

ORIGINAL

IN THE SUPREME COURT OF OHIO

IN RE: C.V.M., JR.
A Minor Child

) 13-1474
) On Appeal from the Cuyahoga
) County Court of Appeals
) Eighth Appellate District
)
) Court of Appeals
) Case No. 99426
)

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT CHARLES V. MUHAMMAD, SR.

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STATEMENT OF THE CASE

This case concerns the right of a father to raise his son as he sees fit, free from governmental interference and free from the unwelcome influence of an ex-wife who has no familial-parental relation to the child. On May 12, 2010, Appellant, Charles V. Muhammad, Sr. ("Father" or "Charles"), filed with the Juvenile Division of the Cuyahoga County Court of Common Pleas a motion to modify custody with respect to his minor son (hereinafter referred to as "C.M."), seeking to be named the child's sole legal custodian. Shortly thereafter, on June 9, 2010, Charles' ex-wife (who is not C.M.'s mother, but who had become acquainted with the child by virtue of her marriage to Father), Appellee Aminah Williams ("Aminah"), filed a counter-motion to modify custody, and a motion to establish support, also seeking sole custody of C.M.

On February 6, 7, 8 and 27, 2012, the trial court held hearings with respect to the parties' cross-motions for custody, and with respect to Aminah's motion to establish support, and on April 9, 2012, the trial court rendered its first judgment entry with respect to the same. By this judgment entry, the trial court (i) awarded custody of C.M. to Aminah, (ii) granted visitation to Charles, and (iii) ordered Charles and C.M.'s mother, Appellee Lawanda Moody ("Lawanda"), to pay child support to Aminah.

Charles appealed the trial court's initial judgment entry to the Eighth District Court of Appeals, and on November 29, 2012, the Court of Appeals rendered its first decision reversing the trial court's initial judgment entry and remanding the case back to the trial court "to apply the correct legal standard of parental unsuitability to the facts and evidence contained in the trial court record." Shortly thereafter, on December 17, 2012, the trial court rendered a second judgment entry containing the same orders as in its first judgment entry, but also containing, in

response to the Court of Appeals' direction, additional language with respect to its finding of parental unsuitability. Father again appealed this second judgment entry from the trial court to the Eighth District Court of Appeals, and on August 1, 2013, the Court of Appeals rendered its second judgment entry in this case, this time affirming the trial court's amended judgment entry. It is from this second decision from the Eighth District Court of Appeals that Father now appeals.

STATEMENT OF THE FACTS

Charles and Aminah were married on December 21, 1995. They never had any children together, but during the course of their marriage Charles did father a child, C.M., with another woman, Lawanda. C.M. was born on September 13, 2003. At the time of his birth, Lawanda tested positive for drugs of abuse (marijuana and cocaine), so the Cuyahoga County Department of Child and Family Services ("CCDCFS") filed with the trial court a complaint seeking a determination that C.M. was neglected and requesting that legal custody be granted to Charles.

The Complaint for Neglect and Legal Custody to Father stated, in pertinent part, as follows:

5. Father of child has established paternity for child, and he does provide care and support for child. *Father was investigated by assigned social worker and deemed an appropriate care giver for his child.* Father desires Legal Custody of his son.
6. Mother is in agreement that *Legal Custody to father is in the best interest of the child.*

(Emphasis added.)

The complaint was later amended to include Charles' then-wife, Aminah, as co-custodian.

Thereafter, on February 25, 2004, the trial court granted custody of C.M. to Charles and Aminah.

The Magistrate's Decision and Findings of Fact included a stipulation as to paragraphs 5 – 6

above, from CCDCFS' complaint for neglect, agreeing that Charles was "*investigated by assigned social worker and deemed an appropriate care giver for his child*" and that "*Legal Custody to father is in the best interest of the child.*" (emphasis added.) No similar findings with respect to Aminah were made.

From this point forward, Charles and Aminah raised C.M. together, as husband and wife. However, in June, 2009, when C.M. was only five years old, Aminah vacated the marital residence, abandoning Charles and C.M. For the following year, Charles raised C.M. on his own. In June, 2010, however, after the parties were divorced, and after Charles had filed his motion seeking sole custody of the child, Aminah absconded with the child and filed her cross-motion for custody in the trial court. Shortly thereafter, on August 18, 2010, the trial court rendered a pretrial order awarding Charles severely limited visitation with C.M., and by implication, granting temporary custody of the child to Aminah.¹ For the next year and a half, Charles had little contact with his son.² The trial court's pretrial order only allowed him to spend six and a half hours with C.M. each week. Further, shortly after the trial court rendered its pretrial custody order, effectively awarding temporary custody to Aminah, the trial court terminated, at least temporarily, Charles' right to visitation. The temporary termination of Charles' right to visitation, which lasted for over six months, was based on unsubstantiated

