[Cite as *In re S.S.*, 2012-Ohio-120.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

IN THE MATTER OF:	**:**	**O P I N I O N**
S.S., DEPENDENT CHILD	**:**	**CASE NO. 2010-G-2997**

Civil Appeal from the Geauga County Court of Common Pleas, Juvenile Division, Case No. 09 JF 000613.

Judgment: Affirmed.

Judith M. Kowalski, 333 Babbitt Road, Suite 323, Euclid, OH 44123 (For Appellant-Toni Kazmierczak).

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David P. Joyce, Geauga County Prosecutor, and *Craig A. Swenson*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Appellee-Geauga County Job and Family Services).

Patrick Kane, 470 Center Street, Building 6-C, Chardon, OH 44024 (Guardian ad litem).

THOMAS R. WRIGHT, J.

{¶1} This appeal is from a judgment of the Geauga County Court of Common Pleas, Juvenile Division. The juvenile court ordered a disposition of legal custody of S.S. ("the child") to appellee-father, James Sullivan, with limited supervised visitation to

appellant-mother, Toni Kazmierczak, and termination of protective supervision to the Geauga County Department of Job and Family Services ("GCJFS").

{¶2} The child had been placed in temporary custody of the father, subject to protective supervision by GCJFS. The court held a review hearing on October 25, 2010. The court also heard the mother's motion to modify/reconsider the prior visitation order at that time. The court heard testimony from the mother and father, the Guardian Ad Litem, Mr. Kane, and the GCJFS social worker, Ms. Ward.

{¶3} Ms. Ward testified regarding a report she received from the child's counselor that he was doing his homework with his father and father's wife. The child also told her he enjoyed sports when he was at his father's home. Ms. Ward testified (regarding the counselor's report) that the counselor recommended that the child stay with his father and stepmother and only have supervised visitation with his mother. Ms. Ward also testified that the child's teacher, in a conversation a day before the hearing, was going to ask appellant not to come to the child's classroom anymore because her behavior was disturbing the class. Ms. Ward further stated that the child's counselor, Dr. Spiesman, had informed her that the child only does homework with his father and his mother did not allow him to go to one of his football games because she did not want him to. Ms. Ward did note that the child's counselor had not asked appellant to participate in any counseling sessions, nor did he have contact with appellant's counselor.

{¶4} Ms. Ward also testified regarding a report GCJFS received from appellant's counselor that although appellant had made improvements, she worries a great deal about the child's mental health, tends to over-emphasize complaints, uses

interpersonal skills to elicit favorable attention, has intense anxiety if she does not receive that attention, and that her history suggests a borderline personality structure where, under great stress, there are temporary periods of paranoia. Regarding the father, Ms. Ward testified that he has completed his counseling and that there were no further recommendations. Ms. Ward did state that there were no complaints in the past 90 days in regard to appellant's participation at the child's school.

{¶5} As to the child, Ms. Ward testified that his behavior is quite different in each home. In the father's home, the child is active and open, talked about how he liked football, and that he was one of the fastest children on the team. Ms. Ward stated that, at appellant's home, the child is more guarded and looks to see where appellant is before he answers a question.

{¶6} The Guardian Ad Litem ("GAL") testified that he had received reports from the child's teacher that appellant was doing better when attending his class; however, since the reports cited by the GAL were at least two weeks old, they were not as recent as the report cited by Ms. Ward. The GAL also spoke with the child's football coach who indicated that the father's behavior at football practice and games was appropriate and not over the top as appellant had suggested. The GAL also advised that he had concerns about extending visitation because: (1) the football coach had received an anonymous letter complaining of the father's behavior; and (2) the coach indicated that no other parent had a reason to send the letter. Appellant denies sending the letter. The GAL also testified that he had discussed with the child whether his father had hit him and that the child stated that the father "kind of smack(s) him or push(es) him." The GAL stated that he had originally advocated for more liberal visitation for appellant, but

that he changed his mind due to appellant taping conversations with the father, a phone conversation the GAL had with the child, and a letter from the child's counselor. The GAL further testified that he thought that, considering appellant's personal problems, she is doing a "wonderful job" of attending counseling to deal with them.

{¶7} Mother-appellant also testified. She stated that she was concerned about the child's reading, which is causing him to fall behind in school. She also testified that she received none of the child's homework from his home. Appellant further stated that she helps the child with his reading by going on a website provided by his teacher and that the child enjoys this learning activity. Appellant was also questioned in regard to her counseling, and appellant stated she is working toward changing her behavior as to her interactions with the father. There was also testimony about an argument between the mother and father over the child's football uniform. The mother denied that she told the coach she has custody of the boy, but stated that the father did not provide her with the child's uniform for his game. Appellant stated she contacted a school official and was provided with an extra uniform. Appellant further testified that she attended a fall festival at the child's school recently, the teachers did not express discomfort with her being there, and that she was asked to participate in some upcoming volunteer work.

{¶8} Father-appellee also testified, admitting that he yelled during an incident involving the uniform and that he swore during the altercation. He also admitted he had done so in a public area in front of his son. The father denied ever striking his son in any way.

{¶9} GCJFS then asked the juvenile court to place the child in the legal custody of his father, order appellant's visits be supervised, and thereafter terminate GCJFS

involvement. The GAL and the father agreed with GCJFS's motion. The juvenile court then found that while the mother had become more consistent with regard to counseling, she continued to make claims against the father that were either "unsubstantiated or untrue." The court also noted that it did not "anticipate meaningful progress in the foreseeable future." The court then found that placing the child in the legal custody of his father was in the child's best interest and ordered appellant to have a minimum of two hours of supervised visits every other week. The court also terminated GCJFS's protective supervision. Finally, the court retained continuing jurisdiction over custody and visitation issues.

{¶10} Appellant now raises the following as error:

{¶11} "[1.] The trial court committed prejudicial error in awarding Legal Custody to the child's father, and granting only limited supervised visitation to the mother, as said decision was against the manifest weight of the evidence.

{¶12} "[2.] The trial court erred to the prejudice of Appellant in finding the award of Legal Custody to the Father and Limited Supervised Visitation for the Mother was in the best interests of the child.

{¶13} "[3.] The trial court erred to the prejudice of Appellant in granting Mother such restrictive visitation that it amounts to a denial of visitation.

{¶14} "[4.] It was error for the trial court to allow testimony concerning the report from the child's counselor in violation of Evid.R. 802 and the Appellant's constitutional right to confront witnesses.

{¶15} "[5.] Appellant was denied the effective assistance of counsel, in that her attorney failed to object to the introduction of a report, which amounted to inadmissible

hearsay. Counsel's deficient performance in this regard prejudiced the defendant, resulting in an unreliable or fundamentally unfair outcome."

{¶16} In appellant's first assignment of error, she argues that the trial court's decision to grant legal custody to the father and to grant only limited supervised visitation to her was against the manifest weight of the evidence. In evaluating whether, in the context of a dependency proceeding, a juvenile court's "custody" judgment is against the manifest weight of the evidence, we use the same standard as when evaluating a criminal conviction. *In re T.W.,* 9th Dist. No. 21594, 2003-Ohio-7185. See, also, *In re J.F.*, 8th Dist. No. 85242, 2005-Ohio-4816, at ¶10. ""The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the (jury/trier of fact) clearly lost its way and created such a manifest miscarriage of justice that the (judgment) must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the (judgment)."" In re T.W. at ¶4, quoting *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶17} Only in the exceptional case, where the trier of fact clearly lost its way and created a manifest miscarriage of justice will reversal be warranted. *In re T.W.* at ¶5. Every reasonable presumption should be made in a light favorable to the trial court. Id. If a judgment granting legal custody is supported by substantial, credible, and competent evidence, then that judgment must be affirmed. *In re Johnson* (Feb. 12, 1992), 1st Dist. No. C-910333, 1992 Ohio App. LEXIS 536.

{¶18} In the instant case, the record supports the trial court's judgment granting legal custody to the father. The child's counselor and GAL both indicated that they have concerns about appellant's relationship with the child. The GAL had concerns that appellant was taping conversations with the father and had exaggerated or fabricated concerns about the father's relationship with the child. The child's counselor, in a report introduced by Ms. Ward, provided that the child was more inclined to do his homework in the father's home, and that there were concerns that appellant was not allowing the child to attend a football game because she did not want him to participate. Therefore, the child's counselor recommended the father have legal custody of the child and appellant have only supervised visitation. Ms. Ward also introduced a report from appellant's counselor that although she was making steps forward, there are concerns about paranoia, her need to illicit favorable attention, and her inability to deal with situations where she is unable to illicit favorable attention.

{¶19} Furthermore, Ms. Ward also noted concerns about appellant's behavior. She noticed that the child appeared more guarded when at appellant's home. She testified that he would look to see where appellant was before answering a question. She further expressed concerns that the child would say how much he enjoyed football in the father's home, yet would state that he did not want to play football anymore when with his mother. Ms. Ward also testified regarding concerns the child's teacher has about appellant's involvement at the child's school.

{¶20} There was evidence presented in regard to appellant's tape-recording of conversations involving the child, the father, and professionals associated with the case. In addition, evidence was presented that appellant made false allegations that the father

was abusing the child. Furthermore, the child had missed numerous football games, practices, and days of school when in appellant's care.

{¶21} All of the foregoing evidence supported the decision to grant legal custody to the father. That is, there was substantial, competent, and credible evidence supporting the trial court's conclusion that granting legal custody to the father is in the child's best interest. The trial court's decision to exercise continuing jurisdiction over the child's custody allows appellant the opportunity to become more involved in the rearing of the child, should she make continued improvement in counseling and in her personal interactions with the child and his father. For this reason, appellant's first assignment is without merit.

{¶22} In appellant's second assignment of error, she argues that the trial court erred in finding that granting legal custody to the father was in the child's best interest. Juvenile courts should consider the totality of the circumstances including, when applicable, the factors set forth in R.C. 3109.04(F). *In re Cloud* (May 19, 1997), 12th Dist. No. CA96-01-002, 1997 Ohio App. LEXIS 2120, at *6. Those factors include: (a) the wishes of the child's parents; (b) if the court has interviewed the child in chambers regarding the child's wishes and concerns as to the allocation of parental rights and responsibilities concerning the child; (c) the child's interaction and interrelationship with his parents, siblings, and any other person who may significantly affect the child's best interest; (d) this child's adjustment to his home, school, and community; (e) the mental/physical health of all persons involved; (f) the parent more likely to honor and facilitate visitation and companionship rights approved by the court; (g) whether either parent has failed to make all child support payments, including all arrearages, that are

required; (h) whether either parent previously has been convicted of or pleaded guilty to any criminal offense; (i) whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent his or her right to visitation in accordance with an order of the court; and (j) whether either parent has established a residence, or is planning to establish a residence, outside this state. R.C. 3109.04(F)(1).

{¶23} The judgment entry of October 27, 2010 does not make specific findings as to each and every factor in R.C. 3109.04(F)(1). However, the trial court did consider those facts it found relevant. The trial court considered that the child has been observed doing well in the father's home. The child participated in counseling as required. Moreover, little has changed in regard to appellant's behavior since the last review hearing. Appellant was continuing to make claims against the father that were either untrue or unsubstantiated, and her intent was to disrupt the child's relationship and placement with the father. Moreover, the GCJFS, the child's counselor, and the GAL were advocating for supervised visits between the child and appellant. The trial court also noted that appellant should have a meaningful role in parenting the child, but that her bizarre behavior was detrimental to the child. Therefore, because the trial court did not err in finding that granting legal custody to the father was in the child's best interest, the second assignment is not well taken.

{¶24} In her third assignment of error, appellant argues that the trial court abused its discretion by restricting her visitation to such an extent that it amounts to a denial of visitation. The trial court granted supervised visitation for a minimum of two hours from 12 noon until 2:00 p.m. on Sundays every other week. While appellant is

correct in asserting that non-custodial parent's right to visitation should only be denied in extraordinary circumstances, appellant does not point us to cases holding that limited supervised visitation of two hours every other week effectively amounts to a denial of visitation. See *Pettry v. Pettry* (1984), 20 Ohio App.3d 350.

{¶25} Under the facts of this case, as previously stated, this court concludes that granting limited supervised visitation did not amount to a denial of visitation. Given the trial court's finding that appellant was still attempting to interfere with the child's placement with his father, this restriction on her visitations was warranted.

{¶26} Appellant also claims that the judgment entry of October 27, 2010 is conflicting because it orders that appellant have only supervised visitation during certain times, yet "[b]oth parents are encouraged to attend all of the child's activities." The "both parents are encouraged to attend all of the child's activities" is listed in the "General Rules" section of the Standard Visitation Order, which is an attachment to the judgment entry. It would appear that the language appellant references in the Standard Visitation Order is, as the title suggests, standardized language placed in all the Juvenile Division's visitation orders and that, therefore, in addition to supervised visitation, she is expressly permitted to attend her child's activities.

{¶27} To the extent that appellant would not be alone with the child at these other activities, this court does not perceive any inconsistency between the basic visitation order and the cited language in the "General Rules." As a result, appellant's third assignment is also without merit because it fails to demonstrate any error in the logic of the trial court's decision.

{¶28} In appellant's fourth assignment of error, she argues that the trial court erred in admitting a report from the child's counselor, Dr. John Spiesman, in violation of Evid.R. 802 and appellant's constitutional right to confront witnesses. Appellant asserts that the report constitutes inadmissible hearsay and should not have been admitted. We disagree. Juvenile Rule 34(B)(2) provides that during a dispositional hearing: "Except as provided in division (I) of this rule, the court may admit evidence that is material and relevant, including, but not limited to, hearsay, opinion, and documentary evidence." A review hearing is a dispositional hearing. R.C. 2151.417(A) provides that "[a]ny court that issues a dispositional order pursuant to section 2151.353, 2151.414, or 2151.415 of the Revised Code may review at any time the child's placement or custody arrangement, the case plan prepared for the child pursuant to section 2151.412 of the Revised Code, the actions of the public children services agency *** in implementing that case plan, the child's permanency plan, if the child's permanency plan has been approved, and any other aspects of the child's placement or custody arrangement."

{¶29} Therefore, the trial court did not err in admitting the report of Dr. John Spiesman because the trial court admitted the report during a dispositional review hearing pursuant to Juv.R. 34(B)(2). The report constitutes material and relevant evidence and was properly admitted. Accordingly, appellant's fourth assignment of error is without merit.

{¶30} In appellant's fifth assignment of error, she argues that she was denied effective assistance of counsel because her attorney failed to object to the introduction of Dr. Spiesman's report. Based upon our disposition of the fourth assignment, appellant's fifth assignment lacks merit as she has failed to demonstrate deficient

performance by trial counsel, a required element in an ineffective assistance argument. *State v. Butcher*, 170 Ohio App.3d 52, 2007-Ohio-118, at ¶90.

{¶31} Consistent with the foregoing analysis, the judgment of the trial court is affirmed.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.