[Cite as *In re C.R.*, 2013-Ohio-5069.]

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

In re C.R., V.R.

Court of Appeals No. L-13-1110

Trial Court No. 12220698

DECISION AND JUDGMENT

Decided: November 15, 2013

* * * * *

Tim A. Dugan, for appellant.

* * * * *

PIETRYKOWSKI, 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 father and appellant, N.O. (mother), and awarded permanent custody of C.R. and V.R. to appellee, Lucas County Children's Services ("LCCS"). For the following reasons we affirm.

{¶ 2} Appellant's appointed counsel has submitted a request to withdraw as counsel pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493

(1967), asserting that there are no meritorious issues for appeal. This court has found that "'the procedures enunciated in *Anders* are applicable to appeals involving the termination of parental rights.'" *In re R.B.*, 6th Dist. Lucas No. L-09-1274, 2010-Ohio-4710, ¶ 1, quoting *Morris v. Lucas Cty. Children Servs. Bd.*, 49 Ohio App.3d 86, 87, 550 N.E.2d 980 (6th Dist.1989).

{¶ 3} In *Anders*, the United States Supreme Court held that where counsel, after a conscientious examination of the case, determines the case to be wholly frivolous, he 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 his client with a copy of the brief and request to withdraw and allow the client sufficient time to raise any matters that she chooses. *Id.* Once these requirements have been satisfied, the appellate court must then conduct an independent examination of the proceedings 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 for appellant has satisfied the requirements set forth in *Anders*, except that he has filed notice with this court that he has been unable to perfect service of his *Anders* brief on mother. Counsel asserts that on September 5, 2013, the same day he filed his brief in this court, he served mother with the

brief via ordinary U.S. mail at the address she provided to the lower court in her June 4, 2013 request to appeal the termination order. Service was returned to counsel with a notice that the post office was unable to deliver to that address and that there was no forwarding address. Counsel states that this was his second attempt to find mother at this address, that since then he has attempted to find a more recent address for her but has been unsuccessful in locating her, that mother has never attempted to contact counsel, and that mother has not contacted the court about a change of address. This court has previously held that such service attempts on the part of appellate counsel comply with the requirements of *Anders*. See *In re Destiny H.K.*, 6th Dist. Williams No. WM-08-021, 2009-Ohio-771, ¶ 6.

{¶ 5} Regarding the merits of the case, counsel asserts that after thoroughly reviewing the record and researching relevant case law, he has been unable to locate any non-frivolous issues for appeal. Counsel for appellant has, however, consistent with *Anders*, asserted three possible assignments of error:

1. LCCS failed to prove reasonable efforts in preventing the continued removal of C.R. and V.R.

2. The Juvenile Court's findings that appellant's children could not be returned to appellant within a reasonable time were not supported by clear and convincing evidence.

3. Appellant received ineffective assistance of counsel.

{¶ 6} Mother has not filed her own brief. Accordingly, we shall proceed to an examination of the potential assignments of error set forth by counsel for appellant and of the entire record below to determine if this appeal lacks merit and is, therefore, wholly frivolous.

{¶ 7} LCCS initially became involved with this family in September 2011, when mother gave birth prematurely to a child, D.F. Both mother and D.F. tested positive for opiates, benzodiazepines, cocaine and marijuana. At that time, mother had three other children, C.R., V.R., and A.F. C.R. and V.R. were fathered by C.R., Sr. ("father"), who is not involved in this appeal. D.F. and A.F. were fathered by W.F., who, during the proceedings below, was successfully reunified with D.F. and A.F. Accordingly, this appeal only addresses issues regarding the termination of mother's parental rights to C.R. and V.R.

{¶ 8} At the time of the referral, C.R. and V.R. were living with father. In December, 2011, however, father was arrested on drug charges, and C.R. and V.R. moved in with appellant and S.V., their maternal grandmother. Following the referral, a safety plan was established to provide the family with services. Under the plan, the children remained with mother but under the supervision of S.V. Mother was referred for a diagnostic assessment, through which she was diagnosed with a mood disorder and opiate and cannabis dependency. She was referred to mental health and substance abuse treatment but was unsuccessful in her attempts to follow an individualized outpatient

treatment plan. She tested positive for cocaine on January 13, 2012. Due to her lack of progress in substance abuse treatment, mother made no progress in mental health treatment.

{¶ 9} On January 18, 2012, LCCS filed a complaint in dependency and neglect and request for emergency shelter care custody of the children. The complaint further alleged that while the family was working to improve conditions in the home, the home did not have heat or hot water. Following an emergency hearing, temporary custody of the children was awarded to LCCS and they were removed from the home. The children were subsequently determined to be dependent and neglected and a case plan was put in place with the goal of reunification. Under the plan, mother was to complete drug treatment and then work on mental health and parenting issues. She was also to secure a legal income and maintain her own stable housing.

{¶ 10} Mother was never successful at addressing her drug dependency issues. Although she entered the Unison drug treatment program twice, she was discharged unsuccessfully on both occasions for her failure to follow through, lack of attendance, failure to attend any sober meetings, and inconsistent attendance in individual therapy. In May 2012, mother was incarcerated and qualified for a program with Compass. In August 2012, however, she was discharged from that program for using drugs while in the program. Mother had also volunteered to attend Drug Court. She appeared one time in March 2012, but then did not appear again until August 2012. Ultimately she was

discharged unsuccessfully from that program as well. Mother was also not compliant in dropping urine screens. A screen she dropped for Unison in December 2012, was positive for cocaine, opiates and benzodiazepines.

{¶ 11} Due to her lack of progress in substance abuse treatment and mental health services, mother never engaged in parenting services. Because she would not provide her case worker with her address or reveal where she was living, the case worker could not confirm if she was maintaining stable housing. She did, however, attend most of the visits with her children, and the LCCS caseworker described mother and the children as very bonded.

{¶ 12} On December 31, 2012, LCCS filed a motion for permanent custody in the court below. Subsequently, V.Q., a relative, filed a motion for legal custody and to intervene in the case. The case proceeded to a hearing on that motion on March 18, 2013, at which mother appeared. In that proceeding, mother's court appointed attorney informed the court that mother would agree to a permanent surrender of the children to V.Q., with the understanding that although there was no guarantee V.Q. could adopt the children, the process would be started. Upon questioning from the court, mother confirmed that was how she wanted to proceed. The court then set the next hearing date for March 22, 2013. On that day, mother failed to appear. Her attorney notified the court that she had just spoken to mother, that mother had forgotten about the hearing, and that mother would try to find a ride. Mother never appeared and the case was set for a pretrial

on April 5, 2013. At that pretrial, mother again failed to appear despite proper notice. Her counsel had no explanation for mother's failure to appear. V.Q., however, did appear and withdrew her motion for legal custody and to intervene.

{¶ 13} On April 30, 2013, the case proceeded to a trial on LCCS's motion for permanent custody. Despite being served with proper notice, mother did not appear for trial. Although she was represented by court appointed counsel, counsel did not call any witnesses on behalf of mother and only cross-examined the guardian ad litem. Counsel informed the court that without her client present, she did not know mother's wishes with regard to the case. She further waived closing argument. At the trial, Pamela Welch, the LCCS caseworker of record, Amber Billmaier, the guardian ad litem, and father testified to the facts as set forth above. In addition, the guardian ad litem testified that the children are bright and articulate and are very bonded with their mother but also stated that they have adjusted well to foster care. Given mother's and father's unresolved substance abuse and housing issues, and the children's need for permanency, the guardian ad litem recommended that permanent custody be awarded to LCCS.

{¶ 14} In a judgment entry of May 30, 2013, the lower court granted LCCS's motion for permanent custody and terminated the parental rights of mother and father. In reaching that determination, the court found that the children cannot and should not be returned to the custody of a parent within a reasonable time and that an award of permanent custody was in the best interests of the children. The court further found that it would be contrary to the welfare of the children to reunify with their family and that the

children had been in the temporary custody of LCCS for 12 or more months of a consecutive 22-month period. These findings were based on clear and convincing evidence that mother was opiate and cannabis dependent and suffered from a mood disorder. Despite a referral for services to address those issues, mother could not remain clean and sober and has not been in compliance with services since February 2012. The court noted that both parents attended a permanency planning conference regarding the children and acknowledged that they had been unsuccessful in resolving the issues that brought the children into care. The court further found that it had been difficult for the LCCS caseworker to have regular contact with mother because she provided phone numbers that did not work and refused to disclose her address. The court concluded that the children had been doing well in foster care and required a permanent plan. Accordingly, the court terminated the parental rights of both parents to C.R. and V.R.

{¶ 15} Because the first and second potential assignments of error are related, they will be discussed together. Appellant's counsel questions whether LCCS made reasonable efforts to prevent the continued removal of the children from their home. The lower court expressly found that LCCS did make reasonable efforts. Counsel further questions whether the lower court's finding that the children could not be returned to the home within a reasonable time was supported by clear and convincing evidence. Both of these issues challenge the weight of the evidence. A trial court's judgment will not be overturned as against the manifest weight of the evidence if the record contains competent credible evidence by which the court could have formed a firm belief or

conviction that the essential statutory elements to terminate parental rights have been established. *In re S.*, 102 Ohio App.3d 338, 344-45, 657 N.E.2d 307 (6th Dist.1995).

{¶ 16} The disposition of a child determined to be dependent, neglected or abused is controlled by R.C. 2151.353 and the court may enter any order of disposition provided for in R.C. 2151.353(A). Before the court can grant permanent custody of a child to a public services agency, however, the court must determine: (1) pursuant to R.C. 2151.414(E) that the child cannot be placed with one of his parents within a reasonable time or should not be placed with a parent; and (2) pursuant to R.C. 2151.414(D), that permanent commitment is in the best interest of the child. R.C. 2151.353(A)(4). R.C. 2151.414(E) provides that, in determining whether a child cannot be placed with a parent within a reasonable time or should not be placed with a parent, the court shall consider all relevant evidence. If, however, the court determines by clear and convincing evidence that any one of the 16 factors listed in the statute exist, the court must find that the child cannot be placed with a parent within a reasonable time or should not be placed with a parent. Those factors include:

> (1) 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.

(2) Chronic mental illness, chronic emotional illness, mental retardation, physical disability, or chemical dependency of the parent that is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year after the court holds the hearing pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code;

* * *

(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[.] R.C. 2151.414(E).

{¶ 17} Clear and convincing evidence is that proof which establishes in the mind of the trier of fact a firm conviction as to the allegations sought to be proven. *Cross v.*

Ledford, 161 Ohio St. 469, 120 N.E.2d 118 (1954). In determining the best interest of the child, R.C. 2151.414(D)(1) directs the court to consider all relevant factors, including, but not limited to:

> (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 services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two month period, or 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 and, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state;
>
> (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.

{¶ 18} We have thoroughly reviewed the record from the proceedings below and conclude that the lower court's findings in support of the factors listed were supported by competent credible evidence. LCCS provided mother with case plan services to address her drug addiction issues, but mother made insufficient progress throughout the history of this case. In a reasonable efforts determination, the issue is not whether the agency could have done more, but whether it did enough to satisfy the reasonableness standard under the statute. *In re Savannah J.,* 6th Dist. Lucas No. L-08-1123, 2008-Ohio-5217, ¶ 40, citing *In re Myers*, 4th Dist. Athens No. 02CA50, 2003-Ohio-2776, ¶ 18. A "reasonable effort" is an "honest, purposeful effort, free of malice and the design to defraud or to seek an unconscionable advantage." *In re Weaver*, 79 Ohio App.3d 59, 63, 606 N.E.2d 1011(12th Dist.1992). The record supports a finding that the agency made reasonable efforts. Mother's failure to make any progress on her addiction problems further supported the court's finding under factor (E)(2). Finally, mother's refusal to provide the caseworker with her address and failure to appear for most of the hearings below supported the court's finding under factor (E)(4).

{¶ 19} The record, therefore, supports the lower court's findings that the children cannot be placed with mother within a reasonable time and should not be placed with mother. The first and second proposed assignments of error are not well taken.

{¶ 20} In his third potential assignment of error, counsel questions whether mother received the effective assistance of counsel in the proceedings below.

{¶ 21} The right to counsel, guaranteed in juvenile proceedings by R.C. 2151.352 and Juv.R. 4, includes the right to the effective assistance of counsel. *In re. Heston,* 129 Ohio App.3d 825, 827, 719 N.E.2d 93 (1st Dist.1998); *Jones v. Lucas Cty. Children Servs. Bd.*, 46 Ohio App.3d 85, 546 N.E.2d 471 (6th Dist.1988). "Where the proceeding contemplates the loss of parents' 'essential' and 'basic' civil rights to raise their children, * * * the test for ineffective assistance of counsel used in criminal cases is equally applicable to actions seeking to force the permanent, involuntary termination of parental custody." *Heston, supra,* at 827. Therefore, in order to prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's performance fell below an objective standard of reasonableness and that prejudice arose from such performance. *State v. Reynolds*, 80 Ohio St.3d 670, 674, 687 N.E.2d 1358 (1998), citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶ 22} The record reveals that appellant was represented by counsel throughout the proceedings below but that appellant failed to appear at most of the hearings and pretrials, and further failed to appear at the trial, despite being duly notified. While appellant's counsel's participation in the trial was minimal, she explained to the court that she was unsure of appellant's wishes. In light of the fact that appellant had appeared at an earlier hearing and supported a plan in which she would voluntarily surrender the children so that they could be placed with V.Q., counsel's explanation is valid. We

further note appellant's lack of cooperation in her own defense. Given these factors, we cannot say that appellant was denied the effective assistance of counsel in the proceedings below, and the third potential assignment of error is not well-taken.

{¶ 23} After conducting an independent review of the record as required by *Anders*, we have found no meritorious grounds for appeal. Appellant's parental rights were terminated in accordance with Ohio's statutory system and due process requirements. Accordingly, 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. 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

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE