

IN THE SUPREME COURT OF OHIO

In the Matter of:

LUCY KATHLEEN MULLEN

A Minor

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Case No. 2010-0276

An Appeal From the First
District Court of Appeals;
Case Nos. C090285 and C090407

MERIT BRIEF OF APPELLANT MICHELE HOBBS

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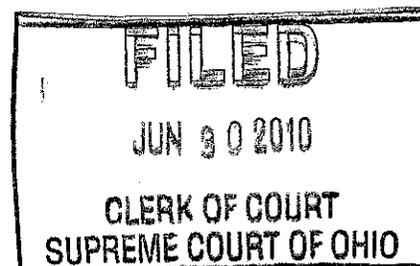
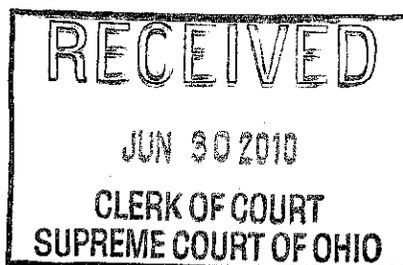


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STATEMENT OF FACTS

This case is a custody dispute between Appellant Michele Hobbs (“Ms. Hobbs”) and Appellee Kelly Mullen (“Ms. Mullen”), two women who agreed to bring a child into the world through donor insemination and to rear their daughter, Lucy, jointly as co-parents. The couple acted in accordance with their agreement such that a bonded relationship formed between Ms. Hobbs and Lucy.

A. Ms. Hobbs And Ms. Mullen Jointly Decided To Have A Child Together Using Known Donor Insemination.

Ms. Hobbs and Ms. Mullen met in May 2000 and started a romantic relationship. (Supp. at 39, Hobbs at Tr.I:244.)¹ Ms. Mullen moved in with Ms. Hobbs about a year and a few months after the couple started dating. (Supp. at 40, Hobbs at Tr.I:246; Supp. at 125, Mullen at Tr.II:25.) Eventually, the couple bought a piece of land together and built a home on their property. (Supp. at 40, Hobbs at Tr.I:246.) They were jointly responsible for the mortgage on their home and they shared equally the expenses associated with maintaining their home. (Supp. at 40-41, Hobbs at Tr.I:246-47.)

Both Ms. Hobbs and Ms. Mullen viewed themselves as – and presented themselves to their family, friends, co-workers and neighbors as – a committed couple in an intimate relationship. (Supp. at 38, Hobbs at Tr.I:242; Supp. at 133-134, Mullen at Tr.II:73-74.) They celebrated May 28th as their anniversary. (Supp. at 134, Mullen at Tr.II:74.) At one point they bought and exchanged rings as a symbol of their commitment to each other. (Supp. at 134, Mullen at Tr.II:74.)

¹ Citations to the trial conducted before the Magistrate include the name of the witness, the transcript volume number (Tr.I or Tr.II) and the relevant page numbers. Citations to the trial exhibits include the name of the offering party, the designation “Tr.Exhibit” and the exhibit number.

In 2003, after Ms. Mullen visited a friend from college who had recently had a baby, the couple discussed having a child of their own. (Supp. at 41, Hobbs at Tr.I:247; Supp. at 125-126, Mullen at Tr.II:25-26.) Both women were interested in using a known sperm donor to conceive a child because they both wanted their child to know the man who made his or her birth possible. (Supp. at 42-43, Hobbs at Tr.I:248-49; Supp. at 127, Mullen at Tr.II:27.) They did not, however, want the sperm donor to assume a parental role. (Supp. at 44, Hobbs at Tr.I:250; Supp. at 127-128, Mullen at Tr.II:27-28.) Indeed, Ms. Mullen testified that she rejected the idea of using one of her friends in Cincinnati as a donor because she was concerned that a nearby friend would want to have “too much involvement.” (Supp. at 127-128, Mullen at Tr.II:27-28.)

Instead of asking someone who lived in Cincinnati, the couple agreed that Ms. Hobbs would ask Mr. Liming – a long-time friend of Ms. Hobbs who, at that time, lived in Atlanta – to donate sperm for the *in vitro* fertilization. (Supp. at 43-44, Hobbs at Tr.I:249-50.) At the time he was asked, Mr. Liming barely knew Ms. Mullen, having met her only once briefly at a party. (Supp. at 113, Liming at Tr.II:121; Supp. at 45-47, Hobbs at Tr.I:253-55.) After spending some time with the couple discussing the limited role they expected he would have in the child’s life, Mr. Liming agreed to be the donor. (Supp. at 46-47, Hobbs at Tr.I:254-55.)

On July 16, 2004, as the couple was preparing for the *in vitro* fertilization, Ms. Mullen and Mr. Liming executed a Donor-Recipient Agreement On Insemination (the “Donor-Recipient Agreement”). (Hobbs Tr.Exhibit 1.) Pursuant to the Donor-Recipient Agreement, Mr. Liming agreed that he would have “no parental rights whatsoever” with respect to any children that were conceived through the use of his sperm. (Hobbs Tr.Exhibit 1, ¶ 6.) He also agreed that he would not demand, request or compel any guardianship, custody, or visitation rights. (Hobbs Tr.Exhibit 1, ¶ 6.) In return, Mr. Liming was released from any financial obligations with respect to the

child. (Hobbs Tr.Exhibit 1, ¶ 7.) Finally, the Donor-Recipient Agreement also made it clear that any right that Mr. Liming might have to guardianship, custody, or visitation in the event of Ms. Mullen's death would be secondary to Ms. Hobbs' rights. (Hobbs Tr.Exhibit 1, ¶ 12.) Indeed, attorney Scott Knox testified that one of the purposes of the Donor-Recipient Agreement was to protect Ms. Hobbs' relationship to the resulting child:

Q: Mr. Knox, what was your understanding of the legal effect of this language, language 12, with respect to Ms. Hobbs' rights under this agreement?

A: My understanding is to be – to protect her right to raise the child if something happened to Kelly [Ms. Mullen] and that right would be superior to Mr. Liming's.

(Supp. at 112, Knox at Tr.I:70.). Even Ms. Mullen agreed, testifying that, in 2004, when she signed the Donor-Recipient Agreement, it was her intention that if something were to happen to her, any child conceived through the use of Mr. Liming's sperm would live with Ms. Hobbs, not Mr. Liming. (Supp. at 142-143, Mullen at Tr.II:98-99.)

B. Ms. Hobbs Was Ms. Mullen's Partner In The *In Vitro* Fertilization Process, The Pregnancy, And The Birth.

In the latter half of 2004, Ms. Mullen and Ms. Hobbs began the *in vitro* fertilization process at the Health Alliance of Greater Cincinnati. (Supp. at 47-54, Hobbs at Tr.I:255-62.) The couple informed their physician, Dr. Thomas, that they were a lesbian couple who wanted to have a child together. (Supp. at 51, Hobbs at Tr.I:259.) As a result, the clinic had the couple jointly execute several documents – namely, a “Consent and Agreement For Cryopreservation And Disposition of Frozen Embryos” and an “Informed Consent For In Vitro Fertilization.” (Hobbs Tr.Exhibits 6 and 7.) On these documents, Ms. Mullen was identified as the “female participant” and Ms. Hobbs was listed as the “partner/husband.” (Hobbs Tr.Exhibits 6 and 7.)

Ms. Hobbs was an active participant in the *in vitro* fertilization process. The couple jointly paid for the fertility treatment – approximately \$10,000-\$12,000– by using a joint credit

card the balance of which was rolled into a second mortgage on their jointly owned home. (Supp. at 54, Hobbs at Tr.I:262.) The nurses at the fertility clinic taught Ms. Hobbs how to administer daily hormone injections to Ms. Mullen. (Supp. at 47-48, Hobbs at Tr.I:255-56.) Ms. Hobbs also accompanied Ms. Mullen to her appointments with Dr. Thomas and she was present when Ms. Mullen's eggs were harvested and when the fertilized eggs were implanted in Ms. Mullen's uterus. (Supp. at 47-50 and 57, Hobbs at Tr.I:255-58 and 266.)

In late 2004, the *in vitro* fertilization succeeded and Ms. Mullen became pregnant. (Supp. at 50, Hobbs at Tr.I:258.) As with the *in vitro* fertilization process, Ms. Hobbs was an active, supportive partner in Ms. Mullen's pregnancy. She accompanied Ms. Mullen to the ultrasound appointments and doctor's visits. (Supp. at 57-58, Hobbs at Tr.I:266-67.) She was Ms. Mullen's partner in Lamaze classes. (Supp. at 48, 59, Hobbs at Tr.I:256, 268.) She often cooked for Ms. Mullen and tended to her when she was not feeling well. (Supp. at 48 and 56-57, Hobbs at Tr.I:256 and 265-66.) Two of the couple's closest friends, Kathy and Rochelle Nardiello, testified about a vacation with the couple during the pregnancy. Kathy testified that Ms. Hobbs attended to Ms. Mullen's needs "as a spouse." (Supp. at 144, K. Nardiello at Tr.I:90.) Rochelle commented that Ms. Hobbs "doted on" Ms. Mullen and seemed "very concerned about [Ms. Mullen's] welfare." (Supp. at 147-148, R. Nardiello at Tr.I:214-15.)

Ms. Mullen went into labor in the early morning hours of July 27, 2005. (Supp. at 62-63, Hobbs at Tr.I:272-73.) Ms. Hobbs drove Ms. Mullen to the hospital and spent the day with her in the birthing suite. (Supp. at 63-64, Hobbs at Tr.I:273-74.) At 5:01 pm, Lucy was born. (Supp. at 64-65, Hobbs at Tr.I:274-75.) Ms. Hobbs cut the umbilical cord. (Supp. at 65-66, Hobbs at Tr.I:275-76.) For the next three days, Ms. Hobbs stayed with Ms. Mullen in the hospital, tending to her needs and helping her get around and use the bathroom. (Supp. at 69-70,

Hobbs at Tr.I:279-80.) After three nights, Ms. Hobbs drove Ms. Mullen and Lucy home. (Supp. at 70, Hobbs at Tr.I:280.) The couple brought a ceremonial birth certificate home with them stating: “This certifies that Lucy Kathleen Mullen was born to Kelly Mullen & Michele Hobbs.” (Hobbs Tr.Exhibit 5; Supp. at 67-69, Hobbs at Tr.I:277-79.)

C. Ms. Hobbs And Ms. Mullen Acted As Equal Parents To Lucy, and Lucy Bonded With Ms. Hobbs As Her Parent.

In every way, Ms. Hobbs was an equal participant in parenting Lucy. When Lucy came home from the hospital, Ms. Hobbs took time off from work to say home and help care for the newborn. (Supp. at 71-74, Hobbs at Tr.I:281-84.) She and Ms. Mullen both fed the baby, changed diapers, and did everything else together that parents do for newborns. (Supp. at 71-74, Hobbs at Tr.I:281-84.)

When both women returned to work, Ms. Hobbs was the person primarily responsible for driving Lucy to and from day care. (Supp. at 85, Hobbs at Tr.I:299; Supp. at 120, Liming at Tr.II:157.) She 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. (Supp. at 75-76, Hobbs at Tr.I:289-90.) She shared responsibility for bathing Lucy. (Supp. at 77-79, Hobbs at Tr.I:291-93.) She taught Lucy how to brush her teeth and she was exclusively responsible for potty training. (Supp. at 77, 85, Hobbs at Tr.I:291, 299.) Ms. Hobbs took care of Lucy when she had diaper rash or when she was sick. (Supp. at 85-91, Hobbs at Tr.I:299-305.) She shared equally in the expenses associated with Lucy’s care. (Supp. at 85, Hobbs at Tr.I:299.) The couple swapped off and shared the childcare responsibilities, with each of them taking primary responsibility at different times. (Supp. at 91-93, Hobbs at Tr.I:305-07.)

Lucy refers to Ms Hobbs as “Momma” or “Ma Shell” and to Ms. Mullen as “Mommy.” (Supp. at 55, Hobbs at Tr.I:264; Supp. at 145-146, K. Nardiello at Tr.I:92-93; Supp. at 149-151,

R. Nardiello at Tr.I:218-20; Supp. at 152,155, Troendle at Tr.I:167, 170.) Ms. Mullen taught Lucy to refer to the women in this manner and the two women referred to each other in this way in front of Lucy. (Supp. at 55, 103, Hobbs at Tr.I:264, 345).

Ms. Hobbs' testimony about her equal role as Lucy's co-parent and Lucy's bond with her was corroborated by several witnesses. The couple's neighbor, Donald Troendle, described how he observed Michele caring for and cooking with Lucy while Ms. Mullen was still at work or working out at the gym. (Supp. at 152-154, Troendle at Tr.I:167-69.) He also observed Ms. Hobbs taking Lucy to and from day care. (Supp. at 154, Troendle at Tr.I:169.) He testified that the couple was jointly responsible for Lucy and that they had a "coordinated child-rearing strategy." (Supp. at 156-159, Troendle at Tr.I:171-74.)

James Stradley, Michele's boss, described how Michele took Lucy to work with her on several occasions when Lucy was ill. (Stradley at Tr.I:146-48.) When asked to describe what he observed, Mr. Stradley noted that Ms. Hobbs looked like any mother taking care of a child and that he had "no doubt" that Ms. Hobbs interacted with Lucy as her mother. (Stradley at Tr.I:148.)

Kathy Nardiello, who saw the couple frequently with their daughter, also testified about how both Ms. Hobbs and Ms. Mullen interacted with Lucy as mothers. For example, when asked to describe what she had observed about the nature of the relationship between Ms. Hobbs and Lucy, Kathy Nardiello stated:

Well, a parenting relationship. I mean, every time I saw them together, you know, Michele didn't act any different than – than any other parent would or any different than Kelly did.

They did the same things. If we were in their company for dinner if Lucy started to cry one of them would take them out – would take Lucy or go talk to her or whatever. You know, sometimes it was Michele. Sometimes it was Kelly.

If we were in their home and, you know, a diaper needed to be changed one of them took Lucy to – to – you know, to change the diaper. One of them, you know, got the bottle ready.

I mean, it was – to me I didn't see any distinction that one was doing any more or any less than they were two parents taking care of Lucy. That's what I observed all the time. I never saw anything different.

(Supp. at 145, K. Nardiello at Tr.I:92.) Kathy's partner, Rochelle Nardiello, agreed, observing that the couple was engaged in "very equal parenting." (Supp. at 150, R. Nardiello at Tr.I:219.) She stated: "Kelly did as much as Michele. Michele did as much as Kelly. I didn't observe one more than the other." (Supp. at 150, R. Nardiello at Tr.I:219.)

Finally, Cincinnati councilwoman Leslie Ghiz testified about what she observed at various social functions. When asked to describe the role that Ms. Hobbs appeared to play in Lucy's life, she stated:

She had a parental role. She was the parent just the same as Kelly was the parent. . . . I never got the impression that there was any difference between the two of them. And had I not known that Kelly was the biological parent I wouldn't have known [Michele] wasn't.

(Supp. at 36, Ghiz at Tr.I:197.) In short, Ms. Mullen and Ms. Hobbs jointly cared for their daughter, Lucy, with each of them acting as equal parents.

D. Ms. Mullen and Ms. Hobbs Consistently Represented To Lucy, Their Family, Their Friends, Their Community and Each Other That They Were A Family And That Both Ms. Mullen and Ms. Hobbs Were Lucy's Mothers.

