

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

DEREK T. DONLEY

C. A. No. 09CA009702

Appellee

v.

MELISA DONLEY

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 07DU068317

Appellant

DECISION AND JOURNAL ENTRY

Dated: August 2, 2010

MOORE, Judge.

{¶1} Appellant, Melisa¹ Donley, appeals from the decision of the Lorain County Domestic Relations Court. This Court affirms.

I.

{¶2} Melisa and Derek Donley, Mother and Father, were married on April 17, 1999. They had one child, D.D. In February of 2007, Mother and Father allowed Edd Johnson, Mother's former co-worker, to move into their home. Soon thereafter, Mother's brother moved into the home. Eventually, Father asked Mother to ask the two men to leave, but she refused. Accordingly, Father moved out of the marital residence and into his parents' home. After Father moved out, Mother allowed another male, her high school friend, to move into the residence.

¹ We note that throughout the trial court docket, Mother's name is spelled both Melisa and Melissa. As the spelling Melisa is utilized on the trial court's final journal entry, we will use that spelling here.

Upon agreement of the parties, D.D. stayed with Father every weekend.

{¶3} Meanwhile, Mother, who had lost her job, was investigating the possibility of working in Las Vegas. Although she informed Father that she was interviewing for a job in Las Vegas, she did not provide him with any further details. In early September of 2007, Mother picked D.D. up early from a weekend visit with Father. She informed Father that they had to be somewhere the next day, but declined to say where. After picking up D.D., Mother packed their belongings, and left for Las Vegas. They were accompanied by Edd Johnson, whom Mother had started dating. She did not inform Father that she had left with D.D. until two days later.

{¶4} On September 19, 2007, Father filed a complaint for divorce. On September 19, 2007, the magistrate issued an ex parte emergency temporary custody order awarding Father temporary parental rights and responsibilities as residential parent and forbade anyone from taking D.D. out of Lorain County or the adjacent counties. The order further instructed all law enforcement officers, including the Las Vegas Police Department to enforce and assist the carrying out of the order. On September 28, 2007, Mother answered the complaint and filed a pleading entitled “objections to the judgment entry ex parte emergency.” On October 3, 2007, the magistrate issued a journal entry that indicated that the court held a hearing on Father’s motion for emergency temporary custody. The magistrate dissolved the earlier grant of ex parte emergency order of temporary custody to Father, but ordered Mother to return D.D. to the trial court’s jurisdiction and ordered that neither party shall remove him from Lorain County during the pendency of the action. The trial court adopted the magistrate’s decision as an order of the court. Mother filed objections to the magistrate’s decision, specifically contesting that she should return D.D. to Ohio.

{¶5} On December 21, 2007, the magistrate issued a decision, stating that he had considered the matter of Father’s motion for temporary orders and vacated the October 3, 2007 order requiring Mother to return D.D. to Lorain County. Further, the magistrate designated Mother temporary residential parent. The trial court adopted this decision. Throughout the proceedings, D.D. visited Father on holidays and for six weeks during the summer. On May 6, 2008, Father filed his proposed shared-parenting plan. On January 12, 2009, June 15, 2009 and June 16, 2009, a trial was held. The trial court determined, in pertinent part, that it was in D.D.’s best interest to reside primarily with Father and that Father be granted sole custody of D.D., subject to Mother’s right of parenting time. Mother timely appealed from the decision, raising four assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

“THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED IN DESIGNATING FATHER AS THE CUSTODIAL PARENT OF THE MINOR CHILD.”

ASSIGNMENT OF ERROR II

“THE TRIAL COURT ABUSED ITS DISCRETION BY DESIGNATING FATHER AS CUSTODIAL PARENT AS THE EVIDENCE PRODUCED AT TRIAL WAS INSUFFICIENT TO AWARD CUSTODY OF THE MINOR CHILD TO FATHER.”

ASSIGNMENT OF ERROR III

“THE TRIAL COURT ABUSED ITS DISCRETION BY DESIGNATING FATHER AS THE CUSTODIAL PARENT OF THE MINOR CHILD AS THE DECISION WAS AGAINST THE MANIFEST WEIGHT OF THE COMPETENT CREDIBLE EVIDENCE PRODUCED AT TRIAL.”

ASSIGNMENT OF ERROR IV

“THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING CUSTODY OF THE MINOR CHILD TO FATHER AS MOTHER HAD TEMPORARY CUSTODY OF MINOR CHILD FOR 2 YEARS IN LAS

VEGAS AND THERE WAS NO CHANGE IN CIRCUMSTANCES AND THE CHANGE OF CUSTODY WAS NOT IN THE BEST INTEREST OF THE CHILD.”

{¶6} In her assignments of error, Mother contests the trial court’s decision granting Father sole custody of D.D. Mother has combined her assignments of error “[f]or purposes of judicial economy,” explaining that “the arguments presented for each assignment of error and issue presented are the same for all[.]”

{¶7} The Ohio Supreme Court has stated that:

“[W]e are mindful that custody issues are some of the most difficult and agonizing decisions a trial judge must make. Therefore, a trial judge must have wide latitude in considering all the evidence before him or her *** such a decision will not be reversed absent an abuse of discretion.” *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 418

{¶8} An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An abuse of discretion demonstrates “perversity of will, passion, prejudice, partiality, or moral delinquency.” *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. *Id.* Further, we must defer to the trial court on matters of credibility. *Flickinger*, 77 Ohio St.3d at 418-419 (asserting that deferring to the fact finder is “crucial in a child custody case, where there may be much evident in the parties’ demeanor and attitude that does *not* translate to the record well.”) On this issue, the Ohio Supreme Court has explained that “[i]n proceedings involving the custody and welfare of children the power of the trial court to exercise discretion is peculiarly important. The knowledge obtained through contact with and observation of the parties and through independent investigation can not be conveyed to

a reviewing court by the printed record.” *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, 23, quoting *Trickey v. Trickey* (1952), 158 Ohio St. 9, 14.

{¶9} Therefore, we are “guided by a presumption that the trial court correctly exercised its discretion.” *Babka v. Babka* (1992), 83 Ohio App.3d 428, 433, citing *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, 138. With this presumption in mind, we have reviewed the record and find that the trial court did not abuse its discretion. See *Id.*

{¶10} Initially, the trial court determined that shared parenting was not in D.D.’s best interest.

“In determining whether shared parenting is in the best interest of the children, the court shall consider all relevant factors, including, but not limited to, the factors enumerated in division (F)(1) of this section, the factors enumerated in section 3119.23 of the Revised Code, and all of the following factors:

“(a) The ability of the parents to cooperate and make decisions jointly, with respect to the children;

“(b) The ability of each parent to encourage the sharing of love, affection, and contact between the child and the other parent;

“(c) Any history of, or potential for, child abuse, spouse abuse, other domestic violence, or parental kidnapping by either parent;

“(d) The geographic proximity of the parents to each other, as the proximity relates to the practical considerations of shared parenting;

“(e) The recommendation of the guardian ad litem of the child, if the child has a guardian ad litem.” R.C. 3109.04(F)(2).

