

**COURT OF COMMON PLEAS
JUVENILE DIVISION
HAMILTON COUNTY, OHIO**

IN RE: LUCY MULLEN

Case No. F07-2803X

**Judge Grady
Magistrate David Kelley**

**MOTHER, KELLY MULLEN'S,
REBUTTAL ARGUMENT**

Now comes the child's Mother, Kelly Mullen, by and through counsel, and hereby states the following as her Rebuttal Argument:

I. The Standard for Review requires Ms. Hobbs to demonstrate Ms. Mullen is unsuitable to retain custody of her daughter because she has contractually relinquished her custodial rights.

Ms. Mullen never entered into a contract, written or verbal, with Ms. Hobbs regarding the care and custody of Lucy.

In Ms. Hobbs' Closing Argument, she incorrectly states, "Ms. Hobbs and Ms. Mullen decided to have a child together using a known sperm donor." Ms. Hobbs goes on to state that the Donor Recipient Agreement on Insemination which was submitted to this Court as Plaintiff's Exhibit 1 gives Ms. Hobbs contractual custodial rights. However, upon inspection of that document, it is clear that Ms. Hobbs never entered into the document at all. The document specifies an agreement between Donor and Recipient. Donor is defined as Scott Allan Liming and Recipient is defined as Kelly Mullen. The document was signed only by Ms. Mullen and Mr. Liming. This document cannot be a contract between Ms. Mullen and Ms. Hobbs where Ms. Hobbs never even signed the document.

II. Ms. Hobbs argues Ms. Mullen's Will and Powers of Attorney which have since been revoked, served to contractually relinquish Ms. Mullen's custodial rights.

There is no legal authority, no case law, and no statutory law which supports Ms. Hobbs' position that Ms. Mullen's revoked Will and Powers of Attorney granted custody of Lucy to Ms. Hobbs. Indeed, the person who drafted the documents, Scott Knox, said in his testimony (See transcript of proceedings, cross-examination of Scott Knox, page 57, lines 22 through 25 and page 58, lines 1 through 6), "Sure. I understand. Now, you indicated that you tell your clients that you know these documents that you've drafted, the Will and Powers of Attorney, can be ripped up the next day and then they would have no power to confer anything; is that correct? Right. Okay. And - - and you tell that to all of your clients? Right."

III. Ms. Hobbs wrongfully states that by allowing Ms. Hobbs to care for Lucy, she granted Ms. Hobbs *de facto* custodial rights.

In her Closing Argument, Ms. Hobbs talked about how she was with Ms. Mullen during Ms. Mullen's pregnancy and Lucy's birth and that she took care of Lucy while Ms. Hobbs and Ms. Mullen lived together. According to Ms. Hobbs, this was an implied contract by Ms. Mullen giving Ms. Hobbs custodial rights. Legally, in Ohio, that's a fallacy.

The Bonfield case is controlling in this issue. See In re Bonfield, 780 N.E.2d, 241, 247 Ohio 2002. In the Bonfield case, the Ohio Supreme Court expressly refused to adopt the *de facto* parenting test. Specifically, in writing for the majority, Chief Justice Moyer stated, "Therefore, as Ohio Revised Code §3109.04 specifically uses the term parent and this term is defined in Ohio Revised Code §3111.01, we find it inappropriate to adopt Appellant's four part test to broaden the narrow class of persons who are statutorily defined as parents for the purposes of entering into a Shared Parenting Agreement." Ohio Courts have specifically rejected the *de facto* parenting test in both the Bonfield case and In re Jones which stated, "Even where there is a close relationship with the nonparent,

relinquishment may not occur where a parent allows a nonparent to be part of the child's life while the biological parent still maintains care and support." See In re Jones, 2002 WL 940195, 4 (Ohio App. 2002). For these reasons, the fact that Ms. Hobbs cared for Lucy is not dispositive of the issue as to whether or not Ms. Mullen contractually relinquished her custody.

IV. Ms. Hobbs wrongfully states that taken in totality, the Wills, Powers of Attorney, Donor Recipient Agreement, and Ms. Hobbs' caregiving are evidence of Ms. Mullen's contractual relinquishment of custody.

