IN THE COURT OF APPEALS
STATE OF GEORGIA

TYLER PERRY, Appellant, vs. KAITLYN JENKINS, Appellee.	CASE NUMBER: A19A1309

BRIEF OF APPELLANT

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PART ONE
STATEMENT OF THE PROCEEDINGS BELOW AND MATERIAL FACTS RELEVANT TO THIS APPEAL

For the purposes of these Enumerations of Error and this Brief in Support, the Record, which is divided into four (4) separate volumes that are labeled "1," "2," "3," and "4," shall hereinafter be referenced as "[R1: 2]" for Record volume 1, page 2; "[R2: 25-27]" for Record volume 2, pages 25 to 27; and so on. The Transcript, which is also divided into four (4) separate volumes that are labeled "5," "6," "7," and "8" following the sequence of the Record volumes, shall hereinafter be referenced as "[T5: 2]" for Transcript volume 5, page 2; "[T8: 25-27]" for Transcript volume 8, pages 25 to 27; and so on.

The underlying action was a Petition for Legitimation, Custody, Visitation and Child Support filed on February 15, 2018 by the Father, Tyler Perry (hereinafter "Father"). [R2: 2-6]. The action concerned the minor child Carson Perry (hereinafter "Minor Child") born in 2015 out of wedlock to the Mother, Kaitlyn V. Jenkins (hereinafter "Mother"). [R2: 2-3]. At a Temporary Hearing in May 2018, of which the Father did not receive actual notice, the Mother consented to the legitimation and the trial court granted temporary visitation to the Father of every other weekend from 9:00 a.m. to 5:00 p.m. both Saturday and Sunday. [R2: 26-29].

When the case came before the Court for a final hearing October 29, 2018, the evidence showed that the Father cared for the Minor Child and the Mother from the time it became known that the Mother was pregnant until approximately 1.5 to 2 years prior to the final hearing. [T8: 7-8, 46-47]. The family moved weekly between their parents' houses, spending a week at each home. [T8: 7, 33-34]. The parties separated in approximately March of 2017. [T8: 7-8]. The Minor Child lived with the Mother, but the Father continued to see the Minor Child "all the time." [T8: 23]. At that time there was an oral agreement between them that the Minor Child would not be in the presence of a significant other until and unless it was "serious." [T8: 22]. In September 2017, after seeing the Father's girlfriend (now wife) with the Minor Child on social media, the Mother drastically restricted the Father's time with the Minor Child. [T8: 22-26].

On December 12, 2017, an Order for Paternity and Child Support was issued by the Walton County Superior Court requiring Petitioner to pay $445.00 per month as child support for the Minor Child with the first payment due on February 1, 2018. [T8: 126-134]. Prior to this time, the Father provided support to the Minor Child by way of purchased items given to the Mother, for which he produced receipts. [T8: 43-46, 135-180].

At the time of the final hearing, the Mother lived with her parents, the Minor Child in this case, her child from a subsequent relationship, the father of that child,

and her grandmother, all in a three-bedroom house. [T8: 6]. The Minor Child shared a room with the Mother's grandmother. [T8: 6]. The Mother had moved at least once during the pendency of the action. [T8: 7]. The Mother worked part-time briefly for Little Caesar's and went on maternity leave on August 10, 2018. [T8: 10-11]. She did not return to employment. [T8: 10]. Her income was $300.00 from her parents to clean their home and the child support the Father in this case is paying. [T8: 10]. Her parents, her boyfriend, and public assistance provided for her expenses. [T8: 11-13].

The Father lived with his wife in a two-bedroom house in Watkinsville, Georgia. [T8: 28-30]. The Minor Child had his own room in this home. [T8: 32]. The Father had signed a lease for this home on March 7, 2018. [T8: 28]. Prior to that, he had lived in his parents' home. [T8: 33]. The Father worked for a pipeline company making $16.00 per hour fulltime with the option for overtime. [T8: 37]. The Father provided insurance for the Minor Child through his employment. [T8: 39-41]. The Father had court-ordered day visits with the Minor Child beginning in May 2018 and had been consistent in exercising them. [T8: 90]. Prior to that, and after the Mother learned of his relationship with his wife, he visited when the Mother would allow it, requesting such visitation every week. [T8: 49-51, 183-193].

While the parties were living together, there were two episodes of domestic violence between them with the Mother being the primary aggressor. [T8: 35]. One episode resulted in law enforcement being called, although no charges were filed. [T8: 8-9, 35]. In the other instance, there was no report, although it was witnessed by the Father's mother. [T8: 35, 75-76].

The Minor Child is a happy child, [T8: 90], and is developing well in several aspects of his education. [T8: 20-21]. The Mother acknowledged that the Father is a fit and proper parent. [T8: 21].

After hearing the testimony of the parties, the Father's mother and the Father's wife, the Court issued an oral ruling that the Mother would be the primary physical custodian, stating "I sincerely believe a small child that's been with the mother needs to stay with the mother." [T8: 101]. As to visitation, the Court in its oral ruling stated "I am leaving visitation where it is until the child reaches the age of five, at which time the standard visitation order applies." [T8: 101]. The "standard" visitation order, which was attached to the Final Order filed by the Court as Exhibit B, provides for regular visitation every other weekend from Friday at 6:00 p.m. until Sunday at 6:00 p.m. with holidays either split or alternating. [R2: 70]. However, the Temporary Order provided no holiday visitation other than that which coincides with the Father's regular visitation weekend and no overnight visits. [R2: 26-29].

