**THIRD PARTY CUSTODY AND GRANDPARENT VISITATION**

1. The Good Judge-ment Podcast has always been committed to including episodes on a variety of topics of interest to judges, including domestic relations cases
2. In our very first recording session, we recorded one episode dealing with third party custody cases and a separate episode dealing with grandparent visitation
3. While our Editing Wizard, Stephen Turner, was editing the recordings, we realized that Governor Kemp had signed a new law which changed the law dealing with third party custody
	1. Literally was signed the day after we recorded our prior episodes
4. So we had to “trash” two episodes
5. We are going to give this a second try
6. Remember that we post written outlines of our notes on our website, GoodJudgePod.com

**THIRD PARTY CUSTODY – THE BASICS**

1. 3 statutes that allow certain 3rd Parties to seek custodial rights to children
	1. §19-7-1 (Grandparent and others can seek custody)
	2. §19-7-3 (Grandparent visitation)
	3. §19-7-3.1 (NEW, the Equitable Caregiver custody statute)
2. Before we examine those statutes, we need to look at the reason for these rules
3. These cases are hard for the judge because the reasons for the rule raise two competing interests
4. There is a legal conflict between the fundamental right to parent and the SEPARATE interest of the state to act in the best interests of the child. Those two interests occasionally diverge.
	1. One of the primary points to keep in mind in these cases is the ***fundamental right*** of parents to retain their rights as parents.
	2. The right to be a parent and raise your children is a **fundamental right** that cannot be interfered with barring proof of a compelling state interest that overrides the rights of the parents under the **14th Amendment**.
	3. “The United States Supreme Court has recognized that parents have a fundamental liberty interest in the care, custody, and management of their children.”[[1]](#endnote-1)
	4. “[P]arents have a fundamental liberty interest in the care, custody, and management of their children and there can scarcely be imagined a more fundamental and fiercely guarded right than the right of a natural parent to his offspring.”[[2]](#endnote-2)
	5. In her dissent to the seminal case of *Clark v. Wade*, Justice Hunstein noted, “[w]hile I agree with the majority that parents' interests in raising their children without undue interference of the State is one of the oldest and most fundamental of liberty interests, in my view the conclusion that a showing of harm is constitutionally required rests, in large part, upon the misplaced and often incorrect assumption that the parents have been the child's primary caregivers and that third parties who seek custody have no legitimate or established relationship with the child. In reality, many children today are being raised not by their parents but by other family members with a strong attachment to the child and who have lovingly and responsibly acted in the role of the child's parent.”[[3]](#endnote-3)
5. The reality of the modern “family” as observed by Justice Hunstein in her dissenting opinion in *Clark v. Wade*, is likely what gave rise to §19-7-3.1.

**SIMILARITIES AND DIFFERENCES BETWEEN §19-7-1 AND §19-7-3.1**

1. §19-7-1(b.1) and §19-7-3.1 are similar to one another but they do have differences
2. It seems that the Legislature has chosen to include some law that resulted from litigating cases involving §19-7-1(b.1) and the grandparent visitation statute (§19-7-3) in drafting §19-7-3.1
	1. But, unfortunately, the 3 statutes do not track each other exactly or incorporate all of the appellate decisions on the topics
3. So we need to examine each statute separately

**§19-7-1(b.1)**

1. §19-7-1(b.1) is focused first on the biological relationship between the 3rd party and the child
2. O.C.G.A. §19-7-1(b.1) provides:
	1. in any action involving the custody of a child between the parents or either parent and a **third party** limited **to grandparent, great-grandparent, aunt, uncle, great aunt, great uncle, sibling, or adoptive parent**, parental power may be lost by the parent, parents, or any other person if the court hearing the issue of custody, in the exercise of its sound discretion and taking into consideration all the circumstances of the case, determines that an award of custody to such third party is for the **best interest of the child** or children **and** **will best promote their welfare and happiness**.
	2. There shall be a **rebuttable presumption that it is in the best interest of the child or children for custody to be awarded to the parent** or parents of such child or children, but this **presumption may be overcome by a showing that an award of custody to such third party is in the best interest of the child or children**. The sole issue for determination in any such case shall be what is in the best interest of the child or children.
3. So §19-7-1(b.1) limits the class of persons who can seek custody of a child to
	1. **grandparent, great-grandparent, aunt, uncle, great aunt, great uncle, sibling, or adoptive parent**
4. “This statute [§19-7-1(b.1)] indicates that there are only three groups capable of exercising parental control: a parent, parents, or a third parties of a limited class.”[[4]](#endnote-4)

