

**IN THE SUPREME COURT OF NORTH DAKOTA**

In the Interest of C.G., a child

State of North Dakota,	)	
	)	
Petitioner / Appellee,	)	
	)	
v.	)	
	)	Supreme Court No. _____
C.G., Child;	)	
B.G., Mother;	)	Barnes County Case No. 02-2020-JV-00026
R.M., Father; and	)	
Sheri Rosenau, Guardian ad Litem;	)	
	)	
Respondent / Appellant.	)	

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**BRIEF OF APPELLANT, R.M.**

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**Appeal from Juvenile Findings of Fact and Order  
for Termination of Parental Rights dated April 6, 2021**

**Barnes County Juvenile Court  
Southeast Judicial District  
Honorable Jay A. Schmitz, Presiding**

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**TABLE OF CONTENTS**

	<u>Paragraph [¶]</u>
STATEMENT OF THE ISSUES .....	1
JURISDICTIONAL STATEMENT .....	4
STATEMENT OF THE CASE .....	5
STATEMENT OF THE FACTS .....	7
STANDARD OF REVIEW.....	14
ARGUMENT .....	15
I.    The juvenile court erred in finding R.M. abandoned C.G. ....	16
A.    There is not clear and convincing evidence that R.M. abandoned C.G. by failing to significantly without justifiable cause communicate with C.G. under N.D.C.C. § 27-20- 02(1)(a)(1). ....	17
B.    There is not clear and convincing evidence that R.M. abandoned C.G. by failing to significantly without justifiable cause provide for the care and support of C.G. as required by law under N.D.C.C. § 27-20-02(1)(a)(2). ....	24
II.   The juvenile court erred in finding C.G. is deprived and that the conditions and causes of the deprivation are likely to continue or will not be remedied. ....	26
III.  The juvenile court erred in finding that reasonable efforts under N.D.C.C. § 27-20-32.2 were made to reunify C.G. and R.M. ....	29
CONCLUSION .....	34

**TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES**

Paragraph [¶]

**Cases**

*B.L.L. v. W.D.C.*,  
2008 ND 107, 750 N.W.2d 466 ..... 17

*In re A.W.*,  
2012 ND 153, 820 N.W.2d 128 ..... 14, 16, 17

*In re F.F.*,  
2006 ND 47, 711 N.W.2d 144 ..... 26

*In re J.C.*,  
2007 ND 111, 736 N.W.2d 451 ..... 15

*In re R.M.B.*,  
402 N.W.2d 912, 915 (N.D. 1987) ..... 17

*In re W.E.*,  
2000 ND 208, 619 N.W.2d 494 ..... 15

**Statutes**

N.D.C.C. § 27-20-02(1)(a)(1) ..... 8, 16, 23

N.D.C.C. § 27-20-02(1)(a)(2) ..... 8, 16, 25

N.D.C.C. § 27-20-32.2 ..... 29

N.D.C.C. § 27-20-32.2(1)..... 29

N.D.C.C. § 27-20-32.2(2)..... 29

N.D.C.C. § 27-20-44(1)(a) ..... 16

N.D.C.C. § 27-20-44(1)(c)(1) ..... 26, 27, 28

N.D.C.C. § 27-20-44(1)(c)(2) ..... 26, 27, 28

N.D.C.C. § 27-20-56(1)..... 4

**Other Authorities**

N.D. Const. Art. VI, § 2 ..... 4  
N.D. Const. Art. VI, § 6 ..... 4

## STATEMENT OF THE ISSUES

[¶ 1] Whether the juvenile court erred in finding R.M. abandoned C.G.

[¶ 2] Whether the juvenile court erred in finding C.G. is deprived and that the conditions and causes of the deprivation are likely to continue or will not be remedied.

[¶ 3] Whether the juvenile court erred in finding that reasonable efforts were made to reunify C.G. and R.M.

## JURISDICTIONAL STATEMENT

[¶ 4] This Court has jurisdiction to hear this appeal under N.D. Const. art. VI, §§ 2 and 6, and N.D.C.C. § 27-20-56(1).

## STATEMENT OF THE CASE

[¶ 5] The State of North Dakota filed a Petition for Termination of Parental Rights of R.M. and B.G. on September 22, 2020, along with a supporting affidavit. (App., 6-26.) A juvenile initial hearing was held on November 17, 2020. (*See App. at 4.*) On November 18, 2020, a juvenile adjudication hearing was scheduled for February 5, 2021. (Index # 27.) The juvenile adjudication hearing took place as scheduled on February 5, 2021. (*See App. at 4.*) On February 12, 2021, the State filed its Argument for Termination of Parental Rights. (Index # 40.) On February 25, 2021, B.G.'s attorney filed her Argument Against Termination of Parental Rights. (*Id. at # 42.*) On February 26, 2021, R.M.'s attorney filed his Brief in Opposition to Termination of Parental Rights of R.M. (*Id. at # 44.*)

[¶ 6] The juvenile court issued a Notice of Further Adjudication Hearing on March 3, 2021. (Index # 47.) On March 12, 2021, a juvenile adjudication hearing was held, where the juvenile court issued oral findings of fact and order for disposition. (See App. at 4.) On April 6, 2021, the juvenile court issued its written Juvenile Findings of Fact and Order for Termination of Parental Rights. (*Id.* at 54-59.) R.M. filed a Notice of Expedited Appeal on May 6, 2021, contemporaneous with this Brief.

### **STATEMENT OF THE FACTS**

[¶ 7] C.G. is the minor child of B.G. and R.M., the Appellant. (App. at 55.) Barnes County Social Services received a child protection report on August 1, 2018 after a search warrant was executed at B.G.'s residence and drug paraphernalia was found. (*Id.*) C.G. was removed from B.G.'s custody and placed into shelter care on August 2, 2018. (*Id.*) He was placed in the care, custody, and control of Barnes County Social Services on October 22, 2018. (*Id.*) C.G. has been in foster care in the custody of Buffalo Bridges Human Service Zone (BBHSZ) (formerly Barnes County Social Services) since August 2, 2018. (*Id.*)

[¶ 8] On September 22, 2020, a Petition for Termination of Parental Rights was filed with respect to C.G.'s parents. (App. at 6-9.) Per the Petition, BBHSZ sought to terminate R.M.'s parental rights to C.G. based on abandonment pursuant to N.D.C.C. § 27-20-02(1)(a)(1) and (2). (See *id.* at 7.) Following the juvenile adjudication hearing on February 5, 2021, the parties submitted briefs. (Index ## 40, 42, 44.) At a further juvenile adjudication hearing on March 12, 2021, the

juvenile court issued oral findings of fact and order for disposition. (*See App. at 31-53.*)

[¶ 9] The juvenile court found that there was clear and convincing evidence of abandonment in the case of R.M. (*Id. at 49.*) Specifically, the juvenile court found that R.M. had not had contact with C.G. since July 2017 when he moved to Montana. (*Id. at 36.*) The juvenile court did not find any justifiable cause for R.M.'s failure to communicate with C.G. for over a year before the removal. (*Id. at 39.*) After removal, the juvenile court found that the first known effort of R.M. to contact BBHSZ was in April 2019. (*Id.*) The juvenile court also found that R.M. specifically had contact with BBHSZ in April 2019 and again in 2020 requesting contact with C.G. (*Id. at 38.*) The juvenile court indicated that there were communication issues between BBHSZ and R.M., and that this may have interfered with R.M.'s ability to communicate with C.G. (*Id. at 39.*) However, the juvenile court found that despite R.M. knowing C.G. was in foster care, he did not return to North Dakota or make any meaningful effort to communicate with C.G. (*Id.*) The juvenile court found that R.M. has been paying child support, and that he has provided care and support to C.G. (*Id. at 36, 39.*)

[¶ 10] Additionally, the juvenile court found that there was clear and convincing evidence that C.G. was a deprived child. (*Id. at 49.*) The juvenile court's findings on deprivation focused largely on issues with B.G. (*See id. at 45.*) As to R.M., the juvenile court found that he does not have a relationship with C.G. (*Id. at 46.*) The juvenile court also found that "R.M.'s home circumstances are not suitable

for a child. He has not demonstrated that he’s maintained sobriety or has the ability to meet C.G.’s significant needs.” (*Id.*)

[¶ 11] The juvenile court next found that there was clear and convincing evidence that the deprivation of C.G. was likely to continue. (*Id.*) The juvenile court stated that R.M. “has not found any stable housing, has not had contact with the child, does not even know the child for the most part, and that his ability to remedy those problems in a reasonable time frame . . . is not likely to occur.” (*Id.* at 48-49.) The juvenile court further found clear and convincing evidence that C.G. had been in foster care for a period approaching 950 consecutive days. (*Id.*)

[¶ 12] Additionally, the juvenile court found by clear and convincing evidence that reasonable efforts were made to reunify C.G. and R.M. (*Id.* at 49-51, 57.) Finally, the juvenile court found that termination of R.M.’s rights was warranted in the best interest of C.G. (*Id.* at 52.) Termination of R.M.’s parental rights was ordered based on abandonment and deprivation. (*See id.* at 49, 52.)

[¶ 13] A written order consistent with the juvenile court’s oral findings was issued on April 6, 2021. (App. at 54-59.)

### **STANDARD OF REVIEW**

[¶ 14] A juvenile court’s findings of fact in a termination case will not be reversed “unless they are clearly erroneous, and the court’s decision to terminate parental rights is a question of fact.” *In re A.W.*, 2012 ND 153, ¶ 9, 820 N.W.2d 128. “A finding is clearly erroneous when it is induced by an erroneous view of the



law, there is no evidence to support the finding, or, on the basis of the entire record, [the] Court is left with a definite and firm conviction a mistake has been made.” *Id.*

## **ARGUMENT**

[¶ 15] “[P]arents have a fundamental natural right to their children, which is of constitutional dimension, but that right is not absolute nor unconditional.” *In re J.C.*, 2007 ND 111, ¶ 12, 736 N.W.2d 451. While the constitutional protections are not absolute, “any doubts should be resolved in favor of the natural parent, and parental rights should be terminated only when necessary for the child’s welfare or in the interest of public safety.” *In re W.E.*, 2000 ND 208, ¶ 30, 619 N.W.2d 494 (quotation omitted) (alterations omitted). An alternative that is in the best interest of the children is preferred over the termination of parental rights. *Id.*

### **I. The juvenile court erred in finding R.M. abandoned C.G.**

[¶ 16] A Court may terminate the parental rights of a parent with respect to a parent’s child if the parent has abandoned the child. N.D.C.C. § 27-20-44(1)(a). In the case of a noncustodial parent, “abandon” means “failure of the noncustodial parent significantly without justifiable cause . . . [t]o communicate with the child; or . . . [t]o provide for the care and support of the child as required by law.” N.D.C.C. § 27-20-02(1)(a)(1)-(2). BBHSZ’s Petition sought to terminate R.M.’s parental rights due to alleged abandonment of C.G. based on both failure to communicate with C.G., and failure to provide care and support for C.G. as required by law. (App. at 7.) “The party seeking termination must prove the required

elements by clear and convincing evidence.” *A.W.*, 2012 ND 153, ¶ 10, 820 N.W.2d 128.

**A. There is not clear and convincing evidence that R.M. abandoned C.G. by failing to significantly without justifiable cause communicate with C.G. under N.D.C.C. § 27-20-02(1)(a)(1).**

[¶ 17] The juvenile court found R.M. abandoned C.G. by failing to significantly without justifiable cause communicate with him. (App. at 39, 56-57.)

In deciding whether a child has been abandoned, a Court should consider:

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.W.*, 2012 ND 153, ¶ 11, 820 N.W.2d 128. “It must be shown the parent possessed ‘intent to abandon the child, which may be inferred from a parent’s conduct.’” *B.L.L. v. W.D.C.*, 2008 ND 107, ¶ 6, 750 N.W.2d 466 (quoting *In re R.M.B.*, 402 N.W.2d 912, 915 (N.D. 1987)) (alterations omitted).

[¶ 18] At trial, R.M. testified that he loves C.G. and that he had no intent to abandon him. (Tr., 154.) He testified that he would love to have contact with C.G. and wants a relationship with C.G. (*Id.* at 154.) R.M. had contact with C.G. when he was an infant, and last saw him before he moved to Montana in July 2017. (*See id.* at 160-162.) He indicated that he and B.G. previously did not get along. (*Id.* at 161-162.) R.M. admitted he has had no contact with C.G. since the time of removal on August 2, 2018. (*Id.* at 160.)

[¶ 19] Stephanie Morse, a social worker at BBHSZ and case manager for C.G., testified that C.G. was not living with R.M. at the time of removal on August 2, 2018. (*Id.* at 61.) She stated R.M. initiated contact with BBHSZ in December 2018 (not April 2019, as the Court would later find). (*Id.* at 72-73.) Ms. Morse confirmed that since C.G. was placed in foster care, R.M. could not simply visit, call, or contact C.G., as contact needed to be arranged through BBHSZ. (*Id.* at 91.)

[¶ 20] R.M. testified that he contacted BBHSZ about arranging telephone calls with C.G., but that nothing was ever set up. (*Id.* at 154.) Ms. Morse confirmed that R.M. told her in April 2019 that he would like to speak with C.G. over the phone. (*Id.* at 89.) Ms. Morse further testified that she “wanted to speak with [C.G.’s] therapist to see if that would be possible for C.G. to have a conversation with his dad.” (*Id.* at 90.) She testified that it was brought up to C.G.’s therapist on an unknown date, but that nothing came of it. (*Id.*) Ultimately, no telephone calls were arranged by BBHSZ between R.M. and C.G. (*Id.* at 89-90.) Prior to trial, R.M. last reached out to Ms. Morse in January 2021 about having contact with C.G. (*Id.* at 160.)

[¶ 21] Ms. Morse testified that she only contacted R.M. by phone six total times between August 2, 2018 and December 20, 2020. (*Id.* at 80.) She also stated that written correspondence sent to R.M. from BBHSZ was getting returned in the mail since the time of C.G.’s removal on August 2, 2018. (*Id.*) It was not until the summer of 2020 that Ms. Morse realized she needed to list an additional name for mail to be delivered to R.M. (*Id.* at 81.)

[¶ 22] The juvenile court found that there were communication issues between BBHSZ and R.M., and that this may have interfered with R.M.'s ability to communicate with C.G. (*Id.* at 39.) But the juvenile court found that despite R.M. knowing C.G. was in foster care, he did not return to North Dakota or make any meaningful effort to communicate with C.G. (*Id.*) These two findings do not align with one another. In order for R.M. to have contact with C.G. while he was in BBHSZ's custody, R.M. needed to go through BBHSZ. R.M.'s meaningful efforts at communication with C.G. were impeded by the ongoing communication issues with BBHSZ. He made what efforts he could given the circumstances. Further, R.M. could not simply just drive to North Dakota and pick up his son from foster care legally.

[¶ 23] R.M.'s inability to contact C.G. directly since his placement in foster care and the communication issues with BBHSZ amounts to justifiable case as to why R.M. failed to communicate with C.G. The evidence presented during the trial does not support a finding, by clear and convincing evidence, that R.M. abandoned C.G. under N.D.C.C. § 27-20-02(1)(a)(1).

