

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

In re B.A.

Court of Appeals No. WM-13-005

Trial Court No. 20113037

DECISION AND JUDGMENT

Decided: January 17, 2014

* * * * *

Abigail L. Wurm, for appellant.

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OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Williams County Court of Common Pleas, Juvenile Division, that terminated the parental rights of appellant, J.A., and granted permanent custody of B.A. to the Williams County Department of Job and Family Services (“the agency”). For the following reasons, the judgment of the trial court is affirmed.

{¶ 2} Appointed counsel 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 her brief filed on appellant's behalf, appointed counsel sets forth one proposed assignment of error. In support of her request to withdraw, counsel for appellant states that, after reviewing the record of proceedings in the trial court, she 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, counsel 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 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*. The record reflects that counsel provided appellant with a copy of

the brief and request to withdraw and notified appellant of his right to raise any matters that he might choose within 45 days. Appellant has not provided this court with a separate brief within the specified time. 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} The record reflects that on June 6, 2011, the agency filed a complaint in the trial court alleging that four-year-old B.A., who was currently in her father's custody, was a neglected and dependent child as defined in R.C. 2141.03(b) and (c) and 2141.04(c) and requested emergency custody of the child. The complaint alleged that father was taking several medications that prevented him from staying awake enough to care for the child, that father had told a social worker that he was going to get a lock for the child's bedroom door so she could not get out while he slept, that the child had been in the area since April 2011 and father had not followed through with medical care for suspected diabetes and a thyroid problem, and that the child had several decayed teeth that had not been treated. The trial court granted emergency custody to the agency and a case plan was established for appellant. According to the family's caseworker, the case plan required that father complete parenting classes, obtain and maintain adequate housing, obtain employment or social security disability status, complete substance abuse treatment and maintain sobriety, and seek medical treatment for his various medical conditions.

{¶ 6} An adjudicatory hearing was held on June 29, 2011, and B.A. was found to be a neglected and dependent child. Temporary custody was granted to the agency and case plan documents were approved.

{¶ 7} The only case plan goal which father completed was to see a doctor about a back problem of which he complained. It was determined that father's back injury did not prevent his obtaining employment, but father insisted he was disabled and continued to pursue obtaining social security disability rather than seek employment. Father did not maintain employment or housing during the pendency of this case, was not cooperative with parenting classes and did not complete substance abuse counseling. Eventually, in December 2011, father agreed to be removed from the case plan for lack of progress. He took no affirmative steps after that time to remedy the situation that led to the removal of B.A. from his home.

{¶ 8} On November 29, 2012, the agency filed a motion for permanent custody of B.A. pursuant to R.C. 2151.413. At the permanent custody trial on April 2, 2013, the trial court heard testimony from the agency caseworker, B.A.'s paternal grandmother, and the child's guardian ad litem. Father was represented by counsel but did not appear. The caseworker testified that B.A. had been in the same foster home since removal and that the child's overall condition had improved. B.A. was very happy and well-adjusted and was no longer spitting, biting, using obscenities, or hoarding food as she had been initially. By judgment entry filed April 17, 2013, the trial court granted the agency's motion for permanent custody. The trial court's detailed judgment entry clearly indicates its thorough

consideration of each and every applicable statutory factor, including R.C. 2151.414 (E)(2)-(16). The trial court found that both parents had abandoned the child, neither having had contact with B.A. since 2011, and that B.A. had been in the temporary custody of the agency for 12 or more months of a consecutive 22-month period. The trial court also found that the agency made reasonable efforts to eliminate the continued removal of B.A. from the home and to make it possible for the child to be returned safely home. The trial court concluded, after considering and applying R.C. 2151.414(D)(1)(a-d), that neither parent was an option for a legally secure permanent placement and that it was in B.A.'s best interest to grant permanent custody to the agency.

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

The appellant was deprived of his due process rights because he was not present at the hearing.

{¶ 10} The transcript of the April 2, 2013 hearing on the motion for permanent custody reflects that counsel informed the trial court that he did not have a street address or phone number for appellant. Apparently, whatever limited communication counsel had with appellant took place by way of e-mail, so counsel had no idea as to appellant's actual location at any given time. In response to the trial court's inquiry, counsel stated that he had received an e-mail from appellant on March 29, four days prior to the hearing, in which appellant stated he did not have transportation; this led counsel to request a continuance, which was denied. Prior to that, counsel last heard from appellant on January 18, 2013. It is worth stating again that on December 23, 2011, after failing to

meet any of the requirements, appellant agreed to be removed from his case plan, essentially giving up any realistic opportunity for reunification with his child B.A. The record further reflects that on May 11, 2012, an agency caseworker filed an affidavit attesting that father's "residence and whereabouts" were unknown and could not with reasonable diligence be ascertained. The caseworker further attested that appellant's last known residence was in Van Wert, Ohio, and that the relatives with whom she had spoken did not know appellant's current whereabouts.

{¶ 11} This court has previously addressed the same argument proposed by appellant's attorney. *In re Joseph P.*, 6th Dist. Lucas No. L-02-1385, 2003-Ohio-2217, ¶ 52, states:

We begin by noting that an individual does not have an absolute right to be present in a civil case to which he is a party. *In re Sprague* (1996), 113 Ohio App.3d 274, 276, 680 N.E.2d 1041; *Mancino v. Lakewood* (1987), 36 Ohio App.3d 219, 221, 523 N.E.2d 332. However, we must also note that an individual has a "basic," "fundamental," and "essential" civil right to raise his or her own children. See *Sprague*, 113 Ohio App.3d at 276; *In the Matter of Dylan R.*, 6th Dist. No. L-02-1267, 2003-Ohio-69, at P21. Because of the competing interests involved in proceedings such as these, Ohio courts have applied a balancing test to determine whether a parent's due process rights are violated when the court proceeds with a hearing on a permanent custody motion without the

parent's presence. Specifically, a court should balance the following factors: "(1) the private interest affected, (2) the risk of erroneous deprivation and the probable value of additional safeguards, and (3) the governmental burden of additional procedural safeguards." *Sprague*, 113 Ohio App.3d at 276, citing *Mathews v. Eldridge* (1976), 424 U.S. 319, 335, 47 L.Ed.2d 18, 96 S.Ct. 893. We previously approved of the Ninth District's reasoning in a case construing these factors. According to the Ninth District, a parent's due process rights are not violated when: (1) the parent is represented at the hearing by counsel, (2) a full record of the hearing is made, and (3) any testimony that the parent wishes to present could be presented by deposition. *In the Matter of Leo D., Deandre E., and Desandra E.* (March 15, 2002), Lucas App. No. L-01-1452, 2002-Ohio-1174, citing *In re Robert F.* (Aug. 20, 1997), Summit App. No. 18100, 1997 Ohio App. LEXIS 3746.

{¶ 12} In the instant case, appellant was represented by counsel at the hearing. A full record was made of the proceedings. Any testimony that appellant wished to submit could have been presented by deposition had appellant made himself available to his attorney. Accordingly, we find that appellant's due process rights were not violated when the court proceeded in his absence.

{¶ 13} Based on all of the foregoing, we find that the trial court's decision granting permanent custody of B.A. to appellee Williams County Department of Job and

Family Services is supported by law and is not an abuse of discretion. Appointed counsel's sole proposed assignment of error is without merit.

{¶ 14} 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.

{¶ 15} On consideration whereof, the judgment of the Williams County Court of Common Pleas, Juvenile Division, is affirmed. Costs of this appeal are assessed to appellant 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.

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, P.J.

JUDGE

James D. Jensen, 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>
