No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Aldona B. — PETITIONER
(Your Name)

vs.

Nicholas S. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court of Appeals of West Virginia
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Aldona Bird
(Your Name)

1419 Gamble Hollow Road
(Address)

Masontown WV 26542
(City, State, Zip Code)

304-282-4990
(Phone Number)

QUESTION(S) PRESENTED

Whether an unwed biological father who meets none of the statutory requirements of caretaking, providing for, legally acknowledging, and forming a parental relationship with a child preserves the same custodial rights as a parent who fulfills parental responsibilities and duties.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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OPINIONS BELOW

The Supreme Court of Appeals of West Virginia has published the opinion in this case on their official website, www.courtswv.gov/supreme-court/opinions.html case number No. 17-0130 (Preston 15-D-122).

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts:**

The date on which the highest state court decided my case was Feb 2, 2018. A copy of that decision appears at Appendix A.

[X] A timely petition for rehearing was thereafter denied on the following date: June 12, 2018, and a copy of the order denying rehearing appears at Appendix D.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 14 provides, in relevant part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The West Virginia statutory provisions relevant to this petition are:

West Virginia Code:

§48. Domestic Relations § 48-22-306. Conduct presumptively constituting abandonment

§49-1-201. Definitions related, but not limited, to child abuse and neglect

§48-9-206. Allocation of custodial responsibility,

§48-9-101. Scope of article; legislative findings and declarations

§48-9-102. Objectives; best interests of the child.

STATEMENT OF THE CASE

Respondent below, N.S., and I have never been married or co-habited. N.S. impregnated me in March, 2014 and I informed N.S. of my pregnancy in April, 2014. It is uncontested that N.S., having financial means to support pregnancy and birth, provided zero material support.

At my invitation, N.S was present at the birth of my child on December 17, 2014, stayed at my home for three days after. It is uncontested that N.S. did not participate in caretaking or make any contribution to the child's care and needs in money or in kind or make any gift to the child or to me, although he had the financial means to do so. The first support N.S. gave the child was in the form of a late court-ordered payment when she was 9 ½ months old. N.S. has remained in arrears for court ordered support since, his arrears now totaling over $20,000.

It is uncontested that I invited N.S. to visit the child, as did my family members. N.S. left my home when the child was 3 days old and did not return to visit, emailing that this was not the relationship he wanted. As a result, he did not see the child at all until she was almost nine months old.

It is uncontested that N.S. did not provide me with a paternity affidavit, and has never legally acknowledged the child, but has never claimed or pled inability to pay or filed for modification of support orders.

When my daughter was 5 months old, in May, 2015, I received a petition from the Bureau of Child Support Enforcement, filed in the Preston County Family Court, naming N.S. and me respondents in a paternity and child support action. I made no application to the BCSE, and neither my child nor I were applicants for or recipients of public assistance. BCSE employees told me that a Mr. Owens had requested a genetics test in the case. I know/knew no Mr. Owens, and the BCSE has not informed me who he might be. The BCSE's initiation of the case, therefore, remains a mystery.

N.S.'s behavior toward the child did not change following the BCSE petition. He had legal *pro bono* representation, although he was/is not indigent, but did not file a petition for custody or visitation.

The BCSE made an appearance at the first hearing in the case on September 3, 2015, but did not advocate for child support, and thereafter did not pursue the case or enforce child support. Family Court ordered N.S. to pay temporary child support, but did not enforce its order. Although no party in the case filed a custody petition, Family Court, for over a year, *sua sponte*, ordered parenting plans, custody changes, and visitations, without evidentiary hearings and without acting on the only petition in the case, the BCSE petition. Family Court acted in violation of WV Code, Rules of Practice and Procedure for Family Court rule 59, time limitations on case disposition, against code requirements for a custody action, and against the WV Supreme Court of Appeals opinion in the case of Brittany vs Amos, which requires the filing of a proper custody petition in a custody case.

