

**JUVENILE COURT  
HAMILTON COUNTY, OHIO**

**IN RE: LUCY MULLEN**

§ **F07-2803**

§ **ENTRY REJECTING THE  
MAGISTRATE'S DECISION**

This cause came to be heard upon the objections of the mother, through counsel, and upon the objections of the alleged father, through counsel, to the Magistrate's Decision dated 12-22-2008. The hearings before the Magistrate were recorded, transcribed, and reviewed along with the case file. The documentary evidence presented at the trial was reviewed.

Attorney Karen Meyer, represents the mother, Kelly Mullen.

Attorneys Lisa Meeks and Christopher Clark, represent the petitioner, the mother's former relationship partner, Michele Hobbs.

Attorney Terry Tranter, represents the alleged father, Scott Liming.

The child under consideration is Lucy Mullen, DOB 7-25-2005, now 3½ years old.

The mother and the petitioner were involved in a long term, same sex, committed relationship that included living together and building a house together. In 2003 the mother and the petitioner decided to have a child. The mother was to bear the child with the emotional and financial support of the petitioner. The mother asked a friend of the petitioner, Scott Liming, to provide the sperm necessary to conceive the child. Mr. Liming agreed to donate his sperm. The mother and Mr. Liming signed a donor-recipient agreement that Mr. Liming would have no parental rights or responsibilities:

The mother became pregnant. The petitioner was an active participant in preparing for the child's birth including accompanying the mother for doctor visits and Lamaze classes, paying medical bills and being present at the actual birth.

For approximately two years after the birth the mother and the petitioner jointly cared for the child. Though the partners' relationship was beginning to deteriorate, they lived together as a family, each providing for the child's well being. The alleged father also became involved with the child. In 2007 the mother and the petitioner severed their relationship and separated. The mother left the house and took the child with her. She then refused to allow the petitioner to have any contact with the child.

On 12-20-2007 the petitioner filed a complaint for shared custody of the child. She requested that the court recognize her as a co-custodian and allocate her shared custody rights.

On 1-30-2008 Mr. Liming filed a complaint requesting sole custody and also a petition requesting joint/shared custody with the mother.

On 4-23-2008 the petitioner, Ms. Hobbs, was awarded interim visitation with the child pending the final determination of the custody litigation. This interim visitation is still occurring at this time.

On 7-28-2008 and 7-29-2008 the Magistrate held evidentiary hearings considering the complaint and petitions. The Magistrate entered a Decision on 12-22-2008 granting the petitioner's motion for shared custody of the child. It is to this Magistrate's Decision, particularly the grant of shared custody to the petitioner that the mother and the alleged father now object.

The alleged father's complaint and petition for custody were not addressed by the Magistrate, apparently so that the alleged father and the mother could enter into a private agreement. It does not appear that the objections filed by either the alleged father or the mother concern this treatment of the alleged father's complaint and petition. But it is necessary for this Court to examine and rule upon the Magistrate's Decision regarding the father's complaint and petition in order to fully decide the issues presented.

Ohio custody law is founded upon the best interests of a child, but rights of competing parties are determined by the parties' relationship to the child. Parents stand upon an equality in determining those rights.<sup>1</sup> But a non parent must yield to the paramount right of a parent, and can only invade the constitutional protection of parent /child custody upon a showing of parental abandonment, contractual relinquishment of custody, total inability to provide care or support, or that the parents are otherwise unsuitable.<sup>2</sup>

Where relationships are complicated as in the instant case, the legal relationship to the child must be established first for each party.<sup>3</sup>

---

<sup>1</sup> ORC 3109.03. Equal parental rights of father and mother.

ORC 3111.01(B); ORC 3109.042.; 3109.04 (B)

*In Re Colvin*, 2008 Ohio 3927, Ohio Appellate Court, 5<sup>th</sup> District, Guernsey County; *In Re Stose*, 208 Ohio 5457, Ohio Appellate Court, 9<sup>th</sup> District, Stark County

<sup>2</sup> *In re Perales*, 52 OS 2<sup>nd</sup> 89 (1977); *Barry vs Rolfe*, 2008 Ohio 3131 Ohio Appellate Court 8<sup>th</sup> District, Cuyahoga County; see also constitutional sanctity of parents: *Troxel vs Granville*, 530 US 57 (2000); *Michael H. v Gerald D.*, 491 US 110 (1989); *Santosky v. Kramer*, 455 US 745 (1982).

