"Complex Issues in Family Law."

Jurisdiction Case Study

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Case outlines:

***Groves v. Groves* 250 Ga 459 (1983)**

Addresses the trial court maintaining jurisdiction of a case where a petition was dismissed and prior to a counter claim being filed but an Oral ruling had been pronounced from the bench.

***Razi v. Burns* 354 Ga. App. 608 (2020)**

Georgia Courts maintain subject matter jurisdiction with an original Order from another state when the plaintiff has voluntarily dismissed the matter during litigation as Father had availed himself of the Court.

***Murphy v. Murphy* 328 Ga. App. 767 (2014)**

Does the trial Court maintain subject matter jurisdiction over a custody and a contempt Order, and pendant jurisdiction over any other Orders while Order on the contempt motion is on appeal and subject to supersedeas? Should we be more mindful of showing the Court and each other more respect?

***Paul v. Paul*, 846 S.E.2d 138 (Ga. Ct. App. 2020)**

Does a court that has issued a divorce decree lack jurisdiction to rule on a subsequent motion to set aside the decree based on fraud? Is personal service required on a Motion to set aside as if it were an original complaint. What happens when the attorney does not file a civil case disposition form with the final divorce decree with the Clerk's office? (You are still on the hook).

***Kasper v. Martin*, 841 S.E.2d 488, 490–91 (Ga. Ct. App. 2020)**

Does a superior court have jurisdiction of a child custody action even though a previously filed dependency action regarding the same child was pending in the juvenile court? Does the juvenile Court have authority to award permanent custody without a transfer order from a Superior Court?

Kasper continued: Is a permanent custody proceeding in superior court is the equivalent of a permanent guardianship proceeding in juvenile court?

1) ***Groves v. Groves* 250 Ga 459 (1983)**

Procedural Summary: Mother filed for divorce and custody of three children. A Temporary Hearing was held which Father attended also. The Court ruled orally for Mother to have primary temporary custody of one child, and Father to have temporary primary custody of the other two children. Mother, unhappy with the ruling, voluntarily dismissed the case two days after the hearing, and before a written Order was entered. She then moved to another county, presumably to find another Judge who agreed with her. Father filed his answer and counterclaim three days after the dismissal was filed, but claimed the filing was prior to receiving service of the dismissal. The Trial Court ruled the provisions of the Temporary Order remained in place. Mother appealed.

Question: Can the Court keep jurisdiction of a case and enter a valid written Order after the petition has been voluntarily dismissed and prior to a counterclaim being filed in the matter?

Appellate Ruling: The Court ruled that Plaintiff had availed itself of the Court through the Divorce filing and request for a temporary hearing, and was aware of the temporary ruling, even though a written Order had not been entered. The oral ruling was considered to be a "verdict" under the law. Therefore, the trial court retained jurisdiction of the case, despite the dismissal and subsequent move to another county.

Of note, three Judges dissented with this ruling, objecting that the Court was creating an additional exception not passed into law by the legislature, and that a temporary ruling was not to be considered a verdict.

Relevant Case Law and Georgia Code:

a) We have previously held that "... once a judgment in a civil case has been announced though not formally entered, the attempted filing of a voluntary dismissal thereafter is not permissible and does not effect a dismissal." *Jones v. Burton*, 238 Ga. 394, 395, 233 S.E.2d 367 (1977).

b) The Civil Practice Act permits voluntary dismissal "... by filing a written notice of dismissal at any time before verdict." OCGA 9–11–41(a) (Code Ann. § 81A–141).

c) If a counterclaim has been pleaded by defendant prior to the service upon defendant of plaintiff's motion to dismiss there can be no dismissal against defendant's

objection, unless the counterclaim can remain pending for independent adjudication. OCGA 9–11–41 (Code Ann. § 81A–141).

2) ***Razi v. Burns* 354 Ga. App. 608 (2020)**

Procedural Summary: The family was living in Georgia when the Father took the children to California and attempted to modify the current legitimation Order. The California Court exercised temporary jurisdiction, ruled Georgia likely had jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), and granted Mother custody of the children until further Order from the correct jurisdiction. Father petitioned to modify child custody in Georgia. The Superior Court, DeKalb County, issued a temporary modification order granting mother primary physical and legal custody of the children, and granting father visitation. DFCS removed the children and placed them in father's custody following an allegation by father of abuse by mother against one of the children. Both parties filed motions seeking an immediate hearing. Following an emergency hearing, the trial court appointed a guardian ad litem (GAL) to conduct an investigation and make custody recommendations. Two months later the GAL filed a motion recommending that mother immediately be granted visitation, and called into question father's allegations of abuse. Father filed a notice of voluntary dismissal. At hearing on GAL's motion, the trial court vacated father's voluntary dismissal, granted GAL's motion that the children begin therapy, and that mother be given visitation. Father appealed.

Question: Can the Georgia Court maintain subject matter jurisdiction with an original Order from another state when the plaintiff has voluntarily dismissed the matter during litigation?

Appellate Ruling: The Court ruled that Georgia was the proper jurisdiction and subject matter under the UCCJEA. The Court further ruled against Father's argument that he did not have standing in Georgia to initiate the current matter, stating he had swore under oath as part of the pleadings that he was a resident of Georgia and the children had been enrolled in a Georgia school. Finally, the Court relied on the Groves decision, even with the subsequent Georgia legislatures further defining that dismissals prior to the first witness being sworn. The Court ruled Father had availed himself of the Court, and the parties had multiple hearing in which witnesses had been sworn to testify.

Relevant Case Law and Georgia Code:

a) a court of this state has jurisdiction to make an initial determination under paragraph (1) or (2) of subsection (a) of Code Section 19-9-61 and ... [a] court of this state or a court of the other state determines that neither the child nor the child's parents or any person acting as a parent presently resides in the other state.

b) *Hall v. Wellborn*, 295 Ga. App. 884, 885-886, 673 S.E.2d 341 (2009) (holding that Georgia lost original, exclusive jurisdiction over child custody case when a Florida court determined that both the parents and the child "presently reside[d]" in Florida).

c) nothing in the UCCJEA required that it specifically include in its order factual findings as to the children's "home state." See *Wondium v. Getachew*, 289 Ga. 208, 210 (2), 710 S.E.2d 139 (2011) (rejecting father's argument that the UCCJEA required "jurisdictional findings regarding the children's home state" in the body of the court's custody modification order because the Court found "no such authority").

d) OCGA § 9-11-41 (a) (1) (A), which provides that, "an action may be dismissed by the plaintiff, without order or permission of court ... [b]y filing a written notice of dismissal at any time before the first witness is sworn."

e) Under OCGA § 19-9-63, for a court in Georgia to exercise jurisdiction over a child custody order entered in another state, it must first determine that it has jurisdiction to make the initial child custody order under sections (1) or (2) of OCGA § 19-9-61 (a). In addition to this determination, one of the following scenarios must also be met:

(1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under Code Section 19-9-62 or that a court of this state would be a more convenient forum under Code Section 19-9-67; or

(2) A court of this state or a court of the other state determines that neither the child nor the child's parents or any person acting as a parent presently resides in the other state.

3) ***Murphy v. Murphy* 328 Ga. App. 767 (2014)**

Procedural Summary: Father brought action to hold mother in contempt for violation or a prior court order (do not discuss the case with the children) on his motion to modify child custody provisions of divorce decree. The trial court entered an order ratifying the status quo as to visitation until a custody evaluation had been completed, and another order denying mother's motion to disqualify the Guardian ad Litem. Mother appealed both orders. Father moved to dismiss both appeals, claiming the Appellate Court did not have jurisdiction.

Question: Does a pending appeal from trial court's order on father's motion to temporarily change physical custody, deprive trial court of jurisdiction to hear father's motion to hold wife in contempt for violations of order?

Question: Does the Court of Appels have jurisdiction regardless of whether or not the parties followed the interlocutory appeal procedure or the parties followed the direct appeal procedure. OCGA § 5-6-35(j).

Question: What is Court of Appeals Rule 10?

Appellate Ruling: The Trial Court found Mother in contempt of its prior Order between the parties and the Appellate Court ruled that the trial court was correct; "however, when a party appeals an order granting nonmonetary relief in a child custody case, the order stands until reversed or modified by the reviewing court unless the trial court states otherwise in its judgment or order. The trial court did not state otherwise in the August 23 order, so that order stood and remained enforceable through contempt proceedings notwithstanding the pending appeal".

The Court noted:

> This is sufficient evidence to authorize the trial court to conclude that Nancy Michelle Murphy violated the August 23 order by refusing to cooperate with the custody evaluator. See *Edwards v. Edwards,* 254 Ga.App. 849, 854, 563 S.E.2d 888 (2002) (a person who simply ignores a court order that she believes is erroneous "does so at [her] own peril and must assume the risk of being held in contempt") (citation and punctuation omitted).
>
> See Also: Where there is a temporary order regarding alimony, child support, and child custody which binds the parties pending decision on appeal of a judgment, that temporary order is enforceable through contempt proceedings pending review of the divorce judgment in the Supreme Court.
> Walker v. Walker, 239 Ga. 175, 236 S.E.2d 263 (1977)

Of additional interest, in the end, everyone involved in the case was probably unhappy with the Appellate Court. Although the Court ruled against the Father's motion to dismiss, the Court also found all of Mother's appeals to be frivolous, and specifically mentioned her habit of disparaging the GAL in Court hearings. **The Court even Ordered the Mother's attorneys to pay a fine for assisting the Mother in bringing these frivolous appeals forward and for violating Court of Appeals Rule 10:**

> Footnote 2: Finally as noted above, our previous opinion rebuked appellants for repeated violations of Court of Appeals Rule 10 which provides, "Personal remarks, whether oral or written, which are discourteous or disparaging to any judge, opposing counsel, or any court, are strictly forbidden." *Murphy v. Murphy,* 328 Ga.App. at 774(4), 759 S.E.2d 909 (2014). Their present brief is only somewhat better. It includes, for example, repeated

unsupported and irrelevant assertions that a particular witness has substance abuse problems. **We again rebuke appellants.**
This lack of professionalism does less than nothing to advance their cause.

Relevant Case Law and Georgia Code:

a) OCGA § 5–6–34(a)(11), allows direct appeals of "[a]ll judgments or orders in child custody cases awarding, refusing to change, or modifying child custody or holding or declining to hold persons in contempt of such child custody judgment or orders" immediately appealable); OCGA § 5–6–37

b) A party could raise on appeal on "all judgments, rulings, or orders rendered in the case ... which may affect the proceedings below." OCGA § 5–6–34(d)

c) The Court has found no authority, in which it was held that the appellate court could not consider a challenge to an order entered in the period between the entry of the appealable judgment and the filing of the notice of appeal. Cf. *Sewell v. Cancel*, 295 Ga. 235, 759 S.E.2d 485 (Case No. S13G1274

d) A trial court's decision not to disqualify a guardian ad litem is reviewed for an abuse of discretion. See *Wrightson v. Wrightson*, 266 Ga. 493, 497(6), 467 S.E.2d 578 (1996).

e) Uniform Superior Court Rule 24.9(4) expressly authorizes the guardian ad litem "to examine any residence wherein any person seeking custody or visitation rights proposes to house the minor child."

f) It shall be within the [c]ourt's discretion to determine the amount of fees awarded to the [guardian ad litem], and how payment of the fees shall be apportioned between the parties. The [guardian ad litem's] requests for fees shall be considered, upon application properly served upon the parties and after an opportunity to be heard, unless waived. In the event the [guardian ad litem] determines that extensive travel ****915** outside of the circuit in which the [guardian ad litem] is appointed or other extraordinary expenditures are necessary, the [guardian ad litem] may petition the [c]ourt in advance for payment of such expenses by the parties. Uniform Superior Court Rule 24.9(8)(g).

g) Personal remarks that are discourteous or disparaging to any judge, opposing counsel, or any court, whether oral or written, are strictly forbidden. GA R A CT Rule 10.

***Paul v. Paul*, 846 S.E.2d 138 (Ga. Ct. App. 2020)**

Procedural summary: The Pauls were divorced in 2015. On November 2, 2018, the Wife filed, in the divorce case, a motion to vacate the final decree. Relying on OCGA §9-11-60(d) (2), which allows for judgments to be set aside due to fraud by the opposing party, she alleged that the Husband had concealed assets from her during settlement negotiations. The Wife's motion was timely filed three days before the expiration of the three-year period for filing such motions and she provided Husband's attorney with a copy of the motion to set aside. Husband moved to dismiss, arguing that the motion should have been filed as a new action and that, accordingly, he himself should have been personally served. The trial court granted the motion.

Question: Does a court that has issued a divorce decree lack jurisdiction to rule on a subsequent motion to set aside the decree based on fraud?

No separate action required; the trial court erred by concluding that the Wife was required to file her motion to set aside as a separate action.

OCGA § 9-11-60 provides in relevant part:
(a) Collateral attack. A judgment void on its face may be attacked in any court by any person. In all other instances, *judgments shall be subject to attack only by a direct proceeding brought for that purpose* in one of the methods prescribed in this Code section.
(b) Methods of direct attack. A judgment may be attacked by motion for a new trial or motion to set aside. *Judgments may be attacked by motion only in the court of rendition....*

[7] In *Rowles v. Rowles*,[8] this Court held that the court that issued the parties' divorce decree did not lack jurisdiction to rule on a subsequent motion to set aside the decree based on fraud, finding meritless the appellee's argument that the movant "was required to file a separate lawsuit to set aside the decree."[9] The same rationale applies to this case, and therefore, the trial court erred by concluding that the Wife was required to file her motion to set aside in a separate case.[10]

Question: Is personal service required on a Motion to set aside as if it were an original complaint.

Personal service not required.
OCGA § 9-11-60 (f) provides:
Reasonable notice shall be afforded the parties on all motions. Motions to set aside judgments may be served by any means by which an original complaint may be legally served.

A judgment void because of lack of jurisdiction of the person or subject matter may be attacked at any time. Motions for new trial must be brought within the time prescribed by law. In all other instances, all motions to set aside judgments shall be brought within three years from entry of the judgment complained of.[1]

Question: What happens when the attorney does not file a civil case disposition form with the final divorce decree with the Clerk's office?

You are still on the hook:

The Wife was not required to personally serve the motion to set aside on the Husband; OCGA § 9-11-5: Wife is permitted to serve him by providing his attorney with a copy of the motion.

OCGA § 9-11-58 (b), which addresses when judgment is entered in a civil case, provides in relevant part:
The filing with the clerk of a judgment, signed by the judge, with the fully completed civil case disposition form constitutes the entry of the judgment, and, unless the court otherwise directs, no judgment shall be effective for any purpose until the entry of the same, as provided in this subsection.

"A party who has prevailed by obtaining a judgment, obviously, has a built-in motivation for filing the civil case disposition form: until the judgment is entered in compliance with OCGA § 9-11-58 (b), it is ineffective[,] and the prevailing party cannot collect on or enforce the judgment."

***Kasper v. Martin*, 841 S.E.2d 488, 490–91 (Ga. Ct. App. 2020)**
(Ertter v. Dunbar redux)

Procedural background: In June 2019, the Kaspers, the paternal aunt and uncle of the child at issue, filed a petition in the Superior Court of Glynn County for temporary and permanent custody of the child against the child's father and Judy Martin, the child's maternal grandmother. The child's mother had died shortly before the Kaspers filed their petition. At that time, the child was the subject of a dependency hearing in the Juvenile Court of Glynn County and was in the legal custody of the Glynn County DFACS. The Glynn County Superior Court found that it did not have jurisdiction and that the case should be resolved in the juvenile court and would transfer the matter to that court; however, in the written order, the court dismissed the Kaspers' action without transferring the matter to the juvenile court.

Question: Does a superior court have jurisdiction of a child custody action even though a previously filed dependency action regarding the same child was pending in the juvenile court?

The Court of Appeals held that "The juvenile court has exclusive original jurisdiction over juvenile matters of dependency and is the sole court for initiating actions concerning a child that is alleged to be a dependent child." citing OCGA § 15-11-10 (1) (C). In such cases, "the juvenile court may award temporary custody of [a] child adjudicated to be deprived." *Ertter v. Dunbar*, 292 Ga. 103, 105, 734 S.E.2d 403 (2012). Juvenile courts also have exclusive original jurisdiction over proceedings for a permanent guardianship. See OCGA § 15-11-10 (3) (B);

Question: Does the juvenile Court have authority to award permanent custody without a transfer order from a Superior Court?

Only superior courts, however, have original jurisdiction to hear custody matters. See Ga. Const. Art. VI, Sec. IV, Par. I. see also *Ertter*, 292 Ga. at 105, 734 S.E.2d 403.
A superior court may transfer a custody matter to juvenile court under OCGA § 15-11-15 (a),[4] in which case the juvenile court has concurrent jurisdiction of the custody matter. See OCGA § 15-11-11 (3).[5]
However, the juvenile court "does not have authority to award permanent custody without a transfer order from a superior court." *Ertter*, 292 Ga. at 105, 734 S.E.2d 403; see *C. A. J.*, 331 Ga. App. at 792 (2), 771 S.E.2d 457.

Therefore, when the superior court did not transfer the custody matter to the juvenile court, the superior court retained jurisdiction and erred by dismissing the Kaspers' petition for permanent custody for lack of jurisdiction.

Question: Is a permanent custody proceeding in superior court is the equivalent of a permanent guardianship proceeding in juvenile court?

The Court of Appeals did not agree with the trial court's ruling that a permanent custody proceeding in superior court is the equivalent of a permanent guardianship proceeding in juvenile court and that, therefore, the rule of "priority jurisdiction" dictates that the juvenile court had jurisdiction of the custody issue.

The Court of Appeals found, first, that there was no evidence that the juvenile court appointed a permanent guardian for the child; in fact, the superior court concluded that the child did not have a guardian. Second, the Juvenile Code clearly distinguishes between permanent guardianship and permanent custody: Juvenile Court has original jurisdiction for permanent guardianship and Superior Court has original jurisdiction for permanent custody.

> "The juvenile court shall have concurrent jurisdiction to hear ... [t]he issue of custody and support when the issue is transferred by proper order of the superior court; provided, however, that if a demand for a jury trial as to support has been properly filed by either parent, then the case shall be transferred to superior court for the jury trial." OCGA § 15-11-11 (3).

Encourage your clients to learn to get along and not make things more complicated than the situation already is with regard to all of the moving pieces. The Courts look to:

N) The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interest of the child;

Ga. Code Ann. § 19-9-3 (West)

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[250 Ga. 460] Richard M. Skelly, Atlanta, for Patty S. Groves.

Robert F. Webb, Atlanta, for William A. Groves.

[250 Ga. 459] WELTNER, Justice.

The wife filed a voluntary dismissal of her divorce and custody action on Friday, November 13, 1981, two days after the trial court had announced its ruling as to temporary custody of the children of the parties, but before an order was signed. The husband had appeared at the rule nisi hearing, and was awarded temporary custody of two children, but did not file an answer and counterclaim until Monday, November 16.

The husband moved to vacate the dismissal, contending inter alia that he had no notice of the dismissal until after he filed his response to the complaint.

On hearing, the trial court ruled that the provisions of its order awarding temporary child custody would remain in effect, notwithstanding the purported dismissal. The wife appeals.

We have previously held that "... once a judgment in a civil case has been announced though not formally entered, the attempted filing of a voluntary dismissal thereafter is not permissible and does not effect a dismissal." Jones v. Burton, 238 Ga. 394, 395, 233 S.E.2d 367 (1977).

Similarly, in criminal cases, we have held that "... a defendant does not have an absolute statutory right, under [OCGA § 17-7-93 (Code Ann. § 27-1404)], to withdraw a guilty plea, after the trial court's oral announcement of the [sentence]." State v. Germany, 246 Ga. 455, 271 S.E.2d 851 (1980).

The Civil Practice Act permits voluntary dismissal "... by filing a written notice of dismissal at any time before verdict." OCGA 9-11-41(a) (Code Ann. § 81A-141).

"It has been held that the plaintiff's right to dismiss can not be exercised after a verdict or a finding by the judge which is equivalent thereto has been reached, if he has acquired actual knowledge of the verdict or finding, whether the same has been published or not. (Citations omitted). The principle at the foundation of these decisions is that after a party has taken the chances of litigation and knows what is the actual result reached in the suit by the tribunal which is to pass upon it, he can not, by exercising his right of voluntary dismissal, deprive the opposite party of the victory thus gained. It is knowledge of the actual, not of the possible, result of a case which precludes the exercise of the right of dismissal. When a verdict in favor of the defendant has been reached but not returned into court, and the plaintiff in some way acquires actual knowledge of the finding, he cannot exercise his right to voluntarily dismiss." Peoples Bank of Talbotton v. Exchange Bank of Macon, 119 Ga. 366, 368, 46 S.E. 416 [250 Ga. 460] (1904).

In this case, the wife initiated the litigation, invoked the aid of the court in determining custody and temporary support, appeared at a hearing, and obtained partial relief in the form of the award of temporary custody of one of the three children, along with child support. Being dissatisfied with the grant of temporary custody of two other children to the husband, she filed notice of dismissal, and, according to the findings of the trial court, removed to another county.

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1. We find that the announcement of the trial court of its decision relative to temporary custody of the children is a "verdict" within the contemplation of the Civil Practice Act, supra, as the award is a finding by the judge which is the equivalent of a verdict, and that the wife had acquired actual knowledge of the finding prior to the time she sought to dismiss her action. Accordingly, under the principles enunciated in Peoples Bank of Talbotton, supra, and other authorities above, the trial court did not err in retaining jurisdiction of the parties and control of the litigation. Because judicial economy dictates that all issues between the parties be resolved in one action, we hold that the wife's purported dismissal was ineffective in toto.

2. To the extent that Miller v. Miller, 247 Ga. 114, 276 S.E.2d 324 (1981), and Carter v. Carter, 241 Ga. 335(1), 245 S.E.2d 292 (1978), are in conflict herewith, they are overruled.

Judgment affirmed.

All the Justices concur, except MARSHALL, P.J., and SMITH and GREGORY, JJ., who dissent.

GREGORY, Justice, dissenting.

I have reservations regarding the wisdom of permitting a plaintiff in a civil action to voluntarily dismiss his complaint at any time before verdict. However, that is precisely what the legislature has provided in OCGA 9-11-41 (Code Ann. § 81A-141).

The legislature has provided exceptions to a plaintiff's right to dismiss any time before verdict. If a counterclaim has been pleaded by defendant prior to the service upon defendant of plaintiff's motion to dismiss there can be no dismissal against defendant's objection, unless the counterclaim can remain pending for independent adjudication. OCGA 9-11-41 (Code Ann. § 81A-141). If a receiver has been appointed, dismissal must be by order of the court. OCGA 9-11-66 (Code Ann. § 81A-166). A class action may not be dismissed [250 Ga. 461] without approval of the court. OCGA 9-11-23(c) (Code Ann. § 81A-123).

The majority opinion creates a new exception to a plaintiff's right to dismiss. The exception is to disallow voluntary dismissal where the trial court has announced its decision relative to temporary custody of children in a pending divorce action. This may very well be a needed exception, but I believe legislative action is required to create this new exception. The majority opinion holds that the trial court's announcement is the equivalent of a "verdict" within the meaning of OCGA 9-11-41 (Code Ann. § 81A-141). The word "verdict" relates to a final determination of the action in the trial court. OCGA 9-11-41 (Code Ann. § 81A-141) dictates a time limit before which a plaintiff may voluntarily dismiss. That time limit is at the end of the case, at the time of the verdict. The majority has moved that time limit forward to the temporary order. A temporary order of custody is merely a provision for custody, "until the final judgment in the case." OCGA 19-6-14 (Code Ann. § 30-206). "Verdict" cannot be equated with a temporary custody order.

I am authorized to state that MARSHALL, P.J. and SMITH, J. join in this dissent.

RAZI
v.
BURNS.

A19A1936

Court of Appeals of Georgia

March 16, 2020

WHOLE COURT

NOTICE: Motions for reconsideration must be *physically received* in our clerk's office within ten days of the date of decision to be deemed timely filed.

RE-068

RICKMAN, Judge.

In this child custody action, Father filed a petition to modify child custody in the Superior Court of DeKalb County (the "Georgia Court") and litigated the case for over three years before attempting, unsuccessfully, to voluntarily dismiss the action after several hearings and numerous court orders. He now asserts, among other things, that the Georgia Court failed to establish that it had jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") to consider his modification petition and erred in denying his attempt to voluntarily dismiss the case. Because we conclude that the undisputed record fully supports the Georgia Court's determination that it had jurisdiction under the UCCJEA, and further that the only conflict in this case has been created by Father's own actions and his legal arguments lack merit, we affirm.

The following facts are undisputed. Father and Mother are the parents of two minor children. Although they never married, Father's paternal rights were established by a legitimation action in California. In 2013, the parties entered into a conciliation agreement and stipulated order for joint physical and legal custody of the children in the Superior Court of California (the "California Court"). In the agreement, the parties stipulated that Father was the biological father of the children and that California was their home state.

In January 2016, the parties and both minor children relocated to Georgia. That same month, the children were enrolled into a public school in Atlanta.

On November 7, 2016, Father unilaterally disenrolled the children from school and absconded with them to California without Mother's knowledge or consent. Three days later, Father filed a ex parte petition for modification of child custody[1] in the California Court and obtained an emergency order granting him sole legal custody of the children to enroll them into a California school under the guise that the Atlanta school had refused to do so. Mother filed an application in the California Court seeking an immediate return of the children to Georgia and to her sole custody, and further requesting a transfer of the case to a Georgia court.

Following a hearing, the California Court exercised temporary jurisdiction to issue an emergency order under the UCCJEA.[2] In the emergency order, the California Court declared Father's application for ex parte relief "duplicitous" and explicitly stated that both the application and his statements made during the hearing lacked candor and were "not credible." The California Court expressed doubt that California was the home state of the children under the UCCJEA, noting that "[i]t appears that Georgia is the home state because this proceeding was initiated only days after . . . Father brought the children to California." It further granted Mother sole legal and physical custody of the children "until further order of a court with jurisdiction under the [UCCJEA]."

The following month, in December 2016, Father started the instant proceedings by filing a verified petition to modify custody in the Georgia Court. In the verified petition, he affirmatively asserted that he was a resident of Fulton County, Mother was a resident of DeKalb County and had been for a period of more than six months

preceding the date of the petition, and Georgia was the home state of the minor children.

Mother filed a verified answer in which she also admitted that she was a resident of DeKalb County and had been for a period of more than six months preceding the date of the petition, and that Georgia was the home state of the children. She not only posed no objection to the Georgia Court's exercise of jurisdiction, but specifically requested that the court "immediately" obtain jurisdiction over the case.

In May 2017,[3] the Georgia Court conducted a hearing on Father's modification petition, a transcript of which is not contained in the record. Following the hearing - and contrary to the position taken by the dissent - the Georgia Court issued a temporary modification order in which it considered its jurisdiction, explicitly finding that both Father and Mother - and thus the children[4] - resided in Georgia and that jurisdiction and venue were proper in its court. The Georgia Court ordered that Mother retain primary physical and legal custody of the children and granted Father visitation.

A follow-up hearing was scheduled to occur in November 2017, although it was continued several times on Father's motion. Meanwhile, the infighting between Father and Mother continued, with each parent lodging various allegations of misconduct against the other, and Father filing a motion for the appointment of a guardian ad litem ("GAL") to investigate the claims.

In May 2018, the Department of Family and Children Services ("DFCS") removed the children from their Mother's home and placed them into Father's custody following an allegation of abuse against one of the children. Pursuant to a "safety plan" implemented by DFCS, the children were to have no contact with Mother. Both parents filed motions in the Georgia Court seeking an immediate hearing, with the Father asking to terminate Mother's visitation for the alleged acts of violence, and the mother seeking to hold Father in contempt for "vilify[ing] and defam[ing]" her character with "unfounded" abuse allegations resulting in her loss of custody.

In June 2018, the Georgia Court held an emergency hearing - which also constituted the follow-up hearing - to address all outstanding motions. Noting that it was "not persuaded that either party [was] being entirely truthful" due to their "very contentious relationship," the court held that it "[could not] make a wholly informed custody decision without the benefit of a full investigation."[5] The court, therefore, directed that the safety plan would be honored, but it appointed a GAL to conduct an investigation and make recommendations concerning child custody and visitation based upon the best interests of the children.

Two months later, the GAL filed a motion in which she stated that it was "imperative" that the court order the children to begin therapy, and that Mother "immediately" be granted weekly visitation. She further requested that she be given an extension of time in which to complete a report so that she may have the opportunity to consult with the children's therapist and observe their visitation with Mother before making a custody recommendation. The GAL also called into question the Father's allegations of abuse, noting that they were "unsubstantiated," and stated that Mother had been kept from having any meaningful interactions with the children for over six months.

The Georgia Court scheduled a hearing to consider the GAL's motion on January 22, 2019.[6] In the week before the hearing, Father filed a motion for a continuance and his attorney filed a motion to withdraw as counsel, citing "disagree[ments] on litigation strategy." The Georgia Court denied the motion for continuance and objected to the motion for withdrawal - taking notice that it was Father who requested the appointment of the GAL - and directed both Father and his counsel to appear at the hearing.[7]

Father appeared on the day of the hearing and filed a notice of voluntary dismissal without prejudice. The Georgia Court vacated Father's

voluntary dismissal. In so doing, the court held, among other things, that it "ha[d] held multiple hearings in this case at which witnesses testified," that "it appear[ed] from [Father's] testimony at the most recent hearing that he [was] dissatisfied with the preliminary investigation conducted by the GAL," and that "the filing of the dismissal prior to the hearing was an attempt to halt any further investigation." In a separate order, the court granted the GAL's motion that the children begin therapy immediately; Mother be given limited, unsupervised visitation with the children; and the GAL receive additional time in order to conduct her investigation. Father now challenges the Georgia Court's authority to issue those orders.

1. Father argues that the Georgia Court erred in holding that it had subject matter jurisdiction under the UCCJEA to consider the modification petition that Father himself filed in the Georgia Court. Specifically, he contends that the trial court failed to make express findings that Georgia is the "home state" of the children. As set forth below, the Georgia Court properly determined that it had jurisdiction under the UCCJEA to consider the modification petition, and the UCCJEA did not require that the court include in its order express factual findings as to the children's "home state."

The UCCJEA has been adopted and codified in both Georgia and California. See OCGA § 19-9-40 et seq.; Cal. Fam. Code § 3400 et seq. The pertinent provision of the UCCJEA provides that a Georgia court may not modify a child-custody determination made by a court in another state *unless*

> a court of this state has jurisdiction to make an initial determination under paragraph (1) or (2) of subsection (a) of Code Section 19-9-61 and . . . [a] court of this state or a court of the other state determines that neither the child nor the child's parents or any person acting as a parent presently resides in the other state.

OCGA § 19-9-63 (2) (emphasis supplied)[8]; see also Cal. Fam. Code § 3423 (b). As to the first of these requirements, a court of this state has jurisdiction to make an initial custody determination under OCGA § 19-9-61 (a) (1) if Georgia was "the home state of the child on the date of the commencement of the proceeding." See also Cal. Fam. Code § 3421 (a) (1). "Home state" is defined as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding." See OCGA § 19-9-41 (7); Cal. Fam. Code § 3402 (g). As shown below, both requirements of OCGA § 19-9-63 (2) have been satisfied.

The Georgia Court conducted a untranscribed, evidentiary hearing and based on the evidence and argument of the parties, issued the temporary modification order in which it explicitly found that Father and Mother resided in Georgia and that jurisdiction was proper in its court. Although the dissent takes issue with the fact that the order did not explicitly reference the children in its order, it is undisputed that the children lived with and between their parents throughout the duration of these proceedings, and there is no allegation or record evidence to the contrary. Rather, as illustrated below, the Georgia Court's determination that jurisdiction was proper in its court is at least supported - if not demanded - by the evidence.

As to the children's "home state," i.e., the state in which they lived for at least six consecutive months before Father filed the modification petition in the Georgia Court, both parties attested to that fact in their verified pleadings. Their sworn statements are corroborated by evidence that the children had been enrolled in a public school in Georgia from January 2016 through November 2016, when Father unilaterally disenrolled them and absconded with them to California, only to return to Georgia to file the modification petition in the Georgia Court the following month. See OCGA §§ 19-9-41 (7), 19-9-61 (a) (1); Cal. Fam. Code §§ 3421 (a) (1), 3402 (g). See generally *Black v.*

Black, 292 Ga. 691, 694 (2) (a) (740 SE2d 613) (2013) (holding that Georgia was the "home state" of the children under the UCCJEA because the mother and children had lived in Georgia for more than six months prior to the filing of the child custody petition and continued to live there at the time it was filed).

As to the requirement that the court find neither the children nor their parents "presently reside[d]" in California, again, both Father and Mother swore in their verified pleadings that they and their children resided in Georgia, a fact that is also corroborated by the children's school enrollment in Georgia. See OCGA § 19-9-63 (2); Cal. Fam. Code § 3423 (b). See generally *Hall v. Wellborn*, 295 Ga. App. 884, 885-886 (673 SE2d 341) (2009) (holding that Georgia lost original, exclusive jurisdiction over child custody case when a Florida court determined that both the parents and the child "presently reside[d]" in Florida).

It follows that the record fully supports the Georgia Court's determination that it had jurisdiction to modify the child custody order under the UCCJEA. See OCGA § 19-9-63 (2); Cal. Fam. Code § 3423 (b). Although the Georgia Court was required to consider its own jurisdiction, as it did, nothing in the UCCJEA required that it specifically include in its order factual findings as to the children's "home state." See *Wondium v. Getachew*, 289 Ga. 208, 210 (2) (710 SE2d 139) (2011) (rejecting father's argument that the UCCJEA required "jurisdictional findings regarding the children's home state" in the body of the court's custody modification order because the Court found "no such authority"). Likewise, the Georgia Court's explicit finding following a hearing that both Father and Mother "presently reside[d]" in Georgia was sufficient to include a finding as to the children when there is not a scintilla of record evidence suggesting that the children resided anywhere but with their parents.

Consistent with our holding, we note that the official comment §101 to the UCCJEA states that it was intended, in part, to prevent the very type of gamesmanship at play in this case by "[d]iscourag[ing] the use of the interstate system for continuing controversies over child custody." UCCJEA § 101 cmt; see generally *Bowman v. Bowman*, 345 Ga. App. 380, 383 (2) (a) (811 SE2d 103) (2018) (recognizing that "[w]e construe the UCCJEA liberally so as to carry out the remedial aspects of the law").

2. Father argues that the Georgia Court erred in vacating his voluntary dismissal. In support of his argument, he relies on OCGA § 9-11-41 (a) (1) (A), which provides that, "an action may be dismissed by the plaintiff, without order or permission of court . . . [b]y filing a written notice of dismissal at any time before the first witness is sworn."

As correctly held by the Georgia Court, Father's voluntary dismissal was not filed "before the first witness [was] sworn." OCGA § 9-11-41 (a) (1) (A). Rather, it was filed after the Georgia Court "held multiple hearings in this case at which witnesses testified and [after the court] issued a temporary order regarding custody and visitation," among other orders. Indeed, the transcript of the emergency hearing conducted in June 2016 shows that, at the very latest, witnesses were sworn on that date. Thus, under a plain reading of the statute, Father was not entitled to voluntarily dismiss the case without order or permission of the court. See *Arby's Restaurant Group v. McRae*, 292 Ga. 243, 245 (1) (734 SE2d 55) (2012) ("[W]e must presume that the General Assembly meant what it said and said what it meant.") (citation and punctuation omitted); see also *Durrance v. Schad*, 345 Ga. App. 826, 829-830 (1) (815 SE2d 164) (2018).

Father's tactic in this litigation is similar to that of the wife in *Groves v. Groves*, 250 Ga. 459, 459 (298 SE2d 506) (1983), as summarized by our Supreme Court:

> the wife initiated the litigation, invoked the aid of the court in determining custody and temporary support, appeared at a hearing, and obtained partial relief in the form of

> the award of temporary custody of one of the three children, along with child support. Being dissatisfied with the grant of temporary custody of two other children to the husband, she filed notice of dismissal, and, according to the findings of the trial court, removed to another county.

Id. at 459. The *Groves* Court held that the wife's voluntary dismissal of her case was ineffective because it violated a prior version of OCGA § 9-11-41 (a), which permitted a voluntary dismissal "any time before verdict." Id. The Court determined that a "decision relative to temporary custody of the children is a 'verdict' within the contemplation of the Civil Practice Act." Id. Consistent with that analogy, a sworn witness in a custody hearing resulting in a temporary custody determination is a "witness" within the contemplation of the Civil Practice Act. See OCGA § 9-11-41 (a) (1) (A). Cf. *Groves*, 250 Ga. at 459. Compare *Target Nat. Bank v. Luffman*, 324 Ga. App. 442, 444 (750 SE2d 750) (2013) (holding that OCGA § 9-11-41 (a) does not bar a voluntary dismissal after sworn testimony is given in a magistrate court not governed by the Civil Practice Act and in which there was no record).

Our conclusion in this regard is further buttressed by the fact that since *Groves*, the legislature has further constricted the time in which a plaintiff may voluntarily dismiss his or her action. Compare OCGA § 9-11-41 (a) (1) (A) (2019) (allowing dismissal "any time before the first witness is sworn") with OCGA § 9-11-41 (a) (2002) (allowing dismissal "any time before the plaintiff rests his case") with Code Ann. § 81A-141 (1982) (allowing dismissal "any time before verdict"). Thus, we see no basis on which to hold that the principles stated in *Grove* would not apply to the facts of this case.

3. Father asserts that every order issued by the Georgia Court must be vacated because he never had standing to bring this action in the first place. In so arguing, he does not dispute that he is the legal father of the children; indeed, he admits it. Rather, he contends only that the order from the California Court - which he admits exists - legitimating the children and granting him custodial rights was never domesticated in Georgia.

Suffice it to say, the record is replete with Father's sworn averments that he is the legal father of the children, a fact that is otherwise stipulated to by the parties and uncontested throughout the history of the case. See *Foster v. State*, 157 Ga. App. 554, 555 (278 SE2d 136) (1981) ("Statements in pleadings are considered as judicial . . . admissions, and . . . until withdrawn or amended, are conclusive."). Nothing in Georgia law provides that a sworn, stipulated, and undisputed fact regarding paternity cannot be considered such in the absence of a domesticated order from a foreign court. Cf. OCGA § 19-9-85 (recognizing that a child custody orders from foreign courts "may" be registered in this state).

4. Lastly, Father argues that the case should be dismissed because the Georgia Court filed its order appointing the GAL and its order granting the GAL's motion for therapy, visitation, and an extension of time before it filed the nunc pro tunc order from the emergency hearing in which it held that the GAL would be appointed. Any argument that Father was harmed by the sequence in which the Georgia Court filed its orders lacks merit. See *Reder v. Dodds*, ____, Ga. App. ____ (5) (Case No. A19A1668, decided Feb. 24, 2020). ("In order to constitute reversible error, both error and harm must be shown.") (citation and punctuation omitted).

*Judgment affirmed. McFadden, C.J., Barnes, P.J., Doyle, P.J., Dillard, P.J., McMillian, P.J. and Mercier, Gobeil, Coomer and Hodges, JJ. concur. Brown, J. concurs in judgment only. Miller, P.J., Reese, Markle, JJ. and Senior Appellant Judge Herbert E. Phipps, dissent.**

*THIS OPINION IS PHYSICAL PRECEDENT ONLY. COURT OF APPEALS RULE 33.2(a).

MILLER, Presiding Judge, dissenting.

I respectfully dissent because the trial court failed to make the proper findings to support its exercise of jurisdiction under the UCCJEA.

Under OCGA § 19-9-63, for a court in Georgia to exercise jurisdiction over a child custody order entered in another state, it must first determine that it has jurisdiction to make the initial child custody order under sections (1) or (2) of OCGA § 19-9-61 (a). In addition to this determination, one of the following scenarios must also be met:

> (1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under Code Section 19-9-62 or that a court of this state would be a more convenient forum under Code Section 19-9-67; or
>
> (2) A court of this state or a court of the other state determines that neither the child nor the child's parents or any person acting as a parent presently resides in the other state.

OCGA § 19-9-63.

