

**COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT**

WILLIAM W. DINGER, I	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellant	:	Hon. John F. Boggins, J.
	:	
-vs-	:	Case No. 2001CA00039
	:	
TERESA MARIA DINGER	:	<u>OPINION</u>
	:	
Defendant-Appellee	:	

CHARACTER OF PROCEEDING: Civil Appeal from the Common Pleas Court, Juvenile Division
Case No. JU113132

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: 9/24/2001

APPEARANCES:

For Plaintiff-Appellant

**CHRISTINE A. JOHNSON
4200 Munson St., N.W.
Canton, Ohio 44735-5426**

For Defendant-Appellee

**HERBERT J. MORELLO
116 Cleveland Avenue, N.W.
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Boggins, J.

This is an appeal from a decision of the Court of Common Pleas, Juvenile Division awarding custody of Daniel Lee W. Dinger (D.O.B. 6/12/87) and Sarah E. Dinger (D.O.B. 10/9/93) to their mother, Teresa Maria Dinger, the appellee.

The sole Assignment of Error is:

I.

THE TRIAL COURT'S ORDER SHOULD BE VACATED BECAUSE THE TRIAL COURT JUDGE ABUSED HIS DISCRETION BY AWARDING LEGAL CUSTODY OF DANIEL DINGER AND SARAH DINGER TO THE BIOLOGICAL MOTHER, TERESA MARIA DINGER, RATHER THAN TO THE BIOLOGICAL FATHER, WILLIAM W. DINGER, WHEN SUCH ORDER WAS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE TO BE IN THE BEST INTERESTS OF THE CHILDREN.

The facts behind this cause are that appellee was married to appellant's son, William Dinger, II.

While she and such son were residing with appellant and his wife, appellant and his daughter in law began an adulterous relationship which produced the children whose custody is the issue of this appeal.

Appellant and his wife were divorced but have remarried subsequent to the marriage and dissolution of appellant and appellee.

Appellee is now residing with a male friend along with two sons and a daughter.

The parties have had a tumultuous relationship since their dissolution with allegations of domestic violence, stalking and arguments.

The trial court considered the recommendation of the guardian *ad litem* as to the granting of custody to the mother.

The trial court agreed and concluded that the best interests of the children were served with custody being granted to appellee.

This appeal asserts that such decision was an abuse of discretion.

In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217. We must look at the totality of the circumstances in the case *sub judice* and determine whether the trial court acted unreasonably, arbitrarily or unconscionably.

We are not fact finders; we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there is relevant, competent and credible evidence upon which the fact finder could base its judgment. *Cross Truck v. Jeffries* (Feb. 10, 1982), Stark App. No. CA-5758, unreported. Accordingly, judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction* (1978), 54 Ohio St.2d 279.

The trial court in this case as a basis for its decision considered the extensive statutory factors of R.C. §3109.04(F) as to the best interests of the children.

R.C. §3109.04(F)

(F)(1) In determining the best interest of a child pursuant to this section, whether on an original decree allocating parental rights and responsibilities for the care of children or a modification of a decree allocating those rights and responsibilities, the court shall consider all relevant factors, including, but not limited to:

(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 previously has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code 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.

(2) 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.**
- (3) When allocating parental rights and responsibilities for the care of children, the court shall not give preference to a parent because of that parent's financial status or condition.**

While the conduct of the parties left much to be desired as role models for the children, both Daniel and Sarah appeared to be well cared for and adjusting satisfactorily at school and at the home of the mother.

This court determines that no abuse of discretion occurred and that the evidence before the trial court supported the decision reached as to assignment of custody.

Appellant's sole Assignment of Error is overruled.

The decision of the trial court is affirmed.

By Boggins, J.

Gwin, P.J. and

Wise, J. concur

JUDGES

JFB/jb 0907

FIFTH APPELLATE DISTRICT

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For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas, Juvenile Division is affirmed.

Costs to appellant.

JUDGES