



## Supreme Court of Georgia

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## CASES DUE FOR ORAL ARGUMENT

### Summaries of Facts and Issues

**Please note:** *These summaries are prepared by the Office of Public Information to help news reporters determine if they want to cover the arguments and to inform the public of upcoming cases. The summaries are not part of the case record and are not considered by the Court at any point during its deliberations. For additional information, we encourage you to review the case file available in the Supreme Court Clerk's Office (404-656-3470), or to contact the attorneys involved in the case. Most cases are decided within six months of oral argument.*

**Tuesday, May 12, 2015**

### **10:00 A.M. Session**

#### **IN THE INTEREST OF M.F., A CHILD (S15A0840)**

A man who claims he is no longer addicted to drugs is appealing a **Douglas County** juvenile judge's refusal to return custody of his almost 7-year-old daughter, who has lived with a couple the court appointed as her guardians since she was 19 months old. He claims the permanent guardianship statute is unconstitutional as his parental rights were never terminated and it is in his daughter's best interest that she be returned to him.

**FACTS:** In February 2010, at the recommendation of the Department of Family and Children Services, the Douglas County juvenile court ruled that M.F. was a deprived child. The juvenile court placed the toddler with Candace and Gerald Rausch. While the Rausches were not related to M.F., they had raised her mother, Lauren Orshoski, following the divorce of the girl's parents. Orshoski and the baby's father, Steven Frank who lived in Douglas County, were not married. According to the Rausches' attorney, after M.F.'s natural parents failed to overcome their substance abuse and failed to comply with the reunification case plan, the child welfare agency filed a Petition for Permanent Guardianship, asking that the Rausches be appointed M.F.'s "permanent guardians," which the juvenile judge did in January 2012. The judge found that it was not in M.F.'s best interest to terminate the parents' rights and recommended visitation

rights for Frank “to support the child’s strong bond to him.” The judge pointed out in the guardianship order that M.F.’s mother and father “are young, intelligent and able to stabilize their lives provided they engage in long-term substance abuse treatment and recovery.” However, the judge also found that the evidence was “more than sufficient for the court to grant the petition for permanent guardianship” and provided “grounds to terminate [Father’s] parental rights.” Frank was awarded visitation rights with his mother serving as supervisor. Frank did not appeal the guardianship order.

In June 2013, the Rausches filed a Motion for Contempt against Frank, alleging the father had not been compliant with the court’s order mandating that his visitation with M.F. be supervised. The judge subsequently held Frank in contempt and rejected Frank’s counterclaim asking the court to modify the guardianship order. The court found that he had illegally exercised unsupervised visitation with the child and exceeded his authority to care for her. The judge also found he’d created an emotionally abusive situation during his visitation exchanges and voiced concern about his continued reliance on the drug Suboxone, which is prescribed to help people recover from addiction to opiates, such as heroin. Frank did not appeal the contempt order or seek to have it set aside.

In 2014, Frank filed a Complaint for Custody in **Gwinnett County** superior court, the county where the Rausches lived, alleging that the conditions in existence when the guardianship was created had been resolved. Frank argued the evidence showed he had remained drug-free for three years and it was in M.F.’s best interest for the court to award custody of her to her natural father. In response, the Rausches filed a motion to dismiss the complaint for custody and a motion to transfer the case. They argued that under Georgia Code § 15-11-244, the permanent guardianship statute, the juvenile court in Douglas County where the guardianship was established retained authority over any change. The statute says: “The court shall retain jurisdiction over a guardianship action...for the sole purpose of entering an order following the filing of a petition to modify, vacate, or revoke the guardianship and appoint a new guardian.” In April 2014, the Gwinnett County court transferred the case to Douglas County. Following a hearing, in August 2014, the same Douglas juvenile judge dismissed the case. The judge, who also charged Frank \$5,000 in attorney’s fees, stated that the standard for modifying the arrangement as established in the Georgia Code “is clear and convincing evidence that there has been a material change of circumstances of the child or the guardian and that such modification, vacation or revocation of the order is in the best interests of the child. In reading the petition and subsequent amendments, the court finds the complaint for custody and subsequent amendments do not allege any legal basis outlined by statute for modification, vacation or revocation of the order.” Frank now appeals to the Georgia Supreme Court.

**ARGUMENTS:** Frank’s attorney argues that the juvenile court erred by dismissing his lawsuit against the guardians for custody as the permanent guardianship statute, § 15-11-244, is unconstitutional. “As a parent, Steven has a constitutional right to the care and custody of his daughter,” his attorney argues in briefs. The juvenile court never terminated Frank’s parental rights, and Georgia law recognizes that “a fit parent acts in the best interest of his or her child.” A “guardianship” is by definition temporary, the attorney argues, meaning it continues during the time the ward is in need of a guardian. “That need may end upon the attainment by the ward of the age of majority or, as in this case, the guardianship may end when the circumstances requiring the guardianship have ceased to exist. Thus, even though the juvenile court’s order

used the word ‘permanent,’ it is in fact and in law, a continuing appointment, not an appointment ‘forever.’” The guardianship statute is unconstitutional in part because while it allows for a “material change of circumstances of the *child* or the *guardian*,” it “does not allow a showing of a material change of circumstances of the Father, even when **those changes result in changed circumstances for the child and are in her best interest**,” the attorney argues. The juvenile judge in this case testified before the legislature on behalf of the permanent guardianship bill when it was first being considered. “It is respectfully submitted that in good faith, the juvenile judge had become so invested in the subject statute as an ‘advocate witness’ before the Legislature that she lost sight of the constitutional rights of the father,” the attorney contends. This is not a case in which the father has asserted a legally frivolous claim under the statute, and the juvenile court lacked the legal authority to award attorney’s fees. Finally, the Gwinnett County court erred in transferring Frank’s custody complaint to the Douglas County juvenile court as superior courts retain authority over custody issues. The guardianship statute “by any objective reading, does not divest the superior court of the Georgia constitutional and statutory jurisdiction over child custody.” Furthermore, the Georgia Constitution requires that cases of this nature be filed in the county of residence of the defendants, the Rausches. “The Gwinnett County Superior Court confused the statutory language granting the juvenile court continuing jurisdiction **over the guardianship** as superseding the constitutional and statutory authority granting jurisdiction to the superior court **over custody matters**,” Frank’s attorney argues.

The Rausches argue Frank accepted the permanent guardianship order as a more beneficial outcome than termination of his parental rights as he would at least maintain visitation rights. Frank has “improperly cast their ‘permanent guardianship’ as merely a dependency-type ‘placeholder guardianship,’ whereby ‘permanent’ guardians of a child in Georgia do not actually represent *permanence* for that child, but instead simply hold a place in line for the child’s natural parent to reunify with the child if or when the natural parent can demonstrate sufficient self-improvement so as to resume his constitutionally-protected right to custody.” The juvenile court correctly rejected Frank’s claim that modification of a “permanent” guardianship could occur “simply because [he] claimed he had changed his behavior,” and the court was right to dismiss his case. “His remedy was to appeal that order, not to file a new complaint in another county without any basis as outlined in Georgia Code § 15-11-244,” the judge stated in her order. The statute “expressly and unequivocally limits the grounds that would authorize modification or vacation of the guardianship...only to changes in the circumstances of the child or the guardians, and excludes as actionable grounds changes experienced by the parent himself.” Frank’s “parental power was permanently severed by the order appointing [the Rausches] as permanent guardians to exercise permanent parental power over [M.F.],” their attorney argues. It is “an upheaval in parental power that occurred through Appellant’s consent as well as the court’s written findings that clear and convincing evidence supported both a finding of Appellant’s parental unfitness and that M.F.’s reunification with her parents was ‘detrimental’ to the child.” Finally, both the Gwinnett superior court and the Douglas juvenile court were correct in ruling that the permanent guardianship statute controls any questions regarding the modification or vacation of the guardianship and that furthermore, the Douglas County juvenile court is the proper forum for Frank’s complaint for custody. The juvenile court had the authority to award attorney’s fees. “In its transfer order, the trial court in Gwinnett transferred ‘all issues, including the issue of attorneys’ fees’ to Douglas County juvenile court for hearing and consideration.”

**Attorney for Appellant (Frank):** Tom Pye  
**Attorney for Appellees (Rausches):** Douglas Fox

**BAGWELL V. TRAMMEL, ET AL. (S15A0820)**

A man is appealing a **Forsyth County** court ruling that he was only entitled to 50 percent of the proceeds from the sale of property that was part of a joint venture, rather than the 70 percent to which he claimed he was entitled.

