

IN THE SUPREME COURT OF OHIO

IN RE: M.M. : CASE NOS. 2009-0318 AND
 : 2009-0090
 :
 : ON APPEAL FROM THE
 : COURT OF APPEALS OF OHIO
 : SECOND APPELLATE DISTRICT,
 : MONTGOMERY COUNTY
 :
 : COURT OF APPEALS
 : CASE NOS. 22872 and 22873

MERIT BRIEF OF APPELLANT, JESSICA LAIRSON

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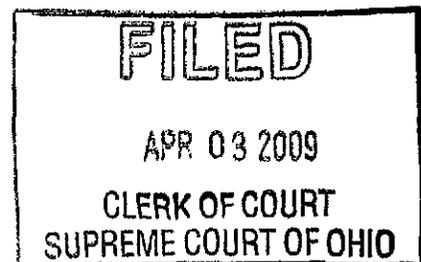


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STATEMENT OF FACTS

This case arises from the Judgment and Opinion of the Montgomery County Court of Appeals affirming the Decision and Judgment of the Montgomery County Juvenile Court awarding permanent custody of M.M. to Montgomery County Children's Services (MCCS). On April 4, 2007, MCCS filed its motion for permanent custody of M.M. MCCS served its motion on Jessica Lairson, the mother of M.M., 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 maternal great aunt, Kathy Richards, filed her motion for legal custody on July 14, 2007. Both motions were heard by the Magistrate on August 14, 2007.

At the hearing, Stacy Keeton of MCCS testified that reunification of M.M. with her mother, Jessica Lairson, was not appropriate. (Tr. 179). Keeton 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. (Tr. 155-165, 173 and 179).

From September to October, 2006, Kathy Richards had visitation with M.M. at MCCS once per week. (Tr. 167). Eventually, Richards had visits with M.M. in her home. (Tr. 167). The visits were stopped in October, 2006, when Stacy Keeton discovered Robert Maxwell at Richards' home during one visit. (Tr. 167-168). Maxwell was Jessica Lairson's former boyfriend and, at one time, believed to be M.M.'s father. (Tr. p. 170). Maxwell was not allowed to have visits with M.M. after the Court determined that he was not M.M.'s father. (Tr. 171).

MCCS approved a home study of Kathy Richards in October, 2006. (Tr. 175). Stacy Keeton of MCCS inspected Richards' home again on August 13, 2007 (the day before the Magistrate's hearing), and found the home in same or even better condition than at the initial home study. (Tr. 187-188).

In May, 2007, Kathy Richards was again granted visitation with M.M. at MCCS (Tr. 167). During visits, Stacy 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.” (Tr. 181). Keeton also observed that M.M. is “very active” with Richards, tries to formulate words, and “do a lot more with Kathy than I thought [the child] was capable of.” (Tr. 181).

Kathy Richards has custody of M.M.’s cousin, Matthew, who also attends visits with M.M. According to Stacy Keeton, M.M. and Matthew get along “fine. [M.M.] loves mimicking and playing and running behind Matthew.” (Tr. 181-182). Matthew looks forward to seeing M.M.: “He talks to [M.M.]. He wants to play with [M.M.]” (Tr. 209). Ms. Keeton testified that the two children are bonded. (Tr. 209).

M.M. receives services through MCCS including speech and developmental therapy. (Tr. 186). Stacy Keeton admitted that those services would be just as available to Kathy Richards as they are to the foster parents. (Tr., 186). Ms. Keeton also observed differences in the way M.M. interacts with the foster parents and Richards: “She would probably whine a little more to 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.” (Tr. 208).

M.M. has two siblings who live in other households. (Tr. 185). Stacy Keeton testified that if MCCS obtains permanent custody, and then consents to adoption by the foster parents, MCCS will cease its involvement with M.M. (Tr. 185). Keeton admitted that there was no guarantee that the adoptive parents would allow any contact between M.M. and her biological relatives. (Tr. 186).

Finally, Stacy Keeton testified that she considered Kathy Richards as a relative placement. (Tr. 177). Keeton admitted that, except for the one incident with Robert Maxwell months before, MCCA would be pursuing legal custody to Richards. (Tr. 194).

Kathy Richards testified that she asked the court for legal custody because M.M. is her niece and she loves her. (Tr. 19). Richards wants to have a relationship with M.M., and continue the relationship between M.M. and Matthew. (Tr. 19-220).

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. (Tr. 220). She stated that she had sufficient household income to support two children until she found employment. (Tr. 221).

Kathy Richards testified that M.M. would have her own room at her home. (Tr. 221). Richards has also dealt with the same eye and speech problems with Matthew as those experienced by M.M. (Tr. 221-222). She would make time for the same therapy sessions which M.M. receives through foster care. (Tr. 222).

Finally, Kathy Richards testified that she had no contact with Robert Maxwell in months; never had a friendship with Maxwell; and, as far as she was concerned, "he could fall off the earth." (Tr. 223). Stacy Keeton testified that Richards told her she has absolutely no interest in ever seeing Robert Maxwell again. (Tr. 190). Richards stated she would abide by court orders regarding Maxwell. (Tr. 224).

On cross-examination, Kathy Richards was asked if she was ever charged with theft. (Tr. 234-235). Richards denied such charge, and the prosecutor acknowledged that she had no evidence to prove this allegation. (Tr. 234 and 242).

The Guardian ad Litem (GAL) recommended that the legal custody of M.M. be given to Richards. In her recommendation, the GAL addressed MCCA's sole concern:

Addressing the "Robert Maxwell issue", as far as Ms. Richards is concerned based on my [i.e., the GAL's] 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 GAL concluded that "it is in [M.M's] best interest to be raised with her family in a good home by her maternal great-aunt."

On October 12, 2007, the Magistrate filed her Amended Decision granting permanent custody to MCCA. (App. A-23). The Magistrate found that there were no relatives suitable to care for the child. (App. A-23). 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. (App. A-24). The Magistrate overruled Richards' motion for legal custody citing only the Magistrate's "concern with the veracity of Ms. Richards concerning her criminal history." (App. A-24). 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. Richards filed supplemental objections on May 28, 2008. On July 3, 2008, the Montgomery County Juvenile Court filed its Decision and Judgment overruling Lairson's and Richards' objections and adopting the Magistrate's Decision. (App. A-17). The Juvenile Court found that the child had regularly visited with Kathy Richards, and bonded with Richards and her older cousin, Matthew, through steady visitation. (App. A-20-21). The Court also found that the GAL recommended that legal custody be granted to Richards. (App. A-21). However, 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." (App. A-21). The Juvenile Court held that permanent custody to MCCA was in the best interest of the child. App. A-21-22). However, the Juvenile Court did

not find that permanent custody was the only way M.M.'s need for a legally secure placement could be achieved.

On appeal, the Montgomery County Court of Appeals held, among other things, that the trial court was not required to find that permanent placement with MCCS was the only way to obtain a secure placement. (App. A-5). Both Lairson and Richards timely filed motions to certify a conflict between the opinion of the Montgomery County Court of Appeals, and the holding of the Twelfth Appellate District in *In re G.N.* (2008), 176 Ohio App.3d 236. On February 2, 2009, the Montgomery County Court of Appeals certified the conflict to the Supreme Court of Ohio on the following question:

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. 2151.151(D)(4).

(App. A-1).

Jessica Lairson filed her Notice of Certified Conflict to the Supreme Court of Ohio in Case No. 09-0318 on February 18, 2009. On March 17, 2009, the Supreme Court of Ohio determined that a conflict exists and granted jurisdiction to hear the case.

ARGUMENT

Proposition of Law No. 1:

A court must determine that a grant of 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).

The right to raise a child is an essential and basic civil right. *In re Hayes* (1997), 79 Ohio St.3d 46, 48, citing *In re Murray* (1990), 52 Ohio St.3d 155, 157. "Permanent termination of parental rights has been described as 'the family law equivalent of the death penalty in a criminal case.'" *In re Hayes, supra*, quoting *In re Smith* (1991), 77 Ohio App.3d 1, 16. A parent "must be afforded every procedural and substantive protection the law allows." *In re Hayes, supra*.

“To terminate parental rights, the movant must demonstrate by clear and convincing evidence that (1) termination is in the best interests of the child, and (2) one of the four factors enumerated in R.C. 2151.414(B)(1) applies.” *In the Matter of A.E.*, (March 25, 2008), Franklin Co. App. No. 07AP-685, 2008-Ohio-1375 at ¶ 13. R.C. 2151.414(D) mandates that the trial court consider all relevant factors in determining the best interests of the child including: “. . . (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 Twelfth Appellate District held that R.C. 2151.414(D)(4) requires the juvenile court to: “. . . specifically determine whether granting permanent custody is the *only way* the child's need for [a legally secure] placement can be achieved to satisfy this statutory requirement.” *In re G.N.* (2008), 176 Ohio App.3d 236, 240. Appellant Lairson agrees with the Twelfth District's interpretation for the reasons below, and submits that, if the Montgomery County Juvenile Court had followed *In re G.N.*, the Court would have found that a legally secure placement could be achieved by awarding legal custody to M.M.'s great aunt, Appellant Kathy Richards.

A court must adhere to the plain and unambiguous language of a statute, giving effect to the words used, and may not delete words used or add words not used. *Wray v. Wymer* (1991), 77 Ohio App. 3d 122, 132; *Cline v. Bur. of Motor Vehicles* (1991), 61 Ohio St.3d 93, 97. R.C. 2151.414(D)(4) requires the juvenile court to first determine whether the child needs a legally secure placement; if so, then the court is required to make a second determination of whether such placement can be achieved *without* a grant of permanent custody. The language of R.C. 2151.41 is clear and unambiguous – the juvenile court must determine whether a legally secure placement exists other than permanent custody. It is axiomatic that permanent custody shall not be awarded unless it is the only alternative; not just the “best option” for achieving a legally secure placement. See *In re G.N.*, *supra* at 240.

In the present case, the Montgomery Juvenile Court concluded that M.M.'s need for a legally secure placement was best served by awarding permanent custody to MCCA. The Juvenile Court found that "permanent custody with the agency will give said child her best chance at permanency." This finding implies that there were other ways to achieve a secure placement, namely legal custody to the child's great aunt, Kathy Richards. However, the Montgomery County Court of Appeals held that the Juvenile Court was not required to find that permanent custody to MCCA was the only way to achieve a secure placement. The Court of Appeals holding flies in the face of the clear language of R.C. 2151.414(D)(4) and effectively deletes the Juvenile Court's statutory duty to consider "whether [a legally secure] placement can be achieved *without* a grant of permanent custody to the agency." (Emphasis added).

"The primary rule of statutory construction is to give effect to the legislature's intent." *Cline v. Ohio Bur. of Motor Vehicles, supra* at 97. As stated above, termination of parental rights is an alternative of last resort. *In re Wise* (1994), 96 Ohio App.3d 619, 624. The United States Supreme Court has explained that permanent termination is one of the few forms of state action which is "both so severe and so irreversible." *M.L.B. v. S.L.J.* (1996), 519 U.S. 102, 118. Given the gravity attached to permanent custody proceedings by the legislature and courts, it is only logical that R.C. 2151.414(D)(4) be interpreted to impose of duty on the juvenile court to determine that permanent custody is the only way to achieve a secure placement.

Other Ohio appellate courts have adhered to the Twelfth District's interpretation of R.C. 2151.414(D)(4) in practice if not in substance. For instance, in *In re A.S.* (2005), 163 Ohio App. 3d 167, the Summit County Court of Appeals affirmed the trial court's decision denying the permanent custody motion of the Summit County Children's Services Board. In its opinion, the appellate court noted: "Although CSB apparently believed that permanent custody was the best way to achieve a legally secure permanent placement for A.S., the trial court disagreed that such

disposition was in the best interest of A.S.” *Id.* at 653. The appellate court found that: “CSB witnesses repeatedly emphasized that permanent custody was necessary because A. S. needed permanency in her life, *overlooking the possibility of other placements that would be less drastic, such as legal custody to a non-parent or a PPLA.*” *Id.* at 653. (Emphasis added). The appellate court upheld the trial court’s conclusion that a placement less drastic than permanent custody satisfied the child’s need for security. *Id.* at 654.

In another Summit County case, *In re A.T.* (Aug. 2, 2006), Summit Co. App. No. 23065, 2006-Ohio-3919, the appellate court noted:

As part of its best interest determination, it is true that the juvenile court is obligated 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.” R.C. 2151.414(D)(4). In the present case, *the trial court specifically found that “[n]o alternatives to permanent custody exist to assure the minor children a safe, secure permanent placement.”*

Id. at ¶ 54. (Emphasis added). Clearly, the trial and appellate courts in *In re A.T.* recognized the duty imposed by R.C. 2151.414(D)(4) to make a specific determination that permanent custody is the only alternative to provide a legally secure placement.

Appellant Lairson also submits that the Twelfth District’s interpretation of R.C. 2151.414(D)(4) is not contrary with this Court’s decision in *In re Schaeffer* (2006), 111 Ohio St.3d 498. In *Schaeffer*, this court held that: “R.C. 2151.414(D) does not give special weight to any of the factors listed therein in determining the best interest of [the] child.” *Id.* at 498 (syllabus). However, in considering R.C. 2151.414(D)(4), this court noted that the trial court determined that the child’s need for a legally secure placement could be achieved by placement with the child’s paternal grandfather and his wife or with the foster parents. In other words, the trial court made the specific determination demanded by R.C. 2151.414(D)(4) that permanent custody was not the only way to achieve a secure placement.

In the present case, the Montgomery County Juvenile Court did not specifically find that permanent custody was the only alternative. In other words, the Juvenile Court did not consider whether M.M.'s need for a secure placement could be achieved through an alternative less drastic than permanent custody. If it had, Appellant Lairson contends that the Juvenile Court would have found that M.M. need for security would have been satisfied by an award of legal custody to the child's great aunt, Kathy Richards. There was clear and convincing evidence that M.M.'s interaction and interrelationship with her Richards and Richards' family was positive and beneficial to the child. See R.C. 2151.414(D)(1). Stacy Keeton, the MCCS caseworker, considered Kathy Richards a possible relative placement. Keeton also found Richards' home suitable for the child; and that Richards' and her nephew Matthew had bonded with M.M. (Tr. 175, 177 and 187-188). Keeton strongly implied that 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 Richards' presence. (Tr. 208).

Kathy Richards loves and wants to raise M.M., and continue M.M.'s relationship with cousin Matthew. No questions were raised about Richards' ability to parent M.M. other than the one incident with Robert Maxwell which occurred eight months before the Magistrate's hearing. Richards' stated unequivocally that she had no contact with Maxwell after the incident, nor wished to have any contact with him ever again.

Further, M.M.'s GAL recommended that legal custody be granted to Kathy Richards. See R.C. 2151.414(D)(2). M.M. would have her own room at Ms. Richards' home. 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, Richards was about to graduate from college with an associate degree in

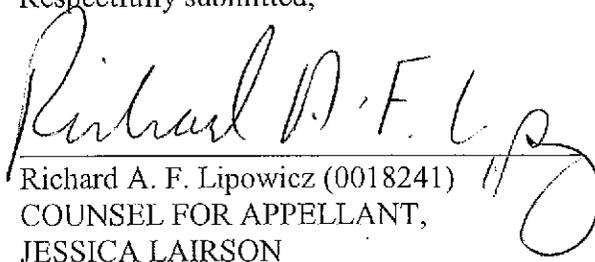
medical office management, and expected to obtain employment in that field. She stated that she had sufficient household income to support two children until she found employment.

The record in this case is devoid evidence that placement with Kathy Richards would be unsafe or unstable other than the *one* incident with Robert Maxwell. On the other hand, the record is replete with clear and convincing evidence that placement with 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.

CONCLUSION

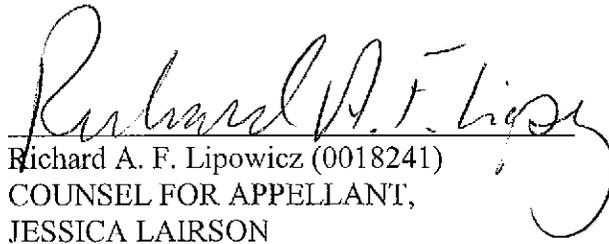
The Twelfth Appellate District's interpretation of R.C. 2151.414(D)(4) is correct, and Appellant Lairson respectfully requests that this Court reverse and remand the present case to the trial court for a specific determination of whether granting permanent custody to MCCS is the only way a legally secure placement for M.M. can be achieved. If such a determination is made, Appellant Lairson believes that the less drastic alternative of legal custody to Appellant Kathy Richards would satisfy M.M.'s need for security without permanently and irrevocably severing M.M.'s ties with her biological relatives.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I certify that copies of the foregoing Merit Brief were been served upon Johnna Shia, Assistant Prosecuting Attorney, Attorney for Appellee Montgomery County Children's Services, 301 West Third Street, Fifth Floor, Dayton, OH 45422, Richard Hempfling, Attorney for Appellant Kathy Richards, 15 West Fourth Street, Suite 100, Dayton, OH 45402, and Virginia C. Vanden Bosch, Guardian Ad Litem, 9506 West State Route 73, Wilmington, OH 45177, by ordinary U.S. mail on this 2nd day of April, 2009.


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APPENDIX

Appx. Page

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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

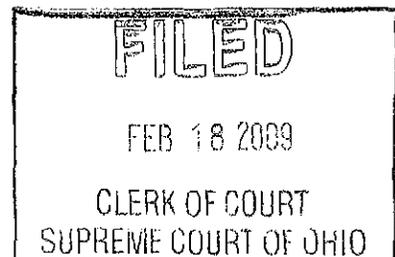
NOTICE OF CERTIFIED CONFLICT
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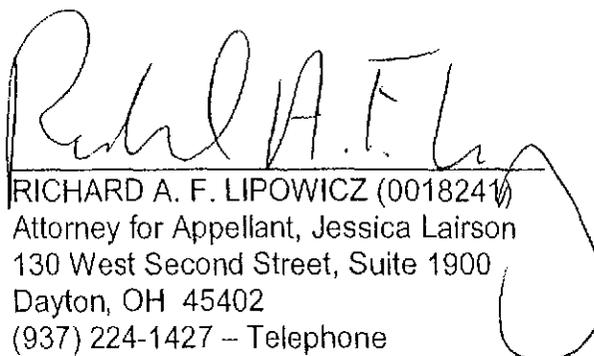


**NOTICE OF CERTIFIED CONFLICT
OF APPELLANT, JESSICA LAIRSON**

Appellant, Jessica Lairson, 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 (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)?"

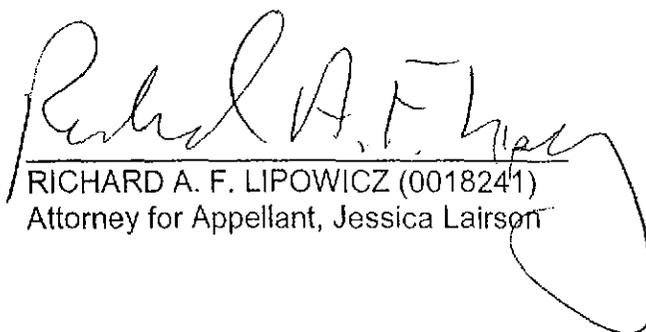
Copies of the Decision and Entry certifying a conflict and the Opinions of both Courts are appended hereto. A discretionary appeal was filed by Appellant, Kathy Richards, in this case on January 12, 2009 (S. Ct. Case No. 2009-0090).

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify, by signing below, that a copy of the foregoing has been served upon Johnna Shia, Assistant Prosecuting Attorney, 301 West Third Street, Fifth Floor, Dayton, OH 45422, Richard Hempfling, Attorney for Kathy Richards, 15 West Fourth Street, Suite 100, Dayton, OH 45402, and Virginia C. Vanden Bosch, Guardian Ad Litem, 9506 West State Route 73, Wilmington, OH 45177, via ordinary U.S. mail on this 13TH day of February, 2009.


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Attorney for Appellant, Jessica Lairson

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.

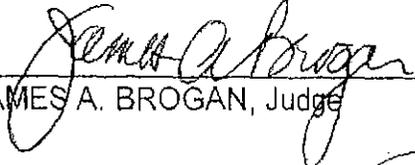
Both cases dealt with a trial court's decision to terminate parental rights. Pursuant to R.C. 2151.414(D), the trial court must consider several factors in determining the best interest of a child, including "the child's need for a legally secure placement and whether that type of placement can be achieved 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.

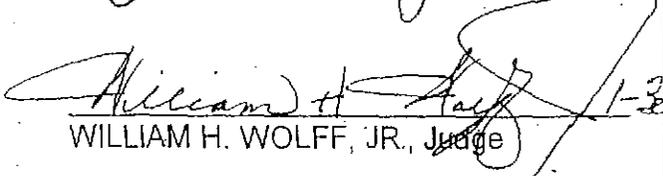
Because we find that our decision is in conflict with the Twelfth District's holding in *In re G.N.*, we certify the following question to the Supreme Court of Ohio for review:

"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

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

IN RE: M.M.

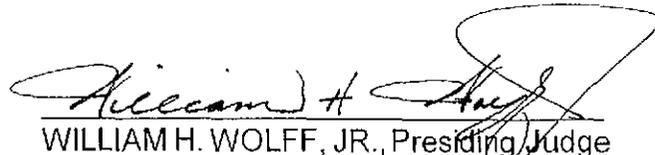
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: C.A. CASE NOS. 22872 and 22873

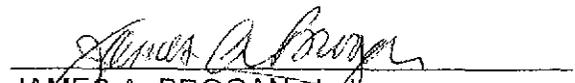
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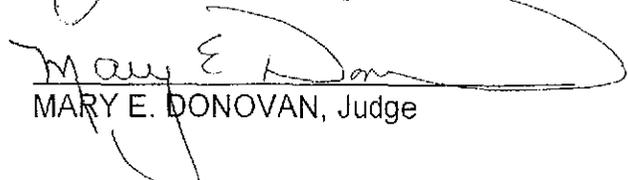
:
: **FINAL ENTRY**

.....
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

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Hon. Nick Kuntz
Juvenile Court
380 West Second Street
Dayton, Ohio 45422

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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Attorney for Plaintiff-Appellee

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Dayton, Ohio 45402
Attorney for Appellant Jessica Lairson

.....
WOLFF, P.J.

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").

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

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

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.

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."

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.

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

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

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.

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.

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

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

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

FILED
JUL 3 2008
2008 JUL -3 AM 10:21
MONTGOMERY COUNTY
OHIO

**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.

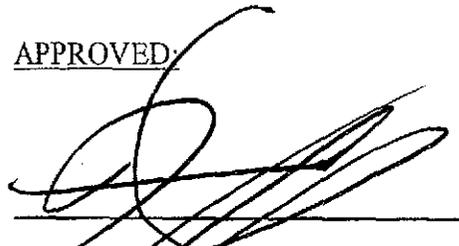
While said child has bonded with Ms. Richards and the Guardian ad Litem recommends legal custody to Ms. Richards, the Court does not consider these factors to be as significant as said child's need for permanency. Further, the Court is not required to consider placement with a relative before granting 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

FILED
JUVENILE DIVISION

07 OCT 12 AM 8: 31

COMMON PLEAS
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

AMENDED
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.
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 Burdckhart 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
Attorney/Guardian ad Litem, Virginia Vandenbosch, Atty, 22 Clay 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

2151.414
TITLE [21] XXI COURTS -- PROBATE -- JUVENILE
CHAPTER 2151: JUVENILE COURT

(A)(1) Upon the filing of a motion pursuant to section 2151.413 of the Revised Code for permanent custody of a child, the court shall schedule a hearing and give notice of the filing of the motion and of the hearing, in accordance with section 2151.29 of the Revised Code, to all parties to the action and to the child's guardian ad litem. The notice also shall contain a full explanation that the granting of permanent custody permanently divests the parents of their parental rights, a full explanation of their right to be represented by counsel and to have counsel appointed pursuant to Chapter 120. of the Revised Code if they are indigent, and the name and telephone number of the court employee designated by the court pursuant to section 2151.314 of the Revised Code to arrange for the prompt appointment of counsel for indigent persons.

The court shall conduct a hearing in accordance with section 2151.35 of the Revised Code to determine if it is in the best interest of the child to permanently terminate parental rights and grant permanent custody to the agency that filed the motion. The adjudication that the child is an abused, neglected, or dependent child and any dispositional order that has been issued in the case under section 2151.353 of the Revised Code pursuant to the adjudication shall not be readjudicated at the hearing and shall not be affected by a denial of the motion for permanent custody.

(2) The court shall hold the hearing scheduled pursuant to division (A)(1) of this section not later than one hundred twenty days after the agency files the motion for permanent custody, except that, for good cause shown, the court may continue the hearing for a reasonable period of time beyond the one-hundred-twenty-day deadline. The court shall issue an order that grants, denies, or otherwise disposes of the motion for permanent custody, and journalize the order, not later than two hundred days after the agency files the motion.

If a motion is made under division (D)(2) of section 2151.413 of the Revised Code and no dispositional hearing has been held in the case, the court may hear the motion in the dispositional hearing required by division (B) of section 2151.35 of the Revised Code. If the court issues an order pursuant to section 2151.353 of the Revised Code granting permanent custody of the child to the agency, the court shall immediately dismiss the motion made under division (D)(2) of section 2151.413 of the Revised Code.

The failure of the court to comply with the time periods set forth in division (A)(2) of this section does not affect the authority of the court to issue any order

under this chapter and does not provide any basis for attacking the jurisdiction of the court or the validity of any order of the court.

(B)(1) Except as provided in division (B)(2) of this section, the court may grant permanent custody of a child to a movant if the court determines at the hearing held pursuant to division (A) of this section, by clear and convincing evidence, that it is in the best interest of the child to grant permanent custody of the child to the agency that filed the motion for permanent custody and that any of the following apply:

(a) The child is not abandoned or orphaned, has not 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, or has not 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 if, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state, and the child cannot be placed with either of the child's parents within a reasonable time or should not be placed with the child's parents.

(b) The child is abandoned.

(c) The child is orphaned, and there are no relatives of the child who are able to take permanent custody.

(d) 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, or 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 and, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state.

For the purposes of division (B)(1) of this section, a child shall be considered to have entered the temporary custody of an agency on the earlier of the date the child is adjudicated pursuant to section 2151.28 of the Revised Code or the date that is sixty days after the removal of the child from home.

(2) With respect to a motion made pursuant to division (D)(2) of section 2151.413 of the Revised Code,

the court shall grant permanent custody of the child to the movant if the court determines in accordance with division (E) of this section that the child cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent and determines in accordance with division (D) of this section that permanent custody is in the child's best interest.

(C) In making the determinations required by this section or division (A)(4) of section 2151.353 of the Revised Code, a court shall not consider the effect the granting of permanent custody to the agency would have upon any parent of the child. A written report of the guardian ad litem of the child shall be submitted to the court prior to or at the time of the hearing held pursuant to division (A) of this section or section 2151.35 of the Revised Code but shall not be submitted under oath.

If the court grants permanent custody of a child to a movant under this division, the court, upon the request of any party, shall file a written opinion setting forth its findings of fact and conclusions of law in relation to the proceeding. The court shall not deny an agency's motion for permanent custody solely because the agency failed to implement any particular aspect of the child's case plan.

(D)(1) In determining the best interest of a child at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) or (5) of section 2151.353 or division (C) of section 2151.415 of the Revised Code, the court shall consider all relevant factors, including, but not limited to, the following:

(a) 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;

(b) 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;

(c) 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, or 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 and, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state;

(d) 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;

(e) Whether any of the factors in divisions (E)(7) to

(11) of this section apply in relation to the parents and child.

For the purposes of division (D)(1) of this section, a child shall be considered to have entered the temporary custody of an agency on the earlier of the date the child is adjudicated pursuant to section 2151.28 of the Revised Code or the date that is sixty days after the removal of the child from home.

(2) If all of the following apply, permanent custody is in the best interest of the child and the court shall commit the child to the permanent custody of a public children services agency or private child placing agency:

(a) The court determines by clear and convincing evidence that one or more of the factors in division (E) of this section exist and the child cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent.

(b) The child has been in an agency's custody for two years or longer, and no longer qualifies for temporary custody pursuant to division (D) of section 2151.415 of the Revised Code.

(c) The child does not meet the requirements for a planned permanent living arrangement pursuant to division (A)(5) of section 2151.353 of the Revised Code.

(d) Prior to the dispositional hearing, no relative or other interested person has filed, or has been identified in, a motion for legal custody of the child.

(E) In determining at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code whether a child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents, the court shall consider all relevant evidence. If the court determines, by clear and convincing evidence, at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code that one or more of the following exist as to each of the child's parents, the court shall enter a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent:

(1) Following the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the home, the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home. In determining whether the parents have substantially remedied those conditions, the court shall consider parental utilization of medical, psychiatric, psychological, and other social and rehabilitative services and material resources that were made available to the

parents for the purpose of changing parental conduct to allow them to resume and maintain parental duties.

(2) Chronic mental illness, chronic emotional illness, mental retardation, physical disability, or chemical dependency of the parent that is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year after the court holds the hearing pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code;

(3) The parent committed any abuse as described in section 2151.031 of the Revised Code against the child, caused the child to suffer any neglect as described in section 2151.03 of the Revised Code, or allowed the child to suffer any neglect as described in section 2151.03 of the Revised Code between the date that the original complaint alleging abuse or neglect was filed and the date of the filing of the motion for permanent custody;

(4) The parent has demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child;

(5) The parent is incarcerated for an offense committed against the child or a sibling of the child;

(6) The parent has been convicted of or pleaded guilty to an offense under division (A) or (C) of section 2919.22 or under section 2903.16, 2903.21, 2903.34, 2905.01, 2905.02, 2905.03, 2905.04, 2905.05, 2907.07, 2907.08, 2907.09, 2907.12, 2907.21, 2907.22, 2907.23, 2907.25, 2907.31, 2907.32, 2907.321, 2907.322, 2907.323, 2911.01, 2911.02, 2911.11, 2911.12, 2919.12, 2919.24, 2919.25, 2923.12, 2923.13, 2923.161, 2925.02, or 3716.11 of the Revised Code and the child or a sibling of the child was a victim of the offense or the parent has been convicted of or pleaded guilty to an offense under section 2903.04 of the Revised Code, a sibling of the child was the victim of the offense, and the parent who committed the offense poses an ongoing danger to the child or a sibling of the child.

(7) The parent has been convicted of or pleaded guilty to one of the following:

(a) An offense under section 2903.01, 2903.02, or 2903.03 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to an offense described in those sections and the victim of the offense was a sibling of the child or the victim was another child who lived in the parent's household at the time of the offense;

(b) An offense under section 2903.11, 2903.12, or 2903.13 of the Revised Code or under an existing or former law of this state, any other state, or the United

States that is substantially equivalent to an offense described in those sections and the victim of the offense is the child, a sibling of the child, or another child who lived in the parent's household at the time of the offense;

(c) An offense under division (B)(2) of section 2919.22 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to the offense described in that section and the child, a sibling of the child, or another child who lived in the parent's household at the time of the offense is the victim of the offense;

(d) An offense under section 2907.02, 2907.03, 2907.04, 2907.05, or 2907.06 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to an offense described in those sections and the victim of the offense is the child, a sibling of the child, or another child who lived in the parent's household at the time of the offense;

(e) A conspiracy or attempt to commit, or complicity in committing, an offense described in division (E)(7)(a) or (d) of this section.

(8) The parent has repeatedly withheld medical treatment or food from the child when the parent has the means to provide the treatment or food, and, in the case of withheld medical treatment, the parent withheld it for a purpose other than to treat the physical or mental illness or defect of the child by spiritual means through prayer alone in accordance with the tenets of a recognized religious body.

(9) The parent has placed the child at substantial risk of harm two or more times due to alcohol or drug abuse and has rejected treatment two or more times or refused to participate in further treatment two or more times after a case plan issued pursuant to section 2151.412 of the Revised Code requiring treatment of the parent was journalized as part of a dispositional order issued with respect to the child or an order was issued by any other court requiring treatment of the parent.

(10) The parent has abandoned the child.

(11) The parent has had parental rights involuntarily terminated with respect to a sibling of the child pursuant to this section or section 2151.353 or 2151.415 of the Revised Code, or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to those sections, and the parent has failed to provide clear and convincing evidence to prove that, notwithstanding the prior termination, the parent can provide a legally secure permanent placement and adequate care for the health, welfare, and safety of the child.

(12) The parent is incarcerated at the time of the filing of the motion for permanent custody or the dispositional

hearing of the child and will not be available to care for the child for at least eighteen months after the filing of the motion for permanent custody or the dispositional hearing.

(13) The parent is repeatedly incarcerated, and the repeated incarceration prevents the parent from providing care for the child.

(14) The parent for any reason is unwilling to provide food, clothing, shelter, and other basic necessities for the child or to prevent the child from suffering physical, emotional, or sexual abuse or physical, emotional, or mental neglect.

(15) The parent has committed abuse as described in section 2151.031 of the Revised Code against the child or caused or allowed the child to suffer neglect as described in section 2151.03 of the Revised Code, and the court determines that the seriousness, nature, or likelihood of recurrence of the abuse or neglect makes the child's placement with the child's parent a threat to the child's safety.

(16) Any other factor the court considers relevant.

(F) The parents of a child for whom the court has issued an order granting permanent custody pursuant to this section, upon the issuance of the order, cease to be parties to the action. This division is not intended to eliminate or restrict any right of the parents to appeal the granting of permanent custody of their child to a movant pursuant to this section.

Effective Date: 10-05-2000; 2008 SB163 08-14-2008;
2008 HB7 04-07-2009