Mercer Law Review

Volume 73
Number 3 *Alumni Edition*

Article 13

4-2022

The Door Opens Wider: The Rights of Non-Biological Parents to Claim Custody Just Expanded

James J. McGinnis

Charles V. Crowe

Andrew B. McClintock

The Door Opens Wider: The Rights of Non-Biological Parents to Claim Custody Just Expanded

James J. McGinnis*

Charles V. Crowe**

Andrew B. McClintock***

I. INTRODUCTION

In the summer of 2013, Susan Hill and Amy Burnett exchanged wedding rings in North Carolina. Though same-sex marriage was not yet legal in most states (North Carolina included), Hill and Burnett moved forward to live together as spouses and began making plans to grow their family. Later in 2013, Burnett began trying to become pregnant. Both women contributed to the cost of the procedures designed to promote pregnancy and, in 2014, Burnett became pregnant with twin girls.[1]

During Burnett's pregnancy, Hill attended birthing classes, purchased items for the nursery, and took part in other sundry tasks that ordinarily precede the birth of children. In late 2014, Hill was present when Burnett gave birth to two baby girls and the parties met

*Partner, Warner Bates. Auburn University (B.A., 1979); Mercer University School of Law (J.D., 1982). Member, State Bar of Georgia.

**Associate, Warner Bates. Mercer University (B.A., 2006); Mercer University School of Law (J.D., 2010). Member, State Bar of Georgia.

***Associate, Warner Bates. University of Georgia (B.A., 2012); University of Georgia School of Law (J.D., 2016). Member, State Bar of Georgia.

1. Hill v. Burnett, 349 Ga. App. 260, 261–62, 825 S.E.2d 617, 619 (2019).

with an adoption attorney shortly thereafter to discuss Hill adopting the children (although no adoption was ultimately finalized).[2]

The parties continued to live together for nearly two more years, during which time Hill helped care for the children, provided clothing and necessities for the children, and developed a bond with the children. The women agreed that Hill would be called "Momma," and Burnett gave Mother's Day cards to Hill.[3]

In June 2016, the women's relationship ended, and Burnett and the children moved out of the parties' residence. During this time, Burnett continued to send Hill photographs of the children and referred to Hill as "Momma." Later that year, Hill filed suit in the Superior Court of Cobb County, Georgia seeking legitimation and establishment of custody and parenting rights. Since no legal basis existed for an unwed parent to claim custodial rights to a child who was not their biological offspring, Hill pled her case on theories of implied contract, promissory estoppel, and constitutional rights.[4]

The trial court dismissed Hill's action for lack of standing as Hill was neither a biological parent of the children, nor an adopted parent of the children. The trial court also sanctioned Hill by ordering her to pay Burnett's attorney's fees pursuant to O.C.G.A. § 9-15-14(a)[5] which provides:

> [R]easonable and necessary attorney's fees and expenses of litigation shall be awarded to any party against whom another party has asserted a claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position.[6]

Though the attorney's fee award was reversed in part on appeal, Hill had no choice but to live with the trial court's ruling that she lacked any standing to petition for custodial rights to children she helped raise and who had once called her "Momma."[7] Such was the case for numerous other non-traditional parents at the time who found themselves on the receiving end of Georgia's often harsh child custody laws. However, it

---

2. *Id.*

3. *Id.* at 262, 825 S.E.2d at 619.

4. *Id.*

5. O.C.G.A. § 9-15-14(a) (2021).

6. *Hill*, 349 Ga. App. at 260–61, 825 S.E.2d at 618–19.

7. *See Id.* (reversing in part an attorney's fee award under O.C.G.A. § 9-15-14(a) as appellant presented a justiciable issue when seeking to establish standing and gain custody and parenting time/visitation).

was the hope of many Georgia legal advocates and legislators that this would soon change.

As courts and state legislatures nationwide began to recognize the need to accommodate modern family structures, many states began to establish, either through the legislature or through the courts, an avenue for individuals who have acted in a parental role to a child to seek and obtain formal custodial or visitation rights to the child even without a biological or other recognized legal relationship.

