[Cite as *Redmond v. Davis*, 2015-Ohio-1198.]

COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

IN THE MATTER OF:	)	CASE NO. 14 CO 37
	)	
	)	
	)	
	)	OPINION
	)	
L.J.R.	)	
	)	
	)	
	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from the Court of Common Pleas Juvenile Division of Columbiana County, OH Case No. C2012-0365-1-2-3
JUDGMENT:	Reversed and remanded with instructions.
APPEARANCES:	
For Plaintiff-Appellant:	Atty. Amanda J. Jackson Plummer & Jackson 1265 E. State Street Salem, Ohio 44460
For Defendant-Appellee :	Atty. Damian P. DeGenova DeGenova & Yarwood, LTD. The Liberty Bldg. 42 N. Phelps Street Youngstown, Ohio 44503

JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: March 26, 2015

[Cite as *Redmond v. Davis,* 2015-Ohio-1198.]
ROBB, J.

{¶1} Plaintiff appellant Ethan Redmond ("Appellant") appeals the decision of the Columbiana County Common Pleas Court, Juvenile Division, granting custody of a child to defendant-appellee Sierra Davis ("the mother"). Appellant initially states that the trial court was required to apply the best interests test in this custody contest between a parent and a non-parent because the mother previously provided him shared custody in an agreement which had been incorporated into a court order. We agree that the best interests test applies due to the prior court order adopting the parties' shared parenting agreement, which essentially relinquished the mother's paramount right to sole custody in subsequent custody proceedings between the parties.

{¶2} After applying the unsuitability test and making findings as to why the mother was not unsuitable, the trial court mentioned the child's best interests. Under the circumstances of this case, we agree with Appellant's position that the court's reference to best interests did not sufficiently evince consideration of the best interests factors in making the custody award. Accordingly, the trial court's decision is reversed, and the case is remanded for application of the best interests test with instructions that the court specifically apply the best interests factors to the custody decision.

STATEMENT OF THE CASE

{¶3} The parties began dating in September 2010. After three months, they realized the mother was pregnant. Upon visiting a physician, the mother learned that conception occurred before she began her relationship with Appellant. (Tr. 9). At some point before giving birth, she advised Appellant and his family of the situation, revealing that the child she was carrying may be the result of an unwanted sexual encounter. The couple remained together, living in a trailer near the house of Appellant's parents on their property.

{¶4} Appellant attended the child's birth in April 2011. His name was placed on the birth certificate as the father, and the child was given his last name. The parties signed an acknowledgement of paternity and held Appellant out as the child's

father. Appellant placed the child on his health insurance, which increased his monthly insurance obligation, and he provided the primary support for the mother and child. (Tr. 14, 118).

{¶5} In 2012, the parties experienced relationship difficulties, at which point Appellant consulted an attorney about drafting a custody agreement. They signed a shared parenting plan, which provided Appellant with equal custody time (on a schedule of alternating weeks of four nights on, three nights off). Each party was named the residential parent when exercising their time. The agreement did not provide for child support due to the equal time and the fact that Appellant agreed to maintain health insurance on the child and pay all medical expenses for the child. At the time, Appellant earned $25,000 and the mother earned $16,100 per year.

{¶6} The agreement was filed with the juvenile court on October 10, 2012. The court adopted the agreement in a judgment entry on October 29, 2012. The mother later testified that she willingly signed the agreement. She believed it was fair and that it was the right thing to do as the child knew Appellant as his father and they were bonded. (Tr. 15-16, 47, 283). She also explained that she wanted Appellant to be a part of the child's life and did not want the child growing up thinking that he had no father. (Tr. 43).

{¶7} The parties stayed together until the week before Thanksgiving, when Appellant told the mother to leave his home. (He had just encountered a man waiting in his drive for the mother and was upset by what the man told him.) (Tr. 57). She and the child moved to her cousin's house in East Palestine; two months later, they moved to an apartment in Lisbon; one month later, she moved to Austintown or Youngstown with a family whose son she was dating; and finally as the summer of 2013 approached, she moved in with friends (whom she called her aunt and uncle) in Leetonia. (Tr. 17-22). At the time of the 2014 hearings, the mother said that she was still living at that home in Leetonia.

{¶8} After the parties' separation, the mother left the child with Appellant's parents many days and nights each week. (Tr. 29, 138-145, 262). In January of 2013, Appellant's brother and fiancée began watching the child two mid-week

overnights per week. Childcare had become too difficult for Appellant's mother during the week due to her employment. Appellant's mother continued keeping the child overnights on weekends. (Tr. 149, 182-184).

{¶9} In February, Appellant asked Children Services to initiate an investigation due to allegations that the mother's new boyfriend hit the mother in the face and hit the child on the back. (Tr. 61-62). She also missed child wellness visits. When Appellant's mother brought the child to the pediatrician for severe diaper rash, the child was said to have lost a pound. (Tr. 28). There were also complaints that the child smelled bad after being with the mother.

{¶10} The mother disputed the allegations. In March 2013, she stopped bringing the child to Appellant's family, moved to a location unknown to Appellant, and refused to answer her phone when he called. (Tr. 26, 63, 150-151). The guardian ad litem testified that Columbiana County Children Services opened an investigation but then closed it when the mother moved to Mahoning County. (Tr. 225).

{¶11} In April, when contact with the child could still not be made, Appellant filed a contempt motion against the mother for violating the court order of shared custody. The mother failed to appear for the show cause hearing; instead, she called the court and advised that she had the flu. On May 30, 2013, Appellant filed a motion to terminate the shared parenting plan and to award custody to him.

{¶12} The court again ordered the mother to appear and show cause as to why she should not be held in contempt, adding that custody of the child could be immediately transferred upon continued failure to appear. When the mother failed to appear for the June 10 hearing, the court ordered that custody be transferred to Appellant by 6:00 p.m. that day. Appellant thereafter provided the mother visitation under his aunt's supervision. After an August 27 pretrial, the court granted the mother unsupervised visitation only on Sundays with no overnights.

{¶13} On October 31, 2013, the mother filed a motion asking the court to terminate the shared parenting plan and grant her exclusive custody. She also moved to establish paternity. In a November 8, 2013 judgment entry, the court

granted her request for genetic testing, noting that both parties signed an acknowledgement of paternity upon the child's birth. The court construed the latter motion as one for relief from the parentage determination. The genetic test established that Appellant was not the child's father.

{¶14} In the November 8 entry, the court increased the mother's companionship with the child to standard visitation and ordered the mother to submit to hair follicle drug testing by November 14. On January 31, 2014, Appellant filed a motion to show cause due to the mother's failure to submit to the hair follicle test. The mother then submitted to the test, which came back negative for drugs. At trial, it was noted that the test is only sensitive to drug use in the past ninety days.

{¶15} Both parties filed legal briefs prior to trial. The mother stated that she had a fundamental right to custody of her child absent a finding of unsuitability. Her brief urged that the best interests test did not apply.

{¶16} Appellant responded that a court order provided him with equal custodial rights, pointing out that a court can adopt an agreement wherein a parent shares custody with a non-parent. He urged that the contractual relinquishment prong of the unsuitability test was met due to the prior agreement, constituting the forfeiture of the mother's paramount right to custody. He concluded that the applicable test was simply the best interests of the child.

{¶17} The court heard testimony on April 29, 2014 and again on July 22, 2014. The mother testified that when Appellant told her to leave his house, he stated that he did not want to see her or the child. (Tr. 25). The mother believed that Appellant did not visit with the child at all during the time his family had the child after the break-up. (Tr. 25, 283). She answered that Appellant did not contact her in those months and provided no support, but she acknowledged that their agreement did not call for support and that he maintained health insurance and paid the medical bills pursuant to the agreement.

{¶18} Although she initially moved frequently after moving out of Appellant's house, she said that since May 2013, she had been living in Leetonia with friends, whom she called her aunt and uncle. She also stated that she had just given birth to

another child and was in a relationship with that baby's father, who was supporting her as she stopped working after the birth. She disclosed that she stayed some nights with him in Chester, West Virginia and was looking for a house with him in Columbiana County or Chester, West Virginia. (Tr. 20-22). At the second hearing, however, she claimed that they were not planning on living in West Virginia. (2d Tr. 8).

{¶19} The mother testified that she wanted to obtain her cosmetology license, which she almost obtained after completing beauty school years prior. (Tr. 35, 242). At the second hearing, she said she may accept a part-time job at a school in Coraopolis, Pennsylvania. (2d Tr. 8-9). She expressed concern for the amount of time Appellant had the child in daycare. (2d Tr. 17). At the time of the first hearing, he was bringing the child to daycare five days a week. At the time of the second hearing, the child had just begun preschool. The mother asked for sole rather than shared custody but admitted that it was in the child's best interests for Appellant to remain in the child's life. (Tr. 43, 273).

{¶20} Appellant also asked for sole custody and stated that the mother should receive time equivalent to standard visitation. He clarified that although he spent limited time with the child in the months his family had the child, he never stopped seeing the child. (Tr. 58-59). His mother confirmed that he would visit with the child on Sundays and would stop over on other days. (Tr. 139, 163-164). Appellant expressed regret and added that he was very upset at the time and was having a hard time with the separation. (Tr. 90, 128, 131). It was also pointed out that, during that period, he was away at work for up to twelve hours some days, sometimes more than five days per week.

{¶21} Appellant expressed concern that, upon returning from the mother's care, the child seemed sleep-deprived and smelled unbathed. Appellant was also concerned that the mother could not provide stability for the child. (Tr. 65). He testified about his caregiving during the year he had temporary custody and noted that the child was close with his fiancée who lived with them. (Tr. 70).

{¶22} In 2013, Appellant made $51,000, as he had recently obtained employment with a large oil and gas company and worked overtime. (Tr. 75). At the second hearing, he had just accepted a position with a start-up energy company where he was predicted to make $90,000 annually. The job is in Cambridge, Ohio, but he moved to New Philadelphia instead (halfway between Cambridge and his prior home). He stated that this was his one chance to better his career, noting that he had no college education. (2d Tr. 29-30).