{¶11} Upon determining that shared parenting was not in D.D.’s best interest, the trial court,

“in a manner consistent with the best interest of the children, shall allocate the parental rights and responsibilities for the care of the children primarily to one of the parents, designate that parent as the residential parent and the legal custodian of the child, and divide between the parents the other rights and responsibilities for the care of the children, including, but not limited to, the responsibility to provide support for the children and the right of the parent who is not the

residential parent to have continuing contact with the children.” R.C. 3109.04(A)(1).

{¶12} To determine the best interest of the child with regard to R.C. 3109.04, the trial court must look to the non-exclusive factors outlined in R.C. 3109.04(F)(1). “While helpful to a reviewing court, there is no requirement that a trial court expressly and separately address each best-interest factor. Absent evidence to the contrary, an appellate court presumes that the trial court considered the relevant statutory factors.” (Internal citations omitted.) *Wise v. Wise*, 2nd Dist. No. 23424, 2010-Ohio-1116, at ¶5. These factors are:

“(a) The wishes of the child’s parents regarding the child’s care;

“(b) If the court has interviewed the child in chambers pursuant to division (B) of this section regarding the child’s wishes and concerns as to the allocation of parental rights and responsibilities concerning the child, the wishes and concerns of the child, as expressed to the court;

“(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 interest;

“(d) The child’s adjustment to the child’s home, school, and community;

“(e) The mental and physical health of all persons involved in the situation;

“(f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;

“(g) Whether either parent has failed to make all child support payments, including all arrearages, that are required of that parent pursuant to a child support order under which that parent is an obligor;

“(h) Whether either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether either parent, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of an adjudication; whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to a violation of [R.C. 2919.25] involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding; whether either parent previously has been convicted of or pleaded guilty to any offense involving a victim who at the time of the commission of the offense was a

member of the family or household that is the subject of the current proceeding and caused physical harm to the victim in the commission of the offense; and whether there is reason to believe that either parent has acted in a manner resulting in a child being an abused child or a neglected child;

“(i) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent’s right to parenting time in accordance with an order of the court;

“(j) Whether either parent has established a residence, or is planning to establish a residence, outside this state.”

{¶13} With regard to the trial court’s determination that pursuant to R.C. 3109.04(F)(2), shared parenting was not in the best interest of the child, Mother first takes issue with the trial court’s conclusion regarding subsection (c); “Any history of *** parental kidnapping[.]” The trial court determined that Mother’s action of taking D.D to Las Vegas, late at night, with no forewarning to Father or any other family member, could be construed as “parental kidnapping.” While Mother contends that the evidence presented showed that Mother did not return D.D. to Ohio on advice from counsel and because she did not believe there was a valid order in place, the trial court specifically explained that it was concerned about the initial action of taking the child to Las Vegas without Father’s knowledge or consent. Mother explains that she had previously discussed moving to Las Vegas with Father and that, at least on one occasion, Father agreed to the move. The testimony at trial, however, revealed that although she had discussed with Father moving to Las Vegas, it was several months prior to the time she moved. Further, Father testified that he told Mother that she could move, but that she could not take their son. Thus, the trial court did not abuse its discretion with regard to this factor.

{¶14} Mother next takes issue with the trial court’s conclusion regarding subsection (d); “The geographic proximity of the parents to each other, as the proximity relates to the practical considerations of shared parenting[.]” The evidence at trial revealed that Mother had set up her residence in Las Vegas and that she did not intend to leave. Father’s home, as well as his and

Mother's extended family, was in and around Lorain County, Ohio. The trial court determined that the distance "would make it extremely difficult to implement a shared parenting plan[.]" Although there was evidence that the parties had accomplished visitation over holidays and summer, the testimony also revealed that this required a parent or grandparent to escort D.D. via airplane, and it required the parent or grandparent to take time from work to travel with the child. In fact, Mother testified that she was forced to quit her first job in Las Vegas because her employer would not allow her to take time off work to bring D.D. back to Ohio to visit with Father over Christmas. Thus, the trial court did not abuse its discretion when it determined that the geographic proximity would make a shared parenting plan very difficult.

{¶15} Lastly, Mother takes issue with the trial court's consideration of the guardian ad litem's recommendation. Specifically, the guardian explained that he recommended that D.D. be permanently located in Ohio, and if both parents resided in Ohio, he would recommend a shared parenting plan with Mother as the residential parent would be in D.D.'s best interest. If, however, Mother chose not to live in Ohio, the guardian recommended custody to Father, with a detailed visitation schedule "that would maximize time available to [D.D.] and [Mother] in the summer and on school holiday breaks." The trial court found notable the fact that the guardian ad litem only recommended shared parenting if both parents lived in Ohio. The trial court determined that Mother had no intention of relocating to Ohio. Thus, the trial court did not abuse its discretion when it considered the recommendation of the guardian ad litem.

{¶16} This Court does not conclude that the trial court's determination, based upon the factors set forth in R.C. 3109.04(F)(2), that a shared parenting plan would not be in D.D.'s best interest was an abuse of discretion. The factors, as set forth by the trial court, were supported by the testimony presented at trial.

{¶17} Mother next contends that the trial court’s determination designating Father as the custodial parent, pursuant to R.C. 3109.04(A)(1), was an abuse of discretion because it was not in D.D.’s best interest. In its entry, the trial court set forth and discussed the non-exhaustive factors set forth in R.C. 3109.04(F)(1).

{¶18} With regard to subsection (c), “the child’s interactions and interrelationship with the child’s parents, siblings, and any other person who may significantly affect the child’s best interest[.]” the trial court stated that it had no problem with either Mother or Father, and that Mother and Father both admitted that the other was a good parent. Again, the trial court found Mother’s move to Las Vegas relevant, as D.D. has lived in three places there in less than two years and has been to two different schools. On appeal, Mother contends that the trial court did not consider Mother’s testimony that she believed these moves to be in D.D.’s best interest, and that his current school curriculum was changing, thus he would be unable to attend the school the next year. Regardless of the reasons for these moves/changes, the trial court did not abuse its discretion when it considered them as relevant to D.D.’s best interest, particularly because, had Mother stayed in Ohio, D.D. would not have been required to change schools.

{¶19} Further, with regard to subsection (c), the trial court considered D.D.’s relationship with his younger half-brother. The trial court indicated that this relationship was a good one and that D.D. took pride in his brother and in being a big brother. The trial court also looked to D.D.’s grandparents and extended family as other people who “significantly affect the child’s best interest[.]” The trial court noted that D.D.’s grandparents all lived in Lorain County and that he had an exceptionally strong bond with his maternal grandmother. The record supports this conclusion and further reveals that D.D. has a strong bond with his paternal grandparents. Testimony revealed that much of D.D.’s extended family, including aunts, uncles,

and cousins, live in and around Lorain County. Finally, testimony revealed that Mother did not have a family support system in Las Vegas. Although Mother argues on appeal that D.D. did not regularly see these relatives when in Lorain, this does not change that fact that the support system existed in Lorain County whereas there was no family support system in Las Vegas.

{¶20} The trial court next turned to subsection (d); D.D.’s “adjustment to the child’s home, school, and community[.]” The trial court indicated that this was not a factor in its decision because D.D. adjusted well to all the changes in his life. On appeal, Mother contends that the trial court arbitrarily used D.D.’s change in home and school as a factor it considered under subsection (c), but did not consider that D.D. adjusted well to these changes. We do not agree. These are two separate and distinct factors. Although D.D. adjusted to the changes, the fact remains that the child has lived in three homes and will have attended three different schools. Despite the positive end result, the ends do not necessarily justify the means. Accordingly, we do not agree that the trial court “arbitrarily” ignored the fact that D.D. was a well-adjusted child, nor do we agree with Mother’s contention that the trial court “skew[ed] its opinion to reach a pre-determined conclusion.”

{¶21} Next, the trial court discussed subsection (e); “The mental and physical health of all persons involved in the situation[.]” The trial court noted that D.D. was healthy without either mental or physical problems, and that Mother did not indicate any health problems. The trial court explained that testimony at trial showed that Father had a history of clinical depression. Father, however, explained that his bouts with depression coincided with major issues in his marriage. He testified that when he first suffered from depression, he sought professional help. It was at this psychologist visit that Father was diagnosed as clinically depressed and prescribed medication. He testified that he was currently taking his medication.

Mother contends on appeal that the trial court's conclusion that as long as Father continued to take his medication "he should have no further problems[.]" was contrary to the testimony presented. Mother does not further explain this statement. Instead, she points to an eight month period of time in which Father stopped taking his medication, and to the fact that he is not currently in counseling. She alleges that during this time, Father wrote a "suicide note." Father's testimony, however revealed that he was managing his depression with the help of his general practitioner and that he stopped taking his medication when he lost his job, and thus his health care coverage.

{¶22} With regard to the "suicide note[.]" the trial court noted that the alleged letter was not introduced as an exhibit. The trial court found that "Father's explanation of letter to be reasonable." Father testified that he was never suicidal, and upon reading the note at the trial, he explained that he did not consider it to be suicidal. He admitted that he was depressed, and that in "less than a month, I lost my wife, my house, my kid, my job, and pretty much everything else." He stated that he never intended to take his own life and he went back to the doctor and resumed his medication. Father testified that he currently felt "wonderful[.]" and although he believed he has recovered, he knew he needed to stay on his medication to remain that way. On cross-examination, Mother's counsel marked an alleged email that Father sent to his mother. Father read a line to the trial court that said "I'll kill myself before that happens. I'll make sure of it." Father did not agree that this line indicated that he was contemplating suicide and further stated that "[i]f you read the rest of the letter. I mean, it says certain things. It was if certain things happen. Not like I'm just going to off myself right then and there." Father further reiterated that he never intended to take his own life and that he never took steps toward suicide.

Thus, this Court cannot conclude that the trial court abused its discretion when it determined that as long as Father continued to take his medication, his mental health should not be an issue.

{¶23} Mother further alleges, with regard to Father's mental health, that the trial court ignored testimony that Father testified that he knew he should stay away from alcohol and that he admitted to previously having a problem with online gambling. With regard to alcohol, Father testified that he used to drink a lot in college, but that he no longer drank and that he could not remember the last time he had a beer. Absent controverting testimony, alcohol does not appear to be an issue in this case. With regard to online gambling, the trial court did not ignore this testimony. Instead, it considered it as an independent, non-statutory factor. The trial court noted that Father admitted to online gambling from the fall of 2006 through February of 2007. Father took out a loan in his name only to pay back the debt and indicated that he had stopped online gambling. Therefore, Mother's contention that the trial court ignored this issue without merit.

{¶24} The trial court looked at subsection (f); "The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights[.]" The trial court concluded that Father was more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights. The trial court pointed to the fact that, during Christmas of 2007, Mother only allowed Father a four hour visit with D.D. Further, during an Easter visit, D.D. arrived in Ohio a full day and a half before Father was able to see him, and that Father did not even know that the child was at maternal grandmother's house. The trial court also found relevant that on the first day of the trial, which was only set for one day, a Monday, Mother informed the trial court that they, including D.D., had arrived in Ohio on Saturday night. She stated that she did not tell Father that they had arrived in Ohio and that they were leaving

shortly after the conclusion of the Monday hearing. Therefore, Father would have received, at best, one to two hours of visitation with D.D. while he was in Ohio.

{¶25} Mother contends that the trial court did not discuss the complaints of maternal grandmother regarding visitation. However, this is not an issue pursuant to this subsection, as this subsection refers only to the parent's visitation. Even if we were to conclude that the trial court *should* have considered this fact, the record indicates that Mother willfully denied both maternal grandmother and paternal grandfather visitation with D.D. after they traveled to Las Vegas in an attempt to convince Mother to return him to Lorain County pursuant to the trial court order. Further, Father testified that he felt that D.D.'s relationship with maternal grandmother was very important and that maternal grandmother could visit with D.D. anytime she wanted. He did testify that he would not allow D.D. to visit maternal grandmother's home because Mother's brother lived there. Father previously testified that Mother's brother used drugs. Therefore, even if the trial court considered "visitation" with the grandparents, the testimony does not support Mother's contention that this consideration would have tilted this factor in her favor.

{¶26} Mother further contends that there was an incident where she had requested extra visitation to take D.D. to a family wedding. Although this visitation was requested during Father's summer visitation, he initially agreed. When the parties could not agree on a timeframe, they resorted to the guardian ad litem to mediate the dispute. Eventually, Father allowed D.D. to attend the wedding with Mother. Although the parties resorted to the guardian ad litem, we note that this requested visitation was during Father's summer visitation time. Father indicated that out of the past year and ninth months he was given approximately eight weeks of visitation. Because the visitation was during this short period of time, he was under no obligation to allow

D.D. to leave with Mother. The fact that he did, therefore, is a positive indication that he is more likely to facilitate visitation.

{¶27} Subsection (g) required the trial court to look at “[w]hether either parent has failed to make all child support payments, including all arrearages, that are required of that parent pursuant to a child support order under which that parent is an obligor[.]” The trial court stated that Father was under a child support order to make payments directly to Mother, and that there was no indication that Father was not complying. On appeal, Mother contends that there was a discrepancy about a dental bill. At trial, Mother’s counsel asked Father about paying a “court –ordered” dental bill. Father stated that it was not a court-ordered bill and that he did not recall a court-ordered dental bill. Therefore, this testimony does not provide a basis to conclude that Father failed to make any court-ordered payments.

