

IN THE SUPERIOR COURT OF WILKINSON COUNTY
STATE OF GEORGIA

ELIZABETH HADAWAY,)
)
 Petitioner,)
)
 v.)
)
 EVELYN FOWLER-DENNARD IN HER)
 OFFICIAL CAPACITY AS DIRECTOR)
 OF THE WILKINSON COUNTY DEPT.)
 OF HUMAN RESOURCES DIVISION OF)
 FAMILY AND CHILDREN SERVICES)
 ("DFCS"), DAVID KELLEY IN HIS)
 OFFICIAL CAPACITY AS INTERIM)
 DIRECTOR OF REGION VI DFCS, MARY)
 DEAN HARVEY IN HER OFFICIAL)
 CAPACITY AS DIRECTOR OF DFCS, AND)
 LISA AND GLEN . IN THEIR)
 CAPACITY AS AGENTS OF DFCS,)
)
 Respondents.)

CIVIL ACTION FILE
NO. 2007CV0105

FILED IN OFFICE THIS
20 DAY OF April
2007 AT 11:45 AM/PM
Clara D. Bell
CLERK OF SUPERIOR COURT
WILKINSON COUNTY, GEORGIA

MEMORANDUM OF LAW IN SUPPORT OF
PETITION FOR WRIT OF HABEAS CORPUS

Petitioner respectfully submits this Memorandum of Law in Support of Petition for Writ of Habeas Corpus.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Emma was born on April 17, 2000. In 2002, an out-of-state court granted sole legal and physical custody of Emma to her natural mother Deborah Shultz. (Exhibit 1)

As detailed in the Comprehensive Child and Family Assessment commissioned by Wilkinson County Division of Family and Children Services (DFCS), Schultz was unable to provide a good home for Emma. (Exhibit 2) Accordingly, in 2006, Schultz asked Petitioner to take Emma.

On May 12, 2006, Petitioner filed a petition for change of legal and physical custody with this Court. At the time, she resided in Wilkinson County. Schultz expressly consented and waived any objection to venue in the Wilkinson County Superior Court. On June 19, 2006, this Court granted legal and physical custody of Emma to Petitioner. (Exhibit 3)

On September 11, 2006, Petitioner, with the support of Schultz, filed a petition to adopt with this Court. At that point, Schultz had executed a Surrender of Parental Rights, which Petitioner filed with this Court in support of the petition to adopt. As a part of the Surrender of Parental Rights and pursuant to statute, Schultz indicated that, if the adoption were to be denied, legal and physical custody of Emma would immediately revert to her. (Exhibit 4) While awaiting the ruling of this Court, Petitioner, along with Emma, relocated to Bibb County on December 31, 2006. On January 8, 2007, this Court denied the petition to adopt and, sua sponte, vacated the grant of legal and physical custody. (Exhibit 5) In doing so, this Court ordered, in relevant part, as follows:

[C]ustody 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; . . . 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.

Id.¹

¹ Because, as set forth below, it was proper for Petitioner to seek the order of the Bibb County Superior Court granting legal and physical custody, it was unnecessary for Petitioner to appeal the January 8, 2007 order of this Court vacating legal and physical custody. Petitioner notes, however, that the January 8, 2007 order of this Court vacating legal and physical custody was legally and factually erroneous. Among other things, it impermissibly established continuing jurisdiction over legal and physical custody in violation of O.C.G.A. § 19-8-5(k)(1) and impermissibly burdened the exercise of the constitutional right to care, custody, and control of

On January 12, 2007, Schultz executed an affidavit in which she acknowledged that she had resumed of care, custody, and control of Emma. (Exhibit 6) Thereafter, Schultz observed the significant distress exhibited by Emma at the prospect of Emma's separation from Petitioner, and concluded that Emma's separation from Petitioner would be contrary to Emma's best interests. Accordingly, Schultz asked Petitioner to take Emma again. To facilitate the exchange, Schultz executed a Contract of Settlement Regarding a Petition for a Change of Custody. (Exhibit 7)

On January 19, 2007, Petitioner filed a petition for change of legal and physical custody with the Bibb County Superior Court. (Exhibit 8) At the time, Petitioner resided in Bibb County. Schultz expressly consented and waived any objection to venue in Bibb County Superior Court. (Exhibit 9)

On February 20, 2007, this Court ordered Wilkinson County DFCS to take Emma. On February 22, 2007, the Wilkinson County Juvenile Court granted legal and physical custody to Wilkinson County DFCS on a temporary basis. (Exhibit 13)

On March 23, 2007, this Court held Petitioner in contempt for violating its order of January 8, 2007. Petitioner's Notice of Appeal was filed on March 28, 2007.

