

**IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
DEFIANCE COUNTY**

TISHA SANDYS,

PLAINTIFF-APPELLANT,

CASE NO. 4-14-20

v.

ERIC L. SANDYS,

O P I N I O N

DEFENDANT-APPELLEE.

**Appeal from Defiance County Common Pleas Court
Domestic Relations Division
Trial Court No. 03DR36072**

Judgment Affirmed

Date of Decision: June 8, 2015

APPEARANCES:

***John C. Ruiz-Bueno, III* for Appellant**

ROGERS, P.J.

{¶1} Plaintiff-Appellant, Tisha Sandys (“Tisha”), appeals the decision of the Court of Common Pleas of Defiance County, Domestic Relations Division, which modified custody of P.S. and designated Defendant-Appellee, Eric Sandys (“Eric”), as the residential and custodial parent of P.S. On appeal, Tisha argues that the trial court erred by conducting an in-chambers, off-the-record interview with Joy Fruchey, the children’s therapist. Tisha also argues that the trial court erred by not appointing a new guardian ad litem (“GAL”) after the GAL’s report revealed that her recommendations were clearly against the children’s wishes. For the reasons that follow, we affirm the ruling of the trial court.

{¶2} Eric and Tisha were married in September 1999. Eric and Tisha have two children together, P.S. and I.S. In September 2003, Eric and Tisha divorced. Tisha was designated as the residential and custodial parent of both children. Eric retained normal visitation rights under the settlement.

{¶3} On August 2, 2012, Tisha filed a motion for contempt. On the same date, she also filed a motion to suspend Eric’s visitation rights. A temporary order granting Tisha’s motion to suspend was filed that day, and a hearing regarding it was scheduled for a later date.

{¶4} On August 31, 2012, Eric filed a motion requesting the appointment of a GAL to protect the interests of the children. On September 7, 2012, a consent

judgment entry was filed appointing Katrina Kight as GAL. Specifically, the entry stated that “Kight is hereby appointed as Guardian ad Litem for the minor children.” (Docket No. 50). On October 10, 2012, Eric filed a motion for modification of custody.

{¶5} A hearing on Tisha’s motions for contempt and to suspend visitation and Eric’s motion for modification of custody was held on July 31, 2014. At the outset of the hearing, the court acknowledged that it had a chance to interview both children in chambers. Modification Hearing Tr. p. 4. The court also acknowledged that it had the chance to interview Joy Fruchey, the children’s therapist, in chambers, off-the-record, and in the presence of the GAL and counsel for both parties. Both parties stipulated to the admission of some evidence, including the GAL’s report and an evaluation performed by Dr. Nicely. Counsel for Eric stated that given the thoroughness of the GAL’s report, most of the potential witnesses (including Fruchey) would not be called since most of their testimony was already included in the report.

{¶6} Tammi Elwood was the first witness to testify for Eric. Elwood testified that she is the School Psychology Assistant at Defiance City Schools. She stated that she has worked with P.S. regarding her individualized education plan (IEP) since P.S. was in first grade. Elwood stated that P.S. was on an IEP beginning in pre-school “for developmental delays with communication which is

speech and language, and also occupational therapy. That continued, transitioned into kindergarten, she then * * * had a cognitive disability along with occupational therapy services and speech and language services.” *Id.* at p. 8.

{¶7} Elwood testified that Tisha transferred P.S. to St. Johns, a parochial school, after second grade. Elwood explained that although St. Johns could offer P.S. some speech and language therapy, St. Johns does not have an intervention therapist or offer occupational therapy and social groups. According to Elwood, parochial schools also do not focus strongly on transition planning.

{¶8} Elwood also testified regarding P.S.’s most recent IEP for the eighth grade. She explained that the plan was for P.S. to take part in a peer mentoring group where she would be paired up with a high school student once a week. Additionally, P.S. would swim once a week at the local YMCA with the special needs unit. Elwood stated that although she felt that P.S. was higher functioning than the other students, she felt it would be good for P.S. to take on a leadership role in this setting. Elwood also testified that P.S. was to work in the cafeteria as part of her IEP. The ultimate goal of this plan was to help P.S. transition from St. Johns, which only goes through the eighth grade, to the public high school.

{¶9} Elwood stated that parts of P.S.’s IEP went well and others did not. While P.S. excelled and enjoyed working in the cafeteria, she stated that she did not enjoy going to the public high school for the mentoring sessions. Elwood

testified that P.S. would stop showing up for one reason or another. She explained that P.S. told her that Tisha did not like P.S. doing this part of the IEP. This concerned Elwood because she found that P.S. is very impressionable and will assume the viewpoints and attitudes of others.

{¶10} Elwood testified that Eric seemed to have accepted P.S.'s special needs and Dr. Stemmler's diagnosis of cognitive disability. However, Tisha refused to sign off on the label of cognitive disability. Elwood explained that Tisha was upset that the IEP team refused to label P.S. as having autism. She also testified about which parent better understands P.S.'s educational needs. Elwood stated that Eric seemed to understand those needs, where Tisha did not. She also felt that if Eric were given the authority to make a decision, then Tisha would attempt to sabotage those efforts.

{¶11} On cross-examination, Elwood testified that she believed P.S. has done well at St. Johns. She explained that she noticed improvement in P.S.'s speech and articulation. However, Elwood stated that P.S. will always struggle academically in comparison to her peers.

{¶12} Katrina Kight, the GAL, was the next witness to testify on behalf of Eric. Kight testified that she has served as GAL for over 18 years in approximately over 200 cases. Kight explained that her duty in this case was "general investigation, um, understanding that this was a motion to potentially

modify visitation or custody, and to speak to both of the parties, talk to them about what their concerns were and make best interest determination.” *Id.* at p. 36.

{¶13} Kight testified that she was given background information about the case from the parties’ attorneys. She reviewed the pleadings and submitted a questionnaire to both parties for them to fill out and return to her. She stated that after the questionnaires have been returned, she interviews both parties. Typically, she will not interview the children until after she has had the opportunity to interview the parents.

{¶14} When asked about how she goes about interviewing the children, Kight explained that she will ask the parents how they prefer she go about interviewing the children. In this case, Tisha stated that it would be better to interview the children together. Thus, Kight set up an interview with the children at St. Johns. During this interview, Kight told the children that her role in the case was to “assist the court in making potential changes to the parenting schedule, and if mom and dad can’t agree on that, sometimes we have to come in and help guide the family and make decisions to help arrange things better for the children.” *Id.* at p. 40.

{¶15} Before she met with P.S., Kight testified that she had a discussion with several of P.S.’s teachers at St. Johns and reviewed some of the reports. As a result, Kight had a good impression of P.S. and her condition before meeting with

her. When asked about I.S., Kight stated that she saw I.S. as the more dominate sibling, although she is younger than P.S. She stated that there was some concern about I.S. possibly bullying P.S. Kight also testified that she believes I.S. is easily able to manipulate P.S. to do things at her behest.

{¶16} Kight also testified regarding P.S.'s medical condition. Kight explained that the biggest issue in her report surrounded P.S.'s disability. She interviewed multiple counselors, doctors, neuropsychologists, special services personnel, and school personnel. She stated that the current diagnosis was a cognitive disability, not on the autism spectrum, from Dr. Christine Stemmler who had been seeing P.S. since 2010. She did acknowledge that there was another diagnosis in 2010 for Pervasive Developmental Disorder (PDD) from Dr. Ziccardi, which is on the autism spectrum. However, Kight explained that Dr. Stemmler possessed all of Dr. Ziccardi's records and reports regarding P.S. when Dr. Stemmler issued her diagnosis. Kight stated that Dr. Stemmler indicated that "she did not feel Dr. Ziccardi applied the correct testing in order to make the diagnosis of PDD, but that had he followed the battery of testing for autism he would have potentially ruled [PDD] out." *Id.* at p. 45. Kight testified that every other doctor in her report agreed with Dr. Stemmler, not Dr. Ziccardi.

{¶17} According to Kight, Dr. Stemmler had recommended that P.S. be moved to a public school as early as 2010. Additionally, Dr. Stemmler

recommended that Tisha give P.S. medication to help her focus, pay attention in class, and engage her in speech, occupational, and behaviorial therapy. Dr. Stemmler also told Tisha to contact state departments for possible financial assistance to help with these services. However, Tisha never followed through with any of these recommendations. Dr. Stemmler continued to recommend these options up until the hearing.

{¶18} Kight also testified about Fruchey's interactions with P.S. According to Kight, Fruchey had to schedule appointments with Eric and the children without telling either Tisha or the children about the meetings so Tisha would be unable to sabotage the appointment.

{¶19} Kight stated that she believed Eric has put forth a strong effort during the course of the court proceedings to learn about each child's needs. She also thought that Eric would follow through with the doctors' recommendations regarding P.S. She also stated that Eric was more likely to honor court-ordered parenting time or visitation than Tisha. Kight explained that Tisha had either attempted or actually prevented Eric from seeing the children on several of his visitation days during the last few years. She supposed that Tisha purposefully sabotages the relationship between the children and Eric.

{¶20} Kight's ultimate recommendation was to split the children up. Eric would be the custodial and residential parent of P.S., while I.S. would remain with

Tisha. She found that this conclusion was in the best interests of the children. She based her recommendation on Dr. Nicely's evaluation, "indicating that the influence [I.S.] would have on [P.S.] could very well interfere with her ability to move on and transition into the life skills programming that would be taking place for her." *Id.* at p. 57-58. Kight's report, which was offered into evidence, showed that the children both wished to remain in Tisha's custody.

{¶21} On cross-examination, Kight testified that P.S. has asked her teachers not to give her homework whenever she goes to Eric's house because Eric has been aggressive towards her to complete her homework quickly. However, Kight also stated that there was evidence that Tisha was doing homework for P.S. while she attended St. Johns.

{¶22} On examination by the court, the court expressed its strong "bias against splitting kids up" to Kight. *Id.* at p. 69. Further, when the court asked Kight what her recommendation would be if the court viewed that keeping the children together was an over-arching concern, Kight answered that the children should both be placed with Eric.

{¶23} Eric then testified. He stated that a change in circumstances occurred because he had only just learned about P.S.'s 2010 PDD diagnosis and the results of her allergy tests, which stated P.S. had a severe allergy to horses and only a mild allergy to cats. After reading the doctors' reports and finding out that P.S.'s

needs were not being met, Eric testified that is when he stepped in and filed the motion to modify child custody.

{¶24} Tisha was the first witness to testify on her behalf. Tisha testified that she never knowingly denied Eric his right to visitation with the children. Rather, she stated that there were several times where it was Eric's fault for a visit not occurring. Tisha added that the children have told her that they never want to see their father again, but she makes them attend the visits.

{¶25} Tisha testified that she took P.S. to see Dr. Ziccardi¹ in 2010 when he diagnosed P.S. with PDD. Dr. Ziccardi is not a medical doctor (MD), so he referred her to Dr. Atiya Khan, who is a MD. According to Tisha, Dr. Khan agreed with Dr. Patricia Bader², who diagnosed P.S. with PDD and Dr. Stemmler³ who diagnosed P.S. with a cognitive disorder, not on the autism spectrum. Basically, Dr. Khan would agree to either one or whatever would be most beneficial to P.S.

{¶26} Tisha stated that she has always advocated for P.S. to be placed in a normal classroom setting, but that none of the professionals agreed with her. She believed that the professionals' views of P.S. were wrong. For example, one

¹ Dr. Ziccardi has a Doctor of Psychology degree from Wright State University.

² Dr. Bader is a MD.

³ Dr. Stemmler has a Doctor of Psychology degree from the Illinois School of Professional Psychology-Argosy University.

report claimed that P.S. struggled to tie her shoes, and Tisha stated that this was not the case.

{¶27} On cross-examination, Tisha testified that the only recommendation she has not followed in regard to P.S. was placing her in a public school. She stated that the decision for P.S. to stop the transition plan was not her decision, but rather the decision of the whole IEP team.

{¶28} Tisha called several different personnel from St. Johns, who all testified similarly. They testified that the IEP put in place for P.S.'s eighth grade year did not work as expected, and thus they had to alter it. They all believed that P.S. has done much better than expected at St. Johns, but stated that she will have to leave St. Johns after her eighth grade year.

{¶29} At the conclusion of testimony, the trial court decided to modify the custody arrangement. Eric was awarded custody of P.S., while I.S. remained with Tisha. In coming to its decision, the court found that an adequate change in circumstances existed based on the evidence showing "the progression of the child through the various treatment and diagnostic and other testing that the father subsequently became aware of." *Id.* at p. 219. The court discussed the relevant factors in R.C. 3109.04(E) and found that the harm likely to be caused to P.S. was outweighed by the advantages. The court added, "I expressed to counsel this morning the strong bias I have in favor of keeping children together. Pretty much

flat out told them no way am I going to separate these kids. I'm persuaded by the evidence though that I was wrong." *Id.* at p. 220-221. He continued his reasoning stating, "The reports from Dr. Nicely, the information conveyed via the GAL's report from the counselors, support the conclusion that [P.S.] ought to reside with her father and [I.S.] ought to continue to reside with her mother." *Id.* at 221. Finally, the court noted,

That earlier today the counselor was by stipulation allowed to speak with the Court and virtually in that context the only useful suggestion she provided is that it would be much better for both these kids if the parents would be a little nicer to each other and at least decent to each other, because your continuing animosity or disdain for each other is poisoning the children's relationship both [sic] directions.