Counsel for the Father requested written findings of fact and conclusions of law. [T8: 101], [R2: 60-61]. In contrast to the oral ruling, the written Final Order stated that several O.C.G.A. § 19-9-3(a)(3) factors were considered, including the Minor Child having been with the Mother, the Mother caring for the Minor Child since birth, and the Mother being unemployed and having no limitation on her time for the Minor Child as opposed to the Father working forty hours per week. [R2: 65-66]. The factors included a finding that "[t]he home environment of each parent is a nurturing and safe environment." [R2: 66].

The written order included a decision to keep child support as ordered previously by Walton County Superior Court. [R2: 67]. The Father was ordered to continue to provide health insurance coverage and that out-of-pocket medical expenses would be shared equally by the parents. [R2: 67-68]. Finally, the order granted the Mother attorney's fees of $2,000.00 but made no finding of fact regarding that decision, stating "[t]his award is based on the financial position of each of the parties as evidenced by the pleadings and the testimony at trial". [R2: 68]. The order was filed on November 30, 2018. [R2: 62]. The Father's Notice of Appeal was timely filed on December 19, 2018 and properly served on opposing counsel. [R2: 1, 74].

PART TWO
ENUMERATIONS OF ERROR

ENUMERATION OF ERROR NO. 1

The trial court failed to give due consideration to joint physical custody upon finding both parents to be fit and proper. [R2: 63-64, para. 5(f)].

ENUMERATION OF ERROR NO. 2

The trial court limited Father's parenting time with the Minor Child so as to exclude overnights until the age of 5 with no evidence to support such limitation, and in violation of the public policy of this state. [R2: 67, para. 2].

ENUMERATION OF ERROR NO. 3

The trial court violated the Father's constitutional rights to both due process and equal protection under the law.

STATEMENT OF PRESERVATION OF ERROR

For all three Enumerations of Error, the error was not apparent until the trial court issued its oral ruling at the conclusion of the final hearing: "I award primary physical custodian to the – custody of the child to the mother. I sincerely believe a small child that's been with the mother needs to stay with the mother." [T8: 101]. Counsel for the Father immediately made an oral request for written findings of fact. [T8: 101-102]. Counsel also filed a timely motion requesting findings of fact and conclusions of law pursuant to O.C.G.A. § 9-11-52 on November 12, 2018, which was after the final hearing but before the entry of judgment. See Payson v.

Payson, 274 Ga. 231 (2001) (holding such filing to be timely when it is made before the entry of judgment and explaining how trial courts' provision of findings of fact and conclusions of law is helpful to the trial court in its process of adjudication, to the parties in understanding trial court's ruling and evaluating the wisdom of a possible appeal, and to appellate courts in reviewing the trial court's rulings for potential error). Thus, counsel for the Father preserved the errors made by the trial court as soon as practicable after such errors first became apparent.

JURISDICTIONAL STATEMENT

Jurisdiction and venue are appropriate in this Court pursuant to O.C.G.A. § 15-3-3.1(6) as the subject matter of this case is not reserved to the Supreme Court or conferred on other courts. See Ga. Const. art. VI, § 6, ¶ III. All parties agreed that this was a "child custody case," [T8: 97, 99], and the trial court awarded attorney fees based upon the child custody statute, O.C.G.A. § 19-9-3. [R2: 68, para. 5]. The issues involved in this appeal all concern the trial court's award of child custody. This case is thus directly appealable pursuant to O.C.G.A. § 5-6-34(a)(11). See Voyles v. Voyles, 301 Ga. 44, 46, 799 S.E.2d 160, 162 (2017) ("[f]or the clarity of the bench and bar, we now reiterate that the 'issue-raised-on-appeal' rule applies to appeals from orders or judgments in child custody cases. This means that the proper appellate procedure to employ depends upon the issue involved in the appeal . . . .").

PART THREE
STANDARD OF REVIEW

With regard to Enumerations of Error No. 1 and No. 3, when a trial court finds both parents to be fit and proper in a child custody case in which joint physical custody is sought by either party, the trial court is reviewed for abuse of discretion in determining whether or not it gave "due consideration to the feasibility of a joint custody arrangement." Baldwin v. Baldwin, 265 Ga. 465, 465, 458 S.E.2d 126, 127 (1995).

With regard to Enumeration of Error No. 2, when a trial court places restrictions on a parent's visitation rights, the trial court is reviewed for abuse of discretion in determining whether it has placed "an unnecessarily burdensome limitation on the exercise of [the] parent's right of visitation." Brandenburg v. Brandenburg, 274 Ga. 183, 184, 551 S.E.2d 721, 722 (2001).

ARGUMENT AND CITATION OF AUTHORITY

I. The trial court failed to give due consideration to joint physical custody upon finding both parents to be fit and proper.

For nearly a quarter century,[1] the law of the State of Georgia has required trial courts to give due consideration to joint physical custody arrangements.

[1] Given the State of Kentucky's recent legislation creating a rebuttable presumption in favor of joint physical custody (see KRS 403.270(2)), as well as recent legislation supporting shared parenting introduced in many other states,

Baldwin v. Baldwin, 265 Ga. 465, 458 S.E.2d 126 (1995). "[W]here, as here, the trial court finds both parents fit and proper, the trial court *must* give due consideration to the feasibility of a joint custody arrangement." Id. at 465, 458 S.E.2d at 127 (emphasis supplied).

> In order to enforce Georgia's policy favoring shared rights and responsibilities between parents, the trial court

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there has perhaps never been a more prophetic and appropriate paragraph written by a judge of this Court, than by Chief Judge Dorothy Beasley more than 25 years ago:

> It thus is evident that the stated legislative policy abandons traditional biases and favors shared parenting rights and responsibilities. Where sole custody is awarded, custodial rights, responsibilities and opportunities lie only with the custodial parent who is solely responsible for "major decisions concerning the child, including the child's education, health care, and religious training...." OCGA § 19-9-6(4). The noncustodial parent is given only the right of visitation. Id. **Where both parents have demonstrated equal ability to effectively care for and nurture the child, as here, it is in the child's best interest that a custody award be fashioned which will best encourage continuing and roughly equal contact with both parents, given the practicalities involved.** . . . There is, after all, one total child, not two halves.

In Interest of A.R.B., 209 Ga. App. 324, 326-27, 433 S.E.2d 411, 413-14 (1993) (emphasis supplied) (physical precedent only; see Court of Appeals Rule 33.2(a)(1)).

> *must* give "due consideration" to the feasibility of a joint custody arrangement. The trial court's order found both parents to be fit and proper, acknowledging that each parent had strengths and weaknesses. *We cannot say the trial court abused its discretion in awarding joint physical custody of the child.*

Willis v. Willis, 288 Ga. 577, 580, 707 S.E.2d 344, 347 (2011) (emphasis supplied).

In this case, the trial court indisputably found that both parents were fit and proper parents. In fact, the trial court noted that the fitness of the parents was not disputed by either party, and that there was no testimonial evidence that either parent was unfit. "Petitioner/Father and Respondent/Mother each stated that the other parent was a fit and proper parent. Neither Petitioner/Father nor Respondent/Mother had any witnesses state otherwise." [R2: 63-64, para. 5(f)]. The trial court further found that "[b]oth parties have stable living situations and suitable dwellings in which to raise the child." [R2: 63-64, para. 5(e)].

It is similarly indisputable that the Father requested joint physical custody as an alternative form of relief in this case. [T8: 63-64]. Opposing counsel highlighted this fact in his argument for attorney fees. [T6: 15]. Under these circumstances, the trial court was required to give "due consideration" to joint physical custody. Such "due consideration" requires the trial court to "set forth facts and conclusions underlying its consideration and rejection of joint custody . . . ." See Baldwin, 265 Ga. at 465[footnote 1], 458 S.E.2d at 127[footnote 1]

(noting the trial court's failure to provide facts and conclusions underlying its consideration and rejection of joint custody in its initial order).

Several factors show that the trial court never gave due consideration to joint physical custody in this case. First, the trial court announced its oral ruling immediately following the closing arguments of counsel and candidly explained its reasoning for its award. "I award primary physical custodian to the – custody of the child to the mother. I sincerely believe a small child that's been with the mother needs to stay with the mother." [T8: 101]. Neither the timing nor the content of the trial court's oral ruling indicates that it gave "due consideration" to joint physical custody.

Second, the trial court did not set forth facts and conclusions underlying its consideration and rejection of joint custody in its written ruling. [R2: 62-73]. In fact, the trial court did not mention the terms "joint physical custody," "shared custody," "shared parenting," or any other term describing a custody arrangement in which "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." O.C.G.A. § 19-9-6(6). There is simply no mention of joint physical custody anywhere in the trial court's Final Order. [R2: 62-73].

Third, there are clear indications in the trial court's Final Order that the trial court obviously did *not* give due consideration to joint physical custody in this

case. After finding that the Mother had been the primary caregiver and that the Minor Child was flourishing, the trial court went on the state that "[t]o remove the minor child from the environment and caregiver under which the minor child has been excelling would be contrary to the best interests of the minor child." [R2: 65]. The trial court goes on to equate a "chang[e of[custody"[2] to "sever[ing] the bonding and ties between [the Mother and the Minor Child]." [R2: 65-66].

The clear implication here is that the trial court considered only two options in this case: either award primary physical custody to the Mother or award primary physical custody to the Father. Clearly, joint physical custody would not have required "remov[ing] the minor child from [his] environment and caregiver." Although the Father disputes that an award of primary physical custody to him would have ever severed the bonds and ties between the Mother and the Minor

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[2] The Father notes that a custody award following legitimation is not a "change of custody," but an initial custody award:

> Once a child is legitimated, . . . the father stands in the same position as any other parent and has a claim to parental and custodial rights with respect to his child. In a case where the father seeks custody after legitimation, the trial court should apply the best interest of the child standard set forth in OCGA § 19–9–3(a). As there has been no previous adjudication of the custody issue in such a case, the change in conditions analysis should not be used.

Braynon v. Hilbert, 275 Ga. App. 511, 512, 621 S.E.2d 529, 530 (2005) (punctuation and citations omitted).

Child, this certainly would not have occurred under a joint physical custody arrangement in which the Minor Child would have "substantially equal time and contact with both parents." O.C.G.A. § 19-9-6(6).

Fourth, it appears that the Ocmulgee Circuit has adopted a "standard" visitation order for all custody cases. [R2: 70]. Notably, there are no provisions for joint physical custody at all in this "standard" visitation order. [R2: 70]. In fact, opposing counsel expressly stated that joint physical custody is almost never granted in the Ocmulgee Circuit, and based his request for attorney fees in part on the fact that the Father requested that the Court at least consider it:

> [T]he reality is our circuit has a standard visitation order. It's put on notice to everyone. Everyone knows that it exists and it does not include split visitation and since there is not any sort of rational basis to give him primary, the only other argument to have is to ask for split, which our circuit just generally does not do. And so they are asking for two things that they were never going to get in this court. And so for that reason, I think I should be awarded fees.

[T6: 15].

Opposing counsel's argument was clear: his client should be awarded attorney fees because the Father's ignorance of clearly publicized Ocmulgee Circuit policies concerning custody caused his client unnecessary trouble and expense. In other words, a father is "never going to get" joint physical custody in the Ocmulgee Circuit, and a father is "never going to get" primary physical

custody in the Ocmulgee Circuit when both parents are found to be fit and proper parents. Any father who even tries should have to pay attorney fees.

The extremely troubling takeaway from opposing counsel's argument is that he clearly believes that the judges of the Ocmulgee Circuit routinely fail or refuse to properly apply Baldwin, 265 Ga. 465, 458 S.E.2d 126, which requires a trial court to give due consideration to joint physical custody where it finds both parents to be fit and proper, as was found in this case. One hopes that opposing counsel's bleak outlook concerning the judges' compliance with binding Supreme Court of Georgia precedent does not reflect the reality in the Ocmulgee Circuit.

However, it is indeed troubling that the Ocmulgee Circuit has adopted a "standard" visitation order for all custody cases that does not seem to at all contemplate due consideration of joint physical custody. If the Ocmulgee Circuit has even one child with parents who are both fit and proper (which this case proves that it clearly does), and if the Ocmulgee Circuit truly and faithfully followed the due consideration requirements of Baldwin, one would expect to see a "standard" visitation order for joint physical custody alongside the "standard" visitation order for primary physical custody arrangements.

Opposing counsel's statements, hard to accept as they may be, offer plausible explanation as to why no such "standard" visitation order for joint physical custody currently exists in the Ocmulgee Circuit. If nothing else comes

from this appeal, the Father hopes that the Ocmulgee Circuit will solemnly revisit its policies concerning custody to ensure that they are aligned with the policies of the State of Georgia concerning custody, as clearly expressed by the General Assembly and as astutely interpreted by this Court. See O.C.G.A. § 19-9-3(d); In Interest of A.R.B., 209 Ga. App. 324, 326, 433 S.E.2d 411, 413 (1993) (physical precedent only; see Court of Appeals Rule 33.2(a)(1)).

The trial court in this case made substantially the same operative findings of fact and conclusions of law as did the trial court in A.R.B.:

> The evidence amply supports the juvenile court's findings that both parents have shared in the responsibilities of child rearing and that either is "perfectly capable of caring and providing for the child from this time forward." Both . . . have shown deep devotion to their child and fitness as parents. It is apparent that this . . . custody dispute is motivated by a fervent desire on the part of each parent to participate significantly in their son's future. A joint custody arrangement in these circumstances should have been given due consideration by the juvenile court in accordance with the State's expressed policy.

Id. The result here should be the same. This case should accordingly be reversed and "remanded for findings and conclusions which give effect to OCGA §§ 19-9-3(d) and 19-9-6." Id.

II. The trial court limited Father's parenting time with the Minor Child so as to exclude overnights until the age of 5 with no evidence to support such limitation, and in violation of the public policy of this state.

The Supreme Court of Georgia has long held that a trial court abuses its discretion when it places "an unnecessarily burdensome limitation on the exercise of a parent's right of visitation." Brandenburg v. Brandenburg, 274 Ga. 183, 184, 551 S.E.2d 721, 722 (2001) (citing Katz v. Katz, 264 Ga. 440, 445 S.E.2d 531 (1994) and Griffin v. Griffin, 226 Ga. 781, 784(3), 177 S.E.2d 696 (1970)). Where there is no evidence of conduct or behavior that would adversely affect the child, such limitations will be reversed. See, e.g., Brandenburg, 274 Ga. at 184, 551 S.E.2d at 723.

In this case, the trial court limited the Father to only daytime visitation with the Minor Child until the Minor Child reached the age of 5. [R2: 67, para. 2(a)]. This restriction was apparently contrary to even Ocmulgee Circuit policies on custody, which apparently usually allow for overnight visitations. [R2: 70]. The record is entirely devoid of any evidence justifying this restriction. One would expect some evidence of misconduct or lack of capability on the part of the Father to care for the Minor Child during overnight periods, but there was none. Nor was there any evidence that the Minor Child had suffered or would suffer any harm if he were separated from the Mother on some nights. Finally, there was no evidence

that would explain the trial court's apparent belief that these concerns would somehow be automatically resolved upon the Minor Child's reaching the age of 5.

