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## FAMILY LAW

# 'Wiseman' Analysis in Shared Custody Determinations No Longer Applicable

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*Special to the Legal*

The seminal cases regarding the awarding of shared custody are the cases of *In re Wesley JK*, 445 A.2d 1243 (Pa. Super. 1982), and *Wiseman v. Wall*, 718 A.2d 844 (Pa. Super. 1998). Under these cases, trial courts are to consider four factors when awarding shared custody. Often referred to as the *Wesley* factors or *Wiseman* factors, trial courts consider the following four factors before awarding shared custody: both parents must be fit, capable to making reasonable child-rearing decisions and willing and able to provide love and care for their children; both parents must evidence a continuing desire for active involvement in the child's life; both parents must be recognized by the child as a source of security and love; a minimal degree of cooperation between the parents must be possible.

The crux of the *Wiseman* analysis is often focused on factor four. In the *Wesley* case, the Superior Court stressed that the minimal degree of cooperation under factor four "does not translate into a requirement that the parents have an amicable relationship." The evolution and application



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of factor four resulted in courts applying a very low threshold for cooperation in meeting the final factor of the analysis.

In January 2011, the new Custody Act became effective. In the new Custody Act, there are 16 enumerated factors that the court is to analyze prior to making a custody decision. Included in the 16 factors is the following: "the level of conflict between the parties and the willingness and ability of the parties to cooperate with one another." Since the enactment of the new Custody Act, prior doctrines that evolved through case law have fallen by the wayside. For example, the primary caregiver doctrine has been held

no longer viable after the enactment of the new Custody Act (see *M.J.M. v. M.L.G.*, 63 A.3d 331 (Pa. Super. 2013)).

Further, in the past, there was debate as to whether the *Wesley/Wiseman* analysis applied to both shared legal custody disputes and shared physical custody disputes. The general application by the courts and understanding of the practitioners was that the analysis applied to both. The recent case of *P.J.P. v. M.M.*, 185 A.3d 413 (Pa. Super. 2018), addressed the issue of whether the *Wesley/Wiseman* analysis survived the enactment of the new Custody Act in 2012. Under the *P.J.P.* case, the Superior Court held that the new Custody Act no longer requires a trial court to give deciding weight to the four *Wesley/Wiseman* factors when awarding shared custody.

The pertinent facts of the *P.J.P.* case are as follows: P.J.P. (the father) and M.M. (the mother) are the parents of their son M.P. The parties exercised custody of the child pursuant to a 2016 order that awarded the mother primary physical custody and the father partial physical custody. Thereafter, the father filed a petition to modify custody seeking a shared physical custody order. According to the opinion,

the trial court conducted a two-day custody hearing “during which the parties each testified concerning their efforts to promote child’s relationship with the other party.” With regard to each party’s cooperation with each other, the mother testified that the father “engages in ‘mental terrorism’ by belittling and insulting her.” The Superior Court highlighted that the mother testified that the father told her “that when the child was older, the father would have the child read the court documents on Google to make sure the child does not make the same mistake the father did by marrying a ‘toxic’ person.” The opinion further highlighted the father’s uncooperative nature and unwillingness to cooperate in co-parenting counseling. After the custody trial, the trial court denied the father’s petition for modification. Following the court’s denial of the father’s motion for reconsideration, the father filed an appeal raising six issues. For purposes of this article, the focus will be on whether: the trial court reached an unreasonable conclusion with regard to the four factors to be considered when awarding joint custody as established in *Wiseman*, and whether the trial court misapplied the law when considering the meaning and context for a “minimal cooperation between the parties.”

In addressing these two issues, the Superior Court focused on the timing of the *Wesley/Wiseman* decisions and the enactment of the new Custody Act. The new Custody Act was enacted over 10 years after the *Wiseman* case was decided. As is mandated by the custody statute, the trial court analyzed each of the enumerated 16 factors under the statute and determined that the majority of the factors either did not apply or weighed equally in favor of both parties. The trial court also concluded that four factors weighed in favor of the mother. Those factors

were: “the likelihood of encouraging and permitting contact with the other party; the availability of extending family; attempts to turn the party against the other parent; and the parents’ level of conflict and willingness and ability to cooperate.” According to the opinion, the trial court did not conclude that any factor weighed in the father’s favor. The Superior Court found that the record supported the trial court’s factual findings and it was, therefore, within the trial court’s discretion to conclude that shared physical custody of the child was contrary to his best interest.

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The Superior Court held that trial courts “need no longer engage in the *Wiseman* analysis when determining whether shared custody is appropriate.” The Superior Court found that the four *Wiseman* factors are assimilated into the 16 enumerated custody factors of 23 Pa. C.S. Section 5328(a). According to the Superior Court: “Section 5328(a), unlike *Wiseman*, does not require certain findings before a court may award shared custody. Under the current statute, courts must now consider all relevant factors, including ‘the ability of the parties to cooperate,’ when making an award of any form of custody, and poor cooperation need not be dispositive.”

Therefore, because the court properly analyzed the case under Section 5328(a), and the evidence supported its findings, the Superior Court affirmed the trial court’s decision.

This case is extremely important for family law practitioners and the bench. Until the publication of the *P.J.P.* case, it was not clear whether a *Wesley/Wiseman* analysis was required in determining shared custody cases. It was the belief of many that the four-step analysis was still viable. Further there were references to *Wesley* and *Wiseman* in appellate opinions following the enactment of the new Custody Act. The Superior Court, in the *P.J.P.* case, highlights that its decision in *P.J.P.* is not in conflict with the case of *R.S. v. T.T.*, 113 A.3d 1254 (Pa. Super. 2015). In that case, the Superior Court found that the *Wiseman* factors had been satisfied which caused the Superior Court to reject the trial court’s conclusion that shared custody was not in the child’s best interest. However, the Superior Court stressed that in the *R.S.* case, the issue of whether the trial court “must make the *Wiseman* findings before awarding shared custody” was not addressed. According to the *P.J.P.* case, a *Wiseman* analysis is no longer mandated. As the Superior Court has found that the *Wiseman* factors are assimilated into Section 5328(a), a faint heartbeat still exists as to the reasoning and persuasive nature behind the prior decisions. However, an analysis of the four factors is no longer required. •