Domestic Relations

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This Article addresses significant case law that arose during the survey period from June 1, 2017 through May 31, 2018.[1]

I. CONTRACT RULES

The Georgia Court of Appeals held that an antenuptial agreement containing a waiver of alimony did not have to include the income of the future husband within its four corners to be enforceable, so long as full and fair disclosure of material financial facts was made prior to execution.[2] Reversing the trial court, the appellate court said requiring disclosure to be in the text of the document was an improper legal standard to judge enforceability.[3]

During the survey period the Georgia legislature made several changes to the Official Code of Georgia Annotated (O.C.G.A.) sections 19-3-60[4] and 19-3-62.[5] The legislature amended O.C.G.A. § 19-3-60 to add subsection (a):

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1. For an analysis of Georgia domestic relation law during the prior survey period see Barry B. McGough, Elinor H. Hitt & Abigail M. Herrmann, *Domestic Relations*, *Annual Survey of Georgia Law*, 69 MERCER L. REV. 83 (2017).

2. Brantley v. Brantley, 345 Ga. App. 644, 646–47, 814 S.E.2d 787, 789 (2018).

3. *Id.* at 646, 814 S.E.2d at 789.

4. O.C.G.A. § 19-3-60 (2018).

5. O.C.G.A. § 19-3-62 (2018).

> As used in this article, the term "antenuptial agreement" means a contract entered into prior to a marriage that determines property rights or contemplates a future settlement to one spouse as to a future resolution of issues, including, but not limited to, year's support, spousal support, and equitable division of property.[6]

The legislature also cleared up some prior confusion regarding the requirements for a valid and enforceable antenuptial agreement. In order for an antenuptial agreement to be valid it must be "in writing, signed by both parties who agree to be bound, and attested to by at least two witnesses, one of whom shall be a notary public."[7] Additionally, "[A]ntenuptial agreements shall be liberally construed to carry into effect the intention of the parties, and no want of form or technical expression shall invalidate such agreements."[8]

Explicitly cautioning "parties to a divorce to ensure that their intentions are plainly expressed," the Georgia Supreme Court construed the phrase "corporate income tax liability" to include payroll taxes owed by a subchapter S corporation.[9] Noting that such entities pass their liability through to their individual shareholders, the high court found that the parties intended those taxes to be paid by the husband.[10] Since the phrase was ambiguous, the husband could not be held in contempt, but the appellate court's construction could be a basis for contempt in the future.[11]

II. EQUITABLE DIVISION

In *Flesch v. Flesch*,[12] the trial court held that the wife "owned" a certain retirement account and that the account was her separate property, despite the fact the wife testified during trial that she deposited marital funds into said retirement account.[13] The trial court was incorrect in finding the retirement account to be entirely the wife's separate, premarital property.[14] Instead, the trial court was required to

6. O.C.G.A. § 19-3-60(a) (2018).
7. O.C.G.A. § 19-3-62.
8. *Id.*
9. Sutherlin v. Sutherlin, 301 Ga. 581, 586, 802 S.E.2d 204, 209 (2017).
10. *Id.*
11. *Id.* at 586–87, 802 S.E.2d at 209–10.
12. 301 Ga. 779, 802 S.E.2d 67 (2017).
13. *Id.* at 780, 804 S.E.2d at 67, 68.
14. *Id.* at 782, 804 S.E.2d at 70.

determine what portion of the account was marital and equitably divide that portion.[15]

In *Hardin v. Hardin*,[16] the Georgia Supreme Court addressed whether a disability benefit paid to the husband during the marriage was marital property or his separate property.[17] The disability policy payout at issue was paid out during the course of the marriage after the husband was determined to be totally disabled. During the marriage, the parties paid the policy premiums out of marital funds, and the money from the payout was deposited into the parties' joint accounts.[18]

The trial court determined that the disability payout was the husband's separate property, as the proceeds compensated the husband "solely for his pain and suffering, disability, and disfigurement, and not for lost wages, lost earning capacity, or medical and hospital expenses."[19] The Georgia Supreme Court affirmed the trial court's decision under the "right for any reason" doctrine, although the higher court approached the topic differently.[20] The higher court agreed with the wife's assertion that the lump sum award included lost wages and lost earning capacity because disability insurance protects against a party's inability to earn an income.[21] As such, some portion of the insurance settlement would have been marital.[22] However, the amount of the insurance settlement, which would constitute marital property, had already been consumed during the marriage, and as such, any remaining amount would be the husband's separate, non-marital property.[23]

In *Gibson v. Gibson*,[24] the Georgia Supreme Court undertook the issue of trusts and transfers thereto, as it relates to equitable division. In *Gibson*, the wife argued that the trial court erred in excluding the husband's transfers to a trust from the marital estate.[25] Georgia has long held that property transferred to a third party during the marriage is not subject to equitable division unless the transfer is fraudulent.[26] The

15. *Id.* at 781–82, 804 S.E.2d at 70.

