

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO
DIVISION OF DOMESTIC RELATIONS AND JUVENILE BRANCH

JULIE ROSE ROWELL,

Petitioner,

vs.

JULIE ANN SMITH,

Respondent.

TERMINATION SUPREME
COURT CODE 6

Redesignate as CUO1

CASE NO. 08JU-10-13850

JUDGE GILL

MAGISTRATE KNEISELY

JUDGMENT ENTRY

Pursuant to Ohio Rules of Civil Procedure / Ohio Rules of Juvenile Procedure, the Court has by specific and/or general order of reference directed that this cause be referred to a magistrate which magistrate has the powers specified in said Ohio Civil Rules / Ohio Juvenile Rules.

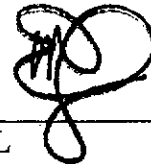
This matter came before the Court upon Petitioner Rowell's Petition for Shared Custody of Madison Rose Smith (dob 9/9/03), filed October 14, 2008, Respondent Smith's Motion for Contempt, filed July 13, 2009, Rowell's Motion for Contempt, filed March 31, 2010, Smith's Motion to Dismiss (Petition), filed January 3, 2011, Smith's Motion for Leave to File Summary Judgment, filed July 20, 2011, and Smith's Motion to Reallocate Guardian ad Litem Fees, filed December 23, 2011. A record was made of the proceedings.

The magistrate has filed a decision in this matter with the Clerk of Courts on see time stamp, and copies thereof were mailed to the parties and/or their attorneys of record. The Court adopts the magistrate's decision and approves same, unless specifically modified or vacated, and enters the same as a matter of record, and includes same as the Court's judgment herein. The Court further finds there is no error of law or other defect on the face of the magistrate's decision. The Court incorporates by reference the attached magistrate's decision and makes same the judgment of this Court.

(Check if applicable)

Pursuant to Ohio Rule of Civil Procedure 53(E)(4)(c) / Juvenile Procedure 40(E)(4)(c) the Court finds immediate relief is justified. Should a party file timely objections to the magistrate's decision, this order shall serve as an interim order, and shall not be subject to the automatic stay caused by the filing of said objections.

JUDGE GILL



PRAECIPE: TO THE CLERK OF COURTS

Pursuant to Civil Rule 58(B), you are hereby instructed to serve upon all parties not in default for failure to appear, notice of the judgment and its date of entry upon the journal.

FILED
COMMON PLEAS COURT
FRANKLIN CO OHIO
2012 FEB 27 11:53
CLERK OF COURTS

**IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO
DIVISION OF DOMESTIC RELATIONS AND JUVENILE BRANCH**

JULIE ROSE ROWELL,

Petitioner,

CASE NO. 08JU-10-13850

vs.

JUDGE GILL

JULIE ANN SMITH,

MAGISTRATE KNISELY

Respondent.

MAGISTRATE DECISION

This matter is before the magistrate for trial upon Julie Rose Rowell's (hereinafter referred to as Rowell¹) Petition for Shared Custody of Madison Rose Smith (dob 9/9/03), filed October 14, 2008, and respondent Rowell's Motion for Contempt, filed August 17, 2011. A separate magistrate decision has been issued on Petitioner Rowell's Motion for Contempt, filed August 17, 2011.

During the pendency of this Petition, a number of motions have been filed and several appeals have been taken while this Petition has been pending for adjudication. Two of the appeals (10AP675 and 10AP708) have been accepted as a discretionary appeal by the Ohio Supreme Court (Case No. 2011-1053) and that appeal remains pending. Both parties were represented by counsel. A court reporter made a record of the proceedings.

The following additional motions were filed:

07/13/09	Smith's Motion for Contempt
03/31/10	Rowell's Motion for Contempt
01/03/11	Smith's Motion to Dismiss (Petition)
07/20/11	Smith's Motion for Leave to File
11/22/11	Rowell's Motion for Temporary Shared Custody
12/05/11	Smith's Motion to Dismiss (Rowell's Mt. for Temporary Shared Custody)
12/23/11	Smith's Motion to Reallocate Guardian ad Litem Fees

¹ Throughout this decision, the magistrate will refer to the parties as Rowell (Petitioner) and Smith (Respondent) to avoid confusion.

Jurisdiction during Pending Appeal

Once an appeal is perfected, the trial court is divested of jurisdiction over matters that are inconsistent with the reviewing court's jurisdiction to reverse, modify, or affirm the judgment. *State ex rel. Rock v. School Emps. Retirement Bd.*, (2002) 96 Ohio St.3d 206, 2002 Ohio 3957. Thus, this court and its judges and magistrates lack authority to proceed with the disposition of any claims that might be subject to the resolution of the claims which are pending within the appellate court's jurisdiction on review. See *State ex rel. Elec. Classroom of Tomorrow v. Cuyahoga County Court of Common Pleas*, (2011) 129 Ohio St. 3d 30, 33.

The appeal accepted (11/02/11) and pending before the Supreme Court directly addresses the validity and enforceability of the temporary orders (specifically imposition of the jail sentence imposed) and is stated in Proposition of Law No. 1 as follows:

Within the exercise of its exclusive, original jurisdiction under R.C. 2151.23 to determine the custody of any child not a ward of another court of this state, a juvenile court has authority under the Rules of Juvenile Procedure to issue and enforce temporary orders that, in the discretion of the court, are reasonably designed to serve the best interests of the minor child during the period of litigation and to maintain the relationships already established with the child prior to the onset of litigation.

Since the pending appeal deals solely with the issue of this court's ability to issue valid temporary orders and to enforce those temporary orders, the resolution of the underlying Petition for Shared Custody will have no impact upon the resolution of those matters and action by this court is not inconsistent with the reviewing court's jurisdiction to reverse, modify, or affirm the judgment.

Smith's Motion for Contempt, filed 7/13/09

The temporary orders allegedly violated were vacated by the Tenth District in Case No. 09AP-671. The magistrate finds that this motion is **MOOT**.

Rowell's Motion for Contempt, filed 3/31/10

This motion was initially scheduled for trial before Magistrate Hosafros (now retired) on April 12, 2010. It was continued to May 17, 2010. The record does not reflect that this motion was either heard on May 17, 2010 or ever rescheduled for hearing. No magistrate decision or judgment entry appears to have been filed for this motion.

Petitioner Rowell is hereby given NOTICE to Ohio Civil Rule 41(B)(1) that this motion will be dismissed on the court's own motion on April 2, 2012 unless this matter is rescheduled for hearing and notice of hearing and entry and order to appear are served upon Respondent Smith.

Smith's Motion to Dismiss, filed 1/03/11

On November 4, 2008, Smith filed a Motion to Dismiss for failure to state a claim upon which relief could be granted. This motion was denied by the trial court on January 15, 2009. Two years later, Smith filed a second Motion to Dismiss alleging that Rowell lacked standing to file the Petition for Shared Custody.

In Re Bonfield (2002) 97 Ohio St. 3d. 387 holds that the juvenile court has jurisdiction to determine the custody claims brought by non-parents pursuant to ORC §2151.23(A)(2) without reference to ORC §3109.04. The court then set forth the standard to be used by the juvenile court in disposing of the petition where the parent and non-parent both desire to have shared custodial rights ordered by a court and the biological parent sought to voluntarily relinquish her right to sole custody in favor of shared custody with the non-parent. The court noted that parents may waive their right to custody of their children and are bound by an agreement² to do so, citing *Masitto v. Masitto* (1986), 22 Ohio St.3d 63, 65. A parents' agreement to grant custody to a third party is enforceable

² In *Bonfield*, a same sex couple had a written agreement allocating parental rights and responsibilities between them regarding children adopted by or born to only one of the women. The couple was jointly seeking legal recognition of their agreement. In *Masitto*, the father had signed a written consent for the maternal grandparents to be appointed as guardian and later divorced the (severely brain damaged) mother with the court setting forth orders referring to the guardianship and setting visitation and support orders for the father.

subject only to a judicial determination that the custodian is a proper person to assume the care, training, and education of the child and in that determination a court shall exercise its discretion in giving due consideration to all known factors in determining what is in the best interest of the children, See *In re Adoption of Charles B.* (1990), 50 Ohio St.3d 88, paragraph three of the syllabus.

In this matter, there is no written agreement between the parties. Instead, Rowell alleges that Smith's conduct has established that she voluntarily shared the care, custody and control of the within minor child, Maddie, and that her conduct establishes the purposeful voluntary relinquishment of Smith's right to exclusive custody to Maddie to Rowell, a non-parent. This issue was specifically addressed in *In Re Mullins* (2011) 129 Ohio St. 3d. 417.

In Re Mullins (2011) 129 Ohio St. 3d. 417 holds that in the determination of whether or not a parent's conduct³ with a non-parent created an agreement for permanent shared legal custody of the legal parent's child⁴, the existence of whether such a contract is present is essential. If a contract exists between Rowell and Smith, the court must then engage in a suitability and best interests analysis. The question is a factual one subject to a preponderance of the evidence standard and is subject to the broad discretion of the trial court.

The magistrate finds that Rowell has standing to bring these issues before this court in her petition for custody. See also *In Re: J. Lapiana and S. Lapiana* 8th Dist. Nos. Nos. 93691 and 93692, 2010 Ohio 3606. Smith's motion to dismiss, filed 1/03/11, is **DENIED**.

³ The same sex couple in *Mullins* did not have a written agreement.

⁴ Although not plead or argued in this case, the parent-child relationship can be contractually established as in *S.N. v M.B* (2010) 188 Ohio App. 3d 324 even though absolutely no biological relationship exists between the child and the contracting individual.

Smith's Motion for Leave to File Motion for Summary Judgment, filed 7/20/11

Smith's motion for leave to file a motion for summary judgment out of rule argues that the decision in *In Re Mullins*, Id., issued by the Ohio Supreme Court on July 11, 2011 contains clarification and new law on the issue of contractual relinquishment and changed Ohio law on the subject such that it would be appropriate for the court to permit the belated filing of a summary judgment motion. Rowell's memorandum contra points out that *Mullins* did not establish a substantive change in the applicable law that would support Smith in a motion for summary judgment. Rowell notes that *Mullins* does firmly establish that a contractual relinquishment of parental rights need not be in the form of a written contract and that each case must turn upon its specific facts.

The Ohio Juvenile Rules of Procedure do not provide for summary judgment motions. Juvenile Rule 22 addresses pleadings and motions; defenses and objections. Rule 22(D) addresses prehearing motions and states: "Any defense, objection or request which is capable of determination without hearing on the allegations of the complaint may be raised before the adjudicatory hearing by motion." Rule 22(E) sets forth motion time and states: "Except for motions filed under division (D)(5) [*relating to serious youthful offender*] of this rule, all prehearing motions shall be filed by the earlier of: (1) seven days prior to the hearing, or (2) ten days after the appearance of counsel....The court in the interest of justice may extend the time for making prehearing motions." A similar timeliness requirement is set forth in Ohio Civil Rule 56(C)⁵ which requires that the motion be filed fourteen (14) days prior to the time fixed for hearing.

Trial testimony commenced on July 6, 2011 and the motion was filed July 20, 2011. Smith's motion is untimely. Although it is within the court's discretion to permit the belated filing

⁵ Juvenile Rule 45(B) allows the application of other procedural rules to juvenile cases. It states: "If no procedure is specifically prescribed by these rules or local rule, the court shall proceed in any lawful manner not inconsistent with these rules or local rules."

of such a motion, the motion is denied. Trial of this matter has been rescheduled innumerable times over three years, temporary orders have only been selectively and sporadically complied with and there have been multiple appeals and other delays. Further delay in the trial of this matter ultimately serves no one in this case. The magistrate finds that further delay in final resolution of the trial of this case would be against the interests of justice. Further, the magistrate finds that *Mullins* extends the holding in *Bonfield* to hold that contractual relinquishment of parental rights does not require a formal written contract. It *may* occur based upon the conduct of the parties and each case must turn upon its own specific facts. Smith's Motion for Leave to File Motion for Summary Judgment, filed 7/20/11, is DENIED.

Rowell's Motion for Temporary Shared Custody, filed November 22, 2011, and Smith's Motion to Dismiss that motion, filed December 5, 2011

Both motions are MOOT.

Rowell's Petition for Custody, filed October 14, 2008

The facts in this case are nearly all disputed. The parties and their respective witnesses each tell a story that nearly always directly contradicts the story told by the other side.

Rowell's position is that she and Smith were strongly attracted to one another immediately. Their relationship quickly developed into a committed life partnership during which they mutually agreed to conceive and raise at least one child together as parents. All major decisions relating to the child were mutually discussed and jointly decided by both Rowell and Smith from the initial selection of the donor until their separation in October 2008. In Rowell's view, they equally bore responsibility for Maddie, from even before her birth, and shared all parenting rights and responsibilities for her throughout her life until Maddie's biological mother, Smith, moved out of their residence and cut off Rowell's contact with Maddie.

Smith's position is the polar opposite. Smith did not include Rowell in any decision making process related to Maddie's conception, birth or any of her care, custody or financial responsibility throughout the five years that Smith and Rowell lived in the same home. Smith denies being Rowell's life partner. Smith adamantly and pointedly claims that she specifically took great care to do nothing that would create the contractual relinquishment of any of her custodian rights and responsibilities to Rowell. The magistrate finds that Smith's testimony, and that of her supporting witnesses, are not credible or supported by any of the ascertainable objective facts and witnesses.

Julie Rowell met Julie Smith in November 2001 at a birthday party for a mutual friend. Rowell and Smith were inseparable almost immediately. Although initially neither moved their possessions into the other's home, they spent nearly all their non-working time together either at Rowell's home on Benson Drive in Groveport or Smith's apartment in Galloway.

Within the first month of the relationship, Smith informed Rowell of her strong desire and plans to have a child, "sooner rather than later" as "her biological clock was ticking⁶." At that time, Smith had already researched and investigated alternative insemination and explored a few potential sperm donors through the office of Holly Barrows, MD. Dr. Barrows' records indicate that Smith's first visit was in March 2001 and that Smith planned to begin alternative insemination in the fall of 2001, about the time she met Rowell. (Rowell Ex. 45)

Rowell was hesitant to continue her relationship with Smith if she was planning to proceed with artificial insemination and a pregnancy and broke off the relationship. The break up was very brief and both women elected to explore their relationship further with Smith deferring her pregnancy plans.

Smith did not return the Dr. Barrows office to pursue a pregnancy or seek insemination efforts until July 17, 2002, over a year after her last appointment. Dr. Barrows records show that

⁶ Smith (dob 7/15/65) was 36 when she met Rowell in November 2001.

Smith received some information about potential sperm donors in March or April of 2001. Information on the following donors was sent to Smith, CB256, CB268, PC1004, PC1047, PC 1053 and PC1057. However, the donor eventually selected and used, PC 1049, was not one of the initial list of donor sent to Smith in 2001. Rowell testified, and Smith admitted, that they discussed potential donors and their attributes. By the time Smith returned to see Dr. Barrows, she and Rowell had been in a committed relationship for several months.

It is clear that by July 2002, the decision has been made to proceed with both Smith's pregnancy and the relationship. Rowell testified that the decision to have a child together was a mutual one, made during their committed life partner relationship. Smith would have the court believe that she always planned to have a child and that her relationship with Rowell, and Rowell's support, companionship and willing assistance to engage in such a momentous decision and life changing undertaking played absolutely no role whatsoever. She went even further to state that she and Rowell never had a good relationship and were never life partners.

Rowell believes that the selection of PC 1049, the eventual donor, was a mutual choice and was selected to reflect a hybrid of physical attributes and interests of both Rowell and Smith. Prior to this selection, the parties had even discussed asking Rowell's brother to be the donor. Smith adamantly testified that the donor selection was made without any discussion or input from Rowell and further that it had been made well before she even met Rowell. On cross, Smith admitted that there were at least some potential donor discussions with Rowell. Further, her testimony is inconsistent regarding Rowell's presence at the two inseminations at Dr. Barrows' office. In her initial testimony, Smith claimed Rowell's sole role was as a driver for the second insemination and that she was not present at all for the first insemination. This contradicts her deposition testimony where she admits Rowell attended both insemination attempts. Smith assumed financial

responsibility for the cost of the donor sperm. (Smith Ex. B) Rowell admitted she did not contribute financially; her testimony was that she believed that the sperm and insemination cost was covered by Smith's insurance.

Smith was inseminated twice with sperm from donor PC1049 on October 14, 2002 and December 11, 2002. Rowell testified she was present for both inseminations and actually "pressed the plunger" to insert the sperm through Smith's cervix, assisting the specialist Tammy Lawson with the procedure. Smith denies that Rowell was present for both insemination attempts and was not an active participant in either insemination. Smith's medical records from Dr. Barrows note Rowell's presence as "partner" for the ultimately successful insemination from the December 11, 2002 appointment. (Rowell Ex. 45)

Tammy Lawson, a nurse practitioner with Dr. Barrows⁷ office from 1998 to 2003, confirmed the AI procedures at Dr. Barrows office. She confirmed that it was customary for her to offer the patient's partner the opportunity to press the syringe plunger for the insemination. She had no specific recall of events for either of Smith's inseminations. Generally it is not something she would necessarily note in the medical records as it was not a medically significant occurrence. She identified Smith as a familiar face but could not identify Rowell. She explained she is not good with faces and names.

During 2002, Smith located and purchased a home, large enough to accommodate the new child, on Tallman Street in Groveport, Ohio. Rowell was not on either the deed or the mortgage. She continued to own and pay the mortgage on her home purchased in 1995 on Benson Drive in Groveport. In December 2002, Smith moved from her Galloway apartment, where she lived fairly close to her sister Stephanie's apartment, across the county to her new house in Groveport. The Tallman street residence was within walking distance from Rowell's home on Benson and Rowell's

⁷ Dr. Barrows is deceased.

parents' home on Madison Street.

In late December 2002, before Christmas, Smith began to experience pregnancy symptoms, including some nausea. Smith used a home pregnancy test. The result was positive. Smith told Rowell the results and, according to Rowell, both were incredibly excited and happy – hugging each other and phoning friends to announce “We’re pregnant!!”

Although Smith and Rowell, both in their mid 30’s, had both been involved in significant relationships with other women prior to their relationship, neither had “come out” to their parents. Neither Smith nor Rowell ever told their parents of their sexual preferences or their relationship as partners rather than friends until Maddie’s impending arrival. In June 2003, about when Smith’s pregnancy would have begun to show, both women informed their parents about their sexual preference, their relationship and the planned birth of a child. At the same time, Rowell officially moved into the Tallman residence with the pregnant Smith.

Initially, there was strong disapproval from both the Smith and Rowell families, and particularly strong disapproval from Smith’s mother. Family relationships were strained for a period of time. Both families had a hard time dealing with the fact that their daughters were in a homosexual relationship AND planning to have a baby. Rowell’s family slowly adjusted and accepted the situation, eventually fully including Smith and Maddie as family members. The Smith family, particularly Smith’s mother, never fully accepted their relationship. The relationship between Smith and her mother was full of conflict and evident disapproval. Smith’s mother never approved of Rowell or accepted her daughter’s intimate relationship with her. Rowell testified that the hostility from Smith’s mother and conflict was the reason that Rowell’s role in Maddie’s life was consistently understated within the Smith family sphere of knowledge, for example any writings in the baby book, newsletter or other written document avoided references to Rowell to

avoid arguments with Smith's mother. Although Smith denied the conflict with her mother, it is telling testimony that both of Smith's siblings are gay and have still not "come out" to the Smiths, despite Julie Smith's revelation of her sexual orientation to her parents.

Rowell completed a full move into the Tallman residence in June 2002, after Smith told her family about the pregnancy and her relationship with Rowell. Rowell eventually leased out her Benson Drive home in early September 2003.

Rowell testified that she and Smith jointly interviewed the obstetrician, Ronda Geiser, as they did every medical or daycare provider⁸ thereafter. Smith and Rowell would introduce themselves as life partners and express their intention to jointly raise the child. Then they would ask if their plans caused any issue with the provider that they would prefer to know immediately and would seek another provider. The initial visit record on January 23, 2003 reflects that husband is crossed out on the form and replaced with partner and is completed with Julie Rowell's name and pertinent information. Smith's sister, an RN at Riverside, is listed as a spare emergency contact. (Rowell Ex. 4) Rowell testified that Dr. Gaiser completed the form in this manner at Smith's direction.

Rowell attended all of the obstetrics visits with Smith. She went to every baby shower, including the baby shower held in Lima by Smith's cousin. She and Smith both put the nursery together, with Rowell painting the room, putting up borders and assembling the baby crib. Rowell and Smith took parenting classes together⁹. Rowell attended all of the Lamaze classes and was Smith's birthing coach.

Rowell was with Smith at the hospital throughout the delivery and cut the umbilical cord, although Smith testified it was without her consent. Smith's mother and sister were present at the

⁸ A similar interview occurred with Maddie's pediatrician Dr. Stacy Scudder, Bright Horizons daycare and the Goddard School.

⁹ Only Smith attended and participated in the breastfeeding classes.

hospital for labor and delivery. The hospital records for *both* Smith and Maddie list Rowell as a relative. (Rowell Ex. 6 & 7) Only Smith and Rowell were given hospital bands matching the baby's band which would allow access to the baby in the hospital nursery. Rowell stayed with Smith for the duration of the 3-4 day hospital stay, taking time away from work and only leaving briefly to care for their pets. Upon their release from the hospital, only Rowell drove home with Smith and Maddie.

Rowell testified that they had several conversations about names during the pregnancy. Ultimately, Smith chose the first name of Madison and the nickname Maddie but that Rowell selected the middle name of Rose. Smith attested that Rowell had absolutely no input into the name selection; that Madison was named after a street where her mother had lived; that she always liked that name; and that the middle name Rose was after Smith grandmother, also named Rose. Rose is a family name in BOTH Smith's family and Rowell's family. It is Rowell's middle name and her mother's first name as well as Smith's grandmother's name. In the baby book, whose contemporaneous sporadic entries were kept solely by Smith, Smith attributes no significance to the selection of Rose¹⁰. (Smith Exhibit 2, pg. 8)

Smith had maternity leave scheduled from September through January 2. In mid December, specifically December 19, 2003, Smith's law firm requested that she return to work for a couple of days to work on some cases in Pittsburgh. Rowell took a couple of days off work to stay full time with Maddie so that Smith could accommodate her law firm's request. While Smith was in Pittsburgh, Maddie developed an ear infection. Rowell took Maddie to the pediatrician, Dr. Stacy Scudder and authorized Maddie's treatment.

¹⁰ The sparsely filled in baby book includes handwritten references to "we"; "Will I be a good mom? What will we call you? Who should we tell?" (Smith Ex. 2, pg. 5)

When Smith returned to work in January, Rowell took two weeks off work to stay with Maddie and rearranged her daily schedule. Rather than continuing to work four ten hour days per week, Rowell changed her schedule to work five days a week, going in early and arranging to leave work by 3:00 pm to reduce the amount of time Maddie was with a childcare provider. At the time of Maddie's birth, Smith was a partner in the law firm of Barkan & Neff and lead counsel in their Dayton office. Smith's job at the firm required long hours and substantial out of town travel. Initially, Rowell's mother Rose cared for Maddie two days a week, Smith's mother cared for Maddie one day a week, Stephanie (Smith's sister) took Maddie one day a week and Maddie attended Bright Horizons day care once a week. Neither Smith's nor Rowell's family members were paid for providing work related care for Maddie.

Maddie was baptized during a regular mass in a catholic church, St. Francis of Assisi Church on Buttles Avenue, on April 18, 2004, by Reverend Weyls. Rowell testified that she and Smith met with Father Weyls prior to the baptism, explained that they were gay parents, and took classes with the priest to prepare them to raise Maddie in the Catholic faith. Father Weyls was very accepting of their status. They chose Smith's sister Stephanie and brother Chad as the godparents¹¹ and Sue Pollack, a non-Catholic, as an additional sponsor. A party for family and friends was held at their home after the baptism, Rowell's family attended the party but not the ceremony. Smith's family attended both. According to Rowell, she was an integral participant in both the preparation and the ceremony; standing next to Smith as the second parent, holding a candle, wiping off the child's forehead¹² and was actively involved in the ceremony. The still photographs of the event show Rowell's close involvement in this happy occasion. Unfortunately, the video of the ceremony

¹¹ The choice of Smith's siblings as godparents was primarily made to placate Smith's mother. Their first choice was Sue Pollock.

¹² Smith admits that Rowell towed off Maddie's head but adamantly insisted that (again) Rowell simply inserted herself into the ceremony and was not requested to be any part of the baptism.

appears to be lost.

A video of the baptismal ceremony was taken by a friend, Wendy Black. This video is missing from the videos of important events in Maddie's life. Maddie's baptismal certificate was not prepared until December 5, 2008 and was signed by Reverend Ronald Atwood, not Rev. Weyls, the officiating priest. The certificate only lists Smith as a parent and lists only two sponsors, Smith's siblings Chad and Stephanie Smith, entirely omitting any reference to Sue Pollock. (Smith Ex. N).

On Maddie's first Mother's Day, Rowell purchased a gold charm necklace with a single charm of a little girl as a gift for Smith. (Rowell Ex. 36 & 44) In the following year, Rowell received one from Smith. Thereafter, they each had matching charm bracelets. Smith admits to the exchange of charms and that the child depicted by the charms signified Maddie specifically. Further she admitted that Maddie was aware that the charms represented her. Rowell Ex. 37 shows that Maddie, with some assistance, made Mother's Day cards at the Goddard School, one for Smith and one for Rowell.

Rowell testified that both she and Smith interviewed the day care center and jointly selected it. Smith denies Rowell's involvement in any decision-making process, including childcare selection. Despite Smith attestations of essentially single parenthood, Bright Horizon's records show that both Smith¹³ and Rowell are listed as parents on the pre-enrollment form, dated 6/14/04, and are living at the same residence address. The form indicates a request for immediate enrollment for Mondays and Fridays from 8:00 am to 3:30 pm. (Rowell Ex. 14) The release authorization form for emergency pickup, dated 6/17/05, lists Rowell first on the list as guardian. Smith's sister is listed next as aunt, then Dale and Rose Rowell are listed third as grandparents, then Judy and Gary Smith are listed fourth and noted as grandparents, and last is Sue Pollock who is listed as a friend.

¹³ Smith is noted more specifically as mother and Rowell is listed as parent.

