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# A Plea for Permanence after Termination of Parental Rights: Protecting the Best Interests of the Child in Ohio

Daniel A. Starett

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# NOTES

## A PLEA FOR PERMANENCE AFTER TERMINATION OF PARENTAL RIGHTS: PROTECTING THE BEST INTERESTS OF THE CHILD IN OHIO

DANIEL A. STARETT\*

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## I. INTRODUCTION

"I'll always be here for you. I promise I'll bring you home."<sup>1</sup> That was the promise made by Peggy Fugate to her little girl as the girl sat crying on her mother's lap in a courtroom.<sup>2</sup> Despite extensive effort on her part, Peggy was unable to make good on the promise that she made to her daughter. Peggy fought her way through the legal system, never giving up on fulfilling her promise, but the Ohio Supreme Court shattered her dream of protecting her little girl.<sup>3</sup>

In the courtroom that day, Selina McBride was taken from the custody of her mother,<sup>4</sup> a decision which Peggy did not fight, "believing her daughter would be adopted into a clean, stable home . . . ."<sup>5</sup> Unfortunately, little Selina, now sixteen, never found her way to a stable home.<sup>6</sup> She has been shuffled among foster homes and finally landed in a group home.<sup>7</sup> Life for Selina has been anything but stable.<sup>8</sup>

Instability has led Selina down the wrong path in her young life. At sixteen, she already has had trouble with the police.<sup>9</sup> She has run away from her foster home

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<sup>1</sup>Sharon Coolidge, *Mom Wants to Adopt Daughter She Lost*, CINCINNATI ENQUIRER, Oct. 28, 2004, at 1A [hereinafter Coolidge, *Daughter She Lost*].

<sup>2</sup>*Id.*

<sup>3</sup>*See In re McBride*, 850 N.E.2d 43 (Ohio 2006), *rev'g* 817 N.E.2d 459 (Ohio Ct. App. 2004). The Ohio Supreme Court held that Peggy was statutorily barred from moving for custody of her daughter after her parental rights had been terminated by the state. *Id.* at 47.

<sup>4</sup>*Id.* at 44.

<sup>5</sup>Coolidge, *Daughter She Lost*, *supra* note 1.

<sup>6</sup>*In re McBride*, 850 N.E.2d at 44.

<sup>7</sup>*Id.*

<sup>8</sup>*See generally* Sharon Coolidge, *Remade Life Not Enough for Custody*, CINCINNATI ENQUIRER, July 20, 2006, at 1A [hereinafter Coolidge, *Remade Life*].

<sup>9</sup>*Id.*

numerous times.<sup>10</sup> The lack of a stable home life threatens to turn Selina into the type of person her mother once was—the very result the court intended to prevent by taking Selina from Peggy’s care.

Nobody would argue that the Peggy Fugate who made that promise to her daughter deserved to retain custody of her child. The old Peggy was a crack addict and had been “in and out of prison.”<sup>11</sup> She had multiple children taken from her care because of neglect.<sup>12</sup> But people can change,<sup>13</sup> and that is exactly what Peggy did.<sup>14</sup>

After nearly a decade of perseverance, Peggy turned her life around.<sup>15</sup> Peggy is now in a happy and stable marriage; she works a full-time job and lives in an apartment with a spare bedroom.<sup>16</sup> After straightening out her life, Peggy began to dream about reuniting with her daughter, knowing that she finally had the ability to be a good mother.<sup>17</sup> The Juvenile Court has allowed Selina to visit with her mother, even allowing a few overnight visits, and Peggy has turned her spare bedroom into a room for Selina.<sup>18</sup> Peggy has begun to develop and nurture a relationship with her daughter, a relationship of a nature that Selina has never experienced—a loving, parental presence.<sup>19</sup>

The new Peggy discovered that her little girl was still bouncing around the foster care system and living in a group home;<sup>20</sup> no mother wants that for her child. So, Peggy entered the court system to seek custody of her child<sup>21</sup> in a process that, she argued, should be analogous to adoption.<sup>22</sup> “All I want to do is hug her and tell her how much I love her[.]”<sup>23</sup> she said when initiating the proceeding. Peggy met early success, with both the Juvenile Court and the Court of Appeals ruling that she was

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<sup>10</sup>*Id.*

<sup>11</sup>Coolidge, *Remade Life*, *supra* note 8.

<sup>12</sup>*Id.*

<sup>13</sup>*In re McBride*, 817 N.E.2d 459, 461 (Ohio Ct. App. 2004), *rev’d*, 850 N.E.2d 43 (Ohio 2006) (“[O]ur court/justice/legal/moral system supposes that people can change.”). The appellate court would have allowed Fugate the opportunity to have a best interests hearing in the trial court to determine if Selina should be returned to Fugate’s custody. *Id.* at 462.

<sup>14</sup>*See generally* Coolidge, *Remade Life*, *supra* note 8.

<sup>15</sup>*Id.*

<sup>16</sup>Coolidge, *Daughter She Lost*, *supra* note 1 (“Fugate . . . is now drug-free, married, and working full time . . . .”); Coolidge, *Remade Life*, *supra* note 8 (stating that Selina has a bedroom at Fugate’s apartment).

<sup>17</sup>Coolidge, *Remade Life*, *supra* note 8.

<sup>18</sup>*Id.*

<sup>19</sup>*See generally id.*

<sup>20</sup>*In re McBride*, 850 N.E.2d 43, 44 (Ohio 2006), *rev’g* 817 N.E.2d 459 (Ohio Ct. App. 2004).

<sup>21</sup>*Id.*

<sup>22</sup>Coolidge, *Remade Life*, *supra* note 8.

<sup>23</sup>Sharon Coolidge, *After Seven Years, a Reunion*, CINCINNATI ENQUIRER, Nov. 30, 2004, at 3B.

able at least to present an argument regarding her child's best interests.<sup>24</sup> Sadly, the Ohio Supreme Court delivered the news that Ohio law, as written, prevented Peggy from becoming a permanent part of her daughter's life and rescuing her from the system that has failed her for so many years, without regard to what might be in Selina's best interests.<sup>25</sup>

The law relied upon by the Ohio Supreme Court mandates the outcome in this case.<sup>26</sup> It does not, however, serve the purpose the State is supposed to serve in cases dealing with children. The Ohio Revised Code is riddled with references to the "best interests of the child,"<sup>27</sup> but the sections of the statutes relied upon by the Ohio Supreme Court in deciding *McBride* are oddly silent in that regard.<sup>28</sup> Protecting children has always been of paramount importance in the courts as well,<sup>29</sup> but the statute controls the outcome.<sup>30</sup>

The statute must be amended to allow the courts to protect the best interest of the children for whom they are in place to serve, even if this means that occasionally a parent who was once adjudged to be incapable of caring for her child, and whose rights were subsequently terminated, may be the best, and often only, option to save that child from the dangers of the foster care system.

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<sup>24</sup>*In re McBride*, 850 N.E.2d at 44.

<sup>25</sup>*See id.* at 47.

<sup>26</sup>*See infra* Part III.

<sup>27</sup>*See, e.g.*, OHIO REV. CODE ANN. §§ 1717.14, 2105.26, 2111.05, 2151.141, 2151.3521, 2151.36, 2151.412, 3105.21, 3107.161, 5103.153, 5103.16 (LexisNexis 2007).

<sup>28</sup>*See* OHIO REV. CODE ANN. § 2151.414(F). The subsection of the statute reads as follows: The parents of a child for whom the court has issued an order granting permanent custody pursuant to this section, upon the issuance of the order, cease to be parties to the action. This division is not intended to eliminate or restrict any right of the parents to appeal the granting of permanent custody of their child to a movant pursuant to this section.

*Id.* The Ohio Supreme Court interpreted this as a procedural fault in Peggy Fugate's attempt to regain custody of her daughter. *In re McBride*, 850 N.E.2d at 45-46. *See also* OHIO REV. CODE ANN. § 2151.353(E)(2) (LexisNexis 2007). The text of this subsection reads as follows:

Any public children services agency, any private child placing agency, the department of job and family services, or any party, other than any parent whose parental rights with respect to the child have been terminated pursuant to an order issued under division (A)(4) of this section, by filing a motion with the court, may at any time request the court to modify or terminate any order of disposition issued pursuant to division (A) of this section or section 2151.414 [2151.41.4] or 2151.415 [2151.41.5] of the Revised Code. The court shall hold a hearing upon the motion as if the hearing were the original dispositional hearing and shall give all parties to the action and the guardian ad litem notice of the hearing pursuant to the Juvenile Rules. If applicable, the court shall comply with section 2151.42 of the Revised Code.

*Id.* The Ohio Supreme Court read this provision as a bar to Peggy Fugate's attempt to regain custody of her daughter. *In re McBride*, 850 N.E.2d at 46-47.

<sup>29</sup>*See, e.g.*, *In re Cunningham*, 391 N.E.2d 1034, 1038 (Ohio 1979) ("[It is] the time-honored precedent in this state that the 'best interests' of the child are the primary consideration in questions of possession or custody of children.").

<sup>30</sup>*In re McBride*, 850 N.E.2d at 47.

Part II of this Note will explore the dangers of exposure to the foster care system, illustrate why we need to protect children from prolonged exposure to the system, and highlight Ohio's performance when it comes to permanency planning for children within the system. Part III will explain the statutory framework on which this decision was based and shed more light on the problem created by this decision, as well as present a comparative analysis of how other jurisdictions handle this problem in their respective statutes. Part IV will look to relevant case law for an understanding of the tradition in Ohio's courts of protecting the "best interests" of children, as well as an analysis of the Ohio Supreme Court's reasoning in *McBride*. In Part V, a solution to this problem will be proposed. Finally, Part VI will conclude.

## II. THE ILL EFFECTS OF EXPOSURE TO THE FOSTER CARE SYSTEM

The effects of an extended stay in the foster care system can be devastating and long lasting.<sup>31</sup> The story of Selina McBride is illustrative of many of these problems, problems resulting from the failures of the system; Selina is not alone in this regard.<sup>32</sup> A plethora of studies have produced similar results regarding the negative impact that exposure to the foster care system has on the children it is supposedly in place to serve and protect,<sup>33</sup> some of which will be discussed below. Also, as the foster care system becomes more dangerous the longer a child is exposed to it, discussion will follow regarding data that will help to understand how long children tend to stay in the foster care system and, more specifically, in the final section, how long Ohio children who have parental rights terminated are apt to stay in the system prior to finalization, as well as a comparison of how these numbers compare to the rest of the United States.

### A. Real Examples of the Dangers Posed by Exposure to the Foster Care System

An examination will show that the foster care system is far from the safehaven many believe it to be. To the extent that it is intended to provide a *safer* home than that from which the affected children come, it probably is successful in the majority of cases. However, if the goal is to provide a good, safe home for these children, then it has probably failed overall. The story of Selina McBride highlights some of the shortcomings of the system, and there do exist many other stories that reinforce this view that the foster care system is not necessarily the place of refuge it is intended to be.

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<sup>31</sup>See generally Deborah A. Martin-Grissom, *Foster Care Adolescents: Examining Perceptions of a Model Resiliency and Life-Skills Training Program* 30-45 (May, 2005) (unpublished Ph.D. dissertation, Cleveland State University) (on file with Cleveland State University Library) (setting forth a plethora of studies regarding the negative effects of the foster care system on children).

<sup>32</sup>See, e.g., RICHARD ENGLAND, *DISPLACED CHILDREN IN CRISIS—OUR ENABLING SYSTEM FOR HIGH RISK BEHAVIOR* (2001). Dr. England recounts the stories of multiple children in the foster care system, ranging from an infant to teenagers. *Id.* His stories shed light on the atrocities that unfortunately are commonplace in the foster care system, atrocities stemming from bureaucratic inefficiency to physical and emotional abuse and beyond. *Id.*

<sup>33</sup>See generally Martin-Grissom, *supra* note 31, at 30-45.

### 1. The System Has Failed Selina

Selina's experience in the foster care system has been anything but ideal. Hamilton County Ohio Job and Family Services took custody of Selina at the age of seven with the intent of finding a permanent placement for her with an adoptive family.<sup>34</sup> Peggy Fugate did not fight this outcome, because she believed that "her daughter would be adopted into a clean, stable home—one [she] was unable to provide."<sup>35</sup> Both Peggy and the agency were wrong.<sup>36</sup> Selina has bounced through the system for seven years, finding temporary placement in a number of institutions and foster homes, never with any sign of permanence.<sup>37</sup> Selina has stated that she does not wish to go through the adoption process.<sup>38</sup> At the time the Supreme Court denied Peggy the right to petition for custody of her daughter, Selina was living in a group home, from which she often ran away, and had been in trouble with the police.<sup>39</sup>

Obviously, life has been hard on Selina.<sup>40</sup> The system that she entered for protection has failed to protect her from the cruelties of the world.<sup>41</sup> Something was not working right; the same something is wrong for too many of the children in the foster care system.

### 2. Selina Is Not Alone

The foster care system lets countless children down each and every day. The problems are certainly not specific to Ohio. They plague the foster care systems of all of the states in this country and around the world. What follows are some illustrative examples of how dangerous this system can be and why any opportunity to allow a child to break free should at least be considered in light of that child's best interests.

One such story is relayed in a book written by Dr. Richard England.<sup>42</sup> Dr. England conveys the story of Dill, a ten-year-old boy who had the mind of a two-year-old.<sup>43</sup> The boy entered foster care as an infant and worked his way through the system, further and further from his biological relatives.<sup>44</sup> All of the evidence indicated a history of sexual and physical abuse at a young age, rendering the boy

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<sup>34</sup>See *In re McBride*, 850 N.E.2d at 44.

<sup>35</sup>Coolidge, *Daughter She Lost*, *supra* note 1.

<sup>36</sup>See generally Coolidge, *Remade Life*, *supra* note 8.

<sup>37</sup>*In re McBride*, 817 N.E.2d 459, 460 (Ohio Ct. App. 2004), *rev'd*, 850 N.E.2d 43 (Ohio 2006).

<sup>38</sup>*Id.*

<sup>39</sup>Coolidge, *Remade Life*, *supra* note 8.

<sup>40</sup>See *id.*

<sup>41</sup>See *id.*

<sup>42</sup>ENGLAND, *supra* note 32.

<sup>43</sup>*Id.* at 29.

<sup>44</sup>*Id.*

essentially mute.<sup>45</sup> Dill was acting out in school; he threw feces at any person who approached him and attacked the other children, which in turn led to Dill's forced internment in a state psychiatric hospital.<sup>46</sup> While in the hospital, Dill received twenty-four-hour care and extensive treatment, and the results were readily visible in his behavior.<sup>47</sup> However, between the newfound smiles and communication, a new behavioral change occurred—attachment, only not to a family, but to “certain of the hospital state.”<sup>48</sup> His behavioral progress led to placement with a foster family; within three weeks the boy was back in the hospital.<sup>49</sup> Apparently, the state's eagerness to place the child in the home had resulted in shoddy background checks and the boy was placed in the care of persons who had not been fully investigated.<sup>50</sup> The foster parents had stopped his medication and neglected him, possibly even physically abusing the boy.<sup>51</sup> They found Dill walking naked down the street, muttering, crying and with no sense of where he was.<sup>52</sup>

Dr. England provides another case study that is illustrative of many of the problems plaguing the foster care system. Cliff was sixteen and had been in over twenty foster care placements due to “severely disordered conduct.”<sup>53</sup> Cliff had “poor impulse control, an extreme level of defiance, and . . . engaged in self-abusive behavior.”<sup>54</sup> He came from a violent and dysfunctional family, having witnessed his father abusing his mother and hated them both for it.<sup>55</sup> When approached by a psychologist, however, Cliff opened up to reveal an unexpected inner beauty, expressing his love for history, politics and current events as well as his impressive chess skills.<sup>56</sup> Cliff asked to be released, but the psychologist spoke with the boy's mother first.<sup>57</sup> The mother revealed her fear that Cliff would follow through with the threats he had made on her life previously, and she knew that he was able to do so.<sup>58</sup> The psychologist did not recommend that Cliff be released, so he escaped from the

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<sup>45</sup>*Id.*

<sup>46</sup>*Id.*

<sup>47</sup>*Id.*

<sup>48</sup>*Id.* at 29-30.

<sup>49</sup>*Id.* at 30.

<sup>50</sup>*Id.*

<sup>51</sup>*Id.*

<sup>52</sup>*Id.*

<sup>53</sup>*Id.* at 48.

<sup>54</sup>*Id.*

<sup>55</sup>*Id.* at 48-49.

<sup>56</sup>*Id.*

<sup>57</sup>*Id.* at 49.

<sup>58</sup>*Id.*



prison that the state had made his home and moved in with his friends.<sup>59</sup> The mother simply got a notice that he was at large.<sup>60</sup>

The stories of Dill and Cliff are probably extreme examples, certainly more so than that of Selina McBride above, yet they are effective examples of how the system fails the children for whom it is in place to serve. Dill spent his life looking for a permanent home to which he could attach himself.<sup>61</sup> He did not find this home in an adoptive or foster family, but in a state mental hospital.<sup>62</sup> Then, the state arranged for him to be taken from this place that he finally felt was home and to be placed into the home of people it had failed to investigate, people who caused irreparable damage to the poor boy.<sup>63</sup> Dill needed special care due to his unique disabilities, and instead, he was given the first care that came along.<sup>64</sup>

Cliff, on the other hand, represents a different failure of the system, a failure to help a child find closure from his old life and to begin anew in another.<sup>65</sup> Cliff was caught up in the violence of his biological family and was unable to find happiness in any placement, even with his mother.<sup>66</sup> The system must help to bring families together—even if those families are not biologically related.

#### *B. Problems Commonly Occurring in Children in Foster Care*

Many studies have been conducted to determine the effects of the foster care system on the children for whom it is in place to protect.<sup>67</sup> The results in the lives of Selina, Dill, and Cliff would probably come as little or no surprise to most of the researchers who have done these studies. The dangers posed to children in the foster care system, the lack of proper medical care for children in the foster care system,

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<sup>59</sup>*Id.* at 50.

<sup>60</sup>*Id.*

<sup>61</sup>*Id.* at 29-30.

<sup>62</sup>*Id.* at 29.

<sup>63</sup>*Id.* at 29-30.

<sup>64</sup>*Id.* at 30.

<sup>65</sup>*See generally id.* at 48-49.

<sup>66</sup>*Id.*

<sup>67</sup>*See, e.g.,* Lily T. Alpert, *Research Review: Parents' Service Experience—A Missing Element in Research on Foster Care Case Outcomes*, 10 CHILD & FAM. SOC. WORK 361 (2005); Bridgett A. Besinger et al., *Caregiver Substance Abuse Among Maltreated Children Placed in Out-of-Home Care*, 78 CHILD WELFARE 221 (1999); Bilha Davidson-Arad et al., *Why Social Workers Do Not Implement Decisions to Remove Children at Risk from Home*, 27 CHILD ABUSE & NEGLECT 687 (2003); Laurel K. Leslie et al., *Foster Care and Medicaid Managed Care*, 82 CHILD WELFARE 367 (2003); Theresa McNichol & Constance Tash, *Parental Substance Abuse and the Development of Children in Family Foster Care*, 80 CHILD WELFARE 239 (2001); Donna D. Petras et al., *Overcoming Hopelessness and Social Isolation: The ENGAGE Model for Working with Neglecting Families Toward Permanence*, 81 CHILD WELFARE 225 (2002); Heather N. Taussig et al., *Children Who Return Home from Foster Care: A 6-Year Prospective Study of Behavioral Health Outcomes in Adolescence*, 108 PEDIATRICS E10 (2001); Jenni Ward, *Substance Use Among Young People 'Looked After' by Social Services*, 5 DRUGS: EDUC., PREVENTION AND POL'Y 257 (1998).

and the short-term and long-term psychological effects of exposure to the foster care system are more than evident.<sup>68</sup>

### 1. The Dangers of the Foster Care System

One author writes that there is no way of knowing how many children in the foster care system are abused and neglected and posits that the problem is more widespread than many believe it to be.<sup>69</sup> Children in the foster care system “have been reported severely beaten and killed[,]” as well as being subjected to bizarre punishments, sexual abuse, and parental neglect.<sup>70</sup> The author cites one national study which indicates that rates of abuse in the foster care system may be more than ten times the rates of abuse for children in the general population.<sup>71</sup> Furthermore, the system fails to protect children by failing to report these abuses—one study showed that as much as 63% of cases of suspected abuse were not reported by one state agency.<sup>72</sup> Further agency failure is evinced by reports that 43% of children were placed in “an unsuitable foster home,” and 57% of children in the system “were at serious risk of harm while in foster care.”<sup>73</sup>

### 2. The Lack of Good Medical Care for Children in the Foster Care System

While all children are certainly in need of medical care, children in foster care have a greater need for medical care due to their generally lower health than any other group of children in the United States.<sup>74</sup> Common problems found by researchers included children who had not received vaccinations and children who had not even received medical examinations upon entry into the foster care system;

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<sup>68</sup>See, e.g., *supra* note 67.

<sup>69</sup>Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L. REV. 199, 205 (1988). As Deborah Martin-Grissom points out, physical abuse can be very dangerous: “Research also shows that being a victim of child abuse may result in antisocial behavior, depression, withdrawn behavior, and inappropriate sexual behavior.” Martin-Grissom, *supra* note 31, at 31 (citation omitted).

<sup>70</sup>Mushlin, *supra* note 69 at 205. For a recent incident of foster care abuse in Ohio, see Mark Puente, *Neighbor Testifies Against Gravelle*, PLAIN DEALER (Cleveland), Dec. 6, 2006, at B4. This article tells some of the details of the story of the Gravelles, foster parents who were found guilty of a number of charges, including locking their foster children in what were essentially cages. *Id.*

<sup>71</sup>Mushlin, *supra* note 69, at 206. Martin-Grissom notes that: “According to the American Academy of Pediatrics (2000), of the more than 500,000 children in foster care in the United States, most have been victims of repeated abuse and prolonged neglect and have not experienced a nurturing, stable environment during the early years of life.” Martin-Grissom, *supra* note 31, at 39.

<sup>72</sup>Mushlin, *supra* note 69, at 207.

<sup>73</sup>*Id.*

<sup>74</sup>*Id.* at 208. Martin-Grissom agrees with this sentiment: “Children in foster care also are likely to suffer from a range of acute and chronic physical health problems.” Martin-Grissom, *supra* note 31, at 42 (citation omitted).

those who did receive an examination often received an incomplete examination.<sup>75</sup> Masses of children in the foster care system are in need of vision and dental care—but the system does not provide this for them.<sup>76</sup>

### 3. Short-Term Psychological Effects of Exposure to the Foster Care System

The immediate psychological effects of exposure to the foster care system are devastating. One study indicates that as many as 90% of children in the foster care system suffer from mental health problems warranting clinical intervention.<sup>77</sup> Specifically, high rates of attachment disorders plague children in foster care due to the inability of the children in the system to develop the necessary bonds with their caregivers when they are jumping from place to place.<sup>78</sup> Another study reveals high rates of “involvement in juvenile crime and prostitution, mental and physical health problems, poor educational and employment outcomes, inadequate social support

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<sup>75</sup>Mushlin, *supra* note 69, at 208. Martin-Grissom found the following problems to be common among children in foster care: “upper respiratory infections, dermatologic disorders, dental caries, and malnutrition.” Martin-Grissom, *supra* note 31, at 42 (citation omitted).

<sup>76</sup>Mushlin, *supra* note 69, at 208-09; Martin-Grissom, *supra* note 31, at 42 (“[C]hildren in [foster] care, when compared to children not in care, were found to have higher rates of vision, hearing, growth, and dental problems.”) (citation omitted).

<sup>77</sup>Susan Vig et al., *Young Children in Foster Care: Multiple Vulnerabilities and Complex Service Needs*, 18 INFANTS & YOUNG CHILD. 147, 151 (2005). Martin-Grissom discusses the widespread nature of psychological problems in children in the foster care system:

In a research study conducted by Clausen et al. (1996), behavior problems in the clinical and borderline range were observed in foster children at a rate of *two and a half times* that expected in a community population. These researchers also noted that *75 to 80 percent* of foster children received scores either in the clinical or borderline range on one or both of the behavior problem and social competence domains. In a similar study, McIntyre and Kessler (1998), report that *61%* of the clinically disordered foster children in their sample manifested multi-symptom syndromes.

. . . . .

. . . Research documents that overall, adolescents in foster care have been exposed to a multitude of adverse conditions and stressors, which may place them at risk for developing post-traumatic stress disorder (PTSD) and substance abuse disorders.

Martin-Grissom, *supra* note 31, at 31, 45 (emphasis added).

<sup>78</sup>Vig et al., *supra* note 77, at 151. Children affected by attachment disorders display the following characteristics:

Children with insecure/ambivalent attachment are markedly distressed during separation and, upon reunion, are inconsolable, obsessed with the parent, and vacillate between the need for closeness and anger at the parent. These children alternate between angry, clingy behavior and passive resistance to physical contact. They can be recognized by their anxious behaviors, and are often diagnosed with Attention Deficit Disorder or Separation Anxiety. Children with insecure/avoidant attachment show the most confusing, contradictory behaviors, marked by two conflicting drives: approach and avoidance.

ENGLAND, *supra* note 32, at 45 (citing K. Reber, *Children at Risk for Reactive Attachment Disorder: Assessment Diagnosis and Treatment*, 5 PROGRESS: FAM. SYS. RES. & THERAPY 83). These conditions worsen with each subsequent placement and corresponding disturbance of the child’s sense of security. *Id.* By the time a child has worked through the system, there is a very good chance that they will develop one of these disorders. *Id.*

systems and early parenthood” among children in the foster care system, linked to their fragile psyches and the psychological stress of being in the foster care system.<sup>79</sup> Yet, another study has indicated that the physical and mental problems of these children may further deteriorate during their stay in the foster care system.<sup>80</sup> One study posited the following reasons for these problems:

These poor outcomes reflect a number of factors including ongoing emotional trauma resulting from experiences of abuse and neglect prior to care, inadequate support while in care, accelerated transitions to adulthood and lack of guaranteed ongoing financial and other assistance to help facilitate this transition. Young people leaving care do not currently receive the ongoing support that a good parent would be expected to provide for their children.<sup>81</sup>

The foster care system obviously poses a danger to children while they are in it—a danger that should be avoided in favor of a safer outcome whenever available.

#### 4. Long-Term Psychological Effects of Exposure to the Foster Care System

The long-term effects on children exposed to the foster care system are just as devastating as the short-term effects. A study of persons formerly in foster care, conducted in the United Kingdom, yielded disheartening results.<sup>82</sup> The study found that adults who were in the system as children were less likely than their peers who had not been in the system to achieve high social status.<sup>83</sup> The study further found that these adults were much more likely than their peers to be homeless, to have at

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<sup>79</sup>Philip Mendel & Badal Moslehuddin, *From Dependence to Interdependence: Towards Better Outcomes for Young People Leaving State Care*, 15 CHILD ABUSE REV. 110, 110 (2006). Martin-Grissom noted similar effects of the system upon children:

Many researchers have noted the emotional and psychological outcomes related to foster care placement. Dore and Eisner (1993), reported that adolescents in foster care frequently present with five dimensions of problematic psychosocial functioning, each of which reflect adverse early life experiences, (e.g., abuse, neglect, insecure early attachments, and inconsistent care giving). The dimensions are: 1) inability to tolerate intimacy, 2) impulsivity, 3) fear of rejection, 4) aggression and 5) low self esteem. Martin-Grissom, *supra* note 31, at 32.

<sup>80</sup>Martin-Grissom, *supra* note 31, at 43-44 (“While many children enter foster care with significant health, mental health and developmental problems, the foster care system itself may sometimes further exacerbate their problems.”); accord Russell M. Viner & Brent Taylor, *Adult Health and Social Outcomes of Children Who Have Been in Public Care: Population-Based Study*, 115 PEDIATRICS 894 (2005), available at <http://pediatrics.aappublications.org/cgi/reprint/115/4/894>.

<sup>81</sup>Mendel & Moslehuddin, *supra* note 79, at 110.

<sup>82</sup>See Viner & Taylor, *supra* note 80.

<sup>83</sup>*Id.* at 896. This could be due to a number of factors: [R]esearchers also reported children in foster care tend to have more difficulty with relating to others (Fashel & Shinn, 1978; Garland et al. 1996; Hulsey & White, 1989; Stein et al., 1996). Rest and Watson (1984) found that adults who had been in foster care as children tended to have difficulty with intimate relationships, a higher incidence of marital problems, and overall low self-esteem. Martin-Grissom, *supra* note 31, at 37.

least one criminal conviction, to suffer from psychological morbidity, and to have poor overall health.<sup>84</sup> Furthermore, men with a history in the system showed higher rates of unemployment and histories of mental illness, while being less likely to succeed in higher education.<sup>85</sup> Finally, women with a history in the system had high incidences of expulsion from school.<sup>86</sup>

The foster care system can have brutal effects on the children it is in place to serve. These effects last long beyond the children's exit from the foster care system. The system is designed to protect them and give them a better life, but it fails too often in this regard.

### C. National Foster Care Statistics

Determining how long a child is likely to stay in the foster care system is a complex calculation. A number of factors, including the race and age of the child, as well as the status of the child's health, might come into play.<sup>87</sup> However, a number of enlightening general figures are published by the Administration on Children, Youth and Families, a subpart of the United States Department of Health and Human Services' Administration for Children and Families.<sup>88</sup> An analysis of the data sheds some light on the overexposure to the foster care system, especially for older children.

#### 1. The Age of Children in Foster Care

The Administration for Children and Families provides large amounts of data for each fiscal year relative to trends and statistics in the foster care system nationwide and for each state.<sup>89</sup> According to the preliminary numbers for fiscal year 2004, the

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<sup>84</sup>Viner & Taylor, *supra* note 80, at 896. Martin-Grissom also speaks to the societal strain caused by adults who are products of the foster care system: "In a study by Cook, Fleishman, and Grimes (1991), which explored employment and economic stability, the authors found that 40% of their former foster care participants were a 'cost to the community' at the time of the interview, (e.g., on welfare, in jail, or on Medicaid) . . . ." Martin-Grissom, *supra* note 31, at 39.

<sup>85</sup>Viner & Taylor, *supra* note 80, at 896.

<sup>86</sup>*Id.*

<sup>87</sup>Infoplease: Adoption Trends, <http://www.infoplease.com/ipa/A0881281.html> (last visited April 8, 2008). Approximately 8% of adoptions are transracial and it is extremely difficult to adopt a healthy white baby due to long waits. *Id.* Furthermore, children with disabilities have trouble finding a home even though they need it most. *Id.*

<sup>88</sup>*See, e.g.*, UNITED STATES DEP'T OF HEALTH & HUMAN SERV., ADMIN. FOR CHILDREN & FAMILIES, CHILD WELFARE OUTCOMES 2002: ANNUAL REPORT (2002).

<sup>89</sup>*See, e.g.*, UNITED STATES DEP'T OF HEALTH & HUMAN SERVICES, ADMIN. FOR CHILDREN & FAMILIES, THE AFCARS REPORT: PRELIMINARY FY 2004 ESTIMATES AS OF JUNE 2006 (2006), available at [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/tar/report11.htm](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report11.htm) [hereinafter AFCARS 2004]; UNITED STATES DEP'T OF HEALTH & HUMAN SERV., ADMIN. FOR CHILDREN & FAMILIES, TIME BETWEEN TPR AND FINALIZATION (2005), available at [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/statistics/time05.htm](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/statistics/time05.htm) [hereinafter TIME BETWEEN TPR AND FINALIZATION].

mean<sup>90</sup> age of children in the foster care system in 2004 was 10.1, while the median<sup>91</sup> age was 10.9, with approximately 53% of children in the foster care system over the age of ten.<sup>92</sup> The mean age of entry for children in the foster care system was 8.3 years and the mean age of exit was 9.9 years.<sup>93</sup> However, the average stay in the system was 30.0 months, rather than the 1.6 years that would seem apparent given the above numbers, with 18% of the stays lasting longer than three years.<sup>94</sup> Furthermore, roughly half of the children who exited the foster care system were under the age of ten, while roughly 37% of those exiting were between the ages of fifteen and eighteen.<sup>95</sup> Approximately 27% of the children in the foster care system in 2004 had been in foster care for three or more years.<sup>96</sup>

## 2. Statistics Regarding Children Awaiting Adoption in the Foster Care System

The Adoption and Foster Care Analysis and Reporting System Report (“AFCARS Report”) also includes information specific to those children in the foster care system awaiting adoption.<sup>97</sup> The report indicates that approximately 65,000 children in foster care had parental rights terminated for all living parents in fiscal year 2004 and that 118,000 children were awaiting adoption at the end of the fiscal year; the mean years that these children had been in continuous foster care was 43.8 months.<sup>98</sup> Of these children who had been in continuous foster care, approximately 13% had been in continuous foster care for less than one year, 42% for two to three years, and 45% for three or more years.<sup>99</sup> On average, these children were five years old when they were removed from the care of their parents or other caretakers, but 12% of these children were removed after the age of ten.<sup>100</sup> Their average age was 8.8 years, with 36% between the ages of zero and five years, 25% between the ages

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<sup>90</sup>The mean of a group of numbers is essentially the average, found by adding all of the numbers, then dividing this total by the total number of things. *See*, MCAS Math – Statistics and Probability: Mean, Median, Mode and Range, <http://www.dean.tec.ma.us/MCAS/mcasmean.htm> (last visited April 8, 2008).

<sup>91</sup>The median of a group of numbers is found by listing all of the numbers in order and finding the middle number, if you have an odd number of data, or averaging the middle two if you have an even number of data. *Id.*

<sup>92</sup>AFCARS 2004, *supra* note 89.

<sup>93</sup>*Id.*

<sup>94</sup>*Id.* Ten percent of the children who exited foster care in 2004 had been in the system for three to four years, while 8% had been in the system for five years or more. *Id.*

<sup>95</sup>*See id.* Also, note that of these, 8% are children who exited the system through emancipation, not because they found a permanent placement. *Id.*

<sup>96</sup>*See id.*

<sup>97</sup>*Id.*

<sup>98</sup>*Id.*

<sup>99</sup>*Id.* For fiscal year 2004, 53,479 children had been waiting for adoption for three or more years. *Id.*

<sup>100</sup>*Id.*

of six and ten years, and 34% over the age of ten.<sup>101</sup> The average age of children adopted from the public foster care system was 6.9 years, with roughly 67% of children who were adopted out of the foster care system being under ten years of age.<sup>102</sup>

Looking solely at national averages, it is apparent that there is a nationwide problem in the foster care system. Far too many children are sitting in the system for far too long. These children have precious little hope for a permanent home. Once a child has been in the system more than three years or reaches the age of ten, or, even worse, both, his likelihood of adoption out of the system has been greatly diminished. Another door, any opportunity to find a loving, permanent home, must be afforded to these children.

#### *D. How Ohio Compares to the Rest of the Nation*

An analysis of relevant statistical data to see how Ohio's foster care statistics compare to those of the rest of the United States can best be done by looking at a report generated by the Administration for Children and Families.<sup>103</sup> This report gives data on the length of time between termination of parental rights and finalization for October 1, 2003 to September 30, 2004, comparing data from all fifty states as well as the District of Columbia and Puerto Rico.<sup>104</sup> By looking to these figures, the potential for long-term exposure to the foster care system in Ohio, and elsewhere, can be readily identified.

##### *1. Percentage of Children Reaching Finalization within Twelve Months of Entry into Foster Care*

In Ohio, 46% of children who had parental rights terminated reached finalization within twelve months.<sup>105</sup> While this figure may initially seem high, further analysis reveals that thirty-six states, as well as the District of Columbia and Puerto Rico, had a higher percentage of children reach finalization in the first year,<sup>106</sup> with Rhode Island, Wisconsin, and the District of Columbia leading the way with 85%, 84%, and 82% of children achieving finalization within the first twelve months, respectively.<sup>107</sup> Two states tied Ohio in this respect,<sup>108</sup> and only eleven states<sup>109</sup> had a lower

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<sup>101</sup>*Id.* Roughly 14,000 children fifteen years of age or older were awaiting adoption at the end of fiscal year 2004. *Id.*

<sup>102</sup>*Id.*

<sup>103</sup>TIME BETWEEN TPR AND FINALIZATION, *supra* note 89.

<sup>104</sup>*Id.*

<sup>105</sup>*See id.*

<sup>106</sup>*See id.*

<sup>107</sup>*Id.*

<sup>108</sup>*Id.* Florida and Oregon each had forty-six percent finalization within the first year. *Id.*

<sup>109</sup>Alabama, Kansas, Michigan, Minnesota, Nevada, New Jersey, New York, South Dakota, Virginia, and West Virginia all had a lower percentage of children reach finalization within the first year. *Id.* West Virginia was the lowest, with only 24% reaching finalization within one year. *Id.*

percentage of children reach finalization in less than one year.<sup>110</sup> These data clearly indicate that children who enter Ohio's foster care system subsequent to termination of parental rights are more likely to still be in the system in one year's time than they would be if they had entered the system in another jurisdiction.

## 2. Percentage of Children Reaching Finalization after Three or More Years in Foster Care

Ohio's already tarnished success rate drops even further as a child sits longer in the system, making it among the worst states for children who do not reach finalization until three or more years have elapsed, with 13% of children falling into this category.<sup>111</sup> Here, we find that forty-five states, the District of Columbia, and Puerto Rico now outperform Ohio by having a lower percentage of children reach finalization during this time frame,<sup>112</sup> with Utah and Wisconsin tying for the lowest percentage of children sitting in the system and waiting this long for finalization at 2%.<sup>113</sup> This means that only four states have a higher percentage of children not reach finalization until three or more years after termination of parental rights.<sup>114</sup> In other words, that unfortunate child who enters Ohio's foster care system hoping to find a stable home is more likely than a child who enters in almost any other jurisdiction to sit in the system for at least three years before leaving the system—and not all of those leaving are leaving to a permanent home.

### *E. The Federal Government's Assessment of Ohio's Foster Care System's Performance*

In addition to publishing the statistical data for each state, the federal government also includes a section wherein it discusses how each state compares to the rest of the nation and to its past performance in a number of categories which it deems important.<sup>115</sup> Of the seven categories considered by the federal government, five are important to consider in this Note.<sup>116</sup> Of these five, two relate to the physical safety

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<sup>110</sup>*Id.*

<sup>111</sup>*Id.*

<sup>112</sup>*See id.*

<sup>113</sup>*Id.*

<sup>114</sup>Maryland, Minnesota, New York, and Virginia all had a higher percentage of children wait until three or more years had elapsed prior to finalization. *Id.* Minnesota had the highest percentage at 16%. *Id.*

<sup>115</sup>*See* UNITED STATES DEP'T OF HEALTH & HUMAN SERV., ADMIN. FOR CHILDREN & FAMILIES, CHILD WELFARE OUTCOMES 2003: OHIO, available at [http://www.acf.hhs.gov/programs/cb/pubs/cwo03/state\\_data/ohio.htm](http://www.acf.hhs.gov/programs/cb/pubs/cwo03/state_data/ohio.htm).

<sup>116</sup>This Note will not discuss Ohio's performance in category four ("Reduce Time to Reunification Without [sic] Increasing Re-entry") as this Note deals more specifically with cases where reunification with parents is not the ultimate goal. *Id.* Also, this Note will not discuss Ohio's performance in category seven ("Reduce Placements of Young Children in Group Homes of Institutions") as this does not directly speak to the problems discussed in this Note. *Id.*



of children in Ohio's foster care system, while the other three relate to foster care outcomes.<sup>117</sup>

The two outcomes that relate to physical safety of children in foster care deal with reducing the incidence of abuse and neglect and reducing the recurrence of abuse and neglect for children in the foster care system.<sup>118</sup> When it comes to reduction of the incidence of abuse and neglect, Ohio has both pros and cons—the incidence of abuse is slightly less than the national median,<sup>119</sup> but this “represents a decline in performance from 2001 to 2003 . . . .”<sup>120</sup> The figures look even more dim when looking at the recurrence rates, as it is initially noted that more children in Ohio who were “victims of maltreatment during the first 6 months of the year experienced another maltreatment incident within a 6-month period . . . .” than the national median.<sup>121</sup> Furthermore, the comments note that Ohio had a “relatively high child maltreatment victim rate.”<sup>122</sup>

As to the program outcomes, Ohio again offers both good and bad results. On a positive note, Ohio performed well on placement stability, which indicates that children in Ohio's foster care system may be less likely to have multiple placements.<sup>123</sup> Children awaiting adoption also tended to be more likely to reach adoption within a twenty-four month period in Ohio than the national median.<sup>124</sup> However, Ohio did not fare so well when it came to “[i]ncreas[ing] permanency for children in foster care . . . .”<sup>125</sup> Less children exiting the foster care system in Ohio were leaving to a permanent home than the national median,<sup>126</sup> and specifically, less

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<sup>117</sup>*Id.* Outcomes one and two relate to abuse and neglect of children in foster care, while outcomes three, five, and six relate to permanency, time in foster care, and placement stability, respectively. *Id.*

<sup>118</sup>*Id.*

<sup>119</sup>*Id.* In Ohio, “0.30 percent of the children in foster care were found to be maltreated by a foster parent or facility staff member . . . [while] the national median [was] 0.39 percent . . . .” *Id.*

<sup>120</sup>*Id.*

<sup>121</sup>*Id.* Ohio was at 8.4% recurrence, while the national median was 7.1%. *Id.*

<sup>122</sup>*Id.* “In 2003, the child maltreatment victim rate in Ohio was 16.9 child victims per 1,000 children in the State population . . . the national median [was] 10.6 child victims per 1,000 children in the population.” *Id.* However, Ohio did improve over the period between 2000 and 2003, as the rate was 18.8 per 1,000 in 2000. *Id.*

<sup>123</sup>*Id.*

85.9 percent of the children in foster care in Ohio for less than twelve months experienced no more than two placement settings . . . which is slightly higher than the national median of 84.2 percent. Also . . . 62.0 percent of the children in foster care for at least 12 months, but less than 24 months, experienced no more than two placement settings, which exceeds the national median of 59.1 percent.

