Mercer Law Review

Volume 73
Number 3 *Alumni Edition*

Article 11

4-2022

Navigating a Potentially Changing Landscape in Child Welfare Appellate Review

Carolyn Altman

Robert Rodatus

Amanda Trimble

Navigating a Potentially Changing Landscape in Child Welfare Appellate Review

The Hon. Carolyn Altman*

The Hon. Robert Rodatus**

The Hon. Amanda Trimble***

I. INTRODUCTION

Recently, the Georgia Supreme Court, in reversing the Georgia Court of Appeals decision as to a legitimation petition, held that the evidence was sufficient, by the appropriate standard of proof, for the trial court to deny the putative father's petition to establish his legal rights to a child. This supreme court opinion, in reviewing the analysis of the court of appeals, illustrated an approach of the court of appeals in some child welfare cases to state a standard of review that defers to the trial court as trier of fact; but then, in *de facto* deference, to the rights of parents to re-weigh the evidence presented to the trial court; and thus, to reach a different conclusion on appeal than the trier of fact.

In *Brumbelow v. Mathenia*,[1] *Mathenia v. Brumbelow,*[2] and *Brumbelow v. Mathenia,*[3] the court of appeals and the supreme court published opinions following a denial of a petition for legitimation by the Habersham County Superior Court, in which the different courts

*Judge, Juvenile Court for the Paulding Judicial Circuit. Samford University; Georgia State University College of Law (J.D.). Member, State Bar of Georgia.

**Senior Judge, State of Georgia. Formerly Presiding Judge, Juvenile Court for the Gwinnett Judicial Circuit. Mercer University School of Law (J.D., 1976). Member, Mercer Law Review. Member, State Bar of Georgia.

***Judge, Juvenile Court for the Western Judicial Circuit. Mercer University School of Law (J.D.). Senior Managing Editor, Mercer Law Review. Member, State Bar of Georgia.

1. 347 Ga. App. 861, 819 S.E.2d 535 (2018) (hereinafter *Brumbelow I*).
2. 308 Ga. 714, 843 S.E.2d 582 (2020) (hereinafter *Brumbelow II*).
3. 358 Ga. App. 404, 855 S.E.2d 425 (2021) (hereinafter *Brumbelow III*).

reached different conclusions while citing the same standard of review. The standard of review as to legitimation decisions has been largely deferential to the trial court—abuse of discretion as to rulings and clearly erroneous as to findings of fact—and is well-established by precedent. The analysis conducted by the court of appeals in this series of opinions raises a question: Is appellate review of trial court parental rights rulings moving toward a different standard of review than the one established by precedent?

II. THE *BRUMBELOW* CASES

In *Brumbelow I*, the appellant challenged the Habersham County Superior Court's denial of his legitimation petition filed during the course of a third-party adoption proceeding.[4] The biological father, Brumbelow, who attempted to legitimate the child in the lower court, argued on appeal that the trial court erred in finding that he abandoned his opportunity interest in developing a parent-child relationship with the child, E. M., and that the trial court's ruling was not supported by the evidence.[5] The evidence presented to the trial court was subsequently interpreted much differently by the court of appeals and then by the supreme court.

The evidence in the trial court showed that the mother and father had a one-time sexual encounter resulting in the mother's pregnancy.[6] When informed, the father denied paternity and never wavered in that denial. He met with the mother at her doctor's office to "do the math" regarding his paternity.[7] Even though he still had doubts as to his fatherhood, he did offer to pay for an abortion, which was his only offer of arguable financial support made during the pregnancy. He did not visit her or make any inquiries regarding her needs or her condition. The mother surrendered her parental rights at the hospital the day after the child's birth so the child could be adopted. Subsequently, she and the alleged biological father met at his attorney's office where she acknowledged service of his legitimation petition. The legitimation and adoption action were consolidated by the trial court.[8]

The court of appeals, in an opinion written by the Hon. Stephen Dillard, held contrary to the findings of the trial court, that the father did not abandon his opportunity interest in developing a parent-child

4. *Brumbelow I*, 347 Ga. App. at 861, 819 S.E.2d at 537.
5. *Id.* at 862–64, 819 S.E.2d at 537–39.
6. *Id.* at 862, 819 S.E.2d at 537.
7. *Id.* at 862, 819 S.E.2d at 538.
8. *Id.* at 862–64, 819 S.E.2d at 537–39.

relationship.[9] It reviewed the evidence considered by the trial judge as well as evidence in dispute and evidence not considered by the trial court.[10] In addressing the standard of review, the court stated:

> We review a trial court's ruling on a legitimation petition for an abuse of discretion, and its factual findings for 'clear error and will only sustain such findings if there is competent evidence to support them.' Bearing these guiding principles in mind, we turn now to Brumbelow's specific claims of error.[11]

The supreme court granted certiorari and reversed the court of appeals' decision that the father did not abandon his opportunity interest.[12] The supreme court cited the same standard as the court of appeals: appellate courts review trial court decisions in this circumstance for abuse of discretion only.[13] The court held, "factual findings made after a hearing shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."[14] Furthermore, the court held that "appellate courts will not disturb fact findings of a trial court if there is any evidence to sustain them."[15]

The court of appeals initial opinion in *Brumbelow I* included analysis of evidence that the trial court did not mention in its order: testimony and other evidence the superior court was entitled to discredit or to afford no significant weight.[16] Unless detailed in the order of the trial court, the trial court's reasons, as trier of fact, for disregarding certain evidence could not be known. The trial court could have assigned no weight at all to the testimony of any witness to the extent that it found testimony not credible.[17]

---

9. *Id.* at 868, 819 S.E.2d at 542.

10. *Id.* at 875–76, 819 S.E.2d at 547.

11. *Id.* at 864, 819 S.E.2d at 539 (quoting *In re* J. M., 337 Ga. App. 811, 788 S.E.2d 888 (2016)).

12. *Brumbelow II*, 308 Ga. at 714–15, 843 S.E.2d at 584.

13. *Id.* at 715, 843 S.E.2d at 584.

14. *Id.* (internal citations omitted) (quoting Matthew v. Dukes, 314 Ga. App. 782, 786, 726 S.E.2d 95, 100 (2012)).

15. *Id.*

16. *Id.* at 715, 843 S.E.2d at 585.

17. *Id.* at 715–16, 843 S.E.2d at 585; *see* Tate v. State, 264 Ga. 53, 56, 440 S.E.2d 646, 649 (1994).

> Credibility of witnesses and the weight to be given their testimony is a decision-making power that lies solely with the trier of fact. The trier of fact is not obligated to believe a witness even if the testimony is uncontradicted and may accept or reject any portion of the testimony.

In its analysis in *Brumbelow II*, the supreme court applied the "any evidence" standard found in *Matthews v. Duke.*[18] The case was remanded to the court of appeals to vacate the prior opinion, to adopt the opinion of the supreme court, and to affirm the trial court.[19] At this point the appellate journey would ordinarily be over. However, the Hon. Stephen Dillard filed a largely unseen concurrence *dubitante*.[20] The concurrence stated, "I concur because my oath requires that I do so. But I continue to believe this court's original decision was correct, and I am troubled by the tone, reasoning, and holding of the supreme court's majority opinion."[21] The delineation of the concurrence as *dubitante* perhaps suggested a desire to move away from the deferential analysis established by precedent and to move toward a standard of review in which the court of appeals takes a more active role in evaluating the evidence presented to the trial court. Furthermore, an examination of analyses the court of appeals has been conducting in cases involving parental rights since 2014, when the new Juvenile Code went into effect, a possible pattern begins to emerge. The stated standard of review is one giving deference to the trial court, yet the appellate analysis, arguably, defers to the parents.

III. APPELLATE ANALYSIS: A POTENTIALLY CHANGING LANDSCAPE

At first blush, the precedential standard of review used by appellate courts in a number of child welfare circumstances seems clear:

> In reviewing a juvenile court's decision to terminate parental rights, we view the evidence in the light most favorable to the juvenile court's disposition and determine whether any rational trier of fact could have found by clear and convincing evidence that the natural parent's rights to custody should be terminated. In so doing, we do not weigh the evidence or determine the credibility of witnesses;

---

18. *Brumbelow II*, 308 Ga. at 715, 843 S.E.2d at 584 (quoting *Matthews,* 314 Ga. App. at 786, 726 S.E.2d at 100). Interestingly, the Georgia Court of Appeals relied on *In re J. M.* for the "competent evidence" standard. *In re J.M.*, 337 Ga. App. at 811, 788 S.E.2d at 889. *See In re* B. H.-W., 332 Ga. App. 269, 272, 772 S.E.2d 66, 69 (2015); Neill v. Brannon, 320 Ga. App. 820, 822, 738 S.E.2d 724, 726 (2013) (both of which relied on *Matthews*).

19. *Brumbelow II*, 308 Ga. at 723, 843 S.E.2d at 589–90.

20. *Brumbelow III,* 358 Ga. App. at 404, 855 S.E.2d at 425 n.3. "A concurrence *dubitante* is a concurrence that is given doubtfully. Unlike a concurrence in the judgment only or a special concurrence without a statement of agreement with all that is said, a concurrence *dubitante* is a full concurrence, albeit one with reservations."

21. *Id.* at 405, 855 S.E.2d at 425. The supreme court's decision was on May 18, 2020. The usually ministerial act of adopting it was completed on February 17, 2021, nine months later. Regarding tone, *see In re* V. G., 352 Ga. App. 404, 418, 834 S.E.2d 901, 912–13 (2019), and *In re* R. B., 346 Ga. App. 564, 576, 816 S.E.2d 706, 715 (2018).

> rather, we defer to the juvenile court's fact finding and affirm unless the appellate standard is not met.[22]

> Even so, in conducting our review, we must proceed with the knowledge that there is no judicial determination which has more drastic significance than that of permanently severing a natural parent-child relationship. It must be scrutinized deliberately and exercised most cautiously. The right to raise one's children is a fiercely guarded right in our society and law, and a right that should be infringed upon only under the most compelling circumstances.[23]

In some cases, the court of appeals plainly applied the precedential standard of review it cited.[24] The court has affirmed trial court decisions, and presumably accepted the trial court's findings of fact in a variety of situations. Where a trial court received and considered expert testimony that a special needs child was benefiting from the stability provided by foster care, and the mother's significant cognitive deficits hampered her ability to implement the skills she had been taught while completing most of her case plan, the court of appeals affirmed the trial court's decision.[25] Similarly, it upheld a trial court's decision when the trial court received and considered expert testimony of bonding with foster parents, of harm if the child was removed from the foster parents, and of harm from the parents' inability to complete their case plans.[26] Likewise, the court of appeals has held that a trial court's findings of fact as to aggravating circumstances, such as physical and sexual abuse, supports a Termination of Parental Rights (TPR).[27] In each of those instances, the court of appeals accepted the facts as found by the trial court. Those opinions do not suggest that the court conducted a *de novo*-type review or reweighed the evidence.

In other cases, the court of appeals' holdings were less deferential to the trial court and appeared more deferential to biological parents. Notably, despite the standard of review being historically deferential to the trial court, the court of appeals has also long recognized the gravity of severing parent-child relationships: "[w]hile we are reluctant to re-

---

22. *In re* T. L., 279 Ga. App. 7, 10, 630 S.E.2d 154, 158 (2006) (internal citations omitted).

23. *In re* D. P., 326 Ga. App. 101, 103, 756 S.E.2d 207, 210 (2014) (quoting *In re* C. J. V., 323 Ga. App. 283, 283, 746 S.E.2d 783, 784–85 (2013)).

24. *See generally* Sauls v. Atchison, 326 Ga. App. 301, 756 S.E.2d 577 (2014); *In re* M. M. M. T., 327 Ga. App. 572, 760 S.E.2d 188 (2014); *In re* B. D. O., 343 Ga. App. 587, 807 S.E.2d 507 (2017) (abandonment case).

25. *In re* T. A., 331 Ga. App. 92, 769 S.E.2d 797 (2015).

26. *In re* E. G. M., 341 Ga. App. 33, 798 S.E.2d 639 (2017).

27. *In re* C. A. B., 347 Ga. App. 474, 819 S.E.2d 916 (2018).

verse the juvenile court's determination, no judicial determination is more drastic than the permanent severing of the parent-child relationship."[28] The court of appeals continues to highlight the right to parent one's child: "[a]nd the right to raise one's children is a fiercely guarded right in our society and law, and a right that should be infringed upon only under the most compelling circumstances."[29]

Certainly, not all trial court reversals by the court of appeals suggest a possible move toward a different standard of review. Indeed, the reasons for some reversals by the court of appeals are obvious. In some instances, the record could not have been reviewed. For example, when the evidence was not only not clear and convincing—as required by law for a TPR—but was totally lacking.[30] The court of appeals reversed other cases where the order of the trial court was unclear and ambiguous.[31] One case involved specific facts the court of appeals held were contradicted by other facts.[32] Yet in another case, the trial court intermingled findings of fact with conclusions of law in its order.[33]

The court of appeals reversed when expert testimony on harm to the child if left in foster care or returned to the parent was lacking.

> Second, regarding the court's conclusion that the child would be seriously harmed by the lack of "permanency" if the mother's rights were not terminated, there was "no expert testimony with regard to the effect on [D. P.] if the mother's parental rights were not terminated; there is no testimony that [D.P.'s] relationship with [his] mother was harmful; and there is no testimony that the [child is] currently suffering due to [his] placement in foster care or that[,] without a permanent placement[, he] would suffer serious harm."[34]

---

28. *In re* D. L. T. C., 299 Ga. App. 765, 771, 684 S.E.2d 29, 29 (2009) (internal citations omitted); *see In re* M.A., 280 Ga. App. 854, 856, 635 S.E.2d 223, 225 (2006).

29. *In re* C. K. S., 329 Ga. App. 226, 232, 764 S.E.2d 559, 564 (2014).

30. Alizota v. Stanfield, 329 Ga. App. 550, 559, 765 S.E.2d 707, 713 (2014) ("While we are cognizant of the deferential standard of review, there is no clear and convincing evidence of a deprivation or any factors in O.C.G.A. § 19-8-10(a) or (b)") (internal citations omitted).

31. *In re* J. A. B., 336 Ga. App. 367, 785 S.E.2d 43 (2016); *see In re* A. B., 350 Ga. App. 158, 159, 828 S.E.2d 394, 396 (2019) (where a juvenile court was reviewing a one page order of dependency without necessary findings of fact and conclusions of law, finding that these deficiencies "prevent[ ] [the court], in this case, from making an intelligent review of the [mother's and father's] challenges to the sufficiency of the hearing evidence.").

32. *In re* D. W., 340 Ga. App. 508, 514, 798 S.E.2d 49, 54 (2017).

33. *In re* B. G., 345 Ga. App. 167, 177, 812 S.E.2d 552, 560 (2018).

34. *In re D. P.*, 326 Ga. App. at 113, 756 S.E.2d at 216–17 (quoting *In re* A. T., 271 Ga. App. 470, 474, 610 S.E.2d 121, 124 (2005) (alterations in original)).

In one case, the Effingham County Juvenile Court remarked on the generally harmful effects of prolonged foster care but did not specifically find harm in continuing the status quo.[35] The court of appeals held that it is insufficient for the trial court to fail to make specific findings as to harm; relying on generalizations is insufficient:

> The trial court made no specific findings to the contrary. Rather, it relied on generalized findings that the children would experience harm absent the stability and permanency of an adoptive home. It is true that we have observed that "children need permanence of home and emotional stability, or they are likely to suffer serious emotional problems." And, as the State points out, one of the codified purposes of the termination procedures set forth in the Juvenile Code is "[t]o eliminate the need for a child who has been adjudicated as a dependent child to wait unreasonable periods of time for his or her parent to correct the conditions which prevent his or her return to the family[.]" But the Code also provides that the State must provide the grounds for termination by "clear and convincing evidence" and the trial court must make written findings as the factual basis for termination.[36]

On the issue of unfitness of the parents, the court found that, "past unfitness, standing alone, is insufficient to terminate . . . ."[37]

Other cases hinged on the test of balance of harm to the child if returned to the parents and harm if the child remained in foster care. For example:

> In the instant case, the evidence is not clear and convincing, at least at this time, that the deprivation is likely to continue, that continued deprivation will seriously harm the children, or that termination of the parents' parental rights is in the best interests of the children.[38]

The court of appeals disregards the "general proposition" regarding stability through adoption when there is no specific evidence the child was suffering harm in the current arrangement or that it would if re-

35. *In re* B. R. J., 344 Ga. App. 465, 477, 810 S.E.2d 630, 640 (2018).

