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SB 331 - Parent and Child Relationship Generally

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DOMESTIC RELATIONS

Parent and Child Relationship Generally: Amend Code Section 2 of Chapter 11 of Title 15 of the Official Code of Georgia Annotated and Title 19 of the Official Code of Georgia Annotated, Relating to Definitions for the Juvenile Code and Domestic Relations, Respectively, so as to Provide How Causing a Child to be Conceived as a Result of Rape is Involved in Terminating Parental Rights; Revise a Definition; Provide that Causing a Child to be Conceived as a Result of Rape is Relevant in Legitimation and Adoption Proceedings; Provide for a Stay of Discovery under Certain Circumstances; Amend Section 4 of Chapter 2 of Title 53 of the Official Code of Georgia Annotated, Relating to Inheritance from Children Born Out of Wedlock, so as to Change Provisions Relating to a Father Making a Sworn Statement in order to Inherit from His Child; Provide for Related Matters; Repeal Conflicting laws; and for Other Purposes

CODE SECTIONS: O.C.G.A. §§ 15-11-2 (amended);
19-7-22 (amended); 19-8-10, -11
(amended); 53-2-4 (amended)

BILL NUMBER: SB 331

ACT NUMBER: 361

GEORGIA LAWS: 2016 Ga. Laws 219

SUMMARY: The Act amends provisions of Georgia's domestic relations statutes to allow a court to deny a biological father's legitimation petition or to terminate his parental rights when there is clear and convincing evidence that the child was conceived as a result of rape. If the court denies the biological father's legitimation petition, the child is still capable of inheriting from the father, but the father is not capable of benefiting from the child.

EFFECTIVE DATE: July 1, 2016

History

Between 17,000 and 32,000 women become pregnant as a result of rape each year.¹ Sarah Hughes was one such woman.² During an annual Georgia Right to Life function, Senator Bruce Thompson (R-14th) listened to Ms. Hughes detail how she became pregnant in college after an assailant she did not know raped her.³ Throughout his arrest, the assailant repeatedly threatened Sarah that if she did not pressure the prosecutor to drop or reduce the charges against him, he would use his parental rights as an opportunity to terrorize her.⁴ Once Senator Thompson heard Ms. Hughes's story, he knew legislation would be necessary to allow sexual assault victims to heal and move forward with their lives.⁵

In general, Georgia law favors the family unit and aims to keep children with their parents.⁶ In keeping with this policy, courts cannot terminate parental rights unless they can justify the decision under a reason specifically enumerated in Georgia law.⁷ As relevant Georgia statutes currently read, a parent's rights can only be terminated if the parent consents, the parent has abandoned the child, the parent cannot be found after executing a diligent search, the parent is too mentally ill to care for the child, or the parent has failed to exercise proper care because of misconduct or inability that is established by clear and convincing evidence.⁸ Historically, rape or sexual assault against the

1. *Parental Rights and Sexual Assault*, NAT'L CONFERENCE OF STATE LEGS. (Jan. 28, 2016), <http://www.ncsl.org/research/human-services/parental-rights-and-sexual-assault.aspx>.

2. Telephone Interview with Sen. Bruce Thompson (R-14th) (Apr. 22, 2016) [hereinafter Thompson Interview].

3. *Id.*

4. Thompson Interview, *supra* note 2. A similar issue motivated Senator Brad Raffensperger (R-50th) to introduce HB 713, a bill that failed to make progress in the 2016 session but was similar in purpose to SB 331. Jon Richards, *Parental Rights Legislation Prefiled for 2016 Legislative Session*, PEACH PUNDIT (Dec. 28, 2015), <http://www.peachpundit.com/2015/12/28/parental-rights-legislation-prefiled-for-2016-legislative-session/> (recounting the story of Ms. Shauna Prewitt, who agreed not to testify against her rapist as part of a settlement agreement ensuring the perpetrator would not be a part of her or the child's life).

5. Thompson Interview, *supra* note 2.

6. Carl Vinson Inst. of Gov't, *Termination of Parents' Rights*, GA. LEGAL AID, <http://www.georgialegalaid.org/resource/termination-of-parents-rights/> (last visited June 4, 2016).

7. Lina Guillen, *Termination of Parental Rights in Georgia*, DIVORCENET http://www.divorcenet.com/states/georgia/termination_of_parental_rights_in_georgia (last visited June 4, 2016).

8. O.C.G.A. §§ 19-8-10–11 (2015). Current examples of parental misconduct or inability under O.C.G.A. § 19-8-11 and O.C.G.A. § 15-11-310(a)(3)-(5) may include abuse of the child, abandonment

mother that resulted in a pregnancy was not considered “parental misconduct or inability.”⁹ Consequently, sexual assailants maintained full parental rights to children conceived as a result of sexual assault.¹⁰ Prior to this Act, victims of sexual assault faced re-victimization through continued interactions with their assailants because of the assailants’ parental rights, assailants’ use of parental rights as leverage, or the difficult decision to abort pregnancies.¹¹

By passing SB 331, Georgia joined thirty-four other states, and the District of Columbia, that have enacted legislation to limit the parental rights of sexual assailants.¹² Currently, twenty-two of those states allow for full termination of parental rights if the parent has been convicted of sexual assault that resulted in the birth of a child, while the remaining states “restrict custody or visitation if the child was conceived as a result of a rape or sexual assault.”¹³ Among the twenty-two states that will terminate a sexual assailant’s parental rights, only Hawaii and Oregon still hold the perpetrator responsible for child support.¹⁴

of the child, injury or death to a sibling or parent of the child, failing to comply with a court decree, or a lack of proper parental care or control that “will cause or is likely to cause serious physical, mental, emotional, or moral harm to such child.” O.C.G.A. § 19-8-11; O.C.G.A. § 15-11-310(a)(3)-(5) (2015); O.C.G.A. § 15-11-2(5) (2015).

9. See O.C.G.A. §§ 19-8-11, 15-11-310.

10. Thompson Interview, *supra* note 2.

11. See Joshua Edmonds, *Georgia Right To Life Backs Denying Rapists Parental Rights*, GA. RIGHT TO LIFE (Dec. 10, 2015), <http://grtl.org/?q=grtl-backs-denying-rapists-parental-rights>; Richards, *supra* note 4. Often, a sexual assault perpetrator will use parental rights as leverage against the mother, causing her to drop criminal charges pending against him in exchange for terminating his parental rights to the child. See Thompson Interview, *supra* note 2.

12. NAT’L CONFERENCE OF STATE LEGS., *supra* note 1.

13. *Id.* The following states allow for the termination of parental rights: Alaska, Colorado, Connecticut, Hawaii, Idaho, Kansas, Louisiana, Maine, Missouri, Montana, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Washington, and Wisconsin. *Id.* The following states restrict or prohibit custody and visitation: Arkansas, the District of Columbia, Hawaii, Illinois, Kentucky, Massachusetts, Michigan, Nevada, New Jersey, New York, Rhode Island, Utah, Virginia, and West Virginia. *Id.*

14. *Id.*

*Bill Tracking of SB 331**Consideration and Passage by the Senate*

Senators Thompson (R-14th), Judson Hill (R-32nd), Bill Cowser (R-46th), Joshua McKoon (R-29th), William Ligon, Jr. (R-3rd) and Renee Unterman (R-45th) sponsored SB 331 in the Senate.¹⁵ The Senate read the bill for the first time on February 8, 2016 and referred it to the Senate Judiciary Non-Civil Committee.¹⁶

The bill, as introduced, proposed to change existing law by adding “conception by rape” to a list of circumstances in Code section 19-7-1(b) that terminate parental rights.¹⁷ The Senate Judiciary Non-Civil Committee removed this change from Code section 19-7-1(b) and instead amended Code section 19-7-22(c), relating to legitimation petitions.¹⁸ The new language in subsection (c) created a “presumption against legitimation,” if a biological father attempts to file a legitimation petition for a child he caused to be conceived by rape.¹⁹ The Judiciary Non-Civil Committee favorably reported the bill by Senate Committee substitute on February 16, 2016, and the Senate read it for a second time the following day.²⁰ On February 25, 2016, the Senate read the bill for the third time and adopted the bill by substitute with a vote of 49 to 0.²¹

Consideration and Passage by the House

Representative Brian Strickland (R-111th) sponsored the bill in the House.²² The bill was first read on February 26, 2016.²³ The House read the bill for a second time on February 29, 2016 and referred the

15. Georgia General Assembly, SB 331, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20152016/SB/331>.

16. State of Georgia Final Composite Status Sheet, SB 331, May 5, 2016.

17. SB 331, as introduced, § 2, p. 2, ll. 42–43, 2016 Ga. Gen. Assemb.

18. SB 331 (SCS), § 2, p. 2, ll. 27–38, 2016 Ga. Gen. Assemb.

19. *Id.*

20. State of Georgia Final Composite Status Sheet, SB 331, May 5, 2016.

21. *Id.*

22. Georgia General Assembly, SB 331, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20152016/SB/331>.

23. State of Georgia Final Composite Status Sheet, SB 331, May 5, 2016.

bill to the House Judiciary Committee.²⁴ The House Judiciary Committee passed the bill by Committee substitute on March 16, 2016,²⁵ after making several changes to the Senate version.²⁶ First, the House Committee clarified the language in the bill editing Code section 15-11-2 paragraph 5, which defines the term “Aggravated Circumstances.”²⁷ The House Committee refined the definition of rape by substituting the language “[c]aused his child to be conceived as a result of rape in violation of Code section 16-6-1” with “[c]aused his child to be conceived as a result of having nonconsensual sexual intercourse with the mother of his child or when the mother is less than ten years of age.”²⁸

The House Committee also revised subsection (c) of Code section 19-7-22, granting a presumption of illegitimacy when a father of a child conceived by rape files a petition for legitimation.²⁹ The House Committee again refined the definition of rape by specifying that courts can only deny a father’s legitimation request because the trial was conceived by rape when presented with:

clear and convincing evidence that the father caused his child to be conceived as a result of having nonconsensual sexual intercourse with the mother of his child or when the mother is less than ten years of age, or an offense which consists of the same or similar elements under federal law or the laws of another state or territory of the United States.³⁰

The Committee also added a provision allowing the child to inherit from the father if the legitimation request is denied.³¹ The father, however, is still denied the right to inherit from the child.³² Finally, the Committee added that “[i]f there is a pending criminal proceeding

24. *Id.*

25. *Id.*

26. *See* SB 331 (HCS), 2016 Ga. Gen. Assemb.

27. SB 331 (HCS), § 1, pp. 1–2, ll. 10–26, 2016 Ga. Gen. Assemb.

28. *Compare* SB 331, as introduced, § 1, p. 12, ll. 265–276, 2016 Ga. Gen. Assemb., *with* SB 331 (HCS), § 1, p. 2, ll. 25–26, 2016 Ga. Gen. Assemb.

29. SB 331 (HCS), § 2, p. 2, ll. 28–48, 2016 Ga. Gen. Assemb.

30. *Id.* § 2, p. 2, ll. 36–40, 2016 Ga. Gen. Assemb.

31. *Id.* § 2, p. 2, ll. 41–45.

32. *Id.*

in connection with an allegation made pursuant to subparagraph (A) of this paragraph, the court shall stay discovery in the legitimation action until the completion of such criminal proceeding.”³³

The House Committee similarly amended the definition of rape by substituting language in subsection (a) of Code section 19-8-10, relating to the termination of parental rights in the context of adoption, by substituting “[p]arent caused his child to be conceived as a result of rape in violation of Code section 16-6-1” for “[p]arent caused his child to be conceived as a result of having nonconsensual sexual intercourse with the mother of his child or when the mother is less than ten years of age.”³⁴ The House made the same change for the definition of rape in paragraph (3) of subsection (a) of Code section 19-8-11, relating to petitioning the superior court to terminate parental rights.³⁵

