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DOMESTIC RELATIONS

Parent and Child Relationship Generally: Provide a Standard for Loss of Parental Power; Enforcement of Duty of Support: Change Procedures Relating to Periodic Review and Adjustment of Administrative and Judicial Child Support Orders

CODE SECTIONS:	O.C.G.A. §§ 19-7-1, 19-9-2, 19-11-12 (amended)
BILL NUMBER:	SB 348
ACT NUMBER:	740
GEORGIA LAWS:	1996 Ga. Laws 412
SUMMARY:	The Act amends several aspects of Georgia domestic relations law. First, the Act provides that in any action involving the custody of a child between a parent and a third party, the court will consider the best interests of the child. Second, the Act provides that the court may, upon petition, look to the child's best interest in determining custody upon the death of either parent. Finally, the Act revises the procedures relating to the periodic review and adjustment of administrative and judicial child support orders.
EFFECTIVE DATE:	April 2, 1996[1]

History

Traditionally, when a parent attempted to regain custody from a third-party parental surrogate, courts generally applied a parental rights standard and awarded custody to the biological parent unless the nonparent could show that the parent was unfit.[2] Thus, a natural right to custody of the child by the biological parent was presumed, so long as the parent was fit. Additionally, parental fitness was presumed, absent clear and convincing evidence to the contrary.[3]

However, as traditional definitions of "parent" and "family" continue to change, courts are increasingly confronted with situations in which a biological parent seeks to regain custody from a third-party surrogate parent, such as a grandparent or other relative.[4] Often, the child and

1. The Act became effective upon approval by the Governor.

2. Suzette M. Haynie, Note, *Biological Parents v. Third Parties: Whose Right to Child Custody is Constitutionally Protected?*, 20 GA. L. REV. 705, 708 (1986).

3. Patman v. Patman, 231 Ga. 657, 203 S.E.2d 486 (1974).

4. Telephone Interview with Sen. David Ralston, Senate District No. 51 (Apr. 22,

surrogate develop strong emotional ties, and determining who should receive custody presents a problem.[5] Consequently, courts and legislatures have begun to shift their emphasis in custody disputes to the best interests of the child.[6] This shift is reflected in SB 348.[7]

Additionally, prior to the Act, the Georgia Department of Human Services (DHR) reviewed and modified a child-support order pursuant to an established administrative procedure within the DHR.[8] This support order review procedure is a requirement for federal funding and is a mechanism to ensure that support payment obligations correspond with changes in family financial circumstances.[9] A party disappointed with the result of a review could appeal the decision to the State Office of Administrative Hearings and ultimately to the Superior Court.[10] However, in November 1995, the Court of Appeals of Georgia held that the DHR lacked the authority to modify a court-ordered child support obligation.[11] The court stated that Code section 19-11-12, upon which the DHR relied, authorizes review and modification only of "IV-D" child support orders.[12] The court held that IV-D orders were orders arising from administrative decisions of the DHR, Office of Child Support Recovery and did not include court orders.[13] After the decision, the DHR immediately ceased administrative review and modification of all judicially derived support orders, and the need for an amendment to the Code was recognized.[14]

SB 348

Best Interest of the Child

Section 1 of the Act amends Code section 19-7-1 by adding a new subsection which provides that in any action involving the custody of a

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1996) [hereinafter Ralston Interview]. Senator Ralston, sponsor of SB 348, is Secretary of the Senate Judiciary Committee. *Id.*

5. *Id.*

6. Haynie, *supra* note 2, at 707.

7. Telephone Interview with Sen. Mary Margaret Oliver, Senate District No. 42 (May 9, 1996) [hereinafter Oliver Interview]. Senator Oliver is the Vice-Chairman of the Senate Education Committee and the Chairman of the Senate Judiciary Committee. *Id.*

8. Telephone Interview with Robert Swain, Deputy Director, Child Support Enforcement, Georgia Department of Human Resources (May 9, 1996) [hereinafter Swain Interview].

9. *Id.*

10. *Id.*

11. Department of Human Resources v. Siggers, 219 Ga. App. 1, 463 S.E.2d 544 (1995).

12. *Id.* at 2, 463 S.E.2d at 545.