Meanwhile (September 2015-March 2016), N.S. met with the child sporadically, using approximately ¼ of court ordered visitation time. I brought the child on time to every court ordered visit; N.S. failed to arrive, came late, and left early. It is uncontested that he formed no relationship with the child during both supervised and unsupervised visits. It is uncontested that the child exhibited a strong fear of him, which she exhibited toward no one else. Due to his verbal abuse of myself and the child, his manhandling of the child, his transporting her in an uninstalled carseat, and returning her from unsupervised visitation in a neglected state, I ceased unsupervised visitations and offered him supervised visits, which he declined, thus not seeing the child at all for months at a time. N.S. continued in arrears for court ordered child support, gave no other support or gifts, and did not participate at all in the child's care in any manner.

When, on June 24, 2016, at a scheduled status hearing which Family Court judge Randall Minor, without legal notice, turned into a contempt hearing against me, the judge requested my parents' telephone number and phoned them, during the hearing, and recorded on the court dvd, and demanded that they deposit $5000 with him in order to continue the case, and acted to give full custody to N.S., I began to act *pro se* and filed a writ of prohibition in Circuit Court. Circuit Court denied the writ, but

ordered a final trial.

Family Court scheduled a final custody trial for October 20, 2016 naming me respondent and N.S., who had filed no petition, petitioner. I filed an objection to a court proceeding in which I was respondent with no petition to answer, and filed a second writ of prohibition, which Circuit Court again denied. On the day of the trial, N.S.'s attorney refused to proceed with an illegal action in which her client had filed no petition. The trial then proceeded on the basis of the BCSE child support petition. N.S. had never filed a financial statement as required by code, and the court allocated child support simply on his say-so as to his earnings. N.S. has never contested either temporary or final child support order and neither claimed nor pled an inability to pay. He has contested and resisted child support enforcement claiming I did not need the money and that my family supported the child.

On October 30, 2016. N.S filed for custody for the first time, when the child was 23 months old, asking for a change of custody to himself and a consequent modification of child support. It is the orders resulting from his custody petition that I am appealing. He had made no legal acknowledgment of paternity. His petition made no reference to the best interests of the child. His filing was not legally adequate.

1. He presented incomplete financial documentation. Code requires a party filing for custody to present complete financial documentation before the case can proceed.
2. The BCSE claimed repeatedly that N.S. had not applied for its services. Code requires a party filing for child custody to make an application to the BCSE before the case can proceed.

The custody trial, despite the filing deficiencies, without any order or attempt to remedy the deficiencies upon my objections, was held on January 17, 2017. As the outcome, Judge Minor gave me primary custody. Primary custody is not defined in WV code. The details of the order, giving NS significant custodial visitation and decision making power, give the term primary custody little meaning, and the order violates both the letter and intent of WV law. The custody order and parenting

plan makes no reference to the best interest of the child, and excuses the lack of a paternal relationship by the accusation that I did not actively promote such a relationship, and requires me to bear the burden of financing NS's custodial time.

REASONS FOR GRANTING THE PETITION

The lower courts' decision in this case departs from both statute and case law, seemingly depriving Petitioner of due process. The court has deprived me of full sole custody of the child I gave birth to, support, and provide for, and ordered shared custody appearing to contradict provisions of West Virginia code, as well as decisions of West Virginia Supreme Court of Appeals and other state and federal decisions regarding custody, the rights of unwed fathers, and child abandonment. The West Virginia Supreme Court upheld Circuit Court's finding that purported "hostility" between N.S. and my family alleviated his parental obligations to visit, caretake, and financially support the child, and thus that his failure to discharge his parental responsibilities did not amount to abandonment. The West Virginia Supreme Court of Appeals also upheld Family Court's ruling that preservation of custodial rights was demonstrated by the court's not knowing that the father does not love the child, setting aside all other criteria found in statute and case law for parental fitness.

1. West Virginia code defines abandonment in two sections: in the provisions for adoption and in the definitions in abuse and neglect cases. In the former definition, (*West Virginia Code Chapter 48. Domestic Relations § 48-22-306. Conduct presumptively constituting abandonment*) West Virginia law agrees with the law of other states and with state and federal case law in defining the obligations and duties of an unwed father who wishes to preserve his custodial rights to the child: to financially support pregnancy and birth and the child after birth, to visit with the child and thus form a parental relationship, and to legally acknowledge the child. WV code does not apply this definition of abandonment exclusively to adoption cases. By refusing to apply the abandonment definition in this case, the lower courts have discriminated against me as a birth mother, and my right and ability to form a stable family with my child without sporadic interference of a biological father who consistently fails to meet statutory parenting requirements, thus depriving my child and myself of equal protection that

the law gives a child and her adoptive, non-biological parents.

When an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child, his interest in personal contact with his child acquires substantial protection under the due process clause....But the mere existence of a biological link does not permit equivalent constitutional protection.
Lehr v. Robertson, 463 U.S. 248, 103 S. Ct. 2985 (1983) Id. at 261, 103 S. Ct. at 2993.

Lehr has been the signpost for appellate decisions of prenatal abandonment, post partum support, and parental rights. For example, in *In re Adoption of Baby EA. W v .jS. W5* , the Florida supreme court held that absence of emotional support and emotional abuse during pregnancy constitute prenatal abandonment. In *White v. Adoption of Baby Boy D., 2000 OK 44* Oklahoma's supreme court held that the assertion of parental rights by an unwed father requires that the father list himself on the birth certificate, contribute to the mother's or child's needs, provide for mother during pregnancy, pay birth expenses, maintain contact with the child, "*The basis for constitutional protection is missing if the parent seeking it has not taken on those parental responsibilities which provide such permanence and stability.*"

The Florida supreme court, in *In the Matter of Adoption of Doe, 543 So. 2D 741, 749.* held, "*...the issue of abandonment turns on the question of whether the parent has evinced a settled purpose to assume parental duties. Providing prebirth support to the unborn child is a parental duty. Evidence of whether the parent has or has not furnished customary support to the pregnant mother is relevant to the issue of abandonment.* "

In Roe v. Reeves, 708 SE 2d 778-2011 – the South Carolina Supreme Court held:

"*He must [provide support] regardless of whether his relationship with the mother-to-be continues or ends. He must do this regardless of whether the mother-to-be is willing to have any type of contact with him whatsoever or to submit to his emotional or physical control in any way...Even in the most acrimonious of situations, a father-to-be can fund a bank account in the mother-to-be's name. He can have property or money delivered to the mother-to-be by a neutral third party. He can—and must—be as creative as necessary in providing material assistance to the mother-to-be during the pregnancy and, the law thus assumes, to the child once it is born. He must not be deterred by the mother-to-be's lack of romantic interest in him, even by her outright hostility. If she justifiably or unjustifiably wants him to stay away, he must respect her wishes but be sure that his support does not remain equally distant...Accordingly, a father's attempts to assert his parental rights are insufficient to protect his relationship with the minor child "unless accompanied by a prompt, good-faith effort to assume responsibility for either a financial contribution to the child's welfare or assistance in paying for the birth mother's pregnancy or childbirth expenses....Father had the means and opportunity to provide*

more, but he simply chose not to and to rely on others to provide for Mother. Even though she rebuked some of his efforts, that did not alleviate or in any way mitigate his obligation. ...The fact that he now wishes to raise his son does not overcome his lack of support and contribution while Mother was carrying his child or after he was born. In short, he did not fully "grasp [the] opportunity" to come forward and demonstrate a full commitment to the responsibilities of parenthood through prompt and good faith efforts."

2. West Virginia Code's second definition of abandonment is found in *§49-1-201. Definitions related, but not limited, to child abuse and neglect:*

   When used in this chapter, terms defined in this section have the meanings ascribed to them that relate to, but are not limited to, child abuse and neglect, except in those instances where a different meaning is provided or the context in which the word is used clearly indicates that a different meaning is intended.

   "Abandonment" means any conduct that demonstrates the settled purpose to forego the duties and parental responsibilities to the child;

   The following West Virginia Supreme Court of appeals decisions and opinions on the question of parental abandonment, finding parental unfitness, apply to and depart from the court's decision in the instant case:

   In the present appeal, the evidence before the trial court established that the petitioner was unfit due to her dereliction of her parental duties. Her complete disinterest in the child's health and well-being demonstrated a settled purpose by the petitioner to forego all duties to her child and to surrender her responsibilities as a parent. The petitioner failed to visit her child with enough regularity to establish a meaningful relationship. Inconsistent contact, punctuated by long periods of no contact, would only act to disappoint and harm the child as he grows older. While the petitioner argues that she provides financial support to her son, this was never done voluntarily.
   Kayla F. vs Leonard F. and Rhonda F., July 30, 2013 Supreme Court of Appeals of West Virginia

   The evidence before the circuit court established that Petitioner Father was an unfit parent due to the dereliction of his parental duties. Petitioner Father failed to regularly visit with his children, owes $568.74 in child support arrears, and does not have a strong bond with either child.
   In Re: T.T. and T.T. April 28, 2014 Supreme Court of Appeals of West Virginia

   Affirming the termination of paternal rights, the West Virginia Supreme Court held:

   A.W. testified that petitioner has not paid child support since 2010, when he petitioned the family court to modify his child support payments to zero dollars per month. Although this petition was granted, petitioner was then, and currently is, in arrears with the payments he was ordered to make prior to this reduction. With regard to communication between petitioner and the child, A.W. testified that petitioner sent the child a birthday card on her first birthday, but has not sent any cards since.

In Re: The Adoption of D, October 1, 2013

Further, the DHHR argues that the record clearly shows that no bond existed between petitioner and the child, as evidenced by petitioner's failure to visit the child on multiple occasions, and further through the fact that the child did not exhibit separation anxiety when leaving petitioner like she did when leaving her foster family. For these reasons, the DHHR argues that termination of petitioner's parental and custodial rights was appropriate
In Re: M.M. ,May 29, 2012

In its opinion in the instant case, the court remained silent on the above criteria as they apply to the instant case.

3. In *§48-9-206. Allocation of custodial responsibility,* West Virginia code implicitly addresses the question of whether a parent who abandons a child may statutorily reassert custodial rights:

(a) Unless otherwise resolved by agreement of the parents under section 9-201 or unless manifestly harmful to the child, the court shall allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation or, if the parents never lived together, before the filing of the action, except to the extent required under section 9-209 or necessary to achieve any of the following objectives:
(1) To permit the child to have a relationship with each parent who has performed a reasonable share of parenting functions;

(2) To accommodate the firm and reasonable preferences of a child who is fourteen years of age or older, and with regard to a child under fourteen years of age, but sufficiently matured that he or she can intelligently express a voluntary preference for one parent, to give that preference such weight as circumstances warrant;

(3) To keep siblings together when the court finds that doing so is necessary to their welfare;

(4) To protect the child's welfare when, under an otherwise appropriate allocation, the child would be harmed because of a gross disparity in the quality of the emotional attachments between each parent and the child or in each parent's demonstrated ability or availability to meet a child's needs;

(5) To take into account any prior agreement of the parents that, under the circumstances as a whole including the reasonable expectations of the parents in the interest of the child, would be appropriate to consider;

(6) To avoid an allocation of custodial responsibility that would be extremely impractical or that would interfere substantially with the child's need for stability in light of economic, physical or other circumstances, including the distance between the parents' residences, the cost and difficulty of transporting the child, the parents' and child's daily schedules, and the ability of the parents to cooperate in the arrangement;

(7) To apply the principles set forth in 9-403(d) of this article if one parent relocates or proposes to relocate at a distance that will impair the ability of a parent to exercise the amount of custodial responsibility that would otherwise be ordered under this section; and

(8) To consider the stage of a child's development.

(b) In determining the proportion of caretaking functions each parent previously performed for the child under subsection (a) of this section, the court shall not consider the divisions of functions arising from temporary arrangements after separation, whether those arrangements are consensual or by court order. The court may take into account information relating to the temporary arrangements in determining other issues under this section.

(c) If the court is unable to allocate custodial responsibility under subsection (a) of this section because the allocation under that subsection would be manifestly harmful to the child, or because there is no history of past performance of caretaking functions, as in the case of a newborn, or because the history does not establish a pattern of caretaking sufficiently dispositive of the issues of the case, the court shall allocate custodial responsibility based on the child's best interest, taking into account the factors in considerations that are set forth in this section and in section two hundred nine and 9-403(d) of this article and preserving to the extent possible this section's priority on the share of past caretaking functions each parent performed.

