *Id.* at 34, 35, 244 S.E.2d at 345.

54. *Id.* at 35, 36, 244 S.E.2d at 346 (Nichols, C.J., dissenting).

55. 239 Ga. 493, 238 S.E.2d 45 (1977).

56. 239 Ga. 750, 239 S.E.2d 3 (1977).

57. 239 Ga. 797, 239 S.E.2d 7 (1977).

58. Daniel v. Daniel, 239 Ga. 466, 238 S.E.2d 108 (1977). The wife had custody for nine months of the year and the husband three. During the three month period the husband did not have to pay child support. The wife returned to school and the husband cared for the children, during which time he did not pay support. The wife left school, retrieved the children and obtained execution against the husband for payments due during the extra months he had the children. The supreme court affirmed a decision dismissing the execution.

59. 239 Ga. 312, 236 S.E.2d 652 (1977).

had been in her husband's name. The court distinguished this case from a *jury* decision (where the jury cannot award a husband his wife's property) apparently on the notion that the trial court has the inherent power to partition the property and to award full relief to the parties while the jury cannot. The parties had submitted schedules to the court setting forth the marital assets and had requested the trial court to divide them.

Two cases addressed the increasingly popular "implied trust" theory; but reached contrary results. *Adderholt v. Adderholt*[60] held that to create a resulting (implied) trust, the party seeking to impose the trust must prove the intent to create it at the time the transaction was consummated (typically the time at which a conveyance is made). Thus, in *Adderholt*, where the husband offered no evidence of such intent at the time of conveyance to his wife, he was denied relief even though he proved that he had provided the purchase money, handled the transaction, and managed and controlled the property after the conveyance. Yet, in *Crymes v. Crymes*,[61] a jury verdict imposing a resulting trust in favor of the husband was affirmed where the principal evidence was proof that the purchase money was supplied by a family corporation owned equally by the husband and the wife.

By way of a property settlement in *Warnock v. Dunbar*[62] the husband agreed to pay all installments of a second mortgage on certain realty. The wife subsequently sold the property and paid off the mortgage with the proceeds. The husband was found to be in contempt of the final decree for his refusal to make payments to the wife thereafter. In affirming, the court held that the wife was subrogated to the lender, otherwise she would be done "injustice" by preventing her from selling her home.[63] The court found this arrangement to be a property division and thus not defeated by the wife's remarriage.

A pair of cases centered on the division of household goods and furnishings. The court of appeals in *Fletcher v. Fletcher*[64] held that the term "furnishings" is not inclusive of all items of personalty in the marital home. Even where title to personal property may have been adjudicated in the action in general terms, title to those items not scheduled in detail is unaffected. The supreme court reached a similar result in *Buckley v. Buckley*.[65] In *Buckley*, the jury awarded the wife all the furniture except

60. 240 Ga. 626, 242 S.E.2d 11 (1978). The court also held that the husband's counterclaim regarding title to certain realty was improperly allowed by the trial court where it was filed some twenty months after the complaint and no evidentiary hearing pursuant to GA. CODE ANN. §81A-113(f) (1977) had been held. On the other hand, his counterclaim for divorce on the irretrievably broken ground was properly allowed since it either was so inherently involved in the wife's prayer that a counterclaim was unnecessary, or because it matured after the answer was filed.

61. 240 Ga. 721, 242 S.E.2d 30 (1978).

62. 240 Ga. 122, 239 S.E.2d 684 (1977).

63. *Id.* at 124, 239 S.E.2d at 685.

64. 143 Ga. App. 404, 238 S.E.2d 753 (1977).

65. 239 Ga. 433, 238 S.E.2d 238 (1977).

that which she elected to give to the husband. When the wife refused to give to the husband any of the items he requested, he brought a contempt action. In reversing the finding of contempt, the court held it error for the trial court to go beyond the terms of the final decree in dividing the property. The term "furniture" was adequately specific, but the items refused the husband (guns, coins, etc.) were not mentioned anywhere in the decree. The court's reasoning in *Buckley* was identical to that in *Fletcher*.

III. CUSTODY

The majority of custody cases worthy of report during the survey year involved questions of the standard of proof or procedure. Most decisions arose out of attempts by the non-custodial parent or by a third party to modify an existing custody award.

A. *Parent v. Parent*

In *Franek v. Ray*[66] the supreme court held, that for the purpose of determining venue, the action commences with the filing of the complaint and not with service of process. Thus, the residence of the defendant at the time the complaint is filed determines where venue will lie.

In *Harris v. Harris*,[67] a divorce case, the trial court stated that the mother had the burden of proof on the custody issue and where the evidence was equally balanced, she had not carried her burden. Although the appellate court held this to be an incorrect statement of the law, it upheld the decision after a review of the record. The trial court had correctly stated that Ga. Code Ann. §30-127 (1969) requires a presumption that the party not in default is entitled to custody. Even though divorce is granted on the irretrievably broken ground, the conduct of the parties remains relevant on the issue of custody.

The supreme court found "reasonable evidence" to support the trial court's change of custody order in *Godfrey v. Godfrey*.[68] The modification apparently was based solely on the presence of a married "live-in-lover" in the custodial parent's (the mother's) home even though there was no evidence that the relationship had any adverse effect on the child.[69] Justice Hill's forceful dissent in *Godfrey* that the majority opinion virtually equated unfitness with acquisition of a live-in-lover may have been heeded in *Hawkins v. Hawkins*.[70] Here again, the reasonable evidence rule resulted in affirmance of an order changing custody. However, the *Hawkins* court held the rule applied even where the divorced parent was charged with having sexual relations if the welfare of the children is affected. *Godfrey*

66. 239 Ga. 282, 236 S.E.2d 629 (1977).
67. 240 Ga. 276, 240 S.E.2d 30 (1977).
68. 239 Ga. 707, 238 S.E.2d 378 (1977).
69. *Id.* at 708, 238 S.E.2d at 379.
70. 240 Ga. 30, 239 S.E.2d 358 (1977).

was cited as authority for the decision.

The divorce decree in *Banister v. Banister*[71] incorporated the agreement of the parties which gave "temporary" custody of the children to the father. The agreement provided that after one year either party could seek a modification without showing changed conditions and that both parties were to be considered equal claimants. The trial court dismissed the mother's modification petition since it did not show changed conditions. The supreme court affirmed, noting that the final decree was a permanent custody award, regardless of what it was called, and that the usual modification requirements applied.

Woods v. Woods[72] reaffirmed *Matthews v. Matthews*[73] by holding that public policy considerations prohibited the non-custodial parent from suing the custodian for modification except in the latter's place of residence. The rule applied in *Woods* even though the custodian had not been tricked or lured into Georgia.

B. Parent v. Third Party

The case of *Gazaway v. Brackett*[74] should be required reading for any custody practitioner because it sets forth the different standards for awards and the applicable test of error on appeal in the most common procedural settings. The case itself holds that a non-parent who has obtained permanent custody may not seek to terminate the natural parent's visitation rights without a showing of present unfitness.

In an increasingly rare occurrence, the supreme court reversed an award of custody to the maternal grandparents in *Childs v. Childs.*[75] The non-parent must prove a relinquishment of custody by the parent pursuant to Ga. Code Ann. §§74-108, -109 or -110 (1973), or must show the present unfitness of the parent. Unfitness must be proven by "clear and convincing evidence" and the evidence offered by the grandparents did not meet that standard.

The father in *Coxwell v. Coxwell*[76] brought a habeas corpus proceeding against the maternal grandparents, who were the legal custodians. It was error for the trial court to deny the mother's motion to intervene because she had not lost all parental rights. The father prevailed and the appellate court affirmed on the reasonable evidence standard.

The court of appeals affirmed the dismissal of the grandparents' petition for visitation rights in *Rhodes v. Peacock.*[77] The court found that Ga. Code

71. 240 Ga. 513, 241 S.E.2d 247 (1978).

72. 238 Ga. 737, 235 S.E.2d 36 (1977). *Accord,* Meek v. Baillargeon, 239 Ga. 137, 236 S.E.2d 81 (1977).