(Rowell Ex. 15) Also completed the same day is an Ohio Department of Job and Family Services (ODJFS) form listing Rowell in the location designated for parent or guardian with guardian filled in for "relationship to child". It also lists Dale and Rose Rowell as Maddie's grandparents. (Rowell Ex. 16) Rowell Ex. 17 and 19 are the year-end tax statements issued to "Julie Smith & Julie Rowell" for Maddie for 2005 and 2006 child care payments, respectively.

In 2006, Maddie left Bright Horizons daycare to begin preschool in September at the Goddard School in Reynoldsburg. Rowell initially chose the school for further investigation by both of them for Maddie's enrollment into pre K. Both Smith and Rowell went to tour the school and jointly agreed on the school. Maddie attended two days a week. Rose Rowell continued to provide childcare for Maddie one day a week.

Norma Lucas, school administrator for the Reynoldsburg Goddard School, testified that she viewed Rowell and Smith equally as parents. Both were given free access and equal authority by the school. Ms. Lucas specifically testified that the school did not treat babysitters, boyfriends or girlfriends of other parents in the same manner as parents. Both Smith and Rowell always attended Maddie's parent teacher conferences together. Rowell and Smith were both treated as parents by the school until Smith unilaterally cut off any contact by Rowell after the court filing and changed the enrollment forms in November or December 2008. Ms. Lucas testified that she observed Maddie's interactions with both Smith and Rowell and that the child responded in the same manner to each of them.

Ms. Lucas testified that Rowell and Smith presented themselves to her at their initial meeting as a family, with both of them Maddie's parents. Goddard school records show that the enrollment forms were filled out by Smith, in her handwriting, and list Rowell as a parent. See ODJFS forms dated 8/25/06 and 2/25/08. (Rowell Ex. 23 & 24) Both forms list Rowell in the

location reserved for a parent and she is designated as parent on Ex. 23 and co-parent on Ex. 24. Rowell Exhibit 24 also notes Rose Rowell as an emergency contact, denoting her as "grandparent." On August 10, 2007, a progress report, addressed to both Rowell and Smith, was prepared for Maddie's transition into the next room within the Goddard School. Rowell signed the form and Maddie was transitioned to the new room. (Rowell Ex. 22) Only Smith signed the enrollment agreement¹⁴, making her solely contractually responsible for tuition payments. (Smith Exhibit 26 & 27) As with Bright Horizons, the year-end tax statement was addressed to both Rowell and Smith for 2006 and 2007. (Rowell Ex. 20 & 21)

Smith would take Maddie to daycare or preschool and Rowell would pick up from daycare or preschool. As Maddie became older, she began dance, soccer and gymnastics. Rowell would take her to these after school activities and Smith would join them at the activity, leaving directly from work to attend.

Shortly after Rowell's June 20, 2003 move into the Tallman Street residence, she and Smith began sharing all household and living expenses, including expenses for Maddie. Customarily two envelopes were kept in a hutch and both parties put their monthly expenses, grocery and other receipts in the envelopes. Rowell would open the mail and pay the regular monthly bills (gas, electric, cable telephone) and Smith would pay the mortgage. At the end of the month, Rowell would do a mathematical reconciliation, equally divide all the expenses and equalize the expenses between them¹⁵. Rowell specifically testified that these expenses included any daycare expense for Maddie and the zoo membership, as well as monthly food, groceries, housing and utilities. Rowell produced some examples of her reconciliation notes and reimbursement checks. These notes reflect

¹⁴ Ms. Lucas testified that approximately 90% of the students only have one parent's signature on the enrollment forms.

¹⁵ Smith testified that Rowell never made any contribution toward Maddie's conception or birth expenses. Rowell believed that these costs were mainly covered by Smith's health insurance. There is an interesting handwritten note on a hospital bill in Smith Ex. 4, pg. 32, "added to budget."

the inclusion of expenses for daycare in every month (DC), toys (Toysrus), birthday party supplies from Party City (Aug. '07), toys for Christmas (Dec. '07), a family zoo membership (\$94.00 in Apr. '08) and gifts for Maddie's attendance at a child's birthday party (May '08). (Rowell Ex. 2)

Dr. Stacy Scudder has been Maddie's pediatrician since birth. Her early records note Rowell as an emergency contact and partner (Maddie was then 7 days old). The box "child lives with" mother is checked. No information is completed in the location for father's information. It is left blank. The bottom of the form indicates that Dr. Scudder was authorized to discuss Maddie's medical concerns with Rowell and Smith designated her as "partner." (Rowell Ex. 13) When Maddie was age 3, Smith completed the form noting that Maddie lived with "both parents" and in the location reserved for father's information, she crossed out father and wrote Rowell's information in that place. Again, the bottom of the form indicates that Dr. Scudder was authorized to discuss Maddie's medical concerns with Rowell and but this time Smith designated her as "co-parent." (Rowell Ex. 18) Later, the records reflect references to "moms" as present for the April 2008 appointment. (Rowell Ex. 9).

Dr. Scudder could not specifically recall whether or not she did a preliminary "meet and greet" appointment with Smith and Rowell. She did state that Rowell was first introduced either as co-parent or as Smith's partner, definitely not as girlfriend or any other identifier than partner or co-parent. She confirmed that both Smith and Rowell attended virtually all of Maddie's appointments (about 18 total visits, nearly all well checks) together. Generally Smith sat in the chair and Rowell would be sitting on the table with the child. In her mind, they acted as parental equals, both entitled to the same access, information and authority regarding Maddie's care. When Smith, as the birth parent and sole legally recognized mother, instructed her to sever contact with Rowell she complied. Dr. Scudder testified that during appointments she referred to both Smith and Rowell as "mom" and

was never corrected by either.

Smith's personal, individual, medical records from her annual appointments with her gynecologist, Dr. Gaiser, conflict with her testimony about Rowell and their relationship. These non-pregnancy appointments were not attended by Rowell. Dr. Gaiser's records for Smith's annual examination on March 24, 2006 reflect her sexual activity as homosexual. The HPI (history of present illness) reflects a notation of "~~married 4 years~~" but goes on to state "committed homosexual relationship" with s.o. Julie. "Considering second pregnancy but trying to get same donor which has been difficult went over roster of genetic abnormalities..." Assessment notes annual and pregnancy counseling. (Rowell Ex. 10)

Smith's next annual examination by Dr. Gaiser occurred on June 26, 2007. The HPI notes "Pleasant 40 yo committed homosexual relationship with female s.o. also Julie. Madison 3 ½ and desire a sibling now but her partner Julie against second baby. Previous sperm donor not available. Madison great." Lower on the page is a notation "no problems with intimacy." Assessment notes annual visit. (Rowell Ex. 11)

Dr. Gaiser's records from the following year, August 6, 2008, reflect HPI notations of "~~marr~~ 41 year old female committed long term homosexual relationship. Madison 4 ½, desires no siblings. Julie (partner) wants no other pregnancies. She and Julie at odds re: Madison sleep in same bed. Julie and Julie OK but could use some focus on their relationship." (Rowell Ex. 12)

These notations could only result from information given by Smith at the time of each appointment. The medical record notes contradict Smith's testimony and are consistent with Rowell's testimony.

Rowell testified that in 2007, Smith's mother was becoming more and more of an issue in their relationship due to her treatment of Smith and her disapproval and dislike of Rowell and their homosexual relationship. Smith would often be crying and upset by her mother's attitude. Due to

this pressure, both were becoming miserable. Smith and Rowell attended therapy sessions with Judy Fischer, initially to work on their relationship and later to mediate their differences over contact with Maddie. The therapy improved the relationship for a time and Smith's mother became less of an issue in their relationship.

In the summer of 2008, Smith told Rowell she had to work longer hours and arrived at their home frequently late, as late as 9:00 or 9:30 pm, when Maddie would be heading for bed. Rowell took care of Maddie but testified that she began to feel like a single parent during the week. She always did the laundry and cleaning but with Smith's lateness, she also assumed the grocery shopping and cooking duties formerly done by Smith. Weekend activities remained the same, revolving around Maddie and family activities. Eventually, in August 2008, Smith told Rowell that she no longer loved her and wanted to end their relationship. Rowell testified that she was shocked by the revelation.

A few days later, Rowell confronted Smith. Smith admitted that she had begun an affair with her co-worker and former supervisor, Judy Cicatiello. Smith admits to having this argument with Rowell but later testified that she did not have a first date with Judy Cicatiello until October 2008. Thereafter, Smith and Rowell slept in separate beds, but Maddie's life and activities remained relatively unchanged. On Maddie's birthday, they threw a birthday party and gave Maddie jointly purchased gifts, including a puppy "Gidget." Later in September, Smith began leaving Maddie with Smith's parents in Lima for the weekends, usually without Smith. At this point, Smith and Rowell returned to Judy Fischer to mediate their separation and to try to minimize the disruption in Maddie's life¹⁶. Rowell refused to move out of the Tallman home without a written agreement in place regarding Maddie.

¹⁶ Although both parties executed releases for Judith Fischer's records and they were to be produced to the court several months before the trial, the records were never produced to the court. Ms. Fischer informed the guardian ad litem that the records were inexplicably stolen from her car during the trial.

