

IN THE SUPREME COURT OF OHIO

Paul Fisher,

Appellant,

v.

Emma Hasenjager,

Apellee.

06-1853

Case No. 06-1815

MERIT BRIEF OF APPELLANT PAUL FISHER

On Conflict Certification and on Discretionary Appeal from the Mercer County
Court of Appeals, Third Appellate District

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INTRODUCTION TO THE CASE

I. Nature of the Case

This is a statutory interpretation case. This case requires the court to interpret R.C. 3109.04(E)(2)(b), a provision in the child custody statute addressing modification of shared parenting plans.

II. Issue Presented

One issue is presented in this case – is residential parent and legal custodian status a “term” of a shared parenting plan for the purpose of applying R.C. 3109.04(E)(2)(b)?

III. Implication of Court’s Decision

If residential parent and legal custodian status is a “term” of a shared parenting plan, then a court may be authorized to modify residential parent and legal custodian status under subsection (E)(2)(b). However, if residential parent and legal custodian status is not a “term” of a shared parenting plan, then a court is not authorized to modify residential parent and legal custodian status under subsection (E)(2)(b).

IV. Procedural Status

This court determined that a conflict exists among the courts of appeals regarding this issue and ordered the parties to brief the following issue:

Is a change in the designation of residential parent and legal custodian of children a “term” of a court approved shared parenting decree, allowing the designation to be modified solely on a finding that the modification is in the best interest of the children pursuant to R.C. 3109.04(E)(2)(b) and without a determination that a “change in circumstances” has occurred pursuant to R.C. 3109.04(E)(1)(a)?¹

¹ Entry, *Fisher v. Hasenjager*, Case No. 06-1853, Dec. 13, 2006.

This court also allowed a discretionary appeal regarding the following Proposition of Law:

After a shared parenting decree has been issued, a court may not modify a parent's status as a residential parent pursuant to R.C. 3109.04(E)(2)(b). Rather, after a shared parenting decree has been issued, a court may only modify a parent's status as a residential parent pursuant to R.C. 3109.04(E)(1)(a).²

V. The Problem – Two Different Approaches

A court definitely is authorized to modify residential parent and legal custodian status in a shared parenting decree under R.C. 3109.04(E)(1)(a). However, a controversy has arisen regarding whether a court is also authorized to modify residential parent and legal custodian status under R.C. 3109.04(E)(2)(b).

Courts have taken two different approaches regarding subsection (E)(2)(b). One court has concluded that modification of residential parent and legal custodian status is authorized under subsection (E)(2)(b). Other courts have concluded that modification of residential parent and legal custodian status is not authorized under subsection (E)(2)(b).

A. Modification authorized under subsection (E)(2)(b)

The Third District has held that, after a shared parenting decree has been issued, a court is authorized to modify residential parent and legal custodian status under subsection (E)(2)(b).³

² Entry, *Fisher v. Hasenjager*, Case No. 06-1815, Dec. 13, 2006.

³ *Fisher v. Hasenjager* (Aug. 14, 2006), Mercer App. No. 10-05-14, 2006-Ohio-4190, 2006 WL 2337659, paras. 35-38.

The Third District observed that subsection (E)(2)(b) states that a court may “modify the terms of the plan for shared parenting.”⁴ Based on this language, the Third District concluded that a court is authorized to modify residential parent and legal custodian status in a shared parenting decree under subsection (E)(2)(b).

B. Modification not authorized under subsection (E)(2)(b)

Five other courts of appeals (the Third, Fourth, Ninth, Eleventh, and Twelfth Districts) have held that, after a shared parenting decree has been issued, residential parent and legal custodian status cannot be modified under subsection (E)(2)(b).⁵ These

⁴ Revised Code subsection 3109.04(E)(2)(b) states:

The court may modify the terms of the plan for shared parenting approved by the court and incorporated by it into the shared parenting decree upon its own motion at any time if the court determines that the modifications are in the best interest of the children or upon the request of one or both of the parents under the decree. Modifications under this division may be made at any time. The court shall not make any modification to the plan under this division, unless the modification is in the best interest of the children.

⁵ *In re Beekman* (March 4, 2004), 2004 WL 432235, 2004-Ohio-1066, para. 15; *Hunter v. Bachman* (Sept. 29, 2004), 2004 WL 2244125, 2004-Ohio-5172, para. 12; *Patton v. Patton* (2001), 141 Ohio App.3d 691, 753 N.E.2d 225, 2001-Ohio-2117, p. 695; *Moore v. Moore* (March 27, 1998), Portage App. No. 97-P-0008, 1998 WL 156983, p. 8; *Fisher v. Campell*, (June 23, 1997), Butler App. No. CA 96-11-248, 1997 WL 349013, p. 2; *Schoettle v. Bering* (Apr. 22, 1996), Brown App. No. CA95-07-011 1996 WL 189027, p. 2.

courts hold that a court is only authorized to modify residential parent and legal custodian status under subsection (E)(1)(a).⁶ These courts hold that a designation of residential parent and legal custodian status is not a “term” of a shared parenting plan. Rather, a designation of residential parent and legal custodian status is an allocation of parental rights and responsibilities. Such an allocation may only be modified under subsection (E)(1)(a).

In addition to the reason stated by these courts, it appears that there is a second independent reason to conclude that residential parent and legal custodian status cannot be modified under subsection (E)(2)(b). A designation of residential parent and legal

⁶ Revised Code subsection 3109.04(E)(1)(a) 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 or the prior shared parenting decree, unless a modification is in the best interest of the child and one of the following applies:

(i) The residential parent agrees to a change in the residential parent or both parents under a shared parenting decree agree to a change in the designation of residential parent.

(ii) The child, with the consent of the residential parent or of both parents under a shared parenting decree, has been integrated into the family of the person seeking to become the residential parent.

(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.

custodian status is not a term of a shared parenting “plan.” Rather, a designation of residential parent and legal custodian status is a term of a shared parenting “order.” Subsection (E)(2)(b) only authorizes a court to modify the terms of a shared parenting “plan.” Subsection (E)(2)(b) does not authorize a court to modify the terms of a shared parenting “order.” Thus, residential parent and legal custodian status cannot be modified under subsection (E)(2)(b).

VI. Appellant’s Position

The appellant’s position can be summarized as follows:

- Residential parent and legal custodian status is not a “term” of a shared parenting plan for the purpose of applying R.C. 3109.04(E)(2)(b).
- Because residential parent and legal custodian status is not a “term” of a shared parenting plan, residential parent and legal custodian status cannot be modified under R.C. 3109.04(E)(2)(b).
- After a shared parenting decree has been issued, residential parent and legal custodian status may only be modified under R.C. 3109.04(E)(1)(a).

STATEMENT OF THE FACTS

I. Background

On October 10, 2002, Demetra Hasenjager (“Demetra”) was born. Soon after her birth, Appellant Paul Fisher (“father”) and Appellee Emma Hasenjager (“mother”) entered into a consent judgment entry which established that Appellant Paul Fisher was the father of Demetra. The initial entry also stated that the mother was designated as Demetra’s residential parent and legal custodian.

In August of 2003, the father filed a motion requesting a change of custody. After the motion was filed, the parents entered mediation. As a result of the mediation, the parents entered into a shared parenting arrangement. In December of 2003, the trial court issued a judgment entry adopting the parents’ shared parenting agreement with minor changes.

The judgment entry did not expressly designate either parent as Demetra’s residential parent and legal custodian. Because the entry did not expressly designate either parent as Demetra’s residential parent and legal custodian, each parent was impliedly designated as Demetra’s residential parent and legal custodian.⁷

II. Trial Court

In January of 2005, the father filed a motion to modify parental rights and responsibilities. The father’s motion requested that the father be designated as Demetra’s sole residential parent and legal custodian.

⁷R.C. 3109.04(K)(6).

In February of 2005, the mother filed a motion to modify parental rights and responsibilities. The mother's motion requested that the mother be designated as Demetra's sole residential parent and legal custodian.

In March of 2005, a trial occurred. After the trial, the court designated the mother as the sole residential parent and legal custodian for Demetra. By this act, the court terminated the father's status as a residential parent and legal custodian for Demetra.

III. Court of Appeals

The father appealed. The father claimed that the trial court erred when it terminated the father's status as a residential parent and legal custodian. Among other things, the father argued that his status as a residential parent and legal custodian could only be modified under R.C. 3109.04(E)(1)(a), and not under R.C. 3109.04(E)(2)(b).

The appellate court reviewed the trial court's decision found that the trial court modified the parents' shared parenting plan. Further, the appellate court found that the trial court modified the parents' shared parenting plan using subsection 3109.04(E)(2)(b), not subsection 3109.04(E)(1)(a).

The appellate court observed that, because the trial court had modified the shared parenting plan pursuant to subsection (E)(2)(b), it was not necessary for the trial court to meet the higher standard for modification found in subsection (E)(1)(a). Rather, it was only necessary for the trial court to find that the modification was in the best interest of the child.

ARGUMENT

Proposition of Law

Residential parent and legal custodian status is not a “term” of a shared parenting plan for the purpose of applying R.C. 3109.04(E)(2)(b).

I. Residential parent and legal custodian status in a shared parenting decree may only be modified under R.C. 3109.04(E)(1)(a)

The appellate courts that have concluded that residential parent and legal custodian status cannot be modified under R.C. 3109.04(E)(2)(b) have reached this conclusion by reasoning that a designation as a residential parent and legal custodian is an allocation of parental rights and responsibilities and that such an allocation can only be modified under R.C. 3109.04(E)(1)(a). These courts hold that an allocation of parental rights and responsibilities cannot be modified under R.C. 3109.04(E)(2)(b) because subsection (E)(2)(b) does not authorize a court to modify an allocation of parental rights and responsibilities.

A. Modification of an allocation of parental rights and responsibilities can only be made under subsection (E)(1)(a)

1. Subsection (E)(1)(a) authorizes a court to modify an allocation of parental rights and responsibilities

Subsection (E)(1)(a) expressly recognizes that a court has the authority to modify a prior decree “allocating parental rights and responsibilities.” Said subsection also expressly recognizes that a court has the authority to modify a prior shared parenting decree that allocates parental rights and responsibilities.⁸

⁸ R.C. 3109.04(E)(1)(a) and (E)(1)(a)(i) and (ii).

2. No other statutory provision authorizes a court to modify an allocation of parental rights and responsibilities

Subsection (E)(1)(a) is the only provision in the custody statute⁹ that expressly authorizes a court to modify a prior decree allocating parental rights and responsibilities. Subsection (E)(2)(b) does not expressly authorize a court to modify a prior decree allocating parental rights and responsibilities.

B. Designation as a residential parent and legal custodian is an allocation of parental rights and responsibilities

1. Designation as a residential parent and legal custodian grants a parent the right to physical and legal control of a child

A parent who is designated as a residential parent and legal custodian is granted the rights and duties of a “residential parent” and the rights and duties of a “legal custodian.” The custody statute does not define these terms. Thus, these terms must be interpreted. Generally, a term is defined by its ordinary usage.¹⁰

It appears that the designation of “residential parent” grants certain rights and duties to a parent. The designation apparently grants the right to a parent to have a child reside with the parent. The designation apparently imposes the duty on a parent to provide an appropriate residence for the child. Thus, the designation of “residential parent” appears to grant to a parent the right to physical control of a child.

⁹ R.C. 3109.04. This section contains the substantive and procedural rules a court must follow regarding the allocation of parental rights and responsibilities. This section shall be referred to as the “custody statute.”

¹⁰ R.C. 1.42 (words and phrases shall be construed according to common usage).

It appears that the designation of “legal custodian” also grants certain rights and duties to a parent. The designation apparently grants the right to a parent to make the decisions that a custodian would normally make for a ward. The designation also apparently imposes the duty on a parent to make decisions based on the best interest of the ward, as would a custodian. Thus, the designation of “legal custodian” appears to grant to a parent the right to legal control of a child.

It is beyond the scope of this brief to provide precise definitions for the terms “residential parent” and “legal custodian.” However, based on the above discussion, it is clear that a designation as a residential parent and legal custodian grants fundamental and highly significant rights and duties to a parent.

Generally, parents are the joint natural guardians of their minor children.¹¹ Further, until a court order to the contrary is issued, parents have equal powers, rights, and duties and neither parent has any right greater than the other parent concerning parental rights and responsibilities including “the right to be the residential parent and legal custodian” of the child.¹² If one parent has been designated as a child’s residential parent and legal custodian, the other parent may not forcibly take the child from that parent.¹³ It appears that, when only one parent is designated as a child’s residential

¹¹ R.C. 2111.08.

¹² *Id.*

¹³ *Id.*

parent and legal custodian, that parent becomes a sole guardian for a child and receives all rights and duties granted by guardianship status, unless otherwise ordered by a court.¹⁴

2. A grant of the physical and legal control of a child is an allocation of parental rights and responsibilities

Prior to the enactment of the current custody statute, when a court allocated parental rights and responsibilities to a parent, said allocation was referred to as a grant of “custody” to the parent.¹⁵ When a court granted custody to a parent, the parent received the right to physical and legal control of the child.¹⁶

Generally, a court may no longer directly grant “custody” of a child. Rather, the granting of custody has now been replaced by the granting of parental rights and responsibilities. In *Braatz*, this court observed that the terms “custody and control” have been changed to “parental rights and responsibilities.”¹⁷ The court also observed that “custody rights” are now referred to as “parental rights and responsibilities.”¹⁸

A court allocates parental rights and responsibilities when it issues a shared parenting order.¹⁹ If a shared parenting order is issued, and the shared parenting order is

¹⁴ *Id.*

¹⁵ See *Braatz v. Braatz* (1999), 85 Ohio St.3d 40, 43-44, 706 N.E.2d 1218, 1221-1222 (explaining the prior custody statute).

¹⁶ *In re Gibson* (1991), 61 Ohio St.3d 168, 171, 573 N.E.2d 1074,1076 (explaining the definition of “custody”).

¹⁷ *Braatz, supra*, at 43.

¹⁸ *Id.*

¹⁹ R.C. 3109.04(A)(2).

silent regarding residential parent and legal custodian status, then each parent is impliedly designated as a residential parent and legal custodian of the child.²⁰ A court may also expressly designate a residential parent and legal custodian in a shared parenting order.²¹

3. Thus, a designation as residential parent and legal custodian is an allocation of parental rights and responsibilities.

Designation as a residential parent and legal custodian grants a parent the right to physical and legal control of a child. The right to physical and legal control of a child is an allocation of parental rights and responsibilities. Thus, designation as a residential parent and legal custodian is an allocation of parental rights and responsibilities.²²

C. Modification of residential parent and legal custodian status can only be made under (E)(1)(a)

A designation as a residential parent and legal custodian is an allocation of parental rights and responsibilities. Modification of an allocation of parental rights and responsibilities in a shared parenting decree can only be made under subsection (E)(1)(a). Thus, a modification of residential parent and legal custodian status can only be made under subsection (E)(1)(a).

²⁰ R.C. 3109.04(K)(6).

²¹ *Id.*

²² This conclusion is also apparent from the custody statute's approach to sole custody cases. The statute states that the parent who is allocated primary parental rights and responsibilities for a child shall be designated as the residential parent and legal custodian of the child. R.C. 3109.04(A)(1). Logically, if a parent is granted *all* parental rights and responsibilities for a child, that parent would also be designated as the residential parent and legal custodian of the child.

The majority of appellate courts that have considered this issue have reached this conclusion. The Fourth, Ninth, and Third Districts have all concluded that a request to modify “residential parent and legal custodian” status is a request to modify parental rights and responsibilities and must be addressed under subsection (E)(1)(a).²³ Other courts have used slightly different language to express the same concept. The Eleventh District has concluded that a request to modify “residential parent” status must be addressed under subsection (E)(1)(a).²⁴ Finally, the Twelfth District has twice concluded that a request to modify “custody” must be addressed under subsection (E)(1)(a).²⁵ None of these courts allow residential parent and legal custodian status to be modified under subsection (E)(2)(b).

Based on the foregoing, this court should conclude that residential parent and legal custodian status in a shared parenting decree may only be modified under subsection (E)(1)(a) and may not be modified under subsection (E)(2)(b).

²³ *Beekman, supra*, para. 15; *Hunter v. Bachman, supra*, at para. 12; *Patton, supra*, at pp. 693 and 695.

²⁴ *Moore, supra*, p. 8.

²⁵ *Fisher v. Campbell, supra*, p. 2.; *Schoettle v. Bering, supra*, p. 2.

II. Residential parent and legal custodian status in a shared parenting decree may not be modified under R.C. 3109.04(E)(2)(b)

Residential parent and legal custodian status must be addressed in a shared parenting order. Residential parent and legal custodian status may not be addressed in a shared parenting plan. Because residential parent and legal custodian status may not be addressed in a shared parenting plan, residential parent and legal custodian status may not be modified under subsection (E)(2)(b).

A. Residential parent and legal custodian status must be addressed in a shared parenting “order,” not in a shared parenting “plan”

Residential parent and legal custodian status must be addressed in a shared parenting order.

1. Residential parent and legal custodian status must be addressed in a shared parenting “order”

The custody statute expressly recognizes that residential parent and legal custodian status must be addressed in a shared parenting order.

a. Procedure in shared parenting cases

If a parent desires shared parenting, the parent must file a pleading or motion requesting a court to grant shared parenting.²⁶ The parent must also file a proposed plan for the exercise of shared parenting.²⁷

After a request for shared parenting and a proposed plan for the exercise of shared parenting are filed with a court, the court must determine if shared parenting should be

²⁶ R.C. 3109.04(G).

²⁷ *Id.*

granted.²⁸ The court must also determine if a proposed shared parenting plan should be approved.²⁹

If a court determines that shared parenting should be granted, and if the court approves a shared parenting plan, the court issues a “shared parenting order.”³⁰

If a court issues a shared parenting order and approves a shared parenting plan, the court must then issue a final shared parenting decree.³¹ The final shared parenting decree grants the parents the “shared parenting of the children.”³² The approved shared parenting plan is incorporated into the final shared parenting decree.³³

²⁸ A court has no duty to grant a request for shared parenting. Even if a plan for shared parenting has been approved by a court, a court “may” issue a shared parenting order. R.C. 3109.04(A)(2). In determining whether shared parenting is in the best interest of a child, a court must consider various factors. *See* R.C. 3109.04(F)(2).

²⁹ R.C. 3109.04(D)(1)(a)(i through iii). More than one proposed shared parenting plan may be filed. Subsection (D)(1)(a) addresses three situations involving proposed shared parenting plans. In subsection (i), both parents jointly make a request for shared parenting and jointly file a proposed shared parenting plan. In subsection (ii), each parent separately requests shared parenting and separately files a proposed shared parenting plan. In subsection (iii), each parent separately requests shared parenting but only one parent files a proposed shared parenting plan.

³⁰ R.C. 3109.04(A)(2).

³¹ R.C. 3109.04(D)(1)(d).

³² *Id.*

³³ *Id.*

- b. The custody statute requires that residential parent and legal custodian status be addressed in a shared parenting “order”

The custody statute requires that residential parent and legal custodian status be addressed in a shared parenting order. The shared parenting order may expressly or impliedly address residential parent and legal custodian status.

The custody statute states that, if a shared parenting order is issued, a court can expressly address residential parent and legal custodian status in the shared parenting order. Specifically, the statute states that, as “provided in the [shared parenting] order,” a court can make whatever designation it determines is appropriate regarding residential parent and legal custodian status.³⁴

The custody statute also states that, if a shared parenting order is issued, and if the shared parenting order is silent regarding residential parent and legal custodian status, each parent is impliedly designated as a residential parent and legal custodian in the “[shared parenting] order.”³⁵

³⁴ R.C. 3109.04(K)(6) (interpolation added). In its entirety, this subsection reads as follows:

Unless the context clearly requires otherwise and except as otherwise provided in the order, if an order is issued by a court pursuant to this section and the order provides for shared parenting of a child, each parent, regardless of where the child is physically located or with whom the child is residing at a particular point in time, as specified in the order, is the “residential parent,” the “residential parent and legal custodian,” or the “custodial parent” of the child.

³⁵ R.C. 3109.04(K)(6).

There is no language in the custody statute that authorizes a court to address residential parent and legal custodian status anywhere other than a shared parenting order. Thus, residential parent and legal custodian status must be addressed in a shared parenting order.

2. Residential parent and legal custodian status may not be addressed in a shared parenting “plan”

As discussed above, the custody statute requires a court to address residential parent and legal custodian status in a shared parenting order. There is no language in the custody statute that authorizes a court to address residential parent and legal custodian status in a shared parenting plan. Further, several provisions in the custody statute indicate that residential parent and legal custodian status may not be addressed in a shared parenting plan.

a. Relationship between shared parenting order and shared parenting plan

A shared parenting order and a shared parenting plan have different functions. As discussed in the first argument, a shared parenting order contains a general grant of parental rights and responsibilities for a child.³⁶ The general grant of parental rights and responsibilities is made in the form of an express or implied grant of residential parent and legal custodian status.

³⁶ See R.C. 3109.04(A). This provision states that a court may “allocate the parental rights and responsibilities for the care of the children” in one of two “ways.” The court may issue a sole custody order or the court may issue a shared parenting order.

A shared parenting plan has a different function. A shared parenting plan contains the specific details that implement the general grant of parental rights and responsibilities made in the shared parenting order.³⁷

Numerous statutory provisions recognize that a shared parenting plan provides the details that implement the general grant of parental rights and responsibilities made in a shared parenting order.

First, the custody statute states that shared parenting means that parents share all or some of the aspects of the care of their children “*in the manner* set forth in the plan for shared parenting.”³⁸

Second, when explaining how a parent may seek a shared parenting order, the custody statute states that a parent may file a proposed shared parenting plan “*for the exercise* of shared parenting by both parents.”³⁹

Third, when explaining how a court may grant a shared parenting order, the custody statute states that a court may “issue a shared parenting order requiring the parents to share all or some of the aspects of the physical and legal care of the children *in accordance with* the approved plan for shared parenting.”⁴⁰

³⁷ See R.C. 3109.04(G) (listing the minimum factors that must be addressed in a shared parenting plan).

³⁸ R.C. 3109.04(J)(emphasis added).

³⁹ R.C. 3109.04(G)(emphasis added).

⁴⁰ R.C. 3109.04(A)(2)(emphasis added).

b. Contents of shared parenting plan

The provision in the custody statute that addresses the contents of a proposed shared parenting plan clearly indicates that the General Assembly intended that residential parent and legal custodian status not be included in a shared parenting plan.

In pertinent part, the custody statute states:

A plan for shared parenting shall include provisions covering all factors that are relevant to the care of the children, including, but not limited to, provisions covering factors such as physical living arrangements, child support obligations, provision for the children's medical and dental care, school placement, and the parent with which the children will be physically located during legal holidays, school holidays, and other days of special importance.⁴¹

The custody statute does not require that residential parent and legal custodian status be included in a proposed shared parenting plan. If the General Assembly intended that residential parent and legal custodian status should be included in a shared parenting plan, it could have expressly required the inclusion of this factor. It did not. The omission of this factor indicates that the General Assembly did not intend for residential parent and legal custodian status to be included in a shared parenting plan.

c. Residential parent and legal custodian status may not be addressed in a shared parenting plan

The custody statute demonstrates that residential parent and legal custodian status may not be addressed in a shared parenting plan. The custody statute contains no language that authorizes residential parent and legal custodian status to be addressed in a shared parenting plan.

⁴¹ R.C. 3109.04(G).

Further, the statute repeatedly recognizes that the function of a shared parenting plan is to provide the details that implement the general grant of parental rights and responsibilities made in a shared parenting order.

Finally, the General Assembly's decision to not require that residential parent and legal custodian status be addressed in a proposed shared parenting plan further demonstrates that the General Assembly did not intend that residential parent and legal custodian status be addressed in a shared parenting plan.

B. Because residential parent and legal custodian status may not be addressed in a shared parenting plan, residential parent and legal custodian status is not a "term" of a shared parenting plan

1. General

Because residential parent and legal custodian status may not be addressed in a shared parenting plan, residential parent and legal custodian status is not a "term" of a shared parenting plan. Rather, residential parent and legal custodian status is a term of a shared parenting order.

2. The Lower Court's Error

In this case, the appellate court attempted to determine what is included in the terms of a shared parenting plan by merely defining the word "terms."⁴² The appellate court viewed the definition of the word "terms" found in Black's Law Dictionary. In said dictionary, the word "terms" is defined as "provisions that define an agreement's scope;

⁴² *Fisher v. Hasenjager*, *supra*, para. 37.

conditions or stipulations < terms of sale>.” The appellate court made two errors regarding its analysis.

First, the appellate court did not ask the proper question. The question is not whether residential parent and legal custodian status can be a “term” of some document. Rather, the question is whether residential parent and legal custodian status can be a term in a shared parenting plan. Subsection (E)(2)(b) states that a court may “modify the terms of the plan for shared parenting” previously approved by the court. Merely analyzing the definition of the word “term” is meaningless. The proper inquiry is whether residential parent and legal custodian status can be a term in a shared parenting plan.

Second, the appellate court failed to consider related provisions in the custody statute. It is a fundamental rule of statutory interpretation that related provisions (provisions in *pari materia*) should be interpreted together.⁴³ Provisions of a statute are related when they address the same subject matter.⁴⁴

The court did not consider other related provisions contained in the custody statute. Specifically, the court did not consider subsection (K)(6) which states that residential parent and legal custodian status must be addressed in a shared parenting *order*. Further, the court did not consider the numerous statutory provisions which state that a shared parenting plan provides the details that implement the general grant of

⁴³ *State v. Moaning* (1996), 76 Ohio St. 3d 126, 128, N.E.2d 1115, 1116, 1966-Ohio-413.

⁴⁴ *Id.*

parental rights and responsibilities made in a shared parenting order.⁴⁵ Finally, the court did not consider subsection (G) which states what must be addressed in a shared parenting plan and which does not require residential parent and legal custodian status to be addressed in a shared parenting plan. By not considering subsection (K)(6), and by not considering other related positions in the custody statute, the appellate court did not properly define the meaning of the phrase “terms of the plan for shared parenting” as that phrase is used in subsection (E)(2)(b).

- C. Because residential parent and legal custodian status is not a “term” of a shared parenting plan, residential parent and legal custodian status cannot be modified under R.C. 3109.04(E)(2)(b)

Revised Code 3109.04(E)(2)(b) states that a court may “modify the terms of the plan for shared parenting” approved by a court and incorporated by the court into a shared parenting decree. Because residential parent and legal custodian status is not a “term” of a shared parenting plan, residential parent and legal custodian status cannot be modified under subsection (E)(2)(b).

Based on the foregoing, this court should conclude that residential parent and legal custodian status is not a term of a shared parenting plan, that residential parent and legal custodian status may not be modified under subsection (E)(2)(b), and that residential parent and legal custodian status may only be modified under subsection (E)(1)(a).

⁴⁵ See R.C. 3109.04(J), (G), and (A)(2).

III. Interpreting subsection (E)(2)(b) to authorize modification of residential parent and legal custodian status will lead to unreasonable and absurd results

A. Introduction

This court should not interpret subsection (E)(2)(b) to authorize a court to modify residential parent and legal custodian status in a prior shared parenting decree because such an interpretation will lead to unreasonable and absurd results.

B. Two options

There is no question that a court may modify residential parent and legal custodian status in a prior shared parenting decree under R.C. 3109.04(E)(1)(a). Thus, if this court interprets subsection (E)(2)(b) to also permit a court to modify residential parent and legal custodian status in a prior shared parenting decree, a court will have two statutory provisions under which it may modify residential parent and legal custodian status in a prior shared parenting decree.

C. Different Standards

Subsection (E)(1)(a) and (E)(2)(b) contain significantly different standards for the granting of a modification. Subsection (E)(1)(a) contains a relatively high standard. Under subsection (E)(1)(a), a party must prove the following facts. First, a change has occurred in the circumstances of a child, the child's residential parent, or either of the parents subject to a shared parenting decree.⁴⁶ Second, the change in circumstances is based on facts that have arisen since the prior decree was issued or that were unknown to

⁴⁶R.C. 3109.04 (E)(1)(a).

the court at the time the prior decree was issued.⁴⁷ Third, the modification is necessary to serve the best interest of the child.⁴⁸ Fourth, if the court is asked to modify “residential parent” status, the parties must also establish that the harm to the child caused by the change of environment will be outweighed by the advantages of the change of environment.⁴⁹

Subsection (E)(2)(b) contains a relatively low standard. Under subsection (E)(2)(b), a party must only prove that the requested modification would be in the best interest of the child. Obviously, the standard for a modification under subsection (E)(2)(b) is significantly lower than the standard for a modification under subsection (E)(1)(a).

D. Unreasonable and absurd results

Having two options will lead to unreasonable and absurd results. If two courts consider the same set of facts, and if one court applies subsection (E)(1)(a) and the other court applies subsection (E)(2)(b), the court applying subsection (E)(1)(a) is significantly less likely to grant the motion to modify because of the higher standard contained in subsection (E)(1)(a). Similarly, the court applying subsection (E)(2)(b) is significantly more likely to grant the motion because of the lower standard contained in subsection

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ R.C. 3109.04(E)(1)(a)(iii). This subsection also permits modification of “residential parent” status if the parents agree to the modification or if the child has been integrated into the family of the person seeking to become the residential parent. R.C. 3109.04(E)(1)(a)(i) and (ii).

(E)(2)(b). Thus, in cases with the same facts, different judgments will be issued. Such results are unreasonable and absurd. In cases with the same facts, the same judgments should be issued. Statutes should not be interpreted in a manner that produces unreasonable and absurd results.⁵⁰

⁵⁰ *State v. Wells* (2001), 91 Ohio St.3d 32, 34, 740 N.E.2d 1097, 1100, 2001-Ohio-3 and 2001-Ohio-227.

IV. Interpreting subsection (E)(2)(b) to authorize modification of residential parent and legal custodian status will cause the modification provision of the custody statute to be vague and unconstitutional

A. Introduction

This court should not interpret subsection (E)(2)(b) to authorize a court to modify residential parent and legal custodian status in a prior shared parenting decree because such an interpretation will cause the modification provision of the custody statute to be overly vague and unconstitutional.

B. No guidance

As discussed above, if subsection (E)(2)(b) is interpreted to authorize a court to modify residential parent and legal custodian status in a shared parenting plan, then a court will have two statutory provisions under which it may modify residential parent and legal custodian status in a shared parenting decree.

If subsection (E)(2)(b) is interpreted in this manner, it is important to note that the custody statute provides a court with no guidance regarding when a court should apply subsection (E)(1)(a) and when a court should apply subsection (E)(2)(b). Because the statute provides no guidance on this issue, courts will apply these subsections in an arbitrary manner. That is, some courts will apply (E)(1)(a) and some courts will apply (E)(2)(b).

C. Vague and unconstitutional statute

Because the statute gives courts no guidance on which subsection to apply, the modification provisions of the custody statute would be “void for vagueness” under the

Due Process Clauses of the Ohio and United States Constitutions.⁵¹ The General Assembly has recognized that a statute should not be interpreted in a manner that causes a statute to operate in an unconstitutional manner.⁵²

⁵¹ Section 1, Article I, Ohio Constitution; Section 1, Fourteenth Amendment to the United States Constitution; see *Perez v. Cleveland* (1997), 78 Ohio St.3d 376, 378, 678 N.E.2d 537, 540, 1997-Ohio-33 (citing *Grayned v. Rockford* (1972), 408 U.S. 104, 108-109, 92 S. Ct. 2294, 2298-2299, 33 L. Ed.2d 222, 227-228 and observing that a statute must contain “reasonably clear guidelines to prevent official arbitrariness or discrimination in its enforcement”).

⁵² R.C. 1.47(A) (in enacting a statute, it is presumed that the General Assembly intended to comply with the Ohio and United States Constitutions).

V. **Interpreting subsection (E)(2)(b) to authorize a court to modify residential parent and legal custodian status will increase litigation, decrease stability, and harm children**

A. **Introduction**

This court should not interpret subsection (E)(2)(b) to authorize a court to modify residential parent and legal custodian status in a prior shared parenting decree because such an interpretation will increase litigation, decrease stability, and harm children.

B. **Increase litigation**

As discussed above, the modification standard contained in subsection (E)(2)(b) is significantly lower than the modification standard contained in subsection (E)(1)(a). Because the (E)(2)(b) standard is significantly lower, the (E)(2)(b) standard is significantly easier to meet. Because the subsection (E)(2)(b) standard is significantly easier to meet, if this court permits modification of residential parent and legal custodian status under subsection (E)(2)(b), more motions to modify will be filed, more modification trials will be conducted, and more modifications will be granted.

C. **Decrease stability and harm children**

Unnecessarily increasing child custody litigation harms children. The child custody statute is an attempt to provide stability regarding the allocation of

fundamental parental rights and responsibilities.⁵³ The statute seeks to spare children from a “constant tug of war” between parents who would file a motion to modify based on insignificant reasons.⁵⁴

Increasing litigation decreases stability and harms children in two ways. First, litigation is harmful to children. Arguably, this is a truism. However, the harm to children caused by custody litigation may also be inferred from the numerous statutory provisions that have been enacted to protect children involved in custody litigation.⁵⁵

Second, modification of fundamental parental rights and responsibilities is harmful to a child. Any significant change in the life of a child will cause some harm to a child. Specifically, a modification of residential parent and legal custodian status will frequently involve a move to another residence. While the advantages of the change may outweigh the disadvantages, this does not alter the fact that some disadvantages are inherent in the change. The General Assembly has recognized that any modification is harmful to some extent by requiring courts to determine, in custody modification cases, if “[t]he harm

⁵³ *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 418, 674 N.E.2d 1159, 1162 (observing that the custody statute “is an attempt to provide some stability to the custodial status of the children, even though the parent out of custody may be able to prove that he or she can provide a better environment,” quoting *Wyss v. Wyss* (1982), 3 Ohio App.3d 412, 416, 445 N.E.2d 1153, 1157).

⁵⁴ *Davis v. Flickinger, supra*, at 418 (quoting *Wyss, supra*, at 416).

⁵⁵ *E.g.* R.C. 3109.04(B)(1) and (2) (allowing a child to be interviewed in chambers and limiting the individuals who may be present at the interview); R.C. 3109.04(B)(3) (prohibiting all individuals from obtaining or attempting to obtain a written or recorded statement or affidavit setting forth a child’s wishes and concerns regarding allocation of parental rights and responsibilities concerning the child).

likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child.”⁵⁶

D. Subsection (E)(1)(a) is logical and sufficient

There is no need to interpret subsection (E)(2)(b) to permit modification of residential parent and legal custodian status in a prior shared parenting decree. Subsection (E)(1)(a) already permits such a modification. Further, subsection (E)(1)(a) functions in a logical and sufficient manner.

1. Logical manner

Subsection (E)(1)(a) functions in a logical manner. Subsection (E)(1)(a) permits modification of residential parent and legal custodian status while subsection (E)(2)(b) permits modification of the term of a prior shared parenting plan. That is, subsection (E)(1)(a) authorizes modification of fundamental and highly significant parental rights while subsection (E)(2)(b) authorizes modification of less fundamental parental rights. Subsection (E)(1)(a) contains a higher standard because of the fundamental and highly significant nature of the parental rights that may be modified under subsection (E)(1)(a).

2. Sufficient manner

Subsection (E)(1)(a) functions in a sufficient manner. There has been no outcry from the general public that subsection (E)(1)(a) contains too high of a standard. There has been no outcry that modifications are not being granted when they should be granted.

⁵⁶ R.C. 3109.04(E)(1)(a)(iii). This standard must be applied in all sole custody cases when a motion to modify has been filed. Obviously, in the matter herein, it is the Appellant’s position that this standard must also be applied in all shared parenting cases when a motion to modify residential parent and legal custodian status has been filed.

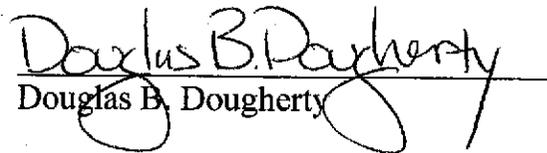
There has been no action by the General Assembly to decrease the standard contained in (E)(1)(a) or to expressly state that subsection (E)(2)(b) can be used to modify residential parent and legal custodian status.

Allowing modification of residential parent and legal custodian status in a prior shared parenting decree under subsection (E)(2)(b) will decrease stability, will harm children, and will not create a more logical modification jurisprudence.

CONCLUSION

Based on the foregoing, Appellant Paul Fisher respectfully requests that this court hold that residential parent and legal custodian status is not a “term” of a shared parenting plan for the purpose of applying R.C. 3109.04(E)(2)(b). Based on this holding, the Appellant further requests that the court reverse the judgments of the court of appeals and the trial court and remand this matter to the trial court for further action consistent with this holding.

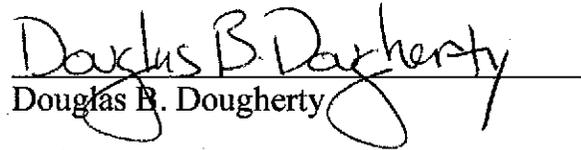
Respectfully submitted,


Douglas B. Dougherty

COUNSEL OF RECORD FOR
APPELLANT PAUL FISHER

CERTIFICATE OF SERVICE

I certify that a copy of the Merit Brief of Appellant Paul Fisher was sent by ordinary U.S. mail to Thomas Luth, Meikle, Tesnot, & Luth, counsel for Appellee Emma Hasenjager, at 100 N. Main St., P. O. Box 485, Celina, Ohio 45822 on the 29th day of January, 2007.


Douglas B. Dougherty

COUNSEL OF RECORD FOR
APPELLANT PAUL FISHER

APPENDIX

APPENDIX – EXHIBIT ONE

NOTICE OF APPEAL TO SUPREME COURT

IN THE SUPREME COURT OF OHIO

06-1815

Paul Fisher,

Appellant,

v.

Emma Hasenjager,

Apellee.

On Appeal from the Mercer
County Court of Appeals,
Third Appellate District

Court of Appeals
Case No. 10-05-14

NOTICE OF APPEAL OF PAUL FISHER

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MERCER CO. COURT OF APPEALS
James J. Highley, CLERK

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MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

xc: Third District Court of Appeals, Douglas B. Dougherty, Thomas Luth
and Mercer County Common Pleas Court, Juvenile Division. kls. 10-2-06.

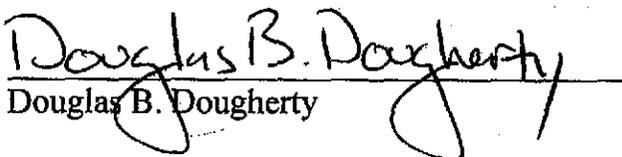
Notice of Appeal of Appellant Paul Fisher

Appellant Paul Fisher hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Mercer County Court of Appeals, Third Appellate District, entered in Court of Appeals case No. 10-05-14, on 8/14/06.

This case is one of great general interest.

Respectfully submitted,

Douglas B. Dougherty, Counsel of Record


Douglas B. Dougherty

COUNSEL FOR APPELLANT,
PAUL FISHER

FILED

OCT 02 2006

MERCER CO. COURT OF APPEALS
James J. Highway, CLERK

Certificate of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for appellee, Thomas Luth, 100 N. Main St., P. O. Box 485, Celina, OH 45822, on September 27, 2006.


Douglas B. Dougherty

COUNSEL FOR APPELLANT,
PAUL FISHER

APPENDIX – EXHIBIT TWO

COURT OF APPEALS JOURNAL ENTRY AND OPINION

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
MERCER COUNTY**

PAUL FISHER

PETITIONER-APPELLANT

CASE NO. 10-05-14

v.

EMMA HASENJAGER

OPINION

PETITIONER-APPELLEE

**CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas
Court, Juvenile Division**

JUDGMENT: Judgment Affirmed

DATE OF JUDGMENT ENTRY: August 14, 2006

ATTORNEYS:

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MERCER CO. COURT OF APPEALS
James J. Highley, CLERK

Case No. 10-05-14

ROGERS, J.

{¶1} Petitioner-Appellant, Paul Fisher, appeals the judgment of the Mercer County Court of Common Pleas, Juvenile Division, which designated Petitioner-Appellee, Emma Hasenjager, as the residential parent and legal custodian of the parties' minor child. On appeal, Fisher asserts that the trial court erred when it terminated his custodial rights under the shared parenting plan and designated Hasenjager as the residential parent and legal custodian of their minor child. Finding that the trial court was able to modify a shared parenting decree, under R.C. 3109.04(E)(2)(b), upon the request of both parties and on its determination that the modification was in the best interest of the parties' minor child, and that the trial court did not abuse its discretion when making such determination, we affirm the judgment of the trial court.

{¶2} On October 10, 2002, Hasenjager gave birth to Demetra Hasenjager. In March of 2003, Fisher and Hasenjager petitioned to adopt an administrative finding of paternity, which concluded that Fisher was the father of Demetra, and to establish visitation, health insurance, support, and tax exemptions. On March 24, 2003, Fisher and Hasenjager entered into a consent judgment entry which established, among other things, that Fisher was the father of Demetra and Hasenjager was the residential parent and legal custodian of Demetra.

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{¶3} In August of 2003, Fisher moved to modify his parental rights and responsibilities. Fisher requested a change of custody and temporary orders to become the residential parent and legal custodian of Demetra. Fisher based his motion on his knowledge that Hasenjager used drugs and alcohol, and that he had concerns over Demetra's safety. In September of 2003, the trial court issued temporary orders whereby both parties were ordered to attend mediations, refrain from drug and alcohol use, complete drug and/or alcohol counseling, and participate in drug screening every two weeks.

{¶4} In November of 2003, the parties attended mediation and entered into a mediated agreement. The mediated agreement provided that Fisher and Hasenjager agreed to modify their March 2003 parenting agreement. As part of the modification, the parties agreed to enter into a shared parenting arrangement with the allocation of parental rights and responsibilities shared equally and a different visitation schedule. The parties also agreed that the amount of child support would remain unchanged and that they would exchange any and all information pertaining to Demetra's best interest. Further, the parties agreed to contact each other as the first option for babysitting and that the other parent had the right of first refusal on babysitting. Also, if neither of them were available for babysitting, the parties agreed to choose from a list of people provided in the agreement as potential babysitters. Both parties also agreed to follow all

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recommendations generated from their drug and alcohol assessment, to sign a release of information in order to obtain verification of the other parent's compliance, and to have the ability to request, in writing, a drug screening of the other parent to be done within seventy-two hours of receipt of such request. Both parties also agreed to split the costs of the mediation, to consider mediation in lieu of court when they were unable to successfully resolve issues as a result of their own efforts, and to attempt to schedule physician appointments so both of them could be present. In December of 2003, the trial court adopted the parties' shared parenting agreement with some minor clarifications.

{¶5} On January 11, 2005, Hasenjager moved to hold Fisher in contempt for failing to follow the shared parenting plan, when he failed to return Demetra for her parenting time and refused to honor her right to provide child care for Demetra. Fisher could not be served with summons because he no longer resided at the address he provided to the court. However, the trial court proceeded and temporarily appointed Hasenjager as "legal custodian [of Demetra] until further order of the court." (Jan. 11, 2005 Judgment Entry p. 1) Also on January 11, 2005, Fisher filed a motion for modification of parental rights and responsibilities, stating that Hasenjager's substance abuse problems put Demetra in danger of being neglected or injured. Specifically, Fisher stated that Hasenjager, at 2:00 AM on December 24, 2004, when she was scheduled for parenting time beginning at

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7:00 AM that morning, totaled her car and was cited for OVI with a blood alcohol level of .207 grams of alcohol per 210 liters of breath. Additionally, Fisher stated that he witnessed Hasenjager have a glass of wine at 10:00 AM on a day when he was picking up Demetra.

{¶6} Subsequently, the trial court modified its temporary custody order of January 11, 2005. Specifically, the trial court ordered Fisher and Hasenjager to, among other things, resume their shared parenting plan adopted in December of 2003 and to refrain from consuming alcohol and all illegal substances within twelve hours prior to and during parenting time with Demetra. In February of 2005, Hasenjager moved to become sole residential parent and legal custodian of Demetra and to be awarded attorney fees and court costs. In March of 2005, all pending matters came before the trial court and a hearing was held. At the hearing, the following testimony was heard:

{¶7} Hasenjager testified that the parties have a shared parenting agreement, and under the agreement, she has parenting time every Monday and Wednesday and on alternating weekends from Friday to the following Monday and has the first option for babysitting on Fisher's parenting time if he has to work. Hasenjager testified that on December 27, 2004, Fisher dropped off Demetra at her residence and then immediately returned, stating that he had changed his mind, and proceeded to remove Demetra. Hasenjager testified that

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despite many requests, Fisher did not return Demetra until the court ordered Demetra's return on January 11, 2005.

{¶8} Hasenjager further testified that she had a good relationship with Demetra and that Demetra had a good relationship with her half sister, Dethora. Also, Hasenjager noted that at her residence, Demetra and Dethora had their own bedrooms. Hasenjager also expressed concern about the atmosphere created when Fisher picked up or dropped off Demetra for parenting time alleging that Fisher would denigrate her, call her obscene names, and flip her off in front of Demetra. Hasenjager maintained that she felt it was important for Demetra to be close to and have a good relationship with her father. Hasenjager also felt that the alternating parenting time was in Demetra's best interest; however, she was concerned about Fisher's abusive verbal behavior towards her in front of Demetra. Additionally, Hasenjager felt that she and Fisher needed to improve communication and was willing to enter counseling with him for Demetra's best interests.

{¶9} Finally, Hasenjager testified that she had been involved in an automobile accident in December of 2004 and that alcohol had been a factor in that accident. However, Hasenjager testified that Demetra was not with her at the time of the accident and that she had never consumed alcohol and driven with Demetra. Hasenjager admitted that due to the late hour that she had gotten to bed after the accident, she was unable to hear Fisher bringing Demetra at 7:00 AM.

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hear her telephone ring until 8:30 AM. Hasenjager further testified that on one occasion, when Fisher was dropping off Demetra, she came to the door with her bed cover wrapped around her and stood behind the door when she opened it to allow Demetra to come in. Hasenjager also testified that she does not use illegal drugs.

{¶10} Ms. Bobbie Fledderjohann, a counselor and clinical director at Gateway Outreach, testified that she had diagnosed Hasenjager with chemical abuse, but not chemical dependence. Specifically, Fledderjohann testified that Hasenjager had abused marijuana and alcohol, but she did not find Hasenjager to be chemical or alcohol dependent. Also, Fledderjohann testified that she did not have any concern about Hasenjager's ability to care for Demetra.

{¶11} Fisher testified that he was concerned about Hasenjager's accident in early December of 2004. Also, Fisher testified that one time when dropping off Demetra for parenting time, Hasenjager came to the door without any clothes on, except for a robe. Fisher also stated that one morning, while picking up Demetra, he had seen a bottle of wine with a glass of what he thought was wine on a table in Hasenjager's residence. Fisher was concerned that Hasenjager was reverting to a lifestyle he felt was dangerous to Demetra.

{¶12} Fisher admitted that he had taken Demetra and not returned her for Hasenjager's parenting time until he was notified that the Sheriff's Department

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had received a court order for Demetra's return. Fisher further admitted that he had not given Hasenjager the opportunity to care for Demetra on the days that he worked. Fisher testified that he had previously notified Hasenjager that Demetra's paternal grandmother would babysit for Demetra during the Christmas holiday. Additionally, Fisher testified that Demetra's paternal grandmother was caring for her other grandchildren during the Christmas holiday; however, Fisher admitted that someone else had babysat Demetra during the time he kept Demetra from Hasenjager. Fisher also admitted that he had refused to tell Hasenjager where Demetra was. With respect to Fisher's statements, the trial court stated, in its judgment entry, "[Fisher] did not show nor admit to any remorse for the concern or anxiety [Hasenjager] felt. Nor did he indicate he felt he was wrong for deciding on his own to take his child away from [Hasenjager]. [Fisher] did not exhibit any concern about having violated the shared parenting agreement." (Apr. 5, 2005 Judgment Entry p. 3)

{¶13} Additionally, Fisher testified that he and Demetra had a good relationship and that Demetra had her own room at his residence. Fisher also noted that during his parenting time, Demetra does not play with other children because he moved into a quiet apartment complex which had mainly older tenants; however, he felt that the location would be calmer for his daughter. Fisher also

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testified that Demetra has a good relationship with her paternal relatives and often visited with them.

{¶14} The trial court also noted in its journal entry that “[i]n response to questioning as to whether he would participate in counseling, [Fisher] reacted very negatively. He stated it would not do any good; stated he and mother do not agree on most things. [Fisher] indicated he would obey a direct court order to get counseling but he was not sure where his and mother’s relationship was going.” (Apr. 5, 2005 Judgment Entry p. 3)

{¶15} After hearing the testimony of the parties, the trial court found that Fisher unilaterally denied custody to Hasenjager when a shared parenting decree was in existence, based on vague fears that Hasenjager might be reverting to a former lifestyle he felt would be dangerous. The trial court also noted that Fisher did not take the appropriate steps to obtain court approval to deviate from the shared parenting order. As a result, the trial court, based on the criteria set forth in *Snyder v. Snyder* (Aug. 21, 1998), 3rd Dist. No. 14-98-22, found Fisher in contempt for a violation of the court’s order on shared parenting and sentenced Fisher to ten days in the Mercer County Jail. The trial court also allowed Fisher to purge the finding of contempt by obeying the court’s orders in the future.

{¶16} Additionally, the trial court found that the parties had requested, and that it was in Demetra’s best interests, to “terminate” the shared parenting plan the

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parties previously entered. (Apr. 2, 2005 Judgment Entry p. 4). Further, the trial court stated, "The court in allocating parental rights and responsibilities has also considered the criteria under Section 3109.01(F)(1)(a) through (j) and other relevant factors in reaching its decision. [Hasenjager] is hereby designated the residential parent and legal custodian of the parties (Sic.) minor child, Demetra." (Apr. 5, 2005 Judgment Entry p. 4). Also, the trial court advised Fisher of his allotted parenting time and gave him the option of babysitting Demetra on Friday's if he was not working and Hasenjager was. Further, the trial court ordered that both parties shall refrain from any abuse of alcohol or drugs while Demetra was with them; that the parties refrain from arguing in front of Demetra; that Fisher shall not verbally abuse Hasenjager in front of Demetra nor make threatening gestures; and, that both parties shall encourage Demetra to love and respect the other parent. The trial court also encouraged the parties to enter into counseling for Demetra's best interests, but refrained from ordering the counseling because of Fisher's unwillingness to participate. Additionally, the trial court deferred the determination of child support pending the submission of financial information. Finally, the trial court stated, "All other orders not in conflict with the above shall remain in full force and effect." (Apr. 5, 2005 Judgment Entry p. 4). Subsequently, the parties submitted the requested financial information and the trial court determined the child support requirements of both parties.

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{¶17} It is from this judgment Fisher appeals presenting the following assignment of error for our review:

The trial court abused its discretion and its decision was against the manifest weight of the evidence when it terminated plaintiff/appellant's custodial rights under the shared parenting plan and designated defendant/appellee as the residential parent and legal custodian of the minor child.

{¶18} In his assignment of error, Fisher argues that the trial court erred when it designated Hasenjager as the residential parent and legal custodian of Demetra. Specifically, Fisher argues that the trial court did not properly find and hold that a substantive change in circumstances had occurred to justify a termination of the parties' shared parenting plan. Additionally, Fisher argues that the trial court did not properly find and hold that the change in custody was in Demetra's best interests. Also, Fisher argues that the trial court did not properly find and hold that any harm caused by a change in custody would be outweighed by the benefits of changing the custody. Further, Fisher argues that the manifest weight of the evidence demonstrates that the shared parenting plan should not have been terminated, and if it was terminated, he should have been designated residential parent. Finally, Fisher argues that the trial court erred when revising the child support by not giving him with the right to claim Demetra as an exemption for all income tax purposes. For the following reasons, we disagree with all of Fisher's arguments.

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{¶19} An appellate court's review of the interpretation and application of a statute is *de novo*. *Akron v. Frazier* (2001), 142 Ohio App.3d 718, 721, *State v. Sufronko* (1995), 105 Ohio App.3d 504, 506. Additionally, an appellate court does not give deference to a trial court's determination when making its review. *Id.* "In construing a statute, a court's paramount concern is the legislative intent in enacting the statute." *State v. S.R.* (1992), 63 Ohio St.3d 590, 594. In order to determine the legislative intent, a court must first look to the statute's language. *Shover v. Cordis Corp.* (1991), 61 Ohio St.3d 213, 218. "Whether a statute is mandatory or directory is to be ascertained from a consideration of the entire act, its nature, its object and the consequences which would result from construing it one way or the other." *State, ex rel. Smith v. Barnell* (1924), 109 Ohio St. 246, 255. Additionally, particular provisions of a statute may be discretionary, while others may be mandatory. *Schmidt v. Weather-Seal* (1943), 71 Ohio App. 387, 389.

{¶20} We begin by noting that the trial court found that the parties requested and that it was in Demetra's best interests *to terminate* the parties' shared parenting plan without providing any guidance as to which section of the Revised Code it applied. The lack of a statutory section, specifically in cases where a trial court is modifying or terminating a shared parenting plan, is

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extremely important, because multiple provisions within the Revised Code allow a trial court to modify or terminate a shared parenting plan.

{¶21} One source of authority for a trial court to modify an existing custody decree is provided in R.C. 3109.04(E)(1)(a), which requires a court to find a change in the circumstances of the child, residential parent, or either parent subject to the shared parenting decree, before a decree allocating parental rights and responsibilities for the care of the children may be modified. R.C. 3109.04(E)(1)(a) provides:

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 or the prior shared parenting decree, unless a modification is in the best interest of the child and one of the following applies:

- (i) The residential parent agrees to a change in the residential parent or both parents under a shared parenting decree agree to a change in the designation of residential parent.**
- (ii) The child, with the consent of the residential parent or of both parents under a shared parenting decree, has been integrated into the family of the person seeking to become the residential parent.**
- (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.**

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{¶22} In addition to modifications authorized under R.C. 3109.04(E)(1), parental rights and responsibilities, as specified in a shared parenting decree, may be modified under R.C. 3109.04(E)(2)(a) and (b). R.C. 3109.04(E)(2)(a) and (b) provide:

In addition to a modification authorized under division (E)(1) of this section:

(a) Both parents under a shared parenting decree jointly may modify the terms of the plan for shared parenting approved by the court and incorporated by it into the shared parenting decree. Modifications under this division may be made at any time. The modifications to the plan shall be filed jointly by both parents with the court, and the court shall include them in the plan, unless they are not in the best interest of the children. If the modifications are not in the best interests of the children, the court, in its discretion, may reject the modifications or make modifications to the proposed modifications or the plan that are in the best interest of the children. Modifications jointly submitted by both parents under a shared parenting decree shall be effective, either as originally filed or as modified by the court, upon their inclusion by the court in the plan. Modifications to the plan made by the court shall be effective upon their inclusion by the court in the plan.

(b) The court may modify the terms of the plan for shared parenting approved by the court and incorporated by it into the shared parenting decree upon its own motion at any time if the court determines that the modifications are in the best interest of the children or upon the request of one or both of the parents under the decree. Modifications under this division may be made at any time. The court shall not make any modification to the plan under this division, unless the modification is in the best interest of the children.

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{¶23} Further, in addition to the modifications authorized under R.C. 3109.04(E)(1) and (E)(2)(a)-(b), a trial court is authorized to terminate a final

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shared parenting decree under R.C. 3109.04(E)(2)(c).¹ R.C. 3109.04(E)(2)(c) provides:

(c) The court may terminate a prior final shared parenting decree that includes a shared parenting plan approved under division (D)(1)(a)(i) of this section upon the request of one or both of the parents or whenever it determines that shared parenting is not in the best interest of the children. The court may terminate a prior final shared parenting decree that includes a shared parenting plan approved under division (D)(1)(a)(ii) or (iii) of this section if it determines, upon its own motion or upon the request of one or both parents, that shared parenting is not in the best interest of the children. If modification of the terms of the plan for shared parenting approved by the court and incorporated by it into the final shared parenting decree is attempted under division (E)(2)(a) of this section and the court rejects the modifications, it may terminate the final shared parenting decree if it determines that shared parenting is not in the best interest of the children.

{¶24} In order to apply the appropriate statute to the case sub judice, we first must determine whether the trial court actually “terminated” or merely “modified” the parties’ shared parenting plan in its April 2005 judgment entry. Looking at the parties’ motions and trial court’s judgment entry, we find that the trial court “modified” the parties’ shared parenting plan. We reach this conclusion for a couple reasons. First, the trial court found that both parties requested a termination of the shared parenting plan; however, upon our review of the parties’

¹ After a court has terminated a shared parenting decree under R.C. 3109.04(E)(2)(c), “the court shall proceed and issue a modified decree for the allocation of parental rights and responsibilities for the care of the children under the standards applicable under divisions (A), (B), and (C) of this section as if no decree for shared parenting had been granted and as if no request for shared parenting ever had been made.” R.C. 3109.04(E)(2)(d).

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motions, both Fisher and Hasenjager actually moved to be designated the sole residential parent and legal custodian of Demetra, not to terminate the shared parenting plan. Since both parties previously agreed to equally allocate the parental rights and responsibilities of Demetra, the trial court's finding "terminates" or removes this specific term or provision of the shared parenting plan and replaces it with a term or provision that Hasenjager is the residential parent and legal custodian of Demetra. In essence, the trial court has modified the parties' shared parenting plan, when it named Hasenjager Demetra's residential parent and legal custodian. Additionally, this conclusion is further supported by the trial court's decision to leave "all other orders not in conflict with the [modifications it made] in full force and effect." (Apr. 5, 2005 Judgment Entry p. 4). This shows that the trial court intended to keep the remaining terms of the shared parenting plan in effect and enforceable. Finally, Hasenjager moved for clarification in April of 2005 to determine whether after the trial court's April 2005 judgment entry, she still had the first right of refusal to provide child care to Demetra, which she agreed to in November of 2003. The trial court confirmed that Hasenjager's first right of refusal was not in conflict with its April 2005 decision and her right was still in full force and effect, reflecting that the trial court did not intend to terminate the entire shared parenting plan. Accordingly, the trial

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court could not have applied R.C. 3109.04(E)(2)(c), because it did not terminate, but modified the shared parenting plan.

{¶25} Since the trial court modified the parties' shared parenting plan, we now turn to the relevant statutes in order to determine whether the trial court erred when it modified the parties' shared parenting plan. We first note that shared parenting decrees may be modified under R.C. 3109.04(E)(1)(a), R.C. 3109.04(E)(2)(a), or R.C. 3109.04(E)(2)(b). Under each of these statutes, modifications to a shared parenting decree require that the modifications be in the best interests of the children involved. See R.C. 3109.04(E)(1)(a), (E)(2)(a), and (E)(2)(b).

{¶26} Under R.C. 3109.04(E)(2)(a), both parents under a shared parenting decree jointly may modify the shared parenting plan if the modifications to the plan are filed with the court. Additionally, the parents' proposed modifications shall be included in the plan, unless they are not in the best interest of the children, whereupon the court may reject them. R.C. 3109.04(E)(2)(a). Further, when both parents, under a shared parenting decree, jointly submit a modification, the modification shall be effective upon the court's inclusion of it in the plan. R.C. 3109.04(E)(2)(a); *Matter of Stiffler* (Sept. 29, 1994), 4th Dist. No. 94 CA 841. Since Fisher and Hasenjager did not jointly move to modify their shared parenting decree, R.C. 3109.04(E)(2)(a) is not applicable to the case sub judice.

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{¶27} Thus, the trial court had to decide whether to apply R.C. 3109.04(E)(1)(a) or R.C. 3109.04(E)(2)(b) to the case sub judice. R.C. 3109.04(E)(2) provides additional methods for modifying a decree allocating parental rights and responsibilities, other than those authorized under R.C. 3109.04(E)(1). *Carr v. Carr* (Aug. 11, 1999), 9th Dist. No. 2880-M. The prefatory sentence to R.C. 3109.04(E)(2)(b) provides, "In addition to a modification authorized under division (E)(1) of this section", clearly showing the General Assembly's intention to provide an independent way to make modifications. *Myers v. Myers*, 153 Ohio App.3d 243, 2003-Ohio-3552, at ¶ 34.

{¶28} Under R.C. 3109.04(E)(2)(b), a trial court may modify the terms of a prior shared parenting decree if it determines that the modifications are in the best interest of the child. See *Patton v. Patton*, 141 Ohio App.3d 691, 695, 2001-Ohio-2117. Also, R.C. 3109.04(E)(2)(b) provides that modifications to the terms of a shared parenting plan can only be made to plans that have been approved by the court and incorporated into the shared parenting decree. Additionally, a trial court may modify the terms of a shared parenting plan, under R.C. 3109.04(E)(2)(b), at any time, upon the trial court's own motion or upon the request of one or both parties under a shared parenting decree. See *Id.* (in dicta); *Carr*, supra. Finally, under R.C. 3109.04(E)(2)(b), trial courts are not required to make a preliminary determination into whether there was a change in circumstances of the child, or

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R.C. 3109.04(E)(1)(a) is applicable to the present case because appellant's proposed modifications of the shared parenting agreement substantially changes the allocation of the parties' parental rights and responsibilities.""); see also *Bauer v. Bauer*, 12th Dist. No. CA2002-10-083, 2003-Ohio-2552, at ¶ 13, citing *Fisher*, supra.

{¶30} Additionally, other appellate courts have required trial courts to apply R.C. 3109.04(E)(1)(a), instead of R.C. 3109.04(E)(2)(b), when the modification to the shared parenting plan affects "an allocation of parental rights and responsibilities." For example, in *Bauer*, the Twelfth District stated,

While a modification of the parental rights and responsibilities in a prior court order allocating parental rights, such as a shared parenting agreement, requires a finding of a change of circumstances under R.C. 3109.04(E)(1)(a), a modification of the terms in a shared parenting agreement only requires a finding that it be in the best interest of the child under R.C. 3109.04(E)(2)(b).

Bauer, supra, at ¶ 13; see *Hunter v. Bachman*, 9th Dist. No. 04CA008421, 2004-Ohio-5172, at ¶ 9, n.1, ("We recognize that other districts may require a court to modify a shared parenting plan under R.C. 3109.04(E)(1)(a) where the modification represents a substantial change from the original plan. However, we opt to follow other districts which do not distinguish between substantial and other changes.") (Citations omitted); *Schoettle v. Bering* (Apr. 22, 1996), 12th Dist. No. CA95-07-011, ("R.C. 3109.04(E)(1)(a) allows a trial court to modify an allocation

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of parental rights and responsibilities, that is custody and visitation, as set forth in an agreed upon shared parenting plan when such modification is in the best interest of the child and a change of circumstances has occurred.”).

{¶31} Also, some appellate courts have allowed modifications to shared parenting plans, under R.C. 3109.04(E)(2), on a trial court’s motion. *Thomas v. Thomas* (Sept. 17, 1999), 2d Dist. No. 98-CA-55, *Carr*, supra.

{¶32} In *Thomas*, appellee-father moved to terminate a shared parenting plan; however, the trial court declined to terminate the shared parenting plan. *Id.* The trial court instead modified the shared parenting plan and ordered that the parties’ children reside with each parent in alternate years and alternate between each parent annually. *Id.* Additionally, the trial court ordered that the non-residential parent could have visitation as the parties agreed or if they could not agree, in accordance with the court’s standard order of visitation. *Id.* In concluding that the trial court did not err in failing to apply R.C. 3109.04(E)(1)(a), the Second District stated:

Although [appellee-father] moved the court for an order terminating the shared parenting plan, that is not what the court did. The trial court modified the shared parenting plan, concluding that it was in the best interest of the children to do so. A trial court is given express authority, on its own motion, to modify a shared parenting plan at any time if it determines that the modification is in the best interests of the children. R.C. 3109.04(E)(2)(b). Because the trial court had the authority to modify the shared parenting plan on its own motion, it had the authority to do so following the hearing on [appellee-father’s]

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motion to terminate the shared parenting plan, concluding, as it evidently did, that a termination of the shared parenting plan was not warranted.

Id.

{¶33} In *Carr*, the parents adopted a shared parenting plan as a part of their divorce, in which father would be primary residential parent and mother would have their child on weekends, alternating holidays, and for a two-week vacation. *Carr*, supra. Subsequently, father and mother each submitted proposed shared parenting plans. Id. After a hearing before a magistrate, the magistrate recommended adoption of a shared parenting plan that differed from both of the proposed plans. Id. The trial court adopted the magistrate's decision, overruled father's objections, and entered judgment for mother. Id.

{¶34} The Ninth District stated, affirming the judgment of the trial court which ordered its own shared parenting plan:

When a shared parenting plan is first adopted under R.C. 3109.04(D)(1)(a)(ii), the trial court must approve a plan submitted by one of the parties, or the court may return the plans with suggestions for modifications. The court cannot create its own shared parenting plan. *McClain v. McClain* (1993), 87 Ohio App.3d 856, 857, 623 N.E.2d 242. However, in the case at bar, a shared parenting plan had previously been adopted. Thus, when the trial court adopted the magistrate's decision, the trial court did not adopt a shared parenting plan but instead modified an existing shared parenting plan.

[Father] argues that all modifications to a shared parenting plan must be pursuant to R.C. 3109.04(E)(1)(a). However, three additional methods of modifying a decree allocating parental

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rights and responsibilities are found in R.C. 3109.04(E)(2). R.C. 3109.04(E)(2)(b) states in relevant part:

The court may modify the terms of the plan for shared parenting approved by the court and incorporated by it into the shared parenting decree upon its own motion at any time if the court determines that the modifications are in the best interest of the children or upon the request of one or both of the parents under the decree.

Thus, the trial court was empowered to modify the shared parenting decree in a form different from the proposed modifications submitted by Father and Mother.

Id. (Footnote omitted).

{¶35} We agree with the logic of *Thomas* and *Carr* and find that the trial court, upon the request of both Fisher and Hasenjager, was able to modify the terms of the shared parenting agreement under R.C. 3109.04(E)(2)(a). While we recognize that some of our sister appellate districts require trial courts to apply R.C. 3109.04(E)(1)(a) when the proposed modifications to the shared parenting plan change the allocation of parental rights and responsibilities, are substantial modifications, or substantially change the parental rights and responsibilities, we specifically find that trial courts are able to modify the terms of the shared parenting plan under R.C. 3109.04(E)(2)(a), either on its own motion or on the request of one or both of the parents subject to a shared parenting plan as long as the modifications are in the best interest of the child. See *Tener v. Tener-Tucker*, 12th Dist. No. CA2004-05-061, 2005-Ohio-3892, at ¶ 19.

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{¶36} While some districts have concluded that some modifications, such as a change in the amount child support, *Tonti v. Tonti*, 10th Dist. Nos. 03AP-494, 03AP-728, 2004-Ohio-2529, at ¶ 78, or who provides transportation, *Schoettle*, supra, are modifications to the “terms” of a shared parenting plan, we find that the General Assembly’s use of the word “terms” in R.C. 3109.04(E)(2)(b) shows its intent to allow trial courts to modify all provisions incorporated in a shared parenting plan.

{¶37} As defined in Black’s Law Dictionary, “terms” are “provisions that define an agreement’s scope; conditions or stipulations <terms of sale>.” Black’s Law Dictionary 1510 (8th Ed. 1999). The provisions in a shared parenting plan which allocate the parental rights and responsibilities of a child between his or her parents define the scope of the parent’s legal rights as well as provide conditions or stipulations of the shared parenting plan. Clearly, they are “terms” of a shared parenting plan. Accordingly, a trial court may modify a shared parenting plan to designate a parent the residential parent and legal custodian, under R.C. 3109.04(E)(2)(b), either on its own motion or on the request of one or both of the parents subject to a shared parenting plan solely on its determination that the modifications are in the best interest of the child.

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{¶38} Since Fisher and Hasenjager both moved to modify their shared parenting agreement to be named residential parent and legal custodian of Demetra, we find that the trial court could have applied R.C. 3109.04(E)(2)(b).

{¶39} In doing so, the trial court was entitled to broad discretion in determining whether a change in the allocation of parental rights and responsibilities was warranted. *Miller v. Miller* (1988), 37 Ohio St.3d 71. An abuse of discretion constitutes more than an error of law or judgment and implies that the trial court acted unreasonably, arbitrarily, or unconscionably. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. In this regard, we are guided by the presumption that the trial court's findings were indeed correct. *Miller*, 37 Ohio St.3d at 74.

{¶40} Therefore, we must determine whether the trial court abused its discretion when it determined that the modification of the shared parenting plan was in the best interest of Demetra. Upon our review of the record, we find that the trial court did not abuse its discretion when it modified the shared parenting plan and designated Hasenjager as the sole residential parent and legal custodian of Demetra.

{¶41} Further, Fisher argues that the trial court erred when it did not designate him with the right to claim Demetra as an exemption for all income tax

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purposes. However, this issue is not properly before this Court because it was not raised as an assignment of error, and we refrain from addressing it.

{¶42} Fisher's assignment of error is overruled.

{¶43} Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed.

CUPP, J., concurs.

BRYANT, P.J., concurs in judgment only.

r

CERTIFICATE OF SERVICE

This is to certify that a time-stamped copy of the foregoing Opinion has been issued by regular US mail and/or by hand to James D. Dodson, Thomas Luth and Honorable Mary Pat Zitter, Judge. Certified copy of same issued to the Mercer County Common Pleas Court, Juvenile Division.



Karen Shaner, Deputy Clerk

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APPENDIX – EXHIBIT THREE

O.R.C. 3109.04

R.C. § 3109.04

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BALDWIN'S OHIO REVISED CODE ANNOTATED

TITLE XXXI. DOMESTIC RELATIONS--CHILDREN

CHAPTER 3109. CHILDREN

PARENTAL RIGHTS AND RESPONSIBILITIES

→3109.04 Court awarding parental rights and responsibilities; shared parenting; modifications; best interests of child; child's wishes

(A) In any divorce, legal separation, or annulment proceeding and in any proceeding pertaining to the allocation of parental rights and responsibilities for the care of a child, upon hearing the testimony of either or both parents and considering any mediation report filed pursuant to section 3109.052 of the Revised Code and in accordance with sections 3127.01 to 3127.53 of the Revised Code, the court shall allocate the parental rights and responsibilities for the care of the minor children of the marriage. Subject to division (D)(2) of this section, the court may allocate the parental rights and responsibilities for the care of the children in either of the following ways:

(1) If neither parent files a pleading or motion in accordance with division (G) of this section, if at least one parent files a pleading or motion under that division but no parent who filed a pleading or motion under that division also files a plan for shared parenting, or if at least one parent files both a pleading or motion and a shared parenting plan under that division but no plan for shared parenting is in the best interest of the children, the court, in a manner consistent with

R.C. § 3109.04

the best interest of the children, shall allocate the parental rights and responsibilities for the care of the children primarily to one of the parents, designate that parent as the residential parent and the legal custodian of the child, and divide between the parents the other rights and responsibilities for the care of the children, including, but not limited to, the responsibility to provide support for the children and the right of the parent who is not the residential parent to have continuing contact with the children.

(2) If at least one parent files a pleading or motion in accordance with division (G) of this section and a plan for shared parenting pursuant to that division and if a plan for shared parenting is in the best interest of the children and is approved by the court in accordance with division (D)(1) of this section, the court may allocate the parental rights and responsibilities for the care of the children to both parents and issue a shared parenting order requiring the parents to share all or some of the aspects of the physical and legal care of the children in accordance with the approved plan for shared parenting. If the court issues a shared parenting order under this division and it is necessary for the purpose of receiving public assistance, the court shall designate which one of the parents' residences is to serve as the child's home. The child support obligations of the parents under a shared parenting order issued under this division shall be determined in accordance with Chapters 3119., 3121., 3123., and 3125. of the Revised Code.

(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. In determining the child's best interest for purposes of making its allocation of the parental rights and responsibilities for the care of the child and for

R.C. § 3109.04

purposes of resolving any issues related to the making of that allocation, the court, in its discretion, may and, upon the request of either party, shall interview in chambers any or all of the involved children regarding their wishes and concerns with respect to the allocation.

(2) If the court interviews any child pursuant to division (B)(1) of this section, all of the following apply:

(a) The court, in its discretion, may and, upon the motion of either parent, shall appoint a guardian ad litem for the child.

(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.

(c) The interview shall be conducted in chambers, and no person other than the child, the child's

R.C. § 3109.04

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.

(3) No person shall obtain or attempt to obtain from a child a written or recorded statement or affidavit setting forth the child's wishes and concerns regarding the allocation of parental rights and responsibilities concerning the child. No court, in determining the child's best interest for purposes of making its allocation of the parental rights and responsibilities for the care of the child or for purposes of resolving any issues related to the making of that allocation, shall accept or consider a written or recorded statement or affidavit that purports to set forth the child's wishes and concerns regarding those matters.

(C) Prior to trial, the court may cause an investigation to be made as to the character, family relations, past conduct, earning ability, and financial worth of each parent and may order the parents and their minor children to submit to medical, psychological, and psychiatric examinations. The report of the investigation and examinations shall be made available to either parent or the parent's counsel of record not less than five days before trial, upon written request. The report shall be signed by the investigator, and the investigator shall be subject to cross-examination by either parent concerning the contents of the report. The court may tax as costs all or any part of the expenses for each investigation.

If the court determines that either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being a neglected child, that either parent previously has been determined to be the perpetrator of the neglectful act that is the basis of an adjudication that a child is a neglected child, or that there is reason to believe that either

R.C. § 3109.04

parent has acted in a manner resulting in a child being a neglected child, the court shall consider that fact against naming that parent the residential parent and against granting a shared parenting decree. When the court allocates parental rights and responsibilities for the care of children or determines whether to grant shared parenting in any proceeding, it shall consider whether either parent or any member of the household of either parent has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code or a sexually oriented 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 proceeding, has been convicted of or pleaded guilty to any sexually oriented offense or other 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 proceeding and caused physical harm to the victim in the commission of the offense, or has been determined to be the perpetrator of the abusive act that is the basis of an adjudication that a child is an abused child. If the court determines that either parent has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code or a sexually oriented 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 proceeding, has been convicted of or pleaded guilty to any sexually oriented offense or other 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 proceeding and caused physical harm to the victim in the commission of the offense, or has been determined to be the perpetrator of the abusive act that is the basis of an adjudication that a child is an abused child, it may designate that parent as the residential parent and may issue a shared parenting decree or order only if it determines that it is in the best interest of the child to name that parent the residential parent or to issue a shared parenting decree or order and it makes specific written

R.C. § 3109.04

findings of fact to support its determination.

(D)(1)(a) Upon the filing of a pleading or motion by either parent or both parents, in accordance with division (G) of this section, requesting shared parenting and the filing of a shared parenting plan in accordance with that division, the court shall comply with division (D)(1)(a)(i), (ii), or (iii) of this section, whichever is applicable:

(i) If both parents jointly make the request in their pleadings or jointly file the motion and also jointly file the plan, the court shall review the parents' plan to determine if it is in the best interest of the children. If the court determines that the plan is in the best interest of the children, the court shall approve it. If the court determines that the plan or any part of the plan is not in the best interest of the children, the court shall require the parents to make appropriate changes to the plan to meet the court's objections to it. If changes to the plan are made to meet the court's objections, and if the new plan is in the best interest of the children, the court shall approve the plan. If changes to the plan are not made to meet the court's objections, or if the parents attempt to make changes to the plan to meet the court's objections, but the court determines that the new plan or any part of the new plan still is not in the best interest of the children, the court may reject the portion of the parents' pleadings or deny their motion requesting shared parenting of the children and proceed as if the request in the pleadings or the motion had not been made. The court shall not approve a plan under this division unless it determines that the plan is in the best interest of the children.

(ii) If each parent makes a request in the parent's pleadings or files a motion and each also files a separate plan, the court shall review each plan filed to determine if either is in the best interest of

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the children. If the court determines that one of the filed plans is in the best interest of the children, the court may approve the plan. If the court determines that neither filed plan is in the best interest of the children, the court may order each parent to submit appropriate changes to the parent's plan or both of the filed plans to meet the court's objections, or may select one of the filed plans and order each parent to submit appropriate changes to the selected plan to meet the court's objections. If changes to the plan or plans are submitted to meet the court's objections, and if any of the filed plans with the changes is in the best interest of the children, the court may approve the plan with the changes. If changes to the plan or plans are not submitted to meet the court's objections, or if the parents submit changes to the plan or plans to meet the court's objections but the court determines that none of the filed plans with the submitted changes is in the best interest of the children, the court may reject the portion of the parents' pleadings or deny their motions requesting shared parenting of the children and proceed as if the requests in the pleadings or the motions had not been made. If the court approves a plan under this division, either as originally filed or with submitted changes, or if the court rejects the portion of the parents' pleadings or denies their motions requesting shared parenting under this division and proceeds as if the requests in the pleadings or the motions had not been made, the court shall enter in the record of the case findings of fact and conclusions of law as to the reasons for the approval or the rejection or denial. Division (D)(1)(b) of this section applies in relation to the approval or disapproval of a plan under this division.

(iii) If each parent makes a request in the parent's pleadings or files a motion but only one parent files a plan, or if only one parent makes a request in the parent's pleadings or files a motion and also files a plan, the court in the best interest of the children may order the other parent to file a

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plan for shared parenting in accordance with division (G) of this section. The court shall review each plan filed to determine if any plan is in the best interest of the children. If the court determines that one of the filed plans is in the best interest of the children, the court may approve the plan. If the court determines that no filed plan is in the best interest of the children, the court may order each parent to submit appropriate changes to the parent's plan or both of the filed plans to meet the court's objections or may select one filed plan and order each parent to submit appropriate changes to the selected plan to meet the court's objections. If changes to the plan or plans are submitted to meet the court's objections, and if any of the filed plans with the changes is in the best interest of the children, the court may approve the plan with the changes. If changes to the plan or plans are not submitted to meet the court's objections, or if the parents submit changes to the plan or plans to meet the court's objections but the court determines that none of the filed plans with the submitted changes is in the best interest of the children, the court may reject the portion of the parents' pleadings or deny the parents' motion or reject the portion of the parents' pleadings or deny their motions requesting shared parenting of the children and proceed as if the request or requests or the motion or motions had not been made. If the court approves a plan under this division, either as originally filed or with submitted changes, or if the court rejects the portion of the pleadings or denies the motion or motions requesting shared parenting under this division and proceeds as if the request or requests or the motion or motions had not been made, the court shall enter in the record of the case findings of fact and conclusions of law as to the reasons for the approval or the rejection or denial. Division (D)(1)(b) of this section applies in relation to the approval or disapproval of a plan under this division.

(b) The approval of a plan under division (D)(1)(a)(ii) or (iii) of this section is discretionary with

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the court. The court shall not approve more than one plan under either division and shall not approve a plan under either division unless it determines that the plan is in the best interest of the children. If the court, under either division, does not determine that any filed plan or any filed plan with submitted changes is in the best interest of the children, the court shall not approve any plan.

(c) Whenever possible, the court shall require that a shared parenting plan approved under division (D)(1)(a)(i), (ii), or (iii) of this section ensure the opportunity for both parents to have frequent and continuing contact with the child, unless frequent and continuing contact with any parent would not be in the best interest of the child.

(d) If a court approves a shared parenting plan under division (D)(1)(a)(i), (ii), or (iii) of this section, the approved plan shall be incorporated into a final shared parenting decree granting the parents the shared parenting of the children. Any final shared parenting decree shall be issued at the same time as and shall be appended to the final decree of dissolution, divorce, annulment, or legal separation arising out of the action out of which the question of the allocation of parental rights and responsibilities for the care of the children arose.

No provisional shared parenting decree shall be issued in relation to any shared parenting plan approved under division (D)(1)(a)(i), (ii), or (iii) of this section. A final shared parenting decree issued under this division has immediate effect as a final decree on the date of its issuance, subject to modification or termination as authorized by this section.

(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

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of the child, it may commit the child to a relative of the child or certify a copy of its findings, together with as much of the record and the further information, in narrative form or otherwise, that it considers necessary or as the juvenile court requests, to the juvenile court for further proceedings, and, upon the certification, the juvenile court has exclusive jurisdiction.

(E)(1)(a) 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 or the prior shared parenting decree, unless a modification is in the best interest of the child and one of the following applies:

(i) The residential parent agrees to a change in the residential parent or both parents under a shared parenting decree agree to a change in the designation of residential parent.

(ii) The child, with the consent of the residential parent or of both parents under a shared parenting decree, has been integrated into the family of the person seeking to become the residential parent.

(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.

(b) One or both of the parents under a prior decree allocating parental rights and responsibilities

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for the care of children that is not a shared parenting decree may file a motion requesting that the prior decree be modified to give both parents shared rights and responsibilities for the care of the children. The motion shall include both a request for modification of the prior decree and a request for a shared parenting order that complies with division (G) of this section. Upon the filing of the motion, if the court determines that a modification of the prior decree is authorized under division (E)(1)(a) of this section, the court may modify the prior decree to grant a shared parenting order, provided that the court shall not modify the prior decree to grant a shared parenting order unless the court complies with divisions (A) and (D)(1) of this section and, in accordance with those divisions, approves the submitted shared parenting plan and determines that shared parenting would be in the best interest of the children.

(2) In addition to a modification authorized under division (E)(1) of this section:

(a) Both parents under a shared parenting decree jointly may modify the terms of the plan for shared parenting approved by the court and incorporated by it into the shared parenting decree. Modifications under this division may be made at any time. The modifications to the plan shall be filed jointly by both parents with the court, and the court shall include them in the plan, unless they are not in the best interest of the children. If the modifications are not in the best interests of the children, the court, in its discretion, may reject the modifications or make modifications to the proposed modifications or the plan that are in the best interest of the children. Modifications jointly submitted by both parents under a shared parenting decree shall be effective, either as originally filed or as modified by the court, upon their inclusion by the court in the plan. Modifications to the plan made by the court shall be effective upon their inclusion by the court in the plan.

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(b) The court may modify the terms of the plan for shared parenting approved by the court and incorporated by it into the shared parenting decree upon its own motion at any time if the court determines that the modifications are in the best interest of the children or upon the request of one or both of the parents under the decree. Modifications under this division may be made at any time. The court shall not make any modification to the plan under this division, unless the modification is in the best interest of the children.

(c) The court may terminate a prior final shared parenting decree that includes a shared parenting plan approved under division (D)(1)(a)(i) of this section upon the request of one or both of the parents or whenever it determines that shared parenting is not in the best interest of the children. The court may terminate a prior final shared parenting decree that includes a shared parenting plan approved under division (D)(1)(a)(ii) or (iii) of this section if it determines, upon its own motion or upon the request of one or both parents, that shared parenting is not in the best interest of the children. If modification of the terms of the plan for shared parenting approved by the court and incorporated by it into the final shared parenting decree is attempted under division (E)(2)(a) of this section and the court rejects the modifications, it may terminate the final shared parenting decree if it determines that shared parenting is not in the best interest of the children.

(d) Upon the termination of a prior final shared parenting decree under division (E)(2)(c) of this section, the court shall proceed and issue a modified decree for the allocation of parental rights and responsibilities for the care of the children under the standards applicable under divisions (A), (B), and (C) of this section as if no decree for shared parenting had been granted and as if no request for shared parenting ever had been made.

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(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;

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(h) Whether either parent or any member of the household of 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 or any member of the household of either parent previously has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code or a sexually oriented 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; whether either parent or any member of the household of 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

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(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.

(G) Either parent or both parents of any children may file a pleading or motion with the court requesting the court to grant both parents shared parental rights and responsibilities for the care of the children in a proceeding held pursuant to division (A) of this section. If a pleading or motion requesting shared parenting is filed, the parent or parents filing the pleading or motion also shall file with the court a plan for the exercise of shared parenting by both parents. If each

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parent files a pleading or motion requesting shared parenting but only one parent files a plan or if only one parent files a pleading or motion requesting shared parenting and also files a plan, the other parent as ordered by the court shall file with the court a plan for the exercise of shared parenting by both parents. The plan for shared parenting shall be filed with the petition for dissolution of marriage, if the question of parental rights and responsibilities for the care of the children arises out of an action for dissolution of marriage, or, in other cases, at a time at least thirty days prior to the hearing on the issue of the parental rights and responsibilities for the care of the children. A plan for shared parenting shall include provisions covering all factors that are relevant to the care of the children, including, but not limited to, provisions covering factors such as physical living arrangements, child support obligations, provision for the children's medical and dental care, school placement, and the parent with which the children will be physically located during legal holidays, school holidays, and other days of special importance.

(H) If an appeal is taken from a decision of a court that grants or modifies a decree allocating parental rights and responsibilities for the care of children, the court of appeals shall give the case calendar priority and handle it expeditiously.

(I) As used in this section:

(1) "Abused child" has the same meaning as in section 2151.031 of the Revised Code, and "neglected child" has the same meaning as in section 2151.03 of the Revised Code.

(2) "Sexually oriented offense" has the same meaning as in section 2950.01 of the Revised Code.

(J) As used in the Revised Code, "shared parenting" means that the parents share, in the manner

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set forth in the plan for shared parenting that is approved by the court under division (D)(1) and described in division (K)(6) of this section, all or some of the aspects of physical and legal care of their children.

(K) For purposes of the Revised Code:

(1) A parent who is granted the care, custody, and control of a child under an order that was issued pursuant to this section prior to April 11, 1991, and that does not provide for shared parenting has "custody of the child" and "care, custody, and control of the child" under the order, and is the "residential parent," the "residential parent and legal custodian," or the "custodial parent" of the child under the order.

(2) A parent who primarily is allocated the parental rights and responsibilities for the care of a child and who is designated as the residential parent and legal custodian of the child under an order that is issued pursuant to this section on or after April 11, 1991, and that does not provide for shared parenting has "custody of the child" and "care, custody, and control of the child" under the order, and is the "residential parent," the "residential parent and legal custodian," or the "custodial parent" of the child under the order.

(3) A parent who is not granted custody of a child under an order that was issued pursuant to this section prior to April 11, 1991, and that does not provide for shared parenting is the "parent who is not the residential parent," the "parent who is not the residential parent and legal custodian," or the "noncustodial parent" of the child under the order.

(4) A parent who is not primarily allocated the parental rights and responsibilities for the care of

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a child and who is not designated as the residential parent and legal custodian of the child under an order that is issued pursuant to this section on or after April 11, 1991, and that does not provide for shared parenting is the "parent who is not the residential parent," the "parent who is not the residential parent and legal custodian," or the "noncustodial parent" of the child under the order.

(5) Unless the context clearly requires otherwise, if an order is issued by a court pursuant to this section and the order provides for shared parenting of a child, both parents have "custody of the child" or "care, custody, and control of the child" under the order, to the extent and in the manner specified in the order.

(6) Unless the context clearly requires otherwise and except as otherwise provided in the order, if an order is issued by a court pursuant to this section and the order provides for shared parenting of a child, each parent, regardless of where the child is physically located or with whom the child is residing at a particular point in time, as specified in the order, is the "residential parent," the "residential parent and legal custodian," or the "custodial parent" of the child.

(7) Unless the context clearly requires otherwise and except as otherwise provided in the order, a designation in the order of a parent as the residential parent for the purpose of determining the school the child attends, as the custodial parent for purposes of claiming the child as a dependent pursuant to section 152(e) of the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C.A. 1, as amended, or as the residential parent for purposes of receiving public assistance pursuant to division (A)(2) of this section, does not affect the designation pursuant to division (K)(6) of this section of each parent as the "residential parent," the "residential parent and legal custodian," or

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the "custodial parent" of the child.

(L) The court shall require each parent of a child to file an affidavit attesting as to whether the parent, and the members of the parent's household, have been convicted of or pleaded guilty to any of the offenses identified in divisions (C) and (F)(1)(h) of this section.

Current through 2006 File 150 of the 126th GA (2005-2006),
apv. by 12/26/06, and filed with the Secretary of State by 12/27/2006.

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APPENDIX -- EXHIBIT FOUR

O.R.C. 2111.08

A-53

R.C. § 2111.08

BALDWIN'S OHIO REVISED CODE ANNOTATED

TITLE XXI. COURTS--PROBATE--JUVENILE

CHAPTER 2111. GUARDIANS; CONSERVATORSHIPS

GENERAL PROVISIONS

**→ 2111.08 Parents are natural guardians; equal parental rights and responsibilities;
guardianship jurisdiction**

The wife and husband are the joint natural guardians of their minor children and are equally charged with their care, nurture, welfare, and education and the care and management of their estates. The wife and husband have equal powers, rights, and duties and neither parent has any right paramount to the right of the other concerning the parental rights and responsibilities for the care of the minor or the right to be the residential parent and legal custodian of the minor, the control of the services or the earnings of such minor, or any other matter affecting the minor; provided that if either parent, to the exclusion of the other, is maintaining and supporting the child, that parent shall have the paramount right to control the services and earnings of the child. Neither parent shall forcibly take a child from the guardianship of the parent who is the residential parent and legal custodian of the child.

If the wife and husband live apart, the court may award the guardianship of a minor to either parent, and the state in which the parent who is the residential parent and legal custodian or who otherwise has the lawful custody of the minor resides has jurisdiction to determine questions concerning the minor's guardianship.

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apv. by 12/26/06, and filed with the Secretary of State by 12/27/2006.

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APPENDIX – EXHIBIT FIVE

UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION 1

UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

APPENDIX – EXHIBIT SIX

OHIO CONSTITUTION, ARTICLE I, SECTION 1

Const. Art. I, § 1

BALDWIN'S OHIO REVISED CODE ANNOTATED

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I. BILL OF RIGHTS

→ O Const I Sec. 1 Inalienable rights

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

Current through 2006 File 150 of the 126th GA (2005-2006),
apv. by 12/26/06, and filed with the Secretary of State by 12/27/2006.

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