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Domestic Relations

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I. INTRODUCTION

This Article reviews opinions impacting the practice of criminal law delivered by the Supreme Court of the United States and the Georgia Supreme Court covering the period of June 1, 2019, up until May 21, 2020. This Article is designed to be a mere overview to both prosecutors and defense attorneys of decisions and new statutes, and it serves as a broad guideline to how these decisions will affect their practices.in the State of Georgia in the first quarter of 2020 and continuing through the end of the survey period.[1]

II. LEGISLATIVE UPDATES

While the 2020 legislative session was cut short by the outbreak of the novel coronavirus, significant legislation passed during the 2019 session went into effect during the survey period. As discussed in last

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[1] *See* Ga. Exec. Order 07.31.20.01: Renewal of Public Health State of Emergency (July 31, 2020), available online at https://gov.georgia.gov/executive-action/executive-orders/2020-executive-orders; Fourth Order Extending Statewide Judicial Emergency, S. Ct. of Ga. (July 10, 2020), available online at https://www.gasupreme.us/wp-content/uploads/2020/07/4th-SJEO-FINAL.pdf.

year's survey,[2] Georgia's new "equitable caregivers" statute, O.C.G.A. § 19-7-3.1,[3] went into effect on July 1, 2019, and provides a new path to legal custodial and visitation rights for persons acting in dedicated parental roles for children with whom they do not have a formal legal or biological relationship.[4] No decisions construing or applying the equitable caregiver law have been issued by the higher courts at the time of this writing. Effective July 1, 2019, O.C.G.A. §§ 19-9-22[5] and 19-9-23[6] were amended to provide that a party may bring a counterclaim for modification of legal or physical custody in response to a complaint seeking a modification of the same.[7] The intent of the amendment is to permit counterclaims for modification to be asserted against complaints for modifications or contempt actions seeking to enforce a child custody order.[8] The child support guidelines codified at O.C.G.A. § 19-6-15[9] were also amended effective July 1, 2019, to make certain grammatical and terminology corrections, to remove alimony as a specific child support deviation in some circumstances, and to exclude certain adoption benefits from gross income.[10]

Additionally, the Living Infants Fairness and Equality Act (LIFE)[11] was scheduled to go into effect on January 1, 2020, making changes to numerous provisions of the Official Code of Georgia Annotated intended to enhance the rights of unborn children and their parents by revising the laws governing abortion and providing protections and benefits to an unborn child with a detectable heartbeat.[12] Among other things, it would have permitted unborn children with detectable human heartbeats to be "included in population based determinations,"[13] and for the parents of such children to seek and receive child support for medical and pregnancy-related expenses.[14] However, on June 28, 2019, a federal lawsuit was brought against the Governor and State of Georgia challenging the constitutionality of the LIFE Act under

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[2] *See* McGough et al., *supra* note 1 at 92–93.

[3] O.C.G.A. § 19-7-3.1 (2020).

[4] *See id.*

[5] O.C.G.A. § 19-9-22 (2020).

[6] O.C.G.A. § 19-9-23 (2020).

[7] Ga. S.B. Bill 190, Reg. Sess., 2019 Ga. Laws 281.

[8] *See id.*

[9] O.C.G.A. § 19-6-15 (2020).

[10] Ga. H.B. Bill 381, Reg. Sess., 2019 Ga. Laws 219.

[11] Living Infants Fairness and Equality (LIFE) Act, Ga. H.B. Bill 481, Reg. Sess., 2019 Ga. Laws 234.

[12] *See generally*, *id.*

[13] O.C.G.A. §§ 1-2-1(d), (e) (2020).

[14] LIFE Act § 5 (amending O.C.G.A. § 19-6-15(a)(4)(a.1)(2)).

42 U.S.C. § 1983[15] by a coalition of plaintiffs comprised of "SisterSong Women of Color Reproductive Justice Collective, seven reproductive health care clinics, and three individual physicians."[16] On October 1, 2019, the federal district court entered a preliminary injunction enjoining the LIFE Act from going into effect pending the final resolution of the case.[17]

III. CHILD CUSTODY AND SUPPORT

Many opinions issued by the higher courts during the survey period serve to clarify Georgia's law with respect to child custody, child support, and the modification of each.

In *Belknap v. Belknap*,[18] pursuant to O.C.G.A. § 19-9-3(a)(5),[19] the father of a fourteen-year-old son petitioned the court for modification of child custody and support, seeking primary custody of the child on the basis of the child's election to live with him. Following the parties' 2011 divorce in Georgia, the father moved to Florida while the parties' two minor children remained in the Atlanta area with the mother. When the younger child turned fourteen, he informed the father that he wished to move in with him, leading the father to file the petition and affidavit of election at issue. Despite the child's election, the trial court denied the petition for modification of custody and issued a final order that did not address the child support modification. The father appealed on the ground that the court erred in failing to honor the child's affidavit of election despite determining him to be a fit parent and in neglecting to modify child support based on a material change in the needs of the child.[20] The Georgia Court of Appeals affirmed the trial court's order.[21] While a prior version of O.C.G.A. § 19-9-3[22] provided that the election of a child aged fourteen or older was controlling unless the court determined that the selected parent was unfit, the current language of O.C.G.A. § 19-9-3 and subsection (a)(5) specifically contains no reference to parental fitness; instead, a child's election is presumptive and may be overridden if the trial court finds that the custody election is not in the child's best interest.[23] The trial court made such a finding and, therefore,

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[15] 42 U.S.C. § 1983 (2020).