16. 301 Ga. 532, 801 S.E.2d 774 (2017).

17. *Id.* at 532, 801 S.E.2d at 775.

18. *Id.*

19. *Id.*

20. *Id.* at 541, 801 S.E.2d at 781.

21. *Id.* at 541, 801 S.E.2d at 780–81.

22. *Id.*

23. *Id.*

24. 301 Ga. 622, 801 S.E.2d 40 (2017).

25. *Id.* at 622, 801 S.E.2d at 42.

26. *Id.* at 625, 801 S.E.2d at 44 (citing Armour v. Holcombe, 288 Ga. 50, 52, 701 S.E.2d 169, 171 (2010)).

husband transferred approximately $3.2 million dollars into two different trusts.[27] The husband was not a beneficiary for either trust, nor was the husband a trustee of the trusts; thus, the transfers were, in effect, transfers to third parties. As the transfers were not fraudulent, the trial court correctly excluded the transfers from the marital estate.[28]

The Georgia Supreme Court also addressed the wife's argument that, because the husband failed to tell her about the transfers, they were fraudulent by way of their "confidential relationship."[29] The trial court used a fact intensive exercise to determine that a confidential relationship did not exist between the parties, including an analysis of their rocky marriage, the existence of joint financial accounts, and the extent to which the parties shared financial information.[30] The high court found that the trial court erred in their analysis of the existence of a confidential relationship, although such error did not warrant reversal.[31] The Georgia Supreme Court stated that spouses do generally enjoy a confidential relationship; however, the question in *Gibson* is not necessarily whether the spouses enjoy a confidential relationship.[32] Instead, it is to what extent such a relationship requires disclosure and if the transfers were fraudulent.[33] The Georgia Supreme Court states that there is not an obligation for a spouse to gain consent from the other spouse for every financial transaction—the size of the transaction and the circumstances of the transaction could give rise to fraud.[34]

The trial court considered several "badges of fraud" under the former Uniform Fraudulent Transfers Act[35] in determining that the husband's transfers were not fraudulent.[36] In *Gibson*, the trial court had enough evidence to support the finding that the transfers were not fraudulent based on the fact that the "Husband did not actively conceal the transfers from Wife, did not retain possession or control of the assets transferred and, did not transfer substantially all of his assets or become insolvent after the transfers."[37]

27. *Id.* at 623, 801 S.E.2d at 43.
28. *Id.* at 626, 801 S.E.2d at 44–45.
29. *Id.* at 626, 801 S.E.2d at 45.
30. *Id.* at 627, 801 S.E.2d at 45.
31. *Id.*
32. *Id.*
33. *Id.* at 626–27, 801 S.E.2d at 45–46.
34. *Id.* at 627, 801 S.E.2d at 45–46.
35. O.C.G.A. § 18-2-74(b) (2018).
36. *Gibson*, 301 Ga. at 628–29, 801 S.E.2d at 46.
37. *Id.* at 629, 801 S.E.2d at 46.

During the survey period, the Georgia Supreme Court also addressed bonuses as marital property. In *Lutz v. Lutz*,[38] the husband earned a bonus of roughly $100,000 in 2016. The trial court ordered that the annual bonus be classified as marital property subject to equitable division and ordered a lump sum payment of the bonus to the wife. The trial court also included the bonus in the husband's gross income for the purpose of calculating child support.[39] The appellate court affirmed the trial court's decision to both equitably divide the roughly $100,000 bonus and include the entire amount in the child support calculation.[40] The appellate court reasoned that the bonus may be subject to equitable division because the money was earned by work performed during the marriage.[41] Under the Child Support Guidelines,[42] the funds are also required to be considered for the purpose of calculating child support.[43] Just because a bonus is income to the husband for the purpose of calculating child support, does not make that bonus immune from equitable division, and the trial court did not abuse its discretion in awarding the wife a portion of the bonus.[44]

