[Cite as *In re LaPiana*, 2010-Ohio-3606.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 93691 and 93692

IN RE: J. LAPIANA AND S. LAPIANA

Minor Children

JUDGMENT:
AFFIRMED

Civil Appeals from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. CU 07 101304 and CU 07 101305

BEFORE: Boyle, J., Rocco, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: August 5, 2010

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MARY J. BOYLE, J.:

{¶ 1} For approximately ten years, appellant, Siobhan LaPiana, and appellee, Rita Goodman, were in a committed relationship. During that time, LaPiana gave birth to two children, S. LaPiana and J. LaPiana, both by anonymous artificial insemination. Six years after the couple separated, Goodman filed an application in the juvenile court under R.C. 2151.23 to determine custody and/or companionship with S. LaPiana and J. LaPiana.[1]

[1] Goodman presented alternative theories in her application, citing multiple statutes, but this is the only one relevant here.

{¶ 2} The trial court found, after considering all of the evidence, that "[d]uring the nearly ten-year relationship between the two women all the evidence indicates they functioned as a family unit." The trial court further found that after the two separated, Goodman "continued to enjoy a significant involvement in the lives of the two boys," and that "involvement, however, changed when [LaPiana] became involved in a heterosexual relationship."

{¶ 3} The trial court ordered that LaPiana be the children's residential parent and legal custodian of the children and further ordered that as such, she had all rights to make decisions regarding the children's religion, doctors, medical treatment, and school selection. It then fashioned a "companionship/visitation schedule" for the children, giving Goodman visitation with the children every other weekend, one day per week, and three weeks of summer vacation. It further ordered that Goodman shall be entitled to notification of school events and activities, and be entitled to reports of the boys' academic progress.

{¶ 4} It is from this judgment that LaPiana appeals, raising four assignments of error for our review:

{¶ 5} "[1.] The trial court lacked jurisdiction to interfere with respondent-appellant's custodial and parental rights, absent a prior finding of unsuitability.

{¶ 6} "[2.] The trial court exceeded its authority in granting petitioner-appellee visitation and quasi-parental rights with the minor children of respondent-appellant because no statute grants petitioner-appellee standing to assert such rights.

{¶ 7} "[3.] The trial court erred when it failed to recognize that the juvenile court is a court of law and not equity and granted possession time and other rights to petitioner-appellee not authorized by statute.

{¶ 8} "[4.] In granting petitioner-appellee visitation and quasi-parental rights with the minor children of respondent-appellant, the trial court violated respondent-appellant's rights under the Fourteenth Amendment to the United States Constitution and the Marriage Protection Amendment of the Ohio Constitution."

{¶ 9} After a thorough review of the record, we affirm.

Juvenile Court's Jurisdiction and Authority

{¶ 10} In her first assignment of error, LaPiana argues that the trial court lacked jurisdiction to grant "visitation and quasi-parental rights" to Goodman. In her second and third assignments, she contends that it exceeded its authority in doing so. For ease of discussion, we will address these assignments together.

{¶ 11} Over 30 years ago, the Ohio Supreme Court set forth the standard courts must apply when deciding custody disputes between a parent

and a nonparent. In *In re Perales* (1977), 52 Ohio St.2d 89, 369 N.E.2d 1047, the high court held at the syllabus that in a "child custody proceeding between a parent and a nonparent, the hearing officer may not award custody to the nonparent without first making a finding of parental unsuitability that is, without first determining that a preponderance of the evidence shows [1] that the parent abandoned the child, [2] that the parent contractually relinquished custody of the child, [3] that the parent has become totally incapable of supporting or caring for the child, or [4] that an award of custody to the parent would be detrimental to the child." Thus, if a court concludes that *any one of these circumstances* describes the conduct of a parent, the parent may be adjudged "unsuitable," and the state may infringe upon the fundamental parental liberty interest of child custody.

{¶ 12} Less than ten years later, in *Masitto v. Masitto* (1986), 22 Ohio St.3d 63, 488 N.E.2d 857, the Ohio Supreme Court held that if a parent contractually relinquishes custody of a child to a nonparent, then in a subsequent custody proceeding between the parent and nonparent, "the general rule is that such award will not be modified unless 'necessary to serve the best interest of the child.' R.C. 3109.04(B)." Id. at 65. The court reasoned: "[w]here a person accepts the custody of a child by virtue of an agreement with the parents of the child, the contract may be such, and the care and support may be furnished for such a length of time and under such

circumstances as to estop the parents from denying that they have relinquished or forfeited their natural right to the custody of the child." Id. at 66.

{¶ 13} More recently, in *In re Bonfield*, 97 Ohio St.3d 387, 2002-Ohio-6660, 780 N.E.2d 241, in an opinion authored by the late Chief Justice Moyer, the Ohio Supreme Court reversed the trial and appellate courts and held that under R.C. 2151.23(A)(2),[2] the juvenile court had jurisdiction to grant "shared custody" of five children to a lesbian "parent" and a "nonparent" — her partner, a "coparent" to the five children.

{¶ 14} The appellants in *Bonfield*, Teri Bonfield and Shelly Zachritz, had "lived together since 1987 as partners in a same-sex relationship." Id. at ¶4. During that time, Teri adopted two children and gave birth to three children, "each of whom was conceived through anonymous artificial insemination." Id. "Shelly participated equally with Teri in the decision to adopt the boys" and "actively participated in the planning and births of the children, assisted with Teri's artificial insemination, and was present throughout Teri's doctor's visits during the pregnancies and actual births." Id. at ¶4-5.

{¶ 15} The Supreme Court noted that "[n]otwithstanding her role as the primary caregiver for their children, Shelly has no legally recognized rights

[2] R.C. 2151.23(A)(2) provides that "[t]he juvenile court has exclusive original jurisdiction under the Revised Code *** to determine the custody of any child not a ward of another court of this state."

with regard to [the children]. Lacking such legal rights, she does not have equal access to the children's medical or school records, and is unable to authorize medical care or obtain medical insurance coverage for the children." Id. at ¶7. It explained that Teri and Shelly filed their Petition for Allocation of Parental Rights and Responsibilities, seeking to "confirm their commitment that they will both continue to raise the children regardless of what happens to their relationship." Id. at ¶9.

{¶ 16} The trial court in *Bonfield* had found that it did not have jurisdiction to grant the shared parenting petition because Shelly was "not a parent within the meaning of R.C. 3109.04." Id. at ¶10. The appellate court affirmed the trial court's order, but for different reasons. It determined that the juvenile court had jurisdiction under R.C. 2151.23(A)(2), but that it had no authority to award parental rights or shared parenting to a person who is not a biological or adoptive parent. Id. at ¶11.

{¶ 17} The Ohio Supreme Court reversed, reasoning:

{¶ 18} "Although we have concluded that Shelly does not qualify as a parent pursuant to R.C. 3109.04, we, like the court of appeals, 'do not intend to discredit [appellants'] goal of providing a stable environment for the children's growth.' We note that although appellants urged the trial court to find that 'both Petitioners have equal standing to parent the minor children,' their brief filed in this court contains repeated references to 'custody,' and

concludes with a plea for the court to recognize that they are 'equal custodial parents.' Similarly, although their petition to the trial court is ostensibly for the allocation of parental rights and responsibilities of minor children, the petition clearly states that appellants request that the court award them 'the legal status of co-custodians [of] the children.' Accordingly, we have examined their claim for shared parenting in the custody context, and conclude that the juvenile court has jurisdiction to determine whether a petition for shared custody is appropriate." Id. at ¶36.

{¶ 19} The Ohio Supreme Court went on to hold in *Bonfield* that upon remand, the trial court, "in exercising its discretion in giving due consideration to all known factors *** may determine whether a shared custody agreement between Teri and Shelly is in the best interests of the children." Id. at ¶49-50.

{¶ 20} LaPiana maintains, however, that "[s]ince the General Assembly has not seen fit to enact a statute giving persons such as Goodman access to the juvenile courts for purposes of requesting visitation or other 'parental' rights, she simply has no standing to petition the court for them, and the court has no power to grant her such rights without standing." We disagree. The Ohio Supreme Court gave "persons such as Goodman" access to the juvenile system through R.C. 2151.23 in *Bonfield*, despite, as the sole dissenting Justice in *Bonfield* pointed out, her not being able to legally marry

her partner or being a "parent under R.C. 3109.04(G)." Id. at ¶55 (Cook, J., concurring in part and dissenting in part).

{¶ 21} LaPiana further maintains that *Bonfield* does not apply because she and Goodman are no longer together, and the petitioners in *Bonfield* were. We also disagree with this argument. Certainly, even before *Bonfield*, juvenile courts had jurisdiction and the authority to decide custody and visitation disputes between a parent and a nonparent after the parent voluntarily relinquished custody. Just as the First Appellate District stated in *In re Mullen*, 185 Ohio App.3d 457, 2009-Ohio-6934, 924 N.E.2d 448,[3] with respect to proving contractual relinquishment of "sole custody": "[w]e find no reason, nor did the trial court, why a partial relinquishment in favor of *shared custody*" should be treated any differently (in the same way as contractual relinquishment of custody, i.e., by conduct). (Emphasis added.) Id. at ¶12. The same reasoning applies to this argument, i.e., when a dispute arises, as it did in here, courts must do what they have always done — decide what is in the best interest of the children. That is exactly what the trial court did in this case.

{¶ 22} Moreover, we find a recent Ohio Supreme Court ruling on a writ of prohibition to be persuasive in this case. See *State ex rel. Smith v. Gill*,

[3] After oral arguments were heard in this case, LaPiana filed "notice of supplemental authority," attaching *Mullen*. We will discuss *Mullen* more fully later in this opinion.

Ohio Supreme Court Case No. 2010-0679. Two women, Julie Rowell and Julie Smith, were in a committed relationship for seven years. During that time, Smith was artificially inseminated and subsequently gave birth to M.S. For the first five years of M.S.'s life, Rowell and Smith lived together with M.S. When the couple separated, Rowell petitioned the Franklin County Juvenile Court for shared custody of M.S. and requested a temporary companionship schedule while the case was pending.

{¶ 23} Rowell averred in her petition that Smith voluntarily relinquished her "exclusive custody rights." Rowell asserted that she and Smith planned the pregnancy together, that she inseminated Smith with a syringe, and that she attended all of Smith's fertility appointments, checkups during the pregnancy, and Lamaze classes. Rowell further asserted that she was the one who cut M.S.'s umbilical cord and that she and Smith named M.S. together, matching the child's middle name to Rowell's middle name to "connect" the child to Rowell. According to Rowell, she acted as M.S.'s second parent in every way during the first five years of M.S.'s life.

{¶ 24} Although Smith disputed nearly every fact in the petition, the trial court granted Rowell temporary companionship with M.S. during the pendency of the case, as well as medical and school rights. When Smith later denied Rowell visitation with M.S., Rowell filed a motion for contempt. The trial court found Smith in contempt and sentenced her to three days in jail.

{¶ 25} Smith subsequently filed a writ of prohibition in the Ohio Supreme Court, claiming that the juvenile court judge "patently and unambiguously lack[ed] jurisdiction to issue orders granting visitation to Rowell or to grant any kind of custodial rights." Smith argued that Rowell was an "unrelated third party — a legal stranger to the child — who lacks even the slightest basis for a [custody petition]." Smith requested that the Ohio Supreme Court direct the juvenile court judge to "cease and desist" (1) from exercising jurisdiction over the case, (2) from granting Rowell any visitation rights, or (3) from granting Rowell any custody rights without first finding that Smith was unsuitable.

{¶ 26} Rowell and the juvenile court judge moved to dismiss the writ because, inter alia, "without a showing of a patent and unambiguous lack of jurisdiction, [Smith] has an adequate remedy at law available."[4] On June 23, 2010, "[u]pon consideration of respondent's motion to dismiss and the motions for leave to intervene as respondent and to dismiss of [Rowell]," the Ohio Supreme Court granted the motions and dismissed Smith's writ. *State ex rel. Smith v. Gill*, Case No. 2010-0679. If the Franklin County

[4] For a writ of prohibition to issue, the relator must establish that (1) the respondent is about to exercise judicial power; (2) the exercise of power is unauthorized by law; and (3) the relator has no other adequate remedy. *State ex rel. Henry v. McMonagle*, 87 Ohio St.3d 543, 2000-Ohio-477, 721 N.E.2d 1051. "If, however, an inferior court patently and unambiguously lacks jurisdiction over the cause, prohibition will lie to prevent the unauthorized exercise of jurisdiction and to correct the results of previous jurisdictionally unauthorized actions." *State ex rel. Litty v. Leskovyansky*

Juvenile Court had "patently and unambiguously lacked jurisdiction," just as LaPiana is claiming here, the Ohio Supreme Court would have granted the writ of prohibition in *Smith v. Gill* — especially since Smith was contending her "constitutional right to the exclusive care, custody, and control" of her child was being violated. But the Supreme Court did not, thereby recognizing that the juvenile court had jurisdiction.

{¶ 27} We therefore find that under *Perales*, *Masitto*, and *Bonfield*, the juvenile court had jurisdiction under R.C. 2151.23 to determine (1) whether LaPiana contractually relinquished *sole* custody of the children to Goodman, (2) whether it would be in the children's best interest to have companionship with Goodman, and further, (3) what that companionship should entail.

Contractual Relinquishment

{¶ 28} First, LaPiana spends a great deal of time arguing that because there was no evidence that she was "unsuitable," relying on the standard set forth in *Perales*, the trial court had no authority to interfere with her parental rights. But we agree with Goodman that under *Perales*, unsuitability does not mean the trial court must find that you are a "bad" parent. Rather, if a trial court finds that a parent contractually relinquished custody of the child, then the parent is "unsuitable" for purposes of custody determinations between a parent and a nonparent. See *Perales*, 52 Ohio St.2d at the syllabus.

(1996), 77 Ohio St.3d 97, 98, 671 N.E.2d 236.

{¶ 29} LaPiana further argues that she did not contractually relinquish her parental rights. She claims that any agreement she signed before the first child's birth is not enforceable.

{¶ 30} The Ohio Supreme Court delineated our standard of review in *Masitto*. It explained "[w]hether or not a parent relinquishes rights to custody is a question of fact which, once determined, will be upheld on appeal if there is some reliable, credible evidence to support the finding." *Masitto*, 22 Ohio St.3d at 66. Thus, a finding of parental unsuitability is therefore based upon the facts of each case that are presented to the court through testimony and other evidence.

{¶ 31} As the First Appellate District recently explained:

{¶ 32} "It is well established in Ohio that a parent may contractually relinquish parental rights to a third-party nonparent. And in *In re Bonfield*, the Ohio Supreme Court recognized that a *parent may voluntarily relinquish sole custody* of a child in favor of shared custody with a nonparent. A court must look to the parent's conduct 'taken as whole' to determine whether there has been a contractual relinquishment." (Emphasis added.) *Mullen*, 185 Ohio App.3d at ¶6, citing, inter alia, *Perales*, *Masitto*, and *Bonfield*.

{¶ 33} Moreover, a written agreement, while instructive, is not necessary; a parent may relinquish custody by conduct, and a court must look

at the evidence as a whole. *Masitto*, 22 Ohio St.3d at 66; see, also, *Mullen* at ¶11.

{¶ 34} The trial court heard testimony in this case establishing that LaPiana and Goodman were in a committed relationship for approximately ten years, from 1991 to 2001. They lived together for most of that time and purchased a home together. During the relationship, LaPiana and Goodman deliberately planned to have children together. As the trial court indicated in its final judgment entry, "[l]esbians never become parents by accident."

{¶ 35} LaPiana was artificially inseminated for both children, using the same anonymous donor. Goodman and LaPiana chose the donor together, ultimately deciding on one who was Jewish, and of Russian and Polish background, to match Goodman's religious and ethnic heritage, and who also had similar educational interests to both LaPiana and Goodman.

{¶ 36} The children were born in 1997 (S. LaPiana) and 2000 (J. LaPiana). Based on Jewish tradition, LaPiana and Goodman chose first names for the children after Goodman's relatives who had passed away, and they gave the children Goodman's last name.[5] The children were also given Hebrew names, with both LaPiana and Goodman listed as parents on the naming certificates. The record is replete with many more exhibits,

[5] In 2005, when the children were eight and five, LaPiana changed the children's surname to hers.

establishing that not only did the boys know Goodman as their mother, so did everyone else, including friends, teachers, health insurance carriers, and doctors. Several documents also evidenced that LaPiana referred to Goodman as the boys' "other parent" to teachers and others in the community.

{¶ 37} Before the first child, S. LaPiana, was born, LaPiana and Goodman entered into a written "Agreement to Jointly Raise Our Child." In the agreement, they sought to "set our rights and obligations regarding our child who'll be born to us by Siobhan." They agreed to "jointly and equally parent," to have "equal power to make medical decisions" for the child, and to both "be responsible for [his] support" until he reaches the age of majority or finishes college. They further agreed to "participate in a jointly agreed-upon program of counseling if either considers separating" due to "the possible trauma our separation might cause our child."

{¶ 38} LaPiana and Goodman even considered the effect a possible separation would have on the child and agreed that if they did separate, "we will do our best to see that our child maintains a close and loving relationship with each of us," "will share in our child's upbringing, and will share in our child's support," "will make a good-faith effort to jointly make all major decisions affecting our child's health and welfare," and "will base all decisions upon the best interests of our child." And they further agreed that upon a

separation, "the person who has actual physical custody will take all steps necessary to maximize the other's visitation, and help make visitation as easy as possible."

{¶ 39} Based upon LaPiana's conduct, taken as a whole, we cannot say the trial court erred in finding that she contractually relinquished sole custody of S. LaPiana and J. LaPiana to Goodman. There was "some reliable, credible evidence" that LaPiana intended to give Goodman shared custody of the children. *Masitto*, 22 Ohio St.3d at 66. LaPiana cannot now claim she did not do so; indeed, as the Ohio Supreme Court stated in *Masitto*, the law estops her from doing so. Id. at 67. When there is "some reliable, credible evidence" to support the trial court's finding, we must uphold the trial court's decision. Id. at 66.

