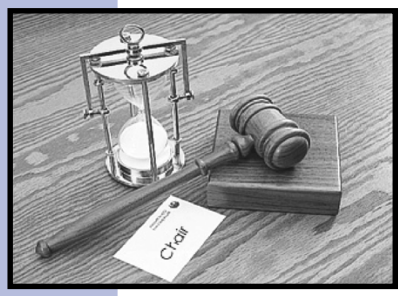
Family Law Section Newsletter

November/December 2001

NOTES FROM THE CHAIR



Elizabeth Greene Lindsey, Chair, State Bar of Georgia Family Law Section

The Family Law Section is going cyber! I hope this newsletter will be the first that you receive by e-mail. If you do not have an e-mail address listed with the State Bar, please visit the Georgia State Bar website (www.gabar.org) and register your e-mail address online. Slightly over one-half (1/2) of our population has provided the Bar with an e-mail address. If you want to view this newsletter on the web, go to our site at www.gabar.org/familylaw.htm and -- Viola! Soon the online version will be password protected. Don't worry, you will still get your newsletter the old fashioned way if you are not yet "surfing the net."

These new improvements are a direct result of the past leadership of this Section. The Family Law Section is committed to promoting education for lawyers, increasing professionalism and bringing important Family Law issues to the forefront of the State Bar, the legislature, and the membership. The ultimate goal of the Section is to raise the level of domestic practice throughout the State and to promote professionalism among the attorneys through education and relationships.

Over the years we have seen dramatic changes in domestic law. Finally shedding the "red headed step child" status, family law is now one of the most complex areas of practice. Family law lawyers must understand corporate law, partnership law, real estate law, taxation, ERISA, accounting, business valuation, mergers and acquisitions, and more. Our cases touch every area of law and every facet of life. More importantly, family law lawyers deal with the most important commodities of the future - children and the family relationships which are the fabric of society.

Over time, we have seen the emergence of terms such as "conciliatory" and "therapeutic" justice applied to family law. The use of alternative dispute resolution (ADR) and mediation are now routine as a more effective and empowering means to resolve family law issues. The development of Family Courts has led the way to courts that are more accessible and responsive to the pressing needs of families in crisis. Interestingly, the development of Family Courts was one of the Section's first goals twenty years ago. Today, Family Courts exist in several jurisdictions, including Fulton and Gwinnett Counties and Augusta.

A need remains for debate and exploration of new ideas in family law. We have virtually no statutory or case law on issues such as relocation, stock options, equitable division, premarital agreements, postnuptial agreements, deferred compensation plans and much more. Since neither the legislature nor the appellate court have addressed these and other issues, lawyers and judges must learn from experiences of lawyers and judges across the State and in other jurisdictions.

To facilitate this opportunity, we are looking forward to adding a "chat room" to the website (once approved and implemented by the State Bar) where we can discuss ideas online. With this Newsletter and website, the Section will continue to keep you updated on what is happening in the General Assembly and in the appellate courts and continue to provide excellent seminars to educate lawyers and judges.

I am looking forward to a year of innovation, continuing improvements to our newsletter and website and providing high quality seminars. The only limit to the service the Section provides is the imagination and vision of its members. Please step up to the plate and take on an active role.

State Bar of Georgia Family Law Section Newsletter

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Editor's Column
Raising the Family Law Bar

Richard M. Nolen, Warner, Mayoue & Bates

"The Power of Words"

"It is said that adversity introduces us to ourselves. This is true of a nation, as well."

President George W. Bush, at the prayer service, National Day of Mourning, following the events of September 11, 2001.

In last issue's Editor's Column, I discussed the importance of leadership in the practice of family law. The basic tenet of leadership is the power to motivate others, particularly during difficult times. In light of the events of September 11th, the need for leadership in our country (and, for that matter, our practice) has never been greater; and, unquestionably, the importance of spoken communication has increased dramatically. It is critical that we recognize in this country the power of words and the power of the spoken word to motivate and shape human behavior, by stirring people to act and by defining their attitudes. Just as the members of our profession advance our clients' interests through the use of well-reasoned advocacy (particularly through the power of the spoken word) during a tense and important period of time (such as a trial), the impact of the words of our leaders is vital in achieving the goal of eradicating terrorism.

In the days following the tragedy, I was struck by the power of President Bush's words in his "opening statement"- the declaration of war on terrorism. In what can only be described as a personification of leadership, his speech outlining the plan for rational response to the tragedy has convinced ordinary Americans of the efficacy and importance of fighting terrorism. Ultimately, he has brought America and the world together, in no small part, through the eloquence, sincerity and strength of his address to Congress and the nation on September 20, 2001.

If any of us doubts the power of our words to motivate, sway, impress, shape, and ultimately, define the acts of others, I ask you to read some excerpts from his speech below. Try not to feel a rush of patriotism. Try not to feel motivated. Try not to feel the power of words. You will not be able to ignore their effect on you. While it is painful to think of our wonderful country under attack, we must focus on the longer-term objectives and also recognize that our response to this threat will define our generation. The ability of all branches of our government to come together, constitutionally, and with great leadership, to respond to the challenge of terrorism is the greatest and most important "trial" of our lives.

If, as President Bush has said, adversity introduces us to ourselves, then, with the extraordinary leadership I have seen thus far, I would be remiss if I did not say that I trust our newest acquaintance.

Speaker, Mr. President Pro Tempore, members of Congress, and fellow Americans:

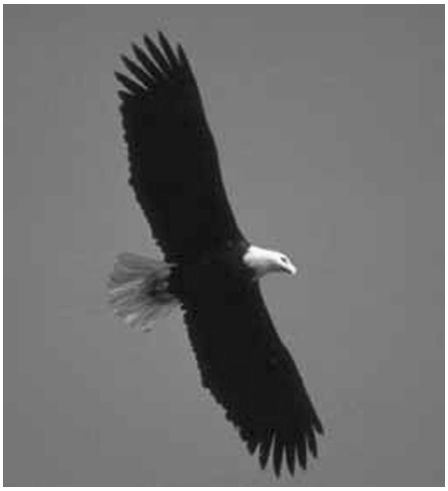
"It is critical that we recognize in this country the power of words and the power of the spoken word to motivate and shape human behavior

Excerpts from President Bush's Address to a Joint Session of Congress

In the normal course of events, presidents come to this chamber to report on the state of the union. Tonight, no such report is needed. It has already been delivered by the American people.

We have seen it in the courage of passengers who rushed terrorists to save others on the ground.

We have seen the state of our union in the endurance of rescuers working past exhaustion.



We have seen the decency of a loving and giving people who have made the grief of strangers their own.

My fellow citizens,
for the last nine days, the entire world has seen for itself the state of our union, and it is strong.

Tonight, we are a country awakened to danger and called to defend freedom. Our grief has turned to anger and anger to resolution. Whether we bring our enemies to justice or bring justice to our enemies, justice will be done.

