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ARTICLES

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NAVIGATING THE CHALLENGES OF SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) IN GEORGIA FAMILY COURTS..... *Jennifer Giles, Esq.*

ETHICS IN FAMILY LAW IN GEORGIA: SELECTED ISSUES
..... *Patrick Longan*

THE WINDING ROAD TO GRANDMA'S HOUSE: GRANDPARENT VISITATION IN GEORGIA
..... *Suzanne Oldweiler*

NAVIGATING THE CHALLENGES OF SPECIAL IMMIGRANT JUVENILE STATUS IN GEORGIA FAMILY COURTS

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I. INTRODUCTION

Special Immigrant Juvenile Status is a pathway for undocumented minors to seek legal status in the U.S. when they cannot return to their home country due to abuse, neglect, or abandonment. At base, the federal law governing Special Immigrant Juvenile Status is aimed at protecting vulnerable immigrant youth. However, the federal process relies in part upon state law and state court process. Georgia state courts application of state law regarding this federal process leads to unique challenges in minors obtaining the required state orders as directed by federal law governing Special Immigrant Juvenile Status. Key issues with state court application of the law involve jurisdictional questioning, judicial reluctance and inconsistent applications of the law. Thus, Georgia's currently judicial practices regarding Special Immigrant Juvenile Status improperly limit a minor's access to relief and create barriers that undermine the purpose of federal immigration law which is to protect at-risk youth.

In the pages that follow, I will discuss the basic framework for a minor to obtain a status adjustment based on the federal Special Immigrant Juvenile process. I will then examine Georgia-specific issues with application of the federal law.

II. THE FEDERAL FRAMEWORK OF SPECIAL IMMIGRANT JUVENILE STATUS (SIJS)

A. Statutory Authority: Immigration and Nationality Act

Under the Immigration and National Act (INA), an immigrant minor may be able to obtain legal status by petitioning the U.S. Citizenship and Immigration Services (USCIS) for Special Immigrant Juvenile Status (SIJS).[1]

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[1] INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J).

SIJS was established in 1990 by Congress[2] and provides an immigration remedy for immigrant minors who find themselves in the U.S. without legal status and without one or both parents. The SIJS classification initially provided humanitarian protection for abused, neglected, or abandoned alien children eligible for long-term foster care.[3]

Since 1990, Congress has enacted other laws that have modified the SIJS requirements for immigrant minors. In 1994, Congress enacted The Immigration and Nationality Technical Corrections Act, which expanded SIJS eligibility to children who are not only dependent on a juvenile court to children who have been placed in the custody of a state agency or department.[4]

Of most relevant note (and the most current), the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) amended the SIJS process to what it is today. The TVPRA, among other changes, removed the need for a court to deem a child eligible for long-term foster care and replaced it with a requirement that reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law.[5] The TVPRA also expanded eligibility to include children whom a juvenile court has placed under the custody of a person or entity appointed by a state or juvenile court; thus, a child no longer just had to be placed in the custody of a state entity or department.[6]

Additionally, there was an updated Policy Manual issued on October 26, 2016 by USCIS which provided revised standards for evaluating SIJS.[7]

In its current form, in order to petition USCIS pursuant to SIJS, an immigrant minor must first petition a state juvenile court to make certain findings of fact in a predicate order (Predicate Order).[8] Those state court findings must include the following:

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[2] USCIS Policy Updates for Special Immigrant Juveniles: A Practice Advisory for State Court Practitioners.

[3] U.S. Citizenship and Immigration Services, *Chapter 1 - Purpose and Background*, https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-1 (last visited Jan. 6, 2026).

[4] *See* Pub. L. 103-416 (October 25, 1994).

[5] *See* Pub. L. 110-457 (December 23, 2008).

[6] *Id.*

[7] U.S. Citizenship and Immigration Services, *Part J - Special Immigrant Juveniles*, https://www.uscis.gov/policy-manual/volume-6-part-j (last visited Jan. 6, 2026).

[8] 8 U.S.C. §1101(a)(27)(J)(i); 8 C.F.R. § 204.11.

1. The child is dependent upon the juvenile court in accordance with state law governing such declarations of dependency, or has been committed to the custody of a state agency, department, individual or entity;

2. Reunification with one or both immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law; and

3. It is not in the best interest of the child to be returned to the country of nationality or last habitual residence.[9]

These factual findings do *not* automatically entitle a Special Immigrant Juvenile to any lawful status or to lawful permanent residence in the United States. Because even after obtaining the Predicate Order, an immigrant minor must still petition the USCIS for an adjustment to legal immigration status.[10] Thus, there is interplay between state courts and federal immigration law.

B. Roadmap of SIJS Cases

Once an immigrant minor finds themselves in the United States, one of the ways in which a minor can obtain legal immigration status is through SIJS. Sometimes, the immigrant minor is detained by immigration authorities at a border crossing into the United States; yet other times, an immigrant minor has come to the United States with a parent or sibling and then finds themselves in the United States without a parent when that parent returns to their home country. If the immigrant minor has been detained by immigration authorities at the border, immigration authorities typically place the immigrant child with a relative (sibling, aunt/uncle, one parent) who is already in the United States. In situations where the child has arrived with a parent or sibling, they are typically left with a relative who is already in the United States, but who has no parental rights to the child.

However the immigrant child arrives in the United States, the immigrant child is faced with potential deportation proceedings unless legal status is obtained. It is highly likely that the relative with whom the immigrant child is placed has no legal ability to make decisions for the child which can impact a caregiver's ability to enroll a child in school or obtain medical care for the child.

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[9] *See* 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11(a), (c), (d)(2).
[10] *See In re* J.J.X.C., 318 Ga. App. 420 (2012).

C. Role of USCIS vs. Role of State Courts: Federal Immigration Relief Built on State Court Findings.

For a minor child who is seeking an immigration status adjustment pursuant to SIJS, there must be a Predicate Order issued by a "state juvenile court"[11], which is defined as "a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles."[12] In Georgia, this could mean the juvenile courts, superior courts, or potentially the probate courts.[13]
Congress tasked the states with making these determinations because of state courts "responsibility to protect children under their jurisdiction and their expertise…in making decisions about the welfare and best interests of children."[14] In fact, the USCIS Policy Manual states that "USCIS relies on the expertise of the juvenile court in making child welfare decisions and does not reweigh the evidence to determine if the child was subjected to abuse, neglect, abandonment, or a similar basis under state law."[15]

On the other hand, the immigration decision in these cases falls squarely in the purview of federal immigration courts based on their expertise with immigration law. The Trafficking Victims Protection and Reauthorization Act of 2008 simplified but still required that DHS review and consent to the SIJS classification.[16] Thus, although USCIS defers to the state juvenile courts on matters of state law, the ultimate decision on a child's immigration status remains with USCIS.[17]

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[11] 8 U.S.C. § 1101(a)(27)(J)(i).
[12] 8 C.F.R. § 204.11(a).
[13] This article does not discuss the process in Georgia probate courts, but focuses on Georgia juvenile and superior courts.
[14] *A Guide for State Court Judges and Lawyers on Special Immigrant Juvenile Status*, Cristina Ritchie Cooper, March 1, 2017, https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/mar-apr-2017/a-guide-for-state-court-judges-and-lawyers-on-special-immigrant-/
[15] U.S. Citizenship and Immigration Services, *Chapter 2 - Eligibility Requirements*, https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-2 (last visited Jan. 6, 2026).
[16] *Id.*
[17] USCIS has sole jurisdiction over petitions for special immigrant juvenile (SIJ) classification. *See* 8 CFR 204.11(h).

III. GEORGIA'S LEGAL LANDSCAPE: WHERE STATE PRACTICE COLLIDES WITH FEDERAL PURPOSE

A. Introduction

In the intersection of state and federal law, there exists tension where a child's future hinges on a state court's interpretation of overlapping legal systems. In Georgia, this tension is brought to the forefront when courts that are tasked with resolving family and custody matters under Georgia law are asked to issue predicate findings required by federal immigration law for SIJS. The result is a legal landscape where different courts, operating under different mandates, come to differing conclusions regarding immigrant minors. Juvenile courts, with their limited but exclusive jurisdiction over dependency matters, tend to move more smoothly within the SIJS framework. Superior courts, however, often struggle with questions of jurisdiction, evidentiary standards, and even the purpose of SIJS-related requests resisting what can be perceived as federal overreach into state-controlled determinations regarding children. What follows explores the evolving legal framework in Georgia as its courts navigate requests for Predicate Orders under SIJS.

B. Georgia Juvenile Courts

i. Jurisdiction in Georgia Juvenile Courts

Pursuant to the Georgia Constitution, Georgia juvenile courts are courts of limited jurisdiction and only have jurisdiction as provided by law.[18] In relevant part, Georgia juvenile courts have exclusive jurisdiction over any child who is alleged to be a "dependent child".[19] A "dependent child" is defined as follows:

> "Dependent child" means a child who:
>
> **(A)** Has been abused or neglected and is in need of the protection of the court;
> **(B)** Has been placed for care or adoption in violation of law; or
> **(C)** Is without his or her parent, guardian, or legal custodian.[20]

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[18] GA CONST. art. VI, § 3, para. 1.
[19] O.C.G.A. § 15-11-10(1)(C). There are other areas of exclusive jurisdiction, however, the relevant area for this article is "a dependent child".
[20] O.C.G.A. § 15-11-2(22).

Because juvenile courts are solely vested with jurisdiction for and accustomed to cases involving dependent children, there is typically little or no issue with obtaining the Predicate Order needed for the SIJS process. In fact, the power granted to juvenile courts aligns exactly to the required first Predicate Order finding for SIJS: "[t]he child is dependent upon the juvenile court in accordance with state law governing such declarations of dependency…"

There is even further alignment between federal SIJS findings and juvenile court. Under O.C.G.A. § 15-11-2(22), a dependent child can also be a child who is "abused" or "neglected". This not only satisfies the first SIJS required finding of dependency but also satisfies a portion of the second SIJS required finding that "reunification with one or both immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law.[21] Therefore, essentially, if the juvenile court finds a child dependent you have already satisfied the first and a portion of the second requirements of the Predicate Order factual findings.

Of benefit in juvenile court with SIJS cases, there is case law dating back to 2012 that clearly states that a juvenile court is required to make the Predicate Order findings. In *In the Interest of J.J.X.C.*, the juvenile court found the child dependent but failed to make the reunification and best interests findings required for the Predicate Order.[22] Instead, the opinion notes that the juvenile court appears to have struck these findings from the proposed order.[23] The opinion goes on to explain that this is an unusual setting where a state court is having to decide an issue relevant only to federal immigration law but that without the findings the child's immigration status hangs in the balance.[24] Thus, the Georgia Court of Appeals held that the court had to make the requested SIJS findings in its order.[25]

In 2023, the Georgia Court of Appeals solidified this position in two reported cases. In *In the Interest of R.E.Z.B.*, the Georgia Court of Appeals clarified dicta that called *J.J.X.C.* into question.[26] Specifically, the dicta stated: "[t]his opinion should not be read to express any view on whether [the

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[21] 8 U.S.C. §§ 1101(a)(27)(J)(i) - (ii)
[22] 318 Ga. App. 420 (2012).
[23] *Id.*at 425.
[24] *Id.*at 426.
[25] *Id.* (reaffirmed in 2018 in the unpublished opinion of *In the Interest of J.C.*, 344 Ga. App. XXVII (Case No. A17A1496)).
[26] 370 Ga. App. 236, 237 (2023).

child] is entitled to the SIJ findings."[27] In a second opinion in 2023, which is in line with *J.J.X.C.*, the Georgia Court of Appeals held "that the juvenile court has a duty to consider the SIJ factors and to make findings regarding those factors."[28]

As such, it is settled over the course of about a decade that the juvenile courts have jurisdiction to make the Predicate Order findings or find that the evidence does not support those findings. This leads to analysis of the second required SIJS finding involving reunification.

ii. Reunification Finding of Fact

The second required finding of fact for an SIJS Predicate Order requires that the court find that an immigrant child cannot be reunited with one or both of their parents because of abuse, neglect, abandonment, or a similar basis.[29] Again, the Georgia Juvenile Code aligns with the federal immigration requirements.

The Georgia Juvenile Code provides detailed definitions of abuse, neglect and abandonment, a finding of any of which can lead to a successful immigration status adjustment. Under the Juvenile Code:

> "Abuse" means:
>
> **(A)** Any nonaccidental physical injury or physical injury which is inconsistent with the explanation given for it suffered by a child as the result of the acts or omissions of a person responsible for the care of a child;
> **(B)** Emotional abuse;
> **(C)** Sexual abuse or sexual exploitation;
> **(D)** Prenatal abuse; or
> **(E)** The commission of an act of family violence as defined in Code Section 19-13-1 in the presence of a child. An act includes a single act, multiple acts, or a continuing course of conduct. As used in this subparagraph, the term "presence" means physically present or able to see or hear.[30]

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[27] *In re* M.J.H., 366 Ga. App. 872, 876 (2023).
[28] *In re* R.E.Z.B., 370 Ga. App. 236, 238 (2023).
[29] 8 U.S.C. § 1101(a)(27)(J)(i).
[30] O.C.G.A. § 15-11-2(2).

"Neglect" means:

(A) The failure to provide proper parental care or control, subsistence, education as required by law, or other care or control necessary for a child's physical, mental, or emotional health or morals;
(B) The failure to provide a child with adequate supervision necessary for such child's well-being; or
(C) The abandonment of a child by his or her parent, guardian, or legal custodian.[31]

"Abandonment" or "abandoned" means any conduct on the part of a parent, guardian, or legal custodian showing an intent to forgo parental duties or relinquish parental claims. Intent to forgo parental duties or relinquish parental claims may be evidenced by:

(A) Failure, for a period of at least six months, to communicate meaningfully with a child;
(B) Failure, for a period of at least six months, to maintain regular visitation with a child;
(C) Leaving a child with another person without provision for his or her support for a period of at least six months;
(D) Failure, for a period of at least six months, to participate in any court ordered plan or program designed to reunite a child's parent, guardian, or legal custodian with his or her child;
(E) Leaving a child without affording means of identifying such child or his or her parent, guardian, or legal custodian and:
(i) The identity of such child's parent, guardian, or legal custodian cannot be ascertained despite diligent searching; and
(ii) A parent, guardian, or legal custodian has not come forward to claim such child within three months following the finding of such child;
(F) Being absent from the home of his or her child for a period of time that creates a substantial risk of serious harm to a child left in the home;

[31] O.C.G.A. § 15-11-2(48).

> **(G)** Failure to respond, for a period of at least six months, to notice of child protective proceedings; or
> **(H)** Any other conduct indicating an intent to forgo parental duties or relinquish parental claims.[32]

To help illustrate how juvenile courts interpret the above definitions, there are various cases that the Georgia Court of Appeals has relied upon in issuing their decisions regarding SIJS and Predicate Orders.

In a second appeal stemming from the case of *In the Interest of M.J.H.*, the trial court found that testimony did not support a finding of neglect and therefore reunification with the child's mother was viable.[33] The child's testimony showed that he continued to maintain a bond with his mother and sent money back to her in Guatemala and that he was not scared of the gangs in his country but rather did not want to return to Guatemala because he "hadn't finished all [his] plans for the future."[34] However, of additional note, is the trial court's finding that reunification with the child's father (who had passed away) was not viable due to abuse, neglect, abandonment, or a similar basis. Interestingly, although the Court of Appeals found the trial court had not committed reversible error due to an abuse of discretion standard of review, the Court stated in dicta that they had "reached a different conclusion on the matter".[35]

Other cases relevant to SIJS matters, and on which the Georgia Court of Appeals relies in SIJS decisions, show that poverty alone is not enough for a finding of neglect.[36] Although this case was a termination of parental rights and not a Predicate Order matter, it is informative in SIJS matters since poverty is almost always a consideration in SIJS cases. Evidence of poverty can certainly be introduced but it needs to be accompanied by other showings, such as a lack of proper parental control which includes such things as failure to protect from harm or abuse.[37]

Not only does the Georgia Juvenile Code align well with the phrasing of the first two SIJS requirements (dependency and reunification), but case law dating back for about twenty years lends support to requests for SIJS findings in dependency cases. What remains is the final SIJS requirement of

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[32] O.C.G.A. § 15-11-2(1).
[33] 371 Ga. App. 383 (2024).
[34] *Id.*at 389.
[35] *Id.*
[36] *In re* C.J.V., 323 Ga. App. 283 (2013).
[37] *In re* L.A.T., 291 Ga. App. 312 (2008); *In re* A.R., 287 Ga. App. 334 (2007).

the best interests of the child, which the juvenile courts are well-positioned to address.

iii. Best Interest Finding of Fact

Under the best interest finding of fact in 8 U.S.C. § 1101(a)(27)(J)(ii), it must be shown that it is not in the immigrant child's best interest to be returned to their country of nationality or last habitual residence. The best interest requirement fits squarely within the purview of juvenile courts.

O.C.G.A. § 15-11-26 sets out a list of twenty factors a juvenile court can consider when determining the best interests of a child. The list is a non-exhaustive list as the final factor listed includes "[a]ny other factors considered by the court to be relevant and proper to its determination."[38]

Because the best interest factors are all-encompassing, this finding of fact is oftentimes met simply by meeting the "dependency" requirement and the "reunification" requirement of SIJS. Those findings already include references to abuse, neglect and abandonment which touch on various best interest factors set out in O.C.G.A. §15-11-26. Additionally, under the best interest factors, a juvenile court shall consider the "least disruptive placement" for a child, the "child's wishes and long-term goals", and "[a]ny recommendation by a court appointed custody evaluator or guardian ad litem".[39]

A recent Georgia appellate court decision requires a juvenile court to make the best interest finding (or specifically deny it if there is insufficient evidence).[40] In *R.E.Z.B.*, the juvenile court refused to make the best interest finding and instead concluded that the court "lack[s] jurisdictional authority to decide whether a child may physically locate in a particular geographical area."[41] The juvenile court had relied on dicta from a prior 2023 appellate case that stated that the Georgia Court of Appeals was not expressing any view on whether a child is entitled to SIJS findings.[42] The Court clarified that this statement was merely dicta and relying upon *In the Interest of J.J.X.C.* reminded the juvenile court that it has "a duty to consider the SIJ factors and to make findings regarding those factors."[43]

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[38] O.C.G.A. § 15-11-26(20).
[39] O.C.G.A. § 15-11-26(13), 16), and (19).
[40] *In re* R.E.Z.B, 370 Ga. App. 236, 238 (2023).
[41] *Id*. at 237.
[42] *Id*.; See also *In re* M.J.H., 366 Ga. App. 872 (2023).
[43] *R.E.Z.B.*, 370 Ga. App. at 236.

In an even more recent case, a juvenile court failed to make the best interest finding concluding that "decisions concerning where a child may physically locate, under Georgia law, are left within the sole discretion of the child's appointed custodian; not a juvenile court judge."[44] The Court of Appeals notes that in at least two other recent appeals with this same issue, prior precedent supports that it is the duty of the juvenile court to make the finding.[45] The Court explains that "the SIJ statute affirms the institutional competence of state courts as the appropriate forum for child welfare determination regarding abuse, neglect, or abandonment, and a child's best interests."[46] The Court goes on to state that a juvenile court is not rendering immigration decisions by making the Predicate Order findings as that decision rests solely with the federal government.[47]

A few months after *H.D.G.H.,* the Georgia Court of Appeals issued yet another ruling on the best interest issue. In *In the Interest of M.E.P.S.*, the juvenile court found that it could not make the best interest finding for similar reasons present in *H.D.G.H.*[48] However, the juvenile court's order in *M.E.P.S.* relied upon a 2006 deprivation case that addressed the ability of a juvenile court to control placement of a child after granting legal custody to the Department of Family and Children Services.[49] However, the Court of Appeals distinguished cases involving SIJS and again ruled that the juvenile court can indeed make the best interest finding explaining that "a factual finding is not a physical custody placement".[50]

In sum, the juvenile courts are well-situated to make determinations concerning the best interests of a child, which align with the purposes of the required SIJS findings. The Juvenile Code mimics the language of the SIJS Predicate Order findings. However, for an immigrant child and his or her caretaker to avail themselves of juvenile court, the caretaker cannot be a parent to the child.[51] If a child is with a parent in the United States, the parent must proceed to Superior Court, where the process does not necessarily go as smoothly as in juvenile court.

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[44] *In re* H.D.G.H., 371 Ga. App. 34, 35 (2024).
[45] *Id.* at 36.
[46] *Id.* (relying upon *In re* R.E.Z.B., 370 Ga. App. at 238).
[47] *Id.* (relying upon *In re* R.E.Z.B., 370 Ga. App. at 238; and, *In re* J.J.X.C., 318 Ga. App. at 424-25).
[48] Interestingly, both *H.D.G.H.* and *M.E.P.S.* arise from the same juvenile court.
[49] 372 Ga. App. 5, 8 (2024).
[50] *Id.*
[51] O.C.G.A. § 15-11-2(22)

C. Georgia Superior Courts

Georgia superior courts have jurisdiction over, among other areas, "all causes, both civil and criminal, granted to them by the Constitution and laws".[52] Therefore, in Georgia, outside of the limited exclusive jurisdiction granted to juvenile courts, the superior courts have jurisdiction to make decisions regarding child custody.[53] Therefore, if an immigrant child is released to a parent who is in Georgia, in order to obtain the Predicate Order, the parent/immigrant child has to go through superior court. Because the immigrant child is with a parent, the immigrant child cannot be deemed dependent under the limited exclusive jurisdiction of Georgia juvenile courts; and, therefore, cannot seek a remedy in juvenile court.

Although Georgia superior courts are accustomed to cases involving child custody issues, those issues typically come up in divorce, legitimation, or custody modification cases that do not request the specific Predicate Order findings. Cases brought by a parent of an immigrant child seeking a custody order that include the Predicate Order findings of fact are not as common in Superior Courts, even if these cases still involve issues of divorce, legitimation, or custody.

Various issues have arisen with how Superior Courts interpret the required findings in the Predicate Order. Issues include jurisdictional issues, incomplete required findings, and questioning of the intent behind the requests for the required findings.

i. Court Jurisdiction Disputes

Some judges incorrectly interpret the language of the immigration code believing SIJS cases must go through juvenile courts. The INA does indeed state that an immigrant child has to petition a "juvenile court" for the Predicate Order.[54] Based on Georgia law, a juvenile court is not a superior court. However, getting beyond the mere use of the term "juvenile court", a "juvenile court" is defined as follows: "a court located in the United States that has jurisdiction under State law to make judicial determinations about the dependency and/or custody and care of juveniles."[55] Examples of state

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[52] O.C.G.A. § 15-6-8(1).
[53] O.C.G.A. § 19-9-23(a); O.C.G.A. § 19-9-61.
[54] 8 U.S.C. §1101(a)(27)(J)(i); 8 C.F.R. § 204.11.
[55] 8 C.F.R. § 204.11(a).

courts that may meet this definition include juvenile, family, dependency, orphans, guardianship, probate, and youthful offender courts.[56]

Based on the federal definition, the superior courts are in fact classified as a "juvenile court" under 8 C.F.R. § 204.11. Outside of the limited exclusive jurisdiction granted to Georgia juvenile courts, the Georgia superior courts fall within the SIJS "juvenile court" definition as "a court…that has jurisdiction under State law to make judicial determination about the…custody and care of juveniles."[57]

Even though a Georgia superior court could not in fact declare an immigrant child dependent (since that power lies with the Georgia juvenile courts), a Georgia superior court can in fact exercise its power over the custody and care of juveniles that may be in a "dependent condition" under Title 19 of the Georgia Code since Title 19 falls squarely in the purview of Georgia superior courts. O.C.G.A. § 19-10-1(a) uses the word "dependent" when describing a child who has been abandoned by their parent(s). That provision states as follows: "A child abandoned by its father or mother shall be considered to be in a ***dependent*** condition when the father or mother does not furnish sufficient food, clothing, or shelter for the needs of the child" (emphasis added).

However, dependency of a child is not the only way to satisfy the first required SIJS finding in a Predicate Order. In fact, the USCIS Policy Manual clarifies that there are two ways to satisfy the first required finding of fact in a Predicate Order: 1) the immigrant child is dependent on the court; or, 2) "legally commits or places the petitioner under the custody of either a state agency or department, or a person or entity appointed by a state or juvenile court".[58] Based on this definition[59], a state court's issuance of a custody order complies with the first required SIJS finding. Child custody is the sole topic dealt with in Chapter 9 of Title 19 of the Georgia Code, the parent-child relationship is the sole topic dealt with in Chapter 7 of Title 19 of the Georgia Code, and Title 19 is solely within the powers of Georgia superior courts. Therefore, the Georgia superior courts certainly have jurisdiction to make the

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[56] USCIS Policy Memo, Volume 6, Part J, Chapter 2.C.

[57] 8 C.F.R. § 204.11.

[58] USCIS Policy Memo, Volume 6, Part J, Chapter 2.C; *see also* 8 C.F.R. 204.11(c)(i)(A)-(B).

[59] The satisfaction of the first SIJS requirement through a custody order became law in 1994, four years after Congress initially established the SIJS classification for immigrant children. Prior to 1994, an immigrant child had to be declared dependent or eligible for long-term foster care. *See* https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-1.

first required SIJS finding of fact in a Predicate Order as provided in 8 C.F.R. 204.11(c)(i).

ii. Incomplete Findings – The Remaining Two SIJS Findings

Getting beyond the initial jurisdictional question, there are two remaining SIJS findings necessary for an immigrant child to be able to proceed with a potential adjustment of status: 1) reunification with one or both immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law; and, 2) it is not in the best interest of the child to be returned to the country of nationality or last habitual residence.[60]

Pursuant to the SIJS finding regarding reunification, a court can support this finding if the court finds abuse, neglect, abandonment, or some similar basis. Title 19 of the Georgia Code, which falls within the jurisdiction of the superior courts, is rife with definitions of these terms, and as you will see below the definitions of one term include other terms as set out in the SIJS requirements.

In regard to abuse, O.C.G.A. § 19-7-5 provides a broad definition. Under this definition, abuse can present as physical injury, neglect, emotional abuse, sexual abuse, prenatal abuse, an act that presents an imminent risk of serious harm, and trafficking.[61] O.C.G.A. § 19-13-1 also defines abuse between a child and a parent as any felony, or commissions of the offenses of battery, simple batter, simply assault, assault, stalking, criminal damage to property, unlawful restraint, or criminal trespass.

Title 19 further provides means by which the superior court can find abandonment. O.C.G.A. § 19-10-1(a) provides a definition of abandonment as "when the father or mother does not furnish sufficient food, clothing, or shelter for the needs of the child." Similarly, O.C.G.A. § 19-9-41(1) provides a definition of abandonment as a child that is "left without provision for reasonable and necessary care or supervision." And O.C.G.A. § 19-7-5(b)(1), defines abandonment with a laundry list of items falling under "showing an intent to forgo parental duties or relinquish parental claims…"

Superior courts are also no strangers to neglect of children. In fact, the definitions of abuse, abandonment and neglect in the Georgia Code are somewhat circular. O.C.G.A. § 19-7-5(b)(11) defines neglect as: (1) a failure

[60] 8 U.S.C. § 1101(a)(27)(J)(i)-(ii).
[61] O.C.G.A. § 19-7-5(b)(5).

to provide parental care or control, subsistence, education required by law, or other care or control of the child; (2) failure of a parent to adequately supervise a child for their well-being; and, (3) abandonment of a child by a parent.

A final way in which the reunification requirement of the SIJS finding can be satisfied is through "other similar basis". This could be viewed as a catch-all SIJS finding in the event that state law does not adequately cover a child's situation. "A "similar basis" may include other terms that are used regarding harm to children or the effect of the parent's death on the child, if not considered abandonment under state law, among other possibilities."[62]

The third finding required by SIJS concerns the best interests of the child to return to their country of nationality or last habitual residence. Title 19 has an extensive list of best interest factors. O.C.G.A. § 19-9-3(a)(3) directs superior courts to consider seventeen factors when determining the child's best interests, and O.C.G.A. § 19-9-3(a)(4) takes those factors further when domestic violence is present with a parent-child relationship. Thus, the third SIJS factor falls well within the purview of superior courts.

In practice, many of these cases can be done via consent between parents and superior courts are accustomed to consent orders which finalize cases. There is nothing prohibiting the use of SIJS-related consent orders in either Georgia law or Federal law when that consent order is a Predicate Order. In fact, the only requirements are that the consent order contains the required findings of fact that USCIS must see in a Predicate Order. However, some superior courts have altered consent orders to remove some of those required findings and others still have completely disregarded consent orders and issued their own orders in SIJS cases.

Removal of the required SIJS findings complicates the child's immigration process and could mean that a child is not even permitted to apply for an immigration status adjustment with USCIS. Georgia laws supports entry of these consent orders unless the consent order is against the child's best interests. In fact, O.C.G.A. § 19-9-5(a) provides as follows:

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[62] A Guide for State Court Judges and Lawyers on Special Immigrant Juvenile Status, Cristina Ritchie Cooper, March 1, 2017; https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/mar-apr-2017/a-guide-for-state-court-judges-and-lawyers-on-special-immigrant-/.

> In all proceedings under this article between parents, it shall be expressly permissible for the parents of a child to present to the judge an agreement respecting any and all issues concerning custody of the child. As used in this Code section, the term "custody" shall include, without limitation, joint custody as such term is defined in Code Section 19-9-6. As used in this Code section, the term "custody" shall not include payment of child support.

Taking this even further, O.C.G.A. § 19-9-5(b) requires a judge to ratify a consent order on custody:

> The judge shall ratify the agreement and make such agreement a part of the judge's final judgment in the proceedings unless the judge makes specific written factual findings as a part of the final judgment that under the circumstances of the parents and the child in such agreement that the agreement would not be in the best interests of the child.

And O.C.G.A. § 19-9-5(c) states: "In his or her judgment, the judge may supplement the agreement on issues not covered by such agreement."

Therefore, Based on the reading of O.C.G.A. § 19-9-5, not only is a judge required to sign off on a consent order (unless finding that the order is not in the best interest of the child) but a judge is also seemingly prevented from altering or removing the Predicate Order findings contained in a consent order because a judge cannot supplement the agreement unless it is silent on an issue.

iii. Bona Fide SIJS Intent

Apart from the statutory requirements detailed above in SIJS cases, superior courts have also at times scrutinized whether SIJS petitions are filed solely for immigration benefits, further complicating outcomes. Under the SIJS classification in the INA states that "the primary reason the required juvenile court determinations were sought was to obtain relief from parental abuse, neglect, abandonment, or a similar basis under state law."[63] According to the USCIS Policy Manual, "[i]n order to consent to the grant of SIJ classification, USCIS must review the juvenile court order(s) and any

[63] 8 C.F.R. § 204.11(b)(5).

supporting evidence submitted to conclude that the request for SIJ classification is bona fide".[64]

Superior courts have used this language to deny various SIJS-related orders reasoning that if the order being sought by a child and petitioner was truly only to address abuse relief, then the SIJS findings would not appear anywhere in the order. However, nowhere in the INA and the USCIS Policy Manual does it state that the state courts are tasked with determining whether the request for a Predicate Order is solely for immigration purposes.

In fact, the "bona fide" requirement under the INA and CFR specifically refers to USCIS as the entity that gives its consent to a Predicate Order.[65] According to 8 C.F.R. § 204.11(b)(5) "USCIS may withhold consent if evidence materially conflicts with the eligibility requirements in paragraph (b) of this section such that the record reflects that the request for SIJ classification was not bona fide."[66] The eligibility requirements referenced include that the child is under 21 years of age at the time of filing the SIJS petition, that the child is unmarried, that the child is physically present in the United States, and, that the child is the subject of a juvenile court order.[67] This juvenile court order is the same as the Predicate Order issued by a state court based solely on state law.[68] Moreover, state law does not contain a requirement that the state courts review cases under this "bona fide" standard.

As such, based on the language of the federal law, the bona fide review is left to USCIS and USCIS does not question a state court's findings in a Predicate Order.[69] USCIS is solely looking to ensure that the requirements of 8 C.F.R. § 204.11(b)(5) are met. USCIS in fact states in its Policy Manual that "USCIS recognizes that there may be some immigration motive for seeking the juvenile court order." The Policy Manual continues to explain that USCIS consent may only be withheld if evidence in front of USCIS "materially conflicts with the eligibility requirements for SIJ classification."[70]

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[64] USCIS Policy Manual, Volume 6, Part J, Chapter 2.D.
[65] 8 C.F.R. § 204.11(b)(5).
[66] *Id.*
[67] 8 C.F.R. § 204.11(b)(1)-(4).
[68] 8 C.F.R. § 204.11(c).
[69] USCIS Policy Manual, Volume 6, Part J, Chapter 2.D.
[70] *Id.*

iv. Superior Court Precedent

Until recently, there was not Georgia case law concerning superior courts that could be used to support the request for the SIJS findings in a custody order. Although there is over a decade of law stemming from Georgia juvenile courts requiring that juvenile courts make the requested SIJS findings, precedent concerning superior court was lacking until 2024. This caused a myriad of outcomes in superior courts that led to much uncertainty for a child seeking to remain with his or her parent in the United States.

Although not a reported case, a 2024 appellate case dealt with the issue of Georgia superior courts making the SIJS findings in a Predicate Order. In *Mendoza v. Mendoza Garcia*, a case involving a child seeking an SIJS Predicate Order, the superior court refused to make the Predicate Order findings of fact (reunification and return to country of origin), in spite of specific written and oral requests by the petitioner and inclusion of those findings in the petitioner's proposed order.[71] The trial court further refused to make those findings even after Petitioner filed a motion for reconsideration again asking the court to make the findings.[72] The Georgia Court of Appeals stated as follows: "[t]he trial court's final order…does not contain any findings relevant to SIJ status, and given the language in the trial court's order denying Mendoza's motion for reconsideration, it is apparent that the court simply chose not to address the issue." The Georgia Court of Appeals, relying on *In the Interest of J.J.X.C.*, 318 Ga. App. 420 (2012), ruled that "the trial court had a duty to enter findings of fact relevant to SIJ status…"[73] The case was remanded to the trial court to make the findings of fact.[74]

The saga of *Mendoza* did not end with the 2024 ruling from the Georgia Court of Appeals. Upon remand, the trial court issued an Order on Remand that made one of the two remaining required findings of fact. In that Order, the trial court found that it was in the child's best interest to not return to his country of nationality and that the child had been abandoned by his father. However, the trial court refused to find that reunification was not viable. Part of the trial court's reasoning in denying making the reunification finding was that the SIJS findings were being requested solely for immigration purposes.[75] Thus, utilizing parts of the INA regarding bona fide

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[71] Mendoza v. Mendoza Garcia, A23A1735 (Ga. App. 2024).
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.* at 4.

intent that arguably should not be utilized by state courts. The case was appealed a second time based on the Order on Remand.

During the second *Mendoza* appeal, the Georgia Court of Appeals issued a decision, which is the first reported case law regarding SIJS findings in Georgia superior courts. The Court ruled, referencing their first decision in *Mendoza*, that the superior court has an affirmative duty to make the requested SIJS findings.[76] Additionally, the Court of Appeals goes on to state that they agreed with the trial court's decision in the Order on Remand insofar as the trial court questioned the credibility of the petitioner; however, the Court of Appeals stated that it is erroneous to rely upon the petitioner's subjective motivation in filing the petition for custody with SIJS findings (finding, more specifically, that reliance upon potential immigration-based reasons for requesting an SIJS order is not an appropriate consideration for state courts).[77] The Court of Appeals cited to decisions regarding the Georgia juvenile courts as well as decisions from Florida, Vermont, and Massachusetts to support its finding regarding the subjective intent of a petitioner in SIJS cases.[78] "We note that the petitioner's motivation in these cases is relevant to the child's SIJ application, but the ultimate determination of the petitioner's motivation is to be made by the federal agency, not the state trial court" (citing to *In re J.J.X.C.*, 318 Ga. App. 420, 424 (2012)).[79] The Court goes on to state that "the purpose of the petition should not have influenced the trial court's consideration of whether reunification was viable or what was in the child's best interest."[80]

In spite of this helpful binding precedent, there are still potentially different outcomes for a child depending on if they proceeded through juvenile court or superior court. The Court of Appeals in *Mendoza* discussed these differences. One of the enumerations of error in *Mendoza* included an argument that it is illogical to find that a parent has abandoned a child while finding simultaneously that the child and that parent could be reunified. The Court stated that this argument would have been successful if it had been appeal arising from juvenile court because under a dependency action in juvenile court abandonment is defined in Title 15 as an "intent to forgo parental duties or relinquish parental claims."[81] However, because the *Mendoza* appeal came from a custody case in superior court, the

[76] Mendoza v. Mendoza Garcia, 374 Ga.App. 730, 733-34 (2025).
[77] *Id.* at 735.
[78] *Id.* at 734-35.
[79] *Id.* at 734.
[80] *Id.*
[81] *Id.* at 735.

abandonment definition under Title 19 requires a finding that a child was "left without provision for reasonable and necessary care or supervision" by a parent.[82] The Court reasoned that the abandonment definition in Title 19 (superior court) differs from the abandonment definition in Title 15 (juvenile court) because the Title 19 definition does not equate to a parent "affirmatively giv[ing] up [his/her] role as a parent."[83]

Thus, there now exists in Georgia one reported case (two cases including the unreported first *Mendoza* appeal) coming out of the superior courts that require superior courts to make the SIJS findings.

IV. CONCLUSION

The Special Immigrant Juvenile Status framework embodies Congress's intent to provide humanitarian protection to vulnerable immigrant youth who cannot safely reunify with one or both parents. By design, this federal immigration remedy depends on the expertise of state courts to make child welfare determinations. Yet, as shown through Georgia's judicial practices, this reliance on state law and procedure has created inconsistent and sometimes prohibitive barriers to relief. The uneven application of the SIJS process across Georgia's juvenile and superior courts creates uncertainty for children.

Georgia juvenile courts, guided by the Juvenile Code and nearly a decade of appellate precedent, have largely recognized their role in issuing predicate findings necessary for SIJS petitions. These courts' alignment with the task given to them by the INA reflects the natural fit between child welfare adjudication and the SIJS statutory purpose. However, the same clarity has not historically extended to Georgia's superior courts. Questions of jurisdiction, definitional inconsistencies across the Georgia Code, and misapplications of the "bona fide" intent requirement have led to unpredictable results and, at times, denial of relief to otherwise eligible minors.

The Georgia Court of Appeals' 2024 decision in *Mendoza* represents a critical corrective step. By affirming that superior courts have both the authority and the duty to make SIJS predicate findings and clarifying that federal immigration motives should not influence a state court's analysis, *Mendoza* realigns Georgia practice with the federal purpose underlying SIJS.

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[82] *Id.* at 736.
[83] *Id.*

Still, despite this binding precedent, the dual system in Georgia—where a child's access to relief can depend on whether their caregiver is a parent or nonparent—will likely continue to produce differing outcomes. Thereby leaving most vulnerable immigrant children without a viable path to lawful immigration status or, more generally, stability.

Moving forward, consistency and clarity are essential. Georgia courts must uniformly recognize their role within the cooperative federalism structure of SIJS: to make factual child-welfare findings under state law without encroaching on federal immigration determinations. Continued judicial education, procedural guidance, and, perhaps, legislative clarification could bridge the current divide between the differing outcomes. Aligning Georgia's practices with federal intent will ensure that the SIJS process functions as Congress designed—to protect, not exclude, immigrant children who have already endured abuse, neglect, or abandonment.

ETHICS IN FAMILY LAW IN GEORGIA: SELECTED ISSUES

Patrick E. Longan[*]

I. INTRODUCTION

All the Georgia Rules of Professional Conduct apply to lawyers who practice family law. But domestic relations matters present some special and recurring issues. For this article, I have selected several to discuss. My criteria for selection of the issues were: (1) relationship of the issue to recent changes or proposed changes to the Georgia Rules of Professional Conduct; (2) reports from family law practitioners or superior court judges that the issue is a common or emerging one; (3) differences between the law in Georgia and either a Model Rule of Professional Conduct or a formal opinion of the American Bar Association Standing Committee on Ethics and Professional Responsibility; and (4) the existence of a Georgia formal advisory opinion on point.[1] The issues relate mostly to a lawyer's responsibilities to clients. A few deal with duties to third parties, while one relates to the duty of candor to the court.

II. ISSUES RELATED TO CLIENTS

A. Prospective Clients

Before a lawyer has a client, there is someone who seeks to confer with the lawyer about entering into an attorney-client relationship. Such a person is a "prospective client," and Georgia Rule of Professional Conduct 1.18 sets forth the lawyer's duties to prospective clients.[2]

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[1] I am a member of the Georgia Formal Advisory Opinion Board. Any opinions expressed in this article are mine and not necessarily the opinions of the Board or any of its members.

[2] GA. RULES OF PROF'L CONDUCT r. 1.18 (2025).

It was not always so. The Georgia Supreme Court adopted Rule 1.18 in 2021.[3] Before then, there was no specific rule governing a lawyer's duties to a prospective client, and the lack of such a rule created problems for the State Bar. For example, attorney Marsha Williams Mignott was accused of using information gained from a prospective client to the detriment of that prospective client.[4] That conduct would be improper as to a current or a former client under Rule 1.8(b)[5] and 1.9(c)(1)[6] respectively, and the Bar tried to use those rules to discipline Mignott.[7] The Georgia Supreme Court rejected that attempt and dismissed the case because Mignott never formed an attorney-client relationship with the alleged victim, and Georgia's Rule 1.18 was not yet in effect.[8]

Now, Rule 1.18 sets forth the lawyer's obligations to a prospective client, defined as a "person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter…."[9] Let's look at a common scenario in the family law context.

Suppose you meet with Mary about the possibility of becoming her lawyer in her divorce from her husband John. In those preliminary discussions, you learn information from Mary that could be significantly harmful to her in the divorce. Perhaps she has been hiding marital assets or conducting an affair. Mary chooses not to hire you. What are your responsibilities to Mary?

As a preliminary matter, you need to determine whether Mary meets the definition of a "prospective client." Not everyone who contacts you about possibly representing them will. For example, if Mary had communicated all her secrets "in response to advertising that merely describes the lawyer's

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[3] Order on 2020-1 Motion to Amend the Rules and Regulations for the Organization and Government of the State Bar of Georgia (May 14, 2021), https://www.gasupreme.us/wp-content/uploads/2021/05/Order-2020-1_issued.pdf.

[4] In Re Mignott, 317 Ga. 764, 893 S.E.2d 891 (2023).

[5] GA. RULES OF PROF'L CONDUCT r. 1.8(B) (2025) ("A lawyer shall not use information gained in the professional relationship with a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these rules").

[6] GA. RULES OF PROF'L CONDUCT r. 1.9(C)(1) (2025) ("A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (a) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known ….).

[7] Mignott, 317 Ga. at 764 – 765, 893 S.E.2d at 891 – 892.

[8] *Id.* at 767, 893.

[9] GA. RULES OF PROF'L CONDUCT r. 1.18(a) (2025).

education, experience, areas of practice, and contact information, or provides legal information of general interest," she would not be entitled to the protections afforded to prospective clients.[10] "Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a 'prospective client.'"[11] On the other hand, if your website or other advertising "specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response," that person is a prospective client.[12]

In our hypothetical, you had an old-fashioned face-to-face talk with Mary about her divorce. Mary nevertheless may not be entitled to the protections afforded to prospective clients. It is not unheard of for parties who are about to file for divorce to try to make sure that all the "good" lawyers in the community are disqualified from representing the other side. These schemers make the rounds of the lawyers they fear and disclose confidential information for the purpose of making sure those lawyers will not show up on the other side. Maybe Mary, in our hypothetical, was secretly executing such a plan. If so, she would not be entitled to status as a prospective client. Comment 2 to Rule 1.18 provides: "a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a 'prospective client.'"[13]

Suppose, however, that Mary meets the definition of a prospective client. What duties do you owe her, even though she never became a client? One is confidentiality, although on first reading the scope of your confidentiality duty may seem mysterious. Rule 1.18(b) provides: "Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information,

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[10] *Id.* at Comment 2.

[11] *Id.*

[12] *Id.* The risk of inadvertently undertaking duties to someone as a prospective client is something to consider in the design of law firm websites, especially "chat" features that invite web surfers to submit information to the firm. The ABA Standing Committee on Ethics and Professional Responsibility has warned: "Imprecision in a website message and failure to include a clarifying disclaimer may result in a website visitor reasonably viewing the website communication itself as the first step in a discussion. Lawyers are therefore well-advised to consider that a website-generated inquiry may have come from a prospective client …." ABA Formal Op. 10-457 (2010).

[13] *Id.* at Comment 2.

except as Rule 1.9 would permit with respect to information of a former client."[14] So, you consult Rule 1.9 to determine what confidentiality duties you owe to former clients. There, you discover that you may not use information you learned from Mary to her disadvantage "except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known."[15] You also may not reveal Mary's information "except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client."[16] In other words, you must treat what you learned from your prospective client Mary just the same as if Mary were a current client, with the exception that you may use her confidential information against her if it has become "generally known."[17]

You also owe Mary some limited duties of loyalty. Suppose that, after Mary tells you that she is not going to retain you, you are contacted by John, who may want you to represent him in his divorce from Mary. If you had previously actually represented Mary in her divorce, Rule 1.9(a) would prevent you from "switching sides" and representing John, unless Mary consented (an unlikely prospect).[18] But Mary was never your client. Under what circumstances must you decline to represent John?

The standard is more relaxed than it would have been if Mary had become a client. As Comment 1 to Rule 1.18 states, "A lawyer's consultations with a prospective client usually are limited in time and depth and … prospective clients should receive some but not all of the protection afforded clients."[19] You will be disqualified from representing John only if John's interests are materially adverse to Mary's (they are), the matters are the same or substantially related (they are), you received information from Mary that could be significantly harmful to her in the matter (maybe, maybe not), and

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[14] GA. RULES OF PROF'L CONDUCT r. 1.18(b) (2025).

[15] GA. RULES OF PROF'L CONDUCT r. 1.9(c)(1) (2025).