*Id.*

<sup>124</sup>*Id.*

<sup>125</sup>*Id.*

<sup>126</sup>*Id.* In Ohio, 83.1% of children exited to a permanent home, while the national median was 86.3%. *Id.*

children with disabilities who exited the system did so to a permanent home.<sup>127</sup> Finally, children who entered the system after the age of twelve were even less likely to leave to a permanent home.<sup>128</sup>

#### F. What Does This All Mean?

Clearly, the above data show a number of things. First of all, it demonstrates that exposure to the foster care system can have negative effects on a child, including developmental, emotional, physical, or mental effects. It also shows that children who enter the system are apt to stay in the system. The longer that a child has been in, or the later in his life that he enters the system, the less likely he is to leave the system into a permanent home. The combination of these factors can lead to only one conclusion: the law ought to provide as many means as possible to allow children to escape from the system into a safe and permanent environment.

### III. THE STATUTORY FRAMEWORK: OHIO AND BEYOND

#### A. Ohio Statutes and Rules

The Ohio Revised Code mandates protection of the best interests of children in a plethora situations.<sup>129</sup> There are currently no less than fifty-nine provisions of the Ohio Revised Code that refer to the “best interest” of the child.<sup>130</sup> These provisions span various subject areas, from corporations<sup>131</sup> and labor and industry,<sup>132</sup> which might not be as readily expected, to areas such as juvenile court proceedings<sup>133</sup> and domestic relations.<sup>134</sup> The Ohio Rules of Civil Procedure<sup>135</sup> and the Ohio Rules of Juvenile Procedure<sup>136</sup> also indicate the deference given to the best interests of the child. Furthermore, the local rules of multiple Ohio’s Courts of Common Pleas make references to the best interest of the child.<sup>137</sup> The theme is pervasive: the General Assembly, through enacting the various sections of the Code cited above,

<sup>127</sup>*Id.* In Ohio, 76.4% of the disabled children who exited foster care went to a permanent home, while 79.5% was the national median for this same group. *Id.*

<sup>128</sup>*Id.* In Ohio, 61.7% of children left to a permanent home, while the national median was 72.2%. *Id.*

<sup>129</sup>*See supra* note 27 (listing some sections of the Ohio Revised Code that require the court to consider the best interests of the child).

<sup>130</sup>*Id.*

<sup>131</sup>*See, e.g.,* OHIO REV. CODE ANN. § 1717.14 (LexisNexis 2007).

<sup>132</sup>*See, e.g., id.* § 4109.06.

<sup>133</sup>*See, e.g., id.* tit. 21.

<sup>134</sup>*See, e.g., id.* tit. 31.

<sup>135</sup>*See, e.g.,* OHIO R. CIV. P. 75.

<sup>136</sup>*See, e.g.,* OHIO JUV. R. 4, 6, 9, 13, 14, 29, 34, 38.

<sup>137</sup>*See, e.g.,* OHIO CUYAHOGA COUNTY DOM. REL. DIV LR 32; OHIO FRANKLIN COUNTY DOM. REL. DIV. LR 15, OHIO HAMILTON COUNTY DOM. REL. DIV. LR 2.1; OHIO MONTGOMERY COUNTY DOM. REL. DIV. LR 4.29; OHIO STARK COUNTY FAM. CT. DIV. LR 17; OHIO SUMMIT COUNTY DOM. REL. DIV. LR 26.

has shown its sincere desire to protect the best interest of the children who must be exposed to the legal system; the courts of this state are obligated to heed to their call and utilize the auspices of their offices to further this protectionist scheme in the best interests of the children that the courts are in place to serve.<sup>138</sup>

### 1. Termination of Parental Rights

Ohio has procedures to be followed when the state believes that termination of parental rights is necessary.<sup>139</sup> Termination of parental rights is generally a last resort effort and is used to free a child for adoption.<sup>140</sup> For example, the state must make reasonable efforts to reunite the family prior to initiating a termination proceeding.<sup>141</sup> However, if those reasonable efforts are unsuccessful, the state must proceed with termination proceedings.<sup>142</sup>

There are a number of procedural safeguards in place to protect the rights of parents in a termination proceeding. These safeguards include such things as notice to all necessary parties (which can be particularly difficult with unknown fathers) and appointment of counsel for parents whose rights are being reviewed by the court.<sup>143</sup> While the court is to protect the rights and interests of the parents, the main purpose of the proceeding is to protect the best interests of the child or children involved.<sup>144</sup>

To this end, there are different events that may lead to termination of parental rights in the state of Ohio. As a precursor, the court must first find that it would be in the best interests of the child to have the parent's rights terminated, and then the occurrence of any one of four situations will allow termination of the parent's rights.<sup>145</sup> First of all, if "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[.]" the court may enter an order terminating parental rights.<sup>146</sup> Additionally, if the child has been

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<sup>138</sup>*Gishwiler v. Dodez*, 4 Ohio St. 615, 617 (Ohio 1855) ("[T]he order of the court should be made with a single reference to [the child's] best interests.").

<sup>139</sup>*See, e.g.*, OHIO REV. CODE ANN. §§ 2151.414, 2151.353 (LexisNexis 2007); *see also* Cecilia Fiermonte & Jennifer L. Renne, *Making it Permanent: Reasonable Efforts to Finalize Permanency Plans for Foster Children* 27-31 (Claire Sandt ed., 2002) (discussing, generally, steps to aid in the termination of parental rights).

<sup>140</sup>*See* FIERMONTE & RENNE, *supra* note 139, at 27 ("[T]erminat[ing] parental rights is the first step toward adoption.").

<sup>141</sup>*See* OHIO REV. CODE ANN. § 2151.414 (LexisNexis 2007); *Santosky v. Kramer*, 455 U.S. 745, 748 (1982) ("At the factfinding hearing, the State must establish, among other things, that for more than a year after the child entered state custody, the agency 'made diligent efforts to encourage and strengthen the parental relationship.'" (quoting N.Y. FAM. CT. ACT §§ 614.1(c), 611 (McKinney 2006))).

<sup>142</sup>*See* OHIO REV. CODE ANN. § 2151.414 (B)(2) (LexisNexis 2007).

<sup>143</sup>*See id.* §§ 2151.353 (I)(1)-(4), 2151.414 (A)(1); FIERMONTE & RENNE, *supra* note 139, at 27-31.

<sup>144</sup>*See* OHIO REV. CODE ANN. §§ 2151.353, 2151.414 (A)(1) (LexisNexis 2007).

<sup>145</sup>*See id.* § 2151.414(B)(1)(a)-(d); *see also id.* § 2151.353(A)(4).

<sup>146</sup>*Id.* § 2151.414(B)(1)(a).

either abandoned or orphaned, with no relatives available to take permanent custody of the child, the court may intervene.<sup>147</sup> Finally, if “[t]he 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 . . . [.]” the court may terminate parental rights.<sup>148</sup>

## 2. Procedures Subsequent to Termination of Parental Rights

In deciding *McBride* and holding that a parent whose parental rights have been terminated may not subsequently petition for custody of that child,<sup>149</sup> the Ohio Supreme Court considered two Ohio Statutes.<sup>150</sup> Ohio Revised Code Section 2151.353 requires the court to consider “the best interest of the child” in a number of subsections,<sup>151</sup> but subsection (E)(2), upon which the Court relied, does not direct the courts to determine what is in the best interest of the child.<sup>152</sup> Section 2151.414 is in the same vein, containing several references to the best interest of the child,<sup>153</sup> but the best interests of the child are not considered by the subsection relied upon by the Court.<sup>154</sup> This Note will discuss the impact of Ohio Revised Code Section 2151.313

<sup>147</sup>*Id.* § 2151.414(B)(1)(b)-(c).

<sup>148</sup>*Id.* § 2151.414(B)(1)(d).

<sup>149</sup>*In re McBride*, 850 N.E.2d 43, 45 (Ohio 2006), *rev’g* 817 N.E.2d 459 (Ohio Ct. App. 2004).

<sup>150</sup>*Id.* The two statutes considered were sections 2151.353(E)(2) and 2151.414(F). *Id.*

<sup>151</sup>*See, e.g.*, OHIO REV. CODE ANN. § 2151.353(A)(4), (C)(3) (LexisNexis 2007); *see also* OHIO REV. CODE ANN. § 2151.353(G)(1)(a)-(b) (LexisNexis 2007) (referring to the “child’s best interest”).

<sup>152</sup>The text of the subsection is as follows:

Any public children services agency, any private child placing agency, the department of job and family services, or any party, other than any parent whose parental rights with respect to the child have been terminated pursuant to an order issued under division (A) (4) of this section, by filing a motion with the court, may at any time request the court to modify or terminate any order of disposition issued pursuant to division (A) of this section or section 2151.414 or 2151.415 of the Revised Code. The court shall hold a hearing upon the motion as if the hearing were the original dispositional hearing and shall give all parties to the action and the guardian ad litem notice of the hearing pursuant to the Juvenile Rules. If applicable, the court shall comply with section 2151.42 of the Revised Code.

OHIO REV. CODE ANN. § 2151.353(E)(2) (LexisNexis 2007).

<sup>153</sup>*See, e.g., id.* § 2151.414(A)(1), (B)(1)-(2).

<sup>154</sup>The text of the subsection is as follows:

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

*Id.* § 2151.414(F). The lack of reference to the best interest of the child in this section is negligible in the analysis, however, since the quoted language is intended to apply at the time of termination of parental rights, whereas this Note is concerned with a time in the future. The recommendation below will account for the necessity of allowing the terminated parent to

on the result in *McBride* and a recommendation of how to correct the statutory language to prevent future injustice.<sup>155</sup>

While this statute, governing disposition of termination proceedings,<sup>156</sup> certainly aims to protect the best interest of the child during the proceedings and at the time of the termination of parental rights, its treatment of the child's best interests after the termination is insufficient. Certainly in the vast majority of cases, a parent who has had her parental rights terminated is not likely to ever come to the point in her life where the child should be returned to her care.<sup>157</sup> But, what happens when a parent *does* change,<sup>158</sup> and the child is still left in a system that has failed him for years?

As the court in *McBride* noted, the disposition statute "specifically prohibits [the parent whose rights have been terminated] from requesting a modification or termination of permanent custody."<sup>159</sup> This result is undoubtedly mandated by the statutory language, but is it the proper result for this matter? Justice Lanziger, writing for a unanimous court, left an indication that it might not be the ideal outcome, concluding his analysis by stating that the Court was simply "following the statutes as they are written."<sup>160</sup> The court is limited in duty to interpreting the statutes that the General Assembly promulgates and cannot of its own initiative promulgate its own statutory scheme.<sup>161</sup>

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reenter the litigation as a named party through the proposed revisions to section 2151.353(E)(2).

<sup>155</sup>Ohio Revised Code Section 2151.353 is of little importance in this Note, as it deals with the question of who may be party to an action. Its failure to protect the best interest of the child in a matter such as this can quite easily be corrected by adopting the recommended changes to the list of persons and entities who may petition for custody of a child after a termination of parental rights, which are proposed below. Allowing the parent to enter into a new proceeding in a manner analogous to that of adoption would make this a moot point. Currently, Ohio law allows a party petitioning for adoption to file a petition "styled, 'in the matter of adoption of [name of child],' " thus, creating a new action, rather than filing under the older action wherein the parental rights had been terminated, as Peggy Fugate had done. *Id.* § 3107.04.

<sup>156</sup>*See id.* § 2151.353.

<sup>157</sup>Parental rights may be terminated for a number of reasons, including, *inter alia*, abuse, neglect, and incarceration, and failure to follow a case plan developed by the local children's service agency. *Id.* § 2151.414.

<sup>158</sup>Recall the Ohio Appellate judge's assertion that "our court/justice/legal/moral system supposes that people can change." *In re McBride*, 817 N.E.2d 459, 461 (Ohio Ct. App. 2004), *rev'd*, 850 N.E.2d 43 (Ohio 2006).

<sup>159</sup>*In re McBride*, 850 N.E.2d 43, 46 (Ohio 2006), *rev'g* 817 N.E.2d 459 (Ohio Ct. App. 2004).

<sup>160</sup>*Id.* at 47.

<sup>161</sup>*Id.*

### 3. The Best Interests of the Child

Several provisions of the Ohio Revised Code provide factors to be considered when making a “best interest” determination.<sup>162</sup> For example, section 2151.414(D) lists factors for the court to consider when determining if termination of parental rights is in the best interest of the child:

- (1) The interaction and interrelationship of the child with the child’s parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child;
- (2) The wishes of the child, as expressed directly by the child or through the child’s guardian ad litem, with due regard for the maturity of the child;
- (3) The custodial history of the child, including whether the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two month period . . .;
- (4) The child’s need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency;
- (5) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.

These types of factors can very easily be adapted to apply in the opposite analysis—as factors to consider whether reinstatement of parental rights would be in the best interest of the child.

#### *B. Is Ohio Alone in Its Treatment of Parents Whose Rights Have Been Terminated?*

All states have statutory mechanisms in place for termination of parental rights and the procedures to be followed by the courts subsequent to termination of parental rights. However, the rules governing these proceedings vary greatly. These types of statutes and rules generally fall into one of three categories: those that do not allow a parent to regain parental rights subsequent to termination, those that are silent or unclear on the question,<sup>163</sup> and those that do allow a parent to regain parental rights

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<sup>162</sup>*See, e.g.*, OHIO REV. CODE ANN. § 2151.414 (LexisNexis 2007) (setting forth a list of factors to be considered when determining whether termination of parental rights is in the best interests of the child or children involved); OHIO REV. CODE ANN. § 3109.04 (LexisNexis 2007) (setting forth a list of factors to be considered when determining whether shared parenting is in the best interests of the child or children involved); OHIO REV. CODE ANN. § 3109.051 (LexisNexis 2007) (setting forth a list of factors to be considered when determining whether an order granting parenting time or companionship time, or visitation rights are in the best interests of the child or children involved).

<sup>163</sup>These states will not be discussed in this Note, as their individual ambiguity lends no clue as to the efficacy of statutes for and against reinstatement of parental rights. Included in the states that do not speak of the issue or are too ambiguous to be interpreted as speaking to the issue are Alabama, Alaska, Arkansas, Connecticut, Florida, Kansas, Kentucky, Louisiana,

subsequent to termination. Statutes denying parents any future opportunity for reinstatement of parental rights and those granting the opportunity for reinstatement will be considered in turn.

### 1. Statutes Denying a Parent the Opportunity to Have Parental Rights Reinstated

There are a number of mechanisms used to bar a parent from regaining parental rights once those rights have been severed. No fewer than ten jurisdictions<sup>164</sup> utilize a clause denying the parent whose rights have been terminated “any right to object to the adoption or otherwise participate in the adoption proceedings”<sup>165</sup> as an initial mechanism to deny a parent from re-entering the child’s life.<sup>166</sup> Other states impose a time limit for all challenges to orders terminating parental rights.<sup>167</sup> At least one state appears to deny a parent whose rights have been terminated any option to challenge the ruling at all, aside from appellate review.<sup>168</sup> One state denies courts the power to set aside an order terminating parental rights.<sup>169</sup> Oregon appears to have one of the strictest statutes, which acts to strip the parent of standing for any type of future proceeding regarding the child for whom the parent has been stripped of parental rights by the court.<sup>170</sup>

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Maryland, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, South Dakota, Vermont, Washington, and Wisconsin.

<sup>164</sup>Colorado (COLO. REV. STAT. § 19-3-606 (2007)), District of Columbia (D.C. CODE ANN. § 16-2361 (LexisNexis 2007)), Georgia (GA. CODE ANN. § 15-11-93 (2007)), Maine (ME REV. STAT. ANN. tit. 22, § 4056 (2007)), Montana (MONT. CODE ANN. § 42-2-611 (2007)), New Mexico (N.M. STAT. ANN. § 32A-4-29 (LexisNexis 2007)), North Carolina (N.C. GEN. STAT. § 7B-1112 (2007)), North Dakota (N.D. CENT. CODE § 27-20-46 (2007)), Utah (UTAH CODE ANN. § 78-3a-413 (2007)), and Wyoming (WYO. STAT. ANN. § 14-2-317 (2007)).

<sup>165</sup>WYO. STAT. ANN. § 14-2-317(b) (2007).

<sup>166</sup>Remember that the process sought by Ms. Fugate’s attorney, which is practically synonymous with the recommendation contained herein, argues for a proceeding similar to an adoption proceeding. Statutes such as this could be argued as a bar to proceedings in this nature.

<sup>167</sup>*See, e.g.*, DEL. CODE ANN. tit. 13, § 1108 (2007) (six months); N.D. CENT. CODE § 27-20-45 (2007) (30 days); OKLA. STAT. ANN. tit. 10, § 7505-7.2 (West 2007) (three months); R.I. GEN. LAWS § 15-7-21.1 (2007) (180 days); TEXAS FAM. CODE ANN. § 161.211 (Vernon 2007) (one year).

<sup>168</sup>ME REV. STAT. ANN. tit. 22, § 4038 (2007).

<sup>169</sup>NEV. REV. STAT. ANN. § 128.120 (LexisNexis 2007); *but see* § 128.160 (allowing a parent whose rights have been terminated to petition the court to set aside a subsequent adoption of that child).

<sup>170</sup>OR. REV. STAT. § 419B.524 (2007).

## 2. Statutes Permitting a Parent to Have Parental Rights Reinstated<sup>171</sup>

A select few jurisdictions allow a parent a method by which they may be able to have parental rights reinstated. Each of these states has a slightly different approach to the subject, although all have similar practical effects. These statutes are in some ways analogous to the recommendations presented below, although none achieve these results in the same way, nor as effectively.<sup>172</sup>

The first state to be considered is Tennessee.<sup>173</sup> This is the most difficult of the states to evaluate regarding a parent's ability to have parental rights reinstated subsequent to termination. To get to that point, two statutes must be considered. First, remembering the analogy between reinstatement and adoption, the Tennessee legislature has enacted a statute that provides that *any* party may file a petition for adoption.<sup>174</sup> Taken alone, this is hardly grounds for celebration. However, another Tennessee statute makes it illegal for a person whose parental rights have been terminated to obtain custody of the child "otherwise than by legal process."<sup>175</sup> Read together, these statutes indicate that a parent whose parental rights have been terminated has a legal procedure available to her, in the state of Tennessee, to have her rights reinstated as to that child. However, this difficult use of two sections is a weak point for a parent who truly desires to pursue this type of proceeding. While Tennessee has taken some vague steps in the right direction, it has not quite solved the problem.

The next instance of a state allowing a parent to regain parental rights subsequent to termination presents an innovative approach to the problem, with a rule mirrored by no other state. The California legislature enacted a statute containing the following provision:

A child who has not been adopted after the passage of at least three years from the date the court terminated parental rights and for whom the court has determined that adoption is no longer the permanent plan may petition the juvenile court to reinstate parental rights pursuant to the procedure prescribed by Section 388.<sup>176</sup>

Accordingly, a child may petition for reinstatement of the parent's rights in the state of California, while the parent himself may not do so. Such a petition will be considered in light of numerous statutory factors, including the likelihood of adoption of the child and the need for permanency, related to the best interests of the

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<sup>171</sup>Most states do allow a state agency to petition for rights on behalf of a parent whose rights have been terminated, however, such an occurrence is so unlikely to be pursued by the state agency as to render it essentially a moot point.

<sup>172</sup>This is true both because the recommendation is tailored specifically to the needs arising under Ohio law and because the solution proposed herein is a more comprehensive solution rather than a general statutory framework.

<sup>173</sup>We will consider two Tennessee statutes, TENN. CODE ANN. §§ 36-1-115 and 36-1-123 (2007).

<sup>174</sup>*Id.* § 36-1-115.

<sup>175</sup>*Id.* § 36-1-123.

<sup>176</sup>CAL. FAM. CODE § 366.26(i)(2) (West 2007).



child.<sup>177</sup> Again, the legislature has taken a step in the right direction, but has failed to reach a place that will truly protect the best interests of the child. This solution necessarily requires the child to have to choose, prior to any inquiry into the best interests of that child, that he would like to return to the care of a parent. However, if the proceeding does not turn out in the child's favor, the damage done to his already fragile emotional state, caused by additional exposure to the court system, is certainly not in that child's best interests.

The legislature of Nevada has provided yet another interesting twist. As noted above, Nevada law does not allow a court to set aside an order terminating parental rights.<sup>178</sup> However, the legislature does provide a mechanism whereby a parent who has had their rights terminated may petition to have the court order terminating parental rights set aside after a decree of adoption has been issued awarding custody of the child to another party.<sup>179</sup> At a hearing on a petition of this nature, the court is compelled to look into whether returning the child to the biological parent would be in the child's best interests.<sup>180</sup> This statute, however, fails to truly promise permanency, as it allows the parent to interfere after the child has finally found placement in a permanent home. A proceeding of this nature could have devastating effects on the child's mental and emotional health.