**§19-7-3.1**

1. §19-7-3.1 focuses on the 3rd party’s involvement in the life of the child and biological relationship between the 3rd party and the child is irrelevant
2. §19-7-3.1 allows anyone who meets the definition of an “equitable caregiver” of the child to seek custody and/or visitation with the child
	1. The statute actually has a proposed complaint and affirmation in the body of the statute
3. §19-7-3.1 cannot be used to initiate a custody or visitation complaint where the parents are not separated and the child is living with both parents
4. In order for a person to be allowed to participate in a custody action involving the child, the Court must find, by ***clear and convincing evidence***, that the person qualifies as an “equitable caregiver” of the child
5. To qualify as an “equitable caregiver,” the person must show, by clear and convincing evidence that the person has:
	1. fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child’s life;
	2. Engaged in consistent caretaking of the child;
	3. Established a bonded and dependent relationship with the child, the relationship was fostered or support by a parent of the child, and sch person and the parent have understood, acknowledged, or accepted or behaved as though such person is a parent of the child;
	4. The person has accepted full and permanent responsibilities as a parent of the child without expectation of financial compensation; **AND**
	5. Demonstrated that the child will suffer physical harm or long-term emotional harm and that continuing the relationship between the 3rd party and the child will be in the best interest of the child.
6. That is a long list of required showings so it would seem that very few people would qualify as “equitable caregivers”

**PROVING “HARM” UNDER THESE STATUTES**

1. The cases have established this concept of proving potential “harm” to children in the context of these 3rd party custody cases. [[5]](#endnote-5)
	1. And §19-7-3.1 actually included the definitions in the statute
2. As you might imagine, because being a parent is a “fundamental right,” a 3rd party seeking custody of a child has to prove more than the 3rd party is a better parent or that the 3rd party can provide more financial resources for the child.
	1. If that was not the rule, rich people could regularly take children from parents who have limited means
3. To establish that element of physical harm or long-term emotional harm that the child would face if the 3rd party was not granted custody, the court must consider:
	1. **In determining the existence of harm, the court shall consider factors related to the child's needs, including, but not limited to:**
		1. **(1) Who are the past and present caretakers of the child;**
		2. **(2) With whom has the child formed psychological bonds and the strength of those bonds;**
		3. **(3) Whether competing parties evidenced an interest in, and contact with, the child over time; and**
		4. **(4) Whether the child has unique medical or psychological needs that one party is better able to meet.**
4. Under both §19-7-1 and §19-7-3.1, the 3rd party seeking custody must show by clear and convincing evidence
	* 1. parental custody would harm the child, where “harm” has been defined as “physical harm or long-term emotional harm, not merely social or economic disadvantages,”[[6]](#endnote-6) and
		2. that an award of custody to the third party relative will best promote the child’s health, welfare, and happiness.[[7]](#endnote-7)
5. It is insufficient for the trial court to find that the child “may” suffer physical or emotional harm if custody is placed in the parent.
6. The standard requires that the trial court find that the child “will” suffer such harm by clear and convincing evidence.[[8]](#endnote-8)

**PRESUMPTIONS IN THESE 3RD PARTY CASES**

1. Implicit in O.C.G.A. §19-7-1(b.1) (and assumedly under §19-7-3.1) are three presumptions:
	1. (1) the parent is a fit person entitled to custody,
	2. (2) a fit parent acts in the best interests of his or her child, and
	3. (3) the child’s best interest is to be in the custody of a parent.[[9]](#endnote-9)
		1. These presumptions are not specifically included within the statutory language of §19-7-3.1
		2. But it seems to us that the constitution requires these presumptions to be met.
2. O.C.G.A. §19-7-1(b.1) established a “rebuttable presumption that parental custody is always in the child’s best interest, thus favoring the biological parents over the third party.”[[10]](#endnote-10)
3. The 14th Amendment demands that the trial court begin the analysis of a third party custody case with the three rebuttable presumptions that are implicit in §19-7-1(b.1).

**COURT CANNOT AWARD JOINT LEGAL CUSTODY BETWEEN PARENTS AND THIRD PARTIES**

1. In *Stone v. Stone*,[[11]](#endnote-11) the Georgia Supreme Court held that joint legal custody ***cannot be granted in a case involving third party custody***.
	1. The *Stone* court held that O.C.G.A. §19-9-6(5) explicitly provides that “joint legal custody” is reserved to custody decisions between parents and is not available in cases where custody is at issue between a parent and a third party.[[12]](#endnote-12)
	2. The holding in Stone has been cited with approval in subsequent cases:
		* 1. *Sheffield v. Sheffield*, 338 Ga. App. 667, 669 (2016);
			2. *Stone v. Webb*, 335 Ga. App. 739 (2016) (*Stone v. Webb* is a case related to the decision in *Stone v. Stone*);
			3. *Holdaway v. Holdaway*, 338 Ga. App. 477 (2016)
2. §19-9-6(6) provides that the term joint legal custody is defined as “…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*.” However, §19-9-6(11) defines sole custody as, “…*a person*, including but *not limited to*, *a parent*, has been awarded permanent custody of a child by a court order….”[[13]](#endnote-13)
	1. Stated more plainly, a parent is entitled to custody unless and until a third party proves by clear and convincing evidence that such parental custody would harm the child. The third party might be entitled to ***visitation*** (in some circumstances as addressed more fully below) but is not entitled to ***custody*** unless that heavy burden is met by the third party.

