IN THE COURT OF APPEALS
STATE OF GEORGIA

TYLER PERRY, Appellant, vs. KAITLYN JENKINS, Appellee.	CASE NUMBER: A21A0969

AMENDED 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 shall hereinafter be referenced as "[R. 2]" for Record page 2; "[R. 25-27]" for Record pages 25 to 27; and so on.

This matter previously came before this Court in Appeal Case No. A19A1309 (hereinafter "First Appeal"). In the First Appeal, this Court reversed and remanded "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." See Order of the Court of Appeals of Georgia in the First Appeal, entered on October 29, 2019, p. 6 (hereinafter "First Appeal Order"). This Court's Remittitur was filed with the Morgan County Clerk's office on November 21, 2019. [R. 7]. By May 15, 2020, the trial court had produced no new order as instructed by this Court. [R. 8]. At that time, the Father requested another hearing, believing that the trial court may need additional information, testimony, or argument to help it make its decision. That hearing was scheduled for June 17, 2020. [R. 8]. When the hearing was called, the trial court indicated that it did not wish to hear any additional information or argument in the case and that it just

needed to rewrite the Final Order to include the information it used in consideration of joint physical custody in this case.[1]

The Father then filed a Motion for Order on Remand on June 19, 2020, requesting that a Final Order be filed within thirty days from the date of the scheduled hearing. [R. 7-18]. A Response to Motion was filed on July 7, 2020, [R. 19-22], and a Reply to Response to Motion was filed on July 17, 2020. [R. 23-46].

The new Final Order was finally filed by the trial court on December 30, 2020. [R. 47-58]. It is this Final Order that Father is now appealing. The Father's Notice of Appeal was timely filed on January 26, 2021. [R. 59-60]. An Amended Notice of Appeal and Certificate of Service were filed on February 2, 2021. [R. 1, 61].

The Father performed a "track changes" analysis of the trial court's two versions of its Final Order (hereinafter "Track Changes Final Order").

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[1] While no transcript is available of this hearing, the hearing was conducted via Zoom. The entire hearing consists of two minutes and 43 second and is available at https://www.facebook.com/GeorgiaParentsForKidsRights/videos/723657155117034.

Unfortunately, Rule 42(g) does not permit such demonstrative exhibits to be attached to a brief. Instead, the results of the Track Changes Final Order analysis are discussed in the relevant sections below.

PART TWO
ENUMERATIONS OF ERROR

ENUMERATION OF ERROR NO. 1

The trial court failed on remand to give due consideration to joint physical custody upon finding both parents to be fit and proper, instead attempting to insert a minimal number of "magic words" into the previous order to make it appear that due consideration had been given. [R. 47-54].

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. [R. 52].

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

As recited in the First Appeal, 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." Counsel for the Father immediately made an oral request for written findings of fact. 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).

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," and the trial court awarded attorney fees based upon the child custody statute, O.C.G.A. § 19-9-3. [R. 53-54, 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 Enumeration of Error No. 1, 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).

With regard to Enumeration of Error No. 3, the appropriate standard of review for a trial court's interference with any aspect of a person's parental rights is constitutional strict scrutiny. Parental rights have been recognized as fundamental liberty interests by the United States Supreme Court since at least the

year 2000. "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." Troxel v. Granville, 530 U.S. 57, 65 (2000). See also Brooks v. Parkerson, 265 Ga. 189, 192 (1995). Even the slightest governmental interference with a person's fundamental liberty interest in the care, custody, and control of their children must survive constitutional strict scrutiny:

> The right to rear children without undue governmental interference is a fundamental component of due process. Substantive due process under the Fourteenth Amendment "forbids the government to infringe certain `fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling government interest."

Nunez v. City of San Diego, 114 F.3d 935, 951-52 (9th Cir. 1997) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997) and applying constitutional strict scrutiny in determining that the City of San Diego's curfew unconstitutionally violated parents' substantive due process rights).

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, choosing instead to add "magic words" to the Order on remand.

This Court of Appeals has stated the obligation of trial courts to give due consideration to shared custody of minor children with their parents if both parents are found to be fit. (See In Interest of A.R.B., 209 Ga. App. 324, 433 S.E.2d 411 (1993); Baldwin v. Baldwin, 265 Ga. 465, 458 S.E.2d 126 (1995)). This policy of considering shared custody is becoming more prevalent across the country as there is more research to demonstrate its efficacy and benefit to the children and their families and as the society continues to evolve into a more egalitarian form, considering the harm that adherence to strict gender roles can have, recognizing that both parents should be given the opportunity to nurture their children and that every child is entitled to as much time as possible with both parents.[2]

[2] 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, including legislation pending in Georgia (see HB 96, available at https://www.legis.ga.gov/legislation/58935, seeking to amend O.C.G.A. § 19-9-3 to state that there shall be "a presumption, rebuttable by clear and convincing evidence to the contrary, that a child's interests are best served by equal or approximately equal parenting time with each parent."), there has perhaps never

Beginning with In Interest of A.R.B., 209 Ga. App. 324, 433 S.E.2d 411, (1993), the policy was further developed by Baldwin v. Baldwin, 265 Ga. 465, 458 S.E.2d 126 (1995) where the Court clearly found that "where, 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 added). Such "due consideration" requires the trial court to "set forth

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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)(2)).

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). It was this requirement that the trial court did not fulfil in either of its versions of its Final Order.

In the First Appeal Order, this Court found that while the trial court enumerated 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 it written order make clear that such an analysis occurred." First Appeal Order, p. 6. This Court further stated that it does "not require magic words or phrases to demonstrate that a feasibility analysis occurred in the trial court…we do require more than a passing reference or innuendo when making determinations regarding the joint physical custody of children." Id.

In its second version of its Final Order, the trial court once again found both parties to be fit and proper. [R. 50]. Thus, the requirement for due consideration of joint physical custody was once again triggered, and the trial court was thus required to "set forth facts and conclusions underlying its consideration and rejection of joint custody. . . ." Baldwin v. Baldwin, 265 Ga. at 465[footnote 1], 458 S.E.2d at 127[footnote 1].

The Track Changes Final Order showed exactly what the trial court changed about its original order. Immediately under the title "FINAL ORDER," the trial court correctly recited the procedural posture of the case on remand. This paragraph includes the trial court's pronouncement that "for the reasons set forth below, *after expressly considering joint physical custody,* this Court finds that join physical custody would not be in the best interests of the child in this case." [R. 47] (emphasis supplied). However, simply stating that the trial court expressly considered joint physical custody does not make it so. Obviously, more is required. Notably, the trial court made absolutely no changes whatsoever to its original version of the Final Order under the section entitled "FINDINGS OF FACT."

It is under the section entitled "CONCLUSIONS OF LAW" where the trial court added the following language: "because Respondent/Mother has always primarily responsible for the child and the child's needs, Petitioner/Father's work schedule would require the child to be with another caregiver than himself when the Respondent/Mother is available, and Petitioner/Father lives no less than 40 minutes from Respondent/Mother. These facts, as well as the others set forth below, result in Respondent/Mother providing a much more stable and predictable environment for this child and the distance between the residences of the parties is not conducive to joint physical custody."

These 82 words constitute the entirety of the substantive work the trial court completed on its Final Order over the course of the 405 days that elapsed between the filing of this Court's remittitur with the Morgan County Clerk's Office on November 21, 2019 and the filing of the second version of the trial court's Final Order on December 30, 2020.

Broken down into its component parts, the additions to the trial court's ruling contains three points of fact: (1) the mother has always been primarily responsible for the child and the child's needs; (2) the father's work schedule would require the child to be with another caregiver while the mother is available; and (3) the parties live no less than 40 minutes away from each other.

Point 1 would be true for either the mother or the father in all custody cases. In all such cases, one parent or the other will have acted as the "primary" caregiver to the child, albeit with varying degrees from case to case. The trial court does not explain how or why it believes that the degree of caregiving difference between the parents in the past in this case is somehow more acute than it would be in a typical case in which joint physical custody would be appropriate. The trial court does not state that the Father is in any way unable to provide caregiving, or that the Father is even less capable of providing caregiving than the Mother. Further, the trial court gives no recognition to the fact that the Mother denied access to the child for months, thereby denying the Father the opportunity to be responsible for the child

and his needs. In short, the trial court sets forth a fact here, but provides no logical connection between this fact and its conclusion that joint physical custody is inappropriate in this case. The trial court's analysis on this point is entirely inadequate, particularly considering the fundamental liberty interest that is being restricted by the trial court's actions.

Point 2 provides a conclusion that the father's work schedule and, apparently, the mother's lack thereof, would somehow require the child to be with a nonparent caregiver at some times if joint physical custody were awarded. There is a lot to unpack here. First, the trial court offers no facts whatsoever that lead to its conclusions, and there appear to be no facts concerning the parents' respective work situations anywhere in the trial court's second version of its Final Order. This runs afoul of Baldwin, as that case requires both facts *and* conclusions that demonstrate that due consideration has been made by the trial court. 265 Ga. at 465[footnote 1], 458 S.E.2d at 127[footnote 1].

Second, the trial court apparently concludes that the mother will never work again, and thus will never have a work schedule that will interfere with her ability to provide care for the child. Simultaneously, the trial court apparently concludes that the Father's work schedule will always prevent the Father from providing care for his child, even when the child reaches school age (as he had at the time of the filing of the Final Order on December 30, 2020). The trial court offers no rational

basis for these conclusions, such as an analysis of the work history and financial needs of each parent. Instead, these conclusions appear to be based entirely on gender bias, or outdated notions of gender roles. At best, these conclusions are completely unsupported by fact-based analysis and, at worst, the products of illegal gender-based discrimination.

Third, the trial court apparently concludes that any time spent with a nonparent caregiver would somehow be harmful to the child. Once again, the trial court's apparent conclusion is unsupported by findings of fact. Additionally, this conclusion is particularly vulnerable because no evidence concerning the subject of nonparent caregiving was ever presented to the trial court, not to mention any evidence of systematic harm that befalls children who are exposed to nonparent caregiving. Put plainly, this is precisely the sort of "passing reference or innuendo" that this Court warned would not be sufficient to comply with the requirements of Baldwin. First Appeal Order, p. 6.

Point 3 recites the fact that the parents live no less than 40 minutes away from each other and the conclusion that this distance is not conducive to joint physical custody. Plainly stated, this is a non sequitur. The 40-minute distance (if even that) between Madison, Georgia and Watkinsville, Georgia is ideal for a joint physical custody arrangement, particularly when one gives due consideration to the benefits of joint physical custody and the relative harm associated with primary

physical custody arrangements, as the clear public policy of the State of Georgia compels. There is simply no rational basis for the trial court's conclusion here, and this conclusion begs the question of exactly what distance *would* qualify as "conducive to joint physical custody" in the eyes of this trial court.

The trial court goes on in the following paragraph to assert its compliance with the law. The trial court makes no further substantive additions, but instead cites more "magic words":

> The Court reached this conclusion by seriously considering O.C.G.A. § 19-9-3(d), the custody options under O.C.G.A. § 19-9-6, applying the factors contained in O.C.G.A. § 19-9-3. Urquhart v. Urquhart, 272 Ga. 548 (2000) and other relevant caselaw and applying this legal authority to the foregoing facts.

[R. 51]. That is the last change in the new Final Order from the previous Final Order. It is followed by the same recitation of the factors from O.C.G.A. § 19-9-3 as they apply to the Mother's care of the child that appeared in the original order. [R. 51-52].

The trial court made the same mistake that the trial court made in Floyd v. Gibson, 337 Ga.App. 474, 788 S.E.2d 84 (Ga. App. 2016), "that the vacated order simply needed to be amended . . . ," Id. at 476, 788 S.E.2d at 86, "that it did not 'see a need to re-litigate the case' and that it simply intended to amend its original order to 'comply with what the Court of Appeals wants,' which it described as simply adding 'magic words' to the prior order." That judge further stated, 'I stand

by my ruling, I just need an amended order to comply with the [Court of Appeals]'." Id. These words are substantially the same as those spoken by the trial court at the scheduled hearing on June 17, 2020. The Final Order filed on December 30, 2020 reflects this sentiment in its construction and should be reversed.

For this version of the trial court's Final Order, the Father waited over a year, until the day before the trial court judge retired. He did not have any overnight visits with his child until the child turned 5 years old in June 2020, coincidentally around the time the Father requested a hearing to assist the trial court by providing whatever information it needed to prepare the order. This Father continues to have a fraction of the time with his child compared to that which was granted to the Mother. There is no rational basis for this disparate treatment.

As with the original order, the trial court relegates the Father to a secondary role as a parent without an analysis of the facts and evidence support that a finding that a grant of joint or shared custody is not in the child's best interests and that granting the Mother primary physical custody would be in the child's best interests. Further, the trial court again attaches and orders the parties to comply with the provisions the standard Visitation Order for the Ocmulgee Circuit [R. 55] and the Standard Orders for Parenting for the Ocmulgee Circuit [R. 56]. The

existence and continued use of these "Standard" orders, which only consider weekend visitation for the non-primary parent, demonstrates that there is no room for other variations of parenting plans in the Ocmulgee Circuit. The determination of custody and visitation in this case was not unique, was not crafted for the particular circumstances of this case, and was not tailored to this child and to this family. Most importantly, it plainly was not and is not the product of "due consideration" of joint physical custody, and should therefore again be reversed.

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. [R. 52, para. 2(a)].

This restriction was apparently contrary to even Ocmulgee Circuit policies on custody, which apparently usually allow for overnight visitations. [R. 55]. 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)). The trial court concluded that both parents maintained "a nurturing and safe environment," [R. 52, 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." 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 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

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 the trial court identified no facts whatsoever in support of the ruling. Such discrimination on 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

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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.").

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." 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.[4] No such evidence was even offered in 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

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[4] 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.

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.

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 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. "The right to raise one's children is a fiercely guarded right in our society and law, and a right that should be infringed upon only under the most compelling circumstances." In re Interest of D.M., 793 S.E.2d 422, 424 (2016) (punctuation and citation omitted).

When any government entity—including a trial court—uses state power to interfere with a parent's fundamental liberty interests 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," [R. 50], 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 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, 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.

(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 but 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).

In 2018, 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) (italics added).

As discussed earlier in this Part under Substantive Due Process, both the United States Supreme Court and 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 those rights.

It has long been established that once the 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 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.

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 liberty interests 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 in the best interests of the child.

In this case, both parents were found to be fit and proper parents. [R. 50]. 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. The trial court clearly preferred the Mother's rights in this decision.

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. Given the trial judge's retirement, given the trial court's failure—after two attempts—to properly demonstrate the due consideration of joint physical custody required by law, and given the complete lack of evidence that the public policy of the State of Georgia favoring joint physical custody should not be followed in this case, the Court should remand with specific instruction that the trial court award joint physical custody to the parents and a parenting plan consistent with that award.

The Father also respectfully asks this Court to admonish the trial court to improve upon its glacial pace in addressing this Court's orders on remand. The trial court averaged about one word of substantive progress on its Final Order for every five days it worked on it. This would be unacceptable in any context, but is especially so when dealing with fundamental liberty interests such as parental rights, as this Court has correctly noted before:

> While this court is forever mindful and respectful of the enormous time constraints placed upon our state's trial court judges, and is reluctant to order time-specific compliance with its directives, we simply cannot overlook the particular facts of this case *where our direction to the trial court was issued over one year ago*. The trial court here was *not required to hold any evidentiary hearing to comply with our direction*, and has twice been requested by counsel over the past year to enter an order consistent with this court's July 13, 2015 opinion. In addition to the

> extraordinary time delay present in this case, this court cannot overlook the potential exigencies associated with the impending start of the school year for the minor child in this case.

Jewell v. Benton, No. A16E0035 (Ga. Ct. App. July 15, 2016) (emphasis supplied).

Counsel for the Father once again implores this Court to give the issues raised in this appeal its 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 23rd day of February, 2021. 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: A21A0969

CERTIFICATE OF SERVICE

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

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