**[Cite as *In re J.H.*, 2013-Ohio-2598.]**

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

In re J.H., A.H.

Court of Appeals No. L-12-1344

Trial Court No. JC11214276

**DECISION AND JUDGMENT**

Decided: June 21, 2013

* * * * *

Laurel A. Kendall, for appellant.

Dianne L. Keeler, for appellee.

* * * * *

**JENSEN, J.**

**{¶ 1}** This is an appeal from a judgment issued by the Lucas County Court of Common Pleas, Juvenile Division, which terminated all parental rights and responsibilities. Appellant, J.G., is the biological father of one of the three children identified in this case, and he appeals the order terminating his parental rights with

respect to that child. The biological mother of all three children has not appealed the court's decision. Therefore, the issues discussed in this appeal are limited primarily to the evidence presented relative to appellant father's parental rights.

**{¶ 2}** Appellant's appointed counsel has filed a memorandum requesting to withdraw from the case, pursuant to *Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). For the reasons that follow, we grant counsel's request and dismiss the appeal.

### A. Statement of Facts and Procedural History

**{¶ 3}** Appellant is the biological father of "J.H."[1] In November 2010, Lucas County Children's Services ("LCCS") received a referral for the mother of J.H. and J.H.'s half-sister indicating that the mother was (1) abusing drugs and alcohol; (2) had mental health issues; (3) lacked stable housing; and (4) failed to provide her daughter with medical care. Initially, LCCS engaged the mother in services without taking custody of the children.

**{¶ 4}** On April 26, 2011, LCCS was awarded temporary custody of J.H. and his half-sister after the mother reportedly stopped following through with services. On June 3, 2011, the mother consented to a finding of dependency and neglect of both children.

**{¶ 5}** The two children were placed with the mother's great aunt until the aunt suffered a stroke in February 2012. Between February and August 2012, J.H. and his

[1] J.H. was born in March 2007; he is currently six years old.

sister lived in a foster home. In August 2012, they went to a new foster home where they remain. In September 2012, a third child, a baby girl, born to the mother in January 2012, joined her half-siblings in the second foster home.

**{¶ 6}** On September 5, 2012, LCCS filed a motion for permanent custody which was heard on October 29, 2012. At that hearing, LCCS sought permanent custody of J.H. and his sisters.

**{¶ 7}** Appellant attended the hearing, having been conveyed from prison, but he did not testify. Little testimony was offered regarding appellant, and the record does not indicate whether appellant has ever had any relationship with J.H. A LCCS caseworker testified that he contacted appellant in May 2011, after the agency was awarded temporary custody. Appellant expressed his disinterest in getting involved in the care of J.H., unless and until his paternity was established. By the time paternity was established, however, appellant was incarcerated. In May 2011, appellant went to prison after pleading guilty in two separate criminal cases: failing to comply with an order or signal of a police officer in violation of R.C. 2921.331(B) and (C)(5)(a)(i), a felony of the third degree and in the other case, unauthorized use of a motor vehicle in violation of R.C. 2913.03(A) and (D)(2). Appellant was sentenced to three years in prison. Appellant's expected release date is April 15, 2014.

**{¶ 8}** Appellant's counsel questioned the caseworker regarding the possibility of placing J.H. with either one of two of appellant's female relatives. The caseworker testified that he contacted each relative and met with one of them. Neither, however, was

interested in pursuing the matter once each learned of the agency's desire to place all of the children together. As explained by counsel for LCCS,

> Although we had some interest from a couple of father's relatives at the very end of this case, you've got to ask yourself where were they? They didn't even visit, they didn't call, they didn't ask for placement and then when they did talk to the caseworker, they appeared to be satisfied with the explanation that * * * we were looking for a place for all three [kids to remain] together and they didn't want to make that commitment to all three and understandably so. But after that they didn't file anything indicating that they wanted custody of [J.H.].

**{¶ 9}** The children's guardian ad litem testified that, after interviewing all the parties and considering various potential relative placements, it was in the best interests of the children that permanent custody be granted to the agency. The guardian ad litem's recommendation was based on the mother's lack of any significant progress to address issues causing the children's removal, appellant's incarceration, and the lack of an appropriate placement with a relative.

**{¶ 10}** Finally, with regard to the children's most recent placement, the caseworker testified,

> In my opinion, they're doing well. This is a foster home that has a foster father so it's the first male consistent figure that [J.H.] has had in his entire life. He's taking that very well. * * * And it's interesting to see as the three

siblings' dynamics grow because this is the first time that all three have lived together. * * * The foster parents have told me that they may be interested in adoption at this point if the children are available.

**{¶ 11}** On November 21, 2012, the trial court granted LCCS's motion for permanent custody. Appellant timely appealed the order on November 26, 2012.

### B. Counsel's *Ander's* Motion

**{¶ 12}** On March 7, 2013, appellant's appointed counsel filed a memorandum seeking to withdraw as counsel for lack of a meritorious, appealable issue under *Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493*; see also State v. Duncan*, 57 Ohio App.2d 93, 385 N.E.2d 323 (8th Dist.1978). Counsel states that it is her belief that the appeal is frivolous.

**{¶ 13}** In *Anders*, the United States Supreme Court set forth the procedure to be followed by appointed counsel who desires to withdraw for want of a meritorious, appealable issue. The court held that if counsel, after a conscientious examination of the case, determines it to be wholly frivolous she should so advise the court and request permission to withdraw. *Anders* at 744. This request, however, must be accompanied by a brief identifying anything in the record that could arguably support the appeal. *Id.* Counsel must also furnish her client with a copy of the brief and request to withdraw and allow the client sufficient time to raise any matters that he chooses. *Id.* Once these requirements have been satisfied, the appellate court must then conduct a full examination of the proceedings held below to determine if the appeal is indeed frivolous.

If the appellate court determines that the appeal is frivolous, it may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements or it may proceed to a decision on the merits if state law so requires. *Id.*

**{¶ 14}** In her memorandum, appellate counsel set forth potential grounds for appeal. Counsel mailed a copy of the memorandum to appellant and advised him of his right to file his own appellate brief. Appellant has not filed an additional brief or otherwise responded.

### C. Potential Assignments of Error

**{¶ 15}** Next, we examine the potential assignments of error and the entire record below to determine if this appeal lacks merit and is, therefore, wholly frivolous. In the *Anders* brief, counsel raised the following assignments of error:

> Potential Assignment of Error 1: It was abuse of discretion for the court to disregard father J.G. as a possible custodial placement of the minor child J.H.
>
> Potential Assignment of Error 2: It was abuse of discretion for the agency to refuse placement of the minor child J.H. to paternal relatives.

**{¶ 16}** 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 A.H.*, 6th Dist. No. L-11-1057, 2011-Ohio-4857, ¶ 11. 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*, 98 Ohio App.3d 337, 342, 648 N.E.2d 576 (3d

Dist.1994). 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*, 38 Ohio St.3d 12, 19, 526 N.E.2d 1350 (1988). 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.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

**{¶ 17}** Before a juvenile court may terminate parental rights and award custody to a public children services agency, it must find clear and convincing evidence of both prongs of the permanent custody test that: (1) the children are abandoned, orphaned, have been in the temporary custody of the agency for at least 12 months of the prior 22 months, or that the children cannot be placed with either parent within a reasonable time or should not be placed with either parent, based on an analysis under R.C. 2151.414(E); and (2) the grant of permanent custody to the agency is in the best interests of the children, based on the factors set forth in R.C. 2151.414(D). *See* R.C. 2151.414(B)(1) and 2151.414(B)(2); *see also In re Kayla H.*, 175 Ohio App.3d 192, 202, 886 N.E.2d 235 (6th Dist.2007) and *In re William S.*, 75 Ohio St.3d 95, 99, 661 N.E.2d 738 (1996).

**{¶ 18}** 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 re M.C.*, 6th Dist. No. L-08-1336, 2009-Ohio-1122, ¶ 19, citing *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

**{¶ 19}** In this case, the trial court found that the first prong of the permanent custody test was satisfied because the children had been in the temporary custody of LCCS for more than 12 of the prior 22 months. It observed that it could decide the motion based upon the children's length of time in temporary custody alone, but it also chose to consider the factors set forth in R.C. 2151.414(E). That section sets forth sixteen different conditions. If a court finds that any one of sixteen conditions exist as to each of the child's parents, then the court must find that the child cannot or should not be returned to his parents within a reasonable time. *In re Jordan M.,* 6th Dist. No. S-07-021, 2008-Ohio-1860, ¶ 5.

**{¶ 20}** As to appellant, the trial court found that R.C. 2151.414(E)(12) applied. That section provides:

> 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}** Here, the court found clear and convincing evidence that appellant was incarcerated at the time the motion for permanent custody was filed, on September 5, 2012, and that he is not scheduled for release until more than 19 months later, on April 15, 2014.

**{¶ 22}** After a review of the record, we conclude that there is clear and convincing evidence in the record to establish that J.H. had been in temporary custody for the

requisite time period and that he cannot and should not be returned to appellant within a reasonable time. Appellant's first potential assignment of error is not well-taken.

**{¶ 23}** Appellant's counsel states in her second potential assignment of error that it was error to refuse placement of J.H. to appellant's relatives. The second part of the two-part test is consideration of the best interest of the child. In considering whether an award of permanent custody to a public children services agency is in the best interests of a child, R.C. 2151.414(D) provides that a,

> court shall consider all relevant factors, including, but not limited to, the following:
>
> (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;
>
> (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;
>
> (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, * * *;

(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;

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

**{¶ 24}** In its judgment entry, the trial court stated that it had considered the statutory factors under R.C. 2151.414(D) and determined by clear and convincing evidence that permanent placement of the children with LCCS was in their best interest. The court found,

L.C.C.S. has provided services to this family for a year and a half after removing the children, without resolution of the issues that caused removal, and now these children have been placed with another sibling in a home where all three might be adopted. The Court finds that an award of permanent custody would facilitate an adoption, either in that home or another permanent home. The Court finds that at the time of trial, there were no relatives identified as appropriate for placement of both [sic] children herein, and the Court finds that no relatives have filed seeking an award of custody of either [sic] child. The Court further finds that the children herein have a significant relationship and it would not be in their best interest to be placed apart from each other. The Court finds, therefore, that the children have been in the temporary custody of L.C.C.S. for twelve

> or more months of a consecutive twenty two months and are in need of a legally secure permanent placement that cannot be achieved without a grant of permanent custody to the L.C.C.S. * * * The Court finds that the only identified father of these children, [appellant], has been largely unavailable to complete services and will remain so for well into 2014, since he is incarcerated.

**{¶ 25}** In our view, there is competent credible evidence in the record supporting the trial court's conclusion, by clear and convincing evidence, that an award of permanent custody of J.H. to LCCS was in the child's best interest under R.C. 2151.414(D). Appellant's second potential assignment of error is not well-taken.

**{¶ 26}** This court, as required under *Anders*, has undertaken its own independent examination of the record to determine whether any issue of arguable merit is presented for appeal. We have found none. Accordingly, we find this appeal is without merit and wholly frivolous. We grant counsel's motion to withdraw as counsel and affirm the judgment of the Lucas County Court of Common Pleas, Juvenile Division.

**{¶ 27}** Pursuant to App.R. 24, appellant is 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

Arlene Singer, P.J. _____
JUDGE

James D. Jensen, J.
CONCUR. _____
JUDGE