

[Cite as *In re J.H.*, 2017-Ohio-940.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105055

**IN RE: J.H.
A Minor Child**

[Appeal by L.W., Mother]

**JUDGMENT:
DISMISSED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. AD 14911147

BEFORE: Blackmon, J., Keough, A.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: March 16, 2017

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PATRICIA A. BLACKMON, J.:

{¶1} L.W. (referred to herein as “Appellant”), the mother of J.H., filed an appeal from the juvenile court order awarding permanent custody of J.H. to the Cuyahoga County Department of Children and Family Services (“CCDCFS”). Appellant’s counsel has filed a motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), asserting that following an examination of the record, including evidence that Appellant has also lost permanent custody of two of her other children, there are no meritorious grounds for appeal. After holding the motion in abeyance to give Appellant an opportunity to file a pro se brief, and following our own independent review, this court grants appointed counsel’s motion to withdraw, and we dismiss the appeal.

Factual and Procedural History

{¶2} On August 29, 2014, several days after J.H. was born, CCDCFS filed a complaint alleging that J.H. is a dependent child and asking the court to award temporary custody to the maternal grandmother. In relevant part, CCDCFS alleged that Appellant has substance abuse problems, mental health issues, six of her other children are not in her care, one is in the legal custody of a family friend, and CCDCFS obtained permanent custody of two other children.

{¶3} The trial court awarded temporary custody of the child to the maternal grandmother. CCDCFS subsequently implemented a case plan requiring Appellant to

complete drug, alcohol, and mental health treatment, undergo random drug screens, and maintain appropriate housing. A guardian ad litem (“GAL”) was appointed for the child.

{¶4} Following a hearing on November 5, 2014, the trial court determined that J.H. is a dependent child after the parties stipulated that:

1. [Appellant] has a history of substance abuse and is currently enrolled in substance abuse treatment. [Appellant] has previously been referred for multiple drug treatment programs.
2. [Appellant] is diagnosed with depression and is in need of ongoing mental health services in order to provide adequate care for the child.

* * *

4. [Appellant] has six other children that are not in her care due to substance abuse. Three of the children are in the care of the maternal grandmother. One child is in the legal custody of a family friend. CCDCFS obtained permanent custody of two other children.

* * *

5. Alleged father * * * is in the process of establishing paternity and has visited the children.

{¶5} On February 5, 2016, following two extensions of temporary custody, CCDCFS filed a motion to modify the temporary custody award to permanent custody.

In relevant part, CCDCFS alleged:

7. [Appellant] has failed to complete substance abuse treatment, and has failed to consistently provide drug screens. [Appellant] also has six other children who are no longer in her care. [Appellant’s] rights were terminated with respect to six other children.

8. * * * [F]ather established paternity and completed drug screening but does not have separate, suitable housing to provide for the care of the child.

{¶6} Three months later, on May 27, 2016, father moved for legal custody of J.H.

On August 17, 2016, the GAL submitted a report that provided, in relevant part, as follows:

[Appellant] completed treatment during December 2015. [Appellant] is currently in aftercare. * * * [Appellant's] last urine screen was negative on 2/11/16. [Appellant's] last hair follicle screen, during September of 2015, was positive for PCP. [Appellant] continues to refuse to provide other hair follicle specimens for the current social worker[.] * * * [Appellant] restarted being compliant on her mental health treatment in January 2016. [Appellant] is currently housed with father. Both parents attend inconsistent visitation with [J.H.].

As of the date of this report, J.H. is successfully residing with his maternal grandmother, and is receiving day care services in Cleveland. As of the date of this report, J.H. * * * sees his parents irregularly while at placement, so bonding with and attachment to parents is tenuous.

{¶7} The GAL opined that legal custody be awarded to the maternal grandmother, or alternatively, to CCDCFS.

{¶8} The matter proceeded to an evidentiary hearing on August 17, 2016. At the start of the hearing, CCDCFS informed the court that father was no longer residing with Appellant and had moved in with his mother, and that “[Appellant] contacted the Agency and reported that father had domestically assaulted her. The Agency is still in the process of procuring police records from that alleged incident.”

{¶9} The social workers established that Appellant has seven children. Four of the children, including J.H., live with the maternal grandmother. CCDCFS was awarded

permanent custody of two of the children. According to the social workers, the maternal grandmother wants to adopt J.H., and that is why CCDCFS is seeking permanent custody of him.

{¶10} The social workers established that Appellant has a 22-year history of drug abuse. She had a positive urine screen in October 2012, January 2013 and February 2013. Appellant did not appear for urine screens in July 2016, provided a urine sample in August 2016, but refused to submit a hair sample. Appellant did not appear for 15 of 22 scheduled psychotherapy appointments. She also missed three of five drug-related appointments. Appellant admitted to the social workers that she had not seen J.H. in “a while,” but she attributed that to difficulties with the maternal grandmother and lack of transportation. Within the two weeks before trial, Appellant advised CCDCFS that father committed domestic violence against her. CCDCFS had no records substantiating this claim, however.

{¶11} The social workers also testified that father was not considered an appropriate caretaker because he was still in a relationship with Appellant and “[Appellant] was still engaged in substance abuse, and there was a barrier between dad and [Appellant] and prohibited him from getting [J.H].” Father is employed and provided CCDCFS with his address but was not home at the scheduled time of a home visit. He had a negative urine drug screen, but did not provide a hair sample, which, though not a formal requirement of his case plan, was requested in order for him to be considered an appropriate placement.

{¶12} The GAL testified that she recommends permanent custody be awarded to CCDCFS due to Appellant's lack of recovery and father's two-year delay in demonstrating that he can adequately care for J.H.

{¶13} On September 14, 2016, the court granted CCDCFS permanent custody of J.H. and stated on the record:

[T]he Court finds by clear and convincing evidence that it is in the best interest of the child to grant permanent custody to the agency * * *. The maternal grandmother wants to adopt the child. * * * The child is living with his siblings.

The [GAL] recommends permanent custody as being in the child's best interest. * * * [H]er recommendation is based on the length of time the child has been in custody.

The father knew how the mother was doing because he lived with her. And his failure to pursue custody himself until almost two years or 18 months after removal is too late.

* * * The parents have shown a lack of commitment. * * * [Appellant] has had parental rights involuntarily terminated with respect to a sibling of the child * * * [and] has failed to provide clear and convincing evidence [to show] she can provide a legally secure placement and adequate care for the health, welfare and safety of the child.

[Appellant] has seven children. Two of them have been placed in the permanent custody of the Agency. [Appellant] has not complied with any case plan services and has not remedied the conditions causing removal.

[Appellant's] address is unknown.

The Agency made a referral for domestic violence services after [Appellant] reported that the dad was physically abusive to her the week before trial.

[Appellant] does not support the father's request for legal custody.

{¶14} Appellant filed a timely notice of appeal from this ruling but her appointed counsel subsequently filed a motion to withdraw pursuant to *Anders*.¹ This court held

¹Father also appealed from the trial court's order. See *In re J.H.*, 8th Dist. Cuyahoga No. 105078.

the motion in abeyance pending the possible filing of a pro se brief of Appellant, and pending our own independent review of the record.²

Anders Standard and Potential Issues for Review

{¶15} In *Anders*, the United States Supreme Court held that if appointed counsel, after a conscientious examination of the case, determines the appeal to be wholly frivolous, he or she should advise the court of that fact 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.* Further, counsel must also furnish the client with a copy of the brief and allow the client sufficient time to file his or her own brief. *Id.*

{¶16} Once the appellant's counsel satisfies these requirements, this court must fully examine the proceedings below to determine if any arguably meritorious issues exist. *Id.*; Loc.App.R. 16(C). If we determine that the appeal is wholly frivolous, we may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements, or we may proceed to a decision on the merits if state law so requires. *Anders*; Loc.App.R. 16(C).

{¶17} In this case, appointed counsel has not set forth potential assignments of error, but instead set forth a detailed analysis of the record and the controlling case law and asserts:

²Appellant did not file a pro se brief herein.

[Appellant] has freely admitted she was not visiting J.H. * * * [She has] seven children. Every single one of those children has been removed from [her] care due to her mental health and substance abuse issues. [Two children] have been placed in permanent custody of CCDCFS. * * *.

The plan to grant permanent custody to the Agency and to have the maternal grandmother adopt J.H. is also supported by [the GAL and] is in the best interests of J.H.

{¶18} Although *Anders* arose in a criminal context, this court approved the application of the *Anders* procedure to an appeal from the juvenile court's denial of a motion for legal custody in *In re T.E.*, 8th Dist. Cuyahoga No. 10428, 2016-Ohio-5935. Other courts throughout the state have also determined that *Anders* is appropriate in appeals involving the termination of parental rights. See *In re S.G.*, 2d Dist. Greene No. 2010-Ohio-2641; *In re D.M.*, 4th Dist. Hocking No. 14CA22, 2016-Ohio-1450; *In re J.K.*, 4th Dist. Athens No. 09CA20, 2009-Ohio-5391; *In re B.F.*, 5th Dist. Licking No. 2009-CA-007, 2009-Ohio-2978; *In re T.S.*, 6th Dist. Lucas No. L-15-1158, 2015-Ohio-4885; *In re C.*, 7th Dist. Belmont No. 97 BA 5, 1999 Ohio App. LEXIS 1193 (Mar. 23, 1999); *In re K.D.*, 9th Dist. Wayne No. 06CA27, 2006-Ohio-4730; *Morris v. Lucas Cty. Children Servs. Bd.*, 49 Ohio App.3d 86, 86-87, 550 N.E.2d 980 (6th Dist. 1989); *In re G.K.*, 12th Dist. Preble Nos. CA2015-01-006 and CA2015-02-007, 2015-Ohio-2581. But see *In re J.M.*, 1st Dist. Hamilton No. C-130643, 2013-Ohio-5896, ¶19 (reaching a contrary conclusion).

