IN THE COURT OF APPEALS OF GEORGIA

IN RE ELIZABETH HADAWAY, * Case Number A07A1626

*

Macon, GA *

Appellant. *

BRIEF OF APPELLANT

COMES NOW Appellant Elizabeth Hadaway, Defendant below, and files this brief on appeal.

PART ONE

STATEMENT OF FACTS

Emma was born on April 17, 2000. (RJ 55, 60)[1] On January 23, 2003, an out-of-state court granted sole legal and physical custody of Emma to her natural mother Deborah Shultz. (RJ 65)

[1] This appeal and its companion appeal In re Johnson, Case No. A07A1627, share the same record. See O.C.G.A. § 5-6-44(c). The trial court initially transmitted only a portion of the record; reference to this portion of the record is denoted as

Schultz was unable to provide a good home for Emma. (RJ 48, 100) Accordingly, Schultz, in an exercise of parental discretion, asked Appellant to take physical custody of Emma on April 28, 2006, which Appellant did on May 10, 2006. (R 103; see also RJ 31, 100, 101)

On May 22, 2006, Appellant, with the support of Schultz, filed a petition for a change of legal custody of Emma from Schultz to Appellant with the Wilkinson County Superior Court. (RJ 4-6) At the time, Appellant, along with Emma, resided in Wilkinson County. (RJ 4) Schultz expressly consented and waived any objection to venue in the Wilkinson County Superior Court. (R 15) On June 19, 2006, Judge James L. Cline, Jr., of the Wilkinson County Superior Court granted legal and physical custody of Emma to Appellant. (RJ 21 ("[I]t is in the best interest of the child that legal and physical custody of the child be placed in the Plaintiff Elizabeth Hadaway."))

On September 11, 2006, Appellant, with the support of Schultz, filed an adoption petition with the Wilkinson County Superior Court. (RJ 29-32)

"RH." The trial court subsequently transmitted the remainder of the record; reference to the remainder of the record is denoted as "RJ."

In support of the adoption petition, Appellant filed the surrender of rights that Schultz had executed. (RJ 37-39) In the surrender of rights, Schultz had elected to resume legal custody of Emma if the adoption proceedings were to conclude without an order granting the adoption petition. (RJ 38)

In assessing the adoption petition, the Court considered a home evaluation. (RJ 80-81) The home evaluation reflected the fact that Appellant was in a lesbian relationship. (RJ 95) The home evaluation recommended the grant of adoption of Emma by Appellant. (RJ 101)

On December 31, 2006, while the ruling of the Wilkinson County Superior Court was pending, Appellant, along with Emma, relocated to Bibb County. (See T 9, 10, 13, 17)

On January 12, 2007, Judge John Lee Parrott of the Wilkinson County Superior Court denied the adoption petition and vacated the grant of legal and physical custody of Emma to Appellant based on the fact that Appellant was in a lesbian relationship. (RJ 80-93 (hereinafter, "underlying order")) In doing so, Judge Parrott ordered, in relevant part, as follows:

> Considering OCGA §§ 19-8-5(k), 19-8-18(d), and 19-8-26(c), custody of the said minor child shall revert to the natural mother Deborah

> Schultz, if she picks up said minor child within ten (10) days from the date of the instant order and thereafter has the said child in her continuous care, custody, and control; the Wilkinson County Department of Family and Children Services and the Wilkinson County Sheriff shall inspect to see in [sic] the order is complied with in a timely, consistent, and good faith manner, and, if the said natural mother should fail to so pick up the said child or exercise continuous, good faith care, custody, and control of the said child, then the said child shall immediately be taken into shelter care and proceedings shall be initiated in Juvenile Court to determine the proper disposition of her as a deprived child under the Juvenile Code.

(RJ 92)

On January 12, 2007, Schultz resumed care, custody, and control of Emma with the intent of bringing Emma to Schultz's home. (T 8-9, 12-13)

Thereafter, Schultz observed the significant distress exhibited by Emma at the prospect of Emma's separation from Appellant, and concluded that Emma's separation from Appellant would be contrary to Emma's best interests. (T 8-9)

Accordingly, Schultz, in an exercise of parental discretion, asked Appellant to take physical custody of Emma, which Appellant did. (Id.)

On January 19, 2007, Appellant, with the support of Schultz, filed a petition for change of legal custody of Emma from Schultz to Appellant with the Bibb County Superior Court. (T Ex. C-1) At the time, Appellant, along with Emma, resided in Bibb County. (Id.) Schultz expressly consented and waived any objection to venue in Bibb County Superior Court. (Id.)

On February 21, 2007, Judge Parrott ordered the Wilkinson County Division of Family and Children Services (hereinafter, "DFACS") to take physical custody of Emma, which it did. (RJ 167) On February 22, 2007, the Wilkinson County Juvenile Court purported to grant legal and physical custody of Emma to DFACS. (See RH 15)

On February 21, 2007, Judge Parrott also ordered Appellant to show cause why she should not be held in criminal contempt for violating the underlying order. (RH 4-6) A show cause hearing was conducted on March 12, 2007. (T 1-25)

On March 26, 2007, Judge Parrott held Appellant in criminal contempt for violating the underlying order. (RH 10-21) In doing so, Judge Parrott sentenced

Appellant to ten days of jail time or five days of jail time and $500 in fines. (RH 19)

A motion for supersedeas was filed on March 29, 2007. (RH 23-43). The motion for supersedeas was granted on April 4, 2007. (RH 79-80)

PRESERVATION OF ERROR

On March 29, 2007, Appellant timely filed a notice of appeal. (RH 1-3)

