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Aunt Wendy Jacobs' attorney, Barbara E. Keon, with a photo of Chelsea Jacobs and her two cousins, says Chelsea is "adjusting very well."

Guardian Case Tests 'Interest' Guideline

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Staff Reporter

Douglas and Holly Jacobs thought a romantic hot-air balloon ride would be the perfect ending to their Napa Valley vacation.

The Duluth couple was in California for a three-day trip that Douglas won for his performance as a dental supply salesman. It was Mother's Day, 1999.

The balloon lifted off at 8 a.m. As the craft rose, winds caused it to drift and strike a power line just 275 feet away. The balloon's

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Centuries-Old Law Given 'Best-Interest' Test

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propane tank fractured, sparking a fire that engulfed the vessel and sent it plunging into a broccoli field. Holly, 29, and Douglas, 34, died from third-degree burns.

The Jacobs left behind a seven-year-old daughter, Chelsea, but no will. A bitter guardianship dispute ensued between the girl's maternal grandmother, Gerlie Huval, and her paternal aunt, Wendy Jacobs.

Huval, who now lives in Alpharetta, had lived with Holly and Douglas Jacobs since Chelsea's birth and helped rear her. Wendy Jacobs, of Maryland, saw Chelsea a few times a year. She and her husband are art professors.

The grandmother could provide continuity of care for the child she helped raise. The aunt and her husband, who have other young children, could provide a more traditional family. The Georgia Court of Appeals sided with the aunt earlier this month, citing an 1871 case that requires a guardian to be "unobjectionable." The grandmother failed that test, in part, the court ruled, because she's had live-in boyfriends in the past. The appeals decision illustrates the difficulty courts confront when they must interpret what's in the "best interest" of a child.

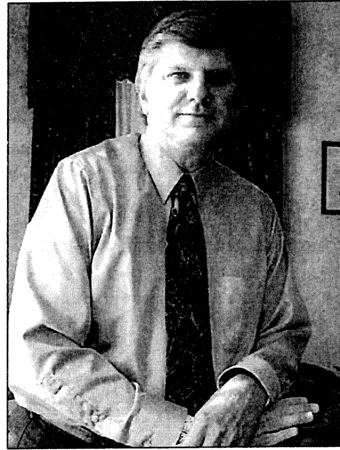
Rare Guardianship Law Invoked

The case was decided in probate court under Georgia's guardianship laws, which come into play when a child is orphaned and his parents have died intestate. Such cases are rare, says Edgar J. Perkerson III, appointed by the probate court judge to serve as Chelsea's guardian ad litem during the proceedings.

Perkerson says that although permanent guardianship and custody are fundamentally the same, the law that governs them is different. Custody disputes use a best-interests-of-the-child test, while the test for guardianship—which dates back to the 1800s—provides that the next-of-kin is preferred to a more distant relative, as long as the next-of-kin is "unobjectionable."

Huval initially was appointed as Chelsea's temporary personal guardian, but later Gwinnett County Probate Court Judge Robert V. Rodatus awarded permanent guardianship to Jacobs and her husband, using his discretion to trump Huval's preferred status under the guardianship law.

The court found that Huval had "led an inappropriate life style in the presence of minors in the past," explaining that, many years ago, she'd divorced when her own children were young and "had two long-term live-in relationships while the minor children lived in her house."



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Lawrenceville lawyer Joseph M. McLaughlin represented the grandmother at trial.

Huval appealed, citing O.C.G.A. § 29-4-8: "Among collateral relatives applying for the guardianship of a minor child, the nearest of kin by blood, if otherwise unobjectionable, shall be preferred. The judge of the probate court, however, may exercise his discretion according to the circumstances of each case and, if necessary, may grant the letters of guardianship to one who is not a blood relative."

The Court of Appeals on March 21 rejected the grandmother's claim. Court of Appeals judge John H. Ruffin Jr. wrote for the panel, which included Presiding Judge Gary B. Andrews and Judge John J. Ellington.

Citing the 1871 case *Johnson v. Kelly*, the panel explained that to determine whether a potential guardian is "unobjectionable," a court should ascertain his or her "habits, temper, morality, sobriety, sense and responsibility, or to the contrary." Ruffin continued: "A person's suitability for guardianship cannot be determined without considering the 'interests and welfare of the child.' " *Huval v. Jacobs*, No. A00A2565 (Ct. App. Ga. March 21, 2001).

Constitutional Question Remains

The panel further suggested that, when presented with a constitutional challenge, the Georgia Supreme Court may be forced to declare the guardianship statute unconstitutional in light of evolving case law.