When they were a couple, Ms. Hobbs and Ms. Mullen consistently presented themselves as a "family." (Supp. at 145-146, K. Nardiello at Tr.I:92-93.) The couple told friends of their agreement to be equal parents to Lucy. (Supp. at 146, K. Nardiello at Tr.I:93.) Ms. Mullen would refer to, and introduce Ms. Hobbs as, Lucy's mother. (Supp. at 151, R. Nardiello at Tr.I:220.) For example, Councilwoman Ghiz recalled that Ms. Hobbs introduced Lucy to her as her daughter and that the couple presented themselves as a family. (Supp. at 33-34, Ghiz at

Tr.I:191-92.) She also noted that Ms. Mullen made it clear to her that Ms. Hobbs was the other parent. (Supp. at 35, Ghiz at Tr.I:194.) Mr. Troendle, the couple's next-door neighbor observed that the couple routinely presented themselves as a family unit and that Lucy referred to both of the women as mother, ma, or momma. (Supp. at 152, 155, Troendle at Tr.I:167, 170.) In addition, the Reverend Canon Ann Wrider, described how the couple met with her to discuss having their baby baptized and joining the Christ Church Cathedral. (Supp. at 160-161, Wrider at Tr.I:26-27.) She testified that the couple presented themselves as a same-sex couple with a baby and as co-parents of their child. (Supp. at 161-162, Wrider at Tr.I:27-28.) It was her understanding based on that meeting that Ms. Hobbs and Ms. Mullen were raising a child together. (Supp. at 161, Wrider at Tr.I:27.)

E. Ms. Mullen Repeatedly Acknowledged In Writing That She Understood Ms. Hobbs To Be Lucy's Co-Parent.

Ms. Mullen memorialized her understanding of Ms. Hobbs' status as Lucy's co-parent in several legal documents. On June 28, 2005, a month before Lucy was born, Ms. Mullen executed several life-planning documents to protect the family she was creating with Ms. Hobbs. (Hobbs Tr.Exhibits 2, 3, 4.) These documents were prepared by Scott Knox, an attorney with significant experience in legal issues affecting non-traditional families. (Supp. at 104-107, Knox at Tr.I:42-45.) In her Last Will And Testament, Ms. Mullen named Ms. Hobbs as both the executor of her will and the guardian of the person and estate of Ms. Mullen's minor child, stating: "***I consider her to be Lucy's co-parent in every way.***" (Hobbs Tr.Exhibit 2, item II and item VII.)

Similarly, in a "Health Care Power of Attorney For Kelly K. Mullen For Her Child," Ms. Mullen named Ms. Hobbs as her agent authorized to make health care decisions for the couple's

expected child. (Hobbs Tr.Exhibit 3, page 2.) This document also states: “***I consider Michele Hobbs to be my child’s co-parent in every way.***” (Hobbs Tr.Exhibit 3, page 1.)

In a “General Durable Power of Attorney of Kelly Mullen For The Care Of Her Child,” Ms. Mullen granted Ms. Hobbs “every Power with respect to my child that I possess.” (Hobbs Tr.Exhibit 4, page 1.) This document explicitly authorized Ms. Hobbs to make decisions regarding Lucy’s “personal care, education, support, maintenance, and living arrangements.” (Hobbs Tr.Exhibit 4, page 1.) Furthermore, in this document, Ms. Mullen once again stated: “***I consider Michele Hobbs as my child’s co-parent in every way.***” (Hobbs Tr.Exhibit 4, page 1.)

Scott Knox, the attorney who prepared these documents, testified that both of the powers of attorney were “non-springing” – i.e., that they took effect upon signing and immediately authorized the recipient of the power to act upon the child’s behalf, granting Ms. Hobbs equal decision-making authority with respect to Lucy. (Supp. at 108-111, Knox at Tr.I:48-51; Hobbs Tr.Exhibits 3, 4.) To protect her daughter and their relationship in the event of an emergency, Ms. Hobbs carried the powers of attorney in the glove compartment of her car. (Supp. at 60-61, Hobbs at Tr.I:270-71.) Only after the relationship between the two women had ended, in August, 2007, did Ms. Mullen revoke these documents. (Mullen at Tr.II:20-24.)

In addition to legal documents, Ms. Mullen acknowledged Ms. Hobbs’ status as a mother in numerous other less formal writings. In an email to Ms. Hobbs dated May 12, 2006, Ms. Mullen stated: “You’re her Momma.” (Hobbs Tr.Exhibit 8.) Similarly, in an email dated May 25, 2006, Ms. Mullen referred to Ms. Hobbs as “the fun Mom,” and, in an email dated February 21, 2007, she referred to Ms. Hobbs as Lucy’s “mother.” (Hobbs Tr.Exhibits 11 and 12; Supp. at 94-95, Hobbs at Tr.I:312-13.) In greeting cards that Ms. Mullen gave to Ms. Hobbs (pretending

that they were from Lucy), Ms. Mullen referred to Ms. Hobbs as “Momma Shell” and “Mom.” (Hobbs Tr.Exhibit 13, page 15 and page 72).

This documentary evidence stood in stark contrast to the testimony of Ms. Mullen, who claimed that, when the couple was planning on having a child, they both understood that it was going to be Ms. Mullen’s child and that Ms. Hobbs would assume the role of a supportive partner. (Supp. at 127-128, Mullen at Tr.II:27-28.) However, when confronted with the documentary evidence indicating that she referred to Ms. Hobbs as Lucy’s mother, Ms. Mullen expressly admitted that she sometimes referred to Ms. Hobbs as “Momma” and sometimes referred to her as “Mom.” (Supp. at 137-141, Mullen at Tr.II:87-91.) Several witnesses stated that Ms. Mullen never corrected anyone when they referred to Michele as Lucy’s mother, momma or mom nor did she do anything to suggest that Ms. Hobbs was not Lucy’s mother. (See Supp. at 55, Hobbs at Tr.I:264; Supp. at 151, R. Nardiello at Tr.I:220; Supp. at 158, Troendle at Tr.I:173; Supp. at 36-37, Ghiz at Tr.I:197-98; Supp. at 162, Wriener at Tr.I:28.)

F. Ms. Mullen, Ms. Hobbs And Mr. Liming Agreed That Mr. Liming Would Have Limited Visitation With Lucy.

When he signed the Donor-Recipient Agreement in 2004, Mr. Liming understood that he would not have any parental or custodial rights with respect to Lucy. (Supp. at 115-117, Liming at Tr.II:151-53.) It was his hope, however, that although he lived in Atlanta, he might still have some role in Lucy’s life, perhaps visiting her when he was in Cincinnati. (Supp. at 114, Liming at Tr.II:125.) Ms. Mullen and Ms. Hobbs also wanted him to play a role in Lucy’s life, but they were adamant that he would not have any legal or custodial decision-making authority. (Supp. at 44, Hobbs at Tr.I:250.) They made it clear to Mr. Liming that he would be helping two women have a child that they were going to be raising together. (Supp. at 44, Hobbs at Tr.I:250.)

As a result, the Donor-Recipient Agreement, which was written to protect Ms. Mullen's and Ms. Hobbs' desire to have a child together, did not provide Mr. Liming with any rights with respect to Lucy. (Hobbs Tr.Exhibit 1.) Mr. Liming signed the Donor-Recipient Agreement even though his attorney cautioned him that it did not reflect Mr. Liming's hope of what his role might someday be. (Supp. at 116-117, Liming at Tr.II:152-53.)

Shortly after Lucy's birth, Mr. Liming decided to move back to Cincinnati. (Supp. at 123-124, Liming at Tr.II:164-65.) He did not, however, assume a custodial role in Lucy's life. Rather, he stood by the agreement he had reached with Ms. Hobbs and Ms. Mullen that the two women would care for Lucy together. (Supp. at 121-123, Liming at Tr.II:162-64.) Indeed, in an email to Ms. Hobbs and Ms. Mullen dated September 9, 2005, shortly after he moved to Cincinnati, 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." (Hobbs Tr.Exhibit 9; Supp. at 121-123, Liming at Tr.II:162-64.)

For the duration of the relationship between Ms. Hobbs and Ms. Mullen, Mr. Liming did indeed remain in a "back seat" role. He did not contribute money to support Lucy, he did not regularly drive Lucy to and from day care and he did not take Lucy to the pediatrician. (Supp. at 118-120, Liming at Tr.II:155-57.) He did, however, begin visiting her approximately once a week. (Supp. at 131-132, Mullen at Tr.II:64-65.)

G. Ms. Hobbs Maintains A Loving, Parental Relationship With Lucy.

Ms. Hobbs has a loving bond with her daughter. She introduced as evidence a 99-page album of photographs chronicling her relationship with Lucy. (Hobbs Tr. Exhibit 13.) She testified about the numerous fun and educational activities she engaged in with her daughter. (Supp. at 80-84, 95-96, Hobbs at Tr.I:294-98, 313-14.) As part of Lucy's birthday celebrations, Ms. Hobbs taught her daughter the importance of giving something back to the community by

asking guests to make a small donation to the neighborhood association instead of purchasing gifts. (Supp. at 83, Hobbs at Tr.I:297.). The money raised at the first party was used to purchase sprinklers for the neighborhood park and the money raised in the second year was used to purchase a permanent picnic table in the park for everyone's enjoyment. (Supp. at 83-84, Hobbs at Tr.I:297-98.) The picnic table bears a stainless steel plaque with Lucy's name. (Supp. at 84, Hobbs at Tr.I at 298.) Finally, Ms. Hobbs also described the highly emotional moment she and Lucy shared on the day that she was reunited with her daughter after being kept apart for several months early in the proceedings below. (Supp. at 99-100, Hobbs at Tr.I:321-22.)

H. Ms. Hobbs Seeks Shared Custody Of Her Daughter.

Ms. Hobbs' relationship with Ms. Mullen ended in 2007, but, for several months afterward, the women continued to live together with Lucy as a family. In October 2007, Ms. Mullen moved out of the family home and prevented Ms. Hobbs from having contact with Lucy.

On December 20, 2007, Ms. Hobbs filed her Verified Complaint For Shared Custody requesting the trial court to grant her equal and shared permanent custody of Lucy. (T.d. 1)² On that same day, Ms. Hobbs also filed a motion requesting interim visitation. (T.d. 2) Ms. Mullen moved to dismiss Ms. Hobbs' Verified Complaint. (T.d. 15) Shortly thereafter, Mr. Liming filed his own petition for shared custody (T.d. 21) and joined Ms. Mullen's motion to dismiss. The two petitions were consolidated. (T.d. 26)

The Magistrate denied the motion to dismiss and granted Ms. Hobbs' motion for interim visitation. (T.d. 36) Ms. Mullen and Mr. Liming filed objections to the interim visitation order, which were denied. (T.d. 47) The Magistrate scheduled a trial to determine whether Ms. Mullen

² Citations to materials from the trial docket include the designation "T.d." and the number on the Juvenile Court's "Transcript of Docket and Journal Entries" that corresponds to the particular document referenced.

had relinquished her right to exclusive custody of Lucy in favor of shared custody with Ms. Hobbs. (T.d. 36)

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. (Appx. 24³) He did not rule on Mr. Liming's custody petition. Specifically, the Magistrate found that:

[T]he evidence and testimony presented at trial support Ms. Hobbs' contention that she as 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 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 . . . [which] was indicative of the parties' understanding at the time of the birth.

(Appx at 29.) With respect to whether Ms. Hobbs and Ms. Mullen had an understanding prior to Lucy's birth that they would be equal parents to Lucy, the Magistrate conceded that "there [was] contradictory testimony from a number of witnesses." (Appx. at 29.) Weighing the competing versions, the Magistrate found that "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."

(Appx. at 29.) Pointing to the will and power of attorney signed by Ms. Mullen "just before and after Lucy was born," the Magistrate found that these documents were "illustrative of the parties' understanding about Ms. Hobbs' role in Lucy's life" at the relevant time period for determining whether a contractual relinquishment had occurred – namely, in the months before Lucy's birth and the period afterward when both women reared Lucy together and jointly fostered a bond between Lucy and Ms. Hobbs. (Appx. at 29.)

³ Citations to materials in the attached Appendix include the designation "Appx," and the corresponding page number.

The Magistrate rejected Ms. Mullen’s conflicting testimony as *post hoc* and lacking in credibility: “The court finds that [the will and power of attorney documents in which Ms. Mullen acknowledged that Ms. Hobbs is Lucy’s ‘co-parent in every way’] 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.” (Appx. at 30 (emphasis added).) The Magistrate found Ms. Hobbs’ testimony that the two women had an agreement to have and raise a child together to be “very credible and believable.” (Appx. at 32.). While “Ms. Mullen and Mr. Liming gave testimony to the contrary, . . . **their version of what happened is not supported by their actions** during the period leading up to and immediately following Lucy’s birth.” (Appx. at 32.) The Magistrate concluded: “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.” (Appx. at 30.)

On April 13, 2009, Judge Lipps of the Juvenile Court (the “Juvenile Court”) – based solely on a review of the transcript and without having personally observed the credibility and demeanor of the witnesses or taking any additional evidence whatsoever – rejected the Magistrate’s decision, reversed his credibility determinations, and dismissed Ms. Hobbs’ petition for shared custody, terminating Ms. Hobbs’ visitation with Lucy. (Appx. at 11.)

Consistent with the Magistrate’s decision, the Juvenile Court found that Ms. Mullen and Ms. Hobbs had lived together in a long term relationship, that they decided together to have a child, and that they “discussed and planned the conception and birth of the child together.” (Appx. at 11 and 17.). The Juvenile Court found that Ms. Hobbs was an active participant in preparing for Lucy’s birth “emotionally, physically, and financially,” and that the parties jointly

cared for the child for two years, living together as a family. (Appx. at 11 and 17.). The court acknowledged: “There are pictures, notes, e-mails and postcards where [Ms. Hobbs] was referred [to] as momma, family, etc. by the mother, child and others. The mother and [Ms. Hobbs] acted as a family and led others to believe that they shared responsibilities as equal partners and parents of this child.” (Appx. at 19.)

However, the Juvenile Court rejected the Magistrate’s credibility determinations to find credible Ms. Mullen’s testimony that she had “refused repeatedly” to enter into a shared custody court order. (Appx. at 21.) Without explanation or citation to evidence, the court stated, “[Ms. Hobbs] and [Ms. Mullen] discussed this concept of shared custody several times from before birth and after. Each time the mother refused to consider such an agreement.” (Appx. at 22.) The Juvenile Court stated that Ms. Mullen’s actions “are not admirable,” and allowed that Ms. Mullen’s “intentions, motives, and indications [to Ms. Hobbs] may have changed over time.” (Appx. at 22.) Nevertheless, the court concluded that because Ms. Mullen had engaged in “conversation” about a shared custody order, but had refused to enter into one, she had declined to “give up” any custodial rights to Ms. Hobbs. (Appx. at 22.) Stating that this was the “most important factor,” the Juvenile Court concluded that Ms. Mullen had not contractually relinquished sole custody and dismissed Ms. Hobbs’ petition for custody. (Appx. at 22.) The court also terminated Ms. Hobbs’ interim visitation with Lucy. (Appx. at 23.)

With respect to Mr. Liming, the Juvenile Court reversed the Magistrate’s decision as well. Although noting that Mr. Liming “has had less contact and care with the child than [Ms. Hobbs],” the court found that Mr. Liming had not relinquished exclusive custody in favor of shared custody with Ms. Hobbs, citing as evidence only that Ms. Hobbs was not a party to the

sperm donor-recipient agreement in which Mr. Liming had ceded all rights to Lucy, and therefore was not authorized to enforce it. (Appx. at 22.)

Ms. Hobbs moved for a stay of the order terminating interim visitation. (T.d. 94) The Juvenile Court granted Ms. Hobbs' motion and reaffirmed its finding that Ms. Mullen had consented to the formation of a bond between Lucy and Ms. Hobbs: "The 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." (T.d. 102)

Ms. Hobbs timely appealed. (T.d. 93.) On December 31, 2009, the appellate court affirmed the decision of the Juvenile Court. (Appx. at 3.) Although the appellate court concluded "[w]e do not doubt that Hobbs bonded with Lucy" (Appx. at 8.), that Ms. Hobbs had presented "strong evidence that Ms. Mullen had intended to give Hobbs shared custody of Lucy" (Appx. at 6.), and that "[t]he record is replete with evidence that Hobbs loves this little girl" (Appx. at 8), the court declined to hold that the Juvenile Court had erred. The appeals court acknowledged expressly that the Juvenile Court had relied "most heavily" on Mullen's alleged repeated refusals to enter into an agreed court order "when presented with the option of doing so" after her relationship with Hobbs had begun to deteriorate, but concluded that this was not error despite the overwhelming evidence of Mullen's consent in happier times to Hobbs' status as co-parent, Mullen's conduct and words consistent with that consent for years, and Lucy's bonded relationship with Hobbs. (Appx. at 6.) Ms. Hobbs filed a timely Notice of Appeal with this Court. (Appx. at 1.)

Throughout all of the legal proceedings described above, Ms. Hobbs has continued to have weekly visitation with Lucy. On April 18, 2008, the Magistrate entered an order granting

six hours of visitation every Saturday during the pendency of the proceedings in the Juvenile Court. (T.d 36.) Shortly after he rejected the Magistrate's decision on the merits, Judge Lipps entered an order staying the termination of visitation during the pendency of the appeal in the intermediate appellate court. (T.d 102.) After Ms. Hobbs filed her timely Notice of Appeal, this Court granted Ms. Hobbs' motion to reinstate visitation during the pendency of the proceedings in this Court. Thus, Ms. Hobbs has had almost uninterrupted weekly visitation with Lucy since Spring 2008.

SUMMARY OF ARGUMENT

The appellate court and Juvenile Court erred in rejecting the Magistrate's decision that Ms. Mullen had contractually relinquished her right to exclusive custody in favor of shared custody with Ms. Hobbs. Under settled Ohio law, parents are bound by their agreements to relinquish their right to exclusive custody in favor of shared custody. It is also settled – and the Magistrate, Juvenile Court and appellate court all correctly concluded – that a parent's relinquishment of custody can be proved through the parties' words and conduct. A court-approved custody agreement is not required.

The Magistrate, Juvenile Court and the appellate court were also correct in finding that the evidence presented at trial demonstrated that Ms. Mullen and Ms. Hobbs had agreed to have a child together through donor insemination and to rear their child together as "co-parents," with the result being that Lucy developed a bonded relationship with Ms. Hobbs. The Juvenile Court and the appellate court made a legal error, however, in concluding that Ms. Mullen had the right to negate unilaterally the prior agreement she had made to allow Ms. Hobbs to be Lucy's co-parent. As a matter of law, if a parent agrees to bring a child into the world with another adult as co-parent, consents to the formation of a parental bond between the child and the adult, and acts

in accordance with the agreement for over two years, then the parent has contractually relinquished exclusive custody in favor of shared custody. The law does not permit a parent to negate the agreement to “co-parent” a child by refusing to obtain a shared custody court order. Because the appellate court’s decision is contrary to Ohio law, it should be reversed and this matter should be returned to the Juvenile Court for an allocation of custody between the parties in the best interests of the child.

In the alternative, the appellate court’s decision should be reversed because the trial court’s decision that Ms. Mullen had never agreed to share custody with Ms. Hobbs was an abuse of discretion. The evidence overwhelmingly proved – and the Magistrate correctly concluded – that Ms. Mullen intended to share custody with Ms. Hobbs. The Juvenile Court abused its discretion in rejecting the Magistrate’s decision because the Juvenile Court elevated the self-serving, disputed testimony of Ms. Mullen that she never intended to share custody with Ms. Mullen above the mountain of unbiased, contemporaneous evidence indicating that she fully intended that Ms. Hobbs would be an equal co-custodian. In so deciding, the Juvenile Court rejected the credibility determinations made by the Magistrate, despite the fact that the Juvenile Court did not personally observe the witnesses and did not take any additional testimony or evidence.

The appellate court’s and Juvenile Court’s decision with respect to Mr. Liming should be reversed for similar reasons. Both the appellate court and the Juvenile Court held that Mr. Liming did not contractually relinquish custody to Ms. Hobbs solely because Ms. Hobbs was not a party to the donor insemination agreement between Mr. Liming and Ms. Mullen. To the extent that such a decision imposes a requirement that the contractual relinquishment of custody can only be proven with a written agreement, it should be reversed as contrary to settled Ohio law.

In the alternative, the decision should be reversed as an abuse of discretion because the evidence at trial overwhelmingly demonstrated that Mr. Liming intended to relinquish his custodial rights so that Ms. Mullen and Ms. Hobbs could be equal co-custodians.

ARGUMENT

Proposition of Law No. 1

If a parent agrees to bring a child into the world with another adult as co-parent, consents to the formation of a parental bond between the child and the adult, and acts in accordance with the agreement for over two years, then the parent has contractually relinquished exclusive custody in favor of shared custody, warranting an allocation of custody between the parties in the best interests of the child.

A. Under Ohio law, parents are bound by their agreements to relinquish their right to exclusive custody in favor of shared custody.

More than a century of this Court's case law holds that a parent's voluntary relinquishment to a third party of her otherwise exclusive right to sole custody is enforceable against the parent once a child has formed a significant parental bond with the third party. This Court long has held that when a parent agrees to cede custody of minor children – either in whole or in part – to another person, the parent is bound by that agreement. See, e.g., *Reynolds v. Goll*, 75 Ohio St.3d 121, 123, 1996-Ohio-153, 661 N.E.2d 1008 (upholding trial court's finding that father had voluntarily relinquished custody and awarding continued custody to "nonbiological parents"); *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 otherwise exclusive right to custody of his daughter even though he continued to provide support); *In re Perales* (1977), 52 Ohio St.2d 89, 6 O.O.3d 293, 369 N.E.2d 1047 (laying out the standard in detail); *Rowe v. Rowe* (1950), 58 Ohio Law Abs. 497, 44 O.O. 224, 97 N.E.2d 223

(holding that parent's agreement to share custody with grandparents was enforceable); *Clark v. Bayer* (1877), 32 Ohio St. 299, 1877 WL 120 (citing even older cases holding that a parent's agreement to relinquish custody to a non-parent was enforceable regardless of whether it was written or "parol," and holding that the father could not later unilaterally sever the children's relationship with the non-parent.)⁴

This Court recently reaffirmed this ancient line of precedent in *In re Hockstock*, 98 Ohio St.3d 238, 2002-Ohio-7208, 781 N.E.2d 971 and *In re Bonfield*, 97 Ohio St.3d 387, 394, 2002-Ohio-6660, 780 N.E.2d 241. The *Bonfield* decision in particular is instructive here as an example of Ohio courts' consistent rulings that a biological parent's voluntary relinquishment of her sole custodial rights is valid and enforceable in the best interests of the child. See, e.g., *In re J.D.F.*, Franklin App. 07-AP-922, 2008-Ohio-2793, appeal dismissed, 120 Ohio St.3d 1453, 2008-Ohio-6813, 898 N.E.2d 968 (Dec. 31, 2008); *In re J.D.M.*, slip op., Warren App. Nos. CA2003-11-113, CA2004-04-035, CA2004-04-040, 2004-Ohio-5409; *Morris v. Hawk*, 180 Ohio

⁴ This Court often has described a juvenile court's obligation to determine whether contractual relinquishment occurred as a requirement to find both that the non-parent is a suitable custodian and that the parent is "unsuitable." *Perales*, 52 Ohio St.2d at 99. However, in this context, "unsuitability" has a special meaning and does not imply unfitness or inadequacy on the part of the parent in any way. "Unsuitable" is a term of art, and means only that the parent has entered into an agreement with a non-parent to share custody. *Hockstock, supra*, 98 Ohio St.3d 238 ¶17; *Perales, supra*, 52 Ohio St.2d 89. "[T]he unsuitability determination that is required before custody may be awarded to a nonparent . . . is determined by whether the record support[s] a finding that the natural parent ha[s] relinquished his or her custodial rights." *Hockstock*, 98 Ohio St.3d 238 at ¶33, *citing Perales*, 52 Ohio St.2d 89. "We do not intend a finding of unsuitability to connote only some moral or character weakness; instead, it is designed to indicate [merely] that contractual relinquishment of custody . . . has been proved by a preponderance of the evidence." *Perales*, 52 Ohio St.2d at 99; *accord, Masitto*, 22 Ohio St.3d at 65-66 (parent may be found "unsuitable" based solely upon his contractual relinquishment); *Miller v. Miller* (1993), 86 Ohio App.3d 623, 621 N.E.2d 745 (whether relinquishment constitutes unsuitability depends on the nature of the contractual relinquishment and is for the trier of fact to decide). Thus, this Court always has been careful to distinguish a court's obligation to find that a parent is "unsuitable" from the unfitness requirements applicable in abuse, neglect, and dependency proceedings under R.C. 2151 *et seq.*

App.3d 837, 2009-Ohio-656, 907 N.E.2d 763; *In re M.S.* (June 23, 2009), Franklin J.C. No. 08 JU 10 13850, unpublished, a copy is attached at A-33; *In re R.A.W.* (Dec. 17, 2009), Franklin J.C. No. 08 JU 09 13321, unpublished, a copy is attached at A-50 and, *In re S.L.* (July 10, 2009), Cuyahoga J.C. No. CU 07 101304 and CU 07 01305, unpublished, a copy is attached at A-55.

As in this case, *Bonfield* involved a lesbian couple who had planned a family and was rearing children together. And as is the case here, although the women in *Bonfield* jointly cared for and supported their children, who viewed them both as equal parents, only the biological mother had a legally recognized relationship with the children. *Bonfield*, 97 Ohio St. 3d at 389. The women sought legal recognition of their children's relationship with both of them in their children's best interests, and petitioned a juvenile court for a shared parenting agreement pursuant to R.C. 3109.04. After the juvenile court dismissed their petition, the women appealed. Although this Court ultimately ruled that statutory *parenting* agreements were not an available remedy, the Court found that entry of a shared *custody* agreement pursuant to R.C. 2151.23 was appropriate, *Bonfield, supra*, 97 Ohio St.3d at 395-96. Citing *Masitto*, 22 Ohio St.3d 63, and older cases, this Court held that "[p]arents may waive their right to custody of their children and are bound by an agreement to do so." *Bonfield*, 97 Ohio St.3d at 395. This 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.* at 395-96. Thus, *Bonfield* made explicit that established Ohio standards regarding relinquishment of child custody rights apply equally to lesbian and gay parents and their children. It also confirmed once again that the juvenile court has jurisdiction to

resolve disputed custody claims, and the standard for doing so, where, as here, custody is disputed between a parent and a non-parent at law.⁵

B. The courts below correctly concluded that a parent’s relinquishment of exclusive custody in favor of shared custody can be demonstrated by words or conduct; a written shared custody agreement is not required.

It is well established that an agreement to relinquish sole custody in favor of shared custody need not be in writing to be enforceable. Rather, “[w]hether or not a parent relinquishes rights to custody is a question of fact” for a trial court to determine based on the parent’s writings, words and conduct, using a preponderance of the evidence standard. See *Masitto*, 22 Ohio St.3d at 65; *Hockstock, supra*, 98 Ohio St.3d 238 at ¶17. Although a written agreement is one form of evidence, it is not necessary, and courts routinely enforce a parent’s voluntary relinquishments of custodial rights in the absence of any writing. See, e.g., *Masitto*, 22 Ohio St.3d at 66 (considering a father’s conduct, “taken as a whole” in determining that he relinquished custody); see, also, *Clark*, 32 Ohio St. at 305-06 and 308 (parents may relinquish custody “by act and word” and finding that an oral agreement and the parties’ corresponding conduct proved parental relinquishment); *Barry v. Rolfe*, Cuyahoga App. Nos. 88459-88911, 2008-Ohio-3131 (affirming trial court’s award of custody to a non-parent after one parent had contractually relinquished custody based on statements of father’s counsel at a hearing, and over the other parent’s objection); *In re Galan*, Seneca App. No. 13-02-44, 2003-Ohio-1298 (enforcing a parent’s contractual relinquishment of custody in favor of nonparents based on a phone conversation); *Rowe*, 58 Law Abs. 497 (language in divorce decree was evidence of a

⁵ In the courts below, Ms. Mullen attempted to distinguish *Bonfield* by arguing that the parties in that case were an intact couple, while the parties in the instant case are disputing custody. As the appellate and juvenile court correctly concluded, this is a distinction without a difference. The *Bonfield* decision cited and relied upon numerous contractual relinquishment cases involving parents disputing non-parents for custody, including *Masitto* and *Perales*.

prior enforceable agreement to relinquish custody); *Reynolds v. Goll*, 75 Ohio St.3d 121 (enforcing nonparents' custodial rights over parent's objection in the absence of a court order or other written instrument). *See also In re Perales*, 52 Ohio St.2d at 91, fn.2 (noting that, although a written agreement may not itself be sufficient to grant a non-parent custody, it may be considered as part of the totality of evidence demonstrating that a parent has contractually relinquished custody).

Based on this body of law, the appellate court below correctly recognized that the threshold issue in this case is whether a preponderance of the evidence adduced at the hearing demonstrates that Ms. Mullen, through her words and conduct over a period of years, agreed to relinquish exclusive custody of Lucy in favor of shared custody with Ms. Hobbs, resulting in a parental bond between Lucy and Ms. Hobbs. That the parties did not reduce this agreement to a consent order is not in itself determinative of anything:

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.

In re Mullen, 185 Ohio App. 3d 457, 461, 2009-Ohio-6934, 924 N.E.2d 448.

C. The evidence overwhelmingly proved – and the appellate court and juvenile court correctly found – that Ms. Mullen and Ms. Hobbs agreed to have a child together, and to rear the child as equal parents.

The evidence presented at trial proved that Ms. Mullen and Ms. Hobbs jointly decided to bring Lucy into the world and rear her in a family with two moms. The factual findings of the Juvenile Court on this point include:

- Ms. Hobbs was “an active participant in preparing for the child’s birth, emotionally, physically and financially.” (Appx. at 19.)
- Ms. Hobbs signed hospital consent forms regarding the *in vitro* process. (Id.)

- Ms. Hobbs accompanied Ms. Mullen to doctor visits and Lamaze classes and paid medical bills. (Appx. at 11.)
- Ms. Hobbs was present at the birth. (Id.)
- After the child's birth, the two women jointly cared for the child, living together as a family for over two years after Lucy was born. (Id.)
- Ms. Mullen, Lucy and others referred to Ms. Hobbs as "Momma." (Appx. at 19.)
- Both Ms. Mullen and Ms. Hobbs "acted as a family and led others to believe that they shared responsibilities as equal partners and parents." (Id.)
- The couple's friends "understood the family to consist of two equal mothers and a child." (Id.)

Based on these factual findings, which were largely undisputed, the trial court correctly concluded that "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 petitioner who would both care for her." (Appx. at 19.) The appellate court noted that these findings comprise "strong evidence that Mullen had intended to give Hobbs shared custody of Lucy." (Appx. at 6.) Thus, the appellate court, trial court and Magistrate all concluded that Ms. Mullen and Ms. Hobbs agreed to have a child together, to share in the responsibility of rearing their child and to hold themselves out to their child, their families, their community and each other as two mothers, and that they acted in accordance with this agreement for years.