Appellant properly took a direct appeal pursuant to O.C.G.A. § 5-6-34(a)(1). "Adoption cases do not fall under O.C.G.A. § 5-6-35(a)(2)." Families First v. Gooden, 211 Ga. App. 272 (1993) (citation omitted); see also In re J.S.J., 180 Ga. App. 873, 873 (1986) ("This case was appealed directly, which was the proper method, as all petitions for adoption whether granted or denied, whether terminating parental rights or not, do not come within O.C.G.A. § 5-6-35(a)(2)."). An adoption case does not transform into a domestic relations case simply because a court issues an order involving custody in the course of disposing of the case. See In re J.P., 267 Ga. 492 (1997) (recognizing that "the determination of where the child will be placed is necessary to [the] disposition [of a deprivation case]," but holding that a deprivation case is not a domestic relations case because "the proceeding . . . is not an action brought to decide custody matters," and noting that

a domestic relations case lies only "[w]here the underlying subject matter, i.e., the issues sought to be appealed, clearly arises from or is ancillary to divorce proceedings, or is derived from a marital relationship and divorce") (quotation omitted); Rodriguez v. Nunez, 252 Ga. App. 56, 59 (2001) ("[The issue that falls under O.C.G.A. § 5-6-35(a)(2)] in the case before us is ancillary to the more significant issues . . . which do not fall under O.C.G.A. § 5-6-35(a)(2). The propriety of [the judgment] is therefore properly before us on direct appeal.").

Appellant also properly took a direct appeal pursuant to O.C.G.A. § 5-6-34(a)(2). See Ramsey v. Ramsey, 231 Ga. 334, 335-37 (1973); Hamilton Capital Group, Inc. v. Equifax Credit Information Servs., Inc., 266 Ga. App. 1, 3 (2004); In re Booker, 186 Ga. App. 614, 614 (1988).

PART TWO

ENUMERATION OF ERRORS

I. The trial court erred in holding Appellant in criminal contempt because Appellant did not violate the underlying order.

II. The trial court erred in holding Appellant in criminal contempt because the underlying order was not sufficiently definite and certain.

III. The trial court erred in holding Appellant in criminal contempt because Appellant did not willfully violate the underlying order.

IV. The trial court erred in holding Appellant in criminal contempt because the underlying order was void.

V. The underlying order was not supported by any evidence and was clearly erroneous.

STATEMENT OF JURISDICTION

"[T]he general rule regarding jurisdiction of an appeal in a contempt action is: the appellate court with subject-matter jurisdiction of the appeal from a judgment has appellate subject-matter jurisdiction of a contempt action in which enforcement of the judgment is sought." Rogers v. McGahee, 278 Ga. 287, 288 n.1 (2004) (citation omitted); see also Ashburn v. Baker, 256 Ga. 507, 508 (1986) ("[It would be inconsistent for [the Supreme Court] to retain jurisdiction of contempt actions involving the same situation of which we had held the Court of Appeals has jurisdiction."). This Court has jurisdiction over this case because the purported contempt did not arise in a type of case over which the Supreme Court has exclusive jurisdiction. See Nowlin v. Davis, 278 Ga. 240, 240 n.1 (2004) ("Cases involving contempt of court are not within [the Supreme Court's] appellate

jurisdiction.") (citation omitted); Harrell v. Fed. Nat'l Payables, Inc., No. A06A2305, 2007 WL 840974 at *2 (Ga. Ct. App. Mar. 21, 2007) ("[The Court of Appeals] has jurisdiction to hear appeals filed after punishment is imposed pursuant to a contempt order.").

PART THREE

STANDARD OF REVIEW

"Contempt is a drastic remedy which ought not to deprive one of his liberty unless it rests upon a firm and proper basis." Martin v. Waters, 151 Ga. App. 149, 150 (1979) (quotation and citation omitted). "The burden of proof of establish[ing] the fact that a contempt has been committed is on the party asserting it." Colley v. Tatum, 227 Ga. 294, 295 (1971) (citation omitted). The standard of review is "that a rational trier of fact must have been able to find the essential elements of the crime beyond a reasonable doubt." In re Bergin, 255 Ga. 429, 429 (1986). "The essential elements of criminal contempt of court have been variously defined; in its broad sense it means disregard for or disobedience of the order or command of the court." In re Spruell, 200 Ga. App. 218, 227 (1991) (quotation omitted). "[T]he trial court's contempt order must be supported by the record on appeal and . . . the

trial court is not authorized to base its finding of contempt on facts not in the record." Id. (citations omitted).

With respect to issues of adoption, questions of fact are reviewed under the "any evidence" standard, and questions of law are reviewed under the "clearly erroneous" standard. Bragg v. State, 226 Ga. App. 588, 589 (1997). With respect to issues of custody, questions of fact are reviewed under the "reasonable evidence" standard, and questions of law are reviewed under the "clearly erroneous" standard." Seeley v. Seeley, 282 Ga. App. 394, 395 (2006); Ormond v. Ormond, 274 Ga. App. 869, 871 (2005).

ARGUMENT AND CITATION OF AUTHORITIES

"The defenses to . . . criminal contempt are that the order was not sufficiently definite and certain, was not violated, or that the violation was not wilful." Harrell, 2007 WL 840974 at *3 (quotation omitted). As set forth below, Appellant did not violate the underlying order; the underlying order was not sufficiently definite and certain; and Appellant did not willfully violate the underlying order.

Moreover, "[a]n order of contempt cannot be based on noncompliance with a void order." In re Estate of Adamson, 215 Ga. App. 613, 613 (1994). As set forth below, the underlying order was void.

For each of these reasons, the trial court erred in holding Appellant in criminal contempt.

Furthermore, "in every case where a person is charged with contempt of court for alleged violations of a court's order, the legal correctness of the underlying order may be challenged on appeal." Sechler Family P'ship v. Prime Group, Inc., 255 Ga. App. 854, 856 (2002) (citation omitted). As set forth below, the underlying order was not supported by any evidence and was clearly erroneous. For this reason, this Court should vacate the underlying order.