73. 238 Ga. 201, 232 S.E.2d 76 (1977). *See* McGough and McGough, *Annual Survey of Georgia Law: Domestic Relations,* 29 MERCER L. REV. 103, 110-111 (1977).

74. 241 Ga. 127, 244 S.E.2d 238 (1978).

75. 239 Ga. 304, 236 S.E.2d 646 (1977).

76. 240 Ga. 46, 239 S.E.2d 371 (1977).

77. 142 Ga. App. 328, 235 S.E.2d 762 (1977).

Ann. §74-112 (1973) permits an award of visitation rights to grandparents, but only where the court has before it any question concerning the custody or guardianship of the minor child.

Two cases construed the 1976 amendment to Ga. Code Ann. §30-127 (1969). In *Sampson v. Sampson,*[78] the court held that the amendment authorized the trial judge to modify visitation rights on his own motion in a contempt proceeding. The *Nipper v. Rich*[79] court held that the amendment limited the holding of *Robinson v. Ashmore*[80] and permitted modification of visitation rights without the need for a showing of changed conditions.

C. *Enforcement of Custody Awards*

To the relief of frustrated parents, the appellate courts have at last shown willingness to put teeth into enforcement of custody awards. In *Fields v. Fields,*[81] the court affirmed imprisonment of the custodial parent (the mother) for a period of twenty-four hours for refusal to obey the court's command to permit the father to visit the child. An order jailing the maternal grandmother for contempt of an order modifying custody from her daughter to the former husband was affirmed in *Wilkerson v. Tolbert.*[82] In *Wilkerson,* the contemner had actual notice of the modification order and evidence of her willful violation was clear. Additionally, in *Griggers v. Bryant,*[83] the supreme court held that a custody award is enforceable by contempt even without a specific injunction to the noncustodian to return the child after visitation.

Walker v. Walker[84] is another case of considerable practical importance to custody litigants. The final decree awarded custody to the wife, but the husband appealed and refused to surrender the child. On the wife's motion, the husband was found in contempt. The supreme court reversed, noting first that there was no temporary custody order in the case. A notice of appeal is an automatic supersedeas of the judgment and the trial court loses enforcement powers pending appeal. In order to challenge the "automatic supersedeas *as it relates to custody* pending appeal, he (appellee) can ask the trial judge to include in his final order a special provision that the custody award is effective as of the date of the judgment to protect the best interest and welfare of the child."[85] Such a provision thereby makes the judgment enforceable by contempt.

78. 240 Ga. 118, 239 S.E.2d 519 (1977). The court expressly disapproved the contrary holdings in Smith v. Smith, 239 Ga. 202, 236 S.E.2d 364 (1977) and Henderson v. Henderson, 231 Ga. 577, 203 S.E.2d 183 (1974).

79. 241 Ga. 123, 244 S.E.2d 237 (1978).

80. 232 Ga. 498, 207 S.E.2d 484 (1974).

81. 240 Ga. 173, 240 S.E.2d 58 (1977).

82. 239 Ga. 702, 238 S.E.2d 338 (1977).

83. 239 Ga. 244, 236 S.E.2d 599 (1977).

84. 239 Ga. 175, 236 S.E.2d 263 (1977).

85. *Id.* at 176, 236 S.E.2d at 264 (emphasis by the court).

IV. ADOPTION AND LEGITIMATION

As usual, the adoption cases centered on the issue of consent, or conduct obviating the necessity for consent to adoption. The court in *Cloud v. Gossett*[86] applied the preponderance of evidence standard to the question of whether a consent to adoption was freely and voluntarily given. Where it did not appear that the natural mother had "been overreached in any particular" the trial court had wide discretion to decide what was in the best interest of the child.[87] In another consent case, *Irwin v. Smith*,[88] the court held that having previously signed a valid consent to adoption in favor of one adoptive parent, the father could not later sign a valid consent in favor of another.

