[Cite as *In re Z.F.*, 2011-Ohio-2172.]

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

In the Matter of: Z.F.

Court of Appeals No. L-10-1354

Trial Court No. 09194787

DECISION AND JUDGMENT

Decided: May 4, 2011

* * * * *

James J. Popil, for appellant.

Jeremy Young, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} J.F. appeals a November 22, 2010 judgment of the Lucas County Court of Common Pleas, Juvenile Division, terminating her parental rights to her daughter, Z.F., and awarding permanent custody of the child to Lucas County Children Services ("LCCS"). K.D. is Z.F.'s father. He agreed to the award of permanent custody of Z.F to

LCCS and also agreed that the placement is in the best interests of the child. K.D. is not a party to this appeal.

{¶ 2} Z.F. was born in May 2009. She was born premature. Mother was discharged from the hospital first, but readmitted five days later to the psychiatric unit for mental health treatment. On June 3, 2009, when Z.F. was to be discharged from the hospital and mother remained hospitalized, LCCS filed a complaint in dependency seeking temporary custody of Z.F.

{¶ 3} The trial court conducted a shelter care hearing on June 3, 2009, and placed the child with LCCS on an interim basis. On July 14, 2009, the trial court determined Z.F. to be a dependant child and awarded temporary custody of Z.F. to LCCS. On March 31, 2010, LCCS filed a motion for permanent custody. Trial proceeded on October 26, 2010. The trial court awarded permanent custody of Z.F. to LCCS on November 22, 2010. It is from the November 22, 2010 judgment that mother appeals.

{¶ 4} Appellant is represented by court appointed counsel in this appeal. By affidavit, counsel states that he reviewed the record of proceedings in the trial court and researched potential issues for appeal but has concluded that there are no arguable issues of merit for appeal. Following procedures under *Anders v. California* (1967), 386 U.S. 738, counsel filed an appellate brief raising a potential assignment of error and also requested leave of court to withdraw as counsel for appellant. Counsel provided copies of both the appellate brief and his motion to withdraw to mother. He also advised mother

of her right to file her own brief and to assign additional assignments of error in the appeal.

{¶ 5} A parent's right to raise his or her children is a fundamental right. *Troxel v. Granville* (2000), 530 U.S. 57, 66; *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, ¶ 28. In cases involving termination of parental rights, the procedures announced in *Anders v. California* apply where appointed counsel concludes that an appeal is wholly without merit and seeks leave of court to withdraw as counsel on appeal. *Morris v. Lucas County Children Services Bd.* (1989), 49 Ohio App.3d 86, 87.

{¶ 6} Under *Anders v. California*, court appointed appellate counsel must undertake a "conscientious examination" of the case and, if counsel determines an appeal will be "wholly frivolous," inform the court of that fact and seek permission to withdraw. *Anders v. California* at 744; *State v. Duncan* (1978), 57 Ohio App.2d 93. The motion is to be accompanied by an appellate brief "referring to anything in the record that might arguably support the appeal." Id. A copy of the brief is to be furnished to the appellant, who is permitted additional time to raise any points she chooses in her own brief. Id.

{¶ 7} Once these requirements have been met, the appellate court is to conduct a full examination of the proceedings to determine whether the appeal is wholly frivolous. Id. Where the appellate court concludes the appeal is wholly frivolous, it may grant the motion to withdraw and dismiss the appeal. Id.

{¶ 8} Appellant has received the required notice under *Anders* and has submitted her own appellate brief. We consider the *Anders* brief first. In the *Anders* brief, counsel for appellant identified one potential issue for appeal:

{¶ 9} "1. The trial court erred in granting appellee Lucas County Children Services' motion for permanent custody as the decision was against the manifest weight of the evidence."

Mental Health

{¶ 10} In August 2007, two years before Z.F.'s birth, mother left a suicide note for her pastor advising him that she had a gun and that by the time he read the note she would be "in the morgue at St. Luke's Hospital." Mother's own mother worked at St. Luke's and appellant arrived at the hospital about the time her mother got off work. Ultimately, Maumee police found appellant in a bathroom at the hospital with a firearm. Police took appellant into custody. Appellant was hospitalized for treatment on an involuntary basis.

{¶ 11} Appellant was treated first at Rescue Crisis and then hospitalized at St. Charles Mercy Hospital for a week. Hospital records indicate that the primary treating physician, Dr. Kul B. Gupta, M.D., concluded that appellant's primary condition requiring treatment was Major Depression.

{¶ 12} Charlene A. Cassel, Ph.D. of the Court Diagnostic and Treatment Center conducted a psychiatric evaluation of appellant at the request of Maumee Municipal Court due to criminal charges arising from the incident. In an August 29, 2007 report,

Dr. Cassel concluded that at the time of the incident appellant "was working up the courage to commit suicide and likely wanted to take her mother with her." The LCCS caseworker assigned to Z.F. testified at trial that mother admitted to her and to others that she went to St. Luke's with an intent to harm her mother.

{¶ 13} Dr. Cassel diagnosed the conditions of depressive disorder, not otherwise specified, and personality disorder, not otherwise specified. In Dr. Cassel's opinion, appellant presented a risk of harm to herself and to her mother.

{¶ 14} After Z.F. was born, appellant was hospitalized in the hospital's psychiatric unit from May 28, 2009, until June 5, 2009. Dr. Kul B. Gupta, M.D., who treated appellant after the 2007 incident, was again the attending physician. In the hospital discharge summary, Dr. Gupta described appellant's condition at the time of admission: appellant suffered from "nausea, vomiting, and inability to walk. She was quite confused, psychotic, bizarre, and inappropriate on the medical floor * * *." Dr. Gupta also reported a final diagnosis in the hospital discharge summary of psychotic disorder not otherwise specified.

{¶ 15} At the joint request of appellant and LCCS, the trial court in this litigation ordered a psychological evaluation of appellant, to be conducted by the Court Diagnostic and Treatment Center. Dr. Mark S. Pittner, Ph.D., a psychologist and consultant with the Court Diagnostic and Treatment Center performed the evaluation. Dr. Pittner issued a report on August 17, 2010, and testified at trial.

{¶ 16} Dr. Mark S. Pittner testified that he is a psychologist and that he has consulted at the Court Diagnostic and Treatment Center for 19-20 years. He has been a psychologist for 30 years. He has conducted 4,000 to 5,000 psychological evaluations over his career.

{¶ 17} Dr. Pittner testified that test validity scaling of MMPI testing he performed on appellant showed the test results were unreliable. Dr. Pittner expressed concern that the PSI testing he conducted was also unreliable. Based on his clinical examination of appellant and review of medical and treatment records, Dr. Pittner testified to an opinion of a range of diagnoses applicable to appellant:

{¶ 18} "At your most benign you have the individual who has major depression, a personality disorder compounded by this lack of insight into the nature of those problems. At the maximum, you've got an individual who may have either a bipolar disorder of a psychoaffective disorder and/or a psychotic disorder not otherwise specified. As I stated earlier, I am very careful about throwing those other labels out there. Unless I had seen her over time myself I would not throw those labels at her."

{¶ 19} Dr. Pittner testified that the diagnoses by other professionals who had treated appellant over a period of time "have severe implications for parenting." Based upon his limited examination, Dr. Pittner testified to the existence of "some legitimate concerns about parenting."

{¶ 20} Dr. Pittner testified that medical records included findings by doctors that appellant was noncompliant in taking her medications and by therapists concluding

appellant had failed to make progress. He testified that "the severity of the mental health issues compounded by the lack of insight will have a direct bearing on any parent's ability to provide adequate care."

{¶ 21} During the course of his evaluation of appellant, Dr. Pittner met with appellant twice. He testified that throughout his evaluation of appellant and those conducted by others that appellant had "little to no understanding of what her mental health issues are." He described further that "while I'm interviewing her she was either intentionally downplaying the history of mental health issues that were raised by previous practitioners, stating that they were inaccurate in their diagnoses. That she really has been mentally healthy these last three or four years. So in part, that's deniable, but in part that is also just lack of insight into the nature of her problems."

{¶ 22} Dr. Pittner also testified, by history, of an increased risk of physical abuse to Z.F.:

{¶ 23} "Q. Do you believe * * * [J.F.] * * * would ever physically abuse a child? Physical abuse in the sense that we all know physical abuse.

{¶ 24} "A. I believe it's more likely than it would be with a typical person. If you believe the diagnoses that have been used in the past that labeled her as either psychotic not otherwise specified or bipolar, both of those diagnoses imply some impulse control issues. If you looked at the history of the offense and the fact that it wasn't just suicide ideation, but she actually acted, she actually took a gun, she actually took it to the locale,

you're not talking anymore about just a mental process. You're talking about a person who had crossed a line into behavioral action."

{¶ 25} Julie Jackson served as the LCCS caseworker for Z.F. from June 2009, when the child was first placed with the agency for shelter care until the month before trial. Sarah Richards of the Veterans Administration acted as appellant's HUD-VASH case manager since August 2009. As a case manager, Richards' duties were to assure appellant, a veteran, received VA services, including housing and other basic needs. Both Jackson and Richards testified at trial.

{¶ 26} Both testified to a recurrent failure of appellant to admit that she had any mental health problems and failure to take medications prescribed for mental health treatment. According to Richards, appellant claimed beginning in February or March 2010, she began taking prescribed medications. Jackson testified that this claim was made only after LCCS changed its goal from reunification of the family to permanent placement with LCCS for adoption. Both Richards and Jackson testified appellant would feign compliance by stating she was taking medications when she was not. Both testified that they saw no progress by appellant with respect to her mental health during the period they worked with mother as caseworkers.

{¶ 27} The trial court appointed Toni Town to serve as the guardian ad litem for Z.F. Town served in that capacity from the shelter care hearing on June 3, 2009, through trial. Ms. Town recommended that the court award permanent custody of Z.F. to LCCS.

Permanent Placement

{¶ 28} As a public children services agency, LCCS filed a motion on March 31, 2010, seeking termination of parental rights and the permanent placement of Z.F. with LCCS. The motion was made pursuant to R.C. 2151.353(B) and 2151.414. The trial court awarded permanent custody to LCCS based upon findings by clear and convincing evidence that under R.C. 2151.414(B)(1)(a) that Z.F. could not be placed with either of her parents within a reasonable time and should not be placed with either parent and that under R.C. 2151.414(D)(1)(a)-(e) that it is in the best interests of Z.F. to grant permanent custody to LCCS and contrary to the child's best interests to be reunified with either parent. See R.C. 2151.414(B)(1)(a).

Manifest Weight of the Evidence

{¶ 29} A trial court judgment terminating parental rights will not be overturned on appeal as against the manifest weight of the evidence where there is competent credible evidence in the record under which the court could have formed a firm belief or conviction that the essential statutory elements for termination of parental rights have been established. *In re Alexis K.*, 160 Ohio App.3d 32, 2005-Ohio-1380, ¶ 26. See *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus (Clear and convincing evidence defined.); *C.E. Morris v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus.

Whether Child could be placed with either parent within a reasonable period of time or should not be place with either parent

{¶ 30} The trial court made findings under R.C. 2151.414(E)(1) and (2) as a basis of its determination that Z.F. could not be placed with either parent within a reasonable period of time or should not be placed with the parents. The statute directs trial courts to "enter a finding that the child cannot be place with either parent within a reasonable time or should not be place with either parent" if it finds by clear and convincing evidence that any one of 16 factors listed in the statute are shown. R.C. 2151.414(E). R.C. 2151.414(E)(1) identifies the following factor:

{¶ 31} "(1) 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. In determining whether the parents have substantially remedied those conditions, the court shall consider parental utilization of medical, psychiatric, psychological, and other social and rehabilitative services and material resources that were made available to the parents for the purpose of changing parental conduct to allow them to resume and maintain parental duties."

{¶ 32} In its opinion, the trial court outlined the numerous services made available to assist mother to remedy the conditions that caused Z.F. to be placed outside the home. The trial court concluded: "The court finds that the mother failed to make substantial

progress in the most crucial part of her services, to address her mental illness, and the conditions which caused the removal have not remedied." In making that determination, the court considered testimony that appellant was non-compliant in taking medication for her mental illness, that appellant had no intention of actually taking medications, and that appellant would feign compliance while admitting to lacking any intent to take the medications.

{¶ 33} The court described "grave concerns regarding her ability to care for the child" as expressed by service providers and testimony that appellant admitted that she not only intended to commit suicide in the incident in 2007 but had also intended to kill her mother. The court considered the testimony by Dr. Pittner of a lack of progress therapeutically or in mental health counseling and concerns by Dr. Pittner of "'severe' implications that mother's mental health problems place on her ability to parent."

{¶ 34} After reviewing and summarizing the evidence at trial, the trial court concluded:

{¶ 35} "Based on the foregoing, the court finds that the mother did not internalize the seriousness of her psychological and mental health issues, and she did not make substantial progress in therapy or towards completion of her case plan services in this regard. And as a result, the mother has failed to remedy the conditions that caused * * * [Z.F.'s] * * * removal."

{¶ 36} We find that competent credible evidence in the record exists sufficient to produce a firm belief or conviction supporting the trial court's determination that mother

failed to substantially remedy the conditions that caused Z.F. to be placed outside the home within the meaning of R.C. 2151.414(E)(1).

{¶ 37} The trial court also made a finding of the existence of the R.C. 2151.414(E)(2) factor with respect to both mother and father. The statutory factor reads:

{¶ 38} "(2) Chronic mental illness, chronic emotional illness, mental retardation, physical disability, or chemical dependency of the parent that 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 after the court holds the hearing pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code [.]"

{¶ 39} The record includes a series of treatment records of mother for mental illness in addition to testimony by Dr. Pittner at trial. The trial court listed different diagnoses of mother's mental illness by treating medical professionals including "Major Depression; Major Depressive Disorder, Recurrent, Severe without Psychotic Features; Depressive Disorder, NOS; and Psychotic Disorder, NOS." At the time of trial, appellant was receiving Social Security disability assistance based upon a mental health disability.

{¶ 40} In its opinion, the trial court drew on the opinion testimony of Dr. Pittner and the history of the 2007 incident at St. Luke's in concluding that appellant's mental illness is so severe that she is unable to provide an adequate permanent home for Z.F.:

{¶ 41} "Dr. Pittner testified extensively about mother's lack of insight into the severity of her mental health condition and her diagnoses. Dr. Pittner testified that

mother's response to learning of her mental health diagnosis was denial: 'I don't know what that is. How can I have that?' Dr. Pittner further testified as to the pervasiveness of mother using denial as a coping mechanism and her denial was so severe as to make portions of her mental health testing invalid.

{¶ 42} "And Dr. Pittner testified that, in his expert opinion, the severity of mother's mental illness in conjunction with mother's complete lack of insight and inability to comprehend her mental illness, create legitimate, well founded concerns about her ability to parent. Further, the psychological expert testified regarding his grave concerns that mother not only had suicidal ideation but also had elaborately acted on her suicidal thoughts. When asked on cross-examination if he thought mother might harm her child, Dr. Pittner testified that this was more likely because of mother's mental health conditions.

{¶ 43} "The court finds the mother is in denial about the existence of her mental health illness. Further the court finds that the severity of the mother's mental health illness is so great that she is unable to provide an adequate home for the child."

{¶ 44} We find that there is competent credible evidence in the record that produces a firm belief or conviction supporting the trial court's determination that mother suffers from chronic mental illness that is so severe that mother cannot provide an adequate permanent home for Z.F. within the meaning of R.C. 2951.414(E)(2).

{¶ 45} With respect to Father, the trial court found factors R.C. 2951.414(E)(2), (4) and (16) had been established by clear and convincing evidence.

{¶ 46} K.D. appeared by telephone, from Florida, at a hearing before the trial court on July 16, 2010. By affidavit he indicated that physical disabilities and financial hardships prevented his traveling from his residence in Florida to Toledo for trial. He informed the court that he is on social security disability and has physical and mental disabilities.

{¶ 47} K.D. acknowledged that he had voluntarily executed an affidavit filed with the court. The affidavit acknowledges that he is the father of Z.F., as confirmed by genetic testing, and that he was provided notice of trial on the motion of LCCS for permanent custody of Z.F. K.D. confirmed his statement in the affidavit that he agreed to surrender his parental rights and agreed to placement of permanent custody of Z.F. with LCCS. K.D. stated at the hearing, "I'm doing this because it's in the best interest of the child. I'm not able to provide proper care or housing or food for the child."

{¶ 48} By agreement of the parties, the affidavit by K.D. and the "Agreement Form Re: Permanent Custody" signed by K.D. agreeing to permanent placement of Z.F. with LCCS were admitted into evidence at trial in this case.

{¶ 49} The trial court also concluded that Z.F. could not be place with K.D. within a reasonable time or should not be placed with either K.D. or mother based upon R.C. 2151.414(E)(2), (4), and (16). With respect to R.C. 2151.414(E)(2), K.D. freely admitted that he suffered from physical and mental disabilities that prevent him from providing an adequate permanent home for the child. With respect to R.C. 2151.414(E)(4), the record reflects a failure of K.D. to regularly support, visit, or communicate with Z.F. With

respect to R.C. 2151.414(E)(16) consideration of "[a]ny other factor the court considers relevant," the trial court considered it relevant that K.D. knowingly and voluntarily agreed to the motion for permanent custody and that the placement is in the best interests of Z.F.

{¶ 50} We find that there is competent, credible evidence in the record that produces a firm belief or conviction that Z.F. cannot be placed with K.D. within a reasonable time or should not be placed with K.D. within the meaning of R.C. 2151.414(E).

Best Interest of the Child

{¶ 51} In its judgment, the trial court conducted an analysis under R.C. 2151.414(D)(1)(a)-(e) of the best interests of Z.F. on placement. The court found that Z.F. had been in foster care for approximately 15 months at the time of trial and was in need of a permanent placement. The child had been placed in a foster home and the foster parents are interested in adopting the child. The court found that Z.F. is doing well in the placement, her needs are being met, and she is thriving. The court found the child is adoptable, has bonded to the foster parents, and her prospect of being adopted is excellent.

{¶ 52} The child, due to her age, is unable to communicate her wishes on placement. The guardian ad litem supports permanent placement with LCCS.

{¶ 53} Shelter care placement of Z.F. outside the home with LCCS was made upon discharge of the child from the hospital from birth. Relative placement was

investigated but no relatives were identified as being interested in placement of the child. Maternal relatives contacted stated they were not interested in placement of the child and wanted no contact with mother.

{¶ 54} Z.F. was placed with LCCS first for shelter care upon discharge from the hospital after birth and second by an award of temporary custody to LCCS after the court determined in July 2009 the child is a dependent child.

{¶ 55} The trial court found that mother loves Z.F. and visits her regularly. The court also found that despite reasonable efforts through case plan services and community services provided the family to assist in reunification, that it would be contrary to the welfare of Z.F. to return her to her mother's home.

{¶ 56} We find competent, credible evidence in the record to establish a firm belief or conviction that permanent placement of Z.F. with LCCS is in the best interest of the child under R.C. 2151.414(D)(a)-(e).

{¶ 57} We have also reviewed mother's brief. Mother asserts facts in the brief, explaining circumstances around certain events and disputing others, much as if mother were testifying in rebuttal at trial. Mother did not testify at trial.

{¶ 58} Our role as an appellate court is to review the record of the proceedings in the trial court for error. It is well settled that "[a] reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter." *State v. Ishmail* (1978), 54 Ohio St.2d 402,

paragraph one of the syllabus. We therefore limit our consideration of mother's brief to facts in the record of the trial court proceedings.

{¶ 59} With that limitation, mother's argument is fact based and limited to whether there are facts in the record to support the trial court's judgment. The argument is in the same nature as the manifest weight of the evidence argument made under the potential assignment of error in the *Anders* brief.

{¶ 60} Considering arguments made in both briefs, we conclude that the judgment awarding permanent custody of Z.F. to LCCS is not against the manifest weight of the evidence. In our view, the trial court judgment is supported by competent, credible evidence in the record of the type sufficient to establish a firm belief or conviction that Z.F. cannot be placed with either parent within a reasonable time or should not be placed with either parent and that permanent placement of the child with LCCS is in the best interest of Z.F. We find the potential assignment of error and appellant's arguments in her brief are not well-taken.

{¶ 61} We have conducted our own independent review of the record, as required by *Anders*, and find no argument of merit for appeal. Accordingly, we grant the motion of counsel to withdraw. We affirm the judgment of the Lucas County Court of Common Pleas, Juvenile Division. Pursuant to App.R. 24, we order appellant to pay the court costs of this appeal. The clerk shall add appellant, J.F., to the list of parties to be served with notice of this judgment.

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.

Mark L. Pietrykowski, J. _____

JUDGE

Arlene Singer, J. _____

Stephen A. Yarbrough, J. _____ JUDGE
CONCUR.

JUDGE