On July 1, 2019, Georgia joined many other states with the enactment of the Adjudicated Equitable Caregiver statute.[8] The statute was sponsored by Chuck Efstration (R-Dacula) and passed by the Georgia General Assembly in April 2019 by a vote of 152 to 3, with 15 not voting.[9] The statute, which officially took effect on July 1, 2019, permits a person who demonstrates an established parental role to petition the court for a determination that they are an "equitable caregiver" to the child; once that determination is made, the court may award visitation or even custodial rights—and responsibilities—to the equitable caregiver.[10]

II. WHAT IS THE ADJUDICATED EQUITABLE CAREGIVER ACT?

In brief, the Adjudicated Equitable Caregiver Act authorizes Georgia Superior Courts to grant custody or visitation rights to third parties who have acted in a dedicated parental role to a minor child, even though they may not have a formal legal or biological relationship.[11] Prior to its enactment, the right of custody was restricted to a few specific classes of people. Legal parents—the parents of children born in wedlock, and the biological fathers of children born out of wedlock who have sought legitimation—are entitled to custody and to exercise parental power over their minor children until and unless their parental rights and relationship is terminated by the operation of law.[12] Adoptive parents enjoy full parental and custodial rights once the adoption process is complete, and the rights of the biological/former parents are terminated.[13] Certain close family members (grandparents, great-grandparents, aunts, uncles, great-aunts, great-uncles, siblings, and adoptive parents) are also statutorily authorized to seek custody only upon a loss of parental power and a showing that the removal of

8. O.C.G.A. § 19-7-3.1 (2021).
9. Ga. H.B. 543, Reg. Sess. (2019).
10. O.C.G.A. § 19-7-3.1.
11. *Id.*
12. O.C.G.A. § 19-7-1 (2021).
13. *Id.*

custody from the legal parents is in the best interests of the children.[14] Additionally, another statute commonly referred to as the "grandparent visitation statute,"[15] authorizes grandparents to file an original action for visitation (but not custody) with a minor grandchild[16] and authorizes grandparents, great-grandparents, and siblings of a minor child to intervene and seek visitation rights where custody, termination of parental rights, or visitation is already at issue in litigation.[17] Legitimation, which is necessary for a biological parent who is not a legal parent to pursue before they may seek custodial rights, is an avenue available only to biological fathers by the express terms of Georgia's legitimation statute.[18]

As the modern family has evolved, and especially in the wake of the Supreme Court of the United States' decision legalizing same-sex marriage in *Obergefell v. Hodges*,[19] serious cracks and gaps have begun to appear in the coverage of the traditional custody framework discussed above. Stepparents, for example, do not fall within the categories of relatives that are permitted to seek custodial rights under O.C.G.A. § 19-7-1 or visitation rights under O.C.G.A. § 19-7-3; in the absence of an adoption, which is not possible while both legal parents retain their parental rights, a stepparent could be left with no enforceable legal right to their stepchildren if something were to happen to the legal parent spouse.[20] Even if the stepparent had maintained a dedicated and committed parental role to their stepchild for the balance of the child's life, divorce, or the death of the legal parent spouse could deprive the stepparent entirely of any enforceable right to see the child or maintain the relationship. Same-sex couples faced similar risks: if only one partner had a biological relationship to the child, the only established path for the non-biological parent to obtain formal custodial or visitation rights was adoption. If for whatever reason adoption was not possible, the non-biological parent could be left without any legally cognizable relationship to the child if something happened to the biological parent or the parents separated.

---

14. O.C.G.A. § 19-7-1(b.1) (2021).

15. O.C.G.A. § 19-7-3 (2018) (invalidated by O.C.G.A. § 19-7-3.1).

16. *Id.* at § 19-7-3(b)(1)(A).

17. *Id.* at § 19-7-3(b)(1)(B).

18. O.C.G.A. § 19-7-22(b) (2021). *See Hill,* 349 Ga. App. 260, 825 S.E.2d 617 (assessing sanctions against female former same-sex partner for seeking to legitimate child in absence of authority permitting her to do so).

19. 576 U.S. 644 (2015).

20. *See* O.C.G.A. §§ 19-7-1, 19-7-3.

The Equitable Caregiver Act represents an attempt to bridge that gap, in that it permits any individual, regardless of biological relationship, to seek custodial and visitation rights with a minor child provided that they demonstrate standing under the criteria set forth in the statute, which is discussed below.[21] This provides an avenue for those categories of caregivers discussed above—stepparents, same-sex partners or spouses, and other close family members or friends who may not fit into the traditional relationship roles contemplated under Georgia's previous custody framework—to formally protect their relationships with the children they have raised and cared for as their own.

