
 IN THE SUPREME COURT OF NORTH DAKOTA

In the Interest of C.A.R., a child

M.L.B.,)	Supreme Court File No.
)	20190385
)	
Petitioner and Appellant,)	Richland County No.
)	39-2018-DM-120
v.)	
)	
T.D.R.,)	APPELLEE'S BRIEF
)	
Respondent and Appellee.)	

**Appeal from the findings of fact and order denying
petition to terminate respondent's parental rights and
order for mediation entered October 8, 2019 in Richland
County District Court, Northeast judicial district, North
Dakota the Honorable Bradley A. Cruff, presiding.**

ORAL ARGUMENT REQUESTED

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Oral Argument:

Oral argument has been requested to emphasize and clarify the Respondent’s written arguments on their merits.

Transcript References:

The name of the child and his father in this brief are pseudonyms. The hearing for this matter was conducted on September 10, 2019. The transcript of that hearing is referred to as “Tr.” in this brief.

STATEMENT OF THE ISSUE

[¶ 1] I. The district court was not clearly erroneous when it found that C.A.R. “Cody” was not abandoned.

II. The district court did not find that T.D.R. “Troy” was unfit therefore it is not in C.A.R. “Cody’s” best interests to terminate his natural father’s rights.

STATEMENT OF CASE

[¶ 2] The Respondent accepts the Appellant’s statement of the case.

STATEMENT OF FACTS

[¶ 3] The Respondent accepts the State’s statement of the facts with the following additions and corrections:

[¶ 4] Troy disputes the Appellant’s position that from his criminal charge until the commencement of this case he made no attempts to contact Cody. Tr. pp. 21, 38-39, 41, 43, 46, 47. Troy also disputes that no support was provided between March of 2016 and January of 2018. Tr. pp. 16, 36-37, 66.

LAW AND ARGUMENT

I. The district court was not clearly erroneous when it found that C.A.R. “Cody” was not abandoned.

[¶ 5] In juvenile proceedings, including termination of parental rights cases, findings of fact are reviewed under the clearly erroneous standard. *In re A.L.E.*, 2018 ND 257, ¶ 4, 920 N.W.2d 461. A finding is clearly erroneous when it is made by an erroneous view of the law, the evidence does not support the finding, or if, on the entire record, the Court is left with a definite

and firm conviction a mistake has been made. *Id.* Questions of law are fully reviewable. *See In re C.R.H.* , 2000 ND 222, ¶ 6, 620 N.W.2d 175.

[¶ 6] Whether Troy unjustifiably failed to communicate with Cody is a factual issue. There is testimony on the record that Troy saw his son frequently, once a week and that he would go to Cody's mother's home half the time in 2016. Tr. pp 13, 21. He testified that at the end of November 2017 he asked his probation officer for permission to visit his son. Tr. pp. 38-39. Troy testified that he sent numerous texts, phone calls and letters requesting parenting time with Cody. Tr. p. 22. Cody's mother testified that she determined it was in Cody's best interests that Troy not see him after he was criminally charged in March of 2017. Tr. pp. 65-67. All of the Appellant's sub issues (i. through iii.) under "I(a)" go to the district court's weighing of credibility and evidence and therefore not clearly erroneous.

[¶ 7] The Court found that Troy's lack of contact with Cody for 15 months was justified because for eight months he was under a Court Order prohibiting his contact with Cody and was advised by his attorney not to have contact with Cody. The Court found that to be a justifiable excuse and was not an indication that Troy intended to abandon his son. This is not a clearly erroneous decision, it is an exercise of the court's considered reasoning, weighing specific facts of the case before it and coming to a conclusion based on those facts. There is no statute or case that **requires** the court to conclude

that a bond order is an unjustified reason for lack of communication.

Therefore, the court's finding was not clearly erroneous.

