Mercer Law Review

Volume 28
Number 1 *Annual Survey of Georgia Law*

Article 12

12-1976

Juvenile Law

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Juvenile Law and The Juvenile Court System

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There is probably no more difficult, albeit interesting, job in the state than the position occupied by the juvenile court judge. Each year brings an increasing number of state appellate decisions involving delinquents, status offenders, and deprived children. In addition, the United States Supreme Court has now rendered six decisions further clarifying the constitutional rights of juveniles in the juvenile justice system.[1] As in the previous *Survey*, the first section of this article will deal with developments in the pre-adjudicatory stage, from "arrest" through the filing of a formal petition. The second section will deal with developments in the adjudicatory stage, the trial on the merits of the petition. And the third section will focus upon developments concerning the dispositional stage, which is that stage in which the judicial decision is made about what should be done with a particular child who has been adjudicated to be in need of supervision, rehabilitation, or treatment within the juvenile justice system. A final section dealing with the court's jurisdiction over deprived children and termination of parental rights proceedings is added for the first time this year in view of the increasing number of significant appellate decisions which have dealt with this aspect of the court's power and responsibility.

I. Pre-Adjudicatory Proceedings

Because a substantial portion of a juvenile's life is spent in school, it is not surprising that the juvenile courts are often called upon to hear disputes involving school officials and students as adversaries. Juvenile court dockets are replete, not only with truancy cases involving the enforcement of the compulsory school attendance laws, but also with delinquency cases deriving from assaults, thefts, and vandalism which have occurred on school property. In addition, due to the increasing public concern about the circulation of drugs in the schools, school officials have assumed an

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1. Kent v. United States, 383 U.S. 541 (1966); *In re* Gault, 387 U.S. 1 (1966); *In re* Winship, 397 U.S. 358 (1970); McKeiver v. Pennsylvania, 403 U.S. 528 (1971); Davis v. Alaska, 415 U.S. 308 (1974); and Breed v. Jones, 421 U.S. 519 (1975).

expanded role in investigating cases of possible drug abuse, often entailing the search of students' lockers and of their persons. Within the past decade there has been a split in decisional authority concerning the fourth amendment rights of students who are subjected to such searches by school personnel prior to the official involvement of the police.[2] The Georgia appellate courts have now wrestled with this issue in a case which, although it did not arise out of a juvenile court proceeding, has significance for all juveniles who become involved in school searches.

A 17-year-old student was talking during lunch hour with two friends on the grounds of the public high school which they attended. As an assistant principal approached the group, one of the students "jumped up and put something down, ran his hand in his pants." As a result of this apparently furtive movement, all three were instructed to empty their pockets. A small amount of marijuana was disclosed among the contents of the pockets of each student. The 17-year-old student was prosecuted as an adult in the Criminal Court of Fulton County, was convicted, and sentenced to six months imprisonment.

On appeal, the court of appeals reversed the conviction. The court based its decision upon a finding that "we cannot, in view of the Fourth Amendment, grant a school official, when acting as a governmental agent, greater rights than an ordinary policeman would have with reference to searching a student in his charge."[3] Hence, under standard constitutional notions requiring probable cause to search, the search here was invalid and its fruits should have been suppressed as a violation of the student's rights.

Thereafter, the Georgia Supreme Court granted certiorari in the case, and all but Justice Gunter aligned to reverse the decision of the court of appeals, thus affirming the original conviction. In a lengthy opinion by Justice Hall for the majority, the court ruled that in the context of student searches conducted by school administrators, free from involvement by law enforcement personnel, such searches are "reasonable under the Fourth Amendment on considerably less than probable cause."[4] The court further stated that

> the restraints placed by the Fourth Amendment on schoolhouse searches by school officials are minimal. It is not necessary to decide what good faith conduct by a searching teacher or official would fail to meet that standard, because the students' acts in the case before us, involving a furtive gesture and an obvious consciousness of guilt by these students at the approach of the assistant principal, clearly gave him adequate reason for the searches he made.[5]

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2. *See Annot.* 49 A.L.R. 3d 978.

3. Young v. State, 132 Ga. App. 790, 791, 209 S.E.2d 96, 98 (1974).

4. Young v. State, 234 Ga. 488, 496, 216 S.E.2d 586, 592 (1975).

5. *Id.* at 498, 216 S.E.2d at 593. It should perhaps be emphasized that when a juvenile is subjected to a search outside of school, for example, in a private dwelling, he is accorded the

Yet, Justice Hall takes this analysis even further in stating that even if there were found to be a violation of a student's rights under the fourth amendment by a school official who conducted an improper search and seizure, the exclusionary rule is an improper remedy for such a violation. Noting a trend among recent U.S. Supreme Court decisions restricting the availability of the exclusionary rule, the Georgia Supreme Court refused to sanction its use in situations where the improper conduct is committed by some state agent other than a governmental law enforcement officer. Although public school officials are governmental officers subject to "some Fourth Amendment limitations in searching their students,"[6] actions for redress are limited to civil actions for damages. The *Young* case thus effectively closes the door to defensive challenges to the propriety of student searches by school officials for the foreseeable future, especially in view of the fact that the U.S. Supreme Court has now denied certiorari to review this decision and conflicting decisions from other jurisdictions.[7]

