

RECENT DEVELOPMENTS IN FAMILY LAW 2002-2003

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RECENT DEVELOPMENTS IN FAMILY LAW 2002-2003

A. *Divorce, Child Custody, Child Support*

1. *Child Custody*

Baker v. Baker, 2003 WL 21251711 (Ga.)

Mr. and Mrs. Baker met when she was approximately two months pregnant with a child by a man named Samples. Samples, who was imprisoned at the time of the child's birth, currently remains in prison under a sentence ending in 2011. Mr. and Mrs. Baker married and a child was born three months later. Importantly, it was undisputed that Mr. Baker provided both financial and emotional support to Ms. Baker throughout the pregnancy, was listed with her consent as the father on the birth certificate, and provided financial and emotional support for the child. Specifically, Mr. Baker made non-court ordered child support payments to Ms. Baker after the couple's separation.

Mr. Baker filed for divorce and sought custody of the child. Ms. Baker answered by arguing that he was not the child's biological father and therefore could not make a claim for custody. Also, Samples moved to intervene, seeking to challenge Mr. Baker's status as the legal father. The trial court ordered both of the men's DNA tested, and it was confirmed that Mr. Baker was not the child's biological father. The Court agreed that it was in the child's best interests that he continue to act as the father. However, the trial court ruled that the 'best interest' standard was not applicable to this situation. Without considering the child's best interests, the court held that Ms. Baker rebutted the presumption of legitimacy, raised by the child's birth during the marriage. The trial court then found that Mr. Baker was not the biological father and that the marriage was irretrievably broken. Thereafter, the couple divorced and Mr. Baker's request for custody was denied.

The Georgia Supreme Court reversed the trial court's ruling and remanded this case for application of the 'best interest of the child' standard. The Court cited Davis v. LaBrec, 274 Ga. 5, where a legal father developed a paternal relationship with a child since birth, was voluntarily named the child's father on the birth certificate, lived with the child since birth, fully accepted the responsibilities of fatherhood, and developed a deep familial and psychological bond with the child through daily association. The Court concluded that analogous to Davis, the best interests of the child standard should apply in this case.

Further, the Court noted that the law that allows the presumption of legitimacy to be rebutted was never intended to sever a child's ties with his or her legal father. Moreover, the Court stated, '[that] our public policy will not permit a mother . . . to enlist the aid of the courts to disturb the emotional ties existing with the legal father after sitting on [her] rights for the first [phase] of the child's life.' Therefore, the Court discerned an incongruity in the law as it applies to mothers and legal fathers in this situation. Specifically, the Georgia Code does not address situations where, as here, the biological mother seeks to delegitimize a child who is presumed to be legitimate under law.

However, the Code does make provisions for situations where a father who is paying child support seeks to set aside a determination of paternity, thereby deligitimizing a child he wrongly believed to be his. Chief among the concerns of the Court with the current law is that under the Code, a legal father's claim for deligitimization takes into account the best interest of the child, whereas a biological mother's claim can be decided with no such inquiry. The Court then urged the legislature to promptly examine this quandary.

Patel v. Patel, 276 Ga. 266 (2003)

The husband in this matter, an obstetrician, had an extramarital affair with Walker, an employee and patient. Thereafter, he and his wife separated and she sought a divorce and custody of their two minor children. In the final divorce decree, the trial court awarded joint legal custody to the parties, but ordered that the wife have sole physical custody. Husband appealed this order contending that the trial court abused its discretion by awarding sole physical custody to the wife based merely on the possibility of prolonged exposure of the children to his paramour.

The Supreme Court affirmed the trial courts decision which, according to the Court, complied with Brandenburg v. Brandenburg, 274 Ga. 183, in which the Court held that it was an abuse of discretion to restrict visitation rights by prohibiting visitation in the presence of a specific person, unless evidence demonstrates that exposure to that individual will adversely affect the child. Further, the Court concluded that the trial court adequately evaluated the best interests of the children, specifically weighing their emotional state. The Court noted that the trial court granted liberal visitation to the husband without regard to Walker's presence. Additionally, the trial court stated that joint physical custody could be appropriate in the event of a change in circumstances, such as remarriage by the husband.

Further, the Supreme Court reasoned that there is an important distinction between visitation and custody determinations. Specifically, visitation rights, according to the Court, should be awarded to a parent unless there is evidence that they are morally unfit. However, a parent may be deprived of custody based on far less, since that award depends on the best interest of the child. The Supreme Court also examined O.C.G.A. § 19-9-1(a)(1) and stated that it confers a prima facie right on the party not in default to custody in the absence of proof that the child's welfare would be superior with the other parent. Furthermore, the Court instructed that if there is such proof, custody should be determined based on the best interests of the child, including but not limited to the conduct of the parties.

The concurring opinion affirmed the trial court's decision in regards to custody. However, the opinion disagreed with the majority's interpretation of § 19-9-1(a)(1), and stated that pursuant to Mock v. Mock, 258 Ga. 407, the trial court can consider the conduct of the parties, but it must ultimately decide custody based on the best interests of the children.

In re CR, 257 Ga. App. 159 (2002)

C.R. was born and immediately placed in the custody of the Clayton County Department of Family & Children Services (“the Department”) based on evidence that his siblings were malnourished to the point of starvation. Thereafter, C.R. was found deprived pursuant to an order. The aforementioned order was not appealed and a subsequent order granting the Department's motion to conclude its efforts to reunify the mother and her children was affirmed on appeal.

Subsequently, both of C.R.'s grandmothers sought to gain custody of him, and the court awarded temporary custody to C.R.'s paternal grandmother, Norman. The order “authorized Norman to obtain for the child physical examinations, ordinary medical care, and such additional medical care and treatment as deemed necessary by a licensed physician.” One week later, the juvenile court held a hearing to consider the mother's religious objections to Norman's desire to have C.R. immunized. At the hearing, the mother described her religious objections as follows: ‘Well, basically I, as a Christian, I believe every word that's in the Bible from Genesis to Revelation, and the Bible also states that we should believe God for our healing, and that puts vaccinations . . . at odds with what the Bible states.’ However, the mother also testified that the church to which she belonged, the “World Changers Church International,” did not disagree with the practice of immunizing children. Further, the mother submitted an affidavit to the Department exempting her children from immunizations on religious grounds pursuant to O.C.G.A. § 31-12-3, which empowers governmental agencies to require ‘persons located within their respective jurisdictions to submit to vaccination against contagious or infectious disease where the particular disease may occur, whether or not the disease may be an active threat.’ Further, § 31-12-3(b) provides: ‘[That] [i]n the absence of an epidemic or immediate threat thereof, this Code section shall not apply to any person who objects in writing thereto on grounds that such immunization conflicts with his religious beliefs.’ However, the juvenile court rejected the mother's objection, and relied on O.C.G.A. § 15-11-13, which governs the rights of a person to whom the court has awarded custody of a deprived child. This Code sections provides as follows:

A custodian to whom legal custody has been given by the court under this article has the right to physical custody of the child, the right to determine the nature of the care and treatment of the child, including ordinary medical care, and the right and duty to provide for the care, protection, training, and education and the physical, mental, and moral welfare of the child, subject to the . . . remaining rights and duties of the child's parents or guardian.

Further, the juvenile court observed that the only remaining parental rights under this Code section recognized by the Court of Appeals were the rights to consent to an adoption and child visitation. Accordingly, the juvenile court ruled that the statute gave Norman the authority to have the child immunized. However, the mother contended that the court's order violated her right to freedom of religion as guaranteed by the United States and Georgia Constitutions.

The Court of Appeals affirmed the juvenile court's order permitting C.R. to be immunized and held that the right to lodge religious objections to a child's immunizations pursuant to O.C.G.A. § 31-12-3(b), § 20-2-771(e), or § 49-4-183(b)(10)(C) were not

residual rights of the child's parents under O.C.G.A. § 15-11-13. Specifically, the Court stated that “[the mother’s] argument misse[d] the point.” The Court further opined that the mother forfeited her right to control her child's medical care and to make religious decisions for him when she lost custody, even though the loss may have been temporary. The Court stated that because the mother did not appeal the juvenile court's order finding C.R. to be a deprived child, she was bound by that determination.

Further, the Court noted that the mother did not challenge the constitutionality of O.C.G.A. § 15-11-13. Rather, the Court stated, she argued that her right to object to her child's immunizations on religious grounds was a residual parental right under the statute. However, the Court noted that religious conflicts in child custody disputes are nothing new. In such proceedings between parents, the ‘person awarded sole custody of a child shall have the rights and responsibilities for major decisions concerning the child, including the child's education, health care, and religious training, and the noncustodial parent shall have the right to visitation.’ In conclusion the Court stated that it “d[id] not believe the legislature intended to bestow upon the parents of a deprived child[,] rights greater than those granted to noncustodial parents under O.C.G.A. § 19-9-6(4).”

Rainey v. Ormond, 2003 WL 21278268 (Ga. App.)

Rainey and Ormond, his ex-wife, had one daughter. Although Ormond was originally given custody of the child, Rainey filed a petition for modification of custody, asserting that his ex- wife was not properly caring for her. Pending a hearing, Rainey was granted temporary custody of his daughter, and Ormond's parents, the Langes, were allowed to intervene in the custody action. At the subsequent hearing, the trial court accepted a settlement agreement regarding custody and granted visitation rights to the Langes. Rainey appealed the grant of visitation to his daughter's grandparents.

The Court of Appeals vacated and remanded the decision of the trial court, stating that it failed to set forth specific findings of fact to support its grant of grandparent visitation. The Court noted that the statutory provision authorizing grandparent visitation rights is O.C.G.A. § 19-7-3. This Code section provides:

The court may grant any grandparent of the child reasonable visitation rights if the court finds the health or welfare of the child would be harmed unless such visitation is granted, and if the best interests of the child would be served by such visitation. The court shall make specific written findings of fact in support of its ruling. There shall be no presumption in favor of visitation by any grandparent.

The Court further quoted Rogers v. Barnett, 237 Ga. App. 301, where it previously held that ‘O.C.G.A. § 19-7-3(c) does not require a finding that a parent is unfit, but simply that “the health or welfare of the child would be harmed unless such visitation is granted,”’ and Hunter v. Carter, 226 Ga. App. 251, where it held that ‘Absent clear and convincing evidence that the child [will] experience actual physical, mental, or emotional harm if visitation was denied, the trial court cannot justify mandating grandparent visitation over the objections of the parents.’ Further, the Court opined that in this case, the trial court's order neither showed that a clear and convincing evidence standard was used nor

contained written findings of fact required by O.C.G.A. § 19-7-3(c). The order granting grandparent visitation stated simply:

Given the allegations the parents have raised against each other (but without making a finding as to the truth or falsity of any of the allegations), the Court finds that enough issues have been raised that visitation with the [maternal grandparents] is in the child's best interests and will promote the child's well-being and avoid harm to the child's welfare, by way of providing a system of checks and balances.

The Court opined that this broad conclusory statement failed to set forth specific findings of fact to support the granted visitation. The Court further dispelled the contention that Rainey's motion for a new trial was a nullity merely because it was filed subsequent to his initial notice of appeal. The Court stated that in Housing Auth. & c. of Atlanta v. Geter, 252 Ga. 196, the Supreme Court considered 'the unique question of the effect of a notice of appeal upon a subsequent motion for new trial which is filed within the statutory period' and held: 'In the event a motion for new trial is timely filed . . . , the effectiveness of the divestiture of jurisdiction is then delayed until the motion for new trial is ruled upon and a notice of appeal to the ruling has been filed or the period for appealing the ruling has expired.'

2. Custody Relocation

Scott v. Scott, 276 Ga. 372 (2003)

Regina and Charles Scott were divorced in 2001. The couple was awarded joint custody of their two-year old daughter with Ms. Scott having primary physical custody. Specifically, the divorce decree provided in Paragraph 3,

in the event that [Ms. Scott] moves to a residence outside of Cobb, County, Georgia, it is hereby ordered and the court specifically finds, that this event constitutes a material change in circumstances detrimentally affecting the welfare of the minor child and that pursuant to Carr v. Carr, [citation omitted], primary physical custody of the minor child shall automatically revert to [Mr. Scott]. This provision is a self-effectuating change of custody provision and no action of the Court shall be necessary to accomplish this change of custody.

Moreover, the trial court held that relocating the Scott's children outside of Cobb County 'constitute[d] a material change in circumstances detrimentally affecting the welfare of the minor child.'

The Georgia Supreme Court granted discretionary appeal to determine whether a self-executing change of custody provision was permissible under Weaver v. Weaver, 260 Ga. 493, and Pearce v. Pearce, 244 Ga. 69. The Court reversed the ruling of the trial court and held that the automatic custody change provision was not a permissible extension of these precedents and should be

stricken from the parties' divorce decree. Further, the Court repudiated the holding in Holder v. Holder, 226 Ga. 254, and disapproved the opinion in Carr v. Carr, 207 Ga. App. 611. The Court stated that provisions like the one in this case, are not valid merely because the initial award of custody was based on the child's best interests. The Court further opined that it is not the factual situation at the time of the divorce decree but rather the factual situation at the time the custody modification is sought that determines whether a change of custody is warranted. Therefore, the Court stated that remarriage and relocation do not automatically warrant a change in custody. Further, the Court noted that there are situations where the aforementioned triggering events, i.e. remarriage, actually promote the best interests of the child.

The Court reaffirmed that the "best interests of the child" is the controlling standard in custody changes. Therefore, the Court stated that whether particular circumstances warrant a change in custody is a fact question determined in each case. The Court opined that the circumstances warranting a change in custody are not confined to those of the actual parent and that any new and material change affecting the child must also be considered. Importantly, the Court noted that the law recognizes that "children are not immutable objects but living beings who mature and develop in unforeseeable directions, [and] the initial award of custody may not always remain the selection that promotes the best interests of the child."

Moreover, the Court stated that "[s]elf-executing change of custody provisions allow for an 'automatic' change in custody based on a future event without any additional judicial scrutiny." Specifically, the Court distinguished the automatic custody change provisions in Weaver and Pearce, where the parties contemplated in their agreement that upon reaching the age of 14, the child might elect the parent with whom they wish to reside, as not being in conflict with the best interests of the child standard. However, the Court noted that appellate courts have upheld automatic change provisions in other situations. Specifically, the Court stated that pursuant to Ofchus v. Isom, 239 Ga. App. 738, Georgia law does not permit a modification of custody based solely on a custodial parent's relocation to another home or upon the custodial parent's remarriage. Nevertheless, appellate courts have ignored Ofchus, thereby approving self-executing change in custody provisions triggered by remarriage or relocation, that mandate without regard for the child's best interest, the removal of a child from the custodial parent. For example, the Court cited Holder v. Holder, 226 Ga. 254, in which the Supreme Court approved a provision that automatically stripped the mother of custody upon her remarriage. The Court in that case looked only to whether the provision operated as a restraint upon marriage and concluded that the mother in that case, 'had the election whether to remarry or to retain custody of the children.' Further, in that case the Court stated that the material change of circumstances affecting the welfare of the children was not involved.

Further, the Court cited Carr, in which the divorce decree provided for a change in custody from the primary to the secondary custodial parent 'in the event that either parent moves to another city (outside the Metropolitan area) or another state.' The Court noted that in that case the Court of Appeals upheld the provision looking solely to the fact that it did not prohibit Ms. Carr from moving, but set

forth consequences if she decided to do so, and found the provision more analogous to the provision approved by the Court in Weaver and Pearce. However, the Supreme Court stated that it found no kinship between the flexible self-executing change of custody provision in these cases designed to accommodate a fourteen-year-old child's exercise of his statutory right to elect the parent with whom he desires to live, and the 'draconian' custody change provisions in Carr and Holder that ignore the best interests of the child at the time of the triggering event. The Court opined that in these cases, once the triggering event occurs, the child is automatically "uprooted without any regard to the circumstances existing at the time." The Court stated that these provisions are "utterly devoid of the flexibility necessary to adapt to the unique variables that arise in every case, variables that must be assessed in order to determine what serves the best interests and welfare of a child." The Court reasoned that unlike the Weaver/Pearce provisions, the purpose of the automatic custody change provisions in Carr/Holder were not to accommodate a child's rights and needs, but to provide a speedy and convenient short-cut for the non-custodial parent to obtain custody of a child by bypassing objective judicial scrutiny.

The Supreme Court opined that while self-executing change of custody provisions are not expressly prohibited by law, any such provision that fails to give "paramount import to the child's best interests in a change of custody as between parents violates this State's public policy as expressed in O.C.G.A. § 19-9-3." The Court stated that while many children experience a degree of trauma as the result of a custodial parent's remarriage or the relocation of the family, the emotional upset constitutes only a factor that can be 'considered in the totality of the circumstances' The Court concluded by stating, "[that] neither the convenience of the parents nor the clogged calendars of the courts can justify automatically uprooting a child from his or her home absent evidence that the change is in the child's best interests."

