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## STATEMENT OF FACTS

Appellant Jessica Lairson incorporates herein the Statement of Facts and Appendices contained in her Amended Merit Brief filed on April 24, 2009.

## ARGUMENT

### **Proposition of Law No. I (Issue Certified for Review):**

**A juvenile 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).**

In its Merit Brief, Appellee, Montgomery County Children's Services (MCCS), first argues that the Twelfth Appellate District's interpretation of R.C. 2151.414(D)(4) ignores the plain language and intent of the statute. To the contrary, MCCS ignores the intent of the statute and gravity of permanent custody proceedings. The primary rule of statutory construction is to give effect to the legislature's intent." *Cline v. Bur. of Motor Vehicles* (1991), 61 Ohio St.3d 93, 97. "Permanent termination of parental rights has been described as 'the family law equivalent of the *death penalty* in a criminal case.'" *In re Hayes* (1997), 52 Ohio St.3d 155, 157, quoting *In re Smith* (1991), 77 Ohio App.3d 1, 16. (Emphasis added). Termination of parental rights is an alternative of *last resort*. *In re Wise* (1994), 96 Ohio App.3d 619, 624. 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. (Emphasis added). Given the severity and finality attached to permanent custody proceedings by the legislature and courts, R.C. 2151.414(D)(4) must be interpreted to impose a duty on the juvenile court to determine that permanent custody is the only way to achieve a legally secure placement.

MCCS also ignores the plain language of R.C. 2151.414(D)(4) which requires the juvenile court to consider: "(4) 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*." (Emphasis added). To fulfill its obligation under R.C. 2151.414(D)(4), the juvenile court must

first make a factual determination of whether the child needs a legally secure placement. If the court finds that a legally secure placement is not needed, then the court's obligation under R.C. 2151.414(D)(4) ends. However, if the court finds that a legally secure placement is needed, then the court must make a second factual determination of whether such placement can be achieved *without a grant of permanent custody*. (Emphasis added). The words "*without a grant of permanent custody*" are clear and unambiguous – the juvenile court must factually determine whether a legally secure placement exists other than permanent custody. Again, given the severity and finality of permanent custody proceedings, it is only logical that permanent custody should 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.*, 176 Ohio App.3d 236, 240.

Second, M CCS alleges that the Twelfth Appellate District abandoned its own ruling in *In re G.N.*, *supra*, citing the Twelfth District's recent decision in *In re B.H.* (Jan. 26, 2009), Fayette App. No. CA2008-06-019, 2009-Ohio-286. On the contrary, the Twelfth District did not abandon its interpretation of R.C. 2151.414(D)(4), but merely found that the children in question needed a legally secure placement and the children's mother could not meet that need. *Id.* at ¶ 27. There is nothing in the Twelfth District's decision to suggest that another alternative, such as a relative placement, was available; in fact, there is a strong implication that there was no other option.

Third, M CCS argues that the Twelfth District's interpretation of R.C. 2151.414(D)(4) would lead to unreasonable results. However, it is not only unreasonable but a travesty to sever a child's ties to her biological family when a legally secure placement with a relative is available as an alternative to permanent custody. Nothing could be more true than the present case where clear, convincing and credible evidence established that: M.M.'s interaction and interrelationship with her great aunt, Appellant Kathy Richards, and Richards' family was

positive and beneficial; M CCS considered Richards a possible relative placement and found Richards' home suitable for the child; Richards and her nephew Matthew had bonded with M.M; and. Richards' parenting style was preferable compared to the foster parents. Unlike the example suggested by M CCS, Kathy Richards was not a stranger to M.M, but had a strong relationship to her through regular contact. Further, the Guardian ad Litem expressed the child's wishes by recommending that legal custody be granted to Richards.

Fourth, M CCS alleges that the Twelfth District's interpretation of R.C. 2151.414(D)(4) in *In re G.N., supra*, is contrary to the holding in *In re Schaeffer* (2006), 111 Ohio St.3d 498 because the Twelfth District places heightened or controlling weight on this factor. However, as stated above, the language of R.C. 2151.414(D)(4) requires that the juvenile court make a factual determination of whether a legally secure placement can be achieved *without a grant of permanent custody*. Again, given the gravity and finality of a termination of parental rights (supposedly an alternative of last resort), greater consideration should be given by a juvenile court to whether viable alternative exists to a grant of permanent custody. Moreover, the facts of the present case are distinguishable from *Schaeffer* where the child's paternal grandfather and his wife had only four monthly visits with the child, and filed their legal custody motion three weeks before the scheduled permanent custody. In the present case, the Juvenile Court found that M.M. child had bonded with Kathy Richards and her older cousin Matthew through steady visitation. And, unlike *Schaeffer*, the Guardian ad Litem in the present case recommended that legal custody be awarded to Richards.

Finally, M CCS relies on *In re A.B.* (2006), 110 Ohio St.3d 230 for the proposition that a less drastic alternative to permanent custody is not always in the child's best interest. In *A.B.*, this Court held that the trial court did not have statutory authority to order a planned permanent living arrangement (PPLA) unless the children's services agency first requests such a disposition. *Id.* at

230 (Syllabus). MCCA suggests that PPLA and other less drastic placement alternatives lack the “permanency envisioned by the legislature” and promote “prevent foster care drift.” (Appellee’s Merit Brief at 12 and 15). However, in the present case, a legally secure, permanent, and less drastic alternative to permanent custody is available for M.M. with her great aunt who knows and loves her, and can provide for her needs outside of the foster care system.

**Proposition of Law No. II:**

**A juvenile court abuses its discretion in granting permanent custody of a child where the court arbitrarily and unreasonably rejects evidence that legal custody to a relative is in the child’s best interest.**

In its Merit Brief, MCCA argues that the Juvenile Court considered all relevant factors, made factual findings as to each one, and found by clear and convincing evidence that an award of permanent custody was in the child’s best interests. The standard of review for permanent custody matters is to determine whether the trial court abused its discretion in reaching its judgment. *In re R.F.* (April 16, 2009), Cuyahoga App. Nos. 90299 and 90300, 2009-Ohio-1798 at ¶ 11. An abuse of discretion connotes that the trial court’s decision was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

In the present case, the Juvenile Court’s abused its discretion in awarding permanent custody of M.M. to MCCA by arbitrarily and unreasonably rejecting evidence that legal custody to Kathy Richards was in the child’s best interest. R.C. 2151.414(D)(1) required the Court to consider the interaction of the child with the child’s relatives. At trial, there was clear, convincing and credible evidence presented that M.M.’s interaction and interrelationship with her great aunt, Kathy Richards, and Richards’ family was positive and beneficial to the child. Stacy Keeton, the MCCA caseworker, considered Kathy Richards a possible relative placement. Keeton found Richards’ home suitable for the child; and that Richards and her nephew Matthew had bonded with M.M. Stacy 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.

Kathy Richards 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. Richards' stated unequivocally that she had not had any contact with Maxwell after the incident, nor wished to have any contact with him ever again. It is important distinction that there was no factual reference to Maxwell in the Magistrate's Decision even though Richards' single contact with Maxwell was the Juvenile Court's only reason for denying legal custody.

R.C. 2151.414(D)(4) required the Juvenile Court to consider the child's need for a legally secure permanent placement and whether that type of placement could be achieved without a grant of permanent custody. However, the Court ignored clear, convincing and credible evidence that Kathy Richards would provide a secure permanent placement for M.M. MCCA found Richards' home to be suitable. MCCA found that M.M. had bonded with Kathy Richards and cousin Matthew. Caseworker Stacy Keeton admired and complimented Richards' parenting style as compared to the foster parents. Keeton admitted that MCCA would be pursuing legal custody to Richards except for the one incident with Robert Maxwell, which occurred eight months before the Magistrate's hearing.

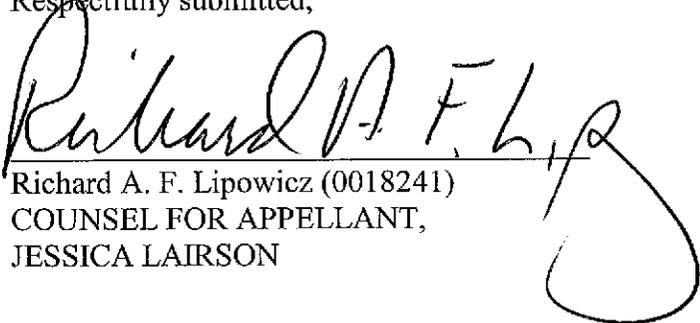
R.C. 2151.414(D)(2) required the Juvenile Court to consider the wishes of the child as expressed directly or through the child's guardian ad litem. M.M.'s Guardian ad Litem recommended that legal custody be granted to Kathy Richards. The Juvenile Court rejected the Guardian's recommendation without giving reasons for doing so. The Juvenile Court did not "consider these factors [child's bonding with Richards and Guardian's recommendation] to be as significant as the child's need for permanency." However, the Juvenile Court's arbitrary

determination flies in the face of clear and convincing evidence supporting the Guardian's recommendation and Richards' assertion that she could provide a legally secure placement. Clearly, the Juvenile Court abused its discretion by arbitrarily dismissing such evidence.

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 MCCA is the only way a legally secure placement for M.M. can be achieved. Further, the Montgomery County Juvenile Court abused its discretion in holding that the best interests of M.M. were served by granting permanent custody to MCCA. The Juvenile Court abused its discretion by arbitrarily and unreasonably rejecting clear, convincing and credible evidence of: (1) the child's positive and beneficial interaction with Kathy Richards and her family, (2) Ms. Richard's ability to provide a legally secure placement for M.M. without a grant of permanent custody; and (3) the wishes of the child as expressed through the Guardian ad Litem. Consequently, Appellant Lairson respectfully requests that this Court reverse the Judgment of the Montgomery County Court of Appeals.

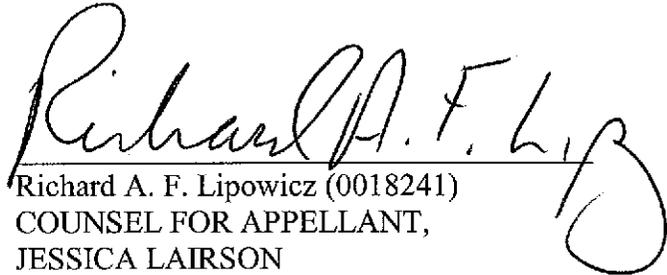
Respectfully submitted,



Richard A. F. Lipowicz (0018241)  
COUNSEL FOR APPELLANT,  
JESSICA LAIRSON

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Reply Brief were 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 21<sup>st</sup> day of May, 2009.

  
Richard A. F. Lipowicz (0018241)  
COUNSEL FOR APPELLANT,  
JESSICA LAIRSON