[Cite as *Wilson v. Wilson*, 2009-Ohio-4978.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

PAULETTE L. WILSON nka MOORE,	:	
Plaintiff-Appellant,	:	Case No. 09CA1
vs.	:	
LARRY GREG WILSON,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellee.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Joan M. Garaczkowski, 602 Chillicothe Street, Suite 224, Portsmouth, Ohio 45662

COUNSEL FOR APPELLEE: Kevin Waldo, 413 Center Street, P.O. Box 4252, Ironton, Ohio 45638

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 9-11-09

ABELE, J.

{¶ 1} This is an appeal from a Lawrence County Common Pleas Court judgment that modified a prior allocation of parental rights and responsibilities ordered in the divorce proceedings between Larry Greg Wilson, defendant below and appellee herein, and Paulette L. Wilson nka Moore, plaintiff below and appellant herein.

{¶ 2} Appellant raises the following assignment of error for review:

> "THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEE'S MOTION TO MODIFY CUSTODY OF THE PARTIES' SEVEN YEAR OLD CHILD BECAUSE THE PROCEDURAL REQUIREMENTS FOR

> CONDUCTING A CHILD'S INTERVIEW PURSUANT TO OHIO REVISED CODE 3109.04(B)(2)(c) WERE NOT FOLLOWED, AND BECAUSE THE REQUIRED CHANGE IN CIRCUMSTANCES NEEDED WHEN MODIFYING PARENTAL RIGHTS AND RESPONSIBILITIES PURSUANT TO OHIO REVISED CODE 3109.04(E)(1)(a) WERE NOT ESTABLISHED."

{¶ 3} On June 12, 2002, the parties divorced. The court designated appellant the residential parent of the parties' only child, born June 2, 2000, and awarded appellee parenting time.

{¶ 4} On January 16, 2007, appellee filed a motion to modify the prior allocation of parental rights and responsibilities and requested the court to designate him the child's residential parent. Appellee alleged that his work schedule and "other issues of parenting the child" constituted a change in circumstance.

{¶ 5} On May 15, 2008, the magistrate held a hearing regarding appellee's motion to modify. At the end of the hearing, the magistrate stated that he had:

> "spoken with the child and found him to be not only articulate, but intelligent, certainly intelligent enough to make a choice in this matter. He has advised that he has wanted to live with his Dad for a few years. That's what he wants to do now.
>
> There has been a change of circumstances in that the child has matured since the time the two of you got divorced. He is now close to 8 years old. When you all got divorced he was like 2 or 3. So the passage of time between a child who is 3 or so to a child who is almost 8 with the intelligence he's got, would constitute a change in circumstances in the child. There has been a change in circumstances in the mother to some extent. She has gotten remarried and has more children. I think the most controlling circumstance, or the change is in the child himself. He wants to live with his Dad."

The magistrate informed the parties that he inquired of the child whether he would like a shared parenting arrangement, but the child stated that they have tried it in the past and it did not work. The child repeated his desire to live with his father. The magistrate

advised the parties that he would honor the child's wishes.

{¶ 6} On June 9, 2008, the magistrate recommended that the trial court designate appellee the child's residential parent. The magistrate determined that a change in circumstance had occurred "in that the child is now 7 years old, and is emotionally mature enough to understand the importance of his election." Appellant objected to the magistrate's decision and the trial court overruled appellant's objections. This appeal followed.

{¶ 7} In her sole assignment of error, appellant asserts that the trial court abused its discretion by modifying the parties' prior allocation of parental rights and responsibilities. She first asserts that the court committed reversible error by failing to ensure that the child's in camera interview was properly recorded to permit appropriate appellate review. Second, she argues that the magistrate failed to ensure that the child had sufficient reasoning ability to express his wishes. Third, appellant contends that the trial court erred by modifying custody without a sufficient showing of a change in circumstance.

A

IN CAMERA INTERVIEW

{¶ 8} R.C. 3109.04(B)(2) sets forth the procedure that a court must follow when interviewing a child in a custody dispute. The statute reads:

> If the court interviews any child pursuant to division (B)(1) of this section, all of the following apply:
>
> * * * *
>
> (c) The interview shall be conducted in chambers, and no person other than the child, the child's attorney, the judge, any necessary court

> personnel, and, in the judge's discretion, the attorney of each parent shall be permitted to be present in the chambers during the interview.

The statute is silent as to whether the in camera interview must be recorded. A majority of Ohio appellate courts agree, however, that courts must ensure that the interview is recorded, but only upon proper request. Patton v. Patton (1993), 87 Ohio App.3d 844, 846, 623 N.E.2d 235 (stating that "a trial court errs in refusing a timely request that a record be made of its interview of minor children who are the subject of proceedings involving the award of parental rights and responsibilities"); Lynch v. Lynch, Huron App. No. H-02-22, 2003-Ohio-1039, at ¶17 (declining to consider appellant's argument that court failed to record in camera interview when appellant failed to make a timely request); Carlin v. Carlin (Mar. 29, 1996), Williams App. No. WM-95-023 (concluding that appellant waived issue regarding failure to record in camera interview when appellant failed to request court to record interview before it happened); see, also, Prohaska v. Prohaska (May 3, 2000), Medina App. No. 2946M; Bowman v. Bowman (Mar. 19, 1997), Medina App. No. 2574-M; In re Reed (Dec. 20, 1995), Greene App. No. 95 CA 56. But, see, Donovan v. Donovan (1996), 110 Ohio App.3d 615, 620, 674 N.E.2d 1252 ("We require that an audio recording, video recording or stenographic record be made and, in order to preserve the privacy of the setting, that no person other than the child and court personnel authorized by the judge be present with the judge in chambers. This will ensure that an appellate court can effectively review the trial court's decision pertaining to custody matters.").

{¶ 9} In Purvis v. Purvis, Adams App. No. 00CA703, 2002-Ohio-570, we considered a somewhat related issue to the one involved in the case at bar. In Purvis,

the appellant challenged the trial court's failure to transcribe the magistrate's recorded in camera interview. The magistrate apparently recorded the in camera interview, but did not have it transcribed. On appeal, the appellant asserted that the trial court erred by failing to have the magistrate's interview transcribed for review in determining objections to the magistrate's decision. We rejected the appellant's argument and stated:

> "The trial court must make a record of any R.C. 3109.04 in camera interview with a child. In re Markum (1990), 70 Ohio App.3d 841, 592 N.E.2d 896; see, also, Donovan v. Donovan (1996), 110 Ohio App.3d 615, 674 N.E.2d 1252; Patton v. Patton (1993), 87 Ohio App.3d 844, 623 N.E.2d 235. It is error for a trial court to fail to read the transcript of a magistrate's in camera interview with a child before adopting and approving the magistrate's report. Winters v. Winters (Feb. 24, 1994), Scioto App. No. 2112, unreported. However, such error may be harmless if it does not affect a substantial right of the parties. Id. citing Civ.R. 61. Here, the trial court's error in failing to have the interview transcribed so that it could read the transcript is harmless because the magistrate accurately summarized the transcript of its interview with [the child] in its decision.
>
> Mr. Purvis has failed to show that the trial court's decision to rely on the magistrate's interview with [the child] is unreasonable, unconscionable, or arbitrary. The magistrate accurately summarized its interview with [the child]. Thus, the trial court did not abuse its discretion in deciding not to personally interview [the child]."

{¶ 10} Thus, the issue in Purvis was not precisely the same as that involved in the case sub judice, i.e., the trial court's or magistrate's failure to record the interview. Instead, the issue was whether the trial court should have reviewed a transcript of the interview that the magistrate had recorded. In Purvis, we were not called upon to decide whether a party must first request that the interview be recorded. Although we cited Donovan with approval, because that language was unnecessary to our ultimate holding, it is dicta that we need not follow. Instead, we choose to be in line with the

majority of Ohio courts and hold that a party must request that the court record the in camera interview. We do not believe, however, that a court possesses an independent duty to ensure that the interview is recorded.

