

IN THE SUPREME COURT OF OHIO

10-0276

In re:

||

LUCY KATHLEEN MULLEN

||

APPEAL NO. C090285;

C090407

MICHELE HOBBS,

||

TRIAL NO. F07-2803

Plaintiff/Appellant,

||

v.

||

KELLY MULLEN,

||

Defendant/Appellee,

||

and

||

SCOTT LIMING,

||

Defendant/Appellee.

||

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT MICHELE HOBBS

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**EXPLANATION OF WHY THIS IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST**

This lawsuit addressed the issue of whether Ms. Hobbs had enforceable custody rights to Lucy Mullen pursuant to an oral agreement Ms. Hobbs had with Ms. Mullen, her lesbian partner and the child's biological mother. Prior to the child's birth, the two women agreed to have and rear a child together. Consistent with that agreement, Ms. Mullen executed various powers of attorney that stated that Ms. Hobbs was Lucy's second parent "in every way." After the child's birth, the two women jointly cared for Lucy, living together as a family. When the relationship between the two women ended acrimoniously, Ms. Mullen denied Ms. Hobbs access to the child triggering Ms. Hobbs' petition for co-custody and interim visitation.

The magistrate conducted a two-day trial and concluded that Ms. Mullen and Ms. Hobbs had entered into a contract to share custody. Although both the trial judge and the appellate court agreed with the magistrate that there was "strong evidence that Mullen had intended to give Hobbs shared custody," the trial court and the appellate court determined that the couple's agreement was not enforceable because Ms. Mullen "always retained the unilateral right to revoke." To reach this conclusion, the trial court relied heavily on Ms. Mullen's testimony that long after Lucy's birth when the relationship between the parties was in decline, Ms. Mullen refused Ms. Hobbs' request that they memorialize their agreement in writing.

As this court has previously acknowledged, a biological parent can contractually relinquish exclusive custody of their child to a biologically unrelated third party without

entering into a written agreement. It is also black letter law that a contract is formed with an offer and acceptance. The decision below turns these legal premises on their heads. When is the contract to relinquish exclusive custody formed if not at the time of acceptance? If a contract is formed upon acceptance, then a parent who has contractually relinquished custodial rights cannot, as a matter of law, unilaterally revoke the parties agreement.

The answers to these questions are of great public and general interest. There are approximately 4 to 6 million adults who self-identify as gay men or lesbians in the United States. More than 39% of same-sex couples in the United States aged 22-55 are raising children; *they are raising more than 250,000 children* under age 18.¹

In 2005, the number of same-sex couples living in Ohio was 30,669. Same-sex couples live in every county in Ohio and constitute 0.8% of coupled household and .04% of all households in the state. About 22% of same-sex couples in Ohio are raising children under the age of 18. As of 2005, *an estimated 11,950 of Ohio's children* are living in households headed by same-sex couples.²

If the court of appeals is affirmed, the families of all same-sex couples raising children together in Ohio pursuant to an oral agreement are at risk. Any biological parent who entered into a oral agreement with their partner can, subsequent to the parties'

¹ R. Bradley Sears, Gary Gates, and William B. Rubenstein, *Same-Sex Couples and Same-Sex Couples Raising Children in the United States: Data from Census 2000* (September 2005), Williams Project on Sexual Orientation Law and Public Policy UCLA School of Law (available for viewing at www.law.ucla.edu/Williamsinstitute/publications/USReport.pdf)

² Adam P. Romero, Clifford J. Rosky, M.V. Lee Badgett, and Gary J. Gates, *Ohio Census Snapshot* (January 2008), The Williams Institute (available for viewing at www.law.ucla.edu/williamsinstitute/publications/OhioCensus/Snapshot.pdf)

agreement to have and raise a child together, refuse to participate in a *Bonfield* petition and use that as evidence that there was no agreement at the outset, even though all the other evidence points to the contrary. And the extension of the premise that a participant in a contract can secretly retain the right to unilaterally revoke would turn basic contract law on its head.

STATEMENT OF THE CASE AND FACTS

A. PROCEDURAL POSTURE

On December 20, 2007, Ms. Hobbs filed her Verified Complaint For Shared Custody requesting the trial court grant her equal and shared permanent custody of Lucy. On that same day, Ms. Hobbs also filed a motion requesting interim visitation. Ms. Mullen moved to dismiss Ms. Hobbs' Verified Complaint. Shortly thereafter, Mr. Liming filed his own petition for shared custody and joined Ms. Mullen's motion to dismiss. The two petitions were consolidated.

The Magistrate denied the motion to dismiss and granted Ms. Hobbs' motion for interim visitation. Ms. Mullen and Mr. Liming filed objections to the interim visitation order, which were denied. The Magistrate scheduled a trial to determine whether Ms. Mullen had relinquished her right to exclusive custody of Lucy in favor of shared custody with Ms. Hobbs. After a two-day trial and extensive post-trial briefing, the Magistrate made detailed findings of fact and granted Ms. Hobbs' petition for shared custody. He did not rule on Mr. Liming's custody petition.

On April 13, 2009, the trial court issued an order rejecting the Magistrate's decision, dismissing Ms. Hobbs' petition for shared custody and terminating Ms. Hobbs' visitation with Lucy.

Ms. Hobbs moved for a stay of the order terminating interim visitation. Judge Lipps granted Ms. Hobbs' motion stating that "[t]he mother, Ms. Mullen, allowed a relationship to develop between the child and the petitioner, Ms. Hobbs, from her birth for approximately two years, until the relationship of the adults deteriorated and custody litigation was filed."

Ms. Hobbs filed a timely appeal on the issue of shared custody. Ms. Mullen filed an appeal on the issue of interim visitation pending appeal. The appeals were consolidated for review. The court of appeals affirmed the trial court and terminated the visitation order.

B. STATEMENT OF THE FACTS

Ms. Hobbs and Ms. Mullen were involved in a long term, committed relationship that included living together and building a house together. In 2003, the women decided to have a child together. They agreed that Ms. Mullen would give birth via donor sperm and that Ms. Hobbs would play an equal role in rearing the child, functioning as the child's second parent "in every way," including by contributing financially and emotionally to the family's needs both before and after the birth.

The two women asked Mr. Liming, a friend of Ms. Hobbs, to donate the sperm needed to conceive the child. He agreed. Mr. Liming and Ms. Mullen then executed a donor-recipient agreement stating that Mr. Liming would have no parental rights or responsibilities.

Ms. Hobbs was an active participant in the *in vitro* fertilization process. The nurses at the fertility clinic taught her how to administer daily hormone injections to Ms. Mullen. She accompanied Ms. Mullen to her appointments with their fertility doctor and

she was present when Ms. Mullen's eggs were harvested and when the fertilized eggs were implanted in Ms. Mullen's uterus. The couple shared the cost of the fertility treatment – approximately \$10,000-\$12,000 – by paying for it with a credit card, the balance of which was ultimately rolled into a second mortgage on their jointly owned home.

In late 2004, the *in vitro* fertilization succeeded and Ms. Mullen became pregnant. Ms. Hobbs was a supportive partner during Ms. Mullen's pregnancy. She accompanied Ms. Mullen to ultrasound appointments and doctor's visits. She was Ms. Mullen's partner in Lamaze classes. She also cooked for Ms. Mullen throughout her pregnancy.

Ms. Mullen went into labor in the early morning hours of July 27, 2005. Ms. Hobbs drove Ms. Mullen to the hospital and spent the day with her in the birthing suite. At 5:01 pm, Lucy was born. Ms. Hobbs cut the umbilical cord.

The two women jointly cared for Lucy after her birth, living together as a family. Ms. Hobbs was the person primarily responsible for driving Lucy to and from day care. Ms. Hobbs was also the primary cook in the family, often spending the late afternoon and early evening hours alone with Lucy in the kitchen, preparing meals for both Lucy and Ms. Mullen. She shared responsibility for bathing Lucy. She taught Lucy how to brush her teeth and she was exclusively responsible for potty training. Ms. Hobbs took care of Lucy when she had diaper rash or when she was sick. She shared equally in the expenses associated with Lucy's care.

Ms. Mullen, Lucy and others referred to Ms. Hobbs' as Lucy's mother and the two women indicated to others that they shared responsibilities as equal partners and parents. To protect Ms. Hobbs' relationship with Lucy, Ms. Mullen executed a General

Durable Power of Attorney and a Health Care Power of Attorney granting Ms. Hobbs the ability to make school, health and other decisions for Lucy. In these documents, Ms. Mullen stated: "I consider Michele Hobbs as my child's co-parent in every way." Ms. Mullen did not revoke these documents until after the couple's relationship had ended.

Although Mr. Liming had contact with Lucy, he stood by the agreement he had reached with Ms. Hobbs and Ms. Mullen that the two women would function as Lucy's primary parental figures. Indeed, in an email to Ms. Hobbs and Ms. Mullen dated September 9, 2005, he stated: "I will always take the back seat in the parent roll [sic], but don't mistake that for not caring!!! . . . I know you two will be the primarys [sic] always." For the duration of the relationship between Ms. Hobbs and Ms. Mullen, Mr. Liming remained in the back seat role. He never contributed money to support Lucy, had limited visitation with no overnight visits, did not regularly drive Lucy to and from day care, and did not take Lucy to the pediatrician – to name just a few of the day-to-day experiences of parenthood that he did not share.

Ms. Mullen's relationship with Ms. Hobbs ended in 2007, but, for several months afterward, the women continued to live and rear Lucy together as a family. In October 2007, Ms. Mullen moved out of the family home and prevented Ms. Hobbs from having any contact with Lucy until Ms. Hobbs filed suit and was granted interim visitation.

Contrary to the mountain of evidence that she had formed an agreement to co-parent Lucy, Ms. Mullen testified that she never intended to give Ms. Hobbs custodial rights. To support her contention, Ms. Mullen testified that sometime in approximately March, 2006, the parties discussed entering into a written agreement for the first time; Ms. Mullen refused to do so.

Ms. Hobbs testified that in the fall of 2006, when the parties were having difficulties in their relationship with each other, they discussed a written co-custody agreement. Ms. Hobbs testified that Ms. Mullen refused because a written agreement would require the involvement of the known sperm donor, Mr. Liming. Ms. Mullen did not want to involve the donor out of fear that he would try to assert custodial rights. Ms. Hobbs testified that Ms. Mullen did not deny her custodial rights, only that Ms. Mullen did not want a written agreement if doing so required Mr. Liming's involvement.