Id. at 223. The court journalized its decision in an entry dated October 27, 2014.

{¶30} Tisha filed this timely appeal, presenting the following assignments of error for our review.

Assignment of Error No. I

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY CONDUCTING A WITNESS INTERVIEW IN CHAMBERS WITHOUT A RECORD AND THEREAFTER REFUSING TO ALLOW TESTIMONY REGARDING THE EFFECTS OF SEPARATING THE MINOR CHILDREN AND SUBSEQUENTLY ORDERING THAT THE CHILDREN BE SEPARATED.

Assignment of Error No. II

THE TRIAL COURT ERRED BY FAILING TO REQUIRE THE GUARDIAN AD LITEM TO CERTIFY A CONFLICT

**BETWEEN HER OPINION AND THE WISHES OF THE
MINOR CHILDREN AND THEREAFTER FAILING TO
APPOINT AN ATTORNEY ADVOCATE TO REPRESENT
THE MINOR CHILDREN.**

Assignment of Error No. I

{¶31} In her first assignment of error, Tisha argues that the trial court abused its discretion when it conducted the interview of Fruchey, the children's therapist, in chambers and off-the-record. Tisha further argues that the court erred by cutting Fruchey off when she began to discuss the possible harms of splitting the children up between both parents. We disagree.

{¶32} Here, both parties stipulated to the in-chambers, off-the-record interview of Fruchey. Further, Tisha failed to make any objection before or during the interview. Since Tisha failed to object to the interview in the trial court, she has waived all but plain error. *In re C.B.*, 3d Dist. Seneca Nos. 13-12-06, 13-12-07, 2012-Ohio-2691, ¶ 33.

{¶33} In civil matters, “ ‘the plain error doctrine is not favored and may be applied only in the extremely rare case * * * where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.’ ” *Ordean v. Ordean*, 3d Dist. Shelby No. 17-06-15, 2007-Ohio-3979, ¶ 14, quoting *Goldfuss v. Davidson*, 79 Ohio St.3d 116 (1997), syllabus.

{¶34} Although Tisha did not address plain error directly, she does claim that she was prejudiced by the trial court when it stopped Fruchey from testifying about the harms of splitting the children up. She argues that had Fruchey been able to testify fully, then the trial court would not have split up the children.

{¶35} This court has several issues with Tisha's argument. The first and most problematic is that we have no idea of knowing what went on during the in-chambers interview with Fruchey. By stipulating to the interview, Tisha prevented a record from being created for this court to review. This court cannot simply take Tisha at her word about what happened in the judge's chambers.

[I]t is an appellant's duty to transmit the record of the proceedings below. See App.R. 9, App.R. 10 and Loc.App.R. 3(D). Without such a record being properly preserved and presented for our review, we have nothing to review. Hence, we are unable to review those matters that are based on a record not before us. As stated in *Paulin v. Midland Mutl. Life Ins. Co.*, 37 Ohio St.2d 109, 112 (1974), "* * * the Court of Appeals is bound by the record before it and may not consider facts extraneous thereto."

Community First Bank v. Holland, 3d Dist. Hardin No. 6-05-04, 2005-Ohio-4751,

¶ 10.

{¶36} The second problem with Tisha's argument is that the trial court apparently found Fruchey's testimony, including any mention of the harms of splitting the children up, to be of little help. During the hearing, the court stated, "I did note that earlier today [Fruchey] was by stipulation allowed to speak with the Court and virtually in that context the only useful suggestion she provided is

that it would be much better for both these kids if the parents would be a little nicer to each other * * *.” Modification Hearing Tr. p. 223.

{¶37} Third, nothing prevented Tisha from calling Fruchey as a witness to testify on the record.

{¶38} Finally, there was ample evidence that supported the court’s decision to give custody of P.S. to Eric. Kight’s report was admitted into evidence, which included summaries of interviews conducted by Kight of everyone involved in P.S.’s life, including Fruchey. Elwood, Kight, and Eric all testified that Tisha had alienated and sabotaged the children’s relationships with their father and failed to meet P.S.’s needs by following up with the doctors’ recommendations. Thus, even if it was error to conduct the interview off-the-record, it was merely harmless error.⁴

{¶39} Accordingly, Tisha’s first assignment of error is overruled.