On Sept. 11, enemies of freedom committed an act of war against our country. Americans have known wars, bur for the past 136 years, they have been wars on foreign soil, except for one Sunday in 1941. Americans have known the casualties of war, but not at the center of a great city on a peaceful morning.

Americans have known surprise attacks, but never before on thousands of civilians.

All of this was brought upon us in a single day, and night fell on a different world, a world where freedom itself is under attack.

After all that has just passed — all the lives taken, and all the possibilities and hopes that died with them, it is natural to wonder if America's future is one of fear. Some speak of an age of terror. I know there are struggles ahead, and dangers to face. But this country will define our times, not be defined by them. As long as the United States of America is determined and strong, this will not be an age of terror; this will be an age of liberty, here and across the world.

I will not forget this wound to our country, or those who inflicted it. I will not yield, I will not rest, I will not relent in waging this struggle for the freedom and security of the American people.

The course of this conflict is not known, yet its outcome is certain. Freedom and fear, justice and cruelty, have always been at war, and we know that God is not neutral between them.

Fellow citizens, we'll meet violence with patient justice, assured of the rightness of our cause and confident of the victories to come. In all that lies before us, may God grant us wisdom, and may He watch over the United States of America.

STATUS OF THIRD PARTY CUSTODY DISPUTES

Jeanney Kutner, Editorial Board and David Webster, Atlanta Bar

In upholding the constitutionality of OCGA § 19-7-1 (b.1) in the recent case Clark v. Wade, 273 Ga. 587 (2001), the Georgia Supreme Court interpreted and clarified the provision governing custody disputes between a biological parent and specified close relatives of the child (grandparent, aunt or uncle, sibling, adoptive parent). The Court saved the statute by construing it narrowly.

OCGA § 19-7-1 was amended in 1996 by adding section (b.1), which provides:

Notwithstanding subsections (a) and (b) of this Code section or any other law to the contrary, in any action involving the custody of a child between the parents or either parent and a third party limited to grandparent, aunt, uncle, great aunt, great uncle, sibling, or adoptive parent, parental power may be lost by the parent, parents, or any other person if the court hearing the issue of custody, in the exercise of its sound discretion and taking into consideration all the circumstances of the case, determines that an award of custody to such third party is for the best interest of the child or children and will best promote their welfare and happiness. There shall be a rebuttable presumption that it is in the best interest of the child or children for custody to be awarded to the parent or parents of such child or children, but this presumption may be overcome by a showing that an award of custody to such third party is in the best interest of the child or children. The sole issue for determination in any such case shall be what is in the best interest of the child or children.

The Court majority distinguished OCGA § 19-7-1 (b.1) from the Washington visitation statute at issue in Troxel v. Granville, 530 U.S. 57 (120 SC 2054, 147 LE2d 49) (2000). The Georgia statute avoids unconstitutionality because it expressly limits those third parties who may seek custody under the best interests standard and because it defers to the fit parent by establishing a rebuttable presumption in favor of parental custody.

"The Georgia statute ...expressly limits those third parties who may seek custody under the best interests standard."

The statute contains a rebuttable presumption that parental custody is always in the child's best interest. It retained three presumptions: "(1) the parent is a fit person entitled to custody; (2) a fit parent acts in the best interest of his or her child; and (3) the child's best interest is to be in the custody of a parent." 273 Ga. at 593.

Before this amendment, OCGA § 19-7-1 and case law required that a third party, even a grandparent, seeking an initial award of custody against a parent show present parental unfitness or loss of parental rights for some other reason. Thus the adoption of OCGA § 19-7-1 (b.1) shifted the trial court's inquiry solely from the question of the current fitness of the biological parent to raise

the child, to include also "consideration of the child's interest in a safe, secure environment that promotes his or her physical, mental and emotional development." 273 Ga. at 593.

As Presiding Justice Fletcher noted:

"Although [the fitness standard] appears fair on its face, its application has caused unfair results because of its reliance on biological connections to the exclusion of other important considerations. The fitness standard does not consider the absence of a custodial relationship between parent and child, the parent's conduct in causing any separation, the emotional bond that the child has developed with the third party due to their day-to-day relationship, or the age, maturity, and special needs of the child. Rather, it automatically vests custody in a biological parent, unless the parent is unfit, to the exclusion of the other relatives who has performed the parental role of nurturing and caring for the child. " 273 Ga. at 592.

In construing that part of the statute that mandates that an award of custody to the specified third party be "for the best interest of the child or children and will best promote their welfare and happiness," the Court applied a narrowing construction consistent with the legislature's intent and with Brooks v. Parkerson, 265 Ga. 189 (1995).

The specified third party must rebut the statutory presumption in favor of the parent by showing that parental custody would harm the child. The Court elucidated its use of the term "harm" to mean either physical harm or "significant, long-term emotional harm." The Court made it clear that social or economic disadvantages alone are not sufficient indicia of harm: "[W]e note that the death of a parent, divorce, or a change in home and school will often be difficult for a child, but some level of stress and discomfort may be warranted when the goal is reunification of the child with the parent."

The Court suggested a series of factors that the trial court should consider when considering custody and harm:

(1) Who are the past and present caretakers of the child;
(2) With whom has the child formed psychological bonds and how strong are those bonds;
(3) Have the competing parties evidenced interest in, and contact with, the child over time; and
(4) Does the child have unique medical or psychological needs that one party is better able to meet. 273 Ga. at 298-99.

Additionally, the Court adopted the standard of proof required for a specified third-party relative to rebut the presumption in favor of parental custody to be clear and convincing evidence. If the third party rebuts the presumption of parental custody by demonstrating such harm by clear and convincing evidence, the third party must still demonstrate that an award of custody to him or her will "best promote the child's welfare and happiness."

Justice Sears noted the narrow facts the Court ruled on, in her special concurrence:

I also write to highlight the fact that the present disputes are between parents who have not cared for their children for a significant period of time and relatives who have stepped forward to do so. In these "reunification" cases, the day-to-day bond of the parent-child relationship already has been interrupted, and the child may have formed strong and lasting relationships with the person who has been caring for him. 273 Ga. at 600.

Continued on page seven

The Georgia Supreme Court Approves New Family Violence Temporary Protective Orders

Vicky O. Kimbrell, Georgia Legal Services

On July 31, 2001, the Georgia Supreme Court approved five new Order forms in Family Violence cases that are required by O.C.G.A. §19-13-53. The new Orders include: a Family Violence Act Ex parte Order, a Family Violence Act Six Month Order, a Stalking Act Ex Parte, a Stalking Act Six Month Order, and a Dismissal form. The orders were adopted in compliance with, and to be compatible with, the new Georgia Family Violence Registry.

The new Georgia Family Violence Orders will allow Temporary Protective Orders to be entered on a centralized data base that will be accessible to judges and law enforcement. When the Registry is in place, law enforcement will be able to check the central database to determine if a TPO has been entered against an abuser. Judges will also have access to the Registry to determine if a civil order has been entered.

The new Orders comply with the federal Full Faith and Credit Act at 18 U.S.C. § 2265. Under that statute, a family violence Order issued by a court in one state must be accorded full faith and credit by a court of another state when the Order is entered in compliance with the statute. Therefore, a TPO order entered in Georgia will be fully enforceable outside of the state as if it were the order of the court of the second state. No domestication or certification is necessary for a Georgia Order to be enforceable in another state, or another state's Order to be enforceable in Georgia.

The Orders also provide the information that is necessary so that a victim's Order will be entered on the National Criminal Identification Center(NCIC) and eventually on the Georgia Crime Identification Center network (GCIC).

The new Orders also assure compliance with 18 U.S.C. § 922(g)(8), so that it is illegal for a person to possess a firearm when subject to a Georgia Family Violence Act or Stalking Act Protective Order.

The new Orders were first recommended by the Georgia Commission on Family Violence. They were then approved by the Rules Committee of the Council of Superior Court Judges and finally adopted by the Georgia Supreme Court. The forms are available at the Georgia Supreme Court web site beginning at:

http://www2.state.ga.us/Courts/supreme / unirules.htm#fvexparte.

A downloadable form of the forms are available in Word and Wordperfect from the Georgia Legal Services web site at www.glsp.org.

Thank you from an Anonymous Client

Randy Kessler, Kessler & Schwarz, P.C. Atlanta

Today's thank you comes from the client who followed your advice, kicking and screaming the whole time. It is now two years later and guess what, the children and your client (Father) have had a steady, stable and consistent relationship since the divorce. True, your client never got his chance to tell a jury how miserable life was with his wife, but at least he and she can now discuss the kids and even sit together at parent-teacher meetings.

You would have earned more money had you allowed the case to be tried. Your client would not have written to the Bar Association complaining that he was forced to sign a document with which he did not agree (complaining about you and that stinking Guardian Ad Whatever that said he should only have secondary custody). Your finest paralegal would not have wasted three days having to explain to him that the case was over and could not be re-opened. Your bill might have even been paid in full (well, maybe not). But you insisted that your client should accept the report of the Guardian Ad Litem since it appeared your client would not be awarded custody, since it would cost a lot of money and since parents who testify against each other are rarely able to communicate afterwards.

The "Thank You"

Well it wasn't a typical, ordinary thank you. Rather it was a wink. Yes a wink. You were at the mall last weekend with your family, and as you passed FAO Schwarz (no relation to Kessler & Schwarz, P.C.) You saw your client leaving the store with his kids, each with stuffed animals with price tags still attached. He winked at you. That was his thanks, and it meant the world to you. It was also an acknowledgment. The wink said "You were there with me at my low point. Thanks for keeping me level-headed and for making the kids a priority".

Third Party Custody, *Continued from page five*

Justice Hunstein, in her special concurrence, would not have required a showing of harm. She noted:

> The precise scope of parental rights in the context of child custody must be carefully considered on a case by case basis. To focus solely on the interests of the parents, as does any standard mandating a showing of harm, ignores what may be the equally compelling interest of the child or the State in protecting the child's welfare and happiness. The facts of these two appeals before us illustrate the danger of requiring a showing of harm. The custody cases at issue do not involved a third party seeking to interfere with an established parent-child relationship but involve a biological parent seeking to gain custody of a child from grandparents who have been responsible for the daily care of the child and are now seeking to keep intact a family unit already in existence. 273 Ga. at 605.

The dissent did not find the majority's parameters to be "the most compelling circumstances" that would justify infringing upon a parent's constitutional right to the custody and control of his or her child. 273 Ga. at 606.

TECH NOTES FOR THE FAMILY LAWYER

By John F. Lyndon, Athens, Georgia

FinPlan's Divorce Planner

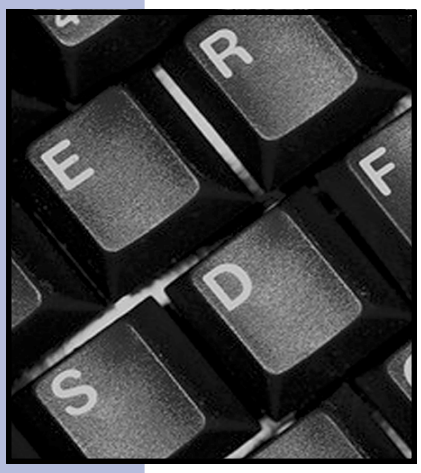
You can't talk for very long about technology in the practice of family law without discussing FinPlan's Divorce Planner.

This software program, which was first released a number of years ago, is specifically designed for the family law practitioner. I personally found the old DOS version to be cumbersome and not particularly user-friendly, but the Windows version, which has been on the market for several years, is much improved.

FinPlan calculates after-tax cash flow for both households, thereby enabling the attorney and his or her client to evaluate the impact of a proposed divorce settlement. The program computes federal, state and FICA taxes and produces cash flow reports that highlight alimony and child support assumptions and the resulting cash available to meet living expenses.

You can analyze several support options on a single screen, facilitating comparison of the tax implications of alimony versus child support payments, with the impact on the net cash flow of each household clearly defined. Adjust the amount of alimony and instantly see the effect on both parties.

As you can imagine, this is a valuable tool to use in mediation and settlement negotiations, and is particularly helpful in those cases which do not justify the cost of retaining a CPA or CFP (certified financial planner).



I frequently use the program to determine the monetary value to each party of the child dependency exemption. When we represent the custodial parent and agree to relinquish the dependency exemption in alternating years (which of course includes the child tax credit), what is that actually costing our client?

Dennis Casty, the president of FinPlan Co., frequently appears at domestic relations seminars, including the Family Law Institute, and in addition to providing training, has been giving complimentary copies of FinPlan to the judiciary for use at hearings. I know that Judge Steve Jones in my circuit has FinPlan installed on his laptop.

The license fee is $520.00, which includes two hours of training. Annual updates are $260.00. If you aren't satisfied with the program, the purchase price will be refunded. The website for contact information is www.divorceplanner.com, or you can call 800-777-2108.

Web Sites:

www.ssa.gov/women

A government website addressing women's questions about Social Security. This site is well-designed and loaded with information.

www.jagcnet.army.mil/legal

Are you representing a member of the armed services or a spouse? Check this one out for information about divorce implications and military retirement issues.

www.firms.findlaw.com/romero/memo18.htm

Bookmark this amazing site if no other. Designed by Thomas R. Glowacki of Madison, Wisconsin, it has almost all the domestic relations links you could ask for.

