IN THE COURT OF APPEALS
STATE OF GEORGIA

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

REPLY BRIEF OF APPELLANT

Respectfully Submitted by:

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PART ONE
STATEMENT ON SYSTEM OF REFERENCE

For the purposes of this Reply Brief of Appellant, the same system of reference used in the Brief of Appellant shall be used here (e.g. "[R. 2]" for Record page 2; "[T. 25-27]" for Transcript pages 25 to 27; and so on).

PART TWO
REPLY REGARDING STATEMENT OF PRESERVATION OF ERROR

In her Response to Statement of Preservation of Error, KAITLYN JENKINS (hereinafter "Mother") once again[1] argues that "O.C.G.A. § 9-11-52(b) expressly excludes 'custody actions' from the purview of O.C.G.A. § 9-11-52. Therefore, the plain language of O.C.G.A. § 19-9-3(a)(8) and O.C.G.A. § 9-11- 52(b) show that error was not preserved by said requests." Brief of Appellee, p. 4.

It is somewhat surprising that Mother has raised this argument again, apparently with no new information to offer. TYLER PERRY (hereinafter "Father") once again points out the case of Sadler v. Rigsby, 790 S.E.2d 639 (2016), in which this Court squarely rejected Mother's argument:

> Rigsby, however, argues that, under the plain language of the statute, OCGA § 9–11–52 does not apply to any custody cases. But Rigsby's argument is not persuasive. In Grantham v. Grantham, the Supreme Court of Georgia held that the trial court erred in failing to issue

[1] See Brief of Appellee, p. 4, in case number A19A1309.

> findings of fact and conclusions of law pursuant to OCGA § 9–11–52 in a contested custody case.
>
> Rigsby argues that findings of fact are available in custody cases pursuant only to OCGA § 19–9–3 (a) (8) and that Sadler was not entitled to such findings because he failed to request findings on or before the close of evidence. . . . However, following the enactment of OCGA § 19–9–3 (a) (8), Georgia courts have continued to apply OCGA § 9–11–52 to contested family law matters, including child custody cases.

Id at 640.

PART THREE
REPLY REGARDING STANDARD OF REVIEW

With regard to all three enumerations of error, this Court certainly must review the judgments of trial courts for both constitutionality as well as for abuse of statutory discretion:

> Our trial courts must be mindful in every case involving parental rights that, **regardless of any perceived authority given to them by a state statute** to interfere with a natural parent's custodial relationship with his or her child, such authority is only authorized if it comports with the long-standing, fundamental principle that parents have a constitutional right under the United States and Georgia Constitutions to the care and custody of their children.

Borgers v. Borgers, 347 Ga. App. 640, 646 (2018) (quotations and citations omitted). Where constitutional error is not asserted by the parties, as it apparently was not in the case of Welch v. Welch, 277 Ga. 808 (2004), the appellate court would have no occasion to address it.

ARGUMENT AND CITATION OF AUTHORITY

I. The trial court failed to give due consideration to joint physical custody upon finding both parents to be fit and proper, choosing instead to add "magic words" to the Order on remand.

In her Brief of Appellee, Mother states that "the trial court expressly identifies its rationale for it finding that joint physical custody was not appropriate in this case." Brief of Appellee, p. 6. However, the trial court merely provides three facts, and utterly fails to provide any analysis or explanation as to why those three facts weigh against joint physical custody.

The first fact identified is that "Respondent/Mother has always [been] primarily responsible for the child and the child's needs" [R. 50]. The trial court does not attempt to explain why this fact cuts against an award of joint physical custody, and in favor of instead placing all the child's eggs in one parental basket. The trial court cites no evidence that Father did not have the capacity to care for the child, take him to doctor appointments, or provide for his education. The trial court fails to explain how continuing to marginalize one of the child's two capable parents is supposedly a good thing when both parents are capable and eager to contribute equally.

Mother points to the case of Arthur v. Arthur, 293 Ga. 63 (2013), in support of her contention that this finding alone is sufficient to support the trial court's

award of primary physical custody to her. However, there is no indication that either parent in Arthur requested joint physical custody, as Father did in this case. The request for joint physical custody is one of the facts that triggers the due consideration requirements of Baldwin v. Baldwin, 265 Ga. 465 (1995).

The second fact identified is that "Petitioner/Father's work schedule would require the child to be with another caregiver than himself when the Respondent/Mother is available . . . ." [R. 50]. Once again, the trial court does not attempt to explain why this fact cuts against an award of joint physical custody. Nevertheless, Mother, whose own choice to remain unemployed unilaterally creates this "advantage," calls this a "compelling justification[] for denying the request for joint physical custody." Brief of Appellee, p. 7.

Mother goes on to state that "[t]he trial court clearly placed preference over having a child with a parent rather [than] with a daycare provider." Brief of Appellee, p. 8. However, the trial court articulated no such preference in its Final Order, though it did express its sincere belief "that a small child that's been with the Mother needs to stay with the Mother"[2] at trial. Having failed to articulate any preference concerning issues of childcare in its Final Order, the trial court similarly failed to articulate any justification for such a preference.

[2] Transcript Volume 8, p. 101 in case number A19A1309.

Instead, Mother endeavors to supply both a preference and a justification for that preference to explain the trial court's actions. However, it was the trial court's responsibility to demonstrate "due consideration" in its Final Order. Mother cannot correct this shortcoming after the fact by speculating as to the trial court's thought processes. The fact that Mother feels she must speculate at all belies the inadequacy of the trial court's Final Order.

The third fact identified by the trial court is that "Petitioner/Father lives no less than 40 minutes from Respondent/Mother." [R. 51]. Yet again, the trial court does not attempt to explain why this fact cuts against an award of joint physical custody. Again, Mother must speculate in order to fill the fatal gaps left in the trial court's Final Order.

Mother attempts to extrapolate an additional fact from this finding, which is her assertion that "the child would have a daily commute of up to about 1 ½ hours each day he was with Father from Father's residence to school." Brief of Appellee, p. 7-8. In addition to being totally absent from the trial court's Final Order, this assertion also happens to be completely untrue.

The child's school, Morgan County Primary School, is actually located at 993 East Avenue, Madison, Georgia 30650. It is approximately 13 miles and 20

minutes[3] northeast from the home occupied by Mother at the time of trial, which was 1131 Antioch Church Road, Madison, GA 30650.[4] It is also approximately 25 minutes and 20.9 miles south of the home occupied by Father at the time of trial, which was 65 S. Barnett Shoals Road, Watkinsville, GA 30677.[5] Far from being a daily commute of "1 ½ hours each day he was with Father," the commute would actually be five minutes longer each day the child was with Father.

The final argument by Mother against this enumeration of error is that the "Standard Visitation Order" is actually not a standard visitation order at all, because the trial court supposedly deviates from it "often." Brief of Appellee, p. 8. Mother considers Father's concern here fully addressed by the fact that the trial court stated "we certainly deviate – or often deviate from the standard visitation." Id. Indeed, the trial court did deviate from the Standard Visitation Order in this case by denying Father any overnight visitation with his own child. [R. 52].

Mother accuses Father of distorting her attorney's argument for attorney fees in order to demonstrate how seldom the trial court deviates from its "Standard

[3] This Court may take judicial notice of these times and distances pursuant to O.C.G.A. § 24-2-201.

[4] Transcript Volume 8, p. 5 in case number A19A1309.

[5] Transcript Volume 8, p. 28 in case number A19A1309.

Visitation Order." However, it is Mother who now attempts to distort her own attorney's argument. Mother's attorney's assertions were plainly obvious in their meaning, and were as follows:

> [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.[6]

(emphasis supplied). Paradoxically, Mother's attorney later stated to this Court that "[t]he trial court's statement that standard visitation is often not followed is similar to Mother's attorney's practice experience in the Ocmulgee Circuit." Brief of Appellee, p. 9. One might fairly ask, which is it, counselor?

These assertions are hopelessly conflicted, and this conflict reveals the true extent to which systemic problems exist with these "Standard Visitation Orders" in the Ocmulgee Circuit.

[6] Transcript Volume 6, p. 15 in case number A19A1309.

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

Mother asserts that the trial court's exclusion of overnight visitation is now moot because the child is now 5 years old. However, this situation squarely meets an exception to the mootness doctrine:

> The courts find justification for deciding issues raised in moot cases when (1) the public interest will be hurt if the question is not immediately decided; (2) the matter involved is likely to recur frequently; (3) it involves a duty of government or government's relationship with its citizens; and (4) the same difficulty that prevented the appeal from being heard in time is likely to again prevent a decision.

Hopkins v. Hamby Corporation, 273 Ga. 19 (2000).

Here, the public interest will be hurt if this issue is avoided through the mootness doctrine. As Mother points out, there is no case law involving an exclusion of overnight parenting time for a young child where there is no evidence of wrongdoing or incapability on the part of the excluded parent. If a published case clarifies that this limitation, too, is wrong, fewer trial courts would err in this fashion.

This matter is also likely to recur frequently. Put simply, the limitation in this case did not require any evidence of wrongdoing or inability to trigger it, so there is no reason to believe that it ever will. Perhaps the most glaring evidence of

its repeatability is the fact that the trial court included this limitation in its Final Order even after the child had already turned 5 years old. The implication is clear: absent intervention by this Court, the trial court will continue to apply this sort of limitation in rote fashion and without any substantial thought.

This issue also involves perhaps the most sacred of all of government's duties to its citizens: the recognition of the limits of its own power. "The liberty interest of parents to direct the upbringing, education, and care of their children is the most ancient of the fundamental rights we hold as a people, and is deeply embedded in our law." Borgers v. Borgers, 347 Ga. App. 640, 645 (2018) (quotations and citations omitted).

Finally, the timeframes involved in appeals of custody matters renders it difficult to obtain appellate review for these kinds of "tender years" limitations. Put another way, children grow up faster than this Court can act, despite its best efforts. Yet, these are critically important years in the development of children. This Court should certainly curtail this sort of government overreach when it has the opportunity to do so.

A common theme throughout Mother's briefs is her effort to draw attention to factual differences in cases without drawing any meaningful conclusions therefrom. She first does this with the case of Brandenburg v. Brandenburg, 274 Ga. 183 (2001), which sets forth a broad proposition: "we have held that a trial

court abuses its discretion when it places an unnecessarily burdensome limitation on the exercise of a parent's right of visitation." Id. at 184. This is the statement of the general rule, and it is not a narrow rule.

Mother identifies obvious distinctions between the facts of this case and the cases cited by Father, but utterly fails to show how these distinctions coalesce into an exception to the general rule stated in Brandenburg. Given this failure, Mother also fails to show why her unstated exception, and not the general rule of Brandenburg, should apply to this case. Put simply, Mother has done nothing more than identify a "distinction without a difference." See, e.g., Fin. Educ. Servs., Inc. v. State, 785 S.E.2d 544 (Ga. Ct. App. 2016).

The trial court indisputably placed a limitation on Father's right of visitation by excluding overnights until the age of 5. This limitation was indisputably burdensome, as it prevented Father from having overnight parenting time with his child, as most other fathers do. This limitation was indisputably unnecessary because the trial court cited absolutely no evidence of past wrongdoing or incapability to justify it. Instead of "fiercely guard[ing] . . . the right of a natural parent to [his or her] offspring," 347 Ga. App. at 647, the trial court here cast these important rights aside with minimal thought.

Finally, Mother speculates that the trial court could have easily made the statement that "a small child that's been with the Mother needs to stay with the

Mother" gender neutral. Brief of Appellee, p. 10. However, if the trial court's statement truly had a gender-neutral meaning, it would not have felt compelled to bolster it as its "sincere belief." The trial court knew very well that its statement would not be well received in the modern world.

Now, Mother attempts to distort the trial court's statements as well.[7] There is nothing remotely gender neutral about the trial court's statement. It clearly reveals an arbitrary preference by the trial court solely on the basis of sex, which is absolutely prohibited by the United States Constitution:

> 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.

Reed v. Reed, 404 U.S. 71, 76-77 (1971).

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

For the purposes of discussing the constitutional analysis of the trial court's actions in this case, it is critical to first note that Mother concedes that the trial court's limitations of Father's parental rights are subject to strict scrutiny. "With

[7] See p. 8 herein.

regard to Enumeration of Error No. 3, the appropriate standard of review for a trial court's interference with any aspect of a person's parental rights is constitutional strict scrutiny." Amended Brief of Appellant, p. 6. "Appellee agrees that the standard of review set forth in Appellant's Brief for Enumeration of Error No. 2 and No. 3 are correct." Brief of Appellee, p. 5. See Am. Subcontractors Assn. v. City of Atlanta, 259 Ga. 14 (1989) (applying strict scrutiny when the appropriateness thereof is conceded by the parties).

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

punctuation and citations omitted). Once again, this is the statement of the general rule. Once again, it is not a narrow rule.[8]

Strangely, although Mother concedes that the trial court's limitations on Father's parental rights are subject to constitutional strict scrutiny, she does not engage in strict scrutiny analysis to show how the trial court's limitations withstand it. Mother has essentially given up on defending the constitutionality of the trial court's actions in this case.

Mother does not argue that the trial court's limitations do not constitute state action. She does not argue that these limitations do not infringe upon Father's parental rights. She does not identify any compelling government interest in denying joint physical custody or in denying overnight visitation until the age of 5. She does not argue that the trial court's actions here were narrowly tailored. Finally, she does not assert that the trial court had no less restrictive alternatives.

Instead, Mother once again engages in "distinction without a difference" analysis,[9] pointing to the factual differences in the various cases cited by Father. Mother's argument appears to be that strict scrutiny of state action is somehow

[8] See p. 12 herein.

