

What To Do If Something Goes Wrong

By:
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A. Rights of the Biological Parents vs. Adoptive Parents: Who Takes Precedence?

The answer to this question varies from state to state but, in Georgia, it depends upon where in the adoptive process you are. Early on in the process when the biological parents execute surrenders of their parental rights, the biological parents' rights take precedence as they may for ten days revoke their surrender of the parental rights to the child.

After the ten days, there is an enormous swing toward allowing the rights of the adoptive parents to take precedence under Georgia law. Unless the adoptive parents obtained the surrender through fraud, duress, or other wrongful conduct or the biological parent was incapacitated at the time of execution, any challenge to the voluntariness of the surrender will fail. Furthermore, in Georgia, the biological parents only have six months after the Final Judgment of Adoption is entered to challenge the adoption. After the six months, the biological parents have no standing to challenge the adoption decree.

There are no express statutory grounds for revocation of the consent by the biological parents; however, consent may be invalid if executed under fraud, duress, or incapacity. *Hicks v. Stargeil*, 226 Ga. App. 639 (1997).

B. Proving a Parent is Unfit in Contested Adoptions

In Georgia, a petition for adoption may be filed when the biological parent refuses to surrender parental rights, and the grounds for termination of rights may be pled in the adoption petition. Under O.C.G.A. § 19-8-10(a), the court must determine by clear and convincing evidence standard either that:

1. the child has been abandoned;
2. the parent cannot be found after diligent search;
3. the parent is insane or incapacitated and cannot surrender such rights;
4. the parent has failed to exercise proper prenatal care or control due to misconduct or inability as set out in O.C.G.A. § 15-11-94(b)(2), (3), or (4); or
5. the adoption is in the best interests of the child after considering the physical, mental, emotional, and moral condition and needs of the child, including the need for a secure and stable home.

O.C.G.A. § 15-11-94(b)(2), (3), and (4) are the grounds for termination of parental rights under the juvenile statute and provide that a decree for termination of parental rights may be entered if:

1. the parent has wantonly and willfully failed to comply with the order of the court for a period of twelve months or longer;

2. the parent has abandoned the child or left the child under circumstances that the identity of the parent is unknown and cannot through diligent search be ascertained and the parent has not come forward to claim the child within three months following the finding of the child; or
3. there is parental misconduct or inability that causes the court to find:
 - a. the child is a deprived child;
 - b. the child's deprived status was caused by lack of proper parental care or control by the parent in question;
 - c. such deprivation is likely to continue or will not be remedied; or
 - d. the continued deprivation will cause or is likely to cause physical, mental, emotional or moral harm to the child.

O.C.G.A. § 19-8-10(b) adds an additional provision for adoptions under O.C.G.A. § 19-8-6, stepparent adoptions, and O.C.G.A. § 19-8-17, relative adoptions, which makes it easier to obtain termination of parental rights during the adoption process if a parent fails, for a year or longer immediately prior to the filing of the adoption:

1. To communicate or make a bona fide attempt to communicate with the child in a meaningful, supportive, parental manner; or
2. To provide for the care and support of the child as required by law or order of the court; and
3. The court finds that the adoption is in the best interests of the child.

The parent who has not surrendered parental rights is then served process, as is outlined in O.C.G.A. § 19-8-10(c), and may appear in the pending adoption and show

cause why his or her rights should not be terminated. Both the biological parents present evidence and the adoptive parents present evidence. The court decides whether the grounds set forth in the statute were proven based upon a clear and convincing evidence standard. At times, the parent will either not appear or send the surrender of parental rights to the attorney rather than to appear and contest.

C. Procedures for Dissolution of Adoption

Despite the policy of permanence in adoptions, the adoption may be attacked by the adoptive parents due to severe and chronic physical, mental, or behavioral disorders subsequent to the adoption, which results in the child becoming a permanent ward of the state, or a stepparent adoption is attacked either by the stepparent to escape financial responsibilities or the biological parent to deprive the stepparent of custodial claims.

The biological parents may contest the adoption before the decree is entered by contesting or revocation of consent or surrender or termination of parental rights. Secondly, the biological parents may contest after the adoption decree is entered. As mentioned above, the adoption will not be set aside when a biological parent wants to revoke a consent that was validly given after the ten-day revocation period unless the biological parent can prove that the consent or surrender was induced by fraud or duress or the parent was incapacitated at the time of execution.

Another ground by which the biological parents attack the adoption is upon *Due Process of the Fourteenth Amendment*, U.S. Const. amend. XIV. The biological parents must be given reasonable notice and an opportunity to be heard.

The most common type of contest is in a stepparent adoption involving a child born out of wedlock. The petition included in the materials is of this nature though paternity was established and the father failed to support the child. In some cases, the biological father may have never been involved in the child's life and paternity may not have been established. It is best to notice the biological parent and obtain his consent so that he will not intervene in the adoption and seek a custodial disposition. If the biological parent is unknown, the attorney must check the putative spouse registry.

Even in a case where the biological mother is married but had a child with another man who was the biological father of the child, it is best to obtain surrenders from the legal father as well as the biological father so that there will be no grounds for anyone to attack the adoption. In the case with a biological and legal father, the biological mother had second thoughts about the adoption after the ten days for revocation and after the adoption decree was entered. Because all the bases were covered, the attorney that she contacted advised her that she would not prevail. Even though the legal father did not contest, the biological mother may have used his failure to execute a consent to try to overturn the adoption. The wise adoption attorney goes beyond the requirement of the statute so that action to dissolve the adoption is never filed.

D. Withdrawal of Consent? Find Out What to Do Next

If the biological mother withdraws consent within the ten-day period, there is nothing that the adoptive parents can do but walk away. If the ten days have passed, the adoptive parents can proceed with the adoption. They would have to file a motion to obtain temporary custody from the court in the county where the biological mother and

child reside in order to take custody and control of the child. (It is also a good idea to obtain a temporary order for custody when there is no revocation of consent when adoptive parents are taking a child from the hospital and sometimes across state lines. Even though there is a signed consent and surrender, there is no order of custody unless the attorney obtains one). The temporary custody order determines who has custody until a final hearing is heard by the court in the adoption case.

The biological parents are required to designate what their desires are as to placement of the child should the adoption fail, either due to the adoptive parents' failure to adopt or the court's unwillingness to grant the adoption, in the surrender of Rights, Final Release for Adoption in a non-stepparent, non-relative adoption. O.C.G.A. § 19-8-26(c). The choices are return of the child to the biological mother, or to a licensed child-placement agency or DHR for placement for adoption. This designation gives the agency or DHR the right to take custody and proceed to court for an order of custody.

In cases where the biological parent withdraws consent, the only way to determine temporary custody is by filing an emergency motion and having the court decide who may take the child. If the parent is not an unfit parent, the only grounds for awarding the child to the adoptive parents lie in the adoption statute and case law.

Overtaking consent requires a showing of duress, fraud or incapacity and not on the grounds of "good and sufficient cause." *Hicks v. Stargel*, 226 Ga. App. 639. Once the ten days expire under O.C.G.A. § 19-8-9(b), a properly executed surrender may not be withdrawn unless consent can be invalidated by proof of duress, fraud, or incapacity.

In the Interests of B.G.D., a child, 224 Ga. App 124 (Ga. App., 1996) Reconsideration Denied, December 20, 1996, Certiorari Denied, April 24, 1997.

In a rather bizarre case, a biological mother's claim that she had been doing cocaine for two days before she signed a surrender, and for that reason her surrender should be voided was denied for failure to prove that she was incompetent and "entirely without understanding" when she surrendered her parental rights. *Schumacher v. Sexton*, 216 Ga. App. 628 (Ga. App., 1995).

The statute and case law favors the adoptive parents so that as long as there is no fraud or duress in obtaining the consent, and the birth parents are not incapacitated when they sign, any attempt to withdraw the surrenders outside of the ten-day statutory period should fail. Furthermore, O.C.G.A. § 19-18-18(e) provides that adoption decrees shall not be subject to judicial challenge if the challenge is filed more than six months after the entry of the adoption decree. Any challenge to the validity of the surrenders based on the grounds of whether they were voluntarily executed will be judged on the best interests of the child standard for review.