

SUPREME COURT OF OHIO

In re: (C.C.S.),

Appellant,

vs.

ADOPTION BY GENTLE
CARE,

Appellee.

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Case No. 2016-0395

Appeal from Franklin County
Court of Appeals Tenth Appellate District

Case No: 15-AP-000884

MERIT BRIEF OF APPELLANT
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STATEMENTS OF FACTS

Adoption by Gentle Care is a licensed, private child placing agency located in Ohio with an executive director and seven full-time staff members. (TR 7/30/14 at 267 - 269.) Gentle Care promises mothers that the social worker assigned to her case will “explore” and “inform [her] of all [her] adoption options,” and “educate [her] on Ohio adoption law.” (TR 7/28/14 at Exh M, pg. 1.) The relationship between mother and agency is therefore one of trust, the mother being a “client” and the social worker being an available “advocate” for her and her child. (7/28/14 at Exh. M, pg. 2; TR 7/31/14 at 24: 10 – 11, 134 – 135.)

A mother stating that she has no option would signify to Gentle Care that the mother is being forced and under duress. (TR 7/31/14 at 186: 7 - 10.)

When a mother otherwise feels like she cannot have the child at home with her, or is having second thoughts about surrendering, Gentle Care’s policy is to advise the mother about her options, including the option to surrender temporarily. (TR 7/31/14 at 256: 17 – 24; TR 8/19/14 at 24 – 25.) In all cases, the social worker who communicates with the mother notates the communications and enters all meaningful information into the agency’s database. (TR 7/28/14 at Exh. K ; TR 7/30/14 at 306.) Gentle Care relies on those case notes and considers them credible. (TR 7/30/14 at 311: 6 – 8.)

Communications between Carri and Gentle Care

See Exhibit K. and references to it in this brief.

The Meeting at Bob Evans Restaurant

Carri met with Gentle Care in person for the first time four days before the birth when she and Kelly Schumaker had lunch at Bob Evans restaurant on March 27, 2014.

(TR 7/28/14 at 137, 147; TR 7/29/14 at 20.) At that meeting, Carri again told Ms. Schumaker that Jeff was pressuring her and leaving her with no choice. (TR 7/30/14 at 194: 19 - 22.) Ms. Schumaker ignoring her own guidelines gave Carri an extensive packet of papers and forms to review and fill out. (TR 7/31/14 at 13: 11 – 14: 7 – 16.) There was no discussion only the presentation of forms.

The Birth

Although Carri's due date was April 7, 2014, her scheduled C-section was moved up to March 31, and she checked into the hospital and gave birth to Camden by C-section that evening. (TR 7/28/14 at 155: 12 – 17, 156: 2 – 6; TR 7/29/14 at 47: 25 – 48: 2 and Amend. Pet. at Exh. I (Birth Cert.), pgs. 5 - 6.) Carri left the hospital the next day, April 1. (TR 7/29/14 at 8.)

The Permanent Surrender

The meeting for the signing of the permanent surrender agreement occurred on April 4, at Carri and Jeff's home, with Carri, Ms. Schumaker, and another Gentle Care social worker, Beth Simmons, present. (TR 7/28/14 at 28: 11 - 21; TR 7/31/14 at 216 - 218.) **Only part of the meeting was digitally recorded.** (TR 7/28/14 at Exh. E, pgs. 1, 17; TR 7/29/14 at 28; TR 7/30/14 at 103 – 104.) Seeing no way out, Carri felt disengaged from the conversation. (TR 7/30/14 at 23 – 24.) After a break in the recording, Carri's answers to questions about why she was surrendering Camden suddenly grew unintelligible. (TR 7/28/14 at 17 - 20.) For example, when Ms. Schumaker asked Carri if she was surrendering Camden so that he would have a stable environment, Carri said "Yeah. But I don't want to (unintelligible)." (TR 7/28/14 at Exh. E, pg. 20.) To which Ms. Schumaker said: "Yeah. And that's not to say that you

wouldn't." (TR 7/28/14 at Exh. E, pg. 20.) Another unintelligible response came from Carri when Ms. Schumaker asked Carri if she had questions about the voluntariness of her signing the permanent surrender agreement. (TR 7/30/14 at 202: 4 – 9.)

Because Carri had no choice but to surrender Camden, and because she put her trust in Ms. Schumaker. (TR 7/30/14 at 254: 1 – 5.) **Carri's problem was time and this 30 day option was a cure to her problem and she would have taken it.**

On April 13, Carri reminded Ms. Schumaker that the decision to surrender Camden was never hers to make and Carri then asked Ms. Schumaker to return Camden to her. (TR 7/29/14 at 65 – 66, 69; TR 7/28/14 at Exh. K, pg. 9.) Ms. Schumaker denied the request immediately. (TR 7/28/14 at Exh. K., pg. 9; TR 7/29/14 at 69.)

The juvenile court held a hearing on July 28 - 31 and August 19, 2014. (Journal Entry of Sep. 12, 2014, T.d.116.)

Near the end of the first day of trial, when Carrie was asked on direct examination why she began to consider adoption during the pregnancy, the following exchange occurred:

A: I—I never considered adoption until March, the middle of March.

Q: Why did you begin to consider it then?

A: Because I was ready to give birth and my significant other told me that I had to choose—

A: —because I felt like I didn't have a choice.

Q: You didn't have a choice to do what?

A: Other than adoption at that day—that point.

(TR 7/28/14 at 145: 22 – 146: 8.)

Early the next day, when Carri was asked again why she began to consider adoption it because of family pressure which left her with no choice. (TR 7/29/14 at 12: 17 – 19; TR 7/30/14 at 150 – 151

At no time was there any consideration given to the constitutional rights of Camden. Obviously Gentle Care considered him a commodity to be sold and not a human being with rights. These rights could not be waived by this minor child.

This case was returned to the Trial Court after its decision of September 12, 2014 was found to be defective in that it did not weigh the evidence and establish the credibility of each witness. The trial court then came out with its decision of September 14, 2015 and failed to treat each witness once again, specifically Dr. Amato, the treating physician for Carri. The cure was to ignore Dr. Amato's testimony and opinion as to Carri's ability to make important decisions based on her medical condition and the prescribed pain killers she was on and the outside pressures she was under.

