

IN THE SUPREME COURT OF OHIO

Paul Fisher, Appellant, )

vs. )

Emma Hasenjager, Appellee. )

CASE NO. 06-1815

**06-1853**

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**MERIT BRIEF OF APPELLEE, EMMA HASENJAGER**

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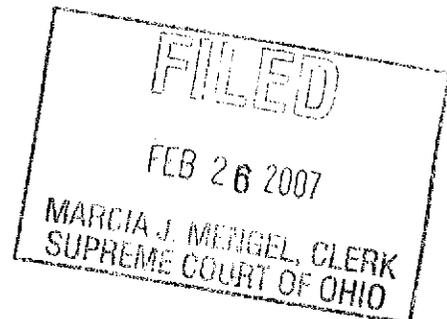
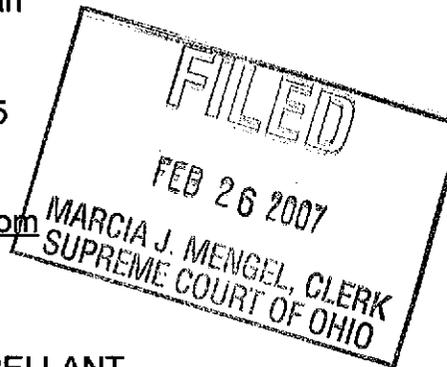
On conflict Certification and on Discretionary Appeal from the Mercer County  
Court of Appeals, Third Appellate District

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## **STATEMENT OF FACTS**

For the purpose of this brief, the Appellee does not disagree with the pertinent facts set forth in the Statement of Facts in Appellant's Brief.

## 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**

Two issues are presented in this case: (1) may a Trial Court modify a shared parenting plan under authority of R.C. 3109.04(E)(2)(b)? (2) were there sufficient facts presented to the Trial Court such that a decision could have been reached under both code sections in question - thus rendering an appeal moot?

### **III. Appellee's Position**

The Appellee's position can be summarized as follows:

1. Whether the standard to be applied in modifying a Shared Parenting Order is change of circumstances/best interest under 3109.04(E)(1)(a) or solely best interest under 3109.04(E)(2)(b), there were sufficient facts presented at trial to warrant the Trial Court's decision.
2. The Legislature scheme of 3109.04(E)(1)(a) and 3109.04 (E)(2)(b) provides alternative methods under which a Trial Court may proceed in modifying a Shared Parenting Decree.

**1. THE TRIAL COURT DID NOT STATE THE CODE SECTION/STANDARD UNDER WHICH IT REACHED ITS DECISION. THE RESULTS WOULD HAVE BEEN THE SAME UNDER EITHER STANDARD.**

The Appellant would have the Court accept that the sole issue before this Court is whether residential parent and legal custodian status is a "term" of shared parenting for the purpose of applying O.R.C. Section 3109.04(E)(2)(b). Applying the Appellant's rationale, if such status is a "term" of shared parenting, the Trial Court may modify this "term" under authority of O.R.C. Section 3109.04(E)(2)(b) by finding this would be in the best interest of the parties daughter. If, on the other hand, according to the Appellant, this is not a "term" of a shared parenting plan, the Court would need to determine, under O.R.C. Section 3109.04(E)(1)(a), that there had been a change of circumstances and that the changes ordered by the Trial Court would be in the best interest of Demetra.

The Appellant mischaracterizes the decision of the Court of Appeals and of the Trial Court.

As was noted by the Court of Appeals, the Trial Court did not state under which subsection of O.R.C. 3109.04 it relied on to reach its decision, and, consequently, which standard it applied in reaching the decision.

The Trial Court did not terminate the Shared Parenting Orders. (Trial Court Decision - Appendix A1; Court of Appeals Opinion paragraph 24) Rather, the Court modified the prior Shared Parenting Order by designating Appellee the residential parent and legal custodian of Demetra and granting Appellant specific parenting time

(basically two overnight periods every week, alternating weekends and Fridays if mother is working). Thus, not including Fridays, Appellant would have Demetra with him six (6) out of every fourteen (14) days - almost 50% of the time.

In analyzing the Trial Court's decision, the Court of Appeals analyzed various subsections of Section 3109.04 to determine the applicable standard under which the Trial Court reached its decision so that it could then determine if there were sufficient facts to warrant the Trial Court's decision. The Court of Appeals analyzed O.R.C. 3109.04(E)(1)(a), 3109.04(E)(2)(a) and 3109.04(E)(2)(b). The Court found (E)(2)(a) inapplicable as that subsection requires both parents to jointly move for modification of the plan.

The Court of Appeals then focused its analysis on 3109.04(E)(1)(a) and 3109.04(E)(2)(b). To summarize the differences 3109.04(E)(1)(a) would require a dual finding that there had been changed circumstances since the prior decree and that a modification was in the best interest of the child, while 3109.04(E)(2)(b) only requires a finding that the modifications are in the best interest of the child, whether there had been changed circumstances or not.

As the Appellate Court determined that the Trial Court had the authority to proceed under O.R.C. 3109.04(E)(2)(b), it did not have to address or determine whether the Court could have also reached a similar decision under Section 3109.04(E)(1)(a). In reviewing the factual findings of the Trial Court, there were many substantial changes that had occurred since the Court's prior custody orders.

The Trial Court did not state under which subsection of O.R.C. 3109.04 it rendered its decision. An analysis of both the Trial Court's decision and the transcript

of the proceedings show that there have been substantial changes in circumstances that would warrant the Court's modification under O.R.C. 3109.04(E)(1)(a).

Thus, whether the standards of O.R.C. 3109.04(E)(1)(a) or 3109.04(E)(2)(b), were applied, the Trial Court's decision would have been affirmed. When applying the facts in the instant case, there is no need for this Court to determine which standard is applicable, the results would be the same. Myers v. Myers, 2003-Ohio-3552, @ 3556

Civil Rule 52 provides that a judgment entry "may be general" unless a party makes a request for findings of facts and conclusions of law, which Appellant did not do.

In order to prevail on the facts, the Appellant must establish that the Trial Court abused its discretion in reaching the ultimate decision. Booth v. Booth, (1989) 44 Ohio St.3d 142 at 144. An abuse of discretion is more than a mere error of law or judgment, it calls for the Trial Court to have acted unreasonably, arbitrarily or unconscionably. Blakemore v. Blakemore (1983) 5 Ohio St.3d 217.

As a general rule, a Court should not reverse a correct judgment because the lower Court stated erroneous reasons for reaching its judgment. Taylor v. Yale v. Towne Mfg. Co. (1987) 36 Ohio App.3d 62.

**2. THE LEGISLATURE, IN ENACTING 3109.04(E)(2)(b), PROVIDED ALTERNATIVE METHODS OF MODIFYING A SHARED PARENTING DECREE.**

The Trial Court has the authority under Section 3109.04(E)(2)(b) to modify the terms of the Shared Parenting Plan/Order when it determines that such change is in the child's best interest. Myers v. Myers (2003) 2003 - Ohio - 3552; Thomas v. Thomas (1999) 99-LW-3825; Carr v. Carr (1999) 99-LW-3257.

While the Appellant spends much time trying to differentiate Subsections (E)(1)(a) and (E)(2)(b) and quotes what he claims is Subsection (E)(b)(2), the Appellant failed to quote the first sentence of Subsection (E)(2)(b). This first sentence is disposition of the Appellant's arguments. When read in its entirety, Subsection (2)(b) of 3109.04(E) states:

(1) In addition to a modification as authorized under division (E)(1) of this section; (underlining added)

(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. He Court shall not make any modification to the plan under this division, unless the modification is in the best interest of the children.

Thus, the legislature specifically provided that the Court could proceed under either subsection (E)(1) or (E)(2).

The Appellant splits hairs in arguing that only a Shared Parenting Order and not a Shared Parenting Plan may address the issue of "residential parent and legal custodian" status. Accepting the Appellant's arguments, the Plan is to address all issues relative to the children except residential parent/legal custodian status and then an order would be issued, incorporating the plan and adding residential parent/legal custodian status.

3109.04(J) provides:

". . . 'shared parenting' means the parents share, in the manner 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."

3109.04(K)(5) provides:

"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 manner specified in the order."

"(b) 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."

Both subsections (K)(5) and (K)(6) refer to the designations of custody, residential parent, etc. unless the context (of the order) clearly requires otherwise.

Again, the clear, unambiguous language of the statute provides that the Court may determine such issues.

3109.04(D) speaks of a plan being submitted and approved or modified by the

Trial Court. Contrary to the Appellant's assertions, it does not state that the plan is to include everything but residential parent/legal custodian status, which somehow the Court is to independently determine.

The Appellant argues that all parts of the Shared Parenting Plan/Order are eventually terms of the Order except the designation of residential parent/legal custodian status. Somehow, according to Appellant, this designation is something other than a "term."

When a word or phrase is undefined, the Court should examine the common meaning of the word or phrase and Ohio case law.

"Common words appearing in a written instrument will be given their ordinary meaning unless absurdity results, or some other meaning is clearly evidenced from the face in overall contents of the instrument." Auto-Owners Ins. Co. v. Merillat (2006) 167 Ohio App.3d 148 at 153 quoting for authority Alexander v. Buckeye Pipe Line Co. (1978) 53 Ohio St.2d 241

The Appellant argues that the phrase "residential parent and legal custodian" is not a "term" when used in the context of a Shared Parenting Plan. However, in his brief (page 9), the Appellant specifically argues that the words "residential parent" and "legal custodian" are terms that need to be interpreted.

**(3) ORC 3109.04 IS NOT UNCONSTITUTIONAL**

The Appellant argues that, should this Court determine that Shared Parenting may be modified under either (E)(1)(a) or (E)(2)(b), this will cause confusion as the Trial Courts are given no guidance as to when to proceed under which subsection. This, according to the Appellant, is an unconstitutional infirmity in the statute.

Again, a plain reading of the applicable statutes would show that (E)(1)(a) applies to any prior decree, whether granting custody to one parent or a shared parenting decree while (E)(2)(b) states that this section is in addition to (E)(1)(a) and applies only to a shared parenting scenario. Further (E)(2)(b) specifically applies to the modification of a shared parenting plan which was approved by the Court and incorporated into the decree whereas (E)(1)(a) does not make reference to this distinction.

Statutes carry a strong presumption of constitutionality. The Appellant has the burden of proving beyond a reasonable doubt that the statute he challenges is unconstitutional. Harold v. Collins (2005) 107 Ohio St.3d 44, State v. Thompkins (1996) 75 Ohio St.3d 558.

The Appellant makes many assumptions of legal and factual results to buttress his arguments of how the statute is unconstitutional. To establish that a statute is unconstitutional on its face, the Appellant's burden is to prove that there exists no set of circumstances under which the sections in question are valid. Harold v. Collier, supra, citing with authority United States v. Salerno (1987) 481 US 739.

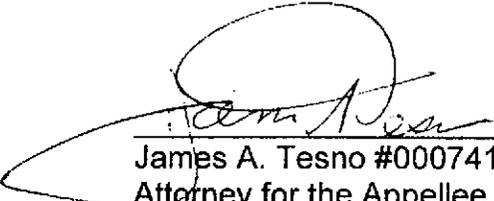
When it is alleged that a statute is void and unconstitutional due to vagueness, all doubts should be resolved in favor of the constitutionality of the statute. City of Oregon v. Lemons (1984) 17 Ohio App.3d 195 at 196.

## CONCLUSION

The Trial Court did not state under which subsection of O.R.C. 3109.04 it reached its decision. There were substantial facts for the Trial Court to reach its decision whether the standard is change of circumstances/best interests [3109.04(E)(1)(a)] or best interests [3109.04(E)(2)(b)].

In determining whether to modify the designation of residential parent and legal custodian under a Shared Parenting Order, the Trial Court must determine if the modification is in the best interest of the child, applying O.R.C. 3109.04(E)(2)(b).

O.R.C. 3109.04 is not unconstitutional.

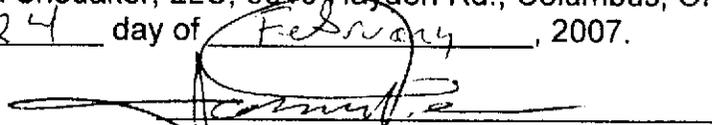


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**PROOF OF SERVICE**

I hereby certify that a copy of the foregoing Brief was served on Atty. Douglas B. Dougherty, Dougherty, Hanneman & Snedaker, LLC, 3010 Hayden Rd., Columbus, OH 43235, by regular U. S. Mail, this 24 day of February, 2007.

  
James A. Tesno

IN THE COMMON PLEAS COURT OF MERCER COUNTY, OHIO  
JUVENILE DIVISION

Paul Fisher  
Petitioner/Respondent

vs.

Emma Hasenjager  
Petitioner/Movant

Case No. 4-2003-030 MERCER CO. JUVENILE COU

FILED  
APR 05 2005

MARY PAT ZITTER  
JUDGE

JUDGMENT ENTRY

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All pending matters came before the court on March 21, 2005. Present were petitioner Emma Hasenjager represented by Attorney Thomas Luth and respondent Paul Fisher represented by Attorney Peter VanArsdel.

On November 12, 2003, the parties entered into a shared parenting agreement which was made an order of this court. On January 4, 2005, Emma Hasenjager, hereinafter "mother" filed a motion for contempt against Paul Fisher, hereinafter "father" alleging father had refused to return the parties child for parenting time and refused her right to provide child care. On January 11, 2005, this court issued orders that the child should be returned to the custody of the mother and that she was appointed legal custodian until further order of the court.

On January 11, 2005, father moved for modification of parental rights and responsibilities and to be designated the sole residential parent and temporary orders. On February 28, 2005, mother moved the court to be designated the sole residential parent and for attorney fees and court costs.

Mother testified inter alia that the parties have a shared parenting plan. She has parenting time from 7:00 a.m. on every Monday and Wednesday overnight and on alternating weekends from Friday at 7:00 a.m. to the following Monday at 7:00 a.m. and further has the first option for babysitting on father's parenting time if he must be at work. On December 27, 2004, father dropped Demetra off then returned immediately and said he had changed his mind and removed her. She did not see her daughter again until she was returned by court order on January 11, 2005. Mother testified father would not tell her where Demetra was and did not return her for mother's parenting time nor did he provide her the opportunity to babysit while he was at work. Mother testified she repeatedly called father wanting her child.

Mother further testified as to the good relationship Demetra had with her half sister Dethora. Each sister had their own room across from each other with mother also having her own room. She testified as to their relationship as being very good. Mother and daughter read and played games together. Mother expressed concern about the atmosphere created when father would bring or pick up Demetra for parenting time alleging that father would denigrate mother in front of their child, calling her obscene names and flipping her off. On one occasion he opened the car door and shoved it, she made a police report. Mother indicated that she tries to maintain a positive outlook and wants to raise their daughter in a positive atmosphere. She maintained that she felt it was important for Demetra to be close to and have a good relationship with her father. She felt that the alternating parenting time was in Demetra's best interest; however was very concerned about the abusive verbal behavior of father to her in front of the child. Mother felt they needed to improve communication and was willing to enter into counseling with father for the best interest of their daughter.

Mother testified that she had been involved in an automobile accident on December 3, 2004, and that alcohol had been a factor. The accident had happened at 1:00 in the morning. Demetra was not with her and she testified she had never had alcohol and driven with her child. She admitted that due to the late hour she had gotten to bed after the accident, she had not heard father bringing Demetra at 7:00 a.m. or heard the telephone ring until 8:30 a.m. She further testified that on one occasion when father was early she had not stopped to get dressed when he came but came to the door with her cover wrapped around her and stood behind the door when she opened it for Demetra to come in. She testified she does not use illegal drugs.

Ms. Fledderjohann, a clinical director at Gateway Outreach Center, testified. She explained the difference between abuse and dependency. She said mother had abused alcohol on the night of the accident, but did not find an alcohol or chemical dependency. She testified that she did not have any concern about mother's ability to care for her child. Mother had come in on her own after the accident to be assessed.

Father testified inter alia that he was concerned about the accident mother had had in early December. He also stated that mother had come to the door without any clothes on just wearing a robe early in the morning when he dropped their daughter off for parenting time. He also testified that one morning he had seen a bottle of wine on the table and a glass with what he thought was wine on the table. He testified he was concerned that mother was reverting to a lifestyle he felt was dangerous.

Father admitted that he had taken their daughter and not returned her for mother's parenting time until notified that the Sheriff's Department had received a court order. He further admitted that he had not given mother the opportunity to care for Demetra on the days that he worked. He did testify that he had previously informed mother that the paternal grandmother would babysit for Demetra during the Christmas holiday. Paternal grandmother was caring for her other grandchildren during that time. However, he also admitted that someone else had babysat also. He admitted he had refused to tell mother where their daughter was. Father did not show nor admit to any remorse for the concern or anxiety mother felt. Nor did he indicate he felt he was wrong for deciding on his own to take his child away from mother. Father did not exhibit any concern about having violated the shared parenting agreement.

Father further testified as to the good relationship between he and his daughter. Demetra did not play with other children during his parenting time because he had moved into a quiet apartment with mainly older tenants. He felt that it would be calmer for his daughter. Demetra has her own room and enjoys being with him. Father also testified that Demetria has a good relationship with her paternal relatives and visited with them often.

In response to questioning as to whether he would participate in counseling, father reacted very negatively. He stated it would not do any good; stated he and mother do not agree on most things. Father indicated he would obey a direct court order to get counseling but he was not sure where his and mother's relationship was going. He desires sole custody with mother to receive standard visitation of every other weekend and once during the week. He indicated he would not be adverse to mother seeing child more than the minimum visitation.

Both parties testified they were in good health. Both parties are employed.

Based on testimony presented, the court finds Paul Fisher unilaterally denied custody to the mother when a shared parenting decree was in existence based on vague fears that mother might be reverting to a former lifestyle he felt would be dangerous. He neither acted with the authority of this court nor did he take any immediate steps to obtain the approval of this court to change the parenting time either before or immediately after deviating from the shared parenting order. Based on the criteria of the Third District Court of Appeals decision in Snyder vs. Snyder, 1998 Ohio App. LEXIS 4290, the court finds Paul Fisher in contempt for a violation of this court's order on shared parenting. He is hereby sentenced to serve ten days in the Mercer County Jail. He may purge this contempt by obeying this court's orders in the future.

The court finds it is in the best interest of the minor child Demetra and at the request of the parties, does hereby terminate the shared parenting plan previously entered into by the parties and ordered by this court.

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.

Emma Hasenjager is hereby designated the residential parent and legal custodian of the parties minor child, Demetra. Paul Fisher shall have parenting time as follows:

Mr. Fisher shall have access to daughter, Demetra, every Tuesday and Thursday, overnight, for a period not to exceed 24 hours. The exchange shall be at 7:00 a.m. Mr. Fisher shall have access on an alternating weekend basis beginning Friday at 7:00 a.m. until the following Monday at 7:00 a.m.

Father shall have the option of babysitting for the child on Friday's, if mother is working and father is not. The receiving party shall provide transportation.

Both parties shall refrain from any abuse of alcohol or drugs while the child is with them. Father and mother shall refrain from arguing in front of the minor child. Father shall not verbally abuse mother in front of the child nor make threatening gestures. Each party shall encourage the child to love and respect the other parent. The court encourages the parties to enter into counseling for the best interest of the minor child, however does not specifically order such counseling due to father's unwillingness to participate in counseling.

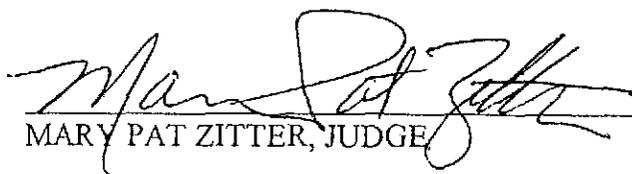
Mother's counsel made a professional statement as to his attorney fee's in this matter. Mr. Luth indicated he had fees in the amount of \$750.00 which included the contempt proceedings. However, there is no breakdown of how much of the fee was for the contempt proceedings and how much was for his representation in the modification of parental rights. Therefore, absent this information, the court cannot make a finding of a reasonable attorney fee and cannot award the same.

The parties shall submit a completed domestic relations financial information form within ten days of the journalization of this entry. The court shall make a determination of child support at that time.

All other orders not in conflict with the above shall remain in full force and effect. This Court continues to retain jurisdiction over the parties and the subject matter.

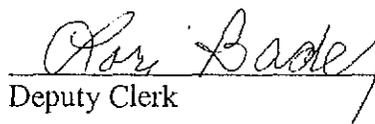
The parties shall split the costs of this action. Mrs. Hasenjager's costs shall be withheld from her deposit.

IT IS SO ORDERED.

  
MARY PAT ZITTER, JUDGE

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing judgment entry has been sent by ordinary U.S. mail to Attorney Thomas Luth and Attorney Peter VanArsdel at their respective addresses on April 6, 2005.

  
Deputy Clerk

RECEIVED MAY 15 2005

IN THE COMMON PLEAS COURT OF MERCER COUNTY, OHIO  
JUVENILE DIVISION

Paul Fisher  
Plaintiff  
vs.  
Emma Hasenjager  
Defendant

Case No. 4-2003-030

FILED  
MERCER CO. JUVENILE COURT

MAY 04 2005

MARY PAT ZITTER  
JUDGE

JUDGMENT ENTRY

This matter is before the court pursuant to a judgment entry filed April 5, 2005.

The parties filed their Domestic Relations 1 forms as ordered. Emma Hasenjager filed her forms on April 19, 2005. Paul Fisher filed his forms on April 18, 2005. Paul Fisher further filed an amendment to his financial information form on April 27, 2005.

Child support shall be payable by Paul Fisher to Emma Hasenjager in the amount of \$210.90 per month, plus 2% processing charge of \$4.22, for a total of \$215.12 per month, effective January 11, 2005.

Any payment of money by the person responsible for the support payments under a support order to the person entitled to receive the support payment that is not made to the Mercer County Child Support Enforcement Agency in accordance with the support order shall not be considered as a payment of support. Any payment made to discharge an obligation other than support shall be deemed to be a gift.

All support payments shall be made to Ohio Child Support Payment Central, P. O. Box 182394, Columbus, OH 43218-2394.

Until a withholding order issues, Obligor shall be responsible for making these payments by check, certified check, or money order to Ohio Child Support Payment Central.

In the event Obligor becomes unemployed and is eligible to receive unemployment benefits, a benefits deduction shall issue to the Bureau of Employment Services.

The parties shall notify the Mercer County Child Support Enforcement Agency of any reason why child support should terminate.

**EACH PARTY TO THIS SUPPORT ORDER MUST NOTIFY THE CHILD SUPPORT ENFORCEMENT AGENCY IN WRITING OF HIS OR HER CURRENT MAILING ADDRESS, CURRENT RESIDENCE ADDRESS, CURRENT RESIDENCE TELEPHONE NUMBER, CURRENT DRIVER'S LICENSE NUMBER, AND OF ANY CHANGES IN THAT INFORMATION. EACH PARTY MUST NOTIFY THE AGENCY OF ALL CHANGES UNTIL FURTHER NOTICE FROM THE COURT OR AGENCY, WHICHEVER ISSUED THE SUPPORT ORDER. IF YOU ARE THE OBLIGOR UNDER A CHILD SUPPORT ORDER AND YOU FAIL TO MAKE THE REQUIRED NOTIFICATIONS, YOU MAY BE FINED UP TO \$50 FOR A FIRST OFFENSE, \$100 FOR A SECOND OFFENSE, AND \$500 FOR EACH SUBSEQUENT OFFENSE. IF YOU ARE AN OBLIGOR OR OBLIGEE UNDER ANY SUPPORT ORDER ISSUED BY A COURT AND YOU WILLFULLY FAIL TO GIVE THE REQUIRED NOTICES, YOU MAY BE FOUND IN CONTEMPT OF COURT AND BE SUBJECTED TO FINES UP TO \$1,000 AND IMPRISONMENT FOR NOT MORE THAN 90 DAYS.**

**IF YOU ARE AN OBLIGOR AND FAIL TO MAKE THE REQUIRED NOTIFICATIONS, YOU MAY NOT RECEIVE NOTICE OF THE FOLLOWING ENFORCEMENT ACTIONS AGAINST YOU:**

**IMPOSITION OF LIENS AGAINST YOUR PROPERTY; LOSS OF YOUR PROFESSIONAL OR OCCUPATIONAL LICENSE, DRIVER'S LICENSE, OR RECREATIONAL LICENSE; WITHHOLDING FROM YOUR INCOME; ACCESS RESTRICTION AND DEDUCTION FROM YOUR ACCOUNTS IN FINANCIAL INSTITUTIONS; AND ANY OTHER ACTION PERMITTED BY LAW TO OBTAIN MONEY FROM YOU TO SATISFY YOUR SUPPORT OBLIGATION. (O.R.C. 3121.29)**

All support under this order shall be withheld or deducted from the income or assets of the Obligor pursuant to a withholding or deduction notice or appropriate order issued in accordance with Chapters 3119, 3121, 3123, and 3125, of the Revised Code or a withdrawal directive issued pursuant to Sections 3123.24 to 3123.38 of the Revised Code and shall be forwarded to the Obligee in accordance with Chapters 3119, 3121, 3123, and 3125 of the Revised Code. (O.R.C. 3121.27). The withholding or deduction notices and other orders issued under sections 3121.03, 3121.04 to 3121.06, and 3121.12 of the Ohio Revised Code, and the notices that require the Obligor to notify the child support enforcement agency administering the support order of any change in the Obligor's employment status or of any other change in the status of the Obligor's assets, are final and enforceable by the Court. (O.R.C. 3121.33).

The parties shall provide health insurance coverage for their child, if it is available at place of employment at a reasonable cost and dual coverage by both parents would provide for coordination of medical benefits without unnecessary duplication of coverage.

Both parties shall designate the child as a covered dependent under any health insurance policy, contract or plan for which the parties contract. Further, both parties shall have thirty (30) days after the issuance of this order to furnish written proof from employer to the Mercer County Child Support Enforcement Agency, P.O. Box 649, Celina, Ohio 45822, that the required health insurance coverage has been obtained, *or is not available at reasonable cost.*

The parties shall provide to each other within thirty (30) days of receipt, written information regarding the following: benefits, limitations and exclusions of any health insurance coverage; copies of any insurance forms necessary to receive reimbursement; payment or other benefits under the health insurance coverage; and a copy of the necessary insurance cards and shall continue to so provide upon the issuance of new information, forms and cards.

In the event either party should change insurance coverage for any reason, he or she shall, within thirty (30) days, notify the other party and the Mercer County Child Support Enforcement Agency and comply with the above orders with regard to the exchange of written insurance coverage information.

Each party shall submit a copy of this order to the insurer at the time application is made to enroll the child in the health insurance policy and no later than thirty (30) days after the issuance of this order, furnish written proof to the Mercer County Child Support Enforcement Agency that this order has been complied with.

In the event the cost of health insurance coverage is no longer available through employment or is no longer available at a reasonable cost through employment, a party must request a court hearing to modify this order.

g. The Obligee shall pay the first \$100.00 per child per year of uncovered medical expenses, in compliance with Local Court Rule III-E(1) of the Domestic Relations Division of the Mercer County Common Pleas Court, which this Court adopts for this purpose. After payment of the first \$100.00 per child per year, the Obligor shall pay 67% of the uncovered medical expenses for the parties' minor child and the Obligee shall pay 33% of the uncovered medical expenses for the parties' minor child.

h. The administrator of the health care plan that provides health insurance coverage for the children may continue making payment for medical, optical, hospital, dental or prescription services directly to any health care provider in accordance with the applicable health insurance policy, contract, or plan.

i. Upon written request by either party, the employer of the person required to obtain health insurance coverage is required to release to the parties or the child support enforcement agency, any necessary information on the health insurance coverage, including the name and address of the health plan administrator and any policy, contract or plan number; and to otherwise comply with any order or notice issued herein.

j. If the person required to obtain health care insurance coverage for the child subject to this child support order obtains new employment, the agency shall comply with the requirements of section 3119.34 of the Revised Code, which may result in the issuance of a notice requiring the new employer to take whatever action is necessary to enroll the children in health care insurance coverage provided by the new employer. Specifically, section 3110.34 mandates that no later than the business day after receipt of a notice of new hire, a child support enforcement agency shall send to a person's new employer a national medical support notice if that person is required to provide health insurance coverage for children who are the subject of a child support order.

k. This order is issued pursuant to the requirements of Ohio Revised Code Section 3119.30 and 3119.32.

Costs are assessed against plaintiff.

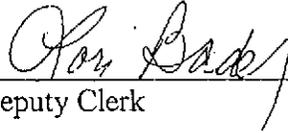
IT IS SO ORDERED.

  
\_\_\_\_\_  
MARY PAT ZITTER, JUDGE

Fisher vs. Hasenjager  
JUDGMENT ENTRY  
Case No. 4-2003-030  
Page 5

CERTIFICATE OF SERVICE

This is to certify that a copy of the above judgment entry has been sent by ordinary U.S. mail to Attorney Thomas Luth and Attorney Peter R. VanArsdel at their respective addresses on  
May 4, 2005.

  
\_\_\_\_\_  
Deputy Clerk

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY OHIO  
COURT OF COMMON PLEAS, JUVENILE DIVISION

ILD SUPPORT COMPUTATION SUMMARY WORKSHEET - SOLE RESIDENTIAL PARENT OR SHARED PARENTING ORD

Judge Mary Pat Zitter	Case No: 4-2003-030 MERCER CO. JUVENILE COURT	Number of Children Married With Each Party	Number of "Other" Children of the Party Residing with Party	Date This Worksheet Created
Names of Paul Fisher	MAY 04 2005	0	0	2005/04/26
Parties: Emma Hasenjager	MARY PAT ZITTER	1	0	

	FATHER	MOTHER
1a. Gross Income From Emp.	\$ 30,000.00	\$ 12,000.00
1b. Overtime and Bonuses	\$ 0.00	\$ 0.00
2. Self-Employment Income	\$ 0.00	\$ 0.00
3. Interest and Dividends	\$ 0.00	\$ 0.00
4. Unemployment Comp.	\$ 0.00	\$ 0.00
5. Workers' Comp./Dis. Ins.	\$ 0.00	\$ 0.00
6. Other Income (taxable)	\$ 0.00	\$ 0.00
6. Other Income (non-taxable)	\$ 0.00	\$ 2,600.00
7. Total Annual Gross Income	\$ 30,000.00	\$ 14,600.00
8. Resident Children Adj.	\$ 0.00	\$ 0.00
9. Other Child Support Paid	\$ 0.00	\$ 0.00
10. Spousal Support Paid	\$ 0.00	\$ 0.00
11. Local Taxes Payable	\$ 600.00	\$ 240.00
12. Work-related Deductions	\$ 0.00	\$ 0.00
13. Total Income Adjustments	\$ 600.00	\$ 240.00
14. Adjusted Gross Income	\$ 29,400.00	\$ 14,360.00
15. Combined Annual Income	\$ 43,760.00	
16. Party's % Income to Total	67.18 %	32.82 %
17. Basic C/S Obligation	\$ 6,814.27	
18. Annual Support per parent	\$ 4,577.82	\$ 2,236.44
19. Net Child Care Exp. Paid	\$ 1,518.40	\$ 0.00
20. Health Insurance Paid	\$ 0.00	\$ 0.00
21. Adjustment Additions	\$ 0.00	\$ 498.34
21. Adjustment Subtractions	\$ 498.34	\$ 0.00
22. C / S After Adjustments	\$ 4,079.48	\$ 2,734.78
23a. Annual Obligation	\$ 4,079.48	
23b. Benefits Received for Child	\$ 0.00	
23c. Actual Annual Obligation	\$ 4,079.48	
24. Deviation Adjustment	\$ -1,548.69	
25. Final Support Figure	\$ 2,530.79	

Bonus & Overtime	FATHER	MOTHER
Year. 3	\$ 0.00	\$ 0.00
Year. 2	\$ 0.00	\$ 0.00
Year. 1	\$ 0.00	\$ 0.00
Average:	\$ 0.00	\$ 0.00

Other Children Adj.	FATHER	MOTHER
Exemption	\$ 0.00	\$ 0.00
Received	\$ 0.00	\$ 0.00
Adjustment	\$ 0.00	\$ 0.00

Child Care Credit	FATHER	MOTHER
Actual Exp.	\$ 2,080.00	\$ 0.00
Fed. Tax Cred	\$ - 561.60	\$ - 0.00
State Tax Credit	\$ - 0.00	\$ - 0.00
Net Credit	\$ 1,518.40	\$ 0.00
Fed. Tax AGI:	\$ 30,000.00	\$ 14,600.00

Local Tax Rate	FATHER	MOTHER
	2.000 %	2.000 %

Self-Employment Income	FATHER	MOTHER
Gross Receipts	\$ 0.00	\$ 0.00
Expenses	\$ - 0.00	\$ - 0.00
F.I.C.A.	\$ - 0.00	\$ - 0.00
Adj. SE Income	\$ 0.00	\$ 0.00

Support Table	INCOME	SUPPORT
Higher Figure	43,800.00	6,817.00
Actual Figure	43,760.00	6,814.27
Lower Figure	43,200.00	6,776.00

Supportworks Child Support Guideline Worksheet Program  
(c) 2003; Piper Software Productions, Inc.  
Version 5.6

www.supportworks.net

Obligor: Father		Household Income after support	\$ 26,869.21	\$ 16,890.79
Child Support Per Week Per Child	In Gross	Child Support Per Month Per Child	In Gross	
\$ 48.67	\$ 48.67	\$ 210.90	\$ 210.90	
\$ 0.97	\$ 0.97	\$ 4.22	\$ 4.22	
\$ 49.64	\$ 49.64	\$ 215.12	\$ 215.12	

Worksheet Prepared by:

The name and address of the preparer firm is printed here on the worksheet Change it to YOUR firm and address at  
OPTIONS: SETTINGS: Firm or Organization found at top of the opening screen

(03/2003) Worksheet has been reviewed and agreed to:

MOTHER: Emma Hasenjager Date FATHER: Paul Fisher Date

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IN THE COURT OF COMMON PLEAS OF MERCER COUNTY OHIO

COURT OF COMMON PLEAS, JUVENILE DIVISION

SUPPORT COMPUTATION WORKSHEET - SOLE RESIDENTIAL PARENT OR SHARED PARENTING OR MERCER CO. JUVENILE COURT

NAMES OF PARTIES: Paul Fisher, Emma Hasenjager, MAY 04 2005, CASE NO. 4-2003-030, MARY PAT ZITTER, JUDGE Mary Pat Zitter

The following parent was designated as the residential parent and legal custodian: [X] MOTHER, [ ] FATHER, [ ] SHARED, No. of minor children: 1

INCOME, COLUMN I FATHER, COLUMN II MOTHER, COLUMN III

1. a. Annual gross income from employment or, when determined appropriate by the court or agency, average annual gross income from employment over a reasonable period of years. (Exclude overtime, bonuses, self-employment income, or commissions).

\$ 30,000.00 \$ 12,000.00

b. Amount of overtime, bonuses, and commissions (Year 1 representing the most recent year)

Table with columns FATHER and MOTHER, rows Year 3, Year 2, Year 1, and AVERAGE.

\$ 0.00 \$ 0.00

(Include in Column I and/or Column II the average of the three years or the year 1 amount, whichever is less, if there exists a reasonable expectation that the total earnings from overtime and/or bonuses during the current calendar year will meet or exceed the amount that is the lower of the average of the three years or the year 1 amount. If, however, there exists a reasonable expectation that the total earnings from overtime/bonuses during the current calendar year will be less than the lower of the average of the three years or the year 1 amount, include only the amount reasonably expected to be earned this year.)

2. For self-employment income:

- a. Gross receipts from business \$ 0.00 \$ 0.00
b. Ordinary and necessary business expenses \$ 0.00 \$ 0.00
c. 5.6% of adjusted gross income or the actual marginal difference between the actual rate paid by the self-employed individual and the F.I.C.A. rate. \$ 0.00 \$ 0.00
d. Adjusted gross income from self-employment (subtract the sum of 2b and 2c from 2a). \$ 0.00 \$ 0.00

3. Annual income from interest and dividends (whether or not taxable) \$ 0.00 \$ 0.00

4. Annual income from unemployment compensation. \$ 0.00 \$ 0.00

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5. Annual income from workers' compensation, disability insurance benefits, or social security disability/retirement benefits.	\$ <u>0.00</u>	\$ <u>0.00</u>
6. Other annual income (identify) _____	\$ <u>0.00</u>	\$ <u>2,600.00</u>
7. Total annual gross income (add lines 1a, 1b, 2d and 3-6)	\$ <u>30,000.00</u>	\$ <u>14,600.00</u>

ADJUSTMENTS TO INCOME

8. Adjustment for minor children born to or adopted by either parent and another parent who are living with this parent; adjustment does not apply to stepchildren (number of children times federal income tax exemption less child support received, not to exceed the federal tax exemption).	\$ <u>0.00</u>	\$ <u>0.00</u>
9. Annual court-ordered support paid for other children.	\$ <u>0.00</u>	\$ <u>0.00</u>
10. Annual court-ordered spousal support paid to any spouse or former spouse.	\$ <u>0.00</u>	\$ <u>0.00</u>
11. Amount of local income taxes actually paid or estimated to be paid.	\$ <u>600.00</u>	\$ <u>240.00</u>
12. Mandatory work-related deductions such as union dues, uniform fees, etc. (Not including taxes, social security, or retirement).	\$ <u>0.00</u>	\$ <u>0.00</u>
13. Total gross income adjustments (add lines 8 through 12)	\$ <u>600.00</u>	\$ <u>240.00</u>
14. Adjusted annual gross income (subtract line 13 from line 7)	\$ <u>29,400.00</u>	\$ <u>14,360.00</u>
15. Combined annual income that is basis for child support order (add line 14, Col. I and Col. II)		\$ <u>43,760.00</u>
16. Percentage of parent's income to total income:		
a. Father (divide line 14, Col. I, by line 15, Col. III)	67.18 %	
b. Mother (divide line 14, Col. II, by line 15, Col. III)		32.82 %
17. Basic combined child support obligation (Refer to schedule, first column, locate the amount nearest to the amount on line 15, Col. III, then refer to column for number of children in this family. If the income of the parents is more than one sum, but less than another, you may calculate the difference.)		\$ <u>6,814.27</u>
18. Annual support obligation per parent.		
a. Father (multiply line 17, Col. III, by line 16a)	\$ <u>4,577.82</u>	
b. Mother (multiply line 17, Col. III, by line 16b)		\$ <u>2,236.44</u>

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19 Annual child care expenses for children who are the subject of this order that are work-, employment training-, or education-related, as approved by the court or agency (deduct tax credit from annual cost, whether or not claimed)

\$ 1,518.40 \$ 0.00

\* State day-care tax credits included if applicable: No

20 Marginal, out-of-pocket costs, necessary to provide for health insurance for the children who are the subject of this order.

\$ 0.00 \$ 0.00

21. Adjustments to Child Support

Father or Mother (only if obligor or shared parenting)

a. FATHER ADDITIONS: Line 16a times sum of amounts shown on line 19, Col. II and line 20, Col. II.

\$ 0.00

b. MOTHER ADDITIONS: Line 16b times sum of amounts shown on line 19, Col. I and line 20, Col. I.

\$ 498.34

c. FATHER SUBTRACTIONS: Line 16b times sum of amounts shown on line 19, Col. I and line 20, Col. I.

\$ 498.34

d. MOTHER SUBTRACTIONS: Line 16a times sum of amounts shown on line 19, Col. II and line 20, Col. II.

\$ 0.00

22. Obligation after adjustments to Child Support:

a. FATHER: Line 18a plus or minus the difference between line 21a minus line 21c

\$ 4,079.48

b. MOTHER: Line 18b plus or minus the difference between line 21b minus line 21d

\$ 2,734.78

23. Actual annual obligation:

a. (Line 22a or 22b, whichever line corresponds to the parent who is the obligor).

\$ 4,079.48

b. Any non-means tested benefits, including Social Security and Veterans' benefits, paid to and received by a child or a person on behalf of the child due to death, disability, or retirement of the parent.

\$ 0.00

c. Actual annual obligation (subtract line 23b from line 23a)

\$ 4,079.48

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24. a. Deviation from sole residential parent support amount shown on line 23c if amount would be unjust or inappropriate: (see section 3119.23 of the Revised Code.) (Specific facts and monetary value must be stated.) \$ -1,548.69
- b. Deviation from shared parenting order: (see sections 3119.23 and 3119.24 of the Revised Code.) (Specific facts including amount of time children spend with each parent, ability of each parent to maintain adequate housing for children, and each parent's expenses for children must be stated to justify deviation.) \$ \_\_\_\_\_

Stated below are specific fact to justify deviation

25. FINAL FIGURE (this amount reflects final annual child support obligation; line 23c plus or minus any amounts indicated in line 24a or 24b) \$ 2,530.79

26. FOR DECREE:  
 Child support per month (divide obligor's annual share, line 25, by 12) \$ 210.90  
 plus any processing charge \$ 4.22  
\$ 215.12

Obligor: **Father**

<p>Worksheet Prepared by:</p> <p>The name and address of the preparer firm is printed here on the worksheet. Change it to YOUR firm and address at OPTIONS: SETTINGS: Firm or Organization found at top of the opening screen</p> <hr/> <p>FATHER'S FEDERAL AGI USE \$ 30,000.00                  MOTHER'S FEDERAL AGI \$ 14,600.00</p>	<p>Worksheet has been reviewed and agreed to:</p> <table style="width: 100%; border-collapse: collapse;"> <tr> <td style="border-top: 1px solid black; border-bottom: 1px solid black; width: 80%;">MOTHER: Emma Hasenjager</td> <td style="border-top: 1px solid black; border-bottom: 1px solid black; width: 20%;">DATE</td> </tr> <tr> <td style="border-top: 1px solid black; border-bottom: 1px solid black;">FATHER: Paul Fisher</td> <td style="border-top: 1px solid black; border-bottom: 1px solid black;">DATE</td> </tr> </table>	MOTHER: Emma Hasenjager	DATE	FATHER: Paul Fisher	DATE
MOTHER: Emma Hasenjager	DATE				
FATHER: Paul Fisher	DATE				

AIS

KATHY ANN CARR, n.k.a. PACHUTA, Appellee  
v.  
MARK J. CARR, Appellant

C.A. NO. 2880-M  
9th District Court of Appeals of Ohio, Medina County.  
Decided August 11, 1999

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO  
CASE NO. 53996

was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

OPINION

BATCHELDER, Judge.

Appellant Mark J. Carr ("Father") appeals from the decision of the Medina County Court of Common Pleas, Domestic Relations Division, modifying a **shared parenting** plan and a child support award. We affirm.

I.

Father and appellee Kathy Pachuta, f.k.a. Carr ("Mother"), were divorced in June 1991. They had one child as issue of the marriage, Marc. As part of the divorce decree, Father and Mother adopted a **shared parenting** plan. They agreed that Father would be the primary residential parent and Mother would have Marc on weekends, alternating holidays, and for a two-week vacation. No child support was ordered.

In November 1992, Father and Mother modified the **shared parenting** plan, granting visitation of Marc to a grandmother and making other minor changes to the custodial arrangements, but Father was retained as the primary residential parent. The trial court approved the modifications. No child support was provided for in the modifying journal entry.

Either shortly before or shortly after the November 1992 modifications were journalized, the parties entered into an informal modification of the **shared parenting** plan. Marc would live with Mother, and Father would have Marc on weekends and at other times. Mother did not work full-time and would stay home with Marc. Father was to pay one-half of Marc's tuition to a private school and one-half of other expenses. However, these changes were not incorporated into a journal entry filed with the trial court. Mother remarried in January 1993; Father remarried in September 1996.

On December 3, 1996, Mother moved to modify parental rights and responsibilities. Mother sought to formalize the arrangement that had existed since late 1992 and to be declared the primary residential parent.

On May 20, 1997, Father moved the trial court to adopt a proposed **shared parenting** plan. Father's plan essentially retained the parties' original **shared parenting** plan, as adopted in 1991, with Father as the primary residential parent and Mother having Marc on weekends, one other day a week, alternating holidays, and for four weeks of summer vacation. Father's proposed **shared parenting** plan did not contain any provision for child support.

On June 17, 1997, Mother moved to adopt a different proposed **shared parenting** plan. Under this plan, Mother was to be the primary residential parent, with Father having Marc on weekends, one other night a week, six weeks of summer vacation, and alternating holidays. Mother's proposed **shared parenting** plan requested an unspecified amount of child

ALL

support.

After a hearing before a magistrate, the magistrate's decision was issued on August 20, 1997. The magistrate recommended adoption of a **shared parenting** plan that differed from the proposed plans of both Father and Mother. The schedule of Marc's time living with each parent was similar to that of Mother's proposed plan, but with only four weeks of summer vacation being granted to Father. The magistrate also recommended that Father should pay child support to Mother in the amount of \$490.21 per month, retroactive to December 3, 1996%the date when Mother filed her motion to modify parental rights and responsibilities. A child support worksheet was attached to the magistrate's decision, but the only evidence with regard to the parties' income was through testimony of the parties.

Father objected to the magistrate's decision, and Mother responded to Father's objections. On June 2, 1998, the trial court overruled Father's objections, adopted the magistrate's decision, and entered judgment for Mother. This appeal followed.

## II.

Father asserts six assignments of error. We will address each in turn.

### A.

#### First Assignment of Error

#### THE TRIAL COURT ERRED WHEN IT FAILED TO ENFORCE THE MEDIATION PROVISION OF THE SHARED PARENTING PLAN.

In his first assignment of error, Father argues that the trial court did not have jurisdiction over Mother's motion to modify parental rights and responsibilities because the **shared parenting** plan required the parties to mediate disputes before resorting to the courts. A clause in the original **shared parenting** plan stated:

The parties may agree that any controversy arising out of this **Shared Parenting** Plan shall be submitted first to the process of mediation through the services of a mediator on whom the parties agree. Further, the parties agree to pursue said mediation in good faith before seeking relief from the Court.

Father contends that this clause required Mother to engage in mediation prior to filing her motion to modify parental rights and responsibilities and that, as a result, the trial court was without jurisdiction to entertain Mother's motion. We disagree.

In support of his argument, Father appears to contend that mediation is equivalent to arbitration, subjecting the **shared parenting** plan to R.C. Chapter 2711 and the general policy of encouraging the resolution of disputes through arbitration. However, the Ohio Supreme Court has unequivocally stated that arbitration and mediation are distinct remedies. Ohio Council 8, AFSCME v. Ohio Dept. of Mental Health (1984), 9 Ohio St.3d 139, 142-43. "[I]t is clear that the terms 'mediation' and 'arbitration' are not functionally equivalent, but represent different methods with which to attempt to resolve grievances." Id. at 143. As such, the law of arbitration does not apply to mediation.

Father's argument that the mediation clause divested the trial court of jurisdiction is not persuasive for two reasons. First, the plain language of the clause states that the parties "may" resort to mediation. This sort of discretionary language does not impose a duty to mediate on the parties. Second, the record is devoid of any evidence that Father raised the issue of mediation prior to the hearing before the magistrate. Instead, Father proceeded without regard to the mediation clause, including submitting a proposed **shared parenting** plan that would modify the then-existing plan. Having proceeded in this manner, we conclude that Father waived any objection to the proceeding based on the mediation clause of the

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original **shared parenting** plan.

The mediation clause of the original **shared parenting** plan did not deprive the trial court of jurisdiction to hear Mother's motion to modify parental rights and responsibilities. Accordingly, the first assignment of error is overruled.

B.

Second Assignment of Error

THE TRIAL COURT ERRED WHEN IT ORDERED ITS OWN **SHARED PARENTING** PLAN IN VIOLATION OF R.C. §3109.04 [sic].

Father argues in his second assignment of error that the trial court erred when it adopted the magistrate's recommended **shared parenting** plan. Both Father and Mother had submitted proposed **shared parenting** plans, but the **shared parenting** plan adopted by the magistrate was different from either of the proposed plans submitted. Father contends that the trial court exceeded its authority by doing so. We disagree.

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. 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.

Husband 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 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.

Father's second assignment of error is overruled.

C.

Third Assignment of Error

THE TRIAL COURT ERRED WHEN IT MADE ISSUED [sic] A CHILD SUPPORT ORDER WITHOUT COMPLYING WITH R.C. §3113.215 [sic].

In his third assignment of error, Father argues that the trial court erred by not requiring the parties to submit income verification information before determining child support, as required by R.C. 3113.215(B)(5)(a). However, Father did not raise this issue in his objections to the magistrate's decision. Civ.R. 53(E)(3)(b) states in relevant part: "A party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law unless the party has objected to that finding or conclusion under this rule." Because this issue was not raised in the objections to the magistrate's decision, Father cannot raise the issue for the first time here. The third assignment of error is overruled.

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## D.

## Fourth Assignment of Error

THE TRIAL COURT ERRED WHEN IT ONLY IMPUTED PART-TIME INCOME TO THE PLAINTIFF-APPELLEE MOTHER WHERE THE EVIDENCE SHOWED THAT SHE WAS CAPABLE OF FULL-TIME WORK AND HAD NO RESTRICTIONS ON HER EARNING ABILITY.

Father argues in his fourth assignment of error that the trial court erred by not imputing enough income to Mother for computing child support. At the hearing, the magistrate heard testimony that Mother is not currently employed but that she had past experience working part-time during the tax season. Based on that testimony, the magistrate imputed an income of \$4,680 to Mother for determining the appropriate level of child support under the mandatory worksheet. The trial court adopted the magistrate's finding on this point. Father contends that Mother's level of imputed income should be higher.

We first note the proper standard of review. In *Mealey v. Mealey* (May 8, 1996), Wayne App. No. 95CA0093, unreported, we held that, when reviewing an appeal from a trial court's adoption of a magistrate's decision under Civ.R. 53(E)(4), we determine whether the trial court abused its discretion in adopting the decision. *Id.* at 5. "Any claim of trial court error must be based on the actions of the trial court, not on the magistrate's findings or proposed decision." *Id.*

An abuse of discretion is more than an error of judgment, but instead demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Id.*

Under R.C. 3113.215(A)(1)(b) and (5), a trial court may impute potential income to a parent who is voluntarily unemployed or underemployed. "Whether a parent is 'voluntarily underemployed' within the meaning of R.C. 3113.215(A)(5), and the amount of 'potential income' to be imputed to a child support obligor, are matters to be determined by the trial court based upon the facts and circumstances of each case." *Rock v. Cabral* (1993), 67 Ohio St.3d 108, syllabus.

In the case at bar, the evidence showed that Mother was not employed on a full-time basis. However, she devoted a significant amount of time to working with Marc on his school assignments and helping in Marc's classroom. She was also formerly employed working on taxes during the tax season. Based on the facts before the magistrate, we cannot say that the trial court acted with passion, prejudice, or the like when it adopted the magistrate's finding that Mother's potential income should be \$4,680 for determining child support. Accordingly, Father's fourth assignment of error is overruled.

## E.

## Fifth Assignment of Error

THE TRIAL COURT ERRED WHEN IT MADE ISSUED [sic] A CHILD SUPPORT ORDER, RETROACTIVE TO THE DATE ON WHICH THE MOTION TO MODIFY THE ALLOCATION OF PARENTAL RIGHTS AND RESPONSIBILITIES WAS FILED WHERE THERE WAS NO MOTION FILED TO ESTABLISH OR MODIFY CHILD SUPPORT.

In his fifth assignment of error, Father asserts that the trial court erred by ordering the payment of child support retroactive to December 6, 1996, when Mother filed her motion to modify parental rights and responsibilities. He contends that Mother's motion was insufficient to put the parties on notice that a modification(fn2) of child support was at issue. We disagree.

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99-LW-3257 (Jul)

"Absent some special circumstance, a trial court order modifying a child support obligation should be retroactive to the date such modification was first requested." *Boldt v. Boldt* (Dec. 9, 1998), Summit App. No. 18736, unreported, at

13. However, "due process requires that the defending party receive adequate notice of the motion and the opportunity to present evidence in opposition." *Bellamy v. Bellamy* (1996), 110 Ohio App.3d 576, 581.

In the case at bar, we conclude that the trial court did not abuse its discretion by adopting the magistrate's decision on the issue of retroactive child support. Mother's motion to modify parental rights and responsibilities outlined the change in Marc's living arrangements and included the following language:

Mother] further states that, since October 1992, [Father] has not paid her any support for [Marc].

[Mother] further states that it would be in the best interest of [Marc] that the previous order of this Court be modified and that she be declared his primary residential parent

We find that this language put Father on notice that child support would be an issue in the motion before the trial court. Due process was thereby satisfied, and the trial court did not abuse its discretion by making child support retroactive to the date that Mother moved to modify parental rights and responsibilities. The fifth assignment of error is overruled.

#### F.

#### Sixth Assignment of Error

THE DECISION OF THE TRIAL COURT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

In the sixth and final assignment of error, Father takes issue with the designation of Mother as the primary residential parent of Marc and the time Marc would spend with each parent. He argues that the weight of the evidence would demonstrate that Father should be Marc's primary residential parent. Father's argument is not well taken.

As noted above, a trial court may modify the terms of a **shared parenting** plan if the modification is in the best interest of the child. R.C. 3109.04(E)(2)(b). Determining the best interest of a child is governed by R.C. 3109.04(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 his 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 his parents, siblings, and any other person who may significantly affect the child's best interest;
- (d) The child's adjustment to his home, school, and community;

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(f) The parent more likely to honor and facilitate visitation and companionship rights approved by the court;

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(i) Whether the residential parent or one of the parents subject to a **shared parenting** decree has continuously and willfully denied the other parent his or her right to visitation in accordance with an order of the court[.]

We review the trial court's decision to affirm the magistrate under an abuse of discretion standard. Mealey, supra.

At the hearing before the magistrate, Father expressed a desire for Marc to live primarily with him. Likewise, Mother testified that she wished for Marc to live primarily with her. Marc's relationships with his stepparents were described as good. Marc was said to be excited about the birth of a half-sibling (of Father and his wife) in the near future. Marc appeared to be well adjusted socially at the private school where he was enrolled, as well as in the neighborhoods where Father and Mother each reside.

The magistrate also held an interview in chambers with Marc. The magistrate's decision indicated that Marc wished to live with Mother and visit Father. The magistrate's decision also indicated that Marc stated that he had a good relationship with his stepparents on both sides.

Marc's scholastic efforts were a matter of no little discord between Father and Mother. It became apparent in the second grade that Marc was not achieving a high level of success in school. After testing by school officials, it was determined that Marc was of low-average to average intelligence, and that he was most likely capable of producing C-quality work in school, with some B's. However, during the third grade, Marc's performance was far below average for the first three grading periods, marked by D's and F's. He improved slightly after the fourth and final grading period, but his overall performance was still below average. There was no explanation given for the decline in Marc's grades in the third grade.

Father believed that Marc was not doing enough work and was not performing to his full potential. Mother believed that Marc was performing to his potential and suspected that Marc exhibited signs of attention deficit disorder.(fn3) Mother testified that she worked with Marc on his assigned homework each night and was involved in his classroom. Father testified that he worked on homework with Marc for at least four hours each weekend that Marc was with him.

Upon a review of the record before us, we cannot say that the trial court abused its discretion when it adopted the magistrate's decision, finding that designating Mother as the primary residential parent was in the best interest of Marc. Both parties provided supportive homes for Marc. Marc had apparently become well adjusted to Mother's neighborhood after she became the de facto primary residential parent in late 1992 and had attended the same school since kindergarten. Further, Marc expressed a desire to retain Mother as the primary residential parent. Thus, the trial court's decision did not evidence an abuse of discretion. Accordingly, Father's sixth assignment of error is overruled.

### III.

Father's assignments of error are overruled. The judgment of the Medina County Court of Common Pleas, Domestic Relations Division, is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the County of Medina, Court of Common Pleas, to

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carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

Costs taxed to appellant.

Exceptions.

BAIRD, P. J., WHITMORE, J., CONCUR

JAMES E. POWELL and JOSEPH G. STAFFORD, Attorneys at Law, 380 Lakeside Place, 323 West Lakeside Avenue, Cleveland, Ohio 44113, for Appellant.

HERBERT PALKOVITZ, Attorney at Law, 1600 Standard Building, 1370 Ontario Street, Cleveland, Ohio 44113, for Appellee.

CHRISTOPHER COLLIER, Guardian Ad Litem, 225 East Liberty Street, Medina, Ohio 44256.

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Footnotes:

1. The subdivisions of R.C. 3109.04(E)(2) are labeled as (a), (b), and (d). R.C. 3109.04(E)(2)(b) has two separate paragraphs that appear to address different matters. It is possible that the Ohio General Assembly intended the second paragraph of R.C. 3109.04(E)(2)(b) to be R.C. 3109.04(E)(2)(c), thereby accounting for that missing subdivision of the statute.

2. The original **shared parenting** plan did not provide for child support. However, the **shared parenting** plan proposed by the magistrate and adopted by the trial court did not establish child support in the first instance. See DePalmo v. DePalmo (1997), 78 Ohio St.3d 535, 539-40. Rather, the trial court's order modified a pre-existing child support order that did not conform with the mandatory worksheet.

3. A school official testified that, after testing, attention deficit disorder had been ruled out.

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**2003-Ohio-3552; Myers v. Myers; 03-LW-2859 (7th)**

2003-Ohio-3552

[Cite as Myers v. Myers, 2003-Ohio-3552]

• **ROBERT D. MYERS, APPELLEE v. PATRICIA L. MYERS, APPELLANT**

CASE NOS. 2001 CO 67 , 2002 CO 35

Decided on June 30, 2003.

7th District Court of Appeals of Ohio, Columbiana County.

**CHARACTER OF PROCEEDINGS:** Civil Appeal from the Court of Common Pleas of Columbiana County, Ohio Case No. 99 DR 265

**JUDGMENT:** Affirmed.

For Plaintiff-Appellee: Aronson, Fineman & Davis Co., L.P.A., Troy D. Barnett

For Defendant-Appellant: Brian J. Macala

**JUDGES:** Hon. Cheryl L. Waite, Hon. Gene Donofrio, Hon. Mary DeGenaro

Waite, Presiding Judge.

This case presents two separate appeals arising out of a child custody dispute, a shared parenting agreement and an agreed judgment entry of divorce. In Case No. 2001 CO 67, appellant, Patricia L. Myers ("Mother"), asserts that the trial court incorrectly denied her Civ.R. 60(B) motion for relief from an agreed divorce decree. In Case No. 2002 CO 35, Mother asserts that there was no change in circumstances sufficient to designate appellee, Robert Myers ("Father"), as the sole residential parent of their only child. We affirm in full the trial court judgment in Case No. 2002 CO 35 and affirm the result, but not the reasoning, of the trial court in Case No. 2001 CO 67.

The parties were married on August 10, 1996. During the marriage, Mother gave birth to Brooke L. Myers.

On May 11, 1999, Father filed a complaint for divorce in Columbiana County Court of Common Pleas. In the complaint, Father stated that "one (1) child has been born as issue of said marriage, namely Brooke L. Myers, dob February 25, 1998[.]"

On May 17, 1999, the court filed temporary orders during the pendency of the divorce. The court granted Mother custody of the child and ordered Father to pay \$50 per month in child support.

On November 18, 1999, Father filed a motion for shared parenting. The motion declared that one child was born as issue of the marriage.

On January 25, 2000, both Mother and Father signed a health insurance disclosure affidavit in which they acknowledged that Brooke was the daughter of Father. On the same day, Mother also signed a child-support-computation worksheet which indicated that Father owed \$247.75 per month in child support.

On January 27, 2000, the parties entered into an agreed judgment entry of divorce. The divorce decree stated that "ONE (1) child has been born as issue of said marriage, namely BROOKE L. MYERS \* \* \*." The divorce decree also

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required Father to pay child support of \$252.71 per month.

As part of the divorce decree, the parties entered into a shared-parenting plan in which both parties were allocated parental rights and responsibilities. Primary parental rights alternated with whichever parent had physical custody of Brooke.

On November 28, 2000, the parties entered into an agreed modification of the shared-parenting agreement. Father was granted seven consecutive days of parenting rights out of every 28 days, corresponding to his work and time off schedule. Except for a few other minor changes, the remainder of the original shared-parenting agreement remained intact.

On May 8, 2001, Father filed a motion to become the sole residential parent of Brooke.

On May 15, 2001, Mother filed a Civ.R. 60(B) motion for relief from judgment. It is clear from the motion that Mother was seeking relief from the divorce decree. Mother's reason for requesting relief was that she was not represented by counsel at the time she executed the divorce decree. Specifically, she sought to have overturned the section of the divorce decree that acknowledged that Brooke was born of the marriage. The sole support raised by Mother in seeking relief from judgment was R.C. 3119.961(A), which states:

"Notwithstanding the provisions to the contrary in civil rule 60(B) and in accordance with this section, a person may file a motion for relief from a final judgment, court order, or administrative determination or order that determines that the person or a male minor referred to in division (B) of section 3109.19 of the Revised Code is the father of a child or from a child support order under which the person or male minor is the obligor."

The R.C. 3119.961/Civ.R. 60(B) motion was apparently heard before a magistrate on July 6, 2001, although the transcript of that hearing is not part of the record on appeal.

On July 19, 2001, the magistrate issued a decision. The magistrate found that Mother was attempting to set aside a paternity decision pursuant to R.C. 3119.961(A). The magistrate concluded that the right of relief from judgment contained in R.C. 3119.961 could only be exercised by the alleged father. The magistrate therefore denied Mother's motion because she was not the father. Mother filed timely objections to the decision on August 2, 2001.

A hearing on the objections took place on November 26, 2001.

On December 11, 2001, the court ruled on Mother's objections. The court held that the mother of a child does not have standing to seek relief from judgment pursuant to R.C. 3113.2111(A)(1), which is a prior version of R.C. 3119.961. The statute was renumbered, effective February 22, 2001, and it is the later version which applies to this case. The court overruled Mother's objections and affirmed the magistrate's decision.

Mother filed an appeal of the judge's decision on December 21, 2001. This appeal was designated as Case No. 2001 CO 67.

On December 27, 2001, the magistrate conducted a hearing on Father's motion to be designated the sole residential parent.

The magistrate filed its decision on January 14, 2002. The magistrate found that a change of circumstances had occurred subsequent to the most recent modification of the shared-parenting agreement. The magistrate found that Mother had voluntarily entered into a master/slave sexual relationship with a man in Cincinnati and that the relationship had rapidly declined. The court found that Mother was whipped, tied up and left in the dark, and subjected to sexual activity that caused her to scream, cry and beg for help. The magistrate found that Father went to Cincinnati to remove Mother and Brooke from the intolerable situation and that Father became the primary care provider for Brooke from February 1,

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2001, until April 7, 2001.

The court found that Mother changed her residence five times since January 27, 2000, and that in two of those moves, she refused to give Father her change-of-address information.

The court found that Mother had various men residing with her after the divorce. The court found that Mother asked Father to care for Brooke so that she could spend time with a male friend at a local motel. The court found that Mother had a history of using pornography and internet sex chat rooms.

The court held that there had been a change in circumstances in the shared-parenting agreement, and that it was in the best interest of the child to designate Father as the residential parent. Mother was given standard visitation rights pursuant to Local Rule 9.4. The court vacated the child-support order issued on January 27, 2000. The court postponed ruling on all issues involving child support, dependency exemption, health insurance coverage, and uninsured medical expenses.

Mother filed objections to the magistrate's decision on January 28, 2002. Mother argued that the magistrate's decision was overbroad in that it essentially terminated the parties' shared-parenting agreement. Mother argued that the court was required to make specific findings explaining why the shared-parenting agreement was terminated or that the court should have maintained the same companionship schedule that was contained in the shared-parenting agreement. Mother also argued that the evidence did not support that a change in circumstances had occurred to justify changing the shared-parenting agreement.

The objections were apparently heard before the court on May 10, 2002, but no transcript of that hearing is in the record.

The court issued its opinion on May 31, 2002. The court held that the magistrate's decision effectively terminated the shared-parenting agreement. The court held that it had the power to terminate the shared-parenting agreement even though Father did not expressly seek termination of the agreement in his motion. The court also held that there was a change in circumstances and that the designation of Father as the residential parent was in the child's best interest.

Mother filed a timely appeal of this second decision on June 27, 2002.

Mother's first assignment of error involves Case No. 2002 CO 35, challenging the May 31, 2002, judgment entry. The assignment of error states:

"Appellee-Father failed to meet his burden of showing a 'change in circumstances' [sic] as required by O.R.C. §3109.04(e)(1)(a) and thus, the sustaining of appellee-Father's motion to modify residential placement by the court was in error as the sustaining of this motion was an abuse of discretion by the court, against the manifest weight of the evidence and contrary to law."

Mother correctly acknowledges that a trial court decision in a domestic relations case is reviewed for abuse of discretion. *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144, 541 N.E.2d 1028. An abuse of discretion constitutes more than an error of law or judgment; it implies that the trial court acted unreasonably, arbitrarily, or unconscionably. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140.

Mother argues that a shared-parenting agreement may not be modified unless the court specifically finds that there has been a change in circumstances as mandated by R.C. 3109.04(E). Strangely, Mother supports her argument by citing R.C. 3109.04(E)(2)(b). This statute does not require the court to find of a change in circumstances prior to modifying or terminating a shared-parenting agreement:

"(b) The court may modify the terms of the plan for shared parenting approved by the court and incorporated by it into

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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." R.C. 3109.04(E)(2)(b).

Mother's premise in her first assignment of error is faulty because the trial court was not required to find a change of circumstances before modifying or terminating the shared-parenting agreement:

"[A] court may terminate or modify a prior shared-parenting decree if it determines that termination or modification of the shared-parenting plan is in the best interest of the child. According to the statute, this determination may be made without a preliminary determination into whether there was a change in circumstances of the child, his residential parent, or either of the parents subject to the shared-parenting decree. See R.C. 3109.04(E)(2)(b) and (c)." *Patton v. Patton* (2001), 141 Ohio App.3d 691, 695, 753 N.E.2d 225.

Although R.C. 3109.04(E)(1) requires a finding of a change in circumstances before allowing a court to modify a prior custody decree, R.C. 3109.04(E)(2) provides a number of independent bases for modifying or terminating a shared-parenting agreement that do not require a finding of change in circumstances. R.C. 3109.04(E)(2) states:

"(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.

"(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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It is clear under these provisions that a shared-parenting agreement is treated differently than a custody decree arising out of adversarial litigation. The court or either parent may invoke the provisions of R.C. 3109.04(E)(2) whenever the best interest of the child requires a modification or termination of the agreement. The trial court interpreted Father's request to be the sole residential parent as a request to terminate the shared-parenting agreement under R.C. 3109.04(E)(2). Therefore, under R.C. 3109.04(E)(2), the trial court was only required to find that terminating the shared-parenting agreement was in the best interests of the child. Any findings concerning a change in circumstances were superfluous and do not constitute prejudicial error. See., e.g., *Hanson v. Kynast* (1987), 38 Ohio App.3d 58, 60, 526 N.E.2d 327. Any comments that the trial court made in its judgment entry relative to a change in circumstances were, in essence, dicta.

Even if the trial court were required to find a change in circumstances, there was overwhelming evidence of a change in circumstances in this case. *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 674 N.E.2d 1159, held that "there must be a change of circumstances to warrant a change of custody, and the change must be a change of substance, not a slight or inconsequential change." Id. at 418, 674 N.E.2d 1159. Davis also held that "a trial judge, as the trier of fact, must be given wide latitude to consider all issues which support such a change [in circumstances], \* \* \*." Id. at 416, 674 N.E.2d 1159.

Mother's frequent changes of address, her decision to expose her daughter to a sexually charged and possibly dangerous environment, Mother's refusal to let Father know of her whereabouts, and her refusal at times to allow Father to visit or take custody of Brooke, all support the trial court's conclusion that there was a change in circumstances.

Mother also argues that it was not in Brooke's best interest for Father to become the sole residential parent. In essence, Mother is challenging the trial court's interpretation of the weight of the evidence. A child-custody decision that is supported by a substantial amount of competent and credible evidence will not be reversed on appeal absent an abuse of discretion. *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, 550 N.E.2d 178, syllabus.

While a trial court's discretion in a custody proceeding is broad, it is not absolute, and the trial court must follow the procedure described in R.C. 3109.04 in making its custody decisions. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74, 523 N.E.2d 846. R.C. 3109.04(F)(1) sets forth a nonexclusive list of factors that the trial court must consider in evaluating the best interests of the children:

"(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

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that parent pursuant to a child support order under which that parent is an obligor;

"(h) Whether either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether either parent, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of an adjudication; whether either parent previously has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding; whether either parent previously has been convicted of or pleaded guilty to any offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding and caused physical harm to the victim in the commission of the offense; and whether there is reason to believe that either parent has acted in a manner resulting in a child being an abused child or a neglected child;

"(i) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;

"(j) Whether either parent has established a residence, or is planning to establish a residence, outside this state."

The court noted the following facts in making its decision: Mother's decision to expose Brooke to an abusive master/slave relationship in Cincinnati; Mother's frequent changes of residence; Brooke's ongoing relationship with her half-sister Brittney (who resided with Mother); the good relationship Brooke had with Father; the stable environment that Father provided; Mother's denial of visitation and companionship rights; and the mental health of all the parties. The court made its decision after clearly considering the factors listed in R.C. 3109.04(F)(1), and the decision is well supported by the record. Mother's first assignment of error is overruled.

Mother's second assignment of error challenges the trial court's failure to grant the Civ.R. 60(B) motion which would have reopened the paternity issue:

"The trial court committed reversible error in finding that the appellant-Mother lacked standing to seek relief from judgment pursuant to O.R.C. 3119.961 on the sole basis that she is a female."

Mother's original claim for relief from the divorce decree (or more specifically, the provision of the divorce decree in which the parties agreed that Brooke was born of the marriage) arose from R.C. 3119.961(A):

"(A) Notwithstanding the provisions to the contrary in Civil Rule 60(B) and in accordance with this section, a person may file a motion for relief from a final judgment, court order, or administrative determination or order that determines that the person or a male minor referred to in division (B) of section 3109.19 of the Revised Code is the father of a child or from a child support order under which the person or male minor is the obligor." (Emphasis added.)

The trial court denied relief under this statute because in his reading of the statute, standing to file a Civ.R. 60(B) motion exists only in the person who is determined to be the father, whereas Mother is Brooke's mother.

A trial court has broad discretion in granting a motion for relief from judgment under Civ.R. 60(B). *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77, 514 N.E.2d 1122. The trial court's ruling will not be disturbed on appeal unless it can be shown that the trial court abused its discretion. *Id.*

The relevant portion of Civ.R. 60(B) states:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2)

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newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment."

The Ohio Supreme Court has held that "[t]o prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that (1) [she] has a meritorious defense or claim to present if relief is granted, (2) [she] is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5), and (3) the motion is made within a reasonable time \* \* \*." *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 1 O.O.3d 86, 351 N.E.2d 113, paragraph two of the syllabus. R.C. 3119.961 presents a ground for relief that qualifies under the catch-all provision of Civ.R. 60(B)(5). Our opinion will focus exclusively on the question whether Mother could possibly prove that she was entitled to relief from judgment under R.C. 3119.961.

Mother argues that R.C. 3119.961 is a remedial law. She argues that, according to R.C. 1.11, remedial laws should be interpreted liberally to promote their purposes.

Mother argues that the relief available from R.C. 3119.961 is open to anyone satisfying the definition of "person" as used in the statute: "a *person* may file a motion for relief from a final judgment, court order, or administrative determination or order that determines that the person or a male minor referred to in division (B) of section 3109.19 of the Revised Code is the father of a child \* \* \*." (Emphasis added.) Mother asserts that the term "person" is gender neutral and should be interpreted to include both men and women. Mother concludes that the relief described in R.C. 3119.961 should be available to the mother of a child and not just to the purported father of a child.

Father argues that, even if Mother were allowed to invoke the statute, her motion for relief from judgment must be denied under R.C. 3119.962(B), which reads:

"(B) *A court shall not grant relief from a final judgment, court order, or administrative determination or order that determines that a person or male minor is the father of a child or from a child support order under which a person or male minor is the obligor if the court determines, by a preponderance of the evidence, that the person or male minor knew that he was not the natural father of the child before any of the following:*

"(1) Any act listed in divisions (A)(2)(a) to (d) and (A)(2)(f) of this section occurred.

"(2) The person or male minor was presumed to be the natural father of the child under any of the circumstances listed in divisions (A)(1) to (3) of section 3111.03 of the Revised Code.

"(3) The person or male minor otherwise admitted or acknowledged himself to be the child's father." (Emphasis added.)

Father contends that he was presumed to be the natural father according to R.C. 3111.03(A)(1), that he agreed to pay child support, and that he acknowledged that he was Brooke's father by signing the divorce decree. Father maintains that these are all reasons listed in R.C. 3119.962 as reasons for denying relief from a paternity judgment.

Father's analysis is correct. A reading of this statute on its face reveals that neither parent in this case could have invoked the right to relief contained in R.C. 3119.961 because both parents are excluded by the provisions of R.C. 3119.962(B). There are two elements that must be established to invoke the exclusions listed in R.C. 3119.962(B). The first requirement is that "the person or male minor knew that he was not the natural father of the child." R.C. 3119.962(B). The parties in this case do not dispute the fact that both of them have always known that Father is not the natural father of Brooke. Mother acknowledges this fact in her brief on appeal:

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"It is undisputed that the Appellee is not the natural father of the minor child **BROOKE L. MYERS**, DOB: 02/25/98. \* \* \* Both Appellant and Appellee are Caucasian and the minor child is African-American. Despite the obvious lack of paternity by the Appellee, he accepted the child as his own."

There is no doubt that the first required element of R.C. 3119.962(B) has been satisfied. The second required element necessary to invoke the exclusions in R.C. 3119.962 is proof that one of the factors listed in R.C. 3119.962(B)(1) through (3) exist. The record shows that three of the factors are established.

First, R.C. 3119.962(B)(1) requires the court to deny relief if "[a]ny act listed in divisions (A)(2)(a) to (d) and (A)(2)(f) of this section occurred." The act specified by R.C. 3119.962(A)(2)(a) is that "[t]he person or male minor was required to support the child by a child support order." Thus, if Father was subject to a child-support order, relief cannot be granted under R.C. 3119.961. The record clearly shows that Father was ordered to pay child support for Brooke. This fact, coupled with the fact that both parties knew from her birth that Father was not Brooke's natural father, prohibits either parent from seeking relief from judgment under R.C. 3119.961.

Second, it is also evident that Father was presumed to be the natural father under R.C. 3111.03(A)(1), which states:

"(A) A man is presumed to be the natural father of a child under any of the following circumstances:

"(1) The man and the child's mother are or have been married to each other, and the child is born during the marriage or is born within three hundred days after the marriage is terminated by death, annulment, divorce, or dissolution or after the man and the child's mother separate pursuant to a separation agreement."

The record reveals that Brooke was born while Mother and Father were married. Therefore, a second factor found in R.C. 3119.962(B)(2) has been established, also preventing the parties from obtaining relief under R.C. 3119.961.

Finally, a third factor listed in R.C. 3119.962(B)(3) is established by the record. This factor requires proof that the purported father "otherwise admitted or acknowledged himself to be the child's father." The record is replete with evidence that supports this factor. The parties acknowledged that Father is Brooke's natural father in the January 25, 2000, health insurance disclosure affidavit and in the divorce decree and the shared-parenting agreement. Therefore, the factor listed in R.C. 3119.962(B)(3) has also been established, preventing both parents from obtaining relief under R.C. 3119.962.

Mother also seeks to challenge the trial court's application of R.C. 3119.961 as a violation of the Equal Protection Clauses of the federal and state constitutions. Constitutional issues should not be decided by the courts unless absolutely necessary. *In re Miller* (1992), 63 Ohio St.3d 99, 110, 585 N.E.2d 396; *State ex rel. Clarke v. Cook* (1921), 103 Ohio St. 465, 134 N.E. 655, syllabus.

"Although a constitutional question may be legitimately presented by the record, yet if the record also presents some other and satisfactory ground upon which the Court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutionality will be left for consideration until a case arises which cannot be adjudicated without considering it and when, [c]onsequently, a decision upon such question would be unavoidable." *Defiance v. Nagel* (1959), 108 Ohio App. 119, 123, 159 N.E.2d 791.

Assuming arguendo that Mother has standing to seek relief under R.C. 3119.961, the record reveals that Mother is otherwise prohibited from obtaining that relief due to the exclusions listed in R.C. 3119.962(B). Therefore, her constitutional arguments are not ripe for review and need not be addressed.

We note, without expressing an opinion, that the Tenth District Court of Appeals has recently declared R.C. 3119.961 to be unconstitutional on its face. *Van Dusen v. Van Dusen*, 151 Ohio App.3d 494, 2003-Ohio-350. The facts and

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reasoning in *Van Dusen* are completely different from that of the case at bar.

Although our reasons for denying Mother relief under R.C. 3119.961 differ from those of the trial court, we are nevertheless compelled to uphold the judgment of the trial court. "[A] reviewing court is not authorized to reverse a correct judgment merely because erroneous reasons were assigned as a basis thereof." *State ex rel. Carter v. Schotten* (1994), 70 Ohio St.3d 89, 92, 637 N.E.2d 306. The trial court's reasoning unnecessarily raises a constitutional issue that is not necessary to resolve the case. The trial court was correct, though, that Mother cannot obtain relief under R.C. 3119.961. For this reason, we reject Mother's second assignment of error.

The trial court did not abuse its discretion in modifying the shared-parenting agreement or in overruling Mother's request for relief under Civ.R. 60(B) and R.C. 3119.961. We affirm the judgment but not the reasoning of the trial court in Case No. 2001 CO 67, in which the trial court overruled Mother's Civ.R. 60(B) motion. We affirm the judgment and reasoning of the trial court in Case No. 2002 CO 35, in which the trial court overruled Mother's objections to the magistrate's decision and modified the parties' shared-parenting agreement.

Judgment affirmed.

Donofrio, J., concurs.

DeGenaro, J., dissents with dissenting opinion.

DeGenaro, Judge, dissenting.

Because the trial court based its decision to terminate the shared-parenting agreement on inadmissible evidence, I must respectfully dissent. In its judgment entry, the trial court acknowledges that it took into account Mother's sexual history when making its determination. Pursuant to the "direct adverse impact" doctrine, a parent's sexual activity may not be taken into account unless it can be proven that the behavior is actually having a present negative effect on the child. The record in this case does not support such a finding since no testimony was adduced regarding the effects either parent's behavior was having on the minor child. Accordingly, I would reverse and remand this case for further proceedings in which the "direct adverse impact" test should be applied.

In *Inscoc v. Inscoc* (1997), 121 Ohio App.3d 396, 700 N.E.2d 70, the court followed established precedent and noted that unless a parent's sexual activity directly and adversely impacts the child, the parent's sexual activity ordinarily should not be a basis for modifying a prior allocation of parental rights and responsibilities:

" "The direct adverse impact approach to custody \* \* \* is the soundest, provided certain limitations on its application are adopted. Courts should consider only present impact. Before depriving a sexually active parent of custody, courts should demand preponderance proof that the parent's conduct is having or is probably having an effect on the child and that the effect is actually harmful. Without such proof, the fact of nonmarital sexual conduct should not justify a custody denial or change. Moreover, on the issue of harmfulness, the primary focus should be on the child's present physical and psychological welfare and developmental potential. Unless accompanied by clearly adverse collateral consequences, moral impact should be ignored." " (Emphasis deleted.) *Inscoc* at 413-414, 700 N.E.2d at 81, quoting *Whaley v. Whaley* (1978), 61 Ohio App.2d 111, 119, 399 N.E.2d 1270, quoting Lauerman, Nonmarital Sexual Conduct and Child Custody (1977), 46 U.Cin.L.Rev. 647, 681. See, also, *Beaver v. Beaver* (2001), 143 Ohio App.3d 1, 757 N.E.2d 41.

A more appropriate standard for considering the alleged moral impropriety of a parent in a custody dispute has been stated as follows:

"Concern for a child's well-being or best interests does not \* \* \* provide the court carte blanche to judge the rights and lifestyles of parents by nonstatutory codes of moral or social values. Although a court is not obliged to wear blinders

as to a parent's lifestyle and/or morals, including sexual conduct, any state interest in competing lifestyles and accompanying moral values which affect child custody would most equitably be served if limited to a determination of the direct or probable effect of parental conduct on the physical, mental, emotional, and social development of the child \* \* \*." *Rowe v. Franklin* (1995), 105 Ohio App.3d 176, 179, 663 N.E.2d 955.

Here, there was a great deal of proof that the Mother was not leading the most conventional of lives. Admittedly, Mother carried on her atypical sexual practices under the same roof as her child. However, the record indicates that any sexual practices which could be considered potentially harmful to the child were kept private. Moreover, the record is devoid of any proof that the minor child was affected in any way by Mother's behavior. To the contrary, there was evidence that the child was doing well in the custody of Mother.

Because there is no way to determine how much weight the trial court actually placed on Mother's sexual behavior when making its determination to terminate the shared-parenting agreement, I would remand this case to the trial court so that it could make its determination by applying the direct-adverse-impact test.

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99-LW-3825 (2nd)

GARY A. THOMAS, Plaintiff-Appellee  
v.  
HEIDI M. THOMAS (NKA MARLOW), Defendant-Appellant

C.A. Case No. 98-CA-55  
2nd District Court of Appeals of Ohio, Clark County.  
Decided September 17, 1999

Case No. 93-DS-0344

WILLIAM D. WEST, 200 North Fountain Avenue, Springfield, Ohio 45504, Atty. Reg. #0018465, Attorney for Plaintiff-Appellee

JERRY A. MEADOWS, 1590 Kettering Tower, Dayton, Ohio 45423, Atty. Reg. #0021262, Attorney for Defendant-Appellant

OPINION

PAIN, J.

Petitioner-appellant Heidi Thomas, now known as Marlow, appeals from an order modifying a shared parenting plan. She contends that the trial court failed to follow the requirements of R.C. 3109.04(E)(1), that the trial court erred in failing to consider all of the factors specified in R.C. 3109.04(F)(1) and (2), that the trial court erred in adopting a modified shared parenting plan that did not meet the requirements of an original shared parenting plan, and that the modification of the shared parenting plan is against the manifest weight of the evidence. Based upon our review of the record, we conclude that the trial court's order modifying the shared parenting plan is not against the manifest weight of the evidence and that it meets the requirements of a shared parenting plan. Furthermore, we conclude that there is nothing in the record to suggest that the trial court failed to consider the factors specified in R.C. 3109.04(F)(1) and (2), and that the modification of the shared parenting plan is authorized pursuant to R.C. 3109.04(E)(2). Accordingly, the judgment of the trial court is Affirmed.

I

The parties dissolved their marriage by a decree of dissolution in 1993. The decree incorporated a shared parenting plan. At this time, the two minor children, Cameron and Derek, were one and three years old, respectively. Pursuant to the terms of the shared parenting plan, the children were to reside with Marlow on Mondays and Wednesday, with Thomas on Tuesday and Thursdays, and with each parent on alternate weekends. Thus, the boys changed their residence every day during the first four days of each week, with four changes of residence every week. Their residence changed on Tuesday, Wednesday and Thursday, and it also changed one more time, either on Monday, or on Friday, depending upon which parent had them for the weekend.

By all accounts, the plan worked smoothly until the boys began school. Even after the boys entered school, the plan worked more smoothly than might be expected, because both parents were admirable in communicating almost on a daily basis concerning the welfare and scheduling of the children.

In July, 1997, Thomas filed a motion to terminate the shared parenting plan. A hearing was held on the motion in March and April of 1998. Marlow opposed the motion. A guardian ad litem, A. Robert Hutchins, participated in the hearing on behalf of the children.

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Following the hearing, the trial court declined to terminate the shared parenting plan, but substantially modified it. The trial court, finding that a change in circumstances had caused a lack of stability in the living arrangements of the minor children at the ages they had attained, ordered that the children reside with each parent in alternate years, beginning with Thomas on August 15, 1998, continuing with Marlow on August 15, 1999, and alternating annually thereafter. The trial court ordered that the non-residential parent have visitation as the parties might agree, or, if they could not agree, in accordance with the court's standard order of visitation. From the order modifying the shared parenting plan, Marlow appeals.

Thomas has brought to the attention of this court that, subsequently to the order of the trial court from which this appeal has been taken, the parties have been sharing the duties of a residential parent on a different basis, apparently alternating as residential parent more frequently than annually, but less frequently than daily. Thomas contends that this arrangement has been working well, and has asked that this court modify the shared parenting plan accordingly. Because the trial court has the initial responsibility for considering the best interests of the children, we decline to modify the plan adopted by the trial court. We did invite the parties to seek an order remanding this cause to the trial court in order that it might consider adopting as its new order the present arrangement between the parties, but this was not acceptable to Marlow, who preferred to have her appeal be adjudicated in due course.

II

Marlow's First Assignment of Error is as follows:

THE TRIAL COURT ERRED IN MODIFYING THE SHARED PARENTING PLAN OF THE PARTIES BY FAILING TO FOLLOW THE REQUIREMENTS OF REVISED CODE SECTION 3109.04(E)(1).

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

In this assignment of error, Marlow complains that the trial court's explanation of the reasons for its order is somewhat conclusory. We agree. However, we have reviewed the entire transcript, and we are satisfied that there is evidence in the record to support the trial court's decision. Marlow made no request for findings of fact and conclusions of law. Accordingly, we conclude that the trial court's failure to provide a more particular explanation of its reasons for its decision is not reversible error.

Marlow's First Assignment of Error is overruled.

III

Marlow's Second Assignment of Error is as follows:

THE TRIAL COURT ERRED IN FAILING TO CONSIDER ALL THE FACTORS REQUIRED TO DETERMINE THE BEST INTERESTS OF THE MINOR CHILDREN, BEFORE ORDERING ANY MODIFICATIONS TO THE SHARED PARENTING PLAN OF THE PARTIES.

Essentially, Marlow argues that because the trial court did not recite the factors that it was required to consider, pursuant to R.C. 3109.04(F)(1), in determining the best interests of the children in connection with the modification of a

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decree allocating parental rights and responsibilities, it must be presumed that the trial court did not consider those factors. To the contrary, a general principle of appellate review is the presumption of regularity; that is, a trial court is presumed to have followed the law unless the contrary is made to appear in the record. In the case cited by Marlow, *Goetze v. Goetze* (March 27, 1998), Montgomery App. No. 16491, unreported, that presumption was overcome, because it was shown, affirmatively in the record, that the trial court had applied an incorrect legal standard in arriving at its decision to deny a motion to change custody.

Nothing in the record before us suggests that the trial court failed to consider the factors prescribed in R.C. 3109.04(F)(1). Indeed, much of the testimony concerned these factors.

Marlow's Second Assignment of Error is overruled.

#### IV

Marlow's Third Assignment of Assignment of Error is as follows:

THE TRIAL COURT ERRED IN ORDERING MODIFICATIONS TO THE SHARED PARENTING PLAN OF THE PARTES WHICH DID NOT MEET THE REQUIREMENTS OF AN ORIGINAL SHARED PARENTING PLAN, AND, INSTEAD, PROVIDED AUTOMATIC YEARLY CHANGES OF THE SOLE RESIDENTIAL PARENT, WITH VISITATION.

In this assignment of error, Marlow argues that the annual change of the residential parent ordered by the trial court in its modification fails to comply with the requirement of R.C. 3109.04(D)(1)(c) that:

Whenever possible, the court shall require that a shared parenting plan approved under . . . 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 interests of the child.

Although there was conflicting testimony in this regard, there was evidence in the record to suggest that the daily changes in residence were having an adverse impact on the best interests of the children, particularly Derek, the older child, who had been prescribed medication for a possible attention deficit disorder. There was testimony that the daily changes in routine made it impossible to establish definite routines, to the detriment of the children's school work.

Admittedly, the trial court's decision to replace daily changes of residence with annual changes of residence was somewhat draconian. However, we do not consider it to have constituted an abuse of discretion. Although the parents communicate admirably considering their children, there was some "finger-pointing" in the testimony in connection with lapses concerning medication, school books, and the like. The trial court may reasonably have concluded that alternating annual terms as residential parents would enhance each parent's understanding, acknowledgment and assumption of the responsibilities of being the residential parent.

Because the parents lived only 12 miles apart, and alternating weekend visitation would continue, the trial court could reasonably conclude that both parents would continue to enjoy the opportunity to have frequent and continuing contact with their children.

In support of this assignment of error, Marlow relies upon *Herstine v. Herstine* (February 9, 1994), Montgomery App. No. 13873, unreported, for the proposition that an annually alternating sole custody order does not meet the requirements for a shared parenting plan. We do not understand that case to support that proposition. In that case, as we understand it, an agreed order of the trial court provided that the father would be designated the residential parent for one year, and that at the end of the year, the mother would then become the residential parent. There was no provision for subsequent annual alternation of the residential parent. As we understand the decision, this court had to decide whether the provision for a

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one-time change of residential parent from father to mother was expressly subject to the further order of the court, or was an automatic change not subject to the further order of the court. This court decided that by the decree's express terms, the change was subject to the further order of the trial court, which permitted the trial court to determine, as it did, that it would not be in the best interests of the children for the scheduled change to take place, without requiring evidence of changed circumstances. We find nothing in *Herstine, supra*, that would preclude an annually alternating residential parent status as part of a shared parenting arrangement.

Marlow's Third Assignment of Error is overruled.

V

Marlow's Fourth Assignment of Error is as follows:

THE TRIAL COURT'S ORDER GRANTING MODIFICATIONS TO THE SHARED PARENTING PLAN OF THE PARTIES WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

We have reviewed the entire transcript of the hearing. Although the evidence on this subject was conflicting, there is testimony in the record that the children began experiencing problems with the daily alternation of their residence once they were enrolled in school. This included testimony from Jo Martin, Derek's first grade teacher, who testified that Derek often would not have his assignments or books, and was confused about whose house he was going to that night. Thomas's mother, Isabelle Thomas, who had been a grade school teacher from 1967 to 1991, testified that the constant routine of going back and forth between parents was tiring Cameron and Derek in school. Thomas, himself, testified that the shared parenting plan stopped working well once the children were enrolled in school. Stephen Switchgale, Derek's second grade teacher, testified that the constant back and forth between houses was not good for someone who, like Derek, has management difficulties.

Although the evidence in the record is conflicting, we conclude that there is evidence in the record to support the trial court's conclusion that the daily change in residential parent stopped being in the best interest of the children once they entered school. Accordingly, Marlow's Fourth Assignment of Error is overruled.

VI

All of Marlow's assignments of error having been overruled, the judgment of the trial court is Affirmed.

We have previously noted that it has come to our attention that the parties, subsequently to the order from which this appeal is taken, have come to a different arrangement concerning the allocation of parental rights and responsibilities, which may be working well. We hope that our disposition of this appeal will not preclude the parties from continuing to cooperate, as they have, in the best interests of their children. They are certainly free to move the trial court for an order incorporating any parenting arrangements that they have made.

BROGAN, J. concurs. KERNS, J. concurs in judgment only.

(Honorable Joseph D. Kerns, Retired from the Court of Appeals, Second Appellate District, Sitting by Assignment of the Chief Justice of the Supreme Court of Ohio).

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