



Members Only

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Allocating and Modifying Parental Rights and Responsibilities in Ohio*

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Introduction

In Ohio, custody of a child is referred to as the “allocation of parental rights and responsibilities.” The phrase “parental rights and responsibilities” is not defined in the Revised Code, but has been considered by the Ohio Supreme Court to be the equivalent of “custody and control,” the phrase it replaced. A person with “custody” of a child has “the right to ultimate legal and physical control of the child.” (*Fisher v. Hasenjager* (2007), 116 Ohio St.3d 53, 57; 2007 Ohio 5589, ¶22, citing *Braatz v. Braatz* (1999), 85 Ohio St.3d 40, 43-44.) In any proceeding in which parental rights and responsibilities for the care of a child are allocated, the court may make the allocation in one of the following ways: sole custody, shared parenting, allocation of parental rights and responsibilities to a relative of the child, or certification of jurisdiction to the juvenile court to determine custody of the child. The objective of the court in making the allocation of parental rights and responsibilities is to render a decision that reflects the best interest of the child. The court may not give preference to a parent because of that parent’s financial status. The court may later modify an allocation order.

A court may allocate parental rights and responsibilities in one of four ways.

Methods of allocating parental rights and responsibilities

Designation of one parent as residential parent (sole custody)

A court may allocate the parental rights and responsibilities for the care of a child to one of the parents, designating that parent as the residential parent and legal custodian, and dividing the other rights and responsibilities for the child’s care between the parents. This arrangement is commonly

* This *Members Only* brief is an update of an earlier brief on this subject dated February 25, 2005 (Volume 126 Issue 1).



Sole custody means one parent, designated the residential parent and legal custodian, has primary parental rights and responsibilities for the care of the child.

referred to as “sole custody” although that terminology is rarely used in the Revised Code. The other rights and responsibilities include the provision of financial support and the right of the parent who is not the residential parent and legal custodian to have continuing contact with the child.

One parent will be designated the residential parent and legal custodian when such a designation is in the best interest of the child and one of the following applies: (1) neither parent files a pleading or motion requesting shared parenting, (2) at least one parent files a pleading or motion requesting shared parenting but does not file a shared parenting plan, or (3) at least one parent files a pleading or motion requesting shared parenting and a plan but no plan is in the best interest of the child. (Revised Code § 3109.04(A)(1).)

In the case of parents who were never married, Ohio law provides that the child’s mother is automatically designated the child’s sole residential parent and legal custodian unless a court issues an order to the contrary. (R.C. 3109.042.)

Shared parenting

Shared parenting means the court allocates the parental rights and responsibilities of the care of a child to both parents and requires the parents to share all or some of the aspects of the child’s physical and legal care. Shared parenting is commonly referred to as “joint custody.”

Either or both parents may file a motion requesting shared parenting. A parent who files a request for shared parenting must also file a shared parenting plan. The parents, jointly or separately, may request shared parenting and submit a plan. The court reviews each plan to determine whether it is in the best interest of the child. The court may require modifications to a plan if the plan is not in the best interest of the child. If the parents do not make changes to the plan or the parents propose changes that are not acceptable, the court may reject the request and proceed as if it were never made. A court may approve only one plan and must determine that the plan is in the best interest of the child.

If the court approves a shared parenting plan, it must incorporate the plan into a final shared parenting decree. The final decree must be issued at the same time as, and be appended to, the dissolution of marriage, divorce, annulment, or legal separation decree to which the shared parenting decree relates. The decree takes effect on the date of issuance.

A shared parenting plan must include provisions covering all factors relevant to the care of a child, including physical living arrangements, financial support, medical and dental care, school placement, and the child’s physical location during legal holidays, school holidays, and other days of special importance. When it is in the best interest of the child, the court

Shared parenting means both parents share all or some of the aspects of the child’s physical and legal care.



must require that a plan ensure the opportunity for both parents to have frequent and continuing contact with the child. (R.C. 3109.04(A)(2), (D), and (G).)