III. CHILD SUPPORT

In *Noble v. Noble*,[45] the trial court included free tuition that the mother received from the university where she was employed when determining her gross income.[46] Under the Georgia Child Support Guidelines, fringe benefits of employment that reduce a party's personal living expenses may be included to determine gross income.[47] However, a benefit like free college tuition is not addressed in the guidelines, and free tuition would tend to reduce a party's personal expenses rather than a party's living expenses.[48] The Georgia Court of Appeals held that the free tuition as a benefit did not significantly reduce the mother's "personal living

38. 302 Ga. 500, 807 S.E.2d 336 (2017).
39. *Id.* at 500–01, 807 S.E.2d at 337–38.
40. *Id.* at 503–04, 807 S.E.2d at 339.
41. *Id.* at 503, 807 S.E.2d at 339.
42. O.C.G.A. § 19-6-15(f)(1)(A)(iv) (2018).
43. *Lutz*, 302 Ga. at 503, 807 S.E.2d at 339.
44. *Id.* at 503–04, 807 S.E.2d at 339.
45. 345 Ga. App. 799, 815 S.E.2d 150 (2018).
46. *Id.* at 801, 815 S.E.2d at 153.
47. *Id.* at 801–02, 815 S.E.2d at 153 (citing O.C.G.A. § 19-6-15(f)(1)(C) (2018)).
48. *Id.* at 802, 815 S.E.2d at 153.

expenses" and thus should not be considered in determining her gross income.[49]

The Georgia legislature amended the Child Support Guidelines regarding multiple worksheets and a step-down reduction for multiple children.[50] Section 19-6-15(b)(12) now allows for the use of multiple worksheets when "there is a likelihood that a child will become ineligible to receive support" within two years of the final order.[51] The Georgia legislature also added guidance for the court when imputing income under the guidelines.[52] When imputing a party's income the court shall consider the circumstances of the parent, including, but not limited to, "assets, residence, employment and earnings history, job skills, education[] . . . age, health, criminal record . . . [and the] job market."[53] Furthermore, "[i]f [the] parent is incarcerated the income may be imputed based upon the actual income and assets available to such incarcerated parent."[54]

The Georgia Supreme Court found that Georgia lacked jurisdiction to modify a child support obligation stemming from a Connecticut divorce decree.[55] The mother brought a motion to modify child support in Georgia where she and the minor children lived. The father still lived in Connecticut.[56] Based on the Uniform Interstate Family Support Act (UIFSA),[57] the father filed a motion to dismiss.[58] Under the Uniform Enforcement of Foreign Judgments Law (UEFJL),[59] the mother argued that jurisdiction was proper in Georgia.[60] UIFSA prohibits Georgia from modifying another state's child support order unless the foreign state has lost continuing, exclusive jurisdiction.[61] Connecticut retained continuing, exclusive jurisdiction because the father was still a resident.[62] Finally,

49. *Id.*

50. Ga. S. Bill 427 Reg. Sess., 2018 Ga. Laws 937 (codified as amended at O.C.G.A. § 19-6-15(b)(12) (2018)).

51. O.C.G.A. § 19-6-15(b)(12).

52. O.C.G.A. § 19-6-15(d) (2018); *see also* O.C.G.A. § 19-6-15(f)(4)(A) (2018).

53. O.C.G.A. § 19-6-15(f)(4)(A).

54. *Id.*

55. Ross v. Ross, 302 Ga. 39, 43, 805 S.E.2d 7, 10 (2017).

56. *Id.* at 39–40, 805 S.E.2d at 8.

57. O.C.G.A. § 19-11-100 (2018).

58. *Ross*, 302 Ga. at 40, 805 S.E.2d at 8.

59. O.C.G.A. § 9-12-130 (2018).

60. *Ross*, 302 Ga. at 40, 805 S.E.2d at 8.

61. *Id.* at 41, 805 S.E.2d at 9.

