

IN THE SUPERIOR COURT OF BIBB COUNTY

STATE OF GEORGIA

ELIZABETH HADAWAY,

Plaintiff,

v.

DEBORAH SCHULTZ,

Defendant.

IN RE: EMMA ROSE BERLOWITZ

CIVIL ACTION NO.

07-CV-46353

ORDER GRANTING PLAINTIFF'S PETITION FOR IMMEDIATE CHANGE OF CUSTODY

The above-captioned case came before the Court on a Petition for Immediate Change of Custody pursuant to O.C.G.A. §19-9-1. The Petition was filed on January 19, 2007. Defendant never filed an Answer and is therefore in default. Plaintiff filed supplemental letter briefs with the Court on March 16, 2007, and on March 19, 2007, and the Court heard testimony and arguments from the Plaintiff on March 22, 2007. As Defendant is in default, she was not entitled to notice of that hearing pursuant to O.C.G.A. §9-11-5(a), and neither she nor a representative was present.

Having considered the record in the case, the briefs submitted, the testimony and evidence presented, and the arguments of Plaintiff's counsel, the Court makes the following findings of fact and conclusions of law:

The child at issue in this case is a six year-old girl, Emma Rose Berlowitz. Defendant Schultz is the biological mother of Emma and was awarded sole legal and physical custody of Berlowitz in a divorce proceeding in Murfreesboro, Illinois in January 2002. Defendant Schultz works as a truck driver and spends much of her time on the road.

In 2004, Defendant Schultz was engaged in a homosexual relationship with a partner by the name of "Star." Defendant Schultz and Star were raising Emma, Emma's brother, Matthew, and Star's two children. The couple experienced a variety of relationship problems including drug abuse, financial issues, and discipline issues with Matthew. In fact, Defendant Schultz had several behavioral problems with Matthew, who was killing pets, being physically violent towards Defendant, and physically and emotionally abusive to Emma. As a result of these problems, Defendant Schultz tried to place Matthew in foster care, but after being unsuccessful in those efforts, she concluded that she was unable to provide adequate care and supervision for Emma.

Consequently, Schultz asked Plaintiff, who was then residing in Wilkinson County, to take physical and legal custody of the child. To assist Plaintiff, the parties signed an agreement whereby Defendant relinquished custody to Plaintiff for the purpose of Plaintiff adopting Emma. After executing the document, Plaintiff filed a petition for custody of the child in the Superior Court of Wilkinson County.¹ That Court granted custody to Plaintiff in its Order on a Petition for Change of Custody, dated June 19, 2006, impliedly finding that it was in the best interests of Emma to live with Plaintiff.

Additionally, Plaintiff filed a petition to adopt Emma in the Superior Court of Wilkinson County.² The Wilkinson County Superior Court heard the petition on November 20, 2006. Plaintiff attended that hearing with Karen Baughier, her homosexual partner of seven years with whom she lived, and Dana Johnson, Plaintiff's attorney at that time. According to Plaintiff's testimony before this Court,

¹ Elizabeth Hadaway v. Deborah Schultz, Superior Court of Wilkinson County, Civil Action No. 2006-CV-0143.

² In re: Petition of Elizabeth Hadaway to Adopt Emma Rose Berlowitz, Female, d/o/b 04/17/2000, Superior Court of Wilkinson County, Case No. 0609-187.

she feared that the Wilkinson County Superior Court would not likely approve her adoption because she perceived that the Court had moral objections to her sexual orientation. Anticipating that the Court would deny her petition to adopt Emma, Plaintiff ended her seven-year relationship with Ms. Baughier, moved from Ms. Baughier's home in Wilkinson County and signed a one-year lease for 1669 Downing Circle, Macon, Bibb County, Georgia.

