Appellate Practice and Procedure

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I. INTRODUCTION

This Article surveys decisions addressing appellate law and procedure handed down by the Georgia Supreme Court and the Georgia Court of Appeals between June 1, 2010 and May 31, 2011.[1] The cases discussed fall into the following categories: (1) appellate jurisdiction; (2) preserving the record; and (3) miscellaneous cases of interest.

II. APPELLATE JURISDICTION

A. *Selecting the Correct Appeal Procedure*

In *Noaha, LLC v. Vista Antiques & Persian Rugs, Inc.*,[2] the Georgia Court of Appeals addressed the proper means of appealing the domestication of a foreign judgment.[3] The court of appeals considered whether, pursuant to section 5-6-35(a)(8) of the Official Code of Georgia Annotated

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1. For analysis of Georgia appellate practice and procedure law during the prior survey period, see Roland F. L. Hall, *Appellate Practice and Procedure, Annual Survey of Georgia Law*, 62 MERCER L. REV. 25 (2010).

2. 306 Ga. App. 323, 702 S.E.2d 660 (2010).

3. *Id.* at 326, 702 S.E.2d at 662.

(O.C.G.A.),[4] an appellant pursuing such an appeal must use the discretionary appeal procedure.[5]

The plaintiff in *Noaha* obtained a judgment against the defendant from the Court of Common Pleas for Richland County, South Carolina, based on the defendant's breach of their settlement agreement.[6] Under the Uniform Enforcement of Foreign Judgments Law,[7] the plaintiff moved the State Court of DeKalb County to domesticate the South Carolina judgment.[8] The trial court domesticated the judgment, and a writ of fieri facias was issued thereon. In the interim, an appeal from the South Carolina judgment was brought, and the Georgia trial court stayed the execution of the domesticated judgment pending such appeal. When the South Carolina court issued a final revised judgment, the Georgia trial court lifted the stay and amended the prior judgment to conform to the revised South Carolina judgment. From the revised judgment, the defendant filed a direct appeal.[9]

The plaintiff moved for the Georgia Court of Appeals to dismiss the appeal on the basis that a direct appeal was improper.[10] The plaintiff maintained that the proper method to attack a domesticated foreign judgment is by a motion to set aside pursuant to O.C.G.A. § 9-11-60(d),[11] and that the defendant's appeal was, in substance, "an appeal of the denial of a motion to set aside."[12] The plaintiff argued that, under O.C.G.A. § 5-6-35(a)(8), the denial of such a motion is appealable only by discretionary appeal. The defendant argued that O.C.G.A. § 5-6-35(a)(8) did not apply because the defendant had moved to vacate the domestication order and opposed the lift of stay.[13]

The court of appeals concluded that, although the defendant moved to vacate the domestication order, the true substance of the appeal was an attack on the domesticated judgment.[14] Thus, the court of appeals

4. O.C.G.A. § 5-6-35(a)(8) (1995 & Supp. 2011).
5. *Noaha*, 306 Ga. App. at 325, 702 S.E.2d at 662.
6. *Id.* at 323-24, 702 S.E.2d at 661.
7. O.C.G.A. §§ 9-12-130 to -138 (2006).
8. *Noaha*, 306 Ga. App. at 323, 702 S.E.2d at 661.
9. *Id.* at 324-25, 702 S.E.2d at 661-62.
10. *Id.* at 325, 702 S.E.2d at 662.
11. O.C.G.A. § 9-11-60(d) (2006).
12. *Noaha*, 306 Ga. App. at 325, 702 S.E.2d at 662.
13. *Id.* at 325-26, 702 S.E.2d at 662-63.
14. *Id.* at 326, 702 S.E.2d at 663 (quoting Rebich v. Miles, 264 Ga. 467, 468-69, 448 S.E.2d 192, 194 (1994)) ("[T]he underlying subject matter generally controls over the relief sought in determining the proper procedure to follow to appeal.").

dismissed the appeal based on its conclusion that the defendant should have filed for a discretionary appeal rather than filing a direct appeal.[15]

In *Avren v. Garten*,[16] the Georgia Supreme Court considered the scope of supersedeas arising from a notice of appeal and application for discretionary appeal.[17] In this postdivorce litigation between a former wife and husband, the trial court found the former wife "in contempt of previous court orders," denied her other requests for relief, and "ordered [her] to pay the outstanding balance due the guardian ad litem appointed to represent the parties' minor son."[18] While the trial court considered the former husband's request for attorney fees, the former wife filed a notice of appeal and an application for discretionary review. Five days later, the trial court granted the former husband's request for attorney fees. The trial court then denied the former wife's motion for reconsideration. The supreme court granted her application for discretionary review of such denial.[19]

The supreme court inquired whether the trial court's denial of the former wife's motion to set aside the award of attorney fees was directly appealable or was subject to a discretionary appeal.[20] The court considered two statutory bases: (1) O.C.G.A. § 5-6-34(a)(11),[21] which authorizes a direct appeal from "[a]ll judgments or orders in child custody cases including, but not limited to, awarding or refusing to change child custody or holding or declining to hold persons in contempt of such child custody judgment or orders,"[22] and (2) O.C.G.A. § 5-6-35(a)(8), which requires an application for discretionary review to appeal the denial of a motion to set aside.[23]

Resolving the apparent inconsistency, the supreme court held that the former wife was required to file an application for discretionary review.[24] The court relied upon *Rebich v. Miles*,[25] which held that, where the appeal invokes both O.C.G.A. §§ 5-6-34(a)[26] and 5-6-35(a),[27]

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15. *Id.*
16. 289 Ga. 186, 710 S.E.2d 130 (2011).
17. *Id.* at 189, 710 S.E.2d at 136.
18. *Id.* at 186, 710 S.E.2d at 133.
19. *Id.* at 189, 710 S.E.2d at 136.
20. *Id.* at 192, 710 S.E.2d at 137.
21. O.C.G.A. § 5-6-34(a)(11) (Supp. 2011).
22. *Id.*
23. *Avren*, 289 Ga. at 192, 710 S.E.2d at 137; *see also* O.C.G.A. § 5-6-35(a)(8).
24. *Avren*, 289 Ga. at 192, 710 S.E.2d at 137.
25. 264 Ga. 467, 468, 448 S.E.2d 192, 194 (1994).
26. O.C.G.A. § 5-6-34(a) (1995 & Supp. 2011).
27. O.C.G.A. § 5-6-35(a) (1995 & Supp. 2011).

an application for appeal is required.[28] Therefore, the inconsistency was resolved in favor of filing an application for appeal.[29]

In *Alston & Bird LLP v. Mellon Ventures II, L.P.*,[30] the court of appeals considered whether an appellant could directly appeal a trial court's review of a special master's findings.[31] In this legal malpractice action arising from a soured investment deal, "[t]he trial court . . . appointed a special master to make reports and recommendations on discovery disputes" and, subsequently, "issues of law and fact."[32] The trial court adopted the special master's recommendations, which effectively invalidated many of the law firm's affirmative defenses, and the law firm appealed. In addition, the trial court granted the plaintiffs' motion for partial summary judgment and denied the law firm's motion for partial summary judgment.[33]

The court of appeals first considered its jurisdiction over the appeal by questioning whether the law firm should have filed an application for discretionary appeal pursuant to O.C.G.A. § 5-6-35(a)(1), which applies to appeals from trial court judgments in review of auditors' decisions.[34] Alternatively, O.C.G.A. § 9-11-56(h)[35] authorizes a direct appeal upon the grant of summary judgment.[36]

The court of appeals held that the law firm could bring a direct appeal.[37] It reasoned that O.C.G.A. § 5-6-35(a)(1), which requires an application for appeal, did not apply because it refers to appeals related to decisions of an auditor.[38] In this case, however, the trial court adopted the decision of a special master.[39] In other words, because the trial court adopted the decision of a special master, and not an auditor, the court of appeals had jurisdiction without the necessity of an application for discretionary appeal.[40]

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28. *Avren*, 289 Ga. at 192, 710 S.E.2d at 137.
29. *Id.*
30. 307 Ga. App. 640, 706 S.E.2d 652 (2010).
31. *Id.* at 642, 706 S.E.2d at 656.
32. *Id.*
33. *Id.*
34. *Alston & Bird LLP*, 307 Ga. App. at 642, 706 S.E.2d at 656; O.C.G.A. § 5-6-35(a)(1).
35. O.C.G.A. § 9-11-56(h) (2006).
36. *Alston & Bird LLP*, 307 Ga. App. at 642, 706 S.E.2d at 656; O.C.G.A. § 9-11-56(h).
37. *Alston & Bird LLP*, 307 Ga. App. at 642, 706 S.E.2d at 656.
38. *Id.*; *see also* O.C.G.A. § 5-6-35(a)(1).
39. *Alston & Bird LLP*, 307 Ga. App. at 642, 706 S.E.2d at 656. The trial court appointed a special master under Uniform Superior Court Rule 46, which was adopted on June 4, 2009. *Id.*; *see also* GA. UNIF. SUP. CT. R. 46.
40. *Alston & Bird LLP*, 307 Ga. App. at 642, 706 S.E.2d at 656.

