

[Cite as *In re J.B.*, 2011-Ohio-3658.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In re: :  
J.B., : No. 11AP-63  
(J.B., : (C.P.C. No. 06JU-05-8366)  
Appellant). : (REGULAR CALENDAR)

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D E C I S I O N

Rendered on July 26, 2011

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*Robert J. McClaren*, for appellee Franklin County Children Services.

*Axelrod Laliberte LLC*, and *Brian J. Laliberte*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas,  
Division of Domestic Relations, Juvenile Branch.

BROWN, J.

{¶1} J.B. ("mother"), appellant, appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, in which the court granted the motion of Franklin County Children Services ("FCCS"), appellee, for permanent court commitment ("PCC") with regard to J.B. ("child").

{¶2} Mother gave birth to the child, a son, on July 15, 2005. At the time of the child's birth, mother was a minor in the custody of FCCS. FCCS placed mother and the child in the home of mother's sister. Mother and the child were removed from the home of mother's sister because mother was physically and verbally aggressive, and she was

not properly caring for the child. On July 24, 2006, the child was adjudicated dependent, after which mother and the child were placed in various homes.

{¶3} On August 27, 2007, after mother fled from her foster home, FCCS was granted temporary custody of the child, and he was placed in foster care. A case plan was put in place in December 2007, and temporary custody was extended several times to allow mother to work on the case plan and attend counseling. On April 10, 2009, E.C., father, established paternity by administrative order.

{¶4} On July 2, 2009, FCCS filed a motion seeking PCC. From December 15 through 17, 2010, the trial court conducted a trial. Mother appeared, represented by counsel, but father did not appear. On January 5, 2011, the trial court granted FCCS's motion for PCC. Mother appeals the judgment of the trial court, asserting the following assignments of error:

I. The trial court erred in admitting and relying upon written hearsay, in the form of a psychological report. This initial error led to the subsequent erroneous admission of hearsay testimony about the report. These related errors allow the admission of extensive hearsay upon which the trial court heavily relied.

II. The trial court failed to ascertain and consider the child's wishes.

{¶5} Mother argues in her first assignment of error that the trial court erred when it admitted at trial the July 12, 2010 psychological report completed by Christine Hanson, M.A., which constituted inadmissible hearsay, and then relied upon such report in its decision.

{¶6} "Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter

asserted." Evid.R. 801(C). Evid.R. 801(D) also specifies certain statements which are not considered hearsay. Generally, hearsay is not admissible unless one of several exceptions to the hearsay rule is applicable. See Evid.R. 802–807.

{¶7} The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173. Absent an abuse of that discretion and a showing of material prejudice, an appellate court will not overturn a trial court's ruling. *State v. Martin* (1985), 19 Ohio St.3d 122, 129. The abuse of discretion standard is defined as "[a]n appellate court's standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence." *State v. Boles*, 187 Ohio App.3d 345, 2010-Ohio-278, ¶18, quoting Black's Law Dictionary (8th ed. 2004) 11.

{¶8} In the present case, the problem with mother's argument is that her trial counsel explicitly stipulated to the admission of the psychological report. A stipulation is a voluntary agreement between opposing counsel concerning the disposition of some relevant point to avoid the necessity for proof of an issue. *Julian v. Creekside Health Ctr.*, 7th Dist. No. 03MA21, 2004-Ohio-3197, ¶54. Once entered into by the parties and accepted by the court, a stipulation is binding upon the parties. *Id.*

{¶9} Importantly, for purposes of the present appeal, it is well-established that a stipulation to the admissibility of evidence precludes any subsequent challenge or claim of error relating to the stipulated evidence. See *Lentz v. Schnippel* (1991), 71 Ohio App.3d 206, 211; *Dubecky v. Horvitz Co.* (1990), 64 Ohio App.3d 726, 742. See also *In re Washburn* (1990), 70 Ohio App.3d 178, 182 (even though documents would have been inadmissible in evidence, because trial counsel stipulated to their admission at trial,

appellant waived any error by stipulation); *In re Beireis*, 12th Dist. No. CA2003-01-001, 2004-Ohio-1506, ¶21 (appellant waived any error related to admission of a report prepared by a counselor when counsel failed to object to this report at trial, and in fact stipulated that it would be entered into evidence); *Wilson v. LTV Steel Co., Inc.* (June 11, 1992), 8th Dist. No. 59515 (appellant waived right to claim error when appellant stipulated to the admission of medical records in their entirety without objecting to or preserving the right to object to the hearsay contained therein). Thus, in the present case, because mother stipulated to the admission of the report, she is precluded from challenging its admissibility before this court on appeal.