⁴ We note that we are not pleased with the court’s decision to conduct an in-chambers, off-the-record interview, even though it was stipulated by both parties. Whereas statutory authority exists to conduct such an interview with a child, no statutory authority exists to conduct one with an adult. Conducting such an interview creates problems, like the one in this case, where one party apparently relies on a statement made by the trial court during the interview only to have the court flip its position after the close of evidence. Then, on appeal, there is no record for an appellate court to review for error. In most cases, such interviews could constitute reversible error. However, given the unique circumstances in this case, including that the interview was stipulated between both parties and Tisha’s failure to object after the trial court cut off Fruchey, any error is harmless.

Assignment of Error No. II

{¶40} In her second assignment of error, Tisha argues that the trial court erred by failing to appoint a new GAL after Kight’s recommendations were in conflict with the children’s wishes. We disagree.

{¶41} Sup.R. 48(D)(1) states that “[a] guardian ad litem shall represent the best interest of the child for whom the guardian is appointed. Representation of best interest *may be inconsistent* with the wishes of the child whose interest the guardian ad litem represents.” (Emphasis added.) Additionally, “When a court appoints an attorney to *serve as both the guardian ad litem and attorney for a child*, the attorney shall advocate for the child’s best interest and the child’s wishes in accord with the Rules of Professional Conduct.” (Emphasis added.) Sup.R. 48(D)(7). Finally, “When a guardian ad litem determines that a conflict exists between the child’s best interest and the child’s wishes, the guardian ad litem shall, at the earliest practical time, request in writing that the court promptly resolve the conflict by entering appropriate orders.” Sup.R. 48(D)(8).

{¶42} “The roles of guardian *ad litem* and attorney are different.” (Emphasis sic.) *In re Janie M.*, 131 Ohio App.3d 637, 639 (6th Dist.1999), citing *In re Baby Girl Baxter*, 17 Ohio St.3d 229, 232 (1985). “Therefore, absent an express dual appointment, courts should not presume a dual appointment when the appointed guardian *ad litem* is also an attorney.” (Emphasis sic.) *In re Janie M.* at

639, citing *In re Duncan/Walker Children*, 109 Ohio App.3d 841, 844-855 (5th Dist.1996) and *In re Kenneth R.*, 6th Dist. Lucas No. L-97-1435, 1988 WL 833569 (Dec. 4, 1998); *In re Amos*, 154 Ohio App.3d 434, 2003-Ohio-5014, ¶ 6 (3d Dist.).

{¶43} In this case, the record shows that Kight was not designated as the children’s attorney. In the entry appointing Kight as GAL, it states that Kight “is hereby appointed as Guardian ad Litem for the minor children.” (Docket No. 50). It does not state that Kight was also appointed to serve as the children’s attorney. Further, at the hearing, she stated that her duty in this case was “general investigation, um, understanding that this was a motion to potentially modify visitation or custody, and to speak to both of the parties, talk to them about what their concerns were and make best interest determination.” Modification Hearing Tr. p. 36. Thus, Kight never held herself out as the children’s attorney.

{¶44} Tisha argues that this case is similar to *Bawidamann v. Bawidamann*, 63 Ohio App.3d 691 (2d Dist.1989). In *Bawidamann*, the court found that a conflict of interest arose when the GAL filed his “Report and Recommendation of Court Appointed Attorney and Guardian Ad Litem for the Minor Children” because his recommendations were not in line with the children’s wishes. *Id.* at 700. The GAL held himself out as the children’s attorney throughout the proceedings. *Id.* Additionally, the GAL used confidential communications from

the children to argue against the children's stated wishes. *Id.* at 703. Thus, the court held a new GAL should have been appointed. *Id.*

{¶45} This case is distinguishable from *Bawidamann* because there is no evidence to suggest that Kight either held herself out as the children's attorney or filed anything on behalf of the children. Kight's testimony shows that she never told the children that she represented them during the court proceedings. Rather, she told the children her role was to "assist the court in making potential changes to the parenting schedule, and if mom and dad can't agree on that, sometimes we have to come in and help guide the family and make decisions to help arrange things better for the children." Modification Hearing Tr. p. 40.

{¶46} Since a dual appointment of GAL and attorney should not be presumed absent express language, we find that no conflict of interest arose, which would have warranted an appointment of a new GAL. In all the filings and testimony in the record, it is clear that Kight was appointed to serve solely as GAL.

{¶47} Accordingly, Tisha's second assignment of error is overruled.

{¶48} Having found no error prejudicial to Tisha in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed

PRESTON and WILLAMOWSKI, J.J., concur.
/jlr