

[Cite as *Burd v. Brown*, 2009-Ohio-7038.]

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
CLARK COUNTY**

TAMEKA BYRD

Plaintiff-Appellant

v.

MARK ANTHONY BROWN

Defendant-Appellee

Appellate Case No. 2009-CA-57

Trial Court Case No. 96-JUV-1343

(Civil Appeal from Common Pleas  
Court, Juvenile)

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**OPINION**

Rendered on the 30<sup>th</sup> day of December, 2009.

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Attorney for Plaintiff-Appellant

MARK BROWN, 226 West Euclid Avenue, Springfield, Ohio 45506  
Attorney for Defendant-Appellee

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BROGAN, J.

{¶ 1} Tameka Byrd appeals pro se from the trial court's June 3, 2009 decision and entry designating appellee Mark Brown as residential parent and legal custodian of the

parties' two minor children, "H." and "N."

{¶ 2} Although Byrd's two-page appellate brief lacks any assignments of error, she appears to contend the trial court's ruling constitutes an abuse of discretion. She asserts that the trial court found Brown's allegations about her abusing the children to be untrue. She also contends the trial court did not allow the children to express their desires or take those desires into consideration. She maintains that the children were not allowed to state their preference to live with her and that a counselor was not permitted to speak about the children's wishes.

{¶ 3} Upon review, we are unpersuaded by Byrd's arguments. The record reflects that H. was born in 1992, and N. was born in 1994. Although Byrd and Brown never married, they lived together "on and off" for a few years after the children were born. Brown then left the home but maintained a relationship with the children and paid child support. The children began residing with him in 2007, when he filed a complaint for permanent custody. The trial court awarded him temporary custody in February 2008, pending resolution of his complaint. The matter ultimately proceeded to a two-day evidentiary hearing in April and May 2009. Following the hearing, the trial court filed a fourteen-page decision and entry in which it named Brown the residential parent and legal custodian and awarded Byrd visitation.

{¶ 4} At the outset of our analysis, we note the absence of a prior judicial decree in this case awarding either party permanent custody. Although Byrd had raised the children for most of their lives, permanent custody never had been litigated. Therefore, the parties stood on equal footing with regard to the allocation of parental rights and responsibilities, and the sole issue before the trial court was whether it was in

the children's best interest for Byrd or Brown to be designated the residential parent and legal custodian. *Pyburn v. Woodruff*, Clark App. No. 2009-CA-10, 2009-Ohio-5872, ¶8.

{¶ 5} 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. We see no abuse of discretion in the trial court's designation of Brown as the residential parent and legal custodian of H. and N. The R.C. 3109.04(F)(1) "best-interest" factors the trial court was required to consider include:

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

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

{¶ 8} "(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;

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

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

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

{¶ 12} "(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;

{¶ 13} “(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 \* \* \*;

{¶ 14} “(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;

{¶ 15} “(j) Whether either parent has established a residence, or is planning to establish a residence, outside this state.”

{¶ 16} The record reflects that the trial court properly addressed each of the foregoing factors. Having reviewed a transcript of the hearing below, we conclude that the evidence supports the trial court's findings. The trial court first noted that Byrd and Brown both had asked to be designated the residential parent. With regard to the children's wishes, the trial court observed that they had changed their minds several times about their preferred living arrangement. In any event, despite their ages, the trial court found the children too immature to give much weight to those changing wishes.

{¶ 17} The trial court noted that the children had a loving, though at times volatile, relationship with both parents. It also observed that both parents had made progress with their parenting skills. The trial court further noted that the children got along well with Brown's wife and her fifteen-year-old daughter, both of whom reside with Brown. The trial court observed, however, that the children had some “issues” with James Williams, Byrd's long-time boyfriend who sometimes resides with her.

{¶ 18} The trial court then found that the children were well adjusted to their

current home and community but were making unsatisfactory academic progress. The trial court noted, however, that both parents were making “significant efforts” to correct the problem. The trial court found insufficient evidence of any mental or physical health issues. It did find, however, that Brown would be most likely to honor court-ordered visitation. In support, it noted that he already had been facilitating “regular and frequent” parenting time for Byrd without any court order to do so.

{¶ 19} While noting that Brown once had been held in contempt for non-payment of child support in 2000, the trial court found no evidence of any current arrearage. It also found no evidence that anyone in either household had been convicted of any crime that had resulted in the children being abused or neglected. The trial court did note, however, that Byrd’s boyfriend, James Williams, had a lengthy criminal history for crimes including felonious assault, theft, drug abuse, menacing, domestic violence, and resisting arrest. Finally, the trial court found that neither party had continuously and willfully denied the other party’s right to parenting time or had any plans to move out of state.

{¶ 20} Based on our review of the record, the trial court did not abuse its discretion in finding Brown best suited to serve as the residential parent and legal custodian. Byrd’s assertion that the trial court rejected Brown’s allegations of physical and emotional abuse does not persuade us otherwise. Although the trial court did not find that Byrd had engaged in abuse, this was only one factor in the trial court’s analysis. The fact that Byrd did not abuse the children certainly did not mandate granting her custody.

{¶ 21} As for Byrd’s argument that the trial court did not afford the children an

adequate opportunity to express their wishes, we disagree. The trial court interviewed both children in camera in July 2008. Byrd never requested an updated interview closer to the April and May 2009 hearing. Although she complains about counselor Vinnie Butler being denied an opportunity to testify concerning the children's wishes, the record contains no ruling precluding such testimony at the April and May 2009 hearing. Butler simply was not called as a witness by Byrd's attorney and, apparently, was not present. We note too that guardian ad litem Laurence Hofbauer testified about the children's preference, the last time he spoke to them, to reside with their mother. Hofbauer added, however, that his own recommendation, as between Byrd and Brown, "would probably be" for Brown to be named the residential parent. In any event, the trial court plainly was aware of the children's wishes. It took those wishes into consideration, but gave them little weight because the children had changed their minds several times, had based their decision on things other than their long-term best interest, and had exhibited relative immaturity.

{¶ 22} Based on the reasoning set forth above, we affirm the judgment of the Clark County Common Pleas Court, Domestic Relations Division.

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DONOVAN, P.J., and FROELICH, J., concur.

Copies mailed to:

Tameka Byrd  
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