{¶10} Furthermore, even if we were to ignore the above well-established tenets and find it was error to admit the psychological report, we would overrule mother's assignment of error. Under the doctrine of invited error, an appellant, in either a civil or a criminal case, cannot attack a judgment for errors committed by himself or herself, for errors that the appellant induced the court to commit, or for errors which the appellant is actively responsible. *Daimler-Chrysler Truck Financial v. Kimball*, 2d Dist. No. 2007-CA-07, 2007-Ohio-6678, ¶40, citing 5 Ohio Jurisprudence 3d (1999, Supp. 2007), Appellate Review, Section 448. Under this principle, a party cannot complain of any action taken or ruling made by the court in accordance with that party's own suggestion or request. *Id.* Accordingly, because mother induced the court to admit the report through stipulation, she can claim no error regarding its admission on appeal and cannot contest the trial court's reliance upon such in reaching its conclusions. For these reasons, mother's first assignment of error is overruled.

{¶11} Mother argues in her second assignment of error that the trial court erred when it failed to ascertain and consider the child's wishes. R.C. 2151.414(D) provides that, in determining the best interest of the child, the court must consider all relevant factors, including "[t]he wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child." R.C. 2151.414(D)(1)(b). A trial court's determination in a PCC case will not be reversed on appeal unless it is against the manifest weight of the evidence. *In re Andy-Jones*, 10th Dist. No. 03AP-1167, 2004-Ohio-3312. Judgments supported by some competent, credible evidence going to all essential elements of the case are not against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, paragraph one of the syllabus.

{¶12} Here, the trial court found that the child was too young and too immature and not capable or competent to express his wishes. The trial court relied upon the report of the guardian ad litem ("GAL"), in which the GAL reported the child was very shy; the foster mother believed the child did not understand the concept of permanent custody; and the psychological report indicated the child did not or was reluctant to respond to questions and was incapable of understanding the questions. The trial court also noted that the child's receptive communication and written communication skills were in the tenth percentile, and he has ADHD symptoms, oppositional defiant disorder anxiety, language delays, and adjustment disorder with mixed disturbance of emotions and conduct.

{¶13} After reviewing the record, we find the evidence supports the trial court's findings under R.C. 2151.414(D)(1)(b). The GAL testified at the hearing that the child has

speech delays, is hyperactive, and has attention issues. The GAL stated that the foster mother did not believe the child had an understanding of the proceedings and the ramifications of PCC. The GAL also testified that, because the child has lived in substitute care since he was two years old, he does not know any differently. The GAL further stated that the child never verbalized his wishes to the GAL, and the GAL did not believe the child would be able to discuss the topic with her intelligently.

{¶14} In the GAL's July 1, 2010 report, the GAL indicated she had tried to speak with the child, but he was very shy. The GAL wrote that the foster mother believed the child did not understand the concept of PCC, and the foster mother had tried to speak with him about it. The GAL ultimately opined that, based upon the child's age, life experience, and understanding, she did not believe he was of a sufficient age to express his opinion as to permanent custody.

{¶15} Mary Weikel, a social worker at Nationwide Children's Hospital Behavioral Health, testified at the trial that the child started counseling in October 2009. She stated that the child has speech delays but no developmental delays. She testified that she witnessed in her own therapy with the child that he was inattentive and oppositional. Weikel also testified that, although the child has not been diagnosed with ADHD, he has traits that resemble it, and he suffers from oppositional defiant disorder anxiety and adjustment disorder with mixed disturbance of emotions and conduct. She said his behavior and focus had improved in the past six months after he started taking Adderall.

{¶16} We find the above testimony and evidence supports the trial court's analysis of the child's inability to express his desires regarding custody due to his age and competency. Although Weikel indicated that the child's behavior was improving, there is

no indication that he was able to express his wishes or understood the concept of PCC. In addition to the child's young age, the evidence demonstrated that his ADHD symptoms, oppositional defiant disorder anxiety, language delays, and adjustment disorder, all affected his ability to communicate his desires regarding permanent custody. See, e.g., *In re Lopez*, 166 Ohio App.3d 688, 2006-Ohio-2251, ¶38 (given the young ages of the three children – two of which were three years old and one of which was two years old – and the evidence that they had language delays, the court found there was clear and convincing evidence to support the trial court's findings that the children were too young to express their wishes); *In re A.T.*, 9th Dist. No. 23065, 2006-Ohio-3919, ¶63 (the record failed to suggest that child had the necessary maturity to understand the proceedings and provide a credible indication regarding his wishes as to custody, where the child was being treated for ADHD, bipolar disorder, disruptive disorder, and was under psychiatric care).

{¶17} Mother cites authority to support her argument that the trial court erred when it failed to ascertain the wishes of the child, relying mainly on this court's decisions in *In re T.V.*, 10th Dist. No. 04AP-1159, 2005-Ohio-4280; and *In re Swisher*, 10th Dist. No. 02AP-1408, 2003-Ohio-5446. Initially, we reject the notion that age alone is the determining factor in deciding whether a child is capable of expressing his or her desires pursuant to R.C. 2151.414(D)(1)(b). Thus, insofar as mother points out the ages of the children found to be capable of expressing their desires in the above cited cases and seeks to compare them with the child's age, we find this comparison of little aid to our analysis. As R.C. 2151.414(D)(1)(b) indicates, the court must take into consideration each individual child's maturity. Because maturity, comprehension, and competency vary

widely among those of very tender years, age alone is an unreliable predictor of the ability of a child to express his or her desires.

{¶18} In addition, the present case differs significantly from *In re T.V.* and *In re Swisher*. In *In re T.V.*, this court reversed the trial court's granting of PCC, finding that the record was "completely devoid" of any attempt to discern whether one of the children at issue was capable of expressing their own wishes. In doing so, we rejected the GAL's statement that the children were too young and incapable of expressing their desires. The GAL had noted only that, being very young, the children were limited in how they could express their desires. Also, the GAL's report identified the persons the GAL interviewed, but did not state that he met with or interviewed either child, or even whether he had observed either child personally. This court concluded there was nothing in the record suggesting that anyone had asked the children their wishes, and no one testified as to what those wishes were.

{¶19} In *In re Swisher*, this court rejected the trial court's conclusion that it was impossible to determine whether the children genuinely wished to live with their mother. We found the record did not contain reliable evidence concerning the children's wishes because none of the children testified at the hearing, none of the children were interviewed in chambers, the GAL did not testify; the GAL's report did not include an expression of the children's wishes, and the GAL's recommendation did not include a statement regarding the children's wishes. Therefore, we reversed the trial court's granting of PCC.

{¶20} In the present case, unlike *In re T.V.* and *In re Swisher*, the record is neither completely devoid of any attempt to discern whether the child was capable of expressing

his own desires, as in *In re. T.V.*, nor does the record contain inadequate evidence concerning the children's wishes, as in *In re Swisher*. Here, as detailed above, the trial court thoroughly analyzed the evidence related to whether the child's maturity was sufficient to express his desires, and the GAL testified and included in her report her efforts to determine the child's desires. The GAL testified regarding the factors that affected the child's ability to express his wishes, and she stated that the foster mother told her she did not believe the child had an understanding of the proceedings and the ramifications of PCC. The GAL also testified she did not believe the child would be able to discuss the topic with her intelligently. In the GAL's report, the GAL stated that the child would not speak with her because he was very shy, and the foster mom had tried to speak with the child about his desires, but he was incapable of communicating his desires to her. Thus, unlike *In re T.V.* and *In re Swisher*, both the trial court and the GAL here attempted to ascertain the child's wishes and fully explained why they were unable to do so. Thus, we find the trial court's determination that the child was too immature and not capable of expressing his wishes was based upon competent, credible evidence. Therefore, mother's second assignment of error is overruled.

{¶21} Accordingly, mother's first and second assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, is affirmed.

*Judgment affirmed.*

BRYANT, P.J., concurs.  
DORRIAN, J., concurs separately.

DORRIAN, J., concurring.

{¶22} I concur with the judgment of the majority because, based on all other relevant factors, I do not believe it was against the manifest weight of the evidence for the trial court to determine that it is in the best interest of this child to grant permanent court commitment ("PCC"). However, I express serious concern regarding evidence that the guardian ad litem ("GAL") appointed for this child did not visit with the child for at least six months prior to trial.

{¶23} In response to appellant's request for an in-camera interview of the child to determine his wishes, the GAL stated that, based on the child's "age, life experience and understanding," she did not believe that the minor child is of a sufficient age to express his opinion as to the proposed permanent custody motion or a potential adoption. (Dec. 17, 2010 Tr. 42.) The trial court's denial of appellant's request for such an interview was based, in part, on "foster mother, [and] the guardian['s] [belief the child] doesn't have a basis for wishes since he has been in foster care, basically his entire life." (Dec. 17, 2010 Tr. 46-47.)

{¶24} In determining whether it is in the best interest of the child to grant PCC, R.C. 2151.414(D)(1)(b) requires the trial court to consider all relevant factors, including "[t]he wishes of the child, as expressed directly by the child or through the \* \* \* [GAL], with due regard for the maturity of the child." Pursuant to local rule, a GAL is required to make "reasonable efforts to become informed about the facts of the case and to contact all parties. In order to provide the court with relevant information and an informed recommendation as to the child's best interest \* \* \* at a minimum" the GAL shall ascertain the wishes of the child "unless impracticable or inadvisable because of the age of the

child or the specific circumstances of a particular case." Loc.R. 27(G)(12)(c) of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

{¶25} The GAL made a determination that ascertaining the wishes of J.B. were "impracticable or inadvisable because of the age of the child or the specific circumstances of [this] case." The evidence suggests, however, that such determination was made June 24, 2010, six months prior to trial, when the GAL had a conversation with his current foster mother,<sup>1</sup> as to [whether] "it would be appropriate to ask him about permanent custody or if she's ever had that conversation with him. [The foster mother] reported that [she] has tried to explain permanency to him and he does not get it." Based on this conversation, the GAL "did not feel that it was \* \* \* necessary to speak with him." (Dec. 17, 2010 Tr. 43-44.)

{¶26} Much development occurs in six months time with a child aged four to five years old. Indeed, Witness Mary Weikel, a social worker who met and worked with J.B. twice a month since October 14, 2009,<sup>2</sup> testified at trial that "[i]n the last six months, [the child] has really - - - is really just kind of a different child." She testified that J.B. was more cooperative and attentive and that his speech had improved with treatment. (Dec. 15, 2010 Tr. 26-28.) She also testified that two factors in particular had contributed to this improvement: (1) medication; and (2) placement in the home of his current foster parents. There is nothing in the record indicating that the GAL revisited the question of J.B.'s

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<sup>1</sup> Both Witness Weikel and Witness Fox, the FCCS caseworker, testified that J.B. had been placed with his current foster parents sometime in Spring of 2010. (Dec. 15, 2010 Tr. 26; Dec. 16, 2010 Tr. 60.) Therefore, the child had only been living with the foster mother approximately one to two months when the conversation took place.

<sup>2</sup> Witness Weikel indicated there was a break in treatment in Spring of 2010 when J.B. switched foster homes. (Dec. 15, 2010 Tr. 26.)

wishes or whether it was impracticable to ascertain his wishes with the foster mother at any time after June 24, 2010. Furthermore, although the GAL testified that she checked in with Witness Elizabeth Fox, the Franklin County Children Services ("FCCS") caseworker, monthly, there is nothing in the record which indicates that they discussed the same. Finally, the trial court stated in its decision that the reasons articulated by the GAL for not exploring the child's wishes are consistent with FCCS's Exhibit 1, the child's most recent psychological evaluation. (Decision at 9.) The court then agreed with the GAL's assessment and found the child to be too young and too immature and not capable or competent to express his wishes. (Decision at 9.) I note that the psychological evaluation was dated July 12, 2010, approximately five months prior to trial and one to two months after J.B. had been placed in his current foster home. Much may have changed between that date and trial.

{¶27} Had the GAL visited the child prior to trial, or even discussed the wishes of the child or the practicability of ascertaining the same with the foster mother, the social worker or the FCCS caseworker, all whom had more regular and recent contact with the child, she may have reached the same conclusion as she did on June 24, 2010. Or she may not have. I do not know. Nevertheless, I am concerned that her determination, upon which the trial court relied, was based on stale information, six months old, and no effort was made to make such an important determination closer to trial.

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