After the House Judiciary Committee approved the bill with its changes, it went to the floor.³⁶ There, Representatives Wendell Willard (R-51st) and Brian Strickland (R-111th) offered an amendment.³⁷ Their proposed amendment revised Code section 53-2-4 of the Official Code of Georgia Annotated, “relating to inheritance from children born out of wedlock.”³⁸ At the time of the suggested amendment, existing law allowed a father to inherit through a child born out of wedlock if he “ha[d], during the lifetime of the child, executed a sworn statement signed by the father attesting to the parent-child relationship.”³⁹ The amendment adds, “provided, however, that when the court determines by clear and convincing evidence that the father caused his child to be conceived as a result of having nonconsensual sexual intercourse with the mother of his child or when the mother is less than ten years of age, such sworn statement shall be insufficient for purposes of this subsection.”⁴⁰

33. *Id.* § 2, p. 2, ll. 46–48.

34. *Compare* SB 331(SCS), § 3, p. 2, ll. 50–51, 2016 Ga. Gen. Assemb., with SB 331 (HCS), § 3, p. 3, ll. 60–62, 2016 Ga. Gen. Assemb.

35. *Compare* SB 331 (SCS), § 4, p. 3, ll. 67–68, 2016 Ga. Gen. Assemb., with SB 331 (HCS), § 4, p. 3, ll. 78–79, 2016 Ga. Gen. Assemb.

36. State of Georgia Final Composite Status Sheet, SB 331, May 5, 2016.

37. SB 331 (HCSFA), 2016 Ga. Gen. Assemb.

38. *Id.*

39. *Id.*

40. SB 331 (HCSFA), 2016 Ga. Gen. Assemb.

The House passed the bill by substitute as amended on March 16, 2016.⁴¹ The Senate passed the House's version of the bill on March 24, 2016.⁴² On March 31, 2016, the bill was sent to Governor Nathan Deal (R), and he signed it into law on April 26, 2016.⁴³

The Act

Rape as an Aggravated Circumstance

Section 1 of the Act adds subsection (G) to Code section 15-11-2(5), which defines “aggravated circumstances.”⁴⁴ The addition includes “a parent causing his child to be conceived as a result of rape” in the definition of aggravated circumstances.⁴⁵ “Aggravated circumstances” are grounds for terminating parental rights.⁴⁶ Thus, the creation of Code section 15-11-2(5)(G) adds that a father causing his child to be conceived by rape is grounds for terminating his parental rights.

Rape Causing a Presumption Against Legitimation

Section 2 of the Act adds Code section 19-17-22(c)(2)(A–C). Code section 19-7-22 provides a method for a father of a child born out of wedlock to legitimize his relationship with his child.⁴⁷ Upon the father's petition, the court may issue an order declaring the father's relationship with the child to be legitimate.⁴⁸ Thereafter, the father and child are capable of inheriting from each other as if the child were not born out of wedlock.⁴⁹ The new subsections allow a court to presume that a biological father's relationship to the child is not legitimate if there is clear and convincing evidence that the child was conceived by rape.⁵⁰ The added subsections also state that regardless

41. State of Georgia Final Composite Status Sheet, SB 331, May 5, 2016.

42. *Id.*

43. *Id.*

44. 2016 Ga. Laws 219, § 1, at 220.

45. *Id.*

46. O.C.G.A. § 15-11-310 (Supp. 2016).

47. O.C.G.A. § 19-7-22 (Supp. 2016).

48. *Id.*

49. *Id.*

50. O.C.G.A. § 19-17-22(c)(2)(A)–(C) (Supp. 2016).

of whether the court denies the legitimation petition, the child will be capable of inheriting from his or her father.⁵¹ However, if the court denies the petition, the father will not be allowed to inherit from the child.⁵²

Finally, Section 2 of the Act, adds that if there is a criminal proceeding in connection with an allegation that the father should be presumed illegitimate because the child was conceived by rape, then discovery should be stayed in the legitimacy action until the criminal proceeding is complete.⁵³