**MISCELLANEOUS ISSUES RELATING TO 3RD PARTY CUSTODY**

1. These statutes are in derogation of common law and cannot be interpreted any way other than **strictly**.
	1. The former legal father of a child is not among the persons listed in §19-7-1(b.1).
	2. Therefore, where the biological father legitimates the child, the parental rights of the legal father are terminated and the former legal father is not among the persons listed in the statute who have the right to seek custody under the best interests standard established under §19-7-1(b.1).[[14]](#endnote-14)
	3. A former spouse is not included within the list of persons under §19-7-1(b.1).[[15]](#endnote-15)
	4. The sister of an alleged putative father is not an “aunt” under §19-7-1(b.1) unless and until the putative father is granted legitimation.
	5. The person claiming to be a third party included within the statutory scheme of §19-7-1(b.1) must be a person within the designated relation to the child at the time of filing the petition.[[16]](#endnote-16)
2. Where a juvenile court grants guardianship over a child, that act does not deprive the superior court from exercising jurisdiction over a petition for custody.[[17]](#endnote-17)
	1. A guardianship in juvenile court “neither terminates parental rights not confers permanent custody” over the child.[[18]](#endnote-18) And an award of custody does supersede a temporary guardianship.[[19]](#endnote-19)
	2. The same principles are true where a probate court has issued temporary guardianship letters.[[20]](#endnote-20)

**CONCLUSION AS TO 3RD PARTY CUSTODY CASES**

1. O.C.G.A. §19-7-1(b.1) still presumes: (1) the parent is a fit person entitled to custody, (2) a fit parent acts in the best interests of his or her child, and (3) the child’s best interest is to be in the custody of a parent.
	1. Although the presumptions are not specifically included within the statutory language of §19-7-3.1, we believe that the Constitution requires those presumptions to remain in effect.
2. To overcome these presumptions, the third party relative (as defined by statute) must show two things by clear and convincing evidence:
	1. (1) parental custody would harm the child, and
	2. (2) that an award of custody to the third party relative will best promote the child’s health, welfare, and happiness.
3. “Harm” to the child must be more than a showing that the child might have better financial, educational or moral advantages with the third party relative over the parent, and it must be more than mere discomfort from switching homes or schools.
	1. When assessing “harm” to the child, the trial court should consider four factors:
		1. (1) who are the past and present caretakers of the child;
		2. (2) with whom has the child formed psychological bonds;
		3. (3) have the competing parties evidenced interest in, and contact with, the child over time; and
		4. (4) does the child have unique medical or psychological needs that one party is better able to meet.

**[END OF 3RD PARTY CUSTODY EPISODE]**

**GRANDPARENT VISITATION**

**SIMILAR BUT VERY DIFFERENT**

1. We have broken up the episodes involving 3rd Party Custody and Grandparent Visitation due to length.
2. If you are presented with a question involving grandparent visitation, it might be a good idea to listen to our episode involving 3rd Party Custody. Some of the underlying principles are true in both types of cases.
3. Grandparents can seek custody of children under §19-7-1(b.1). We addressed that issue in a separate episode. In this episode we are addressing those cases where a grandparent is seeking visitation privileges with a child

**§19-7-3—THE STATUTE**

1. O.C.G.A. §19-7-3
	1. The issue of grandparent visitation is similar but, at the same time, very different from the issue of third party custody. Georgia has long struggled with the legal test to be applied to cases in which grandparents request visitation with children and have declared previous versions of the grandparent visitation statute unconstitutional.[[21]](#endnote-21)
2. The current version of §19-7-3 is widely referred to as the “grandparent visitation statute.”[[22]](#endnote-22)
	1. However, the statute actually confers rights to people other than grandparents.
3. §19-7-3(a) defines “family members” as a grandparent, great-grandparent or sibling. The statute then further defines each of those terms to include usual definitions of grandparents and great-grandparents but defines “sibling” as those people who are the brother or sister of a parent of a minor child.
	1. All three terms are defined in a manner that includes their respective relationships to parents of a minor child and also clarify that the terms continue to be applicable even where the parent involved has died or where the parental rights have been terminated.[[23]](#endnote-23)
4. The right to seek visitation with a minor child under §19-7-3 is very specific and requires a factual analysis to be performed to ensure that the requested relief is authorized by the statute.