Listening —

THE Key to Effective Questioning and Persuasive Argumentation

By: Kenneth H. Schatten, *Kresses, Benda, Lenner & Schatten, Atlanta, Georgia*

There are many skills to master in order to be effective and persuasive in the courtroom. Whether these skills concern one's techniques, rhetorical style, or reasoning and legal strategy, the key that sharpens and enhances all skills is a trial lawyer's ability to listen. Effectively applying this art of listening to its fullest requires that a trial attorney listen at all times in the courtroom, whether it be the words of the judge, a witness or opposing counsel. Imposing this self-requirement allows the trial attorney maximum opportunities to successfully cross-examine witnesses and argue logically and persuasively to the Court.

When representing a Defendant, counsel may oftentimes make immediate headway based solely on a statement or representation made by opposing counsel during Plaintiff's opening arguments. Always try to leave room in your opening outline to incorporate comments on some of opposing counsel's remarks which you may not have considered nor anticipated (although now you gleefully welcome them) when preparing your opening arguments.

Oliver Wendell Holmes, author and father of Justice Oliver Wendell Holmes, wrote, "It is the province of knowledge to speak, and it is the privilege of wisdom to listen." Heeding these words are most helpful when cross-examining opposing parties and witnesses. For instance, quoting a portion of the witness's direct testimony in your question is a method to use when trying to confine a witness's testimony during cross-examination to the response you want to elicit. Sometimes a witness at trial may change or alter testimony from an earlier hearing or deposition. However, seldom does a witness deny or openly change testimony offered moments before during direct examination. Thus, quoting the witness in your question from a statement made during direct examination leaves the witness few, if any, opportunities to disagree with your question.

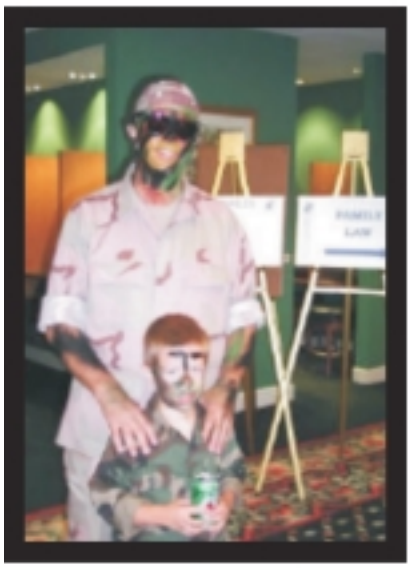
Also, posing to a witness such questions containing the witness's own words can serve as a warning to the witness not to even think about giving any answer except the truth (that is, your version of the truth), or you will have no mercy in immediately subjecting the witness to ridicule and embarrassment by continuously using his own words against him.

Usually the response to such a question, based in part or whole on the witness's own earlier testimony, is so unexpected or demonstrative of lack of forethought that it invites even more pressing questions. Ultimately, in these situations, the witness is so confused and flustered that it becomes difficult for the witness's responses to be consistent with testimony uttered moments before in direct examination.

Of course, in general, part of the questions asked when cross-examining a witness are based upon the witness's direct examination testimony. In order to take full advantage of listening carefully to a witness's direct testimony while simultaneously preparing or modifying your cross-examination outline and/or questions, it is of maximum importance that your other tools of information needed for cross-examination are organized and readily available.

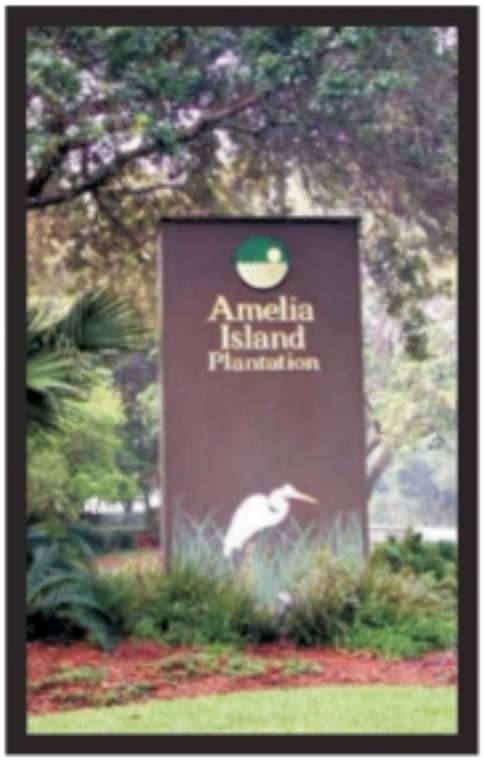
For instance, when a witness who was deposed earlier in the case is testifying (particularly the opposing party), you want to be easily refer to and find damaging deposition testimony for use in impeaching the witness under cross-examination. **Listening**- *continued on page nineteen.*

Family Law Seminar 2001



Rambo and Son (Bob and Robert Boyd)

Attendees Enjoy the cocktail party.



Elizabeth Greene Lindsey addresses the group

Judge Steve Jones and Bob Boyd

Amelia Island, Florida

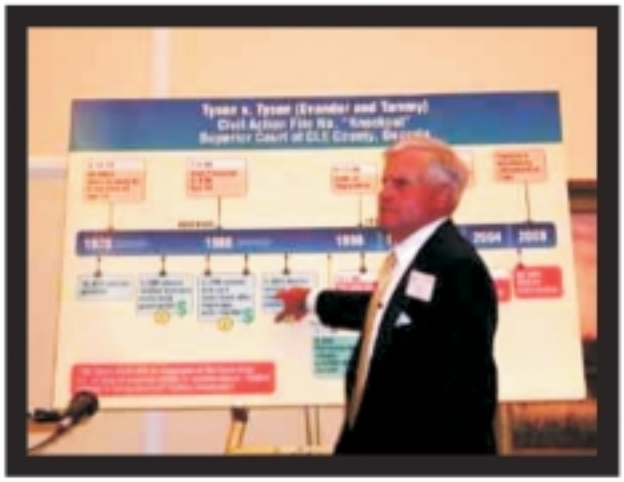
STEVE STILLS
MAKES HIS POINT.

CHAIR ELIZABETH GREENE LINDSEY
AND M. T. SIMMONS
PRESENT THE JACK P. TURNER
AWARD TO BAXTER DAVIS.

THE AUDIENCE GIVES ITS
FULL ATTENTION

PROFESSOR RON CARLSON,
UGA, MODERATES

M. T. SIMMONS
AT THE PODIUM



BAXTER DAVIS SHOWS
AN EFFECTIVE GRAPHIC

GEORGIA CASE LAW UPDATE

Family Law: Deprivation

1. A juvenile court is a court of special and limited jurisdiction that has subject matter jurisdiction over deprivation petitions. Personal jurisdiction can be waived and will be deemed to be waived if not raised during the initial proceedings.

2. A juvenile court's order will be reversed if there is not sufficient evidence to support its order.

In the Interest of M.L.C., 249 Ga.App 435 (2001)

In this case, the father appealed the juvenile court's order finding that his child, M.L.C., was deprived and ordering temporary custody to the Georgia Department of Human Resources which was acting through the Worth County Department of Family and Children Services ("DFACS").

