

other with elderly great grandparents, based on hearsay allegations and the mother's sexual orientation.

STATEMENT OF THE CASE

Appellant Amber Crosby ("mother") has two children, a son, E.C., ("the son") born January 7, 1997, and a daughter, S.C., born June 21, 1999 ("the daughter") (or "the children"). In August 2003, the court adjudicated paternity of the son and ordered Curtis Coulter, Jr. ("the father") to pay the mother child support of approximately \$42 per week. (T-21-2, Nov. 24th hearing.) Thereafter, the son was introduced to the father. The father has custody of another child, C.A.C., approximately the same age as the son. (T-9-10, Nov. 24th) Additionally, the father has been under court order since January 2002 to pay \$56 per week for the support of another child he fathered, C.J.C., born May 27, 2001. (T-18, Nov. 24th; T-21, Dec. 15th) Shortly after the court ordered the father to pay child support, Crystal Coulter, the father's wife, called DFCS anonymously with allegations regarding the mother. (T-20, 21, Nov. 24th; T-24, Dec. 15th)

The Allegation of Deprivation

On September 5, 2003, the Richmond County Department of Family and Children Services ("DFCS") filed a Deprivation Petition against the mother and took the children from her, placing them in the temporary care of relatives under DFCS legal custody. (R-33.)

DFCS case manager Melvin Ransom prepared an Affidavit September 2, 2003, (R-19.) This Affidavit forms the **only** evidence of neglect ever produced by

DFCS. The “evidence” found in the Affidavit forms the basis of the Deprivation Petition. (Compare R-19 with R-33.) According to Mr. Ransom, DFCS was contacted on August 26, 2003 by “the reporter,” Crystal Coulter. (T-20, 21, Nov. 24th; T-24, Dec. 15th)The reporter alleged “that [she] and several other family members are very concerned about the children’s home life. [She] stated that Amber Crosby and Angela Martin are a lesbian couple.” She went on to relay that others were concerned that Amber is “frequently beaten by Ms. Angela Martin in the home in the presence of the children and others.” (R-19.)

Based on these hearsay allegations, DFCS asked the mother to meet with a case manager, which she did on August 28, 2003. Mr. Ransom told her “someone had contacted DFACS about some concerns that they had.” (T-28, Dec. 15th.) He presented the mother that day with a safety plan that she was required to sign, one that removed Ms. Martin from her home and denied the children any contact with Ms. Martin.

On the evening of Saturday, August 30, 2003, the mother had to work at her restaurant job. Angela Martin had been the primary babysitter for the children when she worked. The maternal great-grandparents were out of town and Amber’s sister could only watch them a short while. The mother had no babysitter other than the mother of Angela Martin, who had frequently kept the children. Amber’s sister took the children to Mrs. Martin’s home at bedtime and put them to bed. As Angela Martin could not go to the home she shared with Ms. Crosby because of the safety plan, she came to her mother’s house around 11

p.m., and did not even know the children were there. (T-29-31, Dec. 15th)

In less than an hour the police were called, presumably by Crystal Coulter, and the sleeping children were taken to shelter care. (T-31, Dec. 15th) As Mr. Ransom reported: "Case Manager Mona Thomas responded to a tip received by Richmond County DFCS that [the children] were in McDuffie County with Angela Martin at the home of her mother." (R-21.)

The Richmond County DFCS took the position "that the children are at risk in the home should they remain in the custody, care and control of their mother, Amber Crosby due to her failure to cooperate with the Safety Plan agreed upon on 8/28/03." (R-21.)

The Deprivation Hearings

At the hearing for temporary Shelter Care, DFCS representative Ransom presented an affidavit which showed that, on August 27, 2003, he had interviewed the six year-old son at school. "[He] stated that his mother and Ms. Martin smoke marijuana in the home. He stated that his mother and Ms. Martin also argue and fight a lot but stated he hasn't witnessed Ms. Martin hit his mother. He stated that he does not like Angela because she is mean to him, his sister, and his mother." (R-20.)

