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Transmittal Report

Date: 06/29/2006

To: Attorney Camilla Taylor (312) 663-4307

Business: Lambda Legal

From: Iesha Bass (Admin. Assistant)

RE: [REDACTED] Fairchild (Therese Leach)

Total Pages (including cover sheet) 10

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Note(s): _____

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CODE-H003S

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

Case Number 01 JU-2542

Judge SQUIRE

Magistrate KRIEPEL

~~Plaintiff/Petitioner~~

IN RE: [REDACTED] FAIRCHILD

~~Defendant/Petitioner~~

MOTION FOR CONTINUANCE

On 6-28, 2006, the parties requests a continuance of the hearing set for 6-28-, 2006 for the following reason(s).

- 1 () Engaged Counsel (verification attached)(H006)
- 2 () Witness / Party Unavailable(H007)
- 3 () Illness(H008)
- 4 () Vacation (H009)
- 5 () To Obtain Additional Information(H012)
- 6 () To Obtain Counsel(H015)
- 7 (X) Other Biological mother may be objecting to Mag. Dec. (H010)

Date complaint/petition/motion filed various

Number of previous continuances several

Domestic Violence
2004, 2005

Theresa M Leach

[Signature]
Plaintiff/Petitioner

[Signature]
~~Defendant/Respondent~~

[Signature]
Attorney for Plaintiff/Petitioner

[Signature]
Attorney for ~~Defendant~~/Respondent

Prosecuting Attorney/CSEA

Guardian Ad Litem

ENTRY / MAGISTRATE'S ORDER

() Decision Prior to Hearing

(X) Decision at Time of Hearing

It is therefore ORDERED:

The Court, being fully advised in the premises, and for good cause shown hereby continues the within action, including the order(s) to appear and show cause, if any, to a date and time certain,

Thurs 10/17/06 at 9:30 A.M., 373 South High Street /

31(A), Columbus, Ohio

() The motion for continuance is overruled.(J224)

[Signature]
JUDGE / MAGISTRATE

INSTRUCTIONS TO ASSIGNMENT

Schedule hearing within _____ days.

Schedule hearing on next available date.

Hearing Type Code _____

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

IN THE MATTER OF:

CASE NO. 01JU2542

Rec'd 6-27-06
TFS

JUDGE SQUIRE

FAIRCHILD

MAGISTRATE KRIPEL

JUDGMENT ENTRY

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

This matter was heard on 10/26/05 upon motion(s)/complaint(s) filed 2/14/05 and appearance were made by Thomas Schmidt for Therese Fairchild, Keith Golden for the Denise Fairchild, and Brian Burrier the Guardian ad Litem.

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

(Check if applicable)

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

NOTICE: TAKE HEED THAT THIS ENTRY WHICH MAY BE A FINAL APPEALABLE ORDER HAS BEEN FILED WITH THE CLERK OF THE COMMON PLEAS COURT ON THE DATE INDICATED ON THIS TIME STAMP.
FRANKLIN COUNTY CLERK OF COURTS

Carol Squire

JUDGE SQUIRE

FILED
COMMON PLEAS COURT
FRANKLIN CO OHIO
JUN 22 PM 1:41
CLERK OF COURTS

PRECEPTE: TO THE CLERK OF COURTS

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

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

IN THE MATTER OF:

**CASE NO. 01JU-03-2542
JUDGE SQUIRE
MAGISTRATE KRIPPEL**

[REDACTED] FAIRCHILD,

MAGISTRATE'S DECISION

This matter came before the court for status conference on October 26, 2005. Pending before the court were four motions including a motion for declaratory judgment, filed on February 14, 2005, by Denise Fairchild. The parties were properly served and appeared through their attorney. The Guardian ad Litem, appointed July 20, 2004, also appeared. The parties agreed to submit the motion for declaratory judgment to the Magistrate based upon the motion and memorandum filed, a memorandum contra and a reply memorandum. The memorandum contra was due November 16, 2005 and the reply was due November 30, 2005. Both parties timely submitted their respective legal arguments.

This case originated in 2001 as a walk through Agreed Entry. The original pleadings were filed on March 6, 2001 and an Agreed Entry was signed and journalized by the Judge on March 8, 2001. A waiver of venue was signed by the parties and filed on March 6, 2001.

On May 26, 2004, Therese Marie Fairchild (as designated in the original pleadings) filed a motion for contempt pro se. The contempt motion was set for hearing on July 19, 2004. The parties continued the case that day to September 14, 2004 and a Guardian ad Litem was appointed. On September 14, 2004, the parties continued the case to December 9, 2004. The GAL filed a preliminary recommendation on October 14, 2004.

On November 17, 2004, Therese Fairchild filed a motion to modify parenting time. The matter was set for hearing on December 9, 2004. On December 2, 2004, Denise Fairchild filed four motions, including them a motion to terminate co-legal custody and for supervised parenting time.

On December 9, 2004, a Magistrate's Order was filed granting limited parenting time to Therese Fairchild, dismissing Therese Fairchild's contempt motion filed May 26, 2004 and setting forth a time deadline to submit affidavits on financial matters. The parties continued the case to February 28, 2005. Both parties filed motions after the December 9th hearing and before the February 28th hearing. These new motions were set on the Magistrate's docket on February 28, 2005. Included in those motions was the motion for declaratory judgment.

Effective February 28, 2005, a new magistrate was assigned to hear this case. The Magistrate addressed the venue issue for the first time to the parties' attorneys during a pretrial conference on that day. A Magistrate's Order was issued giving the parties ten days to submit memorandum of law on the issue of venue, which both parties timely submitted.

The Magistrate issued a decision transferring the case to Licking County on June 21, 2005. The case was inadvertently transferred to the Licking County Probate/Juvenile Court when it should have been transferred to the Licking County Domestic Court. The Probate Judge in Licking County refused transfer and the matter was sent back to Franklin County on August 23, 2005. The matter is now before the court to decide the motion for declaratory judgment.

MOTION FOR DECLARATORY JUDGMENT

The first matter to be decided is whether the motion presents a proper claim for a declaratory judgment. The Tenth District Court of Appeals has said that a proper claim must meet a three-prong test. Peat Marwick Main & Co., v. Elliott and AMFM, Inc. et al. 1991 Ohio App. LEXIS 101 (citing Burger Brewing Co., v. Liquor Control. Comm. (1973), 34 Ohio St. 2d 93, 97. The three-prong test is that there must be 1) a real controversy between the parties; 2) a controversy, which is justiciable in character; and 3) a situation in which speedy relief is necessary to preserve the rights of the parties. Peat Marwick, 4.

The controversy between the parties is whether the Agreed Entry entered into by the parties and filed on March 8, 2001 is null and void. This controversy is one that the domestic/juvenile court must decide since it is an entry issued by this court. Finally, speedy relief is necessary to preserve the rights of the parties. This is a proper claim for a declaratory judgment.

Denise Fairchild sets forth three arguments as to why the Agreed Entry filed March 8, 2001 should be declared null and void. Each argument is dealt with individually. For ease of reference Denise Fairchild, the biological mother, is referred to as Denise and Therese Fairchild is referred to as Therese.

The Agreed Entry is illegal and unenforceable.

Pursuant to R.C. 2151.23(A)(2), the juvenile court has jurisdiction to determine custody of any child that is not a ward of another court. Pursuant to R.C. 2151.23(F)(1), ~~the juvenile court must exercise that jurisdiction in accordance with R.C. 3109.04.~~ Denise sets forth the argument that the Agreed Entry filed March 8, 2001 is illegal and unenforceable because there was no co-custody arrangement allowed under R.C.

3109.04. She cites an appeal case from Hamilton County, *In re Bonfield*, 01-LW-0411 (2001), which was later overturned by the Ohio Supreme Court in *In re Bonfield* (2002), 96 Ohio St. 3d 218. These cases are referred to as *Bonfield I* and *Bonfield II* respectively.

Denise relies on the Hamilton County *Bonfield* case because she argues it was the status of Ohio law at the time Denise and Therese entered into their Agreed Entry. In *Bonfield I*, the Hamilton County Court rejected an uncontested petition for custody between two women, one being the biological mother and the other a nonparent, because the nonbiological woman was not a "parent" as defined under R.C. 3109.04. The two women in *Bonfield I* sought a shared parenting plan and the Hamilton County Court refused to extend the definition of parent to include the unrelated adult. Therefore the Court rejected the women's request for shared parenting.

When the case was appealed to the Supreme Court, that Court made it clear in its decision that the Hamilton County Court had only the option of shared parenting. The Supreme Court opinion noted that the trial court urged the litigants to consider joint custody without reference to shared parenting but no request was made to the trial court. See *In re Bonfield II* at page 219. It is clear even at the trial level, the *Bonfield I* court was willing to accept another custodial arrangement between the two women, just not shared parenting. The Hamilton County Court rejected a request for shared parenting between a parent and a nonparent. It did not reject other types of custodial arrangements between the parent and nonparent. At the time the Agreed Entry was journalized other types of custodial arrangements were available to these two litigants.

In *Bonfield II* the Supreme Court said: "It is well settled under Ohio law that a juvenile court may adjudicate custodial claims brought by persons considered nonparents

at law." See Bonfield II at 214 referencing In re Perales (1977), 52 Ohio St.2d 89. This is true even though the child has not been found to be delinquent, neglected or dependent.

Bonfield II at 224 citing In re Torok (1954), 161 Ohio St. 585. R.C. 2151.27(D) states:

Any person with standing under applicable law may file a complaint for the determination of any other matter over which the juvenile court is given jurisdiction by Section 2151.23 of the Revised Code. The complaint shall be filed in the county in which the child who is the subject of the complaint is found or was last known to be found.

The custodian does not have to be a parent. It is clear our court had jurisdiction to determine custody of [redacted] child. At the time of the Agreed Entry, shared parenting was not available, but the parties' Agreed Entry does not grant shared parenting to Denise and Therese. The Entry designates the two women as co-custodians.

In this case, a parent and a nonparent filed a joint petition for custody and presented the Court with an Agreed Entry for co-custodial status. This court clearly had jurisdiction to determine custody of this child pursuant to its authority under R.C. 2151.23(A)(2). The entry was entered into by consent of both parties. Parents may waive their right to custody of their children and are bound by an agreement to do so. See Bonfield II at 225 referring to Masitto v Masitto (1986), 22 Ohio St.3d 63, 65. Therefore the Agreed Entry filed March 8, 2007 was legal and enforceable against both parties.

The Agreed Entry conflicts with Proposition 1 and is therefore unenforceable.

Proposition 1 is a recently enacted amendment to the Ohio Constitution. It is set forth in Article XV, Section 11 and states as follows:

Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.

Granting custody rights of a child to a nonparent and between two unmarried people is not prohibited by this amendment.

Juvenile courts frequently determine custody rights between unmarried people. Even Domestic courts determine custody rights between unmarried people. In addition, juvenile courts sometimes determine custody rights between same sex individuals, for example between a grandmother and aunt, a father and a grandfather, an adult sibling and a parent or between two same sex adults who are unrelated to the child. The granting of custody does not "...approximate the design, qualities, significance or effect of marriage." Granting custody determines, among other things, where a child will live primarily, who will make decisions regarding the care of the child and who may be responsible financially for the child. Denise equates the granting of custody to a nonparent as somehow promoting a same sex marriage. The relationship between the child and the custodian is not the same as the relationship between two adults. The Magistrate finds that the Constitutional amendment does not apply to this case.

The Agreed Entry is contrary to public policy and is therefore unenforceable.

Granting custody of a minor child to a nonparent is done every day. Grandparents seek custody, siblings seek custody, and other related and unrelated adults seek custody of children every day. In many cases the nonparent is the only person available to give custody of the child. The granting of custody to these nonparents is not against public policy. Further, agreed custody agreements are generally not against public policy. The Supreme Court has reasoned that settlement agreements are preferred because the law

favors the resolution of controversies through compromise and settlement rather than through litigation. Spercel v. Sterling Industries, Inc., 31 Ohio St. 2d 36, 285 (1972).

The Agreed Entry filed March 8, 2001 is not against public policy.

Therefore, it is the decision of the Magistrate that the Agreed Entry filed March 8, 2001 is valid and enforceable against both parties.

NOTICE TO THE PARTIES:

A party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law in that decision unless the party timely and specifically objects to that finding or conclusion as required by Civil Rule 53(E)(3) / Juvenile Rule 40(E)(3).

Darwyn Krippel 6-6-06
MAGISTRATE KRIPPEL Date

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