In a case of similar import involving private investigative action, the court of appeals affirmed a finding that a confession extracted by an employer from a juvenile was, under the circumstances, voluntarily made. In *R.W. v. State*,[8] the employer suspected that a juvenile employee had stolen some missing payroll money. She arranged a meeting after store hours with the juvenile and his father and pressed the juvenile to "come clean", noting that she had already contacted a detective and would turn the case over to him unless she could clear the matter up. She suggested to the juvenile that he take a lie detector test and further offered that if he would return any unspent funds, she would not press the charges against him. The juvenile made an admission but later at trial explained his action as an attempt "to get her off my back." The court of appeals found that the determination of voluntariness made by the juvenile court was amply supported by the evidence and affirmed the delinquency adjudication.

Three other confession cases considered the issue of when a juvenile's parents/custodians had to join in a waiver of *Miranda* rights. In *J.A.C. v. State*,[9] police officers went to the home of certain juveniles suspected of school vandalism. According to the testimony, the fathers of the juveniles "decided to talk to the boys about it. So, they brought them into the living room and asked them several questions and talked with them."[10] Although at no time were the *Miranda* warnings given, the court of appeals held that no warnings were required since there had been no custodial interrogation

full fourth amendment rights of an adult. *See*, M.W.W. v. State, 136 Ga. App. 472, 221 S.E.2d 669 (1975) in which the adjudication of a juvenile prosecuted upon a constructive possession of marijuana theory was reversed by the court of appeals.

6. *Id.* at 494, 216 S.E.2d at 591.
7. ___ U.S. ___, 46 L.Ed.2d 413 (1975).
8. 135 Ga. App. 668, 218 S.E.2d 674 (1975).
9. 134 Ga. App. 561, 215 S.E.2d 324 (1975).
10. *Id.* at 563, 215 S.E.2d at 325.

and the parents were present and even participating in the procurement of the juveniles' admissions.

In contrast, the court of appeals reversed a delinquency adjudication based upon a confession which was solicited while the child was being held in custody at the police station out of the presence of either counsel or custodian. *M.K.H. v. State*[11] is an en banc decision, in which the majority held that the police conduct was improper for three distinct reasons. First, there was no showing of emergency which under the Juvenile Court Code[12] would justify taking the child first to the police station rather than to a juvenile detention center. Second, although the *Miranda* warnings were read to the 15-year-old juvenile, the appellate court noted that there had been no apparent effort made to determine if he in fact had understood them. According to testimony presented at trial, the juvenile was functioning below his school grade level, had a "dull normal" range of intelligence, and was possibly schizophrenic.[13] Finally, the majority concluded that the police also had not been sufficiently dilligent in communicating to an adult custodian the seriousness of the delinquency allegations and the juvenile's rights. When the police went to the juvenile's home to take him into custody, his parents were at work and only an adult aunt was present. There was no effort to inform her about the juvenile's *Miranda* rights. As Judge Deen's dissent pointed out, the majority seemed to be extending the holding of the *Gault* and *Freeman v. Wilcox*[14] cases to mean that where parents or those acting *in loco parentis* are not informed of the juvenile's rights and thus have no meaningful opportunity to insist upon being present during his questioning, any resulting confession may be invalid.[15]

Indeed, a panel decision of the court of appeals which was rendered after *M.K.H.* seems to reinforce the conclusion that any confession which results from an interrogation which occurs before adult custodians of a juvenile are located and join in a waiver of rights is per se suspect. In *J. J. v. State*,[16] a 16-year-old, arrested while attempting to cash a stolen payroll check, was taken to jail because there was no available juvenile detention facility. Although an attempt was made to locate his parents, the police proceeded to question him about his possession of the check. Under such circumstances, the court of appeals held that the resulting confession was inadmissible against him at trial.[17]

Aside from matters involving investigation, certainly one of the most

11. 135 Ga. App. 565, 218 S.E.2d 284 (1975).
12. GA. CODE ANN. § 24A-1402 (1976).
13. 135 Ga. App. at 566, 218 S.E.2d at 285.
14. 119 Ga. App. 325, 167 S.E.2d 163 (1969).
15. In another case decided during the survey year, the court of appeals upheld the validity of a confession obtained after both the juvenile and his adult sister-custodian signed an informed waiver of rights. H.L.B. v. State, 135 Ga. App. 474, 218 S.E.2d 150 (1975).
16. 135 Ga. App. 660, 218 S.E.2d 668 (1975).
17. *Id.* at 664, 218 S.E.2d at 671.

critical pre-trial decisions is whether an arrested juvenile will be tried as a juvenile or as an adult. Indeed, the very first case in which the U.S. Supreme Court entered a decision in the area of juvenile justice concerned the nature and rights of a juvenile sought to be transferred to the adult criminal courts for trial.[18] Jurisdictional transfers continue to pose problems for appellate interpretation: there were five decisions on point during the survey year from the court of appeals and one from the U.S. Supreme Court.[19]

GA. CODE ANN. § 24A-2501 (1976) spells out the transfer procedure in force in this state and in order to justify a transfer of a juvenile for trial as an adult requires a finding that the child is not amenable to treatment or rehabilitation through available facilities within the juvenile justice system. As the hearing transcript in *J.J.* attests, the Georgia juvenile courts were really requiring little more than lip-service evidence in support of this finding. Here the juvenile court judge simply took judicial notice of the fact that this juvenile had previously been committed to a Youth Development Center operated by the state. Apparently the court reasoned that because the juvenile had been subsequently charged with the commission of a new offense upon his release, the experience of commitment within the juvenile system had failed and would, furthermore, be a fruitless course of future rehabilitation. The court of appeals held that such reasoning was insufficient to support the finding. The state carries the burden of proving on the record the juvenile's nonamenability to treatment alternatives within the juvenile correctional system. Thus, "there must be testimony as to the rehabilitation possibilities or absence thereof in the record to meet the 'due process' requirements granted juveniles by the Supreme Court . . . . These would include confrontation and cross examination of witnesses."[20]

In *R.W. v. State*,[21] the juvenile was charged with participation in one armed robbery and five burglaries. Based "on the number and severity of the alleged offenses," the juvenile court judge found that he was not amenable to rehabilitation and ordered a transfer to the superior court. The court of appeals reversed, ruling that this was an inadequate showing to justify the transfer:

> We do not believe that the number and severity of the offenses, standing alone, can establish the absence of amenability to rehabilitation. One juvenile who commits armed robbery and several counts of burglary may

18. Kent v. United States, 383 U.S. 541 (1966).

19. J.J. v. State, 135 Ga. App. 660, 218 S.E.2d 668 (1975); R.E.D. v. State, 135 Ga. App. 776, 219 S.E.2d 24 (1975); C.L.A. v. State, 137 Ga. App. 511, ___ S.E.2d ___ (1976); R.W. v. State, 136 Ga. App. 75, 220 S.E.2d 79 (1975); Lincoln v. State, 138 Ga. App. 234, ___ S.E.2d ___ (1976); Breed v. Jones, 421 U.S. 519 (1975).

20. 135 Ga. App. at 663-64, 218 S.E.2d at 670-71. *Accord*, R.E.D. v. State, 135 Ga. App. 776, 219 S.E.2d 24 (1975); C.L.A. v. State, 137 Ga. App. 511, ___ S.E.2d ___ (1976).

21. 136 Ga. App. 75, 220 S.E.2d 79 (1975).

> be more readily capable of rehabilitation through existing facilities than another juvenile who has committed assault and battery on one occasion.[22]

In other words, the decision of transfer must focus upon an individualized assessment of the juvenile's prospects for rehabilitation; to construe the law otherwise might well result in making dispositive the particular offense label alleged in the petition.

In *Breed v. Jones*,[23] the most recent Supreme Court pronouncement in the area of juvenile law, a California juvenile court entered an adjudication of delinquency against a juvenile, but before the scheduled dispositional hearing the court changed its mind and ordered him transferred for prosecution as an adult. Thereafter, the juvenile was tried upon a criminal information and convicted of robbery in the first degree. Granting certiorari, the Supreme Court reversed the conviction agreeing with the juvenile that his rights against being placed twice in jeopardy had been violated by these proceedings. Under the court's rationale, juvenile delinquency proceedings are clearly "essentially criminal" for consideration of double jeopardy claims despite their usually being labeled "civil." Furthermore, the court observed that double jeopardy means being twice in risk of trial and conviction, not risk of punishment. It was, therefore, irrelevant that under these circumstances the juvenile was not actually punished both as a juvenile and as an adult. It was sufficient that he had been forced to defend against charges in two trials with their attendant pressures and attendant psychological, physical, and financial burdens. In *Lincoln v. State*,[24] the court of appeals followed *Breed* in finding that double jeopardy barred the trial of a subsequently indicted juvenile who had previously passed through both adjudicatory and dispositional hearings for the same offense in the juvenile court.

II. Adjudicatory Proceedings

In the future *K.E.S. v. State*[25] will undoubtedly be considered one of a handful of key decisions concerning the rights of juveniles at the adjudicatory stage of juvenile proceedings. In a remarkable *tour de force* by Judge Clark,[26] the court of appeals reversed on six distinct grounds. In brief, the

22. *Id.* at 77-78, 220 S.E.2d at 82.

23. 421 U.S. 519 (1975).

24. 138 Ga. App. 234, ___ S.E.2d ___ (1976).

25. 134 Ga. App. 843, 216 S.E.2d 670 (1975).

26. It seems altogether appropriate to note here the retirement of Judge Sol Clark from the Georgia Court of Appeals in December, 1976. Since these surveys began chronicling the development of juvenile law in this state, Judge Clark has clearly emerged as perhaps the single most significant contributor to the orderly and compassionate development of laws protecting and advancing the interests of juveniles. As a result of the opinions which he has written, he has had a greater impact upon the course of juvenile law than any other jurist in the history of this state. He will be sorely missed.

facts presented the situation of a young girl who had previously been before the juvenile court on unruly petitions alleging that she had run away from home. She had been placed on probation, yet little progress had been achieved toward rehabilitation. In this, the third petition, she was alleged to have violated the terms and conditions of her probation in five counts. Among other things, there was evidence that she had run away to get married, had been living with an older man with whom she had become "strung out" on marijuana, and as a result had been placed for treatment in a hospital psychiatric ward. At the revocation hearing, a guilty plea was entered and she was committed to the state.

At the revocation hearing the girl was without counsel and was accompanied only by her mother who was the petitioner in the proceedings. Appellate counsel thereafter challenged the failure of the court to appoint counsel for the girl at the hearing. In holding that there was a right to counsel at revocation of juvenile probation hearings, the court of appeals distinguished adult probation revocation hearings.[27] Under the Juvenile Court Code, a juvenile is guaranteed representation at all stages of any proceedings alleging delinquency, unruliness, or deprivation.[28]

Additionally, the appellate court held that where, as here, the parent had been the complainant against the juvenile on previous and the present petitions, her purported waiver of counsel was ineffective to bind the child. As Judge Clark observed:

> We cannot equate physical presence of a parent with meaningful representation. . . . [T]he mother who waives the child's rights must be an unbiased mother, free of interests conflicting with the needs of her daughter whom she undertakes to represent—an ally, not an adversary.[29]

Furthermore, the purported waiver of counsel which had been executed by the child was also ineffective. Although the girl had signed a printed form and checked "no" beside the question, "Do you want a lawyer," the court of appeals ruled that a child who is not or cannot effectively be represented by parent or other guardian cannot waive the right to the assistance of counsel. The language of the Juvenile Court Code is mandatory, and the right to counsel in such circumstances is non-waivable: "Counsel must be provided for a child not represented by his parent."[30]

The use of the printed form was also ineffective to apprise the juvenile adequately of her fifth amendment rights in that it did not include a warning that if she chose to incriminate herself, any such statements could and would be used against her. Finally, the court noted that the clear language of the Juvenile Court Code requires a recording of all juvenile

27. Mercer v. Hopper, 233 Ga. 620, 212 S.E.2d 799 (1975).
28. GA. CODE ANN. § 24A-2001(a) (1976).
29. 134 Ga. App. at 847-48, 216 S.E.2d at 673.
30. GA. CODE ANN. § 24A-2001 (1976).

court proceedings unless waived by the juvenile and his parent or guardian.

Another major issue which has troubled the appellate courts within the survey year is whether or not the time requirements of GA. CODE ANN. § 24A-1701(a) (1976) are jurisdictional. As provided in this statute:

> After the petition has been filed the court shall fix a time for hearing thereon, which, if the child is in detention, shall not be later than ten days after the filing of the petition. In the event said child is not in detention then the court shall fix a time for hearing thereon which shall be not later than 60 days from the date of the filing of said petition.[31]

The Juvenile Court Code is silent concerning the sanctions which are appropriate upon a failure to accord the juvenile a hearing within the established time periods. Although there had previously been dictum on this point,[32] in *J.B.H. v. State*,[33] the court of appeals clearly held that the time limitations of the Code must be strictly complied with in view of the juvenile's rights to a speedy trial as established by the legislature. Where a hearing is held after the elapse of the appropriate time standard, the only available remedy is dismissal of the charges.

In *D.C.A. v. State*,[34] the court of appeals reviewed the scope of the sequestration of witnesses rule in juvenile court proceedings. At the delinquency hearing, the solicitor sought to have the juvenile's mother, a defense witness in the case, excluded from the courtroom, and the court approved her inclusion in the sequestration order. The appellate court reversed finding that a parent is a party in delinquency proceedings involving his child and, thus unlike a nonparty witness, is not subject properly to sequestration. In addition, the court held that there is no requirement that a juvenile court judge rehear evidence establishing the allegations of delinquency in a dispositional hearing where, as here, the same judge presides at both hearings. Thus the confused description of juvenile hearings which had resulted from the supreme court's opinion in *M.E.B. v. State*[35] continues to be mitigated in more recent opinions of the court of appeals.

In *G.W. v. State*,[36] the supreme court recognized an exception to the general rule it had established that unless a certificate of immediate review has been granted, a juvenile case is not ripe for appeal at the conclusion of the adjudicatory hearing but must, in fact, await the entry of the dispo-

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31. GA. CODE ANN. § 24A-1701(a) (1976).