This was the only interview that the affiant, Mr. Ransom, conducted. The remaining allegations in Ransom's affidavit were hearsay statements by a supervisor reporting hearsay statements from unidentified sources. According to Ransom's affidavit:

1. Supervisor Humphries said that the former landlady said that there were frequent physical fights with Ms. Martin as the aggressor.
2. Supervisor Humphries said that the grandparents said that the family is “very much aware of the domestic violence going on between Ms. Crosby and Ms. Martin.”
3. Supervisor Humphries said that the daycare provider said that the children haven’t said much but that the mother has come into the center “very upset and crying and made statements eluding to domestic problems.” Further, that the children have stated that they are not allowed to take anything home from school, such as treats, and that “several different things of that nature has led them to believe there are serious issues in the home.” (R-20-21.)

DFCS obtained temporary custody of the children pursuant to an Order for Shelter Care, entered September 2, 2003. (R-31.) At that hearing, the mother tried to explain to the judge her lack of other babysitting for the children and the necessity for her to be at work on Saturday, after missing work on Friday for lack of a babysitter. (T-11-12, Sept. 2d.)

John P. Claeys represented DFCS, and testified as follows:

Your Honor, this is a detention hearing. The problem that we had is after reports of domestic abuse – Ms. Crosby and Ms. Martin are friends, roommates. There are allegations about domestic abuse and violence perpetrated on Ms. Crosby by Ms. Martin. Ms. Martin is apparently the caregiver of the children when Ms. Crosby is gone. After we were informed that some of this abuse, physical abuse, was taking place in front of the children, essentially as alleged in the affidavit, a protective order

was signed. [T-8, Sept. 2d.] Your Honor, apparently the physical violence and abuse has been going on for some time. [T-9-10, Sept. 2d.]

At a subsequent temporary custody hearing, held September 11, 2003, the judge signed a legitimation order making Curtis Coulter Jr. the legal father of E.C., and changed the child's last name to Coulter. (R-53.) The judge also entered a Temporary Custody Order giving DFCS custody of the children for 12 months or until further order of the court. (R-47.) The basis for the temporary order was 1) "[a]llegations of physical abuse of the mother by Ms. Martin and drug use by both women"; 2) "the children reside with the mother and Angela Martin, who are a lesbian couple"; and 3) "[t]he mother signed a safety plan agreeing that Ms. Martin would move out of the house and have no contact with the children during the DFCS' investigation, but on August 30, 2003, the children were found with Ms. Martin in the home of her mother." (R-47, 48) However, "the DFCS' permanency plan for the children is reunification." Id.

The first of three reports issued by the advocate appointed for the children, Kids Restart, was available at this hearing. Kids Restart recommended that the children be returned to the mother with a protective order during the investigation. The author of the Kids Restart report of September 11, 2003, Aldwin C. Yarbrough, noted:

My investigation found little solid evidence for these allegations.... Most of the negative input is based on information provided by Amber's adoptive parents, Ray and Sonja Crosby, who have a strong philosophical differences in how the children are being parents and the influence Angela is having on their adopted daughter. [R-44.]

In addition, the mother had an attorney who pleaded with the judge for that very result:

Mom's attorney: Your Honor, at the present we'd like to ask the Court to consider returning the children to the mother with a protective order. It's my understanding that these - any allegations have been investigated, that they're unfounded, that there's no reason for the children to remain in DFCS's care at this time, Your Honor.

The Court: It bothers me, when a mama wants the children to stay in foster care.

Mom's attorney: Well, I think - first, she'd like to have the children back. But given the alternative of having them placed with certain people that she doesn't feel could care for them or foster care, she feels that the foster care alternative is the best alternative for the children.

The Court: I'm going to place legal custody with y'all [DFCS]. Mr. Ransom, find a relative to put them with. [T-5-6, Sept. 11th.]

The children were placed with relatives: the son was placed with the father; the daughter was placed with the maternal great-grandparents.

