

evidence.

{¶ 3} The record reflects that Pyburn and Woodruff met when they both were on active duty in the U.S. Marine Corps in Kansas City. They never married, and their romantic relationship ended before O. was born. Shortly after O.'s birth in 1999, Pyburn was transferred to another city, and she relocated several times with O. and her older son, W. She continues to serve on active duty in the Marine Corps, and she has lived in Springfield, Ohio, for several years. It is undisputed that Woodruff had minimal contact with O. at the time of her birth and virtually no contact with her for several years thereafter. In 2001, a Missouri court determined that Woodruff was O.'s father and ordered him to pay child support.

{¶ 4} In 2005, when O. was six years old, Pyburn contacted Woodruff to ask if he would care for O. while she attended military training. Woodruff agreed, and O. lived with Woodruff and his wife in Kansas for approximately two months. Later in 2005, when Pyburn believed that she soon would be deployed to Iraq, the parties made arrangements for Woodruff to become O.'s temporary legal custodian during the deployment. Woodruff filed the earlier Missouri decree in Clark County Common Pleas Court ("the trial court") and obtained a temporary order designating him as legal custodian. However, Pyburn never was deployed.

{¶ 5} O. went to visit Woodruff again in the summer of 2006. During that visit, Woodruff became concerned that O. had been sexually abused by Pyburn's older son, W., based on O.'s behavior and her statements about her physical contact with W. Woodruff contacted Pyburn about these concerns, and she indicated that she was aware of the allegations and had addressed them with the children. Woodruff also sought professional

help for O. and initiated an action under Kansas' Protection from Abuse Act. The trial court deferred to the Kansas court while the investigation proceeded, and O. remained with Woodruff.

{¶ 6} In September 2006, Woodruff filed an action in Kansas seeking to register the 2001 Missouri judgment and to obtain custody of O. For jurisdictional reasons, the Kansas court deferred to the trial court and dismissed Woodruff's complaint. The trial court conducted a hearing on October 4, 2007, and January 24 and 25, 2008, to determine how O.'s best interest would be served and who would be the residential parent. In February 2008, the trial court named Woodruff the residential parent and legal custodian, established visitation for Pyburn, and ordered her to pay child support.

{¶ 7} Pyburn appealed from the trial court's February 2008 ruling. On December 19, 2008, we reversed and remanded, finding that the trial court erroneously had relied on inadmissible hearsay documents attached to a guardian ad litem's report. Despite observing that "the admissible evidence might have supported the trial court's conclusion," we were unable to find that its consideration of the inadmissible documents constituted harmless error. Therefore, we remanded the cause for the trial court to make a parenting decision without relying on the documents. On December 30, 2008, the trial court filed a new judgment entry. Without considering the hearsay documents, it designated Woodruff the residential parent and legal custodian, awarded Pyburn visitation, and ordered her to pay child support. Pyburn again has appealed, arguing that the trial court's designation of Woodruff as residential parent and legal custodian is against the weight of the evidence.

{¶ 8} At the outset of our analysis, we note the absence of a prior judicial decree in this case allocating parental rights and responsibilities. Although Pyburn had custody of O.

from the child's birth, that custody arose by operation of law under R.C. 3109.042. Therefore, the trial court correctly found, and Pyburn does not dispute, that it was not required to find a change in circumstances in order to designate Woodruff the residential parent and legal custodian. Because permanent custody never had been litigated, the parties stood on equal footing with regard to the allocation of parental rights and responsibilities. *DeWitt v. Myers*, Clark App. No. 08-CA-86, 2009-Ohio-807, ¶16. The sole issue before the trial court was whether it was in O.'s best interest for Pyburn or Woodruff to be designated the child's residential parent and legal custodian. See R.C. 3109.04(B)(1).

{¶ 9} The Revised Code contains a non-exclusive list of factors a trial court must consider when making a best-interest determination. See R.C. 3109.04(F)(1)(a) through (j). These factors "relate primarily to the health and well being of the child and the parents." *Meyer v. Anderson*, Miami App. No. 01 CA53, 2002-Ohio-2782. Although a trial court is required to consider these factors, it retains broad discretion in making a best-interest determination. *Id.* We review its determination for an abuse of that discretion. *In re D.W.*, Montgomery App. No. 21630, 2007-Ohio-431, ¶13.

{¶ 10} On appeal, Pyburn contends the trial court's ruling primarily turned on one issue: its belief that she did not respond appropriately to O.'s allegations that W. had sexually abused her. Pyburn insists that she handled the situation properly by assessing its severity and confronting the two children. Pyburn further complains that she has not been given an opportunity, since the commencement of these proceedings, to provide O. with the care and treatment the trial court deemed appropriate. Pyburn reasons that the circumstances of the case would be different if O. had not remained with Woodruff in

Kansas since the summer of 2006, when the sexual abuse allegations surfaced.

{¶ 11} Pyburn also disputes the trial court's finding that, despite Woodruff's 1999 court-martial on charges that stemmed from his having sex with a married woman and videotaping the act, he currently is a responsible adult who serves as a good role model for O. Pyburn claims this finding is belied by Woodruff's hearing testimony below, which she contends contained several lies. Finally, Pyburn contends Woodruff displayed a lack of parenting skills when he once returned O. to her from visitation with Shigella, a medical condition that can be fatal if left untreated, and denied that she was sick.

{¶ 12} Upon review, we find no abuse of discretion in the trial court's designation of Woodruff as O.'s residential parent and legal custodian. Contrary to Pyburn's argument on appeal, that decision is not against the weight of the evidence. The R.C. 3109.04(F)(1) "best-interest" factors the trial court was required to consider include:

{¶ 13} "(a) The wishes of the child's parents regarding the child's care;

{¶ 14} "(b) If the court has interviewed the child in chambers * * *, the wishes and concerns of the child, as expressed to the court;

{¶ 15} "(c) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;

{¶ 16} "(d) The child's adjustment to the child's home, school, and community;

{¶ 17} "(e) The mental and physical health of all persons involved in the situation;

{¶ 18} "(f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;

{¶ 19} "(g) Whether either parent has failed to make all child support payments, including all arrearages, that are required of that parent pursuant to a child support order

under which that parent is an obligor;

{¶ 20} “(h) Whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child * * *; “(i) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent’s right to parenting time in accordance with an order of the court; “(j) Whether either parent has established a residence, or is planning to establish a residence, outside this state.”

{¶ 21} Having reviewed the lengthy transcript of the hearing below, we conclude, as the trial court appears to have done, that many of foregoing factors do not weigh significantly in either party’s favor. The record reflects that O. is an academically gifted child who likely could perform well and flourish under the supervision of either Woodruff and Pyburn. The trial court found, however, that it would be in O.’s best interest to remain under Woodruff’s care and supervision in Kansas. The weight of the evidence supports this conclusion. The trial court acted within its discretion in finding, based on the evidence presented, that O.’s allegations of sexual abuse by Pyburn’s older son, W., were true. It also acted within its discretion, based on the evidence, in finding that Pyburn did not take the allegations seriously enough and, in fact, still does not fully believe O’s. story. The trial court noted that this reaction by Pyburn is upsetting to O. The trial court also found, based on the evidence before it, that O. has many friends in Kansas, and that she is well adjusted to home, school, and community life there. In addition, the trial court found that Woodruff “has straightened out his life and serves as an appropriate role model for [O.]” We find ample evidence to support this conclusion. Since his 1999 court-martial from the

military, Woodruff has maintained stable employment for several years. He has married and purchased a home. He also attends college part time and is close to completing a bachelor's degree in business management. He resides with his wife and her grandson, who is the same age as O. Although Woodruff had little contact with O. during the early years of her life, the record reflects that the child now has a close and loving relationship with Woodruff, his wife, and his wife's grandson.

{¶ 22} While Pyburn contends the circumstances of this case would be different if O. had not remained with Woodruff in Kansas since the summer of 2006, the child nevertheless did remain with Woodruff after the sexual abuse allegations surfaced. We do not review the trial court's decision based on what might have been if the facts were different.

{¶ 23} The trial court also acted within its discretion in finding that Woodruff is a good role model for O., despite Pyburn's recitation of several apparent inconsistencies in his hearing testimony. The trial court was aware of the inconsistencies and presumably gave them the weight it deemed appropriate. We see nothing so egregious in his testimony that the trial court necessarily should have found Woodruff wholly lacking in credibility. Finally, O.'s one-time illness with Shigella does not mandate a sweeping finding that Woodruff lacks parenting skills. It may be that Woodruff truly was not aware of the child's illness when he returned her from visitation. In any event, it was an issue for the trial court to consider in the exercise of its discretion.

{¶ 24} Based on the reasoning set forth above, we conclude that the trial court's designation of Woodruff as O.'s residential parent and legal custodian is not against the manifest weight of the evidence. Pyburn's assignment of error is overruled, and the

judgment of the Clark County Common Pleas Court, Domestic Relations Division, is affirmed.

.....

FAIN and FROELICH, JJ., concur.

(Hon. William H. Wolff, Jr., retired from the Second District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

Linda Joanne Cushman
Robert N. Lancaster, Jr.
Hon. Thomas J. Capper