

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

In re Al.J., Da.En., Da.E., Li.E.

Court of Appeals No. L-12-1010

Trial Court No. JC 09 196008

DECISION AND JUDGMENT

Decided: April 19, 2013

* * * * *

Stephen D. Long, for appellant.

Dianne L. Keeler, for appellee.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal brought by appellant father (D.E.) from the judgment of the Lucas County Common Pleas Court, Juvenile Division, that awarded legal custody of the minor children: child 1—Al.J. (dob: 03/18/1997), child 2—Da.En. (dob: 01/25/2001), child 3—Da.E. (dob: 02/09/2003), and child 4—Li.E. (dob: 04/09/2008) to the mother

and further awarded appellant Level 1 supervised visitation with the minor children until further order of the court.

Facts and Procedural History

{¶ 2} After a lengthy trial in 2009, the Lucas County Common Pleas Court, Juvenile Division, made an award of permanent custody to the Lucas County Children Services Board in January 2010. The mother, father and minor children each appealed the judgment. On August 13, 2010, this court reversed the judgment of permanent custody and remanded the case for further proceedings consistent with the decision of the court. *In re A.J.*, 6th Dist. No. L-10-1038, 2010-Ohio-4206 (Aug. 13, 2010).

{¶ 3} Following another lengthy trial involving the testimony of numerous witnesses, on November 11, 2011, the juvenile court awarded legal custody to the mother and further awarded appellant Level 1 supervised visitation with the minor children until further order of the court.

{¶ 4} Appellant D.E. father timely filed his notice of appeal and requested that counsel be appointed to represent him. Subsequently, counsel was appointed.

{¶ 5} Appellant's counsel has advised this court that he has reviewed the record and can discern no meritorious claim on appeal.

{¶ 6} 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.*

{¶ 7} In this case, appellant's appointed counsel has satisfied the requirements set forth in *Anders, supra*. This court further notes that appellant D.E. father has not filed a pro se brief or otherwise responded to counsel's request to withdraw. Accordingly, this court shall proceed with an examination of the potential assignments of error set forth by counsel and the entire record below to determine if this appeal lacks merit and is, therefore, wholly frivolous.

{¶ 8} In his brief, appellant's counsel assigns the following possible grounds for appeal: (1) the trial court abused its discretion in awarding appellant only supervised visitation, and (2) appellant was denied due process where the trial court failed to employ an adequate method of preserving the testimony of witnesses at trial, thereby denying him the opportunity of any effective review of the proceedings in the trial court.

{¶ 9} Appellee Lucas County Children Services Board has filed a responsive brief in which it argues that there can be no abuse of discretion in awarding appellant

supervised visitation with his minor children when, as a result of conviction of a sex crime, he is only permitted contact with children under supervision.

{¶ 10} In addition, the appellee admits that it is “extremely unfortunate” that substantial portions of the proceedings below were not recorded and suggests that App.R. 9 is the proper vehicle to correct any deficiencies in the proceedings.

{¶ 11} Having now demonstrated a “conscientious examination of the record,” and having complied with the initial requirements of *Anders*, counsel asserts that he can find no meritorious issues for appeal and urges this court to proceed to the next step of the *Anders* analysis and to conduct “a full examination of all the proceedings to decide whether the case is wholly frivolous.” *Anders*, 386 U.S. at 744, 87 S.Ct. 1396, 18 L.Ed.2d 493.

{¶ 12} If this court finds the case to be wholly frivolous, the court may either, consistent with the federal constitution, “grant counsel’s request to withdraw and dismiss the appeal” or, if state law requires, “proceed to a decision on the merits.” If, on the other hand, this court “finds any of the legal points arguable on their merits, it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.” *Id.*

{¶ 13} Juv.R. 37(A) states:

(A) Record of proceedings

The juvenile court shall make a record of adjudicatory and dispositional proceedings in abuse, neglect, dependent, unruly, and delinquent cases; permanent custody cases; and proceedings before

magistrates. In all other proceedings governed by these rules, a record shall be made upon request of a party or upon motion of the court. The record shall be taken in shorthand, stenotype, or by any other adequate mechanical, electronic, or video recording device.

{¶ 14} It is undisputed that the proceedings before the Juvenile Court involved a dispositional proceeding in a permanent custody case. Therefore, Juv.R. 37(A) required the court to make a record of the proceeding.

{¶ 15} The transcript of the October 25, 2011 hearing notes at page 131 the “recorded proceedings were interrupted and off the record at 1:59 PM and resumed in the middle of the testimony of the Guardian ad litem at 3:25 PM as follows.”

{¶ 16} The testimony of the guardian ad litem would seem to be crucial to any assessment by the trial court in making a determination concerning supervised visitation, which is the issue on appeal before this court. Thus, it appears that the trial court did not comply with the mandate of Juv.R. 37(A) and the record below is not complete.

{¶ 17} Having reviewed the record in its entirety and having found legal points “arguable on their merits,” this court cannot now reach a decision on the merits of the appeal. We, therefore, grant appellant’s counsel’s motion to withdraw and further appoint attorney Omar Shaaban, 1709 Spielbusch Avenue, Suite 106, Toledo, Ohio 43604, to serve as counsel for appellant father and order him to present, in accordance with App.R. 12 and 16(A), an assignment of error on the issue of whether the juvenile court’s procedures violated due process and on any other matter that he might discover in

diligent review of the record on appeal. Wherefore, we give counsel for appellant until May 31, 2013, to file a brief on behalf of appellant and permit appellee until June 17, 2013, to file its responsive brief. Thereafter, the appeal will be submitted to the court.

Motion granted.

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

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:
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