

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

In the Matter of: K.P., D.P.

Court of Appeals No. L-09-1154

Trial Court No. JC 07-170713

DECISION AND JUDGMENT

Decided: January 29, 2010

* * * * *

Stephen D. Long, for appellant.

Patricia J. Clark, for appellee.

* * * * *

OSOWIK, 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 two children 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.

{¶ 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 two children, K.P. and D.P., are twins born in August 2006. Mother was not married to the twins' father, but it appears from the record that mother and father lived together with the children. LCCS first became involved with mother in October 2006 when the agency opened a case following reports of mother's cocaine abuse. The family cooperated with the agency but the case was closed in May 2007 when the family moved to another county. When the family moved back to Lucas County, the agency again received reports of mother abusing drugs. Mother refused to leave urine screens when asked by the agency to do so and the agency received reports that mother was selling her furniture and her car for drug money. On July 18, 2007, the agency filed a complaint in dependency and neglect and on that date the juvenile court held a shelter care hearing. At the conclusion of the hearing, the magistrate awarded temporary emergency custody of the twins to the agency. On August 21, 2007, the juvenile court held an adjudication hearing. Both parents were present and both consented to an adjudicatory finding of neglect. Accordingly, temporary custody was given to LCCS with the goal of reunification.

{¶ 7} Throughout the following year, the agency submitted amended case plans and several case review hearings were held. In August 2008, the trial court granted the agency's motion to extend custody of the twins. On November 14, 2008, the agency filed a motion for permanent custody and the matter was referred to the juvenile court's permanent custody mediation program.

{¶ 8} On March 11, 2009, a permanent custody mediation was held. Father did not appear. At that time, mother agreed to an award of permanent custody to LCCS and signed the appropriate form. The juvenile court accepted mother's agreement and set the matter for trial with regard to the twins' father. On March 23, 2009, however, mother filed a pro se "notice of appeal" in which she asked for a "second chance" to prove that her children were meant to be with her. At a pretrial held on April 1, 2009, the trial court stated that mother's "notice of appeal" would be considered as a motion to withdraw her consent to the award of permanent custody to LCCS. The "motion to withdraw" was granted and the matter was set for trial.

{¶ 9} On May 14, 2009, the matter came before the trial court for the second time on the agency's motion for permanent custody. Father again failed to appear. Following testimony from the agency's witness, mother again executed an agreement for permanent custody. The trial continued and, upon consideration of the adjudicative facts, exhibits, testimony and other matters of record, the trial court found by clear and convincing evidence that the children could not and should not be placed with either parent within a reasonable time and that they had been in the temporary custody of LCCS for 12 or more

months in a consecutive 22-month period. As to mother, 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 children from her home. Pursuant to R.C. 2151.414(E)(2), the trial court found that both parents have chemical dependency issues that make them unable to provide an adequate permanent home for the children. Pursuant to R.C. 2151.414(E)(16), the trial court found, after a full inquiry, that mother's agreement for permanent custody was made knowingly, voluntarily and intelligently, with full knowledge of the consequences.

{¶ 10} The trial court also found that LCCS made reasonable efforts to prevent the removal of the children from the home and to finalize a permanent plan. The court found that mother did not follow through with case plan services.

{¶ 11} The trial court noted that the children had been removed from the family home since July 2007 and have been in a foster home since that time. The court further noted that the children have adjusted well to the foster home and are thriving in the placement. The foster parents have expressed an interest in adopting the twins. The trial court concluded that it would be in the best interest of both children to award permanent custody to LCCS. It is from that judgment that mother appeals. Father has not appealed.

{¶ 12} As the first potential assignment of error, appointed counsel suggests that mother's May 14, 2009 agreement for permanent custody was not made knowingly, voluntarily or intelligently, or with full knowledge of the consequences of her actions. This court has thoroughly reviewed the transcript of the May 14, 2009 permanent custody

trial. After the agency presented the testimony of mother's case manager at Unison, a brief recess was taken. Following the break, mother's counsel informed the trial court that mother had decided, after a "very informed and thoughtful discussion," that she would agree to the motion for permanent custody. At that time, the trial court conducted a detailed inquiry of mother to determine that she understood her rights if the trial were to proceed as well as the effects of her decision. The trial court reminded mother that the court had permitted her to withdraw her consent to permanent custody once before and indicated that the court would not do so again. Mother indicated that she understood. Mother also indicated that she had discussed her rights with her attorney and believed it was in her best interest to waive her rights. The trial court explained to mother that if permanent custody were to be granted to LCCS, she would have no further legal right to any manner of contact or communication with her children; mother indicated that she understood. Additionally, the trial court explained to mother that a determination as to adoptive placement would be made without her input. Mother stated that no one had promised her anything, pressured her or threatened her in any way to make her decision. Mother further indicated that she was not under the influence of any medications, drugs or alcohol that would affect her ability to understand her actions, and that she had no questions. Finally, mother stated that she was agreeing to permanent custody because she believed it was best for her children. At the conclusion of the foregoing, mother was permitted to execute the permanent surrender document; the trial court then accepted the

agreement. Based on the foregoing, we find that mother's first potential assignment of error is without merit.

{¶ 13} As the second potential assignment of error, counsel for mother suggests that mother was denied effective assistance of counsel. A review of the record reveals that on May 14, 2009, the date of the final hearing, the trial court questioned mother's appointed counsel as to mother's absence at the start of the hearing. Counsel explained that she had been appointed to represent mother in this matter in April, at which time she sent a letter to mother's home address asking mother to contact her. When she did not hear from mother, counsel attempted to call and found that the number she had been given was disconnected. Counsel contacted the agency caseworker, who provided her with another phone number; counsel called and left a message with a family member. She did not hear from mother until a few days prior to the May 14 hearing, when mother left her a phone message. Counsel and mother were finally able to speak in person for approximately one hour the day before the hearing. Counsel indicated to the trial court that she had received discovery from the agency and had reviewed the record; she also had spoken with the ongoing caseworker and guardian ad litem. Counsel asked the court for a continuance in order to speak at length with her client. The trial court denied the request for a continuance.

{¶ 14} 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.

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

{¶ 16} As a third potential assignment of error, counsel for mother suggests that the decision of the trial court to award permanent custody of mother's two children to LCCS was against the manifest weight of the evidence and was not supported by sufficient evidence.

{¶ 17} 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.

{¶ 18} The record reflects that the trial court heard testimony from Barb Porvaznik, mother's case manager with Unison Behavioral Healthcare. Porvaznik testified that mother began services with Unison in May 2008 and that she had worked with mother since September 2008. Mother had been referred to substance abuse treatment, psychiatric evaluation and psychological counseling at Unison. From Porvaznik's testimony, it appeared that mother failed to follow through consistently with the services. Porvaznik further testified as to her meetings with mother and said mother was inconsistent with her attendance at AA meetings, which interfered with the successful completion of her substance abuse program. Mother began participating in individual counseling in May 2008 but missed 17 of the 32 sessions scheduled. Beginning January 2009, mother had intermittently attempted to re-engage in services but never followed through. Additionally, mother continued in her physically abusive relationship with the children's father, despite admitting that he had on more than one occasion "beaten" her up. At the date of the final hearing, mother had not completed the

15-week domestic violence program to which she had been referred five months earlier, having attended only seven classes.

{¶ 19} The trial court also had before it the guardian ad litem's recommendation that permanent custody be awarded to LCCS. The guardian, who had worked with the family since August 2007, found that mother was unable to make use of much of the information presented in the parenting classes she attended. The guardian also concluded that mother did not understand that repeatedly returning to the physically abusive relationship with the children's father would make it harder for her to regain custody of her children.

{¶ 20} This court has thoroughly reviewed the record of proceedings in this case, beginning with the family's initial involvement with the agency in 2007 through the hearing on the motion for permanent custody and the trial court's decision. We find that the judgment entry in this case addresses all of the relevant statutory factors in detail.

{¶ 21} 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 the Lucas County Children Services was in the best interest of K.P. and D.P. Accordingly, mother's third potential assignment of error is without merit.

{¶ 22} As the fourth potential assignment of error, mother's counsel suggests that the trial court improperly proceeded with the permanent custody hearing on May 14, 2009, after mother filed a pro se "notice of appeal" in the trial court on March 23, 2009,

"asking for an appeal" in order to prove that her children are meant to be with her. The record reflects that, at a pretrial held on April 1, 2009, the trial court announced it would consider mother's "notice of appeal" to be a motion to withdraw her consent to permanent custody given at the March 11, 2009 hearing. The trial court thereupon granted the "motion to withdraw consent" and set the matter for final hearing on the agency's motion for permanent custody. As indicated above, a second permanent custody hearing was held on May 14, 2009, allowing mother another opportunity to present her case. However, at the final hearing, mother again chose to execute a permanent surrender of her parental rights. Based on the foregoing, we find that mother was not prejudiced by the trial court's decision to consider her "notice of appeal" as a motion to withdraw her consent to permanent custody, especially in light of the fact that the trial court then granted the motion, thereby allowing mother to proceed with her case. Accordingly, mother's fourth potential assignment of error is without merit.

{¶ 23} As the fifth and final potential assignment of error, counsel for mother suggests that the trial court abused its discretion by denying mother's motion for a continuance made at the May 14, 2009 final hearing. The record reflects that at the pretrial on April 1, 2009, mother asked the trial court to appoint different counsel. Mother's request was granted and new counsel was appointed. The record reflects that mother's trial counsel asked the court for a continuance since she had difficulty contacting mother after she was appointed six weeks earlier. Counsel explained that she and mother finally met the day before the hearing and were able to talk for only an hour.

{¶ 24} This court notes that the decision whether to grant a request for a continuance is a matter within the trial court's discretion. It is well-settled that the trial court has wide discretion in controlling its docket, including the decision to grant or deny a continuance. *Aydin Co. Exchange, Inc. v. Marting Realty* (1997), 118 Ohio App.3d 274, 278. On appeal, the trial court's decision will not be reversed absent a finding of abuse of discretion. *State v. Unger* (1981), 67 Ohio St.2d 65, 67. An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 25} Mother's third trial counsel was appointed at her request on April 1, 2009. Further, at the time of the final hearing, the children had been in foster care for 22 months and the motion for permanent custody had been pending for six months. The proceedings were essentially delayed by mother's decision to withdraw her original consent to permanent custody and the resulting need to reschedule the matter for final hearing. We find that the trial court did not abuse its discretion by denying the request for continuance and moving forward with the final hearing. Accordingly, mother's fifth potential assignment of error is without merit.

{¶ 26} 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. Appellant mother's 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.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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