{¶ 11} We also find our holding in line with the general rule regarding waiver. "Ordinarily, to preserve a trial court error for appeal, an objection must be timely raised to the trial court, where the alleged error may be corrected, or else the objection is waived; it may not be raised for the first time on appeal." Wilburn v. Wilburn, 169 Ohio App.3d 415, 2006-Ohio-5820, 863 N.E.2d 204, at ¶32; see, also, Hirzel v. Ooten, Meigs App. Nos. 06CA10 and 07CA13, 2008-Ohio-7006, at ¶47. As the Ohio Supreme Court held in Schade v. Carnegie Body Co. (1982), 70 Ohio St.2d 207, 210, 436 N.E.2d 1001, "the fundamental rule is that an appellate court will not consider any error which could have been brought to the trial court's attention, and hence avoided or otherwise corrected."

{¶ 12} As applied to the facts in the case at bar, appellant did not request that the magistrate record the in camera interview before it occurred.[1] Consequently, the issue has not been preserved for appellate review. We therefore disagree with appellant that the trial court erred by failing to record the in camera interview.

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[1] Although appellant objected to the magistrate's decision because the magistrate failed to record the in camera interview, she did not object at the time of the interview. Moreover, even if appellant's objection to the magistrate's failure constituted a timely objection, in the case sub judice, we do not believe that the trial court was required to hold a second in camera interview and record it. As the trial court found and as the record shows, the magistrate adequately summarized the substance of the child's interview to enable an adequate review. We caution, however, that the situation might be different if there is no evidence to document the substance of the child's interview.

B

SUFFICIENT REASONING ABILITY

{¶ 13} Appellant next argues that the trial court failed to comply with R.C. 3109.04(B)(2)(b) by failing to ascertain that the child possessed sufficient reasoning ability to express his wishes.

{¶ 14} R.C. 3109.04(B)(2)(b) provides:

> (b) The court first shall determine the reasoning ability of the child. If the court determines that the child does not have sufficient reasoning ability to express the child's wishes and concern with respect to the allocation of parental rights and responsibilities for the care of the child, it shall not determine the child's wishes and concerns with respect to the allocation. If the court determines that the child has sufficient reasoning ability to express the child's wishes or concerns with respect to the allocation, it then shall determine whether, because of special circumstances, it would not be in the best interest of the child to determine the child's wishes and concerns with respect to the allocation. If the court determines that, because of special circumstances, it would not be in the best interest of the child to determine the child's wishes and concerns with respect to the allocation, it shall not determine the child's wishes and concerns with respect to the allocation and shall enter its written findings of fact and opinion in the journal. If the court determines that it would be in the best interests of the child to determine the child's wishes and concerns with respect to the allocation, it shall proceed to make that determination.

{¶ 15} In In re Longwell (Aug. 30, 1995), Lorain App. Nos. 94CA606 and 94CA607, the court adopted the State v. Frazier (1991), 61 Ohio St.3d 247, 574 N.E.2d 483, test used to evaluate a child's competency to determine whether a child possesses sufficient reasoning ability in accordance with R.C. 3109.04(B)(2)(b). The Frazier court held:

> "In determining whether a child under ten is competent to testify, the trial court must take into consideration (1) the child's ability to receive accurate impressions of fact or to observe acts about which he or she will testify, (2) the child's ability to recollect those impressions or observations,

> (3) the child's ability to communicate what was observed, (4) the child's understanding of truth and falsity and (5) the child's appreciation of his or her responsibility to be truthful."

Id. at syllabus. Like the Longwell court, we believe that a trial court may use the Frazier factors to determine a child's reasoning ability.

{¶ 16} We note that when determining a child's reasoning ability, as when determining a child's competency, "[a] trial court is not required * * * to make express findings on the considerations outlined in Frazier. Such a requirement would unduly burden our trial courts with unnecessary formality. Instead, the trial court is merely required to consider the Frazier factors while making the * * * determination." Schulte v. Schulte (1994), 71 Ohio St.3d 41, 43, 641 N.E.2d 719.