{¶28} Subsection (i) required the trial court to determine “[w]hether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent’s right to parenting time in accordance with an order of the court[.]” The trial court stated that:

“Mother left for Las Vegas on approximately September 7, 2007 without notice to anyone in this area other than her traveling companion, Edd Johnson III and one Lavelle Felder, her best friend from high school, who helped her load the u-haul. On September 19, 2007, Father filed this instant action for divorce. On September 19, 2007, Father was awarded temporary parental rights and responsibilities as residential parent of [D.D.], the parties’ child. Within days, maternal grandmother and paternal grandfather went to Las Vegas in an attempt to retrieve [D.D.]. Mother was aware of the court order. When the police officer brought her the grandparents’ copy of the order, she again refused to return the child to her mother and paternal grandfather so they might return him to Ohio and Lorain County. (Mother even denied her mother’s request to see her grandchild.) At a subsequent hearing, journalized on October 3, 2007, the previous order of emergency custody granted to Father was dissolved. In its stead, the court instituted an order which required Mother to return the minor child to the jurisdiction of this court forthwith. Further the order stated that neither party shall permanently remove the child from Lorain County during the pendency of this

action. Mother did not return the child to Lorain County until the Christmas of 2007. She chose to violate both court orders.”

{¶29} We do not conclude, as Mother contends that the trial court “pontificated” about Mother leaving Ohio. In fact, the trial court’s statement represents facts that are supported by both the trial court’s docket and Mother’s own testimony. Mother states on appeal that she “agreed with the court that she made the wrong decision about the way she moved to Las Vegas[.]” Thus, she does not disagree with the trial court’s statement of facts. Instead, she urges this Court to conclude that the trial court should have given more consideration to her more recent behavior. Regardless of Mother’s recent behavior, the trial court did not abuse its discretion when it pointed out, with respect to subsection (i), that she continuously and willfully violated the trial court’s initial orders.

{¶30} Subsection (j) required the trial court to review “[w]hether either parent has established a residence, or is planning to establish a residence, outside this state.” The trial court noted that, as previously stated, Mother has moved to Las Vegas, where she has no support system. The trial court stated that Mother’s testimony at trial indicated that she intended to stay in Las Vegas. This conclusion is supported by the record and Mother does not argue that the trial court was incorrect in this conclusion. Instead, she argues that despite the fact that both Mother and Father’s extended family live in Ohio, D.D. only saw them on holidays and occasionally at family picnics. This argument does not contradict the trial court’s statement that Mother has no support system in Las Vegas and that she intended to stay in Las Vegas. Thus, the trial court did not abuse its discretion when it considered this factor.

{¶31} After considering the required, non-exhaustive factors listed in R.C. 3109.04(F)(1), the trial court stated several factors that it considered that were not required by statute. See *Watcher v. Watcher*, 9th Dist. No. 23170, 2006-Ohio-6970, at ¶23.

{¶32} The first non-statutory factor was “Mother’s apparent lack of good judgment.” The trial court based this conclusion on the fact that Mother allowed two other men, Edd Johnson III and her brother, to live in the marital residence, which only had two bedrooms. After Father moved out of the residence, Mother invited her best friend from high school, Lavelle Felder, to move into the residence. Mother testified that she did not see anything wrong with having three unrelated males living in her home along with D.D. To further support its conclusion that Mother lacked good judgment, the trial court pointed to her decision to leave for Las Vegas without notice to anyone, and without giving D.D. a chance to say good bye to his family. Mother does not contest the trial court’s conclusions. Instead, she argues that the trial court failed to consider Father’s judgment because he was “dating a married woman, not seeking psychological help for his depression or any treatment for his alcohol and gambling addiction.”

{¶33} First, we have already explained that there is no indication in the transcript that Father had an alcohol problem. Second, the trial court, as explained above, gave adequate consideration to Father’s online gambling addiction. Third, the testimony indicated that Father did seek the help of a medical professional, that of his general practitioner. He testified that he was taking medication and seeing his physician regularly. Lastly, Father admitted to dating a married woman, however, Wife herself was married when she began dating Edd Johnson, and subsequently had his child. Therefore, the trial court did not abuse its discretion when it determined that Mother lacked good judgment, which was detrimental to D.D.’s best interest.

{¶34} The trial court further considered Mother’s attitude toward her child. The trial court noted that “[i]t became very apparent that she is the Mother, that she is responsible for the child and that she and only she should make decisions for this child.” The trial court stated that D.D. was “as he is, not only because of the interest, concern and assistance of Mother, but also

because of the interest, concern and assistance of Father, grandparents, relatives and his entire family.” In other words, the trial court expressed concern that Mother did not recognize the importance of Father’s influence on D.D. nor did she recognize that Father should be included in decisions regarding D.D. Mother does not contest this conclusion on appeal.

{¶35} Finally, the trial court considered Father’s plan for D.D. Father testified that he intended to live with D.D. at his mother and father’s home until he could get back on his feet financially. He anticipated that this would take approximately a year. He stated that the school he had chosen for D.D. to attend was the school associated with the parish where he grew up, where he and Mother were married, and where D.D. was baptized. He indicated that the school had a day-care program, but that his mother and father would help with child care and that he had confirmed with his employers that he could leave work at 3:00 or 3:30 p.m. to pick D.D. up from school.

{¶36} Mother contends that it is irresponsible of Father to live with his parents and to rely on them to help with child care. She contends that this indicated that the environment in Ohio was not more stable than the one in Las Vegas and that Father has a “complete lack of financial responsibility.” A review of the transcript reveals, however, that *both* Mother and Father filed for bankruptcy after their separation. Therefore, Father’s decision to move in with his parents until he could financially move out on his own, was not an irresponsible decision. In fact, it showed that Father had a support system in Ohio to help care for D.D. that Mother simply did not have in Las Vegas. D.D.’s paternal grandparents testified that they were willing to help Father with D.D. so that a family member was always with D.D. They testified that D.D. had his own room in their home. The guardian ad litem explained that he had been to the home and that the room was appropriately decorated for a young child. Therefore, even if the trial court had

listed these issues as factors in its decision, this Court would conclude that it did not abuse its discretion when it weighed the factors and determined that its conclusions tipped in Father's favor.

{¶37} Upon review, the trial court sufficiently considered the best interest of the child as set forth in the statutory factors in designating Father as the custodial parent. While the dissent reaches a different conclusion, we have fully set forth above the standard pursuant to which we are required to review the trial court's decision. Further, the trial court shall "determine the relative weight to assign each factor, in relation to the others, when determining [D.D.'s] best interest." *Sheppard v. Brown*, 2nd Dist. No. 2007 CA 43, 2008-Ohio-203, at ¶47. Thus, we do not find error in the trial court's decision to place greater emphasis on particular factors. We conclude that the transcript supports the trial court's designation. Accordingly, we conclude that the trial court did not abuse its discretion, and Mother's assignments of error are overruled.

