

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

In re:	:	Case No. 09CA20
	:	
J.K., W.K., M.K., J.K., and T.K.	:	<u>DECISION AND</u>
	:	<u>JUDGMENT ENTRY</u>
Adjudicated Dependent Children.	:	
	:	Released 9/28/09

APPEARANCES:

Richard H. Hedges, Athens, Ohio, for appellant.

C. David Warren, ATHENS COUNTY PROSECUTING ATTORNEY, and George Reitmeier, ATHENS COUNTY ASSISTANT PROSECUTING ATTORNEY, for appellee.

Harsha, J.

{¶1} April Spears, the mother of J.K., W.K., M.K., J.K., and T.K., appeals the trial court’s decisions awarding temporary and permanent custody of the children to Athens County Children Services (“ACCS”). Her appointed counsel advised this Court that he has reviewed the record and can discern no meritorious claims for appeal. Using the procedure adopted in *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, counsel has essentially moved to withdraw. After independently reviewing the record, we agree with counsel’s assessment that no meritorious claims exist upon which to predicate an appeal. Therefore, we grant counsel’s request to withdraw, find this appeal is wholly frivolous, and affirm the trial court’s judgment.

I. Facts

{¶2} In October 2007, ACCS filed complaints in the Athens County Court of Common Pleas, Juvenile Division, alleging that the children were dependent and

neglected. The court granted an ex parte placement of the children with ACCS and held a probable cause hearing, during which the court extended the temporary custody order and established a date for an adjudication hearing. Spears and James Koon, II, the putative father of the children, appeared on the first day of the hearing with the assistance of counsel. Although Koon's counsel appeared on the second day of the hearing, Koon did not. On January 4, 2008, the judge found the children to be dependent, and continued the temporary orders.¹ In its dispositional order filed on January 28, 2008, the court awarded ACCS temporary custody of the children and incorporated ACCS's case plan into the order.

{¶3} On January 26, 2009, ACCS filed a motion for permanent custody of the children. The court conducted an evidentiary hearing in April 2009. Although Spears's appointed counsel attended the hearing, Spears failed to appear without explanation. Koon did appear at the hearing with the assistance of counsel. Although several witnesses testified at length during the permanent custody hearing, only an abbreviated summary of the events is necessary at this point.

{¶4} ACCS introduced into evidence a guilty plea Spears entered on December 11, 2008 to two counts of aggravated possession of drugs, both fifth degree felonies. ACCS also introduced a guilty plea Koon entered on September 24, 2008 to one count of aggravated possession of drugs, also a fifth degree felony. In addition, Jerry Hallowell, a detective with the Athens County Sheriff's Office, testified that on March 31, 2009 he was called to Spears's apartment to assist the Adult Parole Authority. They found hypodermic needles inside a light cover in the upstairs bathroom. Spears told him the syringes were not hers. She admitted to using heroin once a day but claimed

¹ An identical entry adjudicating the children as dependent was filed on January 10, 2008.

she went to a different apartment to shoot up. Koon was at the apartment during the incident and was arrested on outstanding warrants. Hallowell testified that he told Spears he would be back to “issue her a charge for the paraphernalia,” but when he returned to the apartment two or three days later, it was empty.

{¶15} Darla Evans, the children’s ACCS caseworker, testified that before ACCS obtained temporary custody, the children witnessed Spears and Koon using drugs and having sex. ACCS received an allegation that Spears sold her food stamps to purchase drugs. Evans indicated Spears and the children were “essentially homeless.” They moved from relative to relative and camped out an entire summer because they had nowhere to go.

{¶16} Evans testified that under the case plan, Spears was supposed to obtain independent housing, which she did secure for a time at the Plains Plaza Apartments. However, she was evicted after police found drug paraphernalia in the apartment. Evans testified that Spears did not have a GED and was unemployed through the pendency of the case. Evans also testified that under the case plan, Spears was to submit to random drugs screens, but Evans documented at least nine incidents where Spears refused to comply. On one of the two occasions when Spears did comply, the screen came back positive for marihuana and cocaine. ACCS also tried to get Spears help with her addiction through Health Recovery Services (“HRS”). It took Evans four attempts to get Spears to attend an HRS assessment. After that Spears attended one group session and one individual session before she stopped going to HRS.

{¶17} In addition, Spears was supposed to keep Evans informed of her whereabouts, but Evans did not know where Spears was at the time of the hearing.