1. The father's first argument was that the juvenile court did not have personal or subject matter jurisdiction.

The Georgia Court of Appeals held that a juvenile court "is a court of special and limited jurisdiction." The juvenile courts have subject matter over deprivation petitions. Subject matter in this case was proper because it was addressing alleged deprivation of M.L.C. The court of appeals also held that in this case the father had waived his objections to personal jurisdiction because he did not raise his objection during the juvenile court proceedings.

2. The father claimed that there was insufficient evidence to support the juvenile court's order finding that M.L.C. was deprived.

The Georgia Court of Appeals stated that under Georgia law, a child is deprived if "the child is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for the child's physical, mental, or emotional health or morals." The evidence presented before the juvenile court would be reviewed "in the light most favorable to the juvenile court's judgement to determine whether any rational trier of fact could have found by clear and convincing evidence that [the child] was deprived."

DFACS contended that M.L.C. was deprived because of "substance abuse problem[s] suffered by [the mother and father]. . . which fuel[ed] domestic violence." The evidence presented at trial showed that the mother had a history of abusing prescription medications. The mother admitted in court that she had been hospitalized once for drug use and four times for depression. The mother also admitted to a family therapist that she had a problem with prescription drugs.

The evidence also established that the father had previously smoked marijuana. DFACS established a "safety plan for M.L.C. that placed her with a foster family until the father could be tested for drugs. The father was tested for drugs and the results were negative. DFACS placed M.L.C. back with her father. For a period of seven months, the father was tested for drug use and all the results were negative. However, in March of 2000, the father's drug test yielded positive results. From that point until the deprivation hearing in July 2000, the father's drug tests again yielded negative results.

In addition to the drug use, the evidence established that M.L.C's mother and father had had three (3) violent altercations in the past fifteen (15) years. However, none of the altercations occurred while M.L.C. was present.

The evidence also established that M.L.C. wished that her mother would quit taking so many pills and that her father would stop taking drugs. Besides that, the evidence did not show how the drug use was affecting M.L.C. M.L.C. never missed school unless she was sick and she had been on the honor roll since kindergarten.

Based on the evidence, the Georgia Court of Appeals determined that M.L.C. was a well adjusted child who "recognized the pitfalls of drug use" and that her emotional, physical, and mental needs had been met. The court held that the juvenile court erred in finding M.L.C. deprived because the evidence did not support such a finding.

Family Law: Parental Rights

1. Clear and convincing evidence of parental misconduct or inability must be present in order for the termination of parental rights to be in the child's best interest.

In the Interest of J.M.D. and J.A.D., 249 Ga.App. 457 (2001)

In this case, the mother appealed a juvenile court's order terminating her parental rights. She argued that the evidence was insufficient to show that her children's deprivation would likely continue if her parental rights were not terminated.

The Georgia Court of Appeals determined that in order for parental rights to be terminated, a juvenile court must find that:

> There [was] present clear and convincing evidence of parental misconduct or inability and that termination would be in the child's best interests.
>
> Parental misconduct or inability is present if (1) the child is deprived; (2) the deprivation is caused by the parent's lack of proper parental care or control; (3) the deprivation is likely to continue or will not be remedied; and (4) continued deprivation is likely to cause serious physical, mental, or moral harm to the child. One factor relevant to determining whether a child is without proper parental care or control is whether the parent has [a] medically verifiable deficiency of the parent's physical, mental, or emotional health of such duration or nature as to render the parent unable to provide adequately for the physical, mental, emotional, or moral condition and needs of the child. If the child does not live with the parent, the juvenile court also [should] consider, among other things, whether the parent without justifiable cause has failed for one year or more to develop and maintain a meaningful, supportive parental bond with the child.

The Georgia Court of Appeals further determined that the standard of review of the juvenile court's order was whether "any rational trier of fact could have found by clear and convincing evidence that the parent's right to custody should be terminated."

The evidence presented showed that at the time DFACS got involved, the mother had left the children, ages five (5) and three (3) on a street corner; she did not have a place to live; she did not have the financial means to support the children; and she had a serious mental health problem that required treatment which she refused to get. Furthermore, the mother did not initiate visits with her children and the one weekend she was scheduled to have them, she got overwhelmed and she took them to DFACS. She showed no motivation in being reunited with her children. The Georgia Court of Appeals found that such evidence supported the finding that the mother was incapable of taking care of the children and that the termination of her parental rights were in the children's best interest.

2. To find that a parent has abandoned a child, sufficient evidence must be presented establishing that the parent deserted the child or had an intention to sever the parental relationship, that the parent forewent all duties, claims and obligations to the child. Furthermore, the parent must be given the opportunity to reunify with the child through the establishment of a reunification plan by the Department of Family and Children Services.

In the Interest of V.S., 249 Ga.App. 502 (2001)

In this case, the father appealed a juvenile court's order terminating his parental rights on the grounds that there was not clear and convincing evidence of parental misconduct or inability justifying the termination of his rights.

The Georgia Court of Appeals agreed with the father's argument. The court stated that:

> In order to find abandonment, there must be sufficient evidence of an actual desertion and an intention to sever entirely, so far as possible, the parental relationship, throw of all obligations growing out of the relationship, and forego all parental duties and claims.

In the case at bar, the father made numerous attempts to contact The Department of Family and Children Services ("DFCS") in order to visit his daughter; he offered to pay child support; he gave the child's mother money for prenatal care; he arranged for and kept his visitation appointments for the five month period preceding the hearing; he showed love and affection toward his child; he made arrangements for child care should he be given custody; and he established a bond with his child. Thus, the evidence did not support the finding that the father had abandoned his child.

The court further determined that based on the father's present circumstances it was not in the child's best interest to terminate his parental rights because there was not clear and convincing evidence of his parental unfitness. The father had found an alternative living arrangement and he established child care during the day while he was working. DFCS failed to establish a plan for the father to reunite him with his child.

The court also analyzed his situation under O.C.G.A. §15-11-94(b)(4)(C). This statute provides that:

> Where the child is not in the parent's custody, in determining whether the child is without proper parental care and control, the court shall consider, among other things, whether the parent without

> justifiable cause [had] failed significantly for a year or more prior to the filing of the termination petition: (a) to develop and maintain a parental bond with the child in a meaningful, supportive manner; (b) to provide for the care and support of the child as required by law or judicial decree; and (c) to comply with a court-ordered plan designed to reunite the child with her parent.

The termination petition was filed seven (7) months after the child's birth; the father had made efforts to support his child; and he bonded with her.

The court, therefore, held that the facts of the case demanded that a plan be established to reunite the father with his child and that he be given the chance to comply with the plan. The juvenile court terminated his parental rights prematurely.

3. Clear and convincing evidence establishing parental misconduct or inability must be present in order for a court to terminate a parent's parental rights. Additionally, the court must find that it is in the child's best interest to terminate the parent's parental rights.

In the Interest of H.L.W., 249 Ga.App. 600, 547 S.E.2d 799 (2001)

The father asserted that he did not abandon his child and that the juvenile court erred in terminating his parental rights.

Upon review, the Georgia Court of Appeals stated that a juvenile court must employ a two-prong test to determine whether parental rights should be terminated:

> First, the court determines whether this is a clear and convincing evidence of parental misconduct or inability. If so, the court must consider whether the termination of parental rights is in the best interest of the child, considering the child's physical, mental, emotional, and moral condition and needs.

In applying the two-prong test, the court determined that abandonment constituted parental misconduct or inability. For abandonment to exist:

> There must be sufficient evidence of an actual desertion, accompanied by an intention to sever entirely, so far as possible to do so, the parental relation, throw off all obligations growing out of the same, and forego all parental duties and claims.

The facts presented at trial were that the father and the mother separated seven (7) months after the birth of H.L.W. The father moved to Minnesota and tried a few times to contact the child but otherwise did not show interest in the child. Also, the father did not financially support the child. The mother determined that her cousin and her cousin's family could provide a more stable environment for the child and requested that they adopt H.L.W. The mother signed an affidavit supporting her contentions. The cousin and her family initiated proceedings for the termination of the father's and mother's parental rights. At this time, the father sent the child a few gifts and the cousin a bad check for $300.00.

During the proceedings, the father testified that he did not have a place for the child to live because he was living in military barracks, but he wanted the mother to regain custody so they share custody. The mother testified that she could not provide for the child right away but that she would be willing to work to get the child back; she was not sure if her having custody would be in the best interest of the child.

Based on testimony and evidence, the juvenile court found that the father had abandoned the child and that he demonstrated and continued to demonstrate an "unwillingness or inability to provide for H.L.W." The Georgia Court of Appeals affirmed this finding. It found that the abandonment of the child satisfied the first prong of the test. The court also noted that the second prong of the test was also satisfied by the parental misconduct and inability and it was in the best interest of the child to terminate the father's rights.

In the Interest of K.C., C.C., J.H.C., and W.T.C., 249 Ga.App. 680 (2001)

In this case, the parents of four children appealed from the order of the Juvenile Court of Elbert County which terminated their parental rights. The issue before the Georgia Court of Appeals was whether the evidence was sufficient enough to support the juvenile court's judgment. The court of appeals articulated the two-step process to be used when considering whether parental rights should be terminated:

> First, pursuant to O.C.G.A. 15-11-94(a), a court must find clear and convincing evidence of parental misconduct or inability. Parental misconduct or inability exists when (i) the child is deprived, as that term is defined in 15-11-2(8); (ii) lack of proper parental care or control is the cause of the child's deprivation; (iii) the cause of deprivation is likely to continue or not be remedied; and (iv) it will cause or is likely to cause serious physical, mental, emotional, or moral harm to the child. O.C.G.A. 15-11-94(b)(4)(A). Second, if the court finds clear and convincing evidence of parental misconduct or inability, it then considers whether termination of parental rights is in the best interest of the child, considering the child's physical, mental, emotional, and moral condition and needs, including the child's need for a secure and stable home.

The evidence presented before the trial court was:

(1) that the parents had a history of incarcerations for passing bad checks; (2) the mother had two other children from a prior marriage who lived with the mother of the former husband; (3) the mother and father left their four children with the maternal grandmother so that they could work and pay off past probation fines. The parents admitted that they were unable to find stable employment or maintain a stable home. They did not maintain regular contact with the children. Also the children stated that they were sexually abused by two of their father's friends. Based on the evidence presented, the court of appeals found that the parents had "cavalier" attitude towards having others take care of their children; the parents' conduct supported the finding that they had abandoned their children. And, no evidence was presented demonstrating that the deprivation would not continue. The court found the evidence presented was sufficient enough to maintain the juvenile court's findings that the parents were unfit and the juvenile court did not err in terminating the parents' rights.

In the Interest of T.F., 2001 WL 650557 (Ga.App.)

The mother appealed an order of the Juvenile Court of Pulaski County terminating her parental rights. The issue before the Georgia Court of Appeals was whether there was sufficient evidence to support the juvenile court's findings that the mother's parental rights were properly terminated.

The child, T.F., was born February 24, 1996. She lived her parents until the Pulaski County Department of Family and Children Services ("DFACS") took her into protective custody on September 11, 1997. Both parents used illegal drugs in the child's presence; they did not adequately supervise her; and her mother was the victim of domestic violence inflicted upon her by the child's father. The child was placed in the care of her maternal uncle but he later took her to live with another relative because he did not want to adopt her. The child's mother was imprisoned a few weeks after T.F. was taken away for forgery, theft by conversion, possession of marijuana, and making a false statement against a police officer. The mother was released on parole in July 1998, but was arrested three weeks later for the possession of cocaine. She will be eligible for parole in June 2002, but she cannot be reunited with T.F. until she completes an eight (8) month work release program. The juvenile court found that because the mother continued to be incarcerated, she had not been able to comply with the reunification plan requiring her to submit to an alcohol and drug assessment and to enter a drug treatment program. But, the court did note that while in prison, the mother underwent and passed drug tests; and that she participated in substance abuse classes and parenting classes.

The Georgia Court of Appeals set forth the two-prong test under O.C.G.A. § 15-11-94(a) to determine whether the mother's parental rights were properly terminated by the juvenile court:

> The first step require[d] a finding of parental misconduct or inability, which require[d] clear and convincing evidence that: (1) the child [was] deprived; (2) lack of proper parental care or control [was] the cause of the deprivation; (3) such cause of deprivation [was] likely to continue; and (4) the continued deprivation [would] cause or [was] likely to cause serious physical, mental, emotional, or moral harm to the child. If these four factors [were] satisfied, the court must then determine whether termination of parental rights [was] in the child's best interest, considering physical, mental, emotional, and moral condition and needs, including the need for a secure and stable home. In determining whether the child [was] without proper parental care and control, the court [should] consider whether the parent [had] a history or excessive use or chronic unrehabilitated abuse of intoxicating liquors, narcotic or dangerous drugs, or controlled substances and whether the parent [had] a conviction of a felony and imprisonment therefor which had a demonstrable negative effect on the quality of the parent-child relationship.

Applying the above standard, the court reasoned that the mother had been given several chances to prove her ability to remain sober and to care for her child in an uncontrolled environment. In each of the chances, the mother failed. The court determined that the conditions "[gave] rise to T.F.'s deprivation" [they] were likely to continue and therefore the termination of the mother's parental rights [was] in the child's best interest.

Family Law: Parental Rights; Evidence: Child Hearsay, Hearsay Exception

1. A third party may testify as to what a child said if the statements fit the ten factors set forth in O.C.G.A. § 24-3-16. (1) the atmosphere and circumstances under which the statement was made (including the time, the place, and the people present thereat; (2) the spontaneity of the child's statement to the persons present; (3) the child's age; (4) the child's general demeanor; (5) the child's condition (physical or emotional); (6) the presence or absence of threats or promise of benefits; (7) the presence or absence of drugs or alcohol; (8) the child's general credibility; (9) the presence or absence of any coaching by parents or other third parties before or at the time of the child's statement, and the type of coaching and circumstances surrounding the same; and, the nature of the child's statement and type of language used therein; and (10) the consistency

between repeated out-of-court statements by the child. These factors are to be applied neither in mechanical nor mathematical fashion, but in that manner best calculated to facilitate determination of the existence or absence of the requisite degree of trustworthiness. Nor does the fact that the statement is made days, weeks, or even several months after the alleged incident, in and of itself make the statement unreliable.

In the Interest of J.W. and C.W. Jr., 2001 WL 605048 (Ga.App)

The mother's parental rights were terminated by the juvenile court. She appealed alleging that the juvenile court erred in four (4) ways:

1. Appointing a Court Appointed Special Advocate (CASA);
2. Allowing witnesses to testify about statements made by one of the minor children about sexual abuse by the father;
3. Admitting into evidence a psychological report containing hearsay; and
4. Finding that the deprivation of the children was likely to continue.

The juvenile court had appointed two CASAs, Helen Styles and Patricia Brewer, for the minor children before the Carroll County Department of Children and Family Services ("DFACS") had filed a petition to terminate the mother's parental rights. During the hearing on the termination petition, filed by DFACS, one of the CASAs wanted to be present during the hearing if no party planned to call her as a witness. The court and the parties agreed that she would not be called as a witness and that her report would not be placed into evidence. The mother objected to her continuing as a CASA because the CASA had recommended to DFACS that the mother's parental rights be terminated prior to DFACS filing the termination petition. The mother contended that the CASA was an interested party to the termination hearing. The Georgia Court of Appeals held that there was no harm in allowing the CASA to be present during the hearing because the CASA did not testify during the proceeding, her report was not admitted into evidence, and she was not a party to the termination hearing initiated by DFACS. The court stated that since it did not find that the juvenile court erred in allowing the CASA to be present during the proceeding it did not need to address whether it erred in allowing her to continue as CASA.

The mother's second contention alleges that the trial court erred in allowing the foster mother, psychologist, and caseworkers testify about sexual abuse allegations made by the minor child.

The minor daughter came home to her foster mother after a visit at minor child's aunt's house. The foster mother noticed discharge in the child's panties. When she confronted the child, the child said that she had wet herself. After a discussion with the aunt who stated that the child had not wet herself, the foster mother asked the child again and was told by the child that her father had sexual abused her. It was further determined that the biological mother was aware that something was happening between the daughter and her husband but she testified that she had not seen anything even after admitting that the child and father had spent an abnormally long time in the bathroom together.

The court of appeals reasoned that the mother's testimony corroborated the statements made by the child to others and the trial court did not err in allowing the foster mother, caseworkers, and psychologist to testify at trial was not an abuse of discretion by the trial court under O.C.G.A. § 24-3-16. O.C.G.A. § 24-3-16 sets forth the factors the trial court should consider when deciding if a child's statements provide sufficient indicia of reliability. The factors include:

> (1) the atmosphere and circumstances under which the statement was made (including the time, the place, and the people present thereat; (2) the spontaneity of the child's statement to the persons present; (3) the child's age; (4) the child's general demeanor; (5) the child's condition (physical or emotional); (6) the presence or absence of threats or promise of benefits; (7) the presence or absence of drugs or alcohol; (8) the child's general credibility; (9) the presence or absence of any coaching by parents or other third parties before or at the time of the child's statement, and the type of coaching and circumstances surrounding the same; and, the nature of the child's statement and type of language used therein; and (10) the consistency between repeated out-of-court statements by the child. These factors are to be applied neither in mechanical nor mathematical fashion, but in that manner best calculated to facilitate determination of the existence or absence of the requisite degree of trustworthiness. Nor does the fact that the statement is made days, weeks, or even several months after the alleged incident, in and of itself make the statement unreliable.

The mother also argued that the juvenile court erred by admitting into evidence the psychological evaluations of the minor children because the evaluations contained hearsay statements.

The psychologist testified that her opinions and recommendations were based on discussions and tests with the child and that the background information was obtained by others. The Georgia Court of Appeals reasoned that because the psychologist had testified that his

recommendations were not based on the hearsay in his report and because the trial court only considered admissible evidenced, the mother's argument that the court erred was without merit.

Lastly, the mother alleged that the trial court erred in terminating her parental rights because DFACS presented insufficient evidence that the deprivation of the children was likely to continue because the mother had complied with the DFACS case plan. In considering this contention, the appellate court determined that based on the evidence introduced at trial a trier of fact could have found by clear and convincing evidence that the parent's rights to custody have been lost. The trial court issued an eleven page order terminating the parents' rights. The order reviewed the evidence showing that the mother was mentally slow; she attended special education classes and left school in ninth grade; she was not able to work because fo a debilitating and deteriorating bone disease. The children were first removed from their parents because they had no place to live. The children had head lice and did not know how to use a toothbrush or wipe themselves after using the bathroom. Additionally, the mother had placed another child in the custody of her parents while she was imprisoned even though her father had sexually abused her as a child.

The Georgia Court of Appeals concluded that although the mother had complied with the DFACS plan, the evidence was overwhelming that the deprivation of the children was likely to continue and thus, the trial court did not err in terminating the parental rights of the parents.

Family Law: Legitimation

1. If the State is not involved, a legitimation petition is proper if it is in the best interests of the child.

Davis v. LaBrec, 2001 WL 704413 (2001)

The issue before the Georgia Supreme Court was whether the parental fitness or best interests of the child test applied to the biological father's petition to legitimate his biological child. The court determined that the test to apply under the circumstances was the best interest of the child test.

In this case, the mother, Elizabeth Wolf and her boyfriend, Kevin LaBrec, were involved in a personal relationship for six years when Wolf gave birth to a child. LaBrec's name was put on the child's birth certificate as the father. In July 1996, LaBrec legitimized the child. Wolf supported the legitimization and swore in an affidavit that LaBrec was the child's biological father. Wolf attempted to commit suicide in July 1996; in response, LaBrec initiated court proceedings to obtain full legal and physical custody of the child. It was at this time that Wolf asserted that LaBrec was not the biological father. Later, however, Wolf executed a consent order authorizing LaBrec to be the child's sole permanent physical and legal custodian.

In August of 1997, Jonathan Davis, claimed that he was the child's biological father and filed a complaint to establish paternity, to set aside the previous legitimation order; to legitimate; and to obtain custody of the child. The trial court concluded that Davis had not waived his opportunity to develop a relationship with the minor child; Davis was a fit parent; and the child was legitimately Davis' son. The trial court changed the child's last name to Davis, and granted Davis visitation rights.

The court of appeals reversed the trial court's holding and remanded the case to the trial court in order for it to determine whether it could address Davis' legitimation petition after it considered the preclusive effect of the earlier legitimation and custody orders. If the trial court could address Davis' legitimation petition, then it was to apply the best interests of the child standard.

The Georgia Supreme Court reviewed the trial court's and court of appeals' decision. It articulated the *Eason* proposition: "absent the State's involvement and under other circumstances, the best interests of the child standard would be adequate." In this case the Supreme Court reasoned that LaBrec was named as the father on the birth certificate; he had lived with the child as father and son since the child's birth; and that LaBrec had established a relationship with the child prior to the State's involvement.

Based on the evidence, Georgia Supreme Court determined that the court of appeals had properly reversed and remanded the case to the trial court to consider the effect of the preexisting legitimation and custody orders and to consider whether it was in the best interest of the child to grant Davis' petition.

Family Law: Parental Rights, Reunification

1. Clear and convincing evidence establishing parental misconduct or inability must be present in order for a court to terminate a parent's parental rights. Additionally, the court must find that it is in the child's best interest to terminate the parent's parental rights. Furthermore, the parent must be given the opportunity to reunify with the child through the establishment of a reunification plan by the Department of Family and Children Services.

In the Interest of B.C. and S.N.C., 2001 WL 687420 (Ga.App.)

In this case, the mother, Jennifer Clark, appealed from the juvenile court's decision terminating her parental rights in both of her children, B.C. and S.N.C. In reviewing the juvenile court's decision, the Georgia Court of Appeals

articulated the two-prong test pursuant to O.C.G.A. § 15-11-94(a):

> First, the court shall determine whether there is present clear and convincing evidence of parental misconduct or inability as provided by O.C.G.A. § 15-11-94(b). Secondly, if there is clear and convincing evidence of such parental misconduct or inability, the court shall then consider whether termination of parental rights is in the best interest of the child. Parental misconduct or inability is found where (1) the child is deprived, (2) the lack of proper parental care or control by the parent in question is the cause of the child's deprivation, (3) the cause of the deprivation is likely to continue or will not likely to continue or will not likely be remedied, and (4) the continued deprivation will cause or is likely to cause serious physical, mental, emotional, or moral harm to the child. O.C.G.A. § 15-11-94(b)(4)(A). ***
>
> On appeal [the court] must determine whether, after reviewing the evidence in light most favorable to the appellee, any rational trier of fact could have found by clear any convincing evidence that the natural parent's right to custody should be terminated. . . [T]his Court neither weighs evidence nor determines the credibility of witnesses; rather, [the court defers] to the trial court's fact-finding and affirm unless the appellate standard is not met.

The mother's guardians, Donna and Harold Walls, filed the first deprivation petition on April 1, 1997. S.N.C. was living with the Walls and her mother and the mother's husband. The Walls stated in the petition that the parents were homeless and did not care for the child. The child was left in the Walls' care for long periods of time without being told when the Clarks were coming back or where they were going. The mother did not provide for the child. And, she had recently overdosed on medication prior to the filing of the deprivation petition. In response to the petition, the trial court granted the Walls custody of S.N.C.; ordered the mother to visit with the child on Mondays and Thursdays; to open a checking account; to obtain employment; to enroll in counseling; and to receive parenting instructions.

S.N.C.'s grandparents, the Butlers, intervened and petitioned for custody. Custody was granted to the Butlers on August 28, 1997. During the custody hearing, Clark was jail and could not attend. The court issued an order ordering Clark to pay $35.00 per week for the support of S.N.C., and for DFACS to develop a reunification plan for the parents.

On September 8, 1999, the court had another hearing in which it extended custody of S.N.C. to the Butlers. During this hearing, the court also found that B.C., the mother's ten month old child, was also deprived. Again, Clark was in jail and was unable to attend the hearing. The court gave the Butlers custody of B.C. while stating that it would "reserve the issue of visitation and support" until the mother got out of jail.

On November 8, 1999, the Butlers filed a petition to terminate the mother's parental rights to both S.N.C. and B.C. The court held the termination hearing on January 8, 2000. The Butlers testified that the mother had not complied with the court's order in regards to S.N.C. The Butlers also testified that the mother had taken care of B.C. for a period of time but the Butlers took B.C. to their house after becoming concerned with the mother's living conditions. Clark was present during this hearing and she testified that she was working at Shoney's; that she had not visited the children because Mrs. Butler made her feel unwelcome; that she had been incarcerated for violating her probation; that she was living with the father who had given up his parental rights to the children; and that she was not sure if the father was the father of "her latest baby." Clark also testified that she was maturing and wanted to be a better mother. The guardian ad litem recommended that termination of her parental rights was in the best interest of the children because he was concerned about her two prior arrests and her failure to comply with the court's order on visitation and child support.

In reviewing the trial court's decision to terminate the mother's parental rights in both children, the Georgia Court of Appeals found that the court erred in terminating her rights to B.C. Because no case plan was put in place and her rights were terminated only two (2) months after the deprivation petition was filed. Furthermore, the court found that if the mother had not been incarcerated during the petition hearing, her attorney would not have had enough time to file the appropriate motions requesting visitation or a case plan for reunification.

In relation to the mother's parental rights being terminated to S.N.C., the court found that she had never taken any responsibility for S.N.C.; that she had not complied with the court's order on visitation or child support. She did not make any effort to reunify with S.N.C. Therefore the court held that the trial court was correct in terminating her rights to S.N.C.

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Listening- *continued from page nine.*

You effortlessly can refer to an outline of the witness's deposition — especially one organized by topics — during the direct examination. As such, this type of outline is one of the most efficient tools which allows the attorney during direct examination to devote his full attention to the witness's answers. Also, organizing the exhibits you expect to tender during cross-examination by witness or topic files allows the attorney easy access to them during trial while also being able to listen intently to the testimony. Thus, taking the time to organize deposition summaries, evidence and anticipated exhibits, one's full concentration can be devoted to listening to the witness's direct testimony to determine the inaccuracies between the testimony and the well organized information readily available in the files prepared for trial.

Closing arguments provides the attorney with vast opportunities to persuade the Court with ideas and conclusions derived from testimony solely based on good listening skills. It may be a statement made by the opposing party, or by a witness, or opposing counsel's wording of a particular question, or any combination thereof, which in closing argument counsel emphasizes in support of a major position. Also, oftentimes in support of a line of argument during closing argument, there are appropriate quotes made by opposing counsel or a witness during testimony that you wish to urge the Court to recall in order to demonstrate fallacies in the other parties' positions.

In sum, mastering the art of listening at trial through implementing some of the techniques and suggestions discussed above allows the trial lawyer additional opportunities to more effectively cross-examine witnesses and to present arguments more persuasively to the Court.

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