COURT OF COMMON PLEAS
JUVENILE COURT DIVISION
HAMILTON COUNTY, OHIO

In the Matter of:		
LUCY KATHLEEN MULLEN		Case No. F07-2803
A Minor		

PETITIONER MICHELE HOBBS' POST-TRIAL REPLY MEMORANDUM IN SUPPORT OF HER VERIFIED PETITION FOR SHARED CUSTODY

Petitioner Michele Hobbs ("Ms. Hobbs"), through her undersigned counsel, hereby submits this reply memorandum in further support of her Verified Petition For Shared Custody and in response to the written "Closing Argument" submitted by Kelly Mullen ("Ms. Mullen").[1]

INTRODUCTION

In her Closing Argument, Ms. Mullen offers little to refute the basic facts underlying Ms. Hobbs' claim – namely, that Ms. Mullen and Ms. Hobbs decided to have a child together, that Ms. Hobbs was Ms. Mullen's partner throughout the *in vitro* fertilization process, pregnancy and birth, that Ms. Hobbs and Ms. Mullen shared parenting responsibilities, that the couple held themselves out to their families, friends, church and community as a family with two mothers and, that with Ms. Mullen's consent and encouragement, Ms. Hobbs developed a bonded, mother-daughter relationship with Lucy.

Instead, in her Closing Argument, Ms. Mullen relies on illogical reasoning and abrogated case law to make legal arguments that have been rejected both by the Ohio Supreme Court in the

[1] Scott Liming, who also filed a petition for custody of the minor child, did not submit a post-trial brief in accordance with this Court's briefing schedule.

Bonfield case and by this Court when it denied Ms. Mullen's motion to dismiss. Because Ms. Mullen's legal arguments are still incorrect and because Ms. Hobbs proved the allegations in her Petition For Custody, Ms. Hobbs should be awarded shared custody of Lucy.

ARGUMENT

I. MS. HOBBS' PETITION IS BASED ON LONG-STANDING, CONTROLLING PRECEDENT RECOGNIZING THAT PARENTS ARE CONTRACTUALLY BOUND BY THEIR AGREEMENTS TO RELINQUISH THEIR RIGHT TO EXCLUSIVE CUSTODY.

Ms. Hobbs' Petition For Custody is premised on the fact that she and Ms. Mullen brought Lucy into the world with the shared understanding and agreement that they would parent her together, and that they did so until the couple's relationship ended and Ms. Mullen attempted unilaterally to sever the mother-daughter relationship between Ms. Hobbs and Lucy.[2] The evidence presented at trial regarding the couple's actions overwhelmingly proves that the couple had an agreement to have and rear a child together and, as a result, Ms. Mullen voluntarily relinquished her otherwise exclusive custodial rights in favor of shared custody with Ms. Hobbs. The evidence also proved that Ms. Hobbs has a loving, maternal relationship with Lucy and that it would be in Lucy's best interest for this Court to enter an order protecting that relationship.

Ms. Hobbs' Petition For Custody is well-grounded in Ohio law. As this Court already concluded in its ruling on Ms. Mullen's motion to dismiss, Ms. Hobbs' Petition For Custody properly invokes the court's jurisdiction "to determine the custody of any child not a ward of another court of this state," R.C. 2151.23(A)(2); *see also Bonfield*, 97 Ohio St.3d 387, 394, 2002-Ohio-6660, 780 N.E.2d 241 ("[i]t is well settled under Ohio law that a juvenile court may adjudicate custodial claims brought by the persons considered nonparents at law"). *Bonfield*

[2] Contrary to Ms. Mullen's claim that Ms. Hobbs was involved in Lucy's life for only a year and a half, Lucy lived in the home Ms. Mullen shared with Ms. Hobbs for two years and three months, from her birth in July 2005 until October 2007, when Ms. Mullen unilaterally decided to move out of the couple's home with Lucy. After being denied access to her daughter for several months, Ms. Hobbs has had weekly visitation with Lucy since May 2008.

