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Relocation After *Bodne*

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Introduction[1]

Every so often a case changes the way we practice law in a dramatic way. *Bodne v. Bodne*, 2003 WL 22533120 (GA. Sup. Ct., Nov. 10, 2003, will be one of these cases. As Georgia family law practitioners, we have also felt the effects of two other recent decisions by the Georgia appellate courts: *Scott v. Scott*, 276 Ga. 372 (2003) and *Lewis v. Lewis*, 252 Ga. App. 539 (2001). As it turns out, *Scott* and *Lewis* were stepping stones on the path of the changing Georgia common law to *Bodne*.

This paper was originally to be titled "Relocation After *Scott* and *Lewis*." While, of course, necessitating a change in the title and content of this paper, *Bodne v. Bodne* also altered custody law in Georgia in broad and far-reaching ways. In *Bodne*, the Georgia Supreme Court held that "in relocation cases, as in all child custody cases, the trial court must consider the best interests of the child." In so holding, the Georgia Supreme Court overturned at least 12 Georgia cases representing decades of common law regarding relocation in custody cases. Furthermore, as the dissent in *Bodne* notes, the majority decision in *Bodne* may also be read to overrule an almost century-old presumption that a custodial parent had a *prima facie* right to continue to retain custody absent a showing of a material change in circumstances affecting the welfare of the child, in any case, not just a relocation case. The focus of this paper remains relocation. However, it seems evident that *Bodne* will alter domestic relations law regarding all custody modification issues.

This paper will first discuss the issue of relocation in Georgia custody cases pre-*Bodne*, addressing *Scott* and *Lewis* in particular. Secondly, the paper will focus on the *Bodne* decision, addressing the potential interpretations and impact of the majority, concurring and dissenting opinions. Third, this paper will discuss the social science evidence regarding relocation. Fourth, this paper will look at Senate Bill 16 and the potential for statutory change in the area of relocation. Finally, this paper will address some practical questions for practitioners after *Bodne*, *Scott*, and *Lewis*, and suggest some practical solutions.

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Note from the Chair

by Thomas F. Allgood Jr.
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As I wind down my tenure as an officer of the Family Law Section, I am reminded not of the hours of work and considerable effort put into organizing section seminars and other section activities, but rather the learning experience this has been for me. My participation as a section leader has afforded me the opportunity to work with some of the brightest and most experienced family law practitioners in the state. It has indeed been my privilege to serve.

If you have not experienced the satisfaction that comes from serving your fellow members of the Bar, I encourage each and every one to get involved in some fashion and at some level.

Our section, of which every member should be proud, is not only one of the largest of the State Bar, but is routinely recognized statewide as sponsoring some of the most informative, fun and cutting-edge legal seminars. The Family Law Institute this past May at the Amelia Island Ritz-Carlton Resort was another great success. More than 300 attended and the reviews were outstanding. Steve Steele, the secretary of our section, followed up with another home run at the Nuts and Bolts Seminars in August and September. And the program planned by Richard Nolen, our section vice-chair, for the 2004 Family Law Institute in beautiful San Destin, Fla., is sure to be novel, educational and exciting.

Our recently re-designed section newsletter, under the guidance of Editor Kurt Kegel, continues in my opinion to be worth every penny of the modest $30 each of us pays in section dues.

My predecessors motivated me to continue their success and my chosen successors-in-office give me great confidence that the Section, and its sponsored activities, will continue to be the best of the best.

Special recognition and my sincere thanks must go to Steve Harper and his wonderful staff at I.C.L.E. We Georgia lawyers are indeed fortunate to have an organization like I.C.L.E. in Georgia to assist with our continuing legal education. When it comes to providing legal seminars on dozens of varied topics and at reasonable cost, I would put I.C.L.E. up against any other similar organization in the country.

Over the past four years I have been amazed at the overwhelming willingness of our fellow lawyers to impart their ideas and experience to their colleagues. Without exception, the lawyers and judges I asked to participate in the seminars I planned agreed readily to do so. While some may consider it an honor to be asked to speak to a group of 300 or more lawyers and judges, it is mostly a lot of work. And yet all of our seminar speakers routinely put in dozens of hours of preparation without any reward or remuneration. There is only one explanation for such enormous effort — each recognizes his or her obligation to give back something to the profession.

Please do your part. Ask your colleagues to join the section. Attend the seminars. Submit articles for our newsletter. Contact your local legislators about family law issues and legislation. And most of all — get involved! You will not regret it. ♦

Technology Tips for the Family Law Attorney

by Randy Kessler
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I have been asked to comment on technology that we, as family law attorneys, can use to help our clients, practices and the court. I will try to regularly submit articles based on information I have gathered through discussions I have had with other family law attorneys and from the technology tools we use in our office.

There are all sorts of ways technology can assist us. Next to competent and reliable staff, technology is probably the most useful tool a family lawyer can rely upon. Over the next few months, I plan to discuss all sorts of technology tips ranging from Powerpoint presentations (*Can they be used in the courtroom?*) to Palm Pilots (*Do they really help?*) to wireless technology (*Can we use this in our practice?*) to e-mail, the Internet and the like. I solicit input from everyone who might read this publication. You can certainly submit your comments via e-mail to rkessler@kessler-schwarz.com or via telephone by calling 404-688-8810.

Since this is an introductory article, I suggest we all keep our minds wide open. Question yourself: five years ago, did you have e-mail access at all; three years ago, did you have e-mail access at work; last year, did you have a Web page? Almost every lawyer has e-mail access at their desktop and many lawyers are developing their own Web pages. As this happens, new questions will arise such as, "What good does a Web page do?" and "Should it be designed in-house or through an outside company?" Other questions which we will address include, "Are we limiting our support staff by not investing in the proper technology?" While there are many technology firms that can assist in answering these questions, I will try to answer questions from a family law practitioner point of view.

In our practice, we rely heavily on technology and believe it helps our clients and our practice. It also seems to have the side benefit of creating the "wow" phenomenon in that many clients are impressed that we are not afraid of technology. It seems that clients more and more are expecting us to be at least as technologically savvy as they are and, in fact, more so. It also leads clients to believe that we will have an edge in litigation if we are efficiently utilizing the technological resources available. Aside from this article, there are many other publications which can help advance our technological know how. There are publications presented by the American Bar Association, Association of Trial Lawyers of America and many others. But, I will try to keep it simple.

Finally, in each article, I will try to provide at least one practice pointer or pearl of wisdom which is useful in your family law practice. This month's "pearl" is to hire a young summer clerk. Remember who programmed the first VCRs? The kids in the family. Same thing with today's technology. Who is more likely to use an MP3 player or a Palm Pilot, a 22-year-old law student or a 60–year-old partner in a firm? Don't be afraid to use summer law clerks for more than just legal research. Or, hire college students who want to have a law firm on their resume, who would likely be more than happy to be utilized as a technology assistant, runner or filing clerk. Such a relationship can be very symbiotic in that the young person will develop an understanding of the legal practice while you may develop a better understanding of technology that is widely understood by today's youth, and which future clients will expect you to understand. Over the next few months, I look forward to discussing the benefits of e-mail, Web pages, Palm Pilots, electronic filing, Powerpoint presentations and any other topics which may be suggested. ♦

Bodne

Continued from page 1

Before Bodne: The Evolution of Relocation As A Factor in Change of Custody Cases in Georgia.

