ARIZONA SUPREME COURT

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

APPELLANT JASON M.'S RESPONSE TO DEPARTMENT OF CHILD SAFETY'S AMICUS CURIAE BRIEF

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I. This Court should disregard DCS's speculation, assumptions, and opinions about the record and Jason because DCS conceded it did not review the record before the juvenile and appellate courts.

This Court should disregard DCS's speculation, assumptions, and opinions about the record before the lower courts and Jason because it conceded it did not review the transcripts or index of record on appeal. (DCS's Amicus Brief at 5.) Specifically, this Court should reject DCS's request to "either disregard accusations or presume that the juvenile court rejected them." (*Id.* at 6.) The Department's Amicus Brief attempts to reframe the facts—without having the actual facts—to blindly support Mother's argument.

Here, the record demonstrated Mother did not object to the information presented to the juvenile court, including but not limited to Mother stealing Jason's cell phone to obtain William's[1] contact information (4-12-23 Transcript [Tr.] at 24, 34-36; Ex. 12), Jason making a police report regarding his stolen cell phone (4-12-23 Tr. at 24), and Mother taking pictures of Jason's Truck and license plate before the August 2015 Incident (*id.* at 36-

1. William was the husband of Jason's girlfriend and victim of the Incident. (4-12- 23 Tr. at 36; Ex. 12.) Mother was aware that Jason's girlfriend was married to William. (4-12-23 Tr. at 36.)

37). And Mother asked to admit Jason's Exhibit 12 that contained Mother's specific internet searches regarding revenge against Jason prior to the August 2015 Incident. (4-12-23 Tr. at 124; Ex. 12 at 3.) Thus, this Court should disregard DCS's Prefatory Comment and its assumptions, opinions, and speculation about the record before the juvenile and appellate courts.

Despite admitting it did not review the transcripts, admitted exhibits, or index of record on appeal in this case, DCS claimed:

1. "Jason has made a number of serious accusations against Appellee Mother W. (Mother), claiming she engaged in theft and other 'illegal' activity motivated by desire for 'revenge' and that she was the 'but-for-cause' of Jason's indictment for murder." (DCS's Amicus Brief at 6.)
2. The facts presented about Mother stealing Jason's cell phone and Mother's August 2015 internet searches about getting revenge against Jason were "disputed facts." (*Id.* at 6.)
3. "Jason had only limited involvement with B.W. during the first four months of his life." (*Id.* at 7.)
4. "[B]ecause the juvenile court did not even mention most of the details in Jason's accusations, it appears that to whatever extent

Jason asserted them below, the juvenile court rejected them." (*Id.* at 6.)

Yet, the record before the juvenile and appellate courts contained the following information and Mother did not object to it:

1. Jason was at the hospital at B.W.'s birth and he signed an acknowledgement of paternity. (3-30-23 Tr. at 24; 4-12-23 Tr. at 17-18; Index of Record on Appeal [IRA] 59 [Exhibit B].)
2. From B.W.'s birth until the August 2015 Incident, Jason and Mother had an informal parenting plan where both parents spent time with B.W. and paid for B.W.'s expenses. (3-30-23 Tr. at 24-25, 85; 4-12-23 Tr. at 19-20; 5-17-23 Tr. at 20-22; Ex. 32.)
3. The night before the Incident, Jason and Mother were arguing about B.W. (4-12-23 Tr. at 42-43; Ex 32.)
4. Before the Incident, Mother went to Jason's home without his permission and Mother stole Jason's cell phone. (4-12-23 Tr. at 24, 34-36.) During the criminal trial, Mother admitted on the witness stand that she entered Jason's home without his permission, took his cell phone, and obtained William's phone number from Jason's phone. (*Id.* at 35-36; IRA 70 n.9.)

5. Mother's cell phone searches before the August 2015 Incident included searches about "how to get revenge on baby father" and "the vengeful mother who tears fathers from their children's lives." (4-12-23 Tr. at 42-43; Ex. 12 at 3.)
6. Mother's attorney asked to admit Jason's Exhibit 12—a document that contained Mother's specific internet searches regarding revenge and pornography—in evidence and it was admitted with no objections. (4-12-23 Tr. at 123; Ex. 12 at 3.)
7. The morning after Mother's revenge internet searches and the day of the Incident, she started calling William. (4-12-23 Tr. at 42-43; 5-17-23 Tr. at 24-25.) Per Mother's own testimony, the police contacted her the day of the Incident because she was on the phone with William during the Incident and the police wanted her cell phone. (3-30-23 Tr. at 94.) Her testimony of being on the phone with William during the Incident was corroborated by Jason, his trial attorney, and Exhibit 12. (4-12-23 Tr. at 23, 36; 5-17-23 Tr. at 24-25; Ex. 12 at 2 ["In fact, [Mother] was intricately involved in the events that led to the home invasion and was on the phone with the intruder when he entered [Jason]'s home."])

8. Jason's criminal attorney testified that "without [Mother] contacting [William] that morning, telling him that she believed that his wife was having an affair with Jason, [William] would have never been at the house that day." (4-12-23 Tr. at 36.)
9. The juvenile court asked the parties during trial to clarify if the information being provided about the criminal trial was "disputed" and Mother did not indicate it was disputed. (4-12-23 Tr. at 37-40.) Mother objected to information about her actions before and during the criminal trial as being irrelevant to the abandonment ground. (*Id.*) Mother did not "dispute" the information about her specific testimony during the criminal trial or the evidence presented regarding her actions before the Incident. (*Id.*) Moreover, footnote 9 of the juvenile court's termination ruling stated "[Mother]'s testimony at [Jason]'s criminal trial was consistent with [Jason]'s and his counsel's pre-trial beliefs." (IRA 70 at 9 n.9.)

Accordingly, the record before the juvenile and appellate courts did not support labeling the above information as "serious accusations against Appellee Jessica W. (Mother)." They were not merely accusations but evidence in the form of testimony and exhibits presented during the juvenile

court severance trial and preceding criminal trial and Mother did not object to the content of the information. Mother only objected to its relevance to the abandonment ground. (4-12-23 Tr. at 23, 37.) Mother did not dispute the facts regarding the underlying criminal matter when provided the opportunity by the juvenile court judge. (*Id.* at 37-40.) Accordingly, the information was not "disputed facts" as DCS inaccurately claimed. (DCS's Amicus Brief at 6.) This Court should not disregard the information and nothing in the record demonstrated that the juvenile court rejected the information. (IRA 70 at 8-9 n.9 [the juvenile court stated "[Mother]'s testimony at [Jason]'s criminal trial was consistent with [Jason]'s and his counsel's pre-trial beliefs."]

Based on DCS's concession that it did not review the transcripts and/or index of record in this case and based on the testimony and exhibits presented during the severance trial Jason asks this Court to disregard DCS's speculation, assumptions, and opinions about the record before the juvenile court and Jason.

II. Briefing before this Court demonstrates a conflict in the plain meaning and application of the terms "without just cause" and "just cause" under A.R.S. § 8-531(1), further supporting Jason's argument that the juvenile and appellate courts misinterpreted and misapplied it.

This case and its briefing have identified a conflict in the plain meaning and application of A.R.S. § 8-531(1), specifically the terms "without just cause" and "just cause." Notably, the Indigent Defense Amici Curiae Brief argued the plain meaning of A.R.S. § 8-531(1) required the petitioner to prove prima facie abandonment by showing the respondent's lack of contact with a child was without just cause. (Indigent Defense Amici Brief at 3-5.) While the juvenile and appellate courts and Jason's, Mother's, and DCS's briefs interpreted the language as placing the initial burden on the respondent to prove "just cause." (IRA 70 at 8-9; Decision at ¶ 18; Jason's OB at 20-35; Mother's AB at 16-19; DCS's Amicus Brief at 12, 15.) The conflict in interpretation requires clarification.

In Arizona, courts have not clearly defined what, if anything, constitutes "just cause" for purposes of defending against abandonment. And the briefing before this Court highlights the confusion. The Department's Amicus Brief relies on what it deems a reasonable interpretation and application of the just cause language in A.R.S. §

to the facts of this case (DCS's Amicus Brief at 9-15)—yet it conceded it did not review those facts (*id.* at 5). Nevertheless, as argued above in section I, it made incorrect assumptions about the record and Jason, and wholly ignored Mother's conduct. (*Id.* at 5-15.) Thus, DCS's only argument that the court of appeals did not misinterpret or misapply the term "just cause" under A.R.S. § 8-531(1) is misplaced. Application of A.R.S. § 8-531(1) necessarily requires the juvenile and appellate courts to have specific facts to apply to the "just cause" or "without just cause" language. *Kenneth B. v. Tina B.*, 226 Ariz. 33, 37 ¶ 19 (App. 2010) (finding that in order to assess abandonment under A.R.S. § 8-531(1), a court must rely on the circumstances of the particular case).

More importantly, in order for a plain-text interpretation of the term "just cause" as DCS argues, practitioners and lower courts need guidance on who has the burden to prove "without just cause" or "just cause,"; factors to consider when determining whether a party has demonstrated their burden of proving "without just cause" or "just cause"; and how to apply the statutory language without making the just cause language meaningless. Without guidance, the just cause language in A.R.S. § 8-531(1) will continue to cause confusion.

Additionally, DCS's argument ignores the speculative nature of the juvenile court's ruling (IRA 70 at 10) and conclusory acceptance of it by the court of appeals (Memorandum Decision at ¶ 18). The juvenile court improperly found "no good reasons were offered as to why the available legal options were not explored" in criminal or family court proceedings and that Jason did not argue those efforts would have been futile. (IRA 70 at 10-11.) The record demonstrated why Jason did not seek to modify the criminal release order or initiate a family court proceeding—his criminal attorney's advice. (5-17-23 Tr. at 23-24.) Specifically, Jason's criminal attorney (Hamby) testified that requesting to modify Jason's release order was "a non-starter" and explained why he did not make the request in Jason's criminal case (4-12-23 Tr. at 27, 54-55.) As the Indigent Defense Amici Brief argued, "it is unreasonable and bad public policy to penalize a parent for relying upon the advice of his attorney." (Indigent Defense Brief at 11.)

Hamby also explained in detail that his advice starting in October 2015, to have no contact with Mother, included asking Mother for contact with B.W., sending money for B.W., contacting third parties to facilitate contact with B.W., or initiating a family court case. (4-12-23 Tr. at 32-49, 52-58, 62-63, 69, 71-72, 77-81, 83.) Hamby explained his advice was based on the specific

facts of Jason's criminal case, including facts that within a week of being retained in October 2015, Hamby learned that charges would be filed, Mother played a pivotal role in the case and in the charges brought against Jason, and Mother and Jason were the primary fact witnesses during the criminal trial. (*Id.* at 32-33, 34.) Hamby advised Jason to purse contact with B.W. once his criminal case ended, no one expected the case to last 6 years, and Hamby's advice did not change over the course of the case because he was trying to save Jason's life. (*Id.* at 43, 52, 53, 55, 58.)

The appellate record—which DCS conceded it did not review (DCS's Amicus Brief at 5)—refutes DCS's claim that adopting a reasonably prudent person standard "would not change the result in this case" (*id.* at 14). Jason believes applying a reasonably prudent person standard would have changed the result, especially if this Court sets forth factors for lower court's to apply when assessing abandonment in a private severance action that include assessing the circumstances before, during and after the Termination Petition is filed, including the petitioner's conduct. (Jason's Supp. Brief at 22-23.)

Here, the record demonstrated a reasonably prudent person in Jason's position—a criminal defendant facing first degree murder and conspiracy to

commit first degree murder charges and life in prison, if convicted (4-12-23 Tr. at 32, 46); a father who had contact with his son before the Incident (3-30-23 Tr. at 16, 25; 4-12-23 Tr. at 17-18; 5-17-23 Tr. at 21-22); a father who learned Mother's cell phone internet search history included how to get revenge against him (4-12-23 Tr. at 42-43; Ex. 12); a father who filed a police report because Mother had stolen his cell phone (4-12-23 Tr. at 24, 34-36); a father who learned Mother obtained William's contact information from that stolen cell phone (*id.* at 35-36); a father who learned Mother knew William was the husband of his girlfriend (*id.* at 36); a father who learned that Mother was on an active call with William when William unlawfully entered his home with a knife (*id.* at 26, 36; 3-30-23 Tr. at 94; Ex. 12); a father who was arrested by a SWAT team at gun point on three separate occasions despite having an attorney and appearing at all court hearings (4-12-23 Tr. at 47-48); a father whose was under a May 5, 2017, court release order to not initiate contact with Mother (*id.* at 43, 49-50)—would have followed the advice of his criminal counsel to have no contact with Mother until his criminal case was resolved.

And a reasonably prudent person would have retained counsel to initiate a family court case where Mother would be a party based on the

information Jason had regarding her prior illegal and vengeful conduct leading up to the Incident. Thus, it was reasonable for Jason to fear Mother and her conduct in wanting an attorney before facing Mother in family court.

Moreover, DCS's argument and proposed test implied that Jason made an "unreasonable decision" in acting in self-defense when William entered his home with a knife and claimed Jason acting in self-defense led to the conditions that hindered his relationship with his son. (DCS's Amicus Brief at 12.) Again, a reasonably prudent person in Jason's position who was faced with an unlawful intruder wielding a knife, would and should be able to defend himself. For DCS to imply that Jason's self-defense was "criminal behavior, misconduct, or [an] unreasonable decision[]" is contrary to Arizona law, A.R.S. §§ 13-205 (affirmative defenses; justification; burden of proof), -405 (justification; use of deadly physical force), and would deem his acquittal by an Arizona jury meaningless.

And DCS's proposed test is contrary to cases where DCS initiates a dependency petition where a parent has not had contact with or provided support for the child for six months or longer and despite the "abandonment" DCS provides that parent with reunification services, and in some cases that parent reunifies with their child. *See, e.g.*,

Parental Rights as to B.T., 1 CA-JV 24-0028, 2024 WL 3426805, *1 ¶¶ 2-4 (Ariz. App. July 16, 2024) (mem. decision)[2] (although a private severance appeal, the facts established the child was born in 2011, DCS filed a dependency petition in 2015, the father had not established paternity when the dependency petition was filed and the child was almost 4 years old, the father had not maintained contact with the child from her birth in 2011 to the filing of the dependency petition in 2015, DCS provided the father with paternity testing and reunification services, and the father was reunified with the child in 2016). It is bad public policy for the law to allow a father, like the one in *In re Termination of Parental Rights as to B.T.*, to be offered paternity testing and reunification services after approximately 4 years of no contact with the child because the circumstances were so dire to required DCS's involvement but then allow termination of parental rights for a parent like Jason because the child's circumstances were not dire enough for DCS to become involved and help foster reunification.

Irrespective of who has the initial burden of proving "without just cause" or "just cause[,]" for the reasons set forth in Jason's Opening Brief, Petition for Review, and Supplemental Brief, this Court should reverse the

2. Memorandum decision cited pursuant to Ariz. R. Sup. Ct. 111(c)(1)(C).

termination of Jason's parental rights on the abandonment ground because the record demonstrated just cause for the abandonment. And this Court should provide lower courts and practitioners clarification on the meaning and application of "without just cause" or "just cause" in A.R.S. § 8-531(1).

III. The Department's proposed test for applying the "just cause" language is unworkable in private severance cases because it wholly ignores the custodial parent/petitioner's actions in assessing the "just cause" language.

This Court should also reject DCS's proposed test for applying the "just cause" language because it is unworkable in private severance actions and wholly ignores the custodial parent/petitioner's actions. The Department asks this Court to endorse a plain-text interpretation of "just cause" that would "require a parent attempting to rebut prima facie evidence of abandonment to establish" (1) just cause for the full scope of the parent's inaction and (2) a reasonable causal relationship between the purported justification and the specific parental responsibilities the parent failed to perform. (DCS's Amicus Brief at 15.) This Court should reject DCS's proposed test because it ignores the custodial parent/petitioner's conduct, does not address who has the initial burden to prove "without just cause" or "just cause," does not define what, if anything, could amount to "just cause," and does not provide any guidance to assess the application of the statutory

language.

The Department's proposed test ignores the conduct of the custodial parent/petitioner. While the focus of the abandonment ground is on the noncustodial parent's conduct, *Calvin B.* made clear—without specifically addressing the "just cause" language—that the custodial parent/petitioner may not restrict a parent-child relationship and then seek to terminate the noncustodial parent's parental rights. *Calvin B. v. Brittany B.*, 232 Ariz. 292, 293-94 ¶ 1 (App. 2013.) Thus, DCS's proposed test is unworkable because it does not account for the conduct of a parent like the mother in *Calvin B.* or the custodial parent/petitioner's unclean hands prior to filing a termination petition. It does not account for whether Arizona law requires a noncustodial parent to violate court orders, file futile pleadings, or ignore an attorney's reasonable advice, as addressed by the Indigent Defense Amici Brief. (Indigent Defense Brief at 8-13.) It does not account for the scenario set forth in the Indigent Defense Amici Brief regarding pre-petition conduct, specifically circumstances where a custodial parent/petitioner files a termination petition after the noncustodial parent tries to establish or enforce parenting time through the family court. (*Id.* at 14-19.) The Department's proposed test would leave the law in a worse position than it is and this

Court should reject it.

CONCLUSION

For the foregoing reasons, Jason respectfully asks this Court to vacate the memorandum decision and reverse the termination of his parental rights on the abandonment ground. He also requests that this Court clarify the just cause language in A.R.S. § 8-531(1) and set forth guidelines for lower courts when interpreting and applying the just cause language. In the alternative, he requests this Court remand the case to the juvenile court to reconsider it in light of the new guidelines this Court sets forth.

Respectfully submitted this 16th day of October 2024.

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