¹ The trial court never held any hearing, or made any determination with respect to Charles' suitability as a parent, prior to awarding temporary custody to Aminah. After the undersigned

² Indeed, Charles has had little contact with his son since the time Aminah absconded with him, in June, 2010. From the time Aminah took C.M. from Charles, the trial court, by virtue of its temporary custody order and its subsequent judgment entries, has effectively eliminated Charles as a substantial presence in his C.M.'s life. Oddly enough, in its judgment entries, the trial court relied upon the fact that Charles had little involvement in C.M.'s life since the parties separated as a factor in determining that Charles was unsuitable. The Court of Appeals, moreover, was not interested in the fact that Charles' lack of involvement in his son's life was the direct result of the trial court's orders.

reports of abuse made to CCDCFS by Aminah.³

Charles is a retired Cleveland police officer. He owns a three bedroom, two bath home in a nice, middle-class neighborhood on Cleveland's lower east side. At trial, the parties stipulated that Charles' home and neighborhood are appropriate and acceptable places to raise a child. Charles' income is about \$4,000 per month, after alimony. He receives about \$2,800 per month from his police pension. In addition, he receives about \$1,600 from Cuyahoga County for taking care of his physically-disabled, mentally-challenged brother, Gary, who lives with him. The parties stipulated that Charles has sufficient financial resources to take care of his son.

Until his son was taken from him, and the trial court rendered its temporary custody order preventing him from seeing his son but for six to seven hours each week, Charles was actively involved in raising his son. Aminah admitted this fact at trial, stating that Charles was a good father and adding that she merely wanted to share custody of C.M. with Charles.

Notwithstanding these facts, by its judgment entries, the trial court determined that Charles was an unsuitable parent, terminated his custodial status – a status he had held since C.M.'s birth – and awarded sole custody of his son to his ex-wife, who has no familial-parental relationship to C.M.

LAW AND ARGUMENT

STANDARD OF REVIEW

When reviewing a trial court's judgment on child custody cases, the appropriate standard of review is whether the trial court abused its discretion. Masters v. Masters, 69 Ohio St.3d 794, 630 N.E.2d 665 (1994). An abuse of discretion is more than an error of law; it implies that the court's attitude was unreasonable, arbitrary or unconscionable. Miller v. Miller, 37 Ohio St.3d

³ Again, the trial court never held any hearing, or made any determination with respect to Charles' suitability as a parent, prior to its revocation of Charles' right to visitation.

71, 523 N.E.2d 846 (1988). Abuse of discretion is a “term of art, describing a judgment neither comporting with the record, nor reason.” Radford v. Radford, 2011-Ohio-6263 (8th Dist. Cuyahoga 2011) (citing to State v. Ferranto, 112 Ohio St. 667, 148 N.E. 362 (1925)). “A decision is unreasonable if there is no sound reasoning process that would support that decision.” Id. (citing to AAAA Enterprises, Inc. v. River Place Comm. Redevelopment, 50 Ohio St.3d 157, 553 N.E.2d 597 (1990)). An abuse of discretion may also be found if a trial court “applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact.” Id. (citing to Thomas v. Cleveland, 176 Ohio App.3d 401, 892 N.E.2d 454 (8th Dist. Cuyahoga 2008)).

ASSIGNMENT OF ERROR 1

The trial court abused its discretion in determining that Charles was an unsuitable parent.

The United States Supreme Court has defined the right of a parent to raise his child as a natural right subject to protections of due process. See, Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625 (1923); In re Perales, 52 Ohio St.2d 89, 369 N.E.2d 1047 (1977). It has further stated that parents have a fundamental liberty interest, based on the right to privacy, in the care, custody and management of their children. Id. See, also, Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388 (1982); Zivich v. Mentor Soccer Club, Inc., 82 Ohio St.3d 367, 696 N.E.2d 201 (1998) (“the existence of fundamental, privacy-oriented right of personal choice in family matters has been recognized under the Due Process Clause by the United States Supreme Court.”)) In Perales, this Court reiterated the long-recognized proposition that “parents who are ‘suitable’ persons have a ‘paramount’ right to the custody of their minor children.” 52 Ohio St.2d 89, 97, 369 N.E.2d 1047, 1051 (citing to Clark v. Bayer, 32 Ohio St. 299 (1877)). In furtherance of the

same, this Court has held that, in a custody battle between a parent and a non-parent, the parent “may be denied custody 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.*

