

The Child's Choice: How Age of Election Works in Georgia

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Battling over custody of a child can be one of the most grueling, stressful, and all together emotionally draining experiences one can endure as part of a legal action. A custody battle can be a very long and complicated process that involves multiple court hearings and the services of various experts such as guardian ad litem and mediators. Today's article focuses on one aspect of custody: the impact of the child's preference regarding which parent he or she lives with. Many parents believe that a child always has the freedom to choose, but that is not true. Georgia law is a little more complicated regarding this issue.

It is almost impossible to discuss the impact of a child's choice without first outlining the general rules regarding custody in Georgia. According to Georgia Statute 19-9-3 (a) (2), it is the duty of the judge to determine what is in the best interests of the child and to award custody accordingly. This is commonly referred to as the "Best Interests of the Child Standard". Georgia statute 19-9-3 (a) (3) lists seventeen factors a judge can consider in determining the child's best interests. These factors are also listed in the custody section of the Sutton Law Office's Website. However, it is important to remember that this is a non-exclusive list and the judge has the freedom to consider almost anything he or she deems relevant. In short, the judge has very broad discretion in this matter.

While a child's choice, often referred to as a child's election, is not one of the seventeen factors, it does impact custody. The degree that it impacts custody depends on the age of the child. Georgia statutes 19-9-3 (a) 5 and 19-9-3 (a) 6 specifically address this issue. According to 19-9-3 (a) 5, a child that is at least fourteen years old can select with whom to live. The child's choice is considered presumptive, meaning the judge will award custody based on the child's choice with one caveat. The child's choice must still comport to the Best Interests of the Child Standard. If a fourteen year old child wishes to live with dad, the judge will grant dad custody unless, after considering all relevant factors, the judge determines that giving custody to dad is not in the child's best interests.

This is a slight modification of the longstanding Georgia rule regarding a child's election. Prior to 2008, a fourteen year old child could choose with whom to live unless the judge determined that the chosen parent is unfit. Proving that a parent is unfit is often very difficult absent extreme circumstances such as domestic violence or drug abuse by a parent. The result was that a fourteen year old child almost always chose with whom to live even if it was not the best choice. In 2008, the Georgia General Assembly modified the law replacing the unfit parent standard with the Best Interests of the Child Standard. The new standard allows a judge to have more flexibility in determining custody. Proving that a choice is not in the best interests of a child is not nearly as difficult as proving a parent is unfit. However, this discussion should not be construed as a dismissal of the importance a fourteen year old child's choice. When dealing with two similarly situated parents possessing equal parenting ability, a fourteen year old child will, in most situations, have the power to choose with whom to live.

Georgia law 19-9-3 (a) 6 addresses the preferences of children who are younger than fourteen. A child who is at least eleven years old but not fourteen can express his or her desire and the judge will consider the child's desire as a factor in determining custody. However, unlike the rule governing a fourteen year old child's choice, the desires are not presumptive. The judge retains full discretion to award custody how he or she sees fit pursuant to the Best Interests of the Child Standard. It simply adds the child preference as another factor for the judge to consider. If the child is younger than eleven years old, the judge will not consider the child's preference.

For parents wishing to change or modify an existing custody arrangement based on a child's preference, the age of the child is again an important factor. The side requesting to modify custody must show that a material change in circumstances has occurred warranting new intervention by the court. If the child is at least fourteen years old and desires to live with the other parent, the court will consider the child's desire as a material change in circumstances and will re-evaluate custody. However, the child's choice can only be made once within two years of the last custody determination. If a child younger than fourteen desires to live with the other parent, the court will not consider the child's desire as a material change in circumstances and will not re-open custody.

The above is a brief overview of custody in Georgia and how a child's election works. If you are dealing with these issues or otherwise engaged in a custody dispute, it is vital that you consult an attorney that can advise you regarding your specific situation.

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