IN THE SUPREME COURT OF OHIO

Kayleigh Bruns, Appellee, v. Marcus Green, Appellant.	Case No. 2019-1028 2019-1178 On Appeal from the Franklin County Court of Appeals, Tenth Appellate District

MERITS BRIEF OF APPELLEE KAYLEIGH (BRUNS) PAUL

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STATEMENT OF FACTS

Appellee Kayleigh M. (Bruns) Paul and appellant Marcus D. Green ("Green") are the birth parents of [redacted], the minor child at the center of this case. [redacted] was born on [redacted]. (Sept. 13, 2017 Tr. at 6:16-17.)

Unmarried, Green and Mrs. Paul (at the time, Miss Bruns) lived together both before and after [redacted]'s birth, though not without interruption. Green was unfaithful on multiple occasions, causing Mrs. Paul to move out temporarily while she was eight months pregnant with [redacted] and again a few months after [redacted] was born. (*Id.* at 35:24-36:6.) Green continued his pattern of infidelity, ultimately forcing Mrs. Paul to permanently move out of the couple's Westerville apartment in March 2014.[1] (*Id.* at 37:4-38:4.)

The move was sudden and unplanned. Without the luxury of time to make more permanent arrangements, Mrs. Paul obtained a short-term lease in Pickerington. (*Id.* at 69:16-21.) But once Mrs. Paul was on her own, Green began following her. (*Id.* at 93:23.) He also began arriving at her residence "at all hours of the night" and harassing her. (*Id.*) Up until moving in with Green, Mrs. Paul had lived at home with her mother in Heath, Ohio. (*Id.* at 33:19-24.) In light of Green's infidelity and frightening behavior, Mrs. Paul moved back to Heath to live with her mother, having lived in Pickerington for only about six months. (Apr. 12, 2017 Tr. at 51:12-13.)

Around this same time, on October 10, 2014, Mrs. Paul and Green entered into an agreed shared parenting plan. (Agreed Shared Parenting Plan at 1.) Mrs. Paul filed her formal relocation notice—informing Green and the trial court of her move to Heath—on October 24, 2014, two weeks after the plan was formalized. (Oct. 24, 2014 Change of Address or Relocation at 1.) Such

[1] Appellant's brief erroneously states that this occurred in March 2013. Appellant Br. at 4.

a move to a contiguous county[2] was explicitly contemplated by the agreed shared parenting plan. (*See* Agreed Shared Parenting Plan at 8.) And, at any rate, Mrs. Paul had informed Green of her intended move months earlier—well before the parties agreed to the shared parenting plan.[3] (July 13, 2017 Tr. at 48:15-49:6.)

Unfortunately for all involved, but particularly for [redacted], Green proved unwilling to cooperatively co-parent with Mrs. Paul. While, as in all such cases, there was undoubtedly some fault on both sides, here it was plainly Green who regularly belittled, threatened, and harassed Mrs. Paul. And while Mrs. Paul sought to be as flexible as possible out of concern for [redacted] and consideration for Green, Green, by contrast, consistently went out of his way to make the arrangement as difficult as possible. In short, as the trial court found, Green made shared parenting unworkable.

Green's malfeasance ranged from the petty to the truly frightening. Regarding the former, he would refuse to pick [redacted] up from the park she was visiting a few hundred yards down the street from Mrs. Paul's house because the house was the "agreed" pickup location (Sept. 13, 2017 Tr. at 163:22-166:16); he failed to specify pickup times for [redacted], expecting Mrs. Paul to be available during a six-to-seven-hour window (*id.* at 135:11-14, 165:5-8); and yet he left a scheduled pickup site and refused to return when Mrs. Paul was nine minutes late due to a home visit from [redacted]'s guardian ad litem (*id.* at 126:1-2, 131:8, 132:6-11). As to the latter, he repeatedly threatened Mrs. Paul, telling her, variously, that she would "never see [redacted] again" and that she "better have bail money ready" in light of contrived violations of the agreed shared

[2] Heath is in Licking County.

[3] Green asserts, without citation to record support (the Relocation Notice to which he cites does not address the issue), that Mrs. Paul did not provide him with "any prior notification" of this move. Appellant Br. at 4. Not only is this assertion factually incorrect, Green also has failed to provide any authority for the proposition that early, informal notice was required.

parenting plan. (*Id.* at 171:5-172:16, 167:1-2.) He searched the garbage at the home of the friend with whom Mrs. Paul stayed during one of Green's bouts of infidelity. (July 14, 2017 Tr. at 269:18-270:17.) And on one occasion—recorded by Mrs. Paul in the parking lot of [redacted]'s preschool—Green kicked Mrs. Paul and threatened to "punch [her] in [her] motherf[-]cking face." (Sept. 13, 2017 Tr. at 191:15, 194:20-21.)

Despite Green's behavior, Mrs. Paul continued to do what she could to facilitate co-parenting. Under the terms of the agreed shared parenting plan, Green was required to pay 60% of [redacted]'s preschool tuition. (Agreed Shared Parenting Plan at 10.) When he stopped paying, Mrs. Paul picked up the entire tab, without reimbursement. (Sept. 13, 2017 Tr. at 108:14-110:2.) When Green scheduled new medical appointments for [redacted] (or unilaterally cancelled an appointment made by Mrs. Paul and rescheduled his "own" (*id.* at 234:15-17)), he typically scheduled them during Mrs. Paul's parenting time. (*Id.* at 202:21-203:2.) Mrs. Paul could have easily retaliated but instead always scheduled appointments during her own parenting time to minimize the inconvenience to Green. (*Id.* at 10:16-19, 203:3-12.)

Similarly, Green's work schedule eventually changed, requiring early-morning and late-afternoon hours with a gap in the middle of the day. (*Id.* at 199:4-8.) "[T]o make it easier on" Green, Mrs. Paul agreed to allow Green to take [redacted], who stayed with him weekly from late Wednesday through Friday, at noon on Wednesday, working around his schedule and giving him a bit of extra time with [redacted]. (Sept. 13, 2017 Tr. at 200:9.) But Green did not return the favor. (*Id.* at 199:18-25.) To the detriment not only of Mrs. Paul but of [redacted] herself, Green would not allow Mrs. Paul to pick up [redacted] and commence her weekend parenting prior to Green's Friday afternoon shift but instead insisted on sending [redacted]e back to daycare after his mid-day break until late in the afternoon, when his legally allotted parenting time officially ended, needlessly

prolonging her separation from *both* parents. (*Id.* at 199:11-25.) The same was true on weekends themselves: Though the agreed shared parenting plan gave both parents the right of first refusal,[4] when Green had to work on a weekend during which he had [redacted], he would often send her to daycare for the day rather than allow her mother to take care of her. (Agreed Shared Parenting Plan at 4; Sept. 13, 2017 Tr. at 121:3-123:17.)

Things came to a head in June 2015, when, despite all this, *Green* filed a Motion for Change of Parental Rights and Responsibilities, seeking to "take full custody" of [redacted]. (Mot. for Change of Parental Rights & Responsibilities at 1. *See also* App'x at 24.) In response, Mrs. Paul filed a Motion to Terminate Shared Parenting in August 2015. (App'x at 24.) Green filed his own Motion to Terminate Shared Parenting in September 2015. (*Id.*)

Over two years passed. Then, following several days of testimony, the trial court filed a judgment entry *terminating* shared parenting as requested. (App'x at 34 ("The parties' Joint Shared Parenting Plan is *terminated* effective the date of the filing of this Judgment Entry." (emphasis altered)).) In that lengthy, well-reasoned entry, the trial court noted, among other things, that Green "ha[d] failed to fully comply with the terms of the Agreed Shared Parenting Plan," that he "ha[d] previously threatened to cause physical harm to" Mrs. Paul, that he had exhibited "inappropriate and aggressive behavior," and that he had "failed to present credible evidence that [Mrs. Paul] was uncooperative." (*Id.* at 29-32.) As to Mrs. Paul, the court found that she was "the party most likely to honor and facilitate parenting time," that she was "more cooperative than" Green, and that she was "likely to . . . encourage [[redacted]'s] contact with" Green. (*Id.* at 29-31.) The court also noted that [redacted]'s guardian ad litem had "recommended that the parties' Shared

[4] That is, if either parent was unavailable to watch [redacted] for more than two hours during his or her scheduled parenting time, that parent was required to give the other the option to care for [redacted] during that time.

Parenting Plan terminate and that Mother be designated as the sole residential parent and legal custodian of" [redacted]. (*Id.* at 31.) Despite terminating the shared parenting plan, the trial court still granted Green generous visitation, providing him with parenting time Wednesday through Friday, and every other weekend, until [redacted] started kindergarten, at which time [redacted] was to stay with her mother during the school week and with Green every other weekend during the school year and two out of every three weeks during the summer. (*Id.* at 34-36.)

Unhappy with this result, Green appealed. He argued that the trial court committed reversible error when it terminated the shared parenting decree pursuant to R.C. 3109.04(E)(2)(c) without making the finding of changed circumstances required by a different, independent subdivision of the statute, R.C. 3109.04(E)(1)(a). (App'x at 12-13.) He also argued that the child-support payments he was ordered to make were too high.[5] (*Id.* at 13.) The Tenth District Court of Appeals rejected both arguments and affirmed. (*Id.* at 13-23.) Regarding the change-of-circumstances argument, the court of appeals held that R.C. 3109.04(E)(1)(a) and R.C. 3109.04(E)(2)(c) are independent provisions, the former applying to modifications of prior allocations of parental rights and responsibilities while the latter—which does not require a finding of changed circumstances—applies, independently and exclusively, to termination of shared parenting decrees. (*Id.* at 17-18.)

Green subsequently filed a notice of appeal and memorandum in support of jurisdiction in this Court on July 29, 2019, case number 2019-1028, solely on the R.C. 3109.04(E)(1)(a)/ R.C. 3109.04(E)(2)(c) change-of-circumstances issue. While decision on that memorandum was

[5] Green also raised a third issue, regarding the time of day at which his alternate-weekends parenting time was to commence. (Appellant's 10th Dist. Br. at 22.) This issue was ultimately rendered moot and not discussed in the court of appeals's opinion. (*See* Appellee's 10th Dist. Br. at 23.)

pending, Green filed a notice of certified conflict on August 23, 2019, in case number 2019-1178, again solely as to the R.C. 3109.04(E) change-of-circumstances issue. (Notice of Certified Conflict at 1.) Though the Tenth District and *ten* other courts of appeals have concluded that R.C. 3109.04(E)(1)(A) and R.C. 3109.04(E)(2)(c) are independent provisions and that the latter applies independently and exclusively to *termination* of shared parenting like that at issue here, one district—the Fifth—has reached the opposite conclusion. (App'x 5-8.)

On October 16, 2019, this Court filed an entry in the certified-conflict case acknowledging the conflict (Case No. 2019-1178, Oct. 16, 2019 Entry at 1), accepted the appeal in the jurisdictional case (Case No. 2019-1028, Oct. 16, 2019 Entry at 1), consolidated the two cases (*id.*), and ordered merits briefing on a single issue:

> Does the termination of a shared parenting plan and decree and subsequent modification of parental rights and responsibilities under RC. 3109.04(E)(2) require first a finding of a change in circumstances under R.C.3109.04(E)(l)(a)?

(Case No. 2019-1178, Oct. 16, 2019 Entry at 1.) [6]

[6] The Statement of Facts in Green's opening brief contains several errors in addition to the those noted in footnotes 1 and 3. Green asserts that, "[r]ather than allow [redacted] to enroll in Kindergarten at Westerville Schools pursuant to the parties' Agreed Shared Parenting Plan, [Mrs. Paul] unilaterally chose to enroll [redacted] in the Kindergarten program at [redacted]." Appellant Br. at 6. But in fact [redacted] did not begin kindergarten until *after* the shared parenting plan was already terminated. That is, by the time she began kindergarten, Mrs. Paul had already been granted sole custody. (*E.g.*, App'x at 26, 34 (terminating shared parenting plan, ordering a parenting schedule that was to remain in place "until the child starts kindergarten," and noting that "[redacted] is expected to start kindergarten sometime in August/September of 2018").)

Other errors in Green's Statement of Facts are individually less significant, but their cumulative effect is noteworthy:

- Green's brief asserts that a preschool staff member "testified as to several dates on which [Mrs. Paul] had left [redacted] at daycare in excess of twelve (12) hours . . . ." (Appellant's Br. at 5.) In reality, the cited transcript pages show only *two* occasions on which Mrs. Paul left [redacted] at preschool for anywhere close to twelve hours (and even on those days, the total was still less than, not "in excess of," twelve hours). (Apr. 11, 2017 Tr. at 76:3-9, 76:24-77:4.) The only date on which [redacted] *was* left for a full

ARGUMENT

Proposition of Law

Termination and modification are distinct concepts under R.C. 3109.04(E), and distinct, exclusive statutory requirements are in place with respect to each. Whereas *modification* of a shared parenting decree requires, *inter alia*, a finding of changed circumstances under R.C. 3109.04(E)(1)(a), actual *termination* of a shared parenting decree pursuant to R.C. 3109.04(E)(2)(c) simply requires a determination that continued shared parenting is not in the best interest of the child.

*** * ***

Revised Code 3109.04(E) governs the modification and termination of parenting plans and decrees. All told, its subdivisions address five different ways in which a parenting plan or decree may be modified or terminated. Subdivision (E)(1)(a) governs "court . . . *modif*[*ication*] [of] a prior decree allocating parental rights and responsibilities"; subdivision (E)(1)(b) governs parental requests that a "prior decree allocating parental rights and responsibilities . . . that is not a shared parenting decree . . . be *modified* to give both parents shared rights and responsibilities for the care

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twelve hours was, according to this testimony, February 23, 2017—a Thursday, *i.e.*, one of *Green's* parenting days. (*Id.* at 76:18-23; Agreed Shared Parenting Plan at 3-4.)

- Green asserts that witness Kara Paddock was "hired by the parties" to babysit [redacted], thereby lending her testimony an air of neutrality and, thus, credence. (Appellant's Br. at 5.) In reality, the cited transcript pages do not support this assertion. (*See* Apr. 11, 2017 Tr. at 42:1-44:25.) Ms. Paddock was hired exclusively by Green. (*See id.*)
- Green implies that Journey—Mrs. Paul's other daughter and [redacted]'s half-sister—was shuffled from school to school, stating that Mrs. Paul "moved Journey from Westerville Schools to Reynoldsburg [S]chools and then to Heath [S]chools." (Appellant Br. at 6.) To the contrary, the record is clear that Journey, currently an eighth-grader, has attended Heath Schools all of her life, except for a brief stint in the Westerville School District while Green and Mrs. Paul lived together. (Sept. 3, 2017 Tr. at 14:5-15:1.) Green cites the "Sept. 3, 2017" transcript as support for his contention that Journey also attended Reynoldsburg Schools, but no hearing was held on September 3, 2017. (Appellant Br. at 6.) This is presumably a mere typographical error, but the September *13*, 2017 transcript does not support the proposition either.
- Green is technically correct that Justin Paul is Mrs. Paul's "current husband" (*id.* at 5), but the implication that Mrs. Paul was married previously is false.

of the children"; subdivision (E)(2)(a) governs parent-proposed "joint[]" motions "under a shared parenting decree" to "*modify* the terms of the plan for shared parenting [previously] approved by the court"; subdivision (E)(2)(b) governs "*modif*[*ication*] [to] the terms of [a] plan for shared parenting" made upon the court's "own motion" or devised by the court at the request of one or both parents; and subdivision (E)(2)(c) governs "*terminat*[*ion*] [of] a prior shared parenting decree that includes a shared parenting plan." (Emphasis added). Each of these five subdivisions, in turn, sets forth specific requirements that must be met in order to effect the particular type of modification or termination that that subdivision governs.

There is no disputing the fact that the case at bar centers on the *termination* of a shared parenting plan and decree. Neither party argues otherwise; to the contrary, both affirm the point. *E.g.*, Appellant's Br. at 18 ("there is no longer a shared parenting plan and order"); *id.* at 19 (urging this Court to "state unequivocally that R.C. 3109.04(E)(1)(a) applies to *termination*" (emphasis added)). And this Court has granted review limited to a single issue: "Does the *termination* of a shared parenting plan and decree and subsequent modification of parental rights and responsibilities under RC. 3109.04(E)(2) require first a finding of a change in circumstances under R.C.3109.04(E)(l)(a)?"[7] (Case No. 2019-1178, Oct. 16, 2019 Entry at 1 (emphasis added).) Further, the parties agree that subdivisions (E)(1)(b), (E)(2)(a), and (E)(2)(b) do not apply here.

[7] The wording of this question might tempt the Court or Green (though so far he has avoided the temptation) to take the view that what we have here is actually a two-stage process: first, a termination of an existing shared parenting plan and decree (to which R.C. 3109.04(E)(2)(c) applies) and, later, the modification of parental rights and responsibilities (to which R.C. 3109.04(E)(1)(a) applies). But the statute makes quick work of any such argument. R.C. 3109.04(E)(1)(a) only applies to "modif[ication] *of a prior decree*." (Emphasis added). So if the shared parenting decree has already been terminated pursuant to R.C. 3109.04(E)(2)(c) (*i.e.*, no longer exists), then by definition it cannot be modified. Second, and related, R.C. 3109.04(E)(2)(d) is crystal clear that, once a shared parenting decree is terminated, the modification subdivisions of R.C. 3109.04(E) can no longer apply. Rather, things start from

The only dispute, then, is whether this *termination* case is controlled by R.C. 3109.04(E)(1)(a), which governs "*modif*[*ication*] [of] a prior decree allocating parental rights and responsibilities" or, rather, by R.C. 3109.04(E)(2)(c), which governs "*terminat*[*ion*] [of] a prior shared parenting decree that includes a shared parenting plan." (Emphasis added). Though Appellant Green contends otherwise, the correct answer to this question is the obvious one: The subdivision specifically governing *termination*, subdivision (E)(2)(c), controls this *termination* case. This is so for several reasons. The plain language of the statute requires this result, as does the statute's structure. To conclude otherwise would do violence to this Court's decision in *Fisher v. Hasenjager*, 116 Ohio St.3d 53, 2007-Ohio-5589, 876 N.E.2d 546. The scant authority (11 of 12 courts of appeals support Mrs. Paul's position) supporting Green's position is ill-reasoned and unpersuasive. And there are sound policy reasons for interpreting the statute as written and as interpreted by the overwhelming majority of courts of appeals.

Green's arguments to the contrary are deeply misguided, inimical to both statutory text and precedent. As explained in greater detail below, then, the judgment of the court of appeals should be affirmed.

I. The Structure and Plain Language of the Statute Make Clear that Modification and Termination Are Independent, Exclusive Concepts to Which Different Standards Apply.

Subdivisions (E)(1)(a) and (E)(2)(c) are distinct provisions governing distinct situations and setting forth exclusive standards to be applied depending on which subdivision is invoked.

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scratch:

> Upon the termination of a prior final shared parenting decree under division (E)(2)(c) of this section, the court shall proceed . . . under the standards applicable under divisions (A), (B), and (C) of this section as if no decree for shared parenting had been granted and as if no request for shared parenting ever had been made.

Specifically, subdivision (E)(1)(a) governs "modif[ication]" of "a prior decree allocating parental rights and responsibilities," while subdivision (E)(2)(c), by contrast, governs *termination* of shared parenting decrees. Subdivision (E)(1)(a) provides, in full:

> 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.

R.C. 3109.04(E)(1)(a) (emphasis added). And, for its part, subdivision (E)(2)(c) states:

> The court may **terminate** a prior final shared parenting decree that includes a shared parenting plan approved under division (D)(1)(a)(i) of this section upon the request of one or both of the parents or whenever it determines that shared parenting is not in the best interest of the children. The court may terminate a prior final shared parenting decree that includes a shared parenting plan approved under division (D)(1)(a)(ii) or (iii) of this section if it determines, upon its own motion or upon the request of one or both parents, that shared parenting is not in the best interest of the children. If modification of the terms of the plan for shared parenting approved by the court and incorporated by it into the final shared parenting decree is attempted under division (E)(2)(a) of this section and the court rejects the modifications, it may terminate the final shared parenting decree if it determines that shared parenting is not in the best interest of the children.

R.C. 3109.04(E)(2)(c) (emphasis added).

As already discussed, it is undisputed that the present case centers on a termination, not a

mere modification. Thus, pursuant to the plain language of the statute, R.C. 3109.04(E)(2)(c)—not R.C. 3109.04(E)(1)(a)—applies. Accordingly, pursuant to the terms of R.C. 3109.04(E)(2)(c), the trial court was required to determine only that termination of the shared parenting plan and decree at issue was "in the best interest of" [redacted]. The trial court made such a determination and Green does not contend otherwise. That should be the end of the matter. Indeed, that is the result the court of appeals reached in this case, as well as the result reached by every other court of appeals in the state save one. *See In re A.C.*, 1st Dist. Hamilton No. C-180088, 2019-Ohio-2891, ¶ 17 (collecting cases).

Despite this plain language and the nearly unanimous judgment of the state's appellate courts, Green argues that (E)(1)(a), rather than (E)(2)(c), applies, contending that "[a] modification, of course, encompasses a termination." Appellant's Br. at 7. And he argues that "modification" versus "termination" "is a distinction without a difference." *Id.* at 18. *See also id.* at 13 ("termination of a shared parenting plan is a form of modification" (capitalization deleted)). In Green's estimation, then, termination is a type of modification and, therefore, subdivision (E)(1)(a), governing modification, should apply to terminations rather than the termination-specific (E)(2)(c). But there are numerous reasons why this approach is wrong. First, even if Green were correct in his argument that termination is a subcategory of modification, still (E)(2)(c) should control here. It is a long-established rule of statutory construction that "the specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645, 132 S.Ct. 2065, 182 L.Ed.2d 967 (2012) (quoting *Morales v. TWA*, 504 U.S. 374, 384, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992)). Termination, under Green's theory, is a specific subset of modification. Therefore, pursuant to this canon, (E)(2)(c), the specific subdivision addressing termination, should trump (E)(1)(a), the general modification subdivision.

Green's approach is also wrong because, if (E)(1)(a) rather than (E)(2)(c) applies in cases of termination, then (E)(2)(c) is rendered a nullity.[8] That is, if (E)(2)(c) does not apply to terminations, then it is entirely superfluous. And it is a fundamental canon of statutory interpretation that a "court should avoid a construction that renders a provision superfluous, meaningless, or inoperative." *Dodd v. Croskey*, 143 Ohio St.3d 293, 2015-Ohio-2362, 37 N.E.3d 147, ¶ 34.[9]

Thus, even if Green were correct that modification incorporates and subsumes termination, still Mrs. Paul should prevail here. But in fact Green is not correct. In addition to what has already been discussed, there is yet further textual evidence that modification and termination are mutually exclusive concepts and that the General Assembly designed these two provisions to operate

[8] Similarly, it is no answer to respond that the solution is to apply *both* (E)(1)(a) and (E)(2)(c). Both subdivisions include a form of best-interest analysis and so it may seem at first blush that both could be applied simultaneously. But because (E)(1)(a) combines best-interest analysis with a finding of changed circumstances, the ultimate standards invoked by the two subdivisions are very different, indeed, incompatible with one another. *See Fisher* ¶ 32 (holding that (E)(1)(a) and (E)(2)(b) (which utilizes the same best-interest standard as (E)(2)(c)) "contain significantly different standards" and thus both could not apply). Purporting to apply both would thus actually result in applying only (E)(1)(a). At any rate, Green does not raise this argument, likely because he correctly recognizes that it lacks merit, and so further discussion is unnecessary.

[9] Green asserts that "[i]f the decision of the Court of Appeals is affirmed"—that is, if this Court holds that (E)(2)(c) governs terminations—then "the *four* references in R.C. 3109.04(E)(1)[(a)] to 'a shared parenting decree' will have no meaning whatsoever." Appellant's Br. at 8 (emphasis in original). In so arguing, Green implicitly acknowledges the validity of the canon that statutes must be interpreted to "avoid a construction that renders a provision superfluous, meaningless, or inoperative." But he misses the mark when he asserts that applying subdivision (E)(2)(c) to terminations of shared parenting decrees will render the references to "a shared parenting decree" in (E)(1)(a) inoperative. Subdivision (E)(1)(a), as already discussed, governs "modif[ication] [of] a prior decree allocating parental rights and responsibilities." This includes modifications to the allocation of such responsibilities within "a shared parenting decree." R.C. 3109.04(E)(1)(a). If (E)(2)(c) applies to terminations of shared parenting decrees (it does), the applicability of (E)(1)(a) to *modifications* to the "parental rights and responsibilities" portions of a shared parenting decree will remain unchanged. This Court's decision in *Fisher v. Hasenjager*, after all, held that subdivision (E)(1)(a) applies in precisely those circumstances. *Fisher v. Hasenjager* 116 Ohio St.3d 53, 2007-Ohio-5589, 876 N.E.2d 546, ¶ 37.

independently. Division (E)(2) begins by stating that the methods of termination and modification set forth therein are "[*i*]*n addition* to a modification authorized under division (E)(1)." (Emphasis added). That prefatory clause thus makes clear that the methods of modification and termination found in (E)(2)—including termination provision (E)(2)(c)—are *alternatives* to modification pursuant to (E)(1)(a). *See Dobran v. Dobran*, 7th Dist. Mahoning Case No. 97 CA 166, 1999 Ohio App. LEXIS 4124, at *7 (Sep. 1, 1999) (in using this language, "[t]he legislature made it clear . . . that termination and the best interest standard [articulated in (E)(2)(c)] were available 'in addition to a modification authorized under division (E)(1)[(a)]'"). In other words, the subdivisions of R.C. 3109.04(E)(2) are stand-alone means of modification and termination. Additionally, R.C. 3109.04(D)(1)(d), which provides that "[a] final shared parenting decree issued under this division has immediate effect as a final decree on the date of its issuance," goes on to state that such a decree is "subject to *modification or termination* as authorized by this section [*i.e.*, R.C. 3109.04]," thereby confirming once again that modification and termination are mutually exclusive concepts under the statute. (Emphasis added).

An examination of the ordinary and legal definitions of the terms "modification" and "termination" likewise yields the same result. In normal usage, a "modification" is "the making of a *limited* change in something." *Merriam-Webster's Collegiate Dictionary* 748 (10th ed. 1997) (emphasis added). And to "modify" is "to change *somewhat* the form or qualities of; alter *partially*; *amend*." Modify Definition, *Random House Unabridged Dictionary*, http://dictionary.com/browse/modify?s=t (Dec. 17, 2019) (emphasis added). "Termination," by contrast, is an "*end in* . . . *existence*." *Merriam-Webster's Collegiate Dictionary* 1216 (10th ed. 1997) (emphasis added). And to "terminate" is "to bring to an end; put an end to." Terminate Definition, *Random House Unabridged Dictionary*, http://dictionary.com/browse/terminate?s=t (Dec. 17, 2019). Thus,

modification involves a "limited" change to an original. Termination involves the original's eradication. Termination is thus not a subset of modification but a distinct, independent concept.

Likewise, Black's Law Dictionary defines a "modification" as "[a] change to *something*; an alternation" and "[a] qualification or limitation of *something*." *Black's Law Dictionary* 1095 (9th ed. 2009) (emphasis added). Thus, per *Black's*, while the "something" modified changes, it continues to exist, simply in altered form. By contrast, Black's defines "termination" as "[t]he act of *ending* something." *Id.* at 1609 (emphasis added). Here too, then, modification involves mere alteration of a still-fundamentally-intact original "something"; termination yields its eradication.

In short, the internal structure of R.C. 3109.04(E), R.C. 3109.04(E)(2)'s prefatory clause, the reference to "modification *or* termination" in R.C. 3109.04(D)(1)(d), the dictionary definitions of "termination" and "modification," and blackletter canons of statutory construction are unanimous: (E)(2)(c), not (E)(1)(a), governs terminations of shared parenting decrees. Accordingly, a Court ordering termination of a shared parenting decree need simply determine that termination is in "the best interest of the child[]." R.C. 3109.04(E)(2)(c). Subdivision (E)(1)(a)'s "change . . . in . . . circumstances" provision does *not* apply.

II. ***Fisher v. Hasenjager*** **Mandates the Same Result: Termination Is Governed Exclusively by R.C. 3109.04(E)(2)(c).**

In his opening brief, Green also asserts that this Court's decision in *Fisher v. Hasenjager*, 116 Ohio St.3d 53, 2007-Ohio-5589, 876 N.E.2d 546, controls the outcome of this case and requires reversal. Green is correct in arguing that *Fisher* is highly relevant, even dispositive, here. But he is badly mistaken as to *Fisher*'s import. Properly understood, *Fisher* mandates *affirmance*.

Green argues that *Fisher* "already resolved the precise issue raised" by Green in this case and that *Fisher* requires a finding of changed circumstances in order to terminate a shared parenting decree. Appellant's Br. at 8. In reality, though, this Court's careful analysis in *Fisher*,

applied here, shows that (E)(1)(a) and (E)(2)(c) are independent provisions, each of which is exclusively applicable in specific circumstances. While (E)(1)(a) was appropriate for the *modification* at issue in *Fisher*, (E)(2)(c) is the applicable provision for *terminations* like that at issue in this case.

At issue in *Fisher* was what specific subdivision of R.C. 3109.04(E) a court was required to apply when considering a potential "modification of the designation of residential parent and legal custodian of a child." *Id.* ¶ 10. In *Fisher*, the trial court had denominated its decision as one terminating the parties' shared parenting plan. *Id.* ¶ 3. But "[d]espite the trial court's language 'terminating' the parties' shared-parenting plan, the court of appeals reviewed the parties' motions and the trial court's entry and determined that the trial court had not terminated the parties' shared-parenting plan but instead had modified the plan."[10] *Id.* ¶ 6. Because the court of appeals concluded that *modification*, not *termination*, was at issue, "the court of appeals determined R.C. 3109.04(E)(2)(c) did not apply."[11] *Id.* The issue before the court of appeals was the choice between application of R.C. 3109.04(E)(1)(a) or application of R.C. 3109.04(E)(2)(b).

As already discussed, subdivision (E)(1)(a) governs "modif[ication] [of] a prior decree allocating parental rights and responsibilities." Subdivision (E)(2)(b), for its part, deals with "modif[ication] [of] the terms of [a] plan for shared parenting." It provides, in full:

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[10] Specifically, the court of appeals found that neither parent had moved "to terminate the shared parenting plan." *Fisher v. Hasenjager*, 168 Ohio App.3d 321, 2006-Ohio-4190, 859 N.E.2d 1022, ¶ 24 (3d Dist.). The court of appeals also pointed out that, other than changing residential parent and legal custodian, the trial court had explicitly left all other aspects of the parties' shared parenting plan in place. *Id.*

[11] This situation is the *opposite* of the case at bar, in which the court of appeals, in agreement with the trial court, clearly held that a termination, not a modification, was at issue. (App'x at 19 ("In this case, neither party disputes that the trial court terminated the shared parenting decree and plan, a result both parties sought. [Unlike *Fisher*,] [t]his case firmly involves a termination.").)

> 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.

R.C. 3109.04(E)(2)(b) (emphasis added). Just like subdivision (E)(2)(c), then, subdivision (E)(2)(a) simply requires a determination that the modification at issue is "in the best interest of the child[]." Subdivision (E)(1)(a), by contrast, also requires a finding of changed circumstances. The issue before the court of appeals, therefore, was whether the trial court's modification "chang[ing] . . . the designation of residential parent and legal custodian" constituted a "modif[ication] [of] the terms of [a] plan for shared parenting" under subdivision (E)(2)(b) and therefore required simply a best-interest determination or, rather, whether it was a "modif[ication] [of] a prior decree allocating parental rights and responsibilities" and thus required, pursuant to subdivision (E)(1)(a), a best-interest determination coupled with a changed-circumstances finding.

The court of appeals held that the changes constituted a modification of the terms of a shared parenting plan under subdivision (E)(2)(b) and, therefore, that a finding of changed circumstances pursuant to (E)(1)(a) was not required. On appeal to this Court, the court of appeals's determination that the trial court's "change in the designation of residential parent and legal custodian" was a *modification* rather than a termination of a shared parenting decree was *not* at issue. Instead, the sole issue before this Court was "the proper application of R.C. 3109.04(E)(1)(a) and R.C. 3109.04(E)(2)(b) with respect to the *modification* of the designation of residential parent and legal custodian." *Fisher* ¶ 10 (emphasis added).

On first read, the two topics dealt with in subdivision (E)(1)(a) and subdivision (E)(2)(b)—"modif[ication] [of] a prior decree allocating parental rights and responsibilities" and

"modif[ication] [of] the terms of [a] plan for shared parenting," respectively—might seem virtually indistinguishable. And, at any rate, it could perhaps be convincingly argued that the *Fisher* trial court's "change in the designation of residential parent and legal custodian," *id.* ¶ 1, could be shoehorned into either or both subdivisions. But this Court categorically rejected any attempt to blur the line between the two subdivisions. Rather, the Court distinguished between the "prior decree allocating parental rights and responsibilities," R.C. 3109.04(E)(1)(a), and the "terms of the plan for shared parenting," R.C. 3109.04(E)(2)(c). "[A] decree is used," this Court said, "to grant parental rights and responsibilities to a parent or parents and to designate the parent or parents as residential parent and custodian." *Id.* ¶ 29. "A plan," by contrast, "is not used by a court to designate the residential parent or legal custodian; that designation is made . . . in an order or decree." *Id.* ¶ 31. Accordingly, the Court reasoned, because the modification at issue—a change in "the designation of residential parent or legal custodian"—could not "be a term of a shared-parenting plan" but rather could only be part of a "decree" or order, designation of residential parent or legal guardian "cannot be modified pursuant to R.C. 3109.04(E)(2)(b), governing modification to plans, but must be modified pursuant to R.C. 3109.94(E)(1)(a)." *Id.* Therefore, before ordering the at-issue modification, the trial court was required to make the finding of changed circumstances required by R.C. 3109.04(E)(1)(a). *Id.* ¶ 37.

Aiding its decision, this Court was adamant in asserting that two separate subdivisions of R.C. 3109.04(E) could not and should not be read to cover the same set of circumstances: "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**." *Id.* ¶ 32 (emphasis added).

The Court's decision in *Fisher* is thus highly relevant to the present case. But not in the ways Green suggests. Green argues that "[t]he facts in *Fisher* are *identical* to the case at bar" and that "there can be no doubt that the *Fisher* Justices understood that *Fisher* was a case terminating a shared parenting plan." Appellant Br. at 9, 12 (emphasis in original). But as just shown, the issue before the Court in *Fisher* was *modification*, not *termination*. The court of appeals had expressly rejected the argument that the changes at issue constituted a termination, and this Court did not revisit that issue.[12] *Id.* ¶ 6. To the contrary, the Court was clear that it was addressing only "the proper application of R.C. 3109.04(E)(1)(a) and R.C. 3109.04(E)(2)(b) with respect to . . . *modification* . . . ." *Id.* ¶ 10 (emphasis added). And it concluded that "R.C. 3109.04(E)(1)(a) expressly provides for the *modification* of parental rights and responsibilities in a decree." *Id.* ¶ 26 (emphasis added). It had nothing to say regarding the subdivision that should be applied when termination is at issue. In this respect, then, *Fisher* has no bearing on this case.

But *Fisher* did make clear that each separate subdivision of R.C. 3109.04(E) must be read and applied independently. The Court held that (E)(1)(a) and (E)(2)(b) "contain significantly different standards," and that "[t]o read both sections, with different standards, to apply to" the same scenario "would create inconsistency in the statute." *Id.* ¶ 32. The standard contained in (E)(2)(b)—whether the requested change is "in the best interest of the children"—is identical to that found in (E)(2)(c). Thus, because the case at bar involves (E)(1)(a) and (E)(2)(c), and because (E)(2)(b) and (E)(2)(c) contain an identical standard, the same two "significantly different standards" at issue in *Fisher* are at issue here. Green argues that termination is a subset of

[12] Along similar lines, Green also erroneously asserts that "both parties [in *Fisher*] filed [m]otions requesting the [shared parenting] plan be terminated." Appellant Br. at 9. But in fact "both [parties in *Fisher*] actually moved to be designated the sole residential parent and legal custodian of [the child], *not* to terminate the shared parenting plan." *Fisher v. Hasenjager*, 168 Ohio App.3d 321, 2006-Ohio-4190, 859 N.E.2d 1022, ¶ 24 (3d Dist.) (emphasis added).

modification—that is, that "[m]odification clearly includes termination," Appellant Br. at 14—and therefore that the requirements of *both* (E)(1)(a) and (E)(2)(c) must be met here, but "[t]o read both sections, with different standards, to apply to" the same scenario "would create an inconsistency in the statute." *Id.* ¶ 32. That is, the "two different standards" found in (E)(1)(a) and (E)(2)(c) "cannot be applied to the same situation." *Id.* Put another way, Green's reading of the statute would render (E)(2)(c) mere surplusage. If Green is correct that "[m]odification . . . includes termination," Appellant Br. at 14, then there is never a situation in which (E)(2)(c), rather than (E)(1)(a), would apply.[13] As previously discussed, it is a fundamental canon of statutory interpretation that a "court should avoid a construction that renders a provision superfluous, meaningless, or inoperative." *Dodd v. Croskey*, 143 Ohio St.3d 293, 2015-Ohio-2362, 37 N.E.3d 147, ¶ 34. Along similar lines, "[i]n construing a statute, a court's paramount concern is the legislative intent." *Fisher* ¶ 20 (quoting *State ex rel. Watkins v. Eighth Dist. Court of Appeals*, 82 Ohio St.3d 532, 535, 1998-Ohio-190, 696 N.E.2d 1079). Most certainly the General Assembly did not intend to condemn (E)(2)(c) to irrelevance.[14]

III. The Fifth District's Aberrant Position on R.C. 3109.04(E)(2)(c) Is Ill-Reasoned and Unpersuasive.

In contrast to this Court's careful reasoning in *Fisher* and the detailed, logical analyses provided by many of the *eleven* courts of appeals—including the Tenth District in this case—to

[13] It is no answer to say that *both* (E)(1)(a) and (E)(2)(c) could or should be applied to situations involving termination, so that when modification is at issue a court must comply only with the requirements of (E)(1)(a) while when termination is at issue both (E)(1)(a) and (E)(2)(c) must be satisfied. *See* n. 8, *supra*.

