Domestic Relations

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Of the domestic relations appellate cases decided during the survey period, eighteen are digested here.[1] As has been the recent trend, the Legislature and the appellate courts have continued to focus primarily on issues surrounding children.

I. DIVORCE

The appellate courts considered the admissibility of evidence frequently gathered in domestic relations cases. In *Barlow v. Barlow*,[2] the husband wanted to admit into evidence a tape recording of his wife's cordless telephone conversation with an alleged paramour. A neighbor recorded the conversation without the knowledge of either party to the telephone conversation. The trial court refused to suppress the recording.[3] The Georgia Supreme Court reversed, holding Georgia's anti-wiretapping statute[4] applies to telephone calls made on cordless telephones.[5] The court found users of cordless telephones have an expectation of privacy similar to users of land lines and cellular telephones, which have been expressly included within the anti-

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1. This survey chronicles developments in Georgia domestic relations law from June 1, 1999 to May 31, 2000.
2. 272 Ga. 102, 526 S.E.2d 857 (2000).
3. *Id.* at 102, 526 S.E.2d at 858.
4. O.C.G.A. § 16-11-62(4) (Supp. 2000).
5. 272 Ga. at 104, 526 S.E.2d at 859.

wiretapping statute.[6] The decision does not address whether the neighbor was acting as the husband's agent when the recording was made or whether the agency issue would make any difference in the admissibility of the recording.

In *In re Fulton County Grand Jury Proceedings*,[7] the Georgia Court of Appeals held a private investigator hired to gather evidence for the husband in a divorce case could testify before a grand jury considering criminal charges against the husband.[8] The husband's divorce lawyer hired the investigator to investigate an alleged affair by the wife. The alleged paramour was later found murdered. When the victim's family offered a reward, the investigator came forward with evidence amassed during the investigation. The trial court denied the husband's assertion that his conversations with the investigator were subject to the attorney-client privilege.[9] The appellate court held the conversations occurred after the investigation was concluded and, therefore, were not privileged.[10] Even if privilege attached, the court held the conversations were conducted in furtherance of a crime and therefore admissible under the crime-fraud exception.[11]

In addition to the evidence questions, the supreme court looked at divorce procedure. In *Brown v. Brown*,[12] the wife named her mother-in-law as a codefendant, alleging she held title to real property that actually belonged to the divorcing spouses. When the mother-in-law did not file an answer, the wife successfully moved for a default judgment.[13] The supreme court held the provisions of Official Code of Georgia Annotated ("O.C.G.A.") section 19-5-8, which prohibits default judgments from being granted in divorce, alimony or custody actions, apply to third-party defendants.[14]

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6. *Id.* When the court of appeals held in *Salmon v. State*, 206 Ga. App. 469, 470-71, 426 S.E.2d 160, 162 (1992), that O.C.G.A. § 16-11-62 did not apply to cellular telephone conversations, the Legislature enacted O.C.G.A. § 16-11-66.1 expressly to include protections for cellular calls. O.C.G.A. § 16-11-66.1 (1999).

7. 244 Ga. App. 380, 535 S.E.2d 340 (2000).

8. *Id.* at 380, 535 S.E.2d at 340.

9. *Id.*

10. *Id.* at 383, 535 S.E.2d at 343.

11. *Id.* at 382, 535 S.E.2d at 342 (citing *In re* Hall County Grand Jury Proceedings, 175 Ga. App. 349, 352, 333 S.E.2d 389, 392 (1985)).

12. 271 Ga. 887, 525 S.E.2d 359 (2000).

13. *Id.* at 887, 525 S.E.2d at 359.

14. *Id.* at 888, 525 S.E.2d at 360.

