

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

In re Z.H.H., M.H.H.

Court of Appeals No. L-25-00028

Trial Court No. JC021286267

**DECISION AND JUDGMENT**

Decided: May 1, 2026

\* \* \* \* \*

Stephen M. Szuch, Esq., for appellant.

Laurel A. Kendall, Esq., for appellee.

\* \* \* \* \*

**ZMUDA, J.**

{¶ 1} Appellant, S.H., appeals the January 6, 2025 judgment of the Lucas County Court of Common Pleas, Juvenile Division, finding that she relinquished permanent partial legal custody of her two adopted children, Z.H.H. and M.H.H., to appellee, J.H. She also appeals the trial court's order holding her in contempt of court and the court's

order that she pay the attorney fees J.H. incurred at trial. For the following reasons, we affirm, in part, and reverse, in part, the trial court's judgment.

### **I. Background and Facts**

{¶ 2} This appeal arises from the trial court's resolution of appellee J.H.'s August 1, 2021 amended complaint<sup>1</sup> seeking shared custody of appellant S.H.'s children—Z.H.H. and M.H.H. It is undisputed that S.H. and J.H. had been in a relationship that ended shortly before S.H. adopted the children. Under Ohio law, unmarried individuals cannot both adopt the same children. As described below, the parties both expressed a desire to adopt the children and at some point during their relationship considered getting married so that they could both adopt the children. The parties never married, thus leaving S.H. as the children's only parent under Ohio law. In her amended complaint, J.H. alleged that despite their breakup, she and S.H. had entered into an implied-in-fact agreement to share legal custody of the children.

{¶ 3} On June 10, 2021, the trial court issued an interim order establishing mandatory phone contact between the children and J.H. while the action was pending. The trial court subsequently amended that order in September, 2023, to allow J.H. visitation with the children on alternating weekends. Over the ensuing months prior to

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<sup>1</sup> J.H. originally filed her complaint on September 22, 2021 seeking custody of the children. She amended her complaint on August 1, 2022, including the same factual allegations but adding her claim that the parties entered into a shared custody agreement that is now before this court.

trial, J.H. filed several motions to show cause why S.H. should not be held in contempt for alleged violations of the interim orders. The motions were held in abeyance until the matter proceeded to trial on August 28, 2024. The trial took place over five days— August 28, 2024, August 30, 2024, September 6, 2024, September 17, 2024, and September 30, 2024. At trial, the parties elicited the following testimony:<sup>2</sup>

#### **Testimony of J.H.**

{¶ 4} J.H. testified that she and S.H. began dating at the end of 2014 and that she moved into S.H.’s house in Toledo, Ohio, in April or May of 2015. S.H.’s daughter, E.H.-S., who was five or six at the time, also lived there. J.H. and S.H. had lived together for approximately three and one-half years when they began fostering Z.H.H. in November 2018. They equally divided the duties of caring for Z.H.H. and E.H.-S.

{¶ 5} In March, 2020, Z.H.H.’s younger sibling, M.H.H., was born and became available for foster placement. Upon hearing this, S.H. called J.H. and expressed an interest in also fostering M.H.H. J.H. testified that she was “nervous and worried because my work schedule had changed and [S.H.] and I had some challenges, but I was also excited and I understood that that was what would be best for [Z.H.H.]. . . . I was excited, but nervous.” She informed S.H. of her concerns but “also expressed [her] commitment to making it happen.” She denied telling S.H. that the only way M.H.H.

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<sup>2</sup> Testimony and evidence unrelated to appellant’s assigned errors has been omitted from this summary.

could come into the home was if S.H. agreed to be 100 percent responsible for M.H.H.'s care.

{¶ 6} In a second call, J.H. believed that S.H. “was more emotional . . . , she wanted to let [J.H.] know that it was not just her pushing [J.H.] to get [M.H.H.], but she wanted to do it with [J.H.], she wanted to keep our family together and she wanted to make it work, and she needed [J.H.] to do it with her and she wanted to do it with [J.H.].” J.H. noted that she had concerns about her relationship with S.H., mostly due to her own shifting work schedule and disagreements regarding their supervision of Z.H.H. and E.H.-S. However, J.H. stated that when M.H.H. came into their home, both women did “whatever needed to happen to care for the children” and “were both fully responsible for the children in the house.” J.H. stated that S.H. was the primary point of contact for children services during their fostering of Z.H.H. and M.H.H.

{¶ 7} J.H. and S.H. eventually agreed that Z.H.H. would need a permanent placement. J.H. testified that she and S.H. “both wanted to be his legal parent and that was the intention.” In an email to their children services caseworker, S.H. initially told the caseworker that the adoption papers for Z.H.H. should be prepared with both J.H.'s and S.H.'s names because the women intended to marry and jointly adopt Z.H.H. After learning that they would have to wait for six months after marrying to finalize the adoption, they emailed the caseworker to tell her that they intended to have J.H. proceed with the adoption. J.H. testified that they were then advised by their attorney, Jill Hayes, that they could apply for a waiver of the waiting period after getting married for both of

them to adopt Z.H.H. While they both agreed to seek that waiver, they were subsequently advised that it would not be granted and chose to proceed with having only one of them adopt the children. J.H. stated that while they both still wanted to adopt Z.H.H., they decided that S.H. should adopt him because he would then have a legal sibling relationship with E.H.-S.

{¶ 8} J.H. next testified that she and S.H. ended their relationship in August 2020. Later that month, S.H. finalized her adoption of Z.H.H. At that time, S.H. gave Z.H.H. a last name that combined both her and J.H.'s last names. She gave Z.H.H. the same combined last name when her adoption was finalized in April, 2021, despite the fact that she and J.H. had broken up 9 months earlier.

{¶ 9} According to J.H., she and S.H. agreed that they were “50/50 on everything” when it came to raising the children. Both of them “wanted the kids 100 percent of the time and if [they] could not do that [they] would split responsibility and time 50/50.” J.H. believed that S.H. committed to jointly parenting the children through “[h]er words, her actions[,]” including meeting with attorney Hayes “to develop the co-parenting plan [and] multiple counseling sessions to refine it.” When the fees for attorney Hayes’s services became more than they wished to spend, the parties attempted to negotiate a shared custody arrangement between themselves. They eventually enlisted the assistance of a counselor to assist them in reaching an agreement and considered taking parenting classes. J.H. conceded, however, that she and S.H. never reached a written, signed co-custody agreement.

{¶ 10} Around the time of their breakup, J.H. was deployed with her National Guard Unit for a station in Cleveland, Ohio. She stated that while she was gone, she continued to have visits with the children every other weekend. She also tried to see them on a weekday evening each week, and her family regularly saw them on Wednesday evenings. S.H. frequently reached out to J.H. and her siblings if she needed help with childcare. When J.H. returned from her deployment, S.H. agreed to allow her to see the children every other weekend and one weeknight each week.

{¶ 11} J.H. then described the manner in which their agreement regarding the children began to deteriorate. In August 2021, J.H. was unavailable for a weekend visit because of her military schedule. In a text message exchange, she told S.H. that she had been “asking for a written schedule for the kids for nearly a year” but S.H. had “refused to do that.” S.H. responded, in part, “[y]ou can contact your boss to let them know you are unable to make it . . . . That is part of being a parent, sometimes you are just unable to do something because you are a parent and that should be your priority. . . . I will not pick up your parenting slack[.]”

{¶ 12} On September 17, 2021, S.H. informed J.H. that she and the children were moving to Michigan. In response, J.H. filed the underlying complaint. Up to that point, J.H. was having regular contact with the children. After J.H. filed her complaint, she was no longer allowed to pick up the children from their daycare, and S.H. did not allow her to have a previously scheduled weekend visit with the children. S.H. also prevented J.H. from talking to the children between September 24, 2021 to October 18, 2021.

{¶ 13} When contact resumed, S.H. allowed J.H. to speak to the children on the phone twice a week. She also allowed J.H. some in-person visits with the children. After J.H. filed her complaint, S.H. stopped referring to J.H. as a parent and made comments that the children were not J.H.'s children.

{¶ 14} J.H. then described the financial support she provided for the children before and after their adoption. She explained that she provided daycare payments including money for "food and gas and extraneous things" while she was deployed, major expenses like roof repairs, furnace replacement, and a truck, and buying diapers and wipes for daycare. She also regularly paid water, entertainment, and phone bills. For a while, at S.H.'s request, J.H. paid "what any other parent would have to pay" under the Ohio child support guidelines. J.H. stopped making payments in October 2021 because S.H. moved to Michigan and J.H. no longer knew where the children were going to daycare or how much it cost. S.H. did not respond to J.H.'s text messages requesting that information.

{¶ 15} In November 2022, S.H. stopped all communication between J.H. and the children. S.H. told J.H. that she could see the children if she reimbursed S.H.'s attorney fees, gas, and vacation time spent on court proceedings. J.H. did not pay because S.H. did not provide details about the money she was requesting. During this time, J.H. had some sporadic phone calls with the children. Regular phone contact with the children resumed in February 2023 when the trial court ordered it. J.H. testified that the children

were happy to see her on the video calls and seemed excited to talk to her after having no contact for two months.

{¶ 16} In August 2023, the trial court amended its interim order to give J.H. in-person visits with the children every other weekend beginning September 15, 2023. When J.H. went to S.H.'s house to pick up the children for the first weekend together, S.H. was not home. J.H. texted S.H. to let her know that she was at the house and did not get a response for over an hour. When S.H. did respond, she told J.H. that she and the children were in Wisconsin to visit a friend for the weekend. Several days later, S.H. sent a text asking, “[w]ould [J.H.] like to dismiss the case and we can discuss how things could possibly look in the future?” S.H. did not respond when J.H. attempted to have her next two scheduled phone calls with the children.

{¶ 17} Before her next scheduled visit, J.H. alerted S.H. ahead of time that she planned to exercise her visit that weekend. When she got to S.H.'s house, S.H.'s then-partner and wife by the time trial commenced (“Wife”), answered the door and told J.H. that the children were not home. Again, S.H. did not respond when J.H. attempted to have her next two scheduled phone calls with the children.

{¶ 18} This pattern continued several more times. One weekend, J.H. arrived early and parked near S.H.'s house. About 15 to 30 minutes before the scheduled pick-up time, she saw S.H. and the children leave the house and saw Wife leave shortly after. When she knocked on the door at the pick-up time, no one answered.

{¶ 19} The final time J.H. attempted to pick up the children for the weekend was November 10, 2023. S.H. did not grant her the required visitation. S.H. did not respond to J.H.'s November 22, 2023 email attempting to coordinate her next scheduled visit. In May, 2024, J.H. again emailed S.H. about reestablishing visits, but received no response. At the time of the trial, J.H. had not received any communications from S.H. since September 2023. J.H. incurred attorney fees in the amount of \$3,162.50 from five show-cause motions that her attorney filed related to S.H.'s denial of her court-appointed visits with the children.

{¶ 20} On cross-examination, J.H. confirmed that she was deployed from October 2020 to June 2021. During that time, she generally had visits with the children in person every other weekend and on the phone at midweek. She never had the children for more than three days at a time. J.H. denied that she initially had reservations about fostering children. She also noted that the parties referred to each other as "mom" and as coparents while fostering the children, prior to their adoption by S.H. She also recognized that she could have adopted the children with S.H. had they been married but they "chose not to delay the adoption for marriage."

{¶ 21} Describing the parties' intent to enter into a shared custody agreement, she stated:

When we left Ms. Hayes' office that date in August [2020] it was understood that the absolute skeleton and the most important parts were there. There was always a discussion about issues of the school district and where we were going for that and finalizing that was really the tail end of it

and we did not want to spend more money in Ms. Hayes office while we needed to just finish up.

She conceded that the parties had only a “verbal agreement” about custody rights but denied that S.H. had entirely refused to enter into a written custody agreement. Instead, she said that while they were considering a written agreement, S.H. “dragged her feet multiple times, but attended counseling with [J.H.], established counseling of her own accord and suggestion in order to pursue [an agreement].” J.H. concluded her testimony by stating that she did not oppose S.H. adopting the children because they “had the agreement that [they] would finalize the co-custody agreement and that there wasn’t a question that the children were joint, both of [theirs].”

#### **Testimony of Attorney Jill Hayes**

{¶ 22} Attorney Jill Hayes testified that she assisted with S.H.’s adoptions of Z.H.H. and M.H.H. She also discussed a “co-parenting agreement” with S.H. and J.H. She testified that her file reflected the following notes:

they were looking at a 2-2-3-3 parenting plan when working Monday through Friday. Holidays they were going to let me know. Transportation was going to be by the parent receiving. Vacation time was three weeks with 30-day notice, no longer than a two-week increment, notice if they were going out of Ohio. The mediator was Marty Riewaldt. They were going to split the cost of mediation. They agreed that the child cannot be baptized unless both parties agree. [J.H.] was going to explore that with the child. They were going to agree on activities and if they agreed they were going to split the cost. They were going to split school fees and supplies. Each provide own clothes. Out-of-pocket medical, dental, optical, prescriptions they were going to split. The child was to remain in Lucas or contiguous county. If death or deployment, family members were to have every other weekend Friday at 6 or after school until Sunday at 6. Wednesday midweek after school till 8:30. They had – they were needed to agree to haircuts and hairstyles. No tattoos, piercing only if they agreed.

Nonemergency medical decisions would be [S.H]. [S.H.] was to provide all providers. School with permission to seek records. They did not decide on a school district.

{¶ 23} Hayes stated, “there was just a few things that they hadn’t decided on.”

The meeting from which these notes were taken took place on August 25, 2020, after Z.H.H.’s adoption was finalized on August 3, 2020. J.H. met with Hayes a final time on June 15, 2021. At that time, Hayes was advised that the parties were no longer living together and that “they hadn’t reached a parenting plan agreement.” Hayes noted that she never prepared a draft shared custody agreement for the parties to consider.

#### **Testimony of Wife**

{¶ 24} Wife testified that she and S.H. began dating in February, 2021. At that time, J.H. was visiting with the children once or twice a month. She also stated that J.H.’s family would occasionally visit with the children. The visits eventually changed to once a month and then stopped completely around Thanksgiving of 2022.

{¶ 25} On cross-examination, Wife testified that she was aware that J.H. did not see the children after November, 2022. She was at S.H.’s home when J.H. came for visits but did not remember exact days. She did not recall any instances when S.H. took the children from their house shortly before J.H. was supposed arrive for a visit. Wife confirmed that S.H. conditioned further visits on J.H.’s payment for expenses S.H. incurred in litigating the matter and other household expenses. Wife believed that such a condition was in the children’s best interests because it would repair financial strain on the family.

### Testimony of S.H.

{¶ 26} S.H. testified that she and J.H. began dating in November 2015 and started living together soon after. She recalled that J.H. did not share household expenses until the last year she lived there. She testified that their relationship ended in July 2020, before Z.H.H.'s adoption was finalized. S.H. did not want to get married but they discussed it as an option so that they could jointly adopt the children. Despite this, they were never formally engaged. She described the potential marriage as a way to avoid either party adopting Z.H.H. without the other.

{¶ 27} S.H. next described concerns she had about J.H.'s ability to care for the children. These included J.H.'s "alcohol habits and overall the inequities in like the household duties and taking care of the kids." For example, she testified that J.H. hid bottles of alcohol around the house and in her car and would frequently drink when they were out. She described a particular incident where J.H. drank even though she knew she was going to be driving the family somewhere. S.H. also stated that J.H. treated the children differently. M.H.H. would come home with a full diaper and clothes that did not fit or go to daycare without a coat when Z.H.H. had a coat. S.H. was also unsure about where J.H. was staying with the children and thought that J.H. was telling them to lie to her about where they were staying.

{¶ 28} S.H. acknowledged that J.H. contributed to the children financially but that she provided less than half of their daycare expenses for about six months and paid an amount determined under the Ohio child support guidelines for a few months. J.H.

stopped paying for daycare in July, 2021. She recalled J.H. telling a therapist that the women were seeing that “if [S.H.] won’t give her any right to the kids, then she won’t pay for their daycare.” S.H. believed that J.H. stopped paying for daycare and the child-support-guideline amount because S.H. would not enter into a written coparenting agreement with her.

{¶ 29} S.H. next testified that she was the point of contact for “everything” involving the children. She took Z.H.H. to about 60 percent of his doctor appointments and “did everything” for E.H.-S. and M.H.H. She supported this testimony with text messages showing that J.H. preferred to leave the children at daycare until it closed even though she was available to pick them up earlier and refused to take E.H.-S. to school when she was off of work and S.H. was not. S.H. thought that the messages showed that “if [they]’re acting as a family, . . . then this is just more things that [J.H.] refused to do as part of the family.”

{¶ 30} S.H. next described the time period when they began fostering M.H.H. She testified that J.H. did not want M.H.H. to come into the home. When children services called to tell S.H. that M.H.H. could be placed with them, she and J.H. had the following exchange:

I called [J.H.] to let her know and she said, no, that she didn’t want [M.H.H] coming there and that we weren’t okay and she wasn’t okay to help care for another kid. And I told her that it was either like you can go but [M.H.H] is coming to the house, I’m not saying no to [Z.H.H.’s] sister. And that then she wasn’t going to be able to take care of her, wasn’t going to do any of the work. And I said, that’s fine, I will do the work, I’m going to help take care of her[.]

Regarding Z.H.H.'s adoption, S.H. testified that the parties agreed S.H. should be the adoptive parent because Z.H.H. would then have a legal tie to E.H.-S. They reached that conclusion after first wanting to both adopt the children but being unable to as an unmarried couple.

{¶ 31} S.H. noted that before or after the children's adoptions, she never signed any legal documents giving J.H. decision-making power over her or the children. She also did not include J.H. in her will and did not name J.H. as the children's guardian upon her death. Although the parties discussed a shared custody agreement with Hayes, they never entered into a written contract regarding shared custody of the children because they never agreed on all of the terms. Additionally, S.H. did not want a written custody agreement because "once [she] learned from Jill Hayes that it was something that is essentially permanent, [she] did not want that to be the case."

{¶ 32} While she did not want to share custody with J.H., S.H. testified that she did not intend to keep the children from J.H. In the year between September, 2020 and September, 2021, J.H. saw the children every other weekend, and the children usually went to J.H.'s brother's house for visits on Wednesdays. S.H. cared for the children the rest of the time. Throughout most of 2022, J.H. saw the children one weekend a month.

{¶ 33} Regarding the GAL's recommendation, S.H. did not like that it left her and her family only two weekends per month to do things with the children. She also said that she would be unable to help them maintain their relationships with their blood

relatives. She also thought that the children being away from her family for seven days at a time in the summer was too much.

{¶ 34} On cross-examination, S.H. admitted that she and J.H. referred to each other as parents of the children throughout their relationship. She conceded that she had called J.H. a parent in some text messages. They had a number of conversations about coparenting after their relationship ended, and S.H. told J.H. multiple times that she did not intend to keep the children from her. In reaching their final agreement about S.H. being the adoptive parent, S.H. assured J.H. that she would coparent with her.

{¶ 35} At the first meeting with attorney Hayes, S.H. recalled “possibly mention[ing] the co-parenting agreement to her and she was going to start drafting one or what one would look like.” At the second meeting with Hayes they discussed a shared parenting plan, what the plan would look like, and “what it would mean should [S.H.] sign any document like that and a judge signed it[.]” S.H. admitted that she gave both of the children J.H.’s last name, even though she was in a relationship with Wife by the time of M.H.H.’s adoption.

#### **Testimony of Seneca Weirich, Guardian ad Litem**

{¶ 36} Seneca Weirich, the guardian ad litem assigned to represent the children’s interests, testified that she was able to conduct only a very limited investigation. She explained that her investigation was impacted by stays in this case, S.H.’s refusal to allow her to see the children after her initial visit, and S.H.’s refusal to comply with the court’s

order giving J.H. visits with the children. Because S.H. had not complied with the visitation order, Weirich was unable to observe J.H. with the children.

{¶ 37} Weirich concluded that fostering and adopting the children was a joint effort between S.H. and J.H.—and that S.H. was lying when she claimed otherwise—based on text messages and emails that the parties had provided her. Weirich recommended that S.H. be named the sole residential parent and legal custodian of the children, with J.H. having visitation. She also recommended that J.H.’s family members be allowed to exercise her visitation time if she were deployed.

{¶ 38} Weirich recognized that J.H. is not a legal parent to the children, but thought that she was a parent to them nonetheless. Weirich clarified, “technically [S.H.] is the only one adopted, who adopted legally the children, but the process I do believe they were in it together.” She cited the women being in a relationship and S.H. giving the children J.H.’s last name as evidence of intent to coparent. She also noted that it was possible to coparent without relinquishing parental rights.

{¶ 39} Regarding text messages she reviewed during her investigation about J.H. being hesitant to bring M.H.H. into the home, Weirich testified:

I think that parenting in relationships are complex and I think that people approach parenting in different ways, and I think that we see similar things when somebody gets pregnant accidentally, sometimes the other parent initially will have some reservations. I don’t think that’s incredibly uncommon. I also think it was based off of their current situation and her work. So I don’t have any concern about it, I do acknowledge that I do believe there was some hesitation, but I don’t think that makes her not a parent.

Weirich noted in her report that the parties met with therapists and lawyers to help them create a custody agreement regarding the children, but they were unable to reach an agreement. As a result, no written shared custody agreement exists.

{¶ 40} Weirich explained that she considered J.H. to be a parent to the children—despite her not legally being the children’s parent—because:

these parties entered into this foster care agreement to adopt the children together. It’s very apparent that that is what they did. And then it wasn’t until mom, [S.H.] mom, wanted to move to Michigan with her new girlfriend that contact sort of ceased and . . . co-parenting is difficult and I think she just didn’t want to do it anymore, so she elected not to. So I think had the parties continued with what they had intended to do, that [J.H.] would have ended up with some sort of a legal right, but she did not because of how things transpired. But I do believe she absolutely parented those children and it was the intent that she would be their parent.

#### **D. Trial court’s decision**

{¶ 41} In its decision, after reviewing the facts of the case, the trial court noted that under *In re Mullen*, 2011-Ohio-3361, ¶ 13, it must determine whether there is an implied contract in which “the parent agreed to relinquish permanent, partial legal custody of her child to a nonparent.”

{¶ 42} The trial court found that S.H. would not have reached the point of adopting Z.H.H. if J.H. had not supported her with fostering Z.H.H. The parties agreed on S.H. as the parent who would adopt, and none of the reasons why S.H. was chosen over J.H. was J.H.’s desire not to coparent. The court also found it significant that S.H. chose to use J.H.’s last name as part of the children’s last name. The court further concluded that the parties held themselves out as a family, the children referred to each

woman as “mom,” and J.H. provided care and support, including payment of child support until S.H. refused visits. The court also noted that the women “sought help in co-parenting and nearly reduced their agreement to writing, until . . . [S.H.] refused to do so because she did not want to lose control.” Finally, the court concluded that the parties’ intent to adopt and then coparent was “plain.” Based on that, the court found that “by her words and conduct, [S.H.] voluntarily relinquished her sole right to custody, thus impliedly creating an enforceable contract between the parties.”

{¶ 43} The court went on to consider whether it was in the children’s best interests for J.H. to have parenting time and concluded that it was. The trial court awarded J.H. parenting time and visitation in accordance with the court’s standard interim parenting plan and local parenting plan.

{¶ 44} The court also found S.H. in contempt for her failure to abide by its August, 2023 visitation orders and sentenced her to 30 days in jail, which she could purge by “following all the above directives and mandates of [the] order[.]” and ordered her to pay all court costs and J.H.’s attorney fees arising from her acts of contempt.

{¶ 45} S.H. now appeals, raising seven errors for our review:

I. THE TRIAL COURT ERRED WHEN IT FOUND THAT APPELLANT WAIVED HER CONSTITUTIONAL RIGHT TO SOLE CUSTODY OF HER CHILDREN[.]

II. THE TRIAL COURT ERRED WHEN IT DESIGNATED APPELLEE AS A CO-PARENT WITH APPELLANT[.]

III. THE TRIAL COURT ERRED IN FINDING OF AN IMPLIED CONTRACT BETWEEN THE PARTIES[.]

IV. THE TRIAL COURT ERRED WHEN IT FOUND APPELLANT AGREED TO RELINQUISH PERMANENT PARTIAL LEGAL CUSTODY OF THE MINOR CHILDREN TO APPELLEE[.]

V. THE TRIAL COURT LACKS AUTHORITY TO GRANT HOFFMAN PARENTING TIME/ VISITATION[.]

VI. THE TRIAL COURT ERRED WHEN IT FOUND APPELLANT TO BE IN CONTEMPT, AS THE COURT'S INTERIM ORDER WAS IMPROPER AND SHOULD BE RENDERED INVALID[.]

