ARIZONA SUPREME COURT

In Re Termination of Parental Rights as to B.W.	Arizona Supreme Court No. CV-24-0079-PR Court of Appeals Division One No. 1 CA-JV 23-0202 Maricopa County Superior Court No. JS520409

APPELLEE'S RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

This case does not in fact present a novel legal issue simply because it involves a unique set of particular facts, nor a continuing issue of statewide importance, because this single set of facts happened to one individual. In the appellate court, Father unsuccessfully argued he was faced with a "Hobbesian choice," and now Father is arguing Mother's actions were the "but-for" cause for his prosecution, and therefore caused his failure to maintain a normal parent-child relationship with his son. Mother will show this argument fails.

In this case the record is completely devoid of any actual evidence Mother or her "desire to seek revenge," some eight (8) years earlier was the "but-for" cause for Father's prosecution. That implies for no other reason, and relying on no other evidence but Mother's testimony, Father would not have been prosecuted, and for no other reason than Father's prosecution, Father would have had a normal parent-child relationship with B.W. There is unequivocally no evidence in this record of that. Father's testimony or opinion Mother was the "but-for" cause is not evidence, nor is his criminal counsel's testimony or opinion, evidence of it. Mother's role as a witness in the criminal trial had no impact whatsoever on Father's actual ability to pursue his parental rights in family court. Even after Father was acquitted, he waited nearly four months to file a family court action, instead trying to effectuate his own

"revenge" on Mother first.[1] The *prima facie* abandonment was not rebutted, and the Court should affirm the termination of Father's rights.

ISSUES PRESENTED FOR REVIEW

1. Did the Court misapply A.R.S. § 8-531(1)'s just cause rebuttal?
2. Did the Court misapply A.R.S. § 8-533(B) by affirming the juvenile court's best interest finding?

MATERIAL FACTS

Jessica W. and Jason M. were on and off throughout their years' long relationship. (App. D. at 58). At the time of the Child B.W.'s birth in 2015, they were neither in an "on" part of their relationship, nor were they residing together. (*Id.*). Despite the status of their relationship, and Father's expressed doubts about paternity, Father appeared at the hospital at the time the Child was born. They co-parented mostly amicably in the first several months of the Child's life. On August 13, 2015, after another argument about the Child's paternity, Father shot and killed the husband of his then-girlfriend, and all contact with the Child stopped; Mother testified he disappeared. (*Id.* at 60-61).

[1] Father testified he called the Attorney General to get Mother charged, contacted Phoenix PD to get Mother charged, contacted "CPS" to get Mother investigated and to "help with the crimes committed against [him] that were never answered for," all before taking action in the family court. (Appellant's Appendix [App.] F at 394-95, 433, 447).

From that point forward Father had no contact whatsoever with the Child, not for Christmas, or birthdays, or when he started kindergarten; he never sent any cards, gifts, or letters, never provided support, and never otherwise asserted his parental rights. (App. D at 61-62, 66-67, 76). Father relies heavily on the purported advice of his criminal counsel not to have contact with Mother, but conceded in trial this did not prevent him from paying child support, or from having parenting time, without having contact with Mother. (App. F at 443; App. E at 267, 273).

Father further admitted for the two years following his acquittal and prior to the severance trial, he knew where to send things to Mother for his son, and consciously chose not to; he was under no advice from criminal or other counsel not to have contact with Mother [or the Child], he was under no restraint of any court order or release conditions, and yet he still did nothing to try and have that relationship with his son. (App. F at 432, 449-450). Mother resided in the same place for several years, had the same phone number, and could be found at her place of work as she had worked there for eleven years. (App. D at 80, 82).

