In the Supreme Court of Ohio

IN RE: L.E.S., E.S., & N.S.	:	Case No. 2024-0303
	:	

APPEAL FROM THE COURT OF APPEALS, FIRST APPELLATE DISTRICT, HAMILTON COUNTY, OHIO APP. NO.S C-220430, C-220436

MERIT BRIEF OF APPELLANT PRIYA SHAHANI

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INTRODUCTION

In this custody dispute between former members of a same-sex relationship that ended nearly a decade ago, the First District Court of Appeals (1) extended *Obergefell v. Hodges*, 576 U.S. 644 (2015) to permit a judicial rewrite of Ohio's statute that plainly and unambiguously bars recognition of common-law marriage, and (2) empowered the trial court to seize the constitutionally protected parental rights of good parents in violation of the United States Supreme Court precedent set forth in *Troxel v. Granville*, 530 U.S. 57 (2000).

Appellant Priya Shahani is the biological parent of three children. Appellee Carmen Edmonds is not a "parent" of Ms. Shahani's children under any vision of the term in Ohio law. Even though they were never married in any state (and they never applied for a marriage license in Ohio or any other state), Ms. Edmonds has sought parental rights based on marriage-related Ohio statutes.

The trial court rejected Ms. Edmonds' arguments and denied her request for parental rights. Ms. Edmonds appealed. In reversing the trial court, the First District simply lost its way—it took three missteps in determining there is a route for Ms. Edmonds to obtain parental rights. This included misapprehending a least two United States Supreme Court cases—*Obergefell*, 576 U.S. at 644 (state must issue marriage licenses to same-sex couples and must recognize out-of-state same-sex marriages) and *Troxel*, 530 U.S. at 65 (the right to parental autonomy is a fundamental constitutional right). The First District's decision also violates the Ohio Constitution, rewrites at least two Ohio statutes, and unsettles many more of Ohio's statutory schemes.

The first misstep: contrary to every other court that has considered these issues, the First District incorrectly determined that *Obergefell* mandates a judicial rewrite of sex-neutral statutes to create recognition of not-solemnized marriages (a.k.a. common-law marriage). *See Candelaria*

v. Kelly, 535 P.3d 234, 235-36 (Nev.2023) (citing *Obergefell*). In *Obergefell*, the United States Supreme Court issued two holdings based on its determination that the "constellation of benefits" associated with marriage must be offered to same-sex married couples: (1) states must recognize same-sex marriages that are lawful in other states; (2) states must issue licenses for same-sex marriages. *Obergefell*, 576 U.S. at 680-81. There is no violation of *Obergefell* related to this case because Ms. Shahani and Ms. Edmonds never married in any state, and never applied for and were denied a marriage license in Ohio. Even though any issue related to *Obergefell* should have been resolved in short order, the First District stretched *Obergefell* way beyond breaking point to rewrite Ohio's common-law marriage statute, such that common-law marriage between same-sex couples would now be recognized in Ohio.

The second misstep: the First District violated Ms. Shahani's constitutionally protected right to parental autonomy by empowering the trial court to order that she share her parental rights with a non-parent. *See Troxel*, 530 U.S. at 65. The First District determined that Ohio's failure to recognize same-sex marriage is a justification for seizing the parental rights of good parents who played no role in creating or enforcing Ohio's same-sex marriage ban. The foundation of this decision was that a trial court can rewrite history and force Ms. Shahani into a marriage (without her consent) as a remedy for *the state* hypothetically violating rights Ms. Edmonds never sought to exercise—all despite there being no claim that Ms. Shahani played any role in that hypothetical constitutional violation. But courts are not "in a position to rewrite history." *State v. Vazquez*, 2007-Ohio-2433, ¶ 42 (11th Dist.). Even if a court could rewrite history, doing so would not change the fact that plaintiffs must seek redress from a person who is responsible for the purported harm. *Johnson v. Madison Cty. Court of Common Pleas*, 2017-Ohio-2805, ¶ 6 (A party bringing a claim cannot succeed when it names the wrong defendant.).

The third misstep: disregarding a myriad of precedents, the First District created an unworkable "would have been married" standard that it then weaponized to circumvent Ohio's constitutional bar on retroactive legislation, violate Ohio's statutory scheme for parental rights, and unsettle a host of legal doctrines to create uncertainty in the lives of at least two generations of Ohio citizens. *Zivich v. Mentor Soccer Club*, 1997 Ohio App. LEXIS 1577, *28 (11th Dist. Apr. 18, 1997) (Courts do not rewrite statutes by "legislat[ing] from the bench.").

Because the First District's decision is incorrect on multiple issues of constitutional law and will create shock waves disrupting several areas of Ohio law for years to come, this Court should hold that Ohio does not recognize a "would have been married" standard, reverse the First District's decision, and remand for consideration of the issues the First District declined to address.

STATEMENT OF THE CASE

I. Facts and Background

Ms. Shahani and Ms. Edmonds were once in a relationship but were never married. *See* Transcript of Proceedings Vol. 3, Common Pl. Doc. 384, p. 536. While they could have married in several states during the years they were together, they never did so. *Id.* at pp. 537-38. Nor would Ms. Shahani have married Ms. Edmonds even if Ohio had permitted same-sex marriage. *Id.* at pp. 537-38, 670.

Ms. Shahani conceived with the assistance of artificial reproductive technology and, in 2012, gave birth to L.E.S. *See* Transcript of Proceedings Vol. 1, Common Pl. Doc. 382, pp. 33, 39-40; Transcript of Proceedings Vol. 3, Common Pl. Doc. 384, pp. 772-73. Ms. Shahani and Ms. Edmonds executed a shared custody agreement for L.E.S. *See* Custody Complaint, Common Pl. Doc. 1. Ms. Shahani again conceived with the assistance of artificial reproductive technology and, in 2014, gave birth to twins E.S. & N.S. *See* Transcript of Proceedings Vol. 1, Common Pl. Doc.

382, p. 29. Ms. Edmonds asked Ms. Shahani to execute a shared custody agreement for the twins, but Ms. Shahani refused—not least because the relationship had deteriorated. *See* Transcript of Proceedings Vol. 3, Common Pl. Doc. 384, p. 896. Neither Ms. Shahani nor Ms. Edmonds took any of the steps listed in R.C. 3111.95, the statute that sets forth the requirements for spouses to be considered a "parent" of any child conceived with the assistance of artificial reproductive technology. In the months following the birth of N.S. and E.S., Ms. Shahani and Ms. Edmonds's relationship deteriorated to the extent that Ms. Shahani feared for her safety. *See* Transcript of Proceedings Vol. 3, Common Pl. Doc. 384, pp. 806, 807-09. The relationship ended entirely in January 2015. *Id.*[1]

In the years that followed, Ms. Shahani solely fulfilled the role of a parent—she continued to make the major child-related decisions, covered all expenses, and managed her children's medical needs. *See* Transcript of Proceedings Vol. 1, Common Pl. Doc. 382, pp. 69-73. The children lived with Ms. Shahani and stayed with Ms. Edmonds sporadically. *Id.*

A host of issues led Ms. Shahani to conclude that it was no longer in the best interest of her children for Ms. Edmonds to have so much interaction with them. *See* Transcript of Proceedings Vol. 1, Common Pl. Doc. 382, p. 128; Transcript of Proceedings Vol. 2, Common Pl. Doc. 383, pp. 275-76; Transcript of Proceedings Vol. 3, Common Pl. Doc. 384, pp. 844-45. Ms. Edmonds proved to be an exceedingly poor co-custodian of L.E.S.: she was uncooperative with Ms. Shahani and went out of her way to make child-related interactions between them hostile, threatening, and abusive. *See* Transcript of Proceedings Vol. 1, Common Pl. Doc. 382, p. 128. Ms. Edmonds could not adhere to a set time and location for pickup and drop-off for Ms. Shahani's children and frequently demanded last-minute changes, much to the detriment of all involved. *See* Transcript of

[1] At the time of the breakup, 35 states recognized same-sex marriage. Had Ms. Shahani and Ms. Edmonds intended to marry, they could have done so by, for example, crossing the border into Indiana.

Proceedings Vol. 3, Common Pl. Doc. 384, p. 844. Ms. Edmonds also failed to keep the children in a consistent and appropriate routine. *See* Transcript of Proceedings Vol. 2, Common Pl. Doc. 383, pp. 275-76; Transcript of Proceedings Vol. 3, Common Pl. Doc. 384, pp. 844-45. When the children stayed with Ms. Edmonds, they tended to stay up too late, often slept in other peoples' homes, often lacked adequate sleeping and furniture arrangements, frequently missed their scheduled social and extracurricular activities, and failed to complete their homework. *Id.* As a result, the children were sleep-deprived, emotional, and unable to self-regulate when they returned to Ms. Shahani at their home. *See* Transcript of Proceedings Vol. 3, Common Pl. Doc. 383, pp. 845.

Based on the need to protect her children, Ms. Shahani filed to terminate L.E.S.'s shared custody agreement. Complaint, Common Pl. Doc. 8. In her response, Ms. Edmonds sought "parentage" of all three children (*i.e.*, a judicial declaration that she is a "parent"), and various other quasi-parental rights. Counterclaim, Common Pl. Doc. 13.

II. Procedural Posture

After a lengthy trial court process, the trial court declined to terminate the shared custody agreement for L.E.S. and awarded Ms. Edmonds "companionship" time with the twins. Tr. Op., Appx. at B-15. The trial court declined to issue a judicial decree of "parentage" to Ms. Edmonds. *Id.* at B-3. Both parties appealed to the First District. Notice of Appeal, Common Pl. Doc. 388; Notice of Appeal, Common Pl. Doc. 390.

On appeal, Ms. Edmonds argued the trial court had the power to manufacture a not-solemnized marriage into existence. *See, e.g.*, Appellee/Cross-Appellant's Amended Merit Brief, Appeal Doc. 21, pp. 22-25. Ms. Edmonds further argued that the court could declare her a "parent" because, despite Ms. Shahani never marrying Ms. Edmonds, the court should treat them as if they

were married and apply marriage-based statutes conveying parental rights to persons with no biological connection to the children. *Id.* Ms. Edmonds grounded this argument in the position that the United States Supreme Court's decision in *Obergefell* was retroactive to such an extent that a court must manufacture a not-solemnized marriage if the court determines a same-sex couple "would have been married" had state law not previously barred such marriages. *Id.* at p. 23.

Ms. Shahani countered these arguments by pointing out that states like Ohio, that do not allow common-law marriage, have determined that *Obergefell* does not require states to recognize not-solemnized marriages. *See, e.g.*, Appellant/Cross-Appellee's Reply Brief, Appeal Doc. 26, pp. 18-22. The states that do permit retroactive application of *Obergefell*, do so based on applying state common-law marriage statutes, not by crafting judicial exceptions to constitutional statutes. *See, e.g.*, Appellant/Cross-Appellee's Notice of Additional Authority, Appeal Doc. 39. Ms. Shahani further explained that the remedy Ms. Edmonds was seeking would violate Ms. Shahani's constitutionally protected right to parental autonomy. *See, e.g.*, Appellant/Cross-Appellee's Reply Brief, Appeal Doc. 26, p. 2.

The First District adopted Ms. Edmonds's position and reversed the trial court's decision. Appeal Op., Appx. at A-17, ¶ 35. The First District mandated that the trial court should conduct a hearing in which the court would embrace an alternate reality and determine whether Ms. Shahani and Ms. Edmonds "would have been married" but for Ohio's statutory scheme as enforced pre-*Obergefell*—empowering the trial court to create an unlicensed not-solemnized marriage. *Id.* at A-16, 17, ¶¶ 32-34. The First District did not announce a standard for the trial court to apply, did not explain how the burden of proof should be assigned, or offer any discernable guidance as to how such a determination would be made. *Id.* Instead, the First District offered the internally contradictory statement that the trial court should consider the factors relevant to a common-law

marriage before declaring an unlicensed not-solemnized marriage into existence, but that the "marriage" would somehow not be a common-law marriage. *Id.* According to the First District, the trial court could declare the existence of a legally-binding, unlicensed, not-solemnized marriage based on the "credibility" of the perceived alternate reality. *Id.* This is dangerous and unworkable.

The First District mentioned R.C. 3111.95(A) in passing, but did not address that marriage alone does not convey parental rights when a child is conceived with the assistance of artificial reproductive technology. *Id.* at A-3, ¶ 2. Even when a married mother conceives that way, the statute conveying parental rights requires the undertaking of several administrative steps—none of those steps were completed in this case. *See generally* R.C. 3111.95. It is a necessary consequence of the First District's decision that it empowered the trial court to rewrite, ignore, and/or overlook those statutory mandates too.

The First District determined that the outcome of the remand to the trial court may render other appeal claims moot. The First District therefore declined to address those remaining assignments of error.

SUMMARY OF THE ARGUMENT

This Court should reverse the First District's decision to embrace an alternate reality regarding marriage and to seize Ms. Shahani's constitutional right to parental autonomy. This Court should hold that a "would have been married" standard that empowers the rewriting of history has no place in Ohio law. This reversal is proper for at least three reasons.

First, despite the First District's determination to the contrary, *Obergefell* requires sex-neutral application of marriage-based statues, not creation of common-law marriage. Ohio's statute barring common-law marriage is sex-neutral and unchallenged—reading that statute's plain and

unambiguous language should end the analysis. But the First District created a judicial exception in violation of separation of powers principles and Ohio's bar on retroactive laws. The First District's justification for doing so was its erroneous determination that setting aside multiple constitutional doctrines was the "only remedy" available. In so doing, the First District ignored that 42 U.S.C. § 1983 provides a remedy for Ms. Edmonds' complaint, that it is well settled that § 1983 is the exclusive remedy for Ms. Edmonds' complaint, and that the party the First District ordered a remedy against, Ms. Shahani, played no role in the alleged wrong.

Second, in addition to the unwarranted extension of *Obergefell*, the First District failed to adhere to the United States Supreme Court's holding in *Troxel*. In *Troxel*, the United States Supreme Court ruled that the government has no authority to interfere in a parent's child-rearing choices unless there is a danger of abuse or neglect of the child. *Troxel*, 530 U.S. at 65. Despite there being no such allegation here, the First District determined that the trial court could rewrite history to seize Ms. Shahani's fundamental constitutional right to parental autonomy.

