

# Domestic Relations

by Barry B. McGough\*

The survey period<sup>1</sup> produced sixty-one appellate decisions. Of that group, fourteen are digested here. The cases included clearly focus on issues of children. Moreover, the Georgia General Assembly tightened-up the child support guidelines and added new teeth for enforcement of support orders. Finally, new legislation prohibiting same sex and common law marriages was enacted.

## I. CHILD CUSTODY

In *Baldwin v. Baldwin*,<sup>2</sup> the juvenile court found both parents fit and equally capable of caring for the child. Notwithstanding that finding, the court awarded custody to the mother.<sup>3</sup> The Georgia Court of Appeals reversed, holding that the trial court must consider joint custody where it finds the parents fit and equally capable of caretaking.<sup>4</sup> On remand, the juvenile court awarded joint legal and physical custody. Although the juvenile court concluded that joint custody was not feasible nor in the child's best interest, it construed the court of appeals opinion to mandate that result.<sup>5</sup> The court of appeals denied the father's application to appeal the joint custody order and the supreme court granted certiorari from that denial.<sup>6</sup>

The Georgia Supreme Court reversed:

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1. This survey chronicles developments in Georgia domestic relations law occurring between June 1, 1995, and May 31, 1996.

2. 265 Ga. 465, 458 S.E.2d 126 (1995).

3. *Id.* at 465, 458 S.E.2d at 127.

4. *In re A.R.B.*, 209 Ga. App. 324, 327, 433 S.E.2d 411, 414 (1993).

5. *Baldwin*, 265 Ga. at 465, 458 S.E.2d at 127.

6. *Id.*

We hold that where, as here, the trial court determines that both parties are fit and equally capable of caring for the child, the court must consider joint custody but is not *required* to enter such an order unless it specifically finds that to do so would be in the best interest of the child.<sup>7</sup>

In remanding the custody issue to the juvenile court for reconsideration, the supreme court noted that state legislative policy favors shared rights and responsibilities between the parents.<sup>8</sup> However, the trial courts still have the "primary duty in any custody determination between parents" to decide the best interest of the child and what will promote the child's welfare and happiness.<sup>9</sup>

The *Baldwin*<sup>10</sup> rule was followed in *Graham v. Holmes*,<sup>11</sup> a custody and visitation modification action. In *Graham* the parties by practice over a period of years had substantially increased the mother's visitation with the child. Upon the father's remarriage, the mother's access to the child was restricted. The trial court found the parents equally capable of caring for the child but found no material change in condition which warranted a change of custody.<sup>12</sup> The court did increase visitation, but the expanded visitation was less than the parties had practiced before the father remarried.<sup>13</sup> Surprisingly, the court of appeals stated: "Despite the trial court's finding, there indisputably has been a substantial change in conditions insofar as the mother's relationship with the child is concerned, in that a stepmother has entered the child's life."<sup>14</sup>

Observing that expert opinion was at odds on whether to award joint custody or to change custody, and that the mother had not sought joint custody, the court of appeals held that the trial court had not abused its discretion.<sup>15</sup> The voluntary variation from the visitation awarded by the divorce court "does not ripen automatically into a change of conditions."<sup>16</sup>

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7. *Id.*

8. *Id.* (citing O.C.G.A. §§ 19-9-3(a) (1990) & 19-9-6 (1991)).

9. *Id.*

10. *Id.*

11. 218 Ga. App. 796, 463 S.E.2d 513 (1995).

12. *Id.* at 798-99, 463 S.E.2d at 515.

13. *Id.* at 799, 463 S.E.2d at 515.

14. *Id.* at 798, 463 S.E.2d at 515.

15. *Id.*

16. *Id.* at 799, 463 S.E.2d at 516.