It is clear that neither of the two prongs of OCGA § 19-9-63 have been satisfied in this case. Section (1) is clearly not met in this case since the California court has not determined that it no longer has jurisdiction, nor has it made an explicit determination that Georgia would be a more convenient forum. Section (2) has also not been met because the trial court has not made any affirmative determination that the children do not reside in California. The plain language of the statute is clear that a court must affirmatively make this determination, and the trial court has not done so. A boilerplate statement that "jurisdiction is proper" is insufficient to meet this explicit statutory demand, and it is not our role as an appellate court to make this factual determination in the first instance.[9] We cannot be the court of appellate review and simultaneously make the determinations that the statute requires of the trial court.

Even if we could, I note that the record shows that the father moved the children to California at some point around the time that the petition in this case was filed, and it is not clear when, or if, the children moved back to Georgia. Neither party's pleading in this case definitively says whether the children were residing here in Georgia or were still residing in California at the time the petition was filed here in Georgia.[10] See *Plummer v. Plummer*, 305 Ga. 23, 25-29 (2) (823 SE2d 25) (2019) (instructing us to evaluate whether a trial court has jurisdiction under the UCCJEA by looking to the facts and circumstances at the time the petition is filed). Accordingly, I cannot say that the trial court has made the requisite findings to support its exercise of jurisdiction under OCGA § 19-9-63. See *Delgado v. Combs*, 314 Ga. App. 419, 425-428 (1) (724 SE2d 436) (2012) (concluding that the trial court erred by exercising jurisdiction under OCGA § 19-9-63 when there was a lack of evidence to support its conclusion that none of the parties still resided in Kansas).[11]

Although the father filed the petition in Georgia and yet is challenging the trial court's jurisdiction, we have an independent duty to ensure that the trial court properly exercised its subject matter jurisdiction. *Barland Co. v. Bartow County Bd. of Tax Assessors*, 172 Ga. App. 61, 62 (322 SE2d 316) (1984). I share the majority's concern that the petitioner may be attempting to manipulate the court system to escape a child custody order that he does not like. In my view, however, the remedy for this situation is for Georgia courts to exercise caution, restraint, and thoroughness before assuming jurisdiction over modification petitions like the one in this case because the provisions of the UCCJEA are designed to address these scenarios. Because I would vacate the trial court's orders and remand for it to make the factual findings that the UCCJEA demands, I respectfully dissent.

I am authorized to state that Judge Reese, Judge Markle and Senior Appellant Judge Herbert E. Phipps join me in this dissent.

Footnotes:

[1] Father's petition for modification of child custody is not contained in the record but is referenced in the California Court's December 2016 order.

[2] See OCGA § 19-9-64; Cal. Fam. Code §3447.

[3] In the interim, the Georgia Court ordered the parties to mediation, and in April 2017, they entered into a temporary mediation agreement.

[4] Although the trial court's order does not explicitly state that the children resided in Georgia, it is undisputed that the children lived with and between their parents and according to the parties' verified pleadings, Georgia was their home state.

[5] The order containing its written ruling from the June 2018 emergency hearing was dated February 7, 2019, nunc pro tunc to June 26, 2018.

[6] The record does not contain a transcript of the January 22, 2019 hearing.

[7] The Georgia Court later granted the attorney's motion to withdraw.

[8] OCGA § 19-9-63 excepts jurisdiction otherwise allowed by its temporary emergency jurisdiction, such as that which the California Court exercised in its 2016 emergency order. See OCGA § 19-9-64. See also Cal. Fam. Code §3447.

[9] The Supreme Court of Georgia's holding in *Wondium v. Getachew*, 289 Ga. 208, 210 (2) (710 SE2d 139) (2011), is not to the contrary. In that case, the Supreme Court was discussing a portion of the "home state" provision that did not explicitly require the trial court to "determine" anything. See OCGA § 19-9-61 (a).

[10] The father's allegation in his petition that Georgia is the children's "home state" is not sufficient to establish the children's residence because the technical statutory term "'home state' is not synonymous with [a person's] 'residence.'" (Citation omitted.) *Markle v. Dass*, 300 Ga. 702, 705 (797 SE2d 868) (2017).

[11] I further note that it does not appear that the trial court could have exercised emergency jurisdiction under OCGA § 19-9-64. Among other things, the trial court in this case permanently modified the custody arrangement to grant sole custody to the father, and so "the court could not use temporary emergency jurisdiction to take the action that it did." *Delgado*, supra, 314 Ga. App. at 425 (1).

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330 Ga.App. 169
Court of Appeals of Georgia.

MURPHY et al.

v.

MURPHY.

No. A14A1137.
|
Nov. 17, **2014**.
|
Denied Dec. 4, **2014**.
|
Certiorari Denied March 2, 2015.

Synopsis

Background: Father filed motion to hold mother in contempt for violation of prior court order on his motion for temporary change of custody, in which trial court had ordered parties to undergo custody evaluation and to not discuss case with children. Following hearing at which mother failed to appear, the trial court, A. Quillian Baldwin, Jr., held mother in contempt for refusing to cooperate with custody evaluation, and held mother's attorneys in contempt for discussing case with children and failing to ensure mother's appearance at hearing on motion. Mother and attorneys requested leave to file discretionary appeal.

Holdings: The Court of Appeals, McFadden, J., held that:

Court of Appeals had **jurisdiction** to review contempt order;

appellate briefs filed by mother and mother's attorneys did not comply with appellate rules;

judge to whom father's motion for contempt was transferred was not disqualified from hearing motion;

appeal from trial court's ruling on father's motion to temporarily change physical custody did not deprive trial court of **jurisdiction** to hear motion for contempt;

mother's attorney was not deprived of adequate notice on charge for indirect contempt arising out of his discussion of case with children;

evidence supported order holding attorney in contempt for discussing case with children;

evidence supported order holding mother in indirect criminal contempt for her refusal to cooperate with custody evaluation; and

attorneys could not be held in contempt of court based on mother's failure to appear at hearing.

Affirmed in part and reversed in part.

See also, 759 S.E.2d 909.

Attorneys and Law Firms

**791 Millard Farmer, Jr., Atlanta, Larry King, for Appellants.

Kilpatrick Townsend & Stockton, Stephen Earl Hudson, William R. Poplin Jr., Atlanta, **792 Glover & Davis, Taylor Bridges Drake, Newnan, Michael Williams Warner, for Appellee.

Opinion

McFADDEN, Judge.

*169 Although this is our third opinion in this custody modification action, we are still not presented with a final order on the petition to modify. Instead we are presented with a series of rulings holding appellant Nancy Michelle **Murphy** and her attorneys, Millard Farmer and Larry King, in contempt of court.

Farmer has been held in contempt of an earlier order that prohibited the parties from discussing the case with their children. As Farmer signed a brief to which he exhibited affidavits of the children echoing their mother's anger at John **Murphy**, there is sufficient evidence to support that ruling; and we find that Farmer received sufficient notice and opportunity to be heard before he was held in contempt. Nancy Michelle **Murphy** has been held in contempt of another provision of that order which required her to cooperate with a custody evaluator. Any insufficiency of the evidence presented on that charge at the contempt hearing was supplied by her own brief in opposition to the motion for contempt. In that brief she announced that she deemed herself to be entitled to defy the provision directing her to cooperate with the evaluator. And again we find sufficient notice and opportunity to be heard. Finally Farmer and King have *170 been held in contempt for failure to have Nancy Michelle **Murphy** present at the contempt hearing. But as she was not under subpoena and had not been ordered to appear in person, she was entitled to appear through counsel; so that ruling must be reversed.

We therefore affirm the trial court's contempt order in part and reverse it in part.

1. *Prior appeals.*

Nancy Michelle **Murphy** and John **Murphy** were divorced in 2006. They have two children, born in November 1998 and January 2001. In April 2012, John **Murphy** filed this action, seeking to modify the child custody provisions of the divorce decree.

Nancy Michelle **Murphy** has repeatedly moved to recuse the trial court judge. ***Murphy*** *v.* ***Murphy***, 322 Ga.App. 829, 747 S.E.2d 21 (2013), her first appeal in this case, was a direct appeal from an interlocutory order denying one of her motions to recuse. We dismissed on the basis the order was not appealable as a collateral order and was not appealable under the version of OCGA § 5–6–34(a)(11) adopted in 2013, which authorizes direct appeals from "judgments or orders in child custody cases awarding, refusing to change, or modifying child custody or holding or declining to hold persons in contempt of such child custody judgment or orders."

Our Supreme Court granted Nancy Michelle **Murphy's** petition for certiorari to address whether we erred when we concluded that the 2013 amendment of OCGA § 5–6–34(a)(11) applied retroactively. In ***Murphy*** *v.* ***Murphy***, 295 Ga. 376, 761 S.E.2d 53 (**2014**), the Supreme Court ruled that the amendment did not apply retroactively but nonetheless affirmed the dismissal of Nancy Michelle **Murphy's** appeal on the ground that, "even under the prior version of OCGA § 5–6–34(a)(11), there was no right of direct appeal from the recusal order at issue." Id. at 379, 761 S.E.2d 53.

In the meantime, on August 23, 2013, the trial court entered an order that, among other things, denied John **Murphy's** motion to temporarily change physical custody of the children, directed the parties not to discuss the case with the children, ordered

a custody evaluation, and directed the parties to cooperate with the custody evaluator. In Nancy Michelle **Murphy's** second appeal to our court, *Murphy v. Murphy*, 328 Ga.App. 767, 759 S.E.2d 909 (**2014**), we affirmed that order. We imposed a frivolous appeal penalty against Nancy Michelle **Murphy's** counsel, finding that the appeal was frivolous and dilatory and rife with violations of Court of Appeals Rule 10, which forbids oral or written personal remarks that are discourteous or disparaging to any judge, opposing counsel, or any court.

***171** 2. *Facts underlying the present appeal.*

Six days after the August 23, 2013 order was entered, John **Murphy** filed a motion seeking to hold Nancy Michelle **Murphy** in contempt for violating its visitation provisions. In response Nancy Michelle **Murphy** filed affidavits from the children, testifying ****793** that the motion for contempt had been read to them in the presence of their mother, that their mother had not interfered with their father's visitation as alleged in the motion for contempt, and that they were extremely angry at their father for not telling the truth to the court.

John **Murphy** then amended his motion for contempt. He alleged that Nancy Michelle **Murphy** and "her lawyer" were in contempt of the order's provision prohibiting the parties from discussing the case with the children. He also alleged that Nancy Michelle **Murphy** was violating the requirement of the August 23 order that she cooperate with the custody evaluator in that she had refused to complete the paperwork the custody evaluator required before beginning the evaluation.

The trial court conducted a hearing on the contempt motion on October 3, 2013. Nancy Michelle **Murphy** and Farmer did not appear, but King did appear on behalf of Nancy Michelle **Murphy**. After hearing testimony from John **Murphy** and the driver hired to transport the children from Nancy Michelle **Murphy's** residence to John **Murphy's** residence, the trial court found Nancy Michelle **Murphy**, Farmer, and King to be in contempt. The trial court found Farmer to be in contempt for discussing the case with the children in violation of the August 23 order. It found Nancy Michelle **Murphy** to be in contempt for wilfully refusing to cooperate with the custody evaluator in violation of the August 23 order. And it found King and Farmer to be in contempt because of Nancy Michelle **Murphy's** failure to appear at the contempt hearing.

Nancy Michelle **Murphy**, Farmer, and King filed an application for discretionary appeal of the contempt order. We granted the application, and this latest appeal followed. We first address John **Murphy's** motion to dismiss the appeal, then turn to the deficiencies in the appellants' brief, and finally, address the merits of the challenges to the contempt order.

3. *Motion to dismiss the appeal.*

Because this is an appeal from a contempt order, the appellants were not required to follow the interlocutory appeal procedure. OCGA § 5–6–34(a)(2); *Massey v. Massey*, 294 Ga. 163, 164–165(2), 751 S.E.2d 330 (2013); see also OCGA § 5–6–34(a)(11) (making "[a]ll judgments or orders in child custody cases awarding, refusing to change, or modifying child custody or holding or declining to hold persons in contempt of such child custody judgment or orders" ***172** immediately appealable); OCGA § 5–6–37 ("Unless otherwise provided by law, an appeal may be taken to the Supreme Court or the Court of Appeals by filing with the clerk of the court wherein the case was determined a notice of appeal.").

Because they filed an application for discretionary appeal, we have **jurisdiction** regardless of whether or not they were entitled to follow the direct appeal procedure. OCGA § 5–6–35(j). So we do not decide if they were so entitled, and we deny John **Murphy's** motion to dismiss the appeal.

4. *Deficiencies in the appellants' brief.*

As a threshold matter, we address the deficiencies in the appellants' brief.

The Appellate Practice Act, at OCGA § 5–6–40, provides that enumerations of error are to be concise and "shall set out separately each error relied upon." "It is desirable that each enumeration be explicit, precise, intelligible, unambiguous,

unmistakable, and unequivocal." *MacDonald v. MacDonald,* 156 Ga.App. 565, 569(1)(d), 275 S.E.2d 142 (1980) (physical precedent). Our rules direct that "[t]he sequence of arguments in the briefs shall follow the order of the enumeration of errors, and shall be numbered accordingly." Court of Appeals Rule 25(c)(1). As to each enumeration of error, an appellant is to specify how the error was preserved and to state concisely the applicable standard of review. Court of Appeals Rule 25(a). Briefs and enumerations of error that do not conform to those requirements hinder our ability to determine the basis and substance of an appellant's appeal. *Williams v. State,* 318 Ga.App. 744, 744–745, 734 S.E.2d 745 (2012).

The appellants' brief does not conform to those requirements. Their brief and enumerations **794 of error are rambling and difficult to follow; several enumerations contain multiple allegations of error. These deficiencies are illustrated by enumeration of error four, which is set out in the margin.[1]

*173 As to some of the issues that the appellants attempt to raise, these deficiencies constitute abandonment. The appellants do not address each enumeration of error in the argument section of their brief, and their arguments in that section do not follow the order of the enumeration of errors. And many of the alleged errors referenced in the enumeration of errors, are not supported with arguments, citations to the record, or citations of authority. Court of Appeals Rule 25(c)(2) provides, "Any enumeration of error which is not supported in the brief by citation of authority or argument may be deemed abandoned." See also Court of Appeals Rule 25(c)(2)(i) ("Each enumerated error shall be supported in the brief by specific reference to the record or transcript. In the absence of such reference, the Court will not search for or consider such enumeration.").[2]

In spite of these deficiencies, we will review the claims of error that we are authorized to reach to the extent that we can ascertain the appellants' arguments, *Williams,* 318 Ga.App. at 744–745, 734 S.E.2d 745, and to the extent they have not abandoned them.

5. *Claim that trial judge is disqualified.*

The appellants argue that the Honorable A. Quillian Baldwin, Jr., was disqualified from adjudicating the contempt motion for two reasons: because another judge's transfer of the case to Judge Baldwin was illegal and because unadjudicated disqualification motions were pending against Judge Baldwin at the time that he decided the *174 contempt motion. However, the appellants have cited no authority for the proposition that the transfer of the case to Judge Baldwin was illegal. On the contrary, Uniform Superior Court Rule 3.3 authorizes "an assigned judge [to] transfer an assigned action to another judge with the latter's consent in which event the latter becomes the assigned judge." And **795 there are no unadjudicated disqualification motions. Judge Baldwin orally denied all such motions before hearing the contempt motion. See Uniform Superior Court Rule 25.1 ("In no event shall the motion [for disqualification] be allowed to delay the trial or proceeding.").

The appellants argue that Judge Baldwin was deprived of **jurisdiction** to consider the contempt motion because the August 23 order was currently on appeal and subject to supersedeas. Under OCGA § 5–6–34(e), however, when a party appeals an order granting nonmonetary relief in a child custody case, the order stands until reversed or modified by the reviewing court unless the trial court states otherwise in its judgment or order. The trial court did not state otherwise in the August 23 order, so that order stood and remained enforceable through contempt proceedings notwithstanding the pending appeal. See *Walker v. Walker,* 239 Ga. 175, 176, 236 S.E.2d 263 (1977) (custody award that is not subject to supersedeas is enforceable through contempt; decided before July 1, 2011 effective date of OCGA § 5–6–34(e)).

6. *Contempt citations.*

Having addressed these preliminary matters, we now turn to the trial court's order finding Farmer to be in contempt for discussing the case with the children in violation of the August 23 order, finding Nancy Michelle **Murphy** to be in contempt for wilfully refusing to cooperate with the custody evaluator in violation of the August 23 order, and finding both attorneys to be in contempt because of Nancy Michelle **Murphy's** failure to appear at the contempt hearing.

(a) *Violation of the prohibition of discussing this case with the children.*

The trial court held attorney Farmer in contempt after finding that he was "discussing the issues, allegations, and claims in this case with the children and that such discussions are not necessary to implement the terms of the August Order." The appellants argue that this judgment of contempt must be reversed because Farmer did not receive adequate notice and because the evidence does not support it.

(i) *Notice.*

The appellants argue that the trial court erred in finding that they had sufficient notice of the contempt allegations against them and the hearing on the contempt. We conclude that the notice was reasonable.

***175** Whether or not a party is entitled to notice of the charges of contempt and a hearing on those charges depends on the type of contempt he is charged with. "Acts of contempt are either direct, meaning they are committed within the sensory perception of the judge, or they are indirect, meaning they occur outside the sensory perception of the judge." *In re Shook,* 254 Ga.App. 706, 707, 563 S.E.2d 435 (2002) (citation and punctuation omitted). When a party is charged with committing direct contempt, no advance notice is required and due process is satisfied "by simply giving [the party charged] an opportunity to speak on her own behalf." *Johnson v. State,* 258 Ga.App. 33, 36(2)(b), 572 S.E.2d 669 (2002) (citation omitted). When a party is charged with committing indirect contempt, the party is "entitled, among other things, to reasonable notice of the charges, to counsel of his own choosing, and to the opportunity to call witnesses." *Ramirez v. State,* 279 Ga. 13, 16(3), 608 S.E.2d 645 (2005).

Farmer was charged with indirect contempt and therefore was entitled to reasonable notice of the allegations against him. "[T]he notice must be reasonably calculated to inform persons of the charges against them and their opportunity for a hearing at a specific time and place to present their objections." *Hedquist v. Hedquist,* 275 Ga. 188, 189, 563 S.E.2d 854 (2002) (citation omitted). The notice here met those requirements.

The appellants were adequately informed of the charges. The amended motion for contempt sufficiently specified the allegedly contumacious conduct. It sought to hold counsel in contempt for discussing the issues in the case with the parties' children.

The appellants argue that referring to "Defendant's lawyer" instead of "Millard ****796** Farmer" rendered the motion insufficient. They cite no supporting authority for that argument, and we reject it.

The appellants were adequately notified of their opportunity to be heard at a specific time and place. On September 12, **2014**, counsel for John **Murphy** served upon counsel for Nancy Michelle **Murphy** a "Notice of Hearing" that specified the date, time, and location of a hearing before the trial court "in order for [the trial court] to consider the relief requested in Plaintiff's Motion for Contempt filed in the above captioned matter on August 29, 2013." Counsel served that "Notice of Hearing" by United States mail and by email. Additionally the trial court issued a calendar to counsel for the parties, confirming that a hearing was scheduled for October 3, 2013. The appellants do not deny receiving the notice of hearing or the calendar. Counsel for John **Murphy** served the amended motion for contempt upon counsel for Nancy Michelle **Murphy** on September 27, 2013, six days before the scheduled hearing. Under these facts, we find that the trial court ***176** did not err in concluding that the appellants received reasonable, sufficient notice. See *Gibson v. Gibson,* 234 Ga. 528, 529–530(3), 216 S.E.2d 824 (1975) (notice less than five days before hearing, which appellant did not dispute receiving, was reasonable). Compare *Hedquist,* 275 Ga. at 190, 563 S.E.2d 854 (notice of hearing that did not specify that trial court would hear the contempt motions at pretrial conference was inadequate).

(ii) *Sufficiency of the evidence.*

Farmer argues that the contempt must be reversed because the evidence does not support the finding of contempt. Our standard of review is dictated by the nature of the contempt, whether criminal or civil. *In re Waitz,* 255 Ga.App. 841, 842, 567 S.E.2d 87 (2002). The trial court sentenced Farmer to "be incarcerated in the Coweta County, Georgia jail for a period of 20 days or until he pa[id] One Thousand Dollars ($1,000.00) to the Court." Because he was sentenced to imprisonment for a specified, unconditional period, Farmer's contempt was criminal. See *In the Interest of J.D.,* 316 Ga.App. 19, 21(1), 728 S.E.2d 698

(2012) ("If the contemnor is imprisoned for a specified unconditional period ... the purpose is punishment and thus the contempt is criminal.") (citation and punctuation omitted). "On appeal of a criminal contempt conviction the appropriate standard of appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *In re Waitz*, 255 Ga.App. at 842, 567 S.E.2d 87 (citation and punctuation omitted).

After viewing the evidence in the light most favorable to the prosecution, we conclude that the trial court could have found the essential elements of the crime beyond a reasonable doubt. Farmer signed the brief to which the affidavits reflecting the children's knowledge of the case were attached. Also attached to that brief is an affidavit of Farmer himself, notarized on the same day by the notary who notarized the children's affidavits.

To the extent Farmer argues that he cannot be held in contempt for violating a provision directed at the parties rather than himself, his argument is unavailing. The violation of a court's order by one who was not a party to the proceedings can be punished as a contempt if the contemnor had actual notice of the order and is in privity with, aided and abetted, or acted in concert with the named party in acts constituting a violation of the order. *The Bootery v. Cumberland Creek Props.*, 271 Ga. 271, 272(2), 517 S.E.2d 68 (1999). It is undisputed ***177** that Farmer had actual notice of the order and acted as Nancy Michelle **Murphy's** representative when obtaining the affidavits from the children.

(b) *Failure to cooperate with the custody evaluator.*

The trial court held Nancy Michelle **Murphy** in contempt after finding that she had not cooperated with the custody evaluator. The appellants argue that this judgment of contempt must be reversed because Nancy Michelle **Murphy** did not receive adequate notice and because the evidence does not support it.

****797** (i) *Notice.*

Nancy Michelle **Murphy** was entitled to reasonable notice related to the allegations of indirect contempt for violating the August 23, 2013 court order. For the reasons discussed in Division 6(a)(i), supra, we conclude that she received such notice.

(ii) *Sufficiency of the evidence.*

The trial court sentenced Nancy Michelle **Murphy** to incarceration "until she compli[ed] with the August Order by signing the documents previously submitted to her by [the custody evaluator's] office." This was a civil contempt. See *In the Interest of J.D.*, 316 Ga.App. at 21–22(1), 728 S.E.2d 698 ("If the contemnor is imprisoned only until he performs a specified act, the purpose is remedial and hence the contempt is civil.") (citations omitted). "In civil contempt appeals, if there is any evidence from which the trial court could have concluded that its order had been violated, we are without power to disturb the judgment absent an abuse of discretion." *In re Waitz*, 255 Ga.App. at 842, 567 S.E.2d 87 (citation omitted).

We hold that some evidence supported the conclusion that Nancy Michelle **Murphy** violated the August 23 order by refusing to cooperate with the custody evaluator. The August 23 order set an October 15, 2013 deadline for completion of the custody evaluation. John **Murphy** testified that he had done everything the custody evaluator required in order to begin the evaluation, yet the evaluation had not proceeded. It is not disputed that as of November 19, 2013, the date of the trial court's contempt order, that evaluation had not occurred. And, in a response to the amended motion for contempt which she filed on October 22, 2013, Nancy Michelle **Murphy** expressly defied the August 23 order and declared herself justified in refusing to sign the documents that were a prerequisite to the custody evaluation. The trial court was therefore authorized to conclude that she had not signed those documents. See OCGA § 24–8–821 ("Without offering the same in evidence, either party may avail himself or herself of allegations or admissions made in the pleadings of the other.").

This is sufficient evidence to authorize the trial court to conclude that Nancy Michelle **Murphy** violated the August 23 order by refusing ***178** to cooperate with the custody evaluator. See *Edwards v. Edwards*, 254 Ga.App. 849, 854, 563 S.E.2d 888

(2002) (a person who simply ignores a court order that she believes is erroneous "does so at [her] own peril and must assume the risk of being held in contempt") (citation and punctuation omitted).

(c) *Nancy Michelle Murphy's failure to appear at the hearing.*

We agree with the appellants that the trial court erred in holding Farmer and King in contempt because of Nancy Michelle Murphy's failure to appear at the contempt hearing.

> Absent a properly served subpoena or court order requiring a party to appear in person, a party may choose not to be present at the trial of the case and to be represented solely by counsel. This rule accords with the long-established principle that there is full power on the part of the counsel to represent the client, and it is just the same as if the client were there in person.

In re Estate of Coutermarsh, 325 Ga.App. 288, 290(1), 752 S.E.2d 448 (2013) (citations and punctuation omitted). See also *Masonry Standards v. UPS Truck Leasing*, 257 Ga. 743, 743–744, 363 S.E.2d 553 (1988) (trial court erred in sanctioning defendant for failing to appear in person at trial). John Murphy has pointed to nothing that required Nancy Michelle Murphy to appear in person at the contempt hearing. And because Nancy Michelle Murphy was not required to appear in person, Farmer and King could not be held in contempt for her failure to appear.

Judgment affirmed in part and reversed in part.

DOYLE, P.J., and BOGGS, J., concur.

All Citations

330 Ga.App. 169, 767 S.E.2d 789

Footnotes

1 Whether the court erred in holding Michelle Murphy in contempt for not cooperating, within the time provided by the Court, with the custody evaluator, who presented an illegal condition for Michelle Murphy to perform in order to "cooperate" by requiring that Michelle Murphy execute the psychologist's contract. (V17 p. 3627) The contempt adjudication was not supported with proof beyond a reasonable doubt of Michelle Murphy's violation of the Order. If proven beyond a reasonable doubt that Michelle Murphy violated any directive of the custody evaluator, the directive placed an illegal condition upon Michelle Murphy that is being appealed. In order to accomplish what Judge Baldwin ordered, Michelle Murphy would have had to be subjected to the following, illegal conditions: Michelle Murphy would have been required to execute a contract that is void against the public policy of the State of Georgia, in that: (a) the contract that requires Michelle Murphy to grant the psychologist full immunity from liability, not just the immunity from liability provided by statute that exempts immunity to the psychologist resulting from her bad faith; (b) the contract requires that Michelle Murphy become financially liable for fees that she cannot afford, as it requires that she pay expensive fees to obtain discovery and production, testimony at trial, or be deprived of this evidence that could be necessary to her defense of the psychologist's findings or for use by her as evidence against the plaintiff; (c) the contract provides that the psychologist be paid 18% interest for late payments of fees; (d) unless Michelle Murphy executed the contract, the psychologist would not inform her counsel of the method to be used for the "custody evaluation," and would not provide other information about the scope of the investigation of John Harold Murphy and Renee L. Haugerud that would be conducted before rendering an opinion to the Court; (e) unless Michelle Murphy executed the contract, the psychologist stated that she would not talk to counsel for Michelle Murphy or Michelle Murphy; and, (f) Michelle Murphy would have been subjected to a psychologist who was selected by the guardian ad litem, who was exposed by counsel for Michelle Murphy for converting to her personal use trust funds provided to her in the case, in violation of USCR 24.9(8)(g).

2 Finally as noted above, our previous opinion rebuked appellants for repeated violations of Court of Appeals Rule 10 which provides, "Personal remarks, whether oral or written, which are discourteous or disparaging to any judge, opposing counsel, or any court, are strictly forbidden." *Murphy v. Murphy*, 328 Ga.App. at 774(4), 759 S.E.2d 909 (2014). Their present brief is only somewhat better. It includes, for example, repeated unsupported and irrelevant assertions that a particular witness has substance abuse problems. We again rebuke appellants. This lack of professionalism does less than nothing to advance their cause.

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759 S.E.2d 909

MURPHY
v.
MURPHY.

No. A14A0700.

Court of Appeals of Georgia.

July 9, 2014.
Reconsideration Denied July 31, 2014.

[759 S.E.2d 910]

Millard Farmer, Atlanta, Alfred L. King Jr., for Appellant.

Stephen Earl Hudson, William R. Poplin Jr., Atlanta, Taylor Bridges Drake, Newnan, Michael Williams Warner, for Appellee.

[759 S.E.2d 911]

McFADDEN, Judge.

Nancy Michelle Murphy appeals two orders entered in this custody modification action brought by her former husband, John Murphy. John Murphy has moved to dismiss the appeal. We find that we have jurisdiction to consider Nancy Michelle Murphy's arguments regarding both orders, and we therefore deny John Murphy's motion to dismiss the appeal. We hold, however, that Nancy Michelle Murphy's challenges to the orders have no merit and find that she filed this appeal for purposes of delay. We therefore affirm and impose a frivolous appeal penalty.

Nancy Michelle Murphy and John Murphy were divorced in 2006. In 2012, John Murphy filed this action, seeking to modify the child custody provisions of the parties' divorce decree. On August 23, 2013, the trial court entered an order that denied John Murphy's motion to temporarily change physical custody of the children, holding that physical custody would "not be changed at this time," and went on to ratify the status quo as to visitation and the parties' ongoing practices as to out of state travel. The court held that, should the parties be unable to settle all issues in the case after a custody evaluation had been completed, then the court would conduct a final hearing on the issues of custody and parenting time before November 22, 2013. On September 10, 2013, the trial court entered an order denying Nancy Michelle Murphy's motion to disqualify the guardian ad litem. On September 23, 2013, Nancy Michelle Murphy filed a notice of appeal, designating both the August 23, 2013 order and the September 10, 2013 order as the orders she was appealing.[1]

1. *Jurisdiction.*

John Murphy has moved to dismiss this appeal for two reasons: 1) that the August 23, 2013 order concerning custody does not fall within OCGA § 5–6–34(a)(11), which allows direct appeals of "[a]ll judgments or orders in child custody cases awarding, refusing to change, or modifying child custody ...."; and 2) that the September 10, 2013 order concerning the guardian ad litem was entered subsequent to the August 23, 2013 order. We conclude that Nancy Michelle Murphy properly filed a direct appeal from the August 23, 2013 order and that she can challenge the September 10, 2013 order in this appeal.

(a) *Custody.*

The trial court entered the August 23 order after a hearing, which, the court stated, had been for the purpose of determining "whether circumstances exist which support a temporary change in the physical custody of [the children]" from Nancy Michelle Murphy to John Murphy. The trial court decided that, at least for the time being, "[t]he physical custody of the [c]hildren shall not be changed." This amounts to a refusal to change custody. So, the order falls within the ambit of OCGA § 5–6–34(a)(11), and Nancy Michelle Murphy properly filed a direct appeal from this order.

(b) *Pendent jurisdiction.*

We have pendent jurisdiction over Nancy Michelle Murphy's appeal of the order denying the motion to disqualify the guardian ad litem because, although that order was entered after entry of the custody order, it was entered before Nancy Michelle Murphy filed her notice of appeal. Nancy Michelle Murphy could properly file a direct appeal of the custody order under OCGA § 5–6–34(a)(11), and she could raise on appeal "all judgments, rulings, or orders rendered in the case ... which may affect the proceedings below." OCGA § 5–6–34(d). The September 10, 2013 guardian ad litem order is one such order. It is true, as John Murphy argues, that ample authority exists for the proposition that a party may not use

[759 S.E.2d 912]

OCGA § 5–6–34(d) to challenge orders entered "not prior to or contemporaneous with that [directly appealable] judgment." *Norman v. Ault,* 287 Ga. 324, 331(6), 695 S.E.2d 633 (2010). But in all of those cases, the challenged order was entered not only subsequent to the entry of the directly appealable judgment, but also subsequent to the filing of the notice of appeal. See, e.g., *Bloomfield v. Bloomfield,* 282 Ga. 108, 112(5), 646 S.E.2d 207 (2007); *Cates v. Cates,* 225 Ga. 612, 613(3), 170 S.E.2d 416 (1969); *Waters v. Chase Manhattan Bank,* 308 Ga.App. 885, 887(2), 709 S.E.2d 37 (2011); *Costanzo v. Jones,* 200 Ga.App. 806, 811(3), 409 S.E.2d 686 (1991). See also *Norman v. Ault,* supra, 287 Ga. at 331(6), 695 S.E.2d 633 (court would not consider enumeration challenging contempt order entered after entry of divorce decree and after filing of application for discretionary appeal of divorce decree).

Here, on the other hand, the guardian ad litem order was entered in the gap between the entry of the directly appealable custody order and the filing of the notice of appeal. We have found no authority, and John Murphy has cited none, in which it was held that the appellate court could not consider a challenge to an order entered in the period between the entry of the appealable judgment and the filing of the notice of appeal. Cf. *Sewell v. Cancel,* 295Ga. 235, 759 S.E.2d 485 (Case No. S13G1274, decided June 2, 2014) (appellee may raise in a cross-appeal any adverse rulings issued prior to the filing of a timely notice of cross-appeal, even if the rulings were issued after the ruling conferring appellate jurisdiction and after the filing of the notice of appeal). This unusual fact pattern distinguishes this case from the cases cited by John Murphy. Therefore we hold that we have jurisdiction to consider Nancy Michelle Murphy's challenge to the September 10 order. We observe that to do so furthers the purpose of the appellate practice act "to bring about a decision on the merits of every case appealed and to avoid dismissal of any case or refusal to consider any points raised therein, except as may be specifically referred to in [the act itself]." OCGA § 5–6–30.

2. *The custody order.*

Nancy Michelle Murphy argues that the trial court entered the August 23 order after engaging in ex parte communications with John Murphy's attorney. She also argues that the trial court refused to allow her to present evidence or to complete cross-examination of John Murphy's witness at the August 13, 2013 hearing that resulted in the order. The record belies both arguments.

(a) *The order was not entered ex parte.*

Nancy Michelle Murphy argues that the trial court entered the order ex parte because the order was prepared by counsel for John Murphy and delivered to the trial court, which entered the order the same day. Her argument is belied by the documents of record. The cover letter reflects that counsel for Nancy Michelle Murphy was emailed this communication and proposed order by John Murphy's counsel, albeit on the same day the order was entered. Nancy Michelle Murphy has failed to support her accusation of improper ex parte communications with sworn testimony; she has not even elicited a finding of fact on this issue that would be subject to appellate review.

"Black's Law Dictionary defines 'ex parte' in this context as 'a judicial proceeding, order, injunction, etc.... taken or granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested.' " *Cagle v. Davis*, 236 Ga.App. 657, 661–661(4)(a), 513 S.E.2d 16 (1999) (citation and emphasis omitted). The custody order was not granted at the instance of and "for the benefit of one party only." The order matched the ruling announced at the August 13 hearing, where counsel for Nancy Michelle Murphy had the opportunity to object. And it denied John Murphy's request for a temporary change of custody.

Moreover, "[o]rders prepared ex parte do not violate due process and should not be vacated unless a party can demonstrate that the process by which the judge

[759 S.E.2d 913]

arrived at them was fundamentally unfair." *Fuller v. Fuller*, 279 Ga. 805, 806(1), 621 S.E.2d 419 (2005) (citation and punctuation omitted). Nancy Michelle Murphy has shown no harm as the order matches the announced ruling. She has not demonstrated that the process by which the trial court arrived at its order was fundamentally unfair. Her argument that the custody order is invalid because it was entered ex parte is frivolous.

(b) *The trial court did not commit reversible error by entering the order before Nancy Michelle Murphy had presented evidence.*

Nancy Michelle Murphy argues that the trial court entered the order after denying her the right to present evidence in violation of *Shore v. Shore*, 253 Ga. 183, 318 S.E.2d 57 (1984). She correctly asserts that the trial court ended the hearing for the day—past 6:00 p.m.—and entered the order ten days later and that she had not presented evidence. But at the hearing, after attempting to determine a day when the hearing could resume, the trial court explained that "of course [John Murphy has] the burden on [his] case and [he] will have finished [his] case" but that the court "may decide at that point [he did not] need to hear anything else." Counsel for Nancy Michelle Murphy responded, "All right." The court further explained that after hearing from the guardian ad litem, he would "decide whether [he thought] we need to go any further or [he], at that point, [could] say something about, you know, what [he thought they] need to do."

About an hour before concluding for the day, after an unrecorded, 45–minute conference with the lawyers (in which, according to John Murphy, the guardian ad litem participated), the trial court explained that he needed a custody evaluation by an expert custody evaluator. He explained that until he received the evaluation, he would maintain the status quo, but emphasized that John Murphy would get every visitation to which he was entitled, and as long as he returned the children on time to Nancy Michelle Murphy, he could take them out of state. In his appellate brief, John Murphy represents that at the unrecorded bench conference, counsel for the parties discussed the trial court's proposed resolution of the hearing, and the trial court adopted a recommendation of counsel for Nancy Michelle Murphy.

The trial court's written order denied John Murphy's request for a temporary change in custody. It ordered the parties to "continue the parenting time with the [c]hildren as detailed in the [f]inal [d]ecree," but specified that "[t]here shall be no requirement that a party be limited to exercising parenting time with the [c]hildren in the State of Georgia." It added that "[t]o clarify the every-other-weekend schedule contained in the [f]inal [d]ecree, [John Murphy] shall exercise his parenting time with the [c]hildren beginning Friday, August 23, 2013," the day the order was entered. The court ordered a full custody evaluation by a particular doctor and specified the conditions of that evaluation. Finally, the court ruled that should the parties be unable to settle all issues after the custody evaluation was completed, it would conduct a final hearing on or before November 22, 2013.

Nancy Michelle Murphy correctly argues that the trial court "must consider all facts and conditions which present themselves up to the time of rendering the judgment" in a change of custody proceeding, *Shore*, 253 Ga. at 184, 318 S.E.2d 57. But here, she has failed to show the preservation of error or harm. When the trial court stated that he might not "need to hear anything else" once John Murphy presented his case, given that it was John Murphy's burden to prove his case, counsel for Nancy Michelle Murphy responded, "All right." She has given us no indication of what occurred during the 45–minute, unrecorded conference, which apparently included a discussion about suspending the hearing until the completion of the custody evaluation. Nancy Michelle Murphy has not satisfied her burden of showing error by the record.

[759 S.E.2d 914]

Rohatensky v. Woodall, 257 Ga.App. 801, 801–802(1), 572 S.E.2d 354 (2002).

As for harm, as she concedes in her appellate brief, the August 23 order simply maintained the status quo established by the terms of the divorce decree and denied John Murphy's request to change custody on a temporary basis. Therefore, Nancy Michelle Murphy has not demonstrated that she was harmed by being denied the opportunity to present evidence.

To the extent that she argues that the order improperly modified visitation without her having the opportunity to present evidence by changing John Murphy's visitation from August 16 to August 23, we find no harm. As the trial court explained in the order, he was simply "clarify[ing] the every-other-weekend schedule contained in the [f]inal [d]ecree." To the extent Nancy Michelle Murphy argues that the order modified visitation by allowing John Murphy to exercise his visitation outside the state of Georgia, the court was simply formalizing the parties' practice, given that John Murphy resides out of state. Indeed, at the hearing, Nancy Michelle Murphy, who was called for purposes of cross-examination, admitted that she, too, had taken the children out of the state of Georgia.

Even if Nancy Michelle Murphy was denied the opportunity to present evidence, she has failed to show any harm and thus has failed to show reversible error. See *Alejandro v. Alejandro*, 282 Ga. 453, 456(7), 651 S.E.2d 62 (2007). See also *In the Interest of S.P.*, 282 Ga.App. 82, 85(3), 637 S.E.2d 802 (2006) (mother in deprivation proceeding was not entitled to reversal because she did not show any harm based on her absence from hearing, as she did not demonstrate what evidence she would have provided that would have changed the outcome of the hearing).

The trial court made it very clear that he was merely suspending the hearing for the day, directing that there be a forensic examination before the hearing resumed, and entering an interim order designed to preserve the status quo. That interim order was favorable to Nancy Michelle Murphy as to the central issue, change of custody. Nancy Michelle Murphy had an opportunity to object when the trial court announced his ruling, as well as in the unrecorded conference, and has waived this argument. Her appeal on this issue is frivolous.

3. *The guardian ad litem order.*

Nancy Michelle Murphy argues that the trial court erred by denying her motion to disqualify the guardian ad litem and by failing to conduct a hearing on the motion. We disagree.

A trial court's decision not to disqualify a guardian ad litem is reviewed for an abuse of discretion. See *Wrightson v. Wrightson*, 266 Ga. 493, 497(6), 467 S.E.2d 578 (1996).

Nancy Michelle Murphy's argument is that the guardian ad litem unlawfully converted funds to her personal use. This accusation is also belied by the record. The guardian ad litem used funds from her retainer for travel to visit the children at John Murphy's residence in Tennessee. Uniform Superior Court Rule 24.9(4) expressly authorizes the guardian ad litem "to examine any residence

wherein any person seeking custody or visitation rights proposes to house the minor child."

To the extent that Nancy Michelle Murphy argues that the guardian ad litem should have secured advance approval for the use of the funds, we find that the trial court acted well within the bounds of his discretion. Nancy Michelle Murphy relies on Uniform Superior Court Rule 24.9(8)(g), which states:

It shall be within the [c]ourt's discretion to determine the amount of fees awarded to the [guardian ad litem], and how payment of the fees shall be apportioned between the parties. The [guardian ad litem's] requests for fees shall be considered, upon application properly served upon the parties and after an opportunity to be heard, unless waived. In the event the [guardian ad litem] determines that extensive travel

[759 S.E.2d 915]

outside of the circuit in which the [guardian ad litem] is appointed or other extraordinary expenditures are necessary, the [guardian ad litem] may petition the [c]ourt in advance for payment of such expenses by the parties.

Uniform Superior Court Rule 24.9(8)(g). Assuming that the guardian ad litem violated the rule by failing to secure advance permission before drawing down on her retainer for reimbursement for travel—travel that was entirely appropriate, and indeed necessary—there is nothing to support Nancy Michelle Murphy's contention that the trial court abused his discretion by rejecting her argument that, as a consequence, the guardian ad litem's removal was necessary. Nancy Michelle Murphy simply and frivolously mischaracterizes the guardian ad litem's actions as law-breaking and her conduct as the illegal, unlawful conversion of money she held in trust.

Contrary to Nancy Michelle Murphy's contention on appeal, a hearing was not required. Uniform Superior Court Rule 6.3 provides, "Unless otherwise ordered by the court, all motions in civil actions, including those for summary judgment, shall be decided by the court without oral hearing, except motions for new trial and motions for judgment notwithstanding the verdict." Nancy Michelle Murphy has pointed to no authority that—and indeed, does not even explain why—the trial court erred by denying her motion to disqualify the guardian ad litem without first conducting a hearing. See *Odom v. Hughes*, 293 Ga. 447, 450(1), 748 S.E.2d 839 (2013); Uniform Superior Court Rule 6.3.

Nancy Michelle Murphy's arguments regarding the trial court's denial of her motion to disqualify the guardian ad litem are frivolous.

4. *Frivolous appeal penalty.*

We may impose a penalty under Court of Appeals Rule 15 in cases where the appellant could have no reasonable basis upon which to anticipate that this court would reverse the trial court's judgment. *Hardwick v. Williams*, 272 Ga.App. 680, 683(3), 613 S.E.2d 215 (2005). As detailed above, Nancy Michelle Murphy's arguments are not merely meritless but frivolous. Nancy Michelle Murphy could not have reasonably anticipated reversal by this court on any ground alleged. We conclude that Nancy Michelle Murphy has appealed purely for the purpose of delaying resolution of John Murphy's custody modification petition—an act that is antithetical to the children's best interests. See *Freese II, Inc. v. Mitchell*, 318 Ga.App. 662, 668(7), 734 S.E.2d 491 (2012).

The frivolousness and dilatoriness of Nancy Michelle Murphy's appeal are aggravated by her repeated violations of Court of Appeals Rule 10. That rule provides, "Personal remarks, whether oral or written, which are discourteous or disparaging to any judge, opposing counsel, or any court, are strictly forbidden." Nancy Michelle Murphy's appellate brief contains numerous direct violations of Rule 10, as well as numerous discourteous or disparaging remarks about other persons involved in the case, particularly John

Murphy's wife. Notwithstanding Rule 10, we recognize that cases arise where counsel must show that the issue is not merely error but misconduct. In such cases counsel should take particular care to summarize and cite the record accurately and to use a tone that is respectful and appropriate to the seriousness of the issues. Such care and respect are wholly absent from Nancy Michelle Murphy's brief.

Accordingly, under Court of Appeals Rule 15, each of Nancy Michelle Murphy's counsel shall pay a penalty of $1,250, a total of $2,500. This penalty shall constitute a money judgment in favor of John Murphy against each of Nancy Michelle Murphy's counsel, and the trial court is directed to enter judgment in such amount upon return of the remittitur in this case. Court of Appeals Rule 15(c); *Wieland v. Wieland,* 216 Ga.App. 417, 418(3), 454 S.E.2d 613 (1995).

Judgment affirmed.

DOYLE, P.J., and BOGGS, J., concur.

Notes:

[1] Nancy Michelle Murphy moved to disqualify the members of this panel from participation in this appeal. Her motion was referred to another panel for resolution, and that panel denied her motion.

PAUL
v.
PAUL.

A20A0194

Court of Appeals of Georgia

June 25, 2020

THIRD DIVISION

MCFADDEN, C. J.,

DOYLE, P. J., and HODGES, J.

NOTICE: Motions for reconsideration must be *physically received* in our clerk's office within ten days of the date of decision to be deemed timely filed.

DEADLINES ARE NO LONGER TOLLED IN THIS COURT. ALL FILINGS MUST BE SUBMITTED WITHIN THE TIMES SET BY OUR COURT RULES.

DO-007

DOYLE, Presiding Judge.

Danyelle Howell Paul ("the Wife") filed a motion to vacate her final divorce decree, set aside the parties' settlement agreement, and reopen divorce proceedings based on fraud pursuant to OCGA § 9-11-60 (d). Scott Jason Paul ("the Husband") moved to dismiss the Wife's motion, and the superior court granted his motion. The Wife appeals, and for the following reasons, we reverse.

"We review a ruling on a motion to set aside for abuse of discretion and affirm if there is any evidence to support it."[1] However, "we review questions of law de novo."[2]

The record shows that in April 2014, the Husband filed a divorce petition in the Superior Court of Cobb County. The Wife filed an answer and counterclaim , which she subsequently dismissed after the parties reached a settlement. On November 5, 2015, the trial court entered the parties' divorce decree incorporating their settlement agreement.[3]

On November 2, 2018, the Wife filed in the divorce case a verified motion to vacate the final decree, set aside the parties' settlement agreement, and reopen divorce proceedings. Relying on OCGA § 9-11-60 (d) (2), which allows for judgments to be set aside due to fraud by the opposing party, the Wife argued that the Husband had concealed certain assets from her and that she would not have signed the settlement agreement had she known of those assets. The motion was timely filed three days before the expiration of the three-year period for filing such motions.[4] The Wife provided the Husband's attorney with a copy of the motion to set aside, but she did not effect personal service on him until February 5, 2019, a few weeks before the March 1, 2019 hearing.

On December 17, 2018, in a limited/special appearance in the case, the Husband moved to dismiss the Wife's motion, arguing that it should have been filed as a new action and thus, timely personal service on him was required pursuant to OCGA § 9-11-60 (f). The Wife did not file a response to the motion to dismiss.

On May 3, 2019, following a hearing, the superior court granted the Husband's motion to dismiss and denied the Wife's motion to set aside, concluding that the final judgment and divorce decree "terminated the litigation with prejudice, resolving all pending issues between the parties and closing the action." The trial court also found that although the Husband had reasonable notice that the Wife had filed the motion to set aside, reasonable notice alone did not confer jurisdiction for the court to set aside the judgment:

> The instant action had been closed for very nearly three years; hence, any attack on the [f]inal [j]udgment would need to be brought as a new action and served as an original complaint. In the absence of proper

> service, the [c]ourt obtains no jurisdiction over the person. To find that [the Wife] could serve the [m]otion upon [the Husband's] counsel in another, albeit related, matter would render the service language [of OCGA § 9-11-60 (f)] meaningless.[5]

The Wife filed an application for discretionary appeal, which this Court granted, and this appeal followed. The Wife argues that the trial court erred by determining that she was required to file the motion as a new civil action and personally serve it on the Husband as an original complaint. We agree.

1. *No separate action required.* First, the trial court erred by concluding that the Wife was required to file her motion to set aside as a separate action.

OCGA § 9-11-60 provides in relevant part:

> (a) Collateral attack. A judgment void on its face may be attacked in any court by any person. In all other instances, *judgments shall be subject to attack only by a direct proceeding brought for that purpose* in one of the methods prescribed in this Code section.
>
> (b) Methods of direct attack. A judgment may be attacked by motion for a new trial or motion to set aside. *Judgments may be attacked by motion only in the court of rendition.* . . .
>
> (e) Complaint in equity. The use of a complaint in equity to set aside a judgment is prohibited.[6]

"Under our law, a judgment not void on its face is subject to attack only by a direct proceeding in the court in which it was rendered. . . . If one is dissatisfied with a judgment one does not merely file a new action against the other party or his counsel. Instead, one must attack the prior judgment directly."[7] In *Rowles v. Rowles*,[8] this Court held that the court that issued the parties' divorce decree did not lack jurisdiction to rule on a subsequent motion to set aside the decree based on fraud, finding meritless the appellee's argument that the movant "was required to file a separate lawsuit to set aside the decree."[9] The same rationale applies to this case, and therefore, the trial court erred by concluding that the Wife was required to file her motion to set aside in a separate case.[10]

2. *Personal service not required.* The trial court further erred by concluding that the Wife had to personally serve the Husband with the motion to set aside as if it was an original complaint.

OCGA § 9-11-60 (f) provides:

> Reasonable notice shall be afforded the parties on all motions. Motions to set aside judgments may be served by any means by which an original complaint may be legally served *if it cannot be legally served as any other motion.* A judgment void because of lack of jurisdiction of the person or subject matter may be attacked at any time. Motions for new trial must be brought within the time prescribed by law. In all other instances, all motions to set aside judgments shall be brought within three years from entry of the judgment complained of.[11]

Here, as we concluded in Division 1, the Wife properly filed this case as a motion in the original divorce case. Therefore, the issue is whether she was able to legally serve the Husband with a copy of the motion "as any other motion"[12] pursuant to OCGA § 9-11-5, which governs the service and filing of pleadings subsequent to the original complaint and permits a party to serve a written motion upon a party's attorney.[13] It is undisputed that the Wife provided the Husband's attorney, who was still actively representing the

Husband in his family law litigation with the Wife, with a copy of the motion by U. S. mail and via the Odyssey electronic filing system.

Nonetheless, the Husband argues that the Wife was required to personally serve him with the motion to set aside as an original complaint because it was filed outside the term of court in which the divorce decree was entered. There is no authority for this argument.[14]

The Husband also argues (and the trial court found) that service of the motion via mail and electronically on his attorney was insufficient because the divorce case was closed by virtue of the entry of the final judgment,[15] and therefore, the attorney no longer represented him in the divorce case.[16] In response, the Wife maintains that the divorce case was still open because the Husband failed to file a civil case disposition form with the divorce decree.

OCGA § 9-11-58 (b), which addresses when judgment is entered in a civil case, provides in relevant part:

> *The filing with the clerk of a judgment, signed by the judge, with the fully completed civil case disposition form constitutes the entry of the judgment, and, unless the court otherwise directs, no judgment shall be effective for any purpose until the entry of the same, as provided in this subsection.* As part of the filing of the final judgment, a civil case disposition form shall be filed by the prevailing party or by the plaintiff if the case is settled, dismissed, or otherwise disposed of without a prevailing party; provided, however, that the amount of a sealed or otherwise confidential settlement agreement shall not be disclosed on the civil case disposition form. The form shall be substantially in the form prescribed by the Judicial Council of Georgia.[17]

Thus,

> the clerk is directed to refrain from entering judgment until such a form has been filed. And, the statute imposes no penalties for a failure to file. A party who has prevailed by obtaining a judgment, obviously, has a built-in motivation for filing the civil case disposition form: until the judgment is entered in compliance with OCGA § 9-11-58 (b), it is ineffective[,] and the prevailing party cannot collect on or enforce the judgment.

Here, the Husband — the petitioner in the divorce case — did not file a civil case disposition form with the final divorce decree. Therefore, the case remains "open" for purposes of determining service of the motion to set aside. The Husband's attorney had not filed a notice of withdrawal in the divorce case, and it is undisputed that the attorney represented him in related litigation involving the Wife at the time the motion to set aside was filed. Under these circumstances, the Wife was not required to personally serve the motion to set aside on the Husband as an original complaint and, pursuant to OCGA § 9-11-5, she was permitted to serve him by providing his attorney with a copy of the motion. The trial court erred by concluding otherwise.

*Judgment reversed. Hodges, J., concurs. McFadden, C. J., concurs fully in Division 1 and specially in Division 2.**

***DIVISION 2 OF THIS OPINION IS PHYSICAL PRECEDENT ONLY. SEE COURT OF APPEALS RULE 33.2.**

MCFADDEN, Chief Judge, concurring fully in part and specially in part.

I concur fully in Division 1 of the majority opinion in which the majority correctly holds that the Wife properly filed her motion to set aside as a motion, rather than a separate action. And I concur in the judgment of Division 2, in which the

majority correctly holds that personal service was not required and that the Wife was authorized to "serve the Husband with a copy of the motion 'as any other motion' pursuant to OCGA § 9-11-5, which governs the service and filing of pleadings subsequent to the original complaint and permits a party to serve a written motion upon a party's attorney."

But unlike the majority, I would not adopt the Wife's argument that she was so authorized because the case was still open (for want of the form required by OCGA § 9-11-58 (b), the entry of judgment statute). I would reject the premise of the holding her argument challenges: the trial court erred in his assumption that such service is authorized only if a case is still open.