A. The Case Law Before Lewis on Relocation: Not a Change Unless. . .

Prior to *Bodne v. Bodne*, it was well-established that a person vested with sole physical custody had a *prima facie* right to retain custody. The presumption in favor of the custodial parent retaining custody dates back through almost a century of Georgia common law. S*hields v. Bodenhamer*, 180 Ga. 122 (1935); *Kirkland v. Canty*, 122 Ga. 261 (1905). This presumption is not, however, codified in Georgia statutory law. O.C.G.A. § 19-9-1(a) expressly provides that "in all cases... in which a change in custody of a minor child is sought, the court may look into all circumstances of the parties, including the improvement of the health of a party seeking a change in custody, and after hearing both parties, may make a different disposition of the children."

In contrast to the more liberal statutory requirements for a change in custody, the case law presumption narrowed the ability of a trial court to modify custody. Prior to *Bodne*, to change custody, the trial court had to find affirmatively that either the original custodian was no longer able or suited to retain custody, or conditions surrounding the child had changed so that modification of custody would have the effect of promoting his welfare. It was the change for the worse in conditions in the child's present home environment, rather than the purported change for the better in the environment of the non-custodial parent, which controlled. *Ormandy v. Odom*, 217 Ga. App. 780 (1995); *Mercer v. Foster*, 210 Ga. 546, 81 S.E.2d 871 (1954). Once such a change of condition was determined, then the primary consideration for a change of custody was the welfare of the child, or the best interests standard.

While the trial court was granted discretion to determine whether there was a change of circumstance and to determine what was in the child's best interests, the court was also restricted by the evidence. Even though the appellate courts had stated that if there existed any reasonable evidence to support the trial court's decision concerning a change of custody between parents, such decision would be affirmed on appeal, in practice, prior to *Bodne*, the appellate courts had scrutinized the evidence in relocation cases and often held that the evidence was insufficient to support the trial court's decision. The decision of the trial court had to be based on a new material change of condition that affects the welfare of the child. *Arp v. Hammonds*, 200 Ga. App.715, 409 S.E.2d 275 (1991). As a general rule, prior to *Bodne*, if the primary custodial parent remained fit, the appellate courts would not affirm a change of custody without a showing as to why that parent should lose custody.

Further, prior to *Bodne*, the appellate courts had been willing to allow for a change in custody in the event of relocation if coupled with another change of circumstance deleterious to the child. The appellate courts had been attempting to define on a case by case basis, what is and is not a change of circumstance in the relocation cases. As follows is a list of examples in case law where, prior to *Lewis* and *Bodne*, the appellate courts considered a modification of custody potentially justified where relocation was an additional factor:

1. A move plus a child's adverse emotional problems resulting from a sudden, unannounced move may be a factor which could be considered in the totality of the circumstance in determining whether a change of condition occurred. *In the Interest of R.R.*, 222 Ga. App. 301, 474 S.E.2d 12 (1996). In this case, the appellate court relied heavily on the fact that the trial court made two findings of changed circumstances: a) that relocation was a change of circumstance, and b) the destruction of the relationship between the mother and the child based on the relocation. Those findings were not sufficient to change custody. Evidence that the mother's health had improved was also not sufficient to change custody since there was

no evidence that the father was unsuited for custody. In her concurrence, Justice Beasley stated that the proper remedy was to change the visitation schedule. The case was reversed and remanded. By expressly holding that an adverse emotional impact coupled with a move may be sufficient, the Court of Appeals provided no guidance on the issue.

2. Relocation plus continued progress through a 12 step program and continued sobriety may be a factor. *In the Interest of R.R.*, 222 Ga. App. 301, 474 S.E.2d 12 (1996).

3. A move plus the custodial parent (father) moved in with the former wife of his former wife's new husband, and another woman, and the happy three some and the children moved into a trailer and the children had no other contacts was sufficient to change custody. *Forston v. Fortson*, 152 Ga. App. 326, 262 S.E.2d 599 (1979). The facts of this particular case seem to suggest that the custodial parent — father had "issues" with parenting and stability, irrespective of the relocation.

4. A move, plus prejudicing the child against the other parent and refusing contact with the other parent was held to be sufficient to change custody. *Jones v. White*, 209 Ga. 12, 73 S.E.2d 187 (1952).

5. A move, plus remarriage with stepchildren and frequent moves was held to support a change of custody. *Adams v. Heffernan*, 217 Ga. 404, 122 S.E.2d 735 (1961).

As follows are cases where the courts found the circumstances would **not** support modification based on relocation.

1. Improvement of Non-Custodial Parent's Condition — A showing of change of condition of an out-of-custody parent without showing its material effect on the child is insufficient to war rant a change of custody. See *Arp v. Hammonds*, 200 Ga. App. 715, 716, 409 S.E.2d 275 (1991).

2. Lack of Notice of Move — The Court of Appeals found that lack of notice of a move did not constitute a material change affecting the welfare of the child. *In the Interest of R.R.*, supra.

3. Move Prevents Visitation — The Supreme Court held that increased travel and that fact that the distance makes it impossible to see and return the child in the same day was not grounds to modify custody. *Harrison v. Kelly*, 209 Ga. 537, 74 S.E.2d 546 (1953).

4. Move to Alaska— A move to Alaska is not sufficient to change custody. *Hackney v. Tench*, 216 Ga. 483, 117 S.E.2ds 453 (1960).

5. Possible Move in the Future with Automatic Reopening of Case — In *Tenney v. Tenney*, 235 Ga. App. 128, 508 S.E.2d 487 (1998), the Court of Appeals held that a prospective order for a psychological evaluation in the event of a potential move was improper. The court cannot have continued jurisdiction to automatically reactivate the case. The trial court also could not change custody from a parent who had been awarded sole physical custody based on a requirement that he not move.

Prior to *Bodne v. Bodne*, it was well-established that a person vested with sole physical custody had a *prima facie* right to retain custody. The presumption in favor of the custodial parent retaining custody dates back through almost a century of Georgia common law.

6. Loss of Educational Environment — In *Bisno v. Bisno*, 238 Ga. 328, 232 S.E.2d 921 (1977), moving the children out of the Hebrew Academy in Atlanta fell short of proving a material change substantially affecting the welfare of the children sufficient to change custody.

7. Instability, Joint Legal Custody, Cancelling an Orthodontist Appointment, Temporary Move While Waiting for Court Decision, Remarriage and Relocation — In *Helm v. Graham*, 249 Ga. App. 126, 547 S.E.2d 343 (2001), the Court of Appeals held that when looking at a change of condition, the point of reference is from the date of the last decree of modification to the present action. The trial court had found that the mother had moved frequently. But since the last modification decree, she

had only moved once and that move was to a larger unit within the same complex. The appellate court held that such a move did not amount to instability and the trial court should have limited the evidence to the time period from the last order forward. Having found that the trial court had based its decision to change custody on remarriage and a planned move because it would separate the children from their father and other family members, the Court of Appeals reversed. Also, the fact that there was joint legal custody and the Father had final decision making authority over health matters was not sufficient to change custody, because the parties could still discuss health issues long distance.

The Effect of Lewis on Relocation: A Change for Shared Custody Arrangements

The first inroad toward the concept that relocation would be an independent ground to modify custody was *Lewis v. Lewis*, 252 Ga. App. 539, 557 S.E.2d 40 (2001). In *Lewis*, the Court of Appeals held that in joint physical custody cases, relocation may be a change of circumstances sufficient to modify custody. Further, since neither parent in a joint custody arrangement had a *prima facie* right to custody, the applicable legal standard was the best interest of the children.

The Court of Appeals found that, unlike sole physical custody cases, relocation could independently constitute a change of circumstance in joint custody cases. *Lewis v. Lewis*, 252 Ga. App. 539, 557 S.E.2d 40 (2001). Since neither parent has a *prima facie* right to custody if there were joint physical custody, the court must basically make an initial award of custody once it determines whether there has been a change of circumstance. The change of circumstance can be evidence of a **positive or adverse** change in the circumstances of either of the joint custodial parents, or any change in the circumstances of the child substantially affecting the welfare and the best interest of the child. *In the Interest of S.D.J.*, 215 Ga. App. 779, 452 S.E.2d 155 (1994). Once the court determines that there has been a positive or adverse change of the circumstances of either parent or any change of condition and circumstances substantially affecting the welfare and best interest of the children, then the court is governed by the child's best interests. In changing from a joint or shared custody arrangement to sole custody, the Court found that difficulty in maintaining the shared custody arrangement can amount to an adverse change of condition affecting the welfare of the child. *In the Interest of S.D.J.*, 250 Ga. App. 780, 452 S.E.2d 155. The *Lewis* decision held that relocation can make it difficult to maintain a shared custody arrangement and thus was a change of condition.

In *Lewis*, both parties agreed that the custody schedule had to be modified in light of the move. The trial court found that the impact of the proposed move on the existing custody arrangement would adversely impact the children's welfare and thus it constituted a change of circumstances sufficient to modify custody. Both parties were considered fit and loving. Neither was entitled to preference for custody. Therefore, the court was required to consider only the best interests of the children in determining custody.

The nomenclature in *Lewis* was disturbing for the trial courts and practitioners. In that case, the parties named their arrangement "shared physical custody." The mother had the children during the school year and the father had the children every other weekend starting on Thursday at 3:00 p.m. until Sunday. During the summer, the children resided with their father and the mother had them every other weekend from Wednesday until Sunday. They divided the holidays equally. The mother had agreed not to change her residence for 18 months. The father paid child support to the mother. The court

found that the mother had the children for 60 percent of the time and the father had 40 percent of the time. The Court of Appeals determined that because the parties used the words "shared physical custody" and neither party was denoted as the primary parent, the parties had joint physical custody. Many lawyers and litigants would not have come to the same conclusion. In fact, many times the term "shared physical custody" has been used in agreements because it helps settle cases and makes the non-custodial parent feel better. There was previously no legal meaning attached to the term as there is no statutory definition of shared parenting. Many parties would have been led to believe that with this traditional visitation scheme and the mother's express right to move after 18 months, that the mother had primary custody. Since the Court found otherwise, this case potentially opened the floodgates to more litigation. As is discussed below, however, the potential for increased litigation that was feared following *Lewis*, is significantly greater following *Bodne*.

The Effect of Scott on Custody and Relocation Cases

In its recent opinion in *Scott v. Scott*, 578 S.E.2d 876 (Ga. 2003), the Georgia Supreme Court reversed the holding in *Carr v. Carr*, 207 Ga. App. 611, 429 S.E.2d 95 (*cert. denied*, 263 Ga. 451 (1993), such that now a self-executing change of custody provision based on relocation is not enforceable and should be stricken from the final decree. In *Scott*, the Supreme Court expressly refused to overturn the established principles that relocation and remarriage are not changes of circumstance sufficient to modify custody. The Court cited the two leading cases on these issues, *Ormandy v. Odom*, 217 Ga. App. 780, 459 S.E.2d 439 (1995) and *Mercer v. Foster*, 210 Ga. 546, 81 S.e.2d 871 (1954). As a result of *Scott*, the parties cannot negotiate, and the court cannot order, an automatic change of custody, and there is no statutory mechanism by which to come into court to attempt to modify custody in these cases.

Since the case of *Carr v. Carr*, 201 Ga. App 611, 429 S.E.2d 95 (1993), has been overturned, the trial courts must now exercise judicial scrutiny over all change of custody cases involving relocation and remarriage. The *Scott* opinion echoes the dissent that Justice Hunstein wrote 10 years earlier when the Supreme Court denied the petition for *certiorari* filed in the *Carr* case. See, *Carr v. Carr*, 263 Ga. 451, 435 S.E.2d 44 (1993). Her dissent is often quoted for the line that "self-executing provisions for child custody, more often than not, treat children as potted plants, that is, easily moved at the whim of the parties without due consideration of the child's best interest." Justice Hunstein set the stage in her *Carr* dissent for the notion that the parties in a relocation case should be afforded the same type of judicial scrutiny as in the original award of custody.

However, rather than answering the question of relocation, the *Scott* case posed more problems. On one hand, the Court recognized in dicta that remarriage and relocation directly affect a child, but yet the *Scott* opinion does not allow these factors automatically to warrant a change in custody. The Supreme Court said that there should be judicial scrutiny in those cases. However, prior to *Bodne*, there was no vehicle for a non-custodial parent to travel to the courtroom on the issue of relocation because the Court did not overturn *Ormandy v. Odom*, *supra*.

Bodne v. Bodne

Bodne v. Bodne, 2003 WL 22533120 (GA Sup. Ct., November 10, 2003), changed all former precedent. In *Bodne*, the Georgia Supreme Court expanded *Lewis* and *Scott* and overruled *Ormandy*. From *Carr*, the law has come full circle. Justice Hunstein's approach to custody modification cases, originally represented in her dissent in *Carr* a decade ago, had reached a majority of the Court. Justice Hunstein, writing for the majority, mandates that the best interests test apply in all custody cases. The holding in *Bodne* is as follows: "When exercising its discretion in relocation cases, as in all child custody case, the trial court must consider the best interests of the child and cannot apply a bright-line test." *Id.* at 1. The bright-line tests that cannot be applied are the presumption that "the cus-

todial parent has a *prima facie* right to retain custody" or any self-executing change of custody provision as in *Carr* or *Scott*.

In *Bodne*, the father and mother were divorced in 1999. In the original custody award, "primary physical custody" was granted to the father and the parties agreed to divide the time spent with the children equally. The mother's equal involvement with the children was "an important aspect of the parties' divorce agreement." *Id*. Two years later, the father had remarried and planned to move to Alabama "to enhance his economic opportunity" and "to leave behind the pre-divorce chapter of his life." *Id.* The trial court heard "unanimous testimony. . . that the children would suffer irreparable harm in being denied regular contact with their mother." *Id.* Based on this evidence, the trial court found that their was a substantial change in a material condition affecting the children's welfare and ordered a change in custody to the mother. The Court of Appeals relied on *Ormandy v. Odum, supra*, and reversed, finding that the father, as custodial parent, had a *prima facie* right to retain custody absent a showing that the new location put the children at risk.

The majority opinion in *Bodne* reversed the Court of Appeals, and expressly overruled *Ormandy* and "any other Georgia case" to the extent that case "presumes the custodial parent has a *prima facie* right to retain custody unless the objecting parent shows that the environment of the proposed relocation endangers a child's physical, mental or emotional well-being." *Id.* The majority holding affirmed the trial court's decision that in its discretion the custody should be changed from the father to the mother, finding that the trial court "appropriately considered the myriad factors that had an impact on the children as established by the evidence adduced before it." *Id.* at 2.

In a concurring opinion, Justice Sears writes that the focus on the best interests of the child "has the greatest potential to maximize the well-being of the child." *Id.* at 3. Further, she disagreed with the dissent's emphasis on the "new family unit" headed by the custodial parent, opining instead that "divorce creates a larger, interconnected 'binuclear family', consisting of one household headed by the custodial parent and another household headed by the non-custodial parent, with the child being a part of both." *Id.* at 2. She writes that the child's family, unlike Humpty Dumpty, can be put back together again after divorce by melding the families into this binuclear family.

Justice Benham, joined by Justices Thompson and Carley, writes a long and detailed dissenting opinion. Of foremost concern to the dissenting Justices is the abandonment of many years of guiding precedent, leaving the "area of law fraught with uncertainty and instability." *Id.* at 6. Without the presumption in favor of the custodial parent retaining custody, the worst possible result will be that "every dissatisfaction a non-custodial parent has with the parenting of the custodial parent becomes a proper basis for relitigating custody." *Id.* at 3. The dissent points out that relocation is increasingly common in American life, and that other jurisdictions have recognized the need for the court to take a limited role in parenting decisions after the original award of custody.

Social Science Evidence on Relocation

It would be much easier to decide whether relocation is in the best interests of a child if any reliable scientific evidence about the effects of relocation on a child existed. However, there is no definitive study on the issue of relocation. Most of the work extrapolates from other research. The research is also polarized with two of the leading publications reflecting different views. On the one hand, there is Judith Wallerstein, *To Move or Not to Move: Psychological and Legal Considerations, The Relocation of Children Following Divorce*, Family Law Quarterly 30 (1996) who generally advocates for relocation. On the other hand, there is R. A. Warshak, *Social Science and Children's Best Interests in Relocation Cases: Burgess Revisited*, Family Law Quarterly 34 (2000), who finds that relocation is often not good for the child.

As is evident in the majority, concurring, and dissenting opinions in *Bodne*, there can be radically different perspectives on

the impact of relocation on custody. Whether a child should have a new family unit with the custodial parent, as the dissent in *Bodne* maintains, or a binuclear post-divorce family, as Justice Sears writes in her concurring opinion, is obviously going to be a bias of any given trial court judge.

Dr. Kenneth Waldron, a psychologist in Wisconsin, prepared materials for the American Academy of Matrimonial Lawyers in spring of 2003 and reviewed over 70 studies and literature summaries and found that the bulk of findings do not support relocation. *Relocation: Post-Divorce, Social Science Research Review Summary* (2003). However, he cautions that each case is unique and fact specific, including variables such as ages of the children, emotional health of the children, length of time between parents' separation and divorce, geographic stability, role of the non-custodial parent and the effect the move might have on his or her involvement and issues of single parenting. His summary states that the potential impact on a child can be positive or negative depending on the circumstances of each case. Significantly, Dr. Waldron did not find that research supported the conclusion that the perceived satisfaction and adjustment of the relocating parent trickles down to the child.

The General Assembly's Struggle with Relocation and Senate Bill 16

For years, legislation on relocation has been introduced in the General Assembly. Most recently, Senate Bill 16, which was pending in the Senate last session. The original bill was based on the Model Act prepared by the American Academy of Matrimonial Lawyers.

The original version of the bill contained strict notice provisions and had a provision that failure to give notice of a move would constitute a change of circumstance sufficient to change custody. Along with strict notice provisions, the bill allows a court to consider eight factors in determining whether a proposed relocation justifies a change of custody. The tests focus on a best interest analysis. (See discussion of the Model Act factors discussed herein above.)

In its final version, some of the teeth were taken out of the proposed bill. A great compromise was attempted in order to satisfy the groups who oppose this bill. The bill will come up again in January 2004, since no hearings have yet been held in the judiciary committees. After *Bodne*, however, the bill may not be necessary.

Questions for Practitioners: Custody Settlement Modification After *Bodne*, *Scott* and *Lewis*

For practitioners, the most significant issue after *Lewis* and *Bodne* is the abandonment of a *prima facie* right of the custodial parent to retain custody. As is discussed above, this radical change in the law could well mean that all modification of custody cases may be litigated as if it is an original custody award. The dissent in *Bodne* speaks of this concern of every dissatisfaction of the non-custodial parent becoming grounds for relitigating custody. There could be a significant increase in modification of custody litigation as a result.

With regard to relocation cases, *Bodne*, *Lewis* and *Scott* together do provide some guidance to practitioners: relocation is grounds for a modification of custody action, and in that modification action, the trial court will apply the best interests of the child analysis. Further, at the time of the original award of custody, relocation cannot be dealt with by self-executing change of custody (a "*Carr* provision").

Bodne's majority opinion does not provide much guidance, however, as to what the trial court will or should consider in a litigation over relocation. In the facts of *Bodne*, the mother and father shared equal

time with the children, and the mother was able to show through the evidence that there would be irreparable harm to the children if they relocated with their father. Yet there is no requirement in *Bodne* that in order for a modification action to succeed the custodial arrangement be equal time or that the party opposing the relocation show irreparable harm to the children. Rather, the majority simply states that the trial court shall exercise its discretion using the best interests of the child analysis.

With regard to relocation cases, *Bodne*, *Lewis* and *Scott* together do provide some guidance to practitioners: relocation is grounds for a modification of custody action, and in that modification action, the trial court will apply the best interests of the child analysis.

It seems reasonable to assume that trial courts will seek to define the "myriad factors" mentioned in the majority opinion of *Bodne*. Insight can be found in Justice Sears's concurring opinion. Justice Sears cites several factors that could be considered in determining whether relocation is inappropriate such as: "a child's relationship with the non-custodial parent; his ties to local schools and friends; the child's age; the stress and instability of relocation and the corresponding benefits of consistency and stability for the child; the interests of the binuclear family; the custodial parent's reason for relocating; the dynamics of custodial parent's new family unit; and any other relevant factors. . ." *Id.* at 2.

These factors cited by Justice Sears mirror some of the factors which are listed for consideration in the American Academy of Matrimonial Lawyers Proposed Model Relocation Act (10 J. Am. Acad. Matrim. Law 1, 1998): "(1) the nature, quality, extent of involvement, and duration of the child's relationship with the person proposing to relocate and with the non-relocating person, siblings, and other significant persons in the child's life; (2) the age, developmental stage, needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child; (3) the feasibility of preserving the relationship between the non-relocating person and the child through suitable [visitation] arrangements, considering the logistics and financial circumstances of the parties; (4) the child's preference, taking into consideration the age and maturity of the child; (5) whether there is an established pattern of conduct of the person seeking the relocation, either to promote or thwart the relationship of the child and the non-relocating person; (6) whether the relocation of the child will enhance the general quality of life for both the custodial party seeking the relocation and the child, including but not limited to, financial or emotional benefit or educational opportunity; (7) the reasons of each person for seeking or opposing the relocations; and (8) any other factor affecting the best interests of the child." The factors listed in the Model Relocation Act are more detailed, and arguably less biased against relocation than Justice Sears' factors. Thus, Georgia family law attorneys perhaps should adopt these factors in practice, and persuade trial courts to employ them.

