

What's the Difference?

CONTEMPT V. MODIFICATION: Venue and Other Pitfalls

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Topics of Discussion



- Practical Refresher on Jurisdiction and Venue Pitfalls in Georgia Courts
 - Where will my case be heard, and in front of what judge?
- Jurisdiction and Venue Pitfalls in Contempt and Modification Cases
 - How do I distinguish impermissible modifications from permissible contempt remedies?
 - What should I consider in determining my requests for relief?
- Brief Overview - Registering Foreign Orders
- NEXT SESSION: Jurisdiction and Venue Pitfalls in Custody Cases

Refresher...

Subject Matter Jurisdiction - Divorce and Custody

- “Jurisdiction of the subject matter does not mean simply jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the **class of cases** to which that particular case belongs.” *Crutchfield v. Lawson*, 294 Ga. 407 (2014).
- Divorce Cases: Superior courts in GA have exclusive jurisdiction over **divorce** cases. Ga. Const. Art. VI. § IV. (2016).
- Custody Cases: O.C.G.A. §19-9-61 designates Georgia courts as having jurisdiction over **initial custody** cases when Georgia has been the home state of a child for the six (6) months immediately before the custody action was filed and more
- Subject Matter Jurisdiction CANNOT be waived, and can be challenged at any time.

Subject Matter Jurisdiction - Divorce

- In light of the Constitution designating Superior Courts as having exclusive, non-waivable jurisdiction in divorce cases, will a divorce decree be set aside if entered by a Magistrate Judge and challenged?
 - Fulton County Judicial Officers
- What about a divorce decree entered by a Juvenile Court Judge?
 - Gwinnett County Magistrate and Juvenile Court Judges

Subject Matter Jurisdiction - Divorce

- Georgia Constitution: Article VI, Section IX, Paragraph I (governs Judicial Branch)
 - Administration of the judicial system; uniform court rules; advice and consent of councils. The judicial system shall be administered as provided in this Paragraph. ... the **Supreme Court** shall, with the advice and consent of the council of the affected class or classes of trial courts, by order **adopt and publish uniform court rules** and record-keeping rules which shall provide for the speedy, efficient, and inexpensive resolution of disputes and prosecutions. Each council shall be comprised of all of the judges of the courts of that class.
- Preamble to Uniform Superior Court Rule 1:
 - Pursuant to the inherent powers of the Court and Article VI, Section IX, Paragraph I of the Georgia Constitution of 1983, and in order **to provide for the speedy, efficient and inexpensive resolution of disputes and prosecutions**, these rules are promulgated.

Superior Court Authority to Designate Other Assisting Judges

- Uniform Superior Court Rule 3.1:
 - Provides that the majority of judges in a circuit may adopt different systems for assigning cases
- Uniform Superior Court Rule 3.3:
 - Gives judges **exclusive control** over cases they are assigned, including the ability to **transfer** an assigned action to another judge with the latter's consent in which event the latter becomes the assigned judge
- Uniform Superior Court Rule 18.2:
 - Gives chief judges authority to request assistance from judges of other superior courts, senior judges and retired judges
- O.C.G.A. §15-1-9.1(b):
 - Sets forth a list of circumstances giving rise to use of assistance from other judges
- O.C.G.A. §15-11-33:
 - Provides for transfer of cases involving custody to juvenile court

Pitfall to Avoid when Filing Appeals

- Georgia Appellate Jurisdiction Reform Act of 2016 (became eff. 1/1/2017)
- Court of Appeals now has appellate jurisdiction over divorce and alimony cases filed after January 1, 2017 [House Bill 927]
 - Georgia Court of Appeals: O.C.G.A. 15-3-3.1(a)(5)
 - ... “the Court of Appeals rather than the Supreme Court shall have appellate jurisdiction in” ... “all divorce and alimony cases”
 - But Georgia Supreme Court: O.C.G.A. 5-6-35(a)(2) still says:
 - “divorce, alimony and other domestic relations cases”
- O.C.G.A. §15-11-35 - allows for appeals from Juvenile Court directly to the Court of Appeals in the same manner as appeals from Superior Court [2018 Amendment per Senate Bill 131]

Overcoming Procedural Pitfalls: Venue Options

Where will my case be heard and by who?