III. HOW DOES THE ADJUDICATED EQUITABLE CAREGIVER ACT WORK?

O.C.G.A. § 19-7-3.1 sets forth the entire petition and procedural framework for an individual seeking adjudication as an equitable caregiver.[22] The statute contemplates a two-part process. First, the petitioner must establish standing by demonstrating by clear and convincing evidence that he or she 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, which relationship was fostered or supported by a parent of the child, and such individual and the parent have understood, acknowledged, or accepted that or behaved as though such individual is a parent of the child;
>
> (4) 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 such individual and the child is in the best interest of the child.[23]

In assessing the harm element of subsection (d)(5), the statute further provides that the court should consider:

> (1) Who are the past and present caretakers of the child;

---

21. O.C.G.A. § 19-7-3.1.
22. *Id.*
23. *Id.* at § 19-7-3.1(d).

> (2) With whom has the child formed psychological bonds and the strength of those bonds;
>
> (3) Whether competing parties evidenced an interest in, and contact with, the child over time; and
>
> (4) Whether the child has unique medical or psychological needs that one party is better able to meet.[24]

The statute provides that the initial pleading must be supported by an affidavit attesting to these elements and alleging specific facts under oath and provides that the respondent or defendant party "shall" file a response affidavit along with their Answer.[25]

The court may hold a hearing on an expedited basis to determine "undisputed facts that are necessary and material to the issue of standing" and, if the court is satisfied that the allegations are sufficient, the petitioner may "proceed to [an] adjudication" of their equitable caregiver status based upon the five factors set forth above.[26] The statute also permits the court to grant standing based upon the consent of a child's parents to the establishment of the equitable caregiver relationship, or based upon a written agreement between the proposed caregiver and the parent "indicating an intention to share or divide caregiving responsibilities for the child."[27] Once the court determines a petitioner has standing, the statute provides simply that "[t]he court may enter an order as appropriate to establish parental rights and responsibilities for such individual, including, but not limited to, custody or visitation."[28]

IV. THE CONSTITUTIONAL FRAMEWORK

Georgia's legislature and higher courts have grappled with the establishment of a constitutional framework to allow non-parents to petition for visitation and custodial rights with minor children for more than twenty-five years. The 1998 revisions to the grandparent visitation statute, O.C.G.A. § 19-7-3, provided three avenues for a grandparent to seek visitation: (1) by filing an original action; (2) by intervening in already-ongoing litigation regarding custody of the child; and (3) by proceeding where the child has already been adopted by a blood relative

24. *Id.* at § 19-7-3.1(e).
25. *Id.* at § 19-7-3.1(b)(1)–(2).
26. *Id.* at § 19-7-3.1(b)(3)–(4).
27. *Id.* at § 19-7-3.1(f).
28. *Id.* at § 19-7-3.1(g).

or stepparent.[29] To be awarded visitation rights, the petitioning grandparent merely had to prove "special circumstances which make such visitation rights necessary to the best interests of the child."[30] In its 1995 decision in *Brooks v. Parkerson*,[31] the Georgia Supreme Court found that standard constitutionally impermissible because the Due Process and Equal Protection Clauses of the state and federal Constitutions permit the state to invade the constitutional right of parents to custody and control of their children, "only where the state acts in its police power to protect the child's health or welfare, and where parental decisions in the area would result in harm to the child."[32] As the court held, "even assuming grandparent visitation promotes the health and welfare of the child, the state may only impose that visitation over the parents' objections on a showing that failing to do so would be harmful to the child."[33]

In its 2001 opinion in *Clark v. Wade*,[34] the Georgia Supreme Court set forth the constitutional standard applicable to custody disputes between parents and third parties.[35] The *Clark* opinion actually addressed two consolidated appeals,[36] both challenging the newly established "best interest" standard enacted by the legislature to replace the prior "parental unfitness" standard in custody disputes between parents and third parties under O.C.G.A. § 19-7-1(b.1).[37] Specifically, the amended statutory language at issue provided:

---

29. *See* Brooks v. Parkerson, 265 Ga. 189, 190, 454 S.E.2d 769, 770–71 (1995) (citing former O.C.G.A. § 19-7-3(b)).

30. *Id.* at 191, 454 S.E.2d at 771.

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

32. *Id.* at 193, 454 S.E.2d at 772.