3. Custody Relocation and Modification

Bodne v. Bodne, 257 Ga. App. 761 (2002)

In this case, the parties were divorced and agreed to an arrangement of joint legal custody for their two children, with the father designated as the children's primary physical custodian. Specifically, the custody arrangement stated: "The parties shall have joint legal custody with Husband having primary physical custody of the aforesaid minor children The parties agree to share the children an equal amount of time, including the holidays. The parties anticipate rotating the children between the parties every two weeks." The agreement also provided that Bodne would be responsible for maintaining the children's medical and dental insurance and paying all expenses for their clothing and extracurricular activities. Subsequently, Bodne remarried and informed his ex-wife that he planned to move with the children to Alabama. Bodne then filed a petition to modify his ex- wife's visitation schedule to accommodate the move. Bodne's ex-wife filed a counterclaim, seeking primary physical custody of the children. She argued that Bodne's move constituted a substantial change in a material condition sufficient to warrant a

change in custody. Bodne moved to Alabama with his new wife and the two children, in June 2001.

At the hearing on Bodne's motion to modify visitation, he presented testimony that the children were doing well in school and were adjusting well to their new home. Bodne's ex-wife presented evidence that she had sought treatment for and had overcome her substance abuse problem, was happily remarried to a supportive husband, and that she shared a special bond with her children. No testimony was presented that the children's move with the father had any adverse effect on them. The court found that both parents were capable of caring for the children and held that 'there [had] been a substantial change in a material condition sufficient to justify a modification of custody.' The court reasoned that in light of the parties' prior agreement to share time with the children on a nearly 50-50 basis, Bodne's decision to move out of state made this aspect of the parties' agreement impossible to execute. The court then changed the prior custody arrangement between Bodne and his ex-wife by designating her as the new primary physical custodian of the children. Bodne appealed.

The Georgia Court of Appeals reversed the trial court and remanded this case holding that the trial court erred by changing primary physical custody in the absence of any reasonable evidence of a substantial change in a material condition affecting the welfare of the children. The Court reasoned that an award of custody vests the custodial parent with a prima facie right, and ordinarily the court should favor the parent having such a right. Further, the Court opined that it is a change for the worse in the conditions of the child's home environment rather than any purported change for the better in the environment of the non-custodial parent that the law contemplates under this theory.

The Court then cited Omandy v. Odom, 217 Ga. App. 780, where this Court previously stated, that in situations where one parent is designated as the primary physical custodian of the children, and '[t]he only change in the conditions surrounding the children is that the father remarried ... and moved out of state, [r]elocating and remarrying are not in and of themselves sufficient changes in conditions to authorize a change in custody.' The Court noted that in the present case, the parties specifically agreed that the father would be designated as the primary physical custodian of the children. As such, he had a prima facie right to retain custody of the children, and his relocation to Alabama did not, in and of itself, constitute a change in conditions authorizing a change in custody. Further, the Court noted that Bodne was a loving father who was fully capable of caring for the children. In summation, the Court found that although the evidence did not support a change in custody, the relocation of the children may necessitate a modification of the mother's visitation rights in this case.

4. Custody Modification

Durham v. Gipson, 2003 WL 21349543 (Ga. App.)

Michelle Durham ("the mother") and Arlie Gipson ("the father") were divorced in Virginia and the father was granted primary physical custody of the couple's two minor children. The judgment was domesticated in Georgia after the father and the children moved to this state. Thereafter, the mother, still a resident of Virginia, filed a petition in Georgia for modification of custody based on the fact that Maria, the older child, was

now 14 years of age and decided she wanted to live with her mother. The mother further asserted that Brandy, who was now 10, also expressed an interest in living with her mother. The trial court appointed a guardian ad litem to evaluate the petition, and in a temporary order transferred custody of Maria to the mother based upon its findings that the older child, who was of the age of election under Georgia law, had elected to live with her mother, and that she was a fit and proper custodial parent. The trial court deferred making a determination as to the custody of the younger child until the guardian ad litem could complete her investigation. In a report, the guardian ad litem noted that the girls distrusted guardians because years earlier, when the divorce was still pending, they told a guardian that they wanted to live with their mother; yet, the court placed them with their father. The report further stated that the younger child wanted to live with her mother, and that this caused her to cry at night. Both children also told the guardian they missed each other.

According to the guardian, both the mother and the father were good parents, and both offered good homes. However, the guardian opined that the girls had reached a time in their lives when they needed their mother, and that they had issues 'that c[ould] only be discussed with a mom.' The guardian added that the two girls had bonded and should not be separated. After a hearing, the court ordered that temporary primary physical custody of the younger child be awarded to the mother, making a specific finding that the custodial election of the older child was a material change in circumstances. The judge also found that the guardian made a thorough investigation which, although not binding, would be considered by the court.

Thereafter, the guardian submitted her final report in which she stated that the younger child was happy in her mother's care, and that she desired to remain in her custody. The guardian recommended that the court leave the children together and that the younger child would be devastated if she was compelled to return to Georgia. However, the father's adult daughter from a prior marriage testified that she spoke with Brandy during her summer visitation with their father, and the girl stated that she did not want to choose between her mother and father and she wanted the court to decide. In a final order the trial court ruled that there was no evidence of a material change in circumstances to justify changing custody. The court found that the father had been an excellent parent. The court further noted the guardian ad litem's findings, concluding that the children had thrived under the father's care, and also that the mother had been a good parent to the children. The court stated that although it considered the younger child's wishes, it was not bound by them. In summation, the court concluded that there was no evidence to show the existence of a significant change in circumstances sufficient to change custody to the mother.

The Court of Appeals reversed and remanded the case, opining that the trial court erred in concluding that there was not a sufficient change in condition to warrant a change of custody as to the younger child. The Court stated that it was clear that the trial court struggled with whether an election by a child over the age of 14, is sufficient to justify changing custody of a younger sibling to that parent, especially when both parents provide healthy home environments. However, the Court stated that the Georgia Supreme Court has held that a change of custody of one sibling due to an election is sufficient as a matter of law to constitute a material change in circumstances as to the other siblings. Once that material change is established then the trial court had discretion to decide

whether it was in the best interest of Brandy to live with one parent or the other. According to the Court, this makes sense, because the court's duty in custody cases is to determine whether modification is in the best interest of the children. The Court further stated that relevant changes include any new and material change in the circumstance of either the parent or of the children, which might affect the children's health, happiness or welfare, including being separated from one's sibling which can take an "emotional toll on a child."

5. *Child Support*

Corson v. Marbel, 257 Ga. App. 874 (2002)

After Corson and Marbel divorced, Marbel was awarded custody of their daughter. Thereafter, Corson was obligated: (1) to pay child support, (2) maintain health insurance for their child, and (3) to pay half of her medical expenses not covered by insurance. Specifically, for eight years, Corson paid \$280 per month in child support to Marbel. In 2000, the amount of child support was increased by court order to \$548.32 per month. In 2001, Corson petitioned for a change of custody based upon their now 16-year-old daughter's election. He was awarded temporary custody but no child support. The undisputed evidence showed that Marbel was gainfully employed and that her gross earnings were \$2,037.20 per month. Moreover, her present husband earned approximately the same income and they had a baby daughter with no special needs. Without entering any factual findings, the trial court denied the requested relief. Corson contended that the trial court erred in denying an award of temporary and permanent child support to him. He also claimed that the trial court erred by failing to make the written findings required by statute or special findings on the record pursuant to Ehlers v. Ehlers, 264 Ga. 668.

The Court of Appeals reversed and remanded the decision of the trial court stating that pursuant to O.C.G.A. section 19-7-2,

[i]t is the joint and several duty of each parent to provide for the maintenance . . . of his or her child until the child reaches the age of majority . . . except as otherwise authorized and ordered pursuant to subsection (e) of Code Section 19-6-15[,] and except to the extent that the duty of the parents is otherwise . . . defined by court order.

Additionally, the Court of Appeals stated that child support obligations are set by the statutory guidelines that appear in O.C.G.A. § 19-6-15(b)(5), which must be considered by trial courts. Moreover, the Court opined that the application of the statutory guidelines created a rebuttable presumption that the amount of support indicated by the guidelines is, in fact, the correct amount of support. Further the Court held that in order to deviate from the statutory guidelines, the trier of fact must enter a written finding that the existence of one or more of the "special circumstances," as enumerated by O.C.G.A. § 19-6-15(c), 'makes the presumptive amount of support either excessive or inadequate.' The Court stated that in this case, although it appears the amount of child support would be within the range of 17 to 23 percent of \$2,037.20, the court simply denied 'Plaintiff's

request that Defendant pay child support,’ without entering any written finding of special circumstances. The Court also stated that the mere fact that Marbel and her present husband have a young child ‘will not justify a reduction from the guideline range. The essential question is whether this additional support obligation renders the presumptive amount of support excessive.’

Department of Human Resources v. Allison, 276 Ga. 175 (2003)

Briefly, the parties in this case are divorced, the mother retained custody of the minor child, and the child does not receive any public assistance. Further, the father is obligated pursuant to the divorce decree to pay the mother one hundred dollars per week in child support. At the father’s request, the Department of Human Resources (“DHR”) determined that under the guidelines in O.C.G.A § 19-6-15, the amount of his payments should be reduced. Pursuant to section 19-11-12, DHR filed a petition seeking a decrease in his weekly amount of support and the mother objected to the proposed modification. Citing Allen v. Georgia Dept. of Human Resources, 262 Ga. 521, the trial court denied the petition and held that DHR did not have standing to seek a modification because the aforementioned child did not receive public assistance and DHR did not show a need for additional support. The Georgia Supreme Court granted discretionary appeal.

The Supreme Court affirmed the trial courts ruling, and held that § 9-11-12 conferred standing on DHR to seek a downward modification in cases where it previously participated and obtained an order establishing or enforcing child support, but held that the record in this case failed to show that DHR demonstrated prior involvement in the case. The Court also distinguished Allen as a case seeking an increase in support payments instead of a decrease and therefore stated that demonstrating a need for additional support was irrelevant in this case. Further, the Court stated that DHR is not limited to representing parents whose children are receiving public assistance. Specifically, it stated that §§ 19-11-6(c) and 19-11-8(b) require DHR to accept applications for child support ‘enforcement services’ from parents of minor children not receiving public assistance based on the rationale that the child will then not need public assistance in the future. Also, the Court opined that the review process of §19-11-12 is solely applied to Title IV-D cases and DHR’s review authority under the statute only extends to cases which are already being enforced under that title. Also, the Court noted that § 19-11-12 does not authorize the agency to review a child support order unless it had pre-existing involvement in obtaining the order pursuant to §§ 19-11-6 or 19-11-8.

Importantly, the Supreme Court stated that there is no Georgia statutory or case law permitting DHR’s direct participation in a case for the purpose of a downward modification action on behalf of a non-custodial parent. Further, the Court stated that it did ‘not believe the legislature intended to give DHR the power to seek modification of support to the same extent that a parent [could] do so.’ Additionally, although Allen was distinguishable, the Court stated that its recognition that there is not complete identity of interest between DHR and the parent is applicable. Moreover, the Court relied on the policy that to provide DHR with unlimited authority would leave no incentive for any non-custodial parent to turn to the private bar for downward modification actions.

Eldridge v. Ireland, 259 Ga. App. 44 (2002)

Eldridge and Ireland had a son and Eldridge sued to legitimate him. The couple then agreed to joint legal custody, and a bench trial was held on the issue of child support. The trial court established that Eldridge had an earning capacity of \$45,000 per year and awarded Ireland monthly child support payments of \$750. Subsequently, the trial court: (1) denied Eldridge's motion for a new trial, (2) held that his motion lacked substantial justification and was interposed for the purposes of delay and harassment, and (3) awarded Ireland attorney fees of \$1,250.

The Court of Appeals then granted Eldridge's application for the discretionary appeal of two separate cases. In the first case, Eldridge appealed the child support award. The Court vacated the order and remanded the case holding that the order did not meet the statutory requirements for a decree awarding child support. In the second case, Eldridge appealed the award of abusive litigation attorney fees in connection with his motion for new trial. The Court of Appeals reversed this decision and held that the trial court abused its discretion in awarding the fees.

In the first case, the Court of Appeals stated that O.C.G.A. § 19-6-15(b)(1) provides:

that child support is to be based upon *gross income of the obligor* and subsections (b)(2) through (b)(4) detail what is to be considered by the trier of fact in arriving at the obligor's gross income. . . . Subsection (c) of that same Code section then provide a non-inclusive list of special circumstances which may warrant variations from the amount of child support indicated by the guidelines and specifically require the trier of fact to make a written finding of special circumstances before such a variance is permitted to stand. (emphasis added).

Therefore, the Court opined that the trial court made no findings as to Eldridge's gross income. The Court stated that in this case, the amount of child support was clearly based on a percentage of Eldridge's earning capacity. Further, the Court noted that in Duncan v. Duncan, 262 Ga. 872, the Supreme Court held that an award of child support could be based on the earning capacity of the obligor and not on gross income in certain circumstances. But according to the Court, it is also apparent from Duncan that the obligor's gross income is the starting point for a child support determination under O.C.G.A. § 19-6-15(b). The Court further cited Walker v. Walker, 248 Ga. App. 177, where no finding of gross income of a custodial parent was necessary in computing child support where it was clear that the custodial parent had no actual income. In contrast, the Court noted that Eldridge was the obligor under the child support decree, and that he did have an income. Therefore, the Court opined that Eldridge's income is at issue in this case and in order to review its amount, the Court would need to make assumptions, because there is no express finding of the amount and the amount is disputed.

The Court then cited Urquhart v. Urquhart, 272 Ga. 548, where the Supreme Court previously vacated a child support award where the order failed to comply with

O.C.G.A. § 19-6-15(b) guidelines, including the failure to make written findings as to the gross income of the child's parents. Similarly, in Eleazer v. Eleazer, 275 Ga. 482, the Supreme Court vacated the trial court's order of child support where the trial court failed to make a finding as to the parents' gross income. Moreover, the Court of Appeals concluded that in this case the interests of justice were best served by adopting the remedy employed by the Supreme Court in Urquhart and Eleazer.

The Court of Appeals stated that '[a] motion for new trial may be used in addition to the filing of motions in attacking fact findings, by the court in non-jury trials, contained in the entered judgment.' Therefore, the Court rejected Ireland's reliance on Alf v. Alf, 226 Ga. 880, which stated that a motion for new trial is not an available remedy in a custody case. Further, the Court opined that Alf was not sustainable in light of Adair v. Adair, 236 Ga. 443.

Hulett v. Sutherland, 2003 WL 21145838 (Ga.)

After Cindy Hulett and Donald Sutherland divorced, they agreed to joint legal custody of their daughter, with Hulett having primary physical custody, and Sutherland paying \$450 per month in child support. The final decree stated: "the 'court finds as follows: the gross income of [Sutherland] is approximately \$4,000 per month.' The decree also contained the existence of several special circumstances, including that Sutherland would pay for the daughter's private school tuition through high school, and it ordered a downward departure from the guidelines to award \$450 per month in child support.

In 2002, Hulett brought a petition for upward modification of child support based on Sutherland's increased income and the fact that their daughter was no longer attending private school. At the hearing, Hulett relied upon the final decree that showed Sutherland's annual income in 1997 to be \$48,000 and presented current tax returns and pay stubs showing Sutherland's income in 2001 to be approximately \$74,500. However, the trial court relied upon 1996 and 1997 tax returns and found that Sutherland's income in 1997 was \$81,500, rather than \$48,000. Relying on Sutherland's representation of his income in 1997, the trial court held that Hulett had not shown a substantial increase in Sutherland's income to authorize an upward modification and denied the petition.

The Georgia Supreme Court reversed and remanded the case holding that the final decree was wholly conclusive on the issue of the Sutherland's income. The Court cited O.C.G.A. § 9-12-40 which provides that '[a] judgment . . . shall be conclusive between the same parties . . . as to all matters put in issue . . . until the judgment is reversed or set aside.' Further, the Court rejected the argument that because the parties' settlement agreement did not contain any reference to Sutherland's income, his income was not put in issue, and held that the trial court was bound by the figure in the final judgment. The Court opined that the trial court's final decree, expressly contained a finding regarding income which was in compliance with O.C.G.A. § 19-6-15(a), which requires a trial court to include a 'written finding of the gross income of the father and the mother' in any final decree of divorce in which minor children are involved. The Court further stated that because the final decree has not been reversed or set aside, the trial court's finding that Sutherland's income was \$48,000 is conclusive. Therefore, the trial court was without authority to allow Sutherland to re-litigate a matter that was fully decided.

Lewis v. Scruggs, 2003 WL 21310352 (Ga. App.)

A jury returned a verdict directing Lewis to pay increased child support based upon a substantial change in his financial condition. Specifically, the jury determined that Lewis' gross income was \$144,362 per year. Further, because he was only supporting one child, the jury applied O.C.G.A. § 19-6-15 (b) (5) and awarded child support in the 17 to 23 percent range, which it calculated to be \$1000 per month. The jury also found that special circumstances existed justifying a deviation from the applicable guidelines. These special circumstances included:

(1) [The] [a]ges of the children[,] (2) [the] [i]ncome that should be imputed to a party because of suppression of income[,] (3) [the] [i]n-kind income for the self-employed, such as reimbursed meals or a company car[,] [a]nd (4) [the] [u]nusually high income of either or both parties, which shall be construed as individual gross income of over \$75,000 per annum. See O.C.G.A. § 19-6-15(c).

Lewis appealed from the denial of his motion for a new trial contending that the jury erred in calculating the aforementioned child support award.

The Court of Appeals reversed the judgment and remanded the case for a new trial. The Court reasoned that if the jury correctly applied the 17 to 23 percent guideline pursuant to the aforementioned statute, the monthly award of child support would be at least \$2,045. The Court further reasoned that to justify a downward deviation from this amount, the jury was required to find special circumstances which made the amount of the award excessive. The Court opined that although the jury checked several special circumstances listed on the verdict form, it failed to explicitly state whether an award under the guidelines was excessive. In fact, the Court noted that the form supported an inference that the award was inadequate and that the jury intended for Lewis to pay more, not less. Further, the Court opined that it was unable to deduce the jury's intent because it failed to state as required, what the amount of the award would have been before the application of the special circumstances. The Court stated that the jury failed to calculate correctly the child support award, failed to make the requisite written or record findings, and failed to properly apply the aforementioned statute.

The Court further reasoned that the jury may have confused its authority to find special circumstances pursuant to O.C.G.A. § 19-6-15(b) with its authority under O.C.G.A. § 19-6-15(b)(4) to include back into the computation of gross income those self employment expenses which personally benefited Lewis. Specifically, the Court noted that the jury found Lewis' gross income equaled his gross business receipts for the tax year of 2000. The Court reasoned that to reach this conclusion the jury must have determined that all of his business expenses benefited him personally. The Court further noted that the verdict form in this case did not provide a separate section for calculating self-employment income or for indicating what business expenses personally benefited the obligor and were therefore added back into the jury's finding of gross income. Yet, the Court stated

the form listed all special circumstances warranting a deviation from the guidelines, and stated that some of those could be easily misconstrued to apply to the calculation of self-employment income. For example, '[i]n-kind income for the self employed, such as reimbursed meals or a company car' could be misconstrued. The Court opined that this was a problem because those 'considerations had no relevancy whatsoever to the jury's determination of [Lewis'] gross income.' Rather, the Court concluded they are only to be considered when the jury decides to vary the child support from the presumptive amount, which occurs after the jury has determined the obligor's gross income. The Court concluded its opinion with a caveat directing the court to use caution in creating a verdict form that keeps these issues "separate and distinct."

Richardson v. Levitt, 275 Ga. 444 (2002)

John Richardson and Valerie Levitt were divorced by final judgment and decree which incorporated a settlement agreement, which provided that Richardson was required to pay 25 percent of his gross monthly salary as support for the parties' two minor children and, as additional child support, 25 percent of the net of any future 'bonus or salary increase from his employer' received in a year in which his child support obligations were ongoing. Richardson was to retain as his separate property his entire retirement account and his pension with his employer. Thereafter, Richardson's employer, IBM Corporation, announced the need to reduce the number of employees holding positions, such as Richardson. It offered those employees the opportunity to participate in an 'Application Solutions Transition Option Program Pre Retirement Leave of Absence Agreement' ("ASTO"), which was intended to provide transition assistance to employees who opted into the program and were accepted. Specifically, an employee participating in the program was required to sign a departure commitment agreement, and received 'one week of pay for each six months of service fully or partially completed, up to a maximum of 52 weeks, with a minimum of eight weeks.' Richardson accepted the offer and received a lump sum payment of \$83,463.89.

Thereafter, Levitt filed a contempt action claiming that Richardson was obligated to pay 25 percent of the ASTO payment as child support under the settlement agreement. After a hearing, the trial court found Richardson in wilful contempt for failing to pay child support in excess of his base income, and in failing to pay certain college expenses as required by the agreement

The Supreme Court affirmed the ruling of the trial court and held that the ASTO payment was 'bonus or salary' and was thus subjected to the increase provision contemplated by the settlement agreement and was not a retirement benefit. The Court noted that Richardson's agreement with IBM provided that while on the ASTO pre-retirement leave of absence, he would receive no regular wages, and no retirement income. In addition, the agreement specified that Richardson would retire from IBM at the end of his ASTO leave, and that the lump sum payment was intended to 'assist employees in making the transition into a new career or retirement.' The Court noted that the amount of the payment was calculated on the basis of an employee's regular salary and years of service with IBM, and was made in lieu of any other separation pay. Finally, the Court observed that the agreement specified that the ASTO payment was made in

addition to any accrued retirement income, which benefits would begin at the conclusion of the pre-retirement leave and upon retirement eligibility.

The Court opined that the Supreme Court previously defined salary as compensation paid by an employer for services rendered in Guntin v. Guntin, 263 Ga. 241, and that while ‘retirement benefits’ may be considered salary under that definition, in this case, the parties entered into a contractual agreement which provided that Richardson's retirement income would remain his separate property and thus would not be subject to the escalation clause. The Court then cited Kendrick v. Childers, 267 Ga. 98, where the Supreme Court held that parties may enter into an agreement providing for modification of child support, and such agreement will be enforceable. Further, the Court stated that by definition, a bonus is something extra for which no services are rendered. The Court reasoned that since the lump sum ASTO payment was intended as separation pay based upon services rendered to the employer, it was in the nature of continuing salary to compensate the employee during the period he would no longer receive wages from IBM and during the transition to other employment or retirement. Thus, the Court held that the lump sum separation payment was not intended as retirement income under the terms of the ASTO agreement.

6. *Child Support Guidelines*

Georgia Department of Human Resources v. Sweat, __ Ga. __, 580 S.E.2d 206 (2003)

Briefly, when Samuel and Michelle Sweat divorced, they agreed that Samuel would retain custody of the couple’s three minor children, that Michelle would retain visitation rights, and that she would not be required to pay child support. Thereafter, at Samuel’s request, the Georgia Child Support Enforcement Agency (“the Agency”) notified Michelle of a ‘possible modification’ of her support obligation and asked her to furnish financial information. Shortly thereafter, based upon Georgia’s statutory guidelines (the ‘Guidelines’), the Agency instructed her to pay \$452 per month in child support and \$79 per month towards the children’s health insurance. Michelle challenged both the support award and the Guidelines.

The trial court concluded that the Guidelines: (1) were arbitrary, hastily enacted, and reviewed by an unqualified Guideline Commission, and therefore violated substantive due process under both the Georgia and United States Constitutions, (2) violated state and federal equal protection guarantees by placing different burdens on individuals who, ‘but for the award of child custody,’ “are similarly situated,” (3) violated the state constitutional right to privacy because they interfere with ‘parental decisions regarding financial expenditures on children,’ and (4) violated the takings clause of the Georgia Constitution by reducing Michelle ‘to poverty status’ as she could not afford to appeal if she lost this action in the trial court.

The Supreme Court reversed the trial court’s decision and stated that the Guidelines: (1) do not violate due process because they are rationally related to the important state purpose of ensuring that adequate support is provided for Georgia’s children whose parents have divorced or separated, (2) are not arbitrary as they take into account and vary the amount of support paid based on the non-custodial parent’s income and eighteen enumerated special circumstances, (3) do classify between custodial and

non-custodial parents, but that distinction is required to ensure that the non-custodial parent contributes his fair share of support, (4) do not violate state or national equal protection because no equal protection violation exists unless legislation treats similarly situated individuals differently, and custodial and non-custodial parents are not similarly situated, (5) do not violate the right to privacy because setting child support payment levels is a public function and process, and (6) do not result in an illegal taking because they are not a governmental taking used for a public purpose but the state's efforts to ensure adequate care for children of divorced parents.

B. Settlement Agreements, Alimony, Pre-Marital Agreement

1. Settlement Agreement

Barnett v. Platz, 2003 WL 1961737 (Ga. App.)

Barnett and Platz divorced and their settlement agreement, as incorporated into the final divorce decree, provided that Platz would keep the marital residence, that Barnett would convey her interest in the property to Platz, and that he would be responsible for the mortgage, taxes and insurance on the property. The agreement further provided that if he sold the property, remarried, or died, then Barnett would receive half of the equity in the property, although this amount could not exceed \$20,000. Barnett and Platz remarried and divorced again. Their second settlement agreement, incorporated into the final divorce decree, provided that the marital residence was solely titled in Platz's name and was not marital property subject to division. The agreement also contained the following release provision:

‘Except as otherwise provided herein, the parties shall and do mutually remise, release, and forever discharge each other from any and all actions, suits, debts, claims, demands and any and all obligations whatsoever against each other. Both parties herein do certify that they have revealed to the other party all their present assets and by signing this Agreement, acknowledge same to be true.’

Another clause in the contract provided that ‘each party hereby waives any past, present or future claim or right which he may have against the other party.’

Thereafter, Platz died intestate and the couple's son was appointed administrator of the estate. Based on the first divorce agreement, Barnett filed this lawsuit against her son individually and as administrator of the estate, seeking \$20,000 as her portion of the equity in the marital residence property. The son responded that Barnett gave up any interest in the property pursuant to the release provision in the second agreement. The parties both moved for summary judgment. The trial court denied summary judgment to Barnett and granted summary judgment to her son. The court reasoned that Barnett's interest in the house ripened into a debt owed to her by Platz under the first settlement agreement terms when they remarried. But when they divorced later that year, their second settlement extinguished Platz's debt to Barnett pursuant to the release language

which provided that the parties forever discharged one another from any actions, debts or claims. Barnett appealed.

The Court of Appeals affirmed the trial court. The Court reasoned that regardless of whether the debt was triggered by the remarriage, the settlement agreement released Platz from any obligations to Barnett concerning the property. Further, the Court opined that it must determine the meaning of a settlement agreement according to the intention of the parties. Further, the Court noted that in this case the settlement agreement clearly stated that the property belonged solely to Platz and was not marital property subject to division. Additionally, the Court took notice that two paragraphs later, the release clause unambiguously provided that the parties revealed to each other all their assets and that ‘the parties shall and d[id] mutually remise, release, and forever discharge each other from *any and all* actions, suits, debts, claims, demands and *any and all obligations whatsoever* against each other.’ The Court concluded that based on the clearly stated intention of Platz and Barnett to discharge each other from any and all actions and obligations, Platz had an obligation to give Barnett half the equity of the property under the prior decree. The Court further stated that whether Platz’s obligation became an actual debt upon the remarriage, or whether it was an obligation based on Barnett’s expectancy interest in the property, the obligation was extinguished by the broad language of the release provision in the agreement. The Court then dismissed the additional arguments offered by Barnett concluding that if Platz was indebted to Barnett for half the equity in the house as a result of their remarriage, the release language in the agreement waived that debt and that the plain language of the agreement did not contain language limiting the release to claims arising out of the second marriage.

Guthrie v. Guthrie, 259 Ga. App. 751 (2003)

Sandra Guthrie sued Dallas Guthrie for divorce and the parties attended a mediation, which resulted in a handwritten settlement agreement. Approximately one month later, Dallas, moved to have the agreement set aside arguing that the medication he took for his illness rendered him incapable of making an informed decision, as evidenced by the fact that he agreed to pay more than he could afford. Before the trial court ruled on his motion, Dallas died. The court subsequently dismissed the divorce proceeding.

Thereafter, Sandra filed a complaint seeking to enforce the settlement agreement. Subsequently, she moved the court to enforce the agreement, contending that she was entitled to judgment as a matter of law. The trial court denied the motion on the grounds that the settlement agreement was unenforceable. In its order, the trial court noted that it had discretion to reject the settlement proceedings, and further reasoned that the agreement contractually failed because it lacked consideration. The executors then moved for summary judgment, which the trial court granted. On appeal, Sandra contended that the trial court erred in granting the executors’ motion, and that she was entitled to judgment as a matter of law.

The Court of Appeals reversed the trial court’s grant of summary judgment and rejected Sandra’s contention that she was entitled to judgment as a matter of law, stating that issues of fact still remain. The Court opined that settlement agreements arising out of divorce proceedings are contracts. Moreover, the Court stated that such agreements ‘. . . must be construed in the same manner and under the same rules as all other contractual

agreements.’ Likewise, such agreements are enforceable even if the contract is never incorporated into a final divorce decree. The Court rejected the argument that, that because Dallas died before the divorce was finalized, the settlement agreement lacked consideration and was unenforceable, and stated that ‘the termination of family controversies affords a consideration which is sufficient to support a contract made for such purpose.’ Additionally, the Court rejected the argument that upon Dallas’ death consideration was extinguished, thereby rendering the contract void and stated that ‘the adequacy of consideration must be tested by the facts and conditions existing at the time the contract was made.’ The Court opined that the agreement between the parties did not only settle the divorce, but also the division of property, which provided sufficient consideration to support the agreement.

The Court further stated that the trial court treated this as a divorce case, when in essence it was a contract case. The Court stated that it is unaware of any authority that permits a court to summarily reject an otherwise valid contract merely because it arose out of a divorce proceeding. The Court rejected the arguments that in seeking to have the settlement set aside, Dallas, rescinded the agreement and that by seeking a years support and temporary alimony in contravention of the terms of the agreement, Sandra, agreed to rescission. In summation, the Court stated that generally the issues of capacity to contract and rescission are jury questions and that these actions do not establish as a matter of law an intent to rescind a permanent property settlement agreement.

Horwitz v. Weil, 275 Ga. 467 (2002)

Horwitz and Weil were divorced, and the final decree approved and incorporated by reference a settlement agreement. In April of 2001, Ms. Horwitz filed a motion seeking to hold Weil in contempt, claiming that he failed to comply with the agreement, which provided, in pertinent part, that,

[n]otwithstanding anything herein to the contrary, the husband agrees that upon the sale of the marital residence or on April 1, 2001, whichever event first occurs, he shall pay from the proceeds of the sale to the Wife all of the net proceeds from the sale of the house, but not more than \$50,000.00.

The trial court found that this provision was not ambiguous and that Weil's payment was contingent upon his sale of the house prior to April 1, 2001. Because this condition was not met, the court concluded that Weil was relieved of the obligation and, therefore, could not be held in contempt. Ms. Horwitz sought permission to file a discretionary appeal, and the Supreme Court granted the application.

The Georgia Court Supreme Court reversed and remanded the decision of the trial court and held that the aforementioned paragraph of the agreement was ambiguous. The Court noted that when considered in its entirety, the agreement initially imposed an unconditional requirement that Weil pay in either of two specified events, but then provided for a source of payment which presumably would exist only upon the occurrence of one of the alternatives. Under these circumstances, the Court opined that there was an ambiguity as to the rights and responsibilities of the parties when April 1, 2001 passed and there were no actual sale proceeds.

The Court then applied the “usual rules of construction” to interpret the agreement, which included considering the background of the contract and the circumstances under which it was entered. The Court noted that the aforementioned paragraph of the agreement appeared in the ‘Division of Property’ portion of the settlement agreement, wherein the parties ‘intend[ed] ... to divide equitably between them the property acquired during the marriage.’ Thus, the Court concluded that the purpose of the paragraph was to reimburse Ms. Horwitz for releasing to Weil her present interest in the marital residence, in exchange for a share of the equity, not to exceed \$50,000, payable to her within ten years from the divorce decree. Further, the Court noted that under this interpretation, her right to payment became ‘fixed’ on April 1, 2001 even though Weil still owned the house. Moreover, the Court opined that if payment was contingent upon the sale of the house, the agreement would be a completely illusory. Under that interpretation, the Court noted, Weil could evade payment simply by waiting to sell the residence until after April 1, 2001.

The Court further reasoned that the agreement did not require the existence of ‘actual’ sales proceeds, and the lack of such proceeds did not defeat Ms. Horwitz’s right to payment. Further, the Court noted that with regard to the amount Ms. Horwitz was entitled to recover, the settlement agreement defined ‘net proceeds’ as “those funds remaining after the deduction from the sales price of the then existing balances on the first and second mortgages ... [,] real estate commissions not to exceed six percent (6%), [and] other ordinary, usual and necessary costs of sale.” The Court further noted that price is generally defined as market value and that the fair market value of the property on April 1, 2001, the balances on the outstanding mortgages, and the amounts of the real estate commission were capable of proof. Further the Court noted that expert testimony would be admissible to show the meaning and amount of “ordinary, usual and necessary costs of sale.”

2. Spousal Support, Alimony

Adcock v. Adcock, 259 Ga. App. 514 (2003)

Hugh Adcock, Jr. (“Mr. Adcock”) died and, thereafter, Gregory Adcock, individually; as temporary administrator of the estate of Mr. Adcock; as heir of Mr. Adcock; and as sole beneficiary under the will of Mr. Adcock and sole heir, offered a petition to probate his father’s will. Subsequently, Mr. Adcock’s second wife, Geraldine Adcock, filed a caveat to the will, asserting a spouse’s interest in the estate. The probate judge granted Gregory’s motion to dismiss the caveat, and concluded that the settlement agreement reached by the Adcocks following their separation constituted a renunciation of inheritance rights.

Subsequently, Ms. Adcock filed a declaratory judgment action in superior court, pursuant to O.C.G.A. § 19-6-12, seeking a declaration of her spousal rights in the marital residence where she had resided with Mr. Adcock. Mrs. Adcock then appealed the court’s order granting summary judgment to Gregory, contending that the court erred in finding, as a matter of law, that a deed made under a separation agreement remains enforceable after she reconciled and voluntarily cohabited with Mr. Adcock before his death.

The Court of Appeals affirmed the decision of the trial court likewise holding that the Adcocks' reconciliation did not “vitiolate” the separation agreement as to the division of property in issue under § 19-6-12. The aforementioned Code section provides that:

‘The subsequent voluntary cohabitation of spouses, where there has been no total divorce between them, shall annul and set aside all provision made either by deed or decree for permanent alimony; provided that the rights of children under any deed of separation or voluntary provision or decree for alimony shall not be affected by such subsequent voluntary cohabitation of the spouses.’ (emphasis added).

The Court noted that it was undisputed that Mrs. Adcock and the decedent voluntarily reconciled and lived together as man and wife and that Mrs. Adcock received a \$150,000 cash payment from Mr. Adcock as to the marital residence, in repayment of a loan she made to him before the couple's marriage. However, the Court opined that Mrs. Adcock's testimony on these questions was equivocal in proving: (1) that the reconciliation occurred after the separation agreement was executed and during the pendency of the divorce action before Mr. Adcock's death; (2) that Mrs. Adcock conveyed her interest in the marital residence under the separation agreement; and (3) that the conveyance was independent of the payment Mrs. Adcock received from Mr. Adcock in repayment of the loan she previously made to him.

Therefore, the Court stated that within the meaning of O.C.G.A. § 19-6-12 the separation agreement was an ‘executed property settlement ... not rendered void by cohabitation’ since by its terms it foreclosed an award of alimony to the parties. Specifically, the Court stated that there was no evidence that the property was transferred as alimony and that the reconciliation of the parties was insufficient to annul the conveyance.

Crowther v. Estate of Crowther, 258 Ga. App. 498 (2002)

Crowther married and the decedent died the following year. Subsequent to his death, Crowther filed a “petition for year's support”, naming herself as decedent's surviving spouse and Michael Crowther as his minor child. The petition showed that the child was born approximately two months after the death. Powell, as administrator of decedent's estate, filed a caveat to the petition, alleging that Crowther's minor child was not the decedent's biological child. It further alleged that Crowther induced the decedent to marry her by falsely claiming that she was pregnant with his child, that the marriage was not ratified by subsequent acts, and that as a result, Crowther was not the decedent's lawful widow.

Powell, filed a motion for genetic testing of the child and served a request for admissions, on Crowther. Among other things, Powell requested Crowther to admit that she was married to Ordonez when she married decedent and that she remained married to him. Crowther failed to attend a deposition and did not respond to Powell's discovery requests by the required date, whereby her attorney moved to withdraw from representation. The court allowed the withdrawal and granted the motion for genetic testing. Subsequently, Crowther through new counsel filed a motion to withdraw her

judicial admissions, stating that she failed to respond to the request because she received it two weeks after the service date, and she did not understand the English language or the American judicial process. Crowther filed an answer to Powell's request for admissions, and admitted that she had been married to Ordonez when she married decedent and that she had not divorced him.

Thereafter, Powell moved for summary judgment, stating: (1) that Michael Crowther was not the child of the decedent, (2) that Crowther was married to Ordonez when she married decedent, and (3) that Crowther never divorced Ordonez. Subsequently, Crowther filed an amendment to her answers denying that she had ever been married to Ordonez and stating that any admission to the contrary had been in error. However, Crowther failed to file a motion to amend her earlier, contradictory admission. The court granted the summary judgment motion concluding that because the minor child was not the biological child of the decedent, and was not conceived or born within the marriage, there was no right to year's support. Moreover, the court recognized that a valid marriage was essential to Crowther's case, and ruled that she was married to Ordonez at the time she married the decedent and refused to allow her to withdraw her judicial admission of this fact.

The Court of Appeals affirmed the decision of the trial court. Specifically, the Court stated that the burden was on Crowther to show that she was the legal spouse of the decedent. Further, the Court opined that to withdraw her admissions, Crowther was required to show that the validity of her marriage to the decedent could be proved by admissible evidence. Therefore, the Court concluded that the trial court did not abuse its discretion in holding that Crowther did not meet this burden. Additionally, the Court disagreed that it was error for the court to rely on the genetic test report in support of its ruling that the minor child was not the biological child of the decedent. Specifically, the Court stated that the superior and state courts have concurrent jurisdiction in all proceedings pursuant to paternity statutes and that O.C.G.A. §§ 19-7-43 and 19-7-45, relating to paternity standing and requirements for genetic testing, respectively, were not applicable to court proceedings like this case, which involved estate and distribution issues.

Hunter v. Hunter, 256 Ga. App. 898 (2002)

Forest, Edward, and Donald Hunter, beneficiaries under the will of Arthur Hunter, deceased, filed a caveat in probate court against the “petition for year's support” of Imodean Hunter (“Imodean”), the surviving spouse of the decedent. Imodean filed her “petition for year's support” after the decedent's will was probated, and she was awarded a life estate in the marital residence, titled in the decedent's estate. Further, decedent's will left a remainder interest in the aforementioned property in the decedent's three adult sons by a prior marriage. Under the will, the life estate was contingent upon the surviving spouse electing to live in the residence and not remarry. Therefore, upon moving out of the residence or remarrying, the life estate terminated, the property sold, and the proceeds would be divided equally between the surviving spouse and the three caveators. The probate court denied the caveat and awarded the surviving spouse the marital residence from the decedent's estate valued at \$91,500 as year's support. The caveators appealed claiming the award was excessive.

The Court of Appeals reversed the opinion of the trial court, and opined that the award was excessive, whereas there was no evidence in the record to support the determination that \$91,500 of property was the amount reasonably needed to support and maintain the surviving spouse for a period of 12 months from the decedent's death at the standard of living she obtained prior to the death of the decedent. Specifically, the Court noted that in order to sustain a year's support award, there must be some evidence that the amount of property awarded bears a reasonable relationship to the amount the surviving spouse needed for the period of 12 months from the decedent's death to maintain her standard of living. Further, the Court stated that in making this determination, the following factors should be considered pursuant to O.C.G.A. § 53-3-7(c):

(1) the support available to the surviving spouse from sources other than year's support, including but not limited to the principal of any separate estate and the income and earning capacity of the surviving spouse, (2) the solvency of the decedent's estate, and (3) such other relevant criteria as the court deems equitable and proper.

The Court of Appeals reasoned that prior to the death of decedent, he was disabled, he resided with Imodean in the marital residence, and the couple had joint gross yearly income of about \$27,500. Moreover, the Court stated that a year after the decedent's death, Imodean had gross yearly income of approximately \$28,500, and approximately \$9,300 in savings and checking accounts. However, the Court opined that other than evidence that she purchased a new car after the decedent's death, there was no evidence that the monthly expenses necessary to maintain her standard of living increased after the decedent's death. Further, the Court noted that the marital residence had a fair market value of about \$91,500, was debt free, and that the surviving spouse continued to live there at the time of the year's support hearing which was over two years after the decedent's death. The Court further opined that although Imodean testified that she was better off financially after the decedent's death than before it, she also testified that she was 74, suffered from arthritis, and was unsure how much longer she would be able to supplement her Social Security income through the dry cleaning business work she had done for 15 years. Additionally, the Court noted that Imodean claimed she was entitled to year's support because she took care of the decedent for the many years when he was sick and disabled, and therefore had an equitable interest in the marital residence. However, the Court stated that pursuant to OCGA § 53-3-7(c), the award of the marital residence clearly exceeded the amount necessary to support and maintain Imodean for a period of 12 months. The Court noted that although she made many personal sacrifices during the marriage, that according to Richards v. Wadsworth, 230 Ga. App. 421, 'year's support is not intended to pay the surviving spouse for loss of the relationship or for personal sacrifices made during the marriage. . . .' Likewise, the Court held that Imodean's contributions during the marriage did not entitle her to claim year's support based on an equitable interest because according to the Court, this claim could not be maintained apart from divorce proceedings.

3. *Pre-marital Agreement and Alimony Modification*

Carlos v. Lane, 275 Ga. 674 (2002)

Two days before the marriage of Carlos and Vivian Lane, the parties entered into a premarital agreement in which Carlos obligated himself to pay alimony. When the parties divorced the final decree of divorce incorporated a settlement agreement that required Carlos to make monthly alimony payments for sixty months, terminable upon the remarriage of Lane. This agreement further provided that the parties intended,

[to] waive their statutory right to future modification up or down of the alimony payments for which this Agreement provided, based upon a change in the income or financial status of either party. The statutory modification rights waived herein shall include those rights set out in O.C.G.A. [section] 19-6-19, *et seq.* (emphasis added.)

However, in 2001 Carlos petitioned for alimony modification under O.C.G.A. § 19-6-19(b) based on Lane's involvement in a “meretricious relationship.” The trial court entered judgment on the pleadings and dismissed the petition on the ground that Carlos had waived his right to seek such alimony modification.

The Georgia Supreme Court affirmed the trial court’s decision and held that Carlos waived his right to modify alimony payments. Specifically, the Court noted that the right to seek modification of alimony could be voluntarily waived if the parties entered into an agreement that contained a waiver. However, Carlos contended that by the express terms of the agreement, the parties did not expressly waive the right to seek modification under subsection (b).

The Supreme Court looked first to the language of the agreement to determine the intent of the parties. The Court opined that the waiver language employed in the agreement was plain and unambiguous. Further, the Court noted that contrary to Carlos' position, the statutory citation referenced in the agreement clarified that the parties intended to waive alimony revision under all subsections of the aforementioned statute. Additionally, the Court stated that when parties make an express reference to an entire statute by employing ‘et seq.,’ that language is sufficiently specific to constitute a relinquishment of the right to seek revision of alimony under any subsection of the statute. The Court reasoned that if the parties intended to exclude subsection (b) from the waiver provision, they could have specifically done so. The Court opined that to hold otherwise would not only unduly emphasize one portion of the waiver provision, it would ignore the rule enunciated in Ashworth v. Busby, 272 Ga. 228, that the court should uphold ‘waivers in which the right of modification being waived has been identified by ... statute.’ In addition, the court cited Varn v. Varn, 242 Ga. 309, which according to the Court, cannot be used to deprive a spouse of his or her right to litigate alimony revision where that right has not been waived in the agreement, and stated that likewise, Varn's

rule could not be twisted to deprive a party of their right to stop litigation of the modification issue where the agreement provided for the waiver of such rights.

C. Deprivation and Termination of Parental Rights

1. Deprivation

In re C.B., 258 Ga. App. 143 (2002)

Eight years after C.B. was born, the Henry County Department of Family & Children Services ("DFCS") filed a deprivation petition in the juvenile court asserting that C.B.'s father had been arrested for child molestation and cruelty to children. Specifically, the criminal charges stemmed from alleged instances in which the father and mother played darts with C.B. and her two half-siblings while the family was nude. At the time of the arrest, the father was on probation for an unrelated prior conviction, and his probation was revoked. On the day the petition was filed, the juvenile court held a brief hearing to provide emergency care and shelter for C.B. The father, who was incarcerated, did not attend. However, both parents were represented at the hearing by counsel. Based on the stipulation by the parties, that there was probable cause to believe that the father sexually molested the children and that the mother had neglected them, the juvenile court ordered that C.B. be placed in DFCS' custody. The juvenile court conducted a hearing on the deprivation petition at which the father appeared, but was unrepresented by counsel. When the hearing commenced, the judge asked the father whether he had spoken to the attorney the court appointed to represent him. However, the appointed attorney was not at the hearing, and the father informed the court that he thought he was represented by Whitaker, the attorney defending him in the criminal proceedings. The judge then asked the father whether he wanted a lawyer, and he responded in the affirmative. Although the court called Whitaker to come to the hearing, she was unavailable, and the deprivation hearing proceeded with the father unrepresented.

After the hearing, the court entered an order finding C.B. deprived and awarded temporary custody to DFCS. In its order, the court also formally appointed Whitaker to represent the father and prohibited him from visiting C.B. Subsequently, DFCS developed a reunification plan for the father, and the parties and their attorneys, including Whitaker, attended a hearing to review the plan. Thereafter, a grand jury indicted the father on three counts of child molestation. Count three of the indictment charged that, both the father and mother 'unlawfully perform[ed] an immoral and indecent act [] to ... [all three children, including C.B.] . . . , with intent to arouse and satisfy the sexual desires of said accused by playing games with said children at a time when the children and the accused were all nude.' The father pled guilty to committing child molestation under Count Three, and the trial court sentenced him to ten years.

DFCS then petitioned the juvenile court to terminate the father's parental rights in C.B. Further, a DFCS caseworker testified that, before he went to prison, the father cooperated with DFCS and attended parenting classes, but did not visit the children at DFCS's offices. Additionally, according to the caseworker, after being incarcerated, the

father did not have any contact with C.B. or pay any child support. However, the father testified that he attempted to comply with the case plan, disputed the caseworker's account that he had never visited C.B., and elaborated on his reasons for pleading guilty to child molestation. Specifically, the father stated that he had attended 13 out of 15 parenting classes and that, while he was out on bond, he worked for his sister and gave her \$50 of child support for C.B., 'when [he] could.' The father also maintained that, before he was incarcerated, he visited C.B. at DFCS on a weekly basis for at least ten weeks. The father admitted he played games with the children while nude, but maintained that the conduct was appropriate. Further, the father stated that he pled guilty to the molestation charge only to avoid a longer prison sentence.

The Court of Appeals affirmed the ruling of the juvenile court and noted that under the two-step inquiry for terminating parental rights, a court must first determine 'whether there is clear and convincing evidence of parental misconduct or inability,' and then whether termination is in the best interest of the child. The Court opined that in this case, the father failed this inquiry. Moreover, the father did not dispute that there was sufficient evidence to support that C.B. was deprived. He also did not dispute that his lack of parental care or control caused the deprivation. Moreover, the Court opined that conviction and imprisonment for a felony offense and emotionally abusive and egregious conduct toward a child are factors that, if present, a court may consider in determining whether a child is without proper parental care or control. In addition, the Court noted that there were adequate aggravating circumstances in this case. Specifically, the father pled guilty and was imprisoned for molesting his daughter. Finally, the Court noted that although disputed by the father, evidence showed that he had no contact with C.B. from the time she was removed from the home and that he provided only minimal financial support before being incarcerated. Further, the father was prohibited from having any contact with C.B. until his probation expired in 2010. Thus, the Court reasoned that it could not discern how the relationship would improve in the foreseeable future. Also, the Court rejected the father's assertions that the juvenile court erred in ruling that C.B.'s best interest would be served by terminating his parental rights because according to the Court he offered no argument to refute this assertion. Moreover, the Court noted that the factors addressed above, which established the father's inability to properly care for C.B., also proved that the termination of his parental rights was in C.B.'s best interest.

Finally, the Court agreed that the juvenile court erred in failing to provide counsel to the father at the deprivation hearing. Specifically, the Court stated that the father asked for counsel when the hearing commenced, and the hearing proceeded with him being unrepresented. However, the Court stated that in this case, "the error did not merit reversal." The Court further stated that the father was required to show harm as well as error to warrant reversal, and he failed to do so. Additionally, the Court again noted that the father pled guilty to molesting C.B., never appealed the juvenile court's deprivation order, and did not challenge the court's finding of deprivation. Therefore, the Court concluded that the father was not harmed by the court's erroneous deprivation of his right to counsel. Finally, the court opined that the father was represented by counsel at the emergency shelter hearing, and there was no evidence that appointed counsel's representation of him was prejudiced by a failure to receive notice.

In re C.M.L., 260 Ga. App. 502 (2003)

C.J.C. was born to an unwed mother who later married. Thereafter, the child's stepfather, C.M.L., filed a petition to adopt him pursuant to O.C.G.A. § 19-8-1. C.J.C.'s mother consented to the adoption, but named Hill as the child's biological father in an affidavit. She further stated that she never married Hill, that he had not been determined to be the child's father by a final paternity order of the court, had made no attempt to legitimate the child, had not lived with the child, and did not contribute to his support. C.J.C.'s stepfather then filed a motion to terminate Hill's rights to the child. In response, Hill filed as a separate action, a petition to legitimate C.J.C. However, the court entered orders terminating Hill's parental rights and granting the adoption. Hill contended that the trial court improperly entered those orders because he was not afforded a hearing on his legitimation petition.

The Court of Appeals affirmed the trial court noting that Hill's argument essentially challenged the denial of his legitimation petition. However, the Court stated that he failed to comply with the discretionary procedures to appeal from an order denying a legitimation petition as required by O.C.G.A. § 5-6-35(a)(2), which deprived it of jurisdiction on the matter. Moreover, the Court opined that in its order terminating Hill's parental rights, the trial court expressly stated that it considered his out-standing legitimation petition. The Court further noted that Hill and his counsel were present at the termination hearing, where Hill admitted to having sexual relations with the child's mother and that he knew that she subsequently had a child. The Court further opined that at the hearing Hill denied that he was the child's father, and failed to prepare a brief in objection to the motion to terminate which the court invited him to do. Finally, Hill did not provide a transcript of any of the hearings as part of the appellate record, which according to the Court, left it to presume that the trial court's order is supported by those parts of the record excluded from the record on appeal.

In re D.F., 2003 WL 21005046 (Ga. App.)

The juvenile court terminated J.R.'s parental rights to her three children. She appealed. The Court of Appeals affirmed the termination of the mother's parental rights to all three of her children and held that clear and convincing evidence supported the juvenile court's determination that parental misconduct or inability merited termination of her rights and that termination was in the best interests of the children.

The Court reasoned that J.R. failed to comply with her case plan which mandated that she establish a relationship with her children, failed to obtain and maintain suitable employment and housing, and failed to support her children. Further, both a clinical psychologist and a foster care case manager opined that removing the children from their foster parents would be detrimental. The Court further stated that the trial court did not abuse its discretion in limiting the mother's cross-examination of a caseworker regarding his involvement with her arrest for failure to pay child support because she had previously admitted to both. Therefore, the Court stated that any suspicions about the motives of the Department of Family and Children Services' employee were speculative.

In re D.N.B., 258 Ga. App. 481 (2002)

D.N.B., a minor child, was taken into emergency custody by the Paulding County Department of Family & Children Services (DFACS) at the request of a caretaker who did not know the whereabouts of L.B. At that time, D.N.B., then age four, had five abscessed teeth and numerous other decayed teeth and urgently needed dental work. Specifically, her gums were swollen, infected, and bleeding, and the child had difficulty eating. She also had bruises and marks on her buttocks and thighs. After stabilizing her medical condition with antibiotics, a pediatric dentist extracted the five abscessed teeth and performed other dental procedures including several crowns and pulpotomies. Further, a doctor testified that the condition inside the child's mouth likely had developed over 'a relatively long period, [of] at least six months to a year.'

Therefore, the juvenile court placed D.N.B. in the temporary custody of the Bartow County DFACS. The custody order included a finding that D.N.B. was deprived as defined by O.C.G.A. § 15-11-2(8)(A). The court found that the causes of the deprivation were the instability of a residence and employment, poor parenting skills, choice of caretakers, medical neglect, and physical abuse by unrelated caretakers. Thereafter, the juvenile court entered a supplemental order that listed eight mandatory requirements for L.B.'s reunification with D.N.B. The court stated that before reunification could occur L.B. had to 'substantially comply' with all eight elements of this plan. After D.N.B. had been in State custody for over a year, DFACS petitioned for termination of the mother's parental rights. The court concluded that L.B. failed to comply with almost every element of the reunification plan. Based on the evidence, the juvenile court decided that L.B. had parenting deficiencies and terminated her parental rights.

The Court of Appeals affirmed the ruling of the trial court which terminated the mother's parental rights. The Court noted that L.B. contended that she 'substantially complied' with the reunification plan. Specifically, she pointed out that she remained employed, obtained a psychological evaluation, visited her child, and generally tried to comply with the plan. She also asserted that she tried to maintain stable housing and claimed that she was unable to visit her daughter because DFACS had placed D.N.B. in another county with her biological father who spanked the child with a belt and left her unsupervised. Further, L.B. reiterated the same willingness she espoused at the hearing to undergo counseling, to take parenting classes, and to submit to random drug screens. The Court reasoned that in termination of parental rights cases, the Court does not weigh the evidence or assess witness credibility; but refers to the juvenile court's fact finding unless the evidence fails to satisfy the appellate standard of review. Moreover, the Court stated that nothing in the statutory framework for terminating parental rights set forth in O.C.G.A. § 15-11-94(a)-(b) requires that the parental misconduct or inability be willful. Importantly, the Court noted that notwithstanding her protests to the contrary, the record was replete with evidence that L.B. failed to meet the requirements of the reunification plan. Specifically, the Court noted that despite facing the termination, she still lacked sufficient motivation to obtain psychological counseling, and that her child required treatment for reactive attachment disorder. In summation, the Court opined that the evidence clearly displayed that D.N.B. was deprived while under her mother's care and that the deprivation was likely to continue and likely to cause serious physical, mental, emotional, and moral harm. Further, the Court stated that in light of all the evidence, the trial court did not err in terminating parental rights.

In re J.B., 2003 WL 1848617 (Ga. App.)

A Department of Family and Children Services (“DFCS”) caseworker visited J.B.’s, the minor child’s, home in response to a phone call from a concerned citizen. The child’s mother answered the door to the trailer with a baby in her arm, and the caseworker asked to see J.B. The mother untied the door to his bedroom, explaining that the child had asked her to keep his door tied shut, and J.B. ‘came flying out through’ the living area straight to the refrigerator. The child did not acknowledge the caseworker’s presence, and began eating a cup of corn with his hands. Further, the child’s bed had a dirty, bloody sheet, of which the mother stated she was unaware. Further, the caseworker inspected the two children, and although the baby was unmarked, J.B. was bruised from head to toe with lacerations and bite marks. The mother explained that she had bitten the child once as discipline after he bit her. A pediatrician concluded that J.B. had been abused. The trial court held that the child was deprived.

The Court of Appeals affirmed the trial court’s determination. The Court rejected the mother’s argument that it was error to allow the DFCS witnesses to remain in the courtroom after she invoked the rule of sequestration. Specifically, the Court noted that at the start of the deprivation hearing the mother invoked the rule, and DFCS responded that it wanted its three witnesses, two caseworkers and a placement center employee, to be permitted to stay, and that it did not intend to call the foster parents, who were also present. Further, the Court stated that the mother’s only response was that if the foster parents stayed, they should not be called later as witnesses. The judge then let the parties make their opening statements. The department’s first witness testified, and before and after the lunch break the mother objected to having the department’s other witness testify because they had remained in the courtroom after she invoked the rule. The judge overruled the objection on the ground that all of the witnesses were agents of the DFCS, and all of the information they would give was already in the record for purposes of the placement assessment.

The Court reasoned that the purpose of the rule of sequestration was to prevent a witness who had not testified or who had not completed his or her testimony from overhearing and having his or her testimony affected by the testimony of another witness. Further, the Court noted that in the present case the court allowed the witnesses to remain because they were all agents of DFCS and did not testify about the same events. Therefore, the Court stated that no inconsistencies could have caused them to shape their testimony to support or dispute each other. Further, the Court acknowledged that regardless, the mother waived this issue by allowing the witnesses to remain. The Court also rejected the mother’s contention that the trial court erred in forcing her to proceed in her case before DFCS’ final witness had testified, opining that the mother failed to show the requisite harm needed for a reversal.

In re J.B.C., 2003 WL 1895447 (Ga. App.)

The juvenile court terminated the parental rights of the mother and respective fathers of minor children J.B.C. and A.H.P. The mother appealed, but did not challenge the termination. Rather, the mother asserted that the court's finding that there was no suitable family member with whom to place the children was premature because her sister had not yet been evaluated as a possible placement.

The Court of Appeals agreed with the mother and reversed the court's finding that there was no suitable relative with whom to place the children, holding that the court and the Department of Human Resources ("DHR") had a duty to consider the maternal aunt as a possible placement for the children following the termination of parental rights. Further, the Court reasoned that after a court terminates parental rights, it must try to place the child with another family member and conduct a thorough search for a suitable relative pursuant to O.C.G.A. § 15-11-103(a)(1). Further, the Court noted that in the present case, the mother's sister requested that she be considered as a placement for her children. Nevertheless, the juvenile court ordered that the sister's home need not be investigated as a proper placement. Specifically, in its order the court referred to testimony that on two occasions prior to the termination hearing, the children's aunt did not follow through on paperwork needed for such an evaluation and that she did not visit the children while they were in foster care. However, the Court opined that while the aunt's conduct was one factor for the court and the DHR to consider, it did not eliminate the duty of both to conduct an evaluation.

In re J.J., 259 Ga. App. 159 (2003)

The Henry County Department of Family and Children Services ("DFCS") was informed that a father had sexually abused C.J., one of his children, and that his mother, S.J., beat C.J. when the child reported the abuse. DFCS investigated the referral and discovered that the utilities were turned off at the home, the family was about to be evicted, there was little food, and the home was in a terrible condition. Further, S.J. was in prison and the father refused to work. There were also allegations of emotional and physical abuse by both S.J. and the father, sexual abuse by the father, medical neglect, and substance abuse.

Thereafter, DFCS implemented S.J.'s fourth case plan and a panel reviewed it, noting that S.J. had still not achieved the goals of the plan. Moreover, because S.J. failed to comply with this case plan, DFCS filed a petition to terminate her parental rights. The juvenile court held a hearing the same year and terminated S.J.'s parental rights to all five children. S.J. argued on appeal, that there was insufficient evidence to support the courts findings that: (1) deprivation of the children was likely to continue, (2) the children were likely to be seriously harmed by the continuing deprivation, and (3) it was in their best interests that her rights be terminated.

The Court of Appeals affirmed the trial court. It reasoned that S.J. deprived her children of child support for the two years preceding the termination hearing. In addition, the court opined that S.J. failed to comply with the goals set for her case plan which proved that she caused the children's deprivation. Further, the Court noted that although past deprivation is not sufficient for termination without a showing of present deprivation, the court can consider a parent's past conduct in determining whether such conditions are likely to continue. The Court held that the trial court could have inferred

from the evidence, that the same pattern of deprivation would continue if the children were reunited with their mother. Specifically, the Court noted criminal charges are still pending against S.J., she provided no evidence she would be able to provide a home for the children after incarceration, and her daughter testified that S.J. did not take personal responsibility for the children being in foster care. The Court also concluded that based on the aforementioned factors the children were likely to be harmed by the continued deprivation and it was in their best interests to terminate her parental rights.

In re J.P.V., 2003 WL 21037696 (Ga. App.)

J.P.V., a minor child, was placed in the custody of the Department of Family and Children Services (“DFCS”) three times. Specifically, his mother had a history of mental health problems and was arrested several times for drunk driving. Further, when J.P.V. was still an infant his mother lost control of herself, tore her house, screamed at her children, and butted her head through the walls. The mother then went through counseling and regained custody of J.P.V. However, less than one year later, the mother was arrested and charged with obstruction, criminal trespass, and aggravated battery, resulting in the child’s removal from the home. Subsequently, DFCS filed a deprivation petition and the juvenile court required the mother to abide by all the terms of the case plan. The mother complied with the plan and J.P.V. was returned to her custody. However, the mother was subsequently arrested for using cocaine and drunk driving. Thereafter, the court ordered that reunification services were not appropriate in this case.

The Court of Appeals affirmed the trial court. The Court reasoned that the trial court was permitted to consider its prior orders in reaching a decision. Moreover, the Court noted that the trial court indicated it was taking judicial notice of these records and the mother failed to appeal any of the orders. The Court also stated that pursuant to O.C.G.A. § 15-11-58(h), reunification services are appropriate ‘if reasonable efforts to reunify [the] child with his . . . family will be detrimental to the child.’ The Court further opined that there is a presumption that reunification services are inappropriate if the child has been removed from the home twice and was provided with reunification services on those prior occasions. Therefore, the Court stated that although this presumption is rebuttable, it was not rebutted in this case. Specifically, the mother gave equivocal answers to questions about her drug and alcohol usage.

In re J.W.K., 276 Ga. 314 (2003)

When J.W.K. was between one and two years old, his mother began leaving him overnight with his paternal aunt and uncle. By the time the child was two, his mother left him with his aunt and uncle on a full-time basis. Specifically, the mother would visit J.W.K. once a week, occasionally taking him to her home for an overnight stay. When the child was five, his mother was hospitalized for addiction. When she was discharged, the mother stayed with the aunt and uncle for six weeks until her boyfriend was released from jail. At that time, the mother moved in with her boyfriend, leaving J.W.K. with his aunt and uncle. Thereafter, her visits with the child became sporadic and she eventually only saw him once a month and on holidays.

J.W.K. is now twelve and has lived with his aunt and uncle for close to ten years. He is a straight “A” student and his basic test scores are in the top five percent of the nation. Further, J.W.K.’s mother has shown little interest in his education. Thereafter, the child’s biological father died and his aunt and uncle filed a deprivation petition seeking emergency temporary custody of the child, which was granted. Thereafter his maternal grandparents intervened and consented to a finding of probable cause that J.W.K. was deprived and should be temporarily placed with his aunt and uncle, and that his mother should have visitation rights. A hearing was held at which the mother sought custody, where evidence disclosed that the mother’s live-in boyfriend was a criminal, with a record that included possession of a sawed-off shotgun, marijuana possession, cocaine possession, and sexual assault. Further, the evidence showed that the child feared for his safety during forced visits at his mother’s house. After the hearing the juvenile court found that J.W.K. was deprived by his mother and it was in his best interests that his aunt and uncle be granted legal custody of him for the next two years. The Court of Appeals reversed, finding that the juvenile court erred in concluding that O.C.G.A. § 15-11-58 did not apply to private deprivation matters. The Court of Appeals held that pursuant to this Code section the court was required to determine as matter of fact whether the Division of Family and Children Services of the Department of Human Resources (“DFACS”) had undertaken reasonable efforts to reunify J.W.K. and his mother, and if not to instruct DFACS to determine whether reunification was appropriate and to propose a reunification plan to the court.

The Georgia Supreme Court reversed the decision of the Court of Appeals. The Court reasoned that O.C.G.A. § 15-11-58 applied only when a court ordered the removal of ‘a child from the child’s home.’ Further, the Court opined that in this appeal the evidence is clear that the only home J.W.K. knew for the past ten years was his aunt’s and uncle’s. Therefore, the Court concluded that the juvenile court’s deprivation order did not order the removal of the child from his home, but served to keep him in the only home he had ever known.

In addition, the Court stated that in May 2002, more than eighteen months after the juvenile court’s ruling in this case, O.C.G.A. § 15-11-58 was amended to specify that it only applies to deprivation actions in which a child is placed in the custody of DFACS. However, the Court noted that at the time of the proceeding in this case, the statute contained no language limiting its application, and it was unclear at that time whether it applied to private deprivation actions like the one in this case. The juvenile court concluded that it did not apply to private deprivations and the Court of Appeals reversed. The Supreme Court reversed the Court of Appeals on this issue. The Court reasoned that because the statute as written prior to May 2002 was silent on the question of whether it applied to private proceedings, the legislatures amendment excluding private deprivations from the statute was not necessarily inconsistent with the statute’s previous language. Therefore, the Court opined that it was not clear if the legislature intended to change the law. Specifically, the Court opined that the amendment simply clarified the intent of the statute as it existed at the time of the juvenile court’s ruling.

In re K.C.H., 257 Ga. App. 529 (2002)

Briefly, following a deprivation hearing, six-year-old A.C. and four-year-old J.C.,

were placed in the temporary legal custody of the Department of Human Resources (“DHR”) based on the trial court’s finding that A.C. was molested by the mother’s live-in boyfriend. Further, the court ordered that no reunification plan would be completed for the family until such time as the boyfriend moved out of the residence. However, the mother did not believe that her boyfriend molested A.C., and the boyfriend did not move out of the house. Subsequently, the mother married the boyfriend, and became pregnant with the couple’s child, K.C.H. Moreover, the day before K.C.H. was born the mother and father went to South Carolina to see some of the father’s relatives. Although the mother later claimed that she and her husband were moving to South Carolina on that day, neither the mother nor her husband informed DHR of any planned move to South Carolina prior to the trip. Moreover, a DHR caseworker met with the mother at her residence a week prior to the trip to South Carolina and the mother made no mention of any intention to move. Further, the couple went to South Carolina without informing their landlord in Georgia that they were moving and without requesting that their utilities be turned off. Subsequently, the mother was admitted to a hospital in South Carolina, where she gave birth to K.C.H. The home address given for the mother on her hospital admission records was her Georgia address.

Thereafter, the juvenile court granted a shelter care order based on the father’s continued residence with the mother and his history as an alleged sexual predator. At the deprivation hearing, a case manager testified that she was concerned about K.C.H.’s safety in light of the prior judicial finding that his father had molested A.C., and the mother’s failure to give any indication that she would separate from him. A caseworker also testified that the Department elected to remove K.C.H. from his parents’ custody based on the known threat posed to the child by the mother’s husband, and the husband’s continued presence in the home. The court held that K.C.H. was deprived, placed the child in DHR’s custody, and ordered that the DHR develop a reunification plan. The mother appealed from this order arguing that venue, personal jurisdiction, and subject matter jurisdiction were improper in Georgia as to K.C.H., because she moved to South Carolina the day before K.C.H. was born.

However, the Court of Appeals affirmed the trial court’s finding of jurisdiction, finding that K.C.H. and her parents still resided in Georgia when their child was born, and that K.C.H. was already in the Department’s custody in Georgia for purposes of venue when the deprivation proceedings were commenced. The Court of Appeals also affirmed the trial court’s deprivation finding and held that K.C.H. was deprived. The Court noted that O.C.G.A. § 15-11- 2(8)(A), defined a deprived child as a child who ‘[was] without proper parental care or control, subsistence, education as required by law, or other care or control necessary for the child’s physical, mental, or emotional health or morals. . . .’ The Court reasoned that pursuant to the deprivation order with respect to A.C. and J.C., the mother had notice that her boyfriend was a threat to her children. Moreover, the Court opined that instead of heeding the court’s order and acting in the best interests of her children, the mother acted completely contrary to the court’s order by allowing the man to continue living with her.

Additionally, the Court distinguished the present case from *In re M.A.V.*, 206 Ga. App. 299, where there was no evidence that the deprivation of one child bore any relation to possible future deprivation of another child. However, the Court noted that in the present case, the order made it clear that the mother’s husband posed a threat to her

children, and the mother made a deliberate choice to allow her newborn child to be exposed to a potentially dangerous predator.

In re K.W., 2003 WL 21361506 (Ga. App.)

The South Carolina Department of Social Services (“SCDSS”) obtained legal and physical custody of K.W. after his intoxicated mother left him with a stranger. At that time, the mother was living in South Carolina and was separated from her husband, who lived in Georgia. Following a hearing, a family court in South Carolina concluded that K.W. would remain in SCDSS custody based on evidence that his parents had sexually molested him. Pursuant to an order, the court further required K.W.’s parents to enroll in a sexual offenders program and SCDSS to contact the appropriate county agency in Georgia (the “Department”) to transfer the case. Further, the parents did not comply with the aforementioned order and a subsequent order of the South Carolina family court and the court then prohibited them from having any contact with K.W. for two years and placed him with his uncle and aunt in Georgia pursuant to the Interstate Compact on the Placement of Children (“I.C.P.C”) (*See* O.C.G.A. § 39-4-4).

