ORIGINAL

IN THE SUPREME COURT OF OHIO

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

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RESPONSE TO MS. MULLEN'S STATEMENT OF FACTS

Ms. Hobbs[1] submits this response to Ms. Mullen's misleading statement of facts, which consists largely of a recitation of testimony that both the Magistrate and Juvenile Court rejected as not credible. Ms. Mullen's brief tells a narrative in which she decided to have a child on her own, never intending Ms. Hobbs to be a co-parent. To support this narrative, she cites solely her own self-serving testimony and that of her blood relatives and Mr. Liming. She neglects to mention that all contemporaneous documentary evidence and numerous other witnesses, and even aspects of her own trial testimony, contradict the story she now presents.

A. The testimony of Scott Knox, Ms. Mullen's attorney, contradicts her story.

Ms. Mullen's attorney, Mr. Knox, testified that, after consulting with Ms. Mullen and Ms. Hobbs, he prepared typical documents for a lesbian couple who has jointly decided to have a child together, including a will, a health care power of attorney and a general durable power of attorney. (Knox at Tr.I:44-45.) In each of these documents, which Ms. Mullen executed, he included the following statement by Ms. Mullen: "I consider Michele Hobbs to be my child's co-parent in every way." (Knox at Tr.I:45-46.) He testified that this language was intended to "protect the rights of the co-parent to be a full co-parent." (Knox at Tr.I:47.) As a result, when Ms. Hobbs was asked about whether she and Ms. Mullen had ever contemplated a written document to protect her relationship with Lucy, she stated that she thought that that was what they were getting from Mr. Knox. (Hobbs at Tr.I:330-31.) Mr. Knox did not testify that he ever discussed a written, shared custody agreement with Ms. Mullen and Ms. Hobbs. He stated that

[1] Ms. Mullen's repeated references in her merit brief to Ms. Hobbs as "the girlfriend" are a transparent attempt to obscure the nature of the couple's relationship. The Juvenile Court found that the two women were in a long-term committed relationship. (Appx. at 10.) Ms. Mullen testified that the couple celebrated May 28th as their anniversary and that they bought and exchanged rings as a symbol of their commitment. (Mullen at Tr.II:74.) The couple also sent out a birth announcement to family and friends announcing the birth of their daughter. (Hobbs at Tr.II:270.)

he was not aware if a written, shared custody agreement was a viable option at the time that he prepared documents for Ms. Mullen and Ms. Hobbs. (Knox at Tr.I:57.)

B. Ms. Mullen's father's testimony was not credible.

Ms. Hobbs refuted the testimony of Ms. Mullen's father concerning whether she had ever told him that Lucy would have "one mom and one dad." (Hobbs at Tr.II:269.) Ms. Hobbs stated that she told Mr. Liming, not Mr. Mullen, that Lucy would have "one dad," after Mr. Liming's new boyfriend expressed interest in being Lucy's second dad. (Hobbs at Tr.II:267-69.) She testified that she never told either Mr. Mullen or Mr. Liming that there would be only "one mom." (Hobbs at Tr.II:269.)

Mr. Mullen's testimony at trial that it was his understanding that his granddaughter would have "one mom and one dad" was further undermined by his own admission that he and his wife treated Ms. Mullen, Ms. Hobbs and Lucy as a family unit. (M. Mullen at Tr.II:249.) He also acknowledged that he and his wife invited Ms. Hobbs to refer to them as "Mom" and "Dad." (M. Mullen at Tr.II:249-50.) At trial, Mr. Mullen acknowledged conceding in deposition that Ms. Mullen and Ms. Hobbs had entered "an oral agreement to raise a child," although he tried to claim at trial that he had not meant what he said. (M. Mullen at Tr.II:253-56.)

C. Ms. Mullen does not cite, and cannot cite, any record evidence to support her claim that she discussed a written, court-approved custody agreement with Ms. Hobbs before and after Lucy's birth.

Ms. Mullen states in her brief that she and Ms. Hobbs discussed the concept of a written, court-approved custody agreement, both before and after Lucy's birth. In support, she cites only to the Juvenile Court's decision. The Juvenile Court's finding that the couple discussed a written, court-approved custody agreement before Lucy was born was flatly contradicted by Ms. Mullen's own testimony. (Mullen at Tr.II:45; see also Section II.A of Argument below.)

ARGUMENT

I. The Juvenile Court made a legal error in concluding that, on the one hand, Ms. Mullen and Ms. Hobbs agreed to have a child together and to rear their child as equal parents, but, on the other hand, that Ms. Mullen did not relinquish her right to exclusive custody in favor of shared custody with Ms. Hobbs.

As stated in the opening merit brief ("Hobbs Opening Brief"), the Juvenile Court found that Ms. Mullen and Ms. Hobbs agreed to have a child together and to rear their child as equal co-parents. The Juvenile Court also found that the couple acted in accordance with their agreement and that, as a result, Ms. Mullen permitted and encouraged Ms. Hobbs and Lucy to form a mother-daughter relationship. If the Juvenile Court had correctly applied well-established Ohio custody law to these factual findings, it should have concluded that Ms. Mullen had relinquished her right to exclusive custody in favor of shared custody with Ms. Hobbs. Instead, the Juvenile Court improperly concluded that Ms. Mullen was entitled to revoke her decision to co-parent with Ms. Hobbs and to sever unilaterally the relationship between Ms. Hobbs and Lucy that Ms. Mullen had encouraged and fostered.

A. Ms. Hobbs is not asserting a "new rule of law" – rather, she is asking this Court to correct the lower courts' misapplication of existing law.

In her merit brief, Ms. Mullen incorrectly states over and over again that Ms. Hobbs is asserting a "new" three-pronged fact test for custody disputes. (Mullen Merit Brief at 25, 31, 32, 33, 34, 35, 36, 37, 39.) To the contrary, Ms. Hobbs' status as co-custodian derives from more than a century of Ohio precedent. See *In re Bonfield*, 97 Ohio St. 3d 387, 2002-Ohio-6660, 780 N.E. 2d 241; *Masitto v. Masitto* (1986), 22 Ohio St. 3d 63, 22 OBR 81, 488 N.E. 2d 857; *In re Perales* (1977), 52 Ohio St. 2d 89, 6 O.O.3d 293, 369 N.E.2d 1047; *Clark v. Bayer* (1877), 32 Ohio St. 299, 1877 WL 120. The law on which Ms. Hobbs relies was acknowledged, explained and applied recently by the Eighth District Court of Appeals in *In re J. LaPiana & S. LaPiana*,

Cuyahoga Nos. 93691 & 93692, 2010-Ohio-3606[2]. *LaPiana* also involved a custody dispute between two former lesbian partners who had decided to have children together. After their relationship ended, the couple continued to care for their children jointly until the biological mother attempted unilaterally to revoke the couple's agreement to co-parent their children. Id. at 49-50. After a trial, the juvenile court allocated custody between the women, awarding approximately equal time with the children to the non-biological mother. Id. at 3. The biological mother appealed.

The Eighth District Court of Appeals affirmed based on the same well-established body of law on which Ms. Hobbs relies. Id. at 27, 32. After reviewing this Court's decisions in *Perales*, *Masitto* and *Bonfield*, the *LaPiana* appellate court held that a parent's relinquishment of exclusive custody in favor of shared custody with a non-parent may be demonstrated through the parent's conduct "taken as a whole." Id. at 21, 32-33. The court also noted that, under well-established law, a written agreement is not necessary to enforce a parent's agreement to share child custody. Id. at 33. Accordingly, the *LaPiana* appellate court concluded that the trial court had correctly determined that the biological mother had intended to share custody with her now former partner and allocated shared custody to the parties. Id. at 42.

The factual findings of the *LaPiana* court are remarkably similar to those of the Juvenile Court in this matter. In *LaPiana*, the couple "deliberately planned to have children together." Id. at 34. In this case, the Juvenile Court similarly found that "the testimony and evidence presented to the Magistrate showed a combined discussion and decision to have a child."

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[2] The Lambda Legal Defense and Education Fund, Inc., co-counsel for Ms. Hobbs in this matter, was also counsel to the non-biological mother in *LaPiana*. The *LaPiana* case was decided after Ms. Hobbs submitted her opening brief in this matter.

(Appx. at 18.)[3] In *LaPiana*, the record "establish[ed] that not only did the boys know [the petitioner] as their mother, so did everyone else, including friends, teachers, health insurance carriers and doctors." *In re LaPiana*, 2010-Ohio-3606, at 36. Similarly, in this matter, the Juvenile Court found: "There are pictures, notes, e-mails and postcards where the petitioner was referred as momma, family, etc. by the mother, child and others." (Appx. at 18.) The *LaPiana* court also found that the biological mother had demonstrated through her conduct an agreement to "jointly and equally parent" with her partner and to grant her partner "equal power to make medical decisions." *In re LaPiana*, 2010-Ohio-3606, at 37. Similarly, in this case, the Juvenile Court found that Ms. Mullen acknowledged in writing and through her actions that Ms. Hobbs was her child's "co-parent in every way" and granted Ms. Hobbs equal decision-making authority with respect to school, health and other decisions. (Appx. at 18.)

In short, the two women in the *LaPiana* case had an unwritten agreement about co-parenting that is very similar to the agreement between Ms. Mullen and Ms. Hobbs here. If the Juvenile Court had correctly applied existing law to the undisputed facts, then it would have reached the same conclusion as both trial and appellate courts reached in *LaPiana* – namely, that a biological parent who agrees to have and co-parent children with a partner and to grant her partner equal custodial decision-making authority is not legally entitled unilaterally to revoke her agreement and sever the mother-child relationship that she herself helped create.

The *LaPiana* case demonstrates that the law on which Ms. Hobbs relies is not "new" or difficult to understand and apply. Rather, it is law that is firmly grounded in precedent and designed to protect the best interests of Ohio children.

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[3] Due to a production error, citations in Hobbs Opening Brief to the Appendix copies of the Juvenile Court and Magistrate decisions were incorrect by one page (e.g., when the brief cites to Appx. 18, it should instead cite to Appx. 17.) Counsel apologizes for the error.

B. Contrary to Ms. Mullen's argument, the Juvenile Court did find that Ms. Mullen and Ms. Hobbs agreed to have a child together and to rear their child as co-parents.

Ms. Mullen argues that the Juvenile Court did not conclude that the couple had an agreement to co-parent because, when the Juvenile Court stated that there was a "combined discussion and decision" to have a child with the "stated intention" that the child would be reared jointly by the couple (Appx. at 18), the Juvenile Court did not explicitly use the word "agreement." (Mullen Merit Brief at 38.) This argument elevates semantics over substance and strains the interpretation of easily understood language to its breaking point. "Decision" is defined as "a determination arrived at after consideration." Merriam-Webster Online Dictionary, 2010, http://www.merriam-webster.com/dictionary/decision. "Determination" is defined as a "firm or fixed intention to achieve a desired end." Id. at http://www.merriam-webster.com/dictionary/determination. Thus, when the couple "decided" to have a child together, that was their "intention." Similarly, when Ms. Mullen "decided" that Ms. Hobbs was her child's "co-parent in every way," that was her fixed intention at the time – i.e., to co-parent her child with Ms. Hobbs. Simply put, when two people discuss and decide to do something together, they reach a mutual understanding about a course of action to realize their mutually understood intent. In other words, they "agree."

C. Enforcing a parent's contractual relinquishment of custody is an estoppel remedy designed to protect children – it neither requires nor permits a court to ascertain and enforce specific terms of a contract.

Ms. Mullen also argues that, even if the parties had an "agreement," Ms. Hobbs failed to demonstrate contractual relinquishment because she did not prove each of the specific legal elements of a commercial contract – namely, an offer, an acceptance, a meeting of the minds, consideration, and terms that are reasonably certain and clear. (Mullen Merit Brief at 27.)

Ms. Mullen's argument reflects a fundamental misunderstanding of the law governing contractual relinquishment of sole custody in favor of shared custody. As this Court has noted, contractual relinquishment is based on the equitable legal concept of estoppel:

> Where a person accepts the custody of a child by virtue of an agreement with the parents of the child, the contract may be such, and the care and support may be furnished for such a length of time and under such circumstances as to estop the parents from denying that that they have relinquished or forfeited their natural right to the custody of the child.

Masitto, 69 Ohio St.3d at 66 (internal citation omitted); see also *In re LaPiana*, 2010-Ohio-3606, at 39. To determine whether an agreement exists warranting estoppel, courts must look at the parent's conduct "taken as a whole." *In re LaPiana,* 2010-Ohio-3606 at 32 (citing *In re Mullen*, 185 Ohio App. 3d 457, 2009-Ohio-6934, 924 N.E.2d 448 at 6 (citing *Masitto v. Masitto* (1986), 69 Ohio St.3d 63, 66, 22 OBR 81, 488 N.E.2d 857)).

Ms. Mullen fails to identify a single child custody case in which an Ohio court has required a non-parent to demonstrate an offer, acceptance, meeting of the minds, consideration, or definite terms, as her theory finds no support under Ohio law.[4] Not a single contractual relinquishment case in the child custody context has ever stated or even suggested that a party must prove each of the formal elements of a contract to demonstrate that a parent has agreed to relinquish custody. None of the leading cases – *Bonfield, Masitto, Perales* and *In re Hockstock*[5]– even mention the contract principles of offer, acceptance, meeting of the minds, definite terms, and consideration. Instead, these cases make clear that the only relevant contract principle is

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[4] Ms. Mullen cites only one custody case, *Clark v. Bayer*, in which the court briefly mentions the stipulated fact that the separated parents had agreed to give their infant to the child's grandfather "in consideration that he will receive, care and provide for them." *Clark*, 32 Ohio St. at 306. There is no suggestion in *Clark* that every element of a contract must be proven to demonstrate contractual relinquishment. Furthermore, *Clark* was decided long before *Masitto*, in which this Court stated that contractual relinquishment was based on the legal theory of estoppel, not on rigid application of commercial contract law principles.

[5] *In re Hockstock*, 98 Ohio St.3d 38, 2002-Ohio-7208, 781 N.E.2d 971.

whether the parties had an agreement sufficient to trigger the equitable principle of estoppel, a remedy that is available regardless of whether the parties, in fact, have satisfied all of the formal elements of a contract[6].