{¶8} According to Evans, Spears was scheduled to visit the children twice a week at the agency for the majority of the case, but usually only came once a week. When she did come to the visits, “they were very chaotic and often required two or three staff members to assist with the visitation to keep it under control so it didn’t disrupt the other visitations that were going on at the same time.” From November 5, 2008 to March 3, 2009, Spears did not visit the children at all, and March 3, 2009 was the last time she visited them. She became upset at that visit because ACCS only gave her a \$5.00 gas card to reimburse her for driving to the office, and Spears told Evans that she would not be back because “it wasn’t worth her time.”

{¶9} Evans testified that to her knowledge, the last time Koon was employed was September or October of 2008. He had independent housing on a few occasions but lost it. Koon had been out of state, in rehab, or in jail for the majority of the case, so his visits with the children were infrequent. The visits he did have went more smoothly than the visits Spears had with the children, but the last time he saw the children was November 5, 2008.

{¶10} According to Evans, the four youngest children were ultimately placed with John Spears, their great uncle, and Audrey Miller, his girlfriend, who wanted to adopt them. Evans believed the children felt safe with them and testified that the children were doing well academically under their care.

{¶11} The oldest child, J.K., age ten, had an IQ of 66 and behavioral problems. He was placed in two foster homes before moving to a kinship placement with his paternal grandparents. However, ACCS had to move him to a therapeutic foster home because he was “just out of control.” His current foster parents were not interested in

adopting him, but his paternal grandparents were. Evans felt J.K. had calmed down since the time he was removed from his grandparents' home and that with proper support, they could manage him.

{¶12} Evans testified that in foster care, the children were receiving the medical care, therapy, and counseling they needed. T.K. did not have a birth certificate or medical card until after ACCS took custody of the children. Evans felt granting ACCS permanent custody was in the best interest of the children because they needed a consistent, stable environment which their parents could not provide. She did not feel the parents made a good faith effort to reunite their family.

{¶13} Cathey Glenn-Weinfurtner, the children's guardian ad litem, testified that she had met with the children and their current caretakers but had unsuccessfully tried to meet with the parents. She testified that J.K., age ten, told her that he wished to live with his grandparents. She felt they could provide him with a loving and safe environment but recommended they have a parent/mentor. Glenn-Weinfurtner testified that W.K., M.K., and J.K., age six, "indicated that they would like to stay" at their foster home with John Spears and Audrey Miller. However, Glenn-Weinfurtner acknowledged that J.K. also expressed a desire to be with his parents. Glenn-Weinfurtner testified that T.K. was too young to express where he wanted to live. She felt the children with John Spears and Audrey Miller were in a loving, healthy environment. Glenn-Weinfurtner recommended that all of the children be placed in the permanent custody of ACCS.

{¶14} After the trial court issued its decision and awarded permanent custody to ACCS, Spears filed this appeal.

II. Proposed Assignments of Error

{¶15} In *Anders*, a criminal case, the United States Supreme Court held that if counsel determines after a conscientious examination of the record that the case is wholly frivolous, counsel should so advise the court and request permission to withdraw. *Id.* at 744. Counsel must accompany the request with a brief identifying anything in the record that could arguably support the appeal. *Id.* Counsel also must furnish the client with a copy of the brief and request to withdraw and allow the client sufficient time to raise any matters that the client chooses. *Id.* Once these requirements have been satisfied, the appellate court must then fully examine the proceedings below to determine if meritorious issues exist. *Id.* 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.* Alternatively, if the appellate court concludes that any of the legal points are arguable on their merits, it must afford the appellant the assistance of counsel to argue the appeal. *Id.*

{¶16} Although *Anders* arose in a criminal context, its procedures are appropriate in appeals involving the termination of parental rights. See *In re B.F.*, Licking App. No. 2009-CA-007, 2009-Ohio-2978, at ¶3; *In re K.D.*, Wayne App. No. 06CA27, 2006-Ohio-4730, at ¶¶16-18; *Morris v. Lucas Cty. Children Services Bd.* (1989), 49 Ohio App.3d 86, 86-87, 550 N.E.2d 980. While appointed counsel did not expressly categorize his brief as an *Anders* brief or officially file a motion to withdraw, his brief clearly concludes in his sole "assignment of error" that he can discern no meritorious claims for appeal:

At this time, a thorough review of the Ohio Revised Code, relevant caselaw on dependency, emergency custody, and permanent [custody] of children, transcripts of the Adjudicatory Hearing, the Dispositional Hearing, and the Permanent Custody Hearing, do not indicate any avenues for appeal at this time. The Defendant April Spears is now serving time in prison for drugs, the reason for the permanency hearing and the reason for the permanent removal. There were some basic issues dealt with in this response.

Furthermore, appointed counsel identified anything in the record he felt could arguably support the appeal. We ordered the clerk to serve Spears with a copy of appointed counsel's brief and gave her an opportunity to raise any matters she chose. However, Spears has not filed a pro se brief.

{¶17} Accordingly, we will examine appointed counsel's proposed assignments of error and the entire record to determine if this appeal has any possible merit.

Counsel identifies four "Issues of the Case" which we will treat as counsel's proposed assignments of error:

Issue I: Whether or not permanent custody is an appropriate action for the agency under the actions of these parents.

Issue II: Whether legal "dependency" was appropriately alleged in the documents presented to the court.

Issue III: Whether the evidence met the clear and convincing standard for adjudication that would justify removal and proceeding to the Dispositional hearing.

Issue IV: Whether the parent's failure to obtain a birth certificate for her youngest child should be an issue in a removal action and, if so, its significance to the action.

For ease of analysis, we will address counsel's proposed assignments of error out of order.

III. Jurisdiction to Consider Claimed Errors in Temporary Custody Awards

{¶18} In his second, third, and fourth proposed assignments of error, assigned

counsel examines whether the trial court erred in adjudicating the children as dependent and granting ACCS temporary custody of the children.² However, before we address the merits of these arguments, we must address the State's contention that we lack jurisdiction to do so.

{¶19} The Supreme Court of Ohio has held that:

An adjudication by a juvenile court that a child is "neglected" or "dependent" as defined in R.C. Chapter 2151 followed by a disposition awarding temporary custody to a public children services agency pursuant to R.C. 2151.353(A)(2) constitutes a "final order" within the meaning of R.C. 2505.02 and is appealable to the court of appeals pursuant to R.C. 2501.02.

In re Murray (1990), 52 Ohio St.3d 155, 556 N.E.2d 1169, at syllabus. Moreover, the Supreme Court of Ohio recently held that "an appeal of an adjudication order of abuse, dependency, or neglect of a child and the award of temporary custody to a children services agency pursuant to R.C. 2151.353(A)(2) must be filed within 30 days from the judgment entry pursuant to App.R. 4." *In re H.F.*, 120 Ohio St.3d 499, 2008-Ohio-6810, 900 N.E.2d 607, at ¶18.

{¶20} Here, the trial court found the children dependent, and the court filed its dispositional order continuing temporary custody with ACCS on January 28, 2008. Under *In re Murray* and R.C. 2505.02, the court's entry was a final order that had to be appealed within 30 days. See *In re H.F.* at ¶18. However, neither parent appealed then. Therefore, the court's decision on the temporary custody award became the law of the case. And in the absence of a timely appeal, we lack jurisdiction to consider

² In assigned counsel's third proposed assignment of error, he also mentions the standard for a permanent custody award. Because he actually applies that standard to the facts of this case in his first proposed assignment of error, we will address it in our discussion of that proposed error. Furthermore, counsel's fourth proposed assignment of error refers to evidence considered in the "removal action." Based on the transcript from the adjudication hearing and considering counsel's use of this term in context with the remainder of his brief, it appears counsel uses this term to refer the court's adjudication of the children as dependent and subsequent decision to continue temporary custody with ACCS.

assigned counsel's second, third, and fourth proposed assignments of error challenging that award.

{¶21} Even though appellate counsel did not raise this issue, we recognize that trial counsel's failure to timely appeal this order could give rise to a claim of ineffective assistance of counsel. See Giannelli & Salvador, *Ohio Juvenile Law*, (2009 Ed.) 462-63, Section 40.5. However, we will not require counsel to take a futile act. *State v. Harrington*, Scioto App. No. 05CA3038, 2006-Ohio-4388, at ¶41. In this case, we conclude an appeal of the order of temporary custody would have been futile. ACCS presented ample evidence that the children were dependent and that it should continue to have temporary custody of them. For example, at the adjudication hearing it presented evidence that the children were essentially homeless under Spears's care, even camping out for an entire summer, and that Spears did not appear for scheduled drug screens in accordance with the case plan. Thus counsel's failure to appeal that order did not prejudice Spears and did not amount to ineffective assistance.

IV. Permanent Custody Awards

A. Burden of Proof

{¶22} "An award of permanent custody must be based upon clear and convincing evidence." *In re A.V.*, Lawrence App. No. 08CA31, 2009-Ohio-886, at ¶13. The Supreme Court of Ohio has defined "clear and convincing evidence" as "[t]he measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as required beyond a reasonable doubt as in criminal cases. It does not mean clear and

unequivocal.” *In re Estate of Haynes* (1986), 25 Ohio St.3d 101, 104, 495 N.E.2d 23.

In determining whether a trial court based its decision upon clear and convincing evidence, “a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof.” *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74, 564 N.E.2d 54.

B. Standard of Review

{¶23} “Even under the clear and convincing standard, our review is deferential.” *In re Buck*, Scioto App. No. 06CA3123, 2007-Ohio-1491, at ¶7. An appellate court will not reverse a trial court’s permanent custody decision if some competent and credible evidence supports the judgment. *In re K.J.*, Athens App. No. 08CA14, 2008-Ohio-5227, at ¶10, citing *In re Perry*, Vinton App. Nos. 06CA648 and 06CA649, 2006-Ohio-6128, at ¶40; see, also, *Schiebel* at 74. The credibility of witnesses and weight of the evidence are issues primarily for the trial court, as the trier of fact. *In re Ohler*, Hocking App. No. 04CA8, 2005-Ohio-1583, at ¶15, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (noting that “[t]he underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony”). Moreover, deferring to the trial court on matters of credibility is “crucial in a child custody case, where there may be much evident in the parties’ demeanor and attitude that does *not* translate to the record well.” *Davis v. Flickinger*, 77 Ohio St.3d 415, 419, 1997-Ohio-260, 674 N.E.2d 1159.

C. Requirements for Permanent Custody Awards

{¶24} Under R.C. 2151.414(B)(1)³, a juvenile court cannot make an award of permanent custody of a child to a children services agency unless it finds by clear and convincing evidence that any one of the following conditions apply:

(a) The child is not abandoned or orphaned, has not 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, or has not 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 if, 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, and the child cannot be placed with either of the child's parents within a reasonable time or should not be placed with the child's parents.

(b) The child is abandoned.

(c) The child is orphaned, and there are no relatives of the child who are able to take permanent custody.

(d) 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, 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.

{¶25} The court must also find by clear and convincing evidence that the grant of permanent custody is in the best interest of the child. *Id.* R.C. 2151.414(D) requires the trial court to consider all relevant factors in determining whether the child's best interests would be served by granting the permanent custody motion. These factors

³ The current version of R.C. 2151.414 became effective on April 7, 2009. Although the permanent custody hearing occurred on April 24, 2009, the trial court's decision quotes language from the previous version of the statute. However, based on our comparison of the relevant statutory provisions and our independent review of the record, we find the court's error harmless.

include but are not limited to: (1) the interrelationship of the child with others; (2) the wishes of the child; (3) the custodial history of the child; (4) the child's need for a legally secure placement and whether such a placement can be achieved without permanent custody; and (5) whether any of the factors in divisions (E)(7) to (11) apply.

{¶26} In addition, “except for some narrowly defined statutory exceptions, the state must make reasonable efforts to reunify the family before terminating parental rights. If the agency has not already proven reasonable efforts, it must do so at the hearing on a motion for permanent custody. However, the specific requirement to make reasonable efforts that is set forth in R.C. 2151.419(A)(1) does not apply in a R.C. 2151.413 motion for permanent custody.” *In re A.M.*, Adams App. No. 08CA862, 2008-Ohio-4835, at ¶15, quoting *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, 862 N.E.2d 816, at ¶4; see, also, R.C. 2151.413(D)(1) (“[I]f a child has been in the temporary custody of one or more public children services agencies * * * for twelve or more months of a consecutive twenty-two-month period, the agency with custody shall file a motion requesting permanent custody of the child.”).

D. Analysis

{¶27} In his first proposed assignment of error, assigned counsel examines whether the trial court erred in awarding ACCS permanent custody of the children. The court found that the children had been in the temporary custody of one or more public children services agencies for 12 or more months of a consecutive 22 month period under R.C. 2151.414(B)(1)(d). Although appointed counsel acknowledges that the record supports this finding, his brief indicates that for R.C. 2151.414(B)(1)(d) to apply, the court also had to find that the children could not be placed with either of their

parents within a reasonable time or should not be placed with their parents. However, this is a requirement under the plain language of R.C. 2151.414(B)(1)(a) – not R.C. 2151.414(B)(1)(d). See *In re Berkley*, Pickaway App. Nos. 04CA12, 04CA13, and 04CA14, 2004-Ohio-4797, at ¶61.⁴

{¶28} The trial court also found that permanent commitment was in the best interest of the children and was supported by clear and convincing evidence. The court expressly considered all of the best interest factors set forth in R.C. 2151.414(D) in reaching its decision. It addressed the interrelationship of the children with others and found that while Spears expressed a desire to reunify and a willingness to work on the issues the led to the children’s removal at the start of the case, she stopped making an effort and even failed to visit the children for roughly four months. The court also noted the Koon spent most of the proceedings in jail, rehabilitation, or out of state, and he last visited the children more than five months before the permanent custody hearing. The court noted that J.K., age ten, suffered from various emotional issues, but the four youngest children were “bonded with each other” and content living in foster care together.

{¶29} In addition, the court considered the wishes of the children. In particular, the court found that J.K., age ten, wished to live with his paternal grandparents, and W.K. and M.K. were content in foster care. The court did not make specific findings regarding the wishes of youngest children – J.K., age six, and T.K., age three. The court also set forth the custodial history of children, finding that before ACCS received temporary custody, Spears provided the children with “no stability in housing and no

⁴ Although *In re Berkley* involved a former version of R.C. 2151.414(B)(1)(d), the amended version of this provision is analogous as it contains no requirement concerning the feasibility or propriety of a placement with the parents.

legitimate income.” Furthermore, the court noted ACCS’s involvement, specifically finding that the children had been in the agency’s continuous temporary custody and care for more than 12 months of a consecutive 22 month period. It also addressed the children’s need for a legally secure permanent placement and found that their parents “have not and likely cannot behave in a manner consistent with parenting[.]” The court found that the children were clearly damaged by their parents’ lifestyle and that a legally secure placement could only be achieved with a grant of permanent custody to ACCS. In addition, the court noted that none of the factors in R.C. 2151.414(E)(7)-(E)(11) applied.

{¶30} Based on our review of the evidence we find that there is clear and convincing evidence to support the trial court’s findings and permanent custody award. Evans testified as to the children’s relationship with their parents. She testified regarding the infrequent contact the parents had with the children in the months immediately preceding the hearing. Spears even failed to attend the permanent custody hearing. Moreover, both Evans and Glenn-Weinfurtner testified regarding the positive experiences the children had in foster care. Glenn-Weinfurtner testified that J.K. wanted to be placed with his paternal grandparents again, which both Evans and Glenn-Weinfurtner felt could be successful. Glenn-Weinfurtner also testified that the three older children living with John Spears and Audrey Miller “would like to stay” with their foster parents. In addition, Evans testified as to the custodial history of the children. She testified that Spears and the children were “essentially homeless” before ACCS had temporary custody of the children -- moving from relative to relative and even camping out an entire summer because they had nowhere to go.

{¶31} In addition, ACCS offered evidence to support the court’s finding that the parents “have not and likely cannot behave in a manner consistent with parenting” and that a legally secure placement could not be achieved without granting ACCS permanent custody. Both parents had recent felony convictions for aggravated possession of drugs. Hallowell testified that less than one month before the permanent custody hearing, Koon was arrested on outstanding warrants, and Spears admitted she still used heroin once a day. Furthermore, Evans testified that Koon spent most of the proceedings in jail, rehabilitation, or out of state, and to her knowledge had not been employed for months. Spears never obtained employment throughout the proceedings and lost the only independent housing she acquired after police found drug paraphernalia in the apartment. Furthermore, Evans testified that in foster care, the children were receiving the medical attention, therapy, and counseling their parents had failed to provide them. Thus, we conclude that the record contains ample evidence to support the trial court’s finding that granting ACCS permanent custody serves the children’s best interest.

{¶32} Finally, appointed counsel argues that “testimony challenges the adequacy” of ACCS’s efforts to reunify the family. ACCS filed its motion for permanent custody under R.C. 2151.413. Although the trial court did not make a finding at the permanent custody hearing concerning whether ACCS made reasonable efforts to reunify the family, it was not required to do so under R.C. 2151.419. Furthermore, the court already made reasonable efforts findings at each of the six reviews it held between the disposition and permanent custody hearing. In its journal entries from those reviews, the court specifically noted that ACCS provided the parents with

assistance such as case management, substitute care, visitation, and referrals. The record indicates that Spears did not take full advantage of these services or fully comply with the terms of the case plan. For instance, she stopped visiting the children even though ACCS provided her with gas money, and she stopped attending HRS sessions to overcome her addiction problems. Thus clear and convincing evidence supports the trial court's findings that ACCS made reasonable efforts to reunify the family.

Therefore, appointed counsel's first proposed assigned of error lacks merit.

{¶33} Having reviewed appointed counsel's proposed assignments of error and having independently discovered no meritorious issues for appeal, we grant counsel's motion to withdraw, find this appeal wholly frivolous, and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Court of Common Pleas, Juvenile Division, to carry this judgment into execution.

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

Kline, P.J., and Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.