33. *Id.* at 194, 454 S.E.2d at 773.

34. 273 Ga. 587, 544 S.E.2d 99 (2001).

35. *Id.* at 587–88, 544 S.E.2d at 100.

36. The first, *Clark v. Wade* (S00A1610), concerned a custody dispute between the father and the maternal grandparents after the parents divorced and the mother was arrested for a drug violation. The father petitioned for sole custody, and the grandparents intervened. The trial court found that awarding custody to the grandparents was in the best interests of the child but struck the "best interest" standard down as unconstitutional and awarded custody to the father. The second, *Driver v. Raines* (S00A2014), was an appeal from a custody dispute between an unwed father and the maternal grandparents, in which the trial court found O.C.G.A. § 19-7-1(b.1) unconstitutional for failing to articulate "any standard" and "allow[ing] the factfinder to substitute its subjective judgment about the child's best interest for the parent's decision, thus depriving parents of their liberty and privacy interests in the care, custody, and management of their children." *Id.* at 588–89, 544 S.E.2d at 101.

37. *Id.* at 587–88, 544 S.E.2d at 100 (citing O.C.G.A. § 19-7-1(b.1)).

> [I]n 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. 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.[38]

The Georgia Supreme Court in *Wade* explained that the "[a]doption of this new standard shift[ed] the trial court's inquiry solely from the current fitness of the biological parent to raise the child to include consideration of the child's interest in a safe, secure environment that promotes his or her physical, mental, and emotional development."[39]

Relying in part on the rationale of its prior opinion in *Brooks*, the Georgia Supreme Court in *Clark* reiterated that under the Georgia and United States Constitutions, "[p]arents have a constitutional right . . . to the care and custody of their children,"[40] which is "a fiercely guarded right . . . that should be infringed upon only under the most compelling circumstances."[41] Implicit in this right are three presumptions: "(1) the parent is a fit person entitled to custody, (2) a fit parent acts in the best interest of his or her child, and (3) the child's best interest is to be in the custody of a parent."[42] Thus, "the state may interfere with a parent's right to raise his or her child only when the state acts to protect the child's health or welfare and the parent's decision would result in harm to the child."[43]

The required showing of harm to the child serves to rebut the presumptions in favor of parental custody and to authorize the state to

---

38. O.C.G.A. § 19-7-1(b.1).

39. *Wade*, 273 Ga. at 593, 544 S.E.2d at 104.

40. *Id.* at 596, 544 S.E.2d at 106.

41. *Id.* at 596–97, 544 S.E.2d at 106 (quoting In re Suggs, 249 Ga. 365, 367, 291 S.E.2d 233, 235 (1982)).

42. *Id.* at 593, 544 S.E.2d at 104.

43. *Id.* at 597, 544 S.E.2d at 106 (citing *Brooks*, 265 Ga. at 194, 454 S.E.2d at 773). *See* Troxel v. Granville, 530 U.S. 57 (2000).

constitutionally interfere with the parent's exclusive right to custody and control of the child.[44]

In upholding the newly enacted language of O.C.G.A. § 19-7-1(b.1), the Georgia Supreme Court concluded that the legislature had avoided the constitutional infirmities that were present in the statute at issue in the seminal Supreme Court of the United States case *Troxel v. Granville*,[45] noting that "[f]irst, OCGA § 19-7-1(b.1) expressly limits third parties who may seek custody to a specific list of the child's closest relatives, including an adoptive parent. Second, the statute defers to the fit parent's decision on custody by establishing a rebuttable presumption in favor of parental custody."[46] Ultimately, the court held that the best interest standard applicable to custody disputes between third parties and parents requires:

> [T]hat the third party must prove by clear and convincing evidence that the child will suffer physical or emotional harm if custody were awarded to the biological parent. Once this showing is made, the third party must then show that an award of custody to him or her will best promote the child's welfare and happiness.[47]

Notably, subsection (d)(5) of the Equitable Caregiver Act appears to incorporate the harm standard enunciated in *Wade* and other lines of authority addressing custodial disputes between parents and nonparents.[48] The standard incorporated into the current version of the grandparent visitation statute requires a showing by clear and convincing evidence that "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,"[49] and the standard approved by the court in *Wade* and incorporated into the third-party custody statute requires that parental power be lost and "that the third party must prove by clear and convincing evidence that the child will suffer physical or emotional harm if custody were awarded to the biological parent . . . . [and] that an award of custody to him or her will best promote the child's welfare and happiness."[50] However, the Equitable

44. *Id.* at 598, 544 S.E.2d at 107.

