**[Cite as *Brocklehurst v. Duncan*, 2010-Ohio-5978.]**

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| GREGG H. BROCKLEHURST | : | JUDGES: |
| | : | Hon. Sheila G. Farmer, P.J. |
| Plaintiff-Appellee | : | Hon. John W. Wise, J. |
| | : | Hon. Patricia A. Delaney, J. |
| -vs- | : | |
| | : | |
| AMANDA (PAUL) DUNCAN | : | Case No. CT10-0026 |
| | : | |
| Defendant-Appellant | : | O P I N I O N |

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| CHARACTER OF PROCEEDING: | Appeal from the Court of Common Pleas, Domestic Division, Case No. DE2005-0772 |
| JUDGMENT: | Reversed and Remanded |
| DATE OF JUDGMENT ENTRY: | December 3, 2010 |

APPEARANCES:

| For Plaintiff-Appellee | For Defendant-Appellant |
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| JAMES R. KRISCHAK<br>320 Main Street<br>P.O. Box 190<br>Zanesville, OH 43702-0190 | CHRISTOPHER M. SHOOK<br>33 West Main Street<br>P.O. Box 4190<br>Newark, OH 43058-4190 |

*Farmer, P.J.*

{¶1} On May 1, 2006, appellant, Amanda Duncan, and appellee, Gregg Brocklehurst, filed an agreed shared parenting decree regarding their two children.

{¶2} On July 16, 2009, appellee filed a motion to terminate the shared parenting plan or in the alternative, motion to modify the plan. Hearings before a magistrate were held on December 7 and 8, 2009. By decision filed April 14, 2009, the magistrate recommended terminating the shared parenting plan and designating appellee as the residential parent and legal custodian of the children. Appellant filed an objection on April 28, 2010. On May 3, 2010, the trial court adopted the magistrate's decision. By judgment entry filed May 5, 2010, the trial court denied appellant's objection.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶4} "THE TRIAL COURT ABUSED ITS DISCRETION BY TERMINATING A SHARED PARENTING PLAN WITHOUT FINDING A CHANGE IN CIRCUMSTANCES."

I

{¶5} Appellant claims the trial court erred in terminating the shared parenting agreement without finding a change of circumstances. Appellant asks this court to re-affirm our previous opinion in *Oliver v. Arras*, Stark App. No. 2001 AP 11 0105, 2002-Ohio-1590.

{¶6} The trial court adopted the magistrate's decision wherein the magistrate explained the standard to be used in reviewing the issue sub judice as follows:

{¶7} "To terminate the decree under this subsection, the court is not required to make any finding of changed circumstances and, if the request has been made by at least one of the parents, the Court need not enter a best interest finding before granting the request to terminate the decree. *C.D. v. D.L.,* 12th Dist. App. No. CA2006-09-037, 2007 Ohio 2559, 2007 Ohio App. LEXIS 2380. But see, *Oliver v. Arras,* 5th Dist. App. No. 2001 AP 11 0105, 2002 Ohio 2479, 2002 Ohio App. LEXIS 2721. Although this Court sits within the 5th Appellate District, the decisions of the 5th District Court of Appeals are persuasive, but not binding, authority on this Court. Rule 4(A), Supreme Court Rules for the Reporting of Opinions. Moreover, decisions from any of the courts of appeals issued after May 1, 2002, whether published or not, may be cited as legal authority and weighted as deemed appropriate by a court. Rule 4(B), Supreme Court Rules for the Reporting of Opinions. The 5th District's decision in *Oliver v. Arras* muddles up the distinctly different statutory schemes for terminating a shared parenting decree and modifying any type of decree allocating parental rights and responsibilities, including a shared parenting decree. This difference is clearly reflected in the plain language of §3109.04(E)(1) and (E)(2). The 12th District's holding in *C.D. v. D.L.* reflects not only an accurate reading of the plain language of the statute, but also the consensus of the existing body of case law on this issue. Consequently, the opinion of the 12th District is the more persuasive authority on this issue." See, Magistrate's Decision filed April 14, 2010 at fn. 3.

{¶8} This court stated the following in *Oliver,* supra:

{¶9} "There are certain statutory factors a trial court is required to consider in determining whether modification of custody is appropriate. These factors are

contained R.C. 3109.04(E)(1)(a). First, a trial court must determine whether there has been a change in circumstances. R.C. 3109.04 does not define 'change in circumstances,' however, courts have generally held that the phrase is intended to denote 'an event, occurrence, or situation which has a material and adverse effect upon a child.' *Rohrbaugh v. Rohrbaugh* (2000), 136 Ohio App.3d 599, 604-605, citing *Wyss v. Wyss* (1982), 3 Ohio App.3d 412, 416.