[16] Women of Color v. Kemp, No. 1:19-cv-02973-SCJ, 2020 U.S. Dist. LEXIS 124699, at *16 (N.D. Ga. July 13, 2020).

[17] *Id.*

[18] 351 Ga. App. 748, 833 S.E.2d 135 (2019).

[19] O.C.G.A. § 19-9-3(a)(5) (2020).

[20] *Belknap*, 351 Ga. App. at 748–50, 833 S.E.2d at 135–38.

[21] *Id.* at 756, 833 S.E.2d at 142.

[22] O.C.G.A. § 19-9-3(a)(4) (2006).

[23] *Id.* at 752–53, 833 S.E.2d at 139–40; *see* O.C.G.A. § 19-9-3(a)(5).

refused to honor that the child's election was not an abuse of discretion.[24] Further, because the child support modification relied on a change of custody which was not granted, and the father did not pursue a ruling one way or the other regarding child support, the court of appeals determined that the father waived his claim of error regarding child support.[25]

Wertz v. Marshall[26] involved a dispute under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)[27] as to jurisdiction for modification of custody.[28] The parties were divorced in Florida and the mother was awarded physical custody of the two minor children. Six years after the divorce, the younger of the children moved to Georgia to live with the father, and the father filed a petition in Georgia to modify the Florida custody award to grant him sole and permanent custody of the child. In the mother's answer, she admitted to being a resident of Colorado (where her new husband, a member of the military, was stationed temporarily) and that the Walker County Superior Court had jurisdiction over the modification. She subsequently moved to dismiss the petition on the ground that Florida had retained exclusive jurisdiction to modify the custody award, but the trial court denied the motion to dismiss based upon the jurisdiction admissions in her answer.[29]

The court of appeals affirmed and held that the mother's admission *in judicio* was properly treated as conclusive and the fact that no parties remained in Florida divested that state of jurisdiction under the UCCJEA.[30] However, Presiding Judge (and, at the time of this writing, Chief Judge) Christopher McFadden dissented on the ground that the UCCJEA imposes a higher burden of proof than an admission in an unverified pleading before a court may be deemed to have lost continuing exclusive jurisdiction over a custody matter.[31] As the *Wertz* decision is merely persuasive, rather than binding precedent under Georgia Court of Appeals Rule 33.2,[32] it would be prudent for future litigants faced with

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[24] *Belknap*, 351 Ga. App. at 753, 833 S.E.2d at 140.

[25] *Id.* at 754–55, 833 S.E.2d at 141.

[26] 351 Ga. App. 108, 830 S.E.2d 491 (2019).

[27] O.C.G.A. §§ 19-9-40 to 19-9-104 (2020).

[28] Wertz, 351 Ga. App. at 108, 830 S.E.2d at 492.

[29] *Id.* at 108–09, 830 S.E.2d at 492–93.

[30] *Id.* at 109–10, 830 S.E.2d at 493.

[31] *Id.* at 110–11, 830 S.E.2d at 493–94 (McFadden, P.J., dissenting).

[32] Under the former Rules of the Georgia Court of Appeals, an opinion by a three-judge panel that included a dissent was considered physical precedent only and thus not binding; however, effective March 30, 2020, the court of appeals amended Rule 33.2 such that, effective August 1, 2020, "a published opinion in which a majority of the judges fully concur in the rationale and judgment of the decision is binding precedent." Ga. Ct. App. R. 33.2 (Judgment as Precedent).

similar jurisdictional disputes to consider the arguments and positions set forth in the dissent.[33]

IV. CONTRACTS

In *Dovel v. Dovel*,[34] the Georgia Court of Appeals held, under O.C.G.A. § 19-6-2,[35] that a waiver of alimony provision contained in the parties' divorce settlement agreement precluded an award of attorney's fees.[36] The parties settled the case before trial, and the settlement agreement contained an alimony waiver provision stating that "[e]ach party waives and forever relinquishes any claims and rights each has or may have to alimony, maintenance[,] and support of any nature from the other . . . ."[37] The settlement further provided that the issue of attorney's fees would be reserved for later determination by the court. At the hearing on attorney's fees, the wife's counsel asserted that she sought attorney's fees under O.C.G.A. § 19-6-2; the husband's counsel objected to such an award on the basis that it was precluded by the waiver of alimony in the settlement agreement. The trial court granted the wife's request and ordered the husband to pay fees pursuant to O.C.G.A. § 19-6-2, and the husband appealed.[38]

On review, the court of appeals affirmed the principle that attorney's fees authorized by O.C.G.A. § 19-6-2 "are considered to be a part of alimony."[39] As such, the broad waiver of alimony in the settlement precluded an award of attorney's fees in the nature of alimony.[40] Interestingly, the wife did not contest that the alimony waiver barred an award of fees under O.C.G.A. § 19-6-2. Rather, she argued that the reservation of attorney's fees despite the alimony waiver created ambiguity in the agreement as to whether the parties intended fees to be available under O.C.G.A. § 19-6-2.[41] Applying general principles of contract construction and noting that the wife could have sought and been awarded attorney's fees under O.C.G.A. § 9-15-14[42] notwithstanding the alimony waiver, the court of appeals determined that construing the agreement so as to permit an award of attorney's fees

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[33] *Wertz*, 351 Ga. App. at 110, 830 S.E.2d at 493.

[34] 352 Ga. App. 423, 834 S.E.2d 918 (2019).

[35] O.C.G.A. § 19-6-2 (2020).

[36] *Dovel*, 352 Ga. App. at 423, 834 S.E.2d at 918.

[37] *Id.* at 425, 834 S.E.2d at 920.

[38] *Id.* at 424–25, 834 S.E.2d at 919–20.

[39] *Id.* at 425, 834 S.E.2d at 919 (quoting Vakharwala v. Vakharwala, 301 Ga. 251, 254, 799 S.E.2d 797 (2017)).

[40] *Id.* at 427, 834 S.E.2d at 921.

[41] *Id.* at 425, 834 S.E.2d at 920.

[42] O.C.G.A. § 9-15-14 (2020).

in the nature of alimony would improperly invalidate the waiver provision; as such, the trial court erred in awarding attorney's fees under O.C.G.A. § 19-6-2.[43] This case effectively affirms the substantive rule of the 2019 case *Ford v. Ford*,[44] which is considered persuasive physical precedent only, and presents an important consideration: if a contractual waiver of alimony is effective to bar an award of O.C.G.A. § 19-6-2 fees in the divorce litigation, it should be presumed effective in post-divorce litigation, such as enforcement or contempt actions as well—even where the post-judgment contempt arises from another issue in the divorce, such as property division.[45] Attorneys and litigants who wish to preserve the possibility of a fee award under O.C.G.A. § 19-6-2 in subsequent litigation should consider including an express exception for attorney's fees under O.C.G.A. § 19-6-2 in the alimony waiver provision of any settlement agreement they draft or execute.[46]

A former wife appealed from the trial court's order enforcing an antenuptial agreement and awarding attorney's fees to her former husband under O.C.G.A. § 9-15-14 based upon her challenge to the enforcement of the agreement in *Lynch v. Lynch*.[47] The record showed that the former wife worked for one of the former husband's companies when they started dating and then lived together for approximately two and a half years before getting married. The former husband presented the former wife with a copy of the agreement shortly before they traveled to Hawaii to get married, advised her to retain counsel, and provided her funds to do so. While she did retain counsel, she never thoroughly discussed the agreement with him and received no meaningful advice before executing it two days before the wedding. While the agreement contained a list of the former husband's properties and businesses, and a statement of their respective approximate net worth and annual incomes, it did not contain an attached financial disclosure of formal financial statements.[48] The former husband filed for divorce approximately fifteen years later, and after a hearing on his motion to enforce the agreement, the trial court found it enforceable under the criteria established in *Scherer v. Scherer*[49] and awarded attorney's fees to the former husband

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[43] *Dovel*, 352 Ga. App. at 427, 834 S.E.2d at 921.

[44] 349 Ga. App. 45, 825 S.E.2d 449 (2019) (physical precedent only).

[45] *Id.* at 50, 825 S.E.2d at 454; (citing O.C.G.A. § 19-6-2 authorizing an award of attorney's fees "as a part of the expenses of litigation" in actions "for alimony, divorce and alimony, or contempt of court arising out of either an alimony case or a divorce and alimony case, including but not limited to . . . orders involving property division, child custody, and child visitation rights . . . .")

[46] *Ford*, at 50, 825 S.E.2d at 454.

[47] 351 Ga. App. 160, 160, 828 S.E.2d 460, 462 (2019).

[48] *Id.* at 161–62, 828 S.E.2d 462–63.

[49] 249 Ga. 635, 292 S.E.2d 662 (1982).

under O.C.G.A. § 9-15-14.[50] The former wife appealed on the grounds that the agreement failed to satisfy the first prong of the *Scherer* test—which requires a full and fair disclosure of the parties' assets—and that the award of attorney's fees was improper.[51]

The court of appeals affirmed the enforcement of the prenuptial agreement under *Scherer*.[52] Georgia does impose an affirmative duty of disclosure prior to execution, but the list of properties and businesses and estimates of the former husband's net worth and annual income included in the body of the agreement satisfied his disclosure obligation even though it did not contain a separate schedule identifying all of his assets.[53] The adequacy of his disclosure was bolstered by evidence of their pre-existing relationship and cohabitation, their travel together, and her work as an employee of one of his businesses, and the trial court did not err by enforcing the agreement in its entirety.[54] However, it was error to award attorney's fees under O.C.G.A. § 9-15-14 against the former wife without specifically identifying the sanctionable conduct forming the basis of the award.[55]

V. POST-JUDGMENT RELIEF

The Georgia Court of Appeals addressed a number of procedural and substantive challenges in *McLaws v. Drew*.[56] There, the wife brought a contempt petition against her former husband for failure to pay child support and various expenses due under the final judgment and decree of divorce. During a break in the contempt hearing (which was not transcribed), the former husband began experiencing symptoms of a heart attack and was driven to the hospital by counsel. The husband's attorney returned to court, explained the situation, and requested a continuance. However, the court denied the request and subsequently entered an order finding the husband in willful contempt of the parties' divorce decree, requiring him to pay the sum of his arrearages and attorney's fees under O.C.G.A. § 19-6-2 by November 5, 2018, and providing for his immediate arrest and detention if he failed to pay the full sum.[57]

On November 5, 2018, the former husband filed a motion for new trial or, in the alternative, to set aside and for reconsideration based upon, (1)

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[50] *Lynch*, 351 Ga. App. at 161–62, 828 S.E.2d at 463.

[51] *Id.* at 162–63, 828 S.E.2d at 463.

[52] *Id.* at 164–65, 828 S.E.2d at 464–65.

[53] *Id.* at 163, 828 S.E.2d at 463–64.

[54] *Id.* at 164–65, 828 S.E.2d at 464–65.

[55] *Id.* at 166, 828 S.E.2d at 466.

[56] 355 Ga. App. 162, 843 S.E.2d 440 (2020).

[57] *Id.* at 163, 843 S.E.2d at 442–43.

the trial court's failure to grant a continuance following his medical emergency; (2) the trial court's admission of evidence on a claim for backpay of support for which he did not receive notice in the former wife's pleadings; (3) the trial court's failure to consider certain admissions *in judicio* made by the wife; and (4) the trial court's award of attorney's fees without testimony or evidence and without considering the parties' respective financial circumstances.[58] Despite the automatic supersedeas effect of the motion for new trial—which the former husband's attorney expressly brought to the attention of the trial court—the former husband was arrested and incarcerated for failing to satisfy the contempt order. The trial court declined to enter an order releasing him, instead requiring him to pay over half of the sum due and ordered him released by consent after he made such a payment. The former husband then filed a motion seeking the trial judge's recusal based upon the repeated violation of his due process rights, including the refusal to continue the contempt hearing and his incarceration despite the supersedeas effect of the motion for new trial. The trial court subsequently denied both of the former husband's pending motions, and upon request of the former wife, awarded attorney's fees under O.C.G.A. § 9-15-14(b)[59] against the former husband and his attorney.[60] The attorney against whom the fees were awarded sought discretionary review, and the court of appeals reversed the award of attorney's fees under O.C.G.A. § 9-15-14.[61]

On review, the court of appeals found "no merit" in the trial court's conclusions that the motion for new trial "was baseless in every respect;" "deficient and lacked legal authority;" "failed to comply with Uniform Superior Court Rules;" and that under U.S.C.R. 25.3,[62] the former husband had "failed to satisfy conditions" for recusal.[63] In pertinent part, the court of appeals rejected the argument that the former husband had failed to specify a statutory basis for the motion for a new trial because O.C.G.A. § 9-11-60(c)[64] provides one, and further noted that while "motions for a new trial are available only to challenge some 'intrinsic defect' that does not appear on the face of the record or pleadings, 'errors allegedly committed by the trial court' constitute such an intrinsic defect."[65] The court of appeals determined that the arguments asserted

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[58] *Id.* at 164, 843 S.E.2d at 443 (emphasis added).

[59] O.C.G.A. § 9-15-14(b) (2020).

[60] *McLaws,* 355 Ga. App. at 164–66, 843 S.E.2d at 444.

[61] *Id.* at 162, 843 S.E.2d at 442.

[62] U.S.C.R. 25.3 (2020).

[63] *McLaws*, 335 Ga. App. at 166, 843 S.E.2d at 445.

[64] O.C.G.A. § 9-11-60(c) (2020).

[65] *McLaws*, 335 Ga. App. at 167, 843 S.E.2d at 445 (quoting Gulledge v. State, 276 Ga. 740, 741, 583 S.E.2d 862, 864 (2003)).

in the motion for new trial did not lack substantial justification so as to authorize an award under O.C.G.A. § 9-15-14(b) because the former husband had due process rights to be notified of the claim for payment of back child support against him and to be heard in defense of the claims against him.[66] Thus, the former husband's claims of violation of due process rights were not baseless or lacking justification.[67]

Further, the court of appeals held that the request for recusal did not lack substantial justification even if the accompanying affidavits were arguably insufficient because the record reflected that the trial court had overlooked established law twice to incarcerate the former husband, violating his due process rights—first, by issuing an "impermissible self-executing contempt order" that deprived him of his right to be heard on the issue of willfulness, and second, by ignoring the supersedeas effect of the motion for new trial and permitting him to be jailed for violation of the superseded order.[68] Finally, the court failed to remedy its own violation of O.C.G.A. § 9-11-62(b),[69] which provides for supersedeas upon the filing of a motion for new trial, and instead conditioned the former husband's release on the payment of a portion of the fees he challenged.[70] Accordingly, the court of appeals determined that neither motion was lacking in substantial justification and reversed both attorney's fees awards under O.C.G.A. § 9-15-14(b).[71]

The former husband in *Rowles v. Rowles*[72] moved to set aside the parties' final judgment and decree of divorce based on duress, alleging that he had only agreed to settlement terms because his former wife threatened to expose his extramarital affair to his employer which could have caused his termination and loss of significant deferred compensation. After a hearing, the trial court partially granted the motion and set aside portions of the settlement agreement relating to custody, parenting time, and visitation while denying the motion to set aside as to the financial provisions of the agreement. The court then held a trial on the issues of custody, support, and visitation and entered a Final Order granting custody of the children to their father. The former wife moved for a new trial, which the court denied, and the trial court later awarded the husband $112,189.10 in attorney's fees under O.C.G.A. §§ 19-6-2 and 9-15-14(b). The former wife appealed, challenging the trial court's ruling on the former husband's motion to set aside on procedural

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[66] *Id.* at 167–68, 843 S.E.2d at 445–46.

[67] *Id.* at 168, 843 S.E.2d at 446.

[68] *Id.* at 169, 843 S.E.2d at 447.

[69] O.C.G.A. § 9-11-62(b) (2020).

[70] *McLaws*, 355 Ga. App. at 170, 843 S.E.2d at 447.

[71] *Id.* at 170, 843 S.E.2d at 447–48.

