

XXVI. LEGITIMATION/ PATERNITY

A. **Code Sections:** O.C.G.A. §15-11-28(e); 19-7-20, 19-7-22, 19-7-24, 19-7-40, 19-7-41, 19-7-44, 19-7-45, 19-7-46, 19-7-46.1, 19-7-47.1, 19-7-53

B. **Uniform Juvenile Court Rules:** None

C. **Procedure**

1. Concurrent jurisdiction as to legitimation petitions. O.C.G.A. §15-11-28(e). The juvenile courts of this state have concurrent jurisdiction to hear any legitimation petition properly transferred by superior court order. They also have jurisdiction to hear any legitimation petition filed under O.C.G.A. §19-7-22 if a deprivation proceeding in the juvenile court is pending at the time the legitimation petition is filed. However, if a demand for jury trial involving child support is filed by either parent after the legitimation is granted, then the case must be transferred to the superior court for jury trial. O.C.G.A. §15-11-28(e)(3) and 19-7-22(f).

2. Petition for legitimation; notice. The petition must set forth the name, age, and sex of the child, the name of the mother, and if the father desires to change the child's name, the new name. The mother must have notice of the petition for legitimation. O.C.G.A. §19-7-22(b). The mother of an illegitimate child is entitled to file objections to a petition brought by a putative father to legitimate such child. Murphy v. Thomas, 89 Ga. App. 687 (1954); In Re Application of Ashmore, 163 Ga. App. 194 (1982). As notice is required to be given to the court where the adoption is pending, such notice must also imply a right of the adoption agency and the adoptive parents to file objections to the petition to legitimate. See Ashmore.

The husband of a woman at the time of conception or birth is a party at interest when another man claims fatherhood of a child in a legitimation proceeding, and due process requires that he be served. In re White, 254 Ga. 678 (1985).

3. Child born out of wedlock. Defined in O.C.G.A. §19-7-23 as a child whose parents are not married when that child is born or who do not subsequently intermarry; or a child who is the issue of an adulterous intercourse of the wife during wedlock; or a child who is not legitimate within the meaning of O.C.G.A. §19-7-20.

Only the mother of the child born out of wedlock is entitled to its custody, unless the father legitimates the child pursuant to O.C.G.A. §19-7-22. Until legitimation is completed, only the mother can exercise parental power over the child. However, this does not deprive a natural father of his parental rights under the due process and equal protection clauses of the U.S. Constitution. See Quilloin v. Walcott, 238 Ga. 230 (1977), affirmed 434 U.S. 246, 98 S.Ct. 549 (1978) and Wojciechowski et al v. Allen, 238 Ga. 556 (1977). Even though the mother of an illegitimate child is entitled to custody, the putative father has rights and duties regarding the child. Strickland v. State, 211 Ga. App. 48 (1993).

Unwed fathers whose connection to a child is only biological possess an opportunity interest to develop a relationship with their children via legitimation that is protected by due process of law. This interest begins at conception and lasts until the child reaches the age of majority. The opportunity interest may be lost if not diligently and vigorously pursued. If the interest is not lost or abandoned, then the standard which must be used to determine whether the father has a right to legitimate the child is his fitness as a parent to have custody of the child. However, if the opportunity interest is lost or abandoned, then the court must consider the best interests and welfare of the child before granting the father's legitimation petition. In Re The Matter of Baby Girl Eason, 257 Ga. 292 (1987); LaBrec v. Davis, 243 Ga. App. 307 (2000); In Re D.B., 243 Ga. App. 473 (2000).

A married father's statutory right to legitimate a child born of a woman not his present wife is absolute, subject only to the qualification that the natural mother may object if she shows valid reasons why the petition should not be granted. The father's wife has no legal status to object. Note that legitimation pursuant to this code section does not have the effect of rendering legitimate a child born out of wedlock according to the full significance of that term. While legitimation enables the child to inherit from the father and to enjoy the father's name and like amenities, the child's right to inherit does not extend to the father's wife who is not its mother, or to its half brothers and sisters. In re Pickett, 131 Ga. App. 159 (1974).

4. Children born within wedlock. All children born within wedlock, or within the usual period of gestation thereafter, are irrebuttably presumed legitimate. O.C.G.A. §19-7-20 and 19-7-21. Likewise, the marriage of the mother and reputed father of a child born out of wedlock and the recognition by the father of the child as his shall render the child legitimate and such child shall immediately take the surname of his father. The law favors legitimization where it can be done with safety to society. Harrison v. Odum, 148 Ga. 489 (1918). The presumption in favor of legitimation is one of the strongest and most persuasive presumptions in our law and there must be clear and convincing proof to the contrary to overcome this presumption. Nevertheless, such presumption is rebuttable. See Parks v. State, 155 Ga. App. 44 (1980) and Families First v. Gooden, 211 Ga. App. 272 (1993). Where the possibility of access between husband and wife exists, the presumption of legitimacy should not be overcome absent clear proof. Stephens v. State, 80 Ga. App. 823 (1950). When sexual intercourse between husband and wife is proved, nothing short of impossibility should impugn the legitimacy of offspring. Simeonides v. Zervis, 120 Ga. App. 883 (1969).

5. Purpose of statutes. The primary purpose of the legitimation and paternity statutes is to provide for the establishment rather than the disestablishment of legitimacy and paternity. Ghrist v. Fricks, 219 Ga. App. 415 (1996). The Court of Appeals has also held that public policy is not advanced by the disestablishment of legitimacy and paternity. LaBrec v. Davis, 243 Ga. App. 307 (2000); Grice v. Detwiler, 227 Ga. App. 280 (1997).

Being in derogation of common law, O.C.G.A. §19-7-22, relating to legitimation, must be strictly construed. In re Pickett, 131 Ga. App. 159 (1974).

6. Filing of petition for legitimation. The father of a child born out of wedlock may render the child legitimate by petitioning the superior court of the county of his residence, the county of residence of the child, or if a petition for the adoption of a child is pending, the county in which the adoption petition was filed. O.C.G.A. §19-7-22(a). See In re The Matter of Baby Girl Eason, 257 Ga. 292 (1987). Only a father may make an illegitimate child legitimate by voluntary unilateral action. Parham v. Hughes, 439 US 813, 99 S.Ct. 1742 (1979). Such a complaint cannot be maintained by the mother. Pruitt v. Lindsey, 261 Ga. 540 (1991). If a father wants to gain the right to custody or visitation, he must take the steps required by this code section to do so.

A father may also file a legitimation petition pursuant to O.C.G.A. §15-11-28(e)(2) in the juvenile court of the county in which a deprivation proceeding regarding the child is pending. O.C.G.A. §19-7-22(d).

7. Right to an attorney. An indigent petitioner is not entitled to have an attorney appointed nor a transcript of the legitimation proceeding prepared at public expense. Alexander v. Guthrie, 216 Ga. App. 460 (1995). It is believed rule will be equally applicable under O.C.G.A. §15-11-28(e) proceedings.

8. Evidence. The mother may testify that the 'legal father' is not biological father of her child and testify as to the identity of the biological father. In re White, 254 Ga. 678 (1985).

The trial judge did not abuse his discretion in refusing to legitimate children on the ground that the best interests of the children would be served by maintaining the stable family unit of the mother and her present husband. Mabry v. Tadlock, 157 Ga. App. 257 (1981).

9. Effect of legitimation order. Upon legitimation, the father stands in the same position as any other parent regarding parental and custodial rights with respect to the child. Mitchell v. Ward, 231 Ga. 671 (1974).

The fact that children have been legitimated does not *ipso facto* immunize their father from a proper showing that the children should be removed from his custody. Sims v. Pope, 228 Ga. 289 (1971).