**THE CONSTITUTIONAL STRUGGLES**

1. The law struggles with some of the same issues in the grandparent visitation arena that were addressed in the third party custody discussion above.
	1. The right to be a parent that has been recognized as a fundamental right under the 14th Amendment is equally applicable when the issue is visitation as opposed to custody.
2. There was no right to grandparent visitation at common law when the parents objected to such visitation.[[24]](#endnote-24)
	1. The new statute gives grandparents the mechanism to seek visitation with their grandchildren when the parents object to such visitation.[[25]](#endnote-25)
3. **However, grandparents have no right to seek visitation where the parents of the children are not separated and where the child is living with both parents**.[[26]](#endnote-26)
	1. (You may recall that this exact language is a part of the new “equitable caregiver” 3rd Party Custody statute (§19-7-3.1)
	2. “[T]he statute does not otherwise allow grandparents, by court action, to intrude upon the ‘constitutionally protected interest of parents to raise their children.’”[[27]](#endnote-27)
4. The reason for the limitation is clear and is demanded by the 14th Amendment. The right to parent free of interference from others, including the grandparents of the child, is paramount to any right that the grandparents may have to visitation.

**MECHANISM FOR SEEKING GRANDPARENT VISITATION**

1. A grandparent may file an original action seeking visitation.[[28]](#endnote-28)
	1. The other family members as defined under the statute may only seek to intervene in an action where the custody of a child is at issue, in a divorce action involving a parent, an action involving the termination of parental rights of either parent or where there is an adoption action where the child has been adopted by a blood relative.[[29]](#endnote-29)
	2. However, grandparents and the family members as defined by the statute are subject to a very specific limitation.
	3. ***The statute does not authorize an original action when the parents of the child are not separated and the child is living with both parents***.[[30]](#endnote-30)
2. In *Kunz v. Bailey*, the natural father terminated his parental rights and the mother remarried. The mother’s new spouse adopted the child and the paternal grandparents then filed an original action seeking visitation.[[31]](#endnote-31)
	1. The Supreme Court of Georgia found that the grandparents’ action seeking visitation had to be dismissed because it was an original action and the “parents” of the child were not separated and the child was living with both of its “parents.”
		1. The grandparents argued that the statute should be construed to mean “biological parents” but the argument was not persuasive. The Court found that the statute could not be read to include language that was not a part of the statute. “If the General Assembly intended such a limitation, it would have included specific language to that effect in the statute.”[[32]](#endnote-32)
3. In response to the decision in *Kunz v. Bailey*, the Legislature added a new subsection (d) to §19-7-3. That new provision allowed grandparents to seek visitation if the parent died, was incapacitated, or was incarcerated.
4. §19-7-3(d) was found to be ***UNCONSTITUTIONAL IN PATTEN v. ARDIS*, 304 Ga. 140 (2018).**
	1. The finding that §19-7-3(d) was unconstitutional does not impact the remaining provisions of the statute. (*Reid v. Lindsey*, 348 Ga. App. 425, n. 19 (2019).

**PROOF REQUIRED UNDER THE STATUTE**

1. Assuming that the grandparent or family member has filed the appropriate type of action, the trial court may grant “reasonable visitation rights” if the court finds by clear and convincing evidence that:
	1. 1) the health or welfare of the child would be harmed unless such visitation is granted and
	2. 2) that the best interests of the child would be served by such visitation.[[33]](#endnote-33)
2. The statute does not define what type of visitation schedule might be “reasonable.” The appellate courts will only review the schedule of visitation on an abuse of discretion standard.[[34]](#endnote-34)
3. The statute goes on to provide that the mere absence of an opportunity for a child to develop a relationship with a family member shall not be considered as “harming” the health or welfare of the child where there is no substantial preexisting relationship between the child and that family member.
	1. Further, the statute provides:
		1. “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 original action or intervention:

(A) The minor child resided with the family member for six months or more;

(B) The family member 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 family member 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.”[[35]](#endnote-35)

1. Therefore, the statute requires the trial court to first find, by clear and convincing evidence, that the health or welfare of the child would be harmed if the requested visitation is not granted.
	1. Then, the trial court must find that the best interests of the child are best served by granting the requested visitation.
2. In making the required findings, the statute provides several factual scenarios that could be utilized to make the required findings of harm but the statute also allows the trial court the flexibility, under §19-7-3(c)(1)(D) to look at other facts to support the required findings.

**DESIRES OF PARENT ARE TO BE CONSIDERED BUT ARE NOT CONTROLLING**

1. §19-7-3(c)(3) specifically provides that the desires of the parent regarding family member visitation “shall be given deference by the court” but that the parent’s desires are not controlling.
	1. That deference does not allow the parent to dictate that the visitation occur “at her discretion” or only at the home of the parent.[[36]](#endnote-36)
	2. However, where the child in question has step-siblings, that fact should be considered as part of the overall facts and circumstances of the case in making a decision as to whether visitation should be granted and the terms of the reasonable visitation granted thereunder.[[37]](#endnote-37)

**FACTUAL FINDINGS ARE REQUIRED WHEN CONSIDERING “GRANDPARENT VISITATION”**

1. The paramount requirement of the trial court when considering a visitation request under §19-7-3 is that the *trial court makes the required findings of fact*.
2. **The findings of fact must be in writing**.
	1. This requirement is different than the requirement for written findings set forth in the “regular” custody statute.
		1. Under §19-9-3(a)(8), the parties can request, before the close of evidence, for the trial court to make written findings of fact. However, §19-7-3 demands that written findings be made in ***every case***.
3. The statute and the cases clearly identify what written findings must be made. The statute requires the trial court to find, by ***clear and convincing evidence***, that:
	1. the health or welfare of the child would be harmed if the requested visitation is not granted; and
	2. if the above finding is made, the trial court must find that the best interests of the child are best served by granting the requested visitation.
	3. The court shall make specific written findings of fact in support of its rulings.
	4. There shall be no presumption in favor of visitation by any grandparent.[[38]](#endnote-38)
4. There are numerous appellate cases which have been reversed and/or remanded because the trial court failed to make the required findings.[[39]](#endnote-39)
	1. This is true even where the trial court finds in favor of the parent and denies the request for visitation by a grandparent.[[40]](#endnote-40)
	2. The trial court is required to consider the evidence and make written findings of fact, regardless of whether the relief that is requested is granted.

**CONCLUSION REGARDING GRANDPARENT CUSTODY**

1. §19-7-3 “was enacted to provide a mechanism for courts to grant a grandparent visitation rights with his or her minor grandchild, where, as here, a child’s parent objects. In this regard, the statute codified a standard for the trial courts to utilize in balancing the wishes of an alienated grandparent, the rights of the parents, and the interests of the child.”[[41]](#endnote-41)
2. However, the different interests demand that the statute be narrowly interpreted to ensure that the Constitutional rights of the parents are not unduly infringed upon.
3. Although the statute is commonly referred to as the “Grandparent Visitation Statute,” the statute actually gives rights of visitation to grandparents, great-grandparents and siblings of the parents. However, the demands of the statute remain the same, regardless of which family member is requesting visitation under the statute.
4. The statute demands ***written findings of fact in every case***, regardless of whether the requested relief is granted to the family member.
5. Before granting visitation to a “grandparent,” the trial court must find, by clear and convincing evidence, that the health or welfare of the child would be harmed unless such visitation is granted and that, if so, whether the requested visitation is in the child’s best interests.
	1. The trial court is given wide discretion as to what schedule of reasonable visitation is awarded and may do so as part of a temporary order.
6. However, before addressing any such visitation by a family member, the trial court must make ***written findings of fact*** that comport with the statute.

**[END OF GRANDPARENT VISITATION EPISODE]**

**ISSUES NOT DIRECTLY ADDRESSED IN PODCAST**

**OLDER STANDARDS RELATING TO 3RD PARTY CUSTODY**

1. Over the years, Georgia law has established several different standards for considering custody claims by third parties:
2. The old “parental rights standard” required proof by clear and convincing evidence that that (1) the parent had lost his or her parental power or (2) the parent was unfit.
	1. The Georgia Supreme Court deemed this standard to be too harsh and thereby adopted a standard by which a parent could lose custody in “exceptional circumstances,” meaning the parent was unfit.[[42]](#endnote-42) “[A]dherence to the parental rights doctrine has led child custody cases into the thickets of the technicalities of contract law and away from the more relevant question of what is best for the child.”[[43]](#endnote-43)
3. “Because of the harshness of the parental rights standard, this Court adopted a second standard by which a parent could lose custody in exceptional circumstances.”[[44]](#endnote-44) Under the “parental fitness doctrine,” the focus of the inquiry was on the parent and the third party had to prove by clear and convincing evidence that the biological parent was currently unfit.
	1. The parental fitness doctrine required the trial court to limit its focus to the present unfitness of the biological parent and could not rely upon evidence of past unfitness or make any comparison between the parent’s fitness and that of another person.[[45]](#endnote-45)
	2. “Although this standard [parental fitness] appears fair on its face, its application has caused unfair results because of its reliance on biological connections to the exclusion of other important considerations.”[[46]](#endnote-46)
	3. “Just as this Court adopted the [parental] fitness standard to ameliorate the undesirable consequences of the parental rights standard, we have on occasion rejected or ignored the fitness standard based on ‘exceptional circumstances.’”[[47]](#endnote-47)
		1. In short, the Georgia case law attempted to establish clear rules for third party custody cases but routinely had to carve out exceptions to the “rules” in cases where the facts demanded a different result than that suggested by the rule. These exceptions became known as “exceptional circumstances” but the exceptional circumstances required courts to routinely depart from the established rules relating to third party custody.