{¶ 17} A determination of a child's reasoning ability, like a competency determination, is within the sound discretion of the trial court, and a reviewing court will not reverse its determination absent a clear abuse of discretion. See Frazier, 61 Ohio St.3d at 250-251; see, also, Schulte, 71 Ohio St.3d at 43. An abuse of discretion is more than an error of law or of judgment. Instead, it implies that the court acted in an unreasonable, arbitrary or unconscionable manner. See, e.g., Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 18} In the case at bar, we additionally note that the absence of findings of fact and conclusions of law complicates our review of this argument. Civ.R. 52[2] provides

[2] "'Civ.R. 52, requiring separate findings of fact and conclusions of law upon timely request, applies to change of custody proceedings which involve questions of fact tried and determined by the court without a jury.'" State ex rel. Papp v. James (1994), 69 Ohio St.3d 373, 377, 632 N.E.2d 889, quoting Werden v. Crawford (1982), 70 Ohio St.2d 122, 435 N.E.2d 424, syllabus.

that "judgment may be general for the prevailing party unless one of the parties in writing requests otherwise." Generally, the failure to request findings of fact and conclusions of law results in a waiver of the right to challenge the trial court's lack of an explicit finding concerning an issue. See Pawlus v. Bartrug (1996), 109 Ohio App.3d 796, 801, 673 N.E.2d 188; Wangugi v. Wangugi (Apr. 12, 2000), Ross App. No. 2531; Ruby v. Ruby (Aug. 11, 1999), Coshocton App. No. 99CA4. "[W]hen a party does not request that the trial court make findings of fact and conclusions of law under Civ.R. 52, the reviewing court will presume that the trial court considered all the factors and all other relevant facts." Fallang v. Fallang (1996), 109 Ohio App.3d 543, 549, 672 N.E.2d 730; see, also, In re Barnhart, Athens App. No. 02CA20, 2002-Ohio-6023. In the absence of findings of fact and conclusions of law, we must presume the trial court applied the law correctly and must affirm if there is some evidence in the record to support its judgment. See, e.g., Bugg v. Fancher, Highland App. No. 06CA12, 2007-Ohio-2019, at ¶10, citing Allstate Financial Corp. v. Westfield Serv. Mgt. Co. (1989), 62 Ohio App.3d 657, 577 N.E.2d 383. As the court explained in Pettet v. Pettet (1988), 55 Ohio App.3d 128, 130, 562 N.E.2d 929:

> "[W]hen separate facts are not requested by counsel and/or supplied by the court the challenger is not entitled to be elevated to a position superior to that he would have enjoyed had he made his request. Thus, if from an examination of the record as a whole in the trial court there is some evidence from which the court could have reached the ultimate conclusions of fact which are consistent with [its] judgment the appellate court is bound to affirm on the weight and sufficiency of the evidence.
>
> The message is clear: If a party wishes to challenge the * * * judgment as being against the manifest weight of the evidence he had best secure separate findings of fact and conclusions of law. Otherwise his already 'uphill' burden of demonstrating error becomes an almost insurmountable 'mountain.'"

See, also, Bugg; McClead v. McClead, Washington App. No. 06CA67, 2007-Ohio-4624; International Converter, Inc. v. Ohio Valley Converting, Ltd. (May 26, 1995), Washington App. No. 93CA34.

{¶ 19} In the case sub judice, due to the absence of findings of fact and conclusions of law, we presume the regularity of the trial court proceedings. Thus, in the absence of evidence to the contrary, we presume that the trial court properly applied R.C. 3109.04(B)(2)(b) and that it did not abuse its discretion by finding that the child possessed sufficient reasoning ability. Additionally, our review of the record reveals no evidence to suggest that the trial court's decision was improper. The record reflects that the magistrate spoke with the child and found him to be bright and articulate. The record contains no evidence to suggest otherwise. We therefore disagree with appellant's argument that the trial court failed to ensure that the child possessed sufficient reasoning ability.

C

CHANGE IN CIRCUMSTANCE

{¶ 20} Appellant next asserts that the trial court abused its discretion by finding that a change in circumstance had occurred sufficient to warrant a modification of the parties' prior allocation of parental rights and responsibilities.