{¶23} Appellant's mother testified that she kept a log of all the days she had the child after the parties' separation, estimating that she had the child five to six days a week until the fiancée of her other son took over two mid-week days. (Tr. 138-145, 149). She testified that she heard the toddler say that his mother's boyfriend hit the mother and the child. (Tr. 153). After Appellant obtained custody, the child stayed overnight at her house one night every four to five weeks. (Tr. 155). She expressed that Appellant hugs and holds the child, plays with him, and roams the property with him. (Tr. 156). She also stated that the child comes back from visitation with his mother dirty, smelly, and withdrawn. (Tr. 157). She characterized Appellant's life as stable and the mother's life as unstable. (Tr. 158).

{¶24} Appellant's fiancée testified that she moved in with Appellant in December 2013. She helped care for the child but stated that Appellant performed the daily parenting. She expressed that she loved the child and that Appellant is a good role model and a loving father. (Tr. 202-203). She also stated that the child has a bad odor when he returns from his mother's care and that he experiences a rough transition. (Tr. 204).

{¶25} The guardian ad litem testified that neither party has a criminal history. (Tr. 220, 230). The guardian ad litem stated that Appellant is the primary caregiver, has a structured home, and has a good relationship with the child. (Tr. 227). She noted that the mother reported that she did not have a close relationship with her own family but began visiting her mother, who has a son close in age to the subject child. They have become playmates. (Tr. 221).

{¶26} On August 5, 2014, the court granted custody to the mother and provided Appellant (and his parents) with standard visitation minus the mid-week visit. The court noted that the mother was the primary caregiver of the child while the parties lived together and that Appellant had a significant work schedule. The court pointed out that Appellant's parents exercised four or more days per week of companionship during the three months after Appellant stopped communicating with the mother. The court found that Appellant only saw the child on Sundays during that time and stated that Appellant failed to support the child after the parties' separation.

{¶27} In addressing Appellant's original motion that the mother denied him his rights under the parties' agreement, the court found that Appellant "abandoned" his rights granted under the agreement and that the mother voluntarily allowed Appellant's parents to visit with the child until the Children Services report. (J.E. at 4, 6). The court also referred to the briefly opened Children Services investigation and concluded that there was no evidence to substantiate the allegations.

{¶28} The court stated that the mother indicated that her primary residence was with an aunt in Leetonia and that she stayed one or more days in West Virginia with her boyfriend with whom she was attempting to find a home in Ohio. The court pointed out that Appellant moved 1.5 hours away from his prior home on his parents' property and from the mother's residence in order to pursue significant employment opportunities. It was noted that his employment often required him to work extended hours and that he has to travel an hour from his new house to work.

{¶29} The court admitted as its own exhibit the genetic test result and stated that Appellant is not the biological father of the child. The court stated that Appellant's standing and burden was "well briefed" in the trial brief filed by the mother and pronounced that this case involved a custody dispute between a parent and a non-parent.[1] The court concluded that due to a parent's fundamental right to custody

[1] Appellant's trial brief did not contest that the current dispute should be characterized as one between a parent and non-parent; nor does he do so on appeal. This case presents a unique situation as he was the father in the shared parenting plan and in the court's order adopting that plan, but at later custody modification proceedings, all parties acknowledge that he is now considered a non-parent.

over a non-parent, the applicable test was that of suitability under the *Perales* case. The court then found that none of the four methods of proving unsuitability were established: the mother did not abandon the child; the mother did not contractually relinquish custody; the mother is not totally incapable of supporting or caring for the child; and an award of custody to the mother would not be detrimental to the child.

{¶30} As to contractual relinquishment of the paramount right to custody, the court voiced that agreeing to share custody is not the same as relinquishing custody. The court then reiterated that Appellant "substantially abandoned" the rights he received under the contract and "abandoned the support" of the child for some months. The court thus concluded that the agreement to share custody did not meet the second prong of *Perales*. The court then explained why the mother was not unsuitable under the other *Perales* prongs.

{¶31} The court stated that it was not in the child's best interests to continue the prior shared parenting agreement due to a significant change in circumstances including Appellant's relocation and the abandonment of his rights after the separation. The court declared that based upon the substantial relationship and bonding of the child with Appellant and his parents, it was necessary to continue contact as frequently as can be reasonably accommodated given the distance of Appellant's new home. The court concluded that it was in the best interests of the child to grant the mother legal custody and control subject to companionship rights to be shared between Appellant and his parents. It was stated that Appellant and his parents could share the visitation time as they decided to arrange, and they were responsible for transportation.

{¶32} Appellant filed a timely notice of appeal. Briefing was completed in January 2015. Appellant sets forth two assignments of error on appeal, containing some overlapping arguments. We have divided the arguments so that those dealing with the applicable test are addressed under the first assignment of error and those dealing with the application of the best interests test are addressed under the second assignment of error.

ASSIGNMENT OF ERROR NUMBER ONE

Appellant's first assignment of error provides:

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY FAILING TO FIND THAT APPELLEE WAS UNSUITABLE UNDER THE SUITABILITY TEST."

{¶33} We begin by pointing out that the juvenile court has exclusive original jurisdiction to determine the custody of a child who is not a ward of another Ohio court. R.C. 2151.23(A)(2). *See also* R.C. 2151.23(F)(1) (the juvenile court shall exercise its jurisdiction in child custody matters in accordance with R.C. 3109.04). The custody of a child is a "fundamental liberty interest" of a parent. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982).

