[Cite as *Gunderman v. Gunderman*, 2009-Ohio-3787.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	

DEANNE HASSELL GUNDERMAN	C. A. No. 08CA0067-M
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
RAYMOND GUNDERMAN	COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO
Appellee	CASE No. 04DR0277

DECISION AND JOURNAL ENTRY

Dated: August 3, 2009

BELFANCE, Judge.

{¶1} DeAnne Hassell Gunderman and Raymond Gunderman are divorced and have one child together. Raymond Gunderman moved for a modification of the shared parenting plan seeking an enlargement of parenting time. After a hearing on the matter, the magistrate issued a decision granting the motion. DeAnne Hassell Gunderman filed objections to the magistrate's decision, and filed an appeal to this Court when the trial court overruled her objections. We reverse and remand because we conclude that the trial court applied the incorrect statute when it reviewed the magistrate's decision.

FACTS

{¶2} DeAnne Hassell Gunderman ("Mother") and Raymond Gunderman ("Father") were married in 2003. They have one child, born January 6, 2004. On May 16, 2005, the Medina County Court of Common Pleas, Division of Domestic Relations, entered a final decree of divorce. Pursuant to the decree, both parents were designated as residential parents and legal

custodians of the child. The plan also stated that the parent exercising companionship with the child is considered the residential parent while the child is in his or her care. Based on the shared parenting plan, Mother was the residential parent 81% of the time and Father was the residential parent 19% of the time. Mother was also designated the residential parent and legal custodian of the child for school purposes only.

{¶3} At the time of the parties' divorce, Father worked a full-time job on third-shift, six to seven days a week, which included mandatory overtime. Father subsequently quit his job to enroll in college full-time to pursue a degree. Due to his change in schedule and his desire to spend more time with his child, Father filed a motion to modify the shared parenting plan.[1] At the time of the magistrate's hearing, Father attended classes at the Lorain County Community College every Tuesday and Thursday from 8:00 a.m. until 6 or 7:00 p.m., and every Wednesday for about three hours in the afternoon.

{¶4} At the hearing before the magistrate, Father and his mother testified in support of his request for modification of the shared parenting plan. Mother offered her own testimony and that of her mother in opposition to Father's motion. The magistrate issued a decision granting Father's motion. In so doing, the magistrate determined that a change in circumstances occurred since the entry of the prior decree, and that the modification was in the best interest of the child. As a result of the increase, Father would be deemed the residential parent and legal custodian of the child 30% of the time as opposed to 19% of the time. Mother would be deemed the

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[1] Father's motion of October 26, 2006, also contained a motion for contempt against Mother. The magistrate's decision of September 27, 2007 found Mother in contempt. Mother objected to that finding in her objections to the magistrate's decision. The trial court's entry of judgment filed August 14, 2008, states that Father voluntarily dismissed his motion for contempt, and further vacates the magistrate's contempt ruling. Accordingly, Mother's objection with respect to contempt is not a subject of her appeal.

residential parent and legal custodian of the child 70% of the time as opposed to 81% of time. The magistrate did not specify which statutory provision she was relying upon in making her determination. However, in light of the magistrate's finding that a change in circumstances had occurred, it appeared that the magistrate had implicitly relied upon R.C. 3109.04(E)(1)(a). [2]

{¶5} Mother filed objections to the magistrate's decision. She argued that the magistrate incorrectly determined that a change in circumstances occurred that warranted modification pursuant to R.C. 3109.04(E)(1)(a). She further argued that a modification of the shared parenting plan was not in the child's best interest. The trial court overruled Mother's objections. It rejected Mother's contention that the magistrate had erroneously determined that a change of circumstances had occurred because it determined that Father's motion should not be analyzed under R.C. 3109.04(E)(1)(a) but rather R.C. 3109.04(E)(2)(b). The court reasoned that the change in parenting time was merely a change in a term of the parties' shared parenting plan, and thus, Father's motion could be considered pursuant to R.C. 3109.04(E)(2)(b), which permits modification of a term of a shared parenting plan upon finding that the modification is in the child's best interest. Accordingly, the trial court did not consider whether the magistrate had properly determined that a change in circumstances had occurred since the prior decree, and instead considered only whether modification was in the best interest of the child.

{¶6} Mother has appealed the trial court's ruling and now argues that: (1) the trial court erred as a matter of law in basing its decision on R.C. 3109.04(E)(2)(b) as opposed to R.C.

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[2] As will be discussed more fully below, R.C. 3109.04(E)(1)(a) requires a threshold finding of a change in circumstances of the child's parents that has arisen since the entry of the prior decree prior to considering whether modification is in the best interest of the child. Conversely, R.C. 3109.04(E)(2)(b) permits the court to modify a term of a shared parenting plan if the modification is in the best interest of the child.

3109.04(E)(1)(a); (2) the trial court erred by not requiring Father to show a change in circumstances having an adverse effect upon the child that would warrant modification and; (3) the trial court erroneously determined that modification of the shared parenting plan was in the child's best interest.

STANDARD OF REVIEW

{¶7} This Court generally reviews a trial court's action with respect to a magistrate's decision for an abuse of discretion. See *Fields v. Cloyd*, 9th Dist. No. 24150, 2008-Ohio-5232, at ¶9. In so doing, we review the trial court's action with reference to the nature of the underlying matter. Because we must consider whether the trial court correctly interpreted and applied a statute, Mother's appeal presents a question of law. Accordingly, we apply a *de novo* standard of review, giving no deference to the trial court's determination. *Porter v. Porter*, 9th Dist. No. 21040, 2002-Ohio-6038, ¶5.

LEGAL FRAMEWORK

{¶8} In her first assignment of error, Mother contends that the trial court should have evaluated Father's motion to modify utilizing R.C. 3104.09(E)(1)(a), which requires an initial showing of a change of circumstances in order to modify a prior decree allocating parental rights and responsibilities, rather than R.C. 3109.04(E)(2)(b), which applies to modifications of a term of a shared parenting plan. In response, Father argues that application of division (E)(2)(b) is appropriate because reallocation of parenting time is a modification of a term of the shared parenting plan, not a modification to the allocation of parental rights and responsibilities.

{¶9} R.C. 3109.04(E)(1)(a) states:

> "The court shall not modify a prior decree allocating parental rights and responsibilities for the care of the children unless it finds, based on facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child, the

> child's residential parent, or either of the parents subject to a shared parenting decree, and that the modification is necessary to serve the best interest of the child. In applying these standards, the court shall retain the residential parent designated by the prior decree or the prior shared parenting decree, unless a modification is in the best interest of the child and one of the following applies:
>
> "(i) The residential parent agrees to a change in the residential parent or both parents under a shared parenting decree agree to a change in the designation of residential parent.
>
> "(ii) The child, with the consent of the residential parent or of both parents under a shared parenting decree, has been integrated into the family of the person seeking to become the residential parent.
>
> "(iii) The harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child."

Accordingly, before a modification can be made pursuant to R.C. 3109.04(E)(1)(a), the trial court must make a threshold determination that a change in circumstances has occurred. See *Fisher v. Hasenjager*, 116 Ohio St.3d 53, 2007-Ohio-5589, syllabus. If a change of circumstances is demonstrated, the trial court must then determine whether the modification is in the best interest of the child. Id.

{¶10} R.C. 3109.04(E)(2)(b) provides:

> "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."

{¶11} Division (E)(2)(b) does not require that the threshold determination of a change in circumstances be met. Rather, the trial court need only find that the modification of a term in the shared parenting plan is in the best interest of the child. Id.

{¶12} Recently, this Court has issued opinions reviewing modifications to shared parenting plans and has employed both division (E)(1)(a) and (E)(2)(b) in considering post-

decree motions for modification of shared parenting plans. Although each case was decided based on the specific facts presented, our approach with respect to the application of the above statutes may have understandably created confusion as to the applicable legal standard.

{¶13} In *Hunter v. Bachman*, 9th Dist. No. 04CA008421, 2004-Ohio-5172, at ¶12, this Court upheld the trial court's application of R.C. 3109.04(E)(2)(b) to a motion to modify parenting time. However, in *Andrachik v. Ripepi*, 9th Dist. No. 22516, 2005-Ohio-6746, at ¶10, this Court applied R.C. 3109.04(E)(1)(a) when reviewing the trial court's modification of a shared parenting plan that reduced the father's parenting time. Later, in *Ankney v. Bonos*, 9th Dist. No. 23178, 2006-Ohio-6009, at ¶9, we again applied *Hunter* in reviewing a motion to modify parenting time under a shared parenting plan. However, subsequent to these decisions, the Supreme Court of Ohio has clarified the proper analysis of the above statutes, and its decision thus controls our analysis. See *Fisher* at ¶¶26-27. To the extent that our prior decisions are inconsistent with *Fisher*, they are overruled.

ANALYSIS OF *FISHER*

{¶14} In *Fisher*, the Court considered the following issue:

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

The *Fisher* court determined that "[t]he answer to [that] question is 'no.'" Id.

{¶15} The *Fisher* Court initially observed that there is no dispute that "a court may modify parental rights and responsibilities pursuant to R.C. 3109.04(E)(1)(a)[,]" and that "[o]nly R.C. 3109.04(E)(1)(a) expressly authorizes a court to modify a prior decree allocating parental rights and responsibilities." Id. at ¶21.

{¶16} "'Parental rights and responsibilities' is not defined in the statute[,]" however, that term has been construed as synonymous with the terms "custody and control." Id. at ¶22. Thus, "parental rights and responsibilities reside in the party or parties who have the right to the ultimate legal and physical control of a child." Id. Further, although R.C. 3109.04 does not define "residential parent" and "legal custodian," based upon R.C. 3109.04(A)(1), the residential parent and legal custodian is the person with the primary allocation of parental rights and responsibilities.[3] Id. at ¶23. Thus, "[w]hen a court designates a residential parent and legal custodian, the court is allocating parental rights and responsibilities." Id. at ¶26.

{¶17} The *Fisher* Court further explained that "[a] court also allocates parental rights and responsibilities when it issues a shared parenting order." Id. at ¶24. The court may allocate parental rights and responsibilities to both parents requiring them to share in all or some of the aspects of the physical and legal care of the child in accordance with the approved plan for shared parenting. Id.

{¶18} Because R.C. 3109.04(E)(1)(a) expressly provides for modification of parental rights and responsibilities in a decree and an allocation of parental rights and responsibilities is a designation of the residential parent and legal custodian, the Court concluded that R.C. 3109.04(E)(1)(a) controls when a court modifies an order designating the residential parent and legal custodian. Id. at ¶26.

{¶19} Conversely, while the designation of residential parent and legal custodian can be modified under R.C. 3109.04(E)(1)(a), that designation cannot be modified under R.C.

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[3] R.C. 3109.04(A)(1) states that if one parent is allocated the primary parental rights and responsibilities for the care of the children, that parent is designated the residential parent and legal custodian of the child.

3109.04(E)(2)(b) because subsection (E)(2)(b) allows only for a modification of the *terms* of a shared parenting plan whereas R.C. 3109.04(E)(1)(a) permits the modification of a *prior decree* allocating parental rights and responsibilities. Id. at ¶27. The Court explained that within the custody statute, a "plan" is statutorily different from a "decree" or "order" because an order or decree is used to grant parental rights and responsibilities and to designate the parent or parents as residential parents and legal custodian. Id. at ¶29. By contrast, "[a] plan details the implementation of the shared parenting order." Id. at ¶30. The plan itself is not used by the court to designate the residential parent or legal custodian—that designation is made by the order or decree. Id. at ¶31. Accordingly, the *Fisher* Court concluded that "the designation of residential parent or legal custodian cannot be a term of a shared parenting plan, and thus cannot be modified pursuant to R.C. 3109.04(E)(2)(b)." Id.

{¶20} The *Fisher* Court further observed that R.C. 3109.04(E)(1)(a) and R.C. 3109.04(E)(2)(b), contain significantly different standards for modification, noting that:

> "[i]t is a well-settled rule of statutory interpretation that statutory provisions be construed together and the Revised Code be read as an interrelated body of law. To read both sections, with different standards, to apply to a court's analysis modifying the decree modifying a child's residential parent and legal custodian would create inconsistency in the statute. Two different standards cannot be applied to the same situation." (Internal quotations and citations omitted.) Id. at ¶32.

It noted that the requirement that a "change" must have occurred in the life of the child or parent before the court will consider whether the current designation should be altered is a "high" standard. Id. at ¶33. "Conversely, R.C. 3109.04(E)(2)(b) requires only that the modification * * * be in the best interest of the child." Id. The Court concluded the requirement that a parent seeking modification of a prior decree allocating parental rights and responsibilities is "purposeful":

> "The clear intent of [R.C. 3109.04(E)(1)(a)] is to spare children from a constant tug of war between their parents who would file a motion for change of custody each time the parent out of custody thought he or she could provide the child a 'better' environment. The statute is an attempt to provide some stability to the custodial status of the children, even though the parent out of custody may be able to prove that he or she can provide a better environment." Id. at ¶34, quoting *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 418, quoting *Wyss v. Wyss* (1982), 3 Ohio App.3d 412, 416.

