No. 27910 - State of West Virginia ex rel. Rose L., Mary L., Laura L. And Richard L., Jr., v. Honorable David M. Pancake, Judge of the Circuit Court of Cabell County, and Richard L.

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OF WEST VIRGINIA

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OF WEST VIRGINIA

Davis, J. concurring:

The majority opinion addressed a straightforward issue. The Court was asked to determine whether trial courts have jurisdiction to hold a hearing where a parent has relinquished parental rights resulting from an abuse and neglect case and is claiming that the relinquishment was procured as a result of fraud and duress. The majority has correctly held in Syllabus point 3 of the opinion that "[u]nder the provisions of W. Va. Code, 49-6-7, a circuit court may conduct a hearing to determine whether the signing by a parent of an agreement relinquishing parental rights was free from duress and fraud." I concur in this holding. However, I am compelled to write separately to stress the point that in any proceeding relating to the relinquishment of parental rights the prevailing principle of law is *the best interests of the child*.

The Best Interests of the Child

There can be little argument that no parent should part with his or her child when the consent to the relinquishment of parental rights is induced by fraud or duress perpetrated by another. The life-long bond between a parent and his or her child is an emotional attachment that stands as a cornerstone of civilization. The realization and existence of this fact, however, is tempered by a longstanding principle of law that in "custody matters, we have traditionally held paramount the best interests of the child." Syl. pt 5, in part, *Carter v. Carter*, 196 W. Va. 239, 470 S.E.2d 193 (1996).

Because I am committed to making certain that the "best interests of the child" remains the polar star for child custody decisions in West Virginia, I write separately to caution the lower courts that when conducting a hearing subsequent to any relinquishment proceeding, they must give high regard to the interests of the child(ren) involved. *See William D.A., Sr. v. Shawna Renee A.*, 206 W. Va. 679, 683, 527 S.E.2d 790, 794 (1999) (Davis, J. concurring) ("When addressing issues involving children, especially custody issues, consideration of the best interests of the child must be paramount."); *Kessel v. Leavitt*, 204 W. Va. 95, 174, 511 S.E.2d 720, 799 (1998) ("Superior to any rights of parents to the custody of their own children, however, is the overriding consideration of the child's best interests. Thus, the natural right of parents to the custody of their children is always tempered with the courts' overriding concern for the well-being of the children involved."); Syl. pt. 7, *In re Brian D.*, 194 W. Va. 623, 461 S.E.2d 129 (1995) ("Cases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child(ren)."); *In re Jeffrey R.L.*, 190 W. Va. 24, 32, 435 S.E.2d 162, 170 (1993) ("Although the rights of the natural parents to the custody of their child and the interests of the State as parens patriae merit significant consideration by this Court, the best interests of the child are paramount."); *Michael K.T. v. Tina L.T.*, 182 W. Va. 399, 405, 387 S.E.2d 866, 872 (1989) ("[T]he best interests of the child is the polar star by which decisions must be made which affect children.").[1]

Consistent with this consideration for the best interests of the child and the importance of

[1]*See also* W. Va. Code § 48-4-9(a)(4) (1999)("[T]he court shall decree the adoption if . . . it is in the best interests of the child to order such adoption.").

timely and finally resolving custody issues so that a child may attain the stability and security that is so crucial to a young life, it should be pointed out that, obviously, a relinquishment agreement that is made in writing and entered into under circumstances free from duress and fraud *is valid*. A parent attempting to show otherwise is faced with a challenging task. Indeed, the threshold for establishing duress and fraud in the context of the relinquishment of parental rights is extremely high. As to duress, this Court has held that, in the context of an adoption, duress "means a condition that exists when a natural parent is induced by the unlawful or unconscionable act of another to consent to the adoption of his or her child. Mere 'duress of circumstance' does not constitute duress[.]" Syl. pt 2, in part, *Wooten v. Wallace*, 177 W. Va. 159, 351 S.E.2d 72 (1986). *See also Baby Boy R. v. Velas*, 182 W. Va. 182, 185, 386 S.E.2d 839, 842 (1989) ("[Duress] means a condition that exists when a natural parent is induced by the unlawful or unconscionable act of another to consent to the adoption of his or her child."). With respect to fraud, we have held:

> The essential elements in an action for fraud are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it.

Syl. pt. 1, *Lengyel v. Lint*, 167 W. Va. 272, 280 S.E.2d 66 (1981). *Accord* Syl. pt. 3, *Cordial v. Ernst & Young*, 199 W. Va. 119, 483 S.E.2d 248 (1996); Syl. pt. 2, *Bowling v. Ansted Chrysler-Plymouth-Dodge*, 188 W. Va. 468, 425 S.E.2d 144 (1992); Syl. pt. 2, *Muzelak v. King Chevrolet, Inc*., 179 W. Va. 340, 368 S.E.2d 710 (1988).

Finally, I wish to emphasize that a parent challenging a relinquishment of his or her parental rights on the grounds of duress and fraud has the difficult responsibility of establishing the elements outlined above by *clear and convincing* evidence. *See, e.g.*, 48-4-5(a)(2) (1997) (Repl. Vol. 1999) (allowing revocation of adoption due to fraud or duress only where "[t]he person who executed the consent or relinquishment proves *by clear and convincing evidence* . . . that the consent or relinquishment was obtained by *fraud or duress*" (emphasis added)); *Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc.*, 188 W. Va. 468, 472, 425 S.E.2d 144, 148 (1992) ("[The] elements [of *fraud*] must be proved by *clear and convincing evidence*." (emphasis added)); Syl. pt. 2, *Cardinal State Bank, Nat'l Ass'n v. Crook*, 184 W. Va. 152, 399 S.E.2d 863 (1990) (per curiam) ("'Allegations of *fraud*, when denied by proper pleading, must be established by *clear and convincing proof*.' Syllabus Point 5, *Calhoun County Bank v. Ellison*, 133 W. Va. 9, 54 S.E.2d 182 (1949)." (emphasis added)); Syl. pt. 2, *Warner v. Warner*, 183 W. Va. 90, 394 S.E.2d 74 (1990) ("Since property settlement agreements, when properly executed, are legal and binding, this Court will not set aside such agreements on allegations of *duress* and undue influence absent *clear and convincing proof* of such claims." (emphasis added)); Syl. pt. 3, *Allegheny Dev. Corp., Inc. v. Barati*, 166 W. Va. 218, 273 S.E.2d 384 (1980) (per curiam) ("'The *onus probandi* is on him who alleges fraud, and, if the *fraud* is not *strictly and clearly proved* as it is alleged, relief cannot be granted.' Pt. 1, Syl., *Board of Trustees v. Blair*, 45 W. Va. 812, 32 S.E. 203 (1899)." (second and third emphases added)); Syl. pt. 3, *Carroll v. Fetty*, 121 W. Va. 215, 2 S.E.2d 521 (1939) ("In an action for wrongful death, a written release, signed by the beneficiaries entitled to recovery, may be set aside where it was obtained by *duress* exercised by a third party with the participation or knowledge of the releasee. However, such duress must

be proved by *clear and convincing evidence* and generally presents a question of fact for the jury." (emphasis added)).

Based upon the foregoing authority, it is clear that a parent has a heavy burden to establish duress or fraud once he or she has relinquished parental rights. Importantly, the inquiry does not end even if a parent satisfies that burden. Ultimately, lower courts must always return to the polar star principle: the best interests of the child. Consequently, even when a parent has successfully proven that fraud or duress played a role in the relinquishment of parental rights, trial courts must *still* consider the best interests of the child before finally resolving custody issues. This critical point must be clearly understood. As we have consistently stated: "the natural right of parents to the custody of their children is always tempered with the courts' overriding concern for the well-being of the children involved." *Kessel*, 204 W. Va. 95, 174, 511 S.E.2d 720, 799.

For the reasons so stated, I concur in the majority opinion.