[Cite as *In re S.R.*, 2009-Ohio-6972.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

In the Matter of: S.R.

Court of Appeals No. E-09-052

Trial Court No. 2008 D 49

DECISION AND JUDGMENT

Decided: December 23, 2009

* * * * *

Elizabeth Wilber, for appellant.

Kevin J. Baxter, Erie County Prosecuting Attorney, and Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

* * * * *

HANDWORK, P.J.

{¶ 1} The Erie County Court of Common Pleas, Juvenile Division, terminated the parental rights of R., appellant, ("mother") and granted permanent custody of her son S.R., a minor child, to the Erie County Department of Job and Family Services ("JFS"). For the following reasons, the judgment is reversed.

{¶ 2} The evidence adduced at the hearing on JFS's motion for permanent custody showed that the child is a 12-year old child with severe mental health needs. The child has been diagnosed with "intermittent explosive disorder," which causes him to be verbally and physically aggressive and violent. His I.Q. of 42 places him in the "moderate" range of mental retardation.

{¶ 3} Because of his condition, by October 2007, while residing with his mother, the child allegedly had 15 or more domestic violence charges against him.[1] Seeking help for her child, mother placed him in the temporary custody of JFS. Because of the child's needs, JFS recommended that he be placed at Pomegranate Health Systems, a private in-patient facility in Byesville, Ohio.[2] A JFS caseworker testified that temporary custody was sought because the child required a residential treatment facility, mother could not afford it, and no other options could accommodate the child's special needs. The child was placed at Pomegranate on October 25, 2007.[3]

{¶ 4} Pomegranate therapist and caseworker testimony at the dispositional hearing on JFS's complaint for permanent custody revealed that the child made slight

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[1]While JFS's complaint alleged that the child had domestic violence charges and several caseworkers testified to the existence of the charges, no documentary evidence of the charges was introduced at the hearings on adjudication or disposition. Testimony of caseworkers indicated that the charges resulted from the child's disorder.

[2]The judgment also terminated the rights of mother's long-term cohabiting partner, who was not the child's biological father. Neither mother's partner nor the child's biological father is a party to this appeal.

[3]This date was alleged in the complaint and established by testimony. Neither the temporary custody order nor documentation of the date the child entered Pomegranate appear in the record.

progress at Pomegranate. In its complaint, JFS alleged that it received an average of four to eight notifications per week that Pomegranate staff needed to physically restrain him due to his physical aggression. A psychological assessment performed at Pomegranate recommended that the child's special needs required the accommodation of placement in a long-term MRDD residential facility.

{¶ 5} After a ten-month stay at Pomegranate, on August 29, 2008, JFS filed a motion for permanent custody of the child. The complaint alleged that the child's mother was "unable to provide the structure necessary for [him] to be safe and to behave in an appropriate manner." The complaint also alleged that mother had not visited the child at Pomegranate since March 2008, and that her telephone contact had been "inconsistent."

{¶ 6} On October 3, 2008, an adjudicatory hearing was held. Mother admitted to a finding of dependency. However, she contested the permanent custody motion and requested, by motion, that the court enter a disposition placing her child in a "planned permanent living arrangement" ("PPLA"), so that she could retain her parental rights and the child could still receive the in-patient treatment his special needs required. A PPLA is an order by which the court grants temporary custody of a child to an agency, without terminating parental rights; it "permits the agency to make an appropriate placement of the child and to enter into a written agreement with a foster care provider or with another person or agency with whom the child is placed." R.C. 2151.011(A)(37). JFS opposed mother's motion and request for a PPLA, citing *In re A.B.*, 110 Ohio St.3d 230, 2006-Ohio-4359.

{¶ 7} After the adjudicatory hearing but before the dispositional hearing, JFS filed a motion to suspend visitation between mother and her child. JFS supported its motion with a report from Pomegranate that the child's aggression toward female staff increased after visitations or phone calls from mother. The report also stated that the child had requested no contact with mother at a treatment team meeting in mid-October 2008.

{¶ 8} On November 21, 2008, the hearing on disposition was held before a magistrate. The child's primary therapist at Pomegranate testified to his condition and progress. She described intermittent explosive disorder ("IED") as an inability to "self-regulate" emotions and an absence of an "internal locus of control." Children with IED will "go into an explosive rage without much thought." Because of the child low IQ and low cognitive development, he requires medication and a strict environment to manage his IED. When the child arrived, his behavior was "extremely aggressive" and he would react to staff with physical force, which required physical restraint; on occasion, he required physical restraint over 70 times per month.

{¶ 9} The child was prescribed Inderal, Prolixin, Depakote and Seroquel. Over his stay at Pomegranate, his aggressive behavior decreased to some extent. Despite medication and Pomegranate's strict environment, his behaviors would "wax and wane." He has progressed to where he can verbalize what he needs to do or what behavior was wrong; however, he still has explosive outbursts and episodes of physical aggression and requires physical restraint several times per week.

{¶ 10} The child's primary therapist acknowledged that the child was not ready to leave Pomegranate and required 24-hour-a-day monitoring to avoid harming himself or others. Notably, the therapist opined that the child was not ready to be placed in any home because of his condition, despite his limited improvements; the child needs to remain in a residential treatment facility for "the foreseeable future."

{¶ 11} With respect to mother, the primary therapist was unable to state definitely that a causal connection existed between mother's visits and communications and increases in the child's aggression. She did testify to incidents where mother's inconsistent communication and occasional failures to arrive for scheduled visitation caused the child to become upset and react aggressively. However, both the therapist and the caseworker testified to periods of time where the child's aggressive behaviors would spike and increase without reference to mother's visits.

{¶ 12} While not providing documentation, the child's therapist and caseworker, and the JFS caseworker, stated that mother had not visited her child at Pomegranate between March 2008 and September 2008. Both the therapist and the JFS caseworker admitted that Pomegranate was a 300-mile round trip for mother. The JFS caseworker asserted that she offered mother to ride with her once a month for her visitation at Pomegranate. JFS also provided $20 gas vouchers. The caseworker acknowledged that the price of gasoline was "horrendous" and mother had communicated that the gas vouchers were insufficient. One caseworker asserted that mother had been given two gas vouches in March and April, but had not used them to visit. The Pomegranate therapist

and caseworker acknowledged that mother would have telephone visitation with the child and that he generally enjoyed it. The mother testified that she called Pomegranate every other day to see how he was, but caseworker testimony indicated her telephone contact was less frequent; nonetheless, overall the testimony indicated that the mother stayed in regular telephone contact with her son.

{¶ 13} With respect to any connection between the child's behavior and the mother's visitation, the testimony showed that the child reacted aggressively when the child was unable to reach the mother by telephone, or when mother failed to show for a monthly "Community Day" family visitation event. The therapist and caseworkers testified that they requested a suspension in mother's visitation when the child verbalized in a treatment meeting that he was mad at mother for failing to attend a scheduled visitation and did not want to talk to her. His treatment team wanted to determine definitely whether an absence of communication would positively impact the child's behavior, and, upon their request, JFS moved to suspend visitation and communication.

{¶ 14} The Pomegranate therapist, caseworker and nurse all testified that despite the child's medication and treatment, he was unable to be placed in any home due to his condition. The JFS caseworker, when asked why the agency took temporary custody of him in October 2007, explained that it was partly because Pomegranate was an expensive facility, mother could not afford it (mother is indigent), and his special needs required it.[4]

[4]Although no documentary evidence was submitted, caseworker testimony indicated that Pomegranate charged approximately $315 per day.

She stated: "At the time, [the child] was so out of control that it was felt that he needed to go to a residential place – a secure residential placement to keep him safe and the community safe." The JFS caseworker also explained that foster care was not an option, because he "blew out" of seven or eight foster homes before being returned to mother's custody in May 2007; due to his condition, no family could provide residential care. All witnesses for JFS acknowledged that the child would likely need to remain in a residential treatment facility for much of his life.

{¶ 15} On December 8, 2008, the magistrate issued a proposed decision. First, the magistrate denied mother's motion for a PPLA, pursuant to the authority of *In re A.B.*, supra.

{¶ 16} Second, pursuant to R.C. 2151.414(B)(1)(a), the magistrate found that the child cannot be placed with mother within a reasonable amount of time. The magistrate did not specifically state which factor of parental unfitness applied to mother, pursuant to R.C. 2151.414(E). A finding of parental unfitness on one of the grounds listed in R.C. 2151.414(E) is necessary before granting a motion pursuant to R.C. 2151.414(B)(1)(a).

{¶ 17} Third, the magistrate found that, pursuant to R.C. 2151.414(B)(1)(d), the child had been in the custody of JFS in excess of 12 of the prior 22 months. The magistrate did not state the time periods during which JFS had temporary custody in making this determination. Last, the magistrate found permanent custody to be in the child's best interests. The only "best interests" grounds stated were that none of the

child's relatives "have been identified nor have any attempted to intervene and/or express an interest in [the child]."

{¶ 18} On August 20, 2009, some eight months after the magistrate's decision, the trial court filed its judgment entry. The trial court found it "undisputed" that the child had been in JFS's temporary custody in excess of 12 of 22 months "prior to trial." Specifically, the trial court stated that the child was placed at Pomegranate for treatment "some 13 months before trial." Because it found the "12 of 22" provision triggered, the trial court held that "any discussions of whether child can be placed with a parent in a reasonable time or that the child should be placed with a parent are unnecessary."

{¶ 19} The trial court did discuss extensively whether granting JFS's motion for permanent custody was in the child's best interests. Foremost in its discussion was the child's prognosis and mother's inability to accommodate the child's condition at home and her inability to "provide the specialized services" that he needs. The trial court noted that the GAL did not recommend permanent custody; the GAL's report only stated that the child needed "extended residential and specialized placements." The trial court concluded that the child "needs the security of his placement to continue for the foreseeable future and likely needs future specialized placement and services that simply are not able to be provided by any family member."

{¶ 20} From that judgment, mother appealed, and asserts one assignment of error for review:

{¶ 21} "The court erred as a matter of fact and law and abused its discretion when it found terminating the parental rights of the mother and not reunifying with appellant to be in the child's best interest because such was not the only means of obtaining a legally secure permanent placement for the child, such was not supported by clear and convincing evidence and/or because permanent custody was not in the child's best interest."

{¶ 22} Every termination of parental rights case begins with the premise that "'[P]arents who are suitable persons have a "paramount" right to the custody of their minor children. *In re Perales* (1977), 52 Ohio St.2d 89, 97; *Clark v. Bayer* (1877), 32 Ohio St. 299, 310,' *In re Murray* (1990), 52 Ohio St.3d 155, 157, and that '[p]ermanent termination of parental rights has been described as "the family law equivalent of the death penalty in a criminal case." *In re Smith* (1991), 77 Ohio App.3d 1, 16. Therefore, parents "must be afforded every procedural and substantive protection the law allows." Id.' *In re Hayes* (1997), 79 Ohio St.3d 46, 48." *In re D.A.*, 113 Ohio St.3d 88, 2007-Ohio-1105, ¶ 10. Hence, "termination of parental rights should be an alternative of 'last resort.' *In re Cunningham* (1979), 59 Ohio St.2d 100, 105." Id., 2007-Ohio-1105, ¶ 11.

{¶ 23} A court's decision to terminate parental rights will not be reversed as being against the manifest weight of the evidence as long as 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. *In re S.* (1995), 102 Ohio App.3d 338, 345; *In re William S.* (1996), 75 Ohio St.3d 95.

