OCGA §9-11-14

A judgment may be amended by order of the court to conform to the verdict upon which it is predicated, even after an execution issues.

Judgment must conform to reasonable intendment of verdict upon which it is based, as determined by inspection of the record, including verdict and pleadings. *Kaufman Development Partners, L.P. v. Eichenblatt*, 2013, 324 Ga.App. 71, 749 S.E.2d 374.

VIRAL FACTS

JUDICIAL NOTICE AND RES JUDICATA IN TPR HEARINGS

VIRAL FACTS

Children in care because of allegations of sexual abuse by father, domestic violence in the home, and mother's substance abuse and failure to protect.

At TPR, evidence shows that the mother has filed for divorce from the father, has not relapsed in substance use, and has completed her case plan. Her therapist testifies that she can care for the children.

Court takes judicial notice of the factual findings and legal conclusions of 23 prior court orders and incorporates them into an order terminating parental rights: "In addition to the findings of fact made throughout this order, court orders have been entered finding these children to be dependent and those orders stand today." (*ITIO D.W.*, 340 Ga. App. 508 (2017))

VIRAL FACTS

Once “judicially noticed”, facts from prior orders come in without any procedural safeguards – relevancy, admissibility, credibility, etc.

These viral facts are invariably used to undermine parental rights.

NOTICING AN ISSUE

- Georgia courts have been taking judicial notice for a long time.
- One of the most typical uses of judicial notice is in terminations of parental rights cases, where there may be years' worth of prior orders in the case.
- Typical holding: "[T]he juvenile court did not err in taking judicial notice of the evidence, exhibits, testimony, and orders in the underlying deprivation proceeding in the same court". *ITIO S.N.H.*, 300 Ga. App. 321, 328 (2009).
- Also: "At the termination hearing, the trial court took judicial notice of the entire record, including "all previous unappealed Findings of Fact and Conclusions of Law". *ITIO C.A.B.,* 832 S.E.2d. 645, 646 n.2 (2019).

HISTORICAL AUTHORITY

- For the proposition that a court may take judicial notice of the records in the same court, the *ITIO C.A.B.*, 832 S.E.2d 645 (2019) cited
- *ITIO R.J.D.B.*, 305 Ga. App. 888, 889 (2010), which cited
- *ITIO J.P.V.*, 261 Ga. App. 194, 196 (2003), which cited
- *ITIO S.H.P.*, 243 Ga. App. 720, 722 (2000), which cited
- *Petkas v. Grizzard*, 252 Ga. 104, 108 (1984): "We hold that a trial judge may take judicial cognizance … of records on file in its own court". Cited
- *State v. Brinson*, 248 Ga. 380, 381 (1981), which cited, *inter alia*,
- *Branch v. Branch*, 194 Ga. 575 (1942), which cited
- *Fitzgerald Granitoid Co. v. Alpha Portland Cement Co.*, 15 Ga. App. 174 (1914), which cited
- *Butler v. Eaton*, 141 U.S. 240 (1891) and *Bailey v. Kerr*, 180 Ill. 412 (1899)

HISTORICAL AUTHORITY

- Between 1981 and 2019, the statutory authority for judicial notice in Georgia changed dramatically.

HISTORICAL AUTHORITY

O.C.G.A. 24-1-4 (2010)
Judicial notice

The existence and territorial extent of states, their forms of government, symbols of nationality, the laws of nations, all laws and resolutions of the General Assembly and the journals of each branch thereof as published by authority, the laws of the United States and of the several states thereof as published by authority, general customs of merchants, the admiralty and maritime courts of the world and their seals, the political constitution and history of our own government as well as the local divisions of our own state, the seals of the several departments of the government of the United States and of the several states of the Union, and all similar matters of public knowledge shall be judicially recognized without the introduction of proof.

A NEW CODE – ADOPTING THE FEDERAL RULE

- **§ 24-2-220. Matters judicially recognized**

The existence and territorial extent of states and their forms of government; all symbols of nationality; the laws of nations; all laws and resolutions of the General Assembly and the journals of each branch thereof as published by authority; the laws of the United States and of the several states thereof as published by authority; the uniform rules of the courts; the administrative rules and regulations filed with the Secretary of State pursuant to Code Section 50-13-6; the general customs of merchants; the admiralty and maritime courts of the world and their seals; the political makeup and history of this state and the federal government as well as the local divisions of this state; the seals of the several departments of the government of the United States and of the several states of the union; and **all similar matters of legislative fact** shall be judicially recognized without the introduction of proof. **Judicial notice of adjudicative facts shall be governed by Code Section 24-2-201**.

A NEW CODE – ADOPTING THE FEDERAL RULE

- **§24-2-201 Judicial Notice of Adjudicative Facts**

(a)This Code section governs only judicial notice of adjudicative facts.

(b) A judicially noticed fact shall be a fact which is not subject to reasonable dispute in that it is either:

(1) Generally known within the territorial jurisdiction of the court; or

(2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

A NEW CODE – ADOPTING THE FEDERAL RULE

"Under the new Evidence Code, we know that Georgia evidence rules that track the federal rules are to be interpreted according to federal case law, while rules that were instead carried over from the old Evidence Code are to be interpreted according to our case law interpreting the old Code." *State v. Almanza*, 304 Ga. 553, 553 (2018)

SHAKY FOUNDATION?

- For the proposition that a court may take judicial notice of the records in the same court, the *ITIO C.A.B.*, 832 S.E.2d 645 (2019) cited
- *ITIO R.J.D.B.*, 305 Ga. App. 888, 889 (2010), which cited
- *ITIO J.P.V.*, 261 Ga. App. 194, 196 (2003), which cited
- *ITIO S.H.P.*, 243 Ga. App. 720, 722 (2000), which cited
- *Petkas v. Grizzard*, 252 Ga. 104, 108 (1984): "We hold that a trial judge may take judicial cognizance … of records on file in its own court". Cited
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- *Branch v. Branch*, 194 Ga. 575 (1942), which cited
- *Fitzgerald Granitoid Co. v. Alpha Portland Cement Co.*, 15 Ga. App. 174 (1914), which cited
- *Butler v. Eaton*, 141 U.S. 240 (1891) and *Bailey v. Kerr*, 180 Ill. 412 (1899)

It is well settled that “the taking of judicial notice of facts is, as a matter of evidence law, a highly limited process. The reason for this caution is that the taking of judicial notice bypasses the safeguards which are involved with the usual process of proving facts by competent evidence in ... court.” *Emory Healthcare Inc. v. Pardue*, 328 Ga. App. 664, 669 (2014).

ELEMENTS OF JUDICIAL NOTICE OF ADJUDICATIVE FACTS

What's an "adjudicative fact"?

Adjudicative facts are facts that "relate to the parties, their properties, their businesses" and "who did what, where, when, how and with what motive or intent". *Qualley v. Clo-Tex Intern., Inc.*, 212 F. 3d 1123, 1128 (8th Cir. 2000)

ELEMENTS OF JUDICIAL NOTICE OF ADJUDICATIVE FACTS

The main characteristics of adjudicative facts judicially noticed:

(b) A judicially noticed fact shall be a fact which is **not subject to reasonable dispute** in that it is either:

(1) **Generally known** within the territorial jurisdiction of the court; or

(2) Capable of **accurate and ready determination** by resort to **sources whose accuracy cannot reasonably be questioned**.

Get RID of proof

Facts which may be judicially noticed are:

- Relevant
- Indisputable
- Discernable

ELEMENTS OF JUDICIAL NOTICE OF ADJUDICATIVE FACTS

The main characteristics of adjudicative facts judicially noticed:

Facts judicially noticed must be admissible in evidence on their own terms. For example, they cannot be hearsay if hearsay is inadmissible.

Court orders do not fall under the Public Records exception of Rule 803(8)(C) (*U.S. v. Jones*, 29 F.3d 1549, 1554 (11th Cir. 1994)). When cited for the truth of the matters contained therein as factual findings, court orders are hearsay.

ELEMENTS OF JUDICIAL NOTICE OF ADJUDICATIVE FACTS

The main characteristics of adjudicative facts judicially noticed (con't):

Findings of fact in prior orders are "usually disputed and almost always disputable" (*Ferguson v. Extraco Mortg. Co.*, 264 Fed. Appx. 351, 352 (5th Cir. 2007)).

Conclusions of law in prior orders are not facts. They're conclusions.

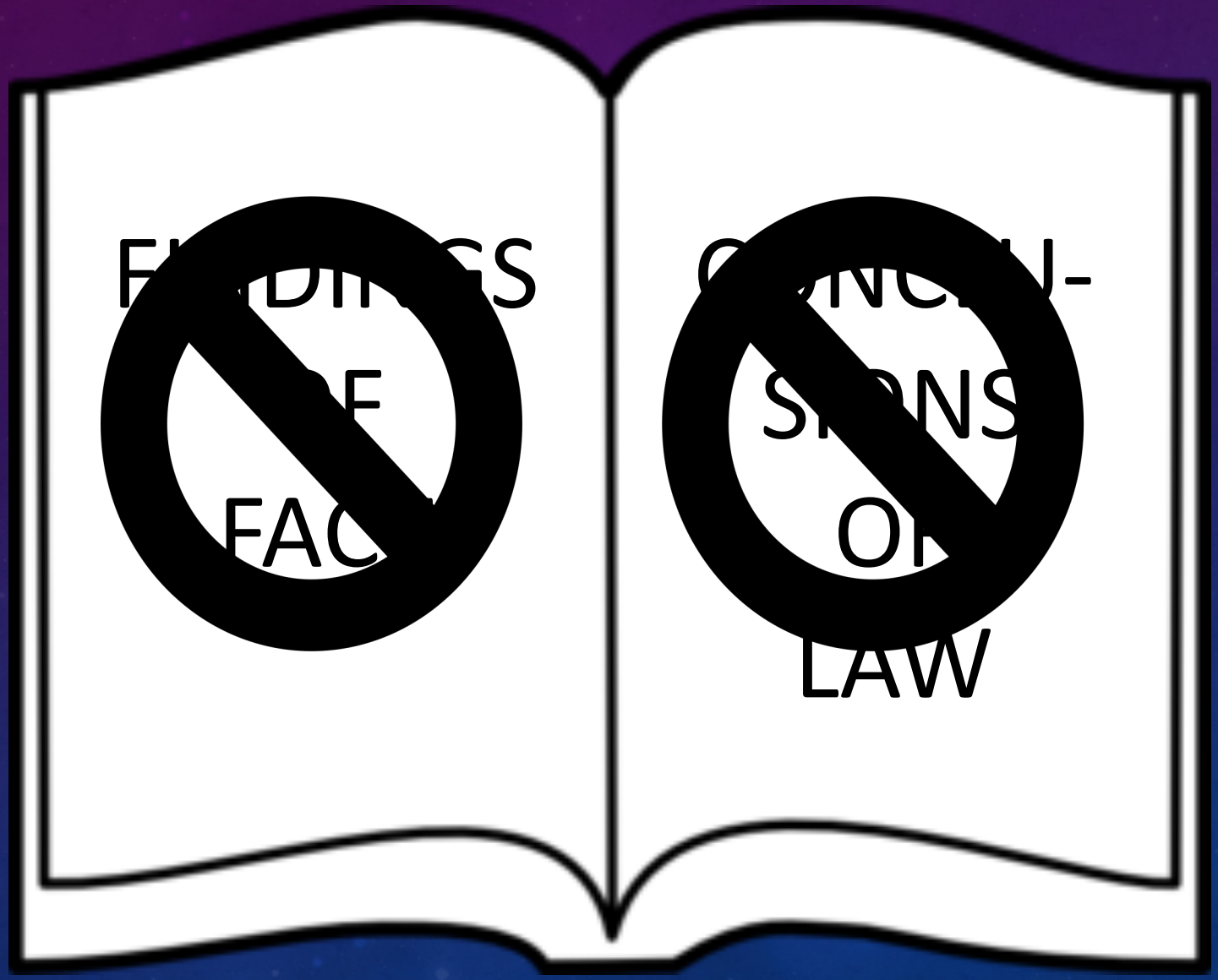
ELEMENTS OF JUDICIAL NOTICE OF ADJUDICATIVE FACTS

Judicial notice is not a substitute for authentication of court records. Authentication of court records is covered by Rule 920, requiring certified copies.

"Judicial notice does not automatically establish the admissibility, relevance, or weight of that evidence." *In re: Hilliard Dev. Corp.*, 238 B.R. 857 (Bankr. S.D. Fla. 1999)

"[A] trial court may not take judicial notice of matters that are the subject of proof in the case." *Emory Healthcare Inc. v. Pardue*, 328 Ga. App. 664, 669 (2014)

JUDICIAL NOTICE OF PRIOR ORDERS



ELEMENTS OF JUDICIAL NOTICE OF ADJUDICATIVE FACTS

What purpose is served by taking judicial notice of a prior court order?

1. To establish that certain assertions were made at a prior hearing, if that becomes relevant in the current hearing (but not for the truth of those assertions).
2. To establish that certain acts were taken (e.g., action dismissed, motion granted or denied, order signed).
3. For purposes of res judicata, to determine if an issue or claim has already been litigated and so is precluded.

When judicial notice is taken of a prior order, the prior order must be properly introduced (Rule 920), and the court must state with specificity which adjudicative facts it is noticing, and for what purpose.