<sup>3</sup> ORC 3111.01. Definition and extent of parent and child relationship.

(A) As used in sections 3111.01 to 3111.85 of the Revised Code, "parent and child relationship" means the legal relationship that exists between a child and the child's natural or adoptive parents and upon which those sections and any other provision of the Revised Code confer or impose rights, privileges, duties, and obligations. The "parent and child relationship" includes the mother and child relationship and the father and child relationship.

(B) The parent and child relationship extends equally to all children and all parents, regardless of the marital status of the parents.

See, *In Re. JDM*, 204 Ohio 5409, Ohio Appellate Court 12<sup>th</sup> District, Warren County (2004); *In re Adoption of Reams*, 52 Ohio App. 3<sup>rd</sup> 52, 10<sup>th</sup> District, Franklin County, (1989),

### **Mother - Kelly Mullen**

No one contests that Kelly Mullen is the biological and natural mother of the child and that she gave birth to the child. The various petitions, motions and briefs by the parties all refer to her as the mother. Evidence showed that the child was physically attached to her at birth when the umbilical cord was cut. In Ohio the natural mother relationship may be established by a showing that that she gave birth to the child.<sup>4</sup> Therefore the Magistrate correctly considered that Kelly Mullen is the legal natural parent and mother of the child under Ohio law.

At the time of birth, the mother was not married. In accordance with Ohio Law, the child was in the legal custody of the mother at birth, by operation of law.<sup>5</sup>

### **Alleged Father - Scott Liming**

Although the alleged father's custody petition was not addressed by the Magistrate, the determination of his legal relationship to the child is important because a non parent petition for any form of custody must respect both legal parents. If the alleged father is the legal father of the child and did not permanently surrender his rights, then consideration must be given to him when allocating custodial rights and responsibilities.

In 2004 Mr. Liming agreed to supply sperm for the mother so that she could conceive a child. The mother and Mr. Liming signed a donor-recipient agreement that Mr. Liming would have no parental rights or responsibilities.

The first consideration must be the statutes of Ohio regarding artificial insemination. The donor-recipient agreement refers to the procedure contemplated by the parties as "alternative insemination" and generally follows the Ohio statutes referencing parental rights from artificial insemination. Those statutes specify that a donor for artificial insemination is not to be considered the natural father of the child.<sup>6</sup>

---

<sup>4</sup> ORC 3111.02 (A) The parent and child relationship between a child and the child's natural mother may be established by proof of her having given birth to the child ---.  
See also ORC 3111.17

<sup>5</sup> ORC 3109.042. An unmarried female who gives birth to a child is the sole residential parent and legal custodian of the child until a court of competent jurisdiction issues an order designating another person as the residential parent and legal custodian. A court designating the residential parent and legal custodian of a child described in this section shall treat the mother and father as standing upon an equality when making the designation.

<sup>6</sup> ORC 3111.95 (B) If a woman is the subject of a non-spousal artificial insemination, the donor shall not be treated in law or regarded as the natural father of a child conceived as a result of the artificial insemination, and a child so conceived shall not be treated in law or regarded as the natural child of the donor. No action or proceeding under ----- the Revised Code shall affect these consequences.

However this mother was apparently impregnated by *in vitro* fertilization – not artificial insemination. A strict reading of the Ohio statutory definition for artificial insemination does not appear to include *in vitro* fertilization.<sup>7</sup> Though the Ohio statutes consider and define artificial insemination and embryo donation,<sup>8</sup> Ohio has no statute considering *in vitro* fertilization by donor insemination where the embryo is replaced in the mother from whence it came. The hospital and doctor did not follow the statutory process or give the notices required if artificial insemination is provided.<sup>9</sup> Further, some lower courts have opined that the Ohio artificial insemination statute only applies to anonymous donors.<sup>10</sup> Though it could be argued that the artificial insemination and embryo statutes impliedly encompass or extend to *in vitro* semen donors who are known to the recipient, this Court declines to find that the alleged father is a non parent by virtue of those specific Ohio statutes under the circumstances of this case.

In his complaint and petition Mr. Liming referred to himself as the natural or biological father of the child. Along with his petition the alleged father wrote that paternity has been established by "birth certificate and complaint for custody attached". It appears that the father claims entitlement to custody as a legal parent/father.