Independent Review

{¶19} “An appellate court will not reverse a juvenile court's termination of parental rights and award of permanent custody to an agency if the judgment is supported

by clear and convincing evidence.” *In re N.B.*, 8th Dist. Cuyahoga No. 101390, 2015-Ohio-314, ¶ 48; *In re M.J.*, 8th Dist. Cuyahoga No. 100071, 2013-Ohio-5440, ¶ 24.

“Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established.” *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118 (1954). A reviewing court is required to examine the record to determine whether the trier of fact had sufficient evidence to satisfy the clear and convincing standard. *In re T.S.*, 8th Dist. Cuyahoga No. 92816, 2009-Ohio-5496, ¶ 24.

{¶20} In order to terminate parental rights and grant permanent custody to CCDCFS, the court must apply the two-prong test set forth in R.C. 2151.414. First, the court must find by clear and convincing evidence, that it is in the best interest of the child to grant permanent custody to the agency, and one of the factors listed in R.C. 2151.414(B)(1) has been met. The factors for the first prong of consideration under R.C. 2151.414(B)(1) include the following: (a) the child cannot be placed with either parent within a reasonable period of time or should not be placed with either parent; (b) the child is abandoned; (c) the child is orphaned and no relatives are able to take permanent custody of the child; or (d) the child has been in the temporary custody of one or more public or private children services agencies for 12 or more months of a consecutive 22-month period. Second, the court must determine by clear and convincing evidence, that permanent custody is in the best interest of the child in accordance with the factors listed in R.C. 2151.414(B)(2), including that “the child cannot be placed with one

of the child's parents within a reasonable time or should not be placed with either parent.”

In re J.M., 8th Dist. Cuyahoga No. 104030, 2016-Ohio-7307. These factors include:

(1) Following the placement of the child outside the 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 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.

* * *

(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;

* * *

(11) The parent has had parental rights involuntarily terminated with respect to a sibling of the child pursuant to this section or section 2151.353 or 2151.415 of the Revised Code, or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to those sections, and the parent has failed to provide clear and convincing evidence to prove that, notwithstanding the prior termination, the parent can provide a legally secure permanent placement and adequate care for the health, welfare, and safety of the child.

* * *

(16) Any other factor the court considers relevant.

{¶21} The existence of one factor alone will support a finding that a child cannot be reunified with the parents within a reasonable time. *See In re William S.*, 75 Ohio

St.3d 95, 99, 1996-Ohio-182, 661 N.E.2d 738; *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, 862 N.E.2d 816, ¶ 50.

{¶22} In this case, with regard to the first prong of the two-prong test, the trial court found by clear and convincing evidence that J.H. had been in temporary custody for approximately 24 months preceding the hearing. The court also determined that J.H. cannot be placed with either parent within a reasonable time or should not be placed with the parents. The record supports the court's determination. In this case, it is undisputed that Appellant does not have custody of any of her seven children. Two of Appellant's other children were committed to the permanent custody of CCDCFS. Four of her children are in the custody of her mother. This factor alone would have supported the trial court's finding that J.H. cannot be placed with the parents within a reasonable period of time. R.C. 2151.414(E)(11); *In re D.G.*, 8th Dist. Cuyahoga No. 99587, 2013-Ohio-3537, ¶ 16; *In re M.W.*, 8th Dist. Cuyahoga No. 91539, 2009-Ohio-121, ¶ 49. Moreover, where this factor is established, the burden is then on the parent to provide clear and convincing evidence to prove that he or she can provide a legally secure permanent placement and adequate care for the health, welfare, and safety of the child. *In re E.A.*, 9th Dist. Medina No. 12CA0059-M, 2012-Ohio-5925, ¶ 14.

{¶23} The record also discloses that Appellant visited J.H. inconsistently and admitted that she "had not seen him in a while." She did not attend most of her required drug treatment and mental health counseling. Additionally, the GAL testified that the award of permanent custody is in J.H.'s best interest. Therefore, viewing the record as a

whole, Appellant did not remedy the conditions that caused J.H. to be removed from the home. The record as a whole clearly and convincingly demonstrates that J.H. cannot be placed with either parent, and it is in the best interest of J.H. to grant permanent custody to the agency. Additionally, as noted by Appellant's counsel, the award of permanent custody will permit Appellant's mother to adopt J.H., and "is in J.H.'s best interest because it will allow him to stay in a familiar environment, continue with his regular routine, and receive proper care from a loving caretaker. [Appellant] will still have opportunities to visit J.H. and spend time with him."

{¶24} Moreover, Appellant does not support the father's motion for legal custody.

Therefore, the record does not support the assertion of additional assignments of error aimed at challenging the denial of father's legal custody motion or other related aspects of the court's orders.

{¶25} Accordingly, we agree that there is no merit to an appeal so we grant counsel's motion to withdraw and we dismiss this appeal.

{¶26} This appeal is dismissed.

It is ordered that appellee recover of appellant costs herein taxed.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

KATHLEEN ANN KEOUGH, A.J., and
EILEEN T. GALLAGHER, J., CONCUR