Father now wants the Court to believe that he believed his failure to seek parenting time, even supervised by an interventionist or third-party agency during the criminal case, was because it would have required contact with Mother, but even Father's family court counsel could not explain why this would be true. When counsel was asked if he discussed with Father why he waited until the acquittal to

initiate the family court matter, he testified that he "wasn't present for Mr. Hamby's discussions about it," and it would *just be conjecture* that he "probably just knew that if you're involved in a criminal matter, you're going to assert your Fifth Amendment rights." (App. E. at 296). He conceded the Child was never a witness or a victim in the criminal matter, such that the court order restricting Father would have applied to the Child. (*Id.* at 302). He further testified there would have been nothing preventing him from establishing paternity. (*Id.)*

When Father's criminal counsel was asked whether, if Father was in family court, his advice would have been "don't testify, don't go under oath, don't make any statements to anyone?", Mr. Hamby's response was he "certainly sat with clients in civil proceedings and with civil counsel and instructed [his] client to invoke if it seemed appropriate at the time. [He] sat through entire proceedings, and they've never had to invoke if they don't get into that arena." (*Id.* at 242-244, 256-57). He testified if a civil action had been filed, he would have asked the civil attorney to file for a stay, an action Father could have chosen to take, but did not. (*Id*. at 244). He testified he never advised Father not to establish paternity of the Child. (*Id.* at 271). He was aware of clients having monitored or supervised visits. (*Id.* at 260). He admitted it would be possible for Father to have had contact with his son, and to complete parenting time exchanges in ways that did not involve Mother. (Id. at 267, 272-73). Last, Mr. Hamby testified if there was a way to financially support the

Child without having contact with Mother, he *would have supported it*. (*Id.* at 270). Father testified he chose to take no action of his own volition, without any force or threats made against him, and with specific knowledge that his criminal counsel had no experience in either family or juvenile law. (App. F at 417-18).

Based on his failures to act diligently even post-acquittal, to file a family court matter any time before 2022, to have contact, and to provide cards, gifts, letters or support, Gail Olson testified termination was in the Child's best interest because he is happy and there was a concern it could be detrimental to introduce Father into his life after all these years. (App. D. at 147). If asked who his father is, he would say Carl, Mother's fiancé, as he has acted as a father figure to him for years. (*Id.* at 83-84). But for Mother's financial situation of having to defend against multiple suits against her, Mother and Carl would have already gotten married. (*Id.* at 86). Mother testified they would be trying for June of 2023 to finally get married, though this has not occurred given ongoing litigation. (*Id.*). It is uncontroverted Carl would adopt the Child "right now at this moment" if he could. (*Id.* at 86-87).

The juvenile court found these facts to be sufficient to terminate Father's parental rights, because while they were "dramatic and unique," they did not amount to "just cause" as contemplated by the statute to rebut the presumption of abandonment. (App. B). The Court of Appeals additionally found the evidence sufficient to affirm the termination. (App. A).

ARGUMENT

I. The Appeals Court Did Not Misinterpret or Misapply the Just Cause Rebuttal Under A.R.S. § 8-531(1).

The Court of Appeals effectively and properly rejected all of Father's legal claims that he argues provide the requisite "just cause," to defeat the presumption of abandonment. Father now argues his actions related to the criminal case, as well as his actions in the family court case after his acquittal all constitute "just cause," relying on *S-114487*.[2] First and foremost, reliance on this case at all is somewhat misguided because the case itself refers to and analyzes the applicable statutes which are now defunct. There is reference to this fact contained within the case itself, as while it was pending, the new and now applicable statutory definition of abandonment was enacted, and all reference to the "intent" of the parent versus conduct of the parent, were removed.

That being said, the holding in *S-114487* is actually on point with what the trial and appellate courts found in this case. The court assessed what constitutes reasonable support, regular contact, and normal supervision [as contemplated in the statutory definition of abandonment] and found it will vary from case to case. *Pima Cnty Juv. Severance Action No. S-114487*, 179 Ariz. 86, 96 (1994). They agreed it may be difficult for an unwed father to provide support or supervision or to even

[2] *Pima Cnty Juv. Severance Action No. S-114487*, 179 Ariz. 86 (1994).

maintain contact, but they concluded the father must take concrete steps to establish the legal or emotional bonds linking parent to child. *Id*. The message was simply to *do something*, because conduct speaks louder than words or subjective intent. *Id.* at 97 (emphasis added). Further, they asserted when circumstances prevent an unwed father from exercising traditional ways of bonding with his child, he must act persistently to establish the relationship *however possible* and must vigorously assert his legal rights to the extent necessary, as it would be only then a biological link would transform into a parental relationship deserving full constitutional protection. *Id.* (emphasis added).

More specifically, the claims of the father in that case were he was prevented from developing a relationship because mother gave up the child [to an adoptive family] and attorneys assisting mother with the adoption manipulated the system against him, even though they knew he did not want to give up his child. *Id*. at 98. The court rejected his arguments, even if true, because while he had contacted attorneys, he did not retain any to assert his rights---*he did nothing*. *Id*. (emphasis added). Finally, the court held even if he had legitimate reasons for not following up on suggestions by the attorneys about how to fight for his child, none of those reasons rose to the statutorily required good cause. *Id*. at 99.

Here, Father argues he should not be viewed in the same way as the father in *S-114487* because he retained a criminal attorney. Retaining a criminal attorney has

absolutely nothing to do with asserting his parental rights in a family or juvenile court action. Instead, what is more apropos in comparing this case to that one, is that father here also consulted a family law attorney, on at least two occasions, and although he could not remember what specifically they had advised him, he admits he consciously chose not to retain one or to take any action in family court to assert his rights. Like the father in *S-114487, he did nothing*. The court of appeals addressed this failure to act in finding, "even when a parent may have difficult choices [to make] it does not provide an automatic defense for inaction—even when the choice is between pursuing the parental relationship or following the advice of counsel to avoid risking criminal liability. (App. A at 7) (citing *Minh T. v. Ariz. Dep't. of Econ.Sec*., 202 Ariz. 76, 77-80 (App.2011).

Moreover, persistently inquiring of his criminal attorney, who had no experience in family or juvenile law, about contact with the child, also provides no legitimate excuse or "just cause" for failing to assert, in any way at all, his parental rights in family court. The court of appeals addressed this specifically when they found, "[e]ven when a court order precludes or limits the parent's contact with the child, it is incumbent on the parent to take some lawful action to maintain the relationship. (App. A at 6) (citin*g In re Pima Cnty. Severance Action No. S-1607*, Ariz. 237, 239 (1985). Even if the criminal release condition precluded Father in this case from having contact with Mother, Father could have, but never did, seek any

clarification or modification of the order to ensure he was legally permitted to have contact with his child[3]--if he had and the criminal court entered an actual no contact order with the Child, Father could not have been lawfully terminated for not having contact with the Child because he would have been following a court order.[4] The same would have been true if Father had initiated a paternity action and the court ordered he not have parenting time, or that the matter would be stayed until his criminal case was over. These would have potentially supplied the "just cause" Father argues here. But, instead here, Father held steadfast in his position of *doing nothing*.

Subsequently hiring a family law attorney some seven (7) years later and then filing a family court action, also does not comport with the directive in the *S-114487* case, in so far as the court said a father must act, act *quickly,* act *persistently and vigorously* even, to assert his parental rights in order to defeat an abandonment presumption. *Pima County Juv. Severance Action No. S-114487*, 179 Ariz. at 96.(emphasis added).

[3] The court of appeals opined Father's argument that it would have been futile to either initiate a family court case or seek modification of his [criminal court] release conditions was entirely speculative. (App. A at 7).

[4] *See Caterina W. v. Anthony R.*, No.1 CA-JV 17-0558 (Ariz. App. May 24, 2018). (finding father did not abandon the child because of not having contact when he was not legally permitted to, and he reasonably relied on and abided by that court order).

Father's argument regarding the reliance on *Minh T.* is also misguided. Neither the juvenile court nor the court of appeals relied on that case because of the nature of the underlying criminal case the parent was facing. Both courts relied on *Minh T.* because again, in each case, the parent had a choice to make, and making that choice negatively impacted their ability to maintain their parental rights. In *Minh T.*, the parents faced much more of an actual risk of incriminating themselves which could have hurt their criminal defense and resulted in their loss of liberty. In this case, there is no known negative consequence that Father may have suffered had he chosen to pursue his legal rights. His attorneys speculated about the possibility of a deposition, or the possibility of having to testify in a custody proceeding, but father's criminal counsel stated he had "sat with clients in civil proceedings and with civil counsel and instructed [his] client to invoke if it seemed appropriate at the time. [He] sat through entire proceedings, and they've never had to invoke if they don't get into that arena." (App. E at 242-244, 256-57) This testimony not only proves Father did have the ability to pursue his parental rights, but also that his criminal counsel could have helped him do so.

The balance of Father's argument that asserts Mother's actions were the "but-for" cause of Father being charged, and further caused the deceased victim to have been in Father's home in the first place, are meritless. The veracity of the statements is not supported in this record in any way. There exists nothing more in the record

than the fact that Mother was a witness in the case against him, whether that was as a "key" or "material" witness is not even relevant to the inquiry here. Furthermore, the leap to Mother being labelled as having "wrongfully restricted,"[5] or persistently and substantially restricted contact between Father and the Child is also unsupported.[6] Mother never erected a single barrier to Father asserting his parental rights. Whatever she searched the internet for seven (7) years prior to the termination trial is irrelevant; it presented no legal barrier or impediment to Father asserting his rights. The record, including all of the evidence and testimony Father presented regarding his criminal case and advice from his criminal counsel, fully supports any reasonable fact finder concluding Father had in fact abandoned the Child without just cause. Therefore, the decision of the court of appeals should be affirmed.

II. The Appeals Court Did Not Misinterpret or Misapply Best Interests Under A.R.S. § 8-533(B).

The trial and appellate courts properly found termination was in the Child's best interests because introducing Father into his life would "damage [his] stability and security,"[7] which is a sufficient detriment to the Child for the court to have

[5] *In re Termination of Parental Rights as to C.R.*, 256 Ariz. 170 ¶ 15 *(*App. 2023).
[6] *Calvin B. v. Brittany B.*,232 Ariz. 292, 304 P.3d 1115 (App. 2013).
[7] App. A at 7-8, ¶ 22 (citing App. B at 21).

granted the termination.[8] The record supported this finding as the Child does not know who Father is and he has not ever met any paternal extended family, as they had never tried to initiate any relationship with him either. (App. D at 118-119). If the Child were asked who his father is, he would say Carl, Mother's fiancé, as he has acted as a father to the Child for years. (*Id.* at 83-84). The courts further found the Child would benefit from an adoption by Carl, his psychological father, because they are bonded and Carl acts like a step-parent would act towards a child.[9] Finally, as Mother testified, both Mother and Carl want the adoption to happen; Mother in fact testified Carl was ready to adopt the child "right now at this moment."[10] The appellate court also concluded the record was sufficient to show the prospect of adoption.[11] The record supported the conclusion Father had "voluntarily made himself a complete stranger to the child," because Father testified *he chose* to take no action of his own volition, without any force or threats made against him, and with specific knowledge that his criminal counsel had no experience in family or juvenile law. (App. E at 252, App.F at 417-18). Both the trial court and the appellate

[8] *See Kent K. v. Bobby M.*, 201 Ariz. 279, 288, 110 P.3d, 1013, 1022 (2005) (holding the court need only find there was sufficient evidence of either a benefit derived by the Child as a result of the termination or the Child would suffer a detriment if parental rights were left intact.)
[9] App. B at 21-22.
[10] App. D at 86-87.
[11] App. A at 7, ¶ 21; see also *Demetrius L. v. Joshlynn F.*, 239 Ariz. 1 (2016) (holding adoption must be legally possible and likely).

court's rulings were consistent with the law and supported by the record; therefore, the termination must be affirmed.

CONCLUSION

Based on all the evidence before it, and the arguments contained herein, this Court should deny the Petition for Review as both the trial and appellate court rulings were legally sound and sufficiently supported by the record.

DATED this 22nd day of May, 2024.

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