All parties apparently share the belief that the pregnancy resulted from the donor sperm of Mr. Liming through *in vitro* fertilization although no genetic tests were taken after birth. Scott Liming's name was placed on the birth certificate under the designation of father. Placement of one's name on a birth certificate or signing a birth certificate no longer presumes or establishes the parent /child relationship. However, the filing of a formal Acknowledgement of Paternity does.<sup>11</sup> Two days after the birth, Scott Liming and Kelly Mullen both signed and filed a duly executed formal Acknowledgement of Paternity which is on file in the Vital Statistics Department of the Ohio Department of Health.

Therefore the Magistrate properly considered Scott Liming as the legal, natural biological parent/father of the child.

---

<sup>7</sup> ORC 3111.88. Definitions. (A) "Artificial insemination" means the introduction of semen into the vagina, cervical canal, or uterus through instruments or other artificial means.

<sup>8</sup> ORC 3111.97 (A) A woman who gives birth to a child born as a result of embryo donation shall be treated in law and regarded as the natural mother of the child.

ORC 3111.97 (D)--- A donor shall not be treated in law or regarded as a parent of a child born as a result of embryo donation. A donor shall have no parental responsibilities and shall have no right, obligation, or interest with respect to a child resulting from the donation.

<sup>9</sup> ORC 3111.90; 3111.91; 3111.93; 3111.94.

<sup>10</sup> *C.O. vs W.S.*, 64 Ohio Misc 2<sup>nd</sup> 9 (1994), Cuyahoga County, Ohio Juvenile Court.

<sup>11</sup> ORC 3111.02. (A) ----- The parent and child relationship between a child and the natural father of the child may be established by an acknowledgment of paternity as provided in --- the Revised Code ---.

ORC 3111.23. The natural mother, the man acknowledging he is the natural father, ---, may file an acknowledgment of paternity ---, acknowledging that the child is the child of the man who signed the acknowledgment. The acknowledgment of paternity shall be made on the affidavit prepared pursuant to --- the Revised Code, shall be signed by the natural mother and the man acknowledging that he is the natural father, and each signature shall be notarized.

ORC 3111.25. An acknowledgment of paternity is final and enforceable without ratification by a court when the acknowledgment has been filed with the office of child support, the information on the acknowledgment has been entered in the birth registry, and the acknowledgment has not been rescinded and is not subject to possible recession ---

The next consideration is the effect of the donor-recipient agreement on the parental rights of Mr. Liming. Despite his donor agreement, Mr. Liming's complaint for custody states that "at no time has he ever agreed to any form of not having custody of his daughter and raising his daughter".

The "Donor-Recipient Agreement on Insemination" signed by both the mother and the alleged father refers to Mr. Liming as "Donor". Specific provisions of the donor-recipient agreement are important to determine whether the alleged father's custodial rights were permanently contracted away.

The agreement sets out "the clear understanding that he will not demand, request or compel any guardianship, custody or visitation rights---Further donor acknowledges that he fully understands that he would have no parental rights whatsoever --- his waivers shall prohibit any action for custody, guardianship, or visitation in any future situation.". The mother shall have the "absolute authority and power to act with sole discretion as to all legal, financial, medical and emotion needs of any child/ren conceived"

There are also clauses in the donor-recipient agreement that give the mother a unilateral ability to later agree with the donor or others to establish custodial relationships and testamentary designations. The donor-recipient agreement provides that the donor is not responsible for child support. The agreement may be amended in writing. It is specified that the written agreement is the whole agreement and that there are no other promises understandings or representations. The agreement is "final and irrevocable."

Importantly, the donor-agreement has a reference regarding possible adoption by "her life partner." and allows the donor to petition for custody but only if the "child is no longer in the custody of donor or donor's partner, Michele Hobbs". Obviously a clerical error reported 'donor' instead of 'recipient'. Nevertheless, this is the only mention of Ms. Hobbs in the donor-recipient agreement.

Mr. Liming now asserts that he believed, contrary to the agreement, that he would have parental rights or at least contact with the child. He based his belief upon discussions with the mother and the petitioner. The agreement itself states that the agreement was drafted by attorney Scott Knox, but attorney Knox states that he did not draft it. Even though the agreement was not what he wanted, the alleged father signed it anyway, being fully advised by his attorney that it did not meet his expectations and contained the clauses that no other representations were relied upon and that the agreement was irrevocable.