B. Jurisdiction over Equity Cases

Over the years, the merger of substantive principles of equity into legal principles has caused much confusion concerning the Georgia Supreme Court's appellate jurisdiction over "[a]ll equity cases."[41] The court must, therefore, continually delineate its scope of jurisdiction over equity cases. For example, in *Reeves v. Newman*,[42] the supreme court returned a case to the court of appeals because the court of appeals erroneously concluded, on the basis of the relief sought in the complaint, that the case was subject to the supreme court's exclusive appellate jurisdiction over equity cases.[43]

In *Reeves*, the plaintiffs, two sisters, sought to set aside deeds and conveyances by their mother allegedly procured by two other sisters' fraud, false pretenses, and undue influence. The jury found in favor of the plaintiffs, and the trial court imposed an implied trust over the property for the benefit of all sisters. All parties then appealed the rulings to the court of appeals, yet none questioned the propriety of the implied trust.[44]

Because the trial court had imposed the equitable remedy of a constructive trust, the court of appeals concluded that the matter was subject to the supreme court's exclusive appellate jurisdiction over equity cases. As a result, the court of appeals transferred the case to the supreme court.[45]

The supreme court recognized that the first question arising as to the cases transferred to it, as purported equity cases, was whether the case was appropriately before the court.[46] The determination of whether an appeal is an "equity case" is based solely on the "issue[s] raised on appeal, not upon the kinds of relief sought in the complaint."[47] In addition, where equitable relief is "merely ancillary to underlying issues of law, or would have been a matter of routine once the underlying issues were resolved," the matter is not an equity case.[48] Finally, an appeal not addressing "the propriety of . . . equitable relief granted or

41. GA. CONST. art. VI, § 6, para. 3, cl. 2.
42. 287 Ga. 317, 695 S.E.2d 626 (2010).
43. *Id.* at 318-19, 695 S.E.2d at 627-28.
44. *Id.* at 317, 695 S.E.2d at 627.
45. *Id.*
46. *Id.* at 318, 675 S.E.2d at 627.
47. *Id.* (quoting Redfearn v. Huntcliff Homes Ass'n, 271 Ga. 745, 748, 524 S.E.2d 464, 467-68 (1999)) (internal quotation marks omitted).
48. *Id.* (quoting Beauchamp v. Knight, 261 Ga. 608, 609, 409 S.E.2d 208, 209 (1991)) (internal quotation marks omitted).

rejected" first belongs in front of the court of appeals, not the supreme court.[49]

Applying the foregoing precedent to this matter, the supreme court recognized that neither party had identified any error concerning "the propriety of the implied trust . . . ."[50] All issues raised on appeal were questions of law, not equity.[51] The supreme court made clear that "[c]ontrary to the [c]ourt of [a]ppeals' analysis, the mere imposition of an implied trust as an equitable remedy does not automatically trigger this Court's jurisdiction."[52] Accordingly, the supreme court returned the appeal to the court of appeals for disposition.[53]

In *Kemp v. Neal*,[54] the plaintiffs, the national African Methodist Episcopal Church and its officials, brought an action to quiet title to property on which the defendant local church held services. The plaintiffs brought the action after members of the defendant local church sought to terminate the local church's relationship with the plaintiffs. The trial court held in favor of the plaintiffs and determined that the defendant's possessory interest in the property was held in trust for the benefit of the plaintiff national church. The trial court also ordered that all property of the defendant local church be delivered to the plaintiffs and that the name of the defendant be removed from all accounts. The defendant brought a direct appeal from the trial court's order to the supreme court.[55]

The supreme court inquired into the matter of jurisdiction sua sponte.[56] While the defendant based jurisdiction on the supreme court's "jurisdiction over '[c]ases involving title to land,'" the supreme court held that the appeal actually came within its jurisdiction over equity cases.[57] The supreme court held that the trial court granted equitable relief when it ordered that the defendant's name be removed from all local church accounts, that such accounts be delivered to the national church, and that the national church "assume all indebtedness on any personal property" of the local church.[58] The supreme court also held that

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49. *Id.* (quoting Warren v. Bd. of Regents of the Univ. Sys. of Ga., 272 Ga. 142, 143, 527 S.E.2d 563, 565 (2000)) (internal quotation marks omitted).

50. *Id.* at 318-19, 675 S.E.2d at 627.

51. *Id.*

52. *Id.* at 319, 675 S.E.2d at 627-28.

53. *Id.* at 319, 675 S.E.2d at 628.

54. 288 Ga. 324, 704 S.E.2d 175 (2010).

55. *Id.* at 324-25, 704 S.E.2d at 177.

56. *Id.* at 325, 704 S.E.2d at 178 (quoting In the Interest of KRS, 284 Ga. 853, 853, 672 S.E.2d 622, 624 (2009)).

57. *Id.*; GA. CONST. art. VI, § 6, para. 3, cl. 1.