{¶ 24} Pursuant to R.C. 2151.414(B), after a child is adjudicated dependent and temporary custody is granted to a public agency, a court may grant the public agency's motion for permanent custody "if the court determines at the hearing held pursuant to division (A) of this section, by clear and convincing evidence, that it is in the best interest of the child to grant permanent custody of the child to the agency that filed the motion for permanent custody and that any of the following apply:

{¶ 25} "(a) The child is not abandoned or orphaned, has not been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period, or has not been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period if, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state, and the child cannot be placed with either of the child's parents within a reasonable time or should not be placed with the child's parents.

{¶ 26} "* * *

{¶ 27} "(d) The child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period, or the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period and, as described in division

(D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state."

{¶ 28} Also, under either statutory provision, in order for sufficient grounds for permanent custody to exist, the trial court must find clear and convincing evidence that a grant of permanent custody would be in the child's best interests. To make this determination, the trial court must examine the factors of R.C. 2151.414(D), which provides that the court "shall examine all relevant factors," including:

{¶ 29} "(a) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child;

{¶ 30} "(b) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child;

{¶ 31} "(c) The custodial history of the child, including whether the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period, or the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period and, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state;

{¶ 32} "(d) The child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency;

{¶ 33} "(e) 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)(1).

{¶ 34} The trial court found termination of mother's parental rights justified solely based on the R.C. 2151.414(B)(1)(d) provision and its conclusion that granting permanent custody to JFS was in the child's best interest. Thus, we examine the record to determine whether competent, credible evidence exists to support a conclusion that the child was in the temporary custody of JFS for 12 months out of a 22-month period and whether granting the motion was in his best interest.

{¶ 35} Upon a thorough review of the record, we find the assignment of error well-taken. The judgment terminating mother's parental rights solely on grounds that the child had been in the agency's custody for 12 of 22 months was in error. Contrary to the trial court's finding, the record simply does not support a conclusion that the child had, in fact, been in the agency's temporary custody for 12 months out of a consecutive 22-month period.

{¶ 36} Specifically, the magistrate and the trial court found that the child had been in JFS's temporary custody for 13 months *by the time of the disposition hearing*. This finding is contrary to the statutory requirement. "Before a public children-services agency or private child-placing agency *can move* for permanent custody of a child on

R.C. 2151.414(B)(1)(d) grounds, the child must have been in the temporary custody of an agency for at least 12 months of a consecutive 22-month period." *In re C.W.*, 104 Ohio St.3d 163, 2004-Ohio-6411, syllabus. (Emphasis added.)

{¶ 37} In the complaint, JFS did state, via an iteration of the alleged facts, that the child had been in JFS custody for more than 12 months of a 22-month period. JFS's complaint alleged that the child had been "placed in eight different foster homes from September 22, 2006 to May 15, 2007 and disrupted all of those placements due to his behavior. He was returned to the custody of his mother on May 15, 2007 * * *. On October 25, 2007, [the child] was placed at Pomegranate Health Systems in Byesville, Ohio due to aggressive behaviors and having 15 or more domestic violence charges against him. * * * [the child] has been in placement at Pomegranate for ten months and the recommendation from his psychological assessment and from Pomegranate is that he be placed, long-term, in an MRDD residential facility which could accommodate for his special needs."

{¶ 38} Assuming the allegations of the complaint are true, the child was in the temporary custody of JFS from September 22, 2006, to May 15, 2007, and again from October 25, 2007 to the day the complaint was filed, August 29, 2008. Thus, according to the complaint, the child was in JFS custody for 17 months and 27 days out of a 23-month period. JFS did not, however, submit any evidence at disposition to establish the truth of these allegations.

{¶ 39} The record contains absolutely no evidence that the child was in JFS custody for the first period, when he was allegedly in foster homes. JFS failed to submit the most basic evidence: The prior case was not made part of the record in this matter, and JFS did not submit any orders showing that it had prior temporary custody of the child. While one JFS caseworker's testimony briefly described the child's behavior during the prior period, when he was allegedly placed at several foster homes and was unable to stay due to his condition, no documentation of the foster placements was placed into evidence at disposition. Without more, the time periods during which the child was in temporary custody as stated in the complaint and as described by one caseworker are without foundation and are merely speculative.

{¶ 40} Also, the trial court plainly erred when it found R.C. 2151.414(B)(1)(d) established by counting only the 13 months the child had been in JFS custody "by the time of trial." The trial court explicitly relied upon the period of time between the child's admission to Pomegranate and the dispositional hearing. The trial court likely did not count the earlier period of time during which the child was allegedly in foster homes because no evidence that JFS had temporary custody for this period was placed in the record.

{¶ 41} The Ohio Supreme Court has established that "the time that passes between the filing of a motion for permanent custody and the permanent-custody hearing does not count toward the 12-month period set forth in R.C. 2151.414(B)(1)(d)." *In re C.W.*, supra, at ¶ 26. "Juv.R. 19 provides, 'An application to the court for an order shall be by

motion. * * * It shall state with particularity the grounds upon which it is made * * *.' [A] motion for permanent custody must allege grounds that currently exist. A juvenile court lacks authority to grant an agency's motion on R.C. 2151.414(B)(1)(d) grounds if those grounds were not satisfied when the motion was filed." Id. at ¶ 24. (Internal citation omitted.)

{¶ 42} Additionally, the 12-month time period must be computed by beginning with the earlier of either the date the child was adjudicated or the date the child is removed from the home, minus 60 days, according to R.C. 2151.414(B): "[A] child shall be considered to have entered the temporary custody of an agency on the earlier of the date the child is adjudicated pursuant to section 2151.28 of the Revised Code or the date that is sixty days after the removal of the child from home."

{¶ 43} Pursuant to this provision, if calculating by the date the child was removed from his home as it did, the trial court was required to subtract 60 days from the date the child was removed from his home and placed at Pomegranate. The time period from October 25, 2007, until the filing of the complaint on August 29, 2008, constitutes ten months and four days. However, once 60 days are subtracted, the evidence only shows that the child was in JFS custody for a little over eight months at the time of the filing of the complaint, for purposes of R.C. 2151.414(B)(1)(d).

{¶ 44} Because JFS did not establish, by clear and convincing evidence, that the child had been in its custody for 12 months out of a 22-month period, the trial court's judgment granting JFS's motion on R.C. 2151.414(B)(1)(d) grounds must be reversed.

Next, we review the second necessary prong for a grant of permanent custody: whether JFS presented clear and convincing evidence that a grant of permanent custody to JFS was in the child's best interests. The trial court did not separately and specifically examine each of the "best interest" factors of R.C. 2151.414(D). "A court is required to consider all relevant favors, including, but not limited to, the factors enumerated in R.C. 2151.414(D) and 2151.414(E)(7) through (11)." *In re Kayla H.*, 175 Ohio App.3d 192, 2007-Ohio-6128, ¶ 60.

{¶ 45} Here, the trial court found permanent custody to be in the child's best interests for two main reasons: the child's condition and need for specialized care, and mother's inability to provide that care. It stated that mother was not able to "provide appropriate care for [the child]," but acknowledged that her inability was "based mostly on child's own needs and issues." It noted that mother and her partner "want to care for him but are currently unequipped to do so." It stated that the "most compelling factor" was the child's "need for a legally secure placement and whether than can be obtained without granting permanent custody." Elaborating, it reiterated the child's special needs, and noted that there was "a poor prognosis for the child to regulate and return to the family in the foreseeable future. It was acknowledged that mother could not provide secure placement and cannot provide the specialized services that child needs. Child needs the security of his placement to continue for the foreseeable future and likely needs future specialized placement and services that simply are not able to be provided by any family member."

{¶ 46} These concerns fail to recognize that every witness testified that the child could not be placed in *any* home at the present time or in the foreseeable future. Thus, it is not merely that mother could not provide appropriate care and resources to meet the child's special needs; rather, the evidence showed that only a residential institution was able to meet the child's special needs, now and in the foreseeable future. While the child requires a secure placement, and one that addresses his special needs, the trial court was required to address the question of whether a secure placement could be achieved *without* severing the parent-child relationship. R.C. 2151.414(D)(1)(d).

{¶ 47} The trial court was also required to examine the other best interest factors, including the interaction between the child and the parent or other caregivers. R.C. 2151.414(D)(1)(a). Here, the trial court focused on testimony that, although mother visited the child while he was at Pomegranate, she did not do so with regularity. However, testimony showed that while mother did not visit from March until September 2008, she was indigent and it was questionable whether the $20 gas vouchers were sufficient to enable a 300-mile round trip. It was undisputed that mother telephoned Pomegranate often to speak with the child and members of his treatment team. It was also undisputed that mother and the child were bonded. The trial court focused on testimony that the child's aggressive behavior would escalate after interacting with mother. However, the child's aggressive behavior, due to his condition, would "wax and wane" according to any upsetting factors in his environment – like the replacement of one caseworker. While the treatment team sought to eliminate the child's contact with mother

to determine whether an absence of contact would assist his condition, the child still required physical restraint several times per week after visitation ceased. No one testified, however, that the reduced necessity for restraint was due solely to a lack of visitation, rather than medication or general progress in the child's treatment. Most importantly, no one testified that an absence of contact with his mother would enable the child to progress enough to be placed in a private home rather than an institutional treatment facility.

{¶ 48} Despite evidence that mother attempted to maintain a relationship with the child while he was at Pomegranate, the trial court also found relevant mother's failure to learn skills that would enable her to have the child in her home. The JFS caseworker testified to the case plan filed after the child was placed at Pomegranate; however, this case plan is not part of the record. According to the testimony, the temporary custody case plan required mother to be assessed by an MRDD agency to see if she was eligible for services and mother did not complete the assessment. However, no evidence or testimony showed that mother has issues or conditions that would render her personally eligible for MRDD assistance.

{¶ 49} The JFS caseworker also testified that the case plan required mother to "work with Pomegranate staff" on how best to "work with" the child. Mother testified that she was willing to work with Pomegranate staff to facilitate reunification, but whenever she visited, the child's therapist was not present and she was not offered help. The child's primary therapist at Pomegranate testified that the child could only go to a

private home at some point in the future, if his condition was under control, and if the caregivers were "very well trained." The therapist observed that mother cares "a great deal" about the child and that the child cares for her. When asked directly whether Pomegranate offers services to family caregivers, the therapist stated, "I do family therapy. * * * I met with them on the occasions that they came initially, and I asked them to do house rules, and I gave them samples, and you know, rules, consequences and rewards. And they – they did that, I think probably to the best of their ability. * * * I would recommend ongoing treatment for [mother] too, * * * something closer to home so that she could learn how to do some of the activities and de-escalation things. But we had to lay the groundwork first, and * * * there wasn't a lot of visits after the first three months." The therapist recommended two to three such training visits per month, and stated that it would be insufficient if a parent could only afford to visit once per month for training.

{¶ 50} Mother's main contention on appeal is that the trial court erred when denying her motion for a PPLA. A PPLA could achieve what the evidence – including the recommendations of the child's therapists, nurse, and caseworkers – demonstrates the child's needs: a placement in a residential facility for the foreseeable future. And, a PPLA would meet the child's special needs without severing the parent-child relationship. Pursuant to statute, a PPLA is warranted if "the child, because of physical, mental, or psychological problems or needs, is unable to function in a family-like setting and must remain in residential or institutional care now and for the foreseeable future beyond the

date of the dispositional hearing * * *." R.C. 2151.353(A)(5)(a). Every JFS witness testified that the child fits this requirement.

{¶ 51} The Ohio Supreme Court has precluded this solution, however, absent a request by the agency to implement it. In *In re A.B.*, 110 Ohio St.3d 230, 2006-Ohio-4359, the court held that a PPLA can only be entered as a dispositional order on the motion of an agency. "After a public children services agency or private child placing agency is granted temporary custody of a child and files a motion for permanent custody, a juvenile court does not have the authority to place the child in a planned permanent living arrangement when the agency does not request this disposition." Id., syllabus, interpreting R.C. 2151.353(A)(5). Therefore, even though a PPLA would have been in the child's best interest, and despite the evidence showing that the child, because of his medical condition, cannot be placed in any home, the trial court had no authority to order a PPLA, absent JFS's request.

{¶ 52} Still, in order to sever the parent-child relationship, JFS had to establish that permanent custody was in the child's best interest. Even if JFS had established that the child had been in JFS custody for 12 months in a 22-month period, that consideration is but one factor of many best interest factors. The trial court had to consider, inter alia, whether a "legally secure placement" could have been achieved without a grant of permanent custody to the agency. R.C. 2151.414(D)(1)(d).

{¶ 53} In *In re D.A.*, 2007-Ohio-1105, the Ohio Supreme Court found that a court could not terminate the parental rights of a parent who was allegedly mentally retarded,

because when "determining the best interest of a child under R.C. 2151.414(D) at a permanent-custody hearing, a trial court may not base its decision solely on the limited cognitive abilities of the parents." Id. at syllabus. This holding was based, in part, on the trial court's failure to consider the remaining best interest factors: "[T]he court should have considered factors such as their relationship with their child, whether they had ever harmed him, and where the child wished to live. R.C. 2151.414(D). All of these factors favor appellants. The evidence showed that they have a very loving relationship with their son, have never harmed him, and desire to do whatever is necessary to be reunited with him." Id. at ¶ 35.

{¶ 54} The same reasoning applies here. The trial court did not consider the bond between mother and the child, the fact that no evidence showed mother ever harmed the child (it was undisputed that the alleged charges of domestic violence were due to the child's condition), and the GAL's failure to recommend severing the parent-child bond. The agency did not establish that mother had limited abilities to care for the child due to any fault of hers. Rather, the agency only established that no caregiver was able to provide for the child's special needs in a family setting at the present time. Moreover, testimony of Pomegranate workers established that any person caring for the child would require extended training. No assistance was provided to mother to obtain this training, apart from $20 gas vouchers to accomplish a 300-mile round trip. As in *In re D.A.*, the trial court's repeated references to mother's inability to care for the child "indicates that that was the sole reason for the termination of parental rights." Id. at ¶ 38. Likewise,

here, the agency did not demonstrate that mother's inability to care for the child was for any reason aside from the child's special needs. For the same reasons, a conclusion that severing the parent-child relationship would be in the child's best interest is unsupported by competent, credible evidence. Id. at ¶ 39.

{¶ 55} For the foregoing reasons, appellant's assignment of error is well-taken. The judgment of the Erie County Court of Common Pleas, Juvenile Division, is reversed and this matter remanded for further proceedings consistent with this decision and judgment. Appellee is ordered to pay the costs of this appeal, pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J. _____
JUDGE

Mark L. Pietrykowski, J. _____
CONCUR.
JUDGE

Arlene Singer, J. _____
CONCURS AND
WRITES SEPARATELY.
JUDGE

SINGER, J.

{¶ 56} I concur, but once again express my concern with the constitutionality of basing a termination of parental rights based solely on R.C. 2151.414(B)(1)(d) before making a determination of parental unfitness. *In re Delfino M.*, 6th Dist. No. L-04-1010,

2005 Ohio 320, at ¶ 24 and *In re Alexis K.*, 160 Ohio App.3d 32, 2005 Ohio 1380 at ¶ 58 and 59, *In re Amber M. L.*, 6th Dist. No. WM-05-003, 2005-Ohio-4172, ¶ 92.

{¶ 57} Because of the severe mental health condition of the child, his special needs can only be served at this time, and perhaps in the foreseeable future, by placement, long term, in a residential treatment facility. Neither fault nor unfitness of the parent has been found. One wonders if any family who must place a severely handicapped, severely physically ill or mentally ill child in a residential treatment facility would be at risk of losing parental rights because of the mere passage of time.