- Use Options to Parties' Advantage:
 - Concurrent JX in Custody Cases: Probate Guardianship, Superior Court Custody or Juvenile Court Services (Timing, Availability of GAL's and Social Services)
- Be Aware of Local Rules:
 - Fulton County Local Rule 1000-4: Duties of Judicial Officers - serve during the absence or upon the request of the Family Division Judges, with the parties' consent
 - Gwinnett County Transfer Rules T-1 through T-13 if objection is to venue or jurisdiction, or can object to transfer or file motion requesting assigned judge
- Amendment to Rules:
 - Any request to the Supreme Court to amend the Uniform Rules of the five classes of trial courts (magistrate, probate, juvenile, state and superior courts), or to adopt rules that deviate from the uniform rules, emergency rules, or experimental rules, shall be filed with the Clerk of the Supreme Court

Refresher...

Venue - Divorce

- The proper “Venue” refers to the county and court in which a case should be heard
- Determining venue includes consideration of the location of the evidence, convenience of the parties
- The venue for divorce cases is in the county where the Respondent lives, if the Respondent is a resident of Georgia
- BUT “If the [Respondent] is not a resident of this state, then in the county in which the [Petitioner] resides; provided, however, a divorce case may be tried in the county of residence of the [Petitioner] if
 - the [Respondent] has moved from that same county within six months from the date of the filing of the divorce action AND
 - said county was the site of the marital domicile at the time of the separation of the parties..”
- Ga. Const. Art. VI. § II. Para. 1 (2016)

Refresher...

Jurisdiction and Venue - Custody

- Initial Custody Case: When parents live in two different states, if the action is an initial custody action, U.C.C.J.E.A. per O.C.G.A. §19-9-61 sets forth the circumstances in which Georgia would have jurisdiction.
- Custody Modifications: O.C.G.A. §19-9-3 requires custody modifications to be filed in the county of the child's parent who has primary physical custody
- Venue CAN be waived if neither party lodges an objection in their initial answer or appearance in the proceedings
- Even when Georgia has jurisdiction to make a custody determination, Trial Courts may weigh the 8 factors set forth in O.C.G.A. 19-9-67(b) and stay the proceedings, transfer the case to a more appropriate forum or take other action due to Georgia being an inconvenient forum.

Jurisdiction - Contempt

- Question: Where do I file a contempt for violation of a Georgia divorce decree?
- Rule: An application/citation for contempt must be filed in the Superior Court where the order in question was issued
- Generally, “only the court offended has power to punish for the contempt” in order to compel obedience to its judgments, orders and processes. *Crutchfield v. Lawson*, 294 Ga. 407 (2014).

Is the question of which county may hear a contempt a venue or subject matter jurisdiction question?

Crutchfield v. Lawson, 294 Ga. 407 (2014)

- H & W divorced in Paulding County. W filed contempt in Cobb County. H answered and filed a contempt counterclaim. H & W announced agreement in open Court. H refused to sign Agreement when reduced to writing after court. Trial Court found H to be in contempt. H appealed, claiming the trial court **lacked SMJX** over the contempt of his divorce decree because only Paulding could enforce its order.
- Rule: whether a trial court is entitled to enforce a divorce decree entered by another court in Georgia **is a question of which venue**, not subject matter jurisdiction, given that the question to be answered would be which Georgia county has the authority to enforce the order.
- Rule: Where a superior court other than the issuing court **acquires jurisdiction** and venue to modify a decree, it also possesses the jurisdiction and venue to entertain a counterclaim alleging contempt of the divorce decree.
- Held: H waived his opportunity to object to venue by entering into the agreement. Trial Court confirmed.

Contempt vs. Modification - Divorce

- Trial courts have broad discretion to determine whether divorce decrees have been violated
- Trial courts have authority to **interpret** and **clarify** divorce decrees
- Trial courts do NOT have authority, under the guise of enforcement in a contempt proceeding, to **MODIFY** the terms of original agreements or divorce decrees
- *Darroch v. Willis*, 286 Ga. 566 (2010)



Improper Modification (No Way) or Permissible Contempt Enforcement (Fair Game)?

CONTEMPT FOR FAILURE TO REFINANCE HOME

- Facts: H was awarded 2 homes in divorce. W ordered to execute QCD to H. H ordered to refinance homes in his own name within 90 days. H found to be in willful contempt for failing to refi homes in his own name, despite having the ability as evidenced by his purchase of other properties after divorce. Trial Court ordered H to sell the homes he refused to refinance.
- Question: Fair game or no way?
- Answer: There is a firm rule against modifying property provisions of divorce decrees as sanctions for contempt. To do so constitutes an improper modification of the material terms of the divorce decree by virtue of ordering the party to **convert an asset** to comply with the order. *Borotkanics v. Humphrey*, No. A17A1573 (Ga. App. March 2, 2018)

Improper Modification (No Way) or Permissible Contempt Enforcement (Fair Game)?

CONTEMPT FOR SABOTAGE OF SALE OF HOME

- Facts: Home and HELOC in H's sole name and H's exclusive possession. W granted home in divorce. H ordered to execute QCD to W so W could sell home. W ordered to pay HELOC and all bills beginning specific date. W files contempt. Trial Court finds that H refused to sign QCD, sabotaged W's attempts to sell home and caused home to fall in disrepair, rendering it unable to be sold. H ordered to pay HELOC and pay for repairs until house could be sold.
- Question: Fair game or no way?
- Answer: In *Sponsler v. Sponsler*, 800 S.E.2d 564 (Ga. 2017), the Court held that despite H's contumacious conduct being the root cause of W's inability to comply with the divorce decree, the Court could not **shift W's express obligation** to assume the HELOC and home repairs after a certain date back onto H. This constituted an impermissible modification of the decree.

Considerations in Addressing Equitable Division of Real Estate in Divorce Cases

- Assets awarded in property division often have sentimental or more (bargained for) value to the recipient than the equivalent value in cash. *Borotkanics*.
- When dividing real estate, include provisions in FJDD and SA's:
 - State current value, payout balance, encumbrances and equity in property at time of order to support client's future damage claim if contempt is filed. Quote comps or appraised values.
 - Mandate timely payment of mortgages, insurance and specific maintenance of property when title remains in OP's name.
 - Designate who will bear the cost of bringing property back to marketable condition if it is permitted to fall in disrepair
 - Requiring OP to list and sell real property if OP cannot refinance in own name by a specific date
 - Including all conditions of the sale, including which party selects agent, address responsibility for reimbursement for repairs to property, required condition of home, setting list price, etc.
 - Schedule execution of QCD after refinance if mortgage is in one party's name and in possession of another
 - Provide for the appointment of a receiver to manage sale of property if OP is non-compliant
- Parties cannot come back after the order is final and reclaim or compel the sale or conversion of real property awarded to a party in order to comply with a provision of the FJDD and SA or Order

Considerations in Addressing Equitable Division of Real Estate in Divorce Cases

- Judges and parties may “reasonably clarify” ambiguous provisions consistent with the “spirit and intent” of FJDD’s
- Test: whether “clarification” is so contrary to the apparent intent of the original order that action amounts to an impermissible modification
- If a contempt remedy involves converting or disposing of a different asset from the original asset awarded, the remedy will likely be deemed an impermissible modification of the original decree.
- Permissible Contempt Remedies to Consider:
 - Imposition of daily dollar amount assessed as a sanction until compliance
 - Attorneys fees, and cite the correct statute as a basis
 - Incarceration until compliance pursuant to a purge order
 - Damages equal to lost value
 - Payment for cost of repairs if needed to restore property to marketable value
 - Suggestive language in order as non-mandatory options for Contemptor to voluntarily relinquish interest in or convert any valuable asset as necessary to comply with purge

Improper Modification (No Way) or Permissible Contempt Enforcement (Fair Game)?

CONTEMPT FOR FAILURE TO DIVIDE RETIREMENT ACCOUNTS

- Facts: Judge Ordered retirement account to be divided 50/50 between spouses, after certain reimbursements were made, and for H to deposit W's 50% into his attorney's trust account for transfer to her. Thereafter, H requested that W to sign a form to transfer the money from H's IRA to W's IRA, to avoid significant penalties. W refused.
- When asked for direction, the Trial Court "amended" its original order to clarify he did not intend for a tax penalty or windfall to inure to either party, and ordered the money to be paid from cash accounts. W appealed.
- Question: Fair game or no way?
- Answer: Attempting to divide **different accounts** in response to cross contempt actions was an impermissible modification of the divorce decree, not clarification. *Morton v. Macatee*, A18A0514 (Court of Appeals, May 15, 2018)
- REMEDY: List who, what, when, where, how, how much and retain financial experts!

Improper Modification (No Way) or Permissible Contempt Enforcement (Fair Game)?

CONTEMPT FOR FAILURE TO FACILITATE COURT ORDERED VISITATION

- Question: Can judge change **custody** if a parent refuses to honor visitation schedule?
- Answer: O.C.G.A. 19-9-3(b) limits modification of custody to once every two years unless there is a showing of material changes in circumstance or condition of parties or child. Other significant factors must be present.
- Question: Can judge change **visitation** if a parent refuses to honor visitation schedule?
- Answer: O.C.G.A. 19-9-3(b) allows judge to review and modify visitation “without the necessity of any showing of a change in any material conditions and circumstances of either party or the child.” See *Stanford v. Pogue*, 340 Ga.App. 86 (2017)(changing visitation schedule 5 months after it was entered to allow D to pick children up from school, jailed M for 20 days without conditions for criminal contempt)
- Question: Can judge incarcerate a parent for refusing to honor visitation schedule?
- Answer: Yes. O.C.G.A. 15-6-8(5) vests Superior Courts with authority to fine up to \$1,000 and incarcerate parties for 20 days when found to be in contempt

Improper Modification (No Way) or Permissible Contempt Enforcement (Fair Game)?

CONTEMPT FOR FAILURE TO PAY CHILD SUPPORT

- Question: Can Trial Court **bar recovery** for contempt of **arrears** accumulated over a **15 year** period due to custodial parent's calculation error based on the doctrine of laches?
- Answer: O.C.G.A. §19-6-17(e) provides that **child support** orders are judgments entitled to full force and effect and are **not subject to retroactive modification**. Barring a claim for child support arrears based on the doctrine of laches amounts to an unauthorized forgiveness of the amount owed in arrears. Trial Courts cannot modify child support provisions in divorce decrees in contempt actions. *Wynn v. Craven*, 301 Ga. 30 (2017). This is so even when parties agree. *Wright v. Burch*, 331 Ga. App. 839 (2015). Parents cannot waive children's rights to receive child support. *Wynn*.
- Question: Can Trial Court **postpone** payments for child support arrears in resolving a **contempt** action?
- Answer: "A trial court may not order the postponement of payment of the child support until the child reaches the age of 18. Minor children are entitled to support during their minority." *Weiss v. Grant*, A18A0002 (Ga. App. 2018).

Improper Modification (No Way) or Permissible Modification (Fair Game)?

