Domestic Relations

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Of the domestic relations appellate cases decided during this survey period,[1] twenty-three are discussed below. Georgia law requires that appeals of domestic relations cases occur through the discretionary application process.[2] A party wanting to appeal an order in a domestic relations case must first file an application to obtain the permission of the appropriate appellate court to file an appeal.[3] As part of a pilot project, the Georgia Supreme Court began accepting all "non-frivolous" applications filed in domestic relations cases during the 2003 calendar year.[4] The supreme court extended the pilot project for the 2004 calendar year; however, the supreme court limited the pilot project to applications filed from divorce cases.[5] The pilot project does not include cases that would be appealed to the court of appeals first,[6] writs of

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1. This survey chronicles developments in Georgia domestic relations law from June 1, 2003 to May 31, 2004.

2. O.C.G.A. § 5-6-35(a)(2) (Supp. 2004).

3. *Id.* § 5-6-35(b).

4. *See* Wright v. Wright, 277 Ga. 133, 587 S.E.2d 600 (2003). Under the pilot project, all divorce and alimony discretionary applications filed with the Georgia Supreme Court on or after January 6, 2003 will be automatically granted unless the application is found to be frivolous by a majority vote of the court.

5. The supreme court had been accepting applications for other matters, e.g., the discretionary application in the contempt and child support modification case. Moccia v. Moccia, 277 Ga. 571, 592 S.E.2d 664 (2004) (filed and accepted under the pilot project in 2003).

6. GA. CONST. art. VI, § 6, para. 2 (listing appeals for which the supreme court has exclusive appellate jurisdiction, including any questions on the constitutionality of a

certiorari,[7] or interlocutory appeals.[8] The domestic relations bar remains hopeful that the pilot project will be extended again for the 2005 calendar year or made permanent; however, no decision has been announced as of yet. The pilot project has enabled courts to address a variety of domestic relations issues that will benefit the domestic relations bar and future litigants.

I. DIVORCE: JURISDICTION

The supreme court twice addressed the application of Georgia's Long-Arm Statute.[9] In *Walters v. Walters*,[10] the parties were married in Denmark and lived abroad during much of their marriage due to the husband's military service. When they returned to the United States, they set up a matrimonial domicile in Georgia. When the parties separated, the husband moved to Florida. After several years the wife filed for divorce in Georgia.[11]

Although the trial court granted the husband's motion to dismiss, based on lack of jurisdiction, the supreme court reversed.[12] Section 9-10-91 of the Official Code of Georgia Annotated ("O.C.G.A.") "allows a Georgia court to exercise personal jurisdiction over a nonresident in the same manner as if he were a resident of the state if certain requirements are met."[13] Specifically, the Long-Arm Statute allows for jurisdiction to be exercised in divorce cases when either the nonresident spouse maintains a matrimonial domicile in Georgia at the time the action was filed or when the nonresident spouse resided in Georgia prior to the action being filed.[14] The nonresident must also have "minimum contacts" with the state to satisfy the due process rights of the nonresident.[15] The court determined that when the husband participated in establishing and maintaining a marital residence in Georgia, he

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statute); GA. CONST. art. VI, § 6, para. 3 (listing appeals for which the supreme court has general appellate jurisdiction including judgments for alimony and divorce); GA. CONST. art. VI, § 5, para. 3 (vesting the court of appeals with jurisdiction in those appellate cases not reserved to the supreme court or other courts).

7. O.C.G.A. § 5-6-15 (1995).

8. O.C.G.A. § 5-6-34(b) (Supp. 2004).

9. O.C.G.A. § 9-10-91 (Supp. 2004).

10. 277 Ga. 221, 586 S.E.2d 663 (2003).

11. *Id.* at 221-23, 586 S.E.2d at 663-64.

12. *Id.* at 221, 586 S.E.2d at 633.

13. *Id.* at 223, 586 S.E.2d at 665 (quoting Strickland v. Strickland, 272 Ga. 855, 856-57, 534 S.E.2d 74, 75 (2000)).

14. O.C.G.A. § 9-10-91(5) (Supp. 2004).

15. Smith v. Smith, 254 Ga. 450, 453, 330 S.E.2d 706, 709 (1985) (quoting Int'l Shoe v. Washington, 326 U.S. 310, 316 (1945)).

assumed certain rights and obligations.[16] Notions of fair play and substantial justice would require the husband to return to Georgia to resolve the issues related to the parties' marriage as opposed to forcing the wife to seek relief in a state where she never had any contacts.[17]

Similarly, in *Cooke v. Cooke*,[18] the supreme court held that the trial court erroneously dismissed a divorce action based on the wife's relocation to England.[19] The parties, an Irish husband, an English wife, and their six children moved to Georgia in 1992. The wife returned to England with the children in 1999; however, the husband remained in Georgia. The parties continued to file joint tax returns, claiming to be full-time Georgia residents. In 2003 the husband filed for divorce in Georgia. The wife moved to dismiss the Georgia action based on lack of personal jurisdiction, improper venue, and *forum non conveniens*. The trial court granted the wife's motion on the two former counts, but the trial court did not address the latter.[20]

In reversing, the supreme court held that the maintenance of the matrimonial domicile in Georgia satisfied Georgia's Long-Arm Statute.[21] The fact that the Georgia residence was the last residence where the parties lived together as a family unit, provided the minimum contacts necessary to satisfy any due process concerns.[22]

II. DIVORCE: PROCEDURE

The supreme court addressed several issues concerning trial procedure in family law cases. First, in *Blaylock v. Blaylock*,[23] the court considered whether one party has a right to a jury trial when the other party has not yet filed defensive pleadings.[24] O.C.G.A. section 19-5-1(a) provides that a jury trial is authorized when "'an issuable defense is filed as provided by law and a jury is demanded in writing . . . on or

16. *Walters*, 277 Ga. at 224, 586 S.E.2d at 665.

17. *Id.*

18. 277 Ga. 731, 594 S.E.2d 370 (2004).

19. *Id.* at 731, 594 S.E.2d at 373.

20. *Id.* at 731-32, 594 S.E.2d at 371. Even though O.C.G.A. section 19-9-67 allows a trial court to decline jurisdiction of custody-related issues based on *forum non conveniens*, it does not appear that the wife was relying on the Uniform Child Custody Jurisdiction and Enforcement Act. O.C.G.A. § 19-9-67 (2004). Under O.C.G.A. section 19-9-61, England would be the children's home state, and under O.C.G.A. section 19-9-44, Georgia should have deferred jurisdiction to the appropriate court in England. O.C.G.A. § 19-9-44 (2004).

21. *Cooke*, 277 Ga. at 733, 594 S.E.2d at 371-72.

22. *Id.*, 594 S.E.2d at 372.

23. 277 Ga. 56, 586 S.E.2d 650 (2003).

24. *Id.* at 56, 586 S.E.2d at 650.

before the call of the case [to] trial . . . .'"[25] Noting that a defendant in a divorce case is not required to file a formal answer and default judgments cannot be entered in divorce cases, the supreme court held that an issuable defense can be filed in documents other than an answer.[26] In this case the wife's demand for a jury trial was denied by the trial court because the husband had not filed an answer. The husband did participate in the preparation of a pre-trial order, wherein he admitted that the wife was entitled to receive child support and an equitable division of the property; however, he disagreed with the amount of child support and the actual division of assets being requested by the wife.[27] Even when the defense is a partial one, as in this case, the supreme court held that either party has a substantive right to demand a jury trial.[28]

When there are factual issues to be determined, the supreme court also held that trial courts cannot reject a party's request to make a closing argument, even during a bench trial.[29] In *Wilson v. Wilson*,[30] the wife's attorney made a request to make a closing argument; however, the judge denied the request.[31] The supreme court recognized that some states allow arguments as an absolute right,[32] while other states give the trial judge discretion whether to allow closing arguments in a bench trial.[33] The supreme court decided, however, to follow a more intermediate approach.[34] The supreme court held that a trial court may not deny a party the right to make a closing argument; however, a trial court may limit the argument in time and content.[35]

III. CHILD CUSTODY

The supreme court was presented with an unusual set of facts in *Baker v. Baker*.[36] Although the wife was two months pregnant when

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25. *Id.* (quoting O.C.G.A. § 19-5-1(a) (2004)).
26. *Id.*
27. *Id.* at 57, 586 S.E.2d at 651.
28. *Id.*
29. Wilson v. Wilson, 277 Ga. 801, 803-04, 596 S.E.2d 392, 394 (2004).
30. 277 Ga. 801, 596 S.E.2d 392 (2004).
31. *Id.* at 801, 596 S.E.2d at 393.
32. *Id.* at 802, 596 S.E.2d at 393. *See* Pettry v. Pettry, 706 So. 2d 107, 108 (Fla. Dist. Ct. App. 1998); Nestor v. George, 46 A.2d 469 (Pa. 1946).
33. *Wilson*, 277 Ga. at 802, 596 S.E.2d at 393. *See* Korbelik v. Staschke, 596 N.E.2d 805, 808 (Ill. App. Ct. 1992).
34. *Wilson*, 277 Ga. at 802, 596 S.E.2d at 393. *See In re* Emileigh F., 724 A.2d 639 (Md. 1999); Fuhrman v. Fuhrman, 254 N.W.2d 97, 101 (N.D. 1977).
35. *Wilson*, 277 Ga. at 802, 596 S.E.2d at 393.
36. 276 Ga. 778, 582 S.E.2d 102 (2003).

the parties met, they married prior to the child's birth. The biological father was incarcerated and would not be released until 2011. The husband provided emotional and financial support to the wife throughout the pregnancy. The husband was listed as the child's father on the birth certificate. When the husband filed for divorce, he sought custody of the child.[37]

Although a child born during a marriage is presumed to be the child of the husband,[38] the presumption can be rebutted by clear and convincing evidence.[39] The wife challenged the husband's request for custody, stating that the husband was not the biological father. When the biological father intervened, the trial court ordered DNA testing, which confirmed that the husband was not the biological father. The trial court indicated that the child's best interests would be served by the husband remaining as the child's father; however, the wife had successfully rebutted the presumption of paternity.[40]

In a four-to-three decision, the supreme court reversed the trial court, holding that the trial court was required to find that the presumption of parentage was not only rebutted by clear and convincing evidence, but also that the rebuttal was in the child's best interests.[41] The dissent claimed the majority opinion overstepped judicial authority by allowing trial courts to utilize the "best interests of the child standard" to determine whether the trial courts should follow statutory procedures passed by the legislature and signed into law by the governor.[42]

IV. CHILD CUSTODY: NON-PARENTS

Cases between parents and grandparents continued to reach the appellate courts. In *Jones v. Burks*,[43] the court of appeals reversed an award of custody to the maternal grandmother in an action contested by the children's father.[44] Under O.C.G.A. section 19-7-1(b.1),[45] custody may be awarded to a close relative of the children if clear and convincing evidence shows that parental custody would harm the children physically or emotionally, and custody by the non-parent would promote

37. *Id.* at 778-79, 582 S.E.2d at 102-03.
38. O.C.G.A. § 19-7-20(a) (2004); O.C.G.A. § 19-8-1(6) (2004).
39. O.C.G.A. § 19-7-20(b).
40. *Baker*, 276 Ga. at 779, 582 S.E.2d at 103.
41. *Id.* at 780, 582 S.E.2d at 104; *see also* Davis v. LaBrec, 274 Ga. 5, 549 S.E.2d 76 (2001).
42. *Baker*, 276 Ga. at 784, 582 S.E.2d at 106 (Benham, J., dissenting).
43. 267 Ga. App. 390, 599 S.E.2d 322 (2004).
44. *Id.* at 392, 599 S.E.2d at 324.
45. O.C.G.A. § 19-7-1 (2004).

the children's health, welfare, and happiness.[46] In awarding custody to the maternal grandmother, the trial court failed to include any written findings to support its decision.[47] The court of appeals remanded the case to the trial court for findings consistent with the requirements of O.C.G.A. section 19-7-1(b.1).[48] Similarly, in *Rainey v. Lange*,[49] the court of appeals reversed an award of visitation, under O.C.G.A. section 19-7-3,[50] to the maternal grandparents when written findings of fact were not included in the trial court's order.[51]

V. CHILD CUSTODY: MODIFICATION

A divided supreme court made new law in the area of relocation by reversing established case law from the court of appeals. In *Bodne v. Bodne*,[52] the supreme court considered whether a primary custodian's move may be considered a basis for a custody modification.[53] The court of appeals had previously ruled that a custodial parent's relocation affected visitation rights; however, a move alone was not a change of circumstances warranting a change of custody.[54]

In *Bodne* the father was awarded primary custody when the parties divorced. The father, remarried and planning to move to Alabama, filed an action to modify the mother's visitation rights. The mother filed a counterclaim for custody. The trial court heard evidence that supported the mother's claim that the proposed relocation would not be in the children's best interests, and the trial judge awarded custody to the mother. The father appealed to the court of appeals, which reversed the trial court's decision based on the established precedent.[55]

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46. Clark v. Wade, 273 Ga. 587, 599, 544 S.E.2d 99, 100 (2001).