In *Wrightson v. Wrightson*,<sup>17</sup> the Georgia Supreme Court struck down a portion of a custody decree that provided visitation would be suspended or modified upon certain determinations by a mental health professional. The court held "the expert's opinion may serve as evidence supporting the trial court's decision to modify or suspend visitation," but "the decision must be made by the trial court, not the expert."<sup>18</sup>

## II. CHILD SUPPORT

In addition to cases concerning child custody, several cases dealing with child support were also decided during the survey period. For example, in *Barnes v. Justis*,<sup>19</sup> the court of appeals held that child support payments due on the first day of the month are to be prorated in the month the child reaches the age of majority.<sup>20</sup>

In *Wright v. Newman*,<sup>21</sup> the supreme court used the contract doctrine of promissory estoppel to impose a child support obligation on a man who was neither the biological nor adoptive father of the child in a case to which the theory of virtual adoption did not apply. The trial court found that Wright promised Newman and the child "that he would assume all of the obligations and responsibilities of fatherhood, including that of providing support."<sup>22</sup> That promise was evidenced "by Wright listing himself as the father on the child's birth certificate and giving the child his last name,"<sup>23</sup> even though at that time he knew he was not the natural father of the child. He supported the child for ten years and held himself out to others as the father. Moreover, the mother and the child relied on Wright's promise to their detriment by not pursuing the biological father. On these facts the supreme court found it would be unjust to permit Wright to evade the consequence of his promise.<sup>24</sup>

## III. ENFORCEMENT

In *Dyer v. Surratt*,<sup>25</sup> the Georgia Supreme Court held that a Georgia court which divorced the parties had subject matter jurisdiction to hear

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17. 266 Ga. 493, 467 S.E.2d 578 (1996).

18. *Id.* at 496, 467 S.E.2d at 581.

19. 219 Ga. App. 815, 467 S.E.2d 3 (1996).

20. *Id.* at 816, 467 S.E.2d at 4.

21. 266 Ga. 519, 467 S.E.2d 533 (1996).

22. *Id.* at 520, 467 S.E.2d at 535.

23. *Id.*

24. *Id.* at 521, 467 S.E.2d at 535. The dissent per Benham, C.J., notes that Wright and Newman severed their relationship when the child was three, and for the next five years, Wright did not see the child. *Id.* at 523, 467 S.E.2d at 537.

25. 266 Ga. 220, 466 S.E.2d 584 (1996).

a contempt action brought by the resident noncustodian against the nonresident custodian when the divorce judgment had not been modified by a foregoing court. However, personal service outside Georgia on the nonresident did not confer in personam jurisdiction on the Georgia court.<sup>26</sup> The supreme court ruled that the Uniform Child Custody Jurisdiction Act "does not provide the exclusive means by which a party may seek enforcement of the custody provisions of a Georgia judgment."<sup>27</sup>

In another enforcement case, the Georgia Court of Appeals held that a trial court cannot direct payment of attorney fees by a party found in contempt of a prior order and simultaneously condition avoidance of, or release from, incarceration upon satisfaction of the award.<sup>28</sup>

In *Williams v. Stepler*,<sup>29</sup> the Georgia Court of Appeals enforced a provision of the Uniform Superior Court Rules, ("U.S.C.R."), holding that, upon request of a party, the in-chambers interview of a child by the trial court must be recorded when custody is involved.<sup>30</sup> The court rejected the argument that a family violence proceeding<sup>31</sup> is not a domestic relations action within the meaning of U.S.C.R. 24.<sup>32</sup>

The juvenile court in *In re R.E.W.*<sup>33</sup> refused the father unsupervised visitation and holiday or summer visitation, finding that he was engaged in an "immoral" homosexual relationship and could not be trusted to keep the nature of that relationship from his daughter.<sup>34</sup> However, the appellate court reversed, holding that there was no evidence that the father's relationship had an adverse effect on the child, and directed the juvenile court to award "customary unsupervised weekend, holiday and summer visitation" to the father.<sup>35</sup>

Kenneth and Elizabeth Davis divorced in 1991 but continued to live in the same household until 1994. Although they shared household expenses, Kenneth did not pay child support as required by the divorce decree. After Kenneth moved out of the house, Elizabeth filed a garnishment for unpaid support.<sup>36</sup>

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26. *Id.* at 221, 466 S.E.2d at 587.

27. *Id.*

28. *Thedieck v. Thedieck*, 220 Ga. App. 764, 767, 470 S.E.2d 265, 267 (1996).

