NOTES

Consent of 'Unfit' Parents Needed for Adoption —Unless Their Rights Are First Terminated

In *Johnson v. Eidson*,[1] the Georgia Supreme Court held that "moral unfitness" of natural parents is not an exception to the statutory prerequisite that natural parents consent to their children's adoption.

The maternal grandparents of Lewis and Jimmy Lynn Johnson[2] had petitioned the court to allow them to adopt their grandchildren without the consent of the natural parents. Their petition was based on (1) their temporary custody of the children, which was granted by a juvenile court after the children had been found in a condition of neglect; (2) abandonment by the natural parents; and (3) the unfit and improper activity of the natural parents. Over the objections of the natural parents, the trial court found the parents to be morally unfit, the grandparents to be morally fit and financially able, and the adoption to be in the best interest of the child. The petition was granted.

Affirming the lower court, the Georgia Court of Appeals noted that abandonment is one of the exceptions to the provision in Georgia's adoption statute[3] that the consent of living natural parents be given before an adoption is granted.[4] The intermediate court interpreted the statute as including moral unfitness of natural parents as a sufficient ground for a finding of abandonment.[5] Because the evidence "almost demanded" a finding of moral unfitness of the natural parents,[6] the court of appeals upheld the trial judge's authorization of permanent custody and adoption for the grandparents.

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1. 235 Ga. 820, 221 S.E.2d 813 (1976).

2. One of the children died after the petition was filed. The facts are in the court of appeals opinion, Johnson v. Eidson, 135 Ga. App. 335, 217 S.E.2d 460 (1975).

3. GA. CODE ANN. §§74-403 through 74-414 (1973).

4. "[W]here a child has been abandoned by such parent, or where such parent of a child cannot be found after a diligent search has been made, or where such parent is insane or otherwise incapacitated from giving such consent . . . or where such parent has surrendered all of his or her rights to said child-placing agency, or to a court of competent jurisdiction for adoption, . . . [or] where such a parent has had his or her parental rights terminated by order of a juvenile or other court of competent jurisdiction, or where such parent is dead." GA. CODE ANN. §74-403(2) (1973).

5. This interpretation was based on the court's interpretation of GA. CODE ANN. § 74-414 (1973). 135 Ga. App. at 336, 217 S.E.2d at 461.

6. Evidence included the "admitted advertisement of the naked natural mother in a sex magazine catering to 'gals, Couples, and Gays' " with solicitations for sex. Also introduced was evidence of abnormal sexual activity, prostitution, solicitation of sodomy and pimping. 135 Ga. App. at 336, 217 S.E.2d at 461.

The Georgia Supreme Court reversed and took this opportunity to interpret the adoption statute. Statutory adoption proceedings are in derogation of the common law, and the fundamental, common-law concept of the paramount right of the natural parents to custody of their children has been consistently protected by the Georgia courts.[7] The best interests of the child may be considered in custody disputes between the father and the mother, but "clearly in this state, a parent is presumptively entitled to the custody of his natural . . . child when met with a challenge to continued custody by a non-parent."[8] This parental-rights doctrine is responsible for the emphasis placed on the prerequisite of parental consent to adoption and for the paucity of exceptions to this requirement.[9]

In *Johnson*, the supreme court was concerned primarily with the scope of one of these narrow exceptions—parental abandonment. This term has been rigidly defined in *Glendinning v. McComas*,[10] in which the court held that abandonment means "actual desertion accompanied by an intention to entirely sever . . . the parental relation."[11] For abandonment to reach the level necessary to obviate consent, the court said, it "must be such as to show a settled purpose to forego all parental duties and claims."[12]

In *Wheeler v. Little*,[13] a similar standard for abandonment was used. The court denied the adoption of a child by her aunt, to whom the natural father had given his child after the mother died. For eight years the father had not contributed in any significant way to the child's upbringing, nor had he shown any desire to have custody of the child. Although adoption would have added to the support available to the child, the petition was denied for lack of consent or abandonment by her natural father.[14]

As a result of this stringent standard, a court will recognize the abandonment exception to the consent requirement only if overwhelming evidence of desertion has been shown. Loss of custody or even cruel or uninterested treatment of the child has not been considered abandonment in an adop-

7. 235 Ga. at 821, 221 S.E.2d at 815. *See also* Carpenter v. Forshee, 103 Ga. App. 758 at 763, 120 S.E.2d 786 at 791 (1961). *Cf.* Jernigan v. Garrett, 155 Ga. 390, 117 S.E.2d 327 (1923).

8. L. HENRITZE & R. STUBBS II, THE SOCIAL CASEWORKER IN GEORGIA JUVENILE COURTS 33 (1972). There is a legal presumption that "flesh and blood" should prevail. Perkins v. Courson, 219 Ga. 611, 625, 135 S.E.2d 388, 391 (1964) (Duckworth, J., dissenting). The petitioner must bear the burden of proving forfeiture of parental rights under the law. This is the "principle that adoption laws, since they forever sever the parental relationship, are to be construed strictly in favor of parents and against applicants for adoption." Note, Adoption—Domicile—Custody—Abandonment, 17 GA. BAR J. 378, 380 (1954).

9. *See* GA. CODE ANN. §74-403(1973), quoted in part in note 4, *supra*.

10. 188 Ga. 345, 3 S.E.2d 562 (1939).

11. *Id.* at 347, 3 S.E.2d at 563.

12. *Id.*

13. 113 Ga. App. 106, 147 S.E.2d 352 (1966).

14. The court said that the legislative intent in the adoption statutes is to protect the natural parent and reflect pre-existing law. *Id.*

tion proceeding,[15] nor has mere failure to provide support.[16] It has been held that "at a minimum, proof is required that support was needed, that support was requested from the parent, and that, being on notice of the child's unmet needs, the parent failed or refused to provide support."[17]

Following these rigid requirements for abandonment, the supreme court in *Johnson* could not condone the use of "moral unfitness" in Code §74-414, which authorizes a grant of permanent custody, as a basis for a finding of abandonment under §74-403, which makes consent a prerequisite. The court reasoned that the construction of the court of appeals would "render the clauses [of §74-414] redundant."[18] The provision reads in the disjunctive:

> If the court is satisfied that the natural parents have just cause to be relieved of the care, support, and guardianship of said child, *or have abandoned* the said child, or are *morally unfit* to retain custody of said child . . . , it shall enter an order granting the permanent custody of the child to the petitioner.[19]

The section was amended in 1966 to abolish the requirement of an interlocutory hearing to determine temporary custody before the final adoption order. The issues of just cause, abandonment and moral unfitness were part of the courts' inquiry under the original interlocutory hearing, and the same considerations are incorporated in the hearing for permanent custody and adoption.

The court in *Johnson* convincingly established that the amendment was intended solely to eliminate the interlocutory hearing and not "meant to change the law of abandonment."[20] It said the legislative intent was clear: All the prerequisites for adoption, including those specified in the consent requirement, must be satisfied. The court also said that construing moral unfitness as abandonment would be inconsistent with both the statutes and the case law of Georgia.[21] While that view is correct, it may demand odd results because of the inconsistency between the liberal grounds for termination of parental rights and the limited exceptions to the prerequisite of consent.

Under §74-403(2), the consent of the natural parents is not necessary for adoption if the parental rights have been terminated by a court order.[22] An

15. R. STUBBS, 27 GEORGIA LAW OF CHILDREN 69 (1969).

16. Gray v. Sweat, 125 Ga. App. 797, 189 S.E.2d 87 (1972). Johnson v. Stickland, 88 Ga. App. 281, 285, 76 S.E.2d 533, 535 (1953).

17. HENRITZE & STUBBS, *supra* note 8, at 35, *citing* Brown v. Newsome, 192 Ga. 43, 14 S.E.2d 470 (1941).

18. 235 Ga. at 822, 221 S.E.2d at 815.

19. GA. CODE ANN. §74-414 (1973) (emphasis added).

20. 235 Ga. at 823, 221 S.E.2d at 816.

21. *Id. See also* Gray v. Sweat, 125 Ga. App. 797, 189 S.E.2d 87 (1972); Herrin v. Graham, 87 Ga. App. 291, 73 S.E.2d 572 (1952).

22. *See* note 4, *supra*.

order severs all the rights and obligations of a parent with respect to the child, including any right to object to adoption.[23] Under Code §24A-3201, the court may terminate parental rights if, among other things, the parent has abandoned the child or "the child is a deprived child, and the court finds that the conditions and causes of the deprivation are likely to continue or will be remedied, and that by reason thereof the child is suffering or will probably suffer serious physical, mental, moral or emotional harm."

This leads to an incongruity in the Georgia statutes: The outcome of adoption proceedings may depend solely upon the chronology of the procedure. In a termination hearing, the court may terminate parental rights on a finding that the child is "deprived" within the meaning of §24A-3201(2), a less stringent standard than that used to find abandonment. Adoption may then be granted without parental consent. The adoptive parent who has not had the foresight to have the natural parent's rights terminated, however, will have to prove abandonment to avoid the parental consent requirement.

In recognizing the termination exception to the consent requirement, the legislature has, in effect, incorporated the less stringent "deprived child" exception into the consent provision along with the abandonment exception. But it has made the lesser standard available only to those prospective adoptive parents who take advantage of the two-step, termination-adoption procedure; the lower standard is not available to those who file for adoption without first seeking a termination hearing. The legal effect of both procedures is the same—to "divest the parents of all legal rights or obligations from them to the child or from the child to them."[24] Consistency could be accomplished simply by making deprivation an exception to the parental-consent prerequisite in the adoption statute itself.

Recognition of a "deprived child" exception would avoid the disparity of results between the outcome in *Johnson* and that of similar situations in which the courts have found "deprivation" because of the moral unfitness of the natural parents. In *In re Levi*,[25] a young mother was considered to be pathogenic[26] and addicted to heroin and a life of crime, although she was attempting a painful and slow rehabilitation process. The court, in terminating the mother's parental rights, recognized the gravity of emotional and moral neglect and held that "[d]eprivation of love and nurture is equally as serious as mental or physical disability."[27]

Similar considerations led the court in *Bennett v. Clemens*[28] to affirm

23. GA. CODE ANN. §24A-3203 (1970).

24. GA. CODE ANN. §74-414 (1973); GA. CODE ANN. §24A-3203 (1970).

25. 131 Ga. App. 348, 206 S.E.2d 82 (1974).

26. Pathogenic is defined by *Webster's Third New International Dictionary* as "causing or capable of causing disease."

27. 131 Ga. App. at 351-352, 206 S.E.2d at 84-85.

28. 230 Ga. 317, 196 S.E.2d 842 (1973). This was a habeas-corpus action brought to secure temporary and permanent custody of the child.

an award of permanent custody of a nine-year-old girl to her 65-year-old grandparents. The natural mother had abandoned and deserted the child after subjecting her to an immoral and disadvantageous environment. Dissenting, Justice Gunter argued that the state "cannot impose a standard of morality devised by judges upon parents of a child when a determination must be made concerning the loss of permanent custody of the child . . . to a third party."[29] Justice Gunter conceded, however, that the state is justified in divesting the natural parent of permanent custody if the child is "neglected, abused, or mistreated in some manner."[30]

Neglect, abuse or mistreatment may exist when a child has been placed in an environment of immorality or depravity. Neglect by reason of an environment of immorality has been held to be a sufficient reason to terminate parental rights.[31] The trend has been to acknowledge the grave possible consequences of emotional and psychological harm to the child in these circumstances.[32] Injury of this nature "has far more impact on the future of our children" than does physical damage.[33]

This "deprived child" exception would recognize that "the essential element in child abuse is not the intention to destroy a child but rather the inability of a parent to nurture his offspring . . . ."[34] It would have the advantage of being far less discretionary than the best-interests-of-the-child doctrine,[35] yet it would recognize the child's welfare without ignoring the parental-rights doctrine.[36] Adoption would not necessarily follow a court's determination that the child's condition fulfilled the "deprived child" exception, but the exception would obviate the consent prerequisite. The worthiness and the ability of the adopting parents, the adoption standards of Code §74-414, and the best interests of the child would still be questions before the court.

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29. *Id.* at 320, 196 S.E.2d at 843-844 (Gunter, J., dissenting).

30. *Id.*

31. Walker v. State, 104 Ga. App. 595, 122 S.E.2d 486 (1961). *See* HENRITZE & STUBBS, *supra* note 8, at 21.

32. A. SUSSMAN & S. COHEN, REPORTING CHILD ABUSE AND NEGLECT 73 (1975).

33. *Id.* at 75.

34. *Id.* at 64, *quoting* Newberger, *The Myth of the Battered Child Syndrome*, 40 CURRENT MEDICAL DIALOGUE 327 (Apr. 1973).

35. 230 Ga. at 323, 196 S.E.2d at 84 (Gunter, J., dissenting).

36. *Id. See also*, 219 Ga. at 629, 135 S.E.2d at 397 (Duckworth, J., dissenting).