IN THE COURT OF APPEALS
STATE OF GEORGIA

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

REPLY BRIEF OF APPELLANT

Respectfully Submitted by:

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PART ONE
STATEMENT OF ADDITIONAL MATERIAL FACTS RELEVANT TO THIS APPEAL

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. "[R1: 2]" for Record volume 1, page 2; "[T8: 25-27]" for Transcript volume 8, pages 25 to 27; and so on).

Because Kaitlyn V. Jenkins (hereinafter "Mother") made certain unanticipated arguments in her Brief of Appellant regarding the preparation and content of the Final Order, Tyler Perry (hereinafter "Father") makes additional statements of fact herein, which are necessary in order to address Mother's unforeseen contentions.

Trial counsel for Father has also filed an affidavit in the trial court to identify and authenticate the drafts of the Final Order prepared by counsel at the trial court's instruction, as well as a Motion to Supplement the Record pursuant to O.C.G.A. § 5-6-41(f) and/or O.C.G.A. § 5-6-41(h) so that these materials may be properly brought before this Court.

After the final hearing, the trial court instructed counsel for the parties to prepare the trial court's Final Order. [T8: 196]. Opposing Counsel prepared a draft and forwarded it to Father's trial counsel. However, before Father's trial counsel responded with her edits, Opposing Counsel forwarded his draft to the trial

court, informing the trial court that the attorneys had decided to submit separate drafts of the Final Order. Opposing Counsel's version of the Final Order left only one blank in paragraph 5 for the amount of attorney fees for the trial court to award. [T2: 68]. After unsuccessfully attempting to follow the Court's instructions to negotiate an acceptable draft Final Order with Opposing Counsel, Father's trial counsel then submitted her own version of the Final Order for consideration.

Opposing Counsel presumably had no contact with the trial court between the time of the hearing and the submission of his proposed Final Order to the trial court, as Father's trial counsel did not participate in any such communications.[1] Father's trial counsel did not approve the proposed Final Order as to form.

The trial court adopted Opposing Counsel's proposed Final Order verbatim without any alterations, other than to add "2000.00" via handwriting into the blank in paragraph 5.

PART TWO
REPLY REGARDING STATEMENT OF PRESERVATION OF ERROR

In her Response to Statement of Preservation of Error, Mother 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

[1] See Georgia Rule of Professional Conduct 3.5(b) and Rule 2.9 of the Georgia Code of Judicial Conduct, both prohibiting *ex parte* communications between attorneys and judges.

O.C.G.A. § 9-11- 52(b) show that error was not preserved by said requests." Brief of Appellee, p. 4. This argument is without merit.

First, Mother misreads O.C.G.A. § 9-11-52(b). This statute does not "expressly exclude" custody actions from its purview, but instead excludes *uncontested* custody actions. The rationale for this is that uncontested matters are very rarely appealed. The benefits of requiring findings of fact and separate conclusions of law to trial courts, parties, and appellate courts, which are explored in detail by the Supreme Court of Georgia in Payson v. Payson, 274 Ga. 231 (2001), simply do not apply to uncontested matters. The burdens of requiring findings of fact and separate conclusions of law in uncontested cases outweigh any benefits.

Second, surprisingly enough, this issue was specifically addressed in one of the few cases cited by Mother that was not previously cited by Father. Arthur v. Arthur 743 S.E.2d 420 (2013) was a divorce case in which a request pursuant to O.C.G.A. § 9-11-52(a) was made. The Supreme Court of Georgia specifically clarified the applicability of O.C.G.A. § 9-11-52(a) in the context of family law matters:

> Unless otherwise specifically provided, the Civil Practice Act applies to actions for divorce, alimony and *custody of minor children*. OCGA § 19–5–8. Accordingly, where, as in this proceeding, a party makes a timely request pursuant to OCGA § 9–11–52(a), "the court shall upon the request of any party made prior to

> such ruling, find the facts specially and shall state separately its conclusions of law."

