

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

**10-0276**

In re:

**LUCY KATHLEEN MULLEN**

Case No.: 2010-02676

An Appeal From The First  
District Court Of Appeals;  
Case Nos.: C090285 and C090407

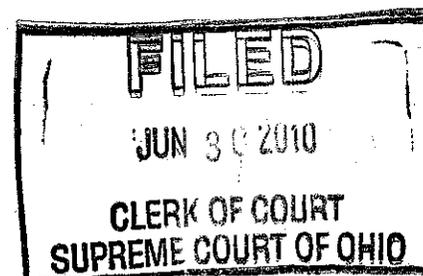
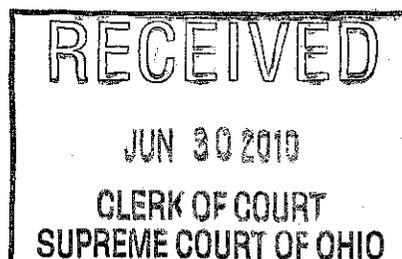
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**BRIEF OF AMICUS CURIAE NATIONAL CENTER FOR LESBIAN RIGHTS IN  
SUPPORT OF APPELLANT MICHELE HOBBS**

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## **INTEREST OF AMICUS CURIAE**

The National Center for Lesbian Rights (“NCLR”) is a national legal non-profit organization founded in 1977 and committed to advancing the rights and safety of lesbian, gay, bisexual, and transgender people and their families. NCLR is particularly well-suited to offer *amicus* assistance to this Court in this matter, as NCLR attorneys litigate across the country in family law cases involving same-sex parents and their children. NCLR has also written numerous books and articles on the ability of same-sex parents to preserve and protect the integrity of their families. NCLR’s extensive experience regarding the specific issue raised in this appeal can thus be of significant assistance to the Court in considering this case.

## **STATEMENT OF FACTS**

Amicus curiae adopts the statement of facts contained in Appellant's brief.

## **SUMMARY OF ARGUMENT**

There have always been families in which a parent, for any number of reasons, chooses to permit another person to take on all of the obligations and responsibilities of a parent and to establish a parental bond with a child, whether that person is a grandparent, a partner, or someone else. Recognizing this, Ohio courts have long held that when parents agree to grant custody rights to people who would not otherwise have such rights, those agreements are enforceable.

This longstanding rule is consistent with the majority rule in other states. Like Ohio, most other states considering this issue have recognized the importance of protecting parent-child bonds that have formed with the agreement of the child’s legal parent. Moreover, recognizing that once a parent-child bond has been formed, it is generally harmful to a child to

permit that bond to be severed, courts generally have enforced such agreements even (and especially) where a legal parent later seeks to renounce the agreement.

The majority rule is supported by strong public policies. Preserving a child's bonded relationships is crucial to the child's well-being, regardless of whether those bonds are accompanied by biological or legal ties. Courts across the country have recognized the need to protect children from the harm of severing established parent-child bonds. Courts also have recognized that there are strong public policy reasons to encourage people to live up to parental commitments and to support the children they agree to parent, even when they are not biologically or legally related to the child.

Parents, too, are protected by this majority rule, which respects parental autonomy by permitting parents to decide whether or not to co-parent with another person. Once a parent has actively encouraged a parent-child bond to develop between her child and another adult, that parent's decision must be respected, and the parent-child bond established in reliance on that decision must be protected. The rule thus recognizes that families take many forms, that parents may choose to share full parental authority with a person who is not a biological or adoptive parent, and that when parents agree to do so, those agreements must be upheld.

## ARGUMENT

### **I. Ohio's Longstanding Rule That A Parent May Enter Into An Enforceable Agreement To Share Custody Is Consistent With The Majority Rule In Other States.**

Ohio law allows parents to enter into enforceable agreements to share custody with another person. *In re Bonfield* (2002) 97 Ohio St.3d 387, 2002-Ohio-6660, 780 N.E.2d 241. In *In re Bonfield*, a woman sought to bestow shared custody rights on her lesbian partner, who had participated in planning for the conception of the children and was raising the children with her

in the role of a coequal second parent, like the role that Appellee Kelly Mullen encouraged her partner Appellant Michele Hobbs to take in their daughter Lucy's life. *Id.* at ¶4-9. The Court held that it was proper for the juvenile court to consider entering a shared custody agreement between the two women, noting that “[p]arents may waive their right to custody of their children and are bound by an agreement to do so.” *Id.* at ¶48, citing *Masitto v. Masitto* (1986), 22 Ohio St.3d 63, 22 OBR 81, 488 N.E.2d 857. The Court further held that a parent’s “agreement to grant custody to a third party is enforceable subject only to a judicial determination that the custodian is a proper person to assume the care, training, and education of the child.” *Id.*

The trial court found that Ms. Hobbs and Ms. Mullen did agree to care for their daughter as two equal mothers, and that agreement should be enforced. It is clear that Ohio's longstanding rule is that a parent's agreement to partially or wholly relinquish custody is enforceable. This rule applies equally to cases, like this one, where the parent enters into an unwritten agreement that she later wishes to abrogate. Indeed, “enforceability” would have no meaning if it applied only when both parties continue to uphold the agreement.

Even before the Ohio Supreme Court’s decision in *In re Bonfield*, Ohio courts had long held that parents could grant custody rights to people who were not legal parents, and that agreements to do so were enforceable and therefore would be enforced even when a legal parent later wished to revoke that consent. As early as 1877, the Ohio Supreme Court held that a father’s agreement to bestow custody rights on the children’s grandfather was a valid contract, and that the father could not later take those rights away from the grandfather, although he no longer wanted the grandfather to raise the children. See *Clark v. Bayer* (1877), 32 Ohio St. 299, 306, 310, 1877 WL 120. At the time that *In re Bonfield* was decided, this basic principle had been consistently cited and applied by Ohio courts for well over a century. See, e.g., *Rowe v.*

*Rowe* (1950), 58 Ohio Law Abs. 497, 44 O.O. 224, 97 N.E.2d 223, 224, 226 (holding that parents' agreement to give custody to grandparents was enforceable, although father subsequently sought sole custody of the children); *In re Perales* (1977), 52 Ohio St.2d 89, 97, 6 O.O.3d 293, 369 N.E.2d 1047 (citing *Clark* for proposition that parents may be denied custody when they have contractually relinquished it); *Masitto v. Masitto* (1986), 22 Ohio St.3d 63, 66, 22 OBR 81, 488 N.E.2d 857 (holding that by entering into an agreement that grandparents would have custody, the father forfeited his natural rights to custody of his daughter although he continued to provide support); *In re Hockstok* (2002), 98 Ohio St.3d 238, 2002-Ohio-7208, 781 N.E.2d 971, at ¶21 (noting that parents can contractually forfeit their parental rights).

The great majority of state courts that have considered the issue have held that courts may award custody or visitation to, or impose child support obligations upon, a person who has either co-parented a child with the agreement and consent of the legal parent or who has agreed to support a child, and this rule applies even if the legal parent later tries to revoke that consent. These states include: Arizona, see *Thomas v. Thomas* (Ariz. Ct. App. 2002), 49 P.3d 306, 309 ; Arkansas, see *Robinson v. Ford-Robinson* (Ark. 2005), 208 S.W.3d 140, 143-44 ; California, see *Elisa B. v. Superior Court* (Cal. 2005), 117 P.3d 660, 670; Colorado, see *In re E.L.M.C.* (Colo. Ct. App. 2004), 100 P.3d 546, 555-56; Connecticut, see *Laspina-Williams v. Laspina-Williams* (Conn. Super. Ct. 1999), 742 A.2d 840, 844; Indiana, see *In re Parentage of A.B.*, 837 N.E.2d 965, 967 (Ind. 2005); Kentucky, see *Mullins v. Picklesimer* (Ky. Jan. 21, 2010), No. 2008-SC-000484-DGE, 2010 WL 246063, at \*9-\*10; Maine, see *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1149-51 (Me. 2004); Massachusetts, see *E.N.O. v. L.M.M.* (Mass. 1999), 711 N.E.2d 886, 888 ; Minnesota, see *Soohoo v. Johnson* (Minn. 2007), 731 N.W.2d 815, 824 ; Mississippi, see *Logan v. Logan* (Miss. 1998), 730 So.2d 1124, 1126; Montana, see *Kulstad v. Maniaci* (Mt. 2009), 352

Mont. 513, \*13; New Jersey, see *V.C. v. M.J.B.* (N.J. 2000), 748 A.2d 539, 551-52; New Mexico, see *A.C. v. C.B.* (N.M. 1992), 829 P.2d 660; North Carolina, see *Mason v. Dwinnell* (N.C. Ct. App. 2008), 660 S.E.2d 58, 67-69; Oregon, see *Shineovich v. Kemp* (Or. App. 2009), 214 P.3d 29, 40; Pennsylvania, see *T.B. v. L.R.M.* (Pa. 2001), 786 A.2d 913, 914; Rhode Island, see *Rubano v. DiCenzo* (R.I. 2000), 759 A.2d 959, 974-75; South Carolina, see *Marquez v. Caudill* (S.C. 2008), 656 S.E.2d 737, 744-45; Washington, see *In re Parentage of L.B.* (Wash. 2005), 122 P.3d 161, 173-76; West Virginia, see *In re Clifford K.* (W.Va. 2005), 619 S.E.2d 138, 157-59; and Wisconsin, see *In re the Custody of H.S.H.-K.* (Wis. 1995), 533 N.W.2d 419, 435-36.

Like courts in Ohio, many other courts across the country have held that parental agreements to co-parent or share custody of a child are enforceable and that a person who has entered into such an agreement has standing to enforce it, even if the legal parent later seeks to revoke the agreement. For example, the New Mexico Court of Appeals held that the former lesbian partner of a child's biological mother had standing to seek enforcement of an oral agreement for shared custody or visitation. *A.C. v. C.B.* (1992), 113 N.M. 581, 585-586, 829 P.2d 660, writ of certiorari denied *C.B. v. A. C.* (1992), 113 N.M. 449, 827 P.2d 837 (citing *In re Adoption of Doe* (1982), 98 N.M. 340, 346, 648 P.2d 798, cert. denied (1982), 98 N.M. 336, 648 P.2d 794). Although the legal parent wished to revoke her prior consent and to sever the parental relationship between her former partner and the child, the New Mexico court held that the unwritten agreement was enforceable, subject to the court's best interest determination. *Id.* at 585-586, 829 P.2d 660.

In a similar case, the Rhode Island Supreme Court held that the former lesbian partner of a child's biological mother was entitled to seek a remedy for the biological mother's alleged

violation of the parties' visitation agreement. *Rubano v. DiCenzo* (R.I. 2000), 759 A.2d 959, 972 (holding that Superior Court possessed concurrent jurisdiction with Family Court to decide whether to enforce an alleged visitation and co-parenting agreement between two women who were former cohabitants after the legal parent reneged on the agreement). The Wisconsin Supreme Court likewise has held that a court may "grant visitation apart from [custody and visitation statutes] on the basis of a co-parenting agreement between a biological parent and another when visitation is in a child's best interest." *In re the Custody of H.S.H.-K.: Holtzmann v. Knott* (1995), 193 Wis.2d 649, 691, 533 N.W.2d 419. As in this case, the parties in *Holtzmann* were a lesbian mother who gave birth to a child and her former female partner. *Id.* The biological mother's agreement to co-parent the child with her partner and her voluntary decision to foster the development of a permanent parent-child relationship between the partner and the child were the basis for the court's holding that the former partner had standing to seek visitation despite the legal mother's wish to sever her parental relationship with the child. *Id.* Indeed, the court held that the legal mother's attempt to revoke the agreement could be "a triggering event justifying" the court's intervention. *Id.* at 695-699, 533 N.W.2d 419.

In addition, the American Law Institute Principles of the Law of Family Dissolution ("ALI Principles") endorse the majority position that the Ohio Supreme Court upheld in *In re Bonfield*. The ALI Principles allow an individual to seek custody if he or she has co-parented a child under an agreement with a legal parent, or has functioned as a parent with the consent of a legal parent. *ALI Principles*, § 2.03(1), adopted May 16, 2000. Under this doctrine, a co-parenting agreement establishes a right to seek custody where the individual lived with the child since the child's birth and held out and accepted full and permanent responsibilities as a parent, and where recognition would be in the child's best interests. Under the ALI Principles, an

agreement to co-parent need not be a formal written agreement so long as other sufficient evidence of the agreement exists. See *ALI Principles*, § 2.03(b) comment b(iii). Many other states likewise do not require a formal written agreement. See, e.g., *In re Parentage of M.J.* (2003), 203 Ill.2d 526, 540, 787 N.E.2d 144; *A.C. v. C.B.* (1992), 113 N.M. 581, 829 P.2d 660. Here, where Ms. Mullen and Ms. Hobbs decided together to have a child, shared in the act of bringing that child into the world, and then co-parented that child together for two years, applying the majority rule affirmed in *In re Bonfield* is warranted despite the fact that the parties did not enter a formal, court-approved custody agreement.

This majority rule protects children in a broad range of circumstances where, with the agreement of the child's legal parent, another adult has assumed parental responsibility for a child, and the child has developed a parent-child bond with that adult. For example, in *In re C.K.G., C.A.G., & C.L.G.* (Tenn. 2005), 173 S.W.3d 714, an unmarried, heterosexual couple had three children by obtaining and fertilizing eggs donated by an anonymous third-party female, which the woman carried to term. *Id.* at 716. The couple intended to rear the children together as father and mother. *Id.* at 717-18. Later, the man sought exclusive custody, claiming that the woman had no standing as a parent because she lacked a genetic connection to the children, although they had been living with her as their mother. *Id.* at 718-19. The Supreme Court of Tennessee rejected this argument and held that the woman had standing to seek custody, noting that both parties had "voluntarily demonstrated the bona fide intent that [the woman] would be the children's legal mother and agreed that [she] would accept the legal responsibility as well as the legal rights of parenthood." *Id.* at 730.

Similarly, in *C.E.W. v. D.E.W.* (2004), 2004 Me. 43, 845 A.2d 1146, a lesbian couple agreed to have a child through assisted reproduction, and raised the child together. When their

relationship ended, C.E.W. and D.E.W. agreed that each would participate equally in all childcare and educational decisions; allocated responsibility for the child's insurance and other expenses; and established a visitation and custody schedule for vacations, holidays, and special events. *Id.* at ¶3. Subsequently, C.E.W. (the non-biological parent) sought a declaration of her parental rights and responsibilities. *Id.* D.E.W. argued that the court could not award such rights absent a showing that she, as the biological parent, had or would place the child in jeopardy, but the Supreme Judicial Court of Maine held that C.E.W. was entitled to seek full parental rights and responsibilities. *Id.* at ¶8, 15.

As the above cases demonstrate, the majority rule protects not only the children of same-sex couples, but children from families of all kinds. Both now and in the past, there are a wide variety of circumstances that may lead a parent to cede custody to or share custody with another person. Like Ohio, many other states recognize that where a parent has voluntarily agreed to do so, the law should protect the bonded family relationships that result, even (and especially) when the parent later wishes to unilaterally revoke her consent.

## **II. The Majority Rule Upheld In *In re Bonfield* Protects The Best Interests Of Children By Protecting Parent-Child Bonds.**

Courts across the country have recognized the public policy need for a rule to protect children's interests in maintaining parent-child bonds, regardless of the biological or legal connection between the child and the parental figure. "It is unmistakably important that children have a sense of continuity, or otherwise stated, that they are [able] to avoid the damages which result from serious separations." *Root v. Allen* (1962), 151 Colo. 311, 314, 377 P.2d 117. "The cessation of contact with a [person] whom the child views as a parent may have a dramatic, and even traumatic, effect upon the child's well-being." *Rideout v. Riendeau* (2000), 2000 Me. 198, 761 A.2d 291, at ¶26. "The damage to the child, who cannot understand what is happening, from

breaking these bonds is something which even competent psychiatrists may be unable to predict. . . . [S]uch a breach may not be permitted lightly at the request of a parent who herself created the unfortunate situation.”). *Youmans v. Ramos* (1999), 429 Mass. 774, 785 n.20, 711 N.E.2d 165. Protecting non-biological parent-child bonds and commitments, as Ohio and a majority of other states do, shelters children from serious, and entirely preventable, harms. It would diminish the significance of true parent-child bonds for law to treat them as disposable, or to permit parents to sever them at will.

The law’s respect for parent-child bonds, regardless of whether they are based on a legal parent-child relationship, is not new. Indeed, the first United States Supreme Court cases to establish the fundamental rights of parents involved families comprised of an aunt raising her niece and a grandmother raising grandsons. See *Prince v. Massachusetts* (1944), 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645; *Moore v. City of East Cleveland* (1977), 431 U.S. 494, 503, 97 S. Ct. 1932, 52 L.Ed.2d 531. Similarly, equitable doctrines protecting parent-child bonds, such as *in loco parentis* and estoppel, have been applied by courts in many states for hundreds of years. See, e.g., *Lord v. Dall* (1815), 12 Mass. 115, 118, 1815 WL 889 (recognizing that brother who supported his younger sister stood *in loco parentis*). As these longstanding precedents attest, there have always been children who depend on persons other than their biological parents for parental nurture and care, and the courts have long recognized their obligation to acknowledge this reality and to exercise their inherent jurisdiction over children to protect these family bonds.

