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ON MOVING TOWARD A FAMILY COURT IN GEORGIA WITHOUT THE NEED FOR CONSTITUTIONAL REVISION

Steven J. Messinger[†]

INTRODUCTION

Social scientists, policy experts, and judges¹ all have argued for unified specialized court systems to deal with the unique and critically important legal problems of children and families. The National Advisory Commission on Criminal Justice Standards and Goals, the United States Department of Health, Education and Welfare, and the American Bar Association all have published recommendations for courts with integrated family jurisdiction.² State-level studies in Virginia, New Jersey, Maine, Florida, and Maryland have made recent recommendations peculiar to their own state systems and circumstances.³ Virginia conducted a working pilot program with experimental courts that were compared to existing courts, resulting in widespread favor of the creation of a family court system.⁴

What is a family court? What forms can it take? How much constitutional revision is necessary in Georgia to create such a court? Can Georgia move in a worthy experimental direction without any constitutional revision?

In 1985, Governor Joe Frank Harris created a task force to study the court system in Georgia. In its final report, popularly referred to as "Justice 2000," the Governor's Judicial Process Review Commission recommended that juvenile courts "be

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1. See, e.g., Robert W. Page, *Family Courts: An Effective Judicial Approach to the Resolution of Family Disputes*, 44(1) JUV. & FAM. CT. J. 1 (1993); Lindsay G. Arthur, *A Family Court—Why Not?*, 51 MINN. L. REV. 233 (1966).

2. See Page, *supra* note 1, at 4.

3. See *id.* at 5.

4. FAMILY COURT PILOT PROJECT ADVISORY COMM. TO THE JUDICIAL COUNCIL OF VIRGINIA, REPORT ON THE FAMILY COURT PILOT PROJECT (June 23, 1992).

created as and function as a division of the superior court" and that consideration be given to including other domestic matters in that division.⁵

Other task forces,⁶ as well as media commentators,⁷ have advocated for the creation of a court with family jurisdiction in Georgia. This Article will examine the types of family court structures, the current legal and constitutional obstacles to the creation of such structures in this state, and the extent of the legislature's power to move in the direction of a family court without the need for any constitutional revision.

I. WHAT OPTIONS FOR A FAMILY COURT?

Family court proponents disagree on the precise structure a specialized family law court should take.⁸ Many supporters focus on the "one judge-one family"⁹ concept, advocating the need for a single judicial officer to adjudicate and resolve all the domestic legal problems of the same family to promote familiarity and consistency. Most supporters agree that only judges who are uniquely interested and experienced and who maintain specialized training in family law matters should preside in such cases.¹⁰

In Georgia, elected superior court judges hear some domestic cases as a portion of their workload. Appointed judges in counties where juvenile courts exist specialize in cases focusing on children. By law, juvenile court judges must attend regular training.¹¹ Superior court judges also attend training, but the law does not require specialized education in family matters. "One judge-one family" is not a part of the system.

5. JUSTICE 2000: REPORT OF THE GOVERNOR'S JUDICIAL PROCESS REVIEW COMM'N 11 (Nov. 1985).

6. See, e.g., GEORGIA DEPARTMENT OF EDUCATION, TASK FORCE ON VIOLENCE AND THE SCHOOLS, INITIAL REPORT, at 10 (Jan. 1994).

7. See, e.g., Editorial, ATLANTA J. & CONST., Sept. 10, 1995, at C6; Editorial, ATLANTA CONST., Nov. 3, 1993, at 10. The *Atlanta Constitution* has printed several other editorials advocating the creation of a family court system in Georgia.

8. Compare *Families in Court: A National Symposium*, 21 PAC. L.J. 891, 953-59 (1990) with SANFORD N. KATZ & JEFFREY A. KUHN, RECOMMENDATIONS FOR A MODEL FAMILY COURT, A REPORT FROM THE NATIONAL FAMILY COURT SYMPOSIUM OF THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES (May 1991).

9. See, e.g., Page, *supra* note 1, at 26-27; Ann L. Milne, *Family Law From a Family System Perspective—The Binary Equation*, 21 PAC. L.J. 933, 949 (1990).

10. See, e.g., Page, *supra* note 1, at 25; Milne, *supra* note 9, at 937.

11. O.C.G.A. § 15-11-4.1 (1994).

The structural alternatives for courts that consider domestic matters at the trial level can be placed in three categories: a system of general jurisdiction trial courts, a system of independent family courts, or a fragmented system of courts.

In a general jurisdiction trial court, all domestic matters are tried within the court. When desired, a "family division" is organized to specialize in domestic matters within such a court.¹² Judges may be assigned to that division on a permanent or long-term basis, or may hear domestic cases either on a temporary or "rotating" basis or as a portion of their workloads.

In an independent family court, all domestic matters are placed within the jurisdiction of a free-standing court. This court operates separately from the trial courts that hear cases other than those domestic matters selected for the "family court."¹³

Finally, in a fragmented system of courts, jurisdiction in domestic cases may be assigned among numerous courts. These courts may include a general jurisdiction trial court, such as Georgia's superior court, and one or more specialized trial courts that hear designated juvenile or family cases, such as Georgia's juvenile courts and probate courts.

