ORIGINAL

In The Supreme Court of Ohio

In the Matter of:	:	Case No.: 2010-0276
	:	
Lucy Kathleen Mullen,		An Appeal From The First
	:	District Court of Appeals;
a minor.		Case Nos.: C090285 and
	:	C090407

MERIT BRIEF OF APPELLEE SCOTT LIMING

Terry William Tranter (0070424)
830 Main Street, Suite 806
Cincinnati, Ohio 45202
Phone: (513)-621-9204
Fax: (513) - 241-0045
tranterterry@yahoo.com
Attorney for Appellee
Scott Liming

Lisa T. Meeks (0062074)
215 E. Ninth Street, Suite 650
Cincinnati, Ohio 45202
Phone: (513)-639-7000
Fax: (513)-639-7011
lisameeks@newmanmeeks.com
Attorney for Appellant
Michelle Hobbs

Douglas B. Dougherty (0017093)
Dougherty, Hanneman, and
Snedaker, LLC
3010 Hayden Road
Columbus, Ohio 43235
Phone: (614)-932-5000
Fax: (614) - 798-1933
doughertylaw@aol.com
Attorney for Appellee
Kelly Mullen

Christopher R. Clark
(Pro Hac Vice Motion Pending)
Lambda Legal Defense and
Education Fund, Inc.
11 East Adams Street,
Suite 1008
Chicago, Illinois 60603
Phone: (312)-663-4413
Fax: (312)-663-4307
cclark@lambalegal.org
Attorney for Appellant
Michele Hobbs

FILED
JUL 16 2010
CLERK OF COURT
SUPREME COURT OF OHIO

Table of Contents

TABLE OF AUTHORITIES.....ii

STATEMENT OF FACTS.....1-5

SUMMARY OF ARGUMENT.....5

ARGUMENT.....6-12

PROPOSITION OF LAW NO. I

THE LOWER COURTS PROPERLY HELD THAT THE BIOLOGICAL FATHER OF THE ABOVE CAPTIONED CHILD RELINQUISHED PARENTAL RIGHTS ONLY TO THE BIOLOGICAL MOTHER.....6

A. The donor-recipient agreement was only between the biological father and mother.....6

B. The trial and appellate court decision was supported by competent and credible evidence, so should not be disturbed on appeal.....6

C. The former partner of the biological mother should have no custody rights to the above captioned child.....7

CONCLUSION.....13

CERTIFICATE OF SERVICE.....14

Table of Authorities

U.S. Supreme Court Cases: **Appx. Page**

Santosky v. Kramer (1982), 455 U.S. 745, 102 S.Ct. 1388.....7

Troxel v. Granville (2000), 530 U.S. 57, 120 S.Ct. 2054.....8

Ohio Supreme Court Cases:

Clark v. Bayer (1877), 32 Ohio St. 299.....8, 9

In re Bonfield (2002), 97 Ohio St.3d 387, 780 N.E.2d 241.....9, 10

In re Murray (1990), 52 Ohio St.3d 155, 556 N.E.2d 1169.....7

In re Perales (1977), 52 Ohio St.2d 89, 369 N.E.2d 1047.....8, 9

Massito v. Massito (1986), 22 Ohio St.3d 63, 488 N.E.2d 857.....7

Ohio Court of Appeals Cases:

Rowe v. Rowe (1950), 58 Ohio L. Abs. 497, 97 N.E.2d 223.....9

In re C.M.J. (2002), 2002 Ohio 2279, 2002 Ohio App. LEXIS 2296.....12

In re J.D.M. (2004), 2004 Ohio 5409, 2004 Ohio App. LEXIS 5166.....11

Ohio Revised Code:

R.C. Section 3111.01(A)-(B).....8

Statement of Facts

This case concerns Appellee Scott Liming (hereinafter "Mr. Liming") who agreed to participate in an "in vitro" donor insemination process with Appellee Kelly Mullen (hereinafter "Ms. Mullen"). (Supp. A-13.) Mr. Liming was the donor. (Supp. A-12, 13.) Ms. Mullen was the recipient. (Supp. A-12, 13.) Accordingly, a child named Lucy Mullen (hereinafter "Lucy") was created. (Supp. A-10, 12, 13.)

Mr. Liming was the father listed on Lucy's birth certificate. (Supp. A-13.) He also later filed a Formal Acknowledgement of Paternity that he is Lucy's father. (Supp. A-13.)

The Appellant Michele Hobbs (hereinafter Ms. Hobbs) was Ms. Mullen's former partner. (Supp. A-10, 16.) She had legal representation around the time Lucy was born. (Supp. A-19, 20.) But she never entered into a shared custody agreement with either Mr. Liming or Ms. Mullen. (Supp. A-14, 15.)

In re Bonfield, this Court's decision involving shared custody for non-traditional families, was the applicable law at the time Lucy was born. (Supp. A-10, 20, 21.) That law could have protected Ms. Hobbs' parental rights, if any, but she can show no such agreement with either of Lucy's

parents. (Supp. A-14-15, 18-21.)

Ms. Hobbs was advised by her attorney, Scott Knox, who specialized in advising non-traditional families of their legal rights. (Supp. A-20-21, 24-25, 31.) **Accordingly, Ms. Hobbs and Attorney Scott Knox, either knew, or should have known that a shared custody agreement was the only secure way to protect Ms. Hobbs' parental rights.** (Supp. A-20, 21.)

In contrast, the other documents that were created by Attorney Scott Knox were all revocable by Ms. Mullen. (Supp. A-19, 29.) And such documents were revoked by Ms. Mullen. (Supp. A-28.) But Ms. Hobbs can show ceremonial documentation concerning Lucy. (Supp. A-18, 20.)

As to Mr. Liming, he was present soon after the child's birth. (Supp. A-26.) He moved from Atlanta, Georgia, to Cincinnati, Ohio, to spend more time with Lucy. (Supp. A-15, 24.) Mr. Liming built a relationship with Lucy that included overnight time at his place. (Supp. A-15.) At the very least, he has always been an important part of Lucy's life. (Supp. A-15.)

When Lucy was about two years old, Ms. Hobbs' relationship with Ms. Mullen ended. (Supp. A-10.) Ms. Mullen and Lucy moved out of the residence that was shared with Ms. Hobbs. (Supp. A-10.) In response, Ms.

Hobbs eventually filed a petition for shared custody in juvenile court. (Supp. A-10.)

After a two-day trial, the magistrate did not rule on Mr. Liming's custody petition. (Supp. A-12, 32.) But he did find that Mr. Liming was a loving parent that was involved in Lucy's life. (Supp. A-28, 31.)

The magistrate agreed that Mr. Liming and Ms. Mullen were Lucy's parents under Ohio Law. (Supp. A-29.) And he encouraged Lucy's parents to establish a shared parenting plan. (Supp. A-29, A-32.)

The magistrate agreed that only Mr. Liming and Ms. Mullen were parties to the donor recipient agreement. (Supp. A-26.) He also found that Mr. Liming and Ms. Mullen did not abandon Lucy. (Supp. A-28, 29.) Moreover, he held that Mr. Liming and Ms. Mullen are suitable parents. (Supp. A-28, 29.)

But the magistrate also held that an implied contract was created between Lucy's mother - and a third party - Ms Hobbs. (A-29, 32.) He granted Ms. Hobbs shared custody of Lucy. (Supp. A-32.)

The above, alleged implied contract of shared custody was based largely on: (1) the revocable documents that were created by attorney Scott Knox; (2) the ceremonial documentation from Lucy's birth; (3) the

supportive role Ms. Hobbs played when she was Ms. Mullen's partner; and (4) the limited observations of vacation friends, a neighbor, and a Cincinnati city councilwoman. (Supp. A-31.)

Mr. Liming and Ms. Mullen timely objected before the trial judge. (Supp. A-10.) The trial judge granted the objections, and held that Ms. Hobbs has no shared custody rights to Lucy. (Supp. A-22.)

