[Cite as *In re S.G.*, 2010-Ohio-2641.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY

IN RE:	:	
	:	Appellate Case No. 2009-CA-46
S.G. & D.G.	:	
	:	Trial Court Case Nos. N38891
	:	S39742
	:	
	:	(Juvenile Appeal from
	:	Common Pleas Court)
	:	

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O P I N I O N

Rendered on the 11th day of June, 2010.

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FAIN, J.

{¶ 1} Appellant, J.G. appeals from a decision of the Greene County Court of Common Pleas, Juvenile Division, awarding permanent custody of his two minor children, S.G. and D.G., to the Greene County Children's Services Board ("the Agency").

{¶ 2} On appeal, J.G.'s appointed counsel has filed a brief pursuant to *Anders*

v. California (1967), 386 U.S. 738, 87 S.Ct. 1396, wherein he proposes three possible assignments of error, but concludes that they lack arguable merit. We have afforded J.G. sixty days within which to file his own, pro se brief. He has not done so. We have performed our duty, under *Anders*, to review the record independently, and we agree with J.G.'s attorney that there are no potential assignments of error having arguable merit. The judgment of the trial court is Affirmed.

I

{¶ 3} The Agency filed a complaint in December, 2006, in which it alleged that S.G., a minor child born November 14, 2006, was neglected and dependent. The Agency alleged that the child's maternal grandmother had informed them that the child had bruising on her body. The Agency took the child to Dayton Children's Medical Center for an examination, where it was determined that the "bruising" was a genetic discoloration known as "Mongolian Spots." During the course of their examination of the child, medical personnel noted that she was underweight and that her protein level was low, suggesting that the child was not being properly fed. Both parents admitted that they had fed S.G. whole milk, rather than formula, when they "ran out of formula." The parents claimed that they had been told to do so by staff at Children's Medical Center.

{¶ 4} An emergency order of custody was issued. Thereafter, at a dispositional hearing, the child was determined to be dependent. An order granting the Agency temporary custody was entered in June, 2007.

{¶ 5} A case plan was developed, which initially required J.G. and the child's mother, A.W., to take lessons in parenting skills. Because both parents had tested positive for illegal drugs, they were required to submit to random drug screens. Thereafter, an amended case plan was entered requiring the parents to undergo a substance abuse and psychological evaluation. It was determined from testing that both parents were functioning at an I.Q. level bordering on "mental retardation." The parents were permitted supervised visitation under the case plan.

{¶ 6} The Agency subsequently became aware that A.W. was pregnant with her third child.[1] During the term of her pregnancy, she tested positive for cocaine use. That child, D.G., was born on October 31, 2007. The Agency immediately filed a complaint seeking temporary custody of D.G., and emergency custody of D.G. was granted to the Agency. A hearing with regard to D.G. was held, the child was determined to be dependent, and temporary custody was granted to the Agency.

{¶ 7} In November, 2007, visitation with the parents was terminated due to their continuing substance abuse and J.G.'s threats of physical harm that had been directed to Agency personnel supervising the visits. The parents were told that visits could resume if they worked on their case plan goals and refrained from threatening behavior. Visitation was never resumed.

{¶ 8} In March 2008, the Agency filed a motion for permanent custody. In April, M.G., the paternal grandmother of the children, filed a pro se complaint

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[1] A.W. had previously had a child with another man. That child is apparently a ward of the State of Texas.

seeking custody. M.G., sixty-five years old at the time of the final hearing, lives in Texas.

{¶ 9} Hearings on the motions for custody were held in June and July, 2008. M.G. exercised one visit with the children each time she came to Ohio for those hearings. During the hearings, the court asked M.G. whether she could travel to Ohio for visitation. M.G. advised the court that she would be able to travel to Ohio two times per month for visitation. The Agency then contacted M.G. to establish a visitation schedule, and a letter dated August 19, 2008, was sent to M.G. to confirm the visitation schedule. The trial court denied the motion for permanent custody, and also denied M.G.'s motion for custody. Another case plan was formulated, which incorporated visitation with M.G. in order to permit her an opportunity to develop a relationship with the children while it was being determined whether she could assume custody.

{¶ 10} In late August, M.G. informed the Agency that she had broken her foot and that her doctor did not want her to travel by bus to Ohio. When asked about travel by plane, M.G. stated that she "does not fly." M.G.'s cast was removed in October, but she informed the Agency that she would not visit because A.W. had threatened her. The Agency explained that A.W. would not know about the visitation or where M.G. was staying during the visitation, but M.G. adamantly refused to attend the scheduled visits.

{¶ 11} In November 2008, J.G. was convicted of Kidnapping and Felonious Assault and was sentenced to a prison term of eighteen years. In December, the Agency filed another motion for permanent custody. In March 2009, M.G. filed

another complaint for custody, which was supported by J.G. Hearings were held in May, 2009, following which the trial court awarded permanent custody of the children to the Agency. J.G. filed a notice of appeal from the award of permanent custody, as well as a request for appointed counsel.

II

{¶ 12} In a proceeding for the termination of parental rights, all of the court's findings must be supported by clear and convincing evidence. R.C. 2151.414(E); *In re J.R.,* Montgomery App. No. 21749, 2007-Ohio-186, at ¶ 9. An order terminating parental rights will not be overturned as being against the manifest weight of the evidence if the record contains competent, credible evidence upon which the trial court could have formed a firm belief that the statutory elements for a termination of parental rights have been established. *In re Forrest S.* (1995), 102 Ohio App.3d 338, 344-345. The credibility of the witnesses, and the weight to be given to their testimony, are matters for the trial court, as the finder of fact, to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231.

{¶ 13} In this case, it is undisputed that the children were in the custody of the Agency for more than twelve consecutive months. Therefore, R.C. 2151.414(B)(1) permits the court to grant permanent custody to the Agency if the court determines, at a hearing held pursuant to R.C. 2151.414(A), "by clear and convincing evidence, that it is in the best interest of the children to grant permanent custody of the children to the agency that filed the motion for permanent custody * * *." "Where children have been in agency custody for the required time, the agency does not have to establish that the child cannot be placed with a parent within a reasonable time or

should not be placed with a parent. The only consideration is the child's best interests." *In re A.U.,* Montgomery App. Nos. 20583, 20585, 2004-Ohio-6219, at ¶ 26.

{¶ 14} In determining what is in the best interests of the child, the trial court must consider all relevant factors, including, but not limited to, the following: (1) the 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; (2) the wishes of the child, as expressed directly by the child or through the child's guardian ad litem; (3) the custodial history of the child, including whether the child has been in the temporary custody of public or private children services agencies for twelve or more months; and (4) the child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody. R.C. 2151.414(D).

{¶ 15} After exercising our independent review of the record, we conclude that the evidence in this case establishes that the children have a good relationship with their foster parents and that the foster parents wish to adopt them. The children have thrived in the care of the foster parents. The Guardian Ad Litem recommended that the children be placed in the permanent custody of the Agency. The children, at the time of the hearing, had been in the custody of the Agency for more than twelve months. Finally, the evidence in the record supports a conclusion that the children could not find a legally secure placement without awarding their custody to the Agency.[2] Therefore, we conclude that the trial court's decision is

[2] After J.G. was imprisoned, A.W. did not have a permanent residence, instead

supported by competent credible evidence.

II

{¶ 16} In the appellate brief filed by counsel pursuant to *Anders*, the following three issues were presented as possible areas for review.

{¶ 17} "THE JUVENILE COURT ERRED BY DENYING APPELLANT J.G.'S MOTION FOR TRANSPORT TO THE HEARING.

{¶ 18} "THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ERRONEOUSLY DEPRIVED APPELLANT J.G. OF HIS RIGHT TO FUNDAMENTAL DUE PROCESS.

{¶ 19} "THE JUVENILE COURT ERRED BY GRANTING PERMANENT CUSTODY TO THE GREENE COUNTY CHILDREN'S SERVICES BOARD AND BY DENYING PERMANENT CUSTODY TO APPELLANT J.G.'S MOTHER, M.G."

{¶ 20} We begin with the last issue raised and note that "R.C. 2151.353(A) does not require a juvenile court to consider placing the children with a relative prior to granting the permanent custody request of an agency. Courts are not required to favor a relative if, after considering all the factors, it is in the child's best interest for the agency to be granted permanent custody." *In re A.A.*, Greene App. No. 2008 CA 53, 2009-Ohio-2172, ¶ 19. "Relatives seeking the placement of the child are not afforded the same presumptive rights that a biological parent receives as a matter of law, and the willingness of a relative to care for the child does not alter the statutory

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living with three different "boyfriends" during the time between August 2008 and the hearings in May 2009. She also appears to have left the State of Ohio for a portion of that time. The evidence in the record supports a conclusion that she could not provide a secure placement for the children.

factors to be considered in granting permanent custody." Id.

{¶ 21} The evidence establishes that M.G. had no meaningful relationship with the children. During the three visits she had with them, Agency workers observed that M.G. was not able to handle the children without help, and it was not clear that she would have any help raising the children on her farm in Texas. M.G. failed to follow through with her established visitation schedule, and the children did not establish any relationship with her – those three visits were the only times that the children had ever met M.G. Therefore, we conclude that the trial court did not err in denying M.G.'s motion.

{¶ 22} We next address the issue regarding whether the trial court erred by denying J.G. the right to attend the hearing. J.G. argues that the juvenile court should have sustained his motion to transport him from prison to attend the hearing. This court has held that a trial court "has discretion to decide whether to proceed with a permanent custody hearing without having an incarcerated parent conveyed." *In re R.D.*, Clark App. No. 08-CA-26, 2009-Ohio-1287, ¶ 12 - 13. In that case, we noted that "the Sixth and Ninth Appellate Districts have held that the failure to transport a parent from the prison to a permanent custody hearing does not violate a parent's due process rights 'when: (1) the parent is represented at the hearing by counsel, (2) a full record of the hearing is made, and (3) any testimony that the parent wishes to present could be presented by deposition." Id.

{¶ 23} J.G. was represented by counsel at the hearing, and a complete record was made. There is nothing to indicate what testimony J.G. would have presented at the hearing on his behalf, or on behalf of M.G., that would have materially affected

the outcome of the proceeding. We conclude that the juvenile court did not abuse its discretion in denying J.G.'s request to be transported to the permanent custody hearing.

{¶ 24} Finally, we address the contention that trial counsel was ineffective in his representation of J.G. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. *Strickland v. Washington* (1984), 466 U.S. 668. To show that a party has been prejudiced by counsel's deficient performance, the party must demonstrate that were it not for counsel's errors, the result of the trial probably would have been different. Id.

{¶ 25} The record establishes that counsel acted properly with regard to his representation of J.G. Counsel filed discovery requests and zealously participated in the hearing. We find nothing in this record to suggest that counsel's performance was deficient. Nor do we conclude, from the record before us, that J.G. was in any way prejudiced by counsel's performance.

III

{¶ 26} We have independently reviewed the record, as required by *Anders v. California*, supra, and we have found no potential assignments of error having arguable merit. Consequently, the judgment of the trial court is Affirmed.

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BROGAN and GRADY, JJ., concur.

Copies mailed to:

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