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CLERK OF SUPERIOR COURT
MORGAN COUNTY, GEORGIA
SUCA2018000030
FEB 02, 2021 08:52 AM

Jody M. Higdon, Clerk
Morgan County, Georgia

IN THE SUPERIOR COURT OF MORGAN COUNTY
STATE OF GEORGIA

TYLER PERRY,	*	
Petitioner,	*	
	*	
v.	*	**CIVIL ACTION FILE NUMBER**
	*	**SUCA2018000030**
KAITLYN V. JENKINS	*	
Respondent.	*	
	*	

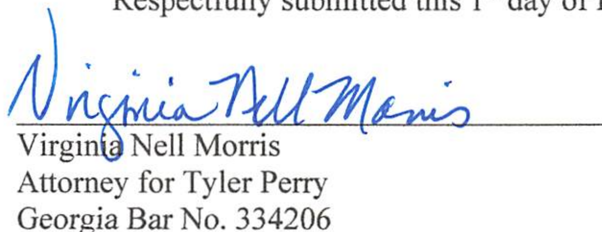
AMENDED NOTICE OF APPEAL

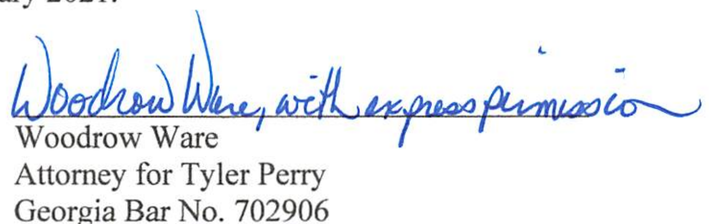
Notice is hereby given that Petitioner Tyler Perry, by and through counsel, hereby appeals to the Court of Appeals of Georgia the Final Order of the Superior Court of Morgan County filed on December 30, 2020 issued after remand from the Court of Appeals' prior decision on appeal filed on October 29, 2019 requiring the Court "for findings and conclusion which give effect to OCGA §§ 19-9-3 (d) ad 19-9-6 (6) and to give due consideration to the issue of joint physical custody."

The Court of Appeals, rather than the Supreme Court of Georgia, has jurisdiction over this matter, as this is not a case in which jurisdiction is exclusively reserved to the Supreme Court by the Constitution of the State of Georgia, Article VI, Section VI, Paragraph I et seq.

The Court will omit nothing from the record on appeal, including the additions to the record since the first appeal. Transcript of the evidence and proceedings have been filed for inclusion in the record of appeal.

Respectfully submitted this 1st day of February 2021.





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JODY M. HIGDON
CLERK OF SUPERIOR COURT
MORGAN COUNTY

IN THE SUPERIOR COURT OF MORGAN COUNTY
STATE OF GEORGIA

TYLER PERRY,	*	
Petitioner,	*	
	*	
v.	*	**CIVIL ACTION FILE NUMBER**
	*	**SUCA2018000030**
KAITLYN V. JENKINS	*	
Respondent.	*	
	*	

RULE NISI

The Georgia Court of Appeals having remanded this case for further consideration and findings, the parties are ordered to appear before this Court for a Hearing on same on the 17th day of June 2020 at 9:00 A.m. before the Honorable William A. Prior, Jr., Judge, Superior Court of Morgan County, at the Morgan County Courthouse, Madison, Georgia. Counsel for all parties are ordered to attend.

SO ORDERED this 18th day of May 2020.

~~Judge~~ Clerk, Morgan County Superior Court

Prepared by:
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EFILED IN OFFICE
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MORGAN COUNTY, GEORGIA
SUCA2018000030
JUN 16, 2020 12:05 PM

Jody M. Higdon, Clerk
Morgan County, Georgia

IN THE SUPERIOR COURT OF MORGAN COUNTY

STATE OF GEORGIA

Tyler Perry,	§	
Plaintiff,	§	CIVIL ACTION FILE NO.
-versus-	§	
	§	SUCA2018000030
Kaitlyn V. Jenkins,	§	
Defendant.	§	

REQUEST TO USE A RECORDING DEVICE PURSUANT TO RULE 22 ON RECORDING OF JUDICIAL PROCEEDINGS.

Pursuant to Rule 22 of the Uniform Rules for Superior Court regarding Use of Electronic Devices in Courtrooms and Recording of Judicial Proceedings, the undersigned hereby requests permission to use a recording device for the hearing, which is scheduled to be done virtually via Zoom in order to record images and/or sound during any and all portions of the proceedings in the above captioned case.

Consistent with the provisions of the rule, the undersigned desires to use the following described recording device: **laptop computer and mobile phone**. The proceedings that the undersigned desires to record commence on June 17, 2020. Subject to direction from the court regarding possible pooled coverage, the undersigned wishes to use this device to record the proceedings on June 17, 2020. The personnel who will be responsible for the use of this recording device are: Charles Langevin. The undersigned hereby certifies that the device to be used and the locations and operation of such device will be in conformity with Rule 22 and any guidelines issued by the court.

The undersigned understands and acknowledges that a violation of Rule 22 and any guidelines issued by the court may be grounds for removal or exclusion from the courtroom and a willful violation may subject the undersigned to penalties for contempt of court.

Respectfully submitted,

This 16th day of June, 2020.

s/Charles M. Langevin, Jr.
Charles M. Langevin, Jr.
Representing Georgia Parents for Kids' Rights, Inc. as Chief Executive Officer

Georgia Parents for Kids' Rights, Inc.
488 Lindbergh Place
Suite 438
Atlanta, GA 30324
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gaparentsforkidsrights@gmail.com

IN THE SUPERIOR COURT OF MORGAN COUNTY

STATE OF GEORGIA

Tyler Perry,	§	
Plaintiff,	§	CIVIL ACTION FILE NO.
-versus-	§	
	§	SUCA2018000030
Kaitlyn V. Jennings,	§	
Defendant.	§	

SUPPLEMENT TO REQUEST TO USE A RECORDING DEVICE PURSUANT TO RULE 22 ON RECORDING OF JUDICIAL PROCEEDINGS.

1.

Georgia Parents for Kids' Rights, Inc. is a Georgia non-profit corporation which is dedicated to protecting the rights of children subject to court proceedings in the State of Georgia.

2.

Experts now almost universally agree, and every recent major academic study has concluded that equal shared parenting time is in a child's best interests absent evidence that one of the parents is unfit. These studies show a significant improvement in every measure of socioeconomic status when children are afforded equal parenting time with each parent versus those who are raised solely by the mother with minimal "visitation" with the father.

3.

Given that this Court initially awarded custody based on a flawed and outdated belief that one parent is somehow a superior parent because of their sex, our organization is concerned about abuse of judicial discretion.

4.

This request is being made pursuant to Rule 22. It is unclear if it is necessary given that the proceedings will take place via Zoom, but we wish to err on the side of caution as to not be in violation of the rules of this Court.

-SIGNATURE ON FOLLOWING PAGE-

Respectfully submitted,

This 16th day of June, 2020.

_*s/Charles M. Langevin, Jr.*______________

Charles M. Langevin, Jr.
Representing Georgia Parents for Kids' Rights, Inc. as Chief Executive Officer

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EFILED IN OFFICE
CLERK OF SUPERIOR COURT
MORGAN COUNTY, GEORGIA
SUCA2018000030
JUN 19, 2020 03:27 PM

Jody M. Higdon, Clerk
Morgan County, Georgia

**IN THE SUPERIOR COURT OF MORGAN COUNTY
STATE OF GEORGIA**

TYLER PERRY, **Petitioner,**	* * *	
V.	* *	**Civil Action File** **Number: SUCA2018000030**
KAITLYN V. JENKINS **Respondent,**	* * *	

MOTION

NOW COMES Petitioner, Tyler Perry, by and through his attorney, to file this motion and request that the Final Order as remanded and ordered by the Georgia Court of Appeals be filed within thirty days of the hearing that was scheduled for June 17, 2020, showing the following:

1.

This is an action filed by Petitioner on February 15, 2018 for Legitimation, Custody, Visitation and Child Support. There was a Temporary Hearing in May 2018 and the Final Hearing was held on October 29, 2018. The Final Order was filed on November 30, 2018, granting primary physical custody to Respondent.

2.

Petitioner filed a Notice of Appeal on December 19, 2018 with the case docketed on January 24, 2019. The Court of Appeals issued a ruling on October 29, 2019 reversing and remanding the case "for findings and conclusion with 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." (Ruling, page 6). The Remittitur was filed with the Morgan County Clerk's Office on November 21, 2019.

3.

Petitioner notes that, in a typical case, a trial court that has a portion of its judgment reversed or vacated with direction will follow that direction and dispose of any unresolved issues promptly. In fact, the law requires nothing less. Pursuant to O.C.G.A. § 15-6-21 (a), "it is the duty of the judge of the superior court of a county of less than 100,000 inhabitants, to decide promptly, within 30 days after the same has been submitted to him." Based on the date of the filing of the remittitur and the latest U.S. Census data for Morgan County, Georgia, the trial court had until **December 21, 2019** to enter its Final Order on Remand.

4.

Petitioner further notes that "[t]he decision and direction [of the appellate court] shall be respected and carried into full effect in good faith by the court below." O.C.G.A. § 5-6-10. "[I]t is the duty of the trial court in good faith to carry into full effect the mandate of this court. The rulings of our appellate courts are binding on the trial court in all subsequent proceedings in the case." Blanton v. Bank of Am., 263 Ga. App. 284, 285, 587 S.E.2d 411, 413 (2003).

5.

When no Order was filed by the middle of May 2020, Petitioner believed that the Court was waiting for and desirous of additional input from the parties on the subject of custody, specifically joint physical custody. For that reason, Petitioner provided a Rule Nisi for the Court to schedule a hearing. The Rule Nisi was filed on May 18, 2020, scheduling a hearing for June 17, 2020 at 9:00 AM.

6.

Petitioner's first enumeration of error was that the Court, having found both parents fit and proper, failed to give due consideration to Petitioner's request for joint physical custody of

the child. The Court of Appeals agreed with this enumeration and remanded this case to the Court to do so.

7.

Petitioner was willing to provide argument on the issue such that the Court would have sufficient information on which to give "due consideration" to joint physical custody, which would have included, among other things, reference to an article published in the Spring 2019 issue of the Family Law Review, a publication of the Family Law Section of the State Bar of Georgia. The title of that article is "Joint versus Sole Physical Custody: What Does the Research Tell Us About Children's Outcome? 'Legitimate' Cause for Concern." Certainly the title of this article, the credentials of its author, and the credibility of its publisher would make it of keen interest to anyone giving joint physical custody "due consideration." For the Court's convenience, it is attached hereto as Exhibit "A."

8.

At the time of the hearing on June 17, 2020, the Final Order required on Remand was almost six (6) full months overdue. In the hearing, the Court indicated that it did not wish to hear any additional information or argument and that his understanding of the Court of Appeals order remanding the case was that he just needed to include in the order the information he used in consideration of joint physical custody in this case. When Petitioner's counsel stated that it was Petitioner's contention that the Court did not consider joint physical custody in making his Final Order, the Court stated that he always considers joint physical custody. The Court then stated that he would write and file the Order and the parties would get a copy of it.

9.

Petitioner notes that during the hearing, the Court asked whether or not a transcript had been produced in the case. This indicates that nearly six (6) full months after the Final Order was already due, the Court had not yet begun to work on it. Petitioner further notes that the Final Order on Remand was already overdue well before the Supreme Court of Georgia's Order Declaring Statewide Judicial Emergency was filed on March 14, 2020. Regardless, the period that followed this declaration was one during which much court was not held at all. This would have seemed the perfect time for trial courts to address overdue orders on remand.

10.

Petitioner was surprised and concerned to learn during the June 17, 2020 hearing that the Court did not require or desire more information or argument in reference to joint physical custody. For if no further information or argument was desired, there appears to be no explanation whatsoever for the lengthy delay in producing the required Final Order on Remand.

11.

Petitioner points out that the Court's delay in producing the required Final Order on Remand is infringing Petitioner's ability to exercise full custody and visitation with his son. More importantly, it is infringing his son's long-recognized right of equal access to both parents. "[A] child . . . has a right to shared parenting when both are equally suited to provide it. Inherent in the express public policy is a recognition of the child's right to equal access and opportunity with both parents, the right to be guided and nurtured by both parents, the right to have major decisions made by the application of both parents' wisdom, judgment and experience." In the Interest of A. R. B, 209 Ga. App. 324, 327 (1993).

WHEREFORE, Petitioner respectfully requests that the Trial Court file its Final Order on Remand no later than thirty (30) days from the date of the scheduled hearing on June 17, 2020 or by July 17, 2020.

Respectfully submitted this 19th day of June 2020.

/s/ Virginia Nell Morris
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EXHIBIT A

The Family Law Review

A publication of the Family Law Section of the State Bar of Georgia – Spring 2019

Cultural Considerations in Custody Litigation in Our Diverse Community

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Joint versus Sole Physical Custody: What Does theResearch Tell Us About Children's Outcome? "Legitimate" Cause for Concern

By Linda Nielsen

Do children fare better or worse in joint physical custody (JPC) families where they live with each parent at least 35 percent of the time than in sole physical custody (SPC) families where they live primarily or exclusively with one parent? This question assumes even more importance as JPC has become increasingly common in the United States and abroad. For example, in Wisconsin JPC increased from 5 percent in 1986 to more than 35 percent in 2012. And as far back as 2008, 46 percent of separated parents in Washington state and 30 percent in Arizona had JPC arrangements. JPC has risen to nearly 50 percent in Sweden, 30 percent in Norway and the Netherlands, 37 percent in Belgium, 26 percent in Quebec and 40 percent in British Columbia and the Catalonia region of Spain.

At least 20 states are considering changes to their custody laws to make them more supportive of JPC. In April 2018, Kentucky became the first state to establish a rebuttable presumption of equal parenting time in all child custody cases, absent situations such as drug abuse or domestic violence that pose a danger to children. Arizona enacted a shared parenting statute in 2014, which has been functioning as a rebuttable presumption of equal parenting time. Four years after its enactment, lawyers, judges and mental health professionals evaluated the law favorably in terms of children's best interests and perceived it as having no impact on legal or personal conflicts between parents.[1]

But are children's outcomes better in JPC than SPC families—especially if their parents do not get along well as co-parents? And if JPC children have better outcomes, is this because their parents have more money, less conflict, better parenting skills or higher quality relationships with their children before they separate? Put differently, are JPC parents "exceptional" because they get along better than SPC parents and mutually agree to the custody plan from the outset?

Those who have expressed misgivings about JPC have made a number of claims that they report are based on the research. For example, in a 2014 judicial branch education seminar[2] and a 2016 seminar sponsored by the Nebraska Psychological Association,[3] Robert Emery stated that no study had ever found positive outcomes for infants or toddlers who spent overnight time with fathers after their parents separated. He went on to add that, according to an Australian study by McIntosh and her colleagues, babies who spent one overnight a week with their fathers were more irritable and more insecure than babies who never spent a night away from their mothers. In his book on child custody, Emery goes further by stating: "Conflict is more damaging to children than having only a limited relationship with your other parent (p. 51)."[4]

How accurate are claims such as these? Do the empirical data support them? To answer these questions, I reviewed all 60 studies that compared JPC and SPC children's outcomes, especially those studies that considered parental conflict, family income, and the quality of children's relationships with their parents when they separated. I also reviewed an additional 19 studies that compared JPC and SPC couples' levels of conflict in order to answer the question: Do JPC parents have significantly less conflict and more cooperative co-parenting relationships than SPC couples?

gettyimages.com/ kate_sept2004

META-ANALYSES OF JPC AND SPC CHILDREN'S OUTCOMES

Researchers sometimes conduct a "meta-analysis," which is a statistical procedure that compares the statistical findings from a group of studies selected by the researcher. There are only two meta-analyses that compared children's outcomes in JPC and SPC.[5,6] Both reached the same conclusion: JPC children had significantly better outcomes than SPC children. The first analysis by Bauserman[5] analyzed only 11 studies from peer reviewed academic journals because so few published studies existed 20 years ago. His analysis did, however, include 22 doctoral dissertations which also found JPC children had better outcomes. Bauserman also examined parental conflict and found that JPC children still had better outcomes even after accounting for parental conflict.

The second analysis by Baude[6] et al. included only 18 of the 55 studies that existed at the time and did not examine parental conflict. But they did address another important question: Do JPC children who live 50 percent time with each parent have better outcomes than JPC children who live 35 percent to 49 percent time with each? The answer was yes.

RESULTS OF THE 60 STUDIES

This article is an abbreviated version of an article published earlier this year that summarizes the results of all 60 studies that statistically compared JPC and SPC children's outcomes across a wide range of measures of well-being.[7] Fifty-three were published in English in academic journals. The other seven were published by Australian teams of academic researchers as part of their country's ongoing studies of JPC and SPC. These seven studies are included because they are often cited in the literature on JPC and because most of them have large, representative sample sizes. A detailed description of each of the 60 studies, their limitations and the reference citations are provided elsewhere and are available upon request (nielsen@wfu.edu). [7]

Data from the 60 studies can be grouped into five broad categories of child well-being:(1) academic or cognitive outcomes (2) emotional or psychological outcomes (3) behavioral problems which include teenage drug, nicotine or alcohol use; (4) physical health or stress related physical problems and (5) the quality of parent-child relationships.

The overall conclusion is that JPC children have better outcomes than SPC children. Compared to SPC children, JPC children had better outcomes on all of the measures in 34 studies; equal outcomes on some measures and better outcomes on other measures in 14 studies; and equal outcomes on all measures in six studies. In six studies JPC children had worse outcomes on one of the measures but equal or better outcomes on all other measures.

Did JPC children still have better outcomes when the researchers considered family income? Yes. In the 25 studies that considered family income before comparing the children, JPC children had better outcomes on all measures in 18 studies, equal outcomes on some measures and better outcomes on other measures in four studies, and equal outcomes on all measures in one study. In only two income studies did the JPC children have worse outcomes than SPC children on one of the measures—with equal or better outcomes on all other measures.

What about parent conflict? When parent conflict was high, did children fare worse in JPC than SPC families? In the 19 studies that considered conflict, JPC children still had better outcomes on all measures in nine studies, equal outcomes on some measures and better outcomes on other measures in five studies, and equal outcomes on all measures in two studies. In only three studies did JPC children have worse outcomes than SPC children on one of the measures.

One argument against JPC is the hypothesis that these parents had much better relationships with their children before their separation than did SPC parents. If that is true, then maybe it isn't the JPC arrangement, but the quality of the relationships, that accounts for the better outcomes. Nine of the 60 studies tested this possibility. JPC children had better outcomes on all measures in five studies, equal outcomes on some measures and better outcomes on others in two studies, and worse outcomes on one of several measures in two studies. Based on this small group of studies, it does not appear that the quality of parenting accounts for JPC children's better outcomes.

OTHER NOTEWORTHY FINDINGS

Several other noteworthy findings emerged from the 60 studies. First and foremost, in no study did JPC children have worse outcomes on all, or even most, measures than SPC children. JPC and SPC children had the fewest differences in regard to academic achievement or cognitive skills. This suggests that the custody arrangement has less impact on grades and cognitive development than on the other areas of children's lives.

The greatest advantage for JPC children was better family relationships. In 22 of 23 studies that assessed family bonds, JPC children had closer, more communicative relationships with both parents. The second greatest advantage for JPC children was better physical and mental health. In 13 of 15 studies that addressed physical health, JPC children had fewer psychosomatic, stress-related physical problems. Forty-two studies assessed children's emotional health: depression, life-satisfaction, anxiety, and self-esteem. In 24 studies, JPC children had better outcomes and in 12 studies there were no significant differences between the two groups. In six studies, the results were "mixed" depending on gender and which measure of emotional well-being was being assessed.

As teenagers, JPC children also had better outcomes. Twenty-four studies assessed one or more of these behaviors: drinking, smoking, using drugs, being aggressive, bullying, committing delinquent acts, getting along poorly with peers. In 21 studies JPC teenagers had better outcomes on all measures. In three studies the results were "mixed" because the differences between JPC and SPC teenagers depended on gender or on which measure was being assessed.

What about children's relationships with their grandparents—and why should we care? In all four studies that addressed this question, JPC children had closer relationships with their grandparents than SPC children. This matters because children who have close relationships with their grandparents after their parents separate tend to be better adjusted emotionally and behaviorally. Especially when the family is experiencing the stress of the parents' separation, strong relationships with grandparents can be a protective factor for children.

NEGATIVE OUTCOMES FOR JPC CHILDREN

In six of the 60 studies JPC children in particular circumstances had worse outcomes than SPC children on one of the measures of well-being. Four of these studies were with teenagers. They first examined a group of Australian teenagers. The boys in JPC were somewhat more likely than boys in SPC to say they "sometimes did not get along well with peers"— but the reverse was true for girls.[8] On the other hand, JPC teenagers reported better relationships with both parents, stepparents and grandparents than SPC teenagers.

The second study assessed a group of American teenagers, all of whom had high conflict divorced parents. When they gave one of their parents a low rating for "positive" parenting (making the children feel they mattered, establishing and consistently enforcing rules), JPC teens had more behavioral and emotional problems

than SPC teens. But when the teenagers gave both parents positive ratings, JPC teenagers had fewer problems than SPC teenagers.[9]

In two studies from Belgium, the results were also mixed. In the first Flemish study JPC and SPC adolescents had similar outcomes on all measures of well-being with two exceptions.[10] Ten teenagers who felt they had bad relationships with their fathers were more depressed and more dissatisfied in JPC than in SPC. And when parental conflict remained high eight years after the divorce, girls were more depressed in JPC than in SPC—but boys were less depressed in JPC.

In the second Flemish study "neurotic" (anxious, tense, depressed, sad) teenagers fared just as well in JPC as in SPC.[11] But highly "conscientious" (task oriented, rule oriented) teenagers felt more depressed and less in control of their lives in JPC than in SPC. In contrast, the least conscientious teenagers fared better in JPC.

SHARED PARENTING FOR BABIES, INFANTS AND PRESCHOOLERS

Six studies focused exclusively on children ages 0 - 5. I begin with the two studies that have received the most worldwide attention because both are frequently cited as evidence that infants and toddlers should spend little, if any, overnight time in their father's care.

In an Australian study led by Jennifer McIntosh,[12] the 19 JPC toddlers were "less persistent at tasks" than the 103 SPC toddlers. And the 22 JPC toddlers scored lower on a test of how they "interacted with" their mothers (sometimes refusing to eat, being clingy when she was leaving). These researchers interpreted this to mean that JPC created more "distressed relationships" with their mothers. In fact, however, JPC toddlers and the majority of toddlers in intact families behaved in these same ways with their mothers — and their scores were perfectly within normal ranges. For children under the age of two, according to their mothers, the 43 babies who overnighted more than four times a month were more "irritable" than the 14 babies who overnighted less than four times a month. The researchers interpreted this as a sign of "stress" from overnighting. But again, babies from intact families had the same irritability scores as the overnighting babies. The 59 infants who overnighted more than four times a month "looked at their mother" and "tried to get her attention" more frequently than the 18 babies who overnighted less than four times a month. The researchers interpreted this as a sign of "insecurity" caused by overnighting. This is a highly questionable interpretation because the researchers extracted the three questions from a test of language development where looking at the mother and trying to get her attention were positive signs that the baby was more ready to learn to talk. This study has been widely criticized for its questionable methodology and interpretations of data.[21,23]

The second was an American study supervised and co-authored by Robert Emery.[13] The study was based on a sample that was not representative of the general population or of divorced parents. The sample was comprised largely of single parent, never married, impoverished, minority families with high rates of incarceration, physical abuse, and mental health problems living in 20 large cities. Even in these families, children ages 0 - 5 who overnighted frequently or who lived in JPC families were not significantly different from those who did not overnight on six measures of well-being with two exceptions. First, children in JPC as three year-olds had fewer social problems at age five than children who were not in JPC at age three—a finding which, for unexplained reasons, is described as "chance." Second, the 111 infants and toddlers in JPC had more "insecure" scores on a test assessing their attachment behaviors toward their mother. The researchers interpreted this to mean that overnights away from the mother resulted in more insecure attachments to her. The problem here is that half of the JPC children were living with their fathers. So the attachment scores were assessing their behavior with their mother even though she was not their primary care-giver. Moreover, the attachment test was based on mothers' reports, not on reports from objective observers. This undermines its validity. In his seminars and book, Emery applies these findings to the general population and describes the study as the "best and biggest" study of the impact of overnighting on babies' attachments to their mothers.

The third study was a nationally representative Swedish study with three, four and five-year-old children. The JPC children had fewer psychological and behavioral problems on a standardized test and on preschool teachers' reports than did SPC children. This held true even after controlling for parents' education levels and the children's ages.[14]

Similarly, in an American study, college students who had lived in JPC families or had frequently overnighted with their fathers before the age of three had better relationships with both parents than those who had not overnighted.[15] They also had better relationships than children who only started overnighting or moved into JPC after the age of five. This held true regardless of the parents' educational levels or how much conflict they had when separating or in ensuing years. "Lost overnight parenting time at age two was not made up by parenting time later (p.11)."

In yet another American study, two to three year-olds who overnighted at least once a week did not have more behavioral or emotional problems than those who did not overnight.[16] Moreover, the four to six year-olds who overnighted had fewer attention problems and fewer social problems than the non-overnighters.

In the oldest of the six studies, the sample included an unusually high number of violent and high conflict parents for the overnighting children.[17] Only eight of the 44 overnighting infants spent more than three nights a month with their father, often going weeks without seeing one another. Nonetheless, the overnighting and non-overnighting infants were not significantly different in their attachment scores with their mothers. Even though the overnights had more "disorganized" scores (meaning the child's behavior was too inconsistent to classify) than babies in intact families, the lead author recently reiterated, that any attachment problems were due to poor parenting or negative characteristics of the parents, not to

overnighting.[18]

In sum, there is no reliable evidence that regular and frequent overnighting or that JPC harms infants, toddlers or preschoolers who are in the care of fit and loving parents. A recent article provides a detailed history of this debate and a summary of the literature relevant to infant overnights.[19]

WHY IS JPC BENEFICIAL EVEN WHEN PARENTAL CONFLICT IS HIGH?

The fact that JPC children still had better outcomes even after factoring in parent conflict undermines the claim that children do not benefit from JPC unless their parents have a low conflict, cooperative relationship. This might partly be explained by the fact that in a separate analysis of[19] studies, JPC couples did not have significantly less conflict or more cooperative, communicative relationships than SPC couples at the time they separated or in the years following separation.[20] Seven of these studies assessed whether most JPC parents had initially agreed to the plan without conflict or whether one or both of them had been "forced" or "coerced" into accepting JPC. From 30 percent to 80 percent of the couples who ended up with JPC did not initially agree to share. In these cases, one or both parents initially wanted sole physical custody. Yet in all seven studies, JPC children had better outcomes than SPC children.

LIMITATIONS OF THE STUDIES

All studies have limitations, and those discussed in this paper are no exception. First, these studies are correlational so they cannot prove that JPC caused the better outcomes. But a number of the studies ruled out conflict, income and quality of parent-children relationships as possible causes —which lends stronger support to the argument that JPC in and of itself is beneficial for children. Second, not all 60 studies are of equal quality. Still, the findings are very consistent which lends more credibility to the results. Third, because the data come almost exclusively from mothers, it is possible that the benefits of JPC are greater than what is being reported since mothers tend to be more opposed to JPC, at least initially, than fathers.

Finally, even though differences between JPC and SPC children's outcomes are statistically significant, the effect sizes are generally small to moderate. Several things must be understood, however, about effect sizes. Small effect sizes are common in social science studies — which includes studies on parental conflict. More importantly, small effect sizes in social science and in medical science have important implications for large numbers of people. Indeed, many public health policies and mental health treatment protocols are based on studies with weak effect sizes.

Then too, we need to consider the risks versus the benefits before dismissing small effect sizes as trivial. For example, if there is a weak but statistically significant link between JPC and teenage drug and alcohol use, we should attend to those results because the consequences can be serious, life-threatening or even fatal.

Moreover, JPC effect sizes are much larger in certain samples or for certain types of problems. For example, in Baude's meta-analysis, effect sizes were four times stronger for behavioral problems than for emotional ones, five times stronger in school samples than in national samples, and five times stronger when JPC children spent 50 percent time with each parent than when they lived 35 - 49 percent time.

CONCLUSION : NO WOOZLING ALLOWED

Woozling is the process where research findings are manipulated and distorted in order to support just one point of view—either by exaggerating or reporting only part of the data, or by excluding certain studies, or by interpreting ambiguous data in only one way.[21] To avoid woozling, I want to clarify several points about the 60 studies.

These studies are not saying that being constantly dragged into the middle of parents' conflicts has no negative impact on children—or that JPC is more beneficial than the quality of parent-child relationships—or that family income has no impact on children. What the studies are saying is that even when conflict is high—absent physically abusive conflict—and even after considering family income and the quality of parent-child relationships, children still benefit more from JPC than SPC. It is an injustice to children, and to the researchers who have conducted these studies, to frame the situation as if one single factor—conflict, income, JPC or quality of parent-child relationships—has to be the sole winner of some imaginary contest. Our goal should be to provide children with as many situations as possible that have been linked to their well-being after their parents separate.

JPC is generally linked to better outcomes than SPC for children, independent of parental conflict, family income, or the quality of children's relationships with their parents. Parents do not need to have a low conflict, communicative coparenting relationship or mutually agree to JPC at the outset in order for children to benefit from JPC. Nor is there reliable evidence that children under the age of four are harmed by or do not benefit from JPC or frequent overnighting. These 60 studies reflect the consensus of an international group of 110 scholars and mental health practitioners and a group of 12 renowned researchers: JPC is in children's best interest, absent situations such as substance abuse or violence, which pose a danger to children even when their parents are still together.[22,23]

* Due to space restrictions, references for the 60 studies and for the other studies summarized in this article could not be included. All citations and the results of each of the 60 studies are available upon request from the author: nielsen@wfu.edu. ***FLR***

Linda Nielsen is a Professor of Adolescent and Educational Psychology at Wake Forest University in Winston Salem, NC. She is an internationally recognized expert on shared physical custody research and father-daughter relationships. In addition to her seminars for family court and mental health professionals, she is frequently interviewed on the topic of shared parenting by journalists, including the New York Times, Time magazine and the Wall Street Journal. nielsen@wfu.edu www.wfu.edu/~nielsen

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Jody M. Higdon, Clerk
Morgan County, Georgia

IN THE SUPERIOR COURT OF MORGAN COUNTY
STATE OF GEORGIA

TYLER PERRY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**CIVIL ACTION**
	)	**FILE NUMBER: SUCA2018000030**
KAITLYN V. JENKINS,	)	
	)	
Respondent.	)	
	)	

RESPONSE TO MOTION

Respondent Kaitlyn V. Jenkins is filing her Response to Petitioner Tyler Perry's Motion filed on June 19, 2020 and in support of said Response, Respondent Kaitlyn V. Jenkins shows the Court as follows:

1.

The above-referenced matter was set down by opposing counsel for a hearing on June 17, 2020 after the Georgia Court of Appeals had remanded this case back to this Court for the purpose of giving express due consideration to joint physical custody.

2.

At the hearing on June 17, 2020, the Court determined that it was aware of the positions of the respective parties, that a transcript of the bench trial had been filed and was accessible by the Court, and that the trial court still had its notes from the trial. Given these facts, the Court determined that it did not need to hear any additional argument and was aware of the direction by the Georgia Court of Appeals.

3.

Despite this declaration by the Court, opposing counsel has used the Motion as a vehicle to provide the argument that she would have made had the Court been inclined to hear such

argument. Because we are using Zoom for hearings due to COVID-19, parties have been providing exhibits to one another via email prior to said hearings. Here, opposing counsel provided Respondent's counsel with said documentation on June 16, 2020. Some of this same documentation is attached to the Motion filed by opposing counsel. Given the Court's express ruling on declining to hear any additional argument or evidence, Petitioner has filed this Motion anyway by couching it as a motion to follow O.C.G.A. section 15-6-21 initially but then descends into Petitioner's argument on the issue of joint physical custody. Respondent objects to the portions of the Motion that simply seek to reargue the case contrary to the Court's ruling on June 17, 2020.

4.

Further and more specifically, opposing counsel seeks to introduce a State Bar of Georgia Family Law Review article on joint physical custody into evidence. While the Family Law Review is titled as such, it is really a magazine for family law practitioners with articles and advertisements. "An article appearing in a magazine cannot be admitted in evidence to prove the opinions of the writer, although he might be an expert in the field in which he wrote." Isley v. Little, 219 Ga. 23, 31 (1963). Further, Petitioner did not introduce any expert testimony on the alleged advantages on joint physical custody at the bench trial. If some expert had been called for such purposes, Respondent would have had the opportunity to cross-examine that witness on his or her opinions. Since that did not occur, this article is inadmissible hearsay. For these reasons, Petitioner's introduction of said article is inadmissible and inappropriate and cannot be relied on by the Court.

5.

As it relates to the remainder of the Motion, Respondent takes no part in Petitioner's criticism of the Court.

This 7th of July, 2020.

/s/ Brad J. Evans
Brad J. Evans
State Bar of Georgia No. 251610

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IN THE SUPERIOR COURT OF MORGAN COUNTY
STATE OF GEORGIA

TYLER PERRY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**CIVIL ACTION**
	)	**FILE NUMBER: SUCA2018000030**
KAITLYN V. JENKINS,	)	
	)	
Respondent.	)	
	)	

CERTIFICATE OF SERVICE OF DISCOVERY

I certify that I have served a copy of the foregoing **RESPONSE TO MOTION** via PeachCourt:

Virginia Nell Morris
Morris Law
P.O. Box 7224
Athens, Georgia 30604

This 7th of July, 2020.

/s/ Brad J. Evans
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Jody M. Higdon, Clerk
Morgan County, Georgia

IN THE SUPERIOR COURT FOR THE COUNTY OF MORGAN

STATE OF GEORGIA

TYLER PERRY, Petitioner, v. KAITLYN V. JENKINS, Respondent.	CIVIL ACTION FILE NUMBER SUCA2018000030

REPLY TO RESPONSE TO MOTION

COMES NOW TYLER PERRY (hereinafter "Mr. Perry"), by and through his attorneys, and files his Reply to KAITLYN V. JENKINS' (hereinafter "Ms. Jenkins") Response to Motion, showing this Court as follows.

First, Mr. Perry addresses Ms. Jenkins' evidentiary arguments, which are repeated from arguments she previously made to the Court of Appeals of Georgia (hereinafter "Court of Appeals"). Mr. Perry notes that the Court of Appeals did not respond to these arguments while reversing the Court's judgment.

Ms. Jenkins argues that the Court may not consider "magazine articles" such as those that appear in the Family Law Review, a publication of the State Bar of Georgia. Ms. Jenkins contends that such consideration would violate the rules of evidence. In support of her theory, Ms. Jenkins cites to Isley v. Little, 219 Ga. 23, 31 (1963), a case that was decided nearly (60) years ago. Only one year after it was decided, Isley was given limited application by the Court of Appeals when a party tried to use it to exclude relevant evidence. See McKinney v. Pitts, 109 Ga. App. 866 (1964). For a case of its age, Isley has been cited quite sparingly in published opinions of the Supreme Court of Georgia and the Court of

Appeals, with fewer than twenty (20) total citations since it was decided. Not all of these citations even address evidentiary matters, but instead cite the peculiar facts of that particular case, involving a "drag strip."

Notably, Isley has not been cited in any published opinion of the Supreme Court of Georgia or the Court of Appeals in nearly thirty (30) years. See Safety-Kleen Corp. v. Smith, 203 Ga. App. 514 (1992). The proposition that Ms. Jenkins cites from Isley, specifically that "[b]ooks of science and art are not admissible in evidence to prove the opinions of experts announced therein," Isley, 219 Ga. 23, 31, has not been cited in any published opinion of the Supreme Court of Georgia or the Court of Appeals in over twenty (20) years. See Bibb County v. Higgins, 241 Ga. App. 161 (1999).

Perhaps most importantly, the case of Isles, as well as any case that cites to Isles, and any other case that cites the proposition from Isles upon which Ms. Jenkins relies, all pre-date the modernization and wholesale replacement of Georgia's Evidence Code, which went into effect on January 1, 2013. See 2011 Ga. Laws 52. As a result, all of these cases are now cast in significant doubt, as they may all have been abrogated by statute. See, e.g., Chrysler Grp. LLC v. Walden, 812 S.E.2d 244, 251-52 (Ga. 2018) ("Because the common law party-wealth rule was itself a rule of relevance, and because there is no specific exclusionary rule in the new Evidence Code carrying forward the common law's general exclusionary rule for that type of evidence, Georgia courts must consider party-wealth evidence under the parameters of the new Evidence Code. This is yet another example of the "new evidence world" in which we live.")

In general, Georgia's new evidence code favors the admission of, rather than exclusion of, relevant evidence. O.C.G.A. § 24-1-1 states that

> The object of all legal investigation is ***the discovery of truth***. Rules of evidence shall be construed to secure fairness in administration, eliminate unjustifiable expense and delay, and promote the growth and development of the law of evidence to the end that ***the truth may be ascertained and proceedings justly determined.***

(emphasis supplied).

Without doubt, there is a scientifically supported and widely accepted truth concerning the "shared parenting vs. single parenting" debate. This is the whole point of the material to which Ms. Jenkins objects. Ironically, Ms. Jenkins seeks to use the rules of evidence, which are by statute meant to aid in the discovery of truth, to actually *conceal* this truth from the Court.

Ms. Jenkins' suggests that such material should be presented to each trial court on a case-by-case basis with expensive expert testimony subject to cross examination. This is both impractical and unrealistic. Ms. Jenkins would use the rules of evidence to *maximize* "unjustifiable expense and delay," rather than eliminate it, as O.C.G.A. § 24-1-1 requires.

It is also important to note that Ms. Jenkins has had ample opportunity to cite to similar materials supporting her position. Mr. Perry would hardly be in a position to object if she were to do so. The trouble is that Ms. Jenkins is not able to do so; her position in unsupportable outside of an artificial environment in which truth is suppressed.

Ms. Jenkins' suggestion that it would be error for the Court to consider the cited article also raises interesting questions. What if the Court had already read the article prior to Mr. Perry's submission of the article to the Court? To be clear, The Family Law Review is hardly just "a magazine." It is a publication of the State Bar of Georgia and is widely distributed to its members. All superior court judges are members of the State Bar of Georgia. Certainly, the State Bar of Georgia expects its publications may be read by most, if not all, of its members. Indeed, it would seem that the entire purpose of publication is that included materials would be considered by attorneys and judges to improve the quality of argument and of the decision-making process for the subjects covered in the materials.

However, Ms. Jenkins objects to the Court's consideration of the same in this case and unequivocally argues that such consideration would be erroneous. Presumably, Ms. Jenkins would move to disqualify this Court if it were to consider the materials. It thus follows that, according to Ms. Jenkins,

any judge who happened to have read the article in question and was later called upon to give "due consideration" to joint physical custody should be disqualified.

Such an absurd result makes it obvious that Ms. Jenkins' argument is fundamentally flawed. If her argument were accepted, one would have to question the utility of the State Bar of Georgia ever publishing anything at all. The threat of disqualification under the rules of evidence would prevent judges from considering published materials, whether in general or in connection with any particular case. Attorneys would stop reading the published materials because they would never be able to use them in court. Effectively, Ms. Jenkins' argument would reduce the Family Law Review's readership to zero.

Obviously, the publication of such materials by the State Bar of Georgia is justified because it is thought to benefit the public, bench, and bar. How does the public, bench, and bar benefit when rote application of the rules of evidence would deny them all the most current scientific data on an issue that is so critical to the welfare of the state's children? Ms. Jenkins' position in this case seems calculated to maximize her chance of prevailing in this particular instance. This is done at the cost of creating extraordinarily bad public policy that would sideline science in favor of encouraging judicial biases regarding gender roles in child rearing.

Of course, Ms. Jenkins' evidentiary arguments are nothing more than a red herring. This Court was not reversed because of evidentiary error. This Court was reversed because it did not follow binding precedent requiring the Court to give effect to the express public policy of this state favoring due consideration of joint physical custody.

The materials to which Ms. Jenkins objects were not submitted to the Court in an effort to supply expert evidence. Mr. Perry is not required to supply expert evidence of the benefits of joint physical

custody. That war was fought and won decades ago. The express public policy of the State of Georgia clearly favors joint physical custody.[1]

If anyone was required to present expert evidence supporting her position, it was Ms. Jenkins. She completely failed to do so. Her wholly unsupported argument against and hostility toward Mr. Perry's request for due consideration of joint physical custody—culminating with her request for attorney fees in response—no doubt significantly contributed to the Court's reversible error in this case.

In her response, Ms. Jenkins also "objects to the portion of the Motion that simply seek to reargue the case contrary to the Court's ruling on June 17, 2020." Response to Motion, para. 3. Ms. Jenkins apparently asserts the power to squelch further argument to the Court concerning how and why the Court should give "due consideration" to joint physical custody, as required by the remittitur of the Court of Appeals. Ms. Jenkins cites no basis in statute or in case law for such objection, or for such power.

On the contrary, "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Mathews v. Eldridge, 424 U.S. 319, 333 (1976). "The amount of due process required depends upon the circumstances at hand: due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Due process is flexible and calls for such procedural protections as the particular situation demands." Collins v. Morris, 263 Ga. 734, 736 (1994) (quotations and citations omitted). It would seem that Ms. Jenkins seeks to procure further error from the Court by encouraging the Court to ignore appropriate argument.

---

[1] "[A] child . . . has a right to shared parenting when both are equally suited to provide it. Inherent in the express public policy is a recognition of the child's right to equal access and opportunity with both parents, the right to be guided and nurtured by both parents, the right to have major decisions made by the application of both parents' wisdom, judgment and experience." In the Interest of A. R. B, 209 Ga. App. 324, 327 (1993).

Here, the Court denied any meaningful hearing after the Court of Appeals found that it failed to give due consideration to joint physical custody as required by law. This was regrettable, as this act gives the unintended appearance that the Court does not understand its error and does not conscientiously seek to correct it. Rather, it gives the appearance that the Court resents the reversal by the Court of Appeals, and seeks only to find the "magic words" required by the Court of Appeals. This, of course, would be the same mistake made by the trial court in Floyd v. Gibson, 337 Ga. App. 474 (2016).

Even though the Court assuredly has no such intent, the denial of meaningful hearing occurred under circumstances in which several interested members of the public had tuned in to observe the hearing. Many others, including state legislators, viewed it after the fact. This all occurred under circumstances in which legislation was pending to require trial courts to award joint physical custody in most cases. See HB 1140, available at http://www.legis.ga.gov/Legislation/20192020/192673.pdf.

The denial of a meaningful hearing in this case has given policymakers the impression that trial courts are indeed unworthy of being trusted with discretion in custody matters, which was assuredly an unintended and unfortunate consequence of the Court's actions. Nevertheless, the Court must remain ever mindful of Rule 1.2 of the Georgia Code of Judicial Conduct, which states that "Judges shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary." Comment 2 to Rule 1.2 also provides that

> Judges must avoid all impropriety and appearance of impropriety. Judges must expect to be the subject of constant public scrutiny. Judges must therefore accept restrictions on their conduct that might be viewed as burdensome by the ordinary citizen, and they should do so freely and willingly.

The Court's decision to deny meaningful hearing on this issue created another unfortunately impression: that this Court does not, as a matter of course, follow the express public policy of the State of Georgia concerning custody arrangements, and instead has constructed its own, contrary policy.

The evidence of this contrary policy is undeniable. To begin, the Court candidly stated at the conclusion of the October 29, 2018 hearing that "I sincerely believe a small child that's been with the mother needs to stay with the mother." Unfortunately, this statement is in hopeless conflict with the express public policy of the State of Georgia.

The concept espoused in the Court's statement is called the Tender Years Doctrine, a theory of custody decision-making that was popularized in the early 19th century. Notably, the Tender Years Doctrine has never at any point been the law in the State of Georgia. Where it once was the law, it has been mostly abandoned. For example, the Alabama Supreme Court held that it was unconstitutional nearly forty (40) years ago. See, e.g., Devine v. Devine, 398 So. 2d 686 (Ala. 1981) (holding that the Tender Years Doctrine violated the equal protection clause of the Fourteenth Amendment to the United States Constitution).

The Court's reliance on the Tender Years Doctrine in a state in which it has never been the law, and in a time decades removed from being declared unconstitutional in most jurisdictions that ever employed it, is a fascinating peculiarity. Because a proper understanding of the Tender Years Doctrine cannot be had without an appreciation of its place in history, Mr. Perry attaches the full Devine opinion hereto as Exhibit "A." Part II thereof supplies a complete history of not only the Tender Years Doctrine, but the equally misguided and unconstitutional Paternal Presumption that existed before it, beginning with the following:

> At common law, *it was the father* rather than the mother who held a virtual absolute right to the custody of their minor children. This rule of law was fostered, in part, by feudalistic notions concerning the "natural" responsibilities of the husband at common law. The husband was considered the head or master of his family, and, as such, responsible for the care, maintenance, education and religious training of his children. By virtue of these responsibilities, the husband was given a corresponding entitlement to the benefits of his children, i.e., their services and association. It is interesting to note that in many instances these rights and privileges were considered dependent upon the recognized laws of nature and in accordance with the presumption that the father could best provide for the necessities of his children . . . .

Devine v. Devine, 398 So. 2d 686, 688 (Ala. 1981) (emphasis supplied).

In short, a proper historical understanding of the Tender Years Doctrine reveals that it was extraordinarily bad policy that was a knee-jerk reaction to other extraordinarily bad policy. The jurisdictions that ever employed either one of them wisely did away with them long ago.

If the Court's candid statements were not sufficient, opposing counsel, in his argument to the Court in the October 29, 2018 hearing, provided overwhelming evidence that the Ocmulgee Circuit has, for whatever reason, constructed a policy in conflict with the express policy of the State of Georgia:

> [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 emphasized with great effect the widely-known and widely-accepted fact that the Ocmulgee Circuit had created its own policy that did not include "due consideration" of joint physical custody as required by law. In fact, opposing counsel argued that this policy was so clear and so well known that Ms. Jenkins should be awarded attorney fees because Mr. Perry had put her to unnecessary trouble and expense by asking the Court to give due consideration of joint physical custody.

Attorney fees were granted, but they were granted because of "the financial position of each of the parties," rather than for the reasons for which Ms. Jenkins sought them. Nevertheless, and regardless of the Court's intent, the award of attorney fees under these circumstances could make it appear that they were truly awarded in response to Mr. Perry asking the Court to give due consideration of joint physical custody.

This is problematic because it is likely to have a chilling effect on any future parent's willingness to request due consideration of joint physical custody in the Ocmulgee Circuit. This gives the appearance

of impropriety that, regardless of what the law requires, the Court may find a way to discourage future parents from seeking joint physical custody in the future.

This discussion should not omit the Ocmulgee Circuit's "standard visitation order" referenced by opposing counsel in his request for attorney fees and attached to the Final Order as "Exhibit A." To date, Mr. Perry can find no indication that the "standard visitation order" has been replaced or revised in response to the Court of Appeals' remittitur. In fact, as of the date and time of this Reply, it appears unaltered on the Morgan County Clerk of Court website.[2]

Mr. Perry repeats his concern previously expressed to the Court of Appeals as follows:

> [I]t 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)).

Brief of Appellant, p.p. 15-16.

Upon information and belief, prior to this case, the Ocmulgee Circuit appeared to know nothing of the express public policy of the State of Georgia as espoused in Baldwin v. Baldwin, 265 Ga. 465

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[2] See https://morgancountyclerkofcourt.com/pdf/Visitation%20Schedule%20-%20Standard%20Orders%20for%20Parenting.pdf, retrieved on July 15, 2020 at 12: 15 PM.

(1995) and the cases it cites. In truth, many other judicial circuits in the State of Georgia are similarly uninformed, and routinely violate the requirements of Baldwin by silently employing the Paternal Presumption and/or the Tender Years Doctrine.

Both of these approaches were once the law in many jurisdictions (only the Paternal Presumption was the law in the State of Georgia), but they have both been abandoned in almost all such jurisdictions. Hard as it may be to accept, they both perpetrated untold harm upon children. Their continued application in the modern era is contrary to public policy, unconstitutional, and, most of all, simply morally wrong. These policies harm children, and the materials to which Ms. Jenkins objects make that very, very clear.

These policies should be clearly, unmistakably, and publicly abandoned by this Court and by the entire Ocmulgee Circuit. The best way to restore public confidence in the circuit is to craft a well-reasoned opinion in this case, and to publicly revise the Ocmulgee Circuit's "standard visitation order" to clarify that the Ocmulgee Circuit will faithfully and conscientiously give the "due consideration" required by law to any and all cases in which joint physical custody is requested.

Respectfully submitted this 16th day of July 2020.

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EXHIBIT A

79-546
Supreme Court of Alabama

Devine v. Devine

398 So. 2d 686 (Ala. 1981)
Decided Mar 27, 1981

79-546.

March 27, 1981.

William Henry Agee of Agee Ghee, Anniston, for petitioner.

J. Todd Caldwell, Anniston, for respondent.

MADDOX, Justice.

We granted certiorari to review the question of whether the "tender years presumption," as applied in child custody proceedings, violates the Fourteenth Amendment to the United States Constitution. In the present case, the Court of Civil Appeals affirmed the trial court's usage of that presumption in awarding custody of the parties' two minor children to the respondent, Alice Beth Clark Devine. For the reasons hereinafter set forth, we reverse and remand.

I

Pursuant to Rule 10 (e) of the Alabama Rules of Appellate Procedure, the petitioner/father (appellant below) and respondent/mother (appellee below) filed the following stipulations of fact to serve in lieu of the record on appeal:

> and the Appellee, Alice Beth Clark Devine, (being the only parties in this cause) were legally and lawfully married on December 17, 1966, in Jefferson County, Georgia, and separated in Calhoun County, Alabama, on March 29, 1979.
>
> (2) The two children born of the parties during their marriage, viz: Matthew Patrick Devine, a son, born June 29, 1972, and Timothy Clark Devine, a son, born June 25, 1975, (the custody as to both of whom the Court has awarded to Alice Beth Clark Devine) are children of "tender years" as contemplated by the "tender years" doctrine or presumption.

687 *687

> (3) The Appellee/natural mother Alice Beth Clark Devine (hereinafter sometimes referred to as "Mrs. Devine") graduated from the Woman's College of Georgia in Milledgeville, Georgia, in 1962, receiving a B.S. degree with a major in Business Administration and a minor in Business Education. Since her graduation in 1962, Mrs. Devine has taught high school for 2 years at Margaret McAvoy High in Macon, Georgia; worked at the Georgia Rehabilitation Center for at least 2 years; was an instructor at the Augusta Area Technical School in Georgia for 2 years; was an instructor — trainer with the Army at Fort Gordon, Georgia for approximately 2 years; taught in high school at Notasulga, Alabama for one year; directed a media library and taught classes for the Department of Rehabilitation at Auburn University for approximately 2 years; in 1975 commenced employment with the U.S. Army at Fort McClellan, Alabama, where she was employed continuously through the time of the trial of this cause as an Educational Specialist with a GS-11 rating earning in excess of $20,000 annually as salary (plus additional fringe benefits), and at the time of the trial Mrs. Devine indicated that she intended to remain employed at Fort McClellan or at some similar employment after the trial.
>
> (4) Mrs. Devine was born July 20, 1940 and was 38 years of age at the time of the trial of this cause. The Appellant/natural father, Christopher P. Devine was born on January 15, 1937, and at the time of the trial of this cause he was a member of the faculty and head of the Guidance and Counseling Department at Jacksonville State University, Jacksonville, Alabama. At the time of the trial, the older son had just completed the first grade at the said University's Elementary Laboratory School and the younger son was enrolled in the said University's Nursery Laboratory School.
>
> (5) The parties further adopt all findings of facts as set forth by the trial court in its judgment of divorce dated July 6, 1979, in its order dated September 6, 1979, and in its order dated October 17, 1979, and incorporate same herein by reference.

The September 6th order referred to in stipulation number 5 was rendered by the trial court in response to the father's initial post trial motion requesting the trial court to modify its custody award. In that order the trial court offered the following justification for its decision:

> The facts of this case clearly show that either plaintiff or defendant would be a fit and proper person to be vested with the care, custody and control of the parties' minor children. While there was evidence presented at trial which raised questions in the mind of the court as to each parent's suitability, none presented was of such magnitude that it showed either to be unfit. Likewise, evidence was presented to the court showing that each parent possessed certain positive qualities that should be considered in determining which of them would be the proper one to be awarded custody.
>
> At the conclusion of the case, there did not exist a clear preponderance of the evidence for either party regarding child custody. However, there exists in Alabama law a presumption that when dealing with children of tender years, the natural mother is presumed, in absence of evidence to the contrary, to be the proper person to be vested with custody of such children. This presumption, while perhaps weaker now than in the past, remains quite viable today. *See e.g. Thompson v. Thompson*, 57 Ala. App. 57, 326 So.2d 124 (1975), *cert. den.* 295 Ala. 425, 326 So.2d 129 (1976); *Taylor v. Taylor*, 372 So.2d 337 (Ala.Civ.App. 1979), *cert. den.* 372 So.2d 341 (Ala. 1979).
>
> Based upon the evidence presented at trial, the presumption of fitness discussed above and the court's opinion that it was in the children's best interest that they be in the custody of their mother, custody was placed subject to plaintiff's liberal visitation rights.

688 On October 17, 1979, in response to the father's second post trial motion, the trial *688 court reaffirmed its position concerning the relative parental suitability of the parties:

> The facts of this case make it obvious that either of the parties would be fit and proper to be awarded the general care, custody, and control of the minor children born of their marriage. They both have individual shortcomings; however, neither possesses adverse qualities of a nature or character sufficient to make either an unfit parent.

The sole issue presented for review is whether the trial court's reliance on the tender years presumption deprived the father of his constitutional entitlement to the equal protection of the law. In resolving this issue, we feel it is necessary to consider the historical development of the tender years presumption and re-examine its modern efficacy in light of recent pronouncements by the United States Supreme Court.

II

At common law, it was the father rather than the mother who held a virtual absolute right to the custody of their minor children.[1] This rule of law was fostered, in part, by feudalistic notions concerning the "natural" responsibilities of the husband at common law. The husband was considered the head or master of his family, and, as such, responsible for the care, maintenance, education and religious training of his children. By virtue of these responsibilities, the husband was given a corresponding entitlement to the benefits of his children, i.e., their services and association. It is interesting to note that in many instances these rights and privileges were considered dependent upon the recognized laws of nature and in accordance with the *presumption* that the father could best provide for the necessities of his children:

1 There are a number of excellent law review articles recounting the historical development of the tender years presumption. For purposes of this opinion, we have relied heavily on Foster, *Life With Father:* 1978, 11 Fam.L.Q. 321 (1978), *reprinted in* S. Katz M. Inker, *Fathers, Husbands Lovers: Legal Rights Responsibilities* 139 (1979); Roth, *The Tender Years Presumption in Child Custody Disputes,* 15 J.Fam.L. 423 (1976); Podell, *Custody — To Which Parent?* 56 Marq.L.Rev. 51 (1972); and Comment, *Measuring the Child's Best Interest — A Study of Incomplete Considerations,* 44 Den.L.J. 132 (1967). See also, 69 Am.Jur.2d *Parent and Child* §§ 28-31 (1971).

> Undoubtedly, the father has primarily, by law as by nature, the right to the custody of his children. This right is not given him solely for his own gratification, but because nature and the law ratifying nature assume that the author of their being feels for them a tenderness which will secure their happiness more certainly than any other tie on earth. Because he is the father, the presumption naturally and legally is that he will love them most, and care for them most wisely. And, as a consequence of this, it is presumed to be for the real interest of the child that it should be in the custody of its father, as against collateral relatives, and he, therefore, who seeks to withhold the custody against the natural and legal presumption, has the burden of showing clearly that the father is an unsuitable person to have the custody of his child.

Hibbette v. Baines, 78 Miss. 695, 29 So. 80 (1900). As Chief Justice Sharkey more eloquently stated in his dissenting opinion in *Foster v. Alston*, 7 Miss. (6 How.) 406, 463 (1842):

> We are informed by the first elementary books we read, that the authority of the father is superior to that of the mother. It is the doctrine of all civilized nations. It is according to the revealed law and the law of nature, and it prevails even with the wandering savage, who has received none of the lights of civilization.

By contrast, the wife was without any rights to the care and custody of her minor children. By marriage, husband and wife became one person with the legal identity of the woman being totally merged with that of her husband. As a result, her rights were often subordinated to those of her husband and she was laden with 689 numerous marital disabilities. As far as any custodial rights were concerned, Blackstone stated *689 the law to be that the mother was "entitled to no power [over her children], but only to reverence and respect." 1 W. Blackstone, *Commentaries on the Law of England* 453 (Tucker ed. 1803).

By the middle of the 19th century, the courts of England began to question and qualify the paternal preference rule. This was due, in part, to the "hardships, not to say cruelty, inflicted upon unoffending mothers by a state of law which took little account of their claims or feelings." W. Forsyth, *A Treatise on the Law Relating to the Custody of Infants in Cases of Difference Between Parents or Guardians* 66 (1850). Courts reacted by taking a more moderate stance concerning child custody, a stance which conditioned a father's absolute custodial rights upon his fitness as a parent. Ultimately, by a series of statutes culminating with Justice Talfourd's Act, 2 and 3 Vict. c. 54 (1839), Parliament affirmatively extended the rights of mothers, especially as concerned the custody of young children. Justice Talfourd's Act expressly provided that the chancery courts, in cases of divorce and separation, could award the custody of minor children to the mother *if the children were less than seven years old.* This statute marks the origin of the tender years presumption in England.

In the United States the origin of the tender years presumption is attributed to the 1830 Maryland decision of *Helms v. Franciscus*, 2 Bland Ch. (Md.) 544 (1830). In *Helms*, the court, while recognizing the general rights of the father, stated that it would violate the laws of nature to "snatch" an infant from the care of its mother:

> The father is the rightful and legal guardian of all his infant children; and in general, no court can take from him the custody and control of them, thrown upon him by the law, not for his gratification, but on account of his duties, and place them against his will in the hands even of his wife. . . . Yet even a court of common law will not go so far as to hold nature in contempt, and snatch helpless, puling infancy from the bosom of an affectionate mother, and place it in the coarse hands of the father. The mother is the softest and safest nurse of infancy, and with her it will be left in opposition to this general right of the father.

Thus began a "process of evolution, perhaps reflecting a change in social attitudes, [whereby] the mother came to be the preferred custodian of young children and daughters. . . ." Foster, *Life with Father: 1978*, 11 Fam.L.Q. 327 (1978).

In Alabama, the first noticeable discussion of the tender years presumption appears in the case of *Cornelius v. Cornelius*, 31 Ala. 479 (1858). In that case the court awarded custody of a young male child to the mother because the father was found to be guilty of certain "fixed intemperate habits"; however, the court qualified its decision by stating that the father could later recover the custody of his child by presenting credible evidence that he had reformed. The court at 31 Ala. 482 reasoned as follows:

> There would be much difficulty in laying down an absolute rule, fixing a period when the custody of a male child should be taken from the mother and given to the father. If all parents were alike suitable, possibly we might do so. As we before remarked, a father or mother who is every way qualified for the trust at one time, may be wholly unfit at another. *Where there is no unfitness in the mother, evidently the child should remain with her, until he has reached an age when he can dispense with those tender offices which only a mother can bestow.* At what particular age that period will arrive, we will not undertake at this time to determine. On the other hand, if one parent be a suitable custodian of the child, and the other not, and this suitableness of the one and unfitness of the other continue, the child should be put under the care of the one who is suitable, and no change should be afterwards made. [Emphasis supplied.]

While recognizing a need for young children to remain in the custody of their mother, the court was not 690 prepared to totally *690 deny the father's "natural rights." The court was apparently as concerned, if not more concerned, with the unfitness of the father as with the tender age of the child.

The attitude expressed in *Cornelius* was not readily accepted. Alabama courts continued to award custody to the father, even in cases involving very young children. In *Bryan v. Bryan*, 34 Ala. 516 (1859), for example, the court awarded the custody of a two-year-old boy and a four-year-old girl to the father; however, in doing so, the court admitted its reluctance to take young children from their mother. At 34 Ala. 521-522 the court stated:

> [W]e would have been extremely reluctant at the commencement of this suit to have withheld our sanction to the protection of the mother in the custody of the children, because at that time one of them was an infant of ten months at the breast, and the other a girl only three years of age. But now the period of lactation with the younger child has passed, and two years have been added to the ages of the children; and it is not now impossible for the father to discharge the duties of nurture and care, in which he will be aided by his mother. Taking into consideration the fact that the defendant is not shown to be of such character, or to have such habits as would necessarily contaminate the children, or render them unsafe in his custody, and the strong favor with which the law regards the father's prior right to the custody of his children, and the unauthorized state of separation from her husband in which the petitioner has placed herself, and her want of any peculiar fitness for the custody and care of the children, and also that the children have passed the age when the mother's care, though valuable and desirable, is indispensable, we deem it our duty to withhold any active interference in behalf of the wife's exclusive custody and control of the children.

In *Bryan*, the age of the children was clearly a significant factor in the court's decision, although the court did mention the mother's "want of any peculiar fitness for the custody and care of the children."

The next major event which promoted the establishment of the tender years presumption in Alabama occurred when the legislature passed an act which affected custodial rights of parents. In both *Cornelius* and *Bryan* the court had acted pursuant to a statute which authorized the chancery courts, in cases of divorce, to award the custody of minor children to either the father or the mother. Code of 1852, § 1977. Although the statute then in force appeared to place the mother and father on equal footing, the courts generally respected the common law rule concerning the father's priority rights. On April 23, 1873, the Alabama Legislature passed an act to further define the custodial rights of fathers. 1872-73 Ala. Acts, Act No. 79. That act provided:

> That from and after the passage of this act, any father legally married to the mother of his child or children, shall be entitled to the custody of such child or children, in case such father is abandoned by the mother of such child or children, as soon as such child or children shall have attained the age of seven years; *Provided*, Such father is a suitable person to have the charge of such child or children. This statute shall be liberally construed.

Admittedly, the statute applied to a very narrow category of cases, *viz.*, those cases in which a wife had voluntarily abandoned her husband. Nevertheless, the new act established a rule that, even in those fact situations clearly justifying an award of custody to the father, the father would not be entitled to the custody of his minor children until they were seven years old. In construing this language in *Thomas v. Thomas*, 212 Ala. 85, 101 So. 738 (1924), this Court stated:

> This provision is a recognition of the fact that during the very tender years of the child the husband has not an unqualified right to its custody, even when the wife is at fault in the separation. Mothering of a young child is one of its rights. None but the real mother can meet this high duty in full measure.

691 *691

As late as 1946, this Court continued to recognize the paternal preference rule. *Brown v. Jenks*, 247 Ala. 596, 25 So.2d 439 (1946); however, by that time the rule was no longer a formidable factor in resolving child custody disputes. The influence of the paternal preference rule had been gradually replaced by a growing adherence to the tender years presumption.

At the present time, the tender years presumption is recognized in Alabama as a rebuttable factual presumption based upon the inherent suitability of the mother to care for and nurture young children. All things being equal, the mother is presumed to be best fitted to guide and care for children of tender years.[2] *Statham v. Statham*, 276 Ala. 675, 166 So.2d 403 (1964); *Clift v. Clift*, 346 So.2d 429 (Ala.Civ.App. 1977). To rebut this presumption the father must present clear and convincing evidence of the mother's positive unfitness. *McGregor v. McGregor*, 257 Ala. 232, 58 So.2d 457 (1952); *Thompson v. Thompson*, 57 Ala. App. 57, 326 So.2d 124 (1975). Thus, the tender years presumption affects the resolution of child custody disputes on both a substantive and procedural level. Substantively, it requires the court to award custody of young children to the mother when the parties, as in the present case, are equally fit parents. Procedurally, it imposes an evidentiary burden on the father to prove the positive unfitness of the mother.

2 In *Wells v. Wells*, 117 S.W.2d 700 (Mo.App. 1938), the court briefly alluded to the fact that at common law, the paternal preference rule was based, in part, upon the assumption that "all things being equal" the father was presumed to be the best custodian. Thus, the paternal preference, like the tender years presumption, was intended to resolve difficult custody questions when divorcing parents were equally fit. The contrasting rules, therefore, share a common assumption, i.e., "all things being equal" one parent is presumed to be a better custodian; however, from this common assumption they "presume" different conclusions.

In recent years, the tender years doctrine has been severely criticized by legal commentators as an outmoded means of resolving child custody disputes. Several state courts have chosen to abandon or abolish the doctrine, noting that the presumption "facilitates error in an arena in which there is little room for error." *Bazemore v. Davis*, 394 A.2d 1377 (D.C. 1978); *accord, Burks v. Burks*, 564 P.2d 71 (Alaska 1977); *In re Marriage of Bowen*, 219 N.W.2d 683 (Iowa 1974); *McAndrew v. McAndrew*, 39 Md. App. 1, 382 A.2d 1081 (1978); *Commonwealth ex rel. Spriggs v. Carson*, 470 Pa. 290, 368 A.2d 635 (1977). Only one court has expressly declared the presumption unconstitutional. *State ex rel. Watts v. Watts*, 77 Misc.2d 178, 350 N.Y.S.2d 285

(1973). Nevertheless, some form of the presumption remains in effect in at least twenty-two states.[3] In twenty states the doctrine has been expressly abolished by statute or court decision,[4] and in four other states its existence is extremely questionable.[5] In four states the presumption remains in effect despite a state's equal rights amendment or statutory language to the contrary.[6] As far as Alabama is concerned, the trial court correctly noted that the presumption, "while perhaps weaker now than in the past, remains quite viable today."

3 Alabama, Arkansas, Florida, Idaho, Kentucky, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, West Virginia, Wisconsin and Wyoming. For an excellent listing of the status of the tender years presumption in the various states see Foster, *Life with Father:* 1978, 11 Fam.L.Q. 321 (1978) and *Annot.*, 70 A.L.R.3d 262 (1976).

4 Alaska, Arizona, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Iowa, Maine, Massachusetts, Michigan, Nebraska, New York, North Carolina, Ohio, Texas and Washington.

5 Kansas, Oregon, Pennsylvania and Vermont.

6 Louisiana, Maryland, Minnesota and Utah.

It is safe to say that the courts of this state, like the courts of sister states, have come full circle in resolving the difficult questions surrounding child custody. At common law, courts spoke of the natural rights of the father. 692 Now they speak of the instinctive role of the mother. *692

The question we are confronted with is not dissimilar to the question confronting the English courts over 150 years ago: Is it proper to deny a parent the custody of his or her children on the basis of a presumption concerning the relative parental suitability of the parties? More specifically, can the tender years presumption withstand judicial scrutiny under the Fourteenth Amendment to the United States Constitution as construed in recent decisions by the Supreme Court of the United States?

III

The appellate courts of this state have held that the tender years presumption is "not a classification based upon gender, but merely a factual presumption based upon the historic role of the mother," *Hammac v. Hammac*, 246 Ala. 111, 19 So.2d 392 (1944). These statements indicate that the courts in the forties had not developed the sensitivity to gender-based classifications which the courts by the seventies had developed. In *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979), the United States Supreme Court held that any statutory scheme which imposes obligations on husbands, but not on wives, establishes a classification based upon sex which is subject to scrutiny under the Fourteenth Amendment. The same must also be true for a legal presumption which imposes evidentiary burdens on fathers, but not on mothers. The fact that the presumption discriminates against men rather than women does not protect it from judicial scrutiny. *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976).

Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), represents the first in a series of cases wherein the United States Supreme Court has considered the constitutionality of statutory classifications which discriminated between men and women on the basis of sex. In *Reed* the Court examined a mandatory provision of the Idaho probate code giving a preference to men over women when persons of equal entitlement applied for appointment as administrator of a decedent's estate. Under the facts of that case the law gave preference to the father, rather than the mother, for appointment as administrator of a child's estate. At the very outset of the opinion the Court expressed its concern over the fact that no attempt was made to determine the relative

capabilities of the parties to perform the functions incident to the administration of an estate. 404 U.S. at 73, 92 S.Ct. at 252. The statute was intended to relieve the probate court of a difficult decision when two or more persons, equally entitled, sought letters of administration. The Court reasoned that:

> To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.

404 U.S. at 76-77, 92 S.Ct. at 254.

Two years later in *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973), the Court relied on *Reed* in striking down a federal statutory scheme which extended a "presumption of dependency" in case of spouses of male members of the uniformed services, but not to spouses of female members. This presumption permitted a male member to claim his wife as a "dependent" without regard to whether she was, in fact, dependent upon him for any part of her support. A female member, on the other hand, could not claim her husband as a "dependent" unless he was, in fact, dependent upon her for over one-half of his support. Thus, as a procedural matter, a female member was required to demonstrate her spouse's dependency, while no such burden was imposed upon male members. As in *Reed*, the Court questioned the underlying purpose of the
693 statute and, in doing so, alluded to the lower court's speculative analysis: *693

> Although the legislative history of these statutes sheds virtually no light on the purposes underlying the differential treatment accorded male and female members, a majority of the three-judge District Court surmised that Congress might reasonably have concluded that, since the husband in our society is generally the "breadwinner" in the family — and the wife typically the "dependent" partner — "it would be more economical to require married female members claiming husbands to prove actual dependency than to extend the presumption of dependency to such members." *[Frontiero v. Laird]* 341 F. Supp. [201], at 207. Indeed, given the fact that approximately 99% of all members of the uniformed services are male, the District Court speculated that such differential treatment might conceivably lead to a "considerable saving of administrative expense and manpower."

Moreover, the government maintained that, as an empirical matter, wives in our society frequently are dependent upon their husbands while husbands rarely are dependent upon their wives. Thus, the government argued that Congress might reasonably have concluded that it would be both cheaper and easier to conclusively presume that wives of male members are financially dependent upon their husbands, while burdening female members with the task of establishing dependency in fact.

In considering these rational explanations of the statutory scheme, the Court cited *Reed* for the proposition that classifications based upon sex, like classifications based upon race, are inherently suspect and must therefore be subjected to close judicial scrutiny. 411 U.S. at 682, 93 S.Ct. at 1768. Additionally, the Court expanded the reasoning used in *Reed* by considering, in a general fashion, the constitutionality of statutes which distinguish between males and females on the basis of "old notions," notions based upon stereotyped distinctions between the sexes. At 411 U.S. at 686, 93 S.Ct. at 1770, the Court reasoned that:

> [S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . ." *Weber v. Aetna Casualty Surety Co.*, 406 U.S. 164, 175 [92 S.Ct. 1400, 1406, 31 L.Ed.2d 768] (1972). And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.

In closing, the Court concluded that:

> [O]ur prior decisions make clear that, although efficacious administration of governmental programs is not without some importance, "the Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois*, 405 U.S. 645, 656 [92 S.Ct. 1208, 1215, 31 L.Ed.2d 551] (1972). And when we enter the realm of "strict judicial scrutiny," there can be no doubt that "administrative convenience" is not a shibboleth, the mere recitation of which dictates constitutionality. See *Shapiro v. Thompson*, 394 U.S. 618 [89 S.Ct. 1322, 22 L.Ed.2d 600] (1969); *Carrington v. Rash*, 380 U.S. 89 [85 S.Ct. 775, 13 L.Ed.2d 675] (1965). On the contrary, any statutory scheme which draws a sharp line between the sexes, *solely*, for the purpose of achieving administrative convenience, necessarily commands "dissimilar treatment for men and women who are . . . similarly situated," and therefore involves the "very kind of arbitrary legislative choice forbidden by the [Constitution]. . . ." *Reed v. Reed*, 404 U.S., at 77, 76 [92 S.Ct., at 254].

411 U.S. at 690, 93 S.Ct. at 1772.

694 In subsequent decisions relying on *Reed* and *Frontiero*, the court reaffirmed and *694 expanded its equal protection analysis. *Orr v. Orr*, supra; *Craig v. Boren*, supra; *Stanton v. Stanton*, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975). In *Craig*, for example, the Court considered the constitutionality of certain Oklahoma statutes which prohibited the sale of "nonintoxicating" 3.2% beer to males under the age of twenty-one and females under the age of eighteen. The Court concluded that the gender-based differential violated the Fourteenth Amendment and reasoned as follows:

> *Reed v. Reed* has . . . provided the underpinning for decisions that have invalidated statutes employing gender as an inaccurate proxy for other, more germane bases of classification. Hence, "archaic and overbroad" generalizations, *Schlesinger v. Ballard, supra* [419 U.S. 498] at 508, [95 S.Ct. 572, 577], concerning the financial position of servicewomen, *Frontiero v. Richardson, supra* [411 U.S.], at 689 n. 23 [93 S.Ct., at 1772 n. 23], and working women, *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 [95 S.Ct. 1225, 1230, 43 L.Ed.2d 514] (1975), could not justify use of a gender line in determining eligibility for certain governmental entitlements. Similarly, increasingly outdated misconceptions concerning the role of females in the home rather than in the "marketplace and world of ideas" were rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy. *Stanton v. Stanton, supra; Taylor v. Louisiana*, 419 U.S. 522, 535 n. 17 [95 S.Ct. 692, 700 n. 17, 42 L.Ed.2d 690] (1975). In light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact. See *e.g., Stanley v. Illinois, supra* [405 U.S.], at 648 [92 S.Ct., at 1211], *cf. Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 650 [94 S.Ct. 791, 801, 39 L.Ed.2d 52] (1974).

Likewise, in *Orr* the Court declared unconstitutional an Alabama statutory scheme imposing alimony obligations on husbands but not wives. In very terse language, the Court commented on statutes which reinforce the concept of the sexual stereotype:

> Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the "proper place" of women and their need for special protection. Cf. *United Jewish Organizations v. Carey*, 430 U.S. 144, 173-174 [97 S.Ct. 996, 1013, 51 L.Ed.2d 229] (1977) (opinion concurring in part). Thus, even statutes purportedly designed to compensate for and ameliorate the effects of past discrimination must be carefully tailored. Where, as here, the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex.

440 U.S. at 283, 99 S.Ct. at 1113.

Reed, Frontiero and *Orr* are particularly significant cases insofar as they scrutinize gender-based classifications involving husbands and wives. In *Caban v. Mohammed*, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979), the Court considered a similar issue regarding gender-based distinctions involving *fathers* and *mothers.* [7] In *Caban*, the appellant, Abdiel Caban, challenged the constitutionality of § 111 of the New York Domestic Relations Law which permitted *695 an unwed mother, but not an unwed father, to block the adoption of their minor child simply by withholding consent. Caban lived with appellee, Maria Mohammed, for approximately five years, during which time Mohammed gave birth to two children. Caban was identified as the father on each child's birth certificate and, together with Mohammed, he contributed to the support of the children. Mohammed eventually took the two children and left Caban to take up residence with Kazin Mohammed whom she subsequently married. Even after the separation, Caban continued to visit and communicate with his children.

[7] We recognize that this Court has denied certiorari in several cases wherein the Court of Civil Appeals had examined the constitutionality of the tender years presumption. *Taylor v. Taylor*, 372 So.2d 337 (Ala.Civ.App. 1979), *cert. den.* 372 So.2d 341 (Ala. 1979); *Thompson v. Thompson*, 57 Ala. App. 57, 326 So.2d 124 (1974), *cert. den.* 295 Ala. 425, 326

So.2d 129 (1976). However, these decisions were rendered prior to *Caban.* We granted certiorari in the instant case to re-examine the constitutionality of the presumption in light of the *Caban* decision.

In a subsequent dispute over the custody of the children, a New York Family Court placed the children in the temporary custody of the Mohammeds and gave Caban and his new wife liberal visitation rights. Approximately one year later the Mohammeds filed a petition seeking to adopt the two children. The Cabans immediately cross-petitioned for adoption. Relying on § 111, the New York court granted the Mohammeds' petition, allowing the Cabans to present evidence only insofar as it reflected upon the Mohammeds' qualifications as prospective parents.

On appeal to the United States Supreme Court Caban asserted that the distinction drawn under New York law between the adoption rights of unwed fathers and unwed mothers violated the Equal Protection Clause of the Fourteenth Amendment. The Court agreed, rejecting the mother's argument that the distinction was justified by a fundamental difference between maternal and paternal relations. At 441 U.S. 389, 99 S.Ct. 1766 the Court reasoned as follows:

> Contrary to appellees' argument and to the apparent presumption underlying § 111, maternal and paternal roles are not invariably different in importance. Even if unwed mothers as a class were closer than unwed fathers to their newborn infants, this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased. The present case demonstrates that an unwed father may have a relationship with his children fully comparable to that of the mother. . . . There is no reason to believe that the Caban children — aged 4 and 6 at the time of the adoption proceedings — had a relationship with their mother unrivaled by the affection and concern of their father. We reject, therefore, the claim that the broad, gender-based distinction of § 111 is required by any universal difference between maternal and paternal relations at every phase of a child's development.

In closing, the Court rephrased this reasoning:

> The facts of this case illustrate the harshness of classifying unwed fathers as being invariably less qualified and entitled than mothers to exercise a concerned judgment as to the fate of their children. Section 111 both excludes some loving fathers from full participation in the decision whether their children will be adopted and, at the same time, enables some alienated mothers arbitrarily to cut off the paternal rights of fathers. We conclude that this undifferentiated distinction between unwed mothers and unwed fathers, applicable in all circumstances where adoption of a child of theirs is at issue, does not bear a substantial relationship to the State's asserted interests.

441 U.S. at 394, 99 S.Ct. at 1769. *Caban* is closely analogous to the present controversy, and is authority for the judgment we render.

IV

Having reviewed the historical development of the presumption as well as its modern status, and having examined the presumption in view of the holdings in *Reed, Frontiero, Orr* and *Caban*, we conclude that the tender years presumption represents an unconstitutional gender-based classification which discriminates between fathers and mothers in child custody proceedings solely on the basis of sex. Like the statutory presumption in *Reed*, the tender years doctrine creates a presumption *696 of fitness and suitability of one parent without any consideration of the actual capabilities of the parties. The tender years presumption, like the statutory schemes in *Frontiero* and *Orr*, imposes legal burdens upon individuals according to the "immutable

characteristic" of sex. By requiring fathers to carry the difficult burden of affirmatively proving the unfitness of the mother, the presumption may have the effect of depriving some loving fathers of the custody of their children, while enabling some alienated mothers to arbitrarily obtain temporary custody. *Cf., Caban*, supra, 441 U.S. at 394, 99 S.Ct. at 1769. Even so, a gender-based classification, although suspect, may be justified if it is substantially related to a significant state interest. *See, Reed, Frontiero* and *Caban*, supra.

Admittedly, the State has a significant interest in overseeing the care and custody of infants. In fulfilling this responsibility in child custody proceedings, the courts of this state, in custody determinations, have applied the "best interests of the child" rule.[8] *Brill v. Johnson*, 293 Ala. 435, 304 So.2d 595 (1974); *Carter v. Harbin*, 279 Ala. 237, 184 So.2d 145 (1966). We are convinced that the tender years presumption rejects the fundamental proposition asserted in *Caban* that "maternal and paternal roles are not invariably different in importance." *Caban*, supra at 441 U.S. 389, 99 S.Ct. 1766. Even if mothers as a class were closer than fathers to young children, this presumption concerning parent-child relations becomes less acceptable as a basis for judicial distinctions as the age of the child increases. *Id.* Courts have come to rely upon the presumption as a substitute for a searching factual analysis of the relative parental capabilities of the parties, and the psychological and physical necessities of the children. The presumption has thus become what one writer refers to as an "anodyne" for the difficult decisions confronting the court. Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J.Fam.L. 423, 438 (1976). However, as Justice White correctly observed in *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), "[p]rocedure by presumption is always cheaper and easier than individualized determination." In view of the fact that the welfare of children and competing claims of parents are at stake, such a means of determination cannot be justified.

8 Ironically, the first application of the best interests rule in an Alabama divorce proceeding was made in *Cornelius v. Cornelius*, supra, the first case discussing the tender years presumption. Prior to that time the rule had only been recognized in those cases wherein children were outside the custody of their father and he asserted his natural rights to their custody by way of habeas corpus. *Ex parte Boaz*, 31 Ala. 425 (1858); *Neville v. Reed*, 134 Ala. 317, 32 So. 659 (1901). Thus, from a common origin the tender years presumption and the best interests of the child rule have grown side by side. In virtually every case wherein this Court applied the tender years rule, it would also express its abiding concern for the best interests of the child. *See, e.g., Hammac v. Hammac*, supra; *Goldman v. Hicks*, 241 Ala. 80, 1 So.2d 18 (1941); *Stoddard v. Bruner*, 217 Ala. 207, 115 So. 252 (1928); *Thomas v. Thomas*, 212 Ala. 85, 101 So. 738 (1924). As far as the courts were concerned, the best interests of young children were always served by placing them in the custody of their mother.

The trial court's custody decree conclusively shows that the tender years presumption was a significant factor underlying the court's decision. Confronted with two individuals who were equally fit (i.e., all things being equal), the trial court awarded custody to the mother.

Accordingly, the judgment of the Court of Civil Appeals affirming the lower court decree and affirming the constitutionality of the tender years presumption is hereby reversed. The cause is due to be remanded to the trial court with directions that the court consider the individual facts of the case. The sex and age of the children are indeed very important considerations; however, the court must go beyond these to consider the characteristics and needs of each child, including their emotional, social, moral, material and educational needs; the respective home environments offered by the parties; the characteristics of those seeking custody, including 697 age, character, stability, mental and physical health; the capacity and interest of each *697 parent to provide for the emotional, social, moral, material and educational needs of the children; the interpersonal relationship between each child and each parent; the interpersonal relationship between the children; the effect on the child of disrupting or continuing an existing custodial status; the preference of each child, if the child is of sufficient

age and maturity; the report and recommendation of any expert witnesses or other independent investigator; available alternatives; and any other relevant matter the evidence may disclose. *In re Marriage of Winter*, 223 N.W.2d 165 (Iowa 1974); *see also, Johnson v. Johnson*, 564 P.2d 71 (Alaska 1977); *In re Marriage of Bowen*, 219 N.W.2d 683 (Iowa 1974); *Christensen v. Christensen*, 191 Neb. 355, 215 N.W.2d 111 (1974). Only in this way will the court truly consider the best interests of the Devine children.

REVERSED AND REMANDED WITH DIRECTIONS.

FAULKNER, JONES, SHORES, EMBRY, BEATTY and ADAMS, JJ., concur.

TORBERT, C.J., dissents.

ALMON, J., not sitting.

TORBERT, Chief Justice (dissenting).

The majority of the Justices on this Court have voted to abolish the tender years doctrine for all purposes in this state. I believe that decision goes too far, and I would retain the doctrine as a factor to be considered in deciding to which parent custody should be awarded.

The well-being of the child is the paramount consideration in determining its custody. *Strickland v. Strickland*, 285 Ala. 693, 235 So.2d 833 (1970); *Ayers v. Kelly*, 284 Ala. 321, 224 So.2d 673 (1969); *Curry v. Curry*, 283 Ala. 272, 215 So.2d 715 (1968). The focus in a child custody hearing is on the child's welfare and best interest, not on the parents or their personal rights. Custody of one's child is not a prize to be fought for; rather it is a responsibility imposed by the court under appropriate conditions or restrictions the court sees fit to impose. Therefore, *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979), *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973), and *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), as well as other cases cited by the majority, have no relevance in the field of child custody. Gender may be an inappropriate factor to consider in bestowing a benefit, but it should be a factor in determining which parent will have primary custody of a very small child.

We are not faced here with the type of problem dealt with in *Orr, Frontiero*, and *Reed, i.e.*, a rule by which one gender was given absolute preference over the other. The tender years doctrine, as the majority correctly stated, has evolved over the years into a factor to be considered in child custody determinations, rather than a compelling presumption. *See, Jenkins v. Jenkins*, 376 So.2d 1099 (Ala.Civ.App. 1979). I believe it is valid as such, and should be retained in its present form. I therefore respectfully dissent.

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Jody M. Higdon, Clerk
Morgan County, Georgia

IN THE SUPERIOR COURT OF MORGAN COUNTY
STATE OF GEORGIA

TYLER PERRY,	)	
Petitioner,	)	
vs.	)	**CIVIL ACTION**
	)	**FILE NUMBER: SUCA2018000030**
KAITLYN V. JENKINS,	)	
Respondent.	)	

FINAL ORDER

A bench trial was held in this matter on October 29, 2018. At the bench trial, Petitioner/Father Tyler Perry appeared with his counsel of record, Virginia Nell Morris and Respondent/Mother Kaitlyn Jenkins appeared with her counsel of record, Brad J. Evans. After hearing evidence from the parties and argument from counsel, the Court entered a Final Order on October 29, 2019. Petitioner/Father Tyler Perry appealed the Final Order to the Georgia Court of Appeals who reversed and remanded the case back to this Court for the purposes of this Court clearly expressing that the Court had considered joint physical custody and determining whether such a custodial arrangement would be the best interests of the child in this case. Therefore, for the reasons set forth below, after expressly considering joint physical custody, this Court finds that joint physical custody would not be in the best interests of the child in this case.

FINDINGS OF FACT

1.

The parties had the following child out of wedlock: CARSON MICHAEL PERRY, male, born in 2015 (the "minor child").

2.

On December 12, 2017, an Order for Paternity and Child Support was issued by the

Walton County Superior Court requiring Petitioner/Father to pay $445.00 per month as child support for the minor child with the first payment due on February 1, 2018. See The Georgia Department of Human Services, ex. rel., Carson Michael Perry v. Tyler Scott Perry, Walton County Superior Court, Civil Action File Number 2017-SU-CV-1939, the final order in which was admitted as Petitioner's Exhibit 4 at trial.

3.

On February 15, 2018, Petitioner/Father filed his Petition for Legitimation, Custody, Visitation, and Child Support in the Morgan County Superior Court. Respondent/Mother acknowledged service on or around March 7, 2018 and filed her Answer to Petition for Legitimation, Custody, Visitation, and Child Support and Counterclaim to Establish Custody and Visitation on or around April 5, 2018. Legitimation of the minor child was never contested.

4.

A temporary hearing was scheduled by Respondent/Mother for May 9, 2018. Respondent/Mother and her counsel of record appeared. Neither Petitioner/Father nor his counsel of record appeared. In the Temporary Order issued on May 9, 2018, CARSON MICHAEL PERRY, a male child born in 2015, was declared the legitimate child of Petitioner/Father/Father TYLER PERRY. In that same Temporary Order, Respondent/Mother was named the temporary primary physical custodian and Petitioner/Father was provided with every other weekend visitation. Petitioner's counsel of record later claimed that she did not receive notice of the temporary hearing but filed no motion to set aside the Temporary Order issued on that date and took no action to modify that Temporary Order.

5.

The following facts established at the bench trial held on October 29, 2018 provided a basis for the Court's Conclusions of Law:

(a) Counsel of record for each party acknowledged and agreed that the bench trial was agreeable to resolve this matter and waived their respective rights to a jury trial.

(b) On his side of the case, Petitioner/Father called as witnesses Respondent/Mother (for purposes of cross-examination), Petitioner/Father, Petitioner/Father's mother, and Petitioner/Father's wife. On her side of the case, Respondent/Mother called only herself as a witness.

(c) The minor child has been in the custody and care of Respondent/Mother since his birth. The minor child was cared for by both Petitioner/Father and Respondent/Mother while they lived together. At some point prior to September, 2017, the parties separated and the minor child lived with Respondent/Mother at Respondent/Mother's parent's home. Petitioner/Father regularly had visitation with the minor child prior to the Temporary Order being issued but overnight stays with Petitioner/Father were rare for the minor child. Since the Temporary Order was issued, Petitioner/Father has had visitation with the minor child every other Saturday and Sunday from 9:00 a.m. to 5:00 p.m. each day.

(d) Respondent/Mother was primarily responsible for taking the minor child to doctor's appointments both while the parties lived together and after the parties lived together. Petitioner/Father occasionally attended these appointments.

(e) Petitioner/Father lives in Watkinsville, Georgia. Respondent/Mother lives in Madison, Georgia. Travel to/from one another takes no less than 40 minutes. Both parties have stable living situations and suitable dwellings in which to raise the child.

(f) 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.

(g) The minor child is intelligent, happy, well-behaved, and well cared for.

6.

Respondent's attorney presented evidence of the attorney's fees and expenses incurred by Respondent as a result of this action. Respondent's attorney stated that his hourly rate is $275.00, he has practiced law for about 15 years, his hourly rate for his legal experience was appropriate and reasonable for this judicial circuit, that the work performed by him was reasonable and necessary in this case, and provided a detailed billing invoice in the amount of $3,455.30 and requested an additional 2 hours or $550.00 in fees for the bench trial, which brought the total attorney's fees and expenses request to $4,005.30. It should be noted that Respondent's attorney's detailed billing invoice was admitted without objection at trial as Respondent's Exhibit 1.

7.

After the close the evidence and after each party had made closing arguments, the Court ruled that Respondent should be the primary physical custodian of the minor child with visitation rights for Petitioner. After the Court ruled, Petitioner's attorney requested that the Court make findings of fact in support of its order.

CONCLUSIONS OF LAW

1.

Petitioner/Father has requested that the Court consider a joint physical custody arrangement. While both parties considered the other to be a proper and fit parent, the Court finds that it is in the best interests of the minor child that Respondent/Mother be the primary physical custodian of the minor child 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.

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. The following factors had a substantial impact on the Court's determination:

(a) O.C.G.A. § 19-9-3(a)(3)(A). While there is love, affection, bonding, and emotional ties between each parent and the minor child, Respondent/Mother has lived with and cared for the minor child his entire life and to sever the bonding and ties between the two of them by changing custody would be detrimental to the minor child's best interests.

(b) O.C.G.A. § 19-9-3(a)(3)(B). Respondent/Mother has demonstrated love, affection, and guidance for the minor child. The minor child is with the Respondent/Mother the vast majority of the time and the evidence established that the child has learned his colors, numbers, letters, and shapes and reads regularly with Respondent/Mother.

(c) O.C.G.A. § 19-9-3(a)(3)(D). Respondent/Mother has the greatest knowledge and familiarity with the minor child and the minor child's needs. Respondent/Mother has lived with and cared for the minor child his entire life. Respondent/Mother has taken the minor child to all of his medical appointments.

(d) O.C.G.A. § 19-9-3(a)(3)(E). Respondent/Mother 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 the current child support obligation.

(e) O.C.G.A. § 19-9-3(a)(3)(F). The home environment of each parent is a nurturing and safe environment.

(f) O.C.G.A. § 19-9-3(a)(3)(G). The minor child has continuously lived with Respondent/Mother for his entire life. Respondent/Mother has maintained a stable, satisfactory environment during the minor child's entire life. The maintenance of this continuity in the child's life is paramount.

(g) O.C.G.A. § 19-9-3(a)(3)(K). Petitioner/Father works approximately 40-48 hours per week. Respondent/Mother is currently unemployed and when she was employed, she worked part-time. Petitioner/Father's employment schedule severely limits his time available to his minor child. Respondent/Mother's schedule has no limitations of time for the minor child.

2.

(a) The parties shall have joint legal custody with Respondent/Mother being the primary physical custodian of said child and Petitioner/Father having visitation with said child every other Saturday and Sunday from 9:00 a.m. to 5:00 p.m. Said visitation shall began May 19, 2018 and continue every other weekend until the minor child reaches the age of five (5) years old, at which time the visitation schedule shall be as set forth in the Ocmulgee Judicial Circuit's Visitation schedule attached hereto as Exhibit "A. The parties shall also comply with the Standard Orders for Parenting attached hereto as Exhibit "B".

(b) While the parties shall have joint legal custody of the child for any and all purposes under Georgia and/or federal law, Respondent/Mother shall be designated as the primary physical custodian and Respondent/Mother's address shall be the minor child's legal address. The parties

shall make a good faith attempt to resolve all issues affecting the child. In the event that an agreement cannot be reached, Respondent/Mother shall have final-decision making on all issues affecting the child.

3.

Petition shall be responsible for picking up and dropping off the minor child at Respondent/Mother's residence.

4.

(a) Child support shall remain as ordered by the Walton County Superior Court in The Georgia Department of Human Services, ex. rel., Carson Michael Perry v. Tyler Scott Perry, Walton County Superior Court, Civil Action File Number 2017-SU-CV-1939.

(b) Petitioner/Father shall continue to maintain health insurance coverage for the minor child. Petitioner/Father and Respondent/Mother shall each pay one-half (50%) of all non-covered, reasonable and necessary medical, dental, orthodontic, psychological, counseling, therapeutic, drug, hospitalization, or other health-related expenses of the children, including any deductible amounts, co-payments or other related expenses not covered by health insurance.

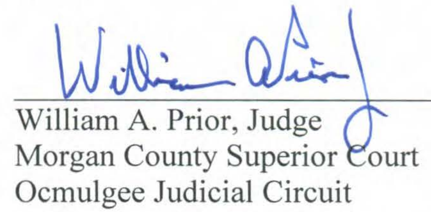
Petitioner/Father shall provide Respondent/Mother with a copy of all policies, booklets, identification cards, or other documents provided to him by the insurer. In the event either party pays all (100%) of any uncovered expense described above, such party shall provide proof of such expense to the other party within 30 days of same, and the other party shall reimburse the paying party within 30 days of receipt of such receipt. Should insurance later reimburse a party for an expense that was previously divided by the parties, then all such reimbursements shall be equally divided.

5.

Respondent/Mother's attorney has requested an award of attorney's fees and expenses of litigation under O.C.G.A. § 19-9-3(g). The Court orders an award of attorney's fees and

expenses in the amount of $2,000.00. This award is based on the financial position of each of the parties as evidenced by the pleadings and the testimony at trial. This amount should be paid by Petitioner/Father to Respondent/Mother's attorney no later than 90 days from the date of this Final Order.

This 29th day of December, 2020.



William A. Prior, Judge
Morgan County Superior Court
Ocmulgee Judicial Circuit

VISITATION

CP= Custodial Parent
NC= Non-custodial Parent
(Mother or Father should be inserted)

The NC shall have liberal periods of custody. If the parties cannot agree, then the following schedule shall control:

Visitation: The NC shall have visitation with the child every other weekend beginning Friday at 6:00 p.m. until Sunday at 6:00 p.m.

Summer: The NC shall have the child(ren) for two non-consecutive weeks during June or July, uninterrupted by the mother's visitation, provided that by May 1st of each year, the NC gives the CP written notice of when he/she intends to exercise the visitation.

Christmas: The CP shall have the minor child beginning the day after school recesses for Christmas holidays until December 26th at 9:00 a.m. during even numbered years. The NC shall have the same time for his/her visitation during odd number years. The CP shall have the minor child with him/her from December 26th beginning at 9:00 a.m. until January 2nd at 9:00 a.m. during odd numbered years. The NC shall have the same time during even numbered years.

Thanksgiving: In even-numbered years, the NC shall have the child(ren) from 6:00 p.m. on the day the child(ren) is/are released from school preceding Thanksgiving holiday until the Sunday following Thanksgiving Day at 6:00 p.m. The CP shall have the child during this time period during odd numbered years.

July 4th: The NC shall have the minor child during odd numbered years from July 4 at 9:00 a.m. until July 5 at 10:00 a.m. The CP shall have the minor child for this schedule during even numbered years.

Spring Break: The CP shall have the child during Spring Break from 6:00 p.m. on the day school recesses for Spring Break until 6:00 p.m. on the day before school resumes in odd numbered years. The NC shall have this time period in even numbered years.

Fall Break: The CP shall have the child during Fall Break from 6:00 p.m. on the day school recesses for Fall Break until 6:00 p.m. on the day before school resumes in even numbered years. The NC shall have this time period in odd numbered years.

Mother's Day: The mother shall have the child on the Friday preceding Mother's Day from 6:00 p.m. until Sunday at 6:00 p.m., regardless of the weekend visitation schedule.

Father's Day: The father shall have the child on the Friday preceding Father's Day from 6:00 p.m. until Sunday at 6:00 p.m., regardless of the weekend visitation schedule.

Federal Holidays: If the NC parent has the child for a weekend visitation where a federal holiday falls on a Monday, then the visitation shall include that Monday until 6:00 p.m.

General Considerations: The NC shall have the responsibility of transporting the child for each period of custody. The NC, or other responsible adult with a valid driver's license, shall pick the child up at the CP's residence at the beginning of the visitation and return the child to the CP's residence at the end of the visitation. During the summer visitation, the parent who is beginning his or her custodial period shall be responsible for picking up the child from the other parent's residence.

Revised 1/12/2017

EXHIBIT "A"

STANDARD ORDERS FOR PARENTING

1. Each parent shall always keep the other informed of his/her actual address of residence, mailing address if different, home and work telephone numbers and any changes within twenty-four hours of such change occurring.

2. Should either parent require child care for twenty-four hours or longer when the child is in his/her care, the other parent shall have first option to provide such care.

3. Neither parent shall say or do anything in the presence or hearing of the child that would in any way diminish the child's love or affection for the other parent, and shall not allow others to do so.

4. All former marital, child sharing, court related and financial communications between the parents shall occur at a time when the child is not present or within hearing range. Communication regarding these issues shall not occur at times of exchanges of the child or during telephone visits with the child.

5. Each parent shall inform the other as soon as possible of all school, sporting, and other special activity notices and cooperate in the child's consistent attendance at such events. Neither parent shall schedule activities during the other parent's scheduled parenting time without the other parent's prior agreement.

6. At least 24 hour notice of schedule change shall be given to the other parent. The parent requesting the change shall be responsible for any additional child care that results from the change.

7. The parties shall have the right to call the minor child on the telephone at any reasonable time, so long as the telephone calls to the child do not become excessive or disrupt the child's normal homework or sleep schedule. Likewise, the child shall have the right to call either parent at all reasonable times. In the event a long distance telephone call is required, the noncustodial parent shall provide a calling card for use by the child to place telephone calls to said parent. All parties will allow the child to have uninterrupted, private conversations with the parent and neither parent shall tape record the child's conversation with the other parent or other person. In the event that there is a dispute between the parties as to when a telephone call can be made, then calls from the parent shall be twice per week on Tuesday and Thursday evenings between the hours of 7:00 p.m. and 9:00 p.m.

8. Each party shall notify the other party as soon as reasonable of any serious illness or emergency affecting the child while in that party's physical custody.

9. Each party shall have the right to communicate with the child's teachers, coaches, tutors, and other educational providers; doctors, nurses, counselors, psychiatrists, and other health care providers; and to obtain copies of the child's school and medical records. Each party shall have the right to attend all school and extra-curriculum events, religious events of significance, graduation, recitals, award ceremonies, and other such events relating to the child.

Revised 1/12/2017

EXHIBIT "B"

CERTIFICATE OF SERVICE

I, Molly Bonner, Secretary to Chief Judge William A. Prior, Jr., do hereby certify that I have this day served the within Final Order upon the individuals listed below by delivering a true copy of said order to them via electronic delivery and properly addressed as follows:

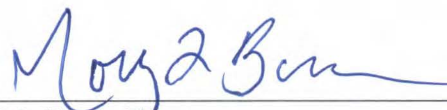
Virginia N. Morris, Esq.
Attorney for Plaintiff
ginny@vnmorrislaw.com

Woodrow W. Ware, III, Esq.
Attorney for Plaintiff
wware@warelegal.com

Brad Evans, Esq.
Attorney for Defendant
brad@bje-law.com

Original Filed with Clerk of Court

This 30th day of December, 2020.



Molly L. Bonner
Post Office Box 728
Madison, Georgia 30650
Tel: (706) 342-0672

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Jody M. Higdon, Clerk
Morgan County, Georgia

General Civil and Domestic Relations Case Disposition Information Form

☑ Superior or ☐ State Court of MORGAN County

For Clerk Use Only

Date Disposed ______________ (MM-DD-YYYY)

Case Number ______________

Case Style ______________

Plaintiff(s)					Defendant(s)				
PERRY	TYLER				JENKINS	KAITLYN	V.		
Last	First	Middle I.	Suffix	Prefix	Last	First	Middle I.	Suffix	Prefix
Last	First	Middle I.	Suffix	Prefix	Last	First	Middle I.	Suffix	Prefix
Last	First	Middle I.	Suffix	Prefix	Last	First	Middle I.	Suffix	Prefix
Last	First	Middle I.	Suffix	Prefix	Last	First	Middle I.	Suffix	Prefix

Reporting Party BRAD J. EVANS

Plaintiff's Attorney VIRGINIA N. MORRIS State Bar Number 334206 Self-Represented ☐

Defendant's Attorney BRAD J. EVANS State Bar Number 251610 Self-Represented ☐

Manner of Disposition
Check Only One

- ☐ Jury Trial
- ☑ Bench/Non-Jury Trial
- ☐ Non-Trial Disposition, such as:
  - ☐ Alternative Dispute Resolution

☐ Check if any party was self-represented at any point during the life of the case.

☐ Check if the court ordered an interpreter for any party, witness, or other involved individual.

☐ Check if the case was referred/ordered to a court-annexed alternative dispute resolution process.

Version 1.1.20

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Morgan County, Georgia

IN THE SUPERIOR COURT OF MORGAN COUNTY
STATE OF GEORGIA

TYLER PERRY,	*	
Petitioner,	*	
	*	
v.	*	**CIVIL ACTION FILE NUMBER**
	*	**SUCA2018000030**
KAITLYN V. JENKINS	*	
Respondent.	*	
	*	

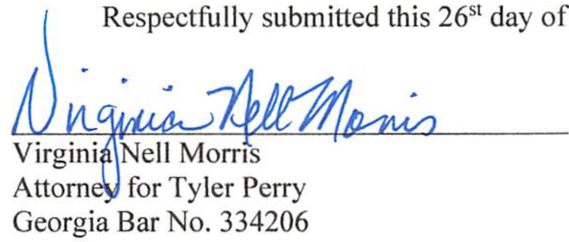
NOTICE OF APPEAL

Notice is hereby given that Petitioner Tyler Perry, by and through counsel, hereby appeals to the Court of Appeals of Georgia the Final Order of the Superior Court of Morgan County filed on December 30, 2020 issued after remand from the Court of Appeals' prior decision on appeal filed on October 29, 2019 requiring the Court "for findings and conclusion which give effect to OCGA §§ 19-9-3 (d) ad 19-9-6 (6) and to give due consideration to the issue of joint physical custody."

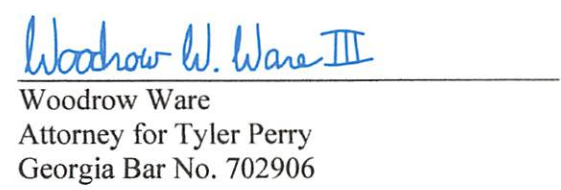
The Court of Appeals, rather than the Supreme Court of Georgia, has jurisdiction over this matter, as this is not a case in which jurisdiction is exclusively reserved to the Supreme Court by the Constitution of the State of Georgia, Article VI, Section VI, Paragraph I et seq.

The Court will omit nothing from the record on appeal, including the additions to the record since the first appeal. Transcript of the evidence and proceedings have been filed for inclusion in the record of appeal.

Respectfully submitted this 26st day of January 2021.



Virginia Nell Morris
Attorney for Tyler Perry
Georgia Bar No. 334206



Woodrow Ware
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MORGAN COUNTY, GEORGIA
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Jody M. Higdon, Clerk
Morgan County, Georgia

IN THE SUPERIOR COURT OF MORGAN COUNTY
STATE OF GEORGIA

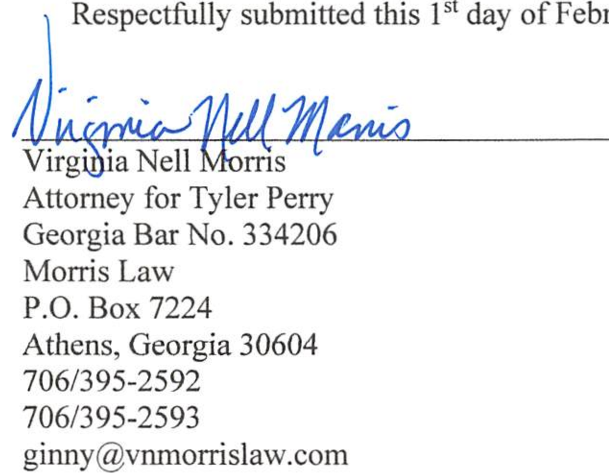
TYLER PERRY,	*	
Petitioner,	*	
	*	
v.	*	**CAFN: SUCA2018000030**
	*	
KAITLYN JENKINS,	*	
Respondent	*	
	*	

CERTIFICATE OF SERVICE

This is to certify that I have, as of the date set forth below, served a copy of **NOTICE OF APPEAL**, on Respondent, via her attorney, to the address listed below, by depositing it in first class U.S. Mail with proper postage affixed thereon:

Brad Evans
271 W Washington St
Ste 120
Madison, Georgia 30650

Respectfully submitted this 1st day of February 2021.



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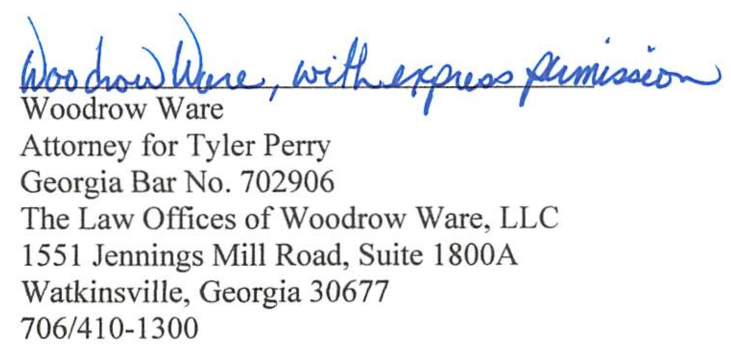

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