

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY**

ERIN TERESA WISE

Plaintiff-Appellee

**V.**

KENNETH LEE WISE

## Defendant-Appellant

Appellate Case No. 23424

Trial Court Case No. 07-DR-143

(Civil Appeal from Common Pleas  
Court, Domestic Relations)

## OPINION

Rendered on the 19<sup>th</sup> day of March, 2010.

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BROGAN, J.

{¶ 1} Kenneth Wise appeals a domestic relations court's decision to designate Erin Wise, his former wife, the residential parent and legal custodian of their son.

{¶ 2} Kenneth and Erin were married in 2003, their son, K.W., was born the

next year, and they separated in 2007, when Erin filed for divorce. Erin then moved to Mississippi, where her family lived. At the final divorce hearing in February 2009, they reached an agreement on all issues except custody of K.W. Helping the court decide the custody issue were a guardian ad litem's report—recommending that Kenneth be granted custody—and psychological evaluations of both parties—in which the psychologist recommended that Erin have custody. Finding the psychological evaluations most helpful, the court gave custody of K.W. to Erin.

{¶ 3} Kenneth has appealed the court's decision, and presents two assignments of error for our review. In the first, he contends that the court failed to consider the custody factors enumerated in R.C. 3109.04(F)(1). And in the second, Kenneth contends that the court's decision is contrary to the manifest weight of the evidence. We find no support for either contention.

### **The court considered the relevant statutory factors**

{¶ 4} Kenneth, in his first assignment of error, contends that the court failed to consider the custody factors enumerated in R.C. 3109.04(F)(1).<sup>1</sup> He claims that, in determining the best interest of K.M., the court considered only the psychological evaluations. Erin says that no rule required the court to address each factor separately. She claims that the court's decision indicates that it considered all the relevant factors.

{¶ 5} The factors that a court is to consider in allocating parental rights and

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<sup>1</sup>"THE TRIAL COURT ERRED BY FAILING TO CONSIDER THE STATUTORY FACTORS CONTAINED IN O.R.C. § 3109.04(F)(1)."

responsibilities are found in R.C. 3109.04. The factors include (a) the wishes of the child's parents; (b) if interviewed, the child's wishes and concerns; (c) the child's interaction and interrelationship with parents, siblings, and other significant people; (d) the child's adjustment to home, school, and community; (e) the mental and physical health of all persons involved; (f) which parent is more likely to abide by court orders regarding parenting time rights; (g) any failure to make child support payments; (h) any convictions or pleas to particular criminal offenses; (i) whether under a shared-parenting plan one parent has interfered with the other's parenting rights; and (j) whether a parent has or plans to move outside Ohio. R.C. 3109.04(F)(1). Erin is correct that, while helpful to a reviewing court, there is no requirement that a trial court expressly and separately address each best-interest factor. *In re Henthorn* (Nov. 28, 2001), Belmont App. No. 00-BA-37 (Citations omitted). Absent evidence to the contrary, an appellate court presumes that the trial court considered the relevant statutory factors. *Quint v. Lomakoski*, 167 Ohio App.3d 124, 2006-Ohio-3041, at ¶12; *In re Henthorn* ("Absent evidence to the contrary, an appellate court will presume the trial court considered all of the relevant factors listed in R.C. 3109.04(F)(1).") (Citation omitted).

{¶ 6} The trial court's decision suggests it considered all the relevant factors.

The court noted that both Kenneth and Erin want custody of K.W. While it appears that the trial judge interviewed K.W. in chambers, the court does not discuss it. The court noted K.W.'s close relationship to his paternal grandmother, and the court noted that Erin lived in Mississippi. The court reviewed the guardian ad litem's report, which recommended that Kenneth be awarded custody. And the court

reviewed the psychological evaluations of Kenneth and Erin, in which, for reasons we will discuss in the second assignment of error, the evaluator recommended that Erin be given custody. Finally, the court's decision manifests the court's struggle in reaching its decision and implies that the court considered more than just a single factor: "This is a very difficult decision, but the court finds that the analysis and recommendation made by the evaluating psychologist is a strong one." April 10, 2009 Decision, p. 6. The statutory factors not alluded to by the court are irrelevant. Kenneth fails to point to any affirmative evidence showing that the court failed to consider all the relevant statutory factors.

{¶ 7} The first assignment of error is overruled.

#### **The decision is not contrary to the weight of the evidence**

{¶ 8} Kenneth, in his second assignment of error, contends that the court's decision is contrary to the manifest weight of the evidence.<sup>2</sup> Kenneth argues that if the court had properly examined all the relevant statutory factors, it would have concluded that K.W.'s best interest laid with him.

{¶ 9} Whether a decision is contrary to the manifest weight of the evidence is a question of law. Under the civil manifest-weight standard, "[i]f competent, credible evidence exists to support the trial court's decision, it must be affirmed." *Gevedon v. Ivey*, 172 Ohio App.3d 567, 2007-Ohio-2970, at ¶60. In a civil manifest-weight analysis, "the court reviews the trial court's rationale and the evidence the trial court

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<sup>2</sup>"THE TRIAL COURT'S DECISION WITH RESPECT TO CUSTODY BEING AWARDED TO PLAINTIFF/APPELLEE IS AGAINST THE MANIFEST WEIGHT OF

has cited in support of its decision.” Id.

{¶ 10} Here, there is competent and credible evidence to support the court’s decision. Much of the evidence presented does not point to a clear custody choice. The guardian ad litem’s recommendation seems to be based on his objection to Erin’s move to Mississippi—he recommends shared parenting if she moves back but recommends Kenneth have sole custody if she stays in Mississippi. But the psychological evaluations offered the court an independent and considered perspective of Kenneth and Erin as potential parents, and showed a definite difference. Although the evaluator said that neither was a “paragon of mental health and personality adjustment,” he concluded, based on his observations and the results of standard psychological evaluations completed by Kenneth and Erin, that K.W.’s best interest was with Erin. Kenneth, the evaluator concluded, presents a significant potential for dangerousness and volatility. In contrast, Erin, he said, has better mental health and stronger parenting skills. Also, the evaluator wrote that Erin does not exhibit a profile or symptoms consistent with Kenneth’s descriptions of her. Finally, we note that the guardian ad litem, in his report, says that K.W.’s own psychologist also recommended that Erin have custody of him. Because we find competent, credible evidence to support the court’s decision, we cannot say that the decision is contrary to the manifest weight of the evidence.

{¶ 11} The second assignment of error is overruled.

{¶ 12} The trial court’s decision is Affirmed.

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DONOVAN, P.J., and FROELICH, J., concur.

Copies mailed to:

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Hon. Judith A. King