

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

In the Matter of:
A.H., C.H., I.H., Q.M., T.H.

Court of Appeals No. L-11-1057

Trial Court Nos. JC 09198828
JC 10206429

DECISION AND JUDGMENT

Decided: September 19, 2011

* * * * *

Tim A. Dugan, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This is an appeal from a judgment issued by the Lucas County Court of Common Pleas, Juvenile Division, which terminated appellant father's parental rights. Counsel appointed to pursue appellant's appeal has filed a brief and motion requesting withdrawal as appellate counsel, pursuant to the guidelines established in *Anders v. California* (1967), 386 U.S. 738. Counsel states that, after careful review of the record

and legal research, he cannot discern any "arguable, non-frivolous issue for appeal."

Anders, supra, at 744. Counsel further states that he has advised appellant of his right to file a brief on his own behalf, and that a copy of both the brief and motion to withdraw have been served upon appellant. Appellant has filed no brief on his own behalf.

{¶ 2} We are required, pursuant to *Anders*, supra, to thoroughly and independently review the record to determine that counsel made a diligent effort and that the proceedings below were free from prejudicial error and conducted without infringement of appellant's constitutional rights.

{¶ 3} Upon consideration, we conclude that counsel's brief is consistent with the requirements set forth in *Anders* and *Penson v. Ohio* (1988), 488 U.S. 75. Counsel for appellant sets forth two potential assignments of error:

{¶ 4} "1) The Juvenile Court's findings that Appellant's children could not be returned to Appellant with a reasonable time were not supported by clear and convincing evidence.

{¶ 5} "2) The Juvenile Court's finding that granting permanent custody of the children to Appellee fell against the manifest weight of the evidence."

I.

{¶ 6} Appellant, J.H., is the biological father of A.H., C.H., I.H., and T.H.¹ In October 2009, Lucas County Children Services ("LCCS") filed a complaint in

¹The month and year of birth of each child is as follows: A.H. (8/2003), C.H. (6/2004), I.H. (9/2007), and T.H. (7/2009).

dependency and neglect alleging that mother² had been unable or unwilling to provide for her children's basic needs and had mental health issues. The complaint further alleged that father had not had "any contact or other interaction with the family" and was "reportedly incarcerated at an unknown location." The complaint also alleged that previous domestic violence incidents had occurred between mother and father. The court appointed counsel for the parents and also a guardian ad litem for the children.

{¶ 7} On January 20, 2010, the court adjudicated the children neglected and a case plan with the goal of reunification with the parents was approved by the court. The court granted temporary custody to LCCS and the children were placed in foster care. The court held disposition hearings on December 13, 2010, and January 18 and 19, 2011. The following evidence and testimony, relevant to father's appeal, was presented. Rochelle Jennings, LCCS caseworker, testified that, as part of the case plan, father was ordered to obtain and maintain stable housing and attend domestic violence services. After another domestic violence incident involving father occurred, however, he was terminated from the domestic violence classes.

{¶ 8} Father, who was conveyed from prison, testified that during the pendency of the proceedings, he had been convicted of burglary and attempt to intimidate a witness. He was sentenced to two years of incarceration, with nineteen months remaining on that

²Appellee, L.B., the biological mother of the children, and Q.M., another child included in the complaint, but not fathered by appellant, have not appealed from the court's decision. Therefore, the issues discussed in this appeal will be limited primarily to the evidence presented relevant to appellant father's parental rights.

sentence. Evidence was presented that before his most recent conviction, father had just recently been released from incarceration for a prior conviction in Mississippi, and was still on probation for that offense.

{¶ 9} The guardian ad litem testified that, after interviewing all the parties and considering various potential relative placements, it was in the best interest of the children that permanent custody be granted to the agency. The guardian ad litem's recommendation was based on mother's lack of any significant progress to address issues causing the children's removal and incarceration in 2010, father's incarceration, and no appropriate relative placements.

{¶ 10} The court found clear and convincing evidence was presented that, despite reasonable efforts by the agency to prevent the children's continued removal from the parents, pursuant to R.C. 2151.353(A)(4) and R.C. 2151.414(B)(1)(a) and (E)(1),(2), (4), (12), (13), and (16), the children cannot and should not be placed with either parent within a reasonable period of time. The court also found that it is in the best interest of the children to grant permanent custody to LCCS. Relative to father, the court specifically found that, pursuant to R.C. 2151.414(B)(1)(a) and (E)(4), father demonstrated a lack of commitment toward the children by failing to regularly support, visit, or communicate with them when able to do so. Pursuant to R.C. 2151.414(B)(1)(a) and (E)(12), (13),and (16), the court found that father's criminal history and current incarceration made him unavailable to care for his children.