743 S.E.2d 420, 423 (2013) (emphasis supplied).

Finally, a brief search of cases that cite Arthur reveals that this Court has recently considered the precise argument Mother makes here, and has rejected it:

> 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 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.

Sadler v. Rigsby, 790 S.E.2d 639, 640 (2016).

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 discretion.

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.

Mother argues that an award of "joint legal custody" satisfies the "due consideration" requirements of Baldwin v. Baldwin, 265 Ga. 465 (Ga. 1995). In support of this argument, Mother highlights the Supreme Court's use of the term "joint custody" in Baldwin and cites to the current definition of that term pursuant to O.C.G.A. § 19-9-6(4).

However, Mother ignores this Court's analysis in In the Interest of A. R. B., 209 Ga. App. 324 (Ga. Ct. App. 1993), which immediately preceded Baldwin and involved the exact same parties. A.R.B. makes it clear that the usage of the term "joint custody" in both A.R.B. and Baldwin was nearly identical to the current statutory definition of "joint physical custody." Compare O.C.G.A. § 19-9-6(6) ("'[j]oint physical custody' means that physical custody is shared by the parents in such a way as to assure the child of *substantially equal time and contact with both parents*.") (emphasis supplied) with In the Interest of A. R. B., 209 Ga. App. 324, 326-27 (1993) ("[w]here both parents have demonstrated equal ability to effectively care for and nurture the child, as here, it is in the child's best interest that a custody award be fashioned which will best encourage continuing and *roughly equal contact with both parents*, given the practicalities involved.")

(emphasis supplied). "Due consideration" under Baldwin clearly requires more than a mere award of joint legal custody. It requires "due consideration" of joint physical custody as well.

Next, Mother asserts that joint physical custody may be considered (and, in fact, rejected) by implication, but cites no law in support of this assertion. If this were true, it is difficult to imagine how any trial court could ever be reversed for failing to give due consideration. However, the trial court in A.R.B. was reversed for this precise reason, was not given any benefit of "implication," and was required to provide "findings and conclusions which give effect to O.C.G.A. §§ 19-9-3 (d) and 19-9-6." Id. at 327. Obviously, such findings and conclusions are required to properly demonstrate "due consideration" in a final order.

Next, Mother asserts that "[e]ven a cursory review of the Final Order demonstrates that the trial court considered facts that would not be relevant to any issue in this case other than Father's request for joint physical custody." Brief of Appellee, p. 8, para. 1. However, Mother's counsel drafted the Final Order in its entirety (with the exception of the amount of the attorney fees) with no more guidance from the trial court as to its reasoning than what was provided at the conclusion of the trial, and as recorded in the transcript. Curiously, the Final Order drafted by Opposing Counsel contains many justifications for the ruling never mentioned by the trial court, and omits the one justification that the trial court

actually gave: "I sincerely believe a small child that's been with the mother needs to stay with the mother." [T8: 101].

With all due respect to both the trial court and Opposing Counsel, the Final Order prepared and signed in this case does not reflect the trial court's stated reasoning, but instead reflects Opposing Counsel's best efforts to supply reasoning that would maximize the chances that the Final Order would be affirmed on appeal. This is not pointed out to attribute nefarious intent to any party; in fact, this practice has become unfortunately common in trial courts of this state. However, this practice should without question be discontinued because it does not comply with the spirit and intent of O.C.G.A. § 9-11-52.

"The purpose of findings of fact is threefold: as an aid in the trial judge's process of adjudication; for purposes of res judicata and estoppel by judgment; and as an aid to the appellate court on review." Payson v. Payson, 274 Ga. 231, 235 (2001). When counsel for the prevailing party supplies the justification for the ruling, and this justification is adopted verbatim by the trial court, the trial court receives no aid in its process of adjudication, and the appellate court receives no aid in understanding why the trial court made the decision that it did.

In fact, this very practice was examined by this Court quite recently. In the case of Floyd v. Gibson, 788 S.E.2d 84 (Ga. Ct. App. 2016), the trial court's order

was vacated by this Court with instruction for reconsideration. The trial court then e-mailed the parties, stating that it

> intended to amend its original order to "comply with what the Court of Appeals wants," which it described as simply adding "magic words" to the prior order. The trial court judge further stated, "I stand by my ruling, I just need an amended order to comply with the [Court of Appeals]."

Id. at 86. After noting these communications, this Court remanded the case back to the trial court for a second time to prepare proper findings of fact and conclusions of law. Id. at 88.

Obviously, this Court does not intend for trial courts to make rulings on one basis and then supplement (or, in some cases, *substitute*) its reasoning with "magic words" to placate this Court. Put simply, this "tail-wag-the-dog" approach is not "how the judicial process should work. An order adopted by a trial court becomes its own, and the findings must be its own (although it may be assisted by counsel). We cannot apply the appropriate deferential standard of review to the trial court's findings of fact when it is entirely unclear that the trial court even made any such findings . . . ." Id. at 88.

An example of an appropriate use of assistance by counsel in crafting an order would be a conference call between the trial judge and the attorneys in which the trial judge goes line-by-line through O.C.G.A. § 19-9-3(a)(3), providing his or

her findings and conclusions for each item, and ultimately asking the attorneys to draft an order with those findings and conclusions included.

The deference Opposing Counsel seeks for the trial court in this case is not available because of the manner in which the Final Order was prepared and adopted:

> It has been noted that when the trial court adopts verbatim the proposed findings and conclusions of the prevailing party the adequacy of the findings is more apt to be questioned, the losing party may forfeit his undeniable right to be assured that his position *has been thoroughly considered*, and the independence of the trial court's thought process may be cast in doubt.

Id. (emphasis supplied) (quotations and citations omitted). To ensure that Father's position has been "thoroughly considered," and that "due consideration" of joint physical custody has been given as required by law, this Court should reverse and remand with instructions for the trial court to "craft its own order without the use of proposed orders from the parties." Id.

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

In her argument that the trial court did not violate the public policy of the State of Georgia, Mother ably identifies factual differences between this case and the cases cited by Father in his Brief of Appellant. However, in doing so, Mother

fails to note the common constitutional framework applied in all of those cases, and thus misses the point entirely.

In all of the cases cited, the trial courts involved were required to apply constitutional strict scrutiny because they were all called upon to encroach upon parental rights. A common thread in each of these cases is state action, as highlighted in Turman v. Boleman, 235 Ga. App. 243 (1998). "After that private agreement was incorporated into the trial court's order, enforcing the private agreement became state action." Id. at 244. Parental rights are fundamental rights under both the United States Constitution, Troxel v. Granville, 530 U.S. 57, 65 (2000), and the Constitution of the State of Georgia, Brooks v. Parkerson, 265 Ga. 189 (1995). When state action is used to infringe upon fundamental rights, strict scrutiny applies. Washington v. Glucksberg, 521 U.S. 702, 721 (1997). Strict scrutiny requires 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. Id.

A second common thread in these cases is that the compelling state interest is prevention of harm to the child. "[W]e find that implicit in Georgia cases, statutory and constitutional law is that state interference with parental rights to custody and control of children is permissible only where the health or welfare of a child is threatened." Brooks v. Parkerson, 265 Ga. 189, 193 (1995).

Applying this framework to each case, the trial court in Brandenburg v. Brandenburg, 274 Ga. 183 (2001) failed strict scrutiny analysis where it prohibited the father from exercising visitation in the presence of his girlfriend. There was no evidence that the girlfriend's presence was harmful to the children, and thus there was no compelling state interest. Id. at 184.

By contrast, the trial court in Simmons v. Williams, 290 Ga. App. 644 (2008) passed strict scrutiny analysis in prohibiting the parents from exposing the children to overnight stays with unrelated members of the opposite sex. Here, the trial court had a compelling state interest in precluding clearly harmful "potential sexual relations by either of the parties with unwed partners in the presence of the children." Id. at 649. Further, as Mother recognizes and points out in her Brief of Appellee, p. 13, para. 1, Simmons employs language signaling strict scrutiny analysis: the trial court's prohibition was "narrowly drawn" to accomplish its compelling state objective. 290 Ga. App. at 648.

In Turman v. Boleman, 235 Ga. App. 243 (1998), the trial court prohibited the mother from allowing the child to have contact with African-American males. Id. This prohibition certainly constituted an abhorrent racial classification that violated public policy. However, this Court recognized an additional error by the trial court—an encroachment on the mother's parental rights that failed strict scrutiny analysis. Just like in Brandenburg, there was no evidence of harm to the

child. Specifically, there was no evidence that exposure to African-American males was harmful. Id. Even if there had been evidence that exposure to a particular individual who happened to be an African-American male was harmful, the trial court's prohibition would not have been narrowly tailored to that particular individual.

Applying this same constitutional framework to this case, the trial court's prohibition here fails strict scrutiny analysis for the exact same reasons that the Brandenburg and Turman trial courts failed. There was absolutely no evidence that overnight visitations with the Father would harm the child.

Contrary to her assertion that she testified that she "did not believe that the minor child was ready for overnight visitation at this point," Brief of Appellee pp. 13-14, Mother in fact never did so. While she stated that she did "not agree with overnight visits at the time," [T8: 25], she never stated why she felt that way, she never stated that the child was not "ready" for overnight visits, and she certainly never testified that the child would be harmed if such visits were ordered.

Mother also stated that "Carson is too young, and this is all a change for him and for -- therefore, with a three-year old, to sit there and make comments about court when I do not say anything about court." [T8: 25]. In this passage, Mother was clearly referencing the child's knowledge of the pending litigation. She later clarified that she was not blaming anyone for the child's knowledge of the court

proceedings, but simply felt that this was not good for the child. "I'm not, you know, saying anything against Tyler or nobody, but it just -- it bothers me that when he sits there and makes comments about court, and makes little comments like that, like a three-year old should not know about what's going on." [T8: 25].

Mother now attempts to take these excerpts out of context and, through paraphrase, change their meaning in order to protect the Final Order. However, these attempts only more thoroughly expose the dearth of support for the prohibition. There was no evidence that overnights with Father would harm the child. As such, there was no compelling state interest in prohibiting overnights with Father.

The trial court's prohibition also totally fails the other two prongs of strict scrutiny analysis. Since there was no evidence of harm, it is impossible to know whether the trial court's prohibition was narrowly tailored to prevent such harm or whether it would be the least restrictive alternative available. Put simply, because the prohibition is a solution in search of a problem, we cannot know whether the solution is narrowly tailored or whether there is a less restrictive solution for the problem.

Mother also apparently criticizes Father's reference to Richard Warshak's journal article in *Journal of Divorce & Remarriage* as being an attempt to introduce scientific evidence at the appellate court level.

First, Father notes that it was *Mother* who had the burden of proving that Father could not have overnights without harming the child. It was not Father's burden to prove that he was safe to have overnights. Again, a trial court cannot make such prohibitions without a compelling state interest in doing so. Brooks v. Parkerson, 265 Ga. 189, 193 (1995). The absence of scientific evidence introduced at trial is fatal to Mother's position, not Father's.

Second, the case cited by Mother, Hawkins v. OB-GYN Associates, P.A., 290 Ga. App. 892 (2008), does not stand for the proposition she asserts. Instead, it holds that an issue not ruled upon at the trial court level cannot be raised on appeal. Id. at 896.

Third, Mother fails to note that the Supreme Court of Georgia has considered such journal articles in crafting opinions that substantially impact social policy. See, e.g. Scott v. Scott, 276 Ga. 372 (2003) (majority citing *Family Law Quarterly* and dissent citing both *Dickinson Law Review* and a different article in *Family Law Quarterly* regarding the social science surrounding relocation situations). The result of this case could certainly impact social policy in this state.

Finally, Father notes that, instead of referencing journal articles supporting her own position that fathers are not appropriate overnight caregivers for young children, Mother seeks to prevent this Court from considering journal articles stating the contrary. The reason for this is that Mother's position currently enjoys

no support from the social science community, and thus she has no such articles to reference.

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

In this section, Mother makes her most compelling argument, specifically that Father "appears to seek no relief from this Court on [a constitutional] basis . . . ." To clarify, Father seeks the same remedy that frustrated trial court judges across the state no doubt seek: a clear, coherent framework for how trial courts should approach cases in which state action is invoked to restrict parental rights.

In this section, Mother once again ably spots factual distinctions in the various cases cited by Father, but once again misses the point. In In re Suggs, 249 Ga. 365 (1982), strict scrutiny analysis applied when DFCS invoked state action to take legal custody of the child from the parent. In Brooks v. Parkerson, 265 Ga. 189 (1995), strict scrutiny analysis applied when a grandparent invoked state action to gain visitation with the child against the will of the parent. And as discussed in more detail above, in Turman v. Boleman, 235 Ga. App. 243 (1998); Brandenburg v. Brandenburg, 274 Ga. 183, 184 (2001); and Simmons v. Williams, 290 Ga. App. 644 (2008); strict scrutiny analysis even applied when a *parent* invoked state action to limit the visitation rights of *the other parent*.

In defense of our trial courts, they are told one day that they

> 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 "[p]arents have a constitutional right under the United States and Georgia Constitutions to the care and custody of their children."

Borgers v. Borgers, A18A0910, at *1 (Ga. Ct. App. Oct. 18, 2018). Literally the very next day, they are told that they have "very broad discretion" "[w]hen considering a dispute regarding the custody of a child." Bridger v. Franze, A18A1230, at *1 (Ga. Ct. App. Oct. 19, 2018).

As Chief Judge Dillard suggests, it is time to abandon "very broad discretion" and to focus trial courts' attention on constitutionally mandated strict scrutiny. Strict scrutiny analysis applies in every single case in which any party—whether a state entity like DFCS, a nonparent relative, or even the other parent—invokes state action to infringe upon the fundamental rights of a parent.

Joint physical custody will be the least restrictive alternative in cases like this one: cases that involve a normal, healthy child with fit and proper parents who live near to one another. Joint physical custody is the only custodial arrangement under the law for which "due consideration" is required. This is because it is the only arrangement that affords equal protection to the parents' respective parental rights and to the child's right of equal access to both parents. It also enjoys the

overwhelming support of the social science community, as well as that of the public.

As Mother suggests, this Court can certainly wait for inevitable action from our legislature, just as other politically similar states like Kentucky (which has a rebuttable presumption that equally shared parenting time is in the best interests of the child) and Arizona (where courts must adopt a parenting plan that maximizes parents' respective parenting time) have done. Indeed, this Court's ruling may very well signal to the General Assembly that there is work to be done there. However, Father humbly believes that the children of our state should not be made to wait when strict scrutiny analysis already mandates joint physical custody in most cases.

So long as it appears that trial courts are free to pick and choose when to apply strict scrutiny analysis and when to apply "very broad discretion," our system of resolving custody disputes will remain vulnerable to the criticisms of the public. "[W]hen state actors engage in this sort of Orwellian policymaking disguised as judging, is it any wonder that so many citizens feel as if the government does not speak for them or respect the private realm of family life." Borgers v. Borgers, A18A0910, at *1 (Ga. Ct. App. Oct. 18, 2018).

Respectfully submitted this 24th day of March, 2019. 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 affixed thereto to insure delivery, addressed as follows:

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