VII. THE TRIAL COURT ERRED WHEN IT ORDERED APPELLANT TO PAY APPELLEE'S ATTORNEY FEES RELATED TO TRIAL[.]

{¶ 46} We address these assignments of error out of order and jointly, when applicable, as described below.

## **II. Law and Analysis**

### **A. S.H. did not appeal the February 18, 2025 judgment entry.**

{¶ 47} The judgment currently being appealed was entered on January 6, 2025. On February 18, 2025, the trial court issued a subsequent judgment entry to “clarify” and “amend” its January 6, 2025 judgment entry. In the February 18th judgment entry, the trial court clarified that “[t]he parties are hereby named co-parents under these orders.” In her second assignment of error, S.H. argues that this was error.

{¶ 48} S.H., however, did not file a notice of appeal from the February 18th judgment entry. Under App.R. 3(A) and 4(A), a party wishing to appeal a judgment must file a notice of appeal within 30 days of the date on which the judgment was entered. An appellate court does not have jurisdiction to consider the issues raised on appeal if the

party fails to properly file a notice of appeal. *State ex rel. Pendell v. Adams Cty. Bd. of Elections*, 40 Ohio St.3d 58, 60 (1988).

{¶ 49} S.H. only filed a notice of appeal from the January 6th judgment entry. Because S.H. did not appeal the February 18th judgment entry, we lack jurisdiction to consider any arguments related to that decision. *State v. Taft*, 2019-Ohio-1565, ¶ 58 (6th Dist.). S.H.’s second assignment of error is not well-taken.

**B. The trial court did not err in finding that J.H. agreed to share custody with nonparent J.H.**

{¶ 50} In her first assignment of error, S.H. argues that the trial court erred when it found that she waived her constitutional right to sole custody of her children. In her third assignment of error, she argues that the trial court erred when it found that she had entered into an implied-in-fact agreement to share custody with J.H. In her fourth assignment of error, she argues that the trial court erred when it found that she agreed to share permanent, partial legal custody of her children with J.H. Because these assigned errors are interrelated, we address them jointly.

{¶ 51} “Parents have a constitutionally protected due process right to make decisions concerning the care, custody, and control of their children, and the parents’ right to custody of their children is paramount to any custodial interest in the children asserted by nonparents.” *In re. Mullen*, 2011-Ohio-3361, ¶ 11, citing *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *In re Murray*, 52 Ohio St.3d 155, 157 (1990); and *Clark v. Bayer*, 32 Ohio St. 299, 310 (1877).

{¶ 52} A parent may voluntarily waive legal custody or share custody with a nonparent through a valid shared-custody agreement. *Id.* at ¶ 11, citing *Bonfield*, 2002-Ohio-6660, at ¶ 50. “A shared-custody agreement recognizes the general principle that a parent can grant custody rights to a nonparent and will be bound by the agreement.” *Id.*, citing *Bonfield* at ¶ 48; *Masitto v. Masitto*, 22 Ohio St.3d 63, 65 (1986); and *Clark* at paragraph two of the syllabus.

{¶ 53} The “essence” of a shared-custody agreement is “the purposeful relinquishment of some portion of the parent’s right to exclusive custody of the child.” *Id.* “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.” *Id.*, quoting *Bonfield* at ¶ 48, 50. Under Ohio law, questions about whether a parent has agreed to “waive” or “relinquish” legal custody, or to share legal custody with a nonparent, are governed by contract law. *See Mullen* at ¶ 12. To determine whether the parties entered into an implied-in-fact agreement granting J.H. partial custody of the children, the evidence must show that the parties had a “meeting of the minds.” *Dunn v. Buzzese*, 2007-Ohio-3500, ¶ 28 (7th Dist.). This can be “shown by the surrounding circumstances, including the conduct and declarations of the parties, [which] make it inferable that the contract exists as a matter of tacit understanding.” *Id.*

{¶ 54} The trial court’s findings of fact established the circumstances related to custody of the children, including the parties’ conduct, when it found that the evidence weighed in favor of the existence of an implied-in-fact agreement. These findings included the following:

1. The parties were in a relationship when they chose to take foster care classes together;
2. After beginning to foster Z.H.H. without any “foster-to-adopt” intentions, the parties shifted their intent to proceed with his adoption;
3. The parties agreed that S.H. would be identified as the adoptive parent “due to work schedules and family dynamics;”
4. The parties were “experiencing challenges in their relationship” contemporaneous with Z.H.H.’s adoption proceedings but that they agreed to pursue the adoption of M.H.H. as well;
5. The parties separated before S.H. completed Z.H.H.’s adoption, J.H. was present at the final hearing for both Z.H.H. and M.H.H.’s respective adoptions;
6. Although the parties relationship ended, the children still maintained a relationship with J.H. and her family;
7. J.H. continued to provide financial support for the children after the parties’ relationship ended;
8. The parties later met with counsel to develop a “co-parenting agreement” but never reduced their plans to writing; and
9. The parties met with two doctors for “co-parent counseling.”

Based on these findings, the trial court found that S.H. had relinquished sole custody of her children and entered into an implied-in-fact agreement to share custody of the

children with J.H. In her first, third, and fourth assignments of error, S.H. argues that the trial court erred in reaching this conclusion. We disagree.

{¶ 55} Under the standard developed in *Mullen*, our review of the trial court’s judgment requires us to determine whether there was reliable, credible evidence to support the trial court’s judgment. *Id.* If there is, the judgment must be affirmed. *Id.* at ¶ 23, citing *Gillen-Crow Pharmacies v. Mandzak*, 5 Ohio St.2d 201 (1966) (“Because the holdings of the juvenile and appellate courts are supported by the evidence and are not clearly against the manifest weight of the evidence, we must affirm them.”). The court’s findings of fact are based on the parties’ testimony at trial. In our review of that testimony, we find that just as in *Mullen*, the trial court’s factual findings weigh both in favor of and against its conclusion that parties entered into an implied-in-fact shared custody agreement. *Mullen* at ¶ 19 (noting the “conflicting and disputed evidence” on which the trial court based its decision). For example, in support of its finding, the trial court noted that J.H. continued to be involved in the children’s lives after her breakup with S.H., that J.H. continued to provide financial support for the children, and that the parties met with counselors to improve their “co-parenting” relationship. Conversely, the trial court considered evidence that there was no agreement, including that the parties never reduced their agreement to writing, that the parties separated prior to S.H.’s adoption of the children, and that J.H. did not challenge S.H.’s adoption of the children after their breakup.

{¶ 56} The fact that the testimony was conflicting does not mean that the trial court erred in finding that the parties entered into an implied-in-fact agreement—just as the conflicting evidence in *Mullen* did not render the trial court’s decision that no agreement was reached erroneous. The determination as to whether the parties entered into the shared custody agreement is within the “broad discretion” of the trial court. *Id.* at ¶ 14. While there was conflicting evidence, the trial court’s conclusion was based on competent, credible evidence—that is, the testimony of the parties and their witnesses. Since there was competent, credible evidence to support the trial court’s judgment, we must affirm its decision. *Id.* at ¶ 23.

{¶ 57} As a result, we affirm the trial court’s judgment that S.H. agreed to relinquish sole custody of her children to J.H., that S.H. entered into an implied-in-fact agreement with J.H. regarding the custody of her children, and that S.H. agreed to share custody of her children with J.H. through that agreement. For these reasons, we find S.H.’s first, third, and fourth assignments of error not well-taken.

**C. The trial court did not err in utilizing a shared parenting plan to award J.H. custodial rights in accordance with the parties’ agreement.**

{¶ 58} In her fifth assignment of error, S.H. argues that the trial court erred when it granted J.H. “parenting time” and “visitation” pursuant to a shared parenting plan. S.H., citing *In re Bonfield*, 2002-Ohio-6660, correctly argues that J.H. is not, and cannot be, a “parent” of the children under Ohio law, and that a trial court cannot award parenting time to a non-parent. In *Bonfield*, the Ohio Supreme Court was asked to

determine whether the partner in a same-sex couple who was not the biological or adoptive parent of the children at issue was a “parent” within the meaning of R.C. 3109.04, the statute that controls awards of parental rights and responsibilities and addresses shared parenting plans. *Id.* at ¶ 15-16. That code section does not define “parent,” so the court looked to the definition of “parent child relationship” in R.C. 3111.01(A), the Revised Code chapter related to parentage, to determine that “there are three ways a ‘parent and child relationship’ can be established: by natural parenthood, by adoption, or by other legal means in the Revised Code that confer or impose rights, privileges, and duties upon certain individuals.” *Id.* at ¶ 24-28. Using that definition, the court found that a same-sex partner did not fall into any of those categories and, therefore, did not qualify as a “parent.” *Id.* at ¶ 35. Thus, under *Bonfield*, trial courts are prohibited from granting parental rights and visitation to a nonparent pursuant to R.C. 3109.04.

{¶ 59} J.H. is in the same position as the partner in *Bonfield*. She is not the natural or adoptive parent of the children and nothing else in the Revised Code confers or imposes rights, privileges, and duties related to the children upon her. While not a parent as a matter of law, J.H. is nevertheless entitled to custodial rights over the children pursuant to the parties’ agreement. The question, then, is how could the trial court have guaranteed those rights when there is no statutory provision to address such an agreement between a parent and a nonparent? To answer this question, the trial court utilized a standard shared parenting plan. We find no error in the trial court’s utilization of a

shared parenting plan as guide to ensure J.H.’s custodial rights since there is no statutory guidance on how a nonparent’s custodial rights can be enforced through an implied-in-fact custody agreement between a parent and nonparent.

{¶ 60} As Justice O’Connor commented in a dissenting opinion in *Mullen*, while “children exist in an array of familial configurations \* \* \* decisions about the custody and care of those children must be made, even in the void of legislative guidance.” *Id.* at ¶ 32. It is undisputed that a parent may relinquish sole custody of their children to share custody of their children through an implied-in-fact custody agreement. *Mullen* at ¶ 11. If courts can find that an agreement to share custody between a parent and nonparent is enforceable but that it cannot grant the rights contained therein because there is no “legislative guidance” on how to ensure the terms of such an agreement are met, then the rights granted in the agreement are illusory. Here, the trial court elected to use the rights normally reserved for parents to ensure that J.H. received the custodial rights S.H. granted to her in their agreement. We do not find fault with the trial court’s use of a “shared parenting plan” to grant the agreed upon custodial rights in the absence of alternative legislative guidance.

{¶ 61} This conclusion comports with the analysis trial courts are required to perform once they determine that a shared custody agreement exists. Ohio law mandates that once a court finds that a valid shared custody agreement exists, it must determine whether the granting of shared custody to the nonparent is in the best interest of any children subject to that agreement. *Bonfield* at ¶ 48-49; *Mullen* at ¶ 11. The requirement

to award custody when it is in a child’s “best interest” is established in R.C. 3109.04—the same statute under which parenting time and visitation rights would be granted to a legally recognized parent. *Masitto*, 22 Ohio St.3d 63 at syllabus, 66-67. We see no reason why the trial court should be obligated to consider the best interest factors under R.C. 3109.04 to determine what custodial arrangement would be in the children’s best interest, but not be able to grant similar rights to a nonparent that would reflect the court’s best interest determination as described in the same statute. Reversing the trial court’s decision as to what is in the children’s best interest because the vehicle through which that judgment was entered—a shared parenting plan that is generally inapplicable to nonparents pursuant to R.C. 3109.04—would negate the trial court’s judgment due to a gap in statutory authority, not on the merits of the trial court’s judgment. We believe it would be against public policy to have children living under a custody arrangement contrary to the trial court’s best interest finding simply because the legislature has not directly addressed the scenario underlying this case.

{¶ 62} We also note that the trial court’s incorporation of a standard shared parenting plan as a vehicle through which it can guarantee J.H.’s custodial rights does not automatically render the rights granted therein to be “parental” rights as described in R.C. 3109.04. Review of the trial court’s judgment shows that it ordered S.H. to “follow all provisions of the plan where ‘Mother’ is referenced” while J.H. was order to “follow all provision of the plan where ‘Father’ is referenced.” Ordering the parties to follow the provisions of a plan that is ordinarily reserved for parents sharing custody merely

recognizes the reality of the implied-in-fact agreement between the parties that S.H. agreed to share her right to custody of her children with J.H. and provided a means to implement those shared rights. It does not result in the grant of statutory parental rights to J.H. The fact that some of J.H.'s custodial rights overlap with rights granted only to a parent in R.C. 3109.04 does not invalidate the trial court's efforts to ensure those rights are protected in accordance with the parties' agreement.

{¶ 63} In sum, the trial court's use of a shared parenting plan, in the absence of any statutory guidance on how to award custodial rights granted through the parties' agreement, should not be undone merely because the agreement incorrectly describes J.H. as a parent. The trial court's use of a shared parenting plan does nothing more than provide J.H. with the custodial rights S.H. granted to her. She should not lose those rights simply because they are described as "parenting time" and "visitation" when those categories are the functional equivalent of the custodial rights granted to her in the agreement.

{¶ 64} We note that the rights granted to J.H. through her legal custody of the children are not equivalent to S.H.'s parental rights as a matter of law. The grant of legal custody of children remains subject to "any residual parental rights, privileges, and responsibilities." *Hockstok*, 2002-Ohio-7208, at ¶ 35. Should the circumstances warrant it, S.H. could seek to challenge J.H.'s custody in the future. *Id.* J.H. has no reciprocal ability to challenge S.H.'s residual parental rights. The fact that the trial court utilized a form referencing "parental rights" and "visitation" to grant J.H. custodial rights over the

children, then, should not be treated as an improper grant of equivalent parental rights to J.H. as any custodial rights it granted are subject to S.H.'s "fundamental liberty interest in the care, custody, and management" as parent of the children. *Id.* at ¶ 16. Put simply, while the trial court's use of a shared parenting plan to grant J.H. rights described as "parental" in nature, it merely served as a vehicle through which J.H. could exercise the rights S.H. granted to her in their agreement. As a result, we find that the trial court did not improperly grant "parenting time" and "visitation" to nonparent J.H. We also note that S.H. only challenges the trial court's grant of visitation and parenting time as being inapplicable nonparent J.H. She does not challenge the scope of the agreement or the rights awarded to J.H. therein. Since we find that the trial court did not err in utilizing the shared parenting plan to award J.H. the custodial rights granted to her in the parties' agreement, we find S.H.'s fifth assignment of error not well-taken.

**D. The trial court did not err in finding S.H. in contempt.**

{¶ 65} In her sixth assignment of error, S.H. argues that the trial court erred by finding her in contempt because its interim visitation order was improper and should be rendered invalid because (1) this was a custody proceeding, not a child support proceeding under R.C. 3109.051(B)(1); (2) the trial court did not truly consider whether the visits were in the children's best interests, and they were not, in fact, in the children's best interests; and (3) the lack of notice and hearing before the court issued its interim order violated her fundamental rights as a parent. She also claims that the court's purge condition was too vague and indefinite to allow her to know what amount of money she

had to pay to purge her contempt. J.H. responds that the trial court properly issued the interim order under R.C. 3109.051(B)(1) because J.H. requested in her complaint that the trial court issue child support orders.

{¶ 66} “Contempt of court” is “the disregard for, or the disobedience of, an order of a court. It is conduct which brings the administration of justice into disrespect, or which tends to embarrass, impede or obstruct a court in the performance of its functions.” (Internal citations and quotations omitted.) *Ameritech Publishing, Inc. v. Mayo Bail Bonds & Sur., Inc.*, 2013-Ohio-831, ¶ 15 (6th Dist.).

{¶ 67} Whether to hold a party in contempt is within a trial court’s broad discretion. *Tillimon v. Taylor*, 1993 WL 283337, \*2 (6th Dist. July 30, 1993). We review a trial court’s decision on a motion for contempt under an abuse-of-discretion standard. *Baum v. Perry-Baum*, 2019-Ohio-3923, ¶ 35 (6th Dist.); *Davis v. Davis*, 2012-Ohio-2088, ¶ 40 (6th Dist.). “A trial court will be found to have abused its discretion when its decision is contrary to law, unreasonable, not supported by the evidence, or grossly unsound.” *State v. Nisley*, 2014-Ohio-981, ¶ 16 (3d Dist.); *State v. Boles*, 2010-Ohio-278, ¶ 16-18 (2d Dist.).

{¶ 68} “Obedience to judicial orders is an important public policy.” *Lepore v. Breidenbach*, 2015-Ohio-2929, ¶ 23 (1st Dist.). “An order issued by a court with jurisdiction must be obeyed regardless of whether such power was imprudently or prematurely exercised and however erroneous the action of the court may be, until the order is reversed by orderly and proper proceedings.” (Cleaned up.) *State v. Moll*, 1992

WL 2539, \*3 (6th Dist. Jan. 10, 1992). An erroneous order is no defense to a charge of contempt. *Slone v. Slone*, 1998 WL 191840 (4th Dist. Mar. 31, 1998).

{¶ 69} Here, given S.H.'s willful, continuous disobedience of the trial court's interim visitation order, we find that the trial court did not abuse its discretion by finding her in contempt. S.H. was bound to follow the court's order, even if she disagreed with it, unless and until it was "reversed by orderly and proper proceedings." *Moll* at \*3. If she was dissatisfied with the visitation order, she could have moved to have it vacated or modified, rather than simply choosing to take matters into her own hands.

{¶ 70} Regarding the purge conditions, the trial court's entry states, "[i]t is further **ORDERED, ADJUDGED and DECREED** that [S.H.] is hereby found in contempt of the Court's visitation orders, and sentenced to thirty (30) days at CCNO. She may purge herself of the contempt by following all the above directives and mandates of this order, including strict adherence to the attached Interim Parenting Plan and Local Parenting Plan." The "above directives and mandates" relate to the parenting time that the trial court awarded to J.H. and to the parties not encouraging or telling the children to call the other anything but "mom." Those "directives and mandates" have nothing to do with the financial sanctions that the court imposed on S.H. *after* imposing the purge condition of complying with the parenting time orders. Thus, S.H. is not required to pay any amount of money to purge herself of contempt, so her argument that the financial sanctions make her purge conditions too vague to be enforceable fails.

{¶ 71} S.H. was required to obey the trial court’s interim order until it was reversed or otherwise vacated, if at all. Thus, the trial court properly found her in contempt, and her sixth assignment of error is not well-taken.

**E. The trial court erred by awarding attorney fees for trial to J.H.**

{¶ 72} In her final assignment of error, S.H. argues that the trial court erred by ordering her to pay 25 percent of the attorney fees that J.H.’s attorney incurred during trial. She contends that there is no statute or contract allowing the court to deviate from the American rule that each side pays its own attorney fees in litigation. J.H. responds that the trial court properly awarded attorney fees as a sanction for S.H.’s contempt under R.C. 3109.051(K).

{¶ 73} Attorney fees are available to litigants in limited circumstances. As the Ohio Supreme Court explained in *Wilborn v. Bank One Corp.*, 2009-Ohio-306, ¶ 7:

Ohio has long adhered to the “American rule” with respect to recovery of attorney fees: a prevailing party in a civil action may not recover attorney fees as a part of the costs of litigation. . . . However, there are exceptions to this rule. Attorney fees may be awarded when a statute or an enforceable contract specifically provides for the losing party to pay the prevailing party’s attorney fees, . . . or when the prevailing party demonstrates bad faith on the part of the unsuccessful litigant.

Additionally, a court may award attorney fees as an element of compensatory damages if punitive damages are awarded. *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 558 (1994).

{¶ 74} In this case, there is not a contractual agreement, an award of punitive damages, or a finding of bad faith under which the trial court could have awarded J.H.

attorney fees related to the trial. J.H. argues that the attorney fee award for trial constituted a “financial sanction” for S.H.’s contempt of court. This argument is misplaced, however, because S.H. was ordered to pay the fees J.H. incurred related to the contempt proceedings, pursuant to R.C. 3109.051, in the trial court’s judgment entry. R.C. 3109.051 expressly limits the award of attorney’s fees to those that “arose in relation to the act of contempt[.]” There is no basis on which to find that the attorney fees incurred at trial were related to S.H.’s “act of contempt.” Therefore, J.H.’s argument that the award of attorney fees incurred at trial served as a “financial sanction” for S.H.’s prior contempt of court is without merit.

{¶ 75} Since there is no legal basis for the trial court to award J.H. any portion of the attorney fees she incurred at trial, we find her seventh assignment of error well-taken.

### **III. Conclusion**

{¶ 76} For the foregoing reasons, we find appellant’s first, second, third, fourth, fifth, and sixth assignments of error not well-taken. We find appellant’s seventh assignment of error well-taken. As a result, the January 6, 2025 judgment of the Lucas County Court of Common Pleas, Juvenile Division, is affirmed, in part, and reversed, in part. We affirm the trial court’s determination that the parties entered into an implied-in-fact agreement to share custody of the children and the trial court’s utilization of the standard shared parenting plan to enforce that agreement. We also affirm the trial court’s finding S.H. in contempt for her violation of the trial court’s interim orders granting J.H.

visitation with the children. We reverse and vacate the trial court’s award of 25 percent of attorney fees incurred at trial to J.H.

{¶ 77} The parties are ordered to divide the costs of this appeal equally under App.R. 24.

Judgment affirmed in part  
and reversed in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.  
*See also* 6th Dist.Loc.App.R. 4.

Gene A. Zmuda, J.  
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JUDGE

Myron C. Duhart, J.  
CONCUR.  
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\_\_\_\_\_  
JUDGE

Christine E. Mayle, J.  
CONCURRING IN PART,  
DISSENTING IN PART AND  
WRITES SEPARATELY.  
\_\_\_\_\_

\_\_\_\_\_  
JUDGE

**MAYLE, J., concurring in part and dissenting in part.**

{¶ 78} I concur with the majority’s resolution of the second, sixth, and seventh assignments of error.<sup>3</sup> I dissent from the remainder of the opinion.

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<sup>3</sup> Regarding the sixth assignment of error—in which S.H. argues that the trial court erred in finding her in contempt for disobeying the interim visitation order because the trial court lacked the authority to award visitation rights to J.H., a nonparent—I want to be clear: I agree with S.H. that the interim visitation order was invalid because Ohio law does not permit the granting of visitation rights to a nonparent in this type of proceeding. *See* Concurring and Dissenting Op. at ¶ 79-80. I nonetheless agree that we must uphold the trial court’s order of contempt because “an order issued by a court with jurisdiction

{¶ 79} Although the word “parent” is a colloquial term that often means different things to different people, it has a fixed and defined meaning under Ohio law. There is a “narrow class of persons who are statutorily defined as parents[.]” *In re Bonfield*, 2002-Ohio-6660, ¶ 34. In Ohio, there are only three ways to become a parent: (1) natural parenthood, (2) adoption, or (3) “other legal means in the Revised Code.” *Id.* at ¶ 28; *see also* R.C. 3111.01(A) (defining “parent and child relationship”). In *Bonfield*, the Ohio Supreme Court made clear that a same-sex partner who is not a biological or adoptive parent does not fit any of these three categories,<sup>4</sup> and thus is not a “parent” within the meaning of R.C. 3109.04—the statute that controls awards of parental rights and responsibilities and shared parenting plans—and cannot be awarded parenting time. *Id.* at ¶ 28-36.

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must be obeyed . . . however erroneous the action of the court may be, until the order is reversed by orderly and proper proceedings.” (Cleaned up.) *State v. Moll*, 1992 WL 2539, \*3 (6th Dist. Jan. 10, 1992).

<sup>4</sup> *Bonfield* was decided before *Obergefell v. Hodges*, 576 U.S. 644 (2015), recognized same-sex couples’ right to marry. Thus, at the time of *Bonfield*, there were no “other legal means in the Revised Code” for one to become a “parent” in a same-sex relationship other than through adoption or natural parenthood. Post-*Obergefell*, it appears that marriage may establish legal parentage for a same-sex female spouse through R.C. 3111.95(A) where the child was conceived through artificial insemination. *See In re L.E.S.*, 2026-Ohio-1449, ¶ 23 (“*Pavan [v. Smith]*, 582 U.S. 563 (2017)] presumably means that a married same-sex spouse could take advantage of the non-spousal artificial insemination statute even though the statutory language refers only to a ‘husband,’ R.C. 3111.95(A).”). Regardless, J.H. and S.H. were same-sex partners, not spouses, and S.H. is the parent of both children through adoption.

{¶ 80} Ohio law similarly restricts the award of “visitation” rights to nonparents. Under R.C. 3109.051(B)(1), visitation may be awarded in “a divorce, dissolution of marriage, legal separation, annulment, or child support proceeding . . . .” It is axiomatic that this is not “a divorce, dissolution of marriage, legal separation, [or] annulment . . . .” Nor is this a “child support proceeding.” This is an action for permanent legal custody. Regardless, even if J.H. intended to initiate a “child support proceeding,” she is a nonparent and therefore lacks standing to do so. *See* R.C. 3109.05 (“[A] court may order either or both *parents* to support or help support their children . . . .” (Emphasis added.)); *Liston v. Pyles*, 1997 WL 467327, \*3 (10th Dist. Aug. 12, 1997) (same-sex former partner did not have standing to pursue child support action or motion for visitation under R.C. 3109.051(B)(1) because she was neither the biological nor adoptive parent of the child at issue).

{¶ 81} Despite recognizing that J.H. “is not a parent as a matter of law,” Majority Op. at ¶ 59, and “under *Bonfield*, trial courts are prohibited from granting parental rights and visitation to a nonparent pursuant to R.C. 3109.04,” Majority Op. at ¶ 58, the majority nevertheless upholds the trial court’s use of its standard “Local Parenting Plan” to award parenting time and visitation to J.H. The majority finds that the record supports the trial court’s determination that J.H. and S.H. entered into an “implied-in-fact custody agreement” through which S.H. relinquished certain legal custody rights to her children. Notwithstanding this conclusion, the majority cannot identify *what* rights S.H. contractually relinquished to J.H. The majority finds that because the legislature has not

offered any “guidance” as to *how* these unidentified rights should be enforced, it was appropriate for the trial court to grant J.H. “rights normally reserved for parents” through its standard parenting plan. Majority Op. at ¶ 60. There are two overarching problems with this analysis.

{¶ 82} First and foremost, the majority upholds the allocation of parenting time and visitation to a nonparent even though it acknowledges that controlling Ohio law prohibits this result. For that reason, I would find the fifth assignment of error well-taken.

{¶ 83} Second but equally important, both the trial court and the majority apply the wrong legal standard when determining that S.H. relinquished sole permanent legal custody of her children. Simply put, the lack of definite terms defeats—rather than supports—the existence of an enforceable contract. This is especially problematic here, where the relinquishment of fundamental parental rights is at issue.

{¶ 84} S.H.’s right to parent her children is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution. *In re Hockstok*, 2002-Ohio-7208, ¶ 16; *In re Mullen*, 2011-Ohio-3361, ¶ 11 (“Parents have a constitutionally protected due process right to make decisions concerning the care, custody, and control of their children . . .”). Because this is a constitutional right, the court should indulge every reasonable presumption against waiver and should not “presume acquiescence” in the loss of this constitutional right. *See State v. Adams*, 43 Ohio St.3d 67, 69 (1989), quoting *Johnson v.*

*Zerbst*, 304 U.S. 458, 464 (1938). A waiver of a constitutional right must be “made knowingly and intelligently” and must be “an intentional relinquishment of a known right.” *State v. D.W.*, 2012-Ohio-4544, ¶ 24, citing *Brookhart v. Janis*, 384 U.S. 1, 4 (1966).

{¶ 85} Moreover, in Ohio, questions about whether a parent agreed to “waive” or “relinquish” this constitutional right have an extra layer of protection: contract law. That is, when considering “whether a parent’s conduct with a nonparent created an agreement for permanent shared legal custody of the parent’s child[, t]he determination of whether such a contract is present is essential.” (Emphasis added.) *Mullen* at ¶ 12. A court must apply basic contract law to determine if a contract exists.<sup>5</sup> “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.” *Id.*

{¶ 86} There are three types of contracts recognized in Ohio: (1) express, (2) implied in law, and (3) implied in fact. *N. Side Bank & Trust Co. v. Trinity Aviation, LLC*, 2020-Ohio-1470, ¶ 14 (1st Dist.), citing *Linder v. Am. Natl. Ins. Co.*, 2003-Ohio-

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<sup>5</sup> In reaching its decision, the trial court relied upon *J.U. v. A.F.*, 2024-Ohio-4944, ¶ 96 (6th Dist.), in which this court held that “basic contract law” should *not* be used to determine whether the parties formed an implied contract for shared permanent legal custody because the “focus” of such contracts “is not on the parties, but rather on the best interest of the child.” The majority does not cite *J.U.* but, in effect, corrects that misstatement of law through its acknowledgment that “questions about whether a parent has agreed to ‘waive’ or ‘relinquish’ legal custody, or to share legal custody with a nonparent, are governed by contract law.” Majority Op. at ¶ 53.

5394, ¶ 18 (1st Dist.); and *Legros v. Tarr*, 44 Ohio St.3d 1, 6 (1989). Express contracts exist when there is an express pronouncement of offer, acceptance, and consideration. *Id.*; *Freelon v. GRG Farms, Inc.*, 2024-Ohio-4764, ¶ 23 (6th Dist.). Implied-in-law contracts are legal fictions that operate in equity when one party wrongfully receives a benefit, which gives rise to a legal obligation. *N. Side Bank* at ¶ 14. These are claims for unjust enrichment and quantum meruit. *Id.*

{¶ 87} Implied-in-fact contracts—i.e., the type of contract that is alleged here—require the parties’ meeting of the minds to be “shown by the surrounding circumstances, including the conduct and declarations of the parties, [which] make it inferable that the contract exists as a matter of tacit understanding.” *Dunn v. Bruzzese*, 2007-Ohio-3500, ¶ 28 (7th Dist.). This flexibility in proving assent, however, does not diminish the requirement that “all the elements” of an enforceable contract must be established. *Rhoads v. Olde Worthington Business Assn.*, 2024-Ohio-2178, ¶ 42 (10th Dist.) (“[T]he existence of express or implied-in-fact contracts does hinge upon proof of all the elements of a contract.”). As the U.S. Supreme Court has said, “[t]he circumstances surrounding the contracting are only relevant to the extent that they help us deduce what the parties to the contract agreed to in fact.” *Hercules Inc. v. United States*, 516 U.S. 417, 426 (1996). That is, “[t]he alleged contract must also reflect the ‘essential terms,’ with requisite definiteness and certainty.” *N. Side Bank* at ¶ 15.

{¶ 88} In this case, the trial court’s judgment entry concluded that S.H.’s “words and conduct” demonstrated that she “voluntarily relinquished her right to sole custody,

thus impliedly creating an enforceable contract between the parties.” As support for its conclusion that S.H.’s actions “impliedly created” an enforceable contract, the trial court cited the following factual findings: (1) J.H. “support[ed] S.H. in the fostering of Z.H.H.,” (2) although the parties gave their own reasons for designating S.H. as the adoptive mother, “none” of the reasons included “[J.H.]’s desire not to co-parent”; (3) S.H. “chose to hyphenate the children’s surnames”; (4) the parties “held themselves out as a family”; (5) the children “referred to them both as ‘mom’”; (6) “care and support was provided by [J.H.], including the payment of child support”; (7) the court did not want to “interfere” with the “family dynamic” regarding division of labor; and (8) the parties “nearly reduced their agreement to writing” until S.H. “refused to do so because she did not want to lose control.”

{¶ 89} The majority identifies a different set of facts as providing competent and credible evidence that S.H. “relinquished sole custody of her children and entered into an implied-in-fact agreement to share custody of the children with J.H.”: (1) the parties took foster care classes together; (2) the parties began fostering Z.H.H. without intentions to adopt but later “shifted their intent”; (3) the parties agreed S.H. would be the adoptive parent due to “work schedules and family dynamics”; (4) the parties “agreed to pursue the adoption of M.H.H.” even though they were having troubles in their relationship; (5) J.H. was physically present for the adoptions of both children; (6) the children “maintained a relationship with J.H. and her family” after the parties broke up; (7) J.H. gave the children “financial support”; (8) the parties met with counsel to develop a “co-

parenting agreement” but never reduced their plans to writing; and (9) the parties engaged in “co-parent counseling.”

{¶ 90} Neither the trial court nor the majority apply contract law to determine the existence of a contract. Instead, they conduct an *equitable* analysis of the parties’ familial relationship—considering the extent of the parties’ participation in the fostering and adoption process, shared caregiving and financial support, former presentation as a family, and failed attempts to reach a co-parenting agreement—instead of a *contractual* analysis of consideration and mutual assent to sufficiently-definite terms. When determining the existence of an implied-in-fact contract, however, surrounding circumstances are relevant only “to the extent” they help the court identify “*what* the parties to the contract *agreed to in fact*.” (Emphasis added.) *Hercules Inc.* at 426. Like any contract, an implied-in-fact contract requires mutual consideration and assent to sufficiently definite terms so that the obligations of each party are clear and enforceable. *N. Side Bank* at ¶ 15.

{¶ 91} Neither the trial court nor the majority identify *any* essential terms of the parties’ purported contract to share permanent legal custody. Without such terms, their conclusion necessarily assumes that S.H. not only gave up her right to sole legal custody, but she also relinquished her ability to determine *what* rights she would share with J.H. and *how* those rights would be structured or exercised. By ordering the parties to share legal custody according to the terms of its local parenting plan, the trial court created contractual terms under the guise of enforcement; it did not enforce any terms to which

the parties mutually agreed. This was error. It was up to the *parties* to provide the required “guidance” as to the essential terms of the parties’ alleged implied-in-fact contract to share legal custody—not the legislature or the trial court.

{¶ 92} Ultimately, this is the import of the Ohio Supreme Court’s clear pronouncement in *Mullen* that it is “essential” that courts determine whether a “contract” exists when asked to determine whether “a parent’s conduct with a nonparent created an agreement for permanent shared legal custody[.]” *Mullen*, 2011-Ohio-3361, at ¶ 12. This ensures that a parent’s relinquishment of her fundamental liberty interests will be established through proof of mutual assent, consideration, and definite terms—just like any other contract—and not inferred from ambiguous conduct or fluctuating relationship dynamics. In fact, while *Mullen* recognized that the relevant contract need not be in writing, it also pronounced that “the best way to safeguard both a parent’s and a nonparent’s rights with respect to children is to agree in writing as to how custody is to be shared, the manner in which it is shared, and the degree to which it may be revocable or permanent, or to apply to a juvenile court for an order under R.C. 2151.23(A)(2) establishing the scope of the legal custody that the parent desires to share, or both.” *Id.* at ¶ 21. In other words, the terms of an agreement for legal custody between a parent and nonparent—whether written or oral—should include (1) how custody is to be shared, (2) the manner in which it is shared, and (3) the degree to which it may be revocable or permanent.

{¶ 93} Justice Pfeifer authored a strong dissent in *Mullen* in which he argued that this contractual analysis was too rigid, unfair, and ill-suited to reality. *Mullen* at ¶ 47-50 (Pfeifer, J., dissenting). Instead, he advocated for “a more workable analysis for lower courts to employ in cases of disputed custody between a natural parent and a nonparent, an analysis rooted in the intent of the parties as evidenced by the nature of the familial relationship[,]” rather a contract. *Id.* at ¶ 51 (Pfeifer, J., dissenting). He argued that instead of a contractual framework, Ohio should adopt the four-part test of *In re Custody of H.S.H.-K.*, 193 Wis.2d 649, 658 (1995), which is aimed at identifying a “parent-like relationship,” rather than a contract.

{¶ 94} Notably, before conducting its analysis, the trial court stated that while “key holdings from the *Mullen* ruling necessarily direct this Court’s ruling,” it was “instructed . . . by the compelling dissent offered by Justice Pfeifer who opined that ‘[o]nce a natural parent promises a co-parenting relationship with another person and acts on that promise, she has created a relationship between the co-parent and the child that has its own life. The natural parent cannot simply declare that relationship over.’ *In re Mullen*, 2011-Ohio-3361, ¶ 36 (Pfeifer, J., dissenting).” A comparison of the trial court’s reasoning with Justice Pfeiffer’s articulation of the *H.S.H.-K.* test shows that the trial court engaged in “an analysis rooted in the intent of the parties as evidenced by the nature of the familial relationship,” *id.* at ¶ 51 (Pfeifer, J., dissenting), rather than the contractual analysis required by *Mullen*.

{¶ 95} The first step of the *H.S.H.-K.* test, as Justice Pfeifer would adopt it, examines “consent to and cultivation of a parent-like relationship between the [petitioning] adult and the child by the natural parent.” *Mullen* at ¶ 55 (Pfeifer, J., dissenting). Here, the trial court’s findings regarding the parties’ mutual involvement in the fostering process, J.H.’s apparent desire to co-parent, the use of hyphenated surnames, and the children’s use of “mom” for both women seemingly satisfy the first element. The second step of the *H.S.H.-K.* test looks at whether the petitioner and child lived together, which would show “an intent to create a family-like environment for the child.” *Id.* at ¶ 56 (Pfeifer, J., dissenting). Here, the trial court’s conclusion that the parties “held themselves out as a family” seemingly satisfies the second element. The third step of the *H.S.H.-K.* test considers if the petitioner took “significant responsibility for the child’s care, education, and development.” *Id.* at ¶ 57 (Pfeifer, J., dissenting). Here, the trial court noted that J.H. provided “care and support” to the children, including child support. The trial court also stated that it would “never intervene” in a “family dynamic” regarding the division of labor. Finally, the *H.S.H.-K.* test requires that the petitioner’s relationship with the children “be significant in duration and depth.” *Id.* at ¶ 58 (Pfeifer, J., dissenting).

{¶ 96} This is not an analysis of the mutual assent and consideration required for the formation of a binding contract under *Mullen*. Rather, it is an equitable analysis of a “parent-like relationship” under *H.S.H.-K.* as advocated by Justice Pfeiffer in his dissent. But the trial court was bound to follow the law as announced by the *Mullen* majority, not

the dissent—as are we. In addition, even before *Mullen*, the Ohio Supreme Court expressly rejected the *H.S.H.-K.* four-part test in *Bonfield* at ¶ 34 (“[W]e find it inappropriate to adopt appellants’ four-part test to broaden the narrow class of persons who are statutorily defined as parents for purposes of entering a shared parenting agreement.”); *see also Mullen* at ¶ 53 (Pfeifer, J. dissenting) (Acknowledging that *Bonfield* rejected the *H.S.H.-K.* factors as a means “to confer parenthood” but arguing these factors should nonetheless be adopted for custody disputes.).

{¶ 97} Admittedly, *Mullen* was a bit cursory when applying the contractual standard it announced, merely noting that its “review of the record shows that not only was there evidence indicating that Mullen had intended to share custody of the child, there was contrary evidence indicating that Mullen did not agree to permanently cede partial legal custody rights to Hobbs”—without any further analysis. *Id.* at ¶ 20. Ultimately, however, the Supreme Court upheld the lower courts’ findings that the various evidence cited by the parties “did not create an agreement to permanently relinquish sole legal custody of her child in favor of shared legal custody with Hobbs.” *Id.* at ¶ 22. And the court specifically rejected appellant’s arguments that the parties clearly agreed to “shared legal custody” because they referred to themselves as “coparents” and operated within a “coparenting relationship.” *Id.* The court noted that “[c]oparenting’ is not synonymous with an agreement by the biological parent to permanently relinquish sole custody in favor of shared legal parenting” and any evidence of “coparenting” must be combined with “other evidence” that shows the parties “shared

the same understanding”—i.e., a contractual meeting of the minds—as to the permanent relinquishment of legal custody by the parent to the nonparent. *Id.*

{¶ 98} Although there are policy arguments that may be made in favor of the “parent-like relationship” framework, *Mullen* adopted a contractual approach (which has its own policy merits), and we are bound to follow rules of law as pronounced by the Ohio Supreme Court.

The court of appeals is conclusively bound by a decision of the Supreme Court. . . . It is the obligation of the court of appeals to reconcile, if possible, the law as pronounced by the Supreme Court and to follow those pronouncements. It is immaterial whether the reasoning advanced in support of the decision is well or ill founded; when the Supreme Court of Ohio lays down the rules of law, such rules of law are binding upon the courts of appeals of Ohio.

(Ellipsis in original and internal quotation omitted.) *State v. Robinson*, 168 N.E.2d 328, 331 (4th Dist. 1958); *Wisniewski v. Wisniewski*, 1985 WL 7091, \*1 (6th Dist. Apr. 5, 1985).

{¶ 99} Here, because the trial court did not engage in a contractual analysis before finding an enforceable contract between the parties, I would find S.H.’s first, third, and fourth assignments of error well-taken. Because that analysis should be conducted by the trial court in the first instance, I would reverse and remand this matter to the trial court to conduct a proper contractual analysis—rather than an equitable analysis of the parties’ coparenting relationship—to determine whether J.H. and S.H. reached an implied-in-fact contract regarding shared permanent legal custody of the children and, if so, if J.H. is a suitable custodian and if the parties’ agreed-upon terms are in the best interest of the children.

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