I. THE TRIAL COURT ERRED IN HOLDING APPELLANT IN CRIMINAL CONTEMPT BECAUSE APPELLANT DID NOT VIOLATE THE UNDERLYING ORDER.

A defense to criminal contempt is that "the order . . . was not violated." Harrell, 2007 WL 840974 at *3. As set forth below, Appellant did not violate the underlying order because the underlying order did not direct her to do anything. Appellant also did not violate the underlying order because Schultz timely resumed

legal and physical custody of Emma both under the express terms of the underlying order and under O.C.G.A. § 19-8-5(k). The fact that, thereafter, Appellant resumed physical custody of Emma does not change the analysis.

A. Appellant Did Not Violate the Underlying Order Because the Underlying Order Did Not Direct Her to Do Anything.

The underlying order did not direct Appellant to do anything. (RJ 92) In particular, it did not direct her to do anything if Schultz failed to resume care, custody, and control of Emma. (Id.) Indeed, the underlying order directed only DFACS and the Wilkinson County Sheriff to do something if Schultz failed to resume care, custody, and control of Emma. (Id.) "A person cannot be found in contempt of a court order or writ which was not directed to him." Am. Express Co. v. Baker, 192 Ga. App 21, 23 (1989) (citation omitted); see also Salter v. Greene, 226 Ga. App. 384, 385 (1997) ("As a matter of law, the appellant cannot be found in contempt for violating a condition of another person's bond."); Yarbrough v. First Nat'l Bank of Atlanta, 143 Ga. App. 399, 399 (1977) ("The writ of possession was directed not to [the appellant] but to the marshal. Since it did not command the appellant to do anything, the writ of possession cannot be the basis of a contempt proceeding against him.") (citations omitted).

B. The Natural Mother Timely Resumed Legal and Physical Custody of the Child Under the Express Terms of the Underlying Order.

Under the express terms of the underlying order, legal custody of Emma reverted to Schultz, not to DFACS. The undisputed evidence in the record confirms that, on January 12, 2007, Schultz resumed care, custody, and control of Emma with the intent of bringing Emma to Schultz's home pending an eventual change of legal and physical custody of Emma from Schultz to Appellant. (T 8 ("I took the child back to her biological mother like I was told to do. The biological mother said she was going to take her."); 9 ("I was there to hand over the child."), 9 ("I took [Emma] to her biological mother."); 12 ("[T]he child was to be returned to the biological mother – this happened on January the 12th."); 12 ("[T]hat was the date the mother was going to pick the child up."); 12 ("[Appellant] offered to call the biological mother or attempt to find her so that the child – the mother could come for the child."); 12 ("On that date, January 12th, we met at a truck stop. I, my paralegal, Ms. Hadaway – the mother was there with her partner. They were in a truck coming through Georgia and were going to pick up Emma."); 13 ("[T]he child was going with her mother to Florida."); 13 ("Elizabeth in good faith had Emma's clothing."))

The fact that, thereafter, Appellant was the *physical* custodian of Emma does not change the fact Schultz was the *legal* custodian of Emma. It is not uncommon for the identity of a legal custodian to differ from the identity of a physical custodian, and the law does not provide that, where a legal custodian has relinquished physical custody of a child, it necessarily follows that the legal custodian has also relinquished legal custody of the child. See O.C.G.A. § 19-9-22 (defining and distinguishing the terms "legal custodian" and "physical custodian"); see also Walker v. Walker, 248 Ga. App. 177, 177 (2001) (mother did not lose joint legal custody simply because she lost joint physical custody).

Moreover, the fact that Schultz asked Appellant to take physical custody of Emma does not change the fact that Schultz exercised "continuous care, custody, and control" of Emma. Indeed, Schultz's continuing decision to permit Appellant to maintain physical custody of Emma is *evidence* of Schultz's exercise of "continuous care, custody, and control" of Emma. It was not a decision to abandon Emma. Rather, it was a decision by a parent in furtherance of the best interests of a child. Indeed, under the circumstances, Schultz's decision to relinquish physical custody of Emma was a responsible decision.

C. The Natural Mother Timely Resumed Legal and Physical Custody of the Child Under O.C.G.A. § 19-8-5(k).

That legal custody of Emma reverted to Schultz, not to DFACS, is consistent with the mandate that the underlying order be interpreted in accordance with O.C.G.A. §§ 19-8-5(k) and 19-8-26(c), as well as O.C.G.A. § 19-8-18(d).

O.C.G.A. § 19-8-5(k) provides, in relevant part, as follows: "[I]f the proceedings resulting from the petition [for adoption] are not concluded with an order granting the petition, the surrender [of rights by the legal parent or guardian of the child] shall operate as follows according to the election made therein by the legal parent or guardian of the child: (1) In favor of that legal parent or guardian."[2] In this case, in the surrender of rights, Schultz had elected to resume legal custody of Emma if the adoption proceedings were to conclude without an order granting the adoption petition. (RJ 38) Thus, consistent with the mandate that the underlying order be interpreted in accordance with O.C.G.A. §§ 19-8-5(k) and 19-8-26(c), legal custody of Emma reverted to Schultz, not to DFACS.

[2] O.C.G.A. § 19-8-26(c) provides the form of the surrender of rights by the legal parent or guardian of the child.

O.C.G.A. § 19-8-18(d) provides, in relevant part, as follows: "If the petition [for adoption] is denied because [the adoption is not in the best interests of the child] or for any other reason under law, the court shall commit the child to the custody of the department or to a child-placing agency, if the petition was filed pursuant to Code Section . . . 19-8-5."[3] The seeming tension between O.C.G.A. §§ 19-8-5(k) and 19-8-26(c) and O.C.G.A. § 19-8-18(d) is resolved by the underlying order itself. It acknowledged that "O.C.G.A. §§ 19-8-5(k) and 19-8-26(c) were revised at a later date than O.C.G.A. § 19-8-18(d)" and that "the general rule in adoptions is that, 'while the statutes governing the surrender of parental rights and adoption must be strictly construed, such statutes are construed in favor of the surrendering biological parent.'" (RJ 91 (quoting In re A.N.M., 238 Ga. App. 21, 24-25 (1999)) Thus, O.C.G.A. § 19-8-18(d) does not change the fact that legal custody of Emma reverted to Schultz, not to DFACS, under O.C.G.A. §§ 19-8-5(k) and 19-8-26(c).

[3] Appellant filed the adoption petition pursuant to O.C.G.A. § 19-8-5.

D. As a Matter of Constitutional Law, It Must Be Presumed That the Natural Mother's Decision to Relinquish Physical Custody of the Child Was Made in Furtherance of the Child's Best Interests.

As a matter of constitutional law, it must be presumed that Schultz's decision to relinquish physical custody of Emma was made in furtherance of Emma's best interests. Under Troxel v. Granville, 530 U.S. 57 (2000), and Clark v. Wade, 273 Ga. 587 (2001), a court is constitutionally obligated to defer to Schultz's decision to relinquish physical custody of Emma.[4]

In Troxel, after the death of the father, the trial court ordered increased visitation between the grandparents and the children over the objection of the mother based on its assessment of the best interests of the children. The United States Supreme Court held that the order was unconstitutional. Citing a long line of cases dating back to Meyer v. Nebraska, 262 U.S. 390 (1923), the Court began

[4] As the record reflects, there was no proceeding in which there was a finding that Schultz was unfit to have legal custody of Emma or that legal custody of Emma by Schultz harmed Emma. The underlying order made no finding concerning Schultz. (See RJ 91 n.37)

by observing that "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." Troxel, 530 U.S. at 66. The Court then expressed concern that the mother's "decision that visitation would not be in the child's best interest [was] accorded no deference" or "any presumption of validity or any weight whatsoever" and that, instead, "the best-interest determination [was placed] solely in the hands of the judge." Id. at 67.

> Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, . . . a court can disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests.

Id. (emphasis in original). The Court then found that there were no "special factors that might justify the State's interference with [the mother's] fundamental right to make decisions concerning the rearing of her two daughters." In particular, the

Court found that "the [grandparents] did not allege, and no court [had] found, that [the mother] was an unfit parent." Id. at 68.

> That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children . . . . [S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.[5]

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[5] "In deciding parental unfitness, the trial court ha[s] to restrict its inquiry to the parent's present fitness; it [cannot] rely on evidence of the parent's past unfitness or compare the parent's ability to raise the child with the superior fitness of a third person. A finding of unfitness must center on the parent alone, that is, can the parent provide for the child sufficiently so that the government is not forced to step in and separate the child from the parent. A court is not allowed to terminate a parent's natural right because it has determined that the child might have better financial, educational, or even moral advantages elsewhere. Only under

Id. at 68-69 (citation omitted). Accordingly, the Court held that, because the order did not "accord at least some special weight to the [mother's] own determination," it "directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child" and therefore "failed to provide any protection for [the mother's] fundamental constitutional right to make decisions concerning the rearing of her own daughters." Id. at 69-70.

In Clark, which involved contests between fathers and grandparents over child custody, the Georgia Supreme Court similarly recognized that "[p]arents have a constitutional right under the United States and Georgia Constitutions to the care and custody of their children. This right to the custody and control of one's child is a fiercely guarded right that should be infringed upon only under the most compelling circumstances." Clark, 273 Ga. at 596-97 (quotation omitted). Moreover, the Court similarly recognized "three presumptions: (1) the parent is a fit person entitled to custody, (2) a fit parent acts in the best interest of his or her

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compelling circumstances found to exist by clear and convincing proof may a court sever the parent-child custodial relationship." Clark, 273 Ga. at 591 (citations omitted).

child, and (3) the child's best interest is to be in the custody of a parent." Id. at 593. Accordingly, the Court held that "the state may interfere with a parent's right to raise his or her child only when the state acts to protect the child's health or welfare[6] *and* the parent's decision would result in harm to the child[7]." Id. at 597 (citation omitted) (emphasis added).

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[6] Even if it were correct that the underlying order found that Schultz's original decision to permit Petitioner to maintain physical custody of Emma was contrary to Emma's best interests – which it is not (see RJ 90) – any such finding necessarily did not take into account the subsequent harm to Emma on account of Emma's separation from Appellant (see T 8-9).

[7] "By harm, we mean either physical harm or significant, long-term emotional harm; we do not mean merely social or economic disadvantages . . . . In considering the issues of harm and custody, trial courts should consider a variety of factors that go beyond the parent's biological connection or present fitness to encompass the child's own needs. These factors should include: (1) who are the past and present caretakers of the child; (2) with whom has the child formed psychological bonds and how strong are those bonds; (3) have the competing

"[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." Troxel, 530 U.S. at 72-73. This is no less true here. Given that, as the record reflects, there was no proceeding in which there was a finding that Schultz was unfit to have legal custody of Emma or that legal custody of Emma by Schultz harmed Emma, a court is constitutionally obligated to respect Schultz's fundamental right to care, custody, and control of Emma and to presume that Schultz's decision to relinquish physical custody of Emma was made in furtherance of Emma's best interests.

* * *

For the foregoing reasons, Appellant did not violate the underlying order. Accordingly, the trial court erred in holding Appellant in criminal contempt.[8]

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parties evidenced interest in, and contact with, the child over time; and (4) does the child have unique medical or psychological needs that one party is better able to meet." Clark, 273 Ga. at 598-99 (citations omitted).