O.C.G.A. §19-7-22 contains no language which can be read as requiring a trial court to consider a visitation issue when determining the merits of a petition to legitimate. In re J.B.K., 169 Ga. App. 450 (1984).

10. Child Support. It is the joint and several duty of each parent of a child born out of wedlock to provide for the maintenance, protection and education of the child until he reaches the age of majority, except to the extent that the duty of one parent is otherwise or further defined by court order. O.C.G.A. §19-7-24. Effective July 1, 1997, O.C.G.A. §19-7-22(e) allows the court in a legitimation action to establish the father's child support obligation upon notice to the mother. However, after a petition for legitimation has been granted, the case shall be transferred to superior court for a jury trial as to the issue of support if such a demand is made by either party.

O.C.G.A. §19-7-22(f). In determining the amount of child support to award, the guidelines found in O.C.G.A. §19-6-15(b) and (c) must be considered by the trier of fact. The trier of fact may vary the amount of child support upon a written finding of special circumstances. Ehlers v. Ehlers, 264 Ga. 668 (1994).

11. Jurisdiction over paternity proceedings. The superior and state courts have concurrent jurisdiction in all proceedings instituted for the determination of paternity of children who are Georgia residents. O.C.G.A. §19-7-40(a). Effective July 1, 1997, the right of a jury trial to determine paternity was abolished. If the Department of Human Resources seeks to establish a child's paternity, the putative father is entitled to a non-jury trial in superior court, if he so demands. Otherwise the office of State Administrative Hearings shall have authority to adjudicate the paternity issue and its administrative determination shall have the same force and effect as a judicial decree. O.C.G.A. §19-7-40(b).

12. Actions for paternity. Where there is an issue of paternity and the putative father refuses to support the child, an action to establish paternity may be brought by the mother, the child, any relative in whose care the child has been placed, the Department of Human Resources where application for public assistance has been received, or the one who is alleged to be the father. O.C.G.A. §19-7-43(a). See Jones v. Alfone, 261 Ga. 258 (1991), which held that O.C.G.A. §19-7-40 broadened jurisdiction to allow a non-resident child to maintain a paternity action against a resident father.

The Georgia Supreme Court held that Georgia's paternity statutes, O.C.G.A. §19-7-43 et seq., are constitutional and do not violate equal protection. The Court held that the paternity statutes recognize that fathers and mothers of illegitimate children are not similarly situated and decrease the effect of inherent differences between them by establishing a father's duty to child support. Previously, common law only recognized the mother's obligation to pay child support. The Court also held that the statutes do not discriminate on their face because fathers cannot sue under them. The Court stated that fathers can achieve the same benefits offered mothers under paternity statutes by utilizing the statutory process for legitimation. Palmer v. Bertrand, 541 S.E.2d 360 (2001).

13. Service in paternity proceedings. Service of process is governed by the civil practice act. O.C.G.A. §19-7-47(a). For proceedings initiated prior to January 1, 1998, the court may order service upon a non-resident Defendant 1) upon a finding that there is a constitutionally permissible basis for jurisdiction over the non-resident Defendant, 2) arising out of the fact that the child was conceived as result of an act of sexual intercourse within this state, 3) while either parent was a resident of the state, and 4) the person on whom service is required is the alleged father of the child. O.C.G.A. §19-7-41. If conception occurred outside the State of Georgia, O.C.G.A. §19-7-41 is inapplicable. In situations where conception occurs outside the state, personal jurisdiction over the alleged father may be obtained pursuant to the Georgia Domestic Relations Long Arm Statute. O.C.G.A. §9-10-91. For paternity proceedings initiated on or after January 1, 1998, O.C.G.A. §19-7-41 no longer requires that the conception occur within Georgia while either parent is a resident of Georgia for a non-resident father to be served outside of Georgia.

