ORIGINAL

IN THE SUPREME COURT OF OHIO

IN RE: M.M.

CASE NO. 09-0090 and 09-0318

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

COURT OF APPEALS
CASE NO: 22872 AND 22873

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STATEMENT OF THE CASE

On June 2, 2006, the Montgomery County Juvenile Court granted interim temporary custody of M.M. to Montgomery County Children's Services (MCCS). On September 1, 2006, M.M. was adjudicated dependent. On October 30, 2006, Maternal Aunt, Kathy Richards, filed a motion for legal custody. On November 28, 2006, the court granted temporary custody to MCCS. On March 20, 2007, the court denied Richard's motion for legal custody.

On April 4, 2007, MCCS filed a motion for permanent custody. Richards filed another motion for legal custody on July 17, 2007. A permanent custody trial was held on August 14, 2007. On October 12, 2007, the Magistrate issued an "Amended Magistrate's Decision and Judge's Order Granting the Motion for Permanent Custody." On October 15, 2007 and May 27, 2008, Mother Jessica Lairson filed her objections to the Magistrate's Decision. Richards also filed objections on May 28, 2008. On July 3, 2008, the Judge overruled their objections and adopted the Magistrate's Decision.

Lairson timely appealed, raising several issues, including a manifest weight argument, and filed her appellate brief on September 17, 2008. Richards also timely appealed, and filed an untimely, but accepted, appellate brief on October 9, 2008. In her brief, Richards argued (1) the court's decision was against the manifest weight of the evidence; and (2) that the court failed to follow the mandates of R.C. 2151.414(D). On November 26, 2008, the Second District Court of Appeals affirmed the court's decision, finding that permanent custody was not against the manifest weight of the evidence and that it is in the best interests of M.M; specifically that R.C. 2151.414(D) does not require the court to "conclude that granting permanent custody to MCCS was the *only* secure placement," but rather that the court "was charged with determining the most

secure placement, which is the one that would best serve M.M.'s interests." *In Re: M.M.*, 2nd Dist. Nos. 22872 and 22873, 2008-Ohio-6236, at *8.

The decision in *In Re M.M.* was found to be in conflict with the decision in *In Re G.N.*, 176 Ohio App.3d 236, 2008-Ohio-1796, and both Lairson and Richards filed a notice of certified conflict with this Court, which was accepted. In addition, Richards filed a discretionary appeal with this Court, which was accepted, and consolidated with the conflict case, adding the additional issue of whether the court's decision was an abuse of discretion. The case is now before this Honorable Court.

STATEMENT OF THE FACTS

M.M. was born drug addicted on December 29, 2005. MCCS placed M.M. with foster parents, David and Lorri Dohery, in June of 2006 and M.M. still resides there today. M.M. has received special care for possible developmental delays and sees a speech therapist for speech delays. M.M. is doing well and has bonded with her foster parents. The Doherys wish to adopt M.M. and make her a permanent part of their family. (Tr. 56, 133, 177)

Mother Jessica Lairson, married to Mark Lairson, is addicted to heroin and Xanax and after M.M. was born, she continually left M.M. with Robert Maxwell, who at the time, was believed to be M.M.'s biological father and who had signed the birth certificate. After a DNA test proved that Maxwell was not the father, Maxwell continued to seek custody of M.M.

In November of 2006, the juvenile court denied Maxwell's motion for legal custody and granted MCCS temporary custody of M.M. At the custody hearing, the court denied Maxwell's motion finding that temporary placement with MCCS was in M.M.'s best interests because of "inappropriate behavior to the child and to mother, his lack of understanding of child development, his obsessive behavior regarding the child, his apparent unstable mental health, his

physical health concerns, his lengthy criminal record, his propensity for domestic violence with his romantic partners, his disregard of court orders and all other concerns presented during trial in this matter." (Decision, January 29, 2007) Maxwell, at the time of the permanent custody hearing, had not had any contact with M.M. or MCCS for over a year. M.M. remained in the temporary custody of MCCS and in the care of the Doherys.

Meanwhile, a case plan was created for the immediate family with specific objectives to complete in order for reunification to occur. Specifically, Mother's objectives included that she complete substance abuse treatment, complete a mental health assessment and follow all recommendations, secure stable and independent housing, secure stable income and sign releases for MCCS. (Tr. 157-165) It is uncontested that Lairson did not complete any of the case plan objectives and failed to have any contact with M.M. since August of 2006. (Id.) Lairson is not seeking custody now.

Richards, M.M.'s maternal great aunt, began visiting with M.M. in September of 2006, however, quickly lost her visitation rights because she violated a court order when she allowed Maxwell to have contact with M.M. during an October visit. (Tr. 167-168) Richards' home had been approved through a home study in October 2006.

On April 4, 2007, MCCS filed a motion for permanent custody. In May of 2007, Richards' visitation with M.M. resumed, but was to be supervised at MCCS. (Tr. 169) Since that time, Richards had been visiting consistently with M.M. and had formed a bond with M.M. On July 17, 2007, after two months of visitation, Richards filed a motion for legal custody.

On August 14, 2007, a hearing on both motions was held. After a full hearing, the Magistrate overruled Richards' motion for legal custody and granted permanent custody to MCCS. The evidence demonstrated that, despite Richards' promise that she was no longer in

contact with Maxwell and had the money to care for M.M., Richards admitted that she had recently accepted money and bedroom furniture for M.M. from Maxwell and his family members. As a result, the Magistrate indicated that it had "no faith in Ms. Richard's judgment." (Decision Overruling Richard's Motion for Custody, March 20, 2007) The Magistrate also indicated that it "has some concern with the veracity of Ms. Richards concerning her criminal history." (Magistrate's Decision Granting Permanent Custody, October 3, 2007)

The Judge approved the Magistrate's decisions, after reviewing the record de novo and addressing each of the R.C. 2151.414(D) factors. Specifically, with respect to factor R.C. 2151.414(D)(4), at issue in this case, the Court indicated that Richards violated a court order and "failed to show the Court she can adequately maintain custody of said child outside of supervised visitation." As a result, the Judge found that the "child's best chance for permanency is adoption, and therefore this factor weighs in favor of granting permanent custody to the Agency." (Decision Overruling Objections to the Magistrate's Decision, July 3, 2008, "Decision") In balancing the remaining R.C. 2151.414(D) factors, the Judge stated, "While said child has bonded with Ms. Richards and the Guardian as 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." (Id.)

The 2nd District Court of appeals affirmed the juvenile court's decision finding that the juvenile court did not abuse its discretion when it found that permanent custody was in M.M.'s best interest. The appellate court found that the juvenile 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)." *In Re M.M.*, at *7. Specifically, with respect to factor R.C. 2151.414(D)(4), the appellate court

agreed that Richards is not trustworthy, has a criminal history, and "quickly violated" a court order, placing M.M. in harm's way. As a result, and in addition to the other statutory factors, the appellate court found that "the most secure placement for M.M., and the one that was in her best interest, was with MCCS." Id. The appellate court also found that the juvenile "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." Id., at *7-8 (Emphasis in original.)

ARGUMENT

Issue Certified 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)?"

No. To require a juvenile court to determine that permanent custody is the *only* way a child's need for a legally secure placement can be met prior to granting permanent custody to an Agency not only ignores the plain language and intent of the statute, but it also ignores this Court's directive in *In re Schaefer* (2006), 111 Ohio St.3d 498, 505, 857 N.E.2d 532, that no one factor is all-controlling and a juvenile court must balance all of the factors listed in R.C. 2151.414(D) "to find the *best* option for the child." ¶ 64.

The 12th District Court of Appeals in *In Re G.N.*, in finding that "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 [R.C. 2151.414(D)(4)]" is wrong. Since its inception, no other Ohio Appellate District has followed its ruling. Notably, the 12th District has even abandoned its own ruling, citing *Schaefer*, supra. See *In the Matter of B.H.*, 12th Dist. No.

CA2008-06-019, 2009-Ohio-286 (finding that a parent is not a viable legally secure permanent placement option was sufficient to satisfy R.C. 2151.414(D)(4).)

I. The language of R.C. 2151.414(D) is plain and unambiguous.

When interpreting a statute, "a court's paramount concern is the legislative intent in enacting the statute. In determining legislative intent, the court first looks to the language in the statute and the purpose to be accomplished. Words used in a statute must be taken in their usual, normal or customary meaning. It is the duty of the court to give effect to the words used and not to insert words not used. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to apply rules of statutory interpretation." *State ex rel. Richard v. Bd. of Trustees of the Police & Firemen's Disability & Pension Fund,* 69 Ohio St.3d 409, 411-412, 1994-Ohio-126, 632 N.E.2d 1292. (Internal citations and quotations omitted.)

Furthermore, "[t]he presumption always is, that every word in a statute is designed to have some effect, and hence the rule that, 'in putting a construction upon any statute, every part shall be regarded, and it shall be so expounded, if practicable, as to give some effect to *every part of it.*' " *Turley v. Turley* (1860), 11 Ohio St. 173, 179, citing *Commonwealth v. Alger* (Mass.1851), 7 Cush. 53, 89 (Emphasis in original.) "In enacting a statute, it is presumed that * * * [t]he entire statute is intended to be effective." R.C. 1.47(B). "It is an axiom of judicial interpretation that statutes be construed to avoid unreasonable or absurd consequences." *State v. Smith,* 104 Ohio St.3d 106, 2004-Ohio-6238.

The purpose of the juvenile statutes contained in Chapter 2151 is to provide care, protection, and mental and physical development to children * * * in a family environment, separating the child from the child's parents only when necessary for the child's welfare or in the

interests of public safety and to provide judicial procedures to assure a fair hearing where the child's rights are recognized and enforced. R.C. 2151.01.

In addition to determining that it is in the best interests of the child to terminate parental rights – which is not at issue here, a juvenile court must also determine whether it is in the best interests of a child to grant permanent custody to the agency that filed the motion. R.C. 2151.414(A)(1). In *determining the best interests of a child*, a juvenile court is required "to *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."

R.C. 2151.414(D) (Emphasis added.)

First, interpreting the language used in R.C. 2151.414(D), it is plain and unambiguous, that the Legislature intended for a juvenile court to *consider* the listed statutory factors in making its *determination* as to whether permanent custody is in a child's best interest. The juvenile court is required to consider and balance all of the factors, giving no greater weight to any one factor. *In re Schaefer*, at ¶ 56. Therefore, as long as the record demonstrates that the juvenile court *considered* these factors **and** the record *supports* the juvenile court's *determination* that

permanent custody is in the child's best interests by clear and convincing evidence, the juvenile court has satisfied its statutory duty pursuant to R.C. 2151.414(D). R.C. 2152.414(A)(1).

Second, and specifically, R.C. 2151.414(D)(4) dictates that a juvenile court must 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." The language used in this factor is also very clear and unambiguous: This factor requires a juvenile court (1) to *consider* the child's need for a legally secure permanent placement; **and** (2) to *consider* whether there is another legally secure permanent placement option available. In no way does this statutory factor require a juvenile court to make a *specific determination* that permanent custody is the *only* option prior to granting permanent custody to an agency. Such a demand ignores the plain language, meaning, and intent of the statute and transforms R.C. 2151.414(D)(4) into an all-controlling factor, taking discretion away from the juvenile court and ignoring this Court's precedent in *In re Schaefer*.

Furthermore, such an interpretation would lead to unreasonable results. For example: A child is found to be in need of a legally secure permanent placement and an agency files a motion for permanent custody. A relative, also considered to be a legally secure permanent placement, files a legal custody motion. At the custody hearing, the evidence presented to the juvenile court also demonstrates that the child wishes to stay with the foster family, the foster family wishes to adopt the child, and the child had been in the foster family's care all 3 years of the child's life. If a juvenile court is required to determine that permanent custody is the *only* option prior to granting permanent custody to an agency, then, in this example, the juvenile court would be required to grant custody to the relative or, in any case, would be required to grant custody to any other legally secure and permanent placement, even though it may not be in the child's best

interests. The juvenile court's discretion to weigh the factors and determine a child's best interest would be absent. The legislature clearly did not intend such an unreasonable result.

In support, this Court in *In re Schaefer*, addressed a very similar circumstance. In addressing factor R.C. 2151.414(D)(4) the juvenile court stated, "* * * the child does have a strong need for a legally secure permanent placement. A legally secure permanent placement could be achieved by a grant of permanent custody to [the agency] so that the child could be placed for adoption with the current foster parents. There is also a possibility that a legally secure placement could be found by placing the child in the legal custody of the child's paternal grandfather and paternal step-grandmother. Such a placement could not legally be disturbed without a subsequent finding that there was a change of circumstances and that it was in the child's best interest that the custody order be modified. However, given the totality of the circumstances, the Court finds that it is in the child's best interest that the permanent custody motion be granted so that the placement of the child in his current foster home can be continued." Id., at ¶ 23.

Schaefer appealed that decision. The appellate court reversed, holding that (1) the court's termination of parental rights was an abuse of discretion; and (2) that the court failed to properly consider placement with David Morris, to "thoroughly explore the less drastic alternative to termination and failed to determine that "termination of *** parental rights was not only a necessary option, but also the only option." Id., at ¶s 28, 29.

The agency appealed that decision to this Court. This Court reversed, explaining that, "The court must consider all of the elements in R.C. 2151.414(D) as well as other relevant factors. There is not one element that is given greater weight than the others pursuant to the statute. The heightened importance that the appellate court assigned to R.C. 2151.414(D)(4) is

not required by or even hinted at in the statute, nor is the trial court required to credit evidence in support of maintaining the parental relationship when evidence supporting termination outweighs it clearly and convincingly. The trial court's opinion demonstrates that it considered all the factors required under R.C. 2151.414(D)." Id., at ¶ 56.

This Court concluded, "The court satisfied its statutory duty. That duty did not include the requirement imposed by the appellate court that the juvenile court determines by clear and convincing evidence that 'termination of appellant's parental rights was not only a necessary option, but also the only option.' Nor did that duty include the requirement that the juvenile court find by clear and convincing evidence that no suitable relative was available for placement. The statute requires a weighing of all the relevant factors, and the trial court did that in this case. R.C. 2151.414 requires the court to find the *best* option for the child once a determination has been made pursuant to R.C. 2151.414(B)(1)(a) through (d). The statute does not make the availability of a placement that would not require a termination of parental rights an all-controlling factor. The statute does not even require the court to weigh that factor more heavily than other factors." Id., at ¶ 64. (Emphasis added.)

This Court's decision in *In re Schaefer* is instructive because interpreting R.C. 2151.414(D)(4) to require a juvenile court to make a *specific determination* that permanent custody is the *only* legally secure permanent placement available prior to granting permanent custody, places heightened importance on R.C. 2151.414(D)(4) that is not required or hinted at in the statute. In fact, such an interpretation would make R.C. 2151.414(D)(4) an all controlling factor, removing the juvenile court's discretion by ignoring the plain language and intent of the statute.

II. Lairson's argument that a juvenile court is required to choose a less drastic placement option over permanent custody is without merit.

In support of Lairson's interpretation that R.C. 2151.414(D)(4) requires a juvenile court to make a specific determination that permanent custody is the *only* legally secure permanent placement available prior to granting permanent custody, she cites to the decisions in *In re A.T.* et al., 9th Dist. No. 23065, 2006-Ohio-3919 and *In re A.S.* (2005), 163 Ohio App.3d 167, 2005-Ohio-5309, 839 N.E.2d 972, for the proposition that a juvenile court must look to *less drastic possibilities* and find that permanent custody is the *only* option for a legally secure permanent placement prior to granting permanent custody to an agency. Lairson's reliance on these cases is misplaced.

In *In re A.T.,* when addressing R.C. 2151.414(D)(4), the juvenile court found that, "[n]o alternatives to permanent custody exist to assure the minor children a safe, secure permanent placement." ¶ 54. The appellate court found that the juvenile court satisfied its statutory duty when it implicitly determined that other options were not appropriate, even if the option of a permanently planned living arrangement (PPLA) was not specifically mentioned or discussed. Id. Lairson mistakes the juvenile court's factual finding for a rule of law. Just because *in this case*, the juvenile court made a factual finding that "[n]o alternatives to permanent custody exist to assure the minor children a safe, secure permanent placement[,]" in no way legally requires a juvenile court *in any case* to determine that permanent custody is the *only* option prior to granting permanent custody to an agency. In fact, the final decision in this case supports the MCCS's position that a juvenile court's statutory duty pursuant to R.C. 2151.414(D)(4) is satisfied when the record demonstrates that the juvenile court *considered* legally secure permanent placement options and determined which option is the *best* option and in the child's best interest. See *In re Schaefer,* supra.

Lairson's reliance on *In re A.S.* also fails. The decision in *In re A.S.* was reversed by this Court in *In re A.B.* (2006), 110 Ohio St.3d 283, 2006-Ohio-4479, 853 N.E.2d 291. *In re A.S.* the 12th District Court of Appeals found that PPLA was in the child's best interests instead of permanent custody, because it was a *less drastic placement option.* In reversing this decision, this Court found that the trial court did not have the statutory authority to order PPLA, even if it was a less drastic measure, because the PPLA statute required the agency to request it prior to it being a proper disposition. *In re A.B.*, supra.

This Court's decision in *In re A.B.* is also instructive. This Court found the statutory language of the juvenile custody statutes to be plain and unambiguous and when giving meaning and effect to the language used, this Court determined that a disposition of PPLA, although a less drastic placement option, lacks the permanency envisioned by the legislature. This Court explained, "[a] PPLA places a child in limbo, which can delay placement in a permanent home." *In re A.B.*, at ¶ 33. This Court noted in its decision that the juvenile court's intent in granting PPLA was to keep the parental relationship intact so that the children could perhaps be later reunited with their father, but if that didn't happen, it was still possible that a foster parent could return the child to the agency at any time. Id., at ¶s 34, 35. In analyzing the statutory language and intent of the juvenile statutes, this Court determined that although PPLA is a less drastic measure, it is not always in the child's best interest. See, also, *In re Schaefer*, at ¶ 23. It necessarily follows, therefore, that just because a less drastic placement is available, it does not necessarily mean that the less drastic placement is in the child's best interests *in any case.*

Finally, Lairson argues that this Court's decision in *In re Schaefer*, is not contrary to the 12th District Court of Appeals decision in *In re G.N.*, finding that a juvenile court is required to make a specific determination that permanent custody is the *only* option prior to granting

permanent custody to the agency. In an attempt to differentiate the decisions, Lairson argues that the juvenile court did make a specific determination demanded by R.C. 2151.414(D)(4) that permanent custody was *not the only way* to achieve a secure placement. (Lairson's Amended Merit Brief, p. 9) Lairson's argument fails for two reasons. First, as argued above, just because a court makes a finding on the record in a particular case does not mean that the finding is required by law. More importantly, this Court in *In re Schaefer* affirmed the juvenile court's determination finding that permanent custody was in the child's best interests, even though there was another legally secure permanent placement option available, supporting MCCS's position that permanent custody need not be the only option available prior to a grant of permanent custody to an agency.

Because R.C. 2151.414(D)(4) does not require a juvenile court to give any special weight to alternative legally secure permanent placement options or less drastic placement options, nor does it require a juvenile court to make a determination that permanent custody is the only option available prior to a grant of permanent custody to an agency, Lairson's argument fails.

III. Richard's interpretation of R.C. 2151.414(D)(4) fails to give meaning and effect to the plain and unambiguous language of the statute.

Richards argues that "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. (Richard's Merit Brief, p. 12) Richard's interpretation fails for two reasons.

First, Richards improperly replaces the word used in the statute, "consider", with a word not used in the statute, "determine" prior to interpreting the statute. See *State ex rel. Richard v. Bd. of Trustees of the Police & Firemen's Disability & Pension Fund,* supra. (It is the duty of the court to give effect to the words used and not to insert words not used.) As argued previously,

when the court gives effect and meaning to the words used in the statute, it reads that a juvenile court is required to *consider*, along with the other factors, the child's need for a legally secure permanent placement **and** to *consider* whether that type of placement can be achieved without a grant of permanent custody to the agency[.]" R.C. 2151.414(D) and (D)(4) (Emphasis added.) The statute requires no such determination that permanent custody be the only option prior to a grant of permanent custody to an agency.

More importantly, Richards interprets R.C. 2151.414(D)(4) in a vacuum: When read in conjunction with R.C. 2151.414(D), it is clear that the statute requires a juvenile court to *consider* all the factors, balance them, and then make a *determination* as to whether permanent custody is in the child's best interests. See R.C. 1.47(B)("[i]n enacting a statute, it is presumed that * * * [t]he entire statute is intended to be effective.") The heightened importance that Richards assigns to R.C. 2151.414(D)(4) is not required by or even hinted at in the statute. See *In re Schaefer*, at ¶ 56. Therefore, because Richards has failed to properly give effect and meaning to the words used in the statute, her argument fails.

IV. The language in R.C. 2151.414(D)(4) is plain and unambiguous and when giving effect and meaning to the words used, a juvenile court is not required to make a specific determination that permanent custody is the *only* way a child's need for a legally secure placement can be achieved to satisfy its statutory duty under R.C. 2151.414(D)(4).

The statute does not place heightened or all controlling weight on any one factor and, therefore, does not require the juvenile court to choose a less drastic placement option over a grant of permanent custody to an agency when determining the best option or what is in the child's best interest. See *In re A.B.*, supra; *In re Schaefer*, supra.

R.C. 2151.414(D) requires the court to *consider* the factors listed in R.C. 2151.414(D) along with the other factors, balance them together, and then *determine* which placement is the

best option or in the child's best interest. See *In re Schaefer*, at ¶ 64. Any other interpretation would fail to give effect and meaning to the plain and unambiguous language used in the statute and would fail to effectuate the General Assembly's intent to promote permanency and to prevent "foster care drift." See *In re A.B.*, at ¶'s 18, 19.

Proposition of Law No. I:

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

On this record, clear and convincing evidence supports the juvenile court's determination pursuant to R.C. 2151.414(D) that permanent custody is in M.M.'s best interests.

In determining the best interests of a child, a juvenile court is required "to 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."

R.C. 2151.414(D). A court must conclude by clear and convincing evidence that an assignment of permanent custody is in the best interests of the child. R.C. 2151.414(A). The court must

consider all the elements in R.C. 2151.414(D) as well as other relevant factors. There is not one element that is given greater weight than the others. *In re Schaefer*, at ¶ 56.

"A court exercising Juvenile Court jurisdiction is invested with very broad discretion, and, unless that power is abused, a reviewing court is not warranted in disturbing its judgment." *In re Pieper Children* (1993), 85 Ohio App.3d 318, 330, 619 N.E.2d 1059. A review of a custody determination by the juvenile court begins with the recognition that the court's exercise of discretion should be accorded "the utmost respect," taking into account that "the knowledge gained through observing the witnesses and the parties in a custody proceeding cannot be conveyed to a reviewing court by a printed record." *In re Campbell* (Oct. 12, 2000), Cuyahoga App. Nos. 77552 and 77603, citing *Reynolds v. Goll* (1996), 75 Ohio St.3d 121, 124, 1996-Ohio-153, 661 N.E.2d 1008.

In this case the juvenile court considered all the factors, made findings relating to each one, and clear and convincing evidence supports the court's findings and final determination that permanent custody is in M.M.'s best interests. The record demonstrates that on the date of the permanent custody hearing, M.M. had been living with the same foster family, since June 1, 2006 or one year. (Tr. 147); See R.C. 2151.414(D)(3). During this time, Richards had visitation with M.M., that was quickly terminated because she allowed Maxwell to have contact with M.M. in violation of a court order. (Tr. 167-169) Nearly a year later, Richards only enjoyed three months of supervised visits. Id. As a result, the court expressed doubt that Richards could adequately maintain custody of M.M. outside of supervised visitation. (Decision, p. 5)

Although the court found that M.M. was too young to express an opinion, being 1 ½ years old at the time of the permanent custody hearing, it recognized that the GAL recommended legal custody to Richards. (Decision, p. 5) See R.C. 2151.414(D)(2). A juvenile court is under

no duty to follow a GAL's recommendation. Rather, a juvenile court must consider the recommendation, along with other factors, and make its own independent determination of what placement option is in a child's best interests. R.C. 2151.414(D) and (D)(2).

The record demonstrates that M.M. has formed a bond with Richards and her older cousin, their interaction is appropriate, and Richards has demonstrated an ability to parent M.M. However, the record also demonstrates that M.M. has formed a bond with her foster family, with whom she has been able to enjoy a sense of permanence with for most of her life. The GAL reported that M.M. had received "excellent care" and was very loved by the foster family. Importantly, the foster family expressed an interest in adopting M.M. and making her a permanent part of their family. See R.C. 2151.414(D)(1), (3) and (4); *In re M.M.*, at *6; (Tr. 56, 133)

The record demonstrates that the juvenile court considered Richards as a possible placement, but expressed doubt that placement with Richards would be either legally secure or permanent. Richards had failed to demonstrate that she would protect the child from Maxwell, who had previously been ordered to stay away from M.M. When permitted a home visit with M.M., Richards quickly violated the court order by permitting Maxwell to visit with M.M. (Tr. 168-169); *In re M.M*, at *7. A surprise visit from the caseworker found Richards "shocked" and Maxwell "hiding." (Tr. 169) Nearly a year later, at the permanent custody hearing, Richards testified that she no longer has contact with Maxwell, nor did she wish to have contact with him. (Tr. 190) However, on cross-examination, Richards admitted that she had recently accepted money and baby furniture for M.M. from Maxwell. (Tr. 233); *In re M.M.*, at *7.

This evidence was significant to the court because, as the court noted, Richards allowed the child to remain in Mother's care even though she was aware of her heroine use and

prostitution. Additionally, the court noted that Richards has known Maxwell and his family for a long time, and had already violated a court order allowing him to see M.M., despite the court's concern for the child. As a result, the juvenile court expressed doubt about Richards' trustworthiness, stating that "the Court has no faith in Ms. Richard's Judgment." (Decision overruling Richards' Legal Custody Motion. p. 2); See R.C. 2151.414(D)(4).

In its decision granting permanent custody to MCCS, the juvenile court explained why it did not feel that placement with Richards would be appropriate. See *In re A.B.*, supra. The juvenile court also cited to each of the factors in R.C. 2151.414(D), made findings, even though not required by the statute, and determined, "[u]pon careful analysis of all the relevant factors listed in R.C. 2151.414(D), the court finds granting permanent custody of [M.M.] to the agency is in the best interests of [M.M.]." (Decision, p. 4) Clear and convincing evidence found in the record supports the juvenile court's findings as to each factor and the juvenile court's determination that permanent custody is in M.M.'s best interests.

Therefore, the juvenile court did not abuse its discretion when it overruled Richard's motion for legal custody and determined that permanent custody is in M.M.'s best interests.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief was sent by first class mail on May 11th, 2009 to: Richard Hempfling, Flanagan, Lieberman, Hoffman & Swaim, 15 West Fourth Street, Suite 100, Dayton, OH 45402, Counsel for Appellant, Kathy Richards; Richard A. F. Lipowicz, 130 West Second Street, Suite 1900, Dayton, OH 45402, Counsel for Mother, Jessica Lairson and Virginia C. Vander Bosch, 9506 West State Route 73, Wilmington, OH 45177, Guardian ad Litem.

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