

STATE OF NORTH DAKOTA IN THE SUPREMECOURT

SUPREME COURT CASE NUMBER 20190385

In the Interest of C.A.R., a Child)	
-----)	
M.L.B.,)	
)	APPELLANT’S BRIEF
<i>Petitioner and Appellee,</i>)	
)	
v.)	
)	
T.D.R.,)	
)	
<i>Respondent and Appellant.</i>)	

**APPEAL FROM DISTRICT COURT’S FINDINGS AND ORDER DENYING
PETITION TO TERMATE RESPONDENT’S PARENTAL RIGHTS AND
ORDER FOR MEDIATION, DATED OCTOBER 8, 2019**

**Made by the Honorable Bradley A. Cruff,
Judge of the District Court, Richland County, North Dakota
District Court Case File No.: 39-2018-DM-00120**

ORAL ARGUMENT REQUESTED

Jonathan L. Green
(ND Bar ID #06853)
Attorney for Petitioner/Appellant

GREEN LAW FIRM, P.C.
328 Dakota Avenue
Wahpeton, North Dakota 58075
(701)672-1218

April 13, 2020

TABLE OF CONTENTS

TABLE OF CONTENTS..... Pg. 2

TABLE OF AUTHORITIES Pg. 3

JURISDICTIONAL STATEMENT ¶ 1

STATEMENT OF THE ISSUES..... ¶ 2

STATEMENT OF THE CASE..... ¶¶ 3-5

REQUEST FOR ORAL ARGUMENT ¶ 6

STATEMENT OF FACTS ¶ 7-15

STANDARD OF REVIEW ¶ 16

LAW AND ARGUMENT ¶ 17-43

CONCLUSION..... ¶ 44

CERTIFICATE OF COMPLIANCE ¶ 45

CERTIFICATE OF SERVICE ¶ 46

TABLE OF AUTHORITIES

Constitutional and Statutory Provisions:

N.D. Const. art. VI, § 2	¶ 1
N.D. Const. art. VI, § 6	¶ 1
N.D.C.C. § 14-09-06.....	¶ 39
N.D.C.C. § 14-09-08.....	¶ 38
N.D.C.C. § 14-15-01.....	¶ 19
N.D.C.C. § 14-15-19.....	¶ 17
N.D.C.C. § 25-03.3-19	¶ 1, 19

Cases:

<i>In re A.M.W.</i> , 2010 ND 154, 786 N.W.2d 727	¶ 16, 20
<i>In re Adoption of H.G.C.</i> , 2009 ND 19, 761 N.W.2d 565	¶ 23, 30, 32, 33
<i>In re Adoption of H.R.W.</i> , 2004 ND 216, 689 N.W.2d 403	¶ 20
<i>In re Adoption of I.R.R.</i> , 2013 ND 211, 839 N.W.2d 846	¶ 20, 25, 31
<i>In the Matter of the Adoption of K.J.C.; K.B.C. and B.J.C.</i> , 2016 ND 67, 877 N.W.2d 67	¶ 28
<i>Matter of Adoption of A.M.B.</i> , 514 N.W.2d 670 (N.D. 1994)	¶ 23, 29, 38
<i>Matter of Adoption of A.M.M.</i> , 529 N.W.2d 864 (N.D. 1995)	¶ 17, 20
<i>Matter of Adoption of J.M.H.</i> , 1997 ND 99, 564 N.W.2d 623	¶ 17
<i>Matter of Adoption of P.R.D.</i> , 495 N.W.2d 299 (N.D. 1993)	¶ 17

McDowell v. McDowell,
2003 ND 174, 670 N.W.2d 876 ¶ 38

S.H.B. v. T.A.H.,
2010 ND 149, 786 N.W.2d 706 ¶ 20

JURISDICTIONAL STATEMENT

[¶1] M.L.B. is appealing from a final order of the District Court, Richland County, North Dakota, denying her Petition to Terminate Respondent’s Parental Rights dated October 8, 2019. (App. 79) The North Dakota Supreme Court has jurisdiction to review the decision of the lower court pursuant to N.D. Const. art. VI, §§ 2 and 6, and N.D.C.C. § 25-03.3-19. The appeal is timely filed.

STATEMENT OF THE ISSUES

- [¶2] I. Whether the district court erred in failing to terminate T.D.R.’s parental rights to C.A.R. on the grounds that T.D.R. had abandoned C.A.R.
- a. Whether T.D.R. unjustifiably failed to communicate with C.A.R.
 - i. Whether the district court erred in holding that T.D.R.’s “actions as a whole are not indicative of a parent who intended to or has abandoned his son.
 - ii. Whether the district court erred in holding “that M.L.B. has denied T.D.R. any contact with C.A.R. after June of 2018 is obviously ‘justifiable cause’ on T.D.R.’s part.”
 - iii. Whether the district court erred in finding that T.D.R. “received consent from his probation officer to have supervised parenting time with C.A.R.”
 - b. Whether the district court erred when it failed to find that T.D.R. significantly and without justifiable cause failed to provide for the care and support of the C.A.R. as required by law.
 - i. Whether the district court erred when it found that “T.D.R.’s failure to pay child support prior to a formal order being in place and his subsequent substantial compliance is not evidence of intent to abandon.”
 - ii. The district court’s finding that “The parties do agree that T.D.R. paid M.L.B. \$400 in March 2017” is not supported by the evidence.