[8] The underlying order did not purport to hold Appellant in criminal contempt for filing the petition for change of legal custody of Emma from Schultz to Appellant

II. THE TRIAL COURT ERRED IN HOLDING APPELLANT IN CRIMINAL CONTEMPT BECAUSE THE UNDERLYING ORDER WAS NOT SUFFICIENTLY DEFINITE AND CERTAIN.

Another defense to criminal contempt is that "the order was not sufficiently definite and certain." Harrell, 2007 WL 840974 at *3. The fact that Appellant not only could reasonably interpret the underlying order in a manner consistent with

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with the Bibb County Superior Court, which alleged a change of circumstance that occasioned a reassessment of Emma's best interests. (RH 14-15 ("The Bibb Superior Court custody case is just a manifestation of Ms. Hadaway and Ms. Johnson's intent to disobey and resist the order of the Court in the instant case and not the contempt itself in the instant case.")) Indeed, it could not have done so without raising concerns of constitutional magnitude. See Tennessee v. Lane, 541 U.S. 509, 523 (2004) (acknowledging fundamental right to access to courts). As the underlying order reflects, whether the petition was frivolous or deficient and therefore subject to sanction, as suggested by the underlying order (RH 14-15, 16-17, 18-19), was a matter to be decided by the Bibb County Superior Court, not the Wilkinson County Superior Court.

her actions (see § I supra) but indeed did so (see § III infra) confirms that the underlying order was not sufficiently definite and certain. Indeed, given that the phrase "continuous care, custody, and control" did not distinguish between legal and physical custody and did not define the term "continuous," it was reasonable for Appellant to conclude that Schultz would not lose legal custody of Emma if Appellant were to take physical custody of Emma, whether on a short-term or long-term basis. It is common knowledge that a parent does not lose legal custody of a child when another individual takes physical custody of the child, whether on a short-term or long-term basis (e.g., while the parent is in the hospital, while the parent is on the road, etc.). Accordingly, the trial court erred in holding Appellant in criminal contempt.

III. THE TRIAL COURT ERRED IN HOLDING APPELLANT IN CRIMINAL CONTEMPT BECAUSE APPELLANT DID NOT WILLFULLY VIOLATE THE UNDERLYING ORDER.

Yet another defense to criminal contempt is that "the violation was not wilful." Harrell, 2007 WL 840974 at *3. Even if it were correct that Appellant violated the underlying order – which it is not (see § I supra) – the undisputed evidence in the record confirms that Appellant did not do so willfully. (T 8 ("I

didn't realize that I was doing anything wrong."); 9 ("I just – I did what I was told to do. I didn't know. I'm not a lawyer."); 9 ("I didn't know that I was doing anything wrong once I took [Emma] to her biological mother."); 9-10 ("I'm sorry if I did anything wrong because I didn't know that I was. I'm – I'm a lay person when it comes to the law. I know not – what rules not to break, but I didn't realize I was breaking a rule or a law."); 10 ("I never intended to break any rules or laws or anything and wouldn't have if I knew that's what I was doing."); 21 ("[A]nything that I did that was wrong was not intentional. I'm a law-abiding citizen and a college graduate and I would never have done anything to jeopardize my future. And I would have never knowingly done anything to you or this Court knowing that it was wrong.")) Indeed, the undisputed evidence in the record confirms that Appellant acted on the advice of DFACS itself. (T 9 ("I was told by DFCS in Wilkinson County that I could just move, which I had already moved at the time out of the county, and I could re-file for custody so long as I submitted all of my paperwork from the denial of the adoption here and go from there."); 9 ("DFCS knew the mother didn't – didn't take the child. They said just to reside in Bibb County and re-file there."); see also T 10 ("I was told by several different sources that what I was doing was appropriate or I was advised to this and that it

was appropriate, that there was nothing illegal about it . . . so I did what I thought was legit.")) "In order to establish criminal contempt, there must be proof beyond a reasonable doubt not only that the alleged contemnor violated a court order, but also that he did so wilfully." Thomas v. Dep't of Human Res., 228 Ga. App. 518, 519 (1997). Accordingly, the trial court erred in holding Appellant in criminal contempt.

IV. THE TRIAL COURT ERRED IN HOLDING APPELLANT IN CRIMINAL CONTEMPT BECAUSE THE UNDERLYING ORDER WAS VOID.

"An order of contempt cannot be based on noncompliance with a void order." Adamson, 215 Ga. App. at 613; see also Mitchell v. Koopu, 242 Ga. 506, 506 (1978) ("The trial court erred in holding the appellant in contempt of [a] void order."). As set forth below, the self-executing change of custody provision in the underlying order is a void order.

"Self-executing change of custody provisions allow for an 'automatic' change in custody based on a future event without any additional judicial scrutiny." Scott v. Scott, 276 Ga. 372, 373 (2003). In Scott, the Georgia Supreme Court held that self-executing change of custody provisions based on a development such as a

relocation or a remarriage are unenforceable. In doing so, the Court observed that "[o]nce the triggering event occurs . . . the child is automatically uprooted without any regard to the circumstances existing at that time. These provisions are utterly devoid of the flexibility necessary to adapt to the unique variables that arise in every case, variables that must be assessed in order to determine what serves the best interests and welfare of a child." Id. at 375 (citation omitted).

> [S]elf-executing change of custody provisions are not rendered valid merely because the initial award of custody may have been based upon the child's best interests. It is not the factual situation at the time of the divorce decree that determines whether a change of custody is warranted but rather the factual situation at the time the custody modification is sought. Our sister states have recognized that these types of automatic custody change provisions should not be given effect because they are premised on a "mere speculation" of what the best interests of the children may be at a future date. It has been recognized that a majority of jurisdictions treat stipulations regarding the automatic change of custody as *void.*

Id. at 376 & n.4 (quotation and citations omitted) (emphasis added). Accordingly, the Court held that, "[w]hile self-executing change of custody provisions are not expressly prohibited by statutory law, we hold that any such provision that fails to give paramount import to the child's best interests in a change of custody as between parents violates this State's public policy." Id.

Under Scott, the provision of the underlying order that mandated an automatic change of legal custody from Schultz to DFACS if Schultz ever ceased "continuous care, custody, and control" of Emma was unenforceable. Thus, even if it were correct that Schultz ceased "continuous care, custody, and control" of Emma – which it is not (see T 8-9) – a change of legal custody of Emma from Schultz to DFACS was properly achievable, not through the unenforceable self-executing change of custody provision, but rather through a deprivation proceeding.

Because the self-executing change of custody provision in the underlying order was void, the trial court erred in holding Appellant in criminal contempt.

V. THE UNDERLYING ORDER WAS UNSUPPORTED BY ANY EVIDENCE AND WAS CLEARLY ERRONEOUS.

This Court may review the underlying order pursuant to O.C.G.A. § 5-6-34(d).[9] Indeed, "in every case where a person is charged with contempt of court for alleged violations of a court's order, the legal correctness of the underlying order may be challenged on appeal." Sechler Family P'ship, 255 Ga. App. at 856 (citation omitted); see also In re I.S., 278 Ga. 859, 860 (2005) (party may challenge unappealed order in course of appeal from subsequent order).

As set forth below, construing the adoption petition as an adoption petition by an unmarried couple, not by a single individual, was not supported by any evidence and was clearly erroneous; and denying adoption and vacating custody

[9] The question of the propriety of the underlying order would not be rendered moot even if Appellant were to abort the adoption proceedings in the Wilkinson County Superior Court. If Appellant were to petition to adopt Emma or any other child in Bibb County or any other jurisdiction, she would be required to report, to her detriment, the denial of the adoption petition by the Wilkinson County Superior Court.

based on solely sexual orientation were not supported by any evidence and were clearly erroneous. For each of these reasons, this Court should vacate the underlying order.

A. Construing the Adoption Petition as an Adoption Petition by an Unmarried Couple, Not by a Single Individual, Was Not Supported by Any Evidence and Was Clearly Erroneous.

The underlying order denied adoption and vacated custody by construing the adoption petition as an adoption petition by an unmarried couple, not by a single individual. (RJ 80-81, 82-83, 86, 89-90) The undisputed evidence in the record, however, confirms that the adoption petition was an adoption petition by Appellant, not by Appellant and Appellant's then same-sex domestic partner Karen Baughier. (RJ 29-32, 95, 101, 104)

The fact that the home evaluation reported information concerning Baughier does not change the analysis. O.C.G.A. § 19-8-17(a)(8) mandates that a home evaluation should report "[a]ny other information that might be disclosed by the investigation that would be of any value or interest to the court in deciding the case." Such information includes information concerning any other individual with whom the petitioner is cohabiting. (See RJ 104)

Moreover, O.C.G.A. § 19-8-3(a) provides for an adoption by a single individual, and does so regardless of whether the petitioner is cohabiting with any other individual – whether a parent, an adult sibling, an adult child, a roommate, or a domestic partner, whether same-sex or opposite-sex. Thus, construing an adoption petition by a single individual who is cohabiting with another individual – including but not limited to a same-sex domestic partner – as an adoption petition by an unmarried couple contravenes O.C.G.A. § 19-8-3(a).[10]

B. Denying Adoption and Vacating Custody Based Solely on Sexual Orientation Were Not Supported by Any Evidence and Were Clearly Erroneous.

The underlying order denied adoption and vacated custody based solely on sexual orientation. Under well-established case law, these were clear errors.

[10] That Appellant filed the adoption petition as a single individual also disposes of the trial court's assertion that Appellant and Baughier sought to file the adoption petition as if they were a married couple.

1. There was no evidence of a nexus between Appellant's sexual orientation and the child's best interests.

The trial court concluded that adoption and custody of Emma by Appellant would be contrary to Emma's best interests because "[h]ere the child will have a long-term exposure to the homosexual parent's lifestyle" and that, "[i]f the instant adoption is approved, inevitably the child will witness both directly and circumstantially the homosexual activity of the [Appellant] and her same sex partner." (RJ 87) The "best interests of the child" standard, however, required actual evidence, not bald assertion, of a nexus between Appellant's sexual orientation and Emma's best interests. Because there was no evidence of such a nexus, the trial court erred in denying adoption and vacating custody based on Appellant's sexual orientation.

In Brandenburg v. Brandenburg, 274 Ga. 183 (2001), the Georgia Supreme Court held that a court may not restrict visitation with a child on account of a relationship with an unmarried opposite-sex partner in the absence of actual evidence of a nexus between the relationship and the child's best interests:

> Although appellant's relationship with Pike could support the imposition of certain limitations upon his visitation rights if it was

shown that such conduct adversely affects his children, the record in this case is devoid of any evidence that such relationship had or likely would have a deleterious effect on the children . . . . Nor is there any evidence that appellant and Pike engaged in inappropriate behavior in front of the children . . . . Absent any evidence that exposure to Pike would adversely affect the best interests of the children, we find the trial court abused its discretion in prohibiting appellant from exercising his visitation rights in Pike's presence.

Id. at 722 (citation omitted). In Arnold v. Arnold, 275 Ga. 354 (2002), the Court extended its holding in Brandenburg in a case involving a relationship with a same-sex partner:

In the absence of any evidence that exposure to a third party will have an adverse effect on the best interests of the children, a trial court abuses its discretion by prohibiting a parent from exercising his or her custodial rights in that person's presence. Here, there is no evidence that the relationship between Wife and her friend was or will be harmful to the children, or that they ever engaged in any inappropriate conduct in the presence of the children. Thus, the trial court abused

its discretion by placing an unauthorized restriction on Wife's exercise of her rights as a custodial parent.

Arnold, 275 Ga. at 354 (citations omitted).

Similarly, in Hayes v. Hayes, 199 Ga. App. 132 (1991), this Court held that a court may not change custody of a child on account of a relationship with an unmarried opposite-sex partner in the absence of actual evidence of a nexus between the relationship and the child's best interests. Id. at 132 (finding evidence of "meretricious relationships in the presence of the child" but no evidence of "sexual acts in the presence of the child"). In Moses v. King, 281 Ga. App. 687 (2006), this Court extended its holding in Hayes in a case involving a relationship with a same-sex partner:

> With respect to the mother's cohabitation, the trial court reasoned that it does not allow unmarried men and women to cohabitate in the presence of the child and therefore Moses' relationship with her partner is meretricious per se. However, Georgia's appellate courts have held that a parent's cohabitation with someone, regardless of that person's gender, is not a basis for denying custody or visitation absent

evidence that the child was harmed or exposed to inappropriate conduct.

Moses, 281 Ga. App. at 691 (citations omitted); see also Buck v. Buck, 238 Ga. 540, 541 (1977) (upholding award of custody of child to mother who had maintained lesbian relationship).

In the deprivation context, this Court has similarly held that sexual orientation per se is not a relevant consideration: "Assuming that the mother's relationship with Martin should factor into the juvenile court's analysis, it should not be a determining factor unless it is shown that the children have been or might be harmed in some manner by their mother's lifestyle." In re E.C., 271 Ga. App. 133, 136 (2004) (citation omitted).

As this Court has long held:

> [I]n some instances a parent's "immoral conduct" might warrant limitations on the contact between parent and child; but only if it is shown that the child is exposed to the parent's undesirable conduct in such a way that it has or would likely adversely affect the child . . . . [T]he primary consideration in determining custody and visitation issues is not the sexual mores or behavior of the parent, but whether

the child will somehow be harmed by the conduct of the parent. Visitation [and custody] rights must be determined with reference to the needs of the child rather than the sexual preferences of the parent. The best interests of the child remain paramount.

In re R.E.W., 220 Ga. App. 861, 863 (1996) (quotation and citations omitted). Accordingly, it is well-established that the "best interests of the child" standard required actual evidence of a nexus between Appellant's sexual orientation and Emma's best interests.[11] Because there was no evidence of such a nexus, the trial

[11] The law of Georgia is consistent with the law of the overwhelming majority of other jurisdictions that have considered the issue. See McGriff v. McGriff, 99 P.3d 111 (Idaho 2004) (holding that custody may not be conditioned on sexual orientation); Damron v. Damron, 670 N.W.2d 871 (N.D. 2003) (same); J.A.D. v. F.J.D., 978 S.W.2d 336 (Mo. 1998) (same); Fox v. Fox, 904 P.2d 66 (Okla. 1995) (same); Van Driel v. Van Driel, 525 N.W.2d 37 (S.D. 1994) (same); S.N.E. v. R.L.B., 699 P.2d 875 (Alaska 1985) (same); Bezio v. Patenaude, 410 N.E.2d 1207 (Mass. 1980) (same); Jacoby v. Jacoby, 763 So. 2d 410 (Fla. Ct. App. 2000) (same); Hassenstab v. Hassenstab, 570 N.W.2d 368 (Neb. Ct. App. 1997) (same);

Inscoe v. Inscoe, 700 N.E.2d 70 (Ohio Ct. App. 1997) (same); In re Marriage of R.S., 677 N.E.2d 1297 (Ill. Ct. App. 1996) (same); Dinges v. Montgomery, 514 N.W.2d 723 (Wis. Ct. App. 1993) (same); In re New Mexico ex rel. Human Res. Dep't, 764 P.2d 1327 (N.M. Ct. App. 1988) (same); Stroman v. Williams, 353 S.E.2d 704 (S.C. Ct. App. 1987) (same); D.H. v. J.H., 418 N.E.2d 286 (Ind. Ct. App. 1981) (same); M.P. v. S.P., 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979) (same); Eldridge v. Eldridge, 42 S.W.3d 82 (Tenn. 2001) (holding that visitation may not be conditioned on sexual orientation); Boswell v. Boswell, 721 A.2d 662 (Md. 1998) (same); In re Marriage of Walsh, 451 N.W.2d 492 (Iowa 1990) (same); In re Marriage of Cabalquinto, 669 P.2d 886 (Wash. 1983) (same); In re Marriage of Dorworth, 33 P.3d 1260 (Colo. Ct. App. 2001) (same); In re Marriage of McKay, No. C6-95-1626, 1996 WL 12658 (Minn. Ct. App. Jan. 16, 1996) (same); In re Marriage of Birdsall, 243 Cal. Rptr. 287 (Cal. Ct. App. 1988) (same); In re Marriage of Ashling, 599 P.2d 475 (Or. Ct. App. 1979) (same); Blew v. Verta, 617 A.2d 31 (Pa. Super. Ct. 1992) (same).

court erred in denying adoption and vacating custody based on Appellant's sexual orientation.[12]

2. Social stigma occasioned by anti-gay animus was not a permissible consideration.

The trial court concluded that adoption and custody of Emma by Appellant would be contrary to Emma's best interests because it found that "the dangers of isolation and stigma in the circumstances of the instant case are highly probable and are not in the best interest of the child sought to be adopted." (RJ 88-89) Social stigma occasioned by anti-gay animus, however, was not a permissible consideration.

