

IN THE SUPREME COURT OF OHIO

In The Matter of:

Case No. 2001-1898

R.B.,

A Dependent Child.

On Appeal from the  
Mercer County Court of  
Appeals, Third Appellate  
District

KERMIT BRICKER, APPELLANT/FATHER and  
BELINA BRICKER, APPELLANT/MOTHER.

MERCER COUNTY DEPARTMENT OF  
JOB AND FAMILY SERVICES,  
APPELLEE.

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MEMORANDUM OF THE  
MERCER COUNTY DEPARTMENT OF  
JOB AND FAMILY SERVICES, APPELLEE,  
IN OPPOSITION TO JURISDICTION

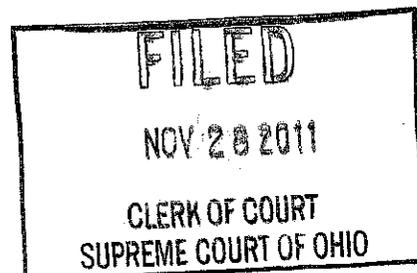
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EXPLANATION OF WHY THIS CASE IS NOT A MATTER OF PUBLIC OR GREAT GENERAL INTEREST.

The standard of evidence is “clear and convincing” in a child permanent custody case conducted in the juvenile courts of this State. This has long been the standard and the courts need no clarification of what evidence it takes to meet this standard.

A new appellate path is proposed by the Appellants, automatic appeal to this Court. The Appellants propose this, focusing only on themselves, proposing that they are entitled to enhanced judicial review of their parental rights. This is contrary to the statutory and common sense position that in such cases the juvenile courts must balance the interests of the parents in being parents and the children in having effective parents. Automatic review in every permanent custody case is unwarranted.

The remaining issues raised by the Appellants’ in their Statement are evidentiary in nature and have been addressed repeatedly. Experts must testify as to a foundation for any opinion given. Dr. Ferri testified that his opinion was based upon his testing and observations. Guardians ad litem are required to file a report and are subject to cross-examination on the content of that report. The Guardian in this matter filed his report and was available to be cross-examined by the Appellants.

## ARGUMENT IN OPPOSITION TO JURISDICTION

### APPELLANTS PROPOSITION OF LAW #1

In determining whether the proponent for permanent custody of children has met its burden of clear and convincing evidence, the opinion of an expert may not rely on facts not in evidence.

### ARGUMENT

As the Appellants state, the Trial Court in granting the motion for permanent custody of the children relied in part on the testimony of Doctor Frederick Ferri. Doctor Ferri testified that he conducted an evaluation of the parent Appellants at the request of the Appellee. This evaluation consisted in part of reviewing a case file from the Appellee, as the Appellants mention, and conducting observation and testing. (Transcript, Pg. 10, Lines 1- 17.) The Doctor testified that he observed the Appellants with their children and had several appointments with them. (Id.) He also testified that he administered a number of standardized tests, an Intellectual Assessment, a Parenting Inventory, and a Child Abuse Potential Inventory. The review of the records formed but one component of the final opinion of the doctor when he stated:

I think given the history that I learned through the records and given the data that I obtained myself, the probability of them learning how to become more effective parents I think is minimal. (Transcript, Page 16, Lines 14-17.)

This opinion was presented to the Trial Court in addition to the testimony of four other witnesses who provided details of the services provided and their delivery of those services to the Appellants.

The foundation of Appellants' argument is the decision from the Ninth Appellate District, In re: CS, 2010 Ohio 4463. The Appellate Court based its decision on the ruling this Court in

State v. Solomon, (1991) 59 Ohio St. 3d 124. The Solomon rule is that "...where an expert bases his opinion, in whole or in major part, on facts or data perceived by him, the requirement of Evid. R. 703 has been satisfied." Id at 126. The question to be answered then is whether or not the expert opinion is based "in major part, on facts or data perceived by him." This question was answered in the Trial Court. Dr. Ferri was asked and answered :

Q. And was your opinion about their parenting abilities primarily based upon your examination of them and your testing or upon the reports of other agencies and other professionals?

A. No, my opinion was based upon my assessment and taking into consideration, you know, other information. I mean, that was part of the picture. *But my opinion was based upon what I observed.* (Transcript, Pages 19 - 20, Lines 22 through 4.) (Emphasis added.)

Based upon the ruling in Solomon the argument of the Appellants then is without merit.

## APPELLANTS' PROPOSITION OF LAW #2

In determining whether the proponent for permanent custody of children has met the burden of clear and convincing evidence, the Court must consider all relevant conditions at the time of the hearing. Expert testimony dated 8 [sic] months before the hearing, and factual witness testimony 6 [sic] months before the hearing, without updates, is insufficient to remove children permanently.

### ARGUMENT

The Appellants complain of the dated nature of the material presented to the Trial Court in support of the motion for permanent custody. Dr. Ferri testified concerning his observations and standardized test results. He identified areas of weakness in the Appellants' parenting abilities, made his report and stopped there. At trial he clearly identified the limit of his opinion.

A. I would be very surprised if the shortcomings would be remedied in that period of time from May (2010) through now (December 2010). I would be very surprised.

Q. Okay. But at any rate, you have not had any contact with them since the spring of 2010, so you wouldn't be able to really say what their present situation is?

A. I'm not in a position to offer any statement on that.

The Appellee presented several other witnesses to address the latter period of time concerning the effort to provide services to the Appellants, the receipt of those services and their effect. The weight to be given to the testimony of the doctor is a matter for the Trial Court.

That some of the testimony is "dated" is entirely due to the actions of the Appellants. Ms. Zwiebel of the Mercer County Department of Job and Family Services testified that the Appellants moved from Mendon in Mercer County to Delphos in Van Wert County and then

within Delphos to Allen County, during the pendency of the case. This served to increase the distance from the service providers, making reunification efforts even more difficult.

(Transcript, Page 31, Lines 8 through 25.)

The Appellants complain specifically about Erin Seitz of Foundations Behavioral Health Services. Ms. Seitz did close the Appellants case in July of 2010 as stated by Appellants. Ms. Seitz testified concerning this at the Trial Court stating:

Q. Okay. When you say they're formerly clients, when did they become former clients?

A. I officially closed their case in July 2010 when they moved to Van Wert County. (Transcript, Page 81 - 82, Lines 23 - 1.)

Ms. Fortman of Help Me Grow testified in an identical fashion, services were ended because the Appellants moved from the county served by her organization. (Transcript, Page 108, Lines 3 - 12.)

The Appellants created their own hardship, moving away from service providers. They cannot now legitimately complain about communication difficulties or lack of services.

### APPELLANTS' PROPOSITION OF LAW #3

In a permanent custody case, the Trial Court cannot rely on a Guardian ad Litem's report that relies on opinions based on facts not introduced into evidence at trial.

#### ARGUMENT

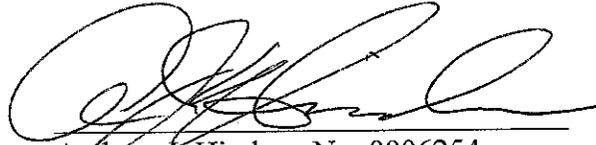
Ohio Revised Code Section 2151.414(C) states in part:

A written report of the guardian ad litem of the child shall be submitted to the court prior to or at the time of the hearing held pursuant to division (A) of this section or section 2151.35 of the Revised Code but shall not be submitted under oath.

Such a report from the Guardian was prepared and filed in this matter as required by statute. In addition, as the transcript indicates, the Guardian ad Litem was present in the courtroom during the proceedings.

This Court in its decision In re: Hoffman, (2002) 97 Ohio St 3d 92, clearly stated the rule that the Guardians ad Litem, who file their reports, which are not under oath, may be called to testify and cross-examined. It is also well accepted law that a party is not permitted to complain of an error which said party invited or induced the trial court to make. State v. Kollar, (1915), 93 Ohio St. 89. The Appellants cannot now legitimately complain that they asked no questions of the Guardian ad Litem.

Appellants' argue that the Guardian based part of his report on the opinion of Dr. Ferri. But as stated in the argument above concerning Appellants' Proposition of Law #1, Dr. Ferri clearly testified at trial that he based his opinion given on his testing and observations. The Guardian's reference to this was information was entirely capable of being tested at trial if the Appellants' had chosen call him to testify.



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### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing, Memorandum was sent by regular United States Mail to James A. Tesno, 100 N. Main St., P.O. Box 485, Celina, Ohio 45822, and Matthew L. Gilmore, 118 W. Market St., P.O. Box 298, Celina, OH 45822, on the 25<sup>th</sup> day of November 2011.



Andrew J. Hinders