WHAT USE MAY BE MADE OF PRIOR ORDERS?

Prior unappealed court rulings are conclusive as to the issues ruled upon. This is a type of *res judicata*.

The prior order must be brought before the court in an admissible form – i.e., certified copy (Rule 920).

WHAT DIFFERENCE DOES ALL THIS MAKE?

Judicial notice, improperly used, is a way of bringing prior facts into the current hearing without there being any current proof.

Res judicata simply provides a snapshot of a prior ruling *as of the date of that ruling* and says that that ruling can't be relitigated.

"[U]nappealed [dependency] orders bind the parents insofar as they establish that the existence of certain conditions (at the times those orders were entered) constituted a clear and convincing showing that the child was [dependent] … But only upon a further showing by the department that the conditions upon which this finding was based still exist at the time of the hearing on the termination petition will this criteria be met." *ITIO A.E.*, 314 Ga. App. 206, 208 (2013)

OCGA §9-12-40

A judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put in issue or which under the rules of law might have been put in issue in the cause wherein the judgment was rendered until the judgment is reversed or set aside.

WHAT DIFFERENCE DOES ALL THIS MAKE?

Revisiting *ITIO D.W.*, 340 Ga. App. 508 (2017):

The initial TPR order improperly judicially noticed a great number of factual findings from several years' worth of orders. Evidence at the actual TPR hearing was not discussed in as great detail as the past findings.

These findings were used to bolster the legal conclusion that dependency was likely to continue, despite testimony at the TPR hearing that the mother was sober, employed, in appropriate therapy, had completed her case plan, and was capable of caring for the children.

Current evidence was refuted by past factual findings – viral facts.

WHAT DIFFERENCE DOES ALL THIS MAKE?

TPR hypothetical: In prior order, there's a finding that grandmother testified that mom uses drugs every day. The conclusion in the prior order that the child is dependent is based in part upon this finding.

Court at TPR takes judicial notice of prior order and finds that mom is using drugs daily.

Perhaps an imaginative SAAG argues that mom is estopped from claiming that she doesn't use drugs every day because the prior finding is res judicata (for an example of this kind of thinking put into practice, see *ITIO T.Z.L.*, 325 Ga. App. 84 (2013).

WHAT DIFFERENCE DOES ALL THIS MAKE?

In the current hearing, that prior statement is hearsay and is inadmissible over objection. It doesn't stop being hearsay because it's in a prior order. This fact, though relied upon by the court at the prior hearing, is reasonably subject to dispute – in fact, it was disputed at the prior hearing. It is not noticeable.

The prior factfinding is not a proper subject of res judicata, because res judicata deals with legal conclusions.

A fact contested at a prior hearing does not become the kind of fact which by its nature is not reasonable subject to dispute simply because a court has made a decision about that fact in a prior hearing. The fact was adjudicated in the prior hearing, but that does not make it an adjudicative fact.

Adjudicative facts are RID:

Relevant

Indisputable (not just no longer disputed, but not ever reasonably disputable)

Discernable (there is a reliable source from which we may discover the fact).

JUDICIAL NOTICE

- Court records: strictly speaking, a court may not take judicial notice of court records, but only of adjudicative facts found within the court record.
- The court may not take notice of the truth of facts contained in its records.

Ask: Would this fact judicially noticed be admissible if it had been directly tendered as evidence? That is, is it admissible under the rules of this particular proceeding?

JUDICIAL NOTICE

- Courts may take judicial notice of the non-disputed content of its own records and of the records of any other court – state or federal. The findings of fact normally do not qualify as non-disputed content.
- All acts of judicial notice should be limited, clear, specific, and on the record.
- Whatever has been judicially noticed in a record has to be stated specifically on the record so that it's clear what is being noticed and why.
- If a document is judicially noticed, it must be introduced at the hearing and made part of the record.

RES JUDICATA

- The introduction of certified prior unappealed court orders allows the petitioner to establish a chain of legal conclusions over time, each limited to its own time.
- Evidence introduced at the TPR hearing may establish that the legal conclusions at prior hearings are still applicable now.
- This is the only appropriate use of prior orders in TPR cases unless a factfinding in a prior order is relevant for some other purpose than the truth of that factfinding.

Sloppy thinking about judicial notice and res judicata create an environment where viral facts are imported from prior hearings without procedural safeguards and are essentially treated as unimpeachable.

These viral facts are almost always relied upon by courts to terminate parental rights, especially where the present evidence for termination is weak.

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