**IN THE SUPREME COURT OF OHIO**

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| In re: (C.C.S.), (C.L.S.) | : | |
| | : | Case No. 2016-0395 |
| Petitioner-Appellant, | : | |
| | : | On Appeal from the |
| v. | : | Franklin County Court |
| | : | of Appeals, Tenth |
| ADOPTION BY GENTLE CARE | : | Appellate District |
| | : | |
| Respondent-Appellee. | : | Court of Appeals |
| | : | Case No. 15-AP-884 |
| | : | |
| | : | **ADOPTION INVOLVED** |

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MERIT BRIEF OF AMICUS CURIAE
OHIO BIRTHPARENT GROUP AND KATE LIVINGSTON, PH.D.

(Supporting Appellant, urging reversal)

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**Steven E. Hillman** (02578)
8581 Crail Court
Dublin, Ohio 43017
Tel: (614) 766-6346
Fax: (614) 766-6418
law@stevenhillman.com

COUNSEL FOR APPELLANT,
C.C.S.

**A. Patrick Hamilton** (13909)
400 South Fifth Street, Suite 103
Columbus, Ohio 43215-5430
Tel: (614) 464-4532
Fax: (614) 221-7590
Hamiltonlaw13909@yahoo.com

**Erik L. Smith** (89330)
62 West Weber Road
Columbus, Ohio 43202
Tel: (614) 330-2739
edenstore@msn.com

COUNSEL FOR AMICUS CURIAE,
OHIO BIRTHPARENT GROUP AND
KATE LIVINGSTON, PH.D

**Jon W. Oebker** (64255)
Tucker Ellis LLP
950 Main Avenue, Suite 1100
Cleveland, Ohio 44113-7213
Tel: (216) 592-5000
Fax: (216) 592-5009
Jon.oebker@tuckerellis.com

COUNSELS FOR APPELLEE, ADOPTION BY GENTLE CARE

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## INTEREST OF AMICUS CURIAE

Ohio Birthparent Group urges the Court to reverse the decision of the Court of Appeals. Ohio Birthparent Group (OBG) is a community organization committed to supporting the life-long needs of birthparents through peer support, advocacy and community education. (See www.ohiobirthparents.org.) Founded in 2010 by birthparents themselves, OBG strives to address, and help correct, the historic lack of services and significant barriers to social recognition faced by women and men who surrender their children for adoption. Thus, OBG is a diverse, multi-generational community of birthparents representing a wide range of experiences with adoption.

To achieve its goals, OBG develops and runs programs for birthparents, adoptees, and anyone impacted by adoption or interested in life-long adoption issues. Those programs include holding group meetings where birth parents, adoptees, and adoptive parents can share perspectives, skills, and strategies that help navigate the changes adoption brings to their lives. Some meetings are open to people considering adoption, including to pregnant women and those hoping to adopt. OBG also helps members and non-members find counseling, support, and information resources in their communities regarding adoption issues.

Kate Livingston, Ph.D. is OBG's Founding Director. Dr. Livingston received her doctorate in Women's Gender and Sexuality Studies from The Ohio State University where she currently teaches undergraduates and conducts research on birthparent experiences, adoption law, and adoption politics. Dr. Livingston is also the non-lawyer appointee on the Supreme Court of Ohio's Commission on Continuing Legal Education.

In addition to being a well-respected scholar of U.S. adoption law politics, Dr. Livingston is a birthmother who has been in an open adoption since 2001.

This case concerns an issue to which OBG and Dr. Livingston are greatly devoted to affecting: the adequacy of services given to birthparents in helping them decide the long-term fate of their children. Surrendering one's child impacts most birthparents for life. Even where the surrender was voluntary, most birthparents feel guilt, shame, and other grief symptoms at some level for having relinquished their children. Those psychological aspects are often manageable with adequate support. The parent's knowledge that she made her choice while having the full information needed to do so reduces the negativity and anxiety she would otherwise feel about adoption, her child's future, and herself.

Unfortunately, OBG regularly encounters birthparents who realize they were not adequately informed and hence feel they did not truly surrender their children voluntarily. The cause is almost always a lack of discussion about alternatives, particularly the options of relative placement, temporary custody, and guardianship. Pressure from a third party is also a factor. Comments from the parent that they did not want to surrender the child but felt they had no choice because they could not bring the baby home from the hospital are typical in those problematic cases. Although most of those birthparents do not challenge their surrenders, their belated discovery of information causes them extra duress, regret, and anger at knowing they would not have surrendered had they understood their options.

This case bears the earmarks of non-discussion between agency and birthparent. The mother told Gentle Care from the start that she did not want to

surrender her child but felt that she had no choice because her significant other would not let her bring the baby home. In addition, the mother's mature age, education, and successful raising of her other children combined with the deliberation over surrender coming so late in the pregnancy indicates coercion rather than an inability or unwillingness to parent. Thus, this case strikes OBG as one where an agency should have discouraged surrender and instead counseled the mother on options, referred her to a lawyer for advice about her rights as a tenant, and suggested marriage counseling.

OBG therefore hopes this Court will focus less on what the mother understood about permanent surrender and more on how the agency applied the law and its policies to the mother's situation. This also marks the third such case OBG has encountered where the agency involved with the parent was Adoption By Gentle Care. Although OBG cannot necessarily call that rate of occurrence disproportionate, OBG can certainly say that they are tired of encountering parents who feel they were betrayed rather than helped by adoption agencies.

## STATEMENT OF THE CASE AND FACTS

This is an appeal from a denied habeas corpus petition in which Appellant asked the Franklin County Juvenile Court to void the permanent surrender agreement she made with an adoption agency and to order that Appellant's child be returned to her. The juvenile court dismissed the petition and the Tenth District Court of Appeals affirmed. Appellant appealed to this Court, which accepted jurisdiction.