45. 530 U.S. 57 (2000).

46. *Wade*, 273 Ga. at 597, 544 S.E.2d at 107.

47. *Id.* at 599, 544 S.E.2d at 108.

48. *See, e.g.*, Patten v. Ardis, 304 Ga. 140, 140, 816 S.E.2d 633, 634 (2018) (following Brooks v. Parkerson and holding O.C.G.A. § 19-7-3(d), a subsection of the grandparent visitation statute, unconstitutional for failing to require a showing of harm to the child if visitation is not granted).

49. O.C.G.A. § 19-7-3(c)(1).

50. *Wade*, 273 Ga. at 599, 544 S.E.2d at 108. *See* O.C.G.A. § 19-7-1(b.1).

Caregiver Act does not clearly specify whether the focus of the harm inquiry is on the denial of the continued relationship with the caregiver, or on harmful conduct by the parent, or both.[51] In other words, insofar as the cases could be read to suggest a distinction in the constitutional standard applicable to visitation disputes (*Brooks* and *Patten*) and that applicable to custody disputes (*Wade*), there may be some questions as to whether or not the harm test set forth in the Equitable Caregiver Act—which contemplates both visitation and custodial awards to third parties—satisfies the applicable constitutional standards.

V. THE IMPACTS OF THE EQUITABLE CAREGIVER ACT

The Georgia Court of Appeals has issued three opinions referencing or deciding appeals under the Equitable Caregiver Act since its enactment in 2019.

The first of these, *Wallace v. Chandler*,[52] concerned a custody petition filed in 2017 by foster parents seeking to establish custody of the foster child placed with them in dependency proceedings. The foster parents, the Chandlers, filed a petition stating that the child was deprived and requested that they be awarded sole custody of the minor child. The mother, who was incarcerated at the time of the filing, did not respond or appear at the final hearing, and the trial court granted the petition and awarded custody to the Chandlers. The mother then filed a motion to set the final custody order aside, which was denied, and appealed from the denial of the motion.[53] Ultimately, the court of appeals reversed the trial court's denial of the motion to set aside on the grounds that the Chandlers did not have standing to pursue custody in the manner they sought to do so.[54] As the court noted, "[i]n general, third parties have no right to seek custody of a child whose parents have not lost custody by one of the means established in O.C.G.A. § 19-7-1 or O.C.G.A. § 19-7-4 or have not been deemed unfit."[55] While the legislature did provide for third parties to seek custody under O.C.G.A. § 19-7-1(b.1), foster parents are not one of the categories of family members who are authorized to seek custody under that code section.[56] However, in discussing possible alternative means for third parties to seek custody, the court of appeals specifically highlighted the

51. O.C.G.A. §§ 19-7-3.1(d)(5), (e).
52. 360 Ga. App. 541, 859 S.E.2d 100 (2021).
53. *Id.* at 541–42, 859 S.E.2d at 101–02.
54. *Id.* at 545, 859 S.E.2d at 104.
55. *Id.* at 543, 859 S.E.2d at 102.
56. O.C.G.A. § 19-7-1(b.1).

recent enactment of O.C.G.A. § 19-7-3.1 as providing a possible avenue for non-relatives to seek and obtain custody of minors in their care.[57]

The first appeal from a substantive award under the Equitable Caregiver Act was decided by the Georgia Court of Appeals on October 4, 2021, in *Skinner v. Miles*.[58] The petitioner, Miles, filed an action under the Equitable Caregiver Act against her former partner, Sarah Skinner, seeking custody and visitation of two minor children. Skinner and Miles had first adopted a child from Texas in 2009, but due to Texas law prohibiting same-sex couples from adopting, only Skinner's name was listed on the adoption paperwork. The parties gave the child Miles' surname as a means of recognizing Miles' role in the child's life. Shortly thereafter, Skinner became pregnant, and the child was born in 2010 and also given Miles' surname as her middle name. The parties lived together and shared responsibilities for care and activities with the children, took the children on vacations and holidays together, and Skinner provided financial support as well. The parties separated and moved to different residences in 2015, but Miles continued to visit with them, and they would stay at her house for scheduled visitation. In 2017, Skinner proposed a formal visitation arrangement, and after brief litigation, the parties entered into a formal Visitation Arrangement. Skinner married a new partner in 2018, and Miles filed an action under the Equitable Caregiver Act shortly after it became effective in July 2019.[59]