- c. Whether the district court erred when it found that T.D.R. “is required to register as a predatory sex offender until November of 2020.”
- II. Whether the district court erred in failing to terminate T.D.R.’s parental rights to C.A.R. on the grounds that T.D.R. was improperly withholding his consent against the best interest of the child.

STATEMENT OF THE CASE

[¶3] This action was commenced by way of service of a Summons and Petition for Termination of Respondent’s Parental Rights on the 19th day of June, 2018 (hereinafter “Petition”) (App. 6, 8, and 9) and was filed contemporaneously with a Petition for Adoption. (App. 6 and 69) An Answer and Counterclaim, dated the 10th day of July, 2018, appear in the record but there is no indication in the record that Respondent ever served the Answer and Counterclaim upon the Petitioner. (App. 1 and 10) In his Answer and Counterclaim T.D.R. requests that the Court deny the Petition in its entirety and award him parenting time with C.A.R. (App. 10) On November 30, 2018, T.D.R. served M.L.B. with a document entitled “Notice Demand Complaint to be Filed” demanding that the Complaint be filed. (App. 13) On December 19, 2018, the Petitioner filed the Petition. (App. 1)

[¶4] On February 20, 2019, M.L.B. served T.D.R. with Petitioner’s Interrogatories, Request for Production and Request for Admission to Respondent (Set 1). (App. 17) T.D.R. served insufficient and incomplete responses to Petitioner’s discovery demands on March 22, 2019, prompting communication between the parties’ lawyers. Id. M.L.B. brought a Motion to Compel Discovery on April 1, 2019. (App. 14, 27) T.D.R. contested the Motion to Compel Discovery and filed a Motion for Protective Relief on April 15, 2019. (App. 48) On April 22, 2019, M.L.B. brought a Motion for Attorney’s Fees. (App. 1) After hearing, on May 9, 2019, the Court granted M.L.B.’s Motion to Compel, denied

T.D.R.'s Motion for Protective Order, and reserved the issue of attorney's fees pending disposition of this case. (App. 48)

[¶5] At no time prior to the evidentiary hearing held on September 10, 2019, or since, has T.D.R. moved the district court for an interim order requesting interim relief regarding his parental rights and responsibilities. (App. 1) On October 8, 2019, the district court issued the Court's Findings of Fact and Order Denying Petition to Terminate Respondent's Parental Rights and Order for Mediation; it is from this Order that M.L.B. now appeals. (App. 69 and 79)

REQUEST FOR ORAL ARGUMENT

[¶6] Request for oral argument is made in this case to more clearly explain 1) the timelines with regard T.D.R.'s lack of contact with the child and his failure to pay child support, and 2) to discuss whether an T.D.R.'s reliance (be that reliance wrong or right) on a Court order preventing him from having contact with minor children is justifiable cause for T.D.R.'s failure to enforce his parental rights and responsibilities.

STATEMENT OF FACTS

[¶7] C.A.R. was born in 2015. (Tr. p. 4, lns. 24) At the time of the evidentiary hearing C.A.R. was four and a half years old. (Tr. p. 23, lns. 3-4) M.L.B. is the biological mother and T.D.R. is the biological father of C.A.R. M.L.B. and T.D.R. broke up in February 2016. (Tr. p. 16, ln 25 and p. 17, lns. 1-2)

T.D.R.'s Failure to Maintain Contact with C.A.R.

[¶8] After the parties broke up in March of 2026, M.L.B. ensured that T.D.R. continued having parenting time with C.A.R. by driving him to T.D.R.'s shop. (Tr. p. 12, lns. 19-25,

and Tr. p. 13, ln. 1) T.D.R. tried to make this parenting time occur at least once a week, but sometime he could not make it work. (Tr. p. 13, lns. 2-6) M.L.B. asserts that on maybe two occasions, T.D.R. met M.L.B. and C.A.R. at a park in Moorhead (Tr. p. 56, lns. 23-25 and p. 57, ln. 1), while T.D.R. claims that it was “maybe 50-50.” (Tr. p. 13, lns. 11-16) Also in dispute is the location of T.D.R.’s parenting time while in Moorhead. T.D.R. claims that the parenting time would occur at M.L.B.’s place (Tr. p. 13, lns. 17-19), but M.L.B. maintains that it was at a public place because she was afraid of T.D.R. (Tr. p 56, lns. 4-16)

[¶9] It is undisputed that T.D.R. has not seen C.A.R. since C.A.R.’s second birthday in early February, 2017. (Tr. p. 11, lns. 21-25; p. 23, lns. 6-7; p. 30, lns. 18-20; p. 31, lns. 18-22) In March, 2017, T.D.R. was charged with Soliciting a Child through Electronic Means to Engage in Sexual Conduct, a felony level offense, in Clay County, Minnesota. (Tr. p. 100, lns. 10-11) (App. 63) From the time T.D.R. was charged until the commencement of these proceedings in June, 2018, a period of fifteen (15) months, M.L.B. avows that T.D.R. made no attempts at trying to set up any parenting time. (Tr. p. 63, lns. 5-7) A condition of T.D.R.’s bond was that he have no contact with any persons under the age of 18 years of age. (App. 65) T.D.R. did not petition the court to amend T.D.R.’s bond or to allow contact with C.A.R. (App. 69) On November 20, 2017, T.D.R. plead guilty to the charge and was sentence to 120 days in jail and is required to register as a predatory offender. (App. 63) T.D.R.’s criminal judgment/probation also prohibits contact with persons under 18 years of age unless approved by T.D.R.’s probation officer in writing. *Id.*

[¶10] When T.D.R. was asked “In fact, you didn’t make a request to see C.A.R. until after the commencement of this action. Isn’t that true?” (Tr. p. 24, lns. 15-16). He responded

“Yes that is true because I, at that time, I didn’t know if I could yet or not, and then after that, that’s when I talked to my probation officer again and he said yeah you can see him and stuff like that.” (Tr. p. 24, lns. 17-20) However, later he contradicts himself when stating he did “try calling a couple of times.” (Tr. p. 46, lns. 3-10) However, when asked if he had any records to support that he had made those telephone calls he said “no.” (Id. at lns. 15-17) M.L.B.’s testimony is that he did not call until after the commencement of these proceedings and characterized his failure to make contact “a relief in the sense that I knew he was getting help he obviously needed.” (Tr. p. 53, lns. 17-21).

T.D.R.’s Failure to Support C.A.R.

[¶11] In March, 2016, T.D.R. made a \$400.00 payment to M.L.B. as support for the benefit of C.A.R. (Tr. p. 52, lns. 21-22). M.L.B. maintains that from March, 2016 through January, 2018 (a period of 21 months) T.D.R. did not provide any support to her. (Tr. p. 52, lns. 21-25 and pg. 53, ln. 1) An Affidavit of Arrears, entered as Exhibit 3, establishes T.D.R. did not commence paying child support until January, 2018, despite a child support order requiring him to pay child support commencing as early as August, 2017. (App. p. 64) T.D.R. claims that he, or his family on his behalf, provided financial support to M.L.B. to care for C.A.R., but provided T.D.R. provided no records to M.L.B. through discovery (App. 28) or to the Court at trial in support of his claims. (Tr. p. 15, lns. 9-25, and p. 16, lns. 1-22; App. 69) M.L.B. is asked about T.D.R.’s insistence that family members made payments to and she denies that it ever happened. (Tr. p. 53, lns. 2-4) M.L.B. is further pressed if she has received any support from T.D.R. or from someone else on T.D.R.’s behalf and she denies receiving anything. (Id. at lns. 5-7) The Court found M.L.B.’s testimony in this regard credible. (App. 69)

C.A.R.'s Family and Home

[¶12] During the 21 months that T.D.R. failed to financially support C.A.R. and the 15 months that T.D.R. failed to even request contact with C.A.R., M.L.B. met and married A.G. (Tr. p. 47, lns. 20-25 through p. 49, ln. 1) M.L.B. live together with A.G.'s two daughters from a previous marriage and C.A.R. (Tr. pg. 49, lns. 10-14) Residing with the family are three dogs with whom C.A.R. has developed a buddy type of bond. (Tr. p. 75, lns. 15-25 and p. 76, lns. 1-12)

[¶13] C.A.R. and A.G. met in September, 2017, and, at the time of trial, had already known each other for two of the C.A.R.'s most formative years. (Tr. p. 50, lns. 3-6) A.G. and C.A.R. have resided in the same home since July, 2018, or approximately 14 months at the time of the evidentiary hearing. (Tr. p. 49, lns. 2-14) C.A.R. is "4 and a half" years old and T.D.R. has not seen C.A.R. for more than half of C.A.R.'s life. (Tr. p. 30, lns. 21-25) The relationship C.A.R. developed with A.G. in the little over two years that they have known each other was natural and never forced. (Tr. p. 78, lns. 23-15 and Tr. p. 79, ln1) C.A.R. started calling A.G. "dad" on his own time and terms. (Id., lns. 1-8) A.G. treats C.A.R. no differently than his two daughters. (Id. 8-9) C.A.R. has also developed a strong bond with what he refers to as his "sisters." (Id. 20-25 and Tr. p. 80, lns. 1-14) Counsel for T.D.R. acknowledges that C.A.R. is fully integrated into A.G. and M.L.B.'s family. (Tr. p. 81, lns. 5-8)

[¶14] A.G. is in pretty good mental and physical health. (Id. lns. 15-17) M.L.B. is "sharp as a tack" takes care of all of the finite details of the family. (Id. lns. 20-25) A.G. is a chief engineer for ABM Industries at the Cargill Plant in Wahpeton (Tr. p. 76 lns 13-15)

earning just over \$80,000 per year. (Tr. p. 76, lns. 21-22) A.G. is able to adequately provide for C.A.R. and the rest of the family, including the dogs. (Id. lns. 23-25)

[¶15] C.A.R. suffers from a kidney disorder whereby his kidneys do not process protein properly. (Tr. p. 83, lns. 3-5) A.G. and M.L.B. have had to take C.A.R. to multiple specialists. (Id. lns. 6-7) The medicines that he takes requires structure, routine and calendaring to ensure that C.A.R. gets the right dose of a given medication at the right time. (Id. 12-18) C.A.R.'s medical concerns have been ongoing for approximately a year and half. A.G. does not just hear about this from M.L.B., he participates in the medical appointments. (Id. lns. 19-20) In the four specialist appointments that C.A.R. has had, A.G. has missed only one (Id. lns. 24-25) and he missed that one due to its impromptu nature and he could not get off from work. (Id. ln. 25 and Tr. p. 84, lns. 1-3) C.A.R. also has bad feet and needs orthotics. (Tr. p. 84, lns. 4-7)

STANDARD OF REVIEW

[¶16] The standard of review on appeal is the clearly erroneous standard. See *In re A.M.W.*, 2010 ND 154, ¶ 6, 786 N.W.2d 727. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support the finding, or if, on the entire record, the court is left with a firm conviction a mistake has been made. *Id.* at ¶ 7.

LAW AND ARGUMENT

[¶17] Both a finding that a parent has abandoned a child or a finding that a parent is withholding consent contrary to best interest of the child, require clear and convincing evidence:

A party seeking termination of the parent-child relationship must prove the elements necessary to support termination by clear and convincing evidence. *Matter of Adoption of P.R.D.*, 495 N.W.2d 299, 302 (N.D. 1993). Clear and convincing evidence means evidence which leads to a firm belief or conviction the allegations are true. [*Matter of Adoption of*] *A.M.M.*, [529 N.W.2d 864] at 866 [(N.D. 1995)]. . . .;

Matter of Adoption of J.M.H., 1997 ND 99, ¶ 7, 564 N.W.2d 623.

I. Whether the district court erred in failing to terminate T.D.R.’s parental rights to C.A.R. on the grounds that T.D.R. had abandoned C.A.R.

[¶18] Generally, a parent of a child must consent to an adoption; however consent is not required of:

b. A parent of a child in the custody of another, if the parent for a period of at least one year has failed without justifiable cause:

- (1) To communicate with the child; or
- (2) To provide for the care and support of the child as required by law or judicial decree.

. . .

a. A parent whose parental rights have been terminated by order of court under section 14-15-19.

[¶19] Section 14-15-19(3)(a), N.D.C.C., authorizes a court to terminate a parent's parental rights in an adoption action if the parent has abandoned the child, stating:

In addition to any other action or proceeding provided by law, the relationship of parent and child may be terminated by a court order issued in connection with an adoption action under this chapter on any ground provided by other law for termination of the relationship, and in any event on the ground . . . [t]hat the minor has been abandoned by the parent[.]

The term “abandon” for purposes of N.D.C.C. ch. 14-15 means:

a. As to a parent of a child not in the custody of that parent, failure by the noncustodial parent significantly without justifiable cause to:

- (1) Communicate with the child; or
- (2) Provide for the care and support of the child as required by law.

N.D.C.C. § 14-15-01(1).

[¶20] This court has explained that the district court should consider the following factors in deciding whether a parent has abandoned a child:

[W]e look to such factors as the parent's contact and communication with the child, the parent's love, care and affection toward the child, and the parent's intent. Also relevant is the parent's acceptance of parental obligations such as providing care, protection, support, education, moral guidance, and a home for the child. A casual display of interest by a parent does not preclude a finding of abandonment, and a parent's negligent failure to perform parental duties is significant to the issue.

In re Adoption of I.R.R., 2013 ND 211, ¶ 11, 839 N.W.2d 846 (quoting *In re Adoption of H.R.W.*, 2004 ND 216, ¶ 6, 689 N.W.2d 403). It must be shown the parent has an intent to abandon the child; however, the parent's intent may be inferred from the parent's conduct. *S.H.B. v. T.A.H.*, 2010 ND 149, ¶ 8, 786 N.W.2d 706.

c. Whether T.D.R. unjustifiably failed to communicate with C.A.R.

[¶21] In its Findings, the Court incorrectly found that “T.D.R. last saw C.A.R. in March of 2017. (App. 69) It is undisputed that T.D.R. has not had contact with C.A.R. since C.A.R.’s second birthday in February, 2017. (Tr. p. 11, lns. 21-25; p. 23, lns. 6-7; p. 30, lns. 18-20; p. 31, lns. 18-22)

GREEN: And after you broke up, do you recall when you last saw the child?

T.D.R.: Yeah. On his birthday when he was 2. February [XX], 2017.

GREEN: What is his birth date?

T.D.R.: February [XX], 2015. 2-[XX]-15.

(Tr. p. 11, lns. 21-25)

GREEN: And the last time you saw him was when he was 2?

T.D.R.: Yes. On his birthday.

(Tr. p. 23, lns. 6-7)

GREEN: You said the last time that you saw CC was on his 2nd birthday?

T.D.R.: Yes.

(p. 30, lns. 18-20)

GREEN: T.D.R., first of all I have ended up confused. 18 I'd like you to look and I'm going to come up and look with you 19 at exhibit 4. So, before we get to this, you said you saw CC on his birthday February [XX], 2017?

T.D.R.: Yes.

(p. 31, lns. 18-22)

The uncontradicted evidence is that T.D.R. has not seen or spoken with C.A.R. since February 2017, or a period of 29 months at the time of trial. The district court's finding that T.D.R. last saw C.A.R. in March of 2016 is not supported by the weight of the evidence and is clearly erroneous.

i. Whether the district court erred in holding that T.D.R.'s "actions as a whole are not indicative of a parent who intended to or has abandoned his son."

[¶22] The district court held that T.D.R.'s "actions as a whole are not indicative of a parent who intended to or has abandoned his son." (App. p. 69) In so holding, the district court erred.

[¶23] "Parental rights require more than just a biological connection; they require a relationship more enduring," and "[w]hile the ties of a natural parent are not to be treated lightly in adoption proceedings, neither should noncustodial parents treat lightly their rights and responsibilities toward their minor children." *I.R.R.* at ¶ 13 (quoting *Matter of Adoption of A.M.M.*, 529 N.W.2d 864, 866 (N.D.1995)). This Court has also recognized a parent subject to incarceration or a protection order must make a greater effort to foster a

nurturing relationship with a child. *A.M.W.* at ¶ 9. Incarceration alone is insufficient to establish abandonment, but incarceration with other factors such as parental neglect, withholding affection, failure to provide financial support, and lack of contact can support a finding of abandonment. *In re Adoption of H.G.C.*, 2009 ND 19, ¶ 15, 761 N.W.2d 565. "When a parent, voluntarily and without reasonable justification, makes himself unavailable to parent a child, the child should not be expected to wait for permanency and stability in his life." *Id.* at ¶ 15. A district court may draw an inference of intent to abandon from a parent's conduct in failing to establish or maintain a relationship with the child. *A.M.W.*, at ¶ 9. A casual display of parental interest does not preclude a finding of abandonment, and a parent's negligent failure to perform parental duties is significant to the issue of abandonment. *H.G.C.*, at ¶ 14. Whether or not a parent can blame counsel for instructing him or her to deny paternity is of no comfort to the child. *Matter of Adoption of A.M.B.*, 514 N.W.2d 670, 674.

[¶24] Prior to the commencement of this action, approximately 15 months had passed from the time T.D.R. had last seen or spoken with C.A.R.. (App. 69). Despite holding that "T.D.R. was solely responsible for the criminal charge that resulted in the no contact order with minors condition [sic] of his bond," the Court nonetheless found that T.D.R. failure to communicate with C.A.R. justifiable. (App. 69) In so holding, the district court found that T.D.R. relied on the advice counsel even though it further found "the record does not show why T.D.R.'s criminal defense attorney did not ask that his bond be modified to allow an exception for contact with C.A.R." *Id.* The Court held that T.D.R.'s reliance on a court order and the advice of his counsel was "a 'justifiable cause' exception." M.L.B. disagrees.

[¶25] Similar to *I.R.R.*, where the mother testified that since birth she was “planning on” terminating the natural father rights, M.L.B. testified that after T.D.R. was charged with a sex crime against a minor and wanted T.D.R. out of her and C.A.R.’s lives. (Tr. p. 64, Ins. 5-8; App. p. 69) Unlike *I.R.R.*, *T.D.R.* had information relating to C.A.R., knew where C.A.R. lived, and had C.A.R.’s contact information. Despite having all this information, T.D.R. made, at most (if one believes him), only a casual display of parental interest until the commencement of these proceedings.

[¶26] The district court’s holding is a misapplication of North Dakota as its analysis is flawed. The district court incorrectly looked to T.D.R.’s reliance on a court order and the advice he received from counsel rather than looking at the conduct that resulted in the court order and advice from counsel. Put another way, but for T.D.R.’s criminal conduct, there would not have been a court order preventing him from having contact with children and he would not have needed the advice of counsel.

[¶27] The district court acknowledges that T.D.R. committed the crime. (App. 69) The proper analysis is: 1) was T.D.R.’s committing a crime voluntary, and 2) was it justifiable. The only evidence the district court received regarding T.D.R. sex charge, was that pleaded guilty. The guilty plea is an admission that T.D.R. voluntarily committed the crime. The luring of minors to engage in sexual conduct is not a ‘justifiable cause’ exception. The district court’s holding leads to an absurd result. The application of the court’s rationale to facts where a parent is sentence to life in prison, with no contact with children, would result in a children growing up with a single parent simple because the imprisoned parent is complying with a court order. This court should adopt precedent that does not lead to an absurd result. If you commit a crime, you must do the time . . . and you may lose your

children too. Whether or not a T.D.R. can blame counsel for instructing him is of no comfort to the C.A.R. Just as in *I.R.R.*, the blame does not rest solely on M.L.B. or T.D.R.'s criminal law attorney. T.D.R.'s conduct is indicative of someone intending on abandoning his son.

ii. Whether the district court erred in holding “that M.L.B. has denied T.D.R. any contact with C.A.R. after June of 2018 is obviously ‘justifiable cause’ on T.D.R.’s part.”