[¶ 8] The district court went on to examine the other seven months it found that Troy did not have contact with his son. The court determined that Troy asked for permission from his probation officer in November of 2017 to contact Cody, which was supported by testimony. *See* Tr. pp. 21, 38. The court found that Troy attempted to see Cody but Cody's mother rebuffed Troy. This is also supported by testimony. *See* Tr. pp. 21-22, 59, 65, 67. The court indicated that in most cases the mother not agreeing to visitation would not be enough to excuse a lack of contact, however, because the court recognized that Troy has intellectual limitations that changed the analysis for the court. The court specifically found that due to Troy's limitation's Cody's mother refusing contact was a justifiable excuse. This is not a clearly erroneous decision. There is no case or statute that **requires** the court to find contrarily and the finding was supported by evidence in the record.

[¶ 9] Whether Troy without **justifiable cause** failed to provide care and support for Cody as required by law is a factual issue. There is testimony and exhibits that support the district court's findings. Troy testified that his mother and sister paid child support on his behalf. Tr. p. 16. The district court found there was no support order until august of 2017. The district court found he is not paid a regular wage which was supported by testimony. Tr. p. 35. The district court found that Troy was current on his support

payments as of the date of the hearing. That finding was supported by testimony and an exhibit. *Id.* The district court found that Tyler’s failure to pay child support prior to the order being in place “and his subsequent substantial compliance with the order does not show he intended to abandon Cody.” Court Order Denying Termination ¶ 25. Once again this is an exercise of the court’s considered reasoning, where it weighed the specific facts before it and came to a conclusion based on those facts. There is no statute or case that **requires** the court to conclude otherwise, therefore this is not an erroneous decision.

II. The district court did not find that T.D.R. was unfit therefore it is not in C.A.R. “Cody’s” best interests to terminate his natural father’s rights.

[¶ 10] It is a fundamental right, the right to a parental relationship. *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). Although not absolute, a parent’s right to the custody and companionship of their children is recognized as one of constitutional dimensions. *In Interest of M.N.*, 294 N.W.2d 635 (N.D. 1980); *Jacobson v. V.S.*, 271 N.W.2d 562 (N.D. 1978). This is a basic premise of cases involving termination of parental rights. The court cannot terminate parental rights by showing it is in the best interests of the children **without showing the parents were unfit**. *Emphasis Added Kottsick v. Carlson*, 241 N.W.2d 842, 853-54 (N.D. 1976)

[¶ 11] At the opening of the hearing on this matter the Appellant conceded there Cody was not deprived. There was no evidence presented that

Troy is an unfit parent. The fact that Cody's step-father makes more money is irrelevant to whether Troy is an unfit parent. The fact that Cody has bonded with his step-father, partially due to his mother's refusal to acknowledge Troy's existence as his father, is irrelevant to determine if Troy is an unfit parent. The Appellant used the hearing to present evidence that supported a conclusion that Troy was unfit because he abandoned Cody. The court disagreed with their position and therefore found that Troy was fit to parent Cody, therefore it is not in Cody's best interests to terminate his natural father's rights.

CONCLUSION

[¶ 12] WHEREFORE, the district court did not commit clear error in the case before this Court now. There is no violation or erroneous view of applicable law committed by the district court, there is ample evidence to support the district court's findings, and under a totality view of the evidence, no mistake has been made in this case.

Dated this 13th day of May, 2020

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T.D.R.,)	CERTIFICATE OF
)	COMPLIANCE
Respondent and Appellee.)	

[¶ 1] This Appellee’s Brief complies with the page limit of 38 set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure.

Dated: May 13, 2020.

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T.D.R.,)	CERTIFICATE OF
)	SERVICE
Respondent and Appellee.)	

[1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellee’s Brief with Certificate of Compliance

and that said copies were served upon:

Jonathan L. Green, Appellant’s Attorney, jon.green@jongreenlawfirm.com

by electronically filing said documents through the court’s electronic filing system and upon the following by placing a true and correct copy with USPS:

T.D.R., 8349 90 St S, Sabin, MN 56580

Dated: May 13, 2020.

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