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INTRODUCTION

I. Issues Presented

The general issue presented in this case is the following – does the child custody statute authorize a court to modify residential parent and legal custodian status in a shared parenting decree under R.C. 3109.04(E)(2)(b)? Subsection (E)(2)(b) authorizes a court to modify the terms of a shared parenting plan. Thus, the specific issue presented in this case becomes – is residential parent and legal custodian status a term of a shared parenting plan under subsection (E)(2)(b)?

II. Appellant's Position

It is the appellant's position that residential parent and legal custodian status is not a term of a shared parenting "plan." Rather, residential parent and legal custodian status is addressed in a shared parenting "order."¹ Thus, the custody statute does not authorize a court to modify residential parent and legal custodian status in a shared parenting decree under subsection (E)(2)(b). Rather, residential parent and legal custodian status in a shared parenting decree may only be modified under R.C. 3109.04(E)(1)(a).

III. Overview

A. Subsection (E)(1)(a)

The custody statute authorizes a court to modify residential parent and legal custodian status in a shared parenting decree under subsection (E)(1)(a). The custody

¹ The shared parenting "order" and the shared parenting "plan" are both ultimately incorporated into a shared parenting "decree." R.C. 3109.04(D)(1)(d).

statute does not authorize a court to modify residential parent and legal custodian status in a shared parenting decree under any other provision. Thus, residential parent and legal custodian status in a shared parenting decree may only be modified under subsection (E)(1)(a).

B. Subsection (E)(2)(b)

The custody statute does not authorize a court to modify residential parent and legal custodian status in a shared parenting decree under subsection (E)(2)(b). Subsection (E)(2)(b) only authorizes a court to modify the terms of a shared parenting plan. However, residential parent and legal custodian status is addressed in a shared parenting “order,” not in a shared parenting “plan.”

C. Other Considerations

If subsection (E)(2)(b) is interpreted to allow modification of residential parent and legal custodian status in a shared parenting decree, this interpretation: first, will lead to unreasonable and absurd results; second, will cause the modification provision of the custody statute to be vague and unconstitutional; and third, will increase litigation, decrease stability, and harm children.

STATEMENT OF THE FACTS

The parties are in agreement regarding the facts of the case.²

² Merit Brief of Appellant Paul Fisher (“Appellant’s Brief,”) p. 6; Merit Brief of Appellee, Emma Hasenjager (“Appellee’s Brief,”) p. 1.

ARGUMENT

Proposition of Law

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

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

A. Appellant’s Position

A designation of residential parent and legal custodian status in a shared parenting decree is an allocation of parental rights and responsibilities. An allocation of parental rights and responsibilities in a shared parenting decree may only be modified under subsection (E)(1)(a).

The custody statute only authorizes an allocation of parental rights and responsibilities to be modified under subsection (E)(1)(a). The custody statute does not authorize an allocation of parental rights and responsibilities to be modified under any other provision.

Because a designation of residential parent and legal custodian status in a shared parenting decree is an allocation of parental rights and responsibilities, and because an allocation of parental rights and responsibilities may only be modified under subsection (E)(1)(a), a designation of residential parent and legal custodian status in a shared parenting decree may only be modified under subsection (E)(1)(a).

Five courts of appeals (the Third, Fourth, Ninth, Eleventh, and Twelfth districts) have held that, after a shared parenting decree has been issued, residential parent and legal custodian status may only be modified under subsection (E)(1)(a).³

B. Appellee's Position

The appellee does not challenge any of the propositions contained in the appellant's first argument.

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

A. Appellant's Position

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

Subsection (E)(2)(b) only authorizes a court to modify the terms of a shared parenting plan.

Because residential parent and legal custodian status must be addressed in a shared parenting order, and because subsection (E)(2)(b) only authorizes a court to

³ See Appellant's Brief, p. 3, footnote 5. It appears that the Third District Court of Appeals has issued conflicting decisions on this issue. In the case herein, the court held that residential parent and legal custodian status in a shared parenting decree can be modified under subsection (E)(2)(b). *Fisher v. Hasenjager* (Aug. 14, 2006), Mercer App. No. 10-05-14, 2006-Ohio-4190, 2006 WL 2337659, paras. 35-38. However, in *Patton v. Patton*, the Third District held that residential parent and legal custodian status in a shared parenting decree may only be modified under subsection (E)(1)(a). *Patton v. Patton* (2001), 141 Ohio App.3d 691, 753 N.E.2d 225, 2001-Ohio-2117, pp. 695-696.

modify the terms of a shared parenting plan, residential parent and legal custodian status in a shared parenting decree may not be modified under subsection (E)(2)(b).

B. Appellee's Arguments

The appellee raises four arguments regarding the appellant's second argument. These are addressed below.

1. Same Decision

The appellee first argues that, even if the appellant prevails, the trial court will make the same decision whether it applies subsection (E)(1)(a) or subsection (E)(2)(b). This argument is irrelevant. It is not the job of this court to speculate on how a lower court may decide an issue on remand.

Further, the appellee may well be incorrect. The modification standard contained in subsection (E)(1)(a) is much more difficult to meet than the modification standard contained in subsection (E)(2)(b). Thus, on remand, the trial court may conclude that the more difficult standard has not been met.

2. Statutory Analysis

The appellee argues that a court may modify residential parent and legal custodian status in a shared parenting decree under subsection (E)(2)(b) based on the introductory clause in subsection (E)(2). The introductory clause states "In addition to a modification authorized under division (E)(1) of this section: [other modifications are authorized as stated herein.]"⁴ The introductory clause is followed by four

⁴ Interpolation added to original.

subpoints. One of these subpoints is subsection (E)(2)(b). Based solely on the introductory clause, and without my explanation, the appellee argues that a court may modify residential parent and legal custodian status in a shared parenting decree under subsection (E)(2)(b).

The appellee is incorrect. This clause does not grant any authority to a court. This clause is only an introductory clause. The subpoints that follow the introductory clause grant authority to a court to engage in various actions. However, the introductory clause, by itself, does not grant any authority to a court to engage in any action.

The appellant acknowledges that a court may modify the terms of a shared parenting plan under subsection (E)(2)(b). However, as explained in the appellant's brief,⁵ residential parent and legal custodian status is not a term of a shared parenting plan. Residential parent and legal custodian status is granted in a shared parenting "order," not in a shared parenting "plan."

3. Caselaw Analysis

The appellee argues that three appellate cases recognize that a court has authority under subsection (E)(2)(b) to modify residential parent and legal custodian status in a shared parenting decree.⁶ The appellee is incorrect. None of these cases

⁵ Appellant's Brief, pp. 17-22.

⁶ Appellee's Brief, p. 6. The appellee actually argues that a court has authority under subsection (E)(2)(b) to modify the terms of a "Shared Parenting Plan/Order." The appellee does not explain what she means by a "Shared Parenting Plan/Order."

stand for the proposition that residential parent and legal custodian status in a shared parenting decree can be modified under subsection (E)(2)(b).

Carr v. Carr⁷

In this case, the trial court had previously issued a shared parenting decree that designated the father as the child's primary residential parent and that granted parenting time to the mother.⁸ The initial shared parenting decree did not address child support. The mother filed a motion requesting that she be designated as the child's primary residential parent. The mother also submitted a new proposed shared parenting plan. The father opposed the mother's motion. The father also submitted a new shared parenting plan. The trial court ordered a new parenting time schedule. The trial court also ordered the father to pay child support to the mother. The decision does not state, and there is no reason to believe, that the trial court issued an order modifying residential parent or legal custodian status.

The father appealed. The father argued that a shared parenting plan could only be modified under subsection (E)(1)(a). The court of appeals rejected this argument and observed that the terms of a shared parenting plan could be modified under subsection (E)(2)(b).

⁷ *Carr v. Carr* (Aug. 11, 1999), Medina App. No. 2880-M, 1999 WL 598837.

⁸ The term "primary residential parent" does not appear in the custody statute. The use of the term "primary residential parent" is not explained in the decision. It appears that the court is using this term to refer to the parent with whom the child spent most of the child's time.

This case is irrelevant. The trial court did not modify residential parent and legal custodian status in the shared parenting decree. The trial court only modified the parenting time schedule and issued a child support order. Nowhere in this case does the court of appeals state or imply that residential parent and legal custodian status in a shared parenting decree can be modified under subsection (E)(2)(b). This case only stands for the proposition that a court can modify the terms of a shared parenting plan dealing with the parenting time schedule and child support under subsection (E)(2)(b).

Thomas v. Thomas⁹

In this case, the trial court previously approved a shared parenting plan that equally allocated parenting time between the parents. The father filed a motion to terminate the shared parenting plan. The mother opposed the motion. The trial court issued an order modifying the parenting time schedule. The trial court did not grant the father's motion to terminate the shared parenting plan.

The mother appealed. The mother argued that the trial court did not follow the requirements of subsection (E)(1)(a).¹⁰ The court of appeals rejected the mother's argument. The court of appeals noted that the trial court had modified the shared

⁹ *Thomas v. Thomas* (Sept. 17, 1999), Clark App. No. 98-CA-55, 1999 WL 812385.

¹⁰ The decision actually states that the mother argued that the trial court did not follow the requirements of subsection "(E)(1)." However, it can only reasonably be interpreted that the mother was arguing that the trial court did not follow the requirements of subsection (E)(1)(a). Subsection (E)(1)(b), the only other provision that could apply, deals with the granting of a shared parenting decree after an initial sole custody decree has been issued.

parenting plan and that a court is authorized to modify a shared parenting plan under subsection (E)(2)(b).

Again, this case is irrelevant. The trial court did not modify residential parent and legal custodian status in the shared parenting decree. The trial court only modified the parenting time schedule. Nowhere in this case does the court of appeals state or imply that residential parent and legal custodian status in a shared parenting decree can be modified under subsection (E)(2)(b). This case only stands for the proposition that a court can modify the terms of a shared parenting plan dealing with the parenting time schedule under subsection (E)(2)(b).

Myers v. Myers¹¹

In this case, a prior shared parenting decree designated each parent as a residential parent and legal custodian. The father filed a motion to become the sole residential parent of the child. The mother opposed the motion. The trial court

¹¹ *Myers v. Myers* (2003), 153 Ohio App.3d 243, 792 N.E.2d 770, 2003-Ohio-3552.

interpreted the father's motion to be a motion to terminate the prior shared parenting decree under subsection (E)(2)(c).¹² The trial court granted the father's motion and terminated the shared parenting decree. The trial court then designated the father as the child's sole residential parent and gave the mother parenting time rights.

The mother appealed. The mother argued that the father was required to meet the change in circumstances test found in subsection (E)(1)(a). The court of appeals rejected this argument. The court of appeals observed that the trial court had interpreted the father's motion to be a motion to terminate the shared parenting decree under subsection (E)(2)(c) and that a court may terminate a shared parenting decree

¹² R.C. 3109.04(E)(2)(c) states:

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.

without finding that a change in circumstances had occurred.¹³

Again, this case is irrelevant. This case does not address when a court may modify residential parent and legal custodian status in a shared parenting decree. Rather, this case addresses when a court may terminate a shared parenting decree. This case addresses a court's authority under subsection (E)(2)(c), regarding the termination of a shared parenting decree. This case does not address a court's authority under subsection (E)(2)(b), regarding modification of the terms of a shared parenting plan.

Conclusion

With the exception of the Third District Court of Appeals in the case herein, no other court of appeals has held that residential parent and legal custodian status in a shared parenting decree can be modified under subsection (E)(2)(b). The three cases discussed above were also cited by the Third District Court of Appeals in the case herein in support of its decision.¹⁴ However, a careful reading of these cases discloses that none of these cases stand for the proposition asserted.

¹³ After a shared parenting decree has been terminated under subdivision (E)(2)(c), a court must issue a modified decree allocating parental rights and responsibilities "as if no decree for shared parenting had been granted and as if no request for shared parenting ever had been made." R.C. 3109.04(E)(2)(d). Thus, after a shared parenting decree has been terminated under subsection (E)(2)(c), a court must make a de novo allocation of parental rights and responsibilities.

¹⁴ *Fisher v. Hasenjager*, *supra*, para. 27 (*Carr and Myers*), para. 32 (*Thomas*), paras. 33 and 34 (*Carr*), and para. 35 (*Thomas and Carr*).

4. Appellant's Choice of Words

The appellee next argues that, the appellant, in his brief, acknowledges that the words "residential parent" and "legal custodian" are "terms." In his brief, the appellant did refer to these words as "terms." Obviously, the words used in a statute are the terms of a statute. However, the fact that these words are the terms of a statute does not mean that residential parent and legal custodian status are terms of a shared parenting plan. The words used by the appellant in his brief are irrelevant in determining the meaning of a statutory phrase or the intention of the General Assembly.

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

A. Appellant's Position

If subsection (E)(2)(b) is interpreted to permit modification of residential parent and legal custodian status in a shared parenting decree, courts will have two different statutory provisions under which they may modify residential parent and legal custodian status in a shared parenting decree. One provision (subsection (E)(1)(a)) contains a relatively high standard. The other provision (subsection (E)(2)(b)) contains a relatively low standard. The custody statute contains no guidance regarding when one provision should be used or when the other provision should be used. Thus, if both provisions may be used, some courts will use one provision and other courts will use the other provision. Because the provisions contain different standards for modification, in cases with the same facts, different judgments will be issued. This

result is unreasonable and absurd. In cases with the same facts, the same judgment should be issued. Statutes should not be interpreted in a manner that produces an unreasonable and absurd result.

B. Appellee's Response

The appellee does not address this argument.¹⁵

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

A. Appellant's Position

As discussed above (Argument III), if subsection (E)(2)(b) is interpreted to permit modification of residential parent and legal custodian status in a shared parenting decree, courts will have two different statutory provisions under which they may modify residential parent and legal custodian status in a shared parenting decree. Because the provisions contain different standards, and because the custody statute contains no guidance regarding when either provision should be applied, some courts will apply one provision and other courts will apply the other provision. Because the provisions contain different standards for modification, in cases with the same facts, different judgments will be issued.

¹⁵ The fact that the custody statute contains no guidance regarding when one provision or the other provision should be used also demonstrates that the General Assembly did not intend to create two different statutory provisions under which a court could modify residential parent and legal custodian status in a shared parenting decree. If the General Assembly intended to create such a structure, the General Assembly would have included additional statutory language that instructed courts when one provision should be used and when the other provision should be used. The General Assembly included no such instructions.

If a statute does not contain reasonably clear guidelines regarding how the statute should be applied, the statute can be applied in an arbitrary or discriminatory manner. To reduce the risks of the arbitrary or discriminatory application of a statute, the Due Process Clauses of the Ohio and United States Constitutions have been interpreted to require statutes to contain reasonably clear guidelines regarding their application. If a statute does not contain reasonably clear guidelines regarding its application, the risks of arbitrariness or discrimination are present, and the statute is overly vague and thus unconstitutional. A statute should not be interpreted in a manner that causes the statute to operate in an unconstitutional manner.

B. Appellee's Argument

The appellee argues that, if residential parent and legal custodian status in a shared parenting plan can be modified under subsection (E)(2)(b), the custody statute will not be overly vague and unconstitutional. However, the appellee does not present any authorities or arguments in support of her position.

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

A. Appellant's Position

The interpretation of the statute advanced by the appellee will increase child custody litigation, decrease stability, and harm children. Because the standard for modification contained in subsection (E)(2)(b) is significantly lower than the standard for modification contained in subsection (E)(1)(a), if this court permits modification of residential parent and legal custodian status under subsection (E)(2)(b), more motions

to modify will be filed and more modification trials will be conducted. Obviously, increasing child custody litigation harms children.

Subsection (E)(1)(a) already permits modification of residential parent and legal custodian status in a shared parenting decree. Because residential parent and legal custodian status bestows fundamental and highly significant parental rights, subsection (E)(1)(a) contains a relatively high standard to modify residential parent and legal custodian status. Given the harms inherent in child custody litigation, the use of a relatively high standard is logical.

A statute should not be interpreted in a manner that causes bad policy results.

B. Appellee's Position

The appellee does not address this argument.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the Reply Brief of Appellant Paul Fisher was sent by ordinary U.S. mail to Thomas Luth, Meikle, Tesnot, & Luth, counsel for Appellee Emma Hasenjager, at 100 N. Main St., P. O. Box 485, Celina, Ohio 45822 and James A. Tesno, Counsel of Record for Appellee, at 100 N. Main St., P. O. Box 485, Celina, Ohio 45822 on the 15th day of March, 2007.

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