[72] 351 Ga. App. 246, 830 S.E.2d 589 (2019).

and substantive grounds as well as the award of attorney's fees against her.[73]

Procedurally, the former wife argued that the trial court erred in ruling on the former husband's motion to set aside because it was not filed during the same term of court as the judgment it challenged and should have been brought as a separate action.[74] The court of appeals rejected both arguments based upon the plain language of O.C.G.A. § 9-11-60(f),[75] which provides a three-year window to attack judgments for fraud and does not require that such challenges be brought as separate actions.[76] Substantively, however, the court of appeals agreed with the former wife that the trial court erred in setting aside the second divorce decree based upon duress.[77] Georgia law distinguishes between setting aside a contract for duress and setting aside a judgment for duress, and imposes a higher bar on the latter: "Before . . . a judgment will be set aside for duress, it must appear that the complainant had a good defense which [he] was prevented from asserting at the original hearing or trial."[78] Here, the record did not show—and the former husband did not argue—that he was prevented from asserting a good defense by the former wife's alleged threats to reveal his conduct to his employer.[79] Accordingly, it was improper for the trial court to set aside the parties' settlement agreement which had been incorporated into the divorce decree.[80] The court of appeals additionally noted, without deciding as to the facts at hand, that "it has long been held that '[a] threat of causing the defendant to lose his job or his fear of such loss is not duress which would void the contract,' when the threat is not otherwise wrongful or unlawful."[81]

VI. POST-JUDGMENT ENFORCEMENT

In *Sponsler v. Sponsler* (*Sponsler III*),[82] a consolidated appeal following remand from the Georgia Supreme Court in the 2017 case of

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[73] *Id.* at 247–48, 830 S.E.2d at 590–91.

[74] *Id.* at 248, 830 S.E.2d at 591.

[75] O.C.G.A. § 9-11-60(f) (2020).

[76] *Rowles*, 351 Ga. App. at 248, 830 S.E.2d at 592*; see* O.C.G.A. § 9-11-60(b), (d), (f).

[77] *Rowles*, 351 Ga. App. at 249, 830 S.E.2d at 592.

[78] *Id.* at 249, 830 S.E.2d at 592 (alteration in original) (quoting Frost v. Frost, 235 Ga. 672, 675, 221 S.E.2d 567, 570 (1975)).

[79] *Id.* at 250, 830 S.E.2d at 593.

[80] *Id.* at 251, 830 S.E.2d at 593.

[81] *Id.* at 250 n.10, 830 S.E.2d at 593 n. 10 (alteration in original) (quoting Atlanta Life Ins. Co. v. Mason, 89 Ga. App. 319, 321, 79 S.E.2d 352, 353 (1953)).

[82] 353 Ga. App. 627, 838 S.E.2d 921 (2020).

Sponsler v. Sponsler (*Sponsler II*),[83] the former husband, the appellant, challenged the trial court's imposition of criminal contempt sanctions against him, refusal to reimburse him for sums allegedly due under the divorce decree, and award of attorney's fees to the court-appointed receiver in the case and his ex-wife.[84] On appeal, the Georgia Court of Appeals affirmed the finding of criminal contempt despite the appellant's challenge that a "presumption of vindictiveness" should apply to the imposition of criminal penalties on remand following his successful prior appeal; reversed the trial court's denial of the former husband's request for reimbursement due under the divorce decree; and vacated the award of attorney's fees to the former wife.[85]

In the underlying contempt action, the former husband was found in contempt for failing to execute a quitclaim deed and Qualified Domestic Relations Order within the time required by the decree and ordered to purge his contempt by making payments to render the property at issue marketable and to make payments on the home equity line of credit on the residence until it was sold.[86] The supreme court in *Sponsler II* affirmed the finding of contempt but reversed as to the sanctions on the grounds that they impermissibly modified the terms of the decree.[87] In the interim between *Sponsler II* and the trial court's order on remand, the evidentiary posture of the case changed because the property at issue had been sold and civil contempt was no longer practicable because coercing compliance with the divorce decree would be impossible.[88] Accordingly, the "law of the case rule" was no longer applicable, and the trial court was authorized to impose criminal rather than civil contempt penalties.[89] Under the presumption of vindictiveness set forth in *North Carolina v. Pearce*,[90] the court of appeals found no merit in the appellant's argument that the imposition of criminal contempt penalties following remand violated his due process rights. [91] While due process demands "'that vindictiveness must play no part in the resentencing of one who has successfully appealed his original conviction[,]' . . . . [a]ny presumption of vindictiveness arising from the imposition of criminal contempt punishment was rebutted by objective evidence establishing

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[83] 301 Ga. 600, 800 S.E.2d (2017).

[84] *Sponsler III*, 353 Ga. App. at 627, 838 S.E.2d at 923–24.

[85] *Id.* at 632–34, 838 S.E.2d at 926–28.

[86] *Id.* at 630, 838 S.E.2d at 925.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] 395 U.S. 711, 89 S. Ct. 2072 (1969).