The trial court conceded that its finding was based on rank speculation, not actual evidence: "[T]here has been no study conducted, through home evaluation

[12] Whatever difference may exist between the application of the "best interests of the child" standard in the adoption context and the application of the "best interests of the child" standard in other contexts, in the adoption context, as in other contexts, there must be *some* evidence of a nexus between sexual orientation and a child's best interests. Here, there is *no* such evidence.

or elsewhere, into the isolation and stigma that the child may face growing up in a small, rural town with two women, in whose care she was placed at the age of six, who openly engage in a homosexual relationship." (RJ 88) Indeed, the undisputed evidence in the record reflects that Emma had not suffered any harm on account of social stigma occasioned by anti-gay animus. For this reason alone, social stigma occasioned by anti-gay animus was not a permissible consideration.

Moreover, it is well-established that constitutional law precludes the accommodation of anti-gay animus. Equal protection jurisprudence has long held that governmental discrimination may not be justified by mere disapproval of a disfavored class. In United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973), the United States Supreme Court held that expressing disapproval of hippies is an inherently illegitimate governmental interest that may not justify governmental discrimination. Id. at 534. As the Court famously declared, "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare [governmental] desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Id. In Romer v. Evans, 517 U.S. 620 (1996), the Court made clear that this principle applies equally where expressing disapproval of lesbian and gay people is concerned. Id. at 634-35.

The source of the disapproval does not change the analysis. As the United States Supreme Court has held, the government may no more discriminate simply because society wants it to do so than it may discriminate simply because it wants to do so. In Palmore v. Sidoti, 466 U.S. 429 (1984), the Court reversed an order that had taken custody of a child from a white woman in an interracial relationship on account of the "social stigmatization" that the child might suffer as a result of the association with the interracial relationship. Id. at 431. In doing so, the Court held as follows:

> The question . . . is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.

Id. at 433 (quotation and footnote omitted). Similarly, in City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985), the Court struck down a zoning ordinance that discriminated against the mentally retarded, holding that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like" and that the government "may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic." Id. at 448. In Lawrence v. Texas, 539 U.S. 558, the Court made clear that this principle applies equally where the accommodation of anti-gay animus is concerned. Id. at 578; see also id. at 582 (O'Connor, J., concurring).

Georgia courts have held no differently. In Turman v. Boleman, 235 Ga. App. 243 (1998), this Court refused to enforce a private agreement to a race-based visitation restriction, holding that "[t]he courts of this State cannot sanction such blatant racial prejudice, especially where it also interferes with the rights of a child in the parent/child relationship." Id. at 244. And, in Blackburn v. Blackburn, 249 Ga. 689 (1982), the Georgia Supreme Court refused to consider social stigma flowing from illegitimacy in its assessment of the fitness of a parent:

> It would be unrealistic to ignore the fact that society may stigmatize Nicholas because his sibling is illegitimate. However, we do not think that the fact that appellant has borne an illegitimate daughter is sufficient evidence of appellant's unfitness to raise Nicholas.

Id. at 694.

In this case, the trial court impermissibly accommodated anti-gay animus in its assessment Emma's best interests. The trial court erred in doing so. See S.N.E. v. R.L.B., 699 P.2d 875, 879 (Alaska 1985) (social stigma occasioned by anti-gay animus is an impermissible consideration in the assessment of a child's best interests); Jacoby v. Jacoby, 763 So. 2d 410, 413 (Fla. Ct. App. 2000) (same); Inscoe v. Inscoe, 700 N.E.2d 70, 82 (Ohio Ct. App. 1997) (same); Johnston v. Mo. Dep't of Soc. Servs., No. 0516-CV09517, 2005 WL 3465711 at *8 (Mo. Cir. Ct. Feb. 17, 2006) (same); see also Damron v. Damron, 670 N.W.2d 871 (N.D. 2003) (overruling Jacobson v. Jacobson, 314 N.W.2d 78 (N.D. 1981) (permitting consideration of "the fact that living in the same house with their mother and her lover may well cause the children to 'suffer from the slings and arrows of a disapproving society'")).

* * *

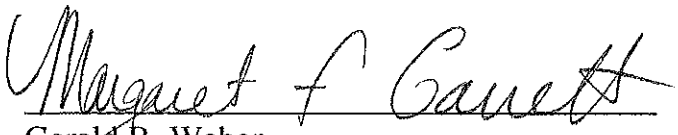
For the foregoing reasons, the underlying order was not supported by any evidence and was clearly erroneous. Accordingly, this Court should vacate the underlying order.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the contempt conviction and vacate the underlying order.

Date: May 23, 2007.

Respectfully submitted,



Gerald R. Weber
Georgia Bar No. 744878
Margaret F. Garrett
Georgia Bar No. 255865
American Civil Liberties Union Foundation
of Georgia
75 Piedmont Avenue, Suite 514
Atlanta, GA 30303
(404) 523-6201
(404) 577-0181 (facsimile)

Kenneth Y. Choe
James D. Esseks
Petitions for Appearance by Courtesy
Pending
American Civil Liberties Union Foundation
Lesbian Gay Bisexual Transgender Project
125 Broad Street, 17th Floor
New York, NY 10004
(212) 549-2627
(212) 549-2650 (facsimile)

Daniel A. Bloom
Georgia Bar No. 064100
Cooperating Attorney for
ACLU Foundation of Georgia
Pachman Richardson, LLC
75 14th Street, Suite 2840
Atlanta, GA 30309
(404) 888-3730
(404) 888-3731 (facsimile)

Amy K. Waggoner
Georgia Bar No. 730099
Cooperating Attorney for
ACLU Foundation of Georgia
Aussenberg Waggoner, LLP
3820 Mansell Road, Suite 170
Alpharetta, GA 30022
(770) 641-8200
(770) 641-8203 (facsimile)

Attorneys for Appellant