Although the parties disagree about the content, timing and significance of these discussions, the parties agree that these conversations took place *after* Lucy was born and *after* they were raising her together. The magistrate, who was in the best position to observe the demeanor and credibility of the witnesses,³ rejected Ms. Mullen's version of events:

The court finds that Ms. Mullen did relinquish partial custody to Ms. Hobbs for a number of reasons. The evidence and testimony presented at trial shows that the women had an agreement to have and raise a child together. Ms. Hobbs' testimony on this issue was very credible and believable A number of the documents⁴ which have already been discussed provide further evidence of the parties' understanding. The will and powers of attorney drafted by Attorney Knox for Ms. Mullen all refer to Ms. Hobbs as an equal co-parent in every way. If this were not the agreement the parties had, why would Ms. Mullen have included that language in these documents Similarly the two documents from The Health Care Alliance list Ms. Hobbs as a partner and one of them had her signature as a "female participant." This was certainly not necessary to allow Ms.

³ The Ohio Supreme Court has noted that deference is given to the factual findings of the trial court because, particularly in child custody cases, the trial judge "has the best opportunity to view the demeanor, attitude and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger* (1977), 77 Ohio St. 3d 415, 418-19, 1997-Ohio-260, 674 N.E.2d 1159, 1162-63.

⁴ The magistrate found that "these documents created around the time of Lucy's birth are of more probative value than statements made now that the parties have separated and become engaged in a dispute over Lucy."

Mullen to go forward with the in vitro procedure and is further illustration that the women understood and agreed that Ms. Hobbs would have a custodial role once the child was born. **Ms. Mullen and Mr. Liming gave testimony to the contrary, but their version of what happened is not supported by their actions during the period leading up to and immediately following Lucy's birth.**

C. **THE DECISIONS BELOW**

The trial court concluded that Ms. Mullen had not intended to relinquish custody, relying heavily on Ms. Mullen's own testimony that some months after Lucy's birth, she repeatedly refused to enter into a *Bonfield*-type agreement with Ms. Hobbs. The trial court concluded that Ms. Hobbs was "an interested partner but not sharing in the legal custody of the child." The appellate court affirmed that there was "strong evidence that Mullen had intended to give Hobbs shared custody of Lucy, but [was] not persuaded that the trial court erred."

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition No. 1: When a parent contractually cedes shared custody of her child to a third party, the contract is formed like any other—upon acceptance of the offer—and it cannot be unilaterally revoked after the agreement is formed.

A. **INTRODUCTION**

The decisions below have potentially devastating consequences for same-sex couples having and raising children together. The decisions below make it possible for a parent to promise to have and raise a child with another, to represent to the third party and the world that the third-party is to be considered the child's co-parent "in every way," to grant the third-party equal legal decision-making authority, and then--by simply refusing to enter into a *Bonfield*-type agreement at some time *subsequent* to the formation

of the oral contract--to unilaterally revoke the agreement if the relationship between the parties sours.

B. BASIC CONTRACT PRINCIPLES APPLY IN CUSTODY DETERMINATIONS BASED ON CONTRACTUALLY RELINQUISHMENT

The courts below correctly concluded that Ohio law allows a parent to contractually relinquish parental rights to a third-party nonparent.⁵ This court recently recognized that a parent may voluntarily relinquish *sole* custody in favor of *shared* custody.⁶ The parent will be bound by their agreement so long as the agreement is in the child's best interest.⁷ An oral agreement to relinquish custody is as valid as a written agreement.⁸ The existence of an oral agreement can be proved by the parties' conduct.⁹ Indeed, the terms of an oral contract may be determined from "words, deeds, acts, and silence of the parties."¹⁰ A contract—by its very definition—is an *event*, not a *process*.¹¹ In other words, when the offer is accepted, the deal is done.

So what was Ms. Mullen's offer?

- Ms. Mullen would be the one to conceive the couple's child using the sperm of an agreed-upon known donor who would play a supporting but non-custodial role in the child's life.

⁵ *Masitto v. Masitto*, (1986), 22 Ohio St. 3d 63, 66, 488 N.E.2d 857

⁶ *In re Bonfield*, 97 Ohio St. 3d 387, 2002-Ohio-6660, 780 N.E.2d 241

⁷ *Id.* at 394; *In re Hockstock*, 98 Ohio St. 3d 238, 2002-Ohio-7208, 781 N.E.2d 971

⁸ *In re Perales* (1977), 52 Ohio St. 2d 89, 369 N.E.2d 1047

⁹ *Id.*

¹⁰ *Rutledge v. Hoffman* (1947), 81 Ohio App. 85, 75 N.E.2d 608, paragraph one of the syllabus

¹¹ "A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration." *Perlmutter Printing Co. v. Strome, Inc.* (N.D. Ohio 1976), 436 F. Supp. 408, 414

- Ms. Hobbs would participate emotionally and financially in the *in vitro* process used for conception and during the term of pregnancy.
- After the birth, Ms. Hobbs would be the child’s co-parent in every way, including accepting financial responsibility for Lucy as well as an emotional commitment to raise her.

Ms. Hobbs joyfully accepted Ms. Mullen’s offer.¹² Ms. Hobbs gladly fulfilled her responsibilities, both financial and emotional, during the conception process and pregnancy. When Lucy was born Ms. Hobbs acted in accordance with the terms of the agreement, loving and supporting Lucy as if she were her own biological child. Ms. Mullen, too, acted in accordance with the terms of the agreement, encouraging and fostering a parental relationship between Lucy and Ms. Hobbs.

The contract was a contract – enforceable against Ms. Mullen—from the moment of Lucy’s birth.

C. THE COURTS BELOW ERRONEOUSLY RELIED ON DISCUSSIONS THAT OCCURRED AFTER THE FORMATION OF THE CONTRACT AS EVIDENCE OF MS. MULLEN’S SECRET INTENT TO WITHHOLD CUSTODY.

After the parties brought Lucy home, they jointly cared for Lucy. They held themselves out as a two-mommy family. Lucy and Ms. Mullen referred to Ms. Hobbs as “Mama.” The pre-birth documents granting Ms. Hobbs decision making authority remained in place.

¹² Mr. Liming, too, had an agreement with Ms. Mullen. He relinquished all legal claims to his biological child and in turn would not be financially responsible for her. Additionally, he agreed that Lucy would know that he was her father but that he would play a supporting, not primary, role in her life. He agreed that Ms. Hobbs and Ms. Mullen would be Lucy’s co-custodians. The contemporaneous evidence corroborates that these were the terms of the agreement between Mr. Liming and Ms. Mullen.

Unfortunately, the relationship between Ms. Mullen and Ms. Hobbs deteriorated. And for the first time—*after* the agreement to have and raise a child, months *after* Lucy’s birth, *after* allowing a mother-daughter bond to form between Ms. Hobbs and Lucy, *after* the relationship was on the rocks, the issue of a *Bonfield*-type agreement was raised.¹³

The court below noted that “[t]he trial court relied most heavily, however, on the fact that Mullen had repeatedly refused to enter into a legally enforceable shared-custody agreement with Hobbs when presented with the option to do so.” The trial judge stated:

The mother said things to the petitioner—her life partner, and to the alleged father *that were interpreted as promises*. These were things that the father and the petitioner wanted to hear at that time. *She allowed the petitioner and others to view the petitioner as part of a three, sometimes four person family*. The mother’s intentions, motives and indications may have *changed over time*. However at all times the mother maintained control of the custodial rights to the child, signing things only when she was fully in control or could revoke documents at her unilateral discretion. But when really pressed with conversation about entering a shared custody agreement that she could not revoke she refused to give away custodial rights.

The trial judge correctly concluded that Ms. Mullen’s outward actions were at odds with her testimony (that her actions belied her “secret” intention to retain sole custody). The trial judge correctly concluded that Ms. Mullen’s “intentions, motives and indications may have changed over time” (that she made an agreement and then she changed her mind). But secret intentions or post-agreement determinations cannot, as a matter of law, be the basis of a conclusion that no agreement existed. As a matter of law, at the

¹³ Both parties testified that the discussions of putting their oral agreement into writing occurred after the deterioration of the relationship, not subsequent to the formation of their agreement to have and raise a child together. There is NO contemporaneous written evidence to corroborate Ms. Mullen’s post hoc testimony regarding her version of the parties’ agreement.

time a contract is formed, one party cannot keep their intentions a secret and then subsequently rely on their secret intentions to negate the existence of a contract. As a matter of law, once a contract is formed, one party cannot unilaterally revoke the contract.¹⁴

CONCLUSION

Ms. Hobbs and other non-traditional families in Ohio should be able to rely on established custody and contract principals—that not only is a deal to raise a child with your same-sex partner as equal custodians an enforceable deal, but that courts will apply basic contract formation principals when determining the terms of the agreement. This Court should accept jurisdiction in this case as one of public or great general interest.

Respectfully submitted,



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¹⁴ *Nagle Heating & Air Conditioning Co. v. Heskett* (1990), 66 Ohio App.3d 547, 585 N.E.2d 866

CERTIFICATION

I hereby certify that a copy of the foregoing was served upon the following individuals by ordinary U.S. Mail this 10th day of February, 2010.

Karen P. Meyer
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And

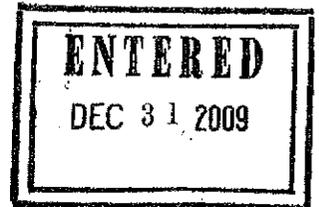
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Lisa T. Meeks

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

IN RE: LUCY KATHLEEN MULLEN	:	APPEAL NOS. C-090285, C-090407
MICHELLE HOBBS,	:	TRIAL NO. F-07-2803X
Plaintiff-Appellant/Cross-Appellee	:	<i>DECISION.</i>
vs.	:	PRESENTED TO THE CLERK OF COURTS FOR FILING
KELLY MULLEN,	:	DEC 31 2009
Defendant-Appellee/Cross-Appellant,	:	COURT OF APPEALS
and	:	
SCOTT LIMING,	:	
Defendant-Appellee.	:	



Civil Appeal From: Hamilton County Juvenile Court

Judgment Appealed From Is: Affirmed in Part and Vacated in Part

Date of Judgment Entry on Appeal: December 31, 2009

Christopher R. Clark and Lamda Legal Defense Education Fund, and Lisa T. Meeks and Newman & Meeks Co., L.P.A., for Plaintiff-Appellant/Cross-Appellee,

Karen P. Meyer and Lutz, Cornetet, Meyer & Rush Co., L.P.A., for Defendant-Appellee/Cross-Appellant,

Terry M. Tranter, for Defendant-Appellee.

Please note: This case has been removed from the accelerated calendar.

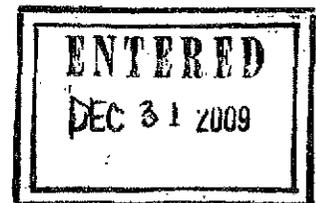
SYLVIA S. HENDON, Presiding Judge.