62. *Id.* at 43, 805 S.E.2d at 10.

the mother incorrectly relied on UEFJL, because UEFJL was preempted by UIFSA.[63]

In *Bennett v. Etheridge*,[64] the trial court found that the mother did not have standing to challenge "a habeas court order discharging the payment of restitution and any arrearage for back child support by the . . . father."[65] On appeal, the Georgia Supreme Court held that as the child's representative she had standing to challenge the habeas court's order when her property rights, meaning the child support arrearages, were impaired.[66]

IV. CHILD CUSTODY

A. Paternity and Legitimation

Cases regarding the legitimacy of a parent–child relationship were addressed by both appellate courts during this survey period. In *Patton v. Vanterpool*,[67] the Georgia Supreme Court faced the question of whether the "'[r]ebuttable presumption' of legitimacy, with respect to '[a]ll children born within wedlock or within the usual period of gestation thereafter who [were] conceived [via] *artificial insemination*,'" extends to children conceived by in vitro fertilization (IVF) therapy.[68] During the pendency of the parties' 2014 divorce, with the consent of Patton, Vanterpool underwent an IVF procedure using both donor ova and donor sperm. The procedure occurred on November 10, 2014, and the parties' final judgment and decree of divorce was entered on November 14, 2014.[69] "The divorce decree incorporated the parties' settlement agreement, which [provides] that, at the time of the agreement, the parties neither had nor were expecting children produced of the marriage."[70]

A child was born on June 6, 2015, as a result of the IVF procedure. After failing in her effort to set aside the divorce decree and include the child in the settlement agreement, Vanterpool instituted a paternity action against Paton, alleging he gave informed consent "and that

63. *Id.* at 43, 805 S.E.2d at 10–11.
64. 302 Ga. 33, 805 S.E.2d 38 (2017).
65. *Id.* at 33, 805 S.E.2d at 39.
66. *Id.* at 34, 805 S.E.2d at 40.
67. 302 Ga. 253, 806 S.E.2d 493 (2017).
68. *Id.* at 253, 806 S.E.2d at 494 (quoting O.C.G.A. § 19-7-21 (2018)).
69. *Id.*
70. *Id.*

O.C.G.A. § 19-7-21 created an irrebuttable presumption of paternity."[71] Patton argued, "he did not meaningfully consent to IVF and that, even if he did, O.C.G.A. § 19-7-21 is unconstitutional." Vanterpool was granted summary judgment on the issue of paternity. This appeal was granted "to address whether O.C.G.A. § 19-7-21 applies to children conceived by means of IVF and, if so, whether O.C.G.A. § 19-7-21 is unconstitutional."[72]

O.C.G.A. § 19-7-21 provides, "All children born within wedlock or within the usual period of gestation thereafter who have been conceived by means of artificial insemination are irrebuttably presumed legitimate if both spouses have consented in writing to the use and administration of artificial insemination."[73] The term "artificial insemination" is not defined in the statute.[74]

After a lengthy literature review, and application of a plain-language construction to the statute, the Georgia Supreme Court determined that "while artificial insemination involves the introduction of sperm to the female reproductive tract to encourage fertilization, IVF involves implanting a fertilized egg into a female; [and while] each procedure aims for pregnancy, the procedures are distinct, and . . . 'artificial insemination' does not [include] IVF."[75] The judgment of the superior court was reversed, and the question of whether O.C.G.A. § 19-7-21 is unconstitutional was not reached.[76]

Another aspect of legitimation, administrative legitimation, was at issue in *Wilson v. Moore*.[77] Benjamin Moore and Holly Wilson "had a short term relationship that included one sexual encounter on December 25, 2010." In late December 2010, Ms. Wilson resumed her relationship with Mr. Wilson. In January 2011, Ms. Wilson discovered she was pregnant and the child, M.S.W., was born in September 2011.[78] Mr. Wilson was present at the birth of M.S.W. and was named as the child's father on the birth certificate.[79]

> The [next] day, Mr. Wilson signed a voluntary acknowledgment of paternity, and he and Ms. Wilson signed an acknowledgment of

71. *Id.* at 253, 806 S.E.2d at 495.
72. *Id.*
73. O.C.G.A. § 19-7-21.
74. *Id.*
75. *Patton*, 302 Ga. at 254–56, 806 S.E.2d at 495–96.
76. *Id.* at 254, 257–58, 806 S.E.2d at 494, 497.
77. 342 Ga. App. 598, 804 S.E.2d 170 (2017).
78. *Id.* at 598, 804 S.E.2d at 171.
79. *Id.* at 600, 804 S.E.2d at 172.