[14] Separately, Green argues elsewhere that modification and termination cannot be separate concepts under R.C. 3109.04(E) because, if they were, it would be impossible to "reconcile R.C. 3109.04(E)(1)[(a)] and R.C. 3109.[04](E)(2)(b)." Appellant Br. at 12. This argument has no merit. First, both (E)(1)(a) and (E)(2)(b) deal exclusively with modification. Neither subdivision even mentions the word "termination." Second, "reconcil[ing]," *i.e.*, explaining the relationship between, (E)(1)(a) and (E)(2)(b) is *precisely what this Court did in* Fisher. *Fisher* at ¶¶ 26-27.

have determined that subdivision (E)(2)(c), not subdivision (E)(1)(a), applies to terminations like this one, the Fifth District reached its contrary position via truncated and unpersuasive reasoning. In his opening brief, Green understandably places significant reliance upon the Fifth District's decisions in *Wright v. Wright*, *Hrabovsky v. Axley*, and *Jagodzinski v. Abdul-Khaliq*. Appellant's Br. at 16-17. But those cases are supported by the thinnest of logical reeds and are of no help here.

Wright was decided first and serves as the foundation for both *Hrabovsky* and *Jagodzinski*. In *Wright*, both parents, who had previously agreed to shared parenting, filed motions "for the reallocation of parental rights and responsibilities." *Wright v. Wright*, 5th Dist. Stark No. 2011CA00129, 2012-Ohio-1560, ¶ 3. The trial court ultimately "terminated the shared parenting plan." *Id.* On appeal, the appellant argued that the trial court had erred by failing to make an (E)(1)(a) changed-circumstances finding. *Id.* ¶ 12. The Fifth District noted that "[t]he *Fisher* case involved a shared parenting plan and two motions for the reallocation of parental rights and responsibilities filed by each parent as the case sub judice [sic]." *Id.* ¶ 22. It went on to quote the conflict question at issue in *Fisher*, *id.* ¶ 23; quoted *Fisher*'s holding, *id.* ¶ 24; and then stated, *without any further analysis*, that "[b]ased upon the *Fisher* holding, we reverse the trial court's decision and remand the matter for a determination on 'change of circumstances,'" *id.* ¶ 26. Subdivision (E)(2)(c) was never mentioned in the opinion, and accordingly there is no indication that the parties ever raised any (E)(2)(c)-based argument.[15] The court in *Wright* conducted no textual analysis, no *con*textual analysis (*i.e.*, it did not consider (E)(1)(a) in light of (E)(2)(c) and the other components of R.C. 3109.04 discussed above and below), and no real analysis of this

[15] Additionally, note that, because the parents in *Wright* moved only for "reallocation of parental rights and responsibilities" rather than for termination of the shared parenting plan and decree, there was a least a colorable argument that *Wright* involved a mere modification, not a termination. *Wright* ¶ 3. This is in contrast to the case at bar, in which both parents explicitly moved for termination. *Supra* at 4.

Court's decision in *Fisher* (a decision which, rightly understood, supports *Mrs. Paul's* position here).

The Fifth District's decisions in *Hrabovsky* and *Jagodzinski* are no better, indeed, are arguably worse. In *Hrabovsky*, there was *no* analysis. The court simply noted, "We held in *Wright* . . . that . . . if there is a change in designation of residential parent and legal custodian . . . , the trial court is required to make a determination that a change in circumstances has occurred." *Hrabovsky v. Axley*, 5th Dist. Stark No. 2013CA00156, 2014-Ohio-1168, ¶ 23. The court took an identical approach in *Jagodzinski*. *See Jagodzinski v. Abdul-Khaliq*, 5th Dist. Licking No. 15-CA-31, 2015-Ohio-5510, ¶ 25. In short, the Fifth District's insufficient and unpersuasive reasoning in its decisions purporting to apply *Fisher* is of no real help to Green here.

IV. Policy Considerations Weigh in Favor of Applying R.C. 3109.04(E)(2)(c), not R.C. 3109.04(E)(1)(a), to Terminations.

Though he does not raise it in his opening brief, perhaps Green's strongest potential argument is that, at first blush, the policy underlying the subdivision (E)(1)(a)/subdivision (E)(2)(c) dichotomy seems less than obvious. Termination of a shared parenting decree is, after all, at least in some ways, a more drastic remedy than "mere" modification of the "parental rights and responsibilities" portion of such a decree. Yet while termination "only" requires best-interest analysis, modification requires best-interest analysis in addition to a finding of changed circumstances and compliance with the other requirements of subdivision (E)(1)(a). This seems—again, at first blush—counterintuitive.

But there is a plausible policy explanation for this arrangement. Under Ohio law, in "any proceeding pertaining to the allocation of parental rights and responsibilities," R.C. 3109.04(A), the baseline assumption—the default position of the law—is *against* shared parenting. That is, unless one or both parents affirmatively file a motion for shared parenting as well as a proposed

"plan for shared parenting," the law requires that "the court . . . allocate . . . parental rights and responsibilities for the care of the children primarily to one of the parents, designate that parent as the residential parent and the legal custodian, and divide" only the other, lesser "rights and responsibilities for the care of the child[]," such as visitation rights and child support obligations, "between the parents." R.C. 3109.04(A)(1). Put another way, when parents divorce or separate, Ohio law evinces a preference that one parent bear the primary rights and responsibilities with respect to the parties' child. *See id.*

This default position makes sound policy sense. Perhaps recognizing that in many, if not most, cases of parent separation the relationship between the child's biological parents is acrimonious, the General Assembly, in establishing this default, placed the well-being and stability of the child ahead of any concern that the separated parents be treated with an exacting level of parity in terms of the "right and responsibilities" allotted to them. The law seeks to prevent separated parents from engaging in "'a constant tug of war'" over their child or children. *Fisher* ¶ 34 (quoting *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 1997-Ohio-260, 674 N.E.2d 1159). In the "typical" circumstance, designating one parent as the primary possessor of rights and responsibilities vis-à-vis the child ensures stability for the child, as any ambiguity concerning—any "tug of war" over—which parent has the final decision-making authority regarding the well-being of the child is minimized. By contrast, when separated parents possess equal or near-equal rights, the potential for conflict, one-upmanship, and "a constant tug of war," over the child increases significantly. Thus, only if one or both parents move for shared parenting and submit a shared parenting plan—that is, only if one or both parents actively demonstrate a willingness to parent cooperatively and thus overcome the presumption against shared parenting—can shared parenting even be *considered* by the court in the first instance. *See* R.C. 3109.04(A)(2).

With this overarching policy in mind, the logic behind the General Assembly's decision to enact a relatively less onerous standard for termination of an extant shared parenting decree and a relatively more onerous standard for "only" modifying the "allocati[on] [of] parental rights and responsibilities," R.C. 3109.04(E)(1)(a), under that decree—while still keeping it in place—comes into view. A motion by one or both parents to terminate a shared parenting decree is a clear indication that one or both parents have ceased to be willing to parent cooperatively and that an irremediable "tug of war" between the parents is imminent or, perhaps more likely, has already begun. Under such circumstances, the justification for shared parenting has evaporated and return to the default—"allocat[ing] . . . parental rights and responsibilities for the care of the child[] primarily to one . . . parent[], [and] designat[ing] that parent as the residential parent and the legal custodian," R.C. 3901.04(A)(1)—on a simple showing that such is in the "best interest of the child[]," R.C. 3901.04(E)(2)(c), is warranted.

On the other hand, when the issue before the court is not termination of a shared parenting decree and return to the legal default but rather modification of the "allocati[on] [of] parental rights and responsibilities" under a still-in-place shared parenting decree, R.C. 3109.04(E)(1)(a), a more exacting examination by the court is necessary before permitting the shared parenting arrangement to continue in modified form. The ostensible reasons for modification, after all, could be genuine, pretextual, and/or an indication that the cooperative relationship between the parents has irreparably broken down (or, alternatively, is alive and well but in need of adjustment). Unlike in situations where termination has been requested and thus it is clear that the cooperative relationship between the parents has broken down, in the modification context a more searching inquiry is necessary to determine whether the requested modifications are indicative of a breakdown in the cooperative relationship or instead are good-faith requests brought about by changed

circumstances and unrelated to acrimony between the parents. Accordingly, in such circumstances, the court must not only determine that the modifications are in the best interest of the child; it must also find that a change of circumstances has occurred that justifies, indeed "necess[itates]," the modification and the continuation of shared parenting rather than reversion to the typically-more-stable statutory default. R.C. 3109.04(E)(1)(a).

This understanding of the statutory regime gives effect to the statute as a whole as well as to its distinctive subdivisions and presents a compelling overarching policy governing the whole of R.C. 3109.04. But even if the Court finds this policy justification, or any other it may discern in the statute, to be unsatisfactory or even disagreeable, still the plain language and structure of the statute, as well as the General Assembly's presumed intent to enact a coherent statute whose subdivisions are all given operative effect, must prevail over any alternative policy preference this Court might have. As the Court has repeatedly stated, "'[t]he General Assembly is the policy-making body in our state and has restricted the exercise of judicial authority with respect to'" the varying constraints and standards found in R.C. 3109.04(E). *Fisher* ¶ 35 (quoting *In re James*, 113 Ohio St.3d 420, 2007-Ohio-2335, 866 N.E.2d 467, ¶ 28). As the court below rightly noted, "Whether this statutory scheme implicates policy concerns is a matter for the legislature, not the judiciary." (App'x at 17.)

V. The Trial Court Record Shows Changed Circumstances.

Finally, even if the Court were to determine—in spite of the textual, structural, precedential, and policy arguments set forth above—that subdivision (E)(1)(a) does apply here and a finding of changed circumstances is thus required, still Mrs. Paul should prevail and the trial court's decision terminating the shared parenting plan and decree should be affirmed. As to changed circumstances, R.C. 3109.04(E)(1)(a) provides: "The court shall not modify a prior decree allocating parental

rights and responsibilities . . . 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." "While the better practice would be for a court to explicitly find a change of circumstances," courts of appeals "will affirm a decision where the factual findings of the [trial] court support a finding of changed circumstances. Explicit language is preferable, but not necessary." *Nigro v. Nigro*, 9th Dist. Lorain No. 04CA008461, 2004-Ohio-6270, ¶ 6. *See also Wangugi v. Wangugi*, 4th Dist. Ross Case No. 99 CA 2531, 2000 Ohio App. LEXIS 1675, at *14 (Apr. 12, 2000) ("failure to file a timely request for findings of fact and conclusions of law waives the right to challenge the trial court's lack of an explicit finding with respect to a change in circumstances").

Here, though it failed to utter any "magic words," the trial court, in its judgment entry terminating the shared parenting plan and decree, made a number of findings indicating that changes in circumstances had occurred with respect to "either of the parents subject to [the] shared parenting decree." R.C. 3109.04(E)(1)(a). The trial court found, for example: that Green had failed to comply with the terms of the shared parenting plan (App'x at 29); that Green had exhibited "inappropriate and aggressive behavior" after the shared parenting plan was adopted (*id.* at 32 (citing specific instances)); and that Mrs. Paul had moved to Heath subsequent to implementation of the shared parenting plan in order to be close to family, with whom [redacted] had since formed a close bond, and "the extent of the distance between [Mrs. Paul's and Green's] residences [was] not conducive to shared parenting" (*id.* at 27-28, 31). Accordingly, the trial court satisfied any requirement for a finding of changed circumstances that this Court might, in spite of all of the above, decide is required. *See In re K.R.*, 11th Dist. Trumbull No. 2010-T-0050, 2011-Ohio-1454,

¶ 55 (holding that, in light of (E)(2)(c), there is no need for a finding of changed circumstances when terminating shared parenting but nevertheless "not[ing] that there was evidence in the record of a change in circumstances"); *Redmond v. Wade*, 4th Dist. Lawrence No. 16CA16, 2017-Ohio-2877, ¶ 52 (noting, under these same circumstances, that "[i]n the absence of findings of fact and conclusions of law, we presume that the trial court applied the law correctly and will affirm its judgment if evidence in the record supports it").

CONCLUSION

For all of these reasons, the judgment of the Tenth District Court of Appeals should be affirmed.

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Respectfully submitted,

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I hereby certify that, on December 19, 2019, a copy of the foregoing Merits Brief of Appellee Kayleigh (Bruns) Paul has been served upon opposing counsel at the following email addresses:

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