[Cite as *Ferris v. Ferris*, 2003-Ohio-1284.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
MEIGS COUNTY

James Scott Ferris	:	
	:	
Plaintiff-Appellee,	:	
	:	Case No. 02CA4
vs.	:	
	:	DECISION AND JUDGMENT ENTRY
Jodi Lynn Ferris,	:	
	:	RELEASED: 3-11-03
Defendant-Appellant.	:	

APPEARANCES:

Susan Gwinn, Athens, Ohio, for appellant.

Sanford H. Flack, Springfield, Ohio, for appellee.

Kline, J:

{¶1} Jodi Lynn Ferris appeals the decision of the Meigs County Court of Common Pleas, which granted custody of the parties' minor children to her. Ms. Ferris argues that the trial court erred in ruling that if she moved from the children's current school district, Mr. Ferris would become the residential parent. Because we find that the trial court exceeded its jurisdiction in doing so, we agree. Ms. Ferris next argues that the trial court erred in ordering that the parties' children continue to attend the Alexander Local School District. We do not address this argument because Ms. Ferris has waived it. Ms. Ferris

finally argues that the trial court erred in ordering that the parties' minor children could have no contact with Michael Harts until a psychologist determined that it would not be harmful. Because we find that the trial court did not abuse its discretion in so ordering, we disagree. Accordingly, we affirm in part and reverse in part the judgment of the trial court.

I.

{¶2} The parties married in 1991 and had two children, Austin and Whitney. In August 2000, Ms. Ferris filed a complaint for divorce in the Athens County Court of Common Pleas. In September 2000, Mr. Ferris filed a complaint seeking a divorce in the Meigs County Court of Common Pleas. In October 2000, the Athens County Court of Common Pleas transferred Ms. Ferris' complaint for divorce to the Meigs County Court of Common Pleas.

{¶3} Pursuant to Ms. Ferris' motion, the trial court interviewed Austin and Whitney.

{¶4} During the divorce hearing, Ms. Ferris testified that she intended to stay in Meigs County regardless of whether she got custody of her children. She further testified that she did not intend to take the children out of Alexander School District because the children are doing well. She also expressed a desire to move closer to the children's school building.

{¶5} Ms. Ferris admitted that before the parties' divorce, she became involved with Michael Harts. She also admitted during

her testimony that the children were fearful of Mr. Harts and had reported this to their guardian ad litem, Jeanie Weeks. She further admitted that the children saw a gun belonging to Mr. Harts when he stayed at Ms. Ferris' residence for two weeks.

{¶6} At the conclusion of the hearing, the trial court stated: "Whoever gets custody, nobody moves from the Albany area- 25 miles from the Albany area. It would be Meigs County or Athens County. Anybody want any other counties?" Ms. Ferris' attorney replied "That is acceptable, Your Honor." After the trial court stated that he was making Ms. Ferris the residential parent, the trial court commented "I have a little problem with this Mr. Harts being around those kids until somebody tells me that the kids aren't actually fearful. Didn't one of the reports say that the kids were bothered by him?"

{¶7} The trial court granted the parties a divorce. The trial court named Ms. Ferris the primary residential parent of Austin and Whitney and awarded visitation with Mr. Ferris. The trial court ordered: (1) that the children shall continue to attend the Alexander Local School District, (2) that the parties are free to move within the school district, (3) "if one of the parties intends to move to a new residence or outside the school district, that party's parenting rights shall be modified to permit the children to remain with the parent residing within said school district", and (4) a party intending to move out of

the school district to comply with certain notification requirements. The trial court ordered (1) the parties to obtain counseling from Dr. Harding, (2) Dr. Harding to review the possible harm of introducing Mr. Harts into the children's lives, and (3) that Mr. Harts is to have no contact with the children until Dr. Harding determines that such contact with the children will not be harmful to them.

{¶8} Ms. Ferris appeals and asserts the following assignments of error: "[I.] The trial court erred in ruling that if [Ms. Ferris] moved from the school district, the parent designated as the residential parent would change to [Mr. Ferris]. [II.] The trial court erred when it held that the children must continue to attend the Alexander School District.[1] [III.] The trial court erred in deciding that the children could not be in the presence of [Mr.] Harts until a psychologist said it would not be harmful."

II.

{¶9} In her first assignment of error, Ms. Ferris argues that the trial court erred in ruling that if she changes her residence to outside of the school district, that Mr. Ferris would automatically become the children's residential parent.

[1] In her statement of the Assignments of Error, Ms. Ferris asserts a different assignment of error, "The trial court erred in ruling that the parties' minor children could have no contact with Michael Harris." Because she did not argue this assignment of error, we disregard it. App.R. 12(A)(2), App.R.

She asserts that R.C. 3109.04 (E)(1)(a) requires that a trial court find that there is a change of circumstances and a determination of the best interest of the children before a trial court reallocates parental rights. She concludes that the trial court's order making the change in residential parent automatic if she moves out of the school district violates R.C. 3109.04(E)(1)(a) and exceeds the court's authority under Article IV, Section 4(B) of the Ohio Constitution.

{¶10} Mr. Ferris disputes that the change in residential parent will be automatic if Ms. Ferris moves from the school district.

{¶11} First, we must determine whether the trial court's decision automatically reallocates parental rights if Ms. Ferris were to move from the school district. The relevant part of the trial court's order states "* * * the children shall continue to attend the Alexander Local School District and the parties shall arrange their residential circumstances to accommodate the children continuing in their education in said school district. [Mr. Ferris] and [Mrs. Ferris] shall have the prerogative to move within the said school district with prior notice to the other party. *However, if one of the parties intends to move to a new residence or outside of the school district, that party's parenting rights shall be modified to permit the children to*

16(A). Instead, we consider the version of her second assignment of error that she actually argued.

remain with the parent residing within said school district. Such an out-of-school move shall not occur without ninety days (90) prior advance written notice of relocation being filed with the court and served on the other party, at which time either party may request the court to review the residential status of the children provided, however, the children shall not be relocated out of the district without prior court consent or order." [Emphasis added]. We read the trial court's decision as prohibiting the parties from moving outside of the school district with the children without prior consent of the trial court. The italicized portion of the decision indicates what will happen if a party moves outside of the school district. Thus, while the decision does not provide for an "automatic" reallocation of parental rights, it does attempt to rule on a matter that has not yet happened.

{¶12} Section 4(B), Article IV of the Ohio Constitution provides that "[t]he courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters * * * as may be provided by law." See, also, *N. Canton v. Hutchinson* (1996), 75 Ohio St.3d 112, 114. "For a cause to be justiciable, there must exist a real controversy presenting issues which are ripe for judicial resolution and which will have a direct and immediate impact on the parties." *State v. Stambaugh* (1987), 34 Ohio St.3d 34, 38,

(Douglas, J., concurring in part and dissenting in part), citing *Burger Brewing Co. v. Liquor Control Comm.* (1973), 34 Ohio St.2d 93, 97-98. The court is required to raise justiciability sua sponte. *Stewart v. Stewart* (1999), 134 Ohio App.3d 556, 558, citing *Neiderhiser v. Borough of Berwick* (C.A.3, 1988), 840 F.2d 213, 216.

{¶13} "To determine whether an issue is ripe for judicial review, the court must weigh (1) the likelihood that the alleged future harm will ever occur, (2) the likelihood that delayed review will cause hardship to the parties, and (3) whether the factual record is sufficiently developed to provide fair adjudication." *Stewart*, citing *Ohio Forestry Assn., Inc. v. Sierra Club* (1998), 523 U.S. 726, 731-733, 118 S.Ct. 1665, 1669-1670, 140 L.Ed.2d 921, 928. Generally, a claim is not ripe if the claim rests upon "future events that may not occur as anticipated, or may not occur at all." *Texas v. United States* (1998), 523 U.S. 296, 300, 118 S.Ct. 1257, 1259, 140 L.Ed.2d 406, 410.

{¶14} We begin by noting that Ms. Ferris' move may not occur as anticipated or at all. The record does not reflect that the parties would endure undue hardship by waiting to apply for a change of custody until after Ms. Ferris moves. Finally, a reallocation of parental rights "depends upon a multitude of factors (see, R.C. 3109.04), and the record is not yet fully

developed so that the court may consider those factors." *Stewart,* 559. Thus, we find that the issue of whether custody of the children will change if Ms. Ferris moves from the school district is not ripe for judicial review, and that the trial court exceeded its jurisdictional powers by ruling upon future events which may or may not occur. Thus, we sustain Ms. Ferris' first assignment of error and reverse that part of the trial court's decision that indicates the consequences for a party moving out of the school district.

