

IN THE SUPREME COURT OF OHIO

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

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

(Supporting Appellant, urging reversal)

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ARGUMENT IN REPLY

Proposition of Law: 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].

A. The mother's trial testimony did not show that the assessor fulfilled the options discussion requirement.

Gentle Care argues that Carri's trial testimony showed that Ms. Schumaker sufficiently discussed the options under Ohio Admin. Code 5101:2-42-09(B)(1). (Appellant's Merit Br. at 26.) Gentle Care errs because the testimony did not show that Ms. Schumaker verbally explained the options to Carri and explored them as solutions to her crisis, as division (B)(1) required. To the contrary, the testimony showed that Ms. Schumaker told Carri only that she could place the child in foster care to gain time.

Options to discuss under division (B)(1) include temporary custody agreement, temporary placement with a non-relative, and temporary placement with a relative. (Juv. Ct. Jgmt. at 8-9*; JFS 01676.) Although those options all involve "foster care" they differ in application and must therefore be explored with the parent separately. As the juvenile court found, division (B)(1) ensures that the agency:

"will *explain* the options to the parent and that the parent will have a chance to contemplate what was explained before surrendering. Those requirements demand giving the parent more than just a 'chance' to discuss or ask questions. They demand an actual verbal explanation of the options by the assessor—such as the explanation given at trial about 30-day agreements."

(Juv. Ct. Jgmt. at 29*.) (Emphasis in original.)

The explanation given at trial about 30-day agreements was the following: The temporary custody agreement involves a foster care placement for a statutorily limited

period of 30 days. (Tr. 8/19 at 29.) The mother is counseled meanwhile about what she might need to make a decision about surrendering or parenting. (Tr. 8/19 at 31.) That difference is why people in foster care circles call an agreement for temporary custody the “30-day agreement,” to distinguish it from other foster care options. (Tr. 7/31 at 11; Juv. Ct. Jgmt. at 9*.)

Gentle Care contends that, because Carri felt sure that Ms. Schumaker discussed the “adoption process” at Bob Evans, the discussion requirement under division (B)(1) must have been satisfied. (Appellee’s Merit Br. at 37 citing Tr. 7/29 at 15.) Gentle Care errs because the foster care options are not part of the adoption process, but are alternative procedures that *interrupt* the adoption process. Gentle Care’s own literature distinguishes them: The assessor will inform the parent of “all of [her] options” *and* “educate [her] on Ohio adoption law.” (Exh. M, pg. 1.) (Emphasis added.) Carri never argued that she misunderstood adoption. She argued that Ms. Schumaker did not explain alternatives to adoption.

Gentle Care contends that Carri’s testimony about “*the* foster care option” having been “raised in discussions” with Ms. Schumaker also showed that division (B)(1) was satisfied. (Appellee Merit Br. at 38.) (Emphasis added.) Gentle Care did not identify the testimony. The argument fails, however, because options must not only be “raised in discussions,” but also must be “verbally explained” to a level such as that “given at trial about 30-day agreements.” Nothing shows Ms. Schumaker having done that.

In addition, the temporary relative custody, temporary non-relative custody, and 30-day agreement alternatives are not just one foster care option that can be explained as “temporary care in a foster home to give you more time.” Instead, each option must

be explored as a solution to the parent's situation even if the parent does not desire more time. Calling the options "*the* foster care option" was therefore misleading.

Moreover, only a discussion at Bob Evans could satisfy division (B)(1) because that was the only pre-surrender meeting. Ms. Schumaker's ending that meeting before knowing Carri's "lifestyle or her family members or what her other choices might be" (Tr. 7/31 at 215: 8-9) shows that she did not explore Carri's situation adequately.

Gentle Care still insists that Carri had a "complete and accurate understanding" of how the temporary custody agreement option worked, as shown by this testimony:

Q. In the surrender—in the surrender process she asked if you wanted more time.

A. And yeah, by taking more time it meant he would have to go to a foster home in the interim. Yes, she did say you could have more time but he'd go to a foster home while I had that time.

(Appellee Br. at 39.)

Again, Gentle Care wrongly presented foster care as one option that need not be explained beyond telling the parent she can gain time by using it. Exploration of the options requires more than that. It requires explaining the nuances of each option to the parent and determining whether one of them might help the parent make a decision.

Gentle Care also misinterpreted the response "but he'd go to a foster home while I had that time." The word "but" implies that Carri would have entertained temporary relinquishment had it been possible without using foster care. Carri was obviously misguided because all temporary placements involve "foster care." Ms. Schumaker's duty then was not to consider all foster care options unavailable, but to explain the nature of foster care to ensure that Carri was not misguided. Gentle Care's insistence

that no further explanation was needed in Carri's situation proves that no further explanation was given.

Gentle Care's erroneous assumptions explain Carri's acknowledgment in the permanent surrender agreement. Carri acknowledged that Ms. Schumaker discussed "temporary custody and foster care and reviewed and signed Ohio laws . . ." on March 27, 2014. (Juv. Ct. Jgmt. at 4*.) Until that signing, however, Ms. Schumaker had consistently portrayed "temporary custody and foster care" as one general option that merely involved "placing the child in a foster home to give you more time." Erroneously assuming that Ms. Schumaker's explanation was complete, and left with her own pre-conceived notions of "foster care," Carri acknowledged the inadequate discussion.

The record overwhelmingly showed that Ms. Schumaker failed to give Carri "actual verbal explanations of the options" and to explore them as solutions to her crisis. Thus, Ms. Schumaker failed to take the steps required to ensure that Carri relinquished her child knowingly and voluntarily, leaving Gentle Care without authority to execute the permanent surrender. Accordingly, the permanent surrender agreement is void.

B. The juvenile court could not reasonably have found that Carri feigned the duress.

According to Gentle Care, the juvenile court reasonably found that Carri surrendered her child free of duress because she had an assertive personality, a reputation for being untruthful, ample time to consider adoption, an adequate understanding of the permanent surrender agreement, and she feigned the duress.

(Appellee's Merit Br. at 25-28; Juv. Ct. Jgmt. at 21-22*.)

All but the last of those rationales were diversions. Carri never argued that her permanent surrender agreement was a function of her personality, honesty, lack of time to consider adoption, or misunderstanding of the agreement. Rather, she claimed that the timing of Jeff's action left her with no practical choice but to surrender the child. Specifically, Carri was unemployed and eight and a half months pregnant when Jeff, her long-time domestic partner and father figure to her five children, told her for the first time that she could not bring the baby home, a position contrary to his previous behavior. Thus, keeping the baby meant the children being thrown out onto the street with very little notice. Carri therefore surrendered the sixth child to save the other five.

According to the juvenile court, however, Carri fabricated the story about Jeff while freely and voluntarily pursuing adoption. That conclusion defied logic. It was belied, first, by the undisputed suddenness of Carri's actions. Carri first contacted Gentle Care on March 15, 2014, three weeks before her due date. Two days later she revealed the adoption plan to her treating pre-natal physician, Dr. Amato who expressed surprised and concluded that the plan was spurred by Jeff "wanting' her to give up the baby since it will mess up their family." (TR 7/28 at Exh. F, pg. 55 (Dr.'s note of 3/17) and Amend. Pet., Exh G., T.d. 69.) (Internal quotation marks in original.)

Those undisputed facts were consistent with a mother suddenly being told by someone with great emotional and financial influence over her that she could not bring her baby home, a situation Gentle Care sometimes encounters. (Tr. 7/31 at 256: 22-24). Conversely, Carri would have no need to fabricate the story about Jeff for Gentle Care and Dr. Amato if she was pursuing adoption freely and voluntarily. To avoid those obvious truths, the juvenile court used evidence about Carri's general character to discredit all of the competent and credible evidence that supported her. Requiring a reviewing court to defer to such a result-oriented tactic makes the manifest weight of the evidence standard illusory.

Gentle Care contended, and the juvenile court found, that Carri's alleged circumstances would not have constituted duress anyway. That was incorrect because Jeff's action forced Carri to choose between keeping the family intact and keeping the baby, a dilemma that constitutes duress. *See Matter of Danielson*, 104 Misc.2d 33, 427 N.Y.S.2d 572, 574 (Rensselaer Cty.1980) (Duress existed because the mother was forced to choose between keeping her husband and keeping her child.) In *Danielson*, the mother's husband said he would leave her if she did not permanently surrender their child. *Id.* at 574. When the husband left her anyway, the mother sought to revoke the agreement on the ground of duress. *Id.* at 573-574. The Court found duress because the mother had been forced to choose between keeping her husband and keeping her child. *Id.* at 574. That held even though the agency had adequately explained the consequences of making a permanent surrender agreement. *Id.*

Carri suffered duress similarly. For six years, she, Jeff, and her five children had lived as a family. The children saw Jeff as a father figure while Carri assumed the role

of stay-at-home mother. When Jeff decided he would not live with the baby, Carri was eight and a half months pregnant and unemployed. Announcing that the baby could not come home put Carri under an impossible time crunch. Carri keeping the baby meant uprooting her other five children, finding new schools for them, and securing sufficient income and housing all while approaching a hospital stay for childbirth, an impossible task. Jeff's prohibition amounted to making Carri choose between keeping the family intact or keeping the baby, a dilemma like the mother's in *Danielson*. That Jeff was not the child's legal or biological father was immaterial, as those facts only made his action more understandable, not less coercive. Like the mother in *Danielson*, Carri made the permanent surrender agreement under duress.

C. The mother did not need to show that the duress was caused by Gentle Care.

The American Academy of Adoption Attorneys argued that Carri was not unduly influenced or pressured by Gentle Care. (Academy Br. at 7.) Gentle Care did not make that argument in its Merit Brief. To the extent the issue is being considered, Ohio Birthparent Group reminds the Court that a permanent surrender agreement can be invalidated because of duress caused by a non-party to the agreement. For example, in *In re Plumley*, 11th Dist. Portage No. 2003P0120, 2004-Ohio-116, the court invalidated a surrender agreement based solely on the actions of the parent's attorney. ¶ 20-25. Holding that duress from a non-party to the agreement is unrecognizable would bind a parent to a permanent surrender even if a non-party had held a gun to the parent's head, an absurd result.

Citing six cases from other states, the Court in *In re Adoption of Infant Girl Banda*, 53 Ohio App.3d 104, 559 N.E.2d 1373 (10 Dist.1988), held that a finding of

duress or undue influence invalidated an adoption consent. *Id.* at 108. Each case cited involved duress caused by a third or non-agency party: *Sims v. Sims*, 30 Ill.App.3d 406, 332 N.E.2d 36 (4 Dist.1975) (consent given under duress where grandparents told the pregnant mother that she could not bring the baby home); *In re Adoption of Anonymous*, 60 Misc.2d 854, 304 N.Y.S.2d 46 (Surr.Ct.1969) (13 year-old mother did not understand the consequences of her consent where she was under severe stress and uncertainty as to the real wishes of her parents); *In re Adoption of Robin*, 571 P.2d 850 (Okla.1977) (16 year-old mother signed consent because her stepmother threatened to kill her and her father if she refused); *Huebert v. Marshall*, 132 Ill.App.2d 793, 270 N.E.2d 464 (1 Dist.1971) (adult mother's consent was procured by duress where she wanted to keep the child but the father said he lost his job and was going to leave her); *In re Adoption of a Minor Child*, 109 R.I. 443, 287 A.2d 115 (1972) (mother's consent obtained by undue influence of her sister, the proposed adoptive mother, who told the mother that the baby could not leave the hospital until the bills were paid); *In re Adoption of Susko*, 363 Pa. 78, 69 A.2d 132 (1949) (undue influence exerted upon mother to give up her child where her brothers threatened an abortion and refused to let her bring the baby home).

Adoption statutes are in derogation of common law, thus requiring strict interpretation. *Lemley v. Kaiser*, 6 Ohio St.3d 258, 260, 452 N.E.2d 1304 (1983). Therefore, the statutes, and not the case law, dictate limitations on duress. See *Matter of Danielson*, 104 Misc.2d 33, 427 N.Y.S.2d 572, 574 (Rensselaer Cty.1980) (Mother's permanent surrender could be invalidated based on an ultimatum from her husband because the statute did not indicate that the duress had to be on the part of the agency.) Like New York law at the time of *Danielson*, no Ohio statute requires the

duress to be on the part of the agency when judging the validity of a permanent surrender. Thus, invalidating a permanent surrender agreement on the ground of duress does not require showing that the duress came from a party to the agreement.

CONCLUSION

Accordingly, the Court should reject Gentle Care's arguments, reverse the Court of Appeals' decision, and order C.C.S. returned to his mother.

Respectfully submitted,

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