At the next hearing, convened November 24, 2003, Mr. Claeys, representing DFCS, summarily reported that "at this time we cannot recommend placing the children back in the mother's home." [T-5, Nov. 24th.] With no evidence of deprivation or harm to the children presented, the mother's attorney requested that the judge follow the recommendation of Kids Restart, to which request the court responded: "Well, DFCS says I can't do that." (T-6, Nov. 24th.) No further evidence of deprivation or neglect was presented. The evidence presented at this hearing related to the fitness of the potential custodians as presented by their counsel. Id

The court appointed advocate for the children, Kids Restart, submitted

another report at the November 24, 2003 hearing. (R-57) It recommended even more strongly that the children be placed in the home of the mother, in the legal custody of DFCS, pending completion of the Case Plan. The conclusion of this second report was that Sonja and Ray Crosby “do not have direct knowledge of what really goes on in Amber’s household in Augusta because they do not visit her in Augusta. Both Angela and Amber deny fighting. Amber has admitted using marijuana in the past but denies ever using it in front of the children. It appears that Angela has been a positive influence in discouraging the use of drugs in the household.” (R-57)

Furthermore, the second report noted, “The mother has enrolled in parenting classes and has displayed a positive attitude to class. She relates well to the children during her visitation with the children. The children demonstrate affection toward the mother and she demonstrates genuine affection and concern for them. I see no reason not to return the children to their home.” (R-57)

Additionally, there were allegations of drug use in the great-grandparents’ home by their children living there and concerns about the great-grandmother’s health. DFCS was opposed to the Coulters keeping both children, as S.C. is not related to them. The reporter’s opinion was that the two children should remain together, and return home. (R-57-58.)

The hearing was kept open for evidence until December 15, 2003. At the December 15, 2003 hearing, a DFCS case manager, Priscilla Germany, testified that “Miss Crosby has been working on her case plan. Whatever we ask her to

do, she has done it.” (T-36-7, Dec. 15th) Mr. Claeys, again representing DFCS announced, “We think that the kids could possible go back home” with “six months after care.”¹ [T-37-8, Dec. 15th]

At this final hearing, Kids Restart presented another updated report:

My investigation found little solid evidence for these allegations of drug abuse, domestic violence and child abuse. I came to the conclusion that the primary reason for these allegations are an attempt on the part of the grandparents and father of E.C. to gain custody of the children rather than any serious concern for the safety and well being of the children. [R-63.]

The reporter based this conclusion on the following:

1. Interviews with daycare caregivers who had frequent contacts with both Angela and Amber had not seen any signs such as bruises to indicate fighting had occurred and had no knowledge of physical violence or drug use. Both Angela and Amber deny fighting. The altercation referred to occurred about 3 years ago and did not happen in front of the children.
2. Their landlord, for the home where they have lived for the past 18 months, reported that they were exemplary tenants.

When I visited their home was clean and safe.

¹ DFCS: “We think that the kids could possible go back home with a protective order.” Judge: “Why a protective order?” DFCS: “Well, basically is what I mean is after care.” When pressed by the attorney representing the great-grandparents and the father, DFCS replied “I didn’t mean protective order. I mean six months of after care. Basically, the children would return home, but we would continue to monitor the case for six months.” [T-37-8, Dec. 15th.]

3. Most of the negative input involved criticisms that Amber and Angela were too strict in how they disciplined the children. For example, they send them to time out when they misbehave, make them drink milk and water instead of soft drinks, and do not allow them to bring toys home from daycare.
4. I concluded that the grandparents in Thompson do not have direct knowledge of what really goes on in Amber's household because they do not visit her in August where she has lived for the past 18 months.
5. The issue of violating the safety plan was overblown and appeared to be a setup. The mother was at work and her sister who was babysitting took the children to Angela's mother's house and left them. Angela was not expected to be home. She returned home and went to her bedroom and did not come into contact with the children.

He found several positive reasons for returning the children to their home including:

1. It appears that Angela has been a positive influence in discouraging the use of drugs in the household. Amber has taken two drug screens and passed both.
2. The mother has displayed a positive attitude in her parenting

classes which she has completed. She relates well to the children during her visitation with the children. The children demonstrate affection toward the mother and she demonstrated genuine affection and concern for them.

3. The mother has stable employment. In addition to her regular job as a waitress at Carrabba's Restaurant, she has been contracting with the owner to do the cleaning of the restaurant.
4. My opinion is that the two siblings should remain together. Since it is not feasible for either the grandparents or the father of E.C. to keep both children and there is no risk to the children, they should be returned to their mother. It appears that this case is more of a custody dispute than one concerning neglect or abuse. [R-63-4.]

The court took the matter under advisement, as follows: "Well, you know, there's been a total of five different hearings according to my notes in this matter, and I want to go back through my notes and take a closer look at the file. I will let y'all know something by the end of the week." (T-38-9, Dec. 15th.)

The Finding of Deprivation

Despite the lack of evidence of deprivation, unfitness or harm to the children after four hearings² and contrary to the recommendation of DFCS and Kids Restart, the court transferred custody on a permanent basis from the mother

² No evidence was presented beyond the initial hearsay allegations presented at the Temporary Shelter hearing.

to the maternal great-grandparents for the daughter and to the recently discovered father for the son, and made no provision for visitation with the mother or any further reference to the reunification plan DFCS was considering.

ENUMERATIONS OF ERROR

1. The juvenile court lacked jurisdiction because this deprivation proceeding was a pretext for a custody battle.
2. There is no evidence upon which a court could have found deprivation.

Jurisdiction is properly in the Court of Appeals as this is an appeal from a final order in a deprivation proceeding, which is neither child custody nor a domestic relations action, a direct appeal is the proper procedure. In the Interest of J.P., 267 Ga. 492 (480 S.E. 2d 8) (1997).

ARGUMENT AND CITATION OF AUTHORITY

I. The Juvenile Court Lacked Jurisdiction Because this Deprivation Proceeding Was a Pretext for a Custody Battle.

The purpose of a deprivation proceeding is to determine whether the child is deprived and is not an action brought to decide custody matters. In the Interest of J. P., 267 Ga. at 493, supra. Juvenile courts “should not entertain deprivation proceedings brought by a non-custodial parent to obtain custody from a . . . custodial parent.” See In re M. C. J., 271 Ga. 546, 548 (1999) (quoting Lewis v. Winzenreid, 263 Ga. 459 (1993)); see also Watkins v. Watkins, 266 Ga. 269 n.7 (1996) (“[E]ach deprivation petition must be judged on its own merits. If it appears from an analysis of the pleading that it is actually a disguised custody

matter, then it is outside the subject matter jurisdiction of the juvenile courts.”) .

Here, the wife of the non-custodial biological father contacted DFCS in a matter of weeks or days after the father was ordered to pay child support. (T-20-2, Nov. 24th hearing; T-24, Dec. 15th). Her untruths and half-truths led to an investigation resulting in a deprivation. Crystal Coulter’s allegations were not based on any evidence she could have known or perceived from the children’s living conditions because she had never visited the children’s home. (T-20, 21, Nov. 24th; T-24, Dec. 15th) Based on the lack of evidence in the allegations and the timing of the deprivation hearing, the juvenile court lacked jurisdiction in this veiled custody battle. Accord, the Kids Restart report of December 15, 2003:

My investigation found little solid evidence for these allegations of drug abuse, domestic violence and child abuse. I came to the conclusion that the primary reason for these allegations are an attempt on the part of the grandparents and father of E.C. to gain custody of the children rather than any serious concern for the safety and well being of the children. It appears that this case is more of a custody dispute than one concerning neglect or abuse. [R-63, 64.]

Even if the juvenile court might have excusably erred on the side of protecting the children at the shelter care hearing, as the Kids Restart reports make clear, it became clear that there was no evidence of deprivation in this case. A father ordered to pay child support, in “mutual cooperation” with disgruntled grandparents, fueled a witch-hunt -- with the initial assistance of DFCS.

An analysis of the lower court’s actions show that the court conducted a custody issue beyond its jurisdiction. See In re M.C.J., 271 Ga. 546, 548 (523 S.E. 2d 6) (1999)(“Under the long-established rule that ‘pleadings... are to be

construed according to their substance and function and not merely as to their nomenclature, being always mindful to construe such documents in a manner compatible with the best interest of justice,' [cit.], each deprivation petition must be judged on its own merits. If it appears from an analysis of the pleading that it is actually a disguised custody matter, then it is outside the subject matter jurisdiction of the juvenile court."); see also In the Interest of K.R.S., 253 Ga. App. 678, 679 (560 S.E. 2d 292) (2002) ("If the petition fails to make valid allegations of deprivation as defined by OCGA § 15-11-2 (8), the matter is not a deprivation proceeding within the jurisdiction of the juvenile court, but is a custody dispute that falls within the jurisdiction of the superior court.").