{¶1} This case involves a custody dispute among three parties. Defendant-appellee/cross-appellant Kelly Mullen is Lucy Mullen's biological mother. Defendant-appellee Scott Liming is Lucy's biological father. Liming had donated his sperm for Lucy's conception and had signed an agreement with Mullen relinquishing his parental rights. He, nevertheless, had played a limited role in Lucy's life. Plaintiff-appellant/cross-appellee Michelle Hobbs was Mullen's life partner before and after Lucy's birth. Hobbs, Mullen, and Lucy lived together. It is beyond dispute that Hobbs had an active role in Lucy's life.

A Complicated Situation

{¶2} Hobbs's and Mullen's relationship ended when Lucy was approximately two years old. Mullen and Lucy moved out. Hobbs petitioned the juvenile court for shared custody of Lucy. Roughly one month later, Liming filed a complaint for sole custody of Lucy and also petitioned the court for shared custody.

{¶3} Hobbs's and Liming's cases were consolidated. A magistrate heard the cases, awarded Hobbs shared custody, but did not rule on Liming's complaint or petition. Liming and Mullen objected. The trial court sustained the objections, holding, in relevant part, that Mullen had never contractually relinquished any of her parental rights regarding Lucy. The court dismissed Liming's complaint and petition on the basis that Liming had filed under the wrong Revised Code section, but the court did determine that Liming was Lucy's father. The court noted that Liming had the option of entering into a shared-parenting agreement with Mullen, or that he could, even without Mullen's



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consent, petition the court for an allocation of parental rights and responsibilities. At Hobbs's request the court stayed the termination of its interim visitation order allowing Hobbs limited visitation with Lucy, pending these appeals.

{¶4} Hobbs has appealed. Mullen has cross-appealed on the issue of visitation. We address first Hobbs's assignment of error, in which she argues that the trial court erred when it determined that Mullen had not contractually relinquished some of her parental rights in favor of shared custody with Hobbs.

Standard of Review

{¶5} Hobbs contends that we must accept the trial court's findings of fact as true, absent an abuse of discretion, but that we must determine de novo whether Mullen had contractually relinquished any of her parental rights. While appellate review of contractual disputes often proceeds in this manner, the Ohio Supreme Court delineated our standard of review in *Masitto v. Masitto*.¹ There, the court held that "[w]hether or not a parent relinquishes rights to custody is a question of fact which, once determined, will be upheld on appeal if there is some reliable, credible evidence to support the finding."²

Contractual Relinquishment

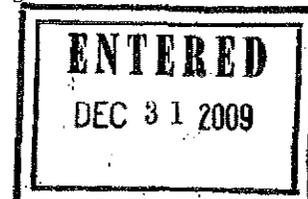
{¶6} It is well established in Ohio that a parent may contractually relinquish parental rights to a third-party nonparent.³ And in *In re Bonfield*,⁴ the Ohio Supreme Court recognized that a parent may voluntarily relinquish sole

¹ (1986), 22 Ohio St.3d 63, 488 N.E.2d 857.

² *Id.* at 66, 488 N.E.2d 857.

³ *In re Perales* (1977), 52 Ohio St.2d 89, 369 N.E.2d 1047; see, also, *Masitto*, supra; *Clark v. Bayer* (1877), 32 Ohio St. 299; *In re Bailey*, 1st Dist. Nos. C-040014 and C-040479, 2005-Ohio-3039.

⁴ 97 Ohio St.3d 387, 2002-Ohio-6660, 780 N.E.2d 241.

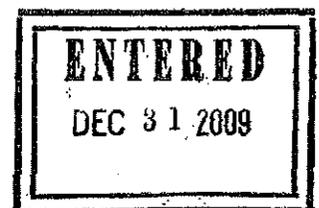


custody of a child in favor of shared custody with a nonparent. A court must look to the parent's conduct "taken as whole" to determine if there has been a contractual relinquishment.⁵

{¶7} Hobbs argues that Mullen's conduct unequivocally demonstrated that Mullen had given Hobbs shared custody of Lucy. Hobbs points to the following findings by the trial court in support of her argument: (1) that she and Mullen had planned for and had paid for the pregnancy together; (2) that Hobbs was present at Lucy's birth; (3) that Hobbs's name appeared on the ceremonial birth certificate; (4) that she and Mullen jointly cared for Lucy; (5) that she and Mullen had held themselves out as and had acted as a family; (5) that Mullen, Lucy, and others had referred to Hobbs as "Momma"; (6) that Mullen's will named Hobbs as Lucy's guardian; and (7) that Mullen had executed a general durable power of attorney and a health-care power of attorney giving Hobbs the ability to make school, health, and other decisions for Lucy.

{¶8} We agree that this is strong evidence that Mullen had intended to give Hobbs shared custody of Lucy, but we are not persuaded that the trial court erred. As the trial court noted, the documents that gave Hobbs parental decision-making powers were given at Mullen's discretion, and Mullen always retained the unilateral right to revoke them. The trial court also relied on testimony from Mullen and others that Mullen had never intended that Hobbs share in the child's legal custody. The trial court relied most heavily, however, on the fact that Mullen had repeatedly refused to enter into a legally enforceable shared-custody agreement with Hobbs when presented with the option to do so.⁶

⁵ *Masitto*, supra.
⁶ See *Bonfield*, supra.



{¶9} Since the trial court's decision is supported by competent, credible evidence, we will not disturb it on appeal.⁷

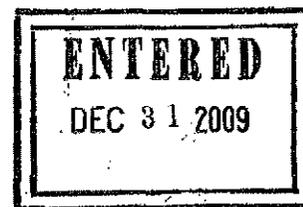
The Significance of *Bonfield*

{¶10} In *Bonfield*, the Ohio Supreme Court held that a parent is bound by his or her voluntary, written agreement to share custodial rights with a non-parent, provided that there has been a judicial determination that such an agreement is in the best interest of the child involved.⁸

{¶11} Hobbs contends that affirming the trial court would set an improper precedent requiring a nonparent, in cases where adoption is not an option, to have a *Bonfield*-type agreement to establish shared custody. We agree with Hobbs that the law does not require a written agreement to establish shared custody, but the trial court did not make a contrary determination.

{¶12} As we have already noted, in *Perales*, the Ohio Supreme Court held that a contractual relinquishment of parental rights can be demonstrated by a parent's conduct. It did not hold that a relinquishment must be written. We find no reason, nor did the trial court, why a partial relinquishment in favor of shared custody cannot be proved in the same way—i.e., through conduct. The significance of *Bonfield* to the trial court was that Mullen had known that a *Bonfield*-type agreement was an option, but had repeatedly refused to enter into one. The court used this as evidence of Mullen's intent not to share legal custody of Lucy with Hobbs.

⁷ Cf. *In re Jones*, 2d Dist. No. 2000 CA 56, 2002-Ohio-2279.
⁸ See *Bonfield*, supra.



Liming's Role

{¶13} Finally, Hobbs argues that the trial court erred when it determined that Liming had not relinquished his parental rights to both Mullen and Hobbs. We find no error. There is competent, credible evidence in the record that the donor-recipient agreement in which Liming agreed to relinquish his parental rights was only between Liming—the donor—and Mullen—the recipient. There was no contract between Hobbs and Liming. This argument has no merit.

{¶14} Hobbs's assignment of error is overruled.

Mullen's Cross-Appeal on the Issue of Visitation

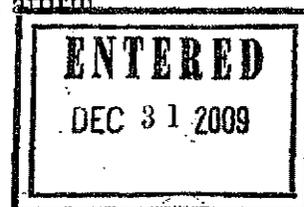
{¶15} Mullen raises one assignment of error. She contends that the trial court did not have jurisdiction to stay, pending appeal, the termination of its interim visitation order. She is correct.

{¶16} Juv.R. 13 allows a juvenile court to set temporary visitation orders pending the outcome of a custody dispute. Once the underlying case is disposed of, however, the trial court's judgment supersedes the temporary order and the temporary order ceases to exist.⁹ Since the visitation order at issue became a legal nullity once the trial court ruled on the merits of this case, there was no legal basis for a stay order. Hobbs has no visitation rights. We sustain Mullen's assignment of error.

Conclusion

{¶17} We do not doubt that Hobbs bonded with Lucy. The record is replete with evidence that Hobbs loves this little girl. But the trial court did not err. Hobbs has no legal right to share in Lucy's custody. We, therefore, affirm.

⁹ See *Smith v. Quigg* (Mar. 22, 2006) 5th Dist No. 2006-Ohio-1494, ¶36.



OHIO FIRST DISTRICT COURT OF APPEALS

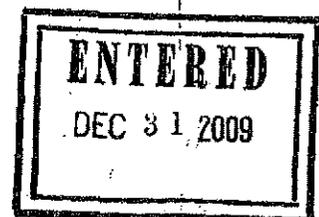
the trial court's judgment to the extent that it denied shared custody. And upon our determination that the trial court had no authority to stay the termination of its interim visitation order, we vacate the stay order.

Judgment affirmed in part and vacated in part.

SUNDERMANN and CUNNINGHAM JJ., concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.



**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

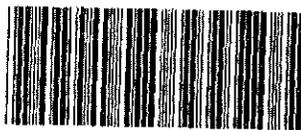
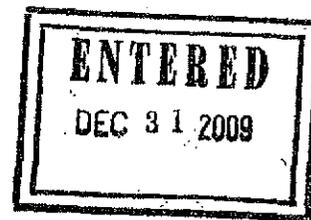
IN RE: LUCY KATHLEEN MULLEN : APPEAL NOS. C-090285,
MICHELLE HOBBS, : C-090407
 : TRIAL NO. F-07-2803X
Plaintiff-Appellant/Cross-Appellee : *JUDGMENT ENTRY.*

vs. :

KELLY MULLEN, :
Defendant-Appellee/Cross-Appellant, :

and :

SCOTT LIMING, :
Defendant-Appellee. :



D86437773

This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed in part and vacate in part for the reasons set forth in the Decision filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The Court further orders that 1) a copy of this Judgment with a copy of the Decision attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on December 31, 2009 per Order of the Court.

By: _____


Presiding Judge

**JUVENILE COURT
HAMILTON COUNTY, OHIO**

IN RE: LUCY MULLEN

§ **F07-2803**

§ **ENTRY REJECTING THE
MAGISTRATE'S DECISION**

This cause came to be heard upon the objections of the mother, through counsel, and upon the objections of the alleged father, through counsel, to the Magistrate's Decision dated 12-22-2008. The hearings before the Magistrate were recorded, transcribed, and reviewed along with the case file. The documentary evidence presented at the trial was reviewed.

Attorney Karen Meyer, represents the mother, Kelly Mullen.

