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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 20-0224 – *In re Adoption of H.G.*

WOOTON, Justice, dissenting, and joined by Justice Armstead:

This case began because petitioner mother, L.W. ("petitioner"), wanted to have visitation with her child, H.G., and ended with the circuit court granting respondent permanent guardian, P.Y.'s ("respondent"), petition to adopt the child based upon petitioner's alleged "abandonment" of the child. *See* W. Va. Code § 48-22-306 (2015) (setting forth facts that can be used to presume abandonment).[1] The majority affirms the decision of the circuit court, a de facto termination of petitioner's parental rights to her child, on the basis of an abandonment presumption, *see id*., such presumption arising, in part, from petitioner's failure to communicate with her child because, pursuant to a court order, visitation was within the sole discretion of respondent – who refused to allow it.[2]

In reaching this result, the majority holds in a new syllabus point that "[t]he determinative period for finding presumptive parental abandonment under West Virginia Code § 48-22-306(a)(2) (2001) is the six-month period immediately preceding the filing of the adoption petition. *But a circuit court may also consider relevant conduct of a parent*

[1] This statute is discussed in greater detail *infra*.

[2] I do not take issue with the majority's resolution of petitioner's assigned error that "permitting the adoption represents an absolute denial of due process" under the "Fourteenth Amendment of the Constitution of the United States of America and Article III of the Constitution of the State of West Virginia."

outside this six-month period when evaluating his or her credibility and intentions." (Emphasis added). First, the statute as enacted contains no license for a court to consider and rely upon facts outside the relevant six-month time period. By permitting consideration of actions outside of this time period, the majority disregarded the express language of the statute in this new syllabus point, despite the absence of a specific challenge to the statutory language raised by the parties. In addition, a straightforward application of the statute to the facts of this case fails to support the statutory presumption that the child was abandoned. *See id*. Accordingly, I respectfully dissent.

H.G. has spent his entire life – some nine years – in a temporary and permanent guardianship with respondent. Petitioner first placed him with respondent, who she knew from church, in temporary guardianship. The temporary guardianship became permanent after the circuit court *refused* to terminate petitioner's parental rights in a 2017 abuse and neglect proceeding, but ordered the child to be placed in a "permanent legal and physical guardianship" with respondent in which visitation with the child was "controlled by" respondent.[3] Significantly, the only issue petitioner appealed was the circuit court's decision to grant visitation at respondent's discretion. She sought scheduled visitation with her child. *In re H.G.*, No. 17-1131, 2018 WL 4944420 (W. Va. Oct. 12, 2018)

[3] Petitioner testified that she is now the biological mother of ten children. Despite being a named respondent in at least one prior petition for abuse and neglect, the circuit court has not terminated her parental rights to any of her children. Further, at the time of the abuse and neglect proceeding she retained custody of her then-youngest child, P.W., III.

(memorandum decision). Petitioner argued to this Court that "the circuit court's order that gives the child['s] custodian[] discretion to exercise visitation is the equivalent to denial of any visitation." *Id*. at *2. However, in our 2018 memorandum decision we affirmed the circuit court's decision. *Id*. Respondent through her counsel received notice of all proceedings in the 2018 appeal, and could have herself appealed the lower court's decision made in the abuse and neglect context, and argued that because she wanted to adopt the child the circuit court needed to terminate petitioner's parental rights. At no time either before or after the 2018 abuse and neglect proceeding did respondent actually seek to adopt this child – *until* petitioner began asking to visit with her child.

In January of 2019, about two years after the abuse and neglect proceeding concluded, but only a few months after this Court denied petitioner's appeal on the visitation issue, she pursued visitation in the only way she could pursuant to the lower court's order: by seeking visitation through respondent. In this regard, it cannot be emphasized too strongly that visitation with her child is the *only* thing that petitioner had pursued and continued to pursue. Two things of significance occurred during the relevant time period. First, petitioner obtained employment, working two jobs – one as a full-time security guard and the other as a part-time caregiver for a single client. As a result of her employment, during the time frame from January 2, 2019, to June 11, 2019, petitioner paid

approximately $500 in child support through the West Virginia Bureau of Child Support Enforcement.[4]

Second, petitioner began sending text messages to respondent seeking visitation with her child. Respondent testified that in February of 2019, petitioner "sent me a text message and wanted to know if she could get with me and have visitation so . . . [H.G.] could meet his new brother, which was two years old, and I didn't respond." Respondent stated that there were "four or five more every other month" and that she never responded to petitioner; instead, she "followed [her] heart." Respondent also testified that she was not going to let petitioner see the child and that she specifically told petitioner: "Let me tell you one thing, I don't know what you're talking about. It's over. I have papers from the supreme court. You lost them all [referring to petitioner's other children]. Why don't you just leave everybody alone?" Finally, respondent told petitioner: "You may not understand the court system, but, sweetie, they cannot redirect it. H. will be our son and that was ordered by the supreme court of Charleston, West Virginia."

