[Cite as *In re Medure*, 2002-Ohio-5035.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

IN THE MATTER OF:	)	CASE NO. 01 CO 3
	)	
MARISSA LYNN MEDURE	)	
BRIANNA KAY MEDURE	)	
FRANK ANTHONY MEDURE, III	)	OPINION
MICHAEL TOD STANDEN MEDURE	)	
	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas, Juvenile Division of Columbiana County, Ohio Case Nos. C2000-0097, 98, 99, & 100

JUDGMENT: Affirmed.

APPEARANCES:

For Petitioner-Appellant, Frank A. Medure, Jr.:
Atty. Patricia A. Morris
412 Boardman-Canfield Road
Boardman, Ohio 44512

For Respondent-Appellee, Jeff Medure:
Atty. Samuel L. Kirkland
Atty. Kathleen Bartlett
585 East State Street
Salem, Ohio 44460

Guardian Ad Litem:
Sheryl Morrison
Columbiana Co. Juvenile Court
260 W. Lincoln Way
Lisbon, Ohio 44432

JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: September 18, 2002

WAITE, J.

{¶1} This is a timely appeal of a judgment of the Columbiana County Court of Common Pleas, Juvenile Division, which arose out of a motion to reallocate parental rights and responsibilities. For the following reasons, we affirm the judgment of the trial court.

{¶2} Frank Medure, Jr. ("Appellant") and Gina Medure were married, for a second time, in 1978. During their remarriage they had six children: Jeffrey Paul Medure ("Appellee"), d.o.b. 12/21/1979; Justin Joseph Medure ("Justin"), d.o.b. 11/11/1981; Marissa Lynn Medure, d.o.b. 6/4/1983; Brianna Kay Medure ("Brianna"), d.o.b. 5/13/1985; Frank Anthony Medure, III, d.o.b. 12/16/1987; and Michael Tod Standen Medure, d.o.b. 12/10/1989.

{¶3} Appellant and Gina Medure were granted a divorce in the Columbiana County Court of Common Pleas on January 12, 1999. Gina Medure was awarded custody of the minor children as part of the divorce.

{¶4} On January 31, 2000, Gina Medure died in an automobile accident.

{¶5} On February 8, 2000, Appellant filed a Motion for Ex Parte Order of Companionship, filing it under the common pleas court case number used in the 1999 divorce action. In the motion, Appellant asked to be named as the residential parent of the minor children. At the time of this filing, the oldest two of the children (Appellee and Justin) had reached the age of majority.

{¶6} On February 11, 2000, Appellee moved for an order naming him as a new party defendant in the case. Appellee alleged that the remaining minor children were in his custody and care. Also on February 11, 2000, Appellant and Appellee

entered into an Agreed Judgment Entry which acknowledged that Appellee was a new party defendant in the case.

{¶7} On July 24, 2000, Appellant and Appellee entered into another Agreed Judgment Entry, in which they agreed that the case would be transferred to Columbiana County Court of Common Pleas, Juvenile Division. They also agreed that the, "matter shall be set as a contested custody action by and between Third -Party Plaintiff, Jeff Medure and Defendant, Frank Anthony Medure, Jr." (7/24/2000 J.E.).

{¶8} On October 30, 2000, Appellant amended his motion for companionship to clarify his request for custody of the four minor children.

{¶9} A two-day trial on the merits was held on November 28, 2000, and concluded on December 26, 2000. Eighteen people testified at the trial, including Appellant, his parents, his brothers, the court-appointed guardian ad litem ("GAL"), a counselor, a psychologist, a social worker, a teacher, a family friend, and five of Appellant's six children.

{¶10} On January 19, 2001, the juvenile court issued its Opinion and Judgment Entry. The court found that, "an award of custody of any one (1) or more of these children to Frank Medure would be detrimental to all of them." (1/19/2001 Opinion, p. 4). The court named Appellee as the residential parent and legal custodian of all four minor children. Appellant filed this appeal on February 20, 2001.

{¶11} Appellant asserts a single assignment of error for our review:

{¶12} "I. THE TRIAL COURT ERRED IN ITS FINDING THAT BY A PREPONDERANCE OF THE EVIDENCE THAT AN AWARD OF CUSTODY OF ANY ONE (1) OF THE MEDURE CHILDREN TO FRANK MEDURE, JR. WOULD BE DETRIMENTAL TO ALL OF THEM."

{¶13} Appellant is challenging the factual findings of the trial court's decision which awarded custody of the children to Appellee. Our standard of review of this decision is very deferential to the trial court: "The discretion which a trial court enjoys in custody matters should be accorded the utmost respect, given the nature of the proceeding and the impact the court's determination will have on the lives of the parties concerned. The knowledge a trial court gains through observing the witnesses and the parties in a custody proceeding cannot be conveyed to a reviewing court by a printed record." *Trickey v. Trickey* (1952), 158 Ohio St. 9, 13, 106 N.E.2d 772. The term "abuse of discretion" means more than simply an error of law or judgment; it signifies that the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. If there is some competent, credible evidence in the record to support the trial court's decision, there is generally no basis for a reviewing court to find an abuse of discretion. *Ross v. Ross* (1980), 64 Ohio St.2d 203, 204, 414 N.E.2d 426.

{¶14} Appellant presents four sub-issues related to this assignment of error. Appellant's first sub-issue argues that the evidence does not support the trial court's finding that it would be detrimental to grant custody of any of the children to Appellant. Appellant contends that this case is governed by *In re Perales* (1977), 52 Ohio St.2d 89, 369 N.E.2d 1047, which held:

{¶15} "In an R.C. 2151.23(A)(2) child custody proceeding between a parent and a nonparent, the hearing officer may not award custody to the nonparent without first making a finding of parental unsuitability that is, without first determining that a preponderance of the evidence shows 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." Id. at syllabus.

{¶16} *Perales* refers to R.C. §2151.23(A)(2), which states:

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

{¶18} "* * *

{¶19} "(2) Subject to division (V) of section 2301.03 of the Revised Code, *to determine the custody of any child not a ward of another court of this state;"* (Emphasis added.)

{¶20} Although this case was not initiated on the authority of R.C. §2151.23, Appellant presumes that the *Perales* holding applies to custody cases arising out of other statutes as well.

{¶21} Furthermore, the trial court relied on *Perales* in making its decision. The trial court found that it would be detrimental to the children for Appellant to have custody, which is one of the findings required by *Perales*. Appellant argues that the manifest weight of the evidence does not support the trial court's finding of unsuitability.

{¶22} Appellee appears to argue in rebuttal that the juvenile court was not required to make the finding that Appellant complains of, and therefore, Appellant could not have been prejudiced by the finding. Appellee argues that this case was certified to the juvenile court pursuant to R.C. §3109.06, which states in pertinent part:

{¶23} "In any case in which a court of common pleas * * * has issued an order that allocates parental rights and responsibilities for the care of minor children and designates their place of residence and legal custodian of minor children, * * * *the*

jurisdiction of the court shall not abate upon the death of the person awarded custody but shall continue for all purposes during the minority of the children. *The court*, upon its own motion or the motion of either parent or of any interested person acting on behalf of the children, *may proceed to make further disposition of the case in the best interests of the children* and subject to sections 3109.42 to 3109.48 of the Revised Code. *If the children are under eighteen years of age, it may certify them, pursuant to this section, to the juvenile court of any county for further proceedings.*

{¶24} "* * *

{¶25} "Any disposition made pursuant to this section, whether by a juvenile court after a case is certified to it, or by any court upon the death of a person awarded custody of a child, shall be made in accordance with sections 3109.04 and 3109.42 to 3109.48 of the Revised Code." (Emphasis added.)

{¶26} As is evident by the wording of the preceding statute, a case that is certified to the juvenile court pursuant to R.C. §3109.06 is subject to the provisions of R.C. §3109.04. R.C. §3109.04(B)(1) states:

{¶27} "(B)(1) When making the allocation of the parental rights and responsibilities for the care of the children under this section in an original proceeding or in any proceeding for modification of a prior order of the court making the allocation, *the court shall take into account that which would be in the best interest of the children*." (Emphasis added.)

{¶28} Also relevant is R.C. §3109.04(D)(2) which states:

{¶29} "(2) *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 * * * to the juvenile court for further proceedings * * *." (Emphasis added).

{¶30} Appellee contends that this case should be governed by the "best interests" standard of R.C. §3109.04, rather than the standard set forth in *Perales*, which is based on parental unsuitability. Appellee asserts that the trial court was not required to make a finding of parental unsuitability. Appellee's conclusion appears to be that it was harmless error for the trial court to make an unnecessary finding.

{¶31} R.C. §3109.04 governs custody disputes between parents and non-parents which arise as part of a divorce. Ohio's courts have been reaching a general consensus that, despite the pure "best interests" language of R.C. §3109.04, some type of *Perales* "parental unsuitability" test must be applied in custody disputes between a parent and a non-parent before custody may be awarded to a non-parent. *Baker v. Baker* (1996), 113 Ohio App.3d 805, 812, 682 N.E.2d 661 (Ninth District) (a finding that the parents are unsuitable is implicit when custody is awarded to non-parent); affirmed in *Comstock v. Comstock* (Mar. 1, 2000), 9th Dist. No. 99 CA 007339; *Lewis v. Lewis*, 7th Dist. No. 99-JE-6, 2001-Ohio-3167 (in which this Court essentially adopts the holding in *Baker* and *Comstock*); *Gorslene v. Huck,* 5th Dist. No. 01CA40, 2001-Ohio-1680; *Esch v. Esch* (Feb. 23, 2001), 2nd Dist. No. 18489; *In re Pryor* (1993), 86 Ohio App.3d 327, 334, 620 N.E.2d 973 (Fourth District); *In re Dunn* (1992), 79 Ohio App.3d 268, 271 (Third District). Although the dissenting opinion below attempts to distinguish these cases from one another, the ultimate conclusion in each one is that a parental unsuitability test must be applied prior to awarding custody of a child to the non-parent.

{¶32} One of the main reasons for requiring a "parental unsuitability" test, even in cases governed by the "best interests" language or R.C. §3109.04, is, "that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville* (2000), 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49. "A parent's constitutional right to custody of his child is sufficiently protected by the requirement of R.C. 3109.04 that custody not be awarded to a nonparent unless such an award is in the best interest of the child *and by the implicit finding regarding suitability included in that finding*." (Emphasis added.) *Baker*, supra, 113 Ohio App.3d at 812, 682 N.E.2d 661.

{¶33} Historically, not every appellate court has agreed that R.C. §3109.04 incorporates or requires the application of a "parental unsuitability" test. *Wright v. Wright* (Oct. 19, 1995), 8th Dist. No. 67884; see also *State ex rel. Reeves v. O'Malley* (June 1, 2001), 8th Dist. No. 78900 (in which the court appears to question its holding in *Wright*).

{¶34} There is no need for us to enter into a lengthy discussion of Appellee's attempt to apply the "best interests" test in this case, because Appellant is not raising this issue. Our duty is to review the issues raised by an *appellant's* assignments of error, and not to address every issue raised by an appellee, particularly if those issues are not relevant to resolving the appeal. App.R. 12(A). Appellant assumes the *Perales* "parental unsuitability" test generally applies to custody cases between parents and nonparents, and this Court has previously come to the same conclusion. See *Lewis*, supra, 7th Dist. No. 99-JE-6, 2001-Ohio-3167. Appellant is only concerned with the weight of the evidence as applied to the *Perales* test.

{¶35} The question before us, therefore, is whether the evidence supports the trial court's finding that Appellant relinquished his right to custody of the children because he was an unsuitable parent. "Whether or not a parent relinquishes rights to custody is a question of fact, which, once determined, will be upheld on appeal if there is some reliable, credible evidence to support the finding." *Masitto v. Masitto* (1986), 22 Ohio St.3d 63, 66, 22 OBR 81, 488 N.E.2d 857.

{¶36} The trial court noted certain findings made by the GAL in her report: the children distrusted Appellant; Appellant was not generally a part of the children's lives; Appellant verbally and physically abused the children; he used severe forms of discipline against the children, including beating them and hitting them with ropes; and he did not keep adequate supplies of food at home. (Tr., Court Exh. 1, GAL Report). Some of the children themselves testified that they were afraid of Appellant and did not want him to have custody. (Tr., p. 447, 465, 484). Alise Bartley, a clinical counselor who treated the children for depression, testified that Appellant had anger management problems. She also testified that the children should not be separated from one another. (Tr. p. 55 ff., 75, 80). Ms. Bartley opined that she could not picture Appellant and the children living in a "cohesive, happy, stable environment in the near future." (Tr., p. 86).

{¶37} Appellee testified that, when he was younger, he was "scared to death" of Appellant. (Tr., p. 119). He testified that Appellant, "would beat me until, you know, I was black and blue and couldn't walk." (Tr., p. 121).

{¶38} Mrs. Sandra Henson, a friend of the Medure family and Marissa's god-mother, testified that she did not think Appellant had the social and personal skills to

raise Brianna. (Tr., p. 425-426). Brianna has special needs and was diagnosed with cerebral palsy. (GAL report).

{¶39} We find substantial evidence in the record supporting the trial court's finding that it would be detrimental for Appellant to be awarded custody of the children.

{¶40} The dissenting opinion below spends considerable time dissecting this Court's recent decision of *In re Custody of Lowe* (Jan. 16, 2002), 7th Dist. No. 00 CO 62. We have not relied on that decision as it is factually and legally distinguishable from the case at bar. In *Lowe*, the custody dispute involved grandparents attempting to gain custody of two grandchildren. The case did not arise out of divorce, legal separation or annulment proceedings, or proceedings pertaining to the allocation of parental rights and responsibilities. Id. at *1. We concluded that the custody dispute did not arise out of R.C. §3109.04, and was therefore governed by R.C. §2151.23. Id at *2. The case at bar arose due to Appellant's attempt to gain custody of his child after a divorce and after the child's mother had died. Appellee, Jeffrey Paul Medure subsequently entered the case by mutual agreement of the parties. Therefore, this case arose out of proceedings initiated and governed by R.C. §3109.04, raising issues not present in the *Lowe* opinion.

{¶41} It is also unclear why the dissent would overrule *Lowe* as it did not hold, as the dissent suggests, that the parental unsuitability test governs all custody cases litigated in juvenile court, and since the analysis in *Lowe* does not deal with the situation which has arisen in the case sub judice.

{¶42} The dissenting opinion also questions the trial court's and this Court's reliance on evidence contained within the GAL's report. The dissent once again mischaracterizes the *Lowe* opinion with regard to the proper use of a GAL's report.

Lowe did not hold, as the dissent suggests, that a GAL's report could never be used to support a trial court's custody decision if the decision was governed by the *Perales* parental unsuitability test. *Lowe* held that "the guardian ad litem's testimony as to the pure best interest of the child cannot be used" when a case is governed by the *Perales* parental unsuitability test. *Lowe*, supra at *3. Both the trial court's and our references to the GAL's report involve factual observations by the GAL and not testimony concerning the pure best interests of the children. Therefore, there is no conflict between our analysis of the GAL's testimony in *Lowe* and the citations to the GAL's report in the instant case.

{¶43} Appellant's second argument is that the trial court failed to make a specific finding that he was unsuitable, and that this omission by the trial court is reversible error. Appellant bases this argument on *Perales,* 52 Ohio St.2d at syllabus, 369 N.E.2d 1047. Once again, assuming arguendo that *Perales* does apply, that case does not require a trial court to use any particular "magic words" in making a finding of unsuitability. In the instant case, the trial court could hardly have been clearer in conveying the message that Appellant was unsuitable:

{¶44} "The Supreme Court in the ***Perales*** decision further defined the concept of parental unsuitability to include, among other things, any finding that an award of custody to the parent would be detrimental to the child. * * * this Court finds that by a preponderance of the evidence that an award of custody to any one(1) or more of these children to [Appellant] Frank Medure would be detrimental to all of them." (1/19/2001 J.E.).

{¶45} Without question, the trial court made the finding required by *Perales.*

{¶46} Appellant's third argument was that the trial court mistakenly placed the burden of proof on him in the custody hearing. The trial court does mention in passing that, "I think you [Appellant] have the burden of proof in this matter." (Tr., p. 537). The trial court made the comment only by way of explaining why Appellant's attorney was permitted to make the last statement during closing arguments. Generally, the, "party required first to produce evidence has the right to open and close the concluding argument." 90 Ohio Jurisprudence 3d (1989) 28-29, Section 402. For the following reasons, it appears that the trial court was correct in concluding the original burden of proof was on Appellant, entitling him to the last statement at closing argument.

{¶47} This case arose because Appellant filed a motion for a change in custody. The case was transferred to the juvenile court pursuant to R.C. §3109.06, which requires the juvenile court to dispose of the child custody case, "in accordance with sections 3109.04 and 3109.42 to 3109.48 of the Revised Code." R.C. §3109.04(E)(1)(a) places the burden on the party moving for a change in custody to prove that there has been a change in circumstances and that the change in custody is in the best interests of the children. Therefore, the trial court was correct that Appellant had the initial burden of proof to produce evidence supporting his motion for a change in custody, entitling him to have the last word at closing argument.

{¶48} Appellant's fourth argument is that custody could not have been granted to Appellee because he never specifically filed a motion requesting custody of the children. While Appellant is correct that the record does not include a specific motion filed by Appellee requesting custody of the children, it is difficult to understand why Appellant is now making this argument. The record indicates that he signed not one, but two, Agreed Judgment Entries establishing Appellee's interest in this case. The

first agreed judgment entry brought Appellee into the case as a party defendant. The second certified the matter to the juvenile court as a custody dispute. It is clear that Appellant has waived any error, if indeed there is error, in not only failing to object to the omission of a separate and distinct motion requesting custody, but also in helping to create the problem by signing agreed judgment entries which assumed that Appellee made a request for custody. "Under the invited-error doctrine, a party will not be permitted to take advantage of an error that he himself invited or induced the trial court to make." *State ex rel. Beaver v. Konteh* (1998), 83 Ohio St.3d 519, 521, 700 N.E.2d 1256. It is abundantly clear from the record that this appeal arose from a dispute between Appellant and Appellee over the custody of Appellant's minor children.

{¶49} Since we must reject all of Appellant's arguments, we hereby overrule his sole assignment of error and affirm the judgment of the trial court.

Donofrio, J., concurs.

DeGenaro, J., dissents; see dissenting opinion.

DeGenaro. J., dissenting:

{¶50} I must respectfully dissent from the majority's opinion for three reasons. First, I would find that, according to statute and case law, the trial court should have applied the statutory best interests test set forth in R.C. 3109.04 rather than the common law suitability test to this custody dispute as it stems from a divorce action initiated in domestic relations court, rather than originating in juvenile court pursuant to R.C. 2151.23. Second, I disagree with the majority's statement eroding the difference between those two tests as case law and proper statutory construction mandate some substantial difference between the two tests. Finally, I will demonstrate how, assuming arguendo the trial court was correct to apply the suitability test, the majority's application of that test conflicts with our recent decision regarding the use of a guardian ad litem report in a suitability analysis. Accordingly, I write to explain my differences with the majority's conclusions.

{¶51} As a preliminary matter, I believe the majority should have exercised the Court's discretion and addressed the first issue raised in this dissent. In his assignment of error, Appellant challenges the manner in which the juvenile court applied the suitability test when determining custody between the parties. However, he never argues the juvenile court applied the wrong test when making that determination. Conversely, Appellee argues the juvenile court should have applied the best interests test, with Appellant responding to that argument in his reply brief. An appellate court always retains the discretion to decide issues not raised before the trial court. *State v. Peagler* (1996), 76 Ohio St.3d 496, 499, 668 N.E.2d 489; App.R. 12(A)(2). Because the parties briefed this unassigned error, I would use that discretion and reverse the trial court's decision because it used the suitability test

rather than the best interests test when determining who was to retain custody of the minor children.