There was not even any evidence supporting a limitation based upon a concern regarding overnight stays with unrelated members of the opposite sex, which this Court approved in the case of Simmons v. Williams, 290 Ga. App. 644, 649, 660 S.E.2d 435, 439 (2008) (physical precedent only as to Division 3; see Court of Appeals Rule 33.2(a)(1)). On the contrary, the record clearly establishes that the Father was married at the time of the final hearing. [T8: 30]. By contrast, the Mother was at that same time cohabitating with her other child's father, to whom she was not married at the time. [T8: 11]. The trial court concluded that both of these situations constituted "a nurturing and safe environment," [R2: 66, para. (e)], yet awarded unrestricted custody to the Mother and only restricted visitation rights to the Father.

"I award primary physical custodian to the – custody of the child to the mother. I sincerely believe a small child that's been with the mother needs to stay with the mother." [T8: 101]. This candid oral ruling proves without any doubt that the trial court has a clear preference for custody in favor of mothers, particularly with regard to children of a very young age.[3] In fact, there is no other plausible

[3] This appears to be an application of the vestigial "tender years doctrine" with regard to child custody, which alludes to the belief that a child benefits more from

explanation for the trial court's award of unrestricted custody in favor of the Mother and restricted visitation in favor of the Father. Discrimination on the basis of sex was indispensable in crafting such a ruling because all evidence of even arguable unfitness in this case stood against the Mother.[4] Such discrimination on

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being with the mother than being with the father during the child's "tender" years. The tender years doctrine has not been the law of the State of Georgia since at least 1913, if ever. Indeed, it appears that the State of Georgia transitioned directly from a custody policy favoring fathers to a custody policy favoring the best interests of the child without any intervening "tender years doctrine" period, which would have favored custody in mothers. See 1913 Ga. Laws, p. 110, § 1 (stating that "there shall be no prima facie right to custody of such child or such children in the *father*, but the court hearing such issue of custody may exercise its sound discretion, . . . the duty of the court being in all such cases in exercising such discretion to look to and determine *solely what is for the best interest of the child or children*, and what will best promote their welfare and happiness, and make award accordingly.") (emphasis supplied). See also 1990 Ga. Laws, p. 1423, § 1 (stating that "there shall be no prima facie right to custody of the child or children in the father *or mother*.") (emphasis supplied); 1991 Ga. Laws, p. 1389, § 1 (stating that "[i]t is the express policy of this state to encourage that a minor child has continuing contact with parents and grandparents who have shown the ability to act in the best interest of the child and to encourage parents to share in the rights and responsibilities of raising their children after such parents have separated or dissolved their marriage.").

[4] See Part III, under Equal Protection.

the basis of sex has been held unconstitutional in this context by other states. See, e.g., Ex Parte Devine, 398 So. 2d 686, 695 (Ala. 1981) (Alabama); King v. Vancil, 34 I11. App. 3d 831, 836, 341 N.E.2d 65, 69 (1975) (Illinois); State ex rel. Watts v. Watts, 77 Misc. 2d 178, 183, 350 N.Y.S.2d 285, 291 (N.Y. Fam. Ct. 1973) (New York).

In addition to likely being unconstitutional under the Constitution of the State of Georgia, the application of the trial court's discretion in this particular case is clearly against the State of Georgia's express public policy. "The only authentic and admissible evidence of public policy of a State is its constitution, laws, and judicial decisions." Turman v. Boleman, 235 Ga. App. 243, 244, 510 S.E.2d 532, 533 (1998) (invalidating the enforcement of a visitation provision preventing a parent from exposing the child to African-American males as violating public policy against racial classification and against public policy encouraging a child's contact with his noncustodial parent).

> It is the express policy of this state to encourage that a child has continuing contact with parents and grandparents who have shown the ability to act in the best interest of the child and to encourage parents to share in the rights and responsibilities of raising their child after such parents have separated or dissolved their marriage or relationship.

O.C.G.A. § 19-9-3(d). "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. In Interest of A.R.B., 209 Ga. App. 324, 327, 433 S.E.2d 411, 414 (1993) (physical precedent only; see Court of Appeals Rule 33.2(a)(1)).

Contrary to this express public policy, the trial court's order in this case prevents the Minor Child from having overnight contact with the Father solely on the basis of its sincere belief that "a small child that's been with the mother needs to stay with the mother." [T8: 101]. This meets the very definition of an arbitrary sex classification. There exists no credible scientific evidence of a general inability on the part of fathers to provide overnight care for their children under the age of 5, nor of any harm that comes to children under the age of 5 who do not have nightly contact with their mothers.[5] No such evidence was even offered in

[5] In nearly two decades no one has adequately answered this question: If babies can sleep apart from mothers during the day under the care of day care attendants, grandparents, babysitters, and fathers, by what logic do we deprive children after their parents' separation of enriching bedtime and morning experiences enjoyed by children in two-parent homes? This challenge overshadows the theoretical and research perspectives and the shifts among professionals in their views about overnights. Fathers take the night shift in two-parent homes. They can, and should, do so when living apart from their children's mothers.

this case. There was no evidence of any inability that was specific to this particular Father, nor was there evidence of harm that might result from overnights away from this particular Mother. Put simply, the apparent preference of the trial court for maternal custody and for limitations on paternal contact enjoys no support in science, in evidence, or in the law.

The trial court in this case imposed limitations upon the Father's visitation rights without any evidence to support such limitations. In this respect, the trial court abused its discretion in the same manner as did the trial court in Brandenburg v. Brandenburg, 274 Ga. 183, 551 S.E.2d 721 (2001). "[A] trial court abuses its discretion when it places an unnecessarily burdensome limitation on the exercise of a parent's right of visitation." Id. at 184, 551 S.E.2d at 722. The trial court's limitations concerning the Father's overnight visitation with the Minor Child in this case should accordingly be reversed. See id. at 184, 551 S.E.2d at 721.

III. The trial court violated the Father's constitutional rights to both due process and equal protection under the law.

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor

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Richard A. Warshak (2018): Night Shifts: Revisiting Blanket Restrictions on Children's Overnights with Separated Parents, Journal of Divorce & Remarriage. https://doi.org/10.1080/10502556.2018.1454193.

> deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1.

SUBSTANTIVE DUE PROCESS

The United States Supreme Court has clearly held that the Fourteenth Amendment of the United States Constitution requires courts to jealously guard the rights of parents against government intrusion.

> The [Fourteenth Amendment's Due Process Clause] also includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests.
>
> The liberty interest at issue in this case — the interest of parents in the care, custody, and control of their children — is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own."

Troxel v. Granville, 530 U.S. 57, 65 (2000) (punctuation and citations omitted). The Supreme Court of Georgia has found likewise. "Parents have comparable interests under our state constitutional protections of liberty and privacy rights. 'The right to the custody and control of one's child is a fiercely guarded right in our society and in our law. It is a right that should be infringed upon only under the most compelling circumstances.' In re: Suggs, 249 Ga. 365, 367 (291 S.E.2d 233)

(1982)." Brooks v. Parkerson, 265 Ga. 189, 192 (1995). "The Supreme Court has made clear that state interference with a parent's right to raise children is justifiable only where the state acts in its police power to protect the child's health or welfare, and where parental decisions in the area would result in harm to the child." Id. at 193.

When any government entity—including a trial court—uses state power to interfere with a parent's fundamental Constitutional rights with regard to their children, such action is subject to the three-part strict scrutiny test. This means that the government action must be (1) narrowly tailored to accomplish (2) a compelling state interest while using (3) the least restrictive means available to do so. See, e.g., Washington v. Glucksberg, 521 U.S. 702, 721 (1997) ("the Fourteenth Amendment forbids the government to infringe . . . `fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.") (italics in original; other punctuation and citations omitted).

This Court has applied these same concepts in disapproving trial courts who have placed unduly burdensome restrictions of visitation rights without first finding a compelling state interest to justify such government intrusion, such as protecting the child from harm. See, e.g. Turman v. Boleman, 235 Ga. App. 243, 244 (1998) ("[a]lthough a court may validly provide, under appropriate

circumstances, that a child is to have no contact with particular individuals who are deemed harmful to the child, such provision cannot be based solely upon racial considerations"). The Supreme Court of Georgia has done so as well. See, e.g., Brandenburg v. Brandenburg, 274 Ga. 183, 184 (2001) ("[a]lthough appellant's relationship with Pike could support the imposition of certain limitations upon his visitation rights if it was shown that such conduct adversely effects his children, the record in this case is devoid of any evidence that such relationship had or likely would have a deleterious effect on the children beyond that normally associated with divorce or a parent's remarriage.") (citations omitted).

In this case, the trial court failed to identify any compelling state interest justifying its decision to eliminate the Father's overnight visitation rights with the Minor Child until the Minor Child reached the age of five. As explored more thoroughly in Part I, the trial court found the Father to be a "fit and proper parent," [R2: 63-64, para. 5(f)], but failed to identify any compelling state interest justifying its decision to deny joint physical custody of the Minor Child to both parents, when other trial courts in the State of Georgia have ordered joint physical custody in substantially similar circumstances. See, e.g., Willis v. Willis, 288 Ga. 577, 580 (2011) ("[t]he trial court's order found both parents to be fit and proper, acknowledging that each parent had strengths and weaknesses. We cannot say the trial court abused its discretion in awarding joint physical custody of the child.")

Here, there was no finding that the Father had or would harm the Minor Child, nor was there any evidence in the record that would have supported such a finding. There was thus no "compelling state interest" that would justify limiting the Father in this case to less than equal parenting time, much less to only daytime visitation when other similarly situated Fathers are awarded such parenting time in this state.

Notwithstanding any apparent statutory authority to the contrary, a trial court's discretion cannot be properly broadened so as to unconstitutionally infringe upon fundamental Constitutional parental rights. This lesson has been repeatedly emphasized by this Court in recent decisions. See, e.g., Borgers v. Borgers, A18A0910, at *1 (Ga. Ct. App. Oct. 18, 2018).

> Our trial courts must be mindful in every case involving parental rights that, regardless of any perceived authority given to them by a state statute to interfere with a natural parent's custodial relationship with his or her child, such authority is only authorized if it comports with the long-standing, fundamental principle that parents have a constitutional right under the United States and Georgia Constitutions to the care and custody of their children. . . .
>
> [W]hen state actors engage in this sort of Orwellian policymaking disguised as judging, is it any wonder that so many citizens feel as if the government does not speak for them or respect the private realm of family life. . . .
>
> As this Court has rightly recognized, the constitutional right of familial relations is not provided

> by government; it *preexists government*. Indeed, this cherished and sacrosanct right is not a gift from the sovereign; it is our natural birthright. Fixed. Innate. Unalienable. Thus, regardless of a court's personal feelings or perception of a parent's fitness to care for or retain custody of his or her child, careful consideration of these bedrock constitutional principles and safeguards must remain central to each case without exception. And when this fails to occur, we will not hesitate to remind our trial courts of the solemn obligation they have to safeguard the parental rights of all Georgians.

(emphasis supplied) (punctuation and citations omitted). Unfortunately, this Court's repeated emphasis is made necessary because trial courts continue to apply their discretion in unconstitutional ways.

PROCEDURAL DUE PROCESS

In Georgia, the best interest of the child standard is the standard that is applied in custody matters, and specifically when the Court is seeking a resolution of custody between two fit parents. O.C.G.A. § 19-9-3(3) provides some guidance as to what the Court should consider in attempting to find the best interests of the child.

However, the factors listed in O.C.G.A. § 19-9-3(3) are subjective, non-exhaustive, and non-quantifiable. Much like the mythical "reasonable man," the best interests of children are interpreted by human judges, with O.C.G.A. § 19-9-3(3) as their non-exclusive guidance. Without question, these best interests are interpreted quite differently from one courtroom to the next, resulting in parents

with similar circumstances receiving completely different outcomes. One need only compare the instant case to the case of Willis v. Willis, 288 Ga. 577 (2011) to observe this phenomenon.

Such irreconcilable outcomes are inconsistent with sound public policy, which calls for outcomes that are both predictable and stable. See Landrum v. Infinity Safeguard Ins. Co., 734 S.E.2d 520, 523 (Ga. Ct. App. 2012). While Justice Hawes seemed to favor a custody standard in favor of mothers, his fear of unbridled discretion in judges making custody decisions was spot-on:

> Discretion is a mystical word, each judge using his own discretion to determine what it means. . . . [D]iscretion as, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague and fanciful, but legal and regular. . . . Under the `discretion' vested in him, no judge has authority to disregard or even to impair any acknowledged or established right of a party by its exercise, and if he does so, it would seem to follow, as a necessary consequence, that he abuses that discretion. . . . The discretion of a judge is said to be the law of tyrants. It is always unknown; it is different in different men; it is casual, and depends upon constitution, temper and passion. In the best, it is every vice, folly, and passion to which human nature is liable. . . .

Mathews v. Mathews, 230 Ga. 779, 784-86 (1973) (punctuation and citations omitted).

Just this past year, Justice Gorsuch of the United States Supreme Court also wrote to express his concern that "[v]ague laws invite arbitrary power." Sessions v. Dimaya, 138 S. Ct. 1204, 1223 (2018).

> The implacable fact is that this isn't your everyday ambiguous statute. It leaves the people to guess about what the law demands—and leaves judges to make it up. You cannot discern answers to any of the questions this law begets by resorting to the traditional canons of statutory interpretation. No amount of staring at the statute's text, structure, or history will yield a clue.

Id. at 1232. No matter how well-intentioned O.C.G.A. § 19-9-3(3) may be, its application in a constitutional vacuum is subject to the exact same criticisms that Justice Gorsuch levels at the statute at issue in Sessions.

EQUAL PROTECTION

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution guarantees that persons similarly situated will have the law applied equally to all such persons:

> The equal protection test focuses on whether the "ends" to be reached by the governmental classification are legitimate and whether the means employed to achieve those ends are substantially related to them . . . . The equal protection test is further complicated by the addition of differing standards of scrutiny depending upon the area being examined. Strict scrutiny is utilized for those areas of suspect classifications where discrimination against a particular class has traditionally existed or where *paramount constitutional rights are abridged.*"

Hughes v. Parham, 243 S.E.2d 867, 241 Ga. 198 (1978) (emphasis supplied).

As discussed earlier in this Part under Substantive Due Process, both the United States Supreme Court and the Supreme Court of Georgia, in addition to this Court, regard parental rights as some of the most fiercely guarded rights in existence. Strict scrutiny applies whenever government seeks to intrude upon these rights.

It has long been established that once a father is adjudicated the legal father of his child, he stands on equal footing with the mother. Sims v. Pope, 228 Ga. 289, 291 (1971). O.C.G.A. § 19-9-3(a)(1) has long required trial courts to consider both parents as potential custodians.

Once the parents are on equal footing legally, it is difficult—if not impossible—to argue that they are not similarly situated. The Supreme Court of Georgia has long applied three presumptions concerning parents: (1) the parent is a fit person entitled to custody, (2) a fit parent acts in the best interest of his or her child, and (3) the child's best interest is to be in the custody of a parent." Clark v. Wade, 273 Ga. 587, 591 (2001). While Clark v. Wade involved a grandparent's challenge to parental custody, these presumptions do not somehow evaporate when the context is shifted to a parent's challenge of the other parent's right to equal contact with the child, or of the child's right of equal access to both parents.

Arguments to the contrary suggest that trial courts are akin to vampires from classic horror novels, such as *Dracula*. These creatures are unable to enter a home and suck the blood of its inhabitants unless someone living in that home invites them in. Similarly, trial courts are seemingly without power to feast upon the fundamental Constitutional rights of parents and children when a mere grandparent seeks to challenge them. See Clark v. Wade, 273 Ga. 587 (2001) and Troxel v. Granville, 530 U.S. 57 (2000). However, when one of the two parents "invites" the trial court in by initiating custody litigation, all of the protections and concerns raised in those cases disintegrate.

There is absolutely no logical or rational justification for this. If anything, a trial court's role should be to jealously protect a child's right of equal access to both parents in custody cases. It is in this context that both parents are likely to attempt to hoard parental power in ways that are highly effective in achieving vengeance against one another, but that are incompatible with what is in the best interests of the child.

In this case, both parents were found to be fit and proper parents according to unrefuted testimony. [R2: 63-64, para. 5(f)]. If the presumptions of Clark v. Wade were properly applied in this context, the trial court would have found that both of these fit and proper parents were entitled to share joint physical custody.

However, by granting primary physical custody to the Mother and denying the Father the right to overnight visits until the Minor Child is five years old, the trial court seemingly rebutted such presumptions without any evidence to do so. Although the trial court stated its preference for the Mother's rights by stating that "I sincerely believe a small child that's been with the mother needs to stay with the mother," [T8: 101], the trial court utterly failed to explain any basis for this preference, other than sincere belief.

Even if one were to assume that trial courts are indeed "vampires" who can disregard the Clarke and Troxel protections once "invited in" by one parent or the other, the facts in this case overwhelmingly supported the Father's claim for primary physical custody. The Father held a lease for a house in which the child had a room of his own, [T8: 28-30, 32], was married to and living with his wife, [T8: 30], and was employed, making sufficient income to support the child. [T8: 37].

By contrast, the Mother was living in a home with her parents, the father of her newest child to whom she was not married, the Minor Child, and her grandmother. [T8: 5-6]. The Minor Child was sharing a room with the Mother's grandmother (i.e. the child's great-grandmother), [T8: 6], the Mother was the aggressor in two incidents of domestic violence against the Father, [T8: 8-9, 34-35, 75-76], and the Mother was unemployed, being supported entirely by her parents,

her boyfriend, and public assistance. [T8: 10-13]. The only area in which the Mother had a clear advantage over the Father was in time spent with the child. However, she clearly achieved this advantage through vengeful gatekeeping behavior, as she denied meaningful access of the Father to the Minor Child once he had moved on romantically. [T8: 22-25, 183-193].

Under these facts, the Father should have been awarded, at a minimum, joint physical custody had the presumptions of Clark v. Wade and equal protection been properly applied.

CONCLUSION

For all of the above reasons, the trial court's award of primary physical custody to the Mother should be reversed and remanded with instruction to give due consideration to the feasibility of a joint physical custody arrangement, as well as findings and conclusions that give effect to O.C.G.A. §§ 19-9-3(d) and 19-9-6. This Court should also encourage—if not require—the Ocmulgee Circuit to revisit its custody policies contained in its "standard" visitation order to ensure that these policies align with the custody policies of the State of Georgia.

Further, the trial court's limitations on the Father's overnight visits with the Minor Child until the age of five (5) should be reversed as being without evidence to support them.

Finally, this Court should once again admonish all trial courts of this state of the importance of applying O.C.G.A. § 19-9-3(3) not in a vacuum, but with full and due regard to the requirements of the United States Constitution and of the Constitution of the State of Georgia.

Counsel for the Father implore this Court to give the issues raised in this appeal its careful and undivided attention. Parents' rights of access to their children, and children's analogous rights of equal access to their parents, now form perhaps the single most compelling issue of civil rights currently facing our society. We are just now beginning to learn the damage that has been done to our children in the decades since the proliferation of modern divorce.

No aspect of society is untouched by the effects that differing custodial arrangements have on our children and on our children's development as they so quickly become the adults that will lead our nation. Despite the yeoman's work that social scientists have performed in studying these issues, many members of our profession remain willfully, purposefully, and disturbingly ignorant of these social scientists' conclusions. The credibility of our judges, our profession, and the very institutions of our court system is threatened as a result.

Given this vital importance, we emphatically believe that this Court's opinion should be published, regardless of what the outcome may be. The accessibility of this Court's opinion to the people of the State of Georgia and to the

elected lawmakers in the General Assembly will lead to much-needed awareness of and examination of these critical considerations in the State of Georgia.

Respectfully submitted this 12th day of February, 2019. This submission does not exceed the word count limit imposed by Rule 24.

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IN THE COURT OF APPEALS
STATE OF GEORGIA

TYLER PERRY, Appellant, vs. KAITLYN JENKINS, Appellee.	CASE NUMBER: A19A1309

CERTIFICATE OF SERVICE

This is to certify that I have served a true and correct copy of the foregoing Brief of Appellant by depositing a copy of same in the United States Postal System with adequate postage affixed thereto to insure delivery, addressed as follows:

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