OTPCLE

Family Law Foundations: 1.28.21

Parenting Plans—A Closer Look

E. Lauren Ducharme

I. When are Parenting Plans required?

A. Statutory Requirement Set Forth by O.C.G.A. §19-9-1(a)[1]

a. Parenting Plans are required in "all cases in which the custody of any child is at issue between the parents."

i. Actions involving minor children which require a Parenting Plan include divorces and modification of custody and/or parenting time provisions.

b. Does it matter if the award or modification of custody/parenting time provisions is Temporary versus Final?

i. Maybe. O.C.G.A. §19-9-1(a) states that a Parenting Plan shall be required for permanent (or final) custody and modification actions, and that it is in the court's discretion as to whether to require same for a Temporary Hearing.

1. Prior to a Temporary Hearing, you may wish to check with the Judge's office as to the Court's preference with regard to Parenting Plans for temporary awards/modifications of custody.

[1] See O.C.G.A. §19-9-1(a) attached as **Exhibit 1**.

c. What happens if you fail to file a proposed Parenting Plan for a Final Hearing?

i. Pursuant to O.C.G.A. §19-9-1(c),[2] failure to file and serve a proposed parenting plan on or before the date set by the court, may result in the court adopting the proposed parenting plan of the opposing party (if the judge finds that such parenting plan is in the best interests of the child).

B. Are Parenting Plans ever not required?

a. Pursuant to O.C.G.A. §19-9-1(a), Parenting Plans are not required in Family Violence Actions.

C. Does the Parenting Plan need to be a separate document?

a. Not necessarily—this is within the discretion of the court.

b. Some jurisdictions require a separate Parenting Plan; however, some jurisdictions will accept a Parenting Plan which is part of a Settlement Agreement.

II. What *must* be included in a Parenting Plan?

A. Statutory Requirements Set Forth by O.C.G.A. §19-9-1(b)(1)(A)-(D)[3]—

A recognition that…

a. A close and continuing parent-child relationship and continuity in the child's life will be in the child's best interest;

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[2] See O.C.G.A. §19-9-1(c) attached as **Exhibit 1**.
[3] See O.C.G.A. §19-9-1(b)(1)(A)-(C) attached as **Exhibit 1**.

b. The child's needs will change and grow as the child matures, and the parents will make an effort to parent in a manner that takes this into account so that future modifications to the parenting plan are minimized;

c. A parent with physical custody will make the day-to-day decisions and emergency decisions while the child is residing with such parent; and

d. Both parents will have access to all of the child's records and information (i.e., education, health, health insurance, extracurricular activities, and religious communications).

B. Additional Statutory Requirements Set Forth by O.C.G.A. §19-9-1(b)(2)(A)-(G)[4]— Unless otherwise agreed or ordered by the Court:

a. Which parent will exercise time with the child each day of the year;

i. Include provision for when the regular parenting time schedule begins.

b. Division of holidays, birthdays, vacations, school breaks, and special occasions, including the time of day for the child's exchange;

c. Transportation arrangements;

d. Whether supervision will be needed for parenting time;

e. Division of decision-making authority as to the child's education, health, extracurricular activities, and religious upbringing;

f. Particulars of contacting the child and any limitations on the parents' right to access records and information of the child;

g. If either parent is in the military, how to manage transitions and communication with the child during periods of deployment.

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[4] See O.C.G.A. §19-9-1(b)(2)(A)-(G) attached as **Exhibit 1**.

III. What *should* you consider including in a Parenting Plan?

A. Legal Custody Considerations

a. Access to Information[5]

i. Each party's right to create his/her own online login to access the child's grades and attendance.

ii. Each party's right to directly receive extracurricular activity schedules and updates (i.e, the soccer schedule).

b. Final Decision-Making Authority

i. If child has an IEP

1. Consider awarding final-say as to education and non-emergency health to the same parent.

ii. Choice of Daycare

iii. Child's Mental Healthcare

B. Classic Non-Disparagement Provisions & Additional Co-Parenting Provisions

i. Classic Non-Disparagement Provisions

1. Neither parent shall do anything that could damage the love or respect of the minor child for the other parent or which may hamper the free and natural development of the minor child's love and respect for the other parent. Neither parent shall make unkind remarks or derogatory statements about the other parent to, or in the presence of, the minor child.

ii. Additional Co-Parenting Provisions:

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[5] See Sample Language attached as **Exhibit 2**.

1. The parents' communication with each other (including text and email) shall be respectful in content, meaning no name-calling and/or deliberate antagonism of the other parent.
    a. Consider any limitations on the method of the parties' communication
        i. If only by email or text, is there opportunity to schedule voice calls to discuss legal custody issues?
        ii. Our Family Wizard – Model Language is available—ToneMeter
        iii. Is there a required response time to messages inviting or requiring a response?
2. The parents shall make genuine efforts to refrain from arguing or disagreements in the presence of the child and from sharing with the child the fact and/or content of an argument or disagreement with the other parent.
3. Neither parent shall discuss the causes of the parties' separation and/or divorce with the child.
4. Neither parent shall discuss finances with the child in the context of the parties' court-ordered financial obligations or entitlements.
5. Neither parent shall interrogate or quiz the child about his/her time with the other parent.
6. Neither parent shall ask the child to keep a secret from the other parent.
7. The parent concluding his/her parenting time shall approach the custody exchange with positivity to reduce, rather than exacerbate, any sadness, guilt, or anxiety the child may feel about the transition.

B. Miscellaneous Provisions Based on Circumstances

a. When one or both parents have substance abuse issues…

i. Prohibition against using or being under the influence of illegal drugs, which includes prescription drugs not prescribed to that parent, and/or using or being under the influence of prescription drugs taken inconsistent with the prescription.

ii. Prohibition against consuming or being under the influence of alcohol during parenting time OR prohibition against consuming alcohol "to excess" during parenting time.

1. Enforceability considerations.

2. How to define "to excess"

iii. Prohibition against driving the child after consuming alcohol

iv. Testing

1. When the use of alcohol and/or illegal drugs is prohibited for the parent at any time[6]

a. Consider randomized drug and alcohol testing protocol (combo of urine and Peth tests) administered by a lab.

i. Specify what happens if test is not submitted to timely or if a "dilute" sample is returned.

2. When the use of alcohol is prohibited during parenting time

a. Consider Soberlink.[7] Be specific about the level of plan selected.

v. Consider creating a "clean" Parenting Plan for dissemination to child's school, extracurricular activities, and healthcare providers.

a. Provisions for Older Children

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[6] See Sample Language attached as **Exhibit 4**.
[7] See Sample Language attached as **Exhibit 5.**

i. For children with cell phones, consider provisions which address:

1. Each parent's right and ability (passwords) to access the child's phone and apps.
2. Any agreed upon limitations as to the child's possession of his/her cell phone (i.e., no later than 10 pm on school nights).
3. Whether "grounding" a child from using his/her cell phone is permitted, and if so, the protocol for communication between the child and other parent during such periods of "grounding."

ii. Consider an acknowledgment that the child is "x" years old and the parties recognize that the child may have his/her own academic, extracurricular, or work obligations.

iii. For a child who drives and has more control over time spent in each household, consider a requirement that the parties communicate closely to ensure that both parents know and confirm where the child is at all times so as to ensure the child's supervision.

IV. What should *not* be included in a Parenting Plan?

A. Self-Executing Change of Custody Provisions

a. What is this?

i. A provision that results in an automatic change of custody or material change in visitation in the future, without the Court's consideration of the best interests of the child at that time.[8]

b. Two Ways Impermissible Self-Executing Change of Custody Provisions Present[9]

i. Provisions which rely on a third-party's future exercise of discretion rather than the court's judgment.

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[8] See Ga. Divorce, Alimony, & Child Custody §33:6 attached as **Exhibit 6.**
[9] See *Weiss v. Grant*, 346 Ga. App. 208 (2018) attached as **Exhibit 7.**

1. For example, the parties agree that a parent's visitation will be contingent upon participation in reunification therapy and that the parties shall follow the recommendations of the reunification therapist with regard to the ultimate visitation schedule.

ii. Provisions which execute at some uncertain date well into the future.

1. For example, Mother shall have primary physical custody of the child for so long as she resides within 35 miles of Cobb County. In the event that Mother relocates more than 35 miles away from Cobb County, primary physical custody of the child shall automatically revert to Father.[10]

c. Are there any circumstances under which some version of this is allowed?

i. On a temporary basis, following the recommendations of a third-party professional may be acceptable because the case is still before the Court.

ii. When an automatic change of visitation is not material.[11]

1. For example, the parties currently live 25 miles away from each other, and Father has every other weekend and every other week dinner visits with the child. If Father relocates to within 10 miles of Mother, Father's every other Wednesday dinner visit shall be converted into an overnight visit.

iii. When visitation gradually increases over time pursuant to a detailed schedule and tight timetable.[12]

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[10] See *Scott v. Scott*, 276 Ga. 372 (2003) attached as **Exhibit 8.**
[11] See *Dellinger v. Dellinger*, 278 Ga. 732 (2004) attached as **Exhibit 9.**
[12] See *Weiss v. Grant*, 346 Ga. App. 208 (2018) attached as **Exhibit 7.**

1. For example, in *Weiss v. Grant*, the trial court's schedule building from supervised visits to unsupervised visits over a 12-month period, with months, visit durations, and visitation safeguards specified, did not constitute an impermissible self-executing change of custody.[13]

B. Certain Prohibitions against Exposing Children to Individuals

a. Three Ways these Unenforceable Provisions May Present

i. Overly broad

1. For example, the provision that Mother shall not have "any overnight male guests while the minor children are present" was overly broad because it prevented mother from having male visitors with whom she has no romantic relationship.[14]

ii. No evidence that exposure has or would harm the children

1. For example, the provision that the children will not be exposed to a certain named friend of Wife was impermissible when there was "no evidence that the relationship between Wife and her friend was or will be harmful to the children, or that they ever engaged in any inappropriate conduct in the presence of the children."[15]

iii. Provision based on arbitrary classification in violation of the Equal Protection Clause

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[13] *Weiss v. Grant*, 346 Ga. App. 208 at 215 (2018).
[14] See *Ward v. Ward*, 289 Ga. 250 (2011) attached as **Exhibit 10.**
[15] See *Arnold v. Arnold*, 275 Ga. 354 (2002) attached as **Exhibit 11.** See also, *Brandenburg v. Brandenburg*, 274 Ga. 183 (2001).

1. For example, provisions which prevent the children's exposure to a certain named individual "or any other African-American male"[16] and provisions which prevent the children's exposure to Husband's "homosexual partners and their friends."[17]

[16] See *Turman v. Boleman*, 235 Ga. App. 243 (1998) attached as **Exhibit 12.**
[17] See *Mongerson v. Mongerson*, 285 Ga. 554 (2009) attached as **Exhibit 13.**

West's Code of Georgia Annotated
Title 19. Domestic Relations (Refs & Annos)
Chapter 9. Child Custody Proceedings (Refs & Annos)
Article 1. General Provisions

Ga. Code Ann., § 19-9-1

§ 19-9-1. Parenting plan for child custody

Effective: July 1, 2016
Currentness

(a) Except when a parent seeks emergency relief for family violence pursuant to Code Section 19-13-3 or 19-13-4, in all cases in which the custody of any child is at issue between the parents, each parent shall prepare a parenting plan or the parties may jointly submit a parenting plan. It shall be in the court's discretion as to when a party shall be required to submit a parenting plan to the court. A parenting plan shall be required for permanent custody and modification actions and in the court's discretion may be required for temporary hearings. The final order in any legal action involving the custody of a child, including modification actions, shall incorporate a permanent parenting plan as further set forth in this Code section; provided, however, that unless otherwise ordered by the court, a separate court order exclusively devoted to a parenting plan shall not be required.

(b)(1) Unless otherwise ordered by the court, a parenting plan shall include the following:

(A) A recognition that a close and continuing parent-child relationship and continuity in the child's life will be in the child's best interest;

(B) A recognition that the child's needs will change and grow as the child matures and demonstrate that the parents will make an effort to parent that takes this issue into account so that future modifications to the parenting plan are minimized;

(C) A recognition that a parent with physical custody will make day-to-day decisions and emergency decisions while the child is residing with such parent; and

(D) That both parents will have access to all of the child's records and information, including, but not limited to, education, health, health insurance, extracurricular activities, and religious communications.

(2) Unless otherwise ordered by the court, or agreed upon by the parties, a parenting plan shall include, but not be limited to:

(A) Where and when a child will be in each parent's physical care, designating where the child will spend each day of the year;

(B) How holidays, birthdays, vacations, school breaks, and other special occasions will be spent with each parent including the time of day that each event will begin and end;

(C) Transportation arrangements including how the child will be exchanged between the parents, the location of the exchange, how the transportation costs will be paid, and any other matter relating to the child spending time with each parent;

(D) Whether supervision will be needed for any parenting time and, if so, the particulars of the supervision;

(E) An allocation of decision-making authority to one or both of the parents with regard to the child's education, health, extracurricular activities, and religious upbringing, and if the parents agree the matters should be jointly decided, how to resolve a situation in which the parents disagree on resolution;

(F) What, if any, limitations will exist while one parent has physical custody of the child in terms of the other parent contacting the child and the other parent's right to access education, health, extracurricular activity, and religious information regarding the child; and

(G) If a military parent is a party in the case:

(i) How to manage the child's transition into temporary physical custody to a nondeploying parent if a military parent is deployed;

(ii) The manner in which the child will maintain continuing contact with a deployed parent;

(iii) How a deployed parent's parenting time may be delegated to his or her extended family;

(iv) How the parenting plan will be resumed once the deployed parent returns from deployment; and

(v) How divisions (i) through (iv) of this subparagraph serve the best interest of the child.

(c) If the parties cannot reach agreement on a permanent parenting plan, each party shall file and serve a proposed parenting plan on or before the date set by the court. Failure to comply with filing a parenting plan may result in the court adopting the plan of the opposing party if the judge finds such plan to be in the best interests of the child.