- D. Based on the Juvenile Court's own findings of fact, the Juvenile Court erred as a matter of law in concluding that Ms. Mullen had the right to sever a bonded parental relationship between Lucy and Ms. Hobbs that Ms. Mullen had encouraged and fostered solely because Ms. Mullen had refused to memorialize her agreement to "co-parent" Lucy with Ms. Hobbs in a court order.**

Accepting for the sake of argument all of the Juvenile Court's findings of fact as correct, the juvenile and appellate courts erred as a matter of law in concluding that Ms. Mullen had not

contractually relinquished custody. Because the Juvenile Court made findings of fact that the parties agreed to have and rear a child together, acted in accordance with that agreement for years, and that Lucy has a parental bond with Ms. Hobbs, the court was required to find that Ms. Mullen had contractually relinquished sole custody in favor of shared custody, and go on to allocate custody between the parties in accordance with Lucy's best interests.⁶ Instead, the Juvenile Court declined to hold that Ms. Mullen had relinquished custody solely on the ground that Ms. Mullen had "refused repeatedly" to reduce her agreement to a shared custody court order. The Juvenile Court stated that this was the "most important factor" in its determination, and the appellate court acknowledged that the trial court had relied "most heavily" on this finding. This was error.

Even if there was credible evidence to support a finding that Ms. Mullen had discussed but refused to reduce her agreement with Ms. Mullen to a court order (and there was not, as discussed in the following point below), it was error for the Juvenile Court to consider the absence of a court order except as evidence of whether the parties had entered into an agreement to rear the child as equal parents. Here, the court had *already concluded* that an agreement to rear the child as equal parents existed. The Juvenile Court expressly found that Ms. Mullen and

⁶ The question of whether a parent is bound by her agreement to co-parent a child, or instead may negate her agreement at any time simply by refusing to commit her agreement to a court order is a question of law reviewable de novo. See, e.g., *Hockstok*, 98 Ohio St. 3d 244, ¶29 (reversing trial court for error of law for trial court's failure to make proper finding of contractual relinquishment before allocating custody between parent and non-parent); see also *Anderson v. Anderson*, 2009 WL 341604, 2009-Ohio-5636, ¶15 (noting that trial court decisions applying an incorrect legal standard are accorded no deference on appeal). While the appellate court below was correct in holding that a trial court's findings of fact relating to whether a parent has contractually relinquished custody are subject to an abuse of discretion standard, see *Mullen*, 185 Ohio App.3d 459, ¶1, citing *Masitto*, 22 Ohio St. 3d 63, the issue raised in this section of the brief does not involve review of the Juvenile Court's findings of fact, but accepts all of them as true for the purpose of this argument.

Ms. Hobbs: 1) decided jointly to have a child together; 2) agreed that they would play an equal role in rearing the child; 3) and held themselves out as a family of two equal parents. (Appx. at 19.) The Juvenile Court also found that, in reliance upon this agreement, Ms. Mullen contributed both to the fertility process and after Lucy's birth to Lucy's upbringing financially, physically, and emotionally. (Id.) Most importantly, the Juvenile Court found that Lucy understands Ms. Hobbs to be her "Momma." (Id.) These factual findings militated a conclusion that Ms. Mullen had contractually relinquished exclusive custody. Nevertheless, the Juvenile Court incorrectly went on to hold that a party to an agreement to act as co-parents of a child may evade responsibility under her agreement simply by consistently refusing to reduce it to a court order – despite the reality of the agreement itself, despite acting in accordance with it for years, despite inducing others to rely on it to their extraordinary detriment, and despite disastrous consequences to the child at the heart of the case.⁷

Ohio law does not permit a parent unilaterally to sever a bonded parental relationship between her child and another adult that the parent herself has created, and to rescind all her promises to protect that relationship forever— simply by refusing to put her agreement into a court order. In light of all of the Juvenile Court's findings that Ms. Mullen had entered into an agreement in fact, the Juvenile Court's additional finding that Ms. Mullen consistently refused to enter into a court order reflecting this agreement because she believed that this would preserve her unilateral right to sever Lucy's relationship with Ms. Hobbs should not have affected the analysis of whether contractual relinquishment occurred, let alone been dispositive. Ms.

⁷ The appellate court incorrectly stated that the Juvenile Court used Ms. Mullen's alleged refusal to sign a shared court order only for a proper purpose – to determine whether Ms. Mullen had intended to enter into an agreement with Ms. Hobbs. Mullen, 185 Ohio App.3d at 452, ¶12. In so doing, the appellate court failed to address that the Juvenile Court had, in fact, already determined that the women had agreed to have and rear a child together as "co-parents."

Mullen's belief was erroneous. Ohio law does not permit a trial court to disregard the reality of a parent's consent to her child's formation of a loving parental bond with another adult on the formalistic ground that the parent deliberately declined to submit the agreement to a court for approval. To the contrary, this Court has held that a trial court must make a factual determination, based on the parties' words and conduct under a preponderance of the evidence standard, of whether an agreement to share the role of parent existed, and once such a finding is entered, the court must allocate custody in a child's best interests. See Sections A and B above.

Even in less high-stakes contexts, where a child's welfare is not at stake, Ohio courts have rejected the Juvenile Court's formalistic approach, refusing to permit a party to negate her agreement simply by declining to put it in writing. For example, even in the context of real estate transactions, where Ohio's statute of frauds *mandates* that all agreements be in writing, *see* R.C. 1335.05, Ohio courts nevertheless have enforced oral agreements when evidence exists to demonstrate that the agreement in reality existed. *See Hunter v. Green*, Coshocton App. No. 09-CA-0010, 2010-Ohio-1460. Such evidence could include "a signed acknowledgement of an oral promise . . . , even if the acknowledgement repudiates the oral promise." *Id.*, citing *Landskroner v. Landskroner*, 154 Ohio App.3d 471, 2003-Ohio-5077, 797 N.E.2d 1002; 1 Restatement of the Law 2d Contracts (1981) 336, Section 131. Additionally, courts have enforced unwritten agreements despite the statute of frauds when the parties have engaged in partial performance and injustice would result if the contract were not enforced. *Hunter*, 2010-Ohio-1460 at ¶31; *Bumgarner v. Bumgarner*, Highland App. No. 09CA22, 2010-Ohio-1894. In all of these cases, the appropriate focus of the trial court is simply to determine whether an agreement existed in reality rather than a myopic attention to whether the parties reduced it to writing. Here, because a child's relationship to a person she has always known to be a parent is

at issue, the Juvenile Court's use of Ms. Mullen's refusal to enter into an agreed court order to negate its finding that Ms. Mullen had entered into an agreement with Ms. Hobbs was particularly unjust and reversible error.

To permit a parent to negate her agreement to co-parent her child with another adult based solely on the parent's refusal to reduce the agreement to a shared court order would not only violate longstanding Ohio law, but also create a rule that would be devastating for children. As this Court has noted: "For at least a century and a half, the 'best interests of the child' standard has been the polestar for Ohio courts in determining matters involving children." *Crago v. Kinzie* (2000), 106 Ohio Misc.2d 51, 59, 733 N.E.2d 1219, citing *Gishwiler v. Dodez* (1855), 4 Ohio St. 615, 1855 WL 28 paragraph two of syllabus (in determining "custody of a child incapable of electing for itself, the order of a court should be made with a single reference to its best interests"). A court's authority to enforce voluntary contractual relinquishments of custodial rights is essential to the courts' role under the doctrine of *parens patriae*, dictating that courts are entrusted to protect the best interests of children. *Kelm v. Kelm*, 92 Ohio St.3d 223, 224, 2001-Ohio-168, 749 N.E.2d 299. In custody matters, a court's overriding concern is always "the welfare of the minor," see *Reynolds*, 75 Ohio St.3d at 123 (citing *Clark*, 32 Ohio St. at 310), because "determinations of custody go to the very core of the child's welfare and best interests." *Kelm*, 92 Ohio St.3d at 225.

Ohio's child-centered approach to custody disputes between parents and non-parents has always permitted courts in cases such as this one, where a child has formed a strong attachment to an adult who is not legally a parent, but who has functioned as one since the child's birth, to protect children from the harm that would result from severing the relationship. Such an approach is consistent with the teaching of child welfare experts, who long have recognized that

sustaining bonds between children and adults who function as their parents is crucial to a child's well-being and health development. See generally, Bowlby, *Attachment*, (Basic Books 1969); Davies, *Child Development: A Practitioner's Guide* (The Guilford Press 1999). A child's attachment to the adults who parent the child does not turn on biological kinship or legally recognized parental status, but develops between a child and an adult "who on a continuing, day-to-day basis, through interaction, companionship, interplay and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs." Goldstein et al., *Beyond the Best Interests of the Child* at 98 (The Free Press 1979); see Mason, *The Custody Wars: Why Children Are Losing the Legal Battle and What We Can Do About It* at 89 (Basic Books 1999); Singre et al., *Mother-Infant Attachment in Adoptive Families* (1985), 56 *Child Dev.* 1546, 1547. Once a child has formed such an attachment, disrupting this relationship can cause the child long term psychological harm lasting well beyond childhood. Goldstein et al., *supra*, at 27; Riggs, *Implications of Attachment Theory for Judicial Decisions Regarding Custody and Third-Party Visitation* (2003). 41 *Fam. Ct. Rev.* 39, 41; Kelly & Lamb, *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children* (2000), 38 *Fam. Concil. Cts. Rev.* 297, 303; Clunis & Dorsey Green, *The Lesbian Parenting Book: A Guide to Creating Families and Raising Children* at 124 (Seal Press 1995). See also *Rideaout v. Riendeau* (2000), 761 A.2d 291, 301, 2000 Me. 198 ("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."); *Youmans v. Ramos* (1999), 711 N.E.2d 165, 173 n.20, 429 Mass. 774 ("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.")⁸.

⁸ Indeed, it is beneficial to children in numerous respects even apart from their psychological

These considerations, in addition to the mandates of Ohio contractual relinquishment law, require that, in custody disputes between a parent and non-parent, courts conduct a searching evaluation of all of the evidence to determine the reality of a child's life – to find out, first and foremost, whether the child has a parent-like relationship with the non-parent who petitions the court for custody, and whether the parent has consented to the formation of that bond. The best interests of a child require that such a determination be made based on a careful consideration and analysis of all of the facts presented to the court. A claim should not be disregarded or dismissed – as was done in this case – based solely on a parent's testimony that she discussed but refused to seek an agreed court order with her former partner, in the face of overwhelming evidence that an agreement between the parties in reality existed, and that the child developed a parental bond as a result of the parties' actions in accordance with that agreement. To allow such a decision to stand tears a child away from her "Momma" forever, severing her relationship with a person she has been reared from birth to understand is her parent. Both Ohio law and child welfare public policy decry such a result.

well-being to encourage adults to live up to parental commitments and to support the children they cause to be born and agree to parent. It is beyond dispute that children benefit if they receive financial support from more than one adult. Accordingly, in cases in which children have been raised in families with two functional parents, courts in many jurisdictions have rejected legal arguments that "would deprive [these children] of the support of their second parent." *Elisa B. v. Superior Court* (2005), 117 P.3d 660, 669, 37 Cal.4th 108 (woman who agreed to her lesbian partner's having children via artificial insemination, and acted as the resulting children's second parent for several years, was required to pay child support when her relationship with her partner ended). *See also, e.g., In re M.J.* (2003), 787 N.E.2d 144, 203 Ill.2d 526 (infertile man who agreed to have a child with his non-marital female partner through artificial insemination was liable for child support regardless of whether he enjoyed the status of "parent" under Illinois' statutory scheme); *Smith v. Smith* (Del. 2006), 893 A.2d 934 (biological mother's former partner was ordered to pay child support after being found to be a *de facto* parent); *L.S.K. v. H.A.N.* (2002), 813 A.2d 872, 2002 Pa.Super 390 (holding that child support guidelines applied to former lesbian partner of the biological mother). Here, Ms. Hobbs has always willingly supported Lucy financially and emotionally, and wishes to continue doing so.

E. In the alternative, the Juvenile Court's ruling that Ms. Mullen did not contractually relinquish exclusive custody in favor of shared custody of Lucy constituted an abuse of discretion.

The Juvenile Court abused its discretion in holding that Ms. Mullen never contractually relinquished exclusive custody in favor of shared custody with Lucy.⁹ The evidence overwhelmingly proves that Ms. Mullen did not object to sharing a parental role with Ms. Hobbs until years after Lucy's birth and after her relationship with Ms. Hobbs had broken down. As discussed in detail below, Ms. Mullen's own testimony flatly contradicts the trial court's finding that Ms. Mullen and Ms. Hobbs discussed entering into an agreed custody order "several times from before birth and after" Lucy's birth and that Ms. Mullen consistently refused to do so. (Appx. at 21-22.) Additionally, the Juvenile Court's findings of fact are internally inconsistent.¹⁰ The court repeated throughout its decision its factual finding that Ms. Hobbs and Ms. Mullen had agreed to have a child together, and to rear the child jointly. (Appx. at 11, 17 and 19; see also T.d 102 (Juvenile Court's order staying the termination of visitation during the pendency of Ms. Hobbs' appeal).) The court also acknowledged that Ms. Mullen's intentions and understanding of the structure of Lucy's family "may have changed over time" (Appx. at 22.), implicitly acknowledging that Ms. Mullen's testimony at trial may not have been an accurate reflection of her intentions at the time that she entered into the agreement and acted in accordance with it for years. However, the Juvenile Court then concluded that Ms. Mullen had not relinquished custody because her purported repeated refusals to enter into an agreed court order were the "most important factor" in determining whether she had agreed to rear Lucy in a family with Ms.

⁹In child custody cases, a trial court's factual findings are subject to review under an abuse of discretion standard. *Smith v. Boyd*, Seneca App. No. 13-05-49, 2006-Ohio-6931, at P38, citing *Masters v. Masters*, 69 Ohio St.3d 83, 85, 1994 Ohio 483, 630 N.E.2d 665.

¹⁰ A trial court opinion involving internally inconsistent findings of fact constitutes an abuse of discretion. See, e.g., *Sharrock v. Sharrock*, Guernsey App. No. 91-CA-26, 1992 WL 71525, at *4 (reversing because "internally inconsistent" findings of fact constituted an abuse of discretion).

Hobbs as equal parents. (Appx. at 22.) Because the overwhelming evidence at trial demonstrates that Ms. Mullen agreed to co-parent Lucy with Ms. Hobbs, and consented to the formation of a loving parental bond between Lucy and Ms. Hobbs, the Juvenile Court abused its discretion in concluding that Ms. Mullen had not contractually relinquished custody.

As an initial matter, all the competent credible evidence introduced at the hearing contradicted the trial court's statement that Ms. Mullen had "discussed the concept of shared custody several times [with Ms. Hobbs] from before birth and after." By Ms. Mullen's own admission on direct examination by her own counsel, her first discussion about signing an agreed custody order did not occur until March 2006, eight months after Lucy was born:

Q: When was the *first time* you recall her [Ms. Hobbs] talking about either, you know, I can get Lucy from you, or would you like to enter into some kind of agreement?

A: I mean, she started – I can remember – Lucy was born in July, 2005. And in tax season 2006 she was very angry that I was getting all the write off. And she therefore thought that I should give her custodial rights or co-parenting or paperwork for Lucy so that she could use the tax writeoff. So that was March '06.

(Mullen at Tr.II:45,) (emphasis added). Ms. Mullen confirmed that the couple did not discuss a court-approved custody agreement at any time before:

Q: And at any time in, let's say, the first year of Lucy's life was there ever any discussion about, we have to put papers in place to protect Lucy or to protect you, to protect Ms. Hobbs? Was there any of those kinds of discussions that you recall?

A: There were never conversations in the first year about, we need to put papers in place to protect Lucy. There were never – you mean as far as –

Q: I'm talking maybe – like there's been testimony about the will and those kinds of things that you had signed previously. Were there any kind of discussions that you would –

A: There were no discussions about further paperwork to protect Lucy.

(Supp. at 129, Mullen at Tr.II:35.) Ms. Hobbs recalled, however, that the first discussion about an agreed court order took place later, in the fall of 2006, when the couple sought counseling to help with the problems in their relationship. (Supp. at 97-98, 101-102 Hobbs at Tr.I:315-16, 332-33.) She testified that, at that time, she contacted a lawyer who informed her that it might be necessary to involve Mr. Liming in the process of preparing an agreed court order and that Ms. Mullen objected solely to the prospect of ceding authority to Mr. Liming, which was the only sticking point. (Supp. at 101-102, Hobbs at Tr.I:332-33.) In sum, although the two women disagree about the specific timing and content of the discussion, they agreed that it occurred in 2006 – the year *after* Lucy’s birth and *after* the two women had assumed equal responsibility for caring for the child.

Thus, even according to Ms. Mullen’s own testimony, her earliest alleged refusal to enter into a shared custody order occurred too late to be relevant to the question of whether she relinquished sole custody in favor of shared custody of Lucy. By her own admission, her first discussion of such an order occurred: (1) *after* the couple had agreed to have a child together; (2) *after* she had acknowledged Ms. Hobbs as her child’s “co-parent” in numerous documents; (3) *after* she had granted Ms. Hobbs equal legal decision-making authority with respect to her child through powers of attorney and other documents; (4) *after* Ms. Mullen had fostered a parent-like relationship between Ms. Hobbs and Lucy; and (5) *after* the couple had held themselves out to their family, friends, and daughter as two mothers. Consequently, even viewing the evidence in the light most favorable to Ms. Mullen and accepting her own testimony about the timing of her discussions as true, she had already contractually relinquished sole custody through her words and actions before the couple ever discussed a shared custody order, warranting an allocation of custody in Lucy’s best interests.

Moreover, the Juvenile Court's conclusion that Ms. Mullen discussed shared custodial rights but refused to grant them to Ms. Hobbs elevates Ms. Mullen's self-serving testimony at the time of trial above a mountain of largely uncontested, contemporaneous evidence demonstrating the contrary – namely, that Ms. Mullen agreed to start a family with Ms. Hobbs and spent two years jointly parenting Lucy with the understanding that Ms. Hobbs was an equal co-custodian, but balked at entering into an agreed court order only after her relationship with Ms. Hobbs began to deteriorate. This evidence includes:

- documents and testimony regarding Ms. Mullen's will and powers of attorney, in which she stated that Ms. Hobbs was Lucy's "co-parent in every way" and granted Ms. Hobbs "every Power with respect to my child that I possess"¹¹
- documents and testimony regarding Ms. Hobbs' active participation as Ms. Mullen's partner in the *in vitro* fertilization process, the pregnancy and the birth
- testimony from numerous witnesses who observed Ms. Hobbs acting as an equal co-parent to Lucy¹²
- documents and testimony from numerous witnesses that Ms. Mullen and Ms. Hobbs told Lucy, their families, their friends, their community and each other that they were a family with two mothers.

The Magistrate appropriately viewed this evidence as more persuasive than the *post hoc* self-serving testimony provided by Ms. Mullen at trial.¹³ For example, after reviewing Ms. Mullen's

¹¹ Ms. Mullen conceded that when she signed a general durable power of attorney granting Ms. Hobbs "every Power with respect to my child that I possess," she understood that she was granting Ms. Hobbs immediate, complete and unfettered decision-making authority with respect to Lucy. (Mullen at Tr.II:83.) She also testified that she understood the ability to make decisions for a child to be the key part of having "custodial rights." (Mullen at Tr.II:79.)

¹² These witnesses include: Cincinnati councilwoman Leslie Ghiz, who observed the women at several public events; Reverend Canon Ann Wridler, who discussed the couple's desire to find a church for their family; Kathy and Rochelle Nardiello, close friends of the couple who interacted with them and Lucy several times a month; and Donald Troendle, the couple's neighbor who saw them daily.

¹³ Ms. Mullen's testimony that she never intended for Ms. Hobbs to assume a parental role is further undermined by the fact that she and Ms. Hobbs attempted to have a second child together in December 2006. (Hobbs at Tr.I:261.)

will, powers of attorney and the medical paperwork that the couple signed as part of the *in vitro* fertilization process, the Magistrate concluded: “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.” (Appx. at 30.) The Magistrate also appropriately relied upon the testimony of third party witnesses. He explicitly found that Kathleen Nardiello, Rochelle Nardiello, Canon Wrider and Councilwoman Leslie Ghiz all provided credible and believable testimony that supported his conclusion that Ms. Mullen and Ms. Hobbs had agreed to be co-custodians. (Appx. at 32.)

Ms. Hobbs also testified that the couple had always agreed that Ms. Hobbs would share custody of Lucy and that Ms. Mullen never told her that she would not have custodial rights:

Q: Okay, Ms. Hobbs, do you recall a time when Ms. Mullen told you that she did not want to give you custodial rights?

A: She never said that to me.

(Supp. at 102, Hobbs at Tr.I:333). The Magistrate specifically found Ms. Hobbs’ testimony that the couple agreed to have and rear a child together to be “very credible and believable.” (Appx. at 32.) By contrast, the Magistrate concluded that Ms. Mullen’s contrary testimony was unworthy of belief. He rejected Ms. Mullen’s claim that she never intended Ms. Hobbs to have a custodial role, finding that [Ms. Mullen’s] version of what happened is not supported by [her] actions during the period leading up to and immediately following Lucy’s birth.” (Appx. at 32.)¹⁴

In reversing the Magistrate to find credible Ms. Mullen’s assertion that she had never intended to “give away any custodial rights,” the Juvenile Court substituted its judgment of the witnesses’ credibility for that of the Magistrate who presided over the hearing and was in a better

position to assess them. Notably, the Juvenile Court did not ask to hear any additional evidence or re-hear the matter itself, as specifically permitted by Juv. R. 40(D)(4)(b) (d), but rendered credibility determinations in conflict with the Magistrate's based solely on a transcript.

This Court has previously noted that, particularly in custody cases, deference should be given to the trial judge because he or she "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, 77 Ohio St.3d 415, 418-19, 1997-Ohio-260, 674 N.E.2d 1159; *Smith v. Boyd*, 2006-Ohio-6931, at P39. However, here, the underlying principle at play weighs in favor of giving deference to the findings of the Magistrate, who was in fact the "trial" judge, not Judge Lipps, because the Magistrate presided over the trial and, therefore, had the opportunity to assess witness credibility. "[O]n the issue of the credibility of witnesses, the Magistrate is the only one who has seen and heard them and the trial court may need to defer to the Magistrate's determinations on credibility unless testimony is extremely internally inconsistent." *Rhoads v. Arthur*, Delaware App. No. 98CAF10050, 1999 WL 547574 at fn.3; accord, 46 Ohio Jur. 3d (2008) Family Law, Section 604. Indeed, Ohio courts have routinely noted that the deference normally attributed to a trial judge's credibility findings is diminished when, as here, only the magistrate observed the witnesses. See, e.g., *Kubin v. Kubin* (2000), 140 Ohio App.3d 367, 370-371, 747 N.E.2d 851 ("When the trial judge commits credibility determinations to a magistrate, the presumption that a subsequent credibility determination made by the trial court is correct is lessened"); *Cox v. Cox*, Fayette App. No. CA 98-05-007, 1999 WL 74573, at *8; *Loges v. England*, Montgomery App. No. 15606, 1996 WL 631399, at *2 (reversing the trial court decision).

Here, there was no internal inconsistency in the testimony warranting a departure from the Magistrate's credibility determinations. Consequently, this Court is further justified in holding that the Juvenile Court abused its discretion because the traditional reason for deference to a trial court's findings of fact – that 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” – is absent here, and the Juvenile Court stood in the same position as an appellate court in reviewing a cold record. *Ream v. Ream*, Licking App. No. 02-CA-000071, 2003-Ohio-2144 (citations omitted).

In summary, the Juvenile Court's decision that Ms. Mullen had not contractually relinquished custody constituted an abuse of discretion because it rested on completely inconsistent factual findings, and because the court's finding that Ms. Mullen had never intended to share custody of Lucy embraced a re-writing of history by Ms. Mullen that is simply not believable. Would Ms. Mullen have had an attorney draft documents acknowledging Ms. Hobbs as her child's “co-parent in every way” if she did not intend Ms. Hobbs to be a co-custodian? Would Ms. Mullen have referred to Ms. Hobbs as her child's mother to her family, friends and neighbors if she did not intend to share custody? Would Ms. Mullen have told Lucy that Ms. Hobbs was her mother if she did not want her daughter to know that Ms. Hobbs would always be there for her? When one considers these questions, it becomes apparent that the evidence did, in fact, prove that Ms. Mullen and Ms. Hobbs agreed to be co-custodians. This Court should find that the Juvenile Court abused its discretion in concluding that Ms. Mullen had not relinquished custody and remand for an allocation of custody between the parties in Lucy's best interests.

F. Mr. Liming Relinquished Custody To Ms. Hobbs And The Juvenile Court Erred In Holding Otherwise.

The Juvenile Court erred in holding that Ms. Hobbs had failed to prove that Mr. Liming had contractually relinquished any custodial rights he may have had to Ms. Hobbs. The Juvenile Court reached this conclusion based solely on the fact that Ms. Hobbs was not a party to the written Donor-Recipient Agreement between Ms. Mullen and Mr. Liming and, therefore, was not authorized to enforce it. In so holding, the Juvenile Court inappropriately dismissed the Donor-Recipient Agreement as having no significance, even though it constituted singularly compelling evidence of the parties' intentions prior to Lucy's birth, and of Mr. Liming's consent to cede custodial rights to Ms. Hobbs. The issue before the Juvenile Court was not the enforceability of the Donor-Recipient Agreement as a legal matter, but instead whether the evidence demonstrated that Mr. Liming intended Ms. Hobbs to have a primary role rearing Lucy as her parent. Because the uncontested and overwhelming evidence introduced below indicates that he did, this Court should find that Mr. Liming contractually relinquished sole custody and remand for an allocation of custody between the parties in Lucy's best interests.

The Juvenile Court permitted one fact – the absence of a written agreement between Mr. Liming and Ms. Hobbs – to trump all of the evidence proving that Mr. Liming fully intended for Lucy to be brought up jointly by Ms. Mullen and Ms. Hobbs without his significant involvement. For example, when he signed the Donor-Recipient Agreement in 2004, Mr. Liming understood that he would not have *any* parental or custodial rights with respect to Lucy. (Supp. at 115, Liming at Tr.II:151.) Although Ms. Mullen and Ms. Hobbs wanted him to be known to Lucy, they were adamant that he would not have any legal or custodial decision-making authority. (Supp. at 44, Hobbs at Tr.I: 250.) They made clear to Mr. Liming that he merely would be helping two women have a child that they were going to be raising together. (Id.) As a result, the

Donor-Recipient Agreement, which was written to protect Ms. Mullen's and Ms. Hobbs' desire to have a child together, did not provide Mr. Liming with any rights with respect to Lucy and released him of any child support obligations. (Hobbs Tr.Exhibit 1.) Regardless of whether the Donor-Recipient Agreement is enforceable by Ms. Hobbs, it is indicative of the parties' agreement about their respective roles in Lucy's life.

Mr. Liming's contractual relinquishment also was evidenced by the uncontested testimony that Mr. Liming stood by the agreement he had reached with Ms. Hobbs and Ms. Mullen that the two women would care for Lucy together, and never provided any financial support. (Supp. at 121-123, 120-120a, Liming at Td.II:162-64, 157-58.) He acknowledged in writing that Ms. Mullen and Ms. Hobbs were Lucy's parents and that he was to play a secondary role, stating in an email to Ms. Hobbs and Ms. Mullen, "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." (Hobbs Tr.Exhibit 9). It was only after the two women separated and Ms. Hobbs petitioned for custody – long after he allowed and encouraged Ms. Hobbs to develop a parental relationship with Lucy – that Mr. Liming was prompted to enter the case and subsequently sought to declare the Donor-Recipient Agreement null and void.

As with respect to its findings about Ms. Mullen, the Juvenile Court ignored – without explanation – the credibility determinations of the Magistrate, who found Mr. Liming's claim that he never intended to relinquish custody to Ms. Hobbs to be inconsistent with his actions leading up to and following Lucy's birth. (Appx. at 32.) Additionally, by citing only Ms. Hobbs' inability to enforce the donor-recipient agreement, the Juvenile Court's decision turned upon the lack of a writing as the sole basis for concluding that Mr. Liming had not relinquished custody. This was contrary to the body of Ohio law that states that contractual relinquishment

can be proven by the parties' conduct and words. (See Section B, above.) Thus, because the evidence proved that Mr. Liming contractually relinquished custody to Ms. Mullen and Ms. Hobbs, the appellate court decision should be reversed with instructions to allocate custody between the parties in Lucy's best interests.

CONCLUSION

In the end, this case is about whether Lucy may be separated forever from the woman she knows to be "Momma" without even a best interests determination. The courts below foreclosed such a determination by holding that a parent may agree to have and rear a child with another adult, induce the adult to act in reliance upon the agreement, encourage and foster a bonded parental relationship between her child and the other adult and then, after all that occurs, sever the relationship based on the parent's *post hoc* claim that she never actually "agreed" to relinquish custodial rights. To uphold such a cynical result not only would be disastrous for Lucy, but also would significantly undermine more than a century of Ohio law that protects children and their relationships to the adults who are rearing them in a custodial role with parental consent. Accordingly, this Court should reverse and remand for an allocation of custody in Lucy's best interests.

Respectfully submitted,

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IN THE SUPREME COURT OF OHIO

10-0276

In re:

||

LUCY KATHLEEN MULLEN

||

APPEAL NO. C090285;
C090407

MICHELE HOBBS,
Plaintiff/Appellant,
v.

||

TRIAL NO. F07-2803

||

||

KELLY MULLEN,
Defendant/Appellee,
and

||

||

||

SCOTT LIMING,
Defendant/Appellee.

||

||

NOTICE OF APPEAL OF APPELLANT MICHELE HOBBS

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FILED
FEB 11 2010
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SUPREME COURT OF OHIO

Notice of Appeal of Appellant Michele Hobbs

Appellant Michele Hobbs hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals case Nos.C-090285 and C-09407.

This case is one of public or great general interest.

Respectfully submitted,



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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.

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

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, ¶136.

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.

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 Calvin, 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 Peralas*, 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 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:

Case No. F07-2803 X

LUCY MULLEN

Decision of Magistrate

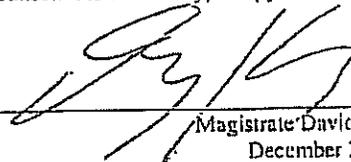
This matter came to be heard on the Petition for Custody herein filed by MICHELLE HOBBS, Other, on 12/20/2007.

Attorney for MICHELLE HOBBS are Lisa Meeks and Christopher Clark. Attorney for SCOTT LIMING is Terry Tranter. Attorney for KELLY MULLEN is Karen Meyer.

The Court, after having reviewed all the evidence and testimony previously presented at trial, does hereby issue a Decision. Motion Granted.

