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## DOMESTIC RELATIONS

*Parent and Child Relationship Generally: Establish New Protocols  
for Child Abuse Investigations, Deprivation, and Access  
to Records; Establish Battered Spouse and Child Defenses*

**CODE SECTIONS:** O.C.G.A. §§ 15-11-34, -58, 16-3-21, 19-7-5, 19-15-1 to -6, 49-5-40 to -41 (amended)

**BILL NUMBERS:** SB 1, SB 2, SB 3, HB 333

**ACT NUMBERS:** 584, 585, 586, 485

**SUMMARY:** These Acts are a comprehensive reform of existing child abuse legislation. The Acts provide for law enforcement involvement in child abuse investigations, require each county to form a child abuse committee and a child fatality subcommittee, and allow access to child abuse reports by child abuse committees, law enforcement personnel, school counselors, medical examiners, and certain state officials. They also require court approval to return a deprived child to his parents, and they establish a battered spouse or child defense.

**EFFECTIVE DATE:** July 1, 1993

### *History*

In 1984, 22,600 cases of child abuse were reported in Georgia.<sup>1</sup> By 1991 that number grew to 65,000 cases.<sup>2</sup> Although the Georgia General Assembly passed sweeping child abuse prevention and reporting legislation in 1990, portions of those laws are not yet implemented, and some are unenforced.<sup>3</sup> For example, the bills enacted in 1990 created a Child Abuse Fatality Panel<sup>4</sup> that was charged with releasing an annual Child Abuse Report.<sup>5</sup> After three years, the Panel produced

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1. David Noel & Scott Marshall, *Child Abuse in Gwinnett*, ATLANTA J. & CONST., Feb. 7, 1993, at J1.

2. *Id.*

3. Beverly Shepard, *Protecting Children*, ATLANTA J. & CONST., Feb. 26, 1993, at E3.

4. O.C.G.A. § 19-15-4(a) (1990).

5. *Id.* § 19-15-4(e) (1990).

only one incomplete and flawed report.<sup>6</sup> The 1990 legislation also established a computerized child abuse registry that many counties do not use because they do not know how to use it or they find the information too incomplete.<sup>7</sup> The computer system was also intended to track families with histories of abuse from county to county. However, the system as implemented monitors only whether a complaint has been filed.<sup>8</sup>

Tragically, the beating deaths of three two-year-old Georgia children<sup>9</sup> illustrated the failure of the current child abuse protection system.<sup>10</sup> After the death of Dustin Shannon, a Cobb County two-year-old, Lieutenant Governor Pierre Howard attempted to investigate why the system failed this child.<sup>11</sup> Lieutenant Governor Howard asked the Division of Family and Children Services (DFACS)<sup>12</sup> to turn over Shannon's case files.<sup>13</sup> Citing confidentiality requirements, DFACS

6. The Panel's report, among other flaws, did not distinguish deaths by child abuse from other homicides. Only 62 of 159 counties required by law to report child abuse statistics for the report did so. Shepard, *supra* note 3. In addition, the report concludes that a seventeen-year-old and a three-year-old died of Sudden Infant Death Syndrome (SIDS). *Id.* These statistics are probably data entry errors, as SIDS very rarely strikes children after their first year. Diane Loupe, *State Review Panel Moving Too Slowly on Monitoring Child Deaths, Single Report Flawed and Incomplete*, ATLANTA J. & CONST., Feb. 5, 1993, at A1.

7. Shepard, *supra* note 3. In addition, some counties do not wish to be on the registry as child abuse reports tend to generate publicity and phone calls to which the counties do not want to respond to. Loupe, *supra* note 6.

8. Dr. Douglas Greenwell, Director of the Division of Family and Children Services (DFACS), stated that not enough money was appropriated to fund a statewide tracking system. Such a system may have saved the life of two-year-old Artealia Lavant, whose reports of abuse slipped between the cracks when the family moved from Cobb County to Douglas County. Loupe, *supra* note 6.

9. Dustin Shannon, Artealia Lavant, and Justin Tornambe were beaten to death, all allegedly by their mothers' live-in boyfriends. In the Shannon and Lavant cases, reports of suspected child abuse had been filed with the DFACS, but overworked caseworkers did nothing to protect the children from their abusers. Diane Loupe, *Ga. Agency Still Keeps Child Abuse Files Closed*, ATLANTA J. & CONST., Oct. 15, 1992, at D2; Richard Greer, *Brutally Beaten 5-year-old is "Miracle" to Anguished Father*, ATLANTA J. & CONST., Jan. 1, 1993, at E1.

10. The present system treats child abuse as a domestic issue, not a criminal problem. As such, priority is placed on keeping the family intact, despite reports of abuse. DFACS' current focus is placed on family intervention and counseling by social workers. *Treating Child Abuse as a Crime*, ATLANTA J. & CONST., Feb. 22, 1993, at A8. Jim Beck, Press Secretary for Lt. Gov. Pierre Howard, observed that if a neighbor's dog is barking, the police are called. *Id.* If a child is beaten, social workers arrive. Telephone Interview with Jim Beck, Press Secretary for Lt. Gov. Pierre Howard (Apr. 8, 1993) [hereinafter Beck Interview].

11. Beck Interview, *supra* note 10.

12. DFACS is a division of the State Department of Human Resources. *Id.*

13. *Id.*

refused.<sup>14</sup> Critics labeled DFACS' use of confidentiality laws a shield to hide the system's failures.<sup>15</sup>

Another problem Lieutenant Governor Howard sought to correct was DFACS' discretion to return a child to an abusive home after a court had ordered the child removed.<sup>16</sup> This goal was in response to a DeKalb County case where the court had ordered a five-year-old child removed from an abusive home for eighteen months, only to have DFACS return him after six months. The child was then nearly beaten to death.<sup>17</sup>

Lieutenant Governor Howard formed a legislative council<sup>18</sup> to draft legislation designed to strip away some of DFACS' confidentiality shield and to get law enforcement officials and district attorneys involved in investigation and prosecution at a much earlier stage.<sup>19</sup> By opening up child abuse records to specific persons outside of DFACS, Lieutenant Governor Howard hoped to make DFACS accountable for their mistakes. Moreover, more visibility by local law enforcement officials and district attorneys lessens the likelihood of a case being overlooked.<sup>20</sup>

Lieutenant Governor Howard's legislative council drafted Senate Bills 1, 2, and 3. Senator Mary Margaret Oliver sponsored these bills in the General Assembly.<sup>21</sup> In the House, Representative Charles A. Thomas, Jr. drafted and introduced a companion bill, HB 333, to allow school guidance counselors to access specific child abuse records upon court order.<sup>22</sup>

14. Dr. Douglas Greenwell, Georgia DFACS Director, declined to turn over the records on the advice of the State Attorney General. Citing state and federal confidentiality laws, the Attorney General's office, stated that the Lieutenant Governor had no legal right to know. Diane Loupe, *Death Report Off-Limits to Howard*, ATLANTA J. & CONST., Oct. 14, 1992, at F1. Greenwell stated that confidentiality laws were designed to protect the privacy of abused children and their alleged abusers, as well as persons who report abuse. Sen. Mary Margaret Oliver questioned how confidentiality statutes protected a dead child. Loupe, *supra* note 9. DFACS eventually turned the records over to Howard after new federal laws signalled a permissible relaxation of confidentiality requirements. Greer, *supra* note 9.

15. Beck Interview, *supra* note 10.

16. *Id.*

17. Greer, *supra* note 9. On December 22, 1992, Nathan Booker was nearly beaten to death by his abusive stepfather, a convicted felon with a history of threatening violence. A less severe beating nearly a year before prompted his initial removal. *Id.*

18. The legislative council included the Lt. Governor, Sen. Mary Margaret Oliver, and several others including DFACS officials, district attorneys, child advocates, and law enforcement officials. Beck Interview, *supra* note 10.