29. 221 Ga. App. 338, 471 S.E.2d 284 (1996).

30. *Id.* at 339, 471 S.E.2d at 286 (citing Unif. Super. Ct. Rule 24.5(B) (1996)).

31. O.C.G.A. §§ 19-13-1 to -34 (1991 & Supp. 1996).

32. 221 Ga. App. at 339, 471 S.E.2d at 286.

33. 220 Ga. App. 861, 471 S.E.2d 6 (1996).

34. *Id.* at 862, 471 S.E.2d at 8.

35. *Id.* at 864, 471 S.E.2d at 9.

36. *Davis v. Davis*, 220 Ga. App. 745, 470 S.E.2d 268, 269 (1996).

The state court dismissed Kenneth's traverse seeking credit for shared expenses.<sup>37</sup> The Georgia Court of Appeals affirmed, holding that the state court neither had the authority to modify the divorce judgment nor equity jurisdiction to give credit for shared expenses.<sup>38</sup>

The Official Code of Georgia Annotated ("O.C.G.A.") section 7-4-12 mandates that all judgments bear interest "upon the principal amount recovered."<sup>39</sup> This provision was properly applied to a 1989 divorce decree awarding the former wife "a sum estimated to be \$40,000 for her share of the equity in the homeplace of the parties."<sup>40</sup> However, the Georgia Supreme Court ruled that interest accrued only from the date that "the principal amount recovered" was ascertained. In the case at bar, that date was in 1994.<sup>41</sup>

#### IV. ALIMONY

Notwithstanding the heated dissent of Justice Hunstein, the majority of the supreme court in *Quillen v. Quillen* upheld a provision in a divorce settlement agreement which obligated the appellee to pay monthly alimony until the appellant cohabited as defined by Georgia law.<sup>42</sup> Justice Carley, writing for the court, reaffirmed the right of parties to contract "on any terms regarding subject matter in which they have an interest,"<sup>43</sup> and relied extensively on the 1995 decision in *Kent v. Kent*.<sup>44</sup>

As the dissent clarifies, *Kent* was a modification action, whereas *Quillen* arose on a motion for contempt brought by the alimony obligee, appellant.<sup>45</sup> Accordingly, the majority affirmance of the trial court's finding that appellee was not in contempt, and that his alimony obligation was terminated by appellant's cohabitation, sidesteps the constitutional venue requirements and procedural protections of a modification proceeding.<sup>46</sup>

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37. *Id.* at 745, 470 S.E.2d at 269.

38. *Id.* at 746, 470 S.E.2d at 269.

39. O.C.G.A. § 7-4-12 (1991).

40. *Brown v. Brown*, 265 Ga. 725, 462 S.E.2d 609 (1995).

41. *Id.* at 727, 462 S.E.2d at 611. The trial court ascertained the former wife's exact share in a declaratory judgment action filed in 1990 but not decided until 1994. *Id.* at 726, 462 S.E.2d at 610.

42. 265 Ga. 779, 462 S.E.2d 750 (1995).

43. *Id.* at 779, 462 S.E.2d at 751.

44. 265 Ga. 211, 452 S.E.2d 764 (1995).

45. *Quillen*, 265 Ga. at 781-82, 462 S.E.2d at 752-53 (Hunstein, J., dissenting).

46. *Id.*

In *Ragland v. Ragland*,<sup>47</sup> the supreme court affirmed a jury verdict ordering each spouse to pay the other one-half of their retirement benefits upon retirement and directing both to choose the fifty percent survivor option available under their retirement system. The former husband appealed. The court held the obligation to be for alimony because the period of payment into the plan is indefinite, bounded by the former husband's death or retirement.<sup>48</sup>

The alimony obligation was not illegal, although it required payments after the husband's death, because "the award in this case will not impose any duty on his estate after his death."<sup>49</sup> Rather, the court likened the obligations to the annuity contract upheld in *Andrews v. Whitaker*.<sup>50</sup>

