[Cite as *In re M.N.*, 2013-Ohio-836.]

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

In re M.N., E.N., B.N.

Court of Appeals Nos. OT-12-002
OT-12-003
OT-12-004
OT-12-016

Trial Court Nos. 20930097
20930098
20930099

DECISION AND JUDGMENT

Decided: March 8, 2013

* * * * *

Stephen D. Long, for appellants.

Mark E. Mulligan, Ottawa County Prosecuting Attorney, and
Emily M. Gerber, Assistant Prosecuting Attorney, for appellee.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} This is an *Anders* appeal. Appellants, J.N. ("mother") and S.N. ("grandmother"), appeal the judgments of the Ottawa County Court of Common Pleas, Juvenile Division, awarding legal custody of children M.N. and E.N. to M.D. ("aunt"), and child B.N. to W.O. ("B.N.'s father"). We affirm.

A. Facts and Procedural Background

{¶ 2} In early 2010, mother consented to findings of dependency with regard to M.N., E.N., and B.N. The children were placed in the temporary custody of aunt, and a case plan was provided to mother with the goal of reunification. In July 2010, the Ottawa County Department of Job and Family Services ("the agency") filed a motion to show cause, alleging that mother missed drug screens, failed to attend AA meetings, and missed a scheduled appointment with her psychiatrist. In October 2010, mother was found in contempt and ordered to serve 30 days in jail, with a purge condition of completing all requested drug screens, regularly attending AA meetings, complying with all H.O.P.E. court orders, and attending all scheduled visitations with the children.

{¶ 3} On November 22, 2010, the agency moved to have legal custody of M.N., E.N., and B.N. awarded to aunt. Subsequently, on January 11, 2011, the agency withdrew its motion for legal custody with regard to B.N., having recently discovered B.N.'s father, W.O. Case plan services were provided to B.N.'s father with the goal of reunification. Grandmother then filed a petition for custody of all three children on January 21, 2011.

{¶ 4} Following a hearing on these motions, the trial court denied grandmother's petition in a judgment entered on April 28, 2011, finding that awarding legal custody to grandmother was not in the best interest of the children. Specifically, the court found that grandmother had minimal contact with the children since 2009, due in part to her own scheduling conflicts. Further, grandmother worked on the island of Put-in-Bay from

April to October, and planned on having a teenager watch the children during these times, or alternatively taking the children with her across the lake. In contrast, aunt has a strong support system and other adults in the home who can provide care for the children. The court was also troubled by grandmother's prior criminal history involving the use of cocaine while driving another grandchild. Finally, the court found that mother consented to legal custody being placed with aunt, who has cared for E.N. and B.N. since December 2009, and M.N. since August 2010. Grandmother appealed this judgment, but we ultimately dismissed her appeal on July 11, 2011, for lack of a final, appealable order.

{¶ 5} In addition to denying grandmother's petition, the trial court also denied the agency's motion for legal custody in favor of aunt. The trial court based its denial on the fact that aunt did not acknowledge her understanding of legal custody pursuant to R.C. 2151.353. The court, however, did extend the order awarding temporary custody of the children to aunt.

{¶ 6} Thereafter, the agency again moved to have legal custody of M.N. and E.N. awarded to aunt. Mother then moved to have the children returned to her, and moved for legal custody of the children. A hearing was held before the trial court on these motions on July 1, 2011, August 2, 2011, and December 23, 2011.

{¶ 7} At the hearing, Amy Marek, a caseworker for the agency, testified that mother had stopped making progress in her completion of the case plan, in that she missed psychiatric appointments and drug screens, and she failed to improve in her

parenting techniques. Marek also testified that the children were doing well in the care of aunt, and that aunt provides the children with needed permanency and stability.

{¶ 8} The agency next called the court appointed special advocate ("C.A.S.A."), Corrine Smith. Over objection that Smith failed to comply with Sup.R. 48, the C.A.S.A. reports were admitted into evidence. In the reports, Smith recommended that custody be awarded to aunt.

{¶ 9} Tom Courtney, mother's counselor, testified next. Over mother's objection based on privilege, Courtney stated that mother had received counseling from him until she was terminated from H.O.P.E. court. He concluded that mother failed to show any progress during those three months of counseling. On cross, however, he admitted that normally it might take six months before he would expect to see progress.

{¶ 10} The agency then called two employees of Joyful Connections, Sheila Powell and Karen Demangos. Some of mother's visits with the children occurred at Joyful Connections, and were observed by Powell and Demangos. Powell testified that mother was frequently inattentive to the children, requiring Powell to intervene when the children engaged in behavior such as standing on chairs or fighting. Powell and Demangos also testified to an incident where M.N. was getting physical with E.N. Because mother did not intervene, a staff member went over and started to walk M.N. away for a "time out." As they were walking past, mother reached out, grabbed M.N., put the child on her lap, and stated that M.N. did not need a time out. Mother was

reminded that she was required to follow staff directives, and that if she did not, the visit would be ended. Mother persisted, so the visit was terminated.

{¶ 11} Cheryl Seigley, the specialized dockets coordinator for the Ottawa County Juvenile Court also testified. Mother objected to Seigley's testimony on the basis that Seigley was biased because she was on mother's treatment team through H.O.P.E. court. Seigley stated that H.O.P.E. court was a voluntary program that sought to reduce the time it took for parents to be reunited with their children. Regarding mother's participation, Seigley testified that mother first received alcohol and drug counseling to maintain her sobriety, then continued with mental health therapy since she was identified as having bipolar disorder. Seigley stated that mother completed stage one of the program after about six months, but that she had difficulty or seemed overwhelmed if she had a list of more than two or three things to do. In addition, Seigley testified that she was concerned by an incident where mother was asked to write an essay, but instead of writing it, mother turned in one written by grandmother. Seigley also expressed her concern over mother's ability to comprehend, noting that although mother was not eligible for services through the Department of Disabilities, she was identified as having a lower ability of functioning. Finally, Seigley stated she was concerned by the fact that mother missed counseling meetings and meetings with her psychiatrist.

{¶ 12} Lastly, the agency called aunt for the purpose of authenticating her signed affidavit of understanding for legal custody in accordance with R.C. 2151.353.

{¶ 13} Mother, in the presentation of her case, first called grandmother as a witness. Grandmother testified that mother was well bonded with the children. She elaborated that mother loved the children and the children loved her, and they would do puzzles together, go to the park, or play together. She testified that mother was currently living with her, and that she would provide support to mother when she needed it. In addition, grandmother also expounded on her previous convictions for possession of cocaine and child endangerment. Grandmother testified that she has had no issues with drugs or alcohol since, and that at no time was she ordered not to be around her grandchildren.

{¶ 14} Next, mother called Larry Kowalski, who testified that mother has a good relationship with her children, and that she acts like a typical mom. He noted that she plays with her children, and the children love being around her.

{¶ 15} Finally, mother testified. Mother described her interactions with her children when she has them for visitation. Mother explained her current work status, that she has seasonal jobs, and that she has applied to four different places looking for work. Mother also testified that she believed she could support the children financially, although she stated on cross-examination that grandmother pays the bills and mother can spend her money how she wants.

{¶ 16} Following the hearing, the trial court entered its January 10, 2012 judgment, denying mother's motion for return of the children, and awarding legal custody

of M.N. and E.N. to aunt. In addition, the trial court granted mother visitation and companionship rights. Temporary custody of B.N. was continued with aunt.

{¶ 17} In February 2012, the agency moved for legal custody of B.N. to be awarded to B.N.'s father. Mother again moved for return of the child and for legal custody. Following a hearing, the trial court entered its judgment on May 14, 2012, awarding legal custody of B.N. to B.N.'s father, and granting visitation and companionship rights to mother.

B. *Anders* Requirements

{¶ 18} 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. *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.*

II. Analysis

A. Mother's Appeal

{¶ 19} Counsel represents both mother and grandmother in this appeal. In mother's brief, counsel proposes seven assignments of error:

1. The trial court's January 10, 2012 Decision and Judgment Entry denying the Motion for Legal Custody of Appellant, J.N. and granting Legal Custody of M.N. and E.N. to a non-related third party was against the manifest weight of evidence.

2. The trial court's May 14, 2012 Decision and Judgment Entry denying the Motion for Legal Custody of B.N. filed by Appellant, J.N., and granting the Agency's Motion for Legal Custody to W.O., the child's father, was against the manifest weight of evidence.

3. The trial court erred in denying Appellant's the [sic] oral Motion to Dismiss the Agency's Motions for Legal Custody.

4. The trial court erred in allowing the CASA reports to be admitted into evidence.

5. The trial court erred in overruling Appellant's objection to the testimony of her counselor.

6. The trial court erred in overruling Appellant's objection to the testimony of Cheryl Seigley, the trial court's employee in charge of the HOPE Court program.

7. The trial court erred in overruling Appellant's Motion to Dismiss/Motion for Directed Verdict.

{¶ 20} Mother has not filed a pro se brief in this matter.

{¶ 21} For ease of discussion, we will address mother's proposed assignments of error out of order.

1. M.N. and E.N.

a. Evidentiary Issues

{¶ 22} The fourth, fifth, and sixth proposed assignments challenge various evidentiary rulings by the trial court. Upon review, we find no merit to these assignments.

{¶ 23} Concerning the fourth proposed assignment, mother objected to the admission of the C.A.S.A. reports at the hearing because Smith failed to comply with Sup.R. 48. However, "[rules of superintendence] are not the equivalent of rules of procedure and have no force equivalent to a statute. They are purely internal housekeeping rules which are of concern to the judges of the several courts but create no rights in individual defendants." *State v. Gettys*, 49 Ohio App.2d 241, 243, 360 N.E.2d 735 (3d Dist.1976). Accordingly, the fourth proposed assignment of error is not well-taken.

{¶ 24} Regarding the fifth proposed assignment, mother objected to the counselor's testimony on the grounds that it was privileged. However, evidence was presented that mother had signed a release, which allowed the counselor to report

mother's progress, treatment, and attendance to the court. Thus, since the counselor only testified to mother's progress, treatment, and attendance, the fifth proposed assignment of error is not well-taken.

{¶ 25} The sixth proposed assignment challenges the admission of Seigley's testimony. Mother objected to Seigley's testimony on the grounds that Seigley was biased through her participation in mother's case at the H.O.P.E. court. Although bias may be explored to impeach the witness under Evid.R. 616(A), it is not grounds for disqualifying a witness. Therefore, the sixth proposed assignment of error is not well-taken.

b. Pre-Hearing Motion to Dismiss

{¶ 26} The third proposed assignment relates to mother's motion, prior to the hearing, to dismiss the agency's motion to award legal custody to aunt. Mother presented three arguments in support. First, mother argued that the agency's motion was jurisdictionally deficient because it did not include an affidavit signed by aunt in accordance with R.C. 2151.353. However, R.C. 2151.353(A)(3) only provides that the proposed legal custodian shall sign a statement of understanding of legal custody in order to be awarded legal custody. It does not require that such a statement be attached to the motion for legal custody. Here, aunt's signed statement was entered into evidence at the hearing. Thus, mother's first argument is without merit.

{¶ 27} Second, mother argued that the trial court lacked jurisdiction over the case because of the pending appeal from the denial of grandmother's petition for legal

custody. However, we dismissed grandmother's appeal on July 11, 2011, well before the trial court entered its judgment awarding legal custody of M.N. and E.N. to aunt on January 10, 2012. Therefore, mother's second argument is without merit.

{¶ 28} Third, mother argued that the motion should be dismissed on the grounds of res judicata because the trial court had already denied a motion from the agency for legal custody to aunt. We disagree. The agency "may at any time file a motion requesting that the court modify or terminate any order of disposition. The court shall hold a hearing upon the motion as if the hearing were *the original dispositional hearing.*" (Emphasis added.) Juv.R. 34(G); *see also* R.C. 2151.353(E)(2). Thus, "[i]nasmuch as the juvenile court is vested with continuing jurisdiction to review and, if necessary, modify its dispositional orders, we conclude that res judicata does not prohibit the litigation of issues relevant to a motion for [legal] custody even though the same or similar issues may have been considered in a prior action falling within the purview of R.C. Chapter 2151." *In re Vaughn*, 4th Dist. No. 00CA692, 2000 WL 33226177, *7 (Dec. 6, 2000), quoting *In re Burkhart*, 12th Dist. No. CA90-07-146, 1991 WL 160086, *4 (Aug. 19, 1991). Therefore, mother's third argument is without merit.

{¶ 29} Accordingly, the third proposed assignment of error is not well-taken.

c. Award of Legal Custody of M.N. and E.N.

{¶ 30} Mother's proposed first and seventh assignments of error are related, and will be addressed together. We initially note that mother's parental rights to her children were not terminated. Nevertheless, where a child has been adjudicated dependent, R.C.

2151.353(A)(3) provides that the trial court may award legal custody of that child to a person other than the child's parents. *In re Sean T.*, 164 Ohio App.3d 218, 2005-Ohio-5739, 841 N.E.2d 838, ¶ 25 (6th Dist.). In order to grant legal custody of a dependent child to a nonparent, the trial court must find, by a preponderance of the evidence, that legal custody is in the child's best interest. *In re Christopher M.*, 6th Dist. No. L-06-1063, 2007-Ohio-1040, ¶ 12. On appeal, we review legal custody determinations for abuse of discretion. *Id.* at ¶ 13. An abuse of discretion connotes that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 31} The seventh proposed assignment questions the trial court's denial of mother's motion to dismiss following the agency's presentation of its case. The trial court denied the motion, finding that it was procedurally inappropriate. Notably, the Juvenile Rules do not specifically contain an equivalent to a Civ.R. 50(A) motion for directed verdict. However, we need not decide whether such a motion is procedurally proper because, assuming it is, sufficient evidence existed to withstand such a motion in this case. The trial court heard testimony that the children were doing well in the care of aunt, and that aunt provided needed structure and stability. The court had the reports from the C.A.S.A. that recommended legal custody be awarded to aunt. Further, the court heard testimony regarding mother's mental health issues and low level of functioning, her financial situation, and her dependence on grandmother. Therefore, the seventh proposed assignment of error is not well-taken.

{¶ 32} For the same reasons, based on our review of all of the evidence, we also cannot say that the trial court abused its discretion in awarding legal custody of M.N. and E.N. to aunt. Accordingly, mother's first assignment of error is not well-taken.

2. Legal Custody of B.N.

{¶ 33} Mother's proposed second assignment of error challenges the trial court's award of custody of B.N. to B.N.'s father. After reviewing the record, we find the trial court's decision did not constitute an abuse of discretion.

{¶ 34} At the hearing, Marek, the agency caseworker, testified that B.N. was very well bonded to B.N.'s father. Marek also testified that B.N.'s father has displayed strong parenting skills, does not have any substance abuse issues, has done everything the agency has requested him to, and even has called the agency and offered to do additional things in order to gain custody of B.N. Marek concluded that she had no concerns with B.N.'s father receiving custody of B.N., and that she absolutely thought that result was in B.N.'s best interest.

{¶ 35} B.N.'s father testified regarding his relationship with B.N. and his desire to obtain legal custody. B.N.'s father also described his current living arrangements with his wife and her seven-year-old daughter, and his 12-year-old daughter who was away for the summer. Further, he described his relationship with his family and the support system that they provide. He also testified that he thought it was important that B.N. remain close with mother and with M.N. and E.N., and that he was willing to work with mother regarding visitation.

{¶ 36} Mother testified that she and B.N. were well bonded. She also testified that she recently began working at McDonalds, making $7.70 an hour. She further stated that she recently became engaged to M.Y., and that the two were planning to get married in June 2012. The agency expressed some concern that M.Y.—who was recently released from serving a five-year prison sentence for passing bad checks, tampering with records, and receiving stolen property—would be left home alone to care for B.N. Mother initially rebuffed this concern, although on cross-examination, she admitted it was possible, if she was at work and grandmother had to leave for a moment, that M.Y. could watch B.N. Mother stated that M.Y. had a good relationship with B.N., and that M.Y. contributed to B.N.'s care. Concerning the living arrangements, mother testified that it was possible grandmother would move out of the residence, and that mother would then be responsible for the $600 monthly rent payment. Mother did not envision any difficulty making the monthly rent payments based on her income.

{¶ 37} Upon review of the testimony presented, we find that significant evidence exists which supports the trial court's conclusion that awarding legal custody of B.N. to B.N.'s father, and not to mother, is in B.N.'s best interest. Therefore, we hold that the trial court did not abuse its discretion. Mother's second assignment of error is not well-taken.

B. Grandmother's Appeal

{¶ 38} Appointed counsel has also filed an *Anders* brief on behalf of grandmother, listing, without explanation, two potential assignments of error:

1. The trial court's May 2, 2011 Decision and Judgment Entry, denying the Motion for Legal Custody of Appellant, S.N., was against the manifest weight of the evidence.

2. Appellant, S.N., was denied the effective assistance of counsel.

{¶ 39} Grandmother has not filed a pro se brief.

1. Denial of Legal Custody

{¶ 40} Regarding grandmother's first proposed assignment of error, we cannot say that the trial court abused its discretion in finding that an award of legal custody to grandmother was not in the children's best interests. The trial court based its conclusion on several factual findings. First, it found that, until recently, grandmother had minimal contact with the children since 2009, due in part to her own scheduling conflicts. Second, it found that grandmother works on the island of Put-in-Bay, and that while working, she plans to have a teenager watch the children, or alternatively take them with her across the lake. In contrast, aunt has a strong support system, including other adults within the home that can watch the children. Finally, the court found that grandmother was convicted in 2006 for possession of cocaine and child endangerment, stemming from an incident where she was under the influence of cocaine while driving a young grandchild. A later search of grandmother's residence revealed cocaine hidden in the grandchild's snowsuit. All of these factual findings were supported by testimony from the hearing. Therefore, we hold that the trial court's denial of grandmother's motion for legal custody did not constitute an abuse of discretion.

{¶ 41} Accordingly, grandmother's first proposed assignment of error is not well-taken.

2. Ineffective Assistance of Counsel

{¶ 42} Grandmother's second proposed assignment asserts that trial counsel was ineffective. To demonstrate ineffective assistance of counsel, appellant must satisfy the two-prong test developed in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That is, appellant must show counsel's performance fell below an objective standard of reasonableness, and a reasonable probability exists that but for counsel's error, the result of the proceedings would have been different. *Id.* at 687-688, 696. Under the first prong, "[j]udicial scrutiny of counsel's performance must be highly deferential. * * * [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance * * *." *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989), quoting *Strickland* at 689. Here, upon our independent review of the record, we do not find that trial counsel's performance fell below an objective standard of reasonableness.

{¶ 43} Accordingly, grandmother's second proposed assignment of error is not well-taken.

III. Conclusion

{¶ 44} 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 appellants' counsel to withdraw.

{¶ 45} The judgment of the Ottawa County Court of Common Pleas, Juvenile Division, is affirmed. Appellants are 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.

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE