[Cite as *In re Spence*, 2010-Ohio-972.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

IN THE MATTER OF THE DISSOLUTION OF THE MARRIAGE OF:	:	**O P I N I O N**
	:	**CASE NO. 2009-P-0004**
JEANNETTE K. SPENCE,	:	
Petitioner-Appellee,	:	
and	:	
RANDAL K. SPENCE,	:	
Petitioner-Appellant.	:	

Civil Appeal from the Portage County Court of Common Pleas, Domestic Relations Division, Case No. 1999 DR 00259.

Judgment: Reversed and remanded.

Paula C. Giulitto, Giulitto Law Firm, L.L.P., 222 West Main Street, P.O. Box 350, Ravenna, OH 44266 (For Petitioner-Appellee).

Pamela S. Harris, 199 South Chillicothe Road, #205, Aurora, OH 44202 (For Petitioner-Appellant).

DIANE V. GRENDELL, J.

{¶1} Petitioner-appellant, Randal K. Spence, appeals the Judgment Entry of the Portage County Court of Common Pleas, Domestic Relations Division, in which the trial court adopted his Shared Parenting Plan as modified by incorporation of petitioner-

appellee, Jeannette K. Spence's proposal. For the following reasons, we reverse the decision of the trial court.

{¶2} Randal and Jeannette were married on February 14, 1994. One child, M.S., was born as issue of the marriage on October 29, 1994. On February 29, 2000, the parties divorced and Jeannette was named the residential parent of M.S.

{¶3} On February 1, 2006, Randal filed a Motion for Reallocation of Parental Rights/Designation as Primary Residential Parent, in which he asked to be named M.S.'s residential parent. Randal also filed a Motion to Modify Child Support, with an affidavit, asserting that M.S. had been residing with him since January 11, 2006.

{¶4} Both Randal and Jeannette filed proposed Modified Shared Parenting Plans with the court. On December 11, 2006, a hearing was held. At the close of the hearing, after it had appeared a settlement had been reached, the trial court asked counsel to prepare an entry. After the parties could not agree upon the language, each submitted their own plan and proposed order. Ultimately, on July 6, 2007, the trial court selected Randal's proposed order and shared parenting agreement. Jeannette filed an appeal, *Spence v. Spence*, 11th Dist. No. 2007-P-0070, 2008-Ohio-2127, in which she raised one assignment of error for our review: "The trial court erred in selecting Father's Entry as it did not comport with the agreement reached by the parties and read into the record." Id. at ¶11.

{¶5} This court held that "the trial court has authority to select one proposed shared parenting plan and to reject the other." Id. at ¶35. However, "[b]ecause it [wa]s not apparent from the record why the trial court chose" Randal's plan, we remanded the case back to the trial court. Id. at ¶38.

{¶6} Upon remand, the trial court issued findings of fact and conclusions of law which stated that "the two plans [submitted] were substantially comparable with the exception that [Randal's] proposal did not accurately reflect the agreement of the parties in regard to the modification of the life insurance provision, and the life insurance provision in [Randal's] plan is not in the best interests of the child."

{¶7} Randal subsequently filed a Motion for Reconsideration, contending that, pursuant to R.C. 3109.04, the court did not have the authority to add or subtract one plan without asking the parties to either submit an agreed provision or holding an evidentiary hearing.

{¶8} The court did not rule on the motion, however, it issued judgment on December 22, 2008, incorporating its findings of fact and conclusions of law and adopting Randal's plan, with modification of the insurance provision. Further, the court found that the plan "accurately reflects Husband's Shared Parenting Plan, as previously submitted to the Court, with the exception of the Insurance provision which now accurately reflects the agreement of the parties which was read into the record and is now found to be in the best interest of the child."

{¶9} Randal timely appeals and raises one assignment of error: "The Trial Court erred in ordering into effect the version of Appellant's Shared Parenting Plan that contained modifications to the Insurance provision and was rewritten by Appellee."

{¶10} "Decisions of a trial court involving the care and custody of children are accorded great deference upon review. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74 ***. Thus, any judgment of the trial court involving the allocation of parental rights and responsibilities will not be disturbed absent a showing of an abuse of that court's

discretion. *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 1997-Ohio-260." *Spenc*e, 2008-Ohio-2127, at ¶13, quoting *Salisbury v. Salisbury*, 11th Dist. Nos. 2005-P-0010 and 2005-P-0084, 2006-Ohio-3543, at ¶89.