Attorneys Lisa Meeks and Christopher Clark, represent the petitioner, the mother's former relationship partner, Michele Hobbs.

Attorney Terry Tranter, represents the alleged father, Scott Liming.

The child under consideration is Lucy Mullen, DOB 7-25-2005, now 3½ years old.

The mother and the petitioner were involved in a long term, same sex, committed relationship that included living together and building a house together. In 2003 the mother and the petitioner decided to have a child. The mother was to bear the child with the emotional and financial support of the petitioner. The mother asked a friend of the petitioner, Scott Liming, to provide the sperm necessary to conceive the child. Mr. Liming agreed to donate his sperm. The mother and Mr. Liming signed a donor-recipient agreement that Mr. Liming would have no parental rights or responsibilities:

The mother became pregnant. The petitioner was an active participant in preparing for the child's birth including accompanying the mother for doctor visits and Lamaze classes, paying medical bills and being present at the actual birth.

For approximately two years after the birth the mother and the petitioner jointly cared for the child. Though the partners' relationship was beginning to deteriorate, they lived together as a family, each providing for the child's well being. The alleged father also became involved with the child. In 2007 the mother and the petitioner severed their relationship and separated. The mother left the house and took the child with her. She then refused to allow the petitioner to have any contact with the child.

On 12-20-2007 the petitioner filed a complaint for shared custody of the child. She requested that the court recognize her as a co-custodian and allocate her shared custody rights.

On 1-30-2008 Mr. Liming filed a complaint requesting sole custody and also a petition requesting joint/shared custody with the mother.

On 4-23-2008 the petitioner, Ms. Hobbs, was awarded interim visitation with the child pending the final determination of the custody litigation. This interim visitation is still occurring at this time.

On 7-28-2008 and 7-29-2008 the Magistrate held evidentiary hearings considering the complaint and petitions. The Magistrate entered a Decision on 12-22-2008 granting the petitioner's motion for shared custody of the child. It is to this Magistrate's Decision, particularly the grant of shared custody to the petitioner that the mother and the alleged father now object.

The alleged father's complaint and petition for custody were not addressed by the Magistrate, apparently so that the alleged father and the mother could enter into a private agreement. It does not appear that the objections filed by either the alleged father or the mother concern this treatment of the alleged father's complaint and petition. But it is necessary for this Court to examine and rule upon the Magistrate's Decision regarding the father's complaint and petition in order to fully decide the issues presented.

Ohio custody law is founded upon the best interests of a child, but rights of competing parties are determined by the parties' relationship to the child. Parents stand upon an equality in determining those rights.¹ But a non parent must yield to the paramount right of a parent, and can only invade the constitutional protection of parent /child custody upon a showing of parental abandonment, contractual relinquishment of custody, total inability to provide care or support, or that the parents are otherwise unsuitable.²

Where relationships are complicated as in the instant case, the legal relationship to the child must be established first for each party.³

¹ ORC 3109.03. Equal parental rights of father and mother.

ORC 3111.01(B); ORC 3109.042.; 3109.04 (B)

In Re Colvin, 2008 Ohio 3927, Ohio Appellate Court, 5th District, Guernsey County; *In Re Stose*, 208 Ohio 5457, Ohio Appellate Court, 9th District, Stark County

² *In re Perales*, 52 OS 2nd 89 (1977); *Barry vs Rolfe*, 2008 Ohio 3131 Ohio Appellate Court 8th District, Cuyahoga County; see also constitutional sanctity of parents: *Troxel vs Granville*, 530 US 57 (2000); *Michael H. v Gerald D.*, 491 US 110 (1989); *Santosky v. Kramer*, 455 US 745 (1982).

³ ORC 3111.01. Definition and extent of parent and child relationship.

(A) As used in sections 3111.01 to 3111.85 of the Revised Code, "parent and child relationship" means the legal relationship that exists between a child and the child's natural or adoptive parents and upon which those sections and any other provision of the Revised Code confer or impose rights, privileges, duties, and obligations. The "parent and child relationship" includes the mother and child relationship and the father and child relationship.

(B) The parent and child relationship extends equally to all children and all parents, regardless of the marital status of the parents.

See, *In Re. JDM*, 204 Ohio 5409, Ohio Appellate Court 12th District, Warren County (2004); *In re Adoption of Reams*, 52 Ohio App. 3rd 52, 10th District, Franklin County, (1989),

Mother - Kelly Mullen

No one contests that Kelly Mullen is the biological and natural mother of the child and that she gave birth to the child. The various petitions, motions and briefs by the parties all refer to her as the mother. Evidence showed that the child was physically attached to her at birth when the umbilical cord was cut. In Ohio the natural mother relationship may be established by a showing that she gave birth to the child.⁴ Therefore the Magistrate correctly considered that Kelly Mullen is the legal natural parent and mother of the child under Ohio law.

At the time of birth, the mother was not married. In accordance with Ohio Law, the child was in the legal custody of the mother at birth, by operation of law.⁵

Alleged Father - Scott Liming

Although the alleged father's custody petition was not addressed by the Magistrate, the determination of his legal relationship to the child is important because a non parent petition for any form of custody must respect both legal parents. If the alleged father is the legal father of the child and did not permanently surrender his rights, then consideration must be given to him when allocating custodial rights and responsibilities.

In 2004 Mr. Liming agreed to supply sperm for the mother so that she could conceive a child. The mother and Mr. Liming signed a donor-recipient agreement that Mr. Liming would have no parental rights or responsibilities.

The first consideration must be the statutes of Ohio regarding artificial insemination. The donor-recipient agreement refers to the procedure contemplated by the parties as "alternative insemination" and generally follows the Ohio statutes referencing parental rights from artificial insemination. Those statutes specify that a donor for artificial insemination is not to be considered the natural father of the child.⁶

⁴ ORC 3111.02 (A) The parent and child relationship between a child and the child's natural mother may be established by proof of her having given birth to the child ---
See also ORC 3111.17

⁵ ORC 3109.042. An unmarried female who gives birth to a child is the sole residential parent and legal custodian of the child until a court of competent jurisdiction issues an order designating another person as the residential parent and legal custodian. A court designating the residential parent and legal custodian of a child described in this section shall treat the mother and father as standing upon an equality when making the designation.

⁶ ORC 3111.95 (B) If a woman is the subject of a non-spousal artificial insemination, the donor shall not be treated in law or regarded as the natural father of a child conceived as a result of the artificial insemination, and a child so conceived shall not be treated in law or regarded as the natural child of the donor. No action or proceeding under ----- the Revised Code shall affect these consequences.

However this mother was apparently impregnated by *in vitro* fertilization – not artificial insemination. A strict reading of the Ohio statutory definition for artificial insemination does not appear to include *in vitro* fertilization.⁷ Though the Ohio statutes consider and define artificial insemination and embryo donation,⁸ Ohio has no statute considering *in vitro* fertilization by donor insemination where the embryo is replaced in the mother from whence it came. The hospital and doctor did not follow the statutory process or give the notices required if artificial insemination is provided.⁹ Further, some lower courts have opined that the Ohio artificial insemination statute only applies to anonymous donors.¹⁰ Though it could be argued that the artificial insemination and embryo statutes impliedly encompass or extend to *in vitro* semen donors who are known to the recipient, this Court declines to find that the alleged father is a non parent by virtue of those specific Ohio statutes under the circumstances of this case.

In his complaint and petition Mr. Liming referred to himself as the natural or biological father of the child. Along with his petition the alleged father wrote that paternity has been established by "birth certificate and complaint for custody attached". It appears that the father claims entitlement to custody as a legal parent/father.

All parties apparently share the belief that the pregnancy resulted from the donor sperm of Mr. Liming through *in vitro* fertilization although no genetic tests were taken after birth. Scott Liming's name was placed on the birth certificate under the designation of father. Placement of one's name on a birth certificate or signing a birth certificate no longer presumes or establishes the parent /child relationship. However, the filing of a formal Acknowledgement of Paternity does.¹¹ Two days after the birth, Scott Liming and Kelly Mullen both signed and filed a duly executed formal Acknowledgement of Paternity which is on file in the Vital Statistics Department of the Ohio Department of Health.

Therefore the Magistrate properly considered Scott Liming as the legal, natural biological parent/father of the child.

⁷ ORC 3111.88. Definitions. (A) "Artificial insemination" means the introduction of semen into the vagina, cervical canal, or uterus through instruments or other artificial means.

⁸ ORC 3111.97 (A) A woman who gives birth to a child born as a result of embryo donation shall be treated in law and regarded as the natural mother of the child,

ORC 3111.97 (D)-- A donor shall not be treated in law or regarded as a parent of a child born as a result of embryo donation. A donor shall have no parental responsibilities and shall have no right, obligation, or interest with respect to a child resulting from the donation.

⁹ ORC 3111.90; 3111.91; 3111.93; 3111.94.

¹⁰ *C.O. vs W.S.*, 64 Ohio Misc 2nd 9 (1994), Cuyahoga County, Ohio Juvenile Court.

¹¹ ORC 3111.02. (A) ----- The parent and child relationship between a child and the natural father of the child may be established by an acknowledgment of paternity as provided in --- the Revised Code ---.

ORC 3111.23. The natural mother, the man acknowledging he is the natural father, ---, may file an acknowledgment of paternity ---, acknowledging that the child is the child of the man who signed the acknowledgment. The acknowledgment of paternity shall be made on the affidavit prepared pursuant to --- the Revised Code, shall be signed by the natural mother and the man acknowledging that he is the natural father, and each signature shall be notarized.

ORC 3111.25. An acknowledgment of paternity is final and enforceable without ratification by a court when the acknowledgment has been filed with the office of child support, the information on the acknowledgment has been entered in the birth registry, and the acknowledgment has not been rescinded and is not subject to possible recession ---

The next consideration is the effect of the donor-recipient agreement on the parental rights of Mr. Liming. Despite his donor agreement, Mr. Liming's complaint for custody states that "at no time has he ever agreed to any form of not having custody of his daughter and raising his daughter".

The "Donor-Recipient Agreement on Insemination" signed by both the mother and the alleged father refers to Mr. Liming as "Donor". Specific provisions of the donor-recipient agreement are important to determine whether the alleged father's custodial rights were permanently contracted away.

The agreement sets out "the clear understanding that he will not demand, request or compel any guardianship, custody or visitation rights---Further donor acknowledges that he fully understands that he would have no parental rights whatsoever --- his waivers shall prohibit any action for custody, guardianship, or visitation in any future situation.". The mother shall have the "absolute authority and power to act with sole discretion as to all legal, financial, medical and emotion needs of any child/ren conceived"

There are also clauses in the donor-recipient agreement that give the mother a unilateral ability to later agree with the donor or others to establish custodial relationships and testamentary designations. The donor-recipient agreement provides that the donor is not responsible for child support. The agreement may be amended in writing. It is specified that the written agreement is the whole agreement and that there are no other promises understandings or representations. The agreement is "final and irrevocable."

