

STATE OF NORTH DAKOTA    IN THE SUPREMECOURT

SUPREME COURT CASE NUMBER 20190385

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

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**N.D.R.APP.P. RULE 40 PETITION FOR REHEARING ON  
APPEAL FROM DISTRICT COURT’S FINDINGS AND ORDER DENYING  
PETITION TO TERMINATE 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**

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ORAL ARGUMENT NOT PERMITTED

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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

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## **STATEMENT OF THE ISSUES**

[¶1] I. Whether both the district court and the North Dakota Supreme Court erred in determining T.D.R. made a payment in support of the C.A.R. in March 2017 (as opposed to March 2016) and the implications of an additional year of failure to support on a finding of abandonment.

## **STATEMENT OF THE CASE**

[¶2] This action was commenced by way of service of a Summons and Petition for Termination of Respondent's Parental Rights on the 19<sup>th</sup> 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 10<sup>th</sup> 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. 3 and 12) 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. 12) 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. 15) On December 19, 2018, the Petitioner filed the Petition. (App. 3)

[¶3] 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. 19) 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. 16 and 29) T.D.R. contested the Motion to Compel Discovery and filed a Motion for Protective Relief on April 15, 2019. (App. 50) On April 22, 2019, M.L.B. brought a Motion for Attorney's Fees. (App. 3) 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. 50)

[¶4] 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. 3) 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. appealed. (App. 69 and 79) On October 21, 2020, the North Dakota Supreme Court issued an opinion affirming the District Court. (App. 83) It is from this opinion that M.L.P. requests a rehearing.

#### **ORAL ARGUMENT**

[¶5] Oral argument is not permitted. N.D.R.App.P. Rule 40.

#### **STATEMENT OF FACTS**

[¶6] 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 Support C.A.R.**

[¶7] 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, Ins. 9-25, and p. 16, Ins. 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, Ins. 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 Ins. 5-7) The Court found M.L.B.'s testimony in this regard credible. (App. 69) During oral argument, the parties agreed that prior to January 2018, T.D.R. had not made a payment since March 2016. The record of the District Court also so reflects.

### **LAW AND ARGUMENT**

¶8 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 both the district court and the North Dakota Supreme Court erred in determining T.D.R. made a payment in support of the C.A.R. in March 2017 (as opposed to March 2016) and the implications of an additional year of failure to support on a finding of abandonment.**

[¶9] 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.

[¶10] 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).

[¶11] 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.

[¶12] The district court and the North Dakota Supreme 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. The district court erred when it found that “The parties do agree that T.D.R. paid M.L.B. \$400 in March 2017” and the North Dakota Supreme Court likewise erred when it found that “the parties agreed T.D.R. paid \$400 in March 2017.” These findings are not supported by the evidence. The parties agreed during oral argument that T.D.R. had not made a payment since March 2016, not March 2017 as indicated the Supreme Court’s opinion. As noted in Appellant’s Brief, T.D.R. failed to financially support C.A.R. from March 2016 until January 2018, a period of twenty-one months. The legislature gave the courts the authority to terminate for failing to support after only one year. The time period in this case is nearly double what is required to find abandonment and terminate. It is difficult to understand why North Dakota caselaw supports termination when the State brings the action but routinely denies termination in cases of step-parent adoptions under similar circumstances. Going nine months without financially supporting one’s child is one thing, but going twenty-one months is inexcusable. Throughout the hearing T.D.R. used his cerebral palsy as a crutch in supporting his failure to support C.A.R. In addition to his failure to pay, T.D.R. has not seen C.A.R. since his second birthday in February 2016. In affirming the district court, the



North Dakota Supreme Court is holding that a parent that 1) has not seen his child for a period in excess of three years, 2) has financially failed in supporting the child for a period of 21 months, and 3) has been convicted of sexually predatory conduct toward a minor deserves to have a relationship with his child. The North Dakota Supreme Court's rate of affirming district court decisions is both considerable and alarming. Mistakes, such as the one made here, lead to a lack of confidence in our judicial system undermining its integrity.

### **CONCLUSION**

[¶13] The Supreme Court (and the district court) incorrectly found that T.D.R. financially supported in the child in March 2017 when it should have found it was March 2016. T.D.R.'s failure to support C.A.R. from March 2016 until January 2018, a period of 21 months, supports a finding of abandonment and T.D.R.'s parental rights to C.A.R. should be terminated.

### **CERTIFICATE OF COMPLIANCE**

[¶ 14] The undersigned, at attorney for Petitioner – Appellant in the above matter, and as author of the above brief, hereby certifies, in compliance with Rule 40(b) of the North Dakota Rules of Appellate Procedure, the above brief was prepared with proportional type face and does not exceed 10 pages.

### **CERTIFICATE OF SERVICE**

[¶ 15] The undersigned attorney represents the Petitioner - Appellant, M.L.B., in the above-entitled matter and hereby certifies that on the 18<sup>th</sup> day of November, 2020, he served Appellant's Petition for Rehearing and Appendix electronically upon Kiara Costa Kraus Parr, at the following email address:

service@kpmwlaw.com

Dated: November 18, 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