13. *Id.*

14. Swain Interview, *supra* note 8.

child between the parents or either parent and certain specifically defined third parties, parental power may be lost if the court determines that an award to the third party is in the best interest of the child.[15]

The Act creates a rebuttable presumption in favor of custody to the parent, but the presumption vanishes upon a showing that parental custody is contrary to the child's best interest.[16] Additionally, section 2 of the Act amends Code section 19-9-2 by allowing the court to utilize the best interest of the child standard in the event that a petition of custody is made upon the death of one parent.[17]

Senator Ralston explained that these changes reflect the legislature's intent to move Georgia law away from a strict "parental priority rights" standard and toward an examination of the best interest of the child when custody is at issue.[18] He stated that these changes make the child's welfare the paramount consideration in custody determinations and reject the earlier reliance on "fitness" as the primary determinative criterion for custody.[19] Senator Ralston noted that this approach is consistent with the national trend in domestic relations law.[20] Additionally, in an attempt to streamline the Act, a portion of the original bill clarifying the language concerning the right of a child above the age of fourteen to choose a custodial parent was deleted.[21]

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15. O.C.G.A. § 19-7-1(b)(1) (Supp. 1996). The Act limits the definition of a third party to "grandparent, aunt, uncle, great aunt, great uncle, sibling or adoptive parent" for purposes of challenging custody. *Id.*

16. *Id.*

17. *Id.* § 19-9-2.

18. Ralston Interview, *supra* note 4. With the exception of an initial amendment by Senator Ralston himself, and a later amendment offered by Senator Barnes, the Act is substantially similar to the as-introduced bill. *Id.*

19. *Id.* Senator Ralston mentioned that the "fitness" standard prevented the introduction of a variety of evidence regarding past parental activities that initially led to the surrogate custody arrangement. *Id.* This exclusion of relevant background information allowed the proceedings to focus in an inappropriately narrow manner solely on the parent's present fitness to assume responsibility for the child. *Id.* Additionally, the admissibility of evidence of the child's emotional ties to the surrogate and other information regarding the child's care and comfort with the surrogate was limited. *Id.*

20. *Id.*

21. *Id. Compare* SB 348, as introduced, 1996 Ga. Gen. Assem. *with* O.C.G.A. § 19-9-3 (Supp. 1996). The original bill would have given the court the power to deny a child's selection of his or her custodial parent if the court determined the selection not to be in the child's best interest. SB 348, as introduced, 1996 Ga. Gen. Assem. The original bill also contained some minor clarifications and added gender neutral language to Code section 19-9-3. *Id.*

Procedures for Review and Modification of Support Orders

In order to amend Code section 19-11-12, Representative Roy Barnes introduced a floor amendment to SB 348.[22] The amendment establishes a revised procedure for reviewing and modifying child support orders.[23] The revision was prompted by a recent judicial decision that limited the review authority of the DHR.[24]

According to Mr. Robert Swain, Deputy Director of Child Support Enforcement for the DHR, the revised review and modification procedure provides for periodic review of judicial and administrative orders no later than thirty-six months after filing.[25] The state will notify parents subject to a child support order at least thirty days prior to the review.[26] Upon an administrative review and determination that a change in support levels is warranted, the DHR shall make a recommendation that the existing order be modified.[27] If the order is administrative in origin, the DHR will request a modification from an administrative law judge.[28]

However, if the order is judicial in origin, the agency will petition the superior court to adopt the agency's recommendation, at which time the parties to the court order will be given an opportunity to respond.[29] If neither party objects to the DHR recommendation, the superior court will issue an order adopting the recommendation of the DHR.[30] In the event that a party objects to the proposed modification, the superior court will conduct a de novo proceeding to consider the matter.[31] Thus, the revised procedure allows for continued expeditious review and modification of child support agreements, while ensuring that DHR

22. SB 348 (HFA), 1996 Ga. Gen. Assem.; Swain Interview, *supra* note 8. Mr. Swain explained that SB 348, as introduced, served as a "vehicle" for Representative Barnes' amendment to promote passage of both proposals prior to the expiration of the legislative session. Swain Interview, *supra* note 8.

23. O.C.G.A. § 19-11-12 (Supp. 1996).

24. Swain Interview, *supra* note 8; *see* Department of Human Resources v. Siggers, 219 Ga. App. 1, 463 S.E.2d 544 (1995).

25. Swain Interview, *supra* note 8.

26. *Id.*

27. *Id.*

28. *Id.*

29. O.C.G.A. § 19-11-12(c)(4) (Supp. 1996).

30. *Id.* Mr. Swain explained that this portion was the critical piece of the Code revision, because the core holding in *Siggers* was that the DHR lacked the authority to unilaterally modify a valid court-ordered child support obligation. Swain Interview, *supra* note 8. After the revision, all judicially derived support orders will be modified pursuant to a superior court proceeding, although the DHR will retain authority to modify all orders that result from administrative agency decisions. *Id.*

31. O.C.G.A. § 19-11-12(c)(4) (Supp. 1996).

implemented modifications are confined within the limits of the DHR's authority.[32]

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32. Swain Interview, *supra* note 8.