**FACTS:** In 1999, Thomas N. Bagwell entered into a Joint Venture Agreement with Bobby D. and Oretta W. Trammel called Etowah Ventures. Bagwell had previously loaned money to the Trammels after they filed for bankruptcy. Bagwell claimed that he cancelled his notes from both the Trammels and their son, which with accrued interest totaled about \$2.25 million, as his own equity contribution to the joint venture. The Trammels in turn contributed a portion of their 103 acres of properties that had secured their note. The Joint Venture Agreement stated that its purpose was to “change the relationship of the parties from a debtor-creditor relationship to a relationship of joint venture wherein Trammel and Bagwell each become members of this specific joint venture with the purpose of making a great deal of money by holding most of the properties [“Joint Venture Properties”] for speculation for a suitable period of time and later selling such [Joint Venture] properties at a good profit....” By August 2002, no joint venture properties had sold, and Bagwell and the Trammels amended the Joint Venture Agreement to say they were “mutually adopting a formula and program of redemption [“Redemption Formula”] which settles any and all issues between the parties and provides for a self-effectuating dissolution in the future of the Joint Venture....” Under the amended Joint Venture Agreement, the parties agreed that upon dissolution of the joint venture, the property would be sold and the proceeds distributed based on the Redemption Formula that gave Bagwell 70 percent with the Trammels receiving 30 percent. By August 30, 2004, Etowah Ventures had sold all but one of the joint venture properties, and the Trammels’ attorney applied the agreed upon Redemption Formula to the proceeds and made the disbursements. Only one of the joint venture properties, which is the subject of this case, remained – a 28.957 acre tract, which was about 28 percent of the total joint venture properties. According to Bagwell, in violation of the agreement and without notifying him, the Trammels transferred that property to their sons by warranty deed. When Bagwell found out about it, he filed a Title Affidavit in January 2005, claiming partial ownership to the property as part of Etowah Ventures. After efforts failed to get the sons to reconvey the property to their parents as trustees for Etowah Ventures, on Aug. 31, 2011, Bagwell sued. After the sons deeded back the property to their parents in 2013, Bagwell amended his complaint, seeking an equitable dissolution and accounting of Etowah Ventures according to the terms of the amended Joint Venture Agreement.

Following a three-day hearing, on Aug. 28, 2014, the trial court entered a final order. In it the judge granted Bagwell’s request for an equitable accounting and partitioning of the property at issue. The court ordered the appointment of a “receiver,” which is a disinterested person appointed by the court, to sell the property and dissolve the joint venture. But the court ruled against Bagwell on his remaining claims, including that he should have been granted 70 percent of the proceeds of any sale of the property based on the amended agreement. The trial court found that the Joint Venture Agreement constituted a “deed,” in which the Trammels had merely transferred one-half interest in the subject property to Bagwell. As a result, the proceeds would

be divided 50/50. Under the 70-30 Redemption Formula, Bagwell stood to gain \$2.6 million and the Trammels about \$1.65 million. But the court ruled that his claim regarding the amended Redemption Formula was barred because Bagwell had allowed the six-year statute of limitations to run before filing a standard claim for breach of written contract, which would have been the proper legal remedy. Bagwell now appeals to the state Supreme Court.

**ARGUMENTS:** Bagwell's attorney argues the trial court abused its discretion "by ruling that the requisite dissolution of Etowah Ventures and accounting between the joint venturers could not be according to the Redemption Formula in the Amended Joint Venture Agreement because the agreement was a simple written contract upon which the six-year statute" of limitations required by state law had run. But "the Amended Joint Venture Agreement was not just a simple contract," the attorney argues. "It was the foundation document establishing the terms of a joint venture and the continuing fiduciary obligations of the joint venturers until the joint venture was validly terminated – so as to be subject to the same accrual rules as an action for an equitable accounting," the attorney argues in briefs. The Trammels never complied with the provisions of Georgia law or of the Amended Joint Venture Agreement for a proper dissolution and termination of Etowah Ventures. Even though the statute of limitations for simple written contracts is six years, for lawsuits such as this, in which Bagwell argues the Trammels failed to perform according to the agreement, the time deadline is seven years, Bagwell's attorney argues. The trial court erred by introducing at the last minute that Bagwell had an adequate legal remedy which was to file for damages. That issue was never argued at trial. "Here the trial court clearly had broad equitable jurisdiction over this case, wherein the parties had solemnly agreed to a Redemption Formula to govern their joint venture relationship going forward – a formula that the Trammels did not challenge as being unfair and which resulted in a roughly 70/30 'partnership' split or reciprocal interests in the subject property going forward precisely because the Trammels got Mr. Bagwell to pay them \$600,000 in cash as an 'advance' against their equity or share of future sales," the attorney argues. The 50/50 split was not "complete justice," as required by state law. "It was a manifest abuse of discretion; and it violated the cardinal legal rule of contract construction, which is 'to ascertain the intent of the parties at the time they entered the agreement.' Here the parties clearly intended for the Redemption Formula to apply upon any final dissolution of the joint venture."

The Trammels' attorneys argue the trial court did not err in denying Bagwell the 70 percent of proceeds based on the Redemption Formula and in finding the Amended Joint Venture Agreement could validly operate only as a deed. Bagwell sought "specific performance of the contract in question because he had failed to file a timely action for damages for breach of contract." Under Georgia law, "actions upon simple contracts in writing shall be brought within six years after the same become due and payable," the attorneys argue. "There is no dispute that [Bagwell] failed to file his complaint within this statute of limitations." Bagwell knew of the Trammels' alleged breach of the contract by Jan. 26, 2005 when he filed his title affidavit alleging an interest in the property. But he did not file this lawsuit until Aug. 31, 2011. Had he filed a lawsuit seeking damages within the time period, he could have sought a judgment against the Trammels which would have been an enforceable lien against the property. The trial court actually rescued Bagwell's claim by construing the contract as a deed, the Trammels' attorneys argue. "In point of fact, [Bagwell] should be elated that the trial court granted any equitable relief

in light of the fact that [Bagwell] never pursued the clearly adequate remedy at law for damages on his claims against [the Trammels].”

**Attorney for Appellant (Bagwell):** George Butler II

**Attorneys for Appellees (Trammels):** R. Thad McCormack, Christopher Elrod

**MARTIN V. MCLAUGHLIN, WARDEN (S15A0883)**

A man convicted of sexually abusing a 12-year-old child is appealing on the ground that state prosecutors failed to prove the crime occurred in **Dawson County**.

**FACTS:** According to the facts at trial, Eddie Davis Martin, Jr. was 21 when he met A.C., a 12-year-old girl who was with her father at a Huddle House restaurant near their home in Dawsonville. At some point, the girl’s father told Martin that she was only 12 years old and he should leave her alone. But Martin began sneaking into the girl’s bedroom at night through a window. The girl testified that at first she and Martin would just talk, but as the visits progressed, there was more and more sexual touching. One night, the girl became uncomfortable and told Martin to leave. The next time Martin called and asked her if he could come over, she said no. She testified that later that night, she awoke and found Martin in her bed. He proceeded to force himself on her and had sexual intercourse with her against her will. She said he told her not to tell anyone or he would kill her. In his defense, Martin’s grandfather testified that on the night of the alleged rape, Martin was staying at his house. The grandfather said he slept in a recliner all night and would have heard if Martin left the house. At trial, the State introduced “similar transaction evidence,” alleging that soon after having sex with the 12-year-old, he had sex with a 15-year-old after going to her home when he knew her parents would be gone. Another similar transaction occurred a few months prior to the crimes alleged in this case, in which Martin visited another 12-year-old girl’s home several times and would “French kiss” her when they were alone. The prosecutor argued to the jury that “Apparently, the defendant likes to have sexual intercourse and perform sex acts on young teenage and preteen girls who are on the heavy side,” and “who have long, shoulder length brown hair.”

In August 2006, Martin was indicted by a Dawson County grand jury for rape, aggravated sexual battery, aggravated child molestation and three counts of child molestation. Following a December 2006 trial, the jury found him guilty of all counts but rape. He was sentenced to 20 years in prison to be followed by a number of years on probation. On appeal, the Georgia Court of Appeals upheld his convictions in 2008 and the state Supreme Court denied his petition to appeal to the high court. In October 2011, Martin filed a petition for a “writ of habeas corpus” in Macon County Superior Court. (Habeas corpus is a civil proceeding that allows already convicted prisoners to challenge their conviction on constitutional grounds in the county where they’re incarcerated. They generally file the action against the prison warden, who in this case was Gregory McLaughlin.) In his petition, Martin alleged he had received “ineffective assistance of counsel” in violation of his constitutional rights from both his trial attorney and his attorney during his appeal because both attorneys neglected to attack the State’s failure to prove venue – or where the crime was committed. In September 2013, the habeas court denied Martin relief, and he now appeals to the Georgia Supreme Court.

**ARGUMENTS:** The Sixth Amendment to the U.S. Constitution states that, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed....” In any

criminal case, venue must be proved beyond a reasonable doubt. In its 2002 ruling in *Graham v. State*, the Georgia Supreme Court said: “Venue is more than a mere procedural nicety; it is a constitutional requirement that all criminal cases be conducted in the county in which the crimes are alleged to have occurred. Proof of venue is essential to a criminal prosecution.” The record in this case, however, “did not prove venue beyond a reasonable doubt,” Martin’s attorney argues in briefs. When A.C. was asked at trial, “where do you live?” she responded, “Dawsonville, Georgia.” When the State prosecutor later asked, “do you know what county your house is in?” the girl replied, “in Dawsonville.” She went on to testify about various incidents involving Martin that allegedly occurred in her house, which were the basis for his charges. While Dawsonville is the county seat of Dawson County, the city of Dawsonville is not located entirely in one county. Rather it lies in at least *four* counties, the attorney argues. “As noted in Martin’s petition, there is no dispute that A.C.’s home was in Dawsonville, and Martin’s aunt’s testimony shows that *part of* Dawsonville is in Dawson County. However, the State presented *no evidence*, nor was there any stipulation or judicial cognition, which showed that Dawsonville – or A.C.’s home – was located entirely within Dawson County,” the attorney argues. “Thus, because ‘the State’s evidence clearly authorized the jury to find that the crimes occurred in [Dawsonville], but failed to mention either that the crimes were committed in [Dawson] County or that [Dawsonville] is located entirely within [Dawson] County,’ the evidence was not sufficient to convict Martin.” The habeas court tried to “sidestep the multi-county issue” by stating that during the trial, the State “did in fact offer circumstantial evidence to prove venue,” including evidence that a 911 call from the victim’s mother resulted in an investigation by the Dawson County Sheriff’s Department and the Dawson County Department of Family and Children’s Services. Also, the testimony of A.C.’s father “created an inference” that his home is located in Dawson County. However, none of the circumstantial evidence clearly delineates in which county the alleged crime occurred, the attorney argues. “The evidence therefore reflects that the state failed to prove beyond a reasonable doubt that venue in Martin’s case lay in Dawson County.” The habeas court therefore erred and should have found that his attorney was ineffective and “Martin was prejudiced by counsel’s failure to raise venue as an issue on appeal.”

The Attorney General’s office argues for the warden and State that the habeas court properly ruled that appellate counsel was not ineffective for not challenging the sufficiency of the evidence of venue. Martin has failed to meet his burden of proving not only that his attorney was deficient, but also that there is a likely probability the outcome of his trial would have been different had it not been for his deficiency. After the appeals attorney reviewed the trial transcript and the trial attorney’s file, he noted that venue was a potential issue, “but ultimately raised other grounds that he believed to be the most meritorious,” the State argues. “Petitioner has not shown that decision was unreasonable.” Furthermore, “Petitioner was not prejudiced because the State provided circumstantial evidence that proved beyond a reasonable doubt that venue was proper in Dawson County.” In addition to the fact that the Dawson County Sheriff’s Office and Dawson County child welfare agency responded to the 911 call by A.C.’s mother, Dawson County investigators contacted the father of a second potential victim of Martin’s related to the case. “As public employees, the investigators and DFACS are presumed to have been acting properly within their jurisdiction,” the State contends. “Second, the victim’s father implied in his response to the State’s question regarding the location of the Huddle House, that he left his home in

Dawson County and went just across the county line into Pickens County where the Huddle House is located.”

**Attorney for Appellant (Martin):** Mark Yurachek

**Attorneys for Appellee (Warden/State):** Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Ryan Kolb, Asst. A.G.