[Cite as *In re D.M.*, 2012-Ohio-3180.]

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

In re D.M.

Court of Appeals No. L-12-1005

Trial Court No. JC 11214759

DECISION AND JUDGMENT

Decided: July 13, 2012

* * * * *

Angela Y. Russell, for appellee.

James J. Popil, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶1} Appellants D.M. ("father") and K.M. ("mother") appeal the December 13, 2011 judgment of the Lucas County Court of Common Pleas, Juvenile Division, which terminated their parental rights to their minor son, D.M., and awarded permanent custody

to Lucas County Children's Services ("LCCS"). For the reasons set forth below, we affirm.

{¶2} D.M. was born in May 2011. The next day, LCCS filed a complaint in dependency and neglect and for permanent custody. The complaint alleged that appellants, married for approximately four years, had a history of domestic violence, mental health issues, and had a prior minor child removed from their custody by LCCS. LCCS was awarded temporary custody. On July 22, 2011, the matter proceeded to an adjudication hearing. At the conclusion of the hearing, D.M. was adjudicated a dependent and neglected child. The disposition hearing was held on September 12 and November 7, 2011; testimony and exhibits were presented. On November 14, 2011, the court orally granted LCCS permanent custody of D.M.

{¶3} On December 13, 2011, the court entered its written judgment entry finding that D.M. should not be returned to appellants and that permanent custody to LCCS was in D.M.'s best interest. The court specifically found the factors under R.C. 2151.414(E)(1),(2),(4) and (11). The court then concluded that it was in D.M.'s best interest to grant permanent custody to LCCS. This appeal followed.

{¶4} Appellants are represented by court appointed counsel in this appeal. By affidavit, counsel states that he reviewed the record of proceedings in the trial court and researched potential issues for appeal but has concluded that there are no arguable issues of merit for appeal. Counsel has requested to withdraw from representation of appellants.

{¶5} A parent's right to raise his or her children is a fundamental right. *Troxel v. Granville*, 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, 862 N.E.2d 816, ¶ 28. In cases involving termination of parental rights, the procedures announced in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), apply where appointed counsel concludes that an appeal is wholly without merit and seeks leave of court to withdraw as counsel on appeal. *Morris v. Lucas Cty. Children Services Bd.*, 49 Ohio App.3d 86, 87, 550 N.E.2d 980 (6th Dist.1989).

{¶6} Under *Anders v. California*, court appointed appellate counsel must undertake a "conscientious examination" of the case and, if counsel determines an appeal will be "wholly frivolous," inform the court of that fact and seek permission to withdraw. *Anders* at 744; *State v. Duncan*, 57 Ohio App.2d 93, 385 N.E.2d 323 (8th Dist.1978). The motion is to be accompanied by an appellate brief "referring to anything in the record that might arguably support the appeal." *Id.* A copy of the brief is to be furnished to the appellant, who is permitted additional time to raise any points she chooses in her own brief. *Id.*

{¶7} Once these requirements have been met, the appellate court is to conduct a full examination of the proceedings to determine whether the appeal is wholly frivolous. *Id.* Where the appellate court concludes the appeal is wholly frivolous, it may grant the motion to withdraw and dismiss the appeal. *Id.*

{¶8} Following procedures under *Anders*, counsel filed an appellate brief raising potential assignments of error and also requested leave of court to withdraw as counsel for appellants. Counsel provided copies of both the appellate brief and his motion to withdraw to appellants. He also advised them of their right to file a brief and to assign additional assignments of error in the appeal. Appellants have not filed a brief.

{¶9} In the *Anders* brief, counsel for appellants identified the following two potential issues for appeal:

> I. The trial court erred in granting appellee Lucas County Children Services' motion for permanent custody as the decision was against the manifest weight of the evidence.
>
> II. The trial court erred in determining that appellants' custody agreement with paternal grandmother was invalid and unenforceable.

{¶10} In his first potential assignment of error, counsel argues that the court's decision awarding LCCS permanent custody of D.M. was against the weight of the evidence. We note that a trial court judgment terminating parental rights will not be overturned on appeal as against the manifest weight of the evidence where there is competent credible evidence in the record under which the court could have formed a firm belief or conviction that the essential statutory elements for termination of parental rights have been established. *In re Alexis K.*, 160 Ohio App.3d 32, 2005-Ohio-1380, 825 N.E.2d 1148, ¶ 26 (6th Dist.).

{¶11} As set forth above, in its judgment entry awarding permanent custody to LCCS, the trial court found by clear and convincing evidence that pursuant to R.C. 2151.353(A)(4), 2151.414(B)(1)(a) and 2151.414(E)(1),(2),(4), and (11) that D.M. was not abandoned but could not be placed with either parent within a reasonable period of time and that pursuant to R.C. 2151.414(D)(1)(a-e), the permanent custody award was in D.M.'s best interest.

{¶12} R.C. 2151.414(E) provides, in relevant part:

> (E) In determining * * * whether a child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents, the court shall consider all relevant evidence. If the court determines, by clear and convincing evidence * * * that one or more of the following exist as to each of the child's parents, 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:
>
> (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.

(2) Chronic mental illness, chronic emotional illness, mental retardation, physical disability, or chemical dependency of the parent that is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year after the court holds the hearing pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code;

* * *

(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;

* * *

(11) 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.

{¶13} Relevant to factor R.C. 2151.414(E)(1), the court found that appellants had failed to remedy the conditions that caused the removal of the child and, in a prior case, his older sibling and have had continuous contact with LCCS since December 2009. The court found that the father continuously denied that he had issues with domestic violence although he acknowledged that he had two prior domestic violence convictions. The mother continued to minimize the incidents despite contradictory records and testimony. Mother and father failed to complete domestic violence courses. As to mental health concerns, the court stated that father refused to complete the psychological evaluation and that mother had not been complaint with further mental health services.

{¶14} The court further found that father suffers from chronic mental illness or physical disability that prevents him from having an adequate permanent home for D.M. R.C. 2151.414(D)(2). The father had been diagnosed with bi-polar disorder and depression and kidney failure. Father had frequently missed visitation due to his health. Father also has frequent outbursts of anger and violent behaviors.

{¶15} Under R.C. 2151.414(E)(4), the court found that appellants demonstrated a lack of commitment toward D.M. by regularly failing to support, visit, or communicate with the child. The court noted the testimony was presented that LCCS security officers terminated the father's visit on more than one occasion due to his threatening behavior. The court further noted that the violence in appellants' relationship negatively impacts D.M.

{¶16} The court then found, under R.C. 2151.414(E)(11), that in June 2011, appellants had their parental rights terminated as to a sibling of D.M. This court affirmed that judgment in *In re K.M.*, 6th Dist. No. L-11-1164, 2012-Ohio-617. The court stated that appellants had moved six times in the past two years and have failed to show that they can adequately care for the health and welfare of the child. It was further noted that the father was convicted of attempt to commit aggravated assault and had current charges for assault.

{¶17} We have carefully reviewed the transcript of the hearing and confirm that the trial court's findings are supported by competent, credible evidence. LCCS caseworker Sarah Hall testified that father has continually denied that he has a domestic violence problem and has failed to complete the domestic violence treatment that was part of the case plan. These issues led to the removal of D.M.'s sibling. Father has also failed to complete a psychological evaluation. Hall testified regarding father's erratic and

violent behavior during visitation and his threat to kidnap his children from their foster home. Hall also testified regarding father's criminal convictions.

{¶18} Regarding mother, Hall stated that she attended only two of several domestic violence classes and that she slept through one of them and did not receive credit. Hall stated that she did not feel that her mental health concerns have been adequately addressed. Out of 32 scheduled visitations, mother missed seven.

{¶19} D.M.'s guardian ad litem, Heather Thibeault testified that she had been involved with the family since D.M.'s sibling was removed from the home. Thibeault testified that early in her involvement mother admitted that father was verbally and physically abusive toward her and that she knew she needed to leave him. She also witnessed mother's bruises and scrapes which, she said, were caused when father pushed her out of a moving vehicle. Later, mother denied that they had any domestic violence issues.

{¶20} Hall and Thibeault both testified that they believed that it was in D.M.'s best interest to award permanent custody to LCCS. Testimony established that D.M. was placed with the same foster family as his sibling and that the foster parents were interested in adoption. Based on the foregoing, we find that appellate counsel's first potential assignment of error is not well-taken.

{¶21} Appellant's second potential assignment of error disputes the trial court's finding that appellants' act of transferring custody of D.M. to his paternal grandmother

one minute after his birth was not valid and enforceable. LCCS argues, and appellate counsel acknowledges, that the document purporting to transfer custody did not operate to transfer custody.

{¶22} The document at issue provided: "[Father] and [Mother] give physical and temporary custody of our newborn son [D.M.] born on May [**], 2011 @ 2:23 p.m. to [C.C.]." Appellants signed the document approximately one minute after D.M.'s birth. The document further provided: "[C.C.] acknowledges this power of attorney physical custody of [D.M.] under Ohio Revised Code 3109.53." C.C. signed the document and it was apparently notarized by a witness but no seal was affixed.

{¶23} R.C. 3109.52 et seq. provides the procedure for granting a grandparent or caregiver with power of attorney for care and custody of a child. R.C. 3109.52 provides, in relevant part:

> The parent, guardian, or custodian of a child may create a power of attorney that grants to a grandparent of the child with whom the child is residing any of the parent's, guardian's, or custodian's rights and responsibilities regarding the care, physical custody, and control of the child, including the ability to enroll the child in school, to obtain from the school district educational and behavioral information about the child, to consent to all school-related matters regarding the child, and to consent to medical, psychological, or dental treatment for the child.

{¶24} R.C. 3109.53 provides a detailed form that a parent "shall" use to create a power of attorney. Finally, R.C. 3109.54 requires that the document be signed and notarized.

{¶25} Reviewing the document signed by appellants and C.C., we must agree that it does not comply with the statutory requirements. First, R.C. 3109.52 specifically states that the child must be in the grandparent's custody. D.M. was not. Next, R.C. 3109.53 provides a very detailed format to which the power of attorney document must conform. The document does not follow the format. Finally, the notary requirement was not met as there was no seal or stamp affixed. Based on the foregoing, we find that appellate counsel's second potential assignment of error is not well-taken.

{¶26} After conducting an independent review of the record as required by *Anders*, we find no meritorious argument for appeal. Accordingly, we grant counsel's motion to withdraw. The judgment of the Lucas County Court of Common Pleas, Juvenile Division, is affirmed. Pursuant to App.R. 24, appellants are ordered to pay the costs of this appeal.

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

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE