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DOMESTIC RELATIONS

Parent and Child Relationship Generally: Provide Requirements and Judicial Standards for Original Actions for Visitation Rights or Intervention; Provide for Revocation or Amendment of Visitation Rights

CODE SECTION:	O.C.G.A. § 19-7-3 (amended)
BILL NUMBER:	SB 640
ACT NUMBER:	954
GEORGIA LAWS:	1996 Ga. Laws 1089
SUMMARY:	The Act prohibits an original action for grandparent visitation where the parents of the child are not separated and the child is living with both parents. If an original action is allowed, the Act requires the court to make specific written findings of fact that the granting of grandparent visitation rights is in a child's best interest and that the child's health or welfare would be harmed if such visitation is denied. The Act also provides for the appointment and compensation of a guardian ad litem and mediation under certain circumstances.
EFFECTIVE DATE:	April 15, 1996[1]

History

Common law provided grandparents "no legal right of visitation with their grandchildren over the objections of the parents."[2] Common law courts did allow for grandparent visitation by consideration of either the "parents' rights to control and maintain custody of the child . . . or the child's welfare and best interests."[3]

In 1976, the State of Georgia first enacted a Grandparents' Visitation Statute.[4] This statute has been described by various courts as the

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

2. Brooks v. Parkerson, 265 Ga. 189, 454 S.E.2d 769 (1995); *see* Bruce S. Sostek, Note, *Grandparents' Visitation Rights In Georgia*, 29 EMORY L.J. 1083 (1980).

3. Cynthia F. Zebrowitz, Note, Brooks v. Parkerson: *To Grandmother's House We Go—The Visitation Rights of Grandparents in Georgia*, 11 GA. ST. U. L. REV. 779, 780 (1995) (providing a detailed overview of the history of the Grandparents' Visitation Statute and of the *Brooks v. Parkerson* controversy that resulted in the statute being found unconstitutional).

4. 1976 Ga. Laws 247; *see Brooks*, 265 Ga. at 190 n.2, 454 S.E.2d at 770 n.2.

"Grandparents' Bill of Rights"[5] and has allowed the trial court, at its discretion, to grant reasonable visitation rights to a grandparent whenever the court had before it a question regarding the guardianship or custody of a child.[6]

Responding to the plea of Judge Shulman in the case of *Mead v. Owens*[7] for "the strong and natural love that grandparents have for their grandchildren [to] be recognized to a greater extent and that their rights to implement that affection . . . be legally enlarged,"[8] the statute was amended by the Georgia General Assembly in 1980.[9] This amended statute authorized the trial court to allow "grandparents to intervene for visitation when questions of guardianship were before a court and to file an original action whenever: (1) one parent dies; (2) one parent dies and the survivor remarries regardless of whether the child has been adopted by the stepparent; or (3) the parental rights of one of the biological parents have been terminated."[10]

In 1981, two additional modifications were made to the Grandparents' Visitation Statute. First, the Georgia General Assembly provided a grandparent's right to intervene in an ongoing divorce or custody fight to petition for visitation rights and also provided for an original action if the parents were divorced.[11] Second, the General Assembly limited the number of times a grandparent could file an original action to once during any two-year period, changing this from the previously allowed once per calendar year.[12]

The Grandparents' Visitation Statute received its last major modifications in 1988 and 1993. The 1988 amendment was extensive and granted a grandparent, even in the absence of issues of custody and guardianship being before the court, the right to file an original action and to intervene in any action "concerning the custody of a minor child, a divorce of the parents . . ., [or] a termination of the parental rights of either parent. . . ."[13] Grandparents could also seek visitation rights when the child was adopted by the child's blood relative.[14] This last provision had the effect of repealing that portion of the 1980 amendment that allowed a grandparent to seek visitation when the

