ORIGINAL

IN THE SUPREME COURT OF OHIO

In re:	‖	
LUCY KATHLEEN MULLEN	‖	Case No.: 2010-0276
	‖	An Appeal From The First District Court of Appeals; Case Nos.: C090285 and C090407

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF OHIO AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF NONE OF THE PARTIES

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INTEREST OF AMICI CURIAE

The American Civil Liberties Union ("ACLU") is a nonprofit, nonpartisan membership organization founded in 1920 to protect and advance basic constitutional rights and civil liberties for all Americans. The ACLU has more than 500,000 members nationwide. The ACLU of Ohio is the state affiliate of the national ACLU with nearly 30,000 members and supporters. The ACLU and ACLU of Ohio (collectively "ACLU") are committed to ensuring that the relationships of children and their parental custodians are protected, regardless of the sexual orientation or marital status of the custodians, and therefore represented the Appellee in *Kulstad v. Maniaci* (2009), 352 Mont. 513, 220 P.3d 595, and has filed amicus briefs in a number of cases addressing this issue. See, e.g., *In re Parentage of L.B.* (2005), 155 Wash.2d 679, 122 P.3d 161. The ACLU is also committed to ensuring that the rights of lesbian and gay Ohioans to legal protections are not restricted by an erroneous construction of the state constitutional amendment banning the recognition of a legal status approximating marriage, Section 11, Article XV, Ohio Constitution (hereinafter "Marriage Amendment"), and has appeared as amicus curiae in several cases involving the interpretation of the Marriage Amendment. See, e.g., *State v. Carswell*, 114 Ohio St.3d 210, 2007-Ohio-3723, 871 N.E.2d 547.

The issues presented in this case have significant implications for the rights of parental custodians and their children in Ohio to preserve their custodial relationships. The women involved in the custody dispute before this Court previously shared a lesbian relationship. Although the ACLU takes no position on the correct resolution of the dispute between Ms. Hobbs, Ms. Mullen, and Mr. Liming, it addresses in this amicus a question of particular concern to Ohio children and their unmarried custodians – the irrelevance of the Marriage Amendment to

the former partners' child custody dispute – and shows plainly that resolution of that dispute in no way implicates the Amendment.[1]

The ACLU believes that this Court's long-standing precedent sets out the proper standard for evaluating child custody petitions, namely, what is in the best interests of the child, *In re Adoption of Charles B.* (1990), 50 Ohio St.3d 88, 90, 552 N.E.2d 884, and that the Marriage Amendment is inapplicable to this case. For the reasons set out in this brief, the ACLU urges the Court to resolve the custody questions before this Court without consideration of the Marriage Amendment, or to explicitly conclude that the Marriage Amendment is not relevant to the questions before this Court.

STATEMENT OF FACTS

The ACLU takes no position on any factual disputes between the parties but adopts the Statement of Facts of Appellant Hobbs for the limited purpose of presenting its argument.

SUMMARY OF ARGUMENT

This case presents a question of whether a court order based on a written shared custody agreement is required in order to prove that a parent contractually ceded her right to exclusive custody in favor of shared custody with a non-parent. Ms. Hobbs offered testimony and documentary evidence at trial to prove that she and Ms. Mullin intended to jointly parent Lucy and that Ms. Hobbs had, with the consent and encouragement of Ms. Mullin, assisted in planning and preparation for Lucy's birth and subsequently functioned as Lucy's parent. According to

[1] Although no party or amicus participant has argued in the pleadings filed to date that the Marriage Amendment is relevant to the underlying custody dispute, that argument has been made in other custody cases involving parental custodians of the same sex. See *In re J.D.F.* (Dec. 31, 2008), Franklin App. No. 07-AP-922, 2008-Ohio-2793, appeal not allowed, 120 Ohio St.3d 1453, 2008-Ohio-6813, 898 N.E.2d 968 (Dec. 31, 2008); *In re S.J.L* (case initiated July 29, 2009), Cuyahoga App. Nos. 93691, 93692.

Ms. Hobbs, Ms. Mullen voluntarily relinquished her right to exclusive custody in favor of shared custody over the daughter they jointly raised until Ms. Mullen attempted to unilaterally end the relationship between Ms. Hobbs and Lucy. This Court has been asked to decide whether the failure of Ms. Hobbs and Ms. Mullen to enter into a court order reflecting their parenting agreement trumps the other evidence offered to prove their custodial agreement.

Since resolution of the custody dispute in this case in no way involves the legal recognition of an unmarried relationship, this Court need not consider the Marriage Amendment. Rather, the issue before this Court is the enforceability of the custodial relationship between Ms. Hobbs and Lucy, which should be decided without regard to the marital status or sexual orientation of the parties in accordance with the law of contractual relinquishment and the "best interests of the child" standard. Even if the enforcement of shared custodial rights could be construed as the recognition of a marital right, the custodial right is not unique to the marital relationship and is only one of the substantial number of rights attached to the marital relationship.

ARGUMENT

Proposition of Law No. I: The state constitutional amendment banning recognition of a legal status approximating marriage, Section 11, Article XV, Ohio Constitution (the "Marriage Amendment") has no effect on determinations of shared custody between former unmarried partners.

A. The issue before this Court concerns the relationship between a child and her parental custodian, and not the relationship between unmarried adults.

Recognizing that the relationship between Lucy and Ms. Hobbs is legally-protected does not run afoul of the Marriage Amendment's prohibition of the "recogni[tion of] a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage," Section 11, Article XV, Ohio Constitution, because a child's

relationship with an adult custodian – a person who functions as her parent – differs from, and is not dependent upon, the particular form of the relationship between her two custodians.

Ohio law articulates clear standards for how courts should decide custodial disputes between a parent and a non-parent custodian or custodians. Once a court determines that a parent has contractually relinquished her exclusive parental rights through an enforceable agreement with a non-parent, it must determine custody based on the best interests of the child. *In re Bonfield*, 97 Ohio St.3d 387, 396, 2002-Ohio-6660, 780 N.E.2d 241. See also *In re J.D.M.* (Dec. 11, 2004), Warren App. Nos. CA2003-11-113, CA2004-04-035, CA2004-04-040, 2004-Ohio-5409, at ¶20-24 (having determined that a parent has relinquished her exclusive parent rights, the court must consider whether a shared parenting arrangement serves the child's best interests). "Abundant case law . . . supports the time-honored standard that what is in the 'best interest of the child' should be the overriding concern in any child custody case." *Miller v. Miller* (1988), 37 Ohio St.3d 71, 75, 523 N.E.2d 846 (listing cases). That standard applies to custody matters, regardless of the sexual orientation or marital status of the person seeking custody. *In re Adoption of Charles B.*, 50 Ohio St.3d at 90.

Application of these standards to unmarried couples does not implicate the Marriage Amendment, since custody determinations depend on the children's relationships with the adults who are parenting them, not the adults' relationship to one another.[2] Neither court orders to share custody nor the custodial status itself is dependent on a custodian's marital status in

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[2] The General Assembly has expressed an official state policy on the parent-child relationship codified in Revised Code Section 3109.401. Specifically, "[t]he general assembly finds ... [t]hat the parent and child relationship is of fundamental importance to the welfare of a child, and that the relationship between a child and *each parent* should be fostered unless inconsistent with the child's best interests." (Emphasis added.) R.C. 3109.401(A). A finding that the nature of Ms. Hobbs and Ms. Mullen's relationship has any relevance to the custody dispute before this Court would undermine this important legislative policy.

relation to the legal parent. The law of contractual relinquishment is available to any custodian to whom a parent cedes rights, not just to spouses. There are, of course, countless never-married couples, formerly-married partners, and individuals who are prohibited from marrying (e.g., two siblings or a grandmother with a mother), jointly raising children in Ohio, and many of these shared custodians are of the same sex. There is nothing anomalous about protecting each custodian's relationship to a child without regard to the particular relationship status – marital or unmarried partner, sibling, or maternal – of the custodians.

Ohio courts routinely have enforced a parent's voluntary relinquishment of custody in favor of a nonparent to whom the parent is not married. See, e.g., *Clark v. Bayer* (1877), 32 Ohio St. 299, 306 (custody transferred from parent to grandfather); *Rowe v. Rowe* (1950), 58 Ohio Law Abs. 497, 44 O.O. 224, 97 N.E.2d 223 (custody transferred to grandfather); *Masitto v. Masitto* (1986), 22 Ohio St.3d 63, 64-65, 22 OBR 81, 488 N.E.2d 857 (appointing maternal grandparents as child's guardian); *In re Whiting* (1990), 70 Ohio App.3d 183, 187, 590 N.E.2d 859 (consent judgment transferring custody to aunt and uncle); *Bragg v. Hatfield,* 152 Ohio App.3d 174, 2003-Ohio-1441, 787 N.E.2d 44, ¶16-19 (allocating parental rights and responsibilities to grandparents by father's agreement); *Matter of Linda Smith* (May 19, 1997), Butler App. No. CA96-07-133, 1997 WL 264128, at *1 (contractual relinquishment of custody to grandmother).

Indeed, Ohio courts are obligated to secure a child's rights without regard to marital status or sexual orientation. Under R.C. 3111.01(B), "[t]he parent and child relationship extends equally to all children and all parents, regardless of the marital status of the parties." See also *Franklin v. Julian* (1972), 30 Ohio St.2d 228, 233, 59 O.O.2d 264, 283 N.E.2d 813 (Ohio public

policy will not deprive children of their rights to support based on marital status of their parents), citing *Pretzinger v. Pretzinger* (1887), 45 Ohio St. 452, 15 N.E. 471. A person's sexual orientation or status also is immaterial to custody. *Inscoe v. Inscoe* (1997), 121 Ohio App.3d 396, 700 N.E.2d 70; *In re Adoption of Charles B.* (1990), 50 Ohio St.3d 88 (listing cases); *Conkel v. Conkel* (1987), 31 Ohio App.3d 169, 31 OBR 335, 509 N.E.2d 983; *Whaley v. Whaley* (1978), 61 Ohio App.2d 111, 15 O.O.3d 136, 399 N.E.2d 1270. A court's primary concern in adjudicating child custody must be the welfare of the child.

Courts in states other than Ohio have recognized that a state constitutional amendment that prohibits the recognition of a marriage between persons of the same sex has no relevance to custody determinations. In *Giancaspro v. Congleton* (Feb. 19, 2009), Mich.App.No. 283267, 2009 WL 416301, the Michigan Court of Appeals reversed a trial court's determination that it had no authority to resolve a child custody dispute between two women who had jointly adopted three children. After noting the existence of Michigan's constitutional amendment, *id.* at *4, fn. 6 (citing Section 25, Article I, Michigan Constitution), it concluded that the trial court "erred in considering whether the parties' relationship with each other could be recognized in Michigan," since "[t]he only relevant consideration in this matter is each individual party's established relationship as an adoptive parent *with the children*, not their relationship to each other." (Emphasis sic.) *Id.* at *4.

Similarly, in *Prashad v. Copeland* (2009), 55 Va.App. 247, 685 S.E.2d 199, the Virginia Court of Appeals rejected a woman's argument that the registration of child custody and visitation orders violated Virginia's constitutional amendment prohibiting the recognition of "a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage...." 55 Va.App. at 263-64 (quoting Section 15-A,

Article 1, Virginia Constitution). The orders entered in North Carolina pursuant to an agreement between a gay male couple, one of whom was the biological father of the child, and a woman who had agreed to act as the men's surrogate gave the men primary custody of a child and the woman secondary custody. The court rejected her argument that entering orders giving custody to the partner who was not the biological father of the child violated Virginia's marriage amendment, because the partner's "custodial and visitation rights arise, not out of his relationship with [the biological father], but out of his relationship with [the child]." *Id.* at 266.

Courts in other states with constitutional amendments prohibiting the legal recognition of certain relationships between couples other than marriage between a man and woman have recognized and enforced the custodial rights of persons who were never married to the child's biological parent. For example, although Kentucky's constitution bans recognition of a "legal status identical or substantially similar to that of marriage for unmarried individuals," Section 233A, Kentucky Constitution, its supreme court affirmed an award of joint custody between a lesbian mother and her former partner because the biological mother of the child had waived her superior right to sole custody in favor of joint custody with the former partner. *Mullins v. Picklesimer* (Ky. Jan. 21, 2010), No. 2008-SC-000484-DGE, 2010 WL 246063, at **7-10. It noted specifically that "an agreement regarding parental rights . . . . is about the parties' relationship with the child, and not the parties' relationship with each other." *Id.* at *6. In South Carolina, the constitution prohibits creation of "a legal status, right, or claim respecting any . . . domestic union" other than "marriage between one man and one woman." Section 15, Article XVII, South Carolina Constitution Annotated. However, the South Carolina Court of Appeals awarded an ex-boyfriend visitation over the objection of the child's mother because she had consented to and encouraged a parental bond to develop between the ex-boyfriend and the child.

Middleton v. Johnson (2006), 369 S.C. 585, 604-05, 633 S.E.2d 162. Finally, even though Montana's constitution restricts marriage recognition to "one man and one woman," Section 7, Article XIII, Montana Constitution, its supreme court awarded a parental interest to the former lesbian partner of the child's adoptive mother in *Kulstad*, 352 Mont. at 535-36.

