[Cite as *In re S.F.*, 2010-Ohio-6145.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

In the Matter of: S.F.

Court of Appeals No. L-10-1177
L-10-1188
L-10-1193

Trial Court No. JC 10-203269

DECISION AND JUDGMENT

Decided: December 15, 2010

* * * * *

Dan M. Weiss, for appellants.

Patricia J. Clark, for appellee.

* * * * *

SINGER, J.

{¶ 1} This is an appeal from a judgment issued by the Lucas County Court of Common Pleas, Juvenile Division, granting permanent custody of appellants' child, S.F.,

to Lucas County Children Services ("LCCS"). Because we conclude that the trial court did not err in terminating appellants' parental rights, we affirm.

{¶ 2} Appellant, P.F., is the biological mother of S.F. and appellant, A.S., is the alleged father. Appellants had two other children together to whom their parental rights were previously terminated. *In re: Andrew S., Emily S.*, 6th Dist. No. L-07-1078, 2007-Ohio-6887. The conditions which caused LCCS to file the complaints in the matter of S.F.'s two siblings were unstable housing, poor parenting skills, domestic violence between appellants, and mental health concerns regarding both parents.

{¶ 3} S.F. was born approximately six weeks premature on February 10, 2010, at the University of Michigan Medical Center, and required hospitalization for over seven weeks due to extensive medical problems. On March 19, 2010, LCCS filed a complaint for original permanent custody of S.F., along with a motion for shelter care. On the same date a shelter care hearing was held and temporary custody was granted to appellee. This temporary custody resulted in S.F. being placed in the home of her paternal uncle and aunt, who are the adoptive parents of her biological siblings, Emily and Andrew S.

{¶ 4} Pretrial proceedings commenced on May 19, 2010. The complaint was amended and four exhibits were admitted into evidence. Each of the appellants stipulated to the amended allegations in the complaint and knowingly and voluntarily agreed to have the trial court make an adjudicative finding based on the evidence before it. Based on the stipulated facts in the complaint and the evidence presented, the court found S.F.

to be a dependent child and held that LCCS had shown that they were not required to make reasonable efforts to prevent the removal of S.F. from appellants' home.

{¶ 5} On June 15, 2010, a dispositional hearing was held on appellee's original motion for permanent custody. At the hearing, the original four exhibits from the adjudication were readmitted into evidence for the purposes of the disposition. Appellants both stipulated to Exhibits 5 and 6, the certified medical records of appellant mother and father, respectively. Further, both appellants stipulated to the court taking judicial notice of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) and the adjudicatory facts of the case.

{¶ 6} At the hearing, Donna Brown, an assessment caseworker with LCCS, testified that around February 10, 2010, LCCS received a call of concern from the University of Michigan Medical Center regarding S.F. Upon receiving the referral, Brown contacted appellant mother by phone and made arrangements to come to her home to speak with her.

{¶ 7} Brown testified that appellant mother told her that she was planning on moving to Michigan, but admitted that she had traveled to Ann Arbor for S.F.'s birth in an attempt to avoid LCCS's involvement. Brown further testified that appellant mother reluctantly admitted that she was living with S.F.'s father, but stated that she knew that if she could bring S.F. home that she could not stay with him.

{¶ 8} Brown testified that appellant mother indicated she had an open case for services with Harbor Behavioral Healthcare, but that she was inconsistent in going, and

that she had not participated in any parenting services since the prior loss of custody of her children, nor had she attended any domestic violence counseling.

{¶ 9} Brown testified that she returned to appellants' home a second time and that appellant father was present when she arrived. She gave him the opportunity to speak with her regarding S.F., but he went to another room, closed the door, and did not come back out.

{¶ 10} The next day, a staffing meeting was held at the agency. LCCS staff, including Brown, were present along with appellant mother and a support person for her, Pastor Fleming. At the meeting, a discussion was held regarding the referral and appellants' past history, and it was determined that LCCS would request permanent custody. Brown testified that the relevant factors considered included the chronic mental health of both parents, concerns over poor insight and parenting, domestic violence that had previously been reported and the fact that the appellants continued to live together, and unstable housing due to several different housing arrangements of appellant mother in the three years prior to S.F.'s birth.

{¶ 11} C.S., sister-in-law to appellant father and adoptive mother of appellants' older two children, testified that she received a phone call from Donna Brown asking if she and her husband would be willing to take S.F. into their home. They accepted and were allowed to visit S.F. in the hospital. C.S., a registered nurse, described S.F.'s medical condition in detail. S.F. had difficulty eating feeding and had to have feeding tubes. She also had an intravenous tube inserted into the left side of her head to give her

medication and fluids. S.F. developed ascites in her abdomen, a condition where fluid collects in the abdominal cavity. This condition remained beyond her discharge and persisted at the time of trial, although her doctors still did not know the cause of the condition.

{¶ 12} S.F. was discharged from the hospital into C.S.'s care. She was placed on a special formula prior to discharge due to her body's inability to properly absorb nutrients. The collection of fluid in her abdominal cavity caused S.F.'s stomach to be distended and it very uncomfortable for her. C.S. was required to measure S.F.'s abdomen several times a day and report the figures to a gastrointestinal specialist to ensure there was not an increase in girth which would indicate that she was retaining more fluid. S.F. also received a diuretic to help relieve some of the additional fluid that would otherwise accumulate in her abdomen. S.F.'s temperature also had to be monitored several times a day and reported to her specialist, as a fever could indicate a bacterial infection in her abdomen caused by the extra fluid, which could result in sepsis or death.

{¶ 13} C.S. testified that since S.F. was discharged into her care, she had occasion to take her to the emergency room for care twice. On the first occasion, shortly after S.F. was released from the hospital, she appeared to be having trouble breathing. S.F.'s enlarged abdomen put her at risk for respiratory distress from the pressure of the fluid on her lungs. On the second occasion, S.F. received emergency care for dehydration. C.S.. testified that S.F. received physical therapy to help her hold her head up and move her

limbs properly. C.S. stated that she also did strengthening exercises with S.F. from the time of her discharge from the hospital as recommended by the medical team there.

{¶ 14} C.S. testified that she did not have contact with either appellant regarding visitation or S.F.'s well being. C.S. testified that appellants had visited S.F.'s siblings in her home during the pendency of the first custody case, but that appellants behaved inappropriately and argued between themselves. Appellant father eventually decided to stop visiting the children, and the visits in C.S.'s home were eventually moved to the agency after appellant mother's continued inappropriate behavior. C.S. stated that she and her husband did not have contact with appellant father, as they believed it was in the best interest of the children. She stated that appellant father had been told that he was not allowed to call their home.

{¶ 15} Barbara Cummins, a caseworker for LCCS, testified that she was assigned S.F.'s case on March 25, 2010 when S.F. was placed in the home of C.S. Cummins testified that she was able to observe S.F. in the home and that she was doing very well and was very bonded to C.S. Cummins had her first contact with appellant mother on March 25, 2010, when she came to visit S.F. at the agency. Cummins testified that appellant mother did attend the visits and was always on time.

{¶ 16} Cummins testified that appellant mother told her she had an on and off relationship with appellant father for quite awhile, and that she had been living with him at the time that S.F. was born. Appellant mother also told Cummins that she had initiated parenting classes and services for women in relationships containing domestic violence

since S.F.'s birth, however, appellant mother did not know the name of the counselor she was seeing. Cummins testified that appellant mother was residing in temporary housing at the home of her pastor, but was seeking other housing.

{¶ 17} Cummins had contact with appellant father at his home on May 15, and during visits at LCCS. Cummins testified that appellant father did not initially have visitation in the case, but after some time he requested visitation, which began on May 16, 2010. Appellant father had attended every visit since that date with one exception, when he called ahead to cancel.