Subsequently, SCDSS filed a petition to terminate the parents’ parental rights and the parents moved to dismiss or stay the termination action in South Carolina, arguing that Georgia was the proper jurisdiction. In an order on the motion, the South Carolina family court agreed to transfer the termination case to Georgia. After the order was entered, however, SCDSS learned that Georgia would not accept jurisdiction and moved for reconsideration of the order. After a hearing, the South Carolina court reversed its order and the parents filed an action for a writ of habeas corpus against K.W.’s uncle and aunt in Clayton County Superior Court, arguing that K.W. should be returned. SCDSS was not made a party nor given notice of the action and without any input from SCDSS, the Clayton County Superior Court granted the writ, and K.W. was returned to his parents. K.W. lived with his parents until the Bartow County Juvenile Court entered a shelter-care order placing him in the Department’s custody. The Department then filed a deprivation petition, and a hearing on that petition was held. The parents objected to the proceedings, arguing that the Bartow County Juvenile Court could not give full faith and credit to the prior orders of the South Carolina family court, as South Carolina no longer had jurisdiction due to the Clayton County order granting custody of K. W. to his parents. However, the juvenile court proceeded over the objections and ruled that K. W. was deprived and that SCDSS was the legal custodian of K. W.

The Court of Appeals affirmed the juvenile court and held that SCDSS maintained legal custody of K.W. The Court opined that the issue in this case was controlled by the ICPC, which was adopted by both South Carolina and Georgia. Further, the Court noted that when an agency from another state places a child in Georgia pursuant to the ICPC:

the agency that sent the child to Georgia shall retain jurisdiction over the child sufficient to determine all matters in relation to the custody, supervision, care, and treatment of the child which it would have had if the child remained in the sending agency's state, until the child is adopted,

reaches majority, becomes self-supporting or is discharged with the concurrence of the appropriate authority in the receiving state.

Therefore, the Court held that SCDSS did not relinquish its jurisdiction over K. W. and was still his legal custodian after he was placed with his uncle and aunt. Moreover, the Court noted that K. W. had not yet been adopted, nor had the South Carolina family court relieved SCDSS of its legal custody of K. W. Specifically, the Court stated that the parents were bound by the findings contained in the prior South Carolina family court orders, as none of these orders were appealed.

The Court also held that the filing of a habeas corpus action did not change the result of the case, as it was not authorized under the ICPC, and the parents could not force Georgia to deprive SCDSS of its jurisdiction over K. W. when the Department had already refused jurisdiction when asked to assume it by SCDSS. Additionally, the Court noted that the parents' attorneys were well aware that the South Carolina family court order transferring the case to Georgia had been reversed, even before a written order was entered or any habeas action was filed. Finally the Court reasoned that even if the habeas action were somehow authorized, the parents did not include SCDSS as a party to the action and therefore any order from the proceedings was not binding on them. In summation, the Court stated that, "to hold otherwise would allow potentially-abusive parents to wrongfully obtain custody of their children by cleverly circumventing the provisions of the ICPC through forum shopping and deliberately excluding the child's legal custodian from the proceedings."

In re M.A.M., No. A03A0816 (Ga. App. filed June 13, 2003)

Briefly, the mother appeals from the juvenile court's order terminating her parental rights. On appeal she contended that the State did not show by clear and convincing evidence that the termination was warranted.

The Court of Appeals affirmed the juvenile court's termination of parental rights. The Court reasoned that the juvenile court previously found by clear and convincing evidence that the minor child was deprived, this order was not appealed, and the mother was therefore bound by it. Further, the Court reasoned that the prior deprivation order stated that the deprivation occurred as a result of the child being 'without proper parental care or control, sustenance, or education as required by law, or other care or control necessary for her physical, mental, or emotional health or morals.' Thus, the Court reasoned that the mother was also bound by this finding. The Court also noted that the child had been admitted to a hospital with serious signs of neglect, including severe diaper rash and gangrene in one of her toes that spread into her bloodstream. The Court noted that the mother did not provide financial support for the child for the time that the child remained in State custody, nor did she retain employment, a requirement of her reunification plan. Further, the Court stated that even when the mother visited M.A.M. she brought other friends and did not develop any parental bond with the child. Further, the Court reasoned that a caseworker had previously testified as to the significant risk posed to the child from her extended time in foster care and the potential for M.A.M. to drift through "foster care limbo," as well as the dangers posed by the lack of stability in her life. The Court further concluded that based on the aforementioned facts, the trial

court could determine by clear and convincing evidence that the deprivation would likely continue, it was causing serious harm to the child, and was in her best interests that the mother's rights be terminated.

In re M.H.S., 2003 WL 21232136 (Ga. App.)

Appellant and his ex-wife divorced and she retained physical and legal custody of their son, M.H.S. Further, the ex-wife testified that the couple broke up as a result of appellant's drinking and the verbal and physical altercations between them. Further, she stated that during the separation and after the divorce, the appellant maintained contact with the child, but stated that his behavior became increasingly erratic. Moreover, the ex-wife claimed that although appellant was taking anti-depressants, he still experienced extreme mood swings. She also testified that she had a strange conversation with appellant after the divorce in which he stated that he would not longer see the child. Soon after this conversation, appellant visited a real estate sales office and claimed that he was house hunting. However, when the appellant and a female agent went to view a vacant house, he pulled a gun on her, bound her feet and hands, and raped her. Further, when the police arrived at the aforementioned house they found a threatening note directed to appellant's ex-wife. The police were concerned for her safety so she agreed to police protection for her and her children. Thereafter, the appellant fled to Arizona, where he admitted himself to a hospital for psychiatric observation. Subsequently, he was transported back to Georgia and during his incarceration he staged two highly publicized hunger strikes. The appellant pled guilty to rape, kidnapping, armed robbery, sexual battery, and possession of a firearm during the commission of a felony and was sentenced to serve twenty years. He is ineligible for parole and is scheduled for release in 2020. Further, appellant had paid court ordered child support of \$400 per month until his arrest. Thereafter, appellant's ex-wife filed a petition to terminate his parental rights. The trial court terminated his parental rights.

The Court of Appeals affirmed the termination. The Court reasoned that in this case, compelling facts supported the trial court's finding of deprivation. Specifically, the Court noted the appellant's confession to the rape and other crimes, the premeditated nature of the crimes, the threatening note directed at the child's mother, the appellant's parent's help in his flee, the high publicity surrounding the crimes, appellant's hunger strikes in the community where M.H.S. lives, and the fact that the child will be twenty-seven before his father is eligible to get out of prison. The Court noted that there were also additional aggravating factors such as the fact that M.H.S. is afraid of his father and suffers from stress related maladies after visits in prison with him. The Court opined that although there was evidence that appellant tried to maintain a relationship with his son by writing him letters and cards, he had been directed by the Victim's Advocacy Group to stop. Further, the Court noted the importance of stability in the child's life and the fact that the mother remarried and the child had a close bond with his step-father. Specifically, the child expressed an interest in having his step-father adopt him. Moreover, the Court opined that while incarceration alone will not always require the termination of parental rights, incarceration with sufficient aggravating circumstances will support a termination. Therefore, the Court found clear and convincing evidence of parental misconduct and that it was in M.H.S.'s best interests to terminate parental rights.

In re N.L., 2003 WL 1848657 (Ga. App.)

The Lamar County Department of Family and Children's Services ("DFCS") received a referral that C.H., appellant's husband, had beaten N.L., the minor child, 'pretty bad all over his body.' On the same day, appellant went to the DFCS and reported that her husband had abused N.L., whereby N.L. was taken to a doctor for a physical examination. The child had multiple bruises but no broken bones. C.H. admitted to DFCS employees that he had beaten the child while high on cocaine. A case plan was developed for appellant and thereafter she voluntarily placed her children with DFCS because she allowed C.H. to come back into her home in violation of the case plan. Subsequently, a new reunification case plan was developed for appellant.

Thereafter, appellant quit her job. Further, she was beaten by her husband but would not separate from him. The couple were then involved in two domestic disturbances. Therefore, another reunification case plan was ordered for the appellant. The Department filed a motion to transfer custody but then moved to dismiss it when it learned that N.J., the other minor child, was injured while in the appellant's custody for an unsupervised visit. Specifically, N.J. had burn marks on his mouth and face. At the hearing to dismiss, the juvenile court found that appellant had been involved in another domestic violence incident. Further, it found that an emergency room doctor examined N.J. following a sexual abuse allegation. Thereafter, the court approved a non-reunification plan for the children and entered an order terminating the parental rights of appellant and the children's fathers.

The Court of Appeals affirmed the ruling of the juvenile court. The Court reasoned that the finding that the children were deprived was already made by the juvenile court and the appellant did not appeal those orders. The Court further reasoned that based on the record it was clear that appellant was the cause of the deprivation. Specifically, appellant paid little or no child support and from the beginning was in violation of her case plans. Moreover, the children were exposed to domestic violence, were abused, and appellant would not leave her husband despite the threat he caused to her children. Further, the Court noted that DFCS expended approximately \$10,000 in an attempt to provide services to appellant. The Court further opined that there was no evidence the mother would end her relationship with her husband in the future and that the deprivation would likely continue if they were reunited with appellant. In conclusion, the Court stated that the children were suffering emotionally, physically, and morally from the abuse and it was clearly in their best interests to terminate parental rights.

In re N.Q., 260 Ga. App. 118 (2003)

The Bulloch County Department of Family and Children's Services ("DFCS") received a report pertaining to the inappropriate conditions and drug use at N.Q.'s, the minor child's, home. Specifically, caseworkers noted that the mother's house had no electricity or gas, and no running water in the kitchen. Further, the clothes and trash were

piled high, the house had little food, the children were dirty, had never been to school, and could not read. A few days later, DFCS took the three children from the home, the juvenile court found them to be deprived, and DFCS developed a reunification plan. Thereafter, based on the mother's willful failure to comply with multiple case plans, the court determined that further efforts to reunify the family would be detrimental to the children and ended reunification services. DFCS then petitioned to terminate the mother's parental rights.

The Court of Appeals affirmed the juvenile court's termination based on the conditions in which the children were originally found and the mother's refusal to cooperate with DFCS for almost two years. The Court reasoned that the unappealed deprivation order established deprivation for purposes of O.C.G.A. § 15-11-94(b)(4)(A)(i). Further, the Court stated that when examining parental care and control of a child in State custody, the juvenile court must consider whether, during the period before DFCS filed the termination petition, the parent's significantly failed to comply with a reunification plan for one year. The Court further opined that the parent's failure to support the child as required by law is also a factor in this inquiry.

Therefore, the Court stated that other than meeting the visitation requirement, the mother made little effort to comply with the reunification plan. Specifically, the mother told DFCS that she would not cooperate with the agency or take part in the reunification process. Further, the Court noted that the mother failed to comply with subsequent non-reunification case plans developed by DFCS and that her financial support for the children was limited to purchasing clothing and giving them "little money" and gifts. Further the Court opined that in this case the mother failed to cooperate with DFCS because she did not believe the agency had jurisdiction over her or her children. The Court further stated that although the mother promised at the termination hearing to work with DFCS, comply with the case plan, and keep her children in school, the Court opined, '[t]he decision as to the child's future must rest on more than positive promises which are contrary to the negative past fact.' In addition, the Court noted that the children could not read a complete sentence when removed from their home but are now attending school and have made remarkable progress. Therefore, the Court opined that the continued deprivation would likely continue to cause them harm and that based on the aforementioned facts the termination would be in their best interests.

In re T.S.T., 257 Ga. App. 354 (2002)

In consolidated cases, Thurmond (father) appealed from a juvenile court order dismissing his petitions to terminate his former wife's parental rights to their three minor children, T.S.T., J.V.T., and L.C.T. Citing O.C.G.A. § 15-11-58(a), the juvenile court dismissed the petitions as premature because Thurmond had not sought a reunification plan or plead facts proving that a reunification plan was not required.

The Court of Appeals reversed the portion of the court's order dismissing the petition as premature, opining that a reunification plan was not mandated by this Code section under the facts of this case. Specifically, the Court stated that several months after Thurmond's appeal was docketed, the Court of Appeals concluded that O.C.G.A. § 15-11-58(a) applied to deprivation petitions brought by private individuals because, at the time, there was nothing in the language of that Code section specifically limiting its

application to cases initiated by the Department of Family & Children Services. Shortly after this decision issued, however, the legislature amended O.C.G.A. § 15-11-58(a) as follows:

A court's order removing a child from the child's home shall be based upon a finding by that court that continuation in the home would be contrary to the welfare of the child. *If the court places custody of the child in the Division of Family and Children Services of the Department of Human Resources*, the court shall also determine as a finding of fact whether reasonable efforts were made by the Division of Family and Children Services of the Department of Human Resources and any other appropriate agencies to preserve and reunify families prior to the placement of a child in *the custody of the Department of Human Resources*, to prevent or eliminate the need for removal of the child from that child's home, and to make it possible for the child to return safely to the child's home. Such findings shall also be made at every subsequent review of the court's order under this chapter. (amendments emphasized).

The Court opined that an appellate court applies the law as it exists at the time its decision is rendered, and that where a statute governs only the procedure of the courts, it is to be given retroactive effect absent an express contrary intention. Further the Court stated that O.C.G.A. § 15-11-58(a) governs the procedure a court applies when making factual findings in support of certain child custody orders. Therefore, the Court opined that the statute is procedural in character and should be applied retroactively. Further, the Court held that amended O.C.G.A. § 15-11-58 states that reunification plans are only required when the court removes a child from his or her home and places him or her in the custody of the Department of Human Resources (“DHR”). However, the Court noted that DHR was not involved in this case and was not seeking custody of the children involved.

In re T.J.J., 258 Ga. App. 312 (2002)

T.J.J. was born, and one month later, the juvenile court determined that she was deprived and granted temporary custody to the Department of Family & Children Services (“DFACS”) based on its findings that the mother was 16, had been in the custody of DFACS since 1989, and was unable to provide adequate supervision and care for her child. That order was not appealed. DFACS then developed reunification case plans for T.J.J.'s parents. Thereafter, T.J. was born and was immediately placed in DFACS's care. Six days later, DFACS filed a deprivation petition based on the aforementioned grounds. DFACS also filed a petition to end reunification services and to terminate the couple’s parental rights to both children on grounds of parental misconduct or inability pursuant to O.C.G.A. § 15-11-94. Moreover, as an additional ground for terminating the father's parental rights to T.J., the petition alleged that the father failed to legitimize her.

At the termination hearing evidence showed that after T.J.J. was born, the mother and the child were immediately placed in separate foster homes. A month later, the

mother left her foster home and did not contact the DFACS caseworker. The caseworker thus placed her on 'runaway' status until August 1999, when she learned that the mother was in jail. Upon the mother's release, she was committed to the Department of Juvenile Justice (DJJ), transferred to a youth detention center, and then sent to boot camp. From there, she was returned to her foster home in March 2000. The following month, the mother gave birth to T.J. Moreover, the caseworker testified that DFACS had 'difficulties' with the mother regarding curfews at the foster home and that she wanted to live with the children's father, but that was not an appropriate DFACS placement. The DFACS caseworker also reported that the mother failed to comply fully with the reunification plan.

Furthermore, the caseworker reported on the mother's contact with her children, testifying that the mother visited T.J.J. a few times before leaving her foster home, but had not done so during the times she was on 'runaway' status or incarcerated. Further, the foster mother recommended that T.J.J., along with her sister, be placed with 'more mature, experienced parents.' Thereafter, the juvenile court terminated parental rights to both children. The Court reasoned that termination of parental rights under O.C.G.A. § 15-11-94 required a juvenile court to find that there was clear and convincing evidence of parental misconduct or inability and that termination was in the child's best interest. Whereby, the mother contended that the likelihood of continued deprivation was not established by clear and convincing evidence.

The Court of Appeals agreed and reversed and remanded the termination of the mother's parental rights pursuant to the establishment of a reunification plan. The Court reasoned that while it is correct that "(p)ast conduct of the mother *may* reflect whether the conditions of deprivation are likely to continue" and that the mother's "recent attempts to put her life in order" *may* be unconvincing," these general statements are not absolutes and do not fit every case. Having been separated from T.J.J. and T.J. since their births, the Court opined that this mother had not been given an opportunity to parent her children. Moreover, the Court noted that the circumstances that prevented that opportunity and contributed to her children's deprivation have changed significantly. Specifically, the mother is no longer a minor and no longer in DFACS' custody. Further the Court noted that she has taken steps consistent with providing adequate care and supervision for her children, including securing employment, obtaining housing, planning a future with her children and their father, and remedying her mistakes. Additionally, the Court opined that her progress cannot be characterized as mere "positive promises which are contrary to negative past fact." The Court also stated that termination of parental rights is a "remedy of last resort" that cannot be sustained where there is no clear and convincing evidence that the cause of the deprivation is likely to continue. Therefore the Court reasoned that because that evidence was not clear and convincing in this case, termination of parental rights was error.

However, the Court of Appeals affirmed the termination of the father's parental rights as to T.J. Accordingly, the Court reasoned that DFACS' termination petition specifically warned that pursuant to O.C.G.A. § 15-11- 96(e), the father would lose all rights to T.J. and that he would not be entitled to object to the termination of his parental rights to her unless he filed a petition to legitimate her within 30 days from receipt of the petition. Further, the Court noted that the father admitted at the hearing that he had not sought to legitimate T.J. Further, the Court opined that the father's failure to do so

constituted an adequate basis for the juvenile court to terminate his parental rights. The Court also noted that on appeal, the father made no argument on this issue.