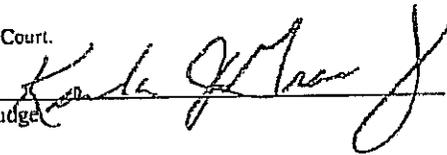
Refer to accompanying entry of this date incorporated herein by reference.

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


Magistrate David Kelley
December 22, 2008

I have received a copy of the Decision of Magistrate and therefore waive service by the Clerk.

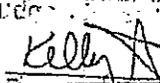
The Magistrate's Decision is hereby approved and entered as the judgment of the Court.


Judge

Objection of Magistrate's Decision

Any party may file written objections to a Magistrate's Decision within 14 days of the filing of the decision. A party shall not assign as error on appeal the Court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ. R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ. R. 53(D)(3)(b).


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CERTIFIED COPY
I hereby certify that this document is a true copy of the original in the Hamilton County Juvenile Court.
12-29-2010
KARLA J. GRADY
Judge, Juvenile Court (Page 1 of 1)
By: 
Deputy Clerk A - 23

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 to 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.



Magistrate D. Kelley
December 22, 2008

the Court to issue a temporary order awarding her a specific schedule of companionship with minor child, Madison Rose Smith during the pendency of this action. On October 24, 2008, Petitioner also filed a *Petition for Shared Custody of Minor Child, Madison Rose Smith*.

On November 4, 2008, Respondent filed a *Motion to Dismiss* and a *Motion for Judgment on the Pleadings Regarding Petition for Shared Custody of Minor Child*. Also filed on November 4, 2008, were affidavits from both parties. The Magistrate had requested the affidavits on the subject of temporary orders.

A Magistrate's Order was filed on November 12, 2008. After consideration of both parties' affidavits, the Magistrate ordered the following:

Julie Rowell and Julie Smith are temporary shared custodians of the minor child, Madison Rose Smith. Julie Rowell shall have possession every Wednesday, 5 PM to 8 PM and every other Friday, 6 PM to Saturday, 6 PM. Julie Smith shall have possession at all other times. The person coming into possession shall provide transportation. Julie Smith shall be the residential parent for school placement purposes and the decision maker regarding the child's education, medical needs, etc. Julie Smith shall maintain all current levels of medical insurance for the minor child and shall be entitled to claim the child for tax purposes.¹

Following the *Magistrate's Order*, Respondent filed a *Motion to Set Aside the Magistrate's Order* and a *Motion for Stay of the Order* on November 17, 2008. A hearing regarding Respondent's motions took place before this Court on December 16, 2008. At the hearing, the parties and their respective counsel agreed that all pending motions brought forth in this case will be heard by the Honorable Judge Elizabeth Gill. In an *Order* filed on December 16, 2009, the Court denied Respondent's *Motion for Stay of the Order* and granted Petitioner extended time with the minor child. The Court also took Respondent's *Motion to Set Aside and the Motion to Dismiss* under advisement.

¹ *Magistrate's Order*, filed November 12, 2008.

On January 15, 2009 a *Decision and Judgment Entry* was filed, denying Respondent's *Motion to Dismiss* and a *Motion for Judgment on the Pleadings Regarding Petition for Shared Custody of Minor Child*, filed on November 4, 2008. Also on January 15, 2009, the Court issued an *Order* granting Respondent's *Motion to Set Aside the Magistrate's Order*. The *Order* further named Petitioner and Respondent as temporary shared custodians of the minor child, in which Respondent was designated as "the residential parent for school placement purposes and the decision maker regarding the child's education, medical needs, etc." The *Order* also increased the Petitioner's companionship schedule, in which Petitioner was granted possession "every Monday 8am to 8pm and every Wednesday 5pm to 8pm." Pursuant to the *Order*, the Petitioner was also granted possession "[e]very other Friday from 5:00pm until Monday 8:00am." Petitioner's alternate weekends were to commence January 22, 2009. As such, in accordance with the *Order*, Respondent is to have possession at all other times.

As to holidays, in odd numbered years, Petitioner is to have "Spring Break, Memorial Day, Labor Day, and the first half of Winter Break." During such time, Respondent is to have "Martin Luther King Day, Fourth of July, Thanksgiving and the second half of Winter Break." In even-numbered years, the schedules are reversed and in the event of a disagreement, hours for holidays shall be defined by Rule 22. Furthermore, the *Order* stated that "[e]ach party shall be entitled to two weeks, consecutive or non-consecutive, vacation with the child during the months of June, July or August." In this, the "[a] general itinerary of the vacation shall be provided for the other party, including dates, locations, addresses, and telephone numbers." Finally, the *Order* specifically stated that "[h]olidays shall not be missed."

On January 26, 2009 Respondent filed a *Notice of Appeal* and a *Motion for Stay*, regarding the *Decision and Judgment Entry* and the *Order* which were filed on January 15, 2009.

On that same day, the Court issued an *Order and Modified Temporary Orders Pursuant to Civil Rule 60(A)*. By request and agreement of the parties to avoid the interim appeal, the *Order* was modified so as to name Respondent Julie Smith as the legal custodian and residential parent of the minor child. All other terms in the previous *Order* remained the same.

On January 29, 2009 Respondent filed a *Notice of Dismissal of the Notice of Appeal*. On January 30, 2009 Petitioner filed a *Motion for Order Requiring Respondent Julie Ann Smith to Appear and Show Cause*. On February 5, 2009 Petitioner filed a *Motion for Contempt*. On this same day, the Court issued an *Order* requiring Respondent to appear and show cause.

On February 11, 2009 Respondent filed a *Second Notice of Appeal*. On February 12, 2009 Respondent filed a *Motion for Stay of the Court's Decision and Judgment Entry of January 15, 2009 and the Order of January 26, 2009*. On May 18, 2009 Respondent also filed a *Motion to Dismiss Petitioner's Motion for Contempt filed January 30, 2009*.

On May 26, 2009 the parties and their respective counsel appeared for a hearing in front of the Honorable Judge Elizabeth Gill. At such time, Respondent argued that the Court's *Order* of January 15, 2009 is void because the Court erred in naming the parties as shared custodians in the order. Respondent therefore maintains that the *Modified Order* of January 26, 2009, though amended so as to name Respondent as the legal custodian and residential parent of the minor child, is also void. The Respondent contends that she can not be held in contempt for violating a void order. The Respondent further added that even if the *Modified Order* is found to be valid, Petitioner failed to file an Amended Motion for Contempt so as indicate any violations which occurred after the January 26, 2009 *Modified Order*. Thus, Respondent argues that she can not be found in contempt for violating the *Modified Order*. Finally, Respondent adds that this Court

does not have jurisdiction to issue such visitation orders in matters involving non-parents where the proceeding that is not a divorce, dissolution, annulment or child support proceeding.

Subsequent to the hearing, Petitioner filed a *Supplemental Affidavit Regarding Petitioner's Attorney Fees* on May 26, 2009. On May 29, 2009, Respondent filed a *Supplement to Respondent's Motion to Dismiss Petitioner's Motion for Contempt filed January 30, 2009*. On this same day, Respondent also filed a *Motion to Strike Petitioner's Supplemental Affidavit Regarding Petitioner's Attorney Fees*. On June 2, 2009 Petitioner filed a *Response to Respondent's Motion to Strike Supplemental Affidavit Regarding Petitioner's Attorney Fees*.

II. APPLICABLE LAW

A. Motion to Dismiss

Pursuant to Civil Rule 12 a party may file a *Motion to Dismiss* as follows:

(B) How presented.

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19 or Rule 19.1. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. . . .

....

(H) Waiver of defenses and objections.

....

- (3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

B. Contempt

Pursuant to R.C. §2705.02(A), “[d]isobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or officer” are acts in contempt of court. The court shall conduct a hearing in all contempt proceedings.² If the court finds a party in contempt, the court may impose the following penalties:

1. For a first offense, a fine of not more than two hundred fifty dollars (\$250.00), a definite term of imprisonment of not more than thirty (30) days in jail, or both;
2. For a second offense, a fine of not more than five hundred dollars (\$500.00), a definite term of imprisonment of not more than sixty days (60) in jail, or both;
3. For a third or subsequent offense, a fine of not more than one thousand dollars (\$1,000.00), a definite term of imprisonment of not more than ninety (90) days in jail, or both.³

In addition, if the contempt deals with an act that the contemnor has the ability to perform, the Court may imprison the contemnor until he or she performs the act.⁴

There are two (2) types of contempt, criminal and civil:

While both types of contempt contain an element of punishment, courts distinguish criminal and civil contempt not on the basis of punishment, but rather, by the character and purpose of the punishment. Punishment is remedial or coercive and for the benefit of the complainant in civil contempt. Prison sentences are conditional. The contemnor is said to carry the keys of his prison in his own pocket, since he will be freed if he agrees to do as ordered. Criminal contempt, on the other hand, is usually characterized by an unconditional prison sentence. Such imprisonment operates not as a remedy coercive in its nature but as punishment for the completed act of disobedience, and to vindicate the authority of the law and the court.⁵

² R.C. §2705.05(A).

³ R.C. §2705.05(A)(1), (2), and (3).

⁴ R.C. §2705.06.

⁵ *Brown v. Executive 200, Inc.* (1980), 64 Ohio St.2d 250, 253-254 (internal citations omitted).

The reason for a civil contempt is to “enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance.”⁶ Before the Court may impose a sentence for civil contempt, the Court must allow the contemnor an opportunity to purge the contempt.⁷

The party who filed the motion bears the burden of proof in a contempt proceeding. In a criminal contempt, proof of the contempt must be beyond a reasonable doubt.⁸ In a civil contempt, proof of the contempt must be by clear and convincing evidence.⁹ In this case, if the Court finds Defendant in contempt, it would be to enforce compliance with an order of the court and/or to compensate for losses or damages sustained by reason of noncompliance. Therefore, the Court would find Defendant in civil contempt.

“Civil contempt consists of three elements: (1) a prior order of the court, (2) proper notice to the alleged contemnor, and (3) a failure to abide by the court order.”¹⁰ The alleged contemnor is entitled to due process, which requires “that a person accused of contempt must be afforded adequate notice of the allegations, time to prepare a defense, and an opportunity to be heard before any sanction is imposed.”¹¹

Plaintiff’s burden of proof is by clear and convincing evidence. “Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being

⁶ *Pugh v. Pugh* (1984), 15 Ohio St.3d 136, 140 (internal citation omitted).

⁷ *DeLawder v. Dodson*, Lawrence App. No. 02CA27, 2003 Ohio 2902, at P10, citing *Carroll v. Detty* (1996), 113 Ohio App.3d 708, 711; *In re Puola* (1991), 73 Ohio App.3d 306, 312 (internal citations omitted).

⁸ *Brown v. Executive 200, Inc.*, *supra*, at 251 (internal citations omitted).

⁹ *Brown v. Executive 200, Inc.*, *supra*, at 253 (internal citations omitted); see also *Sansom v. Sansom*, Franklin App. No. 05AP-645, 2006 Ohio 3909, at P24, citing *DeLawder v. Dodson*, *supra*, at P10, citing *Carroll v. Detty*, *supra*, at 711.

¹⁰ *Howell v. Howell* (June 7, 2005), Franklin App. No. No. 04AP-436, 2005 Ohio 2798, P25.

¹¹ *Layne v. Layne* (June 24, 2004), Franklin App. No. 03AP-1058, 2004 Ohio 3310, P22 (internal citations omitted).

more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and *unequivocal*.¹²

If Plaintiff meets her burden of proof, Defendant may then defend the contempt by showing that he was unable to obey the orders.¹³ Defendant bears the burden of proof of showing his inability to comply by a preponderance of the evidence.¹⁴ Thus, Defendant must show he was unable to pay by a greater weight of the evidence:

By "preponderance of evidence" is meant the greater weight of evidence. It does not mean that more witnesses have testified on one side than on the other; in other words, it does not have reference to the number of witnesses testifying, or the mere quantity of evidence, but to the quality thereof. It means simply that after the testimony of all the witnesses has been weighed, with reference to their credibility, exactness of memory, and all the circumstances surrounding their testimony, the evidence of one side outweighs that of the other.¹⁵

If the Court finds that the weight of the evidence is equal, then Defendant has not met his burden.¹⁶

The Court does not need to find a purposeful, willing, or intentional violation of a court order to find a person in civil contempt.¹⁷ However, as previously stated, before finding a person in civil contempt, the Court must find the person had adequate notice.¹⁸ "Notice is sufficient when it apprises an alleged contemnor of the charges against him or her so that he or she is able to prepare a defense."¹⁹

¹² *Cross v. Ledford* (1954), 161 Ohio St. 469, 477 (emphasis in original) (internal citation omitted); see also *Allen v. Allen*, Franklin App. No. 04AP-1341, 2005 Ohio 5993, at P21, citing *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74.

¹³ *McEnery v. McEnery* (December 21, 2000), Franklin App. No. 00AP-69, *15 (internal citations omitted).

¹⁴ *Hopson v. Hopson* (December 6, 2005), Franklin App. No. 04AP-1349, 2005 Ohio 6468, P20 (internal citations omitted).

¹⁵ *State v. Doakes* (December 14, 2001), Montgomery App. No. 18811, 2001 Ohio 6984, *9 (internal citation omitted).

¹⁶ *Swan v. Skeen* (1974), 40 Ohio App. 2d 307, 308.

¹⁷ *Pugh v. Pugh*, *supra*, at paragraph one of the syllabus.

¹⁸ *Sansom v. Sansom*, *supra*, at P27, citing *E. Cleveland v. Reed* (1977), 54 Ohio App.2d 147, 150.

¹⁹ *Sansom v. Sansom*, *supra*, citing *E. Cleveland v. Reed*, *supra*, citing *Cincinnati v. Cincinnati District Council 51* (1973), 35 Ohio St.2d 197, 203.

C. Attorney Fees

The statutory provision for allowance of reasonable attorney fees means that reasonable attorney fees shall be based upon the actual services performed by the attorneys and upon the reasonable value of those services.²⁰ The burden is upon the attorney rendering the services for which he is to be compensated to introduce into the record sufficient evidence of the services performed to justify reasonable attorney fees in the amount awarded.²¹ Furthermore, it is well-settled that within the context of visitation enforcement matters an award of attorney fees is within the sound discretion of a trial court.²²

D. Jurisdiction of Juvenile Court to Issue Temporary Orders

Juvenile Rule 13(B)(1) states the following:

- (B)(1) Pending hearing on a complaint, the judge or magistrate may issue temporary orders with respect to the relations and conduct of other persons toward a child who is the subject of the complaint as the child's interest and welfare may require.

Franklin Local Juvenile Rule 5(D) states the following:

- (D) The Judge or Magistrate may require motions for temporary orders to be submitted and determined without oral hearing upon affidavits in support or opposition.

