[Cite as *In re: A.M.*, 2018-Ohio-3186.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106789

IN RE: A.M., ET AL.
Minor Children

[Appeal By R.K., Mother]

JUDGMENT:
DISMISSED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. AD 16905007 and AD 16905008

BEFORE: E.T. Gallagher, P.J., S. Gallagher, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: August 9, 2018

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EILEEN T. GALLAGHER, P.J.:

{¶1} Mother-appellant, filed a notice of appeal from the trial court's judgment granting permanent custody of her two minor children to the Cuyahoga County Department of Children and Family Services ("CCDCFS"). Mother's appointed counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), seeking leave to withdraw as counsel. After a thorough review of the record, we grant counsel's request to withdraw and dismiss the appeal.

I. Procedural and Factual History

{¶2} In May 2016, Mother's minor children, A.M. and I.M., were committed to the predispositional temporary custody of CCDCFS. In June 2016, the children were adjudicated neglected and abused. The children were committed to the temporary custody of their paternal grandmother with an order of protective supervision to CCDCFS. However, following paternal grandmother's positive drug test for opiates, the children were removed from her home and placed with the agency in January 2017.

{¶3} In April 2017, the children were placed in the temporary custody of paternal cousins. In August 2017, CCDCFS filed a motion to modify temporary custody to permanent custody. The case proceeded to a hearing on the agency's motion in January 2018. Mother did not appear at the hearing. Counsel for Mother requested a continuance to secure Mother's presence. Counsel indicated that he had not been in contact with Mother and she had not responded to letters sent to her last two known addresses. The trial court denied the motion, and the matter proceeded in Mother's absence. Thereafter, the following testimony was elicited.

{¶4} Jasmine Lynard, the CCDCFS social worker assigned to the case, testified that the family was brought to the attention of the agency at the time of I.M.'s birth because Mother tested positive for opiates and I.M. suffered from withdrawals. Father also had drug abuse issues and passed away during the pendency of this case. Lynard testified that Mother's case plan had the overarching goal of reunification and included objectives for substance abuse and mental health treatment. However, Mother failed to complete her programs and was discharged from the woman's recovery center she was referred to by the agency. Mother also failed to complete a drug screen and failed to follow up with additional referrals. Lynard testified that she last spoke with Mother in June, 2017. During that conversation, Mother "indicated that she still was using and she was currently high earlier in the morning."

{¶5} With respect to the children's placement, Lynard testified that the children were in the care of their paternal grandmother, but were removed from her home once she tested positive for opiates. Thereafter, the children were placed with paternal cousins in February 2017. Lynard testified that Mother had the opportunity to visit the children every Sunday, but has not visited them since June 2017. Lynard testified that the children have bonded with the paternal cousins and that if the trial court awarded permanent custody to the agency, their placement would not change. The paternal cousins are interested in adopting the children. As such, Lynard opined that permanent custody was in the best interests of the children because "they are with familiar family. Everything is going well. And I think it would be in their best interests if the children stay with the paternal cousins."

{¶6} The children's guardian ad litem, Rachel Kopec, recommended that the court grant the agency's motion for permanent custody. Kopec testified that she did not believe that Mother or Father ever truly engaged in the case plan services provided to them through the agency. She

testified that she did not remember "a time since the Agency became involved that these parents have been sober." Kopec further testified that the children are doing well in their current placement and that it is likely the first time in their lives they have lived in a home without drugs in the house.

{¶7} At the conclusion of the hearing, the trial court granted CCDCFS's motion for permanent custody and terminated Mother's parental rights. The trial court issued substantially similar journal entries and findings of fact for each child, stating, in relevant part:

> The court finds that CCDCFS has made reasonable efforts to finalize the permanency plan. Those efforts include mental health and substance abuse. The permanency plan is reunification. The concurrent permanency plan is permanent custody and adoption. The permanency plan is adopted.
>
> Upon considering the interaction and interrelationship of the child with the child's parents, siblings, relatives, and foster parents; the wishes of the child; the custodial history of the child; including whether the child has been in temporary custody of a public children services agency or private child placing agency under one or more separate orders of disposition for twelve or more months of a consecutive twenty-two month period; the child's need for legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody; and the report of the Guardian ad Litem, the court finds by clear and convincing evidence that a grant of permanent custody is in the best interest of the child and the child cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent.
>
> Following the placement of the child outside the child's 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 child's home.
>
> The chronic mental illness, chronic emotional illness, intellectual disability, physical disability, or chemical dependency of the parent is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year.
>
> The parent has demonstrated a lack of commitment towards 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.

{¶8} In February 2018, this court appointed counsel to represent Mother. Based on the belief that no prejudicial error occurred in the trial court and that any grounds for appeal would be frivolous, Mother's counsel filed a motion to withdraw pursuant to *Anders*.

II. Law and Analysis

A. *Anders* Standard and Potential Issues for Review

{¶9} *Anders,* and *State v. Duncan*, 57 Ohio App.2d 93, 385 N.E.2d 323 (8th Dist.1978), outline the procedure counsel must follow to withdraw as counsel due to the lack of any meritorious grounds for appeal. In *Anders*, the United States Supreme Court held that if counsel thoroughly studies the case and conscientiously concludes that an appeal is frivolous, he may advise the court of that fact and request permission to withdraw from the case. *Anders* at 744. However, counsel's request to withdraw must "be accompanied by a brief referring to anything in the record that might arguably support the [a]ppeal." *Id.* Counsel must also furnish a copy of the brief to his client with sufficient time to allow the appellant to file his own brief, pro se. *Id.*

{¶10} Once these requirements have been satisfied, the appellate court must complete an independent examination of the trial court proceedings to decide whether the appeal is "wholly frivolous." *Id.*; Loc.R. 16(C). If the appellate court determines the appeal is frivolous, it may grant counsel's request to withdraw and address the merits of the case without affording the appellant the assistance of counsel. *Duncan*, 57 Ohio App.2d 93, 385 N.E.2d 323 (8th Dist.1978); *State v. Duran*, 4th Dist. Ross No. 06CA2919, 2007-Ohio-2743, ¶ 7. If, however, the court finds the existence of meritorious issues, it must afford the appellant assistance of counsel before deciding the merits of the case. *Id.*

{¶11} Although *Anders* arose in a criminal context, this court has approved the application of the *Anders* procedure to an appeal from the juvenile court's denial of a motion for legal custody. *In re C.S.*, 8th Dist. Cuyahoga No. 105700, 2017-Ohio-8664, ¶ 13, citing *In re T.E.*, 8th Dist. Cuyahoga No. 104228, 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. 2009-CA-46, 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 Cuichta*, 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).

{¶12} Although Mother's counsel asserts that an appeal in this case is "wholly frivolous," she presents three potential assignments of error for review:

> 1. The evidence presented to the trial court did not support, by clear and convincing evidence, a finding that permanent custody to the agency was in the best interests of the children.
>
> 2. The trial court violated Mother's due process rights guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 16 of the Ohio Constitution, and erred as a matter of law when it proceeded with a permanent custody hearing when Mother had not been properly served with the motion or notice of the hearing.
>
> 3. The trial court abused its discretion by denying Mother's motion to continue the hearing.

B. Best Interests Determination

{¶13} "All children have the right, if possible, to parenting from either [biological] or adoptive parents which provides support, care, discipline, protection, and motivation." *In re J.B.*, 8th Dist. Cuyahoga No. 98546, 2013-Ohio-1704, ¶ 66, quoting *In re Hitchcock*, 120 Ohio App.3d 88, 102, 696 N.E.2d 1090 (8th Dist.1996). Likewise, a "parent's right to raise a child is an essential and basic civil right." *In re N.B.*, 8th Dist. Cuyahoga No. 101390, 2015-Ohio-314, ¶ 67, quoting *In re Hayes*, 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997). By terminating parental rights, the goal is to create "a more stable life" for dependent children and to "facilitate adoption to foster permanency for children." *In re N.B.* at ¶ 67, citing *In re Howard*, 5th Dist. Tuscarawas No. 85 A10-077, 1986 Ohio App. LEXIS 7860, 5 (Aug. 1, 1986). However, termination of parental rights is "the family law equivalent of the death penalty in a criminal case." *In re J.B.* at ¶ 66, quoting *In re Hoffman*, 97 Ohio St.3d 92, 2002-Ohio-5368, 776 N.E.2d 485, ¶ 14. It is, therefore, "an alternative [of] last resort." *In re Gill*, 8th Dist. Cuyahoga No. 79640, 2002-Ohio-3242, ¶ 21.

{¶14} In cases of abuse, neglect, and dependency, a trial court may enter a disposition of permanent custody of a child if the court determines by clear and convincing evidence that the child cannot or should not be placed with either parent within a reasonable period of time and that permanent custody is in the child's best interest. *See* R.C. 2151.353(A)(4) and 2151.414(D), (E).

{¶15} "Clear and convincing evidence" is that measure or degree of proof that is more than a "preponderance of the evidence," but does not rise to the level of certainty required by the "beyond a reasonable doubt" standard in criminal cases. *In re M.S.*, 8th Dist. Cuyahoga Nos. 101693 and 101694, 2015-Ohio-1028, ¶ 8, citing *In re Awkal*, 95 Ohio App.3d 309, 315, 642 N.E.2d 424 (8th Dist.1994), citing *Lansdowne v. Beacon Journal Publishing Co.*, 32 Ohio St.3d 176, 180-181, 512 N.E.2d 979 (1987). It "produces in the mind of the trier of fact a firm belief or

conviction as to the facts sought to be established." *In re M.S.* at ¶ 18; *see also In re J.F.*, 11th Dist. Trumbull No. 2011-T-0078, 2011-Ohio-6695, ¶ 67 (a permanent custody decision "based on clear and convincing evidence requires overwhelming facts, not the mere calculation of future probabilities") (emphasis omitted), quoting *In re A.J.*, 11th Dist. Trumbull No. 2010-T-0041, 2010-Ohio-4553, ¶ 76. "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 Jacobs*, 11th Dist. Geauga No. 99-G-2231, 2000 Ohio App. LEXIS 3859, *11 (Aug. 25, 2000), citing *In re Taylor*, 11th Dist. Ashtabula No. 97-A-0046, 1999 Ohio App. LEXIS 2620 (June 11, 1999).

{¶16} The trial court's determination of whether the child cannot or should not be placed with either parent is guided by R.C. 2151.414(E). This section sets forth 16 factors that the trial court may consider in its determination. It provides that if the trial court finds by clear and convincing evidence that any of the 16 factors exists, the court must enter a finding that the child cannot or should not be placed with either parent within a reasonable period of time. *In re D.J.*, 8th Dist. Cuyahoga No. 88646, 2007-Ohio-1974, ¶ 64.

{¶17} In this case, the trial court made findings pursuant to R.C. 2151.414(E)(1), (2), and (4). The existence of one R.C. 2151.414(E) 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. Here, the testimony presented at the permanent custody hearing plainly demonstrates that Mother failed to substantially remedy her substance abuse and mental health issues. As of the time of the hearing, Mother continued to abuse drugs and, therefore, was unable to provide an adequate permanent home for the children. Furthermore, the record clearly demonstrated

Mother's lack of commitment towards the children, as evidenced by her failure to appear at the hearing and the significant gaps in her visitations. Under these circumstances, the trial court's conclusion that the children cannot or should not be placed with Mother within a reasonable period of time was supported by clear and convincing evidence in the record.

{¶18} The trial court also found that a grant of permanent custody was in the best interests of the children pursuant to the factors set forth in R.C. 2151.414(D). R.C. 2151.414(D)(1) directs that the trial court "shall consider all relevant factors," including, but not limited to, the following:

> (a) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child;
>
> (b) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child;
>
> (c) The custodial history of the child, including whether 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;
>
> (d) The child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency;
> (e) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.

R.C. 2151.414(D)(1).

{¶19} We review a trial court's determination of a child's best interest under R.C. 2151.414(D) for an abuse of discretion. *In re D.A.*, 8th Dist. Cuyahoga No. 95188, 2010-Ohio-5618, ¶ 47. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450

N.E.2d 1140 (1983). While a trial court's discretion in a custody proceeding is broad, it is not absolute. "A trial court's failure to base its decision on a consideration of the best interests of the child constitutes an abuse of discretion." *In re N.B.*, 8th Dist. Cuyahoga No. 101390, 2015-Ohio-314, ¶ 60, citing *In re T.W.*, 8th Dist. Cuyahoga No. 85845, 2005-Ohio-5446, ¶ 27, citing *In re Adoption of Ridenour*, 61 Ohio St.3d 319, 574 N.E.2d 1055 (1991).

{¶20} We find no abuse of discretion in the trial court's conclusion that permanent custody is in the best interests of the children. At the permanent custody hearing, the social worker and the GAL testified that permanent custody was in the children's best interests based on Mother's ongoing substance abuse issues, her lack of commitment to the children, and the children's successful placement with the paternal cousins.

C. Service and Notice of Motion for Permanent Custody

{¶21} Counsel asserts that the second potential error that should be reviewed is whether the trial court erred as a matter of law when it proceeded with a permanent custody hearing without providing Mother sufficient service and notice.

{¶22} In the context of permanent custody cases in Ohio, notice of the filing of a motion for permanent custody and notice of the hearing are governed by a number of procedural rules and statutes. Chapter 2151 of the Ohio Revised Code addresses the means by which notice of the filing of a motion for permanent custody and notice of the hearing on such motion must be given to a parent. Specifically, R.C. 2151.414(A)(1) provides:

> Upon the filing of a motion * * * for permanent custody of a child, the court shall schedule a hearing and give notice of the filing of the motion and of the hearing, in accordance with section 2151.29 of the Revised Code, to all parties to the action and to the child's guardian ad litem.

{¶23} R.C. 2151.414(A)(1) requires conformance with R.C. 2151.29, which explains the manner by which notice of the filing of the motion and of the hearing shall be served on parties. Regarding parties residing within the state, R.C. 2151.29 provides, in relevant part:

> Service of summons, notices, and subpoenas * * * shall be made by delivering a copy to the person summoned, notified, or subpoenaed, or by leaving a copy at the person's usual place of residence. If the juvenile judge is satisfied that such service is impracticable, the juvenile judge may order service by registered or certified mail.

{¶24} Juv.R. 16(A) requires that, except as otherwise provided by the rules, summons shall "be served as provided in Civil Rules 4(A), (C) and (D), 4.1, 4.2, 4.3, 4.5 and 4.6."

{¶25} In this case, there is no dispute that all parties to the action and the children's GAL received notice of the permanent custody motion and of the subsequent hearing. In addition, the record reflects that Mother was notified of the permanent custody hearing by service of summons as required under R.C. 2151.29. Our review of the children's dockets confirms that the complaint was filed and successfully served on Mother via certified mail on April 8, 2016. Mother accepted service of the complaint with her signature on April 11, 2016. On August 31, 2017, the agency's motion to modify temporary custody was served upon Mother via U.S. mail. Regarding I.M., the court docket states that service of summons was sent to Mother via certified mail on October 11, 2017. Evidenced by Mother's electronic signature, a certified mail confirmation was returned on October 23, 2017. With respect to A.M., the court's docket states that Mother was served with notice of the permanent custody hearing by ordinary U.S. mail on November 21, 2017, after the certified mail was returned marked "unclaimed." *See* Civ.R. 4.6(D).

{¶26} Upon review of the record, we find proper service of the permanent custody motion and hearing was accomplished under the Ohio Civil Rules. Mother's due process rights were not disregarded as to service.

D. Motion for Continuance

{¶27} Finally, counsel asserts that the third potential error that should be reviewed is whether the trial court abused its discretion by denying Mother's motion to continue the hearing.

{¶28} The decision to grant or deny a motion for a continuance rests in the sound discretion of the trial court. *State v. Unger*, 67 Ohio St.2d 65, 423 N.E.2d 1078 (1981). An abuse of discretion occurs where the trial court's decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶29} The right to parent one's children is a fundamental right protected by the Due Process Clause of the United States and Ohio Constitutions. *In re M.W.*, 8th Dist. Cuyahoga No. 103705, 2016-Ohio-2948, ¶ 9. A fundamental requirement of due process is notice and the opportunity to be heard. *Id*.

{¶30} A parent's right to be present at a custody hearing is not absolute, however. *Id.* at ¶ 10, citing *In re C.G.*, 9th Dist. Summit No. 26506, 2012-Ohio-5999, ¶ 19. While courts must ensure that due process is provided in parental termination proceedings, "a parent facing termination of parental rights must exhibit cooperation and must communicate with counsel and with the court in order to have standing to argue that due process was not followed in a termination proceeding." *In re Q.G.*, 170 Ohio App.3d 609, 2007-Ohio-1312, 868 N.E.2d 713, ¶ 12 (8th Dist.). Any potential prejudice to a party denied a continuance is weighed against a trial court's "right to control its own docket and the public's interest in the prompt and efficient dispatch of justice." *Unger* at 67.

{¶31} In *Unger*, the Ohio Supreme Court noted that "[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to

the trial judge at the time the request is denied." *Unger*, 67 Ohio St.2d at 67, 423 N.E.2d 1078. The Supreme Court identified certain factors a court should consider in evaluating a motion for a continuance. These factors include:

> the length of the delay requested; whether other continuances have been requested and received, the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case.

Id. at 67-68.

{¶32} After examining the record, we conclude that the trial court properly exercised its discretion in not granting the requested continuance. As noted by Mother's counsel and Lynard at the onset of the hearing, Mother has not exhibited cooperation and has consistently failed to communicate with counsel or CCDCFS. Thus, we agree with appellate counsel that no due process violations are apparent on this record.

III. Conclusion

{¶33} Based on the foregoing, we conclude that Mother's appeal is wholly frivolous pursuant to *Anders*. Counsel's request to withdraw is granted, and the appeal is dismissed.

It is ordered that appellee recover from appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga 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.

EILEEN T. GALLAGHER, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
ANITA LASTER MAYS, J., CONCUR