IN THE SUPREME COURT OF OHIO

Kayleigh M. Bruns	:	
	:	
Appellee,	:	
	:	Case Nos. 2019-1028
v.	:	2019-1178
	:	
Marcus D. Green	:	On Appeal from the Franklin
	:	County Court of Appeals
Appellant.	:	Tenth Appellate District

REPLY BRIEF OF APPELLANT MARCUS D. GREEN

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STATEMENT OF FACTS

Pursuant to the Entry filed by this Court on October 16, 2019, the parties were to brief the following issue:

DOES THE TERMINATION OF A SHARED PARENTING PLAN AND DECREE AND SUBSEQUENT MODIFICATION OF PARENTAL RIGHTS AND RESPONSIBILITIES UNDER R.C. 3109.04(E)(2) REQUIRE FIRST A FINDING OF A CHANGE IN CIRCUMSTANCES UNDER R.C. 3109.04(E)(1)(a)?

Based upon the merit briefs, the parties are in total agreement as to the only facts relevant to the issue certified:

1. The parties filed an Agreed Shared Parenting Plan on October 10, 2014. Pursuant to the Shared Parenting Decree, also filed on October 10, 2014, which incorporated the parties' Agreed Shared Parenting Plan:

> ...Both parties agree that Shared Parenting is in the best interest of the minor child, so therefore Mother and Father shall both be designated as the residential parents and legal custodians of the minor child. *Father* shall be designated as the school placement parent as long as he continues to reside in the Westerville School District (Agreed Shared Parenting Plan, p. 2; emphasis added).

2. On June 3, 2015, Appellant filed, pro se, a Motion for Change of Parental Rights and Responsibilities (Custody), using Supreme Court of Ohio Uniform Domestic Relations Form – 24 (also Uniform Juvenile Form 6). That form, promulgated by this Court, requires the following affirmative statement by the movant: "The circumstances have changed since the Court issued the existing order. The change in circumstances and any other reason for the requested change are as follows: . . ." The instructions for the form state as follows:

> **Instructions:** This form is used to request a *change* in a shared parenting plan or a *change* in the designation of the sole residential parent and legal custodian. A Request for Service (Uniform Domestic Relations Form 28) and

> a Parenting Proceeding Affidavit (Uniform Domestic Relations Form – Affidavit 3) must be filed with this Motion (*emphasis added*).

3. On August 27, 2015, Appellee, through counsel, filed a Motion to Terminate Shared Parenting and to Reallocate Parental Rights and Responsibilities.

4. On September 21, 2015, Appellant filed, pro se, a Motion to Terminate Shared Parenting and to Reallocate Parental Rights and Responsibilities, using the same Supreme Court of Ohio Uniform Form from before, but modifying it a bit, to be consistent with the language utilized by Appellee in her Motion.

5. After hearing evidence on seven different days spanning almost seven months (April 11, 2017 through November 2, 2017), the trial Court issued on March 2, 2018, a final Judgment Entry *Modifying* Parental Rights and Responsibilities (emphasis added). Pursuant to that Entry, Appellee was designated the "sole legal custodian and residential parent" of the minor child.

6. The parties agree: in modifying the prior decree of parenting and issuing a new decree of parenting, the trial court made no findings as to a change in circumstances (and, in fact, did not even address it in its Decision/Entry).

Those are the only facts relevant to the issue certified; none are in dispute. Although Appellant disagrees with many of the other alleged "facts" set forth in Appellee's brief, they are superfluous to the proposition before this Court.

ARGUMENT

PROPOSITION OF LAW:

THE TERMINATION OF A SHARED PARENTING PLAN AND DECREE AND SUBSEQUENT MODIFICATION OF PARENTAL RIGHTS AND RESPONSIBILITIES UNDER R.C. 3109.04(E)(2) REQUIRES FIRST A FINDING OF A CHANGE IN CIRCUMSTANCES UNDER R.C. 3109.04(E)(1)(a)

There is no question that the law on this critical issue needs to be stated definitively, since there are confusion and inconsistencies based upon perceived imprecise language utilized by the legislature in the various subsections of R.C. 3109.04, and in the underlying decision by the Third District Court of Appeals (which was the basis for this Court's ruling in *Fisher v. Hasenjager,* 116 Ohio St.3d 53, 2007- Ohio-5589).

