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 SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND COURT RULES

ISSUE PRESENTED FOR REVIEW

1. Did the Court misinterpret and/or misapply the just cause rebuttal under A.R.S. § 8-531(1)?

INTRODUCTION

Father would like the Court to consider the unique facts of this case and decide that his legal abandonment of the Child should be ignored or excused. While the facts of his case are unique, no change in the law is required to find that the trial court and Court of Appeals properly considered all evidence and reasonable inferences and ruled appropriately. Father has not presented any evidence or argument that constitutes any abuse of discretion by the courts, nor has he established that the respective courts came to an egregious conclusion, that no other court would come to. This is true despite the fact Father's arguments have changed over time and he is now arguing differently than he did in the respective courts. His "just cause" has morphed from he was reasonably relying on his criminal counsel's advice, to his detriment, to he was faced with a "Hobbesian choice," to now, Mother is somehow the "but-for" cause for him even being charged with murder. The reality is that could never be true.

The county prosecutor's office reviewed all evidence and believed the case had merit—in fact from the first grand jury to the subsequent ones, the jurors supported and found that Father had not only allegedly tampered with evidence but

had conspired to murder and did murder his lover's husband. Those county attorneys presented their case to the grand jury three (3) different times. Ultimately, the final grand jury approved the charges—and those charges withstood any and all pre-trial challenges, resulting in the case going to trial and being decided by a jury. It is not reasonable to infer, nor is there any factual basis to consider, that Mother was the "but-for" cause of Father's charges, which he argues excuses his failure to do anything to assert his parental rights. Father simply cannot and did not prove that assertion—he actually did not even argue it in the trial court. Even though he was acquitted, there can be no doubt that it was his behavior of shooting and killing his lover's husband that caused him to be criminally charged.

Established law is sufficient for the court to apply the facts of this case to the statutory definition of abandonment. Furthermore, even if the court found that Father rebutted the *prima facie* presumption, the Court of Appeals properly pointed out that only eliminates the time-based presumption; it does not defeat the evidence as a whole. Father failed for seven (7) years to make any effort to have a relationship with his son or to support him, which underlies the trial court's conclusion that he had untried legal actions. He failed to make any effort to have a relationship with his son or to support him before he was even charged, a period of at least a year after the shooting, and despite his criminal attorney's advice for a period of time. He failed for a period of eighteen months following his acquittal to request parenting

time, or to send any cards, gifts, letters or support for the Child. For approximately four (4) of these months, he spent considerable time trying to get Mother charged, rather than immediately and diligently asserting his parental rights. The only way the Court can rule on this case is to affirm the trial court's termination and the Court of Appeals' affirmation of that termination.

ARGUMENT

I. The current case law sufficiently and appropriately directs how to evaluate abandonment Under A.R.S. § 8-531(1).

a. Because the current case law specifically identifies how to measure abandonment, there is no need to further clarify or define it.

Prior to the legal standard that exists now, Arizona courts were charged with determining whether a parent had abandoned their child by examining their intent.[1] Appellate courts held that looking at a parent's intent was subjective and contrary to the intent of the statute. They asserted it was more objective to look at the conduct of the parent with the guidance of the statutory definition. At the time, the definition of abandonment contained the same language it contains now with respect to a parent's failure to provide reasonable support and to maintain regular contact

[1] *Pima Cnty. Juv. Severance Action No. S-114487*, 179 Ariz. 86 (1994) (holding that applying the "settled purpose" test and/or the "conscious disregard" tests were both the wrong way to determine whether a child had been abandoned; the Court found in favor of applying the statutory definition [at that time] which called for a measurement of the parent's conduct, assessed through a case specific factual inquiry).

including normal supervision. *Id*. There was a specific distinction as well between the alleged father who had an established relationship with the child and one who had no relationship with the child. As the law was turning, the court directed that in whatever manner the statutory definition was being applied against an unwed father with no relationship with the child, "the message was…do something." [2] In July of 1994, the legislature recodified the definition of abandonment to what it is today—removing altogether any reference to intent and focusing instead entirely on a parent's conduct. *Id.* at FN 14.