MODIFICATION OF ALIMONY

- Question: Can Trial Court modify periodic alimony?
- Answer: O.C.G.A. § 19-6-19(a) provides for modification of periodic alimony upon a finding of voluntary cohabitation of an ex spouse in a meretricious relationship
- Question: Can Trial Court modify permanent alimony?
- Answer: O.C.G.A. § 19-6-19(a) provides for modification of permanent alimony upon the petition of either spouse showing a change in the income and financial status of either former spouse.
- Question: Can Trial Court enter a step down order periodically reducing alimony over time for future payments?
- Answer: “...Fact-finders are given a wide latitude in fixing the amount of alimony ... and to this end, they are to use their experience as enlightened persons in judging the amount necessary for support under the evidence as disclosed by the record and all the facts and circumstances of the case.” *Patel v. Patel*, 285 Ga. 391 (2009)(rejecting W’s argument that the step down provisions constituted an improper future modification not based on a change in circumstances.)

How Would You Modify or Enforce a Foreign Order in Georgia?

Register it!

For example, Georgia courts can only enforce foreign custody orders if they have been locally registered. This requirement is to ensure affected parties are afforded notice that a foreign order is sought to be enforced in a Georgia court, and to give them an opportunity to challenge the authenticity of the order or otherwise contest its validity.

O.C.G.A. §19-9-85 is entitled “Registering foreign custody determinations; requirements of registering court; contesting registration; confirmation of registered order.”

Potential Pitfalls: Enforcing or Modifying Foreign Orders

- Have all parties to the action adequately been notified of the proceedings?
- Does Georgia have jurisdiction over the issues and parties involved?
- Is the venue convenient relative to the parties and evidence involved?
- Have the external orders presently before the court been altered?
- Has a subsequent order been entered that the current court is unaware of?
- Which states law should govern the out-of-state modification request?

Overcoming Pitfalls: Enforcement of Foreign Orders

Due Process Required - notice, opportunity to be heard 19-9-65

When initial custody cases are decided in foreign courts, O.C.G.A. §19-9-86, entitled “Granting relief and enforcing registered custody determinations,” provides Georgia courts with the authority to enforce them IF:

(a) A court of this state may grant any relief normally available under the laws of this state to **enforce** a *registered* child custody determination made by a court of another state.

(b) A court of this state shall **recognize AND enforce**, but may **NOT modify**, *EXCEPT in accordance with Part 2* of this article, a *registered* child custody determination of a court of another state.

5 Steps to Register Foreign Orders

- Step 1: Obtain a certified copy of the foreign order, plus 4 file-stamped copies:
 - A certified copy to file with the Georgia court
 - A copy to serve on the opposing party
 - A copy for the Georgia resident
 - A copy for the attorney's file (and to provide to the Judge in case the clerks copy cannot be located)

5 Steps to Register Foreign Orders

- Step 2: Draft a *Petition for Registration of Foreign [Custody/Visitation/Child Support/Divorce] Order* indicating:
 - The statutory basis upon which Georgia has jurisdiction over the case
 - Identifying info and relationship of all parties and property of the action
 - A statement indicating the date, manner and diligence in notifying the opposing party
 - The issuing court, case number and details of the foreign order (attach and mark foreign order as an exhibit to the petition)
 - Cite the procedural history of all companion cases in other jurisdictions
 - Certify that the requesting party is unaware of subsequent orders or other pending related actions
 - State the specific relief sought from the court in which the foreign order is being registered
 - Include a request for notice and a hearing

5 Steps to Register Foreign Orders

- Step 3: Attach a sworn, notarized *Verification* as to the authenticity of the certified order and the facts alleged in the petition accompanying the foreign order as Exhibit A
- Step 4: Draft a *Notice of Filing of Foreign Judgment*
- Step 5: File with the appropriate Superior Court Clerk:
 - your certified copy of the foreign order
 - your verified *Petition* + two (2) copies (for the clerk to serve)
 - your *Notice of Filing*, and
 - a proposed order setting the requested hearing after 20 days

Questions???

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