involved a lesbian couple's request for court entry of a statutory shared parenting agreement or, alternatively, shared custodial rights. Similar to Ms. Hobbs and Ms. Mullen, the couple in *Bonfield* planned for and was rearing children together. While the women jointly cared for and supported their children, who viewed them both as equal parents, only the biological mother had a legally recognized relationship with the children. *Bonfield*, 97 Ohio St.3d at 389. Seeking legal recognition of their children's relationship with both of them, which was in the children's best interests, the women petitioned the courts for entry of an appropriate order recognizing their equal status vis-à-vis the children. Through that agreement, the biological mother sought "to relinquish her right to sole custody of the children in favor of shared custodial rights with [her partner.]" *Id.* at 395. Although the Ohio Supreme Court ultimately ruled that statutory *parenting* agreements were not an available remedy, the Court found that entry of a shared *custody* agreement was appropriate, *id.* at 395-96, relying on a long line of cases.

In so ruling, the Ohio Supreme Court confirmed that legal parents may relinquish otherwise exclusive custodial rights in favor of shared custody in the best interests of their children and confirmed that Ohio courts must enter and enforce such agreements "subject only to a judicial determination that the custodian is a proper person to assume the care, training, and education of the child." *Id.* citing *Masitto v. Masitto* (1986), 22 Ohio St.3d 63, 65-66, 488 N.E.2d 857 (*per curiam*). *Bonfield* held that established Ohio standards regarding relinquishment of child custody rights apply equally to lesbian and gay parents and their children. It also confirmed court jurisdiction to resolve disputed custody claims and the standard for doing so where, as here, custody is disputed between a parent and nonparent at law. *Bonfield*, 97 Ohio St.3d at 394 citing *In re Perales* (1977), 52 Ohio St.2d 89, 6 O.O.3d 293, 369 N.E.2d 1047.

The *Bonfield* decision is consistent with the long line of cases that have held that parents could grant custody rights to people who were not legal parents, and that agreements to do so are enforceable. *See Clark v. Bayer* (1877), 32 Ohio St. 299, 310, 1877 WL 120 (1877) (holding that a father's agreement to bestow custody rights on the children's grandfather was a valid contract and that the father could not later unilaterally sever the children's relationship with their grandfather); *Rowe v. Rowe* (1950), 44 O.O. 224, 97 N.E.2d 223 (holding that parent's agreement to share custody with grandparents was enforceable); *In re Perales*, 52 Ohio St.2d at 97, (citing *Clark* for the proposition that non-parents may be awarded custody when parents have contractually relinquished it); *Masitto*, 22 Ohio St.3d at 66 (holding that by entering into an agreement that grandparents would have custody, the father forfeited his otherwise exclusive right to custody of his daughter even though he continued to provide support); *In re Hockstock*, 98 Ohio St.3d 238, 243, 2002-Ohio-7208, 781 N.E.2d 971 (noting that parents can contractually forfeit their exclusive custodial rights).

Consistent with this body of law, Ms. Hobbs alleged in her Petition and proved at trial that Ms. Mullen, by her words and conduct, contractually relinquished exclusive custody in favor of shared custody with Ms. Hobbs. Ms. Hobbs also proved that she is a proper person to assume the care, training, and education of Lucy and that it would not be in Lucy's best interest to sever the mother-daughter relationship between Ms. Hobbs and Lucy. As a result, under established Ohio law protecting children and their relationships with individuals who have acted as their parents or other unusually significant custodians, Ms. Hobbs should be granted shared custody of her daughter Lucy.

A. Partial Relinquishment of Custody By A Biological Parent In Favor Of Shared Custody Has Been Recognized By The Ohio Supreme Court.