58. *Kemp*, 288 Ga. at 325, 704 S.E.2d at 178.

determining "how the trial court should have molded the equitable relief to protect" the local church required "examination of the trial court's exercise of discretion and [thus] depend[ed] upon equitable considerations."[59] The court concluded that "[b]ecause resolution of the equitable issue raised here would not be a matter of routine once the underlying legal issues are resolved . . . a substantive issue on appeal involves the legality or propriety of equitable relief," and thus the appeal came within the "[c]ourt's jurisdiction over equity cases."[60]

Justice Benham dissented from the court's holding that the appeal fell within the court's jurisdiction over all equity cases.[61] Justice Benham determined that the equitable relief awarded by the trial court "flow[ed] directly from the legal determination that the national church . . . own[ed] the real and personal property" in the possession of the local church.[62] Justice Benham concluded that because the equitable relief awarded routinely followed upon the trial court's legal determination, there was "no question of the legality or propriety of equitable relief and the case [was] not one in equity."[63] He stated in his dissent that the court's approach "up-ends th[e c]ourt's 20-year effort . . . to delineate as clearly as possible the scope of its jurisdiction over 'equity cases.'"[64] Justice Benham further stated that

> [t]he majority's approach smudges the bright-line rule th[e c]ourt has been buffing to a sheen and enables a litigant to select the appellate forum in which a case with equitable features is to be heard, a practice th[e c]ourt rejected in *Beauchamp v. Knight* . . . and in *Krystal Co. v. Carter*.[65]

Justice Benham concluded that because the equitable relief granted by the trial court was "ancillary to the underlying legal issue" of which church had "the right to control the local church property," the supreme court's equity jurisdiction was not involved, and the case should have been transferred to the court of appeals.[66]

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59. *Id.* at 326, 704 S.E.2d at 178.

60. *Id.*

61. *Id.* at 334, 704 S.E.2d at 183 (Benham, J., concurring in part and dissenting in part). Justices Thompson and Hines joined Justice Benham in his dissent to the jurisdictional determination. *Id.* at 336, 704 S.E.2d at 185.

62. *Id.* at 335, 704 S.E.2d at 184.

63. *Id.* (quoting Lamar Cnty. v. E.T. Carlyle Co., 277 Ga. 690, 691, 594 S.E.2d 335, 337 (2004)) (internal quotation marks omitted).

64. *Id.* (quoting *Redfearn*, 271 Ga. at 747, 524 S.E.2d at 466) (citations and internal quotation marks omitted).

65. *Id.*; *see also* Krystal Co. v. Carter, 256 Ga. 43, 43, 343 S.E.2d 490, 492 (1986); *Beauchamp*, 261 Ga. at 609, 409 S.E.2d at 209-10.

66. *Kemp*, 288 Ga. at 335, 704 S.E.2d at 184.

C. Miscellaneous Jurisdictional Issues

In *Zinkhan v. Bruce*,[67] a paternal uncle was granted testamentary guardianship of his deceased brother's children by the probate court after the children's father murdered the mother and killed himself. After the maternal uncle and aunt filed a petition for custody, the superior court awarded joint legal custody to both the maternal uncle and aunt and the paternal uncle. However, the superior court awarded physical custody to the maternal uncle and aunt. The paternal uncle appealed to the court of appeals on the basis that the superior court lacked jurisdiction to consider the maternal uncle's petition in light of the probate court's exclusive jurisdiction to appoint him as testamentary guardian.[68]

The court of appeals held that the probate court had exclusive jurisdiction to issue letters of testamentary guardianship and that no valid basis existed for the superior court to exercise jurisdiction and consider the petition for custody.[69] The court rejected the argument that the superior court had jurisdiction over the case as one in equity.[70] The court held that equitable relief was not available because the maternal uncle and aunt had an available legal remedy in the probate court, in that they could petition for revocation or suspension of the paternal uncle's letters of testamentary guardianship.[71] If such petition had been granted, the maternal uncle and aunt could have then "sought further relief by filing a petition for permanent guardianship . . . ."[72] As such, filing the custody action in superior court was simply an improper and invalid attempt to collaterally attack the probate court's guardianship appointment.[73] The court of appeals reversed the superior court's custody order.[74]

In *Tavakolian v. Agio Corp.*,[75] the plaintiff property owner brought suit to redeem property sold at a tax sale.[76] The trial court entered default judgment against the tax sale purchaser and summary judgment against a subsequent transferee of the property.[77] Upon the court of

