IN THE COURT OF APPEALS
STATE OF GEORGIA

TYLER PERRY,	)	
	)	
Appellant,	)	
	)	
vs.	)	**CASE NO. A21A0969**
	)	
KAITLYN JENKINS,	)	
	)	
Appellee.	)	
	)	

BRIEF OF APPELLEE

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PART ONE
STATEMENT OF ADDITIONAL FACTS

This Court reversed and remanded the trial court's initial final order with instructions for the trial court "to give due consideration to the issue of joint physical custody." Order entered by the Court of Appeals of Georgia on October 29, 2019 (the "Appeal Order"), p. 6. This Court further recognized that "the trial court intuitively considered facts that would assist in making a determination regarding the feasibility of joint physical custody between the parties" but "neither the trial court's oral pronouncement or its written order make clear that such an analysis occurred." Id.

The trial court then issued an order dated December 30, 2020 taking into account the instruction in the Appeal Order (the "Trial Court Order"). In addition to many of the same arguments Appellant made in the previous appellate case, Appellant primarily complains in his Amended Brief of Appellant[1] that the trial court still did not give due consideration to a joint physical custody arrangement because (1) the Trial Court Order did not contain enough new acceptable material to Appellant and (2) the trial court used some sort of "magic words" in reaching its conclusions (the "Appellant's Brief"). Appellant's argument is facially and

[1] Appellee has never received a brief from Appellant other than this Amended Brief of Appellant so Appellee is unclear what was, in fact, amended.

substantively weak for the reasons set forth below and should be rejected by this Court.

In the Trial Court Order, the trial court made the following findings of fact and conclusions of law:

- The minor child has been in the custody and care of Mother since birth. R – 49.
- The parties separated between 1 ½ and 2 years prior to trial in 2017. R - 49.
- Father had visitation with the minor child but rarely had overnight visitation – one in September, 2017. R – 49.
- Mother was primarily responsible for taking the minor child to doctor's appointments both when the parties were together and when they were not. R – 49.
- The minor child is intelligent, happy, well-behaved, and well cared for. R – 50.
- Mother has provided the minor child with food, clothing, medical care, day-to-day needs, and other necessary basic care, prior to child support payments being made and with the payment of child support. R – 51-52.

- Mother has maintained a stable home environment for the child. R – 52.

PART TWO
RESPONSE TO STATEMENT OF PRESERVATION OF ERROR

Father claims that he preserved error by requesting written findings of fact after the trial court made its oral pronouncement of the ruling. O.C.G.A. § 19-9-3(a)(8) provides that, in a contested child custody matter, a request for written findings of facts and conclusions of law must be made "on or before the close of evidence . . . ." O.C.G.A. § 9-11-52(a) provides that "in all nonjury trials . . . the court shall upon the request of any party made prior to such ruling, find the facts specially and shall state separately its conclusions of law." O.C.G.A. § 9-11-52(b) expressly excludes "custody actions" from the purview of O.C.G.A. § 9-11-52. Therefore, the plain language of O.C.G.A. § 19-9-3(a)(8) and O.C.G.A. § 9-11-52(b) show that error was not preserved by said requests.

PART THREE
RESPONSE TO STANDARDS OF REVIEW

Appellee agrees that the standard of review set forth in Appellant's Brief for Enumerations of Error No. 1 is correct but Appellee believes the that following case provides a more detailed and accurate explanation of the standard:

> Where the trial court has exercised its discretion and awarded custody of children to one fit parent over the other fit parent, this Court will not interfere with that discretion unless the evidence shows the trial court clearly

> abused its discretion. Where there is any evidence to support the decision of the trial court, this court cannot say there was an abuse of discretion.

Welch v. Welch, 277 Ga. 808, 809 (2004).

Appellee agrees that the standard of review set forth in Appellant's Brief for Enumeration of Error No. 2 and No. 3 are correct.

ARGUMENT AND CITATION OF AUTHORITY

1. The Trial Court Gave Due Consideration to Joint Custody

Appellant states that the trial court did not give due consideration to Appellant's claim for joint physical custody. Appellant's Brief, pp. 7-17. As set forth in Baldwin v. Baldwin, 265 Ga. 465, 465 (1995), a trial court must give "due consideration to the feasibility of a joint custody arrangement" where the trial court finds that both parents are fit and proper. O.C.G.A. § 19-9-6(4) defines "joint custody" as follows:

> "Joint custody" means joint legal custody, joint physical custody, or both joint legal custody and joint physical custody. In making an order for joint custody, the judge may order joint legal custody without ordering joint physical custody.

The Trial Court Order expressly provided the parties with joint legal custody of the minor child. R –52. Father's attorney asked for the following at trial: primary physical custody to Father or a joint physical custody arrangement. R – 50.

As recognized in the Appeal Order, the trial court intuitively gave due consideration to a joint physical custody arrangement in this case. In the Trial

Court Order, the trial court expressly identifies its rationale for its finding that joint physical custody was not appropriate in this case by focusing on these primary facts:

(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 unavailable; and

(3) the parties live no less than 40 minutes away from each other.

The trial court first recognized the reality of the relationship of these parties: Mother is, in fact, the primary physical custodian of the minor child. R – 49-52. Father incorrectly argues that one parent is always primarily responsible for a child in custody cases. Appellant's Brief, p. 12. There are certainly cases where there is a true sharing of parental responsibilities, but this case is not one of them. Mother was always the primarily responsible parent for the minor child because those were the roles taken by the parents in this case. R – 49-52. After separation, Father visited regularly with the child but did not exercise overnight visitation. R – 49. Mother was responsible for taking the minor child to doctor's appointments while the parties lived together and after they separated. R – 49, 51. Further, Mother was responsible for the child's educational development and provided for the

child's basic necessaries and well-being prior to and while Father was paying child support. R - 51-52.

In Arthur v. Arthur, 293 Ga. 63 (2013), the Georgia Supreme Court found that this fact alone was enough to support the award of primary physical custody to one fit parent over another. In Arthur, the Supreme Court affirmed a trial court's award of primary physical custody to a mother, where both parents were fit, due to the fact that the mother had always been the children's primary caretaker. Id. at 64. Therefore, based on Arthur, the trial court's finding that Mother was historically the primary physical custodian of the child is sufficient alone to support the trial court's decision to award primary physical custody to Mother.

Here, however, the trial court provided two (2) additional compelling justifications for denying the request for joint physical custody: the distance between the residences of the parties and Father's work schedule. There is no other reason for the trial court to consider the distance between the parents' residences and the number of hours each parent works except when considering the feasibility of a joint physical custody arrangement. Importantly, these facts shed light on why the trial court would not order a joint physical custody arrangement in this case. At the time of the trial, the child was soon-to-be eligible to attend pre-kindergarten. If joint physical custody had been awarded, the child would have a daily commute of up to about 1 ½ hours each day he was with Father from Father's

residence to school. Therefore, the trial court held that the distance between the parents' respective residences and Father's residence from the child's school was a ground for denying the joint physical custody arrangement and would not be in the child's best interests.

Further, Father testified at trial that his work schedule would require the minor child to be with a third party caregiver if the child was in his physical custody on a joint physical custody basis when Mother would be available to be with the child. R – 50-51. The trial court clearly placed preference over having the child with a parent rather with a daycare provider and such a preference is appropriate and in the best interests of the child. R – 50. In the Appellant's Brief, Father seems shocked that the trial court would issue an order based on these facts because the facts could change in the future. Appellant's Brief, p. 13. That is the reason the parties have the ability to seek to modify child custody based on a change in circumstances.

Father next claims that the existence of the Ocmulgee Circuit's standard visitation order is evidence of the fact that joint physical custody is not awarded in the Morgan County Superior Court. The trial court addressed this concern when raised by Father's trial attorney by stating: "we certainly deviate – or often deviate from the standard visitation." In his Brief, Father purposefully did not include this fact in his Brief because the trial court addressed this argument directly. Further,

Father distorts Mother's attorney's argument. The argument was and is that joint physical custody is not appropriate under these facts. The trial court's statement that standard visitation is often not followed is similar to Mother's attorney's practice experience in the Ocmulgee Circuit.

2. The Trial Court's Ruling Does Not Violate the Public Policy of the State of Georgia

While the Trial Court Order does not violate the public policy of the State of Georgia, it should be noted that the exclusion of overnight visitation is no longer an issue because, as stated in Appellant's Brief, the minor child has been having overnight visits with Father since June, 2020. Therefore, this issue appears to be moot.

The trial court's ruling in this case provided Father with weekend visitation from 9:00 a.m. to 5:00 p.m. on Saturdays and Sundays until the child is five (5) years old. R – 67. Father had been exercising this same visitation under the Temporary Order. R – 26. Father did not exercise overnight visitations with the child since the separation of the parties which occurred 1 /12 to 2 years prior to trial except for one overnight visit in September, 2017. R – 49. The trial court stated it believed a "small child that's been with the mother needs to stay with the mother." This oral pronouncement was made prior to any request for written findings of fact or conclusions of law. The trial court could have just as easily said

a "small child that's been with the [guardian, father, or mother] needs to stay with the [guardian, father, or mother]." Given the facts in this case and the findings contained in the Trial Court Order, it is unsurprising that the trial court would find that this young child who has spent his entire life with one parent should continue to spend his life with that same parent with visitation provided to the other parent. As cited earlier, the Georgia Supreme Court affirmed a trial court's award of primary physical custody to a mother, where both parents were fit, due to the fact that the mother had been the children's primary caretaker. Arthur v. Arthur, 293 Ga. 63, 64 (2013).

Father cites a number of cases to support this argument but an assessment of each of these cases establishes that each case is easily distinguishable from the facts of this case. Father first cites to Brandenburg v. Brandenburg, 274 Ga. 183, 184 (2001) for the proposition that the trial court abuses it discretion when it places "an unnecessarily burdensome limitation on the exercise of a parent's right to visitation." Id. at 184. In Brandenburg, the trial court prohibited the exercise of visitation in the presence of the father's girlfriend. Id. at 183, 184. No evidence was presented at trial showing that father's girlfriend would adversely affect the children. Id. at 184. For this reason, the Georgia Supreme Court found the trial court abused its discretion. Id. Here, there is no restriction as to who can be around the child when he is with Father.

Father next cites to Simmons v. Williams, 290 Ga. App. 644 (2008). This case involved a prohibition from any party having overnight guests of the opposite sex during periods of physical custody or visitation. Id. at 648. The Georgia Court of Appeals held that the prohibition was enforceable because it was narrowly drawn and meant to protect the children from exposure to certain conduct. Id. Again, here there is no restriction as to who can be around the child when he is with Father.

Father then cites to Turman v. Boleman, 235 Ga. App. 243 (1998). Turman involved a disturbing order that prohibited contact with a specific African-American male as well as "any other African-American male". Id. at 243. Yet again, in our case, the trial court did not prohibit the child's contact with any person or class of persons.

Neither Brandenburg, Simmons, nor Turman involve facts remotely similar to this case and their application to this case would be misplaced. The trial court provided Father with no prohibitions on the child's exposure to third parties when in the custody of Father. The trial did, however, order that overnight visitations will not start until the child is more emotionally ready for such a change. R – 52. Mother testified that, as the child's primary caretaker, she did not believe that the minor child was ready for overnight visitation at this point. T – 25:2-6. There was NOT any testimony from any other person to contradict this statement. In fact,

Father was provided with this same visitation in the Temporary Order. Father never attempted to modify said visitation. Again, overnight visitation is now occurring so this issue is moot and Appellee is not aware of any relief available to address an issue that no longer exists.

Next, Father argues that the Trial Court Order in this case constitutes an "arbitrary sex classification" and states that there is no "credible scientific evidence" to support the Trial Court Order. First, Father's implication of an arbitrary sex classification is not well-founded as explained numerous times herein, the trial court could have just as easily said a "small child that's been with the [guardian, father, or mother] needs to stay with the [guardian, father, or mother]." Mother has been the primary caretaker of the child his entire life. R – 64. Second, no scientific evidence was entered into this case at the trial level so the introduction of such evidence for the first time on appeal is impermissible. Hawkins v. OB-GYN Associates, P.A., 290 Ga. App. 892, 896 (2008). Mother was not given an opportunity to cross-examine any experts who offered such evidence at trial.

3. The Trial Court's Ruling Did Not Violate Due Process or Equal Protection

a. Substantive Due Process Was Satisfied In This Case

Father claims that the trial court violated his substantive due process rights under the 14th Amendment to the United States Constitution because 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 . . . ." Appellant's Brief, p. 26. Stated another way, it appears that Father is arguing that Father has a constitutional right to joint physical custody or equal parenting time unless the trial court identifies a compelling state interest showing otherwise. Id. at pp. 25-26.

To support this argument, Father first relies on Troxel v. Granville, 530 U.S. 57 (2000) in which the United States Supreme Court found unconstitutional a State of Washington statute that permitted any party to petition for court-ordered visitation rights if such visitation was in the best interest of the child even if the custodial parent objected. The Supreme Court found that "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." Id. at 65.

Father also relies on In re Suggs, 249 Ga. 365 (1982), Brooks v. Parkerson, 265 Ga. 189 (1995), Washington v. Glucksberg, 521 U.S. 702 (1997), Turman v. Boleman, 235 Ga. App. 243 (1998), Brandenburg, Willis v. Willis, 288 Ga. 577 (2011), and Borgers v. Borgers, 347 Ga. App. 640 (2018) to attempt to advance his substantive due process violation argument. Here is a brief synopsis of the

holdings in each of these cases and a brief explanation of why their application to this case is misguided:

In Suggs, the Georgia Supreme Court held that there was not clear and convincing evidence to support the termination of parental rights where the evidence tended to establish the mother was immature with economic hardships and a child with issues that may require special care. In re Suggs, 249 Ga. at 367. The case before this Court does not involve the termination of a biological parent's rights and placement with the child with a third-party relative.

In Brooks, the Georgia Supreme Court held that the grandparent visitation statute was unconstitutional because the statute did not "clearly promote the health or welfare of the child and does not require a showing of harm before state interference is authorized." Brooks v. Parkerson, 265 Ga. at 194. The case before this Court does not involve a grandparent visitation issue and involves a different analysis given the issue in that case.

In Washington v. Glucksberg, the United State Supreme Court upheld the constitutionality of the State of Washington's ban on physician-assisted suicide. Washington v. Glucksberg, 521 U.S. at 709. Specifically, the Court found that the 14th Amendment was not violated by denying terminally ill adults the right to choose death over life. Id.

As stated earlier in this brief, Turman involved a disturbing order that prohibited contact with a specific African-American male as well as "any other African-American male". Turman v. Boleman, 235 Ga. App. at 243. Clearly, Turman is not similar to the case currently before the court because there is no prohibited contact with any third parties.

In Brandenburg, the trial court prohibited the exercise of visitation in the presence of the father's girlfriend. Bradnenburg v. Brandenburg, 274 Ga. 183, 184 (2001). No evidence was presented at trial showing that father's girlfriend would adversely affect the children. Id. at 184. For this reason, the Georgia Supreme Court found the trial court abused its discretion. Id. There is no prohibited contact with third parties in the Trial Court Order in this case.

In Willis, the trial court divorced the parties and, among other rulings, ordered a joint physical custody arrangement for their child. Willis v. Willis, 288 Ga. 577 (2011). The Georgia Supreme Court affirmed the trial court's ruling of joint physical custody because the trial court expressly found it in the child's best interest after hearing evidence of each parent's relationship with the child and from a social service coordinator who thought joint physical custody would be best in that situation. Id. at 579-580. It should be noted that the Supreme Court did not hold that the result reached in Willis was the only possible result that could have be reached in that case; rather, the Supreme Court simply found that the trial court did

not abuse its discretion in reaching the custody finding it did. Id. at 580. So, application of Willis to this case seems limited at best given different facts and its holding.

In Borgers, the Georgia Court of Appeals found that a trial court exceeded its authority by modifying the legal rights of the parties in a contempt proceeding. Borgers v. Borgers, 347 Ga. App. at 645. Despite the mother being the primary physical custodian and final decision-maker, the trial court ordered the child of the parties being enrolled in school instead of being home-schooled. Id. at 642-643. Here, the trial court provided the parties with joint legal custody and has not restricted either party's ability to be involved in decisions affecting the minor child. Further, the procedural issue in Borgers was the larger issue in that case, namely that the trial court overstepped its authority by changing the legal rights of the parties in a contempt proceeding. Id. at 645.

The common theme of each of these cases is that none of these involve a fact pattern remotely similar to our case - where a parent was provided with joint legal custody and visitation with his child but that parent is seeking relief for greater custodial rights or visitation time than the trial court provided. The cited cases are for the proposition that the State of Georgia, through the trial court in this case, cannot interfere with Father's right to raise his child. However, the trial court's ruling provides Father with the ability to participate in decision-making process by

awarding joint legal custody and provides Father with contact similar to what Father was exercising before and after legitimation of the child. R – 52.

b. Procedural Due Process Was Satisfied In This Case

Father appears to argue that O.C.G.A. § 19-9-3 provides a trial court with unconstitutional discretion. Appellant's Brief, pp. 28-30. Much of Father's argument on this issue relates to his view of the problematic nature of judicial discretion and its application. Id. Georgia Divorce, Alimony, and Child Custody states the process clearly:

> The judge may take into consideration all the circumstances of the case . . . in determining to whom custody of the child should be awarded. The duty of the judge in all such cases will be to exercise its discretion to look to and determine solely what is for the best interest of the child and what will best promote the child's welfare and happiness and to make his or her award accordingly. An "abuse of discretion" occurs either when a ruling by the trial court is unsupported by any evidence of record or when a ruling which is within the court's discretion misstates or misapplies the relevant law.

Ga. Divorce, Alimony, & Child Custody, § 19:11. In the "Procedural Due Process" section, Father's appears to seek no relief from this Court on this basis but simply appears to making his feelings on this issue known to the Court. Further, other than simply claiming that O.C.G.A. § 19-9-3 provides trial courts with "unbridled discretion", Father has not demonstrated exactly where and how this statute is unconstitutional by providing discretion to the trial court to consider various factors when making a custody determination. This type of general concern is better directed at the legislature than the appellate courts.

c. There Is No Equal Protection Violation

Lastly, Father argues that the decisions of Clark v. Wade, 273 Ga. 587 (2001), Troxel v. Granville, 530 U.S. 57 (2000), and the Equal Protection Clause of the United States Constition require at a minimum that Father should have been provided joint physical custody at a minimum because once Father was legitimated, he stood on equal footing with Mother and should have been considered the better option given his biased view of the facts.

First, as noted by Father in his brief, Georgia law provides that both parents are on equal footing for a custody determination once the child is legitimated. Appellant's Brief, p. 30. Once Father deploys his Equal Protection Clause argument and concludes the parties would be similarly situated, the parties would appear to be at no different a position than once legitimation occurred. At this point, the trial court would be required to determine what is in the best interests of the child under O.C.G.A. § 19-9-3. In this case, the trial court clearly made a best interests of child determination using O.C.G.A. § 19-9-3. The finding in favor of Mother being the primary physical custodian and against joint physical custody are supported strongly by these facts:

- The minor child has been in the custody and care of Mother since birth. R – 49.

- Father had visitation with the minor child but rarely had overnight visitation. R – 49.
- Mother was primarily responsible for taking the minor child to doctor's appointments both when the parties were together and when they were not. R – 49.
- The minor child is intelligent, happy, well-behaved, and well cared for. R – 50.
- Mother has provided the minor child with food, clothing, medical care, day-to-day needs, and other necessary basic care, prior to child support payments being made and with the payment of child support. R – 51-52.
- The parties live no less than 40 minutes from one another. R - 49.
- Mother was unemployed and took care of the child full-time. R – 50, 52.
- Father works 40-48 hours per week, which severely limited the time he would actually be able to spend with the child if he was with Father. R - 52. Father testified he planned on putting the child into daycare when he was not able to care for the child.
- Mother has maintained a stable home environment for the child. R – 51.

Second, Father claims that once the fitness standard in Clark v. Wade, 273 Ga. 587 (2001) is met by both parents, then joint physical custody is required. Appellant's Brief, p. 31. This is clearly an incorrect statement of law. In Clark v. Wade, the Georgia Supreme Court held that a third party relative must establish under O.C.G.A. § 19-7-1 that parental custody would harm the child in order to rebut the statutory presumption in favor of the parent. Clark v. Wade, 273 Ga. at 599. The three presumption best interest standard test for cases arising under O.C.G.A. § 19-7-1 does not apply here; this standard applies in cases involving a dispute between a parent and a third party relative. Clark v. Wade, 273 Ga. at 593.

CONCLUSION

The Court of Appeals should affirm the trial court's ruling in this case. The trial court looked and determined what was in the best interest of the child and what would best promote his welfare. The trial court considered all possible custodial arrangements but deemed primary physical custody to Mother was appropriate given the facts and the application of the best interest standard and the factors contained in O.C.G.A. § 19-9-3. The trial court's ruling did not involve an abuse of discretion because it was supported by the evidence and was not a misstatement or misapplication of relevant law.

This submission does not exceed the word count limit imposed by Rule 24.

Respectfully submitted this 12th day of March, 2021.

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CERTIFICATE OF SERVICE

This is to certify that I have served a true and correct copy of the foregoing copy of the foregoing BRIEF OF APPELLEE 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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This 12th day of March, 2021.

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