Unfortunately, no mediation ever took place. An anonymous letter was received by Smith's employer on September 5, 2008, informing the employer of the affair between Smith and Judy Cicatiello (Rowell Ex. 46). Rowell came to the meeting with a proposed parenting plan and schedule. Smith came to the meeting angry and upset over the letter to her employer, believing that Rowell, not any co-worker, sent the anonymous letter. Thereafter, the relationship became completely hostile and communication between Smith and Rowell became impossible.

Smith briefly left the residence with Maddie. Shortly after Smith left, she retained counsel. Her attorney sent a letter to Rowell dated October 7, 2008 essentially requesting that she move out or face legal action from Smith. Smith returned to the Tallman residence with her sister removed Maddie's and Smith's clothing from the house. Smith informed her she would never see Maddie again and that her location was not her concern anymore and none of her business. That was the end of any civil relationship between Smith and Rowell.

Shortly thereafter, Rowell moved out of the Tallman residence and into her parents' nearby home until she could regain possession of her leased home. After the move, Rowell asked to see Maddie, Smith never responded to her request. Around the same time, Rowell filed her petition for shared custody (October 14, 2008). Smith's waiver of service was filed on November 4, 2008.

Rowell presented numerous photographs and video DVD's which are demonstrative of the integral role she played in the Rowell-Smith family. These photos support her testimony that she and Smith were life partners with an agreement to raise Maddie together. They do not support Smith's assertions that Rowell was just a girlfriend/roommate and sometime babysitter. There are several candid photographs and videos of holidays, vacations and other family oriented celebrations, including Easter, Halloween, Christmas, birthday parties and the child's baptism that predominantly feature in the central role all three family members, Maddie, Smith and Rowell, along with various

extended family and friends. (Rowell Exhibits 3, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 64 (stack of family videos), 65 (index to family videos), 72 and 74; See also Smith Ex. 7) Of particular note is a Christmas 2006 video taken by Smith that features Rowell bringing a sleepy Maddie downstairs to open her Christmas presents which was played for the magistrate during the trial. (Rowell Ex. 64, #33) In others, Rowell assists an infant Maddie in opening her Christmas gifts.

In addition, there a number of professional family portraits of Smith, Rowell and Maddie in matching attire. Rowell Exhibits 38 & 39) Two are professional portrait/candid photos of only Rowell and Maddie. (Rowell Exhibits 25 & 40) Smith, Rowell and Maddie spent every holiday and birthday together and also with both of their respective families. They took vacations together, with friends¹⁷ and with each other's family, although Rowell did not always attend Smith family events. (Rowell Exhibits 36 & 42).

In addition to the video evidence, there are a number of cards admitted into evidence that also support Rowell's testimony that she and Smith were life partners with an agreement to raise Maddie as their child together. There are cards from Maddie to each of them for Mother's Day. Rowell Exhibit 67 is a Mother's day card from Maddie to Rowell, signed in Smith's handwriting "Love, Maddie XOXO." Rowell Exhibit 37 is a Mother's Day gift prepared for Rowell by Maddie at her preschool, Mother's Day 2006. Traditionally, every Mother's Day they would shop for flowers, plant and mulch the garden. Professional Christmas photographs of Maddie were sent to both Smith and Rowell's family and friends, signed by Smith "Love, Julie, Julie and Maddie." (Rowell Ex. 26, 41, 43) None of this behavior is consistent with Smith's depiction of their relationship. It is fully consistent with Rowell's testimony that she was an equal parent with Smith.

¹⁷ Rowell Ex. 36 was a trip with friends to Isle of Palms paid for by Rowell to celebrate Smith's 40th birthday. The ring worn on Rowell's left hand was a gift from Smith to signify their relationship as partners. Smith also wore a ring on her left hand from Rowell.

There is no written agreement between Smith and Rowell regarding Maddie or her care, custody and financial support. Rowell testified that there was always the understanding that both Smith and Rowell understood that both were responsible for Maddie's care, upbringing and financial support, always. According to Rowell, the reason there is no written agreement is because Rowell loved and trusted Smith; she believed her; and that she and Smith agreed to prepare a "co-custody agreement" but simply never got around it, explaining that "life got in the way" of actually writing up their agreement. She never thought that Smith would cut off her relationship with Maddie.

Smith attested to the complete opposite. She never intended to share any parental rights or obligations with Rowell and never, in any way, created a co-custody agreement in writing, words or deeds. Additionally, she and Rowell never even discussed the possibility¹⁸. She never considered Rowell as part of her family; never considered her a life partner; never shared any decision-making with Rowell; never delegated any significant caretaking responsibilities to Rowell (in excess of that accorded to a babysitter); Rowell never assumed any financial responsibilities for Maddie; According to Smith, her relationship with Rowell was "rocky" from year one. Smith denies that Rowell attended all the prenatal visits; was involved in the donor selection; had any input into selection of care providers or medical professional. Smith explains her use of the words parent, co-parent, guardian and grandparent in various forms relating to Maddie to denote the ability to grant access to Maddie's records and permit Rowell to be an emergency contact but never to indicate any authority to make any decisions regarding Maddie or authorize treatment. Smith testified that as an attorney she knew attorneys she could retain to prepare such documents as powers of attorney,

¹⁸ No written shared custody agreement was ever prepared or presented to either Smith or Rowell. Neither was presented with an opportunity to either accept or refuse to sign any document. Smith admitted that she never communicated any refusal to enter a written shared custody agreement either directly to Rowell or in any discussion where Rowell was present.

medical powers of attorney, and co-custody agreement and that she knew exactly how to create co-custody or shared custody with Rowell but specifically and intentionally avoided creating any such relationship with Rowell. Smith's actions belie her adamant position.

Based upon Smith's testimony, one would conclude that Rowell was merely a roommate that looked after Maddie from 3:30 pm to 5:30 pm on weekdays, living separate lives within the same house, and there was never more than a "dating relationship" between them which quickly faded. Smith testified that she prepared all the meals, fed Maddie, cleaned up afterward, played with Maddie, bathed her, read her books, put her to bed, and even mowed the grass with Maddie in a backpack. Except for the 3:30 to 5:30pm after school care, Rowell was "off duty" and watching TV. In Smith's view, she just "settled" for this sort of relationship because she was about to become a mother, was scared, and Rowell was stable and "okay" to be with and that was enough for her.

Rowell's testimony on this subject, "life got in the way" of attending to documentary details, including a co-custody agreement, is more credible and consistent with the actions of both parties. Despite the fact that Smith consulted with a financial advisor in July 2007, she prepared none of the documents recommended by the advisor to meet her stated goals to provide education funds for Madison, provide for financial independence, and to provide for Maddie's needs if Smith became disabled or died. Prior to the financial review, Smith had a small 529 plan for Madison funded mainly by contributions from her credit card purchases. Although specifically advised to create a cash reserve for emergency and to prepare a will, designating Madison's care/guardian, to consult with an attorney about a living trust, increasing life insurance benefits to provide sufficient funds for Madison, a durable power of attorney, a healthcare power or attorney and/or living will and a custodial arrangement for Madison, Smith still did not act to create any of these life planning

documents until well after her separation from Rowell when she finally prepared a will naming her sister Stephanie as guardian for Madison. Likewise, Rowell was equally inattentive to her financial affairs.

Prior to their separation and the onset of this litigation, neither of them acted to provide for Maddie in the event of their disability or death. Neither Smith nor Rowell prepared a will or trust, let alone one with Maddie as beneficiary. Only Smith completed a life insurance beneficiary form for her employer when she changed jobs to the State of Ohio in 2005. Rowell had neglected to modify her life insurance beneficiary designation¹⁹ since 1996 for her employer provided policy. No one is designated as Rowell's OPERS beneficiary. Neither has a living will, healthcare power of attorney or durable financial power of attorney. This is true despite the fact that Smith admits she specifically did not want her mother to have guardianship of Maddie in the event of her death. Neither Smith nor Rowell attended to the preparation of any written formal shared custody arrangement, or for that matter, the preparation of important documents necessary to provide for Maddie's care in the event of disaster. Like many individuals, they neglected to act at all. It was not until late 2010, Smith finally created a will, noting her desire for her sister Stephanie to be designated as Maddie's guardian in the event of her death.

The testimony of (formerly) mutual friends is as polarized as the testimony of the parties. Each friend testified in accordance with their current respective relationship with one of the parties and aligned their testimony to match. Likewise, family members testified in support the testimony of their respective family member as demonstrated in the following summaries of their respective testimony.

¹⁹ Rowell's nieces and nephews have been beneficiaries since Rowell changed the designation from a former lover, Teri Craig (noted as sister on the form).

Rowell's friends and family testified that baby showers were for both parents. The written invitations listed only Smith because she was the pregnant parent, having "their baby"; that Rowell and Smith were Maddie's parents; that both were together, side by side as parents, throughout the baptismal ceremony at a "gay friendly" church; that they engaged in joint discussion and decision-making as parents regarding Maddie; that they were clearly a single family unit; that both were reluctant to separate because Maddie should have two parents in the home; and that Smith and Rowell held themselves out as a family and acted as a family unit – with two parents. Rowell's witnesses, particularly Wendy Black – one of their inner circle of formerly mutual friends - testified that Rowell was always perceived as one of Maddie's parents. Further, Rowell provided much objective evidence through Dr. Scudder and Norma Lucas's testimony as well as contemporaneously kept documentary evidence from their records and the records of Dr. Gaiser. This evidence directly refutes Smith's position as set forth in her testimony and her witnesses.

According to Smith's friends and family, all of the baby showers and gifts were only for Smith; that Rowell was only a shower guest (like all other guests) or perhaps just a supportive friend at the baby showers and all thank you notes were written by Smith; that Smith never treated Rowell as a parenting equal or even an equal housemate; that none of them ever observed Rowell be involved in any parenting decisions regarding Maddie²⁰; that Smith always provided all of Maddie's care – whether Rowell was present or not; and that none of them ever observed any indication from either party's actions or words to conclude that Rowell had any parental role whatsoever. Smith's witnesses went even further, testifying that Smith and Rowell's relationship had "fizzled" after a year and half to two years. This would place the demise of the relationship between November 2002, prior to Maddie's conception, and June 2003, the date Smith and Rowell took a major public

²⁰ Most of Smith's witnesses admitted to little opportunity to observe the decision making process. In particular, Smith's sister Stephanie admitted she had little opportunity to observe any decision making process.

step and were informing their respective families for the first time about their sexuality, their relationship, the pregnancy and Rowell's move into the Tallman residence.

Smith's witnesses testified that Rowell was never viewed by them as Maddie's parent, although some attested to the significant relationship and close bonding between Rowell and Maddie. Each of her witnesses testified in lockstep with Smith's position. Three of Smith's witnesses, Sherie Biegal, Jodi Haney and Marnie Bachman, admitted that they had very little opportunity to observe the Smith/Rowell home situation and roles of the parties as their observations were relatively infrequent during birthday parties, holiday visits and football games. The magistrate finds Smith as well as her remaining witnesses not credible. Tina Pollard specifically seemed emotional and very uncomfortable with her testimony which was often inconsistent and so one sided as to be not believable. Ms. Pollard was unable to face the magistrate during most of her testimony, mainly looking down or away from the court. She testified that she initially was supportive of Rowell after the Smith/Rowell separation in 2008 but reverted to Smith's side after an argument with her life partner, Sue Ballard, forced them into therapy. At one point, she slipped in her testimony, referring to Rowell as a parent. The reason she put forth for change to support Smith in this litigation, that she determined that Rowell had lied to her at a soccer game, was completely illogical.

Each and every one of Smith's witnesses seemed completely surprised by the fact that Smith completed many forms in her own handwriting naming Rowell as a parent or co-parent of Madison; that she listed Rowell's parents as grandparents; and that Rowell contributed financially toward Maddie's expenses. Sue Pollock particularly was not only surprised but appeared extremely troubled to learn these facts during cross examination.

Based upon the totality of the evidence and the credibility of the witnesses, Smith's conduct reflects that she contractually relinquished shared custody²¹ of Maddie to Rowell; that Rowell accepted and assumed the shared custodial responsibility for Maddie as well as equal responsibility for Maddie care, including financial responsibility. Rowell participated equally with Smith in the planning and birth of Maddie. She participated in the selection of a donor, assisted with Smith's artificial insemination, attended all of Smith's pre-natal visits, went to parenting and Lamaze classes with Smith, was present throughout Smith's hospital labor and delivery, cut the umbilical cord at delivery, stayed at the hospital with Smith and Maddie, and took them to their home.

Smith acceded to and actively fostered the formation, establishment and growth of a parental relationship between Rowell and Maddie. Smith, Rowell and Maddie continued to live in a single family/household for Maddie's first five years. Rowell assumed the obligations of parenthood by taking significant, equal, responsibility for Maddie's care, education and development as well as contributing financially to Maddie's support without any expectation of financial compensation. Likewise, Rowell's parents contributed to Maddie's early childcare needs without any expectation of compensation. Rowell has acted in this parental role for an extended period of time and has a fully developed, bonded parental relationship with Maddie.

Although Smith is "Mommy"²² to Maddie and Rowell is "Julie", both have been equal care providers for Maddie and equally responsible for Maddie's financial support. Both jointly selected doctors and daycare providers. Both attended all the appointments and parent-teacher conferences. Both celebrated Mother's Day, birthdays, Christmas and Easter with Maddie – buying and opening gifts together. Both referred to their extended family as aunts, uncles and grandparents, even though Rowell's family was not biologically related. The guardian ad litem report reflects that when she

²¹ The magistrate makes a finding of parental unsuitability due to the voluntary contractual relinquishment demonstrated by Smith's conduct.

²² "Ms. Smith 'Mommy' because 'I came out of her tummy.'" (GAL, Exhibit 1, Letter from Lisa Stromeier. 11/6/09)

asked Maddie if she called Rowell's brother "Uncle Denny" or called Rowell "Momma Julie", her responses were "not anymore" and her demeanor became sad. Maddie considered Denny and Rose (Rowell) as part of her family. (GAL Ex. 5, Interim Report 4/29/10) Both Smith and Rowell equally divided and paid for all household expenses, including food, daycare, gifts, heat, electric, housing, gifts, toys (many, many toys) and any other bill added to their budget. Together, they created a loving and committed home in which they equally shared the day to day responsibilities for Maddie.

Neither assumed the role of primary caretaker until Smith unilaterally cut Rowell out of Maddie's life when their relationship failed. Until that point, Maddie had two individuals assuming central caretaking roles in her life. She was never a single parent child but part of a committed familial relationship, albeit a family of all females.

Having made the predicate determination of parental unsuitability, the magistrate must make a determination of whether Rowell is a proper person to assume Maddie's care, training and education. *Bonfield* directs this court give due consideration to all known factors in determining best interests, citing to *In Re Adoption of Charles B.* (1990) 50 Ohio St. 3d 88, paragraph three of the syllabus. Subsequent to the *Bonfield* decision, the Tenth District Court of Appeals held in *In the Matter of: R.N. and R.C.*, 10th Dist. No. 04AP-130, 2004 Ohio 4420, that when making custodial determinations in custody circumstances involving nonparents, a juvenile court should consider the totality of the circumstances, and may, to the extent that they are applicable, look to the factors set forth in ORC §3104.04(F)(1) for guidance.

Everything presented in this matter reflects a close enduring relationship between Rowell and Maddie as well as between Rowell's extended family and Maddie. The testimony is uncontroverted that Maddie was a happy, well adjusted outgoing child during the ongoing

relationship between Smith and Rowell. Video tapes of exchanges show an incredibly excited and happy child whose bonding with Rowell and love for her are undeniable. (Rowell Ex. 60A) It is abundantly obvious that Maddie missed Rowell greatly during their separations, particularly in the initial stages of this case. Maddie can hardly contain her happiness and joy when she has the opportunity to see Rowell. In her interim report, the guardian observed that Maddie was adjusted to both homes but was experiencing difficulty adjusting to her school, Clintonville Academy. (GAL Ex. 5, dated 4/29/10)

The periods of extended separation and denial of any contact between Maddie and Rowell have taken their toll over the extended time taken to try this case. Smith does not follow the temporary orders consistently. Frequently months pass without any contact between Maddie and Rowell. Even when Smith complies with the temporary orders, her compliance is irregular and according to her own whim, at times she has refused to leave during Rowell's time. Smith refused to permit Rowell to pick Maddie up from the Goddard school a moment earlier than 5:00 pm and instructed the school not to permit Rowell inside the building. Smith would drive to the school only to walk Maddie out the door, where Maddie would run and leap into the arms of the patiently waiting Rowell. Smith would appear at Clintonville Academy when Rowell brought Maddie to school in the morning, causing unnecessary discomfort, anxiety and stress for Maddie.

The degree of unwarranted denial of time between Maddie and Rowell is so extensive it is difficult to find fault with Rowell's extremely few acts of self help during the three years this case has awaited trial even though her unannounced visits and last minute exercise of her two week vacation have acted to generate anxiety in Maddie about "being snatched." It was not until very recently that Maddie has expressed some ambivalence toward time with Rowell. Even so, she continues to want to see Rowell, just not spend overnight. (GAL Ex. 3, Stromeier Letter dated

8/16/11) Neither party requested that the magistrate conduct an in camera interview with Maddie.

Smith is adamantly opposed to any contact or any ongoing relationship between Maddie and Rowell. Smith has instructed school personnel, both at the Goddard School and Clintonville Academy, not to speak with Rowell or even permit her to tour Maddie's school. Rowell wants to spend as much time with Maddie as possible, preferably an equal time division with Smith.

Smith fails to recognize the detrimental impact of her own inconsistent behavior with the court ordered time, or her obvious stress and fear over the litigation, has on Maddie. The fact that she does not acknowledge that Maddie's awareness of the conflict between herself and Rowell greatly contributes to the child's evident distress, anxiety and confusion. Smith projects her own fears and insecurities onto Maddie, including the perception that Rowell will "snatch" her. In her letter of 11/6/09, Lisa Stromeier Maddie's therapist, remarks that "when adults are ending their own adult relationships, many children take on the energy of the adult they are with and will say what they think that adult wants to hear in order to make that adult happy. I believe this is happening with Madison. She is very sensitive to the emotions of people she cares for." (GAL Ex. 1)

Smith told Maddie about the potential for the enforcement of her suspended three day jail sentence, even taping the child's heartbroken sobs and tears and playing the tape for the media. On the taped interview Smith, clearly referring to Maddie, says "She was concerned I was gonna get killed in jail; I wasn't gonna have a good place to sleep in jail." (Rowell Ex. 60). Instead, Smith attributes the entirety of Maddie's distress and unhappiness to Rowell's abrupt exercise of two weeks of vacation (under the "invalid" order) without advance notice, claiming Maddie was traumatized by the experience, returning quiet, withdrawn and sullen. In total contrast, Rowell Exhibit 77, a cell phone video taken by Laurel Murphy, shows a happy, outgoing exuberant child

upon her return.

In August 2010, the child's therapist, Lisa Stromeier, attempted a joint counseling session with Smith, Rowell and Maddie and made some recommendations; setting up a safety plan and proposed transitional schedule. In her letter dated 8/4/10, she commented that "I have always felt that visitation for Madison and Julie Rowell was advised." Only the first of the transitional visits occurred, thereafter Smith did not follow the therapist's recommendations²³. (GAL Ex. 2)

Smith is unlikely to comply with court orders and has been found in contempt of the temporary orders more than once. She firmly believes that the orders issued by this court are not valid and are unenforceable. From the inception of the temporary orders in November, 2008, Smith has not followed the orders and has placed her own spin on the meaning of the order, a spin not contemplated by the court. At first, Smith refused to leave during the time allotted to Rowell and she was only permitted the Wednesday time. In early 2009, Rowell's court ordered parenting time was expanded. In response, Smith allowed the Wednesday time and Friday evening but not overnight as ordered. When exchanges were to occur at the daycare, Smith refused to permit Rowell to pick the child up without her personal supervision. Rowell was required to wait outside the building until Smith would arrive from work, walk in, sign Maddie out and deliver her to Rowell in the parking lot.

Smith was held in contempt for denial of Rowell's court ordered time with Maddie and given a three day suspended jail sentence pending her compliance with the purge order²⁴. Despite this, Smith continued not to fully comply with the court ordered time. Smith's compliance with the orders is sporadic at best and incomplete even in the face of a suspended jail sentence with the

²³ In her letter dated 8/6/11, Ms. Stromeier indicated that it was Rowell that did not follow through with the safety plan. This observation was not supported by the trial evidence. It was Smith that did not follow through with the graduated visit schedule outlined in the letter. (GAL Ex. 3 & 5)

²⁴ Smith has twice been sentenced to three days for contempt and that sentence was enforced by the trial court twice. Smith appealed both enforcements and the second enforcement remains pending for decision by the Supreme Court.

threat of imminent enforcement.

There is no indication that Rowell has failed to comply with court orders. In the face of Smith's behavior, Rowell has demonstrated extraordinary patience and forbearance. Most of the time, Rowell avoids exacerbating the conflict between she and Smith by having time with Maddie pursuant to Smith's dictates and trying not to anger Smith. Only a few times Rowell has used self help to effectuate her court ordered parenting time, usually when faced with an extended period without contact with Maddie.

When the recent court of appeals decision regarding temporary orders was issued in June 2011, Smith again unilaterally terminated all contact between Rowell and Maddie. Calls by Rowell to Maddie remain ignored and companionship time does not occur. Despite the specific reinstatement of the temporary orders of this court by the Ohio Supreme Court, Smith continues to maintain the order is invalid and her compliance is not mandatory. It remains to be seen whether or not Smith will comply with any orders issued by this court whether temporary or final.

There has been some testimony that Maddie is fearful of Rowell, crying and hiding from her at exchanges. Smith's sister Stephanie could only identify one occasion where Maddie hid behind a couch at an exchange. Both Laurel Murphy and Shaun Boyd, neither of whom knew Rowell until well into the litigation, testified that both were given the understanding from Smith Maddie was afraid of Rowell and did not want to be with her. During a period that Smith denied Rowell any contact with Maddie, Rowell showed up while Maddie was in either Shaun or Laurel's care after school. Each had expected that contact with Rowell would produce a completely traumatized and panicked reaction from Maddie. Both were shocked to observe Maddie's overwhelming delight at seeing Rowell. Mr. Boyd testified that Maddie's face "lit up" at the sight of Rowell and could not get out of her car seat fast enough to get to Rowell.

Videotaped exchanges of Maddie clearly demonstrate that Maddie loves Rowell deeply and is extremely attached to her. The audio shows that Maddie is happy to be going with Rowell and is looking forward to her time there, whether it is to swim or play with the dog. (Rowell Ex. 60A) Maddie's welcome of Rowell can only be described as ecstatic and exuberant. Smith's testimony that Maddie is in fear of Rowell is self serving and not substantiated by any evidence what so ever.

Smith's current partner, Judy Cicatiello relocated to Boston, Massachusetts. Smith and Maddie have been living in Cicatiello's home since Smith sold her home on Tallman Street. Smith testified to some rather indefinite plans to relocate to Boston with Ms. Cicatiello but it may be that Ms. Cicatiello will return to live in Ohio. Rowell remains living in Groveport.

The last witness in this case was the guardian ad litem, Meredith Snyder. In addition to her testimony, Ms. Snyder filed a written report in April 2010. Ms. Snyder directed her testimony solely to Maddie's best interests. She noted that there is a significant relationship and bond between Maddie and Rowell. She referred to Maddie's 11/20/08 drawing of family done during her therapy with Margie Chessus which showed three stick figures, two adults with a child in the middle, all holding hands. (Rowell Ex. 78) This bond continues to endure despite the repeated extended disruptions of contact between Maddie and Rowell.

In her interim written report, Ms. Snyder recommended a 2/2/5 (MT/WTh and alternate weekends) schedule. Since that time, much angst has been generated in Maddie primarily by Smith's reactions to the litigation and attitudes she inappropriately shares with Maddie. Her inconsistent compliance and unusual interpretations of the temporary orders has only fueled Maddie's anxiety. There has now been an extended time without any contact between Maddie and Rowell since the June 2011 appellate decision. Nonetheless, in her trial testimony, the guardian recommended ongoing time resume and continue between Maddie and Rowell and that all three

maintain ongoing counseling for Maddie with her current counselor Lisa Stromeier or other appropriate counselor and each participate in the counseling as requested by the counselor in her discretion. In her final testimony, report and recommendation, the guardian did not set forth a recommendation for any specific time schedule to the court.

Rowell is age 44 and Smith is age 46. Both appear to be in good physical and mental health. No psychological or psychiatric evaluations were requested or performed on either party. Accordingly, the magistrate has no professional assessment of either party's mental health status. Rowell has been employed as a chemist by the City of Columbus for the past seventeen years. Her annual gross income was \$52,000 for 2010. Her 2009 federal income tax return reflects W-2 wage income of \$50,289. (Rowell Ex. 1). Smith is employed by the State of Ohio. The most current annual gross income information available for her is a W-2 for 2008 showing income of \$89,573.69. (Smith Ex. 33)

Having considered the evidence and appropriate law, it is the decision of the Magistrate that the following orders shall issue:

1. Petitioner, Julie Rose Rowell and Julie A. Smith are awarded shared legal custody of the minor child Madison Rose Smith (dob 9/9/03). Both shall be considered residential and legal custodians of the minor child at all times.

Both custodians shall have the right to make emergency medical decisions for Madison. In such event, the possessory party shall immediately notify the other party of the emergency situation.

After conference and consultation with Petitioner Julie Rose Rowell, Respondent Julie A. Smith shall be the final decision maker regarding any elective medical or other healthcare decision, religious or educational decision or extracurricular activity decision. Both parties shall immediately notify the other of any scheduled medical, dental, vision, therapy or other health related

appointments. Both parties shall be permitted to attend all such appointments, school conferences or other meeting relating to the minor child.

Respondent Julie A. Smith's residence shall determine the child's public school placement.

2. Respondent Julie A. Smith shall have possession of the minor child at all times not awarded to Petitioner Julie Rose Rowell.

Petitioner Julie Rose Rowell shall have possession of the minor child as follows:

Year Round Weekly Schedule

- a. Alternate weekends from Friday morning drop off at school until Monday morning when the child is dropped off to attend school. This alternating weekend schedule shall not change, even when interrupted by holiday and birthday, summer and/or vacation time. The time of the exchange for non-school days (not including holidays set forth below) and summer break from school shall remain the same year round except the exchanges shall be at the respective residences of the parties rather than at the child's school
- b. Every Monday morning from school drop off through Wednesday morning school drop off.
- c. This weekly schedule shall continue year round.
- d. Respondent Julie A, Smith shall not be present for the child's delivery to or pickup from school by Rowell during the time awarded to Rowell.

Holidays (includes birthdays): In odd-numbered years, Respondent Julie A, Smith has Spring Break, Memorial Day, Labor Day, and the first half of Winter Break. In odd-numbered years, Petitioner Julie Rose Rowell has Martin Luther King's Day, Fourth of July, Thanksgiving, and the second half of Winter Break. In the even-numbered years, the schedules are reversed.

In the event of a conflict between regular parenting time and holiday parenting time, holiday parenting time prevails. The alternating weekend schedule continues, however, as if the holiday had

not intervened.

Mother's Day shall be spent with Respondent Julie A. Smith every year and shall be from 10:00 a.m. to 7:00 p.m. The child's birthday shall be spent with Julie A, Smith every year and shall be from 6:00 pm the night before the birthday through the next scheduled exchange with Petitioner Julie Rose Rowell. Each party shall have time with the minor child on their respective birthday every year from 10:00 am to 7:00 pm on weekends and from 4:00 pm to 8:00 pm on a weekday.

Unless otherwise agreed in writing, Holiday hours shall be as follows: Martin Luther King Day (9:00 a.m. to 7:00 p.m.); Spring Break (6:00 p.m. on the day school is out to 7:00 p.m. the day before school recommences); Memorial Day and Labor Day (6:00 p.m. Friday to 6:00 p.m. Monday); July 4th (9:00 a.m. to 9:00 a.m. the next day); Thanksgiving (6:00 p.m. Wednesday to 6:00 p.m. Sunday); Winter Break (first half commences at 6:00 p.m. the last day of school before Winter Break begins, until December 23 at 1:00 p.m.; second half commences at 1:00 p.m. December 26 until 6:00 p.m. the day before school recommences).

Every year, Petitioner Julie Rose Rowell shall have Christmas Eve from December 23 at 1:00 pm. to December 24 at 5:00 pm.. Every year, Respondent Julie A. Smith shall have Christmas Day from December 24 at 5:00 pm through December 26 at 1:00 pm.

Vacations: Each party may arrange an uninterrupted vacation of not more than two (2) weeks with the child. These two weeks may be consecutive weeks (14 consecutive days) or non-consecutive weeks (two periods of 7 consecutive days, each of which may be extended by the weekend allotted to that party either at the beginning or the end of the 7 days). Written notice of the selection of vacation time(s) selected during the summer shall be provided by Smith to Rowell no later than March 1 annually. Thereafter, Rowell shall provide written notice to Smith of the vacation time selected no later than April 15 annually. A general itinerary of the vacation shall be provided for the

other party, including dates, locations, addresses, and telephone numbers. Holiday and birthday celebrations with either party shall not be missed, requiring scheduling of the vacation around these events or that the missed occasion be made up. There is no requirement that regular (non-holiday) time missed by either party during the others vacation be made up.

Telephone Access: The child may call either party as often as she may desire, at reasonable times. In addition, each party shall be entitled to telephone communication with the children not less than three times per week for not less than 15 minutes per call. Neither party shall interfere with or stop the telephone communication.

Transportation: The parties shall divide the transportation equally. The party who is exercising time shall pick up the child from school or the other parent's residence.

Moving: Upon either party's decision to move from their current residence, the other party shall be immediately notified in writing and shall provide the other with the moving date, new residence address and telephone number, and such other pertinent information.

Illness: If the child is ill, each party shall provide 24 hour notice, if possible, so appropriate plans can be made. However, if any is missed due to non-emergency illness, then any missed parenting time shall be made up as provided in the following paragraph.

Make-Up time: Any make-up time required by this schedule shall occur the first weekend of the other party's time immediately following the missed and shall continue during the other party's weekends until made up in full, including partial weekends.

Current Address and Telephone Number: Each parent shall keep the other informed of their current address and telephone number at all times.

Emergency Contact: Both parties shall at all times provide the other party and all care providers, schools or activity providers with a telephone number for contact with both parties in the event of an

emergency. Both parties' names and contact information shall be listed as an emergency contact for any and all forms requesting such information.

Clothing: The parties shall cooperate in the exchange of the child's clothing, toys, personal possessions, medications, prescriptions, school work, teacher reports, grades, parent teacher conference dates and any activity schedule and any other information pertinent to the child as such information becomes available to either party but no later than at each exchange.

Extracurricular Activities: Regardless of the child's current location, her in extracurricular activities, school related or otherwise, shall continue uninterrupted. The party with possession of the child shall provide the transportation to and from these activities. Notice of all extracurricular activities, school related, or otherwise, and any schedules of all extracurricular activities (handwritten, if no formal schedule is provided by the activity) and the name of the activity leader (including address and telephone number if reasonably available) shall be exchanged between the parties.

3. Respondent Julie A. Smith shall maintain medical, dental, vision, or other healthcare insurance as is available through her employer. Respondent Julie Smith shall provide Petitioner Julie Rose Rowell with current medical, dental, vision or other health insurance cards at all times.

The parties shall equally divide and pay the cost(s) and expense(s) associated with extracurricular activities, uninsured medical expenses, including co pays and deductibles, and any work related child care cost incurred for the minor child. Either party may select a family member to provide work related child care during their respective possessory times, at their individual cost. However, neither shall be entitled to a reduction of their portion of the cost of an institutional childcare provider if a fee is charged for such days a family member may be providing work related childcare.

Submission of appropriate documentation for reimbursement of such costs and expenses shall occur monthly and reimbursement by the other party shall be made within 30 days of the receipt of the supporting documentation.

Respondent Julie A. Smith shall be entitled to the tax dependency exemption every year.

4. The child's counseling with Lisa Stromeier, or other child therapist selected by the guardian ad litem if Ms. Stromeier is unavailable, shall continue as deemed necessary by the guardian ad litem. Both parties shall take the child to all scheduled sessions during their respective times of possession. Both parties shall attend and participate in therapy sessions as requested by the child's therapist.

5. Each party shall pay their own respective attorney fees, unless otherwise ordered in prior decisions and/or orders.

6. The parties shall equally divide and pay the Guardian *ad Litem* fees incurred throughout this litigation, consistent with the order appointing the guardian ad litem, filed April 24, 2009. Said payment shall be made in full within thirty days of the filing of this decision unless the guardian ad litem consents in writing to payment at a later date or pursuant to an installment payment agreement. The Guardian ad Litem fees are in the nature of child support and shall not be dischargeable in bankruptcy. Respondent's Motion, filed December 23, 2011, to reallocate the fees of the guardian ad litem is **DENIED**.

7. The appointment of the guardian ad litem shall remain in effect though the final conclusion of the proceedings for which this appointment was made, including any and all appellate proceedings.

8. If either Petitioner Julie Rose Rowell or Respondent Julie A. Smith intends to move to a residence other than the residence specified herein, she shall file a notice of intent to relocate

with this court, addressed to the attention of the relocation officer. A copy of such notice shall be mailed by the court to the other party. Upon receipt of the notice, the court, on its own motion or the motion of either party, may schedule a hearing with notice to both parties to determine whether it is in the best interest of the child to revise the court orders with regard to the time schedule.

Julie Rose Rowell
Petitioner
450 Benson Drive
Groveport, Ohio 43125

Julie A, Smith
Respondent
3045 Stirlingshire Court
Columbus, Ohio 43219

9. Petitioner Julie Rose Rowell, is entitled to access to any record that is related to the child, under the same terms and conditions as Respondent Julie A. Smith, and to which said Respondent Julie A. Smith is legally provided access. Any keeper of a record who knowingly fails to comply with this order is in contempt of court.

10. Petitioner Julie Rose Rowell, is entitled to access, under the same terms and conditions as, to any student activity that is related to the child and to which Respondent Julie A. Smith legally is provided access. Any school employee or official who knowingly fails to comply with this order is in contempt of court.

11. Petitioner Julie Rose Rowell is entitled to access to any day care center/provider that is or will be attended by the child to the same extent that Respondent Julie A. Smith is granted access to the center/provider.

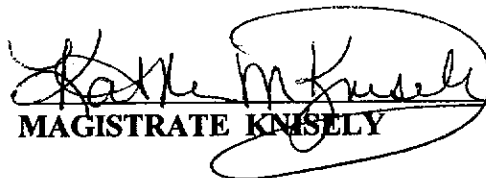
12. All temporary orders and decisions issued in this case shall be incorporated herein as if fully rewritten.

13. Petitioner Rowell and Respondent Smith shall equally divide and pay the balance due for court costs.

This decision is effective upon approval by the Court;

NOTICE TO THE PARTIES:

A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ. R. 53(D)(3)(a)(ii) or Juv. R. 40(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ. R. 53(D)(3)(b) or Juv. R. 40(D)(3)(b).

 2/27/12
MAGISTRATE KNISELY DATE

cc:

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