Importantly, the donor-agreement has a reference regarding possible adoption by "her life partner." and allows the donor to petition for custody but only if the "child is no longer in the custody of donor or donor's partner, Michele Hobbs". Obviously a clerical error reported 'donor' instead of 'recipient'. Nevertheless, this is the only mention of Ms. Hobbs in the donor-recipient agreement.

Mr. Liming now asserts that he believed, contrary to the agreement, that he would have parental rights or at least contact with the child. He based his belief upon discussions with the mother and the petitioner. The agreement itself states that the agreement was drafted by attorney Scott Knox, but attorney Knox states that he did not draft it. Even though the agreement was not what he wanted, the alleged father signed it anyway, being fully advised by his attorney that it did not meet his expectations and contained the clauses that no other representations were relied upon and that the agreement was irrevocable.

Almost all of the donor-recipient agreement was under the control of the mother, particularly all clauses relating to custody rights. Within the agreement the mother retained complete control to unilaterally allow custody or companionship with others. The only clauses adverse to her control were the donation fee and the forfeiture of her right to obtain financial child support. Those were enough as consideration and the contract was valid when signed.

It is permissible for a legal parent to contract away their legal custodial rights and such a contract can be enforced against them.¹²

However, the father filed an affidavit with his petition claiming that after the birth of the child, he and the mother agreed that they would not abide by the donor agreement and that the agreement was for naught. The mother filed an affidavit stating the same. These assertions are made despite the irrevocability clause in the agreement. No written amendment of the agreement was submitted to the court.

The failure to actually pay the nominal sum of money for each donation does not alone void the agreement as was suggested. But importantly, the recipient, Kelly Mullen and the donor, Scott Liming are the only two parties to the contract. Thus they may revoke their agreement and hold it for naught as they have claimed to have done. The amendment clause overrides the irrevocability clause, because the parties could amend the agreement to delete any custodial or support clauses that the parties would agree to amend.

The petitioner, Ms. Hobbs cannot enforce the agreement against either party as she was not a party to the agreement and was not an intended third party beneficiary under contract law. Though slight reference was made to Ms. Hobbs in the agreement, the agreement did not indicate that the performance was for the benefit of Ms. Hobbs and it did not satisfy any duty owed to Ms. Hobbs by either signor. At most, Ms. Hobbs was an incidental beneficiary and is not able to enforce the agreement.¹³

The alleged father has been a presence in the child's life since birth. The evidence reflects that after the birth of the child he moved to Cincinnati to be closer and involved. The alleged father has had regular contact with the child including overnight visits each month. The child has her own furnished bedroom at his residence. The alleged father transports the child to pre-school once each week and financially contributes to the pre-school tuition.

The mother acknowledges the alleged father's involvement in the child's life and now recognizes him as the legal, biological natural father of the child with custodial rights. It appears that the mother and alleged father now wish to enter into some type of shared parenting and child support agreement.

Under the circumstances of this case and in consideration of the above analysis, Scott Liming is the legal, natural, biological father of the child with potential full custodial rights equal to the mother.

¹² See, *In Re. Danielle Bailey*, 2005 Ohio 3039, Ohio Appellate Court 1st District, Hamilton County (contract with third party caretaker); *In Re DB*, 116 OS 3rd 363(1967)(surrogacy contract upheld) *Massito v Massito*, 22 OS 3rd 63 (1986) (grandparent guardianship); See also ORC 5103.15 (voluntary surrender to child caring agency); ORC 3107.07 (adoption consents); *Tressler v. Tressler*, 32 Ohio App. 2nd 79, 3rd District, Defiance County (agreement to stop child support in exchange for adoption consent).

¹³ See, *Hill v Sonitrol of Southwestern Ohio*, 36 OS 3rd 36 (1988); *Lone Star vs Quaranta*, 2003 Ohio 3287, Ohio Appellate Court 7th District, Mahoning County (2003); Restatement of the Law 2nd, Contracts Section 302.

Petitioner - Michele Hobbs

In her filings, the petitioner refers to her relationship with the child as "co parent". Ms. Hobbs and the mother were involved in a long term committed relationship, lived together and shared property. They discussed and planned the conception and birth of the child together. The petitioner contributed financially and emotionally both before and after the birth. The petitioner had an active role in raising and caring for the child on a daily basis.

The legal equitable theories of De facto Parent, In Loco Parentis and Psychological Parent have been relied upon in other jurisdictions to accord a person without genetic ties to a child a legal designation and standing equal to the parents.¹⁴ Generally these theories rely upon a four part test that considers if the petitioner had lived together with the child, if the legal parent consented and fostered the relationship, if the petitioner assumed obligations and responsibilities of parenthood without expectation of compensation for a significant period of time, and if a psychological bond between petitioner and child was formed.¹⁵

However, The Ohio Supreme Court in the case of *In re Bonfield*, has expressly declined to consider the four part test or any of the theories that would give an equal co-parent status to a person beyond those set out by the Ohio legislature.¹⁶ The Ohio Supreme Court found it inappropriate to broaden the narrow class of persons who are statutorily defined as parents.¹⁷ The Ohio statutes indicate that there are three ways a parent and child relationship can be established including natural parenthood, by adoption, or by other legal means in the Ohio Revised Code that confer or impose rights, privileges, and duties upon certain individuals.¹⁸

Therefore Ohio law does not provide for two same sex parents to both be considered as parents as under the circumstances in this case, even if the two persons agree.¹⁹ And also a grandparent, stepparent or any other person cannot gain the legal status of "parent" by virtue of discussion, agreement, finance or care giving deeds, no matter how extensive.

Therefore the Magistrate correctly considered that the petitioner Ms Hobbs is a legal non parent of the child in this case under Ohio law.

¹⁴ *ENO vs LMM*, 71 N.E 2nd 886 (Massachusetts 1999); *In re Custody of HSH-K*, 533 NW 2nd 419, (Wisconsin 1995); *VC vs MJB*, 748 A 2nd 539 (New Jersey 2000).

¹⁵ *In re Custody of HSH-K*, 533 NW 2nd 419, (Wisconsin 1995)

¹⁶ *In Re Bonfield*, 97 OS 3rd 387 (2002); 2002 Ohio 6660

¹⁷ *In Re Bonfield*, 97 OS 3rd 387 at 393 (2002); 2002 Ohio 6660

¹⁸ ORC 3111.01; *In Re Bonfield*, 97 OS 3rd 387 at 392 (2002); 2002 Ohio 6660; see also *In Re Ray*, C00436, Ohio Appellate Court 1st District, Hamilton County (unreported 2001).

¹⁹ *In Re Bonfield*, 97 OS 3rd 387 (2002); 2002 Ohio 6660

Non parent custody analysis – Michele Hobbs

A parent has constitutional rights paramount to other persons who are non parents.²⁰ However, a non parent can obtain custodial rights of a child, surmounting the normally paramount rights of legal parents. This concept has been long recognized in law.²¹ The leading and predominate case in this area of Ohio law is *In Re Perales*.²² That case and the legion of cases following it hold out that a non parent may obtain custody of a child "only if a preponderance of evidence indicates abandonment, contractual relinquishment of custody, total inability to provide care or support, or that the parents are otherwise unsuitable, that is, that an award of custody would be detrimental to the child."²³

The petitioner's petition for custody properly cites the correct statute, language and allegations for custody consideration to a non parent, particularly due to alleged contractual relinquishment.

The evidence showed that the mother takes good care for the child. She has nurtured the child and provided for her, albeit with the help of the petitioner and the alleged father. It cannot be said that the mother abandoned this child, or that she is totally unable to provide care or support for the child. She is not unsuitable, that is where continued custody would be detrimental to the child.

The only remaining *Perales* consideration is whether the mother contractually relinquished custody. The petitioner relies upon the mother's own words, documents, action and deeds to show that the mother contractually relinquished at least partial custody rights in favor of the petitioner.

In most non parent cases where contractual relinquishment is at issue, the relinquishment is total. In those cases sole legal custody was awarded to the non parent.²⁴ Even so, legal custody by a non parent can be subject to the residual rights and responsibilities of the parents including visitation, religious decisions and child support if in the child's best interests.²⁵

²⁰ *Troxel vs Granville*, 530 US 57 (2000); *Santosky v. Kramer*, 455 US 745 (1982); *Meyer v Nebraska*, 262 US 390 (1923); *In re Perales*, 52 OS 2nd 89 (1977).

²¹ *Clark v Bayer*, 32 OS 299 (1877).

²² *In Re. Perales*, 52 OS 2nd 89 (1977).

²³ *In re Perales*, 52 OS 2nd 89 (1977).

²⁴ *Massito v Massito*, 22 OS 3rd 63 (1986) (grandparent guardianship); *In Re. Danielle Bailey*, 2005 Ohio 3039, Ohio Appellate Court 1st District, Hamilton County (contract with third party caretaker); *In re Galen*, 203 Ohio 1298, Ohio Appellate Court 3rd District, Seneca County (contract with parent and unfit too); *In Re DB*, 116 OS 3rd 363(1967)(surrogacy contract upheld).

²⁵ ORC 2151.011 Definitions (46) "rights, privileges, and responsibilities remaining with the natural parent after the transfer of legal custody of the child, including, but not necessarily limited to, the privilege of reasonable visitation, consent to adoption, the privilege to determine the child's religious affiliation, and the responsibility for support.

A contractual relinquishment of a portion or a share of custody is a more difficult concept. Shared custody can have many meanings, from a mere visitation schedule, to joint decision making in school matters, health and treatment issues, religious practice, discipline principles etc. Shared custody, like shared parenting, envisions communication and co-operation between the custodians and seeks agreement rather than contentiousness.

And in this case there is also a legal father who is seeking shared custodial rights. The petitioner specifically requests full and equal participation in all decisions listed above and alternating weeks with the child in her care. She considers the legal father for a lesser share based on his previous limited role and suggests one weekend each month parenting time with no decision making as appropriate for him.

The notion that a non parent and a parent can formally share custody in Ohio was recently confirmed in the Ohio Supreme Court case of *In Re Bonfield*.²⁶ As outlined above the Ohio Supreme Court ruled that a non parent and a parent could not enter into a shared parenting plan, because the non parent was simply not considered a parent in Ohio. However the Court stated that a non parent could enter into a shared custody agreement with a parent and such would assumedly withstand attack by a third person, survive after death or relationship breakup and control any disputes arising between the shared custodians.

The testimony and evidence presented to the Magistrate showed a combined discussion and decision to have a child with the stated intention that the child would live with both the mother and the petitioner who would both care for her. The petitioner was an active participant in preparing for the child's birth, emotionally, physically and financially. Along with the mother, the petitioner signed hospital consent forms regarding the *in vitro* process, its risks and egg disposal. The petitioner was present at the actual birth. The hospital presented the couple with a ceremonial birth certificate listing both the mother and the petitioner without designations.

The mother executed a Will naming the petitioner as the guardian of the child in the event of the mother's death. The mother executed a General Durable Power of Attorney and a Health Care Power of Attorney granting the petitioner to ability to make school, health and other decisions for the child. All three documents contained language that the petitioner is considered by the mother to be the child's "co parent in every way".

For approximately two years after the birth the mother and the petitioner both cared for the child, living together as a family. There are pictures, notes, e-mails and postcards where the petitioner was referred as momma, family etc. by the mother, child and others. The mother and petitioner acted as a family and led others to believe that they shared responsibilities as equal partners and parents of this child. Some of those friends and associates testified that they understood the family to consist of two equal mothers and a child.

²⁶ *In Re Bonfield*, 97 OS 3rd 387 (2002), 2002 Ohio 6660; see also *In Re. JDM*, 204 Ohio 5409, Ohio Appellate Court 12th District, Warren County (2004)

The mother testified that she never intended to share the child and always considered the child to be hers - with the help and support of the petitioner - but not as legal shared custodians. The mother now denies that she ever considered the petitioner as an equal in custody. The baby was given the same surname as the mother with no hyphenated reference to the petitioner. The mother's witnesses and the father all testified their understanding that the child was to have only one mommy and one daddy. They considered the petitioner an interested partner but not sharing in the legal custody of the child.

The petitioner asserts that the mother's implied actions of allowing her to be a part of the child's life, in combination with the mother's documents and words, are evidence that the mother contractually relinquished a share of custody to her as co-custodian of the child, and that the implied contract should now be enforced by this Court.

It is very important to note that every document the mother signed was revocable by her. The will and the power of attorney documents were revocable unilaterally and at any time. She told the alleged father that he would be in the child's life, but made certain that the donor-recipient agreement was completely at her discretion regarding custody. That donor-recipient agreement contained clauses allowing her to grant any custody or care as she might unilaterally determine. The mother completely controlled each document.

The legal documents signed by the mother before the birth evidenced the parties' knowledge that the mother, as the legal parent, had legal rights of custody care and control over the child that were superior to the petitioner. In the Health Care Power of Attorney, the mother listed the petitioner as her legal agent in a fiduciary capacity for her. She also listed the maternal grandmother as a secondary agent. The power of attorney took immediate effect. There is nothing in the instrument that gives guidance if the mother's wishes differed from the petitioner's, such as a decision not to resuscitate the child - except the document was revocable at any time by the mother and the mother would then control - not the petitioner. The same revocability was present in the General Durable Power of Attorney. The Last Will and Testament nominated the petitioner as the guardian of the child but only upon the mother's death. Of course this document was easily revocable too.

It appears that no reciprocal power of attorney was executed by the petitioner in favor of the mother because she already held and controlled all the custody rights that a power of attorney might profess to give her. There was mention in testimony that the petitioner executed a will with testamentary provisions for the mother, but there would be no need to nominate the mother as guardian of the child because she is the child's legal parent with recognized custodial rights.

Same sex couples in Ohio who want to memorialize their commitment and agreements concerning a child they consider as belonging to both of them may feel compelled to execute such documents and add language that they consider each other as a co parent in every way. But that addition does not change the revocability of those documents. These documents do not really protect them if the couple separates. Adoption is generally not available under circumstances like this case.²⁷ These couples seek ways to allow them to legally have a secure and stable family that does not have a traditional basis of parentage or lineage.

²⁷ ORC 3107.03

In Re Adoption of Doe, 130 OA 3rd 288, , Ohio Appellate Court 9th District, Summit County (1998)

However, Ohio has set out a proper and enforceable method to memorialize agreements between such couples. In 2002 the Ohio Supreme Court instructed that agreeing couples may file their agreement for shared custody of a child with the Juvenile Court and if it is in the child's best interest, then the agreement will be enforced.²⁸ The petitioner and the mother were considering their decision to have this child in 2005 well after the *Bonfield* decision.²⁹ They were represented by counsel. Yet they chose not to enter into a shared custody agreement and present it to the Court.

In fact, when presented with the idea of entering an enforceable shared custody agreement as envisioned by the Ohio Supreme Court, the mother refused repeatedly. It is noted that though shared custody was discussed for some time by the petitioner and the mother, the testimony was unclear whether a shared custody agreement was actually drafted or presented, but certainly the mother consistently refused to enter or sign any formal shared custody agreement.

The unofficial hospital birth certificate, birth notices and announcements were ceremonial in nature and carried no force against the mother. The consent form regarding health risk and egg disposal carried no liability to the mother.

Importantly, in *Bonfield* there was not three persons involved, just two. And in *Bonfield* the non parent and parent in were in agreement and would voluntarily enter an agreement, which the Ohio Supreme Court declared would not be disturbed, so long as the Juvenile Court agreed that such was in the best interests of the child. The Ohio Supreme Court did not hold that shared custody could be mandated to a parent who is not in agreement.

In Re Perales does not require that a contractual relinquishment of custody be written.³⁰ However under circumstances such as are present in this case a writing of the agreement between the petitioner and the mother would be instructive and preferred to determine whether a contractual relinquishment was made and how much custody was relinquished. Nothing can be more important than the custodial rights in a child, but many lesser contracts are required to be in writing.³¹ In Ohio, any real estate transaction, most wills, loan agreements and pre nuptial agreements must be in writing.³² The implied contract ability to create a common law marriage was abolished in Ohio in 1991.³³ A shared custody agreement envisioned by the Ohio Supreme Court in *Bonfield* would obviously need to be in writing in order to submit it to a court for approval.³⁴ It is difficult if even possible to determine how much or what portion of custodial rights a parent would be relinquishing when an implied contract encompasses only a share of custody and is not reduced to writing.

²⁸ *In Re JDM*, 204 Ohio 5409, Ohio Appellate Court 12th District, Warren County (2004)

²⁹ *In Re Bonfield*, 97 OS 3rd 387 (2002), 2002 Ohio 6660

³⁰ *In re Perales*, 52 OS 2nd 89 (1977).

³¹ ORC 1335 Statute of Frauds

³² ORC 1335.04; ORC 2107.03; ORC 2107.60; ORC1335.02

³³ ORC 3105.12

³⁴ *In Re Bonfield*, 97 OS 3rd 387 (2002), 2002 Ohio 6660

The most important factor in the determination of whether the mother's words, actions and deeds amounted to a contractual relinquishment of some of her custodial rights was her consistent refusal to enter into a shared custody agreement envisioned under *In Re Bonfield*.³⁵ The petitioner and mother discussed this concept of shared custody several times from before birth and after. Each time the mother refused to consider such an agreement.

The mother said things to the petitioner – her life partner, and to the alleged father that were interpreted as promises. These were things that the father and the petitioner wanted to hear at that time. She allowed the petitioner and others to view the petitioner as part of a three, sometimes four person family. The mother's intentions, motives and indications may have changed over time. However at all times the mother maintained control of the custodial rights to the child, signing things only when she was fully in control or could revoke documents at her unilateral discretion. But when really pressed with conversation about entering a shared custody agreement that she could not revoke she refused to give away any custodial rights. The mother's actions are not admirable but she did not want to give up her custodial rights to the petitioner or anyone else.

A circumstance where the facts were very similar was considered shortly before the *Bonfield* decision. In that case the Appellate Court upheld the Juvenile Court finding that no implied contract or unsuitability of the mother was proven.³⁶

The alleged father did not have a contract implied or otherwise that contractually relinquished his custodial rights in favor of the petitioner. As noted earlier the petitioner was not a party to the donor-recipient agreement and the mother retained complete control over the father's ability to exercise custodial rights with the child. The petitioner does not consider the alleged father equal to her regarding the child, primarily because he had signed the donor – recipient agreement and has had less contact and care with the child than her.

Under the circumstances of this case the Magistrate erred in ruling that the mother entered an implied unwritten contract that relinquished some but not all of the mother's custodial rights in the child. The Magistrate incorrectly forced shared custody with a non parent without the parents' agreement, against their objection and contrary to their belief of what is in the best interest of their child.

Although Mr. Liming states that his basis for filing the petition is an agreement with the mother for shared custody as the child's parent, he did not file under or follow any of the provisions outlined for shared parenting under 3109.04(A)(2), 3109.04(D) or 3109.04(G). His present complaint and petition are not appropriate for court consideration at this time but may be re filed in the future with more specific detail and reference to the code sections giving authority to his custodial claims.

³⁵ *In Re Bonfield*, 97 OS 3rd 387 (2002), 2002 Ohio 6660

³⁶ *In Re Jones*, 202 Ohio 2279, Ohio Appellate Court 2nd District, Miami County (2002)

Therefore for the reasons as set out in this entry:

The Magistrate's Decision is rejected.

The now determined father, Scott Liming's objections are granted.

The now determined father, Scott Liming's complaint and petition are both dismissed.

The now determined father, Scott Liming may enter an arms length agreement for shared parenting with the mother under the correct Ohio statutes and they may file it with the Court for hearing, adoption and enforcement if in the best interests of the child.

The now determined father, Scott Liming, with or without the mother's agreement, may petition the court for an allocation of parental rights and responsibilities under the correct Ohio statute and file it with the Court for hearing and determination in the best interests of the child.

The now determined father, Scott Liming or the mother, Kelly Mullen may file a request for child support with the Child Support Enforcement Agency under the appropriate Ohio statute.

The mother, Kelly Mullen's objections are granted. The mother retains legal custody of the child, Lucy Mullen, in accordance with the automatic provisions of law regarding unmarried mothers.

The petitioner, Michelle Hobbs' petition for shared custody is denied and dismissed.

The interim order for visitation of the child with the petitioner Michelle Hobbs is terminated.

4-13-2009
Date

Shirley R. Zippa
Judge



HAMILTON COUNTY JUVENILE COURT

IN RE:

LUCY MULLEN

Case # F07-2803 X

Magistrate's Decision

Procedural Posture

On December 20, 2007, Michelle Hobbs filed several pleadings with the court by and through her attorney Lisa Meeks. All of these filings pertained to the minor child Lucy Mullen born July 27, 2005. Ms. Hobbs filed a verified complaint for shared custody of Lucy, a motion for an order granting visitation and a request for an ex parte emergency hearing. The court denied the emergency request and continued the other matters for pre-trial. On January 30th, the father, Scott Liming, filed his own petition for custody of Lucy. The initial pre-trial took place on 2/1/2008. The petitioner was represented by Attorney Meeks, the mother, Kelly Mullen, was represented by Attorney Wietholter, and the father waived counsel for that hearing. Prior to the February 1st hearing, Ms. Mullen had filed a motion to dismiss the petitions for custody and visitation. The court scheduled a hearing for argument on the motion to dismiss.