The North Dakota legislature shows both the recognition of the dangers of long-term exposure and understanding of the importance of permanency for the child, but has implemented procedural safeguards to protect the child.<sup>181</sup> Under this statute, the "order terminating parental rights . . . may be vacated by the court upon motion of the parent *if the child is not on placement for adoption and the person having custody of the child consents . . .*"<sup>182</sup> These safeguards, while enacted with good intentions, probably are not the most effective means of protecting the child's best interests. Under this statutory approach, if the child is up for adoption, even if the chances for adoption are slim, the parent cannot intervene to save the child from the system.<sup>183</sup> Furthermore, the person having custody of the child, whose consent is necessary for the parent to regain parental rights, may be biased against the parent, since the custodian likely received custody of the child in the proceeding that terminated the parent's rights.<sup>184</sup>

The West Virginia legislature has demonstrated compassion for the best interests of the children of its state by enacting a statute that allows for a parent to make a motion to modify an order terminating parental rights.<sup>185</sup> This statute requires the

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<sup>177</sup>*Id.*

<sup>178</sup>*See supra* note 169.

<sup>179</sup>*See* NEV. REV. STAT. ANN. § 128.160 (LexisNexis 2007).

<sup>180</sup>*Id.* The statute mandates a presumption that "remaining in the home of the adopting parent is in the child's best interest." *Id.*

<sup>181</sup>N.D. CENT. CODE § 27-20-37 (2007).

<sup>182</sup>*Id.* (emphasis added).

<sup>183</sup>*Id.*

<sup>184</sup>*Id.*

<sup>185</sup>W. VA. CODE ANN. § 49-6-6 (LexisNexis 2007). This section also allows the state agency to make the petition. *Id.*

moving party to demonstrate a change of circumstances warranting modification of the previous order.<sup>186</sup> The only apparent limitation upon this protection is that the order “shall not be modified after the child has been adopted.”<sup>187</sup> With this caveat, the legislature has shown its understanding of the importance of permanency in a child’s home life, however, it has not taken the comprehensive approach truly necessary to correct this problem.

Finally, the statutory framework adopted by the Hawaii legislature appears to be among the most in tune with the child’s best interest. The Hawaiian approach to the problem at hand is sensitive to the needs of children in the system.<sup>188</sup> The statute, in relevant part, contains the following provision:

[A]t any time following the expiration of one year from the date of the entry of any such judgment of termination of parental rights, upon the motion of the parent or parents of the child or the department of human services or any child-placing organization approved by the department or any other proper person, based upon the fact that the child has not been adopted or placed in a prospective adoptive home, the court in which the judgment was entered shall review the same and shall consider the currently reported circumstances of the child and of the parent or parents and shall enter its findings as to whether the circumstances, and the present best interests of the child, justify the continuance of the judgment.<sup>189</sup>

This section grants the court the discretion to consider a number of best interests factors, some of which are mandated in the statute itself, in determining if reuniting the child with the parent is appropriate if the child has sat in the foster care system for only a single year.<sup>190</sup> Clearly, the Hawaiian legislature was aware of the dangers of long-term exposure to the foster care system and was willing to recognize the necessity of providing safeguards for the children of that state who must be exposed to the foster care system.

#### IV. CASE LAW

The courts of Ohio have been called upon countless times to make determinations regarding children and, in many of those instances, the best of interests of children. The best interests of a child were first considered by the Ohio Supreme Court over 120 years ago.<sup>191</sup> Since that time, the Ohio Supreme Court has shaped and defined the phrase through a multitude of judicial opinions. While the

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<sup>186</sup>*Id.*

<sup>187</sup>*Id.*

<sup>188</sup>HAW. REV. STAT. ANN. § 571-63 (LexisNexis 2007).

<sup>189</sup>*Id.*

<sup>190</sup>*Id.*

<sup>191</sup>*Gishwiler v. Dodez*, 4 Ohio St. 615, 617 (Ohio 1885) (“[T]he order of the court should be made with a single reference to [the child’s] best interests.”). The case involved a custody dispute, which the court resolved in favor of the mother of the child, over the father’s assertion that he had the sovereign authority over his child. *Id.* *Gishwiler* is still cited for the proposition that the best interests of the child should be paramount under Ohio law.

composition of the Court has fluctuated, deference for the best interests of a child has remained the same from 1885<sup>192</sup> up through today.<sup>193</sup>

The application of the best interests concept has been seen in a number of contexts, spanning from determination of parental rights and responsibilities amongst parties to a divorce,<sup>194</sup> to whether a child's relatives should have visitation rights with the child,<sup>195</sup> and even to determination of whether a child's surname should be changed.<sup>196</sup> Of particular significance to the issue at hand, the best interests of the child are held by the Ohio Supreme Court to be of the utmost importance in determining whether termination of parental rights is appropriate under the circumstances.<sup>197</sup> One Ohio Supreme Court Justice has even gone so far as to write that "[t]he ultimate responsibility is on the judge to proceed in the best interests of the children."<sup>198</sup> Clearly, the Ohio Supreme Court considers children's best interests to be a crucial inquiry.

When faced with the case of Selina McBride, however, the Ohio Supreme Court did not consider her best interests. Selina came before the Ohio Supreme Court at the culmination of a long, sad story, beginning in a courtroom where her mother's parental rights were terminated and finding its way back into the courts when her mother tried to save her from a life of perpetual confinement to a system that had

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<sup>192</sup>*See, e.g., id.*

<sup>193</sup>*See, e.g., Children's Home of Marion County v. Fetter*, 106 N.E. 761, 766 (Ohio 1914) ("The presumption is that the juvenile court of Marion county, when it committed Howard Fetter to the Children's Home, was acting with reference to the best interests and welfare of the child."); *Trickey v. Trickey*, 106 N.E.2d 772, 774 (Ohio 1952) ("[The trial judge] evidenced sincere concern for the welfare and best interests of the child and acted only after deliberation."); *In re Cunningham*, 391 N.E.2d 1034, 1038 (Ohio 1979) ("Such an interpretation of the statute is consistent with the time-honored precedent in this state that the 'best interests' of the child are the primary consideration in questions of possession or custody of children."); *In re Schaefer*, 857 N.E.2d 532, 538 (Ohio 2006) ("A court must conclude by clear and convincing evidence that an assignment of permanent custody is in the best interest of the child.").

<sup>194</sup>*See, e.g., Kelm v. Kelm*, 749 N.E.2d 299, 303 (Ohio 2001) ("With respect to matters of custody and visitation, the central focus is not, as appellant suggests, the rights of the parents but is, rather, the best interests of the children.").

<sup>195</sup>*See, e.g., Harrold v. Collier*, 836 N.E.2d 1165, 1172 (Ohio 2005) ("The court ultimately decided that Brittany's best interests in maintaining her relationship with [her grandparents] outweighed [her parent's] desire for no visitation.").

<sup>196</sup>*See, e.g., In re Willhite*, 706 N.E.2d 778, 782 (Ohio 1999) ("We hold that when deciding whether to permit a name change for a minor child pursuant to R.C. 2717.01(A), the trial court must consider the best interest of the child in determining whether reasonable and proper cause has been established.").

<sup>197</sup>*See, e.g., In re C.W.*, 818 N.E.2d 1176, 1178 (Ohio 2004) ("[B]efore a court can grant permanent custody to the moving agency, it must 'determine[e] . . . , 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 . . . .'" (quoting OHIO REV. CODE ANN. § 2151.414(B)(1) (LexisNexis 2007))).

<sup>198</sup>*Office of Disciplinary Counsel v. Karto*, 760 N.E.2d 412, 420 (Ohio 2002) (Pfeifer, J., dissenting).

failed her on so many occasions.<sup>199</sup> Little Selina had spent most of her life in the system, a system that her mother had believed was the safest option for the child.<sup>200</sup> However, time passed and the system failed to achieve a permanent placement for Selina, but instead placed her in a group home.<sup>201</sup> She ran away frequently and had trouble with the law on occasion.<sup>202</sup> Her mother wanted to save her from this negative lifestyle, so she petitioned the Juvenile Court for custody of her daughter.<sup>203</sup> Selina's safety and interests apparently were at the forefront of the Juvenile Court's analysis, as it ruled that Peggy should at least be allowed the opportunity to present her argument as to why granting custody of Selina to Peggy would be in the child's best interests.<sup>204</sup>

The appellate court agreed with the decision of the juvenile court, which had decided the case under its mistaken belief that there was no statute or precedent to guide in the decision.<sup>205</sup> The appellate court remembered the importance of the best interests of the child in the judicial scheme, stating that, "[i]n hearing her petition, the court will focus primarily on the events of the past seven years, and, most importantly, on *what will now be in Selina's best interests*."<sup>206</sup> The appellate court would have allowed Fugate the opportunity to at least present evidence that a life with her was in Selina's best interest.<sup>207</sup> Up until this point in the case, the judicial system had acted in a manner consistent with its tradition of protecting, above all else, the best interests of the children for whom it was in place to serve.

The Ohio Supreme Court's opinion in *McBride* lacks that magic little phrase.<sup>208</sup> The Ohio Supreme Court held that Fugate was not allowed even the opportunity to attempt to convince the Juvenile Court that Selina's best interests should be considered, regardless of the party asking it to do so.<sup>209</sup> Why the discrepancy? The Ohio Supreme Court's opinion rests on an application of two sections of the Ohio Revised Code.<sup>210</sup> These sections of the Ohio Revised Code govern disposition of

<sup>199</sup>See generally *In re McBride*, 850 N.E.2d 43 (Ohio 2006), *rev'g*, 817 N.E.2d 459 (Ohio Ct. App. 2004); see also Coolidge, *Daughter She Lost*, *supra* note 1.

<sup>200</sup>See Coolidge, *Remade Life*, *supra* note 8.

<sup>201</sup>*Id.*

<sup>202</sup>*Id.*

<sup>203</sup>*In re McBride*, 817 N.E.2d 459, 461 (Ohio Ct. App. 2004), *rev'd*, 850 N.E.2d 43 (Ohio 2006).

<sup>204</sup>*Id.*

<sup>205</sup>*Id.*

<sup>206</sup>*Id.* (emphasis added).

<sup>207</sup>*Id.* at 462.

<sup>208</sup>*In re McBride*, 850 N.E.2d 43 (Ohio 2006), *rev'g*, 817 N.E.2d 459 (Ohio Ct. App. 2004). The court barred Peggy from petitioning for custody of her daughter based on an analysis of two statutes, neither of which required, or even suggested, that the court consider the best interests of the child. *Id.*

<sup>209</sup>*Id.* at 47.

<sup>210</sup>*Id.* at Syllabus. For a full discussion of the statutory scheme, see *supra* Part III.

abused, neglected, or dependent children<sup>211</sup> and procedures upon motion for permanent custody of a child.<sup>212</sup> The first section is cited by the Ohio Supreme Court as barring Fugate's attempt to petition for custody of her daughter because she is not on the statutory list of persons and entities who may make such a petition.<sup>213</sup> The second section is cited for the proposition that Fugate was a non-party to the action, and therefore, lacked standing to file the petition in the Juvenile Court under the original case number.<sup>214</sup> On the basis of these two statutes, the Court "h[e]ld that a parent who has lost permanent custody of a child does not have standing as a nonparent to file a petition for custody of that child."<sup>215</sup>

Where, though, did the best interests fall to the wayside? The Ohio Supreme Court had a tremendous track record, spanning over 120 years, of protecting the best interests of children who unfortunately had found their way into the court system.<sup>216</sup> Yet, when it came time to decide *McBride*, the Ohio Supreme Court was silent on the best interests of Selina.<sup>217</sup> Never once did the Court say in the opinion that the outcome would protect the best interests of Selina or that the statute was designed to protect the best interests of Selina.<sup>218</sup> This is because the Court is in place to interpret the laws as given to them.<sup>219</sup> The above discussion of the statutory language shows that, indeed, the Ohio Supreme Court was bound by the language of the statutes involved, and the outcome, while tragic, was probably right.<sup>220</sup> This is not a problem that should be corrected by the courts; this problem can only be corrected by the Ohio General Assembly through statutory reform.

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<sup>211</sup>OHIO REV. CODE ANN. § 2151.353 (LexisNexis 2007).

<sup>212</sup>*Id.* § 2151.414.

<sup>213</sup>*In re McBride*, 850 N.E.2d at 46 (applying OHIO REV. CODE ANN. § 2151.353(E)(2) (LexisNexis 2007)). The statute lists multiple entities and any person who has not had parental rights terminated as parties who may petition for custody after a termination of parental rights has occurred. OHIO REV. CODE ANN. § 2151.353(E)(2) (LexisNexis 2007).

<sup>214</sup>*In re McBride*, 850 N.E.2d at 45 (applying OHIO REV. CODE ANN. § 2151.414(F) (LexisNexis 2007)). The statute removes a parent whose rights have been terminated as a party to the action, thus, that parent cannot make a motion under the original case number. OHIO REV. CODE ANN. § 2151.414(F) (LexisNexis 2007).

<sup>215</sup>*In re McBride*, 850 N.E.2d at 47.

<sup>216</sup>*See supra* notes 191 & 194.

<sup>217</sup>*In re McBride*, 850 N.E.2d at 47.

<sup>218</sup>*Id.*

<sup>219</sup>*Id.* at 47.

<sup>220</sup>*See supra* Part III.

V. THE SOLUTION<sup>221</sup>

The statutory structure that exists in Ohio at this time fails to fully protect children from the dangers inherent in the foster care system.<sup>222</sup> The courts cannot protect the children because they are bound to follow the statutes as written. Therefore, one must look to the Ohio General Assembly for relief from this problem. Statutory reform can be implemented in such a way that it protects the best interest of children by carefully considering *every* opportunity to find a permanent placement for the child, regardless of the identity of the person moving for custody. By allowing children the greatest number of options, while still considering what is in the best interest of these children, it is possible to save children from over exposure to the foster care system.<sup>223</sup>

The first step that the legislature needs to take is to eliminate the phrase “other than any parent whose parental rights with respect to the child have been terminated pursuant to an order issued under division (A)(4) of this section” from Ohio Revised Code § 2151.353(E)(2).<sup>224</sup> The statute, thus rewritten, would allow a parent who has turned her life around to at least have her interest in regaining custody of her child considered by the court in light of the child’s best interests, rather than barring her attempt simply because she once lost essentially the same rights that she is now asking the court to grant to her. However, there need to be restraints in place in order to effectively allow only rehabilitated parents to ask the court to consider their suitability as a parent to the child over which they no longer retain parental rights.<sup>225</sup> There should be a number of conditions precedent to a parent’s filing of a petition for custody, or adoption, of the child which must all be met prior to initiation of any

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<sup>221</sup>While this solution is aimed specifically at redressing the Ohio Revised Code’s shortcomings relative to the Ohio Supreme Court’s decision in *McBride*, these principles and examples could easily be applied in a multitude of other jurisdictions, as discussed in Part III of this Note.

<sup>222</sup>*See generally supra* Parts II & III.

<sup>223</sup>In theory, even if only one child is saved from the dangers of the system, this system has been successful.

<sup>224</sup>OHIO REV. CODE ANN. § 2151.353(E)(2) (LexisNexis 2007). The revised subsection in full would then read as follows:

Any public children services agency, any private child placing agency, the department of job and family services, or any party, by filing a motion with the court, may at any time request the court to modify or terminate any order of disposition issued pursuant to division (A) of this section or section 2151.414 or 2151.415 of the Revised Code. The court shall hold a hearing upon the motion as if the hearing were the original dispositional hearing and shall give all parties to the action and the guardian ad litem notice of the hearing pursuant to the Juvenile Rules. If applicable, the court shall comply with section 2151.42 of the Revised Code.

*Id.* (with language omitted to reflect the proposed changes).

<sup>225</sup>While some might argue that a best interests hearing would effectively eliminate the need for the proposed restraints, the author believes that these are a more effective tool to prevent a parent from beginning proceedings that will be unsuccessful and, thus, having an emotional and psychological effect on the child that may create lasting damage. Furthermore, these can reduce the potential strain on the judicial system by limiting the number of full best interest hearings.

proceedings, as well as certain guidelines that the court must keep in mind when ruling on these sensitive matters.

First, there must be no other person or entity in the process of adopting the child. This provision ensures that the child avoids being put in the ominous position of having to choose between a parent and some other person or entity, which would be strenuous on the child's already burdened psyche, while promoting stability. Furthermore, the reason that this reform is necessary is to avoid long-term exposure to the foster care system for these children; if another person is moving to adopt that child, it is less likely that the child will be in the system for an extended period of time. Immediately upon dismissal or termination of the other party or entity's action, the parent would be able to make her motion.

Additionally, there should be a statutory minimum number of years that the child must have been continuously in the foster care system without finding a permanent home before a parent may file her petition for custody. This provision would help to ensure that children at the highest risk for the dangers of the foster care system, due to long-term exposure, would be able to find a home with a parent who has had time to correct the problems in her life. The author recommends a minimum of three years.<sup>226</sup>

On top of that, there must be a statutory minimum period that the parent can prove that she has turned her life around and corrected the problems that led to the termination of her parental rights. This additional provision helps to ensure that the parent has shown a sincere dedication to correcting her life and has not simply cleaned up for a short-term period once the child has been in the system for the minimum number of years. The author recommends a minimum of eighteen months for this requirement. The parent should be required to set forth facts and evidence to prove by a preponderance of the evidence that this requirement is met. Evidence to this effect could include, *inter alia*, proof of steady employment and income, completion of treatment for drug or alcohol abuse, steady habitation of a place of residence, or an ongoing commitment to other members of the parents' family such as a spouse or significant other, the parents' other children, or the children of a spouse or significant other.<sup>227</sup>

If all of these conditions are fulfilled, the court should move on to an analysis of whether returning to the parent's care would be in the child's best interest. At this stage, one final limitation must be recognized: the parent should receive no deference simply due to her status as biological parent of the child. The court could then proceed to a best interest determination using factors such as those found in Ohio Revised Code Section 2151.414(D).<sup>228</sup>

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<sup>226</sup>See *supra* Part III.E.1, stating that thirteen percent of Ohio's children do not reach finalization until after they have been in the foster care system three or more years.

<sup>227</sup>This is in no manner intended to be an exhaustive list, but rather a few indicative factors that the author finds relevant.

<sup>228</sup>OHIO REV. CODE ANN. § 2151.414(D) (LexisNexis 2007). This statute provides the following factors to be considered when evaluating the best interests of the child when determining whether termination of parental rights is appropriate:

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

This language could be easily inserted into the statute as subsection (E)(3), which could be written as follows:

(3)(a) With respect to division (E)(2), if the party moving for custody is a parent whose parental rights with respect to the child have been terminated pursuant to an order issued under division (A)(4) of this section, the following conditions must be met before the court may proceed with the motion:

(i) No other person or entity may be in the process of seeking custody of the child;

(ii) The child must have been in state custody for at a minimum of three consecutive years; and

(iii) The parent must show by a preponderance of the evidence that he has corrected the problems that led to termination of his parental rights and continued to live free of these problems for a minimum of eighteen months.

(b) If the court finds the conditions in division (E)(3)(a) to be met, it then shall proceed to a hearing to determine whether a change in custody is in the best interest of the child. In making the determination, the court shall consider the following factors:

(i) No special treatment shall be afforded to the child's biological parent based solely on his status as biological parent of the child;

(ii) 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;

(iii) The wishes of the child, as expressed directly by the child, an attorney for the child, or through the child's guardian ad litem, with due regard for the maturity of the child;

(iv) The custodial history of the child, including the length of time that the child has been in the temporary custody of one or more public children

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(2) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child;

(3) The custodial history of the child, including whether the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two month period . . . ;

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

(5) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.

*Id.*



services agencies or private child placing agencies, the number of foster care placements the child has had, and the amount of time spent in each placement;

(v) 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 petitioner;

(vi) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parent and child; and

(vii) Any other factor the court considers important in determining the best interests of the child.<sup>229</sup>

## VI. CONCLUSION

Ohio's statutory scheme does not adequately protect children from the dangers of the foster care system.<sup>230</sup> By implementing the recommendations contained herein, the Ohio General Assembly could correct this deficiency and allow the courts to serve their intended purpose of protecting the best interests of the children they serve.<sup>231</sup> Allowing a parent who has had her parental rights terminated an opportunity to petition for the right to become a part of her child's life after the parent has cleaned up her life and the child has had to suffer through several years in a foster care system that has failed him, the legislature would be protecting a fragile and vulnerable segment of the children in the foster care system who may be doomed to spend its entire childhood in the homes of strangers. Summarily denying a permanent home to a child in foster care solely based upon the identity of the person trying to give that child a home goes against the fundamental principles of the legal system. Children like Selina McBride deserve the chance to find out if a parent, like Peggy Fugate, who has changed her life and created a happy, loving home might be in their best interest.

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<sup>229</sup>The newly created subsection regarding factors relevant to determination of the child's best interests are an adaptation of the best interest factors found in Ohio Revised Code Section 2151.414(D).

<sup>230</sup>*See generally supra* Parts II & III.

<sup>231</sup>*See generally supra* Part V.