[Cite as *In re K.B.*, 2010-Ohio-1015.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

IN THE MATTER OF:	)	CASE NO. 09 BE 24
	)	
K.B.	)	
	)	OPINION
	)	
	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from the Court of Common Pleas, Juvenile Division of Belmont County, Ohio Case No. 08 JC 0540
JUDGMENT:	Affirmed.
APPEARANCES:	
For Plaintiff-Appellee:	Atty. Christopher Berhalter Belmont County Prosecutor Atty. Grace Hoffman Assistant Prosecuting Attorney 147-A West Main Street St. Clairsville, Ohio 43950
For Defendant-Appellant:	Atty. Katherine E. Rudzik 26 Market Street, Suite 904 Youngstown, Ohio 44503
JUDGES:	
Hon. Cheryl L. Waite Hon. Joseph J. Vukovich Hon. Mary DeGenaro	
	Dated: March 11, 2010

WAITE, J.

{¶1} Appellant Angela Burghy appeals a judgment of the Belmont County Court of Common Pleas, Juvenile Division, granting permanent custody of her daughter K.B. to Appellee, the Belmont County Department of Jobs and Family Services ("BCDJFS"). Appellant's appointed counsel on appeal has filed a motion to withdraw and an accompanying memorandum in the style set forth in *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493. This procedure is typically used in criminal cases when appointed counsel determines that the appeal is frivolous. There is considerable precedent in Ohio caselaw for applying the rules and procedure used in *Anders*, a criminal case, to civil permanent custody cases in which appointed counsel finds no merit in the appeal and wishes to withdraw. Thus, we will apply the principles and analysis of *Anders* to the instant case. Because there are no nonfrivolous issues for review, counsel is permitted to withdraw and the judgment is affirmed.

Background

{¶2} On May 27, 2008, a dependency complaint was filed in Belmont County regarding K.B. The complaint alleged that Peggy Burghy, K.B.'s grandmother and legal custodian, had died in an automobile accident on February 13, 2008. K.B.'s father was unknown. The complaint alleged that Appellant, K.B.'s biological mother, previously had a child removed from her home and that she had no home available for K.B. Temporary custody was granted to BCDJFS. The court appointed counsel to represent Appellant. The court adjudicated K.B. a dependent child on July 31, 2008. The court found that the child's grandmother had died and the BCDJFS was

seeking custody. The court found that Appellant had not had custody of K.B. for more than one year, and that the most recent placement had been with the maternal grandmother. Appellant had exercised no visitation rights for the prior fifteen months. Appellant did not have a stable residence and had recently lived in four different locations in West Virginia. Appellant had not permitted caseworkers to do a home study on five separate occasions. The court found by clear and convincing evidence that K.B. was a dependent child and granted temporary custody to BCDJFS. This determination was not appealed.

{¶3} BCDJFS attempted to place K.B. with Appellant, but then learned that Appellant did not have her own residence. She had been living with a friend in Proctor, West Virginia, but had been told to move out. Further, K.B.'s relatives in Cleveland, who had been exercising physical custody over the child, no longer wished to do so. BCDJFS requested foster home placement, and K.B. entered foster care.

{¶4} On March 9, 2009, BCDJFS filed a motion to amend temporary custody to permanent custody. The permanent custody hearing took place on July 7 and 14, 2009. Appellant was represented by appointed counsel at the hearing. Eighteen witnesses testified. The parties stipulated that BCDJFS had custody of K.B. for 12 of the past 22 consecutive months. (Tr., p. 192.) The evidence established that Appellant had voluntarily placed K.B. with the child's grandmother in 2007. The grandmother died in February 2008, and K.B. was placed with relatives and then went to foster care. Appellant had previously had a child taken from her custody by

BCDJFS. The child was later returned after Appellant fulfilled her case plan, but was then given up for adoption to a friend of Appellant's.

{¶5} During the time that K.B. was involved with BCDJFS, Appellant was either homeless or temporarily living with friends. Appellant had been hospitalized numerous times for mental health issues. She had attempted suicide more than 20 times between the ages of 15 and 21. Appellant's only income was social security disability income for mental health disabilities. Appellant abused drugs and alcohol and failed to complete drug and alcohol counseling. She had completed only 3 of 12 required parenting classes. Her current home only recently obtained running water, and many of the plumbing fixtures did not work properly due to leaks.

{¶6} The court found by clear and convincing evidence that it was in the best interests of the child that permanent custody be awarded to BCDJFS. The court filed its judgment entry on July 30, 2009. Appellant filed a timely notice of appeal on August 17, 2009, and we appointed counsel for the appeal.

{¶7} The transcript of the trial was filed on October 13, 2009. This is an expedited case under App.R. 11.2(C). Appellee filed a motion to dismiss on November 6, 2009. On December 3, 2009, Appellant's counsel filed a motion to withdraw as appointed counsel pursuant to *Anders*, supra. Counsel reviewed the record and trial transcript and found no meritorious issues for appeal. On December 18, 2009, we allowed Appellant 30 days to file any pro se assignments of error before ruling on counsel's motion to withdraw. No further assignments of error have been filed. We also overruled Appellee's motion to dismiss the appeal. Appellant's

counsel's motion to withdraw, and counsel's reliance on *Anders*, remain pending before us.

Analysis

{¶8} In *Anders*, the United States Supreme Court reasoned:

{¶9} "The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae. The no-merit letter and the procedure it triggers do not reach that dignity. Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court. His role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court-not counsel-then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." (Footnote omitted.) Id., 386 U.S. at 744, 87 S.Ct. 1396, 18 L.Ed.2d 493.

{¶10} The Ohio Supreme Court has similarly reasoned: " 'It is well settled that an attorney appointed to represent an indigent criminal defendant on his or her first appeal as of right may seek permission to withdraw upon a showing that the appellant's claims have no merit. To support such a request, appellate counsel must undertake a conscientious examination of the case and accompany his or her request for withdrawal with a brief referring to anything in the record that might arguably support the appeal. The reviewing court must then decide, after a full examination of the proceedings, whether the case is wholly frivolous.' " (Citations omitted.) *State v. Odorizzi* (1998), 126 Ohio App.3d 512, 515, 710 N.E.2d 1142.

{¶11} This is a civil case and not a criminal case, but considerable authority exists to support the conclusion that *Anders* also applies to appointed counsel in parental rights cases. The first and foremost reason is the similarity, from a due process perspective, of criminal cases and loss of parental rights cases. "The rights to conceive and to raise one's children have been deemed 'essential, * * * basic civil rights of man,' * * * and '[r]ights far more precious * * * than property rights.' " (Citations omitted.) *Stanley v. Illinois* (1972), 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551. The permanent termination of parental rights has been described as, "the family law equivalent of the death penalty in a criminal case." *In re Smith* (1991), 77 Ohio App.3d 1, 16, 601 N.E.2d 45. Based upon these principles, the Ohio Supreme Court has determined that a parent who is at risk of losing all parental rights over his or her child, "must be afforded every procedural and substantive protection the law allows." (Citation omitted.) *In re Hoffman*, 97 Ohio

St.3d 92, 2002-Ohio-5368, 776 N.E.2d 485, ¶14, quoting *In re Hayes* (1997), 79 Ohio St.3d 46, 49, 679 N.E.2d 680.

{¶12} A number of Ohio courts have applied *Anders* in parental rights cases. The First District Court of Appeals reasoned that there was no practical difference between forcing counsel to file an appellate brief and prosecute an appeal on the basis of frivolous issues, and allowing counsel to file a motion to withdraw and explain to the court in the motion that a thorough review of the record failed to reveal any non-frivolous issues for appeal. *In re D.C.*, 1st Dist. No. C-090466, 2009-Ohio-5575, ¶3. The First District also concluded that the procedure outlined in *Anders* should be suitable in a civil case because it had already been accepted under the more stringent rules applicable to criminal cases. The Fourth, Fifth, Sixth and Ninth Appellate Districts have also allowed the *Anders* procedure to be used in parental rights cases in which appointed counsel has failed to find non-frivolous issues for appeal. *In re J.K.*, 4th Dist. No. 09CA20, 2009-Ohio-5391; *In re B.F.*, 5th Dist. No. 2009-CA-007, 2009-Ohio-2978; *Morris v. Lucas County Children Services Bd.* (1989), 49 Ohio App.3d 86, 550 N.E.2d 980; *In re K.B.*, 9th Dist. No. 24598, 2009-Ohio-3168. No appellate district that has been presented with the issue has refused to allow the *Anders* procedure to be used when appointed counsel requests to withdraw in a parental rights case. Based on this unanimous precedent, we will apply *Anders* to this appeal.

{¶13} In applying the *Anders* holding, this Court in *State v. Toney* (1970), 23 Ohio App.2d 203, 52 O.O.2d 304, 262 N.Ed.2d 419, set forth the procedure to be used when counsel of record determines that an indigent's appeal is frivolous:

{¶14} "3. Where a court-appointed counsel, with long and extensive experience * * * concludes that the indigent's appeal is frivolous and that there is no assignment of error which could be arguably supported on appeal, he should so advise the appointing court by brief and request that he be permitted to withdraw as counsel of record.

{¶15} "4. Court-appointed counsel's conclusions and motion to withdraw as counsel of record should be transmitted forthwith to the indigent, and the indigent should be granted time to raise any points that he chooses, *pro se*.

{¶16} "5. It is the duty of the Court of Appeals to fully examine the proceedings in the trial court, the brief of appointed counsel, the arguments *pro se* of the indigent, and then determine whether or not the appeal is wholly frivolous.

{¶17} "6. Where the Court of Appeals makes such an examination and concludes that the appeal is wholly frivolous, the motion of an indigent appellant for the appointment of new counsel for the purposes of appeal should be denied.

{¶18} "7. Where the Court of Appeals determines that an indigent's appeal is wholly frivolous, the motion of court-appointed counsel to withdraw as counsel of record should be allowed, and the judgment of the trial court should be affirmed." Id., at syllabus.

{¶19} Appellant's counsel has indicated only one possible issue for appeal. Counsel noted that a letter from Appellant's former obstetrician/gynecologist was introduced into evidence, and that the letter contained a considerable amount of hearsay evidence that should not have been admitted at trial. Counsel also argues that the letter was unauthenticated, but Appellant acknowledged during her testimony that the letter was from her doctor and that it was a notice that the doctor would no longer accept her as a patient. Thus, the letter was authenticated. (Tr., p. 358.) Counsel did object to the letter being admitted into evidence, and the objection was overruled.

{¶20} The letter in question, listed in the record as "Agency Exhibit 8," is from Erin V. Stoehr, D.O, and is dated March 19, 2009. Dr. Stoehr was providing care to Appellant during her most recent pregnancy. The letter is addressed to Appellant and begins with: "I find it necessary to inform you that, as of the date of this letter, I will no longer be able to continue to provide you with medical care." Then it lists a number of reasons why Dr. Stoehr could no longer provide care. The letter states that Appellant left the doctor's office and refused treatment, against the doctor's advice. It also states that Appellant was taking narcotics throughout her pregnancy. Appellant's counsel posits that these assertions may constitute inadmissible hearsay evidence.

{¶21} Hearsay is, "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). Hearsay evidence is generally not admissible in civil or

criminal trials, but there are a myriad of exceptions to the hearsay rule that allows the admission of evidence that may otherwise appear to be hearsay evidence. Evid.R. 803. Assuming arguendo that the letter from Dr. Stoehr does contain inadmissible hearsay, Appellant would also need to show that the error in admitting the letter was prejudicial error. *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787, 834 N.E.2d 323, ¶35. "No error in * * * the admission * * * of evidence * * * is ground for granting a new trial or for setting aside a verdict * * * unless * * * such action appears to the court inconsistent with substantial justice." Civ.R. 61. It is well established that errors will not be deemed prejudicial where their avoidance would not have changed the result of the proceedings. *Fada v. Information Sys. & Networks Corp.* (1994), 98 Ohio App.3d 785, 792, 649 N.E.2d 904.

{¶22} As Appellant's counsel points out, the evidence in support of the decision to grant permanent custody to BCDJFS is so overwhelming that the admission of Dr. Stoehr's letter could not have affected the outcome of this case. Although the letter mentions that Appellant took narcotics, the evidence of her drug and alcohol abuse also appears throughout the record of this case. Arbita Lal, one of Appellant's mental health therapists, recounted Appellant's abuse of prescription drugs that led to at least five drug overdoses. (Tr., p. 71.) Appellant herself admitted that, "I drank a lot, yes, I partied a lot." (Tr., p. 340.) Jamie Cohen-Pickens of BCDJFS testified that Appellant had a history of drug and alcohol abuse, including, "snorting Vicodin and Xanax". (Tr., p. 192.) Any implication from Dr. Stoehr's letter

that Appellant was abusing narcotics was merely duplicative of other evidence already in the record.

{¶23} It should also be kept in mind that this case was tried to the court, not to a jury. In a bench trial, the trial judge is presumed to rely only on relevant, material and competent evidence. *Parrish v. Machlan* (1994) 131 Ohio App.3d 291, 297, 722 N.E.2d 529. The trial court's judgment entry does not mention Dr. Stoehr's letter or the contents of the letter, and there is no indication that the court relied on the letter in rendering its judgment.

{¶24} The record overwhelmingly indicates that Appellant failed to follow and complete her case plan, had drug and alcohol abuse issues, had numerous mental health issues, had no proper housing for the child, and had barely maintained any relationship with her daughter from the moment the child was born. Any single error in the admission or exclusion of evidence would not affect the outcome of the case.

{¶25} There being no non-frivolous issues to review on appeal, Appellant's motion to withdraw is granted and the judgment of the trial court is affirmed.

Vukovich, P.J., concurs.

DeGenaro, J., concurs.