19. Telephone Interview with Sen. Mary Margaret Oliver, Senate District No. 42 (Apr. 8, 1993) [hereinafter Oliver Interview]. In this way, child abuse investigation has more of a criminal rather than domestic relations focus. *Id.*

20. Beck Interview, *supra* note 10.

21. Oliver Interview, *supra* note 19.

22. Telephone Interview with Rep. Charles A. Thomas, Jr., House District No. 100

**SB 1**

The Act amends Code section 19-7-5<sup>23</sup> relating to domestic relations and chapter 15 of title 19<sup>24</sup> relating to child abuse. Under the previous statute, DFACS case workers were required to notify district attorneys or law enforcement authorities of reported child abuse only when they had "reasonable cause to believe such a report is true."<sup>25</sup> The Act requires DFACS to notify law enforcement of all child abuse reports if the agency reasonably believes the report to be true, or if "the report contains any allegations or evidence of child abuse."<sup>26</sup> This amendment permits law enforcement authorities to be involved at the beginning of an investigation, not after evidence of abuse is indisputable.<sup>27</sup> The bill, as introduced, required law enforcement personnel to be notified if the report contained "any allegation or evidence of *physical injury*."<sup>28</sup> The Senate broadened the requirement to include reports of allegations or evidence of sexual abuse,<sup>29</sup> but the requirement was amended to its final form in the House.<sup>30</sup> The Senate Judiciary Committee also changed the definition of "child abuse" to include "sexual abuse" and then added a new section defining sexual abuse.<sup>31</sup> The definition of sexual abuse added in the House Committee

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(June 1, 1993) [hereinafter Thomas Interview]. Rep. Thomas is the Chairman of the House Judiciary Committee. *Id.*

23. O.C.G.A. § 19-7-5 (Supp. 1993).

24. *Id.* §§ 19-15-1 to -7 (Supp. 1993).

25. 1990 Ga. Laws 1761 (formerly found at O.C.G.A. § 19-7-5(e) (1990)) (emphasis added).

26. O.C.G.A. § 19-7-5(e) (Supp. 1993).

27. Oliver Interview, *supra* note 19.

28. SB 1, as introduced, 1993 Ga. Gen. Assem. (emphasis added).

29. SB 1 (SCS), 1993 Ga. Gen. Assem.

30. SB 1 (HCS), 1993 Ga. Gen. Assem. The House Judiciary Committee decided that some situations may not be covered under the Senate version, which was contrary to the General Assembly's intent to cover a broad scope of abuse cases. "If we're going to cover some abuse, we might as well cover it all." Thomas Interview, *supra* note 22.

31. SB 1 (SCS), 1993 Ga. Gen. Assem. The definition of "sexual abuse" in O.C.G.A. § 19-7-5(b)(3.1) (Supp. 1993) provides that:

"Sexual abuse" means a person's employing, using, persuading, inducing, enticing, or coercing any minor who is not that person's spouse to engage in any act which involves:

(A) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) Bestiality;

(C) Masturbation;

(D) Lewd exhibition of the genital or pubic area of any person;

(E) Flagellation or torture by or upon a person who is nude;

substitute does not include consensual sex between minors or between a minor and an adult not more than five years older.<sup>32</sup>

The Act also amends chapter 15 of title 19. The bill, as introduced, required that child abuse committees specify circumstances in which law enforcement officers may accompany DFACS case workers to homes.<sup>33</sup> The House Judiciary Committee modified this language to also require that local child abuse committees specify circumstances when police *will not* accompany a DFACS caseworker.<sup>34</sup>

The definition of "deprived child" was modified in a Senate floor amendment to exclude spiritual healing performed in accordance with recognized religious practices.<sup>35</sup> The House Committee substitute increased the frequency of required local committee meetings from annually to semi-annually and mandated child abuse educational training for local committee members.<sup>36</sup>

(F) Condition of being fettered, bound, or otherwise physically restrained on the part of a person who is nude;

(G) Physical contact in an act of apparent sexual stimulation or gratification with any person's clothed or unclothed genitals, pubic area, or buttocks or with a female's clothed or unclothed breasts;

(H) Defecation or urination for the purpose of sexual stimulation; or

(I) Penetration of the vagina or rectum by any object except when done as part of a recognized medical procedure.