[91] *Sponsler III*, 353 Ga. App. at 631, 838 S.E.2d at 926 (citing *Pearce*, 395 U.S. 711, 89 S. Ct. 2072 (1969)).

the change in circumstances that existed after remand."[92] Accordingly, the trial court's imposition of criminal rather than civil contempt sanctions following remand was not erroneous.[93]

The court of appeals' opinion in *Sullivan v. Harper*[94] both clarified the boundaries of a party's final decision-making authority in matters of custody and offered insight into the proper approach to evaluating a prohibition on "disparagement" by one former spouse against the other.[95] There, the parties had two minor children, and the consent parenting plan incorporated into their final judgment and decree of divorce provided, in pertinent part: that the mother (Sullivan) would have final decision-making authority "on medical issues;" that both parties would have the right to receive information, records, paperwork, and documents concerning the children and to request such information from providers; and that neither would "disparage the other parent to any teachers, coaches, activity providers, doctors, tutors, dentists, healthcare professionals, or anyone else who may be involved in the children's life in a similar capacity."[96] When one of the children began seeing a new psychologist, the mother filled out a questionnaire in which she referred to the father (Harper) as "manipulative and childlike;" stated that that he lived with his "girlfriend," who was in fact his fiancée; claimed that he emotionally abused or neglected the child and minimized bullying the child experienced; and identified the father as having a substantial mental health history.[97] Sullivan further objected to Harper bringing his "girlfriend" to feedback meetings with the therapist and told the therapist to consult her before releasing documents or information to the father. Harper filed a motion for contempt alleging that Sullivan had violated the parenting plan by disparaging him, interfering with his access to records, and misrepresenting the scope of her medical final decision-making authority.[98]

After a hearing, the trial court found Sullivan in willful contempt for disparaging Harper, interfering with Harper's access to records, instructing the doctors not to permit Harper's fiancée to attend meetings with Harper, and requesting to be consulted before the therapists

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[92] *Sponsler III*, 353 Ga. App. at 631–32, 838 S.E.2d at 926 (quoting Georgia Real Estate Commission v. Home, 141 Ga. App. 226, 232, 223 S.E.2d 16, 19 (1977)).

[93] *Sponsler III*, 353 Ga. App. at 631–32, 838 S.E.2d at 926.

[94] 352 Ga. App. 427, 834 S.E.2d 921 (2019).

[95] *Id.* at 434–36, 834 S.E.2d at 927–28.

[96] *Id.* at 428–30, 834 S.E.2d at 923–24.

[97] *Id.* at 428–29, 834 S.E.2d at 923.

[98] *Id.* at 429, 834 S.E.2d at 923–24.

released information to the child's father.[99] Sullivan appealed.[100] On review, the court of appeals examined the scope of "final decision-making authority" and concluded that the trial court properly clarified the divorce decree by determining that Sullivan's medical decision-making authority did not give her the right to dictate whether a third party could attend feedback sessions with Harper where the child was not present.[101] The court of appeals also affirmed the finding of disparagement.[102] Although the term was not defined in the parenting plan, its common use supported the trial court's conclusion that Sullivan calling Harper "manipulative" and "childlike" could be construed as disparaging despite her professed intent simply to provide relevant information—although the court of appeals was careful to note that while parents may offer honest answers to diagnostic questions intended to aid the medical provider, "this can be done in a way that is not disparaging."[103] The reviewing court affirmed the finding that Sullivan had willfully interfered with Harper's access to the records, but reversed the trial court's determination that Sullivan was in contempt for refusing to allow the fiancée to attend the therapy sessions because the decree was sufficiently ambiguous as to the scope of Sullivan's medical decision-making authority that the trial court found it proper to clarify the same: a person may not be found in contempt for violating an order that does not expressly "inform him in definite terms as to the duties thereby imposed upon him."[104]

VII. EQUITABLE DIVISION OF PROPERTY

The Georgia Court of Appeals clarified the interaction of the presumption of gifts to the marital estate and the "source of funds rule" in *Dixon v. Dixon*,[105] which involved the husband's use of unallocated personal injury settlement funds to purchase a home for the parties during the marriage.[106] Approximately four years after the parties married, the husband was involved in a major accident, and the wife stopped working to care for him. The husband received a million-dollar personal injury settlement, from which he ultimately received a net of $595,380.27. He used a portion of the proceeds to pay the parties' joint

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[99] *Id.* at 429, 834 S.E.2d at 924.

[100] *Id.* at 430, 834 S.E.2d at 924.

[101] *Id.*

[102] *Id.* at 435, 834 S.E.2d at 927.

[103] *Id.* at 434–35, n.5, 834 S.E.2d at 927, n.5.

[104] *Id.* at 436, 834 S.E.2d 928 (*quoting* Hughes v. Browne, 217 Ga. App. 567, 568, 459 S.E.2d 170, 172 (1995)).

[105] 352 Ga. App. 169, 170 834 S.E.2d 309, 312 (2019).

[106] *Id.* at 169, 834 S.E.2d at 311.

bankruptcy liabilities and used roughly $240,000 of the remainder to purchase a residence for the parties as joint tenants with right of survivorship.[107] Fourteen months later, the husband filed for divorce and sought partial summary judgment asking the court to classify the settlement proceeds and the residence as non-marital property or, in the alternative, to apply the source of funds rule,[108] which apportions the marital residence between separate and marital property interests based upon the respective separate and marital contributions of each spouse.[109] The trial court granted the motion for partial summary judgment, finding the settlement proceeds to be the husband's separate property, and determined that (a) the husband had converted a portion of the settlement proceeds to marital assets by titling the house jointly, but (b) the source of funds rule still operated to render the marital residence a wholly non-marital asset. The wife appealed.[110]

Applying the so-called "analytical approach" to the classification of a personal injury award as separate or marital property, the court of appeals determined that a genuine issue of material fact existed as to whether some portion of the proceeds could be shown to constitute marital property so as to preclude summary judgment; however, summary judgment was proper against the wife as to her claim that a portion of the settlement should be considered her separate property as compensation for loss of consortium because she was not a party to the settlement and no evidence suggested that she had made a claim for loss of consortium.[111] Regarding the classification of the marital residence, the trial court correctly determined that the husband had made a gift to the marital estate by titling the parties' home jointly, but erred in applying the source of funds rule to reclassify the property as separate.[112] While the source of funds rule may be applied to return a non-marital investment to a spouse who contributed separate property to a marital asset, it may not be used to wholly reclassify a marital asset as separate.[113]

VIII. VOIDABLE TRANSACTIONS

As a question of first impression, the Georgia Court of Appeals held in *Enlow v. Enlow*[114] that, under Georgia' Uniform Voidable Transactions

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[107] *Id.* at 169–70, 834 S.E.2d at 311.

