No. 2016-0395

IN THE

SUPREME COURT OF OHIO

IN RE: (C.C.S.), (C.L.S.)
Petitioner-Appellant,

vs.

ADOPTION BY GENTLE CARE
Respondent-Appellee.

Appeal from the Court of Appeals,
Tenth Appellate District
Franklin County, Ohio to
The Supreme Court of Ohio

MEMORANDUM AMICUS CURIAE FOR THE AMERICAN ACADEMY OF ADOPTION ATTORNEYS IN SUPPORT OF RESPONDENT-APPELLEE

Steven E. Hillman (0002578)
8581 Crail Court
Dublin, OH 43017
Tel: 614-766-6346
Fax: 614-766-6431
law@stevenhillman.com

Attorney for Petitioner-Appellant
Caroline Stearns

Jon W. Oebker (0064255)
Tucker Ellis LLP
950 Main Avenue, Suite 1100
Cleveland, OH 44113-7213
Tel: 216-592-5000
Fax: 216-592-5009
jon.oebker@tuckerellis.com

A. Patrick Hamilton (0013909)
400 S. Fifth Street, Suite 103
Columbus, OH 43215
Tel: 614-464-4532
hamiltonlaw13909@yahoo.com

Attorneys for Respondent-Appellee
Adoption by Gentle Care

Erik L. Smith (0089330)
62 West Weber Road
Columbus, OH 43202
Tel: 614-330-2739
edenstore@msn.com

Attorney for Amicus Curiae, Ohio Birthparent Group

Julia Cain (0042696)
34 South Main Street
Rittman, OH 44270
Tel: 330-927-3120
cainlegal@yahoo.com

Barbara Thornell Ginn (0083197)
Ginn Law Office, LLC
8595 Beechmont Ave., Suite 103
Cincinnati, OH 45225
Tel: 513-277-1478
Barbara@GinnLLC.com

Attorneys for Amicus Curiae, American Academy of Adoption Attorneys

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STATEMENT OF ISSUES PRESENTED

Whether the trial court, after hearing all the evidence and reviewing issues of fact and law, erred in finding that there was not clear or convincing evidence of fraud, duress or undue influence in the execution of the permanent surrender.

Whether the trial court was unreasonable, arbitrary or unconscionable in denying the Appellant's Petition for Writ of Habeas Corpus and in granting Appellee's Civ. R. 41(B)(2) Motion for Involuntary Dismissal through a finding that the birthmother clearly understood the ramifications of the permanent surrender document.

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Academy of Adoption Attorneys ("Academy") is a not-for-profit organization of attorneys, judges and law professionals throughout the United States and Canada, who have distinguished themselves in the field of adoption law and who are dedicated to the highest standards of practice. The Academy's mission is to support the rights of children to live in safe, permanent homes with loving families, to protect the interests of all parties to adoptions, and to assist in the orderly and legal process of adoption. The Academy's work includes promoting the reform of adoption laws and disseminating information on ethical adoption practices. The Academy regularly conducts seminars on the rights of birth parents and children for attorneys and judiciary. Its members testify regarding pending legislation and submit amicus briefs for consideration by courts. The ultimate goal of the Academy is to promote the best interests of children and families.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae respectfully adopts and incorporates by reference the facts and procedural history presented in Appellee's Merit Brief.

Now comes Amicus Curiae, the American Academy of Adoption Attorneys, and offers the following memorandum in support of Appellee.

ARGUMENT

I. WHEN THE BIOLOGICAL MOTHER AND SOLE LEGAL PARENT OF A CHILD EXECUTES A PERMANENT SURRENDER OF HER CHILD TO AN ADOPTION AGENCY FOR THE EXPRESS PURPOSE OF PLACING HER CHILD FOR ADOPTION AND SUBSEQUENTLY SEEKS TO REVOKE THE PERMANENT SURRENDER, THE COURTS MUST DETERMINE WHETHER THAT PERMANENT SURRENDER WAS GIVEN THROUGH AN EXERCISE OF FREE WILL.