{¶52} Support for my position with regard to the appropriate test to apply is twofold. First, support can be found in a brief review of the history of the law in Ohio with regard to custody disputes between parents and non-parents. A more thorough discussion can be found at Judge Donofrio's concurring opinion in *Lewis v. Lewis*, 7th Dist. No. 99-JE-6, 2001-Ohio-3167. See also *In re Wilson* (Apr. 30, 1999), 2nd Dist. No. 98-CA-19. Second, following canons of statutory construction, the plain language of the applicable statutes dictates the correct test to apply.

{¶53} It has long been the law in Ohio that a court must look to the best interests of the children when making custody determinations. See *Gishwiler v. Dodez* (1855), 4 Ohio St. 615, 617. In addition, Ohio law recognizes a suitable parent's right to custody of his or her minor child "is paramount to that of all other persons." *Clark v. Bayer* (1877), 32 Ohio St. 299, paragraph one of the syllabus. Accordingly, R.C. 3109.04 formerly stated a court could only grant custody of a child to a non-parent upon a finding that neither parent was suitable. This changed in 1974 when the legislature amended R.C. 3109.04 to provide, as it does today, that a court may award custody of a minor child to a non-parent if it finds it is in the best interests of the child to do so. R.C. 3109.04(D)(2).

{¶54} The Ohio Supreme Court interpreted this version of R.C. 3109.04 in *Boyer v. Boyer* (1976), 46 Ohio St.2d 83, 75 O.O.2d 156, 346 N.E.2d 286. In *Boyer*, the mother sought custody of her minor son in a divorce action. However, the son had been living with his paternal grandparents from shortly after his birth until the divorce, when he was six years old. The domestic relations court found it was in the best

interests of the child to stay with his paternal grandparents. The Ohio Supreme Court affirmed, holding that R.C. 3109.04 dictated a domestic relations court no longer needed to find a parent is unsuitable before placing that child with a non-parent.

{¶55} The next year, the Ohio Supreme Court was faced with a similar situation in *In re Perales* (1977), 52 Ohio St.2d 89, 6 O.O.3d 293, 369 N.E.2d 1047. In *Perales*, the mother agreed to surrender custody of her minor daughter to a non-relative. Subsequently, she sought to regain custody under R.C. 2151.23. The juvenile court applied a best interests test and granted custody to the non-parents. The Ohio Supreme Court found the trial court erred. The *Perales* court, relying upon prior law, held that in custody disputes between parents and non-parents arising under R.C. 2151.23, custody disputes not related to divorce actions, the juvenile court may not award custody to the non-parent without finding the parent unsuitable. Id. at syllabus.

{¶56} Some courts initially interpreted *Perales* to mean the suitability test must be made in all child custody disputes between parents and non-parents, regardless of in which court custody was sought. See *Thrasher v. Thrasher* (1981), 3 Ohio App.3d 210, 3 OBR 240, 444 N.E.2d 431, syllabus. However, those courts have reconsidered that position and now find *Perales* was not intended to overrule *Boyer*. See *Reynolds v. Goll* (1992), 80 Ohio App.3d 494, 609 N.E.2d 1276. In reaching that decision, the *Reynolds* court noted its decision in *Thrasher* had come under criticism. It found the position of those criticizing courts was supported by the Ohio Supreme Court's decision in *Masitto v. Masitto* (1986), 22 Ohio St.3d 63, 65, 22 OBR 81, 488 N.E.2d 857, which stated the best interests test is "the sole consideration" in custody proceedings brought under R.C. 3109.04 and that the legislature enactment of the current version of R.C. 3109.04 expressed a clear intent to modify common law in

divorce proceedings. Id. at 498.

{¶57} I agree with *Reynolds*'s conclusion that *Perales* was not intended to overrule *Boyer*, although for additional reasons. It is a canon of statutory construction that the General Assembly is presumed to know the common law when enacting legislation. See *Walden v. State* (1989), 47 Ohio St.3d 47, 56, 547 N.E.2d 962 (Resnick, J., concurring in part and dissenting in part); *State ex rel. County Bd. of Ed. of Huron County v. Howard* (1957), 167 Ohio St. 93, 96, 4 O.O.2d 83, 146 N.E.2d 604; *Davis v. Justice* (1877), 31 Ohio St. 359, 364. Furthermore, it is well-established that the legislature is presumed to know the state of the law relating to the subjects with which it deals. *State ex rel. Cromwell v. Myers* (1947), 80 Ohio App. 357, 368, 36 O.O. 62, 73 N.E.2d 218. When applying the language of a statute, it must be construed in light of the common law in force at the time of its enactment. *State ex rel. Morris v. Sullivan* (1909), 81 Ohio St. 79, 95, 90 N.E. 146; R.C. 1.49(D). Accordingly, when a new statute uses different phraseology than the former law, it is presumed that a change of meaning was also intended to the extent of the change in the language since it is axiomatic in statutory construction that words are not inserted into an act without some purpose. *Malone v. Indus. Comm. Of Ohio* (1942), 140 Ohio St. 292, 299, 23 O.O. 496, 43 N.E.2d 266; *Hancock Cty. Bd. of Edn. v. Boehm* (1921), 102 Ohio St. 292, 131 N.E. 812, syllabus. A reviewing court must not supply words to a statute which were omitted by the legislature. *Lynch v. Gallia Cty. Bd. of Commrs.* (1997), 79 Ohio St.3d 251, 254, 680 N.E.2d 1222.

{¶58} When it amended R.C. 3109.04 in 1974 to say a court may award custody to a non-parent relative if it finds it is in the best interests of the child to award neither parent custody, the legislature knew that under common law custody could

only be given to a non-parent if the court first found the parent unsuitable. "Best interests" and "suitability" were both concepts well established in Ohio courts prior to 1974. See *Gishwiler*, supra; *Clark*, supra. If the General Assembly had wished Ohio courts to determine whether a parent is unsuitable prior to considering the best interests of a child in custody disputes between parents and non-parents it would have said as much. Because it did not do so, this cannot be what R.C. 3109.04 was meant to say. As *Reynolds* recognized:

{¶59} "With the codification of the 'best interest' test in 1974, the General Assembly expressed a clear intent to modify the common law and eliminate consideration of a parent's suitability in domestic relations actions. But the legislature made no comparative change in R.C. Chapter 2151. R.C. 2151.23 is a jurisdictional statute with no substantive law test." Id. at 498.

{¶60} Thus, the two tests must have some substantive distinctions. It is not necessary at this time to explain those distinctions. The point is that those differences must exist.

{¶61} In conclusion, both the case law and the canons of statutory construction support my conclusion that custody disputes arising under R.C. 3109.04 are resolved using the *Boyer* statutory best interests test while custody disputes arising out of R.C. 2151.23 are resolved using the *Perales* suitability test. In general, this means a domestic court uses the best interests test while a juvenile court uses the suitability test when resolving custody disputes between parents and non-parents. However, there is a statutory exception to this general rule, which is the procedural crux of this case.

{¶62} On occasion, juvenile courts are asked to resolve custody disputes

stemming from a divorce. A domestic relations court making or having made custody determinations in accordance with R.C. 3109.04 may certify the custody dispute to the juvenile court to resolve. R.C. 3109.04(D)(2). More to the point in this case, R.C. 3109.06 provides that upon the death of the person to whom the court granted custody in a divorce proceeding, the court "may proceed to make further disposition of the case in the best interests of the children * * *." If the children are minors, the domestic relations court may certify the case to the juvenile court for any further proceedings Id., but is not required to do so. Upon certification however, the juvenile court shall make its custody determination in accordance with R.C. 3109.04 and apply the best interests test. R.C. 3104.06; *In re Surdel*, 9th Dist. No. 01CA007783, 2001-Ohio-1407.

{¶63} This conclusion is based upon the above straightforward statutory construction and the Ohio Supreme Court's interpretation of R.C. 2151.23(F)(1) in *In re Poling* (1992), 64 Ohio St.3d 211, 594 N.E.2d 589. In *Poling,* two children were born of a marriage that ended in divorce and the mother was granted custody. Sometime after, the local Children's Services agency filed a neglect and dependency action against the mother in juvenile court. As a result of that action, the children were made wards of the court and were placed in the custody of the Children's Services agency. Thereafter, upon motion by the Children's Services agency, the juvenile court granted custody to the father over the mother's objections. The question before the Ohio Supreme Court was whether the juvenile court had jurisdiction to make this ruling. Concluding the juvenile court had jurisdiction, the court also recognized that, pursuant to R.C. 2151.23(F)(1), a juvenile court which is making a custody decision stemming from a domestic relations proceeding "must comply with the strictures contained in R.C. 3109.04" and apply the best interests test. Id. at 216; see also

Reynolds at 500 (R.C. 2151.23(F)(1) clarifies that a juvenile court is to apply the best interests test when the case is certified to it under either R.C. 3109.04 or 3109.06). "[I]t would be incongruous to change substantive law tests in the middle of a custody determination. In those cases certified to the juvenile court, it would be required to determine custody based solely on the child's best interest." *Reynolds* at 500.

{¶64} Thus, under circumstances such as in *Reynolds* and *Poling*, according to both R.C. 3109.06 and 2151.23(F)(1) a juvenile court is required to apply the same test the domestic court was required to apply, the best interests test. Hence, I would find in this case the juvenile court abused its discretion by applying the suitability test after the custody dispute had been certified to it by the domestic court, would reverse its decision, and would remand the case in order to give the trial court the opportunity to apply the correct test.

{¶65} The only way I can explain the majority's disagreement with this conclusion is its affinity for a case recently decided by this court, but not specifically relied upon by the majority, *In re Custody of Lowe*, 7th Dist. No. 00 CO 62, 2002-Ohio-440.

{¶66} In *Lowe*, two minor children were born of a marriage and the mother was named custodial parent in the divorce proceedings. The father was frequently delinquent with his support payments and the mother had problems financially supporting the two children. The paternal grandparents provided a great deal of financial support for the children after the divorce. The mother found a job in Illinois and, after obtaining the court's permission, moved the younger child to Illinois with her while the older child stayed with the grandparents in order to finish out the semester at school. Before the semester ended, the mother and the younger child moved back to

Ohio and the younger child went to stay with the grandparents. The mother then began looking for a job in South Carolina. The grandparents told her they would not let her relocate the children and moved for custody. The case was certified to the juvenile court from the domestic court. The juvenile court found both the mother and the father to be unsuitable and granted custody of the children to the grandparents.

{¶67} This Court found the juvenile court was correct to resolve the custody dispute using the *Perales* suitability test.

{¶68} "Child custody disputes under Ohio law are governed by two different statutes, R.C. 2151.23 and R.C. 3109.04. These statutes have different standards for determining who should be granted custody. The trial court correctly applied R.C. 2151.23, the juvenile court statute. R.C. 2151.23 is the juvenile court statute that confers jurisdiction on the juvenile court to hear cases determining the custody of any child not a ward of another court of this state. This statute does not state a standard to determine custody. However, common law has applied the suitability test. [*Perales*, supra]" (Footnote omitted) Id.

{¶69} However, the court ultimately reversed and remanded the case, concluding the juvenile court misapplied the *Perales* test by using the guardian ad litem's report, which focuses on what is in the children's best interests, as part of it's suitability analysis.

{¶70} As can be plainly seen, *Lowe* states that once a case is certified to juvenile court, the suitability test applies merely because the case is in juvenile court. This conclusion ignores the clear mandates contained in both R.C. 3109.06 and R.C. 2151.23(F)(1) and is contrary to the Ohio Supreme Court's decision in *Poling*. Indeed, there is no way to reconcile *Lowe* with the statutes or *Poling*, which held a juvenile

court which determines a custody dispute stemming from or ancillary to a divorce proceeding must apply the best interests test. Thus, even though *Lowe* is recent case law from this district, I would overrule it and, consistent with the Ohio Supreme Court's decision in *Poling*, hold that where as here, child custody disputes ancillary to a divorce proceeding initiated in domestic relations court and then certified to the juvenile court under R.C. 3109.04 or 3109.06, the juvenile court shall, in accordance with R.C. 3109.04, apply the best interests test to determine custody of the children rather than the suitability test.

{¶71} I must concede the majority's decision to leave this unassigned error unaddressed is, of course, discretionary. *Peagler*. However, I am troubled by its statement that "Ohio's courts have been reaching a general consensus that, despite the pure 'best interests' language in R.C. 3109.04, some type of 'parental unsuitability' test must be applied in custody disputes between a parent and a non-parent before custody may be awarded to a non-parent." It then explains what it sees as the reason for this consensus. I believe this is an incorrect statement because, as illustrated below, the cases the majority relies upon address the constitutionality of R.C. 3109.04 best interests test, not how a court is to apply that test. In addition, some of the cases the majority relies upon reach opposite conclusions. Further, in light of recent United States Supreme Court case law, there is some question as to the ongoing constitutional validity of R.C. 3109.04's best interests test. Rather than reconciling these cases and taking the time to address the constitutionality of the best interests test, the majority's statements erode the distinction between the best interests test and the suitability test, thereby finding the best interests test constitutional due to that erosion. Although I believe it is inopportune at this time to raise the constitutionality of

R.C. 3109.04, I believe when this Court conducts such an analysis it should do so rigorously rather than glossing over the differences and distinctions which have arisen in the case law. The following will explain the problems with the majority's statements.

{¶72} Recently, Ohio's appellate courts have been faced with the question of whether the R.C. 3109.04 best interests test is constitutional. In *Baker v. Baker* (1996), 113 Ohio App.3d 805, 682 N.E.2d 661, cited by the majority, the appellant argued a best interests test violated his fundamental right under the United States and Ohio Constitutions to the custody of his children as against all third parties by awarding custody to a non-parent without finding that the appellant was an unfit or otherwise unsuitable parent. The Ninth District found the best interests test did not violate a parent's fundamental right to custody of his or her children.

{¶73} "'It is the last criteria [sic], other unsuitability, which allows the court to balance the interests of parent and child and avoid operating under the premise criticized in *Boyer* * * *, 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." (Emphasis added.) 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.' [*Perales*] at 98, 6 O.O.3d at 297, 369 N.E.2d at 1052.

{¶74} "Properly viewed, the right of a parent is not in conflict with the right of a child. It is in the best interests of a child to be in the custody of a suitable parent, and a parent is not suitable if it would not be in his or her child's best interests for him or her to have custody." Id. at 812.