> legitimation pursuant to O.C.G.A. § 19-7-21.1.[80] The acknowledgment of legitimation form included a statement that the relationship between Mr. Wilson and M.S.W. "shall be considered legitimate for all purposes under law pursuant to O.C.G.A. § 19-7-21.1."[81]

Ms. Wilson and Mr. Wilson were married in February 2012,[82] and they, along with M.S.W., have since lived as a family. Sometime in 2013, Mr. Moore received information that Ms. Wilson had a child who could be his biological daughter. In late 2014, Mr. Moore contacted legal counsel as to his rights regarding the minor child. On February 19, 2015, Mr. Moore filed a Petition for DNA Genetic Paternity Testing and Legitimation, which was answered by Ms. Wilson on July 1, 2015. Also on July 1, 2015, Mr. Wilson filed a Motion to Intervene and to Dismiss the Petition for DNA Paternity Testing and a Petition for Legitimation. DNA testing showed Mr. Moore to be M.S.W.'s biological father. Mr. Moore's request for legitimation of M.S.W. was granted.[83] "The trial court stated that the ruling was in the best interest of M.S.W." and further stated that "Mr. Wilson is not the biological father of M.S.W., nor is he the legal father of the minor child by virtue of marriage, legitimation, or adoption."[84]

On appeal, the Wilsons contend "the trial court erred by concluding that Mr. Wilson was not the legal father of M.S.W. and [by] failing to consider the effect of Mr. Wilson's administrative legitimation of M.S.W. on Moore's legitimation petition."[85] The court of appeals agreed, finding that Mr. Wilson was the legal father of M.S.W., having legitimated the child by signing a voluntary acknowledgment of paternity, and that he and Ms. Wilson signed an acknowledgment of legitimation pursuant to O.C.G.A. § 19-7-21.1.[86] "'Legal father' means a male who . . . [h]as legitimated a child pursuant to [O.C.G.A. § 19-7-21.1]."[87] The lower court's order legitimating Moore as the legal father of M.S.W. was

80. O.C.G.A. § 19-7-21.1 (2015). "O.C.G.A. § 19-7-21.1 was repealed in its entirety in 2016. [This] repeal '[did] not . . . affect a [valid] voluntary acknowledgment of legitimation . . . under the former provisions of O.C.G.A. § 19-7-21.1, nor any of the [associated] rights or responsibilities . . . if it was executed on or before June 30, 2016.'" *Wilson*, 342 Ga. App. at 600 n.2, 804 S.E.2d at 172 n.2 (quoting Ga. S. Bill 64, Reg. Sess., 2016 Ga. Laws 304, 312).

81. *Wilson*, 342 Ga. App. at 599–600, 804 S.E.2d at 172.

82. *Id.* at 598, 804 S.E.2d at 171.

83. *Id.* at 600, 804 S.E.2d at 172.

84. *Id.* at 598–99, 804 S.E.2d at 171–72.

85. *Id.* at 600, 804 S.E.2d at 172.

86. *Id.*

87. *Id.* (alterations in original) (quoting O.C.G.A. § 19-7-21.1(a)(2)(F) (2015)).

vacated.[88] The appellate court instructed the trial court to "consider any preclusive effect of the preexisting administrative legitimation by Mr. Wilson on [Mr.] Moore's legitimation petition," and to further consider "whether the 'delegitimation of the child's lifelong relationship with [Mr. Wilson] is in the best interest of the child.'"[89]

B. Custody

Disappearing jurisdiction was at issue in *Plummer v. Plummer*.[90] The mother and father

> were divorced on December 12, 2013, in Camden County, Georgia, and they were granted joint legal custody of their . . . son, with the mother having primary physical custody. At the time of the divorce, the mother and the child had moved to Florida[, and] the father remained in Georgia. . . . On May 21, 2015, the father filed a modification action in Camden County.[91]

On July 1, 2016, the father moved to Virginia due to military obligations.[92] "On August 19, 2016, the mother filed a motion to dismiss for lack of jurisdiction pursuant to O.C.G.A. § 19-9-62(a)(2)."[93] The trial court granted the motion to dismiss "because neither the child nor the parents resided in Georgia."[94]

Under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA),[95] "[A] Georgia court that makes an initial child custody[96]

88. *Id.* at 600, 804 S.E.2d at 173.

89. *Id.* at 600–01, 804 S.E.2d at 173 (quoting LaBrec v. Davis, 243 Ga. App. 307, 316, 534 S.E.2d 84, 91 (2000)) .

90. 342 Ga. App. 605, 804 S.E.2d 179 (2017).

91. *Id.* at 604, 805 S.E.2d at 180.

92. *Id*.

93. O.C.G.A. § 19-9-62(a)(2) (2018); *Plummer*, 342 Ga. App. at 605, 804 S.E.2d at 180.

94. *Plummer*, 342 Ga. App. at 605, 805 S.E.2d at 180.

95. O.C.G.A. § 19-9-40 (2018).

96. O.C.G.A. § 19-9-61(a) reads as follows:

> (a) Except as otherwise provided in Code Section 19-9-64, a court of this state has jurisdiction to make an initial child custody determination only if: (1) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state; (2) A court of another state does not have jurisdiction under paragraph (1) of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under Code Section 19-9-67 or 19-9-68 and: (A) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection

determination generally will have exclusive, continuing jurisdiction over custody matters."[97] However, O.C.G.A. § 19-9-62(a)[98] provides that such jurisdiction shall continue until

> (1) A court of this state determines that neither the child nor the child's parents or any person acting as a parent has a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or
>
> (2) *A court of this state* or a court of another state *determines that neither the child nor the child's parents* or any person acting as a parent *presently resides in this state*.[99]

O.C.G.A. § 19-9-62[100] further provides in subsection (b) that "[a] court of this state which has made a child custody determination and does not have exclusive, continuing jurisdiction under this Code section may modify that determination only if it has jurisdiction to make an initial determination under Code Section 19-9-61."[101]

The trial court determined that it lost jurisdiction because neither parent nor the child resided in Georgia as required by O.C.G.A. § 19-9-62(a)(2).[102] Once the trial court determined that "it no longer had exclusive, continuing jurisdiction under the UCCJEA," it also no longer had "jurisdiction to modify custody under O.C.G.A. § 19-9-62(b) because it would not have had jurisdiction to make an initial [custody] determination under O.C.G.A. § 19-9-61."[103]

> with this state other than mere physical presence; and (B) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships; (3) All courts having jurisdiction under paragraph (1) or (2) of this subsection have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under Code Section 19-9-67 or 19-9-68; or (4) No court of any other state would have jurisdiction under the criteria specified in paragraph (1), (2), or (3) of this subsection.

O.C.G.A. § 19-9-61(a) (2018).

97. *Plummer*, 342 Ga. App. at 606, 804 S.E.2d at 180 (quoting Hall v. Wellborn, 295 Ga. App. 884, 885, 673 S.E.2d 341 (2004)).

98. O.C.G.A. § 19-9-62(a) (2018).

99. *Plummer*, 342 Ga. App. at 606, 804 S.E.2d at 180 (quoting O.C.G.A. § 19-9-62(a)).

100. O.C.G.A. § 19-9-62 (2018).

101. O.C.G.A. § 19-9-61 (2018); *Plummer*, 342 Ga. App. at 606, 804 S.E.2d at 180 (quoting O.C.G.A. § 19-9-62(b) (2018)).

102. O.C.G.A. § 19-9-62(a) (2018); *Plummer*, 342 Ga. App. at 605, 804 S.E.2d at 180.

103. *Plummer,* 342 Ga. App. at 606, 804 S.E.2d at 181.

The father appealed, arguing that subject matter jurisdiction attached at the time he filed the modification petition.[104] However, using a plain-language construction, the Georgia Court of Appeals found that exclusive jurisdiction was lost when the trial court determined "that neither the child nor the child's parents" presently resided in the state.[105] "Having made such a determination, and lacking jurisdiction to modify custody under O.C.G.A. § 19-9-62(b), the superior court did not err [in] dismissing the father's modification petition."[106] However, this issue is not yet settled, as the Georgia Supreme Court granted certiorari regarding this matter on May 7, 2018, and oral arguments are scheduled for September 10, 2018.[107]

The subject of *McDowell v. Bowers*[108] was the grandparent's efforts to intervene in an adoption of their grandchild.[109] "J.N.S., the biological child of S.S. and E.S., was born in 2009. The child's parents divorced in 2012. The divorce decree, which established the parents' visitation rights," did not contain a provision regarding grandparent visitation. The father, E.S., died in 2014.[110] "In September 2014, [the mother,] S.S.[,] agreed to allow McDowell to adopt J.N.S. . . . McDowell is not a blood relative of J.N.S.[, but] was previously married to S.S. . . . McDowell filed a petition to adopt J.N.S. on September 23, 2015." The Bowers, J.N.S.'s paternal grandparents, were allowed to intervene in the adoption by the superior court.[111] Pursuant to O.C.G.A. §§ 19-7-3 [112] and 19-8-15,[113] the grandparents sought custody of J.N.S. On appeal, the superior court was found to have erred in allowing the grandparents to intervene, and this decision was reversed.[114]

