

parent and legal custodian. Rebecca contends this finding constitutes an abuse of discretion and is against the manifest weight of the evidence.

{¶ 3} The record reflects that the parties never married each other but had one child together, a son named A.M., who was born in January 1998. Because Christopher and Rebecca were not married at the time, Rebecca automatically became the residential parent and legal custodian by operation of law.¹ Shortly after A.M.'s birth, the trial court ordered Christopher to pay child support and granted him standard visitation. At that time, Christopher worked locally for Delphi. His schedule required him to work weekdays and approximately every other weekend. He exercised visitation with A.M. on the weekends he did not work and on holidays.

{¶ 4} In June 1999, Christopher married a woman named Alicia. They subsequently had two children. In June 2002, Christopher took advantage of an opportunity to transfer to a Delphi plant in Bowling Green, Kentucky. He did so because the local Delphi plant "wasn't looking too good" with regard to his continued employment. He felt a particular need for job security as one of the children he had with Alicia had been diagnosed with a malignant brain tumor. Following the move to Bowling Green, which was more than four hours away, Christopher saw A.M. whenever he came to Ohio to visit or whenever his parents brought the child to Kentucky. For several years after the move, he saw A.M. roughly twelve to twenty-four times a year. (July 25, 2008 transcript at 29, 78).

¹See R.C. 3109.042 ("An unmarried female who gives birth to a child is the sole residential parent and legal custodian of the child until a court of competent jurisdiction issues an order designating another person as the residential parent and legal custodian.").

{¶ 5} On July 26, 2007, Rebecca filed a complaint for legal custody, seeking a court order naming her the residential parent of A.M. Christopher filed a similar request on August 14, 2007. After conducting a three-day evidentiary hearing on the matter, speaking to A.M. privately in camera, and considering a guardian ad litem's report, the trial court filed a fifteen-page decision and entry on November 19, 2008, designating Christopher as A.M.'s residential parent and legal custodian and granting Rebecca standard visitation.

{¶ 6} On appeal, Rebecca contends the trial court erred in finding it in A.M.'s best interest for Christopher to be named the residential parent and legal custodian. She claims this finding constitutes an abuse of discretion and is against the weight of the evidence.

{¶ 7} At the outset of our analysis, we note the absence of a prior judicial decree allocating parental rights and responsibilities. Although Rebecca had custody of A.M. from birth, that custody arose by operation of law under R.C. 3109.042. Therefore, the trial court was not required to find a change in circumstances in order to designate Christopher the residential parent and legal custodian. Because custody never had been litigated, Rebecca and Christopher stood on equal footing, despite the fact that Rebecca had raised A.M. for nearly ten years. *DeWitt v. Myers*, Clark App. No. 08-CA-86, 2009-Ohio-807, ¶16; see, also, R.C. 3109.042.

{¶ 8} Rebecca concedes that the sole issue before the trial court was whether it was in A.M.'s best interest for her or Christopher to be designated the child's residential parent and legal custodian. See R.C. 3109.04(B)(1). 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. 01CA53, 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.

{¶ 9} On appeal, Rebecca primarily challenges eight specific findings by the trial court. She also contends the record lacks evidence that Christopher is a qualified, competent parent. She maintains that he has not been “remotely interested” in being A.M.’s father and characterizes his custody request as insincere and retaliatory. She additionally contends the guardian ad litem’s report lacks credibility. Finally, she asserts that the trial court failed to give adequate consideration to the fact that its ruling required A.M. to move nearly 300 miles away from his original home, family, and friends. Upon review, we see no abuse of discretion in the trial court’s ruling, which is supported by the weight of the evidence.

{¶ 10} Rebecca first challenges the trial court’s finding that Christopher maintained an “ongoing relationship” with A.M. prior to moving to Kentucky in 2002. She insists that this finding is “clearly without support.” We disagree. Christopher testified that he saw A.M. on weekends when he was not working and on holidays. Notably, the trial court found Christopher’s testimony to be “very credible.” Although Christopher sometimes worked every other weekend, or even two weekends out of three, his testimony established that he spent numerous weekends and holidays with A.M. prior to moving to Kentucky. Moreover, Christopher testified that he maintained this relationship

with the child even after moving.

{¶ 11} Rebecca next challenges the trial court's finding, based on an in camera interview, that A.M.'s "expressed wishes" about custody were entitled to little weight because of his relative immaturity. Having reviewed a transcript of the interview, we believe the trial court's determination is supported by the evidence and does not constitute an abuse of discretion. At the time of the interview, A.M. was ten years old. He stated that he got along well with both of his parents and would miss either one if visits were infrequent. He said it would be "all right" if he lived with Christopher and only saw Rebecca once a month or so. He then added, "I would like to stay with my mom more than my dad sometimes." When asked why, he opined that Kentucky was "too crowded," particularly the restaurants, which had "a lot of people there." A.M. also expressed a belief that he would do better in school in Ohio because he had tutors and "special classes." A.M. added that he preferred Ohio because he had friends there and because Christopher made him get up for church on Sunday mornings in Kentucky. A.M. acknowledged, however, that he also had "about five" friends in Kentucky.

{¶ 12} In light of the foregoing statements, the trial court was entitled to give A.M.'s preference for living with Rebecca little weight. The trial court reasonably concluded that A.M.'s rationale for preferring Ohio demonstrated relative immaturity. Indeed, A.M. first indicated that he preferred Ohio because Kentucky's restaurants were crowded. The child's preference for Ohio because he had tutors and special-education classes there was more reasonable. Still, it ignored the reality that tutors and special-education classes exist in Kentucky as well. On the other hand, A.M.'s concern about seeing his friends in Ohio was legitimate. This concern was diminished somewhat,

however, by A.M.'s admission that he had a number of friends in Kentucky. Finally, A.M.'s preference for Ohio because Rebecca let him sleep in on Sunday morning is understandable, particularly for a ten-year-old boy. All things considered, however, the trial court reasonably could have concluded that a desire to avoid church was not a particularly weighty reason. Notably absent from A.M.'s expression of his preference to live in Ohio was any indication that he greatly preferred being with his mother. The trial court did not abuse its discretion in giving A.M.'s preference little weight.

{¶ 13} Rebecca next challenges the trial court's finding that she has done "a relatively poor job of adequately tending to [A.M.'s] special needs." Rebecca contends she has offered A.M. assistance and encouragement for his reading disability. She also points out her communication with his teachers, his participation in a special "IEP" educational program at school, and her efforts to secure tutors for him.

{¶ 14} Although we do not dispute the foregoing points, the trial court nevertheless acted within its discretion in finding that she had not adequately tended to A.M.'s educational needs. In reaching this conclusion, we do not wish to denigrate the efforts made by Rebecca, who concedes that she reads poorly herself and, therefore, cannot help A.M. with his homework. The record does reflect interest by Rebecca in A.M.'s education. It demonstrates that she periodically found tutors to help him and communicated with his teachers.

{¶ 15} On the other hand, the record reveals that Rebecca ignored recommendations to send A.M. to summer school in 2007 and 2008. We note too that he was tardy eleven times and had fourteen and a half absences during the third grade. The record also reflects that A.M. frequently failed to turn in homework or turned it in

incomplete. In the third quarter of the school year, he did not turn in any homework binders completely finished. He also did not complete his reading log, which required sixty minutes of reading per week. In addition, he failed to correct assignments on which he received Ds and Fs despite being given an opportunity to do so. A.M. also failed proficiency tests and received numerous poor grades even with allowances being made to account for his reading difficulties. Notably, A.M.'s reading level showed no improvement whatsoever throughout the entire third grade. Despite Rebecca's own reading difficulty, the trial court acted within its discretion in finding that she did not adequately tend to his educational needs.

{¶ 16} Rebecca next challenges the trial court's finding that she had ample time to obtain her own education so she could help A.M. with his school work or, alternatively, to find suitable assistance to help him. Rebecca contends she did obtain tutoring assistance from a woman named Ada Ison for A.M.'s third grade and fourth grade school years. The trial court largely discounted Ison's efforts, however, noting that she had no teaching certificate or specialized education. We agree with Rebecca's assertion that such credentials are not required for a tutor to be effective. At the same time, however, the trial court acted within its discretion in finding that Ison's efforts had resulted in little observable academic progress, particularly with regard to his reading. This lack of progress may not be Ison's fault. It may be attributable to Rebecca's own failure to require A.M. to attend summer school as recommended, her failure to require him to complete his homework, her failure to require him to correct assignments, her failure to require him to turn in his reading log, and her failure to assure that he attended school regularly and on time. Either way, we cannot say the trial court abused its

discretion in finding that she could have done more to assist A.M. academically.

{¶ 17} Rebecca next contends the trial court erred in finding that her home was “relatively dirty,” “chaotic,” and “in a state of disarray.” She insists there was “absolutely no credible evidence” to support such a conclusion. Rebecca concedes that the guardian ad litem described her home as “generally chaotic and in disarray” during an unannounced visit. She notes, however, that the visit occurred after school while she was hurrying to prepare dinner so A.M. and his eight-year-old half brother could attend wrestling practice. Rebecca contends it is unfair to judge her home based on observations made under those circumstances. While this argument is reasonable, we note the existence of other evidence regarding the condition of Rebecca’s home. Connie McGowan, a certified special education teacher who is related to Christopher, testified that she tutored A.M. during the second grade. She visited Rebecca’s home at least six times and observed it to be “pretty messy and dirty looking and it stunk.” Similarly, neighbor Kim Lewis described Rebecca’s apartment as “a mess.” Lewis testified that she saw “[d]irty clothes, dishes, [and] toys.” Although Rebecca disputes this testimony, the trial court had the discretion to find it credible and to rely on it.

{¶ 18} Rebecca next disputes the trial court’s finding that she did not adequately follow up with counseling to assist A.M. with “behavioral issues.” She maintains that “[a]bsolutely no evidence supports this finding.” Upon review, it does not appear to us that A.M. had any serious problems with his behavior. The record reflects that A.M. periodically saw a counselor, Josh Francis. Although we do not find a great deal of evidence on the issue, it appears that Rebecca initially consulted Francis to help A.M. deal with certain issues when he was in kindergarten. The trial court sustained several

objections when Rebecca attempted to describe the nature of the issues. In any event, she later consulted Francis again after an incident in which A.M. and her other son apparently engaged in some form of sexual exploration with a girl approximately their own age. At the time, the children all were about six or seven years old. None of the hearing testimony suggests that the incident was serious. Rebecca also took A.M. to see Francis after her boyfriend, Robert Dooley, died of a methadone overdose while living in her apartment with A.M. and a child she and Dooley had together.

{¶ 19} Christopher asserts that a report from the guardian ad litem establishes A.M.'s diagnosis with "adjustment disorder" and Rebecca's failure to take the child to counseling regularly to address it. After examining the record, however, we have not located a copy of the guardian ad litem's report. Although both parties acknowledge that the trial court reviewed it, the report does not appear to have been admitted into evidence. Therefore, we are inclined to agree with Rebecca that the record fails to support a finding that she neglected to get needed counseling to assist A.M. with "behavioral issues."²

{¶ 20} Rebecca next contends the trial court erred in finding that Christopher is "far more likely to adequately deal with all of [A.M.'s] significant educational and emotional needs[.]" She asserts that this finding "defies reason and logic" and that "zero" credible evidence exists to support it. We disagree. The trial court reasonably could

²This conclusion does not mean, however, the trial court's designation of Christopher as the residential parent must be reversed. Despite the lack of evidence to support this particular factual finding, we are convinced, based on the remainder of our analysis herein, that the trial court did not abuse its discretion in granting Christopher legal custody.

have concluded that Christopher personally was better able to assist A.M. with his school work. Christopher testified that he had helped A.M. with homework on weekends in Kentucky and that he had required A.M. to complete his reading assignments. Christopher added that he would be “very involved” in A.M.’s homework if he were designated the residential parent. He professed a willingness to check A.M.’s work and to help with reading and spelling. Christopher additionally testified that he had talked to teachers in his school district about A.M. and knew how to get help for him. Given A.M.’s relatively poor performance on homework and at school in Ohio, the trial court did not abuse its discretion in finding that Christopher best could address A.M.’s educational needs. The record also suggests that Christopher had a stable home environment in Kentucky and that he enjoyed a good relationship with A.M. For her part, Rebecca lived with a man who died of a drug overdose while A.M. was present in the apartment. At the time of the hearing, she worked only seasonally and was raising A.M. and another child by herself. Although Christopher and Rebecca probably both could deal with A.M.’s emotional needs, the trial court did not abuse its discretion in finding Christopher better suited to do so.

{¶ 21} Rebecca next disputes the trial court’s findings that A.M. would be more likely to have “positive interactions and interrelationships with friends and relatives while residing with his father and while visiting his mother,” and that Christopher would be more likely to honor and facilitate court-approved visitation for Rebecca than she would for him. Rebecca argues that A.M.’s relatives and many of his friends are in Ohio. She also asserts that she has facilitated visits between Christopher and A.M.

{¶ 22} Upon review, we do not dispute that most of A.M.’s relatives and many of

his friends live in Ohio. A.M. also has a number of friends in Kentucky, however, as well as two step-siblings. In any event, the trial court did not simply count the number of friends and relatives in each place. Instead, it evaluated the nature of A.M.'s relationships with others, expressing its belief that he would have more "positive interactions and interrelationships" with friends and relatives in Kentucky. Although we may not have reached the same conclusion, we cannot say the trial court abused its discretion in so finding. As for which party would best facilitate visitation, the record contains some evidence that Rebecca "at times" made it difficult for Christopher to visit A.M. Christopher himself provided such testimony, and the trial court found his testimony to be credible.

{¶ 23} Rebecca also contends the record lacks evidence that Christopher is a qualified, competent parent. She maintains that he has not been "remotely interested" in being A.M.'s father and characterizes his custody request as insincere and retaliatory. The record contains ample evidence from which the trial court reasonably could have concluded otherwise. At the time of the hearing, Christopher resided in Kentucky with his wife, Alicia, and their two children in a suitable home. He worked for Delphi, earning a good salary, and Alicia was a stay-at-home mother. The record contains evidence that Christopher and A.M. had an affectionate relationship and that Christopher treated A.M. the same as his other children. Despite Rebecca's argument to the contrary, the trial court reasonably could have concluded that Christopher is a qualified, competent parent.

{¶ 24} With regard to Rebecca's claim that Christopher has not been "remotely interested" in being A.M.'s father, the record suggests otherwise. As set forth above, Christopher maintained a relationship with A.M. for many years and paid all court-

ordered child support. Before moving to Kentucky, he saw the child under a standard order of visitation as his work schedule permitted. Even after the move, he saw A.M. between twelve and twenty-four times a year. As for Rebecca's claim that Christopher's custody request was insincere and retaliatory, this assertion essentially raises a credibility issue that was for the trial court to resolve. Based on the evidence before us, we cannot say the trial court abused its discretion in concluding that Christopher's interest in gaining custody of A.M. was genuine.

{¶ 25} We reach the same conclusion regarding Rebecca's claim that one of two guardian ad litem reports lacks credibility. Rebecca complains about the guardian ad litem issuing two reports, the second of which was much more critical of her and recommended granting custody to Christopher. Although the reports do not appear to be part of the record before us, Rebecca questions the credibility of the second report and accuses the guardian ad litem of being improperly influenced by Christopher's relatively high income, his nice home, and a "tea party" allegedly given in the guardian ad litem's honor. She also theorizes that the guardian ad litem may have felt compelled to select Christopher as the residential parent because the court paid all expenses for the home visit to Kentucky. Although Rebecca was free to raise these arguments below, the trial court was entitled to reject them. The trial court reasonably could have concluded that the guardian ad litem legitimately changed her mind after visiting Christopher in Kentucky. In any event, even if we discount the guardian ad litem's report entirely given its absence from the record, the weight of the evidence presented at the three-day evidentiary hearing still supports the trial court's designation of Christopher as the residential parent.

{¶ 26} Finally, we are unpersuaded by Rebecca’s claim that the trial court failed to give adequate consideration to the fact that granting Christopher custody would require A.M. to move nearly 300 miles away from his original home, family, and friends. The trial court plainly was aware of this fact. It was no secret that Christopher lived nearly four and a half hours away from Rebecca. The weight to be given to this fact, and its role in the residential-parent determination, were matters for the trial court to resolve in the exercise of its discretion. We see no abuse of that discretion. The record reflects that A.M. had friends and step-siblings in Kentucky, enjoyed spending time there, and had a good relationship with Christopher. The trial court also reasonably found that Christopher best could provide for A.M.’s day-to-day care, and that residing with Christopher would be in A.M.’s best interest. Although the distance between Christopher and Rebecca is substantial, the trial court granted her standard visitation and ordered Christopher to meet her half way to exchange A.M. for visits. Having reviewed the record, we see no abuse of discretion in the trial court’s decision, which is supported by the weight of the evidence.

{¶ 27} The sole assignment of error is overruled, and the judgment of the Clark County Common Pleas Court, Domestic Relations Division, is affirmed.

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FAIN and FRENCH, JJ., concur.

(Hon. Judith L. French, from the Tenth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio)

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