Furthermore, Ms. Mullen's argument erroneously blurs two separate inquiries – first, the trial court's threshold inquiry into whether an agreement exists, and second, the trial court's obligation to determine how custodial responsibilities should be allocated. A trial court's finding that a parent has agreed to share custody with a non-parent is simply a threshold finding authorizing the court to allocate custody based on its own independent best interests determination. A trial court is not required to execute the terms of a child custody contract precisely as the parties intended in happier times – this would be both an impossible mandate, and an abdication of the court's obligation to determine for itself what custody allocation is in a child's best interests. See, e.g., *Seng v. Seng*, Clermont App. No. CA2007-12-120, 2008-Ohio-6758, at 10-12 (holding that the trial court properly ignored a shared parenting plan because it was not in the best interests of the child).

Ms. Mullen's erroneous argument about the need to prove the specific terms of a contract highlights a fundamental error in the Juvenile Court's decision. In concluding that Ms. Mullen secretly could reserve the right to revoke her agreement to co-parent Lucy simply by refusing to reduce it to an agreed court order, the Juvenile Court relied on the dubious premise that "it is difficult . . . 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 in writing." (Appx. at 20.) The Juvenile Court thus appears to have believed that it was required

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[6] Nevertheless, the elements of a contract are present here. For example, the evidence proved that the couple had a "meeting of the minds" because it showed that they agreed to co-parent and acted in accordance with that agreement. Similarly, there was "consideration" because Ms. Hobbs cared for the couple's daughter and supplied financial and emotional support.

to do more than simply determine whether the parties had agreed to co-parent, but instead to figure out theoretical terms of an agreement, such as whether the parties would have contemplated alternating holidays in the event of a split. Such a notion finds no support under existing case law and that court's determination should, therefore, be reversed.

D. Enforcing a parent's contractual relinquishment of custody is good policy designed to protect children – it would not require courts to grant custody to temporary custodians or child-care providers.

Ms. Mullen incorrectly argues that a decision by this Court to enforce her agreement to co-parent Lucy with Ms. Hobbs would be bad policy because it would require Ohio courts, in other contexts, to find contractual relinquishment where none exists. (Mullen Merit Brief at 31-34.) Ms. Mullen posits a "slippery slope" in which courts force parents to turn over their children to paid employees or other non-parents who have taken temporary responsibility while a parent serves overseas in the military. (Mullen Merit Brief at 32-33.) Ms. Mullen even goes so far as to suggest that a decision in Ms. Hobbs' favor would allow a person who babysits a child "every other Saturday afternoon" to petition successfully for custody.

Ms. Mullen's concerns are unfounded. Nothing in the existing case law permits a temporary caregiver to assert successfully a claim of contractual relinquishment. Even in cases where a parent might leave a child with a non-parent for an extended period of time due to a temporary condition or situation – e.g. illness, military service, temporary overseas work assignment – courts can (and do) examine the individual facts of each case and readily determine if the parties had intended to rear a child as co-parents or instead simply contemplated a temporary child-care arrangement. See, e.g., *In re Godsey*, Clark App. No. 2002-CA-69, 2003-Ohio-2692, at 4-8 (highlighting the exhaustive factual analysis of the lower court – a discussion of the initial agreement, the father's individual contacts with his daughter, the length of time he was serving abroad, and his activities and contact since returning to the country – before

determining that the child-care agreement had been properly deemed temporary). Enforcing Ms. Mullen's agreement with Ms. Hobbs would have no effect on how trial courts make those assessments.

Ms. Mullen's professed concern that this case might require courts to grant legal custody rights to "temporary" child-care providers is belied by the undisputed evidence demonstrating that Ms. Mullen's agreement with Ms. Hobbs was not intended to be temporary. Would a parent who intended to enter into a temporary child care-arrangement encourage her child, her family and her friends to refer to the temporary care provider as her child's mother? Would that parent sign powers of attorney that explicitly stated that she considered the child's temporary care provider to be her child's "co-parent in every way?" Would a parent permit a temporary care provider to cut her child's umbilical cord and then send out a birth announcement listing that care provider as the child's co-parent? Would a parent state in her will that, if she were to die, her child should be reared by the temporary child care provider instead of a blood relative? When one considers these questions, it becomes apparent that Ms. Mullen fully intended and agreed that Ms. Hobbs would be Lucy's permanent co-custodian. Under Ohio law, Ms. Mullen is bound by that agreement and the Juvenile Court's ruling must be reversed.

E. This Court has already determined that enforcing a parent's contractual relinquishment of custody is consistent with the United States and Ohio Constitutions.

Ms. Mullen and *amicus curiae* Alliance Defense Fund incorrectly argue that enforcing Ms. Mullen's agreement to co-parent Lucy with Ms. Hobbs would unconstitutionally infringe on Ms. Mullen's right to the care, custody and management of her child.

Ohio courts long have recognized that enforcing a voluntary parental agreement regarding child custody is fully constitutional. That legal parents – and others fulfilling a parental role – have a liberty interest in the care, custody and rearing of their children that merits

substantive protection under the Due Process Clause is well established[7] – but this interest, while protected, is far from absolute. See *Troxel v. Granville* (2000), 530 U.S. 57, 65-66, 120 S.Ct. 2054, 147 L.Ed.2d 49; *Clark*, 32 Ohio St. 299, paragraph two of the syllabus ("The father's right is not, however, absolute under all circumstances"); *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165 (while there is a presumption under *Troxel* that fit parents act in the best interest of their children, this presumption is not irrefutable; nothing in *Troxel* suggests that a parent's wishes should be placed before a child's best interest, which the state has a compelling interest in protecting).

In *Bonfield*, the Ohio Supreme Court considered the impact of the United States Supreme Court's decision in *Troxel* on parental custody agreements and confirmed that entry and enforcement of parental agreements, specifically agreements to relinquish exclusive custody in favor of shared custody, are fully constitutional. *Bonfield*, 97 Ohio St. 3d at 395-96 citing *Masitto*, 22 Ohio St. 3d at 65; see also *Hockstock*, 98 Ohio St.3d at 242 (if a court concludes that a parent has contractually relinquished custody of a child, the state may infringe upon the fundamental parental liberty interest of child custody); *Rowe v. Rowe* (1950) 58 Ohio Law Abs. 497, 499, 44 O.O. 224, 97 N.E.2d 223 ("a person may waive all personal rights or privileges to

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[7] The liberty interest in parental autonomy is not limited to biological and adoptive parents, *Prince v. Massachusetts* (1994), 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (aunt and legal guardian enjoyed parental autonomy rights), nor do biological ties by themselves secure due process protections, *Michael H. v. Gerald D.* (1989), 491 U.S. 110, 128-130, 109 S.Ct. 2333, 105 L.Ed. 91 (biological father not considered legal father). The Constitution is concerned with protecting involved biological parents and de facto parent-child relationships, not merely attaching rights to biological status. "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." *Caban v. Mohammed* (1979), 441 U.S. 380, 397, 99 S.Ct. 1760, 60 L.Ed.2d 29 (Stewart, J., concurring); *Lehr v. Robertson* (1983), 463 U.S. 248, 260, 103 S.Ct. 2985, 77 L.Ed.2d 614, (citing same). See also *Moore v. City of East Cleveland* (1977), 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (plurality opinion) (recognizing family autonomy interest protects grandparents rearing grandchildren in home).

which he is individually entitled, whether secured by contract, conferred by statute, or guaranteed by the Constitution ...") (citation omitted); *Bragg v. Hatfield*, 152 Ohio App. 3d 174, 181, 2003-Ohio-1441, 787 N.E.2d 44 (citing *Troxel* and *Santosky v. Kramer* (1982), 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599, acknowledging parents' "fundamental right to the custody and care of their children," and reviewing *Perales* and *Masitto* to conclude that enforcement of a father's agreed transfer of child custody is constitutionally permissible), appeal not allowed 99 Ohio St.3d 1468, 2003-Ohio-3669, 791 N.E.2d 893.

These cases make clear that Ohio courts constitutionally may enforce a parent's contractual relinquishment based solely on evidence that the parent agreed to cede exclusive custody of a child and consented to the development of an unusually significant and bonded relationship between that child and a non-parent. See, e.g., *Bonfield,* 97 Ohio St.3d at 395 (noting that parents have a fundamental liberty interest in autonomy, but that parents are bound by an agreement to relinquish their sole right to custody, and that such agreements are "enforceable subject *only* to a judicial determination that the custodian is a proper person to assume the care, training, and education of the child") (emphasis added). Recognizing and enforcing parental agreements ***respects*** parental autonomy because such agreements reflect a parent's prior determination that a relinquishment of exclusive custodial rights is in her children's best interests. Enforcement of such agreements merely prevents the parent from arbitrarily severing the critical parent-child bonds that developed through the legal parent's encouragement and consent.

Ohio courts are far from unique in enforcing parental agreements to share custody with third parties who have taken on the role of a functional parent, and in recognizing that this enforcement is consistent with constitutional protection for parental autonomy and protection for

a child's interest in retaining the emotional and financial support of both adults whom the child understands to be parents. As the New Jersey Supreme Court has held in a custody dispute between a biological mother and her same-sex former partner, when a parent has relinquished her "absolute ability to maintain a zone of autonomous privacy for herself and her child" by fostering a second parent's relationship with her child, the Constitution permits court consideration of the minor child's best interest in maintaining a relationship with that second parent. *V.C. v. M.J.B.* (2000), 748 A.2d 539, 552, 163 N.J. 200, cert. denied *M.J.B. v. V.C.* (2000), 531 U.S. 926, 121 S.Ct. 302, 148 L.Ed.2d 243. If a "parent wishes to maintain that zone of privacy she cannot invite a third party to function as a parent to her child and cannot cede over to that third party parental authority the exercise of which may create a profound bond with the child."[8] Id. This Court has approved the same balance between parental autonomy and children's best interests for well over a century. See, e.g., *Clark*, 32 Ohio St. at 306.

Here, the parental relationship between Ms. Hobbs and Lucy was consistent with pre-birth planning and expectations, and has taken hold and grown deeply since Lucy's birth with

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[8] In custody or visitation cases around the country, courts have recognized that it does not unduly infringe parental autonomy to protect a parent-child relationship that a legal parent *voluntarily chose to create and foster* between another adult and her child. See, e.g., *Inoue v. Inoue* (2008), 185 P.3d 834, 118 Hawaii 86; *Hunter v. Haunert* (2007), 270 S.W.3d 339, 101 Ark. App. 93, 2007 WL 4415188; *Middleton v. Johnson* (2006), 633 S.E.2d 162, 169, 369 S.C. 585 ("The legal parent's active fostering of the psychological parent-child relationship is significant because the legal parent has control over whether or not to invite anyone into the private sphere between parent and child," and "when a legal parent invites a third party into a child's life, and that invitation alters a child's life by essentially providing him with another parent, the legal parent's rights to unilaterally sever that relationship are necessarily reduced"); *In re E.L.M.C.* (Colo. App. 2004), 100 P.3d 546; *Rubano v. DiCenzo* (R.I. 2000), 759 A.2d 959, 976 (when a legal parent, "by her conduct," allows another person to "assume an equal role as one of the child's two parents," she renders her own parental rights with respect to the minor child "less exclusive and less exclusory" than they otherwise would have been); *J.A.L. v. E.P.H.* (1996), 682 A.2d 1314, 453 Pa.Super. 78, 92-93 ("[the mother's] rights as the biological parent do not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the parties' separation she regretted having done so").

Ms. Mullen's full consent and encouragement when the couple were still together. This has great constitutional significance. As this Court stated in *Clark*:

> After the affections of both child and [second] parent become engaged, and a state of things has arisen which can not be altered without risking the happiness of the child, and the father wants to reclaim it, the better opinion is that he is not in a position to have the interference of a court in his favor. His parental rights must yield to the feelings, interests, and rights of other parties acquired with his consent.

Id. Where, as here, a legal parent has exercised her autonomy to foster a parental relationship between her child and another adult, she is presumed to act in the best interests of her child.[9] However, if she seeks to sever that parental relationship unilaterally, a court is entitled to and should treat skeptically the legal parent's claim that she is truly acting in her child's best interests, and should protect the child's unusually significant relationship with another adult. Ohio law properly weights parental views, but it does not give them dispositive weight. *Harrold*, 107 Ohio St.3d at 51-52. Recognizing and enforcing Ms. Mullen's voluntary agreement to co-parent both respects her liberty interest in autonomy, giving effect to her own considered decision, and protects the child's interest in maintaining a relationship with both of the adults she understands to be her parents.

Ms. Mullen insists that the Juvenile Court's decision must be affirmed because Ms. Hobbs did not demonstrate that Ms. Mullen's relinquishment of a constitutional right was "knowing, voluntary and intelligent." (Mullen Merit Brief at 23-24, 28.) The cases that Ms. Mullen cites for this proposition are either not custody cases or they predate the decisions in

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[9] Ms. Mullen incorrectly argues that current law does not permit a court to consider the alleged bonding between a child and non-parent. (Mullen Merit Brief at 29-30.) It is Ms. Mullen's decision to allow a bonded mother-daughter relationship to develop between Ms. Hobbs and Lucy that permits a court to infringe upon her liberty interest in the care of her child. In addition, the relationship that Ms. Mullen encouraged Ms. Hobbs to develop with Lucy is probative of Ms. Mullen's intent that Ms. Hobbs be Lucy's co-parent.

Bonfield and *Hockstock* in which this Court concluded that enforcing a parent's agreement to relinquish custody based on a consideration of the parent's conduct is constitutional.

Furthermore, even Ms. Mullen acknowledges that a court's assessment of whether a parent has relinquished custody involves an examination of the parent's conduct "taken as a whole." (Mullen Merit Brief at 29, citing *Masitto*.) Thus, to the extent that there is a requirement that relinquishment be "knowing, voluntary and intelligent," it is a requirement that the conduct that constitutes relinquishment be "knowing, voluntary and intelligent." There is no requirement that a parent must explicitly state that she is relinquishing a constitutional right.

In this case, the evidence conclusively proved that Ms. Mullen knowingly, voluntarily and willingly acknowledged Ms. Hobbs as her child's co-parent, granted Ms. Hobbs custodial decision-making authority with respect to Lucy, held Ms. Hobbs out as Lucy's mother and enthusiastically encouraged the development of a bonded mother-daughter relationship with Ms. Hobbs and Lucy. Thus, Ms. Mullen's suggestion that her waiver was not knowing, or voluntary and intelligent should be rejected.

II. In addition to its other legal errors, the Juvenile Court abused its discretion because there was no reliable or credible evidence to support its conclusion that Ms. Mullen had not relinquished her right to exclusive custody in favor of shared custody; this independently warrants reversal.

Ms. Mullen relies heavily in her brief on the deference due to a trial court's findings of fact in child custody disputes. (Mullen Merit Brief at 40-42.) However, the traditional rationale for deference to a trial court's findings of fact in a child custody dispute is absent in this case.[10]

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[10] Ms. Mullen argues that the appropriate standard of review for reviewing a lower court's factual findings regarding contractual relinquishment is not the abuse of discretion standard, but rather whether the trial court's determination is supported by reliable and credible evidence. (Mullen Merit Brief at 40.) It is well established that an appellate court reviews a trial court's custody determinations using an abuse of discretion standard. *Masters v. Masters*, 69 Ohio St.3d 83, 85, 1994-Ohio-483, 630 N.E.2d 665. In applying this standard in cases involving contractual relinquishment, appellate courts consider whether the decision is based on "some reliable and

Recently, the *LaPiana* court explained why reviewing courts normally defer to a lower court's decision in custody matters: "[T]he underlying rationale of giving deference to the trial court's finding is based upon the premise that the trial court judge is best able to view the witnesses and observe their demeanor, gestures, voice inflections, and to use those observations when weighing the testimony and evidence." *In re LaPiana*, 2010-Ohio-3606, at 48. Likewise, in *Reynolds v. Goll*, the very case that Ms. Mullen relies upon, the court explained that it was "mindful of the fact that the trial court, after carefully listening to the testimony of the parties and witnesses, is in the best position to judge their credibility and to determine whether a parent has abandoned his or her child." 75 Ohio St.3d 121, 124, 1996-Ohio-153, 661 N.E.2d 1008. Here, it was the Magistrate, not the Juvenile Court, who presided over the trial and observed the demeanor, gestures and voice inflections of the witnesses. Based on what he saw and heard, the Magistrate then explicitly evaluated the credibility of the witnesses in his written decision. The Juvenile Court, however, summarily disregarded these credibility findings based solely on a review of a cold record without taking any additional evidence. As a result, the Juvenile Court in this matter is entitled to less deference than is customarily afforded to a lower court's custody decision.

A. The Juvenile Court's decision constitutes an abuse of discretion because it either lacked any evidentiary support whatsoever, or is based on evidence that is neither reliable nor credible.

The evidence relied on by the Juvenile Court in overturning the Magistrate's decision was either absent altogether, or based on testimony that was not credible. As noted by the appellate court in this matter, the Juvenile Court relied "most heavily" on its finding that Ms.

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credible evidence." See, e.g., *In Re Galan*, Seneca App. No. 13-02-44, 2003-Ohio-1298, at 18 (holding that the trial court did not abuse its discretion because there was some reliable, credible evidence that the mother had contractually relinquished custody of her child); *In re LaPiana*, 2010-Ohio-3606, at 30, 48 (same). Thus, the "reliable and credible evidence" standard is simply an articulation of one of the ways in which a court determines if a lower court has abused its discretion.

Mullen had "repeatedly refused to enter into a legally enforceable shared custody agreement when presented with the option to do so." (Appx. at 6.) Specifically, the Juvenile Court stated: "The most important factor in the determination of whether the mother's words, actions, and deeds amounted to contractual relinquishment of some of her custodial rights was her consistent refusal to enter into a shared custody agreement envisioned under *In re Bonfield.* 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." (Appx. at 21.)

There was no evidence at all to support the Juvenile Court's finding that the parties had discussed a shared custody agreement before the child's birth. Although Ms. Mullen and Ms. Hobbs offered conflicting testimony about precisely when they first discussed a written, court-approved custody agreement, they agreed that ***it did not happen until long after Lucy was born*** and after the couple had established themselves as a family with two equal mothers. Ms. Mullen's own testimony flatly contradicted the Juvenile Court's finding. 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 write off. So that was March '06.

(Mullen at Tr.II:45.) (emphasis added). Thus, by the time the couple first considered a written agreement, they had already decided to have a child together and that they would rear their child as co-custodians. That Ms. Mullen *later* refused to enter into a written shared custody agreement is not reliable, credible evidence that she did not previously intend that Ms. Mullen would be her

child's co-parent and contractually relinquish her right to sole custody. Because the Juvenile Court's decision is based on an unambiguously erroneous factual finding, it constitutes an abuse of discretion and should be reversed.

Although the couple's discussion about a written, court-approved shared custody agreement was the "most important factor" underlying the Juvenile Court's decision, the appellate court also noted that the trial court had relied on the testimony of Ms. Mullen and others that Ms. Mullen never intended to relinquish custody. (Appx. at 6.) The only direct evidence supporting the assertion that Ms. Mullen never intended to relinquish custody was Ms. Mullen's own testimony – testimony which Ms. Hobbs refuted.[11] The Magistrate explicitly found that Ms. Hobbs was credible on this point and Ms. Mullen was not. The Juvenile Court offered no explanation for ignoring these credibility determinations.