Almost all of the donor-recipient agreement was under the control of the mother, particularly all clauses relating to custody rights. Within the agreement the mother retained complete control to unilaterally allow custody or companionship with others. The only clauses adverse to her control were the donation fee and the forfeiture of her right to obtain financial child support. Those were enough as consideration and the contract was valid when signed.

It is permissible for a legal parent to contract away their legal custodial rights and such a contract can be enforced against them.<sup>12</sup>

However, the father filed an affidavit with his petition claiming that after the birth of the child, he and the mother agreed that they would not abide by the donor agreement and that the agreement was for naught. The mother filed an affidavit stating the same. These assertions are made despite the irrevocability clause in the agreement. No written amendment of the agreement was submitted to the court.

The failure to actually pay the nominal sum of money for each donation does not alone void the agreement as was suggested. But importantly, the recipient, Kelly Mullen and the donor, Scott Liming are the only two parties to the contract. Thus they may revoke their agreement and hold it for naught as they have claimed to have done. The amendment clause overrides the irrevocability clause, because the parties could amend the agreement to delete any custodial or support clauses that the parties would agree to amend.

The petitioner, Ms. Hobbs cannot enforce the agreement against either party as she was not a party to the agreement and was not an intended third party beneficiary under contract law. Though slight reference was made to Ms. Hobbs in the agreement, the agreement did not indicate that the performance was for the benefit of Ms. Hobbs and it did not satisfy any duty owed to Ms. Hobbs by either signor. At most, Ms. Hobbs was an incidental beneficiary and is not able to enforce the agreement.<sup>13</sup>

The alleged father has been a presence in the child's life since birth. The evidence reflects that after the birth of the child he moved to Cincinnati to be closer and involved. The alleged father has had regular contact with the child including overnight visits each month. The child has her own furnished bedroom at his residence. The alleged father transports the child to pre-school once each week and financially contributes to the pre-school tuition.

The mother acknowledges the alleged father's involvement in the child's life and now recognizes him as the legal, biological natural father of the child with custodial rights. It appears that the mother and alleged father now wish to enter into some type of shared parenting and child support agreement.

Under the circumstances of this case and in consideration of the above analysis, Scott Liming is the legal, natural, biological father of the child with potential full custodial rights equal to the mother.

---

<sup>12</sup> See, *In Re. Danielle Bailey*, 2005 Ohio 3039, Ohio Appellate Court 1<sup>st</sup> District, Hamilton County (contract with third party caretaker); *In Re DB*, 116 OS 3<sup>rd</sup> 363(1967)(surrogacy contract upheld) *Massito v Massito*, 22 OS 3<sup>rd</sup> 63 (1986) (grandparent guardianship); See also ORC 5103.15 (voluntary surrender to child caring agency); ORC 3107.07 (adoption consents); *Tressler v. Tressler*, 32 Ohio App. 2<sup>nd</sup> 79, 3<sup>rd</sup> District, Defiance County (agreement to stop child support in exchange for adoption consent).

<sup>13</sup> See, *Hill v Sonitrol of Southwestern Ohio*, 36 OS 3<sup>rd</sup> 36 (1988); *Lone Star vs Quaranta*, 2003 Ohio 3287, Ohio Appellate Court 7<sup>th</sup> District, Mahoning County (2003); Restatement of the Law 2<sup>nd</sup>, Contracts Section 302.

### **Petitioner - Michele Hobbs**

In her filings, the petitioner refers to her relationship with the child as "co parent". Ms. Hobbs and the mother were involved in a long term committed relationship, lived together and shared property. They discussed and planned the conception and birth of the child together. The petitioner contributed financially and emotionally both before and after the birth. The petitioner had an active role in raising and caring for the child on a daily basis.

The legal equitable theories of De facto Parent, In Loco Parentis and Psychological Parent have been relied upon in other jurisdictions to accord a person without genetic ties to a child a legal designation and standing equal to the parents.<sup>14</sup> Generally these theories rely upon a four part test that considers if the petitioner had lived together with the child, if the legal parent consented and fostered the relationship, if the petitioner assumed obligations and responsibilities of parenthood without expectation of compensation for a significant period of time, and if a psychological bond between petitioner and child was formed.<sup>15</sup>

However, The Ohio Supreme Court in the case of *In re Bonfield*, has expressly declined to consider the four part test or any of the theories that would give an equal co-parent status to a person beyond those set out by the Ohio legislature.<sup>16</sup> The Ohio Supreme Court found it inappropriate to broaden the narrow class of persons who are statutorily defined as parents.<sup>17</sup> The Ohio statutes indicate that there are three ways a parent and child relationship can be established including natural parenthood, by adoption, or by other legal means in the Ohio Revised Code that confer or impose rights, privileges, and duties upon certain individuals.<sup>18</sup>

Therefore Ohio law does not provide for two same sex parents to both be considered as parents as under the circumstances in this case, even if the two persons agree.<sup>19</sup> And also a grandparent, stepparent or any other person cannot gain the legal status of "parent" by virtue of discussion, agreement, finance or care giving deeds, no matter how extensive.

Therefore the Magistrate correctly considered that the petitioner Ms Hobbs is a legal non parent of the child in this case under Ohio law.

<sup>14</sup> *ENO vs LMM*, 71 N.E 2<sup>nd</sup> 886 (Massachusetts 1999); *In re Custody of HSH-K*, 533 NW 2<sup>nd</sup> 419, (Wisconsin 1995); *VC vs MJB*, 748 A 2<sup>nd</sup> 539 (New Jersey 2000).

<sup>15</sup> *In re Custody of HSH-K*, 533 NW 2<sup>nd</sup> 419, (Wisconsin 1995)

<sup>16</sup> *In Re Bonfield*, 97 OS 3<sup>rd</sup> 387 (2002); 2002 Ohio 6660

<sup>17</sup> *In Re Bonfield*, 97 OS 3<sup>rd</sup> 387 at 393 (2002); 2002 Ohio 6660

<sup>18</sup> ORC 3111.01; *In Re Bonfield*, 97 OS 3<sup>rd</sup> 387 at 392 (2002); 2002 Ohio 6660; see also *In Re Ray*, C00436, Ohio Appellate Court 1<sup>st</sup> District, Hamilton County (unreported 2001).

<sup>19</sup> *In Re Bonfield*, 97 OS 3<sup>rd</sup> 387 (2002); 2002 Ohio 6660

## Non parent custody analysis – Michele Hobbs

A parent has constitutional rights paramount to other persons who are non parents.<sup>20</sup> However, a non parent can obtain custodial rights of a child, surmounting the normally paramount rights of legal parents. This concept has been long recognized in law.<sup>21</sup> The leading and predominate case in this area of Ohio law is *In Re Perales*.<sup>22</sup> That case and the legion of cases following it hold out that a non parent may obtain custody of a child "only if a preponderance of evidence indicates abandonment, contractual relinquishment of custody, total inability to provide care or support, or that the parents are otherwise unsuitable, that is, that an award of custody would be detrimental to the child."<sup>23</sup>

The petitioner's petition for custody properly cites the correct statute, language and allegations for custody consideration to a non parent, particularly due to alleged contractual relinquishment.

The evidence showed that the mother takes good care for the child. She has nurtured the child and provided for her, albeit with the help of the petitioner and the alleged father. It cannot be said that the mother abandoned this child, or that she is totally unable to provide care or support for the child. She is not unsuitable, that is where continued custody would be detrimental to the child.

The only remaining *Perales* consideration is whether the mother contractually relinquished custody. The petitioner relies upon the mother's own words, documents, action and deeds to show that the mother contractually relinquished at least partial custody rights in favor of the petitioner.

In most non parent cases where contractual relinquishment is at issue, the relinquishment is total. In those cases sole legal custody was awarded to the non parent.<sup>24</sup> Even so, legal custody by a non parent can be subject to the residual rights and responsibilities of the parents including visitation, religious decisions and child support if in the child's best interests.<sup>25</sup>

<sup>20</sup> *Troxel vs Granville*, 530 US 57 (2000); *Santosky v. Kramer*, 455 US 745 (1982); *Meyer v Nebraska*, 262 US 390 (1923); *In re Perales*, 52 OS 2nd 89 (1977).

<sup>21</sup> *Clark v Bayer*, 32 OS 299 (1877).

<sup>22</sup> *In Re. Perales*, 52 OS 2<sup>nd</sup> 89 (1977).

<sup>23</sup> *In re Perales*, 52 OS 2<sup>nd</sup> 89 (1977).

<sup>24</sup> *Massito v Massito*, 22 OS 3<sup>rd</sup> 63 (1986) (grandparent guardianship); *In Re. Danielle Bailey*, 2005 Ohio 3039, Ohio Appellate Court 1<sup>st</sup> District, Hamilton County (contract with third party caretaker); *In re Galen*, 203 Ohio 1298, Ohio Appellate Court 3<sup>rd</sup> District, Seneca County (contract with parent and unfit too); *In Re DB*, 116 OS 3<sup>rd</sup> 363(1967)(surrogacy contract upheld).

<sup>25</sup> ORC 2151.011 Definitions (46) "rights, privileges, and responsibilities remaining with the natural parent after the transfer of legal custody of the child, including, but not necessarily limited to, the privilege of reasonable visitation, consent to adoption, the privilege to determine the child's religious affiliation, and the responsibility for support.



A contractual relinquishment of a portion or a share of custody is a more difficult concept. Shared custody can have many meanings, from a mere visitation schedule, to joint decision making in school matters, health and treatment issues, religious practice, discipline principles etc. Shared custody, like shared parenting, envisions communication and co-operation between the custodians and seeks agreement rather than contentiousness.

And in this case there is also a legal father who is seeking shared custodial rights. The petitioner specifically requests full and equal participation in all decisions listed above and alternating weeks with the child in her care. She considers the legal father for a lesser share based on his previous limited role and suggests one weekend each month parenting time with no decision making as appropriate for him.

The notion that a non parent and a parent can formally share custody in Ohio was recently confirmed in the Ohio Supreme Court case of *In Re Bonfield*.<sup>26</sup> As outlined above the Ohio Supreme Court ruled that a non parent and a parent could not enter into a shared parenting plan, because the non parent was simply not considered a parent in Ohio. However the Court stated that a non parent could enter into a shared custody agreement with a parent and such would assumedly withstand attack by a third person, survive after death or relationship breakup and control any disputes arising between the shared custodians.

The testimony and evidence presented to the Magistrate showed a combined discussion and decision to have a child with the stated intention that the child would live with both the mother and the petitioner who would both care for her. The petitioner was an active participant in preparing for the child's birth, emotionally, physically and financially. Along with the mother, the petitioner signed hospital consent forms regarding the *in vitro* process, its risks and egg disposal. The petitioner was present at the actual birth. The hospital presented the couple with a ceremonial birth certificate listing both the mother and the petitioner without designations.

The mother executed a Will naming the petitioner as the guardian of the child in the event of the mother's death. The mother executed a General Durable Power of Attorney and a Health Care Power of Attorney granting the petitioner the ability to make school, health and other decisions for the child. All three documents contained language that the petitioner is considered by the mother to be the child's "co parent in every way".

For approximately two years after the birth the mother and the petitioner both cared for the child, living together as a family. There are pictures, notes, e-mails and postcards where the petitioner was referred as *momma*, family etc. by the mother, child and others. The mother and petitioner acted as a family and led others to believe that they shared responsibilities as equal partners and parents of this child. Some of those friends and associates testified that they understood the family to consist of two equal mothers and a child.

---

<sup>26</sup> *In Re Bonfield*, 97 OS 3<sup>rd</sup> 387 (2002), 2002 Ohio 6660; see also *In Re. JDM*, 204 Ohio 5409, Ohio Appellate Court 12<sup>th</sup> District, Warren County (2004)

The mother testified that she never intended to share the child and always considered the child to be hers - with the help and support of the petitioner - but not as legal shared custodians. The mother now denies that she ever considered the petitioner as an equal in custody. The baby was given the same surname as the mother with no hyphenated reference to the petitioner. The mother's witnesses and the father all testified their understanding that the child was to have only one mommy and one daddy. They considered the petitioner an interested partner but not sharing in the legal custody of the child.

The petitioner asserts that the mother's implied actions of allowing her to be a part of the child's life, in combination with the mother's documents and words, are evidence that the mother contractually relinquished a share of custody to her as co-custodian of the child, and that the implied contract should now be enforced by this Court.

It is very important to note that every document the mother signed was revocable by her. The will and the power of attorney documents were revocable unilaterally and at any time. She told the alleged father that he would be in the child's life, but made certain that the donor-recipient agreement was completely at her discretion regarding custody. That donor-recipient agreement contained clauses allowing her to grant any custody or care as she might unilaterally determine. The mother completely controlled each document.

The legal documents signed by the mother before the birth evidenced the parties' knowledge that the mother, as the legal parent, had legal rights of custody care and control over the child that were superior to the petitioner. In the Health Care Power of Attorney, the mother listed the petitioner as her legal agent in a fiduciary capacity for her. She also listed the maternal grandmother as a secondary agent. The power of attorney took immediate effect. There is nothing in the instrument that gives guidance if the mother's wishes differed from the petitioner's, such as a decision not to resuscitate the child - except the document was revocable at any time by the mother and the mother would then control - not the petitioner. The same revocability was present in the General Durable Power of Attorney. The Last Will and Testament nominated the petitioner as the guardian of the child but only upon the mother's death. Of course this document was easily revocable too.

It appears that no reciprocal power of attorney was executed by the petitioner in favor of the mother because she already held and controlled all the custody rights that a power of attorney might profess to give her. There was mention in testimony that the petitioner executed a will with testamentary provisions for the mother, but there would be no need to nominate the mother as guardian of the child because she is the child's legal parent with recognized custodial rights.

Same sex couples in Ohio who want to memorialize their commitment and agreements concerning a child they consider as belonging to both of them may feel compelled to execute such documents and add language that they consider each other as a co parent in every way. But that addition does not change the revocability of those documents. These documents do not really protect them if the couple separates. Adoption is generally not available under circumstances like this case.<sup>27</sup> These couples seek ways to allow them to legally have a secure and stable family that does not have a traditional basis of parentage or lineage.

---

<sup>27</sup> ORC 3107.03

*In Re Adoption of Doe*, 130 OA 3<sup>rd</sup> 288, , Ohio Appellate Court 9<sup>th</sup> District, Summit County (1998)

However, Ohio has set out a proper and enforceable method to memorialize agreements between such couples. In 2002 the Ohio Supreme Court instructed that agreeing couples may file their agreement for shared custody of a child with the Juvenile Court and if it is in the child's best interest, then the agreement will be enforced.<sup>28</sup> The petitioner and the mother were considering their decision to have this child in 2005 well after the *Bonfield* decision.<sup>29</sup> They were represented by counsel. Yet they chose not to enter into a shared custody agreement and present it to the Court.

In fact, when presented with the idea of entering an enforceable shared custody agreement as envisioned by the Ohio Supreme Court, the mother refused repeatedly. It is noted that though shared custody was discussed for some time by the petitioner and the mother, the testimony was unclear whether a shared custody agreement was actually drafted or presented, but certainly the mother consistently refused to enter or sign any formal shared custody agreement.

The unofficial hospital birth certificate, birth notices and announcements were ceremonial in nature and carried no force against the mother. The consent form regarding health risk and egg disposal carried no liability to the mother.

Importantly, in *Bonfield* there was not three persons involved, just two. And in *Bonfield* the non parent and parent in were in agreement and would voluntarily enter an agreement, which the Ohio Supreme Court declared would not be disturbed, so long as the Juvenile Court agreed that such was in the best interests of the child. The Ohio Supreme Court did not hold that shared custody could be mandated to a parent who is not in agreement.

*In Re Perales* does not require that a contractual relinquishment of custody be written.<sup>30</sup> However under circumstances such as are present in this case a writing of the agreement between the petitioner and the mother would be instructive and preferred to determine whether a contractual relinquishment was made and how much custody was relinquished. Nothing can be more important than the custodial rights in a child, but many lesser contracts are required to be in writing.<sup>31</sup> In Ohio, any real estate transaction, most wills, loan agreements and pre nuptial agreements must be in writing.<sup>32</sup> The implied contract ability to create a common law marriage was abolished in Ohio in 1991.<sup>33</sup> A shared custody agreement envisioned by the Ohio Supreme Court in *Bonfield* would obviously need to be in writing in order to submit it to a court for approval.<sup>34</sup> It is difficult if even possible to determine how much or what portion of custodial rights a parent would be relinquishing when an implied contract encompasses only a share of custody and is not reduced to writing.

---

<sup>28</sup> *In Re JDM*, 204 Ohio 5409, Ohio Appellate Court 12<sup>th</sup> District, Warren County (2004)

<sup>29</sup> *In Re Bonfield*, 97 OS 3<sup>rd</sup> 387 (2002), 2002 Ohio 6660

<sup>30</sup> *In re Perales*, 52 OS 2nd 89 (1977).

<sup>31</sup> ORC 1335 Statute of Frauds

<sup>32</sup> ORC 1335.04; ORC 2107.03; ORC 2107.60; ORC 1335.02

<sup>33</sup> ORC 3105.12

<sup>34</sup> *In Re Bonfield*, 97 OS 3<sup>rd</sup> 387 (2002), 2002 Ohio 6660

The most important factor in the determination of whether the mother's words, actions and deeds amounted to a contractual relinquishment of some of her custodial rights was her consistent refusal to enter into a shared custody agreement envisioned under *In Re Bonfield*.<sup>35</sup> The petitioner and mother discussed this concept of shared custody several times from before birth and after. Each time the mother refused to consider such an agreement.

The mother said things to the petitioner – her life partner, and to the alleged father that were interpreted as promises. These were things that the father and the petitioner wanted to hear at that time. She allowed the petitioner and others to view the petitioner as part of a three, sometimes four person family. The mother's intentions, motives and indications may have changed over time. However at all times the mother maintained control of the custodial rights to the child, signing things only when she was fully in control or could revoke documents at her unilateral discretion. But when really pressed with conversation about entering a shared custody agreement that she could not revoke she refused to give away any custodial rights. The mother's actions are not admirable but she did not want to give up her custodial rights to the petitioner or anyone else.

A circumstance where the facts were very similar was considered shortly before the *Bonfield* decision. In that case the Appellate Court upheld the Juvenile Court finding that no implied contract or unsuitability of the mother was proven.<sup>36</sup>

The alleged father did not have a contract implied or otherwise that contractually relinquished his custodial rights in favor of the petitioner. As noted earlier the petitioner was not a party to the donor-recipient agreement and the mother retained complete control over the father's ability to exercise custodial rights with the child. The petitioner does not consider the alleged father equal to her regarding the child, primarily because he had signed the donor – recipient agreement and has had less contact and care with the child than her.

Under the circumstances of this case the Magistrate erred in ruling that the mother entered an implied unwritten contract that relinquished some but not all of the mother's custodial rights in the child. The Magistrate incorrectly forced shared custody with a non parent without the parents' agreement, against their objection and contrary to their belief of what is in the best interest of their child.

Although Mr. Liming states that his basis for filing the petition is an agreement with the mother for shared custody as the child's parent, he did not file under or follow any of the provisions outlined for shared parenting under 3109.04(A)(2), 3109.04(D) or 3109.04(G). His present complaint and petition are not appropriate for court consideration at this time but may be re filed in the future with more specific detail and reference to the code sections giving authority to his custodial claims.

---

<sup>35</sup> *In Re Bonfield*, 97 OS 3<sup>rd</sup> 387 (2002), 2002 Ohio 6660

<sup>36</sup> *In Re Jones*, 202 Ohio 2279, Ohio Appellate Court 2<sup>nd</sup> District, Miami County (2002)

**Therefore** for the reasons as set out in this entry:

The Magistrate's Decision is rejected.

The now determined father, Scott Liming's objections are granted.

The now determined father, Scott Liming's complaint and petition are both dismissed.

The now determined father, Scott Liming may enter an arms length agreement for shared parenting with the mother under the correct Ohio statutes and they may file it with the Court for hearing, adoption and enforcement if in the best interests of the child.

The now determined father, Scott Liming, with or without the mother's agreement, may petition the court for an allocation of parental rights and responsibilities under the correct Ohio statute and file it with the Court for hearing and determination in the best interests of the child.

The now determined father, Scott Liming or the mother, Kelly Mullen may file a request for child support with the Child Support Enforcement Agency under the appropriate Ohio statute.

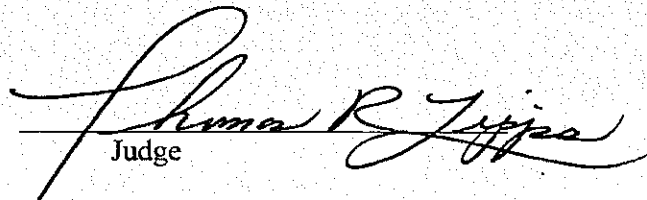
The mother, Kelly Mullen's objections are granted. The mother retains legal custody of the child, Lucy Mullen, in accordance with the automatic provisions of law regarding unmarried mothers.

The petitioner, Michelle Hobbs' petition for shared custody is denied and dismissed.

The interim order for visitation of the child with the petitioner Michelle Hobbs is terminated.

4-13-2009

Date

  
Judge