Credits

Laws 1957, p. 412, § 1; Laws 1962, p. 713, § 1; Laws 1976, p. 1050, § 1; Laws 1978, p. 258, § 2; Laws 1983, p. 632, § 1; Laws 1984, p. 22, § 19; Laws 1986, p. 1000, § 1; Laws 1986, p. 1036, § 1; Laws 1988, p. 1368, § 1; Laws 1992, p. 1656, § 1; Laws 1995, p. 863, § 5; Laws 1999, p. 329, § 3; Laws 2000, p. 1292, § 1; Laws 2007, Act 264, § 5, eff. Jan. 1, 2008; Laws 2011, Act 68, § 2, eff. May 11, 2011; Laws 2013, Act 171, § 2, eff. July 1, 2013; Laws 2016, Act 362, § 1, eff. July 1, 2016.

Formerly Code 1863, § 1685; Code 1868, § 1728; Code 1873, § 1733; Code 1882, § 1733; Civil Code 1895, § 2452; Civil Code 1910, § 2971; Code 1933, § 30-127.

Ga. Code Ann., § 19-9-1, GA ST § 19-9-1

The statutes and Constitution are current through laws passed at the 2020 legislative sessions. Some statute sections may be more current, see credits for details. The statutes are subject to changes by the Georgia Code Commission.

End of Document

Sample Language

Access to Information – Exhibit 2

Both parties shall be entitled to information concerning the children's health (including mental health), education, participation in extracurricular activities and summer camps, and childcare, if any. Both parents shall be listed as "parents" and emergency contacts for the children on all paperwork required by health (including mental health) providers, the children's schools, extracurricular activity providers, and childcare providers (if any). Registration of the children for an extracurricular activity, summer camp, or childcare, the contact information, including but not limited to email address, of both parents shall be provided to the provider/institution. Mother shall immediately take any necessary action to so add Father to any platform concerning the children's education (including but not limited to "Parent Portal" or similar platform utilized by the children's schools) and participation in extracurricular activities (including but not limited to the platform utilized by i9 Sports) so that both parents may access information available to parents and receive updates for parents and children directly.

Sample Language

Proposed Parenting Plan – Exhibit 3

IN THE SUPERIOR COURT OF FORSYTH COUNTY

STATE OF GEORGIA

,	)	
	)	
Plaintiff,	)	
	)	**Civil Action**
v.	)	
	)	**File Number:**
,	)	
	)	
Defendant.	)	

DEFENDANT'S PROPOSED PARENTING PLAN ORDER

Now Comes, , Defendant in the above-styled divorce action, by and through his attorney of record, E. Lauren Ducharme who respectfully submits Defendant's Proposed Parenting Plan Order:

This is an original Parenting Plan.

Child's Name	Year of Birth

I. Custody and Decision Making:

A. Legal Custody

The parties shall have joint legal custody of the minor child.

B. Physical Custodian

Mother shall have primary physical custody of the minor child, subject to Father's parenting time.

C. Day-To-Day Decisions

(1) Ordinary Day to Day Decisions

Day-to-day decisions of a routine nature, including but not limited to, bedtime, scheduling of homework, and day-today customary social activities shall be made by the parent who has physical custody of the child at the time; provided however that the parties shall attempt to establish consistency in each parent's home.

In the event that the child develops an illness or injury of a seriousness sufficient for the child to require medical attention and/or stay home from school, the parent caring for the child shall promptly inform the other parent of the child's condition. The parents shall cooperate to exchange any medications prescribed to the child so that each parent is able to administer the child's prescription medications to her during his/her parenting time. Both parents shall stock over-the-counter medications for the child as well as toiletry/hygiene products during his/her parenting time.

(2) Emergency Decisions

Emergency medical or dental treatment for the child may be obtained immediately by either parent. Any emergency decision which must be made concerning injury or illness of the child shall be made by the party exercising physical custody of the child at the time a decision must be made, provided that that party notify the other party of the emergency situation as soon as reasonably practical under the facts and circumstance then existing.

D. Major Decisions

The parties shall consult with each other as to all major decisions concerning non-emergency health, education, choice of extracurricular activities, and religious upbringing of the minor child.

Major decisions shall be considered and discussed by both parties and made jointly by them. In the event the parties are unable to reach an agreement after consultation, the Mother shall have final decision-making authority.

Each party shall have full access to all medical and educational providers and shall be allowed to consult with any such providers on behalf of the child. Further, both parties shall be entitled to any and all information pertaining to school functions and activities for the minor child, including but not limited to, open houses, parent-teacher conferences and extracurricular activities, and both parties shall be entitled to attend any and all of these functions and activities normally attended by parents.

II. Parenting and Visitation Schedule

The following should not be construed as precluding other visitation or alternative arrangements. The best visitation plan is one the parties have agreed to, rather than one imposed by the court.

The parties shall be entitled to parenting time whenever they can agree; however, in the event that the parties cannot reach an agreement, the below schedule shall constitute the default parenting time schedule. In addition, both parties shall be entitled to the holiday and school break parenting time set forth herein.

A. Regular Parenting Time

Commencing October 30, 2020, Father shall have parenting time with the child every other weekend from Friday at 6:30 pm until Sunday at 6:30 pm.

B. Holiday/School Break Parenting Time:

(1) **Fall Break:** In odd years, Mother shall have parenting time from 6:30 pm on the day school is released for the break until 6:30 pm on the day before school resumes. In even years, Father shall have parenting time from 6:30 pm on day school is released for the break until 6:30 pm on the day before school resumes.

(2) **Thanksgiving:** In even years, Father shall have parenting time from 6:30 pm on the day school is released for the break until 6:30 pm on the day before school resumes. In odd years, Mother shall have parenting time from 6:30 pm on day school is released for the break until 6:30 pm on the day before school resumes.

(3) **Winter (December) Break:** In even years, Mother shall have parenting time from 6:30 pm on the day school is released for the break until December 25th at 1 pm, and Father shall have parenting time from 1 pm on December 25th until 6:30 pm on the day before school resumes. In odd years, Father shall have parenting time from 6:30 pm on the day school is released for the break until December 25th at 1 pm, and Mother shall have parenting time from 1 pm on December 25th until 6:30 pm on the day before school resumes.

(4) **Spring Break:** In odd years, Mother shall have parenting time from 6:30 pm on the day school is released for the break until 6:30 pm on the day before school resumes. In even years, Father shall have parenting time from 6:30 pm on day school is released for the break until 6:30 pm on the day before school resumes.

(5) **Mother's Day and Father's Day weekends:** Father shall be entitled to have the minor child with him on Father's Day weekend from 6:30 pm on the Friday immediately preceding Father's Day until Sunday at 6:30 pm. Mother shall be entitled to have the minor child with her on Mother's Day weekend from 6:30 pm on the Friday immediately preceding Mother's Day until 6:30 pm on Sunday.

(6) **Summer:** The regular parenting time schedule shall govern, except that each party shall be entitled to two, seven-day weeks of parenting time with the child during the summer. In odd years, Father shall notify Mother of his selected weeks by 3/1, and Mother shall notify Father of her selected weeks by 3/15. In even years, Mother shall notify Father of her selected weeks by 3/1, and Father shall notify Mother of her selected weeks by 3/15. Neither party shall select the week before school resumes, when the regular parenting time schedule shall resume.

(7) **Monday Holidays:** The parent entitled to regular weekend parenting time adjoined to a Monday holiday shall have parenting time until Monday at 6:30 pm.

C. Coordination of Parenting Schedules

The exercise of holiday parenting time shall not cause the alternation of weekends/weeks to reset. The holiday/school break parenting time takes precedence over the regular parenting time schedule, and holiday parenting time takes precedence over school break parenting time (i.e., Father's Day).

D. Transportation Arrangements

Unless the parties agree otherwise, Father shall pick up and drop off the minor child at Mother's residence.

E. Contacting the Children

The parents agree that when the child is with one parent, the other parent will have the right to unhampered telephone conversations (this also applies to texting) with the child as follows:

- Unrestricted telephone access to the child with reasonable frequency, during reasonable hours and for reasonable durations.
- The child may call either parent at any reasonable time, which does not interfere with homework, bedtime, meals, etc.
- Neither parent will monitor the child's telephone/text conversations with the other parent.

F. Communication Provisions

During the term of this parenting plan, a parent shall always have the current address and cell phone number of the other parent. A parent shall promptly notify the other parent of a change of address or cell phone number. A parent changing residence must give at least thirty (30) days' written notice of the change (email is acceptable) and provide the full address of the new residence. If a parent is traveling with the child overnight, or taking the child out of state, he/she shall provide the other parent with 7 days' written notice (email is acceptable) of the trip and the address where the child will be staying. If the child is traveling by air, the parent traveling with the child shall provide the other parent with the child's flight

itinerary at the time s/he provides written notice of the trip.

III. Access Rights to Records and Information

Each parent shall have direct access to the child's school, medical, dental and other records of every type, wherever they may be located, and shall have the right to discuss the child with doctors, teachers, administrators, coaches, youth leaders, and any and all other persons who are involved in any aspect of the child's life. Each party shall ensure that the other is listed on all communications and parenting lists regarding extracurricular or educational activities for the child. Each parent shall be entitled to create his/her own username for any school-sponsored online platforms providing access to the child's grades, attendance records, class schedules and assignments, and announcements.

IV. Modification of Plan or Disagreements

By mutual agreement, the parties may vary the parenting time; however, such agreement shall not be a binding court order or be construed as modifying a previous order. Custody shall only be modified by court order. If the parents disagree about this parenting plan or wish to modify it, they must make a good faith effort to resolve the issue between themselves prior to filing a modification action.

V. Conduct of the Parties

The parties shall always promote the welfare and best interest of the child andshall confer with each other on all important matters relating to the child. The parties shall not do anything which will or may tend to estrange the child from the other party. Neither parent shall, directly or indirectly, encourage the child not to visit with the other parent, or otherwise interfere with the other party's rights of custody or visitation. The parties shall use their best efforts to amicably resolve disputes which may arise.

Additionally, the parties shall refrain from the following conduct, which is illustrative of noncompliance with the spirit and intent of the co-parenting principles set forth in this agreement:

(1) neither parent shall make unkind remarks or derogatory statements about the other to, or in the presence of, the minor child;
(2) neither parent shall do anything that could damage the love or respect of the minor child for the other parent or which may hamper the free and natural development of the minor child's love and respect for the other parent;
(3) neither parent shall discuss the causes of the parties' divorce with the child;
(4) neither party shall have the minor child deliver money or messages from one parent to the other;
(5) neither party shall ask the minor child to keep a secret from the other parent;
(6) neither party shall interrogate or quiz the minor child about her time with the other parent;
(7) neither party shall tell the minor child who wants to do something that costs money to "Ask your Father because he is not paying me enough child support" or to "Ask your Mother because I give her plenty of child support;"

(8) the parents shall make genuine efforts to refrain from arguing in the presence of the child and from sharing with the child the fact and/or content of an argument with the other parent; and

(9) the parties' communication (including text messages and email) shall be respectful in content, meaning no name-calling or deliberate antagonism of the other party.

VI. Instruction of the Court

The Court instructs the parties as follows:

1. A close and continuing parent-child relationship and continuity in the child's life is in the child's best interest.

2. The child's needs will change and grow as the child matures, and the parties shall make a good faith effort to take these changing needs into account so that the need for future modifications to the Parenting Plan is minimized.

2. The parties recognize that the parent with physical custody will make the day to day decisions and emergency decisions while the child is residing with such parent.

SO, ORDERED, this____day of _____, 2021.

_____
Superior Court of Forsyth County
Bell-Forsyth Judicial Circuit

Prepared by:

Mother shall submit to the ETG test within four (4) business hours (9:00 a.m. – 5:00 p.m.) of Father's request. If the test result is negative, Father shall reimburse Mother for the cost of the negative test. Except as otherwise specified herein, Mother shall be responsible for the cost of all testing.

(d) Additional Testing: Mother shall be required to pass random drug and alcohol screening at her expense, through Choice Labs, and she shall contact Rhonda Leach at (770)467-6700 within 24 hours of this Agreement to register and to start the testing process. Mother shall submit to three (3) ETG urine tests with a 10 panel drug screen each month and one (1) PeTH blood test each month. Mother shall be required to submit to said random testing on the same day she is selected to screen. Father shall be entitled to receive a copy of all test results directly from Choice Labs. Mother shall sign releases which are necessary for Father to have complete access to the test results which are administered through this Order via Choice Labs or any other testing Mother submits to during the pendency of this Agreement via DUI Court or her current probation (if administratively possible). The failure of any test, failure to take any test or refusal to take any test, will result in an immediate suspension of Mother's visitation time with the minor child until further agreement or court order.

(e) Progressive Parenting Time Schedule: Provided Mother meets the testing requirements herein, she shall have the following periods of parenting time with the minor child, which are progressive in nature:[1]

[1] The parties acknowledge that Mother will be attending DUI Court, which meets once per week (though Mother does not know when at this time). If Mother's parenting time conflicts with said mandatory meeting, the parties shall select an alternate day for the parenting time to occur, by and through attorneys if necessary.