It is inherent in every adoption that the biological parent considering an adoption plan is under difficult and often heart wrenching circumstances. In independent or private agency adoptions, the biological parent seeks out assistance to pursue an adoption plan. The State is not intervening to protect the child but the parent is seeking assistance from an attorney or a private child placing agency (PCPA) to make an adoption plan. That parent in making an adoption plan is voluntarily making a sacrifice for the benefit of the child and/or the benefit of her other children. Adoption is never an easy choice and never under stress free circumstances. It is understandable that after placing a child for adoption that the biological parent may feel anguish and then wonder if she made the correct choice. However the stability of a child depends on a child being given a permanent home in which to be loved and in which to grow and thrive. Stability through permanency has been found repeatedly to be in a child's best interest and that is why Ohio courts have consistently held that the mere fact that a biological parent has had a change of heart is insufficient to revoke a consent or a surrender and runs contrary to public policy. See *In re Adoption of Infant Boy*, 60 Ohio App. 3d 80, 573 N.E.2d 753 (1989) citing *In re Adoption of Infant Girl Banda,* 53 Ohio App. 3d 104, 559 N.E.2d 1373 (1988). See also *In re Adoption of Hockman*,

Eleventh Dist. App. No. 2004-P-0079, 2005-Ohio-140, at ¶27 citing *In re Adoption of Jimenez*, 136 Ohio App. 3d 223, 736 N.E.2d 477 (1999).

Judge Louden, after a full five days of hearing evidence and testimony, held that the birthmother "really had a choice" and the execution of the permanent surrender was the product of her "freedom of exercising her will". Further as the Trial Court Judge, he found that the Appellant "fully understood what she was doing and the decision was 'voluntarily made.'" (Trial Court Opinion at p. 35.)

Courts in evaluating the challenge to a permanent surrender must determine whether a person is exercising his or her free will. That evaluation begins with the court determining whether the parent can understand or comprehend the information provided in the Ohio Jobs and Family Services form 01666 known as the Permanent Surrender of Child. The evaluation also includes a review of the procedural requirements for signing the form. The Permanent Surrender form can only be signed at a minimum of 72 hours after the birth of the child and a minimum of 72 hours after a review of the Ohio Adoption Laws and Materials provided by a certified and licensed adoption assessor. Ohio's seventy-two hour mandatory wait period is more conservative than many other states, which allow relinquishments to be signed any time after the birth of the child[1] or even prior to the birth.[2] Judge Louden completed this evaluation and found that Appellant signed the statement found in the Ohio Laws and Adoption Materials form 1693 indicating that she was provided with written materials on adoption and that she discussed the ramifications of consenting

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[1] No mandatory wait is imposed in the following sixteen states: Alaska, Arkansas, California (for agency placements), Colorado, Delaware, Georgia, Indiana, Maine, Maryland, Michigan, North Carolina, North Dakota, Oklahoma, South Carolina, Wisconsin, and Wyoming.

[2] Birth mothers may consent prior to the child's birth in Alabama and Hawaii. Alabama, Delaware, Hawaii, Illinois, Indiana, Louisiana, Nevada, New Jersey, North Carolina, Oklahoma, Pennsylvania, Texas, Utah and Virginia allow alleged fathers to consent prior to the child's birth.

to an adoption and entering into a voluntary permanent custody surrender agreement. (Trial Court Opinion at p. 29) The Trial Court further found that the biological mother clearly understood the ramifications of the permanent surrender document and further that she was given material on temporary/foster care including an opportunity to place her child in temporary custody for up to 30 days. (Trial Court Opinion at p. 29).

Appellant's challenge that her permanent surrender was not valid due to fraud, duress or undue influence was reviewed by the trial court using prevailing Ohio case law. In reviewing the facts presented on the issue of duress in a case where a parent surrenders custody of a child, "the courts now 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 re Hua*, 62 Ohio St. 2d 227, 405 N.E.2d 255 (1980) citing *Tallmadge v. Robinson*, 158 Ohio St. 333, 109 N.E.2d 496 (1952). Ultimately, the issue to be determined in this case is whether Appellant "really had a choice" when she relinquished her custodial rights, and had the freedom of exercising her own will. See *In re Adoption of Hockman*, Eleventh Dist. App. No. 2004-P-0079, 2005-Ohio-140.

The court in *Hockman* acknowledged that all consent proceedings (and by extension all permanent surrender signings) contain the prospect of either express or implied duress or undue influence. Surrendering one's parental rights is not an easily undertaken decision but it is only after reviewing the external circumstances surrounding the consent/surrender that it can be determined whether the influence was undue. *Hockman, supra* citing *Matter of Adoption of Wenger*, No. 1994-CA-00036, 1994 530819, at *1 (Ohio Ct. App. Sept. 2, 1994).

As acknowledged in *Hockman*, courts have only permitted the invalidation of an adoption on the grounds of duress or undue influence in extreme circumstances. Every biological parent

considering an adoption plan is having difficult life circumstances and does not like the choices their life offers them at the moment. Court however must distinguish between stress and the legally defined concept of duress. Ohio courts have not found undue influence or duress under the following circumstances: in *In re Adoption of Zschach,* 75 Ohio St. 3d 648, 665 N.E.2d 1070 (1996), the adoptive parent previously agreed to the interaction of the natural mother in the child's upbringing in the midst of concerns regarding the natural father's ability to obtain custody of the child; in the case of *Morrow v. Family & Cmty. Servs. of Catholic Charities, Inc.,* 28 Ohio St. 3d 247, 504 N.E.2d 2 (1986) the parents, two college students, argued that they were strongly encouraged by the court and adoption agency to consent to the adoption; in the case of *Infant Boy*, *supra*, a seventeen-year-old high school student became pregnant by her sixteen-year-old boyfriend and her father pressured her into giving the child up for adoption by refusing to assist her in any way; and in *Wenger*, *supra*, a seventeen-year-old was convinced to give the child to her in-laws to adopt, believing that she would remain a part of their family and would "co-mother" the child. The father of the child was away in the military, and the natural mother had minimal parental support and was financially dependent upon her in-laws. See, *In re Adoption of Hockman,* at fn4.

In the case of *In re Adoption of Infant Girl Banda*, 53 Ohio App. 3d 104, 559 N.E.2d 1373 (1988) the following five issues were raised in a motion to vacate the probate order: (1) minority of the parents; (2) ineffective assistance of counsel and conflict of interest; (3) failure to consult the parents of the minor birth parents; (4) failure to appoint a guardian ad litem; and (5) failure of the birth parents to understand the consequences of their actions. The minor birthfather also declined representation by counsel prior to giving his consent. On appeal the Court found the trial judge's factual determinations that the written consent to adoption was valid were supported by the evidence and not contrary to law. See, *Banda, supra*. All of these cases indicate difficult

choices; case law shows it is not unusual for biological parents considering an adoption plan to be contemplating the choice between being homeless and adoption or the choice between being without family support and adoption or the choice of financial loss and hardship and adoption. Appellant indicated her choice was between adoption and stable housing for her and her children. (TR 7/28/14 at 76,146) Appellant's life circumstances were that she had multiple children with multiple fathers and the person providing her housing was not the father of any of her children. There was no testimony that the person providing her housing was acting in an unlawful manner or that he was threatening any sort of violence. The testimony was simply that he may not have wanted her to bring another child into the household, and she had to decide what to do about her life circumstances. The trial judge, who was in the best position to observe the mannerisms of the parties and witnesses during the trial and thus in the best position to ascertain the credibility of the witnesses, found this did not rise to the level of duress or undue influence.

The instances where Ohio courts have invalidated an adoption based on undue influence or duress were described as having extreme circumstances See, *In re Hua* (1980), 62 Ohio St.2d 227, a Vietnamese mother's consent was deemed invalid where she was pressured into giving her child up for adoption by the agency reinforcing and encouraging fears that her child would be killed due to his mixed parentage. *Marich v. Knox Cty. Dep't of Human Servs./Children Servs. Unit*, 45 Ohio St. 3d 163, 543 N.E.2d 776 (1989) a fifteen-year-old who had not sought out an adoption and had no prenatal counseling was pressured to sign a permanent surrender agreement following a telephone conversation initiated by the public agency representative. This was a case not of duress but of undue influence by the agency representative. The mother was persuaded to sign the permanent surrender agreement and pressured by an agency into giving her child up for adoption through repeated unsolicited meetings and through undue influence when the agency

played on her fear of the biological father. See *Hockman, supra* fn.5. In *In re Plumley,* 2004-Ohio-1161, the birthmother testified she felt threatened because the state agency had the power to take away her twins, which were already in custody. All of these cases indicate a threat that is either implied or direct. The undue influence and duress came from public agencies having a perceived position of authority over the biological parent. Appellant has relied on *Marich, supra* to argue undue influence from the agency but that is contrary to the factual distinctions in the case. First, there is a significant difference in a public agency that has the power to take away a child and private agency that has no such power. Second, the threat of homelessness was not from the agency. There is no indication in the case at bar that the undue influence or the pressure came from the private agency. Appellant has argued that the agency should have recognized her "duress" and tried to "cure" it. If in fact Appellant's choice to parent her child would render her homeless, that is a difficult life circumstance not duress and the agency had no power to "cure" that situation: such an argument misunderstands the nature of private adoptions.

The eleventh appellate district in the *Hockman* case declined to find undue influence or duress in the case where a biological mother challenged her consents in a stepparent adoption action stating "In light of the factual circumstances underlying appellee's consents, it is our position that the consents were valid and were not the result of undue influence or duress. When appellee executed the consents, she was an adult, who had a high school diploma. It does not appear as though her consents were rushed in any way. Although she has a history of health problems, was involved in a divorce from an abusive spouse, and her emotional health appeared fragile, the circumstances surrounding her consents do not appear to have been emotionally charged or overwhelming. There was also no evidence presented that she was not alert or unaware of what she was signing." *Hockman, supra*.

The court in *Hockman* also reiterated the standard that undue influence must come from someone in a position of authority over the person being influenced. They specifically stated:

> Further, any influence exerted would have been by appellant or Sean and not by anyone in a position of authority over appellee, and there is no evidence to suggest that anyone acted in a way that compromised the exercise of appellee's free will. Courts have consistently held that individuals in significantly more emotional and volatile states than appellee were not unduly influenced or coerced even where the individuals exercising the influence held significant roles of power. In fact, it has only been in extreme circumstances where the courts have permitted the invalidation of consent on the basis of undue influence or duress. In the instant matter, it is our view that the circumstances surrounding appellee's consents do not rise to the level necessary to constitute undue influence or duress. Thus, the consents may not be invalidated upon these grounds.

Hockman, supra at ¶27.

Appellant's decision, though a difficult one for her to make, was her decision, not brought about by threats or coercion. [Tr. at 87] Further there was not clear or convincing evidence of undue influence. The trial court found Appellant initiated the call to the private agency, that she met with her social worker at a date, time and location of her choosing, that she was given materials about the adoption process, that she selected a prospective adoptive family, she notified the agency of the birth of her child, and she was able to discuss her feelings about adoption both before and after the birth of the child (Trial Court Opinion at p. 3-5). Appellant knew she could proceed with an adoption plan or parent her child. No testimony disputed that fact. Appellant's argument that she was under the influence of medications and hormonal surges after the birth of the child completely disregards the reality that she spent weeks considering her options and repeatedly notified Appellee, the hospital social worker and her family member(s) of her commitment and confidence regarding the adoptive placement. Furthermore, the Appellee Agency held no power over Appellant. Appellant was a mother faced with a difficult life choice. She chose adoption,

without threat, coercion or undue influence as the option that was best for her and her other children at that time in her life.

A permanent surrender is a one page Ohio Department of Job and Family Services Form. It is not a complex legal document. It is written in clear and concise language that states "I agree and understand that under Ohio law, signing this document means: 1. All my rights as a parent to the above named child will end. This includes, but is not limited to, all rights to visitation, communication, support, religious affiliation and the right to consent to the child's adoption. 2. The Agency shall have permanent custody of the child and shall have the right to place the child in any adoptive home or other substitute care setting it finds in the child's best interest." The first paragraph contains space to list the reasons for choosing adoption and also contains space to list the discussed alternatives to adoption. There was no testimony that Appellant did not understand she was placing the child for purposes of adoption therefore there is no fraud claim. She pursued an adoption plan and understood that this was a permanent decision. Appellant directly testified that she knew this was an adoption, she knew she was signing a permanent surrender for purposes of adoption. Again, the Court after hearing all the testimony found Appellant "clearly understood the ramifications of the permanent surrender documents" and the execution of the permanent surrender was the product of her "freedom of exercising her will." (Judgment entry page 35).

CONCLUSION

The Supreme Court of Ohio in *Zschach* found that strict compliance with adoption statutes is required even if it appears unfair.

> "[U]ltimately, the goal of adoption statutes is to protect the best interests of children. In cases where adoption is necessary, this is best accomplished by providing the child with a permanent and stable home… and ensuring that the adoption process is completed in an expeditious manner … If these goals are met, the new parent-child relationship will have the best opportunity to develop fully."

Zschach, 75 Ohio St.3d at 651.

Additionally, the Court found that "[T]he state's interest in facilitating the adoption of children and having the adoption proceeding completed expeditiously justifies such a rigid application. See *Lehr*, 463 U.S. at 265, 103 S.Ct. at 2995, 77 L.Ed.2d at 629." *Zschach,* 75 Ohio St.3d at 652. By following the previously-discussed case law, as well as Ohio's clear statutory language regarding adoptions, and recognizing that the case before the Court today is one of fact and not law, it is clear that the decisions of the trial court and appellate court should be upheld. In Ohio, private adoptions rely on the permanency of surrenders. If this Court reverses the trial court based on this set of facts, the precedential value of a reversal in this case would inject uncertainty into future surrenders because it would allow a birth parent to subsequently invalidate an otherwise knowing and voluntary surrender simply by citing to difficult circumstances at the time of the surrender.

For the foregoing reasons, this Court is urged to deny the appeal and uphold the decisions of the Franklin County Juvenile Court and the Tenth District Appellate Court finding that the Permanent Surrender of Child executed by the biological mother was both knowing and voluntary, and thus is valid.

Respectfully submitted,

s/Julia Cain
Julia Cain (0042696)
34 South Main Street
Rittman, Ohio 44270
Phone: (330) 927-3120
Fax: (330) 927-0007
Email: cainlegal@yahoo.com

s/Barbara Thornell Ginn
Barbara Thornell Ginn (0083197)
Ginn Law Office, LLC
8595 Beechmont Avenue,
Suite 103
Cincinnati, OH 45255
Phone: 513.277.1478
Fax: 513.426.7335
Barbara@GinnLLC.com

Attorneys for Amicus Curiae,
American Academy of Adoption Attorneys

CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing was mailed to the parties by e-mail and regular U.S. Mail on this __5th__ day of July, 2016.

Jon W. Oebker (0064255)
Tucker Ellis LLP
950 Main Avenue, Suite 1100
Cleveland, OH 44113-7213
Tel: 216-592-5000
Fax: 216-592-5009
jon.oebker@tuckerellis.com

A. Patrick Hamilton (0013909)
400 S. Fifth Street, Suite 103
Columbus, OH 43215
Tel: 614-464-4532
hamiltonlaw13909@yahoo.com
Attorneys for Respondent-Appellee Adoption by Gentle Care

Steven E. Hillman (0002578)
8581 Crail Court
Dublin, OH 43017
Tel: 614-766-6346
Fax: 614-766-6431
law@stevenhillman.com
Attorney for Petitioner-Appellant Caroline Stearns

Erik L. Smith (0089330)
62 West Weber Road
Columbus, OH 43202
Tel: 614-330-2739
edenstore@msn.com
Attorney for Amicus Curiae, Ohio Birthparent Group

s/Julia Cain
Julia Cain (0042696)

s/Barbara Thornell Ginn
Barbara Thornell Ginn (0083197)

Attorneys for Amicus Curiae,
American Academy of Adoption Attorneys