67. 305 Ga. App. 510, 699 S.E.2d 833 (2010).
68. *Id.* at 510-11, 699 S.E.2d at 834.
69. *Id.* at 511, 699 S.E.2d at 834.
70. *Id.* at 514, 699 S.E.2d at 837.
71. *Id.* at 514, 699 S.E.2d at 836-37.
72. *Id.* at 514, 699 S.E.2d at 836.
73. *Id.* at 514, 699 S.E.2d at 837.
74. *Id.*
75. 309 Ga. App. 652, 711 S.E.2d 33 (2011).
76. *See* Tavakolian v. Agio Corp., 304 Ga. App. 660, 660, 697 S.E.2d 233, 235 (2010).
77. *Tavakolian*, 309 Ga. App. at 652, 711 S.E.2d at 34.

appeals reversal of the summary judgment order as to the transferee, the trial court conducted a hearing and entered judgment in favor of the owner and against the transferee.[78] The transferee appealed from the judgment and "argue[d] that the trial court lacked jurisdiction to enter final judgment . . . because the remittitur had not [yet] been issued."[79] The court of appeals agreed.[80]

The court of appeals determined that, after it denied the tax sale purchaser's motion for reconsideration in the first appeal, the trial court held the hearing and subsequently issued final judgment.[81] However, during this time, the tax sale purchaser filed a notice of intention to apply to the supreme court for writ of certiorari; thus, the court of appeals did not issue the remittitur to the trial court until after the petition for certiorari was denied, by which time the judgment had already been entered by the trial court.[82] The property owner argued that the fact the remittitur had not been issued did not affect jurisdiction because the remittitur was connected with the tax sale purchaser's appeal, while the final judgment was connected to the transferee.[83] The court of appeals rejected this novel argument, holding that the judgment was a final order that affected both the tax sale purchaser and the transferee and that the trial court had no power to enter judgment in the absence of a remittitur.[84]

Generally, an appellant must file an application for discretionary appeal within thirty days upon the entry of the order, decision, or judgment to be reviewed.[85] When a motion for new trial is filed, however, O.C.G.A. § 5-6-35(d)[86] extends the deadline until thirty days after the trial court rules on the motion for new trial.[87] In *Cooper v. Spotts*,[88] the court of appeals previously dismissed the appellant's application for discretionary appeal because her motion for new trial was pending before the trial court. In an attempt to secure jurisdiction before the court of appeals, the appellant withdrew her motion for new trial.[89] The appellant relied on *Department of Human Resources v.*

78. *Id.* at 652-53, 711 S.E.2d at 34.
79. *Id.* at 653, 711 S.E.2d at 34.
80. *Id.*
81. *Id.* at 653, 711 S.E.2d at 34-35.
82. *Id.*
83. *Id.* at 653, 711 S.E.2d at 35.
84. *Id.*
85. *See* O.C.G.A. § 5-6-35(d) (1995 & Supp. 2011).
86. O.C.G.A. § 5-6-35(d) (1995 & Supp. 2011).
87. *Id.*
88. 309 Ga. App. 361, 710 S.E.2d 159 (2011).
89. *Id.* at 362, 710 S.E.2d at 160.

Holland[90] to argue that the trial court was without authority to rule on the motion for new trial and that the court of appeals had jurisdiction to review the application on the merits.[91]

Overruling *Holland*, the court of appeals held that the filing of the motion for new trial did not divest the trial court of its authority to rule on the motion for new trial.[92] While, generally, the filing of an application for discretionary appeal acts as a supersedeas,[93] O.C.G.A. § 5-6-35(d) effectively delays the divesture of jurisdiction from the trial court until it rules on a pending motion for new trial.[94] Thus, the court of appeals ruled that it should have dismissed the appellant's initial application for discretionary appeal.[95]

The appellant's second application for discretionary appeal was filed beyond the thirty-day period after the trial court's order but within thirty days of her withdrawal of the motion for new trial.[96] The court of appeals held that the appellant's withdrawal of her motion for new trial did not satisfy O.C.G.A. § 5-6-38,[97] which requires that the trial court rule on the motion for new trial.[98] Accordingly, the appellant was not entitled to the extension of time to file her application for discretionary appeal, and the application was dismissed.[99]

In *Davis v. Davis*,[100] a former wife brought an action against her former husband, seeking to impose a constructive trust on her community property interest in his military retirement benefits. The former wife also sought to domesticate the previously entered Louisiana divorce decree. After the trial court dismissed the former wife's action, she filed a notice of appeal to the court of appeals.[101] The court of appeals transferred the case to the supreme court on the basis of the supreme court's "jurisdiction over all divorce and alimony cases and all equity cases."[102]

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90. 236 Ga. App. 273, 511 S.E.2d 628 (1999).
91. *Cooper*, 309 Ga. App. at 362, 710 S.E.2d at 160.
92. *Id.* at 364, 511 S.E.2d at 161.
93. O.C.G.A § 5-6-35(h) (1995 & Supp. 2011).
94. *Cooper*, 309 Ga. App. at 362, 710 S.E.2d at 159-60 (citing Housing Auth. of Atlanta v. Geter, 252 Ga. 196, 197, 312 S.E.2d 309, 311 (1984)); *see also* O.C.G.A. § 5-6-35(d).
95. *Cooper*, 309 Ga. App. at 364, 710 S.E.2d at 161.
96. *Id.*
97. O.C.G.A. § 5-6-38 (1995).
98. *Cooper*, 309 Ga. App. at 364, 710 S.E.2d at 161 (quoting Heard v. State, 274 Ga. 196, 197, 552 S.E.2d 818, 821 (2001)); *see also* O.C.G.A. § 5-6-38.
99. *Cooper*, 309 Ga. App. at 364, 710 S.E.2d at 161.
100. 287 Ga. 897, 700 S.E.2d 404 (2010).
101. *Id.* at 897, 700 S.E.2d at 405.
102. *Id.* at 897-98, 700 S.E.2d at 405.

The supreme court held that because the former wife's property rights depended on property law, rather than upon the divorce decree, the case was not a divorce and alimony case.[103] The former wife's action did not seek to have the trial court clarify the divorce decree but, rather, sought resolution of issues not resolved by the Louisiana court that granted the divorce.[104] Based on the underlying cause of action, "to partition personal property in the form of retirement benefits," the dispute was in fact a property dispute.[105] The supreme court further held that the mere fact that the complaint sought to domesticate the divorce decree did not make the case a divorce or alimony case.[106]

The supreme court also held that the case did not fall within its equity jurisdiction.[107] While the court of appeals stated in its transfer order that the supreme court had described a constructive trust as "a remedial device created by a court of equity to prevent unjust enrichment," the supreme court held that where "the issues raised on appeal are legal in nature and do not relate to the propriety of the constructive trust itself, appellate jurisdiction lies in the [c]ourt of [a]ppeals."[108] The supreme court further held that "an action to partition personal property is generally not an equity case."[109] Concluding that the action was not a divorce and alimony case, nor an equity case, and that no other basis supported its jurisdiction, the supreme court returned the appeal to the court of appeals.[110]

III. PRESERVING THE RECORD

In *Anthony v. Gator Cochran Construction, Inc.*,[111] the supreme court cleared up confusion created by two court of appeals cases regarding the preservation of error from inconsistent verdict forms.[112] The supreme court held that an appellant's failure to object to an allegedly inconsistent special verdict form did not waive such error on appeal.[113] In so ruling, the prior holdings of the court of appeals in *Brannan Auto Parts*

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103. *Id.* at 898, 700 S.E.2d at 405-06.

104. *Id.* at 898, 700 S.E.2d at 406 (quoting Barolia v. Pirani, 260 Ga. App. 513, 514, 580 S.E.2d 297, 299 (2003)).

105. *Id.*

106. *Id.* (quoting Lewis v. Robinson, 254 Ga. 378, 378, 329 S.E.2d 498, 499 (1985)).

107. *Id.*

108. *Id.* at 898-99, 700 S.E.2d at 406 (citation and internal quotation marks omitted).

109. *Id.* at 899, 700 S.E.2d at 406.

110. *Id.*

111. 288 Ga. 79, 702 S.E.2d 139 (2010).

112. *Id.* at 79, 702 S.E.2d at 140.

113. *See id.* at 80, 702 S.E.2d at 140-41.

v. Raymark Industry[114] and *Ford Motor Co. v. Tippins*[115] were expressly overruled by the supreme court.[116]

In *Anthony*, when the jury returned a verdict in favor of the plaintiff, the defendants appealed, arguing that the special verdict form was inconsistent. While the court of appeals recognized that judgments based on inconsistent verdicts are void, it nevertheless affirmed the trial court because the defendants failed to object to the special verdict form. The court of appeals relied on an exception it previously set forth in *Brannan Auto Parts*, which provides that the failure to object to a special verdict form will result in waiver of the error on appeal if the inconsistency is evident from the face of the form.[117]

The supreme court concluded that this exception resulted from the court of appeals misreading the supreme court's holding in *Frostgate Warehouses, Inc. v. Cole*,[118] in which the supreme court did not address inconsistent or void verdicts.[119] Accordingly, the supreme court expressly overruled the court of appeals holding in *Brannan Auto Parts*.[120]

Similarly, the court of appeals relied on *Ford Motor Co.* for the rule that the failure to object to an inconsistent verdict upon its return will result in waiver of such error on appeal.[121] Expressly overruling *Ford Motor Co.*, the supreme court held that if the verdict form is inconsistent, the resulting judgment must be set aside, notwithstanding a party's failure to object.[122] Further, a party's failure to object does not result in waiver of the erroneous verdict form on appeal.[123]

In *Heard v. City of Villa Rica*,[124] a negligence action was brought on behalf of a minor against a city and a volunteer coach for the city's recreation department. The minor sought damages for injuries he sustained in a training session held by the volunteer coach.[125] The defendants argued that the claims against the coach were barred by

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114. 183 Ga. App. 82, 357 S.E.2d 807 (1987), *overruled by Anthony*, 288 Ga. at 80, 702 S.E.2d at 141.

115. 225 Ga. App. 128, 483 S.E.2d 121 (1997), *overruled by Anthony*, 288 Ga. at 80, 702 S.E.2d at 141..

116. *Anthony*, 288 Ga. at 80, 702 S.E.2d at 141.

117. *Id.* at 79-80, 702 S.E.2d at 140-41.

118. 244 Ga. 782, 262 S.E.2d 98 (1979).

119. *Anthony*, 288 Ga. at 79-80, 702 S.E.2d at 140.

120. *Id.* at 80, 702 S.E.2d at 141.

121. *Id.*

122. *Id.*

123. *Id.*

124. 306 Ga. App. 291, 701 S.E.2d 915 (2010).

125. *Id.* at 291, 701 S.E.2d at 916.

O.C.G.A. § 51-1-41,[126] which provides limited immunity from suit for volunteer coaches.[127] The plaintiff argued that the exception to immunity in O.C.G.A. § 51-1-41 applied because the injury was caused by grossly negligent conduct on the part of the coach. The trial court found that the gross negligence exception did not apply, that the coach was immune from suit, and therefore granted summary judgment to the defendants.[128]

On appeal, the plaintiff raised, for the first time, the argument that O.C.G.A. § 51-1-41 did not apply because the coach "was not 'officiating' an 'athletic contest'" as provided in the statute.[129] The plaintiff relied on prior cases in which the court of appeals allowed arguments to be raised for the first time on appeal.[130] The cases relied upon by the plaintiff included *McCombs v. Synthes*[131] in which the supreme court held that a finding on the newly raised "issue was implicit in the trial court's order."[132] However, the court of appeals distinguished *McCombs* on the basis that, in the instant case, the plaintiff and the trial court both assumed that O.C.G.A. § 51-1-41 applied to the defendant coach.[133] The court of appeals also relied on the fact that the plaintiff had affirmatively acknowledged that O.C.G.A. § 51-1-41 applied and then argued that the case fell within the gross negligence exception.[134] The court of appeals also found that "it would be unfair to force [the defendants] to respond to [the] belated argument and address this issue for the first time 'within the narrow time frame of appellate practice rules.'"[135]

IV. MISCELLANEOUS CASES OF INTEREST

In *Propst v. Morgan*,[136] the Georgia Supreme Court granted certiorari to determine whether the court of appeals committed error in considering the merits of the defendant's "motion to recuse the trial judge before considering whether the trial judge properly dismissed [the defendant's] appeal of the final judgment" due to unreasonable delay in

126. O.C.G.A. § 51-1-41 (2000).
127. *Heard*, 306 Ga. App. at 291, 701 S.E.2d at 916-17; *see also* O.C.G.A. § 51-1-41.
128. *Heard*, 306 Ga. App. at 291, 701 S.E.2d at 916-17.
129. *Id.* at 293, 701 S.E.2d at 918; *see also* O.C.G.A. § 51-1-41.
130. *Heard*, 306 Ga. App. at 293, 701 S.E.2d at 918.
131. 277 Ga. 252, 587 S.E.2d 594 (2003).
132. *Heard*, 306 Ga. App. at 293 n.5, 701 S.E.2d at 918 n.5.
133. *Id.*
134. *Id.* at 293, 701 S.E.2d at 918.
135. *Id.* at 294, 701 S.E.2d at 918 (quoting Pfeiffer v. Ga. Dep't of Transp., 275 Ga. 827, 829, 573 S.E.2d 389, 391 (2002)).
136. 288 Ga. 862, 708 S.E.2d 291 (2011).

transmitting the record to the court of appeals.[137] The trial court denied the defendant's motion to recuse the trial judge, and the defendant declined to pursue an interlocutory appeal. The jury subsequently returned a verdict in favor of the plaintiff. After the defendant filed a notice of appeal, the trial court dismissed the appeal on the basis of O.C.G.A. § 5-6-48(c),[138] which allows a trial court to dismiss an appeal due to unreasonable delay in transmission of the record to the appellate court.[139]

On appeal, the plaintiff argued that the court of appeals could only reach the merits of the recusal motion if it concluded "that the trial court erred in dismissing the appeal."[140] Rejecting this argument, the court of appeals held that the trial court should have assigned the motion for recusal to another judge for decision.[141]