[108] *See* Thomas v. Thomas, 259 Ga. 73, 377 S.E.2d 666 (1989).

[109] *Dixon*, 352 Ga. App. at 170, 834 S.E.2d at 311.

[110] *Id.*

[111] *Id.* at 171–73, 834 S.E.2d at 313–14.

[112] *Id.* at 174, 834 S.E.2d at 314–15.

[113] *Id.*

[114] 352 Ga. App. 865, 836 S.E.2d 128 (2019).

Act (UVTA),[115] property transfers made pursuant to a previously entered divorce decree may be subject to avoidance.[116] There, the father of a minor child threatened to sue the child's grandfather for molesting the child. Shortly thereafter, the child's grandfather and grandmother transferred five parcels of real property they owned jointly through a trust to the grandmother as trustee of a trust in her name alone. The quitclaim deeds to the five parcels were filed on August 8, 2016, and on August 16, 2016, the grandparents signed a divorce settlement awarding all five parcels to the grandmother which was incorporated as part of the final judgment and decree of divorce entered on November 18, 2016. In October 2017, the child's father sued the grandfather on the child's behalf for, *inter alia*, fraud and fraudulent conveyance under the UVTA. The plaintiff-appellant prevailed on a motion for partial summary judgment as to her tort claims, but the trial court denied summary judgment on the UVTA claim on the grounds that the UVTA could not be used to set aside the terms of an otherwise valid divorce decree.[117]

The trial court erred in determining that the UVTA was not available to set aside the terms of the grandparents' divorce decree.[118] The Act defines a "transfer" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset and includes payment of money, release, lease, and creation of a lien or other encumbrance,"[119] which is a very broad definition and does not by its plain terms exclude the equitable division of assets incident to a divorce.[120] Finding no authority from Georgia's higher courts, the court of appeals reviewed the statutory statement of intent that the UVTA "shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among states enacting the [UVTA];"[121] surveyed the application of the UVTA and its equivalents in other jurisdictions; and determined the dominant trend to be that the UVTA may be applied to divorce settlement agreements.[122] In the absence of authority to the contrary, the trial court's determination that the UVTA could not be so applied conflicted with the legislative intent behind the statute and was, thus, erroneous.[123]

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[115] O.C.G.A. §§ 18-2-70 to 18-2-85 (2020).

[116] *Enlow*, 352 Ga. App. at 866, 836 S.E.2d at 129.

[117] *Id.* at 866–67, 836 S.E.2d at 129.

[118] *Id.* at 867, 836 S.E.2d at 130.

[119] O.C.G.A. § 18-2-71 (2020).

[120] *Enlow*, 352 Ga. App. at 867–68, 836 S.E.2d at 130.

[121] O.C.G.A. § 18-2-83 (2020).

[122] *Enlow*, at 868–69, 836 S.E.2d at 130–31 (alteration in original).

[123] *Id.* at 869, 836 S.E.2d at 131.

IX. GRANDPARENT CUSTODY

The opinion in *Hannah v. Hatcher*[124] clarifies the statutory provisions granting standing to grandparents to seek custody of children when both parents are living. The paternal grandparents of the minor child sought emergency and permanent custody of their grandchild, alleging that they had been primary caregivers for most of the child's life, the child's parents were unmarried, the biological father—who had not legitimated the child—was incarcerated, the child's mother had executed an agreement to give them temporary guardianship, and both parents were unfit.[125] Following a show-cause hearing at which neither of the child's parents appeared, the trial court entered an order indicating that since the child's biological father had not legitimated the child, it could not award the paternal grandparents custody under O.C.G.A. § 19-7-1(b.1),[126] then dismissed the case.[127] In doing so, the trial court determined that the fact that the biological father could still choose to pursue legitimation affected the analysis of whether the biological father's parents had standing to seek custody.[128] This was error.[129] O.C.G.A. § 19-7-1(b.1) authorizes the biological grandparents of a minor child to seek custody without regard for whether the biological father has legitimated his relationship with the child or not.[130]

X. LEGITIMATION, PATERNITY, AND ASSISTED CONCEPTION

On appeal from a petition for an order of parentage parallel to a divorce action, the Georgia Court of Appeals affirmed the superior court's ruling that the wife, who gave birth to a child conceived with a donor egg by in vitro fertilization (IVF), qualified as an "intended recipient parent" so as to authorize her to seek and be issued an order of parentage under the Option of Adoption Act,[131] and she was not prohibited from doing so even though the concurrent divorce action was pending in a different county.[132] During the marriage, the parents had a child through IVF using an egg from an anonymous donor which was fertilized by the father's sperm and carried to term by the mother. During the parents' subsequent divorce, the father took the position that the mother had no rights to custody of the child because she was not a biological, legal, or

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[124] 352 Ga. App. 186, 834 S.E.2d 307 (2019).