III.

{¶15} In her second assignment of error, Ms. Ferris argues that the trial court erred in ordering that the children continue to attend Alexander Local School District. She asserts that the right to determine which school district the children attend is one of the bundle of rights that belong to the custodial parent.

{¶16} We find that Ms. Ferris has waived this argument by failing to object to the trial court's announcement of this order at the hearing and by failing to make this argument to the trial court.

{¶17} The failure to promptly object and call any error to the attention of the trial court, at a time when it could have been prevented or corrected, amounts to a waiver of such error. *State v. Lott* (1990), 51 Ohio St.3d 160, 174, citing *State v. Gordon* (1971), 28 Ohio St.2d 45, at paragraph two of the

syllabus. An appellant waives any argument, for purposes of appeal, that was not made in the trial court proceedings. *Stores Realty v. Cleveland* (1975), 41 Ohio St.2d 41, 43; *Lippy v. Society Natl. Bank* (1993), 88 Ohio App.3d. 37.

{¶18} Here, Ms. Ferris testified that she did not intend to move from the Albany area and did not intend to take the children out of Alexander School District because the children are doing well. She also expressed a desire to move closer to the children's school building. She also indicated that she knew that the guardian ad litem had changed her recommendation from joint custody to sole custody to Mr. Ferris once she learned that Ms. Ferris intended to relocate to the Cincinnati area. At the end of the hearing, the trial court indicated that it would put on an order prohibiting whoever got custody of the children from moving from the Albany area. Ms. Ferris' attorney did not object; rather, he indicated that that was "acceptable." Thus, we find that Ms. Ferris both failed to object to the trial court's decision and failed to present the argument she now makes on appeal. Accordingly, we overrule her second assignment of error.

IV.

{¶19} In her third assignment of error, Ms. Ferris argues that the trial court erred in ordering that the children not be in

the presence of Mr. Harts until a psychologist determines that it will not harm the children.

{¶20} "Because the trial judge is in the best position to evaluate the child's best interests, a reviewing court should accord great deference to the decisions of the trial judge." *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 420, quoting *Pater v. Pater* (1992), 63 Ohio St.3d 393, 403 (Resnick, J., dissenting). Therefore, a trial court has broad discretion in custody proceedings. *Davis* at 421; *Trickey v. Trickey* (1952), 158 Ohio St. 9. An abuse of discretion involves more than an error of judgment; it implies an attitude on the part of the court that is unreasonable, unconscionable, or arbitrary. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, a reviewing court may not substitute its judgment for that of the trial court. *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, 137-138; *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169.

{¶21} After a thorough review of the record in this case, we cannot find that the trial court abused its discretion in ordering that Ms. Ferris keep the children away from Mr. Harts until a psychologist determines that being in Mr. Harts' presence will not harm the children. The guardian ad litem's report indicates that the children expressed fear of Mr. Harts. Ms. Ferris admitted during her testimony that the children were

fearful of Mr. Harts and had reported this to their guardian ad litem. She also admitted that the children saw a gun belonging to Mr. Harts when he stayed at Ms. Ferris' residence for two weeks. The trial court interviewed the children with the guardian ad litem present; however, Ms. Ferris failed to order a transcript of the interview[2], so we do not know whether the children expressed any views on Mr. Harts to the trial court. Given the children's statement to the guardian ad litem, the evidence that Mr. Harts kept a gun within view of the children, and our limited knowledge about the trial court's direct interaction with the children, we find that the trial court's order was not unreasonable, unconscionable, or arbitrary. Accordingly, we overrule Ms. Ferris' third assignment of error.

V.

{¶22} In sum, we sustain Ms. Ferris' first assignment of error and overrule Ms. Ferris' second and third assignments of error. Accordingly, we affirm in part and reverse in part the judgment of the trial court.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART.

[2] Ms. Ferris requested that the court reporter prepare only a transcript of the "hearing held on the 4th day of January, 2002."

