

SAFETY PLANS FOR CASES INVOLVING SUBSTANCE ABUSE

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I. Introduction

Substance abuse is an all too common issue facing parties in custody disputes. Generally, Georgia public policy “is to allow visitation rights to divorced parents who have demonstrated the ability to act in their minor children’s best interests.”¹ A parent who suffers from substance dependency cannot act in his or her children’s best interest while abusing a substance. However, if the substance-dependent parent remains sober, he or she may be an otherwise fit parent who should receive visitation rights under Georgia law. Thus, the question arises of how to allow parenting time to an otherwise fit but substance-dependent parent with his or her children while ensuring the children’s safety and best interests. One solution is a carefully drafted alcohol or drug safety plan. This paper will analyze the fundamentals of parenting plans and the recent developments in the law governing alcohol and drug safety plans. This paper will further discuss various forms of monitoring and address a potential legal challenge to alcohol and drug safety plans.

II. Alcohol and Drug Safety Plan Fundamentals

An alcohol and drug safety plan consists of court-ordered conditions and restrictions on a parent’s parenting time with which the parent must comply. Generally, these conditions and restrictions require complete sobriety and regular monitoring through testing. The purpose of a safety plan is to ensure that the alcohol or drug-dependent parent remains sober. The safety plan allows the otherwise fit parent to have parenting time and develop a relationship with the children while protecting the children if the dependent parent suffers a relapse.

¹ Taylor v. Taylor, 282 Ga. 113 (2007) (quoting Woodruff v. Woodruff, 272 Ga. 485(1) (2000)).

In setting up a safety plan, one of the most important considerations is ensuring that the testing is appropriate given the circumstances of the parties and the abused substance(s). Various types of monitoring tests and devices are discussed below in Section III. It is always a good idea to consult with an addiction expert or a testing facility regarding the appropriate monitoring and testing options for each case.

A safety plan should be specific regarding the frequency of testing. Frequency often depends on the testing parent's resources as repeated testing can be quite expensive. The right balance should be established between random testing and testing that correlates with the parenting time awarded so that the parent remains sober during his or her care of the children. All testing should be witnessed and performed by a national testing facility. Such facilities offer testing services throughout the United States and the world.

To reduce the interaction between the parties, the safety plan should require the dependent parent to authorize the release of testing results directly to the other parent. Email, if appropriate, should be used to allow the other parent immediate notification if the dependent parent has failed a test.

The duration of the safety plan can play a vital role in whether the dependent parent will remain sober or suffer a relapse. Studies have shown that the likelihood of relapse is approximately 90% for alcohol and 50-80% for other substances.² The relapse rate increases when the individual is placed in a high stress and unstable environment such as a divorce.³ As such, the duration of the safety plan should

² Caron Treatment Center, <<http://www.caron.org/current-statistics.html>> (2012).

³ Brady and Sonne, *The Role of Stress in Alcohol Use, Alcoholism, Treatment, and Relapse*, *Alcohol Research and Health*, Vol. 23, No. 4 (1999).

minimize the risk of relapse by taking into consideration the dependent party's history of substance abuse, previous unsuccessful rehabilitation and treatment, and past relapses. Addiction experts have varying opinions regarding the appropriate duration of a safety plan; however, generally, safety plan durations should last for two to five years, inclusive of sobriety during the litigation.⁴

The parenting plan should address the consequences for the dependent parent's failure to maintain sobriety. Again, it is important to assess the specific circumstances of each case. Generally, such consequences can include suspension of all visitation, suspension of overnight visitation, requiring supervised visitation, or lengthening the term of the safety plan. While having automatic consequences for a relapse is an efficient way for the parties to avoid unnecessary litigation, care must be taken in drafting the consequences to avoid including an improper self-executing modification provision. Self-executing modifications are addressed below in Section IV(B).

III. Testing and Monitoring.

A. Alcohol Testing and Monitoring.

Urine Testing.

Urine-based laboratory tests detect metabolites of alcohol such as ethyl glucuronide (EtG) and ethyl sulfate (EtS). Urine testing can detect the presence of alcohol up to eighty hours after consumption and results can be received within two weeks.⁵

⁴ Polich, Armor and Braiker, Stability and Change in Drinking Patterns, *The Course of Alcoholism: Four Years After Treatment*. New York: John Wiley & Sons (1981).

⁵ Skipper, Weinmann, Thierauf, Schaefer, Wiesbeck, Allen, Miller, and Wurst, Ethyl Glucuronide: A Biomarker to Identify Alcohol Use by Health Professionals Recovering from Substance Use Disorders, *Alcohol and Alcoholism*, Vol. 39, No. 5 (2004).

A major criticism of urine testing is that the testing is extremely sensitive, thereby frequently detecting false positives. Due to its sensitivity, urine testing is not able to distinguish between actual consumption of alcohol and alcohol absorbed into the body from exposure to many common products that contain ethanol, such as mouthwash and hand sanitizer. Counsel should advise the parent being monitored to avoid consumption and contact with any items containing even a trace amount of ethanol or alcohol during the period of testing. An example disclosure form with a list of items to avoid is included in Appendix B. Due to the high risk of a false positive result, the Substance Abuse and Mental Health Services Administration (SAMHSA) has issued an advisory warning that the testing is “scientifically unsupportable as the sole basis for legal or disciplinary action” and that it “is inappropriate as the sole basis for a definitive, life-altering decision.”⁶

Despite the advisory, urine testing remains the most commonly used test for monitoring sobriety in alcohol safety plans. There are several precautions counsel should take to reduce the risk of a false positive. First, the safety plan should explicitly provide for both EtG and EtS testing, and require a blood PEth test if either EtG or EtS is positive. Phosphatidylethanol (PEth) tests, discussed in more detail below, are the best tests to confirm the consumption of alcohol after a positive EtG or EtS result.⁷ Counsel can also agree on a professional monitor, such as an addictionologist, who can determine whether a positive result may have been caused by a false positive. The legality of such a monitor is discussed below in section IV(C).

⁶ Center for Substance Abuse Treatment, *The Role of Biomarkers in the Treatment of Alcohol Use Disorders*, *Substance Abuse Treatment Advisory*, Vol. 5, No. 4 (2006).

⁷ Gregory Skipper, MD, <<http://etg.weebly.com/proper-use.html>> (2012).

Alcohol Rapid Testing.

Many labs offer a series of services that will provide immediate results, often referred to as rapid testing. Rapid testing is advantageous because it safeguards against a party consuming alcohol immediately prior to his or her parenting time. However, it should only be used in addition to full laboratory EtG and EtS urine testing to ensure continued sobriety as the rapid testing can only detect the presence of alcohol that has been consumed within several hours of testing.

Rapid testing can include the use of a breathalyzer, a saliva oral fluid lollipop test, or an oral alcohol sensor strip, often in conjunction, and can detect the presence of alcohol on the subject's breath or saliva. Rapid tests are also hypersensitive and only indicate the presence of alcohol at the time of testing, not intoxication. As such, if a positive result occurs, the party should immediately submit to a full EtG and EtS urine test to verify the result. It is also important that such testing be administered and witnessed by a licensed facility in order to ensure reliability.

Hair Alcohol Testing.

Hair alcohol testing measures the alcohol markers, ethyl glucuronide (EtG) and fatty acids ethyl esters (FAEE), found in hair follicles, by using gas chromatography/tandem mass spectrometry (GC/MS/MS). This form of testing can detect alcohol consumption over a period of up to six months. Results can be received as early as two weeks from the testing.

Hair alcohol testing is non-intrusive and can use hair from the party's scalp, face or body. It is important to specify that the party will submit a hair follicle of 6 cm in length to allow for the most accurate reading. Hair alcohol testing is less sensitive than

other alcohol tests so there is less of a risk for false positives. However, there is a risk of false negatives due to excessive shampooing. A party should disclose all hair products that he or she uses during the intake procedure. The risk of a false negative can be lessened by requiring full EtG and FAEE hair analysis.

Hair alcohol testing is limited in that it does not measure alcohol itself, but rather the alcohol markers. Thus, the testing cannot indicate how much one has been drinking or when he or she last drank. Rather, the testing can only indicate whether there has been above average alcohol consumption at any time in the past. For the purposes of showing complete abstinence, the hair follicle test should be used at least three months after an excessive drinker has agreed to remain sober.

Blood Alcohol Testing.

Blood alcohol testing measures the ethanol marker, phosphatidylethanol (PEth). PEth has been found to be the most reliable marker for blood tests in showing alcohol abuse.⁸ Despite having sensitivities for ethanol use of 99%, PEth tests have a very low risk of false positives.⁹ PEth tests can detect alcohol use for up to three weeks after consumption. PEth tests can discriminate between incidental exposure and alcohol consumption because the volume of alcohol required for a positive test result is higher than what can be produced by incidental exposure.¹⁰ Thus, to reduce the risk of a false positive from incidental exposure, a PEth test should be used to confirm a positive test result on either an EtG or EtS screen.

⁸ Aradottir, Asanovska, Gjerds, Hansson and Alling, Phosphatidylethanol (PEth) Concentrations in Blood are Correlated to Reported Alcohol Intake in Alcohol-Dependent Patients, *Alcohol and Alcoholism*, Vol. 41, No. 4 (2006).

⁹ Id.

¹⁰ USDTL, <<http://www.usdtl.com/pethstatsm.html>> (2012).

B. Drug Testing.

There are a variety of drug tests similar in nature to the above alcohol tests. These include urine, hair, rapid and blood tests. Similar to alcohol safety plans, urine panel drug screens are generally most appropriate for drug safety plans. However, there are many varieties of urine panels that test for specific drugs. Such tests can range from a minimal 5-panel test to a comprehensive 68-panel test. Thus, it is important to speak with a professional regarding which panels are necessary to detect the specific substance a party is at risk of using and any related or companion substances, rather than simply using the most basic 5-panel drug screen.

C. Other Monitoring Devices.

There are several other devices that can be used to monitor sobriety, including the ignition interlock device and continuous transdermal alcohol monitoring device. The ignition interlock device is a monitoring device installed in a party's vehicle that prevents the operation of the vehicle if the device detects alcohol on the party's breath. The use of ignition interlock device has become common place as part of DUI prevention, and is required under Georgia law for repeat offenders.¹¹ However, ignition interlock devices have not yet become commonplace in custody situations.

The use of an ignition interlock device as a part of an alcohol safety plan can help ensure that a party is not consuming alcohol and driving with the children. Other monitoring tests show only whether a dependent parent has consumed alcohol in the past. Such tests cannot show whether an alcoholic parent is currently consuming alcohol. Given the likelihood that the parenting plan allows or requires the dependent

¹¹ O.C.G.A. § 42-8-111(a).

parent to transport the children, the parties cannot ensure that the children are safe while driving with the alcohol-dependent parent without the installation of an ignition interlock device.

A safety plan should require the party to calibrate and download testing information with the monitoring facility on a regular basis. Installation and monitoring facilities are located throughout Georgia (See Appendix C). An ignition interlock device is a relatively cheap sobriety monitoring device. The cost for installation of an ignition interlock device ranges between \$100 and \$250.¹² Monthly costs (including installation insurance and basic fees) range between \$65 and \$90 per month.¹³

Continuous transdermal alcohol monitoring device, also known commercially as Secure Continuous Remote Alcohol Monitoring (SCRAM) or Transdermal Alcohol Detector (TAD), is a device worn as a bracelet that estimates the blood alcohol content of the wearer by measuring the ethanol concentration of his or her perspiration. These devices can quantify alcohol consumption and provide a low cost alternative with continuous testing. Research has proven that such devices accurately measure blood alcohol concentrations.¹⁴ However, there is a delay between the consumption of alcohol and its presence in perspiration. Additionally, since these devices are worn on the person's body, there could be an issue of a social stigma attached with wearing the device.

¹² Sprattler, Ignition Interlocks – What You Need to Know: A Toolkit for Policymakers, Highway Safety Professional, and Advocates, National Highway Traffic Safety Administration, DOT HS 811 246 (2009).

¹³ Id.

¹⁴ Robertson, Vanlaar and Simpson, Continuous Transdermal Alcohol Monitoring: A Primer for Criminal Justice Professionals, The Traffic Injury Research Foundation (2007).

IV. Legality of Alcohol and Drug Safety Plans.

Although commonly used by trial courts, the legal basis for alcohol and drug safety plans has not yet been discussed by the Georgia appellate courts. However, as shown by recent appellate cases such as Johnson v. Johnson, a legal challenge to alcohol and drug safety plans is most likely inevitable.

A. Legal Basis.

Courts have inherent powers to place conditions and restrictions on a parent's behavior that will harm the children.¹⁵ This power has previously supported restrictions on parents having guns during custody exchanges and restrictions on introducing children to third parties.¹⁶ However, although this power has not yet been explicitly extended to support alcohol and drug safety plans, courts frequently use their inherent powers to require safety plans to ensure the children's safety.

B. Self-Executing Modification.

Alcohol and drug safety plans may be challenged for containing an improper self-executing custody or visitation modification provision. A self-executing modification provision is a provision which automatically modifies custody/visitation based on a future event without any additional judicial scrutiny.¹⁷ Self-executing modification provisions can be either proper or improper. A proper self-executing modification is based on a course of conduct committed to by a party at the time of its entry, is limited in time in its application, and is based on a non-arbitrary triggering event.¹⁸ The most common example of a proper self-executing modification provision is a provision that

¹⁵ Blackmore v. Blackmore, 311 Ga.App. 885 (2011).

¹⁶ Moore v. Moore-McKinney, 297 Ga.App. 703 (2009).

¹⁷ Scott v. Scott, 276 Ga. 372 (2003).

¹⁸ Dellinger v. Dellinger, 278 Ga. 732 (2004).

allows for an automatic modification of custody based on the election of 14-year old child.¹⁹ Such is proper because the modification is based on an election of a 14-year old child which is explicitly provided for under Georgia law;²⁰ thus, there is no additional judicial scrutiny necessary.²¹

An improper self-executing modification is one where the provision fails to give paramount import to the children's best interest in changing custody at the time of the modification.²² Self-executing modification provisions triggered by remarriage or relocation have been held improper under Georgia law. The rationale behind such holdings is that remarriage and relocation are arbitrary as to their effect on the best interests of the children. Thus, it is still necessary for a court to determine whether the remarriage or relocation is in the children's best interests such that a change of custody or visitation should occur.²³

While the appellate courts have not examined alcohol and drug safety plans from the perspective of a self-executing modification, such an argument could be asserted by a party trying to set aside an agreed to or court-ordered safety plan. Essentially, one may argue, if a party suffers a relapse that automatically triggers set consequences such as supervised visitation or suspension of visitation, then an automatic modification of custody or visitation has occurred.

Such an argument could be challenged for several reasons. First and foremost, rather than a modification, an alcohol or drug safety plan is a restriction and condition

¹⁹ Weaver v. Jones, 260 Ga. 493 (1990).

²⁰ O.C.G.A. §§ 19-9-1(a)(3)(A), 19-9-3(a)(4).

²¹ Scott v. Scott, 276 Ga. 372 (2003) includes a strong dissent arguing that an automatic modification based on an election is indistinguishable from other self-executing modifications for relocation and remarriage which have been found improper.

²² Scott, 276 Ga. at 375.

²³ Id.

on a parent's parenting time to ensure the safety of the children. If the relapsing parent violates the condition of sobriety, then he or she can no longer exercise his or her parenting time because he or she is then no longer in compliance with the safety plan. To strengthen this argument, the parenting plan should award the dependent parent no parenting time except when in strict and complete compliance with the conditions and restrictions of the safety plan. Secondly, the safety plan does not deal with a speculative future action. Instead, the safety plan protects the children from the dependent parent's current alcohol or drug problem while the dependent parent is in the process of treatment and recovery.