{¶11} "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary or unconscionable. *** The highly deferential abuse of discretion standard is particularly appropriate in child custody cases, since the trial judge is in the best position to determine the credibility of the witnesses and there 'may be much that is evident in the parties' demeanor and attitude that does not translate well to the record. *** In so doing, a reviewing court is not to weigh the evidence 'but must ascertain from the record whether there is some competent evidence to sustain the findings of the trial court.'" Id. at ¶14 (citations omitted).

{¶12} Randal contends that "a version containing Appellee's Insurance provision only *** [was] not in the minor child's best interest." We agree. The record does not support the conclusion that the modified Shared Parenting Plan was in the best interest of the child.

{¶13} When both parties have submitted proposed shared parenting plans, the trial court is required to follow the procedures set forth in R.C. 3109.04(D)(1)(a)(ii), which provides: "If each parent *** files a motion and each also files a separate plan, the court shall review each plan filed to determine if either is in the best interest of the children. If the court determines that one of the filed plans is in the best interest of the children, the court may approve the plan."

{¶14} The statute further states that "[i]f the court determines that neither filed plan is in the best interest of the children, the court may order each parent to submit appropriate changes to the parent's plan or both of the filed plans to meet the court's objections, or may select one of the filed plans and order each parent to submit appropriate changes to the selected plan to meet the court's objections. *** If changes to the plan or plans are submitted to meet the court's objections, and if any of the filed plans with the changes is in the *best interest of the children*, the court may approve the plan with the changes. If changes to the plan or plans are not submitted to meet the court's objections, or if the parents submit changes to the plan or plans to meet the court's objections but the court determines that *none of the filed plans with the submitted changes is in the best interest of the children*, the court may reject the portion of the parents' pleadings or deny their motions requesting shared parenting of the children and proceed as if the requests in the pleadings or the motions had not been made." R.C. 3109.04(D)(1)(a)(ii) (emphasis added).

{¶15} Pursuant to the parties' Divorce Decree, they were originally each required to maintain life insurance in the amount of $300,000, with the minor child as 60% beneficiary and the other parent as 40% beneficiary.

{¶16} According to the modified plan, the parties were each required to maintain a life insurance policy totaling $200,000, with the minor child as the beneficiary of $80,000 (40%) and the other parent as the beneficiary of $120,000 (60%). The modification changed the child from a beneficiary of $180,000, a 60% beneficiary, to $80,000, a 40% beneficiary, while the other parent received the same $120,000 beneficiary and an increase in the percentage of the total policy.

{¶17} Moreover, Randal's plan provided for the surviving ex-spouse's share to be held in trust for the benefit of M.S. However, Jeannette's plan, incorporated into the Shared Parenting Plan by the trial court, allows for the ex-spouse's share to be paid free of any encumbrance. The surviving ex-spouse would be free to spend the money in whatever manner he/she desired, without any benefit to M.S.

{¶18} Although R.C. 3109.04 gives the trial court authority to select one of the proposed plans over the other, there is nothing in the record to show why or how Jeannette's proposal could be in the best interest of the child.

{¶19} "R.C. 3109.04(E)(1)(a) states that the court 'shall not modify a prior decree allocating parental rights and responsibilities' unless it finds a change in circumstances and the modification is in the best interest of the child." *Van Osdell v. Van Osdell*, 12th Dist. No. CA2007-10-123, 2008-Ohio-5843, at ¶11 (citation omitted).

{¶20} Accordingly, pursuant to statute, the court must review the Shared Parenting Plan and determine whether the plan is in the best interest of the child. "[I]f a satisfactory plan is not filed, the court should not adopt any plan at all." *Robinette v. Robinette*, 8th Dist. No. 88445, 2007-Ohio-2516, at ¶8 (citation omitted). Since the modification of the Shared Parenting Plan, specifically the section pertaining to life insurance beneficiaries, was not in the best interest of the child, the trial court should not have adopted the modification.

{¶21} The trial court abused its discretion in adopting the new version of the Shared Parenting Plan.

{¶22} Randal's assignment of error is with merit.

{¶23} For the foregoing reasons, the Judgment Entry of the Portage County Court of Common Pleas, Domestic Relations Division, in which the trial court adopted the modified Shared Parenting Plan, is reversed and remanded for further proceedings consistent with this Opinion. Costs to be taxed against appellee.

TIMOTHY P. CANNON, J., concurs with a Concurring Opinion.

MARY JANE TRAPP, P.J., dissents with a Dissenting Opinion.

TIMOTHY P. CANNON, J., concurring.

{¶24} I respectfully concur in the ruling set forth in the majority opinion as to the absence of evidence in the record establishing the selected plan to be in the best interest of the child. The evidence demonstrates that there were two plans submitted. As noted by the majority, the only difference in the proposed plans was the provision in husband's plan that the portion of life insurance proceeds payable to the other parent be held in trust for the benefit of the minor child. In wife's plan, the surviving parent's expenditure of the life insurance proceeds was completely unrestricted. It is difficult to imagine how this could "benefit" the minor child.

{¶25} I write separately to clarify that the trial court, on remand, should not consider what it apparently considered in adopting wife's plan – namely, that the insurance provision "now accurately reflects the agreement of the parties ***." There is nothing in the record to suggest there was a motion to enforce any such agreement

before the trial court. There was only a decision to determine the better of the two competing shared parenting plans. Therefore, the trial court was required to apply the test set forth by the majority in considering the two plans.

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MARY JANE TRAPP, P.J., dissenting.

{¶26} I must respectfully dissent as the majority has ventured outside of the narrow confines of our earlier decision and remanded to the trial court well beyond the sole assignment of error presented to us in this appeal.

{¶27} Pursuant to our remand, and after reviewing the competing shared parenting plans and issuing findings of fact and conclusions of law, the trial court adopted Mr. Spence's proposed shared parenting plan with the exception of a modification of the life insurance provision.

{¶28} In *In re Spence*, 11th Dist. No. 2007-P-0070, 2008-Ohio-2127 ("*Spence I*"), we determined that it was within the trial court's discretion to choose one shared parenting plan over the other, in this case, Mr. Spence's plan. But, because the trial court failed to issue the requisite findings of fact and conclusions of law in accordance with R.C. 3109.04, it was not apparent from the record why the court chose Mr. Spence's plan over that submitted by Ms. Spence. We determined that facts and conclusions of law were especially necessary because the plans did not contain merely semantic differences, but substantive ones, especially in regard to the life insurance provision, which is now the issue currently on appeal.

{¶29} Mr. Spence contends the trial court erred in adopting his shared parenting plan on remand, insofar as his plan was modified to contain a life insurance provision written and approved solely by Ms. Spence. I find no abuse of discretion in the trial court's adoption of Mr. Spence's plan with the language proposed by Ms. Spence for the modification of the life insurance provision. As directed on remand, and after applying the factors of R.C. 3109.04, the trial court properly issued findings of fact and conclusions of law. While a more extensive entry would have been preferable, the entry met the mandates of our remand.

{¶30} Specifically, the trial court found that the "two plans were substantially comparable with the exception that the husband's proposal did not accurately reflect the agreement of the parties in regard to the life insurance provisions," and, most importantly, that the modified insurance provision, as proposed by Ms. Spence, was in the best interest of the child. The trial court followed the procedural mandates of R.C. 3109.04 in arriving at its decision.

{¶31} Most importantly, neither party asserted below or on appeal that the trial court erred in its determination that the life insurance provision adopted by the trial court is not in the best interest of the child. As this court has previously stated: "[i]t is well-settled in Ohio that issues not initially presented in the trial court may not be raised for the first time on appeal." *Lovas v. Mullett* (June 29, 2001), 11th Dist. No. 2000-G-2289, 2001 Ohio App. LEXIS 2951, 8. Moreover, App.R. 12(A)(2) provides that an appellate court need not pass on errors which were not assigned or argued. Thus, that issue is not before us.

Salient Substantive and Procedural Facts

{¶32} Upon remand, both the parties and the trial court agreed that the parties' proposed modified shared parenting plans were substantially the same, with the exception of the modification of the life insurance provision. The parties' separation agreement and original shared parenting plan, which was incorporated into their divorce decree, required each party to maintain life insurance.