**THE CURRENT STANDARD UNDER §19-7-1(b.1)**

1. The Legislature became involved in the development of the law relating to third party custody and intentionally changed the law with the enactment of O.C.G.A. §19-7-1(b.1) in 1996. The Legislature intended to replace the parental fitness standard with the best interest of the child standard when the new law was enacted.[[48]](#endnote-48)
	1. The Georgia Supreme Court upheld the “best interest of the child” standard when applied to custody disputes between biological parents and custodial third parties in the seminal case, *Clark v. Wade*.[[49]](#endnote-49)

**OVERCOMING THE PRESUMPTION THAT FAVORS PARENTS**

1. A third party relative may overcome the presumption that parental custody is always in the child’s best interest by meeting the following two-part test.
	1. A third party relative must show by clear and convincing evidence
		1. (1) parental custody would harm the child, where “harm” has been defined as “physical harm or long-term emotional harm, not merely social or economic disadvantages,”[[50]](#endnote-50) and
		2. (2) that an award of custody to the third party relative will best promote the child’s health, welfare, and happiness.[[51]](#endnote-51)
2. The Georgia Court of Appeals further explained in *Holdaway* that the trial court “need not determine that the parent seeking custody is unfit, only that the third party relative has established by clear and convincing evidence that awarding custody to the parent would cause either physical harm or significant, long-term emotional harm to the child. If the third party relative meets this burden, then the relative must show that an award of custody to him or her would best promote the best interest of the child.”[[52]](#endnote-52)
3. In determining what would cause “long-term emotional harm”, the trial court must go beyond the parent's biological connection or present fitness and consider a variety of factors, including:
	1. (1) who are the past and present caretakers of the child;
	2. (2) with whom has the child formed psychological bonds;
	3. (3) have the competing parties evidenced interest in, and contact with, the child over time; and
	4. (4) does the child have unique medical or psychological needs that one party is better able to meet.

**EXAMPLE CASES APPLYING THE BEST INTEREST STANDARD UNDER §19-7-1(b.1)**

1. In *Brawner v. Miller,* the mother of two children was murdered. Their biological father filed for legitimation and that action was opposed by the maternal grandfather of the children, Mr. Miller. Brawner and the mother of the children were high school sweethearts and were never married. The children were born in 2002 and 2004. They lived together for a period of time but separated in 2006. The children and the mother primarily resided with the maternal grandfather after the separation. Brawner sporadically saw the children and sporadically paid child support. The mother was murdered in 2013. Brawner filed the legitimation action and sought custody shortly after the mother’s murder. The maternal grandfather intervened in the legitimation action. The trial court granted the legitimation but awarded custody to the maternal grandfather, with visitation with Brawner.
	1. “Brawner [the biological father] has interacted with the boys only sporadically since he and their mother separated, visiting them occasionally and attending only a few school events and extra-curricular activities despite living a mere *five blocks away* from Miller. As Miller [the maternal grandfather] testified, and the trial court reiterated, the boys are still struggling emotionally from the sudden and tragic loss of their mother. And although they are beginning to heal from this severe emotional trauma, the healing process will undoubtedly be harmed if they are, at this point in time, uprooted from the only home they have ever known to live with a father who, while perhaps well-meaning, has yet to build a meaningful relationship with them.”[[53]](#endnote-53)
	2. The *Brawner* Court reiterated that unfitness of the parent does not have to be proven. The Court noted that the 3 statutory presumptions in favor of the parents must be overcome by clear and convincing evidence that parental custody would harm the children. Once these presumptions are overcome, the third party relative must then prove that an award of custody to him or her will best promote the child’s health, welfare and happiness.[[54]](#endnote-54)
2. **The *Brawner* Court made an important point in FN 11 that we need to consider here**:
	1. “It is important to emphasize that the present custody dispute is between a parent who has not cared for his children in quite some time and a grandparent who has commendably done so. In such cases, ‘the day-to-day bond of the parent-child relationship already has been interrupted, and the child may have formed strong and lasting relationships with the person who has been caring for him.’ *Clark*, 273 Ga. at 600, 544 S.E.2d 99 (Sears, J., concurring specially). In contrast, a custody dispute involving a third party seeking to ‘break apart an intact parent-child relationship’ implicates even greater constitutional concerns.’ Id. Cf. *Stone*, 297 Ga. 451, 454–455, 774 S.E.2d 681 (2015) (holding that “construing [OCGA § 19–7–1(b.1) ] as authorizing the State to require a fit and capable parent to share custody of his child with anyone except the child's other parent would raise significant constitutional concerns.”).”
3. In *Strickland v. Strickland*, the Supreme Court again reiterated the applicability of the “best interests standard” in a custody contest between the mother of three children and the maternal grandparents of the children. (the children had three different biological fathers)[[55]](#endnote-55)
	1. The facts of *Strickland* are complicated but the evidence showed that the mother struggled with several different issues over a series of years, including mental health and drug/alcohol use. The children had resided with the maternal grandparents who had received emergency custody (through juvenile court) of the children 4 years before the permanent custody action was filed that eventually ended up being appealed.
	2. Although the mother in *Strickland* presented contrary evidence, the trial court’s conclusions concerning mother’s various issues were to be given great deference on appeal.
4. In *Holdaway v. Holdaway*,[[56]](#endnote-56) the father filed a custody modification action against the mother and the maternal grandmother intervened. The maternal grandmother sought custody or, in the alternative, visitation rights.
	1. The evidence showed that after her divorce from Mr. Holdaway, mother was awarded primary custody and moved into the home of maternal grandmother. Mother struggled with drug/alcohol and moved in and out of the maternal grandmother’s home but the child continuously lived with maternal grandmother. Dad was sporadic with visitation and support and was aware the child was living with maternal grandmother. Dad acquiesced to the child living with maternal grandmother because his work arrangements prevented him from having the child live with him. Important in this decision was the fact that the child had a sister [same mother, different fathers] that maternal grandmother had custody of and to whom this child had a strong bond.
	2. “the trial court was entitled to find that L.H. would suffer significant, long-term emotional harm if she were uprooted from virtually the only home she had ever known with her maternal grandmother and older sister and instead placed in the custody of her father.”[[57]](#endnote-57)
		1. While “some level of stress and discomfort may be warranted when the goal is reunification of the child with the parent,” Clark, 273 Ga. at 598 (IV), 544 S.E.2d 99, the trial court was authorized to find that the emotional harm to L.H. would exceed the “routine” level of stress inherent in any change of custody, particularly in light of the unusually close sibling relationship that would be if disrupted if custody were placed with the father.”[[58]](#endnote-58)

**ENDNOTES**

1. *Troxel v. Granville,* 530 U.S. 57, 120 S.Ct. 2054, 2060, 147 L.Ed.2d 49 (2000) [↑](#endnote-ref-1)
2. *Floyd v. Gibson*, 337 Ga. App. 474, 479 (2016); citing *In re M.F.*, 298 Ga. 138, 145 (2015). [↑](#endnote-ref-2)
3. *Clark v. Wade*, 273 Ga. 587, 601-602 (2001); The decision in *Clark*, together with the respective concurring and dissenting opinions, is an in depth analysis of the relevant law on this subject and is a very informative source of information as to how (and why) the law has developed over the years. [↑](#endnote-ref-3)
4. *Stone v. Stone*, 297 Ga. 451, 454 (2015). [↑](#endnote-ref-4)
5. *Brawner v. Miller*, 334 Ga. App. 214, 217 (2015); *Sheffield v. Sheffield*, 338 Ga. App. 667, 668 (2016) [↑](#endnote-ref-5)
6. *Holdaway v. Holdaway*, 338 Ga. App. 477, 482-483 (2016) [↑](#endnote-ref-6)
7. *Holdaway v. Holdaway*, 338 Ga. App. 477, 482-483 (2016) [↑](#endnote-ref-7)
8. *Floyd v. Gibson*, 337 Ga. App. 474, 478 (2016) [↑](#endnote-ref-8)
9. *Holdaway v. Holdaway*, 338 Ga. App. 477 (2016) [↑](#endnote-ref-9)
10. *Clark v. Wade,* 273 Ga. 587, 590 (2001) [↑](#endnote-ref-10)
11. *Stone v. Stone,* 297 Ga. 451 (2015) [↑](#endnote-ref-11)
12. *Stone v. Stone*, 297 Ga. 451, 453 (2015) [↑](#endnote-ref-12)
13. *Stone v. Stone*, 297 Ga. 451, 453 (2015) (emphasis in original) [↑](#endnote-ref-13)
14. *In re CL*, 284 Ga. App. 674, 675-676 (2007) [↑](#endnote-ref-14)
15. *Phillips v. Phillips*, 316 Ga. App. 829 (2012) [↑](#endnote-ref-15)
16. *Morris v. Morris*, 309 Ga. App. 387, 388 (2011) [↑](#endnote-ref-16)
17. *Drawdy v. Sasser*, 335 Ga. App. 650, 652 (2016) [↑](#endnote-ref-17)
18. *Sheppard v. McCraney*, 317 Ga. App. 91, 92, n. 3 (2012) [↑](#endnote-ref-18)
19. *Drawdy v. Sasser*, 335 Ga. App. 650, 652 (2016) [↑](#endnote-ref-19)
20. *Barfield v. Butterworth*, 323 Ga. App. 156, 160 (2013) [↑](#endnote-ref-20)
21. *Brooks v. Parkerson*, 265 Ga. 189 (1995) [↑](#endnote-ref-21)
22. *Vincent v. Vincent*, 333 Ga. App. 902, 903 (2015) [↑](#endnote-ref-22)
23. O.C.G.A. §19-7-3 provides: “(a) As used in this Code section, the term: (1) “Family member” means a grandparent, great-grandparent, or sibling. (2) “Grandparent” means the 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. (3) “Great-grandparent” means the parent of the parent of a parent of a minor child, the parent of the parent of a minor child's parent who has died, and the parent of the parent of a minor child's parent whose parental rights have been terminated. (4) “Sibling” means the brother or sister of a parent of a minor child, the brother or sister of a minor child's parent who has died, and the brother or sister of a minor child's parent whose parental rights have been terminated.” [↑](#endnote-ref-23)
24. *Fielder v. Johnson*, 333 Ga. App. 658, 662 (2015) [↑](#endnote-ref-24)
25. *Fielder v. Johnson*, 333 Ga. App. 658, 662 (2015) [↑](#endnote-ref-25)
26. O.C.G.A. §19-7-3(b)(2) [↑](#endnote-ref-26)
27. *Kunz v. Bailey*, 290 Ga. 361, 362 (2012); citing *Brooks v. Parkerson*, 265 Ga. 189, 191 (1995) [↑](#endnote-ref-27)
28. O.C.G.A. §19-7-3(b)(1)(A) [↑](#endnote-ref-28)
29. O.C.G.A. §19-7-3(b)(1)(B) [↑](#endnote-ref-29)
30. O.C.G.A. §19-7-3(b)(2) [↑](#endnote-ref-30)
31. *Kunz v. Bailey*, 290 Ga. 361 (2012) [↑](#endnote-ref-31)
32. *Kunz v. Bailey*, 290 Ga. 361, 362-363 (2012) [↑](#endnote-ref-32)
33. O.C.G.A. §19-7-3(c)(1) [↑](#endnote-ref-33)
34. *Luke v. Luke*, 280 Ga. App. 607, 612 (2006) [↑](#endnote-ref-34)
35. O.C.G.A. §19-7-3(c)(1)(A-D) [↑](#endnote-ref-35)
36. *Keith v. Callahan*, 332 Ga, App. 291, 293 (2015); *Evans v. Sangster*, 330 Ga. App. 533, 534 (2015) [↑](#endnote-ref-36)
37. *Keith v. Callahan*, 332 Ga, App. 291, 294-295 (2015) [↑](#endnote-ref-37)
38. O.C.G.A. §19-7-3(c) [↑](#endnote-ref-38)
39. *Esasky v. Ford*, 321Ga. App. 891 (2013); *Cates v. Jamison*, 301 Ga. App. 441 (2009); *Rainey v. Lange*, 261 Ga. App. 491 (2003) [↑](#endnote-ref-39)
40. *Sheppard v. McCraney*, 317 Ga. App. 91 (2012) [↑](#endnote-ref-40)
41. *Sheppard v. McCraney,* 317 Ga. App. 91, 92 (2012) [↑](#endnote-ref-41)
42. *Clark v. Wade*, 273 Ga. 587, 591 (2001) [↑](#endnote-ref-42)
43. *Clark v. Wade*, 273 Ga. 587, 591 (2001) [↑](#endnote-ref-43)
44. *Clark v. Wade*, 273 Ga. 587, 591 (2001); citing *Perkins v. Courson*, 219 Ga. 611, 623 (1964). [↑](#endnote-ref-44)
45. *Clark v. Wade*, 273 Ga. 587, 591 (2011), citing several other cases [↑](#endnote-ref-45)
46. *Clark v. Wade*, 273 Ga. 587, 592 (2001); citing *Knox v. Knox*, 226 Ga. 619, 620 (1970) and *Peck v. Shierling*, 222 Ga. 60 (1996). [↑](#endnote-ref-46)
47. *Clark v. Wade*, 273 Ga. 587, 592 (2001) [↑](#endnote-ref-47)
48. *Clark v. Wade*, 273 Ga. 587, 592 (2001) [↑](#endnote-ref-48)
49. *Clark v. Wade*, 273 Ga. 587 (2001) [↑](#endnote-ref-49)
50. *Holdaway v. Holdaway*, 338 Ga. App. 477, 482-483 (2016) [↑](#endnote-ref-50)
51. *Holdaway v. Holdaway*, 338 Ga. App. 477, 482-483 (2016) [↑](#endnote-ref-51)
52. *Holdaway v. Holdaway*, 338 Ga. App. 477, 482-483 (2016) [↑](#endnote-ref-52)
53. *Brawner v. Miller*, 334 Ga. App. 214, 217 (2015). [↑](#endnote-ref-53)
54. *Brawner v. Miller*, 334 Ga. App. 214, 216 (2015). [↑](#endnote-ref-54)
55. *Strickland v. Strickland*, 298 Ga. 630, 634-35 (2016). [↑](#endnote-ref-55)
56. *Holdaway v. Holdaway*, 338 Ga. App. 477, 484-485 (2016). [↑](#endnote-ref-56)
57. *Holdaway v. Holdaway*, 338 Ga. App. 477, 484-485 (2016). [↑](#endnote-ref-57)
58. *Holdaway v. Holdaway*, 338 Ga. App. 477, 484-485 (2016). [↑](#endnote-ref-58)