II. CHILD CUSTODY

Issues surrounding children, particularly custody, were prevalent in both the Legislature and appellate courts. Despite last year's veto of similar legislation, Governor Roy Barnes signed legislation that requires trial courts to consider the custodial wishes of children over the age of eleven.[15] The trial courts are not bound by the child's decision and must apply the best-interest-of-the-child standard. The election by a child over the age of eleven, but under the age of fourteen, shall not be grounds for a modification action.[16]

During this survey period, the appellate courts again considered venue and jurisdiction. In *Roach v. Kapur*,[17] the court of appeals held it was error for the trial court to allow the father to file a counterclaim for custody modification when the mother had filed an action to modify the support provisions of the parties' divorce decree.[18] The mother filed her action in the county of her residence. Based on the father's motion, the case was transferred to the county of his residence. When the father filed his counterclaim for custody, the mother then moved to transfer venue. The mother appealed when the trial court denied her motion.[19] The court of appeals, citing O.C.G.A. section 19-9-23, held the counterclaim was improper because it was not a separate action nor was it filed in the county of the custodial parent's residence.[20] A different panel reached a similar decision in *Wilson v. Baldwin*.[21]

Also, a trial court may not arbitrarily decline to exercise jurisdiction over child custody. In *Patterson v. Patterson*,[22] the parties presented conflicting evidence as to whether Georgia should exercise jurisdiction over the custody case. Without making any determinations of fact, the trial court decided a trial in Georgia "may not be in the best interest of everybody."[23] For a trial court to decline jurisdiction based on an inconvenient forum rationale, the trial court must find that the alternate forum would be in the child's best interest and that the alternate forum

15. O.C.G.A. § 19-9-1(3)(B) (Supp. 2000).
16. *Id.*
17. 240 Ga. App. 558, 524 S.E.2d 246 (1999).
18. *Id.* at 559, 524 S.E.2d at 246-47.
19. *Id.* at 558, 524 S.E.2d at 246.
20. *Id.* at 559, 524 S.E.2d at 246-47.
21. 239 Ga. App. 327, 519 S.E.2d 251 (1999).
22. 271 Ga. 306, 519 S.E.2d 438 (1999).
23. *Id.* at 308, 519 S.E.2d at 440.

would accept jurisdiction.[24] Because the trial court failed to make the necessary inquiries, it was error to decline jurisdiction.[25]

Relocation has continued to be an issue in custody modification actions. In *Ofchus v. Isom*,[26] the court of appeals held the trial court abused its discretion in modifying custody.[27] Based on the mother's decision to relocate with her new husband to Virginia, the trial court modified custody in favor of the father.[28] The court of appeals gave no credence to the trial court's findings that the move would be detrimental to the child based on the child's being removed from regular visits with the father and other relatives.[29] Because the mother was the primary custodial parent under the divorce decree, she had a prima facie right to continue as the custodial parent.[30] To overcome that right, the father needed to show that the mother was no longer able or suited to be the custodial parent, that conditions had changed negatively affecting the child's home life, or that the child's welfare would be promoted by the change of custody.[31]

In *Mahan v. McCrae*,[32] the court of appeals again held the trial court improperly changed custody based on the custodial parent's decision to move out of state.[33] The trial court ruled the modification was warranted not only because of the move, but also because the mother had blocked the father's attempts to visit with the children beyond what was provided for in the parties' judgment.[34] The appellate court noted past decisions approving a custody change due to the custodial parent's interference with the visitation rights of the noncustodial parent.[35] The court then found no legal support for modifying custody because the custodial parent did not give the noncustodial parent rights beyond what was contained in the visitation order.[36] Three judges dissented,[37]

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24. *Id.*
25. *Id.*
26. 239 Ga. App. 738, 521 S.E.2d 871 (1999).
27. *Id.* at 740, 521 S.E.2d at 873.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 739-40, 521 S.E.2d at 873.
32. 241 Ga. App. 109, 522 S.E.2d 772 (1999).
33. *Id.* at 110, 522 S.E.2d at 774.
34. *Id.* at 111, 522 S.E.2d at 774.
35. *Id.* (citing Moore v. Wiggins, 230 Ga. 51, 55, 195 S.E.2d 404, 406 (1973); Bull v. Bull, 243 Ga. 72, 72, 252 S.E.2d 494, 495 (1979); and Arp v. Hammonds, 200 Ga. App. 715, 717-18, 409 S.E.2d 275, 277 (1991)).
36. *Id.* at 110, 522 S.E.2d at 774.
37. The majority in the 4-3 decision was comprised of Chief Judge Johnson and Judges Pope, Eldridge and Barnes. The dissent, authored by Judge Smith, was joined by Judges

finding evidence existed that supported the trial court's determination that the mother's actions had emotionally harmed the children.[38]

Nonparents seeking custody continues to capture the interest of both the appellate courts and the Legislature. Effective July 1, 2000, the Legislature expanded the list of relatives who may seek custody of a child under the best-interest-of-the-child standard to include great-grandparents.[39] In *In re Stroh*,[40] the court of appeals held that while Georgia law prohibits nonresidents from adopting a child residing in Georgia,[41] nonresidents cannot be prohibited from seeking custody.[42]

In *Stills v. Johnson*,[43] the maternal and paternal grandmothers were opposing each other for custody of their grandchild. After the mother died of cancer, the father, who was incarcerated, transferred custody to the paternal grandmother. The trial court held the custody transfer valid and required the maternal grandmother to show the paternal grandmother to be unfit by clear and convincing evidence.[44] The supreme court held that the trial court applied the incorrect standard.[45] In custody disputes between relatives, the parties need only show what is in the child's best interest.[46] The fact that the father voluntarily transferred custody to one relative does not create a heightened standard.[47]

In *Perrin v. Stansell*,[48] the court of appeals held a relative seeking visitation privileges with a minor child, who is in the temporary custody of another relative rather than either parent, need only show by a preponderance of the evidence that the visitation would be in the child's best interest.[49] Although the grandparents' visitation statute[50] requires a relative to show by clear and convincing evidence that the potential harm due to the absence of visitation outweighs the parents' right to raise the child, the statute does not apply to nonparent custodians.[51] The custodian does "not stand in the shoes of the parent,"

Blackburn and Ellington. *Id.* at 113, 522 S.E.2d at 775.

38. *Id.* at 114, 522 S.E.2d at 776.
39. O.C.G.A. § 19-7-1(b.1) (Supp. 2000).
40. 240 Ga. App. 835, 523 S.E.2d 887 (1999).
41. O.C.G.A. § 19-8-3(a)(3) (1999).
42. 240 Ga. App. at 840, 523 S.E.2d at 891.
43. No. S00A6118, 2000 Ga. LEXIS 542 (July 10, 2000).
44. *Id.* at *2.
45. *Id.* at *1.
46. *Id.*
47. *Id.*
48. 243 Ga. App. 475, 533 S.E.2d 458 (2000).
49. *Id.* at 478, 533 S.E.2d at 461.
50. O.C.G.A. § 19-7-3 (1999).
51. 243 Ga. App. at 477, 533 S.E.2d at 461.

and therefore, does not have the constitutional protections contemplated by O.C.G.A. section 19-7-3.[52]

III. LEGITIMATION

The courts have addressed the issues affecting the legitimacy of children. In *Hall v. Coleman*,[53] the court of appeals held the trial court erred in not declaring the child to be the father's legitimate child.[54] The child's parents married upon learning of the pregnancy; however, the marriage was later determined to be void because the child's mother had never obtained a divorce from her prior husband. After the parents separated, the mother consented to allowing a couple to adopt the child. The trial court denied the father's motion to legitimate the child.[55] The appellate court ruled the motion to legitimate was unnecessary because the child was legitimate by virtue of the parents' marriage.[56] The fact the marriage was later deemed invalid did not cause the child to become illegitimate.[57]

In *In re Estate of Garrett*,[58] the court of appeals held the biological father had no right to inherit from his son.[59] Absent a court order legitimating the child, a court finding of paternity, genetic test results, a sworn statement from the father acknowledging the parent-child relationship, or the father's signing of the birth certificate, the father cannot seek to inherit from the child.[60] Once the child has died, it is too late for the father to take any action towards legitimating the child.[61]

IV. CHILD SUPPORT

The appellate courts took a hard look at the procedures parties must follow when seeking to obtain or enforce an award of child support. In *Hackbart v. Hackbart*,[62] the supreme court reversed the trial court's divorce decree because the order included a child support provision even though the mother did not make a demand for child support in her

52. *Id.*
53. 242 Ga. App. 576, 530 S.E.2d 485 (2000).
54. *Id.* at 578, 530 S.E.2d at 486.
55. *Id.*
56. *Id.*
57. *Id.*
58. 244 Ga. App. 65, 534 S.E.2d 843 (2000).
59. *Id.* at 66, 534 S.E.2d at 845.
60. *Id.*
61. *Id.*
62. 272 Ga. 26, 526 S.E.2d 840 (2000).