Finally, the Court of Appeals reversed and remanded the trial court's finding that T.J.J.'s deprivation was likely to continue or "to cause serious physical, mental, emotional, or moral harm" The Court reasoned that according to his psychologist the father 'did not lack the cognitive ability to understand what it would take to raise a child and to understand the complexity of responding to a child's developmental needs and taking care of them.' Additionally, the Court noted the father had a strong desire and a sense of duty to take care of T.J.J. There was also evidence that the father was able to care for the child. Specifically, for six months, he worked at two restaurants six days a week, earning \$1,100 every two weeks. Further, two weeks before the hearing, the father obtained housing and furnished one of the bedrooms with cribs. He also scheduled his days off to coincide with his visitation day with his children. Moreover, in caring for T.J.J., the father had the support of his parents, T.J.J.'s mother, and T.J.J.'s maternal grandmother. The father's petition to legitimate T.J.J. was also granted. Further, the Court noted that evidence showed that he attended parenting classes, maintained employment, had obtained suitable housing, and maintained regular visitation with T.J.J. In summation, under the circumstances of this case, the Court concluded that there was not clear and convincing evidence that the causes of T.J.J.'s deprivation were likely to continue, that the father was not able to care for T.J.J., or that the father failed to maintain a parental bond with T.J.J. in compliance with the reunification plan.

2. Termination of Parental Rights

Diegel v. Dew, 2003 WL 21361542 (Ga. App.)

Brent and Cami Diegel divorced, after the couple signed a contract to terminate Brent's parental rights in the couple's two children. The contract stated that Cami 'shall file a petition to terminate the father's parental rights within six months of the divorce. Husband shall pay expenses . . . for termination of parental rights.' The contract further stated that the couple 'agree[s] to said termination and shall sign any required documents, perform any required acts and make any required court appearances to terminate such rights.' Thereafter, Cami filed a petition to terminate Brent's parental rights but later dismissed the petition because the payment received from his attorney for filing, was returned for insufficient funds. Cami did not re-file the petition, and Brent sued Cami and her attorney for breach of contract and fraud. The trial court dismissed the complaint on the ground that the agreement was void as Brent could not voluntarily terminate his parental rights.

The Court of Appeals affirmed the ruling of the trial court, and stated that the complaint in this case was based on a void agreement. Further, the Court reasoned that '[o]ne parent cannot contract away the right of a child to be supported by the other parent, and [that] such a provision . . . is void.' Therefore, the Court opined that the contract was essentially an attempt to voluntarily abandon his parental responsibility. Therefore, the Court opined that the agreement was void and Brent was not entitled to relief.

D. Jurisdiction, Procedure, Venue, Constitutionality

1. Personal Jurisdiction

Barolia v. Pirani, 260 Ga. App. 513 (2003)

Parini filed a complaint against Barolia in the superior court, seeking to domesticate a Texas divorce decree and to adjudicate the parties' property distribution. In her answer, Barolia, a Texas resident, admitted jurisdiction and counterclaimed for an equitable division of property and breach of contract. Pirani moved for partial summary judgment on Barolia's counterclaim and the trial court dismissed the complaint and the counterclaim with prejudice, which made Pirani's motion for summary judgment moot. The court held that the existence of the Texas divorce decree prohibited the parties from pursuing property division in Georgia, and further held that venue was not properly established in this case.

Briefly, the parties' Texas divorce decree provided that 'the petitioner [(Barolia)] has not waived her right, if any, to bring action in contract in Texas or Georgia on the instrument signed February 1, 1997[,] and that the Petitioner does not waive her right to an action on the division of property which should be brought in the State of Georgia.' The aforementioned instrument was a document signed by both parties pursuant to a Muslim marriage ceremony in which Pirani agreed to pay Barolia \$25,000 'in accordance with the tenets' of their religion. In his Cobb County complaint against Barolia, Pirani asserted that the Texas divorce decree reserved the issue of property division, which he sought to have resolved. Barolia admitted jurisdiction in her answer and counterclaimed against Pirani, seeking an equitable division of the property, and alleging that Pirani had breached the contract by failing to pay her \$25,000. However, both parties submitted to the Georgia court's jurisdiction, and both sought an equitable property division. Further, Pirani disputed that the parties' contract was subject to review by the court, arguing that it was a religious contract that could only be reviewed by the religious body.

The Court of Appeals reversed the dismissal for lack of jurisdiction and venue and remanded this case, holding that the trial court had the authority to adjudicate the parties claims. The Court noted that neither party in this case contested jurisdiction or venue. Specifically, the Court stated that while the record did not establish Pirani's residence, he filed the initial complaint in the Cobb County Superior Court, thereby submitting himself to that court's jurisdiction. Additionally, Barolia admitted jurisdiction and subjected herself to jurisdiction by filing a counterclaim against Pirani.

The Court further rejected the trial court's analysis of O.C.G.A. § 19-6-27 and stated that it was not applicable in this case. According to the Court, that Code section allows a resident spouse to pursue an action for alimony or child support against a nonresident spouse who obtained a divorce decree in another state without personally serving the resident. The Court further opined that the current action does not involve alimony or child support, but the equitable division of marital assets, which is not

addressed by the aforementioned statute. The Court further examined Newborn v. Clay, 263 Ga. 622, which was cited by the trial court for the proposition that property not specifically identified in a divorce decree remains titled to the original, and opined that Newborn was not applicable to the current case. Specifically, the Court noted that in Newborn the parties' divorce decree included a provision that all marital property had been divided, and the Supreme Court found that because the property was not specifically described in the decree, title remained with the husband and the wife as tenants in common. The Court further distinguished the present case from White v. Lee, 250 Ga. 688, and Cale v. Cale, 242 Ga. 600, and opined that unlike the facts in the aforementioned cases, the parties in this case did not seek to have the trial court clarify or alter their previous divorce decree, but rather to have the court decide issues that were specifically reserved by the Texas court. Further, the Court's review of the record did not reveal any evidence regarding venue except for Barolia's representation in her brief that Pirani resided in Cobb County, and that the bulk of the marital assets were located in DeKalb County. Moreover, the Court did not address Pirani's motion for partial summary judgment on Barolia's counterclaim regarding the pre-marriage contract between the parties, because the trial court found it to be moot.

Chung-A-On v. Drury, ___ Ga. ___, 580 S.E.2d 229 (2003)

In this case, appellant, Chung-A-On's, former wife brought an action against him for modification of child support and he filed a motion to dismiss based on lack of personal jurisdiction. The superior court denied the motion.

The Supreme Court affirmed the trial court's decision to deny appellant's motion to dismiss. Specifically, the Court noted that appellant purposefully availed himself of the Georgia courts to dissolve his marriage in 1990, to obtain custody of one of his children in a modification action in 1994, and to eliminate his child support obligation in that modification action for his child who remained with the appellee. Moreover, the Court explained:

[that] [t]he minimum-contacts standard is satisfied if the nonresident has “ ‘purposefully avail[ed] himself of the privilege of doing some act or consummating some transaction with or in forum,’ ” if the plaintiff's cause of action against the nonresident “ ‘arises out of, or results from, the activity or activities of the defendant within the forum,’ ” and if the exercise of jurisdiction is consistent with “ ‘the due process notions of “fair play” and “substantial justice.” ” ”

Further, the Court found that there was a “nexus” between the appellee's present action against the appellant for modification of child support and the earlier divorce and modification actions. In addition, according to the Court, the exercise of jurisdiction was also consistent with due process notions, as appellant was a resident of Georgia at the time of the divorce and participated in the modification action obtaining custody of one of his children and eliminating his support obligation for the other. In summation, the appellant could reasonably expect to be brought into a Georgia court to address further issues concerning his children.

2. *Filing Procedure*

Parke v. Fant, 260 Ga. App. 84 (2003)

Parke and Fant divorced and pursuant to their settlement agreement, Parke retained primary physical custody of their children. Thereafter, Parke moved to New Orleans on August 3, 2000. At that time, the children were staying with Fant as part of their summer visitation pursuant to the aforementioned agreement. On August, 8, 2000, the children moved with their mother to New Orleans. Thereafter, Fant filed a petition in Georgia for a change in custody. Parke moved to dismiss the petition, arguing that the Georgia court lacked jurisdiction over the children. The trial court held that Fante's petition was timely filed within the period that Georgia retained jurisdiction.

The Court of Appeals affirmed. Moreover, the Court reviewed former O.C.G.A. § 19-9-43(a) (1) (B) in which Georgia courts retain jurisdiction to make child custody determination if Georgia:

[h]a[s] been the child's home state within six months before commencement of the proceeding and the child is absent from this state because of [her] removal or retention by a person claiming [her] custody ... and a parent ... continues to live in this state.

Importantly, the Court noted that according to Parke, the children moved on August 3, 2000, thus Georgia would have retained jurisdiction until February 3, 2001. However, the Court agreed with the trial court's conclusion that Fant's petition was filed on a Saturday and applied O.C.G.A. § 1-3-1(d) (3), which provides that:

[e]xcept as otherwise provided by time period computations specifically applying to other laws, . . . the first day shall not be counted but the last day shall be counted; and, if the last day falls on Saturday or Sunday, the party having such privilege or duty shall have through the following Monday to exercise the privilege or to discharge the duty.

Therefore, the trial court determined that Fant had until February 5, 2001 in which to file the petition.

Moreover, the Court of Appeals reasoned that the Uniform Child Custody Jurisdiction Act ("UCCJA"), superceded in 2001 by the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), should be construed liberally to carry out its remedial purpose, one of which is assuring that litigation concerning child custody 'takes place . . . in the state with which the child and his family have the closest connection.' Additionally, the Court stated that this determination was a fact-sensitive inquiry and found no prohibition against the trial court's application of O.C.G.A. § 1-3-1(d). The Court further disagreed with the mother's contention that the children moved

on August 3, 2000 and stated that the children in actuality remained in Georgia until August 8, 2000. The Court further stated that the purpose of UCCJA was to ensure that litigation occurs in the state in which the child has the closest connections and it refused to engage in the “legal fiction” that the children’s moving date was the same as Parke’s simply because she retained permanent physical custody.

3. *Venue/Unconstitutional Law*

Holmes v. Traweck, 276 Ga. 296, (2003)

Briefly, Traweck was the father of a minor child born to Holmes. Traweck resided in Houston County and the child resided in Dooly County. Traweck filed a petition in superior court pursuant to O.C.G.A. § 19-7-22(a), naming Holmes as defendant, and seeking to establish paternity, gain visitation rights, and change the name of the child. O.C.G.A. § 19-7-22(a) reads:

A father of a child born out of wedlock may render the same legitimate by petitioning the superior court of the county of his residence, the county of the residence of the child, or, if a petition for the adoption of the child is pending, the county in which the adoption petition is filed for legitimation of the child.

Thereafter, Holmes moved to transfer venue to Dooley County, on the basis of her residence and Article VI, Section II, Paragraph VI, of the 1983 Georgia Constitution. The trial court denied the motion and certified its denial order for immediate review. This appeal followed.

The Supreme Court of Georgia granted an interlocutory review and determined that there was a conflict between O.C.G.A. § 19-7-22(a) and Article VI, Section II, Paragraph VI, of the 1983 Georgia Constitution, and therefore reversed the decision of the trial court. Specifically, the Court held that the section of 19-7-22(a) which provides for venue in the county of the putative father, when that county is different from the county of the mother, was unconstitutional. The Court further noted that severance of this venue provision does not affect the purpose behind the remainder of the statute, and that the remaining provisions of 19-7-22(a) are to be given full effect.

The Court reasoned that although several constitutional provisions provide for venue, a legitimation proceeding does not fall into any category of cases for which venue specifically has been provided within the Constitution, and thereby falls under Article VI, Section II, Paragraph VI’s provision for ‘[a]ll other civil cases.’ Further, the Court reasoned that although Traweck claimed that Holmes was not a ‘defendant’ in this case, defendants are “generally those who control the defense of the case . . . , and have the right to introduce evidence, cross-examine witnesses, and to appeal.” Further, the Court opined that although the aforementioned statute does not specifically refer to the mother as a ‘defendant,’ it requires that she be given notice of the petition for legitimation, have notice of any support obligations the court imposes upon the father, and it gives her the power to demand a jury trial on the question of support. Further, the Court stated that the mother’s right to notice of the petition also included the right to file objections and appeal

an award of legitimacy. Therefore, the Court stated, that “[o]nly the mother of a child born out of wedlock is entitled to [the child’s] custody, unless the father legitimates [the child] as provided in Code section 19-7-22. Otherwise, the mother may exercise all parental power of the child.’ Importantly, the Court concluded the mother had a “vested right” in her relationship with her child in this case, upon which legitimation infringed and that she was a defendant within the meaning of the Georgia Constitution.

E. Right to a Jury Trial, Mootness, Collateral Estoppel

1. Right to a Jury Trial

Banks v. Hopson, 275 Ga. 758 (2002)

Banks filed a complaint against Hopson, her former boyfriend, for determination of paternity and an award of child support. In his answer, Hopson admitted that he was named as the biological father on the child's birth certificate and that he was paying \$750 per month in child support. Eight months later, Hopson filed a complaint for legitimation and Banks filed a counterclaim for child support, demanding a jury trial. The trial court combined the two actions for trial and Banks filed an additional demand for a jury trial on the issues of child support and visitation. The trial court denied the request on the grounds that there was no right to a jury trial in a paternity action. At trial, Hopson stipulated that he was the biological father of the child, and Banks consented to the child's legitimation. After a hearing, the court deemed the child legitimate, ordered the father to pay \$1,250 in monthly child support, and set out a visitation schedule. The Georgia Supreme Court granted her petition for certiorari to resolve the conflict between O.C.G.A. § 19-7-40(a), which prohibited jury trials in paternity actions, and O.C.G.A. § 19-7-22(f), which allowed jury trials on child support in legitimation proceedings.

The Supreme Court affirmed the decision of the trial court and concluded that Banks was not entitled to a jury trial. The Court reasoned that the purpose of a paternity proceeding is to determine whether an individual is the father of a child and to establish his duty of support. Moreover, the Court noted that the statute under which Banks filed her complaint expressly stated that no party to an action to establish paternity is entitled to a jury trial. By enacting this prohibition, the Court reasoned that the legislature intended to comply with federal mandates requiring states to implement procedures that would improve child support enforcement. The Court stated that in eliminating the right to a jury trial, as required, the legislature provided a more efficient process to establish paternity and obtain child support payments and ended the tactic of demanding a jury trial to delay a decision on child support.

Moreover, the Court noted that Banks claimed she was entitled to a jury trial based on the request that she filed as part of her counterclaim in the father's legitimation action. The Court noted that she based this entitlement on the arguments that (1) paternity was not an issue at trial after Hopson stipulated to paternity, (2) therefore, the ban on jury trials in OCGA § 19-7-40(a) no longer controlled, (3) the remaining issues before the trial court were legitimation, visitation, and child support; under O.C.G.A. § 19-7-22(f), and (4) she had an express statutory right to a jury trial on child support. However, the Court stated that these arguments ignored the historical purpose of paternity actions and the

legislature's reasoning for eliminating jury trials in paternity proceedings. The Court opined that neither the consolidation of separate paternity and legitimation actions nor the father's decision to admit paternity transformed the lawsuit into one controlled solely by the legitimation statute. Further, the Court noted that if either parent were able to “bootstrap the right to a jury trial under the legitimation statute to a claim for the establishment of paternity, the parents would be able to circumvent the legislative ban on jury trials”

2. *Mootness*

Buchheit v. Stinson, 260 Ga. App. 450 (2003)

Stinson, as guardian ad litem, of minor child R.B., filed a “Petition to Prevent Family Violence.” The petition alleged that R.B.’s mother, Buchheit, caused the child emotional and physical harm. Specifically, it stated that Buchheit was involved in a custody matter regarding her two minor children and that guardian learned that Buchheit,

pulled the . . . child’s hair and hit the child due to the child speaking with the guardian and/or because of what the child ha[d] told the guardian’s office[,] . . . threatened the child that she w[ould] not love her anymore if she t[old] anyone what defendant ha[d] said—or if she sa[id] she want[ed] to live with the father[,] . . . [t]he defendant has slapped the minor child when the child has tried to explain that she wants to stay out of the middle or doesn’t want to talk about the custody case[,] . . . [and] . . . [t]he child is afraid of further violence if she remains in the home.

The trial court found that there was a preponderance of evidence that an act of simply battery occurred. The court entered a sixth month protective order stating that the mother should only be allowed supervised, therapeutic visitation with the child until the psychologist deemed it appropriate.

The Court of Appeals reversed the grant of petition for a protective order against Buchheit under the Georgia Family Violence Act. Specifically, the Court stated that it is unaware of any cases which involved a precise definition of ‘reasonable discipline’ by means of ‘corporal punishment’ under O.C.G.A. § 19-13-1. Therefore, the Court looked to precedents like Maddox v. Boutwell, 176 Ga. App. 492, and Daniels v. Gordon, 232 Ga. App. 811, and held that under the facts of this case, there was no evidence that the mother’s action of slapping her child in response to disrespectful behavior fell outside the boundaries of permissible, ‘reasonable discipline.’