{¶10} "The second factor a trial court must consider is whether the modification is in the best interest of the child. In making this determination, a trial court is required to consider, but is not limited to considering, the factors contained in R.C. 3109.04(F)(1)(a) through (j). Finally, a trial court must find that the harm that will result from the change will outweigh the resultant benefits. See R.C. 3109.04(E)(1)(a)(iii).

{¶11} "The trial court terminated the shared parenting plan pursuant to R.C. 3109.04(E)(2)(c). This section of R .C. 3109.04 does not require a trial court, prior to terminating a shared parenting plan, to find either a change in circumstances or that the harm likely to be caused by the change of environment is outweighed by the advantages of the change of environment.

{¶12} "However, at least one other court of appeals has recognized that subsection (c) of R.C. 3109.04(E)(2) is subordinate to the general provision of R.C. 3109.04(E)(1)(a). See *Stout v. Stout* (Oct. 17, 2001), Union App. No. 14-01-10, unreported; *Inbody v. Inbody* (June 5, 1995), Hancock App. Nos. 5-94-37, 5-94-46, unreported; *Clyborn v. Clyborn* (1994), 93 Ohio App.3d 192, 195. We agree with this interpretation and conclude that in order to terminate a shared parenting plan, the trial

court must consider the factors contained in R.C. 3109.04(E)(1)(a), in addition to complying with subsection (c) of the statute."

{¶13} After a lengthy discussion of the facts, the magistrate in this case rejected the legal precedent of this district, and concluded that the shared parenting agreement should be terminated under the best interests test:

{¶14} "Having found that shared parenting is not in the best interest of [L] and [L] [B], the existing shared parenting decree shall be terminated. As noted above, the Court must proceed to issue a modified decree for the allocation of parental rights and responsibilities for the care of the children under the standards applicable under §3109.04(A), (B), and (C) as if no decree for shared parenting had been granted and as if no request for shared parenting ever had been made. When making an allocation of parental rights and responsibilities, the Court must take into account that which would be in the best interest of the children. In determining the best interests of the minor children, the Court must consider all relevant factors, including but not limited to those listed in §3109.04(F)(1) Ohio Rev. Code.

{¶15} "Having considered those factors, the Magistrate finds that a preponderance of the evidence shows that it is in the best interest of the children for the Court to designate Mr. Brocklehurst as their residential parent and legal custodian.***"

{¶16} On April 28, 2010, appellant filed a pro se objection to the magistrate's decision, arguing the magistrate "employed an incorrect legal standard in evaluating the evidence." By judgment entry filed May 5, 2010, the trial court found appellant's objection was inadequate because it failed to "STATE WITH PARTICULARITY ALL GROUNDS FOR OBJECTION," citing Civ.R. 53(D)[3](b)(ii) which states, "[a]n objection

to a magistrate's decision shall be specific and state with particularity all grounds for objection."

{¶17} We fail to find that an objection challenging the legal standard used by the magistrate was not specific given the lengthy explanation and disagreement by the magistrate of the standard adopted in the Fifth District.

{¶18} We conclude the objection was sufficient and the trial court should have addressed the issue.

{¶19} This assignment of error invites us to reject or re-evaluate our holding in *Oliver* cited supra. We decline to overrule the precedent set in *Oliver,* and remand the matter to the trial court to review the facts presented and determine whether there has been a "change of circumstances" as a threshold question in deciding the shared parenting issue.

{¶20} The sole assignment of error is granted.

{¶21} The judgment of the Court of Common Pleas of Muskingum County, Ohio, Domestic Division is hereby reversed.

By Farmer, P.J.

Wise, J. and

Delaney, J. concur.

_s/ Sheila G. Farmer_____

_s/ John W. Wise_____

_s/ Patricia A. Delaney_____

JUDGES

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IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

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| GREGG H. BROCKLEHURST | : | |
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| -vs- | : | JUDGMENT ENTRY |
| AMANDA (PAUL) DUNCAN | : | |
| Defendant-Appellant | : | CASE NO. CT10-0026 |

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Muskingum County, Ohio, Domestic Division is reversed, and the matter is remanded to said court for further proceedings consistent with this opinion. Costs to appellee.

_s/ Sheila G. Farmer_____

_s/ John W. Wise_____

_s/ Patricia A. Delaney_____

JUDGES