The trial judge never required Ms. Hobbs to present a written shared custody agreement. (Supp. A-20.) Instead, he held that having no such agreement is important evidence of the parent's intentions that Ms. Hobbs was only meant to be a supportive partner of Ms. Mullen. (Supp. A-20, 21.)

Both the magistrate and the trial judge held that the donor-recipient agreement was only between Mr. Liming and Ms. Mullen. (Supp. A-14, 15, 26.) The courts held that Ms. Hobbs was not a party to the agreement. (Supp. A-14, 15, 26.)

The trial judge also held that Mr. Liming was Lucy's father and a "parent" of Lucy as defined by Ohio law. (Supp. A-13.) But he dismissed Mr. Liming's petition because his case was filed under the wrong Revised Code section. (Supp. A-22.) However, the judge also held that Mr. Liming could later re-file his case under the proper R.C. section, and enter into a

shared parenting agreement with Ms. Mullen. (Supp. A-22.) Moreover, the judge held that Mr. Liming could otherwise petition for parental rights and responsibilities as appropriate. (Supp. A-22.)

The appellate court also agreed that Mr. Liming relinquished his parental rights only with Ms. Mullen. (Supp. A-3.) It found that the well-reasoned trial court decision was based on reliable and credible evidence. (Supp. A-5.) Accordingly, it held that Ms. Hobbs' attempts to limit Mr. Liming's parental rights has no merit. (Supp. A-8.)

Ms. Hobbs' discretionary appeal to this Court followed. (Supp. A-1.)

Summary of Argument

The appellate court, trial court, and magistrate agree that Mr. Liming made no contract with Ms. Hobbs concerning Lucy. Contrary to Ms. Hobbs assertions, the lower courts did not require a written custody agreement.

Instead, the lower courts decided this case based on all the evidence presented. And the lower courts exercised good discretion in giving significant weight to written documents, such as the donor recipient agreement between the two parents and the lack of a shared custody plan between the two parents and Ms. Hobbs.

Accordingly, this Court should affirm the lower court decision.

Argument

PROPOSITION OF LAW NO. I

THE LOWER COURTS PROPERLY HELD THAT THE BIOLOGICAL FATHER OF THE ABOVE CAPTIONED CHILD RELINQUISHED PARENTAL RIGHTS ONLY TO THE BIOLOGICAL MOTHER.

A. The donor-recipient agreement was only between the biological father and mother.

Ms. Hobbs cannot show that she was a party to the donor-recipient agreement between Mr. Liming (Lucy's father) and Ms. Mullen (Lucy's mother). There is no question that Mr. Liming is the father of Lucy.

The facts indicate that Mr. Liming was introduced by Ms. Hobbs to Ms. Mullen briefly at a party. Mr. Liming eventually agreed to become a known donor with Ms. Mullen as the recipient. Lucy was born by in-vitro fertilization.

At no time did Mr. Liming sign any papers or make any promises with Ms. Hobbs. Therefore, this Court should find that no privity of contract exists between Mr. Liming and Ms. Hobbs concerning Lucy.

B. The trial and appellate court decision was supported by reliable and credible evidence, so should not be disturbed on appeal.

As stated by the appellate court, the standard of review in this case

is whether the trial court decision was based on reliable and credible evidence. *Massito v. Massito* (1986), 22 Ohio St.3d 63, 488 N.E.2d 857. "[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." *Id.* at 66, 488 N.E.2d 857. "[T]aken as whole" a trial court must consider if there has been a contractual relinquishment of custody. *Id.* As to Mr. Liming the appellate court applied the above rule of law, and stated as follows:

> 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.** (Emphasis mine).

Accordingly, this Court should also uphold the well-reasoned decision of the lower courts by taking the same deferential approach.

C. The former partner of the biological mother should have no custody rights to the above captioned child.

Under Ohio law, "[I]t is axiomatic that a natural parent has a paramount right to the custody of his or her children." *In Re Murray* (1990), 52 Ohio St.3d 155, 157, 556 N.E.2d 1169 (citing *Santosky v. Kramer* (1982), 455 U.S. 745, 753, 102 S.Ct. 1388). Indeed, parents of a

child have a fundamental right under the due process clause of our Constitution to shelter their children as a custodial right. *Troxel v. Granville* (2000), 530 U.S. 57, 66, 120 S.Ct. 2054.

R.C. Section 3111.01(A) defines a parent as: (1) a natural parent; (2) an adoptive parent; or (3) a parent fitting any other provision of the Revised Code that confers or imposes rights, privileges, duties, and obligations. R.C. Section 3111.01(B) goes on to clarify that the above definition of parentage applies equally to all parents, regardless of marital status.

Applying the plain language of the above definition, Ms. Hobbs is not Lucy's parent.

In contrast, Mr. Liming and Ms. Mullen are Lucy's parents, and warrant the same consideration to raise Lucy as they see fit, in spite of their marital status. They have the same right to keep Lucy away from third parties as a married couple would receive.

Accordingly, since 1877, this Court held that "...in all cases of controverted right to custody, the welfare of the minor is first to be considered," but "suitable" [parents] have a "paramount" right to the custody of their minor children unless they forfeit the right by contract, abandonment, or by becoming totally unable to care for and support those

children. *In re Perales* (1977), 52 Ohio St.2d 89, 97, 369 N.E.2d 1047, 1051-1052, (citing *Clark v. Bayer* (1877), 32 Ohio St. 299, 310). Moreover, "[w]hen it is found that a parent is a suitable person and the fitness of the home is not in dispute and such parent is able and willing to support and care for its child, the parent's right is paramount to that of all other persons." *Rowe v. Rowe* (1950), 58 Ohio L. Abs. 497, 1-3, 97 N.E.2d 223, syllabus.

At bar, the lower courts agree that Mr. Liming and Ms. Mullen never abandoned Lucy. The courts also agree that Lucy's parents are suitable, and the fitness of their respective households is not in dispute. Moreover, the courts below also agree that Mr. Liming and Ms. Mullen is able and willing to care and support Lucy. Therefore, Lucy's parents have a paramount right to raise Lucy without Ms. Hobbs, a non-parent, unless they have forfeited such right to Ms. Hobbs by contractual relinquishment.

But only ***when a case is uncontested,*** may a parent voluntarily relinquish custody to a third party pursuant to a shared custody agreement. *In re Bonfield* (2002), 97 Ohio St.3d 387, 47-50, 780 N.E.2d 241, 249. Accordingly, Ms. Hobbs and Ms. Mullen were free to protect themselves if they both desired a long term relationship under *In re Bonfield* ***before*** their

relationship went sour. *Id.* In contrast, *In re Perales* and *Massito v. Masitto* now apply as to whether an implied contract exists between Lucy's parents and Ms. Hobbs because ***this is a contested case***. *Id.*

Since she cannot show a written contract for shared custody, Ms. Hobbs now alleges to have an implied contract for shared custody. She alleges the following words or conduct as enumerated by the appellate court, at bar: (1) she was involved in Ms. Mullen's pregnancy; (2) she was present during Lucy's birth; (3) her name was on a ceremonial birth certificate; (4) she helped Ms. Mullen care for Lucy; (5) she and Ms. Mullen appeared to be a family; (6) she was called "Momma" by Lucy; (7) Ms. Mullen's will named Lucy as guardian; and (8) Ms. Mullen had executed a durable power of attorney concerning Lucy.

But Ms. Hobbs was represented by a lawyer, Scott Knox, that specialized in family planning for gay couples. His representation occurred close in time with **Lucy's birth that was in July, 2005**.

But Attorney Scott Knox either had to know, or should have known about ***In re Bonfield*** **- decided December 13th, 2002**. Such an attorney had to advise, or should have advised Ms. Hobbs that a shared custody agreement was the **only** way she could expect to raise Lucy in the event her

relationship with Ms. Mullen went sour. It follows that the absence of such an agreement during the time Ms. Mullen and Ms. Hobbs were partners is considerable evidence of no agreement.

