



## Allocating and Modifying Parental Rights and Responsibilities in Ohio\*

PREPARED BY: AMY L. ARCHER, RESEARCH ASSOCIATE  
REVIEWED BY: RALPH D. CLARK, DIVISION CHIEF

### 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."<sup>1</sup> A court may allocate parental rights and responsibilities for the care of a child 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 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.

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

\*This *Members Only* brief is an update of an earlier brief on this subject dated July 30, 2008 (Volume 127 Issue 12).



## **Methods of allocating parental rights and responsibilities**

### ***One parent as residential parent (sole custody)***

A court may allocate the parental rights and responsibilities for the care of a child to one parent, 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 referred to as "sole custody," although that terminology is rarely used in the Revised Code. The other rights and responsibilities include 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 the designation is in the child's best interest 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 and a shared parenting plan but no plan is in the child's best interest.<sup>2</sup>

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. However, if the mother has been convicted of or pleaded guilty to

rape or sexual battery and has been declared to be the parent of a child born as a result of that rape or sexual battery, she cannot be designated the residential parent and legal custodian of that child.<sup>3</sup>

### ***Shared parenting***

Shared parenting means the court allocates the parental rights and responsibilities to both parents and requires them to share all or some 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 court reviews each plan to determine whether it is in the best interest, and may require modifications if the plan is not in the child's best interest. If the parents do not make changes or they 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 child's best interest. The court must incorporate the approved plan into a final shared parenting decree.

A shared parenting plan must cover all factors relevant to the child's care, 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 child's

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

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



best interest, the court must require that a plan ensure the opportunity for both parents to have frequent and continuing contact with the child.<sup>4</sup>

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 child's best interest.<sup>5</sup> In *Bonfield*, two women in a same-sex relationship were raising children together, but under Ohio law only one 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 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."<sup>6</sup>

#### ***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 to designate neither parent as the residential parent and legal custodian, the court may commit the child to the custody of a relative. The court also may certify to the juvenile court its finding that neither parent should be the residential parent and legal custodian.

On certification, the juvenile court has exclusive jurisdiction to make custody decisions.<sup>7</sup>

Parents have a fundamental right to the care, custody, and control of their child.<sup>8</sup> Therefore, for a nonparent to gain custody, the court first must make a determination that the parents are unsuitable. Without a finding of unsuitability, the allocation of parental rights and responsibilities to a nonparent infringes on the parents' fundamental right.<sup>9</sup>

#### ***Best interest of the child***

In determining the best interest of a child when 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.<sup>10</sup>

#### ***Custody allocations other than shared parenting***

When allocating parental rights and responsibilities other than by shared parenting, the court must consider the following factors:<sup>11</sup>

- The parents' wishes;
- If the child was interviewed in chambers, the child's wishes and concerns as expressed to the court;
- The child's interaction and interrelationship with parents, siblings, and others who may significantly affect the child's best interest;

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*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 child's best interest to designate either parent as the residential parent and legal custodian.*

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



A parent's performance or likely performance in allowing or facilitating parenting time may be considered in allocating parental rights and responsibilities.

The court may modify a prior decree if there has been a change of circumstances and modification is necessary to serve 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 the residential parent (or one of the parents subject to a shared parenting decree) has continuously and willfully denied parenting time to the other parent;
- Whether either parent has failed to make child support payments;
- Whether either parent has been convicted of or pleaded guilty to a criminal offense 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 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 either parent has established, or is planning to establish, a residence outside Ohio.

### **Shared parenting**

A court considering whether shared parenting is in the child's best interest must consider all relevant factors, including those listed above and the following additional factors:<sup>12</sup>

- The parents' ability to cooperate and make decisions jointly concerning the child;
- Each parent's ability 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;
- The recommendation of the guardian ad litem;
- Deviation factors listed in statute<sup>13</sup> 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 facts that have arisen since the decree, or that were unknown to the court at the time of the decree, that (1) 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 (2) modification is necessary to serve the child's best interest. The court must retain the residential parent designated by the decree, unless a modification is in the child's best interest and one of the following applies: (a) the residential parent in a sole custody situation (or both parents under a shared parenting decree) agrees to change the residential parent designation, (b) 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 (c) the advantages of a change in the child's environment outweigh the disadvantages.