EXHIBIT
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SPECIAL CONDITIONS

The parties agree that the safety of the minor child is paramount. As such, certain conditions shall be required to help insure the safety and well-being of the child.

a) Neither party shall use any illegal drugs or be under the influence of any illegal drugs while the child is in their care.

b) Mother shall not consume any alcohol or have alcohol in her home or vehicle while the child is a minor. Further, Mother shall not abuse any prescription drug. She shall not take or be under the influence of any prescription drug not provided to her by a current prescription from a medical doctor.

c) Mother has registered for and is currently enrolled in the SoberLink Level 2 Premium Program and shall remain on said program unless certain conditions pursuant to this Order are met (see section d below). Each party has agreed to and executed a Level 2 Family Law Monitoring Program Agreement ("Exhibit C"). Said Soberlink Agreement shall not be filed with this Court, but the document shall be incorporated by reference. The Mother shall be fully responsible for any and all costs associated with this program. The Mother shall list the Father as a "concerned party" so that he is able to receive all test results. The Mother shall submit to each test as set out in the Soberlink Agreement, to wit, a test each morning at the Mother's typical waking hour, a test each evening at the Mother's typical bed time hour, and a daily test that is scheduled by Soberlink. Said testing shall take place every day, seven days per week, fifty-two weeks per year. In addition, Mother shall conduct a test both within one hour prior to driving with the minor child in the vehicle and within one hour after the termination of Mother

[redacted]
Mother's Initials

[redacted]
Civil Action File Number: [redacted]
Forsyth County Superior Court

[redacted]
EXHIBIT
tabbies
5

driving with the child in the vehicle. "Driving with the minor child" shall include any scheduled visitation pickup or drop off for which Mother is responsible, notwithstanding whether she has another individual drive, and shall include any motorized craft, including watercraft. A test will be considered "missed" if it is not performed within one hour of the time set out above. All Soberlink records shall be admissible in Court.

d) After testing negative for a period of 12 months with no failures or missed tests as defined by Soberlink, Mother may change her registration with SoberLink to Level 1 testing (testing only during Parenting Time). Each party will agree to and sign the Level 1 Family Law Member Program Agreement. The Mother shall be fully responsible for any and all costs associated with this program. The Mother shall list the Father as a "concerned party" so that he is able to receive all test results. The Mother shall submit to each test as set out in the Soberlink Agreement, which will include a testing schedule as follows: a test one hour before picking up the child for parenting time, every evening at 9:00 pm when the child is scheduled to be with Mother for Parenting Time and every morning at 9:00 AM while the child is scheduled to be with Mother for Parenting Time. Said testing shall take place only on parenting time days for Mother. A test will be considered "missed" if it is not performed within one hour of the time set out above. All Soberlink records shall be admissible in Court. In the event of one positive test or failure to retest as defined by Soberlink, Mother shall immediately reinstate the Level 2 Plan set out above. Mother shall remain on the Level 2 Soberlink Plan as set out above until for twelve (12) consecutive months. After testing negative for a period of 12 months with no failures or missed tests as defined by Soberlink, Mother may again change her registration with SoberLink to Level 1 testing (testing only during

Parenting Time) pursuant to this Paragraph. In the event of any failed or missed tests on Level 1, Mother shall immediately return to Level 2 testing protocols

e) If Mother contends the Soberlink device is compromised or lost, she will immediately seek a replacement and submit to an EtG test every 3 days at her expense until the new Soberlink device is delivered to Mother. As the testing facility is only open Monday through Friday, if a test needs to be taken on a Saturday or Sunday, Mother will do it by 10:00 A.M. Monday morning.

d) If Father requests same via text, Mother shall submit to a hair follicle test but not more than once in a ninety (90) day period. Said test shall be conducted by a licensed facility. Father shall be permitted to receive a copy of all test results directly from the facility. Mother shall sign any release necessary for Father to obtain said test results. The test shall be conducted to detect, at minimum, the following drugs: Amphetamine/methamphetamine/ecstasy, marijuana metabolite, cocaine and metabolites, opiates (codeine, morphine, 6-acetylmorphine), and phencyclidine (PCP). Father shall be responsible for the cost of the testing. Father shall "pre-pay" for any test that Mother is required to take pursuant to this paragraph so that Mother is able to take the test as required. If Mother tests positive, Mother shall reimburse Father for the cost of the failed test within 10 days of the results being obtained. Mother shall ensure that she reports to the testing agency any prescriptions drugs she has been prescribed by a doctor, including drugs administered for surgery purposes and detection of those shall not be a "failed" test.

e) Additional testing: In the event Father has a good faith belief that Mother is under the influence or may be circumventing the above testing, he may request that

Ga. Divorce, Alimony, & Child Custody § 33:6

Georgia Divorce, Alimony, and Child Custody October 2020 Update
David A. Webster and Deborah A. Johnson

Part III. Custody

Chapter 33. Custody—Miscellaneous Provisions

§ 33:6. Self-executing orders and agreements

It is permissible for a divorce agreement which has been approved by the court to contain a self-executing change of custody and modification of child support obligations,[1] so long as primary importance is given to the child's best interests, at the time of the change.[2] For example, it has been held permissible where the event was a child obtaining age 14 who would elect to live with the noncustodial parent.[3] Such is not permissible for a child under 14.[4] On the other hand, where the factual situation (such as remarriage and relocation) does not give primary importance to the best interests of the child and thus, violates public policy, such would not be permissible.[5] A self-executing change of custody provision is not permissible if it ignores the child's best interests at the time of the change.[6] However, self-executing changes of visitation may be allowed where (1) there is evidence that one or both parties have committed to a given course of action that will be implemented at a given time; (2) there is evidence how such will impact upon the best interests of the child; and (3) the provision is carefully crafted to address the effects on the offspring of that given course of action; but the foregoing would apply only in extremely narrow circumstances and must be drafted to ensure it will not impact adversely upon any child's best interest.[7] Furthermore, it is not the factual situation at the time of the divorce decree that determines whether a change is warranted, but the factual situation existing at the time of the material change in custody, and the same rules apply to visitation.[8]

There is no distinction between custody and visitation when a material change in visitation is at issue.[9] Also, where an expert is involved, the expert's opinion may serve as aiding the trial court's decision to modify custody or visitation, but the decision must be made by the trial court, not by the expert.[10]

The paramount concern is the child's best interest, and issues such as convenience of the parents or clogged court calendars are secondary.[11]

It is improper to have a self-executing suspension or modification of visitation contingent on the determinations of a third person, because it is the trial court's responsibility to determine whether the evidence warrants modification of custody or visitation, and such cannot be delegated to another.

Footnotes

1 Pearce v. Pearce, 244 Ga. 69, 257 S.E.2d 904 (1979); Weaver v. Jones, 260 Ga. 493 (3), 396 S.E.2d 890 (1990) (also see § 16:3, supra).

2 Scott v. Scott, 276 Ga. 372, 578 S.E.2d 876 (2003), repudiating the holding in Holder v. Holder, 226 Ga. 254, 174 S.E.2d 408 (1970) and disapproving the holding in Carr v. Carr, 207 Ga.App. 611, 429 S.E.2d 95 (1993).

See Brazzel v. Brazzel, 337 Ga. App. 758(3)(b), 789 S.E.2d 626 (2016), holding that the arbitrator had properly considered the best interests of the child at the time of the automatic visitation changes.

For a case where there is no abuse of discretion because the custody provision gave paramount import to the child's best interests, see Lester v. Boles, 335 Ga. App. 891(1), 782 S.E.2d 53 (2016). In accord: Weiss v. Grant, 346 Ga. App. 208(3), 816 S.E.2d 335 (2018) (periodic future alterations in schedule were based on trial court's judgment of children's best interest); Durden v. Anderson, 338 Ga. App. 565(2), 790 S.E.2d 818 (2016) (self-executing future modification was conditioned upon a custody change commencing with a planned event that would occur at a readily identifiable time).

See Bankston v. Warbington, 332 Ga. App. 29(2), 771 S.E.2d 726 (2015), holding that the child custody self-executing change-of-custody is void. Also see Oxford v. Fuller, 338 Ga. App. 515, 790 S.E.2d 303 (2016).

3 Weaver v. Jones, 260 Ga. 493(3), 396 S.E.2d 890 (1990). Also see Ford v. Hanna, 293 Ga. App. 863, 866(1), 668 S.E.2d 271 (2008).

4 Scott v. Scott, 276 Ga. 372, 578 S.E.2d 876 (2003); Tanner v. Morris, 288 Ga. 138 n.2, 702 S.E.2d 167 (2010).

5 Scott v. Scott, 276 Ga. 372, 578 S.E.2d 876 (2003). Also see O.C.G.A. § 19-9-3.

See Oxford v. Fuller, 338 Ga. App. 515, 790 S.E.2d 303 (2016), holding that the child custody self-executing change of custody is void where there is no evidence that might support findings that the best interests of the children will be served by requiring to change residences, school systems, circles of friends, activities, and states, on a yearly basis.

See Curtis v. Klimowicz, 279 Ga.App. 425(1), 631 S.E.2d 464 (2006), holding that the order limiting the removal of the child from the United States does not impose an improper self-executing modification of custody triggered by an overseas assignment. Also see Sahibzada v. Sahibzada, 294 Ga. 783(2), 757 S.E.2d 51 (2014).

6 Scott v. Scott, 276 Ga. 372, 578 S.E.2d 876 (2003);Wrightson v. Wrightson, 266 Ga. 493 (3), 467 S.E.2d 578 (1996).

See Coleman v. State, 308 Ga. App. 731 (2), 708 S.E.2d 638 (2011), finding that the agreement did not include a self-executing change of custody provision, but a re-evaluation of custody by the court if the father moved outside the county.

7 Scott v. Scott, 276 Ga. 372, 578 S.E.2d 876 (2003). Dellinger v. Dellinger, 278 Ga. 732(1), 609 S.E.2d 331 (2004). (See the dissent on page 737 that contends that visitation can be granted under very flexible terms which gives the trial court greater discretion.) This is true, whether the self-executing provision is by agreement of the parties or by trial court. Scott-Lasley v. Lasley, 278 Ga. 671(3) (2004).

A self-executing change of visitation would be improper where there is an open-ended, automatic, material change in visitation (1) without providing for a determination whether the visitation change is in the best interest of the child and (2) without correcting the triggering event to those best interests. Dellinger v. Dellinger, 278 Ga. 732, 736(1), 609 S.E.2d 331 (2004). In accord: Rumley-Miawama v. Miawama, 284 Ga. 811(2), 671 S.E.2d 827 (2009).

For a case where there is no abuse of discretion because the custody provision gave paramount import to the child's best interests, see Lester v. Boles, 335 Ga. App. 891(1), 782 S.E.2d 53 (2016). In accord: Weiss v. Grant, 346 Ga. App. 208(3), 816 S.E.2d 335 (2018) (periodic future alterations in schedule were based on trial court's judgment of children's best interest); Durden v. Anderson, 338 Ga. App. 565(2), 790 S.E.2d 818 (2016) (self-executing future modification was conditioned upon a custody change commencing with a planned event that would occur at a readily identifiable time).

8 Dellinger v. Dellinger, 278 Ga. 732, 739(1), 609 S.E.2d 331 (2004); Rumley-Miawama v. Miawama, 284 Ga. 811(2), 671 S.E.2d 827 (2009).

Also see Hardin v. Hardin., 338 Ga. App. 541, 790 S.E.2d 546 (2016), holding that the self-executing change of visitation was invalid because there was delegation of judgment to another (clearly it is not the trial court) to decide if mother has made the required therapeutic progress, and this makes the triggering event arbitrary with only a tangential connection to the child's best interests, and the order lacks the flexibility needed to adapt to the unique invariables that must be assessed at the time of the triggering event in order to make such a decision. Contra, see Pate v. Sadlock, 345 Ga. App. 591 (3), 814 S.E.2d 760 (2018) (court retained authority to assign visitation regardless of therapist's recommendation).

9 Dellinger v. Dellinger, 278 Ga. 732(1), 609 S.E.2d 331 (2004) (holding that the self-executing change in visitation was invalid). Also see Johnson v. Johnson, 290 Ga. 359, 360, 721 S.E.2d 92 (2012); Hardin v. Hardin., 338 Ga. App. 541(1), 543, 790 S.E.2d 546 (2016).
See Higdon v. Higdon, 321 Ga. App. 260, 265(2), 739 S.E.2d 498 (2013), where the issue of whether the provision was invalid as a self-executing change of custody need not be considered because the issue was moot.

10 Johnson v. Johnson, 290 Ga. 359, 360, 721 S.E.2d 92 (2012), reversing the trial court because the provisions concerning the termination of supervised visitation were to be decided by a therapist, not the judge, and constituted an invalid self-executing material change of visitation.
Also see Hardin v. Hardin., 338 Ga. App. 541, 790 S.E.2d 546 (2016), holding that the self-executing change of visitation was invalid because there was delegation of judgment to another (clearly it is not the trial court) to decide if mother has made the required therapeutic progress, and this makes the triggering event arbitrary with only a tangential connection to the child's best interests, and the order lacks the flexibility needed to adapt to the unique invariables that must be assessed at the time of the triggering event in order to make such a decision.

11 Scott v. Scott, 276 Ga. 372, 578 S.E.2d 876 (2003); Dellinger v. Dellinger, 278 Ga. 732, 735(1), 609 S.E.2d 331 (2004).

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346 Ga.App. 208
Court of Appeals of Georgia.

WEISS
v.
GRANT.

A18A0002
|
June 12, 2018

Synopsis

Background: Ex-husband brought action against ex-wife seeking to modify a child custody order from another state, and ex-wife counterclaimed for contempt based on unpaid child support. After denying ex-wife's motion to dismiss, the Superior Court, Paulding County, Lyles, J., modified the custody order in ex-husband's favor and ordered repayment of support arrearage. Ex-wife appealed.

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

[1] the Superior Court had jurisdiction to modify out-of-state custody order;

[2] the Superior Court did not dismiss ex-husband's claim and had authority to reconsider claim in final order;

[3] decision to change prior custody award was not an abuse of discretion;

[4] order that gradually increased ex-husband's visitation was permissible self-executing order;

[5] order included appropriate safeguards to deter ex-husband from fleeing with children; and

[6] order improperly limited ex-wife's ability to collect support due and improperly postponed payment of arrearage.

Affirmed in part and reversed in part.

Ray, J., concurred in judgment only in part.

West Headnotes (27)

[1] **Child Custody** ⇐ Residence or domicile of child or parent

Child Custody ⇐ "Home state" of child

Georgia trial court had jurisdiction under Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to modify prior, out-of-state child custody order, where children and parents no longer resided in other state, and Georgia was home state of children at time ex-husband filed action to modify order. Ga. Code Ann. §§ 19-9-61(a), 19-9-63.

[2] **Child Custody** ⇐ Hearing and Determination

Trial court in modification proceeding did not dismiss ex-husband's claim for joint legal custody at a hearing, but rather temporarily denied claim, and thus court had authority to reconsider claim in final order; even though trial court used term "dismiss" near end of hearing on custody, court stated that it did not plan to change joint legal custody "at this particular point in time," court expressly indicated that denial of claim was merely temporary ruling, and court's use of "dismiss" was misstatement that was immediately corrected.

[3] **Judgment** ⇐ Necessity for entry

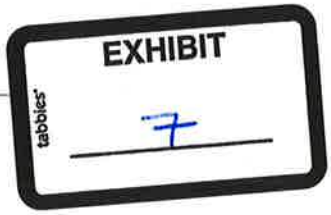
An oral pronouncement by a trial court during a hearing is not a judgment until it is reduced to writing and entered as a judgment.

1 Cases that cite this headnote

[4] **Judgment** ⇐ Mode of rendition

An oral pronouncement explaining how the court intends to rule is not binding.

[5] **Judgment** ⇐ Construction with reference to decision or findings



An oral pronouncement explaining how the court intends to rule may provide insight on the intent of a later written judgment, but any discrepancy between the written judgment and oral pronouncement is resolved in favor of the written judgment.

1 Cases that cite this headnote

[6] **Child Custody** ⇐ Weight and Sufficiency

Child Custody ⇐ Visitation

Evidence ⇐ Nature of Subject

Some evidence supported trial court's decision to change prior custody award, which gave ex-wife sole custody because of ex-husband's unlawful taking of children, and to award ex-husband joint legal custody and visitation rights, and therefore decision was not an abuse of discretion; court relied heavily on clinical psychologist's testimony, ex-husband successfully completed his sentence for prior interference with custody, and ex-husband had reestablished good relationship with children.

[7] **Child Custody** ⇐ Welfare of child and material change in circumstances

A petition to change child custody should be granted only if the trial court finds that there has been a material change of condition affecting the welfare of the child since the last custody award.

1 Cases that cite this headnote

[8] **Child Custody** ⇐ Welfare of child and material change in circumstances

If there has been a material change of condition affecting the welfare of the child since the last custody award, then the court should base its new custody decision on the best interest of the child.

[9] **Child Custody** ⇐ Welfare of child and material change in circumstances

The evidence sufficient to warrant a modification of custody can consist of a change in material conditions that have a positive effect on the child's welfare.

1 Cases that cite this headnote

[10] **Child Custody** ⇐ Change in circumstances or conditions

Child Custody ⇐ Materiality of change

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.

1 Cases that cite this headnote

[11] **Child Custody** ⇐ Grounds and Factors

Child Custody ⇐ Reports and recommendations

Factors the court may consider in determining whether the best interests of the child favor a new custody decision include the bonding and emotional ties existing between each parent and child and any recommendation by a court-appointed custody evaluator. Ga. Code Ann. § 19-9-3(a) (3) (A, O).

[12] **Child Custody** ⇐ Modification

A trial court's decision regarding a change in custody or visitation will be upheld on appeal unless it is shown that the court clearly abused its discretion.

[13] **Child Custody** ⇐ Modification

Where there is any evidence to support the trial court's ruling regarding a change in custody or visitation, a reviewing court cannot say there was an abuse of discretion.

[14] **Child Custody** ⇐ Questions of law or fact

Whether there are changed conditions affecting the welfare of the children occurring after the rendition of a former final custody judgment that

will warrant changing custody is essentially a fact question in each individual case.

[15] **Child Custody** ⇐ Modification

If there is reasonable evidence in the record to support the decision made by the trial court in changing or refusing to change custody or visitation rights, then the decision of that court must prevail.

[16] **Child Custody** ⇐ Judgment

Trial court's change of visitation order, which gradually increased ex-husband's amount of supervised and then unsupervised visitation over course of one year pursuant to specific schedule, was permissible self-executing order; order did not delegate court's judgment to a third party by relying on third-party's future exercise of discretion to make visitation changes, order did not execute at some uncertain date well into future, and order was based on best interests of children.

[17] **Child Custody** ⇐ Conditions

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

[18] **Child Custody** ⇐ Conditions

Not all self-executing change of custody provisions are invalid; rather, courts must closely examine the nature of any such provision in determining whether it fails to give paramount import to the child's best interests.

[19] **Child Custody** ⇐ Conditions

Self-executing change of custody provisions that rely on a third-party's future exercise of discretion are prohibited because they essentially delegate the trial court's judgment to that third party.

[20] **Child Custody** ⇐ Conditions

Self-executing change of custody provisions that execute at some uncertain date well into the future are not permitted because the trial court creating those provisions cannot know at the time of their creation what disposition at that future date would serve the best interests of the child; the passage of time and thus likelihood of changed circumstances is just too great.

[21] **Child Custody** ⇐ Visitation

Trial court in modification proceeding included appropriate safeguards in visitation plan to deter ex-husband from fleeing with children, as he had done in past, where, during months of supervised visitations, court specified acceptable locations and supervisors, authorized ex-wife to call supervisor during visits, and authorized use of video calls, and, during initial months of unsupervised visitation, court mandated supervision of drives to and from ex-wife's house and of any time not spent at ex-husband's house and provided for use of tracking device for ex-wife to know ex-husband's location.

[22] **Child Custody** ⇐ Visitation Conditions

Child Custody ⇐ Supervised visitation

Where a court is concerned that a parent might abduct a child, certain arrangements, including limited and supervised visitation, could be instituted to satisfy the trial court's concerns that the parent might abduct the child if granted visitation.

[23] **Child Support** ⇐ Assignment of errors and briefs

Ex-wife failed to support, with citations to evidence in record, claim that trial court miscalculated ex-husband's child support arrearage at $27,270, where only evidence concerning arrearage referenced anywhere in brief was portion of ex-wife's own trial testimony

that arrearage totaled $21,900. Ga. Ct. App. R. 25(c) (2) (i).

[24] **Child Support** Judgment and Order

Trial court's order obligating ex-husband to repay child support arrearage at rate of only $100 per month improperly limited ex-wife's ability to collect child support due and improperly postponed payment of bulk of arrearage until children reached age 18; court found arrearage of $27,270, and children were ten and seven years old at time of final order.

[25] **Child Support** Enforcement

To enforce and collect a child support order, the remedies of action for contempt, execution by writ of fi. fa., garnishment, Uniform Reciprocal Enforcement of Support Act (URESA), and an action to set aside fraudulent conveyances are available to the complaining spouse, either singly or concurrently.

[26] **Child Support** Enforcement

With respect to enforcement and collection of a child support order, the complaining spouse is not required to make an election of remedies, and a trial court may not limit the remedies available.

[27] **Child Support** Judgment and Order

In an action to collect a child support arrearage, a trial court may not order the postponement of payment until the child reaches the age of 18; minor children are entitled to support during their minority.

Attorneys and Law Firms

****338** Beverly L. Cohen, Roswell, for Appellant.

Martin Enrique Valbuena, Dallas, for Appellee.

Opinion

McFadden, Presiding Judge.

***208** This appeal challenges a trial court order modifying a child custody order from another state and ordering payment of a child support arrearage. Contrary to the appellant's claims, the trial court had jurisdiction to modify the foreign custody order. The court did not err in modifying the prior order. The order addresses the appellee's past misconduct and does not exceed the scope of the court's discretion. But the appellant is correct that the trial court erred in ordering the appellee to repay a child support arrearage at the rate of $100 per month, which improperly postpones the bulk of the payments until after the children have reached the age of 18. Accordingly, we affirm in part and reverse in part.

Sarah Weiss and Larry Grant were married in 2007, separated in 2008, and divorced in 2011. The final divorce decree, entered by the Superior Court of Paulding County, Georgia, found that the parties had two minor children, L.G. and T.G.; that Weiss and the children were residents of South Carolina; and that a child custody action was pending in a South Carolina family court.[1] The South Carolina court had previously entered a temporary order giving the parents joint custody of the children, designating Weiss as the primary physical custodian, and awarding Grant one week of visitation each month.

In April 2011, after a scheduled visitation, Grant failed to return the children to Weiss, purportedly because Weiss was allowing a convicted child abuser to be around the children. Weiss has disputed that allegation. Grant apparently moved out of his home in Paulding County, took the children to live with him at different homes both in and out of state, and concealed those locations from Weiss. On ***209** April 27, 2012, the South Carolina court entered a final custody order finding that Grant had fled with the children and that they were still missing, granting sole custody of the children to Weiss, and suspending Grant's visitation.

In October 2012, Grant and the children were found by police living in Alabama. Grant was arrested on an outstanding South Carolina warrant and the children were returned to Weiss. Grant pled guilty in South Carolina to a misdemeanor charge of interfering with child custody and was given a probated sentence, which he completed.

Grant filed a complaint in Paulding County Superior Court for modification of the South Carolina order which had awarded sole custody to Weiss and had suspended his visitation. Weiss filed an answer and motion to dismiss the action for lack of jurisdiction. The trial court denied the motion to dismiss, finding that it had jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), OCGA § 19–9–40 et seq. A hearing was held on July 1, 2015, during which the trial judge stated that while he was not, at that point, going to change custody, he was going to appoint a psychologist or counselor to evaluate the family and make a recommendation to the court on "the question of what to do about these children and ... their parents in the future." The ****339** court directed the parties to meet and see if they could agree on a person to conduct the evaluation.

On September 9, 2015, the trial court entered a temporary order which, pursuant to the parties' agreement, appointed clinical psychologist Dr. Robert Shaffer to evaluate the family and make a recommendation about what "is in the [c]hildren's best interests regarding re-introducing [Grant] into the [c]hildren's lives." The order reiterated that the court was not, at that point, going to modify custody. But the order temporarily awarded Grant two hours per week of supervised visitation.

Over a year later, on December 16, 2016, the trial court held a final hearing at which Dr. Shaffer was qualified as an expert witness. Dr. Shaffer testified, among other things, that he had no concerns about any issues that would prevent Grant from having a full relationship with his children; that the children were connected and emotionally bonded to Grant; that he believed Grant could adequately meet the needs of the children; that Grant's abduction of the children was based on a genuine protective instinct and concern about the children's welfare; and that Grant understood what he did was wrong and was not inclined to commit such an act again, and would instead avail himself of other resources to protect the children. Dr. Shaffer also testified not only that there was no reason to restrict the children ***210** from supervised visitation with the father, but that unsupervised visitation would actually be healthier for the children. Dr. Shaffer further opined that, in assessing the family as a whole, it would be appropriate for Grant and Weiss to share joint legal custody.

On December 27, 2017, the trial court entered a final order modifying the South Carolina custody order. The trial court found that a change in custody was in the best interests of the children, ordering that Weiss and Grant have joint legal custody of the children, awarding Weiss primary physical custody, and awarding Grant visitation rights. Weiss filed a motion for new trial, which the trial court denied. Weiss appeals.

1. *Jurisdiction.*

[1] Weiss contends that the trial court lacked jurisdiction to modify the South Carolina custody order. Because the parties and their children no longer resided in South Carolina and jurisdiction was otherwise proper in the trial court, the argument is without merit.

OCGA § 19–9–63, which is part of the UCCJEA, provides in pertinent part:

> [A] court of this state may not modify a child custody determination made by a court in another state unless a court of this state has jurisdiction to make an initial determination under paragraph (1) or (2) of subsection (a) of Code Section 19–9–61 and: (1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under Code Section 19–9–62 or that a court of this state would be a more convenient forum under Code Section 19–9–67; *or (2) A court of this state ... determines that neither the child nor the child's parents or any person acting as a parent presently resides in the other state.*

(Emphasis supplied.)

With regard to the first provision set forth above—that in order to modify the custody ruling of a foreign court, a Georgia court must have jurisdiction to make an initial custody determination under OCGA § 19–9–61—

> [t]his provision makes it clear that ... the requirements of [either] paragraphs[ ] (1) or (2) of OCGA § 19–9–61 (a) must be satisfied by showing[, in pertinent part]: *(1) This state is the home state of the child on the date of the commencement of the proceeding,* ... [or] (2) A court of another state does not have jurisdiction under paragraph (1) of this subsection, or a court of the home state of the child has declined to exercise ***211** jurisdiction on the ground that [Georgia] is the more appropriate forum [and certain other factors are met].

Jackson v. Sanomi, 292 Ga. 888, 889–890, 742 S.E.2d 717 (2013) (citation and punctuation omitted).

In the instant case, the trial court expressly found in its 2017 final order that Grant had lived in Georgia since 2012 and that "[a]t ****340** the time this action was filed, [Weiss] and

the [c]hildren were residents of Paulding County Georgia, and Georgia was the home state of the [c]hildren." The trial court further found in its final order that "at the time this lawsuit was filed and up until the time of trial, Georgia was and has remained the home state of the [c]hildren." Likewise, in its order denying Weiss' motion for new trial, the trial court reiterated that it had "previously found on multiple occasions, including in section 4 of the Final Order, that Georgia was and remained the home state of the children at the relevant times prior to and during the course of this litigation, and that none of the children, parents, or persons acting as parents resided any longer in South Carolina."

Nevertheless, Weiss argues on appeal that no determination was ever made that Georgia was the home state of the children at the time the complaint was filed. But as recounted above, the record plainly shows that the trial court expressly made that precise determination multiple times. Weiss has pointed to no evidence contradicting that determination; on the contrary, she admits in her appellate brief that she and the children were living in Georgia at the time this action was filed. Accordingly, given the findings that the children and parents no longer resided in South Carolina and that Georgia was the home state of the children at the time the action was filed, the trial court "properly assumed jurisdiction pursuant to OCGA § 19–9–63 to try proceedings filed in the Georgia court seeking to modify the [South Carolina] court custody determination." *Lopez v. Olson*, 314 Ga.App. 533, 538 (2), 724 S.E.2d 837 (2012).

2. *Joint legal custody.*

Weiss enumerates that the trial court erred in awarding the parties joint legal custody. Her arguments in support of this enumeration are without merit.

(a) *No authority to reconsider joint legal custody claim.*

[2] Weiss contends that the trial court dismissed Grant's claim for joint legal custody during the hearing on July 1, 2015, and therefore it had no authority to reconsider that claim in its final order. But contrary to this contention, the trial court did not dismiss the claim for joint legal custody at the hearing.

***212** Near the end of the hearing, the judge announced, "I don't plan on changing the issue of joint legal custody *at this particular point in time*." (Emphasis supplied.) After counsel for Weiss asked the judge if he was granting her motion for a directed verdict on the joint legal custody claim, the trial court did not rule on the motion, and instead stated, "Well, I'm going to dismiss that part of the complaint. I'm going to deny that part of his complaint dealing with the change of custody[.]" Upon inquiry by counsel for Grant, the judge expressly indicated that the denial of the claim for change of custody was merely a temporary ruling at that point. The judge later confirmed that the custody ruling was temporary, explaining to Grant's counsel: "I'm just *denying* your request [for joint legal custody] *for now*. I guess if something is different some other time, I'll consider it. *But right now*, I'm not changing any custody." (Emphasis supplied.) Thereafter, the trial court entered its written temporary order appointing Dr. Shaffer, expressly denying Weiss' motion for a directed verdict, and reiterating that "*at this point it does not appear* that [the court] will grant Plaintiff's request for joint legal custody." (Emphasis supplied.) Nowhere in the order did the trial court dismiss the change of custody claim.

Thus, it is clear from a review of the entire hearing transcript and the written temporary order that the trial court never intended to and did not dismiss the claim for joint legal custody. In discussing that claim at the hearing, "the trial court's [initial] use of [the word 'dismiss'] instead of ['deny'] was a misstatement, or palpable 'slip[ ] of the tongue' [which the court immediately corrected]." *Smallwood v. State*, 296 Ga.App. 16, 20 (3), 673 S.E.2d 537 (2009) (citations and punctuation omitted). As explained at the hearing and in the written order, the court merely denied the claim temporarily, but left the matter open for further consideration after the evaluations and recommendations by Dr. Shaffer. Accordingly, Weiss' enumeration of error, premised on the inaccurate factual assertion ****341** that the court had dismissed the change of custody claim, is without merit.

(b) *Scrivener's error.*

[3] **[4]** **[5]** Weiss complains that the language in the temporary order denying her motion for a directed verdict was a scrivener's error because it did not comport with the trial court's intention, as revealed by a review of the hearing transcript, to dismiss Grant's claim for joint legal custody. However, as discussed above, a review of the hearing transcript does not reveal that the court intended to dismiss the claim, and instead plainly reveals that the court intended only to deny that claim temporarily. Thus, there was no discrepancy between the trial judge's oral pronouncement at the hearing and the court's ***213** written temporary order. Moreover, even if there had been a discrepancy,

> an oral pronouncement by a trial court during a hearing is not a judgment until it is reduced to writing and entered as a judgment. An oral pronouncement explaining how the court intends to rule is not binding. It may provide insight on the intent of a later written judgment, but any discrepancy between the written judgment and oral pronouncement is resolved in favor of the written judgment.

Noble v. Noble, 345 Ga.App. 799 (1), 815 S.E.2d 150 (2018) (citation and punctuation omitted). Accordingly, Weiss has shown no error.

(c) *Abuse of discretion.*

[6] **[7]** **[8]** **[9]** **[10]** **[11]** **[12]** **[13]** Weiss contends that the trial court abused its discretion in modifying the South Carolina child custody order. We disagree.

> A petition to change child custody should be granted only if the trial court finds that there has been a material change of condition affecting the welfare of the child since the last custody award. If there has been such a change, then the court should base its new custody decision on the best interest of the child. The evidence sufficient to warrant a modification of custody can consist of a change in material conditions which have a positive effect on the child's welfare[.]

Viskup v. Viskup, 291 Ga. 103, 105 (2), 727 S.E.2d 97 (2012) (citation and punctuation omitted). "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." *Neal v. Hibbard*, 296 Ga. 882, 884 (1), 770 S.E.2d 600 (2015) (citation and punctuation omitted). Factors the court may consider in determining the best interests of the child include the bonding and emotional ties existing between each parent and child, and any recommendation by a court-appointed custody evaluator. See OCGA § 19–9–3 (a) (3) (A), (O). "A trial court's decision regarding a change in custody/visitation will be upheld on appeal unless it is shown that the court clearly abused its discretion. Where there is any evidence to support the trial court's ruling, a reviewing court cannot say there was an abuse of discretion." *Vines v. Vines*, 292 Ga. 550, 552 (2), 739 S.E.2d 374 (2013) (citations omitted).

[14] **[15]** Here, the trial court made extensive findings of fact in its final order, relying heavily on Dr. Shaffer's testimony and recommendations, and finding that there were material changes in circumstances ***214** since the entry of the South Carolina custody order, which was premised on Grant's unlawful taking of the children. Among other things, the court found that Grant had successfully completed his sentence for the interference with custody charge in South Carolina, that it does not appear likely he would take the children again in violation of court orders, that he has cooperated with Dr. Shaffer's treatment and recommendations, that he has reestablished a good relationship with the children, and that reintroducing Grant into the children's lives has moved forward positively. Based on its finding of material changes in circumstances, the court concluded that a modification of custody was warranted and that a close and continuing relationship with each parent is in the best interests of the children.

> Whether there are changed conditions affecting the welfare of the child[ren] occurring after the rendition of a former final custody judgment which will warrant changing custody is essentially a fact question ****342** in each individual case. And if there is reasonable evidence in the record to support the decision made by the [trial] court in changing or refusing to change custody or visitation rights, then the decision of that court must prevail.

Dearman v. Rhoden, 235 Ga. 457, 459 (4), 219 S.E.2d 704 (1975) (citations and punctuation omitted). Because the trial court's "determination was supported by some evidence, [including the expert testimony of Dr. Shaffer,] we cannot say that the trial court abused its discretion when it made [the] modification of custody." *Bankston v. Warbington*, 332 Ga.App. 29, 34 (1), 771 S.E.2d 726 (2015) (citations omitted).

3. *Visitation award.*

[16] Weiss claims that the visitation awarded to Grant by the trial court, which gradually increased the amount of supervised and then unsupervised visitation over the course of one year, constituted an impermissible self-executing change in custody. However, because the award does not entail an improper delegation of judicial authority, does not contain provisions that execute at an uncertain date well into the future, and based the gradual increase in visitation on the children's best interests, we find no error.

[17] **[18]** **[19]** **[20]** In its final order, the trial court found that in the best interests of the children, Grant was entitled to resume regular visitation with the children, but that a gradual increasing of those rights was appropriate. The court then set out a detailed visitation schedule providing for two hours of supervised visitation every weekend in January 2017; four hours of supervised visitation every weekend in ***215**

February 2017; eight hours of supervised visitation every other weekend in March and April 2017; twelve hours of unsupervised visitation at Grant's house every other weekend in May and June 2017, but supervision of any time not spent at the home, including the drive to and from the mother's home; twelve hours of unsupervised visitation every other weekend in July and August 2017; twenty-four hours of unsupervised visitation every other weekend in September and October 2017; and thirty-six hours of unsupervised visitation every other weekend in November and December 2017. Then, beginning in January 2018 and proceeding thereafter, the order provided for a more traditional visitation schedule, including visitation every other weekend, and specified school holiday and summer break visitations.

> Visitation privileges are, of course, part of custody. Self-executing change of custody provisions allow for an automatic change in custody based on a future event without any additional judicial scrutiny. Our Supreme Court has 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. But not all self-executing provisions are invalid. Rather, we must closely examine the nature of any such provision in determining whether it fails to give paramount import to the child's best interests.
>
> ...
>
> A review of the case law regarding prohibited self-executing provisions shows that they can generally be summarized as having one of two critical flaws. First, self-executing provisions that rely on a third-party's future exercise of discretion essentially delegate the trial court's judgment to that third party. And, second, self-executing provisions that execute at some uncertain date well into the future are not permitted because the trial court creating those provisions cannot know at the time of their creation what disposition at that future date would serve the best interests of the child; the passage of time and thus, likelihood of changed circumstances is just too great.

Hardin v. Hardin, 338 Ga.App. 541, 543–544 (1), 790 S.E.2d 546 (2016) (citations and punctuation omitted).

In this case, the visitation plan "at issue is a self-executing change of visitation since it allows for an automatic change in [Grant's] visitation with his child[ren], from supervised to unsupervised ***216** [and for increasing lengths of time], based on [certain dates] without any additional judicial scrutiny." *Johnson v. Johnson*, 290 Ga. 359, 360, 721 S.E.2d 92 (2012). However, this self-executing visitation plan does not suffer from ****343** either of the critical flaws that generally are found in prohibited provisions. See *Hardin*, supra. First, the visitation plan in this case does not improperly delegate the trial court's judgment to a third party by relying on that third party's future exercise of discretion to make visitation changes. Rather, the trial court exercised its own discretion in determining a specific schedule for Grant's gradually increasing visitation privileges. Compare *Johnson*, supra (visitation provision impermissibly gave therapist the authority to determine how and when to phase out supervised visitation); *Hardin*, supra at 545 (1), 790 S.E.2d 546 (provision improperly delegated authority to determine custody changes to a counselor); *Ezunu v. Moultrie*, 334 Ga.App. 270, 273 (2), 779 S.E.2d 44 (2015) (provision stricken where it allowed children's therapist to decide if and when modifications of visitation were warranted). Second, the provision for Grant's increasing visitation privileges did not execute at some uncertain date well into the future; instead, the detailed visitation plan set forth specific dates for each change to occur within the year following the final order. Compare *Dellinger v. Dellinger*, 278 Ga. 732, 735 (1), 609 S.E.2d 331 (2004) (self-executing change in visitation provision lacked any expiration date and could take effect at any time, even years in the future). See *Lester v. Boles*, 335 Ga.App. 891, 893 (1), 782 S.E.2d 53 (2016) (self-executing custody provision set to occur at a readily identifiable time 16 months after entry of order did not suffer the infirmity identified in *Dellinger* because it was not an open-ended provision conditioned upon some future event that could occur at any time).

Moreover, not only does the self-executing visitation plan in this case not suffer from the critical flaws discussed above, but the trial court based the gradually increasing visitation privileges on the best interests of the children. In making its decision, the trial court expressly and repeatedly found, based on the evidence, that a change of custody, including Grant's visitation, was warranted in the best interests of the children; that a close and continuing relationship with both parents was in the best interests of the children; and that in the best interests of the children, Grant was entitled to resume regular visitation and "that a gradual increasing" of such visitation was appropriate. "Because the challenged [visitation] provision in this case gave paramount import to the [children's] best interests, we find no abuse of discretion." *Lester*, supra (punctuation omitted). See also ***217** *Durden v. Anderson*, 338 Ga.App. 565, 567 (2), 790 S.E.2d 818 (2016)

(upholding self-executing modification of father's visitation rights upon child reaching age for pre-kindergarten).

4. *Visitation safeguards.*

[21] Contrary to Weiss' claim, the trial court included numerous safeguards in its gradually increasing visitation plan to deter Grant from fleeing with the children. During the months of supervised visitations, the court specified acceptable locations and supervisors, authorized the mother to call the supervisor during the visits, and authorized the use of video calls for the mother to view the children during the visits. During the initial months of unsupervised visitation at Grant's house, the court mandated supervision of the drives to and from the house and of any time not spent at the house, and further provided for the use of a tracking device for Weiss to know Grant's location. Throughout the visitation periods, the court ordered specific contact requirements for Weiss to be informed of the children's location.

[22] Where a court is concerned that a parent might abduct a child, certain "arrangements, including limited and supervised visitation, could be instituted to satisfy the trial court's concerns that [the parent] might abduct the child if granted visitation." *Williams v. Williams*, 301 Ga. 218, 221 (1), 800 S.E.2d 282 (2017) (citation and punctuation omitted). See also *Chandler v. Chandler*, 261 Ga. 598, 599 (1), 409 S.E.2d 203 (1991). The trial court instituted such arrangements and safeguards in its visitation order, and Weiss "has shown no abuse of the trial court's discretion here." *Williams*, supra.

5. *Child support arrearage.*

[23] The trial court ruled in favor of Weiss on her counterclaim for contempt for ****344** Grant's nonpayment of previously ordered child support, finding a child support arrearage of $27,270 and ordering Grant to pay $100 per month "until such time as the entire child support arrearage is paid off." On appeal, Weiss first contends that the trial court miscalculated the amount of the arrearage. However, she has failed to support this enumeration of error with citations to any evidence in the record showing that the court miscalculated the arrearage amount. See Court of Appeals Rule 25 (c) (2) (i) ("Each enumerated error shall be supported in the brief by specific reference to the record or transcript. In the absence of a specific reference, the Court will not search for and may not consider that enumeration.") The only evidence concerning the arrearage that is referenced anywhere in her brief is a portion of her own trial testimony that the arrearage totaled $21,900. Under these circumstances, Weiss "has failed to carry [her] burden on appeal of affirmatively proving by the record that the [trial] court erred in finding [the arrearage amount of ***218** Grant's] child support payments[.]" *In re Estate of Williams*, 241 Ga. App. 17 (1), 525 S.E.2d 742 (1999) (citation omitted).

[24] **[25]** **[26]** **[27]** But Weiss further argues that the provision for Grant to repay the child support arrearage at the rate of $100 per month is erroneous because at that rate it would take over 18 years to pay the entire amount. We agree.

> A husband or wife has a variety of remedies available for enforcing and collecting a child support order. The remedies of action for contempt, execution by writ of fi. fa., garnishment, URESA (Uniform Reciprocal Enforcement of Support Act), and an action to set aside fraudulent conveyances are available to the complaining spouse, either singly or concurrently. The complaining spouse is not required to make an election of remedies, and a trial court may not limit the remedies available to collect or enforce a child support order. In addition, a trial court may not order the postponement of payment of the child support until the child reaches the age of 18. Minor children are entitled to support during their minority.

Strunk v. Strunk, 294 Ga. 280, 283 (5), 754 S.E.2d 1 (2013) (citations and punctuation omitted). Here, the trial court's order that Grant must only pay $100 per month improperly limits Weiss' ability to collect the child support due and postpones payment of much of the child support until after the children, who were ten and seven years old at the time of the final order, reach the age of eighteen.

> [C]ontrary to the general rule that children are entitled to financial support during their minority, the trial court's order on arrearage payments limits the amount that [Grant] was required to pay while the children were minors living at home and postponed payment of the bulk of the arrearage until the children reached the age of 18. Because the trial court erred in ... limiting [Weiss'] remedies, and postponing much of the payments until the children were 18, we reverse the portion of its order setting out a payment schedule for the arrearage.

Id. at 284 (5), 754 S.E.2d 1.

Judgment affirmed in part and reversed in part.

Rickman, J., concurs. Ray, J., concurs fully in Divisions 1, 2, 3, and 4 and in judgment only in Division 5.*

*219 * DIVISION 5 OF THIS OPINION IS PHYSICAL PRECEDENT ONLY. SEE COURT OF APPEALS RULE 33.2(a).

All Citations

346 Ga.App. 208, 816 S.E.2d 335

Footnotes

1 The parties had agreed to have the Georgia court handle their divorce and the South Carolina court handle child custody issues.

End of Document

276 Ga. 372
Supreme Court of Georgia.

SCOTT
v.
SCOTT.

No. S02A1909.
|
March 27, 2003.

Synopsis
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 (14)

[1] **Child Custody** ⇐ Questions of law or fact
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.

6 Cases that cite this headnote

[2] **Child Custody** ⇐ Change in circumstances or conditions
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.

2 Cases that cite this headnote

[3] **Child Custody** ⇐ Welfare and best interest of child
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.

3 Cases that cite this headnote

[4] **Child Custody** ⇐ Operation and Effect
Child Custody ⇐ Modification
"Self-executing change of custody provisions" allow for an automatic change in custody based on a future event without any additional judicial scrutiny.

10 Cases that cite this headnote

[5] **Child Custody** ⇐ Child's preference of custodian
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).

1 Cases that cite this headnote

[6] **Child Custody** ⇐ New partner for party
Child Custody ⇐ Parent or custodian's relocation of home
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.

2 Cases that cite this headnote

[7] **Courts** Highest appellate court

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.

1 Cases that cite this headnote

[8] **Child Custody** Hearing and Determination

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** Conditions

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.

13 Cases that cite this headnote

[10] **Child Custody** Conditions

Child Custody Change in circumstances or conditions

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.

10 Cases that cite this headnote

[11] **Child Custody** Child's preference

Child Custody New partner for party

Child Custody Parent or custodian's relocation of home

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.

4 Cases that cite this headnote

[12] **Child Custody** Time for proceedings

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** Conditions

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.

5 Cases that cite this headnote

[14] **Child Custody** ⇐ Welfare and best interest of child

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.

6 Cases that cite this headnote

Attorneys and Law Firms

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

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

Opinion

***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[1]). 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).

[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 *Hunnicutt 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 ***375** *Pearce,* supra. Id. at 613, 429 S.E.2d 95.[2]

[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.[3] 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

> [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.[4] 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).

[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.[5]

[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*[6] and *Pearce v. Pearce,*[7] 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.

To begin, in *Weaver v. Jones,*[8] and *Pearce v. Pearce,*[9] 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;[10] the original decree was simply being followed and not modified;[11] the trial court had participated in and approved the custody and support provisions by incorporating the parties' agreement into the original divorce decree;[12] and such provisions promoted judicial economy.[13]

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.*[14] 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[15] and to insure that any visitation provisions are appropriate.[16] 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."[17] 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.

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.[18]

Moreover, an initial award of custody between parents must be based on the child's best interests,[19] 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.[20]

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[21] 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."[22] 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."[23]

> 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.[24]

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,[25] 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.[26] That conclusion is clearly at odds with the stated public policy of this State.[27]

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** ***382** 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.

All Citations

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

Footnotes

1 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.

2 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).

3 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.

4 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).

5 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).

6 260 Ga. 493, 396 S.E.2d 890 (1990).

7 244 Ga. 69, 257 S.E.2d 904 (1979).

8 260 Ga. at 494, 396 S.E.2d 890.

9 244 Ga. at 70, 257 S.E.2d 904.

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

11 Id.

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

13 Id.

14 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).

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

16 *Worley,* 261 Ga. at 218–219, 403 S.E.2d 799.

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

18 See OCGA §§ 19–9–1 and 19–9–3.

19 OCGA § 19–9–3(a).

20 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.

21 OCGA §§ 19–9–3(a)(5), 19–9–6.

22 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").

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

24 Id. at 327, 433 S.E.2d 411.

25 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).

26 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.

27 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).

278 Ga. 732
Supreme Court of Georgia.

DELLINGER
v.
DELLINGER.

No. S04F1376.
|
Nov. 23, 2004.

Synopsis
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 (7)

[1] **Child Custody** ⇐ Conditions

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.

13 Cases that cite this headnote

[2] **Child Custody** ⇐ Visitation

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.

6 Cases that cite this headnote

[3] **Child Custody** ⇐ Visitation

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.

2 Cases that cite this headnote

[4] **Child Custody** ⇐ Conditions

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.

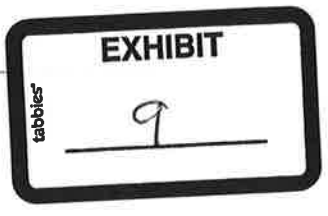
6 Cases that cite this headnote

[5] **Child Custody** ⇐ Conditions

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.

10 Cases that cite this headnote

[6] **Child Custody** ⇐ Visitation



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.

3 Cases that cite this headnote

[7] **Child Custody** ⇐ Discretion

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.

Attorneys and Law Firms

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Opinion

***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[1] 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.

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.[2]

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.[3] 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.

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.[4] 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.[5] 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.

[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 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.[6] 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.

[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,*[7] 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.

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.[8]

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 ***739** 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.

All Citations

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

Footnotes

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

2 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.

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

4 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."

5 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 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.

7 276 Ga. 372, 578 S.E.2d 876 (2003).

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

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289 Ga. 250
Supreme Court of Georgia.

WARD
v.
WARD.

No. S11A0437.
|
May 31, 2011.

Synopsis

Background: After the parties divorced, former wife filed an action that sought to hold former husband in contempt, for sole custody of the children, and for child support, and former husband filed a counterclaim that sought an increase in child support. The Superior Court, Pike County, Brantley, Senior Judge, declined to modify child custody, increased former wife child support obligation, and awarded former husband attorney fees. Former wife appealed.

Holdings: The Supreme Court, Nahmias, J., held that:

[1] the trial court abused its discretion when it amended visitation provision in divorce decree to prohibit former wife from having "any overnight male guests" while the minor children were present, and

[2] the trial court abused its discretion when it awarded former husband $10,000 in attorney fees.

Reversed in part; vacated in part; and remanded with direction.

West Headnotes (3)

[1] **Child Custody** ⚿ Excluding other persons from being present during visitation

Child Custody ⚿ Amendment, clarification, opening, or vacating

The trial court abused its discretion when it amended visitation provision in divorce decree to prohibit former wife from having "any overnight male guests" while the minor children were present; the provision was overbroad and prohibited former wife from having male visitors with whom she had no romantic relationship and for whom the record did not support a finding of any harmful effect on the children.

2 Cases that cite this headnote

[2] **Child Custody** ⚿ Proceedings in general

Child Custody ⚿ Findings

The trial court abused its discretion when it awarded former husband $10,000 in attorney fees, in post-divorce action that sought to hold former husband in contempt of court and to modify child custody; the trial court did not specify the statutory basis for its award either at the final hearing or in its written order, and former husband failed to identify the statutory basis for his request for attorney fees.

5 Cases that cite this headnote

[3] **Costs** ⚿ American rule; necessity of contractual or statutory authorization or grounds in equity

Generally, an award of attorney fees is not available in Georgia unless authorized by statute or contract.

10 Cases that cite this headnote

Attorneys and Law Firms

****556** Miller & Brown, John Broadhurst Miller, Fayetteville, for appellant.

M. Barbara Gayle Moon, McDough, for appellee.

Opinion

NAHMIAS, Justice.

***250** Appellant Dorene Ward and appellee Richard Ward were divorced in March 2007. Richard was awarded primary physical custody of the parties' two young children. Dorene was awarded substantial visitation and was required to pay child support. In February 2008, Dorene fil

seeking to hold Richard in contempt of the final divorce decree, to obtain sole custody of the children, and to obtain child support in the event child custody was given to her. Richard counterclaimed for an increase in child support and for attorney fees. After a hearing, the trial court ruled that Richard was not in contempt, declined to modify custody, increased Dorene's monthly child support payment, amended the visitation provision of the final decree to provide that Dorene "shall not have any overnight male guests while the minor children are present," and awarded Richard $10,000 in attorney fees.

Dorene filed an application to appeal, which this Court automatically granted under OCGA § 5–6–35(j) because she had the right to a direct appeal under OCGA § 5–6–34(a)(11) based on the child custody issue she raised. On appeal, Dorene contends that the trial court erred by adding the visitation provision and in awarding attorney fees.[1]

[1] 1. Dorene contends that the amended visitation provision is overbroad, because on its face it prohibits her from having her father, a brother, a new spouse, or even the children's father spend the night at her house while the minor children are present. We agree. A trial court has discretion to place restrictions on custodial parents' behavior that will harm their children. See *Arnold v. Arnold,* 275 Ga. 354, 354, 566 S.E.2d 679 (2002) (holding that if evidence shows that "exposure to a third party will have an adverse effect on the best interests of the children," a trial court may prohibit a parent "from exercising his or her custodial rights in that person's presence"); *Brandenburg v. Brandenburg,* 274 Ga. 183, 184, 551 S.E.2d 721 (2001) (holding that the husband's relationship with a girlfriend "could support the imposition of certain limitations upon his visitation ***251** rights if it was shown that such conduct adversely affects his children"). Here, however, even assuming that the evidence was sufficient to find that the children would be adversely affected if any boyfriends of Dorene spent the night with her, the restriction against "*any* overnight male guests" would prohibit Dorene from having visitors with whom she has no romantic relationship and for whom the record does not support a finding of any harmful effect on her children. Accordingly, the trial court abused its discretion ****557** in adopting this provision. See *Arnold,* 275 Ga. at 354, 566 S.E.2d 679; *Brandenburg,* 274 Ga. at 184, 551 S.E.2d 721.

[2] **[3]** 2. We also agree with Dorene that the trial court erred in awarding attorney fees. "Generally, an award of attorney fees is not available in Georgia unless authorized by statute or contract." *Moon v. Moon,* 277 Ga. 375, 378, 589 S.E.2d 76 (2003). Here, because the case involved an action for contempt of a divorce decree and modification of child support and was not purely an action for modification of custody, the award could have been based on OCGA § 19–6–2. See *Roberts v. Tharp,* 286 Ga. 579, 581, 690 S.E.2d 404 (2010); *McDonogh v. O'Connor,* 260 Ga. 849, 850, 400 S.E.2d 310 (1991). OCGA § 19–6–2 "authorizes a trial court in a divorce action to exercise its sound discretion and, after considering the financial circumstances of the parties, to award attorney fees as necessary to ensure the effective representation of both parties." *Simmons v. Simmons,* 288 Ga. 670, 673, 706 S.E.2d 456 (2011). The award of attorney fees also could have been based on OCGA § 9–15–14, which authorizes attorney fees in any civil action against a party who asserts frivolous claims or defenses. Where a review of the record does not reveal whether the trial court based the award on § 19–6–2 or § 9–15–14, "the issue of attorney fees must be remanded for an explanation of the statutory basis for the award and any findings necessary to support it." *Cason v. Cason,* 281 Ga. 296, 300, 637 S.E.2d 716 (2006).

Having reviewed the record in this case, we conclude that the award of attorney fees must be vacated and remanded. The trial court did not specify the statutory basis for its award either at the final hearing or in its written order. Although Richard also did not identify the statutory basis for his request for attorney fees, he moved for "reasonable attorney fees for having to defend this frivolous action," thus indicating that he was relying on OCGA § 9–15–14. At the hearing, after explaining its reasons for denying Dorene's request for custody modification, the trial court said that "this was a weak case for a change." It is unclear whether the court meant for this remark to explain its award of attorney fees to Richard, as a "weak" case is not necessarily the same as a "frivolous" case, but the comment suggests that the court intended to ***252** award fees under OCGA § 9–15–14. However, "[a]n order awarding attorney fees under OCGA § 9–15–14 must include findings of conduct that authorize the award," *Cason,* 281 Ga. at 300, 637 S.E.2d 716, and the trial court's order contains no such findings, so any award under § 9–15–14 cannot stand.

In addition, at the final hearing and in the court's order, there is no indication that the trial court made the award under OCGA § 19–6–2 based on the financial circumstances of the parties. Compare *Simmons,* 288 Ga. at 673–674, 706 S.E.2d 456 (concluding that the award was properly made pursuant to § 19–6–2 where the wife did not move for attorney fees

under § 9–15–14, "there is no indication that the trial court considered an award of attorney fees on that basis," and the "record indicates that the trial court considered the relative financial positions of the parties"). Accordingly, we vacate the award of attorney fees and remand the issue to the trial court to explain "the statutory basis for the award" and to make "any findings necessary to support it." *Cason,* 281 Ga. at 300, 637 S.E.2d 716.

Judgment reversed in part, vacated in part, and case remanded with direction.

All the Justices concur.

All Citations

289 Ga. 250, 710 S.E.2d 555, 11 FCDR 1592

Footnotes

1 We reject Richard's contention that Dorene waived her right to raise these two issues on appeal.

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275 Ga. 354
Supreme Court of Georgia.

ARNOLD

v.

ARNOLD.

No. S02A1020.

July 15, 2002.

Synopsis

Husband filed for divorce and sought custody of minor children. After bench trial, the Superior Court, Clayton County, Albert B. Collier, J., awarded wife primary physical custody of children, but prohibited children from any contact with wife's friend. Wife applied for discretionary appeal after her motion for new trial was denied. The Supreme Court, Carley, J., held that restriction on wife's rights as custodial parent was unauthorized.

Reversed.

West Headnotes (2)

[1] **Child Custody** ⇐ Incidents and Extent of Custody Award

Trial court in divorce case, when entering final decree that awarded wife primary physical custody of minor children, placed unauthorized restriction on wife's rights as custodial parent by prohibiting children from any contact with wife's friend and imposing upon wife the duty of ensuring there was no such contact, where no evidence was presented that the relationship between wife and her friend was harmful to the children, or that they engaged in any inappropriate conduct in the children's presence.

5 Cases that cite this headnote

[2] **Child Custody** ⇐ Incidents and Extent of Custody Award

In the absence of any evidence that exposure to a third party will have an adverse effect on the best interests of the children, a trial court abuses its discretion by prohibiting a parent from exercising his or her custodial rights in that person's presence.

5 Cases that cite this headnote

Attorneys and Law Firms

**680 *354 Tina G. Stanford, Smith, White, Sharma & Halpern, Forest Park, David Alfred Webster, Atlanta, for Appellant.

Julian T. Arnold, Clarkston, for Appellee.

Stephen Randall Scarborough, Lambda Legal Def/Educ Fund, Inc., Atlanta, Amicus Appellant.

Opinion

CARLEY, Justice.

Julian Arnold (Husband) filed for divorce from Kimberly Arnold (Wife) and sought custody of their minor children. A bench trial was held. In the final decree, the trial court awarded primary physical custody to Wife, but also prohibited the children from any contact with a certain named friend of Wife and imposed on her the responsibility of being sure that there was no such exposure. In the motion for new trial, Wife urged the trial court to delete this provision from the decree. The trial court denied the motion, and Wife applied for a discretionary appeal. We granted the application to determine whether imposition of the restriction complies with the standard established by *Brandenburg v. Brandenburg,* 274 Ga. 183, 184(1), 551 S.E.2d 721 (2001).

[1] [2] In the absence of any evidence that exposure to a third party will have an adverse effect on the best interests of the children, a trial court abuses its discretion by prohibiting a parent from exercising his or her custodial rights in that person's presence. *Brandenburg v. Brandenburg,* supra at 184(1), 551 S.E.2d 721. Here, there is no evidence that the relationship between Wife and her friend was or will be harmful to the children, or that they ever engaged in any inappropriate conduct in the presence of the children. Thus, the trial court abused its discretion by placing an unauthorized restriction on Wife's exercise of her rights as a custodial parent. *Brandenburg v. Brandenburg,* supra at 184(1), 551 S.E.2d 721.

Judgment reversed.

All the Justices concur.

All Citations

275 Ga. 354, 566 S.E.2d 679, 02 FCDR 2095

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235 Ga.App. 243
Court of Appeals of Georgia.

TURMAN
v.
BOLEMAN.

No. A98A1712.
|
Nov. 12, 1998.

Synopsis
Mother moved to hold father in contempt for denying mother visitation rights to their child pursuant to provision in their settlement agreement, incorporated into their divorce decree, which gave mother certain specified visitation rights away from father's residence on condition that child not be in presence of any African–American male. The Superior Court, Franklin County, Bryant, J., denied motion. Mother appealed. The Court of Appeals, Blackburn, J., held that: (1) provision in question was unenforceable as against public policy; (2) father was not in wilful disobedience of any term in decree; but (3) father could not in future rely on provision in question in providing visitation privileges to mother.

Affirmed.

West Headnotes (10)

[1] **Child Custody** ⇐ Agreements, Contracts, or Stipulations

Provision in parties' settlement agreement, incorporated into their divorce decree, which gave mother certain specified visitation rights on condition that child not be in presence of any African–American male violated express public policy against racial classification and public policy encouraging child's contact with his noncustodial parent; thus, provision was unenforceable. O.C.G.A. § 19–9–3(d).

2 Cases that cite this headnote

[2] **Contracts** ⇐ Public Policy in General

The only authentic and admissible evidence of public policy of a State is its constitution, laws, and judicial decisions.

[3] **Divorce** ⇐ Effect of merger or incorporation

Where parties' settlement agreement was incorporated into divorce decree, provision of agreement that violated public policy was not enforceable as matter of private contract; after private agreement was incorporated into trial court's order, enforcing private agreement became state action.

[4] **Child Custody** ⇐ Conditions

Although a court issuing a divorce decree may validly provide, under appropriate circumstances, that a child is to have no contact with particular individuals who are deemed harmful to the child, such provision cannot be based solely upon racial considerations, as such ruling violates public policy.

1 Cases that cite this headnote

[5] **Child Custody** ⇐ Visitation

Child Custody ⇐ Visitation

Although provision of divorce decree upon which father relied in denying visitation to mother violated public policy, father could not be held in contempt, as he never disobeyed court's order; however, because Court of Appeals held such provision unenforceable, father could not rely on it in providing future visitation privileges to mother.

3 Cases that cite this headnote

[6] **Contempt** ⇐ Discretion of court

Contempt ⇐ Review

The trial court's discretion in contempt matters is broad, and its decision will be upheld if there is any evidence to support it.

1 Cases that cite this headnote

[7] **Contempt** ⇐ Disobedience to Mandate, Order, or Judgment

To hold in contempt, the court must find that there was a wilful disobedience of the court's decree or judgment.

1 Cases that cite this headnote

[8] **Appeal and Error** ⇐ Theory and Grounds of Decision Below and on Review

A decision of a trial court which is right for any reason will be affirmed.

[9] **Contempt** ⇐ Disobedience to Mandate, Order, or Judgment

A party is entitled to rely on the plain terms of a court order until such provisions are modified by the court.

5 Cases that cite this headnote

[10] **Contempt** ⇐ Validity of mandate, order, or judgment

Even where the terms of a court order are determined to be violative of public policy and thus unenforceable, reliance on the original terms will not support a contempt action prior to a judicial adjudication of such unenforceability.

1 Cases that cite this headnote

Attorneys and Law Firms

****533** ***245** Law Offices of John F. Lyndon, Walter R. Finch III, Athens, for appellant.

Fitzpatrick & Camp, Barry L. Fitzpatrick, Danielsville, for appellee.

Opinion

***243** BLACKBURN, Judge.

Sheila Mae Turman appeals from the denial of her motion to hold her ex-husband, Orville Joseph Boleman, in contempt for denying Turman visitation rights to their child. While the visitation provision was contrary to public policy and therefore unenforceable, its plain language did authorize Boleman's conduct and precluded a finding of contempt at this time. We affirm the trial court's denial of Turman's motion for contempt.

Turman and Boleman were divorced on November 13, 1996. Their settlement agreement, which was incorporated into the final judgment and decree, provided that Boleman would have custody of their minor child. The agreement gave Turman certain specified visitation rights away from the father's residence "on the condition [that] at no time shall [the child] be in the presence of William 'Larry' Little or any other African–American male except that [Turman] shall not be in contempt of court if she has casual contact with any African–American male other than William 'Larry' Little." After Turman married Kenneth Turman, an African–American male, Boleman refused to allow Turman to visit with the child away from Boleman's residence. Turman moved to hold Boleman in contempt for refusing to allow her to exercise her visitation rights. At the hearing on the contempt motion, Turman argued that the provision in the settlement agreement conditioning her visitation rights upon the child's having no contact with any African–American male was unenforceable.

[1] [2] The trial court improperly upheld the validity of the visitation provision which prohibited the child's contact with any African–American males. This provision is unenforceable as against public ***244** policy. "The only authentic and admissible evidence of public policy of a State is its constitution, laws, and judicial decisions." *Mut. Life Ins. Co. v. Durden,* 9 Ga.App. 797, 800(3), 72 S.E. 295 (1911). The visitation provision here violated the express public policy against racial classification and the public policy encouraging a child's contact with his noncustodial parent.

[3] The visitation provision of the divorce decree sanctioned arbitrary racial classification in determining visitation rights in violation of the Equal Protection Clause of the state and federal constitutions. The trial court held that the provision was enforceable because it was a matter of private contract. However, after that private agreement was incorporated into the trial court's order, enforcing the private agreement became state action. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti,* 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984). The courts of this State cannot sanction such blatant racial prejudice, especially where it

also interferes with the rights of a child in the parent/child relationship.

**534 [4] The agreement between the parties clearly violated the State's public policy to promote the best interests of the child. "It is 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." OCGA § 19–9–3(d). Contrary to this policy, the agreement prevents the child from having contact with his natural mother solely on the basis of an arbitrary racial classification. Although a court may validly provide, under appropriate circumstances, that a child is to have no contact with particular individuals who are deemed harmful to the child, such provision cannot be based solely upon racial considerations, as such ruling violates the public policy of the State of Georgia.

[5] [6] [7] [8] The trial court properly found that Boleman was not in contempt of court at this time. "The trial court's discretion in [contempt] matters is broad[,] and its decision will be upheld if there is any evidence to support it." (Punctuation omitted.) *Dept. of Human Resources v. Cowan,* 220 Ga.App. 230, 232(2), 469 S.E.2d 384 (1996). "To hold in contempt, the court must find that there was a wilful disobedience of the court's decree or judgment." *Beckham v. O'Brien,* 176 Ga.App. 518, 522, 336 S.E.2d 375 (1985). The trial court properly denied Turman's motion for contempt because Boleman never disobeyed the court's order. A decision of a trial court which is right for any reason will be affirmed. *Southern Electronics Distrib. v. Anderson,* 232 Ga.App. 648, 502 S.E.2d 257 (1998).

[9] [10] A party is entitled to rely on the plain terms of a court order until such provisions are modified by the court. *Padgett v. Lael,* 244 Ga. 180, 181(2), 259 S.E.2d 441 (1979). Even where the terms of a court order are determined to be violative of public policy and thus unenforceable, reliance on the original terms will not support a contempt action prior to a judicial adjudication of such unenforceability. In this case, Boleman refused to allow visitation away from his residence after Turman married an African–American male. His actions did not violate the original terms of the divorce decree. Since there is no evidence of wilful disobedience of the terms of the decree, Boleman cannot be held in contempt. However, having found that the visitation provision is unenforceable, Boleman cannot in the future rely on the original provision in providing visitation privileges to Turman, as otherwise set forth in the agreement. The trial court's decision is affirmed.

Judgment affirmed.

McMURRAY, P.J., and ELDRIDGE, J., concur.

All Citations

235 Ga.App. 243, 510 S.E.2d 532

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285 Ga. 554
Supreme Court of Georgia.

MONGERSON
v.
MONGERSON.

No. S09F0132.
|
June 15, 2009.

Synopsis
Background: Following final judgment in divorce action by the Superior Court, Fayette County, Christopher C. Edwards, J., husband applied for discretionary review under Family Law Pilot project, which was granted.

Holdings: The Supreme Court, Benham, J., held that:

[1] husband was not required to name child who reached majority as beneficiary of his life insurance;

[2] it was not an abuse of discretion to prohibit husband's child visitation in paternal grandparents' presence;

[3] provision that prohibited husband "from exposing the children to his homosexual partners and friends" violated public policy;

[4] alimony award to wife for as long as she was earning passing grades toward a college degree was not abuse of discretion;

[5] interest rate imposed on award of attorney fees to wife violated statute; and

[6] attempt by trial court to retain jurisdiction was wholly ineffective.

Affirmed in part, vacated in part, and remanded.

Melton, J., concurred specially, joined by Carley, J.

West Headnotes (14)

[1] **Child Support** ⇐ Construction in general

An intention to support a child into its majority is found only where there is specific and unambiguous language in the parties' settlement agreement to that effect. West's Ga.Code Ann. § 19-6-34.

[2] **Child Support** ⇐ Construction in general

Husband was not required to name a child who had reached majority as beneficiary of a policy of life insurance on husband's life, under terms of his agreement at the divorce hearing to maintain a life insurance policy for the benefit of his four children, who were then minors. West's Ga.Code Ann. § 19-6-34.

[3] **Child Custody** ⇐ Excluding other persons from being present during visitation

A trial court has discretion to prohibit the exercise of visitation rights by a non-custodial parent in the presence of certain people if the evidence demonstrates the children have been exposed to inappropriate conduct involving the specified persons or that exposure to the prohibited persons would adversely affect the children, but in the absence of evidence that exposure to a third party will have an adverse effect on the best interests of the children, a trial court abuses its discretion by prohibiting a parent from exercising his or her custodial rights in that person's presence. West's Ga.Code Ann. § 19-9-3(d).

1 Cases that cite this headnote

[4] **Child Custody** ⇐ Excluding other persons from being present during visitation

Trial court did not abuse its discretion by prohibiting husband from exercising his custodial rights in the paternal grandparents' presence; there was evidence the grandparents had been physically and emotion

of the children, and husband acknowledged he had not fulfilled his promise to never leave his children alone with his parents, which supported court's decision that exposure to paternal grandparents would have an adverse effect on the best interests of the children. West's Ga.Code Ann. § 19-9-3(d).

1 Cases that cite this headnote

[5] **Child Custody** ⇐ Conditions

Provision in divorce order that prohibited husband "from exposing the children to his homosexual partners and friends" was an arbitrary classification based on sexual orientation that violated the public policy to encourage divorced parents to participate in the raising of their children, in the absence of evidence that exposure to any such person known to husband would have an adverse effect on the best interests of the children. West's Ga.Code Ann. § 19-9-3(d).

1 Cases that cite this headnote

[6] **Judgment** ⇐ Mode of rendition

Judgment ⇐ Necessity for entry

A trial court's oral pronouncement is not a judgment until it is reduced to writing and entered as a judgment.

[7] **Judgment** ⇐ Judgment distinguished from decision or findings

Judgment ⇐ Construction with reference to decision or findings

The trial court's oral pronouncements are not binding because, while they may provide insight on the intent of the subsequent written judgment, any discrepancy between the written judgment and oral pronouncements is resolved in favor of the written judgment.

[8] **Child Custody** ⇐ Agreements, contracts, or stipulations

Child Custody ⇐ Placement of child with third parties

Husband's agreement was not required to validate trial court's final divorce judgment provision giving wife a right of first refusal that required husband to notify wife when he planed to leave the children in the care of a third party, in order that wife could decide whether to provide care for the children in that instance.

[9] **Divorce** ⇐ Discretion as to amount

Divorce ⇐ Discretion as to amount

The factfinder is given wide latitude in fixing the amount of alimony, and may use personal experience as an enlightened person in judging the amount necessary for support under the evidence as disclosed by the record and all the facts and circumstances of the case.

[10] **Divorce** ⇐ Rehabilitative awards; awards until self-supporting

Alimony award to wife for as long as she was earning passing grades toward a college degree was not an abuse of discretion, where wife's monthly income was one-tenth that of husband, wife spent the majority of her time during the 21-year marriage as a fulltime homemaker and child caregiver, and she required additional education to obtain gainful employment.

[11] **Divorce** ⇐ Authority and discretion of court

Divorce ⇐ Counsel fees, costs and allowances

Whether to award attorney fees in a divorce action is a matter within the discretion of the trial court, and the exercise of that discretion will not be reversed unless manifestly or flagrantly abused. West's Ga.Code Ann. § 19-6-2.

3 Cases that cite this headnote

[12] **Divorce** ⇐ Need and Ability to Pay

The trial court, when considering an award of attorney fees in a divorce action, is required

to consider the financial circumstances of the parties. West's Ga.Code Ann. § 19-6-2(a).

4 Cases that cite this headnote

[13] **Interest** ⇐ On Judgments

Interest rate of 11.25%, imposed on award of attorney fees to wife in divorce action, violated statute providing that "[a]ll judgments in this state shall bear annual interest upon the principal amount recovered at a rate equal to the prime rate on the day the judgment is entered plus 3 percent," where the prime rate was 7.75 percent on the day the judgment was actually entered, but the court had used the higher rate of 8.25 on the earlier date when it orally pronounced its judgment. West's Ga.Code Ann. § 7-4-12(a).

[14] **Child Custody** ⇐ Relief granted

Attempt by trial court to retain jurisdiction of a divorce and custody case was wholly ineffective, in its language that it would "entertain a request to review and modify the current visitation schedule at any time, at the request of either party," and would consider specified facts established at the hearing when faced with a request to review and modify visitation.

Attorneys and Law Firms

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Opinion

BENHAM, Justice.

***554** Appellant Eric Duane Mongerson and appellee Sandy Kay Ehlers Mongerson were married in March 1986 and were divorced by a judgment and decree filed October 1, 2007. This Court granted appellant Husband's application for discretionary review pursuant to the Family Law Pilot Project.[1]

The final judgment, which incorporated the parties' settlement agreement, gave appellee Wife custody of the couple's three minor children, gave Husband limited visitation with his children until greater periods of visitation were deemed appropriate by the children's therapist, and required Husband ****894** to pay monthly child support, to maintain a life insurance policy on which the couple's four children were named as beneficiaries, to pay 90 percent of the minor ***555** children's uninsured health expenses, and to pay Wife monthly alimony for as long as she was enrolled at an educational facility and earning passing grades in a program to obtain a college degree. Husband was ordered to pay attorney fees of $8,800 to Wife's attorney, with the option of paying $200 a month and with the award accruing interest at an annual rate of 11.25 percent. The children were to have no contact with their paternal grandparents, and Husband was "prohibited from exposing the children to his homosexual partners and friends."

[1] [2] 1. The trial court's order requires Husband to maintain a life insurance policy on his life with the four children of the marriage named as equal beneficiaries.[2] A life insurance policy is often used as a means of providing child support. See OCGA § 19-6-34. A parent can use a life insurance policy to voluntarily provide more child support than is statutorily required (see *McClain v. McClain,* 235 Ga. 659, 221 S.E.2d 561 (1975)), but an intention to support a child into his majority is found only where there is specific and unambiguous language to that effect. *Anderson v. Anderson,* 251 Ga. 508, 509, 307 S.E.2d 483 (1983). The couple's eldest child had reached the age of majority when the October 2007 divorce judgment was entered, and there is no evidence of specific and unambiguous language that reflects a voluntary obligation on the part of Husband to assume a support obligation that exceeded his legal duty. Accordingly, it was error to require Husband to name a child who had reached majority as beneficiary of a policy of life insurance on Husband's life.

[3] [4] 2. Husband complains the trial court abused its discretion when it ordered that the children not be exposed to their paternal grandparents and prohibited Husband "from exposing the children to his homosexual partners and friends." While this State has a policy to "encourage parents to share in the rights and responsibilities of raising their child[ren] after such parents have separated or dissolved their

marriage" (OCGA § 19-9-3(d)), a trial court has discretion to prohibit the exercise of visitation rights by a non-custodial parent in the presence of certain people if the evidence demonstrates the children have been exposed to inappropriate conduct involving the specified persons or that exposure to the prohibited persons would adversely affect the children. *Brandenburg v. Brandenburg,* 274 Ga. 183(1), 551 S.E.2d 721 (2001); *Moses v.* ***556** *King,* 281 Ga.App. 687, 691, 637 S.E.2d 97 (2006). "In the absence of evidence that exposure to a third party will have an adverse effect on the best interests of the children, a trial court abuses its discretion by prohibiting a parent from exercising his or her custodial rights in that person's presence." (Citation omitted.) *Arnold v. Arnold,* 275 Ga. 354, 566 S.E.2d 679 (2002).

Contrary to Husband's assertion, the record contains evidence that supports the trial court's decision that exposure to the paternal grandparents will have an adverse effect on the best interests of the children. There was evidence the grandparents had been physically and emotionally abusive of the children, and Husband acknowledged he had not fulfilled his promise to never leave his children alone with his parents. Accordingly, the trial court did not err when it restricted contact between the children and their paternal grandparents.

[5] The blanket prohibition against exposure of the children to members of the gay and lesbian community who are acquainted with Husband is another matter. There is no evidence in the record before us that any member of the excluded community has engaged in inappropriate conduct in the presence of the children or that the children ****895** would be adversely affected by exposure to any member of that community. The prohibition against contact with any gay or lesbian person acquainted with Husband assumes, without evidentiary support, that the children will suffer harm from any such contact. Such an arbitrary classification based on sexual orientation flies in the face of our public policy that encourages divorced parents to participate in the raising of their children (OCGA § 19-9-3(d)), and constitutes an abuse of discretion. See *Turman v. Boleman,* 235 Ga.App. 243, 244, 510 S.E.2d 532 (1998) (abuse of discretion to refuse to permit mother to exercise visitation rights with child in the presence of any African-American male); *In the Interest of R.E.W.,* 220 Ga.App. 861, 471 S.E.2d 6 (1996) (abuse of discretion to refuse father unsupervised visitation with child based on father's purported "immoral conduct" without evidence the child was or would be exposed to undesirable conduct and had or would be adversely affected thereby). In the absence of evidence that exposure to any member of the gay and lesbian community acquainted with Husband will have an adverse effect on the best interests of the children, the trial court abused its discretion when it imposed such a restriction on Husband's visitation rights. *Arnold v. Arnold,* supra, 275 Ga. 354, 566 S.E.2d 679. Accordingly, we vacate the blanket prohibition against exposure of the children to Husband's gay and lesbian acquaintances.

3. The trial court's order requires Husband to pay 90 percent of any uninsured health care expense of the minor children and contains a non-exhaustive list of various healthcare expenses covered by the provision, including "psychiatric/psychological." Citing ***557** *Wimpey v. Pope,* 246 Ga. 545, 272 S.E.2d 278 (1980) ("medical expenses," as used in divorce decree, did not cover bills for children's psychological care), Husband contends he should not be held responsible for payment of bills for the children's psychological counseling. *Wimpey* stands only for the proposition that psychological care is not included within the phrase "medical care," when that phrase is used in a judgment of divorce and is not defined therein. Id. at 546, 272 S.E.2d 278. In the case at bar, the phrase at issue is "health care expenses" and that term is defined in the judgment as including psychological care. Inasmuch as Husband is responsible for 90 percent of "uncovered health care expenses," including psychological care, Husband's contention is without merit.

4. Husband's assertion that the trial court failed to make a finding of Wife's gross income is without merit. The trial court's order contains a finding of each party's gross monthly earnings, and the transcript of the final hearing contains evidence supporting said finding. See *Dyals v. Dyals,* 281 Ga. 894(1), 644 S.E.2d 138 (2007) (factfinder's determination of gross income not disturbed when supported by evidence of record).

[6] **[7]** 5. Husband takes issue with three provisions of the final judgment on the ground that the trial court's oral ruling at the close of the hearing did not include such measures. A trial court's oral pronouncement is not a judgment until it is reduced to writing and entered as a judgment. *Williams v. City of LaGrange,* 213 Ga. 241(1), 98 S.E.2d 617 (1957). The trial court's oral pronouncements are not binding because, while they may provide insight on the intent of the subsequent written judgment, any discrepancy between the written judgment and oral pronouncements is resolved in favor of the written judgment. *Blair v. Bishop,* 290 Ga.App. 721(2), 660 S.E.2d 35 (2008).

[8] With regard to the final judgment's provision giving Wife a "right of first refusal" that requires Husband to notify Wife when he plans to leave the children in the care of a third party in order that Wife can decide whether she shall provide care for the children in that instance, Husband additionally complains that the parties did not agree to such a provision. However, the judgment issued by a trial court in a divorce action is not limited to only those matters upon which the parties have agreed.

6. Husband complains that the award of alimony to Wife constitutes an abuse of discretion, contending the trial court made no finding concerning Husband's ability to pay and Wife's needs, and contending the award is grossly excessive because it is possible ****896** under the terms of the award for Wife to remain a student and receive alimony for the rest of her life.

[9] [10] The factfinder is given wide latitude in fixing the amount of ***558** alimony, and may use personal experience as an enlightened person in judging the amount necessary for support under the evidence as disclosed by the record and all the facts and circumstances of the case. *Farrish v. Farrish,* 279 Ga. 551, 552, 615 S.E.2d 510 (2005). The record reflects that the trial court considered that Wife has a monthly income approximately one-tenth that of Husband and that Wife has spent the majority of her time during the 21-year marriage as a full-time homemaker and child caregiver and requires additional education to obtain gainful employment. The trial court did not abuse its discretion in making its alimony award. *Arkwright v. Arkwright,* 284 Ga. 545(2)(a), 668 S.E.2d 709 (2008).

Husband's concern that the alimony award as entered gives Wife an opportunity to abuse the alimony award in the future is speculative and can be addressed in a petition for modification should Husband's fears be realized at some point in the future.

7. Husband finds fault with the assessment of attorney fees against him, arguing the trial court did not make factual findings necessary to support an award of attorney fees based on OCGA § 19-6-2(a), the trial court did not afford Husband an evidentiary hearing to challenge the value and need of the legal services performed by Wife's attorney, and the trial court abused its discretion by including a provision authorizing the accrual of interest on the award at 11.25 percent until paid in full.

The final judgment and decree of divorce did not cite a statutory basis for the attorney fee award, but that omission does not mean that the statutory basis of the award is in question. *Mixon v. Mixon,* 278 Ga. 446(2), 603 S.E.2d 287 (2004). OCGA § 19-6-2 authorizes the trial court in a divorce action to exercise its sound discretion and award attorney fees after considering the financial circumstances of both parties. The award is " 'to ensure effective representation of both spouses so that all issues can be fully and fairly resolved.' [Cit.]" Id. Wife's request for attorney fees in her complaint sought the award for her representation during the divorce litigation, evidence of the parties' disparate financial conditions was presented at the final hearing before the trial court, no motion for an award of attorney fees pursuant to OCGA § 9-15-14 was made, there is no indication in the record that the trial court sua sponte undertook a consideration of an award of attorney fees on that basis, and Husband does not contend the award was made pursuant to any statutory provision other than OCGA § 19-6-2. Id.; *Gomes v. Gomes,* 278 Ga. 568, 569, 604 S.E.2d 486 (2004). We conclude the award was made pursuant to OCGA § 19-6-2.

[11] [12] Whether to award attorney fees in a divorce action pursuant to OCGA § 19-6-2 is a matter within the discretion of the trial court, and the exercise of that discretion will not be reversed unless ***559** manifestly or flagrantly abused. *Dasher v. Dasher,* 283 Ga. 436(2), 658 S.E.2d 571 (2008). The trial court is required by OCGA § 19-6-2(a) to consider the financial circumstances of the parties when considering an award of attorney fees, and the transcript of the final hearing establishes the trial court properly considered the relative financial positions of the parties. See *Patel v. Patel,* 285 Ga. 391, 393(4), 677 S.E.2d 114 (2009); *Wood v. Wood,* 283 Ga. 8(6), 655 S.E.2d 611 (2008); *Rieffel v. Rieffel,* 281 Ga. 891, 893, 644 S.E.2d 140 (2007).

Husband's complaint that he was not afforded a hearing on the issue of attorney fees is without merit. The trial court began the final hearing by stating that the issues remaining for resolution at the hearing were alimony and attorney fees, and reminded the parties that testimony "is regarding alimony and attorney fees only." During the hearing, Husband's counsel argued that no award of attorney fees should be made due to Husband's financial condition. After the evidence was presented, the trial court orally announced a ruling on the issue of attorney fees and Husband voiced no objection.

[13] Husband's concern about the interest rate imposed on the award of attorney ****897** fees is justified. OCGA §

7-4-12(a) states that "[a]ll judgments in this state shall bear annual interest upon the principal amount recovered at a rate equal to the prime rate ... on the day the judgment is entered plus 3 percent." Husband asserts the date of the judgment was October 1, 2007, and the applicable prime rate was 7.75 percent. Wife contends the applicable prime rate is 8.25 percent, the rate on July 20, 2007, the day the trial court orally pronounced its judgment. However, as we stated earlier, an oral pronouncement is not a judgment; it must be reduced to writing and entered as a judgment to be effective. See Division 5, supra. The portion of the attorney fee award which set the rate of interest is vacated and the case is remanded to the trial court to determine the rate of interest the judgment is to carry pursuant to OCGA § 7-4-12(a).

8. In its order, the trial court awarded child custody and visitation according to the terms of the parties' stipulated agreement. The trial court's order went on to express its opinion that, but for the agreement, the trial court would not have permitted Husband the limited contact to which the parties agreed. The trial court's order advised the parties that it would "entertain a request to review and modify the current visitation schedule at any time, at the request of either party," and would consider specified facts established at the hearing when faced with a request to review and modify visitation.

[14] We read the language at issue as an attempt by the trial court to retain jurisdiction of the case and, as such, it is wholly ineffective. *Anthony v. Anthony,* 212 Ga. 356, 358, 92 S.E.2d 857 (1956). Accordingly, ***560** the case is remanded to the trial court for removal of that language from the judgment.

Judgment affirmed in part and vacated in part, and case remanded with direction.

All the Justices concur, except CARLEY and MELTON, JJ., who concur specially.

MELTON, Justice, concurring specially.
While I concur with the overall result of the majority opinion, I write separately to emphasize that Division 2 of the majority opinion should only be read to stand for the well-settled proposition that, absent *evidence* of harm to the best interests of the children through their exposure to certain individuals, a trial court abuses its discretion by prohibiting a parent from exercising their visitation rights while in the presence of such individuals (in this instance, Husband's homosexual partners and friends). See *Brandenburg v. Brandenburg,* 274 Ga. 183(1), 551 S.E.2d 721 (2001); *Arnold v. Arnold,* 275 Ga. 354, 566 S.E.2d 679 (2002). While Husband's behaviors or actions affecting his children's well being could support the trial court's imposition of any number of restrictions on Husband's visitation rights, the trial court abused its discretion by restricting Husband's visitation rights based on his children's potential exposure to Husband's compatriots, independent of whether or not Husband's friends exhibited any harmful behavior that could affect the children. Our case law is clear that such a visitation restriction must fail.

I am authorized to state that Justice Carley joins in this special concurrence.

All Citations

285 Ga. 554, 678 S.E.2d 891, 09 FCDR 2004

Footnotes

1 Pursuant to the Family Law Pilot Project, this Court grants all non-frivolous applications seeking review of a judgment and decree of divorce. *Wright v. Wright,* 277 Ga. 133, 587 S.E.2d 600 (2003).

2 While the parties' settlement agreement did not include this provision, Husband agreed when he testified at the divorce hearing to maintain the life insurance policy for the benefit of his children. Thus, we do not see this as a case in which the trial court imposed over the parent's objection the requirement that the parent maintain a life insurance policy for the benefit of minor children. Compare *Gardner v. Gardner,* 264 Ga. 138, 441 S.E.2d 666 (1994); *Clavin v. Clavin,* 238 Ga. 421, 422, 233 S.E.2d 151 (1977).

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