Initial Legal Conclusions and Facts

Ohio law recognizes two basic types of child placement agreements, temporary custody and permanent surrender. R.C. 5103.15. (Juv. Ct. Jgmt. at 26*.) Temporary custody lets a parent place their child with a private agency for 30 days without court approval. R.C.5103.15(A). (Juv. Ct. Jgmt. at 26-27*.) The parent is counseled during that time about what she might need to make a decision about surrendering or parenting. (Tr. 8/19 at 29.) Foster care workers call the option the "30-day agreement" to distinguish it from other types of foster care situations. (Tr. 7/31 at 11; Tr. 8/19 at 29.)

Permanent surrender, in contrast, is an agreement to relinquish all parental rights to an agency so that the child will be adopted. R.C. 5103.15(B). (Juv. Ct. Jgmt. at 27*.) Ohio law prohibits a permanent surrender agreement from being executed until an adoption assessor reviews "Ohio Law and Adoption Materials" with the parent and, separately, discusses with the parent what options besides permanent surrender are available to her. Ohio Adm. Code 5101:2-42-09(B)(1) and (5). (Juv. Ct. Jgmt. at 27*.) In addition, a permanent surrender agreement cannot be executed until seventy-two hours after those in-person discussions. Ohio Adm. Code 5101:2-42-09(A) and (C). (Juv. Ct. Jgmt. at 27*.) Private agencies therefore establish policies to follow in

deciding whether to accept permanent surrender agreements from parents of newborns. (Tr. 7/31 at 24, 134-135, 296.)

Gentle Care's Policies

Appellee, Adoption By Gentle Care, a private adoption agency, promises a mother that the social worker assigned to her case will "explore" and "inform" [her] of all of [her] options" and "educate [her] on Ohio adoption law." (Exh. M, pg. 1.) Thus, Gentle Care promotes the relationship between parent and agency as being one of trust, the parent being a "client" and the social worker being an available "advocate" for the parent and child. (Exh. M, pg. 2; Tr. 7/31 at 24, 134-135. Schumaker—assessor at Gentle Care)) Gentle Care's social workers are therefore trained to identify situations where a third party is pressuring or forcing a parent into an adoption plan. (Tr. 7/31 at 296. (Saunders—Exec. Director of Gentle Care)) When it is evident to the social worker that the mother is surrendering involuntarily, Gentle Care's policy is to tell the mother that no one can force her to surrender and then to decline to make the agreement. (Tr. 7/30 at 295, 297, 299-300. (Saunders)) A mother saying she has no option signifies to Gentle Care that the mother is being forced. (Tr. 7/31 at 186. (Schumaker))

At the pre-surrender meeting required by the administrative rule, the social worker tries to determine why the parent is pursuing adoption; in the Executive Director's words: "[W]e want to know what got you to this place?" (Tr. 7/31 at 7: 11-12; 31: 18-21.) Knowing the parent's lifestyle and family member situation helps the social worker determine whether an option other than permanent surrender might best serve the parent. (Tr. 7/31 at 215. (Schumaker) Options include discharging the child temporarily to a family member, temporary custody, and foster care. (Tr. 8/19 at 28: 22

-29: 10. Kennedy—social worker supervisor at Gentle Care)) A situation where the parent “doesn’t feel like she could have the child at home with her” would call for the offering of a temporary custody/30-day agreement. (Tr. 7/31 at 256: 22-24. (Simmons—social worker at Gentle Care)) The social worker also gives the parent a packet that includes material listing her rights and alternatives and encourages her to read it. (Tr. 7/31 at 88-90. Saunders)); (Form JFS 01676.)

To ensure adequate supervisory review of the case file, the social worker notates every communication with the mother, wherever it occurs, and enters all meaningful information into the agency database. (Tr. 7/30 at 306. (Saunders)) The supervisors rely on those case notes and consider them credible. (Tr. 7/30 at 311: 6-8. (Saunders)) After a permanent surrender agreement is made, Gentle Care’s social worker supervisor reviews all of the paperwork, including the case notes, to ensure that policies and laws were followed. (Tr. 8/19 at 11-13. (Kennedy))

Communications Between Carri and Gentle Care

On March 15, 2014, Gentle Care social worker, Kelly Schumaker, received a phone call from Carri S., a 38-year-old unwed mother of five children. (Exh. K, pg. 1.) Carri was quiet on the phone, but eventually explained to Ms. Schumaker that she had cheated on her boyfriend, whom she called her husband, and had become pregnant. (Exh. K., pg. 1.) Carri’s due date was three weeks away. (Exh. K., pg.1.) Carri told Ms. Schumaker that her boyfriend was very hurt and now would not even talk about the situation, forcing Carri to place the baby for adoption to “save her family.” (Exh. K, pg.1.) Ms. Schumaker responded by explaining the adoption process to Carri and offering to send her a birthparent packet and to set up a meeting. (Exh. K., pg. 1.) Carri

declined the offers and the phone call ended with Ms. Schumaker encouraging Carri to call back if she had questions. (Exh. K., pg. 1.)

An hour later, Carri texted Ms. Schumaker, telling her that she was really uncomfortable even considering a decision like this because “my kids are my life but I really don’t think I have a choice.” (Exh. K., pg. 1.) Ms. Schumaker replied that the decision was Carri’s and that it had to be a decision she was “comfortable with.” (Exh. K., pg. 1.) Carri said she understood and though she was uncomfortable with the decision, it was best for her family. (Exh. K., pg. 1.) Carri then said she was “90%” and “just wanted it to be fast and painless as possible.” (Exh. K., pg. 1.) Ms. Schumaker responded: “No problem!” (Exh. K., pg. 1.)

Carri texted Ms. Schumaker again that afternoon and told her the baby would likely be born early, that she was “100%” for adoption, but that her aunt would call the agency because Carri was finding the situation difficult. (Exh. K., pg. 1.)

The next morning, Ms. Schumaker received the call from Carri’s aunt, who told her that Carri was struggling a lot with this choice and that she wanted to make sure she had all the right information. (Exh. K., pg. 1.) Later, Carri texted Ms. Schumaker, telling her the baby might be delivered early and that she “really want[ed] this over.” (Exh. K., pg. 2.) Indeed, a C-section operation scheduled for April 7 was moved up to March 31. (Exh. K., pg. 2.)

*Carri’s Obstetrician/Gynecologist—Dr. Amato*

The next day, March 17, Carri discussed the adoption plan with her obstetrician and gynecologist, Dr. Amato, Carri’s treating physician during the pregnancy. (July 29, Tr. 93, 95, 99, 118, 130: 14-24. (Amato)) Carri’s adoption plan surprised Dr. Amato

because this was the first he had heard about it and because it was arising so late in the pregnancy, a rare occurrence in the Doctor's experience. (Tr. 7/29 at 129-130. (Amato) Dr. Amato knew the adoption plan was linked to Carri's family situation; namely, that Carri's "significant other [was] 'wanting' her to give up the baby since it will mess up their family." (Tr. 7/28 at Exh. F, pg. 55 (Doctor's note of March 17, 2014) and Amend. Pet., Exh. G.) (Emphasis in original.) Dr. Amato was worried that Carri had not sufficiently thought through the decision. (Tr. 7/29 at 99, 118, 130: 17-22. (Amato))

*Scheduling the pre-surrender meeting*

On March 25, Ms. Schumaker received a text from Carri about scheduling the pre-surrender meeting. (Exh. K., pg. 2.) Carri stated that that they could not meet at her house because her family was back from vacation. (Exh. K., pg. 2.) Carri then asked Ms. Schumaker if "suburban moms/females really do this? I feel terrible. My kids have such a great life. I'm sure he would too, but my significant other is just too hurt." (Exh. K., pg. 2.) The message was accompanied by a picture of Carri and three of her children. (Exh. K., pg. 2.)

Ms. Schumaker replied: "Very cute picture! I work with people from all walks of life, everyone makes an adoption plan for a slightly different reason." (Exh. K., pg. 2.) Carri told Ms. Schumaker that she still felt like a bad person, that her kids were her life, and that she just wanted it to be over with and to be as "painless as possible." (Exh. K., pg. 2.) About setting up the mandatory pre-surrender meeting, Carri said that she would "have to see what was going on with kids and hub."

*The Pre-Surrender Meeting*

Ms. Schumaker and Carri eventually agreed to meet on March 27 at a Bob Evans restaurant. (Exh. K., pg. 3-4.) Arriving there, Carri and Ms. Schumaker chose a corner booth where Carri felt comfortable. (Exh. K., pg. 4.) Nevertheless, Carri was quite emotional throughout the meeting, stating repeatedly that her five children were her life and that she did not want to place this child for adoption but felt she had no choice. (Exh. K., pg. 4.) Carri explained that she and her boyfriend, Jeff, had been together for about six years. (Exh. K., pg. 4.) Jeff knew the child was not his because he could not conceive children, and now he would not even talk about parenting this child together. (Exh. K., pg. 4.) Carri also told Ms. Schumaker that she felt she had no option because Jeff did not want her to take the baby home. (Tr. 7/31 at 130: 9-12. (Schumaker)) Thus, Carri was making the adoption plan to save her family. (Exh. K., pg. 4.) She explained further to Ms. Schumaker that Jeff was a part of the family and that the children loved him. (Exh. K., pg. 4.) He had even helped raise Carri's youngest daughter as his own child, as she was born not long before Carri and Jeff met and began living together. (Exh. K., pg. 4.) Carri again told Ms. Schumaker that she had no choice but to place the baby for adoption. (Exh. K., pg. 4.)

Ms. Schumaker proceeded to go through each paper she had in her folder. (Tr. 7/31 at 127-128. (Schumaker)) She explained the birth parent agreement, the Native American affidavit and the Living Expenses affidavit, which Carri signed. (Exh. K., pg. 4.) Carri then signed the Human Arc form, Confidentiality Agreement, and Release of Information forms. (Exh. K., pg. 4.) Ms. Schumaker then explained the Ohio Adoption Law and Materials form, which Carri also signed. (Exh. K., pg. 4.)

Carri's lack of questions about the Ohio Adoption Law and Materials form made Ms. Schumaker wonder if Carri had seen the documents before. (Tr. 7/31 at 128: 24 – 129; 6. (Schumaker)) Ms. Schumaker ended the meeting by giving Carri copies of all the surrender paperwork and explaining the "surrender process" to her. (Exh. K, pg. 4.) She confirmed with Carri that the putative father was not in the military. (Exh. K, pg. 4.) She also confirmed Carri's choice of an adoptive couple. (Exh. K., pg.4.)

The note about the meeting stated nothing about a discussion of options having occurred or how Carri may have responded to any option mentioned. (Exh. K, pg. 4.) Ms. Schumaker also came away from the meeting believing that Carri had choices other than permanent surrender, but she did not know Carri's "lifestyle or her family members or what her other choices might be." (Tr. 7/31 at 215: 8-9. (Schumaker) She did know that Carri was pursuing adoption because she felt it was her only "option." (Tr. 7/31 at 126, 129-130, 145: 20 – 146: 3, 183: 23-25; 185-186. (Schumaker))

*The Day of the Birth*

On March 31, a few hours before the C-section surgery, Ms. Schumaker called the social worker at Riverside Hospital, Sally Sexton, and told her that Carri did not want to see the baby and wanted to be moved to a different floor. (Exh. K, pg. 4.) She explained to Ms. Sexton that Carri was "very conflicted about what she wants to do and would really like to parent but thinks it will tear her family apart because she cheated on her boyfriend and got pregnant." (Exh. K, pg. 4.)

At about seven o'clock that evening, Ms. Schumaker heard from Carri's aunt that the baby was born, appeared healthy, and that Carri seemed at peace with her decision. (Exh. K, pg. 5.) But the next morning Ms. Schumaker received a call from

Ms. Sexton who told her that Carri was unpleasant to talk to and seemed “very impatient.” Ms. Schumaker told Ms. Sexton that Carri was not at all happy with having to make an adoption plan. (Exh. K, pg. 5.)

*The Permanent Surrender Signing*

On April 4, Ms. Schumaker and another Gentle Care social worker, Beth Simmons, met with Carri at her home to sign the permanent surrender agreement. (Exh. K, pg. 8.) That was the second and last time Carri and Gentle Care met in person. (Exh. K, pgs. 3-10.) During the permanent surrender meeting, Carri seemed emotional, even asking Ms. Schumaker to speak in the third person when going through the paperwork. (Exh. K, pg. 8.) Carri told Ms. Schumaker that she still felt like a bad person for making an adoption plan, but knew it was the right decision for her family. (Exh. K, pg. 8.) After reviewing “Ohio Laws” and asking Carri a few questions about putative fathers, Ms. Schumaker read the Affidavit and Relinquishment and the Permanent Surrender aloud while a tape recorder ran. (Exh. K, pg. 8.)

Ms. Schumaker then engaged in a colloquy with Carri, which included the following questions and answers:

“Q. And you understand that you will be signing a permanent surrender of child document and that this is not a temporary custody form?

A. Yes.

Q. And do you understand that you're not obligated to proceed with the surrender today, and that baby could be placed in foster care or discharged to you to give you more time?

A. I understand.

Q. Okay. Would you like to consider any of these options?

A. No.

* * *

Q. Who have you talked to about -- who have you talked to about your decision to place the child for adoption?

A. Like?

Q. Like who in your family?

A. Okay. My aunt, my twin sister.

Q. Your Aunt [] right?

A. Yeah.

* * *

Q. All right. And have you felt like any of these people have tried to pressure you in any way -

A. Not at all.

Q. - going forward? And no one from Gentle Care or from Riverside?

A. No.

Q. Okay.

A. No one.

* * *

(Tr. 7/29 at 35-38, 43. (Carri))

Carri then signed the Affidavit and Relinquishment and the Permanent Surrender. (Exh. K, pg. 8.)

*Megan Kennedy's Case Review*

As the social worker supervisor at Gentle Care, Megan Kennedy reviewed all of the paperwork in Carri's case to ensure that policies and laws were followed. (Tr. 8/19 at 9-13. (Kennedy)) She reviewed Carri's entire file, including the completed permanent surrender paperwork to determine why Carri was surrendering. (Tr. 8/19 at 8-9; 11-12, 16. (Kennedy)) Ms. Kennedy contended that she knew a 30-day agreement was offered to Carri because of what the permanent surrender agreement and its transcript contained and because the social workers "talk about it at surrender." (Tr. 8/19 at 29: 17-21. (Kennedy)) Nevertheless, because Ms. Kennedy "was not there" at the time, she

could not discern whether a temporary custody agreement option had been discussed with Carri to any level of detail. (Tr. 8/19 at 30: 1-6. (Kennedy)) She could not tell, for example, whether it was explained to Carri that she could enter into a "temporary custody agreement for up to thirty days," since a description to that level of detail would be given only if the parent asked what temporary custody meant. (Tr. 8/19 at 30: 13-21. (Kennedy)) After Ms. Kennedy's review, Gentle Care placed the child with prospective adoptive parents, who petitioned to adopt him. (Exh. K at 10; Amend. Pet. Hab. Corp. Exh. A., T.d. 69.)

*The Revocation*

A week later, on April 12, Ms. Schumaker received a phone call from Carri stating that she told the putative father's family about the adoption plan because she felt so bad about making it. (Exh. K, pg. 9.) A few hours later, Ms. Schumaker received a text from Carri stating, in full: "I am having horrible feelings about what transpired too[.] I'm off medication and not feeling well at all with what has happened. I'm not comfortable with any of this. Goodnight. Carri." (Exh. K, pg. 9.)

The next day, April 13, Carri told Ms. Schumaker on the phone that she wanted her baby back. (Exh. K, pg. 9.) Ms. Schumaker told Carri that she had made a final decision that could not be changed. (Exh. K, pg. 9.) Carri said she knew that, but that she was pressured and it was never her decision to make. (Exh. K, pg. 9.)
Ms. Schumaker explained again what permanent surrender meant and then asked Carri what had changed. (Exh. K, pg. 9.) Carri replied that Jeff felt bad for pressuring her to place the baby for adoption. (Exh. K, pg. 9.) Gentle Care declined to return the child to Carri. (Exh. K, pg. 9).

After learning of the situation, the prospective adoptive parents returned the child to Gentle Care on or about April 30. (Exh. K., pgs. 15-16; Tr. 7/31 at 302-303.) Gentle Care still declined to return the child to Carri, however, compelling Carri to petition the juvenile court for a writ of habeas corpus. (Pet. for Hab. Corp. T.d. 2.)

The Petition for Habeas Corpus

Carri filed an original, and then an amended, petition for a writ of habeas corpus in the juvenile court, claiming that the permanent surrender agreement was a product of duress because Jeff gave Carri an ultimatum that she either place the child for adoption or break up the family. (Juv. Ct. Jgmt. at 15*.) The Amended petition also averred that Ms. Schumaker told Carri that the child would go into foster care if she did not surrender him permanently, without explaining to Carri what foster care would consist of or suggesting that she sign a temporary surrender agreement. (Id; Amend. Pet. T.d. 69 at pg. 38, Sec. C.2.)

Juvenile Court's Judgment

The juvenile court dismissed the petition under Civ. R. 41(B)(2), reasoning that Ohio law did not recognize pressure from a non-party to avoid a contract and that Carri had not carried her burden of proof. (Juv. Ct. Jgmt. at 18-19*.) Regarding the former, the juvenile court cited *Blodgett v. Blodgett*, which held that to avoid a contract on the basis of duress. a party had to prove coercion by the other party to the contract. 49 Ohio St.3d 243, 551 N.E.2d 1249 (1990). (Juv. Ct. Jgmt. at 19*.)

Regarding Carri's burden of proof, the juvenile court concluded that the permanent surrender agreement was not the product of duress, either from Jeff or from Gentle Care. (Id. 19-20*.) The juvenile court opined that Carri's circumstances were

not the “fault of anyone else” and that Carri “feigned” the duress from Jeff because she “takes no responsibility for her actions.” (Id. at 20*.) The juvenile court noted Carri’s age, college education, and assertive personality traits. (Id.) Carri had also initiated the adoption process and had twenty days from that initial contact to consider her permanent surrender decision, leaving her unrushed. (Juv. Ct. Jgmt. at 21*.) Carri had also told Ms. Schumaker that she was sure of her decision and had acknowledged that she understood the permanence of the surrender agreement, that she was not obligated to sign it, and that no one had pressured her into signing it. (Id. at 21-22*, 30*.)

The juvenile court also considered Carri’s testimony about Jeff’s ultimatum non-credible because Carri had a record of crimes of dishonesty and because the putative father testified about Carri having a propensity to lie. (Id. at 22*.) The juvenile court pointed out that Carri and her five children were still living with Jeff at the time of trial, diminishing Carri’s claim that Jeff ever gave her an ultimatum and showing instead that “her living arrangements were secure with a man.” (Id. at 23, 31*.) Therefore, though she was unemployed and had five children, Carri understood the gravity of the surrender and its irrevocability (Id. at 31*) leading the court to believe that Carri “feigned” duress and coercion, which did not exist at the time of the surrender. (Id. at 34*.) The juvenile court ultimately concluded that Carri, with custody of her five other children, had a choice to keep the child—a “choice similar to choosing not to get pregnant.” (Juv. Ct. Jgmt. at 22*). Carri’s situation was therefore one of “buyer’s remorse.” (Id. at 33*.) Accordingly, the juvenile court found Carri’s evidence and testimony insufficiently credible to meet her burden of proof for granting the required habeas relief. (Id. at 35*.)

Regarding the claim that the assessor did not discuss options with Carri, the juvenile court cited the permanent surrender agreement Carri signed, which stated: "The assessor has provided the following counseling and discussed alternatives to the surrender, pre and post-adoption options, temporary custody and foster care and reviewed and signed to [sic] Ohio laws an adoption materials form. The date on which this was provided was March 27, 2014. The name of the assessor was Kelly Schumaker[.]" (Juv. Ct. Jgmt. at 4*.)

The juvenile court also found that Gentle Care gave Carri information about all of her options "(i.e., the ODJFS pamphlet)," which was in the packet Carri took home, and which Carri acknowledged having received and having been able to discuss and inquire about. (Id. at 28-29*.) (Quotation in original.) In particular, the juvenile court found that Carri's acknowledgment on the form regarding Ohio Law and Adoption Materials meant that she had a chance to discuss and inquire about "*the materials* Ms. Schumaker *discussed* with her, which did include the written information about options." (Id. at 29*.) (Emphasis in original.) The juvenile court cited to trial testimony without elaborating. (Juv. Ct. Jgmt.at 29* citing Tr. 7/29 at 36, 50; Tr. 7/31 at 19-22, 87-88, 127-128.)

<u>The Court of Appeals' Judgment</u>

The Court of Appeals affirmed, reasoning that the trial court's decision about duress was not against the manifest weight of the evidence because the judgment showed how the trial court weighed the evidence and what evidence it found credible. (Op. at ¶ 21-22.) The Court reiterated the trial court's findings about the agreement itself, the transcript of the surrender meeting, Carri's answers to questions during the surrender, Carri's bold personality, her statements to Ms. Schumaker about being sure

about adoption, and her history of being untruthful. (Op. at ¶ 24-25.) The Court of Appeals found that to be competent, credible evidence going to each essential element of the duress claim. (Op. at ¶ 26.)

Regarding the need to discuss options under the administrative rule, the Court of Appeals reasoned that Carri was presented with packets of information about options at the pre-surrender meeting at Bob Evans. (Op. at ¶ 37.) Without citation, the Court of Appeals concluded that options were discussed, including "temporary custody with an agency and foster care," which information was also contained in the pamphlet Carri received. (Op. at ¶ 37.) Along with Carri's answers in the permanent surrender colloquy, that was ample evidence that all the options of what could be done with the child were discussed with Carri. (Op. at ¶ 38-39.) The Court of Appeals declined to decide whether duress had to come from a party to the agreement. (Op. at ¶ 41.)

**ARGUMENT**

A petition for a writ of habeas corpus will be granted where a parent's permanent surrender agreement is invalid. *Marich v. Knox County Dept. of Human Servs.*, 45 Ohio St.3d 163, 165 (1989). A trial court can dismiss a habeas corpus petition under Civ.R. 41(B)(2), however, if "the plaintiff's evidence is not persuasive or credible enough to satisfy her burden of proof." *Jarupan v. Hanna*, 173 Ohio App.3d 284, 2007-Ohio-5081, 878 N.E.2d 66, ¶ 9 (10 Dist.) Conversely, the motion must be denied if dismissing the case would be incorrect as a matter of law or against the manifest weight of the evidence. *In re Adoption of Baby Girl E.*, 10th Dist. No. 04AP932, 2005-Ohio-3565, ¶ 17. In that case, appellee's failure to request further presentation of evidence after the court weighs evidence the appellee offered waives any claim that appellee has more evidence to present. *Id.* at ¶ 17-18. A reviewing court will not reverse a judgment for

being against the manifest weight of the evidence if some competent, credible evidence went to all the essential elements of the case. *State v. Arnold*, Slip Opinion No. 2016-Ohio-1595, ¶ 63. Appellant proposed the following:

> **<u>Proposition of Law:</u> When determining if a parent is voluntarily relinquishing custody of her child, it is imperative that all steps be taken to ensure that [the] relinquishment is given without duress, and duress is particular to that individual at the time she makes her decision. The fiduciary provided by the [Agency] must protect the [Parent].**

One step an agency must take to ensure that the relinquishment is given without duress and to protect the parent is to discuss with the parent at a meaningful time what options she has besides permanent surrender. Ohio Admin. Code 5101:2-42-09(B) ("the administrative rule"). Accordingly, Ohio law mandates that at least 72 hours before a permanent surrender agreement can be executed, "the assessor shall meet with the parents *** to do the following:

> (1) Discuss with the parents *** other options available in lieu of surrendering the child.
>
> (5) Review, discuss and complete the JFS 01693 'Ohio Law and Adoption Materials[.]'"

To "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 May 30, 2016.) (Emphasis added.)

The courts below found the administrative rule satisfied based on Carri's responses and acknowledgments at the permanent surrender signing, Ms. Schumaker's alleged discussion of written materials at the pre-surrender meeting, and certain trial testimony. Specifically, Carri acknowledged at the permanent surrender signing that:

> "The assessor has provided the following counseling and discussed alternatives to the surrender, pre and post-adoption options, temporary custody and foster care and reviewed and signed to [sic] Ohio laws an adoption materials form. The date on which this was provided was March 27, 2014. The name of the assessor was Kelly Schumaker[.]" ("the acknowledgment")
>
> (Juv. Ct. Jgmt. at 4*.)

The juvenile court found that Carri's acknowledgment on the Ohio Law and Adoption Materials form meant that she had a chance to discuss and inquire about the materials Ms. Schumaker discussed with her, which included written information about options. (Juv. Ct. Jgmt.at 29* citing Tr. 7/29 at 36, 50; Tr. 7/31 at 19-22, 87-88, 127-128.) The Court of Appeals affirmed on the same reasoning. (Op. at ¶ 36-38.)

That evidence was not competent and credible enough for the courts below to conclude that Ms. Schumaker discussed the 30-day agreement or other options with Carri at the pre-surrender meeting. The case notes mentioned nothing about a discussion, which would have been crucial information for supervisory review of the case file. In addition, Gentle Care's procedure was to avoid discussing the 30-day agreement option until the parent inquired about it. Ms. Schumaker, in turn, never testified that she mentioned temporary custody to Carri or that Carri inquired about it, but she did testify that Carri asked few questions in the pre-surrender meeting.

*Review of Gentle Care's Polices*

The social worker's initial task at the pre-surrender meeting is to determine why the parent is considering adoption so that solutions to a parent's situation can be adequately explored. (Tr. 7/31 at 7, 31.) A parent feeling as if she cannot have the child at home with her calls for the 30-day agreement being discussed. (Tr. 7/31 at 256.) To ensure adequate supervisory review of the case, the social worker notates all

communication with the mother, wherever it occurs, and enters all meaningful information into the database. (Tr. 7/30 at 306.) The supervisor relies on those case notes and considers them credible. (Tr. 7/30 at 311: 6-8.)

Under those policies, the 30-day agreement option and relative placement options were highly applicable to Carri's situation because Ms. Schumaker knew that Carri felt she could not have the child at home. (Tr. 7/31 at 130. (Schumaker)) Exploration of those options, and Carri's responses to them, would therefore have been meaningful information to put in the case notes for supervisory review.

The case notes, however, were devoid of information about options being explored or how Carri responded to any suggestion of them. In addition, Kelly Schumaker, the adoption assessor who met with Carri at the pre-surrender meeting, testified consistently that she knew Carri was pursuing adoption because she saw it as her only "option," which to Gentle Care signified coercion. (Tr. 7/31 at 126: 3-9; 129-130; 145-146; 183: 23-25; 185: 6-7; 186: 2) She also testified that Carri asked few questions at the pre-surrender meeting. (Tr. 7/31 at 128-129; 176: 24-25).

Megan Kennedy, who reviewed Carri's entire file, testified that temporary custody was an agreement that let an agency "put a child in foster care and then giv[es] a birth mother more time to make her decision and if she doesn't want to make the adoption plan, then she can terminate that agreement" and perhaps extend the agreement after 30 days. (Tr. 08/19 at 29.) Presumably, that would be Ms. Kennedy's initial explanation to a parent who inquired about the meaning of temporary custody. Consider now Ms. Kennedy's testimony about how she reviewed Carri's case file to ensure that Gentle Care's policies and the administrative rule were followed:

"Q. Okay. Do you know whether [the temporary custody option] was offered to Miss Stearns?

A. It was.

Q. And how do you know that?

A. We talk about it at surrender.

Q. Do you know that from reading the transcript of the permanent surrender?

A. Yes.

Q. Okay. Do you know whether it was explained to her that she could enter into a temporary agreement for thirty days – for up to thirty days?

A. I'm not sure how Kelly Schumaker actually explained it to her at the time, 'cause (sic) I was not there.

Q. Okay. Would it have been typical for a birth parent social worker to describe that option at that level of detail to a – birth mother?

A. I mean if a birth mom asks what is temporary custody mean, we would talk to her about what it means.

Q. Uh-huh (affirmative response). But if temporary custody were mentioned by the birth parent social worker and no question was asked about what that meant, then there would be no further explanation coming from the birth parent social worker, is that correct?

A. Correct, because the word temporary custody means temporary, so it really doesn't usually need more explanation." (Tr. 08/19 at 29: 17 – 30: 21.)

That testimony shows Gentle Care's complete disregard for the discussion requirement under division (B)(1) of the administrative rule. Division (B)(1)

requires an exploration of options *regardless* of any inquiry by the parent. Upon reading that Carri could not bring the baby home, Ms. Kennedy, under Gentle Care's own policy, had to consider the 30-day agreement, and perhaps the relative placement, options as important. Yet after reviewing the entire file, including Carri's acknowledgment at the permanent surrender signing, Ms. Kennedy could not tell whether the temporary custody option had been explained to Carri to even the slightest level of detail, i.e. that Carri "could enter into a temporary agreement for up to thirty days." By Gentle Care's policy, Ms. Kennedy knew that Ms. Schumaker would have notated that crucial information, and Carri's response to it, had she discussed it. Thus, upon seeing nothing mentioned about temporary custody in the case note, Ms. Kennedy was duty-bound to schedule another meeting to explore options with Carri.

Instead of doing that, Ms. Kennedy blindly relied on a boilerplate acknowledgment that was presented to Carri eight days after the pre-surrender meeting occurred and while Carri was on heavy pain medication. Ms. Kennedy also put the onus on Carri by presuming she would have inquired about temporary custody had it been mentioned. And had Carri not inquired, Ms. Kennedy presumed no harm because "temporary custody" explained itself. That process was incompetent.

Except for trial testimony the juvenile court and Ms. Kennedy had identical records before them when deciding whether a 30-day agreement was actually discussed at Bob Evans. The testimony the juvenile court cited and relied on regarding this issue dealt only with the permanent surrender meeting transcript (Tr. 7/29 at 36, 50) the general need to inform parents at the pre-surrender meeting (Tr. 7/31 at 19-22) and

the need to encourage the parent to read the pamphlet. (Tr. 7/31 at 127-128). Gentle Care never testified that they had actually discussed the options. Thus, the juvenile court's finding that temporary custody was explored as a solution at the pre-surrender meeting was just as incredible and incompetent as Ms. Kennedy's finding of the same.

The reliability of Carri's responses and acknowledgments at the permanent surrender signing was also suspect because parents under duress tend to give answers they believe are needed to cause the surrender. See e.g. *In re Plumley*, 11th Dist. No. 2003P0120, 2004-Ohio-1161, ¶ 19-23 (permanent surrender found invalid despite the mother's positive colloquy responses because her lawyer told her she would more likely lose rights to her other children if she did not surrender them, and that the permanent surrender was over and done with.); *Matter of Danielson*, 104 Misc.2d 33, 427 N.Y.S.2d 572, 574 (N.Y. Rensselear Cty.1980) (mother's permanent surrender agreement found invalid despite the social worker adequately explaining the consequences of the agreement to her because the mother's husband had threatened to leave the mother if she did not surrender the child.)

Carri's colloquy responses were also unreliable on their face. From March 15 to April 4, Carri told Ms. Schumaker consistently that the situation with Jeff was forcing her to pursue adoption. Schumaker never expressed disbelief in Carri's representations. Thus, when Carri responded at the colloquy that "no one" was pressuring her in any way to go forward, Ms. Schumaker heard something inconsistent with what she had been hearing for the last three weeks. Jeff, Carri's long-time domestic partner and the family breadwinner, was unmentioned. A true "advocate" would have clarified the situation with Jeff in the colloquy, whether it had changed, etc. A reasonable "advocate"

would therefore have suspected that Carri was merely giving Ms. Schumaker the answers needed to cause the permanent surrender.

Instead of doing that, Ms. Schumaker played on as if Carri's inconsistent response was no news to her at all and as if Jeff did not exist. Accordingly, Ms. Schumaker failed to determine why a "client" was pursuing adoption before the permanent surrender was signed. That dereliction by Schumaker and Carri's inconsistent response about being pressured also diminished the credibility of Carri's acknowledgment about temporary custody having been discussed at Bob Evans.

A parent's statements at a permanent surrender colloquy cannot cure an adoption agency's failure to follow the law and their own policies *before* they proceed to the colloquy. By putting stock in Carri's responses and acknowledgments at the permanent surrender colloquy in the face of what Gentle Care's own records showed about their own failure before that colloquy occurred perverts both justice and the truth. It was also ironic that the evidence the courts below most heavily relied on to justify their decisions were responses from the one witness the juvenile court found non-credible everywhere else--Carri. Accordingly, Gentle Care's failure, and the juvenile court's incompetent decision, could not have been saved by Carri's responses and acknowledgments at the permanent surrender meeting.

The trial court's incorrect decision regarding the administrative rule was not saved by the supposed discussed of written materials either. The only document that mentioned options was the pamphlet (JFS 01676). The pamphlet, in turn, merely referred parents to the assessor who could explain options. Regarding options, the pamphlet stated only the following:

> "[The Assessor] will give you complete information about services and options you may have. The Assessor can tell you about: Parenting your child yourself * Placing your child with a friend or relative [or non-relative] temporarily or permanently * Guardianship and foster care options * State and federal laws on adoption . . . * Making an adoption plan."
> (JFS 01676.)

Again, except for trial testimony, the juvenile court had no more information before it when deciding the discussion question than Ms. Kennedy had when she decided the discussion question. The juvenile court also concluded correctly that the need to discuss the Adoption Law and Materials and the need to discuss options in lieu of surrender were distinct and separate requirements. (Juv. Ct. Jgmt. at 27*.) That separateness is crucial because the Adoption Law and Material form (JFS 01693) does not contain the pamphlet (JFS 01676). The Adoption Law and Material Form is merely an acknowledgment by the parent that she has:

> "been provided with a copy of written materials on adoption; [was] *able to* discuss and ask questions about the *materials* and the *adoption* process; and [is] now fully aware of the ramifications of . . . entering into a voluntary permanent custody surrender agreement."
>
> (JFS 01693, Sec. I.) (Emphasis added.)

Therefore, without evidence showing the level to which temporary custody (and other options) was explained at Bob Evans, the juvenile court, like Ms. Kennedy, could not have concluded that temporary custody was actually "discussed." That evidence did not exist. Thus, the record contained no competent, credible evidence that division (B)(1) of the administrative rule was met.

Ms. Schumaker failed to fulfill her role as an advocate for Carri in other ways as well. The case notes show a mother in torment after concluding, near the end of a pregnancy, that she and her five other children would be evicted if she kept the child.

An advocate would have seen a mother grasping at straws to save a dissolving marriage and family life and, consequently, a mother who needed time and counseling instead of an adoption plan. Even accepting the trial court's incredible finding that Carri "feigned" the situation with Jeff, Carri's desire to preserve her marriage and the lifestyle of her other kids without surrendering her new child if possible was undisputable. The 30-day agreement would have given Carri real time to think through the situation free of the stress of the impending birth. Thus, a 30-day agreement should have been fully discussed and offered. But it wasn't.

In addition, Carri's resignation at the permanent surrender was not surprising given that she received only platitudes when she had reached out to Ms. Schumaker before. For example, Carri's guilt-laden question about whether suburban moms "really do this" was met not with any real counseling or compassion, but with an implicit justification of adoption: "[E]veryone makes an adoption plan for a slightly different reason." Carri's grief-filled plea that her kids were her life but that she really did not think she had a choice was not met with an examination of options or a referral to alternative resources, but with a self-protective dismissal: "It has to be a decision you're comfortable with." Carri's resigned request to have the adoption done as fast and painless as possible was not met with a suggestion that Carri take more time to consider her situation, but with the opportunistic response: "No problem!"

How much more effective it would have been had Ms. Schumaker simply said to Carri: "It sounds like you're in a lot of pain and turmoil right now. Why don't we arrange for someone to take care of your baby in a safe environment for a while after his birth so you don't have to rush into a decision? Meanwhile, you can visit the baby and talk with

counselors about your relationship with Jeff and explore other resources that might help you in case it doesn't work out. Let's discuss that."

Ms. Schumaker did nothing even approaching that. She simply banked on Carri's predictable tendency to give the answers needed to cause the permanent surrender, and at a time when she would be at her physical, and perhaps mentally, weakest Ms. Kennedy then played along with it.

Ms. Schumaker also violated 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. (TR 7/30 at 295, 297, 299 – 300; TR 7/31 at 186.) By contravening that policy, Ms. Schumaker became an advocate for Jeff, and for adoption, instead of for Carri. Thus, the juvenile court's decision that the temporary custody, or any other, option was adequately "discussed" at the pre-surrender meeting was not supported by competent, credible evidence.

Prejudice

Carri suffered prejudice as a matter of law because failing to satisfy the administrative rule left the agency's authority to execute a permanent surrender agreement unvested. The administrative rule establishes a discussion and 72-hour rule requirement that agencies must follow to avoid rash surrender decisions like the one Carri made. That rule has the force of law and must be followed, lest the permanent surrender agreement be unacceptable, hence void. Because Gentle Care did not timely and adequately discuss options available to Carri in lieu of surrendering, particularly the temporary custody option, Carri's permanent surrender agreement was void.

Gentle Care's dereliction of duty prejudiced Carri nevertheless because she would have made a temporary custody agreement had it been explained to her. The ambivalence temporary custody aims to alleviate existed within Carri. On one hand, she could not bring the baby home. On the other hand, she did not want to surrender him. By Gentle Care's own policy, a "30-day agreement" was the prime option to explore. Moreover, when Jeff expressed regret a few days after the permanent surrender, Carri immediately asked Gentle Care to return the child to her. Had the child been in temporary custody at that time, Carri would have terminated the agreement.

The juvenile court's rationale that Carri was not prejudiced by any lack of discussion because she could not have known that Jeff would change his mind was thoughtless. The 30-day agreement gives hostile family members a chance to cool down before the parent makes a permanent surrender agreement under their influence. Alternatively, should the family member remain hostile, the parent has time to consider other avenues so that her ultimate decision is made intelligently and knowingly. A 30-day agreement would have served those purposes here. Carri was prejudiced by Gentle Care's incompetence.

The duress and its source were clear in this case. Gentle Care furthered the duress by knowing about it and still failing to discuss an option that Carri had available to her and which would have alleviated the duress had Carri understood and known about the option. The Court of Appeals therefore erred as a matter of law by basing its affirmance on the juvenile court's findings that the mother received written information about birth parent rights and options and had responded in certain ways at the permanent surrender signing and colloquy. Thus, this Court should reverse.

## CONCLUSION

The decision below is fundamentally wrong in its reasoning and dangerous in its implications for fairness in adoption. The decision below reduces the crucial discussion requirement in the administrative rule to lip service and lets adoption agencies rely on formal paperwork and canned colloquies instead of truly advocating for the parent. The decision below must be reversed. A reversal will promote the exemplary purpose of the administrative rule and preserve the child's best interest as the polestar in adoption.

Respectfully submitted,

*/s Erik L. Smith*

Erik L. Smith (89330)
62 West Weber Road
Columbus, Ohio 43202
(614) 330-2739
edenstore@msn.com

COUNSEL FOR AMICUS CURIAE,
OHIO BIRTHPARENT GROUP

## CERTIFICATE OF SERVICE

I certify that a true copy of this Brief was sent through the e-filing system and by separate email to the following counsel on June 5, 2016:

Steven E. Hillman, Counsel for Appellant, at < law@stevenhillman.com >

A. Patrick Hamilton, Counsel for Appellee, at < hamiltonlaw13909@yahoo.com

Jon W. Oebker, Counsel for Appellee, at < jon.oebker@tuckerellis.com >

*/s Erik L. Smith*
Erik L. Smith (89330)
Counsel for Amicus Curiae
OHIO BIRTHPARENT GROUP AND
KATE LIVINGSTON, PH.D.