[Cite as *In re J.D.*, 2013-Ohio-5176.]

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

In re J.D., O.S.

Court of Appeals No. L-13-1136
L-13-1140

Trial Court No. JC 11217428

DECISION AND JUDGMENT

Decided: November 22, 2013

* * * * *

Laurel A. Kendall, for appellant.

Jeremy G. Young, for appellee.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} This is an *Anders* appeal. Appellant, G.S., the father of minor child O.S., appeals the judgment of the Lucas County Court of Common Pleas, Juvenile Division, which terminated appellant's parental rights, and awarded permanent custody of O.S. to appellee, Lucas County Children Services ("LCCS"). We affirm.

A. Factual and Procedural Background

{¶ 2} Appellant was married to J.S., the mother of O.S. ("mother"). During the pregnancy, mother frequently used heroin. Because of this, and because mother was making allegations of domestic violence, appellant left the state and moved to Oregon. Thereafter, O.S. was born in August 2011. At the time of birth, O.S. tested positive for opiates and showed signs of addiction. LCCS was notified, and it filed a complaint in dependency, neglect, and abuse, and requested an emergency shelter care hearing. At the hearing, the court placed O.S. in the shelter care of J.H. and T.S., cousins of mother. Notably, mother also had an older child, J.D., who was placed in the shelter care of R.S., mother's aunt. Appellant is not the biological father of J.D.

{¶ 3} Mediation was held on October 5, 2011, at which the parties agreed to a finding of neglect as to O.S. and J.D. The children were formally adjudicated neglected on November 4, 2011, and temporary custody of O.S. was awarded to J.H. and T.S. A case plan for all of the parents was created with the goal of reunification, and services were provided to mother. Appellant was not present at the mediation or the subsequent disposition hearing as he was incarcerated in Oregon on an assault conviction. Instead, several of appellant's family members were present, and at the time were instructed to contact Patricia Samson, the ongoing caseworker, to set up the required fingerprinting and criminal background check if they were interested in visiting O.S. None of the family members contacted Samson.

{¶ 4} For a while, mother made progress in her case plan through her participation in Family Drug Court. However, at times mother would relapse. During the time mother was participating in case plan services, appellant contacted LCCS to see if any services were available for him. Samson told appellant that she did not have any services to offer him since he was incarcerated in Portland, Oregon, and since he indicated that he would seek employment in his trade as a commercial fisherman in either Texas or Alaska upon his release.

{¶ 5} In May 2012, appellant was released from jail. He returned to northwest Ohio in July 2012, when a prior civil protection order against him for the protection of mother expired. However, he did not contact Samson, and she was unaware of his location, until January 2013. Appellant explained that he was under the impression that mother was progressing in her case plan services and would be reunited with her children as early as August 2012. Thus, appellant decided to serve time on an outstanding warrant he had in Ohio, believing that he could reconnect with O.S. and J.D. upon his release. Unfortunately, mother was no longer making progress, and in December 2012, mother moved to terminate her participation in Family Drug Court with the understanding that by doing so her chances of reunification with her children would become virtually nonexistent.

{¶ 6} In the interim, LCCS moved for temporary custody of the children in November 2012, with the intent to seek permanent custody. LCCS filed this motion after being notified that the children's current placement could no longer continue. The court

granted the motion and awarded temporary custody of both O.S. and J.D. to LCCS. LCCS placed the children with K.S., a maternal cousin. On February 1, 2013, LCCS moved for permanent custody of the children. K.S. later determined that she could not provide a permanent home for the children, and the children were placed in foster care in March 2013.

{¶ 7} Appellant, upon learning that mother was not compliant with her case plan services, contacted Samson in January 2013 to set up visits with O.S. With limited exceptions, appellant visited O.S. weekly from January 2013 to May 2013.

{¶ 8} Also in January 2013, appellant sought help at Rescue Crisis for treatment of depression, and was referred to Unison for a mental health assessment. The assessment indicated that appellant suffered from Depressive Disorder (not otherwise specified), Intermittent Explosive Disorder, Posttraumatic Stress Disorder, and Bipolar Disorder (not otherwise specified). Appellant was referred for a psychiatric evaluation, but did not complete it. He also was referred to anger management and individual therapy, but Samson testified that when she contacted Unison, she was told that appellant was not in any of the services.

{¶ 9} In addition to the mental health concerns, appellant was arrested on March 31, 2013, and was convicted of two counts of menacing. On April 14, 2013, appellant was again arrested and charged with disorderly conduct. A trial on that charge was scheduled to take place after the hearing on LCCS' motion for permanent custody.

{¶ 10} Shortly before the permanent custody hearing, appellant filed a motion to extend temporary custody. Appellant requested the additional time so that he could complete services and demonstrate that he would be a fit parent for O.S. Appellant also requested that O.S. be placed with a paternal relative while he completed those services.

{¶ 11} On May 28, 2013, the trial court conducted a hearing on LCCS' motion for permanent custody and appellant's motion to extend temporary custody. At the hearing, the court received testimony from Samson, appellant, and Carolyn Kay, the guardian ad litem. Samson and Kay both recommended that it was in the children's best interest for the court to award permanent custody to LCCS. In particular, Samson and Kay testified that the children were doing well in their placement with the foster family, and that after having been moved around so often the children desperately needed stability and permanency. Appellant, for his part, testified that he was getting his life in order, that he found a job in Ottawa County, had a place to live, and had family and friends that could provide a support system. He testified that he has never harmed O.S. in any way, and that he feels he should have an opportunity to be O.S.'s father.

{¶ 12} The day after the hearing, the trial court entered its decision, in which it found by clear and convincing evidence under R.C. 2151.414(B)(1)(a) that the children cannot be placed with either parent within a reasonable time or should not be placed with either parent. Specifically, as it relates to appellant, the court found that he has continuously and repeatedly failed to substantially remedy the conditions causing O.S. to be placed outside the home as stated in R.C. 2151.414(E)(1), has demonstrated a lack of

commitment towards O.S. by failing to regularly support, visit, or communicate with her when able to do so and by not providing adequate housing as stated in R.C. 2151.414(E)(4), and has legally abandoned O.S. by not having contact with her for 90 days as provided in R.C. 2151.414(E)(10). In addition, the court found by clear and convincing evidence under R.C. 2151.414(D) that it is in the best interests of the children to award permanent custody to LCCS. Accordingly, the trial court granted LCCS' motion and awarded it permanent custody of J.D. and O.S.

{¶ 13} Appellant has timely appealed the judgment of the trial court. However, mother and R.D., the father of J.D., have not appealed. Thus, our review will be limited to the trial court's findings as they pertain to appellant and O.S.

B. *Anders* Requirements

{¶ 14} Appointed counsel has filed a brief and requested leave to withdraw as counsel pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Under *Anders*, if, after a conscientious examination of the case, counsel concludes the appeal to be wholly frivolous, he or she should so advise the court and request permission to withdraw. *Id.* at 744. This request must be accompanied by a brief identifying anything in the record that could arguably support the appeal. *Id.* In addition, counsel must provide the appellant with a copy of the brief and request to withdraw, and allow the appellant sufficient time to raise any additional matters through the filing of his or her own appellate brief. *Id.* Once these requirements are satisfied, the appellate court is required to conduct an independent examination of the proceedings below to determine

if the appeal is indeed frivolous. *Id.* If it so finds, the appellate court may grant counsel's request to withdraw, and decide the appeal without violating any constitutional requirements. *Id.*

C. Potential Assignments of Error

{¶ 15} Appointed counsel has proposed two potential assignments of error for our review:

1. The trial court erred in finding that Lucas County Children Services Board had made a reasonable effort to reunify the minor child O.S. with her father, G.S.

2. The trial court erred in awarding permanent custody to Lucas County Children Services Board when there were suitable paternal relatives available to take legal custody of O.S.

{¶ 16} Appellant has not filed a pro se brief in this matter.