Rape Terminates Parental Rights in Context of Adoption

Code section 19-8-10(a) provides a list of circumstances where a parent is not required to formally surrender or terminate their parental rights under Code sections 19-8-4, 19-8-5, 19-8-6, or 19-8-7, prior to the adoption of their child.⁵⁴ Section 3 of the Act amends Code section 19-8-10(a) to add the child being conceived by rape as a circumstance where the child can be adopted without having the father's rights terminated or surrendered under the aforementioned Code sections.⁵⁵

Rape Terminates Parental Rights of Remaining Parent by Court Petition

Section 4 of the Act amends Code section 19-8-11 sets forth the procedure a department or child-placing agency should follow for terminating the parental rights of a parent after the other parent's rights have already been terminated.⁵⁶ Now, if a court determines by clear and convincing evidence that the parent caused his child to be conceived by rape, Code section 19-8-11(a)(3) provides that a department or child-placing agency may terminate parental rights of the remaining parent.⁵⁷

51. *Id.*

52. *Id.*

53. *Id.*

54. O.C.G.A. § 19-8-10(a) (Supp. 2016).

55. *Id.*

56. O.C.G.A. § 19-8-11 (Supp. 2016).

57. O.C.G.A. § 19-8-11(a)(3) (Supp. 2016).

Rape Causes Father's Sworn Statement to be Insufficient for Inheritance Purposes

Section 5 amends Code section 53-2-4 which defines the rights of inheritance from a child born out of wedlock.⁵⁸ The mother of the child, other children of the mother, and maternal kin may automatically inherit from the child born out of wedlock as if the child were legitimate.⁵⁹ The father, however, may not automatically inherit.⁶⁰ Code section 53-2-4(b)(1-5) lists ways that a father may inherit from the child.⁶¹ One such way, listed in Code section 53-2-4(b)(3), is if “the father has, during the lifetime of the child, executed a sworn statement signed by the father attesting to the parent-child relationship.”⁶² The Act adds language to Code section 53-2-4(b)(3), making a sworn statement insufficient to permit a father to inherit from a child if the court determines by clear and convincing evidence that the child was conceived by rape.⁶³

Analysis

Legislators originally intended for SB 331 to terminate parental rights only if the father was formally convicted of rape.⁶⁴ Legislators quickly realized, however, rape is often under-reported and the assaults that are reported do not always result in a criminal conviction.⁶⁵ Therefore, as originally constructed, SB 331 would have left many mothers outside the scope of its protection.⁶⁶ To address this gap, legislators revised SB 331 early in the session to apply to cases where a child was conceived as a result of “nonconsensual sexual intercourse” rather than requiring “a child to be conceived as a result of rape in violation of Code section 16-6-1,”

58. O.C.G.A § 53-2-4 (Supp. 2016).

59. *Id.*

60. *Id.*

61. O.C.G.A § 53-2-4(b)(1)–(5) (Supp. 2016).

62. O.C.G.A § 53-2-4(b)(3) (Supp. 2016).

63. *Id.*

64. *See* Thompson Interview, *supra* note 2.

65. *See id.*

66. *Id.* Many rape charges are pled down to sexual assault. *Id.*

lessening the mother's burden to terminate the father's parental rights.⁶⁷

The decision to change the requirement from a rape conviction to any "nonconsensual sexual intercourse" was not without controversy.⁶⁸ Some legislators and commentators expressed concerns that mothers' families could use the law as a punitive tool against fathers.⁶⁹ For example, the drafters did not want a mother's disapproving parents or grandparents, who may raise a child conceived from a consensual dating relationship, to use this bill as a way to exclude the biological father from a future relationship with the mother and child.⁷⁰ The drafters believe that placing the initial burden of proving nonconsensual intercourse on mothers will alleviate this concern and eliminate the potential for abuse.⁷¹

