[Cite as *In re C.C.S.*, 2015-Ohio-2126.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of: [C.C.S.]	:	
[C.L.S.]	:	No. 14AP-739 (C.P.C. No. 14JU-8823)
Petitioner-Appellant,	:	(REGULAR CALENDAR)
v.	:	
Adoption by Gentle Care,	:	
Respondent-Appellee.	:	

D E C I S I O N

Rendered on June 2, 2015

Erik L. Smith; *Steven E. Hillman*, for appellant.

A. Patrick Hamilton; *Tucker Ellis LLP*, and *Jon W. Oebker*, for appellee.

APPEAL from the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch

BRUNNER, J.

{¶ 1} This appeal is from the denial of a writ of habeas corpus to invalidate petitioner-appellant C.L.S.'s permanent surrender of custody of her minor child for adoption to respondent-appellee Adoption by Gentle Care ("Gentle Care"). The trial court held that she failed to prove by clear and convincing evidence that the written permanent surrender she executed was a product of fraud, duress or undue influence.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} Appellant and her five children have lived with J.G. from 2008. J.G. worked to support the household while appellant stayed home and tended to the children in their Dublin residence. In 2013, appellant became pregnant by an "old friend." J.G., who is not the father of any of appellant's five children, would not agree to bring the child

into the home. Appellant contacted Gentle Care, a licensed, private child placement agency, on March 15, 2014. Four days before the child was born, appellant met with a Gentle Care social worker, Kelly Schumaker. Appellant states that she explained to Schumaker that the decision was a nightmare, but appellant had no choice. Appellant stated that she was 90 percent sure she wanted to surrender the child and wanted the process to be as fast and painless as possible. Appellant claimed that J.G. was making her surrender the child and that the choice was not her own. Schumaker gave appellant Gentle Care's standard forms to review and complete. Appellant signed the documents. Appellant feared that if the adoption did not go through, the child would be placed in foster care. She did not want to look at the documents, and Schumaker gave her a folder enclosing the forms to take home and review. Schumaker read from her own forms and explained the documents to appellant.

{¶ 3} Appellant's prenatal care physician, Dr. Joseph Amato, expressed concern that she had not sufficiently thought through her decision, appellant having expressed that J.G. wanted her to give up the baby and that doing so was her best way of making things work for everyone else in the home. Appellant's scheduled cesarean section took place on April 7, 2014. Three days later, on April 10, 2014, appellant signed a permanent surrender agreement at her home. Schumaker and another Gentle Care social worker, Beth Simmons, were present. Appellant points to portions of the recorded conversation that are unintelligible, including her responses to questions about whether she signed the permanent surrender agreement voluntarily. The recorded portions include the following:

> Q. In your own words can you explain what we're doing today?
>
> * * *
>
> A. I'm giving up -- I'm signing my parental rights.
>
> Q. Okay. Yeah. Signing your parental rights to Adoption by Gentle Care?
>
> A. Yes.
>
> Q. Making an adoption plan.

A. Yes.

Q. Is that right?

A. Yes.

Q. Okay. That's okay. And how long have you been considering adoption?

A. For approximately a month.

Q. Okay.

A. Three, four weeks.

Q. Three to four weeks? Do you feel like that's a long enough time to consider all of your options?

A. Yes.

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. And do you understand that you have the right to seek to [sic] an attorney before we go on?
A. Yes.

Q. Would you like to talk to one?

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. Is that right?

A. Like just (inaudible) my best friend.

* * *

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.

* * *

Q. Okay. And before we go on, are you aware that the decision you're making is a final decision that cannot be changed?

A. Yes.

Q. Do you have any questions?
A. No.

(July 29, 2014 Tr. 35-38, 43.)

{¶ 4} Appellant also signed on April 10, 2014, an affidavit of relinquishment, which stated:

> I understand and agree that I have the right to seek the counsel of any attorney of my choosing before making the decision as to parenting or permanently placing my child for adoption with Adoption by Gentle Care: that having

> discusse[d] this decision with my attorney or having declined to do so, I have the absolute right to refuse to place my child for adoption; that I consider the signing of permanent surrender of child to be a final and irrevocable decision; that if I do permanently place my child, the relationship between me and the child is permanently severed, as provided for in the child's placement and adoption statutes.
>
> This process terminates the legal rights and responsibilities that existed between me and the child.

(July 29, 2014 Tr. 44.)

{¶ 5} The permanent surrender document appellant signed includes Schumaker's written note that appellant was unable to care for the child because she thought it would be emotionally best for the child and her family if the child were placed for adoption with someone to ensure the child is in a stable environment. The document includes language that, with appellant's signature, all of her rights as a parent to the child will end. Further language in the document is as follows:

> I have read this permanent surrender or it was read to me before I signed it. I was given the opportunity to ask questions concerning this permanent surrender, and those questions were fully answered to my satisfaction. I understand and agree to the terms of this permanent surrender of my child. I am signing this permanent surrender of my child voluntarily and at least seventy-two hours after the birth of the child.

(July 29, 2014 Tr. 51.)

{¶ 6} Claiming that J.G. had expressed remorse for forcing her to surrender the child, appellant contacted Schumaker on April 13, 2014 and asked her to return the child. The request was denied. Appellant petitioned the Franklin County Probate Court to revoke the permanent surrender. 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. Appellant's petition with the probate court was dismissed for lack of jurisdiction.

{¶ 7} Appellant then petitioned the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, for a writ of habeas corpus and alleged that she had signed the permanent surrender agreement under duress. At the close of

appellant's evidence, the juvenile court granted Gentle Care's motion to dismiss the petition under Civ.R. 41(B)(2).

II. ASSIGNMENTS OF ERROR

{¶ 8} Appellant appeals assigning four assignments of error for review:

> I. THE TRIAL COURT ERRED IN DISMISSING THE PETITION FOR HABEAS CORPUS BECAUSE THE EVIDENCE CLEARLY SHOWED THAT APPELLANT SIGNED THE PERMANENT SURRENDER AGREEMENT UNDER DURESS FROM HER DE FACTO HUSBAND OR AS A RESULT OF BEING UNDULY INFLUENCED.
>
> II. ALTERNATIVELY, THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE BY IMPROPERLY EXCLUDING EVIDENCE OF COMMUNICATIONS BETWEEN APPELLANT AND HER DE FACTO HUSBAND THAT WOULD SHOW HOW APPELLANT WAS COERCED INTO SURRENDERING HER CHILD.
>
> III. THE TRIAL COURT ERRED IN DISMISSING THE PETITION FOR HABEAS CORPUS BECAUSE THE AGENCY DID NOT TIMELY AND ADEQUATELY DISCUSS THE OPTIONS AVAILABLE TO APPELLANT IN LIEU OF SURRENDERING THE CHILD, AS REQUIRED BY OAC: 5105:2-42-09(B).
>
> IV. THE TRIAL COURT ERRED IN GRANTING A "DIRECTED VERDICT" IN A BENCH TRIAL BY NOT DETERMINING WHETHER EVIDENCE OF SUBSTANTIAL, PROBATIVE VALUE SUPPORTED EACH ELEMENT OF THE PLAINTIFF'S CLAIMS. IF THE PLAINTIFF HAS PRESENTED THAT EVIDENCE AND THE TRIAL COURT STILL GRANTED A "DIRECTED VERDICT WITHOUT WEIGHING THE EVIDENCE AND DETERMINING THE CREDIBILITY OF THE WITNESSES, THEN AN APPELLATE COURT CANNOT TREAT THE "DIRECTED VERDICT" AS A CIV.R. 41(B)(2) INVOLUNTARY DISMISSAL.

We address appellant's fourth assignment of error and find it dispositive so as to render moot our consideration of the others.

III. DISMISSAL UNDER CIV.R. 41(B)(2)

{¶ 9} Appellant claims that she presented sufficient evidence to avoid a directed verdict, which the trial court treated as an involuntary dismissal under Civ.R. 41(B)(2).

The standard of review on Civ.R. 41(B)(2) motions differ from that on a motion for a directed verdict. As we stated in *Jarupan v. Hanna*, 173 Ohio App.3d 284, 2007-Ohio-5081, ¶ 9 (10th Dist.):

> In contrast to Civ.R. 50(A)(4), Civ.R. 41(B)(2) allows a trial court to determine the facts by weighing the evidence and resolving any conflicts therein. * * * If, after evaluating the evidence, a trial court finds that the plaintiff has failed to meet her burden of proof, then the trial court may enter judgment in the defendant's favor. * * * Therefore, even if the plaintiff has presented evidence on each element of her claims, a trial court may still order a dismissal if it finds that the plaintiff's evidence is not persuasive or credible enough to satisfy her burden of proof.

"An appellate court will not overturn a Civ.R. 41(B)(2) involuntary dismissal unless it is contrary to law or against the manifest weight of the evidence." *Id*.

{¶ 10} However, "when a trial court grants a 'directed verdict' in a bench trial, an appellate court must first determine whether evidence of substantial, probative value supports each element of the plaintiff's claims. If the plaintiff has indeed presented such evidence and the trial court nevertheless granted a 'directed verdict' without weighing the evidence and determining the credibility of the witnesses, then an appellate court cannot treat the 'directed verdict' as a Civ.R. 41(B)(2) involuntary dismissal. The appellate court must instead remand the case to the trial court so that that court can fulfil its role as the trier of fact." *Id*. at ¶ 14.

{¶ 11} The trial court judgment does not include any discussion of appellant's principal claim of duress: that J.G. would not tolerate the child in the house and would dismiss appellant and all of the children if she kept the baby. Appellant did present evidence to support her claim of duress, but the trial court did not mention this evidence, let alone weigh it and determine the credibility of the witnesses in this regard. We therefore sustain appellant's fourth assignment of error and remand the case to the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, so the trial court can fulfill its role as the trier of fact.

{¶ 12} "Absent a weighing of the evidence, an appellate court cannot review the 'directed verdict' under the manifest-weight standard applicable to Civ.R. 41(B)(2) in voluntary dismissals." *Id*. at ¶ 13. Beyond the court's mischaracterization of appellant's

situation as "buyer's remorse" or the trial court's characterization of appellant's reasons for seeking to void or rescind the surrender of permanent custody as being "no different for any other mother with a change of heart about the surrender," the requisite determinations have not been made by the trial court of "whether evidence of substantial, probative value supports each element of the plaintiff's claims" and if so, whether after "weighing the evidence and determining the credibility of the witnesses" appellant is or is not entitled to relief. (Judgment, 4.) *Jarupan* at ¶ 14.

{¶ 13} We are constrained by the longstanding principle of law that a court speaks through its journalized judgment entry:

> It is well-settled law that a court speaks through its journal entries. See *State ex rel. Fogle v. Steiner*, 74 Ohio St.3d 158, 656 N.E.2d 1288, 1995-Ohio-278; *Gaskins v. Shiplevy*, 76 Ohio St.3d 380, 667 N.E.2d 1194, 1996-Ohio-387; *State ex rel. Leadingham v. Schisler*, 4th Dist. No. 02CA2827, 2003-Ohio-7293; *State v. Ellington* (1987), 36 Ohio App.3d 76, 521 N.E.2d 504. Without the transcript, we don't know whether the trial court actually did conduct the appropriate analysis or make the appropriate findings under the correct statute. However, even assuming, arguendo, that the trial court did conduct an analysis on the record using the correct statute, this is still problematic. If a journal entry and the trial judge's opinion are in conflict, the journal entry controls. *Andrews v. Bd. of Liquor Control* (1955), 164 Ohio St. 275, 131 N.E.2d 390. Furthermore, where a journalized order and the trial judge's comments from the bench are contradictory, the journalized order controls. *State v. Burnett* (Sept. 18, 1997), 8th Dist. No. 72373, citing *Economy Fire & Cas. Co. v. Craft Gen. Contractors, Inc.* (1982), 7 Ohio App.3d 335, 455 N.E.2d 1037. See also *Scarbrough v. Scarbrough* (July 18, 2001), 9th Dist. No. 00CA007743 (a trial court speaks through its journal entry and an oral pronouncement of judgment is not binding).

State v. Hillman, 10th Dist. No. 09AP-478, 2010-Ohio-256, ¶ 15.

{¶ 14} The trial court's entry does not inform us that it was able or permitted to enter a directed verdict for Gentle Care and involuntarily dismiss the matter pursuant to Civ.R. 41(B)(2) because the findings required to support such action do not exist in the court's judgment entry denying appellant's petition.

{¶ 15} Accordingly, we remand the matter so the trial court may explicate and weigh the circumstances and pressures it previously found appellant to have "very clearly

described," but not to have been "justification or sufficient to establish an involuntary surrender, or duress or undue influence necessary to void or rescind her permanent surrender of custody for purposes of adoption." (Judgment, 4.)

{¶ 16} In post-briefing motions, Gentle Care sought to strike certain statements of fact in the reply brief as unsupported, and appellant asked us to strike Gentle Care's motion to strike. Whether appellant's unsupported points may or may not be treated as fair comment on the evidence, or argument, they are not material to our determination and therefore both motions are denied.

IV. CONCLUSION

{¶ 17} Appellant's fourth assignment of error is sustained, rendering the remaining three assignments of error moot. This matter is remanded to the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, consistent with this decision.

Motions denied.
Judgment reversed and
cause remanded with instructions.

HORTON, J., concurs.
BROWN, P.J., dissents.

BROWN, P.J., dissenting.

{¶ 18} I respectfully disagree with the disposition of appellant's fourth assignment of error in the majority decision. The trial court acknowledges that "[C.L.S.] very clearly described the circumstances and pressures under which she found herself" and found she did not establish duress necessary to void the permanent surrender of her child.

I would overrule appellant's fourth assignment of error.