The weight of the testimony and evidence presented in this case, nearly all of which related to the fitness of the potential custodians, reveal that the juvenile court entertained a custody hearing instead of a search regarding deprivation.

II. There Is No Evidence of Deprivation

The standard of review is clear and convincing evidence regarding evidence of deprivation. In re M.E., 265 Ga. App. 412, 416 (1) (593 S.E. 2d 924) (2004)("On appeal, we review a finding of child deprivation challenged as support by insufficient evidence to determine whether any rational trier of fact could have found by clear and convincing evidence that the child was deprived."). Additionally, the standard of review of a trial court's ruling on a legal question is "plain legal error" and the appellate court makes an independent review. Suarez v. Halbert, 246 Ga. App. 822, 824 (1) (543 S.E. 2d 733)

(2000) (when a question of law is at issue, no deference is owed to the trial court's ruling.); see also Gwinnett County v. Davis, 268 Ga. 653 (492 S.E. 2d 523) (1997)("Where it is apparent that a trial court's judgment rests on an erroneous legal theory, an appellate court cannot affirm.[cit.]").

The following principles are controlling:

1. A deprived child under Georgia law is a child "without proper parental care or control, subsistence, education as required by law, or other care or control necessary for the child's physical, mental, or emotional health or morals." O.C.G.A. § 15-11-2 (8) (A).
2. The determination of whether a child is deprived depends upon the child's welfare alone. "[I]t is the child's welfare and not who is responsible for the conditions which amount to deprivation that is the issue." [cits.] In the Interest of M.E., 265 Ga. App. at 416 (1).
3. [T]o authorize a termination of parental rights, or even a loss of temporary custody by the child's parents, on the basis of deprivation, the deprivation must be shown to have resulted from unfitness on the part of the parent, that is, either intentional or unintentional misconduct resulting in the abuse or neglect of the child or by what is tantamount to physical or mental incapability to care for the child. Id.

The evidence adduced in the trial of this case consisted of the following:

1. The father and his wife testified that they had made a “mutual cooperation” pledge with the maternal grandparents to work together. (T-12, 18, Nov. 24th) They both testified as to their backgrounds, income, employment, and their physical, moral, and financial ability to care for the son. (T-9-12, 16-18, Nov. 24th.)
2. Crystal Coulter testified on cross-examination about the father’s child support obligations and about her role in contacting DFCS with her “concerns” about the mother. (T-18-22, Nov. 24th.)
3. Two witnesses testified as to the father and stepmother’s good moral character. (T-23-28, Nov. 24th.)
4. Two witnesses testified as to the maternal grandparents’ good moral character. (T-29-33, Nov. 24th.)
5. Mr. Yarbrough, Kids Restart investigator, testified that the initial allegations made in this case, the daycare provider’s triple hearsay statement, concerned events that had happened several years ago. (T-5, Dec. 15th.)
6. The mother’s employer testified as to her dependability as an employee and that she had never observed any violence between Amber and Angie. (T-6-8, Dec. 15th.)
7. The mother’s present landlady testified as to the cleanliness of Amber’s home, and the lack of complaints from any neighbors. (T-15-17, Dec. 15th.)

8. A former sister-in-law of Angie Martin testified as to the cleanliness of Amber's home, the presence of age-appropriate toys and food, clothing for the children, the lack of knowledge of any violence between Amber and Angie, the lack of first-hand knowledge of any drug usage. This witness, an employee of Augusta Housing Authority, was an investigator who had made determinations for families of children at risk of being removed from their homes as to what steps the families could take to improve their living situation. (T-13-4, Dec. 15th.)
9. The mother of Curtis Coulter's other child, born May 27, 2001, who worked at the Richmond County Courthouse, Board of Elections, testified as to Crystal Coulter's efforts to find out information concerning Amber and Angie. (T-23-26, Dec. 15th.)
10. The mother testified as to the events recorded in Mr. Ransom's Affidavit and her progress on her care plan. (T-26-34, Dec. 15th.)
11. On cross-examination, the father's attorney asked the mother if she were engaged in a lesbian relationship with Angie Martin. (T-35, Dec. 15th.)
12. A DFCS representative testified that DFCS recommended that the children be returned to the mother and that the mother had complied with all DFCS requests. (T-36-9, Dec. 15th.)

There was no evidence that the children were without proper parental

control and care, or neglected or abused. Nothing in any of the four hearings reported approaches the threshold of being evidence that the children were ever deprived.

The trial court's "findings of fact" consisted of the following:

1. The Kids Restart reports, all of which recommended that the children return home and none of which found neglect or unfitness on the part of the mother. (R-44, 57, 63)
2. The testimony of the mother's supervisor that the mother was a dependable employee and that she was unaware of any family violence, having had an opportunity to work with the mother and Angie together.
3. The testimony of Angela's ex-sister-in-law that the mother's home was adequate and that the children were cared for properly and that she was unaware of any domestic violence in the mother's home between the mother and Angie.
4. The testimony of the mother's current landlord that the mothers' home has been well maintained and that she had received no complaints about the mother and Angie.
5. A review of notes the court made in prior hearings, the recitation of which consist of some of the triple hearsay contained in Melvin Ransom's Affidavit and some misstatements as to the contents of that triple hearsay.
6. The statement: "It was admitted at the [December 15th hearing] that Angela Martin and Amber Crosby were engaged in a lesbian relationship and

maintained that relationship in the home in the presence of the children.” (R-61.)

The findings of fact are deficient on their face in the following particulars:

1. Aldwin Yarbrough, the Kids Restart investigator, testified that the allegations contained in Mr. Ransom’s Affidavit were several years old. (T-4-5, Dec. 15th.)
2. Nowhere in the record is there any statement that “Amber Crosby admitted to the case manager that she had used marijuana in the past on a regular basis.”
3. Nowhere is there any statement in the record that “when initially detained, both Amber Crosby and Angela Martin failed to submit to a drug screen within 24 hours as requested.” Priscilla Germany, DFCS case manager, testified to the very opposite. (T-35-7, Dec. 15th)
4. The statement “that other members of the family were aware of the domestic violence between the partners and had counseled Ms. Martin in the past about the violence” was refuted as being unfounded and part of a custody dispute by the December 15, 2003 Kids Restart report. (R-63, 64.)
5. The case manager could not have possibly “found” that physical abuse was inflicted upon Amber Crosby by Angela Martin in the presence of the children.
6. Nowhere in Mr. Ransom’s triple hearsay Affidavit does he state that “the older child, E.C., confirmed [that physical abuse was inflicted

upon Amber Crosby by Angela Martin in the presence of the children].” In fact the statement in the Affidavit attributed to E.C. says the opposite: “He stated that his mother and Ms. Martin also argue and fight a lot but stated that he hasn’t witnessed Ms. Martin hit his mother.” (R-20.)

7. Nowhere is there any statement, even triple hearsay, that the mother’s relationship with Angie Martin was maintained “in the presence of the children.”

A deprivation finding must be based on admissible evidence of current deprivation, not past or future deprivation. See, e.g., K. R. S., 253 Ga. App. at 679 (“The juvenile courts of this state have jurisdiction with regard to a child who is alleged to be deprived, not a child who has allegedly been or will allegedly be deprived while in the legal custody of his parent.”). Even if there were a factual basis to find past domestic violence between the mother and Angie Martin, such finding is insufficient as a matter of law for finding present deprivation. See In re C.D.E., 248 Ga. App. 756, 761 (546 S.E. 2d 837) (2001).

A caseworker’s testimony based on hearsay is insufficient to sustain a deprivation finding. See C.D.E., 248 Ga. App. at 758 (deprivation finding reversed because caseworker had no personal knowledge of the reports of domestic violence, but instead relied completely on information related to her by others). Hearsay evidence contained in reports is likewise insufficient to sustain a deprivation finding. Id. at 764-5. In C.D.E., this Court held that the trial court

erred in relying on the psychological report as the basis for its conclusion because “records which contain diagnostic opinions of third parties who are not available for cross-examination are generally inadmissible . . . hearsay evidence has no probative value even when it is admitted without objection.” *Id.* at 764. “And given the court’s express reliance on the [Affidavit], we cannot apply the principle that judges are presumed to ‘separate the wheat from the chaff’ and to ignore hearsay evidence in making their determinations.” *Id.* at 764-5.

The standard of review of a trial court’s findings of fact is whether they are clearly erroneous. *See, e.g., Sadler v. First National Bank of Baldwin County*, 267 Ga. 122 (475 S.E. 2d 643) (1996). However, “If the court's judgment is based upon a stated fact for which there is no evidence, it should be reversed.’ [cits] .” *Palm Restaurant of Ga. v. Prakas*, 186 Ga. App. 223, 227 (8) (366 S.E. 2d 826) (1988).

Here, the evidence upon which the court based its deprivation finding consisted of statements contained in the DFCS caseworker’s report about domestic violence, which would never sustain a finding of deprivation because they are hearsay and because they are based in the past. An admission of past drug use is likewise not sufficient to find deprivation.

III. There Is No Evidence of Harm to the Children.

Even if the facts were that the mother endures abuse, uses drugs, or commits crimes, this would never be sufficient for a finding of deprivation unless it were proven that the child is harmed by such behavior. Even the murder of

one parent by the other does not automatically result in a forfeiture of the latter parent's parental rights, but instead must be considered with other evidence of parental unfitness. See, e.g., In re M. L. C., 249 Ga. App. 435 (548 S.E. 2d 137) (2001); In re D. E. K., 236 Ga. App. 574 (512 S.E. 2d 690) (1999). Compare In re S. S., 232 Ga. App. 287 (501 S.E. 2d 618) (1998); In the Interest of C. N., 231 Ga. App. 639 (500 S.E. 2d 400) (1998).

As there is no admissible evidence of current harm in this case, there is no basis for a finding of deprivation. The only possible reason that the court might have made a finding of deprivation is the mother's sexual orientation.

Courts ought to preserve the parent-child relationship except under the "most compelling circumstances." Watkins v. Watkins, 266 Ga. 269 (466 S.E. 2d 860)(1996). The Georgia Supreme Court has recognized that the "freedom of personal choice in matters of family life is a fundamental liberty interest, protected by the United States Constitution, and that the right to the custody and control of one's child is a fiercely guarded right in our society and in our law." Id.

A trial court cannot base its finding of deprivation upon its own opinion that parental conduct is immoral. If a parent's homosexuality or relationship with another adult does not harm or deprive the child, the court cannot revoke custody. In In re R. E. W., 220 Ga. App. 861, 862-3 (471 S.E. 2d 6) (1996):

The juvenile court premised its denial of the father's request for unsupervised visitation on the finding that the father was engaged in an 'immoral' homosexual relationship, and that the father could not be

“trusted to . . . see that his relationship does not occur in such a manner as to come to the attention of the child.” [cits.]...We agree with the juvenile court that in 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.” [cits.] In this regard, we agree with those courts from other jurisdictions that have held that the 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. *Id.* at 862-3.

CONCLUSION

In this case, a juvenile court entertained hearsay upon hearsay, promulgated by disgruntled relatives with their own agendas, compounded at first by DFCS, and split up a family, took children away from their mother for no reason and without justification. In November 2003, the judge explained his refusal to return the children to their mother even on a temporary basis: “Well, DFCS says I can’t do that.” When DFCS came to the conclusion, finally, that the children should be together and returned home to the mother, the judge was silent as to what DFCS said he could and could not do. The judge ignored the overwhelming lack of evidence of any deprivation.

The actions of the juvenile court are contrary to justice. They are contrary to the laws and public policies of the State of Georgia. They are contrary to the statutory scheme, which is quite specific in its design to protect the rights of children and to ensure their best interest and to ensure that the proceedings provide fair and due process to parents.

This 23d day of August 2004.

Respectfully submitted,

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