In *Kriseman v. Kenmore*,[89] the court affirmed the denial of a petition for adoption filed by the natural mother's new husband. The court construed Ga. Code Ann. §74-403(2) (1973) which provides that a wanton and willful failure to comply with a support order for a period of twelve months or longer obviates the need for the father's consent to adoption. The court held that the absence of a "legal excuse" for noncompliance with the order was not wanton and willful *per se* where the mother had told the father that she and her new husband did not want further child support payments.[90] In *Tucker v. Dimpfl*,[91] however, the court of appeals was not reluctant to uphold the granting of a petition for adoption upon a finding of abandonment by the natural father. The evidence demonstrated that the father had not shown interest in the child, had failed to furnish love and affection without good reason to explain why he could not, and had failed to supply material support for more than four years. Although the father had made one child support payment, it was not in keeping with his ability to pay.

Almost unbelievably, two cases during the survey year explored the hoary and strictly limited doctrine of virtual adoption. In *Ellison v. Thompson*,[92] the wife and her first husband had two children prior to their divorce. She remarried and her second husband adopted the children. A second divorce followed. The first husband then helped care for the children, providing some support pursuant to the first divorce decree for one or two years. He claimed the boy as a dependent for tax purposes and lived with the children while his former wife was hospitalized. The trial court held that these facts constituted a virtual adoption and concluded that the first husband was liable for support. The supreme court reversed. The court stated that the doctrine of virtual adoption was limited to allowing

86. 143 Ga. App. 444, 238 S.E.2d 578 (1977).
87. *Id.*, 238 S.E.2d at 579.
88. 240 Ga. 553, 242 S.E.2d 64 (1978).
89. 143 Ga. App. 490, 238 S.E.2d 585 (1977).
90. *Id.* at 491, 238 S.E.2d at 586.
91. 143 Ga. App. 545, 239 S.E.2d 215 (1977).
92. 240 Ga. 594, 242 S.E.2d 95 (1978).

a child to participate in the estate of his foster parent if the latter had contracted with the natural parent to adopt the child and leave it an estate.[93] The doctrine creates no legal rights, but simply exists to enforce contract rights in equity. A parent-child relationship does not arise from such a contract. In *Williams v. Murray,*[94] the court affirmed a finding of virtual adoption and set forth the elements of proof necessary to invoke the doctrine.

Finally, in *Hughes v. Parham,*[95] the supreme court upheld the constitutionality of the Georgia Wrongful Death Statute[96] even though it denies the father of an illegitimate child a cause of action for its wrongful death, while granting such a right to the mother. Justice Hill dissented, noting that the distinction between treatment of the parents had its only application after the child was dead and it was too late to promote family unity.

V. LEGISLATION

Effective Janauary 1, 1979, the Georgia Child Custody Intrastate Jurisdiction Act of 1978[97] will seek to make uniform in all Georgia courts, actions for changes of custody. A complaint seeking change of custody must be brought as a separate action (and not as a counterclaim to an action to enforce a custody decree) in the county of residence of the legal custodian.[98] Complaints in the nature of habeas corpus actions will no longer be permitted for custody modification.[99] Furthermore, withholding of custody will bar the offender from almost all other domestic relief until the violation is cured.[100]

The Uniform Child Custody Jurisdiction Act[101] is a comprehensive attempt to reduce conflicts between Georgia and other states in the treatment of custody disputes. The Act adopts the notion of a "home state" as the forum best suited to make custodial decisions.[102] In the case of a conflict between the Act and other custody provisions, the Act controls.[103]

In considering awards of temporary alimony to the wife for attorney's fees in divorce litigation, the trial courts must now look to the financial status of the husband and the wife.[104]

93. *Id.* at 596, 242 S.E.2d at 96, 97.
94. 239 Ga. 276, 236 S.E.2d 624 (1977).
95. 241 Ga. 198, 243 S.E.2d 867 (1978).
96. GA. CODE ANN. §105-1307 (1965).
97. GA. CODE ANN. §24-3016 (Supp. 1978).
98. *Id.*
99. *Id.*
100. *Id.*
101. GA. CODE ANN. §74-501 (Supp. 1978).
102. GA. CODE ANN. §74-503(e) (Supp. 1978).
103. GA. CODE ANN. §30-127(c) (Supp. 1978).
104. GA. CODE ANN. §30-202.1(a)(1) (Supp. 1978).