

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

In re A.F., E.F.

Court of Appeals No. WM-13-007

Trial Court Nos. 20123028
20133003

DECISION AND JUDGMENT

Decided: February 21, 2014

* * * * *

Thomas A. Thompson, Williams County Prosecuting Attorney,
and Katherine Zartman, Assistant Prosecuting Attorney, for appellee.

Ryan S. Thompson, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant mother appeals the judgment of the Williams County Court of Common Pleas, Juvenile Division, terminating her parental rights for two children and granting permanent custody to a county children's services agency.

{¶ 2} On June 22, 2012, Bryan, Ohio police received a complaint from a citizen who reported that she had loaned her van to a couple that refused to return it, despite repeated requests. On June 26, 2012, police stopped a van meeting the description of the one reported. The occupants of the car were appellant, A.C., her five-year-old daughter, A.F., and the child's father, Er.F. Also found in the car were a stolen checkbook, stolen credit cards, drug paraphernalia and a quantity of what later proved to be, a then new to the area amphetamine, bath salts.

{¶ 3} Police arrested appellant and Er.F. on an initial charge of felony unauthorized use of a motor vehicle. A.F. was sheltered in the custody of appellee, William County Department of Job and Family Services. On July 24, 2012, A.F. was adjudicated a dependent child. The court granted temporary custody of her to appellee. She was placed in foster care.

{¶ 4} The arrest of appellant and Er.F. permitted a number of theft and drug offenses in several counties and two states to catch up with them. Nonetheless, appellant was released on July 2, 2012, only to be arrested the next day for stealing a purse from a parked car. Er.F. was released sometime in July 2012, and remained mostly free until January 2013, when he was imprisoned for a felony conviction.

{¶ 5} Pregnant at the time of her arrest, appellant gave birth to a boy in a Michigan women's prison in February 2013. The baby, E.F., was taken into emergency custody by appellee the following day. He was subsequently adjudicated dependent and appellee

was granted temporary custody. Appellee placed the boy in the same foster home as his sister. On June 6, 2013, appellee moved for permanent custody of both children.

{¶ 6} The matter proceeded to a September 2013 hearing on the motion at which now seven-year-old A.F. testified to her life prior to foster care. A.F. testified to seeing her parents steal and inject drugs in her presence. She also reported loud late night parties hosted by her parents that kept her awake on school nights. A.F.'s teachers testified to a dramatic improvement in her performance at school once she moved to foster care.

{¶ 7} The children's father appeared at two of the three days of hearings, able to attend because he had been transferred by the Department of Corrections into transitional control at a Toledo halfway house. The father testified that he would like to keep the children, but was unable to offer assurances of employment or secure housing once he completed his sentence. Moreover, other charges remained unresolved. A caseworker testified that the father's visitation with the children, even when he was not incarcerated, was inconsistent. The caseworker also testified that she had offered to work with the father on a reunification plan, but that the father declined to participate.

{¶ 8} Appellant was not present for the hearing. At the time, she remained imprisoned in Michigan, serving a 23 to 168 month sentence for identity theft. Appellee introduced records showing that appellant had been convicted of 50 criminal offenses as an adult. She has three unresolved criminal matters remaining when she is released from the Michigan penal system.

{¶ 9} Following the hearing, the court issued lengthy findings and conclusions. The court found that the children had been abandoned by both parents, either because their voluntary criminal activity and resulting incarceration prevented them from acting as parents or because, even when the opportunity existed to contact the children, they failed to do so. The court concluded that neither child could be placed with either parent within a reasonable time or should not be placed with their parents, pursuant to R.C. 2151.414(B)(1)(a). Alternatively, the court found multiple R.C. 2151.414(E) factors applicable: R.C. 2151.414(E)(1), parents failed to remedy conditions causing the children to be placed outside the home; R.C. 2151.414(E)(2), chemical dependency of parents; R.C. 2151.414(E)(4), parents demonstrate a lack of commitment; R.C. 2151.414(E)(10), parents abandoned the children; R.C. 2151.414(E)(12), present imprisonment of a parent; R.C. 2151.414(E)(13), repeated incarceration of parents; and R.C. 2151.414(E)(16), other factors—the court enumerated the parents intravenous use of drugs in the child’s presence, commission of thefts in the child’s presence, inadequate parental care prior to removal. On these findings, the court concluded that it was in the best interest of the children that their parents’ parental rights be terminated and that permanent custody of the children be granted to appellee.

{¶ 10} From this judgment, appellant now brings this appeal.

{¶ 11} Appointed counsel for appellant has filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and seeks leave to withdraw as counsel.

{¶ 12} In *Anders*, the United States Supreme Court held that if counsel, after a conscientious examination of the appeal, determines it to be wholly frivolous he should so advise the court and request permission to withdraw. *Id.* at 744. The request shall include a brief identifying anything in the record that could arguably support an appeal. *Id.* Counsel shall also furnish his client with a copy of the request to withdraw and its accompanying brief, and allow the client sufficient time to raise any matters that he chooses. *Id.* 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.* Although *Anders* is normally reserved for appointed counsel in criminal matters, we have held that it is also applicable for counsel appointed in termination of parental rights cases. *Morris v. Lucas Cty. Children Servs. Bd.*, 49 Ohio App.3d 86, 87, 550 N.E.2d 980 (6th Dist.1989).

{¶ 13} Appointed counsel has met the requirements set forth in *Anders*. Appellant did not file a brief. Accordingly, this court shall proceed to examine the potential assignments of error set forth by counsel and the entire record below to determine whether this appeal lacks merit rendering it wholly frivolous.

{¶ 14} Appellate counsel sets forth two potential assignments of error:

I. The Appellant was denied effective assistance of counsel.

II. The Appellant was deprived of her due process rights because she was not present at the hearing.

I. Ineffective Assistance of Counsel

{¶ 15} To successfully assert a claim of ineffective assistance of counsel, a party must demonstrate that counsel's performance was deficient and that this deficiency operated to the prejudice of the represented. "Prejudice" exists only when the lawyer's performance renders the result of the trial unreliable or the proceeding unfair. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Appellant must show that there exists a reasonable probability that a different result would have been returned but for counsel's deficiencies. *See id.* at 694.

{¶ 16} We have thoroughly reviewed the record in this matter and fail to find any deficiency in trial counsel's performance. The evidence properly admitted during the termination hearing was voluminous and persuasive and supports all of the trial court's findings. Accordingly, appellate counsel's first potential assignment of error is without merit.

II. Absence of Appellant at Hearing

{¶ 17} Appellate counsel's second potential assignment of error suggests that appellant's due process rights may have been violated because the trial court denied her motion to be transported from her Michigan prison to be present for the termination of

parental rights hearing. Appellate counsel properly notes that we have considered this issue in *In re Jesse P.*, 6th Dist. Lucas No. L-04-1028, 2004-Ohio-3801.

{¶ 18} In *Jesse P.*, the surviving parent of two children was incarcerated when the trial court conducted the hearing on a children’s services agency’s motion to terminate parental rights. The trial court denied the father’s motion to convey him from prison to the hearing, although it admitted into evidence the father’s letter indicating his desire to regain custody. Following the hearing, the court terminated the father’s parental rights and granted permanent custody to the children’s services agency. On appeal, the father claimed the trial court’s refusal to order his attendance at the hearing denied him his right to defend against the motion to terminate parental rights.

{¶ 19} In *Jesse P.*, at ¶ 51, we set forth the analytical structure to resolve this question by quoting our prior decision in *In re Joseph P.*, 6th Dist. Lucas No. L-02-1385, 2003-Ohio-2217, ¶ 52:

We begin by noting that an individual does not have an absolute right to be present in a civil case to which he is a party. *In re Sprague*, 113 Ohio App.3d 274, 276, 680 N.E.2d 1041(12th Dist.1996); *Mancino v. Lakewood*, 36 Ohio App.3d 219, 221, 523 N.E.2d 332 (8th Dist.1987). However, we must also note that an individual has a “basic,” “fundamental,” and “essential” civil right to raise his or her own children. *See Sprague*, 113 Ohio App.3d at 276; *In re Dylan R.*, 6th Dist. Lucas No. L-02-1267, 2003-Ohio-69, at ¶ 21. Because of the competing interests

involved in proceedings such as these, Ohio courts have applied a balancing test to determine whether a parent's due process rights are violated when the court proceeds with a hearing on a permanent custody motion without the parent's presence. Specifically, a court should balance the following factors: "(1) the private interest affected, (2) the risk of erroneous deprivation and the probable value of additional safeguards, and (3) the governmental burden of additional procedural safeguards." *Sprague*, 113 Ohio App.3d at 276, citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976). We previously approved of the Ninth District's reasoning in a case construing these factors. According to the Ninth District, a parent's due process rights are not violated when: (1) the parent is represented at the hearing by counsel, (2) a full record of the hearing is made, and (3) any testimony that the parent wishes to present could be presented by deposition. *In the Matter of Leo D., Deandre E., and Desandra E.*, 6th Dist. Lucas No. L-01-1452, 2002-Ohio-1174, citing *In re Robert F.*, 9th Dist. Summit No. 18100, 1997 WL 537666 (Aug. 20, 1997).

{¶ 20} If anything, the burden of granting appellant's motion to transport is greater here than in *Jesse P.* or *Joseph P.* In neither of those cases was the incarcerated parent who requested to be at the hearing being held in another state. Moreover, appellant was represented by counsel at the hearing, a full record of the proceedings was made and letters from appellant were introduced into evidence. Given these circumstances, the trial

court properly denied appellant's motion. Appellate counsel's second potential assignment of error is without merit.

{¶ 21} Upon this record, we concur with appellate counsel that appellant's appeal is without merit. Moreover, 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 wholly frivolous. Counsel's motion to withdraw is found well-taken and is, hereby, granted.

{¶ 22} On consideration, the judgment of the Williams County Court of Common Pleas, Juvenile Division, is affirmed. Appellant is ordered to pay the court costs of this appeal pursuant to App.R. 24. The clerk is ordered to serve all parties with notice of this decision.

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.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

<p>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: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