{¶75} It should be noted that in *Comstock v. Comstock* (Mar. 1, 2000), 9th Dist. No. 9 CA 007339, another case cited by the majority, the same appellate court that decided *Baker* was once again faced with the question of what standard should be used when determining custody issues between parents and non-parents. In that case, the Ninth District stated, "Both R.C. 3109.04 and R.C. 2151.23 provide for custody of a child to be awarded to a non-parent. In custody proceedings between a parent and a non-parent, custody may not be awarded to the non-parent without first determining that the parent is unsuitable." Id. at 2, citing *Perales* at the syllabus. However, *Comstock* never cited to *Baker* or attempted to explain how they are related. This statement in *Comstock* gives the impression that in all custody proceedings between parents and non-parents, the court must first determine the parent is unsuitable before it may award custody to the non-parent. However, when read in conjunction with *Baker*, *Comstock* reaffirms the *Baker* decision that a suitability determination is inherent in the nature of a best interests analysis.

{¶76} In contrast, in *Esch v. Esch* (Feb. 23, 2001), 2nd Dist. No. 18489, appellant made a similar challenge to the constitutionality of the best interests test. The appellate court did not adopt *Baker*'s reasoning. Instead, it found the best interests test unconstitutional because it fails to give some credence or presumption to the parent's decisions. Relying on *Troxel v. Granville* (2000), 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49, the court stated, "If, simply because it disagrees with the parents as to the child's best interests, a state court granting visitation to a non-parent is unconstitutional, then a state court granting custody to a non-parent based on the same disagreement must also be unconstitutional." Id. at 4. As the court found the standard stated in the statute to be unconstitutional, it reverted back to the common

law standard and found the suitability test must be applied when determining custody disputes between parents and non-parents. Id.

{¶77} Without citing to *Esch*, this court also noted the constitutionality of R.C. 3109.04 is open to debate in light of *Troxel*. *Lewis*, supra (Donofrio, J., concurring). However, that case was not a proper case for such a determination. Id.

{¶78} Contrary to the majority's assertion, these cases do not stand for the proposition that a trial court complies with R.C. 3109.04 when determining custody between parents and non-parents if it conducts a suitability analysis either before it conducts or as part of the best interests test. Rather *Baker*, *Comstock*, and *Esch* address whether R.C. 3109.04 is constitutional due to its failure to expressly state that the trial court must consider a parent's suitability before it may turn to what is in the child's best interests and those cases come to different, opposing conclusions. The fallacy in the majority's statement is especially clear when R.C. 3109.04 is examined in light of the canons of statutory construction discussed above.

{¶79} An obvious question I must answer is why, given the fact that I feel the need to address the unassigned error regarding which test is to be applied in the present case, I previously stated that I feel this to be an inopportune time to address the constitutionality of R.C. 3109.04. As noted above, some Ohio courts, notably the Second District in *Esch*, have already found R.C. 3109.04 unconstitutional because it failed to include a parental suitability test when determining custody disputes between parents and non-parents arising in divorce proceedings. Likewise, this Court has previously noted R.C. 3109.04 is of questionable constitutionality in *Lewis*. However, regardless of how obvious the need for this Court to address the issue sometime in the near future, in this case neither of the parties have even mentioned the

constitutionality of R.C. 3109.04 in their briefs. This is in contrast to the unassigned error I would address in this case as each party argued that issue in their briefs to this court. In addition, the Attorney General has not been given the opportunity to defend the constitutionality of R.C. 3109.04. See R.C. 2721.12(A); *Cicco v. Stockmaster*, 89 Ohio St.3d 95, 2000-Ohio-0434, 728 N.E.2d 1066, syllabus. Accordingly, at this time I would be hesitant to state an opinion on R.C. 3109.04's constitutional validity as the majority has done.

{¶80} Finally, even if I agreed with the majority and chose not to address the unassigned error addressed above, I would disagree with the majority's conclusion. Recently, this Court dealt with a case which is procedurally indistinguishable from the case at hand. See *Lowe*, supra. In *Lowe*, the juvenile court was asked to decide a custody dispute between a parent and a non-parent. When making this determination, the juvenile court conducted a *Perales* suitability test while relying upon the report of a guardian ad litem. This Court found it to be reversible error for a trial court to rely upon the report of a guardian ad litem when conducting a *Perales* suitability analysis. Similarly, in this case the trial court conducted a *Perales* suitability test and relied upon a guardian ad litem's report when making its custody determination. However, in this case the majority concludes the trial court is correct for doing so, thus conflicting with *Lowe*.

{¶81} In conclusion, I would exercise this Court's discretion to address an unassigned error as both parties were able to address the issue in their briefs to this court. I would hold that in child custody disputes between parents and non-parents arising out of a divorce and certified to the juvenile court pursuant to R.C. 3109.04 or R.C. 3109.06, the juvenile court must apply the statutory best interests test rather than

the common law suitability test. I would also refuse to address the constitutionality of this requirement as neither party nor the state has been given the opportunity to attack or defend the constitutionality of R.C. 3109.04. Finally, the majority's conclusion that the trial court was correct to rely upon the report of a guardian ad litem when it made its *Perales* parental suitability determination is in direct conflict with *Lowe* which held such reliance is in error. For these reasons, I must respectfully dissent from the majority's opinion.