More importantly, however, all of the contemporaneous evidence – the evidence from the time period when the couple was considering having a child together and then rearing their child as a family – proved that Ms. Mullen fully intended that Ms. Hobbs would be her child's co-custodian. Based on this evidence, the Juvenile Court made the following factual findings, which the appellate court explicitly found to be "strong evidence that Mullen had intended to give Hobbs shared custody of Lucy": (1) the couple planned for and paid for the pregnancy together; (2) Ms. Hobbs was present at Lucy's birth; (3) Ms. Hobbs' name appeared on the ceremonial birth certificate; (4) the couple jointly cared for Lucy; (5) the couple held themselves out as, and had acted as, a family; (6) Ms. Mullen, Lucy and others referred to Ms. Hobbs as

[11] Ms. Mullen also cites to her own cousin's testimony that Ms. Hobbs told Ms. Mullen's cousin that Ms. Hobbs would not have custody rights through adoption. (Mullen Merit Brief at 7.) This testimony, even if true, simply reflects Ms. Hobbs' understanding of the law concerning adoption and is not inconsistent with the evidence demonstrating that Ms. Mullen and Ms. Hobbs intended that Ms. Hobbs would be Lucy's co-parent and that they sought the advice of an attorney to protect that arrangement.

"Momma; (7) Ms. Mullen's will named Ms. Hobbs as Lucy's guardian; and, (8) Ms. Mullen had executed powers of attorney giving Ms. Hobbs the ability to make school, health, and other decisions for Lucy. (Appx. at 6.) It was an abuse of discretion for the Juvenile Court to disregard these factual findings, which were based on reliable contemporaneous evidence, in favor of the biased self-serving testimony that Ms. Mullen offered at trial that the Magistrate found to be unworthy of belief.

III. Mr. Liming contractually relinquished his right to custody to Ms. Hobbs.

For the reasons stated in Ms. Hobbs' Opening Brief, the evidence overwhelmingly proved that Mr. Liming relinquished his right to exclusive custody to Ms. Hobbs. Mr. Liming's primary argument in his Merit Brief is that all of the evidence indicating that he had agreed that Ms. Hobbs, and not he, would be Lucy's parent should be disregarded because Ms. Hobbs was not a party to the Donor-Recipient Agreement in which he relinquished his parental rights. As stated in Ms. Hobbs' Opening Brief, and as recognized by the Magistrate, the Juvenile Court and the appellate court below, it is black letter law that a written agreement is not necessary to prove contractual relinquishment. Thus, the Juvenile Court was incorrect in ignoring all of the evidence that proved that Mr. Liming had relinquished custody to Ms. Hobbs solely because she and Mr. Liming had not entered into a written agreement.

Mr. Liming then attempts to justify the Juvenile Courts decision by citing *In re Jones*, Miami App. No. 2000 CA 56, 2002-Ohio-2279. In that case, the Court of Appeals for the Second District rejected a claim by a non-parent that she should be entitled to shared custody because her former partner had relinquished her right to exclusive custody in favor of shared custody. In reaching this decision, the court stated "we know of no Ohio law that allows for 'relinquishment' to occur in a situation where a parent allows a non-parent to be a part of the child's life while that parent still maintains care and support." Id. In December 2002, the Ohio

Supreme Court reaffirmed in *Bonfield* the notion of partial relinquishment that was rejected by the *Jones* court and held that a biological parent could, in fact, relinquish exclusive custody while still maintaining care and support as a co-custodian, citing cases dating back to the nineteenth century. Thus, Mr. Liming's reliance on *Jones* is misplaced because its central holding was incorrect at the time it was decided and plainly rejected by the Ohio Supreme Court in *Bonfield.*

Finally, Mr. Liming argues that the fact that Ms. Mullen and Ms. Hobbs had not entered into a written court-approved agreement similar to the one discussed in *Bonfield* is relevant because, in Mr. Liming's view, the couple's attorney, Scott Knox, knew or should have known that such an agreement was the only way to protect Ms. Hobbs' relationship with Lucy. According to Mr. Liming, that Mr. Knox did not provide the couple with a written custody agreement indicates that the women did not intend that Ms. Hobbs would be a co-custodian. In fact, Scott Knox testified that he was unaware if a written, shared custody agreement was a viable option at the time he prepared documents for the women and that the documents he did prepare were designed to protect Ms. Hobbs' right to be a full co-parent.

Respectfully submitted,

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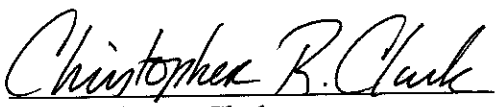

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