Georgia currently fits within the "fragmented system" category. Under Georgia law,¹⁴ juvenile courts consider matters of delinquency and unruliness (cases in which children violate the law), deprivation (protection of abused, neglected, and abandoned children), termination of parental rights other than in adoption cases, and other selected special matters including some cases that are under the concurrent jurisdiction of other courts.¹⁵ Probate courts also hear family-related matters such as guardianship.¹⁶ All other domestic civil proceedings are currently under the jurisdiction of the superior courts.

It is not the purpose of this Article to advocate either for or against the creation of a family law court in Georgia or to analyze which type of family court structure might best suit the

12. See, e.g., KATZ & KUHN, *supra* note 8, at 3 (Hawaii Circuit Court, Family Court Division); *id.* at 10 (New Jersey Superior Court, Family Part).

13. See, e.g., *id.* at 12. Rhode Island's Family Court is a limited jurisdiction domestic court equal in stature to the general jurisdiction tribunal. *Id.* New York's Family Court and South Carolina's Family Court are inferior courts with limited jurisdiction specializing in domestic matters. *Id.* at 10, 12.

14. O.C.G.A. § 15-11-5 (1994).

15. See, e.g., *id.* § 15-11-6.

16. *Id.* § 15-9-30(5)-(6).

citizens of this state. Exhaustive examinations have been conducted that philosophize about what is effective and what is not,¹⁷ what critical issues must be addressed in creation and organization,¹⁸ and how domestic subject matter jurisdiction is organized in the courts of various states.¹⁹ Instead, this Article examines constitutional and statutory obstacles to creating a family law court in Georgia and reveals how far the General Assembly can go toward that end without changing the current constitution.

II. THE CURRENT DOMESTIC SYSTEM IN GEORGIA

Currently, jurisdiction over domestic proceedings is scattered among all the constitutionally created trial courts in Georgia. The superior courts have exclusive jurisdiction over divorce,²⁰ adoption,²¹ annulment of marriages,²² legitimation,²³ and spousal alimony.²⁴ Actions under the Uniform Reciprocal Enforcement of Support Act are also within superior court jurisdiction.²⁵ Custody proceedings are generally tried in the superior courts,²⁶ but the juvenile courts have concurrent jurisdiction over any custody matters transferred by a court of record.²⁷ Further, although support of children is generally a superior court matter, the transfer statute allows support matters connected to custody proceedings to be transferred to the juvenile courts.²⁸ Issues of paternity determination are within

17. See generally Hunter Hurst, *Judicial Rotation in Juvenile and Family Courts: A View From the Judiciary*, 42(3) JUV. & FAM. CT. J. 3, 13 (1991); Haney Theonnes, *Jurisdictional Issues Between Juvenile and Domestic Relations Courts*, JUDGES J., Summer 1988, at 19. For alternative perspectives within a single state, compare Fraser Himes & Richard Y. Feder, *Family Law Judicial System: Indictment from Within*, FLA. B.J., Nov. 1987, at 11, with Ralph Steinberg, *Family Law Divisions: An Alternative to a Separate Family Law Court System*, FLA. B.J., July-Aug. 1988, at 24.

18. Page, *supra* note 1, at 23-29; KATZ & KUHN, *supra* note 8, at 4-6.

19. KATZ & KUHN, *supra* note 8, at 7-9.

20. O.C.G.A. § 19-5-1 (1991 & Supp. 1995).

21. *Id.* § 19-8-2 (1991). The statutory provision specifically leaves room for a grant of subject matter jurisdiction to the juvenile courts, but juvenile courts have not been given authority to address the adoption issue in any direct manner. *Id.*

22. *Id.* § 19-4-1.

23. *Id.* § 19-7-22.

24. *Id.* § 19-6-1.

25. *Id.* § 19-11-51.

26. *Id.* §§ 19-9-1 to -3 (1991 & Supp. 1995).

27. *Id.* §§ 15-11-5(c), -6(b) (1994).

28. *Id.* The transfer of support issues to the juvenile courts leaves a potential

the concurrent jurisdiction of the superior courts and the state courts.²⁹

Juvenile courts have exclusive jurisdiction over unruliness and most juvenile delinquency matters.³⁰ Termination of parental rights is a matter for consideration by the juvenile courts,³¹ but the issue can be litigated in the superior courts during adoption proceedings.³² Purportedly, deprivation³³ actions are within the exclusive jurisdiction of the juvenile courts. However, allegations of family violence may involve the same or related factual issues,³⁴ and petitions for relief from family violence fall under exclusive superior court jurisdiction.³⁵ Juvenile courts also share concurrent jurisdiction over guardianship of the person or property of children with the probate courts.³⁶ Further, certain juvenile criminal law violations may be transferred between the superior courts and the juvenile courts.³⁷ Additionally, juvenile courts have jurisdiction over certain special statutory matters.³⁸

State courts have jurisdiction over misdemeanor criminal cases.³⁹ Consequently, assaults and batteries between family members are decided there. As previously noted, state courts can hear paternity actions. Further, an attorney general's opinion suggests that state courts have concurrent jurisdiction with the superior courts to hear Child Support Recovery Act proceedings.⁴⁰

procedural problem if a party exercises the right to a jury trial on that issue because jury trials are not authorized in juvenile courts. *See id.* § 15-11-28(a) (1994 & Supp. 1995).

29. *Id.* § 19-7-40 (1991 & Supp. 1995).

30. *Id.* § 15-11-5 (1994). *But see id.* § 15-11-5(b)(1), (2)(A).

31. *Id.* §§ 15-11-80 to -86.

32. In one case, the Georgia Supreme Court held that, in certain circumstances, an independent action to terminate parental rights may originate in the superior court if it is "in pursuance of . . . prospective adoption of [a] child." *H.C.S. v. Grebel*, 321 S.E.2d 321, 322 (Ga. 1984).

33. O.C.G.A. § 15-11-2(8) (1994) (defining "deprivation" as abuse, neglect, abandonment, or other acts or omissions that amount to failure to properly provide or care for a child).

34. *Id.* § 19-13-1 (1991 & Supp. 1995).

35. *Id.* § 19-13-2 (1991).

36. *Compare id.* § 15-11-6(a) (1994) with *id.* § 15-9-30(a)(5)-(6).

37. *Id.* §§ 15-11-5(b)(2)(B)-(D), -39.

38. *See id.* §§ 15-11-110 to -118 (Parental Notification Act).

39. *Id.* § 15-7-4(1). This jurisdiction is concurrent with superior courts. *See id.* § 15-6-8(1); *Allen v. State*, 70 S.E.2d 543 (Ga. Ct. App. 1952); *Smith v. State*, 9 S.E.2d 714 (Ga. Ct. App. 1940).

40. 83 Op. Att'y Gen. 33 (Ga. 1983).

Magistrate courts are authorized to issue arrest warrants, grant bail, and hold preliminary hearings in many criminal cases.⁴¹ Therefore, magistrate court orders have a significant impact on the protection of parties in family relationships and also have indirect control over the parties' behavior when related criminal cases are in preliminary stages at the same time civil domestic issues are being litigated.

Because jurisdiction over domestic proceedings is divided among the courts, one could conclude that such a scheme is not only disorganized, confusing, and overlapping, but also has the potential for promoting forum shopping and, thereby, judge shopping. Can these problems be remedied without revision of the Georgia Constitution?

The Georgia Constitution of 1983 places few limitations on actions by the General Assembly in the area of subject matter jurisdiction. These limitations will be examined in detail in the remaining sections of this Article. This review will show that the foregoing distribution of domestic cases can be changed significantly by general statutory enactment.

III. COURT ORGANIZATION UNDER THE GEORGIA CONSTITUTION OF 1983

The current Georgia Constitution specifically provides for five classes of trial courts: magistrate courts, probate courts, juvenile courts, state courts, and superior courts.⁴² It states that every county shall have a superior court, a probate court, a magistrate court, and "where needed," a state court and a juvenile court.⁴³

One might assume that constitutional amendment or revision would be required to abolish any of the five constitutional trial courts, but that assumption may be incorrect. Georgia constitutions prior to the 1983 revision provided that the General Assembly could abolish courts, but gave specific protection against such action to those courts named in the first section of the judicial article.⁴⁴ The 1983 revision deleted any such protection and gives the legislature the direct and unqualified permission to "abolish, create, consolidate, or modify . . .

41. O.C.G.A. § 15-10-2 (1994).

42. GA. CONST. art. VI, § 1, ¶ 1.

43. GA. CONST. art. VI, § 1, ¶ 6.

44. See *Hines v. Etheridge*, 162 S.E. 113, 115 (Ga. 1931); *Nobles v. State*, 58 S.E.2d 496, 499 (Ga. Ct. App. 1950).

courts.”⁴⁵ Thus, under the current Georgia Constitution, the General Assembly may be able to abolish one or more of the constitutional courts that are specifically enumerated in the judicial article⁴⁶ without constitutional revision.⁴⁷

Rhode Island’s highest court discussed this principle in *Gorham v. Robinson*,⁴⁸ a case concerning a legislative attempt to decrease the duration of a term of office for sitting judicial officers:

[A] constitutional court is one which is named or described and expressly protected by the Constitution, and which therefore has the protection that is there provided, or is one which is recognized by name or definite description in the Constitution but is given no express protection. The latter kind of constitutional court, we believe, is generally held to be exempt from being abolished by the Legislature, *unless the Legislature is clearly authorized to abolish it. . . .*⁴⁹

Georgia’s superior courts are the only constitutional trial courts with constitutionally specified powers or subject matter jurisdiction. One constitutional provision vests “power to issue process in the nature of mandamus, prohibition, specific performance, quo warranto, and injunction”⁵⁰ exclusively in the superior courts. Another provision grants the superior courts all trial level jurisdiction “except as otherwise provided in this Constitution”⁵¹ including exclusive jurisdiction in “felony cases, except in the case of juvenile offenders as provided by law; in cases respecting title to land; in divorce cases; and in equity cases.”⁵²

No such exclusive power or exclusive jurisdiction is reserved for any of the other four classes of trial courts within the

45. GA. CONST. art. VI, § 1, ¶ 7.

46. GA. CONST. art. VI, § 1, ¶ 1.

47. The publishers of the Official Code of Georgia Annotated note this change. GA. CONST. art. VI, § 1, ¶ 7 (ed. note).

48. 186 A. 832 (R.I. 1936).

49. *Id.* at 850 (emphasis added); accord *Granger v. State*, 221 S.E.2d 451, 453 (Ga. 1975) (“A court specifically named in [the Georgia Constitution] may not be abolished . . . in the absence of other specific constitutional authority.”) (emphasis added).

50. GA. CONST. art. VI, § 1, ¶ 4.

51. GA. CONST. art. VI, § 4, ¶ 1.

52. *Id.*

constitution itself. In fact, the constitution only provides that their jurisdiction be determined "as provided by law."⁵³

Finally, a recent amendment to the constitution allows the creation of experimental courts as "pilot projects" by general legislation enacted by a two-thirds majority of the members of each house of the General Assembly.⁵⁴ Such court or courts, if created, could operate without regard to existing constitutional conditions for uniformity, jurisdiction, and power, but could only function for a "limited duration."⁵⁵

IV. ON CREATING A GENERAL JURISDICTION TRIAL COURT WITH UNIFIED FAMILY COURT JURISDICTION

A number of legislative approaches to family law jurisdiction could be taken to unify all domestic cases in the existing superior court. Because the current constitution reserves no specific subject matter jurisdiction exclusively for any of the four limited jurisdiction trial courts,⁵⁶ the first question is whether to eliminate the existing juvenile courts or to retain them with some portion of their current subject matter jurisdiction.

One logical approach may be to delete any civil jurisdiction of the juvenile court and place it in the superior court along with the existing domestic caseload that it now considers. This change would require only general legislation removing actions concerning deprivation,⁵⁷ termination of parental rights,⁵⁸ involuntary treatment or commitment of juveniles for mental illness or mental retardation,⁵⁹ judicial consent,⁶⁰ parental notification,⁶¹ and custody or guardianship matters involving concurrent jurisdiction⁶² from the juvenile court and placing those cases in the superior court. If such a strategy were

53. GA. CONST. art. VI, § 3, ¶ 1.

54. GA. CONST. art. VI, § 1, ¶ 10 (amended 1994).

55. *Id.*

56. GA. CONST. art. VI, § 3, ¶ 1.

57. O.C.G.A. § 15-11-5(a)(1)(C) (1994).

58. *Id.* §§ 15-11-5(a)(2)(C), -80 to -86.

59. *Id.* § 15-11-5(a)(1)(D). The substantive law and procedural scheme for such matters are in chapters 3 and 4 of title 37 of the Georgia Code. Due consideration should be given to leaving the authority for commitment for evaluation of children charged with delinquency or unruliness in whatever forum hears those matters. *See id.* § 15-11-40.

60. *Id.* § 15-11-5(a)(2)(A).

61. *Id.* §§ 15-11-110 to -118.

62. *Id.* §§ 15-11-5(e), -6.

implemented, it would also be consistent to delete the related civil jurisdiction of the probate court⁶³ and place it in the superior court. The remaining juvenile court jurisdiction over delinquency and unruliness alone could be retained in a more specialized juvenile court. Some difficulty would arise in determining the need for shifts or additions in judicial personnel to accommodate these changes, but there would be no need to reorganize the existing court system, constitutionally or otherwise.

Alternatively, the juvenile courts could be abolished or consolidated with superior courts. As explained earlier, the General Assembly may already have the power to abolish or consolidate a constitutional court through general legislation.⁶⁴ However, the General Assembly might avoid that thorny issue and attempt to merge the courts through constitutional amendment.⁶⁵

If all the cases currently heard by the juvenile courts were reassigned to the superior courts,⁶⁶ significant organizational issues would still remain, including:

- 1) Should a separate division be created within the superior court or should the superior court continue to function without legally mandated divisions of subject matter jurisdiction?
- 2) If a separate division were mandated, should it be a juvenile division with jurisdiction similar to current juvenile courts or should it include broader domestic jurisdiction?
- 3) If a broad domestic division were created, should it entertain civil family law matters only or should it adjudicate intra-family criminal matters as well?⁶⁷

The discussion in this section has summarized the rather clear-cut steps to expansion of the superior courts for the purpose of unifying domestic jurisdiction; however, the concerns stated above should serve to underscore the potential practical and

63. *Id.* § 15-9-30(a)(5).

64. See GA. CONST. art. VI, § 1, ¶ 7.

65. In either case, simple logic suggests that eradication of a complete system of courts would pose significant political and economic impediments.

66. Related probate court matters would also be relocated. O.C.G.A. § 15-9-30(a)(5) (1994).

67. For an articulation of both sides of the argument on whether to include criminal subject matter jurisdiction, see KATZ & KUHN, *supra* note 8, at 8-9.

political obstacles in a large and diverse state such as Georgia with so many counties and judicial circuits.

V. ON CREATING AN INDEPENDENT FAMILY COURT

Because no "family court" exists under current Georgia law, the creation of new independent family courts would be a monumental task. First, juvenile courts would have to be abolished or their subject matter⁶⁸ merged into the new family courts. This would take either general legislation eradicating the entire system of juvenile courts⁶⁹ or an amendment eliminating them from the constitution.⁷⁰ Alternatively, juvenile courts could be retained with jurisdiction over matters involving delinquency and unruliness, while general legislation could reassign all civil subject matter jurisdiction to the new family courts.⁷¹

Next, all domestic subject matter jurisdiction of the superior courts⁷² would have to be merged into the new family courts. This clearly would require constitutional revision to permit the assignment of subject matter jurisdiction in divorce cases and any other domestic cases classified as equity cases to the new family courts.⁷³

Further, constitutional revision would also be required if the new family courts were added by name to the judicial article.⁷⁴ Without such enumeration, the new family courts would lack the status of constitutional courts.⁷⁵

Thus, any potential strategy for the creation of independent, free-standing family courts would require both significant constitutional revision and extensive general legislation to reshape the Georgia court system. Currently, the creation of independent family courts in Georgia would be a much more difficult proposition than merely reorganizing the superior courts to include unified family court jurisdiction.

68. See *supra* notes 30-38 and accompanying text.

69. See *supra* notes 42-49 and accompanying text.

70. GA. CONST. art. VI, § 1, ¶ 1.

71. This was one of the options proposed in the preceding section of this Article in the event of the expansion of the superior courts to include unified family court jurisdiction. See *supra* notes 57-63 and accompanying text.

72. See *supra* notes 20-29 and accompanying text.

73. See GA. CONST. art. VI, § 4, ¶ 1.

74. GA. CONST. art. VI, § 1, ¶ 1.

75. See *supra* notes 42-55 and accompanying text.

VI. ON MOVING TOWARD A FAMILY COURT IN GEORGIA WITHOUT
THE NEED FOR CONSTITUTIONAL REVISION

While much literature supports the creation of family courts,⁷⁶ there have been warnings and criticisms as well.⁷⁷ Judge Robert W. Page's exhaustive study advocating the creation of family courts acknowledges that "[t]he question of why a family court is preferable needs exploration."⁷⁸ To this author's knowledge, no scientific analysis exists concerning whether any particular court model is more effective for families or, particularly, whether family courts tend to emphasize adults to the detriment of children. Is there another option for Georgia at this time that would not require constitutional revision or drastic court reorganization? What legislative alternatives are available?

Georgia's juvenile courts were made constitutional courts by their enumeration in the judicial article of the 1983 constitution.⁷⁹ Their purpose includes "the care, guidance, and control"⁸⁰ of children who come before the court.⁸¹ Domestic issues addressing the welfare and protection of children not exclusively reserved for superior court jurisdiction by the constitution⁸² could be reassigned to the subject matter jurisdiction of the juvenile courts because the constitution provides that their subject matter jurisdiction is determined "as provided by law."⁸³ Matters that the General Assembly might logically consider for such legislation include petitions for legitimation of children, petitions to establish paternity, petitions for adoption, child custody proceedings, child support and

76. See, e.g., Page, *supra* note 1; Arthur, *supra* note 1; KATZ & KUHN, *supra* note 8.

77. See, e.g., *One Big Family Court?* CAL. LAW., Jan. 1990, at 36 (warning against creation of family law division of California's general jurisdiction trial court); CRIM. JUST. NEWSL., Jan. 4, 1982, at 5 (criticizing New York Family Court as ineffective). *But see* CRIM. JUST. NEWSL., Dec. 5, 1983, at 5 (applauding creation of Family Part of Superior Court in New Jersey).

78. Page, *supra* note 1, at 1.

79. GA. CONST. art. VI, § 1, ¶ 1.

80. O.C.G.A. § 15-11-1(2) (1994).

81. *Id.*

82. See GA. CONST. art. VI, § 4, ¶ 1.

83. See *id.* In addition, art. VI, § 1, ¶ 4 powers reserved for superior courts must not be delegated to any other trial court. Both of Georgia's appellate courts recognize that the General Assembly may assign to the jurisdiction of other trial courts any subject matter that is not reposed within the exclusive jurisdiction of the superior courts by the constitution. See *Austin v. Aldredge*, 179 S.E.2d 66, 67 (Ga. 1971); *EVI Equip., Inc. v. Northern Ins. Co.*, 342 S.E.2d 380, 381 (Ga. Ct. App. 1986).

enforcement proceedings, and petitions for relief under the family violence act.⁸⁴ If the General Assembly were to consider reassigning such cases to the juvenile courts, it would also have to address such matters as the right to a jury trial and the constitutional restrictions in equity and divorce cases.

A. *Legitimation and Paternity*

Legitimation and paternity are similar statutory proceedings, unconnected to divorce cases, that seek to establish specified legal relationships between parent and child. The legitimation petition⁸⁵ is a vehicle by which a father seeks to perfect legal rights of parenthood and inheritance and to have the right to seek custody or visitation by court order.⁸⁶ Issues for adjudication may include whether the father has exercised his opportunity interest in developing a relationship with the child⁸⁷ and his fitness for custody.⁸⁸ Child support issues are before the court in the event that legitimation is granted.⁸⁹ The paternity action is a vehicle initiated on behalf of the child to establish paternity and order support for the child.⁹⁰ Each of these actions focuses on the child's rights, significantly impacts the child's

84. Name changes fall within the statutory jurisdiction of superior courts. See O.C.G.A. § 19-12-1 (1991). Petitions to change the name of a minor under O.C.G.A. § 19-12-1(c) could be reassigned to the juvenile courts. Whether these actions should be brought in a different court than actions for adult name changes will not be discussed further. Annulment actions are equity cases. See *Gearllach v. Odom*, 37 S.E.2d 184 (Ga. 1946); *Reynolds v. Reynolds*, 112 S.E. 470 (Ga. 1922). Alimony proceedings, like divorce cases, have also been regarded as equitable actions in Georgia. See *Gorman v. Gorman*, 236 S.E.2d 652, 654 (Ga. 1977). Contempt actions brought to enforce the provisions of a divorce decree have been construed by the supreme court to fall within the scope of divorce cases. See *Hancock v. Coley*, 368 S.E.2d 735, 737 (Ga. 1988). Thus, any effort to reassign cases related to those issues by general legislation would likely violate the constitution. In any case, they are issues that focus on the legal rights and obligations of the parents rather than the children and will not be considered further for possible subject matter jurisdiction of the juvenile courts.

85. O.C.G.A. § 19-7-22 (1991).

86. *Id.*

87. See *In re Baby Girl Eason*, 358 S.E.2d 459 (Ga. 1987); *Alexander v. Guthrie*, 454 S.E.2d 805 (Ga. Ct. App. 1995).

88. See *In re Baby Girl Eason*, 358 S.E.2d at 462-63; *Hardy v. Arcemont*, 444 S.E.2d 327 (Ga. Ct. App. 1994). In some legitimation cases, the issues of custody or visitation are also adjudicated. See, e.g., *Gregg v. Barnes*, 417 S.E.2d 206 (Ga. Ct. App. 1992); *Murphy v. Suddeth*, 375 S.E.2d 254 (Ga. Ct. App. 1988). For a discussion of child custody cases, see *infra* Part VI.C.

89. O.C.G.A. § 19-7-22 (1991).

90. *Id.* §§ 19-7-49, -51.

future, and addresses and balances issues with which juvenile courts are intimately familiar.⁹¹

B. Adoption

Adoption is also unconnected to divorce, and the suggestion that the juvenile courts might be involved in jurisdiction over adoptions has already been made in the General Assembly.⁹² The most logical reason for considering the assignment of adoption cases to juvenile courts is that the issue of termination of parental rights is often litigated in adoption cases,⁹³ but is also separately considered in juvenile courts.⁹⁴ Placing both adoption and termination cases in one court would promote judicial expertise as well as avoid judge shopping.⁹⁵

C. Child Custody Proceedings

Custody issues not arising within the context of divorce include change of custody cases, actions for modification of specific custody and visitation provisions of a divorce decree, and custody and visitation issues that may be raised in a legitimation proceeding. Habeas corpus proceedings or complaints in the nature of habeas corpus proceedings are no longer permitted when seeking a change of child custody.⁹⁶

Georgia's appellate courts have repeatedly held that custody and visitation issues occurring separately from divorce actions may be heard by the juvenile courts upon a proper transfer order.⁹⁷ The General Assembly could, in its discretion, enact

91. Although surveys of judges, court personnel, and others would be valuable in considering whether any of these issues should be assigned to juvenile courts, legitimation and paternity proceedings are among the cases that superior court judges might be willing to surrender.

92. See O.C.G.A. § 19-8-2 (1991); see also *supra* note 21.

93. See O.C.G.A. §§ 19-8-11 to -12 (1991).

94. *Id.* §§ 15-11-80 to -86 (1994).

95. The author's experience suggests that superior court judges enjoy granting adoptions and might prefer to retain that jurisdiction. As an alternative to assigning juvenile court termination cases to the superior courts, superior court judges might welcome the adjudication of all termination issues by the juvenile courts, regardless of context, while reserving the ultimate grant of adoption for the superior courts. Appropriate amendment to the adoption laws could accomplish this result.

96. See O.C.G.A. § 19-9-23(d) (1991).

97. See, e.g., *Robinson v. Ashmore*, 207 S.E.2d 484 (Ga. 1974); *Wilbanks v. Wilbanks*, 141 S.E.2d 161 (Ga. 1965); *In re D.N.M.*, 389 S.E.2d 336 (Ga. Ct. App. 1989).

legislation to place original jurisdiction of any or all of these cases in the juvenile courts. Custody and visitation issues that arise after a divorce, particularly in families in which emotional upheaval is prevalent, present problems quite familiar to juvenile court judges.

D. Child Support and Child Support Enforcement

The Uniform Reciprocal Enforcement of Support Act (URESA)⁹⁸ and the Child Support Recovery Act (CSRA)⁹⁹ are statutory proceedings designed to aid enforcement of child support obligations. The Georgia Supreme Court has held that a proceeding under URESA "is not a divorce or alimony case within the meaning of the Constitution of Georgia,"¹⁰⁰ and the purposes and procedures relative to the CSRA are such that its construction leads to the same conclusion. These cases focus on the welfare of the child and are initiated by and through state agencies and personnel, such as the Department of Human Resources and special assistant attorneys general who work regularly with juvenile courts.¹⁰¹

Child support issues also arise in the context of divorce proceedings in which children are involved, in post-divorce actions to modify support provisions of a divorce decree, and in legitimation and paternity actions. Because custody actions that are separate from divorce proceedings have been held not to be "divorce cases" as that category is used in the constitution,¹⁰² it seems unlikely that post-divorce child support issues would be treated any differently.

E. Family Violence

Petitions seeking relief from family violence may be filed in the superior courts.¹⁰³ The litigants may be spouses, former spouses, other family members, or residents or former residents of the same household. Thus, these statutory actions clearly are

98. O.C.G.A. §§ 19-11-40 to -81 (1991 & Supp. 1995).

99. *Id.* §§ 19-11-1 to -31.

100. *O'Quinn v. O'Quinn*, 122 S.E.2d 925, 926 (Ga. 1961).

101. Due to the volume and nature of these cases, the author believes that superior court and state court judges would be less likely to guard their jurisdiction in these matters than in other types of cases.

102. See cases cited *supra* note 97.

103. O.C.G.A. § 19-13-2 (1991).

not “divorce cases,” even though temporary spousal support, temporary property possession, temporary child support, and temporary custody may be addressed by the court when the parties are married couples with children.

The primary purpose of the family violence statute is protection from violence and, as a result, the court is authorized to grant a protective order restraining a party from harassment, interference, or acts of family violence defined by the statute.¹⁰⁴ For this reason, concerns arise as to whether the relief permitted is injunctive in nature, thereby raising the possibility that legislation conferring jurisdiction upon any court other than the superior court to hear these cases might be held violative of the exclusive jurisdiction of the superior courts in equity cases under the constitution.¹⁰⁵

Among the states enacting legislation that authorizes protective relief from domestic violence outside the scope of divorce litigation, most, like Georgia, have had little or no appellate construction of their statutes. However, in *In re Marriage of Blitstein*,¹⁰⁶ the Illinois Court of Appeals held that domestic violence protection orders that “affect the relations of the parties in their daily activities outside the litigation”¹⁰⁷ and that require a person to “do or refrain from doing a particular thing”¹⁰⁸ are injunctions. Further, in construing Iowa’s Domestic Abuse Act,¹⁰⁹ the Iowa Supreme Court, in *Christenson v. Christenson*,¹¹⁰ had no difficulty referring to a protective order granted between ex-spouses in a post-divorce context as being “injunctive relief,” even though the Iowa statute does not use the term “injunction” or any similar language.¹¹¹ In contrast, some states have included traditional language associated with equitable relief in their domestic violence laws,

104. *Id.* § 19-13-1 (1991 & Supp. 1995).

105. GA. CONST. art. VI, § 4, ¶ 1.

106. 569 N.E.2d 1357 (Ill. Ct. App. 1991); accord *In re Marriage of Fischer*, 592 N.E.2d 604 (Ill. Ct. App. 1992).

107. *Blitstein*, 569 N.E.2d at 1360.

108. *Id.* (citations omitted). If Georgia courts favored the analysis that protective orders requiring a person to act or refrain from acting (except regarding procedural directions within litigation) are injunctive, there would be a constitutional problem with the statutory authority of the juvenile courts to grant protective relief under existing law. See O.C.G.A. § 15-11-57 (1994).

109. IOWA CODE ANN. §§ 236.1-18 (1994).

110. 472 N.W.2d 279 (Iowa 1991).

111. *Id.*

such as “temporary restraining order”¹¹² or “injunction,”¹¹³ apparently recognizing the equitable nature of the protection.

Although Georgia appellate courts have not addressed the issue, protective orders in family violence cases are sufficiently similar to injunctive relief that assigning such cases to juvenile courts might be a constitutional error by the legislature.

F. Jury Trials

The addition of some or all of the subject matter under consideration to the jurisdiction of the juvenile courts might result in the need to make jury trials available when a party is entitled to a jury trial by statutory or constitutional right, such as in some child support matters.¹¹⁴ However, the constitution specifically authorizes the General Assembly to “prescribe any number, not less than six, to constitute a trial jury in courts of limited jurisdiction.”¹¹⁵ There appears to be no constitutional prohibition against general legislation to institute jury trials in the juvenile courts to whatever extent juries may be necessary or desirable.

G. Constitutional Restrictions in Equity Cases

Without constitutional revision, no courts other than the superior courts may grant equitable relief. Thus, the General Assembly must avoid granting powers to the juvenile courts that are equitable in nature and should avoid assigning subject matter jurisdiction that might require the use of equitable powers to fully adjudicate cases.¹¹⁶ However, courts having no equity jurisdiction “may entertain jurisdiction of an equitable

112. HAW. REV. STAT. §§ 586-1 to -11 (1993).

113. FLA. STAT. ANN. § 741.30(1) (West Supp. 1995).

114. For example, the legislation regarding paternity actions requires that jury trials be afforded. O.C.G.A. § 19-7-49 (1991). Parties also have the statutory right to demand a jury trial in child support modification proceedings. *Id.* § 19-6-19(a) (1991 & Supp. 1995). *But see* *Strange v. Strange* 148 S.W.2d 494, 496 (Ga. 1966) (holding that there is no constitutional right to a jury trial in a URESA proceeding because the action is wholly statutory and because no right to seek child support after a divorce existed at common law prior to the first constitution of Georgia).

115. GA. CONST. art. I, § 1, ¶ 11.

116. *See, e.g., supra* notes 107-17 and accompanying text.

plea purely defensive in its nature"¹¹⁷ so long as affirmative equitable relief is not granted.

H. *Constitutional Restrictions in Divorce Cases*

The overriding constitutional obstacle to the creation of a separate family court forum is the exclusive original jurisdiction of the superior courts in divorce cases.¹¹⁸ If the idea is to add to the jurisdiction of the juvenile courts some of the domestic cases that focus on children, many such cases could be reassigned "as provided by law."¹¹⁹ What about the custody and support issues that are litigated during the course of the very action in which parents dissolve their marriage?

Georgia law provides that "[c]ourts of record, in handling divorce, alimony, or habeas corpus cases involving the custody of a child or children, may transfer the question of the determination of custody and support to the juvenile court for investigation and a report back to the superior court or for investigation and determination."¹²⁰ This authority has been a part of Georgia law in some form since at least 1950.¹²¹ Does it allow for the transfer of custody issues in the context of a divorce case without offending the Georgia Constitution?

In *Robinson v. Ashmore*,¹²² Justice Gunter suggested that, pursuant to the constitutional provision granting exclusive jurisdiction to the superior courts in divorce cases, when child custody is "decided in a divorce case . . . the question of custody cannot be transferred to the juvenile court."¹²³ However, in *Sullivan v. Sullivan*,¹²⁴ the Georgia Court of Appeals suggested otherwise, citing *Wilbanks v. Wilbanks*,¹²⁵ indicating that since *Robinson* was a habeas corpus case and not a divorce case, Justice Gunter's comment was obiter dictum.¹²⁶

117. *Autry v. Palmour*, 184 S.E.2d 15, 17 (Ga. Ct. App. 1971); see also *Crummey v. Crummey*, 10 S.E.2d 859, 860 (Ga. 1940).

118. GA. CONST. art. VI, § 4, ¶ 1.

119. GA. CONST. art. VI, § 3, ¶ 1.

120. O.C.G.A. § 15-11-6(b) (1994).

121. See 1950 Ga. Laws 367, § 10, at 375.

122. 207 S.E.2d 484 (Ga. 1974).

123. *Id.* at 485.

124. 333 S.E.2d 417 (Ga. Ct. App. 1985).

125. 141 S.E.2d 161 (Ga. 1965).

126. *Sullivan*, 333 S.E.2d at 421.

Wilbanks, however, was also a habeas corpus case, as was *Fortson v. Fortson*,¹²⁷ the case upon which the *Wilbanks* opinion relies. Thus, pronouncements in those cases regarding custody issues in divorce cases are also obiter dictum for the same reasons pointed out in the *Sullivan* case. Also, to the extent the *Sullivan* opinion suggests a constitutional construction of the divorce cases language of the transfer statute, it, too, is obiter dictum because the Georgia Court of Appeals does not have jurisdiction over such questions.

Currently, it does not appear that the Georgia Supreme Court has ever directly addressed the constitutionality of the divorce cases provision of the transfer statute¹²⁸ in relation to the exclusive superior court jurisdiction provision of the constitution regarding divorce cases.¹²⁹ In another context regarding its own jurisdiction, the Georgia Supreme Court noted that when the Georgia Child Custody Intrastate Jurisdiction Act prohibited the "use of a complaint in the nature of habeas corpus seeking a change of child custody,"¹³⁰ the supreme court's jurisdiction in appeals of custody cases "not also involving a judgment of divorce" was effectively ended because the only cases involving custody over which the supreme court had jurisdiction were divorce and habeas corpus actions.¹³¹ The Georgia Court of Appeals recognized this distinction in *Evans v. Davey*,¹³² noting that the supreme court continues to have jurisdiction over appeals from custody issues arising during a divorce, while the court of appeals has jurisdiction over all other appeals from custody cases.¹³³

Consequently, if the Georgia Supreme Court distinguished custody issues in the context of divorce cases from other custody cases in determining its own exclusive jurisdiction, the court could make the same distinction in construing the exclusive jurisdiction of the superior courts. Thus, any statute vesting jurisdiction of custody questions in divorce cases in any court other than the superior court should be considered very risky,

127. 35 S.E.2d 896 (Ga. 1945).

128. See O.C.G.A. § 15-11-6(b).

129. See GA. CONST. art. VI, § 4, ¶ 1.

130. O.C.G.A. § 19-9-23(d) (1991).

131. *Munday v. Munday*, 257 S.E.2d 282, 283 (Ga. 1979); see also *Ashburn v. Baker*, 350 S.E.2d 437 (Ga. 1986); *Carter v. Foster*, 273 S.E.2d 614 (Ga. 1981).

132. 267 S.E.2d 875 (Ga. Ct. App. 1980) (citing *Munday*, 257 S.E.2d 282 (Ga. 1979)).

133. *Id.*

and serious doubts about the constitutionality of the "investigation and determination" portion of the transfer statute¹³⁴ will continue until and unless the Georgia Supreme Court directly addresses the issue.

CONCLUSION

The creation of an independent family court in Georgia would require major constitutional and statutory overhaul. The reorganization of the superior courts to include unified family court jurisdiction would require the elimination of a functioning system of courts through constitutional revision or a risky eradication of a constitutional court.

The Georgia Constitution, however, allows for a third creative option with no change in the constitution. Subject matter jurisdiction of the existing juvenile courts could be expanded by general legislation without apparent risk of offending the constitution by reassignment of cases that are within the experience of juvenile court judges and personnel and that correlate well with the current caseload of the juvenile courts because they focus on the care, protection, and development of children. This list includes legitimation, paternity, child support recovery, child support modification, change of custody or visitation, and possibly adoption.

The ease of accomplishing this expansion of the juvenile courts makes this option worthy of discussion in connection with studies on possible family court creation in Georgia or for consideration in connection with possible pilot project legislation.

134. O.C.G.A. § 15-11-6(b) (1994). Such doubts probably do not apply to the "investigation and a report back" option of that provision because, under that scenario, the superior court never abdicates its adjudicatory authority.