"Although it is not necessary for us to resolve this issue here, we believe that the Supreme Court will in the future be required to address the continued viability of OCGA § 29-4-8 in guardianship disputes," Ruffin wrote. The constitutional problem, the panel explained, arises because of case law recently set forth by the Georgia Supreme Court in *Stills v. Johnson* (2000).

In *Stills*, the high court considered the standard for determining a custody dispute between a child's grandmother and uncle. The child's father had transferred parental power to the grandmother. The court held that voluntarily transferring parental power to the grandmother did not give her a superior right to custody that could be overcome only on a showing of unfitness. "[W]here two parties seek custody of a child, and neither is a parent of the child, custody is to be governed by the standard of best interest of the child," the *Stills* court wrote.

According to Chelsea's guardian ad litem, *Stills* requires that O.C.G.A. § 29-4-8 be set aside entirely or construed to mean that any proposed guardian is objectionable if the appointment is contrary to a child's best interests.

"The best-interests-of-the-child standard has to prevail [because] it's broad enough to cover all the factors that might apply to the individual case," Perkerson says. He says that in *Huval v. Johnson* the Court of Appeals "has interpreted 'unobjectionability' to mean the best-interest-of-the-child."

That analysis is a departure from established law, according to Huval's lawyer, Joseph M. McLaughlin of Clark & McLaughlin in Lawrenceville.

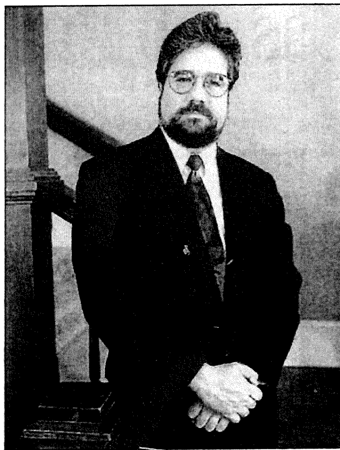
"There had been some past instances that going by blood is, in most instances, in the best interest of the child," McLaughlin says. "They're trying to cut some new law there," he says.

"Ultimately the best-interests-of-the-child was a consideration by the court," says Jacobs' lawyer, Barbara E. Keon of Land Cohen and Keon. But, Keon says, the ruling doesn't create new law because it uses the established unobjectionability test while looking at best interests, too.

Best Interests Once Rejected

Though a best-interests test has become the standard for determining custody, for many years Georgia courts frowned on using it to determine guardianship. Indeed, the 130-year-old *Johnson* case cautions against relying too heavily on judges' evaluation of fitness instead of blood ties.

"The Code is emphatic. It's language is plain and not modified by doubt: 'Among collaterals applying for guardianship the nearest of kin by blood, if otherwise unobjectionable, shall be preferred.' ... Such is the Code, and the sentiment it enunciates meets with a prompt response in every breast. Judges have great embarrassment in the decision of questions involving the rights of children, and the rule of looking to the best interest of the child in the selection of guardians, even with the wisest jurists has turned out unfortunately. It is hard to set up a discretion which will stand the test. But the law wisely makes blood relationship or kinship the test, and those who stand closest to the ward are to have preference, not that one not so near who may be wealthier, more intelligent or educated, shall have it from these advantages."



FILE PHOTO

Christopher J. McFadden says, "Courts are wise to be cautious of their own opinions."

"I think the language [of *Johnson*] reflects a certain real wisdom of caution in the exercise of judicial power," says Christopher J. McFadden, a Decatur lawyer who handled the grandmother's appeal. "Judges and courts are wise to be cautious of their own opinions and doubtful of their own wisdom," he says. Nevertheless, McFadden says he thinks it's unlikely that the guardianship statute will withstand a future constitutional challenge in light of *Stills*.

The high court never may have to reach that constitutional question, Parkerson says. "There is a way in front of us for it to become a matter of statutory revision," he explains. He says he suspects a revision of the guardianship code that is in the works will bring that portion of the guardianship code into line with the permanent custody statute.

The lawyers disagree about whether the Court of Appeals ruling is best for Chelsea, who is now 9.

"To take her away from Gerlie is like losing another parent," says McLaughlin.

"I am sure there was some adjustment," Keon admits. "The court was more concerned with the long-term benefit and best interest than the temporary trauma and adjustment associated with relocating," she says.

Chelsea is "adjusting very well," Keon says. Under a liberal visitation plan she has seen her grandmother and speaks to her on the phone. "The aunt and uncle have been very cooperative in making sure that has occurred," she adds. Parkerson, too, is confident the court made the right decision. "The child in question lives in a two-parent household now. ... The aunt and uncle have filed an adoption action. She's doing well," he says. ❑

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