

IN THE SUPREME COURT OF OHIO

09-0090

IN RE: M.M.

CASE NO.

ON APPEAL FROM THE
COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT,
MONTGOMERY COUNTY

COURT OF APPEALS
CASE NOS. 22872 and 22873

MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT, KATHY RICHARDS

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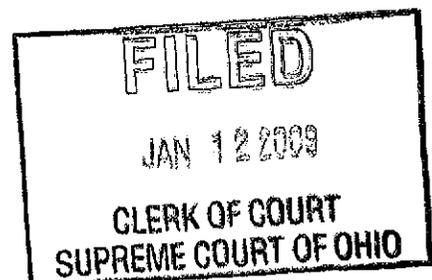


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**EXPLANATION OF WHY THIS IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST**

The instant case arises out of proceedings in the Montgomery County Juvenile Court. Specifically, the Juvenile Court granted a Motion for permanent custody of M.M., which was filed by Montgomery County Children's Services, and overruled a Motion for legal custody which had been filed by Appellant, Kathy Richards, the maternal great-aunt of M.M. On appeal, the Montgomery County Court of Appeals affirmed the Order of the Juvenile Court.

This case presents the court with the opportunity to provide guidance for Ohio's Juvenile Courts in striking the proper balance between removing a child from its mother's custody, while still maintaining familial ties if at all possible. This Court itself has called the complete termination of parental rights "the family law equivalent of the death penalty." *In re Hayes* (1997), 79 Ohio St. 3d 46, 48 (quoting *In re Smith* (1991), 77 Ohio App. 3d 1, 16).

All too often, in an effort to determine whether a parent is fit to have custody of her child, Courts utilize the draconian expedient of granting permanent custody to a public Agency without giving sufficient consideration to less drastic means. Thus, Courts frequently lose sight of the fact that in terminating the rights of the parent, they are also irrevocably terminating the rights of the child to continue a familial relationship with any of her close biological relatives.

As will be set forth more fully in the argument that follows, the foregoing scenario is exactly what happened herein. Here, M.M. had a loving, caring relationship with her aunt, Kathy Richards, for her entire life. A deep bond also existed between M.M. and her cousin Matthew, who has been in Ms. Richards' custody for years.

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Everyone concerned agreed that Mrs. Richards had an appropriate home. Her financial ability to care for M.M. was unquestioned. The MCCA caseworker lauded Ms. Richards' parenting skills. The guardian ad litem recommended legal custody to Ms. Richards. Even the Court of Appeals noted (at p. 7 of its Opinion), that "this case presents a closer call than many other permanent custody cases."

The only apparent stumbling block was a unique incident that occurred several months prior to the hearing, and almost two years prior to the Juvenile Court's final decision. At that time Robert Maxwell, a man who originally claimed to be the father of M.M., but who was later excluded and ordered to have no contact with her, was found at Ms. Richards' home during a visit with M.M. Although home visits were terminated by MCCA as a result of the incident, supervised visits were eventually permitted. It was primarily through monitoring these visits that MCCA and the Guardian came to realize the close bond that M.M. had with her aunt and cousin.

In spite of no evidence that Robert Maxwell continued to be a problem, as well as the Guardian's recognition of such fact and recommendation of legal custody to Kathy Richards, the Juvenile Court, stating that it "cannot clearly determine whether Ms. Richards can provide permanency for [M.M]," overruled her Motion for legal custody.

The foregoing has, in fact, resulted in "the family law equivalent of the death penalty" for M.M., in the sense that, if allowed to stand, the Juvenile Court's decision means that all of M.M.'s extended biological family will henceforth be dead to her. Unfortunately, this same scenario is played out over and over throughout the State. As a result, this case involves issues that are of public or great general interest, and this Court should accept jurisdiction.

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STATEMENT OF THE CASE AND FACTS

On April 4, 2007, Montgomery County Children's Services (MCCS) filed its motion for permanent custody of M.M. MCCS served its Motion on Jessica Lairson by publication and posting notice pursuant to Juvenile Rule 16(A) and Local Rule 5.29 of the Montgomery County Juvenile Court. M.M.'s great aunt Kathy Richards, filed her motion for legal custody on July 14, 2007. Both Motions were heard by Magistrate on August 14, 2007.

On October 3, 2007, the Magistrate filed her Decision granting permanent custody to MCCS. The Magistrate found that there were no relatives suitable to care for the child. The Magistrate also held that it was not in the best interest of the child to place her in the home of a biological relative. The Magistrate overruled Kathy Richard's Motion for legal custody citing only the Magistrate's "concern for veracity of Ms. Richards concerning her criminal history." The Magistrate did not make a specific finding that permanent custody was in the best interest of the child.

Lairson filed objections to the Magistrate's Decision on October 15, 2007, and supplemental objections on May 27, 2008. Kathy Richards filed supplemental objections on May 28, 2007. The Juvenile Court filed its Decision and Judgment overruling Lairson's and Richard's objections and adopting the Magistrate's Decision on July 3, 2008.

At the Magistrate's Hearing held herein on August 14, 2007, MCCS caseworker Stacy Keaton testified that reunification of M.M. with her mother Jessica Lairson, was not appropriate. Keaton stated that Lairson had: substance abuse and mental health problems; no contact with M.M. since August 2, 2006; no stable housing or income; and had otherwise not completed the case plan.

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From September to October, 2006, M.M.'s great aunt, Kathy Richards, had visitation with M.M. at MCCA once per week. Eventually, Ms. Richards had visits with M.M. in her home. The visits were stopped in October, 2006, when Stacy Keeton discovered Robert Maxwell at Richards home during one visit. Maxwell was Jessica Lairson's former boyfriend and, at one time, believed to be M.M.'s father. Maxwell was not allowed to have visits with M.M. after the Court determined that he was not M.M.'s father.

MCCA approved a home study of Kathy Richards in October, 2006. Ms. Keeton personally inspected Ms. Richards home on August 13, 2007 (the day before the hearing), and found the home in the same or even better condition than at the initial home study.

In May, 2007, Kathy Richards was again granted visitation with M.M. at MCCA. During visits Ms. Keeton observed that M.M. "seems to have really bonded with Kathy. She knows her, she greets her. She will hug her randomly. She seems to enjoy having visits with her." Ms. Keeton also observed that M.M. is "very active" with Ms. Richards, tries to formulate words and "do a lot more with Kathy than I thought (the child) was capable of."

Kathy Richards has custody of M.M.'s cousin, who also attends visits with M.M. According to Ms. Keeton, M.M. and Matthew get along "fine, [M.M.] loves mimicking and playing and running behind Matthew." Matthew looks forward to seeing M.M., "he talks to [M.M.] he wants to play with [M.M.]" Ms. Keeton testified that the two children are bonded.

M.M. receives services through MCCA including speech and developmental therapy. Ms. Keeton admitted that those services would be just as available to Kathy Richards as they are to the foster parents. Ms. Keeton also observed differences in the way that M.M. interacts with both the foster parents and Kathy Richards: "She would probably whine a little more to

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be picked up more when she's with the foster parents. And when she's with Kathy, I would see her just get down and go for it...I do see her more active when she's with Kathy and Matthew.

Keeton testified that she considered Kathy Richards as a possible relative placement. Keeton admitted that, except for the one incident with Robert Maxwell eight months before, MCCS would be pursuing legal custody to Kathy Richards.

Kathy Richards testified that she asked the court for legal custody because M.M. is her niece and she loves her. Ms. Richards wants to have a relationship with M.M., and continue the relationship between M.M., and Matthew.

At the time of the hearing, Ms. Richards was about to graduate from college with a degree in medical office management, and expected to obtain employment in that field. She stated that she had sufficient household income to support two children until she found employment.

Ms. Richards testified that M.M. would have her own room at her home. Ms. Richards has also dealt with the same eye and speech problems with Matthew as those experienced by M.M. She would make time for the same therapy sessions which M.M. receives through foster care.

Finally, Ms. Richards testified that she had not had any contact with Robert Maxwell in months; never had a friendship with Maxwell; and, as far as she was concerned, "he could fall off the face of the earth." Stacy Keeton testified that Ms. Richards told her she has absolutely no interest in ever seeing Robert Maxwell again. Ms. Richards states she would abide by court orders regarding Maxwell.

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The Guardian ad Litem for M.M., who had been actively involved in the case for most of M.M.'s life, filed her final report on August 9, 2007. That report details the bonding between M.M., and Kathy Richards, and other members of M.M.'s extended family. Although, in prior reports, the GAL expressed some reservations about Kathy Richards and the one previous incident regarding Mr. Maxwell, in her final report, the GAL had this to say:

Addressing the "Robert Maxwell issue", as far as Ms. Richards is concerned based on my involvement with the case from the start, I do not believe that Robert is a concern any longer. I believe Ms. Richards when she states to me that she has no contact with Robert.

As a result, the Guardian concluded that "it is in [M.M's] best interest to be raised with her family in a good home provided by her maternal great-aunt."

On October 3, 2007, the Magistrate filed her "Decision and Judge's Order Granting the Motion for Permanent Custody." Ms. Richards and Jessica Lairson each filed timely Objections and Supplemental Objections to such Decision. On July 3, 2008, the Court filed its "Decision and Judgment Concerning Objections to the Decision of the Magistrate." The Court upheld the Magistrate, overruled Ms. Richards' Motion for Legal Custody, and granted permanent custody of M.M. to MCCS.

Both Kathy Richards and Jessica Lairson filed timely appeals to the Montgomery County Court of Appeals. Both cases were consolidated by that Court. On November 26, 2008, the Court of Appeals filed its Opinion and its Judgment Entry, affirming the Decision of the Juvenile Court.

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Ms. Richards and Ms. Lairson have each timely filed a Motion to Certify Conflict in the Court of Appeals, which Motions have not yet been decided by that Court. A separate "Notice of Pending Motions to Certify Conflict" is being filed herewith.

ARGUMENT

Proposition of Law No. I:

A Juvenile Court abuses its discretion in granting permanent custody to an Agency where it unreasonably rejects evidence that granting legal custody to a relative is in the child's best interest.

The right to maintain and pursue intimate familial associations is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment. *Moore v. City of East Cleveland* (1977), 431 U.S. 494, 503, 91 S.Ct. 1932, 52 L.Ed.2d 531. Because of this, the United States Supreme court has explained that permanent termination is one of the few forms of state action that is "both so severe and so irreversible." *M.L.B. v. S.L.J.* (1996), 519 U.S. 102, 118, 17 S.Ct. 55, 136 L.Ed.2d 473. Termination of parental rights has been described by the Ohio Supreme Court as "the family law equivalent of the death penalty." *In re Hayes* (1997), 79 Ohio St.3d 46, 48, 679, N.E.2d 680, quoting *In re Smith* (1991) 77 Ohio App. 3d 1, 16, 601 N.E.2d 4.

Upon a motion for termination of parental rights, the burden of proof on a children's services agency is to prove by clear and convincing evidence that the provisions of Ohio Rev. Code Ann. §2151.414(B)(D), and (E) support the granting of permanent custody of the children to the agency. *In re Schreiber*, 2005 Ohio 5494. Additionally, pursuant to O.R.C.

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§2151.414(B)(1), a court may only grant permanent custody of a child to a state agency if it is in the best interest of the child. *In re Ratcliff*, 2005 Ohio 1301. In other words, in order to terminate a parent's rights under R.C. 2151.414, the juvenile court must find clear and convincing evidence that (1) permanent custody is in the child's best interest, pursuant to R.C. 2151.414(D), and (2) one of the circumstances in R.C. 2151.414(B) applies. Finally, the Supreme Court of Ohio has indicated that a juvenile court shall consider all relevant factors in determining the best interest of a child, not just factors enumerated in R.C. 2151.414(D), *In re C.F.*, 113 Ohio St.3d 73, 2007 Ohio 1104.

Ohio Revised Code §2151.414(D) mandates that in determining the best interest of a child the court **must** "consider all relevant factors, including, but not limited to, the following:

- "(1) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster care-givers and out-of-home providers, and any other person who may significantly affect the child;
- "(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;
- "(3) The custodial history of the child, including whether the child has been in the temporary custody of one or more public children service agencies or private child placing agencies for twelve or more months of a consecutive twenty-two month period***;
- "(4) The child's needs for a legally secure and permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency.
- "(5) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child."

In other words, a court "must either specifically address each of the required considerations set forth in R.C. 2151.414(D) in its judgment entry, or otherwise provide some affirmative indication in the record that the court has considered" such specific factors. *In re*

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D.H., 2007 Ohio 1762, ¶19. Further, where, as here, a court "renders a decision which goes against the specific recommendations of the guardian ad litem, [it] must at least address the reasons for doing so." *Id.*, ¶20.

In the present case, it is Appellant's position that the Juvenile Court unreasonably failed to consider or to give proper weight to several of the foregoing factors. First, there was clear and convincing evidence that M.M.'s interaction and interrelationship with great aunt, Kathy Richards, and Ms. Richard's family was positive and beneficial to the child. Stacy Keeton, the MCCS caseworker, consider Kathy Richards a possible relative placement. Keeton also found Ms. Richards' home suitable for the child, and that Ms. Richards and her nephew Matthew had bonded with M.M. Keeton strongly implied that Ms. Richards' parenting style was preferable compared to the foster parents. Keeton expressed at length that M.M. was more willing to grow, learn and try new things while in Ms. Richards' presence.

Kathy Richards wants to raise M.M. and continue M.M.'s relationship with cousin Matthew. No questions were raised about Ms. Richards' ability to parent M.M. other than the one incident with Robert Maxwell. Ms. Richards stated unequivocally that she had no contact with Maxwell after the incident, nor wished to have any contact with him again. It is important to note that there was no factual reference to Maxwell in the Magistrate's Decision even though Ms. Richards' single contact with Maxwell was the Juvenile Court's principal reason for denying legal custody. (Decision and Judgment, p. 5).

There was also clear, convincing and credible evidence that Kathy Richards would provide a legally secure permanent place for M.M. MCCS found Richards' home suitable. MCCS found that M.M. had bonded with Richards and cousin Matthew. Caseworker Stacy

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Keeton admired and complimented Richards' parenting style as compared to the foster parents. Keeton admitted that MCCA would be pursuing legal custody to Richards except for the one incident with Robert Maxwell, which occurred eight months before the Magistrate's hearing.

Finally, R.C. 2151.414(D)(2) required the Juvenile Court to consider the wishes of the child as expressed directly or through the child's guardian ad litem. M.M.'s Guardian ad Litem (GAL) recommended that legal custody be granted to Kathy Richards. The Juvenile Court rejected the GAL's recommendation without giving specific reasons for doing so. The Juvenile Court merely stated that it did not "consider these factors [i.e., child's bonding with Richards and GAL's recommendation] to be as significant as the child's need for permanency." (Decision and Judgment, p. 5). Here, the Juvenile Court's arbitrary determination flies in the face of clear and convincing evidence supporting the GAL's recommendation and Ms. Richards' ability to provide a legally secure placement.

Neither the Court nor the Magistrate expressed any disbelief in Ms. Richards' undisputed testimony that she had not had any contact with Maxwell for several months and, as far as she was concerned, "he could fall off the earth." Further, in her final report recommending legal custody to Ms. Richards, the GAL stated:

Addressing the "Robert Maxwell issue", as far as Ms. Richards is concerned based on my involvement with the case from the start, I do not believe that Robert is a concern any longer. I believe Ms. Richards when she states to me that she has no contact with Robert.

Also undisputed was the fact that Kathy Richards has had regular visitation with M.M., and has bonded with M.M. She loves M.M. and wants to continue the relationship between M.M. and cousin Matthew. M.M. would have her own room at Ms. Richards' home. Ms.

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Richards has also dealt with the same eye and speech problems with Matthew as those experienced by M.M. She would make time for the same therapy sessions which M.M. receives through foster care. At the time of the hearing, Ms. Richards was about to graduate from college with an associate degree in medical office management, and expected to obtain employment in that field. She stated that she had sufficient household income to support two children until she found employment.

In short, the record is devoid of evidence that placement with Ms. Richards would be unsafe or unstable other than the **one** incident with Robert Maxwell which occurred eight months before the trial. On the other hand, the record is replete with clear and convincing evidence that placement with Ms. Richards would be positive and beneficial for M.M. Denying legal custody to Kathy Richards is not in M.M.'s best interest, and only serves to sever any relationship M.M. would have with her biological relatives.

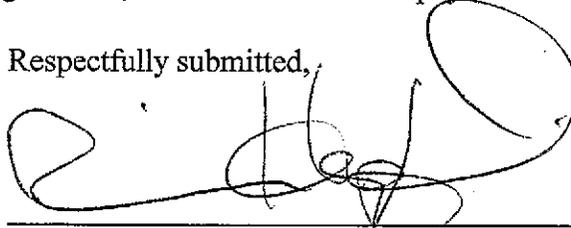
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CONCLUSION

For all of the foregoing reasons, the Court should accept jurisdiction over this case.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. Hempfling', is written over a horizontal line. The signature is stylized and somewhat cursive.

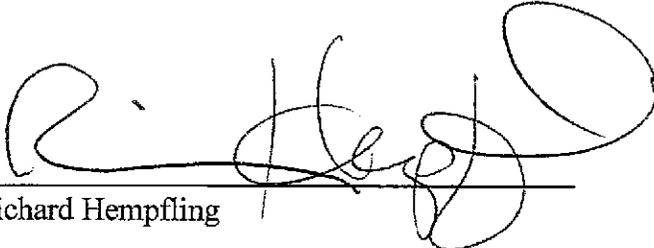
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CERTIFICATE OF SERVICE

I hereby certify, by signing below, that a copy of the foregoing MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT has been served upon Johnna Shia, Assistant Prosecuting Attorney, 301 West Third St., Dayton, OH 45422 and Richard A.F. Lipowicz, 130 West Second St., Suite 1900, Dayton, OH 45402 and Virginia C. Vanden Bosch, 9506 West State Route 73, Wilmington, OH 45177, by regular U.S. Mail, this 12th day of January, 2009.


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APPENDIX

Judgment Entry, Court of Appeals of Montgomery County, Case Nos. 22872
and 22873 (Nov. 26, 2008)..... A-1

Opinion, Court of Appeals of Montgomery County, Case Nos. 22872 and
22873 (Nov. 26, 2008)..... A-3

Decision and Judgment Concerning Objections to the Decision of the
Magistrate, Montgomery County Juvenile Court, Case No. JC 06-5550
(July 3, 2008)..... A-11

Magistrate’s Decision and Judge’s Order Granting the Motion for Permanent
Custody, Montgomery County Juvenile Court, Case No. JC 06-5550
(October 3, 2007)..... A-17

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IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

IN RE: M.M.

C.A. CASE NOS. 22872 and 22873

T.C. NO. JC 06 5550

FINAL ENTRY

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Pursuant to the opinion of this court rendered on the 26th day of
November, 2008, the judgment of the trial court is affirmed.

Costs to be paid as stated in App.R. 24.

WILLIAM H. WOLFF, JR., Presiding Judge

JAMES A. BROGAN, Judge

MARY E. DONOVAN, Judge

THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT

A-1

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THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT

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IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

IN RE: M.M. :
: C.A. CASE NOS. 22872 and 22873
: T.C. NO. JC 06 5550
: (Civil appeal from Common
Pleas Court, Juvenile Division)
:

.....
OPINION

Rendered on the 26th day of November, 2008.

.....
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WOLFF, P.J.

Jessica Lairson and Kathy Richards appeal from a judgment of the Montgomery

THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT

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County Court of Common Pleas, Juvenile Division, which awarded permanent custody of Lairson's daughter, M.M., to Montgomery County Children's Services ("MCCS").

M.M., who is almost three years old, came into the temporary custody of MCCS in June 2006 and was placed in foster care. Her biological mother, Lairson, is a prostitute and drug addict. MCCS developed a case plan with the goal of reunifying M.M. with Lairson, but at this point all the parties concede that Lairson is incapable of caring for M.M. and has not made any significant progress toward the completion of her case plan objectives. In fact, Lairson has not had any contact with MCCS. Paternity tests excluded Lairson's husband and two other men as M.M.'s father, and her father remains unknown. MCCS filed a motion for permanent custody of M.M. in April 2007.

Kathy Richards is Lairson's aunt. In July 2007, Richards filed a motion for legal custody of M.M. After a hearing, the magistrate recommended that permanent custody be awarded to MCCS. Lairson and Richards filed objections. In July 2008, the trial court adopted the magistrate's decision and awarded permanent custody to MCCS.

Lairson and Richards appeal from the trial court's judgment. They each argue that the trial court erred in concluding that it was in M.M.'s best interest to award custody to MCCS rather than to Richards. Lairson raises an additional argument that she was not properly served with notice of the proceedings, which was accomplished by publication. We will begin with the issue of notice.

MCCS served Lairson by publication because it claimed that her residence could not be ascertained with reasonable diligence. Lairson disputes this claim, arguing that her residence could have been easily determined by contacting the Dayton Police Department or the Municipal Court because she had been arrested several times and prosecuted in the

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SECOND APPELLATE DISTRICT

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months preceding the hearing.

Due process requires that the government *attempt* to provide actual notice to interested parties if it seeks to deprive them of a protected liberty, such as the right of a parent to custody of his or her child, but it does not require that an interested party receive *actual* notice. *In re Thompkins*, 115 Ohio St.3d 409, 2007-Ohio-5238, 875 N.E.2d 582, ¶10, 14, citing *Dusenbery v. United States* (2002), 534 U.S. 161, 170, 122 S.Ct. 694, 151 L.Ed.2d 597. "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it," but due process does not require "heroic efforts" to ensure the notice's delivery. *Id.* at ¶14, quoting *Mullane v. Cent. Hanover Bank & Trust Co.* (1950), 339 U.S. 315.

Civ.R. 4.4(A) requires the use of "reasonable diligence" to ascertain the residence of a party. The supreme court has defined "reasonable diligence" as "[a] fair, proper and due degree of care and activity, measured with reference to the particular circumstances; such diligence, care, or attention as might be expected from a man of ordinary prudence and activity." *Thompkins*, 115 Ohio St.3d at ¶25, citing *Black's Law Dictionary* (5 Ed.1979), at 412. "Reasonable diligence requires taking steps which an individual of ordinary prudence would reasonably expect to be successful in locating a defendant's address." *Id.*, citing *Sizemore v. Smith* (1983), 6 Ohio St.3d 330, 332, 453 N.E.2d 632.

The MCCS caseworker, Stacy Keeton, stated by affidavit that Lairson had not had contact with M.M. since early August 2006, that Lairson had not made progress on her case plan, and that MCCS had had difficulty maintaining contact with her. Keeton stated that MCCS had sent letters to Lairson's last known addresses and had tried to contact her and other relatives by phone. Lairson had been terminated from substance abuse

THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT

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programs to which she had been referred by MCCS. During their last contact, Lairson had admitted engaging in drug abuse and prostitution. MCCS was unable to determine whether Lairson had obtained housing or legal employment. MCCS was aware of Lairson's criminal record, including charges of loitering, solicitation, and prostitution in March 2007 and an outstanding warrant for her arrest.

The trial court concluded that service by mail and public posting was proper under the circumstances presented. It stated: "The record shows several notices were mailed to several former addresses and a diligent search was conducted, which did not locate Ms. Lairson. Further the Court finds the Guardian ad Litem was also unable to locate or contract [sic] Ms. Lairson prior to the hearing. Service by publication is sufficient where the mother has a history of sporadic conduct and was unable to obtain stable housing or provide the Agency with an address to send notices. The Court finds Ms. Lairson was properly served under the circumstances of this case through mailing and posting."

We agree with the trial court's assessment that the methods MCCS used to attempt to locate Lairson were reasonable and sufficient under the circumstances and that, having failed to locate Lairson through these efforts, MCCS was justified in completing notice by mail and posting. Although, in hindsight, it appears that MCCS *might* have located Lairson through court and police records, MCCS took the steps which one of ordinary prudence would reasonably expect to be successful in locating Lairson's address. *Thompkins*, 115 Ohio St.3d at ¶25.

Lairson's assignment of error related to notice is overruled.

Lairson and Richards each raise an assignment of error in which they assert that the trial court erred in finding that it was in M.M.'s best interest to award permanent custody

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to MCCS.

R.C. 2151.414(D) provides that the following factors shall be considered, along with all other relevant factors, in determining the best interest of a child:

"(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;

"(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;

"(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 ***;

"(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[.]"

The best interest of the child must be established by clear and convincing evidence.
R.C. 2151.414(B)(1).

In addition to her argument that the trial court's decision is not in M.M.'s best interest, Richards asserts that the trial court erred in granting permanent custody to MCCS because MCCS had not developed an adoption plan and because the court did not conclude that permanent custody was the *only* way to achieve a secure placement for M.M.

We begin with the trial court's conclusion that it was in M.M.'s best interest to award permanent custody to MCCS. It is undisputed that M.M.'s mother was incapable of caring for her and would not have been an appropriate caregiver. The best interest analysis

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focused only on whether M.M. would be better off in the custody of M CCS, where her foster family could adopt her, or with Richards. M.M. had lived with her foster family for fourteen months at the time of the hearing, and the family had expressed interest in adopting her. The guardian ad litem reported that M.M. had received "excellent care" and was very loved by the foster family.

Richards had also been a steady presence in M.M.'s life. She visited M.M. regularly with another child who was in her care (M.M.'s cousin), and M.M. seemed to have bonded with both of them. M CCS had considered placing M.M. with Richards but decided against it when Richards allowed Robert Maxwell to have access to the child during a home visit. Maxwell had had a relationship with Lairson, but paternity testing proved that he was not M.M.'s father. Maxwell had unaddressed mental health issues, and the court had ordered that he have no contact with M.M.

The guardian ad litem recommended that custody be awarded to Richards. She acknowledged her "struggle" with weighing M.M.'s prospects for adoption with the foster family against the benefit of keeping her with a family member. The guardian ad litem concluded that Maxwell was no longer a concern, and she recommended that custody be awarded to Richards.

The caseworker, Stacy Keeton, also acknowledged that Richards had bonded with M.M. and interacted well with her. The caseworker's primary concern about placing M.M. with Richards centered on whether Richards would permit Robert Maxwell to have contact with the child. She testified that she had found Maxwell at Richards' home the second time that Richards had been permitted to take the child to her home, after Keeton had had extensive discussions with Richards about the fact that Maxwell was not allowed to see

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M.M.

Richards testified that Maxwell had come to her house without her permission when M.M. was present. She did not explain how or if Maxwell had known that M.M. was at the house at that time. Richards acknowledged that she had received money and furniture from Maxwell for M.M.

The trial court clearly considered M.M.'s relationships with her foster parents, aunt, and cousin, the guardian ad litem's recommendation, M.M.'s custodial history, and her need for a secure placement, as required by R.C. 2151.414(D). The trial court concluded that her most secure placement would be with MCCS so that the foster family could pursue an adoption.

Although this case presents a closer call than many other permanent custody cases, we cannot conclude that the trial court abused its discretion in concluding that M.M.'s best interest would be served by granting custody to MCCS. The magistrate expressed doubt about Richards' truthfulness, especially in regard to her criminal history, and concluded that it was not in M.M.'s best interest "to remove the child from the home she has known for the majority of her life to place her in the home of a biological relative." The court noted that M.M. already had a "sense of permanency" with her foster family and that her best chance for permanency was through adoption. The court observed that Richards "quickly violated" a court order about contact with Maxwell when M.M. was allowed to visit her home. In the absence of a successful pattern of visitation with Richards, the court reasonably concluded that the most secure placement for M.M., and the one that was in her best interest, was with MCCS. Contrary to Richards' assertion, the court was not required to conclude that granting custody to MCCS was the *only* secure placement; it was charged with determining

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the most secure placement, which is the one that would best serve M.M.'s interests.

Richards' contention that MCCS was required to develop an adoption plan before seeking permanent custody of M.M. has been rejected by the Supreme Court of Ohio. See *In re T.R.*, – Ohio St.3d –, 2008-Ohio-5219, ¶12.

The assignments of error are overruled.

The judgment of the trial court will be affirmed.

.....
BROGAN, J. and DONOVAN, J., concur.

Copies mailed to:

Johnna M. Shia
Richard Hampfling
Richard A. F. Lipowicz
Hon. Nick Kuntz

THE COURT OF APPEALS OF OHIO
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**IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, OHIO
JUVENILE DIVISION**

In re: Margaret Maxwell

* **CASE NO. JC 06-5550**

* **JUDGE NICK KUNTZ**
* **MAGISTRATE MACIOROWSKI**

* **DECISION AND JUDGMENT**
CONCERNING OBJECTIONS
TO THE DECISION OF THE
MAGISTRATE

This matter is before the Court upon objections filed by Jessica Lairson, mother of said child, by and through her attorney, Richard Lipowicz, on October 15, 2007, and supplemented on May 19, 2008. Kathy Richards, maternal great aunt of said child, has also filed objections, by and through her attorney, James Swaim, on October 17, 2007, and supplemented on May 28, 2008. Ms. Lairson and Ms. Richards object to the Decision of the Magistrate filed October 3, 2007, by Magistrate Maciorowski. Montgomery County Children Services (herein know as Agency) filed a response, by and through the Office of the Montgomery County Prosecuting Attorney, on October 17, 2007, and supplemented on June 6, 2008.

On October 3, 2007, Magistrate Maciorowski denied Ms. Richard's motion for legal custody, and granted permanent custody of said child to the Agency. Magistrate Maciorowski made the following findings of fact:

1. The allegations contained in the motion are found to be true.
2. Margaret D. Maxwell, the above captioned child is a minor child, was born on December 29, 2005.
3. Her birth certificate indicates that Jessica Lairson is the mother of the child. She is the same person listed in the pleadings.
4. While there is no legal father of the child, there is an alleged father of the child. Those circumstances are as follows: Several men have completed genetic testing and none have been found to be the father.
5. The Agency has made reasonable efforts to:

- a. prevent the removal of the child from the child's home
 - b. to eliminate the continued removal of the child from the child's home
 - c. and make it possible for the child to return home
6. The Agency has made reasonable efforts to implement and finalize the permanency plan.
7. The relevant services provided by the agency to the family of the child are: case management, substitute foster care, information/referral, and a home study.
8. Those services did not prevent the removal of the child from the child's home or enable the child to return home.
9. There are no relatives or non-relatives willing and able to accept legal custody of the child.
10. The child has been in foster care since June 1, 2006. The child has not been in foster care 12 or more months out of the last 22 months.
11. The child is not able to be placed in the home of the mother in a reasonable time.
12. The mother failed to respond to the services due to significant substance abuse problems and housing issues that have not been addressed, mental health issues and inability to demonstrate parenting skills.
13. The mother has failed to remedy the conditions causing the child to be placed outside the home.
14. The mother is unwilling to provide, food, clothing, shelter, and other basic needs.
15. The mother failed to regularly support the child financially.
16. The mother failed to visit or communicate with the child.
17. The mother has abandoned the child.
18. The mother has a drug problem severe enough to interfere with the care of the child into the foreseeable future.
19. The Agency has attempted to contact and involve the alleged father of the child with the reunification process.
20. The alleged father has not provided any care, interest or financial support for the child.
21. The case plan was directed at the mother and includes the following objectives:
 - a. Obtain a substance abuse assessment;
 - b. Obtain a mental health assessment;
 - c. Obtain stable housing and income;
 - d. Have visitation with the child; and,
 - e. Sign appropriate releases of information;
22. The mother did not complete the case plan as indicated
23. Reunification of the child with the mother is not possible within a reasonable period of time, as the mother has had no contact with the child for an extended period of time and has taken no action to become appropriate to parent the child.
24. There is reasonable expectation of adoption.
25. In accordance with § 2151.04 of the Ohio Revised Code, the child was found to be dependent by entry filed on August 21, 2006.
26. The Guardian ad Litem recommends that legal custody of the child be granted to the aunt, Kathy Richards.

Ms. Lairson objects to the Magistrate's Decision claiming the Magistrate's finding of "no suitable relatives" was not supported by the evidence because Ms. Richards was a relative suitable for placement. Ms. Lairson further claims the evidence does not support the Magistrate's finding that legal custody to Ms. Richards was not in the best interest of the child. Ms. Lairson claims said child has bonded with Ms. Richards and that the Magistrate failed to consider whether permanency could be achieved without granting permanent custody. Ms. Lairson claims Ms. Richards is capable of providing a legally secure placement, and there are no justifiable concerns keeping Ms. Richards from achieving custody. Ms. Lairson further asserts the Guardian ad Litem recommends legal custody to Ms. Richards. Ms. Lairson also claims she was not served properly because her whereabouts could have been determined by a diligent search. Ms. Lairson claims she was arrested several times and here whereabouts could have been easily determined.

Ms. Richards objects the Magistrate's Decision claiming the Magistrate made no express finding of best interest, and therefore the Magistrate Decision must be rejected. Ms. Richards claims there is an abundance of evidence that shows a bond between said child and Ms. Richards. Further, Ms. Richards claims the Magistrate failed to consider if legally secure placement could be achieved without granting permanent custody. Ms. Richards claims there is no evidence that supports the finding that she is not suitable for legal custody of said child.

The Agency responds to the objections claiming the Magistrate properly considered all the factors of R.C. § 2151.414(D), and properly came to the decision that permanent custody was in the best interest of said child. The Agency claims the Magistrate considered Ms. Richards as a possible option, but ultimately decided permanent custody was in the best interest of the said child. Further, the Agency claims Ms. Lairson was properly served by posting because a diligent search for her location was conducted and proved unsuccessful. Further, Ms. Lairson has not had any contact with the Agency or her child since August 2, 2006.

Upon through review of all of the objections, transcripts, and the available record, the Court hereby **OVERRULES** Ms. Lairson's and Ms. Richard's objections. The Court finds Ms. Lairson was properly served under the circumstances of this case. The local rule 5.29 for Montgomery Court Juvenile Court requires service by mailing to the last known address as well as by posting in a public place. The record shows several notices were mailed to several former addresses and a diligent search was conducted, which did not locate Ms. Lairson. (Tr. Pg. 155-156). Further the Court finds the Guardian ad Litem was also unable to locate or contract Ms. Lairson prior to the hearing. (Guardian ad Litem Report filed August 9, 2007). Service by publication is sufficient where the mother has a history of sporadic conduct and was unable to obtain stable housing or provide the Agency with an address to send notices. See *In re Cowling*, 72 Ohio App.3d 499 (1991). The Court finds Ms. Lairson was properly served under the circumstances of this case through mailing and posting. Upon finding that service was proper the Court advances to the permanent custody analysis under R.C. § 2151.414.

Pursuant to R.C. § 2151.414(B)(1), the Court may grant permanent custody to the agency that filed the motion if it is in the best interest of the child to grant permanent custody to the agency, and one of four conditions listed in the statute also apply. In order to grant permanent custody to the Agency, the condition stated in R.C. § 2151.414(B)(1)(a) requires the Court to find that child cannot be placed with either of the child's parents within a reasonable time or should not be placed with the parents, if the child was not abandoned, orphaned, or has not been in the temporary custody of one or more public or private children services for a period of 12 months or more of a consecutive 22 month period. Further, R.C. § 2151.414(B)(1)(b) requires only that the child be abandoned. A finding of abandonment, for the purposes of permanent custody, requires the parents fail to visit or maintain contact with the child for more than ninety days. R.C. § 2151.011(C).

In the present case, the Court finds Ms. Lairson has abandoned said child because she has failed to visit or contact said child since August 2, 2006, which is a period longer than ninety days. (Tr. Pg. 155-156). Further, Ms. Lairson has failed to contact the Agency since August 2, 2006, and her whereabouts are currently unknown. (Tr. Pg. 155-156). The Court finds R.C. § 2151(B)(1)(b) is satisfied, and therefore the Court finds the analysis of R.C. § 2151.414(E) is not necessary in said matter. The Court declines to address whether or not the child can be placed with the mother within a reasonable period of time in accordance with R.C. § 2151.414(E), and further, shifts focus to the best interest analysis.

Pursuant to R.C. § 2151.414(D), in determining the best interest of a child the court shall consider all relevant factors, including, but not limited to, the following:

- (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;
- (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;
- (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;
- (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;
- (5) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.

Upon careful analysis of all the relevant factors listed in R.C. § 2151.414(D), the Court finds granting permanent custody of said child to the Agency is in the best interest of said child. The Court finds said child has not had any contact with Ms. Lairson since August 2, 2006, but has regularly visited Ms. Richards. (Tr. Pg. 156, 166). Said child seems to have bonded with Ms. Richards and her older cousin Mathew through steady

visitation. (Tr. Pg. 172, 181). The Court finds that while said child has no bond with her parents, she does have a bond with Ms. Richards, which weighs against granting permanent custody to the Agency.

Further, the Court finds said child's wishes are not applicable because said child is too young to express such opinion. However the Court finds the Guardian ad Litem recommends the Court deny permanent custody to the Agency and grant legal custody to Ms. Richards. (GAL Report filed August 9, 2007). The Court finds the GAL Report weighs against granting permanent custody to the Agency.

The Court finds said child has been placed in the same foster home since June 1, 2006, and has been able to enjoy a sense of permanency. Conversely, the Court finds Ms. Lairson is incapable of permanency, and Ms. Richards nearly lost visitation rights by violating a Court Order. (Tr. Pg. 167-169). Ms. Richards has demonstrated appropriate visitation with said child during supervised visitation, but quickly violated Court Order when the Court allowed said child to visit her at her home. (Tr. Pg. 167-169, 172). Ms. Richards allowed said child to have contact with Robert Maxwell against Court Order a short time after the caseworker dropped said child off for visitation. (Tr. Pg. 167-169). Therefore, the Court finds the child's placement history weighs in favor of granting permanent custody to the Agency.

Further, the Court finds the foster parents have provided a safe and loving environment, in which there is a reasonable expectation of adoption and permanency. (Tr. Pg. 50-56). Ms. Lairson is not able to provide said child with permanency, and the Court cannot clearly determine whether Ms. Richards can provide permanency for said child. Ms. Richards has done well when visiting with said child at supervised visitation, but failed to show the Court she can adequately maintain custody of said child outside of supervised visitation. (Tr. Pg. 167-169). The Court finds said child's best chance for permanency is adoption, and therefore this factor weighs in favor of granting permanent custody to the Agency.

The Court finds R.C. 2151.414(E)(10) is applicable in the present case because Ms. Lairson has abandoned said child, and therefore this factor weighs in favor of granting permanent custody to the Agency.

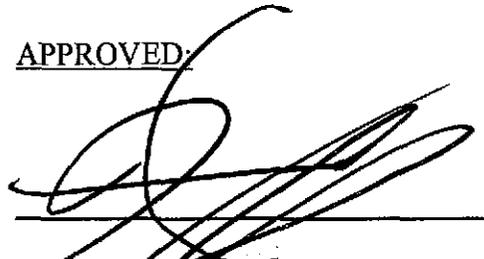
While said child has bonded with Ms. Richards and the Guardian ad Litem recommends legal custody to Ms. Richards, the Court does not consider these factors to be as significant as said child's need for permanency. Further, the Court is not required to consider placement with a relative before granting permanent custody to the State, where the child is not orphaned. See *In re Leonard*, 1997 Ohio App. LEXIS 1698 (12 Dist. 1997). The Court finds permanent custody with the Agency will give said child her best chance at permanency. The foster parents have provided said child with a loving home in which she can better develop physically, mentally, and emotionally. (Tr. Pg. 50-56). Said child has bonded with the foster parents, and there is a reasonable expectation of adoption by the foster parents. (Tr. Pg. 50-56). Accordingly, upon review of the

factors listed in R.C. § 2151.414(D), the Court finds granting permanent custody to the Agency is in the best interest of said child.

With the above determinations, the Court hereby adopts the Decision of the Magistrate, as its own, with all the provisions and requirements contained therein, and hereby makes the same the ORDER OF THIS COURT.

IT IS SO ORDERED.

APPROVED:



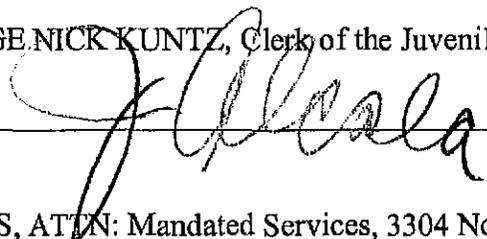
Nick Kuntz, Judge

ENDORSEMENT

Copies of the foregoing order were entered upon the journal and mailed to counsel of record and/or the parties on the date indicate

JUDGE NICK KUNTZ, Clerk of the Juvenile Court

By: _____



Date: _____

JUL - 3 2008

MCCS, ATTN: Mandated Services, 3304 North Main Street, Dayton, Ohio 45405
Assistant Prosecuting Attorney for MCCS, CPU
Jessica Lairson, 24 Huffman Ave., Dayton, Ohio 45403
Kathy Richards, 807 Sagamore Avenue, Riverside, Ohio 45404
Richard A.F. Lipowicz, 130 West Second Street, Suite 1900, Dayton, Ohio 45402
Richard Hempfling, 318 W. Fourth St., Dayton, Ohio 45402
Dayton City Schools, ATTN: Christine Pruitt, 115 South Ludlow Street, 2nd Floor,
Dayton, Ohio 45402
Citizen Review Board
Magistrate Maciorowski
Chris Kuntz, Bailiff
Daniel Schubert, Law Clerk

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MONTGOMERY COUNTY

**IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
JUVENILE DIVISION**

IN RE: Margaret D. Maxwell SSN xxx-xx-xxxx DOB 12/29/2005 JC NO. F 2006-5550 0B; G 2006-5550 0F

Judge Nick Kuntz
Magistrate Michelle Maciorowski

**MAGISTRATE'S DECISION AND
JUDGE'S ORDER GRANTING THE
MOTION FOR PERMANENT CUSTODY**

* * * * *

PROCEEDINGS

This case came before Magistrate Michelle Maciorowski on August 14, 2007 in the matters of the motion for permanent custody (0B) filed on April 4, 2007 by Montgomery County Children Services and the motion for legal custody (0F) filed on July 17, 2007.

Elizabeth Orlando, the Montgomery County Assistant Prosecuting Attorney for Montgomery County Children Services was present. The mother, Jessica Lairson, was not present and she was represented by Attorney Richard Lipowicz. The Guardian ad Litem, Virginia Vandenbosch, was present and had filed a timely report. Richard Hempfling, Attorney for Maternal Aunt, was present. Kathy Richards, maternal aunt, was present. Stacey Keeton, the Montgomery County Children Services caseworker, was also present for the hearing.

The motion for legal custody (0F) be and hereby is denied.
All parties were served and the case is otherwise properly before the Court.

FINDINGS OF FACT

1. The allegations contained in the motion are found to be true.
2. Margaret D. Maxwell, the above-captioned child is a minor child, was born on December 29, 2005.
3. Her birth certificate indicates that Jessica Lairson is the mother of the child. She is the same person listed in the pleadings.
4. While there is no legal father of the child, there is an alleged father of the child. Those circumstances are as follows: Several men have completed genetic testing and none have been found to be the father.
5. The Agency has made reasonable efforts to:
 - a. prevent the removal of the child from the child's home;
 - b. to eliminate the continued removal of the child from the child's home; and,
 - c. make it possible for the child to return home.
6. The Agency has made reasonable efforts to implement and finalize the permanency plan.
7. The relevant services provided by the agency to the family of the child are: case management, substitute foster care, information/referral and a home study.
8. Those services did not prevent the removal of the child from the child's home or enable the child to return home.
9. There are no relatives or non-relatives suitable to care for the child.
10. The child has been in foster care since June 1, 2006. The child has not been in foster care 12 or more months out of the last 22 months.
11. The child is not able to be placed in the home of the mother in a reasonable time.

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12. The mother failed to respond to the services due to significant substance abuse problems and housing issues that have not been addressed, mental health issues and inability to demonstrate parenting skills.
13. The mother has failed to remedy the conditions causing the child to be placed outside the home.
14. The mother is unwilling to provide, food, clothing, shelter, and other basic needs.
15. The mother failed to regularly support the child financially.
16. The mother failed to visit or communicate with the child.
17. The mother has abandoned the child.
18. The mother has a drug problem severe enough to interfere with the care of the child into the foreseeable future.
19. The agency has attempted to contact and involve the alleged father of the child with the reunification process.
20. The alleged father has not provided any care, interest or financial support for the child.
21. The case plan was directed at the mother and includes the following objectives:
 - a. Obtain a substance abuse assessment a treatment;
 - b. Obtain a mental health assessment;
 - c. Obtain stable housing and income;
 - d. Have visitation with the child; and,
 - e. Sign appropriate releases of information;
22. The mother did not complete the Case Plan as indicated.
23. Reunification of the child with the mother is not possible within a reasonable period of time, as the mother has had no contact with the child information an extended period of time and has taken no action to become appropriate to parent the child.
24. There is reasonable expectation of adoption.
25. In accordance with §2151.04 of the Ohio Revised Code, the child was found to be dependent by entry filed on August 21, 2006.
26. The Guardian ad Litem recommends legal custody to the aunt, Kathy Richards.

CONCLUSIONS OF LAW

1. In accordance with §2151.414(E) of the Ohio Revised Code, there is clear and convincing evidence that the child cannot be placed with the mother and/or father within a reasonable time because the mother has had little to no contact with the child in the past year and has taken no action to become appropriate. It is not in best interest of the child to be in the care of the mother.
2. In accordance with §2151.414(D) of the Ohio Revised Code, there is clear and convincing evidence that the child cannot be placed with the mother and/or father within a reasonable time.
3. Reasonable efforts were made to eliminate the child's continued removal from the home.
4. The Court has considered all the arguments in this action. Although the Court believes Ms. Richards does love this child, the Court must be concerned solely with this child's best interest as it has already been determined that reunification with the mother is not viable. The child has resided for the past 14 months in the home of the foster parents. She is bonded and well-cared for in that home. There is a strong likelihood of adoption by the foster family. The Court cannot find that it is in the best interest of the child to remove the child from the home she has known for the majority of her life to place her in the home of a biological relative. In addition, the Court has some concern with the veracity of Ms. Richards concerning her criminal history.

MAGISTRATE'S DECISION

1. Permanent Custody be and hereby is granted to Montgomery County Children Services.
2. The former order granting temporary custody to Montgomery County Children Services be and hereby is terminated.
3. The natural, legal, or adoptive parents are divested of any and all parental rights, privileges, and obligations, including all residual rights and obligations.
4. An updated case plan is to be submitted as an amendment.

5. The Dayton City School District is ordered to be responsible for the cost of educating said child, including but not limited to, any summer courses or tutoring sessions, because at the time of removal, the parent of the child resided at 44 Burdkhart Ave., Dayton, Ohio 45403
6. An Annual Review/Permanency Planning Hearing will be held on March 10, 2008 at 10:45 a.m. before the Citizen Review Board, Juvenile Justice Center, Room 262, 380 W. Second Street, Dayton, Ohio 45422.
7. The Guardian ad Litem shall serve on this case until an adoption is finalized.

MAGISTRATE MICHELLE MACIOROWSKI

Magistrate Michelle Maciorowski

JUDGE'S ORDER ADOPTING MAGISTRATE'S DECISION

The above Magistrate's Decision is hereby adopted as an Order of this Court. The parties have fourteen (14) days to object to this decision and may request Findings of Fact and Conclusion of Law pursuant to Civil Rule 52 and Montgomery County Juvenile Court Rule 5.11.2. A party shall not assign as error on appeal the Court's adoption of any finding of fact or conclusion of law, in that decision, unless the party timely and specifically objects to that finding or conclusion as required by Juvenile Court Rule 40(E)(3).

IT IS SO ORDERED.

JUDGE NICK KUNTZ

Judge Nick Kuntz

ENDORSEMENT: The Clerk of Courts is hereby directed to serve upon all parties not in default for failure to appear, notice of the judgement and its date of entry upon the journal.

NOTICE OF FINAL APPEALABLE ORDER

Copies of the foregoing Entry and Order, which may be a Final Appealable Order, were entered upon the journal and mailed to the parties indicated below, via regular mail, on or within three (3) days of the time stamped date on this Order.

JUDGE NICK KUNTZ, By: J. Petrella, (Deputy Clerk), Juvenile Division

MCCS, ATTN: Mandated Services, 3304 North Main Street, Dayton, Ohio 45405

Assistant Prosecuting Attorney for MCCS, CPU

Jessica Lairson, 24 Huffman Ave., Dayton, Ohio 45403

Attorney for Mother, Richard A.F. Lipowicz, 130 West Second Street, Suite 1900, Dayton, Ohio 45402

Attorney for Maternal Aunt, Richard Hempfling, 318 W. Fourth St., Dayton, Ohio 45402

Dayton City Schools, ATTN: Christine Pruitt, 115 South Ludlow Street, 2nd Floor, Dayton, Ohio 45402

Citizen Review Board

R. Loveless, Case Management Specialist

/lmw