The supreme court noted that under established case law, "an appellate court typically will not address the merits of the case before deciding whether the trial court properly dismissed the appeal," pursuant to O.C.G.A. § 5-6-48(c).[142] The supreme court also noted that another line of decisions held that if, after a motion for recusal, "it is later determined that the judge should have been disqualified[, then] . . . all proceedings after the filing of the motion to recuse are 'invalid . . . .'"[143] The supreme court stated that "[h]aving considered these two lines of cases, we conclude the merits of a party's recusal motion against the trial judge must be an exception to the general rule" that the merits of an appeal should not be addressed before deciding whether the appeal was properly dismissed under O.C.G.A. § 5-6-48(c).[144] The supreme court concluded that "[i]t would undermine the integrity of the judicial process to insulate the recusal issue from review and to treat as legitimate the dismissal of an appeal by a judge who should be disqualified based on a proper consideration of a recusal motion."[145] Thus, the supreme court affirmed the judgment.[146]

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137. *Id.* at 862-63, 708 S.E.2d at 292-93.

138. O.C.G.A. § 5-6-48(c) (1995 & Supp. 2011).

139. *Propst*, 288 Ga. at 862-63, 708 S.E.2d at 292-93; *see also* O.C.G.A. § 5-6-48(c).

140. *Propst*, 288 Ga. at 863, 708 S.E.2d at 293.

141. *Id.*

142. *Id.*

143. *Id.* at 864, 708 S.E.2d at 293 (quoting Gillis v. City of Waycross, 247 Ga. App. 119, 122, 543 S.E.2d 423, 426 (2000)).

144. *Id.* at 864, 708 S.E.2d at 294.

145. *Id.*

146. *Id.* at 865, 708 S.E.2d at 294.

In *In re N.A.U.E.*,[147] a father whose parental rights were terminated filed an application for discretionary appeal in the court of appeals, challenging the termination order.[148] The father contended that O.C.G.A. § 5-6-35(a)(12),[149] which requires a parent to file a discretionary application to appeal an order terminating parental rights, violated due process.[150] The court of appeals transferred the father's application on the basis of the constitutional question, and the supreme court granted the application to decide whether O.C.G.A. § 5-6-35(a)(12), which took effect in 2008, did in fact violate due process.[151] The supreme court made short work of the constitutional argument. The court relied on well-established case law that if a "trial on the merits is provided," a state is not required to provide appellate review[152] and noted that discretionary appeals may be provided even in criminal cases.[153]

To seek an interlocutory appeal, an appellant must obtain a certificate of immediate review from the trial court judge who issued the order to be reviewed on appeal.[154] In *Mauer v. Parker Fibernet, LLC*,[155] the court of appeals dismissed an appeal because the appellant failed to satisfy this requirement.[156] When the original trial court transferred the case to another court with proper venue, the appellant requested a certificate from the transferee court instead of the transferor court that had issued the removal order.[157] The court of appeals held that "[b]ecause the certificate was not signed by the trial judge who issued the removal order," the certificate was invalid under O.C.G.A. § 5-6-34(b) and did not provide a basis for the court of appeals to exercise jurisdiction over the appeal.[158] The court of appeals noted that, although O.C.G.A. § 9-10-53[159] provides that upon transfer, all further proceedings are to "be conducted as if the case had been originally commenced in the [transferee] court,"[160] O.C.G.A. § 5-6-34(b) contains a more

147. 287 Ga. 797, 700 S.E.2d 393 (2010).
148. *Id.* at 797, 700 S.E.2d at 393.
149. O.C.G.A. § 5-6-35(a)(12) (Supp. 2011).
150. *In re N.A.U.E.*, 287 Ga. at 797, 700 S.E.2d at 393; *see also* O.C.G.A. § 5-6-35(a)(12).
151. *In re N.A.U.E.*, 287 Ga. at 797, 700 S.E.2d at 393-94.
152. *Id.* at 797, 700 S.E.2d at 394 (quoting Lindsey v. Normet, 405 U.S. 56, 77 (1972)) (internal quotation marks omitted).
153. *Id.*
154. *See* O.C.G.A. § 5-6-34(b) (1995 & Supp. 2011).
155. 306 Ga. App. 160, 701 S.E.2d 599 (2010).
156. *Id.* at 160-61, 701 S.E.2d at 600.
157. *Id.* at 161, 701 S.E.2d at 601.
158. *Id.* at 162, 701 S.E.2d at 602.
159. O.C.G.A. § 9-10-53 (2007).
160. *Id.*

specific rule governing the requirements for the certificate of immediate review.[161] Accordingly, the court of appeals concluded that the appellant "failed to follow the interlocutory procedures" and dismissed the appeal.[162]

161. *Mauer*, 306 Ga. App. at 162-63, 701 S.E.2d at 602; *see also* O.C.G.A. § 5-6-34(b).
162. *Mauer*, 306 Ga. App. at 163, 701 S.E.2d at 602.