### **III. The Majority Rule Protects Parental Autonomy And Honors The Families That Parents Themselves Create.**

In addition to protecting children, the majority rule affirmed in *In re Bonfield* respects parental autonomy by permitting parents to decide whether or not to co-parent with another

person. The rule recognizes that parents may choose to parent with, or cede custody to, a person who is not a biological or adoptive parent.

In custody or visitation cases involving a person who has formed a parent-child bond with the child, courts considering the question of parental autonomy have recognized that it does not violate parental autonomy to protect a parent-child relationship that a legal parent has chosen to create and foster between her child and another adult. "The legal parent's active fostering of the psychological parent-child relationship is significant because the legal parent has control over whether or not to invite anyone into the private sphere between parent and child." *Middleton v. Johnson* (S.C. Ct. App. 2006), 369 S.C. 585, 597, 633 S.E.2d 162. As the New Jersey Supreme Court has explained: "The parent has the absolute ability to maintain a zone of autonomous privacy for herself and for her child. However, if she wishes to maintain that zone of privacy she cannot invite a third party to function as a parent to her child and cannot cede over to that third party parental authority the exercise of which may create a profound bond with the child." *V.C. v. M.J.B.* (2000), 163 N.J. 200, 224, 748 A.2d 539.

In other words, while a parent's decision about whether to permit another person to develop a parent-child relationship with her child must be respected, once a parent has made that decision and encouraged a parental bond to form, there is a compelling interest in protecting the child from the "emotional harm . . . intrinsic in the termination or significant curtailment of the child's relationship with a psychological parent." *In re E.L.M.C.* (Colo.App. 2004), 100 P.3d 546, 561. "[C]hildren have a strong interest in maintaining the ties that connect them to adults who love and provide for them." *V.C.*, 163 N.J. at 221, 748 A.2d 539. The South Carolina Supreme Court has explained: "[W]hen a legal parent invites a third party into a child's life, and that invitation alters a child's life by essentially providing him with another parent, the legal

parent's rights to unilaterally sever that relationship are necessarily reduced." *Marquez v. Caudill*, 376 S.C. 229, 242, 656 S.E.2d 737, 744 (S.C. 2008).

Similarly, the Rhode Island Supreme Court has held that when a legal parent, "by her conduct," allows another person to "assume an equal role as one of the child's two parents," she renders her own parental rights with respect to the minor child "less exclusive and less exclusory" than they otherwise would have been. *Rubano v. DiCenzo* (R.I. 2000), 759 A.2d 959, 976. As a Pennsylvania appellate court stated, "[the mother's] rights as the biological parent do not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the parties' separation she regretted having done so." *J.A.L. v. E.P.H.* (1996), 453 Pa. Super. 78, 92-93, 682 A.2d 1314.

### CONCLUSION

Ohio courts have long held that parents can grant custody rights to people who would not otherwise have such rights, and that agreements to do so are enforceable. This rule, affirmed in *In re Bonfield*, is consistent with the majority rule in other states. Like Ohio, most other states considering this issue have recognized the importance of protecting parent-child bonds that have formed with the agreement of the child's legal parent. As the case law strongly shows, protecting these bonds benefits children and preserves parental autonomy.

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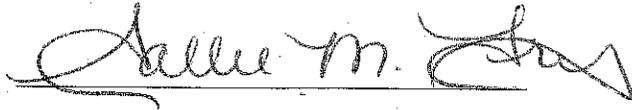
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Here, Ms. Mullen voluntarily agreed to co-parent with Ms. Hobbs, and she and Ms. Hobbs co-parented their daughter for two years. This Court should reverse the appellate court's decision and hold that Ms. Mullen cannot now unilaterally go back on that agreement at the expense of her daughter's parent-child bond with Ms. Hobbs.

Date: June 29, 2010

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Sallee M. Fry", written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I hereby certify that, on June 29, 2010, I caused a copy of the foregoing Brief of Amicus Curiae National Center For Lesbian Rights In Support of Appellant to be served by regular mail upon:

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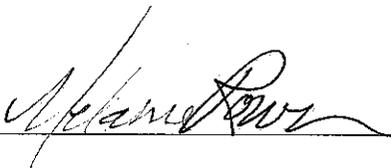
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