

[Cite as In re Elliott, 2004-Ohio-388.]

STATE OF OHIO, JEFFERSON COUNTY  
IN THE COURT OF APPEALS  
SEVENTH DISTRICT

IN THE MATTER OF: )  
 )  
ALYSSA ELLIOTT, )  
 )  
DEPENDENT CHILD. )

CASE NO. 03 JE 30  
03 JE 33

OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from Jefferson County  
Common Pleas Court, Juvenile  
Division, Case No. 2001 DN 45.

JUDGMENT: Reversed and Remanded.

APPEARANCES:  
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JUDGES:  
Hon. Gene Donofrio  
Hon. Cheryl L. Waite

Hon. Mary DeGenaro

Dated: January 26, 2004

DeGenaro, J.

{¶1} These timely, expedited appeals have been consolidated and come for consideration upon the record in the trial court and the parties' briefs. Both Appellants, David Elliott and Jennifer Pyles, challenge the decision of the Jefferson County Court of Common Pleas, Juvenile Division, to grant Jefferson County Children Services Board's motion for permanent custody. The issues this court must address are 1) whether the trial court erred by denying Jennifer's request for the appointment of an independent expert psychologist at the state's expense, and 2) whether the trial court violated David's due process rights by terminating his parental rights when that determination was against the manifest weight of the evidence.

{¶2} Whenever a children services agency moves for permanent custody and an indigent parent's mental health is an important issue in the case, caselaw provides that the trial court should grant that parent's motion to appoint an expert to testify on his or her behalf. In this case, the JCCSB requested that Pyles be evaluated by a forensic psychologist to determine whether she was a suitable parent and that psychologist's testimony was a critical part of the trial court's ultimate conclusion. Accordingly, the trial court abused its discretion when it denied Pyles' motion to be evaluated by an independent expert at the State's expense.

{¶3} Before a trial court can grant a motion for permanent custody R.C. 2151.419(A) provides that it must find, among other things, that the agency made reasonable efforts to prevent the removal, or to eliminate continued removal, or to make it possible for the child to return home. According to the statute the agency bears the burden of proving these reasonable efforts by clear and convincing evidence. In this case, efforts to reunite the family were not futile, yet the JCCSB refused to comply with the parent's requests for more time with the child even after the parents fully complied with the case plan. In addition, the JCCSB did not make any efforts to reunite the family for the first nine and one half months it had custody of the child. Even then, it only had reunification as its goal for seven of the twenty-three

months that it had temporary custody of the child. Accordingly, the trial court's conclusion that the JCCSB made reasonable efforts to reunify the family is against the manifest weight of the evidence.

{¶14} For these reasons, the trial court's decision is reversed and this case is remanded for further proceedings.

#### Facts

{¶15} On May 9, 2001, Pyles and Elliott were living together as boyfriend and girlfriend. That day he found her on the bathroom floor in extreme distress and he called 911. The emergency personnel which arrived on the scene helped Pyles give birth to a child. That same day, the JCCSB removed the child from Pyles and Elliott and filed an ex parte motion for emergency custody. That motion was based upon Pyles' criminal history which caused this child to be dependent. In 1997, she was convicted of involuntary manslaughter, abuse of a corpse, failure to report knowledge of the death, and child endangerment. It appears that Pyles was previously pregnant and concealed that pregnancy. She did not receive prenatal care for the child and the child was discovered dead in the trunk of a car. In this case, Pyles again apparently concealed a pregnancy and did not receive any prenatal care. But the fact that the baby did not receive prenatal care in this case did not harm the baby in any way. The JCCSB's motion for emergency custody was granted the next day.

{¶16} In its initial case plan, the JCCSB stated that its goal was permanent custody of the child, so it did not intend on taking reasonable efforts to reunite the child with Pyles and Elliott. The parents moved for an order that Pyles be evaluated by a psychologist which was granted. The psychologist, Dr. Anthony Golas, found Pyles had behavioral problems, but "no major psychiatric reasons \* \* \* that would contradict Ms. Pyles' current ability to care for a child." He then made three recommendations: (1) that Pyles be allowed to interact with the child over a more extended period of time to allow an evaluation of her parenting skills, (2) to consider participation in a parenting program, and (3) individual and couple's counseling to better evaluate the emotional stability, views, and beliefs of Pyles and Elliott as well as the relationship between them. Dr. Golas also evaluated Elliott and concluded Elliott

"was very motivated to provide full-time custodial care of his daughter and willing to follow all of the court's instructions and Children Service's instructions to regain permanent custody."

{¶7} After adjudicatory and dispositional hearings held more than nine months after the child's birth, the JCCSB was granted temporary, not permanent, custody of the child. Significantly, the trial court ordered that the JCCSB implement a case plan using Dr. Golas' recommendations because it disagreed with the JCCSB's belief that it did not need to make reasonable efforts to reunite the family.

{¶8} However, because the JCCSB was uncomfortable with Dr. Golas' conclusions, upon the JCCSB's motion the trial court ordered that Pyle be evaluated by Dr. Hewitt, a forensic psychologist. Forensic psychology is a subspecialty of psychology which enables the specialist to make legal conclusion, which is beyond Dr. Golas' expertise. Dr. Hewitt concluded that Pyles was unfit to be a mother and would remain unfit for the foreseeable future. Accordingly, he recommended that the child be placed into permanent custody with the JCCSB.

{¶9} After receiving Dr. Hewitt's report, the JCCSB again moved for permanent custody of the child. Pyles moved to be evaluated by her own forensic psychologist at the State's expense, which the trial court denied.

{¶10} At a second dispositional hearing, JCCSB personnel admitted that Pyles and Elliott had fully complied with all aspects of the case plan. The JCCSB also stipulated that it never observed that the child was in danger when with Pyles and Elliott. The parents next introduced evidence that they sought additional counseling and parenting classes. Nevertheless, despite finding the JCCSB failed to make reasonable efforts to reunite the family, the magistrate concluded that awarding permanent custody of the child to the JCCSB was in the child's best interests. Both Pyles and Elliott filed objections to the magistrate's decision. The trial court concluded that the JCCSB made reasonable efforts to reunite the child with Pyles and Elliott. But it also concluded that permanent custody was in the child's best interests.

### Constitutional Considerations

{¶11} Before addressing Appellants' assignments of error, we must emphasize the seriousness which we and any other court must view a motion for permanent custody of a child. When a trial court grants this motion, the parents' rights over the children which are the subject of the motion are terminated. "Any consideration of procedures designed to terminate parental rights begins with the recognition of the unique sanctity that our culture and our law place on the parent/child relationship." *In re Alyssa C.*, 153 Ohio App.3d 10, 2003-Ohio-2673, ¶11. A parent has a "fundamental liberty interest" in the care, custody, and management of his or her child. *Santosky v. Kramer* (1982), 455 U.S. 745, 753. The Ohio Supreme Court has stated that a parent's right to raise his or her children is an "essential" and "basic civil right". *In re Murray* (1990), 52 Ohio St.3d 155, 156. A fit parent is presumed to act in the child's best interests. *Troxel v. Granville* (2000), 530 U.S. 57, 68. But a parent's rights are not absolute. A parent's natural rights are always subject to the ultimate welfare of the child, which is the polestar or controlling principle to be observed. *In re Cunningham* (1979), 59 Ohio St.2d 100, 106. Thus, in certain circumstances the State may terminate a parent's rights to a child.

{¶12} Termination of parental rights is comparable to the death penalty in its severity and, thus, the parties are to be accorded every procedural and substantive protection allowed by law. *In re Hayes* (1997), 79 Ohio St.3d 46, 48, quoting *In re Smith* (1991), 77 Ohio App.3d 1, 16. Any action to terminate parental rights where the child is abused, neglected, or dependent must balance the parents' liberty interests against the children's right to be free from harm from their parents. See *Lassiter v. Dept. of Soc. Serv.* (1981), 452 U.S. 18, 27. "Because an award of permanent custody is the most drastic disposition available under the law, it is an alternative of last resort and is only justified when it is necessary for the welfare of the children." *In re Woodall* (June 13, 2001), 9th Dist. Nos. C.A. 20346, C.A. 20436, citing *In re Cunningham* (1979), 59 Ohio St.2d 100, 105.

Mother's Assignment of Error  
Expert Witness for an Indigent Parent

{¶13} In her sole assignment of error, Pyles alleges:

{¶14} "The court erred by not allowing the Appellant an opportunity to have her own expert witness assist her in violation of her due process rights under the fourteenth amendment of the United States Constitution."

{¶15} Pyles argues that the trial court erred when it denied her motion for an expert witness at the State's expense since the trial court granted the JCCSB's motion that she be evaluated by a forensic psychologist and made her mental health a critical issue in the case. The JCCSB has not presented this court with a substantive response to this argument.

{¶16} This issue regarding the appointment of an expert in parental termination cases was first addressed by the First District in *In Re Brown* (Nov. 26, 1986), 1st Dist. No. C-850878. There, the mother was diagnosed as a chronic schizophrenic and the court awarded permanent custody after finding her mental illness interfered with her ability to provide parental care to her child. The mother appealed and argued that due process mandated that the trial court appoint a psychiatric expert to assist an indigent parent in permanent custody proceedings in which the parent's mental health is at issue. The appellate court agreed, explaining that when an indigent parent in a permanent custody proceeding was faced with an allegation of mental illness, the assistance of a psychiatric expert is imperative to his or her ability to counter that allegation.

{¶17} The issue in *Brown* was revisited by the Third District in *In re Shaeffer Children* (1993), 85 Ohio App.3d 683. The *Shaeffer* court stressed that, although the trial court retains discretion in these matters, it is well-established that parents have a fundamental interest in the care, custody, and management of their children. *Id.* at 689. Thus, when the State initiates proceedings to deprive parents of custody of their child, the parents must be provided with fundamentally fair procedures in accordance with the Due Process Clause of the Fourteenth Amendment to the United States

Constitution and the due process guarantee of Section 16, Article I, of the Ohio Constitution. *Id.* at 689-690.

{¶18} The *Shaeffer* court closely followed the analysis of the *Brown* decision when applying the test set forth in *Mathews v. Eldridge* (1976), 424 U.S. 319, 334-335, stating that "where the parent's mental health is the principal issue, the risk of erroneous deprivation is a serious one and the merits of the proposed procedural safeguard are significant. \* \* \* [T]he state's interest in economic and administrative efficiency [is] comparatively weak and the prospective additional burden \* \* \* relatively slight." *Shaeffer* at 691. The *Shaeffer* court adopted *Brown's* holding, with the following clarification:

{¶19} "We are not holding that due process requires the appointment of a psychiatric expert in every permanent custody proceeding where a parent's mental health is made an issue. However, in this case, because the indigent parent's mental or emotional health was clearly the predominant issue from the outset and ultimately became the determinative issue, and because the parent made a timely request for such assistance, we hold that the assistance of a court-appointed psychiatric expert was mandated by the Fourteenth Amendment to the United States Constitution and by Section 16, Article I of the Ohio Constitution." *Id.* at 691.

{¶20} Applying the *Shaeffer* analysis, several courts held that a court appointed expert was not necessary when the parent's mental health was not the primary issue when deciding whether to terminate parental rights. See *In re B.G.*, 8th Dist No. 81982, 2003-Ohio-3256 (Mother not entitled to a psychiatric expert since her parental rights were terminated due to her continuous and repeated failure to substantially remedy the conditions causing the children to be placed outside the home and that she had parental rights involuntarily terminated with respect to a sibling of the children); *In re Bolser* (Jan. 31, 2000), 12th Dist. Nos. CA99-02-038, and CA99-03-048 (Father was not entitled to a psychological expert if the central issue in the case was his progress in fulfilling the case plan); *In re Deja H.* (Aug. 20, 1999), 6th Dist. No. L-99-1038 (Parent is not entitled to a psychological expert since the parent's substance abuse was the principal or primary reason for the complaint for permanent

custody); see, also, *In re Harmon* (Sept. 25, 2000), 4th Dist. No. 00 CA 2694; *In re Hogle* (June 27, 2000), 10th Dist. No. 99AP-944.

{¶21} This court reviewed the denial of a father's request for an expert in *In re Hess* (Mar. 21, 2003), 7th Dist. No. 02 JE 37. In that case, this court affirmed the trial court's decision, emphasizing the fact that the mother, not the father, was ordered to undergo psychological or psychiatric treatment. The panel concluded that the father's mental condition was neither a central, predominant, or determinative issue nor the basis of the complaint or the grounds for the motion for permanent custody. Rather, the issues surrounding the father were the alleged abuse of his child and his drinking problems.

{¶22} In contrast, when an expert's testimony is part of the case for permanent custody, then the court should appoint an expert. "Where the juvenile court grants the state's request for a psychological examination of an indigent parent to be performed by an examiner selected and paid by the state the parent is entitled to an expert of his or her own. Funds to employ her own psychologist should have been awarded appellant in order to afford her a meaningful opportunity to rebut the allegations of FCCS's expert." *In re Stanley* (Dec. 7, 1993), 10th Dist. No. 93AP-972.

{¶23} In the present case, the record demonstrates that Pyles mental health was a central issue. The JCCSB obtained ex parte emergency custody and moved to terminate parental rights based upon the fact that Pyles delivered a baby in 1997 without telling anyone about the pregnancy or receiving prenatal care. The baby died but Pyles failed to report the death for almost three weeks. Pyles was then convicted of involuntary manslaughter, abuse of a corpse, failure to report knowledge of a death and child endangerment.

{¶24} Pyles anticipated that her mental health would be an integral issue at the hearing for permanent custody and requested that a court appointed psychologist perform an evaluation on her, which the magistrate granted. An evaluation was done by Dr. Golas who stated in his report that he was asked by the court to determine whether Pyles could safely care for her second child. Dr. Golas concluded that there were no major psychiatric reasons found that would affect her ability to care for a



child, but recommended three things happen before a decision of custody is made. First, the doctor recommended that Pyles be observed interacting with her daughter over an extended period of time. Second, he believed Pyles should consider participating in a parenting program. Third, he thought Pyles and Elliott should attend individual and couples counseling to better evaluate their emotional stability.

{¶25} The guardian ad litem then filed a report with the court saying that Dr. Golas failed to explain how a person with no psychiatric problems could engage in the same behavior during a subsequent pregnancy that resulted in the death of her first child. The magistrate responded to the GAL's report by requesting that Dr. Golas review additional materials which could lead to a supplemental report of his initial evaluation. Nevertheless, it ordered that Dr. Golas's recommendations be implemented in the case plan.

{¶26} Subsequently, the JCCSB moved for an order that Pyles submit to a psychological evaluation performed by Dr. Charles Hewitt, a forensic psychologist. The court granted the motion and Pyles was evaluated by Dr. Hewitt who diagnosed Pyles as having "Moderate to Severe Mixed Personality Disorder, Mixed, with Histrionic and Narcissistic Traits; R/O Antisocial & Aggressive/Sadistic Features." He concluded in his expert opinion " \* \* \* that Miss Pyles' parental rights be terminated and [the child] placed for adoption."

{¶27} Relying primarily on Dr. Hewitt's report and findings, the JCCSB again moved for permanent custody. In response, Pyles moved the court to appoint her a forensic expert to rebut Dr. Hewitt's finding of unsuitability. The trial court denied her motion and proceeded to a dispositional hearing on the JCCSB's motion for permanent custody. In granting the JCCSB's motion for permanent custody, the magistrate indicated that the most compelling testimony was presented by Dr. Hewitt. The trial court reviewed and adopted the magistrate's decision, taking into consideration the report of Dr. Golas and the report and testimony of Dr. Hewitt. The testimony at trial showed that Dr. Hewitt had expertise in forensic psychology which Dr. Golas did not. This specialty allowed Dr. Hewitt greater insight into Pyles' conduct

which Dr. Golas could not refute. Without her own forensic expert, Pyles could not refute this evidence which was presented against her.

**{¶28}** An examination of the facts in this case clearly demonstrates that Dr. Hewitt's report and testimony regarding Pyles' mental health were the central reasons why the trial court granted the JCCSB's motion for permanent custody. Her mental health directly impacted the trial court's conclusion that she was unfit to be a parent. Pyles could not challenge this testimony since the trial court denied her request for a similarly qualified expert. The trial court's failure to give Pyles the opportunity to present an expert witness on this central issue is a violation of her right to due process. See *Shaeffer, Stanley, Brown*. Pyles' sole assignment of error is meritorious.

#### Father's Assignments of Error

**{¶29}** Each of Elliott's assignments of error address the same issues and the arguments in favor of his second assignment of error are conclusory and rely on those made in his first assignment of error. Accordingly, they will be dealt with together, and allege:

**{¶30}** "The facts do not support the trial court's decision to permanently terminate the father's parental rights."

**{¶31}** "The father's right to due process was violated by the termination of his parental rights."

**{¶32}** Elliott contends that the trial court's conclusion that the child could not be placed with either parent within a reasonable time or should not be placed with the parents is against the manifest weight of the evidence. According to Elliott, the fact that Pyles was convicted of various offenses involving her first child does not demonstrate that this child should not be placed with her parents since any evidence that she is a present risk to the child is speculative. He next argues that the evidence does not show that the couple is incapable of parenting the child since the JCCSB never gave them a reasonable opportunity to demonstrate their parenting skills. Finally, he claims that the JCCSB failed to prove by clear and convincing evidence

that he could not protect the child from Pyles if Pyles did pose a danger to the child in the future.

{¶33} In response, the JCCSB contends that it was not required to prove that the child could not be placed with either parent within a reasonable time or should not be placed with the parents since the child had been in its custody for twelve or more months of a consecutive twenty-two month period. So it claims that it only needed to prove that giving it permanent custody of the child is in the child's best interests. It then goes on to argue that it did prove that the child could not be placed with either parent within a reasonable time or should not be placed with the parents. The JCCSB then contends that the trial court properly concluded that it was in the best interests of the child to grant it permanent custody. Finally, the JCCSB claims that it made reasonable efforts to reunite the parents and child.

#### Standard of Review

{¶34} R.C. 2151.414 was enacted to protect a parent's constitutional rights in permanent custody proceedings by providing procedures a trial court must follow and findings it must make before terminating parental rights. All of the trial court's findings must be supported by clear and convincing evidence. R.C. 2151.414(B). We cannot overturn those findings if the record contains competent, credible evidence by which the court could have formed a firm belief or conviction that the essential statutory elements for a termination of parental rights have been established. *Alyssa C.* at ¶13; *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

{¶35} Further, a trial court's determination in a custody proceeding is subject to reversal upon a showing of an abuse of discretion. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

#### Elements Controlling Permanent Placement

{¶36} As a general rule, the agency must prove three elements before a trial court can grant it permanent custody of a child: (1) that 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; (2) that the agency made reasonable efforts to reunite the family; and, 3) that permanent custody is in the child's best interests. See *In re Starkey*, 150 Ohio App.3d 612, 2002-Ohio-6892, ¶¶13-14; R.C. 2151.414(B); R.C. 2151.419(A). But if, as in this case, 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, then the trial court does not need to consider the first element. *In re Nice* (2001), 141 Ohio App.3d 445, 458-459; R.C. 2151.414(B)(1)(d).

{¶37} In his first argument, Elliott challenges the first element, claiming the trial court erred when it determined that 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. This argument is misplaced. In this case, the JCCSB removed the child from Pyles and Elliott on May 9, 2001, and the child had continually been in the JCCSB's custody from that date until the motion for permanent custody was heard on April 16, 2003. Accordingly, R.C. 2151.414(B)(1)(d) applies and the trial court did not need to make a finding regarding this first element. See *Hess* at ¶¶15-21. Accordingly, Elliott's first argument is meritless.

#### Reasonable Efforts to Reunite the Family

{¶38} Elliott's next argument focuses on the second element, that the trial court erred when it determined that the JCCSB made reasonable efforts to reunite the child with him and Pyles. He claims the agency never intended to return the child to Elliott and Pyles. Since the JCCSB did not make reasonable efforts to reunite the family, he believes the trial court could not grant the JCCSB permanent custody of the child. In response, the JCCSB argues that it did not need to demonstrate that it made reasonable efforts to reunite the family. In addition, it argues that its efforts were reasonable.

{¶39} Whenever a trial court removes a child from the child's home or continues the removal of a child from the child's home, it must determine whether the agency has made reasonable efforts to prevent the removal, or to eliminate continued removal, or to make it possible for the child to return home. *Starkey* at ¶14; R.C.

2151.419(A)(1). This statute applies regardless of how long the child has been in the agency's temporary custody. *Id.* "The agency shall have the burden of proving that it has made those reasonable efforts." R.C. 2151.419(A)(1). A reasonable effort is "an honest, purposeful effort, free of malice and the design to defraud or to seek an unconscionable advantage." *In re Weaver* (1992), 79 Ohio App.3d 59, 63.

{¶40} When a trial court is considering whether the agency made reasonable efforts to prevent the removal, the issue is not whether the agency could have done more, but whether it did enough to satisfy the reasonableness standard under the statute. *In re Brewer* (Feb. 12, 1996), 7th Dist. No. 94-B-28. Accordingly, the agency does not need to show that it made reasonable efforts to prevent the removal if it can show that those efforts would have been futile. *In re T.K.*, 9th Dist. No. 03CA0006, 2003-Ohio-2634, ¶16, citing *In re Jackson* (Aug. 13, 1999), 2nd Dist. No. 17514; *In re Smallwood* (Jan. 26, 1998), 12th Dist. No. CA97-02-041; *In re Crosten* (Mar. 21, 1996), 4th Dist. No. 95CA1692.

{¶41} The evidence in this case demonstrates that the JCCSB did not attempt to reunify the family for over nine months, that it only did so at the order of the court, and that it ceased attempting to reunify the family seven months after it first implemented the case plan. In addition, the parents fully complied with the case plan, but were only given a minimal opportunity to demonstrate their parenting skills. Since the JCCSB failed to prove by clear and convincing evidence that reasonable efforts to reunite the family were futile, the minimal efforts it did make were patently unreasonable. The trial court's conclusion to the contrary is against the manifest weight of the evidence.

{¶42} The trial court concluded that the JCCSB's efforts to reunite the family were reasonable since it offered and/or provided counseling, parenting skills training, extended visitation periods, and daycare services to the family for reunification purposes. Notably, this conclusion directly contradicts the magistrate's findings. The magistrate found that the JCCSB "made little effort to reunify the child with her biological parents \* \* \*." Later in the decision, the magistrate specifically found that "[n]o efforts had [sic] been made to reunite the child with her mother."

{¶43} The magistrate's conclusion that the agency made no efforts to prevent the removal is not an accurate statement of the facts. As the trial court noted in its judgment entry, the JCCSB provided Pyles and Elliott with counseling and extended visitation periods. Thus, there were some efforts to reunite the family. But a complete review of what happened in this case is necessary to decide whether those efforts met the statutory reasonableness standard.

{¶44} Because of Pyles' history, the JCCSB obtained emergency custody of the child the day after she was born. Approximately one month later, on June 13, 2001, the JCCSB filed its first case plan, with the stated goal of permanent custody of the child. The JCCSB stated in the case plan that it did not feel it needed to make reasonable efforts to prevent the removal due to Pyles' previous conviction for involuntary manslaughter. It allowed the parents to visit their child for only one hour every two weeks.

{¶45} On July 19, 2001, the parents moved the court to order increased visitation time which the magistrate granted on August 15, 2001, increasing their visitation to two hours per visit, twice a month. Two weeks later Pyles moved for the court to appoint a psychologist to perform an evaluation on her, which the magistrate granted. The parents chose to visit Dr. Golas for the evaluation.

{¶46} On November 20, 2001, the JCCSB filed its semi-annual review of the case and stated that its goal was still permanent custody of the child.

{¶47} Dr. Golas filed his report with the court on December 17, 2001. He found Pyles had behavioral problems, but found "no major psychiatric reasons \* \* \* that would contradict Ms. Pyles' current ability to care for a child." He then made three recommendations: (1) that Pyles be allowed to interact with the child over a more extended period of time to allow an evaluation of her parenting skills, (2) to consider participation in a parenting program, and (3) individual and couple's counseling to better evaluate the emotional stability, views, and beliefs of Pyles and Elliott as well as the relationship between them.

{¶48} On February 21, 2002, the magistrate held adjudicatory and dispositional hearings. In the decision entered the next day, the magistrate specifically disagreed

with the JCCSB's belief that it did not need to take reasonable efforts to prevent the child's removal and ordered that the JCCSB implement a case plan based on Dr. Golas' recommendations. It then granted temporary custody of the child to the JCCSB. At this point, the child had been in the JCCSB's temporary custody for over nine months and the only contact the JCCSB permitted the family were two visits a month for two hours a visit which the parents obtained only as the result of a court order.

{¶49} The following week the JCCSB filed a new case plan with the trial court. For the first time, the stated purpose of that case plan was to reunite the then almost ten month old child with her parents. It provided that the parents take certain steps to demonstrate and augment their parenting skills. For instance, it provided that Pyles attend individual counseling with Dr. Golas, that Elliott be evaluated by Dr. Golas, that they attend couples counseling with Dr. Golas, that they each attend parenting classes, and that they be given a week-long stay with the child in the JCCSB's family living apartment where their interaction with the child could be evaluated by the JCCSB personnel. Both Pyles, Elliott, and the guardian ad litem agreed to this case plan. Pursuant to the case plan, each parent could visit with the child once a week for two hours and were able to keep the child for a week in the family living apartment. Over the course of the next few months, Pyles and Elliott repeatedly requested additional time with their child.

{¶50} The trial court received Dr. Golas' evaluation of Elliott on May 2, 2002. Dr. Golas found no evidence of any major psychological or psychiatric problems that would interfere with his ability to function as a parent. Dr. Golas found that Elliott "was very motivated to provide full-time custodial care of his daughter and willing to follow all of the court's instructions and Children Service's instructions to regain permanent custody."

{¶51} On June 20, 2002, the magistrate agreed to extend the JCCSB's temporary custody over the child and noted that the JCCSB had offered some services to the parents, including case management and counseling, daycare and visitation services, and parenting skills training.

{¶52} On July 11, 2002, Pyles moved for make-up visitation since the child's foster parents were unavailable to bring the child to any of the scheduled weekly visitation periods the entire month of June. The magistrate granted that motion.

{¶53} On July 29, 2002, the JCCSB moved the court to order Pyles to submit to another psychological evaluation. It felt that it found some of the statements that Pyles made to Dr. Golas, as referenced in his report, were troubling and did not feel those statements were fully addressed by Dr. Golas. It asked that Pyles be evaluated by Dr. Hewitt, a forensic psychologist. The trial court granted that motion the same day.

{¶54} On September 25, 2002, the JCCSB filed another semi-annual review of the case. Once again, the JCCSB stated that its goal was adoption of the child "as Agency plans to file for [permanent custody] of Alyssa." It did so on December 12, 2002, using Dr. Hewitt's report as the basis for its motion. The JCCSB's amended case plan, filed on January 29, 2003, also reflected that its goal had reverted to adoption rather than reunification.

{¶55} During the entire course of proceedings, Elliott was repeatedly told that the JCCSB would not consider giving him custody of the child as long as he stayed with Pyles. This was reflected both in the testimony of their JCCSB caseworker and the guardian ad litem's reports filed both before and after the trial court ordered that the JCCSB make reasonable efforts to reunite the child with Pyles and Elliott.

{¶56} At the final dispositional hearing, the parents proved that they fully complied with the case plan, that they sought additional time to be with the child, and that they went to counseling and parenting classes above that required by the case plan.

{¶57} First, we note that the trial court did not find that reasonable efforts to reunite the family would be futile and this conclusion is supported by competent, credible evidence. Dr. Golas examined both Pyles and Elliott. He found no reason why Elliott could not parent the child. He believed Pyles could parent the child after counseling and parenting classes. In addition, even though Dr. Hewitt found that Pyles would be an unsuitable parent, he did not give an opinion on Elliott's parenting



abilities. Finally, the JCCSB stipulated that its employees never saw that the child was in any danger when with Pyles and Elliott or that the parents had any problems with the child. Accordingly, we accept the trial court's conclusion that reasonable efforts to reunite the family were not futile.

{¶58} That being the case, our review turns to whether the JCCSB's efforts to reunify the family were reasonable. The JCCSB only tried to implement a case plan towards reunification for less than seven of the twenty-three months it had custody of the child, that the parents fully complied with that case plan, that they requested additional visitation time, and that they sought out parenting resources above those required in the case plan. The JCCSB stipulated that the parents never had a problem with the child or that the child was in danger when she was with them. No witness ever testified that Elliott was an unsuitable parent and the JCCSB continually indicated that it would give him custody of the child if he left Pyles. Finally, although there is evidence that Pyles is an unsuitable parent, there is no evidence that the traits which make her unsuitable would endanger the child if she and Elliott were both given custody.

{¶59} The record in this case is clear. The JCCSB conducted itself in this case as if Pyles losing her parental rights was a foregone conclusion. It never intended to make reasonable efforts to reunify her with the child and only made limited efforts when ordered to do so by the court. When the parents fully complied with the case plan, it refused their request for additional time with their child. It only set reunification as a goal for seven of the twenty-three months it had temporary custody of the child. Under no circumstances can these actions be called reasonable efforts to reunite the family as contemplated by the statute.

{¶60} The JCCSB contends that it did not need to prove that it made reasonable efforts to prevent the removal since it sought permanent custody at the original disposition. In support of this contention, the JCCSB cites *In re Baby Girl Baxter* (1985), 17 Ohio St.3d 229. The JCCSB is incorrect. *Baby Girl Baxter* does not hold that an agency need not implement a reunification plan if the agency sought custody in its original disposition. Instead, *Baby Girl Baxter* says that a trial court does

not need to find that the agency made reasonable efforts to prevent the removal if it grants permanent custody in its initial disposition of the case. *Baby Girl Baxter* does not release JCCSB from its obligation to make reasonable efforts to prevent a child's removal from a home. It merely addresses the findings a court needs to make if it decides to grant a motion for permanent custody.

{¶61} In this case, the trial court did not award permanent custody to the JCCSB at the initial disposition hearing. Instead, it granted temporary custody to the JCCSB. Whenever an agency is granted temporary custody of a child, R.C. 2151.412(A)(2) mandates that the agency prepare a case plan. The general goals of a case plan are 1) to achieve a safe out-of-home placement in the least restrictive, most family-like setting available and in close proximity to the home from which the child was removed or the home in which the child will be permanently placed and 2) to eliminate with all due speed the need for the out-of-home placement so that the child can safely return home. R.C. 2151.412(F)(1). Accordingly, the JCCSB's argument that it did not need to prove that it made reasonable efforts to return the child is meritless.

{¶62} It is clear from the record the JCCSB decided not to make any attempt to reunite this family until ordered to do so by the trial court. In its initial case plan, the JCCSB stated that its goal was permanent custody and concluded that it did not need to make reasonable efforts to reunite the family. But the JCCSB does not have the authority to determine whether it needs to make reasonable efforts to reunify a family. That authority lies solely in the trial court. *T.K.* at ¶17. The statutes governing permanent custody proceedings specifically state that a trial court shall decide whether the agency has to make reasonable efforts to reunite a family. See R.C. 2151.413(D)(2); R.C. 2151.419(A)(2). "[I]t is not for the agency to pick and choose which parents are worthy of case plans." *T.K.* at ¶17.

{¶63} Finally we note that when determining whether the agency has made reasonable efforts to prevent the removal, the trial court shall issue written findings of fact setting forth the reasons supporting its determination. R.C. 2151.419(B)(1). When the court makes this determination regarding reunification efforts, "it shall briefly

describe in the findings of fact the relevant services provided by the agency to the family of the child and why those services did not prevent the removal of the child from the child's home or enable the child to return safely home." R.C. 2151.419(B)(1). Granting an agency's motion for permanent custody is error absent a further finding in full conformity with R.C. 2151.419(B) that reasonable efforts at reunification were made or would have been futile. *In re Lawson/Reid Children* (Apr. 18, 1997), 2nd Dist. No. 96-CA-0010.

{¶64} In this case the trial court found that the JCCSB made reasonable efforts to reunite the family, and it listed the services the JCCSB provided. But the trial court failed to explain "why the services did not prevent the removal of the child from the child's home or enable the child to return safely home." R.C. 2151.419(B)(1). Given our conclusion that the trial court's determination that the JCCSB made reasonable efforts to reunite the family is against the manifest weight of the evidence, we do not need to remand this case for further findings in accordance with R.C. 2151.419(B)(1). But we emphasize the trial court has the obligation to make these findings when awarding permanent custody.

{¶65} It was against the manifest weight of the evidence for the trial court to conclude that the JCCSB made reasonable efforts to reunite the family in this case. The JCCSB overstepped its authority when it determined that it did not need to make these efforts. Furthermore, it refused to make further efforts to reunite the family after the parents complied with the case plan. Accordingly, Elliott's arguments in this regard are meritorious.

{¶66} The final element a trial court must consider when deciding when to grant a motion for permanent custody is the best interests of the child. But since we have concluded that the agency failed to make reasonable efforts to reunite the family in this case, we do not need to address Elliott's final argument regarding whether permanent custody was in the child's best interests.

#### Conclusion

{¶67} We take issue with the JCCSB's initial decision not to attempt to reunite the family. When it overstepped its authority by doing so, it violated its statutory

obligations and placed the parents' due process rights in serious jeopardy. The agency's failure to make reasonable efforts to reunify the family during this period affects the length of time the child is in its temporary custody. This, in turn, affects both whether the trial court must consider whether 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 and some of the statutory factors the trial court must consider when determining what is in the child's best interests. See R.C. 2151.414(B)(1), (D)(1), (3). We cannot allow a children services agency to stack the deck against parents in this way in the future, as it flies in the face of fundamental fairness.

{¶68} This case is remanded for two reasons. First, the trial court must grant Pyles' request for an expert witness since her mental health is the central reason why the JCCSB moved for permanent custody of the child. Second, it must make an alternative disposition of the child at this time since the agency has not made reasonable efforts to reunite the family.

{¶69} Accordingly, the judgment of the trial court is reversed and this cause is remanded for further proceedings in accordance with this opinion.

Waite, P.J., and Donofrio, J., concur.