Abele, J., Concurs in Judgment and Opinion as to Assignments of Error I and III, Dissents as to Assignment of Error II:

{¶23} I concur in both the judgment and the opinion with respect to appellant's first assignment of error. I agree that the trial court's judgment's "automatic" reallocation of parental rights based upon a single, future and unrealized event (residential parent's possible future relocation) exceeds the trial court's present jurisdictional authority.

{¶24} The issues that surround a residential parent's relocation and that relocation's impact upon child custody, frequently arise in post-decree custody modification disputes. Generally, courts, when confronted with this situation, consider a multitude of factors including, but not limited to, the custodial parent's reasons for relocation, the child's quality of life issues, and whether the child's relocation would adversely impact and disrupt the child's meaningful relationship with the non-custodial parent and any extended family or other caretakers. See 2002 Vol. 1 Ohio Domestic Relations Law, Sowald Morgenstern, Section 16:11, page 824-828; R.C. 3109.04.

{¶25} In the instant case, in the event that either party intends to relocate, the trial court will have at that time the opportunity to review all of the pertinent facts and circumstances in deciding whether to modify the residential parent status. I fully agree with the trial court that children

need stability, consistency and permanency in their lives, especially during a difficult domestic upheaval. However, the court will be in a more advantageous position in the future to evaluate the children's needs. New information may surface in the future concerning the parties' conduct and parenting skills and may cast a very different light on the situation.

{¶26} With respect to appellant's second assignment of error, I respectfully dissent. Generally, custodial parents may choose the schools to which they send their children. Lawson v. Lawson (Dec. 21, 2001), Lawrence App. No. 01CA25, citing Smith v. Smith (Dec. 28, 1999), Franklin App. No. 98AP-1641; Gardini v. Moyer (1991), 61 Ohio St.3d 479, 575 N.E.2d 423 (Wright, J. Dissenting); Rand v. Rand (1985), 18 Ohio St.3d 356, 481 N.E.2d 609 (Celebrezze, C.J. Concurring). In the case sub judice, the central issue is whether the trial court may enforce a divorce decree's terms which, ostensibly, include the parties' "agreement" that the children should remain in a particular school district.

{¶27} In Lawson, supra, we noted that the parties' explicit and detailed agreement envisioned that their child would continue to attend a particular high school. Thus, we held that under the unique facts present in that case, the custodial parent should not be permitted to refuse to abide by her explicit agreement regarding the child's schooling, absent a

substantial change in circumstances and absent a finding that changing schools would be in the child's interest. In the instant case, however, it appears that the trial court expressed its view that the children should remain in the school district that they now attend. My review of the transcript reveals that the parties understood the court's preference and, in order to be considered for the residential parent award, acquiesced to the court's demand. I find the present case distinguishable from Lawson as this situation did not involve the parties voluntarily reaching an agreement and submitting that agreement to the trial court for approval. Thus, I am reluctant, under these facts, to conclude that appellee waived appellate review of this particular issue. Rather, much like appellant's first assignment of error, I believe that to automatically modify custody in the event that the residential parent chooses to enroll her children in a different school constitutes an abuse of discretion.

{¶28} Once again, I believe that the trial court's obvious concern for the children is laudable. However, in the event that the residential parent desires to enroll her children in a different school system, the court will have the ability at that time to review and to consider all the information available and may make a decision based upon the fully developed facts. At this juncture, it is almost impossible to predict all

of the factors that may have a bearing on the children's welfare at some future date. Thus, it is advisable to refrain from deciding this issue until it becomes necessary to do so.

{¶29} With respect to appellant's third assignment of error, I concur in both the judgment and opinion that the trial court did not abuse its discretion by limiting the children's contact with Mr. Harts until a psychologist determines that Harts' presence will not harm the children. The primary responsibility of the guardian ad litem and the trial court is to act in furtherance of the children's best interests. Thus, I agree with the principal opinion that the trial court's action with respect to Mr. Harts is not unreasonable, unconscionable or arbitrary.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED IN PART AND REVERSED IN PART and the cause remanded to the trial court for further proceedings consistent with this opinion and that costs herein be taxed equally between the parties.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Meigs County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as the date of this Entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Evans, P.J.: Concurs in Judgment and Opinion.
Abele, J.: Concurs in Judgment and Opinion as to A/E I and III; Dissents with attached Dissenting Opinion as to A/E II.

For the Court

BY: _____
Roger L. Kline, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.