{¶34} This right of a parent to rear her own child presents itself in custody proceedings between a parent and a non-parent, as opposed to a custody proceeding between two parents. *In re Perales*, 52 Ohio St.2d 89, 96, 369 N.E.2d 1047 (1977). In such a dispute, it has long been held that a "suitable" parent has a "paramount right" to the custody of their minor child "unless they forfeit that right by contract, abandonment, or by becoming totally unable to care for and support those children." *Id.* at 97, citing *Clark v. Bayer*, 32 Ohio St. 299, 310 (1877); *Masitto v. Masitto*, 22 Ohio St.3d 63, 65, 488 N.E.2d 857 (1986).

{¶35} The *Perales* Court thus concluded that a parent may be denied custody over a non-parent in a juvenile court custody proceeding "only if a preponderance of the evidence indicates abandonment, contractual relinquishment of custody, total inability to provide care or support, or that the parent is otherwise unsuitable that is, that an award of custody would be detrimental to the child." *Id.* at 98. *Perales* thus recognized four types of unsuitability. *See id.* at syllabus.[2]

---

[2] What were first phrased as exceptions to the rule that a suitable parent maintains custody essentially became recategorized (in the *Perales* syllabus and at page 98 of the opinion) as options for finding unsuitability in addition to detriment to the child. *See id.* at 97-98. Various courts utilize the *Perales* opinion's first reiteration of *Clark* at page 97 (rather than the syllabus) so that contractual relinquishment is phrased as an exception to a suitable parent's paramount right, rather as a method for labeling a parent unsuitable. It results in the same analysis either way.

{¶36} Appellant urges that the trial court erred in concluding that the mother did not contractually relinquish her paramount right to custody under the second prong of the *Perales* test (not her right to custody, but her paramount or primary right to custody of her child over a non-parent). In *Perales*, it was said that the mother signed an agreement "purporting" to give custody to a non-parent. *Id.* at 90. After making the aforesaid legal pronouncements regarding the parent's paramount right to custody and the prongs of the unsuitability test, the Supreme Court remanded for application of the unsuitability standards it set forth.

{¶37} The Court pointed out that the trial court made no determination of unsuitability and "the evidence in the record that [the mother] forfeited her right to custody or that [the mother's] custody would be detrimental to [the child] was not sufficient for this court to substitute its judgment for that of the trial court." *Id.* at 99. Contrary to the mother's suggestion in the present appeal, the *Perales* Court did not find the contractual relinquishment insufficient in that case, but found the record insufficient (in light of the trial court's failure to make an unsuitability finding) for the Court to enter its own judgment, requiring a remand for the trial court to engage in its fact-finding function.

{¶38} In speaking of the second *Perales* option, the Supreme Court has since stated: "if a parent contracts away custody rights of his minor child, he may be considered to have forfeited his right to custody of such child, and may accordingly be found to be unsuitable for custody. Parents may undoubtedly waive their right to custody of their children and are bound by an agreement to do so." *Masitto*, 22 Ohio St.3d at 65 (subject only to a judicial determination that the non-parent is a proper person to assume the care, training, and education of the child).

{¶39} *Therefore, if a parent contractually relinquishes custody of a child to a non-parent, then in a subsequent custody proceeding between the parent and non-parent, the general rule provides that custody will not be modified unless necessary to serve the best interest of the child*. *Id.* Whether a parent relinquished her right to custody can depend on conduct and can present a question of fact which is to be upheld on appeal if there is some reliable, credible evidence to support the finding.

Id. at 66 (also noting that a parent can be estopped from denying the relinquishment after a lengthy time has passed since the non-parent began exercising custody under the agreement).

{¶40} In *Masitto*, the father agreed to provide custody to grandparents in guardianship and divorce proceedings. The Supreme Court found that the retention of visitation rights and the payment of child support did not eliminate the fact that the father relinquished his paramount custodial rights. *Id.* Thus, the trial court was not required to find the father otherwise unsuitable in order to award custody to the non-parent; rather, *the test applicable to the father's request for custody modification was best interests*. *Id.*

{¶41} Besides reiterating the general principle in *Perales* applying to original custody awards between a parent and a non-parent, *Masitto* also stands for the general rule that *once a custody award is made to a non-parent, a later request for modification by the parent does not require a showing of parental unsuitability in order to deny that parent's request*. *See In re Hockstok*, 98 Ohio St.3d 238, 2002-Ohio-7208, 781 N.E.2d 971, ¶ 21, 38, citing *Masitto*, 22 Ohio St.3d at 65. In *Hockstok,* the Court found that the mother's agreement to give temporary custody to non-parents for six months and her entry into a six-month extension of the original agreement was not an agreement to provide legal custody of her child to the non-parents. *Id.* at ¶ 33 (and then finding no constructive forfeiture).

{¶42} The question then arises as to whether a prior agreement to *share* custody falls under the *Perales* prong of relinquishment of custody for purposes of avoiding the parent's "paramount right" to custody. In other words, does the contractual relinquishment of sole custody in favor of shared custody forfeit the paramount right of a parent to custody of their child over a non-parent? (This question asks whether the agreement surrenders the mother's right to preferential treatment through use of the suitability test, not whether she surrenders her parental rights in general.)