14. Right of father to intervene in paternity proceedings. Whenever the Department of Human Resources petitions the superior court or other authorized trier of fact to establish paternity, the father may intervene to petition for the legitimation of the child born out of wedlock if the child's mother consents to the filing of such a petition. In such cases, upon the determination of paternity or if a voluntary acknowledgement of paternity has been made and has not been rescinded pursuant to O.C.G.A. §19-7-46.1, the court or trier of fact as a matter of law and pursuant to the provisions of O.C.G.A. §19-7-51 may enter an order or decree legitimating a child born out of wedlock, if such an order or decree is in the best interests of the child.

15. Appointment of guardian ad litem; procedural issues. In a paternity action, the court, in its discretion, may appoint a guardian ad litem to represent a minor child who is the subject of a paternity action. Payment of the guardian ad litem shall be determined by the court. Neither the child's mother nor his alleged or presumed father may represent the child as guardian ad litem. O.C.G.A. §19-7-44(a). The natural mother shall be made a party or, if not subject to the jurisdiction of the court, be given notice in a manner prescribed by the court with an opportunity to be heard. O.C.G.A. §19-7-46(b). Upon motion of any party, paternity hearings may be held in a closed court without the admittance of any person other than those necessary to the action. O.C.G.A. §19-7-53.

16. Visitation, custody and child support issues. In legitimation proceedings, issues of visitation and custody shall not be determined by the court until a separate petition is filed by one of the parents or by the legal guardian of the child. Flannagan v. Cantrell, 233 Ga. App. 547 (1998). The child's mother shall retain custody until a court order is issued addressing the question of custody. O.C.G.A. §19-7-22(g). An appeal from an order awarding child support in a legitimation proceeding is subject to the discretionary appeal procedure. Jackson v. Roach, 199 Ga. App. 653 (1991). If the trial court grants legitimation but reserves ruling on the issues of custody and visitation, the order is interlocutory and a certificate of immediate review is required.

In a paternity action, the alleged biological father cannot be required to pay temporary child support prior to an adjudication of paternity. Hughes v. Dulock, 207 Ga. App. 492 (1993).

17. Order for Genetic Testing. In any case in which the paternity of a child has not been established, any party may make a motion for the court to order the mother, the alleged father, and the child to submit to genetic tests as specified in O.C.G.A. §19-7-45 and O.C.G.A. §19-7-43(d). The motion shall be granted unless the court finds good cause as defined by the federal Social Security Act or if other good excuse for noncooperation is established. Effective July 1, 1997, if the court or the Department of Human Resources orders genetic testing, the Department of Human Resources shall pay the costs of the tests subject to recoupment from the alleged father if paternity is established. O.C.G.A. §19-7-43(f). O.C.G.A. §19-7-46(b) provides that there exists a rebuttable presumption of the paternity of a child born out of wedlock if scientifically credible parentage-determination genetic testing has been performed which establishes at least a 97 percent probability of paternity. Prior to July 1, 1997, this rebuttable presumption could be overcome by competent evidence to the contrary as determined by the trier of fact. Effective July 1, 1997, this rebuttable presumption can only be overcome by clear and

convincing evidence to the contrary. O.C.G.A. §19-7-46(b). The parentage determination testing shall include, but is not necessarily limited to, red cell antigen, human leukocyte antigen (HLA), red cell enzyme, and serum protein electrophoresis tests, or testing by deoxyribonucleic acid (DNA) probes.

An order requiring genetic tests is enforceable by contempt, provided that if the petitioner in an action to determine paternity refuses to submit to an order for a genetic test, the court may dismiss the action upon motion of the respondent. O.C.G.A. §19-7-45. Evidence of a refusal by the alleged father to submit to a genetic test in an action to determine paternity is admissible to show that the alleged father is not precluded from being the father of the child. O.C.G.A. §19-7-46(d).

NOTE: Judges need to beware that O.C.G.A. §19-7-47.1, enacted in 1992, provides for the establishment of a putative father registry at the Department of Human Resources. The registry may be used to establish child support obligations. Any information entered on a birth certificate or recorded in the putative father registry is admissible as prima facie evidence of the establishment of paternity.