[4] The evidence in the appendix record shows that petitioner had withholdings for child support from April 29, 2016, through the end of October, 2016. Further, according to the appendix record, petitioner also had withholdings from her pay beginning in January of 2019 and continuing to January of 2020.

Petitioner testified that respondent told her to stop communicating with respondent and to leave the child alone.[5] According to petitioner, respondent told her "[i]f I didn't, they would file harassment charges against me." Petitioner testified:

> Of course I would like to just stop by and see the child or I would love to just send the child something whether he knew it was from me or not. Bottom line was I'm not just going to show up and disrupt the child where there's just going [to] end up being a big argument or fight because of me getting, you know, threatened with harassment or something like that. That's nothing the child needs to see go on. So I tried to go about it the correct legal way like I was told to do through court and message . . . [respondent] for visitation to be setup.

Petitioner further testified that she tried to contact respondent about visitation and to see if her child needed anything, asking respondent to let her know and she would "do what I can do." However, again, respondent never responded. Further, when asked why she did not do more to try and communicate with her child, she responded: "There is no contact with . . . [respondent.] How would I even know if anything was received or what he needed or what to do?"[6]

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[5] There was no evidence that petitioner ever tried to contact the child directly. However, in addition to respondent, petitioner also communicated with the respondent's partner.

[6] On January 18, 2019, petitioner, who was a self-represented litigant, filed a "Petition for Modification" seeking visitation with the child. This petition was never served on respondent guardian, but petitioner testified that after she filed it, she "waited a few months" and went back to ask about the status. She was then told that "it was sent to the judge and that nothing was done yet. . . . So, again, I waited. And I went back and I was told that it was sent up to the judge . . . and they were still waiting on a hearing." Consequently, petitioner took no other action regarding said petition other than filing the same with the circuit court.

Thereafter, on July 12, 2019, respondent filed a petition to adopt the child, arguing that petitioner had abandoned him. In order to adopt the child respondent was required to prove that petitioner's conduct presumptively constituted abandonment within the purview of West Virginia Code § 48-22-306 involving adoptions.[7] That statute provides:

> (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*.

Id. (emphasis added). We further held in syllabus point two of *In re Jeffries*, 204 W. Va. 360, 512 S.E.2d 873 (1998), that

> [f]or a natural parent to avoid the presumption that he or she has abandoned a child who is over the age of 6 months, *W. Va. Code*, 48-4-3c(a)(1) [1997] [now W. Va. Code § 48-22-306 (2015)] requires the parent to financially support the child, within the means of the parent. Furthermore, *W. Va. Code*, 48-4-3c(a)(2) [1997] [now W. Va. Code § 48-22-306 (2015)] requires the parent to visit or otherwise communicate with the child when the parent: (1) knows where the child resides; (2) is physically and financially able to do so; and (3) is not

[7] *Compare* W. Va. § 49-1-201 (2015 & Supp. 2021) (defining "imminent danger to the physical well-being of the child" to include condition of "abandonment by parent, guardian, or custodian" within the confines of abuse and neglect).

> prevented by the person or authorized agency having the care or custody of the child. If 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 6 months preceding the filing of the adoption petition, a circuit court shall presume the child has been abandoned.

In light of our long-standing law regarding the application of the adoption presumption, I respectfully disagree with the majority's creation of a new syllabus point interpreting and adding language to West Virginia Code § 48-22-306 when there was no challenge raised in regard to the construction of statutory language.