{¶33} Mr. Spence's plan modified the life insurance provision to reflect a reduced amount of insurance each party was required to carry, but it also changed the provision as to the use of the death benefit paid to the surviving ex-spouse from that agreed to in the original separation agreement and shared parenting plan. Specifically, Mr. Spence proposed changing the term "beneficiary" to "trustee," thereby changing the nature of the payment to the surviving spouse. He further proposed that the $120,000 paid to the surviving ex-spouse "supersedes the approximate remaining support obligations of either party by approximately $60,000, and it is expected that either parent would invest or otherwise spend this money in a way that is meant ultimately for [the minor child's] benefit or gain."

{¶34} Ms. Spence contended that Mr. Spence's modification of the allocation of the death benefit did not comport with the original separation agreement, which provided that each ex-spouse would receive a death benefit individually (instead of as a trustee for the child as Mr. Spence proposed) of $120,000 or 60% of the gross benefit, and the minor child would receive the remaining $80,000 or 40%. Ms. Spence argued that this was also in keeping with the parties' agreement at the hearing on Mr. Spence's motion held on December 11, 2006.

{¶35} It is apparent that neither party contested the reduction in the gross amount of life insurance. Mr. Spence then filed a response to Ms. Spence's proposal, contending that the court could not "cherry-pick" between the plans, and must hold an evidentiary hearing as to the proposed modification of the insurance provision inasmuch as the parties were not in agreement.

The Trial Court's Findings of Fact and Conclusions of Law

{¶36} On October 21, 2008, the trial court issued its findings of fact and conclusions of law. The court found that prior to the hearing the parties had entered into an agreement regarding the allocation of parental rights, and that Ms. Spence's counsel advised the court that the parties intended to use Ms. Spence's plan as a template, and further, that Mr. Spence's proposed plan would be reviewed to see if there was any specific language that would need modification.

{¶37} The court found that although the parties were instructed to submit an agreed entry, this became impossible due to the parties' disagreement on the language and content of their agreement. The court asked each counsel to prepare and submit a proposed shared parenting plan. The court then reviewed the December 11, 2006 hearing transcript, compared the contested plans, and selected Mr. Spence's shared parenting plan, with the exception of the life insurance provision, finding that the two plans were "substantially comparable," but that Mr. Spence's proposal did not "accurately reflect the agreement of the parties in regard to the life insurance provision." The court also found that Mr. Spence's plan and the life insurance provision proposed by Ms. Spence was in the best interest of the child.

{¶38} The court further found that because the parties reached an agreement, but could not agree "upon the specific shared parenting plan to submit," the reallocation of parental rights was contested. Therefore, it was required to follow the procedures outlined in R.C. 3109.04, which gives the trial court authority to select one of the proposed plans over the other after reviewing each to determine if either is in the best interest of the child.

{¶39} After consideration of the R.C. 3109.04(F)(1) factors, the court concluded that, with the exception of the life insurance provision, Mr. Spence's plan was in the best interest of the child. Accordingly, the trial court ordered the adoption of Mr. Spence's shared parenting plan "once corrected as to the insurance provision."

{¶40} Mr. Spence then filed a motion for reconsideration, contending that pursuant to R.C. 3109.04, and inasmuch as the parties did not agree as to the life insurance provision, the court did not have the authority to add to or subtract from one plan without asking the parties to either submit an agreed provision or holding an evidentiary hearing.

{¶41} It must be emphasized that Mr. Spence did not contest the court's finding that his plan, as modified, was in the child's best interest.

{¶42} The court did not rule on the motion, and, instead, issued its judgment on December 22, 2008, fully incorporating its original findings of fact and conclusions of law issued on October 21, 2008, adopting Mr. Spence's plan with the modified life insurance provision as submitted by Ms. Spence.

Standard of Review

{¶43} While the majority accurately states the standard of review, I submit that it has not been appropriately applied in the case. "Decisions of a trial court involving the care and custody of children are accorded great deference upon review. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74. Thus, any judgment of the trial court involving the allocation of parental rights and responsibilities will not be disturbed absent a showing of an abuse of that court's discretion. *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 418." *Spence I* at ¶13, quoting *Salisbury v. Salisbury,* 11th Dist. Nos. 2005-P-0010 and 2005-P-0084, 2006-Ohio-3543, ¶89.

{¶44} "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary or unconscionable." Id. at ¶14, quoting *Salisbury* at ¶89, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. "The highly deferential abuse of discretion standard is particularly appropriate in child custody cases, since the trial judge is in the best position to determine the credibility of the witnesses and there 'may be much that is evident in the parties' demeanor and attitude that does not translate well to the record.'" Id., citing *Salisbury* at ¶89, citing *Wyatt v. Wyatt*, 11th Dist. No. 2004-P-0045, 2005-Ohio-2365, ¶13. "In doing so, a reviewing court is not to weigh the evidence 'but must ascertain from the record whether there is some competent evidence to sustain the findings of the trial court.'" Id., quoting *Salisbury* at ¶89, citing *Clyborn v. Clyborn* (1994), 93 Ohio App.3d 192, 196.

{¶45} Moreover, upon remand, the trial court is bound to follow the "law of the case." In *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3-4, the Supreme Court of Ohio

explained the "law of the case" doctrine, stating: "[t]he doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and the reviewing levels. *** Thus, where at a rehearing following remand a trial court is confronted with substantially the same facts and issues as were involved in the prior appeal, the court is bound to adhere to the appellate court's determination of the applicable law. *** Moreover, the trial court is without authority to extend or vary the mandate given." *Jacobs v. Budak*, 11th Dist. No. 2007-T-0033, 2008-Ohio-2756, ¶29, quoting *Weller v. Weller,* 11th Dist. Nos. 2006-G-2723 and 2006-G-2724, 2007-Ohio-4964, ¶15.

Whether the Trial Court Followed the Mandates of R.C. 3109.04

{¶46} Faced with the competing life insurance provisions, the trial court found Ms. Spence's proposed insurance provision to be in keeping with the agreement on the record to a downward modification of the total amount of insurance each was required to carry, and further, and most fundamentally, that the modified provision, as proposed by Ms. Spence, was in the best interest of the child. The court filed its findings of fact and conclusions of law pursuant to R.C. 3109.04.

{¶47} Thus, I cannot find that the trial court abused its discretion in its judgment as it is now apparent from reviewing the entire record with the benefit of the court's findings of fact and conclusions of law, why the court chose to modify the insurance provision. Mr. Spence's proposed plan strayed from the provision of the original divorce decree incorporating the parties' separation agreement and shared parenting plan concerning the life insurance policies to be maintained by each ex-spouse. Moreover,

the trial court made the critical and specific finding that the life insurance provision, as modified, was in the child's best interest.

{¶48} As we reviewed in *Spence I*, "[w]hen both parties have submitted proposed shared parenting plans, the trial court is required to follow the procedures set forth in R.C. 3109.04(D)(1)(a)(ii)." Id. at ¶33.

{¶49} R.C. 3109.04(D)(1)(a)(ii) provides, in relevant part: "If each parent *** files a motion and each also files a separate plan, the court shall review each plan filed to determine if either is in the best interest of the children. If the court determines that one of the filed plans is in the best interest of the children, the court may approve the plan. *If the court determines that neither is in the best interest of the children, the court may order each parent to submit appropriate changes to the parent's plan or both of the filed plans to meet the court's objections. If changes to the plan or plans are submitted to meet the court's objections, and if any of the filed plans with the changes is in the best interest of the children, the court may approve the plan with the changes.* If changes to the plan or plans are not submitted to meet the court's objections, or if the parents submit changes to the plan or plans to meet the court's objections but the court determines that none of the filed plans with the submitted changes is in the best interest of the children, the court may reject the portion of the parents' pleadings or deny their motions requesting shared parenting of the children and proceed as if the requests in the pleadings or the motions had not been made. If the court approves a plan under this division, either as originally filed or with submitted changes, or if the court rejects the portion of the parents' pleadings or denies their motions requesting shared parenting under this division and proceeds as if the requests in the pleadings or the

motion had not been made, the court shall enter in the record findings of fact and conclusions of law as to the reasons for the approval or rejection or denial. Division (D)(1)(b) of this section applies in relation to the approval or disapproval of a plan under this division." (Emphasis added.)

{¶50} Thus, pursuant to R.C. 3109.04, after reviewing the competing plans, the trial court has the authority to select one proposed shared plan and reject the other. It may also select one plan and order each parent to submit appropriate changes, thereby, in effect rejecting certain portions of a plan and accepting submitted changes from a competing plan. As we noted in *Spence I,* some courts have found that substantial compliance with these requirements will suffice provided the trial court's reasons for approval or denial of the agreement are apparent from the record. Id. at ¶35, see, e.g., *Theiss v. Theiss* (April 11, 2001), 9th Dist. No. 00CA0022, 2001 Ohio App. LEXIS 1655.

{¶51} Mr. Spence misconstrues our holding in *Spence I*, as he argues that the court failed to follow the procedural mandates of R.C. 3109.04(D), requiring both parties to submit changes regarding objections the trial court may have regarding one or both of the submitted plans. He asserts that because the life insurance provision ultimately adopted by the court was "rewritten by appellee only," the trial court erred.

{¶52} In *Spence I*, we were compelled to remand because of the trial court's failure to issue findings of fact and conclusions of law that would enable the reviewing court to determine and evaluate the basis of the court's decision.

{¶53} With those now before us, it is clear that the trial court substantially complied with the mandates of R.C. 3109.04(D) and 3109.04(F)(1).

{¶54} The court had before it and properly considered the two plans and considered that the parties had agreed to a modification, but that the agreement of the final joint plan could not be effectuated. Thus, the court could choose one plan and reject another and order each parent to submit appropriate changes to the selected plan to meet the court's objection.

{¶55} Upon remand, all concerned were well aware that the dispute centered around the life insurance provisions, and that the court already had before it each party's preferred version of the life insurance provision for consideration. Thus, there was no need to ask the parties to resubmit the proposed language or hold a further evidentiary hearing.

{¶56} As long as the court enters in the record its findings of fact and conclusions of law detailing what it considered and its reasons for approving or refusing to approve a shared parenting plan, or for accepting submitted but sometimes competing changes, and makes a determination that the plan chosen is in the child's best interest, a reviewing court then has before it all the necessary elements to conduct a review upon an abuse of discretion standard.

{¶57} Mr. Spence focuses on the fact that there was, in fact, no in-court agreement as to the modification of the life insurance provision. A review of the December 11, 2006 hearing reflects the parties agreed to a $100,000 downward modification of the total amount of life insurance each party would be required to carry, thus modifying the amount to $200,000 instead of $300,000, as originally agreed to at the time of the divorce.

{¶58} Mr. Spence's insurance provision made no mention of the original agreement of the parties at the time of the decree. Ms. Spence's provision provided that each ex-spouse would receive a $120,000 benefit in order to maintain the dollar amount of the benefit agreed upon at the time of the divorce.

{¶59} As adopted by the trial court, the life insurance provision now reads: "Pursuant to the Parties' Decree of Divorce, Separation Agreement and Shared Parenting Plan, and other subsequent Court orders, Father and Mother shall maintain a life insurance policy upon his/her life; however the total death benefit must now total Two Hundred Thousand Dollars ($200,000), of which the parties shall designate their minor child as the beneficiary of Eighty-Thousand Dollars ($80,000) and shall designate the minor child's other parent as the beneficiary of One Hundred Twenty Thousand Dollars ($120,000.00). The parties acknowledge that this modification of life insurance *comports with this Court's previous Orders by maintaining a death benefit of One Hundred Twenty Thousand Dollars ($120,000), or forty percent (40%) of it's [sic] previously ordered death benefit of Three Hundred Thousand Dollars ($300,000), being payable to the other parent.* Mother and Father shall give the other party notice on an annual basis that said policy is in full force and effect. Mother and Father shall pay all premiums on said policy when due and not borrow against or otherwise hypothecate the policy. In the event the insurance company will not pay on the claim, the Mother or Father's estate will be liable to the beneficiaries in the amount of the insurance that should have been maintained by the Mother and Father." (Emphasis added.)

{¶60} In keeping with the original divorce decree, the court modified the provision to maintain the $120,000 amount the surviving ex-spouse would receive.

Thus, when we review the entire record in light of the court's findings of fact and conclusions of law, it is apparent that the trial court considered the two competing proposals, the prior order (decree), and the R.C. 3109.04(F)(1) factors; and modified the provision contained in Mr. Spence's plan using Ms. Spence's proposed language, finding it to be in the child's best interest. The best interest finding was not challenged; thus, I would affirm the judgment of the Portage County Court of Common Pleas, Domestic Relations Division.

{¶61} The dispute between the parties has been a protracted one. A final resolution of this dispute without further hearing and expense, clearly, is in the best interest of this child.