5. *See, e.g.*, Heard v. Coleman, 181 Ga. App. 899, 900, 354 S.E.2d 164, 165 (1987).
6. 1976 Ga. Laws 247.
7. 149, Ga. App. 303, 254 S.E.2d 431 (1979).
8. *Id.* at 304, 254 S.E.2d at 432 (Shulman, J., concurring specially).
9. 1980 Ga. Laws 936.
10. Zebrowitz, *supra* note 3, at 787-88; *see* Brooks v. Parkerson, 256 Ga. 189, 190 n.2, 454 S.E.2d 769, 770 n.2 (1995).
11. 1981 Ga. Laws 1318.
12. *Compare id. with* 1980 Ga. Laws 936.
13. 1988 Ga. Laws 864, § 1, at 867.
14. *Id.*

grandchild had been adopted by a stepparent.[15] This failing was addressed by the Georgia General Assembly in 1993, when adoption by a stepparent was added to the list of actions in which grandparents have the right to intervene and petition for visitation.[16] After this final amendment, the statute essentially "allow[ed] a grandparent to bring an action for visitation under any circumstances . . . except that an original petition may not be filed more than once in any two-year period."[17]

In 1995, the Georgia Supreme Court in *Brooks v. Parkerson*[18] found the Grandparent Visitation Statute unconstitutional "because it does not clearly promote the health or welfare of the child and does not require a showing of harm before state interference is authorized."[19] The Georgia Supreme Court looked to the United States Supreme Court's recognition of "a constitutionally protected interest of parents to raise their children without undue state interference"[20] and for the "protection of the family unit under the due process and equal protection clauses of the Fourteenth Amendment, and under the privacy aspect of the Ninth Amendment."[21]

The Georgia Supreme Court also found comparable liberty and privacy rights protections to exist under the state constitution, noting that "[t]he right to the custody and control of one's child is a fiercely guarded right in our society and in our law. It is a right that should be infringed upon only under the most compelling circumstances."[22] The cumulative effect of the statute's failings led the court to find the statute unconstitutional under both federal and state constitutions.[23]

Senator Abernathy sponsored this bill in an effort to provide a constitutionally viable statute that recognizes both the child's and the grandparents' best interests in facilitating the maintenance of an ongoing relationship between the parties.[24] The Act's language reflects the General Assembly's careful attempt to follow the Georgia Supreme

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15. *Compare id. with* 1980 Ga. Laws 936, § 1, at 937.

16. 1993 Ga. Laws 456, § 1, at 457 (formerly found at O.C.G.A. § 19-7-3(b) (Supp. 1995)).

17. Brooks v. Parkerson, 265 Ga. 189, 190 n.2, 454 S.E.2d 769, 770-71 n.2 (1995).

18. *Id.* at 189, 454 S.E.2d at 769.

19. *Id.* at 194, 454 S.E.2d at 774.

20. *Id.* at 191, 454 S.E.2d at 771 (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

21. *Id.* at 191, 454 S.E.2d at 772 (citing Stanley v. Illinois, 405 U.S. 645, 651-52 (1972)).

22. *Id.* at 192, 454 S.E.2d at 772 (quoting *In re* Suggs, 249 Ga. 365, 367, 291 S.E.2d 233, 235 (1982)).

23. *Id.* at 194, 454 S.E.2d at 774.

24. Telephone Interview with Sen. Ralph David Abernathy, III, Senate District No. 38 (May 9, 1996) [hereinafter Abernathy Interview].

Court's instruction regarding grandparents' visitation rights as explained in *Brooks v. Parkerson*.[25]

The original focus on the proposed legislative changes was to modify the judicial standard in accordance with the constitutional requirements developed in *Brooks*.[26] A secondary purpose of the original bill was to provide both a guardian ad litem provision and an extensive mediation procedure for the determination of visitation rights.[27]

SB 640

Judicial Standard

As introduced in the Senate, the bill would have changed Code section 19-7-3(c) to read: "the court may grant any grandparent of the child reasonable visitation rights upon a showing that a failure to grant such visitation rights would be harmful to the child and otherwise not in the best interest of the child."[28] This language was inserted in an effort to closely mimic the "acceptable" language described in the *Brooks* case.[29] The court in *Brooks* specifically noted that the state's interference with "a parent's right to raise children is justifiable only where the state acts in its police power to protect the child's health or welfare, and where parental decisions in the area would result in harm to the child."[30] The court held that "state interference with parental rights to custody and control of children is permissible only where the health or welfare of a child is threatened."[31]

The standard was modified and put into its final form by the House Judiciary Committee.[32] The House Committee's standard states that "the court may grant any grandparent of the child reasonable visitation rights if the court finds the health or welfare of the child would be harmed unless such visitation is granted, and if the best interests of the child would be served by such visitation."[33] The "health and welfare" language was inserted to make the judicial standard mirror

25. 265 Ga. 189, 454 S.E.2d 769 (1995); Abernathy Interview, *supra* note 24.