{¶ 21} Appellate courts typically review trial court decisions regarding the modification of a prior allocation of parental rights and responsibilities with the utmost deference. Davis v. Flickinger (1995), 77 Ohio St.3d 415, 418, 674 N.E.2d 1159; Miller v. Miller (1988), 37 Ohio St.3d 71, 74, 523 N.E.2d 846. Consequently, we may sustain a

challenge to a trial court's decision to modify parental rights and responsibilities only upon a conclusion that the trial court abused its discretion. Davis, supra. In Davis, the court defined the abuse of discretion standard that applies in custody proceedings:

> "'Where an award of custody is supported by a substantial amount of credible and competent evidence, such an award will not be reversed as being against the weight of the evidence by a reviewing court. (Trickey v. Trickey [1952], 158 Ohio St. 9, 47 O.O. 481, 106 N.E.2d 772, approved and followed.)' [Bechtol v. Bechtol (1990), 49 Ohio St.3d 21, 550 N.E.2d 178, syllabus].
>
> The reason for this standard of review is that the trial judge has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page. As we stated in Seasons Coal Co. v. Cleveland (1984), 10 Ohio St.3d 77, 80-81, 10 OBR 408, 410-412, 461 N.E.2d 1273, 1276-1277:
>
> 'The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge 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. * * *
>
> * * *
>
> * * * A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not. The determination of credibility of testimony and evidence must not be encroached upon by a reviewing tribunal, especially to the extent where the appellate court relies on unchallenged, excluded evidence in order to justify its reversal.'
>
> This is even more 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."

Id. at 418-419. R.C. 3109.04(E)(1)(a) governs the modification of a prior decree allocating parental rights and states:

> 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, the child's residential parent, or either of the

> parents subject to a shared parenting decree, 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 the modification is in the best interest of the child and one of the following applies:
>
> * * *
>
> (iii) The harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child.

{¶ 22} Thus, to modify a prior allocation of parental rights and responsibilities, three factors generally guide a trial court's decision: (1) whether a change in circumstances occurred, (2) whether modification is in the child's best interest, and (3) whether the benefits that result from the change outweigh any harm. See R.C. 3109.04(E)(1)(a); Clark v. Smith (1998), 130 Ohio App.3d 648, 653, 720 N.E.2d 973.

{¶ 23} In the case sub judice, appellant focuses her argument on whether the trial court abused its discretion by determining that a change in circumstance has occurred. She argues that the court's finding that the child's maturation and desire to live with his father does not constitute a sufficient change in circumstance. Because appellant does not raise any argument regarding the child's best interest or whether the advantages of changing custody outweigh any potential harm, we do not address those issues.

{¶ 24} This court has previously recognized that a child's attainment of an age in which he can demonstrate "sufficient reasoning ability" to choose a residential parent may in fact constitute a sufficient "change in circumstances." Morgan v. Morgan, Highland App. No. 06CA15, 2006-Ohio-6615, at ¶10; see, also, In re Brayden James, 113 Ohio St.3d 420, 2007-Ohio-2335, 866 N.E.2d 467, at ¶18 (recognizing that the advancement of a child from infancy to adolescence constitutes a change in

circumstance); Perz v. Perz (1993), 85 Ohio App.3d 374, 376, 619 N.E.2d 1094 fn. 1 (finding that a child's attainment of an age of "sufficient reasoning ability" to express his or her wishes constitutes a change in circumstances "such as would justify a further inquiry into the best interest of the child"). The passage of time, standing alone, however, is not sufficient to demonstrate a change in circumstance. See Davis v. Flickinger (1997), 77 Ohio St.3d 415, 420, 674 N.E.2d 1159; see, also, Waggoner v. Waggoner (1996), 111 Ohio App.3d 1, 6, 675 N.E.2d 541 (stating that "the change in a child's age is alone not dispositive of the right to modify a prior decree"). A child's maturation along with other factors, however, may establish a sufficient change in circumstances. As the Davis court explained:

> "* * * * [E]ven a small change in age, which requires a major adjustment to previous visitation or custody arrangements, when combined with hostility between the parents that adversely affects the visitation or custody arrangement, may constitute a sufficient change of circumstances to warrant a change in custody."

Id. at 420; see, also, Boone v. Kaser (Aug. 28, 2001), Tuscarawas App. No.2001AP050050 ("[T]he passage of time during a significant developmental portion of a child's life, combined with other pertinent factors, such as the child's expressed desires to reside with mother, supports [a] trial court's finding of a change of circumstances, requiring further inquiry by a trial court"); Butler v. Butler (1995), 107 Ohio App.3d 633, 637, 669 N.E.2d 291 (stating that the although the "passage of time, alone, is not sufficient to find a change of circumstances and relitigate the issue of custody, * * * [the] passage of time during a significant portion of a child's life, combined with other pertinent factors * * * supports a finding of a change of circumstances"); Khulenberg v. Davis (Aug. 25, 1997), Butler App. No. CA96-07-143 (concluding that a

combination of facts, including (1) the child's age of twelve years, (2) the child's preference to reside primarily with his father, and (3) the long history of difficulty between the parties constituted a sufficient change in circumstance).

{¶ 25} In Perz v. Perz (1993), 85 Ohio App.3d 374, 376-377, 619 N.E.2d 1094, 1096, the Sixth District Court of Appeals addressed a similar situation to the one in the case at bar and stated:

> "In this case, appellant argues that the passage of time is a sufficient change of circumstances to allow an inquiry into the best interest of the children. Certainly, a child's age would be a 'circumstance' that would have had a substantial impact on the court's formulation of the original custody order, as the age of the child is a factor that must be considered when making an original custody order. * * * What becomes for us the gravamen of the situation concerns the extent of the change that must be shown through the passage of time. A literal application of the statute would lead to the conclusion that any change in the child's age would allow the court to inquire further. A child ages with each passing minute, yet to allow a court to intervene in the life of a family merely because of the passage of an instant would be to remove all meaning from the relevant clause of the statute. In short, such an application would lead to absurd results, and generally courts do not construe statutes to that end. * * * Therefore, we must conclude that the legislature intended something more reasonable-a significant passage of time.
>
> Here, the children had progressed from infancy to a distinct and considerably different phase of their development. A child's needs change over such a period of time. The type of supervision necessary also changes. A child will change in physical, mental and moral development as the child leaves infancy and enters more advanced stages of life. We find that the passage of such a period of time is a sufficient change of circumstances to warrant a further inquiry into the best interest of the children."

Id. at 636-637.

{¶ 26} In the case at bar, we do not believe that the trial court abused its discretion by determining that a change in circumstance had occurred sufficient to warrant a modification of the prior allocation of parental rights and responsibilities. The

record contains other facts, in addition to the child's maturation, to support a finding of a change in circumstance. The child stated that he wishes to live with his father. Furthermore, when the trial court first designated appellant the residential parent, the child was nearly two years old. At the time of the hearing, he was one month shy of eight. Thus, he had matured from toddlerhood to boyhood. He now attends school and participates in extracurricular activities. His needs as a young boy may be vastly different from those he needed as a young toddler. Additionally, appellant has remarried and has other young children with her new husband. Thus, we are unable to conclude that the trial court abused its discretion by finding that a change in circumstance had occurred. Moreover, we again note that we must presume the regularity of the trial court proceedings.

{¶ 27} Lastly, as we stated in Crites v. Dingus, Athens 07CA38, 2008-Ohio-7039, at ¶19:

> "We again emphasize the deference that we must accord trial court decisions involving the custody of children. Choosing between parents is not an easy task, especially when both are caring and loving parents, as are both appellant and appellee. Unfortunately, when parents separate courts must choose one parent and the decision may rest upon slight differences of opinion regarding the better overall environment for the child. Appellate courts are not well-suited to make such decisions based upon a review of a cold record. Instead, trial courts, where the evidence is heard and witnesses are evaluated, are more aptly suited to make this determination. Thus, in the instant case we decline to second-guess the trial court's decision. Also, due to the lack of findings of fact and conclusions of law we do not know exactly how the trial court interpreted the evidence. Rather, because some evidence exists to support the trial court's decision, we presume that it is correct."

{¶ 28} Accordingly, based upon the foregoing reasons, we overrule appellant's sole assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court to carry this judgment into execution.

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

Kline, P.J.: Concurs in Judgment Only
McFarland, J.: Concurs in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.