IN RE: E.C.M. APPLYING FOR PRIVATE ADOPTION OF SMP	*	**NO. 2000-CA-2753**
	*	**COURT OF APPEAL**
	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
ST. BERNARD 34TH JUDICIAL DISTRICT COURT
NO. 1113-J, DIVISION "D"
HONORABLE KIRK A. VAUGHN, JUDGE
* * * * * *
JAMES F. MCKAY, III
JUDGE
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(Court composed of Chief Judge William H. Byrnes III, Judge Steven R. Plotkin, Judge James F. McKay, III)

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AFFIRMED

Appellant, E.C.M., appeals the judgment of the trial court denying her motion to overturn custody in favor of S.M.P.'s biological parents, W.B. and J.P., and granting their motion for habeas corpus thereby ordering appellant to return S.M.P. to their custody.

S.M.P. was born on February 28, 1998. The natural mother, J.P., allegedly physically gave S.M.P. to E.C.M., her second cousin, on March 3, 1998. On March 4, 1998, an act of surrender was filed in the 24th Judicial District for the State of Louisiana; this was dismissed for improper venue. On June 28, 1999, J.P. executed a notarial act of surrender for adoption attached to E.C.M's petition for adoption, but did not file these documents in the in 34th JDC until August 2, 1999. On August 4, 1999, the trial court issued an order approving pre-adoption placement of S.M.P. with E.C.M. along with an order to the St. Bernard Sheriff's Office to conduct a records check of the prospective adoptive parent. The trial court appointed attorney

John Finckbeiner as curator for the absent father, W.B., whose name was unknown to the court at the time of the curatorship appointment. On October 22, 1999, W.B. filed notice of intention to file motions to annul the adoption and exercise parental rights and J.P. filed a motion to dissolve her notarial act of surrender. On November 19, 1999, the trial court dissolved the June 28,1999 act of surrender, and granted J.P.'s and W.B.'s notice of intention to exercise parental rights and notice of opposition to adoption. The trial court also dissolved the appellants' incomplete petition for adoption and issued a warrant for the return of the physical custody of S.M.P. to J.P. and W.B. On November 22, 1999, the trial court issued an attachment for the return of S.M.P., whereabouts unknown. On April 20, 2000, J. P. and W.B. filed a petition for habeas corpus with requested service to E.C.M's attorney, Joseph Casanova and to E.C.M.'s residence in Florida pursuant to the Louisiana Long Arm Statute, La. R.S. 13:3201. Although E.C.M. claims that she was never served, her attorney was properly served and he was present at the hearing. On May 5, 2000, the trial court, following a hearing on the natural parents' petition for habeas corpus, ordered E.C.M. to surrender the child immediately. The appellant filed a motion to overturn

the November 19, 1999 custody judgment, which the trial court denied because the matter had prescribed and the act of surrender and adoption had already been dissolved without any appeals being timely taken. The trial court awarded joint custody of S.M.P. to the parents, naming J.P. as the domiciliary parent and ordering her to attend parenting classes.

The appellant argues that the trial court erred in dissolving the June 28, 1999 act of voluntary surrender and argues that the appellees failed to meet their burden of proof to be awarded joint custody of S.M.P. The trial court dissolved the act of surrender and the appellant's petition for adoption on November 19, 1999.

The act of surrender shall be presumptive evidence of a legal and voluntary surrender, only if it contains every element required by La. Ch.C. art. 1122 and is in all other respects executed in accordance with the provisions of Title XI. La. Ch.C. art 1104(B). For all adoptions, La. Ch.C. art 1122 requires that the act of surrender contain specific information and declarations, substantially in accordance with the form provided for therein, and be executed in authentic form. Id.

Other than the court's approval of E.C.M.'s petition for private adoption and placing S.M.P. with E.C.M., no other adoption proceedings

ever occurred. Furthermore, the record is void of any evidence that the formal requirements for a voluntary act of surrender pursuant to La. Ch. C. articles 1120 through 1125, were followed rendering it fatally flawed with multiple inadequacies. Pursuant to La. Ch.C. art. 1110, the surrender of a child for adoption by one parent shall have no effect upon the parental rights of any other parent. The record fails to provide any acts by W.B., which would prevent him from exercising his parental right to S.M.P.

The formal requirements of La. Ch.C. articles 1121 and 1122 (C) and (D), dictate that the surrendering parent must be advised by an attorney other than one associated with the prospective adoptive parent and that the surrendering parent receive mental health counseling. The record is void of any information proving that the natural mother was represented by her own counsel or evaluated by a psychiatrist prior to the surrender. The trial court concluded that the act of surrender did not comply with the Children's Code and declared the act null and void.

The appellees argue that the appeal has prescribed and that the only issue valid in the appeal is the writ for habeas corpus and the motion to overturn custody judgment rendered on May 5, 2000, and signed by the trial court on May 18, 2000. We agree.

The Uniform Rules of the Courts of Appeal, Rule 4-3, prohibits a

litigant from waiting an unreasonable period of time before seeking supervisory review. "An application not filed in the appellate court within the time so fixed or extended shall not be considered, in the absence of a showing that the delay in filing was not due to the appellant's fault. Ross v. City of New Orleans, 96-1853 (La. App. 4 Cir. 9/13/96), 6994 So. 2d 973. Pursuant to La C.C.P. art. 2123, a suspensive appeal must be taken within thirty days of the expiration of the delay for applying for a new trial or judgment notwithstanding the verdict. La. C.C.P. art. 1974 dictates that the delay for applying for new trial is seven days. The judgment dissolving J.P.s' act of surrender judgment was rendered and signed by the trial court on November 19, 1999. The appellant did not file her motion to overturn custody judgment until May 5, 2000; she filed nothing with the trial court during the period between the judgment dissolving the act of surrender, her petition for adoption and the date of filing her motion to overturn custody. She never filed a notice of appeal or motion for new trial with the trial court despite being represented by counsel throughout all proceedings. On May 5, 2000, the trial court conducted a hearing on the petition for habeas corpus and motion to overturn custody, which appellant had filed with the court on the day of the hearing. The trial court advised the appellant that the time for appealing the judgment concerning the acts of surrender had long since

passed and the only issues before him were the writ of habeas corpus and the motion to overturn custody judgment.

Addressing appellant's assertion that parents have failed to meet their burden of proof concerning the custody of the child, both parents have manifested intent to raise the child. Appellant attempts to raise a substantial commitment argument which is not applicable to this case because the trial court had already dissolved the act of surrender which was never timely appealed. The child has been in the care and custody of her natural parents since May 5, 2000. It is clearly in the best interest of the child not to overturn the trial court's judgment.

As the issue of the act of surrender has been found to be prescribed and the biological father has expressed an intention to raise the child, we find no error in the trial court's ordering the appellant to return the physical custody of the child to her natural parents. We also find no error in the trial court's judgment denying appellant's motion to overturn custody.

For the aforementioned reasons, we affirm the judgment of the trial court.

AFFIRMED