[16] GA. RULES OF PROF'L CONDUCT r. 1.9(c)(2) (2025).

[17] Lawyers often believe the "generally known" exception is broader than it is. The ABA Standing Committee on Ethics and Professional Responsibility has opined that the "generally known" exception applies only to information "widely recognized by members of the public in the relevant geographic area; or (b) widely recognized in the former client's industry, profession, or trade." ABA Formal Op. 479 at 1 (2017). It also found that "[i]nformation is not 'generally known' simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information." *Id.*

[18] GA. RULES OF PROF'L CONDUCT r. 1.9(a) (2025) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.").

[19] GA. RULES OF PROF'L CONDUCT r. 1.18 Comment 1 (2025).

Mary will not consent to the conflict (she won't).[20] The only "maybe" in that sequence is whether you received significantly harmful information. If you did, you're disqualified. If you did not, there is no conflict.

One lesson is to try to limit what you learn in the early stages of dealing with a prospective client.[21] An alternative is to obtain informed consent at the outset of your communications with the prospective client that you will not be precluded from representing another party in the matter because of any information you learn from the prospective client.[22]

If you learned significantly harmful information from Mary about Mary's impending divorce from John, and you neither obtained her advance consent to you representing John nor can you obtain that consent now, you may not represent John. Suppose, however, that John asks one of your partners to represent him in the divorce. Your conflicts system flags that John's opposing party Mary consulted you about the divorce. You are disqualified, but is your conflict imputed to your partner? If so, could the partnership cure that conflict by screening you from your partner's representation of John?

Rule 1.18(c) imputes your conflict to your partner: "If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except [with the informed consent of both John and Mary]."[23] Screening would not help. This is a significant change that Georgia made to Model Rule of Professional Conduct 1.18, which allows for screening in certain circumstances when the conflict is with a prospective client.[24]

Georgia Rule 1.18 now provides detailed guidance about your responsibilities to a prospective client. It is important to recognize when you

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[20] GA. RULES OF PROF'L CONDUCT r. 1.18(c) (2025).

[21] Comment 4 to Rule 1.18 provides this guidance: "In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose."

[22] Comment 5 to Rule 1.18 provides: "A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter."

[23] GA. RULES OF PROF'L CONDUCT r. 1.18(c) (2025).

[24] MODEL RULES OF PROF'L CONDUCT r. 1.18(d) (2025).

are communicating with a prospective client and to be aware of your duties of confidentiality and loyalty even if you are not hired.

B. Issues Related to Fees

Domestic relations cases frequently raise issues related to fees. The most common one in disciplinary cases is the failure to return unearned fees, in violation of Rule 1.16(d), at the end of the representation. Many of these cases involve abandonment of the client after payment of a fee deposit and the refusal of the lawyer to return the money after being fired.[25] These are straightforward issues under the rules of conduct.[26] There are, however, several special fee issues that warrant discussion.

1. Advance Payment of Fees and "Nonrefundable Retainers"

It is commonplace, and understandable, for family law attorneys to require clients to pay fees in advance. These arrangements go by various names (e.g., "advance payment," "prepayment," and "deposit"). In Georgia, the precise term is "special retainer." As the Formal Advisory Opinion Board explained in 2003:

> A special retainer is a contract for representation obligating a client to pay fees in advance for specified services to be provided by an attorney. This definition applies regardless of the manner of determining the amount of the fee or the terminology used to designate the fee, e.g., hourly fee, percentage fee, flat fee, fixed fees, or minimum fees. Generally, fees paid in advance under a special retainer are earned as the specified services are provided.[27]

Under the Model Rules of Professional Conduct, a lawyer must place prepaid fees into the lawyer's trust account until they are earned.[28] Not so in Georgia,

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[25] See, e.g., In Re Perry, 318 Ga. 155, 158 (2024).

[26] See GA. RULES OF PROF'L CONDUCT r. 1.3 (2025) ("A lawyer shall act with reasonable diligence and promptness in representing a client. Reasonable diligence as used in this rule means that a lawyer shall not without just cause to the detriment of the client in effect willfully abandon or willfully disregard a legal matter entrusted to the lawyer.") and 1.16(d) ("Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as … refunding any advance payment of fee that has not been earned.").

[27] Georgia Formal Advisory Opinion 03-1 (2003).

[28] ABA Formal Op. 505 at 6 (2023).

where placing the advance fees in the trust account is permitted but not required, "absent special circumstances necessary to protect the interest of the client."[29] The Model Rules and the Georgia Rules align, however, over the requirement that any unearned fees must be returned to the client at the end of the representation.[30]

Sometimes lawyers designate part of the special retainer fee as "nonrefundable" and decline to refund that portion no matter when the attorney-client relationship ends.[31] That practice is permissible in Georgia only in specific circumstances:

> Some services, for example, the services of the attorney's commitment to the client's case and acceptance of potential disqualification from other representations, are provided as soon as the contract is signed. The portion of the fee reasonably allocated to these services is, therefore, earned immediately. These fees, and any other fees that have been earned by providing specified services to the client, need not be refunded to the client. In this sense, a special retainer can be made non-refundable.[32]

The permissibility of this practice arises from the fact that one factor in determining the reasonableness of an attorney's fee is "the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer."[33] It is prudent to be cautious, however, about how much of the advance payment you designate as "nonrefundable." The Formal Advisory Opinion Board has reminded Georgia lawyers not to make fee

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[29] Georgia Formal Advisory Opinion 03-1 (2003) (citing Georgia Formal Advisory Opinion 91-2 (1991). I thank John Shiptenko, Senior Assistant General Counsel of the State Bar of Georgia, for his assistance with this point.

[30] ABA Formal Op. 505 at 5 (2023); Georgia Formal Opinion 03-1 (2003). See also MODEL RULES OF PROF'L CONDUCT r. 1.16(d) (2025) and GA. RULES OF PROF'L CONDUCT r. 1.6(d) (2025) (both requiring return of unearned fees at the end of a representation).

[31] This is to be distinguished from a "general retainer," which is a fee that is "paid – and deemed earned – upon the promise of availability to represent a client, whether or not services are actually needed or requested by the client." ABA Formal Op. 505 at 2 (2023). General retainers are "quite rare." *Id.* at 3. It would be particularly surprising to see a divorce lawyer on general retainer. Perhaps only Henry VIII would foresee needing to divorce so often that it would be beneficial to pay a lawyer to be on call.

[32] Georgia Formal Advisory Opinion 03-1 (2003).

[33] GA. RULES OF PROF'L CONDUCT r. 1.5(a)(2) (2025).

arrangements that are intended to penalize clients for terminating the attorney-client relationship.[34]

2. Fees Paid in Marital Property

A sitting superior court judge with long experience in family law recently alerted me that he has seen fee arrangements wherein a lawyer is to be paid by receiving a specific piece of property (such as a work of art) if the client obtains that property when the marital estate is divided. Almost forty years ago, the Supreme Court of Georgia approved the practice of lawyers in domestic cases obtaining interests in marital property as security for payment of their fees unless the specific circumstances would compromise the lawyer's independent judgment.[35] That opinion was based on Standard 31 but is consistent with current Rule 1.8(j):

> A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that a lawyer may: (a) acquire a lien granted by law to secure the lawyer's fees or expenses as long as the exercise of the lien is not prejudicial to the client with respect to the subject of the representation.[36]

The 1986 Formal Advisory Opinion stressed that the interest in the marital property could only be to secure the payment of fees.[37]

Being paid with marital property, as opposed to just taking a security interest in the property, is different. It is also problematic. Marital property is a "subject matter" of a divorce case, and a lawyer who is to be paid by acquiring specific property has acquired a "proprietary interest" in one of the subjects of the litigation the lawyer is conducting for the client. The arrangement that the judge describes likely violates rule 1.8(j) because of the risk that it would skew the lawyer's advice regarding property division.[38] The lawyer's interest would be to ensure that the specific property that is to be the lawyer's fee ends up in the client's hands, regardless of advantages the client might obtain by bargaining that property away to the spouse in exchange for other preferred property.

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[34] Georgia Formal Advisory Opinion 91-2 (1991).

[35] Georgia Formal Advisory Opinion 86-1 (1986).

[36] GA. RULES OF PROF'L CONDUCT r. 1.8(j) (2025).

[37] Georgia Formal Advisory Opinion 86-1 (1986).

[38] GA. RULES OF PROF'L CONDUCT r. 1.8 Comment 19 (2025).

This arrangement also may run afoul of Rule 1.5(d)(1), which provides: "A lawyer shall not enter into an arrangement for, charge, or collect: (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof…."[39] If the arrangement is that the lawyer will be paid only if the client obtains the specific property in the divorce, then the fee is contingent upon securing the divorce (and contingent on the terms of the property division). One reason why contingent fees are prohibited in divorce cases is that the lawyer has a disincentive to advise or support reconciliation – the lawyer would not be paid at all because the contingency never occurs. That same risk is present when the lawyer only gets paid if the divorce happens and the client receives the specific property the lawyer contracted to receive as the fee.

3. "Churning" Fees

Another fee issue came to my attention from a friend who practices family law. He reports that his adversaries frequently channel the emotions of their clients and continue the marital arguments in the divorce proceedings. Such posturing is a way of showing the client that the lawyer is "on their side" and shares their disregard for the opposing party and counsel. My friend wrote, "there are many attorneys who believe that litigating family law cases means writing long multi-page letters to opposing counsel essentially, again, continuing the marital arguments. These letters in no way advance the case, but just provide those attorneys . . . [an] opportunity for billing …."[40] They "stir the pot."[41]

There are problems with such conduct, first as a matter of professionalism. Georgia's Aspirational Statement on Professionalism recites that all lawyers should aspire "[t]o model for others, and particularly for . . . clients, the respect due to those we call upon to resolve our disputes and the regard due to all participants in our dispute resolution processes."[42] Another aspiration is "the expeditious and economical achievement of all client objectives."[43] Treating opposing parties and counsel disrespectfully and

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[39] GA. RULES OF PROF'L CONDUCT r. 1.5(d)(1) (2025).

[40] Email from Franklin T. Gaddy to the Author November 7, 2024 (on file with the Author).

[41] *Id.*

[42] Georgia Lawyer's Creed and Aspirational Statement on Professionalism at 3 (https://cjcpga.org/wp-content/uploads/2019/07/1-Lawyers-Creed-and-Aspirational-Statement-Clean-Copy-v-2013-new-logo-seal.pdf).

[43] *Id.* at 4.

drawing out the divorce proceedings to please an embittered client are inconsistent with these aspirations.

But professionalism and ethics are different things.[44] As a matter of ethics, the issue with "stirring the pot" is 1.5(a)'s prohibition on charging unreasonable fees. One factor in determining reasonableness is the "time and labor required" for the representation.[45] A lawyer who is channeling the client's anger to generate more billable hours is not billing for time and labor that is required by the circumstances. Such fees would be unreasonable under Rule 1.5(a).[46]

C. Agreements to Limit the Scope of Representation

My friend also informed me that courts are seeing abuses of agreements to provide representation with a limited scope in family law cases. The Georgia rules allow for limited scope representation under certain conditions: "A lawyer may limit the scope and objectives of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."[47] Limited scope representation has the potential to alleviate some of the problems caused by the number of pro se divorce litigants. For example, having a lawyer just to help complete the child support worksheets would streamline many cases. In fact, the Georgia Supreme Court has created a study committee to explore (among other issues) whether trained non-lawyers should be licensed to provide such limited-scope services to help those who otherwise would clumsily proceed pro se. The State Bar of Georgia surveyed its members about the idea in March 2025.[48]

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[44] See Harold G. Clarke, *Professionalism: Repaying the Debt,* 25 GEORGIA BAR J. 170, 173 (1989) ("ethics is a minimum standard which is required of all lawyers while professionalism is a higher standard expected of all lawyers.").

[45] GA. RULES OF PROF'L CONDUCT r. 1.5(a)(1) (2025).

[46] See also comment 5 to Rule 1.5: "A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures." For an extreme example of a lawyer who decided to "stir the pot" and ended up disbarred, see In Re Farmer, 307 Ga. 307 (2019).

[47] GA. RULES OF PROF'L CONDUCT r. 1.2(c) (2025).

[48] Email from Ivy Cadle, President of the State Bar of Georgia, March 19, 2025 (Subject: Supreme Court of Georgia Study Committee on Legal Regulatory Reform Seeks Input) (linking to survey) (on file with the Author). The Study Committee issued its report in June 2025 and recommended a pilot project that would license "Limited License Legal Professionals" to help with housing and consumer debt matters, but not family law. The Committee's report is available on the website of the Supreme Court at

Rule 1.2(c), however, is subject to abuse. Suppose a lawyer undertakes representation of a low-income person in a family law case after obtaining a substantial upfront deposit (perhaps all the money the client can pay). Then the lawyer provides full-service representation at an hourly rate until the deposit is exhausted (long before the case is complete), at which point the lawyer seeks to withdraw for nonpayment of fees under Rule 1.16(b)(4) or (5).[49] The client is left without a lawyer and without funds to hire another. This inevitable eventuality is not explained to the client at the outset of the "limited scope" representation.

That arrangement violates both Rule 1.2(c) and Rule 1.5. A limited scope representation must be reasonable.[50] An arrangement such as that just described is unreasonable for the same reasons the comments to Rule 1.5 disapprove of it:

> An agreement may not be made, the terms of which might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction.[51]

Limited scope representation is a way of helping clients help themselves. Taking all of their money up front, and then withdrawing when the money runs out, does not accomplish that goal.

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https://www.gasupreme.us/08-26-2025-study-committee-on-legal-regulatory-reform-seeks-public-comment-on-report/.

[49] GA. RULES OF PROF'L CONDUCT r. 1.16(b) (2025) ("except as stated in paragraph (c), a lawyer may withdraw from representing a client … if: … (4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; [or] (5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client ….").

[50] GA. RULES OF PROF'L CONDUCT r. 1.2(c) (2025).

[51] GA. RULES OF PROF'L CONDUCT r. 1.5, Comment 5 (2025). Comment 5 does provide that "it is proper to define the extent of services in light of the client's ability to pay." *Id.* But the scenario I am describing is one in which the likely outcome – abandonment in the midst of the case – is not explained to the client before the "limited service" agreement is made.

D. Sex with Clients

The propriety of sexual relationships between lawyers and clients has been long debated.[52] Anecdotally, the problem arises most frequently in divorce cases. Over twenty years ago, the American Bar Association approved an amendment to the Model Rules to deal with this issue: "A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced."[53] A comment to the Model Rule explains the rule and its effect:

> Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.[54]

Model Rule 1.8(j) is thus a prohibition with no exceptions.

Georgia has considered adopting a version of Model Rule 1.8(j) but so far has not done so. That does not mean, however, that sex with clients is unregulated in Georgia. Suppose that you and your divorce client find yourselves sexually attracted to each other. You would like to commence a sexual relationship and continue the attorney-client relationship. But commencing a sexual relationship with a client is fraught with risks of conflicts of interest under Georgia Rule of Professional Conduct 1.7, which provides in relevant part: "A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests … will materially and adversely affect the representation of the client, except [with informed consent]."[55] The chance that the sexual relationship will pose risks of material and adverse effects on the representation are high, especially in a divorce case. For example, once you begin a sexual relationship with your client, your personal interest in continuing that relationship likely would affect your advice to the client if the client's spouse attempts to reconcile.

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[52] See, e.g., Mary Wood, *Sexual Ethics Affect Lawyer's Professionalism,* October 30, 2002 (reporting on panel presentation about the ethics of lawyer-client sexual relationships) (https://www.law.virginia.edu/news/200210/sexual-ethics-affect-lawyers-professionalism-panel-says).

[53] MODEL RULES OF PROF'L CONDUCT r. 1.8(j) (2025).

[54] *Id.* at Comment 20.

[55] GA. RULES OF PROF'L CONDUCT r. 1.7(a) (2025).

Although in Georgia lawyers are not strictly prohibited from commencing sexual relationships with their clients, the lawyer must be alert to the possibility that the lawyer's personal interests might materially and adversely affect the representation of the client.

But Rule 1.7 is not a prohibition, unlike Model Rule 1.8(j). You may be able to obtain informed consent from your client to the conflicts raised by commencing a sexual relationship. Before doing so, you must consider whether the conflict is consentable: "Client informed consent is not permissible if the representation: …involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients."[56] You must try to be objectively self-aware and ask whether the sexual relationship makes it reasonably unlikely that you can resist the temptation to serve your personal interests rather than the client's. If it is reasonably unlikely that you can do so, then you must choose between the sexual relationship and the client-lawyer relationship. Informed consent to the conflict is not possible.

If, however, you conclude that despite the conflict you will be able to provide adequate representation to the client, you may seek informed consent in compliance with Rule 1.7(b). You must consult with the client, which means that you must communicate "information reasonably sufficient to permit the client to appreciate the significance of the matter in question."[57] You must also supply the client "in writing reasonable and adequate information about the material risks of and reasonable available alternatives to the representation" and give the client the chance to consult with independent counsel.[58] If the client gives informed consent after the lawyer takes these steps, then the lawyer must confirm that consent in writing.[59]

Trying to represent a client with whom one is having a sexual relationship is perilous. Even if you follow all the steps under Rule 1.7 to conclude that a conflict is consentable and to obtain informed consent, you should realize that sometimes sexual relationships end badly, and the client might decide later to file a grievance against you. Then someone else – perhaps a special master appointed by the Supreme Court – will be the one to decide, at least initially, if the conflict was consentable and, if so, whether

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[56] GA. RULES OF PROF'L CONDUCT r. 1.7(c) (2025).
[57] GA. RULES OF PROF'L CONDUCT r. 1.0(d) (2025).
[58] GA. RULES OF PROF'L CONDUCT r. 1.7(b) (2025).
[59] *Id.*

> you conveyed reasonable and adequate information to make consent to the conflict of interest informed. It will usually be the more prudent course to refer the client to another lawyer if you and your client wish to commence a sexual relationship.

E. Clients with Diminished Capacity[60]

A superior court judge has informed me that increasingly he is seeing parties in divorce proceedings display signs of diminished capacity. Usually, these parties are elderly. If you have a client in that category, you have special responsibilities under Georgia Rule of Professional Conduct 1.14.

Rule 1.14 identifies two types of clients with diminished capacity. You are empowered to take protective action if the client is "at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest."[61] If the client's diminished capacity is not so severe that those risks are present, you "shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."[62] You must assign your diminished-capacity client to one group or the other.

Your legal training did not prepare you to make this judgment, but you must make it nevertheless. A comment to Rule 1.14 provides guidance:

> In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.[63]

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[60] Much of this discussion of diminished capacity is reproduced by permission from a paper I wrote with Professor Suparna Malempati and Susan Goico for a CLE program presented in 2024 by the Georgia Chief Justice's Commission on Professionalism. I thank my co-authors for that permission.

[61] GA. RULES OF PROF'L CONDUCT r. 1.14(b) (2025).

[62] GA. RULES OF PROF'L CONDUCT r. 1.14(a) (2025).

[63] GA. RULES OF PROF'L CONDUCT r. 1.14 Comment 6 (2025).

Note that several of these factors depend upon getting to know your client well over time, in order to enable you to know whether the client has a "variable" state of mind and whether the client's instructions are consistent with the client's "long-term commitments and values." There is also a confidentiality issue at this stage (discussed below).

If you determine that the client does not meet the criteria in Rule 1.14(b) for protective action, your obligation is, as noted, to "as far as reasonably possible, maintain a normal client-lawyer relationship."[64] Effective communication is the key. Think specifically about time, place, and manner of communication. For example, if your client's diminished capacity is due to age-related cognitive decline, it may be that your client is more alert in the morning than in the evening. You may find that you need to repeat yourself to make sure that the client understands. The client may understand better if the conversation occurs in the client's home or other familiar space. Using plain language in both oral and written communication may be extremely helpful.

Another option is to obtain the assistance of a family member or friend. The comments to Rule 1.14 note: "The client may wish to have family members or other persons participate in discussions with the lawyer."[65] The usual formulation of the scope of the attorney-client privilege would include communications under these circumstances if the assistance of another is reasonably required.[66] Beware, however, of the family member whose "assistance" is self-interested or aggressive. "[T]he lawyer must keep the client's interests foremost and … must look to the client, and not family members, to make decisions on the client's behalf."[67]

If you determine that the client "is at risk of substantial physical, financial, or other harm unless action is taken and cannot adequately act in the client's own interest," then you have the option to take protective action.[68] That action can range from modest to drastic. Protective action includes "consulting with individuals or entities that have the ability to take action to

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[64] GA. RULES OF PROF'L CONDUCT r. 1.14(a) (2025).

[65] GA. RULES OF PROF'L CONDUCT r. 1.14 Comment 3 (2025).

[66] See, e.g., THE RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 70, Cmt. F ("A person is a confidential agent for communication if the person's participation is reasonably necessary to facilitate the client's communication with a lawyer or another privileged person and if the client reasonably believes that the person will hold the communication in confidence.").

[67] GA. RULES OF PROF'L CONDUCT r. 1.14 Comment 3 (2025).

[68] GA. RULES OF PROF'L CONDUCT r. 1.14(b) (2025).

protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian."[69] The comments add more detail:

> Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client.[70]

Comment 5 goes on to provide guidelines for deciding among these alternatives. You "should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections."[71]

Confidentiality issues arise at two stages. The first is in making the determination whether the client is at substantial risk and cannot act to protect his or her own interest. As noted, Comment 6 guides that judgment. It provides that in "appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician." Seeking that guidance would require revelation of confidential information such as the lawyer's experience in interacting with the client. Those revelations, however, are often necessary and are made for the purpose of representing the client. They are therefore "impliedly authorized" under Georgia Rule of Professional Conduct 1.6(a).[72]

Taking protective action also raises confidentiality issues. For example, protective action includes the possibility of "consulting with family members."[73] Those consultations will usually require the revelation of confidential information. Rule 1.14(c) explicitly permits these disclosures: "Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to

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[69] GA. RULES OF PROF'L CONDUCT r. 1.14 Comment 3 (2025).
[70] *Id.* at Comment 5.
[71] *Id.*
[72] GA. RULES OF PROF'L CONDUCT r. 1.6(a) Comment 5 (2025).
[73] GA. RULES OF PROF'L CONDUCT r. 1.14 Comment 5 (2025).

paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests."[74] Comment 8 cautions the lawyer to limit such disclosures as much as possible and specifically to consider "whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client." The Comment concludes (unhelpfully), "The lawyer's position in such cases is an unavoidably difficult one."

With the aging of the pool of potential clients, family law attorneys must be sensitive to the special issues that arise when a client displays signs of diminished capacity. Rule 1.14 must be consulted for its guidance about the ethical issues that may arise and how lawyers should handle them.