Either or both parents under a decree 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 child's best interest, and the shared parenting plan complies with the legal requirements for such plans.

Parents under a shared parenting decree may jointly modify the court-approved terms. They 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 child's best interest. If the modifications are not in the child's best interest, the court may reject the modifications or alter the proposed modifications or the plan.

The court may modify the terms of a court-approved shared parenting plan on its own motion at any time if it determines that modifications are in the child's best interest.

The court may terminate a shared parenting decree on the request of one or both parents or whenever it determines that shared parenting is not in the child's best interest. If the parents attempt to jointly modify a plan that is the basis of a shared parenting decree and the court rejects the modifications, the court may terminate the decree if the court determines that shared parenting is not in the child's best interest. 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.<sup>14</sup>

#### *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 an action for an order is pending, is ordered to active military service, that parent must notify the other parent 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 so that the court can issue an order before the active military service begins.

The court must then schedule a hearing, which must be held not later than 30 days after receipt of the application, except under exigent

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*Parents may jointly modify a court-approved shared parenting plan.*

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

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*The court may modify or terminate a shared parenting plan at any time if it is in the child's best interest.*



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*Either parent may apply for an expedited hearing to allocate or modify parental rights and responsibilities so an order may be issued before military service begins.*

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*A court may also temporarily allocate or modify parental rights and responsibilities and limit the temporary order to the duration of the parent's military service.*

circumstances. The court cannot modify a prior decree allocating parental rights and responsibilities unless the court determines that (1) there has been a change in circumstances of the child, the residential parent, or either of the parents, and (2) modification is necessary to serve the child's best interest. The court cannot find past, present, or possible future active military service to be a change in circumstances justifying modification, and must make specific written findings of fact to support any modification.

The court also may issue a temporary order allocating or modifying parental rights and responsibilities during the active military service. The temporary order must specify whether the military service is the basis of the temporary order, and must provide for its termination and resumption of the prior order within ten days after receipt of notice of the termination date of the military service, unless the other parent demonstrates that resumption of the prior order is not in the child's best interest. The parent ordered to active military service must provide written notice of the date of termination not later than 30 days after the service ends. At

the request of the parent ordered to active military service, the court must allow the parent to participate in the temporary order proceeding and to present evidence by electronic means to the extent permitted by the rules of the Ohio Supreme Court.<sup>15</sup>

### *Change in circumstances*

In 2007, the Ohio Supreme Court held that based on 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 child's best interest.<sup>16</sup> 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 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.<sup>17</sup> 



## Endnotes

<sup>1</sup> *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.

<sup>2</sup> R.C. 3109.04(A)(1).

<sup>3</sup> R.C. 3109.042(A) and (B).

<sup>4</sup> R.C. 3109.04(A)(2), (D), and (G).

<sup>5</sup> *In re Bonfield* (2002), 97 Ohio St.3d 387; 2002 Ohio 6660.

<sup>6</sup> *Bonfield* at 393-394, 396; ¶¶ 35, 48-50.

<sup>7</sup> R.C. 3109.04(D)(2).

<sup>8</sup> *Troxel v. Granville* (2002), 530 U.S. 57, 66.

<sup>9</sup> *Hockstok v. Hockstok* (2002), 98 Ohio St.3d 238, 242; 2002 Ohio 7208, ¶ 17.

<sup>10</sup> R.C. 3109.04(F)(1).

<sup>11</sup> R.C. 3109.04(F)(1).

<sup>12</sup> R.C. 3109.04(F)(2).

<sup>13</sup> R.C. 3119.23.

<sup>14</sup> R.C. 3109.04(E).

<sup>15</sup> R.C. 3109.04(I).

<sup>16</sup> *Fisher v. Hasenjager* (2007), 116 Ohio St.3d 53, 60-61; 2007 Ohio 5589, ¶ 37.

<sup>17</sup> *In re James* (2007), 113 Ohio St.3d 420, 424; 2007 Ohio 2335, ¶ 18.

**PUBLISHED BY THE OHIO  
LEGISLATIVE SERVICE  
COMMISSION STAFF**

9th Floor  
Vern Riffe Center  
Columbus, Ohio  
(614) 466-3615

Deputy Director  
Jim Kelly

Author  
Amy L. Archer  
Research Associate

Reviewer  
Ralph D. Clark  
Division Chief

Layout & Design  
Linda Bayer