[Cite as *In re Adoption of L.A.J.*, 2010-Ohio-3976.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	JUDGES: Hon. Julie A. Edwards, P. J.
IN THE MATTER OF:	Hon. John W. Wise, J. Hon. Patricia A. Delaney, J.
THE ADOPTION OF	Case No. 2010 CA 00010
LACI ANN JONES	O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Probate Division, Case No. 206760
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 23, 2010

APPEARANCES:

For Petitioners-Appellants	For Respondent-Appellee
LORRIE E. FUCHS Post Office Box 35787 Canton, Ohio 44735	RICHARD KUHN 1428 Market Avenue North Canton, Ohio 44714

Wise, J.

{¶1} Petitioners-Appellants Karen and Larry Jones appeal the decision of the Stark County Court of Common Pleas, Probate Division, which found that the biological mother's consent was required for the adoption of Laci Ann Jones.

{¶2} This appeal is expedited and is being considered pursuant to App.R.11.2(C).

{¶3} Initially, we shall address the "Statement of Transcript" prepared by Appellants in this matter.

{¶4} The evidentiary hearing on the issue of consent before the Probate Court was not recorded and therefore, no transcript exists as to such hearing.

{¶5} App.R. 9(C) permits an appellant to submit a narrative transcript of the proceedings when a verbatim transcript is unavailable, subject to objections from the appellee and approval from the trial court. App.R. 9(C) provides:

{¶6} "(C) Statement of the evidence or proceedings when no report was made or when the transcript is unavailable

{¶7} "If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee no later than twenty days prior to the time for transmission of the record pursuant to App.R. 10, who may serve objections or propose amendments to the statement within ten days after service. The statement and any objections or proposed amendments shall be forthwith submitted to the trial court for settlement and approval. The trial court shall act prior to the time for transmission of

the record pursuant to App.R. 10, and, as settled and approved, the statement shall be included by the clerk of the trial court in the record on appeal.

{¶8} App.R. 9(D) authorizes parties to submit an agreed statement of the case in lieu of the record:

{¶9} "(D) In lieu of the record on appeal as defined in division (A) of this rule, the parties, no later than ten days prior to the time for transmission of the record pursuant to App.R. 10, may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with additions as the trial court may consider necessary to present fully the issues raised by the appeal, shall be approved by the trial court prior to the time for transmission of the record pursuant to App.R. 10 and shall then be certified to the court of appeals as the record on appeal and transmitted to the court of appeals by the clerk of the trial court within the time provided by App.R. 10."

{¶10} While Appellant did prepare a Statement of Transcript pursuant to Rule 9(c) and Appellee filed a Response to such Statement, Appellant failed to submit such statement to the trial court for settlement and approval.

{¶11} This Court has previously held that "[f]actual assertions appearing in a party's brief, but not in any papers submitted for consideration to the trial court below, do not constitute part of the official record on appeal, and an appellate court may not consider these assertions when deciding the merits of the case." *State v. Lewis,* 5th

Dist. No. 2006-CA-00066, ¶ 7, citing *AkroPlastics v. Drake Industries* (1996), 115 Ohio App.3d 221, 226, 685 N.E.2d 246, 249.

{¶12} Accordingly, as to those assignments of error dependent for their resolution upon a trial transcript, this Court has no choice but to presume the validity of the lower court's proceedings, and affirm. *Knapp v. Edwards Lab.* (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 384.

STATEMENT OF THE FACTS AND CASE

{¶13} The relevant facts as set forth in the trial court's Judgment Entry of December 21, 2009, are as follows:

{¶14} Laci Ann Jones was born on August 23, 2003 to Tricia Ann Whaley ("Mother") and Gregory Alan Jones ("Father"). Mother and Father were never married.

{¶15} Father signed the consent form for the adoption by Petitioners on June 28, 2009. Father is currently incarcerated and is scheduled to be released in 2011.

{¶16} Laci has resided with Appellant since she was approximately one year old. In an Agreed Entry filed October 4, 2005, in the Court of Common Pleas, Division of Domestic Relations, Stark County, Ohio, the paternal grandmother, Appellant Karen Jones, was designated as Laci's sole residential parent and legal custodian. Father was entitled to reasonable visitation as allowed by Appellant, and Mother was entitled to supervised visitation. Mother and/or Father were permitted to petition the court for a change of custody upon proof of home and personal stability. Child support was not addressed in the Agreed Entry.

{¶17} Mother had minimal contact with Laci after the Agreed Entry was filed. A letter dated December 19, 2007 to Karen from Attorney Richard R. Kuhn stated that

Tricia wanted to discuss reinitiating the court-ordered visitation. On December 31, 2007 a Judgment Entry in Contempt and Notice to Show Cause was filed by Mother against Karen. A Motion to Modify Visitation was filed in January, 2008.

{¶18} On January 17, 2008, Mother was granted supervised visitation through Trinity or Massillon YWCA.

{¶19} On April 22, 2008, Attorney John Frank was appointed as Guardian ad Litem at the hearing on the Complaint for Visitation in the Juvenile Division.

{¶20} A Judgment Entry dated July 7, 2008, found that the GAL had not been paid.

{¶21} A Judgment Entry dated October 2, 2008, found that Mother failed to contact Guardian or pay the initial retainer and failed to timely comply with the GAL's request for hair follicle testing.

{¶22} In October, 2008, Mother telephoned Appellant and told her that she would not continue attending supervised visits with Laci.

{¶23} In December, 2008, Appellant purchased Christmas gifts for Laci. Appellant refused to allow her to bring the gifts to Laci. Instead, Appellant's niece dropped off the presents for Laci at Appellant's residence. The gifts included arts and crafts, clothing, and toys valued at approximately $200.00.

{¶24} On June 4, 2009, Mother filed a motion to reinitiate visitation with Laci.

{¶25} On August 5, 2009, Appellants Karen Jones and Larry Jones, paternal grandparents, filed a petition for the adoption of Laci Ann Jones. The Petition stated that the consent of the biological mother Tricia Whaley was not required due to failure without justifiable cause to provide for maintenance and support of the minor as

required by law or judicial decree for a period of at least one year immediately preceding the filing of the adoption petition.

{¶26} Father signed the consent form for the adoption by Petitioners on June 28, 2009.

{¶27} On August 29, 2009, Tricia Whaley, the biological mother, filed an Objection to the Petition for Adoption, denying that she failed without justifiable cause to provide for the maintenance and support of Laci Ann Jones.

{¶28} On November 30, 2009, an evidentiary hearing was held before the Probate Court on the Objection to Petition for Adoption. Appellant and Mother were both present at the hearing and both were represented by counsel. Testimony was received from both Appellant and Mother. Exhibits were admitted into evidence.

{¶29} On December 14, 2009, counsel for both parties submitted Proposed Findings of Fact and Conclusions of Law.

{¶30} By Judgment Entry filed December 21, 2009, the trial court found that "[p]etitioners have failed to meet their burden of proof and the consent of the biological mother, Tracey Whaley, is required."

{¶31} Appellants timely filed a notice of appeal and herein raise the following Assignments of Error:

ASSIGNMENTS OF ERROR

{¶32} "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FOUND THAT THE NATURAL MOTHER'S CONSENT WAS NECESSARY TO PERMIT THE PATERNAL GRANDPARENTS TO ADOPT THE MINOR CHILD.

{¶33} "II. THE COURT COMMITTED AN ERROR OF LAW BY FAILING TO RECORD THE PROCEEDING BELOW:"

I.

{¶34} In their first assignment of error, Appellants argue that the trial court erred in determining that the natural mother's consent was required for the adoption in the instant case. We disagree.

{¶35} In the case sub judice, Appellant, who are the paternal grandparents of the minor child, alleged that the biological mother's consent was not required for approval of their petition for adoption.

{¶36} R.C. §3107.07(A) provides that a natural parent's consent to the adoption of his or her child is not required if the court finds that said parent has failed without justifiable cause either to communicate with the child or to provide for the maintenance and support of the child as required by law or judicial decree for a period of at least one year prior to the filing of the petition for adoption.

{¶37} Pursuant to R.C. §3107.07(A), the petitioner for adoption has the burden of proving, by clear and convincing evidence, both that the natural parent has failed to support the child for the requisite one-year period and that this failure was without justifiable cause. *In Re Adoption of Bovett* (1987), 33 Ohio St.3d 102, 515 N.E.2d 919, paragraph one of the syllabus. The language of R.C. §3107.07(A) must be strictly construed to protect the interest of the non-consenting parent who is subject to forfeiture of his or her parental rights. *In Re Adoption of Sunderhaus* (1992) 63 Ohio St.3d 127, 132, 585 N.E.2d 418.

{¶38} A probate court's determination under R.C. §3107.07(A) will not be disturbed on appeal unless such determination is against the manifest weight of the evidence. *In Re Adoption of Masa* (1986), 23 Ohio St.3d 163, 492 N.E.2d 140, paragraph two of the syllabus; *Bovett* at paragraph four of the syllabus. A judgment supported by some competent, credible evidence will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279. A reviewing court must not substitute its judgment for that of the trial court where there exists some competent and credible evidence supporting the judgment rendered by the trial court. *Myers v. Garson,* 66 Ohio St.3d 610, 1993-Ohio-9.

{¶39} In the case sub judice, in its December 21, 2009, Judgment Entry the trial court found that Appellants failed to meet their burden of proof and the biological mother's consent was therefore required.

{¶40} In its Conclusions of Law, the trial court specifically stated the following:

{¶41} "Mother has sporadic employment over the past several years and was laid off from a full-time job in February, 2009. She currently has part-time employment. Mother paid for the scheduled visitation sessions at the Massillon YWCA and provided food during those visits.

{¶42} "Mother purchased Christmas gifts in December, 2008 worth approximately $200.00. [Appellant] did not allow Mother to deliver these Christmas gifts to Laci, nor would she allow Mother to speak to Laci on the telephone. Mother testified that she did not attempt to send cards or gifts after this because of the difficulties she experienced in December, 2008.

{¶43} "In light of the foregoing, the Court finds that the Petitioners have failed to meet their burden of proof and the consent of the biological mother, Tracey Whaley, is required."

{¶44} Upon our review of the trial court's Judgment Entry and the record, we find that there exists competent, credible evidence to support the trial court's conclusion. Further, without a transcript of the hearing, we must accept the trial court's findings as accurate and presume the validity of the proceedings.

{¶45} Appellants' first assignment of error is overruled.

II.

{¶46} In their second assignment of error, Appellants argue that the trial court's failure to record the evidentiary hearing on the issue of consent was an error of law. We disagree.

{¶47} Upon review, this Court finds no rule stating that the trial court is required to record its proceedings in the absence of a request by one of the parties.

{¶48} "Ordinarily, to preserve a trial court error for appeal, an objection must be timely raised to the trial court, where the alleged error may be corrected, or else the objection is waived; it may not be raised for the first time on appeal." *Wilburn v. Wilburn,* 169 Ohio App.3d 415, 2006-Ohio-5820, 863 N.E.2d 204, at ¶ 32; see, also, *Hirzel v. Ooten,* Meigs App. Nos. 06CA10 and 07CA13, 2008-Ohio-7006, at ¶ 47. As the Ohio Supreme Court held in *Schade v. Carnegie Body Co.* (1982), 70 Ohio St.2d 207, 210, 436 N.E.2d 1001, "the fundamental rule is that an appellate court will not consider any error which could have been brought to the trial court's attention, and hence avoided or otherwise corrected."

{¶49} Appellants do not contend that a record was requested, by a party attending this proceeding, and the trial court refused to record the proceedings. Appellants merely allege that the trial court should have made a record on its own initiative.

{¶50} As applied to the facts in the case at bar, Appellant did not request that the trial court record the evidentiary hearing. Consequently, the issue has not been preserved for appellate review. We therefore disagree with Appellant that the trial court erred by failing to record the hearing.

{¶51} Appellants' second assignment of error is overruled.

{¶52} For the foregoing reasons, the judgment of the Court of Common Pleas, Probate Division, Stark County, Ohio, is hereby affirmed.

By: Wise, J.

Edwards, P. J., and

Delaney, J., concur.

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JUDGES

JWW/d 713

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:	:	
	:	
THE ADOPTION OF	:	JUDGMENT ENTRY
	:	
LACI ANN JONES	:	Case No. 2010 CA 00010

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, Probate Division, Stark County, Ohio, is affirmed.

Costs assessed to Petitioners-Appellants.

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JUDGES