[125] *Id.* at 186, 834 S.E.2d at 307.

[126] O.C.G.A. § 19-7-1(b.1) (2020).

[127] *Hannah*, 352 Ga. App. at 187–88, 834 S.E.2d at 307–08.

[128] *Id.* at 188, 834 S.E.2d at 308.

[129] *Id.* at 189, 834 S.E.2d at 309.

[130] *Id.*

[131] O.C.G.A. §§ 19-8-40 to 19-8-43 (2020).

[132] In the Interest of C.B., 353 Ga. App. 363, 363, 837 S.E.2d 517, 518 (2019).

adoptive parent. The wife then petitioned for and obtained, in a separate proceeding in another court, an order declaring her to be the legal parent. The husband's motion for a new trial or to set the parentage order aside was denied, and he appealed.[133]

The Option of Adoption Act permits an intended parent who receives an embryo transfer to seek and obtain an order declaring that person a legal parent even though they may not have a biological relationship to the conceived child.[134] Evidence supported the trial court's conclusion that the mother qualified as an "intended recipient parent" under O.C.G.A. § 19-8-40(5),[135] and contrary to the father's argument no language in the Act limited its application to adoptions of embryos by third parties.[136] Further, the Act specifically requires a petition for an order of parentage to be filed "in the county in which any petitioner or any respondent resides," so despite the pendency of the divorce in Fulton County, the mother was authorized to seek the order of parentage in her county of residence, Clayton.[137] There was no requirement that the cases be consolidated and since the subject matter of the mother's petition differed from that of the divorce, she was not prohibited from prosecuting two actions against the father in different courts simultaneously.[138]

The court of appeals addressed whether Georgia recognizes the tort of "wrongful birth" after the parents of a child conceived with donor sperm sued the sperm bank operator under a variety of theories of tort in *Norman v. Xytex Corporation*.[139] As the child grew up, he was diagnosed with ADHD and an inherited blood disorder, began experiencing suicidal and homicidal ideations, and was prescribed "various medications including anti-depressants and an anti-psychotic."[140] The appellant-parents alleged that the donor had "completely fabricated" his sperm donor application and sought damages under theories including, *inter alia,* fraud, misrepresentation, products liability, negligence, breach of warranty, and specific performance.[141] The defendant corporation moved to dismiss on the ground that the various tort theories were effectively a claim for wrongful birth, which is not a recognized tort

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[133] *Id.* at 363, 837 S.E.2d at 518.

[134] *Id.* at 364–66, 837 S.E.2d at 518.

[135] O.C.G.A. § 19-8-40(5) (2020).

[136] In the Interest of C.B., 353 Ga. App. at 366, 837 S.E.2d at 519–20.

[137] O.C.G.A. § 19-8-42(b) (2020); In the Interest of C.B., 353 Ga. App. at 367, 837 S.E.2d at 520.

[138] In the Interest of C.B., 353 Ga. App. at 367, 837 S.E.2d at 520*; see generally*, O.C.G.A. § 9-2-5(a)(2020) ("No plaintiff may prosecute two actions in the courts at the same time for the same cause of action and against the same party.").

[139] 350 Ga. App. 731, 830 S.E.2d 267 (2019).

[140] *Id.* at 731, 830 S.E.2d at 268.

[141] *Id.* at 731–32, 830 S.E.2d at 268–69.

claim in Georgia, and the trial court dismissed all of the plaintiffs' claims on that basis except the specific performance claim. The parents argued on appeal that the trial court had erred in construing their complaint as one for wrongful birth.[142]

On review, the court of appeals recited the Supreme Court's prior ruling that "[a]n action for 'wrongful birth' is brought by the parents of an impaired child and alleges basically that, but for the treatment or advice provided by the defendant[s], the parents would have aborted the fetus, thereby preventing the birth of the child,"[143] even though the complainants may "attempt to characterize what is, fundamentally, a wrongful birth claim as some other cause of action."[144] Georgia recognizes causes of action for wrongful pregnancy or wrongful conception, but the key distinction is that both of those causes of action arise where "the alleged negligence resulted in *un*desired conception."[145] Where, instead, the parents desired the conception, but allege that they would not have conceived had they known in advance that the child would suffer the impairments caused by a provider's alleged negligence or wrongful acts, there can be no recovery: "[a]s the Supreme Court of Georgia stated[,] 'we are unwilling to say that life, even life with severe impairments, may ever amount to a legal injury.'"[146]

XI. CONCLUSION

While the 2019–2020 survey period did not see major paradigm shifts in the law of domestic relations, the higher courts issued a number of important clarifications regarding the application of the law to peculiar sets of facts. The outbreak of COVID-19 in March 2020 caused a significant disruption to the operation of the courts and the lives of millions of Georgians, and the effects on litigants and resultant litigation are likely to be felt in the 2020–2021 survey period and beyond.

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[142] *Id.* at 732, 830 S.E.2d at 269.

[143] *Id.* (second alteration in original) (quoting Atlanta Obstetrics & Gynecology Group v. Abelson, 260 Ga. 711, 713, 398 S.E.2d 557, 560).

[144] *Id.* at 732, 830 S.E.2d at 269.

[145] *Id.* at 733, 830 S.E.2d at 269.

[146] *Id.* at 734, 830 S.E.2d at 270 (punctuation omitted) (quoting *Atlanta Obstetrics & Gynecology Group*, 260 Ga. at 715, 398 S.E.2d at 561 (1990)).