Such service is authorized by OCGA § 9-11-60 (f). That subsection, which predates the requirement of a completed case disposition form now set out at OCGA § 9-11-58 (b), expressly contemplates that motions to set aside will be brought after entry of a judgment. It provides that motions to set aside like the one before us "shall be brought within three years from entry of the judgment complained of." And it goes on to provide that a void judgment "may be attacked at any time."

So we should look to OCGA § 9-11-60 (f) for the scope of that authority — not to OCGA § 9-11-58, the entry of judgment statute. Nothing in OCGA § 9-11-60 (f) suggests that entry of a judgment or closing of a case are dispositive of whether a motion to set aside must be served like an original complaint or may be "served as any other motion." OCGA § 9-11-60 (f) provides, " Reasonable notice shall be afforded the parties on all motions. Motions to set aside judgments may be served by any means by which an original complaint may be legally served if it cannot be legally served as any other motion."

Here, as the majority explains, the motion to set aside was served "as any other motion" on the attorneys who represented the Husband in regard to the judgment being attacked and who continue to represent him in related litigation between these parties. I would hold that service to be reasonable and legally authorized under OCGA § 9-11-60 (f).

Footnotes:

[1] (Citations and punctuation omitted.) *Vagile v. Addo*, 341 Ga. App. 236, 240 (2) (800 SE2d 1) (2017).

[2] *Jordan v. State*, 322 Ga. App. 252, 256 (4) (b) (744 SE2d 447) (2013).

[3] In his appellate brief, the Husband contends that he filed a separate contempt action to enforce the decree in the Superior Court of Cobb County in *Paul v. Paul*, Case No. 17-1-1336-52, and that the parties have filed multiple motions and pleadings in that case. These contentions are not, however, supported by citation to the record, and the pleadings do not appear to be included in the appellate record.

[4] See OCGA § 9-11-60 (f).

[5] (Citation and punctuation omitted.) The court cited *Southworth v. Southworth*, 265 Ga. 671, 673 (3) (461 SE2d 215) (1995).

[6] (Emphasis added.)

[7] (Punctuation omitted.) *Zepp v. Toporek*, 211 Ga. App. 169, 171 (1) (b) (438 SE2d 636) (1993).

[8] 351 Ga. App. 246, 248 (1) (830 SE2d 589) (2019) (physical precedent only as to Divisions 2, 3, 4, & 5).

[9] Id.

[10] See id. See also *White v. White*, 274 Ga. 884 (2) (561 SE2d 801) (2002) (reviewing a motion to set aside as a valid post-judgment motion in a divorce case).

[11] (Emphasis added.)

[12] OCGA § 9-11-60 (f).

[13] See OCGA § 9-11-5 (a), (b).

[14] The cases cited by the Husband in his brief — *Benton v. State Highway Dept.*, 220 Ga. 674 (141 SE2d 396) (1965); *Williams v. Cook*, 209 Ga. 718 (1), (2) (75 SE2d 545) (1953); *Roberts v. Roberts*, 150 Ga. 757 (105 SE 448) (1920); *Adams Drive, Ltd. v. All-Rite Trades, Inc.*, 136 Ga. App. 703 (222 SE2d 174) (1975) — are inopposite and do not require a different result.

[15] The Husband points out that the divorce case was considered "closed" by the trial court clerk's office when the motion to set aside was filed. We note, however, that the case was listed as "open" when the Husband's attorney called the clerk's office to inquire about the status of the case, and the clerk's office changed it to "closed" after the phone call. Regardless, the clerk's designation on the docket is not what determines whether a case is legally closed for purposes of our analysis. See, e.g., OCGA § 9-11-58 (b).

[16] We note that the Husband's attorney never represented to the trial court that he did not represent the Husband in the related litigation with the Wife, but instead only that he no longer represented him in the divorce case because it was closed. In fact, the Husband suggested in his motion to dismiss the Wife's motion to set aside that she never requested that the Husband or his attorney execute an acknowledgment of service, thereby implying that his attorney would have had authority to do so.

[17] (Emphasis added.) Of course, the filing of or the failure to file, the civil case disposition form does not affect the deadlines for filing a notice of appeal or a motion for attorney fees under OCGA § 9-15-14. See *Horesh v. DeKinder*, 295 Ga. App. 826, 828-830 (1) (673 SE2d 311) (2009) (holding that a prevailing party cannot collect or enforce a judgment until the judgment is entered in compliance with OCGA § 9-11-58 (b)).

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841 S.E.2d 488
Court of Appeals of Georgia.

KASPER et al.

v.

Judy MARTIN et al.

A20A0244
|
April 3, 2020

Synopsis

Background: While child was subject of dependency proceeding, because he had tested positive for narcotics at birth, child's paternal aunt and uncle filed petition in the superior court seeking temporary and permanent custody. The Superior Court, Glynn County, George M. Rountree, J., concluded it did not have jurisdiction and dismissed the matter.

The Court of Appeals, Rickman, J., held that superior court had jurisdiction of child custody action.

Reversed.

Attorneys and Law Firms

***489** Holle Weiss-Friedman, Brunswick, for Appellants.

Beverly L. Cohen, Roswell, Christopher Michael Carr, Penny Hannah, Shalen S. Nelson, Atlanta, John P. Rivers, Brunswick, Frances Williams Dyal, for Appellees.

Opinion

Rickman, Judge.

At issue in this case is whether a superior court had jurisdiction of a child custody action even though a previously filed dependency action regarding the same child was pending in the juvenile court. We hold the superior court in this case erred in concluding that it did not have jurisdiction and therefore erred by dismissing the action.

We review the question of whether a court lacks subject-matter jurisdiction, an issue of law, for plain legal error. See *Kogel v. Kogel*, 337 Ga. App. 137, 140 n.7, 786 S.E.2d 518 (2016).

The record shows that in June 2019, Eleanor and Charles **Kasper**, the paternal aunt and uncle of the child at issue, filed a verified petition in the Superior Court of Glynn County, asserting that they should be given temporary and permanent custody of the child; the **Kaspers** named as defendants the child's father and Judy **Martin**, the child's maternal grandmother. The child's mother had died shortly before the **Kaspers** filed their petition.

The undisputed facts show that, at the time of the custody petition, the child was the subject of a dependency hearing in the Juvenile Court of Glynn County because he had tested positive for narcotics at birth in 2016. The child was placed in the legal custody of the Glynn County Department of Family and Children Services ("DFACS") at that time. DFACS initially placed

the child in foster care. Approximately two months before the Kaspers filed their custody petition, however, DFACS placed the child with Martin, his maternal grandmother, who lives in Florida. The Kaspers, who live in Colorado, also moved to intervene in the juvenile court dependency proceeding.

*490 In the superior court proceeding, the Kaspers requested custody of the child on a temporary and permanent basis under OCGA § 19-7-1 (b) (1),[1] and they indicated that they would concede to a transfer of the matter to juvenile court under OCGA § 15-11-15[2] if necessary for report and recommendation. The child's father answered, admitted all of the allegations of the petition, and prayed that the court grant the Kaspers permanent physical and legal custody of the child. Martin answered and moved to dismiss the custody action on the ground that the superior court lacked jurisdiction because the juvenile court proceeding was already pending and the Kaspers had moved to intervene in that proceeding. In their reply to the motion, the Kaspers attached several records from the juvenile court proceeding. Meanwhile DFACS moved to intervene in the superior court action, also attaching several records from the juvenile court action, and filed a proposed answer to the Kaspers' petition. The superior court then held a hearing on the pending motions.

At the hearing, the child's father, a college student, reiterated that he agreed to custody being placed with the Kaspers. The Kaspers announced that the juvenile court had granted their petition for intervention. And the superior court[3] commented that the juvenile court had jurisdiction over requests for permanent guardianship, which, the court stated, "for all practical purposes is the equivalent of [p]ermanent [c]ustody." The superior court concluded that it did not have jurisdiction, that custody should be resolved in the juvenile court, and that it was therefore transferring he matter to that court:

> [M]y opinion [is] that the [j]uvenile [c]ourt is currently asserting [j]urisdiction in this [c]ase and that the [s]uperior [c]ourt, therefore, has no [s]ubject [m]atter [j]urisdiction in this [c]ase. However, to the extent that the [s]uperior [c]ourt may have some [s]ubject [m]atter [j]urisdiction in this [c]ase, I am, as a sitting [p]ro [h]ac [v]ice [s]uperior [c]ourt [j]udge, transferring the matter to [j]uvenile [c]ourt so that they'll all be heard together.

The court added that it was not dismissing the proceeding. But in the written order that followed, the court simply dismissed the Kaspers' action without transferring the matter to juvenile court. This appeal followed.

The Kaspers assert that the superior court erred by dismissing the custody action for lack of jurisdiction, in part by erroneously concluding that a permanent custody proceeding in superior court is the equivalent of a permanent guardianship proceeding in juvenile court. We agree with the Kaspers.

"The juvenile court has exclusive original jurisdiction over juvenile matters of dependency and is the sole court for initiating actions concerning a child that is alleged to be a dependent child." *In the Interest of A. L. S.*, 350 Ga. App. 636, 639 (1), 829 S.E.2d 900 (2019), citing OCGA § 15-11-10 (1) (C). In such cases, "the juvenile court may award temporary custody of [a] child adjudicated to be deprived." *Ertter v. Dunbar*, 292 Ga. 103, 105, 734 S.E.2d 403 (2012). Juvenile courts also have exclusive original jurisdiction over proceedings for a permanent guardianship. See OCGA § 15-11-10 (3) (B); *In the Interest of M. F.*, 298 Ga. 138, 139 (1), 780 S.E.2d 291 (2015).

Only superior courts, however, have original jurisdiction to hear custody matters. See Ga. Const. Art. VI, Sec. IV, Par. I. (Georgia Constitution bestows on superior courts "jurisdiction in all cases, except as otherwise provided in this Constitution."); *In the Interest of C. A. J.*, 331 Ga. App. 788, 792 (2), 771 S.E.2d 457 (2015) ("Issues of permanent *491 child custody... fall within the superior court's jurisdiction."); see also *Ertter*, 292 Ga. at 105, 734 S.E.2d 403. A superior court may, however, transfer a custody matter to juvenile court under OCGA § 15-11-15 (a),[4] in which case the juvenile court has concurrent jurisdiction of the custody matter. See OCGA § 15-11-11 (3).[5] Thus, a juvenile court "does not have authority to award permanent custody without a transfer order from a superior court." *Ertter*, 292 Ga. at 105, 734 S.E.2d 403; see *C. A. J.*, 331 Ga. App. at 792 (2), 771 S.E.2d 457.

It follows that in this case, when the superior court did not transfer the custody matter to the juvenile court, the superior court retained jurisdiction and erred by dismissing the **Kaspers**' petition for permanent custody for lack of jurisdiction. See *Ertter*, 292 Ga. at 105, 734 S.E.2d 403 (holding that superior court had jurisdiction of aunt and uncle's petition for permanent custody in the absence of a transfer order to juvenile court, which had placed the child with the maternal grandmother temporarily during a dependency proceeding); *Mauldin v. Mauldin*, 322 Ga. App. 507, 509 (1), 745 S.E.2d 754 (2013) (holding that without order transferring issue of custody to juvenile court, superior court retained jurisdiction to award permanent custody).

We find no merit in the trial court's reasoning that a permanent custody proceeding in superior court is the equivalent of a permanent guardianship proceeding in juvenile court and that, therefore, the rule of "priority jurisdiction"[6] dictates that the juvenile court had jurisdiction of the custody issue. First, there is no evidence that the juvenile court appointed a permanent guardian for the child; in fact the superior court concluded that the child did not have a guardian. See *Stanfield v. Alizota*, 294 Ga. 813, 815, 756 S.E.2d 526 (2014) (no conflict between superior court and juvenile court existed and, thus, no issue of priority jurisdiction, where, "although the juvenile court was the first tribunal to take personal jurisdiction over [child] for the deprivation action, it never took subject matter jurisdiction over the termination of [child's] parents' parental rights because no petition for termination was ever filed in the juvenile court."). Second, the Juvenile Code clearly distinguishes between permanent guardianship and permanent custody, and it grants original jurisdiction to the juvenile court for the former and to the superior court for the latter. See *In the Interest of M. F.*, 298 Ga. at 139 (1), 780 S.E.2d 291.

For these reasons, we hold that the superior court erred by dismissing the custody action for lack of jurisdiction. The **Kaspers**' final enumeration of error is mooted by our holding.

Judgment reversed.

Dillard, P.J., and Brown, J., concur.

All Citations

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Footnotes

1 Although a child under the age of 18 remains under the control of his or her parents, "[p]arental power shall be lost by ... [v]oluntary contract releasing the right to a third person." OCGA § 19-7-1 (b) (1).

2 "In handling divorce, alimony, habeas corpus, or other cases involving the custody of a child, a superior court may transfer the question of the determination of custody, support, or custody and support to the juvenile court either for investigation and a report back to the superior court or for investigation and determination." OCGA § 15-11-15 (a).

3 The judge presiding over the custody hearing in superior court was sitting specially; he was normally a full-time judge of the same juvenile court.

4 See supra n. 2.

5 "The juvenile court shall have concurrent jurisdiction to hear ... [t]he issue of custody and support when the issue is transferred by proper order of the superior court; provided, however, that if a demand for a jury trial as to support has been properly filed by either parent, then the case shall be transferred to superior court for the jury trial." OCGA § 15-11-11 (3).

6 "The doctrine of priority jurisdiction provides that where different tribunals have concurrent jurisdiction over a matter, the first court to exercise jurisdiction will retain it." *Stanfield v. Alizota*, 294 Ga. 813, 815, 756 S.E.2d 526 (2014).

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