[Cite as *In re S.P.*, 2011-Ohio-4696.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

IN THE MATTER OF:	:	**O P I N I O N**
S.P. AND T.P., DEPENDENT CHILDREN	:	**CASE NOS. 2011-L-038**
	:	**and 2011-L-039**

Civil Appeals from the Lake County Court of Common Pleas, Juvenile Division, Case Nos. 2008 DP 1974 and 2008 DP 1975.

Judgment: Affirmed.

Sheila M. Sexton, McNamara & Loxterman, 8440 Station Street, Mentor, OH 44060 (For Appellant-Geri Rae Johnson).

Charles E. Coulson, Lake County Prosecutor, and *Teri R.* Daniel, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Appellee-Lake County Department of Job and Family Services).

Anita B. Staley, Barthol & Staley, L.P.A., 7327 Center Street, Mentor, OH 44060 (Guardian ad litem).

DIANE V. GRENDELL, J.

{¶1} Appellant, Geri Johnson, appeals from the Judgment of the Lake County Court of Common Pleas, Juvenile Division, granting permanent custody of her two children, T.P. and S.P., to appellee, Lake County Department of Job and Family Services (LCDJFS). One issue to be determined in this case is: When a child's parent is frequently incarcerated and is alcohol dependent, is it in that child's best interest to grant permanent custody to a children services agency? This court must also determine whether a trial court may consider a planned permanent living arrangement

when one is not requested by the children services agency, and whether a hearsay exception applies under Evid.R. 807 when a party fails to give notice of the exception's applicability. For the following reasons, we affirm the decision of the court below.

{¶2} Geri Johnson is the biological mother of T.P., born on March 28, 2000, and S.P., born on January 22, 2003. Steven Pounds is the biological father of both children.

{¶3} On October 2, 2008, LCDJFS filed two complaints, alleging that T.P. and S.P. were dependent children. The complaints alleged that the Euclid Police Department received a report of a child running around an apartment building. Upon their arrival, police officers noticed that the child's mother, Johnson, was in the hallway, intoxicated. The officers were unable to locate T.P. at an address provided by Johnson. The complaints also asserted that a social worker received a police report documenting an incident of abuse between Johnson and her boyfriend, and stating that officers responding to the abuse incident noted that T.P. had a bump on his head and redness on his neck.

{¶4} On November 17, 2008, the trial court found T.P. and S.P. to be dependent children under R.C. 2151.04 and granted protective supervision to LCDJFS.

{¶5} On March 23, 2009, LCDJFS filed a motion requesting emergency temporary custody of T.P. and S.P., asserting that they had been left at home unattended. On March 24, 2009, a Magistrate Order was issued, granting temporary custody of the children to LCDJFS. The magistrate found T.P. and S.P. were in "immediate danger from [their] surroundings[,] *** removal was necessary to prevent immediate or threatened physical or emotional harm," and removal was in their best interest.

{¶6} On April 27, 2010, the trial court granted LCDJFS' Motion to Extend Temporary Custody of T.P. and S.P.

{¶7} On September 15, 2010, LCDJFS filed a Motion for Permanent Custody, asserting that Johnson continuously failed to remedy the conditions causing the children to be placed outside of her home and had repeatedly failed to follow through with the case plan.

{¶8} Hearings were held in this matter on January 5, 26, and 31, 2011, and on February 9 and 10, 2011. Johnson appeared at the hearings on all dates except January 31, when she was unable to be located. T.P. and S.P.'s father, Pounds, did not appear at any of the proceedings. The following testimony was presented at the hearings.

{¶9} John Bender, the assistant principal at Royalview Elementary School, testified that T.P. and S.P. attended Royalview in 2008 and 2009. During this time, both children were sent to his office on several occasions. He stated that T.P. was sent to the office for "putting [his] hands on other students" and S.P. was sent to the office for similar behavior, as well as for using inappropriate language.

{¶10} Shelly Pulling, the principal at T.P.'s school, testified that T.P. was placed on a behavioral plan for students who are "experiencing difficulty in school" because he had caused disruptions due to his swearing and rambunctious behavior. She stated that T.P. receives support for students who are "emotionally disturbed," and was placed in a special classroom for children with similar behavioral problems.

{¶11} Bonnie Shinhearl, a mental health therapist at Crossroads, conducted individual counseling sessions with T.P., S.P., and Johnson. She testified that both children have reactive attachment disorder (RAD). She explained that she counsels T.P

regarding his "defiant behavior" and works with S.P. on her aggressive behaviors and her "need for control." Shinhearl testified that S.P. attends the PHP program at Crossroads, which is a "therapeutic school that houses children with extreme behavior problems that can't be managed *** in a typical school setting."

{¶12} Regarding counseling sessions with Johnson, Shinhearl testified that Johnson has weekly appointments, but missed three appointments, including her last two, due to conflicts with Johnson's work schedule. Shinhearl testified that Johnson "has made progress" in her counseling sessions and she has "made improvement in her understanding" of her children's needs. However, Shinhearl explained that Johnson needs to be able to understand how to use "specific interventions" to encourage positive behaviors in her children, due to their RAD, and there is still "a lot of work to be done."

{¶13} Melissa Flick, a supervisor with LCDJFS, was the supervisor on T.P. and S.P.'s case. Flick testified that LCDJFS had protective supervision for several different periods, starting in 2007. Flick stated that Johnson refused to sign release forms, as required by the case plan, thereby preventing LCDJFS from monitoring the mental health and alcohol-use case plan goals. Flick explained that Johnson was able to comply with the case plan for a period of time but this compliance "was superficial because there weren't any changes occurring with her situation."

{¶14} Flick testified that T.P. and S.P. had been in three different foster homes while in LCDJFS' custody. The children were removed from the first foster home due to "inappropriate discipline," which resulted in an injury to T.P.'s lip. The children were removed from the second foster home due to concerns regarding the children's hygiene, discipline that included taking away T.P.'s glasses, and the foster parents' failure to allow T.P. to participate in a football program. The children are currently

placed in a third foster home. On one weekend, T.P. and S.P. were placed in a home with a respite provider and a physical altercation took place between the two children.

{¶15} Suzanne Heslop, a social worker for LCDJFS, had been working on T.P. and S.P.'s case since 2007. Heslop stated that Johnson did not meet her case plan goals, as she failed to complete a drug and alcohol program on six different occasions and also failed to complete mental health counseling. However, Johnson did complete the required parenting class.

{¶16} Heslop testified that it was "hard to say" whether Johnson complied with the stable housing goal because Johnson had obtained her apartment less than a month prior to the trial and had not shown Heslop a pay stub that would verify Johnson could continue to pay rent. She stated that the apartment has two bedrooms and Johnson indicated she would sleep in the living room and each child would have his or her own bedroom.

{¶17} Heslop explained that when Johnson visited with T.P. and S.P., they were typically happy and excited to see her. Johnson was "usually always at visitation" and often brought gifts or food for the children. Heslop believed there were some indications of "attachment and bonding" between the children and Johnson and the children "care very much about her." Heslop stated that the children were "scared" to be adopted.

{¶18} Heslop testified that she was aware that abuse occurred in the first foster home where the children lived and she heard T.P. was "picked up by his legs" by his foster father and had injured his lip.

{¶19} Meghan Bohinc, a mental health therapist and case manager at Crossroads, provided counseling for T.P., S.P., and Johnson. She counseled the parties on issues related to reunifying the children with their mother, dealing with

changes in their lives, and with "attachment issues." Bohinc testified regarding a letter she wrote to LCDJFS recommending Johnson participate in family counseling sessions with T.P. and S.P. She was not aware of Johnson participating in any of these family sessions, although Johnson did express an interest in participating in such sessions.

{¶20} Two drug counselors, Eve Smith and Lynn Davis, testified that Johnson completed drug and alcohol assessments, but did not follow through with completing counseling or after-care programs. Both Smith and Davis testified that Johnson was diagnosed as alcohol dependent and had admitted to having an alcohol problem. Johnson admitted to consuming about thirty beers and two-fifths of liquor a week, and had been doing so for the past two years.

{¶21} Richard Naylor, testified that Johnson completed a relapse group and an after-care group at the Lake-Geauga Center, and was discharged on October 28, 2010, with a recommendation that she abstain from the use of alcohol. He stated that although Johnson successfully completed the program, if he had been aware that Johnson had relapsed during her treatment at the Lake-Geauga Center, he would not have considered her completion of the program to be successful.

{¶22} Tara Cuturic, an intake specialist at Pathways, testified that Johnson completed a mental health assessment but failed to complete recommended counseling.

{¶23} Amber Thomas, a supervisor and therapist at Crossroads, is trained in working with children who have RAD and was submitted as an expert witness. She testified that RAD is a diagnosis used to describe children who have had "attachment breaks" in their early childhood and who have "a pattern of difficulty in establishing and being in relationships with other people." She explained that attachment breaks can

occur when children experience trauma, witness violence, or have a parent who has drug and alcohol problems. According to Thomas, children with RAD engage in behavior designed to "keep people distant." Thomas testified that both T.P. and S.P. met the criteria for RAD.

{¶24} Thomas stated that if T.P. and S.P. were returned to a home where a parent could not maintain stability or sobriety, "the prognosis would not be good." She also believed that "quite a bit" of work was left to be done by Johnson and the time frame for such work to be completed would be "longer than a year."

{¶25} Thomas also admitted that Dr. Chavinson, a psychiatrist who works with Crossroads, did not sign paperwork confirming T.P.'s RAD diagnosis. However, Thomas claimed that this was due to a failure to update the paperwork correctly and T.P.'s therapists had properly diagnosed him with RAD.

{¶26} Several police officers testified regarding arrests of Johnson for Disorderly Conduct. Officer Edward Miller testified that on March 22, 2009, Johnson was arrested for Disorderly Conduct, due to intoxication, and at the time of the arrest, T.P. and S.P. were present and "appeared to be dirty." Officer Charles Krejsa also testified that Johnson was arrested for Disorderly Conduct, due to public intoxication, on January 26, 2011.

{¶27} Raymond Gandolf, Johnson's probation officer, testified that she was placed on probation for a Domestic Violence conviction in October of 2007 and was unsuccessfully terminated from probation in May of 2010. He testified that she violated the terms of her probation by failing to comply with the provisions requiring her to refrain from consuming alcohol and was incarcerated for probation violations on at least four separate occasions from 2008 through 2010. He stated that Johnson admitted to the

continued use of alcohol in 2007, and in June of 2008, he noticed the odor of alcohol on her breath.

{¶28} Diane Wakeley, a therapist and counselor who previously worked at Crossroads and developed Crossroads' attachment and bonding program, testified as an expert witness. She had reviewed Crossroads' records related to T.P.'s and S.P.'s RAD diagnoses. She stated that the assessment instrument used by Crossroads has been rejected by most clinicians as a standardized instrument. Wakeley testified that the testing may not have been accurate due to stress caused by the changes occurring in the children's lives. Wakeley did not believe the assessment conducted was a "solid assessment" and felt the results of the assessment should be called into question.

{¶29} Johnson testified that she has been attending twelve-step Christian group meetings as well as AA meetings. She stated that she has housing for the children and each child would have his or her own bedroom in her apartment. She testified that she has a job cleaning houses. She explained she did not appear at the hearing on January 31, 2011, because she did not know that the hearing was occurring. Johnson testified that she takes medication for anxiety and post-traumatic stress disorder and takes the medication as prescribed.