O.C.G.A. § 19-7-3 does not authorize grandparents to intervene in a third-party adoption proceeding, such as the circumstances presented, and obtain custody.[115] O.C.G.A. § 19-7-3 only allows for intervention to

104. *Id.* at 607, 804 S.E.2d at 181.

105. *Id.* at 608, 804 S.E.2d at 182.

106. *Id.*

107. *Oral Argument Calendar, September 2018*, SUP. CT OF GA., https://www.gasupreme.us/events/oral-arguments-september-10-2018/ (last visited Sept. 28, 2018).

108. 342 Ga. App. 811, 805 S.E.2d 136 (2017).

109. *Id.* at 811–12, 805 S.E.2d at 136.

110. *Id.* at 812, 805 S.E.2d at 137.

111. *Id.* at 812, 805 S.E.2d at 136–37.

112. O.C.G.A. § 19-7-3 (2018).

113. O.C.G.A. § 19-8-15 (2018).

114. *McDowell*. 342 Ga. App. at 812–14, 805 S.E.2d at 137–38.

115. O.C.G.A. § 19-7-3.

obtain visitation rights.[116] "Further, the only adoption proceedings listed in this Code section are those in which the child is being adopted by a blood relative or stepparent, and McDowell is neither."[117] In addition, "because 'an adoption is not the equivalent to a proceeding to terminate parental rights within the meaning of O.C.G.A. § 19-7-3' . . . O.C.G.A. § 19-7-3(b)(1)(B)[118] provides no basis for permitting the grandparents to intervene."[119]

O.C.G.A. § 19-8-15[120] articulates limited circumstances in which the blood relatives of a minor child may object to an adoption, though it provided the Bowers no relief.[121] In relevant part, O.C.G.A. § 19-8-15(b)[122] states,

> If the child sought to be adopted has no legal father or legal mother living, it shall be the privilege of any person related by blood to the child to file objections to the petition for adoption. A family member with visitation rights to a child granted pursuant to Code Section 19-7-3 shall have the privilege to file objections to the petition of adoption if neither parent has any further rights to the child and if the petition for adoption has been filed by a blood relative of the child.[123]

First, "J.N.S.'s legal mother is alive, and . . . consented to the adoption."[124] Second, "the grandparents [had] not established . . . visitation rights to J.N.S. pursuant to O.C.G.A. § 19-7-3."[125] Third, O.C.G.A. § 19-8-15 allows objections "be made when a blood relative files

116. *Id*. O.C.G.A. § 19-7-3(b)(1)(B) reads as follows:

> Any family member shall have the right to intervene in and seek to obtain visitation rights in any action in which any court in this state shall have before it any question concerning the custody of a minor child, a divorce of the parents or a parent of such minor child, a termination of the parental rights of either parent of such minor child, or visitation rights concerning such minor child or whenever there has been an adoption in which the adopted child has been adopted by the child's blood relative or by a stepparent, notwithstanding the provisions of Code Section 19-8-19.

O.C.G.A. § 19-7-3(b)(1)(B) (2018).

117. *McDowell*, 342 Ga. App. at 812–13, 805 S.E.2d at 137.

118. O.C.G.A. § 19-7-3(b)(1)(B) (2018).

119. *McDowell,* 342 Ga. App. at 813, 805 S.E.2d at 137 (quoting Murphy v. McCarthy, 201 Ga. App. 101, 102, 410 S.E.2d 198, 199 (1991)).

120. O.C.G.A. § 19-8-15 (2018).

121. *McDowell*, 342 Ga. App. at 813, 805 S.E.2d at 137.

122. O.C.G.A. § 19-8-15(b) (2018).

123. *McDowell*, 342 Ga. App. at 813, 805 S.E.2d at 137 (quoting O.C.G.A. § 19-8-15(b)).

124. *Id*.