36. *In re* E. M. D., 339 Ga. App. 189, 204, 793 S.E.2d 489, 500 (2016) (quoting *In re* J.E., 309 Ga. App. 51, 58, 711 S.E.2d 5, 11 (2011) (alterations in original)); O.C.G.A. § 15-11-260(a)(2) (2013); O.C.G.A. § 15-11-320(a) (2020); O.C.G.A. § 15-11-320(b)(1) (2020).

37. *In re* T. M., 329 Ga. App. 719, 723, 766 S.E.2d 101, 104–05 (2014).

38. *In re* S. B., 335 Ga. App. 1, 9, 780 S.E.2d 520, 527 (2015).

turned to the custodian under improved conditions.[39] As stated elsewhere,

> Additionally, no caseworker testified as to any adverse effect on S.O.C. "by [his] remaining in foster care as opposed to [his] being permanently adopted." To the contrary, the evidence shows that S.O.C. is currently thriving in foster care. And while the DFCS caseworker testified that she believes S.O.C. would possibly suffer harm if he was returned to the mother at this point, "the mother's [present] inability to care for her children does not necessarily mean that her current relationship with them is detrimental."[40]

However, the court of appeals, ultimately upheld the trial court's finding that the children would likely be harmed by remaining in foster care indefinitely. "This finding is no error. [As] [the Georgia Court of Appeals] has recognized, in case after case, [dependent] children should not be required to linger unnecessarily and indefinitely in foster care, inasmuch as children need permanence of home and emotional stability, or they are likely to suffer serious emotional problems."[41]

The court of appeals reached a similar conclusion in *In re C. S.*,[42] a termination brought by a mother who had remarried and whose child had bonded with his stepfather, where the court ruled, "C. S.'s need—rather than some generalized need—for permanence in his current environment with his mother and stepfather where he feels secure and his needs are met."[43] The court noted the lack of clarity on the issue of harm in *In re E. M. D.*:

> This dual consideration makes sense given that the statute requires the State to show that continued dependency—not merely a specific arrangement for the child—will cause harm. Dependency will cause harm only if all of the options available to DFCS short of termination—keeping the child in foster care, or returning the child to the parent—will themselves cause harm. Thus, it follows logically that the potential harm of both options should be considered.[44]

---

39. *In re* M. M. R., 336 Ga. App. 14, 24, 783 S.E.2d 415, 423 (2016) (quoting *In re A. T.*, 271 Ga. App. at 473, 610 S.E.2d at 123; *In re* J. S. B., 277 Ga. App. 660, 663, 627 S.E.2d 402, 406 (2006)).

40. *In re* S. O. C., 332 Ga. App. 738, 746, 774 S.E.2d 785, 792 (2015) (alterations in original).

41. *In re* C. L., 353 Ga. App. 587, 590, 838 S.E.2d 903, 906 (2020) (quoting *In re* C. L., 315 Ga. App. 606, 613, 727 S.E.2d 163, 167–68 (2012)).

42. 354 Ga. App. 133, 840 S.E.2d 475 (2020).

43. *Id.* at 140, 840 S.E.2d at 482.

44. *In re* E. M. D., 339 Ga. App. 189, 201, 793 S.E.2d 489, 498 (2016).

The court of appeals has also held that if abandonment is proven, it is not necessary to show harm.[45] For example, a showing of harm was unnecessary in a case where a trial court found that termination of the appellant's parental rights was in the child's best interests in part because the appellant "essentially had no relationship with the child since she entered care."[46] In the case of *In re C. A. B.*,[47] this burden of proving abandonment was met after remand and a second appeal. The court of appeals concluded that the Whitfield County Juvenile Court failed to do so and made no specific findings to the contrary.[48] Rather, the court of appeals relied on generalized findings that the children would experience harm absent the stability and permanency of an adoptive home.[49] In the second appeal, the court of appeals also held there was lack of parental care and control because of the mother's continued cocaine abuse.[50] The court of appeals has also ruled that finding that dependency is likely to continue does not necessarily justify a finding of harm, although facts authorizing such a finding could also support a finding of harm in particular circumstances.[51] In one dependency case, a "single incident of violence" was enough to prove dependency.[52] Another dependency was reversed because of the limited record (twenty-eight pag-

45. *In re* I. H. H., 345 Ga. App. 808, 811, 815 S.E.2d 133, 135 (2018).

46. *In re* E. M., 347 Ga. App. 351, 358, 819 S.E.2d 505, 510 (2018).

47. *In re* C. A. B., 351 Ga. App. 666, 832 S.E.2d 645 (2019).

48. *Id.* at 666–67, 832 S.E.2d at 647.

49. *Id.* at 673, 832 S.E.2d at 650.

50. *Id.*

> The case manager testified that C. A. B. was thriving in foster care and bonded with the foster parents, that the mother was unstable, that it was critical to C. A. B.'s life that he have a safe, secure, and stable home, and that, in her professional opinion, continued contact with the mother would be harmful to the child. Further, the mother had tested positive for cocaine three times spanning almost the child's entire life as of the time of the termination hearing, when C. A. B. was 18 months old. *Id.*

[A]t the termination hearing, the mother admitted that in March 2017, she did "two lines" of cocaine three days before she went into labor with another child, who was removed from the mother by the state of Tennessee due to testing positive for cocaine. *Id.* at 669, 832 S.E.2d at 647.

51. *In re* A. S., 339 Ga. App. 875, 881–82, 794 S.E.2d 672, 678 (2016).

52. *In re* T. S., 348 Ga. App. 263, 270, 820 S.E.2d 773, 779 (2018). The boyfriend, in violation of the mother's case plan, was in the presence of her and the children and "shot the children with a BB gun or pellet gun in the mother's presence. The children also witnessed the boyfriend," who had tested positive for methamphetamine, "roll up something green and smoke it." *Id.* at 264, 820 S.E.2d 775.

es) that frustrated the appellate court's ability to review the trial court's findings.[53]

In each of these cases, the court of appeals held, for a variety of reasons, that the facts, as found by the trial courts, did not meet the appropriate standard or proof, or that the trial court erred in failing to have a clear record or write a clear order. Despite the reasoning of the court of appeals in these cases, as in *Brumbelow II,* the court of appeals sometimes appears to assume a trial court based its decision on certain facts, despite a lack of support from the record or from the order of the lower court.[54] For example, in one such case, the appellate court held that "the juvenile court appears to have prematurely discounted the [parents'] progress toward meeting [their] goals."[55] In making such a statement, the appellate court appears not to defer to the trial court, but rather to supply its own reasoning instead. In an adoption case, with some similarities to *Brumbelow II*, failure to support the child or communicate with the child was justifiable.[56] Likewise, a stepmother seeking to adopt did not prove unjustifiable failure to support or to communicate. She and the father were not cooperative.[57] In *Hewlett v. Hewlett*,[58] the appellate court reversed the grandparents' adoption because of the child's best interest. There was a healthy bond between all parties.[59]

In a case where the father's history of incarceration, lasting about forty-eight months of the child's life, had a demonstrable negative effect on the parent–child relationship, and his failure to parent, rear, or support his now-adult children, supported a finding that the lack of proper parental care and control was the cause of the child's deprivation, and his current living situation was unstable; the court reversed the judgment and remanded the case for establishment of a reunification plan

53. *In re* M. S., 352 Ga. App. 249, 259–61, 834 S.E.2d 343, 352–54 (2019)("Although the juvenile court took issue with the fact that the parents now live next door to each other, remain friends, and might consider entering into a romantic relationship again in the future, those facts at most establish potential future dependency, not present dependency"); *see In re* H. B., 346 Ga. App. 163, 165, 816 S.E.2d 313, 317 (2018).

54. *In re* R. E., 333 Ga. App. 53, 58, 775 S.E.2d 542, 546 (2015) ("Although the order is not clear, we assume that the juvenile court was referring to what her order describes as the parents' 'polyamorous lifestyle.'").

55. *In re* S. B., 335 Ga. App. 1, 8, 780 S.E.2d 520, 526 (2015) (quoting *In re C. J. V.*, 323 Ga. App. at 287, 746 S.E.2d at 787) (alterations in original)).

56. Woodall v. Johnson, 348 Ga. App. 820, 827–28, 823 S.E.2d 379, 384 (2019).

57. Price v. Grehofsky, 349 Ga. App. 214, 215, 825 S.E.2d 594, 597 (2019). The mother and stepmother met and became friends in a drug court program.

58. 349 Ga. App. 267, 825 S.E.2d 622 (2019).

59. *Id.* at 272, 825 S.E.2d at 626.

for the father, subject to whatever disposition would be warranted by future events and those occurring since the termination hearing.[60]

In re D. M.[61] is a case of note:

> Specifically, the trial court highlighted the repeated instances of inadequate food, clothing and shelter; inadequate supervision, including the very young children being found unattended in the street on multiple occasions throughout the mother's history with the Department; the mother's resistance toward acquiring recommended therapy for D. M. due to her denial that he needed same; injuries that were sustained by the children; and the psychologist's ultimate recommendation that the mother not be reunited with the children. As previously noted, the psychologist based that recommendation upon her finding that the mother's personality disorder prevented her from making lasting changes and resulted in immediate regression each time the children were returned to her custody, and she also opined that the diagnosis explained the mother's lack of progress despite the Department providing numerous services to her over the years.[62]

Accordingly, the Colquitt County Juvenile Court concluded that "there was sufficient evidence that D. M. and B. A. M. were dependent at the time of the termination hearing due to a lack of proper parental care and control."[63]

The court of appeals agreed that there was sufficient evidence that the children were dependent due to a lack of proper parental care and control and that there was sufficient evidence to show that any dependency was likely to continue.[64] Even though extremely troubled by the mother's history with the Department of Family and Children Services (DFCS or the Department), the court of appeals reversed the trial court because there was insufficient evidence that any continued dependency was likely to cause serious physical, mental, emotional, or moral harm to the children.[65] The court of appeals held:

> More precisely, the juvenile court must make explicit findings of fact with regard to the child or children at issue, rather than a hypothetical child placed in the subject child or children's situation. And here, the juvenile court did the latter. Indeed, without providing *any* specific findings of fact based upon the evidence before it, the juvenile

60. *In re* N. T., 334 Ga. App. 732, 732, 780 S.E.2d 416, 418 (2015).
61. 339 Ga. App. 46, 793 S.E.2d 422 (2016).
62. *Id.* at 53–54, 793 S.E.2d at 429.
63. *Id.* at 54, 793 S.E.2d at 429.
64. *Id.* at 54, 793 S.E.2d at 429–30.
65. *Id.* at 56–57, 793 S.E.2d at 431.

> court merely cited to generalized concerns of doubt, uncertainty, hesitancy in life, and the need for stability and permanence.[66]

Even in cases where the appellate court reluctantly defers to evidentiary findings of the trial court, one judge concurred only in the judgment.[67] In one case, the court of appeals found insufficient facts to terminate a father's parental rights, although the court was extremely troubled by the facts that the father had been incarcerated for most of his children's lives and by the seemingly limited role he played in their upbringing.[68] In another case, the court of appeals reminded the juvenile courts and the State, in a special concurrence, of their solemn obligation to safeguard the rights of their citizens.[69] In another decision based simply on failure to follow time limits a special concurrence states:

> In sum, I take this opportunity, yet again, to remind our juvenile courts and the State that, in making any decision or taking any action that interferes with a parent–child relationship, our Juvenile Code is subordinate to and must be construed in light of the fundamental rights recognized by the federal and Georgia constitutions.[70]

In what may be a watershed decision, the court of appeals reversed a TPR on the grounds that harm was not proven.[71] The Department failed to prove that any continuing dependency is likely to cause serious harm to the child.[72] In his special concurring opinion, Judge Dillard agreed with the majority that return to the parent would harm the parents but the State was also required to prove—by clear and convincing evidence—that R. S. T., who is "currently in foster care[,] is likely to suffer

---

66. *Id.* at 55, 793 S.E.2d at 430–31 (citing *In re J. E.*, 309 Ga. App. at 66–67, 711 S.E.2d 16–17 (Dillard, J., dissenting)).

67. *In re* S. P., 336 Ga. App. 488, 503, 784 S.E.2d 846, 856 (2016) (Dillard, J., concurring in judgment only).

68. *In re* E. G. L. B., 342 Ga. App. 839, 848–49, 805 S.E.2d 285, 293 (2017) ("To paraphrase Justice Don Willett of the Supreme Court of Texas: The constitutional right of familial relations is not provided by government; it preexists government") (quoting Patel v. Texas Dep't of Licensing and Regul., 469 S.W.3d, 69, 92–93 (2015)). This case dealt with licensing eye brow threaders.

69. *In re* C. H., 343 Ga. App. 1, 18–19, 805 S.E.2d 637, 650 (2017) (Dillard, J., concurring), *vacated as moot*, Case Nos. S18C0322 & S18G0322, 2018 Ga. LEXIS 774 (Ga. Nov. 14, 2018).

70. *In re R. B.*, 346 Ga. App. at 575, 816 S.E.2d at 714.

71. *In re* R. S. T., 345 Ga. App. 300, 313, 812 S.E.2d 614, 625 (2018).

72. *Id.* at 312, 812 S.E.2d at 624. The majority opinion was comprised of six judges. One judge concurred fully and specially, and two concurred fully in divisions 1 and 2, and in judgment only as to division 3. Five judges dissented and one was disqualified.

serious harm as a result of continued dependency if the child remains indefinitely in foster care[,]"[73] explaining:

> This is so even in cases like the one before us, where the biological parent's relationship with her child is virtually nonexistent. We recognize, of course, that it can undoubtedly be challenging for the State to meet this burden when dealing with a parent who refuses to cooperate in being reunited with her child. How do you demonstrate that a young child is being harmed in foster care when she is happy and unaware of her mother's regrettable behavior? That cannot be an easy task. But this is the exact case before us. And the problem, as I see it, is that O.C.G.A. § 15-11-310 (a) (5) is a strained vehicle for terminating this mother's constitutional right of familial relations. In my view, this is a classic abandonment case, and the State and juvenile court will have another opportunity on remand to reconsider whether this natural parent–child relationship should continue in that context.[74]

In her dissent, Judge Barnes set out the "rational trier of fact" standard and the deference to be accorded the trial judge who weighs the evidence and judge's credibility and whose "primary responsibility is to consider and protect the welfare of a child whose well-being is threatened."[75] She concluded the evidence can show both types of harm, by removal from foster care or return to the parent.[76] In his dissent, Judge McFadden succinctly stated:

> This is not a close case. The trial court's detailed findings of fact fully support his alternative conclusions that this child faces a prospect of serious harm and that she has been abandoned. I do agree that it would have been better, and more helpful to this court, if the juvenile court had more clearly tied his findings of fact to his conclusions of law and to the statutory text. But we should not drag out this litigation for another year so he can present us with a more perfect order.[77]

Another case where the review of the trial court's first-hand view of the evidence was not approved by a panel of the court, but engendered a dissent, was *In re G. M.*,[78] a dependency case. The mother had a sub-

---

73. *Id.* at 317, 812 S.E.2d at 627 (alterations in original).

74. *Id.* at 318, 812 S.E.2d at 628.

75. *Id.* at 322, 812 S.E.2d at 630 (quoting *In re* S. C. S., 336 Ga. App. 236, 245, 784 S.E.2d 83, 90 (2016)).

76. *In re R. S. T.*, 345 Ga. App. at 321, 812 S.E.2d at 630 (Barnes, J., dissenting).

77. *Id.* at 332, 812 S.E.2d at 637 (McFadden, J., dissenting).

78. 347 Ga. App. 487, 819 S.E.2d 909 (2018).

stance abuse problem and had sought treatment but relapsed. She also had legal problems and the children had dental decay. The majority held this did not justify removal.[79] Judge Doyle dissented and stated:

> Clear and convincing evidence is an intermediate standard of proof, greater than a preponderance of the evidence but less than proof beyond a reasonable doubt; under the clear and convincing evidence standard it is not necessary to make a showing of evidence that is unequivocal or undisputed . . . . [T]here was clear and convincing evidence on which the juvenile court could rely to support its finding that the children were dependent because of the mother's chronic, unrehabilitated drug use.[80]

Another case that reaches different decisions as to different children on the overall facts is *In re A. B.*,[81] where the court affirmed termination as to the two oldest children and the youngest child but reversed as to the other five.[82] The distinction seems to be that the two oldest children had experienced and observed physical and verbal abuse and the youngest had been in foster care since birth. But as to the remaining five children: "However, the record is devoid of any evidence as to how the home environment harmed the other five children. There are no trauma assessments for those five children, no therapy notes or testimony, and these five children expressed the desire to return to their parents."[83]

A case where it could be argued that the court of appeals essentially retried the TPR is *In re M. R. B.*,[84] where after reciting the "any rational trier of fact" standard,[85] the court of appeals reversed the TPR where the trial judge, who determines credibility and weighs the evidence, found:

> [T]hat there was no plan for reunification with either parent, and [i]n order to be considered for a return of custody the father would need to complete a [Comprehensive Child and Family Assessment] and follow any recommendations therein. The father would need to obtain and maintain stable, sufficient housing and income for a period of at least six consecutive months. He would need to complete a psychological evaluation and follow any recommendations therein. He would need to complete a parenting/nurturing class approved by the De-

79. *Id.* at 493, 819 S.E.2d at 914.
80. *Id.* at 494–95, 819 S.E.2d at 914–15 (Doyle, J., dissenting).
81. 346 Ga. App. 2, 815 S.E.2d 561 (2018).
82. *Id.* at 7, 12, 815 S.E.2d at 567, 571.
83. *Id.* at 10–11, 815 S.E.2d at 569–70.
84. 350 Ga. App. 595, 829 S.E.2d 848 (2019).
85. *Id.* at 596, 829 S.E.2d at 850.

> partment and provide proof of the same. He would need to undergo an alcohol and drug assessment and complete any recommendations. The father would need to maintain visitation with the child as long as same is beneficial to the child and pay support for the child in the amount of at least $45.00 per week until an account has been established with Child Support Enforcement . . . . The compliance of the father has been: The father has attended visitation twice and completed a negative drug screening on September 8, 2017. There was an incident at the first visit wherein the father's ex-girlfriend called police. On the date of this hearing [the father] is incarcerated on multiple charges . . . . The current visitation between the mother, father and the child is: Each parent had attended two visits with the child prior to this hearing. As of the date of this hearing, both parents are incarcerated. There was an incident at the father's first visit, where his ex-girlfriend called police. The child is experiencing nightmares and bedwetting surrounding the visits. The Court hereby suspends all visits between the child and parents until further Order of this Court. The Court finds that visitation with the parents is not in the best interest of the child at this time.[86]

The father would not have been able to complete many items in his case plan due to his incarceration, which the Department argued was a consequence of his criminal acts. However, in finding this was not clear and convincing evidence that he failed to make progress toward reunification[87] the court did find it important enough to note:

> Further, while [the father] has a pattern of criminal activity and is currently incarcerated on a felony theft charge with a maximum release date of 2020, his criminal record covers a period of less than eight years, not nine as the trial court found.[88]

In the case of *In re V. G.*,[89] the court reversed a dependency in part because the Fulton County Juvenile Court's order was awkwardly worded.[90] A judge concured specially that even after giving the trial courts order due deference, the evidence is not clear and convincing.[91] He opined an observation:

---

86. *Id.* at 597–98, 829 S.E.2d at 851–52.

87. *Id.* at 606, 829 S.E.2d at 856–57. The father had applied for transfer to another correctional facility for the necessary courses.

88. *Id.* at 605, 829 S.E.2d at 856.

89. 352 Ga. App. 404, 834 S.E.2d 901 (2019).

90. *Id.* at 407, 834 S.E.2d at 905.

91. *Id.* at 414, 834 S.E.2d at 909 (Dillard, J., concurring).

> I pause to make an observation that I hope will be of benefit to the State's attorneys going forward. Many of the State's briefs in dependency and termination-of-parental-rights cases fail to acknowledge the reality of Georgia's dramatically altered jurisprudential landscape. As the State has undoubtedly noticed, we no longer reflexively affirm juvenile court orders. Nevertheless, the State's briefs often overwhelmingly cite to older opinions that failed to seriously consider the parents' constitutional right to familial relations with their children. In the future, it would be helpful if the State took to heart our increasingly frequent reversals of dependency and termination-of-parental-rights orders and submitted briefs that address more recent—*i.e.*, those from the past decade—Georgia appellate opinions.[92]

Then, in *In re L. B.*,[93] a TPR was affirmed.[94] Regarding the evidence, the court ruled the dependency was likely to continue:

> As noted above, on appeal from a termination order we do not weigh the evidence or resolve credibility issues. In this case, the trial court was authorized to resolve any conflicts in the evidence and, "[i]nasmuch as the [mother's] unresolved [mental health] issues were a primary cause of [L. B.'s] dependency, the juvenile court did not err in concluding that the cause of the [child's] dependency was likely to continue[.]"[95]

In another recent case, *In re M. M. D.,*[96] the court was faced with an incarcerated parent, as in *In re M. R. B.,* and noted:

> [A] parent's incarceration does not *always* compel the termination of parental rights, but it can support a termination when sufficient aggravating circumstances are present. Those circumstances are present in this case. Indeed, one of the factors that may be considered is whether the incarcerated parent has made an effort to communicate with the child and, despite imprisonment, maintain a parental bond in a meaningful, supportive and parental manner.[97]

---

92. *Id.* at 418, 834 S.E.2d at 913 n.25 (Dillard, J., concurring).

93. 356 Ga. App. 488, 847 S.E.2d 861 (2020)

94. Id. at 488–89, 847 S.E.2d at 861.

95. *Id.* at 491, 847 S.E.2d at 863 (citing *In re C. S.*, 354 Ga. App. at 136, 840 S.E.2d at 479) (quoting *In re E. G. M.*, 341 Ga. App. at 50, 798 S.E.2d at 653) (alterations inoriginal); *see also In re* J.J.J., 289 Ga. App. 466, 469–70, 657 S.E.2d 588, 591 (2008) (dependency is likely to continue when appellant has medically verifiable deficiency of mental or emotional health and has failed to comply with a reunification plan).

96. 356 Ga. App 653, 848 S.E.2d 687 (2020).

97. *Id.* at 655, 848 S.E.2d at 690 (quoting *In re C. S.*, 354 Ga. App. at 138, 840 S.E.2d at 481).

The court then affirmed the TPR in part based on the expert testimony of a longstanding DFCS employee, concluding that:

> [B]ased on her review of the case file as well as her training, expertise, and experience that in light of the Father's ongoing incarceration and unwillingness to bond with M. M. D., the child would be harmed by lingering in foster care and preventing adoption by the only care givers with whom she had bonded.[98]

In another incarcerated parent case, the court reversed the TPR because the evidence did not support the finding that:

> [T]he father had abandoned H. A. S. during the approximately 15 months between when the child came into DFCS custody and the termination hearing. The uncontroverted evidence . . . reflects that H. A. S. resided with his father for almost his entire life before the father's arrest. And the evidence further reflects that although the father could not visit the child or complete many aspects of his case plan while incarcerated, the father completed a prison substance abuse treatment program that was a condition for regaining custody of his child, finished two levels of parenting classes, and sent letters to the child that were never delivered by DFCS.[99]

The court of appeals has applied the "any evidence" standard set out in *Brumbelow II* in a legitimation case, *Westbrook v. Eidys*.[100] The question remains as to whether the court of appeals will begin applying it in other cases involving parental rights, such as dependencies, and TPR's, or continue to retry the cases and weigh the evidence and judge the credibility of witnesses.

IV. PRACTICE POINTERS

So, what is a practitioner to do in this landscape of caselaw? First, be aware of the tension and the changing dynamics. Be mindful that the standard of review is "any rational trier of fact," but that the Georgia Court of Appeals is scrutinizing the "rational triers" of constitutionally protected liberty interests. The court of appeals has put all practitioners on notice: "As the State has undoubtedly noticed, we no longer reflexively affirm juvenile court orders."[101]

---

98. *In re M. M. D.*, 356 Ga. App. at 657, 848 S.E.2d at 692.

99. *In re* H. A. S., 358 Ga. App. 54, 59 853 S.E.2d 371, 375 (2020).

100. 356 Ga. App. 619, 620, 848 S.E.2d 660, 662 (2020) (citing *Brumbelow II*, 308 Ga. App. at 715, 843 S.E.2d at 584).

101. *In re V. G.*, 352 Ga. App. at 418, 834 S.E.2d at 913, n.25.

Second, analyze the issues within the framework of the constitutionally protected liberty interests and insist upon clear and convincing evidence. This might seem obvious, but, if it is a close call, it is not clear and convincing evidence. When the information is muddy, the analysis clouded, the presentation of evidence stilted, the petitioner is not meeting the burden by clear and convincing evidence. And judges, be mindful of making errant remarks. As the court of appeals admonished: "We note that the juvenile court judge remarked at the end of the termination hearing that this case was a difficult one—one that he 'could . . . argue both ways.'"[102]

Third, draft better orders that properly include, weigh, and analyze the evidence. A well-written order takes significant time and effort. With high caseloads and congested court calendars, this can seem an unachievable ideal. Yet, it is necessary—not just as a best practice—but by law: failing to make a specific finding of fact as to each of the elements constitutes reversible error.[103] The orders need to be detailed and resolve conflicts within the evidence. An order which details the testimony of each witness or which contains merely a brief of the evidence or a recitation of what took place in court does not satisfy the requirement for making findings of fact.[104] Drafters must "show their work" and show which combination of facts led to a certain conclusion. The trial court must state "not only the end result of that inquiry but the process by which it was reached." [105] The court of appeals has further insisted that the written order contain conclusions of law that are separate from the findings of fact, and must avoid intermingling findings of fact and conclusions of law.[106] A well-crafted order is detailed, organized, includes thorough analysis, and comprehensively addresses the statutory elements. It is no small task and cannot be rushed.

If the drafter lacks competency, be encouraged. Good writing is a skill that can be improved and developed. Take the time to become better. Enroll in a legal writing Continued Legal Education (CLE) course. Purchase and study books on legal writing. Enlist the help of colleagues and ask them to read, edit, and provide feedback on the drafts.

The parties deserve a well written order. If the juvenile court is going to interfere with, or ultimately sever, the family relationship, the evidence must be compelling and the delivery of the judgment must be ef-

---

102. *In re B. R. J.*, 344 Ga. App. at 477, 810 S.E.2d at 640.

103. Patty v. Dept. of Hum. Res., 151 Ga. App. 555, 260 S.E.2d 551 (1979); *see* Caldwell v. Broome, 166 Ga. App. 250, 304 S.E.2d 98 (1983).

104. *In re B. G.*, 345 Ga. App. at 177, 812 S.E.2d at 560.

105. *In re D. M.*, 339 Ga. App. at 55, 793 S.E.2d at 430.

106. *In re B. G.*, 345 Ga. App. at 168, 812 S.E.2d at 554.

fective. The Georgia Court of Appeals will appreciate the clarity and craftsmanship as well.