[9] See p. 13 herein.

applied differently where there is no case with identical facts as precedent. Mother cites no authority for this proposition, and there is none.

Mother also appears to assert that there is no procedural due process violation when a trial court simply follows state law. See Brief of Appellee, p. 17. She essentially argues that a trial court need only follow O.C.G.A. § 19-9-3 and the Georgia case law interpreting it in making a custody determination. Finally, she misconstrues Father's argument as an attack on the constitutionality of O.C.G.A. § 19-9-3, which it is not.

The error here lies in the trial court's application of O.C.G.A. § 19-9-3 in a constitutional vacuum, not with the statute itself. In doing so, the trial court fails a cardinal rule of statutory construction, which is to "give a narrowing construction to a statute when possible to save it from constitutional challenge." Clark v. Wade, 273 Ga. 587, 598 (2001). In other words, if a trial court construes O.C.G.A. § 19-9-3 to give it authority "to infringe . . . `[parental rights] *at all*"[10] without withstanding constitutional strict scrutiny, the trial court has failed to give O.C.G.A. § 19-9-3 an appropriately narrow construction.

Father, on the other hand, sees no irreconcilable conflict between the application of constitutional strict scrutiny and the appropriately narrow

[10] Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

application of O.C.G.A. § 19-9-3. The concept that a trial court must satisfy not only state law, but also the state and federal constitutions, is nothing new in this context. In fact, this Court has recently and repeatedly admonished trial courts to ensure that their actions comply not only with state law, but also with the federal and Georgia constitutions when dealing with parental rights.[11]

Unfortunately, many judges and attorneys have a severely atrophied grasp on the constitutional issues that swirl in family courts. In fact, this phenomenon has been described as a "constitutional 'twilight zone[]' in which judges adjudicating the responsibilities and obligations of the most basic unit of American society illegitimately violate parents' constitutional rights in the name of children's best interests."[12] Mother's preoccupation with applying O.C.G.A. § 19-9-3 in the absence of constitutional strict scrutiny proves the authors' point. All too often,

[11] See, e.g., In re C. H., 805 S.E.2d 637 (2017); Borgers v. Borgers, 347 Ga. App. 640 (2018); In re R. S. T., 812 S.E.2d 614 (Ga. Ct. App. 2018); In re R. B., 816 S.E.2d 706 (2018); In re V. G., 834 S.E.2d 901 (2019).

[12] David Domina, James Bocott, & Jeremy Hopkins, Yes, Virginia, the Constitution Applies in Family Court, Too, The Nebraska Lawyer 27 (July/August 2018) (available at https://tinyurl.com/y73nhcc3) (last visited March 31, 2021).

trial courts fall into the trap of believing that compliance with an inappropriately broad construction of a state statute constitutes complete compliance with the law.

With regard to equal protection, Mother argues that "[the] three presumption best interests standard test for cases arising under O.C.G.A. § 19-7-1 does not apply here; this standard applies in cases involving a dispute between a parent and a third party relative."

Again, Mother misidentifies the source of these presumptions. They do not originate from Clark v. Wade, 273 Ga. 587 (2001), nor are they limited in their application to O.C.G.A. § 19-7-1. They were succinctly noted by the Supreme Court of the United States as early as 1979, which itself drew upon sources that were much, much older:

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). See also Wisconsin v. Yoder, 406 U.S. 205, 213 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Meyer v. Nebraska, 262 U.S. 390, 400 (1923). . . . **The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural**

> **bonds of affection lead parents to act in the best interests of their children.**

Parham v. J. R, 442 U.S. 584, 602 (1979) (emphasis supplied).

This case presents this Court with a unique opportunity to consolidate and simplify trial courts' approach to custody cases. Both parties to this case agree that constitutional strict scrutiny applies to all cases in which a trial court infringes upon parental rights *at all*. The statute at play does not matter. Trial courts must satisfy both constitutional strict scrutiny *and* the applicable statute in each case. Trial courts should know that, absent this correct approach, this Court "will not hesitate to remind our trial courts of the solemn obligation they have to safeguard the parental rights of all Georgians." Borgers v. Borgers, 347 Ga. App. 640, 651 (2018).

CONCLUSION

For all of the above reasons, the trial court's award of primary physical custody to Mother should be reversed, and this Court should remand with specific instruction that the trial court award joint physical custody to the parents and a parenting plan consistent with that award.

Respectfully submitted this 31st day of March, 2021. This submission does not exceed the word count limit imposed by Rule 24.

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CERTIFICATE OF SERVICE

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

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