26. Abernathy Interview, *supra* note 24; *see* SB 640, as introduced, 1996 Ga. Gen. Assem.

27. Abernathy Interview, *supra* note 24; *see* SB 640, as introduced, 1996 Ga. Gen. Assem.

28. SB 640, as introduced, 1996 Ga. Gen. Assem.

29. Abernathy Interview, *supra* note 24.

30. Brooks v. Parkerson, 265 Ga. 189, 193, 454 S.E.2d 769, 772 (1995).

31. *Id.* at 193, 454 S.E.2d at 773.

32. *See* SB 640 (HCS), 1996 Ga. Gen. Assem.

33. *Id.*; O.C.G.A. § 19-7-3(c) (Supp. 1996).

the *Brooks* decision in an effort to make the bill stand up to anticipated judicial inquiry.[34]

The House Committee also added a requirement that "[t]he court shall make specific written findings of fact in support of its rulings"[35] for two reasons. First, it was an effort to comply with the Georgia Supreme Court's requirement that the state could only "impose [grandparent] visitation over the parent's objections on a showing that failing to do so would be harmful to the child."[36] Second, it was an attempt to make the appellate review process less complex and mystifying by providing the actual basis for judicial review.[37]

Finally, the House Committee removed a redundant provision that allowed the court discretion to deny grandparent visitation rights.[38] As the judiciary's proper focus should be on the best interests of the child, the Committee felt that the legislation was sufficiently directive even without stating a presumption in favor of grandparents.[39] It was noted that the courts have discretion to deny visitation rights via the power inherently built into the best interest standard.[40]

Guardian Ad Litem and Mediation

The original bill offered in the Senate also added two new sections to Code section 19-7-3. The first addition allowed for the appointment of a guardian ad litem for the minor child and the assignment of visitation rights cases to mediation if the grandparents could "bear the cost without unreasonable hardship."[41] This guardian ad litem language was added to protect the best interests of the child throughout the proceedings.[42] The mediation language was added in an attempt to limit the potential number of cases that reach the courts.[43] The cost of the guardian ad litem and mediation is to be born solely by the petitioning grandparent.[44] This was done to avoid an undue financial burden on the parents or parent of the affected child.[45]

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34. Abernathy Interview, *supra* note 24.

35. SB 640 (HCS), 1996 Ga. Gen. Assem.; *see* O.C.G.A. § 19-7-3(c) (Supp. 1996).

36. Brooks v. Parkerson, 265 Ga. 189, 194, 454 S.E.2d 769, 773 (1995); Abernathy Interview, *supra* note 24.

37. Abernathy Interview, *supra* note 24.

38. *Compare* SB 640, as introduced, 1996 Ga. Gen. Assem. *with* SB 640 (HCS), 1996 Ga. Gen. Assem.

39. Abernathy Interview, *supra* note 24.

40. *Id.*

41. SB 640, as introduced, 1996 Ga. Gen. Assem.

42. Abernathy Interview, *supra* note 24.

43. *Id.* Mediation was felt to be an ideal medium for the quick and expeditious handling of the vast majority of visitation cases. *Id.*

44. SB 640 (HCSFA), 1996 Ga. Gen. Assem.; O.C.G.A. § 19-7-3 (Supp. 1996).

45. Abernathy Interview, *supra* note 24.

The second addition offered by the original bill provided an extensive and complex series of procedural rules governing the mediation process for grandparent visitation disputes.[46] This section was introduced to provide guidelines to inform the mediators and the courts what should be accomplished in the mediation proceedings.[47] The Senate Judiciary Committee simplified this section by merely stating that mediation is allowed and by requiring the court to fix a hearing time upon failure of mediation or if the court does not order mediation.[48] This modification was deemed sufficient and, while it lacked specific guidelines, it was assumed that the state's current mediation system has enough inherent guidelines to adequately guide the mediation of grandparent visitation suits.[49]

Original Actions

The House Judiciary Committee imposed a limitation on original actions by prohibiting "an original action where the parents of the minor child are not separated and the child is living with both of the parents."[50] This provision was added to the bill in an effort to protect the intact, "nuclear" family.[51] The legislative presumption is that the intact parents will have the best interests of the child in mind.[52] This language was also inserted to comport with Justice Sears' concurring opinion in *Brooks*, in which she states:

> While I have no quarrel with governmental interference where a parent's conduct may injure a child emotionally or physically, interference on less than those grounds is contrary to our common law tradition of protecting the nuclear family as the foundation of society and leaving fit parents the exclusive right to determine what is in their children's best interest.[53]

Representative Ehrhart offered an amendment to further limit the applicability of the statute by also prohibiting an original cause of action in cases "where the custodial parent of the minor child has remarried and the minor child is living with the custodial parent and

46. SB 640, as introduced, 1996 Ga. Gen. Assem.
47. Abernathy Interview, *supra* note 24.
48. SB 640 (SCS), 1996 Ga. Gen. Assem.; *see* O.C.G.A. § 19-7-3(d)-(e) (Supp. 1996).
49. Abernathy Interview, *supra* note 24.
50. SB 640 (HCS), 1996 Ga. Gen. Assem.; *see* O.C.G.A. § 19-7-3(b) (Supp. 1996).
51. Abernathy Interview, *supra* note 24.
52. *Id.*
53. Brooks v. Parkerson, 265 Ga. 189, 195, 454 S.E.2d 769, 774 (1995) (Sears, J., concurring); Abernathy Interview, *supra* note 24.

stepparent."[54] This amendment was offered in an attempt to limit the applicability of the statute to as few categories of grandparents as possible.[55] It was defeated by the House as the membership felt that the amendment imposed an unnecessary restriction.[56] Limiting protection to the intact nuclear family was thought to be an ideal compromise.[57]

Attorney Fees

Representative Barnes offered an amendment to the House committee substitute provided for the award of attorney fees "upon [a] finding that the petition is brought for the purpose of harassment or any other improper purpose."[58] The amendment was incorporated into the Act and was viewed as presenting a potential financial barrier that will discourage grandparents from bringing suit simply to harass.[59]

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54. Journal of the House, 1996 Ga. Gen. Assme., Mar. 13, 1996, at 2281-82.

55. Telephone Interview with Rep. Earl Ehrhart, House District No. 36 (May 7, 1996) [hereinafter Ehrhart Interview]. Representative Ehrhart notes that confrontations requiring such a law generally come up only in adversarial relationships and the potential for abuse of the system is great. He provided an all-too-real example: a single mother with two children who works for a living. This mother probably only has the children to herself for two weekends a month, other than the normal day-to-day workday schedule where she is the "drill sergeant." The non-custodial parent gets the child for the other two weekends. The threat is simple: if the father turns out to be a "deadbeat" and the mother wants to go to the court to enforce the custodial support decree, the father can threaten or blackmail her with having his parents sue for visitation rights, which would reduce her time with the children to one weekend. Representative Ehrhart feels that this bill is a de facto increase in the visitation rights of the noncustodial parent. He feels that the focus should be on the child's best interest, and the child's best interest is not being met by being forced in the middle of three adverse parties: the custodial parent, the non-custodial parent, and the grandparents. *Id.*

56. Abernathy Interview, *supra* note 24. Representative Ehrhart felt that the presence of a large and vocal lobbyist group representing the grandparents politically foreclosed any opportunity to restrict the bill in the manner he proposed. Ehrhart Interview, *supra* note 55.

57. Abernathy Interview, *supra* note 24.

58. *See* SB 640 (HCSFA), 1996 Ga. Gen. Assem.

59. Abernathy Interview, *supra* note 24.