The United States Supreme Court has demanded that a fundamental right cannot be implicitly waived but rather must be waived knowingly and intentionally. See Johnson v. Zerbst, 304 U.S. 458, 464, 465 (1938). In that case, the Supreme Court found "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." The Ohio Supreme Court has adopted the following as knowing and intentional waivers of custodial rights: guardianships, entries, divorce decrees, and shared custody agreements. See In re Perales, 52 Ohio St.2d 89, 89, 369 N.E.2d 1047, 1048 (1977), Masitto v. Masitto, 22 Ohio st.3d 63, 488 N.E.2d, 857, and In re Bonfield, 780 N.E.2d, 241, 247 Ohio 2002 respectively. However, there has never been a finding by an Ohio court that the biological parent had waived his or her right to custody absent some written document filed with the Court.

In this case, everyone agreed that although Ms. Hobbs had sought Ms. Mullen's signature on a Shared Custody Agreement, Ms. Mullen had refused repeatedly to sign any such agreement. See direct testimony of Kelly Mullen, page 45, lines 2 through 8, "and she - - so when things were good she'd say, I'd feel a lot more safe and secure if you would give me rights to Lucy. And I'd adamantly told her every time, I am not giving - - I am never signing anything, custody, visitation, nothing official, that gives you any rights to Lucy." See also page 46, lines 8 through 11, "Oh yeah. We had many out-

loud discussions where she knew she had no custodial rights to Lucy and she knew I was - - I was never going to give them to her.”

Further, finally, Ms. Hobbs states in her Closing Argument, “It is well settled under Ohio Law that when a biological parent agrees to grant custody of minor children in whole or in part to another person, the parent is bound by that contractual agreement.” However, each of the cases she cites in support had written contracts filed with the Court evidencing the biological parent’s desire to relinquish custody. In this case, no such contract was ever signed or filed. As such, Ms. Hobbs has failed to prove that Ms. Mullen is unsuitable to continue to parent her child because she contractually relinquished her custodial rights to Ms. Hobbs.

V. Ms. Mullen does not agree Ms. Hobbs is an appropriate and suitable adult to interact with her daughter, Lucy.

Pursuant to Ohio Revised Code §3109.042, Ms. Mullen as an unmarried female gave birth to Lucy on July 25, 2005, and therefore, has sole rights to make decisions regarding the benefit and welfare of Lucy. During this trial Ms. Mullen and even Ms. Hobbs’ witnesses called into questions Ms. Hobbs’ suitability to interact with Lucy.

For example, Ms. Hobbs’ witness, Kathleen Nardiello, discussed Ms. Hobbs’ habit of leaving the residence and leaving Lucy in someone else’s care. (See cross examination of Kathleen Nardiello, page 106, lines 24 to 25 and page 107, lines 1 through 9, “Okay. And do you remember specifically anything that Ms. Mullen complained about in terms of Ms. Hobbs’ lifestyle choices about not being home? Yeah. She complained that - - that Michele, you know, went - - went out too frequently. Went out where? She went out to a bar or she went out to visit friends or went out to dinner. I mean - -.”) (See also cross examination of Rochelle Nardiello, page 225, lines 10 through 23, “She was concerned that Michele’s lifestyle had not changed since the birth of Lucy which she had hoped and that she had continued to be just as social and visiting a local bar near their house. And she was concerned about

that. Okay. Did she mention to you anything about Ms. Hobbs being involved in an intimate relationship with other women? Yes. Could you tell us about that? She told us that she had found Michele kissing another woman at their door - - in their home at the time.”) Further, Canon Ann Wrider, Ms. Hobbs’ witness, testified that Ms. Hobbs was not even present for Lucy’s Baptism. (See cross examination testimony of Canon Ann Wrider, page 30, lines 7 through 18, “Right. But Ms. Hobbs did not appear? Right. Okay. And - - and were you ever made aware of why she wasn’t there? No. We didn’t know and asked and - - and couldn’t seem to get information about why she couldn’t be there. Ms. Mullen at no time indicated that she did not want to go forward because Ms. Hobbs was not there, did she? No.”) (See also testimony of Scott Liming, Lucy’s Father, page 141, lines 14 through 16, “- - what was the whole point of having a child if you don’t want to be home hanging out with your partner and that child?”) (See also, page 141, line 25 and page 142, lines 1 through 3, “So her - - her - - what were her habits as far as drinking and socializing and going out? Well, I mean, they’ve been again brought up numerous times.”) Ms. Mullen strenuously objected to Ms. Hobbs’ interaction with Lucy for a myriad of reasons. Ms. Mullen’s stated, first of all, when the two women lived together, Ms. Hobbs chose not to stay at home and spend time with Lucy. (See direct testimony of Kelly Mullen, page 41, lines 7 to 8, “She was out, I mean, five nights a week. She - - she would go to Milton’s down the street.”) (See also, page 47 of Kelly Mullen’s direct testimony, lines 14 through 19, “When she got home at two a.m. I said, Hey you’re - - I mean, I get it - - I get it. You’re not interested in this relationship. You know, you’re interested in yourself and your social life and your friends. You’re not interested in my family back here on Milton Street.’) Ms. Mullen objected to Ms. Hobbs’ failure to care for Lucy even when Lucy was supposed to be in her care. (See Kelly Mullen’s direct testimony, page 52, lines 6 through 10, “For three hours - - I was in my daughter’s room for three hours and at 1:30 in the morning - - so Michele Hobbs never came up and check on that baby one time or she would have known I was home for three hours.”) Ms. Mullen has repeatedly objected to

Ms. Hobbs' drinking habits particularly when she was supposed to be caring for Lucy. (See Kelly Mullen's direct testimony, page 53, lines 3 to 4, "Michele was so drunk - - so drunk she couldn't even - - she staggered up the steps.") (See also page 53, lines 6 and 7, "If there had been an emergency there is no way Michele Hobbs could have taken care of my baby.") Ms. Mullen also stated she was concerned about Ms. Hobbs' behavior after Lucy suffered a seizure. (See Kelly Mullen's direct testimony, page 57, lines 1 through 3, "After twenty minutes Shell said, Lucy seems fine. I'm going to head out. And I was livid.")

Finally, Ms. Mullen was very concerned about Ms. Hobbs having guns in the house. Ms. Mullen expressed fear for herself and her daughter. (See direct testimony of Kelly Mullen, page 58, lines 9 through 12, "You know, Michele owns three hand guns. And her behavior got so bizarre it got to the point where my dad and Scott and myself - - it wasn't safe to be there anymore.") (See also page 58, lines 16 and 17, "Well, I mean, first of all, she was out drinking, I mean, every night.") (See also page 59 of Kelly Mullen's direct testimony, lines 1 through 9, "She would bring strangers in the house for overnights. And, you know, it got to the point where I didn't sleep in the master bedroom anymore because other women had been sleeping in it. So I was sleeping in the back bedroom. And then on the nights that I would hear her come home with other women I'd actually go in and sleep with Lucy because there was a stranger in the house.")

Ms. Mullen also expressed concern about Ms. Hobbs even being willing to take care of Lucy and how Ms. Hobbs expressed hatred of Ms. Mullen. (See Kelly Mullen's direct testimony, page 60, lines 14 through 20, "So I waited a minute. And Lucy was crying very hard and she said, I want my mommy. So I walked into Lucy's room and Lucy reached out to me. Shell kind of shoved her toward me and Shell said, You know what? That's it. I'm done helping you take care of Lucy. And that was on September 5th.") (See also page 63, lines 2 through 8, "I did not let her go. And by this time - - I mean, by this point, especially by the time I moved out, she had expressed to Scott and others so much

hatred towards me that I - - I didn't - - it wasn't safe for her to take my baby anywhere. I don't feel safe with her taking my baby now anywhere.”)

Because the Standard of Review for a nonparent to gain custodial rights is unsuitability, there has never been a best interest determination in this case. However, the aforementioned testimony makes it clear that Ms. Hobbs is not an appropriate caregiver for Lucy Mullen.

VI. Ms. Hobbs has failed to prove Ms. Mullen relinquished care and custody of Lucy to her, and therefore, requests a new Standard of Review.

A. Ms. Hobbs asserts that she helped care for Lucy upon Lucy's birth. Ms. Hobbs cites this as evidence of Ms. Mullen's relinquishment of her custodial rights to Lucy. This position was expressly rejected by the testimony of both parties and the Ohio Supreme Court. Both Ms. Hobbs and Ms. Mullen agreed in their testimony that Ms. Mullen continued to care for Lucy every day of her life. Both parties also agreed Ms. Mullen had sought the help of a number of other people in caring for Lucy including Ms. Hobbs, Mr. Liming, the child's biological father, a baby sitter (Karen Reagan), Lucy's grandparents, her pediatrician, and a host of others.

Ms. Hobbs' position that by seeking the help of other parties including Ms. Hobbs, Ms. Mullen relinquished her custody is contradicted by the Ohio Supreme Court. The Ohio Supreme Court has clearly defined relinquishment as a biological parent failing to care for a child on a daily basis and turning over that care to another party. See Masitto v. Masitto, 22 Ohio st.3d 63, 488 N.E.2d, 857 and In re Perales, 52 Ohio St.2d 89, 89, 369 N.E.2d 1047, 1048 (1977). Where Ms. Mullen continued to care for Lucy every day, according to case and statutory law, there can be no relinquishment.

B. Ms. Hobbs' remedy is with the Legislative branch of the government not the Judicial branch.

Ms. Hobbs seeks to modify the current law. The current law requires there be a finding that Ms. Mullen is unsuitable to parent Lucy. The current law requires that this unsuitability be

shown by a contractual relinquishment. Case and statutory law requires the contract must be in writing, and that there must be a showing Ms. Mullen knowingly and intentionally relinquished her custodial rights. There is no case law or statutory law to support Ms. Hobbs request that this Court find when Ms. Mullen signed her Will and her Powers of Attorney, or when she allowed Ms. Hobbs to care for Lucy, or when Ms. Mullen signed the Donor Recipient Agreement with Mr. Liming, Ms. Mullen unknowingly relinquished her custody. This is in direct violation of the findings by the United Supreme Court. See Johnson v. Zerbst, 304 U.S. 458, 464, 465 (1938).

Further, Ms. Hobbs seeks to modify the legal definition of relinquishment. The Ohio Supreme Court has defined custodial relinquishment as when the custodial parent ceases to care for the child for some period of time. See Masitto v. Masitto, 22 Ohio st.3d 63, 488 N.E.2d, 857 and In re Perales, 52 Ohio St.2d 89, 89, 369 N.E.2d 1047, 1048 (1977). In this case, relinquishment never happened. Ms. Mullen has cared for and continues to care for Lucy through this date.

The law is clear. In order for any of Ms. Mullen's custodial rights to be disturbed (including awarding shared custody or visitation), this Court must first make a finding that Ms. Mullen is unsuitable to continue to be Lucy' sole residential parent and legal custodian. The Court must find that Ms. Mullen entered into a contract with Ms. Hobbs and that Ms. Mullen, at some point, failed to care for Lucy for some period of time and allowed Ms. Hobbs to care for Lucy instead. None of these facts are consistent with the facts of this case.

Ms. Hobbs seeks to have the standard changed. She seeks not to find that Ms. Mullen is unsuitable. (See cross examination of Michele Hobbs, page 345, line 9 (regarding Kelly Mullen), "She's a great Mom.") She seeks to have not a written contract but an implied contract as the standard for relinquishment of custody. Finally, she seeks to redefine relinquishment as allowing another party to assist with the care of the child rather than actually relinquishing care and custody of the child.

This branch of the government has no ability to offer Ms. Hobbs the relief she requests. The Legislative branch of the government drafts and adopts the statutes that govern the facts of this case. The Judiciary branch is entrusted with applying that current law. There is no evidence that Ms. Mullen is anything other than a suitable and appropriate custodial parent of Lucy Mullen. All evidence shows that Ms. Mullen never entered into a written or even oral contract with Ms. Hobbs relinquishing custody of her daughter. There is absolutely no evidence to indicate Ms. Mullen ever relinquished care and custody of her child to Ms. Hobbs at any time.

As such, Ms. Mullen respectfully requests this court dismiss Ms. Hobbs' Petition for Custody and find she has not met her burden to demonstrate that Ms. Mullen is unsuitable to retain custody of Lucy because she contractually relinquished custody of her daughter to Ms. Hobbs.

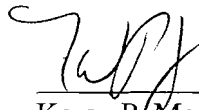
RESPECTFULLY SUBMITTED,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has this 12th day of November, 2008 been served by Regular Mail and/or e-mail upon Lisa T. Meeks and Christopher Clark, Attorneys for Michele Hobbs, 215 East 9th Street, Suite 650, Cincinnati, OH 45202 and Terry M. Tranter, Attorney for Scott Liming, 806 Second National Bank Building, 830 Main Street, Cincinnati, Ohio 45202.



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