Even if an alcohol or drug safety plan could be considered a self-executing modification, one could argue that it would not be an improper self-executing modification. What distinguishes an alcohol or drug safety plan from other automatic modification provisions is that it is not based on a future occurrence, but rather the current state of the parties. Alcohol and drug recovery is a process that lasts a lifetime. In enacting a safety plan with automatic consequences for relapses, the trial court has determined the best interests of the children at the time of the entry of the safety plan, either by the parties' agreement or after hearing evidence. Additionally, unlike a modification due to remarriage or relocation, which could be either beneficial or detrimental to the children (and thus arbitrary), a parent's relapse is a non-arbitrary event that can only be detrimental to the children. Therefore, one could make a compelling argument that no additional judicial scrutiny as to the best interests of the children is necessary prior to an automatic modification.

C. Recent Developments.

On January 9, 2012, the Georgia Supreme Court decided Johnson v. Johnson.²⁴ The parenting plan in Johnson awarded the father visitation supervised by a reasonable adult, as approved by the child's therapist, until such time as the therapist determines that supervision is not necessary. Extending the precedent set in Wrightson v. Wrightson,²⁵ the Supreme Court found that the provision regarding the permanent termination of supervision of the father's overnight visitation was an improper and material self-executing modification because the trial court improperly delegated to the therapist its obligation to determine the best interests of the child in terminating the supervised visitation.²⁶ Underlying this holding is the principle that a third party cannot automatically modify permanent visitation without the Court's scrutiny because such would be an improper delegation of the Court's obligation to determine the best interests of the children.²⁷

It is important to note that the Supreme Court did not find the requirement of supervised visitation to be improper. Rather, the Supreme Court found the delegation by the trial court to a third party of the determination of when to terminate the supervised visitation to be improper. This is because, in terminating supervised visitation, the visitation awarded would be permanently modified without any additional judicial scrutiny as to the best interest of the children.

The Johnson decision directly affects the use of a monitor in a drug or alcohol safety plan. Monitors are often used to enact the immediate consequences of the safety

²⁴ 290 Ga. 395 (2012).

²⁵ 266 Ga. 493 (1996).

²⁶ Johnson.

²⁷ Wrightson.

plan without seeking an emergency hearing and relief from the Court. In drafting such provisions, care must be taken to avoid conflicting with the holding of Johnson. One such way to avoid the Johnson holding is to expressly name the monitor as an arbitrator. The recent enactment of O.C.G.A. § 19-9-1.1 makes it expressly permissible for parents to agree to binding arbitration on the issue of child custody and matters relative to visitation, parenting time, and a parenting plan. Pursuant to the code section, the judge must incorporate the arbitration award into the final decree of child custody unless the judge makes specific written factual findings that the arbitration award would not be in the best interests of the children.²⁸ The Court of Appeals has encouraged the use of arbitrators in deciding such custody disputes.²⁹

Another method to avoid the Johnson holding is to allow the monitor only the authority to make temporary decisions until further order of the Court. This allows the parties immediately to change the dependent parent's custody or visitation in order to protect the children from a relapse while still reserving the court's ultimate decision as to any permanent modification affecting the best interests of the children. Any decision by the monitor, being only temporary, would not be material and thus would not be improper.

Parties could also consider not using a monitor or automatic consequences at all. Rather, if the dependent parent fails an alcohol or drug test, the safety plan would allow either party to move for an emergency hearing to request a modification of visitation or custody. In such case, the safety plan could provide that if the non-dependent parent

²⁸ O.C.G.A. § 19-9-1.1.

²⁹ Gould v. Gould, 240 Ga.App. 481 (2000).

denies the dependent parent from exercising visitation or custody, the dependent party's alcohol or drug test failure shall be a valid defense to a potential contempt action. Crafting the safety plan as such avoids any concerns of a legal challenge on the basis of a self-executing modification including those issues raised by Johnson.

V. Conclusion

An alcohol and drug safety plan can be an effective tool to ensure the best interests and safety of the children while still allowing a recovering parent parenting time. However, practitioners should be aware of the many considerations involved in drafting an effective and legal safety plan. As much of the science is beyond the scope of general knowledge for family law attorneys, it is always advisable to consult an addiction expert regarding which monitoring test is most appropriate for each specific substance being abused. Hopefully, this paper will allow family law practitioners to be creative and craft safety plans that will be mutually beneficial to both parties and their children in a custody case.

Questions or Comments?

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IN THE SUPERIOR COURT OF _____ COUNTY

STATE OF GEORGIA

SUSAN S. OBER,)	
)	
Plaintiff,)	
)	CIVIL ACTION
v.)	
)	FILE NO.
ALAN C. OHAL,)	
)	
Defendant.)	
_____)	

PARENTING PLAN AND SAFETY PLAN

SUSAN S. OBER, Plaintiff, and ALAN C. OHOL, Defendant, having reached the below Parenting Plan and Safety Plan, as shown by each party’s signatures below;

It is hereby ORDERED as follows:

I.

CUSTODY

[Insert Custody Provisions]

II.

PARENTING TIME WITH CHILDREN

Wife shall have primary physical custody of the Children and Husband shall have secondary physical custody. Wife’s residence shall be the Children’s residence for the purpose of school districting.

Husband is in the process of recovering from an addiction to alcohol and drugs. The parties expressly acknowledge that Husband is a fit parent to have parenting time with the children so long as he remains sober and in full and strict compliance with the

below safety plan. Likewise, the parties expressly acknowledge the danger to the Children if Husband resumes his alcohol and drug use. As such, Husband is hereby awarded no parenting time except when maintaining sobriety and when in full and strict compliance with the alcohol and drug safety plan set forth below. So long as Husband remains sober and is in full and strict compliance with the alcohol and drug safety plan, the following shall be the schedule of Husband's parenting time with the Children, unless the parties agree in writing otherwise, or until further order of the Court.

[Insert parenting time schedule]

III.

SAFETY PLAN

Husband shall submit to witnessed EtG and EtS screens and a witnessed standard 10 panel drug test (with expanded opiates) administered at a lab approved by Choice Labs by Tuesday at 5:00 p.m. immediately after each weekend visitation.

Husband shall immediately execute and submit any and all forms to authorize Choice Labs and any Choice Labs approved lab to communicate with Wife regarding Husband's monitoring, treatment and testing and to send all testing results and notification of any failure to comply with such testing directly to Wife by email.

[Option A – Emergency Hearing]

In the case that either the EtG or EtS screen indicates a positive result set at the cut-off level of 100 ng, Husband shall immediately submit to a PEth test administered at a lab approved by Choice Labs within two days of the positive EtG or EtS screen so that the positive EtG or EtS result can be confirmed. If the PEth test confirms the positive EtG or EtS result, or if the standard 10 panel drug test (with expanded opiates) indicates

a positive result for any drug set at the industry cut off level as determined by the testing agency, or if Husband fails to take a required test, either party may immediately move the Court for an emergency hearing. A positive EtG or EtS screen, PEth test, or 10 panel drug test (with expanded opiates) shall not automatically terminate Husband's parenting time. However, Husband expressly agrees that a failed alcohol or drug test shall be a valid defense to a claim of contempt asserted by Husband if Wife does not allow Husband to exercise parenting time with the Children as a result of a failed alcohol or drug test.

[Option B – Arbitrator]

In the case that either the EtG or EtS screen indicates a positive result set at the cut-off level of 100 ng, Husband shall immediately submit to a PEth test administered at a lab approved by Choice Labs within two days of the positive EtG or EtS screen so that the positive EtG or EtS result can be confirmed. If the PEth test confirms the positive EtG or EtS result, or if the standard 10 panel drug test (with expanded opiates) indicates a positive result for any drug set at the industry cut off level as determined by the testing agency, or if Husband fails to take a required test, the parties shall immediately submit the issue of modification of Husband's parenting time and/or safety plan to binding arbitration, pursuant to O.C.G.A. §§ 19-9-1.1, 9-9-1, *et sub.*, within 10 days of receipt of the positive result. _____ is hereby named as the arbitrator for this matter, unless mutually agreed upon otherwise in writing by the parties. An arbitration hearing shall be held within 30 days of the receipt of the positive result, unless mutually agreed upon otherwise in writing by the parties. The arbitrator shall issue a binding arbitration award concerning the modification of parenting time and this safety plan, as well as an

allocation of costs for the arbitration, within 10 days of the conclusion of the arbitration hearing. Said arbitration award shall then be submitted to this Court within 30 days of the arbitration award. Custody, parenting time, and the safety plan shall remain open and pending and this Court reserves the authority to modify this Order to adopt or reject the arbitration agreement, pursuant to O.C.G.A. § 19-9-1.1, as part of this matter without the necessity of a filing of a new action. Until such time as the arbitrator can issue its award, Wife shall be entitled to refuse parenting time to Husband and Husband's positive testing result, as defined above, shall be a valid defense to a contempt action. The parties shall abide by the binding arbitration award until such time as the Court adopts or rejects the arbitration award, and the same shall be a valid defense to a contempt action.

The above safety plan shall be instituted and complied with immediately upon the execution of this Parenting Plan. The witnessed EtG and EtS screening and witnessed standard 10 panel drug testing shall continue for a period of two years from the date of this Agreement unless otherwise extended by the Court.

SO ORDERED, this the _____ day of _____, 20__.

The Honorable _____
Judge, Superior Court of _____ County

Agreed to by:

SUSAN S. OBER

ALAN C. OHAL



Alcohol Monitoring and Testing Client Disclosure Form

You have agreed to begin an alcohol monitoring and testing program as a condition to your parenting time. By signing below, you are acknowledging that you have been advised regarding the risks of false positives and items to avoid as part of the alcohol monitoring and testing program.

As part of the alcohol monitoring and testing program, you will be tested for **ethylglucuronide (EtG) and ethylsulfate (EtS)**. EtG and EtS are metabolites of alcohol that are excreted more slowly from the body than alcohol itself. The presence of these metabolites in your urine will cause a positive testing result and will trigger the agreed upon consequences for a relapse, including, potentially, loss of parenting time.

When being monitored with EtG/EtS, you should be aware of and avoid certain items which contain alcohol so that inadvertent "incidental" exposure does not cause a positive test result. By avoiding these items, incidental alcohol exposure and the risk of a false positive can be lessened.

It is YOUR responsibility to limit and avoid exposure to products and substances that contain ethyl alcohol. It is YOUR responsibility to read product labels to know what is contained in the products you use and to inspect these products **BEFORE** you use them. It is further YOUR responsibility to inform the testing agency of any medications you are taking, prescription or otherwise. Terms used to describe alcohol in products that must be avoided include: denatured alcohol, SD alcohol, and ethanol or ethyl alcohol. Use of any products on the attached list or any other product containing alcohol could result in a positive test result which will trigger the agreed upon consequences. When in doubt, do not use, consume or apply anything that might contain alcohol.

As an additional precaution against incidental alcohol exposure, you should avoid eating any foods, except for water, for 4-6 hours prior to submitting a urine sample, if possible. This includes being careful to avoid breathing anything that contains alcohol. Most minor exposure to alcohol only causes an effect for 4-6 hours. Strictly avoiding them prior to giving a sample will minimize the chances of a misleading positive test.

WHEN IN DOUBT, DO NOT CONSUME OR USE AN ITEM CONTAINING ALCOHOL!

I have read and understand my responsibilities detailed above:

Signature

Date

List of Common Items Which Contain Alcohol

Item	Alcohol Content
Hand Sanitizer	60-70%
Balsamic Vinegar	3-6%
Sauerkraut	.2-.8%
Vanilla Extract	35%
Non-alcoholic Beer	.5%
Mouthwash	25-35%
Cold Medicine	25%
Pain Reliever	7%
Shave Lotion	50-60%
Antibacterial Washcloths	10%
Windshield Wax	70-95%
Insect Repellant	40-50%
Air Freshener	3-7%
Laundry Detergent	1-5%
Cologne/Perfume	60-100%

The above list is not exhaustive. It is YOUR responsibility to closely examine all labels to avoid any products containing denatured alcohol, SD alcohol, ethanol or ethyl alcohol. It is also important to avoid all food, deserts, and other items cooked with alcohol, including wine, beer, liqueur, liquor, and sherry. Avoid all exposure to alcohol through contact with your skin or through inhalation.

Ignition Interlock Installation and Service Locations

- Athens, GA: Custom Sound of Athens, Inc., (706) 549-4844.
- Augusta: Guardian Interlock, (706) 736-1700;
Mobile Audio Concepts, LLC, (706) 863-3664.
- Canton: Canton DUI & Defensive Driving, (770) 479-6562.
- Carrollton: Guardian Interlock of West Georgia, (770) 830-0045.
- Columbus: Kar Tunes, (706) 323-0651.
- Conyers: LifeSafer Interlock of North Georgia, Inc., (800) 633-1517.
- Cumming: AA-Academy of Action Driving School, Inc., (770) 889-1023;
Express Emission Test, (678) 947-5514.
- Dalton: Signal Catchers, Inc., (706) 259-7833.
- Douglasville: Meineke Car Care Center, (877) 777-5020.
- Dunwoody: 1A Smart Start of Dunwoody, Inc., (770) 396-0614.
- Fayetteville: Guardian Interlock of South Metro, (770) 460-6304.
- Gainesville: Automotive Service and Performance, (678) 450-8101.
- Griffin: The Bass Station, (770) 412-0740.
- Jonesboro: Draeger Safety Diagnostics, Inc., (770) 472-6434.
- Kennesaw: Safety Interlock Systems, LLC, (770) 924-2255;
SGG Enterprises, Inc., (770) 424-9111.
- Lawrenceville: Expert Collision Center, Inc., (770) 682-6858
- Macon: Alpha Interlock, (478) 808-0353;
LifeSafer Interlock of North Georgia Inc., (800) 633-1517.
- Marietta: Draeger Safety Diagnostics, Inc., (770) 422-8080;
Guardian Interlock Systems, (800) 499-0994.
- Riverdale: Guardian Interlock of South Metro Atlanta, (770) 478-8373.
- Rome: A+ DUI Interlock Service, (706) 290-9669.

Roswell: 1A Smart Start, (770) 998-5677.

Savannah: Street Beats, (912) 353-7433.

Stockbridge: Guardian Interlock of South Metro, (770) 389-3847;
Innovative Sounds, (770) 389-8292.

Valdosta: Audio Xtremes & Tint, (229) 242-5350;
LifeSafer Interlock of South Georgia, Inc., (800) 892-6960.

Supreme Court of Georgia.

JOHNSON

v.

JOHNSON.

No. S11F1856.

Jan. 9, 2012.

Background: Following entry of judgment of divorce, father filed motion for new trial in which he contended that provision of judgment concerning termination of supervised visitation constituted an improper self-executing modification contingent upon determination of a therapist. The Superior Court, DeKalb County, Courtney Lynn Johnson, J., denied motion. Father filed application for discretionary review, which was granted.

Holding: The Supreme Court, Benham, J., held that visitation provision of divorce decree constituted an invalid self-executing material change of visitation.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Child Custody 76D ↪217

76D Child Custody

76DV Visitation

76Dk215 Visitation Conditions

76Dk217 k. Supervised

visitation. Most Cited Cases

Child Custody 76D ↪577

76D Child Custody

76DIX Modification

76DIX(B) Grounds and Factors

76Dk577 k. Visitation. Most

Cited Cases

A requirement that a parent's visitation be supervised is a provision expressly meant for the child's best welfare and it is the trial court's responsibility to determine whether the evidence is such that a modification of custody or visitation privileges is warranted, and the responsibility for making that decision cannot be delegated to another, no matter the degree of the delegatee's expertise or familiarity with the case; while the expert's opinion may serve as evidence supporting the trial court's decision to modify visitation, the decision must be made by the trial court, not the expert.

[2] Child Custody 76D ↪577

76D Child Custody

76DIX Modification

76DIX(B) Grounds and Factors

76Dk577 k. Visitation. Most

Cited Cases

A self-executing change of custody or visitation is acceptable as long as it poses no conflict with law's emphasis on the best interests of the child; however, a self-executing change in custody or visitation that constitutes a material change, or one that is allowable only upon a determination that it is in the best interests of the child at the time of the change, generally violates public policy founded on the best interests of

the child.

[3] Child Custody 76D ↪577

76D Child Custody

76DIX Modification

76DIX(B) Grounds and Factors

76Dk577 k. Visitation. Most

Cited Cases

Portion of judgment of divorce that allowed for an automatic change in father's visitation with his child, from supervised to unsupervised, based on a future determination of a therapist, without any additional judicial scrutiny, was an invalid self-executing material change of visitation.

****92** Berk & Moss, Stephen Joseph Berk, Decatur, for appellant.

Jean Miller Kutner, Atlanta, for appellee.

BENHAM, Justice.

***359** The marriage of appellant Roy Johnson ("Father") and appellee Ping Hu Johnson ("Mother") ended with the entry of a judgment and decree of divorce in December 2010. The issue before this Court is whether the judgment contains an improper self-executing modification that is contingent upon a determination to be made by a person other than a judge.

The judgment of divorce incorporated by reference a parenting plan and custody order that gave Mother primary physical custody of the parties' 12-year-old daughter, with Father

awarded visitation that required supervision when the child spent the night in ****93** Father's custody. The parenting plan provided that the overnight visitation would be supervised by "a reasonable adult approved by [a therapist treating the child], until such time as [the therapist] determines that supervision is not necessary." The plan also stated that the therapist "shall have the authority to determine how supervised visitation should be phased out over time and when supervision may end." Father filed a motion for new trial in which he contended that the provisions concerning the termination of the supervised visitation constituted an improper self-executing modification contingent upon the determination of the therapist. The trial court denied the motion, finding that the self-executing provision was not a material change in custody and was in the child's best interests. Acting pursuant to this Court's Pilot Project, by which we granted all non-frivolous applications for discretionary review of a final judgment and decree of divorce, we granted Father's application for ***360** discretionary review.^{FN1}

FN1. This application was granted on June 29, 2011. The Pilot Project expired on June 30, 2011, after being in use for eight-and-one-half years. Effective July 1, 2011, the Pilot Project was replaced by Supreme Court Rule 34(4), by which this Court shall grant a timely application from a final judgment and decree of divorce that is determined by the

Court to have possible merit.

[1][2][3] Visitation rights are part of custody (OCGA § 19-9-22(1)), and the provision at issue is a self-executing change of visitation since it allows for an automatic change in Father's visitation with his child, from supervised to unsupervised, based on a future event—the determination of the therapist—without any additional judicial scrutiny. See *Scott v. Scott*, 276 Ga. 372, 373, 578 S.E.2d 876 (2003). A self-executing change of custody/visitation is acceptable as long as it “pose[s] no conflict with our law's emphasis on the best interests of the child.” *Id.* at 374, 578 S.E.2d 876. However, a self-executing change in custody/visitation that constitutes a material change, i.e., is one “that is allowable only upon a determination that it is in the best interests of the [child] at the time of the change” (*Dellinger v. Dellinger*, 278 Ga. 732, 734, 609 S.E.2d 331 (2004)), generally violates Georgia's public policy founded on the best interests of the child. A requirement that a parent's visitation be supervised is “a provision expressly meant for the [child's] best welfare” (*Sigal v. Sigal*, 289 Ga. 814, 817, 716 S.E.2d 206 (2011)), and

[i]t is the trial court's responsibility to determine whether the evidence is such that a modification ... of custody/visitation privileges is warranted, and the responsibility for making that decision cannot be

delegated to another, no matter the degree of the delegatee's expertise or familiarity with the case. While the expert's opinion may serve as evidence supporting the trial court's decision to modify ... visitation, the decision must be made by the trial court, not the expert.

Wrightson v. Wrightson, 266 Ga. 493(3), 467 S.E.2d 578 (1996).

Since the provision regarding the termination of supervision of Father's overnight visitation with his child is a material change in visitation that will occur automatically without judicial scrutiny into the child's best interests, it is an invalid self-executing change of visitation that should not have been included in the judgment and decree of divorce. Accordingly, we reverse that portion of the judgment and decree of divorce and remand the case to the trial court with direction that the self-executing provision of the judgment and decree of divorce be stricken.

***361** *Judgment affirmed in part and reversed in part, and case remanded with direction.*

All the Justices concur.

Ga., 2012.

Johnson v. Johnson

290 Ga. 359, 721 S.E.2d 92, 12 FCDR 80

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C

Court of Appeals of Georgia.
BLACKMORE

v.

BLACKMORE (two cases).

Nos. A11A1277, A11A1526.

Oct. 7, 2011.

Background: Mother filed petition to modify visitation. Father filed counterclaim, seeking dismissal of mother's petition and a modification of her visitation. The Superior Court, Cobb County, Elsey, J., pro hac vice, entered interim order restricting mother's visitation and ordering that it be supervised, but ultimately issued a final order removing the restrictions that had been placed on mother's visitation and awarding her more visitation. Father appealed and filed motion to enforce supersedeas. Mother filed a motion for supersedeas bond. The trial court issued ordering denying these motions, and father appealed this order. Appeals were consolidated.

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

(1) trial court did not exceed its authority in exempting child custody and visitation provisions from supersedeas effect after father had filed a notice of appeal from order removing restrictions that had been placed on mother's visitation and granting her more visitation;

(2) neither trial court's increase of mother's visitation with children, nor provision of order allowing mother to

make decisions regarding the children's day-to-day care when they were in her custody amounted to a de facto change of custody;

(3) trial court acted within its authority in placing restrictions on parents' behavior; and

(4) no harmful error resulted from trial court's refusal to admit custody evaluation and amended custody evaluation reports.

Affirmed.

West Headnotes

[1] Child Custody 76D ↻906

76D Child Custody

76DXIII Appeal or Judicial Review

76Dk906 k. Effect of appeal. Most

Cited Cases

Trial court did not exceed its authority in exempting child custody and visitation provisions from supersedeas effect after father had filed a notice of appeal from order removing restrictions that had been placed on mother's visitation with children and granting her more visitation, as trial court had broad authority to decide matters of supersedeas effect of child custody rulings, as well as a mandate to protect the best interest and welfare of the children pending appeal. West's Ga.Code Ann. § 5-6-46(a).

[2] Child Custody 76D ↻576

76D Child Custody

76DIX Modification**76DIX(B) Grounds and Factors**

76Dk576 k. Joint custody. Most Cited Cases

Neither trial court's increase of mother's visitation with children, nor provision of order allowing mother to make decisions regarding the children's day-to-day care when they were in her custody amounted to a de facto change of custody, for which a material change in circumstances was required, as the increased visitation awarded to mother did not exceed the time of custody allowed to father, who was children's primary physical and legal custodian. West's Ga.Code Ann. § 19-9-3(b).

[3] Child Custody 76D 577**76D Child Custody****76DIX Modification****76DIX(B) Grounds and Factors**

76Dk577 k. Visitation. Most Cited Cases

Trial court may not indirectly change custody of children by modifying the visitation schedule.

[4] Child Custody 76D 904**76D Child Custody****76DXIII Appeal or Judicial Review**

76Dk904 k. Presentation and reservation of grounds of review. Most Cited Cases

Court of Appeals could not address on father's appeal of order granting mother increased visitation with

children the issue of whether trial court violated father's constitutional rights in prohibiting parents from communicating, other than through an intermediary, except in event of a major medical emergency, and prohibiting the parent not having physical custody of children at the time from attending the children's extracurricular activities, as father failed to show that he had raised his constitutional arguments before the trial court or that the trial court ruled on them.

[5] Child Custody 76D 219**76D Child Custody****76DV Visitation****76Dk215 Visitation Conditions**

76Dk219 k. Excluding other persons from being present during visitation. Most Cited Cases

Trial court acted within its authority, in child visitation dispute in which mother was awarded increased visitation with children, in prohibiting parents from communicating, other than through an intermediary, except in event of a major medical emergency, and prohibiting the parent not having physical custody of children at the time from attending the children's extracurricular activities, as these restrictions on the parents were narrowly tailored conditions justified by the evidence.

[6] Child Custody 76D 219**76D Child Custody****76DV Visitation**

76Dk215 Visitation Conditions
76Dk219 k. Excluding other persons from being present during visitation. Most Cited Cases

Trial court has discretion to place restrictions on custodial parents' behavior that will harm their children.

[7] Child Custody 76D ⚡216

76D Child Custody
76DV Visitation
76Dk215 Visitation Conditions
76Dk216 k. In general. Most Cited Cases

In awarding child visitation rights to a parent, a trial court is authorized to impose such restrictions as the circumstances warrant.

[8] Courts 106 ⚡217(3)

106 Courts
106VI Courts of Appellate Jurisdiction
106VI(B) Courts of Particular States
106k217 Georgia
106k217(3) k. Appellate jurisdiction of Court of Appeals in general. Most Cited Cases

Court of Appeals is a court for the correction of errors of law committed by lower courts.

[9] Child Custody 76D ⚡923(3)

76D Child Custody
76DXIII Appeal or Judicial Review

76Dk913 Review
76Dk923 Harmless Error
76Dk923(3) k. Visitation. Most Cited Cases

No harmful error resulted from trial court's refusal to admit custody evaluation and amended custody evaluation reports prepared by custody evaluator appointed by trial court in visitation dispute between children's parents, as this evidence was merely cumulative of the custody evaluator's extensive testimony about the methods she used to gather data to prepare her evaluation, and about the results of the tests she administered and her conclusions.

****505** Brock, Clay, Calhoun & Rogers, Nancy I. Jordan, Debbie C. Peleros, Marietta, for appellant.

Moore, Ingram, Johnson & Steele, Stephen C. Steele, Marietta, for appellee.

****506** McFADDEN, Judge.

***885** In Case No. A11A1277, David Blackmore appeals an order increasing the visitation granted to his former wife, Dawn Blackmore, with their two children. In Case No. A11A1526, he appeals an order denying his motion for supersedeas. Contrary to his arguments, the trial court did not impermissibly change custody by expanding visitation; did not commit harmful error by refusing to review custody evaluation reports; did not rely solely on the testimony of one witness; and was within its authority to restrict the parties from communicating with each other

and from attending the children's extracurricular activities. We therefore affirm the final order. To the extent the issue is not moot, we also affirm the trial court's denial of David Blackmore's motion for supersedeas because the trial court did not exceed its authority in exempting the visitation provisions from supersedeas even after David Blackmore had filed a notice of appeal.

The Blackmores divorced in January 2006 and agreed to joint legal and physical custody of their two children and agreed that David Blackmore would have final decision-making authority. Less than five months later, David Blackmore moved to modify custody, contending that Dawn Blackmore's behavior was erratic and unstable. The trial court entered a consent order resolving the modification petition. The parties continued to have joint legal custody, but David Blackmore became the primary physical custodian.

In 2008, Dawn Blackmore filed the instant petition to modify visitation, seeking, among other things, more visitation and primary decision-making authority over healthcare issues and the children's extracurricular activities. David Blackmore filed a counterclaim, seeking dismissal of Dawn Blackmore's petition and a modification of her visitation “to insure that the children [were] not placed in an *886 unsafe situation.”

The parties agreed to the appointment of a guardian ad litem and to the appointment of Dr. Jacqueline

Hill as a custody evaluator. Once Hill completed her custody evaluation, the guardian ad litem reviewed it—before the parties received copies—and determined there was a need for immediate intervention. Accordingly, at the urging of the guardian ad litem, David Blackmore filed an emergency motion seeking immediately to limit Dawn Blackmore's visitation and to require that her visitation be supervised.

On July 24, 2009, after hearing testimony from Hill, the trial court entered an order on David Blackmore's emergency motion, adopting in their entirety the recommendations in Hill's custody evaluation. The court ordered Dawn Blackmore's visitation to be supervised and limited to every other Saturday from 9:00 a.m. until 6:00 p.m.

Beginning June 9, 2010, the trial court conducted a final hearing on the modification petition and counterclaim. It entered a final order on July 29, 2010, which removed the restrictions on Dawn Blackmore's visitation and granted her more visitation. The court continued David Blackmore's primary physical and legal custody of the children but ordered that each parent would make decisions regarding the day-to-day care of the children, including their extracurricular activities and medical treatment, while the children were residing with that parent. The court included a provision prohibiting the parties from contacting each other and preventing them from attending extracurricular activities when the other parent has custody.

David Blackmore filed an appeal. He also filed a motion to enforce supersedeas, contending that the trial court should enforce the July 24, 2009 order on his emergency motion pending the resolution of the appeal of the July 2010 order. Dawn Blackmore responded and filed a motion for supersedeas bond. The trial court denied the motions. David Blackmore also filed an appeal of that order as well as a Rule 40(b) Emergency Motion seeking the enforcement of the July 24, 2009 emergency order, rather than the July 29, 2010 final order, pending appeal. We denied that motion. We have consolidated the appeals for decision.^{FN1}

FN1. David Blackmore's motion for leave to file a supplemental brief and Dawn Blackmore's motion for leave to file a supplemental response brief are granted. We have read and considered the supplemental briefs.

****507** [1] 1. David Blackmore argues that under OCGA § 5-6-46(a), the notice of appeal of the final order and his payment of appeal costs triggered automatic supersedeas of that order and that the trial ***887** court erred by denying his motion for supersedeas. He contends that the July 24, 2009 emergency order should have remained in effect and governed custody and visitation pending the appeal of the final order. To the extent that this argument is not moot given our ruling below, see *Simpson v. Simpson*, 233 Ga. 17, 22, 209 S.E.2d 611 (1974), we find no error.

As to future cases, the legislature has resolved this issue by adding subsection (e) to OCGA § 5-6-34 and subsection (k) to OCGA § 5-6-35. The new subsections provide:

Where an appeal is taken pursuant to this Code section for a judgment or order granting nonmonetary relief in a child custody case, such judgment or order shall stand until reversed or modified by the reviewing court unless the trial court states otherwise in its judgment or order.

But the new subsections apply “to all notices or applications for appeal filed on or after July 1, 2011,” Ga. L. 2011, p. 562, § 4, and thus do not resolve the issues here.

In its order denying David Blackmore's motion for supersedeas and Dawn Blackmore's motion for the imposition of a supersedeas bond, the trial court found that the allegations upon which the July 24, 2009 emergency order was based—that Dawn Blackmore had “emotional and mental issues”—were not supported by any credible evidence and were wholly without merit. It added that the court's intention, as reflected in its nunc pro tunc entry of the final order and its ruling from the bench that Dawn Blackmore's unsupervised visitation begin immediately, was for the “severely restrictive, oppressive and unwarranted” terms of Dawn Blackmore's visitation to be lifted immediately as in the best interest of the children. In its order

resolving the supersedeas issue, the court expressly excepted the custody and visitation provisions of its June 12, 2010 order from any supersedeas effect. See *Walker v. Walker*, 239 Ga. 175, 176, 236 S.E.2d 263 (1977). The trial court did not exceed its authority.

David Blackmore argues that the trial court could not include the language excepting the visitation provisions from supersedeas effect once he had appealed the final order. Instead, he argues, the court had to include the key language at the time the final order was entered. We disagree.

In *Walker*, 239 Ga. at 175, 236 S.E.2d 263, the Supreme Court created a method to modify the automatic supersedeas of custody provisions pending appeal. The court wrote that

[w]henver an appellee in this situation wishes to challenge *888 the grant of an automatic supersedeas *as it relates to custody* pending appeal, he can ask the trial judge to include in his final order a special provision that the custody award is effective as of the date of the judgment to protect the best interest and welfare of the child. Subject to review by this court, this type of order would effectively modify the automatic supersedeas as it regards custody and would be enforceable through contempt proceedings in the trial court.

(Emphasis in original.) *Id.* at 176, 236 S.E.2d 263. Nothing in *Walker* indicates that the court must include the

language at the time the order is entered in order to effectively modify the automatic supersedeas. Indeed, the Supreme Court referred to the party wishing to challenge the automatic supersedeas as “appellee,” indicating the party could seek such remedy after a notice of appeal had been filed.

In *Frazier v. Frazier*, 280 Ga. 687, 690–691(5), 631 S.E.2d 666 (2006), the Supreme Court extended *Walker* and ruled that a trial court was authorized to except the custody provisions of a divorce decree from the automatic supersedeas provided by OCGA § 9–11–62(b). That statute, which governs the stay of proceedings upon the filing of a motion for new trial, provides that “[t]he filing of a motion for a new trial or motion for judgment notwithstanding the verdict shall act as supersedeas unless otherwise ordered by the court; but the court may condition supersedeas upon the giving of bond with good security in such amounts as the court may order.” As it concerned the supersedeas**508 effect of a motion for new trial, *Frazier* clearly contemplated a post-final-order adjustment to exempt the custody provisions of such final order from automatic supersedeas.

David Blackmore argues that the holding in *Frazier* only applies to motions for new trial, not notices of appeal. But given the Supreme Court’s acknowledgment of the trial court’s broad authority to decide matters of the supersedeas effect of child custody rulings, as well as the trial court’s mandate to protect the best interest and

welfare of the children pending appeal, see *Walker*, 239 Ga. at 176, 236 S.E.2d 263, we see no reason to limit the trial court's authority in the manner urged by David Blackmore. Consequently, we conclude the trial court did not err by resolving the issue of supersedeas after David Blackmore had filed his notice of appeal.

[2] 2. David Blackmore contends that the court's final order amounted to a de facto change in custody, which was impermissible because there were no changes in material circumstances. See OCGA § 19-9-3(b). The provisions of the final order which David Blackmore contends amount to a change in custody are the increased amount of visitation granted to Dawn Blackmore as well as the provision in *889 which the court granted each parent the right to make decisions regarding the children's day-to-day care while the children are in the custody of that parent.

[3] It is true that a trial court may not indirectly change custody by modifying the visitation schedule. *Martin v. Buglioli*, 185 Ga.App. 702, 703, 365 S.E.2d 866 (1988); *Bullington v. Bullington*, 181 Ga.App. 256, 257(2), 351 S.E.2d 700 (1986). But here there was no such change.

In *Martin*, 185 Ga.App. at 703, 365 S.E.2d 866, we held that the trial court created a de facto change in custody by giving the noncustodial parent visitation for the greater part of the year. In *Bullington*, 181 Ga.App. at 257, 351 S.E.2d 700, we held that the trial court

created a de facto change in custody by giving the noncustodial parent the right to visitation at all times except for the first weekend of each month, alternating holidays, and a set period of summer vacation. In *Kennedy v. Adams*, 218 Ga.App. 120, 122-123(3), 460 S.E.2d 540 (1995), a physical precedent cited by David Blackmore, we held that since the time of visitation provided to the noncustodial parent exceeded the time of custody provided to the custodial parent, the new schedule amounted to a change in custody. But here the increased visitation provided to Dawn Blackmore does not exceed the time of custody allowed to David Blackmore. We conclude that the increase did not amount to a de facto change of custody. Nor did the provision allowing Dawn Blackmore to make decisions regarding the children's day-to-day care when they are in her custody amount to a de facto change in custody.

[4][5] 3. David Blackmore contends that the court abused its discretion in prohibiting the parties from communicating with each other, other than through an intermediary, except in the event of a major medical emergency and except to allow David Blackmore to notify Dawn Blackmore by e-mail of the name and location of the children's school. He also challenges the provision that prohibits the parent not having physical custody at the time from attending the children's extracurricular activities. David Blackmore contends that these provisions violate his constitutional rights and his right to contract.

[6][7] David Blackmore has not shown that he raised his constitutional arguments before the trial court or that the trial court ruled on them. We therefore cannot address them here. *Gottschalk v. Gottschalk*, 311 Ga.App. 304(9), 715 S.E.2d 715 (2011). In any event, “[a] trial court has discretion to place restrictions on custodial parents’ behavior that will harm their children.” *Ward v. Ward*, 289 Ga. 250(1), 710 S.E.2d 555 (2011). The provisions do not, as David Blackmore insists, infringe upon his rights. Rather, they are narrowly tailored conditions justified by the evidence. “In awarding visitation rights, a trial court is authorized to impose such restrictions***890** as the circumstances warrant.” (Citation and punctuation omitted.) *Moore v. Moore–McKinney*, 297 Ga.App. 703, 713(5), 678 S.E.2d 152 (2009) (upholding prohibition against parties possessing weapons when exchanging the children, as evidence supported conclusion that provision ****509** was in the children’s best interests and provision did not infringe upon the Georgia constitutional right to keep and bear arms).

[8] Although Dawn Blackmore does not object to these provisions being stricken, we are a court “for the correction of errors of law committed by lower courts.” *Taylor v. Taylor*, 182 Ga.App. 412, 413, 356 S.E.2d 236 (1987). Here the lower court did not err. We note that this issue returns to the breast of the court.

[9] 4. David Blackmore argues that

the court erred by refusing to admit—or even to read—the custody evaluation and amended custody evaluation reports prepared by Hill. Although Hill testified at the hearing, David Blackmore contends that her testimony did not provide all the raw statistical data that is contained in the reports. He also contends that the trial court never reviewed the many sources of information Hill received, but he fails to specify these sources or how they would have affected the outcome.

At the final hearing, Hill testified extensively. She testified about the methods she used to gather data to prepare her custody evaluation. She listed the tests she administered and described them. She testified about the results of the tests and her conclusions. And she testified about her reports. “Since the excluded evidence was merely cumulative, no harmful error is shown....” (Citations and punctuation omitted.) *Walthour v. State*, 196 Ga.App. 721, 722(1), 397 S.E.2d 10 (1990).

5. David Blackmore argues that the trial court abused its discretion in relying solely upon the testimony of Dawn Blackmore’s psychiatrist to the exclusion of all other testimony and evidence because the psychiatrist testified as her advocate. Nothing in the final order indicates that the trial court failed to consider the other evidence, including the testimony of Hill, the testimony of the children’s psychologist, the testimony of the guardian ad litem, the testimony of the children’s former

nannies, the testimony of the social worker who supervised visitation, the testimony of one child's teacher and the other child's soccer coach, the testimony of Dawn Blackmore, and the testimony of David Blackmore.

Upon appellate review, we presume that the trial court properly considered all of the evidence before it. *Brewer v. Harvey*, 278 Ga.App. 503, 505, 629 S.E.2d 497 (2006). And “[a]s factfinder, it was the trial court's duty to reconcile seemingly conflicting evidence and to weigh the credibility of witnesses.” *Willis v. Willis*, 288 Ga. 577, 580(3)(d), 707 S.E.2d 344 (2011). David Blackmore has not shown that *891 the trial court abused its discretion.

Judgments affirmed.

PHIPPS, P.J., and ANDREWS, J.,
concur.

Ga.App.,2011.

Blackmore v. Blackmore

311 Ga.App. 885, 717 S.E.2d 504, 11
FCDR 3111

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Supreme Court of Georgia.

DELLINGER

v.

DELLINGER.

No. S04F1376.

Nov. 23, 2004.

Background: Wife filed a petition for divorce. The Superior Court, Douglas County, Howe, J., granted husband primary physical custody of the children and formulated two different visitation plans. Wife appealed.

Holding: The Supreme Court, Hunstein, J., held that the trial court erred when it included the self-executing change in visitation provision in the parties divorce decree.

Reversed with direction.

Sears, P.J., filed a dissenting opinion in which Carley and Thompson, JJ., joined.

West Headnotes

[1] Child Custody 76D ↪223

76D Child Custody

76DV Visitation

76Dk215 Visitation Conditions

76Dk223 k. Restrictions on Conduct. Most Cited Cases

Child Custody 76D ↪577

76D Child Custody

76DIX Modification

76DIX(B) Grounds and Factors

76Dk577 k. Visitation. Most Cited Cases

The trial court erred when it included in divorce decree self-executing change in visitation provision, which changed mother's visitation with children if she moved more than 35 miles from county; the provision effected a material change in visitation, it was imposed without any evidence that wife was committed to moving out of state, and the provision was not limited to applying to that particular course of action.

[2] Child Custody 76D ↪577

76D Child Custody

76DIX Modification

76DIX(B) Grounds and Factors

76Dk577 k. Visitation. Most Cited Cases

Material changes in one parent's visitation rights necessarily implicate the best interests of the child because visitation controls the child's contact with the non-custodial parent.

[3] Child Custody 76D ↪577

76D Child Custody

76DIX Modification

76DIX(B) Grounds and Factors

76Dk577 k. Visitation. Most Cited Cases

Material changes in the amount of contact with a parent affects a child's

best interests regardless of whether that parent is the custodial or non-custodial parent.

[4] Child Custody 76D ⚖️216

76D Child Custody
 76DV Visitation
 76Dk215 Visitation Conditions
 76Dk216 k. In General. Most Cited Cases

Child Custody 76D ⚖️577

76D Child Custody
 76DIX Modification
 76DIX(B) Grounds and Factors
 76Dk577 k. Visitation. Most Cited Cases

Self-executing material changes in visitation violate the State's public policy founded on the best interests of a child unless there is evidence before the court that one or both parties have committed to a given course of action that will be implemented at a given time; the court has heard evidence how that course of action will impact upon the best interests of the child or children involved; and the provision is carefully crafted to address the effects on the offspring of that given course of action.

[5] Child Custody 76D ⚖️223

76D Child Custody
 76DV Visitation
 76Dk215 Visitation Conditions
 76Dk223 k. Restrictions on Conduct. Most Cited Cases

Child Custody 76D ⚖️577

76D Child Custody
 76DIX Modification
 76DIX(B) Grounds and Factors
 76Dk577 k. Visitation. Most Cited Cases

Evidence supported finding that self-executing visitation provision in divorce decree, which changed mother's visitation with children if she moved more than 35 miles from county, involved a material change in visitation, and thus provision could not be employed absent a determination that it was in the best interests of the children; mother's visitation with children would change from mother having the children 50% of the time to mother seeing the children two days per week every other weekend if she moved more than 35 miles from county.

[6] Child Custody 76D ⚖️577

76D Child Custody
 76DIX Modification
 76DIX(B) Grounds and Factors
 76Dk577 k. Visitation. Most Cited Cases

It is the factual situation existing at the time of the material change in visitation that determines whether a change is warranted, not the factual situation at the time of the divorce decree.

[7] Child Custody 76D ⚖️921(1)

76D Child Custody

76DXIII Appeal or Judicial Review

76Dk913 Review

76Dk921 Discretion

76Dk921(1) k. In General.

Most Cited Cases

Where the trial court exercises its discretion and awards custody of a child to one fit parent over the other fit parent, the Supreme Court will not interfere with that decision unless the evidence shows the trial court clearly abused its discretion.

****332 *739** Harmon, Smith, Bridges & Wilbanks, Archer D. Smith III, Fred P. Anthony, Jr., Atlanta, for appellant.

Alembik, Fine & Callner, Joseph M. Winter, Atlanta, Michelle G. Harrison, Kenneth W. Krontz, Douglasville, for appellee.

***732** HUNSTEIN, Justice.

This appeal challenges the validity of a self-executing change of visitation provision in a divorce decree. Appellant Sonja Dellinger, a life-long resident of Alabama, filed a divorce petition to end her nine-year marriage to appellee Terry Dellinger in February 2003, six months after the parties moved to Georgia. Appellant sought primary physical custody with joint legal custody of the parties' two children. At the time of the August 2003 hearing on the divorce petition, the older child was six years old and had just entered first grade while the younger child was three years old and in day care. Both parties worked in downtown Atlanta ^{FN1} while appellee lived in the marital residence in Douglas

County and appellant lived in an apartment with the children. However, appellant testified that if she received custody of the children, she intended to return home to Alabama with them.

FN1. Appellant is a public accountant certified in Alabama but not in Georgia; appellee is a server support analyst with a two-year technical degree.

Under the terms announced orally by the judge and later incorporated into the final divorce decree, the trial court awarded the parties joint legal custody but gave primary physical custody of the children to appellee. The trial court then formulated two visitation plans. Under "Plan A," appellant had the children for basically half of the time and her child support obligation was set at ten percent of her gross income. The departure from the guidelines was based on "the extended visitation." Also under Plan A the parties would alternate holiday visitation; appellant would have the children for four weeks in the summer; and the parties would share equally in the delivery and return of the children. "Plan B" went automatically into effect if appellant chose to reside "more than thirty-five miles from Douglas County." Under Plan B appellant could visit with her children only on ***733** the first, third and fifth weekend of each month and four weeks of summer vacation; she was required to both collect and return the children; and her child support obligation increased to 23 percent.^{FN2}

FN2. The divorce decree is silent

whether the alternating holiday visitation schedule would be affected should appellant move to a residence outside the 35-mile zone.

Appellant thereafter filed an application to appeal from the final divorce decree, which we granted pursuant to this Court's pilot project. See *Wright v. Wright*, 277 Ga. 133, 587 S.E.2d 600 (2003).

[1] 1. Appellant contends the trial court erred by providing for a self-executing change of visitation should she move more than 35 miles outside of Douglas County without considering the best interests of the children at the time of any such move. We agree and reverse.

[2][3] In *Scott v. Scott*, 276 Ga. 372, 578 S.E.2d 876 (2003), this Court held that any self-executing change of custody provision that fails to give paramount import to the child's best interests in a change of custody as between parents must be stricken as violative of Georgia public policy. *Id.* at 375, 578 S.E.2d 876. This ruling was premised on the idea that the law "recognizes that because children are not immutable objects but living beings who mature and develop in unforeseeable directions, the initial award of custody may not always remain the selection that promotes the best interests of the child." *Id.* at 373, 578 S.E.2d 876. While we recognize that "[v]isitation rights (even extensive visitation rights) do not constitute custody," *Atkins v. Zachary*, 243 Ga.

453, 254 S.E.2d 837 (1979), visitation rights are a part of custody and changes in one parent's visitation rights ****333** necessarily affect the custodial rights of the other parent. *Id.*; see also *Nodvin v. Nodvin*, 235 Ga. 708, 221 S.E.2d 404 (1975). Material changes in one parent's visitation rights also necessarily implicate the best interests of the child because visitation controls the child's contact with the non-custodial parent. Children do not understand or care about the legal niceties the courts draw between visitation and custody: it is the child's contact with the parent that impacts the child's best interests, not whether that contact occurs under the label of visitation or custody. Material changes in the amount of contact with a parent affects a child's best interests regardless whether that parent is the custodial or non-custodial parent. Therefore, we decline to draw a distinction between custody and visitation when a material change in visitation is at issue.

[4] In accordance with *Scott*, *supra*, we hold that self-executing material changes in visitation violate this State's public policy founded on the best interests of a child unless there is evidence before the court that one or both parties have committed to a given course of ***734** action that will be implemented at a given time; the court has heard evidence how that course of action will impact upon the best interests of the child or children involved; and the provision is carefully crafted to address the effects on the offspring of that given course of action.

Such provisions should be the exception, not the rule, and should be narrowly drafted to ensure that they will not impact adversely upon any child's best interests.

[5] Applying our holding to the self-executing change of visitation provision in this case, we first address whether a material change in visitation is involved in this case. Under the terms of the challenged provision, should appellant move to a residence situated more than 35 miles from Douglas County, the children's contact with her will be automatically decreased from Sunday through Wednesday every single week to two days every other weekend. The triggering event thus means that instead of spending half of their lives with appellant, the children will see her at best six days a month during most of the year.^{FN3} We hold that a change of this magnitude constitutes a material change of visitation that is allowable only upon a determination that it is in the best interests of the children at the time of the change. *Scott*, supra.

FN3. The children would still be able to spend four weeks with appellant during the summer.

The dissent posits that the automatic change provision was based on evidence before the trial court at the time of the divorce that appellant intended to return to Alabama after the divorce was finalized and thus the trial court was able to "accurately predict" the impact of appellant's move on the best interests of the children. The trial transcript,

however, does not support this argument in that appellant's testimony regarding her intention to return to Alabama was premised upon her receipt of primary physical custody of the children. When asked what she would do if appellee received primary physical custody, the only evidence before the trial court regarding her intentions was that she would do "what is necessary" to provide her children with her presence and time.^{FN4} Given the trial court's custody ruling in favor of appellee, there was no evidence before the trial court upon which it could have "predicted" whether appellant will choose to return to Alabama at any point in the future or instead choose to remain in the Atlanta area near her children.^{FN5} Thus, the *735 trial court could not have concluded that appellant had committed to a given course of action, i.e., returning to Alabama, or that she **334 would implement that course of action at any given time.

FN4. In his testimony appellee gave no indication that he would consider returning to Alabama to be near his children if appellant was given custody. E.g., after acknowledging he had problems with his daughter, appellee testified that he was "willing to do whatever it takes to remedy that. However, that's going to not take place if [the daughter] is two hundred miles away."

FN5. Indeed, the trial court's own statements indicate its recognition that a return to

Alabama by appellant might require new court hearings before the visitation issue could be resolved, when it commented that “I did a Plan A and a Plan B because if, in fact, the move occurs then we’ll have to hire lawyers and pay lawyers and come back to court and do that...”

[6] It is the factual situation existing at the time of the material change in visitation that determines whether a change is warranted, not the factual situation at the time of the divorce decree. See *Scott*, supra at 376, 578 S.E.2d 876. However, the automatic change in visitation provision in this case contains no language limiting its application at or near the time of the divorce. In fact, the challenged provision lacks any expiration date at all. As drafted the provision would authorize implementation of the self-executing change of visitation at any time, even though the change could be triggered months or even years in the future. This material change in the children’s visitation would be accomplished automatically and “without any regard to the circumstances existing” in the children’s lives at the time of the change. *Scott*, supra at 375, 578 S.E.2d 876. As such, this provision is “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.” *Id.*

Further undermining the validity of

the challenged provision is the arbitrary triggering event chosen by the trial court. Self-executing material changes in visitation must be carefully crafted to connect the occurrence of the triggering event to the best interests of the child or children so as to warrant a material change in visitation. Here, the triggering event—appellant’s move to a residence 35 miles from Douglas County—has only a tangential connection with the children’s best interests. If the children’s commute time was a concern, the provision’s arbitrary 35-mile limit has no relationship to traffic patterns and congestion in the metro Atlanta area. Indeed, appellant may very well be able to collect and return her children faster to their Douglas County home driving from a residence in Alabama, outside the 35-mile zone, than she could from a location inside the zone in downtown Atlanta. As drafted, the challenged provision fails to reflect an individualized consideration of the children’s best interests in this case and neither recognizes nor promotes those best interests as they may be affected by the triggering event.

In applying *Scott* here, we reiterate its holding that “[n]either the convenience of the parents nor the clogged calendars of the courts can justify automatically [requiring a material change in visitation] absent evidence that the change is in the child’s best interests. The paramount concern in *any* [material change in visitation] must be the best interests and welfare of the minor child. [Cit.]” (Emphasis in *736 original.) *Id.* at 377, 578 S.E.2d

876. When the self-executing change of visitation provision in this case is analyzed under *Scott*, supra, the provision effected a material change in visitation; it was imposed without evidence before the court that appellant had committed to a given course of action she intended to implement at a given time; and the provision was not carefully crafted to apply to that given course of action.^{FN6} The provision thus improperly authorized an open-ended, automatic, material change in visitation without providing for a determination whether the visitation change is in the best interests of the parties' children and without connecting the triggering event to those best interests. It follows that the trial court erred by including that self-executing change in visitation provision in the parties' divorce decree. Therefore, we reverse this case with the direction that the trial court strike the self-executing provision of the decree.

FN6. Some evidence, in the form of the guardian ad litem's report, addressed the impact appellant's return to Alabama would have upon the best interests of the parties' two children.

[7] 2. "Where the trial court exercises its discretion and awards custody of a child to one fit parent over the other fit parent, this Court will not interfere with that decision unless the evidence shows the trial court clearly abused its discretion. [Cit.] *Powell v. Powell*, 277 Ga. 878, 596 S.E.2d 616 (2004). Based on the evidence adduced at the hearing, we cannot say there was a clear abuse of

discretion in the trial court's award of custody.

Judgment reversed with direction.

****335** All the Justices concur, except SEARS, P.J., CARLEY and THOMPSON, JJ., who dissent.

SEARS, Presiding Justice, dissenting.

Today, the majority opinion improperly curtails the tools available to trial courts to protect the best interests of children in cases involving difficult visitation issues. The majority does so by precluding, except in extremely narrow circumstances, the use of provisions permitting self-executing changes of visitation. In addition, the majority adopts a new rule restricting such provisions, but unfairly fails to remand the case to the trial court to give the court and the parties an opportunity to address the application of the new rule to this case. For these reasons, I dissent to the majority opinion.

Unlike the majority opinion, Justice Thompson's dissent outlines an approach that gives trial courts the flexibility to fashion provisions for self-executing changes of visitation in divorce decrees and thus permits trial courts to ensure that a visitation order protects a child's best interests. In *Scott v. Scott*,^{FN7} this Court adopted a rigid rule prohibiting automatic modifications of custody. Relying on *Scott*, ***737** the majority improperly adopts a new, restrictive rule for determining the validity of self-execution visitation provisions. As outlined by Justice

Thompson, given the more flexible rules governing visitation, as opposed to custody, trial courts should be permitted to impose automatic modifications of visitation if, in the trial court's discretion, such provisions are warranted by the evidence. In the present case, because the appellant had contemplated moving to Alabama, and because the trial court had the discretion to conclude that, under the existing visitation arrangement, such a move would not be in the best interests of the parties' children, the trial court did not abuse its discretion in providing for automatic changes to the visitation plan in the event of such a move.

FN7. 276 Ga. 372, 578 S.E.2d 876 (2003).

Moreover, the majority requires that a non-custodial parent must have firmly committed to a future move before a trial court may adopt a self-executing provision regarding visitation. The majority adopts this requirement purportedly to protect the child's best interests. The child's best interests, however, are not determined by the level of commitment by the non-custodial parent to a move, but by the degree to which the move, if it happens, will have an impact on the child. And, in this regard, the impact on the child is the same whether the non-custodial parent is firmly committed to moving or has, less firmly, merely contemplated doing so. Thus, trial courts should be permitted to fashion provisions for self-executing changes of visitation in cases, such as the present one, where the non-

custodial parent has indicated a desire to move to a different location, and where that move will clearly make the initial visitation provisions a hardship for the children involved.

For the foregoing reasons, I completely join in Justice Thompson's dissent.

I also dissent for a reason not addressed by Justice Thompson. In this case, the majority creates a new rule concerning questions of visitation rights, and that rule requires findings of fact and the exercise of discretion by the trial court. It is unfair to the appellee to adopt such a new rule, and then not to remand the case to the trial court to give it and the parties an opportunity to address the application of the rule to the present case.^{FN8}

FN8. See *Warehouse Home Furnishings Distrib. v. Davenport*, 261 Ga. 853, 854, 413 S.E.2d 195 (1992).

For all of the foregoing reasons, I dissent to the majority opinion. I am authorized to state that Justice Carley and Justice Thompson join in this dissent.

THOMPSON, Justice, dissenting.

I believe the self-executing provision modifying visitation in this *738 case was permissible and a proper exercise of the trial court's discretion. Accordingly, I would affirm the judgment of the trial court.

In *Scott v. Scott*, 276 Ga. 372, 578

S.E.2d 876 (2003), this Court held that self-executing change of custody provisions are not expressly****336** prohibited by statutory law and that they may be upheld so long as they properly consider the best interests of the child at the time the self-executing change would become effective. *Id.* at 375, 578 S.E.2d 876. Of course, we must look to the best interests of the child in determining both custody and visitation matters. See OCGA §§ 19-9-3(a)(2); 19-9-22(1); 19-9-41. See also *Patel v. Patel*, 276 Ga. 266, 267, 577 S.E.2d 587 (2003); *Woodruff v. Woodruff*, 272 Ga. 485, 486, 531 S.E.2d 714 (2000). However, when it comes to visitation, the best interests of the child test can be fulfilled simply by ensuring that the child is given an opportunity to form a reasonable relationship with the noncustodial parent. See *Woodruff*, supra. Thus, unlike custody, visitation may be granted under very flexible terms and gives rise to a greater discretion in the trial court. This Court recognized as much when it noted that it is “inappropriate to apply rigid or bright line rules developed within the context of custody to matters of visitation.” (Punctuation omitted.) *Patel*, supra.

A myriad of variables must be considered to modify custody following the relocation of a custodial parent which are inapplicable to the relocation of a noncustodial parent. For example, in determining whether the best interests of the child have been affected by the move of a custodial parent, a court must consider changes in school district and neighborhood safety. *Scott*,

supra at 376, 578 S.E.2d 876. However, these changes are of almost no import when the move is made by the noncustodial parent because the child will not attend school in the district in which the noncustodial parent resides. Furthermore, whereas a distant move by a custodial parent may improve the child's schooling, a distant move by a noncustodial parent who has visitation privileges during the school week would negatively impact the child's ability to attend and excel in school.

Of course, the best interests of the child prevail over notions of judicial economy. *Scott*, supra at 377, 578 S.E.2d 876. However, judicial economy and the best interests of the child need not be mutually exclusive. With few exceptions, Georgia's Uniform Child Custody Jurisdiction and Enforcement Act, OCGA § 19-9-60 et seq., provides that the court which made the initial custody determination will retain exclusive, continuing jurisdiction of the matter. Given the broad discretion of trial courts in regard to visitation and their continuing jurisdiction under most circumstances, it is reasonable to accommodate the concept of judicial economy in a self-executing visitation order so long as actions in the name of judicial economy comport with the best interests of the child.

Reductions in the number of times parents drag visitation issues into court should ensure both predictability and continuity so that the “dynamic character of the children's growth and development is not prejudiced ... by

delayed change of [visitation] when that is needed or by the insecurity of inconclusiveness if [visitation] is to remain the same.” *Scott*, supra at 377, n. 5, 578 S.E.2d 876. When a trial court can accurately predict the effect of a future event on the best interests of the children, all parties will benefit from the security and conclusiveness of a self-executing order modifying visitation rights.

“Modification of child visitation rights is a matter of discretion with the trial court.” *Parker v. Parker*, 242 Ga. 781, 781, 251 S.E.2d 523 (1979). In the exercise of its discretion, a trial court must look to the unique situation of each individual case. *Scott*, supra at 373, 578 S.E.2d 876. In this case, the noncustodial parent testified that if she were awarded physical custody of the children she would take them back to Birmingham. She also testified that she was raised in Birmingham and that her family continued to live there; that she visited there almost every weekend; and that she continued to take her children there for regular medical and dental care. Asked if she would move to Birmingham if she was not awarded physical custody, the noncustodial parent could only say she was not sure. In addition, the guardian ad litem averred that in her opinion, the children would be impacted negatively if the noncustodial parent were to move to Birmingham and extended visitation privileges were to continue. Given these facts, I would hold that the self-executing visitation modifications were reasonably designed**337 to comport

with a highly likely and significant change in residence of the noncustodial parent and the resulting effects of this relocation on the education, well-being, and best interests, of the children.

I respectfully dissent. I am authorized to state that Presiding Justice Sears and Justice Carley join in this dissent.

Ga.,2004.

Dellinger v. Dellinger

278 Ga. 732, 609 S.E.2d 331, 04 FCDR 3745

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Supreme Court of Georgia.
 SCOTT
 v.
 SCOTT.

No. S02A1909.
 March 27, 2003.

Mother appealed from judgment of the Superior Court, Cobb County, Michael Stoddard, J., concerning legality of divorce decree's self-executing change of custody provision. Upon granting discretionary review, the Supreme Court, Hunstein, J., held that provision, under which physical custody transferred to father should mother leave county of residence without regard to a best interest of the child analysis, violated custody statute, disapproving *Carr v. Carr*, 207 Ga.App. 611, 429 S.E.2d 95, and abrogating *Holder v. Holder*, 226 Ga. 254, 174 S.E.2d 408.

Reversed.

Sears, P.J., dissented with opinion in which Carley, J., joined.

West Headnotes

[1] Child Custody 76D 657

76D Child Custody
 76DIX Modification
 76DIX(C) Proceedings
 76DIX(C)3 Hearing and
 Determination
 76Dk657 k. Questions of Law

or Fact. Most Cited Cases

Whether particular circumstances warrant a change in custody is a fact question determined under the unique situation in each individual case. West's Ga.Code Ann. § 19-9-3.

[2] Child Custody 76D 555

76D Child Custody
 76DIX Modification
 76DIX(B) Grounds and Factors
 76Dk555 k. Change in
 Circumstances or Conditions. Most
 Cited Cases

The circumstances warranting a change in custody are not confined to those of the custodial parent; any new and material change in circumstances that affects the child must also be considered. West's Ga.Code Ann. § 19-9-3.

[3] Child Custody 76D 554

76D Child Custody
 76DIX Modification
 76DIX(B) Grounds and Factors
 76Dk554 k. Welfare and Best
 Interest of Child. Most Cited Cases

The law recognizes that because children are not immutable objects but living beings who mature and develop in unforeseeable directions, the initial award of custody may not always remain the selection that promotes the best interests of the child. West's Ga.Code Ann. § 19-9-3.

[4] Child Custody 76D ↪531(1)

76D Child Custody
 76DVIII Proceedings
 76DVIII(D) Judgment
 76Dk531 Operation and Effect
 76Dk531(1) k. In General.
 Most Cited Cases

Child Custody 76D ↪550

76D Child Custody
 76DIX Modification
 76DIX(A) In General
 76Dk550 k. In General. Most
 Cited Cases

“Self-executing change of custody provisions” allow for an automatic change in custody based on a future event without any additional judicial scrutiny.

[5] Child Custody 76D ↪78

76D Child Custody
 76DII Grounds and Factors in
 General
 76DII(C) Factors Relating to Child
 76Dk78 k. Child's Preference of
 Custodian. Most Cited Cases

A child's selection of the parent with whom he desires to live, where the child has reached 14 years of age, is controlling absent a finding that such parent is unfit; without a finding of unfitness the child's selection must be recognized and the court has no discretion to act otherwise. West's Ga.Code Ann. §§ 19-9-1(a)(3)(A), 19-9-

3(a)(4).

[6] Child Custody 76D ↪567

76D Child Custody
 76DIX Modification
 76DIX(B) Grounds and Factors
 76Dk567 k. New Partner for
 Party. Most Cited Cases

Child Custody 76D ↪568

76D Child Custody
 76DIX Modification
 76DIX(B) Grounds and Factors
 76Dk568 k. Parent or
 Custodian's Relocation of Home. Most
 Cited Cases

Georgia law does not permit a modification of custody based solely on a custodial parent's relocation or merely upon the custodial parent's remarriage. West's Ga.Code Ann. §§ 19-9-1, 19-9-3.

[7] Courts 106 ↪91(1)

106 Courts
 106II Establishment, Organization,
 and Procedure
 106II(G) Rules of Decision
 106k88 Previous Decisions as
 Controlling or as Precedents
 106k91 Decisions of Higher
 Court or Court of Last Resort
 106k91(1) k. Highest
 Appellate Court. Most Cited Cases

Denial of a writ of certiorari by the Supreme Court is not binding as a precedent in another case, and does not come within the doctrine of stare

decisis.

[8] Child Custody 76D ⚡650

76D Child Custody

76DIX Modification

76DIX(C) Proceedings

76DIX(C)3 Hearing and Determination

76Dk650 k. In General. Most Cited Cases

Change of custody is just as important to the child and to others as an original award of custody, and the parties should be afforded the same type of hearing on the subsequent application as they are entitled to on an original award.

[9] Child Custody 76D ⚡530

76D Child Custody

76DVIII Proceedings

76DVIII(D) Judgment

76Dk530 k. Relief Granted. Most Cited Cases

Child Custody 76D ⚡550

76D Child Custody

76DIX Modification

76DIX(A) In General

76Dk550 k. In General. Most Cited Cases

Child Custody 76D ⚡554

76D Child Custody

76DIX Modification

76DIX(B) Grounds and Factors

76Dk554 k. Welfare and Best

Interest of Child. Most Cited Cases

While self-executing change of custody provisions are not expressly prohibited by statutory 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 state's public policy as expressed in child custody statute. West's Ga.Code Ann. § 19-9-3.

[10] Child Custody 76D ⚡530

76D Child Custody

76DVIII Proceedings

76DVIII(D) Judgment

76Dk530 k. Relief Granted. Most Cited Cases

Child Custody 76D ⚡550

76D Child Custody

76DIX Modification

76DIX(A) In General

76Dk550 k. In General. Most Cited Cases

Child Custody 76D ⚡555

76D Child Custody

76DIX Modification

76DIX(B) Grounds and Factors

76Dk555 k. Change in Circumstances or Conditions. Most Cited Cases

Self-executing change of custody provisions are not rendered valid merely because the initial award of custody may have been based upon the child's best interests; it is not the factual situation at

the time of the divorce decree that determines whether a change of custody is warranted but rather the factual situation at the time the custody modification is sought. West's Ga.Code Ann. § 19-9-3.

[11] Child Custody 76D 566

76D Child Custody

76DIX Modification

76DIX(B) Grounds and Factors

76Dk566 k. Child's Preference.

Most Cited Cases

Child Custody 76D 567

76D Child Custody

76DIX Modification

76DIX(B) Grounds and Factors

76Dk567 k. New Partner for

Party. Most Cited Cases

Child Custody 76D 568

76D Child Custody

76DIX Modification

76DIX(B) Grounds and Factors

76Dk568 k. Parent or

Custodian's Relocation of Home. Most Cited Cases

Remarriage and relocation directly affect a child but they do not automatically warrant a change in custody; the variables are too unfixed to determine at the time of the divorce decree what affect a future remarriage or relocation may have on a child, and while many children experience a degree of trauma or difficulty as the result of a custodial parent's remarriage or the

relocation of the family unit, that emotional upset constitutes only a factor that can be considered in the totality of the circumstances and balanced in determining whether a change of condition occurred. West's Ga.Code Ann. § 19-9-3.

[12] Child Custody 76D 604

76D Child Custody

76DIX Modification

76DIX(C) Proceedings

76DIX(C)1 In General

76Dk604 k. Time for

Proceedings. Most Cited Cases

Judicial process for resolving custody disputes should be expedited all along the way so that the dynamic character of the children's growth and development is not prejudiced or harmed by delayed change of custody when that is needed or by the insecurity of inconclusiveness if custody is to remain the same.

[13] Child Custody 76D 261

76D Child Custody

76DVI Geographical Considerations

76Dk261 k. Removal from

Jurisdiction. Most Cited Cases

Child Custody 76D 530

76D Child Custody

76DVIII Proceedings

76DVIII(D) Judgment

76Dk530 k. Relief Granted.

Most Cited Cases

Divorce decree's self-effectuating change of custody provision, which stated "in the event that [mother] move[d] ... outside of ... county ... it [was] ... ordered ... that ... event constitute[d] a material change in circumstances detrimentally affecting the welfare of ... minor child and that ... primary physical custody of ... minor child [would] automatically revert to [father]," violated public policy of custody statute and, thus, was unlawful, where provision failed to provide for a determination of whether custody change was in child's best interest at time change would occur; disapproving *Carr v. Carr*, 207 Ga.App. 611, 429 S.E.2d 95, and abrogating *Holder v. Holder*, 226 Ga. 254, 174 S.E.2d 408. West's Ga.Code Ann. § 19-9-3.

[14] Child Custody 76D ↪ 554

76D Child Custody

76DIX Modification

76DIX(B) Grounds and Factors

76Dk554 k. Welfare and Best Interest of Child. Most Cited Cases

The paramount concern in any change of custody must be the best interests and welfare of the minor child. West's Ga.Code Ann. § 19-9-3.

****877 *382** Browning & Tanksley, LLP, Thomas J. Browning, Marietta, for appellant.

Dupree, Poole & King, Russell D. King, Patrick N. Millsaps, Marietta, for appellee.

***372** HUNSTEIN, Justice.

We granted Regina Scott's application for discretionary appeal to address whether a self-executing change of custody provision in the Scotts' divorce decree was permissible under *Weaver v. Jones*, 260 Ga. 493, 396 S.E.2d 890 (1990) and *Pearce v. Pearce*, 244 Ga. 69, 257 S.E.2d 904 (1979). For the reasons that follow, we find that the automatic custody change provision was not a permissible extension of *Weaver* and *Pearce* and should be stricken from the parties' divorce decree.

Regina and Charles Scott were divorced in 2001. Custody of their two-year-old daughter was placed jointly in the parties with Ms. ****878** Scott given primary physical custody. The divorce decree further provided in Paragraph 3 that

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 ***373** change in circumstances detrimentally affecting the welfare of the minor child and that pursuant to *Carr v. Carr*, 207 Ga.App. 611 [429 S.E.2d 95] (1993), 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.

[1][2][3] The best interests of the child are controlling as to custody

changes. OCGA § 19-9-3(a)(2); *Parr v. Parr*, 196 Ga. 805, 27 S.E.2d 687 (1943). Whether particular circumstances warrant a change in custody is a fact question determined under the unique situation in each individual case. *Wilson v. Wilson*, 241 Ga. 305, 245 S.E.2d 279 (1978). In contemplating a custodial change, the trial court must exercise its discretion to determine whether a change is in the best interests of the child. OCGA § 19-9-3. The circumstances warranting a change in custody are not confined to those of the custodial parent: any new and material change in circumstances that affects the child must also be considered. *Handley v. Handley*, 204 Ga. 57, 59, 48 S.E.2d 827 (1948). The law thus recognizes that because children are not immutable objects but living beings who mature and develop in unforeseeable directions, the initial award of custody may not always remain the selection that promotes the best interests of the child.

[4][5] Self-executing change of custody provisions allow for an “automatic” change in custody based on a future event without any additional judicial scrutiny. Our appellate courts have upheld several such automatic custody change provisions. In *Weaver*, supra, the parties contemplated that an older child, upon reaching the age of 14, might utilize the statutory procedures allowing a child of that age to choose the parent with whom the child wishes to reside. See OCGA §§ 19-9-1(a)(3)(A), 19-9-3(a)(4). Accord *Pearce*, supra (under terms of agreement, “each of the children shall be given the opportunity

to decide” the parent with whom the child preferred to reside ^{FN1}). The self-executing change of custody provisions in those two cases thus provided that upon the child deciding to reside with the non-custodial parent, the obligations of the parents would switch automatically without further court intervention. The self-executing change of custody provisions in *Weaver* and *Pearce* were thus consonant with statutory and case law, which recognizes that “[a] child's selection of the parent with whom he desires to live, where the child *374 has reached 14 years of age, is controlling absent a finding that such parent is unfit. Without a finding of unfitness the child's selection must be recognized and the court has no discretion to act otherwise. [Cits.]” *Harbin v. Harbin*, 238 Ga. 109-110, 230 S.E.2d 889 (1976).

FN1. The age of the children in *Pearce* was not pertinent to our holding therein and the opinion contains no discussion regarding the applicability of OCGA §§ 19-9-1(a)(3)(A), 19-9-3(a)(4) to the parties' decision to allow their children to choose the parent with whom they wanted to reside.

[6] The self-executing custody change provisions in *Weaver* and *Pearce* pose no conflict with our law's emphasis on the best interests of the child. The same, however, cannot be said of other automatic change of custody provisions the appellate courts have earlier approved. It is well established that “Georgia law does not

permit a modification of custody based solely on a custodial parent's relocation" to another home, city or state, *Ofchus v. Isom*, 239 Ga.App. 738, 739(1), 521 S.E.2d 871 (1999) or merely upon the custodial parent's remarriage. See *Mercer v. Foster*, 210 Ga. 546(3), 81 S.E.2d 458 (1954). Nevertheless, the appellate courts have ignored this case law to approve self-executing change in custody provisions triggered by remarriage or relocation that mandate, without regard to the child's best interests, the removal of the child from the custodial parent. In *Holder v. Holder*, 226 Ga. 254, 174 S.E.2d 408 (1970), this Court **879 approved a provision that automatically stripped the mother of custody of her children upon her remarriage. Looking only to whether the provision operated as a restraint upon marriage, this Court concluded that the mother "had the election whether to remarry or to retain custody of the children. She elected to remarry, and thereupon her right to custody under the agreement and decree ceased. [Cits.]" Id. at 256(1), 174 S.E.2d 408. As to the trial court's ruling that there had been no showing of a material change of circumstances substantially affecting the welfare and best interests of the children, we concluded in abbreviated fashion that change of circumstances was "not involved here." Id. at 256(3), 174 S.E.2d 408. See also *Hunnicut v. Sandison*, 223 Ga. 301, 303-304(1), 154 S.E.2d 587 (1967) (approving provision in divorce decree granting custody of children to appellant "so long as he did not remarry, and that in the event he remarried, the appellee

would have custody of the children").

[7] Likewise, in *Carr*, supra, expressly relied upon by the trial court here, the divorce decree mandated 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 Atlanta area) or another state." Id., 207 Ga.App. at 611, 429 S.E.2d 95. The Court of Appeals upheld the provision looking solely to the fact that it "did not prohibit [Ms.] Carr from moving, it simply set forth self-executing consequences if she decided to do so," id. at 612, 429 S.E.2d 95, and finding the provision "more akin" to the provisions approved by this Court in *Weaver* and *Pearce*, *375 supra. Id. at 613, 429 S.E.2d 95.^{FN2}

FN2. This Court denied certiorari in *Carr*, after initially granting then vacating the writ, on the basis that it failed to satisfy the relevant criteria. *Carr v. Carr*, 263 Ga. 451, 435 S.E.2d 44 (1993). "The denial of a writ of certiorari by the Supreme Court is not binding as a precedent in another case, and does not come within the doctrine of stare decisis." *Seaboard A.L. Ry. v. Brooks*, 151 Ga. 625, 631, 107 S.E. 878 (1921).

[8] We find no kinship between the flexible self-executing change of custody provision in *Weaver* that is designed to accommodate a 14-year-old child's exercise of his or her statutory right to select the parent with whom the child

desires to live, see also *Pearce*, and the draconian custody change provisions in *Carr* and *Holder* that altogether ignore the best interests of the child at the time of the triggering event.^{FN3} Once the triggering event occurs—such as remarriage or relocation—the child is automatically uprooted without any regard to the circumstances existing at that time. See *Holder*, supra at 256(3), 174 S.E.2d 408. 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. Unlike the *Weaver / Pearce* provisions, the purpose of the automatic custody change provisions in *Carr/Holder* is not to accommodate a child's rights and needs. Rather, the purpose is to provide a speedy and convenient short-cut for the non-custodial parent to obtain custody of a child by bypassing the objective judicial scrutiny into the child's best interests that a modification action pursuant to OCGA § 19-9-3 requires. This “short-cut” operates at the expense of the child, even though

FN3. No relevant distinction may be drawn between self-executing change of custody provisions based upon their source. Whether originating with the parties, a guardian ad litem or the trial judge, once the provision is incorporated into the divorce decree it stands on equal footing with all the provisions in the decree passed upon and ordered

by the trial court.

[a] change of custody is just as important to the child and to others as an original award of custody, and the parties should be afforded the same type of hearing on the subsequent application as they are entitled to on an original award. [Cit.], quoting 24 Am.Jur.2d *Divorce and Separation* § 1008 (1983).

(Punctuation omitted.) *Clapper v. Harvey*, 716 A.2d 1271, 1275 (Pa.Super.1998).

[9] While self-executing change of custody provisions are not expressly prohibited by statutory law, we hold that 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 ****880** public policy as expressed in OCGA § 19-9-3.

[10] ***376** The trial court here found that relocating the Scotts' child outside of Cobb County “constitutes a material change in circumstances detrimentally affecting the welfare of the minor child.” However, self-executing change of custody provisions are not rendered valid merely because the initial award of custody may have been based upon the child's best interests. It is not the factual situation at the time of the divorce decree that determines whether a change of custody is warranted but rather the factual situation at the time the custody modification is sought.^{FN4} See *Mallette v. Mallette*, 220 Ga. 401, 403(1), 139 S.E.2d 322 (1964); *Danziger*

v. Shoob, 203 Ga. 623, 625, 48 S.E.2d 92 (1948).

FN4. Our sister states have recognized that these types of automatic custody change provisions should not be given effect because they are premised on a “mere speculation” of what the best interests of the children may be at a future date. See, e.g., *Zeller v. Zeller*, 640 N.W.2d 53 (N.D.2002); *deBeaumont v. Goodrich*, 162 Vt. 91, 644 A.2d 843 (1994); *Hovater v. Hovater*, 577 So.2d 461 (Ala.Civ.App.1990). It has been recognized that “a majority of jurisdictions treat stipulations regarding the automatic change of custody as void.” *Zeller*, supra at 59 (Sandstrom, J., dissenting).

[11] Remarriage and relocation directly affect a child but they do not automatically warrant a change in custody. *Mercer*, supra, 210 Ga. at 548(3), 81 S.E.2d 458; *Ormandy v. Odom*, 217 Ga.App. 780, 781, 459 S.E.2d 439 (1995). There are situations, such as the remarriage of a custodial parent to a loving stepparent or the relocation of residence to a superior school district or a safer neighborhood, where the change in circumstances clearly would promote the child's best interests and welfare. See Wallerstein and Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 Fam. L.Q. 305 (1996). The variables are too unfixed to determine at the time of the

divorce decree what effect a future remarriage or relocation may have on a child. While many children experience a degree of trauma or difficulty as the result of a custodial parent's remarriage or the relocation of the family unit, that emotional upset constitutes only a factor that can be “considered in the totality of the circumstances [cit.] and balanced in determining whether a change of condition occurred.” *In the Interest of R.R.*, 222 Ga.App. 301, 305(2), 474 S.E.2d 12 (1996).

[12] The dissent posits that without a self-executing custody change provision, a child's best interests may be damaged as the result of the custodial parent's relocation before a modification action can be successfully concluded. However, custodial parents cannot simply pick up and move on a moment's notice without notifying the non-custodial parent. See OCGA § 19-9-1(c)(3), providing that notification “shall be given” by a custodial parent to the non-custodial parent and any other person granted visitation rights “at least 30 days prior to the anticipated change of residence”; *id.* at (c)(1), providing that *377 the court awarding custody of a minor “shall retain jurisdiction of the case for the purpose of ordering the custodial parent to notify the court of any changes in the residence of the child.” This argument also fails to recognize that an automatic custody change provision forces the custodial parent to initiate judicial proceedings to maintain custody of a child even when there is no evidence other than the remarriage or the move itself to indicate a change in the child's

circumstances.^{FN5}

FN5. Regarding the speedy resolution of custody disputes in the court, we agree with Judge Beasley's exhortation that

[t]he judicial process for resolving custody disputes should be expedited all along the way so that the dynamic character of the children's growth and development is not prejudiced or harmed by delayed change of custody when that is needed or by the insecurity of inconclusiveness if custody is to remain the same.

Tenney v. Tenney, 235 Ga.App. 128, 131, 508 S.E.2d 487 (1998) (Beasley, J., concurring specially).

[13][14] 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. The paramount concern in *any* change of custody must be the best interests and welfare of the minor child. *Jordan v. Jordan*, 195 Ga. 771, 25 S.E.2d 500 (1943). **881 Therefore, we repudiate our holding in *Holder* and disapprove the opinion in *Carr*, supra, 207 Ga.App. at 611, 429 S.E.2d 95, relied upon by the trial court to impose the self-executing change of custody provision upon Ms. Scott in the instant appeal. Because the provision in Paragraph 3 of the parties' divorce

decree fails to provide for a determination whether the custody change is in the best interest of the parties' daughter at the time the change would automatically occur, it violates the public policy as expressed in OCGA § 19-9-3. It follows that the trial court's denial of Ms. Scott's motion is reversed and the divorce decree is vacated with direction that the trial court set aside Paragraph 3 of the decree.

Judgment reversed with direction.

All the Justices concur, except SEARS, P.J., and CARLEY, J., who dissent.

SEARS, Presiding Justice, dissenting.

Because I conclude that the provision in the trial court's decree for a self-executing change of custody was permissible under *Weaver v. Jones*^{FN6} and *Pearce v. Pearce*,^{FN7} because I conclude that the provision is based on the best interests of the child, which is the overriding concern of Georgia's custody laws, and because I conclude that the provision minimizes litigation and promotes a healthy relationship between both parents and their child, I dissent to the majority's disapproval*378 of such provisions.

FN6. 260 Ga. 493, 396 S.E.2d 890 (1990).

FN7. 244 Ga. 69, 257 S.E.2d 904 (1979).

To begin, in *Weaver v. Jones*,^{FN8} and *Pearce v. Pearce*,^{FN9} this Court approved self-executing modifications of child

support and child custody in the context of agreements that had been incorporated into divorce decrees. In those cases, the decrees awarded custody of the parties' child or children to the wife, but provided that if the parties' child or children decided to live with the husband, the wife would begin paying child support to the husband. This Court held that the provisions regarding the changes in child custody and child support were self-executing. In addition, even though this Court recognized that child support and child custody provisions of a divorce decree generally cannot be modified without a subsequent court proceeding, the Court upheld the validity of such self-executing provisions for several reasons: The parties had agreed to the provisions and were thus bound by them;^{FN10} the original decree was simply being followed and not modified;^{FN11} the trial court had participated in and approved the custody and support provisions by incorporating the parties' agreement into the original divorce decree;^{FN12} and such provisions promoted judicial economy.^{FN13}

FN8. 260 Ga. at 494, 396 S.E.2d 890.

FN9. 244 Ga. at 70, 257 S.E.2d 904.

FN10. *Pearce*, 244 Ga. at 70, 257 S.E.2d 904.

FN11. *Id.*

FN12. *Weaver*, 260 Ga. at 494,

396 S.E.2d 890.

FN13. *Id.*

Contrary to the majority's conclusion, *Pearce* and *Weaver* cannot be distinguished from the present case. First, the majority incorrectly states that *Pearce* is consistent with statutory law that permits a 14-year-old child elect to live with a parent. This Court's opinion in *Pearce* does not state that the children were age 14 or over, and a review of this Court's records indicates that the children were under age 14 at the time of the divorce decree and at the time of the change of custody. Thus, *Pearce* supports the trial court's action in this case, and undercuts the majority's holding that no change of custody can occur for children under age 14 unless a trial court determines at the time of the change that the change is in the best interests of the children. Moreover, even though *Weaver* did involve a 14-year-old child's decision to elect to live with the original non-custodial parent, changes of custody based on the child's election could only be accomplished by a modification action before *Weaver*.^{FN14} Such modifications were deemed necessary, it appears, so that trial courts could exercise their supervisory powers to insure ****882** that a child has selected a fit parent ***379** for custody^{FN15} and to insure that any visitation provisions are appropriate.^{FN16} These decisions are significant ones for children age 14 or over, and in *Weaver*, we authorized trial courts to place such provisions in divorce decrees and thus approved

decisions on these issues to be made in advance of the actual change in custody. Moreover, one of this Court's reasons for approving the provision in *Weaver* was that the trial court had "participated in the change by adopting the consent agreement. It had an opportunity at that time to review and reject the proposed arrangement for a change of custody at the child's election, but chose to ratify it instead." ^{FN17} Similarly, in the present case, the trial court heard evidence from the child's court-appointed guardian ad litem that a self-executing change of custody was in the best interests of the child, reviewed whether such a provision was appropriate, and chose to incorporate such a provision into its divorce decree. For the foregoing reasons, this Court's decisions in *Weaver* and *Pearce* support the trial court's decision in the present case.

FN14. See *Worley v. Whiddon*, 261 Ga. 218, 403 S.E.2d 799 (1991); *Hagan v. McCook*, 256 Ga. 712, 353 S.E.2d 197 (1987).

FN15. See *Harbin v. Harbin*, 238 Ga. 109, 230 S.E.2d 889 (1976).

FN16. *Worley*, 261 Ga. at 218-219, 403 S.E.2d 799.

FN17. *Weaver*, 260 Ga. at 494, 396 S.E.2d 890.

In addition, I conclude that self-executing changes of custody imposed by a trial court are not against the public policy of this State, as they are primarily designed to promote the development of

well-adjusted children. As an initial matter, there is nothing in this State's modification statutes that expressly precludes self-executing changes of custody.^{FN18}

FN18. See OCGA §§ 19-9-1 and 19-9-3.

Moreover, an initial award of custody between parents must be based on the child's best interests,^{FN19} and it is clear that in some (although not all) instances, a self-executing change of custody premised on the child living in a certain location can be in the child's best interests. For example, when the evidence at trial shows that a child has two parents equally fit to have custody and that the child has important ties to current friends, schools, and relatives, a trial court can conclude that the child's best interests will be furthered by remaining in the child's present location. In this regard, a trial court could find that if forced to move to a different county or state, a child may suffer lower academic performance or emotional difficulties based on the stress of adjusting to new friends, schools, and neighborhoods, as well as on the fact that his relationship with the non-custodial parent will be significantly disrupted. In addition, in certain instances, a trial court may find that the stress of travel, by air or otherwise, may harm the child and that the time spent traveling will, among other things, force the child to forego beneficial, age *380 appropriate activities with peers. The court could also believe that the custodial parent would attempt to move

the child primarily to interfere with the non-custodial parent's relationship with the child, giving the child the impression that frequent contact with his non-custodial parent is expendable. Furthermore, if no self-executing change of custody provision is included in a final decree, a trial court could find that the child's best interests may be quickly and perhaps significantly damaged. For example, without a self-executing change of custody, a child may be moved by the custodial parent to a different state, and by the time the non-custodial parent files a modification action and has it ruled on by trial and appellate courts, what the initial trial court determined to have been the child's best interest will already have been damaged.^{FN20}

FN19. OCGA § 19-9-3(a).

FN20. Although the majority correctly notes that OCGA § 19-9-1(c) provides for certain notices to be given the non-custodial parent if the custodial parent desires to change residences, nothing in § 19-9-1(c) prohibits a custodial parent from moving from an area the trial court has determined that it is in the child's best interest to live, and the 30-day time frame is hardly enough time for a non-custodial parent to contest such a move.

Significantly, permitting a trial court the flexibility to decide whether a self-executing change of custody is appropriate is consistent with the joint

custody awards permitted under **883** our statutes ^{FN21} and with the express policy of this State to “encourage that a minor child has continuing contact with parents and grandparents who have shown the ability to act in the best interest of the child and to encourage parents to share in the rights and responsibilities of raising their children after such parents have separated or dissolved their marriage.” ^{FN22} As has been stated, the foregoing statutes, which were added to our custody laws in the early 1990s, “evince a policy favoring equally shared parenting obligations and opportunities which places children first in the constellation of individual interests and desires.... It thus is evident that the stated legislative policy abandons traditional biases and favors shared parenting rights and responsibilities.” ^{FN23}

FN21. OCGA §§ 19-9-3(a)(5), 19-9-6.

FN22. OCGA § 19-9-3(d). See *Baldwin v. Baldwin*, 265 Ga. 465, 458 S.E.2d 126 (1995) (OCGA § 19-9-3 “indicate[s] a state policy favoring shared rights and responsibilities between both parents”).

FN23. *In the Interest of A.R.B.*, 209 Ga.App. 324, 326, 433 S.E.2d 411 (1993).

Although the dispute is symbolized by a “versus” which signifies two adverse parties at opposite poles of a line, there is in fact a third party whose

interests and rights make of the line a triangle. That person, the child who is not an official party to the lawsuit but whose well-being is in the eye of the *381 controversy, has a right to shared parenting when both are equally suited to provide it. Inherent in the express public policy is a recognition of the child's right to equal access and opportunity with both parents, the right to be guided and nurtured by both parents, [and] the right to have major decisions made by the application of both parents' wisdom, judgment and experience. The child does not forfeit these rights when the parents divorce. Whether a parent forfeits his or her portion of the relationship or any part of it, or is incapable of performance, must be determined by the factfinder.^{FN24}

FN24. *Id.* at 327, 433 S.E.2d 411.

It is in the best interests of children to have a close, loving relationship with fit and interested parents, and such a relationship is hard to foster without regular contact. Thus, trial courts ought to be able to craft these self-executing provisions based on the nature, quality, and duration of the child's relationship with the non-custodial parent, as well as on the age, developmental state, and needs of the child. In this regard, although the majority relies on an article that promotes the goal of permitting the relocation of custodial parents,^{FN25} that article is premised, in part, on the authors' conclusion that frequency of contact with both parents is not necessarily in the child's best

interests.^{FN26} That conclusion is clearly at odds with the stated public policy of this State.^{FN27}

FN25. Judith S. Wallerstein & Tony J. Tanke, *To Move or Not To Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 *Fam. L.Q.* 305 (1996).

FN26. *Id.* at 311-312. In this regard, Wallerstein and Tanke write that the "frequency of visiting or amount of time spent with the non-custodial parent over the child's entire growing-up years is [not] significantly related" to the child's psychological development. *Id.* at 312.

FN27. See OCGA §§ 19-9-3(a)(5), (d); § 19-9-6; *In the Interest of A.R.B.*, 209 Ga.App. at 326-327, 433 S.E.2d 411. Wallerstein and Tanke's study has also come under criticism. See James, *Custody Relocation Law in Pennsylvania: Time To Revisit and Revise Gruber v. Gruber*, 107 *Dick. L.Rev.* 45, 56-60 (2002); Richard A. Warshak, *Social Science and Children's Best Interests in Relocation Cases: Burgess Revisited*, 34 *Fam. L.Q.* 83, 84-87 (2000).

Finally, a parent with physical custody, such as Ms. Scott, will know well in advance the consequences of a move out of the area in which the trial

court has found that it is in the child's best interests to live. If the physical custodian believes that it is not in her child's best interest to remain there, but to move with her, she may always petition the trial court for a modification of the child custody provisions of the final decree. Thus, because the trial court will have considered the child's best interests in providing for a self-executing change of custody, and because the initial custodial parent may file for a modification of the self-executing provision, there is no danger, as alleged by Ms. Scott, that appropriate consideration will not be ****884** given to the child's best interests if self-executing changes of custody are permissible.

For the foregoing reasons, I conclude that the case law and public policy of this State mandate the conclusion that the trial court did not err including the self-executing provision in question in its final judgment. Accordingly, I dissent to the majority opinion.

I am authorized to state that Justice CARLEY joins in this dissent.

Ga., 2003.

Scott v. Scott

276 Ga. 372, 578 S.E.2d 876, 03 FC DR 1104

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Supreme Court of Georgia.

WRIGHTSON

v.

WRIGHTSON.

No. S95A1805.

March 15, 1996.

Reconsideration Denied March 28,
1996.

Marital dissolution was sought. The Superior Court, DeKalb County, Gail C. Flake, J., dissolved marriage and awarded permanent custody to former husband. Former wife's application for discretionary review was granted. The Supreme Court, Benham, C.J., held that: (1) custody could be awarded to former husband; (2) supervised visitation was improperly subject to suspension or modification by therapist; (3) trial court could find that former husband lacked ability to pay child support and alimony; and (4) former husband could be awarded attorney fees incurred in bringing emergency motion for change of temporary custody.

Affirmed in part and reversed and remanded in part.

Fletcher, P.J., concurred in part, dissented in part, and filed opinion in which Hunstein, J., concurred.

West Headnotes

[1] Child Custody 76D ↪467

76D Child Custody

76DVIII Proceedings

76DVIII(B) Evidence

76Dk466 Weight and
Sufficiency76Dk467 k. In general. Most
Cited Cases
(Formerly 134k301)

Evidence supported award of permanent custody of daughter to former husband; award was supported by testimony of former husband's neighbor, his fiance, court-appointed psychiatrist for child, physician who examined child in light of allegations of sexual abuse, former roommate of former wife, and guardian ad litem.

[2] Child Custody 76D ↪531(2)

76D Child Custody

76DVIII Proceedings

76DVIII(D) Judgment

76Dk531 Operation and Effect

76Dk531(2) k. Termination.

Most Cited Cases

(Formerly 134k302)

Child Custody 76D ↪659

76D Child Custody

76DIX Modification

76DIX(C) Proceedings

76DIX(C)3 Hearing and
Determination76Dk659 k. Decision and
findings by court. Most Cited Cases
(Formerly 134k303(8))

Allowing suspension or modification of former wife's supervised visitation, if therapist for child or former husband determined that former wife presented risk to child's emotional or physical safety or presented risk of fleeing with child, was improper as self-executing

suspension or modification of visitation contingent upon determination of therapist; decision had to be made by trial court, not expert.

[3] Child Custody 76D ↪659

76D Child Custody

76DIX Modification

76DIX(C) Proceedings

76DIX(C)3 Hearing and Determination

76Dk659 k. Decision and findings by court. Most Cited Cases (Formerly 134k303(8))

Trial court has responsibility to determine whether evidence warrants modification or suspension of custody/visitation privileges, and that responsibility for making decision cannot be delegated to another, no matter the degree of delegatee's expertise or familiarity with case; while expert's opinion may serve as evidence supporting trial court's decision to modify or suspend visitation, the decision must be made by trial court, not expert.

[4] Child Support 76E ↪556(5)

76E Child Support

76EXII Appeal or Judicial Review

76Ek548 Review

76Ek556 Discretion

76Ek556(5) k. Enforcement; arrearages; contempt. Most Cited Cases (Formerly 134k312.6(4.1))

Trial court's determination that former husband's failure to pay child support and alimony was due to inability to pay and did not warrant contempt

would not be disturbed in absence of gross abuse of discretion.

[5] Costs 102 ↪194.44

102 Costs

102VIII Attorney Fees

102k194.44 k. Bad faith or meritless litigation. Most Cited Cases

Conduct of wife and her attorney in arranging interviews of child by authorities without making court aware of the development could be found to have caused husband's emergency motion for change of temporary custody prior to divorce, and, thus, husband could be awarded reasonable attorney fees incurred in bringing emergency motion. O.C.G.A. § 9-15-14(b).

[6] Courts 106 ↪13.2

106 Courts

106I Nature, Extent, and Exercise of Jurisdiction in General

106I(A) In General

106k13.1 Actions by or Against Nonresidents, Personal Jurisdiction In; "Long-Arm" Jurisdiction

106k13.2 k. In general. Most Cited Cases

(Formerly 106k12(2.1))

Courts 106 ↪29

106 Courts

106I Nature, Extent, and Exercise of Jurisdiction in General

106k29 k. Exercise of jurisdiction beyond territorial limits. Most Cited Cases

State courts have no extra-territorial

jurisdiction and lack personal jurisdiction over citizens of other states.

****579 *499** Domestic relations. DeKalb County Superior; Gail C. Flake, Judge. Patricia B. Ball, Norcross, for Jeannie L. Wrightson.

Janis Y. Dickman, George S. Stern, Stern & Edlin, Atlanta, for Michael F. Wrightson.

***493** BENHAM, Chief Justice.

The final judgment and decree of divorce which dissolved the marriage of appellant Jeannie Wrightson and appellee Michael Wrightson awarded permanent custody of the couple's daughter to appellee/father. In the course of the custody contest, allegations were made that the child had suffered sexual abuse. The trial court's decision to award custody of the child to appellee was based on its findings that appellee was "a committed and capable father" who "can provide excellent care and a wholesome family life" for the child. The trial court further found that the child would benefit greatly from appellee's "nurturing homelife, supportive, child-centered neighbors, and dedicated and helpful extended family." The trial court found no credible evidence that appellee had committed alleged acts of sexual abuse against the child, and reiterated the court-appointed child psychiatrist's observation that the child had "a tremendous amount of safety and trust in [her father]...." While not doubting that appellant/mother loved and cared deeply for the child, the trial court found that appellant's "possessiveness and inability to allow [appellee] to develop

and maintain a healthy parental relationship with his daughter ha[d] become obsessive" and injurious to the child and, if allowed to continue, could have "devastating long-term effects" on the child. We granted appellant's application for discretionary review of the trial court's judgment.

The appellate record and the accompanying transcripts evidencing the eleven days of hearings held by the trial court bear witness to a family tragedy that has spilled over from Georgia into North Carolina and Missouri. The divorce proceedings have formally dissolved what was a Georgia family unit, with appellant currently living in Georgia, appellee in North Carolina, and their soon-to-be six-year-old daughter residing with her paternal grandmother in Missouri.

As soon as it became apparent that custody of the child was contested, the trial court appointed a guardian ad litem for the child and later, a child adolescent psychiatrist to conduct a psychological evaluation of the parties and their daughter. Initially, appellant was awarded temporary custody of the child, with the child visiting her father's North Carolina home. The visitation arrangement was suspended when allegations were made that appellee had sexually ***494** abused his daughter, as well as the four-year-old daughter of his fiancée. The allegations were the culmination of a telephone conversation appellant had with North Carolina authorities expressing concern for the child's well-being while visiting appellee. Before it was dismissed for lack of evidence, the allegation concerning the

fiancee's daughter caused the removal of that child from the home she shared with her mother and appellee, as well as the suspension of unsupervised visitation between appellee and his daughter.

Upon the return of the fiancee's child to her home with her mother and appellee, the Wrightsons' daughter was judicially permitted to resume visitation in appellee's North Carolina home. During the first visitation thereafter, appellee saw North Carolina authorities approaching his home and, fearing they were going to remove his daughter and place her in foster care as they had his fiancee's daughter, appellee returned the child to Georgia, where he consulted with his attorney, the guardian ad litem, and the court-appointed child adolescent psychiatrist. While his attorney successfully petitioned the trial court for an extension of the visitation **580 period and an emergency hearing, appellee took the child to his mother's home in Missouri. He then returned to Georgia for a three-day emergency hearing after which the trial court gave temporary custody of the child to appellee, with physical custody of the child to remain with her paternal grandmother. Both parents were restricted to telephonic visitation with the child. Six weeks later, the trial court entered the final judgment and decree of divorce, giving permanent custody of the child to appellee, and setting a two-year schedule of supervised visitation, followed by liberal and unsupervised visitation privileges for appellant. Contemplating that appellee would have the child remain with her paternal grandmother until the North Carolina

investigations were concluded, the trial court authorized the child's continued temporary residency in Missouri until appellee informed his mother that the North Carolina proceedings had been resolved such that the child could return to her father's home.

[1] 1. The majority of appellant's enumerated errors center around those portions of the trial court's judgment which concern the award of child custody and visitation. Appellant contends the trial court abused its discretion in awarding sole and permanent custody of their daughter to appellee.

“In a contest between parents over the custody of a child, the trial court has a very broad discretion, looking always to the best interest of the child, and may award the child to one even though the other may not be an unfit person to exercise custody or had not otherwise lost the right to custody... Where in such a case the trial judge has exercised [her] discretion, *495 this court will not interfere unless the evidence shows a clear abuse thereof... In a case such as this, it is the duty of the trial judge to resolve the conflicts in the evidence, and where there is any evidence to support [her] finding it cannot be said by this court that there was an abuse of discretion on the part of the trial judge in awarding custody of the minor child to the father.” [Cit.]

Anderson v. Anderson, 240 Ga. 795(2), 242 S.E.2d 593 (1978). The testimony of appellee's North Carolina neighbor, appellee's fiancee, the court-appointed child psychiatrist, a physician

who examined the child in light of the allegations of abuse, appellant's former roommate, and the guardian ad litem support the trial court's findings. As there is evidence to support the award of permanent custody to the father, the trial court did not abuse its discretion, and that part of the judgment awarding permanent custody of the child to her father is affirmed. *Brand v. Brand*, 244 Ga. 124, 259 S.E.2d 133 (1979).

2. Appellant contends the trial court made a prospective award of custody to appellee and an impermissible temporary award of custody in the final judgment and decree of divorce when it determined that the child should remain with her paternal grandmother until the North Carolina proceedings are resolved and it is safe for the child to return to her father's home. Contrary to appellant's assertion, the trial court's judgment clearly awards permanent custody of the child to appellee. Compare *Banister v. Banister*, 240 Ga. 513, 241 S.E.2d 247 (1978) where, in the final judgment of divorce the trial court gave temporary custody of the children to one party and reserved the question of permanent custody for determination at a later date. Since the judgment issued by the trial court awarded permanent custody of the child, it was not an attempt to retain jurisdiction. Compare *Buck v. Buck*, 238 Ga. 540(1), 233 S.E.2d 792 (1977).

[2] 3. The final judgment delineated appellant's visitation privileges and required that visitation be supervised for the first two years. In not more than two years, appellant is entitled to the reasonable, liberal, unsupervised

visitation privileges to which the parties agree.^{FN1} The supervised visitation is subject to suspension or modification **581 should either the therapist treating the child or the therapist treating appellant determine that appellant is a risk to the child's emotional or physical safety or well-being, or presents a risk of fleeing with the child. Appellant maintains that the order calls for an improper self-executing *496 suspension or modification of visitation contingent upon the determination of a therapist.

FN1. The trial court provided a visitation schedule within its order in the event the parties were unable to come to an agreement. Compare *Shook v. Shook*, 242 Ga. 55(2), 247 S.E.2d 855 (1978), where this court held the trial court abused its discretion by refusing to specify a visitation schedule to take effect in the event the parties were unable to agree on visitation.

[3] We agree. " 'Visitation privileges are, of course, part of custody. (Cit.)' [Cit.]" *Prater v. Wheeler*, 253 Ga. 649, 322 S.E.2d 892 (1984). It is the trial court's responsibility to determine whether the evidence is such that a modification or suspension of custody/visitation privileges is warranted, and the responsibility for making that decision cannot be delegated to another, no matter the degree of the delegatee's expertise or familiarity with the case. While the expert's opinion may serve as evidence supporting the trial court's decision to modify or suspend visitation, the

decision must be made by the trial court, not the expert. Accordingly, we reverse that part of the visitation portion of the final judgment which states that supervised visitation “shall be suspended or modified during such time that either therapist determines [appellant] presents a risk to [the child's] emotional or physical safety or well-being or presents a risk of fleeing with [the child],” and remand the case to the trial court for modification of that portion of the final judgment. Cf. *Chandler v. Chandler*, 261 Ga. 598(1), 409 S.E.2d 203 (1991).

[4] 4. Also contained in the final judgment is the trial court's denial of appellant's motion to find appellee in contempt for failure to pay child support and alimony. The trial court found there was an arrearage but that appellee had not had the financial means to make the payments. Appellant contends the trial court erred when it refused to find appellee in contempt for his failure to pay child support. “The trial court in a contempt case has wide discretion to determine whether [its] orders have been violated. [Its] determination will not be disturbed on appeal in the absence of an abuse of discretion. [Cits.]” *Davis v. Davis*, 250 Ga. 206, 207, 296 S.E.2d 722 (1982). The trial court's determination that appellee's failure to pay was due to inability will not be disturbed except for a gross abuse of discretion. *Parr v. Parr*, 244 Ga. 168(1), 259 S.E.2d 432 (1979). Finding no such abuse, we decline to disturb the trial court's resolution of the issue.

[5] 5. After ordering the parties to bear their own costs of litigation,

including attorney fees, the trial court, citing OCGA § 9-15-14, ordered appellant and her counsel to pay appellee the reasonable attorney fees he incurred in bringing his emergency motion for change of temporary custody. The trial court based its order on its determination that the need for judicial intervention was due to the conduct of appellant and her counsel, that is, the proceedings were unnecessarily expanded by improper conduct of appellant and her attorney. OCGA § 9-15-14(b). An award pursuant to OCGA § 9-15-14(b) “is discretionary and the [appellate] standard of review is abuse of discretion.” *Haggard v. Bd. of Regents of the Univ. System*, 257 Ga. 524(4)(c), 360 S.E.2d 566 (1987). As there is evidence which supports the trial court's finding *497 that the emergency hearing was caused by appellant and her counsel arranging interviews of the child by North Carolina authorities without making the court aware of the development, we find no abuse of discretion on the part of the trial court and decline to disturb the award.

6. In its final judgment, the trial court observed that the guardian ad litem had “maintained a continuing commitment to assure that [the child's] welfare and safety are protected.” As the evidence of record supports the trial court's determination, we cannot say the trial court abused its discretion by failing to disqualify the guardian ad litem.

[6] 7. While this matter was pending before it, the trial court issued an order asserting its exclusive personal

jurisdiction over the child and ordering investigatory personnel to ask the trial court's permission should they wish to subject the child to questioning or a physical examination in the ****582** course of their investigations. In light of our remand to the trial court for reconsideration of the limitation placed upon visitation (see Division 3, *supra*), we take this opportunity to remind the trial court that the courts of this state have no extra-territorial jurisdiction and lack personal jurisdiction over the citizens of other states. *Ashburn v. Baker*, 256 Ga. 507(2), 350 S.E.2d 437 (1986).

Judgment affirmed in part and reversed and remanded in part.

All the Justices concur, except FLETCHER, P.J., and HUNSTEIN, J., who dissent in part.

FLETCHER, Presiding Justice, concurring in part and dissenting in part. ^{FN1}

FN1. I concur in the holding in division 3 that the trial court abused its discretion in allowing a therapist to suspend or modify visitation.

I have no hesitation concluding that a trial court abuses its discretion when it awards permanent and sole custody of a five-year-old girl to the father who is the subject of an ongoing, active investigation into allegations that he molested that child. The “any evidence” standard is a highly deferential standard. Deference in the face of the extreme decisions of the trial court in this case, however, amounts to an

abdication of our responsibility to reverse the trial court when there has been a clear abuse of discretion.

1. Six weeks before the award of custody was made, the trial court heard testimony from a special agent from the North Carolina State Bureau of Investigation who stated that the father was the subject of a criminal investigation into whether he had abused his child when she was in North Carolina for court-ordered visitation. The agent testified that the investigation began in September 1994, was ***498** ongoing, and the agent planned to present a case to a grand jury. Additionally, the agent testified that while the mother had first contacted North Carolina authorities in August 1994, she had no role in their continuing investigation. The trial court allowed the agent to testify regarding only the status and not the details of the investigation. Therefore, it cannot be said that the trial court weighed the evidence held by the North Carolina authorities and found it lacking or that the mother's allegations were the sole basis of the investigation.

FN2

FN2. The trial court did hear testimony that the North Carolina authorities had insufficient evidence to proceed against the father for molesting his live-in-lover's child.

2. The trial court's disdain for the North Carolina investigation is shown in two other respects.

(a) Prior to entering the final decree and judgment, the trial court issued an

order requiring the North Carolina investigatory and social services agencies to seek permission from the trial court before conducting any interviews of the child. A court of this state clearly has no authority to direct authorities in another state who are investigating possible criminal behavior committed within their jurisdiction.^{FN3}

FN3. The North Carolina Attorney General filed an amicus brief that discusses the constitutional and statutory provisions in that state regarding investigation of child abuse and the protection of minor child who may be abused.

(b) Finally, the trial court actually approved the father's flight from North Carolina with the child to avoid the police. In March 1995, the child was in North Carolina for court-ordered visitation that was to take place "at his home in Asheville, North Carolina." During that visitation, the father and child were in a nearby park when he observed police approaching his house. Believing that the police had a court order to remove the child from his house or an indictment against him, he hid for several hours and sent the child off with neighbors so she would not be found. Then later that night, without informing the child's mother or her counsel, he took the child and the two fled North Carolina. He and the child spent the night on the road, drove to Atlanta, and then took the child to his mother's home in Missouri. Incredibly, following an emergency ****583** hearing ^{FN4} the trial court validated the father's actions in spiriting the child away under cover of

darkness to evade police by placing temporary custody with his relatives in Missouri.

FN4. The emergency hearing was initiated by the father who was in violation of the court's prior order at the time he brought the emergency motion for a change of custody.

3. While the trial court shut its eyes to an ongoing, active investigation in another state, and approved the father's intentional avoidance of that investigation, it relied on a court-appointed psychiatrist who testified that he spent no more than one hour alone with the child and who was "convinced right off the bat" that there was no abuse when he observed the child and father together in his office.

Evidence of the father's "wholesome family life" ^{FN5} cannot overshadow the reality of an ongoing, active criminal investigation. Clearly, the trial court's custody determination was not based on then existing facts, but on the court's hopeful assumption that the father would be cleared. Under these extreme and unusual circumstances, I would find that the trial court abused its discretion and would remand for additional evidence and a new determination of custody.

FN5. Prior to obtaining a divorce, the father began living with another woman and fathered a child out-of-wedlock.

4. Finally, I cannot agree that the trial court was authorized in its final

order to allow custody to shift from the grandmother in Missouri to the father based solely on *the father's* notification to his relatives that the North Carolina proceedings were over. This court has never before approved a self-executing change of custody based on a parent's unverified assertion that he has been cleared in a child abuse investigation and we should not do so now.

I am authorized to state that Justice HUNSTEIN joins in this partial concurrence and partial dissent.

Ga.,1996.

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266 Ga. 493, 467 S.E.2d 578

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