The facts are that the Appellee so ignored their duty to Carri, their duty to Camden and the law as to totally void any agreement that would deny Carri her son.

ARGUMENT

When determining if a parent is voluntarily relinquishing custody of her child it is imperative that all steps be taken to insure that such relinquishment is given without duress and duress is particular to that individual at the time she makes her decision. The fiduciary provided by the Appellee must protect the Appellant.

Importance of Natural Parent

In the case of In re Adoption of G. V. 126 Ohio St.3d 249 this Court sets out parameters both in the majority opinion and in the dissent that define the great care demanded in the relinquishment by the mother of her child. The majority opinion states:

" [T]he right of a natural parent to the care and custody of his children is one of the most precious and fundamental in law." In re Adoption of Masa (1986), 23 Ohio St.3d 163, 164, 23 OBR 330, 492 N.E.2d 140, citing Santosky v. Kramer (1982), 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599

" Few consequences of judicial action are so grave as the severance of natural family ties." Santosky, 455 U.S. at 787, 102 S.Ct. 1388, 71 L.Ed.2d 599 (Rehnquist, J., dissenting). Because adoption terminates fundamental rights of the natural parents, " we have held that ' * * * [a]ny exception to the requirement of parental consent [to adoption] must be strictly construed so as to protect the right of natural parents to raise and nurture their children.' " In re Adoption of Masa, 23 Ohio St.3d at 165, 23 OBR 330, 492 N.E.2d 140, quoting In re Schoeppner (1976), 46 Ohio St.2d 21, 24, 75 O.O.2d 12, 345 N.E.2d 608. With " a family association so undeniably important * * * at stake," we approach the case before us " mindful of the gravity" of the circumstances and the long-term impact on all the concerned parties. M.L.B. v. S.L.J. (1996), 519 U.S. 102, 117, 117 S.Ct. 555, 136 L.Ed.2d 473.

Importance of Following the Law

In Justice Brown's dissent it is pointed out how important it is to follow the law as written (**In re Adoption of G. V.** Supra @250):

Our role with regard to statutory interpretation is to apply clear and unambiguous statutes as written and to engage in no further interpretation. State ex rel. Burrows v. Indus. Comm. (1997), 78 Ohio St.3d 78, 81, 676 N.E.2d 519. It is our duty to enforce a statute as written and to not add or subtract language from the statute. In re Adoption of Holcomb (1985), 18 Ohio St.3d 361, 366, 18 OBR 419, 481 N.E.2d 613

In both of these excerpts we are mindful of the important of parenthood and the mandate to be mindful of the law and its strict application to the severance of the parental rights to protect the fundamental rights, duties and obligations of to all those dealing with the adoption of a child.

Duress is Measured by all Contributions Effecting the Mother

One must consider the specific individuals involved in the adoption process and their contribution to the environment under which the natural mother was operating. In the case of **Marich v. Knox County Dept. of Human Services/Children Services Unit**,

45 Ohio St.3d 163 (Ohio 1989) this Court set out:

As stated in Tallmadge v. Robinson (1952), 158 Ohio St. 333, 340, 49 O.O. 206, 209, 109 N.E.2d 496, 500, "[t]he real and ultimate fact to be determined in every case is whether the party affected really had a choice; whether he had his freedom of exercising his will." The factors to be considered in this subjective inquiry are set forth in Tallmadge at paragraph two of the syllabus: "In determining whether a course of conduct results in duress, the question is not what effect such conduct would have upon an ordinary man but rather the effect upon the particular person toward whom such conduct is directed, and in determining such effect the age, sex, health and mental condition of the person affected, the relationship of the parties and all the surrounding circumstances may be considered."

Role of a Fiduciary

A fiduciary is one who undertakes to advise and protect the rights of Carrie and Camden Stearns in this adoption and relinquishment proceedings. The particular person in this case is Kelly Schumaker the mother's social worker and Gentle Care employee. In the case of **Groob v. KeyBank**, 843 N.E.2d 1170, 108 Ohio St.3d 348, 2006-Ohio-1189 (Ohio 2006) this Court defined a fiduciary as follows:

a fiduciary is defined as " ' "a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking." ' " (Emphasis deleted.) *Strock v. Pressnell* (1988), 38 Ohio St.3d 207, 216, 527 N.E.2d 1235, quoting *Haluka v. Baker* (1941), 66 Ohio App. 308, 312, 20 O.O. 136, 34 N.E.2d 68, quoting 1 Restatement of the Law, Agency (1933), Section 13, Comment a. The full breadth of a fiduciary duty is not appropriate when parties are engaged in a business transaction in which each is operating according to his own best interests.

This Court has remained consistent in its defining a fiduciary as it did in **Strock v. Pressnell**, 38 Ohio St.3d 207 (Ohio 1988) when it said:

It was correctly stated that a fiduciary is " 'a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking' [quoting *Haluka v. Baker* (1941), 66 Ohio App. 308, 312, 20 O.O. 136, 138, 34 N.E.2d 68, 70]." (Emphasis added.) This is precisely the situation in the case at bar. Pressnell enjoyed a position of trust "created by his undertaking" (i.e., his position as a marriage counselor). But for Pressnell's professional status, appellant and his wife would not have sought his guidance.

It has long been recognized that we are most easily deceived by those in whom we place our trust. Alexander Hamilton wrote:

For it is a truth, which the experience of all ages has attested, that the people are commonly most in danger

when the means of injuring their rights are in the possession of those (toward) whom they entertain the least suspicion. (Federalist Papers, No. 25, p. 164)

The Appellant was actively solicited into trusting that Kelly Schumaker was her guide and confidant, her friend and fiduciary in whom she placed the wellbeing of herself and her son. The Appellant relied on Kelly to look out for her and Camden. This trust was abused for the sake of 40 pieces of silver or in the case \$30,000 in fees to be gained by ripping Camden from his mother and selling him to benefit Gentle Care and therefore its employee Kelly.

Duress

In evaluating whether or not the Appellant was under duress or undue influence when asked to give up her newborn child one must look at the totality of the circumstances existing at the time she was asked to sign an agreement to permanently surrender her son.

As an inducement to lure mothers in to Gentle Care they provide that the mother may pick and approve the adoptive family. This is a lengthy process where the mother identifies all of the attributes she specifies the adoptive parents to have. This is substantiated by the testimony of the Appellee's employee Megan Kennedy. (Trans. Aug. 19, 2014, pg. 33) This contractual arrangement has been breached by the Appellee in that they placed the child in foster care several times and now evidently in another foster care not picked or approved by the Appellant. The adoptive home picked by the Appellant returned the child with the caveat that the child should be with the mother. "Before a hearing, the adopting parents dismissed their adoption petition voluntarily and returned the child to Gentle Care. They did not wish to raise the child while a biological parent

sought to retrieve the child.” (Remand Decision, Docket #177) No one approached the Appellant to obtain a second choice. She was to have no input even though this choice was given as a promise by the Appellee for the Appellant to sign adoption papers. This is fraud which bears as a burden of proof preponderance. In this case everyone admits that selection of the adoptive family was indeed given to the Appellant and that family chose to return the child for the mother to rear.

At no time was there any consideration given to the constitutional rights of Camden. Obviously Gentle Care considered him a commodity to be sold and not a human being with rights. These rights could not be waived by any of the parties for this minor child. The trial court should have taken it upon itself to protect the rights of the minor Camden but instead totally ignore his very existence except as a piece of merchandise. The trial court should have stood in loco parentis but acted more like a merchant.

In the case of **In Re: Adoption Of Baby Girl E.**, 2005-Ohio-3565, 04AP932, 05-LW-3085 (10th) the Court states:

"The real and ultimate fact to be determined in every case is whether the party affected really had a choice; whether he had his freedom of exercising his will." Id., citing Tallmadge, supra. Duress is present when a state of mind was created such that the person giving consent "was induced to do an act which [s]he would not otherwise have done and which [s]he was not bound to do." Tallmadge, at 340. ¶32 **In determining whether duress is present, a court assesses the effect of claimed "threats" upon the particular individual providing the consent, not the effect of such "threats" upon an "ordinary" individual.** (emphasis added)

A permanent surrender agreement made under duress or undue influence is invalid. Duress and undue influence mean that outside powers overcame the person's

will and induced her to do something she would have not done otherwise and was not bound to do.

In re Adoption of Zschach, 75 Ohio St.3d 648 (Ohio 1996) states:

"Undue influence" is defined as " '[a]ny improper or wrongful constraint, machination, or urgency of persuasion whereby the will of a person is overpowered and he is induced to do or forbear an act which he would not do or would do if left to act freely.'

Whether a challenge to an adoption consent is based on fraud, undue influence, or some other consent-vitiating factor, the real and ultimate fact to be determined is whether the party affected was denied the exercise of his or her free will. **Tallmadge v. Robinson** (1952), 158 Ohio St. 333, 340.

Carri satisfied those elements at trial. She was eight and half months pregnant with Camden when Jeff told her that she could not bring Camden home after the birth. Carri's need to keep her five other children from suddenly losing their current home, father figure, and significant provider gave her no practical choice under that ultimatum but to surrender Camden. With only two weeks to her delivery and five children, she had no choice and the Appellee knew it.

Carri would not have surrendered Camden otherwise because she was never prone to do so until Jeff first told her she could not bring Camden home only two weeks before she was to give birth. She was eight and one half months pregnant given two weeks by Jeff to find a place for her and six children to live. This appeared to be impossible for Carri about to deal with major surgery in only two weeks.

Carri was not bound to surrender Camden, it was solely the timing of Jeff's ultimatum that gave Carri no option left open to her but to seek adoption. It was **not** the

pressure of having a sixth child to rear, but the totality of her situation with only two weeks to delivery and major surgery.

Gentle Care's contribution to the coercion would apply to the claims of undue influence, fraud and duress since Gentle Care placed themselves in a position of trust to the victim of the duress by supplying a social worker to act as her advisor. One of the social workers at Gentle Care is supposed to look out for the mother's rights placing that worker in a fiduciary relationship with Carri. It was her duty to discuss completely all choices that were available before signing the agreement.

Gentle Care promises mothers that the social worker assigned to her case will "explore" and "inform [her] of all [her] adoption options," and "educate [her] on Ohio adoption law." (TR 7/28/14 at Ex. M, pg. 1.) The relationship between mother and agency is therefore one of trust, the mother being a "client" and the social worker being an available "advocate" for her and her child and in a fiduciary relationship. (7/28/14 at Ex. M, pg. 2; TR 7/31/14 at 24: 10 – 11, 134 – 135.)

Gentle Care additionally contributed to the duress because they knew about the coercion from Jeff before the permanent surrender (see Exhibit K). Thus, Gentle Care violated its own policy of declining to make permanent surrender agreements under that condition. By contravening their policy, Gentle Care enhanced the duress from Jeff denying Carri the exercise of her free will.

A permanent surrender agreement that is the product of duress or undue influence is invalid. **In re Adoption of Zschach**, 75 Ohio St.3d 648, 657, 665 N.E.2d 1070 (1996). Duress means a threat overcame the person's will and induced her to do

something she would not have done otherwise and was not bound to do. **In re Hua**, 62 Ohio St.2d 227, 232, 405 N.E.2d 255 (1980).

In determining whether the agreement was the product of duress, courts focus on how the threatening conduct **affected the particular person to whom the conduct was directed, and not how the conduct might affect the ordinary person.**

Tallmadge v. Robinson, 158 Ohio St. 333, 109 N.E.2d 496 (1952), syllabus at 2. Accordingly, courts may consider the age, sex, health, and mental condition of the person affected; the relationship between the parties; and all of the surrounding circumstances.

Id. The ultimate fact to determine is whether the party affected really had a choice.

Morrow v. Family & Community Servs. of Catholic Charities, Inc., 28 Ohio St.3d 247, 251, 504 N.E.2d 2 (1986).

The court cannot ignore duress since this mother was forced to choose between her children's pseudo father and Camden. The agency did contribute to the duress by ignoring it so that they had a commodity to sell, Carrie's baby Camden. Thus, the permanent surrender agreement is invalid.

Carri suffered duress as the mother. Carri, Jeff, and the five children had lived for six years as a family unit, with Carri and Jeff assuming husband and wife roles. (TR 7/29/14 at 7 – 9; TR 7/30/14 at 148 – 151.) As household father figure, breadwinner, and symbolic husband, Jeff had power and influence over Carri as the defacto husband and father. Jeff exercised that power when, two weeks before Camden was due to be born, Jeff told Carri that she could **not bring Camden home.** (TR 7/30/14 at 224; TR 7/31/14 at 130 and 140)

Carri keeping Camden meant that Carri could not come home and she and her children would be homeless and destitute. (TR 7/28/14 at 76, 146, and Exh. K, pg. 2.) Thus, Carri's conundrum two weeks before the due date was not whether to parent a sixth child, but whether or not to render all of her children homeless. Carri's need to keep her five other children from losing their current home, father figure, and significant provider gave her no choice under Jeff's ultimatum but to surrender Camden. That Jeff presented his ultimatum to Carri at the end of the pregnancy made the threat to Carri and the other children imminent. Consistent with that situation, Carri told Gentle Care that surrendering Camden was not her choice, but that she was doing it to save her family. Jeff's position was an overt threat that left Carri with no choice as a caring mother.

Carri would not have surrendered Camden otherwise. Carri did not even consider adoption until mid-March, when Jeff first told her she could not bring Camden home. Carri could have raised the six children alone if she had simply been told by Jeff just a few months earlier. Thus, adoption was not something Carri would otherwise have chosen for Camden independent of Jeff's ultimatum.

Carri was not *bound* to surrender Camden. Carri considered Camden a blessing and as is a fit parent was able to care for the additional family if only she had known earlier when she was able to physically prepare alternative living arrangements for her family. Carri had taken care of her children before meeting Jeff. And nothing required Carri legally to surrender Camden.

Gentle Care's contribution to the coercion would apply in determining undue influence, where the wrongdoer is generally in a fiduciary capacity or in a position of trust and confidence in relation to the victim of the influence. **Marich v. Knox County**

Dept. of Human Servs., 45 Ohio St.3d at 166. Gentle Care could have cured the duress by simply following up on Carri's allegations. The social workers at Gentle Care are supposed to look out for the mother's rights placing those workers in a fiduciary relationship with Carri. It was their duty to discuss completely all choices that were available before signing the agreement.

During the initial contact on March 15, 2014, Carri told Ms. Schumaker that Jeff had hostile feelings about the pregnancy and that she therefore had to surrender Camden to "save her family." (TR 7/28/14 at 139 and Exh. K, pg. 1.) Before signing the permanent surrender Carri repeatedly told Ms. Schumaker that she did not want to surrender Camden for adoption, but that it was not her choice. (TR 7/28/14 at 18 - 24; 28; 30: 13 - 17, 56: 1-3; 110: 13 - 16; 148, 189 - 190; 194, 254; Exh. C, pg. 1 and Exh. K, pg. 4; TR 7/29/14 at 12: 17 - 19; 24: 1 - 8, 27 - 28.)

On another occasion, Carri reiterated to Ms. Schumaker that she did not want to surrender Camden and asked her if other suburban moms surrendered their children because they were pressured. (TR 7/30/14 at 149 - 150; and Exh. H, pgs. 1- 2.) Carri told Ms. Schumaker that the decision was a nightmare, but that she had no choice. At this point all possible alternatives should have been discussed in detail. **On page 3 the trial court ignores that before and after Carri said she was 100% sure she stated she was forced and had no choice. Wavering indicates duress pursuant to the Appellee's policy.**

Exhibit K shows just what Gentle Care knew from the review of Exhibit K which was admitted into evidence and is part of the transcript that:

1. The Appellant told Adoption by Gentle Care that “I don’t think I have a choice”.
(page 1)
2. The Appellant’s Aunt reported to Adoption by Gentle Care that the Appellant was struggling with this decision and wanted to make sure she had all of the **right information.** (page 1)
3. The Appellant expressed her duress and undue influence to Adoption by Gentle Care when she told Adoption by Gentle Care that her other children’s great life was in jeopardy because her significant other was too hurt to allow Camden to come home. (page 2)
4. The Appellant told Adoption by Gentle Care that “she does not want to place this baby for adoption but feels she has no other choice.” (page 4)
5. On April 3rd the Appellant explained to the Social Worker that she was in pain and sleepy. This was a red flag to the Social Worker that the Appellant was on pain medications not able to make any decision regarding her baby. (page 7)
6. On April 3rd Adoption by Gentle Care recorded only a selected portion of the surrender interview and held at least one if not more conversations off the record. (page 8) The off the record conversation included the Appellant being told not to mention her Native American heritage or anything that would in any way delay the adoption procedure being used by Adoption by Gentle Care.
7. On April 12, 2014 the Appellant left a voice mail explaining that she was off her pain medication and did not want to give up her baby. (page 9) She made it clear that Jeff had pressured her into giving up her baby for adoption and she wanted her baby back.

8. The Steve Lump clearly represented to Adoption by Gentle Care he never wanted the baby and wanted the Appellant to get an abortion and was very upset that she did not get an abortion. This was additional pressure on the Appellant that contributed to the undue influence and duress she was under. (page 10)
9. The original adoptive family expressed a desire to have a dependency hearing but Adoption by Gentle Care never followed up on this request. (page 10)
10. Adoption by Gentle Care received the medical records of the Appellant and verified the pain medications that the Appellant was taking before and on April 3rd when the permanent surrender was presented for signature. (page 12)
11. Adoption by Gentle Care posted the profile of the adoptive family on their website making public the names and address of the adoptive family. (page 15)
12. The adoptive family was concerned about the life long ramifications of parenting a child whose biological parent wants him. (page 15)
13. Adoption by Gentle Care went to Cleveland to retrieve the baby from the adoptive family. They were placing him in foster care and acknowledged that the end result would be to return the baby to the Appellant. (page 16)
14. Adoption by Gentle Care went so far as to discuss the preparation of the documentation they would have the Appellant sign when they gave her back her baby. (page 16)
15. Adoption by Gentle Care became concerned over social media and not the baby or the undue influence and duress suffered by the Appellant. (page 17)
16. Adoption by Gentle Care became increasingly concerned with social media to the point of asking the Steve Lump to contact the Appellant and explain how this was

delaying the process which at this point was returning the baby to the Appellant.

Adoption by Gentle Care saw this as a “complicating factor” (page 19)

17. Adoption by Gentle Care on approximately May 22, 2014 moved the baby from one foster home but due to these foster parents going on vacation (page 23) the baby was moved to another, making the third move in one and a half months. (page 22)

18. Adoption by Gentle Care’s reason for not returning the baby to the Appellant became a battle of ego and concern not over this situation but a concern over the financial impact it might have on Adoption by Gentle Care for future adoptions. (page 27)

19. Adoption by Gentle Care knew that the only gain they would have in continuing to oppose the Appellant would be a fee. (page 29). Adoption by Gentle Care believed that they could run the Appellant out of money to pursue the case that they believed would ultimately result in the Appellant receiving the baby and might result in the surrender being declared invalid as in fact due to duress and undue influence between Jeff, the pain, the pain killers and the natural biological dump of hormones there was no ability for the Appellant to make an informed and voluntary decision. (page 29)

20. Although some of the board members of Adoption by Gentle Care believed that the Court should consider the best interest of the child, the only evidence of the Appellant’s ability to parent was positive towards her. (pages 29-30)

Gentle Care’s policy of declining permanent surrender agreements when it is evident that the mother is surrendering involuntarily or being pressured by a third party

would have caused any fiduciary to protect Carri. (TR 7/30/14 at 295, 297, 299 – 300; TR 7/31/14 at 186.) Gentle Care's social workers assume a fiduciary relationship with mothers and are promoted as being their available advocates, (Exh. M, pg. 2; TR 7/31/14 at 24: 10 – 11, 134 – 135). The contravention of that duty turned Ms. Schumaker into an advocate for the monetary enhancement of Gentle Care and not as a protector for Carri. She violated her fiduciary duty to Carri. Gentle Care's choice to proceed to the permanent surrender agreement while knowing of the coercion from Jeff therefore was a knowing furtherance of the duress. Furthering the duress contributes to the duress. *See, Hua*, 62 Ohio St.2d 227 (Vietnamese mother's consent was invalid where she was pressured into surrendering her child for adoption by the agency reinforcing and encouraging fears that her child would be killed due to his mixed parentage.)

In re Adoption of Zschach, 75 Ohio St.3d 648, 658 (Ohio 1996): "Undue influence" is defined as "[a]ny improper or wrongful constraint, machination, or urgency of persuasion whereby the will of a person is overpowered and he is induced to do or forbear an act which he would not do or would do if left to act freely." "Whether a challenge to an adoption consent [665 N.E.2d 1079] is based on fraud, undue influence, or some other consent-vitiating factor, the real and ultimate fact to be determined is whether the party affected was denied the exercise of his or her free will. **Tallmadge v. Robinson** (1952), 158 Ohio St. 333, 340, 49 O.O. 206, 209, 109 N.E.2d 496, 500.

The Supreme Court of Ohio outlined the scope of duress in **Tallmadge v. Robinson**, 158 Ohio St. 333 (1952), as follows:

The courts * * * seek to determine whether the threats were such as to have overcome the will of the person threatened and to have created a state of mind such that he was induced to **do an act which he would not otherwise have**

done and which he was not bound to do. In performing this analysis, courts are instructed to consider "the age, * * * health, and mental condition of the person affected, the relationship of the parties and all the surrounding circumstances * * *." (emphasis added)

Here we have a mother with five, now six, children living with her significant other for almost six years who was told in her thirty-eighth week of pregnancy that he would not allow another child into his home. She was being forced to choose between her newborn son and she and her five children being turned out into the streets. She had no choice on April 4, 2014. (Trans. July 29, 2014, pgs. 13, lines 6-25, page 14, lines 1-8; pg. 24, lines 3-13; pg. 26, lines 14-23)

The Appellant was instructed by the employee of the Appellee to deny her Native American heritage or it would interrupt the adoption process (Trans. July 29, 2014, pg. 21, lines 3-7). Gentle Care turned off and on the digital recorder thereby causing spoliation of the evidence. Negligent or inadvertent destruction of evidence is sufficient to trigger sanctions where the opposing party is disadvantaged by the loss. Farley Metals, Inc. v. Barber Colman Co. (1994), 269 Ill.App.3d 104, 206 Ill.Dec. 712, 645 N.E.2d 964, 968. Where the loss of evidence is belated, a court should not dwell on intent but, rather, focus on the importance of information legitimately sought and which is unavailable as a result of the destruction of evidence. Farley Metals, Inc., supra. What the trial court heard was not the original digital recording but a recording that was edited to provide a false representation to the trial court.

The biological father insisted that the Appellant get an abortion. The biological father, Steven Lump, stated in his text message to the Appellant she should abort this child and have another. (Trans. August 19, 2014, pg. 113, lines 18-21) She was being

harassed to terminate the pregnancy, which was additional pressure and an assurance that she would be on her own. (Trans. July 29, 2014, pg. 40, lines 7-20)

Appellant additionally was under the influence of narcotics prescribed by her obstetrician for pain resulting from her cesarean section. She was in a heightened state of anxiety and depression due to the natural hormonal increase influencing her behavior. She was released from the hospital with instructions not to make any important decisions due to the influence of the narcotics in her system.

With all of these outside influences added to the ones previously discussed there can be no question of the undue influence and duress the Appellant was experiencing at the time she was asked to permanently give up her child. Dr. Amato's testimony of July 29, 2014 is most telling:

1. Pg. 98 Dr. Amato is concerned about the biological father's induced stress; that Appellant was not giving real thought to her choice; and she was on the narcotic vicodin.
2. Pg. 106 The Appellant was not to make any important decisions while on vicodin.
3. Pg. 109 In the Appellant's situation the effects of vicodin would be compounded.
4. Pg. 111 There is a hormonal dump that really hits approximately 48 hours after birth which causes postpartum blues and depression specifically in the Appellant's situation of not going home with her child.
5. Pg. 113 This is not just depression but **major depression**.

6. Pg. 118 Dr. Amato did not believe that she had the ability to make a decision regarding giving up her child.
7. Pg. 126 Since Vicodin, Norco and Percocet all have Tylenol in them it makes these narcotics even more powerful.

Once she regained her faculties she recanted her agreement. The trial court referred to it as buyer's remorse. This crass analogy is not worthy of the trial court since we are dealing with a child and not a used car.

Thus, the permanent surrender agreement executed by Carri and Gentle Care was a product of duress or undue influence and therefore invalid. Accordingly, this Court should reverse the judgment of the juvenile court.

The next question we must ask is where was the protection espoused by Gentle Care in providing a fiduciary to aid in the protection of the rights of Carri? Miss Schumaker had a duty to see to it that the letter of the law was followed. Her obligation was to protect Carri and see to it that Gentle Care followed the law.

The adoption assessor "shall meet" with the parent to "discuss options available to her in lieu of surrendering the child." OAC: 5101:2-42-09(B)(1). Those options include the parent keeping the child and surrendering the child temporarily for up to 30 days without judicial approval. See R.C. 5103.15(A). This option was not discussed (Trans. 7/31/14, pg. 258, lines 13-25)

This agency was required to follow OAC: 5101:2-42-09 and they did not. Both sections of the administrative regulation direct the agency with the word "shall," and because section (A) cannot begin until the fulfillment of section (B), a permanent surrender is invalid without the previous fulfillment of section (B). Temporary surrender

constitutes an option under the administrative rule because it is the only option mentioned in 5103.15 besides permanent surrender.

Gentle Care failed to comply with section (B)(1) of OAC: 5101:2-42-09 because the assessor, Ms. Schumaker, did not discuss the options available to Carri under R.C. 5103.15 when they met at Bob Evans restaurant on March 27, 2014. Carri met with Gentle Care in person for the first time four days before the birth when she and Kelly Schumaker had lunch at Bob Evans restaurant on March 27, 2014. (TR 7/28/14 at 137, 147; TR 7/29/14 at 20.) They did not meet personally after that until the permanent surrender. At that meeting, at Bob Evans, Carri again told Ms. Schumaker that Jeff was pressuring her and leaving her with no choice. (TR 7/30/14 at 194: 19 - 22.) Ms. Schumaker nevertheless gave Carri an extensive packet of papers and forms to review and fill out. (TR 7/31/14 at 13: 11 – 14: 7 – 16.) None of those documents pertained to the temporary surrender option.

The trial court found on page 27 of its September 23, 2015 decision:

According, an agency lacks authority to accept the agreement until special requirements of OAC 5101:2-42-09 are met. OAC:5101:2-42-04(B)(3) and (C)(1). One of those requirements is the agency must “ [d]iscuss with the parent... other options available in lieu of surrendering the child.” OAC:5101:2-42-09(B)(1). After the discussion, 72 hours must pass before the permanent surrender agreement can be executed. OAC 5101:2-42-09(C)(1). Those requirements are separate from the agency’s need to discuss Ohio Law and Adoption materials and to question the parent when executing the permanent surrender later on. OAC:5101:2-42-09(B)(5)

On pages 27 and 28 of the trial court decision of September 23, 2015 the trial court defines “ ‘Discuss’ means ‘to speak with another or others about; talk over. The options an agency must discuss include keeping the child, placing the child with

nonrelatives temporarily, and placing the child in temporary custody/foster care.” This discussion never happened. Therefore, the Appellee never complied with the regulations that required a discussion, not just providing a packet of papers. There simply was no discussion as demanded by OAC:5101:2-42-09. On page 29 the trial court concedes that the chance to discuss or ask questions is insufficient the regulations demand an actual verbal explanation of the options by the assessor which includes the 30 day agreements. The trial court says that it was given and relies on a witness who was not present nor did she have any personal knowledge of this option being discussed. In fact the testimony relied upon by the trial court said unless the Appellant asked for an explanation none would be given. (Tr. 8/19, page 30, lines 13-21) In fact none was ever given and no verbal explanation was ever given.

Private adoption agencies can assume and retain custody of children through an “agreement for temporary custody of child” or through a “permanent surrender of child.” R.C. 5103.15; OAC: 5101:2—1-01(B)(12); 5101:2-42-04(B)(3) and (5). An agreement for temporary custody lets the agency keep custody of the child up to 30 days. R.C. 5103.15(A)(1); OAC: 5101:2-42-08(F). Either party may terminate the custody before the agreed time, and the child will be returned to the parent. OAC: 5101:2-42-06(B).

A “permanent surrender of child,” in contrast, presumes adoption being pursued. Because of that grave consequence, an agency lacks authority to accept the surrender agreement until it “discuss[es] with the parent . . . other options available in lieu of surrendering the child.” OAC: 5101:2-42-04(B)(3) and (C)(1); OAC: 5101:2-42-09(B)(1). Seventy-two hours must then pass before the permanent surrender agreement can be executed. OAC: 5101:2-42-09(C)(1). Those requirements are separate from the

agency's need to discuss Ohio Law and Adoption Regulations, to question the parent when executing the permanent surrender later on, and giving the parent a pamphlet but not discussing the options. OAC: 5101:2-42-09(B)(5); R.C. 3107.082(A); 3107.083(A)(1)(a).

Gentle Care failed to discuss the surrender options as required by OAC: 5101:2-42-09(B)(1), leaving it without authority to execute the permanent surrender agreement.

Administrative rules have the force of law. **Columbus & S. Ohio Elec. Co. v. Indus.**

Comm., 64 Ohio St.3d 119 (1992). The administrative rule required Gentle Care to

“discuss” the non-surrender options Carri had available to her. OAC: 5101:2-42-

09(B)(1). “Discuss” means “to consider or examine by argument, comment, etc.; talk over or write about, especially to explore solutions. . .”

www.dictionary.reference.com/browse/discuss (Last visited Aug. 3, 2015.) Options an

agency must discuss include keeping the child, placing the child with non-relatives

temporarily, and placing the child in temporary custody/foster care. (Exh. M.; TR 8/19 at 28: 22 – 29: 10.)

Hearing nothing about the relative placement or temporary custody agreement options, Carri then signed the forms in Shumaker's packet fearing that Camden would necessarily go into “foster care” if the adoption did not go through, an image scary to Carri. (TR 7/29 at 77; 7/30 at 18 – 20; Exh. 2.) Carri really needed her trusted fiduciary but Ms. Schumacker was busy protecting her employer and the fee that was being earned by Gentle Care.

That conclusion is enhanced by the fact that it parallel's Gentle Care's policy of giving parents the options information to review and then not explaining it to them unless

they ask about it – because “temporary custody” and “foster care” are supposedly self-explanatory. Kelly Schumaker’s procedure violated OAC: 5101-2-42-09(B)(1) because the State required an in-person meeting to “talk over” and “explore” surrender option “solutions” and mere labels do not satisfy those regulations.

The terms “foster care” and “temporary custody” do not explain themselves and the mere use of these terms do not constitute a discussion. As Megan Kennedy testified, unlike foster care or relative care, a temporary custody agreement is substitute care for a statutorily limited time of 30 days. (TR 8/19 at 29.) That difference is why people who work in foster care call an agreement for temporary custody the “30-day agreement,” to distinguish it from other surrender and foster care options. (TR 7/31 at 11: 1 – 5.) Thus, Ms. Schumaker merely mentioning “foster care options,” “temporary custody,” or other alternatives at the Bob Evans meeting or later did not constitute a “discussion” under the administrative rule.

The law places no duty on Carri to inquire about options. To the contrary, the administrative rule put the duty on Ms. Schumaker to inform Carri of her options because Gentle Care’s authority to proceed depended on it. Thus, Ms. Schumaker had a duty to tell Carri that an adoption could not proceed without discussing all of her options sufficiently at the meeting. Sufficient discussion would include “exploring” how each option might be a “solution” to Carri’s dilemma and have given her a choice which she did not have, cleared her system of pain killers and allow her to go forward with her life with Camden. Ms. Schumaker proceeded to the acknowledgment forms without **discussing** the 30-day agreement option again breaching her fiduciary duty as well as her legal obligation.

Gentle Care's failure to hold a proper discussion of non-surrender options left its authority to accept the permanent surrender agreement unvested. OAC: 5101:2-42-09(B)(1) and (C). That failure to vest made the permanent surrender agreement void. Gentle Care lacked authority to execute the permanent surrender.

The agency case notes (Exhibit K) *before and after* the surrender showed Gentle Care's knowledge of the pressure from Jeff. A 30-day agreement would have given Carri time *before and after* the birth to think through the situation--a need Doctor Amato recognized. Carri would then have had the time to make other living arrangements, learn about potential public services, and give Camden's siblings time to adjust to a separation and move.

The 30-day agreement option would have served its purpose of avoiding permanent surrenders being merely the product of someone's emotional reaction. Accordingly, agencies must discuss the temporary custody and relative placement options precisely because the situation may change in a way the parent does not see.

Because Gentle Care did not discuss options available to Carri in lieu of surrendering, particularly the temporary custody agreement option, the permanent surrender agreement is invalid as a matter of law and Camden must be returned to her. OAC: 5101:2-42-09.

On page 3 of the trial court's decision it uses portions of the spoiled recording to try and justify that the option of temporary custody was discussed, but even here there is no discussion. In fact regardless of the trial court's "findings" the Appellee never discussed the various surrender options with the Appellant. Mentioning them by name is

not a discussion. A discussion would be telling the Appellant in lay terms just what each option consisted of and her alternatives under those options.

Discuss means to discuss. The trial court knows the law on pages 27 and 28 of its Decision but forgets it on page 30 of the same Decision.

The trial court shows it is conflicted between the law and its personal opinions (pages 32 and 33 of its decision). The law was not followed and the personal opinions of the trial court cannot overrule the law. The trial court's opinion that adoption was in the best interests of the child is amazing since nowhere in this entire procedure was the best interest of the child ever mentioned except by the original adoptive parents who concluded that the best interests of Camden could best be served by his mother, Carri. (Exhibit K, page 15)

Evidence of what Jeff told Carri late in the pregnancy about surrendering Camden was improperly excluded because the evidence was intended to explain why Carri suddenly felt she had to surrender Camden, a factor material to the case. However, since the answers were not stricken we can see the testimony:

A: Because I was ready to give birth and my significant other told me that I had to choose—

ATTORNEY OEBKER: Objection.

ATTORNEY HAMILTON: Objection. Sorry.

JUDGE LOUDEN: Sustain.

A: —because I felt like I didn't have a choice.

Q: You didn't have a choice to do what?

A: Other than adoption at that day—that point.

(TR 7/28/14 at 145: 22 – 146: 8.)

This out-of-court statement was properly admissible when it is used to explain the later actions of the person to whom the statement was directed. State v. Osie, 140 Ohio St.3d 131:

¶ 122. " It is well established that extrajudicial statements made by an out-of-court declarant are properly admissible to explain the actions of a witness to whom the statement was directed." State v. Thomas, 61 Ohio St.2d 223, 232, 400 N.E.2d 401 (1980). A statement is not hearsay when introduced to show its effect on the listener. " A statement that D made a statement to X is not subject to attack as hearsay when its purpose is to establish the state of mind thereby induced in X, such as * * * having knowledge or motive * * *." (Footnotes omitted.) 2 McCormick on Evidence, Section 249, at 191 (7th Ed.Broun Ed.2013).

Thus, an out-of-court statement is not hearsay when it is introduced to show its effect on the listener. *Id.*

Jeff had put Carri in a helpless situation by telling her, three weeks before her due date, that she had to choose between placing Camden for adoption, which would keep Carri and the other children with Jeff, or raising Camden, whereupon Jeff would kick Carri and the children out immediately.

As in *Osie*, the evidence was being used to show why Carri had no choice but to surrender Camden right then. As in *Osie*, Jeff's statement was relevant because it was made to Carri herself and it explained the fix she was suddenly in three weeks before her baby was due.

Jeff telling her in mid-March that she had to choose between keeping Camden and keeping the current family together was duress, by showing what Carri reasonably believed and what affect it had on her.

Even the Appellee's motion for a verdict was a violation that unduly restricted the Appellant's right to produce witnesses to rebut any testimony by the Appellee and to further show that the Appellant had no choice. One must first look at the timing of the Appellee's Motion. Since the Appellee had already called two witnesses it had waived its right to request a dismissal under 41(B)(2) and the Appellant had a right to call rebuttal witnesses before the trial court ruled. Regardless of labels this was not a ruling after the Appellant's case as the trial court treated it. The Appellee waived additional evidence not the Appellant. (page 25 of Sept. 23, 2015 decision of trial court)

The Trial Court is bound to review the evidence and to make its own determination as to the sufficiency of the evidence that would require the return of this baby to his mother. The trial court did not weigh the evidence and determine the credibility of the witnesses. The trial court totally ignored the only neutral witness and expert, Dr. Amato. His testimony shows that the Appellant was in no condition to make any important decision. Pain killers, hormones and Jeff's punitive order delivered two weeks before Carri was to give birth rendered her unable to exercise her own will.

The court measured undue influence and duress by the following yardstick: "Ms. Stearns now alleges 'buyer's remorse' about her permanent custody surrender. She alleges reasons to void or rescind the surrender of permanent custody that would be no different for any other mother with a change of heart about the surrender." The recitations of the Appellant are supported by Exhibit K, the Appellee's own records.

Every witness called by the Appellee affirmed that Carri was under duress. The trial court then bootstraps this vague recitation into its conclusion that it sees no undue influence. This blindness to the facts of this case and the failures recited above require a reversal of the trial court's decision.

The trial court allows unrelated opinions to cloud the real issues in this case. As can be seen on page 22 of its new decision (September 14, 2015) the trial court states "A choice similar to not choosing to not get pregnant." The cute maligning statement chosen by the trial court: "buyer's remorse" and "choosing not to get pregnant" shows a decision based on personal prejudices. Evidently as shown on page 23 the trial court lists additional choices that the Appellant made that affront the sensibilities of the trial court: 1) living with a significant other 2) a sexual encounter with Steve Lump. The trial court also mistakenly uses the spoiled audio recording which was censored and manipulated by the Appellee.

The trial court seems to want to ignore this Appellate Court's decisions in **In re Adoption Of Baby Girl E.**, 2005-Ohio-3565, 04AP932, 05-LW-3085 (10th)

53 Ohio App.3d 104, 108; In the Matter of the Adoption of Baby Doe, Franklin App. No. 03AP-917, 2004-Ohio-689, ¶16. Accordingly, a jurisdictional prerequisite for an adoption decree is that "[t]he consent must be of the consentor's own volition, free from duress, fraud, or other consent-vitiating factors and with full knowledge of the essential facts." *Infant Girl Banda*, at paragraph one of the syllabus; *In re Adoption of Jimenez* (1999), 136 Ohio App.3d 223, 227. "[T]he real and ultimate fact to be determined is whether the party affected was denied the exercise of his or her free will." *Zschach*, at 659, citing *Tallmadge v. Robinson* (1952), 158 Ohio St. 333, 340. See, also, *In re Hua* (1980), 62 Ohio St.2d 227, 232. {¶24} In examining Ohio's statutes, its consent provisions, and their due process implications, we note that, because

Ohio's adoption statutes are in derogation of the common law, strict compliance with the statutes is necessary to protect the fundamental rights of natural parents. Lemley v. Kaiser (1983), 6 Ohio St.3d 258;

However, if valid consent of the natural parent to the adoption proceedings is lacking, the adoption decree violates due process of law, and giving effect to the decree violates the public policy of this state. Smith, at 421. Accordingly, if a natural parent establishes by clear and convincing evidence that his or her "consent" was the result of fraud, duress, or some other consent vitiating factor, the "consent" is invalid as not freely and voluntarily given and the adoption decree is void. Zschach, at 657; Infant Girl Banda, at 108; Morrow, at 251; In re Adoption of Holcomb (1985), 18 Ohio St.3d 361, 368; In re Adoption of Baby Doe, supra. {¶27} As appellant claims, the probate court's decision and judgment in this case do not indicate that the court determined, or even considered, whether the 1996 adoption decree is invalid due to any factor other than fraud. However, appellant argued in the probate court that the adoption decree must be vacated as void because **her "consent" to the adoption was the product not only of fraud, as provided by R.C. 3107.16(B), but also the consent-vitiating factors of duress, undue influence, mistake and/or misunderstanding that rendered her "consent" affidavit invalid.**

"The real and ultimate fact to be determined in every case is whether the party affected really had a choice; whether he had his freedom of exercising his will." Id., citing Tallmadge, supra. **Duress is present when a state of mind was created such that the person giving consent "was induced to do an act which [s]he would not otherwise have done and which [s]he was not bound to do."** Tallmadge, at 340. {¶32} In determining whether duress is present, a court assesses the effect of claimed "threats" upon the particular individual providing the consent, not the effect of such "threats" upon an "ordinary" individual.

{¶37} **The importance of a natural parent's free, knowing, and voluntary consent to the adoption of a child cannot be overstated.** Because clear, convincing, and uncontroverted evidence establishes that appellant's consent to S.B.'s adoption of Baby Girl E was given under circumstances constituting duress, **the affidavit**

purporting to give appellant's consent to the adoption is invalid and the adoption decree is accordingly void as lacking the requisite valid parental consent to the adoption.

(emphasis indicated was added)

CONCLUSION

" [T]he right of a natural parent to the care and custody of his children is one of the most precious and fundamental in law." In re Adoption of Masa (1986), 23 Ohio St.3d 163. There is a duty to determine if the relinquishment of this right is given without duress or undue influence. This duty falls upon the agency taking this relinquishment and the protector they assign to gain the trust of the natural parent. Protection is provided in the law and the law must be followed. When there is a need for adoption the natural parent, the child and the adoptive parents all benefit, but when there is no need all of the same people will be hurt. If we do not wish to take the generous act of adoption and turn it into a profit motivated business we must see to it that the fiduciary and the adopting agency follow the law by providing complete and full disclosure of the law and that there is no duress or undue influence present influencing the decision of the natural parent to give up this precious and fundamental right. **The relinquishment must be declared void when there is duress, undue influence or the law and administrative code are not followed and enforced as written.**

Respectfully submitted



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