

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

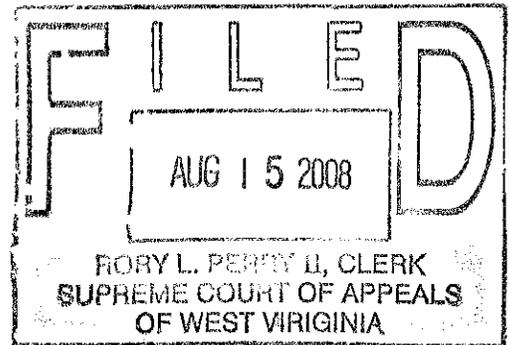
**In the Matter of: THE PETITION
OF CAREY LYNN BAKER FOR THE
ADOPTION OF JOHANNA CAROLINE
D [REDACTED], AN INFANT FEMALE CHILD
UNDER THE AGE OF TWELVE YEARS,
AND GRANT THOMAS D [REDACTED] AND
JAMESON TODD D [REDACTED], INFANT
MALE CHILDREN UNDER THE AGE
OF TWELVE YEARS**

APPEAL NO. 34218

Adoption Action No. 07-A-49
The Honorable Paul Zakaib, Jr.
Circuit Court of Kanawha County

BRIEF ON BEHALF OF APPELLANT, CAREY LYNN BAKER

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**TO THE HONORABLE JUSTICES OF THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA**

I. KIND OF PROCEEDING AND NATURE OF RULING IN THE LOWER COURT

Pursuant to West Virginia Code § 48-22-704 and Rule 3 of the West Virginia Rules of Appellate Procedure, Petitioner Carey Lynn Baker (“Mr. Baker”) appeals to this Honorable Court from an Order entered by Judge Paul Zakaib, Jr. of the Circuit Court of Kanawha County on April 3, 2008, denying his Petition to Adopt Johanna Caroline D[REDACTED] Grant Thomas D[REDACTED], and Jameson Todd D[REDACTED] (A copy of the Order is attached hereto as Exhibit A.) Jamie Alicia Baker, the birth mother of these infant children joined Mr. Baker in his petition for the adoption of her minor children, and joins his Appeal before this Honorable Court. The record below is replete with testimony and evidence demonstrating the birth father’s abandonment of his children in the months preceding Mr. Baker’s Petition for Adoption. This fact notwithstanding, on April 3, 2008, the Circuit Court entered an Order denying Mr. Baker’s Petition for Adoption. Accordingly, Mr. Baker appeals the Circuit Court’s denial of his Petition for Adoption and respectfully requests that this Honorable Court grant appropriate relief.

II. STATEMENT OF FACTS AND BACKGROUND

Mr. Baker is a resident of the State of West Virginia and Kanawha County and is a football coach at the University of Charleston. (Tr. at 77-78.) He is a dedicated coach and devoted family man. Johanna Caroline D[REDACTED] Grant Thomas D[REDACTED] and Jameson Todd D[REDACTED], along with their birth mother, Mr. Baker’s wife, Jamie Alicia Baker, have all been residing as a family in Mr. Baker’s home continuously since June of 2005. (Pet. at ¶3.) Johanna Caroline D[REDACTED] was born on January 21, 1996 and is twelve years old. (Tr. at 80.) Grant Thomas D[REDACTED] was born on December 5, 2000 and is seven years old. (*Id.*) Jameson Todd D[REDACTED] was born on September 12, 2003 and is four years old. (*Id.*)

On or about August 10, 2007, Mr. Baker filed a Petition for Adoption of these children in the Circuit Court of Kanawha County, West Virginia. His wife, Jamie Alicia Baker joined in his Petition.¹ Mr. Baker's Petition for Adoption of Johanna, Grant, and Jameson was based upon West Virginia Code § 48-22-306. In West Virginia, abandonment by a birth parent is presumed when the birth parent fails to financially support his/her child within the birth parent's means and fails to visit or communicate with his/her child when the birth parent knows where the child lives and is physically and financially able to do so, and when these failures continue uninterrupted for the six months prior to the petition for adoption. *See* W. Va. Code § 48-22-306.

Mark D [REDACTED] is the biological father of Johanna Caroline D [REDACTED] Grant Thomas D [REDACTED] and Jameson Todd D [REDACTED]; however, Mr. D [REDACTED] has been anything but a father to these children. He has failed to support these children financially since at least June of 2006 when he made his last child support payment. (Tr. at 22-23; 89.) At the time of the adoption hearing in this case, he was over \$19,000 behind in payments to his children. (Tr. at 25; 89.) He has failed to provide their medical insurance since December 2005, and he owes at least \$3,700 in overdue medical expense payments. (Tr. at 25-26; 89-90.) He has also failed to provide Court-mandated insurance for his children. (Tr. 25-27.) Mr. D [REDACTED]'s ongoing violation of family court orders and his flagrant disregard for the financial, medical, and emotional needs of his children characterize the neglect — rather than care — that he has ungraciously shown his children.

While college educated and employable in the work force, Mr. D [REDACTED] claimed he was “unable” to meet his financial obligations to his children. Not only is this claim unsupported by

¹ Jamie Alicia Baker (formerly Jamie D [REDACTED]) received a divorce decree in March of 2004, from the Circuit Court of Columbia County, Arkansas, Domestic Relations Division granting her a divorce from Mark Ernest D [REDACTED] (Tr. at 42, 89.) On December 31, 2004, Jamie Alicia Baker married Carey Lynn Baker in Magnolia, Columbia County, Arkansas. The Order by the Circuit Court incorrectly noted that the D [REDACTED]'s divorce was on December 1, 2004.

Mr. D [REDACTED], but also it is directly controverted by the facts in this case. As the record clearly shows, Mr. D [REDACTED] arranged for the following payments and support for himself:

- He borrowed money to make a car payment. (Tr. at 27.)
- His third wife supported him and paid for his personal living expenses. (Tr. at 27.)
- He arranged for his mother and sister to pay his own medical bills.. (Tr. at 28.)
- He has paid for legal services in two states. (Tr. at 42; 62.)
- He was able to come up with enough money to pay for 90 days of inpatient rehabilitation at a cost of \$10,000. (Order at Findings of Fact ¶3.)
- He has, in spite of a college education, voluntarily removed himself from the work force. (Tr. at 7, 48.)

The record further indicates that it was Mr. D [REDACTED]'s indifference towards his parental responsibilities and lack of concern for his children — rather than his supposed inability — which has led to his absence from their lives. Quite tellingly, while Mr. D [REDACTED] was in drug rehab, and during the exact time period in which Mr. D [REDACTED] abandoned his children by failing to support them and failing to visit or communicate with them, Mr. D [REDACTED] was able to meet, court (which presumably would involve expenses like telephone calls, greeting cards, flowers, an engagement ring, etc.), and eventually marry his now third wife. Interestingly, Mr. D [REDACTED] testified that he began processing out of his drug rehabilitation center in August 2007, because he received the Notice of Adoption in this case, but Georgia Probate Court records show that the marriage license for Mr. D [REDACTED] and his now third wife was dated in early September 2007. (Tr. at 54.) Clearly, if Mr. D [REDACTED] was able to meet, court, and marry a woman while in drug rehab, he had sufficient access to money and means of communication that he could have maintained a relationship with his children, if he desired to do so. Instead, these facts clearly

demonstrate that Mr. D [REDACTED] chose to provide for himself rather than for his biological children and even prioritized his own emotional needs for personal relationships above theirs.

In similar fashion, Mr. D [REDACTED] forgot, or at least failed to recognize, his own children's birthdays. When his oldest daughter Johanna's birthday came around in January of 2007, he failed to buy her a gift, send her a card, or even remember her with a phone call.. (Tr. at 31.) Mr. D [REDACTED]'s son, Grant, had a birthday just a couple of weeks before the adoption hearing in this case, but Mr. D [REDACTED] likewise failed to give him a present or a card. (Tr. at 30-31.) Even when his youngest son turned four years old last September (the same month in which Mr. D [REDACTED] married his now third wife), he failed to get him even a small present or card and did not bother to call him. (Tr. at 31.) In fact, the record shows that Mr. D [REDACTED] failed to give his children anything at all for their last three birthdays. (Tr. at 84; 94-95.) Instead, since 2005, it has been Mr. Baker who has been financially supporting Johanna, Grant and Jameson, and it has been Mr. Baker who has attended the children's school events and celebrated their birthdays with gifts, cards, and personal affection. (Tr. at 80-81; 84-85.)

Mr. D [REDACTED]'s conspicuous physical absence from his children's lives is also indicative of his abandonment of the children. In addition to not financially supporting his children, Mr. D [REDACTED] failed to visit his children even once during the six months prior to the filing of the Petition for Adoption at issue in this case. (Tr. at 19-20.) His last visit with his children was in October 2006, (*id.*) despite the fact that he knew where the Bakers lived (Tr. at 82) and had been there before. (Tr. at 21.) Also, Mr. D [REDACTED] had Mr. Baker's current cell phone number and his current home telephone number, which he historically used to call the Bakers and arrange for visits with the children. (Tr. at 82.) Since October 2006, Mr. D [REDACTED] failed to contact Mr. Baker to arrange any visitation with the children. (Tr. at 83.)

Mr. D [REDACTED] admits that he has not talked to his children since October 2006, and it is clear from the record that Mr. D [REDACTED] did not attempt, by any other means, to keep in contact with his children during that time. (Tr. at 34.) The Bakers never made any effort to keep Mr. D [REDACTED] from seeing his children, never ignored his phone calls, refused his mail, or interfered with or impeded, in any way, his ability to see the children. (Tr. at 82.) In fact, there never was any mail, e-mail or packages from Mr. D [REDACTED] for his children. (Tr. at 84.) Mr. D [REDACTED] failed to call, write, visit or communicate in any way with his children since October 2006, including neglecting to send birthday, Christmas, or other holiday presents or cards, despite the fact that Mr. D [REDACTED] knew the address, telephone number, and whereabouts of his children throughout that period of time.

While Mr. D [REDACTED] claimed that he tried to call and send letters to his children between October 2006 and the time of the filing of Mr. Baker's petition for adoption, the Order from the Circuit Court makes clear that:

On the issues of attempting to contact the children and interfering with contacting the children, the Court did not find any one witness more credible than the other.

(Order at Findings of Fact ¶ 11.)

To compound his fraudulent behavior, Mr. D [REDACTED] is also an admitted drug abuser and a convicted criminal. Mr. D [REDACTED] was indicted in Arkansas on over 70 counts of forgery and impersonating a licensed professional in connection with his attempts to forge prescriptions to obtain narcotic drugs.² (Tr. at 9-12; Order at Findings of Fact ¶ 4.) He was also indicted in Tennessee on three (3) counts of violating probation (which he was placed on in connection with charges for solicitation to obtain a narcotic drug) and three (3) counts of obtaining drugs using a

² Mr. D [REDACTED] has subsequently pled guilty to 20 felony counts in the Circuit Court of Mississippi County, Arkansas. He received five (5) years probation.

forged prescription and impersonating a licensed professional. (Tr. 13-15.) Even worse, Mr. D [REDACTED] pursued his criminal activities of forging prescriptions and obtaining drugs while he had Johanna, Grant, and Jameson with him during the summer of 2006. (Tr. at 37-39.) , as evidenced by the following excerpt from Mr. D [REDACTED]'s testimony:

Q: (Mr. Barnette) So you left your children with someone else while you went to obtain drugs?

A: (Mr. D [REDACTED]) Excuse me?

Q: You left your children with someone else while you went to obtain drugs?

A: You know, I think I've answered these kind of charges and I think I answered your question that I have not done that with my children. Where else are we going with that?

Q: Where we're going is did you [leave] your children with someone else while you attempted to obtain drugs?

A: If my mother was keeping them, then obviously I left them with somebody else. I think I answered your question.

(Tr. at 38-39.)

Mr. and Mrs. Baker both testified that they believe it is in the best interests of Johanna, Grant, and Jameson that Mr. Baker's petition for adoption be granted. (Order at Findings of Fact ¶ 15.) Mrs. Baker is currently being treated for cancer. (Tr. at 88; 96.) Fortunately, her doctors in Charleston and at M.D. Anderson Hospital in Houston, Texas, have given her a positive outlook; however, should Mrs. Baker's condition change, and Mr. Baker's petition for adoption be denied on appeal, these children could be sent to live with Mr. D [REDACTED] after having to face the untimely passing of their mother. (Tr. at 97.) Mr. Baker very much wants to adopt Johanna, Grant, and Jameson. (Tr. at 85.) He respectfully appeals to this Court to consider the best interests of the children and reverse the decision of the Circuit Court of Kanawha County.

III. ASSIGNMENTS OF ERROR

- A. **The Circuit Court Used the Wrong Legal Standard to Evaluate Mark D [REDACTED]'s Conduct in This Case.**
- B. **The Circuit Court Failed to Consider the Best Interests of Johanna, Grant and Jameson Todd D [REDACTED]**

IV. STANDARD OF REVIEW

As this Court explained in Syllabus Point 4 of *Burgess v. Porterfield*, “[t]his Court reviews the circuit court’s final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*.” 196 W. Va. 178, 469 S.E.2d 114 (1996). *See also In re the Adoption of William Albert B.*, 216 W. Va. 425, 428, 607 S.E.2d 531, 534 (2004).

V. DISCUSSION OF LAW AND ARGUMENT

The Circuit Court erred in denying Mr. Baker’s Petition to Adopt Johanna Caroline D [REDACTED], Grant Thomas D [REDACTED], and Jameson Todd D [REDACTED] because it used the wrong legal standard in evaluating Mr. D [REDACTED]’s conduct respecting his children in this case. Further, the Circuit Court failed to consider what is in the best interests of the children in this case.

- A. **The Circuit Court Used the Wrong Legal Standard to Evaluate Mark D [REDACTED]'s Conduct in This Case.**

The Circuit Court utilized the wrong legal standard in this case and failed to properly apply the statutory presumption of abandonment in this case. As a starting point, abandonment voids the presumption that a biological parent is fit to have custody of his/her child. *See In re Adoption of William Albert B.*, 216 W. Va. 425 (2004) (citing *Kiger v. Hancock*, 153 W. Va. 404 (1969)). West Virginia Code § 48-22-102 defines abandonment as “any conduct . . . that demonstrates a settled purpose to forego all duties and relinquish all parental claims to the child.”

W. Va. Code § 48-22-102. More specifically, codifying this Court's decision in *In re Harris*, 160 W. Va. 422 (1977),³ abandonment is presumed when the following specific conduct is shown:

Abandonment of a child over the age of six months *shall be presumed* when the birth parent:

(1) Fails to financially support the child within the means of the birth parent; and

(2) Fails to visit or otherwise communicate with the child when he or she knows where the child resides, is physically and financially able to do so and is not prevented from doing so by the person or authorized agency having the care or custody of the child: Provided, That such failure to act continues uninterrupted for a period of six months immediately preceding the filing of the adoption petition.

W. Va. Code § 48-22-306 (emphasis added). Where conduct described in this section is shown, the legislature clearly requires that such conduct be presumed to constitute abandonment. Whether the parent intended to relinquish his or her parental claims is irrelevant to the analysis.

Mr. Baker's Petition to adopt Johanna Caroline D [REDACTED], Grant Thomas D [REDACTED], and Jameson Todd D [REDACTED] is premised upon Mark D [REDACTED]'s conduct constituting abandonment under West Virginia Code § 48-22-306. (See also Petition for Adoption at ¶ 7.) The Circuit Court's Conclusions of Law quotes the wrong definition of abandonment in this case. (Order at Conclusions of Law ¶ 1.) The Circuit Court quoted West Virginia Code § 48-22-102, which requires proof of conduct that demonstrates a settled purpose to relinquish all parental claims to the child. The Court quoted the standard of proof in this case as "clear, cogent and convincing." (Order at Conclusions of Law ¶ 2.) While this standard may apply to proof of abandonment

³ "Where a father abandons his children, provides no support and maintenance, does not visit the children, and does not in any other reasonable way, given his position in life and the opportunities for the exercise of his parental rights, exercise the authority or undertake the responsibilities of a parent, . . . we would not be concerned with the father's protectable interest because he would have waived such interest by abandonment." *In re Harris*, 160 W. Va. 422 (1977).

under § 48-22-102, it simply does not apply to § 48-22-306, where proof of certain conduct creates a statutory presumption of abandonment. *See In re Adoption of William Albert B.*, 216 W. Va. at 430 (first analyzing conduct presumptively constituting abandonment and then, when abandonment was not found under that definition, analyzing abandonment under § 48-22-102 and utilizing the clear, cogent and convincing standard of proof.).

Moreover, the Circuit Court's error in this regard was not harmless. This is not a case of the Circuit Court merely reciting the wrong law. Instead, it is clear from the Circuit Court's Conclusions of Law that it relied upon and applied the wrong law to the facts of this case. Paragraphs 3, 4, 5, and 7 in the Conclusions of Law section of the Circuit Court's Order all reference the wrong definition of abandonment for this case, and this misunderstanding as to the applicable law clearly impacted the Court's ultimate decision:

3. The Court cannot find that the biological father, Mr. D [REDACTED] has abandoned or permanently relinquished his parental right to the children.
4. While Mr. D [REDACTED] has not provided child support for some time, his addictions, problems with the law, and hospitalization for drug rehabilitation has likely been a major factor in hindering him from doing so, *not any intent or settled purpose to forgo his parental duties or relinquish all parental claims to the children.*
5. The Petitioner has failed to prove that the biological father has abandoned or permanently relinquished his parental rights to the children as abandonment is defined by W. Va. Code § 48-22-102.
7. Based upon the entire record, the Court cannot find *intent to abandon the children* by the biological father.

(Order at Conclusions of Law ¶¶ 3-5, 7) (emphasis added).

The only paragraph in the entire Conclusions of Law section of the Order that arguably quotes the proper standard in this case is paragraph 6, which is discussed more below, and even that paragraph misstates the law. When the entire Conclusions of Law portion of the Order is

read, it appears that the Court was reading the two definitions of abandonment as both having to be established in order to grant the Petition for adoption. That is not the law in this case. The Order repeatedly speaks of Mr. D [REDACTED] lacking the "intent" to abandon his children or relinquish his parental rights. Mr. D [REDACTED]'s intentions are wholly irrelevant in this case.

The proper standard for abandonment in this case is found at West Virginia Code § 48-22-306. In the Circuit Court, Mr. Baker fully demonstrated that Mr. D [REDACTED]:

1. failed to financially support his children within his means; and
2. failed to visit or otherwise communicate with his children when he knew where they lived, was physically and financially able to do so, and was not prevented from doing so by the Bakers,

for a period of six months before the filing of the adoption petition in this case. At this point, a statutory presumption of abandonment arose. *See* W. Va. Code § 48-22-306(a). Here again, however, the Circuit Court utilized the wrong standard in evaluating the presumption. The Circuit Court's order at paragraph 6 of the Conclusions of Law section stated:

The Petitioner has failed to show un rebutted conduct on the part of the biological father presumptively constituting abandonment.

It is not Petitioner's burden to show un rebutted conduct. It is clear that once conduct meeting W. Va. Code § 48-22-306(a) has been shown, *the burden shifts to the birth parent to rebut the evidence and show compelling circumstances preventing that parent from supporting and communicating with the children.* This shifting burden framework is consistent with Rule 301 of the West Virginia Rules of Evidence, which provides that a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption. *See* W. Va. R. Evid. 301.

In this case, the record contained undisputed testimony that, for a period exceeding the statutory minimum of six months, Mr. D [REDACTED] failed to support his children within his means

and, in addition, he failed to be physically or emotionally present in their lives. The record is clear, and indeed Mr. D [REDACTED] has admitted, that he has failed to support his children financially since June 2006, when he made his last child support payment. (Tr. at 22-23.) At the time of the adoption hearing, Mr. D [REDACTED] was over \$19,000 behind in payments to his children. (Tr. at 25.) He has failed to provide their medical insurance since December 2005, and he owes at least \$3,700 in overdue medical expense payments. (Tr. at 25-26.) He has also failed to provide Court-mandated insurance for his children. (Tr. 25-27.) In short, the record in this matter is replete with conduct that W. Va. Code § 48-22-306(a) compels a court to presume constitutes statutory abandonment. As discussed above, Mr. D [REDACTED]'s persistent violation of family court support orders, his conspicuous physical absence from his children's lives, and his flagrant disregard for their financial, medical, and emotional needs — despite his means to provide support and affection — is precisely the nature of conduct contemplated by the statute and as envisioned by this Court's ruling in *In re Harris*.

Mr. D [REDACTED]'s attempt to demonstrate compelling circumstances explaining his failure to support his children was that his drug addiction, problems with the law, and hospitalization for drug abuse, as well as his unemployment, hindered his ability to support his children. (Order at Findings of Fact ¶ 12 and Conclusions of Law at ¶ 4.) All of the excuses offered by Mr. D [REDACTED] for his alleged inability to support his children were clearly rebutted by evidence that Mr. D [REDACTED] admittedly had access to plenty of financial resources:

- He borrowed money to make a car payment. (Tr. at 27.)
- His third wife supported him and paid for his living expenses. (Tr. at 27.)
- He arranged for his medical bills to be paid by his mother and sister. (Tr. at 28.)
- He paid for legal services in two states. (Tr. at 42; 62.)

- He was able to come up with enough money to pay for 90 days of inpatient rehabilitation at a cost of \$10,000. (Order at Findings of Fact ¶ 3.)
- He has, in spite of a college education, voluntarily removed himself from the work force. (Tr. at 7; 48)

In addition, while Mr. D [REDACTED] was in his very expensive drug rehab program, and during the exact time period in which Mr. D [REDACTED] abandoned his children by failing to support them and visit or communicate with them, Mr. D [REDACTED] was able to meet, court and marry his now third wife. Clearly, if Mr. D [REDACTED] was able to meet, court and marry a woman while in drug rehab, he had sufficient access to money and means of communication that he could have maintained a relationship with his children, if he chose to do so. Instead of doing so, however, he abandoned them.

The record provides ample support for the conclusion that it was Mr. D [REDACTED]'s indifference towards his parental responsibilities and lack of concern for his children — rather than his supposed inability — which has led to his absence from his children's lives. Despite Mr. D [REDACTED]'s attempt to demonstrate “compelling circumstances” for his alleged inability to support his children, it is clear that paying for cars, expensive drug rehabilitation programs, medical bills, a new girlfriend and then bride, as well as lawyers in two states cannot rebut the presumption that Mr. D [REDACTED]'s conduct constitutes abandonment under W. Va. Code § 48-22-306.

The second element of proving conduct constituting abandonment under W. Va. Code § 48-22-306, namely that Mr. D [REDACTED] not visit or otherwise communicate with his children in the six months prior to the petition for adoption at issue in this case, is also easily satisfied. It is undisputed that Mr. D [REDACTED] last saw his children in October of 2006. (Order at Findings of Fact

¶ 5.) It is undisputed, moreover, that Mr. D [REDACTED] last spoke to his children in October 2006. (Tr. at 34.)

There was testimony on both sides concerning alleged attempts by Mr. D [REDACTED] to contact his children and alleged attempts to prevent contact by the Bakers; however, the Circuit Court specifically found that it “did not find any one witness more credible than the other” on these issues. (Order at Findings of Fact ¶ 11.) If the court did not find any one witness more credible or persuasive than another, then it cannot be said that Mr. D [REDACTED] rebutted the presumption of abandonment demonstrated by Mr. Baker. It is also important to note that, despite his many assertions about attempting to contact his children on the telephone or through the mail, Mr. D [REDACTED] did not present any documentary evidence to support these attempts to the Circuit Court. (Order at Findings of Fact ¶ 9.)

Accordingly, Mr. D [REDACTED] failed to overcome the statutory presumption of abandonment, and the Circuit Court erred when it applied incorrect legal standards and, based thereon, failed to find presumptive abandonment in this case. For the foregoing reasons, Mr. Baker respectfully requests that this Court reverse the Circuit Court’s Order denying his adoption petition.

B. The Circuit Court Failed to Consider the Best Interests of the D [REDACTED] Children in this Case.

“The best interests of the child is the polar star by which decisions must be made which affect children.” *Napoleon S. v. Walker*, 217 W. Va. 254 (2005) (citing *Michael K.T. v. Tina L.T.*, 182 W. Va. 399, 405 (1989)). Even in cases involving the relinquishment or termination of a parent’s rights, the paramount concern remains the best interests of the children involved therein. See *In re Ceasar L.*, 221 W. Va. 249 (2007). The Circuit Court failed to consider what is in the best interest of the D [REDACTED] children in this matter. While immediate custody of these children remains with their birth mother, Jamie Baker, Mrs. Baker is currently undergoing

treatment for cancer. Mrs. Baker's doctors have given her a positive outlook; however, should Mrs. Baker's condition change, and Mr. Baker's petition for adoption be denied on appeal, these children could end up being sent to live with Mr. D [REDACTED] after having to face the untimely passing of their mother. (Tr. at 97.) This is just one reason why this appeal is of paramount importance for these children.

While none of the D [REDACTED] children testified before the Circuit Court due to their respective ages, Mrs. Baker provided the Court with one particular anecdote clearly demonstrating how difficult it would be for Johanna D [REDACTED] to be taken away from Mr. Baker.

Q: (Mr. Barnette) Let me ask you to tell Judge Zakaib about the school assignment Johanna wrote in 2005.

A: (Mrs. Baker) Okay. Johanna is my writer and as an English teacher that makes my very proud, but she got an opportunity to write about a hero, someone she really admired. I think probably most picked movie stars and athletes.

My little girl picked Carey [Baker]. She picked her dad and she said that he was a great role model, dependable. When she needed something, he was there. She felt safe with him as her father and just a wonderful loving tribute.

She brings it home and we have to wrap it up for Christmas that year and that's what she put on the tree for him. I think she was probably prouder than a purchased gift, which those are the best gifts anyway. I didn't get chosen, you know, I thought that was interesting. She immediately focused on choosing him.

(Tr. at 97-98.)

Additional testimony, including expert testimony, was presented to the Circuit Court in support of Mr. Baker's Petition for Adoption. For instance, Dr. Russ Voltin examined the children and the Bakers, and his testimony was presented to the Circuit Court in the form of his deposition transcript. (Tr. at 124.) The clear recommendation of Dr. Voltin, based on his psychiatric training, was that Mr. Baker was the psychological parent for these children and it

was in their best interests that he be permitted to adopt them. (Tr. at 134.) Similarly, Donna McCune, who has worked in the field of adoptions for twenty years, recommended to the Circuit Court that Mr. Baker be permitted to adopt Johanna, Grant, and Jameson, finding that it would be in their best interests. (Tr. at 118.) Perhaps most importantly, Mrs. Baker, the birth mother of the children, testified that she believes it is in the best interests of Johanna, Grant, and Jameson that Mr. Baker's petition for adoption be granted. (Order at Findings of Fact ¶ 15.)

Finally, and of significant importance when considering the best interests of these children, Mr. D [REDACTED] has been indicted on close to 80 criminal charges in two states. (Tr. at 9-15; Order at Findings of Fact ¶ 4.) The charges range from forging a prescription and impersonating a licensed professional to probation violations. (*Id.*) Mr. D [REDACTED] is an admitted drug user who, in the past, has dumped his own children on his mother so he can go out and obtain drugs illegally. (Tr. at 37-39.) He is unemployed and is over \$19,000 behind in child support payments. (Tr. 22-25 and Order at Findings of Fact ¶¶ 3; 19.) He even had to go get a court order to get his daughter from his second marriage back from his deceased wife's parents. (Tr. at 68-71.) It is difficult to imagine how it would be in the best interests of these children to end up in the custody of an admitted drug abuser, who has a lengthy criminal record, and a long history of failing to support or even interact with his own children.

There is absolutely no indication that the Circuit Court considered the testimony of Donna McCune or Dr. Voltin. There is no indication that the Circuit Court considered the charges pending against Mr. D [REDACTED] and how those charges might impact the D [REDACTED] children and their welfare. There is no indication that the Circuit Court gave any thought to the children in this case at all. The Order only reads in terms of focusing on Mr. D [REDACTED]'s rights without regard to what may be in the best interests of these children. It was error for the Circuit Court

not to consider the best interests of Johanna, Grant, and Jameson D [REDACTED] in this case. Therefore, Mr. Baker respectfully requests that this Court properly consider the best interests of the children and grant relief that is equitable and just.

VI. RELIEF PRAYED FOR

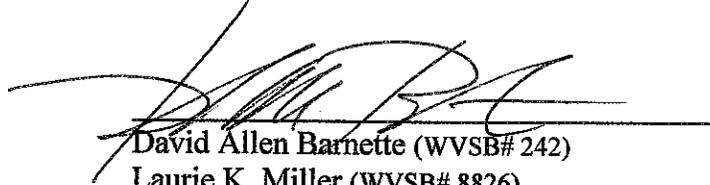
The Circuit Court erred in denying Mr. Baker's Petition for Adoption of his wife's children, Johanna, Grant, and Jameson, in this case. The Circuit Court erred by using the wrong legal standard to evaluate Mr. D [REDACTED]'s conduct which constituted statutory abandonment of his children. In the six months preceding Mr. Baker's Petition for Adoption, Mr. D [REDACTED] failed to financially support his children and failed to visit or otherwise communicate with his children despite the fact that he knew where they were, had their telephone numbers, and was not prevented from seeing or talking to them. Mr. D [REDACTED]'s conduct in this regard met the standards under which abandonment "shall be presumed." Nothing presented in the record of this case overcame this presumption. The Circuit Court specifically found as a matter of fact that no witness was any more credible than any other on this issue of attempting to contact the children and interfering with contacting the children. That finding alone makes it clear that Mr. D [REDACTED] failed to overcome the presumption of abandonment of his children. Further, the Circuit Court failed to consider what would be in the best interests of the D [REDACTED] children in this case. Upon consideration of the entire record in this case, it is clear that the best interest of these children is served by permitting their adoption by Mr. Baker.

For the foregoing reasons and in consideration of the applicable law, Carey Baker respectfully appeals to this Honorable Court to reverse the Circuit Court of Kanawha County's Order denying his Petition to Adopt Johanna Caroline D [REDACTED] Grant Thomas D [REDACTED] and Jameson Todd D [REDACTED].

Respectfully submitted,

CAREY LYNN BAKER

By Counsel

A handwritten signature in black ink, appearing to read 'D. A. Barnette', is written over a horizontal line. The signature is stylized and somewhat cursive.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

In the Matter of: THE PETITION
OF CAREY LYNN BAKER FOR THE
ADOPTION OF JOHANNA CAROLINE
D [REDACTED], AN INFANT FEMALE CHILD
UNDER THE AGE OF TWELVE YEARS,
AND GRANT THOMAS D [REDACTED] AND
JAMESON TODD D [REDACTED], INFANT MALE
CHILDREN UNDER THE AGE OF TWELVE
YEARS

APPEAL NO. _____

Adoption Action No. 07-A-49
The Honorable Paul Zakaib, Jr.
Circuit Court of Kanawha County

CERTIFICATE OF SERVICE

I, David Allen Barnette, counsel for the Appellant, do hereby certify that a true copy of the foregoing *Brief on Behalf of Appellant, Carey Lynn Baker* was served this 15th day of August, 2008, by first-class mail, postage prepaid, addressed as follows:

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