pleadings.[63] "While OCGA § 19-5-10 allows a court presiding over an undefended divorce case to conduct a hearing and make a determination on child support, it does not authorize a court to grant relief beyond that requested in the pleadings."[64] The court noted the mother's failure to follow proper procedures did not preclude her from other avenues of having a child support order put in place.[65]

In *Rose v. Thorpe*,[66] the mother filed an action to modify child support because she claimed the father under-reported his income at the time of the divorce. The trial court agreed with the mother, ordering the father to make a lump sum payment of $17,500 and increasing the monthly payments.[67] The appellate court held the trial court abused its authority by retroactively modifying the child support award.[68] The court indicated that if the mother had wanted to obtain a retroactive application, she should have filed a motion to set aside the judgment, not a motion to modify the child support.[69]

In *Ward v. DHR*,[70] the court of appeals held the Department of Human Resources ("DHR") should have filed a motion to modify child support rather than an action to establish support.[71] However, the court found the error to be harmless because the mother was given notice and a de novo hearing.[72] The mother also argued that DHR failed to meet the standards set forth in O.C.G.A. section 19-6-19 necessary for a modification to be made.[73] However, the court held those standards only apply in modification actions directly between parents.[74] When DHR is involved, the Department is required to determine if the payments are consistent with the child support guidelines[75] and make recommendations accordingly.[76]

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63. *Id.* at 27, 526 S.E.2d at 841-42.
64. *Id.*, 526 S.E.2d at 842.
65. *Id.*
66. 240 Ga. App. 834, 525 S.E.2d 381 (1999).
67. *Id.* at 834, 525 S.E.2d at 382.
68. *Id.*
69. *Id.* at 834-35, 525 S.E.2d at 382.
70. 241 Ga. App. 298, 527 S.E.2d 3 (1999).
71. *Id.* at 299, 527 S.E.2d at 5.
72. *Id.* at 300, 527 S.E.2d at 6.
73. *Id.* at 299, 527 S.E.2d at 5.
74. *Id.*
75. O.C.G.A. § 19-6-15 (1999).
76. 241 Ga. App. at 299-300, 527 S.E.2d at 5.

V. ALIMONY

In an action to modify the alimony provisions of a divorce decree, the trial court may not prohibit a party from introducing the divorce decree into evidence. In *Cotton v. Cotton*,[77] the trial court granted the former wife's motion to suppress the divorce decree and excluded any testimony, evidence or argument as to the aggregate amount of alimony that had been paid.[78] The court of appeals held the prior judgment was required to be admitted into evidence and the failure to do so was reversible error.[79] Yet the appellate court also held the trial court was within its discretion in preventing the parties from referring to the aggregate amount of alimony that had been paid.[80] That evidence would not be relevant to the modification action, but it could have a prejudicial effect, and therefore, the trial court acted properly.[81]

Finally, the appellate courts tackled the issue of health insurance coverage in *Blair v. Blair*.[82] As part of alimony, the husband was ordered to maintain health insurance coverage for the wife comparable to the plan provided him by his employer. The husband continued to pay for the conversion policy, but it did not provide comparable coverage. The wife obtained a better policy, but the husband refused to pay for the more expensive policy obtained by the wife. When the wife filed a contempt action, the trial court ordered the husband to pay the higher premiums plus $13,044.41 in expenses that would have been covered under the employer's policy but were not covered under the conversion policy.[83] The appellate court held the trial court did not go far enough.[84] To the extent a party fails to provide required health insurance for a former spouse, the obligated party becomes a self-insurer.[85] The appellate court reasoned that the husband paid for approximately 29.5% of the total premiums; therefore, he was liable for 70.5% of the $74,638 in expenses covered by the wife's insurance policy.[86]

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77. 272 Ga. 276, 528 S.E.2d 255 (2000).
78. *Id.* at 276, 528 S.E.2d at 256.
79. *Id.* at 277, 528 S.E.2d at 256-57.
80. *Id.* at 278, 528 S.E.2d at 257.
81. *Id.*
82. 272 Ga. 94, 527 S.E.2d 177 (2000).
83. *Id.* at 95, 527 S.E.2d at 178.
84. *Id.* at 96, 527 S.E.2d at 179.
85. *Id.* at 96-97, 527 S.E.2d at 179.
86. *Id.* at 97, 527 S.E.2d at 179.