At the April 3rd hearing on the motion to dismiss, all parties were present and represented by counsel. By that time, Mr. Liming had retained Terry Tranter to represent him. The court took the matter under advisement and later issued a ruling which denied the motion to dismiss, granted the petitioner Michelle Hobbs' request for an interim order of visitation, and scheduled the pending matters for two full days of trial. Counsel for Ms. Mullen and Mr. Liming filed objections to this ruling which were overruled by Judge Grady on May 8th.

After hearing a trial on the pending actions on July 28th and 29th, the court took the matter under advisement for the issuance of the following decision. At the conclusion of the trial, the attorneys requested an opportunity to obtain a transcript of the proceedings and submit both a written closing argument and a response to opposing counsels' written closing. The court granted this request and received the last of the briefs on November 12. It should be noted that counsel for Mr. Liming submitted his brief after the initial deadline, and counsel for Ms. Hobbs filed a motion asking that his brief be stricken. The court will treat the pleading as a response to the petitioner's brief and take it into consideration when making this decision.

Ms. Hobbs has been represented by Lisa Meeks throughout these entire proceedings. The court later granted Christopher Clark's motion for admission pro hac vice, and he has also represented Ms. Hobbs. Mr. Liming has been

represented by Terry Tranter. Thomas Wietholter initially represented Ms. Mullens, but Karen Meyer ultimately substituted as her counsel. Attorneys Clark, Meeks, Tranter, and Meyer were all present during the trial.

Statement of the Facts

Michelle Hobbs and Kelly Mullen were involved in a romantic relationship with one another that began in 2000. They began living together approximately one year after they started dating. At some point during their relationship, they began to discuss the idea of having a child and the various means by which this could be accomplished. Ms. Mullen claims that she was the one that wanted to have the child and that she never intended Ms. Hobbs to be a parent or co-parent. Ms. Hobbs contends that it was a mutual decision and that both she and Ms. Mullen planned to be parents to the child. The women researched the issue and decided that artificial insemination from a known donor was the best option. They wanted the child to have a father figure, but did not intend for him to be overly involved with the child.

Ms. Hobbs had a friend named Scott Liming whom she thought would be a good fit for what she and Ms. Mullen were considering. Not only did he have the attributes they were looking for in a biological father, but he lived in Atlanta making it less likely that he would be intrusive in seeking a significant relationship with the child. She introduced Mr. Liming to Ms. Mullen and both women subsequently discussed their plans with him. After considering the proposal and discussing it with his partner, he agreed to be the donor. Ms. Hobbs testified that they decided Ms. Mullen was the one who should become pregnant because she is the younger of the two by eight years. Ms. Mullen contends that she was always going to be the only mother to the child and that her partner was merely assisting her in fulfilling her dream of having a child.

Ms. Hobbs contributed financially to the cost of the in vitro procedure and was present during medical appointments, the harvesting of the egg, and the birth of the child. Ms. Hobbs presented two documents into evidence which demonstrate her involvement in the efforts to have a baby. Hobbs' exhibit six is The Health Care Alliance's form for consent and agreement for cryopreservation and disposition of frozen embryos. The document lists Ms. Hobbs as Ms. Mullen's "partner" and was initialed by both women. Hobbs' exhibit seven is the informed consent for in vitro fertilization created by the health alliance. Once again, both women initialed the document and it listed Ms. Hobbs as a partner. She also signed the document as a "female participant." The fact that she was listed as a partner and initialed or signed both documents demonstrates that Ms. Hobbs was playing a much more active role in the in vitro process than merely that of a supportive girlfriend.

Prior to Lucy's birth, Ms. Mullen and Ms. Hobbs met with Scott Knox, an attorney who specializes in gay and lesbian legal issues. He has worked with a

number of same sex partners who intend to raise children together. He drafted a will, a health care power of attorney, and a durable power of attorney for the parties. He also reviewed, but did not draft, a donor recipient agreement executed by Ms. Mullen and Mr. Liming. In each of the documents he drafted for Ms. Mullen and Ms. Hobbs, there is found the language "I consider Michelle Hobbs to be Lucy's co-parent in every way." These documents were signed only by Ms. Mullen and were revocable by her at will. (She did in fact revoke these instruments and replace them with a new will and powers of attorney in August of 2007.) Attorney Knox testified that these women consulted him and had the documents drafted in an effort to protect Ms. Hobbs' role as a co-parent for the child.

Ms. Mullen and Mr. Liming signed a donor recipient agreement prior to Lucy's birth in which he agreed that he would have no parental rights whatsoever. In the document, he also agreed that he would not seek any visitation or custody rights and would not be responsible for financially supporting the child. In essence he would have no parental rights and responsibilities. Ms. Hobbs was not a party to this document and did not sign it. Although the agreement prohibited Mr. Liming from seeking custody, guardianship or visitation, it gave Ms. Mullen the right to agree to grant him such rights in the future if she wished to do so. (See Hobbs' exhibit #1, paragraph six.)

While Ms. Mullen was pregnant with Lucy, Ms. Hobbs went to the doctor visits with her and was her partner in Lamaze classes. Mr. Liming still resided in Atlanta at this time and did not participate in any of these activities. Friends of the couple testified that Ms. Hobbs was very attentive to Ms. Mullen's needs while she was pregnant.

Ms. Mullen gave birth to Lucy on July 27, 2005. Ms. Hobbs was in the delivery room and cut the umbilical cord. The parties obtained a ceremonial birth certificate from Christ Hospital which indicated that Lucy Kathleen Mullen was born to Kelly Mullen and Michelle Hobbs on July 27th 2005. Mr. Liming was not present for the birth, but arrived at the hospital shortly thereafter.

The primary factual disagreement between the parties concerns the part that Ms. Hobbs played in the decision to have a child and the role that they anticipated she would play in the child's life. Ms. Mullen and Mr. Liming claim that there was never an intention for her to be a parent to Lucy. They argue that she was merely a supportive girlfriend in Ms. Mullen's efforts to become a mother and deny that she was ever going to be a co-parent to the child. Ms. Hobbs vigorously disputes this and argues that she was an equal partner in the decision to have a child and that there was always an understanding that she would be an equal co-parent to Lucy in every way. She points to the language in Ms. Mullen's will and powers of attorney as evidence of this.

Kathleen and Rochelle Nardiello are a lesbian couple who were very close friends with Ms. Mullen and Ms. Hobbs while they were dating. They both testified that they saw the parties and Lucy on a weekly basis after she was born. The couples also vacationed together when Lucy was very young. They spoke often to the parties about having a child and the process they went through, because they were also thinking of having children together. (At the time of the

trial, Rochelle was pregnant with twins.) Both Kathleen and Rochelle testified that Ms. Mullen and Ms. Hobbs were equal co-parents for Lucy and that they presented themselves as a family with a child and two moms.

The Nardiellos' testimony was supported by another of Ms. Hobbs's witnesses, Cincinnati city councilwoman Lesley Ghiz. She got to know Ms. Hobbs through her work as a Log Cabin Republican. Although she did not see the couple as well as the Nardiellos did, she saw them together with Lucy at several parades and functions and observed that they had a "fluid exchange of responsibilities" in caring for Lucy. She saw them as being equal co-parents to the child. In addition, Cannon Ann Rider who was a priest at the Christ Church Cathedral (Episcopal) testified that when Hobbs and Mullen approached her about performing the baptism they presented themselves as co-parents of the child. Cannon Rider ultimately performed the baptism, but Ms. Hobbs did not attend because of a dispute she had had with Ms. Mullen. James Stradley who was Ms. Hobbs boss at the time testified that she took time off after the child's birth, took advantage of her flexible work schedule to care for Lucy, and on several occasions brought the child to work with her.

Ms. Hobbs testified that she was involved in every part of the process of deciding to have a child, going through the in vitro procedures, and caring for Lucy once she was born. She was present in the delivery room, and cut the umbilical cord. She adamantly maintains that the agreement was always that she was Lucy's mother too and an equal co-parent in every way. Ms. Hobbs testified that she cooked for the child, cared for her when she was ill, and transported her too and from daycare. Lucy called her "momma". Her contention is that once the romantic relationship with Ms. Mullen ended, Ms. Mullen retaliated by cutting off her access to Lucy and going back on her agreement to co-parent the child.

Ms. Mullen and Mr. Liming gave very different testimony from Ms. Hobbs on the issue of her role with Lucy. They both testified that there was never any intention for Ms. Hobbs to be Lucy's co-parent or second mother. It is their claim that she was merely supporting her girlfriend in her attempt to have a child. Mr. Liming stated repeatedly in his testimony that Lucy was always supposed to have just one mother and one father. His partner, Chad Payton, has a positive but limited role in Lucy's life analogous to that of a loving step-parent, and Mr. Liming argues that this was Ms. Hobbs' planned role as well. Ms. Mullen testified that Ms. Hobbs' role was planned to be one of a supportive partner and not a mother or co-parent. She stated that Ms. Hobbs was not an equal provider of care for Lucy and continued to go out at night and socialize as she had done before Lucy's birth. She portrays Ms. Hobbs as a person who enjoyed showing off the child to others but not as someone who was interested in providing the day to day care that a young child needs. Ms. Mullen testified that Ms. Hobbs was furious on one occasion when she asked her to stay home with her and Lucy while the child recovered from a seizure that had necessitated a trip to the emergency room.

Mr. Liming supports Ms. Mullen's position that Ms. Hobbs was never going to be a co-parent for the child. He admits that his role in Lucy's life has expanded

significantly from the limited one that he initially envisioned. Upon spending time with her after she was born, he decided to relocate to Cincinnati so that he could be more involved in her life. He and Ms. Mullen have become much closer than he and Ms. Hobbs are, and they are in agreement that he is and should be an active father figure. They have apparently discussed agreeing to a Shared Parenting Plan between themselves.

Ms. Mullen's version of Ms. Hobbs limited role in Lucy's life is supported by her parents who testified that Ms. Hobbs never referred to herself as Lucy's mother and only sought an expanded role after the couple's romantic relationship soured.

While they were together, the women shared the responsibility of caring for Lucy. Since the separation, Ms. Mullen has been the primary caregiver with some help from Mr. Liming. The court agrees with Ms. Mullen's attorney that she has been actively involved in caring for Lucy every day since she has been born and has never abandoned the child in any way. There is no dispute that Ms. Mullen has always acted as Lucy's mother and provided her with the love and support that she needs. There is also no evidence that either Mr. Liming or Ms. Hobbs have ever acted inappropriately towards the child or pose any risk to her at all. It was clear to this magistrate that all three parties love this little girl very much and want only the best for her.

The court finds that the evidence and testimony presented at trial support Ms. Hobbs' contention that she was an active participant in the decision to have a child and the steps necessary to achieve that goal. She identified the sperm donor; helped pay for the costs associated with in vitro fertilization, and was there with Ms. Mullen for the birth and all of the appointments and procedures which preceded it. She signed or initialed documents related to the in vitro procedures and was listed as a partner in those documents. She was also listed as a parent on the ceremonial birth certificate obtained at the hospital. This birth certificate has no legal relevance, and the official state birth certificate does not and could not include Ms. Hobbs' name. However, the ceremonial birth certificate is indicative of the parties' understanding at the time of birth.

The evidence and testimony demonstrate that Ms. Mullen and Ms. Hobbs had an understanding that they would act as equal co-parents for the child. There is contradictory testimony from a number of witnesses on this point. However, the court gives great credence to the contemporaneous documents from the period just before and after Lucy was born. Ms. Mullen signed a will and two powers of attorney which clearly stated that she considered Ms. Hobbs as Lucy's co-parent in every way. She had Ms. Hobbs listed as a partner in the in vitro paperwork. Her attorney is correct in pointing out that the will and powers of attorney were revocable at will by her client. They were in fact revoked and replaced with new documents several years later. However, the fact that she included the language about Ms. Hobbs being a co-parent in documents drafted around the time of the child's birth is illustrative of the parties' understanding about Ms. Hobbs' role in Lucy's life. The fact that the powers of attorney were non-springing, meaning that they did not require Ms. Mullen's incapacity to go into effect, further supports this interpretation. She may have wanted to grant Ms. Hobbs power of attorney

regardless of her planned role in Lucy's life, but she certainly did not have to include the co-parent language to do so. Ms. Mullen did not hesitate to draft an agreement with Mr. Liming that took away any parental rights and responsibilities that he may have had, but at the same time listed Ms. Hobbs as an equal co-parent in three separate documents. The documents themselves could be and were revoked by Ms. Mullen. However, their revocation does not reduce the insight that they give into the intent and agreement of the parties concerning the care and raising of the child. The court finds that these documents created around the time of Lucy's birth are of more probative value than statements made now that the parties have separated and become engaged in a dispute over Lucy. The same is true of the ceremonial birth certificate which listed both Ms. Hobbs and Ms. Mullen as parents of Lucy.

Legal Analysis and Conclusion

For reasons set forth more fully below, the court finds that Ms. Mullen did relinquish partial custody to Ms. Hobbs and cannot now completely cut her out of Lucy's life. It is in the child's best interests to maintain ties with Ms. Hobbs. Ms. Mullen should be the primary residential custodian, but Ms. Hobbs has a role to play as well. Mr. Liming has previously relinquished any rights to custody or visitation, but Ms. Mullen apparently wishes to enter into a shared parenting plan with him. The Donor-Recipient agreement that she signed gives her the ability to agree to visitation or Shared Parenting with Mr. Liming. He and Ms. Mullen are free to work out any type of visitation or shared parenting agreement they wish.

It is clear that under Ohio law Ms. Hobbs cannot be considered one of Lucy's legal parents. Ms. Mullen is the legal and biological mother, and Mr. Liming is the father. Second parent adoption is not available in Ohio meaning that Ms. Hobbs could not have adopted the child unless Ms. Mullen was willing to give away all of her parental rights. That was never contemplated by anyone involved in the case. It is also true that there has been no showing that either Ms. Mullen or Mr. Liming are unfit or unsuitable parents to Lucy. On the contrary, they both impressed the court as loving and appropriate parents in every way. It is well settled law in Ohio that in order for a non-parent to prevail in custody litigation against a parent, the court must first find the legal parent(s) to be either unfit or unsuitable to care for the child. See **In Re Perales**, 52 Ohio St.2d 89; 369 N.E.2d 1047 (1977). Ms. Hobbs' argument is that a showing of unfitness or unsuitability is unnecessary in this case because Ms. Mullen voluntarily relinquished partial custody of Lucy to her. Ohio law does recognize the ability of a parent to relinquish full or partial custody of a child.

The issue which the court was forced to decide is whether the evidence and testimony presented at trial demonstrate that Ms. Mullen relinquished partial care and custody of her daughter to Ms. Hobbs. This is an issue of significant complexity and importance. On one hand, the right of parents to care for and make decisions about their children is basic and fundamental in nature and is understandably given great protection by the law. Relatives, step-parents, family friends and others may have a large role to play in a child's life, but it is the parents who typically make decisions for their children and determine what role, if any, others are permitted to play. Just because a parent allows people to help raise and care for a child does not indicate that he or she is relinquishing partial custody. If that were the case, parental rights would be unfairly prejudiced. Every parent who hired a nanny, let their new spouse help care for a child, or left their child with their grandparents over the summer would be at risk of losing the exclusivity of their custodial parental rights. This would obviously be ridiculous and detrimental to the rights of parents, the best interests of children, and public policy. The attorneys for Ms. Mullen and Mr. Liming argue that to grant Ms. Hobbs any parental rights would be a slippery slope which would result in just this type of problem.

Counsel for Mr. Liming and Ms. Mullen in essence claim that, although for a time Ms. Hobbs may have played a role similar to that of a loving step-parent, this in no way amounted to any relinquishment of custody by Ms. Mullen. However, Ms. Hobbs and her attorneys are correct to point out important differences between a step-parent's role and the one that Ms. Hobbs has played. Unlike a step-parent, she was involved in the decision to have a child and was present at every step of the way during the in vitro procedures, the pregnancy, and the birth. The fact that Ms. Mullen listed her as an equal co-parent in every way in three separate legal documents is also significant. The same is true of the fact that Ms. Hobbs was listed as a partner and signed or initialed the in vitro paperwork. She was also listed as a parent in the ceremonial birth certificate issued at the hospital. When same sex partners in Ohio make a decision to have a child together, the current state of the law does not offer much, if any, protection to the partner who is not the one giving birth or listed in the adoption paperwork. This is an issue that may need to be addressed legislatively, but that is a matter for another day and a different branch of government. The issue before this court is whether Ms. Hobbs has any legal or custodial rights to Lucy based upon the fact that the parties originally contemplated that she would help raise her as an equal co-parent.

It is important to consider the holding of the Ohio Supreme Court in the case of **In Re Bonfield**, 96 Ohio St. 3d 218; 773 N.E. 2d 507 (2002). That case involved two women who were involved in a long standing same sex relationship with one another. One of the women adopted two children during the relationship and had three more by anonymous artificial insemination. In order to protect the other woman's legal rights to the children, they jointly filed a Petition for the Allocation of Parental Rights and Responsibilities in the Hamilton County Juvenile Court. The trial court found that the partner did not qualify as a parent under Section 3109.04 of the Ohio Revised Code and ruled that shared parenting

was not available to them. Writing for the majority, Chief Justice Moyer agreed with the lower court's determination that shared parenting was restricted to parents only and therefore unavailable to the parties. He then went on to note that parents may waive their right to custody and are bound by an agreement to do so. See **Masitto vs. Masitto**, 22 Ohio St. 3d 63; 488 N.E.2d 857. That is what the legal mother was attempting to do in the Bonfield case, relinquish her right to sole custody and share it with her partner. Chief Justice Moyer held that under Section 2151.23(A) (2) the juvenile court had the authority to determine whether shared custody between the partners was in the child's best interests. Shared custody was an available option although shared parenting was not.

The fundamental factual difference between **Bonfield** and the case now before the court is that the parties in that case were still romantically involved and in full agreement to share custody of the children with one another. Ms. Mullen and Ms. Hobbs are obviously not in agreement, and their relationship ended acrimoniously some time ago. Counsel for Ms. Mullen argues that this crucial factual difference renders the **Bonfield** decision inapplicable in deciding this case. This magistrate disagrees. The legal mother in Bonfield was seeking to relinquish partial custody at the time she filed the petition for shared parenting. The legal mother in this case sought to relinquish partial custody in the period immediately before and after Lucy's birth. The timing of the relinquishment is not as important as the fact that such a relinquishment occurred.

The court finds that Ms. Mullen did relinquish partial custody to Ms. Hobbs for a number of reasons. The evidence and testimony presented at trial shows that the women had an agreement to have and raise a child together. Ms. Hobbs' testimony on this issue was very credible and believable. It was also strongly supported by Kathleen and Rochelle Nardiello. They were close friends with both Ms. Hobbs and Ms. Mullen and spent a great deal of time with them when they were discussing having a child together. Cannon Rider and Leslie Ghiz also provided credible testimony which indicated Ms. Mullen and Ms. Hobbs had such an understanding.

A number of the documents which have already been discussed provide further evidence of the parties' understanding. The will and the powers of attorney drafted by Attorney Knox for Ms. Mullen all refer to Ms. Hobbs as an equal co-parent in every way. If this were not the agreement the parties had, why would Ms. Mullen have included that language in these documents? Attorney Knox indicated that the parties came to him concerned about protecting Ms. Hobbs' role in the child's life. Similarly the two documents from The Health Care Alliance list Ms. Hobbs as a partner and one of them had her signature as a "female participant." This was certainly not necessary to allow Ms. Mullen to go forward with the in vitro procedure and is further illustration that the women understood and agreed that Ms. Hobbs would have a custodial role once the child was born. Ms. Mullen and Mr. Liming gave testimony to the contrary, but their version of what happened is not supported by their actions during the period leading up to and immediately following Lucy's birth.

As noted earlier, Ms. Mullen and Mr. Liming apparently intend to enter into an agreement with one another on visitation or shared parenting. Mr. Liming is

already spending a fair amount of time with his daughter. Ms. Mullen is free to enter into such an agreement, and it would certainly seem to be in Lucy's best interest to do so. If today's decision stands, Ms. Hobbs will also have some custodial rights to Lucy. The court is aware that having three individuals with a custodial interest in the same child poses logistical issues that will need to be addressed at a future hearing. If the objections which will certainly be filed by one or more parties are denied by the judge, a hearing should be set before this magistrate to determine a schedule for sharing custody of Lucy. Ms. Mullen should be the primary residential custodian. The interim order of visitation remains in place until further order of the court. The custody petition filed by Mr. Liming is not addressed in today's decision so that he and Ms. Mullen have an opportunity to enter into an agreement.

A copy of today's decision will be mailed to all parties and counsel. As a courtesy, a copy will be faxed to each of the attorneys today.

COPY

Magistrate D. Kelley
December 22, 2008