Following a four-day bench trial, the trial court determined that Miles had demonstrated standing, proven that she had "'established a strong bond with both minor children and that [she] had an ongoing relationship with both children since [S. M. S.'s] adoption and [K. M. S.'s] birth . . . .' [and] found that if Miles was not granted equitable caregiver status, the children would suffer long-term emotional harm."[60] The court granted Miles' petition to be adjudicated an equitable caregiver, and Skinner appealed.[61] On review, the court of appeals held that the trial court had properly applied the statute to the facts in determining standing based first upon the affidavits of the parties and then upon the five factors set forth in O.C.G.A. § 19-7-3.1(d).[62] While Skinner claimed that "Miles did not establish by clear and convincing evidence that the children will suffer physical or

57. *Wallace*, 360 Ga. App. at 544–45, 859 S.E.2d at 103–04.

58. 361 Ga. App. 764, 863 S.E.2d 578 (2021) (recons. denied Nov. 2, 2021).

59. *Id.* at 764–767, 863 S.E.2d at 580–582.

60. *Id.* at 766, 863 S.E.2d at 581.

61. *Id.*

62. *Id.* at 770, 863 S.E.2d at 583; *See* O.C.G.A. § 19-7-3.1(d).

long-term emotional harm if the court did not grant Miles equitable caregiver status," the court of appeals found that "after considering the factors listed in the statute for determining harm, the court concluded that Miles demonstrated that the children would suffer physical or long-term emotion[al] harm, and that continuing the relationship between Miles and the children was in the children's best interest."[63] Notably, Skinner does not appear to have challenged the constitutionality of the statute. The court of appeals affirmed the trial court's ruling and denied Skinner's motion for reconsideration on November 2, 2021.[64]

The Georgia Court of Appeals ruled on a second challenge to a trial court's order under the Equitable Caregiver Act in *Teasley v. Clark*,[65] issued on November 1, 2021. In *Teasley*, the minor child's stepfather, Clark, filed a Complaint against Teasley, the biological father, seeking to be adjudicated an equitable caregiver and requesting an award of joint legal and secondary physical custody after the child's biological mother, Stephanie Clark, passed away in a car accident. The evidence in the record showed that the petitioner, Craig Clark, began dating the child's mother in 2010, when the child was a year old, then married Stephanie Clark in 2013, and the three lived together in Georgia following his discharge from the military in 2014. After the mother died in a car accident in 2020, the child went to live with Teasley, his biological father, but Clark continued to support the child and had established a bond with him during their time living together. The trial court entered an order adjudicating Clark as an equitable caregiver and awarded him temporary visitation, and Teasley appealed.[66]

Teasley challenged the constitutionality of the statute, the propriety of the court's order of temporary visitation, and the court's failure to make specific findings of fact in its final order.[67] On review, the court of appeals determined that he had failed to preserve the constitutional challenge for review because it was not raised at the trial court.[68] The court of appeals also ruled that Teasley's challenge to the temporary visitation award relied upon inapplicable authority,[69] which predated

63. *Id.* at 769, 863 S.E.2d at 583.

64. *Id.* at 770, 863 S.E.2d at 583.

65. 361 Ga. App. 721, 865 S.E.2d 556 (2021).

66. *Id.* at 721–22, 865 S.E.2d at 557.

67. *Id.* at 722, 865 S.E.2d at 558.

68. *Id.*

69. *Id.* Teasley relied upon *Land v. Wrobel*, 220 Ga. 260, 138 S.E.2d 315 (1964), wherein the Georgia Supreme Court held that the mother, rather than the grandmother, was entitled to custody and control of a minor child after the custodial parent had died, where there was no finding or showing that the mother was unfit. However, as the court

the enactment of the Equitable Caregiver Act.[70] The Equitable Caregiver Act does, by its clear terms, authorize the trial court to make an award of custody or visitation to an adjudicated equitable caregiver.[71] Finally, the court of appeals was unpersuaded by Teasley's claim that the trial court had erred by failing to make specific findings of fact; while the statute does require that the court find by clear and convincing evidence that the petitioner has satisfied the elements of O.C.G.A. § 19-7-3.1(d), it does not require that additional specific findings of fact be made.[72]

While there has been relatively little appellate activity concerning the Equitable Caregiver Act since its enactment, it is clear it is being used at the trial level, and stepparents and former same-sex partners are successfully using it as intended to maintain relationships with children with whom they have established bonded, loving parental relationships even in the absence of a blood relationship. As the matters of *Hill* and *Wallace* illustrate, these outcomes were simply not possible under Georgia's custodial framework before the enactment of the Equitable Caregiver Act.