F. Conflicts When Acting as Counsel and Guardian ad Litem for a Minor

In Georgia, a minor is entitled to court-appointed counsel in a proceeding to terminate parental rights.[75] The lawyer for the minor has the same duties that the lawyer has to any other client.[76] Georgia law also requires the appointment of a guardian ad litem for the minor in this situation.[77] The role of the guardian ad litem is to advocate for the minor's best interest.[78] The guardian ad litem and the attorney for the child can be the same person "unless or until there is a conflict of interest between the attorney's duty to such child as such child's attorney and the attorney's considered opinion of such child's best interests as guardian ad litem."[79]

Suppose that you represent a minor child and serve as the guardian ad litem. As guardian, you believe the best interests of the minor would be served by termination of the parent's rights. Your job as guardian is to explain that to the court. On the other hand, as the attorney for the minor, your obligation would be to provide candid advice that the minor would be better off if the parent's rights were terminated. If the minor agrees, then all is well. There is no conflict. But what if, despite your advice, the minor instructs you as their lawyer to seek a result – denial of the termination of parental rights – that you believe to be against the minor's best interests?

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[74] GA. RULES OF PROF'L CONDUCT r. 1.14(c) (2025).
[75] O.C.G.A. 15 – 11 – 262(a) – (b).
[76] *Id.* at 262(c).
[77] *Id.* at 262(d).
[78] O.C.G.A. 15 – 11 – 105(a).
[79] O.C.G.A. 15 – 11 – 262(d).

In 2016, the State Bar of Georgia Formal Advisory Opinion Board posed this question: "May an attorney who has been appointed to serve both as legal counsel and as guardian ad litem for a child in a termination of parental rights case advocate termination over the child's objection?"[80] The obvious answer to this question is no. You cannot as the minor's attorney substitute your judgment for theirs. The minor is a client with diminished capacity, but recall that your duty under Rule 1.14(a) is to have as normal a lawyer-client relationship as possible with diminished capacity clients.[81] In a normal lawyer-client relationship, the client decides the objectives of the representation. And the comments to Rule 1.14 recognize that "children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody."[82] If your client has instructed you that the objective of the representation is to keep the parent's rights intact, then you cannot argue for the opposite result without violating Rule 1.2(a). You either follow the client's instructions or seek to withdraw as counsel because the client is insisting on pursuing an objective that you believe to be imprudent.[83]

But is there another solution that would enable you to try to do what's best for the minor? Suppose you withdrew as the attorney because the client's objective is imprudent. Could you continue to serve as guardian ad litem and advise the court that the child's interests would best be served by termination of parental rights? Again, the answer is no. Once you have withdrawn as the attorney, the minor becomes a former client. Inevitably, in trying to convince the court to terminate the parent's rights you would be using confidential information you learned in your representation of the minor to the detriment of the minor (at least as the minor perceives the situation). That would violate rule 1.9(c)(1).[84]

The Formal Advisory Opinion Board reached the same result when it concluded that the attorney must withdraw as guardian ad litem "when it becomes clear that there is an irreconcilable conflict between the child's

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[80] Georgia Formal Advisory Opinion 16-2 (2016).

[81] GA. RULES OF PROF'L CONDUCT r. 1.14(a) (2025).

[82] GA. RULES OF PROF'L CONDUCT r. 1.14 Comment 1 (2025).

[83] GA. RULES OF PROF'L CONDUCT r. 1.16(b)(3) (2025).

[84] GA. RULES OF PROF'L CONDUCT r. 1.9(c)(1) (2025). ("A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known….").

wishes and the attorney's considered opinion of the child's best interests…."[85] The attorney cannot continue as guardian but maybe can continue as counsel. Whether the lawyer continues to represent the minor, and seeks the result the minor wants, depends upon just how imprudent that lawyer believes that decision to be.

G. Confidentiality and Client Threats of Violence

Many divorce cases involve marriages marked by domestic violence.[86] The divorce proceedings themselves are not likely to calm things down. As one lawyer wrote on his website:

> Domestic violence can escalate during the divorce process due to increased stress and tension. The divorce process itself can be emotionally charged and stressful, and these factors can further escalate instances of domestic violence. The heightened emotions and conflicts that arise during divorce proceedings can intensify the abusive behavior, making it even more challenging for the parties involved to find a resolution.[87]

A divorce attorney must be prepared to navigate client threats of violence in accordance with the rules of conduct.

Take an example. Recently, a Houston County man who was in the midst of divorce proceedings found his wife in bed with her new boyfriend.[88] The man shot and killed the boyfriend and has now been sentenced to life with the possibility of parole. Suppose you represented this man before the homicide. He tells you that he knows his wife is sleeping with her new boyfriend while the man's children are in the house. He angrily tells you, I am "going to take care of this myself." You know your client always carries a gun because he is a tow truck driver and sometimes feels threatened while he is on the job. What do you do?

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[85] Georgia Formal Advisory Opinion 16 – 2 at 1.

[86] *Understanding the Link Between Domestic Violence and Divorce*, Law Offices of Peter Van Aulen, https://www.pvalaw.com/understanding-the-link-between-domestic-violence-and-divorce.html.

[87] *Id.*

[88] *Man Convicted of Killing Estranged Wife's Friend in Warner Robins Learns His Sentence*, Lars Lonnroth, 13 WMAZ, https://www.13wmaz.com/article/news/local/warner-robins/man-convicted-killing-estranged-wifes-friend-warner-robins-sentence-court-records-show/93-67f79fd9-6ed4-4483-a634-5fc7f6ae6057.

You are generally bound by Rule 1.6(a) to "maintain in confidence all information gained in the professional relationship with a client …." The client's rage at his wife, his stated intentions "to take care of" the situation, and his possession of a gun – all of that is confidential. There are, however, exceptions to the general rule of confidentiality. One may be applicable here. You may reveal what you have learned from your client if you reasonably believe it is necessary to do so "to avoid or prevent harm … to another as a result of client criminal conduct … clearly in violation of the law…."[89] If you do, you must first (if feasible) make a good faith effort to persuade your client not to act.[90] But if those efforts fail, you are left with the decision whether to reveal your client's confidential information to possibly save the life of the wife or, as it turned out, the life of the new boyfriend.

It is crucial to realize that this is a matter of discretion rather than duty. Rule 1.6(b)(1) provides that a lawyer "may" reveal confidential information if an exception applies. Comment 12 to Rule 1.6 leaves no doubt: "A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this rule." So, if you were representing the Houston County husband and heard him threaten his wife, you could warn her or not. If a tragedy occurs, and your client carries out a threat to kill someone, your failure to warn was a perfectly acceptable decision under the Georgia Rules of Professional Conduct.[91]

III. Issue Relating to Third Parties

The issues discussed so far all involve duties to clients. I want to raise two issues that concern duties to third parties.

A. Unrepresented Opposing Parties

In 2022, there were 45,413 pro se litigants in domestic civil cases in Georgia.[92] Family law practitioners cannot avoid having to deal from time to

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[89] GA. RULES OF PROF'L CONDUCT r. 1.6(b)(1)(i) (2025).

[90] GA. RULES OF PROF'L CONDUCT r. 1.6(b)(3) (2025).

[91] Not every state agrees. See, e.g., ILL. RULES OF PROF'L CONDUCT r. 1.6(c) (2025). ("A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.").

[92] CIVIL ACCESS TO JUSTICE INNOVATIVE IDEAS TO SUPPORT SELF-REPRESENTED LITIGANTS AND INCREASE COURT EFFICIENCY IN CIVIL CASES at 7 (2023), https://georgiacourts.gov/wp-content/uploads/2024/03/Civil-Access-to-Justice-Report-12_22_2023.pdf.

time with unrepresented adversaries. In doing so, they must be careful to comply with Rule 4.3.

Suppose you represent Jane in her divorce from Bill, who is unrepresented. Eventually, you will need to negotiate with Bill to try to reach an agreement. Because Bill does not have a lawyer, the "no-contact rule" (4.2) does not apply, and you are free to communicate with him directly. But you still must be careful as you do so.

Rule 4.3(a) provides that, in dealing on behalf of a client with an unrepresented party, you may not state or imply that you are disinterested.[93] Simple enough– don't lie to an unrepresented party. But Rule 4.3(a) imposes an additional duty that requires more alertness. You have an obligation if you know or reasonably should know that the unrepresented party misunderstands your role - you must make reasonable efforts to correct the misunderstanding, even if you did not contribute to it.[94] Notice especially the "know or reasonably should know" standard. It will do you no good in a disciplinary proceeding to plead ignorance of the unrepresented party's misunderstanding if the special master or, ultimately the Supreme Court, decides that under the circumstances you *should have* known about it.

Let me give you an example I often use in my class. Suppose you are representing a husband in a divorce from his wife, who is unrepresented. You meet with the wife to present a proposed settlement agreement. She reads it and says to you, "thank you so much for helping us out. This has been a tough time for both of us." The wife seems to think that you are helping her, yet your sole allegiance is to her adversary. In that circumstance, you know or should know that the wife misunderstands your role in the matter. You have an obligation to make reasonable efforts to correct that misunderstanding. You might, for example, explain to the wife: "Please understand that I represent your husband, and I do not represent you. It is not therefore my role to help you resolve the issues – my sole allegiance is to your husband. Do you understand?"

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[93] GA. RULES OF PROF'L CONDUCT r. 4.3(a) (2025). An intentional misrepresentation such as that would also violate Rule 4.1(a) ("In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person ….") and Rule 8.4(a)(4) ("It shall be a violation of the Georgia Rules of Professional Conduct for a lawyer to: … engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation ….").

[94] GA. RULES OF PROF'L CONDUCT r. 4.3(a) (2025).

Rule 4.3(b) imposes another restriction on your communications with an unrepresented party. It provides:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not … give advice other than the advice to secure counsel, if a lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of a client.[95]

Suppose you want to settle a divorce case with an unrepresented party. You can present a proposed agreement to them, but they may not understand it. What if the unrepresented party asks you, for example, what "joint legal custody" means. If the unrepresented party does not understand what the proposal means, it may not be possible to resolve the case. Can you explain, or would that constitute legal advice that you are prohibited from giving?

Fortunately, Comment 2 to 4.3 gives you a way out of this dilemma. Remember, the purpose of Rule 4.3 is to protect the unrepresented party from making the mistake of trusting you, in the naive belief that you are looking out for them. You can eliminate that risk if you explain that you represent an adverse party and do not represent the unrepresented party. Once you do that, Comment 2 to Rule 4.3 tells you that you "may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations." You cannot of course make materially false statements of fact or law,[96] but you are free to seek the best deal for your client consistent with the truth, without fear of running afoul of Rule 4.3.

B. The No-Contact Rule and Represented Opposing Parties

Suppose you represent the wife in a divorce case and send a settlement proposal to the husband's counsel. Despite following up by phone, email, and text, you cannot get a response. You suspect (maybe based upon prior dealings with this lawyer) that opposing counsel has not conveyed the settlement offer to his client. What can you do?

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[95] GA. RULES OF PROF'L CONDUCT r. 4.3(b) (2025).
[96] GA. RULES OF PROF'L CONDUCT r. 4.1(a) (2025).

One thing is clear: you may not communicate directly with the husband to convey the settlement offer. Georgia Rule 4.2 provides: "A lawyer who is representing a client in a matter shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order."[97] You know the husband is represented in the matter, and the presentation of a settlement offer certainly would be about the subject of the representation.

One option you may consider is to ask your client to contact her husband and convey the settlement offer. The comments to Georgia Rule 4.2 recognize that parties have a right to communicate with each other.[98] You might also be tempted to follow the suggestions of American Bar Association Formal Opinion 11-461, which advised:

> Parties to a legal matter have the right to communicate directly with each other. A lawyer may advise a client of that right and may assist the client regarding the substance of any proposed communication. The lawyer's assistance need not be prompted by a request from the client. Such assistance may not, however, result in overreaching by the lawyer.[99]

Following this guidance would mean that you could equip your client with the documents and "talking points" needed to get the settlement talks going. As long as you do not overreach – such as by having your client try to get her husband's signature on the settlement before speaking with his lawyer – you would be in bounds, at least under the ABA's interpretation of the Model Rules.

However, there is reason for caution in Georgia. Comment 8 to Georgia Rule 4.2 may forbid the type of party-to-party communication you want to have: namely, one instigated and directed by you. The entire Comment states, "Parties to a matter may communicate directly with each other because this Rule is not intended to affect communications between parties to an action entered into *independent of and not at the request or direction of counsel*."[100] The italicized language suggests that the ABA's

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[97] GA. RULES OF PROF'L CONDUCT r. 4.2(a) (2025).

[98] GA. RULES OF PROF'L CONDUCT r. 4.2 Comment 8 (2025). ("Parties to a matter generally may communicate directly with each other because this Rule is not intended to affect communications between parties to an action ….").

[99] ABA Formal Op. 11-461 at 1 (2011).

[100] GA. RULES OF PROF'L CONDUCT r. 4.2 Comment 8 (2025).

advice about the lawyer's role in suggesting and guiding party-to-party contact may not square with Georgia's rule. And the Georgia Supreme Court has expressed some skepticism about using ABA ethics opinions in interpreting Georgia rules.[101] You may be better advised to find another way to get a response from opposing counsel. Court involvement ultimately may be the best recourse.

One additional twist on domestic relations cases and Rule 4.2 bears mentioning. Suppose the husband in a divorce is a lawyer, while the wife is not a lawyer but is represented by one. May the lawyer-husband contact the represented wife without permission of the wife's lawyer? On the one hand, this is a party-to-party communication, which is normally permitted. On the other hand, the husband is a trained advocate, and allowing him to contact the wife directly without the permission of the wife's lawyer poses the exact risk that Rule 4.2 is designed to protect against, the "misuse of the imbalance of legal skill between a lawyer and a layperson."[102]

The Supreme Court of Georgia recently amended Rule 4.2 to provide more guidance about party-to-party communications when one of the parties is a lawyer. Rule 4.2(a) now reads (the new language is italicized):

> A lawyer who is representing a client *or proceeding pro se* in a matter shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order.[103]

This amendment errs on the side of protecting the represented party from the dangers of communicating with a lawyer on the other side, at the cost of limiting otherwise permissible party-to-party communication. A lawyer who

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[101] See In re Formal Advisory Opinion No. 20-1, 313 Ga. 803, 807, 872 S.E.2d 745, 747 n.1 (2022) ("[W]e have modified the proposed FAO 20-1 to omit all of footnote 1 and a portion of footnote 3 in the proposed FAO, which contained references to ABA Model Rule 4.2, Comment 7 to that rule, and ABA Formal Opinion 91-359 (March 22, 1991)."

[102] GA. RULES OF PROF'L CONDUCT r. 4.2 Comment 7 (2025).

[103] In Re Motion to Amend 2023-2 (December 20, 2024) (https://www.gasupreme.us/wp-content/uploads/2024/12/Motion-to-Amend-2023-2_Order_FINAL_entered.pdf.). The American Bar Association Standing Committee on Ethics and Professional Responsibility reached the same conclusion in 2022 by interpreting the Model Rule 4.2 (which does not contain language explicitly about a pro se lawyer) to cover pro se lawyers because, according to the ABA, the pro se lawyer is representing a client – himself or herself. ABA Formal Op. 502 at 1 (2022).

is representing themselves and is also represented by counsel is proceeding pro se within the meaning of the amended rule.[104] Notice, however, that a represented lawyer who is not also representing themself may have contact with a represented opposing party, without the permission of the other side's lawyer. Such a lawyer would neither be representing a client nor proceeding pro se and so would be outside even the broader reach of new Rule 4.2.

IV. One Issue Relating to Candor to the Court: Secret Settlements

A superior court judge alerted me to an issue he has been seeing with respect to candor to the court. The scenario is this: A husband and wife agree to divorce and agree on child support. They want to avoid the hassle of completing the required detailed calculations of presumptive child support.[105] The husband and wife ask the lawyer to file for divorce on behalf of one spouse and to represent to the court that the couple have no children. The other spouse appears pro se and goes along with the ruse. The parties receive a quick and inexpensive divorce, relying on their secret "side deal" about the details.

Rule 3.3(a) provides that a lawyer "shall not knowingly: (1) make a false statement of material fact or law to a tribunal; (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client…."[106] To misrepresent the existence of minor children of a divorcing couple violates Rule 3.3(a). That fact is material, even when the parties have reached an agreement, because the court is required by law to review the agreement with the best interests of the child in mind. As O.C.G.A. § 19-6-15 states, after reciting at great length the required process for determining presumptive child support:

> Nothing contained within this Code section shall prevent the parties from entering into an enforceable agreement contrary to the presumptive amount of child support which may be made the order of the court pursuant to review by the court of the adequacy of the child support amounts negotiated by the parties, including the provision for medical expenses and health insurance; provided, however, that if the agreement negotiated by the parties does not comply with the provisions contained in this Code section and does not contain findings

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[104] GA. RULES OF PROF'L CONDUCT r. 4.2 Comment 8 (2025).

[105] See O.C.G.A. § 19-6-15.

[106] GA. RULES OF PROF'L CONDUCT r. 3.3(a) (2025).

> of fact as required to support a deviation, the court shall reject such agreement.[107]

The child support guidelines are complicated, and following them and obtaining court approval can be time-consuming and expensive. But lying to the court about the existence of minor children to save time and money is not an option.

V. Conclusion

This article is not intended as a comprehensive examination of ethics issues in family law cases. It discusses only selected issues according to the criteria described in the introduction. For broader discussions of ethics in family law, a good place to start is Ethics, Malpractice, and Professional Liability in Matrimonial Cases, a journal of the American Academy of Matrimonial Lawyers.[108]

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[107] O.C.G.A. § 19-6-15(c)(6).

[108] The most recent issues are available at https://www.aaml.org/category/ethics-malpractice-and-professional-liability-in-family-law-cases/.

THE WINDING ROAD TO GRANDMA'S HOUSE: GRANDPARENT VISITATION IN GEORGIA

Suzanne Oldweiler[*]

INTRODUCTION 50

I. GRANDPARENTING 50

A. Grandparents Defined 50

B. The Role of the Grandparent 52

C. The Effect of Grandparent Relationships 55

II. GRANDPARENT VISITATION IN THE UNITED STATES 59

A. Grandparent Rights versus Grandparent Visitation 59

B. Mediation Support in the ABA Model Rules 60

C. The Clash of Constitutional Rights and the Best Interest Standard 61

D. Other Jurisdictions 64

III. GRANDPARENT VISITATION IN GEORGIA 66

A. "Grandparents" as Defined in the Georgia Code 66

B. Georgia Public Policy 69

C. The Legal Framework of Georgia's Grandparent Visitation Statute 70

D. Grandparent Visitation Compared to Child Custody Determinations in Georgia 70

E. Establishing Grandparent Visitation 72

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F. Modifying Grandparent Visitation 74
G. The Evolution of Georgia's Grandparent Visitation Law 75
IV. CONCLUSION 94

INTRODUCTION

Nana. Grandmother. Grandma. Mo. Grandmama. Gigi. Abuela. Grand-mere. Oma. . .

Ditde. Papa. Boppa. Grandpa. Granddaddy, Gramps. Pops. Abuelo. Grand-père. Opa. . .

Grandparents have many nicknames, reflecting terms of endearment for elder relatives who may "occupy very special places in our lives, and in our hearts."[1] To recognize grandparents and celebrate the special places they hold, Congress passed legislation in 1978 setting the first Sunday after Labor Day as Grandparents Day.[2] Now, American grandchildren and their parents purchase millions of Grandparents Day cards each year.[3] To preserve the valuable relationship between grandparents and their grandchildren, all fifty states have enacted laws to permit a grandparent to petition for visitation with their grandchild in some form.[4] Georgia's grandparent visitation statute, O.C.G.A. § 19-7-3, has endured several iterations in response to evolving family dynamics and constitutional challenges. In Section I, we examine the characteristics of grandparents, their roles, and the effect of such relationships on grandchildren. In Section II, we explore the legal landscape regarding grandparent visitation in the United States, while Section III evaluates the structure, the application, and the evolution of Georgia's legal framework for grandparent visitation.

I. GRANDPARENTING

A. Grandparents Defined

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[1] Kate Hanson, "Grandparents Day 2024: When, Why and How to Celebrate This Holiday," *Today*, Aug. 3, 2022, available at https://www.today.com/parents/parents/when-is-grandparents-day-rcna40920.

[2] "About – Grandparents Day," available at https://grandparentsday.org/grandparentsweek/about/.

[3] Smith, P.K., & Smith, P.K. (Eds.). *The Psychology of Grandparenthood: An International Perspective* (1st ed., Routledge 1991), available at https://doi.org/10.4324/9780203359174.

[4] Sarah J.M. Cox, "Grandparent and Third-Party Visitation Rights: A 50 State Survey," CHILDREN'S LEGAL RIGHTS JOURNAL, vol. 40, no. 2, art. 2 (2020); "Grandparent Visitation & Custody Laws: 50-State Survey," available at https://www.justia.com/family/child-custody-and-support/grandparent-visitation-custody-laws-50-state-survey/.

"Grandchildren *create* grandparents."[5] Grandchildren, by their birth, create a new role for the parents of their parents[6] and often bestow upon them a new alias—the grandparent nickname.[7] Regardless of the moniker chosen or the name ultimately adopted,[8] the demographics of grandparents are quite broad.[9] For example, grandparents can vary significantly in age, from the thirties where there is teenage pregnancy, to over 100 years of age in cases of extreme longevity.[10] Grandparents also vary by education level, race, and ethnicity.[11] Increases in divorce and remarriage have resulted in more blended families and step-grandparent relationships.[12] This includes not only the marital separation of the grandchild's parents but also that of grandparents. Several recent articles address the rise of the gray divorce trend:

> [T]hese separations are more common than ever before. Gray divorce — dissolutions of marriages occurring among adults older than 50 — doubled between 1990 and 2010,[13] according to a 2022 study. These days, 36 percent of adults who get divorced in the US are 50 and older. Close to two-thirds of those separating in midlife had already been divorced at least once, according to the study's lead author, Susan

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[5] Thompson, Susie Shy. *Mawmaw Got Run Over by a Combine: Grandparent Naming Practices in the Rural South.* University of Louisville. 176.pp. https://www-s3-live.kent.edu/s3fs-root/s3fs-public/file/15-Thompson.pdf.

[6] *Id*. at 175.

[7] *Id.*

[8] *Id.* at 175-176.

[9] Hagestad, G. O. (1985). *Continuity and connectedness.* In V. L. Bengtson & J. F. Robertson (Eds.), Grandparenthood 31–48. (Sage 1985).

[10] *Id.*

[11] Bruno Arpino, et al. "Family Histories and the Demography of Grandparenthood." Demographic Research, vol. 39, 2018, pp. 1105–50. Available at: https://www.jstor.org/stable/26585363.

[12] Giarrusso, Roseann, et al. "Family Complexity and the Grandparent Role." Generations: Journal of the American Society on Aging, vol. 20, no. 1, 1996, pp. 17–23. Available at: http://www.jstor.org/stable/44877325.

[13] Susan L Brown, I-Fen Lin, The Graying of Divorce: A Half Century of Change, *The Journals of Gerontology: Series B*, Volume 77, Issue 9, September 2022, Pages 1710–1720, https://doi.org/10.1093/geronb/gbac057.

> Brown,[14] a sociology professor at Bowling Green State University. While divorce rates among younger groups remain higher,[15] that gap is shrinking as older adults continue to split, Brown says. (There is limited data on same-sex marriages in the United States, so many studies focus solely on heterosexual pairings.)[16]

While parents may feel pressure to stay together for their children,[17] that pressure appears to dissipate for grandparents,[18] especially for those adjusting to an empty nest.[19] Still, if emotions are high, divorcing and divorced grandparents may need to apply co-parenting strategies to their grandparent role to prevent conflicts, such as switching off for family holidays or special occasions.[20] Regardless, as grandparents remain diverse and the categories of individuals considered to be grandparents have expanded, so has the grandparent role.[21]

B. The Role of the Grandparent

"Fifty years ago, nuclear families constituted 42% of all American households.[22] Today, they account for only 22% [of all American

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[14] "Susan L. Brown," available at https://www.bgsu.edu/arts-and-sciences/sociology/people/susan-l-brown.html.

[15] "Age Variation in Divorce Rates, 1990-2021." Available at https://www.bgsu.edu/ncfmr/resources/data/family-profiles/westrick-payne-lin-age-variation-divorce-rate-1990-2021-fp-23-16.html.

[16] Allie Volpe, "The Astonishing Rise of Gray Divorce," *Vox*, Oct. 1, 2024, available at https://www.vox.com/the-highlight/372912/gray-divorce-after-50-trend-financial-social-consequences.

[17] "Gray Divorce: Why Late-Life Splits Are More Common Today," *Newsweek*, available at https://www.newsweek.com/gray-divorce-late-life-more-common-today-1838744.

[18] Jocelyn Elise Crowley, *Gray Divorce: What We Lose and Gain from Mid-Life Splits* (2018).

[19] "Gray Divorce: Why Late-Life Splits Are More Common Today," *Newsweek*, available at https://www.newsweek.com/gray-divorce-late-life-more-common-today-1838744.

[20] Kathryn Smerling, forthcoming, *Learning to Play Again: Rediscovering Our Early Selves to Become Better Adults* (add forthcoming publication date).

[21] *Id.*

[22] Carly Stern, "Will the American Nuclear Family Die Out?" *OZY*, Feb. 11, 2020, available at https://www.ozy.com/news-and-politics/the-nuclear-family-is-in-de-cline-but-did-it-ever-represent-america/258493/; Melanie Mears, "Comment, Revisiting Grandparent Rights

households], a decline by nearly half of what they were before." As a result, the American nuclear family continues to diversify and grandparents take on greater involvement in their grandchildren's lives.[23] "Factors such as divorce, economic hardship, single parenthood, teenage pregnancy, drug and alcohol addiction, incarceration, child abuse and neglect, and military employment have influenced this increase in involvement."[24]

The grandparent role has expanded during a time of demographic transition characterized by longer life expectancy, later childbearing years, and declining fertility rates, all of which have changed the structure of families.[25] Grandparents are on average healthier and have fewer grandchildren to support than their predecessors, creating the opportunity for development of the grandparent role.[26] Younger grandparents are more likely to be physically and mentally fit, which increases the likelihood of intensive childcare.[27] However, age defines a grandparent's involvement in other roles, such as being an active member of the workforce, a position that may compete with the grandparent's role.[28] Still, numerous studies conclude that

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Across the United States," 36 J. AM. ACAD. MATRIMONIAL L. (2023), available at https://www.aaml.org/wp-content/uploads/9-MAT104.pdf.

[23] *See* Hope Yen, "Grandparents Playing Larger Role in Raising Grandchildren," *New Haven Reg.*, Aug. 25, 2011, available at https://www.nhregister.com/news/article/Grandparents-playing-larger-role-in-raising-11570728.php; Melanie Mears, "Comment, Revisiting Grandparent Rights Across the United States," 36 J. AM. ACAD. MATRIMONIAL L. (2023), available at https://www.aaml.org/wp-content/uploads/9-MAT104.pdf.

[24] E.g., Id.; Tricia V. Argentine, Grandparents Act as the "National Guard" of Their Families—All Eager and Ready to Respond When in Need: A Call for Expansion of Grandparent Visitation Rights in North Carolina, 37 N.C. CENT. L. REV. 68, 69 (2014); Michael K. Goldberg, A Survey of the Fifty States' Grandparent visitation statutes, 10 MARQ. ELDER'S ADVISOR 245, 246 (2009); Terry Turner, Taking Care of Yourself While Raising Your Grandchildren, RETIRE GUIDE (July 31, 2020), https://www.retireguide.com/guides/self-care-raising-grandchildren/; Melanie Mears, "Comment, Revisiting Grandparent Rights Across the United States," 36 J. AM. ACAD. MATRIMONIAL L. (2023), available at https://www.aaml.org/wp-content/uploads/9-MAT104.pdf.

[25] Emre Sari, "Multigenerational Health Perspectives: The Role of Grandparents' Influence on Grandchildren's Wellbeing," INT'L J PUB. HEALTH, 2023, 68: 1606292, published online Sept. 8, 2023. doi: 10.3389/ijph.2023.1606292.

[26] Arpino, et al., *supra* n.11.

[27] Hank and Buber, "Grandparents Caring for their Grandchildren: Findings from the 2004 Survey of Health, Ageing, and Retirement in Europe" JOURNAL OF FAMILY ISSUES 20(1):53-73 (2009).

[28] Arpino, et al., *supra* n.11.

grandparents find their role, which is largely shaped by individual, familial, socio-historical, economic, and demographic factors,[29] to be very satisfying.[30]

Additionally, the age and number of grandchildren, along with geographical proximity, present a structure for interaction between the generations.[31] The likelihood that a child in the United States will live with a grandparent has increased over time, with three-generation and grand family living arrangements being more prevalent among racial and ethnic minority groups.[32] Children in multigenerational households receive substantial time investment from grandparents.[33] In addition, there are "skipped-generation" households where a grandparent and grandchild co-reside but no parent is present, as well as "three-generation shared-care households" where the grandparent claims primary responsibility for the grandchild.[34] In these scenarios, grandparents typically take on caregiving responsibilities.[35] Notably, while grandparents influence their grandchildren, that influence is bidirectional.[36] Despite the changing dynamics of families and society, the

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[29] Kemp, Candace L. "The Social and Demographic Contours of Contemporary Grandparenthood: Mapping Patterns in Canada and the United States." Journal of Comparative Family Studies, vol. 34, no. 2, 2003, pp. 187–212. Available at: http://www.jstor.org/stable/41603872.

[30] Thiele, D. M., and Whelan, T. A., "The Nature and Dimensions of the Grandparent Role," *Marriage & Family Review*, vol. 40, no. 1, 2006, pp. 93–108, doi: 10.1300/J002v40n01_06.

[31] Arpino, et al., *supra* n.11.

[32] Amorim, Mariana, et al. "From 6.5% of children living with a grandparent in 1990 to 12% doing so in 2015". The Magnitude and Timing of Grandparental Coresidence during Childhood in the United States, Demographic Research, vol. 37, 2017, pp. 1695–706. Available at: http://www.jstor.org/stable/26332239.

[33] Kalil, Ariel, et al. "Time Investments in Children across Family Structures." The Annals of the American Academy of Political and Social Science, vol. 654, 2014, pp. 150–68. Available at: http://www.jstor.org/stable/24541737.

[34] Mutchler, Jan E., and Lindsey A. Baker. "A Demographic Examination of Grandparent Caregivers in the Census 2000 Supplementary Survey." Population Research and Policy Review, vol. 23, no. 4, 2004, pp. 359–77. Available at: http://www.jstor.org/stable/40230866.

[35] *Id.*

[36] Wong, ELY, Liao, JM, Etherton-Beer, C, Baldassar, L, Cheung, G, Dale, CM, et al. Scoping Review: Intergenerational Resource Transfer and Possible Enabling Factors. *Int J Environ Res Public Health*(2020) 17(21):7868. doi:10.3390/ijerph17217868; Sari *supra* n.25.

role of the grandparent continues to add value to those around them as "stress buffers, family watchdogs, roots, arbitrators, and supporters."[37]

C. The Effect of Grandparent Relationships

Grandparent relationships can be valuable for families. In many scenarios, grandparents add a layer of continuity,[38] stability, childcare, companionship, and financial and emotional support[39] that helps both young and adult grandchildren thrive.[40] Importantly, grandparents may lend support to both generations of parents and grandchildren.[41] They can be great triangulators, serving as a grandchild's second layer of guidance that shapes development[42] beyond the boundaries of a nuclear family.[43] Grandparents may carry out family traditions that translate into precious memories, they may occasionally bend parent rules,[44] and they might share personal stories

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[37] "Importance of Grandparents to Their Grandchildren," available at https://foreverfamilies.byu.edu/importance-of-grandparents-to-their-grandchildren.

[38] Hagestad, G. O. *Continuity and connectedness.* In V. L. Bengtson & J. F. Robertson (Eds.), Grandparenthood 31–48 (Sage Publications, Inc. 1985).

[39] Kornhaber, Arthur, and Kenneth L. Woodward. *Grandparents/grandchildren: The vital connection*. Routledge, 2019.

[40] "Grandparenthood." In B. H. Fiese, M. Celano, K. Deater-Deckard, E. N. Jouriles, & M. A. Whisman (Eds.), APA handbook of Contemporary Family Psychology: Foundations, Methods, and Contemporary Issues Across the Lifespan 557–574. (Am. Psychol. Ass'n 2019). Available at: https://doi.org/10.1037/0000099-031; Troll L. E. "Grandparents: The Family Watchdogs." In T.H. Brubaker (Ed.), *Family Relationships in Later Life* 63-74 (Sage 1983).

[41] Attias-Donfut C, Wolff FC. "The Redistributive Effects of Generational Transfers." In Arbur S, Attias-Donfut C, editors. *The Myth of Generational Conflict: The Family and State in Ageing Societies* 22-46 (Routledge 2000); Soldo BJ. "Cross Pressures on Middle-Aged Adults: A Broader View." *Journal of Gerontology: Social Sciences,* vol. 51, 1996, S217–S273.

[42] Coall, David A., and Ralph Hertwig. "Grandparental Investment: A Relic of the Past or a Resource for the Future?" *Current Directions in Psychological Science*, vol. 20, no. 2, 2011, pp. 93–98. Available at: http://www.jstor.org/stable/23045759.

[43] Laura T. Kessler, "Community Parenting," 24 WASH. U. J.L. & POL'Y 47 (2007).

[44] The Fun Seeker is a frequent pattern, one in which the grandparent-child relationship is characterized by "fun morality." Neugarten, Bernice L., and Karol K. Weinstein. "The Changing American Grandparent." *Journal of Marriage and Family*, vol. 26, no. 2, 1964, pp. 199–204. Available at: https://doi.org/10.2307/349727, accessed Oct. 1, 2024.

about events marked in history books,[45] and help children establish narrative identities.[46] Even as interactions between grandchildren and grandparents may become less frequent, such as during a grandchild's college years, grandchildren perceive their grandparents, particularly their grandmothers, as influential in their value development.[47]

Grandparents may also influence their grandchild's physical health. For example, the bond between grandparents and their grandchildren has the potential to reduce risky behavior, such as smoking and drug use among teenagers.[48] A strong bond may also improve nutritional outcomes, reducing the likelihood of childhood obesity, and lead to better mental health in grandchildren.[49] This bond can also adversely affect grandchildren, *e.g.*, when grandparents indulge in unhealthy habits, such as smoking.[50]

Co-residency with a grandparent is shown to influence their grandchildren. For example, in all 33 OECD[51] member countries, co-residence with grandparents has been linked to adverse cognitive and non-cognitive outcomes, such as lower mathematics scores and changes in locus of control.[52] However, race and living companions are factors in determining the impact of co-residency. For white children, living with a single mother

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[45] Blundon, A. "The Role of Grandparents." In *Rural Transformation and Newfoundland and Labrador Diaspora* (Brill 2013), available at https://brill.com/view/book/edcoll/9789462093027/BP000022.xml.

[46] Green, Anna. "Grandparents, Communicative Memory and Narrative Identity." Oral History, vol. 47, no. 1, 2019, 81–91. Available at: http://www.jstor.org/stable/45214451.

[47] Karen A. Roberto, Ph.D., and Johanna Stroes, M.A., "Grandchildren and Grandparents: Roles, Influences, and Relationships," vol. 34, issue 3, available at https://doi.org/10.2190/8CW7-91WF-E5QC-5UFN.

[48] Sari *supra* n.25.

[49] Sadruddin, AFA, Ponguta, LA, Zonderman, AL, Wiley, KS, Grimshaw, A, and Panter-Brick, C. How Do Grandparents Influence Child Health and Development? A Systematic Review. *Soc Sci Med* (2019) 239:112476. doi:10.1016/j.socscimed.2019.112476.

[50] Duarte, R, Escario, JJ, and Molina, JA. Smoking Transmission in-Home Across Three Generations in-Home Across Three Generations. *J Subst Use* (2015) 21:1–5. doi:10.3109/14659891.2015.1018970.

[51] The Organisation for Economic Co-operation and Development, https://www.oecd.org/en/about.html.

[52] Sadruddin *supra* n.49; Radl, J, Salazar, L, and Cebolla-Boado, H. Does Living in a Fatherless Household Compromise Educational Success? A Comparative Study of Cognitive and Non-Cognitive Skills. *Eur J Popul* (2017) 33(2):217–42. doi:10.1007/s10680-017-9414-8.

and a grandparent is associated with increased cognitive stimulation and higher reading recognition scores, compared to living with a single mother alone.[53] However, for Black children, grandparent co-residence is associated with less cognitive stimulation.[54] Comparatively, three-generation co-residence scenarios have been associated with lower levels of expressive language for White, Asian, and Black children but more expressive language for Hispanic children.[55] "Co-residence was also associated with more externalizing behavior for White and American Indian/Alaskan Native children but less externalizing behavior for Hispanic and Black children."[56] Thus, living with a grandparent may benefit children, but the pattern of results differs by race.[57]

Additionally, the mental health histories of grandparents play an important role in the social and emotional wellbeing of young children.[58] Thus, healthy grandparents conveying to grandchildren that their lives as older adults are still full of possibilities and open to new growth is important to grandchildren's mental health.[59] From the grandchild's perspective, affectionate communication from grandparents has shown to be indirectly associated with less loneliness via heightened shared family identity, but only for grandchildren who judged grandparents' futures as expansive.[60] Further, due to working parent responsibilities, grandmothers in particular increasingly take on childcare for preschool age grandchildren and their

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[53] Emre Sari, "Multigenerational Health Perspectives: The Role of Grandparents' Influence on Grandchildren's Wellbeing," INT'L J PUB. HEALTH, 2023, 68: 1606292, published online Sept. 8, 2023. doi: 10.3389/ijph.2023.1606292.

[54] *Id.*

[55] Pilkauskas, Natasha V. "Living with a Grandparent and Parent in Early Childhood: Associations with School Readiness and Differences by Demographic Characteristics." *Developmental Psychology*, vol. 50, no. 12, Dec. 2014, pp. 2587-2599.

[56] *Id.*

[57] Dunifon, Rachel, and Lori Kowaleski-Jones. "The Influence of Grandparents in Single-Mother Families." Journal of Marriage and Family, vol. 69, no. 2, 2007, pp. 465–81. Available at: http://www.jstor.org/stable/4622450.

[58] Hancock, K.J., Mitrou, F., Shipley, M. et al., "A Three Generation Study of the Mental Health Relationships Between Grandparents, Parents, and Children," *BMC Psychiatry* 13, 299 (2013), available at https://doi.org/10.1186/1471-244X-13-299.

[59] Bernhold, Q. S., "Grandparents' Affectionate Communication Toward Grandchildren and Grandchildren's Mental Health Difficulties: The Moderating Role of Future Time Perspective," *Health Communication*, vol. 35, no. 7, 2019, pp. 822–831, available at https://doi.org/10.1080/10410236.2019.1593080.

[60] *Id.*

mental health may impact grandchildren directly through frequent caregiving and indirectly through influencing their parents.[61] Still, research suggests that children find unique acceptance in their relationships with grandparents, which benefits them emotionally and mentally.[62] Grandparents can be a major support during family disruptions, such as during their parents' divorce, the birth of a sibling, the death of a loved one, incarceration, military duty, and more.[63]

Conversely, not all grandparent relationships are healthy ones that serve a grandchild's best interests, and grandparents who exhibit toxic behaviors, such as consistently undermining parental authority, manipulating with guilt or shame, disregarding boundaries, and being verbally or physically abusive can negatively impact family dynamics.[64] In circumstances like these, parents may object to grandparents having relationships with their children.[65] Parents may also limit the amount of time their child sees their grandparents.[66] While grandparents can be a source of support, they can also be a source of conflict, such as after a change in family circumstances: a death in the family, incarceration, divorce, and drug abuse,[67] which may result in a grandparent's need to pursue legal avenues to protect their relationships with grandchildren in their own interests and that of their grandchildren.

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[61] Johnston, D.W., Schurer, S., and Shields, M.A., "Evidence on the Long Shadow of Poor Mental Health Across Three Generations." *IZA Discussion Paper*, vol. 6014 (2011), available at https://www.econstor.eu/handle/10419/55107.

[62] "Importance of Grandparents to Their Grandchildren," available at https://foreverfamilies.byu.edu/importance-of-grandparents-to-their-grandchildren.

[63] *Id.*

[64] Ashley Austrew "How to Identify and Deal with Toxic Grandparents," September 11, 2025, available at https://www.care.com/c/toxic-grandparents-warning-signs/.

[65] Lauren F. Cowan, There's No Places Like Home: Why the Harm Standard in Grandparent Visitation Disputes Is in the Child's Best Interests, 75 FORDHAM L. REV. 3137, 3137 (2007). Available at: https://ir.lawnet.fordham.edu/flr/vol75/iss6/16.

[66] Clark, S.J., Freed, G.L., Singer, D.C., Gebremariam, A., & Schulz, S. (2020, August 17). "When parents and grandparents disagree." 36(5), 1-2. C.S. Mott Children's Hospital National Poll on Children's Health.

[67] *Id* at 3138.

II. GRANDPARENT VISITATION IN THE UNITED STATES

A. Grandparent Rights versus Grandparent Visitation

According to Black's Law Dictionary, grandparent rights are "a grandfather's or a grandmother's rights in seeking visitation with a grandchild."[68] In other words, grandparent rights are only an individual grandparent's right to have standing to pursue visitation with a grandchild.[69] Conversely, the Black's Law Dictionary defines grandparent visitation as "a grandparent's court-approved access to a grandchild."[70] Thus, if a grandparent seeks visitation with their grandchild, they must first establish their rights through their relationship as a grandparent before a court may award visitation. Specifically, grandparents seeking to establish visitation with their grandchildren must first bear the burden of proving that they have standing to bring such a claim before the grandparent may prove that they should be granted visitation over a fit parent's objection.[71] Importantly, grandparents have no right to visitation, but only a right to request the privilege of visitation:[72]

> [T]he right of a grandparent to visit with one's grandchild is never the issue before a court…the more fundamental right affected by grandparent visitation jurisprudence is *the child's right to a continuing relationship with his or her own family, namely, a grandparent*—usually over the objection of the child's own parent. Therefore… judges are often in the position of weighing the rights of parents versus the rights of the parents' own children.[73]

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[68] GRANDPARENT RIGHTS, Black's Law Dictionary (12th ed. 2024).

[69] Daniel R. Victor, Keri L. Middleditch, "Grandparent Visitation: A Survey of History, Jurisprudence, and Legislative Trends Across the United States in the Past Decade," 22 J. AM. ACAD. MATRIMONIAL L. (2009), available at https://www.aaml.org/wp-content/uploads/MAT206_0.pdf.

[70] VISITATION, Black's Law Dictionary (12th ed. 2024).

[71] Troxel v. Granville, 530 U.S. 57 (2000).

[72] Sachs v. Walzer, 242 Ga. 742 (1978).

[73] Victor and Middleditch, *supra* n.69.

Interestingly, proponents of grandparent visitation legislation are often child advocates, rather than people who are "pro-grandparent," who seek to protect children from the harm that follows a parent's decision to eliminate a child's contact with a family member with whom the child has a loving and emotionally bonded relationship.[74] The objective of such advocates is not to obtain visitation for the grandparent and the child, but to create an opportunity for the child's disputing family members to convene and work to resolve their disputes.[75] While a parent and a grandparent can jointly agree to visitation and freely enter agreements permitting the same, high-conflict situations that do not support the best interests of the grandchild can be an influential factor for a court. Generally, in cases involving the issue of grandparent visitation, "a moderate amount of antagonism that does not have a major impact on the child will not preclude court-ordered visitation." However, where the level of antagonism is too high, such as circumstances where a grandparent may use their visitation to undermine the child's relationship with their parent, that could result in denial of visitation.[76]

The national non-profit Grandparent Rights Organization, which has lobbied in all fifty states for grandparent legislation, has made it clear that, "just because you have a law does not mean you have to have a lawsuit."[77] The threat of litigation can effectively bring feuding family members together, despite their differences, in the best interests of the minor child.[78]

B. Mediation Support in the ABA Model Rules

The American Bar Association issued Model Rules for grandparent

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[74] Melanie Mears, "Comment, Revisiting Grandparent Rights Across the United States," J. AM. ACAD. MATRIMONIAL L. 393 (2023), available at https://www.aaml.org/wp-content/uploads/9-MAT104.pdf.

[75] *Id.*

[76] Jeff Atkinson, "The Rights of Grandparents," Dec. 11, 2011, available at https://www.americanbar.org/groups/senior_lawyers/resources/voice-of-experience/2010-2022/rights-grandparents/.

[77] Todd C. Berg, "Grandparent Visitation Law Back on the Books: Provides Recourse When Visitation is Denied, available at http://www.grandparentsrights.org, quoting Grandparents Rights Organization founder, Richard S. Victor (2005); Melanie Mears, "Comment, Revisiting Grandparent Rights Across the United States," 36 J. AM. ACAD. MATRIMONIAL L. 393 (2023), available at https://www.aaml.org/wp-content/uploads/9-MAT104.pdf.

[78] Mears *supra* n.74.

visitation in 1989.[79] Notably, given the opportunity for antagonism in family law litigation, the rules encourage attorneys, court personnel and other professionals to refer parties involved in grandparent visitation disputes to participate in mediation before the filing of any court action, in an effort to "develop agreements between the disputants regarding grandparent visitation, to reduce acrimony between the parties and to minimize any trauma for the child involved."[80] However, when mediation does not resolve the visitation issue, litigants are reliant on the changing legal landscape of grandparent visitation.

C. The Clash of Constitutional Rights and the Best Interest Standard

As grandparent rights advocates pushed for legislation that would allow grandparents to be involved in the lives of their grandchildren, they saw success by the end of the 1980s as all fifty states had enacted grandparent visitation statutes,[81] although the District of Columbia did not follow.[82] While opponents of third-party visitation laws attempted to frame the issue of grandparent visitation as contrary to a parent's right to make decisions concerning the child versus a grandparent's right to see their grandchild, a more accurate reflection of American jurisprudence highlights the competing rights of a parent versus the rights of the child.[83]

As the Supreme Court of the United States has recognized that "the relationship between parent and child is constitutionally protected,[84] the Court addressed the constitutionality of Washington's grandparent visitation statute in the landmark case of *Troxel v. Granville*, where the Court held that pursuant to the Due Process Clause of the Fourteenth Amendment of the U.S.

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[79] "Grandparent Visitation," *American Bar Association*, Nov. 16, 2017, available at https://www.americanbar.org/groups/public_interest/child_law/resources/attorneys/grandparent_visitation/.

[80] *Id.*

[81] Mears *supra* n.74.

[82] Jeff Atkinson, "The Rights of Grandparents," Dec. 11, 2011, available at https://www.americanbar.org/groups/senior_lawyers/resources/voice-of-experience/2010-2022/rights-grandparents/.

[83] Daniel R. Victor, Keri L. Middleditch, "Grandparent Visitation: A Survey of History, Jurisprudence, and Legislative Trends Across the United States in the Past Decade," 22 J. AM. ACAD. MATRIMONIAL L. 394 (2009), available at https://www.aaml.org/wp-content/uploads/MAT206_0.pdf.

[84] Quilloin v. Walcott, 434 U.S. 246, 255 (II) (A) (1978); Patten v. Ardis, 304 Ga. 140, 143 (2018).

Constitution, and absent special circumstances justifying interference, fit parents have a fundamental right to make decisions concerning the care, custody, and control of their children.[85] *Troxel* established "a presumption that fit parents act in the best interests of their children."[86] On an interesting note, the Court stopped short of ruling that all third-party visitation statutes were unconstitutional.[87]

> We do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context . . . Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation violate the Due Process Clause as a per se matter.[88]

Following *Troxel*, many state courts narrowed the circumstances in which third parties can obtain visitation.[89] As of 2023, at least 32 state supreme courts have ruled on the constitutionality of the states' grandparent visitation statutes since *Troxel* was decided.[90] A majority of the states have held that the statutes or a portion of the statutes are constitutional, at least as applied in some circumstances.[91] By 2024, at least eight states — Florida,[92]

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[85] *Troxel*, 530 U.S. at 66 (2000).

[86] Barnhill v. Alford., 315 Ga. 304, 312 (2022).

[87] Daniel R. Victor, Keri L. Middleditch, "Grandparent Visitation: A Survey of History, Jurisprudence, and Legislative Trends Across the United States in the Past Decade," 22 J. AM. ACAD. MATRIMONIAL L. 394 (2009), available at https://www.aaml.org/wp-content/uploads/MAT206_0.pdf.

[88] *Troxel*, 530 U.S. at 73 (2000).

[89] 2 Modern Child Custody Practice § 9-13A (2024).

[90] *Id.*

[91] *Id.*

[92] Von Eiff v. Azicri, 720 So. 2d 510 (Fla. 1998) (holding that the State Constitution's guarantee of privacy was violated by the state's grandparent visitation statute mandating that if one or both parents are deceased, trial court shall order grandparent visitation upon grandparent's petition, when in the best interest of the minor child, without first requiring proof of demonstrable harm to child).

Georgia,[93] Hawaii,[94] Idaho,[95] Illinois,[96] Iowa,[97] Michigan,[98] and Washington[99] — have held a version of their respective state statutes to be unconstitutional.

ABA Model Rules encourage state legislators to consider several factors in grandparent visitation, such as:

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[93] Brooks v. Parkerson, 265 GA. 189 (1995) (holding that an earlier version of O.C.G.A. § 19-7-3 is unconstitutional in allowing grandparent visitation without a showing of harm to the child.

[94] Doe v. Doe, 116 Hawai'i 323 (2007) (holding that Hawaii's grandparent visitation statute HRS § 571-46.3 was facially unconstitutional because it did not include a "harm to the child" standard required by the right to privacy under the state's constitution).

[95] Nelson v. Evans, 170 Idaho 887 (2022) (holding that Idaho's grandparent visitation statute I.C. § 32-719 was facially unconstitutional because it was not narrowly tailored). *See also* Murray v. Dalton, 558 P.3d 1057 (2024) (reaffirming that the statute interfered with fundamental parental rights and was subject to strict scrutiny analysis).

[96] *See* Wickham v. Byrne, 199 Ill. 2d 309, 769 N.E.2d 1 (2002) (holding that the statute authorizing grandparent visitation, 750 ILCS 5/607(b)(1), (b)(3) or Section 607 of the Illinois Marriage and Dissolution of Marriage Act, was facially unconstitutional) and Lulay v. Lulay, 193 Ill.2d 455 (2000) (holding that the statute governing grandparent visitation privileges applied to this case, where the parents agreed that visitation by the grandmother should not occur, did not serve a compelling statute interest and thus unconstitutionally infringed on the parents' fundamental liberty interest in raising their children).

[97] Santi v. Sant, 633 N.W.2d 213 (2001) (holding that Iowa Code § 598.35(7) (1999) was unconstitutional, not because it fails to require a showing of harm, but because it does not require a threshold finding of parental unfitness before proceeding to the best interest analysis). *See also* In Re Marriage of Howard, 661 N.W.2d 183 (2003) (holding that the section of the statute permitting a petition for grandparent visitation when the parents of a child are divorced was facially unconstitutional); Wurpts v. Iowa District Court, Sioux County, 687 N.W.2d 286 (2004) (finding that the statute was unconstitutional for failing to comport with the Due Process Clause); and Lamberts v. Lillig, 670 N.W.2d 129 (2003) (consistent with prior rulings in *Santi* and *Howard*).

[98] DeRose v. DeRose, 469 Mich. 320 (2003) (holding that M.C.L.A. 722.27b was unconstitutional because it violated parents' liberty interests that are protected by due process guarantees).

[99] In re Parentage of C.A.M.A., 154 Wash.2d 52 (2005) (holding that Washington's grandparent visitation statute, RCW 26.09.240, was unconstitutional because the statutory presumption that visitation with a grandparent was in the child's best interest upon showing of a substantial relationship infringed on fit parent's due process right to control visitation, and the unconstitutional portion of the statute was not severable, thus the entire statute was invalid).

> a) the nature and quality of the relationship between the grandparent and the child, including such factors as whether emotional bonds have been established and whether the grandparent has enhanced or interfered with the parent-child relationship;
> b) whether visitation will promote or disrupt the child's psychological development;
> c) whether visitation will create friction between the child and his or her parent(s);
> d) whether visitation will provide support and stability for the child after a nuclear family disruption;
> e) the capacity of the adults involved for future compromise and cooperation in matters involving the child;
> f) the child's wishes, if the child is able to freely form and express a preference; and
> g) any other factor relevant to a fair and just determination regarding visitation.
> 4. State legislation or court rules should require judges presiding in grandparent visitation cases to appoint qualified guardians ad litem for the children involved in such disputes.[100]

Thus, the ABA advises states to incorporate specific aspects of family dynamics in the best interest standard as it pertains to a determination of grandparent visitation.

D. Other Jurisdictions

In 2021, the ABA published a survey on "*Nonparent" Custody and Visitation Statues* summarizing the statues in all fifty states, the District of Columbia, and Puerto Rico.[101] While every state has at least one nonparent

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[100] "Grandparent Visitation," *American Bar Association*, Nov. 16, 2017, available at https://www.americanbar.org/groups/public_interest/child_law/resources/attorneys/grandparent_visitation/.

[101] "Nonparent Custody and Visitation Statutes in 2020," *Family Law Quarterly*, vol. 54, no. 4, 2021, pp. 365-376 (Am. Bar Ass'n), available at https://www.americanbar.org/content/dam/aba/publications/family_law_quarterly/nonparent-custody-and-visitation.pdf.

visitation statute, there are differences among them, including who has standing to seek visitation.[102]

These visitation statutes highlight the growing diversity in American families. Specifically, the statutes differ regarding which nonparent relatives are expressly named to have standing to seek visitation. By comparison, Georgia's statute, by naming grandparents, great-grandparents, and siblings, is moderately inclusive to the other states' statutes.[103] Fifteen states limit visitation to grandparents only: Alabama, Alaska, Indiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, North Carolina, South Carolina, South Dakota, Vermont, West Virginia, and Wyoming.[104] Twelve states limit visitation to grandparents and great-grandparents: Arizona, Colorado, Connecticut, Florida, Idaho, Iowa, Maine, Minnesota, Montana, New Mexico, Oklahoma, and Pennsylvania.[105] California offers a broader list by including grandparents, great-grandparents, siblings, aunts and uncles, stepparents, and former legal guardians, while also including an "order of preference" regarding custody.[106] Similarly, the Ohio statutes lists grandparents and relatives, where a relative is defined as "[A]ny other person other than a parent."[107] Additionally, Louisiana's statute names grandparents, siblings, "any other relative," stepparents, and step-grandparents.[108] Oregon's visitation statute includes foster parents, while the Texas and Minnesota statutes exclude them. Washington's statute lists grandparents, stepparents, and extended family members which include "blood relatives" and stepsiblings.[109]

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[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] "Nonparent Custody and Visitation Statutes in 2020," *Family Law Quarterly*, vol. 54, no. 4, 2021, pp. 365-376 (Am. Bar Ass'n), available at https://www.americanbar.org/content/dam/aba/publications/family_law_quarterly/nonparent-custody-and-visitation.pdf.

[108] *Id.*

[109] *Id.*

III. GRANDPARENT VISITATION IN GEORGIA

A. "Grandparents" as Defined in the Georgia Code

While a "grandparent" in the traditional sense is "the parent of one's father or mother,"[110] the definition of "grandparent" varies significantly across the Georgia Code. The Georgia legislature expands this definition in O.C.G.A. § 19-7-3, Georgia's Grandparent visitation statute, to a "parent of a parent of a minor child, the parent of a minor child's parent who has died, and the parent of a minor child's parent whose parental rights have been terminated."[111] Elsewhere in the Georgia Code, the definition of a grandparent varies. For example, several definitions are relationship-focused that convey the connections between such family members:

> "**relative**" in O.C.G.A. § 49-6-72 (10) (Ga. Social Services Code) and in O.C.G.A. § 39-4A-7 (Article II) (t) (Ga. Minors Code, O.C.G.A. Title 39);
>
> "**family member**" in O.C.G.A. § 31-7-381 (6) (Ga. Health Code, O.C.G.A. Title 31), in O.C.G.A. § 38-4-15 (Ga. Military, Emergency Management, and Veterans Affairs Code, O.C.G.A. Title 38), and also in O.C.G.A. § 19-7-3 (a) (1) (Ga. Domestic Relations Code, O.C.G.A. Title 19);
>
> "**immediate family member**" in O.C.G.A. § 34-1-10 (a) (4) (Ga. Labor and Industrial Relations Code, O.C.G.A. Title 34), in O.C.G.A. § 17-21-2 (4) (Ga. Criminal Procedure Code, O.C.G.A. Title 17), in O.C.G.A. § 48-5C-1 (a) (2) (Ga. Revenue and Taxation Code, O.C.G.A. Title 48), in O.C.G.A. § 7-1-1001 (a) (4) (Ga. Banking and Finance Code, O.C.G.A. Title 7), and in O.C.G.A.§ 40-5-24 (b) (2) (C);
>
> "**kinship caregiver**" in O.C.G.A. § 20-1-15 (3) (Ga. Education Code, O.C.G.A. Title 20);
>
> one "**related to such candidate**" in O.C.G.A. § 21-2-385 (Ga. Elections Code, O.C.G.A. Title 21);

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[110] "Grandparent," Merriam-Webster, available at: https://www.merriam-webster.com/dictionary/grandparent.

[111] O.C.G.A. § 19-7-3(a).

potentially part of a child's "**family and permanency team**" under O.C.G.A. § 15-11-2 (32.1) (Ga. Juvenile Code, O.C.G.A. Title 15, Chapter 11);

Other sections of the Code contain definitions that grant certain rights, permit a grandparent to take certain actions, or limit them in doing so, such as the following:

a "**person entitled to request a certificate of birth resulting in stillbirth"** in O.C.G.A. § 31-10-33 (h) (2) (Ga. Health Code, O.C.G.A. Title 31);

a "**person who may consent to surgical or medical treatment**" when certain conditions are met under O.C.G.A. § 31-9-2 (a) (6) (D) (Ga. Health Code, O.C.G.A. Title 31);

maternal grandparents of a fetus may be "**a party that may obtain relief in a civil action for a partial birth abortion if the mother has not attained 18 years of age at the time of the abortion"** in O.C.G.A. § 16-12-144 (c) (1) (Ga. Crimes and Offenses Code, O.C.G.A. Title 16); and

"member of the minor's family… whether of the whole or half blood or by adoption" in O.C.G.A. § 44-5-111 (10), one that is excluded from being a "**disinterested witness**" in O.C.G.A. § 44-5-141 (5), and a "**person who may make an anatomical gift of decedent's body or part"** in O.C.G.A. § 44-5-147 (Ga. Property Code, O.C.G.A. Title 44);

where a decedent lacks a will, as one " **in the fourth degree…who shall share the estate equally**" [if surviving the decedent] in O.C.G.A. § 53-2-1 (c) (6) (Ga. Wills, Trusts, and Administration of Estates Code, O.C.G.A. Title 53);

"appointed conservator" under certain conditions under O.C.G.A. § 29-3-81 (a) (3) or as an "**appointed successor guardian"** under O.C.G.A. § 29-2-41 (a) (2) (Ga. Guardian and Ward Code, O.C.G.A. Title 29);

while grandparents are not specifically named, they may serve as a "**conservator in a Wrongful Death action"** on behalf of a minor

child if there is no surviving spouse, pursuant to O.C.G.A. § 51-4-2 (b) (3) (A) (Ga. Torts Code, O.C.G.A. Title 51);

a **"person holding a degree of relationship in which marriage is prohibited"** in O.C.G.A. § 19-3-3 (a) (4) (Ga. Domestic Relations Code, O.C.G.A. Title 19);

a "**person excluded from appointment to the State Commission on Compensation"** under certain conditions under O.C.G.A. § 45-7-91 (b) (Ga. Public Officers and Employees Code, O.C.G.A. Title 45);

a "**person excluded from constituting an "athlete agent""** under O.C.G.A. § 43-4A-2 (2) (Ga. Professions and Businesses Code, O.C.G.A. Title 43); and,

"a person excluded from compensation when the offender is the person's grandchild" in O.C.G.A. § 28-5-104 (a) (2) (A) (Ga. General Assembly Code, O.C.G.A. Title 28).

Other statutes may refer to grandparents in a way that is outside traditional norms:

a "**farmer**" who is the "**owner of a commercial agricultural or silvicultural operation or an employee thereof**," which includes a grandparent when their grandchild qualifies for the term under O.C.G.A. § 40-6-305 (a) (1) (Ga. Motor Vehicles and Traffic Code, O.C.G.A. Title 40);

"**victim**" when certain conditions are met under O.C.G.A. § 17-17-3 (4) or as a "**person to act in place of a victim during a physical disability"** if the victim is physically unable to exercise privileges and rights as listed in O.C.G.A. § 17-17-4 (Ga. Criminal Procedure Code, O.C.G.A. Title 17);

Notably, beyond the definitions of grandparents, the rights of grandparents also vary across the Georgia Code. However, exploration of such variations is beyond the scope of this work.

B. Georgia Public Policy

In Georgia, grandparents have a legally recognized interest in the welfare of their grandchildren,[112] and it is the public policy of the State to encourage that a minor child have continuing contact with parents and grandparents who have demonstrated the ability to act in the best interest of the child.[113] Georgia's grandparent visitation statute was enacted to provide a mechanism for courts to grant grandparent visitation rights with his or her minor grandchild where a child's parent objects.[114] At odds with a parent's constitutional right is the child's constitutional right to protection of his or her person and the state's compelling interest in protecting the welfare of children.[115] In most scenarios, the legal right of the parent and the interest of the child are the same; however, through misconduct or other circumstances, the welfare of the child may require that the child be separated from its parent wherefore the *parens patriae* must protect the helpless and the innocent.[116] Through the application of this doctrine under certain circumstances, "the legislature may enact statutes that permit a child's interest to prevail over a parent's constitutional right to custody."[117]

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[112] Scott v. Scott, 308 Ga. App. 263, 265 (2011) (citing O.C.G.A. §§ 19-7-1 (b) (1) and 19-7-3 (b); seeking to be substituted as next friend in the grandchildren's civil suit against their defendant mother for the wrongful death of their father); See David A. Webster & Deborah A. Johnson, *Georgia Divorce, Alimony, and Child Custody* § 26:7 (Oct. 2024 Update).

[113] O.C.G.A. § 19-9-3 (d); David A. Webster & Deborah A. Johnson, *Georgia Divorce, Alimony, and Child Custody* § 26:7 (Oct. 2024 Update); See Stone v. Stone, 297 Ga. 451, 452–453 (2015), (finding that in determining the issue of custody, O.C.G.A. § 19–9–3 (d) encourages contact with grandparents, and O.C.G.A. § 19–7–3 provides a mechanism for a grant of visitation rights to grandparents when necessary to ensure and preserve that contact.); Sheffield v. Sheffield, 338 Ga. App. 667 (2016); Marks v. Soles, 339 Ga. App. 380(2) (2016); Stone v. Webb, 335 Ga. App. 739 (2016); and In re M.F., 298 Ga. 138(2) (2015).

[114] Leach v. Warner, 360 Ga. App. 856 (2021).

[115] Clark v. Wade, 273 Ga. 587, 597 (2001).

[116] *Id.*

[117] *Id.*

C. The Legal Framework of Georgia's Grandparent Visitation Statute

Georgia's current Grandparent visitation statute,[118] codified as O.C.G.A. § 19-7-3 and effective as of July 1, 2025, seeks to balance the rights of the parents, the interests of the child, and the wishes of an alienated grandparent.[119] The statute is comprised of eight sections:

(1) the individuals with standing to bring a claim;
(2) the right to file an original action or intervene in an existing action;
(3) the terms for filing an original action, the court's deference to the child's parent(s)
regarding visitation,[120] and minimum visitation;[121]
(4) the showing of harm required by a clear and convincing evidence standard;
(5) guardian ad litem expenses and mediation;
(6) the hearing;
(7) the court's authorization beyond visitation; and,
(8) priority for competing visitation claims.[122]

D. Grandparent Visitation Compared to Child Custody Determinations in Georgia

Like similar grandparent visitation laws in other states, Georgia's Grandparent visitation statute protects a child's right to have a relationship

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[118] While the statute is "commonly referred to as the Grandparent visitation statute" or the "Grandparent Visitation Act," the title of the statute denotes its application to a broader audience: "§ 19-7-3. Grant of visitation rights to family members". See Namdar-Yeganeh v. Namdar-Yeganeh, 369 Ga. App. 700, 701 (2023), *cert. denied* (Apr. 16, 2024) and Sheppard v. McCraney, 317 Ga. App. 91, 92 (2012).

[119] *Leach*, 360 Ga. App. 856 (2021).

[120] For example, "[i]n no case shall the granting of visitation rights to a family member interfere with a child's school or regularly scheduled extracurricular activities." O.C.G.A. § 19-7-3 (c) (4).

[121] The minimum duration of visitation is noteworthy, as the statute provides"[v]isitation time awarded to a family member shall not be less than 24 hours in any one-month period," yet if there are competitive claims by more than one individual seeking visitation under this Code section, "the court shall determine the amount of time to award to each petitioner which shall not be less than 24 hours in any one-month period in the aggregate." O.C.G.A. § 19-7-3 (c) (5).

[122] "When more than one family member files an action pursuant to this Code section, the court shall determine the priority of such actions." O.C.G.A. § 19-7-3 (h).

with her or her grandparent(s),[123] which may be violated when a parent of the child dies, is incarcerated, has their parental rights terminated, divorces,[124] or whenever the parent's minor child has been adopted by a blood relative or by a stepparent, notwithstanding the provisions of O.C.G.A. § 19-8-19.[125] In these scenarios, the "surviving or custodial parent is no longer related to one set of the child's grandparents" and the parent may not support the child's relationship with that set of grandparents such that the grandparents are alienated from the child.[126] Georgia's Grandparent visitation statute gives standing to the grandparents from whom the child is being alienated so that the child's rights can be brought to the attention of the court having jurisdiction over the child, as the child does not have standing to sue her or her own parent to seek such contact.[127]

Importantly, the issue of grandparent visitation is distinct from the issue of child custody. For example, where a grandparent has been raising their grandchild for several years and the child has come to regard the grandparent as a primary paternal figure, the grandparent is likely to retain custody, even if the parents are considered fit.[128] In *Namdar-Yeganeh*, the Supreme Court of Georgia addressed the relationship between Georgia's custody statute, O.C.G.A. § 19-9-3 and the grandparent visitation statute, O.C.G.A. § 19-7-3:

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[123] O.C.G.A. § 19-7-3 (b) permits "any family member" to intervene and seek visitation, which pursuant to the statute means any grandparent, great-grandparent, or sibling.

[124] In the case of divorce, the grandparent's adult child may have limited or no visitation rights. *See*
Kunz v. Bailey, 290 Ga. 361, 362 (2012) (holding that "by virtue of the limiting language in the last sentence of OCGA § 19-7-3 (b), grandparents may only file an original action for visitation when the parents are separated *and* the child is not living with both parents" (emphasis in original)); Barnhill v. Alford., 315 Ga. 304, 309 (2022).

[125] O.C.G.A. § 19-7-3; *See* Mears *supra* n.74.

[126] *See* Mears *supra* n.74.

[127] *Id.*

[128] Jeff Atkinson, "The Rights of Grandparents," Dec. 11, 2011, available at https://www.americanbar.org/groups/senior_lawyers/resources/voice-of-experience/2010-2022/rights-grandparents/. Georgia's Equitable Caregiver Statute, O.C.G.A. § 19-7-3.1, enacted in 2019, provides another avenue for third parties to obtain visitation rights; however, the Supreme Court of Georgia limited the statute on Constitutional grounds in *Dias v. Boone*, 320 Ga. 785 (2025). Further, as addressed by the Supreme Court of Georgia in *Dias*, unlike Georgia's grandparent visitation statute, O.C.G.A. § 19-7-3, "the Equitable Caregiver Statute contains no presumption that it is in the best interests of a child to be in the custody of her legal parent." *See Dias* at 797. O.C.G.A. § 19-7-3.1 is outside the scope of this writing.

> "O.C.G.A. § 19-9-3 encourages the continuation of established contact with grandparents in the context of a custody dispute between parents[129] whereas O.C.G.A. § 19-7-3 provides a mechanism for a grant of visitation rights to grandparents when necessary to ensure and preserve this contact."[130]

Thus, Georgia's custody statute seeks to generally preserve an existing grandparent-grandchild relationship amid disputes between parents, while Georgia's grandparent visitation statute seeks to establish specific visitation time for grandparents with their grandchild when there is a dispute between a parent and grandparents.

E. Establishing Grandparent Visitation

The freedom of personal choice in matters of family life is a fundamental liberty interest, protected by the United States Constitution and "[t]he right to the custody and control of one's child is a fiercely guarded right in our society, which should be infringed upon only under the most compelling circumstances."[131] While this right may be fiercely guarded, over time, the custodial rights of parents have fluctuated, expanding and restricting through the evolution of the state's statutory and case law impacting the issue of grandparent visitation. Recently, the Court of Appeals of Georgia recognized that the plain language of O.C.G.A. § 19-7-3 (b) (1) (A) permits grandparents to file an original action to establish visitation with grandchildren, provided, under O.C.G.A. § 19-7-3 (b) (2), the parents are separated and the grandchild is not living with both parents.[132] A grandparent may file an original action[133] for visitation where the issue of custody is

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[129] O.C.G.A. § 19-9-3 (d).

[130] Stone v. Stone, 297 Ga. 451, 455 (2015); Namdar-Yeganeh, 369 Ga. App. at 705 (2023).

[131] Watkins v. Watkins, 266 Ga. 269, 270 (1996).

[132] *Namdar-Yeganeh*, 369 Ga. App. at 704 (2023); O.C.G.A. § 19-7-3.

[133] As distinguished from an "original pleading." See Miller v. Rieser, 213 Ga. App. 683, 690, 446. S.E.2d 233, 239 (1994) (where the action originated by the grandmother who sought visitation rights through an amendment to her petition, it is an "original action for visitation rights" within the meaning of O.C.G.A. § 19–7–3 (b)).

before the court.[134] Further, a custody question arises when grandparents seek a modification of a habeas corpus order denying the grandparents custody.[135] When custody questions are at issue, the grandparent visitation statute may be invoked.[136] In such circumstances, grandparents can intervene in certain existing proceedings.[137]

Once a case involving grandparent visitation has commenced, grandparents could likely face an uphill battle in seeking a visitation award, as parents benefit from a presumption that they should retain or regain custody against the interests of a nonparent.[138] To overcome that presumption, grandparents must show by clear and convincing evidence that parental custody would result in harm to the child.[139] In a concurring opinion for a 2025 case before the Supreme Court of Georgia that upheld parental rights over a putative equitable caregiver, Chief Justice Peterson referenced Georgia's grandparent visitation law, noting that interference with the fit legal parent's decision-making "requires a showing by clear and convincing evidence that the child will suffer harm from a fit parent's *particular decision* regarding the child's contact with a third party, and that the trial court's remedy be tailored to the harm caused by that decision."[140] The Chief Justice continued, "we find that implicit in Georgia cases, statutory and constitutional law is 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."[141]

In considering whether the health or welfare of the child would be harmed without an award of grandparent visitation, the court shall consider and may find that harm to the child is reasonably likely to result when, prior to the death, incapacitation, or incarceration of the child's parent, certain circumstances exist, such as: (1) the minor child resided with the grandparent for six months or more; (2) the grandparent provided financial support for the

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[134] Id.

[135] George v. Sizemore, 238 Ga. 525 (1977).

[136] Spitz v. Holland, 243 Ga. 9 (1979); Mead v. Owens, 149 Ga. App. 303 (1979); Murphy v. McCarthy, 201 Ga. App. 101 (1991).

[137] Id. at 704; *See also* Barnhill v. Alford, 315 Ga. 304, 308-310 (2) (2022); Pate v. Sadlock, 345 Ga. App. 591, 594 (1) (b) (i) (2018).

[138] *Clark,* 273 Ga. at 544.

[139] *Id.*

[140] *See* Venticinque v. Lair, 924 S.E.2d 312, 316 (Ga. 2025) (citing *Dias*, 320 Ga. at 798 and *Patten*, 304 Ga. at 144–45).

[141] *Id.* at 316-17.

basic needs of the child for at least one year; (3) there was an established pattern of regular visitation or child care by the grandparent with the child; or (4) any other circumstance exists indicating that emotional or physical harm would be reasonably likely to result if such visitation is not granted.[142] The statute expressly states that "the mere absence of an opportunity for a child to develop a relationship with a grandparent shall not be considered as harming the health or welfare of the child when there is no substantial preexisting relationship between the child and such grandparent."[143]

In addition to carrying the burden to overcome a showing of harm to the child, grandparents must also show that an award of grandparent visitation would serve the child's best interest.[144] Additionally, so long as the grandparent may bear the cost without unreasonable financial hardship, the court may appoint a guardian ad litem for the child, assign the issue of visitation rights for a grandparent for mediation, or set a hearing on the issue of grandparent visitation.[145] Regardless of whether a grandparent is awarded visitation with their grandchild, the court may still direct a parent, by court order, to notify the grandparent of "every performance of the minor child to which the public is admitted, including, but not limited to, musical concerts, graduations, recitals, and sporting events or games."[146] In making such determinations, the court is required to make specific written findings of fact in support of its rulings.[147] Moreover, pursuant to O.C.G.A. § 19-7-3, "an original action requesting visitation rights shall not be filed by any grandparent more than once during any two-year period and shall not be filed during any year in which another custody action has been filed concerning the child."[148]

F. Modifying Grandparent Visitation

Once a grandparent's visitation rights are established, a parent of the child may petition the court for revocation or amendment of such visitation rights for good cause shown, and the court, in its discretion, may grant or deny the request for same, provided that such a petition shall not be filed

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[142] O.C.G.A. § 19-7-3 (d) (1) (A-D).

[143] *Id.*

[144] O.C.G.A. § 19-7-3 (c) (1).

[145] O.C.G.A. § 19-7-3 (e-f).

[146] O.C.G.A. § 19-7-3 (g).

[147] O.C.G.A. § 19-7-3 (d) (1).

[148] O.C.G.A. § 19-7-3 (c) (2).

more than once during any two-year period.[149] The opportunity for grandparents to modify established visitation with their grandchild is new, as before the Georgia legislature passed Senate Bill 245 in 2025, discussed *infra*, grandparents lacked standing under Georgia law to petition to modify or revoke an existing order that awarded them visitation with their grandchild.[150] Thus, once grandparent visitation was awarded, grandparents essentially had one opportunity to establish a visitation plan that would sustain the growth, development, and changing circumstances for both the child and the grandparents, unless the parties involved could agree to a modification by consent, until Senate Bill 245 closed this gap.[151]

G. The Evolution of Georgia's Grandparent Visitation Law

At common law in Georgia, grandparents had no legal right of access to their grandchildren when the parents objected to such visitation.[152] A grandparent's access to their grandchild stemmed from a "moral, rather than a legal obligation" of the parent to permit such visitation.[153] Georgia courts addressed issues regarding a grandparent's legal right to visit a minor grandchild in a series of earlier cases: *Churchill v. Jackson*,[154] *Davis v. Davis*,[155] and *Jackson v. Martin.*[156]

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[149] *Id.*

[150] *Namdar-Yeganeh*, 369 Ga. App. 700 (2023).

[151] S.B. 245, 158th Ga. Assemb., 2025-2026 Reg. Session, available at https://www.legis.ga.gov/legislation/70720; *See also* by this author Case Summary: Namdar-Yeganeh v. Namdar-Yeganeh et al., and Vice Versa, 17 JOHN MARSHALL L.J. 323 (2025).

[152] *See Grandparents' Visitation Rights In Georgia*, 29 EMORY LAW JOURNAL 1083 (1980).

[153] *DOMESTIC RELATIONS Grandparents' Visitation Rights*, 2 GA. ST. U. L. REV. 189 (1986); *Grandparents' Visitation Rights in Georgia*, 29 EMORY L.J. 1083, 1083 (1980).

[154] Churchill v. Jackson, 125 Ga. 385, 53 S.E. 960 (1906) (granting the non-custodial grandparent with visitation rights under the best interest of the child standard); *DOMESTIC RELATIONS Grandparents' Visitation Rights*, 2 GA. ST. U. L. REV. 189 (1986).

[155] Davis v. Davis, 212 Ga. 217, 220 (1956) (concluding that the court could not interfere on a grandparent's behalf with the parent's right to custody and control of their minor child); *DOMESTIC RELATIONS Grandparents' Visitation Rights*, 2 GA. ST. U. L. REV. 190 (1986).

[156] Jackson v. Martin, 225 Ga. 170 (1969) (per curiam) (finding an abuse of discretion where a trial court qualified an award of custody to the parent by granting visitation rights to the grandparents); *DOMESTIC RELATIONS Grandparents' Visitation Rights*, 2 GA. ST. U. L. REV. 190 (1986).

1. Georgia's First Grandparent Visitation Statute

Thereafter, the Georgia legislature responded with Georgia's first grandparent visitation statute, enacted in 1976, which provided the trial court with discretion to grant reasonable visitation rights to the maternal and paternal grandparents of the child "whenever any court in this state shall have before it any question concerning the custody of or guardianship of [the] minor child."[157] Subsequently in *George v. Sizemore*, the Georgia Supreme Court limited the interpretation of this statute to allow only grandparents who were parties in a custody or guardianship action to seek visitation rights.[158] In 1977, the court addressed the impact of court-ordered grandparent visitation rights on stepparent adoption, upholding the adoptive parent's right to parent and denying visitation rights to the grandparents.[159]

2. The Grandparents' Bill of Rights Act

Beginning in 1980, the statute — known then as the Grandparents' Bill of Rights Act[160] — was expanded through several amendments, which clarified the scope of grandparents rights.[161] The 1980 amendment authorized the trial court to allow grandparents to intervene to seek visitation with their minor grandchild when questions of guardianship were before a court and also to file an original action when: (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 biological parent has been terminated.[162] Following the 1980 amendment, the Court of Appeals clarified

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[157] Code Ann. § 74–112 (1976) (Ga.L.1976, p. 247, § 1); *Houston v. Houston*, 156 Ga. App. 47, 48 (1980); Brooks v. Parkerson, 265 Ga. 189, 190 (1995) (fn 2).

[158] George v. Sizemore, 238 Ga. 525 (1977); "*DOMESTIC RELATIONS Grandparents' Visitation Rights*, 2 GA. ST. U. L. REV. 190 (1986).

[159] George v. Sizemore, 238 Ga. 525, 527 (1977); See, e.g., Heard v. Coleman, 181 Ga. App. 899, 900, 354 S.E.2d 164, 165 (1987) and "*DOMESTIC RELATIONS Grandparents' Visitation Rights*, 2 GA. ST. U. L. REV. 190 (1986).

[160] *DOMESTIC RELATIONS Grandparents' Visitation Rights*, 2 GA. ST. U. L. REV. 191 (1986).

[161] 1980 Ga. Laws 936; 1986 Ga. Laws 1516; C. Henson, DOMESTIC RELATIONS Parent and Child: Expand Scope of Grandparents' Visitation Rights, 5 GA. ST. U. L. REV. Rev. 374 (1988). Available at: https://readingroom.law.gsu.edu/gsulr/vol5/iss1/26.

[162] 1980 Ga. Laws 936-937; Brooks v. Parkerson, 265 Ga. 189, 190 (1995) (n. 2); Smith v. Finstad, 247 Ga. 603 (1981) (upholding the constitutionality of the retroactive application of the 1980 statute); Kean Decarlo, *Parent and Child Relationship Generally: Provide Requirements and Judicial Standards for Original Actions for Visitation Rights or*

in *Houston v. Houston* that grandparents were permitted to file an original action for visitation rights after an adoption was granted.[163] The Court of Appeals of Georgia found that the trial court correctly ruled that "standing was lacking in the absence of any issue as to custody."[164] However, twelve days after the trial court entered its orders in the case, the Grandparents' Bill of Rights Act was amended,[165] and the Court of Appeals "conclude[d] that the amendment applies retroactively:"[166]

> a reviewing court should apply the law as it exists at the time of its judgment rather than the law prevailing at the rendition of the judgment under review, and may therefore reverse a judgment correct at the time it was rendered and affirm a judgment that was erroneous at the time, where the law has been changed in the meantime and where such application of the new law will impair no vested right under the prior law. *City of Valdosta v. Singleton*, 197 Ga. 194, 208, 28 S.E.2d 759 (1944); *Osteen v. Osteen*, 244 Ga. 445, 260 S.E.2d 321 (1979).[167]

This timely outcome was a win for grandparents seeking to establish visitation following the adoption of their minor grandchild.[168]

3. The 1981 Statutory Expansion

In 1981, the statute was modified to expand a grandparent's right to intervene when the parents of a minor child filed a divorce or custody

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Intervention; Provide for Revocation or Amendment of Visitation Rights, 13 GA. ST. U. L. REV. 148, 149 (1996).

[163] Houston v. Houston, 156 Ga. App. 47, 48 (1980).

[164] *Id.*

[165] The amendment clarified that the statute provides that the "parent of a minor child's parent who has died shall have the right to file an original pleading, but not more than once during any calendar year, to obtain visitation rights to said minor child." (Ga.L. 1980, pp. 936, 937); Houston v. Houston, 156 Ga. App. 47, 48 (1980).

[166] *Houston*, 156 Ga. App. at 48.

[167] *Id.*

[168] *Id.*

action.[169] Additionally, the Georgia General Assembly provided that grandparents could also file an original action if the grandchild's parents were already divorced, although it limited the number of times a grandparent could file such original action to once during any two-year period (deviating from the once per calendar year limitation under 1980 Ga. Laws 936).[170]

4. The Issue of Standing and the Nonmarital Grandchild in *Welch v. Suggs*

In 1985, the Court of Appeals of Georgia addressed in *Welch v. Suggs* whether paternal grandparents whose grandchildren were born out of marriage have standing.[171] The trial court concluded that the petitioners lacked standing to seek visitation rights on the basis that the father had not legitimized the child and pursuant to O.C.G.A. § 19-7-25: "[o]nly the mother of an illegitimate child is entitled to his custody, unless the father legitimates him as provided in Code Section § 19–7–22."[172] Thus, appellees argued and the trial court agreed that "the putative father has no parental rights upon which *his* parents can base their prayer for either custody or visitation"[173] However, the Court of Appeals disagreed, drawing a parallel to a similar issue in an adoption case decided by the Supreme Court of Georgia.[174] The Supreme Court, in *Nelson v. Taylor*, addressed whether the paternal grandparents were "relatives" such that the mother could voluntarily relinquish her parental rights to them pursuant to the earlier version of O.C.G.A. § 19-8-3 (a) (5).[175] The Supreme Court held that the putative father "has some parental rights" in his nonmarital child, and therefore the paternal grandparents constitute "relatives" under the applicable statute[176] Thus in *Welch*, the Court held that the grandparents' claim for visitation rights was

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[169] 1981 Ga. Laws 1318; Kean Decarlo, *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*, 13 Ga. St. U. L. Rev. 148, 149 (1996).

[170] 1981 Ga. Laws 1318; Kean Decarlo, *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*, 13 GA. ST. U. L. REV. 148, 149 (1996).

[171] Welch v. Suggs, 175 Ga. App. 233 (1985).

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] Nelson v. Taylor, 244 Ga. 657, 658 (1979).

properly before the court and should have been heard,[177] paving the way for biological paternal grandparents of grandchildren born out of wedlock to have standing under O.C.G.A. § 19-7-3.

5. The 1988 and 1993 Statutory Amendments

Additional amendments to the statute followed in 1988 and 1993.[178] The 1988 amendment greatly expanded grandparents' rights such that they were permitted to file an original action and 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. . . ." *regardless* of whether the issues of custody or guardianship were before the court, as well as seek visitation rights when the child was adopted by a blood relative.[179] The 1988 provision regarding a child's adoption by a blood relative repealed the portion of the 1980 amendment that allowed a grandparent to seek visitation when the grandchild had been adopted by a stepparent.[180] This issue was resolved in the Georgia legislature's 1993 amendment, which added adoption by a stepparent to the list of actions in which grandparents had a legal right to intervene and petition for visitation with their grandchild.[181] Furthermore, the 1993 amendment "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."[182]

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[177] *Welch*, 175 Ga. App. at 233.

[178] 1988 Ga. Laws 864; 1993 Ga. Laws 456.

[179] Kean Decarlo, *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*, 13 GA. ST. U. L. REV. 148, 149 (1996).

[180] *Id.*

[181] 1993 Ga. Laws 456, S 1, at 457 (formerly found at O.C.G.A. S 19-7-3(b) (Supp. 1995)); Kean Decarlo, *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*, 13 GA. ST. U. L. REV. 150 (1996).

[182] Brooks v. Parkerson, 265 Ga. 189, 190 n.2, 454 S.E.2d 769, 770-71 n.2 (1995) (emphasis added); Kean Decarlo, *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*, 13 GA. ST. U. L. REV. 148, 150 (1996).

6. The Issue of Constitutionality in *Brooks v. Parkerson*

Given the extensive variables unique to domestic relations that may impact a minor child, the fact dependent nature of such cases, and a court's wide discretion on such issues, Georgia has continued to wrangle with the intersection of the parental rights and a grandparent's right to seek visitation, especially as the structure of families continue to evolve and constitutional issues remain.[183] Georgia's Grandparent Visitation Act has faced constitutional scrutiny, and [184] case law confirms constitutional protections for parental rights:

> [T]here can scarcely be imagined a more fundamental and fiercely guarded right than the right of a natural parent to its offspring. *Nix v. Dept. of Human Resources*, 236 Ga. 794, 795, 225 S.E.2d 306 (1976). See also *Wisconsin v. Yoder*, 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); *In re Suggs*, 249 Ga. 365, 367, 291 S.E.2d 233 (1982) ("The 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.").[185]

In the 1995 case of *Brooks v. Parkerson,* the Supreme Court of Georgia Court held that the Grandparent Visitation Act of 1988 was unconstitutional because it authorized courts to award child visitation to a grandparent over the objection of fit parents and without a clear and convincing showing of harm to the child.[186] Specifically, the Court found the statute "does not clearly promote the health or welfare of the child and does

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[183] Crary v. Clautice, 318 Ga. 573, 577, 899 S.E.2d 98, 102 (2024) ("dismiss[ing] as moot the portion of Appellant's appeal challenging the trial court's denial of Appellant's request for a declaration that the grandparent visitation statute is unconstitutional" on the basis that the standards fail to protect parents' "fundamental liberty interests" in "the care, custody, and control of their children." Troxell v. Granville, 530 U.S. 57, 65 (11) 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)).

[184] *Leach*, 360 Ga. App. 856 (2021).

[185] Elmore v. Clay, 348 Ga. App. 625, 627–28 (2019).

[186] Brooks v. Parkerson, 265 Ga. 189 (1995).

not require a showing of harm before state interference is authorized,"[187] parents have a constitutionally protected interest in raising their children without undue state interference,[188] and as a result of 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," the statute is unconstitutional.[189]

7. The 1996 Amendment and Subsequent Cases

The legal landscape for grandparent visitation continued to evolve, and additional amendments to the statute followed in 1996.[190] Following the 1996 amendment, the statute provided 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."[191] The statute also provided that "due process requires that evidence supporting mandated visitation rights must meet the clear and convincing standard of proof."[192]

In *Elmore v. Clay*, a 2019 case, the Court of Appeals of Georgia emphasized the importance of the harm requirement by holding that "inability to tell if trial court exercised its discretion to find clear and convincing evidence of harm required remand."[193] Thus, it is not enough that a child's visitation with a grandparent would be in the child's best interest, as the grandparent seeking visitation must prove by clear and convincing evidence that the lack of visitation would be harmful to the child.

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[187] *Id.* at 194 (1995); Kean Decarlo, *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*, 13 GA. ST. U. L. REV. 148, 150 (1996).

[188] *Brooks*, 265 Ga. at 191 (1995); Kean Decarlo, *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*, 13 GA. ST. U. L. REV. 148, 150 (1996).

[189] *Brooks*, 265 Ga. at 191 (1995) (citing Stanley v. Illinois, 405 U.S. 645, 651-52 (1972)).

[190] Enacted Legislation Laws 1996, p. 1089, § 1.

[191] Ormond v. Ormond, 274 Ga. App. 869, 870 (2005).

[192] *Id.*

[193] *Elmore*, 348 Ga. App. at 625.

In the 2005 case of *Ormond v. Ormond,*[194] the Court of Appeals found that the trial court "found by clear and convincing evidence that the best interests of the children would be served by granting visitation to the grandparents, the court expressly did not find by clear and convincing evidence that the children or their health or welfare would be harmed unless visitation was granted."[195] Thus, *Ormond* reinforces the requirement of a showing that grandparent visitation is the child's best interest and the health or welfare of the child would be harmed unless such visitation is granted.

8. Parental Military Obligations in *Luke v. Luke*

The Court of Appeals found in *Luke v. Luke* that a grandparent would not be provided visitation on the grounds that a parent's military obligations curtailed a grandparent's visitation opportunities with a grandchild.[196] Notably, "any detrimental impact to the grandparents through the loss of visitation opportunities with a grandchild, whether due to the death or divorce of a child's parents, relocation of the family, or other unfortunate circumstances, is irrelevant to the court's determination" on the issue of granting grandparent visitation.[197] However, where a court finds "by clear and convincing evidence that the minor children would suffer actual emotional harm unless visitation is granted," the court is authorized to grant visitation under Georgia's grandparent visitation statute.[198]

9. The Issue of Adoption in *Kunz v. Bailey*

In the 2012 case of *Kunz v. Bailey,* the court considered the complexities of blended families and adoption under the statute. In *Kunz*, the biological paternal grandparents petitioned for visitation rights pursuant to O.C.G.A. § 19-7-3 (b) after their son (the child's father) terminated his parental rights to the child, the mother married the child's stepfather, the stepfather adopted the child, and the grandparents were subsequently denied access to the child.[199] In the trial court, the child's mother and adopted father moved to dismiss the action, arguing that the child lived with them and the

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[194] Ormond v. Ormond, 274 Ga. App. 869 (2005).

[195] *Id.* at 870.

[196] Luke v. Luke, 280 Ga. App. 607 (2006).

[197] *Id.* at 610.

[198] *Id.*

[199] Kunz v. Bailey, 290 Ga. 361 (2012).

grandparent's action was unsustainable under the plain language of O.C.G.A. § 19-7-3 (b):[200]

> Except as otherwise provided in this subsection, any grandparent shall have the right to file an original action for visitation rights to a minor child or to intervene in and seek to obtain visitation rights in any action in which any court in this state shall have before it any question concerning the custody of a minor child, a divorce of the parents or a parent of such minor child, a termination of the parental rights of either parent of such minor child, or visitation rights concerning such minor child or whenever there has been an adoption in which the adopted child has been adopted by the child's blood relative or by a stepparent, notwithstanding the provisions of Code Section 19–8–19. This subsection shall not authorize an original action where the parents of the minor child are not separated and the child is living with both of the parents.[201]

The trial court denied the parents' motion to dismiss however, the Court of Appeals reversed, relying on the tenants of statutory construction and reasoning that the term "parent," as used in O.C.G.A. § 19–7–3 (b), included a "legal father" as found in the adoption statute and therefore the term "parent" included adoptive parents, in addition to natural parents.[202] Because the child resided with both the parent and adoptive parent, the Court of Appeals concluded that the grandparents' original action for visitation was not permitted by O.C.G.A. § 19–7–3 (b).[203]

Next, the Supreme Court of Georgia granted the grandparents' petition for certiorari to resolve whether the Court of Appeals correctly concluded that the limiting language of O.C.G.A, § 19–7–3 (b)—forbidding original actions for grandparent visitation if the parents are together and living with the child—includes adoptive parents.[204] The Supreme Court

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[200] *Id.*; Fielder v. Johnson, 333 Ga. App. 658, 659 (2015).

[201] O.C.G.A. § 19–7–3(b) (2011); *Kunz,* 290 Ga. at 361.

[202] Bailey v. Kunz, 307 Ga. App. 710, 712–713 (2011); *Kunz,* 290 Ga. at 362.

[203] *Kunz*, 290 Ga. at 362 (2012).

[204] *Bailey,* 307 Ga. App. at 710; *Kunz*, 290 Ga. at 362.

upheld the Court of Appeals holding, expressly rejecting the grandparents' argument that the statute's use of the term "parents" included only biological parents (and not adoptive parents) of the child.[205] The Court reasoned that the limiting language in O.C.G.A. § 19–7–3(b) provided that grandparents may only file an original action for visitation when the parents are separated and the child is not residing with both parents.[206] Further, the Court reasoned that congruent with their holding in *Brooks v. Parkerson* in finding Georgia's Grandparent visitation statute unconstitutional,[207] the statute "does not otherwise allow grandparents, by court action, to intrude upon the "constitutionally protected interest of parents to raise their children.""[208] Therefore, the grandparents had "no basis to file an original action under the statute" because the mother's husband was the child's parent at the time the grandparents filed their original action for visitation, the parents were not separated, and the child was living with the parents.[209]

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[205] Fielder v. Johnson, 333 Ga. App. 658, 660–61 (2015).

[206] *Id.* at 660.

[207] Brooks v. Parkerson, 265 Ga. 189 (1995) ("The U.S. Supreme Court has long recognized a constitutionally protected interest of parents to raise their children without undue state interference.... Parents have comparable interests under our state constitutional protections of liberty and privacy rights. The 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." Id. at 191, 192(2)(a), 454 S.E.2d 769 (citations and punctuation omitted)).
Notably, Presiding Justice Benham, joined by Justice Hunstein, dissented: "I believe the majority has ignored long-standing rules of statutory construction and, in so doing, has placed Georgia in the vanguard of a minority of one." Brooks v. Parkerson, 265 Ga. 189, 197 (1995). In a footnote, Justice Benham noted that "No state has declared a grandparent visitation statute violative of the U.S. Constitution. Tennessee, the only other state to find its grandparent visitation statute unconstitutional, based its holding on the Tennessee Constitution alone. Hawk v. Hawk, 855 S.W.2d 573, 582 (Tenn.1993)." Justice Benham argued "Our statute is a legitimate exercise of the General Assembly's power to balance the competing interests of children, their parents, and their grandparents… For over 80 years the appellate courts of Georgia have recognized the authority of a trial court to exercise its discretion and provide for visitation between grandparents and grandchildren when it was in the best interest of the children involved…As I cannot join my colleagues in second-guessing the legislature, I dissent from their holding that the Grandparent visitation statute is not constitutional."

[208] *Fielder,* 333 Ga. App. at 660.

[209] *Id.* at 660–61.

10. The 2012 Amendment

Following *Kunz v. Bailey*[210] addressed *infra*, the Georgia legislature amended O.C.G.A. § 19-7-3 and, among other revisions, added subsection (d) that authorizes courts to award child visitation in certain circumstances to a grandparent over the objection of a fit parent and without a clear and convincing showing of harm to the child:

> Notwithstanding the provisions of subsections (b) and (c) of this Code section, if one of the parents of a minor child dies, is incapacitated, or is incarcerated, the court may award the parent of the deceased, incapacitated, or incarcerated parent of such minor child reasonable visitation to such child during his or her minority if the court in its discretion finds that such visitation would be in the best interests of the child.[211]

While this provision applies to fewer cases than the statute that was held unconstitutional in *Brooks* and authorized awards of visitation to "any grandparent," the Supreme Court of Georgia addressed the constitutionality of the provision in *Patten v. Ardis*.[212]

11. Grandparent Visitation on a Temporary Basis in *Van Leuvan v. Carlisle*

The Court of Appeals of Georgia confirmed the trial court's authority to issue a temporary grandparent visitation order in *Van Leuvan v. Carlisle.*[213] In this 2013 case, the maternal grandmother petitioned for visitation with the minor grandchild, and the trial court found that the grandmother had met the standard required under O.C.G.A. § 19-7-3 (c) (1), thus, awarding her with visitation in the child's best interest.[214] In addition to raising other enumerations of error, mother argued that Georgia's Grandparent visitation statute does not expressly authorize the trial court's issuance of a "temporary"

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[210] Kunz v. Bailey, 290 Ga. 361 (2012).

[211] Ga. L. 2012, p. 862, § 1. *See also* Barnhill v. Alford, 315 Ga. 304 at n.11 (2022); Patten v. Ardis, 304 Ga. 140, 140 (2018) (citing O.C.G.A. § 19-7-3 (d)).

[212] Patten v. Ardis, 304 Ga. 140 (2018).

[213] Van Leuvan v. Carlisle, 322 Ga. App. 576 (2013).

[214] *Van Leuvan,* 322 Ga. App. at 576.

order granting visitation to the grandmother and by granting such relief, "the trial court ignored the rules of statutory construction, impermissibly expanded the scope of the statute, and improperly altered the status quo between the parties."[215] However, the Court of Appeals disagreed, finding that the trial court was authorized to issue a temporary grandparent visitation order pursuant to the authorization of temporary orders in custody proceedings under O.C.G.A. § 19-9-3 (a) (1) and (a) (6), paired with the definition of a "child custody determination" O.C.G.A. § 19-9-41 (3): "A judgment, decree, or other order of a court providing for the legal custody, physical custody, or *visitation* with respect to a child", including a "permanent, *temporary*, initial, and modification order."[216] Therefore, the court upheld the trial court's temporary order providing grandparent visitation in the case.[217]

12. The Issue of a Deceased Parent in *Fielder v. Johnson*

The 2015 case of *Fielder v. Johnson* followed *Kunz*, where the maternal grandparents of the child's deceased mother filed a petition seeking visitation under O.C.G.A. § 19–7–3, and the defendant father filed a motion to dismiss the action on the basis that the grandparents lacked standing.[218] Father's argument was based upon a series of events that following his divorce from the child's mother: he was awarded sole physical custody of the child, he married another woman, the child's mother died, his wife adopted the child, and that since father's remarriage the couple had not separated, the child consistently lived with the couple, and neither the father or his wife were incapacitated or incarcerated.[219] Given these circumstances, father argued that O.C.G.A. § 19–7–3 (b) and *Kunz* made clear that the grandparent's petition could not be sustained since it was filed as an original action.

13. The 2016 Amendment

Georgia Legislators amended O.C.G.A. § 19-7-3 in 2016 by extending minor visitation to great-grandparents and siblings of parents while retaining such rights for grandparents.[220] Importantly, this amendment

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[215] *Id.* at 583.
[216] *Id.*
[217] *Id.*
[218] *Fielder*, 333 Ga. App. at 658.
[219] *Id.* at 658–59.
[220] H.B. 229, 153rd Gen. Assemb., Reg. Sess. (Ga. 2016), http://www.legis.ga.gov/legislation/en-US/Display/20152016/HB/229.

provided these additional family members with standing to bring an original visitation action when the custodial parent refuses to allow them visitation to the child.[221]

14. The Issue of Constitutionality in *Patten v. Ardis*

In the 2018 case of *Patten v. Ardis*, the Supreme Court of Georgia struck down language in Georgia's Grandparent Visitation Rights Act of 2016 that allowed Georgia courts to grant grandparent visitation in circumstances involving the death, incapacitation, or incarceration of a parent, if a grandparent could prove such visitation would be in the child's best interest.[222] More specifically, the Court noted that "a child may suffer very real harm in those circumstances when the custodial parent refuses to permit visitation with a grandparent."[223] However, the Court could not "conclude that harm is so inherent in the limited circumstances in which O.C.G.A. § 19-7-3 (d) applies that proof by clear and convincing evidence of actual or threatened harm to the child is constitutionally unnecessary."[224] Thus, the Court found the Georgia statute to be an unconstitutional infringement on parent's rights because the statute allows a court to set aside a fit parent's decisions about what is best for his or her child, "without clear and convincing proof that those decisions have harmed or threaten to harm the child, and based simply on the conclusion of a judge that he knows better than the parent what is best for the child."[225] Therefore, in alignment with the Court's holding in *Brooks*, the Supreme Court of Georgia ruled in *Patten* that statute "violates the right of parents to the care, custody, and control of their children, as that fundamental right is guaranteed by the Constitution of 1983."[226]

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[221] Teresa Gohlke, *House Bill 229: Domestic Relations; Grandparent Rights to Visitation and Intervention to Great-Grandparents and Siblings of Parents; Expand*, 10 JOHN MARSHALL L.J. 213, 221-222 (2017).

[222] *Patten,* 304 Ga. at 140.

[223] *Id.* at 145.

[224] *Id.*

[225] *Id.* at 140.

[226] *Id.*; *See also Brooks* at 192 (2) (a) and Clark v. Wade, 273 Ga. 587, 596 (IV) (2001) (Fletcher, P.J.) (Parents have a constitutional right under the United States and Georgia Constitutions to the care and custody of their children.).

15. The Issue of Constitutionality in *Leach v. Warner*

In the 2021 case of *Leach v. Warner*, the child's mother asserts "that a portion of the grandparent visitation statute, O.C.G.A. § 19-7-3 (c), is unconstitutional."[227] However, as the trial court did not address any constitutional claim, Leach's constitutional argument was not preserved for appellate review. Accordingly, the court cited *Lucas v. Lucas* in holding that it will "not rule on a challenge to the constitutionality of a statute unless the issue has been raised and ruled on in the trial court."[228]

The *Leach* court also highlighted the deference given to parental decisions, noting that a "parent's decision shall not be conclusive when failure to provide family member contact would result in emotional harm to the child."[229] Further, the court found that when there is a preexisting relationship between the child and the family member, the child may suffer some emotional injury that is harmful to the child's health when that child is denied any contact with his or her family member.[230]

16. The 2022 Amendment

In response to *Patten* and following *Fielder v. Johnson*,[231] the statute was again amended in 2022[232] through Senate Bill 576, which requires grandparents to show "by clear and convincing evidence that the health or welfare of the child would be harmed unless that such visitation is granted"[233] and outlined possible circumstances in which a court may find such a showing of harm.[234] Notably, the statute confirms that the "mere absence of an opportunity for a child to develop a relationship with a family member" is insufficient to show harm to the health or welfare of the child "when there is no substantial preexisting relationship between the child and such family member."[235] Further, the custodial parent's judgment as to the best interests

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[227] *Leach*, 360 Ga. App. at 856 (2021).

[228] Lucas v. Lucas, 273 Ga. 240, 242 (3) (2000).

[229] *Leach,* 360 Ga. App. at 859.

[230] *Id.*

[231] 222 Ga. App. 658 (2015); *See also* Ga. L. 2022, p. 749, § 1 and Barnhill v. Alford, 315 Ga. 304 at n.11 (2022).

[232] Enacted Legislation Laws 2022, Act 866, § 1, eff. July 1, 2022.

[233] S.B. 567, 2024 Gen. Assem., Reg. Sess. (Ga. 2024) available at https://www.legis.ga.gov/legislation/62467.

[234] *Id.*

[235] O.C.G.A. § 19-7-3 (c)(1).

of the child regarding visitation shall be given deference by the court but shall not be conclusive and in considering whether the health or welfare of the child would be harmed without such visitation, the court shall consider and may find that harm to the child is reasonably likely to result when, prior to the death, incapacitation, or incarceration of the child's parent:

> (A) The minor child resided with the grandparent for six months or more;
>
> (B) The grandparent provided financial support for the basic needs of the child for at least one year;
>
> (C) There was an established pattern of regular visitation or child care by the grandparent with the child; or
>
> (D) Any other circumstance exists indicating that emotional or physical harm would be reasonably likely to result if such visitation is not granted.[236]

Thus, in Georgia, the right of a fit parent to parent their child supersedes a grandparent's right to visitation with their grandchild, unless the grandparent with an existing relationship with their grandchild can show that the child would be harmed without visitation and that the visitation serves the child's best interests.

17. The Issues of Standing and Constitutionality in *Barnhill v. Alford*

In *Barnhill v. Alford*, Georgia courts resolved the issue of a biological grandparent's standing when their daughter (the biological mother) was deceased and the grandchild was adopted by the father's wife (the child's step-mother).[237] In *Barnhill*, the Supreme Court of Georgia addressed "whether a grandmother's action for visitation rights to her biological granddaughter (the minor child of her deceased daughter) under OCGA § 19-

[236] O.C.G.A. § 19-7-3 (d) (1) (A-D).

[237] Fielder v. Johnson, 333 Ga. App. 658 (2015); Barnhill v. Alford., 315 Ga. 304 (2022).

7-3…was precluded by the adoption of the child by her stepmother," the wife of the biological father.[238] Several months after the grandmother filed her petition for grandparent visitation, the child's stepmother filed a petition for adoption of the child, without providing the trial court of the maternal grandmother with notice.[239] While the biological father and the adoptive parent argued that the grandmother lacked standing, the Supreme Court of Georgia disagreed as her standing was established as the "parent of a minor child's parent who has died."[240]

Additionally, the constitutionality issue of the grandparent visitation statute was again before the Supreme Court of Georgia *Barnhill*.[241] The Court rejected the Barnhills' argument that "O.C.G.A. § 19-7-3 (c) (1) creates a presumption in favor of family member visitation[242] that directly contravenes the presumption that fit parents will act in the best interests of their children," and asserts that "this paragraph [of the statute] is unconstitutional."[243] The Court reasoned that the plain language of this provision places the burden of proof upon the family member seeking visitation and requires the trial court to use its discretion to award visitation only upon clear and convincing evidence that the child's health and welfare would be harmed without visitation and that the child's best interests would be served by visitation, which does not unconstitutionally interfere with the parent-child relationship and is not unconstitutional on its face or as applied to the grandmother's petition for visitation.[244] Further, the Court held that the provision did not create a presumption in favor of family member visitation but instead provided factors[245] that the court "shall" consider in making that determination.[246] Lastly, the Court awarded visitation to the grandmother on the basis that the grandmother proved, by clear and convincing evidence, that the grandchild would suffer harm without visitation and that such visitation was in the grandchild's interest.[247]

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[238] *Barnhill*, 315 Ga. at 304.

[239] *Id.* at 304–05. The child's stepmother subsequently moved to be added as a party-defendant to the grandparent visitation action following her adoption of the child, and the motion was granted.

[240] *Barnhill*, 315 Ga. at 308.

[241] *Id.*

[242] Citing *Davis*, 356 Ga. App. at 878 (Coomer, J., concurring).

[243] *Barnhill*, 315 Ga. at 312.

[244] *Id.* at 313.

[245] O.C.G.A. § 19-7-3 (c) (1) (A-D).

[246] *Barnhill*, 315 Ga. at 313; See O.C.G.A. § 19-7-3 (c) (1).

[247] *Id.* at 315.

18. The Issue of Modifications of an Existing Order

Pate v. Sadlock[248] analyzed whether a grandparent was permitted to file a *counterclaim* in response to a parent's properly filed modification action under O.C.G.A. § 19-7-3 (c) (2) and "did not hold that a grandparent has the statutory right *to initiate* an action to modify an existing visitation order.[249] Pate also reinforced that standard that courts may grant grandparent visitation if it is proven by clear and convincing evidence that the child's health or welfare would be harmed without such visitation and that the visitation is in the best interest of the child.[250] By reinforcing this standard, the court ensures that state interference with parental rights is only justified when necessary to protect the child, aligning with the constitutional requirements of the statute.[251]

The issue of a grandparent's right to modify an existing visitation order under O.C.G.A. § 19-7-3 again arose in *Namdar-Yeganeh*,[252] where the Court of Appeals held that the grandparents lacked standing to petition the court to modify an existing visitation order that provided them with visitation with their grandchildren. After *Namdar-Yeganeh*, grandparents seeking visitation with their grandchild via an original action or via consent must consider potential future modifications and strive to incorporate those provisions in their order since they were unable to bring a modification action.[253] As addressed *infra*, Senate Bill 245 provided grandparents with greater flexibility in modifying an existing award of visitation.

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[248] Under the grandparent visitation statute, grandparents had authority to seek, and trial court had authority to grant, temporary modification of grandparents' visitation rights provided in original consent order entered into between mother and father; statute provided no limitation on how often grandparents could intervene in an existing qualifying action, nor did it limit grandparents' ability to counterclaim for a modification of visitation in response to an action by a parent, and grandparents sought modification in response to mother's action in which she requested that the grandparents' visitation rights be revisited, reviewed, and modified on a temporary and permanent basis, and that grandparents' summer visitation rights be suspended pending further investigation of the court. *Pate v. Sadlock*, 2018, 345 Ga. App. 591, 814 S.E.2d 760.

[249] *Namdar-Yeganeh*, 369 Ga. App. at 705–06.

[250] *Id.*

[251] *Id.*

[252] *Namdar-Yeganeh*, 369 Ga. App. 705 (2023). See this author's Case Summary: Namdar-Yeganeh v. Namdar-Yeganeh et al., and Vice Versa, 17 JOHN MARSHALL L.J. 323 (2025).

[253] *Id.*

19. The Issue of Constitutionality in *Crary v. Clautice*

In 2024, the issue of the constitutionality of O.C.G.A. § 19-7-3 was yet again before the Supreme Court of Georgia in *Crary v. Clautice*.[254] In *Crary*, the trial court granted Mother's petition to set aside and revoke a final consent order, which had granted grandparent visitation rights under O.C.G.A. § 19-7-3 to Appellee maternal grandparents.[255] On appeal, Appellant challenged an order from the revocation proceeding and sought to declare unconstitutional the grandparent visitation statute,"[256] and the court dismissed as moot "the portion of Appellant's appeal that challenges the constitutionality of the grandparent visitation statute."[257]

20. Visitation, Mental Injury, and Constitutionality in *Pinkerton v. Nichols*

The Court of Appeals considered a grandparent's established pattern of regular visitation with their grandchild before and after the father's untimely death, and whether the subsequent lack of grandparent visitation would constitute harm to the minor child sufficient to grant an award of grandparent visitation.[258] The court considered the testimony of the parties and the guardian ad litem, along with evidence of the grandmother's regular visitation and care of the children and the child's need for extended family, as considered by the court in *Davis v. Cicala*, and found sufficient evidence supporting the visitation award.[259] Further, the appellate court found that the trial court was not required to find evidence of mental injury to the children, as mother had relied on the code section for dependency cases in asserting that error. [260] Moreover, the Court of Appeals declined to consider mother's argument that the O.C.G.A. § 19-7-3 was unconstitutional because the trial court did not directly rule on this constitutional challenge and because Georgia's Supreme court, who would have exclusive jurisdiction over the issue, had not ruled on same.[261]

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[254] Crary v. Clautice, 318 Ga. 573 (2024).

[255] *Id.*

[256] *Id.*

[257] *Id.*

[258] Pinkerton v. Nichols, 375 Ga. App. 245 (2025).

[259] *Id.;* Davis v. Cicala, 356 Ga. App. 873 (2020)(children would be harmed by lack of grandparent visitation given historical pattern of regular visitation and consideration of the children's need for extended family).

[260] *Pinkerton*, 375 Ga. App. at 245.

[261] *Id.*

21. Postadoption Change of Relationship in *Interest of A. G. Q.*

The Court of Appeals confirmed that an adoption decree changes a parent's relationship with their biological child such that the natural parent has no legal rights to visit with the child and is thus a legal stranger, a characterization which fails to meet the "family member" definition provided by O.C.G.A. § 19-7-3.[262] Therefore, in *In the Interest of A.G.Q., a Child.*, the appellate court held that pursuant to Georgia's grandparent visitation statute, the trial court was not authorized to grant visitation to a biological mother following the child's adoption.[263]

22. S.B. 245 (2025) Amends O.C.G.A. § 19-7-3

As the legal landscape for grandparent visitation continues to evolve in Georgia, constitutional issues, among others, still exist for Georgia families. In response to the "gap in the law"[264] preventing grandparents with an existing visitation order to modify or revoke such visitation, as was the case in *Namdar-Yeganeh*, Georgia legislators proposed Senate Bill 245, which adds the following proposed language to the bill, among other modifications to the statute:

> After such visitation rights have been granted to any parent of the deceased, incapacitated, or incarcerated parent of the minor child, such parent **may petition the court for revocation or amendment of such visitation rights** for good cause shown, which the court, in its discretion, may grant or deny; provided, however, that such a petition shall not be filed more than once during any two-year period.[265]

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[262] In the Interest of A. G. Q., A25A1315, 921 S.E.2d 52 (2025).

[263] *Id.*

[264] Georgia Senator John Kennedy's description regarding O.C.G.A. § 19-7-3 being silent on the issue of a grandparent's standing to petition to modify an existing visitation order. *See* Senate Legislative Day 28 (pt. 2) – 2025 Session - 3/6/25, *Georgia State Senate*, VIMEO, https://vimeo.com/showcase/11527921/video/1063364389.

[265] S.B. 245, 158th Ga. Assemb., 2025-2026 Reg. Session, available at https://www.legis.ga.gov/legislation/70720.

The Georgia Senate unanimously voted in favor of the bill on March 6, 2025,[266] and the bill passed and was adopted by substitute in the Georgia House of Representatives on March 28, 2025 by a 160 to one vote.[267] The bill was signed by Governor Brian Kemp and became effective as of July 1, 2025, thereby providing grandparents with an existing visitation order with standing to bring a modification action in Georgia, albeit not more than once in any two-year period.[268] This amendment places grandparents on a similar playing field as parents and children,[269] who are also subject to the two-year limitation in modification of custody, absent a showing of the change in circumstances requirement. Further, while this amendment eases the burden for grandparents who would previously need to foresee potential modifications to any visitation agreement and incorporate those provisions in the original order, parents may now be more likely to follow the ABA's recommendation to mediate or possibly enter into a consent order granting grandparents visitation given the grandparent's additional leverage resulting from this change in the law.

IV. CONCLUSION

While *Troxell* confirmed that under the Due Process Clause of the U.S. Constitution's 14th Amendment, fit parents have a fundamental right to make decisions concerning the care, custody, and control of their children, and as the case established a presumption that fit parents act in the best interest of their child,[270] the pendulum continues to swing between the rights of a parent and those of a grandparent seeking to establish or modify visitation with their grandchild. Georgia's grandparent visitation statute, O.C.G.A. § 19-7-3, was enacted to provide a mechanism for courts to grant grandparents visitation with their minor grandchild when the child's parent objects, and to codify a standard to balance the rights of the parents, the wishes of a grandparent, and the interests of the child.[271] However, the ongoing evolution of this area of law in Georgia, paired with the unique facts of each case and the wide discretion provided to family court judges, presents a risk for parents seeking to hold onto their constitutional right to parent their child in their

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[266] *See id.* and Senate Legislative Day 28 (pt. 2) – 2025 Session - 3/6/25, *Georgia State Senate*, VIMEO, https://vimeo.com/showcase/11527921/video/1063364389.

[267] S.B. 245, 158th Ga. Assemb., 2025-2026 Reg. Session, available at https://www.legis.ga.gov/legislation/70720.

[268] *Id.*

[269] O.C.G.A. § 19-9-3; Elder v. Hedden, 344 Ga. App. 628 (2018).

[270] *Troxel*, 530 U.S. at 66.

[271] Vincent v. Vincent, 333 Ga. App. 902 (2015).

child's best interest. As Senate Bill 245 expanded the statute to include the revocation or modification of a grandparent's visitation rights, and as the constitutionality of the 2025 version of the statute has not yet been addressed by Georgia's highest court, it is clear that the road will continue to wind for grandparent visitation law in Georgia.