Since that time, there have been dozens of cases that have appropriately considered individual factual circumstances and provided additional guidance as to what is or might be abandonment. While not specifically ever identifying what "just cause" is, the courts have at every turn indicated whether the specific facts of a case measured by this standard does or does not hold muster. It is unequivocal that the burden is on the unwed father to act and act quickly[3] and to take concrete steps to establish the legal or emotional bonds linking parent to child, even if it is difficult, or the court may find abandonment.[4] These efforts must be exerted however possible. *Id.*

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[2] *Id*.
[3] *Id.* at 101. ("[W]e have adopted a rule that preserves parental interests when the parent grasps the opportunity [to assert their parental rights and build a relationship with their child] quickly, diligently, and persistently.")
[4] *Id.*

The court has gone further to explain that when circumstances preclude a parent from exercising traditional methods of bonding with their child, the parent must act persistently to establish the relationship again, however possible, and must vigorously assert their legal rights to the extent necessary.[5] This is true even if there are court orders precluding or limiting a parent's contact with a child, as the parent can and should still take lawful action to maintain the relationship. (App. A at 6) (citing *Pima Cnty. Severance Action No. S-1607*, 147 Ariz. 237, 239 (1985)). These cases were decided in 1985, 1994 and 2000, but have been an objective and relatively non-complicated way of deciding abandonment cases. The basic tenets or principles offered in these cases are still applicable after decades and do not need to be modified, clarified, or changed in any way in order to decide the extant case, despite Father's claims to the contrary.

Similarly, cases which have looked at the behavior of the parent seeking termination also provide sufficient protection and guidance. The law has directed that in instances where the parent seeking termination has wrongfully restricted the other parent from maintaining a relationship with their child,[6] or persistently and substantially restricted contact between a parent or child,[7] thus causing the

[5] *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246 (2000).
[6] *In re Termination of Parental Rights as to C.R.*, 256 Ariz. 170, ¶ 15 (App. 2023).
[7] *Calvin B. v. Brittany B.*, 232 Ariz. 292, 304 P.3d 1115 (App. 2013).

relationship to be detrimentally affected, they will not be able to prevail in a termination based on the abandonment ground. These concepts are tangible and universally applicable, without further clarification. The court further distinguishes the weight of the argument by designating that the parent's conduct must be willful or have been committed with the intent to disrupt the other parent's relationship with their child.[8]

While not specifically mirroring the potential underlying reason for a no contact order, there are cases that have also addressed when and how court orders precluding contact may be sufficient cause to rebut and defeat an abandonment allegation. This has included where there was an order for no contact until a parent successfully addressed their alcohol addiction, satisfied terms of probation, and paid fines before parenting time would be considered,[9] as well as requiring a child's therapist to authorize contact because of historical mental health and aggression concerns, and requiring participation in counseling services and parenting classes.[10]

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[8] *Anthony O. v. Nora R.*, 2 CA-JV 2022-0016, 2022 WL 2348526, at 4, ¶ 14 (Ariz. App. June 29, 2022) (mem. decision) (affirming termination where Mother moved and did not inform Father of her new address and phone number because nothing in the record supported that she undertook those actions specifically to evade Father's contact).

[9] *See Caterina W. v. Anthony R.*, 1 CA-JV 17-0558, 2018 WL 2341881 (Ariz. App. May 24, 2018) (mem. decision).

[10] *Sarah R. v. Jeremy R.*, 1 CA-JV 15-0270, (Ariz. App. Feb. 9, 2016) (mem. decision) (reversing termination because Mother's contact was cut off by court order which delegated to child's therapist to control its duration, and Mother took actions within her control to address the issues preceding the order, maintained contact with

The court has also favorably considered efforts taken within a parent's control to pursue the relationship and to assert parental rights, even if there is a no contact order in place. *See id.* The facts of this case, as compared to the prior case law, disprove Father's assertion that a court order or the legal advice of an attorney prevented him from being able to *do anything* to assert his rights or pursue a relationship with his child. No additional refinement of the law is necessary for this court to find the trial court and appellate court properly considered his circumstances in their respective rulings.

b. Further clarification, or narrowly defining "just cause" or how to apply it would cause inequity in the treatment of children and parties subject to termination actions.