VI. LOOKING FORWARD: THE FUTURE OF THE EQUITABLE CAREGIVER ACT

At the time of this writing, a constitutional challenge to the Equitable Caregiver Act is pending before the Georgia Supreme Court. In an order dated September 1, 2021, the court of appeals transferred the pending appeal in *McAlister v. Clifton*[73] to the supreme court to hear the matter as an issue of first impression.[74] The appeal was docketed in the supreme court on September 16, 2021, and oral arguments are scheduled for January 18, 2022.[75] Attorneys and parents potentially seeking to avail themselves of the statute should be attentive to the outcome of this pending appeal.

---

in *Teasley* stated, *Land* predated the enactment of the statute by more than fifty years. Indeed, *Land* was decided at a time when habeas corpus proceedings were still proper means by which to adjudicate custody disputes. *But see* O.C.G.A. § 19-9-23(c) (2019) ("The use of a complaint in the nature of habeas corpus seeking a change of child custody is prohibited.").

70. *Teasley*, 361 Ga. App. at 722, 865 S.E.2d at 558.

71. O.C.G.A. § 19-7-3.1.

72. *Teasley*, 361 Ga. App. at 723, 865 S.E.2d at 558. By contrast, the court noted that the grandparent visitation statute does require that the trial court make specific written findings of fact. *See* O.C.G.A. § 19-7-3.1.

73. A21A1264. McAlister v. Clifton., Sept. 21, 2021.

74. *Id.*

75. McAlister v. Clifton, _ Ga. App. _, 867 S.E.2d 126 (2021).

Additionally, it is worth noting that Georgia House Representative Chuck Efstration (R-Dacula), an initial sponsor of the Equitable Caregiver Act, proposed an amendment to the statute through House Bill 216 during the 2021–2022 legislative session.[76] Representative Efstration's proposed amendment would alter the operation of the statute such that, in order to establish standing, the petitioner would need to show that they had satisfied the five-part test set forth in subsection (d) "within the five years immediately preceding the filing of the initial pleading[.]"[77] Further, the proposed amendment would add subsection (k) to the end of the Act, which would provide that a party granted custody as an adjudicated caregiver "shall be subject to having his or her custodial rights to a child removed upon the finding by a court that one or both parents are no longer a risk of causing physical harm or long-term emotional harm to the child."[78] Representative Efstration's proposal was adopted by the Senate as part of the 2021–2022 Senate Bill 86, which was generally an amendment to the Fair Business Practices Act of 1975.[79] The Senate version of the amendment largely retained Representative Efstration's revisions, including the addition of subsection (k), but additionally included a caveat in subsection (g) that the trial court's order establishing parental rights and responsibilities for the adjudicated equitable caregiver could not order the payment of child support to the equitable caregiver.[80] S.B. 86 was not sent to the Governor before the legislative session adjourned on March 31, 2021. However, considering the scope of the proposed revisions to the law, practitioners and aspiring equitable caregivers would do well to remain apprised of any future legislative activity relating to the Equitable Caregiver Act.

In the meantime, however, the Equitable Caregiver Act remains a viable pathway for nontraditional parents and caregivers to establish formal legal custodial relationships with minor children with whom they have established bonded, dependent parental relationships, where previously no such pathways existed. In short—it appears to be working.

---

76. Ga. H.R. Bill 216, Reg. Sess. (2021) (unenacted). Chuck Efstration (R-Dacula) is an initial sponsor of the Equitable Caregiver Act, along with co-sponsors Mary Margaret Oliver (D-Decatur), Mike Wilensky (D-Dunwoody), and Bonnie Rich (R-Suwanee). Ga. H.B. 543, Reg. Sess. (2019).

77. Ga. H.R. Bill 216, Reg. Sess. (2021) (unenacted).

78. *Id.*

79. Ga. S. Bill 86, Reg. Sess. (2021) (unenacted).

80. *Id.*