[Cite as *Lewis v. Lewis*, 2001-Ohio-3167.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

SARA LEWIS, n.k.a. FRAM	)	**CASE NO. 99-JE-6**
	)	
PLAINTIFF-APPELLANT	)	
	)	
VS.	)	**O P I N I O N**
	)	
ROBERT LEWIS	)	
	)	
DEFENDANT-APPELLEE	)	
	)	
AND	)	
	)	
PATRICIA WHITE	)	
	)	
INTERVENOR-APPELLEE	)	

CHARACTER OF PROCEEDINGS: **Civil Appeal from Jefferson County Court of Common Pleas Jefferson County, Ohio Case No. 94 DR 391**

JUDGMENT: **Affirmed.**

JUDGES:
Hon. Cheryl L. Waite
Hon. Edward A. Cox
Hon. Gene Donofrio

[Cite as *Lewis v. Lewis*, 2001-Ohio-3167.]

Dated: January 31, 2001

APPEARANCES:

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WAITE, J.

{¶1} This timely appeal arises from the decision of the Jefferson County Court of Common Pleas to grant custody of Constance Lewis to her maternal great-grandmother, Intervenor-Appellee ("Appellee") Patricia White. For the following reasons, we affirm the judgment of the trial court.

{¶2} On July 24, 1993, Constance Lewis (Connie) was born to Appellant Sara Lewis and Robert Lewis. On November 9, 1994, Appellant filed a complaint for divorce from Robert Lewis. On March 16, 1995, the Jefferson County Court of Common Pleas granted

the divorce and gave custody of Connie to Appellant in Case No. 94-DR-391.

{¶3} Connie was born with a cleft lip and palate which made feeding difficult. Shortly after her birth, Connie was hospitalized for failure to thrive and required several surgeries to correct her malady. Unknown to the trial court at the time of the divorce, Connie was placed in the physical custody of Appellee Patricia White, her maternal great-grandmother, who lived closer to the Akron hospital were the surgeries were performed. Because of her impairment, Connie was eligible for Social Security Disability Benefits. However, despite the fact that Connie was cared for by Appellee, Appellant received Connie's benefit checks and used them to her own advantage.

{¶4} Appellee was Connie's primary care giver from the time that Connie was approximately nine months old until May 18, 1998, at which time Appellant forcibly removed Connie from Appellee's residence. Subsequent to those events, Appellee filed an action in the Portage County Juvenile Court seeking legal custody of Connie. The Portage County Juvenile Court ruled that it lacked jurisdiction as Connie's legal residence was in Jefferson County. The case was transferred to the Jefferson County Juvenile Court which ruled that it lacked jurisdiction because the general division of the Common Pleas Court retained jurisdiction over the matter by way of the judgment granting Appellant a divorce and

giving her custody of Connie.

{¶5} On October 23, 1998, Appellee filed a motion to intervene and for allocation of parental rights and responsibilities with respect to Appellant's original divorce action. The trial court allowed Appellee's motion and held a hearing on the request for allocation of parental rights. On January 28, 1999, the trial court filed a journal entry ruling that neither Appellant nor Connie's father were suitable parents and it was in Connie's best interest to place her in the permanent custody of Appellee.

{¶6} On February 4, 1999, Appellant filed her notice of Appeal. Her first assignment of error alleges:

{¶7} "THE TRIAL COURT DID NOT HAVE JURISDICTION TO DETERMINE CUSTODY OF CONNIE."

{¶8} Appellant cites *In re Poling* (1992), 64 Ohio St.3d 211, 215, for the proposition that a juvenile court has jurisdiction to decide issues of child custody when a determination of child custody had previously been made in a divorce proceeding in a domestic relations court. Appellant further states that under R.C. §2151(A)(1), the Juvenile Court has exclusive jurisdiction over dependency actions, while under R.C. §2151(A)(2), the Juvenile Court has exclusive jurisdiction to determine custody of a child not a ward of any other court. Appellant asserts that Appellee invoked the exclusive jurisdiction of the Juvenile Court when she filed the action in Portage County. Appellant also

contends that as Appellee did not appeal the decision of the Portage County Court to transfer jurisdiction to the Jefferson County Juvenile Court, the latter was the only forum in which Appellee could litigate her custody claim.

