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Change Of Circumstances In Shared Parenting Cases Since *Fisher v. Hasenjager*

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The 2007 decision of the Ohio Supreme Court in *Fisher v. Hasenjager*, 116 Ohio St. 3d 53, 2007-Ohio-5589, 876 N.E.2d 546 (2007), has posed some interesting interpretive issues for courts of appeal in the more than five years since its issuance. The certified conflict in *Fisher* appears straightforward on its face:

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

Id., at ¶ 1. The Supreme Court answered that certified question with a "no" and held as follows:

A modification of the designation of residential parent and legal custodian of a child requires a determination that a 'change of circumstances' has occurred, as well as a finding that the modification is in the best interest of the child. (R.C. 3109.04(E)(1)(a), construed.)

Id.; Syllabus of the Court.

The interpretive difficulty, though, arises out of the factual posture of the case. The parents had initially entered into a shared parenting plan, and then each subsequently moved the court "to become the sole residential parent and legal custodian of the child. *Id.*, at ¶ 2. The trial court found "that the parties had requested, and that it was in the child's best interest, to terminate the shared parenting plan," *id.*, at ¶ 3, and designated the Appellee as "the residential parent and legal custodian" of the minor child. *Id.*, at ¶ 3. The court of appeals, despite the trial court's reference to termination of the shared parenting plan, determined that the trial court had not terminated the plan but modified it. *Id.*, at ¶ 6. Interpretive confusion arises because the majority opinion never explicitly defines its understanding of whether the plan has been terminated or modified as to the designation of residential parent and legal custodian. The majority opinion instead focuses on the distinction between whether a shared parenting decree (or order) had been modified, as opposed to the terms of a shared parenting plan.

The initial inquiry is in reference to the application. R.C. 3109.04(E)(2)(c) permits the termination of a shared parenting plan if the court finds that the plan is not in the best interest of the child. If the case involved a termination of a shared parenting plan, should not the statute apply? The dissent by Justice Pfeifer, joined by Justice Lanzinger, makes that very point: that because the case involved a termination of a shared parenting plan, it was unnecessary for the court to go beyond R.C. 3109.04(E)(2)(c) in its analysis.

But the Court did direct its analysis beyond the context of a termination of a shared parenting plan. This may result from the applicability of R.C. 3109.04(K)(6) to the facts. As the Court noted, if a shared parenting order is issued and the order is silent regarding the residential parent and legal custodian status, and the context does not clearly require otherwise, "then each parent

is a residential parent and legal custodian of the child." *Id.*, at ¶ 25. However, R.C. 3109.04(L)(6) allows for the possibility that a shared parenting order may be structured so that only one parent is the residential parent and legal custodian:

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 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.

R.C. 3109.04(K)(6) (emphasis added).

The Court further noted that a shared parenting plan does not designate the residential parent and legal custodian, but that the designation is only made by order or decree. *Id.*, at ¶ 31. Therefore, the designation is not a "term" of the shared parenting plan and cannot be modified pursuant to R.C. 3109.04(E)(2)(b), which allows modification of the terms of the plan by consideration of the best interest of the child only. *Id.*, at ¶ 33. Consequently, a parent seeking a "modification of a prior decree allocating parental rights and responsibilities [must] show a change of circumstances[.]" *Id.*, at ¶ 34.

Fisher states the policy behind this view of the legislature's intent:

The standard in R.C. 3109.04(E)(2)(b) for modification of a shared-parenting plan is lower because the factors contained in a shared parenting plan are not as critical to the life of a child as the designation of the child's residential parent and legal custodian. The individual or individuals designated the residential parent and legal custodian of a child will have far greater influence over the child's life than decisions as to which school the child will attend or the physical location of the child during holidays.

Id., at ¶ 36.

Interestingly, as noted, the Court assumes that shared parenting term modifications are expected to be relatively minor in the life of a child. Consider, however, a modification motion which would not alter the designation of residential parent and legal custodian, but would modify the term for designation of school placement parent, where that parent seeks to move out of state, and also modify the parenting time schedule.

The purpose of this article is to briefly survey how Ohio appellate districts have interpreted *Fisher* when addressing similar questions. While there is largely agreement between the districts, there are varying responses to *Fisher*.