III. DECISION

A. Petitioner's *Motion for Contempt* filed on January 30, 2009

On January 15, 2009, the Court issued an *Order* granting Respondent's *Motion to Set Aside the Magistrate's Order*. The *Order* also named Petitioner and Respondent as temporary shared custodians of the minor child, in which Respondent was designated as "the residential

²⁰ *Glimcher v. Doppelt*, (1966), 5 Ohio App. 2d 269, 1966 Ohio App. LEXIS 497

²¹ *Glimcher v. Doppelt*, (1966), 5 Ohio App. 2d 269, 1966 Ohio App. LEXIS 497

²² *Sagan v. Tobin*, (2006), 2006 Ohio App. LEXIS 2447, 2006 Ohio 2602,

parent for school placement purposes and the decision maker regarding the child's education, medical needs, etc." In the instant matter, the parties maintained a romantic relationship throughout the conception process and birth of said child. Therefore, while the Respondent is the biological parent of the minor child, Petitioner is considered a non-parent under Ohio law because she is not biologically related to the minor child. As noted in the Court's prior *Decision and Judgment Entry* filed on January 15, 2009, the Ohio Supreme Court has ruled the following:

In an R.C. 2151.23(A)(2) child custody proceeding between a parent and a nonparent, the hearing officer may not award custody to the nonparent without first making a finding of parental unsuitability that is, without first determining that the preponderance of the evidence shows that the parent abandoned the child, that the parent contractually relinquished custody of the child, that the parent has become totally incapable of supporting or caring for the child, or that an award of custody to the parent would be detrimental to the child.²³

Thus, in the absence of a shared custody agreement and prior to a determination of parental unsuitability, a same sex partner who is not biologically related to the minor child is not entitled to shared custody under Ohio law. For this reason, on January 26, 2009 the Court modified the January 15, 2009 *Order* by removing the shared custodial language and naming Respondent as the legal custodian and residential parent of the minor child. On January 30, 2009 Petitioner filed a *Motion for Contempt* contending that Respondent violated the previous *Order* of January 15, 2009. However, the only notice that Respondent had up until this point in time was of an invalid order which therefore could not be violated. It is for this reason, that the Court finds that Petitioner's *Motion for Contempt* filed on January 30, 2009 is moot.

B. Petitioner's *Motion for Contempt* filed on February 5, 2009

As mentioned above, in a *Modified Order* filed on January 26, 2009, the Court amended the language of the temporary order pursuant to Civil Rule 60(A). Civil Rule 60(A) is a vehicle

²³ *In re Perales*, (1977), 52 Ohio St. 3d 89

whereby errors or omissions by the court may be corrected at any time by the court's own initiative or on the motion of any party and after such notice, if any, as the court orders.²⁴ As the prior order was invalid, the Court properly used Civil Rule 60(A) to correct the January 15th *Order*, effectuating a valid Modified Order. Following the *Modified Order*, the Petitioner filed a *Motion for Contempt* on February 5, 2009. In her second contempt motion, Petitioner merely restated the same reasoning and violations as in her prior motion for contempt, as well as added the most current violation at the time which occurred on Monday, January 26, 2009. Thus, Petitioner did not specifically state in her February 5, 2009 motion that any violations occurred after January 26, 2009.

However, when appearing before the Court on May 26, 2009, Petitioner did express that Respondent had continued to violate the *Modified Order*. Pursuant to the *Modified Order*, Petitioner was granted possession "every Monday 8am to 8pm and every Wednesday 5pm to 8pm." The Petitioner was also granted possession "[e]very other Friday from 5:00pm until Monday 8:00am." In this, Petitioner's alternate weekends were to commence January 22, 2009. As to holidays, in odd numbered years, Petitioner is to have "Spring Break, Memorial Day, Labor Day, and the first half of Winter Break." At the May 26, 2009 hearing Petitioner explained that, since the Court issued the *Modified Order*, Respondent has refused to give possession of the minor child to Petitioner on alternate weekends for the times specified in the order, as well as on the Spring Break and Memorial Day holidays.²⁵ Accordingly, Petitioner's *Motion for Contempt* filed on February 5, 2009 was in regards to Respondent's on-going defiance of the Court's orders. Petitioner filed the February 5th contempt motion as a result of Respondent's refusal to allow Petitioner time with the minor child on alternate weekends as

²⁴ Civil Rule 60(A)

²⁵ This is evidenced by *Petitioner's Exhibit C*, email dated March 31, 2009; See also *Petitioner's Exhibit A*, Calendar of Missed Visitation

ordered by the Court.²⁶ Specifically, Respondent had only allowed Petitioner time with the minor child every other Friday from 6 p.m. until Saturday 6 p.m., rather than every other Friday from 5:00 p.m., until Monday 8:00 a.m. as ordered by the Court. Furthermore, Petitioner then added Respondent's most recent violations regarding the holiday time provisions when appearing at the hearing on May 26, 2009.

Pursuant to Ohio law, a court may consider the months in which the contempt continued to occur after the date of the filing of the motion.²⁷ In *Leuvoy v. Leuvoy*, the Court found that requiring a party to repeatedly file motions for contempt up to the eve of trial for a continuing contempt makes little sense when the principles of judicial economy are considered.²⁸ It is for this reason that Petitioner was not required to file an Amended Motion for Contempt every time Respondent chose to repeatedly violate the order. In the instant matter, Respondent had notice that Petitioner was asking for a finding of contempt based on her denial of Petitioner's time with the minor child. Petitioner's February 5, 2009 contempt motion clearly stated that Respondent denied Petitioner time with said child. At this point in time, Respondent was put on notice that there was a *Modified Order* in effect and that Petitioner had filed a *Motion for Contempt* as a result of Respondent's failure to abide by court orders. Moreover, Respondent was properly served with notice of the show cause hearing schedule for May 26, 2009. However, despite such notification, Respondent continued to disregard the Court's orders, as well as Petitioner's contempt motion, and further denied Petitioner holiday time with the minor child.²⁹ As Respondent continued to intentionally violate the Court's orders, this Court agrees with the

²⁶ This is evidenced by a letter submitted by Respondent's Counsel specifically stating that Petitioner will not be allowed to have the minor child for the weekend nor on Monday, January 26, 2009. See *Petitioner's Exhibit B*, filed on January 30, 2009.

²⁷ *Leuvoy v. Leuvoy*, (May 25, 2000), 10th Dist. No. 99AP-737

²⁸ *Leuvoy v. Leuvoy*, (May 25, 2000), 10th Dist. No. 99AP-737

²⁹ See *Petitioner's Exhibit A*, Calendar of Missed Visitation

Court's reasoning in *Leuvoy* and finds that in the face of continuing contempt a party is not required to repeatedly file motions for contempt up to the eve of trial as such a requirement would go against the principles of judicial economy. To require Petitioner to file a new contempt motion each alternating weekend when she was denied for a period of five months would unnecessarily inundate the court with redundant contempt motions. Therefore, taking into consideration the months in which the contempt continued to occur after the date of the filing of Petitioner's contempt motion, the Court finds that the continuous denial of visitation is sufficient for a finding of contempt against Respondent.

The following three elements must be established for a finding of civil contempt: "(1) a prior order of the court, (2) proper notice to the alleged contemnor, and (3) a failure to abide by the court order."³⁰ The alleged contemnor is entitled to due process, which requires "that a person accused of contempt must be afforded adequate notice of the allegations, time to prepare a defense, and an opportunity to be heard before any sanction is imposed."³¹ Herein, the Court issued a *Modified Order* requiring Respondent to allow Petitioner time with the minor child. Respondent was properly served with the *Modified Order*. However, Respondent went on to repeatedly deny Petitioner time with the minor child and thus, failed to abide by the Court's orders. Accordingly, Respondent was then properly served with Petitioner's *Motion for Contempt* and a *Notice of Hearing to Show Cause*.³² At such time, Respondent was provided adequate notice of the allegations, time to prepare a defense, and an opportunity to be heard at the May 26, 2009 hearing. Despite such notice, Respondent continued to violate the *Modified Order*. At the May 26, 2009 hearing, Respondent admitted to limiting Petitioner's visitation

³⁰ *Howell v. Howell* (June 7, 2005), Franklin App. No. No. 04AP-436, 2005 Ohio 2798, P25.

³¹ *Layne v. Layne* (June 24, 2004), Franklin App. No. 03AP-1058, 2004 Ohio 3310, P22 (internal citations omitted).

³² See *Certified Mail Receipt*, filed on February 9, 2009

time during the alternate weekends and denying holiday time which was awarded to Petitioner in the *Modified Order*. It is for this reason that the Court finds Respondent in contempt.

C. Jurisdiction of Juvenile Court to Issue Temporary Orders

The Court now turns to Respondent's *Motion to Dismiss Pursuant to Ohio Civil Rule 12(B)(1)*. It is the position of the Respondent that it was not within this Court's jurisdiction to award visitation to Petitioner, an unrelated third party without any custody agreement. Respondent argues that this Court does not have jurisdiction to issue such visitation orders in matters involving non-parents where the proceeding is not a divorce, dissolution, annulment or child support proceeding. Therefore, Respondent maintains that the Court does not have the power to find Respondent in contempt.

However, this Court has authority to issue temporary orders allowing non-parent visitation under Ohio Juvenile Rule 13(B)(1) and Franklin Local Juvenile Rule 5(D). According to these sections, the Juvenile Court has jurisdiction to "issue temporary orders with respect to the relations and conduct of other persons toward a child who is the subject of the complaint as the child's interest and welfare may require."³³ Thus, the Rule does not restrict the Court's authority to issue temporary orders only with respect to parents or relatives of the child. Moreover, Local Juvenile Rule 5(D) provides that "the Judge or the Magistrate may require motions for temporary orders to be submitted and determined without oral hearing upon affidavits in support or opposition."³⁴ Thus, a trial court is granted broad discretion in issuing temporary orders. The Court therefore finds that the Franklin County, Ohio, Court of Common Pleas, Juvenile Division has jurisdiction to issue temporary visitation orders in this case.

³³ Ohio Juvenile Rule 13(B)(1)

³⁴ Franklin Local Juvenile Rule 5(D)

Pursuant to Ohio Juvenile Rule 13(B)(1), before making such temporary orders the Court must take into consideration the child's interest and welfare. Herein, there is no evidence of harm as it relates to Petitioner's visitation with the minor child. Instead, Respondent has often trusted Petitioner to take care of the minor child on several occasions. When appearing before the Court on May 26, 2009 the Respondent admitted that, at times when Respondent would travel out of town, the minor child would stay with Petitioner. Respondent also admitted that she would often have Petitioner pick up the minor child from daycare if she was unavailable to do so. Finally, as already mentioned in the Court's prior *Decision and Judgment Entry* filed on January 15, 2009, pursuant to Ohio Revised Code §2151.23(A), the Juvenile Court has exclusive, original jurisdiction to determine the custody of any child not a ward of another court of the state, including hearing and determining custody issues relating to this matter.³⁵ Ohio's extensive set of case law regarding such custody disputes illustrates the ability of the non-parent to prove a set of facts which would entitle them to custody rights. Pursuant to *In re Perales*, a parent may be found unsuitable upon a fact-based determination of a parent's contractual relinquishment of his or her custodian rights.³⁶ Thus, should the Court determine that Respondent had consented to a change in custody or relinquishment of sole custodial rights, the Court recognizes that any actions taken by Respondent to deny Petitioner visitation with the minor child could be detrimental to the child. In a circumstance where a child has been placed by his or her parent in a living situation wherein the child develops a relationship with a non-parent, the child's best interest will more likely than not be affected by the unilateral decision of the legal parent to discontinue or limit the relationship with the non-parent. This is most certainly true with the facts presented in this case wherein there is no evidence of abuse or neglect at the hands of the

³⁵ Ohio Revised Code §2151.23(A)(2).

³⁶ *In re Perales*, (1977), 52 Ohio St. 3d 89

non-parent. It is for this reason that the Court finds it is in the child's best interest for Petitioner to maintain a relationship with the minor child by means of visitation during pendency of this matter.

D. Attorney Fees

As to the matter of attorney fees, the Court finds that Petitioner neglected to properly submit evidence concerning the attorney fees she incurred. When the parties appeared before the Court on May 26, 2009, Petitioner failed to present any evidence as it relates to the amount of attorney fees she has sustained as a result of Respondent's acts of contempt. Following the hearing, Petitioner filed a *Supplemental Affidavit Regarding Petitioner's Attorney Fees* on May 27, 2009. As the evidence put forth in Petitioner's *Supplemental Affidavit* was not presented at the time of the hearing, it is not properly before the Court. Therefore, the Court will not consider Petitioner's *Supplemental Affidavit* as evidence of costs arising out of the contempt proceeding.

IV. CONCLUSION

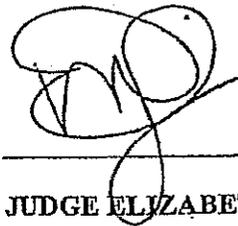
The Court has thoroughly reviewed the parties' motions, the testimony and evidence presented, the entire file, and the applicable law. Pursuant to its careful review, the Court finds that Petitioner's *Motion for Contempt* filed on January 30, 2009 is not well taken. Therefore, Respondent's *Motion to Dismiss Petitioner's Contempt Motion of January 30, 2009* filed on May 18, 2009 is GRANTED.

Additionally, the Court finds that Petitioner's *Motion for Contempt* filed on February 5, 2009 is well taken. Accordingly, the Court hereby GRANTS the same and ORDERS the following:

Respondent is sentenced to three (3) days of incarceration in the Franklin County Correction Center suspended on the condition she purges herself by obeying the current

periods. As Petitioner has been denied eight (8) days during her weekend time visitation periods and nine (9) days during Spring Break, Petitioner shall have possession of the minor child every weekend from July 10, 2009 through September 20, 2009. In addition, as Respondent has denied Petitioner the Memorial Day holiday, Petitioner shall have possession of the minor child for the Fourth of July weekend.

IT IS SO ORDERED.



A handwritten signature in black ink, appearing to read 'Elizabeth Gill', is written over a horizontal line. The signature is stylized and somewhat cursive.

JUDGE ELIZABETH GILL

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
DIVISION OF DOMESTIC RELATIONS AND JUVENILE BRANCH

In The Matter of the Custody of : Case No.: 08JU-09-13321
RILEY ANNE WARREN, :
Minor Child : JUDGE KIM A. BROWNE
ELIZABETH WARREN :
Plaintiff, : Magistrate Darrolyn Krippel
v. :
NANCY SCOTNEY :
Defendant. :

JUDGMENT ENTRY

This cause came before the Court on November 2, 2009, upon the Motion of Plaintiff Elizabeth Warren filed June 30, 2009 to dismiss the Complaint to Establish Joint Custody Plan for Minor Child, Defendant Nancy Scotney's Memorandum Contra dated July 2009, and Plaintiff's Reply dated October 2, 2009. Plaintiff appears represented by Attorney Gary Gottfried, and Defendant appears represented by Attorneys LeeAnn M. Massucci and Camilla B. Taylor, who was admitted *pro hac vice* from Illinois.

Plaintiff and Defendant entered into a domestic partnership in California in 2005. Plaintiff gave birth to the minor child, Riley Anne Warren, on November 11, 2005. Defendant completed a second parent adoption of Riley in 2006, wherein a person who is biologically unrelated to the child is allowed to adopt the child while the biological parent still retains her parental rights. Once the adoption is completed, California recognized both Plaintiff and Defendant as the legal parents of Riley Anne Warren.

The parties moved to Ohio in 2006. They began to experience trouble in their relationship in late 2006, and those problems persisted and increased over the next two years. The parties separated in the summer of 2008. Riley continued to reside with the Plaintiff following the separation, while Defendant continued to spend time with Riley.

YOU ARE HEREBY NOTIFIED THAT THIS ENTRY
WHICH MAY BE A FINAL APPEALABLE ORDER
HAS BEEN FILED WITH THE CLERK OF THE
COMMON PLEAS COURT ON THE DATE
INDICATED ON THE TIME STAMP.

FRANKLIN COUNTY CLERK OF COURTS

Following the end of the parties' relationship, the parties filed a Complaint to Establish Joint Custody Plan for Minor Child on September 30, 2008. In that motion, the parties alleged that Elizabeth Warren is the biological mother of Riley and that Nancy Scotney is also a legal mother of Riley as the result of her stepparent adoption in California. The parties then jointly requested that the Court make orders regarding a specific parenting schedule. On October 7, 2008, the parties entered into an Agreed Interim Order regarding parenting time and an Order Appointing a Guardian *Ad Litem*. A hearing on February 24, 2009 is continued for the GAL to conduct home visits and an investigation. On March 26, 2009, the parties filed a Second Agreed Interim Order regarding holiday schedules and subsequent parenting time, as well as counseling, day care and drug screens. On June 30, 2009, Plaintiff filed a Motion to Dismiss the Complaint to Establish Joint Custody Plan for Minor Child. On July 14, 2009, the parties entered into a 3d Agreed Interim Order providing for summer parenting time and traveling permissions. On July 24, 2009, Defendant filed a Memorandum Contra to Plaintiff's Motion to Dismiss and on October 2, 2009 Plaintiff filed a Reply. The matter has a record hearing on November 2, 2009.

APPLICABLE LAW

A trial court is granted broad discretion in deciding custody matters. It is well settled under Ohio law that a juvenile court may adjudicate custodial claims brought by persons considered non-parents at law. *In re Hockstok*, (2002), 98 Ohio St. 238. Pursuant to ORC 2151.23(A)(2), the Juvenile Court has exclusive, original jurisdiction to determine the custody of any child not a ward of another court of the state, including custody between parents and non-parents. The Court in *In re Bonfield* (2002), 97 Ohio St. 3d 387 at 394, states that, "[t]his exclusive responsibility to determine the custody of any child not a ward of another court of Ohio cannot be avoided merely because the petitioner is not a "parent" under ORC 3109.04." As it stands today, there is no provision of the Ohio Revised Code that provides a standard for a juvenile court to apply in determining custody disputes that fall within the jurisdiction of ORC 2151.23(A)(2). Fortunately, Ohio has developed case law which provides a framework to guide juvenile

courts in this process. Specifically, *In re Perales* (1977), 52 Ohio St.2d 89, continues to control actual disputes between parents and nonparents under ORC 2151.23(A)(2).

It is a parent's fundamental right to make decisions about the care, custody and control of their children, and that right is protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *In re Perales* (1977), 52 Ohio St. 2d 89 at 96 citing *Meyer v. Nebraska* (1923), 262 U.S. 390. Because parents have constitutional custodial rights, any action by the state which affects this parental right, such as granting custody of a child to a nonparent, must be conducted pursuant to procedures that are fundamentally fair. *In re Hockstok* (2002), 98 Ohio St.3d 238.

Specifically, the Ohio Supreme Court in *Perales* has held:

In an R.C. 2151.23(A)(2) child custody proceeding between a parent and a nonparent, the hearing office may not award custody to the nonparent without first making a finding of parental unsuitability that is, without first determining that the preponderance of the evidence shows that the parent abandoned the child, that the parent contractually relinquished custody of the child, that the parent has become totally incapable of supporting or caring for the child, or that an award of custody to the parent would be detrimental to the child.

If a court concludes that any one of these circumstances describes the conduct of a parent, the parent may be deemed unsuitable and that state may infringe upon the fundamental parental liberty interest of child custody. *In re Hockstok, ibid.*

A parent may be found unsuitable upon the determination of a parent's contractual relinquishment of her custodial rights. The Ohio Supreme Court in *Mastitto v. Mastitto* (1986), 22 Ohio St. 3d 63, held that "[w]hether or not a parent relinquishes rights to custody is a matter of fact, which, once determined, will be upheld on appeal if there is some reliable, credible evidence to support the finding." Ohio courts do not require that a parent's agreement to relinquish custody be in writing. *Clark v. Bayer* (1877), 32 Ohio St. 299. Instead, a parent's actions or words may relinquish their custodial rights. *Clark, ibid.* A parent's actions or words may illustrate that the parent had consented to a change in custody. *Miller v. Miller* (1993), 86 Ohio App. 3d 623, at 626. Such a finding is **based upon the facts of each case, which are presented at trial** through testimony and other evidence brought before the court.

If a court finds that the parent has relinquished custody and has made a determination of unsuitability, the parent must then meet the standards of ORC 3109.04(B), the "best interest of the child" test. *Miller, ibid.* At such time, focus shifts from the rights of the parents to the rights of the child. A child's rights are effectuated through the use of the best interest of the child standard. This is a weight of the evidence question, and if the judgment of the trial court is supported by competent probative evidence, the reviewing court must affirm the decision of the trial court. *Miller at 627.*

ANALYSIS

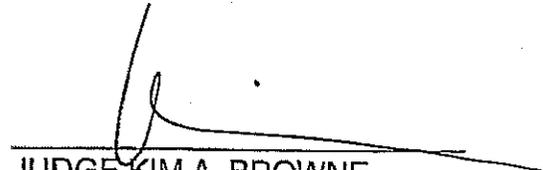
This Court has authority to consider this custody matter under ORC 2151.23(A)(2). This section gives the Juvenile Court the exclusive, original jurisdiction to determine the custody of any child not a ward of another court of the state, including hearing and determining custody and parenting time issues relating to this matter. As a trial court is granted broad discretion in deciding such custody matters, this Court therefore find that the Franklin County, Ohio, Court of Common Pleas, Juvenile Division has jurisdiction to determine the custody matters in this case.

The Court now addresses the Motion of Plaintiff to dismiss the Complaint to Establish Joint Custody Plan for Minor Child. Plaintiff claims that Defendant cannot be recognized as Riley's legal parent and argues that Ohio is not required to give full faith and credit to the California adoption because, Plaintiff alleges, it is contrary to the public policy of Ohio prohibiting same-sex couple adoptions. However, this Court need not consider whether it will give effect to this allegedly prohibited adoption. Pursuant to *Perales*, this Court must consider whether Plaintiff, by word or action, has contractually relinquished her custodial rights. If Defendant can prove by a preponderance of the evidence that Plaintiff's words or actions illustrated that Plaintiff had consented to a change in custody or a relinquishment of sole custodial rights, Defendant may be entitled to relief. The Court points out that both parties have stated that Plaintiff and Defendant lived together during the time that the minor child was born and that they continued to cohabit for several years after the birth of said child. In addition, both parties acknowledge the "second parent adoption" from California. The Court finds that,

pursuant to *Perales*, a hearing must take place in which Defendant will have the opportunity to prove a set of facts which may entitle her to custody rights.

The Court has thoroughly reviewed and considered all the documents filed by the parties, the arguments of counsel, the entire file, and the applicable law. Based upon the careful consideration of the foregoing presented in the instant case, the Plaintiff's Motion to Dismiss is deemed **NOT WELL TAKEN**, and the same is hereby **DENIED**.

IT IS SO ORDERED!



JUDGE KIM A. BROWNE

Copies to:

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Attorney for Defendant

Magistrate Krippel

PRAECIPE: TO THE CLERK OF COURTS Pursuant to Civil Rule 58(B), you are hereby instructed to serve upon all parties not in Default for failure to appear, notice of the Judgment and its date of entry upon the journal.

COURT OF COMMON PLEAS, JUVENILE COURT DIVISION
CUYAHOGA COUNTY, OHIO

IN THE MATTER OF ^{Solomon} J. LAPIANA

CASE NO CU07101364-05

JUDGE: Kristin W. Sweeney

JUDGE: Jerry Hayes by Assignment

Journal Entry

Rita Goodman
Petitioner

vs

Siobhan La Piana
Respondent

This matter came before the Honorable Jerry L. Hayes, Judge by Assignment for hearing on this 9th and 10th day of June, 2008 and this 10th day of July, 2009 on which date the matter was concluded. Rita Goodman, Petitioner, was present represented by Attorney Pamela J. MacAdams and Siobhan LaPiana, Respondent, was represented by Attorney John E. Schoonover and Attorney

Katherine A. Friedell. Attorney John V. Heutsche, Guardian ad Litem for the minor children was also present.

Testimony was taken from Petitioner Rita Goodman, Respondent Siobhan La Piana, Rachael Goodman, Mother of Petitioner, Dr. Meryl Soto-Schwartz, Marko Lukowsky and the Guardian ad Litem, Attorney John Heutsche. Exhibits were offered and received and final arguments were submitted to the Court by written memoranda.

John V. Heutsche presented his Motion for Guardian ad litem fees in the amount of \$22,500.00 to be assessed to the parties. The court, following Local Rule 17(D), determined that the Guardian ad litem fees were reasonable and necessary and should be assessed to the parties equally, as follows: \$11,250.00 to Petitioner and \$11,250.00 to Respondent.

The matter before the Court is the allocation of parental rights between Rita Goodman, Petitioner, and Siobhan La Piana, Respondent.

The two women were involved in a same sex relationship which began in the early 1990's and, with minor interruptions, continued until 2001. During the course of this relationship, two children were born to Siobhan La Piana. Solomon J. La Piana was born April 26, 1997, and Jack K. La Piana was born on May 17, 2000.

Counsel for the Petitioner states in her written memoranda of final argument that "Lesbians never become parents by accident." In fact, there was great deal of planning. Siobhan was selected to be the biological mother in recognition of the age differences between the two women. They selected a donor for artificial insemination who was Jewish, of Russian and Polish background and who shared the artistic interest of both woman. Both boys have the same donor.

donor. -

During the nearly 10 year relationship between the two women all the evidence indicates they functioned as a family unit. The boys were named after Rita's family members. They celebrated birthdays and holidays as any family would and the boys carried Goodman as their last name. (the Respondent unilaterally changed both of the minor children from Goodman to LaPiana). In fact, the two women even entered into a written agreement to "Jointly

Raise our Child" (Jack was not yet born).

The two women, however, never held a ceremonial marriage and Petitioner never attempted adopt the two boys (not permitted in Ohio but possible in other states).

The relationship ended in 2001, but the Petitioner continued to enjoy a significant involvement in the lives of the two boys. That involvement, however, changed significantly when Siobhan became involved in a heterosexual relationship with Marko Lukowsky. The relationship between Rita Goodman and the two boys became more and more restricted as Siobhan's new partnership blossomed.

Having determined that she would eventually be shut out of the lives of the two boys, Rita Goodman turned to the Courts seeking an Order of Shared Parenting and/or a Companionship Schedule. The position of Respondent Siobhan La Piana is that, as the biological mother, she, and she alone has a fundamental right to make the decisions regarding the care, custody and control of her children. She argues that Petitioner is seeking rights that are afforded only to married couples and, furthermore, seeks an involvement with the children exceeding that which would be granted to couples formerly married.

Respondent cites the Marriage Protection Amendment Act as standing for the proposition that Petitioner Goodman has not standing or legal status regarding the children. In addition, Respondent cites *In re Cheyenne Madison Jones (2002, Miami County) 2002 Ohio App. Lexis 2269*, (non biological partner cannot be a parent within meaning of R. C. 3109.04 and not entitled to award of parental rights) *Troxel v. Granville, (2000), 530 U.S. 57*, (Fourteenth Amendment protects rights of parent to make decisions regarding the child), *In re Bonfield (2002), Ohio St. 3rd 218* (non biological party has no standing to assert custody), and *Liston V. Pyfas (1997 Franklin County), 1997 Ohio App. Lexis 3627* (non biological partner had no standing to bring child support motion).

Petitioner Rita Goodman argues that she is as much a "mom" to these two boys as is Siobhan La Piana. Her written memoranda states:

"...Rita is just as much mom as Siobhan is to these boys. On Mother's Day (P Ex. 17) they make two cards, one for each mother. When they illustrate family the illustration contains Rita, Siobhan and the boys (P Ex. 14). When they do school projects related to mother and family, they reference Rita as mother (P F. 14). When they do school projects related to mother and family, they reference Rita as mother (P F's 15, 16, 18, 19, 32). When the schools camps, community, temple and medical personnel reference these women, both are listed as mother (P Ex. 20-24).

Petitioner argues that one of the most critical pieces of evidence in favor of Petitioner's position is the agreement to "Jointly Raise our Child" which Rita Goodman and Siobhan La Piana executed at the time of the first child's birth. The agreement was followed by both parties and

used to help raise both of the minor children.

Petitioner suggests the agreement accompanied by the actions of the two parties constitute waiver of Siobhan's exclusive right to parent the children and, in fact, relinquished a part of that time to Rita Goodman.

Counsel for the Petitioner argues that the controlling legal precedent is found in the cases of *In re: Bonfield (2002), 96 Ohio St. 2d 218*, and *in re; Perales (1977) 52 Ohio St. 2d 89*. Petitioner suggests that the Ohio Supreme Court in *Bonfield* holds that a juvenile court has the jurisdiction to adjudicate a claim for shared custody pursuant to R.C. 2151.23 (A)(2) and that such exclusive jurisdiction cannot be avoided merely because an applicant is not a "parent" under R.C. 3109.04. Petitioner also argues that *In re: Fairchild (2002), Franklin County No. 01 JU-03-2542*, states that:

"...it is well settled law that 'parents who are suitable' persons have a 'paramount' right to custody of their minor children unless they forfeit that right by contract....." (Emphasis added).

Petitioner further argues that if a finding of unsuitability is necessary, a finding of contractual relinquishment of custody is sufficient to show unsuitability. *Perales, 52, Ohio St 2d at 98*.

After a full consideration of the testimony of the parties, an examination of the exhibits, a review of the applicable law and a review of the written arguments of counsel, it is ORDERED, ADJUDGED, and DECREED that:

1. Respondent Siobhan La Piana shall be named residential parent and legal custodian for the minor children, Solomon J. Lapiana and Jack K. La Piana.
2. All decisions regarding religion, physician selection, medical treatment, and school selection shall be made by the residential parent.
3. Petitioner Rita Goodman shall be entitled to notification of school events and activities and shall be entitled to reports of the boys academic progress and Respondent Siobhan La Piana shall provide her with the same. Rita Goodman shall be entitled to attend all school activities and events with the exception of parent/teacher conferences.
4. Petitioner Rita Goodman shall be entitled to the following companionship/visitation schedule:
 - A. Every other weekend from Friday evening at 5:00 pm (earlier by agreement) until Monday morning. During school periods Petitioner will deliver the children to school. During non school times Petitioner will deliver the children to Respondents residence by 9:00 am.
 - B. Petitioner will have visitation one evening a week. During non school times it shall be overnight. During school times it will be from 5:00 pm until 8:00 pm. Petitioner will pick up the children at an agreed upon exchange point and Respondent will collect the children at the end of visitation at the same location. Unless otherwise agreed, the weekday visits will take place on Wednesday.
 - C. When times of special meaning occur the parties will adjust the visitation and schedule and make up time any time missed.
 - D. Petitioner may have three uninterrupted weeks of summer visitation or may, by agreement, break up the weeks. Notice shall be given by Petitioner to Respondent at least 30 days in advance by certified mail.
 - E. Visitation may be expanded by agreement of the parties.
 - F. The Petitioner and the Respondent shall share the fees of the guardian ad litem equally and each shall pay to the guardian ad litem \$11,250.00. The parties shall be responsible for payment of their own attorney fees.
 - G. Should either the Petitioner or the Respondent elect to leave the jurisdiction of the Court notice shall be provided to the other party. Nothing in this requirement is intended to indicate that

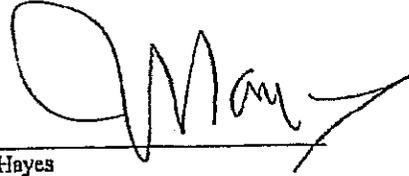
permission shall be withheld.

H. The duties of the appointed guardian ad litem shall terminate with the filing of this judgment.

I. Any motions still pending and not specifically addressed by this Judgment Entry shall be dismissed.

The Court suggests that Petitioner may wish to contribute financially to the support of the minor children. A special bank account should be opened and all child related payment should be made from that account to avoid later disputes.

It is so Ordered!



Judge Jerry L. Hayes

Date: July _____, 2009