Another question for practitioners is how can relocation be dealt with at the time of the divorce and original award of custody? If your client hopes to relocate in the future, it will be important to advise him or her that the other parent may well be able to hold up or ultimately prevent the relocation through a modification of custody action. With this client, it may be appropriate to negotiate all of the terms of a future relocation at the time of the original decree, or at the very least build into the agreement requirements to mediate or arbitrate the issue of relocation in the future.

If, on the other hand, your client wishes to prevent relocation, it would seem a good idea to include in the language of an agreement, mention of all of the factors which might be considered in a modification, as well as notice requirements, mechanisms for requiring the relocating party to pay for costs of litigation and travel. Below is an example of hypothetical language for an agreement which might protect against relocation:

Given the parties' fervent belief that it is essential to the children's best interests and welfare to maintain a strong relationship and frequent contact with both of their parents, the parties agree that they shall use their best efforts to maintain their respective households in close proximity to one another until both of the children graduate from high school.

The parties understand that it is extremely difficult to predict future events and that the children are not immutable objects, but living beings who may mature and develop in unforeseeable ways. The parties recognize that whether particular circumstances in the future warrant a change in custody is a factual question determined under the unique situation in each individual case. In the event of a relocation by either party, the parties agree to work with one another in the utmost good-faith to restructure the custody provisions of this agreement in a manner consistent with the best interests of the children.

If the parties are unable to reach an agreement regarding the restructuring of the custody provisions of this agreement, they shall attend at least one mediation session with a licensed therapist or psychologist mutually agreed upon by the parties, in an effort to resolve the custody issues extrajudicially. If the parties are unable to agree upon a licensed therapist or psychologist, they shall each choose a licensed therapist or psychologist and those two professionals shall work with one another to select a third licensed therapist or psychologist to meet with the parties in an effort to formulate a new custody arrangement intended to promote the children's best interests, given the planned relocation of one of the parties.

If the parties are still unable to reach an agreement regarding the restructuring of the custody provisions of this agreement, it will be incumbent upon the relocating party to file a petition for change of custody in a court of competent jurisdiction, so that there can be a judicial determination of whether it would be in the children's best interests to reside with the relocating parent or with the non-relocating parent. In no event shall either parent relocate more than __ miles from the former marital residence with either or both of the children without the other parties' prior express written consent, or a judicial determination that it would be in the children's best interests for the children to move and reside with the relocating parent.

In making this agreement, the parties recognize that a change of custody is just as important to the children as an original award of custody, and the parties must be afforded the same type of hearing on the subsequent application as they are entitled to on an original award. The parties further agree that the relocating party shall have the burden of proof that the relocation is in the best interests of the child.

The placement of the burden of proof upon the relocating party is based upon the parties' recognition of the following: (1) that both parents are equally fit to have primary custody of the children; (2) that the children have important ties to current friends, schools and relatives; (3) that, if forced to move to a different county or state, the children may suffer lower academic performance or emotional difficulties based on the stress of adjusting to new friends, schools and a new neighborhood; (4) that a relocation will cause a significant disruption in the relationship between the children and the non-relocating parent; (5) that the stress of travel, by air or otherwise, may harm the children and that the time spent traveling will, among other things, force the children to forego beneficial, age appropriate activities with peers; and (6) that the relocating parties' attempt to move with the children could give the children the impression that frequent contact with the non-relocating parent is expendable. ***[Note – These factors are derived from Justice Sears' dissent in Scott v. Scott. Another approach would be to use the factors as set forth in Justice Sears' concurring opinion in Bodne or the AAML Model Relocation Act.]*** Having said that, the parties agree that, in the event of a planned relocation by either parent, all variables affecting the children must be assessed and that the paramount consideration shall be the children's best interests, in order to accommodate the children's rights and needs.

see Relocation on page 19

Georgia Case Law Update

by Sylvia A. Martin
Sylvia Martin, Attorney at Law

Attorneys Fees

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

In this case, the Court of Appeals held that the authority given to a trial court by O.C.G.A. § 19-6-19(d), which allows a court to award attorneys fees to the prevailing party in a child support modification action, is not limited to actions between parties who were formerly married to one another. In this case, the parties were never married, and the father was ordered to pay child support for the minor child of the parties after the state brought a paternity action on behalf of the child. A few years later, the father filed a petition to change custody. The mother filed a counterclaim for an increase in child support. The parties reached an agreement on the custody matter, and the court awarded the mother an increase in child support. The court also ordered the father to pay the mother's attorneys fees pursuant to O.C.G.A. § 19-6-19. On appeal, the father claimed that the attorneys fees award was erroneous because O.C.G.A. § 19-6-19 limits such an award to parties who were previously married.

The pertinent part of the statute states that any judgment providing for support of children shall be subject to revision upon petition filed by either former spouse, and that the court may award attorneys fees in such a case to the prevailing party. The Court of Appeals analyzed the statute and noted that it appears in the chapter of the code titled "Alimony and Child Support Generally." The court further found that the courts have recognized a legislative intent for all parents, regardless of whether married to each other, to financially support their children, and that the Child Support Guidelines are intended to apply equally in divorce, paternity and legitimation actions. The court reasoned that it would follow, then, that the term "former spouse" is to be equated with "parent" for purposes of considering child support, and that O.C.G.A. § 19-6-19 authorized an award of fees regardless of whether the parties were married to each other.

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

The former husband (hereinafter "husband") filed a petition to modify downward his child support obligation. He later amended the petition to add a count for change of custody. The former wife ("wife") answered the petition and filed a motion for summary judgment on the downward modification claim, which was granted by the trial court. The parties reached an agreement on the custody issues. The wife filed a motion for attorneys fees pursuant to O.C.G.A. §§ 9-15-14 (attorneys fees are authorized when action has complete absence of justiciable issue of law or fact) and 19-6-22 (court can require party who is obligated to pay support and files a modification action to pay fees of other party) which was granted by the trial court with no hearing on the wife's motion. The Court of Appeals remanded the case to the trial court and held, first of all, that the order did not state whether the fees were awarded pursuant to O.C.G.A. § 9-15-14 or O.C.G.A. § 19-6-22, and the trial court did not make a determination that such fees were reasonable and necessary. The Court of Appeals held that the wife would have the burden of proving the cost and reasonableness of the fees. The Court of Appeals further held that the husband's request for a change of custody was ancillary to his modification of support, and thus, the wife was allowed to ask for fees in such a case. In an action for change of custody brought by the non-custodial parent, the

court has no authority to award attorneys fees, including actions for a change of custody where a request for child support is also made. The Court of Appeals distinguished such actions from the one before it and found that the husband's amended request for a change of custody did not change the character of the original petition for a modification of support.

Child Support

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

The father filed a legitimation action which was agreed to, and the trial court had a hearing on the issue of child support. The court found that the father had an earning capacity of $45,000. The evidence showed that the father worked for a family-owned business and had worked for such business since 1992. The business suffered a loss in 1999 and most of the employees were dismissed. The father worked part-time for the business at that time. The evidence showed that the father earned $50,000 in 1998, over $35,000 in 1999 and $22,000 in 2000, which was the year in which the hearing was held. In its child support order, the trial court found the existence of a special circumstance that income should be imputed to the father due to suppression of income and employment in a family-owned business. The Court of Appeals vacated the order and remanded to the trial court for failure to make a finding as to the father's gross income and for failure to acknowledge a variance from the guidelines. The Court of Appeals noted that there are certain circumstances when it is acceptable for a trial court to base a child support award on the earning capacity rather than the actual income of a payor parent; however, the court indicated that the payor's gross income must be the starting point. In order for a trial court to impute additional income because of suppression of such income, the starting point must be the payor's actual income. In this case, the trial court made no express finding of the father's gross income, so it was impossible for the Court of Appeals to determine if there was a suppression of additional income.

