

FILED

STATE OF NORTH CAROLINA
CHEROKEE COUNTY

2018 MAR 14 PM 4:14

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
18 CVD 0046

CHEROKEE CO. C. S. C. CLERK

[REDACTED]

Plaintiff,

Vs.

[REDACTED]

Defendant,

DECLARATORY JUDGMENT

THIS MATTER coming on to be heard and being heard before the undersigned judge of the district court at the session of civil district court in Cherokee County on February 28, 2018 on Defendant [REDACTED]'s counterclaim for declaratory judgment, the Court heard from the parties and their attorneys.

IT APPEARING TO THE COURT that both parties are present; the Plaintiff is represented by Zeyland McKinney and the Defendant is represented by David A. Wijewickrama, Ron Moore, D. Brandon Christian, and Melissa Jackson, and;

IT FURTHER APPEARING TO THE COURT that this action for child custody was filed by the Plaintiff in this Court seeking, *inter alia*, custody of the minor child [REDACTED] born [REDACTED] 2016. Plaintiff further sought and received an emergency *ex parte* order granting him temporary custody of the minor child pending further order of this Court, based in material part, on maintaining the status quo which Plaintiff contends was established by a Custody and Visitation Agreement. The Defendant filed a special appearance, answer, counterclaim, and several procedural motions, including a plea for a declaratory judgment, and;

IT FURTHER APPEARING TO THE COURT that Defendant filed an action seeking a declaratory judgment that the Custody and Visitation Agreement ("CVA") utilized by the Plaintiff in his application for an emergency *ex parte* custody order is unlawful, was created in violation of Defendants rights, and is void *ab initio*, and;

IT FURTHER APPEARING TO THE COURT that Defendant has filed this action for a declaratory judgment as a counterclaim, and Plaintiff has agreed to have the declaratory judgment action heard this date, expressly waiving any additional notice and the opportunity to file a responsive pleading or answer to the declaratory judgment action, and;

IT FURTHER APPEARING TO THE COURT that both sides were given an opportunity to be heard, the court received evidence in documentary and testimonial formats.

Based upon the arguments of counsel, evidence presented, and the applicable rules the Court makes the following

FINDINGS OF FACT

1. Defendant is the biological mother of [REDACTED] born [REDACTED] 2016, both of whom reside in Cherokee County, NC.
2. The legal father of the minor child, on the birth certificate, is [REDACTED]
3. The Biological father of the minor child is [REDACTED]
4. The CVA in question was used by the Plaintiff as part of the basis for his complaint for an *ex parte* custody order.
5. There were gross irregularities in not merely the process used to obtain the CVA, but in the illegality of the CVA itself.
6. At or around the time the CVA was executed by Defendant, DSS social worker David Hughes went to the residence of [REDACTED] with a notary to have her sign the CVA.

7. SW Hughes told [REDACTED] that by signing the CVA [REDACTED] (1) would avoid court involvement, and (2) could avoid further drug testing.
8. SW Hughes also told [REDACTED] that, under the CVA, [REDACTED] would have visitation as agreed upon by the parties.
9. [REDACTED] understood and believed that to mean that her visitation with her child would be at least what she had been getting and probably more.
10. Beyond these assertions, SW Hughes did not explain or attempt to explain any of the terms and conditions of the CVA to [REDACTED].
11. SW Hughes told [REDACTED] that once she signed the CVA:
 - a. The case would be closed and there would be no follow up by the Department;
 - b. The CVA was a legally binding document and was valid until the child turned 18 years of age; and
 - c. That she would have to get an attorney to change and or modify the CVA.
12. [REDACTED] did not have independent counsel, was not offered independent counsel, and due to the fact that the SW Hughes came to her home with a notary on the date the CVA was signed, [REDACTED] did not have the opportunity to seek independent legal counsel.
13. [REDACTED] did not understand the terms and or conditions of the CVA.
14. There has never been a judicial determination as to custody of this minor child.
15. After the parties executed the CVA on November 13, 2016, custody of [REDACTED] was assumed by the Plaintiff.
16. The Defendant was unable to see her daughter for approximately one year based on the CVA.
17. [REDACTED] attempted on a number of occasions to visit with her minor child.

18. [REDACTED] contact [REDACTED] on several different dates and was denied visitation with the minor child.
19. [REDACTED] understood when he signed the CVA that visitation was discretionary.
20. At all relevant times, SW Hughes was an employee or agent of Cherokee County DSS (hereafter CCDSS) and was acting within the course and scope of his employment thereof.
21. CCDSS social worker David Hughes went to the residence of [REDACTED] with a notary to have her sign the CVA.
22. [REDACTED] had prior involvement with the CCDSS prior to having the child subject to this action.
23. [REDACTED] had a substantial history with CCDSS due to prior involvement with her three older children.
24. CCDSS occupied a place of trust, making representations to the Defendant about the state of the law and the legal effects of her signing the CVA.
25. A person in the [REDACTED] position would have reasonably relied upon the representations of the social worker because of who he was and the special position of trust he held.
26. Moreover, that position of trust was reinforced because Defendant did not have and was not offered counsel when she was asked to sign the CVA.
27. SW Hughes clearly made material misrepresentations about the CVA and the CVA process to induce Defendant to sign.
28. SW Hughes did not explain or attempt to explain any of the terms and conditions of the CVA to [REDACTED].
29. [REDACTED] had began working with SW Katie Johnson and had signed a case plan indicating the issues which led to the removal of the child and the steps that [REDACTED] would need to take in order to reunify with her child.

30. [REDACTED] submitted herself to drug testing pursuant to her case plan.
31. SW Hughes as well as Director Cindy Palmer indicated that the Defendant requested the CVA.
32. The Defendant nor the Plaintiff ever indicated by their testimony, that either party requested to sign a CVA.
33. The execution of a case plan contradicts the use or facilitation of a CVA.
34. The CVA was drafted and created by employees of CCDSS in conjunction with, at the direction of, and with and the approval of the Cherokee County Department of Social Services Attorney Scott Lindsay.
35. CCDSS has used CVAs to routinely remove children from their biological parents without due process of law or Court oversight.
36. The use of CVAs by CCDSS has been a regular course of dealing and pattern of practice over the course of many years.
37. The CVA or some variation thereof has been used by CCDSS for a number of years.
38. No CVA has ever been reviewed, signed, or entered and filed as an Order of the North Carolina District Court.
39. CCDSS Director Cindy Palmer, insisted that she did not know of the practice of using CVA until December of 2017 when she was informed of a prior incident with another CVA.
40. At all times relevant as set forth herein, Director Cindy Palmer, Social Worker Hughes and Attorney Scott Lindsay were acting within their Official scope of duty as employees and agents of Cherokee County Department of Social Services.
41. At the time the CVA was executed, Defendant was informed by CCDSS agents and employees that it carried the force of law, and she was legally bound to adhere to its terms.

42. This material misstatement of law and fact is yet another example of CCDSS's agents and employees threatening Defendant and making material, false, and fraudulent assertions to coerce her to sign the CVA.
 43. As a direct result of the use of a similar CVA in another case by CCDSS, a sitting Judge of the District Court notified the North Carolina Department of Health and Human Services ("DHHS") on December 20, 2017 of CCDSS's practices in using CVAs.
 44. DHHS responded to this notification by letter. (Defendant's Exhibit A to her Answer, which was received into evidence by the Court during this hearing)
 45. DHHS states in its letter that "facilitating such private custody agreements without the oversight of the Court falls outside of both law and policy."
 46. The Court accepts the Defendant's prayer for declaratory judgment relief as a counterclaim.
 47. Based on the findings as set forth herein, this Order is in the best interest of the minor child.
- Based upon the foregoing Findings of Fact, and in consideration of all applicable statutes, rules, cases, and other mandatory and compelling authority, the Court reaches the following:

CONCLUSION OF LAW

1. Pursuant to the Uniform Declaratory Judgment Act, N.C. Gen. Stat. §§ 1-253 through 1-267, parties, between whom exists a genuine controversy, are entitled to an action before a court of competent jurisdiction to determine the rights of the parties as to any instrument or other document.
2. The court accepts the Defendants prayer for Declaratory Judgment relief as a counterclaim.

3. The CVA (Exhibit A to Plaintiff's Complaint) purports to create legal rights as between the parties regarding the custody of the minor child [REDACTED] born [REDACTED] 2016, and was relied upon by the Plaintiff as part of the basis for his *ex parte* custody order, which remains in effect.
4. Therefore, there exists between the parties a genuine controversy over the legal rights created by the CVA, and the parties are entitled to a declaratory judgment setting forth what rights, if any are created by the CVA.
5. For the reasons set forth more specifically below, the CVA creates no rights, is illegal, and is *void ab initio*.
6. The Fourteenth Amendment to the Constitution of the United States provides that no person shall be "deprive[d] . . . of life, liberty, or property, without due process of law" Article I, Section 19 of the North Carolina Constitution states that "[n]o person shall be . . . or in any manner deprived of his life, liberty, or property, but by the law of the land."
7. In *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000), the United States Supreme Court held that "[i]n light of . . . extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."
8. To ensure that all parents enjoy the protections of due process in any case where DSS seeks to remove a child from his or her parent, the North Carolina General Assembly has enacted the Juvenile Code in Chapter 7B of the North Carolina General Statutes to govern all proceedings in which a juvenile is alleged to be abused, neglected, or dependent.
9. It is beyond dispute that one of the fundamental rights enjoyed by all parents under the United States Constitution is the right to raise their children without government

interference. *See e.g. Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (“The liberty interest at issue in this case -- the interest of parents in the care, custody, and control of their children -- is perhaps the oldest of the fundamental liberty interests recognized by [the United States Supreme] Court.”); *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923), (“[T]he ‘liberty’ protected by the Due Process Clause includes the right of parents to ‘establish a home and bring up children’ and ‘to control the education of their own.’”); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925), (“[T]he ‘liberty of parents and guardians’ includes the right ‘to direct the upbringing and education of children under their control’; . . . ‘the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.’”); *Prince v. Massachusetts*, 321 U.S. 158 (1944), (“It is cardinal . . . that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (“The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition”); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (“[T]he relationship between parent and child is constitutionally protected”); *Parham v. J. R.*, 442 U.S. 584, 602 (1979) (The United State Supreme Court’s “jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. [Its] cases have consistently followed that course”); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (discussing “the fundamental liberty interest of natural parents in the care, custody, and

management of their child"); and *Troxel*, at 66 ("In light of . . . extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.")

10. The same protection is extended to the people of North Carolina by Article I, Section 19 of the North Carolina Constitution.
11. The term "law of the land" as used in Article I, Section 19 of the North Carolina Constitution means the general law, the law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. It means the regular course of the administration of justice through the courts of competent jurisdiction, after the manner of such courts. Procedure must be consistent with the fundamental principles of liberty and justice. *State v. Chesson*, 228 N.C. 259, 45 S.E.2d 563 (1947), writ dismissed, 334 U.S. 806, 68 S. Ct. 1185, 92 L. Ed. 1739 (1948). See also, *Eason v. Spence*, 232 N.C. 579, 61 S.E.2d 717 (1950). Among other things, "the law of the land" or "due process of law" imports both notice and the opportunity to be heard before a competent tribunal. *Parker v. Stewart*, 29 N.C. App. 747, 225 S.E.2d 632 (1976); *Utica Mut. Ins. Co. v. Johnson*, 41 N.C. App. 299, 254 S.E.2d 643 (1979).
12. Moreover, the North Carolina "Supreme Court has held that the term 'law of the land,' as used in Article I, Section 19 of the North Carolina Constitution, is synonymous with 'due process of law' as that term is applied under the Fourteenth Amendment to the United States Constitution. *In re Pettion of Smith*, 82 N.C. App. 107, 109, 345 S.E.2d 423, 425 (1986) (quoting *In re Moore*, 289 N.C. 95, 221 S.E. 2d 307 (1976)). Also see *State v. Smith*, 90 N.C. App. 161, 368 S.E.2d 33 (1988), *aff'd*, 323 N.C. 703, 374 S.E.2d 866, *cert.*

denied, 490 U.S. 1100, 109 S. Ct. 2453, 104 L. Ed. 2d 1007 (1989); and *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

13. The General Assembly has clearly states that the DSS Code "shall be interpreted and construed so as to . . . provide procedures for the hearing of juvenile cases that assure fairness and equity and that *protect the constitutional rights of juveniles and parents . . .*" N.C. Gen. Stat. § 7B-100(1) (emphasis added).
14. Complying with the DSS Code by the State and CCDSS is the means by which the constitutional rights described above are protected.
15. There is no provision of law permitting the use of extrajudicial CVAs to obtain the voluntary surrender of parental custody.
16. DHHS has recognized this. After CCDSS's use of CVAs, such as the one in this case, was brought to the attention of the District Court of Cherokee County, the presiding judge, notified DHHS of CCDSS's action. Upon receipt of this notice, DHHS issued the letter attached to Defendant's Answer as Exhibit A. In the letter DHHS states that "facilitating such private custody agreements without the oversight of the Court falls outside of both law and policy."
17. CCDSS, Director Palmer, Attorney Lindsay, and all agents and employees of CCDSS acting in the course and scope of their employment violated Defendant [REDACTED] rights under the Fourteenth Amendment to the Constitution of the United State, Article I Section 19 of the Constitution of the State of North Carolina, and Chapter 7B of the North Carolina General Statutes by using the CVA to remove the minor child from her mother's custody.
18. Any and all CVAs which are obtained outside the judicial process violate the rights of both the parents and children affected under the Fourteenth Amendment to the Constitution of

the United State, Article I Section 19 of the Constitution of the State of North Carolina, and Chapter 7B of the North Carolina General Statutes

19. The complete, utter, willful, and malicious decision of CCDSS, Director Palmer, Attorney Lindsay and David Hughes to willfully and deliberately remove the minor child in this case from Defendant [REDACTED] custody by means of this unlawful CVA is the direct and proximate cause of Defendant [REDACTED] being separated from her child.
20. Any injury or harm accruing to any parent or child affected by a CVA is the direct and proximate result of CCDSS's, Director Palmer, Attorney Lindsay and the other policy makers for CCDSS deciding to violate the rights of parents and children.
21. The CVA before the court in this case was obtained outside of the judicial process, and therefore was obtained in violation of Defendant [REDACTED] rights under the Fourteenth Amendment to the Constitution of the United State, Article I Section 19 of the Constitution of the State of North Carolina, and Chapter 7B of the North Carolina General Statutes.
22. Pursuant to the North Carolina General Statutes, the District Court Division of the General Court of Justice has original and exclusive jurisdiction over all matters pertaining to DSS cases brought under Chapter 7B and custody action brought under Chapters 50 and 50A.
23. There has never been a judicial determination as to custody of this minor child, therefore, the CVA cannot have legal authority.
24. North Carolina recognizes two types of fraud, actual and constructive.
25. Actual fraud occurs when a person obtains something from another person by means of a misrepresentation. "In pleading actual fraud, the particularity requirement is met by alleging time, place and content of the fraudulent representation, identity of the person

making the representation and what was obtained as a result of the fraudulent acts or representations.” *Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678 (1981).

26. Constructive fraud is similar. “The very nature of constructive fraud defies specific and concise allegations and the particularity requirement may be met by alleging facts and circumstances ‘(1) which created the relation of trust and confidence, and (2) [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.’” *Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678-79 (1981) (quoting *Rhodes v. Jones*, at 548-49, 61 S.E. 2d at 725.)

27. As it pertains to the CVA in this case, both were present and all elements of both have been met to the Court’s satisfaction thru exhibits and testimony.

28. As stated in the findings of fact above:

- a. At or around the time the CVA was executed by Defendant, CCDSS social worker David Hughes went to the residence of [REDACTED] with a notary to have her sign the CVA.
- b. CCDSS occupied a place of trust, making representations to the Defendant about the state of the law and the legal effects of her signing the CVA.
- c. A person in the Defendant’s position would have reasonably relied upon the representations of the social worker because of who he was and the special position of trust he held.
- d. Moreover, that position of trust was reinforced because Defendant did not have and was not offered counsel when she was asked to sign the CVA.

- e. SW Hughes clearly made material misrepresentations about the CVA and the CVA process to induce Defendant to sign.
- f. Additionally, SW Hughes told [REDACTED] that by signing the CVA [REDACTED] (1) would avoid court involvement, and (2) could avoid further drug testing.
- g. SW Hughes also told [REDACTED] that, under the CVA, [REDACTED] would have visitation and contact with the minor child.
- h. Beyond these assertions, SW Hughes did not explain or attempt to explain any of the terms and conditions of the CVA to [REDACTED]
- i. SW Hughes told [REDACTED] that once she signed the CVA the case would be closed and there would be no follow up by the Department; the CVA was a legally binding document and was valid until the child turned 18 years of age; and that she would have to get an attorney to change and or modify the CVA.
- j. Despite the fact that SW Hughes told [REDACTED] that she was signing a binding legal document, which would have the force and power of a court order and bind her rights insofar as they concerned her custody of her minor child, [REDACTED] did not have independent counsel, was not offered independent counsel, and was not given the opportunity to speak with independent legal counsel.
- k. Moreover, [REDACTED] did not understand the terms and or conditions of the CVA, especially the fact that the CVA did not create any legal rights as to the minor child's custody.
- l. Yet, after the parties executed the CVA on November 13, 2016, custody of [REDACTED] [REDACTED] was assumed by the Plaintiff.

29. These material misrepresentations made by the social worker induced Defendant into signing the CVA, making it the product of fraud, and therefore carries no legal effect.
30. The Court upon consent of the parties allows the Defendant's prayer for declaratory judgment to be made in the form of claim rather than a motion.
31. The Court has personal and subject matter jurisdiction.
32. This Order is in the best interest of the minor child.
33. The aforestated findings are incorporated as if fully set forth herein.

DECREE

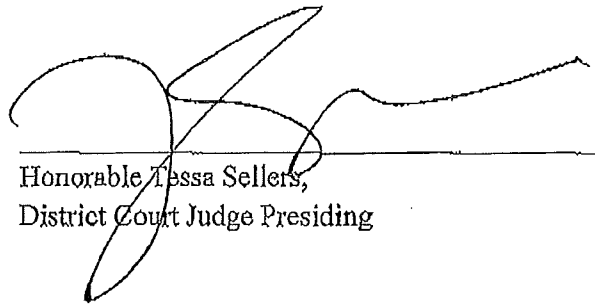
In consideration of the forgoing Findings of Fact and Conclusion of Law this Court now ORDERS, ADJUDGES, and DECREES pursuant to the North Carolina Declaratory Judgment Act, N.C. Gen. Stat. § 1-253 *et seq.* that:

1. The aforestated findings and conclusions are incorporated as if fully set forth herein.
2. The CVA is unlawful.
3. This Order is in the best interest of the minor child.
4. The process of obtaining the CVA violated the constitutional rights of the Defendant.
5. The CVA is the product of both actual and constructive fraud on behalf of the Cherokee County Department of Social services, its agents and employees and Attorney Scott Lindsay and Director Cindy Palmer.
6. The Court hereby declares pursuant to N.C. Gen. Stat. § 1-253 that this and all other CVAs similar to and like this in form, content and structure created by Cherokee County

Department of Social Services, their agents or employees and Attorney Scott Lindsay are
and shall be at all times *void ab initio*.

Entered this, the, 28th day of February, 2018.

Signed this, the, 14th day of March, 2018.



Honorable Tessa Sellers,
District Court Judge Presiding