

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

In re J.H.

Court of Appeals No. L-12-1072

Trial Court No. JC 10-202365

DECISION AND JUDGMENT

Decided: February 7, 2013

* * * * *

Dan M. Weiss, for appellant.

Angela Y. Russell, for appellee.

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OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, Juvenile Division, that terminated the parental rights of appellant S.H. and granted permanent custody of his minor child J.H. to appellee Lucas County Children Services (“LCCS”). For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} Appointed counsel, Dan M. Weiss, has submitted a request to withdraw pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). In his brief filed on appellant's behalf, appointed counsel sets forth one proposed assignment of error. In support of his request to withdraw, counsel for appellant states that, after reviewing the record of proceedings in the trial court, he was unable to identify any appealable issues.

{¶ 3} *Anders, supra*, and *State v. Duncan*, 57 Ohio App.2d 93, 385 N.E.2d 323 (1978), set forth the procedure to be followed by appointed counsel who desires to withdraw for want of a meritorious, appealable issue. In *Anders*, the United States Supreme Court held that if counsel, after a conscientious examination of the case, determines it to be wholly frivolous he should so advise the court and request permission to withdraw. *Id.* 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 his 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 may proceed to a decision on the merits if state law so requires. *Id.*

{¶ 4} In the case before us, appointed counsel has satisfied the requirements set forth in *Anders, supra*. This court further finds that appellant was notified by counsel of his right to file an appellate brief on his own behalf but has not done so. Accordingly, this court shall proceed with an examination of the potential assignment of error proposed by counsel for appellant and the record from below in order to determine if this appeal lacks merit and is, therefore, wholly frivolous.

{¶ 5} Counsel for appellant sets forth the following proposed assignment of error:

The trial court's finding of permanent custody is against the manifest weight of the evidence.

{¶ 6} J.H. was born in June 2008. The record reflects that in January 2009 the child's mother sought and was granted a domestic violence protection order against appellant, father of J.H. One month later, father was charged with violating the protection order. Father moved back and forth between Toledo and Arkansas and in the summer of 2009 mother sent J.H. to Arkansas with appellant for approximately one month. In October 2009, appellant came to Toledo and took J.H. to live with a maternal aunt. In November 2009, appellant was charged with two more violations of the protection order with regard to mother and he was subsequently convicted and placed on probation. On November 24, 2009, mother filed a report with the Toledo police alleging that appellant had held a knife to her throat, and she sought another protection order. Criminal charges remained pending for the incident at the time the complaint herein was filed; appellant also had outstanding warrants for various other charges. On

November 30, 2009, LCCS filed a complaint in dependency and neglect and sought emergency shelter care of J.H. The agency was granted interim temporary custody. On April 29, 2010, J.H. was adjudicated a dependent and neglected child and temporary custody was awarded to LCCS with a goal of reunification.

{¶ 7} The agency was granted two extensions of temporary custody and, on September 28, 2011, it filed a motion for permanent custody and request for further extension of temporary custody. As to appellant, the agency alleged that in February 2010, appellant removed J.H. from the maternal aunt's home where she had been placed pursuant to a safety plan and took J.H. out of state. Several days later, J.H. was located in Arkansas and returned to Ohio and was placed in foster care; J.H. remained in the foster home at the time the complaint was filed. The agency further alleged that father had a lengthy history of involvement in sexually oriented businesses, some of which were run out of his home, and that father was arrested in Wood County in 2006 as part of a sting operation and charged with prostitution. The agency alleged that father and mother had a chaotic relationship spanning many years and that, after being advised to have no contact with mother, father continued to live with her despite being told that involvement with mother would jeopardize his reunification efforts. Additionally, the agency alleged that father had not established stable housing throughout the duration of his case plan services and had demonstrated that he would not put the child's needs ahead of his own or provide a safe and consistent home for the child. Lastly, the agency alleged that J.H. had adjusted well to the foster home and had shown consistently improved behavior.

{¶ 8} Hearings were held on the permanent custody motion on January 23 and 27, 2012, and February 14, 2012. Father was present and represented by counsel. Mother was present the first two days but failed to appear for the final day of testimony although her attorney was present. We note that mother has not appealed the termination of her parental rights as to J.H.

{¶ 9} The trial court heard testimony from numerous caseworkers and other individuals who worked with father and J.H. during the pendency of this case. Effie Lee, an assessment caseworker with LCCS, testified as to her initial contact with the family in November 2009. At that time, the agency had received a referral regarding domestic violence between mother and her current boyfriend. When Lee was assigned the case, J.H. was residing with a maternal aunt. Under the conditions of a written safety plan, father was not to reside in the home and mother and father were not to visit the child at the same time due a history of domestic violence between the two parents. When the agency received temporary custody after filing the initial complaint, J.H. was placed in the same relative's home. However, at the time of the first adjudication hearing on February 22, 2010, J.H.'s aunt stated she did not know where the child was. The agency soon learned that father had taken J.H. to Arkansas.

{¶ 10} Katherine Samples testified that she received this case as the ongoing caseworker in February 2010. When Samples arrived at court for the adjudication hearing on February 22, 2010, she was informed that J.H. had been kidnapped from the aunt's home. The child's aunt reported that when she woke up that morning the child

was gone. She contacted police and an investigation began. Mother believed that father had taken J.H. and the agency attempted to contact father in Arkansas, where he had relatives. Eventually, the child's aunt made contact with father and father agreed to meet the aunt at a designated location. When the aunt went to the location, father was not there. Shortly thereafter, father contacted the aunt; J.H. was returned to the agency on February 26, 2010. The child was referred to her doctor for treatment of a rash and blisters on her abdomen, genital area and legs, and was placed in foster care that day. Samples further testified that father did not contact her after the foster placement.

{¶ 11} Samples had no contact with father until May 6, 2010, when he called her. In the meantime, Sample had maintained contact with father's attorney, informing him of case plan services and court dates. While father's attorney attended various court proceedings, father did not. On May 12, 2010, Samples met with father at the agency. Father admitted taking J.H. to Arkansas several months earlier and said he did not want mother to have custody of the child. Father also told the caseworker that he had ten children and that most of them were living in Arkansas. Samples discussed domestic violence and sex offender services for father and recommended sex offender treatment, due to father's history of running escort services, being charged with prostitution in 2006 and a prior substantiated sex abuse referral regarding one of father's sons. Visitation with J.H. could not be arranged at that time because father had some open warrants that had to be resolved. Father was referred for a diagnostic assessment but no recommendations were given at that time. Father initially indicated that he did not have

the financial means to pay for the domestic violence program but by September 2010, he had engaged in domestic violence classes and was participating in regular visitations at the agency. He was still unemployed, however. By early 2011, father had completed his domestic violence program and was engaged in parenting classes. He also expressed willingness to have an assessment done in order to start the sex offender treatment. In April 2011, father was referred to 20 sessions of a “criminal thinking errors” group with a sex offender aspect included. Samples was troubled by the way father vacillated between his concern for the child’s welfare and his concern for mother and preoccupation with mother and helping her with her problems. Samples learned from father that he had been in the escort business for approximately 13 years and that his job skills essentially were related to that area. Father felt the agency was preventing him from obtaining employment, and therefore from regaining custody of J.H., because the agency would not approve work in the escort business.

{¶ 12} Samples also testified to the child’s behavior after being placed in foster care at the age of 20 months. Initially, J.H. had temper tantrums and was aggressive toward the other children in the home, sometimes biting, hitting and scratching. She also used “the B word and the F word.” Samples further testified that when she observed father with J.H., the two appeared to be bonded and the child appeared to be happy to see father. After not seeing J.H. for several months, father began visiting the child consistently in June 2010.

{¶ 13} The trial court also heard testimony from Denise Greenblatt, the LCCS caseworker for this family beginning in April 2011. In July 2011, mother told Greenblatt she was not currently working on her case plan because father said he did not want her to because he was working on services and it would be harder for him to regain custody if mother was participating in services at the same time. As of April 2011, father was unemployed and living with the mother of some of his children. During another period in early 2011, father lived with one of mother's sisters. In June 2011, father told Greenblatt he was torn between wanting to help mother and working toward reunification with J.H. In late June 2011, father stated he was experiencing difficulty with "chaotic things" in his life regarding his case plan, visitations and working for a roofing company. In July, he was living with the daughter of the mother of one of his sons.

{¶ 14} In November 2011, J.H. moved to a new foster home and adjusted to the transition well. At the time of the hearing, J.H. was attending play therapy. Greenblatt recommended that permanent custody of J.H. be granted to LCCS because neither parent was able to provide a stable home for the child for over two years, the parents had a history of domestic violence with each other and other individuals, father had violated a domestic violence protection order twice, both parents had been arrested for prostitution, father was increasingly focused on mother rather than on J.H. and his own case plan, and father lacked a regular income. The new foster home is a potential adoptive home and J.H. has bonded well with the foster parents and appears happy. She is no longer

screaming, kicking, biting, swearing or exhibiting other inappropriate behavior and her “fits” have decreased to perhaps once a week.

{¶ 15} Harold Stevens, a parenting educator with LCCS, testified that father attended and successfully completed the parenting group Stevens facilitated in April 2011. Stevens further testified that in July 2011, father spoke to him and related that he felt he had taken a step backward because he had become involved again with mother. Father stated that he felt mother had “sexual control” over him and that he was unable to resist her. He further stated that at that time, he had no regular income but was selling his blood plasma and some of his computer equipment so that he could give money to mother.

{¶ 16} Christy Little testified that she was J.H.’s foster mother beginning February 2010, when the child was 20 months old. At that time, Little had informed the agency that she would not be a potential adoptive home. When J.H. was placed in the Littles’ home, the child was “really angry.” J.H. did not do well following instructions, had a lot of “really, really big fits,” and would bite, scratch and hit. Additionally, J.H. was resistant to affection for the first nine months to a year in the foster home. Little and her husband worked with J.H. to provide consistency in daily life and to help the child gain control of negative emotions. Little interpreted the fits, which could last as long as 45 minutes, as the child’s way of releasing anger. Little testified that over the years, having had more than 100 foster children in her home, she had never witnessed fits and inconsolable demeanor as extreme as that demonstrated by J.H. Then, in late 2011, when

the agency started a permanent plan, the Littles began to prepare J.H. for placement in a foster home interested in adoption. J.H. was very familiar with the family as they were friends of the Littles and often visited. Over time, Little explained J.H.'s needs and discussed in detail how to handle the child's behavior. J.H. had pre-placement visits with the new family and eventually was ready to make the transition in November 2011. Little testified that the new family was providing the consistency, safety and structure J.H. desperately needs, and that J.H. was stable and responding well to the home.

{¶ 17} Karen Bower, guardian ad litem for J.H. since November 2010, testified that she had observed the child in both foster homes and at visitations with both parents. Bower believed J.H. to be well adjusted to the new foster home. Bower noted a "radical improvement" in the child's behavior since she first observed J.H., describing the child as currently normal, lively, happily engaged and developmentally on target. Bower recommended permanent custody to LCCS based on the parents' failure to complete case plan services, their lack of focus on the child, their history of domestic violence, and their lack of stable income or housing.

On March 1, 2012, the trial court filed a highly detailed judgment entry in which it ordered that the parental rights of both parents as to J.H. be terminated and that permanent custody of J.H. be granted to Lucas County Children Services. It is from that judgment that father appeals.

{¶ 18} In support of his sole proposed assignment of error, counsel for father asserts that the trial court's finding of permanent custody was against the manifest weight

of the evidence. In support, counsel states that father was actively attempting to complete his case plan and visited with his child consistently.

{¶ 19} In granting a motion for permanent custody, the trial court must find that one or more of the conditions listed in R.C. 2151.414(E) exist as to each of the child's parents. If, after considering all relevant evidence, the court determines by clear and convincing evidence that one or more of the conditions exists, 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. R.C. 2151.414(B)(1). Further, pursuant to R.C. 2151.414(D), a juvenile court must consider the best interest of the child by examining factors relevant to the case including, but not limited to, those set forth in paragraphs 1-5 of subsection (D). Only if these findings are supported by clear and convincing evidence can a juvenile court terminate the rights of a natural parent and award permanent custody of a child to a children services agency. *In re William S.*, 75 Ohio St.3d 95, 661 N.E.2d 738 (1996). Clear and convincing evidence is that which is sufficient to produce in the mind of the trier of fact 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.

{¶ 20} The trial court found in this case, by clear and convincing evidence, that it was in the best interest of J.H. to grant permanent custody to LCCS and, pursuant to R.C. 2151.414(B)(1)(d), that the child had been in the temporary custody of the agency for 12 or more months of a consecutive 22-month period. Considering factors relevant to the

best interest of the child as set forth in R.C. 2151.414(D)(1)(a) through(e), the trial court found that J.H. had formed positive relationships with both sets of foster parents. The trial court also found that the guardian ad litem and caseworker both recommended permanent custody and that J.H. was in need of a legally secure permanent placement which could only be achieved with an award of permanent custody to LCCS. The trial court further found, pursuant to R.C. 2151.414(B)(1)(a), that J.H. could not and should not be reunified with either parent within a reasonable period of time, and that, pursuant to R.C. 2151.414(E)(1), the parents had not remedied the conditions which caused the removal of the child from the home. The trial court found that father had demonstrated a lack of commitment to providing an adequate permanent home for J.H. In further support of this finding, the trial court found that much of father's testimony was not credible. The court noted that the evidence showed father had violated his child support orders and had failed to pay any child support for J.H.

{¶ 21} Our examination of the record reveals that father showed a lack of effort and commitment to the reunification process. Father did not fully complete his thinking errors group program or sex offender treatment program. He never established suitable, stable housing or stable employment and failed to pay any child support for J.H. At one point in 2010, when father did not have custody of J.H., he took the child to Arkansas without the knowledge or permission of the court.

{¶ 22} Based on all of the foregoing, we find that the trial court's decision granting permanent custody of J.H. to LCCS was supported by clear and convincing evidence. Appointed counsel's sole proposed assignment of error is without merit.

{¶ 23} Accordingly, upon our own independent review of the record, we find no grounds for a meritorious appeal. Appellant's counsel's motion to withdraw is found well-taken and is granted.

{¶ 24} The judgment of the Lucas County Court of Common Pleas, Juvenile Division, is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

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

<p>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.</p>