II. Analysis

{¶ 17} To terminate parental rights and award permanent custody of a child to a public services agency, the juvenile court must find, by clear and convincing evidence, (1) that one of the enumerated factors in R.C. 2151.414(B)(1)(a)-(d) apply, and (2) that permanent custody is in the best interest of the child. R.C. 2151.414(B)(1). 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. It is more than a preponderance of the evidence, but does not require proof beyond a reasonable doubt. *Id.*

{¶ 18} "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. Lucas No. L-11-1057, 2011-Ohio-4857, ¶ 11, citing *In re Andy-Jones*, 10th Dist. Franklin Nos. 03AP-1167, 03AP-1231, 2004-Ohio-3312, ¶ 28. In conducting a review on manifest weight, the reviewing court "weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 17. We recognize that, as the trier of fact, the trial court 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). Thus, "[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts." *Eastley* at ¶ 21, quoting *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, fn. 3, 461 N.E.2d 1273 (1984).

{¶ 19} Here, the trial court found pursuant to R.C. 2151.414(B)(1)(a) that "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." R.C. 2151.414(E) provides a list of

circumstances which, if any single one is found by clear and convincing evidence, requires the trial court to enter a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent. As it pertains to appellant, the trial court found that R.C. 2151.414(E)(1), (4), and (10) apply.

{¶ 20} In the first potential assignment of error, counsel offers that the trial court erred when it found that LCCS made reasonable efforts to reunify O.S. with appellant. This assignment of error is directed towards R.C. 2151.414(E)(1), which states,

> 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. (Emphasis added.)

{¶ 21} In the present case, when appellant first requested services, he was in jail in Portland, Oregon. Thus, LCCS was unable to provide services to him, but informed him that he could seek services on his own. When appellant returned to northwest Ohio and

made his presence known to LCCS, he obtained a diagnostic assessment from Unison, which he released to Samson. The assessment resulted in referrals for a psychiatric evaluation, anger management, and individual therapy. Therefore, although not directly initiated by LCCS, services were provided to appellant. Samson testified, however, that appellant failed to engage in those services. In addition, appellant was arrested twice in the months before the permanent custody hearing, demonstrating that he was still dealing with his mental health, anger management, and possibly substance abuse issues. Accordingly, we conclude that the trial court's finding that appellant failed to substantially remedy the condition that caused O.S. to be placed outside of her home is not against the manifest weight of the evidence.

{¶ 22} Moreover, the trial court's determination under R.C. 2151.414(B)(1)(a) that O.S. could not be placed with appellant within a reasonable time or should not be placed with appellant is independently supported by the court's findings under R.C. 2151.414(E)(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"), and R.C. 2151.414(E)(10) ("The parent has abandoned the child"). Notably, "a child shall be presumed abandoned when the parents of the child have failed to visit or maintain contact with the child for more than ninety days, regardless of whether the parents resume contact with the child after that period of ninety days." R.C. 2151.011(C).

{¶ 23} Here, despite knowing that mother was pregnant, appellant left Ohio and moved to Oregon. O.S. was born in August 2011. Appellant was released from jail and returned to Ohio in July 2012. However, he did not have any contact with O.S. until January 2013. Therefore, because of appellant's failure to visit or maintain contact with O.S., we hold that the trial court's findings under R.C. 2151.414(E)(4) and (10) are not against the manifest weight of the evidence.

{¶ 24} Accordingly, appellant's first potential assignment of error is not well-taken.

{¶ 25} As the second potential assignment of error, counsel offers that the trial court erred in awarding permanent custody of O.S. to LCCS when there were potentially suitable paternal relatives available. Upon our review, we find that the record does not support this argument.

{¶ 26} Appellant's relatives attended the initial mediation where they were told that they would need to be fingerprinted and complete a criminal background screening if they were interested in even having visitation with O.S. None of the relatives attempted to complete any of the required steps. Moreover, when it became apparent that K.S. would be unable to provide a permanent home for the children, Samson asked appellant if there was anyone he knew that could take the children. He replied that it was short notice and he was unable to provide any names. Therefore, no suitable paternal relatives were identified in the record as being available to care for O.S.

{¶ 27} Accordingly, appellant's second potential assignment of error is not well-taken.

III. Conclusion

{¶ 28} This court, as required under *Anders*, has undertaken our own examination of the record to determine whether any issue of arguable merit is presented for appeal. We have found none. Accordingly, we grant the motion of appellant's counsel to withdraw.

{¶ 29} 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. The clerk is ordered to serve all parties 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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE