[Cite as *Acus v. Acus*, 2010-Ohio-856.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

MADISON COUNTY

ALISHA A. ACUS,	:	
Petitioner-Appellant,	:	CASE NO. CA2009-08-017
	:	O P I N I O N
- vs -		3/8/2010
	:	
DONALD A. ACUS,	:	
Petitioner-Appellee.	:	

APPEAL FROM MADISON COUNTY COURT OF COMMON PLEAS
Case No. 2008DR-01-005

Shannon M. Treynor, 63 North Main Street, P.O. Box 735, London, Ohio 43140, for petitioner-appellant

Suzanne K. Sabol, 820 South High Street, Columbus, Ohio 43215, for petitioner-appellee

Wendy J. Starr, 62 South Oak Street, P.O. Box 615, London, Ohio 43140, guardian ad litem

BRESSLER, J.

{¶1} Petitioner-appellant, Alisha A. Acus, appeals from the decision of the Madison County Court of Common Pleas denying her request to relocate to Cleveland with her minor daughter following her divorce from petitioner-appellee, Donald A. Acus. For the reasons outlined below, we reverse and remand for further proceedings.

{¶2} Alisha (Mother) and Donald (Father) were married on June 14, 1997. As a

product of their marriage, the couple had one child, Olivia, born July 29, 2006. However, after being married for over ten years, Mother filed a petition for dissolution and a separation agreement on January 17, 2008.[1] Thereafter, the trial court, upon finding the separation agreement to be "fair and equitable," entered a decree of dissolution on February 22, 2008.

{¶3} On August 1, 2008, Mother filed a "Motion to Implement Child Support," which provided, among other things, notice to the court of her intent to relocate to Cleveland with her minor daughter. After holding a hearing, a magistrate denied Mother's request to relocate. The trial court then overruled Mother's objections and adopted the magistrate's decision.

{¶4} Mother now appeals, raising three assignments of error. For ease of discussion, Mother's assignments of error, all dealing with the trial courts decision preventing her from relocating to Cleveland with her minor daughter, will be addressed together.

{¶5} Assignment of Error No. 1:

{¶6} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ENTERING A RULING ON THE AUTHORITY OF AN UNPUBLISHED FOURTH DISTRICT OPINION THAT IS IN DIRECT CONFLICT WITH A REPORTED OPINION OF THE TWELFTH APPELLATE DISTRICT." [sic]

{¶7} Assignment of Error No. 2:

{¶8} "THE COURT WAS WITHOUT JURISDICTION TO APPROVE OR DENY THE RIGHT OF [MOTHER] TO RELOCATE."

{¶9} Assignment of Error No. 3:

1. The separation agreement designated Mother as the residential parent and legal custodian of their minor child, whereas Father was provided "parenting time rights * * * by agreement of the parties."

{¶10} "THE COURT ABUSED ITS DISCRETION AND VIOLATED THE CONSTITUTIONAL RIGHTS OF FREEDOM BY PROHIBITING THE RELOCATION OF [MOTHER] AND HER CHILD OUTSIDE OF THE 'MADISON COUNTY AREA.'"

{¶11} Throughout her three assignments of error, Mother, as residential parent, argues that pursuant to R.C. 3109.051(G)(1), the trial court erred in its decision preventing her from relocating to Cleveland with her minor daughter. We agree.

{¶12} R.C. 3109.051(G)(1), which deals with the requirements of a residential parent intending to relocate, states, in pertinent part:

{¶13} "If the residential parent intends to move to a residence other than the residence specified in the parenting time order or decree of the court, the parent shall file a notice of intent to relocate with the court that issued the order or decree. * * * Upon receipt of the notice, the court, on its own motion or the motion of the parent who is not the residential parent, may schedule a hearing with notice to both parents to determine whether it is in the best interest of the child *to revise the parenting time schedule* for the child." (Emphasis added.)

{¶14} In turn, while the express terms of R.C. 3109.051(G)(1) permit the trial court to schedule a hearing "to determine whether it is in the best interest of the child *to revise the parenting time schedule* for the child," the statute "does not give the trial court the authority to prevent the residential parent from relocating with the child." *In re Noble* (Mar. 30, 2001), Trumbull App. No. 99-T-0154, 2001 WL 314889, at *1; see, *Spain v. Spain* (June 21, 1995), Logan App. No. 8-94-30, 1995 WL 380067, at *2; *Moore v. Moore* (Mar. 27, 1998), Portage App. No. 97-P-0008, 1998 WL 156983, at *4; *Kassavei v. Hosseinipour* (June 2, 2001), Trumbull App. No. 2000-T-0132, 2001 WL 589392, at *1. See, also, *In re T.M.*, 161 Ohio App.3d 638, 2005-Ohio-3083, ¶11-12; *Harris v. Harris*, Lorain App. No. 06CA009056, 2007-Ohio-3123, ¶6.

{¶15} In this case, there were no prior agreements preventing Mother from relocating, nor were there any provisions in the dispositional order regarding her ability to relocate.[2] See *In re T.M.* at ¶13, citing *Williams v. Williams*, Trumball App. No. 2002-T-0101, 2004-Ohio-3992; *Kassavei*, 2001 WL 589392 at *2; see, also, *Zimmer v. Zimmer*, Franklin App. No. 00AP-383, 2001-Ohio-4226, 2001 WL 185356, at *2-*4. As a result, and under the facts of this case, the trial court did not have the authority to prevent Mother from relocating to Cleveland with her minor daughter. Instead, pursuant to R.C. 3109.051(G)(1), the court could merely schedule a hearing "to determine whether it is in the best interest of the child to *revise the parenting time schedule* for the child."[3] See *In re Noble*, 2001 WL 314889 at *2; *Kassavei*, 2001 WL 589392 at *2; *Spain*, 1995 WL 380067 at *2. Therefore, because the trial court's decision preventing Mother from relocating with her daughter outside of the "Madison County area" was contrary to law, appellant's assignments of error are sustained and this matter is remanded for further proceedings. *Kassavei*, 2001 WL 589392 at *2.

{¶16} Upon remand, the trial court shall comply with the express terms of R.C. 3109.051(G)(1), which, as stated above, merely allow it to schedule a hearing in order to "determine whether it is in the best interest of the child to *revise the parenting time*

2. Neither the visitation schedule, nor the parties' separation agreement, places any restrictions on Mother's ability to relocate with the couple's minor daughter. In fact, the visitation schedule merely requires Mother, as the residential parent, to "file with the court a notice of [her] intent to relocate with the [child] to a new residence and provide the complete address of that new residence at least thirty days in advance of such move," whereas the separation agreement simply parrots the language found in R.C. 3109.051(G)(1).

3. **{¶a}** The magistrate denied Mother's "request for court approval to relocate" after finding "insufficient justification to permit removing [the child] from the Madison County area * * * wherein [the child] would be deprived from the relationship with her father * * *." Thereafter, the trial court adopted the magistrate's decision denying Mother's request to relocate by relying on the Fourth District Court of Appeals opinion in *Alvari v. Alvari* (Feb. 2, 2000), Lawrence App. No. 99CA05, 2000 WL 133849.

{¶b} However, as the Fourth District explicitly stated in *Alvari*:

{¶c} "R.C. 3109.051(G)(1) is not relevant in this case because the issue before the trial court was not the relocation of a residential parent. Rather, the issue before the trial court was which parent should be designated as the residential parent." Id., 2000 WL 133849 at *2.

schedule for the child." (Emphasis added.) Such a decision is to be made "solely upon contemplation of the child's best interest." *Hetterich v. Hetterich* (Apr. 9, 2001), Butler App. No. CA2000-06-122, 6; see, e.g., *Spain*, 1995 WL 380067 at *2.

{¶17} Judgment reversed and remanded for further proceedings.

YOUNG, P.J., and HENDRICKSON, J., concur.

{¶d} In turn, because Mother had previously been designated residential parent, and because the issue before the court *was* the relocation of the residential parent, the trial courts reliance on *Alvari* was improper as the Fourth District's decision was inapplicable to the case at bar.