{¶43} The mother argues that it is impossible to relinquish her primary right to custody by entering into a *shared* custody agreement because she necessarily

retained some of her custodial rights by *sharing* custody. The trial court accepted her position that an agreement to share parenting time is not the contractual relinquishment of custody under *Perales*. However, Appellant correctly responds that an agreement to share custody (especially when adopted by the court and made a court order) meets the contractual relinquishment prong of *Perales* (with assistance from the other general rule mentioned in *Hockstok* and *Massito* that suitability does not apply where the court is asked to change a prior court order of custody that already provided custody to a non-parent).

{¶44} Initially, we note that in a case reviewed in more detail infra, the Supreme Court pointed out: "[the mother] voluntarily seeks to *relinquish her right to sole custody of the children in favor of shared custodial rights* with [her former girlfriend]." *In re Bonfield*, 97 Ohio St.3d 387, 2002-Ohio-6660, 780 N.E.2d 241 (emphasis added). The Court then immediately added with regards to this statement involving the sharing of custody with a non-parent: "Parents may waive their right to custody of their children and are bound by an agreement to do so." *Id.* at ¶ 47-48, citing *Masitto*, 22 Ohio St.3d at 65.

{¶45} The Court more recently pronounced that "[a] shared-custody agreement recognizes the general principle that a parent can grant custody rights to a non-parent [sic] and will be bound by the agreement." *In re Mullen*, 129 Ohio St.3d 417, 2011-Ohio-3361, 953 N.E.2d 302, ¶ 11. The "essence" of a shared custody agreement is "the purposeful relinquishment of *some portion* of the parent's right to exclusive custody of the child." *Id.* (emphasis added). The Court equated the provision of shared custody or "partial legal custody" with the voluntary relinquishment of custody for purposes of whether the juvenile court can reach the best interests test. *Id.* at ¶ 11-23.

{¶46} Finally, this court has ruled that the best interests test applies where a shared parenting agreement previously existed between the parents and a non-parent. *In re Delucia*, 7th Dist. No. 05MA5, 2005-Ohio-6933. In that case, the mother, the father, and the maternal grandmother all sought custody. Before the juvenile court could rule, they agreed on a shared parenting plan naming the

grandmother as the joint custodian while the mother was exercising her time. Later, the father asked the court to dissolve the shared parenting plan and award him custody. The dispute proceeded between the father and the grandmother.

{¶47} The magistrate found that the prior shared parenting agreement was not a contractual relinquishment of custody by either parent and thus the best interests test need not be applied because the child's best interest was presumptively with the parent over the non-parent grandmother. The magistrate stated that the father was not unsuitable and alternatively found an award of custody to the father to be in the child's best interests. The magistrate and then the trial court named the father as the residential parent and the mother as the non-residential parent, with no visitation provided to the grandmother. The trial court echoed the magistrate's statements, except the court did not alternatively state that it was in the child's best interests for the father to have custody. *Id.* at ¶ 18.

{¶48} The grandmother argued on appeal that the court applied the wrong test, urging that the *Perales* parental unsuitability test was inapplicable as the court was not dealing with an original award of custody between a parent and a non-parent. We agreed stating that in an original custody action between a parent and non-parent, custody is to be given to the parent unless the parent falls into an unsuitability category under *Perales*. When an original custody award has already been made, the subsequent contest does not require application of the suitability test. *Id.* at ¶ 31.

{¶49} We pointed out that the case involved modification of a shared parenting/joint custody agreement which included a non-parent as a joint custodian. *Id.* at ¶ 32. We emphasized that the father agreed to share custody with a non-parent, which the trial court adopted, and concluded that in order to modify that shared custody agreement in favor of the parent's sole custody, the juvenile court should not have otherwise relied upon the father's suitability. *Id.* We then reversed and remanded for application of the best interests test. *Id.*

{¶50} In accordance with all of the foregoing, a shared custody agreement with a non-parent can in fact involve relinquishment of the paramount right to

custody. *See Mullen*, 129 Ohio St.3d 417. *See also In re LaPiana*, 8th Dist. Nos. 93691, 93692, 2010-Ohio-3606 (mother's conduct showed intent to share custody of children with former girlfriend so that there was prior contractual relinquishment under *Perales* and best interests applied). Here, the agreement evincing the intent to share custody was written and clear, which is the preferred method. Yet, even mere conduct evincing an intent to share custody can establish relinquishment of the paramount right to custody. *See Masitto*, 22 Ohio St.3d at 66.

{¶51} Where there is a prior order granting shared custody to a non-parent by incorporating that agreement, the parent does not have a paramount right to custody. A finding of parental unsuitability is not required in order to refuse the parent's later request for sole custody. *See Delucia*, 7th Dist. No. 05MA5. Here, we have a shared parenting plan that was adopted by court order wherein the mother called Appellant the child's father and granted him equal custodial rights. We thus conclude that she relinquished her primary right to sole custody. That act by the mother and the court's order of shared parenting eliminated the need for Appellant to establish the mother's unsuitability in future custody modification proceedings.

