

**FOURTH DIVISION  
DOYLE, P. J.,  
COOMER and MARKLE, JJ.**

**NOTICE: Motions for reconsideration must be  
*physically received* in our clerk's office within ten  
days of the date of decision to be deemed timely filed.  
<http://www.gaappeals.us/rules>**

**October 29, 2019**

**NOT TO BE OFFICIALLY  
REPORTED**

**In the Court of Appeals of Georgia**

A19A1309. PERRY v. JENKINS.

COOMER, Judge.

Tyler Scott Perry filed his petition for legitimation, custody, visitation and child support in February 2018 regarding a son he fathered with Kaitlyn Jenkins. Following a final hearing, the trial court granted primary physical custody of the child to Jenkins and ordered that Perry would have limited visitation rights. Perry appeals, arguing the trial court failed to give due consideration to joint physical custody upon finding both parents to be fit and proper. Perry further contends the trial court erred by limiting his parenting time with the child with no evidence to support such limitation, and by doing so, violated his constitutional rights to both due process and equal protection under the law. Because we agree that the trial court was required to

give due consideration to the feasibility of a joint custody arrangement, we reverse and remand.

“Where a trial court exercises its discretion and awards custody to one fit parent over the other fit parent, [appellate courts] will not interfere with that decision unless the evidence shows the trial court clearly abused its discretion.” *Brock v. Brock*, 279 Ga. 119, 121 (3) (610 SE2d 29) (2005) (citation omitted). The record shows that Jenkins and Perry dated for approximately five years before ending their relationship. During the relationship, Jenkins and Perry had a son together. The child was approximately two years old when the couple split. After the break up, Jenkins and the child went to live with her parents and Perry continued to be actively involved in the child’s life. Perry provides health insurance for the child in addition to court-ordered monthly child support payments. However, Jenkins limited Perry’s visitation time with the child after Perry began dating someone that Jenkins did not approve of. Perry currently rents a two-bedroom, one-bath home with his wife. Although Jenkins believes that Perry is a good father to the child and would take great care of the child, she feels the child is too young for overnight visits with Perry.

Perry petitioned the trial court for legitimation, custody, visitation, and child support. Following a temporary hearing in May 2018, which Perry did not attend

because he did not receive notice, the trial court found Perry the legal father of the child, granted Jenkins primary physical custody of the child, and granted Perry visitation with the child every other weekend. During the final hearing in October 2018, Perry testified that he wanted primary physical custody of the child, or in the alternative, to share primary custody of the child with Jenkins. After the final hearing, in which the trial court heard testimony from Jenkins, Perry, Perry's wife, and Perry's mother, the trial court awarded primary physical custody to Jenkins noting that "I sincerely believe a small child that's been with the mother needs to stay with the mother." The trial court also kept the visitation order issued following the temporary hearing in place until the child reaches the age of five. Perry then requested the trial court issue written findings of fact, from which he now appeals.

1. Perry first contends that upon a finding that both parents were fit and proper, the trial court failed to give due consideration to his request for joint physical custody of the child. We agree.

OCGA § 19-9-3 provides in part:

In all cases in which the custody of any child is at issue between the parents, there shall be no prima-facie right to the custody of the child in the father or mother. There shall be no presumption in favor of any particular form of custody, legal or physical, nor in favor of either

parent. Joint custody may be considered as an alternative form of custody by the judge and the judge at any temporary or permanent hearing may grant sole custody, joint custody, joint legal custody, or joint physical custody as appropriate.

“Joint physical custody means that physical custody is shared by the parents in such a way as to assure the child of substantially equal time and contact with both parents.”

*Marks v. Soles*, 339 Ga. App. 380, 385 (2) (793 SE2d 587) (2016) (emphasis and punctuation omitted). See also OCGA § 19-9-6 (6). “[W]here, as here, the trial court determines that both parents are fit and equally capable of caring for the child, the court must consider joint custody but is not required to enter such an order unless it specifically finds that to do so would be in the best interest of the child.” *Baldwin v. Baldwin*, 265 Ga. 465, 465 (458 SE2d 126) (1995) (emphasis omitted). “‘Joint custody’ means joint legal custody, joint physical custody, or both joint legal custody and joint physical custody.” See OCGA § 19-9-6 (4).

In its final order granting Jenkins primary physical custody of the trial, the trial court made the following conclusions of law:

The minor child has resided with [Jenkins] since birth, has primarily been in the care of [Jenkins] since birth, and on all accounts, the minor child is flourishing. [Perry, Jenkins and Perry’s witnesses] agreed that [Perry and Jenkins] were proper and fit parents. . . . [Jenkins]

has lived with and cared for the minor child his entire life and to sever the bonding and ties between the two of them by changing custody would be detrimental to the minor child's best interest. [Jenkins has maintained a stable, satisfactory environment during the minor child's entire life. The maintenance of this continuity in the child's life is paramount. . . . [Perry] works approximately 40-48 hours per week. [Jenkins] is currently unemployed and when she was employed, she worked part-time. [Perry's] employment schedule severely limits his time available to his minor child. [Jenkins'] schedule has no limitations of time for the minor child.

The trial court found that both parents are equally cable of caring for and providing for the child and that both Jenkins and Perry agree that the other was a fit and proper parent. Furthermore, the trial court found that "the home environment of each parent is a nurturing and safe environment." The trial court ordered that Perry and Jenkins would have joint legal custody. However, nowhere in its findings of fact or in its oral pronouncement of its ruling does the trial court express any indication that it gave due consideration to the feasibility of Perry's request for joint physical custody of the child. This State's express policy is that a

child who is not an official party to the lawsuit but whose well-being is in the eye of the controversy, has a right to shared parenting when both are equally suited to provide it. Inherent in the express public policy is a recognition of the child's right to equal access and opportunity with

both parents, the right to be guided and nurtured by both parents, the right to have major decisions made by the application of both parents' wisdom, judgment and experience. . . . Whether a parent forfeits his or her portion of the relationship or any part of it, or is incapable of performance, must be determined by the factfinder.

*In Interest of A.R.B.*, 209 Ga. App. 324, 327 (3) (433 SE2d 411) (1993) (physical precedent only). See also *Scott v. Scott*, 276 Ga. 372, 380-381 (578 SE2d 876) (2003) (Sears, P.J, dissenting).

Although we find the trial court intuitively considered facts that would assist in making a determination regarding the feasibility of joint physical custody between the parties, neither the trial court's oral pronouncement or its written order make clear that such an analysis occurred. We do not require magic words or phrases to demonstrate that a feasibility analysis occurred in the trial court, however, we do require more than a passing reference or innuendo when making determinations regarding the joint physical custody of children. Thus, we remand the case to the trial court for findings and conclusions which give effect to OCGA §§ 19-9-3 (d) and 19-9-6 (6) and to give due consideration to the issue of joint physical custody. Compare *Urquhart v. Urquhart*, 272 Ga. 548, 549-550 (1) (533 SE2d 80) (2000) (affirming trial court's determination that both parents were fit and proper, but concluding that

it was in the child's best interest that Husband be given permanent and exclusive custody since Husband afforded "a much more stable and predictable environment for this child" than did Wife); *Scott v. Scott*, 227 Ga. App. 346, 350 (4) (489 SE2d 117) (1997) (where the record was clear that the trial court gave serious consideration to joint custody options available under OCGA § 19-9-6 and chose one of those options, "The fact that the court did not award joint physical custody is no indication that it failed to consider seriously all options available under OCGA § 19-9-6, and we cannot say that the court abused its discretion.").

2. In light of our holding in Division 1, we need not address the remainder of Perry's enumerations.

*Judgment reversed and remanded. Doyle, P. J., and Markle, J., concur.*