*Id.* § 19-7-5(b)(3.1) (Supp. 1993).

32. These situations were expressly excluded from both O.C.G.A. §§ 19-7-5(b) and 49-5-40(a)(3.1)(I) because the General Assembly did not want adolescents being charged with sexual abuse. Fourteen years is the age of consent in Georgia, and this provision will protect a nineteen-year-old who has sexual relations with a consenting fourteen-year-old. This age spread was as broad as the Assembly felt they should protect. Telephone Interview with Rep. Denmark Groover, House District No. 125 (June 2, 1993) [hereinafter Groover Interview]. The House's intent was also to eliminate the possibility that a teacher or other supervisor would be required to file a sexual abuse report if they suspected that two teenagers might be engaging in sexual relations. Oliver Interview, *supra* note 19.

33. The intent of this section is to show the abuser that some authority other than a case worker is involved and to promote joint investigations. Police are better trained in evidence-gathering should prosecution be required. Beck Interview, *supra* note 10.

34. SB 1 (HCS), 1993 Ga. Gen. Assem. (emphasis added). The House Judiciary Committee's intent was to give the police some discretion in deciding which cases to investigate, and to protect the privacy of alleged abusers in visits that do not yet warrant joint investigation. Oliver Interview, *supra* note 19.

35. Sen. Charles "Chuck" Clay, Senate District No. 37, sponsored the Senate floor amendment to protect the rights of Christian Scientists to pursue spiritual healing for their children without running afoul of the law. David Pendered, '93 *Georgia Legislature: Senate Approves Child Abuse Bills*, ATLANTA J. & CONST., Feb. 16, 1993, at B3.

36. Because the previous law set no training guidelines, education was inconsistent between counties. Oliver Interview, *supra* note 19.

A final important amendment provided that child abuse reports made to law enforcement personnel or district attorneys should not be subject to public inspection except via court order or in a related civil case, by a showing of clear and convincing evidence.<sup>37</sup>

The Act provides no express penalties for failure to adhere to its requirements.<sup>38</sup>

### SB 2

This Act amended Code sections 49-5-40 and 19-5-41 to expand the list of persons entitled to access child abuse report records.<sup>39</sup> The intent of this Act is to prevent DFACS from cloaking its activities in confidentiality requirements and to allow the state's policy makers to evaluate how the system is working in order to implement any necessary changes.<sup>40</sup> Under the previous law, records could be examined only at the discretion of the Department of Human Resources.<sup>41</sup> The Senate originally added police, law enforcement agencies, and medical examiners to the list of persons entitled to access,<sup>42</sup> and the House further expanded the list to include future or prospective foster parents,<sup>43</sup> the state Attorney General, and the Governor.<sup>44</sup> The House floor amendment granted access to the Lieutenant Governor and to the Speaker of the House.<sup>45</sup>

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37. SB 1 (HFA), 1993 Ga. Gen. Assem.; O.C.G.A. § 19-7-5(i) (Supp. 1993). The floor amendment was sponsored by Rep. Tom Cauthorn, House District No. 35. SB1 (HFA), 1993 Ga. Gen. Assem.

38. Some penalties were discussed, but none could be agreed on and enforcement would have been a problem. Oliver Interview, *supra* note 19. Because action and cooperation are required on a local level without state funding, the Assembly did not feel that it could impose state penalties. Groover Interview, *supra* note 32.

39. SB 2, as passed, 1993 Ga. Gen. Assem.

40. Oliver Interview, *supra* note 19.

41. 1991 Ga. Laws 1320.

42. SB 2, as introduced, 1993 Ga. Gen. Assem.

43. Foster parents were included because as rights for other persons to gain access to records opened up, the Assembly felt that foster parents should similarly be informed. Groover Interview, *supra* note 32. Tragically, this portion of the Act came too late to save the life of four-year-old Donovan Clark, who was killed by a twelve-year-old foster child, an abused boy with a history of arson, theft, and fighting. Donovan's mother, who was also the twelve-year-old's foster parent, has sued the Georgia Department of Human Resources for negligent failure to warn her of the boy's "criminal tendencies." Jingle Davis, *Appling Mom Sues DHR Over Foster Son*, ATLANTA J. & CONST., Mar. 2, 1993, at H2.

44. O.C.G.A. § 49-5-41(a)(10) (Supp. 1993). The Attorney General and Governor may submit a written request to DFACS to examine the records of a particular child. SB 2 (HCS), 1993 Ga. Gen. Assem. The purpose is to get the records in the hands of the state's policy makers when necessary. Oliver Interview, *supra* note 19.

45. SB 2 (HFA), 1993 Ga. Gen. Assem.; O.C.G.A. § 49-5-41(a)(10) (Supp. 1993).

**SB 3**

This Act amends Code sections 15-11-34 and 16-3-21.<sup>46</sup> Code section 15-11-34 is amended to require a court order to return a child to an abusive home after a court has previously determined the child to be “deprived” and ordered the child removed from the home.<sup>47</sup> The court need not conduct a formal hearing before deciding whether or not to re-transfer the child.<sup>48</sup> This amendment adds a judicial check on DFACS’ discretion to return a child to an abusive home.<sup>49</sup>

The Act also establishes the “battered spouse” or “battered child” defense to homicide.<sup>50</sup> Under this law, persons who use force in self-defense or in defense of others may introduce evidence, in a criminal prosecution for murder or manslaughter, that they were a victim of family violence or child abuse by the deceased.<sup>51</sup> Further, such defendants may also present expert testimony on the effects of abuse on the defendant and the defendant’s state of mind at the time of the homicide.<sup>52</sup>

The Senate Judiciary Committee amended the bill to permit a court to find a child “deprived” while in the custody of the Department of Human Resources or DFACS.<sup>53</sup> This amendment was the most controversial part of the bill because DFACS strongly opposed it.<sup>54</sup>

The final amendment to the bill related to evidence admissible in criminal trials.<sup>55</sup> Under current law, a criminal defendant testifying in his own behalf must first put his character in issue before evidence of his bad character is admissible against him.<sup>56</sup> Under the amendment proposed in SB 3, a defendant’s prior convictions for cruelty to children or any sexual offense, homicide, assault, or battery committed against a victim under the age of eighteen would be admissible in a trial for any

46. SB 3, as passed, 1993 Ga. Gen. Assem.

47. O.C.G.A. § 15-11-34 (Supp. 1993)

48. Oliver Interview, *supra* note 19. Robert Bassett, lobbyist for the Council of Juvenile Court Judges, stated, “Already the courts are overloaded. If this passes, they are going to be maxed out beyond belief.” Beverly Shepard, *Abuse Bill May Strain Courts*, ATLANTA J. & CONST., Jan. 19, 1993, at C6. However, Sen. Mary Margaret Oliver stated that the Juvenile Courts did not oppose the bill. Oliver Interview, *supra* note 19.

49. Beck Interview, *supra* note 10.

50. O.C.G.A. § 16-3-21(d) (Supp. 1993).

51. According to Sen. Mary Margaret Oliver, current Georgia case law supports the “battered spouse” defense. Oliver Interview, *supra* note 19.

52. O.C.G.A. § 16-3-21(d) (Supp. 1993).

53. O.C.G.A. § 15-11-34(c) (Supp. 1993); SB 3 (SCS), 1993 Ga. Gen. Assem.

54. Oliver Interview, *supra* note 19. Despite DFACS opposition to this provision, however, fifty-one abused children died while in state custody in 1988. Loupe, *supra* note 9.