Third, despite the First District's commentary to the contrary, if the decision is allowed to stand, a host of Ohio legal doctrines are unsettled. As a starting point, even if Ms. Shahani and Ms. Edmonds were married, Ms. Edmonds could not be declared a "parent" unless the court rewrites the artificial reproductive technology statute because that statute requires execution of written consent—which did not happen in this case. Further, a "would have been married" standard is unworkably speculative and would destabilize Ohio law regarding parental relationships, property rights, taxation, health care, and even evidentiary issues like spousal privilege. This Court should not authorize the use of a speculative standard that rewrites the pasts of law-abiding Ohio citizens.

ARGUMENT

Proposition of Law: Neither the State nor Federal Constitution Empower a State Court to Ignore State Statutes Barring Common-Law Marriage, Manufacture an Unlicensed Marriage into Existence, and Hinder a Parent's Fundamental Rights Based on that Manufactured Unlicensed Marriage.

The First District's decision rests on an unwarranted extension of *Obergefell*. In *Obergefell*, the United States Supreme Court determined that, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, "the right to marry is fundamental" and states must provide the "constellation of benefits" associated with marriage to same-sex couples who *choose* to marry. *Obergefell*, 576 U.S. 646-47. Based on this determination, the Court issued two holdings: First, states must recognize same-sex marriages that are lawful in other states. *Id.* at 680-81. Second, states must issue licenses for same-sex marriages. *Id.* The United States Supreme Court has since held that states must provide marriage-based benefits in a sex-neutral fashion. *See, e.g.*, *Pavan v. Smith*, 582 U.S. 563 (2017). As Ms. Shahani and Ms. Edmonds never married and never applied for a marriage license, that should have ended the discussion regarding *Obergefell* and its progeny. But in this case, the First District extended *Obergefell* in a way that every other court addressing a similar argument has refused to do; in violation of Ohio's sex-neutral common-law marriage statute and every other applicable state law, the First District adopted a "would have been married" standard. Appeal Op., Appx. at A-17 ¶ 34.

The First District's decision is also contrary to the United States Supreme Court's holding in *Troxel*, that parents are free of government interference in their parenting choices. *Troxel*, 530 U.S. at 65. Based on a standard that empowers the trial court to rewrite history and create marriages, the First District determined that the trial court could also violate the United States Supreme Court's mandates in *Troxel* and violate Ms. Shahani's constitutionally protected right to parent without government interference. Appeal Op., Appx. at A-17 ¶ 34. The First District

justified this by holding that Ms. Shahani's parental rights were the price Ms. Shahani had to pay for Ohio (not Ms. Shahani) creating and enforcing a statute banning same-sex marriage. Appeal Op., Appx. at A-12, 13 ¶ 24. Simply put, a person's right to parental autonomy is fundamental, whereas the government has no right to "rob Peter to pay Paul" after re-envisioning history. The First District's decision is wrong on every front.

I. *Obergefell* Does Not Empower Courts to Rewrite Constitutional State Laws Barring Recognition of Not-Solemnized Marriages.

A. *Obergefell* and state common-law marriage statutes

Courts addressing the scope of *Obergefell* have looked at the interplay between *Obergefell*'s holdings and state laws that relate to marriage. Courts have found that, if a state law relates to marriage, that law must be interpreted in sex-neutral terms and must accordingly apply equally to same-sex couples and different-sex couples. In line with this finding, courts in states that recognize common-law marriage have applied common-law marriage precedent to same-sex relationships. In states that do not recognize common-law marriage, litigants have repackaged common-law marriage as a "would have been married" standard and asked the courts to rewrite history to create not-solemnized marriages based on speculating about an alternate reality. Courts have rejected such efforts.

In *Candelaria*, for example, the Nevada Supreme Court sitting en banc, explained that no matter how the argument is dressed, a "would have been married" standard is indistinguishable from common-law marriage. 535 P.3d at 239. Further, when common-law marriage is barred by state statute, the court has no choice but to abide by that statute unless that statute is itself unconstitutional. *Id.* The *Candeleria* court explained that adopting a "would have been married" standard violates the constitution because doing so would usurp legislative authority. *Id.*

Candelaria is in good company. Thirteen other decisions have been issued by state courts grappling with the interplay between *Obergefell*, retroactivity, and common-law marriage. Courts sitting in states that *do not* permit common-law marriage have issued six relevant opinions that uniformly demonstrate that courts *cannot* create retroactive not-solemnized marriages where state law prohibits common-law marriage. *Anderson v. S. Dakota Retirement Sys*., 2019 S.D. 11, (same-sex partner cannot collect benefits under police retirement plan because they were not married and *Obergefell* does not apply retroactively to create common-law marriages in states that do not otherwise recognize common-law marriage); *Field v. Woolard*, 2017 NYLJ LEXIS 2442 (New York law does not recognize common-law marriage but does honor common-law marriages from other states and acknowledges that Pennsylvania permitted common-law marriage under *Obergefell*.); *Sheardown v. Guastella*, 324 Mich.App. 251, 259-60 (2018) ("[P]laintiff is not in a position to argue that she was denied a benefit granted to a heterosexual married person, because she was never married to defendant. As a result, the liberty interest in the right to marry that was extended to same-sex couples in *Obergefell* simply does not come into play."); *Matter of Leyton*, 22 N.Y.S.3d 422 (holding, in non-common-law marriage states, *Obergefell* did not require treating commitment ceremony as a valid marriage ceremony, which would have been inconsistent with the parties' mutual understanding that they were not legally married); *Philip Morris USA, LLC v. Rintoul*, 342 So.3d 656 (Fla.App.2022) (loss of consortium claim failed after court relied on state's bar on common-law marriage when rejecting argument to apply *Obergefell*).

Compare the opinions issued in states that do not recognize common-law marriage with the eight opinions that have been issued by courts sitting in states that *do* permit common-law marriage. Those eight opinions demonstrate that courts apply common-law marriage rules retroactively based on *Obergefell*. *Ford v. Freemen*, 2020 U.S. Dist. LEXIS 149176, at *2

(N.D.Tex. Aug. 17, 2020) (court recognizing a common-law marriage based on Texas statute and *Obergefell*); *Swicegood v. Thompson*, 435 S.C. 63, 65 (2021) (holding that *Obergefell* applied but an independent state law precluded the recognition of a common-law same-sex marriage under the specific facts of the case); *Adami v. Nelson* (*In re J.K.N.A.*), 398 Mont. 72 (2019) (*Obergefell* applies retroactively for purposes of recognizing common-law marriage); *Gill v. Van Nostrand*, 206 A.3d 869 (D.C.2019) (same); *In re Estate of Carter*, 2017 PA Super 104 (same); *In re Marriage of Lafleur v. Pyfer*, 2021 CO 3 (same); *Ranolls v. Dewling*, 223 F. Supp. 3d 613 (E.D.Tex. 2016) (same); *Hogsett v. Neale*, 2021 CO 1 (same but redefining the requirements for common-law marriage to require *mutual intent* to create a common-law marriage).

As *Candelaria* and the other thirteen cases demonstrate, in states that recognize common-law marriage, courts have determined *Obergefell* mandates sex-neutral application of common-law marriage precedent; in states that do not recognize common-law marriage however, a "would have been married" standard plays no role and *Obergefell* does not serve to force recognition of not-solemnized marriages.

B. Ohio's common-law marriage statute

"Common-law marriages were prohibited in Ohio by statutory amendment after October 10, 1991, R.C. 3105.12(B)(1)." *Williams v. Ormsby*, 2012-Ohio-690, ¶ 39. Marriages "may occur in this state only if the marriage is solemnized by a person described in section 3101.08 of the Revised Code and only if the marriage is otherwise in compliance with Chapter 3101 of the Revised Code." *Rihan v. Rihan*, 2006-Ohio-2671, ¶ 25 (2nd Dist.). The legislature has spoken in clear and unambiguous terms; common-law marriage is not available in Ohio and instead Ohio marriages must be licensed and solemnized. R.C. 3101.05, R.C. 3101.08.

A court may not invade the province of the legislature and violate the separation of powers by rewriting a statute or ordinance. *See Pratte v. Stewart*, 2010-Ohio-1860, ¶ 54. If a statute has exceptions, those exceptions must be drafted by the legislature, not the courts. *See Pelletier v. Campbell*, 2018-Ohio-2121, ¶ 20. Courts interpret statutes and "[t]o go beyond it is to usurp a power which our democracy has lodged in its elected legislature." *State ex rel. Clay v. Cuyahoga Cty. Med. Exam'rs Office*, 2017-Ohio-8714, ¶ 39 (quoting Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum.L.Rev. 527, 533, 535 (1947)). Courts "should not and, therefore, do not, judicially graft an exception to the express language of [a] statute." *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.*, 82 Ohio St.3d 222, 227 (1998).

Though there is no argument here that R.C. 3105.12 is unconstitutional, it bears noting that even when a statute is unconstitutional, the court cannot rewrite it "because doing so would condone a * * * remaking of an unconstitutional statute into a new statute not subject to the legislative process." *Zeigler v. Zumbar*, 2011-Ohio-2939, ¶ 42 (quoting *People v. Taylor*, 9 N.Y.3d 129, 153 (2007)).

C. Ohio's courts cannot craft judicial exceptions to a constitutional statute.

It bears repeating that Ms. Shahani and Ms. Edmonds were not married under the laws of any state. Accordingly, the first holding of *Obergefell* is not at issue here. Similarly, Ms. Shahani and Ms. Edmonds did not apply for a marriage license in Ohio only to be denied. Accordingly, the second holding of *Obergefell* is not an issue here either.

All that remains is to determine whether *Obergefell* dictates that Ohio must recognize a not-solemnized marriage—it does not. R.C. 3105.12(B)(1) is a sex-neutral statute that expressly provides that Ohio does not recognize marriages unless they are licensed and solemnized.

Obergefell requires equal treatment of different-sex and same-sex couples who *choose* to marry. *Obergefell*, 576 U.S. at 646-47. *Obergefell* therefore prohibits the creation of a judicial exception to a statute that gives the court the authority to declare into existence same-sex marriages but not different-sex marriages. R.C. 3105.12(B)(1) applies equally to all couples. The First District's holding destroys that equality.

Despite neither holding from *Obergefell* applying and Ohio law barring common-law marriage, the First District determined that *Obergefell* mandates tossing aside this sex-neutral legislation and recognizing not-solemnized same-sex marriages. Without explaining how it could recognize a not-solemnized marriage other than by crafting a judicial exception to Ohio's common-law marriage statute, the First District concluded that the trial court could award Ms. Edmonds the benefits of marriage based on a "would have been married" alternate reality.

The First District determined:

> the only remedy this court sees for the unconstitutional deprivation of rights in this case, which safeguards not only the right to marry but the children involved in the relationship, is to recognize—in the limited circumstances where it is affirmatively established—marriages that would have existed at the time the children were conceived, absent Ohio's unconstitutional ban on same-sex marriage.

Appeal Op., Appx. at A-12, 13 ¶ 24.

This decision plainly runs afoul of Ohio statutory law barring recognition of not-solemnized marriages. R.C. 3105.12(B)(1) expressly provides that Ohio does not recognize marriages unless they are solemnized. The First District's decision should be reversed because it violates separation of powers limitations by usurping legislative authority to create a judicial exception to a clear, unambiguous, and constitutional sex-neutral statute.

D. There are proper remedies available for litigants that timely pursue them.

It bears delving deeper into the First District's "only remedy" statement. Ms. Edmonds' claim, and the First District's erroneous decision, rest on the foundational premise that Ms.

Edmonds' constitutional rights were violated by Ohio and therefore she can seek redress from Ms. Shahani. There are several interwoven problems with this conclusion.

First, Ms. Edmonds has not filed an action against the state of Ohio or a government official that enforced an unconstitutional law; the only opposing party in this case is Ms. Shahani. There is no precedent or logic supporting the conclusion that a plaintiff can seek redress from an innocent bystander. *Johnson*, 2017-Ohio-2805, ¶ 6 (A party bringing a claim cannot succeed when it names the wrong defendant.).

To overcome this problem, Ms. Edmonds would have to establish a causal link between the constitutional claim and Ms. Shahani. But Ms. Edmonds cannot offer a plausible argument that Ms. Shahani's actions caused any aspect of any constitutional violation. *See Chapman v. Higbee Co.*, 319 F.3d 825, 833 (6th Cir. 2003) (en banc) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 947 (1982)) ("A private party's actions constitute state action under § 1983 where those actions may be fairly attributable to the state." (cleaned up)). Ms. Edmonds does not allege that Ms. Shahani played any role in creating or enforcing Ohio's same-sex marriage law.

Even if Ms. Shahani was somehow responsible for Ohio having an unconstitutional law on its books, the Sixth Circuit has long held that "§ 1983 provides the exclusive remedy for constitutional violations for rights protected by the Fourteenth Amendment where Congress has not otherwise provided a cause of action." *Smith v. Kentucky*, 36 F.4th 671, 675 (6th Cir.2022) (cleaned up). And the Sixth Circuit has further held § 1983 provides the remedy for violations of *Obergefell*. *See Ermold v. Davis*, 936 F.3d 429, 438 (6th Cir.2019). Ms. Edmonds has not brought a § 1983 claim against Ms. Shahani.

In sum, pre-*Obergefell*, if a person wanted to challenge Ohio's law banning same-sex marriage, that person could have obtained a remedy by filing a declaratory judgment action like

the one filed by the plaintiff in the *Obergefell* case. Post-*Obergefell*, a person challenging state action related to same-sex marriage could obtain relief by filing a § 1983 action against the state official that violated those rights. *See, e.g.*, *Ermold v. Davis*, 2022 U.S. App. LEXIS 27443, (6th Cir. Sep. 29, 2022). Ms. Edmonds cannot hit the threshold mark of showing a constitutional violation of any right because Ohio neither failed to recognize an out-of-state marriage nor refused to issue her a marriage license, but assuming a person could show such a violation, that person had a remedy pre-*Obergefell* (declaratory judgment action) and has a remedy post-*Obergefell* (a § 1983 claim). Assuming, arguendo, Ms. Edmonds could show Ohio violated her rights, there are available remedies—but she sat on her rights and did not pursue them. In no world is Ms. Edmonds' decision attributable to Ms. Shahani.