{¶ 18} Cummins testified that when she did the home visit with appellant father, he stated that he was not interested in obtaining custody of S.F. because he was a "lost cause," however, he did advocate for appellant mother to receive custody of S.F. Cummins testified that the first notice she had of appellant father's desire to gain custody was when he came to the adjudicative hearing on May 19, 2010 with a lawyer.

{¶ 19} Cummins testified that she was able to review both appellants' medical records from Harbor Behavioral Healthcare. She stated that this did not cause her to reconsider the request for permanent custody. Cummins testified that there were chronic issues with appellant father's mental health, and with him being on and off his medications. She further testified that appellant mother also had ongoing mental illness for which she received medication. Cummins was concerned with the insight and judgment appellant mother had shown, especially when she was pregnant with S.F. and was told she had a high risk pregnancy which required an amniocentesis. Rather than

have the procedure, appellant mother refused. Instead, she went to Michigan to avoid LCCS without considering the medical risk to S.F., after she had been continually advised that she should not leave the area.

{¶ 20} As caseworker of record, Cummins stated that she would recommend permanent custody of S.F. to LCCS. She based this on unresolved issues from the first custody case that were still ongoing. The continuing abusive relationship between appellants was of great concern. Cummins acknowledged, however, that domestic violence treatment was never part of the case plan in the first custody case. Also relevant were appellant mother's unstable housing and her poor insight and judgment. Further, Cummins stated that appellant mother did not really ask questions about S.F., her medical condition, or what was going on with her.

{¶ 21} Another concern that Cummins had was the pattern of missed appointments or being late for appointments in the record of both parents, when S.F.'s medical problems required a lot of appointments. Cummins testified that she recalled the same issue in the first custody case. She also recalled that appellant father had participated in parenting and visitation initially in that case and then ceased his involvement, and stated that she believed that behavior was consistent with what she had observed in appellant father's most current records.

{¶ 22} Cummins testified that there were concerns with appellant father going on and off his medications, and also his argumentative and non-compliant behavior towards his employment counselors. Appellant father also had several different jobs during the

time Cummins had reviewed the case, and there were issues with his refusal to accept suggestions from his counselors to alter his behavior in order to retain employment.

{¶ 23} Heidi Farless, a domestic violence advocate from Project Genesis, testified on behalf of appellant mother. Farless testified that appellant mother came to Project Genesis for intake on February 18, 2010, and had her first group counseling session on February 24, 2010. Farless stated that appellant mother completed the 16 required classes for the program and that she believed appellant mother had successfully completed the program and had benefited from the course.

{¶ 24} Farless testified that appellant mother never identified the individual who had perpetrated the domestic violence against her, or that she had lived with appellant father until the time of S.F.'s birth. Farless was aware that appellant mother had lost custody of two children prior to the case with S.F., but was unaware of the extensive parenting classes appellant mother had been provided with or the fact that at their conclusion counselors were unable to recommend that the children be safely returned to her.

{¶ 25} Barbara Fleming, appellant mother's pastor with whom she was residing, also testified on behalf of appellant mother. Fleming testified that appellant mother had come to live with her in February 2010 after the LCCS staffing meeting, and that until that point in time appellant mother was still residing with appellant father. Fleming had provided appellant mother with transportation to the University of Michigan hospital to

visit S.F., would supervise the visits at the hospital, and would not allow appellant mother to visit without supervision.

{¶ 26} Fleming testified that appellant mother is able to take care of herself, but that it would take a support team for her to be able to care for S.F.. Fleming believed that if shown how to care for S.F.'s needs, appellant mother would be able to do so, however, someone would need to come by the house to make sure that things were alright with the child. Fleming stated that she was unaware of the extensive parenting classes appellants had received in the first custody case and that counselors had been unable to recommend that the children be returned safely to them.

{¶ 27} Appellant father testified that he had voluntarily stipulated to LCCS taking custody of his older two children. He further stated that in that case he stopped doing parenting and other services and visitations because someone had told him he no longer had rights to that stuff, but he could not remember who had told him that. Appellant father testified that with respect to this case, he had initiated taking parenting classes on his own.

{¶ 28} Appellant father testified that after hearing the testimony regarding S.F.'s condition that he had no concerns regarding his ability to take care of S.F. as a single parent, and that he felt he would be able to care for her medical needs if he was instructed on what to do. He also stated that he would have family and friends to help him the same as any other single parent would.

{¶ 29} Along with testimony at the hearing regarding domestic abuse in the relationship, appellant mother's medical records indicated domestic violence in her relationship with appellant father. Appellant father denied ever being abusive toward appellant mother and stated that they would have arguments, and that was it. He stated that he believed that the extensive references to domestic violence in the record from appellant mother's perspective were due to the way that abuse is interpreted, and that all that could have stemmed from was verbal arguments.

{¶ 30} Appellant father also testified regarding his medical health diagnosis of paranoid schizophrenia, saying that as long as he took his medication he was alright. He stated that many of the symptoms of the disorder he never experienced personally, but characterized his illness as "problems in thinking." Appellant father testified that he did not recall incidents where he had hallucinations when he was off of his medication. He stated that he really did not have that serious of a problem. Appellant father stated that he did not believe his diagnosis would impact his ability to parent S.F.

{¶ 31} Appellant father testified that he saw a counselor for employment, Anna Kennedy, due to a problem holding a job for any length of time. He stated that the lack of employment was generally because work had ended and there was no work left to do, and it was not always due to his own doing. Appellant father testified that he recalled Kennedy discussing with him on May 17, 2010, the fact that he had either not showed, cancelled or arrived late for his three prior appointments. Appellant father stated that he

has a cell phone but did not know how to put dates into it, so he had forgotten the two previous appointments.

{¶ 32} Lastly, Dan Nathan, the guardian ad litem ("GAL") for S.F., testified. He had been the GAL on the case for S.F.'s siblings as well. Nathan stated that in the original case the primary concern was that they could not become satisfied with appellant mother's parenting skills despite the extensive parenting classes she was given. He further stated that appellant father had been involved in the services for some time, but by the end of the case had disengaged completely.

{¶ 33} Nathan stated that in the investigation for this case he had met with both parents, had conversations with appellant mother's counselors at Harbor and reviewed both appellants' medical files, and had spoken with the LCCS caseworker and reviewed their files.

{¶ 34} During his visits to S.F.'s placement, Nathan was able to observe the older two siblings and found that they were very well adjusted and happy. From his observations of S.F. in the home, Nathan concluded that it was a very good placement for her. He found C.S. to be very nurturing and attentive to S.F.'s needs.

{¶ 35} Nathan testified that appellant father had expressed concerns regarding S.F.'s moral upbringing in C.S.'s home, but that he disagreed that it would not be a good home or that she would not have a good moral upbringing. Nathan further testified that appellant father's testimony about missing appointments because he did not have a

calendar was of concern regarding his ability to care for S.F., especially considering her medical needs.

{¶ 36} As the GAL, Nathan stated that his recommendation would be for LCCS to be granted permanent custody of S.F. and for C.S. and her husband to adopt her. He stated that there was nothing that had changed since the first custody case to cause him to believe that a case plan or more time would alter the outcome of the case or change his position regarding S.F.'s best interest. With her medical needs, S.F. would present an even greater challenge than the first two children would have, and Nathan did not believe either parent was prepared to meet that challenge.

{¶ 37} With respect to appellant father, Nathan's biggest issue was his mental health and the fact that at times he took care of it and at times he had not. Nathan further stated that appellant father had a low threshold for stress even when he was taking care of himself and on his medication, and that it would make for an unsafe situation.

{¶ 38} On July 6, 2010, the court issued a judgment entry on the dispositional hearing finding pursuant to R.C. 2151.353(A)(4) by clear and convincing evidence that S.F. should not be placed with either parent and that pursuant to R.C. 2151.414(D) that an award of permanent custody to LCCS was in her best interest.

{¶ 39} From that judgment, appellants bring two assignments of error:

{¶ 40} "A. The trial court committed reversible error when it held that appellee did not have to make reasonable efforts to reunify the child with her father, appellant, because his parental rights had been involuntarily terminated.

{¶ 41} "B. The trial court committed reversible error when it impermissibly admitted the Diagnostic and Statistical Manual of Mental Disorders, DSM-IV as an exhibit, took judicial notice of the manual and made medical findings utilizing the learned treatises."

{¶ 42} This case was filed pursuant to R.C. 2151.353(A)(4) as an original complaint for permanent custody. R.C. 2151.414(D) and (E) set forth the statutory requirements that must be met for an award of permanent custody to be made pursuant to that section. Subsection (D) requires that the court find it is in the best interest of the child to make an award of permanent custody to the agency. Subsection (E) lists sixteen factors which may exist as to each of the child's parents. If one or more of the factors exists, the court shall enter a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent.

{¶ 43} One of the factors found by the court in this case is R.C. 2151.414(E)(11), which states:

{¶ 44} "The parent has had parental rights involuntarily terminated with respect to a sibling of the child pursuant to this section or section 2151.353 or 2151.415 of the Revised Code, or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to those sections, and the parent has failed to provide clear and convincing evidence to prove that, notwithstanding the prior termination, the parent can provide a legally secure permanent placement and adequate care for the health, welfare, and safety of the child."

{¶ 45} R.C. 2151.419 gives the requirements for determining whether an agency has made reasonable efforts to prevent removal of a child from the home. The statute gives five circumstances where, if any single one is found to be true, the court must determine that the agency was not required to make reasonable efforts to prevent the removal of the child.

{¶ 46} In the instant case, the court found that subsection (E)(11) applied as appellants had already had their parental rights involuntarily terminated with respect to their two older children. This eliminated the need for LCCS to make any reasonable efforts to prevent S.F.'s removal from the home.

{¶ 47} Appellant father claims that in the first custody case he voluntarily relinquished his parental rights, rather than having them involuntarily terminated. This court stated in its decision and judgment entry on appellant mother's appeal in the original custody case:

{¶ 48} "On that date, * * * , father of both children, stipulated as to the allegations in the motions for permanent custody of both children as they related to him. The trial court found father's stipulation to be made knowingly and voluntarily and with full understanding of the consequences of his actions. Father then executed the 'Agreement for Permanent Custody' form which was marked as an exhibit and entered into evidence." *In re: Andrew S., Emily S.*, supra.

{¶ 49} Appellant contends that the fact that because his stipulation to the allegations against him was made voluntarily means that his parental rights were

voluntarily terminated. The trial court stated "the mere stipulation to allegations in a motion for permanent custody filed pursuant to ORC2151.415 did not convert the proceeding to a voluntary permanent surrender as provided in ORC5103.15(B)(1), and this Court finds that ORC 2151.414(E)(11) is an appropriate finding in the instant case."

{¶ 50} "The Ohio Supreme Court has long-recognized that R.C. 5103.15 'has no connection with the law with reference to Juvenile Courts, the statutes concerning which are Sections 2151.01 to 2151.54, inclusive, together with Sections 2151.55, 2151.99 and 2153.01 to 2151.17, inclusive, Revised Code.'" *In the Matter of Isreal Y.* (July 16, 2007), 6th Dist. No. L-07-1030, 2007-Ohio-3685. (Citations omitted.) Specifically, "a motion for permanent custody made pursuant to R.C. 2151.413 is distinct and separate from an agreement surrendering permanent custody of a child made pursuant to R.C. 5103.15." *In the matter of: Gordon*, 3d Dist. Nos. 5-04-22, 5-04-23,2004-Ohio-5889, citing *In Re Ross* (Sept. 11, 1998), 2d Dist. No. 16582. "The procedures necessary to implement an agreement under R.C. 5103.15 are not applicable when a Juvenile Court considers a R.C. 2151.413 motion. This is true even in the situation where the parent stipulates that permanent custody is in the child's best interest." Id.

{¶ 51} In *Ross*, the appellant had also stipulated to certain accusations against her and had signed an agreement granting permanent custody of her children to the Child Services Board. Appellant in that case also believed this agreement should be treated as a voluntary surrender of custody, but the appellate court found that the juvenile court did not approve any agreement of voluntary surrender pursuant to R.C. 5103.15; rather the

juvenile court continued to hear the matter before it, the original complaint for permanent custody, and followed the procedures required by R.C. 2151.414. The trial court in the original custody case of S.F.'s siblings acted likewise, accepting the stipulations and agreement into evidence to be considered and continuing the dispositional hearing on the complaint for permanent custody under the procedures outlined by R.C. 2151.414.

{¶ 52} Juv.R. 29(D) requires that prior to accepting an admission, the juvenile court must determine that it was made voluntarily and knowingly, with understanding of the consequences of the admission. *In the Matter of Isreal Y.* at ¶ 7. "A statement that it would be in the child's best interest to grant permanent custody constitutes an 'admission' for purposes of Juv. R. 29(D)." Id., citing *In Re Ross* (Sept. 11, 1998), 2d Dist. No. 16582. Thus the court, for the purpose of accepting the admission into evidence, had to determine that the statement was made knowingly and voluntarily. This determination did not convert the involuntary custody proceeding into a voluntary proceeding.

{¶ 53} The trial court in the original custody case found that appellant father knowingly and voluntarily made stipulations to the accusations against him and signed an "Agreement for Permanent Custody." However, the court did not approve any surrender of custody; rather the stipulations and agreement were accepted into evidence to be considered along with all other evidence and testimony regarding the original complaint for custody. The court was still required to proceed according to R.C. 2151.414 and find by clear and convincing evidence that the criteria were met. The court could still have determined that the children could be placed with appellant even with the stipulation and

agreement entered into evidence, if it did not believe that the statutory requirements were met.

{¶ 54} Because the stipulations and agreement entered into by appellant father did not make the termination of his parental rights voluntary, we find the first assignment of error not well-taken.

{¶ 55} In their second assignment of error, appellants claim reversible error because the court entered into evidence and took judicial notice of the Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV"). Appellants claim that its admission as an exhibit required expert testimony under Evid.R. 803(18). However, appellants clearly ignore the fact that both stipulated to the court taking judicial notice of the DSM-IV.

{¶ 56} When evidence is admitted by consent of the parties, it should be given whatever weight it would have absent the technical rules. *Sac and Fox Indians of the Mississippi in Iowa v. Sac and Fox Indians of the Mississippi in Oklahoma* (1911), 220 U.S. 481, 31 S.Ct. 473.

{¶ 57} Further, error cannot be predicated upon a ruling that admits or excludes evidence unless a substantial right of the party is affected and a timely objection or motion to strike appears of record stating the specific ground of the objection if it is not apparent from the context. Evid.R. 103(A)(1). In this case it is clear that appellants did not object to the admission of the DSM-IV, in fact, they agreed to its admission and

consideration by the court. Thus no error can be predicated upon the court's decision to admit the manual into evidence.

{¶ 58} Appellants further claim that the court impermissibly diagnosed both appellants based on these definitions without any expert medical testimony. The court specifically references relevant medical records from Harbor Behavioral Healthcare, admitted into evidence and stipulated to by both appellants, as the basis for its finding regarding appellants' medical conditions.

{¶ 59} Because appellants stipulated to the admission of the DSM-IV and to the court taking judicial notice of it, their second assignment of error is not well-taken.

{¶ 60} The judgment of the Lucas County Court of Common Pleas, Juvenile Division, terminating appellants' parental rights to S.F. is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE