

Gwin, J.,

{¶1} Appellant Rubin Faller appeals the judgment of the Court of Common Pleas of Licking County, Ohio, which terminated his parental rights to B.F., his biological daughter. Appellant's counsel has submitted a request to withdraw pursuant to *Anders v. California* (1967), 386 U.S. 738, asserting there are no meritorious issues for appeal.

{¶2} In *Anders*, the United States Supreme Court held if a counsel, after a conscientious examination of the case, determines it to be wholly frivolous, counsel should so advise the court and request permission to withdraw. The request must be accompanied by a brief identifying anything in the record that could arguably support an appeal. Counsel must furnish his client with a copy of the brief and request the court to allow the client sufficient time to raise any matter that he or she chooses. Once these requirements have been satisfied, the appellate court must then conduct a full examination of the proceedings to determine if the appeal is indeed frivolous. If the appellate court determines 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 requires.

{¶3} The procedures set out in *Anders*, supra are applicable to appeals involving the termination of parental rights. *Morris v. Lucas County Children's Services Board* (1989), 49 Ohio App. 3d 86.

{¶4} This case is an expedited appeal, and this court should enter judgment within 30 days of submission of the briefs, or of the oral argument, whichever is later, unless compelling reasons in the interest of justice require a longer time. App. R. 11.2 (C)(5). We find that the procedural requirements of *Anders*, supra, constituted a

compelling reason which in the interest of justice required a delay in this expedited appeal.

{¶15} In her *Anders* brief, counsel for appellant states she has conducted a thorough review of the record and researched the possible appellate issues raised in the case. Counsel for the appellant reached the conclusion there exists no meritorious issues for appeal. She served a copy of the brief on appellant Rubin Faller, and Rubin Faller has not filed a pro se brief or any other response.

{¶16} Counsel for appellant sets out three potential assignments of error for this court's review:

{¶17} "I. THE TRIAL COURT COMMITTED PLAIN ERROR IN FINDING IT WAS IN THE BEST INTEREST OF B. F. TO BE PLACED IN THE PERMANENT CUSTODY OF THE STATE.

{¶18} "II. THE TRIAL COURT COMMITTED HARMFUL ERROR IN FINDING THAT B. F. SHOULD BE PLACED IN THE PERMANENT CUSTODY OF THE STATE RATHER THAN THE LEGAL CUSTODY OF HER MATERNAL GRANDPARENTS.

{¶19} "III. THE TRIAL COURT COMMITTED HARMFUL ERROR IN ADMITTING THE AGENCY'S EXHIBITS I THROUGH N OVER OBJECTION OF FATHER'S COUNSEL."

{¶10} The relevant facts of the case are as follows. B.F. was born November 6, 2007, to appellant and Pamela Webb, who is not a party to this appeal. Appellee Licking County Department of Job and Family Services took custody of the child on November 13, 2007. On February 1, 2008, the court found B.F. to be dependent and granted the agency temporary custody.

{¶11} The appellee filed a case plan with the goal of reunifying of the family, but subsequently on July 28, 2008, appellee filed its motion for permanent custody pursuant to R.C. 2151.413 (A) and 2151.414 (E)(1). The appellee presented evidence both parents had failed to participate in the case plan, and in addition, appellant was incarcerated on pending felony charges. At the close of evidence, the magistrate placed B.F. in the permanent custody of the agency so she can be adopted by her maternal grandparents. The magistrate found by clear and convincing evidence, it was in B.F.'s best interest to permanently terminate all parental rights of appellant and Webb.

I.

{¶12} In his first proposed assignment of error, appellant urges the trial court committed plain error in finding it was in the child's best interest to be placed in the permanent custody of the state.

{¶13} In order to rise to the level of plain error, it must appear on the face of the record not only that the court committed error, but that except for the error, the result of the trial would have been otherwise. *State v. Underwood* (1983), 3 Ohio St. 3d 12, 444 N.E. 2d 1332. We should take notice of plain error only with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Long* (1978), 53 Ohio St. 2d 91, 372 N.E. 2d 804.

{¶14} We note appellant raised this issue in his objections to the magistrate's decision, and thus we will not apply the plain error standard to appellant's proposed assignment of error.

{¶15} R.C. 2151.414 sets forth the procedure to be followed and standard to be applied in cases where a children services agency moves for permanent custody of an abused, neglected or dependent child. *In re: Amanda W.* (1997), 124 Ohio App.3d 136, 141-142, 705 N.E.2d 724. The agency must offer clear and convincing evidence to establish that one or more of the conditions listed in R.C. 2151.414(E) exists as to each of the child's parents. *In re: William S.* (1996), 75 Ohio St.3d 95, 661 N.E.2d 738, syllabus. If the court determines that one or more of the conditions listed in R.C. 2151.414(E) exists, the court will enter a finding that the child cannot be placed with either of his or her parents within a reasonable time or should not be placed with his or her parents. R.C. 2151.414(E). Finally, under R.C. 2151.414(D), a juvenile court must consider the best interests of the child by examining factors relevant to that case. Only then can the court terminate the rights of a natural parent and award permanent custody of a child to a children services agency. *In re: William S.* at 99 .

{¶16} Clear and convincing evidence is more than a mere preponderance of the evidence. Rather, a plaintiff must prove each of its allegations by producing "in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford* (1954), 161 Ohio St. 469, 120 N.E.2d 118, syllabus by the court, paragraph three.

{¶17} In determining whether a child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents, a court shall consider all relevant evidence. The statute sets out sixteen factors the court may consider relevant. Appellant asserts there are only two factors of R.C. 2151.414(E) are applicable to this case: (1) the parent has failed continuously and repeatedly to

substantially remedy the conditions causing the child to be placed outside the home, and (12) the parent is incarcerated at the time of the filing of the motion and will not be available to care for the child at least 18 months after the filing of the motion for permanent custody or the dispositional hearing.

{¶18} At the time of the hearing appellant's felony case was pending and the court could not make a determination what appellant's sentence would be.

{¶19} As stated supra, appellant filed an objection to the magistrate's decision. The trial court found the essence of appellant's objection was that the evidence presented was not clear and convincing. The court overruled the objections. Appellant argued if he had been given more time to work on his case plan he would have been able to demonstrate he was capable of parenting his daughter within a reasonable amount of time. He suggested an award of legal custody was more appropriate than permanent custody. See II, *infra*. Appellant also objected to the admission of the agency's exhibits (I) through (N). See III, *infra*.

{¶20} The court found appellant had not made significant progress in his case plan. Appellant had not maintained gainful employment, or complied with the rules of his probation. He failed to follow up in any program to treat his alcohol and chemical abuse issues, failed to complete random drug screens, and failed to follow through with the recommended psychological counseling. Appellant did not have housing of his own. All these conditions had been listed in the case plan.

{¶21} The court also found appellant's subsequent arrest on five felony counts was further indication he was unable to parent his daughter and would not be able to do so within a reasonable amount of time.

{¶22} R.C. 2151.414(D) sets out the factors a court should consider in determining the best interest of the child:

{¶23} “(1) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child;

{¶24} “(2) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child;

{¶25} “(3) The custodial history of the child, including whether the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999;

{¶26} “(4) The child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency;

{¶27} “(5) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.”

{¶28} The trial court found B.F. needs a secure and permanent placement, which appellant simply could not provide. In appellee’s temporary custody, B.F. was a happy child developing as she should, with security, safety, and stability.

{¶29} We find there was sufficient, competent and credible evidence presented to the trial court for it to find by clear and convincing evidence appellant failed to continuously and repeatedly remedy the conditions which caused B.F. to be removed from her parents. The record contains clear and convincing evidence from which the

court could conclude it is in her best interest to be placed in the agency's permanent custody so she can be adopted by the maternal grandparents.

{¶30} The first assignment of error is overruled.

II

{¶31} In his second potential assignment of error, appellant argues the court committed prejudicial error in finding the child should be placed in the permanent custody of the State rather than legal custody of her maternal grandparents, from which he would maintain some residual parental rights. He does not assert he is able to take custody of the child.

{¶32} Appellant concedes no one filed a motion or requested legal custody. The magistrate raised the issue sua sponte during the hearing, and appellant's trial counsel argued the issue in closing.

{¶33} In the case of *In Re: A.B.*, 10 Ohio St. 3d 230, 2006-Ohio-4359, 852 N.E. 2d 1187, the Ohio Supreme Court discussed the various dispositional orders available to a juvenile court. The Supreme Court found if an agency has temporary custody of the child and files a motion for permanent custody, a juvenile court does not have the authority to place the child in a planned permanent living arrangement (PPLA) instead. The rationale is simply that the clear language of the statute requires the agency to specifically request a PPLA disposition. *Id.* at paragraph 37.

{¶34} R.C. 2151.353 requires a person seeking legal custody to file a motion prior to the dispositional hearing, and the movant must also indicate he or she understands the responsibility legal custody entails.

{¶35} We find in the absence of a motion for legal custody, the trial court could not award legal custody of B.F. to the maternal grandparents and permit appellant to retain residual parenting rights.

{¶36} The second assignment of error is overruled.

III

{¶37} In his third potential assignment of error, appellant argues the court committed harmful error in admitting the appellee's exhibits I through N over the objection of appellant's trial counsel. The exhibits concern, among other things, a civil protection order entered against appellant in another situation, and various documents evidencing appellant's criminal history.

{¶38} A trial court has discretion to admit or exclude relevant evidence. *State v. Sage* (1987), 31 Ohio St. 3d 173. This court may not find error in the trial court's decision unless we find the court abused its discretion. *State v. Adams* (1980), 62 Ohio St. 2d 151. In order to find abuse of discretion, we must determine the court acted in an unreasonable, arbitrary, or unconscionable manner. *Id.*

{¶39} The trial court found trial counsel objected on the grounds no party was requesting legal custody so the evidence was not relevant. The trial court found because in closing argument trial counsel requested the court grant legal custody to the grandparents, appellant had waived this argument. The court also found some of the same evidence contained in the exhibits was elicited from appellant without objection. We agree with the trial court's reasoning, and add a court is presumed to rely only on relevant, admissible evidence. *State v. Bays*, 87 Ohio St.3d 15, 27, 1999 -Ohio- 216, 716 N.E.2d 1126, citation deleted.

{¶40} We have reviewed the record, and we find the trial court correctly overruled the objection to the magistrate's decision.

{¶41} The third assignment of error is overruled.

{¶42} Because the matter comes to us on an *Anders* brief we have also conducted a full examination of the proceedings, and we find the trial court committed no error of law, nor did it abuse its discretion in the proceedings and in its decision.

{¶43} For the foregoing reasons, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed.

By Gwin, J.,

Farmer, P.J., and

Hoffman, J., concur

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

HON. WILLIAM B. HOFFMAN

