

No. \_\_\_\_\_

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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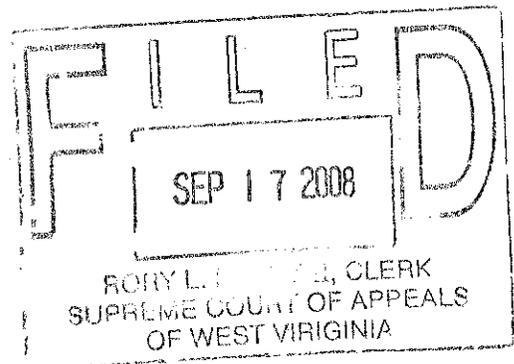
CHARLESTON

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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



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APPELEE'S REPLY BRIEF

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Counsel for Appellee

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APPELLEE'S BRIEF

TO THE HONORABLE JUSTICE OF THE SUPREME COURT  
OF APPEALS OF WEST VIRGINIA:

Pursuant to Rule 10(b) of the Rules of Appellate Procedure, the Appellant submits this memorandum in reply to the Appellant's Brief.

STATEMENT OF THE CASE

The D [REDACTED] were divorced in Columbia County, Arkansas in March 2004. Mrs. D [REDACTED], now Jamie Baker, was granted custody of the children. In February 2005, Mr. D [REDACTED] received extended summer visitation. In June 2006, the mother moved to West Virginia.

Mr. D [REDACTED] enjoyed extended summer visitation in 2006. He last had visitation with his children in Arkansas in October 2006. When he tried to have visitation in November 2006, he testified that the mother would not bring the children for the visitation.

The evidence showed that Mr. D [REDACTED] was arrested in September 2006. Mrs. Ray testified that although she did not interfere with visitation, that as a mother protective of her children, she would not allow her children to be around the father if she believed he was involved in drug use or crime. She was aware of Mr. D [REDACTED]'s legal problems at the time she is accused by Mr. D [REDACTED] of interfering with contact with the children.

Mr. D [REDACTED] was in inpatient rehabilitation from January 2007 until August 2007, the time

of the filing of the petition to adopt. He is still in aftercare.

During his treatment he testified that he tried to call his children. His calls were refused. He wrote letters, the last in July 2007 one month prior to filing of the petition to adopt. He did not keep copies of the letters sent.

In addition to trying to overcome his addiction to painkillers in rehabilitation, Mr. D [REDACTED] was also involved in litigation to modify custody of his children both in Arkansas and Kanawha County West Virginia where the mother attempted to change jurisdiction of the pending Arkansas motion to modify to Kanawha County. That motion was denied in Kanawha County in February 2007.

Mr. D [REDACTED] was unemployed at the time of filing the petition and during the time period when he did not pay support. He has had to borrow money from family members to pay for his expense for drug treatment and all other expense.

#### **AUTHORITIES RELIED UPON**

1. West Virginia Code §48-22-306
2. State ex rel. Kiger v. Hancock, 153 W.Va. 404, 168 S.E.2d 798 (1969).
3. In re Willis, 157 W.Va. 225, 207 S.E.2d 129 (1973).
4. In re Jeffries, 204 W.Va. 360, 512 S.E.2d 873 (W.Va. 1998)

#### **ARGUMENT**

*The Circuit Court Used the Correct Legal standard to Evaluate Mr. D [REDACTED]'s Conduct to Find*

*That He Had Not Abandoned His Children*

"A parent has the natural right to the custody of his or her infant child and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty, or has waived such right, or by agreement or otherwise has permanently transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts." Syllabus Point 1, State ex rel. Kiger v. Hancock, 153 W.Va. 404, 168 S.E. 2d 798 (1969).

The Appellee submits that the circuit court applied the correct legal standards in denying the petition to adopt. The court properly found that Mr. D [REDACTED] did not abandon his children as that term is defined by law. Further the court found that Mr. D [REDACTED]'s inability to support or contact his children was caused by compelling circumstances as defined by law.

West Virginia Code §48-22-306 provides that:

(a) 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.

Mr. D [REDACTED] has had to leave his employment and enter a program for treatment of his addiction to prescription painkillers. He has been forced to borrow money to pay legal expense in two states to try to see his children and his most basic living expenses.

Statements regarding money spent on Mr. D [REDACTED]'s wife are not supported in the record and are offered in an attempt to prejudice the Court against Mr. D [REDACTED]. Comments regarding

allegations of money spent on "his now third wife" are gratuitous and should be ignored. (Mr. D [REDACTED]'s second wife died in December 2005, the day after the birth of their child.)

Mr. D [REDACTED] testified that he sent letters to his children while in rehabilitation, the latest in July 2007, one month prior to the filing of the petition to adopt. True, he did not bring to court copies of personal letters to his children. However at the time, he was unaware that there would be an adoption filed and that he would need to retain copies of letters to his children as evidence.

Likewise, Mr. D [REDACTED] testified that he tried to contact his children by phone but was unable to get through. The mother and stepfather denied receiving the calls letters or preventing communication between the father and his children.

The trial court did not rule on this conflict in the evidence. Instead, the trial court relied on the provision of West Virginia Code § 48-22-306 (d) and prior case law regarding intent to abandon to reach his decision.

The relevant portion of W. Va. Code §48-22-306, provides

(d) Notwithstanding any provision in this section to the contrary, any birth parent shall have the opportunity to demonstrate to the court the existence of compelling circumstances preventing said parent from supporting, visiting or otherwise communicating with the child: Provided, That in no event may incarceration provide such a compelling circumstance if the crime resulting in the incarceration involved a rape in which the child was conceived.

Mr. D [REDACTED] presented evidence showing compelling circumstances preventing him from providing support, visiting or otherwise communicating with his children. He was in rehabilitation trying to overcome his drug addiction in order to be able to parent his children.

The trial court specifically found in paragraph 4 of its order that,

'While Mr. D [REDACTED] has not provided child support for some time, his drug addictions, problems with the laws 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.”

The evidence supports a finding by the trial court that Mr. D [REDACTED] experienced compelling circumstances that prevented him from providing support for his children and not sustaining contact. The statute does not provide a list of acceptable compelling circumstances. It only mentions one circumstance that is not compelling, incarceration for a crime involving rape in which the child was conceived.

"The standard of proof required to support a court order limiting or terminating parental rights to the custody of minor children is clear, cogent and convincing proof." Syllabus Point 6, In re Willis, 157 W.Va. 225, 207 S.E. 2d 129 (1973).

Among the numerous definitions of abandonment of a child within the purview of the adoption laws, the most frequently approved is that "abandonment imports any conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child." In re Jeffries, 204 W.Va. 360, 512 S.E. 2d 873 (W.Va. 1998)

The trial court had the opportunity to observe Mr. D [REDACTED] during his testimony. The court could conclude based upon the demeanor of the witness whether this was a man who had any "settled purpose to forgo all parental duties and relinquish all parental claims to his children." He has begged money from family and friends to recover from his drug addiction and to litigate to see his children. He has tried to communicate both by phone and letter from rehabilitation both to maintain contact with his children and as he testified, as part of his treatment where he was required to communicate with those hurt by his addiction. The court's ruling was correct. It is supported both by the evidence and the law and should be upheld.

*The Circuit Court Applied Properly Considered The Question Before It, That Is, Whether Mr.*

*D [REDACTED] Had Abandoned His Children.*

Part B of the Appellant's assignment of error consists of arguing that Mr. Baker is a better person to raise the children than Mr. D [REDACTED].

The opinions of Dr. Voltin and Donna McCune are entitled to little if any weight in this type of proceeding. Ms. McCune had not considered that the effect of her opinion was to recommend the termination of all parental rights to a man she had never met and knew nothing about. The same is true for Dr. Voltin's opinion. Both opinions are to the effect that Mr. Baker is a proper person to help raise children and that he has provided his step-children with a good home and established a close relationship with the children.

The Appellant argues that "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." With all due respect, the adoption petition would not get very far without the approval of the mother married to the Appellant.

The arguments raised in this section of the Appellants' brief would be relevant to a petition to modify a parenting plan to limit visitation, provide supervised visitation or impose other restrictions such as requiring drug screens. However pending criminal charges, drug use and even incarceration are insufficient to do what is being asked, terminate all parental rights of a father.

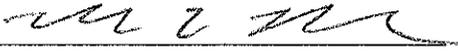
Mr. D [REDACTED]'s sins are repeated again and again throughout the Appellant's brief. If all you have is a hammer, everything is a nail.

While Mr. D [REDACTED]'s drug use and its consequences raise questions regarding under what

terms and conditions he should be permitted to have further visitation with his children, they do not justify termination of all his rights so he can be replaced by the new stepfather regardless of the type of home he has provided.

Mr. D [REDACTED] spent the time away from his children treating his drug addiction. He had to borrow money from family and friends to do so. He now has his life back on track, is working, paying his child support and trying to get on with his life. The family court is in the best position to determine what type of parenting arrangement is in the best interests of the children. The trial court's decision to deny the petition to adopt should be upheld and the appeal dismissed.

MARK D [REDACTED]  
Appellee, By Counsel

  
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CERTIFICATE OF SERVICE

I, Edward L. Bullman, counsel for the defendant herein, Mark D [REDACTED], do hereby certify that on this 16<sup>th</sup> day of September, 2008, I have placed a true and exact copy of the foregoing **APPELLEE'S REPLY BRIEF** in the United States Mail, postage properly paid, in envelopes addressed as follows:



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Edward L. Bullman