In 2002, the Ohio Supreme Court held that the juvenile court has jurisdiction to determine if a shared custody agreement between a parent and a nonparent is in the best interest of the child. (*In re Bonfield* (2002), 97 Ohio St.3d 387; 2002 Ohio 6660). In *Bonfield*, two women in a same-sex relationship were raising children together, but under Ohio law only one of the women had legally recognized rights to the children. The women sought to enter into a shared parenting arrangement as a method of ensuring that, regardless of the couple's relationship, each woman would be involved in raising the children. Although one woman was not a legally recognized "parent" as defined in R.C. 3109.04 and so a shared parenting decree was not available, the Supreme Court recognized that a parent may enter into a custody agreement with a nonparent, subject to a judicial determination that the custodian is "a proper person to assume the care, training, and education of the child." *Id.* at 393-394, 396; ¶¶35, 48-50.

Court grants custody to a relative or certifies jurisdiction to the juvenile court

If the court finds, with respect to a child under 18, that it is in the child's best interest that the court designate neither parent as the residential parent and legal custodian, the court may

commit the child to the custody of a relative. The court may also certify its finding that neither parent should be the residential parent and legal custodian to the juvenile court. On certification, the juvenile court has exclusive jurisdiction to make custody decisions. (R.C. 3109.04(D)(2).)

Parents have a fundamental right to the care, custody, and control of their child (*Troxel v. Granville* (2002), 530 U.S. 57, 66). Therefore, in order for a nonparent to gain custody of the child, the court must first make a determination that the child's parents are unsuitable. Without a finding of unsuitability, the allocation of parental rights and responsibilities to a nonparent infringes on the parent's fundamental right. (*Hockstok v. Hockstok* (2002), 98 Ohio St.3d 238, 242; 2002 Ohio 7208, ¶17.)

Best interest of the child

In determining the best interest of a child in allocating parental rights and responsibilities, the court must consider all relevant factors. While the court has discretion in determining what is relevant, the Revised Code lists specific factors that must be considered depending on the type of custody allocation. (R.C. 3109.04(F)(1).)

Custody allocations other than shared parenting

When allocating parental rights and responsibilities other than by

The court has discretion in determining the best interest of the child but must consider certain factors specified by law.

The court may commit a child to the custody of a relative or certify jurisdiction over the child to the juvenile court, if it would not be in the best interest of the child to designate either parent the residential parent and legal custodian.



shared parenting, the court must consider the following factors (R.C. 3109.04(F)(1)):

- The parents' wishes;
- If the child was interviewed in chambers, the wishes and concerns of the child as expressed to the court;
- The child's interaction and interrelationship with parents, siblings, and other persons who may significantly affect the child's best interest;
- The child's adjustment to home, school, and community;
- The mental and physical health of all persons involved;
- The parent more likely to honor and facilitate court-approved parenting time rights or companionship and visitation rights;
- Whether either parent has failed to make child support payments;
- Whether either parent has been convicted of or pleaded guilty to committing a criminal offense involving an act that resulted in a child being abused or neglected;
- Whether either parent, in a case in which a child has been adjudicated abused or neglected, has been determined to be the perpetrator of the abusive or neglectful act;
- Whether either parent has been convicted of or pleaded guilty to committing an offense of domestic violence, a sexually oriented offense, or an offense that caused physical harm, against a member of the parent's family or household;
- Whether there is reason to believe that either parent has acted in

a manner resulting in a child being abused or neglected;

- Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent visitation;
- Whether either parent has established, or is planning to establish, a residence outside this state.

Shared parenting

A court considering whether shared parenting is in the best interest of a child must consider all relevant factors, including those listed above and the following additional factors that are applicable to shared parenting determinations (R.C. 3109.04(F)(2)):

- The ability of the parents to cooperate and make decisions jointly concerning the child;
- The ability of each parent to encourage the sharing of love, affection, and contact between the child and the other parent;
- Any history of, or potential for, child abuse, spousal abuse, other domestic violence, or parental kidnapping by either parent;
- The geographic proximity of the parents to each other;
- The recommendation of the guardian ad litem;
- Deviation factors listed in statute (R.C. 3119.23) that courts may consider when determining the amount of support under a child support order.