Hulett v. Sutherland,
276 Ga. 596 (2003)

The mother brought an upward modification of child support action against the father, claiming that he had an increase in income since the divorce and that the child's circumstances had also changed such that an increase was warranted. The divorce decree stated that the father's income at the time of divorce, which was in 1997, was $48,000. The final decree had not been reversed or set aside. At the trial of the modification case, the mother showed that the father's income in 2002 was $74,500. The father had filed a counterclaim for a downward modification, alleging that he had suffered a decrease in his financial situation since the time of divorce. The trial court relied upon the father's 1996 and 1997 income tax returns and found that, despite the amount stated in the final decree, the father's income at the time of divorce had been actually $81,500, and thus denied the mother's request for an upward modification. On appeal, the Supreme Court reversed and remanded the case, holding that the trial court's finding in 1997 at the time of divorce that the father's income was $48,000, was conclusive and binding on the parties and could not be relitigated in a subsequent action.

Lewis v. Scruggs,
261 Ga.App. 573 (2003)

The Court of Appeals determined that the jury was confused by the verdict form and had incorrectly applied the guidelines in this modification of child support case. The mother brought an action against the father for increased child support. The evidence at trial showed that the father was a self-employed therapist. The jury determined that his gross income was $144,362 per year; however, it was not clear if the jury determined his income based on gross business receipts or net income. The Court of Appeals noted that the verdict form could have confused the jury in determining the father's gross income, and that at the retrial the attorneys and the court should be mindful of giving the jury a better crafted form. The Court of Appeals remanded the case for a new trial in finding that the jury incorrectly applied the guidelines, again in part due to a poorly drafted verdict form. The jury awarded an amount that was less than the guideline amount authorized for one child, but the special circumstances checked by the jury did not imply that the jury thought the award was excessive.

The jury failed to state, as required by law, what amount the award would have been before the application of the special circumstances and then to explain why it deviated from that amount. Thus, the case was sent back for a new trial.

Civil Procedure-Joinder

Gardner v. Gardner, 276 Ga. 189 (2003)

In this divorce case, the husband was the sole stockholder and director of two or three corporations in which he had an interest and from which he derived his income. In his complaint, the husband stated that the only marital property consisted of stock in his three corporations, and in his DRFA, he listed the stock in said corporations as his only assets. The wife in her DRFA listed no assets in her own name, and she learned during the litigation of the case that the corporations held title to all of the marital assets, including the marital residence and the parties' automobiles. The wife thereafter sought to join the husband's two corporations in which he was the sole shareholder as defendants in the divorce case for the purpose of dividing the marital property, which request was granted by the trial court. The Supreme Court affirmed the trial court's order and held that because the trial court's order to join the corporations in the action was limited to the purpose of reaching the marital estate. Such joinder, the Court reasoned, is just because a contrary result would allow parties to shield marital assets by titling the assets in the name of a corporation owned by one spouse.

Custody

Bodne v. Bodne, 2003WL22533120, 2003 Ga. LEXIS 942

Bodne effected a dramatic change in Georgia law on the issue of relocation in a custody action. Previous to *Bodne*, the long-standing law in this state was that a primary physical custodian's move out of state did not in and of itself constitute a sufficient change in custody to warrant a modification of custody. Now, the Supreme Court has determined that a trial court, when exercising its discretion in relocation and all custody cases, must consider the best interests of the child and cannot apply a bright-line test. Thus, relocation alone can now constitute a new and material change in circumstances that could support a change of custody.

In this case, the father had primary physical custody of the children with the mother having approximately equal time with them. A couple of years after the divorce, the father had remarried and planned to relocate with the children to another state to improve his financial condition. The father filed a petition to modify the mother's visitation in anticipation of the move. The evidence at trial was that both parties were good parents, that each parent had established a loving bond with the children, and that the parties shared equal access to the children on all levels. The mother's witnesses testified that the children's move out of state would have a negative impact on them in that it would limit their access to their mother. The trial court found that the father's move would cause the children to suffer irreparable harm and would compromise the parties' agreement in their divorce decree for the mother to have equal access to the children. Thus, the trial court concluded that there was a material change in circumstances affecting the welfare of the children and changed physical custody to the mother. The father appealed to the Court of Appeals, which reversed the trial court's order and applied the existing law that automatically assumed that at relocation would not compromise the best interests of the children unless and until it was proven that the relocation would place the children at risk. The Supreme Court reversed the Court of Appeals and also reversed *Ormandy v. Odom*, 217 Ga.App. 780 (1995) and any other Georgia case wherein it was presumed that the custodial parent has a *prima facie* right to retain custody in a relocation case unless the objecting parent shows that the new location would endanger a child's physical, mental or emotional well-being.

Durham v. Gipson, 261 Ga.App. 602 (2003)

In a change of custody action, the trial court may consider a fourteen-year-old's election to live with the non-custodial parent as a material change in circumstance when considering whether custody of a younger sibling should also be changed.

In this matter, the father had been granted primary physical custody of the parties' two daughters upon their divorce. When the oldest child turned fourteen, she elected to live with the mother. The mother filed a change of custody action wherein she asked the court to award her custody of both the fourteen-year old and the ten-year old. The mother was granted temporary custody of both children, and a *Guardian ad Litem* was appointed. The guardian found that both parties were excellent parents, but that the younger child had a strong bond with her older sister, and that she was having a difficult time being separated from her mother. Thus, the guardian recommended that custody of the younger child be changed. The trial court found that there was no evidence to show a significant change in circumstances that adversely affected the younger child to warrant a change in custody. The trial court awarded custody of the older child to the mother based on the child's election, but denied a change of custody of the younger child. The Court of Appeals held that the trial court erroneously applied existing law that allows for a court to consider an older sibling's election to live with the non-custodial parent as a significant change in circumstances that could warrant a change in custody. The Court of Appeals remanded the case for the trial court to correctly apply the law to the facts.

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

The final divorce decree awarded joint legal custody of the minor children to the parties, with the wife having sole physical custody. The primary evidence submitted on the issue of the best interest of the children was the husband's extramarital affair with an employee/patient that led to his forced resignation from his medical practice. On appeal, the husband complained that such evidence was insufficient to support an award of custody to the wife. The Supreme Court found that the award was proper and that the husband's visitation rights were not restricted by the trial court, following the holding in *Brandenburg v. Brandenburg*, 274 Ga. 184 (1). The majority opinion is somewhat confusing in that the Court analyzed O.C.G.A. § 19-9-1, which states that the party not in default in a divorce case is entitled to the custody of the minor children. The Court further stated that custody could be awarded to the party in default if the best interests of the children are considered. The majority opinion seems to say that the trial court's primary inquiry in custody cases should be a determination of which party is not in default and awarding custody on that basis, rather than on the best interest standard. Justice Hunstein in her concurring opinion cautions the bench and bar that, while conduct can be considered on the issue of custody, the trial court should always first consider the best interests of the children when establishing custody.