Numerous courts in states with *statutory* prohibitions against allowing couples of the same sex to marry have recognized and enforced the custody rights of persons who were formerly in a same-sex relationship with the child's second parent. See, e.g., *Mason v. Dwinnell* (2008), 190 N.C.App. 209, 232-33, 660 S.E.2d 58 (awarding custody over child to former partner of child's biological mother, noting that "[a]lthough this appeal arises in the context of a same-sex domestic partnership, it involves only the constitutional standards applicable to all custody disputes between legal parents and third parties");[3] *Connor v. Velinda* (2005), 356 Ill.App.3d 315, 323, 826 N.E.2d 1265, 1271, 292 Ill.Dec. 829, 834 (deciding custody dispute between two co-adoptive mothers "despite the fact that [the two women] were prohibited from marrying under Illinois law");[4] *T.B. v. L.R.M.* (2001), 567 Pa. 222, 232, 234, 786 A.2d 913 (former partner of child's biological mother had standing to seek custody, since "the nature of the relationship between [the biological mother and her ex-partner] has no legal significance to the determination of whether [the ex-partner] stands *in loco parentis* to" the child);[5] *SooHoo v. Johnson* (Minn. 2007), 731 N.W.2d 815 (awarding visitation to lesbian ex-partner of adoptive mother);[6] *In re Parentage of A.B.* (Ind. 2005), 837 N.E.2d 965 (lesbian ex-partner of child's

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[3] North Carolina limits marriage to a man and woman. N.C.Gen.Stat.Ann. 51-1.2.
[4] Illinois limits marriage to a man and woman. 750 ILCS, Section 5/212(a)(5).
[5] Pennsylvania limits marriage to a man and woman. Pa.Consolidated Stat.Ann., Title 23, Section 1704.
[6] Minnesota limits marriage to a man and woman. Minn.Stat.Ann. 517.03.

biological mother could be granted parental rights);[7] *In re Parentage of L.B.*, 155 Wash.2d at 706-08 (former lesbian partner of child's biological mother could be awarded parental rights);[8] *In re E.L.M.C.* (Colo.App. 2004), 100 P.3d 546, 562 (awarding joint parenting responsibility to lesbian ex-partner of adoptive mother);[9] *C.E.W. v. D.E.W.* (Me. 2004), 845 A.2d 1146, 1152 (awarding parental rights and responsibilities to lesbian ex-partner of child's biological mother).[10] These court decisions confirm the basic concept that custodial rights with respect to a child are not dependent on the nature of the relationship between the persons who share those custodial rights.

If this Court recognizes Ms. Mullen's agreement to share her exclusive custodial rights with Ms. Hobbs, it does not "create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage," Section 11, Article XV, Ohio Constitution, because the relationship between the two co-custodians and their child does not depend on the particular relationship between the two custodians, Ms. Mullen and Ms. Hobbs. Moreover, neither the custodial relationship between Ms. Hobbs and Lucy, nor the contractual relationship between Ms. Hobbs and Ms. Mullen, bears any resemblance to a marital relationship.

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[7] Indiana limits marriage to a man and woman. Ind.Code 31-11-1-1.
[8] Washington limits marriage to a man and woman. Rev.Code Wash.Ann. 26.04.020.
[9] Colorado limits marriage to a man and woman. Colo.Rev.Stat.Ann. 14-2-104.
[10] Maine limits marriage to a man and woman. Me.Rev.Stat.Ann., Title 19-A, Section 701.

B. The protection of a custodial relationship does not approach the recognition of a marriage or marriage substitute.

This Court's leading case interpreting the Marriage Amendment, *State v. Carswell*, 114 Ohio St.3d 210, demonstrates that the Amendment has no application in the matter presently before the Court. The Marriage Amendment provides that:

> Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions *shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.*

(Emphasis added). Section 11, Article XV, Ohio Constitution. In *Carswell*, the Court noted that the first sentence of the Amendment is easily understood to bar recognition as a marriage "any union between persons other than one man and one woman." *Id.* at ¶11. With respect to the second sentence, the Court concluded:

> The definition of 'status,' our understanding of the legal responsibilities of marriage, and the rights and duties created by the status of being married, combined with the first sentence of the amendment's prohibition against recognizing any union that is between persons other than one man and one woman, causes us to conclude that the second sentence of the amendment means the state cannot create or recognize a legal status for unmarried persons that bears *all* of the attributes of marriage – a marriage substitute.

(Emphasis added.) *Id.* at ¶13. Thus, a legal status for unmarried persons does not infringe upon the Marriage Amendment if it bears only one or even multiple attributes of marriage, but not all of the bundled attributes, and does not act as a substitute for marriage.

Carswell involved a criminal defendant's challenge to the constitutionality of the domestic violence law under which he was prosecuted. The defendant argued that the state's case against him depended on offering evidence that his "alleged victim had been 'living as a spouse' with Carswell and that she was therefore a 'family or household member'. . . ." *Id.* at ¶3. This Court rejected his argument that the statute's dependence on his "spousal" relationship with

his victim violated the Marriage Amendment, because the statute did not create or recognize "a legal status for unmarried persons that bears *all* of the attributes of marriage," (emphasis added), *id.* at ¶13, nor did it create or recognize "a legal status similar to marriage (for example, a civil union)." *Id.* at ¶15. "The state does not create cohabitation; rather it is a person's determination to share some measure of life's responsibilities with another that creates cohabitation." *Id.* at ¶35. "The state does not have a role in creating cohabitation, but it does have a role in creating marriage." *Id.* (citing R.C. 3101.01 et seq.). In addition, the "living as a spouse" status of potential domestic violence victims was one of many relationships on which domestic violence protections could be based. *Id.* at ¶32 ("In addition to the contested classification of a 'person living as a spouse,' the statute recognizes at least 11 other classification of specific victims" such as "spouse, former spouse, a parent, a child . . . ").

Likewise, the recognition of unmarried persons' joint custody right does not violate the Marriage Amendment because a right to child custody does not involve the state in creating cohabitation, nor does joint custody comprise all of the numerous bundled rights and responsibilities that go along with being married. Moreover, in the same way that Ohioans are entitled to domestic violence protection from a variety of family and other household members in addition to spouses, custodial rights are not unique to married couples. Joint custodians may have a multiplicity of non-marital relationships to one another, including sibling, maternal, and domestic partner relationships. See, supra., at Section A, p. 5. Finally, in contrast to the statute at issue in *Carswell* in which the "living as a spouse" relationship between the person charged and his victim was an essential element of certain crimes of domestic violence, the protection of custodial relationships between a child and her custodial parents is never dependent on the

specific type of relationship between the custodians.[11] For that reason, any suggestion that recognition of joint custodial relationships with children violates the Marriage Amendment is an even less persuasive argument that the unsuccessful argument put forward in *Carswell*.[12]

As a legal relationship, marriage is unique. There is no legal status that bundles together all the legal rights and responsibilities that accrue automatically to couples who are married. Under federal statutes, approximately 1,138 relationship protections are contingent on marital status. *See* U.S. General Accounting Office, *Defense of Marriage Act: Update to Prior Report* (Jan. 2004), available at http://www.gao.gov/htext/d04353r.html (last visited July 23, 2010). Many additional protections accrue to couples automatically under Ohio law when they marry. *See Carswell*, 114 Ohio St.3d 210, at ¶13, 33. Just a few examples include the rights to make medical decisions for an incapacitated spouse (R.C. 2133.08(B)) and to access various statutory protections of a family's economic security such as real estate ownership rights (see, e.g., R.C. 1313.29), taxation (R.C. 5711.14, 5747.05), division of property in the event of divorce (R.C. 5302.20), spousal support obligations (R.C. 3103.03, 3105.18), and the automatic right to inherit in the absence of a will (R.C. 2105.06). The application of the well-established law of contractual relinquishment of custodial rights comes nowhere close to achieving the breadth of legal protections and social approbation offered to married couples.

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[11] Consequently, even the broad interpretation of the Marriage Amendment argued by the *Carswell* dissent – that the domestic violence protection offered to "a person living as a spouse" violated the Amendment, *Carswell*, 114 Ohio St.3d 210, at ¶38-54 – does not support an argument that enforcing the voluntary contractual relinquishment of custodial rights violates the Amendment.

[12] The Court of Appeals came to the same conclusion in *Fitz v. Fitz*, Cuyahoga App. No. 92535, 2009-Ohio-5236, when it concluded that "[t]he act of terminating or modifying spousal support on the grounds of cohabitation does not create or recognize a legal status for individuals who cohabitate" in violation of the Marriage Amendment. *Id.* at ¶11, 14.

Once before, in a case involving similar facts to this case, this Court was asked to abandon settled child custody law in favor of an overbroad application of the Marriage Amendment, and the Court wisely declined. In *In re J.D.F.*, 2008-Ohio-2793, a lesbian couple conceived a child by donor insemination, raised the child together from birth, and entered into an agreed court order reflecting their shared custody agreement. *Id.* at ¶2-3. When the couple split up years later, the biological mother sought to have the court order she had sought years earlier invalidated, arguing that it was prohibited by the Marriage Amendment. The Tenth District Court of Appeals upheld the court order despite these arguments. *Id.* at ¶7. She then petitioned this Court based on the Marriage Agreement. Appellant Denise Fairchild Memorandum in Support of Jurisdiction, attached hereto as Exhibit A. This Court dismissed her appeal as not involving any "substantial constitutional questions." (Dec. 31, 2008), 120 Ohio St.3d 1453, 2008-Ohio-6813, 898 N.E.2d 968, attached hereto as Exhibit B.

This case is no different, because it also concerns the enforcement of a shared custody agreement, even though the agreement between Ms. Hobbs and Ms. Mullen was never reduced to writing or entered as a court order. The recognition of an oral agreement comes no closer to the creation or recognition of a marital relationship than does a written agreement. Like *In re JDF*, this case does not require the Court to address the nature of Ms. Hobbs' and Ms. Mullen's former relationship nor the Marriage Amendment. Instead, the cases address the custodial relationships of each woman with a child. In neither case does a parent's custodial agreement with a non-parent custodian implicate the Marriage Amendment.

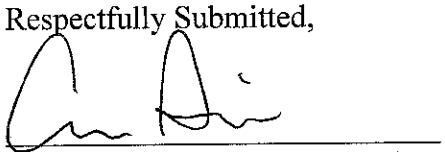
The ACLU urges this Court to once again find that there are no "substantial constitutional questions" at issue in the present custody dispute. The Court is not being asked to grant legal recognition to Ms. Hobbs' and Ms. Mullen's former relationship. To the contrary, this Court is

being asked whether to recognize the bond between Ms. Hobbs and the girl she helped to raise and Ms. Mullen's consent to the formation of that bond, which can be accomplished under existing legal standards without consideration of the Marriage Amendment.

CONCLUSION

For the foregoing reasons, Amici, the ACLU of Ohio and the ACLU, urge this Court to resolve the custody questions before this Court without consideration of the Marriage Amendment, Section 11, Article XV, Ohio Constitution, or to explicitly conclude that the Marriage Amendment is not relevant to the questions raised by the custody dispute this Court has been asked to decide.

Respectfully Submitted,



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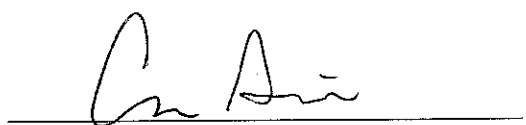

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IN THE SUPREME COURT OF OHIO

In the Matter of:

J.D.F., a minor child,

(D.F.,

Appellant).

C.A. No. 07AP-922

C.P.C. No. 01JU-03-2542

Franklin County Court Of Appeals, Tenth District Court of Appeals

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APPELLANT DENISE FAIRCHILD'S MEMORANDUM IN SUPPORT OF JURISDICTION

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EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This cause presents one focal procedural issue as well as one momentous substantive issue. The focal procedural issue revolves around the appropriate use of a declaratory judgment in a civil action and the momentous substantive issue revolves around custodial rights of same-sex couples.

In this case, the court of appeals refused to address the merits of the matter by ruling Appellant's Motion for Declaratory Judgment was not initiated properly. Therefore, the court of appeals refused to determine whether an Agreed Entry entered into by two women who had been partners in a long-term lesbian relationship that resulted in a minor child conceived through artificial insemination was violative of the Ohio Constitution. Due to the fact that the Motion for Declaratory Judgment was filed in the course of an active case, and not filed as its own separate action, the court of appeals ruled that several of Appellants' assignments of error were sustained; however, not for the reasons Appellants proposed, only for the limited purpose of remanding to dismiss the Motion for Declaratory Judgment.

The decision of the Tenth District Court of Appeals is merely based upon case law from the First District Court of Appeals. By adopting the First District Court of Appeals' position on "Motions" for Declaratory Judgment, the court of appeals has needlessly limited the procedural alternatives available to a litigant in Franklin County. It does not appear that the Supreme Court of Ohio has ruled whether a "Motion" for Declaratory Judgment that has been filed as part of a pending action is an acceptable pleading. Moreover, the court of appeals' decision refuses to address one of the most controversial topics of recent history: the rights of same-sex couples. Both the procedural aspects and substantive aspects of this case need to be addressed by this court.

The implications of the decision of the court of appeals affect the procedural options of every litigant in this state. The overarching principle of O.R.C. 2721.12 provides "when declaratory relief is sought under this chapter in an action or proceeding, all persons who have or claim any interest that would be affected by the declaration shall be made parties to the action or proceeding." No where does the section specifically limit declaratory judgments to its own separate proceeding. Apart from the procedural limitations, which make this case one of great public interest, a decision on the merits of this action has broad general significance. Thousands and thousands of citizens of Ohio are involved in same-sex relationships. The General Assembly has made it clear that same-sex couples do not have the same rights of heterosexual couples. This case has the ability to expand on this concept.

Finally, this case involves a substantial constitutional question. This case involves Proposition 1, an amendment to the Ohio Constitution that was passed by a large majority in November 2004, and is now effective. Proposition 1 provides: "Only a union between one man and one woman may be a marriage valid in or recognized by this state. This state shall not create or recognize a legal status for unmarried individuals that intends to imitate marriage." The key to this amendment is the second sentence, which indicates that the state cannot create or recognize a legal status for unmarried person that intends to imitate marriage. This case involves custodial rights stemming from a long-term relationship, similar to a marriage. Nothing in the Revised Code or Ohio Constitution grants parenthood upon a same sex partner, and nowhere in this definition may be found an indication that same sex partners were intended by the General Assembly to be parents. Thus, same sex partners are expressly excluded.

In conclusion, this case puts in issue the applicability and scope of declaratory judgments as well as the custodial rights of same-sex couples that have raised children together. This

honorable court must grant jurisdiction to hear this case and review the decision of the court of appeals to facilitate a clear state-wide procedure for declaratory judgments and to clarify the custodial rights of same-sex couples with children.

STATEMENT OF THE FACTS

Appellant Denise Fairchild and Appellee Therese Leach, although legal residents of Licking County, filed a Complaint for Custody of the Minor Child, Joshua D. Fairchild, which included a walk through Agreed Entry in early 2001 in the Juvenile Branch, Domestic Relations Division of the Franklin County Court of Common Pleas. The parties, who were never married or otherwise legally related, had been involved in a lesbian relationship when Appellant was artificially inseminated with sperm from an anonymous donor. On March 8, 2001 the trial court approved and filed an Agreed Entry providing for co-custody of Joshua. While the title of the relationship was that of co-custody the respective duties and responsibilities of the parties were labeled and defined as in the nature of co-parenting as opposed to that of co-custody.

Soon after Joshua's birth, the parties' relationship terminated and Appellee vacated the parties' residence. After several years during which she had no contact with the minor child and which she failed to provide any financial support Appellee filed Motions asking the Juvenile Court to first, find that Appellant was in contempt of court for not permitting Appellee to have visitation with Joshua; and second, to order a specific visitation schedule for her. Appellant filed contra Motions seeking to have the Agreed Entry held to be unenforceable or to otherwise terminate it.

The trial court added Joshua as a party and appointed a Guardian *ad litem*. Temporary visitation was ordered and subsequently attempted but after two (2) visits was suspended.

Joshua, who is now eleven (11) years old and has the ability to clearly articulate his thoughts on this matter, expressed his disagreement with the recommendation of the Guardian *ad litem* that supervised visitation occur. Accordingly, the Court appointed attorneys Danny Bank and Lorie McCaughan from the Capital University Law School Legal Clinic to represent his interests in this matter.

While the parties had been litigating their respective Motions, Appellant, prompted by the enactment of the Amendment to the Ohio Constitution in early 2005, filed a Motion for Declaratory Judgment seeking to adjudicate the underlying enforceability of the Agreed Entry. Following two (2) Magistrate Decisions, one of which was a remand and two (2) trial court decisions, the appeal to the Tenth District Court of Appeals followed.

STATEMENT OF THE CASE

On November 17, 2004, Appellee Therese Leach initiated this case by filing a Motion for Specific Parenting Time. On December 2, 2004, Appellant Denise Fairchild filed a Motion for Supervised Parenting Time, a Motion for Psychological Evaluation of Appellee, a Motion to Terminate Co-Legal Custody of Joshua, and a Motion for Temporary and Permanent Child Support. Appellee subsequently filed two Motions for Contempt on January 25, 2005 and March 9, 2005.

On February 14, 2005, Appellant filed a Motion for Declaratory Judgment that is the subject of this appeal. On June 22, 2006 a Decision was issued by the Magistrate finding the Declaratory Judgment Motion to present a proper claim. The Magistrate further denied the Motion holding that the parties' Agreed Entry filed March 8, 2001 was legal and enforceable against both parties; the recently enacted Constitutional Amendment of Article XV, Section 11

does not apply to this case; and the parties Agreed Entry is not against public policy.

Appellant filed Objections to the Decision of the Magistrate on July 5, 2006. On January 4, 2007, following an objections hearing and a *de novo* review, the Court entered a Decision and Judgment Entry sustaining in part and overruling in part the Magistrate's Decision. The Court held that the Magistrate erred in failing to first make specific determinations as to both parties and remanded the matter for further findings and proceedings, as necessary to comply with the decision. More specifically, the court overruled the first objection (labeled "A" from Denise Fairchild's Objection Filed July 5, 2006) and sustained the second objection (labeled "B" from Denise Fairchild's Objection Filed July 5, 2006). That second objection (labeled "B") had three sub-parts that in their entirety dealt with whether the Agreed Entry was legal, whether the Agreed Entry violated the Ohio Constitution, and whether the Agreed Entry was opposed to Ohio's public policy. Despite having sustained Appellants' objection related to the legality, constitutionality and public policy issue, the Court has since <u>never</u> addressed the legality, constitutionality or public policy matters of the Agreed Entry in light of Article XV, Section 11.

On June 4, 2007, the Magistrate issued a remand Decision holding that the parties were both suitable parent/person and therefore the parties' Agreed Entry was valid and enforceable against both parties. Appellants filed a Joint Objection to the Magistrate's Decision that reiterated Appellant Denise Fairchild's original objections as well as raised an additional objection that the Magistrate erred in not conducting an evidentiary hearing on the remand. On October 18, 2007, the Court issued a Decision and Judgment Entry holding the first three (3) objections were res judicata and further, the Decision of the Magistrate was proper and no further evidence is required. However, up to this point, the trial court has still not addressed the issues that were originally remanded by Judge Squire related to Denise Fairchild's objections based

upon the legality of the Agreed Entry, whether the Agreed Entry violates the Ohio Constitution, and whether the Agreed Entry is opposed to Ohio's public policy. On November 9, 2007, Appellants Denise Fairchild and Joshua Fairchild filed a Joint Notice of Appeal. On June 10, 2008, The Tenth District Court of Appeals rendered its opinion whereby three (3) of Appellants' four (4) assignments of error were sustained to the limited extent to remand this matter to the trial court to dismiss this matter as a procedural nullity. This Notice of Appeal and Memorandum in Support of Jurisdiction follows.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: An action for a declaratory judgment may be initiated by a motion during a pending action or by filing a complaint in its own distinct proceeding.

The court of appeals held "Appellant's request for a declaratory judgment cannot be adjudicated because it was not properly initiated." Appellant filed a motion for declaratory judgment as part of the underlying proceeding whereby Appellee was seeking an Order from the trial court for a specific parenting schedule. The trial court, through a magistrate, ruled upon the Motion for Declaratory Judgment filed by Appellant and made no mention of it being "procedurally incorrect and inadequate to invoke the jurisdiction of the court pursuant to R.C. Chapter 2721." Appellant timely filed objections to the Magistrate's Decision which ruled upon the Motion for Declaratory Judgment. After sustaining some of Appellant's objections, the trial court Judge remanded this to the Magistrate for further proceedings. Appellant timely filed objections to the Magistrate's second decision based upon the Motion for Declaratory judgment. The trial court Judge ruled upon the Motion for Declaratory Judgment again, to which Appellant timely filed an appeal to the Tenth District Court of Appeals. At no point in any of the

aforementioned proceedings involving this Motion for Declaratory Judgment did the Court itself or any opposing attorney mention, let alone plead, that the filing of a Declaratory Judgment action as part of another proceeding is procedurally incorrect.

To arrive at its conclusion, the court of appeals relies upon a case from another appellate district: The First District Court of Appeals. Through Appellant's research of this matter, it does not appear that the Supreme Court of Ohio or the Tenth District Court of Appeals has ruled upon whether or not the filing of a "Motion" for Declaratory Judgment during a pending action is procedurally incorrect thus barring a ruling upon the Declaratory Judgment. Furthermore, Revised Code Chapter 2721 does not specifically preclude the filing of a "Motion" for Declaratory Judgment as part of a case that is already in progress. Therefore, this is a case of first impression for the Supreme Court of Ohio.

Appellant submits that the court of appeals merely used this procedural opening to avoid having to decide this case upon its merits. Nevertheless, this honorable Court has not addressed the issue of whether or not there is more than one acceptable way to file a Declaratory Judgment action. Accordingly, Appellant must overcome this hurdle to have this matter decided upon the merits.

Proposition of Law No. II: The Amendment to the Ohio Constitution made by Proposition 1 makes it illegal for a same-sex partner to have the status of a parent over a child that the same-sex partner is not biologically related to.

A year and ten months after the First District Court of Appeals decided *Bonfield*, the Ohio Supreme Court decided its appeal in *In re Bonfield*, 97 Ohio St.3d 387 (2002). The Supreme Court agreed with the lower courts that the non-biological partner was not a parent under O.R.C. §3109.04, but held that a juvenile court has the jurisdiction to determine the

custody of a child, and that the juvenile court need not refer to O.R.C. §3109.04 to determine whether a petition for shared custody is appropriate by employing a "best interest of the child" standard. *Id.* at 394. The court distinguished *Perales* in that the *Perales* parties had an actual dispute, while the *Bonfield* parties did not. Instead, the *Bonfield* parties were trying to have the court recognize the validity of their petition for a shared parenting agreement, where the biological mother sought to relinquish her right to sole custody of the children in favor of shared custody with her partner. According to this Court, the juvenile court is vested with authority to determine the best interests of the child in such circumstances. *Id.* at 395.

The Supreme Court also referred to the fact that "parents may waive their right to custody of their children and are bound by an agreement to do so. The parents' 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 care, training, and education of the child." *Id.* Therefore, as of August 2002, the Supreme Court permitted juvenile courts to consider a shared parenting agreement between two people of the same sex, so long as it is in the best interests of the child for them to do so.

In adopting this rule, the Supreme Court adopted a minority rule. The majority of states that have addressed this issue have declined to extend their courts' blessing to such agreements, instead deferring to state legislatures to determine policy regarding such a hot-button issue. See, e.g., *Curiale v. Reagan*, 222 Cal. App.3d 1597 (1999); *Thompson v. White*, 11 S.W.3d 913 (Tenn. App. 1999); *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586 (1991); *Music v. Rachford*, 654 So.2d 1234 (Fla. Dist. Ct. App. 1995); and *Coons-Andersen v. Andersen*, 104 S.W.2d 630 (Tex. App. 2003). Only a handful of states permit visitation rights, subject to the best interests of the child test. See, e.g., *E.N.O. v. L.M.M.*, 429 Mass. 824, 711

N.E.2d 886 (1999); *V.C.v. M.J. B.*, 319 N. J. Super. 103, 725 A.2d 13 (1999); *Titchenal v. Dexter*, 166 Vt. 373, 693 A.2d 682 (1997); *Holtzman v. Knott*, 193 Wis.2d 649, 533 N.W.2d 419; and *Barnae v. Marchant-Schumacher*, 123 N.M. 583, 943 P.2d 1036 (1997). Thus, the Ohio Supreme Court adopted a minority position. That minority position remained in effect until January 2005.

Proposition 1, an amendment to the Ohio Constitution, was passed by a large majority in November 2004, and is now effective. Proposition 1 provides: "Only a union between one man and one woman may be a marriage valid in or recognized by this state. This state shall not create or recognize a legal status for unmarried individuals that intends to imitate marriage." The key to this amendment is the second sentence, which indicates that the state cannot create or recognize a legal status for unmarried person that intends to imitate marriage.

O.R.C. §3111.01(A) defines "parent and child relationship" as 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." There are three ways in which an individual can gain status as a parent: by natural parenthood, by adoption, or by other legal means which confer or impose rights, privileges, and duties upon certain individuals. *Bonfield, supra*, 97 Ohio St.3d at 391, ¶34. Nothing in the Revised Code grants parenthood upon a same sex partner, and nowhere in this definition may be found an indication that same sex partners were intended by the General Assembly to be parents. Thus, same sex partners are expressly excluded.

Since the trial court issued its ruling on Denise Fairchild's Motion for Declaratory Judgment, the Supreme Court of Ohio has addressed a similar situation involving the legal rights

and classifications of people living together who are not married. In *State v. Carswell*, the Supreme Court of Ohio held that the term "person living as a spouse" . . . merely identifies a particular class of persons for the purposes of domestic-violence statutes. It does not create or recognize a legal relationship that approximates the designs, qualities, or significance of marriage, as prohibited by Section 11, Article XV of the Ohio Constitution. 114 Ohio St. 3d 210. This recent decision shows the Supreme Court of Ohio's willingness to deny people who are not married the privileges of being married. Here, Appellant Denise Fairchild and Appellee were not married because it is illegal according to the laws of Ohio. Accordingly, the Courts of Ohio should not confer benefits upon Appellee as if she and Denise Fairchild were married. For the purposes of this case, the most relevant privilege that has been conferred upon Appellee is the granting of co-custody over Joshua Dove Fairchild as if she were the equivalent of a biological parent and was entitled to an ongoing legal relationship with Joshua Dove Fairchild. Therefore, Appellant submits that Appellee has been unlawfully awarded co-custody of Joshua Dove Fairchild.

Thus, the only means for a same sex partner to become a parent is by adoption or through marriage. The amendment to the Ohio Constitution made by Proposition 1 makes it illegal for a same-sex partner to have the status of a parent, meaning that the enforcement of the Agreed Entry expressly conflicts with the language and terms of Proposition 1. Accordingly, the Agreed Entry is unconstitutional, and is void as a matter of law.

CONCLUSION

For the reasons discussed above, this case involves a substantial constitutional question and is of great public interest. The appellant requests that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

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APPENDIX

FILED
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2008 JUN 11 PM 3: 33
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of:	:	
J.D.F., a minor child,	:	No. 07AP-922 (C.P.C. No. 01JU-03-2542)
(D.F. and J.D.F.,	:	(REGULAR CALENDAR)
Appellants).	:	

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on June 10, 2008, and having sustained to the limited extent indicated, and not for the reasons appellants posit, the first, third, and fourth assignments of error, rendering moot appellants' second assignment of error, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, is reversed, and this cause is remanded to that court to dismiss appellant's "motion for declaratory judgment" as a procedural nullity. Costs to appellants.

BRYANT, PETREE & BROWN, JJ.

By _____
Judge Peggy Bryant

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of:	:	
J.D.F., a minor child,	:	No. 07AP-922 (C.P.C. No. 01JU-03-2542)
(D.F. and J.D.F.,	:	(REGULAR CALENDAR)
Appellants).	:	

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CLERK OF COURTS

OPINION

Rendered on June 10, 2008

Krupman, Golden, Meizlish & Marks, LLP, Keith E. Golden and *Adam H. Karl*, for appellant D.F.

Capital University Law School, Danny W. Bank and *Lorie McCaughan*, for appellant J.D.F.

LeeAnn M. Massucci; Thomas F. Schmidt; Camilla B. Taylor; Bailey Cavalieri, LLC, and *Robert Eblin*, amicus curiae, for appellee.

APPEAL from the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

BRYANT, J.

{¶1} Appellant, D.F. ("appellant"), and her minor child, J.D.F. ("minor child") (collectively, "appellants"), appeal from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, adopting a magistrate's June 4, 2007 decision that declared, pursuant to a "motion for declaratory judgment," an

Agreed Entry filed March 8, 2001 to be valid and enforceable against appellant and appellee, T.F. ("appellee"). Because a motion for declaratory judgment is a procedurally incorrect means to challenge the Agreed Entry, we reverse and remand with instructions to dismiss the motion.

{¶2} The facts underlying appellants' appeal date back to early 2001, when appellant and appellee, then involved in a long-term lesbian relationship, jointly filed a complaint for custody of the minor child. The minor child was born four years earlier as a result of appellant's being artificially inseminated with sperm from an anonymous donor. On March 8, 2001, the court filed the jointly-submitted Agreed Entry granting custody of the minor child to appellant and appellee.

{¶3} The Agreed Entry not only gave both appellant and appellee co-custodial status over the minor child but included in their agreement that, in the event of a future dispute, neither could rely upon any biological or legal connection to the minor child in order to gain any advantage over the other. The Agreed Entry further ordered that appellant and appellee be treated in the law as two equal parents of the minor child, "the same as they would be treated under the law if they were any other two unmarried parents of a child." (Agreed Entry, 3.) Each was given the right to obtain medical and school records, to authorize medical treatment, to enroll the child in and pick him up from school, and to participate in the child's educational, religious, and community activities. Since appellant and appellee were residing together when the Agreed Entry was issued, it did not provide terms for custody and support of the minor child, although the court

retained jurisdiction over such matters. At the time the Agreed Entry was issued, appellant had legal representation; appellee appeared pro se.

{¶4} After the relationship between appellant and appellee ended, appellee filed a pro se motion for contempt on May 26, 2004, alleging appellant violated the Agreed Entry in failing to permit visitation between appellee and the minor child in accordance with the terms of the Agreed Entry. The trial court appointed a guardian ad litem, who recommended that appellee have regular visitation with the minor child. Appellant and appellee each filed numerous other motions, including appellant's motion for declaratory judgment that sought to have the Agreed Entry declared null and void. The motion for declaratory judgment, the only motion subject of appellants' appeal, was referred to a magistrate for a hearing.

{¶5} By entry filed June 22, 2006, the trial court adopted the magistrate's decision finding the Agreed Entry to be valid and enforceable against both women. Following consideration of appellant's timely objections to the magistrate's decision, the trial court determined the magistrate erred in failing to assess appellee's suitability to share custody of the minor child. Accordingly, the trial court returned the matter to the magistrate.

{¶6} Based upon appellant's and appellee's agreement in the 2001 Agreed Entry that each believed the other to be a suitable person to share custody, the magistrate found appellee to be a suitable custodian. Appellants filed a joint objection to the magistrate's decision, but the trial court on October 18, 2007 adopted the magistrate's decision, overruled appellants' objections and entered judgment accordingly.

{¶7} Appellants appeal, assigning four errors:

> 1. The trial court abused its discretion when it found that the matters raised in Appellant's first three objections filed June 15, 2007 are res judicata when the Court's decision and Entry dated January 4, 2007 sustained [appellant]'s second objection when no further proceedings were conducted on the sustained issues.
>
> 2. The trial court abused its discretion in finding, without first conducting an evidentiary hearing, that the parties' March 8, 2001 Agreed Entry granting them co-custody of [the minor child] was legal and enforceable against both parties.
>
> 3. The trial court abused its discretion in finding that the recently enacted Constitutional Amendment of Article XV, Section 11 does not apply to the parties' March 8, 2001 Agreed Entry granting them co-custody of [the minor child].
>
> 4. The trial court abused its discretion in finding that the parties' March 8, 2001 Agreed Entry granting them co-custody of [the minor child] was not against Ohio's public policy.

I. First, Third, and Fourth Assignments of Error

{¶8} Because the first, third, and fourth assignments of error attack the Agreed Entry, we address them jointly. In doing so, we do not reach the merits of the assigned errors, because procedural defects resolve the issues raised on appeal.

{¶9} Appellant's request for a declaratory judgment cannot be adjudicated because it was not appropriately initiated. Appellant filed a motion for declaratory judgment, but a "motion" for a declaratory judgment is procedurally incorrect and inadequate to invoke the jurisdiction of the court pursuant to R.C. Chapter 2721. *Fuller v. German Motor Sales, Inc.* (1988), 51 Ohio App.3d 101, 103. See, also, *State v. Nemitz* (Aug. 7, 1998), Hamilton App. No. C-970561; *Belock v. Belock* (Sept. 19, 1997), Geauga App. No. 97-G-2045; and *State v. Wright,* Mahoning App. No. 01 CA 80, 2002-Ohio-6096.

The declaratory judgment statutes contemplate a distinct proceeding that a party generally initiates by filing a complaint, not by including the declaratory judgment request in a motion filed in the middle of already existing litigation, as appellant did. Id. Because neither the Civil Rules nor R.C. Chapter 2721 provide for it, the procedure appellant used here is a nullity, and the trial court's decision based upon the nonexistent procedure is reversible error. Id.

{¶10} Indeed, although appellant's motion on its face seeks a declaration of rights or status, in reality it attempts to facially attack the Agreed Entry to which she is a party. Except for irregularity or fraud in its procurement, neither of which appellant alleges here, a consent decree entered by a court having jurisdiction over both the subject matter and the parties is not subject to attack through appeal. *Goetz v. First Benefits Agency, Inc.* (Oct. 15, 1997), Summit App. No. 18381, citing *Sponseller v. Sponseller* (1924), 110 Ohio St. 395, 399-400. See, also, *Sanitary Commercial Serv., Inc. v. Shank* (1991), 57 Ohio St.3d 178, 181. Moreover, even if appellant could have appealed the Agreed Entry, App.R. 4 required her to do so within 30 days after the trial court filed the entry. Because appellant failed to appeal during that time period, she cannot now challenge the merits of the Agreed Entry through a request for declaratory relief: a party cannot use a declaratory judgment action as a substitute for an appeal. *Moore v. Mason,* Cuyahoga App. No. 84821, 2004-Ohio-1188, at ¶14 (stating "[a] declaratory judgment action * * * cannot be used as a substitute for an appeal or as a collateral attack upon a conviction"), citing *Shannon v. Sequeechi* (C.A.10, 1966), 365 F.2d 827, 829 (noting declaratory relief is not "a means whereby previous judgments by state or federal courts may be re-examined").

{¶11} In an attempt to circumvent her inability to attack the Agreed Entry, appellant contends the trial court lacked jurisdiction over this matter when it entered the Agreed Entry, as no statute provides for an adjudication of custodial rights in lesbian relationships.

{¶12} Custody disputes fall within one of two statutes, depending upon the circumstances. R.C. 3109.04 applies to custody disputes arising out of divorce, legal separation or annulment actions in domestic relations courts where the opposing parties are usually the child's parents. By contrast, R.C. 2151.23(A)(2) authorizes a juvenile court to determine custody of any child who is not a ward of another court of the state, and the proceedings often involve a parent and a nonparent. *In re Brayden James*, 113 Ohio St.3d 420, 2007-Ohio-2335, at ¶38 (Lundberg Stratton, J., dissenting), citing *In re Hockstok*, 98 Ohio St.3d 238, 2002-Ohio-7208 and *In re Perales* (1977), 52 Ohio St.2d 89.

{¶13} Appellant thus correctly points out that R.C. 3109.04 applies to married or formerly married couples and thus cannot provide the trial court with jurisdiction in this matter. See, also, R.C. 3101.01(A) (stating "[a] marriage may only be entered into by one man and one woman"); R.C. 3101.01(C)(1). Nonetheless, as the Ohio Supreme Court's decisions in *Hockstok* and *Perales* make clear, a juvenile court has jurisdiction pursuant to R.C. 2151.23(A)(2) over the custody of a child who is not otherwise the ward of the state, even when one of the parties vying for custody is a nonparent. Since the trial court had jurisdiction over the subject matter under R.C. 2151.23, appellants' contention to the contrary is not persuasive.

{¶14} In the final analysis, the trial court could not properly consider appellant's "motion for declaratory judgment" and committed reversible error when it resolved the motion. Accordingly, albeit not for reasons appellants advance, we sustain the first, third, and fourth assignments of error to the limited extent of concluding the trial court erred in not dismissing appellant's "motion for declaratory judgment."

II. Second Assignment of Error

{¶15} Appellants' second assignment of error contends the trial court erred in enforcing the Agreed Entry when the court failed to hold an evidentiary hearing to determine whether appellee was a suitable custodian for the minor child. In so arguing, appellants do not facially challenge the Agreed Entry, but instead maintain that, in the absence of a suitability hearing, the trial court failed to follow the proper procedure before granting co-custody to appellee.

{¶16} Our determination that appellant's "motion for declaratory judgment" is procedurally defective renders moot appellants' second assignment of error. Despite the plethora of motions both parties filed in the trial court, the issue of unsuitability was raised only in the context of appellant's "motion for declaratory judgment." Because the motion is procedurally improper, neither appellants' motion nor appeal presents a procedural vehicle to raise the issue of suitability for determination.

{¶17} For the reasons set forth in this opinion, we sustain to the limited extent indicated, and not for the reasons appellants posit, the first, third, and fourth assignments of error, rendering moot appellants' second assignment of error, and we remand this

matter to the trial court to dismiss appellant's "motion for declaratory judgment" as a procedural nullity.

Judgment reversed and case remanded with instructions.

PETREE and BROWN, JJ., concur.

ON COMPUTER - KMH

FILED
DEC 31 2008
CLERK OF COURT
SUPREME COURT OF OHIO

The Supreme Court of Ohio

In the Matter of:
J.D.F., a minor child,
(D.F. and J.D.F.)

Case No. 2008-1446

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Franklin County Court of Appeals; No. 07AP922)

THOMAS J. MOYER
Chief Justice

ELECTRONICALLY
JOURNALIZED

The Supreme Court of Ohio
CASE INFORMATION

GENERAL INFORMATION

Case: **GEN-2008-1446** Discretionary Appeal (Non-felony); Claimed Appeal of Right

Filed: 07/24/2008

Case is disposed

In the Matter of:
J.D.F., a minor child,
(D.F. and J.D.F.)

PRIOR JURISDICTION

Jurisdiction Information	Prior Decision Date / Case Number(s)	
Franklin County, 10th District	06/10/2008	07AP922

PARTIES and ATTORNEYS

Denise Fairchild; Appellant
Represented by: Keith Golden, Counsel of Record
Represented by: Adam Karl
T. F.; Appellee
Represented by: LeeAnn Massucci, Counsel of Record
Represented by: Thomas Schmidt

DOCKET ITEMS

07/24/08	Notice of appeal Denise Fairchild *Filed by: Denise Fairchild*
07/24/08	Memorandum in support of jurisdiction *Filed by: Denise Fairchild*
07/25/08	Copy of notice of appeal sent to clerk of court of appeals
08/25/08	Memorandum in response *Filed by: T. F.*
12/31/08	**DECISION: Jurisdiction declined and appeal dismissed**
01/13/09	Copy of entry sent to clerk

********** **End of case information** **********