(d) In determining how to schedule the custodial time allocated to each parent, the court shall take account of the economic, physical and other practical circumstances such as those listed in subdivision (6), subsection (a) of this section.

Code clearly states that custody be allocated on the basis of past performance and not on any hope of future action. *"A change of custody should not be based only upon speculation that such change will be beneficial to the children.' Syl. pt. 6, Holstein v. Holstein, 152 W. Va. 119, 160 S.E.2d 177 (1968)." Syllabus Point 3, Rowsey v. Rowsey, 174 W.Va. 692, 329 S.E.2d 57 (1985). Opinion, Case No.21777 John D.K. v. Polly A.S. September 1993 term, Supreme Court of Appeals of West Virginia*

Also citing Holstein, the Supreme Court of Appeals of West Virginia held that:

this court has also been adamant that a court's speculation regarding whether a change would materially promote the child's welfare is an improper ground for a determination. In syllabus point six of Holstein v. Holstein, 152 W.Va. 119, 160 S.E.2d 177 (1968), this Court stated this principle as follows: "A change of custody should not be based only upon speculation that such change will be beneficial to the children." Tevya W., v. Elias Trad V., January 2011 Term

Awarding custody on the basis of the court's speculation that a parent who has done no caretaking, performed no parenting functions, and to whom the child has no emotional attachment, and without addressing the best interests of the child, would thus appear to be prohibited by repeated case law opinion.

Again, on the definition of the best interests of the child,

The statutes and rule prohibit a modification of the disposition in this case in the absence of a showing that the child's best interests would be served by altering the status quo. ...He is entitled to a sense of stability and permanency in his life...The petitioners emphasize the fact that the mother was asked to address the issue of how removing the child from his grandparents would serve the child's best interests. She responded by saying that a child should be with his mother, but she did not offer evidence on issues which might impact the best interests analysis.
Carrie W. vs Steven W., *March 16, 2015*

In contrast, in the instant case, the lower courts make only one best interest statement: that it is in the interest of the child to know her father. This opinion comes into conflict with the court's own case law and the explicit statute in code:

§48-9-101. Scope of article; legislative findings and declarations. (b) limits the custodial rights of parents: the Legislature declares that a child's best interest will be served by assuring that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interest of their children.

West Virginia Code defines the best interests of the child to reflect past (not prospective) parental performance and fulfillment of parental duty and responsibility:

§48-9-102. Objectives; best interests of the child.
(a) The primary objective of this article is to serve the child's best interests, by facilitating:

(1) Stability of the child;

(2) Parental planning and agreement about the child's custodial arrangements and upbringing;

(3) Continuity of existing parent-child attachments;

(4) Meaningful contact between a child and each parent;

(5) Caretaking relationships by adults who love the child, know how to provide for the child's needs, and who place a high priority on doing so;

(6) Security from exposure to physical or emotional harm; and

(7) Expeditious, predictable decision-making and avoidance of prolonged uncertainty respecting arrangements for the child's care and control.

(b) A secondary objective of article is to achieve fairness between the parents.

Custody was allocated in this case to a parent who failed on each point of code and case law to

preserve his custodial rights.

REASONS FOR GRANTING THE WRIT

I respectfully ask this Honorable Court to rule delineating the answers to the issues raised in this case:

1. Whether statutory requirements for parental custodial responsibility apply to both parents equally.
2. Whether abandonment criteria apply only in cases of adoption.
3. Whether custody can be allocated without regard to statutory requirements for parental responsibility and a demonstration of best interests of the child.
4. Whether the law allows the court to allocate custodial rights to a parent who has statutorily abandoned a child on the hope that the parent's verbal expressions of intent to parent will be fulfilled in the future.
5. Whether a fit parent who has consistently provided for a child, and a child who has a home and relationship with aforesaid parent are entitled to due process and equal protection.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: September 10, 2018

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Allene Bird

Date: December 28, 2018