125. *Id.* at 813, 805 S.E.2d at 138.

for adoption," and McDowell is not a blood relative.[126] Thus, "the grandparents . . . failed to show . . . they [had] a legal right to object . . . [and] they are not authorized to intervene in [the] adoption proceeding."[127]

In *Edler v. Hedden*,[128] the Georgia Court of Appeals turned its attention to custody affidavits. Edler and Hedden divorced in February 2012, and Hedden, the mother, was awarded primary physical custody of their children, including E.E.[129] "In December 2015, [based on E.E.'s affidavit of election, the final divorce order was modified so that E.E. could reside with [Edler,] her father."[130] Three months later, in March 2016,

> Hedden filed a petition for change of custody indicating that E.E., aged 15, had signed an affidavit electing to return to the physical custody of [Hedden]. The trial court granted the [petition], noting that E.E. had made her second election within two years of the prior election, and that her request was therefore valid under O.C.G.A. § 19-9-3(a)(5).[131]

O.C.G.A. § 19-9-3(a)(5)[132] provides, in relevant part,

> In all custody cases in which the child has reached the age of 14 years, the child shall have the right to select the parent with whom he or she desires to live . . . . provided, however, that such selection may only be made once within a period of two years from the date of the previous selection.[133]

Edler argued the trial court misinterpreted the statute when it allowed E.E. to make a second election of where she preferred to live "because less than two years had passed since her first election."[134] The mother interpreted the statute to mean that "after a child has chosen which parent . . . to live with, the child may make a different selection once within . . . two years . . . of the child's original selection."[135] The

126. *Id.*

127. *Id.* at 813–14, 805 S.E.2d at 138.

128. 344 Ga. App. 628, 811 S.E.2d 434 (2018). This opinion is physical precedent only. *See* Ga. Ct. App. R. 33.2.

129. *Edler*, 344 Ga. App. at 628, 811 S.E.2d at 435.

130. *Id.*

131. *Id.*

132. O.C.G.A. § 19-9-3(a)(5) (2018).

133. *Id.*

134. *Edler*, 344 Ga. App. at 628, 811 S.E.2d at 435.

135. *Id.* at 629, 811 S.E.2d at 36.

mother's interpretation was rejected by the appellate court, in that each selection by the child would become the "previous selection," which would create an unlimited selection cycle and the two-year period would be without meaning or effect.[136]

In reversing the trial court's judgment, the appellate court found that "the most logical interpretation of O.C.G.A. § 19-9-3(a)(5) is that . . . the child's selection is effective for two years from the date of his or her previous selection."[137] Thus, because E.E. originally chose to live with her father in December 2015, she could not change her mind with another election until December 2017.[138] The court of appeals did note that this does not restrict a judge "from changing the custody arrangement for a child where there is a change in material conditions or circumstances of the parties or child."[139]

V. ENFORCEMENT

The Georgia Supreme Court affirmed a downward modification of alimony based on the former wife having a meretricious relationship even though the former wife now lived separately from her boyfriend.[140] In affirming the trial court's decision, the Georgia Supreme Court stated that the cohabitation requirement of O.C.G.A. § 19-6-19(b)[141] does not have to exist at the time of filing the modification, only that the cohabitation had to occur "[s]ubsequent to a final judgment of divorce awarding periodic payment[s] of alimony."[142]

In *Holmes-Bracy v. Bracy*,[143] the former husband was ordered to pay the former wife 50% of his military retirement per month. The former wife filed a contempt action against the former husband for lack of payment, and the trial court found that the former husband was not in contempt because the decree in its entirety had become dormant. [144] The Georgia Supreme Court reversed the trial court's decision based on the former wife being entitled to installment payments, not a lump sum

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 630 n.2, 811 S.E.2d at 436 n.2 (citing O.C.G.A. § 19-9-3(b) (2018)).

140. Provenzano v. Jones, 302 Ga. 139, 141, 805 S.E.2d 909, 911 (2017).

141. O.C.G.A. § 19-6-19(b) (2018).

142. *Provenzano*, 302 Ga. at 140–41, 805 S.E.2d at 910–11 (quoting O.C.G.A. § 19-6-19(b)).

143. 302 Ga. 714, 808 S.E.2d 669 (2017).

144. *Id.* at 715, 808 S.E.2d at 670.

payment.[145] The dormancy period for an installment payment runs when each installment becomes due.[146]

145. *Id.* at 716, 808 S.E.2d at 671.
146. *Id.* at 715, 808 S.E.2d at 671.