FIRST DISTRICT:

In *Cwik v. Cwik*, 1st Dist. No. C-090843, 2011-Ohio-463, the initial custody order named the mother as "sole residential and legal custodian." *Id.*, at ¶ 2. This decision was challenged because the parties had filed a pre-decree agreement for shared parenting. *Id.*, at ¶ 7. The agreement did not state that it would be incorporated into a final decree. *Id.* The issue on appeal was whether the agreement required the court to find a change of circumstance in its final order. The First District found in the negative:

Unlike in *Fisher*, in this case the trial court did not modify a shared-parenting decree. Rather the court entered an original custody decree, and in doing so, it vacated the interim agreed entry of April 2008 that provided for shared parenting. Therefore, R.C. 3109.04(E)(1)'s 'change in circumstances' requirement did not apply.

Id., at ¶ 37.

SECOND DISTRICT:

Toler v. Toler, 2nd Dist. No. 10-CA-69, 2011-Ohio-3510 concluded that a change in circumstances was not necessary to terminate a shared parenting plan. In considering what constituted a change in circumstances, the court in *Gillum v. Gillum*, 2nd Dist. No. 24401, 2011-Ohio-2558, held that the following facts did not demonstrate a change in circumstances:

- past marijuana use;
- danger posed by MySpace posting;
- the children's familiarity with an alternate placement; and
- minor interferences with parenting time.

In *Sutton v. Sutton*, 2nd Dist. No. 24108, 2011-Ohio-1439, custody of the minor child was initially awarded to the father. The mother subsequently filed a post-decree motion for reallocation of parental rights and responsibilities, but the parties jointly filed a petition for shared parenting in which they agreed they would share custody, with the father being designated school placement parent. Later, though, motions were filed to suspend mother's parenting time and to terminate shared parenting. The trial court (a magistrate) recommended that shared parenting remain in effect, but changed the school placement parent designation to the mother. The father objected unsuccessfully and appealed. The court of appeals upheld the trial court determination that there had been a change of circumstances even though the "terms" of the plan were what was modified. *Id.*, at ¶ 19.

THIRD DISTRICT:

The Third District does not require a "substantial" change in circumstances, but only that "the change must be a change of substance, not a slight or inconsequential change." *Vent v. Vent*, 3rd Dist. No. 16-12-05, 2012-Ohio-5946, at ¶ 20, citing *Davis v. Flickinger* (1997), 77 Ohio St. 3rd 415, at 418.

A change of circumstances was found in *Dodson v. Bullinger*, 3rd Dist. No. 15-10-06, 2010-Ohio-6263, in the passage of time during a significant developmental portion of a child's life, the child's poor school attendance record, and the development of a strong relationship with the father.

Although relocation alone was not found to be a sufficient fact for a change of circumstances, interference with custody and the disruption of familial relations by the relocation did support a finding of change of circumstances in *Long v. Long*, 3rd Dist. No. 14-10-01, 2010-Ohio-4817.

In the Matter of *Luke Illig*, 3rd Dist. No. 13-08-26, 2009-Ohio-916, an original shared parenting plan designated both parents as residential parents of Luke. The father subsequently filed a motion to terminate the shared parenting plan, and both parents agreed that it was in Luke's best interest to terminate the plan. A trial resulted in a judgment entry naming the mother as residential parent and legal custodian. Upon appeal, the court found, in applying *Fisher*, that a change of circumstances was required although the magistrate had specifically found that "termination and not modification of the subject shared parenting agreement" was necessary. *Id.*, at ¶ 20. Nevertheless, the court of appeals found:

According to the distinction articulated in *Fisher*, the July 1, 2008 Judgment Entry modifies the designation of the residential parent. Accordingly, we find that the trial court was required to apply the standard as articulated in R.C. 3109.04(E)(1)(a). Given that both parents requested a change in the shared parenting plan, the trial court was required to determine if. . . a change in circumstances occurred[.]

Id., at ¶ 16.

A best-interests analysis was required to change school placement parent in *Ralston v. Ralston*, 3rd Dist. No. 9-08-30, 2009-Ohio-679, and to modify the shared parenting schedule in *Herdman v. Herdman*, 3rd Dist. No. 9-08-32, 2009-Ohio-303.

FOURTH DISTRICT:

A failure to facilitate parenting time was found to be a change of circumstance in *In the Matter of F.M.B. a Minor Child*, 4th Dist. No. 10CA28, 2011-Ohio-5368.

A shared parenting order which failed to explain whether the trial court terminated the shared parenting decree or merely modified the terms of the shared parenting plan was held to be void for vagueness in *Clyburn v. Gregg*, 4th Dist. No. 09CA3115, 2010-Ohio-4508.

An allocation of parenting time is a term of a shared parenting plan, as is the designation of school placement parent. *Bishop v. Bishop*, 4th Dist. No. 08CA44, 2009-Ohio-4537.

A trial court judgment which prospectively modified the terms of a shared parenting plan upon a potential out-of-state relocation did not require a change of circumstances analysis because the court did not modify the prior allocation of parental rights and responsibilities. *Picciano v. Lowers*, 4th Dist. No. 08CA38, 2009-Ohio-3780.

FIFTH DISTRICT:

In distinction to the general view, the Fifth District consistently holds that termination of a shared parenting plan, and designation of one parent as the residential parent and legal custodian, requires a determination that a change of circumstances has occurred. *Wright v. Wright*, 5th Dis. No. 2011CA00129, 2012-Ohio-1560; *Rice v. Rice*, 5th Dist. No. 10 CA F 0091, 2011-Ohio-3099; *Sims v. Durant*, 5th Dist. No. 2008-CA-27, 2008-Ohio-6442.

Parenting time is a term of a shared parenting plan. *Kovach v. Lewis*, 5th Dist. No. 11-COA-018, 2012-Ohio-1512.

A change in circumstances was found in the following facts in *Bowker v. Bowker*, 5th Dist. No. 10CAF110085: the aging of the children by five years, the fact that the children were struggling in school, repeated relocations of the children, frequent job changes of a parent, various school changes, and the mother's arrest for theft of drugs.

In *Frame v. Frame*, 5th Dist. No. 09CA000036, 2010-Ohio-2440, the court held that a "determination on change of circumstances is subjective and not subject to any bright-line test." *Id.*, at ¶ 33. One issue alone is not enough to find a change of circumstances; "the totality of all the facts is what is to be considered." *Id.* Here, a change in circumstances was found based upon a change of residence into a step-parent home, addition of a step-brother, a change in work hours of a parent, and a parent's negative view of parenting time. *Id.*, at ¶ 34.

SIXTH DISTRICT:

In *Andrew P. v. Jessy Z.*, 6th Dist. No. WD-07-029, 2008-Ohio-4124, 896 N.E 2d 220, a trial court was found to have abused its discretion when it terminated a shared parenting plan and named both parents as the residential parent and legal custodian.

An interesting interpretation of *Fisher* is found in *Rogers v. Rogers*, 6th Dist. No. H-07-024, 2008-Ohio-1790:

Recently, the Supreme Court of Ohio in *Fisher v. Hasenjager* (2007), 116 Ohio St.3d 53, 2007-Ohio-5589, held that a mere change in the designation of the residential parent and legal custodian did not constitute a termination of the shared parenting plan, but rather only a modification of the plan.

Despite this dictum, the court of appeals concluded, though, that a termination of a shared parenting plan did not require a change of circumstances.

SEVENTH DISTRICT:

The Seventh District has held that a combination of factors must be considered to amount to a change of circumstances. *Gomez v. Gomez*, 7th Dist. No 08 NO 356, 2009-Ohio-4809. In *Gomez*, the court found that a combination of the following constituted a change in circumstance: both parties remarried, mother changed residences, hostility increased between father and new stepfather, parties were untimely for exchanges, mother was found in contempt, mother refused to provide medical information about the children, mother prevented father from exercising the majority of his summer vacation, police intervention was frequently sought, and children's services was contacted regarding alleged abuse allegations. *Id.* at ¶¶ 23-33.

Remarriage of a parent does not automatically demonstrate a change in circumstance. *Campana v. Campana*, 7th Dist. No. 08 MA 88, 2009-Ohio-796.

In *Surgenavic v. Surgenavic*, 7th Dist. No. 08 MA 29, 2009-Ohio-1028, termination of a shared parenting plan and designating the father residential parent was upheld where parents agreed father would become child's residential parent when infant ceased breastfeeding, mother exhibited increased hostility toward father which prevented cooperation as to medical and visitation issues, and mother refused to comply with court-ordered visitation.

An ongoing and worsening conflict between parents can constitute a change in circumstances. *Depascale v. Finocchi*, 7th Dist. No. 08 MA 216, 2010-Ohio-4869.

A trial court appropriately found a change in circumstance sufficient to award custody to father, where father became the default primary caregiver due to mother's work schedule, mother moved out of state with the child without notifying father or obtaining court approval, mother failed to allow father visitation or communication with the child, and where mother told the court that she moved out of state for a job that she promptly quit after her move. *Simkins v. Perez*, 7th Dist. No. 11 MA 80, 2012-Ohio-1150, at ¶¶ 27 and 28.

EIGHTH DISTRICT:

Mother's relocation to in-state residence constituted change in her circumstances and not a change in children's or father's circumstances. *Mansberry v. Bach*, 8th Dist. No. 96471, 2011-Ohio-6627.

NINTH DISTRICT:

A request for a change in parenting time is a request to alter the physical control of a child and thus constitutes a request to modify the allocation of parental rights and responsibilities, such that a change of circumstances must be found. *Gunderman v. Gunderman*, 9th Dist. No. 08CA0067-M, 2009-Ohio-3787, at ¶ 23.

Mother failed to prove a change in circumstances where she only demonstrated that she experienced difficulty working around vacation times and medical appointments for the child, and that her relationship with father was disharmonious. *Sejka v. Sejka*, 9th Dist. No. 10CA0133-M, 2011-Ohio-4711, at ¶ 14.

A trial court erred when it found no change in circumstances had occurred, where mother presented evidence that there was a breakdown in the parties' relationship and that the children suffered as a result, and that both children strongly desired to relocate out of state with their mother. *Syverson v. Syverson*, 9th Dist. No. 12CA010205, 2012-Ohio-5569 at ¶ 15.

TENTH DISTRICT:

Despite the clear language in *Fisher* and other courts' decisions, holding that the best-interests test applies to school placement modification, the Tenth District applied the change-in-circumstances test earlier this year when modifying school placement. *Geier v. Swank*, 10th Dist. No. 09AP-670, 2010-Ohio-627. In *Geier*, mother moved from Columbus to Cleveland. *Id.* The court found that there was a change in circumstance and modified the designated school placement parent. *Id.* Mother unsuccessfully appealed, arguing that the court erred in finding a change in circumstance. *Id.* The appellate court did not discuss whether the trial court applied the correct test. *Id.* Therefore, it is unclear as to what test the Tenth District actually believes is the correct test to apply. *Fisher* was not mentioned in the opinion.

ELEVENTH DISTRICT:

In *Lake v. Lake*, 11th Dist. No. 2009-P-0015, 2010-Ohio-588, a modification of parenting time under a shared parenting plan was upheld as being in the best interests of the child to reverse an adverse relationship between the child and father. *Id.* at ¶ 72. Thus, the court treated the modification a "term" of a parenting plan not requiring a finding of a change in circumstance.

An award of sole custody to father was upheld where the trial court found a change of circumstances based upon mother's changed work schedule and her frequent moves, which caused instability in the lives of the parties' children. *Rutherford v. Rutherford*, 11th Dist. No. 2009-P-0086, 2010-Ohio-4195, at ¶ 18.

TWELFTH DISTRICT:

The Twelfth District held that repeated unsubstantiated accusations of sexual misconduct against the other parent can constitute a change in circumstance. In the Matter of R.A.S., 12th Dist. No. CA2011-09-102, 2012-Ohio-2260.

In *Pierson v. Gorrell*, 12th Dist. No. CA2011-11-216, 2012-Ohio-3878, at ¶¶ 27 and 28, mother's "combative" e-mails, in which she accused the father of being unfair and telling him to "knock it off and act like an adult," was a proper factor in determining if a change of circumstance had occurred.

A trial court erred in applying the change-of-circumstance test when evaluating whether to grant father's request to enjoin or restrict the issuance of a passport for the child, as father had only moved to modify a term of the parties' shared parenting plan. *Van Osdell v. Van Osdell*, 12th Dist. No. CA2007-10-123, 2008-Ohio-5843 at ¶¶ 14 and 16.

No change of circumstance was found where father alleged that he had been denied medical and school records, denied court-ordered visitation, there was no heat in his daughter's bedroom, there was cat urine in her bed, and dangerous animals in the home. In the Matter of M.D.D., 12th Dist. No. CA2009-06-170, 2010-Ohio-326 at ¶¶ 21 and 36.

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