{¶30} The guardian ad litem (GAL), Attorney Anita Staley, testified that she believed granting permanent custody of the children to LCDJFS would be in their best interest because Johnson cannot provide consistency and has trouble meeting the children's basic needs. She explained that the children had "serious emotional and behavioral issues that existed well before [the] children were in the temporary custody of [LCDJFS]." She believed that while in their mother's care, the children have "had a history of chaos and uncertainty." In her GAL report, filed on November 26, 2010,

Staley noted that the children expressed their wishes to be reunified with their mother, but they were bonded with the foster family and feel safe in the foster home.

{¶31} On March 2, 2011, the trial court issued a Judgment Entry, granting permanent custody of T.P. and S.P. to LCDJFS. The court found that Johnson "either cannot, or will not, provide the environment necessary for the return of the children." The court also found that Johnson had not complied with the case plan and has "severe and chronic" chemical dependency. The trial court considered the factors in R.C. 2151.414(D) and the children's wishes, and found that Johnson does not have the ability to parent the children, the children had been in the custody of LCDJFS for over twelve of the last twenty-two months, and the children need a secure placement that Johnson is unable to provide. The court also found that Johnson's chemical dependency makes her unable to provide an adequate home, the father has demonstrated a lack of commitment to the children, and the children cannot be placed with either parent within a reasonable time.

{¶32} Johnson timely appeals and asserts the following assignments of error:

{¶33} "[1.] The trial court erred by granting permanent custody of T.P. and S.P. to the Lake County Department of Job and Family Services and applying the wrong law on adoption.

{¶34} "[2.] The trial court erred by refusing to admit into evidence hearsay statements of the child as to abuse that occurred while the child was placed in foster care."

{¶35} "[P]arents who are suitable persons have a 'paramount' right to the custody of their minor children." *In re Murray* (1990), 52 Ohio St.3d 155, 157 (citations omitted). "The fundamental interest of parents is not absolute, however." *In re D.A.*, 113

Ohio St.3d 88, 2007-Ohio-1105, at ¶11. The "extreme disposition" of permanently terminating a parent's rights with respect to a child "is nevertheless expressly sanctioned *** when it is necessary for the 'welfare' of the child." *In re Cunningham* (1979), 59 Ohio St.2d 100, 105. "[T]he *fundamental* or *primary* inquiry at the dispositional phase of these juvenile proceedings is not whether the parents of a previously adjudicated 'dependent' child are either fit or unfit," rather, it is "the best interests and welfare of that child [that] are of paramount importance." Id. at 106 (emphasis sic).

{¶36} R.C. 2151.414(B) is the applicable standard that a trial court must apply to determine the outcome of a motion for permanent custody. The statute provides:

{¶37} "(B)(1) Except as provided in division (B)(2) of this section, the court may grant permanent custody of a child to a movant if the court determines at the hearing held pursuant to division (A) of this section, by clear and convincing evidence, that it is in the best interest of the child to grant permanent custody of the child to the agency that filed the motion for permanent custody and that any of the following apply:

{¶38} "(a) The child is not abandoned or orphaned, has not been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period, or has not been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period, *** and the child cannot be placed with either of the child's parents within a reasonable time or should not be placed with the child's parents.

{¶39} "(b) The child is abandoned.

{¶40} "(c) The child is orphaned, and there are no relatives of the child who are able to take permanent custody.

{¶41} "(d) The child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period or the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period ***." R.C. 2151.414(B)(1)(a)-(d).

{¶42} "Assuming the juvenile court ascertains that one of the four circumstances listed in R.C. 2151.414(B)(1)(a) through (d) is present, then the court proceeds to an analysis of the child's best interest." *In re T.B.*, 11th Dist. No. 2008-L-055, 2008-Ohio-4415, at ¶34. "In determining the best interest of a child ***, the court shall consider all relevant factors, including, but not limited to, *** [t]he interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child; [t]he wishes of the child ***; [t]he custodial history of the child ***; [and] [t]he child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency." R.C. 2151.414(D)(1)(a)-(d).