{¶9} This assignment of error lacks merit.

{¶10} Appellant misconstrues R.C. §2151.23(A)(1)(2) as granting sole jurisdiction over the present matter to the juvenile court. The statute provides:

{¶11} "(A) The juvenile court has exclusive *original* jurisdiction under the Revised Code as follows:

{¶12} "(1) Concerning any child who * * * is alleged to be * * * a delinquent, unruly, abused, neglected, or dependent child;

{¶13} "(2) * * * to determine the custody of any child not a ward of another court of this state[.]" (Emphasis added).

{¶14} Appellant has not considered that the juvenile court has "original" jurisdiction of the matters named in the statute. In the matter before us, jurisdiction had previously vested in the common pleas court. Appellant misconstrues both the statute and *In re Poling, supra,* as holding that the juvenile court has exclusive jurisdiction over the custody of a child when a custody determination has been previously made in a domestic relations proceeding.

{¶15} Construing R.C. §2151.23(A), the Ohio Supreme Court in *In re Poling* determined that the phrase, "* * * any child not a 'ward of another court' * * * cannot be construed to prohibit a juvenile court from changing custody of children subject to a divorce

decree." *Id.*, 214. The Supreme Court stated:

{¶16} "We hold that pursuant to R.C. 2151.23(A), the juvenile court has jurisdiction to determine the custody of a child alleged to be abused, neglected, or dependent when not the ward of any court in this state. Under our interpretation of subdivision (A)(2) of R.C. 2151.23, this jurisdiction includes children subject to a divorce decree granting custody pursuant to R.C. 3109.04."

{¶17} Id., 215.

{¶18} However, the Court continued:

{¶19} "While clarifying the jurisdiction of the juvenile court under R.C. 2151.23, we recognize some confusion exists in light of the continuing jurisdiction of the domestic relations court which awards custody in divorce cases under R.C. 3109.04. Particularly, this becomes apparent when considering the case of *Loetz v. Loetz* (1980), 63 Ohio St.2d 1, 2 [citations omitted] wherein we reiterated that '[t]he court in which a decree of divorce is originally rendered retains continuing jurisdiction over matters relating to the custody, care, and support of the minor children of the parties. [citations omitted]'

{¶20} "Therefore, a court which renders a custody decision in a divorce case has continuing jurisdiction to modify that decision. However, the juvenile court has jurisdiction to make custody awards under certain circumstances. Hence, for the purposes of deciding custody where there has been a prior divorce decree, these courts can accurately be said to have concurrent jurisdiction. In other words, the juvenile court may entertain and determine custody of children properly subject to its jurisdiction, even though there has been a prior divorce decree granting custody of said children to a parent pursuant to R.C. 3109.04."

{¶21} *Id.*

{¶22} It is unmistakable that the trial court in the present case had concurrent jurisdiction with the juvenile court to determine the custody of Connie. Appellee sought a modification of the previous allocation of parental rights and responsibilities, a matter clearly cognizable in the common pleas

court. Accordingly, we hold that Appellant's first assignment of error lacks merit.

{¶23} Appellant's second assignment of error alleges:

{¶24} "THE TRIAL COURT FAILED TO USE THE CORRECT STANDARD OF PROOF IN FINDING MS. FRAM UNSUITABLE FOR CUSTODY OF HER DAUGHTER."

{¶25} Appellant states that both the United States Supreme Court and the Ohio Supreme Court have determined that biological parents have a fundamental interest in the custody of their children. *Santosky v. Kramer* (1982) 455 U.S. 743; *In re Perales* (1977), 52 Ohio St.2d 89. Appellant argues that under *In re Perales*, a trial court must prove by a preponderance of evidence that a parent is unsuitable to have custody of a child in order to terminate parental rights but that according to *Santosky v. Kramer*, a trial court must employ the clear and convincing evidence standard when terminating parental rights in favor of granting custody to a non-parent. Appellant further states that in *Johntonny v. Malliski* (1990), 67 Ohio App.3d 709, the court of appeals stated that to terminate a parent's fundamental right to visitation, the trial court must employ the clear and convincing standard. By analogy, Appellant argues that the same standard must be employed when the paramount right of custody is concerned.

{¶26} This assignment of error lacks merit. Appellant is confused as to the nature of the proceedings by which Appellee was granted custody of Connie. Appellant's entire argument presumes

that the trial court terminated her parental rights when in fact this matter came before the trial court on Appellee's motion for *allocation* of parental rights and responsibilities pursuant to R.C. §3109.04; there is nothing on the record to indicate that the proceedings in any way *terminated* Appellant's parental rights. Under R.C. §3109.04(D)(2), the trial court may award custody of a child to a relative if the court finds that, "* * * it is in the best interest of the child for neither parent to be designated the residential parent and legal custodian of the child." The standard for the court is clearly to consider what is in the best interest of the child, not, as Appellant contends, to determine by clear and convincing evidence that Appellant was not a suitable parent.

{¶27} **R.C. §3109.04(E)(1)(a)(iii) provides in pertinent part:**

{¶28} **"The court shall not modify a prior decree allocating parental rights and responsibilities for the care of children unless it finds, based on facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child, his residential parent, * * *, and that the modification is necessary to serve the best interest of the child. In applying these standards, the court shall retain the residential parent designated by the prior decree * * *, unless a modification is in the best interest of the child and * * * The harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child."**

{¶29} **A trial court has the power to exercise broad discretion in matters concerning the allocation of parental rights and responsibilities, and its decision shall not be disturbed on**

appeal absent a showing of an abuse of such discretion. *Masters v. Masters* (1994), 69 Ohio St.3d 83, 85. An abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. The discretion exercised by the trial court must be given our utmost respect as the trial court is in a superior position to evaluate the parties' credibility and the relevant factors. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74.

{¶30} A review of the transcript reveals that the circumstances support a change of custody and that the trial court's decision was within its discretion. There was testimony that Connie resided with Appellee since infancy following her admittance to the hospital for failure to thrive. (Tr. 1/6/99 pp. 45, 77). Moreover, there was testimony that Appellant did not seek Connie's return until May of 1998. (Tr. 1/6/99 p. 88). This is in contrast to evidence before the trial court at the time of Appellant's divorce. There was no mention in Appellant's parenting affidavit that Connie was residing with Appellee or that Appellee had any role as a care giver.

{¶31} There was also testimony that Appellant ignored Connie's medical needs caused by her birth defects while Appellee tended to Connie's needs during her recovery. (Tr. 1/6/99 pp. 47-48). Appellee testified that Appellant violently snatched Connie away

from her and that Appellant dragged Appellee with her car and then ran over her. (Tr. 1/6/99 p. 94-96).

{¶32} Appellant admitted to a history of mental health problems. (Tr. 1/6/99 p. 162). Moreover, Appellant testified as to some questionable parenting practices. She admitted to permitting her husband to prepare a mixture containing Mountain Dew for one of her infant children. (Tr. 1/6/99 p. 189). Appellant also testified that she taught five year old Connie to operate a microwave oven. (Tr. 1/6/99 pp. 189-190). Connie's Guardian Ad Litem also testified as to the unsuitable conditions for Connie at Appellant's home, highlighted by the instance of Connie not arriving home on her school bus with no genuine concern from Appellant. (Tr. 1/6/99 pp. 14-15).

{¶33} Given the testimony presented to the trial court, it was not an abuse of discretion for the court to place Connie in Appellee's custody. Therefore, we hold that this assignment of error lacks merit. Accordingly, we affirm the judgment of the trial court.

{¶34} Cox, P.J., concurs in judgment only and with the concurring opinion of Judge Donofrio.

{¶35} Donofrio, J., concurs in judgment only; see concurring opinion.

{¶36} DONOFRIO, J., concurring in judgment only.

{¶37} As early as 1855, the Ohio Supreme Court recognized that custody determinations should be made with a "single reference" to

the child's best interest. *Gishwiler v. Dodez* (1855), 4 Ohio St. 615, 617. However, it also later recognized that a "suitable" parent's right to the custody of his or her child "is paramount to that of all other persons" when deciding a dispute between a parent and a nonparent. *Clark v. Bayer* (1877), 32 Ohio St. 299, paragraph one of the syllabus. Notwithstanding the child's best interest as addressed in *Gishwiler*, the *Clark* court appreciated a natural parent's common law right to raise and care for his or her own child.

{¶38} Prior to 1974, statutory law was in accord. R.C. 3109.04 mandated that upon a finding that neither parent was suitable to have custody, a court could grant custody of a minor child to another relative. However, in 1974, the General Assembly amended R.C. 3109.04 to allow a court to grant custody to another relative if the court finds that custody to neither parent is in the best interest of the child. Specifically, under R.C. 3109.04(D)(2):

{¶39} "If the court finds, with respect to any child under eighteen years of age, that it is in the best interest of the child for neither parent to be designated the residential parent and legal custodian of the child, it may commit the child to a relative of the child or certify a copy of its findings, together with as much of the record and the further information, in narrative form or otherwise, that it considers necessary or as the juvenile court requests, to the juvenile court for further proceedings, and, upon the certification, the juvenile court has exclusive jurisdiction."

{¶40} The Supreme Court of Ohio interpreted this provision in *Boyer v. Boyer* (1976), 46 Ohio St.2d 83, paragraph one of the

syllabus. In that case, the natural mother of a child sought custody of him in a divorce action. *Id.* at 84. The child, however, had lived with his paternal grandparents since shortly after his birth, and was six years-old at the time of the divorce. *Id.* at 83-84. The grandparents sought to retain custody, and the child's father supported their claim. After finding that the best interest of the child supported his remaining with the grandparents, the domestic relations court granted them custody. On appeal, the Supreme Court affirmed the judgment of the trial court. *Id.* at 87.

{¶41} The mother in *Boyer* argued that the domestic relations court had erred in granting custody to a non-parent without first finding that his natural parents were unsuitable. *Id.* at 85-86. The Supreme Court held, to the contrary, that R.C. 3109.04 expressly permitted the trial court to award custody to a relative upon a finding that it was in the child's best interest. *Id.* at paragraph one of the syllabus. The court stated, "The General Assembly has [with R.C. 3109.04] granted to children the right to be placed with the relative whose custodianship would be in the child's best interest." *Id.* at 86. The court also expressed the view that "the child's right to a suitable custodian and parental rights, when not in harmony, are competing interests, requiring that one give way to the other." *Id.* at 87. Because the General Assembly had acted in support of the child's rights, those rights

prevailed. See *id*. at 86-87.

{¶42} In *Boyer*, the Supreme Court applied a best-interest analysis adopted by statutory enactment in domestic relations cases. A different, common-law standard applies, however, in proceedings between parents and non-parents for which the legislature has not expressly embraced the best-interest analysis. The common-law standard was announced by the Ohio Supreme Court in *In re Perales* (1977), 52 Ohio St.2d 89, syllabus.

{¶43} *Perales* involved a child custody action arising in the juvenile court under R.C. 2151.23, instead of the domestic relations court under R.C. 3109.04. *Id*. at 90. The mother in *Perales* sought to regain custody of the daughter she had given up approximately two years earlier when she signed an agreement purporting to surrender custody to a non-relative. *Id*. The trial court granted custody to the adoptive parent after finding that the child's best interest lay with that grant of custody. *Id*. The court of appeals reversed the judgment, determining that the natural mother was entitled to custody as a matter of law. *Id*. at 91-92. The Supreme Court, then, reversed the appeals court's judgment, but it remanded the cause for the trial court to consider mother's suitability as a parent in accordance with the standard announced in its opinion. *Id*. at 99.

{¶44} In the *Perales* opinion the Supreme Court noted a long-standing judicial rule recognizing that parents who are "suitable"

have a "paramount" right to custody of their minor children unless they forfeit that right by contract, abandonment, or by their becoming unable to care for the children. *Id.* at 97, quoting *Clark v. Bayer* (1877), 32 Ohio St. 299. The court distinguished *Boyer* by noting that *Boyer* arose under R.C. 3109.04 and involved a custody award to a relative of the child, whereas the *Perales* case arose under R.C. 2151.23(A) and involved the custody claims of a non-relative. *Id.* at 96. Thus, the court rejected the best-interest-only approach of *Boyer* for matters arising under R.C. 2151.23. *Id.* The court held that before a juvenile court could award custody to a non-parent there must be a judicial finding of unsuitability, which could be shown by evidence that the parent contractually relinquished custody, that the parent had become incapable of caring for the child, or that an award of custody to the parent would be detrimental to the child. *Id.* at syllabus.

{¶45} The adoption of two different standards for parent/non-parent custody disputes in *Boyer* and *Perales* has resulted in much confusion. See *Baker v. Baker* (1996), 113 Ohio App.3d 805, 808; *Thrasher v. Thrasher* (1981), 3 Ohio App.3d 210 ("It is evident that there may be disputes between parents and non-parents under either R.C. 3109.04 or 2151.23, and it would be inconsistent and unwise to have two distinct substantive law tests, one for each statute."); *Wright v. Wright* (Oct. 19, 1995), Cuyahoga App. 67884, unreported, 1995 WL 614500 at *9 (Harper, J., dissenting) ("The

law is certainly unsettled in this regard considering the difference of opinion by the appellate courts of this state following the Supreme Court of Ohio's decision in *Perales*."). The resulting inconsistency is most apparent in cases like the case at hand, where a relative of the child and the child's natural parent compete for custody. If the custody dispute arises in the context of a divorce, under R.C. 3109.04(D)(2) and *Boyer*, the court need only consider the best interest of the child. See, *e.g.*, *Baker*, 113 Ohio App.3d at 812. On the other hand, if a custody dispute arises as an original action in the juvenile court, the common-law *Perales* standard applies and the court must weigh parental suitability. See, *e.g.*, *Reynolds v. Goll* (1996), 75 Ohio St.3d 121, 123; *In re Porter* (1996), 113 Ohio App.3d 580, 589. Other than the difference in the statutes, there appears to be little logic in applying different standards simply because different divisions of the court are exercising jurisdiction. See *Thrasher*, 3 Ohio App.3d at 213.

{¶46} **In *Thrasher v. Thrasher* (1981), 3 Ohio App. 3d 210, the Ninth District Court of Appeals, while noting that the Supreme Court in *Perales* distinguished R.C. 3109.04 because that section generally pertains to custody disputes between two parents rather than between a parent and a non-parent, nevertheless found the reasoning of *Perales* applicable to R.C. 3109.04. The court stated:**

{¶47} "Clearly the best interests test of R.C. 3109.04 was not meant to apply only to disputes between parents as *Perales* indicates. The language of the statute itself states that if granting custody to neither parent is in the best interests of the child, the court may grant custody to another relative. In *Boyer v. Boyer*, *supra*, where the Supreme Court construed R.C. 3109.04 to require only a best interests test, the dispute was between a parent and a non-parent. It is evident that there may be disputes between parents and non-parents under either R.C. 3109.04 or 2151.23, and it would be inconsistent and unwise to have two distinct substantive law tests, one for each statute. In fact, as the dissent in *Perales* notes, R.C. 2151.23 is merely a jurisdictional statute which does not have a substantive law test attached to it. Thus, by re-introducing the suitability test the court in effect modified Boyer, supra, and its construction of R.C. 3109.04."

{¶48} The *Thrasher* court further noted that the Supreme Court handled the potential conflict between the suitability test and the best interest test by defining suitability in terms of the best interest of the child. See syllabus of *Perales*, *supra* (one indicia of parental unsuitability is if "an award of custody to the parent would be detrimental to the child.").

{¶49} The Ninth District has subsequently criticized its holding in *Thrasher*. In *Reynolds v. Goll* (1992), 80 Ohio App.3d 494, affirmed (1996), 75 Ohio St.3d 121, the Ninth District recognized that *Boyer* was still controlling precedent in proceedings under R.C. 3109.04 and announced its intention to no longer follow the precedent of *Thrasher*. *Id*. at 498; see also *Baker*, 113 Ohio App.3d at 813, (Ninth District holding that an explicit finding of unsuitability is not necessary under R.C. 3109.04.). However, in *Comstock v. Comstock* (Mar. 1, 2000),

Lorain App. No. 99CA007339, unreported, 2000 WL 235552, the Ninth District stated:

{¶50} "Both R.C. 3109.04 and R.C. 2151.23 provide for custody of a child to be awarded to a nonparent. In custody proceedings between a parent and a nonparent, custody may not be awarded to the nonparent without first determining that the parent is unsuitable. *In re Perales* (1977), 52 Ohio St.2d 89, 369 N.E.2d 1047, syllabus." 2000 WL 235552 at *2.

{¶51} Nevertheless, the Third District had already adopted the *Thrasher* rationale in *In re Dunn* (1992), 79 Ohio App.3d 268, 271, and has continued to follow it. See *Houser v. Houser* (Aug. 31, 1998), Mercer App. No. 10-98-7, unreported, 1998 WL 598104. Likewise, the Fourth District Court of Appeals has adopted the *Thrasher* approach, *Van Hoose v. Van Hoose* (Apr. 19, 1990), Pike App. No. 433, unreported, 1990 WL 54873, and appears likely to adhere to it, see *Thompson v. Thompson* (Aug. 10, 1995), Highland App. No. 94CA859, unreported, 1995 WL 481480.

{¶52} More importantly, the United States Supreme Court has repeatedly recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. See, *e.g.*, *Meyer v. Nebraska* (1923), 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (holding that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own."); *Pierce v. Society of Sisters* (1925), 268 U.S. 510, 534-535, 45 S.Ct. 571, 69 L.Ed. 1070 (holding that

the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control."); *Prince v. Massachusetts* (1944), 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *Stanley v. Illinois* (1972), 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'" (citation omitted)); *Wisconsin v. Yoder* (1972), 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L.Ed.2d 15 ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); *Quilloin v. Walcott* (1978), 434 U.S. 246, 255, 98 S.Ct. 549, 54 L.Ed.2d 511 ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); *Parham v. J. R.* (1979), 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 ("Our jurisprudence historically has reflected Western civilization concepts of the

family as a unit with broad parental authority over minor children. Our cases have consistently followed that course."); *Santosky v. Kramer* (1982), 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child."); *Washington v. Glucksberg* (1997), 521 U.S. 719, 720, 117 S.Ct. 2258 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the righ[t] * * * to direct the education and upbringing of one's children." (citing *Meyer* and *Pierce*)).

{¶53} The U.S. Supreme Court reaffirmed this principle once again as recently as June 2000 in *Troxel v. Granville* (2000), 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49. In that case, the court found a Washington state nonparental visitation statute at odds with this principle and ruled it unconstitutional. The statute provided, "*[a]ny person* may petition the court for visitation rights at any time," and the court may grant such visitation rights whenever "visitation may serve *the best interest of the child*." (Emphases added.) Wash.Rev.Code 26.10.160(3). The court noted:

{¶54} "That language effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review. Once the visitation petition has been filed in court and the matter is placed before a judge, a parent's decision that visitation would

not be in the child's best interest is accorded no deference. Section 26.10.160(3) contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the State of Washington a court can disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests." *Troxel*, 530 U.S. at __, 120 S.Ct. at 2061.

{¶55} Although R.C. 3109.04 does not sweep as broadly as the statute at issue in *Troxel*, it nevertheless "directly contravene[s] the traditional presumption that a fit parent will act in the best interest of his or her child," *Troxel*, 530 U.S. at __, 120 S.Ct. at 2062, when a nonparent moves for custody.

{¶56} Viewing R.C. 3109.04 in light of *Troxel*, I believe its constitutionality as applied in certain situations is open to debate. However, this is not the case for such a determination. The trial court took the exact approach I would advocate in a case such as this one. The court observed:

{¶57} "Normally, custody or parental rights issues are determined purely by the best interest of the child. Where a non-parent is requesting custody or 'parental rights' a threshold finding that both natural parents are unsuitable is necessary before the Court reaches the issue of the best interests of the child." Feb. 1, 1999 Findings of Fact and Conclusions of Law, p. 7

{¶58} The court then went on to give a detailed and well-reasoned explanation that appellant is unsuitable.[1] Based on the

[1] Appellant also argues that the trial court erred by using a

foregoing, I concur in the judgment only.

"preponderance of the evidence" standard rather than a "clear and convincing evidence" standard in determining that she was unsuitable. It is not clear from the court's decision which standard it applied. However, a thorough review of the court's decision reveals that its determination was supported by clear and convincing evidence.