On April 2, 2007, the Bibb County Superior Court granted legal and physical custody of Emma to Petitioner. (Exhibit 10) In doing so, it found a new and material change of circumstance that substantially affected Emma's best interests. Id. In particular, it relied on the testimony of the expert commissioned by Wilkinson County DFCS to assess Emma's best interests, and found that Emma was suffering substantial harm on account of the separation of Emma from Petitioner:

Emma by Schultz. It also penalized Petitioner on account of her sexual orientation in violation of family and constitutional law.

I. Emma has regressed academically. The Plaintiff has provided competent evidence that when she took custody of Emma, she could not read, write, or do simple math. In fact, Emma had never attended school, and Plaintiff spent all of the summer of 2006 tutoring Emma to ensure that she acquired all of the skills necessary to enter the First Grade with her peer group. Plaintiff succeeded in her efforts, and Emma was primarily an A-/B+ student this past fall, despite not having been to K-4 or kindergarten. Now, due to the stress, turmoil, trauma, and upheaval of being removed from Plaintiff's custody, Emma can no longer read, and she refuses to do mathematics. Her grades have suffered as a result. Dr. Gregory testified that these psychological reactions were to be expected, given Emma's past.

II. Emma has regressed physically since being removed from Plaintiff's custody and being placed with her foster family. She wets the bed nightly and currently must take two medications in an attempt to medically control that problem. The court finds that Emma did not have this problem prior to being transferred to the custody of Wilkinson County DFCS.

III. Emma has regressed emotionally since being taken from Plaintiff's care and custody. It must be remembered that Emma already suffered from fears of abandonment when Defendant Schultz transferred custody of her to Plaintiff, and throughout her time with Emma, Plaintiff continually had to sincerely and lovingly assure her that she would never abandon her and never betray her trust and confidence. Now, Emma has psychologically regressed in the wake of the woman, who she calls her mother, being forced to turn her over to a foster family, who by definition are strangers. Dr. Gregory testified that Emma had already been severely traumatized by the events of the past month, as evidenced by her behavior in school and in her foster home, and it will likely take years to help Emma deal with her abandonment issues.

Id. (footnotes omitted); see also Exhibit 2.

Since April 2, 2007, Petitioner has repeatedly attempted to enforce the grant of legal and physical custody. (See, e.g., Exhibit 13) Notwithstanding the propriety of the order of the Bibb County Superior Court, Respondents have kept Emma from Petitioner.

ARGUMENT

As set forth below, the order of the Bibb County Superior Court properly superseded the January 8, 2007 order of this Court because (1) it found a new and material change of circumstance that adversely affected Emma's best interests, and (2) Schultz expressly consented

and waived any objection to venue in Bibb County Superior Court. Accordingly, in refusing to respect the order of the Bibb County Superior Court, Respondents have refused to respect the rights of the party with legal custody of Emma. Such unlawful detention of a child is a classic scenario in which a writ of habeas corpus must issue forthwith. See O.C.G.A. § 9-14-1 (“Any person alleging that another person in whom for any cause he is interested is kept illegally from the custody of the applicant may seek a writ of habeas corpus to inquire into the legality of the restraint.”); O.C.G.A. § 9-14-2 (“In all writs of habeas corpus sought on account of the detention of a . . . child, the court on hearing all the facts may exercise its discretion as to whom the custody of the . . . child shall be given.”).

I. THE GRANT OF LEGAL CUSTODY TO PETITIONER BY THE BIBB COUNTY SUPERIOR COURT WAS PROPER.

Where a grant of legal custody is at issue, “the principle of *res adjudicata* is applicable *unless a material change of circumstances substantially affecting the welfare and best interest of the children is made to appear.*” Handley v. Handley, 204 Ga. 57, 59 (1948) (emphasis added). “A change of circumstances that would render a prior judgment inconclusive . . . includes *any* new and material change in the circumstances of . . . the children, which might substantially affect the health, happiness, or welfare of the children.” Id. (emphasis added). “The law . . . recognizes that because children are not immutable objects but living beings who mature and develop in unforeseeable directions, the initial award of custody may not always remain the selection that promotes the best interests of the child.” Scott v. Scott, 276 Ga. 372, 373 (2003).

As detailed in both the Comprehensive Child and Family Assessment commissioned by Wilkinson County DFCS and the findings of the Bibb County Superior Court, Emma regressed physically, emotionally, and academically – and substantially so – on account of the separation

of Emma from Petitioner. Exhibits 2, 10. This regression was the new and material change in circumstance that substantially affected Emma's best interests – and that properly occasioned the reassessment of Emma's best interests.

In reassessing Emma's best interests, the Bibb County Superior Court concluded that "Emma's best interest is served by returning custody of her to Plaintiff." Exhibit 10; see also Exhibit 2 ("In Emma's best interest, it is recommended that she return to her family, Ms. Elizabeth Hadaway."). Its conclusion was rooted in law: "The best interests of the child are controlling as to custody changes." Scott, 276 Ga. at 373 (citations omitted). Accordingly, the grant of legal custody to Petitioner by the Bibb County Superior Court was proper.

II. VENUE WAS PROPER IN THE BIBB COUNTY SUPERIOR COURT.

The determination of the jurisdiction in which the petition for change of legal custody should have been filed is made by reference to the Georgia Child Custody Intrastate Jurisdiction Act of 1978, O.C.G.A. § 19-9-20, et seq. The Act provides, in relevant part, as follows: "[A]fter a court has determined who is to be the legal custodian of a child, any complaint seeking to obtain a change of legal custody of the child shall be brought as a separate action in the county of residence of the legal custodian of the child." O.C.G.A. § 19-9-23(a). It defines the term "legal custodian," in relevant part, as follows: "'Legal custodian' means a person, including, but not limited to a parent, who has been awarded permanent custody of a child by a court order." O.C.G.A. § 19-9-22(2). Thus, the answer to the question turns on the identity of the legal custodian on January 19, 2007, the date on which the petition for change in legal custody was filed.

Under the terms of the January 8, 2007 order of this Court, Schultz, not Wilkinson County DFCS, was the legal custodian on January 19, 2007. On January 12, 2007, Schultz

executed an affidavit in which she acknowledged the resumption of care, custody, and control of Emma. (Exhibit 6) Thus, custody reverted to Schultz, not Wilkinson County DFCS under the terms of the January 8, 2007 order of this Court.²

This is so notwithstanding the fact that, thereafter, she observed that the separation of Emma from Petitioner would be contrary to Emma's best interests and, accordingly, decided to ask Petitioner to take Emma again. Indeed, in the absence of a specific finding that Schultz was an unfit parent, this Court – along with the government more generally – was constitutionally obligated to give her decision to do so special weight. See Troxel v. Granville, 530 U.S. 57, 68-69 (2000); see also Clark v. Wade, 273 Ga. 587, 596-99 (2001).

Even though Schultz, unlike Petitioner and Emma, did not reside in Bibb County on January 19, 2007, venue was proper in the Bibb County Superior Court because she expressly consented and waived any objection to venue in Bibb County Superior Court. (Exhibit 7) It is well-established that a legal custodian may consent or waive any objection to venue. Ganney v. Ganney, 238 Ga. App. 123, 125 (1999); Houston v. Brown, 212 Ga. App. 834, 834 (1994); Daust v. Daust, 204 Ga. App. 29, 30 (1992); see also Kapur v. Roach, 272 Ga. 767, 768 (2000). Accordingly, Bibb County Superior Court was a proper venue for the adjudication of the petition for change of legal and physical custody, and the order of the Bibb County Superior Court is valid.

III. A WRIT OF HABEAS CORPUS MUST ISSUE FORTHWITH.

On January 12, 2007, custody reverted to Schultz under the terms of the January 8, 2007 order of this Court. On April 2, 2007, custody transferred to Petitioner under the terms of the

² As an additional matter, custody reverted to Schultz, not Wilkinson County DFCS, under the terms of the Surrender of Parental Rights and pursuant to statute. (Exhibit 4)

order of the Bibb County Superior Court. Thus, as a matter of law, Wilkinson County DFCS was never the party with legal custody of Emma.

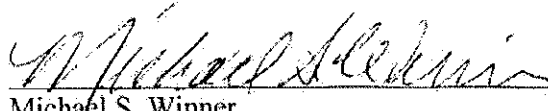
In keeping Emma from Petitioner notwithstanding the propriety of the order of the Bibb County Superior Court, Respondents have necessitated the issuance of a writ of habeas corpus. See O.C.G.A. §§ 9-14-1, 9-14-2. Particularly in light of the substantial harm that Emma is suffering on account of the separation of Emma from Petitioner, Petitioner respectfully requests the issuance of a writ of habeas corpus forthwith.

CONCLUSION

For the foregoing reasons as well as those set forth in the Petition for Writ of Habeas Corpus, Petitioner respectfully requests that this Court grant the Petition for Writ of Habeas Corpus.

This 19th day of April, 2007.

Respectfully submitted,



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