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

The Supreme Court in this case disapproved of *Carr v. Carr* and repudiated its holding in *Holder v. Holder*, and held that a self-executing change of custody provision in a final divorce decree violates public policy if such provision fails to give import to a child's best interests. In this matter, the parties had joint legal custody of the minor child, with the mother having primary physical custody of her. The decree provided that if the mother moved outside of Cobb County, Ga., that such move would constitute a material change in circumstances detrimentally affecting the welfare of the minor child and that, pursuant to *Carr*, physical custody of the child would automatically revert to the father with no further action of the court being necessary. The Court distinguished its holdings in *Weaver v. Jones*, 260 Ga. 493 (1990) and *Pearce v. Pearce*, 244 Ga. 69 (1979) from the case before it. In both *Weaver* and *Pearce*, the self-executing provisions involved children once reaching the age of fourteen choosing to live with the non-custodial parent. In such event, the obligations of the parties would automatically switch without the need of court intervention. The Court found that the provisions in those cases were consistent with statutory law in that a fourteen-year-old's election is controlling absent proof that the chosen parent is not fit and proper to have custody. However, the Court found that other self-executing provisions that had previously been approved by the appellate courts were no longer acceptable. In the *Holder* case, the mother would automatically lose custody of the children upon her remarriage. Such provision was previously upheld on appeal as an elec-

tion by the mother to either have custody or to remarry. In the *Carr* case, custody automatically reverted to the other parent upon a move by the custodial parent to a city outside of Atlanta or to another state. The Court found that the provisions in *Carr* and *Holder* erroneously ignored the best interests of the children, and that the children could be uprooted from an otherwise appropriate situation based upon a triggering of the event in question. The Court noted that neither the convenience of the parents nor the backlog of cases in the courts can justify automatically uprooting a child absent evidence that the change is in the child's best interests and welfare. Justice Leah Sears wrote a lengthy dissent which will not be set forth in this article.

Family Violence-Evidence

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

The *Guardian ad Litem* appointed in a custody dispute between the parents filed a family violence action on behalf of the nine-year-old child. At the evidentiary hearing, the child testified and stated that her mother had slapped her on the face one time, it left no bruises, it stung then went away. The guardian testified that the school counselor had said she thought the child was being harmed physically and emotionally by the mother, and that the mother had slapped the child's body and pulled her hair. The mother testified and stated that she had slapped the child on her leg in the course of discipline, and denied slapping her in the face or pulling her hair. The trial court found that there was evidence of an act of simple battery and that family violence had occurred. The court transferred custody to the father and gave the mother supervised visitation with the child. On appeal, the Court of Appeals reviewed the evidence and determined that the trial court erred in finding that a simple battery had occurred and that there was insufficient evidence for the court to conclude that a simple battery had occurred rather than reasonable discipline in the form of corporal punishment.

Grandparent Visitation

Rainey v. Lange,
261 Ga.App. 491 (2003)

The Court of Appeals in this case made it clear that any order awarding visitation rights to grandparents must have specific findings of fact to support the order, even if such order is a result of an agreement between the parties. The statutory provision that authorizes visitation rights to grandparents is O.C.G.A. § 19-7-3 and states, in part, that the court shall make specific written findings of fact in its order to support the award of grandparent visitation rights. In *Rainey*, the father had filed a change of custody action against the mother, and the maternal grandparents had intervened in the action to obtain visitation rights. The parties reached an agreement and presented an order to the trial court, which was entered by the court. The provision in question which failed to follow O.C.G.A. § 19-7-3 stated as follows:

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

The Court of Appeals found that the above provision was too broad and conclusory and lacked specific findings, and so the case was remanded so that the trial court could enter such written findings if supported by the evidence, based upon a clear and convincing standard.

Legitimation

***Baker v. Baker,* 276 Ga. 778 (2003)**

The Supreme Court determined that the "best interest of the child" standard should apply in cases where a mother of a child attempts to delegitimate the child and prevent the legal father from asserting rights associated with his bond as a parent with the child. In this matter, the mother and legal father met when the mother was pregnant with the child. The biological father was not the legal father. The mother and the legal father married before the child was born. The legal father knew he was not the biological father; however, he signed the birth certificate as the father, and developed a paternal bond with the child during the parties' marriage by providing emotional and financial support. The legal father filed for divorce approximately one year after the marriage and sought custody of the child. The mother

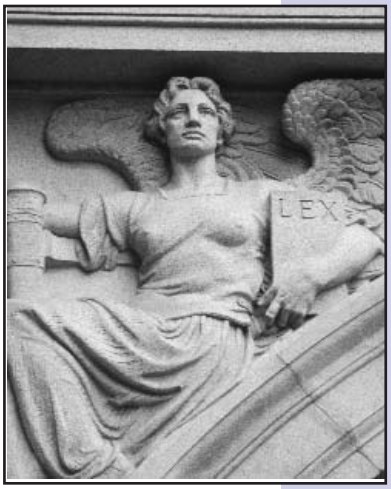
disagreed and stated that because he was not the biological father, the legal father could not make a claim for custody. The biological father intervened in the divorce case and challenged the legal father's right to have custody of the child. During the parties' separation, the legal father provided child support voluntarily to the mother.

The trial court ordered DNA tests, and the child's parentage was conclusively determined. Based on the DNA test alone, the trial court found that, while it would be in the child's best interest for the legal father to maintain custody rights with the child, the standard was not a "best interest" standard, the mother had rebutted the presumption of legitimacy and thus, the legal father's claim for custody was denied.

The Supreme Court reversed and remanded the trial court's order. A child born in wedlock is considered to be legitimate. A father of a legitimated child is entitled to parental and custodial rights in the child. A child's legitimacy may be disputed by clear and convincing proof to the contrary. In this case the mother sought to delegitimate the child with the DNA evidence alone. The Supreme Court found that the question to be determined was whether, in such a situation, the "best interest of the child" standard should apply when the legal father is opposing the mother's attempt to delegitimate. After comparing the holdings of *Davis v. LaBrec*, 274 Ga. 5 (2001), and *Ghrist v. Fricks*, 219 Ga.App. 415 (1995), the Court concluded that, although the code provides the means for the presumption of legitimacy to be rebutted, the trial court should consider the child's best interests when deciding whether to permit the legal father's status to be challenged. The Court noted that there is an incongruity in the law that should be addressed by the legislature. If a presumptive father wants to challenge his status as father and essentially cease paying child support because he finds he is not the biological father, he has a very tough standard to meet in order to have the previous order overturned. However, if a mother wants to oppose a legal father asserting his rights although he may not be the biological father, all she has to do is prove parentage through DNA testing.

***Holmes v. Traweek*, 276 Ga. 296 (2003)**

In this case, the Supreme Court declared unconstitutional a portion of the statute providing for venue in legitimation cases. The statute in question is O.C.G.A. § 19-7-22(a), which provides that a father may file a legitimation action in the county of his own residence, the county of residence of the child, or the county in which an adoption petition is pending. The father and mother lived in different counties, and the father filed the legitimation action in his county of residence. The mother appealed, and on appeal, the father claimed that the mother was not a "defendant" so that the Constitutional provision for all matters not specifically provided for in the Constitution, venue shall be in the county of residence of the defendant. The Supreme Court found that in a legitimation action the mother, given all the rights afforded her in the context of such an action, is a defendant. Thus, the Court found that the portion of O.C.G.A. § 19-7-22, which provides for venue in the county of the putative father when different from the mother's county is contrary to the Georgia Constitution, and such provision was declared unconstitutional.



Settlement Agreements

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

The parties separated and soon thereafter the husband filed for divorce. They entered into an agreement whereby they divided the real estate, personal property and debts they had acquired, and they each waived the right to receive alimony from the other. The agreement also stated that it was a full and final settlement of all claims, and that each party relinquished any interest in the estate of the other party. The wife transferred to husband by quitclaim deed her interest in the marital residence, and the husband gave wife a lump

sum payment of $150,000. Before the divorce was finalized, the parties resumed cohabiting with one another. The husband then died. The wife filed an action in probate court to assert an interest in the husband's estate, which was denied. She then sought a declaratory judgment asking the court to declare her marital rights in the marital residence. The trial court ruled that the settlement agreement was binding and conclusive, and that the wife had relinquished her interest in the marital residence. The Court of Appeals affirmed and held that O.C.G.A. § 19-6-12 provides that subsequent cohabitation after an agreement is entered and before a divorce is final only annuls any award of alimony to a spouse. The Court found that the property and monies transferred pursuant to the agreement were not in the nature of alimony and thus were not voided by the parties subsequent cohabitation.

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

The wife filed for divorce, and approximately one month later the parties attended mediation and reached an agreement, which was handwritten and signed by both parties. The husband had brain cancer, was on strong medication at the time of mediation and moved for the court to set aside the agreement based on his inability to reach an informed decision because of his illness and medication. Before the court ruled on his motion and before the final decree of divorce was entered, the husband died. The trial court dismissed the divorce complaint. In another county, the wife filed a complaint to enforce the settlement agreement, claiming she was entitled to judgment as a matter of law. The trial court denied the wife's motion to enforce the agreement, and the executors of the husband's estate moved for summary judgment claiming there was no consideration for the agreement once the husband died. The trial court granted the motion for summary judgment, holding that the consideration had been extinguished upon husband's death and that because the agreement was entered in connection with a divorce case, the court had the authority to approve of or reject any agreements. The Court of Appeals reversed the trial court and found that the consideration was not insufficient. The court further found that the action before the trial court was not a divorce case as the divorce complaint had been dismissed by the previous court. The trial court was to review the agreement as it would any other contract. The Court held that the wife was not entitled to judgment as a matter of law as there were questions of fact to be determined by the court, including the capacity of the husband to enter into the contract, and the possible recission of the contract by the wife. Cert was recently granted in this case on May 20, 2003. ♦

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Tips on Repeal of Dependency Exemption Phase-Out

By Scott Thurman
Thurman Financial Consulting, Inc

For 2003, the amount of the dependency exemption is $3,050 per dependent. The dependency exemption is phased out or eliminated for higher income taxpayers. The exemption for taxpayers whose adjusted gross income exceeds certain thresholds is reduced by two percent for each $2,500 of income above the threshold amount. The threshold amounts for 2003 are $209,250 for joint filers, $174,400 for a head of household, $139,500 for single taxpayers and $104,625 for married persons filing separately.

For divorcing parents, the exemption for dependent children goes to the custodial spouse. The custodial spouse can waive the exemption and allow the non-custodial spouse to claim it by signing Form 8332. Form 8332 can be used permanently or on a year-by-year basis. When the non-custodial spouse, typically the husband, has income greater than the threshold amounts, he normally does not attempt to obtain the exemption because the phase-out rules would eliminate any tax benefit to him.

Watch out! Beginning in 2006, the phase-out provisions start to phase-out themselves. In 2006 and 2007, the amount of the exemption phase-out reduction that would otherwise apply is reduced by one-third and for 2008 and 2009 by two-thirds. After 2009, the exemption phase-out is repealed. This means there will be no income limitations on claiming dependency exemptions.

A non-custodial spouse with high earnings may be giving up a valuable tax benefit by agreeing to forego the dependency exemptions. A dependent who is two-years-old in 2003 could provide 10 years of dependency exemptions for the non-custodial spouse. Both spouses should consider assigning the exemptions to the spouse who receives the greatest tax benefit. By using IRS Form 8332, the exemption can be assigned on a year-by-year basis. ♦

Relocation

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> The parties further agree that, regardless of the outcome of the relocating parent's petition for change of custody, the relocating parent shall be responsible for the timely payment of the reasonable and necessary attorney's fees and litigation expenses incurred by the non-relocating party in litigating the change of custody issue. Moreover, in the event that either party is permitted to relocate with the children, the parties agree that the non-relocating party shall be responsible for the payment of any and all reasonable and necessary travel expenses incurred by the non-relocating parent in exercising his or her custodial time with the children.

Conclusion

In conclusion, with *Scott* and *Bodne* in 2003 the common law of Georgia regarding relocation in custody cases has radically changed. It seems likely that with the majority of the Georgia Supreme Court in *Bodne* overruling the custodial parent's *prima facie* right to retain custody, all of Georgia custody law has also changed. It remains to be seen, however, if the fears expressed in the dissent in *Bodne* (increased custody litigation and unsettled law) are founded. ♦

Endnotes

1. Our thanks to Elizabeth G. Lindsey for her contribution of comprehensive materials on this subject matter she had earlier prepared prior to the Bodne decision for a presentation she gave on relocation to the Superior Court Judges of Georgia.

The Editor's Corner

by Kurt Kegel
Davis, Mathews & Quigley P.C.

"Children are the only people wise enough to enjoy today without regretting yesterday or fearing tomorrow." – anonymous

As we begin this new year, many of us continue to tackle complex issues on a daily basis, which often have a direct impact on our clients' children. While children may be able to enjoy today without regretting yesterday or fearing tomorrow, our actions and advice given to clients can often have an impact on the children of the family we can only begin to imagine. In this, our first edition of 2004, I have included an article prepared by one of my partners, Robert E. Boyd, for a recent American Academy of Matrimonial Lawyers and Family Law Section Seminar, analyzing the recent decision of *Bodne v. Bodne*, and the effect that decision, along with others, will have on our practices and the decisions our clients may make, as those decisions affect their children.

Whether you agree or disagree with the *Bodne* decision, those types of decisions are the decisions we, as family law practitioners, have been seeking from the Supreme Court to provide guidance in our practices. On Dec. 11, 2003, the Georgia Supreme Court issued a press release providing that the Divorce and Alimony Pilot Project has been extended through Dec. 16, 2004. This certainly is good news for the practitioner, since we will continue to be provided with the ability to seek further clarification on areas of family law where clarification is needed. However, as has been previously expressed, we should not abuse this system, or we may very well find ourselves back at the starting block seeking the right for direct appeal through the legislature. For more information on the Pilot Project, please visit the Supreme Court's Web site at www.state.ga.us/courts/supreme.

I have very much enjoyed the opportunity I have been presented to serve as editor of this newsletter. However, I must admit that this job comes with its frustrations. During the time I have been acting as editor, I have met a variety of people at seminars and other family law functions. Oftentimes, I will either ask the audience as a whole, or ask individuals to submit articles for inclusion in the newsletter. However, I have received very little response to my requests. My thanks to Sylvia A. Martin, for the continued time and energy she devotes in contributing her articles on recent decisions. My thanks to Randall M. Kessler, for agreeing to provide articles regarding technology tips for the family law attorney. My thanks to Robert D. Boyd, for granting permission to include his timely article on relocation.

For those of you who have been thinking about submitting an article, as our chair, Thomas F. Allgood Jr. suggests in his comments, get involved and submit that article.

Happy New Year to all! ♦

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