Further, the majority's action in altering and expanding the language to the statute is contrary to our well-established law. We have repeatedly held that

> [i]t is well established that "'[a] statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning.' *Hereford v. Meek*, 132 W.Va. 373, 386, 52 S.E.2d 740, 747 (1949)." *Mace v. Mylan Pharmaceuticals, Inc.*, 227 W.Va. 666, 673, 714 S.E.2d 223, 229 (2011); *see also* Syl. Pt. 1, in part, *Ohio Cnty. Comm'n v. Manchin*, 171 W.Va. 552, 301 S.E.2d 183 (1983) ("Judicial interpretation of a statute is warranted only if the statute is ambiguous [.]").

State ex rel. Smith v. W. Va. Crime Victims Comp. Fund, 232 W. Va. 728, 732, 753 S.E.2d 886, 890 (2013). Having specifically found that the statutory language is "plain," the majority had no legal basis to construe the language to expand the six-month time frame

provided by the Legislature for the purpose of determining whether the statutory presumption applies to the facts of this case. *See* Syl. Pt. 2, *Huffman v. Goals Coal Co.*, 223 W. Va. 724, 679 S.E.2d 323 (2009) ("It is the duty of the Legislature to consider facts, establish policy, and embody that policy in legislation. It is the duty of this Court to enforce legislation unless it runs afoul of the State or Federal *Constitutions*.").

A critical examination of the facts undeniably demonstrates that the clear statutory presumption regarding abandonment of a child by a natural parent was not proven. In this regard, the evidence presented to the circuit court in a hearing on respondent's petition established that petitioner contributed approximately $500 in child support payments for the child, which payments were taken from petitioner's wages during the specific time from January 2, 2019, to June 11, 2019, when petitioner was employed. Critically, according to the statute, the "failure to financially support the child" is not examined in isolation. The statute expressly provides that there must be a failure to financially support the child "within the means of the birth parent." *Id*. Further, the statute in no way suggests that an "involuntary support payment" fails to meet this element.

The majority, relying upon dicta from *In re Adoption of C.R.*, 223 W. Va. 385, 758 S.E.2d 589 (2014) (per curiam), concludes that the failure to financially support element of the statutory presumption is easily met. In *Adoption of C.R.*, the Court found that involuntary payment of child support through wage withholding was insufficient to

overcome the financial support factor. *Id*. at 389-90, 758 S.E.2d at 593-94. However, the Court's application of the statutory factors in *Adoption of C.R.* was expressly limited to "the case presently" before it. *Id*. at 389, 758 S.E.2d at 593. Further, in *Adoption of C.R.*, as well as other memorandum decisions which rely upon that case for the proposition that a parent's involuntary wage withholding is insufficient evidence of financial support, the Court completely failed to discuss, acknowledge or reconcile how involuntary payment of child support through wage withholding fails to constitute financial support of a child "within the means of the birth parent." Rather, the Court simply focused on the proposition that a parent has a duty to support his or her child. *See id*. at 389-90, 758 S.E.2d at 589-90 (citing various cases supportive of the principle that a parent has an "irrefutable duty to support his child"). Again, these cases are devoid of any discussion or analysis regarding why involuntary support payments of child support fail to meet this factor. The notion that a parent is "failing" to financially support his or her child simply because the support payments are being "involuntarily" withheld from his or her wages is not supported by the statutory language addressing such support. *See* W. Va. Code § 48-22-306(a)(1). Moreover, there is no evidence that petitioner in this case took any steps to attempt to have the child support deductions stopped or reduced.

In examining whether respondent carried her burden[8] of demonstrating that petitioner failed to financially support the child within her means, respondent failed to produce any evidence that petitioner had "the means" to provide any more financial support for her child than she did. To the contrary, the evidence showed that petitioner had been making regular financial support payments, albeit involuntarily, beginning in January of 2019 when she became employed. W. Va. Code § 48-22-306(a)(1); *see In re Adoption of L.A.*, No. 16-0149, 2017 WL 785879, at *5 (W. Va. March 1, 2017) (memorandum decision) ("Pursuant to W. Va. Code § 48-22-306(a)(1), the first factor necessary for a finding of presumptive abandonment is the parent's failure to provide financial support for his/her child "*within the means* of the birth parent." (Emphasis added). The evidence in this case is uncontradicted that, at the relevant time, Father was not employed and had no income from which to fulfill his support obligation. In other words, Father had no "*means*" by which to pay child support. *Id*."); *see also In re Petition of Carey L.B.*, 227 W. Va. 267, 274-75, 708 S.E.2d 461, 468-69 (2009) (stating that "[m]ere non-payment of child support is not enough to invoke the presumption contained in W. Va. Code § 48-22-306[,]" and