32. E.S. v. State, 134 Ga. App. 724, 215 S.E.2d 732 (1975).

33. ___ Ga. App. ___, ___ S.E.2d ___ (1976).

34. 135 Ga. App. 234, 217 S.E.2d 470 (1975).

35. 230 Ga. 154, 195 S.E.2d 891 (1973). For a critical analysis of this case see McGough, *Annual Survey of Georgia Law: Juvenile Law and the Juvenile Court System*, 26 MERCER L. REV. 129, 135 (1974).

36. 132 Ga. App. 499, 208 S.E.2d 356 (1974), *rev'd*, 233 Ga. 274, 210 S.E.2d 805, 133 Ga. App. 712, 213 S.E.2d 16 (1975).

sitional order.[37] The juvenile in *G.W.* was adjudicated delinquent on charges of auto larceny by a Georgia juvenile court; however, since he was a resident of Florida, the juvenile court transferred the case to the appropriate Florida juvenile court for consideration of dispositional alternatives. Under Florida law an appeal from an adjudication of delinquency is deemed waived unless a timely appeal is taken before disposition; therefore, the juvenile urged that he was caught between the two sets of conflicting laws and would lose his rights to any judicial review unless the Georgia appellate courts interceded to review his case. The Georgia Supreme Court responded to his plea holding that in order to avoid a denial of equal protection and rights to appeal, where a juvenile could not otherwise obtain review of a judgment of delinquency, an adjudicatory order would be considered final and appealable to the Georgia appellate courts.

III. Post-Adjudicatory Proceedings

It has only been within the last two years that the appellate courts have had the opportunity to make any significant rulings regarding the permissible range of dispositional orders available to the trial courts. In *P.R. v. State*[38] the Georgia Court of Appeals considered the legality of conditioning a juvenile's probation upon an order of restitution to the victim. It approved the use of restitution holding that restitution was not analogous to the imposition of a fine which is clearly prohibited by the Juvenile Court Code.[39] The court of appeals observed that a fine is penal in nature whereas restitution is constructive and rehabilitative. However, any such restitution ordered must be an indemnification rather than forfeiture; it may not, therefore, exceed the victim's loss as substantiated by the evidence.

In *M.J.W. v. State*,[40] the juvenile court imposed a more novel condition upon probation. Here the juvenile was found to have been responsible for a fire which had been set in a school rest room trash can and was adjudicated on charges of criminal damage to property. At the dispositional hearing, the court placed the juvenile on probation for one year on condition that he contribute 100 hours of work to the county Parks and Recreation Department. On appeal, the court of appeals approved the juvenile court's order and rejected the argument that such order resulted in the enforcement of involuntary servitude, or that it was cruel and unusual punishment or penal in nature. Judge Clark reasoned that requiring work for a public purpose for one who had destroyed public proprty was "akin to restitution" and hence, was a creative, constructive condition of proba-

37. *See, e.g.*, M.K.H. v. State, 132 Ga. App. 143, 207 S.E.2d 645 (1974); D.C.E. v. State, 130 Ga. App. 724, 204 S.E.2d 481 (1973); and M.E.B. v. State, 230 Ga. 154, 195 S.E.2d 891 (1973).

38. 133 Ga. App. 346, 210 S.E.2d 839 (1974).

39. E.P. v. State, 130 Ga. App. 512, 203 S.E.2d 757 (1973).

40. 133 Ga. App. 350, 210 S.E.2d 842 (1974).

tion well within the statutory mandate that a juvenile judge is to make the disposition of a delinquent child as is "best suited to his treatment, rehabilitation, and welfare."[41]

Also during the Survey year, the supreme court has handed down several related decisions, all dealing with the powers of the superior courts to impose sentences upon juveniles. The basic statute governing such matters is GA. CODE ANN. § 99-209(a)(5) (1976) which, in essence, differentiates among three types of juvenile offenders who are tried and sentenced by the superior courts prior to their attaining the age of seventeen.

First, under this statute, a juvenile convicted of a capital offense shall be sentenced into the custody of the State Department of Offender Rehabilitation, *i.e.*, the adult correctional system.[42] Similarly, a juvenile who has a prior adjudication for a felony-grade offense in the juvenile court or prior conviction in the superior court may be sentenced upon a second felony conviction to serve time in the adult correctional system. All other juveniles under 17 years of age who are tried by the superior courts must be sentenced into the custody of the Division of Children and Youth, State Department of Human Resources, *i.e.*, the juvenile rehabilitation system.

The Georgia Attorney General has declared that the legal authority and responsibility of the Department of Human Resources for providing custodial care for committed juveniles ends upon their reaching age seventeen. At that time, those previously committed must either be released or transferred by court order to the Department of Offender Rehabilitation.[43] There was some doubt, at least prior to 1975, about what would become of juveniles committed to the juvenile justice system upon their coming of age. *Carrindine v. Ricketts*[44] addressed this problem. The supreme court's opinion in the *Carrindine* case is a valuable research source because of Justice Ingram's comprehensive analysis of the legislative history bearing upon the sentencing powers of the superior court in ordering disposition for juvenile offenders. However, the juvenile in *Carrindine* was sentenced under the former law which has now been revised to resolve ambiguities, and thus it is probably more helpful for the practicing attorney to be aware of the new legislation rather than to focus upon the specific facts upon which *Carrindine* was based. In 1975, the legislature amended the Youthful Offender Act to provide that a superior court could commit an offender to

41. GA. CODE ANN. § 24A-2302 (1976).

42. *See, e.g.*, Brown v. State, 235 Ga. 353, 219 S.E.2d 419 (1975). In Crawford v. State, 236 Ga. 491, 224 S.E.2d 365 (1976), the Georgia Supreme Court affirmed the conviction and sentencing of a 16-year-old charged with armed robbery and murder to two consecutive life sentences. The court rejected the claim that such a sentence constituted cruel and unusual punishment. It also seems significant to note that in the opinion of the Georgia Attorney General, under current law a juvenile can be sentenced to death for the commission of a capital felony offense. Op. Ga. Att'y GEN. 75-43 (June 13, 1975).

43. OP. GA. ATT'Y GEN. 74-139 (October 9, 1974).

44. 236 Ga. 283 (1976).

the custody of the State Department of Offender Rehabilitation even though he might have been originally committed to the Department of Human Resources. Upon a juvenile offender's reaching the age of 17, the superior court is empowered to enter an order transferring the offender to the Youthful Offender Division of the adult correctional system.[45]

In the *Carrindine* case, upon being notified that the juvenile had become 17, the superior court simply entered an order, without notice or hearing, which transferred the juvenile to the Youthful Offender Division of the Department of Offender Rehabilitation. Among other things, Carrindine argued on appeal that such a procedure had deprived him of his due process right to be heard on the issue of a change in the nature of his incarceration. The supreme court denied the assertion that a hearing was necessary,[46] finding that the youthful offender facilities and juvenile treatment facilities were not functionally different. In both programs, the respective agencies were following the policy established by the legislature that younger inmates be segregated from the more experienced older prisoners and were to receive specially tailored programs of rehabilitation.[47]

IV. Deprivation Proceedings

At least on its face, the 1971 Juvenile Court Code seemed to invest the juvenile courts with broad jurisdiction over matters involving child custody. Not only do juvenile courts appear to have authority over children alleged to be "deprived"[48] but Ga. Code Ann. § 24-302 (1976) seems to cede to these courts original jurisdiction regarding children whose custody is "in controversy." However, in the case of *In re J.R.T.*,[49] the supreme court construed this section narrowly to mean that the juvenile courts had original jurisdiction in custody disputes only where the child was alleged to be delinquent, unruly, or deprived.[50] Otherwise, the juvenile court's powers are dependent upon a proper order of transfer from a superior court.[51]

Such a transfer order from a superior court for investigation and report by the juvenile court was at issue in *Haralson v. Moore*.[52] This is an extraordinarily important decision for the practicing lawyer in view of the

45. Ga. Code Ann. § 77-359(b)(1)(ii) (1975).

46. *But see* Allen v. Ricketts, 236 Ga. 294, 223 S.E.2d 633 (1976), in which under the unusual circumstances of the case, the court ruled that a hearing on the transfer to the adult correctional system was required by due process.

47. A third case of lesser importance on the sentencing powers of the superior courts is Patton v. Ricketts, 226 Ga. 293, 223 S.E.2d 635 (1976); which considers the appropriate penalties for a juvenile who has escaped from a facility maintained by the State Department of Human Resources. See also Op. Ga. Att'y Gen. 75-98 (August 28, 1975).

48. Ga. Code Ann. §§ 24A-301(a)(1)(C) and 24A-401(h) (1976).

49. 233 Ga. 204, 210 S.E.2d 684 (1974).

50. *See, e.g.*, Ball v. State, 137 Ga. App. 333, 223 S.E.2d 743 (1976).

51. *See, e.g.*, Scarborough v. Howell, 236 Ga. 352, 223 S.E.2d 713 (1976).

52. 236 Ga. 131, 223 S.E.2d 107 (1976).

increasing frequency with which superior court judges are seeking the recommendations of juvenile courts through transfer procedures. Here the juvenile court's report concluded that custody of a child should be placed with the father, and the superior court relied exclusively upon it in granting the father's petition for change of custody.

The appellant mother charged that the superior court had abrogated its responsibility in failing to hold an evidentiary hearing after having received the report. She further challenged the fact that the report contained a considerable amount of hearsay. The supreme court rejected these arguments noting that the parties had consented to the submission of the custody issue to the juvenile court and that the resulting report would be considered by the court in reaching its decision on the father's petition for a change of custody. Justice Jordan reasoned that the parties had waived both hearing and hearsay objections. The warning is clear in the *Haralson* case that lawyers must use great caution in framing transfer orders for the court's consideration lest they unwittingly waive valuable rights of their clients.

Of final interest in the developing law governing deprivation and custody cases in the juvenile courts are a pair of cases dealing with procedure. In *Brown v. Fulton County Department of Family & Children Services*,[53] the court of appeals ruled that the time requirements of the Juvenile Court Code for hearings upon petitions alleging deprivation are mandatory and jurisdictional;[54] however, when the court in the exercise of sound discretion continued a hearing timely set because of the absence of a material witness, it retained the authority to reset the case to be later heard. In the course of this opinion, the appellate court also indicates that in deprivation proceedings, the juvenile court should enter findings of fact pursuant to the mandate of GA. CODE ANN. § 81A-152 (1972).[55] In *Sanchez v. Walker County Department of Family & Children Services*,[56] the court of appeals held that an order of a juvenile court awarding temporary legal custody of a child found to be deprived constituted a final judgment subject to appeal.[57]

There remains to be noted the recent explosion in the use of termination

53. 136 Ga. App. 308, 220 S.E.2d 790 (1975).

54. GA. CODE ANN. § 24A-1701(a) (1976).

55. Such an interpretation would bring applicable procedure governing deprivation orders in line with other similar proceedings. Githens v. Githens, 234 Ga. 715, 217 S.E.2d 291 (1975) (contested child custody case); Crook v. Georgia Dept. of Human Resources, 137 Ga. App. 817, 224 S.E.2d 806 (1976) (termination of parental rights).

56. 135 Ga. App. 891, 219 S.E.2d 583 (1975), *rev'd*, 235 Ga. 817, 221 S.E.2d 589; 138 Ga. App. 49, 225 S.E.2d 441 (1976).

57. Under GA. CODE ANN. § 24A-3201 (1976), the juvenile court is empowered only to enter orders of temporary custody in deprivation proceedings. Hence, there could never be appellate review of juvenile court dispositions in such cases unless such judgments were considered final for purposes of appeal. Sanchez v. Walker County Dep't of Family & Children Serv., 235 Ga. 817, 221 S.E.2d 589 (1976).

of parental rights proceedings in the juvenile courts pursuant to GA. CODE ANN. ch. 24A-32 (1976). Out of an untold number of hearings at the trial level, eight appellate decisions have been generated in the past two years. Prior to 1974, there had never been Georgia appellate precedent in this area.

The seminal case is *In re Levi*.[58] After an extensive investigation, the Fulton County Department of Family and Children Services filed a petition in the juvenile court to terminate parental rights to an 18-month-old baby. The mother had come from a broken home and had been reared in state institutions; often she had run away. Shortly before the birth of her child she was admitted to Grady Hospital for psychiatric care, hepatitis, vaginal disease, and heroin addiction. At birth, the mother was 15 years old and admitted having been a heroin addict for three years. The child was abandoned at the hospital, but several days later the mother returned and picked it up. A hearing was later held before a referee following a complaint by the Atlanta Police Department when the child was "abandoned" by the mother with a babysitter, but the child was returned to the mother. Subsequently, when the mother was arrested for armed robbery and aggravated assault, the child was adjudicated deprived and placed in the temporary custody of the department for foster home care. Meanwhile, the mother had served a prison sentence for possession of heroin and using false identification and was paroled. When she demanded to see her child and was told it would take two weeks, she left Renewal House and disappeared.

The department had brought its petition on the ground of "deprivation . . . likely to continue . . . [whereby] the child is suffering or will probably suffer serious physical, mental, moral, or emotional harm."[59] At the hearing, the mother made an impassioned plea for her child, stating that she could end her drug involvement and make a home for the child. The caseworker testified that the child was highly adoptable, and the foster father of the child testified that he had had possession of the child for the past six months and wished to adopt it.

The juvenile court dismissed the petition for termination of parental rights. The judge stated at the hearing that the only circumstances in which he granted such relief was when "deprivation is due to physical impairment due to some physical retardation . . . and I don't know legally whether I can grant the order prayed for."

The court of appeals reversed with directions to enter the judgment of termination. As Judge Deen observed:

> Under the testimony given [the mother's] rehabilitation is likely to be a slow and painful process; it may be effected, and her youth gives promise that if it is, her possibilities of family and child rearing, if this is what she

58. 131 Ga. App. 348, 206 S.E.2d 82 (1974).

59. GA. CODE ANN. § 24A-3201(a) (1976).

> wants, may yet be good. On the other hand, the infant's situation is critical . . . . [The Juvenile Court Code] is to be liberally construed toward the protection of the child whose well-being is threatened. Deprivation of love and nurture is equally as serious as mental or physical disability. "A termination hearing seeks above all else the welfare of the child, with due regard for the rights of the natural and adoptive parents."[60]

The Georgia Court of Appeals further illuminated this area with its next opinion, *Spence v. Levi*.[61] The facts before the court were, again, rather extreme. In 1961, the mother was convicted of abandonment of her one-year-old child and ordered to pay $15 per week for his support in foster home care. For the next five years, the child spent a total of 14 months with his mother at which time he was again placed in foster home care. At the time of termination proceedings, the child was now 14 years old and had spent the last six years with foster parents who desired to adopt him. The child testified that he desired his mother's parental rights to be terminated so that he could be freed for adoption. The Fulton County Department of Family and Children Services filed the petition in the juvenile court seeking termination of parental rights, and the juvenile court granted the department's petition severing the parent-child relationship.

On appeal by the mother, the court of appeals affirmed, observing:

> The initial abandonment proceedings and removal of the child came about as a result of complaints on the part of relatives of misconduct, neglect and abuse, and no period is shown in the record where there was ever a wholehearted attempt on the part of the natural mother to reclaim the child and enter into a secure family relationship. That this resulted in mental and emotional harm to the child is well-established by his own testimony as well as that of the expert witnesses.[62]

The appellate court further ruled that the exclusion of the mother during the testimony of the child regarding his feelings about her was a proper exercise of the court's discretion where she was represented by counsel in court and he was afforded the right of cross-examining the child. Finally, the court of appeals held that, contrary to the inheritance consequences upon adoption,[63] an order of termination of parental rights cuts off all inheritance rights, both from the biological parents to the child and from the child to those parents.

Moss v. Moss[64] is yet another decision in which the court of appeals found that the record warranted the juvenile court's order terminating

60. 131 Ga. App. at 351-52, 206 S.E.2d at 85.

61. 133 Ga. App. 581, 211 S.E.2d 622 (1974).

62. *Id.* at 583, 211 S.E.2d at 623-24.

63. The supreme court has ruled the opposite way in adoption proceedings. *i.e.*, a child may still inherit from his biological parents even after adoption. Sears v. Minchew, 212 Ga. 417, 93 S.E.2d 746 (1956).

64. 135 Ga. App. 401, 218 S.E.2d 93 (1975).

parental rights[65] to two minor children. However, its chief significance lies in the appellate court's explicit approval for the first time in this state the use of an agency social worker as an expert witness duly qualified in the field of sociology and psychology.

In attempting to synthesize circmmstances warranting an order of termination, the Georgia Court of Appeals has listed moral unfitness, physical abuse, abandonment, refusal to support or similar misconduct by a parent.[66] However, in *Elrod v. Hall County Department of Family & Children Services*[67] the allegations of the termination petition and the evidence adduced at the hearing really fit into none of these categories.

The child's father had been confined in a mental institution for several years for treatment associated with head injuries sustained in automobile accidents. He was considered totally disabled for purposes of drawing social security, his only income, and by his own concession was incapable of caring adequately for the child without assistance from someone else. The only family members who expressed a desire to maintain a home for the child were the paternal grandmother and paternal step-grandfather who were divorced. Although in the past the child had been shifted between those two homes, because of their age and limited financial resources, neither relative had been able to provide a permanent home for him. In bringing the petition, the welfare agency relied heavily upon the rather dramatic progress which the child had made when, with his father's consent, he was finally placed in a foster home under the department's supervision.

In an opinion affirming the juvenile court's order terminating parental rights which freed the child for adoption, Judge Marshall reasoned:

> The thread running through these [termination] cases not only manifests moral unfitness, physical abuse and abandonment by the parent or parents but also reflects a condition of frequent moves from home to home thereby lessening the probability of development of a meaningful parent-child relationship, as well as probable deprivation of a sound environment founded in love and nurture. These cases found a substantial *danger of a child suffering emotional harm* as well as physical, mental or moral harm.[68]

In the latest termination appeal, *Murray v. Hall County Department of Family & Children Services*,[69] the court of appeals affirmed the termination of a father's parental rights to his 18-month-old illegitimate child.

65. *See also* Blair v. Division of Family & Children Serv., 135 Ga. App. 312, 217 S.E.2d 457 (1975).

66. Elrod v. Department of Family & Children Serv., 136 Ga. App. 251, 256, 220 S.E.2d 726, 730 (1975).

67. *Id.*

68. *Id.* at 255-56, 220 S.E.2d at 729 (emphasis in original).

69. 137 Ga. App. 291, 223 S.E.2d 486 (1976).

While there was no evidence of specific abuse toward this particular child, at the time these proceedings were instituted the father was under sentence for conviction of child abuse toward two other children who had been under his care and control. Moreover, he had subsequently on one occasion escaped from prison and was facing an additional sentence on that charge. The reality of enforced separation from this child by incarceration for a substantial time in the future, coupled with his "proved disposition for cruelty toward children" was thought to support amply the conclusion that "*any* child subject to [this father's control was and would continue to be a deprived child."[70]

V. CONCLUSION

As the wealth of appellate decisions in this area indicates, the juvenile courts are no longer the privileged province of a few hardy professionals. Many of the decisions of this survey period are those of first impression in this state, and a great deal of judicial insight and craftsmanship is manifest. It was a vintage year for Georgia juvenile law.

70. *Id.* at 293, 223 S.E.2d at 487-88 (emphasis supplied).