

**STATE OF WEST VIRGINIA  
SUPREME COURT OF APPEALS**

**In re: The Adoption of Wesley G.**

**No. 11-0553** (Boone County 10-A-10)

**FILED**

**March 9, 2012**

RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**MEMORANDUM DECISION**

Timothy G. (petitioner herein) appeals the circuit court's order granting the adoption of petitioner's minor son by the child's maternal great-grandfather, Troy W. (respondent herein).<sup>1</sup> Petitioner filed a petition for appeal and a reply brief by counsel Benjamin M. Mishoe. Respondent filed a summary response by counsel L. Scott Briscoe.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The child was born on April 9, 2005. The child's mother died on February 9, 2010. The child has been living with respondent. On April 27, 2010, respondent filed a petition for adoption, which he served on petitioner as the child's putative biological father. After the petition was filed, petitioner obtained DNA testing and established his paternity. Thereafter, petitioner objected to the adoption, although he consented to the child remaining in respondent's care because petitioner is incarcerated.

According to petitioner, respondent verbally moved the court to grant the adoption on the grounds that petitioner had abandoned the child. By order entered February 22, 2011, the circuit court granted the adoption. The circuit court found that petitioner admitted having a relationship with the child's mother and admitted knowing that the mother gave birth nine months later, but even during a period when petitioner was not incarcerated, petitioner failed to request paternity testing and made no attempt to contact or support the child. The circuit court also found that the child's best interests would be promoted by this adoption.

“‘This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*.’ Syllabus Point 4, *Burgess v. Porterfield*, 196 W.Va. 178,

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<sup>1</sup> This Court does not include last names in order to protect the privacy of the minor child.

469 S.E.2d 114 (1996).” *In re Carey L.B.*, 227 W.Va. 267, 273, 708 S.E.2d 461, 467 (2009) (per curiam).

Petitioner asserts that the circuit court lacked sufficient factual basis to find abandonment. He argues that he did not know that the child was alleged to be his until the adoption petition was filed. However, petitioner has failed to include any transcripts in the appellate appendix record. “An appellant must carry the burden of showing error in the judgment of which he complains. This Court will not reverse the judgment of a trial court unless error affirmatively appears from the record. Error will not be presumed, all presumptions being in favor of the correctness of the judgment.” Syl. Pt. 5, *Morgan v. Price*, 151 W.Va. 158, 150 S.E.2d 897 (1966).

Because we will not presume error, and because the applicable standard of review dictates that a circuit court’s findings of facts must upheld unless clearly erroneous, this Court has no basis to reverse the circuit court’s order. The circuit court found that petitioner knew the child was born nine months after his relationship with the mother but, during a period of time when petitioner was not incarcerated, he took no action to establish paternity, contact the child, or support the child.

Although the circuit court’s order does not cite the statute regarding abandonment, it is obvious from the findings of fact that the court concluded that petitioner had abandoned the child within the meaning of West Virginia law. West Virginia Code § 48-22-102 defines “abandonment” as “any conduct by the birth mother, legal father, determined father, outsider father, unknown father or putative father that demonstrates a settled purpose to forego all duties and relinquish all parental claims to the child.” *E.g., In re Carey L.B.*, 227 W.Va. at 274, 708 S.E.2d at 468.

Accordingly, we affirm.

Affirmed.

**ISSUED:** March 9, 2012

**CONCURRED IN BY:**

Chief Justice Menis E. Ketchum  
Justice Robin Jean Davis  
Justice Brent D. Benjamin  
Justice Margaret L. Workman  
Justice Thomas E. McHugh