**B. There is not clear and convincing evidence that R.M. abandoned C.G. by failing to significantly without justifiable cause provide for the care and support of C.G. as required by law under N.D.C.C. § 27-20-02(1)(a)(2).**

[¶ 24] The juvenile court's written order found R.M. abandoned C.G. by failing to significantly without justifiable provide for the care and support of C.G. as required by law. (App. at 56-57.) The juvenile court's oral findings indicated

that R.M. has been paying child support, and that he has provided care and support to C.G. (*Id.* at 36, 39.) At trial, R.M. testified that he is currently employed as a cook at the Raceway Cafe. (Tr. at 147.) Prior to that, R.M. worked at Cattleman’s. (*Id.* at 148.) R.M. testified that he is paying approximately \$130 in child support every pay period, which is every two weeks. (*Id.* at 149.) He stated that he has been paying child support dating back to when he lived in Valley City, which was before he moved to Montana in July 2017. (*Id.* at 146, 149.) Sheri Rosenau, the Guardian ad Litem for C.G., testified that R.M. was paying \$131.82 per paycheck for child support for C.G. (*Id.* at 131.)

[¶ 25] The evidence presented during the trial does not support a finding, by clear and convincing evidence, that R.M. abandoned C.G. under N.D.C.C. § 27-20-02(1)(a)(2).

**II. The juvenile court erred in finding C.G. is deprived and that the conditions and causes of the deprivation are likely to continue or will not be remedied.**

[¶ 26] A Court may terminate the parental rights of a parent with respect to a parent’s child if the child is deprived and the deprivation is “likely to continue or will not be remedied and that by reason thereof the child is suffering or will probably suffer serious physical, mental, moral, or emotional harm.” N.D.C.C. § 27-20-44(1)(c)(1). A Court may also terminate the parental rights of a parent with respect to a parent’s child if the child is deprived and the child has been in foster care for at least 450 of the previous 660 nights. N.D.C.C. § 27-20-44(1)(c)(2). While R.M. does not dispute that C.G. had been in foster care for at least 450 of the past 660

days, termination under this provision is discretionary, *not* mandatory. *Id.*; *In re F.F.*, 2006 ND 47, ¶ 16, 711 N.W.2d 144.

[¶ 27] While the Petition alleged that C.G. was deprived and in foster care for a period of at least 450 of the previous 660 nights pursuant to N.D.C.C. § 27-20-44(1)(c)(2), the Petition did not allege that the deprivation was likely to continue or would not be remedied under N.D.C.C. § 27-20-44(1)(c)(1). (*See* App. 6-7.) Further, from review of the State’s Argument for Termination of Parental Rights, the State ultimately did not ask to terminate R.M.’s parental rights to C.G. on either of these bases (but instead on the grounds of abandonment). (*See* Index # 40.)

[¶ 28] As such, the juvenile court erred in making findings on deprivation under N.D.C.C. § 27-20-44(1)(c)(1) and (2), and by subsequently relying on these findings to terminate R.M.’s parental rights.

**III. The juvenile court erred in finding that reasonable efforts under N.D.C.C. § 27-20-32.2 were made to reunify C.G. and R.M.**

[¶ 29] Prior to seeking termination of R.M.’s parental rights to C.G., BBHSZ failed to make reasonable efforts to reunify C.G. and R.M. as required under N.D.C.C. § 27-20-32.2. “[R]easonable efforts must be made to preserve families, reunify families, and maintain family connections . . . [t]o make it possible for a child to return safely to the child’s home.” N.D.C.C. § 27-20-32.2(2).

“Reasonable efforts” means:

the exercise of due diligence, by the agency granted authority over the child under this chapter, to use appropriate and available services to meet the needs of the child and the child’s family in order to prevent removal of the child from the child’s family or, after removal, to use

appropriate and available services to eliminate the need for removal, to reunite the child and the child's family, and to maintain family connections.

N.D.C.C. § 27-20-32.2(1). C.G. was removed from B.G.'s care and placed into foster care on August 2, 2018. (App. at 55.) Following removal, BBHSZ failed to make reasonable efforts to reunify C.G. and R.M., or at least to make R.M. a candidate for placement.

[¶ 30] Ms. Morse testified about the services offered by BBHSZ to reunify C.G. with his parents. (Tr. at 36-40.) She admitted that the majority of the services offered by BBHSZ were offered to B.G. to reunify her with C.G. (*Id.* at 92.) When specifically asked about what reasonable efforts were made to reunify C.G. and R.M., she testified that the Interstate Compact for the Placement of Children (ICPC) was started twice: once in December 2018 and once in the summer of 2020. (*See id.* at 62, 72-73, 92.) Per Ms. Morse's testimony, while the ICPC process was started in North Dakota, the bulk of the process was handled by a local social services agency in Montana. (*See id.* at 64-65, 84, 92.) The first ICPC was not completed, and the second ICPC was denied in December 2020. (*Id.* at 64.) As noted by Ms. Morse, there is no limit as to the number of times the ICPC process can be initiated. (*Id.* at 87-88.)

[¶ 31] Ms. Morse also testified that BBHSZ wanted R.M. to complete a chemical dependency evaluation, parental evaluation, and mental health evaluation. (*Id.* at 63, 66, 74.) For all three evaluations, Mr. Morse testified that BBHSZ did not: (1) provide R.M. with a list of locations where he could get the evaluations

completed, (2) help R.M. arrange an appointment for the evaluations, or (3) offer to pay for any of the evaluations. (*Id.* at 82-83, 85-86.) When asked what was done to assist R.M. in completing these evaluations, Ms. Morse testified that she referred R.M. to the local human service center in Montana. (*Id.*) Ms. Morse testified that it was her intent to let the social services agency in Montana help R.M. with the evaluations. (*See id.* at 82, 85-86.)

[¶ 32] The only services offered by BBHSZ to specifically reunite C.G. and R.M. was to start the ICPC process twice, resulting in a referral to a social services agency in Montana. (*Id.* at 84.) This in no way amounts to reasonable efforts to reunify C.G. and R.M., especially when compared to the number of services offered to B.G. by BBHSZ. R.M.'s parental rights to C.G. cannot be terminated when BBHSZ first failed to make reasonable efforts to reunify him and C.G.

[¶ 33] The evidence presented during the trial does not support a finding, by clear and convincing evidence, that reasonable efforts were made to reunify C.G. and R.M.

### **CONCLUSION**

[¶ 34] Based on the foregoing, the Court should reverse the April 6, 2021 Juvenile Findings of Fact and Order for Termination of Parental Rights as it relates to R.M. and his child, C.G.



Dated this 6<sup>th</sup> day of May, 2021.

*/s/ Leah R. Carlson*

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**CERTIFICATE OF COMPLIANCE**

[¶ 35] Pursuant to N.D.R.App.P. 32(e), the undersigned hereby certifies that the above brief contains 17 pages, which complies with the page limitation under N.D.R.App.P. 32(a)(8)(A).

Dated this 6<sup>th</sup> date of May, 2021.

*/s/ Leah R. Carlson*

Leah R. Carlson

ND ID No. 07893

**CERTIFICATE OF SERVICE**

[¶ 36] I hereby certify that on May 6, 2021, I caused to be electronically filed the Brief of Appellant, R.M., with the Clerk of the North Dakota Supreme Court via the North Dakota Supreme Court E-Filing Portal and served the same on Tonya Duffy and Katie Nechiporenko, attorneys for the State of North Dakota; Ashley Schell, attorney for B.G.; Sheri Rosenau, Guardian ad Litem; and Christopher D. Jones, Executive Director of the North Dakota Department of Human Services, via the North Dakota Supreme Court E-Filing Portal as follows:

Email to Tonya Duffy and Katie Nechiporenko at:	states_attorney@barnescounty.us
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Email to Christopher D. Jones at:	chrisdjones@nd.gov

Dated this 6<sup>th</sup> day of May, 2021.

*/s/ Leah R. Carlson*

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