III.

{¶38} Mother's assignments of error are overruled. The judgment of the Lorain County Domestic Relations Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

CARR, J.
CONCURS

BELFANCE, P. J.
CONCURS IN PART, AND DISSENTS IN PART, SAYING:

{¶39} I concur in the main opinion's conclusions that the trial court did not err in consideration of the shared parenting factors set out in R.C. 3109.04(F)(2). I do so, however, because the record reflects that Father filed a proposed shared parenting plan and a motion asking the trial court to adopt his proposed plan. This motion was never withdrawn and thus remained pending for the trial court to consider after trial of the matter. Thus, the trial court's consideration of the shared parenting factors was not arbitrary nor was it improperly considered for the purpose of determining which parent should be the sole residential parent and legal custodian of the child.

{¶40} Nonetheless, I dissent with respect to this Court's resolution of Mother's remaining arguments and would conclude that the trial court abused its discretion in designating Father as the residential parent.

{¶41} The trial court is charged with considering each of the statutory factors outlined in R.C. 3109.04(F)(1) in determining what is in the best interest of the child. Although the trial court correctly states that “absent evidence to the contrary, an appellate court presumes that the trial court considered the relevant statutory factors”; here, the trial court expressly stated that it decided *not* to consider certain factors because they were not relevant. Further, the trial court did not indicate that the factors it declined to consider were not relevant due to an absence of evidence. Thus, in my view, the trial court committed reversible error because it failed to consider each of the best interest statutory factors as were made relevant by the evidence.

Interrelationship with parents, siblings and others

{¶42} R.C. 3109.04(F)(1)(c) requires the trial court to consider “[t]he child’s interaction and interrelationship with the child’s parents, siblings, and any other person who may significantly affect the child’s best interest[.]” Notwithstanding the statutory directive to consider this factor, the trial court merely stated that it had “no problem” with either parent parenting the child. Thus, the trial court did not satisfy its obligation to examine the substance of the child’s interrelationships with his parents, his sibling and any other person who may significantly affect his best interests.

{¶43} The record establishes that Mother has been the primary caretaker of D.D. At trial, there was universal acknowledgement that Mother is a good mother. When living in Lorain County, Mother was responsible for ensuring that D.D.’s medical, academic, and social needs were met. When Father left the marital home, Father had weekend contact with D.D., but D.D. primarily resided with Mother and it was Mother who was left to contend with the daily responsibilities attendant to D.D.’s care as well as his financial support as Father was not providing ongoing financial support and had been gambling away substantial sums of money. It

is also evident that Mother was the more involved parent with respect to establishing and nurturing his academic growth as well as providing enrichment activities for the child. Thus, while the child was residing in Lorain County, Father, although having a positive relationship with D.D., was not D.D.'s primary caretaker. For example, he could not name the child's pediatricians, did not know the name of D.D.'s best friend, or the name of D.D.'s soccer coach. Father did not volunteer at D.D.'s school as Mother did. According to Mr. Johnson, Mother's significant other, Father did not attend D.D.'s preschool graduation. D.D. did not want Father to attend his soccer games and preferred Mother to attend them. Although Mother did not fault Father for his non-attendance at the games, the child's preference is indicative of the child's choice as to who he wanted there and who he was comfortable having at his games.

{¶44} Overall the record reveals that while D.D. loves his Father and likes to spend time with him, Father was not significantly involved with D.D. when the parties resided in Lorain County. At trial, Mr. Johnson stated that he observed that when D.D. attempted to interact with Father, "he'd blow him off; and he'd come to me[,] or another person to interact with. Mr. Johnson stated that he attended more school functions than Father. Mr. Johnson also observed that Father often did not come home. He also observed Father gambling on the computer in the basement. He observed that when Mother would come down to the basement to do laundry, Father would "flip[] [the] pages" on the computer thereby concealing his conduct. Mr. Johnson also observed that after Father moved out of the home, he would not come to get D.D. on the days he was supposed to get him. On some occasions, Father would pick up D.D. and drop him off with Mother's mother, "Grandma Wein." On other occasions, Mr. Johnson took D.D. to Grandma Wein's when Father was supposed to have him. According to Grandma Wein, when Mother relocated to Las Vegas, Father told her that he didn't really want custody of D.D. but that

it would be the only way that he knew how to hurt Mother. He further stated that he would drag the litigation on as long as he could so that he could drain Mother of every penny she had.

{¶45} It should be noted that prior to relocating to Las Vegas, the record reflects that Mother had numerous discussions with Father about relocating to Las Vegas. Father and his parents were all aware of the potential move. It is also significant that this decision was made at a time when Mother was unemployed and unable to find employment locally, Father had not been providing regular monetary support for the household, and Mother relied upon her brother, Mr. Johnson and a long time friend to assist her financially by paying rent for living in the home and providing food stamps.

{¶46} Upon relocation to Las Vegas, Mother continued in her role as primary caretaker of D.D. As indicated by the GAL, Mother made sound choices regarding D.D.'s care and had fully met his needs. According to the trial court, D.D. is a delightful child who is bright, well adjusted and articulate. The record reveals that he has unquestionably thrived while in Mother's care. In examining D.D.'s bond with his parents, the record reflects that while away from his mother in Ohio, D.D. told the GAL that he sometimes misses Mother and cries in his room. On another occasion, when he was allowed to visit with Grandma Wein, the first thing D.D. asked of Grandma Wein was to call his mother. By contrast, D.D. did not express missing his Father while living in Las Vegas and did not speak of crying and being sad while away from Father. Upon relocation to Las Vegas, he did not exhibit any change in his behavior despite living apart from his father.

{¶47} Troubling is the fact that the trial court ignored several instances of extremely damaging interactions between Father and the child. On one occasion, D.D. was disciplined by

Mother because D.D. called Mr. Johnson a “nigger.” D.D. disclosed that Father had told him to call Mr. Johnson by that name

{¶48} On another occasion, Father exploded in anger at Grandma Wein while at the airport. Father was yelling, cursing and screaming at Grandma Wein in front of D.D. as well as others in the airport. In addition, Father, with D.D.’s knowledge, prohibited Grandma Wein from calling D.D. at Father’s home. During the spring break of 2008, when Father was exercising companionship with D.D., Grandma Wein attempted to call D.D. at Father’s parents’ home where Father was living. Grandma Wein stated that Father’s mother “told [D.D.] he had to give the phone to his dad because his dad had to tell me something, and [Father] told me that I as not allowed to call there[.]” Father told Grandma Wein that if she wanted to talk to D.D. or if D.D. wanted to talk to her, she would have to contact him on his cell phone. When Grandma Wein later asked why D.D. hadn’t spoken with her, D.D. responded: “My dad won’t let me talk to you.” Further, when D.D. was in Ohio, Father did not willingly allow D.D. to visit with Grandma Wein, but did so only after intervention by the GAL.

{¶49} These incidents demonstrate Father’s lack of insight as to the importance of these relationships to D.D., his unwillingness to foster these relationships, as well as how damaging such alienating conduct would be to a young child. By contrast, although Father had developed an intimate relationship with a married woman, Colleen Deming, there was no testimony that Mother made any disparaging comments about Father’s significant other or otherwise discouraged the development of a relationship with Ms. Deming. D.D. played with Ms. Deming’s children and on numerous occasions, D.D. was left at Ms. Deming’s home without Father being there. Nor was there any testimony that Mother ever made disparaging remarks about Father or his family.

{¶50} In further considering D.D.’s interrelationship with any person who may impact his best interest, it is clear from the record that Grandma Wein is a critical person in D.D.’s life and that D.D. is deeply bonded to Grandma Wein. While residing in Lorain County, Grandma Wein cared for D.D. daily when his parents were at work. Since the move to Las Vegas, Grandma Wein has regularly visited D.D. in Las Vegas and thus has continued the relationship with D.D. Although the trial court based its custody decision in part on the notion that D.D. would be able to enjoy support and relationships with his extended family, it is apparent from the record that upon granting sole custody to Father, the one person with whom D.D. was most bonded would not be a source of ongoing support to the child. At trial, when asked whether D.D. has a special relationship with Grandma Wein, Father responded “Yes. Like one I’ve never seen before.” However, Father’s conduct does not belie a willingness or desire on his part to promote or support this primary relationship. Grandma Wein testified that she was certain that if Father were granted sole custody of the child, she would never see the child. Thus, paradoxically, it is evident that D.D. would have a greater opportunity to continue this primary relationship if he were living in Las Vegas than if he were living in Lorain County.

{¶51} With respect to D.D.’s interrelationship with extended family, with the exception of Grandma Wein, D.D. had very limited involvement with other extended family. Father’s parents both indicated that when D.D. resided in Lorain County, they saw D.D. about one time per month as both worked full time and had little opportunity to interact with D.D. D.D. did not regularly interact with Father’s extended family but did generally attend a family picnic in the summer and also saw relatives at holidays such as Christmas and Easter. Moreover, D.D.’s godfather testified that he rarely saw D.D. He had such little interaction with D.D. and Mother and Father that he was unaware that Mother and Father had separated. Father’s father stated that

D.D. did not have a close relationship with the relatives who he described as attending the family gatherings that would take place two times per year. Thus, D.D.'s extended family members, while certainly important to the child, were never a regular part of D.D.'s daily life, did not provide support to him when he resided in Lorain, and are not individuals with whom the child forged his most significant and primary bonds. Mother's relocation to Las Vegas did not materially alter D.D.'s level of interaction with Father's extended family, as D.D. was able to interact with extended family on holidays and during the annual summer gathering as he had in the past.

{¶52} R.C. 3109.04(F)(1)(c) specifically requires the trial court to consider the child's interrelationship with his siblings. The trial court mentioned that D.D. has a brother; that D.D. takes pride in his brother; and the relationship has increased now that his brother is older. In contrast to D.D.'s extended family of grandparents cousins and the like, D.D. shares a primary familial relationship with his brother, who other than the parents, is the closest and most intimate familial relationship that D.D. has and will have in his life. Notwithstanding, the trial court while acknowledging the existence of the relationship, did not consider the significance of this primary relationship to D.D., the impact on D.D. when faced with losing consistency of the relationship, and the loss of the ability to further develop his relationship with his brother. Instead, the trial court seemed to place more importance upon D.D.'s relationships with extended family that he only saw at holidays and a family picnic.

{¶53} In Las Vegas, D.D. also resides with Mr. Johnson. Prior to the relocation, Mr. Johnson assisted with D.D.'s care and had developed a relationship with D.D. During that period, he described his relationship with D.D. as that of a big brother. He would wrestle, play video games, go outside and push D.D. on the swing, or go to the park or zoo with the child. He

also attended D.D.'s school programs and school graduation. Although Mr. Johnson and Mother are not married, they are cohabiting with each other as would a husband and wife. Thus, Mr. Johnson's role in D.D.'s life is akin to that of a step-father. The evidence established that D.D. has a positive relationship with Mr. Johnson. Further, while D.D. has a bond with Mr. Johnson, he also understands Mr. Johnson is not his father. Mr. Johnson's considerable involvement with the child makes him a person who significantly affects D.D.'s best interest under R.C. 3109.04(F)(1)(c). The trial court gave no consideration to D.D.'s interrelationship with Mr. Johnson.

{¶54} Although the trial court did not examine D.D.'s interrelationships with his parents and others who might significantly affect his best interest, the trial court instead focused upon Mother's relocation to Las Vegas and the fact that she moved with D.D. in the middle of the night to Las Vegas. The trial court also stated that while in Las Vegas, Mother also moved residences and schools several times. Although these facts would have been more relevant upon considering D.D.'s adjustment to his home, school and community, such evidence should have been considered in the context of examining the totality of the child's interrelationship with his Mother and others. For example, with respect to the change in residence and schools, the record reflects that Mother had sound reasons for each change and the changes did not reflect irresponsibility or instability on Mother's part.

{¶55} The record reflects that Mother's move from her first residence was due to the fact that the residence fell into foreclosure because the landlord was not paying the mortgage, thus necessitating a move to another residence. As reflected in part by the testimony of the GAL, the evidence reflected that Mother made thoughtful and sound choices for the child both regarding choices of school and a residence. Further, there was no evidence adduced that any

move adversely affected D.D. Ultimately, the trial court did not examine the substance of the relationship or bond of D.D. with Mother and others who may significantly affect D.D.'s best interest.

The child's adjustment to home, school and community

{¶56} R.C. 3109.04(F)(1)(d) requires the trial court to consider the child's adjustment to home, school, and community. The trial court declined to consider this factor and instead indicated that this was not a factor it considered because D.D. appeared to adjust wherever he was. However, consideration of this factor is not only mandatory, it is highly significant in assessing the best interests of the child. A child's adjustment to home, school and community is a reflection of the child's overall well being, and is indicative of whether the child is secure in his daily surroundings and whether the child is thriving in his physical, social, and academic environment. The record reflects that D.D. had always primarily resided with his Mother. He adjusted very positively to living with his Mother in Las Vegas as well as living with Mr. Johnson and eventually his younger brother. D.D.'s social relationships were nurtured and he had developed positive peer relationships and was engaged in enrichment activities outside of the school environment. At school, D.D. was doing very well, and had progressed academically. In sum, D.D.'s adjustment to his home, school and community was very positive and reflected that the child was a secure, happy and confident child while in his mother's care. This factor should not have been summarily disregarded by the trial court.

{¶57} In failing to examine this factor, the trial court seemed to suggest that because the child exhibits adaptability this factor is not relevant. However, examining the child's adjustment to home, school and community provides the court with vital information that has a bearing on determining whether there is reason to upset the child's established environment. It is a

reflection in part as to whether the child is in a nurturing and secure environment in which he can thrive. The evidence was undisputed that D.D. was thriving as he continued to primarily reside with Mother as he had done since infancy. The record is clear that the child did not decline while in Las Vegas despite the distance from his Father. By contrast, D.D. was sad and cried in his room because he missed his mother while he was in Ohio. The trial court in failing to examine this factor ignored the significance of the child's positive adjustment to home, school and community and its significance to the security and stability that D.D. derives from that environment. It was error for the trial court to have disregarded this factor.

Mental and physical health of all persons involved

{¶58} R.C. 3109.04(F)(1)(e), requires the trial court to consider the “[t]he mental and physical health of all persons involved in the situation[.]” The trial court failed to consider this factor and instead concluded that this factor was not relevant to its decision. This was erroneous.

{¶59} The record does not reflect any discernable physical health problems on the part of Mother, Father or D.D. With respect to mental health issues, there was no evidence that Mother had any mental health disorders. However, there was evidence that Father had significant mental health issues. Father had been diagnosed with clinical depression. Father's mother stated that Father had been previously prescribed Prozac or a generic form of it four to five years ago for what she described as “mood swings.” Prior to D.D.'s birth Father had sought professional help had been diagnosed with clinical depression. It does not appear that Father had ongoing treatment for this condition, and he did not consistently take his medication. He stated that he now sees his physician one time per year and has stayed on his medication. The trial court seemed unconcerned about Father's clinical depression, did not attach significance to Father's lapse in taking his medication and found that as long as Father stays on his medication,

he should not have any problems. Father also indicated that he had had past problems with alcohol and as result he stays away from alcohol.

{¶60} The evidence further revealed that Father has an untreated gambling addiction. Father secretly gambled on the computer during the marriage beginning in 2006 and the gambling was taking place almost every day. Father could not recall the total sum of money that he spent and was unsure how much he lost, but it was possibly \$7,000 or \$8,000. Father stated that at the time of trial, he had \$5,000 in gambling debt. Significantly, Father has never sought any professional assistance for this addiction. Instead, he stated that he felt he could manage his addiction on his own and that because he was living with his parents, they were able to watch him to make sure that he did not gamble. As Father stated, “I’m at my parents’ house, so pretty much I’m scrutinized and watched just so it doesn’t happen again.” The record reflects at the time Father was secretly gambling, the parties had financial difficulties. Ultimately, the parties lost their home to foreclosure.

{¶61} Father also related that he had employment difficulties. In 2008, Father was terminated from his employment prior to the expiration of a 90-day trial period. He stated the employer had described him as “moody” and that the employer was unhappy that he refused to follow employment rules relative to the hair covering he was to wear. Instead of following the employer’s protocol, Father had insisted on wearing a baseball cap while at work. Father also acknowledged that his employment file reflected that the employer had alleged that he had sexually harassed a co-worker. The trial court does not appear to have attached any significance to these incidents when viewed against the backdrop of Father’s clinical depression.

{¶62} The trial court also did not consider Father’s gambling addiction as relevant under R.C. 3109.04(F)(1)(e). Because the trial court mentioned Father’s gambling in a separate portion

of the journal entry, it appears that the trial court did not recognize the significance of Father's addiction as a mental health disorder. It is apparent that the trial court did not consider: (1) the seriousness of this addiction; (2) the fact that Father was in denial as to the necessity of obtaining treatment; and (3) the impact of granting sole residential custody to a parent with an untreated addiction who was not functioning as a self-sufficient adult. In this regard, the trial court seemed to ignore that from 2007, Father has had difficulty retaining employment, and that Father has been residing with his parents, who in part, are watching over him to ensure that he does not gamble. It was also not troubled that Father stated that he felt that he could manage his addiction on his own without professional intervention. By contrast, Mother has established her own residence, obtained steady employment and has demonstrated that she is independently able to meet her parental responsibilities under circumstances where the child has thrived under her care.

Parent most likely to honor court-approved parenting time rights and companionship rights

{¶63} The trial court was required to consider the parent most likely to “honor and facilitate court-approved parenting time rights or visitation and companionship rights[.]” R.C. 3109.04(F)(1)(f). The trial court properly found this factor to be relevant. Overall, the record reveals that while both parents generally followed the companionship schedule that they agreed to during the pendency of the matter, the GAL felt that both parents had exhibited some poor choices relative to facilitating companionship during the pendency of the case. However, these incidents went beyond parenting time that was “court-approved.” For example, Father had the opportunity to facilitate companionship when Mother asked that D.D. be permitted to go to a family wedding. Father initially agreed, but Father later reneged. It was not until after the GAL intervened, that D.D. was permitted to go to the wedding. Father also did not allow D.D. to visit with Grandma Wein until the GAL intervened. During Christmas of 2007, Mother allowed only

a four-hour visit with the child. It does not appear that at that time the parties had any order or understanding regarding companionship. Father also complained about an Easter visit where child arrived a day before Father saw him. However, Father admitted that Mother did give him the child on the time and date that she was supposed to. It appears that his complaint was that Mother should have brought the child to him earlier than the agreed upon time. However, Mother also explained that she had arrived with D.D. at her mother's home late at night on the day before the child was to go with his Father. Finally, Mother did not offer Father the opportunity to have companionship time with Father when the child was present in Ohio on the first day of trial in January 2009.

{¶64} It is undisputed that Father had companionship during the parties' established companionship periods. Ultimately, although the GAL did not approve of some of the choices that both parents made during the pendency of the divorce action, it does not appear that this factor weighed heavily in favor of either parent.

Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court

{¶65} In considering R.C. 3109.04(F)(1)(i), the trial court in its entry again discussed Mother's move to Las Vegas and Mother's failure to obey the initial orders of the trial court. In September 2007 Father filed his complaint for divorce. That same day, he obtained an ex parte order granting him custody. Upon obtaining this order Mr. Donley, Father's father, and Grandma Wein traveled to Las Vegas. Although the trip was ostensibly made to ensure the D.D. was alright, the grandparents involved local police and appeared at Mother's home in a police cruiser in the evening. The police informed Mother that they would not require Mother to turn the child

over to the grandparents. Under those circumstances, Mother did not allow either grandparent to see the child.

{¶66} After Father obtained the ex parte order, a hearing was scheduled and Mother attempted to attend the hearing telephonically. It is unclear why Mother was not permitted to participate in the hearing. During this hearing, the ex parte order was dissolved and a new order to return D.D. to Lorain County was entered. Mother did not return the child.

{¶67} A subsequent hearing was held in November. Mother again requested permission to appear telephonically and arrangements were made so that Mother could appear. For the first time since the complaint had been filed, Mother appeared at this hearing without counsel. After hearing from both parties, the magistrate awarded temporary custody to Mother. With respect to Mother's move to Las Vegas, the magistrate found that the parties had previously discussed Mother's job interview and relocation to Las Vegas. Further, the magistrate found that there was no credible evidence that Mother was in possession of Husband's personal property. Significantly, Father did not object to the factual findings of the magistrate and did move to set aside the magistrate's decision. Father did not file a contempt motion asking the court to hold Mother in contempt for the prior failure to obey the court's orders.

{¶68} Mother explained that she did not return the child initially upon advice of counsel that she was attempting to retain. This attorney was never retained in the matter. It is unclear whether the trial court considered this testimony or whether it found Mother to be credible as to her explanation. Notwithstanding Mother's initial failure to obey the court orders requiring her to appear at the hearing and to return D.D. to Lorain County, Mother offered explanations for all of her conduct once she appeared before the court. Further, after the entry of the trial court's temporary orders, Mother followed all orders of the court. Moreover, while I do find Mother's

initial disregard of the trial court's order relevant, it is equally clear that once Mother actually appeared before the court, the court did not sanction Mother for the prior conduct; instead, the court found that the parties had in fact discussed the job interview and relocation and that Father's assertions that Mother was in possession of Father's personal property were not credible.

{¶69} Thus, while Mother did not follow the initial orders of the trial court, she did not continue to exhibit a disregard of the court's orders. Notwithstanding the initial failure to obey the trial court's order at the outset of the case, Mother's conduct at the outset of the divorce permeates the trial court's ultimate decision. The failure to obey a court order is significant and serious; however, in this case, Mother's failure must be examined in conjunction with all of the relevant best interest factors. In this regard, it appears that the trial court's continual emphasis on Mother's move to Las Vegas and her failure to obey the initial court order was essentially determinative of the award of residential custody to the Father. While Mother's violation was serious, the trial court had a duty to examine the best interests of the child by examining his significant relationships and the interrelationship of both parents with the child and other best interest factors that the court found not relevant to its decision. Instead, the trial court repeatedly alluded to these same facts when considering the statutory factors it elected to consider and even characterized Mother's conduct as parental kidnapping. The court had the option of sanctioning Mother for the conduct, however, it elected not to do so. Moreover, Father did not even ask the court to sanction Mother.

{¶70} Mother's relocation and initial failure to return the child to Lorain County, while serious and relevant for consideration, should be viewed in the context of all of the evidence at trial and evaluated along with all of the statutory factors.

Other evidence considered by the trial court

{¶71} The trial court indicated that it gave weight to the recommendation of the GAL. The GAL, in stating his opinion, indicated that were Mother residing in Lorain County, he would recommend that she be designated the primary residential parent of the child. However, the GAL indicated that he had a concern that Mother did not have enough of a support system in Las Vegas and thus, if Mother continued to reside in Las Vegas, he would recommend that Father be residential parent and legal custodian of the child. While the GAL was concerned that Mother did not have an external support system, the GAL did not provide any facts indicating that Mother was in need of external support because she could not meet her parental obligations. Further, the GAL appeared to ignore Mr. Johnson as Mother's significant other and a person unquestionably providing Mother with support. For example, Mr. Johnson testified about his involvement in picking up the child from school, a task that undoubtedly provides Mother with support. Further, although the GAL expressed this concern, the evidence established that Mother was demonstrating not only that she could responsibly care for the child but that she could care for the child in a manner in which the child was positively thriving. There was no indication that Mother was in need of any additional support that she did not have or that the child was suffering in any manner for lack of a support network. In fact, the opinion of the GAL is not based upon any occurrence, but based upon a concern as to the future. However, Mother's independence, self-sufficiency and the ability to meet her parental obligations was a positive, not a negative.

{¶72} Conversely, Father had not been self-sufficient since the parties separated and had been living with his parents. Thus, the GAL recommended custody to the parent who was the *least* self-sufficient, who in the past had never assumed primary responsibility for the child and who has a serious and untreated addiction as well as a mental health condition. Because the trial

court did not consider several critical best interest factors, a question is raised whether it is in the child's best interest to uproot the child from a stable home environment where he is thriving, has significant primary relationships, and is in his own home with his own room, and award sole custody to a parent who himself has no home of his own and has been dependent upon his own parents. The trial court expressed concerns about the child changing residences; yet its decision requires the child to leave his established home, move into a new home with Father's parents for an unforeseen period of time, and then, assuming Father ultimately establishes his own residence, be subjected to yet another move at some point in the future.

{¶73} The GAL also seemed to be concerned that in living in Las Vegas, D.D. was away from the support of his extended family. However, the evidence reflects that when D.D. resided in Lorain County he was not "supported" by extended family. As noted above, D.D.'s main support was Grandma Wein. The paternal grandparents saw D.D. monthly and certainly had a warm relationship. D.D. saw Father's relatives at holidays. This is not the picture of extended family that had significant and regular contact with D.D. or that provided him with daily support. The only relative who provided daily and ongoing support was Grandma Wein with whom D.D. was closely bonded. However, in light of testimony at trial, it is evident that Grandma Wein would not be permitted to provide regular support to the child were he to reside with Father in Ohio.

{¶74} Thus, in failing to consider all of the best interest factors, the trial court appears to have ignored the historical relationship of the parents to the child, the fact that Mother has been the primary caretaker of the child, that D.D. has been thriving under Mother's primary care, as well as the significant addictive behaviors of Father. Although the GAL placed great emphasis on the importance of the support derived from extended family, there was no evidence that

Father's extended family provided this support or that Mother lacked the support she needed in order to responsibly care for the child.

{¶75} Finally, although we are to accord deference to that trial court's credibility determinations, the trial court did not specifically make any. For example, it did not state that it did not believe Grandma Wein's testimony, which was material to many issues before the court. Nor did it indicate that it disbelieved Mr. Johnson's testimony which included among other things, that Father was often inattentive to D.D. Thus, there is no indication that the trial court disregarded evidence that was relevant to the enumerated R.C. 3109.04(F)(1) factors based upon its assessment of credibility.

{¶76} Upon thorough review of the record, I can only conclude that the trial court abused its discretion in awarding sole residential custody to the Father; the trial court failed to fully consider all of the factors contained in R.C. 3109.04(F)(1) as were made relevant by the evidence. Accordingly, I dissent from the main opinion's resolution of the majority of Mother's arguments.

APPEARANCES:

KENNETH N. ORTNER, Attorney at Law, for Appellant.

PAMELA L. GORSKI, Attorney at Law, for Appellee.