[8]Respondent had the burden to prove the two statutory elements needed to establish abandonment – not petitioner. *See Adoption of Schoffstall*, 179 W. Va. 350, 352, 368 S.E.2d 720, 722 (1988) ("The standard of proof required to support a court order limiting or terminating parental rights to custody of minor children is clear, cogent and convincing proof." Syl. Pt. 6, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973); *State v. Carl B.*, 171 W.Va. 774, 301 S.E.2d 864 (1983). In the case before us we do not believe that Neil and Michelle Shedd established by clear and convincing evidence that Charles Schoffstall abandoned his parental rights to Michael.").

that "the adoptive father must also show that the biological father failed to support the children within the biological father's means and abilities.").

In addition to the financial support factor,[9] in order for abandonment to be presumed under West Virginia Code § 48-22-306, respondent had to show that petitioner failed to visit or communicate with the child *and* that she was "not prevented from doing so by the person . . . having 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." *Id*. The evidence presented by respondent was that in the six months prior to the filing of the adoption petition respondent failed to respond to text messages sent to her by petitioner in which petitioner was asking to visit with the child. The respondent also testified that she was not going to let petitioner see the child because she was following her heart. The only specific event that respondent claimed to have been missed by petitioner was the child's birthday party. According to respondent, she "put on Facebook" that she was having the child's birthday party "at the rec center" and petitioner "never came[,] and "never dropped him off a birthday card." Respondent indicated that petitioner had traveled to South Carolina to see her two older children, but did not stop to

[9] *See* Syl. Pt. 2, *In re Adoption of Schoffstall*, 179 W. Va. at 350, 368 S.E.2d at 720 (holding that "[u]nder *W. Va. Code*, 48-4-3(a) [1984] [now W. Va. Code § 48-22-306 (2015)], failure to pay child support alone does not constitute abandonment of the natural parents' rights in an adoption proceeding."); *accord* Syl. Pt. 2, *In re Petition for Adoption of Mullens by Farley*, 187 W. Va. 772, 421 S.E.2d 680 (1992).

see the child, H.G.[10] However, respondent also testified that petitioner was not specifically invited to the child's party. In fact, according to petitioner's testimony, the reality was that petitioner was told by respondent "not to try to contact the child," *which respondent admitted*. Petitioner was threatened by respondent with harassment charges and was told by respondent that the child "will be our son and that was ordered by the supreme court of Charleston, West Virginia."

It is abundantly clear in this case that petitioner was put between a rock and a hard place simply because she sought visitation with her child. Given that the circuit court had left visitation to respondent's discretion, it is patently unfair and contravenes the plain language of the adoption statute to allow respondent to use her discretion to refuse petitioner any contact with the child and then turn around and use petitioner's failure to communicate or visit the child as evidence of abandonment. This factual scenario fits squarely within the statutory admonition that the petitioner can "not [be] prevented from" communicating or visiting with the child by "the person . . . having care or custody of the child." *See* W. Va. Code § 48-22-306(a)(2). Here, respondent totally controlled petitioner's ability to communicate or visit with the child, admitted that she was not going to let petitioner have any contact with the child, and then leveraged this control to support

[10] It could be inferred from this fact that petitioner was afforded visitation with her older children.

the petition for adoption. The majority's affirmance of this result is in direct contravention with the express statutory language of West Virginia Code § 48-22-306(a)(2).

In summary, a de facto termination of parental rights under the auspices of abandonment, *see* W. Va. Code § 48-22-306, occurred in this case. The evidence of record – or the lack of such evidence – clearly demonstrates that respondent failed to meet her burden of proving the requisite statutory requirements needed in order for a circuit court to find abandonment. *See generally Corey D. v. Travis R.*, 245 W. Va. 232, 858 S.E.2d 857 (2021) (finding a de facto termination of biological father's parental rights violated the statutory directive of West Virginia Code § 48-24-103 (2015), which required court to declare him the father). I believe this Court should have reversed the circuit court's decision to grant the petition to adopt the child because the statutory requirements for conduct presumptively constituting abandonment were not met.

For all the foregoing reasons, I respectfully dissent. I am authorized to state that Justice Armstead joins in this separate opinion.