Notwithstanding the fact that the trial court in the instant case, at the time of the C.M.’s birth, determined Charles to be a suitable parent and granted custody of the child to him, and notwithstanding the fact that Charles’ ex-wife (who also sought custody of the child, but who has no familial-parental relation to C.M.) testified at trial that he was a good father and that she merely wanted to share custody of the child with him going forward, the trial court determined that a grant of custody to the father would be detrimental to the child, therefore making the threshold determination of unsuitability, and granted custody of the child to the non-parent, Charles’ ex-wife, Aminah. In making the determination of unsuitability, the trial court specifically recognized, by stipulation, that Charles neither abandoned C.M., nor contractually relinquished custody of him, and that Charles was fully capable of providing care and support for the child, just as he provides care and support for his physically-disabled, mentally-challenged brother, Gary. Thus, the determination of unsuitability was based solely on the residual, catch-all factor of detriment to the child. This finding of detriment, however, appeared to be based on little more than the trial court’s fear, as posited by the guardian ad litem for the child, that Charles may not allow the child to see his ex-wife in the future if he were granted custody – a factor addressing not the suitability of the child’s parent, but the best interest of the child. The trial court, moreover, essentially ignored the fact that it had previously determined Charles to be a suitable parent when it originally granted custody to him at the time of the C.M.’s birth.

In Massito v. Massito, 22 Ohio St.3d 63, 488 N.E.2d 857 (1986), this Court, in holding that the consent to a guardianship of a child by another estops the consenting parent from claiming that he did not relinquish his natural right to custody of the child, essentially held that a parent who has relinquished custody is not entitled to a second bite at the suitability apple. See, also, In re Hockstok, 98 Ohio St.3d 238, 781 N.E.2d 971 (2002). At trial, and in prior appellate proceedings, it was argued that the estoppel principle recognized by this Court in Massito, and reiterated by the Court in Hockstok, should be applied to the facts in this case, and that, thus, the prior finding of suitability with respect to Charles – which determination neither Aminah nor Lawanda, who were both involved in the proceedings, questioned at the time – should not be overturned simply because the guardian ad litem in this case believed that the C.M. would be better off with Charles ex-wife, rather than Charles himself, and because the guardian ad litem was concerned that Charles may not allow C.M. to see his ex-wife going forward if he were awarded custody. Not only do such concerns disregard the suitability of the parent, in favor of a pure best interest analysis, but they fail to recognize the fact that Charles was previously determined to be a suitable parent by the trial court, thus possessing a “paramount” right to the custody of his child.

The reason this case is important is because it concerns the removal of a child from the father that had raised him, and the placement of that child with the father’s ex-wife (who has no familial-parental relation to the child), after the father had already been determined to be a suitable parent by the same trial court in a previous proceeding, and notwithstanding the fact that the father’s ex-wife testified at trial that he was a good father and that she merely wanted to share custody with him going forward. In light of these facts, as well as the fact that Aminah did not raise the prospect that a grant of custody to Charles would be detrimental to the child at the

proceeding that resulted in the original grant of custody to him, it is unreasonable that the trial court would determine that Charles was, only five years later, now unsuitable. If Massito stands for anything, it is the proposition that a party should be estopped from making a suitability argument when that party was silent as to this fact at a previous proceeding pursuant to which a suitability determination was made.

Stated alternatively, under Massito, an ex-wife should not be permitted, after divorce, to argue that her ex-husband is an unsuitable parent, in order that she might wrest custody of his child from him, when she did not question the suitability of her ex-husband at the time he was originally awarded custody, prior to divorce. Regardless of the degree of involvement an ex-wife may have had in the life of a step-child, given the holdings of the United States Supreme Court in Meyer and Santosky, a trial court should not be able to truncate the fundamental liberty interest that a parent has in the custody, care and management of his child in favor of that parent's ex-spouse simply because of the unfounded fear that, after divorce, that parent may not want his child to associate with his ex-spouse, especially when that ex-spouse has testified at trial that her ex-husband is a good father.

In Perales, this Court recognized that it was forced to choose, to some extent, between two alternatives in the "parental versus third-party issue." See, Perales, supra. at footnote 9. In reconciling these alternatives, this Court noted that under the "parental right" doctrine, "parents are entitled to the custody of their children unless it 'clearly appears that they are unfit or have abandoned their right to the custody or unless there are some extraordinary circumstances which require that they be deprived of custody.'" Id. (citing to Annotation, Child Custody Parent or Grandparent, 31 A.L.R.3d 1187, 1191, 1196). In "balancing the interests of both parent and child," this Court reconciled the "best interest" of the child doctrine and the "parental right"

doctrine by recognizing that “parents who are ‘suitable’ persons have a ‘paramount’ right to the custody of their minor children.” 52 Ohio St.2d 89, 97, 369 N.E.2d 1047, 1051.

The trial court’s determination in this case essentially declares a parent’s “paramount” right to be defunct. The trial court did not determine that Charles was “clearly unfit” or that “extraordinary circumstances” existed that required the absolute truncation of his fundamental liberty interest in the care, custody and management of his son’s life. To the contrary, the trial court specifically recognized that Charles was fully capable of providing care and support for his child. Notwithstanding the same, the trial court found that Charles was unsuitable based primarily upon the fear that he may not allow his ex-wife to see his child in the future if he were granted custody.

In Perales, this Court noted, in dicta, that it was the “otherwise unsuitable” portion of its definition of unsuitability that provided the ultimate balancing of parental rights and the best interest of the child, stating, “It is the last criteria, other unsuitability, which allows the court to balance the interests of the parent and child and avoid operating under the premise criticized in Boyer v. Boyer...that ‘the child’s right a suitable custodian and parental rights, when not in harmony, are competing interests, requiring that one give way to the other’ ...If courts dealing with the general concept of suitability measure it in terms of the harmful effect of the custody on the child, rather than in terms of society’s judgment of the parent, the welfare of the child should be given the priority which is called for in the Clark opinion.” 52 Ohio St.2d 89, 98, 369 N.E.2d 1047, 1052.

This Court, however, has never addressed the meaning of the phrase “detrimental to the child,” as used in its definition of unsuitability. In Perales, this Court did note that “[i]t is becoming increasingly common for courts to weigh the emotional and psychological (as well as

the physical and mental) effects which a custody award may have on the child.” Id. at footnote 11. It has, however, never addressed exactly what is contemplated by the phrase “detrimental to the child.” What Father seeks in this case is a determination by this Court with respect to the extent to which this phrase can be applied by a trial court in wresting custody away from a parent who is admittedly a good father and who has previously been determined by that trial court to be a suitable parent. Was it really the intent of this Court in Perales to allow a trial court the unfettered discretion to determine that a father who has not abandoned his child, who has not contractually relinquished custody, who is fully capable of providing care and support for his child, who has previously been adjudicated to be a suitable parent and who is admittedly a good father is, nonetheless, otherwise unsuitable merely because of an unsubstantiated fear that such father may not allow his son to associate with his ex-wife going forward? If this is the case, then truly this Court has abandoned parents’ fundamental liberty interest in the care, custody and management of their children in favor of a pure best interest analysis that totally disregards the paramount right possessed by parents.

Simply stated, it was unreasonable for the trial court in this case to determine that Charles was an unsuitable parent. Only five years earlier, at the time of C.M.’s birth, the trial court had determined that Charles was a suitable parent. Moreover, his ex-wife testified at trial that he was a good father and that she merely wanted to share custody of C.M. with him going forward. Given these facts, it was unreasonable for the trial court to declare that Charles was otherwise unsuitable and that a grant of custody to him would be detrimental to C.M. If Charles is capable of caring for his mentally-challenged, physically-disabled brother, then clearly he is capable of caring for his son. In such circumstances, a trial court should not be able to declare a parent that it had previously determined to be suitable to now be unsuitable, in favor of that parent’s ex-

spouse, simply because it believed that the ex-spouse's presence in the child's was beneficial. To do so completely disregards the parent's fundamental liberty interest in the care, custody and management of his child's life in favor of a pure best interest of the child analysis. It utterly ignores the paramount right of a parent to raise his children. Aminah may have provided, to some extent, a maternal influence in C.M.'s life, but that does not mean that she should be elevated to the level of a parent in a custody battle determined under Perales.

Charles is C.M.'s father, and by Aminah's admission, he is a good father. The trial court, moreover, had already determined him to be a suitable parent. In light of these facts, it was unreasonable for the trial court to reverse itself and determine that, after divorce, Charles has somehow become unsuitable as a parent. To do so interferes with Charles' constitutionally protected right to raise his child as he sees fit. As such, Charles seeks the opportunity to present these issues in greater detail to this Court. For the foregoing reasons, Charles requests that this Court accept this jurisdictional appeal and hear this case.

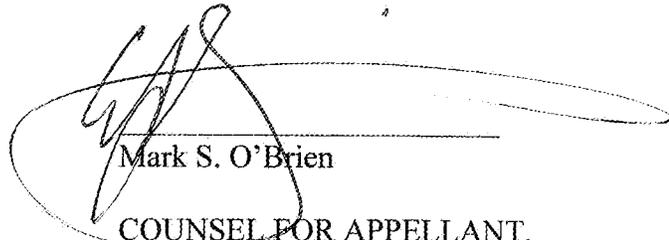
STATEMENT OF CONSTITUTIONAL QUESTION AND/OR SOCIETAL INTEREST

This case presents questions that are of great general interest to the citizens of the State of Ohio, as well as significant Constitutional issues. The United States Supreme Court has stated that "the right to raise one's children is an 'essential' and 'basic civil right.'" In re Miller, 52 Ohio St.3d 155, 556 N.E.2d 1169 (1990) (citing to Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208 (1972)). The trial court's decision in this case interferes with this right where Charles is concerned. Moreover, it undermines this Court's decision in Perales. The balancing of the "parental right" and "best interest" doctrines that was contemplated by this Court in that case has been, by the trial court's application of the phrase "detrimental to the child," turned on its head. Instead of utilizing this term as an ultimate balancing tool, the trial court has used the phrase as a

means of justifying the revocation of a previous award of custody to a parent who was previously determined to be suitable in favor of that parent's ex-spouse, simply because the trial court believed that it would be in the child's best interest.

Given the high rate of divorce in the modern world, all parents in this state should be concerned with the trial court's judgment entry in this case. It effectively places step-parents on an equal footing with parents in custody battles. Moreover, it effectively renders null and void the constitutionally protected rights possessed by parents with respect to their children. This case is not just about C.M., Charles and Aminah. It has far reaching effects for all parents. If the trial court in this case can revoke Charles' status as custodian of C.M., when he was previously determined by the trial court to be a suitable parent, then, clearly, the fundamental right of all parents to the care, custody and management of their children is in jeopardy. For the foregoing reasons, Charles requests that this Court accept this jurisdictional appeal and hear this case.

Respectfully submitted,



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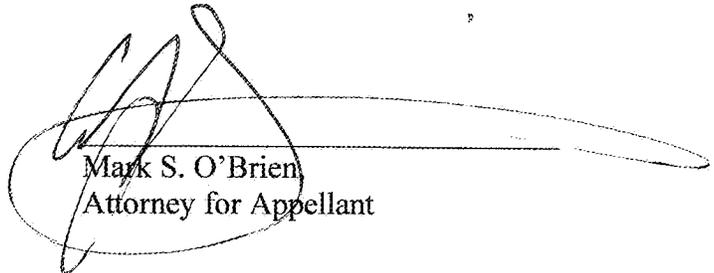
CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction was deposited in the U.S. Mail, postage prepaid, on this 16th day of September, 2013 for regular delivery to the following:

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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 99426

IN RE: C.V.M., JR.
A Minor Child

[Appeal by C.V.M., Sr., Father]

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. AD 03902263

BEFORE: E.A. Gallagher, J., Celebrezze, P.J., and Kilbane, J.

RELEASED AND JOURNALIZED: August 1, 2013

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FILED AND JOURNALIZED
PER APP.R. 22(C)

AUG X 1 2013

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By Deputy

EILEEN A. GALLAGHER, J.:

{¶1} Father-appellant appeals the trial court's decision that found him to be an unsuitable parent and awarded legal custody of his son, C.V.M., to appellee-custodian (hereinafter "stepmother"), a nonparent. For the reasons that follow, we affirm.

{¶2} The pertinent background facts of this case were stated by this court in *In Re: C.V.M., Jr.*, 8th Dist. No. 98340, 2012-Ohio-5514 ("C.V.M. I") as follows:

Appellant is the natural father of C.V.M., who was born in 2003. In 2004, the juvenile court granted custody of C.V.M. to father and his wife, who is not C.V.M.'s biological mother. Both father and wife acted as parents to the child. In 2010, wife filed for divorce against father. In May 2010, father filed a motion with the juvenile court for sole legal custody of C.V.M.; however, wife (hereinafter referred to as "custodian") obtained physical custody of the child. In August 2010, custodian was granted temporary custody of the child and was granted a divorce from father. Thereafter, a myriad of contentious motions were filed, and allegations were made by the parties against each other. Ultimately, motions were filed by custodian for sole legal custody of C.V.M. and by father for modification of the temporary custody order.

The trial court held a hearing on all pending motions, including the motions affecting the sole legal custody of C.V.M. The crux of the hearing was to determine who would be the child's legal custodian. The trial court took testimony from father, custodian, C.V.M.'s guardian ad litem, C.V.M.'s birth mother, and five character witnesses called on behalf of father. Following the hearing, the trial court issued a judgment entry and written opinion granting legal custody to custodian after finding that an award of custody to father would be detrimental to the child.

Id. at ¶ 2-3.

{¶3} In C.V.M. I, this court reversed the judgment of the trial court awarding sole custody to stepmother and remanded the case for the trial court to apply the correct legal standard of parental unsuitability to the facts elicited at the hearing. Upon remand, the trial court issued a new judgment entry finding appellant to be an unsuitable parent because an award of custody to appellant would be detrimental to C.V.M. The trial court again awarded legal custody of C.V.M. to stepmother. Appellant appeals from this judgment, asserting the following sole assignment of error:

The trial court abused its discretion in determining that [appellant] was an unsuitable parent.

{¶4} A trial court enjoys broad discretion in custody proceedings because “custody issues are some of the most difficult and agonizing decisions a trial judge must make.” *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 1997-Ohio-260, 674 N.E.2d 1159. A trial court’s custody determination will not be disturbed unless the court abused that discretion. *Miller v. Miller*, 37 Ohio St.3d 71, 74, 523 N.E.2d 846 (1988). An “abuse of discretion” connotes that the court’s attitude is “unreasonable, arbitrary, or unconscionable.” *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶5} While the trial court has discretion in custody proceedings, the record must contain sufficient factual evidence to support the court’s findings.

C.V.M. I, 8th Dist. No. 98340, 2012-Ohio-5514, citing *In re Schwendeman*, 4th Dist. Nos. 05CA18 and 05CA25, 2006-Ohio-636. We will not reverse a judgment as being against the manifest weight of the evidence when the record contains some competent, credible evidence going to all the essential elements of the case. *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus. In conducting our review, we must make every reasonable presumption in favor of the trial court's findings of fact. C.V.M. I, citing *Myers v. Garson*, 66 Ohio St.3d 610, 614, 1993-Ohio-9, 614 N.E.2d 742. We give deference to the trial court as the trier of fact because it is "best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony." C.V.M. I, quoting *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 461 N.E.2d 1273 (1984).

{¶6} Because legal custody where parental rights are not terminated is not as drastic a remedy as permanent custody, the trial court's standard of review in a legal custody proceeding is not clear and convincing evidence as in permanent custody proceedings, but merely preponderance of the evidence. C.V.M. I, citing *In re D.P.*, 10th Dist. Franklin No. 05AP-117, 2005-Ohio-5097. "Preponderance of the evidence" means "evidence that's more probable, more persuasive, or of greater probative value." *In re M.F.*, 5th Dist. Ashland No.

12-COA-036, 2013-Ohio-1755, quoting *State v. Finkes*, 10th Dist. Franklin No. 01AP-310, 2002-Ohio-1439.

{¶7} In a child custody proceeding between a parent and nonparent not arising from an abuse, neglect or dependency determination, a court may not award custody to the nonparent without first making a finding of parental unsuitability — that is, without first determining by a preponderance of the evidence that the parent abandoned the child, that the parent contractually relinquished custody of the child, that the parent has become totally incapable of supporting or caring for the child or that an award of custody to the parent would be detrimental to the child. *In re Perales*, 52 Ohio St.2d 89, 369 N.E.2d 1047 (1977), syllabus; *In re Hockstok*, 98 Ohio St.3d 238, 2002-Ohio-7208, 781 N.E.2d 971. The *Perales* test, however, requires that some detriment to the child be shown before he is taken away from an otherwise suitable parent. *Thrasher v. Thrasher*, 3 Ohio App.3d 210, 213, 444 N.E.2d 431 (9th Dist.1981).

{¶8} On remand, the trial court in this case found by a preponderance of the evidence that appellant was unsuitable because “an award of the child’s custody to the [appellant] would be detrimental to the child.” The trial court based this finding on the fact that appellant has a history of substance abuse, has spent minimal time with C.V.M. since appellant and stepmother separated, has provided minimal emotional support or guidance for C.V.M., has failed to

be supportive of C.V.M.'s schooling, has consistently missed C.V.M.'s extracurricular activities, consistently failed to provide any financial support for C.V.M., has stated that he would only allow C.V.M. to interact with stepmother on his own terms and has mental health problems. While we do not agree with every detail of each of the specific reasons espoused by the trial court or the relative weight the trial court may have assigned to them, in light of the entire record we cannot say that the trial court abused its discretion in finding that an award of custody to appellant would be detrimental to C.V.M.

{¶9} Appellant argues that the trial court abused its discretion by relying, in part, on evidence concerning appellant's suitability that existed prior to the juvenile court's original grant of custody to appellant in 2004. Specifically, the trial court found that appellant had a "history of substance abuse,"¹ felony convictions and possible mental health problems. The record reflects that each of these factors existed prior to 2003 when appellant was investigated by an assigned social worker, was "deemed an appropriate [caregiver] for his child" and was granted custody of C.V.M.

{¶10} While we agree with appellant's proposition that it would generally

¹We note that the trial court found appellant to have a "history of substance abuse" based on a single positive urine screen in 2003. The record reflects that appellant completed a drug and alcohol assessment with no recommendation being made and agreed to participate and follow all recommendations of the assessment including treatment, but the record is unclear as to whether he actually participated in or completed treatment or whether he submitted any subsequent urine specimens.

be inappropriate for a trial court to declare a parent unsuitable based solely on negative information that the court was aware of prior to the original grant of custody in favor of that parent, such is not the case before us. First, the trial court's unsuitability determination was based on far more information than just the above pre-existing conditions. Second, the record reflects that in 2003 the court did not grant sole custody of C.V.M. to appellant originally, but rather the complaint for legal custody for C.V.M. was amended to include stepmother. Appellant explained at the trial court's hearing that stepmother was added because she "conned" or tricked him into including her in the complaint for custody and he relented in hopes of appeasing her. Stepmother testified that after appellant failed a drug test, the Cuyahoga County Department of Children and Family Services ("CCDCFS") would not allow sole custody to appellant. She testified that the complaint was amended to include her as a co-custodian after she took, and passed, a drug test. The complaint refers to her as "step mother." Although we agree that the weight to be given to appellant's felony conviction, failed drug test and prior mental health concerns is slight, we note that the record does not reflect that these factors were a non-concern in the original custody decision. To the contrary. The record reflects that appellant may not have gained custody without stepmother joining in the complaint.