Further, the Court addressed its jurisdiction to entertain this appeal. The Court held that this case was not moot because it involved issues that both affected an existing class of sufferers and tended to evade review. Specifically, the Court stated that the court entered the protective order on January 24, 2002 and it expired on July 24, 2002, thus rendering the issues in this appeal arguably moot. However, the Court cited Baca v. Baca, 256 Ga. App. 514, wherein it stated:

if an issue . . . is capable of repetition yet evades review, we do not view that issue as moot. . . . This case involves a six month protective order, which is the maximum length of time such order may remain in effect. Given the time constraints of appellate courts, it often is not feasible to reach the merits of this type of appeal during the six month window. Accordingly, we must address whether the various issues are common to an existing class, yet tend to evade review. *Id.* at 515-516.

3. *Collateral Estoppel*

Edmondson v. Gilmore, 2003 WL 21299385 (Ga. App.)

In the case of In re T.M.G., 275 Ga. 543, the Supreme Court reversed the Court of Appeals, and held that the minor child's foster parents, the Edmondson's, were not collaterally estopped from seeking to adopt T.M.G. The Edmondson's were not parties to a separate adoption case involving the surrender of the biological mother's parental rights to an Alabama couple. Accordingly, the Court of Appeal vacated its judgment in Edmondson, where the Court concluded that collateral estoppel barred the Edmondson's from petitioning to adopt the child. The Supreme Court in In re T.M.G., concluded that the Edmondson's were free to proceed with the adoption. The Court's opinion in Edmondson was vacated and the judgment of the Supreme Court was made the judgment of the Court.

F. Attorney Fees

Cotting v. Cotting, 2003 WL 21197287 (Ga. App.)

Briefly, the Cottings divorced, agreed that Mrs. Cotting would retain primary physical custody of their child, and established a schedule for 'parenting time.' However, disputes regarding parenting arose whereby Mr. Cotting sought enforcement and modification of the settlement agreement. Mrs. Cotting answered and filed a counterclaim moving the trial court to hold Mr. Cotting in contempt for violation of the divorce decree. The case proceeded to a bench trial resulting in a final order, whereby the trial court held Mr. Cotting in contempt while determining that Mrs. Cotting complied fully with the decree. As a result, Mrs. Cotting was awarded attorney fees pursuant to O.C.G.A. § 19-6-2(a). The trial court further noted that Mr. Cotting filed several meritless discovery motions, entitling Mrs. Cotting to a fee award under O.C.G.A. § 9-11-37(a)(4)(B). The court then ordered Mr. Cotting to pay his ex-wife \$3,000 in attorney fees, but it did not apportion that award between the contempt and discovery findings. Additionally, Mr. Cotting filed a second complaint against Mrs. Cotting, seeking custody modification. The trial court denied his motion for reconsideration in the enforcement action and dismissed his modification action. It also directed Mr. Cotting to pay Mrs. Cotting \$7,000 in attorney fees in this suit. The \$7,000 payment in the enforcement action was in addition to the previous \$3,000 fee award.

The Court of Appeals vacated and remanded the award to the extent that there were no factual findings to support the trial court's award for the enforcement action. The Court reasoned that Mrs. Cotting claimed the fees were authorized pursuant to O.C.G.A. § 9-15-14, which authorizes fees when a party is forced to defend against groundless litigation. However, the Court stated that even if the trial court had based its fee decision on §§19-6-2 or 9-11-37(a)(4)(B), which relate to contempt and discovery violations respectively, remand was necessary for greater factual findings.

Further, Mrs. Cotting argued that the first order holding her husband in contempt and denying his discovery motions authorized the \$7,000 fee under either of the aforementioned statutes. However, the Court of Appeals stated that those rulings already formed the basis for the first fee award of \$3,000. Therefore, the Court could not discern whether the trial court intended the \$7,000 award to relate back to or supplement the first fee award. Additionally, there was no indication that the trial court entered a second contempt finding or ruled on an additional motion to compel.

The Court further found the award for the modification action was skeletal and to the extent it relied on § 19-15-14, vacated and remanded it for factual findings. It also reversed any portion of the first \$3,000 fee award based on §§ 19-6-2 or 9-11-37(a)(4)(B) because that case was solely regarding custody modification and had no contempt allegations. Therefore, the Court opined that the award fell outside of the parameters of § 19-6-2, which does not authorize an award in a modification suit. Further, the Court noted that there was no evidence that the parties conducted discovery or filed motions to compel in that case and that § 9-11-37 therefore did not apply.

Monroe v. Taylor, 259 Ga. App. 600 (2003)

In this case, Monroe and Taylor, who were never married, had a child. Thereafter, Monroe filed an action against Taylor seeking a change in custody based on a change in conditions in Taylor's home. Taylor filed a counterclaim for increased child support based on a change in Monroe's financial condition and sought attorney fees. After a hearing, the trial court awarded Taylor, as the prevailing party, attorney fees pursuant to O.C.G.A. § 19-6-19(d). However, Monroe contended that the term 'former spouse' used to describe parties who may file and respond to a petition for modification of child support within this statute limited the attorney fees provisions to parties who were previously married. The trial court held that the statute was not limited by the aforementioned language.

The Court of Appeals affirmed the decision of the trial court stating that although this chapter of the O.C.G.A. was conceived in the context of marriage, Georgia courts have recognized the legislative intent to provide for the proper support of minor children whose parents never married. Further, the Court noted that the "Child Support Guidelines," were previously held mandatory and must be applied regardless of whether parents are married. Specifically, the Court stated that for the purposes of Chapter 6 of the Domestic Relations Code, the term 'former spouse' is equated with 'parent' when considering issues of child support. In addition, the Court opined that pursuant to Haselden v. Haselden, 255 Ga. 366, there was no reason to distinguish between an action initiated by a support modification petition and a support modification claim added via a counterclaim to a pending custody action.

Patton v. Turnage, 2003 WL 1343218 (Ga. App.)

Briefly, Patton hired Turnage to represent him in a divorce action, with Patton, a lawyer, acting as co-counsel. Turnage's representation of Patton continued until Turnage petitioned the court to withdraw from the case. Turnage claimed that the philosophies of the two men in how to handle the case were incompatible. Turnage's motion to withdraw was filed less than one month before the divorce trial was scheduled to begin. The trial court granted Turnage's request for withdrawal, at which time Patton's outstanding bill was almost \$40,000. Turnage sent Patton monthly statements, informing him that the bill remained unpaid and subsequently filed suit for the unpaid balance. The trial court granted partial summary judgment to Turnage, finding that Patton was liable for unpaid fees and ordered that the matter be set for trial with regard to damages. After the trial, the jury awarded Turnage \$42,199.84 for prior expenses and legal representation, \$9,424.89 in interest, and \$6,329.98 in attorney fees for "stubborn litigiousness" pursuant to O.C.G.A. § 13-6-11. However, Patton contended that the trial court erred in denying his counterclaim against Turnage, because Turnage damaged him when he withdrew as his counsel one month before his divorce trial, resulting in thousands of dollars in additional expenses at the last moment.

The Court of Appeals affirmed the decision pertaining to the attorney withdrawal and pre-judgment interest and reversed on the amount of attorney fees charged. Specifically, the Court stated that attorney withdrawal with court permission and in accordance with the applicable rules does not constitute legal malpractice. Further, in this case the Court noted that the appellant failed to voice any opposition whatsoever to his attorney's withdrawal at the hearing before the trial court. Therefore, the Court reasoned that because appellant acquiesced in that ruling and did not allege that it had been challenged on appeal at the time it was sought, the Court would not question it.

Moreover the Court noted that O.C.G.A. § 13-6-11 'allows recovery of attorney fees if the defendant . . . acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense.' Further, the Court noted that it is only necessary that a plaintiff show one of these three conditions to recover. The Court opined that an award of attorney fees under this Code section is to be affirmed if there is any evidence to support it. Additionally, the Court noted that questions pursuant to § 13-6-11 are typically jury questions. Therefore, the Court opined that based on the record, there was sufficient evidence for a jury to conclude that Patton had been stubbornly litigious. Specifically, although Turnage sent Patton bills for a number of years, Patton never questioned them until after Turnage brought suit. Moreover, during trial, Patton testified:

I didn't think that I had to explain to Mr. Turnage how a client would feel if they are abandoned like that. *That was my primary grievance with Mr. Turnage. Not the fact that he might have overcharged five hours or six*

hours, if he did, but the fact that I was abandoned. That was my beef with Mr. Turnage. (Emphasis added).

Therefore, the Court noted that Patton admitted that his issues with Turnage were not centered on the amount of Turnage's bill, but the fact that Turnage abandoned him prior to trial.

However, the Court opined that in this case, the only evidence regarding the attorney fees incurred by Turnage was provided through Turnage's direct examination during trial. Further, the Court stated, '[that] it is well-settled that an award of attorney fees is to be determined upon evidence of the reasonable value of the professional services which underlie the claim for attorney fees.' Specifically, a court may consider a contingent fee agreement and the amount it would have generated as evidence of usual and customary fees in determining both the reasonableness and the amount of an award of attorney fees. Therefore, because there was no evidence provided that the fees were either usual or customary or testimony which showed that the contingency fee was a valid indicator of the value of the professional services rendered, the Court reversed the award of attorney fees pursuant to O.C.G.A. § 13-6-11. Further, in regards to pre-judgment interest the Court noted that Patton's grievance against Turnage related to Turnage's withdrawal, not the amount of his bill. Further, the Court found that Patton did not testify that Turnage had overcharged him. As such, the Court concluded that Patton offered no proof that the amount charged in Turnage's bills was not due and payable.

Wehner v. Parris, 258 Ga. App. 772 (2002)

Wehner (father) filed a petition for downward modification of child support. Subsequently, Parris requested that the petition be dismissed and that she be awarded attorney fees in the amount of \$13,680.62 pursuant to O.C.G.A. §§ 9-15-14 and 19-6-22. Parris then moved for summary judgment and Wehner amended his petition to add a claim for modification of child custody. The superior court granted Parris' summary judgment on the petition, holding that the evidence was insufficient to warrant downward modification of child support. By consent order, the parties later resolved the child custody modification issue and the Court of Appeals granted Wehner's application for discretionary review of the court's judgment which awarded \$7,500 to Parris in attorney fees. In addition to challenging the award of attorney fees, Wehner contended: "[(1)] that the superior court erred in awarding attorney fees as not authorized in a child custody action, and [(2)] that, even if deemed an action for modification of child support, the award of attorney fees was unauthorized in the absence of a duly noticed hearing to determine whether they were reasonable and necessary."

The Court of Appeals vacated and remanded the decision of the superior court holding that the court's award,

was silent as to the basis upon which attorney fees were awarded, whether under O.C.G.A. § 9-15-14(a) or (b) or O.C.G.A. § 19-6-22, that attorney fees were awarded in the absence of a hearing upon inadequate findings, and that Wehner's action, as amended, was not a change in custody action barring attorney fees.

Further, the Court rejected Wehner’s assertion that the fee award was in error. Specifically, Wehner characterized the instant action as one for “change in custody” as to which his request for modification of child support was ancillary, pursuant to Walker v. Walker, 248 Ga. App. 177, and In the Interest of S.K.R., 229 Ga. App. 652. However, the Court stated that although attorney fees are not authorized in an action for change of custody brought by the noncustodial parent, nor in a change of custody action in which a request for child support is also made, where, as in this case, the noncustodial parent requested a change in custody ancillary to seeking a modification of child support these precedents did not control. Specifically, the Court stated:

[w]here a petition [to modify alimony] is filed by a party obligated to pay alimony, the court may require the party to pay the reasonable expenses of litigation as may be incurred by the party's former spouse, either on behalf of the former spouse, or the child or children, or both, in defense thereof.

In summation, the Court noted that when Mr. Wehner amended his action for modification of child support by a request for change in custody, it did not make his request for change in custody ancillary. Therefore, the Court opined that attorney fees are awardable in a modification of child support action brought by the party obligated to pay child support, even where such party, as the noncustodial parent, also requests a change in custody.

G. Attorney Liens

Clayton v. Moore, 259 Ga. App. 688 (2003)

This appeal arose from the intersection of two separate lawsuits. The first, was a federal action between Clayton and an insurer regarding the proceeds of a life insurance policy on his deceased wife. The second, was a custody action in which Clayton’s three children were awarded to Moore, their maternal aunt. Thereafter, Clayton was ordered to pay \$53,500 in past and future child support, out of the life insurance proceeds that were the subject of the federal suit. In this appeal, Clayton challenged an order dissolving an attorney’s lien held by his counsel (“Ashley”) in the federal suit.

After the murder of Clayton’s wife, her sister, Moore, instituted an action seeking custody of her children and child support. As part of that action, she sought a restraining order preventing the aforementioned life insurance proceeds from being distributed to Clayton. Moore moved the trial court to lift the restraining order, and his motion was granted. Subsequently, the court ordered the proceeds of the life insurance policy to be deposited into the court registry and the parties to mediate their dispute regarding the proceeds. A settlement was not reached in the aforementioned matter and the superior court entered an order awarding Moore \$40,000 as back child support and \$13,500 in future child support. The funds were ordered to be paid to Moore’s counsel, Ashley, out of the proceeds held in the district court registry, which totaled \$72, 298.93.

Clayton was awarded the proceeds as the legal beneficiary under the policy in the federal action. Thereafter, his attorney asserted an attorney’s lien on the proceeds, and the

district court reasoned that the only issue remaining was whether the lien on the proceeds was superior to the child support award against Clayton, and referred the issue to the superior court for determination. Further, the district court directed its clerk to disburse the funds to Ashley ‘as Attorney for Willie E. Clayton,’ to enter judgment in favor of Clayton, and to close the file. Ashley then sent Moore’s attorney a check for \$43,379.21 which resulted in an underpayment to Moore. Thereafter, Moore’s attorney filed a motion to dissolve the lien, requesting an emergency hearing. The superior court granted Moore’s motion, holding that no valid lien could attach to the amount that had previously been awarded as child support. The superior court ordered that \$10,121 of the money held in the superior court registry be paid to Moore’s attorney immediately. Clayton, filed an application for discretionary appeal.

This Court of Appeals affirmed the trial court which, according to the Court, correctly ruled that Ashley’s attorney’s lien was not superior to the previous child support award. The Court cited Law Office of Tony Center v. Baker, 185 Ga. App. 809, in which the Court of Appeals previously addressed this issue. The Court concluded in Law Office of Tony Center, that child support ‘occupies a special niche in our law,’ since ‘to allow an attorney’s lien to be asserted against child support would necessarily result in counsel for the custodian taking from the children’

I. Although there is no conclusive study on custody relocation, or related custody issues, this type of evidence would be persuasive on custody matters if admissible. The Georgia Supreme Court is currently in the process of considering what evidentiary standard to adopt in Georgia for scientific evidence in July of 2003.

H. Evidentiary Issues

1. Admissibility of Scientific Evidence

Orkin Exterminating Company, Inc. v. Carder, 258 Ga. App. 796 (2002)

Carder sued Orkin Exterminating Company, Inc. to recover for personal injuries sustained as a result of exposure to pesticides Orkin used at his workplace. At trial, Orkin challenged the methods employed by Dr. Frumpkin to determine the cause of Carder’s illness, claiming that they failed to satisfy the basic standard governing the admissibility of scientific evidence set forth in Harper v. State, 249 Ga. 519.

The Court of Appeals affirmed the ruling of the trial court and reasoned that the test in Georgia for ‘determining whether a scientific principle or technique . . . is competent evidence in a court of law’ was first set out in Harper. Specifically, the Court noted that in this State it is proper for the trial judge to decide whether the procedure or technique in question has reached a scientific stage of verifiable certainty, or in other words, ‘whether the procedure rests upon the laws of nature.’ The Court opined that the trial court may make this determination from evidence presented at trial by the parties, and expert testimony in this regard may be valuable. Moreover, the Court stated that the trial court can base its determination on exhibits, treatises, or the rationales of cases in other jurisdictions. Importantly, the Court noted that the trial court makes this

determination based on the evidence available rather than by simply calculating the consensus in the scientific community. Further, the Court opined that once a procedure has been recognized in a substantial number of courts, a trial judge may take judicial notice, without receiving evidence, that the procedure has been established with verifiable certainty, or that it rests upon the laws of nature.

The Court opined that in this case, the methods employed by Dr. Frumpkin had not been tested by others and therefore had no known rate of error, and that he failed to establish a written protocol for the testing, publish the test results in some work of medical literature, or subject the test results to peer review. The Court noted however that factors like these were taken into consideration by federal courts primarily in determining the validity of the theory or technique itself, as opposed to one experimenter's application of that technique pursuant to Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579. In summation, the Court opined that Daubert involved application of a federal evidentiary rule which has not been adopted in Georgia. Therefore, the Court of Appeals did not apply Daubert in this case.

Orkin Exterminating Company, Inc. v. Carder, 258 Ga. App. 796 (2002), cert. granted, (Ga. April 29, 2003) (No. S03G0650).

The Supreme Court granted certiorari to review the judgment of the Court of Appeals and the case is automatically assigned to the calendar for July of 2003. The Georgia Supreme Court is particularly concerned with the following issue or issues:

What standards or factors should govern the admissibility of expert scientific evidence in Georgia? [Compare Harper v. State, 249 Ga. 519, with Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, and Kumho Tire Co. v. Carmichael, 526 U.S. 137.]