55. SB 3, as introduced, 1993 Ga. Gen. Assem.

56. Oliver Interview, *supra* note 19.



one of those offenses regardless of whether the defendant has first put his character into issue.<sup>57</sup> The Senate broadened this exception to include defendants not testifying at all.<sup>58</sup> However, the entire amendment was deleted by the House and does not appear in the Act.<sup>59</sup>

### *HB 333*

This Act amends Code sections 15-11-58 and 49-5-41 relating to persons authorized to have access to child abuse report records.<sup>60</sup> The Act allows school administrators, guidance counselors, principals, and teachers to access records, as part of their student counseling duties, by court order and subject to strict confidentiality restrictions.<sup>61</sup> The Act particularly specifies that a student's records of marijuana and controlled substance abuse may also be released to school officials.<sup>62</sup>

This Act also amended Code section 49-5-41 to include school principals, guidance counselors, school social workers, or psychologists

57. SB 3, as introduced, 1993 Ga. Gen. Assem.

58. SB 3 (SFA), 1993 Ga. Gen. Assem. In a Senate Judiciary Committee Meeting held Feb. 9, 1993, Jack Martin of the Georgia Association of Criminal Defense Lawyers pointed out that the bill, as originally drafted, allowed evidence of prior convictions to be used only against a defendant testifying in his own behalf. Therefore, to avoid this penalty, a defense lawyer needs only to prevent his client from testifying. *Lawmakers '93* (WGTV television broadcast, Feb. 11, 1993) (videotape available in Georgia State University College of Law Library). To rectify the discrepancy, SB 3 (SFA) removed the condition that the defendant testify. SB 3 (SFA), 1993 Ga. Gen. Assem.

59. O.C.G.A. § 24-9-20 (Supp. 1993); SB 3 (HCS), 1993 Ga. Gen. Assem. The section of the bill removed by the House Judiciary Subcommittee attempted to establish a "similar transaction" rationale to circumvent the inadmissibility of certain character evidence. Groover Interview, *supra* note 32. However, the Subcommittee members did not want to create a special evidentiary law for child abuse. *Id.* Instead, the admissibility of similar transactions is left to the discretion of the court. *Id.* Moreover, allegations of prior instances of child or family abuse, once made, are highly inflammatory and often impossible to rehabilitate. *Id.* "Once the accusation is made, it's like Humpty Dumpty; you can't put him back together again." *Id.*

60. Rep. Thomas saw the need for opening child abuse records to school counselors and psychologists after speaking with a group of them. Thomas Interview, *supra* note 22. The counselors complained that their work with students was ineffective if they did not know what problems they were dealing with. *Id.* A student in counseling may be suddenly absent for a period of time because he or she was placed in foster care in another school district or the child was sent to the Youth Detention Center. *Id.* The information disclosed in these records would advise school officials how to continue counseling and it may also be used to protect staff and students from a student who has a history of violence. *Id.*

61. O.C.G.A. § 15-11-58 (Supp. 1993).

62. *Id.* Such records were enumerated so that school officials could access more information than just child abuse, neglect, or criminal reports. *Id.* The intent is that school counselors have a full history of a student's problems in order to better counsel the student. Thomas Interview, *supra* note 22.

in the list of persons allowed access to child abuse records.<sup>63</sup> A Senate floor amendment attempted to require that the local school superintendent request that a student's records be released, but this requirement did not appear in the final version of the bill.<sup>64</sup> The bill faced virtually no opposition in the General Assembly,<sup>65</sup> and no significant changes were made to the Act as it moved through the legislature.

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63. O.C.G.A. § 49-5-41 (Supp. 1993).

64. Sen. Charles "Chuck" Clay, Senate District No. 37, sponsored the Senate floor amendment, but the Conference Committee removed the requirement because it added another time-consuming procedural step to the process of obtaining records. Thomas Interview, *supra* note 22.

65. *Id.*