

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**

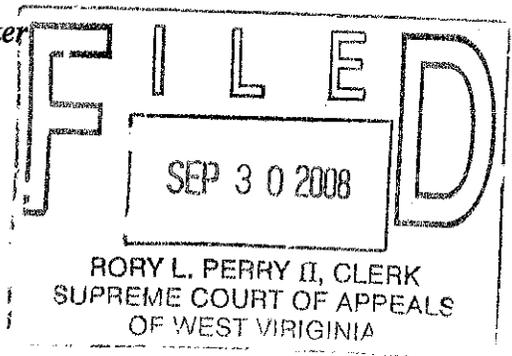
APPEAL NO. 34218

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

REPLY BRIEF ON BEHALF OF APPELLANT, CAREY LYNN BAKER

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September 29, 2008



Petitioner's arguments supporting his petition for adoption are fully set forth in his Brief on Behalf of Appellant, Carey Lynn Baker. The purpose of this Reply is to briefly respond to certain erroneous arguments raised by Respondent.

The Respondent's principal argument — namely, that Mr. D [REDACTED] did not abandon his children under applicable law — is plainly incorrect. What constitutes abandonment of a child by its parent within the purview of adoption laws is clearly established in West Virginia. *See* W. Va. Code § 48-22-306 (establishing factors which presume abandonment for purposes of permitting the adoption of a child without a parent's consent when the stated conditions occur uninterrupted for a period of six months immediately preceding the filing of the adoption petition).¹ Pursuant to the statute, in order for Mr. D [REDACTED] to avoid the presumption that he has abandoned his children, Mr. D [REDACTED] is statutorily required to (i) financially support the children, within his means, and (ii) visit or otherwise communicate with the children when he knows where the children reside, is physically and financially able to do so, and is not prevented by the Bakers from doing so. *Id.* As this Court has observed, it is equally clear under West Virginia law that abandonment is a valid ground for termination of parental rights in the case of a nonconsensual adoption.²

¹ 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." (emphasis added).

² Syl. pt. 2, *In re Jeffries*, 204 W. Va. 360, 512 S.E.2d 873 (1998) (holding, in part, that "[i]f there is evidence in a subsequent adoption proceeding that the natural parent has both failed to financially support the child, and failed to visit or otherwise communicate with the child in the [six] months preceding the filing of the adoption petition, a circuit court shall presume the child has been abandoned"); *State ex rel. Kiger v. Hancock*, 153 W. Va. 404, 168 S.E.2d 798 (1969) (holding that abandonment of a child voids the presumption that a biological parent is fit to have custody).

In applying the foregoing principles to the circumstances of this case, it is clear that Mr. D█████'s conduct constituted abandonment under West Virginia law. Based on undisputed testimony, there is clear, cogent, and convincing proof in the record that Mr. D█████ (i) failed to support his children since June 2006 and owes in excess of \$19,000 in child support arrears; (ii) failed to provide court-mandated insurance for his children since December 2005 and owes at least \$3,700 in overdue medical expense payments; (iii) failed to call, write, visit or communicate, in any way, with his children since October 2006; and (iv) consistently neglected to remember his children's birthdays or other holidays during that time period as well.

(Appellant's Br. at 2.) Mr. D█████'s willful indifference towards his parental responsibilities and his conspicuous physical absence from his children's lives continued uninterrupted for a period of time exceeding the statutory minimum of six months. *See* W. Va. Code § 48-22-306. Accordingly, W. Va. Code § 48-22-306 compels a presumption of abandonment in this case.

The Respondent has also glossed over the dispositive rule that, once a *prima facie* showing of abandonment has been made pursuant to W. Va. Code § 48-22-306, the burden of proof shifts to the Respondent to rebut the evidence and show compelling circumstances preventing him from supporting and communicating with his children. *See* W. Va. Code § 48-22-306(d) ("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"). Given the facts cited above and in the Appellant's Brief, it is clear that Respondent has failed to carry his burden. Mr. D█████ argued that his drug addiction, legal problems, hospitalization for drug abuse, and unemployment constitute "compelling circumstances" so as to justify his failure to support his children financially and emotionally. (Appellee's Br. at 4-6.) All of the excuses offered by Mr. D█████, however, were clearly

rebutted by evidence that Mr. D [REDACTED] admittedly had access to plenty of financial resources, had voluntarily removed himself from the work force, had the ability to maintain a relationship with a woman whom he later married, and had knowledge of the children's whereabouts and was not prevented from contacting them by the Bakers. (Appellant's Br. at 3, 11.) Quite tellingly, Mr. D [REDACTED] was able to meet his personal financial needs, including paying for cars, expensive drug rehabilitation, medical bills, and legal fees, during the same period of time when he neglected to financially support his children. *Id.* Moreover, Mr. D [REDACTED] was able to court and marry his new wife during the same time that he failed, even once, to visit, communicate, or send a card or present to any of his three children. *Id.* It is thus clear that none of the circumstances Mr. D [REDACTED] raised is sufficient to rebut the presumption of abandonment under W. Va. Code § 48-22-306. Accordingly, even if this Court were to find Mr. D [REDACTED]'s good and bad acts in equipoise — and the Appellant vigorously denies that they are — this Court should still find in favor of Appellant because that equipoise means that Respondent has failed to carry his burden. *See* W. Va. Code § 48-22-306.

Finally, Respondent ignores the cardinal rule that “[t]he 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 (205) (citing *Michael K.T. v. Tina L.T.*, 182 W. Va. 399, 405 (1989)). Even in cases involving relinquishment or termination of parental rights, this Court has observed that “[s]uperior to any rights of parents to the custody of their own children . . . 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 court's overriding concern for the well-being of the children involved.” *In re Jeffries*, 204 W. Va. at 366 (citations omitted) (concluding that “in an adoption action where it is alleged that a biological parent has abandoned a child, it is ‘highly

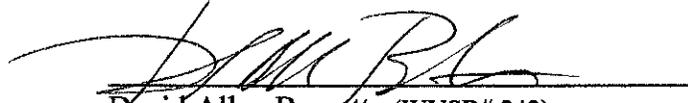
relevant for the circuit court to consider” whether the biological parent “was dilatory in grasping the opportunity to assert his parental rights and responsibilities”) (*citing State ex rel. Roy Allen S. v. Stone*, 196 W. Va. 624, 638, 474 S.E.2d 554, 568 (1996)). The record indicates that, in contravention of clear legal precedence, the circuit court failed to consider the best interests of the children in this matter, but rather simply focused on Mr. D [REDACTED]’s rights. There is no indication that the circuit court considered the testimony supporting Mr. Baker’s adoption, including expert testimony that Mr. Baker is already the psychological parent for the children. (Appellant’s Br. at 15.) Similarly, there is no indication that the circuit court considered the fact that Mr. D [REDACTED] an admitted drug abuser, has been indicted on close to 80 criminal charges in two states and has pled guilty to 20 felony counts in Arkansas. (Appellant’s Br. at 5.) Nor did the circuit court consider how those criminal charges might impact the children and their welfare. There can be no question that the children’s interests and welfare would be served by remaining in a safe, loving household with parents who are gainfully employed, law-abiding, and not addicted to drugs.

In short, Mr. D [REDACTED]’s conduct met the statutory standards under which abandonment “shall be presumed.” Because he failed to present any evidence of “compelling circumstances” sufficient to rebut this presumption, Mr. D [REDACTED] has therefore failed to carry his burden in dispelling the presumption of abandonment. Furthermore, once a presumption of abandonment has been established, the best interests of the children must be considered by this Court, even above Mr. D [REDACTED]’s parental rights. Upon consideration of the entire record in this case, it is clear that the best interests of these children are served by permitting their adoption by Mr. Baker.

Respectfully submitted,

CAREY LYNN BAKER

By Counsel

A handwritten signature in black ink, appearing to read 'DAB', is written over a horizontal line.

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CERTIFICATE OF SERVICE

I, David Allen Barnette, counsel for the Appellant, do hereby certify that a true copy of the foregoing *Reply Brief on Behalf of Appellant, Carey Lynn Baker* was served this 30th day of September, 2008, by first-class mail, postage prepaid, addressed as follows:

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