{¶21} Further, the Court found that the legislation comports with the "rationale regarding stability in the lives of children as a desirable component of their emotional and physical development." Id. at ¶35, quoting *In re Brayden James*, 113 Ohio St.3d 420, 2007-Ohio-2335, at ¶28. By contrast, the standard for modification under R.C. 3109.04(E)(2)(b) 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. The Court also noted that terms of a plan such as a child's medical care or holiday provisions are more likely to require change over time than the child's residential parent and legal custodian. Id.

APPLICATION OF *FISHER* TO THIS CASE

{¶22} Appellee suggests that *Fisher* is distinguishable from the instant matter because unlike *Fisher*, Father did not seek to alter the status of Mother as a residential parent and legal custodian, but only the parenting time under the plan. Although a request to modify the amount of parenting time under a shared parenting order or decree could appear to be merely a request to modify a term of a shared parenting plan, *Fisher* negates that conclusion because under *Fisher*, a request for modification of parenting time is a request for modification of the allocation of parental rights and responsibilities. See id. at ¶26.

{¶23} As noted above, parental rights and responsibilities reside in the party or parties who have ultimate legal and physical control over the child. Id. at ¶22. Under *Fisher* we discern the following: First, "[w]hen a court designates a residential parent and legal custodian, the court is allocating parental rights and responsibilities." Id. at ¶23. Second, when a court initially allocates parental rights and responsibilities, it may designate both parties as residential parents and legal custodians of the child and allocate some or all of the physical and legal care of the child to both parents. Id. at ¶24. Third, when a party requests modification of either the physical and/or legal control of the child, that party is requesting a modification of a prior decree allocating parental rights and responsibilities. See id. at ¶26. Accordingly, a request for a change in parenting time is a request to alter the physical control of the child and thus constitutes a request to modify the allocation of parental rights and responsibilities. The mere fact that one party may still retain the status of a "residential parent and legal custodian of the child" does not mean that the court has not modified the allocation of parental rights and responsibilities of the child. Although both parties may maintain their legal status as residential parents and legal custodians of the child, a change in parenting time could result in a complete change in the child's daily life, potentially including a change of residence and significant change in the amount of time the child spends with the parent previously responsible for the primary care of the child.[4] Such a change would undoubtedly impact the stability and consistency in the child's

[4] For example, a court could allocate parental rights and responsibilities with one parent having parenting time with the child 20% of the time and the other 80%. The parent with the lesser time could file a motion seeking a modification of parenting time to 80%. Assuming the motion is granted, the child would now be with the requesting parent 80% of the time and be with the parent previously having the majority of the parenting time only 20% of the time. Thus, although both parties would continue to maintain the status as residential parent and legal custodians of the child, the change in the child's daily life is significant.

life. Thus, we believe that a change in parenting time, which includes a change in physical control of the child, goes to the heart of the allocation of parental rights and responsibilities as it is the essence of the possession, care and control of the child. Accordingly, when a party files a motion to modify parenting time under a shared parenting plan, the party is seeking a reallocation of parental rights and responsibilities issued under a prior order or decree as opposed to a change in a term of the parties' shared parenting plan. Therefore such a motion must be considered under R.C. 3109.04(E)(1)(a).

{¶24} This conclusion is in keeping with the policy concerns expressed in *Fisher*. Parenting time encompasses the physical care and control of the child and is central to the allocation of parental rights and responsibilities. A change in parenting time has a fundamental impact on the child's life and goes to the heart of the continuity, stability and security of the child. Without a requirement of a threshold determination of a change in circumstances, parents could easily and frequently request modifications that would significantly change the daily life of the child, potentially subjecting children to continual litigation and manipulation by the parents, thus thwarting the legislative intent to promote stability in the lives of children. It is for this reason that in order to curtail the constant tug of war for primary physical control of the child, the legislature requires the high standard of a change in circumstances for modification of the allocation of parental rights and responsibilities. See *Fisher* at ¶33.

{¶25} Because the trial court did not apply the appropriate legal standard, we sustain Mother's first assignment of error, reverse the decision of the trial court, and remand the matter to the trial court for consideration of the magistrate's decision pursuant to R.C. 3109.04(E)(1)(a). Because we have sustained Mother's first assignment of error, we need not address her remaining assignments of error.

CONCLUSION

{¶26} The judgment of the Medina County Court of Common Pleas, Division of Domestic Relations is reversed and remanded for proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to 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). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

EVE V. BELFANCE
FOR THE COURT

MOORE, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

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