II. The First District's Decision Violates the United States Supreme Court's Holding in *Troxel* that Parents are Free of Government Interference when Making Parental Decisions.

The problems caused by the First District's application of a "would have been married" standard are wide-ranging. But in this case, the most damaging effect of the First District's holding is that, after applying a "would have been married" standard, the trial court could decree that Ms. Shahani was not the sole parent of her three children. Instead, according to the First District, the trial court could order that Ms. Shahani share parental control with a person who is neither biologically nor otherwise legally a "parent." Appeal Op., Appx. at A-17, ¶ 35. In so holding, the First District violated Ms. Shahani's constitutional right to parental autonomy.

The United States Supreme Court stated in *Troxel* that "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." 530 U.S. at 66. Likewise, this Court has recognized that parents have a fundamental liberty interest in the care,

custody, and management of their children. *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St. 3d 367, 372 (1998). Among the decisions controlled by a parent are visitation rights. *Troxel*, 530 U.S. at 60.

Government interference with these rights is limited to protecting the children. *See Martin* v. *Saint Mary's Dep't Of Soc. Servs.*, 346 F.3d 502, 506 (4th Cir. 2003) ("A state has a legitimate interest in protecting children from *neglect* and *abuse* and in investigating situations that may give rise to such *neglect* and *abuse*.") (emphasis added); *Kia P.* v. *McIntyre*, 235 F.3d 749, 759 (2d Cir. 2000) (noting "the state's compelling interest in protecting children from *abuse* and *neglect*") (emphasis added).

There is "the traditional presumption" articulated by the Supreme Court in *Troxel* "that a fit parent will act in the best interest of his or her child." *Troxel*, 530 U.S. at 69 ("[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."); *see also Schulkers v. Kammer*, 955 F.3d 520, 542 (6th Cir.2020).

Here, there is no allegation that Ms. Shahani is an unfit parent and there is nothing in the record or otherwise to suggest that she engages in any level of abuse or neglect. In fact, the record shows that the genesis of this dispute was Ms. Shahani's efforts to protect her children from neglect. In other words, the record is devoid of any evidence justifying the court's interference in Ms. Shahani's parental autonomy. Despite this, the First District erroneously empowered the trial court to do exactly what the United States Supreme Court forbade—seize Ms. Shahani's parental autonomy despite her status as a fit parent being without challenge. And it bears repeating, the

First District took this step because *the state of Ohio* had an unconstitutional law on its books, *not* because Ms. Shahani did anything wrong.

Because the First District's decision empowers the trial court to violate the United States constitution, this Court should reverse.

III. The First District's Decision Runs Afoul of and/or Unsettles a Myriad of Legal Doctrines.

A. Courts cannot rewrite Ohio's statutory scheme regarding artificial reproductive technology.

Assuming, arguendo, this Court embraced a "would have been married" standard, that would be an advisory opinion in this case unless the Court also permits a judicial rewrite of R.C. 3111.95(A). Being married to a person who conceives with the assistance of artificial reproductive technology does not make that person into the child's parent; whether a spouse becomes a parent is determined by application of R.C. 3111.95(A). Written using sex-neutral terms, in relevant part, R.C. 3111.95(A) provides:

> If a married [person] is the subject of a non-spousal artificial insemination *and if [the spouse] consented to the artificial insemination*, the [spouse] shall be treated in law and regarded as the natural [parent] of a child conceived as a result of the artificial insemination, and a child so conceived shall be treated in law and regarded as the natural child of the [spouse].

(Emphasis added).

R.C. 3111.95(A) plainly and unambiguously limits parentage rights to spouses who have formally "consented" to artificial insemination. This consent must be in writing, must include fourteen distinct pieces of information, and must be signed by *the mother* and the mother's *spouse*. R.C. 3111.92; R.C. 3111.93. Ms. Shahani and Ms. Edmonds did not execute the necessary writing. In other words, even if the Court rewrote the common-law marriage statute to create the possibility of not-solemnized marriage in Ohio, that would not make Ms. Edmonds a "parent" unless the

Court also rewrote the artificial reproductive technology statutory scheme to eliminate the clear and unambiguous written-consent requirement.

Because Ohio's artificial reproductive technology statute makes application of a "would have been married" standard futile, this Court should reverse the First District's decision.

B. The Ohio Constitution bars retroactive application of law.

The First District's decision to craft a judicial exception to R.C. 3105.12(B)(1) and implicitly rewrite R.C. 3111.95(A) violates the Ohio retroactivity clause. The Ohio Constitution bans retroactive statutes—"The general assembly shall have no power to pass retroactive laws." Section 28, Article II.[2] Interpreting this Clause, this Court held:

> The prohibition against retroactive laws is not a form of words; it is a bar against the state's imposing new duties and obligations upon a person's past conduct and transactions, and it is a protection for the individual who is assured that he may rely upon the law as it is written and not later be subject to new obligations thereby.

Lakengren v. Kosydar, 44 Ohio St. 2d 199, 201 (1975).

In explaining the preclusion on retroactive laws, this Court held that an impermissible retroactive law is one that impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction, or creates a new right altogether. *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St. 3d 100, 107 (1988). In other words, "the retroactivity clause nullifies those new laws that reach back and create new burdens, new duties, new obligations, or new liabilities not existing at the time the statute becomes effective." *Smith v. Smith*, 2006-Ohio-2419, ¶ 6 (cleaned up). In *Smith*, this Court applied

[2] Of course, the First District (not the general assembly) rewrote these statutes and then applied them retroactively. But it would be absurd to argue that the appeals court can engage in a "two wrongs make a right" activity by judicially legislating, applying the judicial rewrite retroactively, and then finding judicial legislation is not subject to legislative limitations set forth in the Ohio Constitution.

Section 28, Article II when holding a law related to a parent's rights and obligations was unconstitutional as applied. *Id.* at ¶ 11.

Here, not only does the First District's decision rewrite statutes in violation of separation of powers principles, but the decision also violates the retroactivity clause by changing two statutory schemes with retroactive effect to the detriment of Ms. Shahani. Under Ohio's statutory scheme, as it existed the entire time Ms. Shahani and Ms. Edmonds were a couple, Ms. Shahani had a vested and accrued substantive right to be free from the duties and obligations that come with marriage unless she *chose* to enter a solemnized marriage. Similarly, marriage-related statutes, such as R.C. 3111.95(A), that could diminish Ms. Shahani's parental autonomy, had no effect because Ms. Shahani was not married—and in any event, there was no written consent as required by R.C. 3111.95(A). But the First District's decision takes away Ms. Shahani's marriage-related rights and parental autonomy based on retroactive application of a judicially crafted exception to Ohio's statutes barring common-law marriage and mandating written consent under R.C. 3111.95(A).

For these additional reasons, this Court should reverse the First District's decision.

C. A "Would Have Been Married" Standard is Unworkable.

Even if this Court:

1. held that *Obergefell* empowers courts to craft judicial exceptions to common-law marriage statutes and apply the judicially crafted exception retroactively;

2. held that trial courts have the power to seize the parental rights of a wholly fit parent as a remedy for the state's conduct in which that wholly fit parent played no role;

   and

3. rewrote the artificial reproductive technology statute to eliminate the written consent requirement and applied that new rule retroactively;

the Court should still reject a "would have been married" standard and reverse the First District's decision because the standard is unworkably speculative and destabilizes an abundance of legal landscapes.

1. Unworkably Speculative

Applying a "would have been married" standard is unworkable because it requires the court to selectively rewrite history. Courts have rejected the notion that rewriting history is the proper method in circumstances similar to this case. In *Sheardown v. Guastella*, for example, the court held that "retroactive application of *Obergefell* would be unjust insofar as it would presuppose the actions of the parties years ago" and would "introduce an element of unpredictable legal and ethical chaos." 2018 Mich. Cir. LEXIS 241, *20. A "would have been married" standard also ignores the lack of notice to the person whose rights are being seized. *See Stone v. Thompson*, 428 S.C. 79, 86 (2019) (A marital obligation cannot be imposed upon a person that does not understand the triggers for such marital bonds.).

These two artifices build upon each other to create an impossible task for courts. To apply a "would have been married" standard effectively, the trial court would need to be both a time-traveler and mind-reader because the court would need to reverse engineer whether the individuals would have made certain choices years earlier. The court would also need to account for whether the decision making would have been the same had the individuals been on notice of the different consequences of their actions.

There are other situations in which United States Supreme Court holdings on constitutional issues cannot be applied retroactively because doing so would create an unmanageable butterfly effect. For example, *Citizens United v. FEC*, 558 U.S. 310, 312 (2010), the Supreme Court ruled that certain campaign finance restrictions were unconstitutional infringements on speech. But we

do not have a "would have been elected" standard; courts do not change people's voting choices and declare a new winner of years-old elections based on how the court predicts individuals would have voted but for the unconstitutional financing restrictions affecting the spread of a candidate's platform.

Similarly, the United States Supreme Court recently held that college admissions programs that rely on race as a substantial factor violate the Equal Protection clause of the Fourteenth Amendment. *Students for Fair Admissions, Inc. v. President & Fellows of Harv. College*, 600 U.S. 181 (2023). But we do not have a "would not have been admitted" standard under which courts take away degrees from graduates based on the court's prediction about whether the university would have made different admissions choices had it disregarded race-based admissions factors.

A "would have been married" standard also creates a substantial likelihood of a false positive. The "would have been married" standard rests on the false assumption that everyone who is in a committed relationship unequivocally endorses marriage and would choose to marry. In effect, the "would have been married" standard focuses on evidence showing a desire to be long-term partners (which may or may not include a legally recognized union) and contorts that into a desire for a legally recognized union. But "non-marital cohabitation is exceedingly common and continues to increase among Americans of all age groups." *Stone*, 428 S.C. at 86 (citing Renee Stepler, *Number of U.S. adults cohabitating with a partner continue to rise, especially among those 50 and older*, Pew Research Ctr. (Apr. 6, 2017), https://www.pewresearch.org/fact-tank/2017/04/06/number-of-u-s-adults-cohabiting-with-a-partner-continues-to-rise-especially-among-those-50-and-older/.) For example, actors Sarah Paulson and Holland Taylor have been in a relationship for nine years but, despite being empowered to marry, have decided not to. If they

had a different timeline and ended their relationship prior to the *Obergefell* decision, a "would have been married" analysis would have resulted in a false positive.

Even if a party expressly states the desire to marry (which did not happen in this case), this statement does not translate to a couple "would have been married"—only that the couple might have *planned* to marry. There are well-publicized examples of individuals who were engaged but broke off the engagement prior to the wedding. Faced with the gravity of solemnizing the union, one or both decided not to follow through with the planned wedding. President James Buchanan was engaged to Ann Coleman but called off the engagement; Julia Roberts called off her wedding to Kiefer Sutherland three days before the ceremony; and NBA player Richard Jefferson cancelled his wedding so late that guests were already arriving at the venue. But an analysis of these relationships prior to the pre-wedding breakup would likely result in a false positive under the "would have been married" standard. How could a court ever be sufficiently certain that a mother would not change her mind only when facing the moment of announcing "I do"? The answer is never—rendering a counter-reality "would have been married" standard unworkable.

Turning the focus back to this case, if a married mother made the decision to conceive with the assistance of artificial reproductive technology, so long as the consent requirements were met, the mother knows that the parental rights will be shared with her spouse. *See* R.C. 3111.95. Indeed, this is exactly why the forms are required: so that the would-be parents are making informed decisions. But, when the mother conceives with the assistance of artificial reproductive technology and is not married, that mother's parental rights are disconnected from the decision to cohabitate with another person. It would be absurd to hold that courts could determine that the mother was willingly deciding to marry and share parental rights, by relying on the mother's decision to cohabitate that was entirely disconnected from marriage and her parental rights.

2. Legal Uncertainty Created by a Revisionist History

The Court should also consider the parade of horribles that would follow endorsement of a "would have been married" standard. In *Obergefell* and its progeny, the Supreme Court reasoned that the constellation of benefits associated with marriage are constitutionally protected. *Obergefell*, 576 U.S. 646-47. Though the First District stated its decision was limited to parental rights, a holding that some benefits of marriage are more protected than others runs afoul of *Obergefell*. In *Obergefell* and its progeny, the United States Supreme Court expressly listed many benefits of marriage that are protected and applying a "would have been married" standard to those benefits shows the expanse of legal frameworks the First District's decision destabilized.

The First District narrowed the issue to parent's rights only, so let's start there: The facts of this case show one insurmountable obstacle to a "would have been married" standard (*i.e.*, it allows the government to take parental rights away from a good parent who is not even accused of wrongdoing) but examine the other side of the coin. Imagine Ms. Shahani and Ms. Edmonds ended their relationship and Ms. Shahani filed for child support on the basis that the couple "would have been married" and that Ms. Edmonds is a presumptive parent under a judicially rewritten statutory scheme. R.C. 3111.13 provides a route for the court to order backdated child support. Would Ms. Edmonds have to pay? Given that Ms. Shahani and Ms. Edmonds ended their relationship approximately ten years ago, would Ms. Edmonds owe a decade of backpay?[3]

Under R.C 3107.06, adoption is complete only with the parents' consent. If this Court retroactively changes the rules for determining who is a "parent," there would be numerous adoptions that would need to be revisited as individuals who were not previously classified as

[3] An initial review of the calculations shows that Ms. Edmonds would owe well over $50,000 to Ms. Shahani.

"parents" would gain standing to object. Do courts now have to nullify certain adoptions based on retroactive application of a "would have been married" standard?

Parents also have the right to make medical decisions for minor children. Must hospitals conduct impromptu administrative hearings to determine who has medical decision-making authority?

Do courts need to examine a "would have been married" standard before dividing the estate of a person that dies intestate? Under R.C. 2105.06 (C) and (D), both minor children and adult children would receive proceeds of the "parent's" estate; and under R.C. 2105.06(F), if the deceased is childless, the deceased's "parents" receive the proceeds of the estate.

Looking past the First District's unwarranted narrowing of *Obergefell* to parental rights, a series of other societal issues are at play.

Divorce-based property rights: If there is a "would have been married" standard, there must also be a "would have been divorced" standard. Do long-since-split same-sex couples now go to court and file for divorce? What is the effective date of their marriage and divorce? Do courts have to define and then redistribute property years after a separation?

Taxation: Are states to retroactively apply taxation laws such that former couples that "would have been married" must amend tax filings? For example, must Ms. Shahani and Ms. Edmunds file amended taxes and pay any deficits and penalties because of an underpayment? Does the state have to pay refunds if it is determined that Ms. Shahani and Ms. Edmonds overpaid after examining amended returns based on married-filing-jointly status?

Health care: What about family-based health insurance plans? Can a court "remedy" a historical lack of family health insurance options for unmarried same-sex couples by ordering a

health insurance company to pay years-old medical bills because two people "would have been married" but for Ohio's statutory scheme?

Spousal evidentiary privilege: Do courts have to examine a "would have been married" standard when determining whether spousal privilege protects communications?

The United States Supreme Court listed each of these benefits of marriage in the *Obergefell* decision.

* * * * *

The Court should reverse the First District and reject the "would have been married" standard because rewriting history as a basis for redefining the present would "introduce an element of unpredictable legal and ethical chaos" to Ohio marriage and parentage laws and unconstitutionally abridge Ms. Shahani's parental rights. *See Sheardown*, 2018 Mich. Cir. LEXIS 241, *20.

CONCLUSION

For these reasons, this Court should reverse the First District's decision and hold that a "would have been married" standard does not apply in Ohio. This Court should also hold that there is no justification for applying marriage-based statutes in this case because there was no marriage. This Court should remand the case to the First District to resolve the unaddressed assignments of error.

Respectfully submitted

/s/ Paul R. Kerridge

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served to all counsel of record via electronic mail on July 26, 2024.

/s/ Paul R. Kerridge
Paul R. Kerridge (0092701)

APPENDIX A

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

IN RE: L.E.S., E.S., N.S. : APPEAL NOS. C-220430
C-220436
TRIAL NO. F12-728Z
:
: *JUDGMENT ENTRY*

This cause was heard upon the appeals, the record, the briefs, and arguments.

The judgment of the trial court is reversed and the cause is remanded for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for these appeals, allows no penalty, and orders that costs are taxed under App.R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App.R. 27.

To The Clerk:

Enter upon the Journal of the Court on 1/19/2024 per Order of the Court.

By: Ginger S. Bock
Administrative Judge

D140463335

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

IN RE: L.E.S., E.S., N.S. : APPEAL NOS. C-220430
C-220436
: TRIAL NO. F12-728Z

: *OPINION.*

Appeals From: Hamilton County Juvenile Court

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: January 19, 2024

Durst Kerridge Khatskin LLP, Alexander J. Durst, Paul R. Kerridge, Link Nestheide Family Law and *Diana M. Link*, for Appellant/Cross-Appellee,

Hilton Parker LLC, Jonathan L. Hilton, Geoffrey C. Parker, Essig & Evans LLP and *Danielle L. Levy*, for Appellee/Cross-Appellant,

ACLU of Ohio Foundation, Amy R. Gilbert and *Freda J. Levenson*, for Amici Curiae American Civil Liberties Union of Ohio Foundation and National Association of Social Workers,

Frost Brown Todd LLP, Ryan W. Goellner, Lewis Brisbois, Bisgaard & Smith LLP and *Jason A. Paskan*, for Amicus Curiae The Nathaniel R. Jones Center for Race, Gender, and Social Justice.

ZAYAS, Presiding Judge.

{¶1} The "right to marry is a fundamental right inherent in the liberty of the person." *Obergefell v. Hodges*, 576 U.S. 644, 675, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015); *see, e.g., Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); *Zablocki v. Redhail*, 434 U.S. 374, 383-384, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978). In *Obergefell*, the United State Supreme Court held that states may not constitutionally exclude same-sex couples from "marriage on the same terms and conditions as opposite-sex couples." *Obergefell* at 675-676. Consequently, states cannot constitutionally deprive same-sex couples of the "constellation of benefits" linked to marriage under state law. *Id.* at 646-647, 670; *Pavan v. Smith*, 582 U.S. 563, 564, 137 S.Ct. 2075, 198 L.Ed.2d 636 (2017).

{¶2} Under R.C. 3111.95(A), Ohio conclusively recognizes a consenting different-sex spouse of a married woman as the natural parent of a child conceived as a result of nonspousal artificial insemination during the marriage. *Obergefell* clearly compels the result that such legal recognition must be equally extended to a consenting same-sex spouse of a married woman under Ohio law as Ohio has linked the establishment of a parent-and-child relationship to the marriage in such a situation and therefore provides married couples with a form of legal recognition not available to unmarried couples. *See Pavan* at 567; *see also Harrison v. Harrison*, 643 S.W.3d 376, 382-383 (Tenn.App.2021).

{¶3} The more difficult question presented to this court on appeal is whether the same-sex consenting partner of a woman subject to nonspousal artificial insemination can be recognized as the legal parent of the child(ren) conceived as a result of the nonspousal artificial insemination where the parties were never married but would have been at the time of the child(ren)'s conception had they legally been

able to do so and have the marriage recognized in their home state of Ohio. For the reasons that follow, we hold that such a partner should be recognized as a legal parent under Ohio law where it is affirmatively established that the parties would have been married at the time of the child(ren)'s conception but for Ohio's unconstitutional ban on same-sex marriage. *See In re Domestic Partnership of Madrone*, 271 Or.App. 116, 128, 350 P.3d 495 (2015).

{¶4} In the instant case, the juvenile court determined that there was no pathway under Ohio law for appellee/cross-appellant C.E. to be recognized as the legal parent of the child(ren) consensually conceived by her same-sex partner, appellant/cross-appellee P.S., as a result of nonspousal artificial insemination during their relationship, despite C.E.'s assertion that the parties would have been married at the time of conception had they legally been able to do so. Instead, based on a number of other factors, the trial court found that P.S. relinquished sole custody of the children in favor of shared custody with C.E. under *In re Bonfield*, 97 Ohio St.3d 387, 2002-Ohio-6660, 780 N.E.2d 241, and *In re Mullens*, 129 Ohio St.3d 417, 2011-Ohio-3361, 953 N.E.2d 302. Because we hold that in this case the juvenile court should have first determined whether the parties would have been married at the time of the child(ren)'s conception—but for Ohio's unconstitutional ban on same-sex marriage—before finding that C.E. could not be recognized as a legal parent of the child(ren) under Ohio law, we reverse the juvenile court's parentage determination and remand the cause for further proceeding consistent with this opinion and the law. Since the juvenile court's judgment on remand could render P.S.'s assignments of error pertaining to custody and visitation moot, determination of P.S.'s assignments of error is premature, and we decline to address them.

I. Factual and Procedural History

{¶5} On March 9, 2012, P.S. and C.E. jointly filed an R.C. 2151.23(A)(2) nonparent petition for custody regarding L.E.S., born February 16, 2012. The petition indicated that P.S. was contractually relinquishing custody of L.E.S. based on a cocustody agreement (the "custody agreement") between the parties. The custody agreement provided that the parties lived together as a family with L.E.S. and L.E.S. had no legal, presumed, or alleged father under R.C. 3111.95(B) as L.E.S. was conceived using anonymous artificial insemination. Under the agreement, P.S. expressly relinquished any right she may have to exclusive or paramount care, custody, and/or control of L.E.S.

{¶6} On October 11, 2018, P.S. filed a motion for contempt and to terminate or modify the custody agreement based on a change in circumstances. The motion argued that she was the birth mother of L.E.S., and that C.E. was not acting in the best interest of the child.

{¶7} In response, C.E. filed a complaint for parentage and custody of L.E.S., plus E.S. and N.S., born April 11, 2014. The complaint maintained that the juvenile court had jurisdiction to determine parentage and custody under R.C. 3111.01-3111.99 and 2151.23(A)(2), the update in law before and after *Obergefell*, 576 U.S. 644, 135 S.Ct. 2584, 192 L.Ed.2d 609, and *In re Mullens*, 129 Ohio St.3d 417, 2011-Ohio-3361, 953 N.E.2d 302. The complaint asserted that all three children were conceived using artificial reproductive technology ("ART") with the same anonymous sperm donor matching the ethnicity of C.E. The complaint further asserted that P.S. gave birth to the children with the active and consistent involvement of C.E.—both financially and otherwise—and both parties' written consent. C.E. averred in the complaint that, although same-sex marriage was not legally recognized in Ohio during their 12-year

relationship, the parties held a "civil commitment ceremony" prior to the birth of the children and presented as married to friends, family, and others.

{¶8} P.S. subsequently filed a motion to dismiss C.E.'s complaint, arguing, among other things, that no established Ohio law allowed for any parental rights to be bestowed upon C.E. for any of the children, and that the parties ended their relationship shortly after E.S. and N.S. were born and never entered into a shared-custody agreement for E.S. and N.S. After responsive briefing and oral argument, the magistrate entered an order on April 19, 2019, denying P.S.'s motion to dismiss.

{¶9} Hearings were held on December 6 and December 13, 2019, and January 31, September 11, and September 18, 2020. C.E. testified that the parties were engaged and committed exclusively to each other. However, at the time of their engagement, they were unable to legally marry. She further testified that they were not married at the time the children were born because they were unable to legally marry. She agreed in her testimony that the parties could have traveled to another state to be married during their relationship and that the parties had the ability to travel as they traveled often. She said they even traveled to Boston to be married. However, they concluded that their marriage would not be acknowledged in Ohio, so they ultimately did not marry.

{¶10} In contrast, P.S.'s sister testified at the hearing that, when asked, P.S. once said that the parties were not getting married.

{¶11} On January 26, 2021, the magistrate entered a decision on the parentage, custody, and visitation issues. Relevant for our purposes here, the magistrate denied C.E.'s request to be established as a legal parent, finding no basis in Ohio law to do so.

{¶12} Both parties filed objections to the magistrate's decision. Among other things, C.E. argued that the magistrate erred in finding that Ohio law did not allow for a determination that she was a legal parent of the children post-*Obergefell*. P.S. asserted several objections pertaining to the custody and visitation issues, among other things. On August 5, 2022, the juvenile court entered a decision generally overruling all objections. Pertaining to parentage, the juvenile court found that the magistrate correctly determined that Ohio law prevented C.E. from being established as a legal parent of the children and that *Obergefell* did not change this result.

{¶13} C.E. and P.S. now appeal the juvenile court's decision.

II. Law and Analysis

A. Standard of Review

{¶14} When ruling on objections to a magistrate's decision, Juv.R. 40(D)(4)(d) requires the juvenile court to "undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law." This court reviews a juvenile court's decision on objections to a magistrate's decision for an abuse of discretion. *See, e.g., In re E.N.*, 1st Dist. Hamilton No. C-170272, 2018-Ohio-3919, ¶ 22. However, where the appeal presents only questions of law, this court's review is de novo. *See, e.g., In re J.P.*, 10th Dist. Franklin No. 16AP-61, 2016-Ohio-7574, ¶ 11.

B. Parentage

{¶15} "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity." *Obergefell*, 576 U.S. at 651-652, 135 S.Ct. 2584, 192 L.Ed.2d 609. "Under the Due Process Clause of the Fourteenth Amendment, no State shall 'deprive any person of life, liberty, or property, without due process of law.' " *Id.* at

663. The liberties protected by the Due Process Clause "extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *Id.*

{¶16} "The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution." *Id.* "[I]t requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect." *Id.* at 644. This inquiry is not bound by history and tradition. *Id.* Rather, the inquiry "respects our history and learns from it without allowing the past alone to rule the present." *Id.* "When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim of liberty must be addressed." *Id.*

{¶17} The right to marry is a fundamental constitutional right that applies with equal force to same-sex couples. *Id.* at 665. This right includes the "identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond." *Id.* One of the bases for protecting the right to marriage is that it safeguards children and families. *Id.* at 667. This includes not only the protection that marriage provides to children and families under state law, but also more profound benefits. *Id.* at 668. "By giving recognition and legal structure to their parents' relationship, marriage allows children 'to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.' " *Id.* Marriage is the foundation of family and society, and society supports married couples by "offering symbolic recognition and material benefits to protect and nourish the union." *Id.* at 669.

> Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history

> made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and ***child custody, support, and visitation rules.*** * * *. The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.
>
> There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same sex-couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives.

(Emphasis added.) (Citations omitted.) *Id.* at 669-670.

{¶18} Under both the Due Process and Equal Protection Clauses, same-sex couples must be permitted to marry "on the same terms and conditions as opposite-sex couples." *Obergefell*, 576 U.S. at 675-676, 135 S.Ct. 2584, 192 L.Ed.2d 609; *Pavan*, 582 U.S. at 564, 137 S.Ct. 2075, 198 L.Ed.2d 636. The United States Supreme Court has continued to invalidate state laws that do not provide same-sex couples with the same "constellation of benefits" that are linked to marriage under state law. *See Pavan* at 566-567 (reversing a decision of the Arkansas Supreme Court which did not require

same-sex spouses to receive the same recognition as different-sex spouses under an Arkansas law that required a married woman's husband to appear as the child's father on the child's birth certificate when the child was conceived by means of artificial insemination).

{¶19} "When [the United States Supreme] Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect * * * as to all events, regardless of whether such events predate or postdate the announcement of the rule." *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993), syllabus.

{¶20} Here, the juvenile court found that *Obergefell* did not create a pathway under Ohio law for C.E. to be recognized as a legal parent of the children as the parties were never married. Although recognizing that the parties ended their relationship prior to *Obergefell*, the court failed to acknowledge the retroactive application of *Obergefell*. Specifically, the juvenile court did not consider whether the parties would have been married at the time the children were conceived but for Ohio's unconstitutional ban on same-sex marriage or consider how Ohio law contravenes the mandate of *Obergefell* that same-sex couples receive the same constellation of benefits linked to marriage as different-sex couples. The narrow question now before this court is whether the juvenile court should have considered whether the parties would have been married at the time the children were conceived—absent Ohio's unconstitutional ban on same-sex marriage—before determining whether C.E. could be established as a legal parent of the children under Ohio law.

{¶21} Under Ohio law, "[i]f a married woman is the subject of non-spousal artificial insemination and if her husband consented to the artificial insemination, the husband shall be treated in law and regarded as the natural father of a child conceived

as a result of the artificial insemination and a child so conceived shall be treated in law and regarded as the natural child of the husband." R.C. 3111.95(A). Under this section, the husband is conclusively considered to be the natural father of the child with respect to the father-and-child relationship, and no action or proceedings under R.C. 3111.01 to 3111.18 or R.C. 3111.38 to 3111.54 can affect the relationship. *Id.*

{¶22} Thus, under Ohio law, marriage provides the husband in such a situation with the benefit of a conclusively established father-and-child relationship with a child conceived by his wife as a result of the nonspousal artificial insemination. Under *Obergefell*, this marital benefit cannot constitutionally be deprived from a consenting same-sex spouse of a married woman as Ohio has linked the establishment of a parent-and-child relationship to the marriage in such a situation and therefore provides married couples with a form of legal recognition not available to unmarried couples. *See Pavan*, 582 U.S. at 567, 137 S.Ct. 2075, 198 L.Ed.2d 636 ("Arkansas has thus chosen to make its birth certificates more than a mere marker of biological relationships: The state uses those certificates to give married parents a form of legal recognition that is not available to unmarried parents. Having made that choice, Arkansas may not, consistent with *Obergefell*, deny married same-sex couples that recognition."); *see also Harrison*, 643 S.W.3d at 382-383 (analyzing a similar Tennessee statute and reaching the same result).

{¶23} If we were to simply hold that such legal recognition is not available to C.E. merely because the parties were not legally married at the time the children were conceived, we would be failing to consider the retroactive effect of *Obergefell* for parties that were not legally married due to Ohio's unconstitutional same-sex marriage ban, the fundamental harm caused by such unconstitutional ban, and the impacted children who are left without a conclusive parent-and-child relationship because of a

state wrong. To do so continues the harm that *Obergefell* was meant to remedy and does not provide due process or equal protection under the law. *See generally Pueblo v. Haas*, 511 Mich. 345, 352, 367-374 (2023) (holding that the court could not justifiably deny same-sex couples—who were never married but would have been before the birth of a child born as a result of in vitro fertilization but for Michigan's unlawful prohibitions on same-sex marriage—the benefit of utilizing Michigan's equitable-parent doctrine as the underlying rationale of the equitable-parent doctrine was served by the extension and the court's duty was to ensure that constitutional rights were safeguarded and further harms were not perpetrated).

{¶24} Rather, the only remedy this court sees for the unconstitutional deprivation of rights in this case, which safeguards not only the right to marry but the children involved in the relationship, is to recognize—in the limited circumstances where it is affirmatively established—marriages that would have existed at the time the children were conceived, absent Ohio's unconstitutional ban on same-sex marriage. *See Dick v. Reeves*, 1967 OK 158, 434 P.2d 295 (Okla.1967) (validating a ceremonial interracial marriage of a decedent performed prior to the United States Supreme Court's decision in *Loving*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010, and recognizing the decedent's spouse—post-*Loving*—for purposes of intestate succession); *see generally Brooks v. Fair*, 40 Ohio App.3d 202, 532 N.E.2d 208 (3d Dist.1988) ("It has never been the policy of this state to encourage the illegitimization of children."); R.C. 2151.01 ("The sections in Chapter 2151. of the Revised Code, with the exception of those sections providing for the criminal prosecution of adults, shall be liberally interpreted and construed so as to effectuate the following purposes: (A) To provide for the care, protection, and mental and physical development of children subject to Chapter 2151. of the Revised Code, whenever possible, in a family

environment, separating the child from the child's parents only when necessary for the child's welfare or in the interests of public safety; (B) to provide judicial procedures through which Chapters 2151. and 2152. of the Revised Code are executed and enforced, and in which the parties are assured a fair hearing, and their constitutional and other legal rights are recognized and enforced."). We find this remedy to be within the clear intent of R.C. 3111.95 of legitimizing any child(ren) conceived under the circumstances of the statute by two consenting parents—who would have been married absent the ban—and ensuring that both consenting parents are responsible for the child(ren)'s welfare. *See generally Treto v. Treto*, 622 S.W.3d 397, 402 (Tex.App.2020) (reviewing and interpreting the Texas parentage code in a manner consistent with the legislative intent of the statutes and the guarantees of equal protection).

{¶25} We note that, contrary to the juvenile court's finding, the Ohio Supreme Court's decision in *In re Mullens*, 129 Ohio St.3d 417, 2011-Ohio-3361, 953 N.E.2d 302, does not prevent a determination of parentage in this case. The issue presented to the court in *Mullens* was "whether a parent, by her conduct with a nonparent, entered into an agreement through which the parent permanently relinquished sole custody of the parent's child in favor of shared custody with the nonparent." *Id.* at ¶ 1. Thus, the issue of who may be considered a parent under Ohio's parentage statutes was not directly before the court. Yet, citing to *In re Bonfield*, 97 Ohio St.3d 387, 2002-Ohio-6660, 780 N.E.2d 241, the court did say that "Ohio does not recognize a parent's attempt to enter into a statutory 'shared parenting' arrangement with a nonparent, same-sex partner because the nonparent does not fall within the definition of 'parent' under the current statutes." *Id.* at ¶ 11. However, we must recognize that there was no argument presented to the court in *Mullens* pertaining to who may be considered

a parent under Ohio law, and the Ohio Supreme Court's decision in *Bonfield* does not govern this case.

{¶26} In *Bonfield*, the Ohio Supreme Court—when addressing the parental rights of a same-sex partner—looked to R.C. 3111.01 for the definition of a "parent," and recognized three ways a parent-and-child relationship could be established: (1) by natural parenthood, (2) by adoption, or (3) "by other legal means in the Revised Code that confer or impose rights, privileges, and duties upon certain individuals." *Id.* at ¶ 28. The parties—at a time prior to *Obergefell* when same-sex marriage was prohibited in Ohio—argued that R.C. 3111.95(A) provided "other legal means" by which parental rights could be recognized and advocated for a four-part test to be utilized when determining whether a same-sex partner should be treated as a parent under R.C. 3111.95(A). *Id.* at ¶ 29-30, 55. The court ultimately rejected the asserted four-part test proposed by the parties, but never rejected the general claim that R.C. 3111.95(A) created other legal means by which parental rights may be conferred under Ohio law. *Id.* at ¶ 34.

{¶27} R.C. 3111.95(A) clearly creates "other legal means" by which parental rights are conferred on certain individuals under Ohio law, and—as established above—the United States Supreme Court's subsequent decision in *Obergefell*, 576 U.S. at 675-676, 135 S.Ct. 2584, 192 L.Ed.2d 609, clearly compels the result that such legal recognition is equally extended to same-sex spouses. Therefore, neither *Mullens* nor *Bonfield* is contrary to our holding in this case.

{¶28} Accordingly, for all the foregoing reasons, we hold that the trial court should have considered whether, but for Ohio's unconstitutional ban on same-sex marriage, the parties would have been married at the time the children were born before determining that *Obergefell* did not create a pathway for C.E. to be recognized

as a legal parent of the children under Ohio law. *See In re Domestic Partnership of Madrone*, 271 Or.App. 116, 128, 350 P.3d 495 (2015) (holding that *choice*—and not merely intent to parent—was the key to the determination of whether a similar statute should apply to a particular same-sex couple that was not permitted to marry in Oregon and therefore the factual question to be answered was whether the parties *would have* been married before the children were born had they been able to do so).

{¶29} We emphasize that this opinion does not decide any question beyond the narrow issue before this court or make any determination that this same question can or should be utilized when deciding any other rights and liabilities relating to marriage or children in Ohio. Rather, this opinion is meant to solely address the narrow set of cases in which, absent the chance to prove the parties would have been married at the time of the child(ren)'s conception had they been able to do so, the party lacks any remedy to right the wrong created by the unconstitutional deprivation of her rights, which in this case is the inability to establish parental rights, particularly under R.C. 3111.95(A), based on a marriage in the same manner as a different-sex spouse under Ohio law.

{¶30} P.S. points to *Candelaria v. Kelly*, 535 P.3d 234 (Nev.2023), and argues that the "would-have-married" standard usurps legislative authority in states—such as Ohio—that do not recognize common-law marriage since common-law marriage is not recognized even for different-sex couples. We disagree. In a common-law marriage, the parties involved have to their avail the personal choice to be legally married but choose not to do so. Here, the parties were unconstitutionally deprived of their personal choice and ability to be lawfully married in their home state and of recognition of a lawful marriage entered in another jurisdiction.

{¶31} In *Candelaria*, the Nevada Supreme Court hinged the retroactive effect of *Obergefell* to the date of solemnization. *Candelaria* at 237-238. We find this to be illogical in a situation where the exact issue is that the parties were unconstitutionally deprived of their personal choice and freedom to lawfully marry in their home state or have a lawful marriage recognized. In essence, the decision in *Candelaria* detriments parties whose decision not to marry or solemnize their union was based on circumstances beyond their control: their home state's unconstitutional ban on same-sex marriage. *See generally, e.g., In re Harper*, 1st Dist. Hamilton No. C-800045, 1981 Ohio App. LEXIS 4967 (Jan. 1, 1981) (holding that the paramount status of the natural parent's right to custody would be destroyed where the basis of an unsuitability finding was circumstances beyond the parent's control). Further, the sole question before the court in *Candelaria* was the determination of a date of a marriage for purposes of *property division in a divorce*. *Candelaria* at 235. As we have already emphasized, this court is not reaching any conclusion on whether the same question used here pertaining to parentage can or should be utilized when deciding any other rights and liabilities relating to marriage or children in Ohio. Accordingly, we do not find *Candelaria* to be persuasive here.

{¶32} Nevertheless, we caution that the question to be answered is not whether the parties held themselves out as married at the time. The necessary inquiry should not be decided in favor of a marriage based solely on facts analogous to a determination of common-law marriage as Ohio does not recognize common-law marriage even for different-sex couples. This is not to say that some of the same considerations inquired upon for common-law marriage may not be used to aid the trier of fact in making a credibility determination as these factors most certainly may be relevant when assessing the credibility of the parties at issue. In fact, any number

of factors may ultimately be relevant when assessing credibility and determining whether the parties would have been married at the time of the child(ren)'s conception, but for Ohio's unconstitutional ban on same-sex marriage.

{¶33} We recognize that decisions about marriage "are among the most intimate that an individual can make." *Obergefell*, 576 U.S. at 646, 666, 135 S.Ct. 2584, 192 L.Ed.2d 609. Accordingly, the trial court should proceed with caution in ensuring that the effect of a marriage is not imposed on a party that would not have mutually assented to the marriage, while also recognizing the restrictive situation the parties were placed in due to the unconstitutional ban on their liberty.

{¶34} If it is credibly established that the parties would have been married at the time a child was conceived absent the ban, then this court is of the opinion that marriage should be recognized for the purposes of determining parental rights, particularly under R.C. 3111.95(A). In other words, this opinion has one specific purpose: to allow for the recognition of marriages in limited situations where the parties would have been married at the time that a child was conceived had they been legally able to do so and have the marriage recognized in their home state. It is meant to right a wrong for which this court sees no other remedy, and to safeguard the children involved by preserving the irreplaceable bond that is the parent-and-child relationship.

{¶35} Accordingly, we sustain C.E.'s cross-assignment of error as we hold that the trial court should have determined whether the parties would have been married at the time of the child(ren)'s conception before deciding that *Obergefell* did not create a pathway for C.E. to become a parent under Ohio law.

IV. Conclusion

{¶36} Having sustained C.E.'s cross-assignment of error, we reverse the judgment of the trial court pertaining to the determination of parentage and remand the cause for further proceedings consistent with this opinion and the law. We note that the juvenile court may hear additional evidence under Juv.R. 40(D)(4)(d).

{¶37} Because the trial court's judgment on remand could render P.S.'s assignments of error pertaining to custody and visitation moot, determination of the assignments of error is premature and we decline to address them.

Judgment reversed and cause remanded.

WINKLER and KINSLEY, JJ., concur.

Please note:

The court has recorded its own entry this date.

APPENDIX B

HAMILTON COUNTY JUVENILE COURT

Case No. F/12/000728 Z

CSEA #

Judicial Entry

IN RE: EMERSON CARTER EDMONDS SHAHANI, ET AL

This matter came before the Court on Objections to the Magistrate's Decision dated January 26, 2021. Carmen Edmonds, by and through counsel, filed an Objection on February 9, 2021. Priya Shahani, by and through counsel, filed an Objection on February 19, 2021.

Also before the Court is an Objection to the Magistrate's Decision dated March 16, 2021 filed by Ms. Shahani, by and through counsel, on April 1, 2021.

The Objections to the Magistrate's Decision dated January 26, 2021 were timely filed. The Objection to the Magistrate's Decision dated March 16, 2021 was not timely filed, however the Court grants leave to file out of time.

All necessary transcripts have been filed, properly made a part of the record, and reviewed by the Court.

The Court finds the Objections to the Magistrate's Decision are not well-taken, and overrules the same.

The parties to this matter are Priya Shahani and Carmen Edmonds. The parties were previously in a relationship, and while the two were still a couple, all three children subject to this order were conceived through artificial insemination. Ms. Shahani is the biological mother of all three children, and Ms. Edmonds is not biologically related to the children. The children have no legal father, thus under Ohio law have only one parent.

On May 21, 2012, by agreement of the parties, this Court awarded the parties shared custody of Lila Edmonds-Shahani. Emerson Shahani, and Nikhil Shahani were born on April 11, 2014. The parties never entered into a Shared Custody agreement for Emerson and Nikhil.

On October 11, 2018, Ms. Shahani, by and through counsel, filed a Motion for Contempt of visitation, and a Motion to Terminate or in the Alternative Motion to Modify Shared Custody Agreement. On November 6, 2018, Ms. Edmonds, by and through counsel, filed a Complaint for Parentage, Custody, and in the Alternative, Shared Custody, Visitation or Companionship Rights.

Magistrate set an interim order of visitation on September 3, 2019. This Court upheld the Magistrate's Order on December 5, 2019.

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Ms. Shahani and Ms. Edmonds were in a relationship from 2003 until 2015. The couple ended their relationship prior to *Obergefell v. Hodges*, 135 S.Ct. 2584, 192 L.E.2d 609 (2015), in which the United States Supreme Court held the right to marry is a fundamental right, which cannot be denied to same-sex couples by the states. Therefore, at no point during the parties relationship were they permitted under Ohio law from marrying.

For the artificial insemination Ms. Shahani and Ms. Edmonds engaged in the process of choosing an anonymous sperm donor together and chose one of Columbian heritage to match Ms. Edmonds heritage. Vials of the donor sperm were preserved in order to use the same donor for any future children, and in fact used the same donor for both pregnancies. Ms. Edmonds contributed to the cost of artificial insemination.

When the Children were born, all three of them shared the last name Edmonds-Shahani, however, Ms. Shahani had the name Edmonds dropped from Nikhil and Emerson's names through the Hamilton County Probate Court.

Prior to the birth of Nikhil and Emerson, Ms. Shahani executed a will, a living will, and a healthcare power of attorney, which appointed Ms. Edmonds as the guardian of the children in the event something happened to her, and recognized Ms. Edmonds as the co-parent of the children. The parties also held themselves out as co-parents of the children in the community, and have the children refer to each of them by maternal names.

Both parties contributed to the care of the children financially.

Both parties and the Guardian ad Litem (GAL) agree all three children are closely bonded and should remain on the same parenting/companionship time schedule. The testimony also showed the Children are closely bonded with both Ms. Shahani and Ms. Edmonds. Ms. Shahani has never outright terminated Ms. Edmonds ability to spend time with the Children, and even prior to the interim visitation order allowed Ms. Edmonds to have time with the Children.

The GAL found each home to be a loving and safe environment for the Children. Ms. Shahani resides with her partner, Julie Buck, in Cincinnati. Ms. Edmonds, at the time of the trial, was residing in Norwood with her partner, Jennifer Wendell, however, Ms. Edmonds indicated to the Magistrate she was attempting to relocate.

Ms. Shahani testified she is intimidated by Ms. Edmonds due to Ms. Edmonds temper. Ms. Shahani also does not believe the parties can effectively communicate. However, the GAL and the evidence presented showed that the hostility between the parties that existed when their relationship ended has cooled considerably.

Ms. Edmonds' Objection argues four grounds for Objection.

Ms. Edmonds first Objection argues the Magistrate erred by denying her request to make a legal determination that she is a legal parent of the three children post-Obergefell.

In *In re Mullen*, 129 Ohio St.3d 417, 953 N.E.2d 302, 2011-Ohio-3361, the Ohio Supreme Court held, "Ohio does not recognize a parent's attempt to enter into a statutory 'shared parenting' arrangement with a nonparent, same-sex partner because the nonparent does not fall within the definition of 'parent' under the current statutes." *Id.* at ¶11, *citing In re Bonfield*, 97 Ohio ST.3d 387, 780 N.E.2d 241, 2002-Ohio-6660, ¶35.

The Magistrate correctly found that In re Mullen bars this Court from issuing a finding that Ms. Edmonds is a legal parent under the current statutes of the state of Ohio. Ms. Edmonds cites to multiple sections of the Revised Code and the United States Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. 644, 135 S.Ct.

2584, 192 L.Ed. 609, to argue there exists a pathway to determine Ms. Edmonds is legally a parent. However, the Court finds this argument unpersuasive.

There is simply no statute or holding from a higher court that explicitly or implicitly authorizes this Court to determine Ms. Edmonds is a parent to the children.

The Court finds Ms. Edmonds first ground for Objection is not well-taken, and is hereby overruled.

Ms. Edmonds second ground for Objection argues the Magistrate erred by finding that because Ms. Edmonds is not a legal parent, the Court cannot order Shared Parenting.

Although the Ohio Supreme Court's holding in the Mullen case explicitly disallows a Court order Shared Parenting involving a non-parent, the Mullen Court does allow for a non-parent to enter into a shared-custody agreement.

As noted by the Tenth District Court of Appeals in *T.H. v. N.H.*, 10th Dist. No. 19AP-747, 2021-Ohio-217, 167 N.E.3d 95, "Nonetheless, Ohio does recognize a parent's ability to 'voluntarily share with a nonparent the care, custody, and control of his or her child through a valid shared-custody agreement.'" *Id.* at ¶41, *citing Rowell* at ¶27. The Tenth District went on to hold that a shared-custody agreement may exist between two parties even in the absence of a written contract or prior court order:

> In Mullen, the Supreme Court confirmed that "a parent, through words and conduct can agree to share legal custody with a nonparent" [Mullen] at ¶14.
>
> . . .
>
> Contrary to the trial court's findings, no court order is required in order for a parent to demonstrate through their words and conduct that they manifested an agreement to share legal custody with a non-parent.

Id. at ¶58-59. *See also In re G.R.-Z. and C.R.-Z.*, 9th Dist. Summit No. 28316, 2017-Ohio-8393.

Therefore, although the Court finds the Magistrate did not err in not ordering Shared Parenting, a review of the record does indicate a shared-custody agreement existed for all three children.

With respect to Lila, the parties entered into a valid written shared-custody agreement. The Magistrate did not find Ms. Shahani's testimony that she did not understand the shared-custody agreement credible, and as the Magistrate was the finder of fact, the Court defers to the Magistrate's opinion in that regard. The Court does note Ms. Shahani was represented by counsel at the time of the shared-custody agreement, and continued to abide by the shared-custody agreement, including not attempting to change Lila's last name.

The parties made a joint decision to have all three children, and when choosing a sperm donor, they chose a donor of Columbian descent to match Ms. Edmonds heritage. The parties held themselves out as co-parents of all three children to the community. All three children refer to both parties in a maternal way. Additionally, all three children were initially given the last name Edmonds-Shahani, although Ms. Shahani had Nikhil and Emerson's last name changed to Shahani after the couple's relationship ended.

Although the parties did not enter into a written shared-custody agreement for Nikhil and Emerson, Ms. Shahani did execute a will, a living will, and healthcare power of attorney, and appointed Ms. Edmonds as the guardian if anything happened to Ms. Shahani.

Based on the totality of the circumstances, the Court finds by clear and convincing evidence the parties entered into a shared-custody agreement through their written agreement, as well as their words and conduct for Lila Edmonds- Shahani.

Based on the totality of the circumstances, the Court finds by clear and convincing evidence the parties entered into a shared-custody agreement through their words and conduct for Nikhil Shahani and Emerson Shahani.

Ms. Edmonds third ground for Objection argues the Magistrate erred in determining the companionship rights between the parties and the children.

In considering companionship time, the Court must determine the best interest of the children. In making a determination of the best interest of the children, the Court must consider the factors enumerated under division (D) of section 3109.051:

(1) The prior interaction and interrelationships of the child with the child's parents, siblings, and other persons related by consanguinity or affinity, and with the person who requested companionship or visitation if that person is not a parent, sibling, or relative of the child;

The children are all very bonded with each other, as well as Ms. Edmonds and Ms. Shahani. The Guardian ad Litem visited the homes of both Ms. Edmonds and Ms. Shahani and found them to be appropriate, safe and loving homes.

(2) The geographical location of the residence of each parent and the distance between those residences, and if the person is not a parent, the geographical location of that person's residence and the distance between that person's residence and the child's residence;

The Magistrate found the location between the parties does not create an impediment for companionship time when Ms. Edmonds resided in Norwood. While Ms. Edmonds relocation creates a greater distance between the homes of the parties, the distance is still not an impediment to companionship time.

(3) The child's and parents' available time, including, but not limited to, each parent's employment schedule, the child's school schedule, and the child's and the parents' holiday and vacation schedule;

The Court has considered the available time of the children and the parties in reviewing the companionship time order issued by the Magistrate, and weighed each person's schedule appropriately.

(4) The age of the child;

Lila is now ten years old, and Nihil and Emerson are now eight years old. The Court has considered the respective ages of the children and weighed it appropriately.

(5) The child's adjustment to home, school, and community;

The Children are adjusted to spending time in the homes of both parties, their school and community. Ms. Edmonds has relocated, but the evidence presented showed the children were safe, and well-cared for in Ms. Edmonds' home prior to her move. The Court is convinced the children will be similarly adjusted to Ms. Edmonds' new home quickly.

(6) If the court has interviewed the child in chambers, pursuant to division (C) of this section, regarding the wishes and concerns of the child as to parenting time by the parent who is not the residential parent or companionship or visitation by the grandparent, relative, or other person who requested companionship or visitation, as to a specific parenting time or visitation schedule, or as to other parenting time or visitation matters, the wishes and concerns of the child, as expressed to the court;

The Court has not interviewed any of the children in chambers.

(7) The health and safety of the child;

The health and safety of the children are not a concern with either party. The Guardian ad Litem found both homes to be a safe and loving environment.

(8) The amount of time that will be available for the child to spend with siblings;

The parties, and the Guardian ad Litem all seem to agree the companionship time schedule should be the same for all three children. The children are all well bonded to one another.

(9) The mental and physical health of all parties;

The mental and physical health of all parties do not create any concern for the Court. Ms. Edmonds has recovered from cancer and her physical health does not cause any concern for her ability to care for these children.

(10) Each parent's willingness to reschedule missed parenting time and to facilitate the other parent's parenting time rights, and with respect to a person who requested companionship or visitation, the willingness of that person to reschedule missed visitation;

Although Ms. Shahani now seeks to terminate the shared-custody agreement regarding Lila, she did continue to allow Ms. Edmonds to exercise companionship time with all three children, even prior to an order of the court requiring her to.

(11) In relation to parenting time, whether either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether either parent, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of the adjudication; and whether there is reason to believe that either parent has acted in a manner resulting in a child being an abused child or a neglected child;

Having previously found Ms. Edmonds is not a parent, this factor is not applicable to companionship time for Ms. Edmonds.

(12) In relation to requested companionship or visitation by a person other than a parent, whether the person previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether the person, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of the adjudication; whether either parent previously has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding; whether either parent previously has been convicted of an offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding and caused physical harm to the victim in the commission of the offense; and whether there is reason to believe that the person has acted in a manner resulting in a child being an abused child or a neglected child;

This factor is not applicable to Ms. Edmonds.

(13) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;

Ms. Edmonds stated she only agreed to less companionship time with Lila because Ms. Shahani threatened to restrict her time with the Nikhil and Emerson. Even if the Court found that to be true, the Court cannot find Ms. Shahani continuously and willfully denied Ms. Edmonds right to companionship time in accordance with an order of the court, as Ms. Edmonds ultimately agreed to the change.

(14) Whether either parent has established a residence or is planning to establish a residence outside this state;

There was no evidence presented that either parent resides outside of this state, or has any intention of relocating outside of this state.

(15) In relation to requested companionship or visitation by a person other than a parent, the wishes and concerns of the child's parents, as expressed by them to the court;

Ms. Shahani wishes Ms. Edmonds to not have a permanent companionship time order, and specifically seeks to terminate the shared-custody agreement with regards to Lila.

(16) Any other factor in the best interest of the child.

The Court has not considered any other factor in the best interest of the child.

For the foregoing reasons, the Court finds the companionship time schedule issued by the Magistrate to be in the best interest of the children.

The Court finds Ms. Edmonds third ground for Objection is not well-taken, and is hereby denied.

Ms. Edmonds fourth ground for Objection argues the Magistrate erred in determining the transportation provisions of the companionship time schedule.

Although the Magistrate noted the distance between the parties does not create an impediment for companionship time, Ms. Edmonds is relocating from Norwood to Maineville. Ms. Edmonds move still does not create an impediment to companionship time, however the Court does find it appropriate for Ms. Edmonds to be responsible for transportation of the children at the beginning and ending of her companionship time.

Ms. Shahani's Objection to the Magistrate's Decision dated January 26, 2021 argues in opposition to Ms. Edmonds' Objections and puts forth six grounds for Objection. Ms. Shahani's first ground for Objection argues the Magistrate erred by denying Mother's Motion to Bifurcate Proceedings.

The Court finds the Magistrate did not err in deciding the proceedings of all three children at the same time. While the proceeding regarding Lila require the Court to consider a different legal standard, as the parties entered into a written shared-custody agreement, the factual and legal issues for all three children are very similar, and the implications of a decision for Lila naturally has implications on the decision for Emerson and Nikhil.

The Court finds Ms. Shahani's first ground for Objection is not well-taken, and hereby overrules the same.

Ms. Shahani's second ground for Objection argues this Court's December 5, 2019 Judicial Entry was improper.

Ms. Shahani seeks to have this Court reconsider its prior Judicial Entry regarding temporary companionship time, which the Magistrate relied on in part.

The December 5, 2019 Judicial Entry addressed the previous Motion to Set Aside the Magistrate's Order regarding temporary companionship time. The December 5, 2019 Judicial Entry also addressed Ms. Shahani's argument the Court should dismiss Ms. Edmonds' petition as she lacked standing. This Court held, as discussed below, the case law from the Ohio Supreme Court clearly shows Ms. Edmonds has standing to pursue a permanent companionship time schedule, and not simply a temporary one.

The Court is not persuaded the December 5, 2019 Judicial Entry is improper as it was supported by case law, and the case law upon which it was based has not been overturned or otherwise interpreted in a way inconsistent with the December 5, 2019 Judicial Entry.

The Court finds Ms. Shahani's second ground for Objection is not well-taken, and is hereby denied.

Ms. Shahani's third ground for Objection argues the Court and the Magistrate misinterpreted *Rowell v. Smith*, 133 Ohio St.3d, 978 N.E.2d 146 (2012).

Ms. Shahani argues this Court and the Magistrate misinterpreted Rowell v. Smith because Ms. Shahani posits that *Rowell v. Smith* does not extend to a permanent decision regarding companionship time. The Court does not find Ms. Shahani's argument persuasive.

As the Court previously noted, it would create a nonsensical outcome if a temporary companionship time order could be issued by the Court when one party lacks standing to pursue a permanent companionship time order. Further, the Court notes, the Tenth District Court of Appeals in *Rowell v. Smith*, 10th Dist. Franklin No. 12AP-802, 2013-Ohio-2216, ¶57 found an individual who was the non-biological parent of a child born during a same-sex relationship did have standing to pursue permanent companionship time after the Ohio Supreme Court's decision in the same case regarding temporary companionship time.

The Court finds Ms. Shahani's third ground for Objection is not well-taken, and is hereby denied.

Ms. Shahani's fourth ground for Objection argues the Magistrate applied the wrong standard in evaluating Ms. Shahani's Motion to Terminate Shared Custody Agreement and improperly denied the motion.

Ms. Shahani argues the Magistrate's consideration of the best interest factors enumerated under division (F)(2) of section 3109.04 is superfluous as Ms. Edmonds has not been declared a parent, and therefore the Shared Parenting factors should not be considered. In determining whether to terminate a shared-custody agreement, Ms. Shahani argues the only relevant consideration for the Court is the best interest factors enumerated under division (F)(1) of section 3109.04.

The *Mullen* court held once a court determines a valid shared-custody agreement has been established, the only question for the juvenile court is to determine if the non-parent custodian is suitable, and what is in the best interest of the child:

> A valid shared-custody agreement is reviewed by the juvenile court and is an enforceable contract subject only to the court's determinations that the custodian is "a proper person to assume the care, training, and education of the child" and that the shared-legal-custody arrangement is in the best interests of the child.
>
> This appeal concerns whether a parent's conduct with a nonparent created an agreement for permanent shared legal custody of the parent's child. The determination of whether such a contract is present is essential. If there is no such contract, then the parent retains all parental rights. If there is such a contract, then the juvenile court must engage in a "suitability" and "best interests" analysis.

Mullen, at ¶11-12.

While *Mullen* directs the Court to determine the best interest of the children, it is silent as to which factors the Court must consider in making such a determination. The Court agrees with Ms. Shahani the Magistrate's determination of whether a change in circumstances has occurred is superfluous, however, the Court is not persuaded that the Magistrate erred in considering the factors enumerated under division (F)(2) of section 3109.04.

A shared-custody agreement is substantially similar to an order for shared parenting, insofar as two individuals share custody of the subject child. In the case of a shared-custody agreement, however, a parent has relinquished some custodial rights to a non-parent. However, as a shared-custody agreement still involves two individuals who share custody rights, rather than custodial rights and responsibilities being held by one individual, the Court finds a best interest determination for a shared-custody agreement should resemble a best interest determination for shared parenting.

Pursuant to division (E)(2)(c) of section 3109.04, the Court may terminate a shared parenting decree if it determines shared parenting is not in the best interest of the children:

> The court may terminate a prior final shared parenting decree that includes a shared parenting plan approved under division (D)(1)(a)(i) of this section upon the request of one or both of the parents or whenever it determines that shared parenting is not in the best interest of the children. The court may terminate a prior final shared parenting decree that includes a shared parenting plan approved under division (D)(1)(a)(ii) or (iii) of this section if it determines, upon its own motion or upon the request of one or both parents, that shared parenting is not in the best interest of the children. If modification of the terms of the plan for shared parenting approved by the

> court and incorporated by it into the final shared parenting decree is attempted under division (E)(2)(a) of this section and the court rejects the modifications, it may terminate the final shared parenting decree if it determines that shared parenting is not in the best interest of the children.

Similarly, the Court may terminate a shared-custody agreement if it finds shared-custody is not in the best interest of the children. Nothing in this section requires the Court to first find a change in circumstances has occurred, as is required in modifying a legal custody determination under division (E)(1) of section 3109.04. For this reason, the Court finds the Magistrate erred in determining whether a change in circumstances has occurred.

In determining the best interest of a child subject to a shared parenting order, the Court must consider the factors enumerated under division (F)(1) and (F)(2) of section 3109.04. The Court begins its analysis by considering the (F)(1) factors:

(a) The wishes of the child's parents regarding the child's care;

Ms. Shahani wishes to terminate the shared-custody agreement for Lila, and for Ms. Edmonds time with the children to be very limited.

> (b) If the court has interviewed the child in chambers pursuant to division (B) of this section regarding the child's wishes and concerns as to the allocation of parental rights and responsibilities concerning the child, the wishes and concerns of the child, as expressed to the court;

The Court has not interviewed the children in chambers.

> (c) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;

The evidence has shown both parties are very closely bonded with the children, and the children are closely bonded with one another.

(d) The child's adjustment to the child's home, school, and community;

The Court agrees with the Magistrate's finding that the children are very well adjusted to the home environment provided by Ms. Edmonds, and there is no reason to believe that will change with a change of residence.

(e) The mental and physical health of all persons involved in the situation;

Ms. Edmonds prior battles with cancer do not limit her ability to provide adequate care for the children. There are no other concerns regarding the mental and physical health of the parties involved.

> (f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;

The Magistrate found Ms. Shahani, the residential parent of the children, in contempt for violating a court order for companionship time for Ms. Edmonds. The Court has adopted the Magistrate's Decision in this Judicial Entry, and for that reason finds Ms. Edmonds most likely to honor and facilitate court-ordered parenting time

and companionship time. However, the Court finds both parties are very likely to honor and facilitate court-ordered parenting time and companionship time, and has placed little weight on this finding.

(g) Whether either parent has failed to make all child support payments, including all arrearages, that are required of that parent pursuant to a child support order under which that parent is an obligor;

Neither party has ever been subject to a child support order.

(h) Whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether either parent, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of an adjudication; whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code or a sexually oriented offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding; whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding and caused physical harm to the victim in the commission of the offense; and whether there is reason to believe that either parent has acted in a manner resulting in a child being an abused child or a neglected child;

The Court finds there is not reason to believe that either parent has acted in a manner resulting in a child being an abused child or a neglected child. Ms. Edmonds has not always been nice to Ms. Shahani, but there is absolutely no evidence Ms. Edmonds has ever acted in a way that put the children at risk of harm.

(i) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;

The Magistrate found Ms. Shahani to be in contempt. The Court has accepted and approved that decision as part of this Judicial Entry.

(j) Whether either parent has established a residence, or is planning to establish a residence, outside this state.

Neither party has established a residence, or plan to establish a residence outside this state. Although Ms. Shahani urges the Court to consider Ms. Edmonds move to a nearby county under this factor, Ms. Edmonds did not move out of the state.

After considering the (F)(1) factors, the Court next turns to the (F)(2) factors:

(a) The ability of the parents to cooperate and make decisions jointly, with respect to the children;

Despite some initial issues after their romantic relationship ended, the Court finds the more recent communication between the parties has been much more cordial. The parties are certainly able to cooperate and make decisions jointly with respect to the children.

(b) The ability of each parent to encourage the sharing of love, affection, and contact between the child and the other parent;

The Court further believes both parties are capable of encouraging the sharing of love affection and contact between the child and the other parent. Both parties seem to agree the children are bonded with both parties, and it would be a detriment to sever those bonds.

(c) Any history of, or potential for, child abuse, spouse abuse, other domestic violence, or parental kidnapping by either parent;

Neither parent has a history of child abuse, spouse abuse, other domestic violence or parental kidnapping. Although Ms. Shahani would argue Ms. Edmonds has the potential for such abuse, the Court finds the evidence presented insufficient to find Ms. Edmonds as a higher than average potential for abuse.

(d) The geographic proximity of the parents to each other, as the proximity relates to the practical considerations of shared parenting;

Although Ms. Edmonds did relocate, the Court does not find the geographic proximity of the parties to be prohibitive to shared custody.

(e) The recommendation of the guardian ad litem of the child, if the child has a guardian ad litem.

The GAL recommends the children be placed in the shared custody of the parties.

For the foregoing reasons, the Court finds shared custody to be in the best interest of all three children.

Ms. Shahani's fifth ground for Objection argues the Magistrate's Decision contained numerous factual inaccuracies and employed improper terminology.

Ms. Shahani notes the Magisitrate used the terms "parent" and "parenting time" to describe Ms. Edmonds relationship and time with the children, despite declining to find Ms. Edmonds is a parent. The Court acknowledges this was in error, but appears to be a scrivener's error. Although the Magistrate used these terms, the Magistrate clearly declines to establish Ms. Edmonds as a parent. Therefore, the Court finds the Magistrate did err by using improper terminology, which is corrected by this Judicial Entry.

The Magistrate stated Ms. Shahani had eggs frozen, however the Court also acknowledges Ms. Shahani testified the parties ordered multiple vials of sperm from the same donor.

Ms. Shahani argues the Magistrate erred in finding Ms. Edmonds' thyroid cancer was part of the reason the parties decided Ms. Shahani would carry the children. The Court finds this was not in error. Both parties testified they discussed having children together. Although Ms. Shahani argues Ms. Edmonds considering carrying children is not relevant, the Court finds it is relevant as the decision to carry these children was clearly a decision discussed and made together.

Ms. Shahani finally takes issue with the Magistrate not finding she was under medical duress when executing the estate plan prior to the birth of Nikhil and Emerson, and that the estate plan was later revoked by Ms. Shahani. The Court declines to find Ms. Shahani was under medical duress at the time the estate plan was executed, as there was insufficient evidence to make such a finding. The Court does acknowledge the estate plan was later revoked by Ms. Shahani, and has considered that fact as part of the analysis in this Judicial Entry.

Ms. Shahani's sixth ground for Objection argues the Magistrate erred in ordering permanent companionship time for Ms. Edmonds without giving extreme deference to Ms. Shahani's wishes.

As noted above, it is the position of this Court the Ohio Supreme Court's holding in Rowell regarding temporary companionship clearly implies the Court may grant permanent companionship. The Court further notes the Tenth District's holding in *Rowell* also shows the Court may grant permanent companionship time in cases in which a parent has relinquished some custodial rights by entering into a shared-custody agreement with a non-parent, which is supported by cases such as *T.H. v. N.H., In re G.R.-Z. and C.R.-Z.* None of these cases indicate the Court must give extreme deference to a parent's wishes once they have relinquished some custodial rights to a non-parent.

The Court finds Ms. Shahani's sixth ground for Objection is not well-taken, and is hereby denied.

Ms. Shahani's seventh ground for Objection argues the Magistrate failed to award Attorney's Fees as Ms. Edmonds motions were frivolously filed.

The First District Court of Appeals explained the standard for determining frivolous conduct in *Fannie Mae v. Hirschhaut,* 1st Dist. Hamilton No. C-180473, 2019-Ohio-3636, ¶28:

> A motion for sanctions under R.C. 2323.51 requires a trial court to determine whether the challenged conduct constitutes frivolous conduct as defined in the statute, and, if so, whether any party has been adversely affected by the frivolous conduct. Riston at ¶ 17. R.C 2323.51(A)(2)(a) defines frivolous conduct as conduct that satisfies at least one of the following conditions:
>
> (i) [i]t obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation[;]
>
> (ii) [i]t is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law[;]
>
> (iii)[t]he conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery[;]
>
> (iv)[t]he conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief.

In the case at bar, Ms. Edmonds filings do not satisfy any of the conditions of frivolous conduct pursuant to division (A)(2)(a) of section 2323.51 of the Revised Code. Ms. Edmonds conduct does not warrant the award of sanctions.

Ms. Shahani's seventh ground for Objection is not well-taken, and is hereby overruled.

Ms. Shahani also objects to the Magistrate's Decision to dismiss the contempt actions against Ms. Edmonds.

In a civil contempt action, the initial burden is on the moving party to show by clear and convincing evidence the other party has violated an order of the Court:

> In a civil-contempt proceeding, the movant bears the burden of demonstrating by clear and convincing evidence that the other party has violated an order of the court. Once the movant has met his or her burden, the burden then shifts to the other party to either rebut the showing of contempt or demonstrate an affirmative defense by a preponderance of the evidence.

Souder v. Souder, 1st Dist. No. C-150552, 2016-Ohio-3522, ¶20, *citing Pugh v. Pugh*, 15 Ohio St.3d 136, 139-140, 15 Ohio B. 285, 472 N.E.2d 1085 (1984).

Ms. Shahani filed two separate contempt actions. First, on October 11, 2018, Ms. Shahani alleges Ms. Edmonds violated the shared-custody agreement with regards to Lila by failing to cooperate as required under the shared-custody agreement.

With regards to Ms. Shahani's first contempt action, the Magistrate correctly found there was some initial tension between the parties, and anger in communications from Ms. Edmonds; however, there was not sufficient evidence to find that Ms. Edmonds failed to cooperate with Ms. Shahani.

On September 4, 2020, Ms. Shahani filed a Motion for Contempt alleging Ms. Edmonds violated the terms of the shared-custody agreement by failing to advise Ms. Shahani of her intentions of sell her home and relocate to Warren County. The Court notes the Magistrate incorrectly stated Ms. Edmonds was potentially moving to Clermont County.

The Court finds the Magistrate did correctly determine there was not clear and convincing evidence presented that Ms. Edmonds had violated the terms of the shared-custody agreement. At the time of the hearing before the Magistrate and the filing of the Motion for Contempt, Ms. Edmonds had not relocated. Ms. Edmonds was not under a duty to inform Ms. Shahani she was considering relocating.

Ms. Shahani further objects to the Magistrate's Decision to find her in contempt.

Ms. Edmonds filed a motion for contempt on August 2, 109 alleging Ms. Shahani violated the terms of the shared-custody agreement by taking Lila out of the country from June 12, 2019 to June 29, 2019 without Ms. Edmonds consent. Ms. Edmonds further alleged Ms. Shahani violated the terms of the shared-custody agreement by making health care decisions for Lila without consulting Ms. Edmonds. On September 14, 2020, Ms. Edmonds filed another motion for contempt, again alleging Ms. Shahani violated the terms of the shared-custody agreement with regards to the vacation and healthcare provisions, and alleging Ms. Shahani violated the terms of the shared-custody agreement's provisions regarding schooling and school records.

The Magistrate correctly found clear and convincing evidence was presented to establish Ms. Shahani had been making unilateral decisions regarding Lila's healthcare and school, and Ms. Edmonds was denied access to Lila's My Backpack school account.

Further, there was clear and convincing evidence Ms. Shahani took Lila out of the country for extended vacation time without the consent of Ms. Edmonds.

The Court does not find Ms. Shahani's argument that Ms. Edmonds allowed Ms. Shahani to make these unilateral decisions persuasive, and unsupported by the record.

Finally, Ms. Shahani objects to the Magistrate's award of attorney fees to Ms. Edmonds.

Once a party has been found in contempt of court for failing to comply with or interfering with a grant of companionship or visitation rights must be ordered to pay any reasonable attorney's fees pursuant to division (K) of section 3109.051:

> If any person is found in contempt of court for failing to comply with or interfering with any order or decree granting parenting time rights issued pursuant to this section or section 3109.12 of the Revised Code or companionship or visitation rights issued pursuant to this section, section 3109.11 or 3109.12 of the Revised Code, or any other provision of the Revised Code, the court that makes the finding, in addition to any other penalty or remedy imposed, shall assess all court costs arising out of the contempt proceeding against the person and require the person to pay any reasonable attorney's fees of any adverse party, as determined by the court, that arose in relation to the act of contempt, and may award reasonable compensatory parenting time or visitation to the person whose right of parenting time or visitation was affected by the failure or interference if such compensatory parenting time or visitation is in the best interest of the child. Any compensatory parenting time or visitation awarded under this division shall be included in an order issued by the court and, to the extent possible, shall be governed by the same terms and conditions as was the parenting time or visitation that was affected by the failure or interference.

An award of attorney fees under this division is mandatory. *See Estate of Harrold v. Collier*, 9th Dist. Wayne C.A. No. 09CA00602010-Ohio-3457, ¶11; *Cichanowicz v. Cichanowicz*, 3rd Dist. 2013-Ohio-5657, ¶94, citing *Robinson v. Robinson*, 8th Dist. Cuyahoga No. 85980, 2005-Ohio-6240, ¶14.

Ms. Shahani argues the Magistrate award of attorney fees in the amount of $2,000 was improper. In Ms. Edmonds' Exhibit 38, labelled Affidavit in Support of Attorney Fees, Ms. Edmonds incurred approximately $22,963.00 in attorney fees in this matter. In the attached itemized records, roughly $536 is demarcated as "contempt."

In *Woloch v. Foster*, 98 Ohio App.3d 806, 813, the Second District Court of Appeals held,

Also,"where the amount of the attorney's time and work is evident to the trier of fact, an award of attorney fees, even in the absence of specific evidence to support the amount, is not an abuse of discretion." *Kreger v. Kreger* (Dec. 11, 1991), Lorain App. No. 91CA005073, unreported, 1991 WL 262883.

Because the attorney fees here were nominal in amount, no evidence of the amount of attorney fees actually incurred, or the reasonableness of that charge, is necessary. The fifth assignment of error is overruled.

In the case at bar, the contempt, custody and companionship issues were all tried together and were interrelated. Due to the interconnectivity of the issues, the $2,000 may have been reasonable in the absence of specific evidence as to the amount of attorney fees incurred in relation to the contempt motion, however as Ms. Edmonds' counsel presented evidence which specifically noted which fees were incurred in relation to the contempt motions, it would be arbitrary to increase that amount without any more evidence to indicate how much to increase that amount by.

Therefore, the Court finds the $536 to be the appropriate amount to award for attorney fees.

Based upon an independent review of the record, the evidence presented, and the arguments submitted to the Court, with regard to the Magistrate's Decision dated January 26, 2021, the Court finds the Magistrate properly determined the factual issues, even though the Magistrate stated some factual inaccuracies. The Magistrate was

able to view the demeanor of the witnesses, judge the credibility of the testimony and the weight of the evidence presented to the Court. However, the Court finds the Magistrate did not properly apply the law to the facts of the case.

Accordingly, the Magistrate's Decision dated January 26, 2021 is not appropriate and is hereby modified by the Court consistent with this Judicial Entry.

Based upon an independent review of the record, the evidence presented, and the arguments submitted to the Court, with regard to the Magistrate's Decision dated March 16, 2021, the Court finds the Magistrate did properly determined the factual issues and properly apply the law.

Accordingly, the Magistrate's Decision dated February 19, 2021 is not appropriate and is hereby modified by the Court consistent with this Judicial Entry.

The Court awards Ms. Edmonds, companionship time with all three children as follows:

Ms. Edmonds is entitled to time with the children every other weekend beginning on Friday when she picks the children up after school and ending on Monday morning when she drops them off at school. When the children are not in school, she may pick them up at Ms. Shahani's residence or another location agreed upon by the parties at 3:00 p.m. on Friday and drop them off by noon on Monday.

On the alternating weeks, Ms. Edmonds may pick up the children from school on Wednesday afternoon and have them until she drops them off at school on Friday morning. For periods when school is not in session, she may pick them up at Ms. Shahani's residence or another location agreed upon by the parties at 3:00 p.m. on Friday and drop them off by noon on Monday.

On the alternating weeks, Ms. Edmonds may pick up the children from school on Wednesday afternoon and have them until she drops them off at school on Friday morning. For periods when school is not in session, she may pick them up at Ms. Shahani's residence at 3:00 p.m. on Wednesday and return them by noon on Friday.

Each party is entitled to three weeks of extended parenting time with the children every year. Unless there is an agreement to the contrary, no individual period of extended parenting time may exceed two weeks. The parties must inform one another in writing at least thirty days in advance before exercising extended parenting/companionship time. Any party who will be traveling with the children during extended time or any other time must inform the other of where they are going and provide a written itinerary of their trip.

Each party is entitled to reasonable telephone contact with the children when they are with the other parent. Absent extenuating circumstances, reasonable would mean no more than once per day. Each party is under an obligation to immediately inform the other of any illness or injury suffered by one of the children when in their care.

During even numbered years, Ms. Shahani will have parenting time on New Year's Day, President's Day, Memorial Day, Veteran's Day, and Thanksgiving Day. Each of these times will begin at noon and continue until 8:00 p.m. Ms. Edmonds is entitled to the same companionship time on these holidays with the children in odd numbered years.

During odd numbered years, Ms. Shahani will have parenting time on Martin Luther King Day, Easter, July 4th, Labor Day, and Halloween. This parenting time will begin at noon and continue until 8:00 p.m. Ms. Edmonds is entitled to the same companionship time with the children in even numbered years on these holidays.

During even numbered years, Ms. Shahani will have parenting time from noon until 9:00 p.m. on Christmas Eve. During odd numbered years, Ms. Shahani will have parenting time on Christmas Day from 9:00 a.m. until 8:00 p.m. Ms. Edmonds may have the children from noon until 9:00 p.m. on Christmas Eve in odd numbered years and on Christmas Day from 9:00 a.m. until 8:00 p.m. in even numbered years.

The children will alternate time with the parties on Mother's Day. Ms. Shahani may have the children in odd numbered years, and Ms. Edmonds will have them in even numbered years. Whichever party does not have the children on Mother's Day has an absolute right to speak with them on the phone that day. Communication using Zoom, FaceTime, or any other means of remote communication may be utilized.

Obviously neither of the parties is the father of any of the children. However, Father's Day is a holiday set aside to honor a parent of the child. Therefore, the children will alternate time with the parties on Father's Day as well. Ms. Edmonds may have the children on Father's Day in odd numbered years, and Ms. Shahani will have them in even numbered years.

During even numbered years, Ms. Shahani is entitled to have all three children whenever one of them has a birthday. If a birthday falls on a time when the children are typically with Ms. Edmonds, Ms. Shahani may have them between 5:00 p.m. and 9:00 p.m. Ms. Edmonds will have the same time with the children in odd numbered years in the event that a birthday falls on a day where they are scheduled to be with Ms. Shahani.

For the holiday and special occasion parenting time, Ms. Shahani must provide transportation at the beginning of her time with the children, and Ms. Edmonds must provide transportation at its conclusion.

If either party is more than thirty minutes late to pick the children up for her parenting/companionship time, she has forfeited the right to that specific parenting time. If she is more than thirty minutes late to return the youth without calling or providing an explanation, she could be subject to a contempt finding. Reasonable and justifiable explanations for being later than thirty minutes will inevitably arise. The party who is running late must contact the other to say that she is running late and the reasons for the tardiness.

The parties must provide and keep each other updated with all of their relevant contact information including residential addresses, email addresses, and telephone numbers including cell phone information.

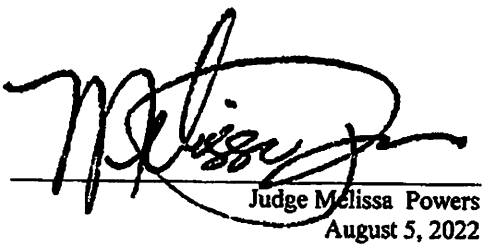
Ms. Edmonds is entitled to access to the children's medical and educational records. Ms. Shahani must sign any and all necessary releases so that she can get that information directly from the school or health care providers.

If any of the children have extra-curricular activities scheduled, the party who has him or her at the time of the scheduled activity bears the responsibility to get the child to the activity and pick the child up once the activity ends.

The holiday and special occasion schedule takes precedence over the extended parenting time which in turn takes precedence over the normal weekly schedule.

The contempt actions filed on behalf of Ms. Shahani on October 11, 2018 and September 4, 2020 are hereby dismissed.

Ms. Shahani is found to be in contempt on the motions filed on Augsut 2, 2019 and September 14, 2020. She may purge the contempt by paying $536 in attorney fees to Ms. Edmonds no later than November 30, 2022. There are no additional costs for fines or filing fees.



Judge Melissa Powers
August 5, 2022

Notice of Appeal

Pursuant to Juv. R. 34(J) and App.R. 4, a party has the right to appeal the judgment of this Court to the 1st District Court of Appeals by filing a Notice of Appeal in the Juvenile Court Clerk's Office within 30 days of the judgment.

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APPENDIX C

§ 3105.12 Evidence of marriage; common law marriage prohibited.

(A) Except as provided in division (B) of this section, proof of cohabitation and reputation of the marriage of a man and woman is competent evidence to prove their marriage, and, in the discretion of the court, that proof may be sufficient to establish their marriage for a particular purpose.

(B)

(1) On and after October 10, 1991, except as provided in divisions (B)(2) and (3) of this section, common law marriages are prohibited in this state, and the marriage of a man and woman may occur in this state only if the marriage is solemnized by a person described in section 3101.08 of the Revised Code and only if the marriage otherwise is in compliance with Chapter 3101. of the Revised Code.

(2) Common law marriages that occurred in this state prior to October 10, 1991, and that have not been terminated by death, divorce, dissolution of marriage, or annulment remain valid on and after October 10, 1991.

(3) Common law marriages that satisfy all of the following remain valid on and after October 10, 1991:

(a) They came into existence prior to October 10, 1991, or come into existence on or after that date, in another state or nation that recognizes the validity of common law marriages in accordance with all relevant aspects of the law of that state or nation.

(b) They have not been terminated by death, divorce, dissolution of marriage, annulment, or other judicial determination in this or another state or in another nation.

(c) They are not otherwise deemed invalid under section 3101.01 of the Revised Code.

(4) On and after October 10, 1991, all references in the Revised Code to common law marriages or common law marital relationships, including the references in sections 2919.25, 3113.31, and 3113.33 of the Revised Code, shall be construed to mean only common law marriages as described in divisions (B)(2) and (3) of this section.

Section 3111.92 Consent by both spouses.

The non-spousal artificial insemination of a married woman may occur only if both she and her husband sign a written consent to the artificial insemination as described in section 3111.93 of the Revised Code.

Section 3111.93 Provisions of consent form.

(A) Prior to a non-spousal artificial insemination, the physician associated with it shall do the following:

(1) Obtain the written consent of the recipient on a form that the physician shall provide. The written consent shall contain all of the following:

(a) The name and address of the recipient and, if married, her husband;

(b) The name of the physician;

(c) The proposed location of the performance of the artificial insemination;

(d) A statement that the recipient and, if married, her husband consent to the artificial insemination;

(e) If desired, a statement that the recipient and, if married, her husband consent to more than one artificial insemination if necessary;

(f) A statement that the donor shall not be advised by the physician or another person performing the artificial insemination as to the identity of the recipient or, if married, her husband and that the recipient and, if married, her husband shall not be advised by the physician or another person performing the artificial insemination as to the identity of the donor;

(g) A statement that the physician is to obtain necessary semen from a donor and, subject to any agreed upon provision as described in division (A)(1)(n) of this section, that the recipient and, if married, her husband shall rely upon the judgment and discretion of the physician in this regard;

(h) A statement that the recipient and, if married, her husband understand that the physician cannot be responsible for the physical or mental characteristics of any child resulting from the artificial insemination;

(i) A statement that there is no guarantee that the recipient will become pregnant as a result of the artificial insemination;

(j) A statement that the artificial insemination shall occur in compliance with sections 3111.88 to 3111.96 of the Revised Code;

(k) A brief summary of the paternity consequences of the artificial insemination as set forth in section 3111.95 of the Revised Code;

(l) The signature of the recipient and, if married, her husband;

(m) If agreed to, a statement that the artificial insemination will be performed by a person who is under the supervision and control of the physician;

(n) Any other provision that the physician, the recipient, and, if married, her husband agree to include.

(2) Upon request, provide the recipient and, if married, her husband with the following information to the extent the physician has knowledge of it:

(a) The medical history of the donor, including, but not limited to, any available genetic history of the donor and persons related to him by consanguinity, the blood type of the donor, and whether he has an RH factor;

(b) The race, eye and hair color, age, height, and weight of the donor;

(c) The educational attainment and talents of the donor;

(d) The religious background of the donor;

(e) Any other information that the donor has indicated may be disclosed.

(B) After each non-spousal artificial insemination of a woman, the physician associated with it shall note the date of the artificial insemination in the physician's records pertaining to the woman and the artificial insemination, and retain this information as provided in section 3111.94 of the Revised Code.

§ 3111.95 Recipient’s husband considered natural father; status of donor.

(A) If a married woman is the subject of a non-spousal artificial insemination and if her husband consented to the artificial insemination, the husband shall be treated in law and regarded as the natural father of a child conceived as a result of the artificial insemination, and a child so conceived shall be treated in law and regarded as the natural child of the husband. A presumption that arises under division (A)(1) or (2) of section 3111.03 of the Revised Code is conclusive with respect to this father and child relationship, and no action or proceeding under sections 3111.01 to 3111.18 or sections 3111.38 to 3111.54 of the Revised Code shall affect the relationship.

(B) If a woman is the subject of a non-spousal artificial insemination, the donor shall not be treated in law or regarded as the natural father of a child conceived as a result of the artificial insemination, and a child so conceived shall not be treated in law or regarded as the natural child of the donor. No action or proceeding under sections 3111.01 to 3111.18 or sections 3111.38 to 3111.54 of the Revised Code shall affect these consequences.