{¶ 40} As we noted earlier, LaPiana submitted a "notice of supplemental authority" after oral arguments were heard in this case, and attached *Mullen*, 185 Ohio App.3d 457.[6] In *Mullen*, the First Appellate District recently found that a trial court did not err in finding that a lesbian parent did not contractually relinquish sole custody of a child to her former partner. Id. at ¶8. Although the couple did not have a written agreement, the former

[6]On May 5, 2010, the Ohio Supreme Court accepted *Mullen* for discretionary review. *In re Mullen*, 125 Ohio St.3d 1413, 2010-Ohio-1893, 925 N.E.2d 1001.

partner argued that the parent's "conduct unequivocally demonstrated" that she had given the partner shared custody. Id. at ¶7.

{¶ 41} The former partner pointed to the following findings by the trial court in support of her argument: (1) that the two women had planned for and paid for the pregnancy together, (2) that the partner was present at the child's birth, (3) that the partner's name appeared on a ceremonial birth certificate, (4) that the two women jointly cared for the child, (5) that they had held themselves out as and had acted as a family, (6) that the parent, the children, and others had referred to the partner as "momma," (7) that the parent's will named the partner as the child's guardian, and (8) that the parent had executed a general durable power of attorney and a healthcare power of attorney, giving the partner the ability to make school, health, and other decisions for the child.

{¶ 42} The First District agreed with the former partner that those facts were "strong evidence that Mullen had intended to give [her] shared custody" of the child. Id. at ¶7. The appellate court further agreed with the former partner that "the law does not require a written agreement to establish shared custody." Id. at ¶11. But the First District could not overlook the one factor "most heavily" relied upon by the trial court — that the parent "had known that a *Bonfield*-type agreement [i.e., shared custody granted by the juvenile court] was an option, but had repeatedly refused to enter into

one." Id. at ¶12. The trial court found this was strong evidence that the parent did not intend to share custody of the child with her former partner, and the appellate court agreed. *Mullen* at ¶8, 12.

{¶ 43} Here, a *Bonfield*-type agreement was not available when S. LaPiana and J. LaPiana were born. *Bonfield* was decided in late 2002, at a time when LaPiana and Goodman were separated but still cooperating with one another regarding the children. And there is absolutely no evidence in the record that when a *Bonfield*-type agreement became a viable option, that LaPiana or Goodman knew about it.[7] Nor is there any evidence that LaPiana refused to enter into any such agreement.

{¶ 44} Indeed, the evidence here of LaPiana's intent to give shared custody to Goodman is even stronger than in *Mullen*. Not only are *all eight factors* that were present in *Mullen* (that the First District found to be "strong evidence" of intent) also present here, but LaPiana and Goodman also had a written "Agreement to Jointly Raise Our Child." And although this agreement only applied to S. LaPiana, we find that based on LaPiana's

[7]Goodman's attorney asked LaPiana, "[t]hen did you know five years later [after S. LaPiana was born] that under the *Bottomfield* case, the law changed." LaPiana replied that she did not know that. This court believes that Goodman's attorney probably said "the *Bonfield* case" (which was decided five years after S. LaPiana was born), but was misunderstood by the court reporter. If Goodman's attorney did say "the *Bonfield* case," then we could say definitively that LaPiana *did not know* that a *Bonfield*-type agreement was available. Regardless, there was still no evidence that she refused to enter into one.

conduct as a whole, she clearly intended Goodman to have shared custody of the second child, J. LaPiana, as well. In addition to all of the other facts, this was further evidenced by LaPiana's letter to Goodman, telling her why she wanted to expand their family and have a second child ("our family feels incomplete with just one child of course, our family is wonderful, and full of love and delight, and if no second child comes, it will remain so. But a second child, I feel, would complete the circle.").

{¶ 45} LaPiana disputes many of these facts, claiming — despite the GAL's testimony and the overwhelming evidence to the contrary — that everything she did within the ten-year relationship, including picking the donor, naming the children after Goodman's relatives, entering into the agreement, holding themselves out to the community as a family, was all "at Goodman's insistence, at a time when she had the greatest degree of control over LaPiana." But upon review, we cannot simply choose to believe LaPiana over Goodman. It is the trial judge who is in the best position to observe the witnesses, weigh evidence, and evaluate testimony. *Clark v. Clark*, 3d Dist. No. 14-06-56, 2007-Ohio-5771, ¶23, citing *In re Brown* (1994), 98 Ohio App.3d 337, 648 N.E.2d 576.

{¶ 46} Thus, there was not only "some reliable, credible evidence" here that LaPiana intended to give shared custody of the children to Goodman, there was "strong evidence" of such. See *Mullen*, 185 Ohio App.3d at ¶7.

Therefore, this court must defer to the trial court's finding that LaPiana contractually relinquished sole custody. *Masitto*, 22 Ohio St.3d at 66.

Juvenile Court's Standard:
Best Interests of the Children

{¶ 47} Under *Masitto* and *Bonfield*, if a trial court finds that a parent contractually relinquished sole custody to a nonparent, then in a subsequent custody proceeding between the parent and nonparent, the court must determine what would be in the children's best interests.

{¶ 48} Generally, the trial court's discretion with respect to child custody issues should be accorded the utmost respect, especially in view of the nature of the proceeding and the impact the court's determination will have on the lives of the participants. See *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 674 N.E.2d 1159. Absent an abuse of discretion, a reviewing court should affirm a trial court's judgment. Thus, a reviewing court will not overturn a trial court's custody or placement judgment unless the trial court has acted in a manner that can be characterized as arbitrary, unreasonable, or capricious. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. The underlying rationale of giving deference to the trial court's finding is based upon the premise that the trial court judge is best able to view the witnesses and observe their demeanor, gestures, voice inflections, and to use

those observations when weighing the testimony and evidence. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.

{¶ 49} When LaPiana and Goodman separated in 2001, they seemingly followed their agreement regarding support and equal parenting time — until approximately late 2006. Twelve pages of emails, spanning a number of years, were entered into evidence, establishing that after the parties separated, they fully cooperated with each other, took turns picking the children up from school, alternated weekends and holidays with the children, planned and shared the children's birthday parties, were flexible on schedules if the other had a conflict, and discussed and planned summer camp options for the boys. They lived within blocks of each other, making this arrangement easy for everyone, especially the children.

{¶ 50} But all of that changed in late 2006, when LaPiana, who was then in a heterosexual relationship, sent an email to Goodman stating, "[t]he children and I are in a new family now and things are going to change to make the new family work for us all." As the relationship between LaPiana and Goodman became increasingly strained, LaPiana began to limit Goodman's time with the children.

{¶ 51} Soon after LaPiana began denying Goodman as much time with the children as she had previously had, Goodman filed her application in the

juvenile court under R.C. 2151.23 to determine custody and/or companionship with the two children.

{¶ 52} In addition to the two parties, the guardian ad litem ("GAL"), Goodman's mother, and Goodman's friend testified.

{¶ 53} The GAL in this case, attorney John Heutsche, testified that the boys have always referred to LaPiana and Goodman as "momma" or "mommy." He emphasized that "[t]he only distinction that they've ever made is they've always told me very clearly that Siobhan is their biological mother and that Rita is their non-biological mother. But they've never indicated that either woman is anything other than a mother, and the fact that they have two mothers." He stated that it would be "devastating to the boys" if Goodman was no longer in their lives. Heutsche recommended an extensive companionship plan to the trial court, based on what the two women had traditionally followed until late 2006.

{¶ 54} Goodman's mother testified that the boys were her grandchildren and they always had been. They called her grandma, and had been to Florida to visit her many times and she to Ohio to visit them. She also provided financial support to them when they needed it. She stated that her late husband died before J. LaPiana was born, but S. LaPiana had been his only grandson when he died. She placed the following words on her

husband's tombstone: "beloved husband, father, and grandfather," and grandfather was for S. LaPiana.

{¶ 55} At the hearing, the trial court stated to the parties, "[y]ou had a relationship together. You had it for a long time. *** This is just a question of trying to do something for these kids that you both love, and try to do what is best for them by maintaining the relationship between the two of you. And it should not be that problematic. I mean, when these children were born, and newborns, you both decided that each one would call you mom. They didn't decide that on their own. And that was okay until something happened."

{¶ 56} A short time later, the trial court said, referring to what happens when couples separate and become vindictive, "I hate to see that happen, not because I care about you two, you're adults. But I do care about the affect that it has on the kids."

{¶ 57} The trial court found, after considering all of the evidence, that "[d]uring the nearly 10[-]year relationship between the two women all the evidence indicates they functioned as a family unit." The trial court further found that after the two separated in 2001, Goodman "continued to enjoy a significant involvement in the lives of the two boys," and that "involvement, however, changed when [LaPiana] became involved in a heterosexual relationship."

{¶ 58} The trial court ordered that LaPiana be the children's residential parent and legal custodian of the children and further ordered that as such, she had the right to make decisions regarding the children's religion, doctors, medical treatment, and school selection. It then fashioned a "companionship/visitation schedule" for the children, giving Goodman visitation with the children every other weekend, one day per week, and three weeks of summer vacation. It further ordered that Goodman shall be entitled to notification of school events and activities, and shall be entitled to reports of the boys' academic progress.

{¶ 59} Ultimately, the trial court gave Goodman considerably less companionship time per month than the GAL had recommended (which was even more time than the court's standardized visitation schedule due to Goodman's academic schedule). And in fact, the trial court gave Goodman *less time with the children* per month than LaPiana had offered Goodman. LaPiana testified at trial that she was willing to give Goodman one weekend of visitation per month and two evenings each week. The trial court actually gave Goodman less visitation during the week (only one day instead of two, which equals four days less per month), but one more weekend per month (three days per month more), for a total of one day less per month.

{¶ 60} Accordingly, we cannot say that the trial court abused its discretion in awarding Goodman companionship with the children, finding that it was in the children's best interests.

{¶ 61} LaPiana's first, second, and third assignments of error are without merit.

Fourth Amendment and Ohio's Defense of Marriage Amendment

{¶ 62} In her fourth assignment of error, LaPiana argues that the trial court's decision infringes on her Fourth Amendment liberty rights "to make decisions regarding the care, custody, and control of her children." She further maintains that the Ohio's Defense of Marriage Amendment, enacted by voters in 2004, prohibits the trial court from granting Goodman companionship with the children. See Section 11, Article XV, Ohio Constitution. We disagree with both arguments.

{¶ 63} A parent's fundamental right to raise a child without state inference is not violated when the parent contractually relinquishes custody. *Perales* at the syllabus. And the Ohio Defense of Marriage Amendment says nothing about parenting or children.

{¶ 64} LaPiana's fourth assignment of error is also without merit.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

JAMES J. SWEENEY, J., CONCURS;
KENNETH A. ROCCO, P.J., DISSENTS WITH SEPARATE OPINION

KENNETH A. ROCCO, P.J., DISSENTING:

{¶ 65} My colleagues' opinion is based upon an erroneous assumption: that the trial court granted Goodman and LaPiana shared custody of S. LaPiana and J. LaPiana. It did not. The court granted LaPiana sole custody of the children. It granted Goodman visitation. Therefore, we must analyze the trial court's decision under the laws governing visitation, not custody.

{¶ 66} " 'Visitation' and 'custody' are related but distinct legal concepts. 'Custody' resides in the party or parties who have the right to ultimate legal and physical control of a child. 'Visitation' resides in a noncustodial party and encompasses that party's right to visit the child. * * * In other words, 'visitation' is granted to someone who does not have 'custody.'" *In re Gibson* (1991), 61 Ohio St.3d 168, 171, 573 N.E.2d 1074.

{¶ 67} Goodman asked the juvenile court to designate her as the children's legal parent and establish a shared parenting plan, but the court did not. Rather, the juvenile court ordered, in pertinent part, that:

{¶ 68} "1. Respondent [LaPiana] shall be named residential parent and legal custodian for the minor children * * *.

{¶ 69} "2. All decisions regarding religion, physician selection, medical treatment, and school selection shall be made by the residential parent.

{¶ 70} "3. Petitioner [Goodman] shall be entitled to notification of school events and activities and shall be entitled to reports of the boys['] academic progress and Respondent [LaPiana] shall provide her with the same. [Goodman] shall be entitled to attend all school activities and events with the exception of parent/teacher conferences.

{¶ 71} "4. Petitioner [Goodman] shall be entitled to the following companionship/visitation schedule:

{¶ 72} "* * * "

{¶ 73} Goodman was not awarded custody of the children. She has not cross-appealed from the juvenile court's denial of her request for custody or shared parenting. LaPiana obviously was not prejudiced by the order to the extent that it awarded her sole legal custody of the children. Therefore, the question addressed by the majority — whether LaPiana contractually relinquished sole custody of the children — has no bearing on the outcome of this appeal.

Jurisdiction

{¶ 74} In her first assignment of error, LaPiana argues that the juvenile court had no jurisdiction to interfere with her custody of the children unless it found that she was not a suitable parent. Despite the phrasing of the assignment of error, the issue is not truly jurisdictional. R.C. 2151.23(A)(2) grants the juvenile court exclusive original jurisdiction "to determine the custody of any child not a ward of another court of this state." The juvenile court plainly had jurisdiction under R.C. 2151.23(A)(2) to determine custody of the children.

Authority to Order Visitation in a Custody Case

{¶ 75} Though not directly raised by the parties, there is an issue whether the juvenile court had authority to order visitation as part of its determination of a custody action initiated in the juvenile court. The Ohio Supreme Court left this question open in *In re Gibson*, 68 Ohio St.3d 168, 171, at fn. 3, but implicitly answered it in the affirmative in *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165. In *Harrold*, the juvenile court granted visitation rights to the maternal grandparents of a child born to an unmarried woman after the court awarded custody to the child's father. The Supreme Court proceeded to address a certified conflict on the question "[w]hether 'Ohio courts are obligated to afford "special weight" to the wishes of the parents of minor children concerning non-parental visitation as outlined in *Troxel v. Granville* (2000), 530 U.S. 57.'" In doing so, the court did not consider that there was any issue whether a juvenile court could order visitation in a custody proceeding

initiated in the juvenile court. Based on *Harrold*, therefore, I believe the juvenile court had jurisdiction to award visitation in an action to determine custody.

Standing

{¶ 76} In her second assignment of error, LaPiana contends that Goodman did not have standing to request visitation under any Ohio statute. She cites two statutes allowing a court to order visitation outside the context of a divorce, separation or annulment proceeding. First, R.C. 3109.11 allows a common pleas court to grant the "parents and other relatives" of a deceased parent reasonable companionship or visitation with a minor child if it is in the child's best interests to do so. This statute obviously has no application here, as both LaPiana and Goodman are living.

{¶ 77} R.C. 3109.12 allows a court to grant, e.g., the parents and relatives of an unmarried woman, companionship or visitation with the child, if it is in the child's best interests. LaPiana is an unmarried woman. She flatly asserts that Goodman is not her relative, without explanation or citation. Goodman does not address this issue. Nevertheless, I believe it is the key to this case.

{¶ 78} It is well settled that the term "relative" includes persons related by consanguinity and persons related by affinity. Goodman is not related to LaPiana by blood. Relationships by affinity are generally those created by marriage, for example, the relationship of father- or mother-in-law, or of step-parent and -child.

{¶ 79} The term "affinity" is potentially broader than this. Black's Law Dictionary (6th Ed. 1990) 59 defines "affinity" as "a close agreement; relation; spiritual relation or attraction held to exist between certain persons." The primary definition, according to the Oxford English Dictionary, is "a natural liking or sympathy for someone or something." Webster's Unabridged Dictionary (2d Ed. 1998) defines the term "affinity" as "a natural liking for or attraction to a person, thing, ideal, etc." In business parlance, affinity relationships occur among businesses that can mutually benefit by association, for example, realtors and mortgage brokers. Affinity groups consist of persons united for a common goal or purpose, for example, environmental groups, animal rights organizations, or anti-war groups.

{¶ 80} In the context of familial relationships, affinity relationships are sometimes extremely attenuated. For example, a step-grandmother (whose son married the child's mother after the child's birth) was found to have standing to seek visitation with the child after the child was permanently removed from the mother's custody. *McFall v. Watson*, 178 Ohio App.3d 540, 2008-Ohio-5204, 899 N.E.2d 158. Moreover, a stepfather has been granted visitation with a child under R.C. 3109.11 after the mother died and the child's natural father was given custody. *Goeller v. Lorence*, Lorain App. No. 06CA008883, 2006-Ohio-5807.

{¶ 81} The thread connecting the child and the person seeking visitation in all of these cases is a relationship with one of the child's parents by marriage. For this reason, I do not believe the concept of affinity relationships can be

stretched to include unmarried domestic partners. Ohio does not recognize the relationship between unmarried partners in its domestic relations laws. When unmarried domestic partners separate, there is no legal provision for, e.g., the division of assets, support of the parties, or the custody of the parties' children. However thoroughly entangled their lives may be, their relationship does not have the legal consequences of a marital relationship. Therefore, the partners and their families cannot be considered to be "related" to one another by affinity.

{¶ 82} Since Goodman was not related to LaPiana by affinity, she was not entitled to visitation with LaPiana's children under R.C. 3109.12. I am not aware of any other statute that would allow Goodman to obtain visitation, and the parties suggest none. Therefore, I would sustain the second assignment of error and reverse the common pleas court's order to the extent that the court granted Goodman visitation rights.

{¶ 83} I am fully cognizant of the lasting psychological and emotional impact my opinion would have on the parties and the children alike. However, I cannot in good conscience approve the mistaken analysis the majority has followed to reach its more humane result. This is "[a] government of laws, and not of men." We are limited by the statutory authority granted to us by the legislature.

{¶ 84} LaPiana's third assignment of error urges that the juvenile court fashioned equitable rights for Goodman beyond the court's statutory authority. Fourth, LaPiana argues that the juvenile court violated her parental rights under the Due Process Clause of the Fourteenth Amendment to the United States

Constitution and the Ohio Marriage Protection Amendment. Having found that the court lacked authority to award visitation to Goodman, these assignments of error are moot. See, e.g., *State ex rel. Myles v. Brunner*, 120 Ohio St.3d 328, 2008-Ohio-5097, 899 N.E.2d 120, ¶26, fn. 2.

{¶ 85} I would affirm the award of custody to LaPiana but reverse the award of visitation to Goodman. Accordingly, I dissent.