Burden of Proof

For the court to effectively terminate parental rights, deny a legitimation petition, or prevent the biological father from inheriting from the child, the mother must prove the allegations of "nonconsensual sexual intercourse" by "clear and convincing evidence."⁷² The Supreme Court held in *Santosky v. Kramer* that the intermediate standard of proof—"clear and convincing evidence"—was appropriate when determining whether the rights of a parent should be terminated upon finding a child was "permanently neglected."⁷³ The Court found termination of parental rights "particularly more important and more substantial than mere loss of money" to apply the "fair preponderance of the evidence standard."⁷⁴

At the same time, requiring a mother to prove "nonconsensual sexual intercourse" beyond a reasonable doubt would be improper because "termination proceedings often require the factfinder to

67. Compare SB 331 (as introduced), § 1, p. 1, ll. 26–27, 2016 Ga. Gen. Assemb., with O.C.G.A. § 15-11-2(5)(G) (Supp. 2016).

68. See Thompson Interview, *supra* note 2.

69. *Id.*

70. *Id.*

71. *Id.*

72. O.C.G.A. §§ 19-7-22(c)(2)(A), 19-8-10(a), 19-8-11(a)(3), 53-2-4(b)(3) (Supp. 2016).

73. *Santosky v. Kramer*, 455 U.S. 745, 770 (1982).

74. *Id.* at 756–58.

evaluate medical and psychiatric testimony, and to decide issues difficult to prove to a level of absolute certainty, such as lack of parental motive, absence of affection between parent and child, and failure of parental foresight and progress.”⁷⁵ The “clear and convincing evidence” standard of proof satisfies due process, and appropriately balances the State’s legitimate concern of protecting the welfare of the child with the rights of the person affected by termination proceedings.⁷⁶ Finally, to further protect fathers in Georgia, existing law mandates that all parties involved in termination proceedings either employ counsel or obtain a court appointed attorney to ensure that an indigent parent has representation.⁷⁷

Effects of the Legislation

If a court decides a mother has provided clear and convincing evidence that her child was conceived as a result of nonconsensual intercourse, the effects are wide reaching. For example, in addition to terminating parental rights, SB 331 creates a presumption against legitimation if a male alleged to have fathered a child through nonconsensual sex tries to legitimate his parental rights.⁷⁸ If the court denies a legitimation petition because the child was conceived by nonconsensual sex, the parent whose rights were terminated or not legitimated cannot inherit from the child.⁷⁹ However, the child is still permitted to inherit from the parent whose rights were terminated under these circumstances.⁸⁰ This provision ensures children are protected, but not disadvantaged as a result of their conception.⁸¹ In other words, if the father is financially stable, the State does not want to interfere with the child benefitting from those resources.⁸²

75. *Id.* at 770.

76. *Id.* at 768–69.

77. O.C.G.A. § 15-11-262(j)(2) (2015).

78. O.C.G.A. § 19-7-22(c)(2)(A) (Supp. 2016).

79. O.C.G.A. §§ 19-7-22(c)(2)(B), 53-2-4(b)(3) (Supp. 2016).

80. O.C.G.A. § 19-7-22(c)(2)(B).

81. *See* Thompson Interview, *supra* note 2.

82. *Id.*

Alternatively, if the child receives an inheritance from the mother, the father has no access to that inheritance.⁸³

Other States

Unlike courts in other states, Georgia courts can terminate a father's parental rights without a criminal conviction of sexual assault or rape.⁸⁴ As a result, Georgia is able to provide protection to a greater number of women that would otherwise be excluded if their perpetrator pled to lesser charges or was never convicted of rape. Georgia also has more expansive legislation than many other states since it terminates all parental rights and not just some rights, such as terminating custodial rights but allowing for visitation. Additionally, unlike laws in many states, SB 331 permits courts to assign a child support order to a father despite the termination of his parental rights.⁸⁵ Any implications of these enhanced protections will likely manifest themselves over time as Georgia courts interpret and apply the new law.

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83. *Id.*

84. *Termination of Rapists' Parental Rights Laws*, RAPE, ABUSE, & INCEST NAT'L NETWORK, <https://apps.rainn.org/state-laws/landing-page/> (last updated July 13, 2013).

85. Thompson Interview, *supra* note 2.