

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

In re A.J., D.E. IV, D.E., L.E.

Court of Appeals No. L-12-1010

Trial Court No. JC 09 196008

DECISION AND JUDGMENT

Decided: May 30, 2014

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Amar Shaaban, for appellant.

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JENSEN, J.

{¶ 1} In this matter, appellant-father, “D.E. III”, appeals a judgment by the Lucas County Court of Common Pleas, Juvenile Division. The lower court, in part, awarded appellant Level 1 supervised visitation with his minor children. Counsel for appellant requests leave to withdraw from the case pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). For the reasons that follow, we grant counsel’s request and dismiss the appeal.

Procedural History

{¶ 2} The parties to this action have been litigating the custody of the minor children since 2008. At issue here is the juvenile court's December 13, 2011 decision to (1) award legal custody of the children to the mother; (2) award Level 1, supervised visitation to appellant; and (3) grant protective supervision to the Lucas County Children Services Board ("CSB"). Appellant filed a pro se notice of appeal on January 11, 2011, and requested an attorney. Subsequently, counsel was appointed.

{¶ 3} Appellant's appointed counsel filed a brief pursuant to *Anders*, advising the court that he had reviewed the record and could discern no meritorious claim on appeal. Counsel did, however, raise the issue of the juvenile court's failure to fully preserve the trial testimony. On April 19, 2013, this court noted that a portion of the testimony offered by the guardian ad litem ("GAL") was neither transcribed nor recorded. *In re A.J.*, 6th Dist. Lucas No. L-12-1010, 2013-Ohio-1598, ¶ 15. Accordingly, we found,

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.

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 [a new] attorney * * * 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. *Id.*

{¶ 4} On July 31, 2013, appellant's newly appointed counsel, counsel for CSB, and the GAL filed a Joint Stipulation Correcting the Record. The parties stipulated that the GAL's report, which was already part of the record: (1) adequately reflected the GAL's testimony during the proceedings; (2) accurately supplemented the missing portions of the record; and (3) was a sufficient correction of the record pursuant to App.R. 9. On September 25, 2013, this court adopted the stipulation as a supplemental record, pursuant to App.R. 9(E).

{¶ 5} On August 19, 2013, newly appointed counsel filed a second *Anders* brief.

Law and Analysis

{¶ 6} In *Anders*, the United States Supreme Court set forth the procedure to be followed by appointed counsel who desires to withdraw for want of a meritorious, appealable issue. The court held that if counsel, after a conscientious examination of the case, determines it to be wholly frivolous he should so advise the court and request permission to withdraw. *Anders*, 386 U.S. at 744, 87 S.Ct. 1396, 18 L.Ed.2d 493. 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 it may proceed to a decision on the merits if state law so requires. *Id.* See also *State v. Duncan*, 57 Ohio App.2d 93, 385 N.E.2d 323 (8th Dist.1978).

{¶ 7} Counsel sets forth two potential grounds for appeal:

The trial court abused its discretion in awarding Appellant only supervised visitation.

The trial court did not comply with Juv.R. 37(A) whereby the recording of the Guardian Ad. Litem's testimony was interrupted and thus violating his due process rights by denying and [sic] method of review of the proceedings in question.

{¶ 8} Counsel mailed a copy of the memorandum to appellant and advised him of his right to file his own appellate brief. Appellant has not filed an additional brief or otherwise responded.

{¶ 9} Next, we examine the potential assignments of error and the entire record below to determine if this appeal lacks merit and is, therefore, wholly frivolous. We consider counsel's arguments in reverse order.

{¶ 10} Counsel states that appellant’s due process rights were violated when the juvenile court failed to completely record the GAL’s testimony because the incomplete record precludes full and adequate appellate review.

{¶ 11} “[W]hen a juvenile court fails to comply with the recording requirements of Juv.R. 37(A) and an appellant attempts *but is unable to submit an App.R. 9(C) statement to correct or supplement the record*, the matter must be remanded to the juvenile court for a rehearing.” (Emphasis supplied.) *In re B.E.*, 102 Ohio St.3d 388, 2004-Ohio-3361, 811 N.E.2d 76, ¶ 16. Here, of course, appellant was able to supplement the record, and the parties agree that the GAL’s report accurately reflects her testimony. It bears noting that the GAL’s report is twenty-three pages in length. The parties’ stipulation is now part of the record. Therefore, the absence of a complete transcript of the GAL’s testimony, while not optimal, did not prevent full and adequate appellate review. We find that appellant’s due process rights were not violated. Appellant’s second proposed assignment of error is not well-taken.

{¶ 12} Appellant’s counsel also argues that the trial court abused its discretion in limiting appellant to Level 1 supervised visitation. We find that the issue is moot.

{¶ 13} While the appeal in the instant case was pending, CSB filed a complaint for permanent custody on November 1, 2012. A lengthy trial was held, and on May 14, 2013, the juvenile court awarded permanent custody of the children to CSB. On February 4, 2014, this court affirmed the termination of appellant’s parental rights, as well as the mother’s parental rights. *In re A.J.*, 6th Dist. Lucas No. L-13-1118, 2014-

Ohio-421, ¶ 72. Therefore, based upon the award of permanent custody to CSB, his argument in this case, regarding limited visitation, is moot. Appellant no longer has any visitation rights, limited or otherwise. *In re Egbert Children*, 99 Ohio App.3d 492, 496, 651 N.E.2d 38 (12th Dist.1994) (Mother's claim, that juvenile court erred in failing to place children in long-term foster care, is rendered moot by decision that lower court did not err in awarding permanent custody to CSB). Appellant's first proposed assignment of error is not well-taken.

{¶ 14} This court, as required under *Anders*, has undertaken its own independent examination of the record to determine whether any issue of arguable merit is presented for appeal. We have found none. Accordingly, we find this appeal is without merit and wholly frivolous. We grant counsel's motion to withdraw and affirm the judgment of the Lucas County Court of Common Pleas, Juvenile Division.

{¶ 15} Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

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

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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