An Analysis of the 2008 Changes to Georgia Child's Custody Laws

Section 1 of House Bill 369 includes a statement of public policy. Many statutes include such a statement to assist courts in interpreting the law later.

It is expressly declared in HB 369 that it is the public policy of the State of Georgia to "assure that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interests of their children and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage or relationship."

Sections 2 and 3 of HB 369 deal with the area of appeals.

Prior to the passage of this bill, for many years in Georgia, family law cases have been, for the most part, subject to discretionary appeals procedures. That is, if a litigant wanted to appeal a decision in a divorce or child custody case, he or she typically had to file an application for appeal, requesting permission for the appellate court to appeal. Parties in other types of civil cases were allowed to appeal automatically (these cases were called "direct appeal" cases).

There has been an effort so several years to restore the rights of direct appeal in family law cases. Section 2 of the bill makes an inroad on that effort by providing that "All judgments or orders in child custody cases including, but not limited to, awarding or refusing to change child custody or holding or declining to hold persons in contempt of such child custody judgment or orders" are now directly appealable. Section 3 provides a corresponding deletion of child custody cases from those which must be appealed, if at all, only by application, as well as adding to that list of discretionary appeals, "Appeals from orders terminating parental rights."

Section 5 of HB 369 is where the most substantial changes to Georgia law were made in the bill. It affected several existing Code sections and I will address each by reference to the statute it changed or added.

OCGA 19-9-1
The previous version of this statute was completely deleted and replaced with new provisions

Parenting plans are now required in all cases involving custody of a child, except in family violence cases. Each parent can submit their own proposed plan or they can submit a joint plan. It is up to the judge as to when the plan must be submitted. A plan must be submitted for all final hearings in original or modification of custody cases, and may, in the judge's discretion be required for temporary hearings. The final decree in any case involving custody must include a parenting plan.

What goes into a parenting plan? Unless otherwise ordered by the judge, a parenting plan shall include the following:
(A) A recognition that a close and continuing parent-child relationship and continuity in the child´s life will be in the child´s best interest;
(B) A recognition that the child´s needs will change and grow as the child matures and demonstrate that the parents will make an effort to parent that takes this issue into account so that future modifications to the parenting plan are minimized;
(C) A recognition that a parent with physical custody will make day-to-day decisions and emergency decisions while the child is residing with such parent; and
(D) That both parents will have access to all of the child´s records and information, including, but not limited to, education, health, extracurricular activities, and religious communications.
(2) Unless otherwise ordered by the judge, or agreed upon by the parties, a parenting plan shall include, but not be limited to:
(A) Where and when a child will be in each parent´s physical care, designating where the child will spend each day of the year;
(B) How holidays, birthdays, vacations, school breaks, and other special occasions will be spent with each parent including the time of day that each event will begin and end;
(C) Transportation arrangements including how the child will be exchanged between the parents, the location of the exchange, how the transportation costs will be paid, and any other matter relating to the child spending time with each parent;
(D) Whether supervision will be needed for any parenting time and, if so, the particulars of the supervision;
(E) An allocation of decision-making authority to one or both of the parents with regard to the child´s education, health, extracurricular activities, and religious upbringing, and if the parents agree the matters should be jointly decided, how to resolve a situation in which the parents disagree on resolution; and
(F) What, if any, limitations will exist while one parent has physical custody of the child in terms of the other parent contacting the child and the other parent´s right to access education, health, extracurricular activity, and religious information regarding the child.

Finally, if the parties cannot reach agreement on a permanent parenting plan, each party shall file and serve a proposed parenting plan on or before the date set by the judge. Failure to comply with filing a parenting plan may result in the judge adopting the plan of the opposing party if the judge finds such plan to be in the best interests of the child.

The bill adds a new Code section 19-9-1.1. This statute makes it expressly permissible for the parents of a child to agree to binding arbitration on the issue of child custody and matters relative to visitation, parenting time, and a parenting plan. The parents may select their arbiter and decide which issues will be resolved in binding arbitration. The arbiter´s decisions shall be incorporated into a final decree awarding child custody unless the judge makes specific written factual findings that under the circumstances of the parents and the child the arbiter´s award would not be in the best interests of the child. In its judgment, the judge may supplement the arbiter´s decision on issues not covered by the binding arbitration.

OCGA section 19-9-3 was also substantially rewritten.

Subsection (a)(1) provides, as before, that in all cases in which the custody of any child is at issue between the parents, there shall be no prima-facie (automatic) right to the custody of the child in either the father or the mother. There shall be no presumption in favor of any particular form of custody, legal or physical, nor in favor of either parent. Joint custody may be considered as an alternative form of custody by the judge and the judge at any temporary or permanent hearing may grant sole custody, joint custody, joint legal custody, or joint physical custody as appropriate.

Subsection (a)(2) of OCGA section 19-9-3 provides that the judge hearing the issue of custody **shall** (no longer "may") make a determination of custody of a child. As before, custody matters are not to be decided by a jury. The judge may take into consideration all the circumstances of the case, including the improvement of the health of the party seeking a change in custody provisions, in determining to whom custody of the child should be awarded. The duty of the judge in all such cases shall be to exercise its discretion to look to and determine solely what is for the best interest of the child and what will best promote the child´s welfare and happiness and to make his or her award accordingly.

The best interest standard has been the one applied by courts in Georgia before now, but the statute now provides a list of specific factors in subsection (a)(3):

In determining the best interests of the child, the judge may consider any relevant factor including, but not limited to:
(A) The love, affection, bonding, and emotional ties existing between each parent and the child;
(B) The love, affection, bonding, and emotional ties existing between the child and his or her siblings, half siblings, and stepsiblings and the residence of such other children;
(C) The capacity and disposition of each parent to give the child love, affection, and guidance and to continue the education and rearing of the child;
(D) Each parent´s knowledge and familiarity of the child and the child´s needs;
(E) The capacity and disposition of each parent to provide the child with food, clothing, medical care, day-to-day needs, and other necessary basic care, with consideration made for the potential payment of child support by the other parent;
(F) The home environment of each parent considering the promotion of nurturance and safety of the child rather than superficial or material factors;
(G) The importance of continuity in the child´s life and the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;
(H) The stability of the family unit of each of the parents and the presence or absence of each parent´s support systems within the community to benefit the child;
(I) The mental and physical health of each parent;
(J) Each parent´s involvement, or lack thereof, in the child´s education, social, and extracurricular activities;
(K) Each parent´s employment schedule and the related flexibility or limitations, if any, of a parent to care for the child;

(L) The home, school, and community record and history of the child, as well as any health or educational special needs of the child;
(M) Each parent´s past performance and relative abilities for future performance of parenting responsibilities;
(N) The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interest of the child;
(O) Any recommendation by a court appointed custody evaluator or guardian ad litem;
(P) Any evidence of family violence or sexual, mental, or physical child abuse or criminal history of either parent; and
(Q) Any evidence of substance abuse by either parent.

There is also added to OCGA section 19-9-3 a new subsection (a)(4), listing additional factors a judge may consider in a custody case in which the judge has made a finding of family violence:

(A) The judge shall consider as primary the safety and well-being of the child and of the parent who is the victim of family violence;
(B) The judge shall consider the perpetrator´s history of causing physical harm, bodily injury, assault, or causing reasonable fear of physical harm, bodily injury, or assault to another person;
(C) If a parent is absent or relocates because of an act of domestic violence by the other parent, such absence or relocation for a reasonable period of time in the circumstances shall not be deemed an abandonment of the child for the purposes of custody determination; and
(D) The judge shall not refuse to consider relevant or otherwise admissible evidence of acts of family violence merely because there has been no previous finding of family violence. The judge may, in addition to other appropriate actions, order supervised visitation or parenting time pursuant to Code Section 19-9-7.

The provisions on whether a child fourteen years of age or older could continue to choose which parent he or she would live with was one of the most hotly debated portions of the bill.

Subsection (a)(5) of the new version of OCGA section 19-9-3 deals with the right of children 14 years or older to elect their custodial parent. As originally introduced, the bill would have abolished this right of election. However, the right re-emerged in a subsequent version, and in the bill as passed, some vestige of the right still exists, although it has been changed to some degree.

The law now provides that: “In all custody cases in which the child has reached the age of 14 years, the child shall have the right to select the parent with whom he or she desires to live. The child´s selection for purposes of custody shall be presumptive unless the parent so selected is determined not to be in the best interests of the child. The parental selection by a child who has reached the age of 14 may, in and of itself, constitute a material change of condition or circumstance in any action seeking a modification or

change in the custody of that child; provided, however, that such selection may only be made once within a period of two years from the date of the previous selection and the best interests of the child standard shall apply."

Previously, the selection of the 14 year old or older child was controlling on the court absent a finding of unfitness of the selected parent. Now it is presumptive unless the selected parent is determined not to be in the best interests of the child. New to the statute is the provision that the selection alone is a basis for modification of custody but that the selection may not be made more often than once every two years. Considering there is only a four year window between the ages of 14 and 18, as a practical matter, this allows for the possibility of only two changes of custody based on the election.

Subsection (a)(6) of the new version of OCGA section 19-9-3 addresses the selection made by children who are between the ages of 11 and 14.

"In all custody cases in which the child has reached the age of 11 but not 14 years, the judge shall consider the desires and educational needs of the child in determining which parent shall have custody. The judge shall have complete discretion in making this determination, and the child´s desires shall not be controlling. The judge shall further have broad discretion as to how the child´s desires are to be considered, including through the report of a guardian ad litem. The best interests of the child standard shall be controlling. The parental selection of a child who has reached the age of 11 but not 14 years shall not, in and of itself, constitute a material change of condition or circumstance in any action seeking a modification or change in the custody of that child. The judge may issue an order granting temporary custody to the selected parent for a trial period not to exceed six months regarding the custody of a child who has reached the age of 11 but not 14 years where the judge hearing the case determines such a temporary order is appropriate."

Subsection (a)(7) of OCGA section 19-9-3 is the former subsection 6 and continues to provide that: "The judge is authorized to order a psychological custody evaluation of the family or an independent medical evaluation. In addition to the privilege afforded a witness, neither a court appointed custody evaluator nor a court appointed guardian ad litem shall be subject to civil liability resulting from any act or failure to act in the performance of his or her duties unless such act or failure to act was in bad faith."

Subsection (a)(8) of OCGA section 19-9-3 is new and provides: "If requested by any party on or before the close of evidence in a contested hearing, the permanent court order awarding child custody shall set forth specific findings of fact as to the basis for the judge´s decision in making an award of custody including any relevant factor relied upon by the judge as set forth in paragraph (3) of this subsection. Such order shall set forth in detail why the court awarded custody in the manner set forth in the order and, if joint legal custody is awarded, a manner in which final decision making on matters affecting the child´s education, health, extracurricular activities, religion, and any other important matter shall be decided. Such order shall be filed within 30 days of the final hearing in

the custody case, unless extended by order of the judge with the agreement of the parties."

The legislature is requiring judges in family law matters now to make detailed findings to support child support determinations, after last year's new child support guidelines went into effect and now, if requested, in custody cases, to explain the reasons for a custody determination.

Subsection (f) of OCGA section 19-9-3 provides for notice of relocations and changes of addresses of either parent as follows:

"(1) In any case in which a judgment awarding the custody of a child has been entered, the court entering such judgment shall retain jurisdiction of the case for the purpose of ordering the custodial parent to notify the court of any changes in the residence of the child.

(2) In any case in which visitation rights or parenting time has been provided to the noncustodial parent and the court orders that the custodial parent provide notice of a change in address of the place for pickup and delivery of the child for visitation or parenting time, the custodial parent shall notify the noncustodial parent, in writing, of any change in such address. Such written notification shall provide a street address or other description of the new location for pickup and delivery so that the noncustodial parent may exercise such parent´s visitation rights or parenting time.

(3) Except where otherwise provided by court order, in any case under this subsection in which a parent changes his or her residence, he or she must give notification of such change to the other parent and, if the parent changing residence is the custodial parent, to any other person granted visitation rights or parenting time under this title or a court order. Such notification shall be given at least 30 days prior to the anticipated change of residence and shall include the full address of the new residence."

Subsection (g) of OCGA section 19-9-3 addresses the issue of attorney's fees in custody cases. For many years in Georgia, attorney's fees have not been available in cases dealing purely with custody matters. One party could seek a modification of custody and cause the other party to incur substantial attorney's fees, with no recourse to recover the fees unless the court made a finding that the party had engaged in frivolous litigation.

HB 369 provides a long-needed correction of that situation by providing for an award of attorney's fees in custody cases. It also provides a statutory basis for awards of expert witness fees, guardian ad litem fees and other expenses incurred in the case:

"Except as provided in Code Section 19-6-2, and in addition to the attorney´s fee provisions contained in Code Section 19-6-15, the judge may order reasonable attorney´s fees and expenses of litigation, experts, and the child´s guardian ad litem and other costs of the child custody action and pretrial proceedings to be paid by the parties in proportions and at times determined by the judge. Attorney´s fees may be awarded at

both the temporary hearing and the final hearing. A final judgment shall include the amount granted, whether the grant is in full or on account, which may be enforced by attachment for contempt of court or by writ of fieri facias, whether the parties subsequently reconcile or not. An attorney may bring an action in his or her own name to enforce a grant of attorney´s fees made pursuant to this subsection."

Minor changes were made to OCGA section 19-9-4, which authorizes the judge in a custody case to order a home study investigation by the Department of Family and Children Services (DFCS) in cases involving specific claims of abuse, neglect or other harm to the child. It provides now as follows:

"(a) On motion of either party in any action or proceeding involving determination of the award of child custody between parents of the child, when such motion contains a specific recitation of actual abuse, neglect, or other overt acts which have adversely affected the health and welfare of the child, the judge may direct the appropriate family and children services agency or any other appropriate entity to investigate the home life and home environment of each of the parents. In any action or proceeding involving determination of the award of child custody between parents of the child when during such proceedings a specific recitation of actual abuse, neglect, or other overt acts which have adversely affected the health and welfare of the child has been made the court judge shall also have authority on his or her own motion to order such an investigation if in the judge´s opinion the investigation would be useful in determining placement or custody of the child. The judge may also direct either party to pay to the agency the reasonable cost, or any portion thereof, of the investigation. The report of the investigation will be made to the court judge directing the investigation. Any report made at the direction of the judge shall be made available to either or both parties for a reasonable period of time prior to the proceedings at which any temporary or permanent custody is to be determined. Both parties shall have the right to confront and cross-examine the person or persons who conducted the investigation or compiled the report if adequate and legal notice is given.

(b) This Code section shall apply only with respect to actions or proceedings in which the issue of child custody is contested; and this Code section is not intended to alter or repeal Code Sections 49-5-40 through 49-5-44."

OCGA section 19-9-5 also had minor stylistic changes made. It deals with the parties' ability to agree on custody matters and the court's ability (and responsibility) to review and approve, where appropriate, those agreements:

"(a) 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.

(b) 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. The judge shall not refuse to ratify such agreement and to make such agreement a part of the final judgment based solely upon the parents´ choice to use joint custody as a part of such agreement.

(c) In his or her judgment, the judge may supplement the agreement on issues not covered by such agreement."

OCGA section 19-9-6 received a few changes. The most notable was to add to the list of decisions included under joint legal custody was extracurricular activities. The term "parenting time" was also added as an alternative to the term "visitation." The statue now reads as follows:

"As used in this article, the term:

(1) 'Joint custody' means joint legal custody, joint physical custody, or both joint legal custody and joint physical custody. In making an order for joint custody, the judge may order joint legal custody without ordering joint physical custody.

(2) 'Joint legal custody' means both parents have equal rights and responsibilities for major decisions concerning the child, including the child´s education, health care, extracurricular activities, and religious training; provided, however, that the judge may designate one parent to have sole power to make certain decisions while both parents retain equal rights and responsibilities for other decisions.

(3) 'Joint physical custody' means that physical custody is shared by the parents in such a way as to assure the child of substantially equal time and contact with both parents.

(4) 'Sole custody' means a person, including, but not limited to, a parent, has been awarded permanent custody of a child by a court order. Unless otherwise provided by court order, the person awarded sole custody of a child shall have the rights and responsibilities for major decisions concerning the child, including the child´s education, health care, extracurricular activities, and religious training, and the noncustodial parent shall have the right to visitation or parenting time. A person who has not been awarded custody of a child by court order shall not be considered as the sole legal custodian while exercising visitation rights or parenting time."

In OCGA section 19-9-7, the bill also added "parenting time" as an alternative to the term "visitation," in the prior statute dealing with the impact of family violence on visitation. The restrictions, such as supervised visitation, were in the prior version of the statute. The current version reads as follows:

“(a) A judge may award visitation or parenting time to a parent who committed one or more acts involving family violence only if the judge finds that adequate provision for the safety of the child and the parent who is a victim of family violence can be made. In a visitation or parenting time order, a judge may:

(1) Order an exchange of a child to occur in a protected setting;
(2) Order visitation or parenting time supervised by another person or agency;
(3) Order the perpetrator of family violence to attend and complete, to the satisfaction of the judge, a certified family violence intervention program for perpetrators as defined in Article 1A of Chapter 13 of this title as a condition of the visitation or parenting time;
(4) Order the perpetrator of family violence to abstain from possession or consumption of alcohol, marijuana, or any Schedule I controlled substance listed in Code Section 16-13-25 during the visitation or parenting time and for 24 hours preceding the visitation or parenting time;
(5) Order the perpetrator of family violence to pay a fee to defray the costs of supervised visitation or parenting time;
(6) Prohibit overnight visitation or parenting time;
(7) Require a bond from the perpetrator of family violence for the return and safety of the child; and
(8) Impose any other condition that is deemed necessary to provide for the safety of the child, the victim of family violence, or another family or household member.

(b) Whether or not visitation or parenting time is allowed, the judge may order the address of the child and the victim of family violence to be kept confidential.

(c) The judge shall not order an adult who is a victim of family violence to attend joint counseling with the perpetrator of family violence as a condition of receiving custody of a child or as a condition of visitation or parenting time.

(d) If a judge allows a family or household member to supervise visitation or parenting time, the judge shall establish conditions to be followed during visitation or parenting time."

Section 8 of HB 369 provides the effective date for the new law. "This Act shall become effective on January 1, 2008, and shall apply to all child custody proceedings and modifications of child custody filed on or after January 1, 2008."

The standards currently in effect, such as the current binding provisions on the fourteen year old election, will apply to any cases filed before January 1, 2008.