{¶11} We cannot fault the trial court for accepting the testimony of

stepmother as more credible than the testimony of appellant. The record reveals appellant's credibility to be highly suspect. During the trial court's hearing, appellant was repeatedly confronted with reports of negative behavior on his part and in each instance appellant asserted that the reporting party was lying and/or had fabricated the incidents in question. If one were to accept appellant's testimony as true, fellow Cleveland police officers fabricated and lied about events that led to his felony convictions and the end of his police career; the principal of C.V.M.'s former school lied about being cursed at by appellant that led to the school seeking a no trespassing order against him; Warrensville Heights police lied about his aggressive conduct at a visitation pick up that occurred at the Warrensville Heights Police Department; CCDCFS lied about his positive drug test in 2003; the Cuyahoga County Juvenile Court's clinical psychologist lied in her report regarding a discussion of his mental health; and both stepmother and C.V.M.'s biological mother lied about a plethora of issues to which they testified at the hearing.

{¶ 12} The evidence indicating that appellant is presently an unsuitable parent is of far greater concern to this court than felony convictions and a failed drug test from a decade in the past. The trial court noted that appellant has spent minimal time with C.V.M. since appellant and stepmother separated. We agree with appellant's criticism of this factor as a product, in part, of the trial

court's own temporary visitation schedule whereby appellant was only allotted four hours each Wednesday and three and one-half hours each Friday to spend with C.V.M. However, beyond this limited visitation schedule, the record supports the trial court's finding that appellant has "not availed himself of the court-ordered companionship time." Significant testimony was introduced regarding incidents at C.V.M.'s bus stop, stepmother's home and the Warrensville Heights Police Department where appellant failed to make use of his visitation time due to his own conduct and his failure to communicate in a civil manner with stepmother. Consistent with this pattern of behavior, the record reflects that appellant was barred from C.V.M.'s former school, has had problems with C.V.M.'s present school and caused one daycare center to decline care of C.V.M. while another daycare center called the police and banned him from their property. Stepmother also testified that when she initially separated from appellant she had asked appellant to watch C.V.M. while she worked and he declined.

{¶13} Appellant failed to attend C.V.M.'s extra-curricular activities including his participation in organized youth football wherein he won a local championship as the team's quarterback. Appellant blamed stepmother and C.V.M. for failing to make him aware of such opportunities to be a part of C.V.M.'s life. Stepmother testified that she did make appellant aware of

C.V.M.'s extracurricular activities.

{¶14} The record supports the trial court's finding that appellant has failed to provide any financial or medical support for C.V.M. in the time since appellant and stepmother separated.² Appellant did not deny this at the hearing despite the presentation of evidence that he had ample capability to provide such support. There is no explanation for this failure other than that appellant chose to withhold support for C.V.M. due to his negative feelings towards stepmother and the fact that during the pendency of this case she retained custody of C.V.M.

{¶15} The Guardian ad litem ("GAL") report and the juvenile court's child custody / visitation evaluation performed by Dr. A. Justice raise the greatest concerns regarding appellant's unsuitability. We are mindful that the test for parental "suitability" is different from the "best interest" test. A pure "best interest" test looks totally to the best situation available to the child and places the child in that situation. *Thrasher v. Thrasher*, 3 Ohio App.3d 210, 213, 3 Ohio B. 240, 444 N.E.2d 431 (9th Dist.1981). The *Perales* test, however, requires that some detriment to the child be shown before he is taken away from an otherwise suitable parent. Simply because one situation or

²The record reflects that the sole item that appellant provided C.V.M. in the time since appellant and stepmother separated was a pair of hand-me-down shoes, which were many sizes too large for C.V.M.

environment is the "better" situation does not mean that the other is detrimental or harmful to the child. *In re Porter*, 113 Ohio App.3d 580, 589, 681 N.E.2d 954 (3d Dist.1996). Our task is not to weigh whether custody in favor of stepmother would be a better situation for C.V.M. than custody in favor of appellant. However, we must consider whether placement of C.V.M. in the custody of appellant would be detrimental to the child. We find that in addition to the previously discussed factors, the GAL report and the child custody / visitation evaluation strongly support the trial court's conclusion that such custody would be detrimental.

{¶16} The child custody / visitation evaluation performed by Dr. Justice reported that appellant demonstrated "delusional ideation involving religious and persecutory themes." Appellant's personality assessment inventory suggested "suspicion, hostility, and quick anger responses." Dr. Justice observed C.V.M. and appellant interacting and described C.V.M. as being uncomfortable and possessing a "reserved demeanor with his eyes downcast." C.V.M. was "sullen and reserved" when in the company of appellant. Dr. Justice did not observe such uncomfortable behavior in C.V.M.'s interactions with others.

{¶17} Dr. Justice also noted that appellant spoke in vagaries that appeared to have no effect upon C.V.M. and which C.V.M. later confirmed

privately that he did not understand. C.V.M. told Dr. Justice that he spends just about the right amount of time with appellant and would like to spend even more time with stepmother. The record, including appellant's own testimony, indicated that when appellant does have visitation time with C.V.M., the child spends significant time alone in his room bouncing a basketball. Dr. Justice testified that C.V.M.'s responses showed that "he is a sad child who frequently feels like crying and who looks upon his future with a sense of uncertainty and apprehension" and noted that C.V.M.'s mental health records indicated that he possessed adjustment disorder with anxiety and individual counseling had been recommended to address fear and anxiety about his father. Dr. Justice further testified that C.V.M. was afraid of appellant because he is mean.

{¶18} In regards to appellant's mental health, Dr. Justice concluded:

[Appellant] likely has a psychotic condition. He is highly defensive and has a history of providing little information upon clinical evaluation, necessarily making precise diagnosis difficult. [Appellant] has consistently had problems in conforming his behavior to meet societal standards. He presently demonstrated a stilted, overly intellectualized style of interacting that is often seen in individuals suffering schizophrenia. He was pushy and insistent when interacting with [C.V.M.] for purposes of the present evaluation. He clearly prioritized his own needs over those of the child.

{¶19} The GAL testified that C.V.M. prefers to live with stepmother but to have contact with appellant. The GAL noted that

C.V.M. viewed stepmother as "mom." In fact, the record reflects that C.V.M. was unaware of the fact that stepmother was not his biological mother until the pendency of this custody dispute when appellant informed him of that fact.

{¶20} The GAL further testified that C.V.M. has nightmares of people breaking into his home and kidnapping him and is fearful that he won't see stepmother again should appellant gain custody. C.V.M. reported that he was also fearful that should custody be awarded to appellant, he would no longer have contact with his biological mother and siblings, at least one of whom C.V.M. has developed a close relationship with.

{¶21} Consistent with these concerns, appellant testified at the hearing that should he gain custody of C.V.M., he would "probably" allow C.V.M. to see stepmother but only "on his terms." Appellant had no idea what his terms would be and stated that he would raise his son as he saw fit. The record reflects that appellant sent a threatening text message to stepmother intimating that she would not see C.V.M. in the future.

{¶22} The GAL testified that custody in favor of appellant would be detrimental to C.V.M. This court has previously found such an opinion to carry significant weight. *See, e.g., In Re: S.M.*, 160 Ohio App.3d 794,

2005-Ohio-2187, 828 N.E.2d 1044 (8th Dist.). The GAL based his opinion in large part on appellant's own position that C.V.M. would only be allowed contact with stepmother on his terms. The record reflects that appellant's behavior towards stepmother has created a hostile environment in which the parties are unable to adequately communicate in regard to parenting and visitation issues, even in the face of a court-ordered visitation schedule. Appellant's own testimony at the hearing confirms his inability to establish the necessary cooperation with stepmother to facilitate court-ordered visitation. The GAL's concern that appellant would frustrate or terminate contact between C.V.M. and stepmother to the detriment of C.V.M. is supported by the record. Dr. Justice's evaluation of C.V.M. demonstrates the detriment that the mere threat of the severance or disruption of C.V.M.'s relationship with stepmother has had on C.V.M.'s mental health during this custody dispute.

{¶23} The GAL also expressed his concerns regarding appellant's inability to interact appropriately with others, particularly C.V.M.'s school and daycare staff. We share the GAL's concern on this point. The record is replete with evidence of appellant's inability to interact in a civilized

manner with others, much less stepmother, and the testimony of all parties including appellant, revealed that he treats her with open hostility. Even if we were to disregard the mental health evaluation of Dr. Justice, it is firmly established in the record that appellant is unable to conduct himself in a reasonable and appropriate manner when interacting with third parties involved in C.V.M.'s life and that his failure to do so is detrimental to C.V.M.

{¶24} Although natural parents have a fundamental liberty interest in the care, custody and management of their children and a finding of parental unsuitability is not to be made lightly, considering the above record we cannot say that the trial court abused its discretion in finding appellant to be unsuitable. A preponderance of the evidence demonstrated that appellant is an unsuitable parent and that an award of the custody to the appellant would be detrimental to C.V.M.

{¶25} Appellant's sole assignment of error is overruled.

{¶26} The judgment of the trial court is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said lower court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant
to Rule 27 of the Rules of Appellate Procedure.



EILEEN A. GALLAGHER, JUDGE

FRANK D. CELEBREZZE, JR., P.J., and
MARY EILEEN KILBANE, J., CONCUR