{¶52} As Appellant urges, the application of the proper test and whether the shared custody agreement constituted relinquishment were legal issues, rather than factual decisions, and are not subject to deference. The trial court factually found that the mother agreed to share parenting responsibilities, and then legally concluded that a shared parenting agreement is not relinquishment. As set forth above, this holding is incorrect.

{¶53} An alternative argument set forth by the mother is that a shared *parenting* plan cannot technically be entered with a non-parent and it should thus be considered void. The Supreme Court has ruled that even though parties argued that they were entitled to a "shared parenting" order from the juvenile court (who refused to rule because the same-sex parties were not both recognized as "parents" under Ohio law and thus could not ask for shared *parenting*), the matter could proceed as a request for shared *custody*. *In re Bonfield*, 97 Ohio St.3d 387 at ¶ 36 (the mother sought shared parenting with her former girlfriend whom the children had always

considered a co-parent), citing R.C. 3109.04(D) (use of "parent") and R.C. 3111.01 (definition of parent). Thus, a parent's agreement to share *custody* with a non-parent is valid, even if the plan should not be called one of shared *parenting*. *See id.*; *In re Mullen*, 129 Ohio St.3d 417.

{¶54} Here, the shared parenting plan had already been adopted by the juvenile court and incorporated into a court order. Moreover, at the time of the court's order adopting the parties' agreement, Appellant was the child's father for all intents and purposes. *See* R.C. 3111.01(A) (the parent and child relationship means the legal relationship that exists between a child and the child's natural or adoptive parents and upon which any provision of the Revised Code confers or imposes rights, privileges, duties, and obligations); R.C. 3111.02(A) (the parent and child relationship between a child and the natural father of the child may be established by an acknowledgment of paternity).

{¶55} Notably, the case before us does not deal with a review of the court's prior order adopting the shared parenting agreement but with the effect of the mother entering the agreement and the effect of the court adopting the agreement in its order of shared parenting. *The effect* of the prior agreement to share equal time with Appellant is not eliminated by the mother's later decision to establish genetically that Appellant was not the biological father (a fact she knew when she entered the agreement). In fact, as aforementioned, whether a parent contractually agreed to share legal custody can be factually established by words and conduct alone. *In re Mullen*, 129 Ohio St.3d 417 at ¶ 12-15. *See also Masitto*, 22 Ohio St.3d at 66.

{¶56} A prior court order using the term "shared parenting" instead of the term "shared custody" is not later considered invalid where it incorporated the parties' own agreement, especially under circumstances such as those existing in this case. Specifically, Appellant and the mother signed an acknowledgement of paternity at the child's birth; Appellant was named as father on the child's birth certificate; the child was given his last name; and he was treated as the father thereafter even when the parties knew he was not the biological father. As their relationship drew to a close, the mother entered a shared parenting agreement with Appellant, giving him equal

custody time and rights, which was adopted as a court order. Such fact cannot be eliminated by a claim that the terminology (which was proper in the past) will not still be applicable *after* the trial court rules that Appellant is to be considered a non-parent in the future.

{¶57} This leaves the one remaining question on the topic of relinquishment. After stating that the mother's agreement to share parenting time did not contractually relinquish custody for purposes of *Perales*, the trial court added that for a period of months after entering the agreement, Appellant "substantially abandoned" his contractual rights (and "abandoned the support of his child"). The trial court then concluded, "The Court does not find, therefore, that the Shared Parenting Agreement entered into by the parties as filed with the Court meets the burden under the second prong cited by the *Perales* court." It appears the court alternatively held that even if the mother contractually relinquished her paramount right, this can be ignored where Appellant did not exercise the rights the contract granted him during the first three months of the parties' separation.

{¶58} Appellant admits that he had limited contact with the child in the three months after the separation due to his work schedule and his difficulty handling the situation. Yet, Appellant urges that this is not evidence of abandonment of his rights. The trial court found that Appellant's parents had the child four or more days per week during this time; Appellant lived within a short walk from his parents; and he visited the child on Sundays when he "would stop" at his parents' house. Thus, the court found that he maintained regular contact with the child even if it was not custodial.

{¶59} It is also noted that the court order adopting the agreement did not require child support but did require him to provide health insurance and to pay all medical expenses. Appellant maintained that insurance for the child and paid the child's medical bills during the three months after the separation (and beyond). He did not exercise shared custody, but his parents did (meaning that the mother's expenses would not have increased as a result of him not exercising his shared custody rights).

{¶60} Appellant laments that the juvenile court judged his post-separation behavior harshly and points out that the mother did not seek to spend more time with the child as a result of his non-exercise of all hours to which he was entitled. He also points out that after the first three months, the mother refused contact for four months at which point he was given sole, temporary custody by the court, *which sole custody he exercised for fourteen months*.

{¶61} Legally, the situation entails a question of whether Appellant's non-exercise of shared custody for three months (but instead his exercise of visitation while his parents had the child) meant that the mother's paramount right to sole custody was automatically re-activated. The mother could certainly have asked for the shared custody order to be terminated due to the circumstances (and requested to be named the residential parent). But, the mere existence of these circumstances would not cause *the court order of custody* to cease existing for purposes of legally determining whether a finding of unsuitability was required for the modification proceedings. As aforestated, this was not merely a case of a contractual relinquishment but additionally involved a court entry incorporating that contract into a custody order, and once a court order provided shared custody to a non-parent, the test was no longer unsuitability of the parent.

{¶62} For all of the foregoing reasons, we conclude that the mother did not possess the paramount right to custody since she had contractually relinquished that paramount right in a shared parenting agreement adopted by the juvenile court. Therefore, the applicable test in further custody proceedings between the parties was the child's best interests.[3]

ASSIGNMENT OF ERROR NUMBER TWO

Appellant's second assignment of error provides:

[3] As such, we need not address Appellant's alternative unsuitability arguments that the mother is totally incapable of supporting and caring for the child, that an award of custody would be detrimental to the child, and that the trial court thus should have found the mother unsuitable under the third and fourth prongs of *Perales*.

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY FAILING TO APPLY THE BEST INTERESTS OF THE CHILD STANDARD TO DETERMINE THE ALLOCATION OF PARENTAL RIGHTS."

{¶63} The domestic relations statute provides a list of factors and instructs that the court shall consider the relevant factors in determining the best interests of a child. R.C. 3109.04(F)(1). A juvenile statute mandates that "[t]he juvenile court shall exercise its jurisdiction in child custody matters in accordance with sections 3109.04 * * *." R.C. 2151.23(F)(1).

{¶64} Thus, the statutory best interests factors within R.C. 3109.04(F)(1) are applicable to juvenile custody proceedings. *In re Bell*, 7th Dist. No. 04NO321, 2005-Ohio-6603, ¶ 37, 55-56. The statute supplies a framework of potentially pertinent factors and is not exclusive as the court can consider matters that are not listed. *Gomez v. Gomez*, 7th Dist. No. 06NO330, 2007-Ohio-1559, ¶ 32 citing *Nentwick v. Nentwick*, 7th Dist. No. 96JE27 (Feb. 18, 1998) (in weighing the best interests factors, no one factor is dispositive); R.C. 3109.04(F)(1) ("including, but limited to").

{¶65} The statutory best interests factors include, but are not limited to, the following: (a) the parents' wishes; (b) the child's wishes if the court has interviewed the child; (c) the child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interests; (d) the child's adjustment to home, school, and community; (e) the mental and physical health of all relevant persons; (f) the parent more likely to honor and facilitate court-approved parenting time or companionship rights; (g) whether either parent has failed to make child support payments pursuant to a support order; (h) whether either parent or any member of their households has been previously convicted of certain criminal offenses involving children; (i) whether the residential parent or a parent subject to a shared parenting decree has continuously and willfully denied the other's right to parenting time in accordance with a court order; and (j) whether either parent has or is planning to establish a residence outside of Ohio. R.C. 3109.04(F)(1)(a)-(j).

{¶66} Although some of appellant's arguments overlap within the two assignments of error, the remaining arguments here are whether the best interests factors support an award of custody to the mother and whether the trial court's entry evinces that the court applied the statutory best interests factors. We cannot address the application of the best interests factors to this case if the trial court did not apply that test in the first instance. Consequently, the threshold question is whether the trial court alternatively applied the best interests test after finding that the applicable test was unsuitability and that the mother was not unsuitable.

{¶67} Appellant urges that the entry does not evince that the trial court considered the statutory best interests factors as the decision focused on finding that the mother was not unsuitable under *Perales*. Appellant urges that a simple reference to the best interests test does not warrant a presumption that the trial court applied the best interests of the child test in making the custody award.

{¶68} The mother responds that even if application of the best interests test was required here, the trial court alternatively fulfilled that obligation by stating that it was in the child's best interests for custody to be granted to her. She notes that there is no rule requiring findings of fact regarding the statutory factors and posits that where the trial court is merely required to "consider" the factors, the reviewing court should presume that the trial court did so.

{¶69} We have pointed out that there is no statutory mandate that a trial court separately address each of the best interests factors. *In re Henthorn*, 7th Dist. No. 00BA37 (Nov. 28, 2001) (but recommending the trial court review the factors in its entry). And, we have stated that we presume the court considered the factors *absent evidence to the contrary*. *Id.*

{¶70} In a recent case reviewed by this court, we refused to presume the court considered the factors as we found evidence to the contrary of such a presumption. *In re J.K.*, 7th Dist. No. 14CA899, 2014-Ohio-5502, ¶ 31-32. That juvenile court seemed to apply the wrong test as the court did not place the parents on equal footing and suggested that the proceeding was a modification rather than an original allocation of custody. *Id.* at ¶ 30. The court made two factual findings that

could have been aligned with a statutory best interests factor but did not discuss various other pertinent factors and did not mention the best interests test. *Id.*

{¶71} Due to the combination of circumstances, we remanded for application of the best interests test and added instructions for the trial court to explain the reasons underlying the judgment in order to evince its consideration of the best interests of the child. *Id.* at ¶ 2, 32, 37, citing *In re Bell*, 7th Dist. No. 04NO321 at ¶ 55-56 (where we could not determine whether the court used the proper test, we remanded with instructions for the court to specifically refer to the best interests test and to explain the reasons underlying the judgment). Although specific factual findings as to the relevant statutory factors are not required in an original order, such specification is a proper instruction on remand from an order where it could not be presumed that the court originally applied the factors. *See id.*

{¶72} The juvenile court incorrectly applied the unsuitability test and essentially found that the mother's paramount right to custody was maintained when it was not due to contractual relinquishment and a prior court order incorporating such contract. Had the trial court's legal pronouncement been correct, then consideration of the child's best interests would not have been necessary. However, this court has found otherwise, therefore requiring this trial court to apply the best interests test.

{¶73} The court's entry did not refer to the best interests factors. The entry *did* refer to the child's best interests twice. However, the context of these statements must be evaluated.

{¶74} After making detailed findings that the mother had a fundamental right to her child and that she was not unsuitable, the court stated that it was not in the child's best interests to continue the prior shared parenting agreement due to a significant change in circumstances including Appellant's relocation and the abandonment of his rights following the parties' separation. (J.E. at 8). This statement specifically refers to why shared parenting was being terminated. It does not relate to the child's best interests as to whom custody will be awarded.

{¶75} The second statement the court made was: "It is in the best interest of [the child] to grant his mother, legal custody and control of [the child], subject to companionship rights to be shared between [Appellant] and his parents * * *." (J.E. at 8-9). Considering that the court had already applied the unsuitability test in favor of the mother's right to custody, this statement as to best interests related to why the court was providing visitation to Appellant (whom the parties and the court all agree is a non-parent) and to why the court was providing visitation to Appellant's parents as well.

{¶76} From the context of the two sentences referring to best interests, it does not clearly appear that the juvenile court, as an alternative holding to its suitability determination, made best interests findings as to custody. That is, the court did not express that, assuming arguendo the mother's paramount right to custody did not apply, it was in the child's best interests for custody to be awarded to the mother. In fact, the mother's trial brief urged that the applicable test was unsuitability and that the best interests test was not to be applied, and the trial court adopted the mother's legal position, which the court described as "well briefed." The court's entry then focused on finding that Appellant failed to show that the mother was unsuitable.

{¶77} We cannot conclude that the entry evinces that the trial court considered the statutory best interests factors in determining which party should be awarded custody. This case is therefore reversed and remanded for application of the best interests of the child test with instructions to specifically explain the underlying reasons supporting this test.

{¶78} Lastly, we clarify that the applicable test is only that of best interests. Appellant sets forth an alternative argument regarding the trial court's mention of changed circumstances. Appellant initially states that his failure to exercise equal custody for three months was not a changed circumstance since he later had sole custody for fourteen months, and he disputes that his relocation constituted a changed circumstance. As Appellant then points out, however, the changed circumstances test is not applicable here.

{¶79} In a typical case, the termination of the shared parenting plan is not governed by the existence of changed circumstances, and only the best interests test applies in allocating custody after shared parenting is terminated. *Mogg v. McCloskey*, 7th Dist. No. 12MA24, 2013-Ohio-4358, ¶ 20; *Koughner v. Koughner*, 194 Ohio App.3d 703, 2011-Ohio-3422, 957 N.E.2d 835, ¶ 18 (7th Dist.), applying R.C. 3109.04(E)(2)(c)-(d) (after termination of shared parenting order, custody proceeds as if an original determination {not as if a modification} and entails application of the best interests test). *See also Manis v. Manis*, 12th Dist. No. CA2014-05-070, 2014-Ohio-5086, ¶ 13; *Drees v. Drees*, 3d Dist. No. 10-13-04, 2013-Ohio-5197, ¶ 11-12; *Green v. Richards*, 6th Dist. No. WD-12-039, 2013-Ohio-406, fn. 1; *Curtis v. Curtis*, 2d Dist. No. 25211, 2012-Ohio-4855, ¶ 7-8; *Nolan v. Nolan*, 4th Dist. No. 11CA3444, 2012-Ohio-3736, ¶ 44; *In re K.R.*, 11th Dist. No. 2010-T-0050, 2011-Ohio-1454, ¶ 42–46.

{¶80} Here, both parties asked to terminate the shared parenting plan in order for each to seek sole custody. *See generally Masitto*, 22 Ohio St.3d at 65 (if a parent contractually relinquishes custody of a child to a nonparent, then in a subsequent custody proceeding between the parent and nonparent, the general rule provides that custody will not be modified unless necessary to serve the best interests of the child). *Id.* We agree with Appellant's assertion that a change of circumstances was not required in this case.

{¶81} Where changed circumstances were not required prior to terminating the shared parenting plan and granting custody to one of the movants, the court's finding that there *were* changed circumstances can be harmless. *Manis*, 12th Dist. No. CA2014–05–070 at ¶ 13 (termination of shared parenting does not require changed circumstances but application of that test was harmless and any findings court made as to changed circumstances were merely superfluous). As we are remanding for application of the best interests test in any event, the issue is hereby clarified for said remand: changed circumstances are not required to grant the joint request to terminate the shared parenting plan.

{¶82} In conclusion, the trial court's decision is reversed, and the case is remanded for application of the best interests test with additional instructions that the court specifically apply the best interests factors to the custody decision.

Donofrio, P.J., Concurs.

DeGenaro, J., Concurs.