[Cite as *In re A.R.*, 2014-Ohio-4916.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

IN THE MATTER OF:	:	
	:	
A.R. and J.R.	:	Case No. 14CA10
	:	
ADJUDICATED DEPENDENT CHILDREN.	:	DECISION AND JUDGMENT ENTRY
	:	**RELEASED: 10/21/2014**

APPEARANCES:

Lynn Turner, Hillsboro, Ohio, for Mother.

Kathryn Hapner, Hapner & Hapner, Hillsboro, Ohio, for Father.

Anneka P. Collins, Highland County Prosecutor, and Molly Bolek, Highland County Assistant Prosecutor, Hillsboro, Ohio, for Appellee.

Harsha, J.

{¶ 1} A.B. and A.R. separately appeal the trial court's decision that awarded Highland County Children Services (HCCS) permanent custody of their two biological children: five-year-old A.R.1 and three-year-old J.R. A.B. (the mother), asserts that the trial court's decision to award HCCS permanent custody of her children is against the manifest weight of the evidence because the evidence fails to show that awarding HCCS permanent custody and permanently terminating her parental rights is the only way to achieve a legally secure permanent placement for the children. We have previously rejected the argument that a trial court cannot award a children services agency permanent custody of a child unless it finds that awarding the agency permanent custody is the only way to achieve a legally secure permanent placement for a child. Instead, whether a child can achieve a legally secure permanent placement

without granting a children services agency permanent custody is but one factor that a trial court must consider when evaluating a child's best interest under R.C. 2151.414(D). Consequently, the mother's assertion that the trial court could not award HCCS permanent custody without finding that doing so was the only way the children could achieve a legally secure permanent placement is meritless.

{¶ 2} Furthermore, we reject the mother's argument that the children could have achieved a legally secure permanent placement by being placed with their paternal grandmother. The evidence supports the trial court's finding that the children's paternal grandmother would not be an appropriate caregiver due to her prior drug conviction. This evidence supports the court's finding that the paternal grandmother would not be able to provide the children with a legally secure permanent placement. Consequently, the mother's argument is meritless, and the trial court's judgment awarding HCCS permanent custody of the children is supported by the manifest weight of the evidence. Accordingly, we overrule this assignment of error and affirm the trial court's judgment.

{¶ 3} A.R. (the father), also appealed the trial court's judgment. His appointed counsel advised this court that she has reviewed the record and can discern no meritorious claims for appeal. Using the procedure adopted in *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, counsel has moved to withdraw. After independently reviewing the record, we agree with counsel's assessment that no meritorious claims exist upon which to predicate an appeal. Therefore, we grant counsel's request to withdraw, find the father's appeal is wholly frivolous, and dismiss his appeal.

FACTS

{¶ 4} In August of 2012, HCCS filed an abuse, neglect, and dependency complaint that requested the court to award temporary custody of the children to HCCS. The complaint alleged that the mother had been arrested and, consequently, unable to care for the children. The complaint further alleged that the home was unsafe: "The floor had holes where the ground beneath could be seen, and other areas of the floor were soft. Two of the bedroom floors were severely sloped. Clothing was piled throughout the home to the point of making it difficult to enter or exit the rooms. A pile of blankets and pillows were on the floor in front of the entrance to the home, where it was reported that the family sleeps. In the kitchen a mattress was leaning against the stove with dirty diapers, old food, and mouse droppings were found. A mini fridge was open and had insects crawling on the inside with old food spilled in the bottom with a strong sour odor. Pieces of broken glass were located in the bathtub. Items consistent with illicit drug use, including needles, spoons and a white powdery substance was located on a chair and on top of a cabinet, accessible to the children."

{¶ 5} Within a month, the children's parents admitted that the children are dependent, and the court dismissed the abuse and neglect allegations. The parents agreed to continue the children in HCCS's temporary custody for six months.

{¶ 6} HCCS developed a case plan that required the parents to (1) complete a substance abuse assessment and comply with treatment recommendations, (2) complete random drug screens, (3) complete a parenting education course and comply with recommendations, (4) maintain safe, sanitary, and stable housing and maintain stable legal income, and (5) comply with probation. The case plan also required the

mother to complete a mental health assessment and comply with provider recommendations. The parties later agreed to two six-month extensions of temporary custody.

{¶ 7} In January of 2014, HCCS filed a motion to modify the disposition to permanent custody. HCCS asserted that the children have been in its custody for at least 12 of the last 22 months under R.C. 2151.414(B)(1)(d) and that the children cannot or should not be placed with their parents within a reasonable time. HCCS alleged that neither parent completed substance abuse treatment recommendations, a parenting education course, or a domestic violence education course. HCCS further asserted both parents were incarcerated and the mother failed to complete a mental health assessment.

{¶ 8} Subsequently, the guardian *ad litem* filed his report and recommended that the court award HCCS permanent custody of the children.

{¶ 9} In late March of 2014, the court conducted a hearing to consider HCCS's permanent custody motion. A visitation monitor testified that A.B. attended forty-seven out of a possible eighty-two visits, and A.R. attended thirty-three out of a possible seventy-three. She observed the parents' interaction with the children and explained that the children "are very happy to see their parents," the family interacts appropriately, and the visits have been "very good." The visitation monitor stated that when the parents failed to show for visits, the children appeared "confused and bewildered," and sometimes, the younger child cried.

{¶ 10} HCCS caseworker Tonia Farley testified that the children have been in HCCS's temporary custody since August 2012. Farley explained that neither parent completed the case plan requirements and the children lack a safe and secure legally permanent placement. Farley stated that no suitable relatives could care for the children and that HCCS could not approve the children's paternal grandmother due to her prior drug conviction.

{¶ 11} Subsequently, the guardian *ad litem* filed a supplemental report. He noted that the trial court ordered him to conduct a home study of the paternal grandmother's home. He reported that in 2003, the grandmother pled guilty to possession of marijuana and was placed in a treatment in lieu of conviction program. She subsequently was terminated from the program and sentenced to community control. The guardian *ad litem* questioned the grandmother about the prior conviction, and she claimed that her husband committed the crime and that she was charged simply because she lived with him. The guardian *ad litem* stated that he did not believe the grandmother was "100% honest." The guardian *ad litem* determined that awarding HCCS permanent custody of the children would be in their best interests. He did not recommend that the court place the children with the grandmother due to her prior drug conviction and her failure to complete treatment in lieu of conviction.

{¶ 12} The trial court granted HCCS permanent custody of the two children. The court found, pursuant to R.C. 2151.414(B)(1)(d), that the children had been in HCCS's permanent custody for at least twelve of the past twenty-two months. The court further determined that awarding HCCS permanent custody would be in the children's best interests. The court gave this analysis of the best interest factors:

"The interaction of the children with their parents since August 9, 2012, has been limited to visits at the Family Advocacy Center. The mother exercised about 60% of her available visits and the father about 50%. When visiting the interaction seemed appropriate. The children seemed happy to visit and the parents acted appropriately.

Neither child is old enough or mature enough to express their wishes.

The children have not resided with either parent since August 9, 2012. They have been moved several times and it is anticipated will be moved from their current placement. At the time of the permanent custody hearing on March 27, 2014, there were no approved home studies and no recommended relative placements for either child. The Court agrees with the Guardian *Ad Litem* that placement with [the paternal grandmother] is not in the best interest of either child.

This action was initiated primarily because the parents were unable and/or unwilling to provide a safe and proper home for the children as well as the substance abuse issues of both parents. Of important note to the Court is that after over nineteen months of failure to comply with the eight case plans that were filed before the permanent custody motion was filed neither parent has been willing to make the effort required to reunify with their children. The problems originally identified remain unresolved and the lack of effort to visit with their children all available times speaks volumes as to the true commitment/priority of the parents.

This action is yet another in a series of actions observed by the Court where parents place higher priority on their drug habits than their children. Had either parent elected to prioritize reunification with their children the same would have easily been accomplished under the framework of the case plans filed herein.

The Court also notes the Guardian *Ad Litem* recommends the permanent custody motion be granted.

The children of this action, as do all children, need a legally secure permanent placement in order to thrive. The parents by their selfish and misguided choices have convinced this Court they are unwilling to provide that permanent placement. By vesting [HCCS] with permanent custody the children will be provided the optimal possibility of a legally secure permanent placement."

II. A.B.'S ASSIGNMENT OF ERROR

{¶ 13} The mother raises one assignment of error:

"The trial court erred in finding that permanent custody was in the best interests of the children at this time. The court failed to determine that granting permanent custody to the agency and terminating all parental rights was the only way to achieve a legally secure permanent placement for the boys."

STANDARD OF REVIEW

{¶ 14} "A reviewing court generally will not disturb a trial court's permanent custody decision unless the decision is against the manifest weight of the evidence." *In re R.S.,* 4th Dist. Highland No. 13CA22, 2013–Ohio–5569, ¶29; *accord In re J.V.-M.P.,* 4th Dist. Washington No. 13CA37, 2014–Ohio–486, ¶11. To determine whether a permanent custody order is against the manifest weight of the evidence, an appellate court must weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether in resolving evidentiary conflicts, the trial court clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *R.S.* at ¶30, citing *Eastley v. Volkman,* 132 Ohio St.3d 328, 2012–Ohio–2179, 972 N.E.2d 517, ¶20. In reviewing the evidence under this standard, we must defer to the trial court's credibility determinations because of the presumption in favor of the finder of fact. *In re R.S.* at ¶33, citing *Eastley* at ¶21. Deferring to the trial court on matters of credibility is "crucial in a child custody case, where there may be much evident in the parties' demeanor and attitude that does not translate to the record well." *Davis v. Flickinger,* 77 Ohio St.3d 415, 419, 674 N.E.2d 1159 (1997); a*ccord In re Christian,* 4th Dist. No. 04CA 10, 2004–Ohio–3146, ¶7. As the Ohio Supreme Court explained long-ago:

> "In proceedings involving the custody and welfare of children the power of the trial court to exercise discretion is peculiarly important. The knowledge obtained through contact with and observation of the parties and through independent investigation can not be conveyed to a reviewing court by printed record."

Trickey v. Trickey, 158 Ohio St. 9, 13, 106 N.E.2d 772 (1952). Furthermore, unlike an ordinary civil proceeding in which a jury has no contact with the parties before a trial, in a permanent custody case a trial court judge may have significant contact with the

parties before a permanent custody motion is even filed. *In re R.S.* at ¶34. In such a situation it is not unreasonable to presume that the trial court judge had far more opportunities to evaluate the credibility, demeanor, attitude, *etc.*, of the parties than this court ever could from a mere reading of the permanent custody hearing transcript. *Id.*

{¶ 15} In a permanent custody case, the dispositive issue on appeal is "whether the juvenile court's findings * * * were supported by clear and convincing evidence." *In re K.H.,* 119 Ohio St.3d 538, 2008–Ohio–4825, 895 N.E.2d 809, ¶43; *accord* R.C. 2151.414(B)(1). "Clear and convincing evidence" is "that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford,* 161 Ohio St.469, 120 N.E.2d 118 (1954), paragraph three of the syllabus; *State ex rel. Miller v. Ohio State Hwy. Patrol,* 136 Ohio St.3d 350, 2013–Ohio–3720, 995 N.E.2d 1175, ¶14. "[I]f the children services agency presented competent and credible evidence upon which the trier of fact reasonably could have formed a firm belief that permanent custody is warranted, then the court's decision is not against the manifest weight of the evidence." *In re R.M.,* 2013–Ohio–3588, 997 N.E.2d 169, ¶55 (4th Dist).

B. PERMANENT CUSTODY PRINCIPLES

{¶ 16} A parent has a "fundamental liberty interest" in the care, custody, and management of his or her child and an "essential" and "basic civil right" to raise his or her children. *Santosky v. Kramer,* 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed .2d 599 (1982); *In re Murray,* 52 Ohio St.3d 155, 156, 556 N.E.2d 1169 (1990); *accord In re*

D.A., 113 Ohio St.3d 88, 2007–Ohio–1105, 862 N.E.2d 829. A parent's rights, however, are not absolute. *D.A.* at ¶11. Rather, "'it is plain that the natural rights of a parent * * * are always subject to the ultimate welfare of the child, which is the pole star or controlling principle to be observed.'" *In re Cunningham,* 59 Ohio St.2d 100, 106, 391 N.E.2d 1034 (1979), quoting *In re R.J.C.,* 300 So.2d 54, 58 (Fla.App.1974). Thus, the state may terminate parental rights when a child's best interest demands such termination. *D.A.* at ¶11.

C. PERMANENT CUSTODY FRAMEWORK

{¶ 17} R.C. 2151.414(B)(1) permits a trial court to grant permanent custody of a child to a children services agency if the court determines by clear and convincing evidence that the child's best interest would be served by the award of permanent custody and that:

> (a) The child is not abandoned or orphaned 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 ending on or after March 18, 1999, 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.
>
> (b) The child is abandoned.
>
> (c) The child is orphaned, and there are no relatives of the child who are able to take permanent custody.
>
> (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 ending on or after March 18, 1999.

{¶ 18} Thus, before a trial court may award a children services agency permanent custody it must find (1) that one of the circumstances described in R.C. 2151.414(B)(1) applies, and (2) that awarding the children services agency permanent

custody would further the child's best interest. Here the mother does not challenge the trial court's R.C. 2151.414(B)(1)(d) finding. Thus, we do not address it.

E. BEST INTEREST

{¶ 19} "In a best-interests analysis under R.C. 2151.414(D), a court must consider 'all relevant factors,' including five enumerated statutory factors * * *. No one element is given greater weight or heightened significance." *In re C.F.*, 113 Ohio St.3d 73, 2007–Ohio–1104, 862 N.E.2d 816, ¶57, citing *In re Schaefer,* 111 Ohio St.3d 498, 2006-Ohio-5513, 857 N.E.2d 532, ¶56. The five enumerated factors include: (1) the child's interaction and interrelationship with the child's parents, siblings, relatives, foster parents and out-of-home providers, and any other person who may significantly affect the child; (2) the child's wishes, as expressed directly by the child or through the child's guardian ad litem, with due regard for the child's maturity; (3) the child's custodial history; (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 to the agency; and (5) whether any factors listed under R.C. 2151.414(E)(7) to (11) apply.

{¶ 20} The mother limits her argument to whether the trial court's finding under R.C. 2151.414(D)(1)(d) is against the manifest weight of the evidence. This provision requires the trial court to consider "[t]he child's need for a legally secure permanent placement and whether that placement can be achieved without a grant of permanent custody to the [children services] agency." Appellant argues that this provision requires a trial court to determine that granting permanent custody to the agency and terminating parental rights is the only way to achieve a legally secure permanent placement for the children.

{¶ 21} We have previously rejected this same argument. *In re J.H.*, 4th Dist. Hocking No. 14CA4, 2014-Ohio-3108. There, we rejected the mother's argument that the trial court was required to seriously consider a relative placement before awarding the children services agency permanent custody. We explained:

> "[In *In re Schaefer,* 111 Ohio St.3d 498, 2006–Ohio–5513, 857 N.E.2d 532, the court] rejected the argument that a trial court must find by clear and convincing evidence that no suitable relative is available for placement before awarding a children services agency permanent custody. The court explained that R.C. 2151.414(D)(1)(d) is not entitled to any 'heightened importance,' and the trial court is not 'required to credit evidence in support of maintaining the parental relationship when evidence supporting termination outweighs it clearly and convincingly.' *Id.* at ¶56, 857 N.E.2d 532. The *Schaefer* court further rejected any argument that a juvenile court must determine by clear and convincing evidence that 'termination of appellant's parental rights was not only a necessary option, but also the only option' or that 'no suitable relative was available for placement.' *Id.* at ¶64, 857 N.E.2d 532. The court stated that R.C. 2151.414(D) 'does not make the availability of a placement that would not require a termination of parental rights an all-controlling factor,' and it 'does not even require the court to weigh that factor more heavily than other factors.' *Id. Accord C.T.L.A., supra,* at ¶52 (stating that trial court 'had no duty to first consider placing the child with [a]ppellant's relatives or a family friend before granting [a]ppellee permanent custody'); *In re J.K.,* 4th Dist. Ross No. 11CA3269, 2012–Ohio–214, ¶27 and ¶30; *In re A.C.H.,* 4th Dist. Gallia No. 11 CA2, 2011–Ohio–5595, ¶44; *In re M.O.,* 4th Dist. Ross No. 10CA3189, 2011–Ohio–2011, ¶20 (stating that children services agency 'had no statutory duty to make "reasonable efforts" to effect a relative placement before seeking permanent custody * * * * [, and] the juvenile court did not have to find by clear and convincing evidence that no suitable relative was available for placement before awarding the agency permanent custody')."

Id. at ¶24.

{¶ 22} Thus, a juvenile court is vested with discretion to determine what placement option is in the child's best interest. *In re A.C.H.,* 4th Dist. Gallia No. 11CA2, 2011–Ohio–5595, ¶44. The child's best interest is served by placing the child in a permanent situation that fosters growth, stability, and security. *In re Adoption of Ridenour,* 61 Ohio St.3d 319, 324, 574 N.E.2d 1055 (1991). Therefore, 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. *Schaefer* at ¶64.

{¶ 23} In this case, the trial court clearly determined that awarding HCCS was in the children's best interests and that placing them in the paternal grandmother's custody would not be in their best interests. The trial court apparently concluded that the children would have a better chance of a permanent home that would foster their growth, stability, and security by being placed in HCCS's custody instead of the paternal grandmother's custody. The court had no duty to find that awarding HCCS was the only way the children could achieve a legally secure permanent placement before awarding HCCS permanent custody.

{¶ 24} Moreover, the evidence supports the trial court's finding that the children's paternal grandmother would not be able to provide the children with a legally secure permanent placement. HCCS declined to consider the grandmother as a placement option due to her prior drug conviction. After the permanent custody hearing, the guardian *ad litem* examined whether the children could be placed with the grandmother. He concluded that the grandmother's past drug conviction, coupled with her inability to comply with the treatment in lieu of conviction program and her apparent dishonesty about the circumstances surrounding the conviction, demonstrated that placing the children with the grandmother would not be in their best interests. All of these factors support the trial court's finding that the children could not be placed with the paternal grandmother and could not achieve a legally secure permanent placement without granting HCCS permanent custody.

{¶ 25} Accordingly, based upon the foregoing reasons, we overrule A.B.'s assignment of error.

III. A.R.'S APPEAL

A. *ANDERS*

{¶ 26} The father's appellate counsel filed a motion to withdraw and an *Anders* brief. In *State v. Lester,* 4th Dist. Vinton No. 12CA689, 2013–Ohio–2485, ¶3, we discussed *Anders'* requirements:

> In *Anders,* the United States Supreme Court held that if counsel determines after a conscientious examination of the record that the case is wholly frivolous, counsel should so advise the court and request permission to withdraw. Counsel must accompany the request with a brief identifying anything in the record that could arguably support the appeal. *Anders* at 744. The client should be furnished with a copy of the brief and given time to raise any matters the client chooses. *Id.* Once these requirements are met, we must fully examine the proceedings below to determine if an arguably meritorious issue exists. *Id.* If so, we must appoint new counsel and decide the merits of the appeal. *Id.* If we find the appeal frivolous, we may grant the request to withdraw and dismiss the appeal without violating federal constitutional requirements or may proceed to a decision on the merits if state law so requires. *Id.*

{¶ 27} This court has previously applied *Anders* to an appeal involving the termination of parental rights. *In re J.K.*, 4th Dist. Athens No. 09CA20, 2009-Ohio-5391. Other courts have done the same. *In re J.L.*, 5th Dist. Muskingum No. CT2014-0010, 2014-Ohio-2684, ¶17; *In re B.A.*, 6th Dist. Williams No. WM-13-005, 2014-Ohio-151, . *But see In re J.M.*, 1st Dist. Hamilton No. C-130643, 2013-Ohio-5896, ¶19 (holding that "the *Anders* procedures are not appropriate in appeals from decisions terminating parental rights or awarding legal custody").

{¶ 28} We have independently review the record and agree with the father's counsel that no arguably meritorious issues exist. Therefore, we grant counsel's request to withdraw and dismiss A.R.'s appeal.

IV. CONCLUSION

{¶ 29} Having overruled A.B.'s assignment of error and dismissed A.R.'s appeal, we affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, J. & Hoover, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.