In her Closing Argument, Ms. Mullen incorrectly insists that partial relinquishment of custody is not a doctrine supported by any Ohio statutory or case law and that Ms. Hobbs has failed to cite any law or precedent in support of her position. This argument ignores the central holding in *Bonfield.* In *Bonfield*, the Ohio Supreme Court faced this exact question – whether a biological mother can relinquish exclusive custody in favor of shared custody with her lesbian partner. The Court answered in the affirmative, confirming that a parent may elect to remain involved in a child's life as a co-custodian by relinquishing exclusive custody in favor of shared custody and that this relinquishment is binding and enforceable on the parent. *Bonfield*, 97 Ohio St.3d at 395, citing *Masitto*, 22 Ohio St.3d at 65-66 (father's retention of custodial rights is not inconsistent with a finding that he voluntarily relinquished sole custody and enforcement of his agreement to do so). In essence, the *Bonfield* court reaffirmed the long-standing contractual relinquishment theory articulated in numerous cases and applied that theory in a situation where the biological parent was relinquishing exclusive custody in favor of shared custody. Thus, contrary to Ms. Mullen's argument, Ms. Hobbs *has* cited precedent in support of her position, namely binding precedent from the Ohio Supreme Court.

In contrast, in her attempt to persuade this Court to reject the Ohio Supreme Court's analysis in *Bonfield,* Ms. Mullen cites *In re: Jones*, Miami App. No. 2000 CA 56, 2002 WL 940195, an unpublished, intermediate appellate court decision that predates *Bonfield* and which was abrogated by *Bonfield* with respect to the very point for which Ms. Mullen cites it. In *In re: Jones*, 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." *In re: Jones*, 2002 WL 940195 at *5. Seven months later, in December 2002, the Ohio Supreme Court embraced 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 to cases dating back to the Nineteenth Century. Thus, Ms. Mullen'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.*

Perhaps recognizing that the law does not support her argument, Ms. Mullen advances a specious "slippery slope" argument in an attempt to persuade this Court to ignore the relevant case law and reject Ms. Hobbs' petition. Ms. Mullen argues that, if courts were to accept Ms. Hobbs' legal theory, then any person who assists parents – e.g., babysitters, nannies, school teachers, and coaches – would have a viable custody claim under a partial relinquishment theory. This absurd argument ignores the fundamental differences between the relationships that these service providers have with children and the relationship that Ms. Hobbs has with her daughter Lucy. A school teacher did not cut Lucy's umbilical cord – Ms. Hobbs did. A babysitter did not have complete unfettered legal decision-making authority with respect to Lucy – Ms. Hobbs did. A nanny did not jointly decide to have a baby with Ms. Mullen and act as her partner through the *in vitro* fertilization process and pregnancy – Ms. Hobbs did. A coach did not cook for and care for Lucy and drive her to and from daycare every day – Ms. Hobbs did. Simply put, the legal theory upon which Ms. Hobbs relies protects the relationships children have with people who have acted as their custodians in a parent-like capacity. It has no application to babysitters, nannies, school teachers and coaches and it demeans the child-centered interest at stake here.

B. A *Written* Contract Is Not A Necessary Prerequisite To Prove The Existence Of An Agreement To Relinquish Custody.

Ms. Mullen also incorrectly argues that Ms. Hobbs cannot prevail unless she can produce a written, irrevocable contract explicitly granting her legal custody. There is no requirement that the contractual relinquishment of custodial rights be memorialized in a written agreement. Rather, a parent's voluntary relinquishment of custodial rights is simply a question of fact for a trial court to determine based on the parent's writings, words and conduct. *Masitto*, 22 Ohio St.3d at 65. While a written agreement is one form of evidence, it is not necessary, and courts have enforced parents' voluntary relinquishments of custodial rights in the absence of any writing. *Masitto,* 22 Ohio St.3d at 66 (considering a father's conduct, "taken as a whole" in determining that he relinquished custody); *see, also, Clark*, 32 Ohio St. at 305-06 and 308 (recognizing that parents may relinquish custody "by act and word" and finding that an oral agreement and the parties' corresponding conduct proved parental relinquishment); *In re Galan*, Seneca App. No. 13-02-44, 2003-Ohio-1298 (enforcing a parent's contractual relinquishment of custody in favor of nonparents based on a phone conversation); *Rowe*, 44 O.O. 224 (language in divorce decree was evidence of a prior enforceable agreement to relinquish custody); *Reynolds v. Goll*, 75 Ohio St.3d 121, 1996-Ohio-153, 661 N.E.2d 1008 (enforcing nonparents' custodial rights over parent's objection in the absence of a court order or other written instrument).

Ms. Mullen's reliance on *Masitto* and *Perales* for the proposition that contractual relinquishment can only be proven by the existence of a written, binding contract is misplaced. In *Masitto,* the father's agreement to relinquish custody was reflected in a divorce decree, but the Court specifically stated that it was basing its decision on the father's conduct "taken as a whole." *Masitto,* 22 Ohio St.3d at 66. In *Perales*, although the Court's recitation of the facts indicates that the mother had signed a written agreement purporting to give custody of her child

to a non-parent, the Court did not characterize the agreement as a binding contract. Nor did it state that such a contract or written agreement was necessary to prove contractual relinquishment. In light of the cases that have found contractual relinquishment in the absence of a binding, written contract, Ms. Mullen's argument that such a contract is required is not well-founded.

As discussed below and in Ms. Hobbs' opening post-trial memorandum, Ms. Hobbs proved through Ms. Mullen's writings, words, and conduct that Ms. Mullen contractually relinquished her exclusive right to custody in favor of shared custody. A signed, written agreement to that effect is not required under Ohio law.

C. The Contractual Relinquishment Concept Is Applicable Where There Is a Dispute Between the Biological Parent and the Non-Biological Custodian.

In prior pleadings, Ms. Mullen has argued that *Bonfield* is inapplicable because, in *Bonfield*, there was no dispute between the two women who were both seeking a joint custody order from the Court. (Mullen Motion to Dismiss ¶¶ 6, 10 and 14) This factual distinction, however, does not refute the core legal principle that was articulated in *Bonfield* and the other cases discussed in *Bonfield*—namely, that a biological parent who contractually relinquishes his or her right to exclusive custody will, under Ohio law, be bound by that agreement. Thus, while it is true that there was no dispute in *Bonfield*, the Ohio Supreme Court decided that the couple in *Bonfield* could enter into a joint custody agreement because, under Ohio law, the biological mother could relinquish her right to custody and that she would be *bound* by that agreement. It is the legal concept recognized in *Bonfield*, not the specific factual circumstances, that are applicable to the matter currently before the court. Furthermore, the contractual relinquishment concept discussed in *Bonfield* has been recognized, applied and enforced in numerous other cases where there *has* been a dispute between the biological parent and the non-biological custodians.

See, e.g., Hockstock, Reynolds, Masitto and *Perales*. Thus any suggestion that Ms. Hobbs does not have a right to custody because the parties are not now in agreement is simply legally incorrect. The issue for this Court to decide is not whether Mr. Mullen *now* wants to relinquish exclusive custody. Rather, it is whether she already has.

II. THE TOTALITY OF THE EVIDENCE, NOT JUST MS. MULLEN'S WILL AND POWERS OF ATTORNEY, PROVES THAT MS. MULLEN AGREED TO RELINQUISH EXCLUSIVE CUSTODY IN FAVOR OF SHARED CUSTODY.

As detailed in her Post-Trial Memorandum, Ms. Hobbs presented overwhelming evidence that she and Ms. Mullen agreed to have a child together and to raise that child as equal co-custodians in a "two Mommy" household. To summarize, this evidence includes:

- documents and testimony regarding Ms. Mullen's will and powers of attorney in which she stated that Ms. Hobbs' was Lucy's "co-parent in every way" and granted Ms. Hobbs "every Power with respect to my child that I possess";
- documents and testimony regarding Ms. Hobbs' active participation as Ms. Mullen's partner in the *in vitro* fertilization process, the pregnancy and the birth;
- testimony from numerous witnesses regarding Ms. Hobbs acting as an equal co-parent to Lucy;
- documents and testimony from numerous witnesses regarding how Ms. Mullen and Ms. Hobbs told Lucy, their families, their friends, their church, their community and each other that they were a family with two mothers.

Ignoring most of this evidence, Ms. Mullen argues that, because her will and powers of attorney were revocable, Ms. Hobbs has failed to prove that she and Ms. Mullen had an agreement regarding their child. Ms. Mullen misunderstands, however, the evidentiary relevance of the will and powers of attorney. Ms. Hobbs is not arguing that these documents were irrevocable. Nor is she arguing that the documents are themselves the agreement between the women. Rather, the documents are a powerful, credible part of the totality of evidence reflecting the couple's agreement. The documents indicate that, from the very beginning, Ms. Mullen intended Ms. Hobbs to be an equal co-custodian to their daughter Lucy, acting as a "co-parent"

with equal responsibilities and decision-making authority. Indeed, attorney Scott Knox stated that the documents he prepared for Ms. Mullen were the type of documents that he drafts when a lesbian couple comes to him and expresses an agreement to co-parent a child. (Knox at I:71.)

The intent reflected in these documents is completely supported by the rest of the evidence presented at trial, which demonstrates that, after Lucy was born, the two women acted completely in accord with their intent. They shared parenting responsibilities and held themselves out as Lucy's two mothers. In short, Ms. Hobbs, with Ms. Mullen's consent and encouragement, assumed the role of Lucy's second mother. Thus, it is the totality of the evidence, not just the wills and powers of attorney, that prove the agreement that the two women had regarding their child.[3]

In light of the contemporaneous documentary evidence and testimony from non-biased third party witnesses proving that the couple had an agreement to have and raise a child together, Ms. Mullen's testimony that she never intended Ms. Hobbs to be a co-custodian is simply not credible. In a desperate attempt to turn this Court's attention away from this evidence, Ms. Mullen highlights in her Closing Argument her own testimony in which she claims that Mr. Knox told her that the documents he drafted for her gave Ms. Hobbs no rights to Lucy. This testimony, which is inadmissible hearsay, was objected to at trial and stricken by the Court. (*See* Mullen at II:109-10.) More importantly, Ms. Mullen's inadmissible testimony was not supported by Mr. Knox, who testified that, although the documents he drafted were revocable, he could not opine as to whether they might have a legal significance that survived their revocation. (Knox at

[3] Ms. Mullen attempts to dismiss the evidence regarding Ms. Hobbs' role in the child's life by saying that it pertains to a *de facto* parenting theory that is not available under Ohio law. Here again, Ms. Mullen is mistaken. Ms. Hobbs is not asserting that she is a *de facto* parent. Rather, her request for relief is based on the fact that Ms. Mullen contractually relinquished her right to exclusive custody in favor of shared custody. The evidence pertaining to Ms. Hobbs' equal involvement in parenting Lucy is part of the totality of evidence proving the couple's agreement regarding custody.

I:56.) In short, at trial, Ms. Mullen was revealed as a woman who, now that she no longer cares for Ms. Hobbs, wants to renege on the couple's agreement and unravel Ms. Hobbs' bonded relationship with Lucy. Fortunately for Lucy, Ohio law does not permit a parent to encourage and foster the development of a parent-like custodial relationship between a non-parent and a child and then unilaterally sever that relationship at his or her whim.

III. ENFORCING MS. MULLEN'S VOLUNTARY RELINQUISHMENT OF SOLE CUSTODY IN FAVOR OF SHARED CUSTODY IS FULLY CONSTITUTIONAL.

Ms. Mullen also incorrectly argues that it would somehow violate the U.S. Constitution for this Court to find based on the evidence presented at trial that she voluntarily agreed to relinquish exclusive custody of Lucy in favor of shared custody with Ms. Hobbs. Ms. Mullen suggests that Ms. Hobbs must produce evidence of a written waiver of custodial rights by Ms. Mullen in order to prevail. Here again, Ms. Mullen's argument is based on a fundamental misunderstanding of the law.

Ohio courts have never required a written or verbal waiver of constitutional rights prior to enforcing a parent's contractual relinquishment of custody. To the contrary, Ohio courts have held on numerous occasions that once a parent has consented to and encouraged the formation of a significant parent-child bond between a child and a non-parent, it is constitutionally permissible to enforce the parent's agreement to share custody in the best interests of the child – even over the parent's objection and even in the absence of a written custody agreement.

Although legal parents have a liberty interest in the care, custody and rearing of their children under the Due Process Clause of the United States Constitution, that interest 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, syllabus par. 2 ("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

(although 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, and the state has a compelling interest in protecting a child's best interest). 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 enforcement of parental agreements – specifically agreements to relinquish exclusive custody in favor of shared custody – is fully constitutional. *Bonfield*, 97 Ohio St.3d at 395-96, citing *Masitto*, 22 Ohio St.3d at 65; *see also In re 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 in child custody); *Rowe*, 44 O.O. at 225 ("a person may waive all personal rights or privileges to 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 and 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.

As these cases make clear, Ohio courts have held that enforcement of a parent's contractual relinquishment is constitutional based solely on evidence that the parent agreed to cede exclusive custody and consented to the development of an unusually significant and bonded relationship between the 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, 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 determination that a relinquishment of exclusive custodial rights is in her children's best interests and prevents that parent from arbitrarily severing the critical second parent-child bond that developed through the legal parent's encouragement and consent.

Ohio courts are far from unique in enforcing parental agreements to share custody when those agreements have caused the creation of a significant bonded relationship between a non-parent and the child, recognizing that this enforcement is consistent with constitutional protection for parental autonomy and protection for the child's interest in retaining the emotional and financial support of both adults that the child understands are her 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."[4] *Id.* The Ohio Supreme Court has approved

[4] In custody or visitation cases around the country, courts that have considered parental autonomy arguments 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 Hawai'i 86, 2008 WL 257343, *15, *Hunter v. Haunert* (2007), ____ S.W.3d ____, 101 Ark . App.

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 with Ms. Mullen's full consent and encouragement. This has great constitutional significance. As the Ohio Supreme 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.

Clark, 32 Ohio St. at 306. 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. 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 the child's best interest, and should protect the child's unusually significant relationship with another adult. It is, in summary, constitutionally appropriate to enforce Ms. Mullen's voluntary agreement to relinquish sole custody in favor of shared custody and to allocate custodial rights and responsibilities between the parties in the best interests of Lucy.

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").

IV. MS. MULLEN OFFERED NO COMPETENT, CREDIBLE EVIDENCE TO DEMONSTRATE THAT IT WOULD NOT BE IN LUCY'S BEST INTEREST TO PRESERVE THE MOTHER-DAUGHTER RELATIONSHIP BETWEEN MS. HOBBS AND LUCY.

In a last ditch effort to convince this Court to allow her to renege on her agreement, Ms. Mullen mounts a scurrilous attack on Ms. Hobbs' character by arguing that there have been "allegations" that Ms. Hobbs has a drinking problem and that she spent an inordinate amount of time in bars "neglecting Lucy." According to Ms. Mullen, because these allegations call Ms. Hobbs' parenting capabilities into question, it would not be in Lucy's best interest for this Court to award shared custody to Ms. Hobbs.

Allegations, of course, are not facts. A review of the actual testimony reveals that Ms. Mullen has fallen far short of proving that Ms. Hobbs has or had a "drinking problem" or that she spent time socializing when she should have been caring for Lucy.

With respect to Ms. Hobbs' alleged drinking problem, Ms. Mullen testified about one incident in which she believed that Ms. Hobbs was drunk. Ms. Hobbs testified that she was not. (Hobbs at II:265-66.) The couple's close friend, Kathy Nardiello, testified that both women drank in social situations, but that she never observed either woman get out of hand or act inappropriately. (K. Nardiello at I:137.) She also testified that, during the course of the couple's relationship, Ms. Mullen never expressed any concern that Ms. Hobbs was a drunk. (K. Nardiello at I:115.) In light of the seriousness of Ms. Mullen's allegation, one might expect that Ms. Mullen would have presented a parade of witnesses testifying about Ms. Hobbs' alleged drunkenness or evidence of a DUI charge or other negative consequence associated with someone who has a drinking problem. Ms. Mullen presented no testimony like this. In fact, Ms. Mullen did not even raise the drinking issue when this Court was considering Ms. Hobbs' request for interim visitation. One would assume that if she was so concerned about Ms. Hobbs'

drinking, she would have alerted the Court of this concern when it was considering awarding visitation to Ms. Hobbs. In short, the absence of evidence of Ms. Hobbs' "drinking problem" speaks volumes – she doesn't have a drinking problem.

The evidence that Ms. Hobbs spent time socializing when she should have been caring for Lucy is similarly lacking. Ms. Mullen testified that Ms. Hobbs spent 4-5 times per week out socializing, while she stayed at home caring for Lucy.[5] In contrast, Ms. Hobbs testified that the two women would trade off parenting responsibilities so that they could each maintain their social lives. For example, Ms. Hobbs stated that she would stay at home and care for Lucy while Ms. Mullen went to football games, worked out at the gym and drank beers with her friends while they watched the television show *Survivor*. (Hobbs at I:305-07.) Ms. Hobbs' testimony is entirely consistent with the testimony of several non-biased, third-party witnesses who testified that they observed Ms. Hobbs and Ms. Mullen sharing and trading off parenting responsibilities. (*See* Troendle at I:171-74; K. Nardiello at I:92; R. Nardiello at I:219 and Ghiz at I:197.) No witness testified that there was ever a time when Ms. Hobbs neglected Lucy because she was socializing.

Ms. Mullen has fallen far short of proving any facts to suggest that it would not be in Lucy's best interest for this Court to preserve and protect Lucy's relationship with Ms. Hobbs, whom Lucy has known since the day she was born as her mother. Indeed, Ms. Mullen's current accusation that Ms. Hobbs is not a good parent is belied by the fact that, as late as January 2007, six months before the couple broke up, Ms. Mullen was attempting to have a second child with

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[5] Ms. Mullen attempts to buttress this statement with inadmissible hearsay testimony from other witnesses. For example, Karen Regan claimed that she "knew" Ms. Hobbs was a regular at Milton's, a local bar, but admitted that she wasn't there. (Regan at II:194.)("More times than not we didn't go, but I do know that she regularly was at Milton's."); *see also* Liming at II:141-42 (Q: "What were her habits as far as drinking and socializing and going out?" A: "Well, I mean, they've been again brought up numerous times."). This testimony is not only lacking an appropriate foundation, but, more importantly, it does not even prove Ms. Mullen's point. Neither Ms. Regan nor Mr. Liming identified a single incident when Ms. Hobbs neglected Lucy because she was "socializing."

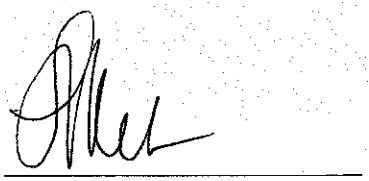
Ms. Hobbs. (Hobbs at I:261.) Ms. Mullen's allegations of a drinking problem and excessive socializing are like her claim that she never agreed that Ms. Hobbs would be Lucy's mother – a rewriting of history fueled by the fact that she simply no longer cares for Ms. Hobbs. Ohio law, however, places Lucy's best interest over the changing whims of Ms. Mullen's affections. As a result, Ms. Hobbs should be awarded shared custody of Lucy.

CONCLUSION

In the conclusion of her Closing Argument, Ms. Mullen insinuates that Ms. Hobbs is asking this Court for some sort of special treatment because she is a woman. Nothing could be further from the truth. The Ohio law upon which Ms. Hobbs relies does not provide special rights to women or to gay men and lesbians. Rather, it protects children – children who have special, bonded relationships with adults who are not their biological parents but who have acted as their parents. Simply put, Ms. Hobbs is not entitled to shared custody because she is a woman or because she was involved in a same-sex relationship with Ms. Mullen. Ms. Hobbs is entitled to shared custody because she and Ms. Mullen agreed together to bring a child into the world and to raise that child together as equal co-custodians. Ms. Mullen agreed to and fostered Ms. Hobbs' relationship with Lucy and, under Ohio law, she cannot now unilaterally decide to rip Lucy away from the woman she has always known as "Momma."

Respectfully submitted,

MICHELE HOBBS



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CERTIFICATE OF SERVICE

A copy of *Petitioner Michele Hobbs' Post-Trial Reply Memorandum in Support of Her Verified Petition for Shared Custody* was served on the following individuals by email and regular U.S. Mail, postage pre-paid, this 12th day of November, 2008:

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