

Case No: SC87548

IN THE SUPREME COURT OF MISSOURI

IN THE MATTER OF BABY GIRL P.

E.P.,

Appellant,

vs.

A.M. and L.M.

and

Adoptions of Babies and Children Inc.,

Respondents.

SUBSTITUTE BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities.....5

Jurisdictional Statement.....7

Statement of Facts.....8

 Procedural History Including Case No. WD 64497.....8

 History and Birth of Baby Girl P.....11

 Meeting on June 11, 2004, and Consent

 Hearing on June 18, 2004.....16

 Withdrawal of Consent20

 Procedural History Following WD 64497.....26

Points Relied On.....28

Argument.....31

I. The trial court erred in denying the Motion of a biological mother to withdraw her previously given consent to the adoption of her child, because § 453.030.7 RSMo. provides that a biological parent may withdraw her consent at any time prior to the acceptance and approval of the consent by a judge, in that the substantial weight of the evidence presented at trial established that the actions taken by the biological mother to notify the other parties involved in the case that she no longer wished to consent

to the adoption of her child constituted a withdrawal of her consent, said actions being taken prior to the approval and acceptance of the biological mother's consent by a judge.....31

II. The trial court erred in denying the motion of a biological mother to withdraw her previously given consent to the adoption of her child, because Missouri law provides that a parent is to be relieved from her previously given consent where said consent was given while she was under duress from a "force of circumstances", in that the substantial weight of the evidence produced at trial established that the biological mother had little, if any, knowledge of the legal system under which the adoption would be granted, the mother had little, if any, ability to communicate in the English language, the attorney hired by the Respondents to represent the mother did not speak her native language, and the mother was given false information by the Respondents regarding the status of her consent, such that the mother's consent was given while she was under duress of a "force of circumstances".....48

III. The trial court erred in denying the motion of a biological mother to withdraw her previously given consent to the adoption of her

child, because Missouri law provides that a biological parent will be allowed to withdraw her consent if said consent was obtained through fraud or misrepresentation, or for “good cause”, in that the substantial weight of the evidence produced at trial established that, in executing said consent, the biological mother reasonably relied upon numerous misrepresentations made to her by the Respondents, their agents and representatives, which effectively precluded the biological mother from providing a knowing and voluntary consent to the adoption of her child, and any inaction by the biological mother to withdraw her consent after the execution thereof was also induced by numerous misrepresentations made to her by the Respondents.....53

Conclusion.....68

Certificate of Service.....70

Certificate of Compliance.....70

TABLE OF AUTHORITIES

Cases:

<i>Epperson v. Director of Revenue</i> , 841 S.W.2d 252 (Mo. App. 1992).....	35, 40
<i>Gruett v. Nesbitt</i> , 17 P.3d 1090 (Or. App. 2001).....	46-47
<i>In Re Adoption of H.M.C.</i> , 11 S.W.3d 81 (Mo. App. 2000).....	31, 48, 53
<i>In Re Adoption/Guardianship No. 11137</i> , 664 A.2d 443 (Md. App. 1995).....	41, 42, 45, 47
<i>In Re D.C.C.</i> , 935 S.W.2d 657 (Mo. App. 1996).....	54, 67
<i>In the Interest of A.N.M., et al.</i> , 517 S.E.2d 548 (Ga. App. 1999).....	47
<i>In the Interest of: Baby Girl P.</i> , 159 S.W.3d 862 (Mo. App. 2005).....	10, 32, 41, 43
<i>In the Matter of D., et al.</i> , 408 S.W.2d 361 (Mo. App. 1966).....	49, 52, 54
<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923).....	32
<i>Norber v. Marcotte</i> , 134 S.W.3d 651 (Mo. App. 2004).....	68
<i>Sanderson v. Porta-Fab Corp.</i> , 989 S.W.2d 599 (Mo. App. 1999).....	35
<i>Solesbee v. Balkcom</i> , 339 U.S. 9 (1950).....	44
<i>Troxel v. Granville</i> , 530 U.S. 57, 65 (2000).....	44
<i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997)	32
<i>West v. Witschner</i> , 428 S.W.2d 538 (Mo. 1968).....	35

Statutes and Rules:

§ 453.030 RSMo.2003.....7, 10, 32, 41, 43, 44, 46, 49, 68

§ 477.070 RSMo. 2004.....7

§ 5-311 (c) (1) Md. Family Law Code 2003.....45

Missouri Supreme Court Rule 74.06.....54

Missouri Supreme Court Rule 83.04.....7

Missouri Supreme Court Rule 84.14.....68

Constitutional Provisions:

U.S. Const. Amendment 14 § 1.....44

Mo. Const. Art. I § 10.....44

Mo. Const. Art. V § 10.....7

Restatements of Law:

Restatement of Agency § 268.....46

Miscellaneous Authorities:

Black’s Law Dictionary.....42, 43

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the Circuit Court of Jackson County, Missouri, Family Division, denying the biological mother of a child the opportunity to withdraw her previously given consent to the adoption of her child, as provided in § 453.030.7 RSMo., and under the applicable laws of the State of Missouri. Jackson County is within the territorial jurisdiction of the Western District of the Missouri Court of Appeals. § 477.070 RSMo. 2004. Following opinion by that court, issued on January 3, 2006, the Supreme Court of Missouri granted transfer pursuant to Supreme Court Rule 83.04, because of the general interest and importance of a question involved in the case, or for the purpose of reexamining the existing law, pursuant to Article V § 10 of the Missouri Constitution. Therefore, the jurisdiction of this Court is properly invoked.

STATEMENT OF FACTS

Procedural History Including Case No. WD64497

Baby Girl P. was born at Truman Medical Center, located in Kansas City, Jackson County, Missouri, at approximately 1:33 a.m. on June 9, 2004. (Transferred L.F. 3). On June 11, 2004, at approximately 9:58 a.m., the biological mother of the child, referred to herein as “E.P.”, executed a Consent to Termination of Parental Rights and Consent to Adoption (hereinafter referred to as the “Consent”). (Transferred L.F. 3).

A hearing was held on June 18, 2004, before Commissioner Geoffrey E. Allen, during which E.P. testified regarding the execution of the consent, and the circumstances surrounding the birth of her child. (TR 2-22). Subsequent to the consent hearing, the trial court held a temporary custody hearing pursuant to which the child was placed in the temporary custody of the adoptive parents. (TR 394, ll. 9-12).

On June 22, 2004, the court entered its Judgment adopting the Findings and Recommendations issued by Commissioner Allen pursuant to the consent hearing. (Transferred L.F. 17 – 20).

On July 2, 2004, E.P. filed, “pro se”, her Motion for Rehearing, to Withdraw Natural Mother’s Consent to Termination of Parental Rights and Consent to Adoption, Request to be Notified of all Future Hearings, and

Request for Counsel to be Appointed, along with her Statement in Support of said Motion. (Transferred L.F. 21-23). In response to this Motion, on July 9, 2004, the undersigned was appointed as counsel for E.P., and the matter was set for trial on the Mother's Motion to Withdraw her Consent on July 29, 2004. (Transferred L.F. 34).

On July 29, 2004, E.P. requested leave, without objection, to file Mother's Amended Motion for Leave to Withdraw Consent to Termination of Parental Rights and Adoption. (Transferred L.F. 39-42; TR 32, ll. 14-20). Trial commenced on July 29, 2004, and continued through July 30, 2004. (TR 23-440).

On August 2, 2004, Commissioner Geoffrey E. Allen issued his Findings and Recommendations, which were adopted and confirmed by the Honorable Jon R. Gray on that same date. The Judgment was mailed on August 3, 2004, to all parties. (Transferred L.F. 43-46).

E.P. then filed "Mother's Motion for Rehearing" with the court on August 11, 2004. (Transferred L.F. 51-61). On August 12, 2004, counsel for E.P. received a "Nunc Pro Tunc Findings and Recommendations", issued by Commissioner Allen and adopted and confirmed by the court on August 5, 2004. (Transferred L.F. 47-50). The Judgment had been mailed on August

10, 2004, and was not received until after E.P. had filed her Motion for Rehearing. (Transferred L.F. 50).

On August 20, 2004, E.P. filed Mother's Amended Motion for Rehearing. This Motion supplemented the original Mother's Motion for Rehearing only with respect to the reference to the Nunc Pro Tunc Findings and Recommendations. (Transferred L.F. 62-72).

The Mother's Motion for Rehearing and Amended Motion for Rehearing were denied by Judge Jon R. Gray on August 23, 2004. (Transferred L.F. 85).

The Notice of Appeal regarding Case No. WD64497 was filed on August 31, 2004. (Transferred L.F. 86-89).

On April 12, 2005, the Missouri Court of Appeals, Western District, filed its opinion in Case No. WD64497. *In the Interest of: Baby Girl P.*, 159 S.W.3d 862 (Mo. App. 2005); (L.F. 1-3). The appellant's amended brief raised three points of error regarding the Judgment of the trial court. Focusing on point I raised by the mother, the Appellate Court concluded that the circuit court erred in requiring that a withdrawal of consent be in writing. As stated, "[f]or this reason, the case must be remanded to determine whether, *under the circumstances of the case*, E.P. orally communicated a withdrawal of consent under section 453.030.7 before the trial court accepted her previously given

consent.” (emphasis added). Because the Court of Appeals determined that the trial court made an error of law, the court did not consider the remaining issues raised by E.P. in points II and III of the appellant’s amended brief. (L.F. 3). Instead, the court reversed the trial court’s order denying E.P.’s request to withdraw her consent and remanded the case for further proceedings consistent with the opinion in WD64497. (L.F. 3).

History and Birth of Baby Girl P.

E.P. was born on October 6, 1974, in a small village in Guatemala. (TR 234, ll.17 – 25; TR 238, ll. 8-9). She is of Hispanic decent, Catholic, and has a fourth grade Guatemalan education. (Transferred L.F. 6-9; TR 238, ll. 12-14). She speaks and understands very little of the English language and, although Spanish is her primary language, has difficulty reading and understanding some of it as well. (TR 379, ll. 16-19; 380, 1.22 – 381, 1.3; 381, 1.8 – 382, 1.10; 384, ll. 7–19.)

E.P.’s first child, B. P., now six years of age, resides with her and she has always provided for his care. (TR 236, ll. 1-6). In October 2003, E.P. learned that she was pregnant with her second child. The pregnancy was a surprise to her due to the fact that the father had told her it was not possible for him to father any children. (TR 236, 1.7 – 237, 1.16). Upon learning of the pregnancy, the father abandoned E.P. (TR 236, 1.19 – 237, 1.7).

E.P.'s pregnancy was complicated with various health problems. She vomited much of the time and was hospitalized on two occasions due to dehydration. She was also diagnosed with gestational diabetes and participated in testing to determine if the child had any birth defects, due to some concerns by her doctor. (TR 239, l.1 – 240, l.4). Despite these difficulties, the mother attended all of her prenatal appointments and consistently followed her doctors' recommendations to care for the developing child. (TR 240, ll. 5–14).

It was during this time that the mother first considered placing her child up for adoption. During one of her prenatal visits at Truman Medical Center, E.P. spoke about this option, with the aid of an interpreter, to Lori Smith, a social worker employed by the hospital. (TR 240, l.15 - 241, l.30). Thereafter, Ms. Smith contacted an adoption agency, Adoptions of Babies and Children, Inc. ("ABC Adoptions"), one of the respondents in this action. ABC Adoptions is a private agency that facilitates adoptions and provides services to birth parents and prospective adoptive parents. (TR 103, l.24 – 104, l.19).

In April 2004, Catherine Welch, a representative and agent of ABC Adoptions, contacted E.P. at Truman Medical Center. (TR 99, ll. 12-13; TR 176, ll. 9-21). Ms. Welch is a "birth parent coordinator" for ABC Adoptions and has been employed in that capacity since June 2003. (TR 100, ll. 8-10). A

birth parent coordinator is a person who provides assistance and services to birth parents who wish to make an adoption plan for their children. (TR 98, 1.25 – 99, 1.8). Ms. Welch spoke very little Spanish and had never worked with a client who did not speak the English language before this case. (TR 101, ll. 1–25; 102, ll. 3-19).

Over the next several months, Ms. Welch met with E.P. on at least seven occasions at Truman Medical Center, communicating with E.P. with the aid of an interpreter. (TR 101, ll. 11-18). She also provided transportation for E.P. on several occasions. (TR 106, ll. 9-11). During this time, Ms. Welch prepared a Social History of E.P., and was well aware of E.P.’s educational, social, and cultural background. (Transferred L.F. 6-9; TR 106, 1.12 – 107, 1.19).

According to Ms. Welch, educating and advising birth parents on Missouri adoption law was another function of her role as birth parent coordinator. (TR 108, ll. 2-6). She testified that she explained to E.P. during one of these meetings that E.P. could not consent to the adoption until the child was at least forty-eight (48) hours old, the fact that it would be necessary for E.P. to have an attorney during the consent process, and that E.P. would need to attend a court hearing at some point. (TR 108, ll. 13-21). Although

these details were told to E.P., Ms. Welch did not tell the mother when she could no longer make the decision to parent her child. (TR 109, ll. 11-18).

Ms. Welch testified during trial that a birth parent coordinator's chief duty is to the birth parent, and that, throughout the adoption process, the coordinator becomes the sole source of advice, support and counsel for the parent, who looks to them for the majority of their needs. (TR 177, ll. 16-22; 178, 1.17 – 179, 1.16).

It was also explained to E.P. that, if she gave up her child for adoption, the costs of the birth parent coordinator services, as well as all of her medical expenses incurred during the pregnancy and birth of the child, would be paid by the agency. Ms. Welch explained that such costs are covered by fees charged to the prospective adoptive parents when they enlist the agency services. (TR 104, 1.20 – 105, 1.3; 111, 1.21 – 114, 1.22).

Ms. Welch further testified that she told E .P. that the agency would select and pay for an attorney for E.P. during the consent process. (TR 109, 1.19 - 110, 1.1). Although Ms. Welch told E.P. that if she had her own attorney she could work with them, E.P. was not told that the agency would pay for another attorney's fees or that she had an option of hiring an attorney that spoke Spanish, her native language. (TR 110, ll. 6 -12). The payment of

all of these expenses was contingent upon E.P. placing her child for adoption. (TR 180, ll. 3-21).

It is undisputed that, during her pregnancy, E.P. consistently indicated to Ms. Welch that she wished to place her child up for adoption. She worked with Ms. Welch in selecting a family for this purpose and she depended on Ms. Welch to assist her with this process. (TR 364, l. 12 – 354, l.25).

On June 9, 2004, E.P. gave birth to Baby Girl P. at approximately 1:30 a.m. at Truman Medical Center, in Kansas City, Missouri. Ms. Welch spoke to her later that day and E.P. indicated that she wanted to go ahead with the adoption process. (TR 120, ll. 4-17).

Prior to the birth of Baby Girl P., E.P. had developed a birth plan with the help of Ms. Welch outlining her wishes regarding contact with the child after the birth. (TR 161, l.23 - 162, l.5). Although this plan was merely a guide that could be changed at any time, E.P. did not understand this fact. E.P. met with the hospital social worker about the plan and believed that she could not see her child after birth without permission of the hospital social worker. (TR 246, l.6 – 247, l.1). She attempted to visit her child on two occasions at the hospital nursery, but was questioned about her presence, so she returned to her room. (TR 247, l.7 248, l.17). Before she was discharged from the hospital on June 10, 2004, E.P. was encouraged by her cousin, who

was visiting, to take her child home with her. However, E.P. did not believe that this was still possible, due to the fact that she had completed paperwork with Ms. Welch and hospital personnel regarding the birth plan and social history. (TR 248, 1.16 – 249, 1.11).

Meeting on June 11, 2004, and Consent Hearing on June 18, 2004

On June 11, 2004, Ms. Welch took E.P. to a meeting with Kevin Kenney, an attorney who had been contacted, selected and paid for by ABC Adoptions and, indirectly, by the adoptive parents. (TR 110, ll. 2-5). Ms. Welch was familiar with Mr. Kenney due to the fact that he had represented other birth parents and worked with her agency in the past. (TR 120, 1.18 – 121, 1.11). Mr. Kenney does not speak Spanish and was aware of the fact that E.P. does not speak nor understand the English language. (TR 121, ll. 12-16). E.P. had never spoken to, nor met, Mr. Kenney before June 11, 2004, and mistakenly, but understandably, believed that Mr. Kenney represented the agency's interests and not her own. (TR 43, ll. 14-18; 249, 1.14 - 250, 1.3).

Present at the meeting were Mr. Kenney, E.P., Ms. Welch, E.P.'s son, and Ms. Enedina Wilbers, an interpreter hired by Mr. Kenney to assist with the communication process. (TR 122, ll. 3-6; 201, 1.24 – 202, 1.3). Ms. Welch was present for a majority of the meeting between E.P. and Mr. Kenney, other than a short period of time when Ms. Welch volunteered to go outside the

office with E.P.'s son, due to the fact that he was being a little disruptive. (TR 202, 1.4 – 203, 1.3).

E.P. was crying and upset during the meeting. (TR 205, ll. 8-19). E.P. was presented with a Consent to the Termination of her Parental Rights and Adoption, which was read to her by the interpreter, due to the fact that the consent form was written in English. E.P. signed the Consent. (TR 206, ll. 6-15). It was not explained to E.P. that she could still parent her child or that, even if she signed the Consent, she could still change her mind before or after she went to Court. (TR 206, 1.16 – 207, 1.5). In fact, E.P. was told by Mr. Kenney (through the interpreter) that, after she signed the Consent, she could not change her mind about the adoption unless she could prove that she had been under the influence of drugs or did not have a clear state of mind at the time she signed the Consent. (TR 207, ll. 6-10). During trial, Ms. Wilbers testified, over much objection, that she believed that, when E.P. signed the Consent on June 11, 2004, the decision regarding the adoption was final. (TR 207, 1.11 – 208, 1.4; 208, 1.25 – 209, 1.20; 211, ll. 1–14). This conclusion was based upon what was communicated by Mr. Kenney to the interpreter, and what she, in turn, stated to E.P. (TR 203, ll. 4 – 12; 211, ll. 13-14).

Arrangements were made on June 11, 2004, for E.P. to attend a hearing regarding the Consent on June 18, 2004. During the time period of June 11-

18, 2004, E.P. experienced physical complications from the birth of her child and did not feel well emotionally. (TR 253, ll. 15-22). Although E.P. was no longer sure that she wanted to give her child up for adoption, she did not communicate this fact to anyone because, much like the interpreter, Ms. Wilbers, E.P. thought it was too late for her to change her mind. (TR 253, 1.23 - 254, 1.16). Ms. Welch had no contact with E.P. during this time period and did not ask E.P., after June 11, 2004, if she needed more time to make her decision, or if she had changed her mind about the adoption. (TR 125, ll. 14-16; 126, ll. 18-25).

E.P. testified during the June 18, 2004, hearing regarding her understanding of the Consent, and was questioned by her attorney, Mr. Kenney, as well as Commissioner Allen. An interpreter translated for E.P. during the hearing due to the language barrier. (TR 2 – 22, generally).

E.P. had never been in any type of courtroom before and was afraid, intimidated, and emotionally upset during the hearing. (TR 254, 1.17 – 255, 1.11). When questioned by her attorney and Commissioner Allen regarding the adoption, she seemed confused at times. (TR 12, 1.22 – 13, 1.3). At one point, the Court explained to E.P. that she was not “stuck” with the consent and that there was a possibility that Baby Girl P. would not be permanently placed with the proposed adoptive parents. (TR 15, 1.23 - 16, 1.23). This statement

surprised E.P., since she believed that she no longer had the option to change her mind. (TR 255, 1.25 – 256, 1.8; 262, ll. 3-12). Although E.P. stated that she did understand and wanted the court to accept her Consent, her questions to the court illustrate that she was learning of this fact for the first time. (TR 16, ll. 16–17, 1.18; 261, ll. 6– 262, 1. 12). Nonetheless, she told the Court that she did wish to go forward with the process. (TR 262, ll. 3–8). It was not E.P.’s intention to deceive the Court, but she was confused and fearful of what would happen if she told the Commissioner and others present in the courtroom that she did not want to give her child up for adoption. (TR 255, ll. 1–11; 260, ll. 3–15; 262, ll. 9–16).

Immediately following the hearing, E.P. questioned Ms. Welch regarding the location of the child due to the fact that the prospective birth parents were at the hearing without Baby Girl P. She had mistakenly believed that the infant was already placed with them. (TR 127, ll. 8-18; 262, 1.17 – 263, 1.6). When she learned that the child was not with the adoptive parents, E.P. realized and understood for the first time that what the Commissioner had explained was true and that her parental rights had not yet been terminated. (TR 262, ll. 9 – 25).

Withdrawal of Consent

On June 19, 2004, the day after the Consent hearing, E.P. began orally communicating her withdrawal of the consent to numerous parties. (TR 128, ll. 17-25; 264 – 283, generally). She first tried to call Ms. Welch at the agency early in the morning on June 19, 2004, and when she couldn't reach her there, she called her on her cell phone. When she spoke to Ms. Welch, E.P. told her she wanted her baby with her. (TR 264, 1.14 – 265, 1.16). Ms. Welch told her that she was sorry, it was not possible, she had already gone to Court and it was finished. (TR 265, ll. 16 -17). Although Ms. Welch testified that she could not understand exactly what E.P. was saying on June 19, 2004, she did state that it was clear that E.P. was crying, very upset, and said something about the “baby”. (TR 129, ll. 1–18; 131, ll. 20 – 22). Ms. Welch acknowledged that on June 19, 2004, she believed it was possible that E.P. had changed her mind about the adoption. (TR 132, 1.11 – 133, 1.4; 183, 1. 18 – 184, 1.21).

In response to this situation, Ms. Welch told E.P. that she would call her back on Monday with the aid of an interpreter. (TR 129, ll. 19–22). Ms. Welch took no steps on Saturday, June 19, 2004, to obtain an interpreter or otherwise assist E.P. in withdrawing her consent. (TR 130, 1.24 – 131, 1.1 185, 1.9 – 186, 1.17). Ms. Welch testified during trial that she knew that time was

of the essence in this situation and that the Consent was not final until it was accepted by a Judge. (TR 109, ll. 1 – 18; 185, 1.19 - 23).

However, Ms. Welch did make several other contacts on Saturday, June 19, 2004. She first called Susan Dunaway, the adoptive parent coordinator, and told her that she had spoken to E.P. and that E.P. was upset and that she mentioned something about the baby. (TR 131, 1.4 – 21). She also called the Director of the Agency, Jennifer Agee, on June 19, 2004, regarding the situation. Although Ms. Welch was not certain if she discussed with Ms. Agee the fact that E.P. had changed her mind about the adoption, arrangements were made to have E.P. speak to a bilingual therapist on Monday. (TR 134, ll. 7 – 136, 1.1). There was no discussion concerning obtaining an interpreter or bilingual therapist on Saturday, nor was there any attempt to contact Kevin Kenney or to suggest to E.P. that she contact Mr. Kenney. (TR 136, 1.23 – 137, ll. 3-12).

E.P. continued in her attempts to regain custody of her child on Monday, June 21, 2004. (TR 266, 1. 3 – 274, 1. 3, generally). Despite her promise, Ms. Welch did not call E.P. on Monday. (TR 266, ll. 3-6). However, E.P. called Ms. Welch repeatedly, trying two different numbers, on twenty-four (24) occasions. (TR 271, 1.12 – 272, 1.10). Finally, E.P. called Ms. Wilbers, expressing the fact that she was not able to reach Ms. Welch on June

21, 2004. In response, Ms. Wilbers called Ms. Welch on that date and was able to reach her and discuss the situation with her. (TR 213, ll. 1 – 17). Ms. Wilbers told Ms. Welch that E.P. was trying to reach her and that she was very upset. Ms. Welch acknowledged the fact that she was aware of E.P.’s condition and that she was making attempts to have a Spanish-speaking counselor speak to E.P. that day. At no time did Ms. Welch request that Ms. Wilbers serve as an interpreter and attempt to discern the nature of E.P.’s distress. (TR 213, ll. 18– 20).

Ms. Wilbers testified at trial that, based on her conversation with E.P. on June 21, 2004, she believed that E.P. had changed her mind about the adoption. She further testified that E.P. asked her, “how can I get my baby...” (TR 230, l. 13 – 25, 231, l.4). Ms. Wilbers also spoke to Kevin Kenney on June 21, 2004, and told Mr. Kenney that she had spoken to E.P. and that E.P. was very upset. (TR 214, l.16 – 215, l.8).

When E.P. was finally able to reach Ms. Welch on June 21, 2004, she again repeated her desire to have her child returned to her. She asked Ms. Welch for help, and requested that Ms. Welch ask the Judge to forgive her and ask him if he would “please give back my baby” (TR 273 l. 20 – 274, l. 3). Ms. Welch again responded that it wasn’t possible because E.P. had already gone to court. (TR 273, ll. 14-19; 351, ll. 18 -21). Although Ms. Welch

testified at trial that she could not understand E.P. during this conversation, she did understand the word “baby” and the fact that E.P. was again very distraught. (TR 142, l.16 – 143, l.10).

In addition to E.P. and Ms. Welch, the court heard from several other witnesses regarding the mother’s attempts to regain custody of her child. Ms. Judith Abisaab is an employee of the Primitivo Garcia School, where E.P.’s son is enrolled. (TR 37, l. 11 – 38, l.2) Ms. Abisaab testified that she noticed, on Monday, June 21, 2004, that E.P. appeared very distraught when she came to pick up her son. (TR 38, l.5 – 40, l.10). Ms. Abisaab approached E.P. and inquired as to why she was so upset. E.P. told her that she had placed her child for adoption, but, had changed her mind and wanted her baby returned to her. (TR 42, l. 10-15; 45, ll. 14-16). She told Ms. Abisaab that she had believed that when she signed the papers she had given up her child. It did not appear to Ms. Abisaab that E.P. understood on June 21, 2004, what to do in order to have her child returned to her. (TR 42, ll. 23-25).

The court also heard testimony from Ms. Iberty Gedeon, a bilingual therapist who, in response to E.P.’s conversation with Catherine Welch on June 19, 2004, was hired by ABC Adoptions Inc., to contact E.P. and discuss the situation with her. Ms. Gedeon had previously been employed with ABC Adoptions, as a birth parent coordinator, and occasionally worked for ABC

Adoptions, on a contractual basis. (TR 51, 1.13 – 53, 1.6). Ms. Gedeon testified that on June 21, 2004, she was acting for, and on behalf of, ABC Adoptions, as their agent. (TR 88, ll. 5-17).

Ms. Gedeon called E.P. late in the day on June 21, 2004, and found her to be very distraught and crying. Ms. Gedeon testified that E.P. told her that she had made a mistake, and stated “I want my baby back”. (TR 63, 1.9 – 64, 1.1). E.P. pleaded to Ms. Gedeon -- asking for her help in getting her child returned to her on June 21, 2004. (TR 64, ll. 12-15). Despite her pleas, Ms. Gedeon repeatedly told E.P., “I cannot help you to have your child back”. (TR 77, 1. 25; 78, ll.18 – 25).

During this telephone conversation on June 21, 2004, Ms. Gedeon told E.P. that she would talk to Ms. Welch to see if anything could be done to help her. Instead, Ms. Gedeon called the agency and spoke to Jennifer Agee, the Director of the agency. Ms. Gedeon knew Ms. Agee, as the two had attended school together. In addition, the two had worked together previously when Ms. Gedeon was employed by ABC Adoptions. (TR 65, 1.21 – 66, ll.15). Ms. Gedeon told Ms. Agee about her conversation with E.P. and they both concurred that there was nothing that could be done due to the fact that the Commissioner had already signed the papers. (TR 67, ll. 5-21). Even though Ms. Gedeon had never worked with, nor had any training for this type of

situation, she communicated this inaccurate “information” to E.P. on June 21, 2004. (TR 88, 1.18 – 89. 1.7; 90, 1.24 – 91, 1.21).

On June 22, 2004, E.P. called Ms. Gedeon and again asked for her help. Subsequent thereto, an appointment was set up for Ms. Gedeon, Ms. Welch, and the mother to meet on July 25, 2004. (TR 69, 1.22 – 70, 1.10). During this meeting, the mother was again told that nothing could be done to have her child returned to her custody. (TR 74, ll. 1-9).

Ms. Gedeon further testified that she knew that E.P.’s attorney did not speak Spanish and she was worried about whether E.P. could communicate with her attorney. Yet, she did not suggest, on June 21, or June 22, 2004, that the mother call Mr. Kenney, or any other attorney, for advice, notwithstanding that she was familiar with the Spanish-speaking community and that she knew of at least one Spanish-speaking attorney just a few blocks from her office. She also testified that she failed to offer to interpret for the mother to anyone who could help her. (TR 82, 1.14 – 84, 1.19; TR 85, 1.2 – 86, 1.22).

E.P. mistakenly believed Kevin Kenney, the attorney who met with her, was actually the attorney for ABC Adoptions (TR 43, ll. 16 – 18). She did not understand that he was her advocate, and believed that his role was completed at the time of the consent hearing. (TR 276, ll. 7–11; 356, ll. 2–20).

When E.P. was cross-examined by parties in this case she had difficulty understanding the questions and was confused by the process. (See generally, TR 313, 1.12 – 320, 1.20; 322, 1.20 – 325, 1.12; 327, 1.16 – 329, 1.10; 330, 1.2 - 332, 1.6). At one point, the court commented on the language, educational, and cultural barrier, requesting that counsel simplify his questions to E.P. (TR 330, ll. 13-16).

Procedural History Following WD64497

In response to this Court's decision in WD64497, Commissioner Geoffrey E. Allen set the case for oral argument on May 12, 2005, at 9:00 a.m. There was no evidence presented during this hearing, but, prior to argument, counsel for the mother requested that the court issue Findings of Fact and Conclusions of Law in the matter. (L.F. 6-7).

On June 6, 2005, Commissioner Allen issued his Findings and Recommendations for Facts and Conclusions of Law, which were adopted and confirmed, without modification, by Judge Jon R. Gray, on the same date. (L.F. 9-20).

On June 17, 2005, the mother again filed a Motion for Rehearing and Suggestions in Support Thereof. (L.F. 21-29). Judge Gray denied the Mother's Motion on June 21, 2005. (L.F. 30-31).

A second Notice of Appeal was filed by the mother on July 1, 2005. (L.F. 32-35). Thereafter, the cause was submitted to the Court of Appeals for the Western District of Missouri. On January 3, 2006, the Court of Appeals issued its opinion in Case No. WD65656, affirming the judgment of the trial court. Transfer to this Court was applied for and subsequently granted on April 6, 2006.

POINTS RELIED ON

I. The trial court erred in denying the Motion of a biological mother to withdraw her previously given consent to the adoption of her child, because § 453.030.7 RSMo. provides that a biological parent may withdraw her consent at any time prior to the acceptance and approval of the consent by a judge, in that the substantial weight of the evidence presented at trial established that the actions taken by the biological mother to notify the other parties involved in the case that she no longer wished to consent to the adoption of her child constituted a withdrawal of her consent, said actions being taken prior to the approval and acceptance of the biological mother's consent by a judge.

Epperson v. Director of Revenue, 841 S.W.2d 252 (Mo. App. 1992)

In Re Adoption/Guardianship No. 11137, 664 A.2d 443 (Md. App. 1995)

In the Interest of Baby Girl P., 159 S.W.3d 862 (Mo. App. 2005)

Troxel v. Granville, 530 U.S. 57 (2000)

U.S. Const. Amendment 14 § 1

Mo. Const. Art. I § 10

§ 453.030.7 RSMo. (2003)

II. The trial court erred in denying the motion of a biological mother to withdraw her previously given consent to the adoption of her child, because Missouri law provides that a parent is to be relieved from her previously given consent where said consent was given while she was under duress from a “force of circumstances”, in that the substantial weight of the evidence produced at trial established that the biological mother had little, if any, knowledge of the legal system under which the adoption would be granted, the mother had little, if any, ability to communicate in the English language, the attorney hired by the Respondents to represent the mother did not speak her native language, and the mother was given false information by the Respondents regarding the status of her consent, such that the mother's consent was given while she was under duress of a "force of circumstances".

In the Matter of D., et al., 408 S.W.2d 361 (Mo. App. 1966)

§ 453.030.7 RSMo. (2003)

III. The trial court erred in denying the motion of a biological mother to withdraw her previously given consent to the adoption of her child, because Missouri law provides that a biological parent will be allowed to withdraw her consent if said consent was obtained through fraud or misrepresentation, or for “good cause”, in that the substantial weight of the evidence produced at trial established that, in executing said consent, the biological mother reasonably relied upon numerous misrepresentations made to her by the Respondents, their agents and representatives, which effectively precluded the biological mother from providing a knowing and voluntary consent to the adoption of her child, and any inaction by the biological mother to withdraw her consent after the execution thereof was also induced by numerous misrepresentations made to her by the Respondents.

In Re D.C.C., 935 S.W.2d 657 (Mo. App. 1996)

In the Matter of D., et al., 408 S.W.2d 361 (Mo. App. 1966)

ARGUMENT

I. The trial court erred in denying the Motion of a biological mother to withdraw her previously given consent to the adoption of her child, because § 453.030.7 RSMo. provides that a biological parent may withdraw her consent at any time prior to the acceptance and approval of the consent by a judge, in that the substantial weight of the evidence presented at trial established that the actions taken by the biological mother to notify the other parties involved in the case that she no longer wished to consent to the adoption of her child constituted a withdrawal of her consent, said actions being taken prior to the approval and acceptance of the biological mother's consent by a judge.

Standard of Review

In adoption cases, the judgment of a trial court will be sustained unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *In re Adoption of H.M.C.*, 11 S.W.3d 81, 86 (Mo. App. 2000).

Withdrawal of Consent by E.P.

While it is undisputed that E.P. did not file a formal, written withdrawal of her consent to the adoption of her child prior to the acceptance of the

consent by the circuit judge, the Missouri Court of Appeals for the Western District has held that the withdrawal of a birth parent's consent to adoption of a child is not required to be in writing and adoption statutes are to be strictly construed against the deprivation of natural parents in regard to the parent and child relationship. (*In the Interest of: Baby Girl P.*, 159 S.W.3d 862 (Mo. App. 2005)). Thus, the question before the Court is whether the actions taken by E.P. constitute a withdrawal of her consent under § 453.030.7 RSMo.

In its Judgment of June 6, 2005, the trial court found that “the biological mother failed to effectively communicate an oral withdrawal of her consent, under RSMo. Section 453.030.7, prior to the acceptance of her consent by the judge.” (L.F. 16). In support of its decision, the trial court made a number of factual findings that, not only were unsupported by the weight of the evidence presented, but, were clearly **against** the weight of the evidence. As it is firmly established that the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States provides “heightened protection” against government interference with certain fundamental liberty interests, including the interest of parents in “the care, custody, and control of their children”, the judgment of the trial court herein must be reversed. *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

The record reflects that, beginning June 19, 2004, the day after the consent hearing and three days before the consent was approved and accepted by a judge, E.P. repeatedly communicated to the adoption agency and other parties involved that she had changed her mind and wanted her child returned to her. E.P. initially contacted Catherine Welch, the birth-parent coordinator employed by ABC Adoptions, on June 19, 2004. While E.P.'s lack of English speaking skills rendered communication difficult, Ms. Welch acknowledged that, when E.P. contacted her that day, E.P. was very upset and that she, Ms. Welch, believed it was possible that E.P. had changed her mind about the adoption. (TR 129, 131). In addition, Ms. Welch subsequently contacted the Director of ABC Adoptions, Jennifer Agee, and the adoptive-parent coordinator, Susan Dunaway, on that same date to discuss the conversation she had with E.P. (TR 131, 134).

On the following Monday, June 21, 2004, E.P. continued her attempt to contact the other parties in an effort to regain custody of her child. While she had no way of contacting the adoptive parents, E.P. did attempt to call Ms. Welch, using two different telephone numbers, a total of 24 times on June 21. (TR 271-272). After she was unable to contact Ms. Welch, E.P. contacted Ms. Enedina Wilbers, an interpreter that had been hired by E.P.'s "counsel", Kevin Kenney. (TR 213). Ms. Wilbers thereafter contacted Ms. Welch and

was able to speak with her regarding the situation. (TR 213). Ms. Welch stated to Ms. Wilbers that she was aware of the situation and was trying to locate a bilingual counselor to speak to E.P. (TR 213).

E.P. again contacted Ms. Welch on June 21, 2004, and requested that Ms. Welch ask the judge to forgive her and ask if the judge would “please give back my baby”. (TR 273). Ms. Welch responded that it was not possible for E.P. to have her baby because she had already gone to court. (TR 273).

On June 21, 2004, ABC Adoptions hired Ms. Iberty Gedeon, a bilingual therapist, to contact E.P. and discuss the situation. Ms. Gedeon was a former employee of ABC Adoptions and was now a contract worker for ABC Adoptions. (TR 51-53). After discussing the situation with E.P., Ms. Gedeon stated that she would contact Ms. Welch and see if she could find some help. Instead, Ms. Gedeon contacted ABC Adoptions director, Jennifer Agee. Thereafter, Ms. Agee and Ms. Gedeon, obviously recognizing the fact that E.P. wanted her child returned to her, decided that nothing could be done to help E.P. since the Commissioner had already signed the papers. (TR 65-67). Ms. Gedeon then relayed this inaccurate “information” to E.P.

Ms. Gedeon acknowledged that it was obvious to her that E.P. had changed her mind about the adoption. (TR 82). She also acknowledged that she knew that the attorney that had been hired by ABC Adoptions to represent

E.P. did not speak Spanish, and that she was worried about whether E.P. could effectively communicate with Mr. Kenney. (TR 82-84). No attempt was made by ABC Adoptions to contact a Spanish-speaking attorney for E.P.

Nevertheless, E.P. attempted to contact Mr. Kenney on June 21, 2004, but was unable to reach him. At that point, she had, for all intents and purposes, exhausted all of her resources.

While it is well-settled that, when reviewing the judgment of a trial court, the appellate court will defer to the findings of the trial court where the credibility of a witness is involved, a reviewing court need not do so where the disputed question is not a matter of direct contradictions by different witnesses. *Epperson v. Dir. Of Revenue*, 841 S.W.2d 252, 255 (Mo. App. 1992)(citing, *West v. Witschner*, 428 S.W.2d 538, 542 (Mo. 1968)). Thus, the principle that due deference is given to the findings of those before whom witnesses gave testimony is applicable only where the evidence to be reviewed is evenly balanced, or very close to being evenly balanced, and where there is conflicting testimony about a particular issue. See, *Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 604 (Mo. App. 1999).

While the trial court entered findings that it did not find the testimony of the biological mother, nor that of Ms. Gedeon, to be credible with regard to the mother orally withdrawing her consent to the adoption, the evidence that

E.P. did indeed make such oral statements is uncontroverted. Indeed, every action taken by E.P. between the time period of June 18, 2004 (the date of the consent hearing before the commissioner), and June 22, 2004 (the date the biological mother's consent was accepted and approved by a judge), is consistent with the fact that she had changed her mind and wanted her child returned to her.

The biological mother testified that, on numerous occasions, between June 18, 2004, the date of the consent hearing, and June 22, 2004, the date that the consent was accepted and approved by the judge, she told multiple persons, all working for, and as representatives of, ABC Adoptions, that she had "made a mistake" and "wanted her baby back". (TR 264-265, 273-274). This testimony was corroborated by Ms. Gedeon, who spoke to the mother on June 21, 2004, and testified as follows:

"Q: When you spoke to her (the biological mother), what did she tell you?

A: That she -- She was crying a lot. That she had made a mistake. That, basically, what I was trying to do was calm her down through the phone and give her -- her some support and guidance. And she said, 'I want my baby back.' I said, 'I don't know if -- I'm not the person

that -- She thought I was the person who could help her with that. I'm not the person that could help her with that...

Q: Okay. During that conversation with my client (the biological mother) on June the 21st, did she express to you that she had signed the consent paperwork?

A: She was crying. You know, she was just, you know, upset with everything that had happened and she wanted help. She kept asking for help. And I said I'm not the person that can help you right now." (TR 63-64).

Under cross-examination, Ms. Gedeon further stated:

"And most of our conversations were not always about what you're asking me. My conversations with her is, you need to be able to receive help. And -- And try to fully understand what is going on. In-between those -- those statements of guidance and support to her, I would say to her "I cannot help you to have your child back..." (TR 77-78).

Finally, when questioned by the trial court commissioner, Ms. Gedeon testified as follows:

“Q: Was it obvious to you on June 21st when you talked to the mother that she was having second thoughts?

A: Yes.” (TR 82).

And, while the trial court stated that it found E.P. to not be a credible witness because she had “testified during court proceedings on July 29 and 30, 2004, that she lied to the court during her June 18, 2004 consent hearing...” (L.F. 15, ¶. 34), a careful reading of the transcript reveals that, while some statements made by E.P. were not truthful, nor were said statements an intent to “lie to” or deceive the court. Rather, they were incorrect responses made due to a lack of understanding of the legal process and out of fear. (TR 259-264; 317-325). Indeed, it is difficult to imagine what motivation would exist for E.P. to “lie” to or deceive the court when one considers that, had E.P. truly understood her rights during the June 18, 2004, consent hearing, she simply could have told the court that she wanted her child returned to her, thus avoiding the lengthy litigation that has since occurred.

In addition, while the trial court stated that the testimony of Ms. Enedina Wilbers, the interpreter hired to work with the mother during the consent process, was credible regarding the biological mother’s “failure to effectively communicate an oral withdrawal of her adoption” (L.F. 15, ¶ 37), and that the court believed the testimony of Ms. Wilbers that E.P. never

specifically stated that she wanted to “withdraw her consent” to the adoption (L.F. 13), both the trial court and the Court of Appeals for the Western District ignored the fact that Ms. Wilbers also testified that, after speaking with E.P. on June 21, 2004, she (Ms. Wilbers) believed that the biological mother had changed her mind about giving her child up for adoption and that E.P. had stated, “how can I get my baby back”. (TR 230-231). The testimony of Ms. Wilbers and Ms. Gedeon is even more compelling when one considers the fact that, while called to testify by the biological mother’s trial counsel at the hearing on the Mother’s Motion to Withdraw her Consent, both witnesses were, during their involvement with this case, acting as agents and representatives of ABC Adoptions, (TR 88; 215-216) and held no loyalties to the biological mother. Thus, any logical reason to doubt the veracity of their testimony does not exist.

In light of the above, it is clear that the statement by the Western District Court of Appeals that “whether E.P. orally communicated an intent to withdraw consent was contradicted by other witnesses...” is simply not accurate. In fact, the only witness at trial that did **not** state that E.P. specifically communicated that she wanted her child returned to her was Ms. Welch, the birth parent coordinator for ABC Adoptions, who simply testified that she could not fully understand what E.P. was saying during their

telephone conversations on June 19 and June 21, 2004, because E.P. was speaking in Spanish. And, while the Court of Appeals stated that “Ms. Welch testified that she did not fully understand E.P. but that she believed E.P. had called because she was grieving over giving up her child” (App. A15), this is clearly an inaccurate recitation of the facts. In fact, Ms. Welch acknowledged that she believed it was possible that E.P. had changed her mind about the adoption.

In that the evidence of E.P.’s communication of her desire to withdraw her consent is uncontroverted, the appellate court is not bound by the findings of the trial court with regard to the credibility of witnesses. And, while the Court of Appeals’s opinion contends that a distinction was made by the court in *Epperson* between implied and express credibility determinations, such a distinction was not made by that court, nor should such a distinction be cause for ignoring established precedent.

Thus, the only remaining issue is whether E.P.’s communications constitute a withdrawal of her consent to the adoption. A review of the evidence and applicable case law warrants a finding that the actions taken by E.P. do constitute a withdrawal of her consent and that the trial court erred in holding otherwise.

As the Western District noted, “[t]he statute [§ 453.030.7 RSMo.] contains no direction to a birth parent as to how to go about withdrawing the written consent or to whom notice of such withdrawal is to be directed.” *In the Interest of: Baby Girl P.*, 159 S.W.3d 862 (Mo. App. 2005). Therefore, a question of law remains as to whether the actions taken by the biological mother in this case can be deemed to be a withdrawal of her consent sufficient to meet the requirements of § 453.030.7.

While the issues specifically presented in the present case have not previously come before this Court, at least one other jurisdiction has addressed these issues. In *In Re: Adoption/Guardianship No. 11137*, 664 A.2d 443 (Md. App. 1995), the Maryland Court of Appeals was faced with a factual situation similar to that currently before the Court. In that case, the prospective adoptive father of a child obtained the consent of the natural mother to the adoption of her child. Immediately after the consent was signed and notarized, the natural mother indicated to the adoptive father that she “was going to try to get it overturned”, to which the adoptive father responded that she would be unsuccessful because “she had already lost her right.” *Id.* at 445. The trial court refused to allow the natural mother to withdraw her consent even though it was given within the statutory period. The trial court held that, even assuming the natural mother told the adoptive father that she

would get the consent “turned around”, the natural mother’s oral statement to the adoptive father was not a revocation of her consent, but a statement of her future intention to seek revocation of the consent. *Id.* at 446.

On appeal, the natural mother argued that the oral statement made to the adoptive father was in fact a statement of revocation of her consent and that this oral revocation of her consent met the statutory requirements. In finding in favor of the natural mother, the court held that the natural mother’s communication to the adoptive father, if made, was sufficient under the statute. The court emphasized that there is a presumption that a child’s interests will be best served in the care of the natural parent and that the “right to raise one’s own child, recognized by constitutional principles...is so fundamental that it may not be taken away unless clearly justified.” *In Re: Adoption/Guardianship No. 11137*, 664 A.2d at 447. The court concluded that “**any words** that indicate that a natural parent does not intend to relinquish his or her rights to the child, if found by a trial court to have been timely communicated to the petitioner or consentee, must be broadly construed as tantamount to a revocation of consent.” *Id.* at 449. (Emphasis added)

Black’s Law Dictionary defines “withdraw” as, “to take back (something presented, granted, enjoyed, possessed or allowed).” *Black’s Law*

Dictionary, 8th Edition. And, while the trial court herein found the biological mother's statement, "I want my baby back", to be "vague and ambiguous" (L.F. 14), it is difficult to imagine a more unambiguous statement could be made, short of the mother specifically using the words, "I hereby withdraw my consent to the adoption of my child". Indeed, such a finding is, not only against the weight of the evidence presented, but, clearly an erroneous application of the law set forth in § 453.030.7 RSMo., and by the Western District Court of Appeals in *In the Interest of: Baby Girl P.*, 159 S.W.3d 862 (Mo. App. 2005).

Furthermore, while the trial court opined that the statement, "I want my baby back", was merely an indication of E.P.'s distress after giving up her baby, the court fails to reference any evidence produced at trial to support such a finding. In fact, there was no evidence to support such a finding and the lack of ambiguity in the biological mother's statement is further borne out by the fact that Ms. Gedeon, the bilingual therapist hired by ABC Adoptions to work with E.P., knew, based on that statement made by E.P. during their telephone conversations on June 21, 2004, that the biological mother wanted her child returned to her and, in fact, had requested the help of Ms. Gedeon in accomplishing the same. Thus, it is clear that E.P. did everything within her power and ability to execute a withdrawal of her consent, and in fact did so,

contacting everybody she could whom she believed might be able to help her make her thoughts known to the adoptive parents, the adoption agency, and the trial court.

Denial of Due Process

Given the exhaustive efforts made by E.P. to have her child returned to her, and the findings by both the trial court and the court of appeals that E.P. failed to withdraw her consent, a question is raised as to whether or not E.P. was effectively denied due process.

It is well established that no person shall be deprived of life, liberty or property without due process of law. (Mo. Const. Art. I § 10; U.S. Const. Amendment 14 § 1). Due Process is that which comports with the deepest notions of what is fair and right and just. *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950). In fact, the right to parent one's child is one of the oldest fundamental liberty interests recognized in our law. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

As previously noted, Section 453.030.7 RSMo., while providing that the written consent required in adoption cases “may be withdrawn anytime until it has been reviewed and accepted by a judge”, fails to set forth how a withdrawal of a previously given consent to adoption is to be made or to whom it is to be addressed. In addition, although the statute is very specific as

to what language the consent is to contain, it does not require that the “right to withdraw” the consent be mentioned anywhere on the consent form. And, while Missouri courts have not yet addressed this issue, the court in *In Re: Adoption/Guardianship No. 11137*, 664 A.2d 443 (Md. App. 1995), did address this problem and its effect on a biological parent’s rights.

The statute in question in *In Re: Adoption/Guardianship No. 11137* provided that, “within 30 calendar days after the required consent to an adoption is signed, the individual or agency executing the consent may revoke the consent.” *Md. Family Law Code* § 5-311 (c) (1). In addition, the applicable consent form set forth the birth parent’s right of revocation. However, neither the statute nor the consent form contained any direction as to how a parent could exercise this option. In holding in favor of the biological mother the Maryland Court of Appeals noted that “[t]he conspicuous absence from the consent of any instructions regarding how appellant might exercise her right to revoke calls into question whether appellant had any meaningful opportunity to do so.” *In Re: Adoption/Guardianship No. 11137*, 664 A.2d 443. at 448.

In the case currently before the Court, the Court of Appeals found that “E.P., although distressed after giving up her baby, did not orally withdraw [her] consent.” This statement by the court not only misstates the evidence, as

previously noted herein, but, on its face, requires a specific mode of communication of a birth parent's withdrawal of a previously given consent not required under § 453.030.7 RSMo.

In the present case, not only were there no instructions given regarding how a withdrawal of consent is to be made, there is no mention of the biological parent's right to withdraw the consent anywhere on the consent form. Thus, by not requiring the inclusion of this crucial information to biological parents in the consent form, the statute deprives biological parents of the process necessary to ensure that the fundamental rights protected by the Missouri and United States Constitutions are not rendered moot.

In that § 453.030.7 RSMo. does not set forth a specific procedure by which a natural parent must abide in withdrawing a consent to adoption of a child previously made, and, in that the nature of the parent-child relationship is of such importance that courts should act to preserve its integrity in the best interest of the child, and, in that the substantial weight of the evidence produced at trial supports a finding that E.P. communicated to the parties herein¹ that she had changed her mind about giving her child up for adoption

¹ “[N]otification given to an agent is notice to the principal if it is given....(a) to an agent authorized to receive it; [or] (b) to an agent apparently authorized to receive it...” *Restatement of Agency*, § 268. See also, *Gruett v. Nesbitt*, 17

and wanted her child returned to her, the judgment of the trial court should be reversed and the biological mother's withdrawal of consent to the adoption of her child should be allowed. See, *In Re: Adoption/Guardianship No. 11137*, 664 A.2d at 449. See also, *In the Interest of A.N.M., et al.*, 517 S.E.2d 548 (Ga. App. 1999).

P.3d 1090, 1098 (Or. App. 2001) (“Because [the adoption agency] acted as an agent for adoptive parents in placing child with them for adoption, [the adoption agency’s] fraudulent acts toward father are attributable to adoptive parents”).

II. The trial court erred in denying the motion of a biological mother to withdraw her previously given consent to the adoption of her child, because Missouri law provides that a parent is to be relieved from her previously given consent where said consent was given while she was under duress from a “force of circumstances”, in that the substantial weight of the evidence produced at trial established that the biological mother had little, if any, knowledge of the legal system under which the adoption would be granted, the mother had little, if any, ability to communicate in the English language, the attorney hired by the Respondents to represent the mother did not speak her native language, and the mother was given false information by the Respondents regarding the status of her consent, such that the mother's consent was given while she was under duress of a "force of circumstances".

Standard of Review

In adoption cases, the judgment of a trial court will be sustained unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *In re Adoption of H.M.C.*, 11 S.W.3d 81, 86 (Mo. App. 2000).

Duress by “force of circumstances”

Even were this Court to find that, pursuant to § 453.030.7 RSMo., E.P. did not timely withdraw her consent to adoption of her child, the facts of this case compel a finding that the judgment of the trial court should be reversed, in that the consent was made while E.P. was under duress.

It has long been recognized that, where the consent by a natural parent to the adoption of their child is executed while the natural parent is under duress, the parent can be relieved of the contract and the consent held for naught. *In the Matter of D., et al.*, 408 S.W.2d 361 (Mo. App. 1966). In fact, “consent for adoption has been likened unto an offer made by the natural parent to enter into a contract, but which may be withdrawn before it becomes binding by acceptance **or before there has been a meeting of the minds.**” *Id.* at 366. (Emphasis added)

Not only have the courts of this State long recognized that legal duress is a justification for allowing a natural parent to withdraw or revoke their consent to adoption of a child, but the Court of Appeals has also opined that a parent will be relieved from the contract (consent) if it be shown there existed what, for want of better words, can be called duress by “force of circumstances”. *Id.* at 367. A review of the relevant facts in the instant case

supports a finding that the consent of E.P. was given while under duress of a “force of circumstances”.

Although ABC Adoptions was aware that E.P. did not speak the English language, the birthparent coordinator assigned to work with E.P. spoke very little Spanish and had never worked with a client who did not speak the English language. (TR 101-102). In addition, while there were known to be Spanish-speaking attorneys in the area, ABC Adoptions chose to hire an attorney for E.P. who did not speak her native language. (TR 120-121). Perhaps most importantly, the consent that was presented to E.P. to sign was written in English, a language E.P. was not fluent in as was known by all of the parties involved. (L.F. 3-4). Unfortunately, these barriers to communication helped cultivate this field of duress of “force of circumstances”.

Not only was the language barrier an aggravating factor, but E.P.’s lack of understanding of the judicial system, combined with the inaccurate information provided to her by the adoptive parents and ABC Adoptions, placed E.P. under even more emotional strain and duress. During her initial meeting with “her attorney” and the representatives of ABC Adoptions, E.P. was told that, after she signed the consent, she could not change her mind about consenting to adoption unless she could prove that she had been under

the influence of drugs or did not have a clear state of mind at the time she signed the consent. (TR 253). The trial testimony of Ms. Wilbers, the interpreter who was hired to effectuate communication between E.P. and her attorney, further bore this out when she stated that, based upon the statements made by the attorney to E.P., it was her understanding that E.P. could not withdraw her consent unless she could prove that she had been under the influence of medications or was not of a clear state of mind. (TR 207).

On June 19, 2004, the day after the consent hearing, E.P. telephoned Ms. Welch, the birth-parent coordinator from ABC Adoptions, and informed her that she wanted her baby back. (TR 264-265). Ms. Welch stated that she was sorry but it was not possible for E.P. to have her baby back because she had already gone to court and it was finished. (TR 265). Again, on June 21, 2004, when E.P. was able to speak with Ms. Welch, she was informed that she would not be able to have her baby returned to her because she had “already gone to court”. (TR 273). Finally, on June 21, 2004, when E.P. discussed the situation with Ms. Gedeon, the bilingual therapist hired by ABC Adoptions, she was again informed that there was no way of getting her child returned to her because the judge had already signed the papers. (TR 67).

The aforementioned circumstances would likely cause any natural parent to be under duress sufficient to nullify any consent given as a result

thereof. How then could the facts of the present case not be even more compelling? Here, the natural mother, whose education consisted of reaching the 4th grade level in a Guatemalan school, was in a foreign land, did not speak the native language and was completely dependent upon those who sought the adoption of her child. Not to mention the fact that E.P.'s pregnancy was complicated with various health problems and she was hospitalized on at least two occasions due to dehydration during her pregnancy. (TR 239-240).

In that “equity has long relieved parties of contracts made under the influence of apprehensions not amounting to legal duress”, *In the Matter of D., et al.*, 408 S.W.2d 361, 368-69 (Mo. App. 1966), and, in that the “force of circumstances” present at the time E.P. signed the written consent to adoption of her child amounts to duress sufficient to warrant the revocation of said consent, the judgment of the trial court should be reversed and the consent of E.P. to the adoption of her child should be held for naught.

III. The trial court erred in denying the motion of a biological mother to withdraw her previously given consent to the adoption of her child, because Missouri law provides that a biological parent will be allowed to withdraw her consent if said consent was obtained through fraud or misrepresentation, or for “good cause”, in that the substantial weight of the evidence produced at trial established that, in executing said consent, the biological mother reasonably relied upon numerous misrepresentations made to her by the Respondents, their agents and representatives, which effectively precluded the biological mother from providing a knowing and voluntary consent to the adoption of her child, and any inaction by the biological mother to withdraw her consent after the execution thereof was also induced by numerous misrepresentations made to her by the Respondents.

Standard of Review

In adoption cases, the judgment of a trial court will be sustained unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *In re Adoption of H.M.C.*, 11 S.W.3d 81, 86 (Mo. App. 2000).

Misrepresentation and Good Cause

Finally, the judgment of the trial court should be reversed on the grounds that the consent to adoption, signed by E.P., was obtained through misrepresentation and there is “good cause” sufficient to warrant a reversal of the trial court’s judgment.

Missouri Supreme Court Rule 74.06 (b) provides, *inter alia*, that “the court may relieve a party or his legal representative from a final judgment or order for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party...” Further, Missouri courts have recognized the application of the provisions set forth in Supreme Court Rule 74.06 (b) to adoption cases in holding that a parent may be allowed to withdraw her consent to the adoption of her child for a variety of reasons, including a showing of fraud, duress, coercion, or other good cause. *In Re D.C.C.*, 935 S.W.2d 657 (Mo. App. 1996); *In the Matter of D., et al.*, 408 S.W.2d 361 (Mo. App. 1966).

The evidence adduced at trial established that E.P. was mistakenly informed by “her” attorney, hired and paid for by the Respondents herein, at a meeting held prior to the consent hearing, that, after the consent was signed, E.P. could not change her mind about the adoption unless she could prove that

she had been under the influence of drugs or did not have a clear state of mind at the time the consent was signed. (TR 207). Further, it is important to keep in mind that E.P. understood very little, if any, of the English language and yet, despite having knowledge of that fact, neither the attorney hired by ABC Adoptions to work with E.P. nor the birth parent coordinator assigned by ABC Adoptions to work with E.P. were bilingual. (TR 101, 121).

Perhaps more importantly, while the introductory correspondence from ABC Adoptions to the biological mother was written in Spanish, as well as the mother's social history report prepared by ABC Adoptions, the consent form presented to the biological mother for her signature was written in English, again, a language over which the mother had little, if any, command. (TR 206, ll. 9 – 10).

On a number of occasions, prior to E.P. withdrawing her consent, E.P. was given false information by the prospective adoptive parents, through ABC Adoptions and the attorney hired by ABC Adoptions to “represent” E.P. at the initial consent hearing. Prior to the consent hearing, none of the parties, including the attorney hired by ABC Adoptions to represent E.P., explained to E.P. that she could still parent her child or that she could change her mind about the adoption at any time prior to a judge entering a final order. (TR 206–207).

Not only were misrepresentations made to the biological mother prior to her executing her consent to the adoption of her child, but, further misrepresentations were made to E.P. immediately following the consent hearing of June 18, 2004. On June 19, 2004, E.P. contacted the birthparent coordinator with ABC Adoptions, Ms. Welch, and told her that she wanted her baby with her. (TR 264–265). Ms. Welch told E.P. that it was not possible because she had already gone to Court and it was finished. (TR 265). On June 21, 2004, E.P. again contacted Ms. Welch and repeated her desire to have her child returned to her. She asked Ms. Welch for help, and requested that Ms. Welch ask the Judge to forgive her and ask him if he would “please give back my baby”. (TR 273–274). Ms. Welch again erroneously responded that it wasn’t possible because E.P. had already gone to court. (TR 273, 351).

Even Ms. Enedina Wilbers, the interpreter working with E.P. during this time, testified that it was her understanding that, once the written consent was signed by the biological mother, the process was final and E.P. could not change her mind. (TR 211).

Finally, on June 21, 2004, Ms. Gedeon, the bilingual therapist hired by ABC Adoptions, contacted E.P. to discuss the situation. (TR 63). Ms. Gedeon testified that, after speaking with E.P. on the telephone, she, Ms.

Gedeon, contacted the director of ABC Adoptions, Ms. Jennifer Agee. She further testified as follows:

“Q: What did you tell Jennifer Agee on the 21st?

A: That I had spoken to Ms. Piedrasanta (the biological mother). That she was very distraught. That if we could arrange for her to receive some support through the agency, and if there was anything that can be done. And, you know, we were under the impression that [t]here was not much that can be done if the judge had signed already.

Q: Okay. Did you discuss that with her? That there was nothing that could be done because the judge had signed something already?

A: Yes.

Q: Okay. And did she acknowledge to you that that, in fact, was her understanding? That nothing could be done because the judge had already signed something?

A: Yes.

Q: And did you share her opinion at that time?

A: Yes.

Q: Okay. Did you express this opinion to my client (the biological mother) the next day? That there was nothing that could be done?

A: Yes.” (TR 67).

Further, under questioning by the commissioner, Ms. Gedeon testified as follows:

“Q: So, and again, I don’t mean any criticism of you, but it just didn’t occur to you to say, hey, why don’t you walk down to Ms. Gladney’s office, who speaks Spanish. She’s a lawyer, talk to her about what in the world to do in this situation? That didn’t occur to you to -- to tell her that, even though you’re not a lawyer?

A: My guess -- or the question to that answer (sic) would be, I wasn’t a role as a counselor that is going to provide some sort of support to a woman who has already made a decision that cannot be reversed. Like I’ve done it in the past when I’ve worked at adoption agency. You know, because it’s -- it’s --

Q: Well, you kind of assumed that the law was the same now as it was six years ago then, right?

A: And I guess then that would be a mistake for me.” (TR 86).

And, in response to cross-examination by the guardian ad litem regarding her telephone conversation with E.P. on June 21, 2004, Ms. Gedeon testified as follows:

“Q: Okay. Did you inform her that if the judge had signed the papers it was too late?

A: I was told that, and I, you know, shared that information with her.

Q: And you shared it with her on that occasion; is that correct?

A: Correct.” (TR 90-91).

Further, it is clear that E.P. relied upon the misrepresentations made by ABC Adoptions and their agents, obviously to her detriment. When questioned about her June 11, 2004, meeting with Kevin Kenney, the attorney hired to represent her during the consent proceeding, and the June 18, 2004, consent hearing itself, the biological mother testified as follows:

“Q: After you signed the consent, where did you think your baby was?

INTERPRETER: With the Millers.

Q: After you signed the consent, did Mr. Kenney ever tell you that you could change your mind?

INTERPRETER: No, he only said was I under the influence of medication or narcotics.

Q: Okay. Did he ever tell you that before you went to court you could change your mind and get your baby returned to you?

A: No..." (TR 252 – 253).

“Q: Did Mr. Kenney tell you on the 18th of June that you could still take -- change your mind and take your baby home?

A: No.

INTERPRETER: No.

Q: When is the first time that you knew you could take your baby home with you that day?

INTERPRETER: When Mr. Judge says that I can change my mind." (TR 255 – 256).

Finally, when E.P. was cross-examined by the Respondent's attorney, she explained her actions as follows:

“Q: You understand that you bear substantial responsibility for why we're here today; do you not?”

INTERPRETER: If they had explained to me that the baby could return -- could have returned to me I would not have told the judge to accept my consent.” (TR 316).

As a direct result of the aforementioned misrepresentations made to her, E.P. was effectively precluded from providing a knowing and voluntary consent to the adoption of her child. Even if said consent was initially knowingly and voluntarily given, the misrepresentations made by the Respondents to E.P. after the consent hearing held on June 18, 2004, effectively precluded her from taking additional steps to make known her desire to withdraw that consent prior to the acceptance and approval thereof by the trial court judge.

And, while the Court of Appeals stated in its opinion that the trial court commissioner “found not credible each person who testified that E.P. was told she could not withdraw her consent”, as the aforementioned facts illustrate, this is simply not accurate. The trial court made no finding concerning Ms. Gedeon and her credibility with respect to misrepresentations made to E.P.

On the other hand, Ms. Wilbers was specifically found by the trial court to be a credible witness.

In addition to the aforementioned misrepresentations made by the Respondents, other actions by the Respondents warrant a finding by this Court that “good cause” exists to allow the mother to withdraw her consent.

As previously noted, E.P.’s understanding of her legal rights with respect to the consent, and the effects thereof, was obviously hampered by the educational and language barriers that existed in this case. However, the lack of response by the Respondents, through ABC Adoptions, to E.P.’s cries for help exasperated the situation.

During trial, Ms. Welch, the birth-parent coordinator assigned by ABC Adoptions to work with E.P., testified, under cross-examination by the Guardian ad Litem, regarding her duties and obligations to the biological mother, and to the court, during the time in question. Ms. Welch stated as follows:

“Q: So part of this whole process is -- is making people aware of what their rights are, and what the risks are associated with this process; is that correct?

A: Yes.

Q: Now as an agent, and as an agency, who has just admitted to the Court that your chief responsibility is to provide the birthing plan, the plan of action for the parent of the child, then you provide and become the sole source for advice to that person; is that right? Advice, support, and counsel, whether you counsel them yourself, or provide independent legal counsel --

A: Yes.

Q: -- is that correct?

A: Yes...

Q: And for the most part, you undertake the majority of their needs; do you not?

A: For the most part.

Q: And they look to you as their guider -- their guidance, their support; is that correct?

A: Yes. ” (TR 178 – 179).

“Q: Let me ask you this. Would you feel that you have a duty to this Court had at the conclusion of that consent hearing, and a temporary custody hearing, had you learned within minutes, maybe hours, even less than a

day that the prospective adoptive parents had hypothetically abused this child, would you have reported that to anybody?

A: Yes.

Q: And that's your duty; is that correct?

A: Yes.

Q: And your duty is to keep the Court advised as to what's going on with respect to the status of this case?

A: Yes.” (TR 181 -182).

Further, Ms. Welch testified regarding her knowledge of the issues surrounding the biological mother's consent and Ms. Welch's failure to take any immediate action, despite the urgency of the situation:

Q: Okay. So anyway, you did have a feeling that she possibly wished to revoke her consent, as of the 19th? Is that correct?

A: It was possible, but based on the information I got from the phone conversation, I was not certain.

Q: You weren't certain. But anyway, this was less than 24 hours after that earlier hearing. The hearing the day before; et (sic)?

A: I don't believe it was less than 24 hours.

Q: Okay. But it was --

A: I don't know for sure --

Q: -- the next day, right?

A: -- what time the call came.

Q: Was that in the morning? Was that a call in the morning, or the afternoon, or what time was it?

A: I believe it was late morning, but I'm not for sure.

Q: So with that information at hand, you took no steps to continue in your role, responsibility to provide advice, counsel, and support to someone who over the past eight meetings had come to rely upon you as the sole provider of that source of advice, counsel, and support; is that right? You didn't do anything instantly at that moment?

A: I told her we would arrange for someone to call her on Monday...

Q: And, of course, you're somewhat trained. You earlier stated for the Court that once that judgment is signed by the next judge it's too late, right? Didn't you think time

was of the essence at that point? Not knowing when that judgment would be signed?

A: I wasn't sure what she was trying to communicate to me.

Q: She has a language problem, right? She speaks Honduran Spanish, right? Is that correct? You don't know what she speaks, do you? Other than some kind of Spanish?

A: Yes.

Q: And you know you have to rely upon an interpreter to get the full brunt of the conversation?

A: Yes.

Q: And here she's crying, you can't make out words. She could have been dying from some kind of internal bleeding, as far as you could tell; is that correct?

A: It's possible.

Q: And so you went to no trouble to get an interpreter to find out what this person felt was such that it caused her to be in this condition, in a traumatic condition?

A: On that day, no.” (TR 184 – 186).

Inasmuch as the substantial weight of the evidence presented at trial established that E.P. reasonably relied upon misrepresentations made to her by the Respondents, and, in that the actions taken by the Respondents are such that “good cause” exists to allow the biological mother to withdraw her consent to adoption, E.P. prays this Court reverse the judgment of the trial court herein and allow E.P. to withdraw her consent to the adoption of her child. See, *In Re D.C.C.*, 935 S.W.2d 657 (Mo. App. 1996).

CONCLUSION

In that the substantial weight of the evidence established that E.P. made known her desire to withdraw her consent to the adoption of her child, and thus met the requirements of § 453.030.7 RSMo., the judgment of the trial court should be reversed. Such a holding herein is further warranted in that the substantial weight of the evidence established that the consent of E.P. to the adoption of her child was obtained by the Respondents while E.P. was under duress of a “force of circumstances”.

In addition, in that material misrepresentations were made by the Respondents, through their agents and representatives, both before and after the biological mother provided written consent to the adoption of her child, and E.P. reasonably relied upon such misrepresentations in taking action, or failing to take action, there exists “good cause” for this Court to allow E.P. to withdraw her consent to the adoption of her child. In that Missouri Supreme Court Rule 84.14 authorizes this Court to finally dispose of a case, Appellant, E.P., prays this Court enter its Order reversing the judgment of the trial court and allowing E.P. to withdraw her consent to adoption of her child. *Norber v. Marcotte*, 134 S.W.3d 651, 662 (Mo. App. 2004).

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I hereby certify that (1) copy and (1) computer diskette of the foregoing was served by me, via first-class mail, postage prepaid, this ___ day of April, 2006, on each of the following:

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I hereby certify that this brief contains the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b) and contains 13,891 words; and that the diskettes provided this Court and counsel have been scanned for viruses and are virus-free.

Kimberly A. Carrington

Case No: SC87548

IN THE SUPREME COURT OF MISSOURI

IN THE MATTER OF BABY GIRL P.

E.P.,

Appellant,

vs.

A.M. and L.M.

and

Adoptions of Babies and Children Inc.,

Respondents.

APPENDIX FOR

SUBSTITUTE BRIEF OF APPELLANT

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TABLE OF CONTENTS

Judgment and Findings and Recommendations for	
Facts and Conclusions of Law.....	A1
Opinion of the Missouri Court of Appeals, Western District	
Case Number WD65656, In the Matter of Baby Girl P.....	A13
U.S. Const. Amendment 14 § 1.....	A22
Mo. Const. Art. I § 10.....	A23
Mo. Const. Art. V § 10.....	A24
§ 453.030 RSMo.....	A25
§ 477.070 RSMo.....	A31
Supreme Court Rule 74.06.....	A32
Supreme Court Rule 83.04.....	A34
Supreme Court Rule 84.14.....	A35