47. *Jones*, 267 Ga. App. at 392, 599 S.E.2d at 324.

48. *Id.*

49. 261 Ga. App. 491, 583 S.E.2d 163 (2003).

50. O.C.G.A. § 19-7-3 (2004).

51. *Rainey*, 261 Ga. App. at 491-92, 583 S.E.2d at 164. O.C.G.A. section 19-7-3(c) expressly requires written findings of fact.

52. 277 Ga. 445, 588 S.E.2d 728 (2003).

53. *Id.* at 446, 588 S.E.2d at 729.

54. *Id.* at 446-47, 588 S.E.2d at 729 (citing Ormandy v. Odom, 217 Ga. App. 780, 459 S.E.2d 439 (1995)); *see also* Helm v. Graham, 249 Ga. App. 126, 547 S.E.2d 343 (2001); Daniel v. Daniel, 250 Ga. App. 482, 552 S.E.2d 479 (2001); Lewis v. Lewis, 252 Ga. App. 539, 557 S.E.2d 40 (2001); Ofchus v. Isom, 239 Ga. App. 738, 521 S.E.2d 871 (1999); Mahan v. McRae, 241 Ga. App. 109, 522 S.E.2d 772 (1999); Holt v. Leiter, 232 Ga. App. 376, 501 S.E.2d 879 (1998); Grubbs v. Dowse, 226 Ga. App. 763, 177 S.E.2d 237 (1970); Mercer v. Foster, 210 Ga. App. 546, 81 S.E.2d 458 (1954).

55. *Bodne*, 277 Ga. at 445, 588 S.E.2d at 728-29.

The supreme court granted certiorari in the case.[56] The supreme court reversed the court of appeals because it determined a bright line test was inapplicable.[57] The court reasoned that in a custody modification case, there can be no presumption that a moving parent will always retain custody or always lose custody.[58] Likewise, there can be no presumption that the primary custodian is entitled to retain custody.[59] The court must examine the evidence in each case, determine if a significant change has occurred affecting the children's welfare, and, if so, determine whether a change of custody is in the best interests of the children.[60] The supreme court concluded that the trial court utilized the correct standard.[61]

The court of appeals was also called upon to decide whether certain facts authorized a modification of child custody.[62] In *Durham v. Gipson*,[63] the mother sought custody of the parties' two daughters that had been residing with the father. The older daughter was over the age of fourteen and had elected to live with the mother. The younger daughter was ten, and there was conflicting evidence about her desires. The trial court awarded custody of the older daughter to the mother; however, the trial court found that there was no basis to change custody of the younger daughter.[64]

Georgia law allows for children over the age of fourteen to elect the parent with whom they will reside, and the child's election is binding unless the selected parent is determined to be unfit.[65] Elections made by children between the ages of eleven and fourteen must be considered by trial courts; however, the elections are not binding.[66] Furthermore, elections made by children between the ages of eleven and fourteen are not, in and of themselves, a change in circumstances warranting a modification of custody.[67]

The court of appeals clearly stated that the custody change of one child was a change of conditions that would warrant changing the

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56. *Id.* at 446, 588 S.E.2d at 729.
57. *Id.*
58. *Id.*
59. *Id.* at 447, 588 S.E.2d at 729.
60. *Id.* at 446, 588 S.E.2d at 729.
61. *Id.* at 447, 588 S.E.2d at 729.
62. Durham v. Gipson, 261 Ga. App. 602, 605, 583 S.E.2d 254, 257 (2003).
63. 261 Ga. App. 602, 583 S.E.2d 254 (2003).
64. *Id.* at 602-05, 583 S.E.2d at 255-57.
65. O.C.G.A. § 19-9-1(a)(3)(A) (2004); O.C.G.A. § 19-9-3(a)(4) (2004).
66. O.C.G.A. § 19-9-1(a)(3)(B) (2004); O.C.G.A. § 19-9-3(a)(4.1) (2004).
67. O.C.G.A. § 19-9-1(a)(3)(C) (2004).

custody of other siblings.[68] The appellate court emphasized the "best interests of the child" standard and the emotional toll of separating siblings as important considerations in promoting the child's welfare.[69]

VI. CHILD SUPPORT: GUIDELINES

Georgia's Child Support Guidelines ("Guidelines")[70] continued to withstand appellate scrutiny. The first constitutional challenge to the Guidelines to reach the appellate court was the 2003 case of *Georgia Department of Human Resources ("DHR") v. Sweat.*[71] The supreme court upheld the constitutionality of the Guidelines despite allegations that the Guidelines violated substantive due process, equal protection, privacy, and illegal taking laws.[72] The mother applied for a writ of certiorari to the United States Supreme Court; however, the writ was denied.[73]

In *Ward v. McFall*,[74] the Guidelines were challenged under the Supremacy Clause of the United States Constitution.[75] To qualify for federal funds from the federal Aid to Families with Dependent Children program, Georgia had to include written guidelines in its "state plan" for the calculation of child support, and procedures to review the guidelines at least once every four years.[76] Georgia instituted its Guidelines; however, the review of the Guidelines did not meet all of the requirements set forth by the federal statute.[77] The trial court found that Georgia's failure to comply with the federal mandates invalidated the Guidelines under the Supremacy Clause of the U.S. Constitution.[78] The supreme court disagreed.[79] A state's domestic relations laws will not be overridden by federal statutes unless the state statute does "major damage to 'clear and substantial' federal interests."[80] After

68. *Durham*, 261 Ga. App. at 605-06, 583 S.E.2d at 257 (citing Westmoreland v. Westmoreland, 243 Ga. 77, 252 S.E.2d 496 (1979); Lamb v. Lamb, 230 Ga. 532, 198 S.E.2d 171 (1973)).

69. *Id.* at 606, 583 S.E.2d at 257.

70. O.C.G.A. § 19-6-15 (2004).

71. 276 Ga. 627, 580 S.E.2d 206 (2003), *cert. denied*, 124 S. Ct. 432 (2003).

72. *Id.* at 627, 580 S.E.2d at 209.

73. Sweat v. Georgia Dep't of Human Servs., 124 S. Ct. 432 (2003).

74. 277 Ga. 649, 593 S.E.2d 340 (2004). The supreme court entered a second opinion, *Keck v. Harris*, 277 Ga. 667, 594 S.E.2d 367 (2004), which affirmed a trial court's rejection of the same Supremacy Clause arguments set forth in *Ward*.

75. U.S. CONST. art. VI.

76. *Ward*, 277 Ga. at 650, 593 S.E.2d at 341 (citing O.C.G.A. § 19-6-15(D) (2004)).

77. *Id.* at 651, 593 S.E.2d at 341 (citing 42 U.S.C.A. § 667 (2000).

78. *Id.*

79. *Id.* at 653, 593 S.E.2d at 343.

80. *Id.* at 652, 593 S.E.2d at 342 (quoting Rose v. Rose, 481 U.S. 619, 625 (1987)).

considering the federal interest in having states impose and enforce child support orders against noncustodial parents, the supreme court held that any failure by Georgia to strictly adhere to the review process did not do major damage to the federal interest.[81]

The appellate courts continued to demand technical compliance with the Guidelines.[82] In *Southerland v. Southerland*,[83] the supreme court remanded the case back to the trial court because the child support judgment recited the father's income but not the mother's income.[84] The court determined the Guidelines required written findings of each party's income.[85] In *Todd v. Todd*,[86] the court of appeals remanded a child support modification case in which the trial court awarded child support in excess of the Guidelines without enumerating the findings that supported the departure.[87] In *Esser v. Esser*,[88] the supreme court held that the trial court erred in adopting the parties' agreement without including the written findings required by the Guidelines, which included the parties' incomes, calculation of the range of child support required under the Guidelines, and findings of any special circumstances.[89] The case was remanded for a new child support award to be entered.[90]

In *Eleazer v. Eleazer*,[91] the supreme court affirmed the trial court's child support order when the order contained the requisite findings to support a deviation from the Guidelines.[92] At the parties' original trial, the trial judge awarded custody of the parties' two children to the mother and ordered the father to pay $2500 per month for the children as child support.[93] The father appealed to the supreme court, which concluded that the child support order did not include the findings required by the Guidelines.[94] On remand before a different judge, the trial court granted a new trial on all issues.[95] The new trial court ordered the father to pay $1,562.50 per month as child support, even

81. *Id.*, 593 S.E.2d at 342-43.
82. Southerland v. Southerland, 278 Ga. 188, 598 S.E.2d 442 (2004).
83. 278 Ga. 188, 598 S.E.2d 442 (2004).
84. *Id.* at 189, 598 S.E.2d at 444.
85. *Id. See* O.C.G.A. § 19-6-15(a) (2004).
86. 267 Ga. App. 243, 599 S.E.2d 236 (2004).
87. *Id.* at 244, 599 S.E.2d at 237.
88. 277 Ga. 97, 586 S.E.2d 627 (2003).
89. *Id.* at 99, 586 S.E.2d at 629.
90. *Id.*
91. 277 Ga. 821, 596 S.E.2d 577 (2004).
92. *Id.* at 823, 596 S.E.2d at 578.
93. Eleazer v. Eleazer, 275 Ga. 482, 569 S.E.2d 521 (2002).
94. *Id.* at 483, 569 S.E.2d at 522.
95. *Eleazer*, 277 Ga. at 822 n.1, 596 S.E.2d at 577 n.1.

though the father's income was $118,560 per year and a middle-Guidelines amount would be $2495 per month.[96] The supreme court held that the new trial court was within its discretion in lowering the child support based on the following factors: (1) the father's obligation to the support of another child; (2) the husband's income in excess of $75,000 per year; (3) the father's obligation to pay for healthcare premiums for the children and one-half of the uninsured expenses; and (4) the extraordinary travel expenses to facilitate visitation.[97]

VII. CHILD SUPPORT: ENFORCEMENT

In the following two cases, both courts focused on the powers of the trial court to enforce child support orders. In *Collins v. Billow*,[98] the supreme court emphasized that trial courts are not authorized to modify child support amounts in the context of a contempt case.[99] In *Collins* when the parties divorced in 1996, the father was awarded custody and the mother was required to pay child support in the amount of $115 per week or twenty-three percent of her annual income, whichever was greater. The father filed a contempt action, and in 1998 the trial court entered an order that increased the child support to $140 per week. The father filed a second contempt action claiming that because twenty-three percent of the mother's income equaled an amount greater than $140 per week, the mother was behind in child support. The mother contended that the 1998 order required only a flat amount of $140 per week, which she had paid.[100] The supreme court noted that the trial court was not authorized to modify the child support in 1998; however, the order was not appealed by either party, and too much time had elapsed to file a motion to set aside the order.[101] The order, therefore, was enforceable.[102] The supreme court agreed that the 1998 order increased the child support to $140 per week and did not reference or include the earlier automatic increases from the divorce decree.[103]

In *Dial v. Adkins*,[104] the court of appeals allowed the trial court to enter an order awarding interest on a child support arrearage in an

96. *Id.* at 822-23, 596 S.E.2d at 577.

97. *Id.*, 596 S.E.2d at 578.

98. 277 Ga. 604, 592 S.E.2d 843 (2004).

99. *Id.* at 605, 592 S.E.2d at 845 (citing Harper v. Smith, 261 Ga. 286, 404 S.E.2d 120 (1991)).

100. *Id.* at 604, 592 S.E.2d at 844.

101. *Id.* at 605-06, 592 S.E.2d at 845 (referencing the three year statute of limitations for filing a motion to set aside under O.C.G.A. § 9-11-60).

102. *Id.* at 606, 592 S.E.2d at 845.

103. *Id.*

104. 265 Ga. App. 650, 595 S.E.2d 332 (2004).

action separate from the contempt case that determined the arrearage.[105] After the parties divorced in Tennessee, the mother moved to Georgia and initiated an action to hold the father in contempt for failing to comply with their child support order. The father was ordered to purge himself of the contempt by issuing a payment of $30,000 by a certain date, followed by periodic payments of the balance. The wife later filed a separate action, under O.C.G.A. section 7-4-12.1,[106] seeking interest on the child support arrearage and was awarded $38,329.35 in interest. On appeal the father claimed that the action for interest was barred by *res judicata* as the claim for interest could have been put in issue during the contempt case. [107] The court of appeals, however, held that "the doctrine of *res judicata* is less strictly applied in divorce and alimony cases, including cases dealing with child support issues."[108] Because the issue of interest was not contested in the earlier case, the mother was entitled to pursue interest in a separate action.[109]

VIII. CHILD SUPPORT: MODIFICATION

The supreme court decided two cases concerning the right to have child support orders modified. In *Staffon v. Staffon*,[110] the supreme court held that the obligor's incarceration cannot serve as a basis for modifying child support.[111] The court reasoned that the incarcerated parent is liable for the consequences of his voluntary acts including the incarceration and the inability to maintain employment.[112] Georgia

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105. *Id.* at 652, 595 S.E.2d at 334.

106. O.C.G.A. § 7-4-12.1 (2004). The statutory interest rate is twelve percent per annum for child support payments that are more than thirty days late. *Id.*

107. *Dial*, 265 Ga. App. at 650-51, 595 S.E.2d at 333-34. The opinion does not address, and, therefore, the father was not allowed to raise the compulsory counterclaim provision of O.C.G.A. section 9-11-13(a), which states:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

O.C.G.A. § 9-11-13 (Supp. 2004).

108. *Dial*, 265 Ga. App. at 651-52, 595 S.E.2d at 334 (citing Brookins v. Brookins, 257 Ga. 205, 207-08, 357 S.E.2d 77, 79 (1987)). *See* Bailey v. Hall, 266 Ga. App. 222, 599 S.E.2d 226 (2004) (refusing to apply res judicata in a legitimation case).

109. *Dial*, 265 Ga. App. at 652, 595 S.E.2d at 334.

110. 277 Ga. 179, 587 S.E.2d 630 (2003).

111. *Id.* at 182, 587 S.E.2d at 633.

112. *Id.* at 180, 587 S.E.2d at 632 (quoting Chandler v. Cochran, 247 Ga. 184, 187, 275 S.E.2d 23, 27 (1981)).

courts have applied similar reasoning in actions to terminate parental rights of an incarcerated parent when the incarcerated individual had not been involved in the child's life or had not contributed financially to the child's care.[113] In an analogous situation, a parent obligated to pay child support who voluntarily gave up his career to enter the ministry at much less pay was deemed not entitled to a modification of child support.[114]

In *Moccia v. Moccia*,[115] the supreme court held that when the original child support amount was based on the obligor's earning capacity, a downward modification cannot be granted without a showing that the earning capacity has diminished.[116] The father's child support award was based on his earning capacity at the time of the divorce. When the father sought to modify his child support in a later action, the trial court determined that the father had failed to produce any evidence that he had tried to find employment commiserate with his abilities. The trial court further found that the father had failed to show a decrease in his income, due to discrepancies between the father's testimony and the evidence presented at trial.[117] In affirming the trial court, the supreme court held that "[t]he trial court correctly held [the father] to the standard of proof established by OCGA § 19-6-19(a), requiring him to show a reduction in his financial status and income."[118]

IX. ATTORNEY FEES

Attorney fees awards continue to be reversed when trial courts fail to articulate the basis for the award and make findings of fact to support the award. In *Reese v. Grant*,[119] the former husband filed a contempt action against the former wife. Although the trial court did not find the former wife in contempt, the trial court did order her to pay the former husband's attorney fees.[120] In a contempt case, the trial court is authorized to award attorney fees under two statutes. First, under O.C.G.A. section 19-6-2,[121] the trial court may award attorney fees to

113. *See, e.g., In re* M.C.L., 251 Ga. App. 132, 553 S.E.2d 647 (2001); *In re* A.T.H., 248 Ga. App. 570, 547 S.E.2d 299 (2001).
114. Stiltz v. Stiltz, 236 Ga. 308, 310-11, 223 S.E.2d 689, 691 (1976).
115. 277 Ga. 571, 592 S.E.2d 664 (2004).
116. *Id.* at 571, 592 S.E.2d at 665.
117. *Id.* at 571-72, 592 S.E.2d at 665.
118. *Id.* at 572, 592 S.E.2d at 665.
119. 277 Ga. 799, 596 S.E.2d 139 (2004).
120. *Id.* at 799, 596 S.E.2d at 140.
121. O.C.G.A. § 19-6-2(a)(1) (2004).

either party; however, the trial court must include findings of fact concerning the parties' relative financial positions.[122] Second, the trial court could award attorney fees for frivolous litigation under O.C.G.A. section 9-15-14,[123] but the trial court must include findings of fact warranting the award.[124] In *Reese* the trial court awarded attorney fees without stating the statutory basis or the findings of fact necessary to support the award; therefore, the case was remanded.[125] In *Moon v. Moon*,[126] the supreme court employed the same analysis and remanded the attorney fees award made in a divorce case.[127]

X. LEGITIMATION

In *Bailey v. Hall*,[128] the court of appeals held that when a trial court denies a putative father's petition for legitimation, the putative father is not prevented from filing another legitimation action when circumstances have changed since the prior action.[129] Since the trial court denied the legitimation petition in 1997, the father had established a history of paying child support, expressed a desire for visitation, and established a stable family life. The mother, on the other hand, had gotten divorced, and her husband never attempted to adopt the child. The trial court granted the mother's motion to dismiss based on the doctrine of *res judicata*.[130] In reversing, the court of appeals stated that although the cause of action and the parties were the same, *res judicata* did not prevent courts from reexamining cases when the facts have changed.[131] The case was remanded to the trial court for a determination of whether the new facts alleged by the father warranted a reevaluation of the legitimation case.[132]

XI. MARITAL TORTS

In *Gates v. Gates*,[133] the supreme court held that interspousal tort immunity applies to cases when the tort occurred prior to the marriage,

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122. *Id.*
123. O.C.G.A. § 9-15-14 (Supp. 2004).
124. Cotting v. Cotting, 261 Ga. App. 370, 371, 582 S.E.2d 527, 529 (2003).
125. 277 Ga. at 799, 596 S.E.2d at 140.
126. 277 Ga. 375, 589 S.E.2d 76 (2003).
127. *Id.* at 379, 589 S.E.2d at 81.
128. 267 Ga. App. 222, 599 S.E.2d 226 (2004).
129. *Id.* at 222-23, 599 S.E.2d at 227.
130. *Id.* at 222, 599 S.E.2d at 226-27.
131. *Id.* at 223, 599 S.E.2d at 227 (citing Durham v. Crawford, 196 Ga. 381, 26 S.E.2d 778 (1943)).
132. *Id.* at 222-23, 599 S.E.2d at 227.
133. 277 Ga. 175, 587 S.E.2d 32 (2003).

but the tort case was filed in conjunction with the divorce.[134] Interspousal immunity bars spouses from suing one another;[135] however, there is an exception when, at the time of the injury or the discovery of the injury, there is no longer any marital harmony to preserve.[136] In *Gates,* prior to the marriage, the parties were involved in a motorcycle accident. After a year of marriage, the parties separated and the wife filed for divorce, and included a tort claim for injuries resulting from the motorcycle accident. The husband's motion for summary judgment was denied by the trial court, which found that there was a factual issue to be determined, i.e., whether there was marital harmony to preserve.[137] The supreme court held that the exception to interspousal immunity did not apply when the wife, knowing of the injuries, chose to marry the husband, since at some point after the injury, there was marital harmony to preserve.[138]

XII. CONCLUSION

There were significantly more decisions rendered by the appellate courts during this survey period than any in the recent past, largely due to the continuation of the supreme court's pilot project. Long established precedent was reversed concerning child custody modifications. Constitutional challenges to the child support guidelines were rejected and explained. The appellate courts reversed orders for failing to make the requisite findings of fact. With clear guidance from the appellate courts, trial judges will be able to make better decisions, domestic relations attorneys will be better able to advise and represent their clients, and clients will be better able to understand and anticipate the issues that will arise during their court cases. Hopefully, the pilot project will be extended, or made permanent, and perhaps the court of appeals will institute a similar project.

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134. *Id.* at 178-79, 587 S.E.2d at 35.

135. O.C.G.A. § 19-3-8 (2004).

136. *Gates*, 277 Ga. at 178, 587 S.E.2d at 35 (citing Harris v. Harris, 252 Ga. 387, 388, 313 S.E.2d 88 (1984)).

137. *Id.* at 175, 587 S.E.2d at 33.

138. *Id.* at 178, 587 S.E.2d at 35. *See also* Robeson v. Int'l Indemn. Co., 248 Ga. 306, 282 S.E.2d 896 (1981).