[¶28] The district court’s holding that “The fact that M.L.B. has denied T.D.R. any contact with C.A.R. after June 2018 is obviously ‘justifiable cause’ on T.D.R.’s part” is not in accordance with North Dakota law. The district court’s ruling is inconsistent with prior cases in which this Court affirmed the district court where a finding was made that a parent had abandoned a child despite allegations the custodial parent was frustrating the noncustodial parent’s attempt to establish a relationship with the child. *In the Matter of the Adoption of K.J.C.; K.B.C. and B.J.C.*, 2016 ND 67, ¶ 20, 877 N.W.2d 67.

[¶29] In *A.M.B.*, 514 N.W.2d at 673, the father claimed the mother hid herself and the child from him and this Court said the mother's actions were of substantial significance. However, this Court also considered that the mother did not prohibit the father from seeing the child when he visited on the child's birthday, the father did not pursue the mother's offer to arrange visitation, the father attempted to see the child on one other occasion, the father did not bring an action to establish paternity, and the father did not provide any financial support. *Id.* at 673-74. This Court affirmed an adoption decree, concluding the father abandoned the child and his consent to the adoption was not required. *Id.* at 674.

[¶30] In *H.G.C.*, 2009 ND 19, ¶¶ 13, 18, 761 N.W.2d 565, this Court affirmed the district court's finding the father abandoned the child despite the father's claim that the mother

frustrated his attempts to have a relationship with the child by telling him he could no longer see the child and refusing to respond to his communication attempts. This Court held the evidence supported the district court's finding that the father abandoned the child because the evidence established the mother did not hide herself or the child, the father could have attempted to contact the mother, and the father did not make any attempt to have a relationship or contact the child in the two years before his rights were terminated other than a phone call and sending the child two cards. *Id.* at ¶¶ 14-16.

[¶31] Similarly, in *I.R.R.*, 2013 ND 211, ¶ 14, 839 N.W.2d 846, this Court affirmed the district court decision terminating the father's parental rights despite allegations the mother frustrated the father's attempts to have a relationship with the child. The father claimed the mother actively thwarted any contact or relationship between him and the child, she moved and did not tell him where the child was, she obtained a protection order against him, returned all correspondence and packages, and refused any communications and visitation with him or his family. *Id.* at ¶¶ 8, 14. This Court held the district court's finding the father abandoned the child was not clearly erroneous, and the evidence supported the court's finding the father displayed only a casual interest in the child and did not take affirmative steps to perform his parental duties. *Id.* at ¶ 14.

[¶32] In discussing a claim that a custodial parent had frustrated a noncustodial parent's attempts to have a relationship with a child, this Court has recognized the custodial parent's actions may not be "insignificant" but the noncustodial parent must still make attempts to foster and maintain a relationship with the child. *H.G.C.*, 2009 ND 19, ¶ 13, 761 N.W.2d 565.

[¶33] From November 2017, to the commencement of this action in June of 2018, a period of 7 or 8 months, T.D.R. made, at most, a couple of casual attempts at contacting C.A.R. (Tr. p. 39, ln. 5) Even taking T.D.R. at his word, T.D.R.’s couple of attempts at contacting C.A.R. are nothing more than a casual display of parental interest which does not preclude a finding of abandonment. *H.G.C.*, at ¶ 14. This is particularly true given that T.D.R. acknowledges that he had not seen C.A.R. since his second birthday and he only made a “couple of attempts.” The record reflects that after the commencement of this action T.D.R. requested parenting time through his attorney which was denied by M.L.B.’s attorney. (App. 1, 66 and 67) Despite having filed a counterclaim to enforce his parental rights, the record reflects that T.D.R. did not request any type of interim relief and made no other efforts to otherwise enforce his parental rights. Even after the district court issued its order denying the Petition to terminate his parental rights and responsibilities, the record reflects that T.D.R. took no immediate action to enforce his parental rights.

[¶34] The district court’s holding “that M.L.B. has denied T.D.R. any contact with C.A.R. after June of 2018 is obviously ‘justifiable cause’ on T.D.R.’s part” does not comport with a long line of this Court’s decisions nor does it comport with the facts in this case. T.D.R.’s few requests through counsel supports a finding that he made only casual attempts to enforce his parental rights when he had competent counsel and additional legal options available. The district court’s holding constitutes a mistake of law requiring reversal.

iii. Whether the district court erred in finding that T.D.R. “received consent from his probation officer to have supervised parenting time with C.A.R.”

[¶35] The evidence does not support that T.D.R. received consent from his probation officer to have supervised parenting time with C.A.R. T.D.R. testified as follows:

GREEN: How long after you were sentenced did you wait before you asked your probation officer if you could make an attempt to set up some sort of parenting time?

T.D.R. Not very long because he came back out and had the paperwork that says right here T.D.R., he goes I put in here that you can see your son.

GREEN: The probation officer said that?

T.D.R.: Yes. The probation officer, B.B.

(Tr. p. 46, ln. 25 and p. 47, lns 1-7)

No other testimony relating to T.D.R. obtaining permission was submitted by either party. This exchange clearly shows that T.D.R. had the ability to request permission to see C.A.R., but it falls short of establishing that he in fact made that request. The record reflects that M.L.B. attended T.D.R.'s hearings on his charge of Soliciting a Child through Electronic Means to Engage in Sexual Conduct. (Tr. p.53, lns.22-23 and p. 60, lns. 16-19) This is important because the record is devoid of any indications that T.D.R. ever informed M.L.B. that his probation officer gave him permission to see C.A.R.. T.D.R. should have had his probation officer send M.L.B. written communication authorizing T.D.R. to have contact with C.A.R. in a supervised setting. In Attorney Richie's letter to Attorney Green, there is no mention of the probation officer having given T.D.R. permission to see C.A.R. (App. 66) What's more, is that there is not even an indication that this parenting time would be supervised. *Id.* The only evidence indicating the court heard indicating that T.D.R. had his probation officer's permission was from T.D.R. Just as with the rest of his defenses, he has provided no corroborating evidence. M.L.B. asserts that T.D.R.'s testimony alone is not enough to support a finding that he had received his probation officer's permission to have contact with C.A.R.

d. Whether the district court erred when it failed to find that T.D.R. significantly and without justifiable cause failed to provide for the care and support of the C.A.R. as required by law.

[¶36] The district court erred when it failed find that T.D.R. significantly and without justifiable cause failed to provide for the care and support of the C.A.R. as required by law in two ways. First, the district court erred when it found that “T.D.R.’s failure to pay child support prior to a formal order being in place and his subsequent substantial compliance is not evidence of intent to abandon.” This holding is contrary to established North Dakota law. Second, the district court failed when it found that “The parties do agree that T.D.R. paid M.L.B. \$400 in March 2017.” This finding is not supported by the evidence and it is material in determining the number of months that T.D.R. went without financially supporting C.A.R.

[¶37] T.D.R. maintains that the reason that he paid his child support when he the money comes in from jobs. (Tr. p. 18 lns. 1-4) However, in a letter written months earlier to Attorney Richie, Attorney Green points out, “First, while your client is current in child support it is clear that he would not be but for him facing jail time. Your client’s paying child support at the last possible minute demonstrates that he had no intention of supporting the child but for the State intervening.” (App. 66) It could be purely coincidental that T.D.R. had payments for jobs coming in the day before or the day of court, but highly improbable given his lack of interest in the child leading up to the commencement of these proceedings.

- i. **Whether the district court erred when it found that “T.D.R.’s failure to pay child support prior to a formal order being in place and his subsequent substantial compliance is not evidence of intent to abandon.”**

[¶38] Parents have a duty to support their children. See N.D.C.C. § 14-09-08; see also *McDowell v. McDowell*, 2003 ND 174, ¶ 13, 670 N.W.2d 876. The absence of a court order does not absolve a parent of the obligation to support a child. *A.M.B.* at 673-74.

[¶39] The district court held:

“T.D.R. had a **moral obligation to support C.A.R.** prior to entry of the August 2017 court order. N.D.C.C. § 14-15-06(1)(b) provides that abandonment may be proven if a parent “fails to provide for the care and support of the child as required by law or judicial decree.” All parents have a legal duty to support their children, but no judicial decree was in effect until August 2017. Since entry of the support order T.D.R. has gone a maximum of four months without making a child support payment. T.D.R. was current in his child support obligation when this matter was commenced and at the time of trial. **T.D.R.’s failure to pay child support prior to formal order being in place and his subsequent substantial compliance is not evidence of intent to abandon.**

[**Emphasis added**] (App. 69)

[¶40] In *A.M.B.*, this Court expressly rejected the notion that noncustodial parents only have a moral obligation to support their children and that failure to pay child support prior to formal order being in place is not evidence of intent to abandon. It is undisputed that T.D.R. knew that C.A.R. was his child. T.D.R. had more than a moral obligation, he had a legal obligation to do so with or without a court order. *A.M.B.* at 673-74. The Courts holding is contrary to North Dakota law and constitutes reversible error.

ii. The district court's finding that "The parties do agree that T.D.R. paid M.L.B. \$400 in March 2017" is not supported by the evidence.

[¶41] The district court erred when it found T.D.R. provided support to M.L.B. for the benefit of C.A.R. in March of 2017. The uncontradicted testimony of M.L.B. establishes that she received no support from T.D.R. from March of 2016 until January of 2018.

GREEN: Do you recall T.D.R.'s testimony when he said he made payments whether sporadic or otherwise he made some level of payments from CC 2nd birthday until the payment in 8 January of 2018. Do you recall that testimony?

M.L.B.: The testimony, yes.

GREEN: Did he in fact make sporadic payments during that 11 period of time?

M.L.B.: Um. No.

GREEN: Did he make any payments during that period of time?

M.L.B. I'm sorry, from when?

GREEN: From his 2nd birthday or just prior to him getting in 16 trouble. I'll even call it they're basically the same month. 17 The time he got in trouble on the sex charge until January of 18 2018.

M.L.B.: There was one time in March of 2016.

GREEN: How much did he pay you in March of 2016?

M.L.B.: \$400.00. We met in the park to play with CC. And then we went to the gym for pancakes.

GREEN: And then after that did he make any payments until you received a payment in January of 2018?

M.L.B.: No.

(Tr. p. 52, lns. 6-25 and p. 53, ln. 1)

The district court’s mistaken finding is understandable because the question posed to M.L.B. related to 2017. However, M.L.B., knowing that her attorney was asking the wrong question, answered that it was in fact March of 2016 that she had last received a \$400.00 payment from T.D.R. This is important because the Court further found that “M.L.B. stated that there was no other direct or in-kind support during this time which the court finds.” (App. p. 69) Put another way, the district court found M.L.B.’s testimony credible that she had not received any support other than the \$400 payment despite T.D.R.’s assertion to the contrary. The weight of the evidence shows that T.D.R. failed to support for C.A.R. for a period of 21 months. The district court even acknowledges that despite the entry of a child support order requiring payments as far back as August 2007, that T.D.R. did not commence paying child support until January 2018. (App. 49 and 69) T.D.R.’s payments, some of which are substantial, serve as evidence that T.D.R. could have been financially supporting the child for the preceding 21-month period, but wholly failed to do so.

d. Whether the district court erred when it found that T.D.R. “is required to register as a predatory sex offender until November of 2020.”

[¶42] The district court’s finding that T.D.R. is required to register as a sex offender until November of 2020 is not supported by the evidence. The only evidence elicited regarding T.D.R.’s registration was through T.D.R.’s own testimony, as follows:

GREEN: Do you currently have to register as a sex offender?

T.D.R.: Yes.

GREEN: Do you have to register as a sex offender for the rest of your life or how long do you have to register for?

T.D.R. No. Just 10 years.

GREEN: And your conviction was in 2018>

T.D.R.: Yes.

GREEN: By my calculation you have to register until 2028?

T.D.R.: Yes.

(Tr. p. 20, lns. 12-22) The undisputed evidence supports that T.D.R. must register as a predatory sex offender until 2028. Accordingly, the district court erred in finding that T.D.R. must register as a predatory sex offender until 2020.

II. Whether the district court erred in failing to terminate T.D.R.'s parental rights to C.A.R. on the grounds that T.D.R. was improperly withholding his consent against the best interest of the child.

[¶43] Upon reviewing *Kostick v. Carlson*, 241 N.W.2d 842, M.L.B. concedes that the district court did not err in failing to terminate T.D.R.'s parental rights to C.A.R. on the grounds that T.D.R. was improperly withholding his consent against the best wishes of the child. With that acknowledgement, it is difficult to imagine when N.D.C.C. § 14-15-19(3)(c) would ever apply.

CONCLUSION

[¶44] The district court made a number of findings which were not supported by the manifest weight of the evidence. While some of those mistakes on their own do not constitute reversible error, others do. Certainly, taken as a whole, the collective number erroneous findings constitutes reversible error. The district court also made a number of mistakes of law, all of which constitute reversible error. M.L.B. requests that the Supreme Court 1) reverse the decision of the district court 2) hold that she has shown by clear and

convincing evidence that T.D.R. abandoned C.A.R. and 3) order the termination of T.D.R.'s parental rights.

Respectfully submitted this 13th day of April, 2020.

GREEN LAW FIRM, P.C.
328 Dakota Ave
Wahpeton, ND 58075
(701) 672.1218
Attorneys for Petitioner - Appellant

By: /s/ Jonathan L. Green
Jonathan L. Green (ND Bar ID 06853)
jon.green@jongreenlawfirm.com

CERTIFICATE OF COMPLIANCE

[¶ 45] The undersigned, at attorney for Petitioner – Appellant in the above matter, and as author of the above brief, hereby certifies, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, the above brief was prepared with proportional type face and does not exceed 38 pages.

Dated this 13th day of April, 2020.

GREEN LAW FIRM, P.C.
328 Dakota Avenue
Wahpeton, ND 58075
(701) 672-1218
Attorneys for Petitioner - Appellant

By: /s/ Jonathan L. Green
Jonathan L. Green (ND Bar ID #06853)
jon.green@jongreenlawfirm.com

CERTIFICATE OF SERVICE

[¶ 46] The undersigned attorney represents the Petitioner - Appellant, M.L.B., in the above-entitled matter and hereby certifies that on the 13th day of April, 2020, he served Appellant’s Brief and Appendix electronically upon Kiara Costa Kraus Parr, at the following email address:

service@kpmwlaw.com

Dated this 13th day of April, 2020.

GREEN LAW FIRM, P.C.
328 Dakota Avenue
Wahpeton, ND 58075
(701) 672-1218
Attorneys for Petitioner - Appellant

By: /s/ Jonathan L. Green
Jonathan L. Green (ND Bar ID #06853)
jon.green@jongreenlawfirm.com