

IN THE SUPREME COURT OF OHIO

IN RE: M.M.

CASE NO.

09-0318

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

COURT OF APPEALS
CASE NOS. 22872 and 22873

NOTICE OF CERTIFIED CONFLICT
OF APPELLANT, KATHY RICHARDS

RICHARD HEMPFLING (0029986)
Flanagan, Lieberman, Hoffman & Swaim
15 West Fourth St., Suite 100
Dayton, OH 45402
(937) 223-5200 - Telephone
(937) 223-3335 - Facsimile
rhempfling@flhslaw.com
Counsel for Appellant, Kathy Richards

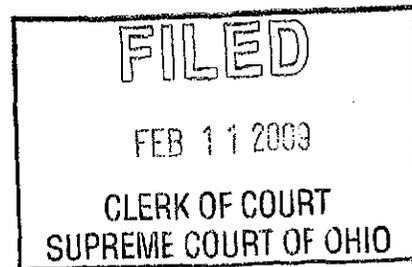
JOHNNA M. SHIA (0067685)
Assistant Prosecuting Attorney
301 West Third St., Fifth Floor
Dayton, OH 45422
(937) 225-5757 - Telephone
(937) 496-6555 - Facsimile
Counsel for Appellee, Montgomery County Children's Services

RICHARD A.F. LIPOWICZ (0018241)
130 West Second St., Suite 1900
Dayton, OH 45402
(937) 224-1427 - Telephone
(937) 228-5134 - Facsimile
Counsel for Mother, Jessica Lairson

VIRGINIA C. VANDEN BOSCH (0029453)
9506 West State Route 73
Wilmington, OH 45177
Guardian ad Litem

Flanagan
Lieberman
& Hoffman
& Swaim

Attorneys at Law
15 West Fourth Street
Dayton, Ohio 45402
937/223-5200

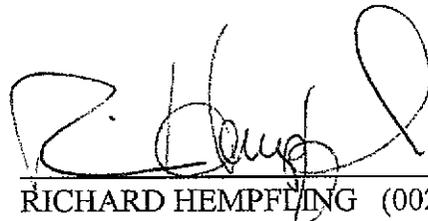


**NOTICE OF CERTIFIED CONFLICT
OF APPELLANT, KATHY RICHARDS**

Appellant, Kathy Richards, by Counsel, hereby gives notice that on February 2, 2009, the Montgomery County Court of Appeals filed a Decision and Entry certifying a conflict between its Decision herein (In re M.M., 2008-Ohio-6236) and the decision of the Twelfth District Court of Appeals in In re G.N., 176 Ohio App 3d 236, 2008-Ohio-1796, discretionary appeal denied, 118 Ohio St. 3d 1511, 2008-Ohio-3369. The certified question is as follows: "Must a court specifically determine whether granting permanent custody is the *only* way a child's need for a legally secure placement can be achieved in order to satisfy its duty under R.C. 2151.414(D)(4)?"

Copies of the Decision and Entry certifying a conflict and the Opinions of both Courts are appended hereto. A discretionary appeal was filed in this case on January 12, 2009 (S. Ct. Case No. 2009-0090).

Respectfully submitted,



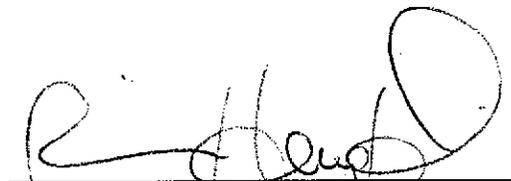
RICHARD HEMPFLING (0029986)
Flanagan, Lieberman, Hoffman & Swaim
15 West Fourth St., Suite 100
Dayton, OH 45402
(937) 223-5200 - Telephone
(937) 223-3335 - Facsimile
rhempfling@flhslaw.com
Counsel for Appellant

Flanagan
Lieberman
& Hoffman
& Swaim

Attorneys at Law
15 West Fourth Street
Dayton, Ohio 45402
937/223-5200

CERTIFICATE OF SERVICE

I hereby certify, by signing below, that a copy of the foregoing has been served upon Johnna M. Shia, Assistant Prosecuting Attorney, 301 West Third St., Fifth Floor, Dayton, OH 45422, 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, via ordinary U.S. Mail on this 10 day of February, 2009.


RICHARD HEMPFLING (0029986)

Flanagan
Lieberman
& Hoffman
Swaim

Attorneys at Law
15 West Fourth Street
Dayton, Ohio 45402
937/223-5200

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MONTGOMERY CO., OHIO
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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

DECISION AND ENTRY

Rendered on the 2nd day of February, 2009.

JOHNNA M.M. SHIA, Atty. Reg. No. 0067685, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

RICHARD HEMPFLING, Atty. Reg. No. 0029986, 318 West Fourth Street, Dayton, Ohio 45402
Attorney for Appellant Kathy Richards

RICHARD A. F. LIPOWICZ, Atty. Reg. No. 0018241, 130 West Second Street, Suite 1900, Dayton, Ohio 45402
Attorney for Appellant Jessica Lairson

PER CURIAM:

This matter comes before the court on Jessica Lairson's and Kathy Richards' App.R. 25 motions to certify a conflict between our opinion dated November 26, 2008, and the

Twelfth Appellate District's holding in *In re G.N.*, 176 Ohio App.3d 236, 2208-Ohio-1796, discretionary appeal denied, 118 Ohio St.3d 1511, 2008-Ohio-3369.

Both cases dealt with a trial court's decision to terminate parental rights. Pursuant to R.C. 2151.414(D), the trial court must consider several factors in determining the best interest of a child, including "the child's need for a legally secure placement and whether that type of placement can be achieved without a grant of permanent custody to the agency." In *In re M.M.*, the trial court concluded that the child's need for a secure placement was best served by awarding custody to MCCS but did not find that placement with MCCS was the *only* way to obtain a secure placement. On appeal, we held that the court was not required to find that permanent placement with MCCS was the *only* manner to obtain a secure placement. *In re M.M.*, Montgomery App. No. 22872, 22873, 2008-Ohio-6236, at ¶26. In *In re G.N.*, the Twelfth District held that a trial court's conclusion that placement with Childrens Services was "the best option" for securing a legally secure placement was insufficient to comply with R.C. 2151.414(D)(4). The Twelfth District held that, to satisfy this statutory factor, the court must find that "granting permanent custody is the *only* way the child's need for a secure placement can be met." *In re G.N.*, 176 Ohio App.3d 236 at ¶18.

Because we find that our decision is in conflict with the Twelfth District's holding in *In re G.N.*, we certify the following question to the Supreme Court of Ohio for review:

"Must a court specifically determine whether granting permanent custody is the *only* way a child's need for a legally secure placement can be achieved in order to satisfy its duty under R.C. 2151.414(D)(4)?"

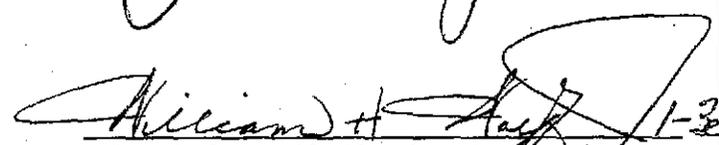
IT IS SO ORDERED.



MARY E. DONOVAN, Presiding Judge



JAMES A. BROGAN, Judge



WILLIAM H. WOLFF, JR., Judge

Copies mailed to:

- Johnna M. Shia
- Richard Hempfling
- Richard A. F. Lipowicz
- Hon. Nick Kuntz

[Cite as *In re M.M.*, 2008-Ohio-6236.]

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)
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:

.....
OPINION

Rendered on the 26th day of November, 2008.

.....
JOHNNA M. SHIA, Atty. Reg. No. 0067685, Assistant Prosecuting Attorney, 301 W.
Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

RICHARD HEMPFLING, Atty. Reg. No. 0029986, 318 West Fourth Street, Dayton,
Ohio 45402
Attorney for Appellant Kathy Richards

RICHARD A. F. LIPOWICZ, Atty. Reg. No. 0018241, 130 West Second Street, Suite
1900, Dayton, Ohio 45402
Attorney for Appellant Jessica Lairson

.....
WOLFF, P.J.

{¶ 1} Jessica Lairson and Kathy Richards appeal from a judgment of the
Montgomery County Court of Common Pleas, Juvenile Division, which awarded
permanent custody of Lairson's daughter, M.M., to Montgomery County Children's

Services ("MCCS").

{¶ 2} 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.

{¶ 3} 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.

{¶ 4} 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.

{¶ 5} 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 months preceding the hearing.

{¶ 6} 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.

{¶ 7} 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.

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

{¶ 9} 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 contact [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."

{¶ 10} We agree with the trial court's assessment that the methods M CCS used to attempt to locate Lairson were reasonable and sufficient under the circumstances and that, having failed to locate Lairson through these efforts, M CCS was justified in completing notice by mail and posting. Although, in hindsight, it appears that M CCS *might* have located Lairson through court and police records, M CCS 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.

{¶ 11} Lairson's assignment of error related to notice is overruled.

{¶ 12} 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 to MCCS.

{¶ 13} 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:

{¶ 14} "(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;

{¶ 15} "(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;

{¶ 16} "(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 ***;

{¶ 17} "(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[.]"

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

{¶ 19} 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.

{¶ 20} 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 focused only on whether M.M. would be better off in the custody of MCCS, 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.

{¶ 21} 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. MCCS 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.

{¶ 22} 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.

{¶ 23} 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 M.M.

{¶ 24} 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.

{¶ 25} 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 MCCA so that the foster family could pursue an adoption.

{¶ 26} 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 MCCA. 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 M CCS. Contrary to Richards’ assertion, the court was not required to conclude that granting custody to M CCS was the *only* secure placement; it was charged with determining the most secure placement, which is the one that would best serve M.M.’s interests.

{¶ 27} Richards’ contention that M CCS 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.

{¶ 28} The assignments of error are overruled.

{¶ 29} 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

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

In re G.N. et al.

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CASE NO. CA2007-12-119
(Accelerated Calendar)

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OPINION
4/14/2008

:

:

APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS,
JUVENILE DIVISION
Case No. 2003-JC-3232

Donald W. White, Clermont County Prosecuting Attorney, and David H. Hoffmann and Tom Flessa, Assistant Prosecuting Attorneys, for appellee, Clermont County Department of Job and Family Services.

Robert C. Bauer, guardian ad litem.

William R. Kaufman, for appellant, Frances M.

POWELL, Judge.

{¶1} Appellant, Frances M., appeals the decision of the Clermont County Court of Common Pleas, Juvenile Division, granting permanent custody of her minor children, G.N. and H.N., to the Clermont County Department of Job and Family Services ("CCDJFS"). For the reasons set forth below, the juvenile court's judgment is affirmed in part and

reversed in part, and the cause is remanded for further proceedings.

{¶2} This case concerns the second permanent-custody determination made by the juvenile court with respect to G.N. and H.N. On March 14, 2006, the magistrate issued his original decision granting permanent custody of the children to CCDJFS, finding that the children had been in the temporary custody of CCDJFS for 12 or more months of a consecutive 22-month period and that it was in the children's best interest to grant permanent custody to CCDJFS. Appellant filed objections to the magistrate's decision, over which the juvenile court affirmed the magistrate's decision in its entirety.

{¶3} On January 16, 2007, however, this court reversed the juvenile court's decision on the basis that the court had failed to properly consider the requisite statutory factors in making its permanent-custody determination. *In re G.N.*, Clermont App. No. CA2006-08-062, 2007-Ohio-126. The case was remanded to the juvenile court with instructions to properly consider those factors and to accord the matter the appropriate analysis.

{¶4} Thereafter, on January 24, 2007, appellant filed a Civ.R. 60(B) motion for relief from judgment with the juvenile court, arguing that the court's original permanent-custody decision should not have "prospective application" due to appellant's progress in abstaining from drug use and in maintaining "a suitable, appropriate home and lifestyle." On April 25, 2007, the magistrate issued supplemental findings of fact and conclusions of law, wherein he again determined that a grant of permanent custody to CCDJFS was in the children's best interest. The magistrate's decision did not, however, address appellant's Civ.R. 60(B) motion. The juvenile court thereafter upheld the magistrate's decision over appellant's written objections and expressly overruled appellant's Civ.R. 60(B) motion.

{¶15} Appellant now appeals the juvenile court's permanent-custody decision, advancing three assignments of error.

{¶16} Assignment of Error No. 1:

{¶17} "The trial court erred by not permitting a hearing on [appellant's] Civ.R. 60(B) motion filed on January 24, 2007."

{¶18} Assignment of Error No. 2:

{¶19} "The trial court's decision to deny [appellant's] Civ.R. 60(B) motion was error."

{¶110} Appellant's first and second assignments of error concern the juvenile court's treatment of her Civ.R. 60(B) motion. As the record demonstrates that the motion was filed in the juvenile court after this court had reversed and remanded the juvenile court's decision granting permanent custody of G.N. and H.N. to CCDJFS, we find appellant's assignments of error as to this matter without merit.

{¶111} Under Ohio law, it is well settled that "[o]nly final judgments are subject to vacation or modification pursuant to Civ.R. 60(B)." *Groza-Vance v. Vance*, 162 Ohio App.3d 510, 2005-Ohio-3815, ¶52, citing *Jarrett v. Dayton Osteopathic Hosp., Inc.* (1985), 20 Ohio St.3d 77, 20. "Where a judgment is reversed for error, and remanded for further proceedings, the cause may be taken up, by the court below, at the point where the first error was committed, and be proceeded with, as in other cases, to final judgment." *Wilson v. Kreuzsch* (1996), 111 Ohio App.3d 47, 51, citing *Montgomery Cty. Commrs. v. Carey* (1853), 1 Ohio St. 463, paragraph one of the syllabus, and *Miller v. Miller* (1960), 114 Ohio App. 234, 237-238. "The effect of a reversal and an order of remand is to reinstate the case to the docket of the trial court in precisely the same condition that obtained before the error occurred." *Id.*, citing *Richman Bros. Co. v. Amalgamated Clothing Workers of Am.*

(1956), 101 Ohio App. 459, 465.

{¶12} In this case, the effect of our reversal of the juvenile court's first permanent-custody decision was to reinstate the case in the trial court in a posture where no final judgment had yet been rendered as to CCDJFS's motion for permanent custody. As a result, there was no final judgment from which appellant could request relief pursuant to Civ.R. 60(B), and a motion for relief from judgment was not the proper procedural device for appellant to seek introduction of evidence of her improved lifestyle. Accordingly, we find that the juvenile court did not err in failing to conduct an evidentiary hearing on or in denying appellant's Civ.R. 60(B) motion. Appellant's first and second assignments of error are therefore overruled.

{¶13} Assignment of Error No. 3:

{¶14} "The trial court erred in finding * * * a grant of permanent custody was in the children's best interests."

{¶15} In her third assignment of error, appellant contends that the juvenile court erred in finding that a grant of permanent custody was in the children's best interest when there was conflicting evidence presented as to the statutory factors governing permanent custody. As previously noted, this court reversed the juvenile court's original permanent-custody decision because it did not contain a clear indication that the court considered the required statutory factors pursuant to R.C. 2151.414 in making its permanent-custody determination. *In re G.N.*, 2007-Ohio-126. In doing so, we remanded the matter to the juvenile court to properly consider the requisite statutory factors, with clear instructions as to the analysis expected of the juvenile court, considering the magnitude of permanent-custody matters. *Id.* at ¶42-43.

{¶16} As we stated therein, the Ohio Supreme Court has found permanent termination of parental rights to be "the family law equivalent of the death penalty in a criminal case," entitling parents to "every procedural and substantive protection the law allows." *Id.* at ¶43, quoting *In re Hayes* (1997), 79 Ohio St.3d 46, 48. We therefore continue to encourage trial courts to carefully and conscientiously review the applicable statutes governing permanent custody and to craft permanent-custody decisions to reflect that such an analysis was in fact undertaken. Where a court fails to comply with the statutory requirements governing permanent custody, we are forced to remand these matters to the trial court to do so, thereby leaving children such as G.N. and H.N. in limbo for unnecessarily prolonged periods of time.

{¶17} After reviewing the record in this case, we note that the juvenile court appears to have heeded our instructions to specifically consider each statutory factor pursuant to R.C. 2151.414(D). Our review of the court's decision, however, reveals a fundamental failure of the court with respect to its consideration of R.C. 2151.414(D)(4), concerning the children's "need for a legally secure permanent placement." This provision requires a trial court to consider "[t]he 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." In reversing the juvenile court's first permanent-custody decision, we specifically instructed the court that this statutory factor "does not require the court to consider whether an agency *can* provide the necessary legally secure permanent placement, but instead requires the court to consider whether granting permanent custody *is the only way* the children's need for such placement can be achieved." (Emphasis added.) *In re G.N.*, 2007-Ohio-126, at ¶40.

{¶18} Nevertheless, on remand, the juvenile court found that "the *best option* for achieving the legally secure permanent placement the children strongly need is by granting permanent custody to the Agency." (Emphasis added.) Such a finding was made after the court noted the "tentative efforts" of the children's aunt, uncle, and stepparents with respect to completing the training required for adoption and the "untrustworthiness" of appellant. The court's use of the phrase "best option" implies there are other possible, though less desirable, options by which the children's need for a legally secure and permanent placement can be achieved.

{¶19} We reiterate that because R.C. 2151.414(D)(4) requires a juvenile court to consider whether a child's need for a legally secure permanent placement "can be achieved without a grant of permanent custody," the juvenile court must specifically determine that granting permanent custody is the *only way* the child's need for such placement can be achieved to satisfy this statutory factor. Because the juvenile court did not make this determination, the court's finding with respect to R.C. 2151.414(D)(4) is in error. Appellant's third assignment of error is therefore sustained.

{¶20} The judgment is affirmed in part and reversed in part, and the cause is remanded to correctly apply R.C. 2151.414(D)(4) based on the evidence before it at the time of the magistrate's original decision.

Judgment accordingly.

WALSH, P.J., and BRESSLER, J., concur.