Instructive, is the trial court in *In re J.D.M.,* that denied a lesbian couples attempt to create an *In re Bonfield* shared custody agreement. *In re J.D.M.* (2004), 2004 Ohio 5409, 2004 Ohio App. LEXIS 5166 (p. 5). The trial court held that "...the Shared Custody Agreement circumscribed the discretion of [J.D.M.]'s mother to determine what might be in his best interest." *Id.*

The trial court went on to hold:

> ...the custody agreement "serves no purpose" while the couple resides in the same household, and that the agreement may in the future, circumvent J.D.M.'s mother's ability to decide what is in his best interest. **...the parties could achieve their intended result while protecting J.D.M.'s mother's interests by executing a combination of powers of attorney, will, and releases.** (emphasis mine) *Id.*

The appellate court later reversed the above trial court decision. *Id* (p. 10).

But it is instructive that Ms. Hobbs and Ms. Mullen chose the combination of documents suggested by the trial court in bold above. Similarly, Ms. Mullen also wanted to keep control over Lucy's best

interests, and did not want Ms. Hobbs to possibly interfere with that discretion over time.

Also, like Ms. Hobbs, Ms. Dvorak was a third party non-parent to a child in *In re C.M.J.,* and attempted to create an implied contract for shared custody. *In re C.M.J.* (2002), 2002 Ohio 2279, 2002 Ohio App. LEXIS 2296 (p. 2-3). Ms Dvorak claimed to be a *de facto* parent based on the following words or conduct: (1) the anonymous donor for the child at issue was of a Czechoslovakian and German heritage like Ms. Dvorak; (2) Ms. Dvorak attended birthing classes with the biological mother; (3) baby showers were thrown for Ms. Dvorak; (4) she served as a coach in the delivery room, and cut the umbilical cord; (5) the baby was named after Ms. Dvorak's birth city; (6) Ms. Dvorak's name was on the birth announcement; (7) her name was on the baptismal announcement; and (8) she was actively involved in parenting and decision making. *Id.*

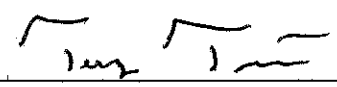
In applying *In re Perales* to the above facts, the trial court concluded that Ms. Dvorak had failed to allege any contractual relinquishment by her former partner, the biological mom. *Id.* For the same reasons, this Court should find that no implied contract of shared custody exists between either of Lucy's parents and Ms. Hobbs.

Conclusion

In conclusion, this Court should affirm the lower court decision. It should allow Mr. Liming and Ms. Mullen to continue the five year process of fostering a parental relationship with Lucy.

Moreover, this Court should not allow Ms. Hobbs, who was represented by legal counsel, to create an unwritten or implied *In re Perales* shared custody agreement with Lucy's parents - where none exists.

Respectfully Submitted…



Terry William Tranter (0070424)
830 Main Street, Suite 806
Cincinnati, Ohio 45202
Phone: (513)-621-9204
Fax: (513)-241-0045
tranterterry@yahoo.com
Attorney for Appellee
Scott Liming

Certificate of Service

I certify that, on July 16th, a copy of this Merit Brief was delivered to:

Douglas B. Dougherty (0017093)
Dougherty, Hanneman, and
Snedaker, LLC
3010 Hayden Road
Columbus, Ohio 43235
Phone: (614)-932-5000
Fax: (614) - 798-1933
doughertylaw@aol.com
Attorney for Appellee
Kelly Mullen

Christopher Clark
(Pro Hac Vice Motion Pending)
Lambda Legal Defense and
Education Fund, Inc.
11 East Adams Street,
Suite 1008
Chicago, Illinois 60603
Phone: (312)-663-4413
Fax: (312)-663-4307
cclark@lambalegal.org
Attorney for Appellant
Michele Hobbs

Lisa T. Meeks (0062074)
215 E. Ninth Street, Suite 650
Cincinnati, Ohio 45202
Phone: (513)-639-7000
Fax: (513)-639-7011
lisameeks@newmanmeeks.com
Attorney for Appellant
Michelle Hobbs

Terry William Tranter
Attorney for Appellee
Scott Liming