II.

{¶ 11} A trial court's determination in a permanent custody case will not be reversed on appeal unless it is against the manifest weight of the evidence. *In re Andy-Jones*, 10th Dist. Nos. 03AP-1167 and 03AP-1231, 2004-Ohio-3312, ¶ 28. The factual findings of a trial court are presumed correct since, as the trier of fact, it is in the best position to weigh the evidence and evaluate the testimony. *In re Brown* (1994), 98 Ohio App.3d 337, 342. Moreover, "[e]very reasonable presumption must be made in favor of the judgment and the findings of facts [of the trial court]." *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 19. Thus, judgments supported by some competent, credible evidence going to all essential elements of the case are not against the manifest weight of the evidence. *Id.*; *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus.

{¶ 12} A juvenile court may grant permanent custody of a child to a public services agency if the court finds, by clear and convincing evidence, two statutory prongs: (1) the existence of at least one of the four factors enumerated in R.C. 2151.414(B)(1), and (2) that the child's best interest is served by a grant of permanent custody to the children's services agency. *In re M.B.*, 10th Dist. No. 04AP-755, 2005-Ohio-986, ¶ 6. Clear and convincing evidence requires that the proof "produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established ." *In the Matter of Coffman* (Sept. 7, 2000), 10th Dist. No. 99AP-1376, citing *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

{¶ 13} Under the first prong, the first factor under R.C. 2151.414(B)(1) is as follows:

{¶ 14} "(a) The child is not abandoned or orphaned, 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 * * * 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."

{¶ 15} In making a finding under R.C. 2151.414(B)(1)(a), that the child cannot be placed with his parents within a reasonable time or should not be placed with his parents, the court need find, by clear and convincing evidence, that only one of the eight factors enumerated in R.C. 2151.414(E) exists. In this case, the five factors under that section pertinent to father state:

{¶ 16} "(1) Following the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the home, the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home. In determining whether the parents have substantially remedied those conditions, the court shall consider parental utilization of medical, psychiatric, psychological, and other social and rehabilitative services and material resources that were made available to the parents for

the purpose of changing parental conduct to allow them to resume and maintain parental duties.

{¶ 17} "* * *

{¶ 18} "(4) The parent has demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child;

{¶ 19} "* * *

{¶ 20} "(12) The parent is incarcerated at the time of the filing of the motion for permanent custody or the dispositional hearing of the child and will not be available to care for the child for at least eighteen months after the filing of the motion for permanent custody or the dispositional hearing.

{¶ 21} "(13) The parent is repeatedly incarcerated, and the repeated incarceration prevents the parent from providing care for the child.

{¶ 22} "(16) Any other factor the court considers relevant."

{¶ 23} Once a finding is made by the court satisfying one of the factors enumerated in R.C. 2151.414(B)(1), its analysis turns to the second prong, the best interest of the child. In making this determination, R.C. 2151.414(D)(1) provides that the court "shall consider all relevant factors, including, but not limited to, the following:

{¶ 24} "(a) 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;

{¶ 25} "(b) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child;

{¶ 26} "(c) The custodial history of the child, including whether 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;

{¶ 27} "(d) 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;

{¶ 28} "(e) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child."

{¶ 29} After reviewing the record, we agree with counsel that under both proposed assignments of error, there was more than sufficient evidence presented to support the trial court's findings and ultimate disposition. Moreover, we have also conducted our own independent and thorough review of the record to determine whether the trial court proceedings were free from prejudicial error and conducted without infringement of appellant's constitutional rights. We find no such error. We conclude, therefore, that this case presents no arguable issues meriting review; we further determine this appeal to be

without merit and wholly frivolous. Appellate counsel's motion to withdraw is hereby granted.

{¶ 30} The judgment of the Lucas County Court of Common Pleas, Juvenile Division, is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

{¶ 31} The clerk is ordered to serve all parties, including the defendant if he or she has filed a brief, with notice of this decision.

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.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.