{¶43} When reviewing the juvenile court's findings, this court applies the civil manifest-weight-of-the-evidence standard. *In re Lay* (1986), 25 Ohio St.3d 41, 42 (citation omitted). "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶24, quoting *C.E. Morris Co. v. Foley Constr. Co*. (1978), 54

Ohio St.2d 279, at the syllabus. "A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not." Id., quoting *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 81.

{¶44} In her first assignment of error, Johnson asserts that the trial court's ruling was not in the best interest of the children and was not supported by the evidence presented at trial. Specifically, Johnson asserts that the children have a strong bond with her, want to remain in her custody, and she is resolving her substance abuse problems.

{¶45} We first note that the trial court's judgment demonstrates it properly considered the required best interest factors, pursuant to R.C. 2151.414(D).

{¶46} Regarding R.C. 2151.414(D)(1)(a) and (b), the evidence presented shows that the children did interact well with their mother and had a bond with her. The testimony of the GAL establishes that the children wanted to live with Johnson, although they also felt "safe" with their foster parents.

{¶47} However, although the children have a bond with Johnson, she is unable to provide a secure home for the children. The testimony of T.P. and S.P.'s counselors, as well as the testimony of the GAL, established that it would not be in the best interest of the children to remain with their mother, due to her inability to meet their needs.

{¶48} Regarding R.C. 2151.414(D)(1)(d), the children's need for a legally secure placement is of special importance in this case. T.P. and S.P. have a strong need for a secure placement due to their RAD diagnoses. The testimony of Thomas, the children's therapist, as well as Staley, the GAL, emphasized their need for "consistency" and "stability" within their living situation. Thomas testified that the prognosis for the children would not be positive if they returned to a home with a parent who was inconsistent due

to alcohol problems and frequent incarceration. Thomas also believed Johnson was unable to properly parent the children and handle the problems caused by their RAD.

{¶49} The weight of the testimony presented at trial showed that Johnson would not be able to provide a secure placement. Staley and Thomas testified Johnson was unable to provide the consistency and stability that the children need. The testimony of several police officers, as well as Johnson's probation officer, demonstrated that Johnson has been frequently arrested and incarcerated. On one occasion, while the children were still living with Johnson, they had to be placed in shelter care due to Johnson's arrest. Johnson's incarceration is a relevant consideration when engaging in a best interest analysis and prevents her from being able to provide a secure home to the children. See *In re C.N.*, 8th Dist. No. 81813, 2003-Ohio-2048, at ¶32 (the trial court's best interest analysis was not an abuse of discretion when the court found that the children needed a legally secure placement due to the mother's history of substance abuse, rejections of drug treatment, and repeated incarceration); *In re A.P.*, 5th Dist. No. 10-CA-65, 2011-Ohio-1909, at ¶¶82-83 (a father's repeated incarceration was an issue to be considered in determining a child's best interest).

{¶50} In addition, Johnson's continued alcohol problem makes it difficult to consider her home a legally secure placement. The testimony of Smith and Davis demonstrated that Johnson was alcohol dependent. Officers Miller and Bruno testified that in 2008 and 2009, Johnson exhibited signs of intoxication. Gandolf testified that Johnson continually violated her probation due to her use of alcohol. Johnson herself admitted that she drank up to thirty beers per week. While Johnson asserts that she has started to make progress on her alcohol use, Officer Krejsa testified that Johnson appeared to be under the influence as recently as January 26, 2011. Testimony also

established that Johnson was frequently unable to complete alcohol treatment programs. Johnson's alcohol use had led to several incidents where the children were either left at home or not being supervised.

{¶51} Moreover, testimony presented at the trial established Johnson's inability to comply with the case plan. She was unable to abstain from alcohol use, did not successfully complete required counseling and alcohol treatment, and refused to sign release forms as required by the case plan. Failure to comply with the case plan is a relevant factor to consider when evaluating a child's best interest, as it demonstrates the child's need for a legally secure placement and the mother's inability to provide such a placement. *In re L.M.*, 11th Dist. No. 2010-A-0058, 2011-Ohio-1585, at ¶50.

{¶52} T.P. and S.P. have also been in the custody of LCDJFS for at least 12 of the past 22 months. See R.C. 2151.414(D)(1)(c). The children have been in the custody of LCDJFS since March of 2009. Moreover, during this time, Johnson has only had one unsupervised visit with the children and was allowed only supervised visitations at Crossroads.

{¶53} When considering Johnson's ongoing alcohol dependency issues, the pattern of arrests, including Johnson's recent arrest on January 26, 2011, and the children's need for a stable environment due to their RAD, the trial court's decision to grant permanent custody of T.P. and S.P. to LCDJFS is not against the weight of the evidence.

{¶54} Johnson argues next that the trial court erred by pursuing an open adoption because Ohio does not have a law allowing such adoptions.

{¶55} The trial court stated, in its March 2, 2011 Judgment Entry, that "[Johnson] is requesting that the Court order an open adoption if the Court orders permanent

custody. *** The Court hereby finds, and the State correctly points out, that the Court has no jurisdiction to order an open adoption. The Court, may, however, recommend or urge an open adoption." The court stated that it "recommend[ed] that if an open adoption is an option for the children in this case, that an open adoption be pursued."

{¶56} The trial court in this matter did not have jurisdiction to order an open adoption, as such jurisdiction is vested in the probate court. *In re Adoption of Geisman*, 11th Dist. No. 99-A-0071, 2000 Ohio App. LEXIS 4572, at *13 (in an adoption case "the probate court had exclusive jurisdiction over the matter"). Accordingly, the trial court explicitly found in its Judgment Entry that it had no jurisdiction to make such an order. Instead, the court only "recommended" that an open adoption be pursued if it were an option. The trial court did not err by making this recommendation. See *In re Muldrew*, 2nd Dist. No. 19966, 2004-Ohio-2044, at ¶14 (the juvenile court did not abuse its discretion when it "recommended that if an open adoption is an option for the children in this case that it be pursued").

{¶57} Moreover, even if the trial court had erred by recommending that an open adoption be pursued, we note that Johnson, through counsel, in her Supplemental Closing Argument, requested that an open adoption be pursued if permanent custody was granted to LCDJFS. "Under the invited-error doctrine, a party will not be permitted to take advantage of an error which he himself invited or induced the court to make." *State ex rel. O'Beirne v. Geauga Cty. Bd. of Elections*, 80 Ohio St.3d 176, 181, 1997-Ohio-348 (citation omitted); *Royse v. Dayton*, 2nd Dist. No. 24172, 2011-Ohio-3509, at ¶11 (under the doctrine of invited error, "a party cannot complain of any action taken or ruling made by the court in accordance with the party's own suggestion or request").

Johnson requested an open adoption and cannot now assert the trial court erred by considering whether an open adoption should be pursued.

{¶58} Johnson also asserts that, because terminating her parental rights was not in the children's best interest, the trial court should have considered placing the children in a planned permanent living arrangement (PPLA), pursuant to R.C. 2151.353(A)(5), which would allow Johnson more time to resolve her alcohol issues.

{¶59} A PPLA is a placement that gives legal custody to an agency without terminating parental rights and allows the children services agency to make an appropriate placement, including foster care or other placements. R.C. 2151.011(B)(37). A PPLA is one of the dispositions available to the juvenile court upon adjudication that a child is abused, neglected, or dependent. R.C. 2151.353(A)(5). A child may be placed in a PPLA if "a public children services agency *** requests the court to place the child in a planned permanent living arrangement and if the court finds, by clear and convincing evidence, that a planned permanent living arrangement is in the best interest of the child", and that certain factors exist. Id.

{¶60} Regarding the applicability of a PPLA in a custody case, the Ohio Supreme Court has held that "R.C. 2151.353(A)(5) is unambiguous and does not authorize the trial court to consider a planned permanent living arrangement unless the children services agency has filed a motion requesting such a disposition. Accordingly, we hold that after a public children services agency *** is granted temporary custody of a child and files a motion for permanent custody, a juvenile court does not have the authority to place the child in a planned permanent living arrangement when the agency does not request this disposition." *In re A.B.*, 110 Ohio St.3d 230, 2006-Ohio-4359, at ¶37. This court has also found that, when a children services agency does not request

a PPLA, "the trial court [is] neither authorized nor required to consider that disposition." *In re H.R.*, 11th Dist. No. 2008-G-2866, 2009-Ohio-922, at ¶112.

{¶61} In addition, the Ohio Supreme Court has found that PPLAs are generally undesirable. *H.R.*, 2009-Ohio-922, at ¶106; *A.B.*, 2006-Ohio-4359, at ¶33 ("A planned permanent living arrangement places a child in limbo, which can delay placement in a permanent home. Because the General Assembly intended to encourage speedy placement, R.C. 2151.353 places limitations upon the use of planned permanent living arrangements.").

{¶62} In this case, the record reveals that LCDJFS did not file for or request a PPLA. As LCDJFS did not do so, the issue was not before the trial court and the court could not consider such a disposition. As the Supreme Court has made clear, a children services agency must request a PPLA in order for the trial court to consider placing the child in such an arrangement. Moreover, once a permanent custody motion has been filed, as occurred in the present case, the trial court has no authority to seek such a disposition.

{¶63} Johnson asserts that in *Miller v. Green Cty. Children's Servs. Bd.*, 162 Ohio App.3d 416, 2005-Ohio-4035, and *In re Tanker* (2001), 142 Ohio App.3d 159, appellate courts held that an agency's failure to request a PPLA did not preclude the trial court from making the determination that a child could be placed in a PPLA. However, these cases were decided prior to *A.B.*, in which the Ohio Supreme Court explicitly held that the trial court has no authority to place children in a PPLA without the agency's request. 2006-Ohio-4359, at ¶37.

{¶64} We note that in *In re A.W.,* 9th Dist. No. 09CA009631, 2010-Ohio-817, the appellate court, when reviewing the applicability of a PPLA in a permanent custody

case, expressed concerns about the trial court's failure to consider a PPLA. However, this case is distinguishable from the present case on several grounds. The appellate court's concern in *A.W.* was the children services agency's inability to find an adoptive placement for the child. The child in that case, unlike S.P. and T.P., had never been in even a temporary placement outside of a mental health facility. Id. at ¶24. The appellate court ultimately reversed based on the lack of evidence presented on the best interest factors, not on the trial court's failure to consider a PPLA. The appellate court noted that a PPLA placement was not a dispositional option available to the trial court, due to the agency's failure to request such a disposition. Id. at ¶23 and ¶25, citing *A.B.*, 2006-Ohio-4359, at ¶37.

{¶65} The first assignment of error is without merit.

{¶66} In her second assignment of error, Johnson asserts that the trial court erred by failing to admit testimony from the social worker, Suzanne Heslop, regarding abuse to T.P. that occurred in the foster home and the desire of the children to not live in foster care.

{¶67} "[A] trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence." *Rigby v. Lake Cty*. (1991), 58 Ohio St.3d 269, 271; *In re Lambert*, 11th Dist. No. 2007-G-2751, 2007-Ohio-2857, at ¶84 ("[w]e review the trial court's admission of evidence under an abuse of discretion standard").

{¶68} 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). Hearsay is inadmissible at trial, unless it falls under an exception to the rules of evidence. Evid.R. 802.

{¶69} Johnson argues that Evid.R. 807 and R.C. 2151.35(F) should apply as exceptions to the hearsay rule, as T.P. was an abused child, and, therefore, Heslop's testimony regarding T.P.'s statements about abuse and his adjustment to the foster home were improperly excluded by the trial court.

{¶70} The Ohio Supreme Court has held that "R.C. 2151.35(F) is inconsistent with Article VIII of the Ohio Rules of Evidence and, as such, has no force or effect." *In re Coy*, 67 Ohio St.3d 215, 219, 1993-Ohio-202 (citation omitted); *In re R.R.*, 9th Dist. No. 23641, 2007-Ohio-4808, at ¶9. "Evid.R. 807 should be used by trial courts in determining whether, in abuse cases, an out-of-court statement(s) made by a child who, at the time of trial (or hearing), is under the age of twelve years is admissible at the trial or hearing." *Coy*, 67 Ohio St. 3d 215, at paragraph two of the syllabus.

{¶71} As R.C. 2151.35(F) has been found to have no effect, we will consider whether Evid.R. 807 applies in this case. Evid.R. 807 provides a hearsay exception for certain statements made by children under twelve years old in abuse cases. One requirement for this exception to apply is that, "[a]t least ten days before the trial or hearing, a proponent of the statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness." Evid.R. 807(A)(4).

{¶72} Johnson asserts that the trial court erred by failing to conduct the proper inquiry to determine if the statements in question should be excluded under Evid.R. 807.

The record does not show Johnson's counsel fulfilled the notice requirement, such that Evid.R. 807 could be applied or considered as a hearsay exception. Although Evid.R. 807(C) requires the court to conduct a hearing to make findings of fact on the applicability of Evid.R. 807, this hearing is triggered by compliance with the notice requirement. Evid.R. 807, Staff Notes ("[t]he pre-trial notice requirement is intended to alert opposing parties to the possible use of this exception, which in turn should trigger a request for an out-of-court hearing as required by Evid.R. 807(C)"). In addition, trial counsel never raised the issue of Evid.R. 807 being a possible exception and never objected to the exclusion of the statements on the grounds of that exception being applicable.

{¶73} In addition, even if the trial court improperly failed to admit the aforementioned statements, any error that resulted was harmless. The record contained sufficient additional evidence of the occurrence of abuse in the foster homes and of the children's living arrangements and preferences that it was unnecessary to include such statements. Any error was harmless, because the ultimate conclusion that Johnson's parental rights should be terminated was supported by other admissible evidence. *In re Clowtis*, 11th Dist. Nos. 2006-L-042 and 2006-L-043, 2006-Ohio-6868, at ¶38 (the error of the trial court in excluding evidence was harmless because the court's decision was supported by other admitted evidence).

{¶74} The trial court admitted Flick's testimony that "inappropriate discipline" occurred at the first foster home, including testimony that the foster father pushed T.P., which resulted in an injury to his lip. There was no objection to this testimony and it was before the trial court for its consideration. In addition, Heslop testified, also without objection, that she was aware that abuse occurred in the first foster home and she

heard T.P. was "picked up by his legs" by his foster father and had injured his lip. This evidence was sufficient to establish that T.P. had experienced an injury due to abuse from the foster father. Therefore, failure to admit a third statement regarding the abuse that occurred to T.P. was harmless, as the trial court was clearly aware of, and considered, the abuse that occurred to T.P.

{¶75} Evidence regarding the children's adjustment to foster care and wishes involving their placement was also presented at trial. The GAL testified as to the children's wishes regarding their residence and they were given an opportunity to answer questions during the in camera interview. In addition, Flick testified regarding their movement between several foster homes, the abuse that occurred in the first home, and their current foster placement. Heslop also testified about the foster placements of the children. Therefore, there was sufficient evidence of the children's wishes to live with their mother and displeasure with some of the foster placements such that the exclusion of the statements in question, if it was made in error, was harmless error.

{¶76} The second assignment of error is without merit.

{¶77} Based on the foregoing, the Judgment of the Lake County Court of Common Pleas, Juvenile Division, granting permanent custody of T.P. and S.P. to LCDJFS, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.