[Cite as *In re L.H.*, 2010-Ohio-1601.]

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

In the Matter of: L.H.

Court of Appeals No. L-09-1217

Trial Court No. JC 07168641

DECISION AND JUDGMENT

Decided: April 9, 2010

* * * * *

Stephen D. Long, for appellant.

Dianne L. Keeler, for appellee.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, Juvenile Division, that terminated the parental rights of appellant mother ("mother") and granted permanent custody of her child L.H. to appellee Lucas County

Children Services ("LCCS"). For the following reasons, the judgment of the trial court is affirmed.

{¶ 2} Appointed counsel, Stephen D. Long, has submitted a request to withdraw pursuant to *Anders v. California* (1967), 386 U.S. 738. In his brief filed on appellant's behalf, appointed counsel sets forth two proposed assignments of error. In support of his request to withdraw, counsel for appellant states that, after reviewing the record of proceedings in the trial court, he was unable to find any appealable issues.

{¶ 3} *Anders*, supra, and *State v. Duncan* (1978), 57 Ohio App.2d 93, 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 he should so advise the court and request permission to withdraw. Id. 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.

{¶ 4} In the case before us, appointed counsel has satisfied the requirements set forth in *Anders*, supra. We note that appellant mother has not filed a brief raising any issues for appeal, despite correspondence from appointed counsel informing her of her right to do so.

{¶ 5} Accordingly, this court shall proceed with an examination of the potential assignments of error proposed by counsel and the entire record below to determine if this appeal lacks merit and is, therefore, wholly frivolous.

{¶ 6} The facts relevant to the issues raised on appeal are as follows. Mother's child, L.H., was born in January 2005.[1] LCCS first became involved with mother with regard to L.H. on May 20, 2007, when the trial court issued an ex parte order allowing the agency to take L.H. into shelter care custody. This was prompted by an incident two days earlier when mother removed an IV from L.H.'s arm and took the child from the hospital emergency room against the doctor's orders. The following day, May 21, 2007, the agency filed a complaint in dependency and neglect with respect to L.H. A shelter care hearing was held that day and mother agreed to an award of temporary custody to the agency. The parties further agreed that mother would undergo a psychological evaluation and substance abuse assessment and follow any resulting recommendations.

{¶ 7} Over the next 26 months, motions too numerous to detail herein were filed by both parties in the trial court. Mother repeatedly requested new appointed counsel and

[1]Mother has two older sons who are in the custody of their father. Mother also has a son, R.R., born in July 2008, who at the time of this writing is in the custody of Wood County Children Services.

was represented by her fifth attorney at the time of the final hearing. Case plans were filed with the goal of reunification.[2]

{¶ 8} At a hearing held August 15, 2007, appellant consented to an adjudicatory finding of dependency and neglect. Temporary custody was continued with LCCS.

{¶ 9} On August 30, 2007, mother filed a motion for legal custody with protective supervision. A hearing was held on February 6, 2008, and the motion was denied on February 19, 2008. Several extensions of temporary custody were granted. Despite having appointed counsel, mother filed numerous pro se motions for change of venue and change of custody, as well as for transcripts and new counsel. Eventually, the trial court instructed mother that any future motions were to be filed only through counsel.

{¶ 10} On August 12, 2008, mother filed a notice of appeal. Thereafter, mother filed a motion for voluntary dismissal and on December 8, 2008, this court dismissed the appeal (case No. L-08-1272).

{¶ 11} On March 27, 2009, the agency filed a motion for permanent custody. Hearings were held on the permanent custody motion on July 8-10 and July 22, 2009.

{¶ 12} As the first potential assignment of error, appointed counsel suggests that appellant mother was denied effective assistance of counsel. A review of the record reveals that, from the inception of the case through final hearing, mother was represented

[2]L.H.'s father did not participate in case plan services or exercise visitation with the child. He did not appear at the final hearing, although duly served and notified. Father's parental rights were terminated and he has not appealed.

by a series of five different attorneys, each one appointed upon her request that current counsel be removed. Mother's fifth attorney was appointed approximately four months prior to the final hearing.

{¶ 13} To prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied upon as having produced a just result. The standard requires appellant to satisfy a two-prong test. First, appellant must show that counsel's representation fell below an objective standard of reasonableness. Second, appellant must show a reasonable probability that, but for counsel's perceived errors, the results of the proceeding would have been different. *Strickland v. Washington* (1984), 466 U.S. 668. This test is applied in the context of Ohio law that states that a properly licensed attorney is presumed competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153.

{¶ 14} Based on the foregoing, we are unable to find that mother received ineffective assistance of counsel. Accordingly, mother's first potential assignment of error is without merit.

{¶ 15} As the second potential assignment of error, appointed counsel suggests that the trial court's finding of permanent custody was not supported by clear and convincing evidence and was against the manifest weight of the evidence.

{¶ 16} Mother received services in both Lucas County and Wood County during the pendency of this case. She completed domestic violence and parenting groups and received services provided by three mental health agencies between 2007 and 2009. The

record reflects that the trial court heard testimony from several police and corrections officers who had contact with mother during the pendency of this case, several counselors and parenting instructors, two caseworkers, the child's guardian ad litem, and mother. Testimony relevant to this appeal is summarized below.

{¶ 17} The agency's first witness was Officer Jeffrey Castanzo, with the Oregon Police Department. Castanzo testified that he was called to the Holiday Inn in Oregon on February 15, 2009, on a report of a disturbance in one of the rooms. Castanzo found mother in the room, which was in total disarray. The officer testified that mother appeared to be very intoxicated and admitted to having consumed alcoholic beverages and prescription drugs. Two other officers found a male walking through the motel parking lot, carrying an infant in a car safety seat. Costanzo estimated that the child was approximately six months old. The officers brought the man and baby back to the motel room and learned that the baby was mother's son. The baby, who was in the temporary custody of the Wood County Department of Job and Family Services at that time, was on a 30-day visitation with mother. It was determined that the male, who was the baby's father, had warrants for domestic violence charges and was wanted by the U.S. Border Patrol. Castanzo further testified that mother attempted to prepare a bottle for the baby but was physically unable to do so. The officers contacted the Wood County authorities and the baby was taken back into their custody.

{¶ 18} Angela Korte, an assessment clinician with Behavioral Connections, testified that she conducted an assessment of mother in January 2009. She diagnosed

mother with alcohol abuse and possible sedative abuse. Korte recommended that mother be further evaluated for appropriate drug and alcohol treatment. Korte referred mother to Neeru Jettly, a chemical dependency counselor with Behavioral Connections in Wood County.

{¶ 19} Jettly testified that mother was placed in an intensive outpatient treatment program. Mother attended 20 sessions between March 24 and May 8, 2009. During the course of treatment, mother admitted to signs and symptoms of alcohol dependence. Mother admitted to having a high tolerance for alcohol. She further admitted to binge drinking, at times up to 12 or 14 shots in one sitting, and to having experienced blackouts. She reported excessive drinking to the point of passing out as recently as mid-March 2009. Jettly further testified that mother's reports of a history of substance abuse were inconsistent. Jettly testified that she believed mother was in denial as to the severity of her problems and lacked insight, failing to associate her drinking with her child custody issues. However, mother was attending AA meetings regularly and tested negative on all of her random drug screens.

{¶ 20} At the time of the final hearing, mother was no longer in treatment at Behavioral Connections. Jettly explained that mother did not complete both phases of her outpatient treatment. At the end of phase two of her treatment, Jettly referred mother to another counselor who decided that mother would not benefit from further treatment.

{¶ 21} Lieutenant Matthew Bombrys, Toledo Police Department, testified as to his contact with mother in September 2008, when he responded to a call regarding a fight

outside a bar. He further testified that mother was arrested for disorderly conduct - intoxication.

{¶ 22} Officer Bob Holland, Toledo Police Department, testified as to his contact with mother when he responded to a domestic violence call in December 2008. The officer found mother to be highly intoxicated but did not place her under arrest.

{¶ 23} The agency also presented the testimony of Tammie Prenger, an LCCS caseworker who had contact with mother for 16 months prior to the hearing. Prenger testified that mother completed her parenting classes and her domestic violence survivors' group. Mother was referred to the domestic violence group based on concerns arising from her relationship with her husband. Mother completed the group in October 2008, but continued to see her husband until at least February 2009, when they were involved in the altercation at the Holiday Inn. Prenger further testified that mother received some individual and group counseling services at Unison and Harbor in 2008 until she moved to Wood County. At the time of the hearing, mother was not involved in any services, although Prenger recently had worked on a referral to a chemical dependency agency. Prenger stated that mother does not believe she needs substance abuse treatment. Prenger testified that mother reported taking Xanax, Vicodin and Darvocet at various times, which were prescribed by a variety of physicians, sometimes following hospital emergency room visits. At the time of the final hearing, the agency had been attempting to address mother's prescription drug issue for over two years.

{¶ 24} Prenger stated that the agency continued to have concerns regarding substance abuse and mental health counseling. Prenger testified that mother's visits with L.H. had recently been changed to a higher level of supervision after L.H. told several people that her mother might take her to Mexico. Prenger stated that mother is not employed. Mother has told the agency that she gets money from "under the table" work for friends and from her husband. Prenger further testified that mother's case plan services with local agencies have been interrupted several times due to mother's moving from Lucas County to Wood County and back again; she was currently living with friends in Lucas County. Prenger was unaware of mother's having made any plans as to suitable, independent housing if she regained custody of L.H. and did not know how mother would meet the child's other basic needs.

{¶ 25} LCCS next presented the testimony of Erin Cart, a caseworker for Wood County Children Services. Cart testified that she had worked with mother since August 2008, after Wood County received custody of mother's one-year-old son, R., at birth. Drug treatment was a requirement under the Wood County case plan and Cart expressed ongoing concern about mother's use of prescription drugs. Mother told Cart that she is unable to work due to anxiety issues and because she "can't think straight."

{¶ 26} Mother presented several witnesses. Janis Woodson, a parenting instructor with LCCS, testified that mother attended her class for approximately 12 weeks in 2008. Mother did well and demonstrated proper parenting skills when Woodson observed the hour-long visitations with L.H. between July and November 2008.

{¶ 27} Dawn Smith, a supervisor for Centralized Drug Testing, testified as to four instances between June and December 2008, when mother tested positive for a variety of drugs, including benzodiazepenes and opiates.

{¶ 28} Sheila Plasman testified as to her contact with mother after she became the Court-Appointed Special Advocate for mother's son R. in Wood County in July 2008. Plasman stated that mother indicates she will be able to provide financially for her children because she is "creative." She expects to receive child support for L.H. from the child's father in Mexico. Mother reported to Plasman that she has physical problems that make it difficult for her to work but that she will work if she needs to.

{¶ 29} Shari Bernstein testified that she became mother's drug and alcohol therapist at Unison in March 2008. Bernstein testified that she had seen mother's diagnostic assessment of alcohol dependence and borderline personality disorder. Bernstein's psychological evaluation of mother resulted in a diagnosis of adjustment disorder, alcohol dependence in full remission, and borderline and antisocial tendencies. She worked with mother on issues of communication skills and loss and bereavement until October 2008, when mother was discharged from the program because her Medicaid benefits ran out and she was living in Wood County. Bernstein believed mother made significant progress with her but was unsure as to how that translated to mother's "outside world."

{¶ 30} Richard Whittier, a security guard at the LCCS offices, testified as to one occasion in February 2009, when mother had to be removed from visitation because she

appeared to be "under the influence of something." Mother did not cooperate with efforts to remove her.

{¶ 31} Mother testified on her own behalf, detailing the various treatment programs in which she participated after LCCS was awarded custody of her daughter in 2007. Mother stated that she stopped taking Xanax after the Holiday Inn incident in February 2009, and had not consumed any alcoholic beverages for several months. When asked if she has an alcohol problem, mother responded, "If I drink, yes."

{¶ 32} The child's guardian ad litem testified that she did not believe it was in the child's best interest to be returned to mother's custody because mother has not remedied the issues that initially caused L.H. to be removed.

{¶ 33} 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 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 paragraphs 1-5 of subsection D. Only if these 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.* (1996), 75

Ohio St.3d 95. 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* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

{¶ 34} Upon consideration of the adjudicative facts, exhibits, testimony, guardian ad litem's recommendation and other matters of record, the trial court found by clear and convincing evidence that L.H. could not and should not be placed with either parent within a reasonable time. The trial court found, pursuant to R.C. 2151.414(E)(1), that although case plan services had been provided to mother, she had not remedied the conditions which caused the removal of the child from her home. Pursuant to R.C. 2151.414(E)(2), the trial court found that mother has chemical dependency issues that make her unable to provide an adequate permanent home for the child. Pursuant to R.C. 2151.414(E)(14), the trial court found that mother was unwilling to provide basic necessities for the child or prevent the child from suffering neglect.

{¶ 35} The trial court found, pursuant to R.C. 2151.414(D)(1)(c), that the child had been in the temporary custody of LCCS for twelve or more months of a consecutive 22-month period and was in need of a legally secure permanent placement. The trial court noted the age of the case and that L.H. had been in the temporary custody of LCCS for more than two years at the time of trial, without either parent being appropriate for reunification. The trial court also noted that the guardian ad litem recommended that permanent custody be given to LCCS.

{¶ 36} This court has thoroughly reviewed the record of proceedings in this case, beginning with mother's initial involvement with LCCS in 2007, through the hearing on the motion for permanent custody and the trial court's decision. We find that the judgment in this case addresses all of the relevant statutory factors. Based on our review of the record as summarized above, we further find that the trial court's decision was supported by clear and convincing evidence that an award of permanent custody to Lucas County Children Services was in the best interest of L.H. Accordingly, mother's second proposed assignment of error is not well-taken.

{¶ 37} Upon our own independent review of the record, we find no other grounds for a meritorious appeal. Accordingly, this appeal is found to be without merit and is wholly frivolous. Appointed counsel's motion to withdraw is found well-taken and is hereby granted. The decision of the Lucas County Court of Common Pleas, Juvenile Division, is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

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.

Peter M. Handwork, J.

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JUDGE

Mark L. Pietrykowski, J.

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JUDGE

Thomas J. Osowik, P.J.
CONCUR.

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JUDGE