Modification

General procedure

A court may modify a decree allocating parental rights and responsibilities only if it finds, based on the facts that have arisen since the decree or that were unknown to the court at the time of the decree, that there has been a change in the circumstances of the child, the residential parent, or either of the parents subject to a shared parenting decree and that modification is necessary to serve the best interest of the child. The court must retain the residential parent designated by the decree, unless a modification is in the best interest of the child and one of the following applies: (1) the residential parent in a sole custody situation (or both parents under a shared parenting decree) agrees to change the residential parent designation, (2) the child, with the residential parent's consent (or both parents' consent under a shared parenting decree), has been integrated into the family of the person seeking to become the residential parent, or (3) the advantages of a change in the child's environment outweigh the disadvantages.

Either or both parents under a decree allocating parental rights and responsibilities that is not shared parenting may file a motion requesting that the decree be modified to a shared parenting decree. The court may make the modification if it is authorized because of a change of circumstances, shared parenting is

in the best interest of the child, and the shared parenting plan complies with the legal requirements for such plans.

Parents under a shared parenting decree may jointly modify the terms of a shared parenting plan that the court has approved. The parents may make the modifications at any time by jointly filing the modifications with the court. The court must include the modifications in the plan unless they are not in the best interest of the child. If the modifications are not in the best interest of the child, the court may reject the modifications or alter the proposed modifications to the plan. Modifications become effective at the time the court includes them in the shared parenting plan.

Regardless of whether the parents request that the court modify a shared parenting plan, the court may modify the terms of a court approved plan on its own motion at any time if it determines that modifications are in the best interest of the child.

The court may terminate a shared parenting decree that includes a jointly proposed shared parenting plan on the request of one or both parents or whenever it determines that shared parenting is not in the best interest of the child. The court may terminate a decree that includes a plan originally proposed by one of the parents if the court determines, on its own motion or the request of one or both parents, that shared parenting is no longer in the best interest of the child. If the parents attempt to jointly modify a plan

Parents may jointly modify a court approved shared parenting plan.

The court may modify a prior decree if there has been a change of circumstances and modification is necessary to serve the best interest of the child.

The court may make modifications to or terminate a shared parenting plan at any time if it is in the best interest of the child.

Either or both parents may request that a decree be modified to a shared parenting decree.



that is the basis of a decree and the court rejects the modifications, the court may terminate the decree if the court determines that shared parenting is not in the best interest of the child. If it terminates a shared parenting decree, the court must issue a modified decree allocating parental rights and responsibilities for the care of the child as if the court had not issued a shared parenting decree. (R.C. 3109.04(E).)

Procedure when a parent is called to active military service

When a parent who is subject to an order allocating parental rights and responsibilities, or for whom such an order is pending, is ordered to active military service in the uniformed services, that parent must notify the other parent who is subject to the order within three days of receiving notice of the activation. Either parent may then apply to the court for a hearing to expedite an allocation or modification proceeding.

After receiving the application, the court must then schedule a hearing. The hearing must be held within 30 days after receipt of the application, except under exigent circumstances. The court may not modify a prior decree allocating parental rights and responsibilities unless the court determines that there has been a change in circumstances of the child, the child's residential parent, or either of the parents subject to a shared parenting decree, and that modification is necessary to serve

the best interest of the child. The court may consider active military service in the uniformed services in determining whether a change in circumstances exists and must make specific written findings of fact to support any modification.

The court may also modify a prior decree allocating parental rights and responsibilities after the parent's active military service has been terminated. The court also may issue a temporary order allocating or modifying parental rights and responsibilities during the parent's active military service. (R.C. 3109.04(I).)

Change in circumstances

In 2007, the Ohio Supreme Court held that based upon statute, a modification of the designation of residential parent and legal custodian of a child requires a determination that a "change in circumstances" has occurred, as well as finding that the modification is in the best interest of the child. (*Fisher v. Hasenjager* (2007), 116 Ohio St.3d 53, 60-61; 2007 Ohio 5589, ¶37.) A different 2007 Ohio Supreme Court case listed several factors that have been considered by Ohio courts as potentially fulfilling the "change in circumstances" requirement. These include a new marriage that creates hostility by the residential parent and spouse toward the nonresidential parent, frustrating attempts at visitation; the advancement of a child from infancy to adolescence; unruly behavior of the residential



parent involving the police; and fights between the residential parent and a new spouse that required police intervention, along with the fact that the residential parent had frequently moved. (*In re James* (2007), 113 Ohio St.3d 420, 424; 2007 Ohio 2335, ¶18.) 

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