In a proceeding involving the allocation of parental rights and responsibilities (or custody), the trial court can either designate one parent as the residential parent and legal custodian, adopt a shared parenting plan filed by one or both of the parties, or award custody to a third-party or entity.

> R.C. 3109.04 provides a comprehensive statutory scheme governing the allocation of parental rights and responsibilities and custody matters. Pursuant to the statutory guidelines, there are two ways for parents to share parental rights. In re M.S., 8th Dist. Cuyahoga No. 99563, 2013-Ohio-4043, ¶ 10-11. Under the first approach, the trial court may allocate parental rights and responsibilities primarily to one of the parents and designate that parent as the residential parent and legal custodian of the child. Id. at ¶ 10. If the court chooses this approach, it must provide the nonresidential parent with support provisions and an ability to have continuing contact with the child. R.C. 3109.04(A)(1); M.S. at ¶ 10. Under the alternative approach, the parties may request shared parenting which requires the court to conduct an in-depth analysis of the best interests of the child and whether the shared parenting plan conforms to those interests. R.C. 3109.04(F)(1); M.S. at ¶ 11.
>
> *Woyt v. Woyt,* 8th Dist. Cuyahoga Nos. 107312, 107321, and 107322, 2019-Ohio-3758, pp. 3-4

The parties can file a joint motion for shared parenting, or either or both of the parties can

request shared parenting in a pleading or in a motion. However, in any event, a shared parenting plan *must* be filed.

R.C. 3109.04 provides in relevant part as follows:

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

The trial court then determines if the plan – or one of the plans – is in the best interest of the children. If the trial court deems that changes are necessary to the proposed plan(s), the court can require that the changes be made. Ultimately, the court either approves *a plan,* or, alternatively, allocates parental rights and responsibilities primarily to one of the parents and designates that parent as the residential parent and legal custodian of the child. If the court approves a plan, the approved plan is incorporated into a final shared parenting decree.

R.C. 3109.04 provides, in relevant part, as follows:

> (D)(1)(d) If a court approves a shared parenting plan under division (D)(1)(a)(i), (ii), or (iii) of this section, *the approved plan shall be incorporated into a final shared parenting decree granting the parents the shared parenting of the children.* Any final shared parenting decree shall be

> issued at the same time as and shall be appended to the final decree of dissolution, divorce, annulment, or legal separation arising out of the action out of which the question of the allocation of parental rights and responsibilities for the care of the children arose. (*emphasis added*)

Finally, as to shared parenting, R.C. 3109.04 provides, in relevant part, as follows:

> (L) For purposes of the Revised Code:
>
> . . . (5) Unless the context clearly requires otherwise, if an order is issued by a court pursuant to this section and the order provides for shared parenting of a child, both parents have "custody of the child" or "care, custody, and control of the child" under the order, to the extent and in the manner specified in the order.
>
> (6) Unless the context clearly requires otherwise and except as otherwise provided in the order, if an order is issued by a court pursuant to this section *and the order provides for shared parenting of a child, each parent*, regardless of where the child is physically located or with whom the child is residing at a particular point in time, as specified in the order, *is the "residential parent," the "residential parent and legal custodian," or the "custodial parent" of the child.* (*emphasis added*)

The issues before this Court are not nearly as complicated as Appellee would have this Court believe. Appellee makes a convoluted argument concerning the words "modification" and "termination." Although it is not mentioned in Appellee's brief, the clearest and most comprehensive word is "change," which *is* mentioned in this Court's OUDR Form 24. What this Court simply needs to decide is, regardless of the terminology used by the trial court, the court of appeals, or this Court in *Fisher* or in the case at bar, in the final analysis, after *Fisher* or the case at bar was fully and finally resolved, was there still a shared parenting plan and a shared parenting decree? If so, the parties have shared parenting, and *both* parties are the residential parents and legal custodians If there was a decree which allocated parental rights and responsibilities primarily to only one of the parents and designated that parent as the sole residential parent and legal custodian of the child(ren), the residential parent and legal custodian has been changed from

both parents to one parent, and one parent has lost the rights of a residential parent and legal custodian.

In *Fisher*, as in the case at bar, at the end of the day, there was no longer a shared parenting plan; there was no longer a shared parenting decree; there was no longer shared parenting; one of the parents was no longer a residential parent and legal custodian. Whether it was a "modification" or a "termination" or a "change" is irrelevant. The facts are the facts. Therefore, the issue certified has been fully and finally resolved by this Court's decision in *Fisher,* and, by virtue of stare decisis, this Court needs to consider nothing more, despite Appellee's somewhat confusing and lengthy misinterpretation of the statute.

As stated in Appellant's original brief, if the State legislature felt that this Court's decision in *Fisher* in 2007 was at odds with its intent, it was incumbent upon the legislature to rewrite the statutes.

> The doctrine of *stare decisis* requires a court to recognize and follow an established legal decision in subsequent cases in which the question of law is again in controversy. *Clark v. Snapper Power Equip., Inc.,* 21 Ohio St.3d 58, 60, 488 N.E.2d 138 (1986). As a result, "[w]ell-reasoned opinions become controlling precedent, thus creating stability and predictability in our legal system." *Westfield Ins. Co. v. Galatis,* 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, {¶ **19**} *Considerations of stare decisis are particularly apt in the area of statutory construction because if the legislature disagrees with a court's interpretation of a statute, it may amend the statute. Pearson v. Callahan,* 555 U.S. 223, 233, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009); *Rocky River v. State Emp. Relations Bd.,* 43 Ohio St.3d 1, 6, 539 N.E.2d 103 (1989).
>
> *New Riegel Local School Dist. Bd. of Edn. v. Buehrer Group Architecture & Eng., Inc.*, Slip Opinion No. 2019-Ohio-2851, p. 10 (emphasis added).

The Ohio legislature did revisit R.C. 3109.04 in 2011 – four years *after* this Court's decision in *Fisher* (129th General Assembly File No.21, HB 121, §1, eff. 6/9/2011). Changes were

made to the statute as it relates to those in military service; however, in amending the statute, the legislature made *no changes* to the sections of R.C. 3019.04 referenced above.

Appellee's brief contains five sections, the headings for which are quoted below. To the extent the arguments raised therein are not resolved by the above, Appellant's Reply to each section is restated and set forth below.

I. The Statute Is Clear that R.C. 3109.04(E)(1)(a) Applies to the Termination of a Shared Parenting Plan.

As mentioned in the preceding paragraphs, Appellee's reliance on the subtle nuances between the terms "modification" and "termination" is confusing, and misplaced. Again, perhaps it is so simple and straightforward that Appellee overlooked the obvious, but "shared parenting decree" is referenced *four times* in R.C. 3109.04(E):

R.C. 3109.04(E)(1) provides as follows:

> (a) The court shall not modify a prior decree allocating parental rights and responsibilities for the care of children unless it finds, based on facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child, the child's residential parent, *or either of the parents subject to a shared parenting decree*, and that the modification is necessary to serve the best interest of the child. In applying these standards, the court *shall retain* the residential parent designated by the prior decree *or the prior shared parenting decree*, unless a modification is in the best interest of the child and one of the following applies:
>
> (i) The residential parent agrees to a change in the residential parent or both parents under a *shared parenting decree* agree to a change in the designation of residential parent.
> (ii) The child, with the consent of the residential parent or of both parents under a *shared parenting decree*, has been integrated into the family of the person seeking to become the residential parent.
> (iii) The harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child (*emphasis added*).

Appellee's arguments in this section of her brief as to the inapplicability of R.C. 3109.04(E)(1)(a) to a termination of a party's rights as a residential parent and legal custodian would render all of the references to a shared parenting decree in said statute a nullity. The statute is clear that 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: . . ." Can Appellee in good faith dispute that when there is a shared parenting plan and a shared parenting decree, each parent is the "residential parent," the "residential parent and legal custodian," or the "custodial parent" of the child"? (See R.C. 3109.04(L)). Can Appellee in good faith dispute that when there is no longer a shared parenting plan and a shared parenting decree, the primary parental rights and responsibilities are allocated to only one of the parents, and that parent is designated the residential parent and legal custodian of the child? Can Appellee in good faith dispute that when such occurs, the court has *not* retained the residential parent designated by *the prior shared parenting decree*, because one of the parents – in this case, Appellant – is no longer a residential parent and legal custodian?

Appellee obfuscates the issue by focusing on the word "modify" in R.C. 3109.04(E)(1)(a). In so doing, Appellee ignores the legislative history of the statute. Prior to the adoption in 1981 of the "joint custody" provisions of R.C. 3109.04, custody decrees were not "terminated", since there would then be no remaining valid Decree of Divorce or Decree of Dissolution of Marriage. Rather, the decrees were *modified* (to keep intact and in force the other provisions of the Decree). Prior to the effective date of Substitute House Bill No. 71 (114th General Assembly, eff. 8/27/1981), R.C. 3109.04(B)(1) provided that: "The court shall not modify a prior custody decree unless it finds, based on facts which have arisen since the prior decree or which were unknown to the court at the time of the prior decree, that a change has occurred . . ." That language was retained by the

legislature in 1981 but modified as to form to address joint custody decrees. In 1990, "joint custody" became "shared parenting". Nevertheless, the *same* substantive language requiring a change in circumstances was utilized by the legislature, with the *specific references to shared parenting decrees* discussed above (in what became R.C. 3109.04(E)(1)(a); see Amended Substitute Senate Bill No. 3, 118th General Assembly).

Based upon the legislative history, a "modification" of a shared parenting decree pursuant to R.C. 3109.04(E(1)(a) encompasses the termination of the rights of a residential parent and legal custodian, and an awarding of those rights to the other parent (or another third party). Therefore, the termination of a shared parenting plan and decree and subsequent modification of parental rights and responsibilities under R.C. 3109.04(E)(2) requires first a finding of change in circumstances under R.C. 3109.04(E)(1)(a).

II. This Court's Decision in *Fisher v. Hasenjager*, 116 Ohio St.3d 53, 2007- Ohio-5589 Controls and Is Dispositive of the Case at Bar

Interestingly, both Appellant and Appellee rely on this Court's decision in *Fisher* to support his/her respective positions. However, Appellee totally misconstrues the holding in *Fisher*.

As this Court stated in its decision in *Fisher*:

> "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)?" *The answer to this question is "no."*
>
> *Fisher,* at p. 2 (emphasis added).

Again, Appellee attempts to argue that *Fisher* only applies to a "modification" and not a "termination." However, there can be no doubt that the *Fisher* Justices understood that *Fisher* was a case terminating a shared parenting plan. The trial court in *Fisher* terminated the shared parenting plan, and designated one parent as the sole residential parent and legal custodian. In its

decision in *Fisher*, this Court stated specifically that "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*". *Fisher*, at p. 2 (emphasis added). Finally, the *very first line* of the dissent in *Fisher* states as follows:

> {¶ 38} I dissent because this case involves a *termination of a shared parenting decree* pursuant to R.C. 3109.04(E)(2)(c). That statute allows a court to terminate a final shared-parenting decree merely upon the request of one or both of the parents or whenever the court "determines that shared parenting is not in the best interest of the children. *(emphasis added)*
>
> *Fisher*, pp. 11-12.

As she does with the words "modification" and "termination," Appellee attempts to complicate the issue by confusing the terms of a "plan" with a "decree". Appellee's argument is further made difficult to understand by a handful of references to statutes which don't exist: (E)(b)(c), (E)(b)(2), and (E)(b)(3), or which are irrelevant (E)(1)(b).

As is clearly set forth above, a shared parenting decree simply incorporates the terms of a plan. There are no independent, substantive provisions in a shared parenting decree. R.C. 3109.04(D)(1)(d) provides that "[i]f a court approves a shared parenting plan under division (D)(1)(a)(i), (ii), or (iii) of this section, *the approved plan shall be incorporated into a final shared parenting decree granting the parents the shared parenting of the children*" (emphasis added).

Attached is a copy of the Shared Parenting Decree in this case. It is 12 lines long. In terms of substance, it is identical to virtually all shared parenting decrees. As required by statute, it *adopts a plan*. It does not designate the residential parents and legal custodians; that is automatic by operation of law. The decree simply adopts the terms of the plan.

If the decision of the Court of Appeals is affirmed, *Fisher* will be totally eviscerated, and all references to shared parenting decrees in R.C. 3109.04(E)(1)(a) will be a nullity.

III. The Decisions of the Courts of Appeals are not Binding or Instructive to this Court

How lower courts have interpreted *this* Court's decision in *Fisher* is, of course, not binding on this Court and offers little assistance in resolving the issue certified. Some of the courts of appeals have not even referenced *Fisher* in their decisions on this issue; others have little or no analysis in their decisions of the interplay between the statutes, as discussed herein. None of them address the legislative history, the provisions in R.C. 3109(E)(1)(a) as to shared parenting decrees, or *stare decisis.*

IV. Public Policy Supports Appellant's Proposition of Law

In her brief, Appellee mistakenly states that Appellant did not address public policy in his merit brief. In his Merit Brief, Appellant quoted this Court's decision in *Fisher*:

> 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." *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 418, 674 N.E.2d 1159, quoting *Wyss v. Wyss* (1982), 3 Ohio App.3d 412, 416, 3 OBR 479, 445 N.E.2d 1153. . . We note that another statute that addresses orders granting legal custody of a child sets forth the same standard for a modification. R.C. 2151.42(B) also requires a court to find that a "change has occurred in the circumstances of the child or the person who was granted legal custody" and that modification is in the best interest of the child before modifying an order granting legal custody. See *In re Brayden James* at ¶ 26.
>
> *Fisher*, at p. 11.

Appellant further argued that by failing to apply the change of circumstances standard mandated by R.C. 3109.04(E)(1)(a), the trial Court and the Court of Appeals created the exact tug-of-war described in *Fisher:*

> The child has been pulled from one school and community in one county, to another school and community in a different county. Even though the parties had always been in agreement that the child should attend the best school possible (which even Appellee's boyfriend did with his child when

> he opted for Westerville schools as opposed to Newark/Heath schools), the child is now in Newark/Heath schools. The parenting time schedule has been disrupted. The child's activities have all changed. The application of the law – a finding of the requisite change of circumstances – would prevent that tug-of-war. (Appellant's Merit Brief, pp.18-19)

Finally, Appellant, at page 19 of his Merit Brief, concluded as follows:

> There is no logical rationale to support a double standard when it comes to children: if there is a change in the residential parent when the original designation was through a Decree of Divorce or Dissolution, a change of circumstances is required; if there is a change in the residential parent when the original designation was through a Decree of Shared Parenting, based upon the decision of the Franklin County Court of Appeals, a change of circumstances is not required.

In her brief, Appellee demonstrates what may be a naivety when it comes to shared parenting and public policy. As set forth above, prior to 1981, Ohio's "public policy" did not recognize co-parenting ("joint custody" or "shared parenting"). In 1981, the parties could, for the first time, request joint custody – but only if they both agreed to do so. Recognizing that public policy mandated that *a court* should determine whether shared parenting was in the best interest of a child, and not one parent who might be vindictive or manipulative because of the termination of a marriage, the statutes were amended. In 1990, the statutes were broadened, and authorized a court to adopt a shared parenting plan if it was in the best interest of the child, *even if* the other parent disagreed.

More and more the legislature and the courts have recognized the very basic principle set forth in R.C. 3109.03 (which applies to all parents, whether married or not):

> When husband and wife are living separate and apart from each other, or are divorced, and the question as to the parental rights and responsibilities for the care of their children and the place of residence and legal custodian of their children is brought before a court of competent jurisdiction, they shall stand upon an equality as to the parental rights and responsibilities for the care of their children and the place of residence and legal custodian of their children, so far as parenthood is involved.

Domestic relations practitioners at the trial court level are aware that the courts tend to favor shared parenting, as prompted by the statutory changes set forth above. Those principles are further buttressed by the changes in March of 2019 to the *child support* statutes. Those changes provide for automatic reductions in child support, and presumed further deviations downward in support, based upon the amount of time a parent is spending with his or her children. Those changes were made precisely because of the overwhelming number of cases in Ohio involving parents who are co-parenting and sharing time with their children.

The fact that a party needs to "request" shared parenting in a pleading or a motion is irrelevant. If a parent does not request that he or she be designated the sole residential parent and legal custodian, the court cannot order such under the supposed "default" provisions which Appellee seems to suggest exist. Appellee's assertion that somehow shared parenting is a step child is not founded either in law, or in fact.

The changes in Ohio law over the last 38 years are supported by multiple studies. One such study is that reported by the American Psychological Association in its June, 2002, Vol 33, No.6 magazine:

> A study published in the March, 2002, Journal of Family Psychology (Vol. 16, No. 1) found that children from divorced families are better adjusted when they live with both parents at different homes or spend significant time with both parents compared with children who interact with only one parent. Robert Bauserman, PhD, of the Baltimore Department of Health and Mental Hygiene . . . examined 1,846 sole-custody and 814 joint-custody children. Both groups of children were compared with a sample of 251 kids in intact families. Bauserman found that children in joint-custody arrangements had fewer behavioral and emotional problems, higher self-esteem and better family relationships and school performance compared with those in sole-custody situations. And he found no significant difference in adjustment among children in shared custody and those living in intact family situations. Joint-custody children probably fare better, according to Bauserman, because they have ongoing contact with both parents. The contact with both parents, he argues, is the key ingredient in kids' adjustment, he said. The findings indicate that children don't necessarily need to be in joint physical custody to

> show better adjustment, they just need to spend substantial time with both parents. Also, according to the research, couples with joint-custody agreements tend to experience less conflict--which speaks to the concern that joint custody is harmful to kids because it exposes them to ongoing parental strife. In fact, Bauserman notes, "it was the sole-custody parents who reported higher levels of current conflict." He found that some research shows that joint custody may actually reduce parental conflict over time.

Further, in *In re Brayden James,* 113 Ohio St.3d 420, 2007-Ohio-2335 (quoted above, in part, in *Fisher*), this Court acknowledged:

> ...that the Constitutions of both the United States and the state of Ohio afford parents a fundamental right to custody of their children. In re Hockstok, 98 Ohio St.3d 238, 2002-Ohio-7208, 781 N.E.2d 971, ¶ 16, citing Santosky v. Kramer (1982), 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599; and In re Murray (1990), 52 Ohio St.3d 155, 157, 556 N.E.2d 1169." (p. 6).

Custody is a right afforded to *both* parents – not just one.

Appellee acknowledges in her brief that her interpretation of R.C. 3109.04(E)(1)(a) and R.C. 3109.04(E)(2)(c) may be "counterintuitive." In fact, her argument, and logic are, as stated above, essentially flawed. If a shared parenting plan can be terminated without *any* change in circumstances whatsoever, it invites the exact tug of war referenced above. In the present case, the child was pulled from one school and community in one county, to another school and community in a different county; the parenting time schedule was disrupted; the child's activities all changed. How did Appellee's ability to do that, without proving any change in circumstances and without providing any evidence that the harm likely to be caused by the change of environment was outweighed by the advantages of the change of environment to the child, promote stability, and reduce conflict? Instead of parenting together under a plan to *which both parents had agreed,* all the changes referenced above were imposed upon Appellant and the child. Appellant was a residential parent and legal custodian *and even the school placement parent.* Without proving any

change, or that the harms would be outweighed by the advantages, his rights were stripped away, and he became a visiting parent.

As a matter of public policy, parents to a shared parenting plan should not be treated as second class citizens. If anything, because of a history of co-parenting under a plan which was determined by a court to be in the child's best interest, the requirements to change that plan should be more stringent that those in custody/visitation arrangement.

V. This Court Is Not to Act as a Trial Court or a Court of Appeals and Weigh Evidence and Determine Facts

Despite the fact that the question certified and to be briefed in this case is "does the termination of a shared parenting plan and decree and subsequent modification of parental rights and responsibilities under R.C. 3109.04(E)(2) require first a finding of a change in circumstances under R.C. 3109.04(E)(1)(a)," Appellee actually requests that this Court review the evidence, and make factual findings in a type of "harmless error" argument. Obviously, if the Appellee was going to request such, she had the opportunity to do so before the Tenth District Court of Appeals. She chose not to do so, and the Court of Appeals made no such finding.

CONCLUSION

For the reasons set forth above, and in Appellant's Merit Brief, the decision of the Court of Appeals should be reversed, and the Proposition of Law should be adopted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon counsel for Appellee by electronic transmission at erobinson@robinsonlegal.org and by regular U.S. Mail at ROBINSON LAW FIRM LLC, 6600 Lorain Avenue #731, Cleveland, OH 44102, this 6th day of January, 2020.

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