On January 8, 2007, the Superior Court of Wilkinson County denied Plaintiff's adoption petition due to her failure to reveal in the adoption petition that she was cohabiting with Ms. Baughier, her failure to show that she alone was financially capable of assuming responsibility of Emma, and her failure to show that the adoption is in the best interest of Emma.³ In the Order Denying Adoption Petition⁴, the Court also vacated the Order on a Petition for Change of Custody issued in Elizabeth Hadaway v. Deborah Schultz, Civil Action No. 2006-CV-0146, and ordered that physical and legal custody of Emma be returned to Defendant Shultz within ten days from the date of the order. The Court directed the Wilkinson County Sheriff to,

inspect to see in 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

³ Since the Wilkinson County Superior Court denied Plaintiff's Petition for Adoption, that court has found Plaintiff and her former counsel, Dana Johnson, in criminal contempt and ordered them to report to the Wilkinson County Jail on April 6th in order to serve their sentence. Additionally, the Wilkinson County Superior Court has also requested the State Bar of Georgia to investigate Ms Johnson in order to determine if she should be punished professionally for her actions described in detail in the Order Denying Adoption, the Court's Finding of Contempt and Judge John Lee Parrott's letter to William Smith, General Counsel to the State Bar of Georgia.

This Court has no interest or desire to unnecessarily involve itself with the workings of another superior court. Further, it should be noted that this judge has great respect for each of the judges in the Ocmulgee Judicial Circuit and trusts them to make what they believe to be fair and equitable decisions and this court will do its best to support its colleagues whenever possible. Further, this court is sensitive to cases involving governmental agencies or persons located in that circuit. However, this Court has a Petition before it related to a child and it is bound to hear this case. This Court must decide this case on the evidence as presented to it. The Wilkinson County Superior Court has already found the Plaintiff and her counsel in criminal contempt and sentenced them as it saw fit. This Court will not revisit that decision nor will it punish Plaintiff further by refusing to hear this particular Petition.

⁴ A copy of the Order Denying Adoption is attached to this Order as People's Exhibit A.

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.

Plaintiff met Defendant Shultz at a truck stop in Jeffersonville, Georgia on January 12, 2007, in order to comply with the Order Denying Adoption. According to her uncontraverted testimony (and consistent with an earlier affidavit signed by Plaintiff), Plaintiff believed that Emma would leave with Defendant Shultz when the parties met at the truck stop. Additionally this Court reviewed an affidavit that Defendant Shultz executed acknowledging the resumption of custody, control and continuous care of Emma and acknowledging her intention to return to Florida with the child. However, after providing a brief period of privacy to Emma and Plaintiff, Defendant Shultz changed her mind and refused to take Emma with her after seeing how devastated the child was about leaving Plaintiff. According to Plaintiff, she did everything in her power to comply with the provisions of the order of the Superior Court of Wilkinson County and only took the child back because she feared that Ms. Shultz would simply leave Emma at the truck stop.

After refusing to take Emma, Defendant Schultz executed a new Contract of Settlement Regarding a Petition for a Change of Custody with Plaintiff, again transferring her legal and physical custody to Plaintiff. This new Contract had the following caption at the top of the first page: "In the Superior Court of Bibb County," presumably because the Plaintiff had moved her residence to Bibb County and could therefore legally avail herself of this Court's jurisdiction. Plaintiff filed the contract with the Petition for Immediate Change of Custody in this instant action on January 19, 2007, eight days after the Wilkinson County Superior Court denied her Petition to

adopt Emma.⁵

On February 20, 2007, the Superior Court of Wilkinson County issued an order directing the Wilkinson County Department of Family and Children Services (DFCS) to take custody of Emma. DFCS then contacted Plaintiff at her Macon home, explaining to her that she could: (1) drop Emma off at the DFCS office to be placed with a foster family, (2) meet the DFCS case worker at the foster family's home to relinquish custody, or (3) have DFCS pick Emma up at Plaintiff's home. Plaintiff chose the second of these options based on her belief that it would be the easiest on Emma, and Plaintiff then relinquished custody of Emma to her foster family, the Reddicks.

On February 22, 2007, a Wilkinson County Shelter Care Hearing was conducted, at which time the Juvenile Court of Wilkinson County ordered that physical and legal custody of Emma be transferred to DFCS pending a final hearing in the Juvenile Court. Under that order, Plaintiff was to have no further contact with Emma. According to the unrefuted testimony at the hearing before this Court, Plaintiff has fully complied with the provisions of the Juvenile Court's ruling, and she has had no further communications with Emma.

Wilkinson County DFCS placed Emma with Lisa and Glenn Reddick. According to testimony before this Court, the Reddicks have five other children living in the home that are between the ages of six months and three years old. Additionally, the Reddicks have six other children who are frequently at their house that are 17 years of age and older.

Alicia M. Gregory, the professional hired by Wilkinson County DFCS to conduct the Comprehensive Child and Family Assessment on the child, testified that

⁵ Defendant Schultz also executed a handwritten Acknowledgement of Service and signed a Waiver of Venue, and those documents are also filed with the petition in this action.

Emma has a long history of trauma including physical, emotional, and probably sexual abuse.⁶ Because Defendant has abandoned Emma, she now suffers from severe abandonment issues. According to Dr. Gregory, the removal from Plaintiff has only exacerbated Emma's abandonment issues and intensified her emotional problems. Further, Dr. Gregory testified that since being removed from Plaintiff's home in late February, Emma has struggled to focus on her schoolwork due to her continuous worries over her future and due to her deepened fears of abandonment. Indeed, Emma has virtually ceased reading and refuses to work math problems. Her grades have suffered, and she has begun to wet her bed through her pull-ups and sheets every night. As a result, Emma now takes two medications (Imipramine and Desmopressin) in an attempt to stop her bed-wetting.

Dr. Gregory concluded, and in fact was quite adamant, that Emma's best interests would be served by returning Emma to Plaintiff's custody. Indeed, Dr. Gregory stated that Emma's current foster placement was the worst possible scenario for Emma, not because the Reddicks are not fine foster parents, but because Emma needs considerable individualized attention due to her abandonment issues. If the Court decided to leave Emma in DFCS' custody, then Dr. Gregory opined and advised that she needed to be placed with another family that could provide her with more individual attention.

Although a review and modification of child custody shall not be had more frequently than once every two years, the Court's power to enter a judgment relating to the custody of a minor is not limited or restricted in any new proceeding provided that the party requesting the change makes a showing of a change in any material

⁶ In addition to her testimony before the Court, Dr. Gregory filed an excerpt from her Comprehensive Child and Family Assessment with the Court as a supplemental brief as a friend of the court. The Court has attached that document to this Order as People's Exhibit B.

conditions or circumstances of a party or the minor. O.C.G.A. §19-9-1(b). Where an award of custody of a minor child has been duly made, the doctrine of *res judicata* applies and the award is conclusive on the parties unless there are new and material conditions and circumstances substantially affecting the interest and welfare of the child. Bagley v. Bagley, 226 Ga. 742, 743, 177 S.E.2d 255 (1970); Adams v. Heffernan, 217 Ga. 404, 122 S.E.2d 735 (1961). Change of circumstances that would render a prior judgment inconclusive is not necessarily limited to change in moral or financial condition of the parent to whom the initial award was made, but includes any new and material change in the circumstance of either parent or of the child, which might substantially affect the health, happiness, or welfare of the child. Robinson v. Ashmore, 232 Ga. 498, 502, 207 S.E.2d 484 (1974); Madison v. Montgomery, 206 Ga. 199, 203, 56 S.E.2d 292 (1949); Handley v. Handley, 204 Ga. 57, 59, 48 S.E.2d 827 (1948). A trial judge is vested with wide latitude and discretion in determining whether or not there has been such a change, and that discretion will not be interfered with by the appellate courts absent a showing of abuse. Adams, 217 Ga. at 404; Madison, 206 Ga. at 203.

The question of the fitness of a party seeking custody is always a proper subject of inquiry for the court. Adams, 217 Ga. at 406. Evidence touching character, conduct, and reputation of either of the parties, or any other evidence tending to throw light on their fitness to be custodian of child, is admissible, but witnesses cannot give their opinion that one is not a fit person to have a child. Milner v. Gatlin, 143 Ga. 816, 85 S.E. 1045 (1915); Moore v. Dozier, 128 Ga. 90, 57 S.E. 110 (1907). Where there is no evidence that a child's mother is presently engaged in a homosexual relationship but merely evidence of past conduct, the custody of a child shall not be denied on the basis of the mother's unfitness. Gay v. Gay, 149 Ga.

In this case, the Court finds that the Plaintiff has shown that there have been significant changes in Emma's circumstances, including the following:

- 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.⁷ 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

⁷ Plaintiff testified that Defendant often referred to Emma as "retarded" or "stupid." Emma's brother also referred to her in these terms and often called her a "stupid bitch."

her to Plaintiff⁸, 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 has 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.

IV. Plaintiff has terminated her seven-year, same-sex relationship with Ms. Baughier, and she is not presently engaged in any other homosexual relationship. Under direct and forceful questioning from the Court, she assured this Court, under oath, that given the Hobson's choice between her partner and her children, she would choose her children every time. She testified that she gave up her relationship because of her strong desire to maintain custody of her three children. This Court declines the temptation to weigh in on what, if any, effect a party's sexual preferences should have on a Petition for Change of Custody since this particular circuit has previously awarded custody of children to homosexuals if it found it was in the best interests of the particular child in question.

Given that Plaintiff's Petition for Immediate Change of Custody is not barred under the doctrine of *res judicata* due to these changes in the material conditions and

⁸ As described earlier, Defendant drives tractor trailer trucks around the country so that Emma has never really had a home and constantly moved around. When with her natural mother, she lived in the cab of a truck. This living arrangement, if it can be called as such, also contributed to Emma's abandonment and anxiety issues.

circumstances, this Court can properly decide the issue before it, namely, whether it is in the best interests of Emma Rose Berlowitz to remain in foster care or to return her to Plaintiff. Given the testimony of Plaintiff, and relying specifically on the professional recommendations of Dr. Gregory, Wilkinson County's chosen professional, all of the evidence in this case undeniably leads to the conclusion that Emma's best interest is served by returning custody of her to Plaintiff. This order is consistent with the June 19, 2006, order of the Superior Court of Wilkinson County that initially awarded custody of Emma to Plaintiff.

This court finds that Plaintiff is the only party in this case (and tragically, likely the only person in the world) who has provided Emma with the one-on-one attention, love, and affection every child deserves and that will also be required in order to have any hope of overcoming the child's abandonment issues. No one else took the time to teach Emma how to read, write, and do arithmetic. No one else has formulated a plan to help Emma overcome the emotional and psychological traumas that she has endured in her young life. As good as the Wilkinson County DFCS foster family must be, surely returning Emma to Plaintiff is better.

Plaintiff demonstrated that she is both financially and physically able to care for Emma. Plaintiff works as an Emergency Medical Technician at the Medical Center of Central Georgia, and she earns approximately \$46,000 per year, not including her earnings from working overtime hours. She has saved over 300 hours (approximately 7 weeks) of Personal Accumulated Leave (PAL) time. Plaintiff has been honest with her supervisors about her current custody efforts, and they have supported her efforts to regain custody of Emma. Plaintiff is prepared to expend a lot of her leave time in order to spend extra time with Emma to overcome the additional trauma Emma suffered when she left Plaintiff earlier this year. Additionally, Plaintiff's

family members are prepared to assist her and stand in the gap for her while Plaintiff works.

Finally, even discounting the Plaintiff's testimony as self-serving and biased, Dr. Gregory, unequivocally testified that it is absolutely in Emma's best interests to be returned to Plaintiff. She based her conclusion on the psychological tests that she conducted on the child and based on her interviews with Plaintiff, the Reddicks, and Emma. Further, Dr. Gregory testified that Emma has a deep, emotional attachment to the Plaintiff. Dr. Gregory also relied on the Reddicks' admission that there has been a notable regression in Emma's schoolwork in the month that she has been in their foster care.

In light of the controlling statutory and case law discussed above, as well as the facts as found by the Court, the Plaintiff's Petition for Immediate Change of Custody of Emma Rose Berlowitz is hereby **GRANTED** so that Plaintiff shall now have and enjoy legal and physical custody of Emma Rose Berlowitz.

SO ORDERED, this 30th day of March, 2007.

Tilman E. Self, III
Judge, Superior Courts of Georgia
Macon Judicial Circuit