#### V. DIVORCE—SERVICE OF PROCESS

Mr. Southworth sued his wife for separate maintenance. She answered and counterclaimed for separate maintenance. Thereafter, the wife's counsel withdrew and the wife moved out of state. The husband amended his complaint by adding a count seeking divorce. Service of the amendment was attempted by mail to the wife at the Georgia address listed in her former counsel's motion to withdraw. The wife did not answer the amendment nor appear at trial. The divorce decree awarded the husband all of the marital property, custody of the children, and child support.<sup>51</sup> Within the same term of court, the wife moved to set aside the decree. The trial court granted the motion and the supreme court affirmed.<sup>52</sup>

The supreme court held the "husband's amendment was not a 'pleading subsequent to the original complaint' . . . within the meaning of O.C.G.A. section 9-11-5(a)."<sup>53</sup> Rather, the amendment stated an entirely new cause of action seeking relief which would obviate the original claim.<sup>54</sup> Accordingly, in order to meet the wife's constitutional right to notice, the husband was required to serve her pursuant to O.C.G.A. section 9-11-4.<sup>55</sup> If he knew her address, service should have

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47. 266 Ga. 643, 469 S.E.2d 658 (1996).

48. *Id.* at 643, 469 S.E.2d at 659.

49. *Id.*

50. 265 Ga. 76, 453 S.E.2d 735 (1995).

51. *Southworth v. Southworth*, 265 Ga. 671, 461 S.E.2d 215 (1995).

52. *Id.* at 674-75, 461 S.E.2d at 218.

53. *Id.* at 674, 461 S.E.2d at 218 (citing O.C.G.A. § 9-11-5(a) (1993)).

54. *Id.*

55. *Id.* (citing O.C.G.A. § 9-11-4 (1993)).

been attempted in accordance with O.C.G.A. section 9-11-4(e)(2).<sup>56</sup> Otherwise, he should have attempted service by publication.<sup>57</sup>

## VI. LEGISLATION

The General Assembly has prohibited marriages between persons of the same sex,<sup>58</sup> and common law marriages entered on or after January 1, 1997 are also forbidden.<sup>59</sup>

Grandparent visitation rights were restored in other legislation.<sup>60</sup> However, the trial court must specifically find "the health or welfare of the child would be harmed unless such visitation is granted" and that "the best interests of the child would be served by such visitation."<sup>61</sup> There is no presumption in favor of grandparent visitation.<sup>62</sup>

O.C.G.A. section 19-5-12 enacts a new form for final judgments of divorce specifying findings required by the child support guidelines.<sup>63</sup> Moreover, the General Assembly enacted a host of provisions limiting or denying various licenses for non-compliance with child support orders.<sup>64</sup> Included in the list are driver's licenses.<sup>65</sup>

In another change, O.C.G.A. section 19-3-33.1 now permits a spouse to use a surname from a previous marriage alone or in conjunction with the surname of the other spouse.<sup>66</sup>

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56. *Id.* (citing O.C.G.A. § 9-11-4(e)(2) (1993)).

57. *Id.* (citing O.C.G.A. § 9-11-4(e)(1) (1993)).

58. O.C.G.A. § 19-3-3.1 (Supp. 1996).

59. *Id.* § 19-3-1.1.

60. *Id.* § 19-7-3 (1991 & Supp. 1996).

61. *Id.* § 19-7-3(c).

62. *Id.*

63. *Id.* § 19-5-12 (1996); *see also* § 19-6-15 (1996).

64. O.C.G.A. § 2-7-102 (1996) (pesticide); O.C.G.A. § 7-1-1017 (1996) (mortgage lenders and brokers); O.C.G.A. § 19-6-28.1 (1996) (driver's, trade, business or profession); O.C.G.A. § 12-6-49.1 (1996) (forestry); O.C.G.A. § 26-4-78 (1996) (pharmacy); O.C.G.A. §§ 33-23-21, 33-23-22 (1996) (insurance agents); O.C.G.A. § 40-5-54.1 (1996) (driver's); O.C.G.A. § 43-39A-14 (1996) (real estate appraisers); O.C.G.A. § 43-40-15 (1996) (real estate).

65. O.C.G.A. § 40-5-54.1 (1996).

66. *Id.* § 19-3-33.1 (1991 & Supp. 1996).

