[Cite as *In re H.R.*, 2014-Ohio-635.]

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

In re H.R.

Court of Appeals Nos. WM-13-008
WM-13-009

Trial Court No. 20123006

DECISION AND JUDGMENT

Decided: February 21, 2014

* * * * *

Ryan S. Thompson, for appellant K.P.

William J. Brenner, for appellant D.R.

Russell R. Herman, Special Prosecuting Attorney, for appellee.

* * * * *

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 K.P., mother of H.R., and appellant D.R., the child's father, and granted permanent custody of

H.R. 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} Mother and father have filed separate appeals but their cases have been consolidated. Their respective assignments of error will be addressed separately following our discussion of the factual and procedural background of this matter.

{¶ 3} Appointed counsel for mother 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 his brief filed on appellant mother's behalf, appointed counsel sets forth two proposed assignments of error. In support of his request to withdraw, counsel for mother states that, after reviewing the record of proceedings in the trial court, he was unable to identify any appealable issues.

{¶ 4} *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*.

{¶ 5} In the case before us, appointed counsel has satisfied the requirements set forth in *Anders, supra*. The record reflects that counsel provided appellant mother with a copy of the brief and request to withdraw and notified appellant of her right to raise any matters that she 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 assignments of error proposed by counsel for appellant mother and the record from below in order to determine if this appeal lacks merit and is, therefore, wholly frivolous.

{¶ 6} The record reflects that appellants' child, H.R., was born in November 2011. On February 1, 2012, the agency filed for an ex parte removal of H.R. due to a domestic violence and abuse situation between H.R.'s parents while H.R. was present. At the emergency hearing held the following day appellant mother appeared and consented to a grant of emergency temporary custody to the agency and placement of H.R. in foster care. Father did not appear at the hearing. On that same date, the agency filed a complaint alleging H.R. to be a dependent child. On March 9, 2012, H.R. was adjudicated dependent; both mother and father consented. Temporary custody of H.R. was continued with the agency.

{¶ 7} A case plan was developed by the agency and adopted by the court to remedy the problems that initially caused H.R. to be placed outside the home. The case plan required both parents to complete parenting classes, obtain and maintain adequate housing and stable employment, attend mental health counseling and take all other necessary steps to meet H.R.'s needs. On May 24, 2013, due to both parents' failure to successfully complete any of the requirements of their case plan, the agency filed a motion for permanent custody. The motion was set for hearing on September 17 and 23, 2013. Father appeared on the first day with counsel but failed to appear for the second day due to his incarceration. Father's counsel appeared at all proceedings. Mother failed to appear on either day, although her appointed counsel was present at all proceedings. The trial court heard testimony from the agency's caseworker, H.R.'s foster mother and appellant father.

{¶ 8} Tiffany Kime, the family's caseworker, testified that she began working with appellants and H.R. in March 2012 when H.R. was four months old. At that time, father was living with a girlfriend and mother was living in a trailer owned by her parents until she was evicted that April. Kime spoke to father's parents regarding possible temporary placement for H.R. but the grandparents were not interested, stating they would rather see the child remain in the current foster home with a sibling who had been removed from appellants' custody by Defiance County Juvenile Court. In April, mother told Kime that she was pregnant with appellant father's child. That month, the agency arranged supervised visitations with H.R. and H.R.'s sibling.

{¶ 9} Kime testified as to the agency's case plan goals, which included physical and financial stability, parenting classes and mental health counseling. Appellants were assigned a parent aid who worked with them on parenting and budgeting issues. Appellants' participation in the parenting classes varied, with periods of compliance alternating with periods of several weeks without any contact with their parent aide. The parenting classes were never completed and neither parent had contact with the parent aide after January 2013. Both parents had problems maintaining employment. Kime was aware of mother briefly having two jobs during her involvement with the agency. The agency was able to confirm five jobs held by father from March 2012 through April 2013. During that time, appellants applied for public assistance

{¶ 10} Neither parent completed mental health counseling. Father refused to sign the original case plan because he did not want to comply with the requirement that he attend counseling. Father eventually complied with counseling beginning November 2012 but was discharged from the program unsuccessfully in May 2013. Ultimately, neither parent completed the mental health counseling. As to housing, Kime reviewed appellants' various housing arrangements, which included multiple moves, evictions and instances of utilities being shut off for nonpayment. In October 2012, mother reported to Kime that father had been physically abusing her. Mother stated that she was going to end her relationship with father, but five days later she was again living with him.

{¶ 11} By January 2013, both parents began to miss visitations. Following an annual review hearing in February 2013, the agency decided to allow home visits. After

one home visit, the agency learned that the police had answered a domestic violence call to the home, so the visits were once again scheduled to take place at the agency. By March, it appeared that father was working but appellants were two months behind on rent and utilities.

{¶ 12} Kime stated that her most recent contact with mother was in mid-March 2013, when mother picked up H.R. for a home visit. Kime testified that mother had no contact with either her or the agency since March 22, 2013, when mother called to cancel a visit. To the best of Kime's knowledge, mother had no contact with H.R. after the March visit. After that, father picked up H.R. for one visit and said that mother was waiting at home. By April 19, father reported that mother had moved, taking with her the couple's newborn child. Kime unsuccessfully attempted to contact mother through her father and stepmother, who reported having no contact with her. By the end of April, father reported to Kime that he was moving to Michigan. Kime's attempt to contact mother's biological mother with regard to placement was unsuccessful. An attempt to investigate possible placement with another of mother's relatives in Michigan was rejected by the relative.

{¶ 13} Kime believed that mother was currently living in Jackson, Michigan, although that information was not confirmed by mother. Kime's most recent contact with father was at the end of May 2013, when father told her during a phone conversation that he had moved. Father refused to give her an address but Kime later learned that father was also living in Jackson, Michigan. Father was told at that time that he would be

removed from the case plan if the agency could not locate him. By the end of May 2013, both parents were taken off the case plan.

{¶ 14} Shortly thereafter, the agency learned of an address through the Jackson County Human Services when appellants applied for assistance. Kime traveled to Jackson, Michigan, in July 2013 in order to serve mother with papers with regard to a court hearing. However, Kime was told by another individual living at the address that appellants were no longer there.

{¶ 15} Kime testified that H.R.'s foster parents have adopted the child's older sibling. Through home visits, Kime has observed a close bond between H.R. and her sibling as well as between H.R. and her foster parents. Kime believes that H.R. is happy and well-adjusted and is meeting her developmental milestones. The foster parents indicated they wished to adopt H.R. if the agency were to receive permanent custody.

{¶ 16} Kime concluded by stating she believes an award of permanent custody is in H.R.'s best interest.

{¶ 17} M.W., H.R.'s foster mother since the child was three months of age, testified that she and her husband love H.R. and hope to adopt if the agency is granted permanent custody. M.W. testified as to H.R.'s strong emotional bond with H.R.'s older sibling and the two other children in the home.

{¶ 18} Appellant father testified as to his relationship with H.R. and his current living situation in Michigan. Father stated that he was currently attending a three-month program at Premier Medical Academy in Jackson, Michigan, so that he could be certified

"in the medical field." He was not able to specify the exact certification or diploma he would have upon completion of his course of study, but stated that he would be able to perform various medical procedures and would be "one step below an R.N.," with an earning potential in the range of $50,000 to $70,000 annually if he worked 50-80 hours per week. Father testified that in addition to H.R., he has five other children, all under the age of three, with four different mothers and has been ordered to pay child support for all of them. He does not have custody of any of the children and has permanently lost his parental rights as to at least two of them. Father admitted he has not seen H.R. for "a little bit" but was not able to state the exact date of their last visit. He admitted not seeing H.R. in July, August or September, but could not remember whether he had seen the child in June. He said he inquired about having the custody case transferred to Michigan and was told it was a long process. Father said mother decided not to attend the hearing because she would be subject to arrest on a warrant, which would take her away from her youngest child.

{¶ 19} The child's guardian ad litem recommended that permanent custody be awarded to the agency. In her report submitted to the trial court, the GAL stated that it was apparent that the parents did not have any desire to work toward reunification based on their move to Michigan and their failure to communicate with the agency or their child. The guardian noted that both parents had been removed from their case plan in early 2013 because they moved from Ohio and that the agency was not able to locate them.

{¶ 20} On October 2, 2013, the trial court issued its judgment entry granting the agency's motion for permanent custody of H.R. 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 noted at the outset that notice of the hearing was properly served on all parties, although the mother failed to appear. The trial court found that, despite the efforts of the case workers, neither parent successfully completed the case plan goals. Father has paid only irregular child support for any of his six children and is currently $15,000 in arrears. The trial court found that both parents have shown a lack of commitment to H.R., that neither has provided financial support for the child in more than a year, that father introduced no evidence to support his claim that he would be earning $20 per hour and working 80 hours per week once he completes his program, and that the evidence is such that neither parent would likely be in a position to provide for H.R.'s needs in the near future. The trial court found that appellants left the state of Ohio without notice and without providing the agency with contact information and that the absence of any contact with the child since April 2013 for mother and May 2013 for father clearly demonstrated an intent to abandon H.R. The trial court also found that the parties previously had a child involuntarily removed by the Defiance County Juvenile Court in July 2012. Further, the trial court found that H.R. had been in the custody of the agency for approximately 16 months of a consecutive 22-month period at the time the motion for permanent custody was filed on May 24, 2013.

{¶ 21} As to H.R.'s best interest, 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 H.R.'s best interest to grant permanent custody to the agency.

Mother's Appeal

{¶ 22} Counsel for mother sets forth the following proposed assignments of error:

I. The Appellant was denied effective assistance of counsel.

II. The Appellant was deprived of her due process rights because she was not present at the hearing.

{¶ 23} As to counsel's first proposed assignment of error, it is well-established that claims of ineffective assistance of counsel are reviewed under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prove ineffective assistance of counsel, appellant must demonstrate both that the performance of trial counsel was defective and that, but for that defect, the outcome would have been different. *Id*. at 687. Applying *Strickland* to the instant case, we are unable to find that trial counsel was ineffective in any respect. Accordingly, appointed counsel's first proposed assignment of error is not well-taken.

{¶ 24} As to appointed counsel's second proposed assignment of error, we note that the trial court found that mother had been properly served with notice of the hearing. Father testified that mother did not want to attend because she feared being arrested on an outstanding warrant. An individual does not have an absolute right to be present in a

civil case to which she is a party. Further, a parent's due process rights are not violated when the parent is represented at the hearing by counsel, a full record of the hearing is made, and any testimony that the parent wishes to present could be presented by deposition. *In re Joseph P.*, 6th Dist. Lucas No. L-02-1385, 2003-Ohio-2217, ¶ 52. (Citations omitted.)

{¶ 25} In the instant case, mother was represented by counsel at the hearing. A full record was made of the proceedings. Any testimony that mother wished to submit could have been presented by deposition had she made herself available to her attorney. Accordingly, we find that mother's due process rights were not violated when the court proceeded in her absence. Appointed counsel's second proposed assignment of error is without merit.

Father's Appeal

{¶ 26} Appellant father sets forth the following assignments of error:

1. Failure to grant continuance to father was reversible error.

2. Failure to consider granting custody to a family member was reversal [sic] error.

3. The Judgment was against the weight of evidence.

{¶ 27} As to appellant father's first assignment of error, we refer to our discussion of mother's proposed assignment of error regarding her failure to attend the hearing and the applicable law. A trial court has discretion to decide whether to proceed with a permanent custody hearing absent an incarcerated parent. *State ex rel. Vanderlaan v.*

Pollex, 96 Ohio App.3d 235, 236, 644 N.E.2d 1073 (6th Dist.1994). *See also In re Joseph P., supra*. Here, father attended the first day of the hearing and testified at length; on the second day, he was incarcerated. Father was represented by counsel at all stages of the proceedings. Accordingly, we find that the trial court's decision to deny appellant father's request for a continuance was not an abuse of discretion. Appellant's first assignment of error is not well-taken.

{¶ 28} In support of his second assignment of error, appellant asserts that the trial court failed to consider placing H.R. with a suitable relative. To the contrary, the trial court heard testimony, as summarized above, that the caseworker contacted several of the grandparents with regard to possible placement. The record reflects that none of the grandparents wished to pursue custody. The trial court addressed this issue in its judgment entry, noting that none of the grandparents had an interest in seeking custody and none had asked to be made part of the case plan. This assignment of error is not well-taken.

{¶ 29} As his third assignment of error, appellant asserts that the trial court's decision was against the weight of the evidence.

{¶ 30} In granting a motion for permanent custody, the trial court must find that one or more of the conditions listed in R.C. 2151.414(E) exist as to each of the child's parents. If, after considering all relevant evidence, the court determines by clear and convincing evidence that one or more of the conditions exists, the court shall enter a finding that the child cannot be placed with either parent within a reasonable time or

should not be placed with either parent. R.C. 2151.414(B)(1). Further, pursuant to paragraphs 1-5 of R.C. 2151.414(D), a juvenile court must consider the best interest of the child by examining factors relevant to the case including, but not limited to, those set forth in subsection (D). Only if those findings are supported by clear and convincing evidence can a juvenile court terminate the rights of a natural parent and award permanent custody of a child to a children services agency. *In re William S.*, 75 Ohio St.3d 95, 661 N.E.2d 738 (1996). Clear and convincing evidence is that which is sufficient to produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶ 31} Here, the trial court found, by clear and convincing evidence as set forth in detail above, that H.R. was abandoned, that the child could not be placed with either parent within a reasonable time or should not be placed with either parent, and that it was in the best interest of H.R. to grant permanent custody to the agency. Additionally, our examination of the record reveals that appellant father showed a lack of effort and commitment to the reunification process, which was glaringly apparent by his abandonment of both his case plan and his child as described above.

{¶ 32} Based on all of the foregoing, we find that the trial court's decision granting permanent custody of H.R. to the Williams County Department of Job and Family Services was supported by clear and convincing evidence. Appellant father's third assignment of error is not well-taken.

{¶ 33} As to mother's appeal, upon our own independent review of the record, we find no grounds for a meritorious appeal. Appellant mother's counsel's motion to withdraw is found well-taken and is granted.

{¶ 34} On consideration whereof, the judgment of the Williams County Court of Common Pleas, Juvenile Division, is affirmed. Costs of this appeal are assessed equally to appellants K.P. and D.R. 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