Any time the Court is considering making changes to the law, either by discarding, refining, narrowing, or otherwise changing the way in which it applies, it must consider consequences, particularly those that might be unintended. The Court must decide whether the impact of the change is necessary to protect or preserve the rights of the parties involved, or globally needed to prevent now defunct or inapplicable premises of law from resulting in decisions that no longer serve their intended purpose.

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a relative and the child's therapist inquiring about the child, sent gifts for the child, sought alternative ways to bond with the child like one way visitation, preparing a photo album for the Child, and pursued sibling visitation with the child—all of which amounted to her diligent and persistent pursuit of her legal rights).

The legislature and the courts have taken great care to carve out what is believed to be sufficient grounds to terminate parental rights to a child. All of their efforts have been and are guided by the strongly held notion that a parent's fundamental liberty interest in the care, custody and control, and management of their child(ren), shall be protected at all costs, and in every way possible, unless circumstances exist where it should not.[11] In this case, Mother has an equal interest in the care, custody, control and management of her child, and she therefore has a valid constitutional interest to have the severance affirmed so that she can protect her son from a father who has never made any effort to have a relationship with him, in lieu of her fiancé adopting him.

If the court holds that a pending criminal charge can or should be considered "just cause" to rebut a presumption of abandonment, it will cause inequities both between children in state custody and children not in state custody, and parents involved in private terminations and state terminations. If a pending criminal matter could excuse a parent's failure to have a normal parent-child relationship, or

[11] *See, e.g., Santosky v. Kramer*, 455 U.S. 745 (1982) (finding the state may terminate the rights of parents over parental objection upon a finding that the child is "permanently neglected"). While there is presumed to be a greater infringement on a parent's rights when a termination action is undertaken by the state, the impact of changes in the law, without doubt, will have consequences for private terminations as well.

asserting one's legal rights to their child, at least while the charge is pending, children not in state care would be left with no opportunity to have the psychological parent-child relationships they share with third parties, made legal via termination and adoption. Unless there were a consent, an act of abuse or neglect sufficient to meet that ground, or if mental illness/deficiency or substance abuse could somehow be proven—while considering the requirement that remediating services would be a necessary element, these children might otherwise be left without the opportunity to seek stability and security that adoption provides for an indeterminate period of time since criminal cases can often go one for several years.[12] Conversely, children in state care could at least achieve their permanency by being able to have the rights to their parents terminated via the time in care, or mental illness/deficiency or substance grounds. This inequity goes against the intent of the termination statutes.[13] It is not likely that the legislature thought to minimize or undervalue the interests of a child not in state care.

On the other side, if the court holds that a pending criminal charge can or should be considered "just cause" to rebut a presumption of abandonment, then

[12] Father testified that neither he nor his counsel knew the criminal case would go on as long as it did, but criminal cases, particular murder cases frequently last for several years, so it would be reasonable to infer that at least counsel should have known and been able to articulate that possibility to Father.

[13] The termination statute flows from the Adoption Safe Families Act (ASFA), the federal law that directs the states to timely seek permanency for children in state care, as in their best interests.

parents subject to a Dependency and state termination would be unable to share the commensurate protection from a termination, because the state has the ability to seek it on other grounds not available privately. This proposed change will undoubtedly also have a negative impact on when and how some of the other grounds are sought. If a pending criminal charge is a defense against abandonment, should it not then be considered a defense against time in care? Would it just apply to murder charges, or to violent felonies, or property crimes? Would there be an argument made that the numerosity or chronicity of the charges pending against a parent would be a factor to be considered in denying termination, or in preventing the filings?

If there is any differentiation in the applicable criminal offense, then there will inevitably be unequal application and protection of each individual parent's rights. Would this change necessitate the overturning of *Minh T.*[14], which has been widely and effectively utilized applicable law for twenty-three years? The public policy implications and fallout from a potential change such as this lend heavily in favor of not making any change to the way in which "just cause" relates to rebuttal of the *prima facie* abandonment presumption. Where a change is not legally necessary to achieve a just result in this case, or in the general application of the statutory

[14] *Minh T. v. Ariz. Dep't of Econ. Sec.*, 202 Ariz. 76 (App. 2011).

presumption, the overarching interest in fundamentally fair proceedings should prevail.

The term "just cause," is intentionally not narrowly defined to allow for greater consideration of specific facts on a case-by-case basis—the same is true for several other terms in the statutory definition of abandonment such as "reasonable support," "regular contact," "normal supervision," "normal parental relationship," or "minimal efforts." These terms serve the purpose of being a reference point against which a court can measure or gauge the specific facts of any given case—and which litigants can argue in a wide variety of ways. The lack of specificity actually provides greater opportunity to rebut the presumption overall. For these reasons, this Court should not disturb the rulings of the trial and appellate courts.

c. When the Court focuses on the parent's conduct objectively, and considers the evidence presented and reasonable inferences, the decision of the trial court and the Court of Appeals are consistent with the law and must be sustained.

Both the trial court and the appellate court in this matter rejected the argument that Father's criminal case and the advice of his counsel amount to "just cause" to rebut the *prima facie* presumption. Both courts offered that Father's belief regarding the potential consequences of pursuing action in the criminal or family court was speculative. (App. A at 7; App. B at 20). Father did not argue that pursuing action in

either court would have been futile, as noted by the trial court,[15] but the Court of Appeals indicated the arguments he did make were, nonetheless, "entirely speculative." (App. A at 7). Both courts asserted that he could have and should have pursued action in either or both courts so that he could have tried to build a relationship with the Child.

The courts' reliance on the evidence presented and their reasonable inferences are supported by the law. Parenting time in the family court is determined based on a number of factors. The Court must assess the child's best interests pursuant to A.R.S. § 25-403 as well as determine if there is any basis on which to restrict an award of parenting time based on A.R.S. §25-410(B) and/or §25-411(D). To restrict a parties' parenting time to being supervised or suspended, the court must find that in the absence of supervision, the children's physical health would be *endangered* or their emotional development *significantly impaired* or that unsupervised time would *seriously endanger* the children's physical, mental, moral, or emotional health.[16]

It is reasonable to infer that the family court, applying the statutes, could have and likely would have at minimum, awarded Father supervised parenting time. This can be, and often is, ordered through a third-party agency, whereby no contact

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[15] App. B at 20, FN 13.

[16] *Hart v. Hart*, 220 Ariz. 183 (App. 2009); *see also* A.R.S. §25-410 and -411(D).

between Mother and Father would have ever been necessary. The Court of Appeals further cited that he could have tried to seek a modification or clarification of his criminal release conditions, "if that was even necessary." (App. B at 7).

There can be no doubt whatsoever that the family law attorney, Mr. Boca, with whom Father consulted twice,[17] would have explained all of the above to Father. Further it is reasonable to infer that Father was informed that the simple act of filing a Petition to Establish Paternity, Parenting Time and Child Support, especially through counsel, would not have required Father to have had any contact at all with Mother. If Temporary Orders were sought, a hearing would have been held, but Father could invoke his Fifth Amendment rights not to testify about anything related to the criminal case—in fact, his attorney specifically testified that he had in fact sat with clients through those kinds of civil proceedings, [to protect their right against self-incrimination], and the criminal case sometimes never even came up at all.[18]

With respect to parenting time, Father's criminal counsel admitted he was aware of parents having contact with their children and completing exchanges in ways that did not involve contact with the other party, and that he was aware of clients having supervised visits.[19] He admitted he never advised Father not to

[17] App. F at 390-91, 418. ("He told me ***different things he could do***.")
[18] App. E at 242-244, 256-57.
[19] App. E at 260.267, 272-73.

establish paternity of the child, and if there was a way to pay support without contact with Mother he would have supported it.[20] Last, he testified that he could have and would have asked for a stay in any civil proceeding until the criminal matter resolved.[21]

If Father had participated in a Temporary Orders hearing, the family court would have determined whether he could have parenting time. In a best-case scenario, it is reasonable to infer he could have had unrestricted parenting time, or in a worst-case scenario, he could have had supervised or suspended parenting time with or without conditions to remove the restriction. If he was court-ordered to have no contact unless or until certain conditions had been met, and if the court made the resolution of the criminal matter a condition, Father could have actually been protected from having his rights terminated.[22] Moreover, regardless of what parenting time he would have been awarded, he would have legally established paternity, and an order would have been entered for child support to be paid through the Child Support Clearinghouse,[23] which would have negated any need for Father to have contact with Mother to financially support his son. Even if the Court was

[20] App. E. at 270-71.
[21] App. E at 244.
[22] *See Caterina W*, No.1 CA-JV 17-0558; *See also Sarah R.,* No.1 CA-JV 15-0270.
[23] A.R.S §25-320 and Rule 47(c)(3), *A.R.F.L.P.* (for any temporary parenting time order entered under this rule, the court must determine an amount of child support under A.R.S. §25-320 and the Arizona Child Support Guidelines).

inclined to move the case to Final Orders as required by the rules,[24] it was reasonable to infer that Father could have come out of any hearing, or could have entered into agreements, which either gave him unrestricted or restricted parenting time, and an order for him to support the child. Absent from Father's defense was any actual testimony that his failure to try to establish a parent-child relationship while the criminal case was pending was related to his privilege against self-incrimination.[25]

Assuming self-incrimination was at least in part the reason Father did not pursue untried legal actions,[26] his criminal counsel could also have protected him in and out of the courtroom. For instance, depositions were discussed, and these are allowed in family court proceedings,[27] but the rule specifically allows for counsel to instruct a deponent not to answer—or the deponent themselves may choose not to answer any questions, when necessary to preserve a privilege.[28] The Fifth Amendment would be a privilege that could unequivocally need to be preserved. In contested proceedings, the court may, but is not required to, draw a negative inference from a party invoking the Fifth Amendment while testifying. At best, the court may not have found any reason to draw a negative inference, and at worst, they could have negatively inferred facts that would already become part of the record,

[24] Rule 46(b)(2)(A) and (B), *A.R.F.L.P.*
[25] App. B at 19.
[26] App. B at 19.
[27] Rule 57(a)(1), *A.R.F.L.P.*
[28] Rule 57(c)(2), *A.R.F.L.P.*

presumably, through Mother's testimony and pleadings. The trial court commented on this phenomenon, and other considerations stating, "[s]o informed, the family court would have taken necessary steps to protect both parents' rights as well as [the child's] best interests."[29]

Most importantly, it is reasonable to infer, again, that Nicholas Boca, the family law attorney Father consulted with twice, would have advised Father on all of these issues. Further, it is reasonable to infer that the reason why Mr. Boca was not called as a witness to testify about the advice he gave Father, was because his testimony would have been substantially damaging to Father's "just cause" argument. No doubt, it can be inferred that he would have confirmed having gone over the law, the rules, and exactly when and how Father could pursue a family court action. This Court simply cannot ignore that based on all of the evidence the trial court had, including judging the veracity of each witnesses' respective testimony on the issue, and the reasonable inferences able to be drawn, that Father consciously decided to *do nothing*. He had options and he chose not to utilize them, to his ultimate peril.[30] As the trial court concluded, [Father's failure to pursue any action

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[29] App. B at 19.

[30] App. B at 20. (finding parents sometimes must make "difficult choices" when they are involved in legal proceedings that are obstacles to a normal parent-child relationship, internally citing *Minh T.*, 202 Ariz. at 80. "But, if the choice is to absent oneself from an infant child's life without even trying the legal efforts that might

in family court or criminal court] did not "insulate him from the civil consequences of his abandonment of the Child, particularly when no good reasons were offered as to why the available legal options were not explored in either the criminal court or in a parallel family court proceeding."[31] It is because of this failure to act, that the Court of Appeals affirmed the trial court's ruling, and this Court must similarly affirm it.

II. The Term "Just Cause" Relates Only to the *Prima Facie* presumption, so even if the Trial Court and the Appeals Court Believed it was Rebutted, it could Still Find Abandonment Occurred.

Even if this court finds that Father's pending criminal matter, and his reliance on counsel's advice were "just cause," that only means that the *prima facie* presumption may have been rebutted;[32] it does not in fact completely absolve Father from the court terminating his rights based on abandonment generally.[33] This premise was also recently affirmed by the Court of Appeals in a case decided May 28, 2024, *In re the Termination of Parental Rights as to S.W.* In that case, the court asserted that, "the law does not allow parents to legally abandon their children so

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have allowed some contact with that infant child, the parent must accept the consequences of that choice.")

[31] App. B at 19-20.

[32] This generalization also ignores Father's testimony that for a period of time he actually went against his counsel's advice. (App. E at 408).

[33] App. A at 7 (by the terms of the statute, a "just cause" showing is merely a rebuttal to a time-based presumption of abandonment).

long as "just cause" explains their failure to maintain normal parental relationships with their children."[34] They further offered that when more is presented beyond the *prima facie* evidence of abandonment, that parent's "just cause" explaining their failure may rebut the *prima facie* showing, but it *will not defeat* a finding of abandonment based on additional affirmative evidence establishing it.[35] The evidence in this case is not only overwhelming, it is undisputed. Father never attempted to have a relationship with the Child. He never tried to legally assert his rights, he never sent cards, gifts or letters or support. He never provided the basic necessities of life or normal supervision. He failed to make appropriate efforts even in the more than a year before he was charged and the criminal court order came into play, and the more than a year after he was acquitted through the completion of the termination trial. He never sent anything, despite admitting he knew where Mother lived and that he could have sent things to the Child. He failed to acknowledge the Child's birthdays or Christmas. *He did nothing—for seven years.* As a result of his choice to do nothing, the trial court and the appellate court rightly concluded he had literally and legally abandoned his son, and this Court must affirm that decision

[34] *In re Termination of Parental Rights as to S.W.,* No. 1 CA-JV 24-0016, 2024 WL2738642 (Ariz. App. May 28, 2024) (mem. decision).
[35] *Id*. at ¶ 8. (emphasis added).

unless clearly erroneous,[36] and unless as a matter of law *no one* could reasonably find what the trial court found.[37]

CONCLUSION

The trial court and Court of Appeals properly considered all evidence presented and reasonable inferences to correctly find Father's rights should be terminated. No change in the law is necessary to come to this conclusion. That the facts in this case are unique does not, in and of itself, mean that an issue of widespread importance exists to cause any change in the law. If the Court were to narrowly define the term "just cause," to include some sort of carve out for pending criminal charges, there would be inequities both for children in private versus state terminations, and parents in private versus state terminations. The fallout would be destructive to both private and state terminations as well as the intent of the ASFA law. None of this is what the legislature or the courts have intended when they purposefully have not narrowly defined the term "just cause." This is further evident in their decision not to narrowly define the other terms in the statutory definition of abandonment.

Finally, even if the court finds that Father's pending criminal case and reliance on his criminal counsel's advice to his detriment, is "just cause" to rebut the *prima*

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[36] *See Maricopa Cnty. Juv. Action No. J-75482,* 111 Ariz. 588, 591 (1975)
[37] *See Brionna J. v. Ariz. Dep't. of Child Safety*, 255 Ariz. 471 (2023) (emphasis added).

facie presumption—that is all it does; it only counters the time-based presumption and shifts the burden of proof back to Mother. All of the evidence showing Father's failure to act to assert his parental rights in any way, convincingly still constitutes abandonment. The trial court's decision must be affirmed unless it was clearly erroneous, and no other court could find similarly. Father has not met his burden in proving that, and therefore the termination must be affirmed.

Respectfully submitted this 25th day of September, 2024.

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