

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: _____

3 Filing Date: **October 11, 2017**

4 **No. A-1-CA-35903**

5 **STATE OF NEW MEXICO ex rel.**
6 **CHILDREN, YOUTH AND FAMILIES**
7 **DEPARTMENT,**

8 Petitioner-Appellee,

9 v.

10 **MICHAEL H.,**

11 Respondent-Appellant,

12 and

13 **IN THE MATTER OF JAYDA'MAE S.,**

14 Child.

15 **APPEAL FROM THE DISTRICT COURT OF GUADALUPE COUNTY**

16 **Matthew J. Sandoval, District Judge**

17 Children, Youth & Families Department
18 Charles E. Neelley, Chief Children's Court Attorney
19 Rebecca J. Liggett, Children's Court Attorney
20 Santa Fe, NM

21 for Appellee

1 Law Offices of Nancy L. Simmons, P.C.

2 Nancy L. Simmons

3 Albuquerque, NM

4 for Appellant

5 Arthur L. Bustos

6 Las Vegas, NM

7 Guardian Ad Litem

1 **OPINION**

2 **BOHNHOFF, Judge.**

3 {1} The district court ruled that Appellant Michael H. (Father) had neglected his
4 child (Child) by abandoning her. Father argues that his lack of knowledge that
5 Child’s mother, Gina S. (Mother), who had custody of the infant, would neglect her
6 and also his lack of certain knowledge through DNA testing that he in fact was the
7 father of Child negate any conclusion of abandonment under NMSA 1978, Section
8 32A-4-2(A)(2) (2009, as amended 2016 and 2017), and thus neglect under Section
9 32A-4-2(F)(1) (current version at Section 32A-4-2(G)(1)). We reject Father’s
10 arguments, and therefore affirm.

11 **BACKGROUND**

12 {2} Child was born in March 2015. The New Mexico Children, Youth and Families
13 Department (CYFD) took Child into custody on April 11, 2016. CYFD then filed an
14 abuse/neglect petition on April 13, 2016 naming Mother and Father as respondents,
15 and Carlos G. (Husband) as an interested party. Based on information provided by
16 Mother, CYFD alleged that Father is the biological father of Child and that Mother
17 had not been in a relationship or had contact with Father since she was one month
18 pregnant with Child. The petition alleged that Father abused Child as defined in
19 Section 32A-4-2(B)(1) (one “who has suffered or who is at risk of suffering serious

1 harm because of the action or inaction of the child’s parent, guardian or custodian”) and Section 32A-4-2(B)(4) (one “whose parent, guardian or custodian has knowingly, 2 intentionally or negligently placed the child in a situation that may endanger the 3 child’s life or health”). The petition also alleged that Father neglected Child as 4 defined in Section 32A-4-2(F)(1) (one “who has been abandoned by the child’s 5 parent, guardian or custodian”) and Section 32A-4-2(F)(2) (one “who is without 6 proper parental care and control or subsistence, education, medical or other care or 7 control necessary for the child’s well-being because of the faults or habits of the 8 child’s parent, guardian or custodian or the failure or refusal of the parent, guardian 9 or custodian, when able to do so, to provide them”).

11 {3} The district court entered a stipulated order for DNA testing on May 18, 2016. 12 On June 2, 2016, Mother entered a no contest plea to the allegation that she neglected 13 Child under Section 32A-4-2(F)(2). The district court then conducted Father’s 14 adjudication hearing on July 7, 2016, during which the following witnesses testified: 15 Mother; Amber Martinez, the CYFD permanency planning worker for Child; and 16 Father.

17 **I. Mother’s Testimony**

18 {4} Mother testified that she had just ended a relationship with another man when 19 she began a sexual relationship with Father. Mother testified that she did not live with

1 Father and that she did not have any relationship with him other than a sexual one.
2 When Mother discovered she was pregnant, she immediately identified Father as the
3 father of Child. Mother told Father she was pregnant with Child, and said that
4 “[Father] believed me, like right away, he was all there for it, saying that, yeah, he
5 was gonna take responsibility.”

6 {5} When Mother was three months pregnant, she told Father’s live-in girlfriend
7 that she was pregnant with Father’s child. When Father learned that Mother had told
8 his girlfriend that she was pregnant with Father’s baby, Father told Mother that if she
9 retracted the statement and told his girlfriend that her baby was not Father’s, then
10 Father would “take care of [her] and the baby.” Mother acceded to Father’s request
11 and told the girlfriend that someone else was the father, but Mother did not tell
12 anyone else that he was not Child’s father. Shortly thereafter, Mother reaffirmed to
13 Father’s girlfriend that Father was the father of Child. Mother also received messages
14 from Father’s girlfriend acknowledging that Mother was pregnant with Father’s child.
15 Mother testified that, after she reaffirmed to Father’s girlfriend that Father was the
16 father of her baby, Father “dropped off the face of the earth.”

17 {6} Father did not provide any support to Mother during her pregnancy. Child was
18 born in Las Vegas, New Mexico; Father was not present at the birth. After Child was
19 born, Mother was told that in order to receive welfare benefits, she had to file a

1 petition for child support from Father. Mother filed the child support petition, but
2 “dropped it” after she married Husband, as she believed Husband “was a better father
3 than [Father].” Mother testified that her only contact with Father since she was three
4 months pregnant had been during a meeting with CYFD after Child was removed
5 from her custody. Father never supported Mother or Child following Child’s birth,
6 and Father did not visit Mother to meet Child after Child’s birth. The first time Father
7 met Child was when Ms. Martinez brought Child to his home. Other than that one
8 visit, for the first fifteen months of Child’s life, Father had no contact with Child.

9 **II. CYFD Permanency Planning Worker’s Testimony**

10 {7} Ms. Martinez testified that she emailed Father on April 28, 2016, regarding
11 Child, and Father called her that day. During that phone call, Father said that he had
12 had sex with Mother one time. Father also told Ms. Martinez that he had a vasectomy
13 two years earlier and so could not be Child’s father. The next day, Father called her
14 and stated that after investigating and looking at a timeline, Father did not have a
15 vasectomy two years ago and that Child looked just like his son who was born three
16 months before Child. Ms. Martinez also testified that she had seen Facebook
17 messages in which Mother reported to Father that Child was Father’s baby.
18 According to Ms. Martinez, Mother notified Father that Child was his and that after
19 Mother married, Mother told Father that “she didn’t . . . need anything from him

1 because her husband was there to step up and be a father to [Child].”

2 {8} Ms. Martinez testified that she and her supervisor brought Child to Father’s
3 home so Father could meet Child. During a family-centered meeting facilitated by
4 CYFD, Father stated that the only reason “he stepped up was because [Child] was in
5 foster care and he didn’t want [Child] in foster care.” Ms. Martinez testified that
6 Father had not established a relationship or a bond with Child since he had only met
7 Child once before the hearing. Ms. Martinez was also concerned because Father had
8 never provided any financial support to Child.

9 {9} Ms. Martinez testified that the week before Father’s adjudication hearing,
10 Father called her and left a voicemail indicating that he wanted to relinquish his
11 parental rights to Child. Father explained his decision by stating that he did not want
12 to do any parenting classes required by CYFD because he did not feel that he had
13 done anything wrong with respect to Child.

14 **III. Father’s Testimony**

15 **A. Father’s Testimony Regarding When He Had Notice of Mother’s**
16 **Pregnancy With Child**

17 {10} Father testified that he first found out about Child and that he was Child’s
18 father when Ms. Martinez emailed him in April 2016, although he did not remember
19 the date. Father, however, also admitted he had notice that Mother was pregnant with
20 his child much earlier than April 2016, when Mother was communicating with both

1 him and his girlfriend on Facebook about Mother’s pregnancy with Child, but that
2 Mother told him Child was not his. Father continued, “She kept . . . trying to argue
3 with us on Facebook, that *she just wanted me to take care of my responsibilities*, and
4 I said that you told me that it wasn’t my responsibility because it’s not my kid.”
5 According to Father, because Mother was trying to argue with him on Facebook, he
6 blocked her, and therefore did not find out about Child until CYFD took Child into
7 its custody. Mother never asked him for anything related to Child, which made him
8 believe that Child was not his, because “if it was my daughter, [Mother] would have
9 pursued [me] as being the dad, not telling me and arguing with my [girlfriend] that
10 it was someone else’s, we don’t need your money no way.”

11 {11} Father insisted he had “no idea” Mother was pregnant with his child until
12 CYFD contacted him because he believed someone else could have been the father
13 and because Mother became pregnant “so soon.” On cross-examination by Mother’s
14 attorney, when asked whether Mother did give him notice that she was pregnant with
15 his child, Father answered, despite his previous denial, “And when I asked her for a
16 DNA test, she did never get back a hold of me, and she kept writing other
17 letters—that I don’t need your help, I don’t need your money, I don’t need this, I
18 don’t need that—and we just blocked her from all the pages, and this is the first time
19 I’m hearing about it now.”

1 **B. Father's Other Testimony**

2 {12} Father testified that he has eight children including Child, ranging in age from
3 25 years to Child's age, which was 16 months at the time of the hearing. Father did
4 not have any previous record with CYFD. When Father's counsel asked him if he
5 wanted to provide for his daughter financially, emotionally, and in every way
6 possible, Father responded yes.

7 {13} Father admitted that he saw a photograph of his daughter for the first time after
8 he found out where she was (implying foster care), looked on Facebook, found a
9 photograph of Child and said, "Wow, kinda looks like [my son]." Father continued,
10 "[My girlfriend] is the one that said, hey, that's your baby, if it's yours, we're gonna
11 have the DNA test, if it's your kid, we don't want her in foster care. Because [Ms.
12 Martinez] told me the first couple—the family she stayed with, didn't want her for
13 long term. That's what made me push for my kid. I never said, oh, the only reason I
14 want her is because she's in foster care. I wanted her because she's my daughter and
15 I'm a stay at home dad with her brother that's three months older than her." Father
16 also testified that he will "always provide for my kids whether their mothers need me
17 or not."

18 {14} Father testified that he felt he was being "bullied" and treated unfairly by
19 CYFD because although he was not in Child's life, that was not his fault, and he

1 could not do everything CYFD was asking him to do with the short notice that CYFD
2 was providing him for some tasks.

3 **IV. District Court’s Decision**

4 {15} At the conclusion of the July 7, 2016 hearing, the district court orally ruled that
5 Father had abandoned Child. The district court also found that Father knew about
6 Child at the beginning of Mother’s pregnancy and, significantly, that Mother was
7 more credible than Father. The district court was troubled by Father’s expressed
8 desire to relinquish his rights to Child the week before the adjudicatory hearing,
9 stating that it did “not sit well with the [c]ourt.” Finally, the district court stated,
10 “fifteen months have gone by, and here we are. And you didn’t step forward, [Father],
11 until you were finally tested, and there you are.”

12 {16} The district court entered Father’s adjudicatory judgment on July 20, 2016,
13 which stated in relevant part:

14 3. CYFD has proven by clear and convincing evidence that as
15 to [Father], [Child] is a neglected child as follows:

16 a. [Child] has been abandoned by her [Father],
17 pursuant to Section 32A-4-2(F)(1).

18 4. The [district court made] the following findings and
19 conclusions:

20 a. [Father] had knowledge that [Mother] was pregnant
21 and that [Mother] indicated he was the father of
22 [C]hild;

- 1 b. [Father] did not provide any financial or other
2 support to [Mother] throughout her pregnancy.
- 3 c. [Mother] filed a paternity action for child support
4 listing [Father] as the Respondent in 2015.
- 5 d. [Father] has not provided any financial support and
6 did not have contact with [C]hild for a period of
7 over three months.
- 8 e. [Father] left [Child] in the care of [Mother] where
9 [Child] was neglected.
- 10 f. There was no justifiable cause for [Father] leaving
11 [Child] in the care of others without provision for
12 support and without communication for over three
13 months.

14 **DISCUSSION**

15 **I. Statutory Framework**

16 {17} The Children’s Code, NMSA 1978, §§ 32A-1-1 to -25-5 (1993, as amended
17 through 2017), contains the Abuse and Neglect Act (the Act), NMSA 1978, §§ 32A-
18 4-1 to -35 (1993, as amended through 2017). The purpose of the Children’s Code is:

19 first to provide for the care, protection and wholesome mental and
20 physical development of children[,] . . . then to preserve the unity of the
21 family whenever possible. A child’s health and safety shall be the
22 paramount concern. . . . It is the intent of the [L]egislature that, to the
23 maximum extent possible, children in New Mexico shall be reared as
24 members of a family unit[.]

25 Section 32A-1-3(A).

26 {18} The Act defines child abuse, child neglect, and provides the process for the

1 adjudication of both.¹ Section 32A-4-2(A)(2)(a) defines “abandonment” as follows:

2 abandonment includes instances when the parent, *without justifiable*
3 *cause: . . . (2) left the child with others, including the other parent or an*
4 *agency, without provision for support and without communication for*
5 *a period of: (a) three months if the child was under six years of age at*
6 *the commencement of the three-month period[.]*

7 (Emphasis added.) (Internal quotation marks omitted.) Section 32A-4-2(F)(1) in turn
8 defines a “neglected child” as a child “who has been abandoned by the child’s parent,
9 guardian or custodian[.]”

10 {19} Under the Act, a district court holds an adjudication hearing to determine
11 whether a parent abused and/or neglected his or her child. Section 32A-4-20.
12 According to Section 32A-4-20(H), “If the court finds on the basis of . . . clear and
13 convincing evidence, competent, material and relevant in nature, that the child is
14 neglected or abused, the court shall enter an order finding that the child is neglected
15 or abused and may proceed immediately or at a postponed hearing to make
16 disposition of the case.” Section 32A-4-20(I) provides for immediate appeal to this

17 ¹The 2009 version of the definitions section of the Act, was in effect at the time
18 the petition was filed as opposed to the 2016 version, which was in effect at the time
19 of the adjudication. The definition of “abandonment” is unchanged, and in both the
20 2009 and the 2016 versions, it is found at Section 32A-4-2(A). The definition of
21 “neglect” is also unchanged, but has been renumbered from Section 32A-4-2(E)(1)
22 in the 2009 version to Section 32A-4-2(F)(1) in the 2016 version. (In its 2017 session
23 our Legislature amended Section 32A-4-2 again (effective June 16, 2017), so that the
24 definition of neglect is now found at Section 32A-4-2(G).) The district court’s
25 adjudicatory judgment cites to the 2016 version, and the parties do so on appeal. We
26 cite to the 2016 version as well.

1 Court of an adjudication determination.²

2 **II. The District Court’s Findings Were Supported by Clear and Convincing**
3 **Evidence and Those Findings Supported the District Court’s**
4 **Determination That Father Had Abandoned and Thus Neglected Child**

5 {20} Father states that he “challenges Findings of Fact Nos. 4(e) and 4(f) for lack
6 of substantial evidence. As a matter of law, Father [also] challenges whether these
7 findings, even if supported by substantial evidence, support the ultimate finding of
8 neglect.” As we understand Father’s legal argument, he is contending that his lack of
9 knowledge that Mother would neglect Child while Child was in Mother’s care and
10 also lack of certain knowledge based on DNA testing that he was the father of Child
11 amount to justifiable cause that negates any conclusion of abandonment under
12 Section 32A-4-2(A)(2) and thus neglect under Section 32A-4-2(F)(1).

13 ²Father acknowledges, and CYFD agrees, that Father’s notice of appeal from
14 the adjudication judgment was untimely. The district court entered the written
15 adjudicatory judgment finding that Father neglected Child on July 20, 2016. Father
16 filed his notice of appeal appealing the adjudication judgment on September 12, 2016,
17 which was more than thirty days after the order was filed. *See* Rule 12-201(A)(1)(b)
18 NMRA. “We review de novo the question of whether this Court should accept
19 jurisdiction where the notice of appeal from an adjudication of abuse and neglect is
20 filed late.” *State ex rel. Children, Youth & Families Dep’t v. Amanda M.*,
21 2006-NMCA-133, ¶ 18, 140 N.M. 578, 144 P.3d 137. A timely notice of appeal “is
22 a mandatory precondition to the exercise of appellate jurisdiction.” *State ex rel.*
23 *Children, Youth & Families Dep’t v. Lance K.*, 2009-NMCA-054, ¶ 51, 146 N.M.
24 286, 209 P.3d 778. However, “it is well settled that failure to timely file a notice of
25 appeal from either an adjudication of abuse or neglect or an order terminating parental
26 rights constitutes ineffective assistance of counsel per se, such that the merits of an
27 appeal will be considered notwithstanding the procedural deficiency.” *Id.* Although
28 Father’s notice of appeal was untimely, we proceed to the merits.

1 {21} “To meet the standard of proof in an abuse or neglect proceeding, the fact
2 finder must be presented with clear and convincing evidence that the child was
3 abused or neglected.” *State ex rel. Children, Youth & Families Dep’t v. Shawna C.*,
4 2005-NMCA-066, ¶ 7, 137 N.M. 687, 114 P.3d 367. “For evidence to be clear and
5 convincing, it must instantly tilt the scales in the affirmative when weighed against
6 the evidence in opposition and the fact finder’s mind is left with an abiding
7 conviction that the evidence is true.” *Id.* (internal quotation marks and citation
8 omitted). “Our standard of review is a narrow one and we may not re-weigh the
9 evidence. Our standard of review is therefore whether, viewing the evidence in the
10 light most favorable to the prevailing party, the fact finder could properly determine
11 that the clear and convincing evidence standard was met.” *Id.* (internal quotation
12 marks and citations omitted). Further, “our review is limited to a determination of
13 whether the district court could have found that the parents abused or neglected [the
14 c]hild based upon the evidence before it. We therefore disregard any of the evidence
15 contained in the record that arose after the adjudication of abuse and neglect.” *Id.*

16 {22} Father’s challenge to the district court’s determination that he had neglected
17 Child by abandonment without justifiable cause requires interpretation of the
18 statutory definition of abandonment. This Court “reviews issues of statutory
19 interpretation de novo.” *In re Grace H.*, 2014-NMSC-034, ¶ 34, 335 P.3d 746.

1 **A. Substantial Evidence Supports the District Court’s Findings That Father**
2 **(1) Left Child in the Care of Mother (2) Without Provision for Support or**
3 **Communication, and (3) That Child Was Neglected While in Mother’s**
4 **Care; Substantial Evidence Also Supports the District Court’s Finding**
5 **That Father Was on Notice That He Was the Father of Child**

6 {23} Finding 4(e) states: “[Father] left Child in the care of [Mother] where Child
7 was neglected.” The three witnesses testified during the adjudication hearing that
8 Father had no contact with Mother after the time she was three months pregnant until
9 the CYFD-facilitated meeting that occurred before the hearing. Mother testified and
10 Father admitted that Father did not support her during her pregnancy. Father further
11 admitted that the first and only time he met his daughter was when she was fifteen
12 months old, about a month before the adjudication hearing, during a visit that was
13 also facilitated by CYFD. Thus, the district court’s finding that Father left Child in
14 Mother’s care was supported by clear and convincing evidence.

15 {24} Further, as stated above, early in this proceeding Mother entered a no contest
16 plea to CYFD’s allegation that she had neglected Child. Father does not address the
17 evidence regarding and otherwise does not challenge the underlying finding that
18 Child was neglected while in the care of Mother. “[W]e review substantial evidence
19 claims only if the appellant apprises the Court of all evidence bearing on the issue[.]”
20 *Chavez v. S.E.D. Laboratories*, 2000-NMCA-034, ¶ 26, 128 N.M. 768, 999 P.2d 412,
21 *aff’d in part, rev’d in part*, 2000-NMSC-034, 129 N.M. 794, 134 P.3d 532. Therefore,

1 Father's substantial evidence challenge to Finding 4(e) is rejected.

2 {25} Finding 4(f) states: "There was no justifiable cause for [Father] leaving [Child]
3 in the care of others without provision for support and communication for over three
4 months. As stated, there also was clear and convincing evidence that, following
5 Child's birth, Father did not support Child or communicate with Child for over three
6 months. The evidence showed that Father did nothing to contact Mother, to provide
7 support to Child, or even to meet Child or inquire as to her well-being. In short,
8 Father did nothing to support or foster any kind of relationship with Child for the first
9 fifteen months of her life, i.e., absent a showing of justifiable cause he abandoned
10 Child as that term is defined in Section 32A-4-2(A)(2). Father testified at the hearing
11 that he would "always provide for my kids whether their mothers need me or not."
12 His actions indicate otherwise. Father did nothing with respect to Child until Ms.
13 Martinez contacted him. Although Mother never reached out to Father again
14 following Child's birth to specifically ask him for support or to introduce Child to
15 him, Father's obligations owed to Child were not contingent upon such action.³

16 {26} Substantial evidence therefore supports the basic factual determinations that

17 ³Father's actions can be compared with the father's actions in *Benjamin O.*,
18 2009-NMCA-039, ¶¶ 18-23. In that case, the father did not communicate with his
19 child for five months, and this Court affirmed the district court's finding that he had
20 neglected and abandoned his child. *Id.* ¶ 41-42. Here, Father did not communicate
21 with his child for fifteen months.

1 underlie the district court's Findings 4(e) and 4(f). Father's main challenge in fact is
2 legal: that as a matter of law he cannot be adjudicated to have neglected Child unless
3 he knew that Mother herself had neglected Child and also that, on the basis of DNA
4 testing, he was the father of Child. We address those arguments in the following
5 sections.

6 {27} However, because it is material to our analysis, we also note that substantial
7 evidence established that Father was on notice that he was the father of Child. Father
8 and Mother engaged in sexual intercourse. Mother testified that she told Father about
9 her pregnancy by him as soon as she knew about it, and that Father told her he would
10 take responsibility for Child. Mother also testified that Father later told her he would
11 support her during her pregnancy if she would tell Father's girlfriend that Child was
12 not his. Indeed, Father does not challenge the district court's Finding 4(a) that he
13 knew Mother was pregnant and that Mother had identified him as the father of Child.
14 Thus, Father was on notice for several months before Child's birth that he was the father
15 of Child. Further, the fact that Father initially told Mother he would take responsibility
16 for Child amounts to an admission of paternity. The district court specifically stated that
17 it credited Mother's testimony that Father knew he had a child when she was three-
18 months pregnant. As stated above, we do not reweigh this evidence.

1 **B. Father’s Knowledge That Child Would Be Neglected While in Mother’s**
2 **Care**

3 {28} Father’s first challenge to Findings 4(e) and 4(f) focuses not so much on the
4 fact of Mother’s neglect of Child while in her care as on the implication that he bears
5 responsibility for that neglect. That is, he argues that for him to be found to have
6 abandoned and thus neglected Child while Child was in the custody of Mother, as a
7 matter of law he “would have to know that Child would be neglected in his absence.”
8 He contends that the district court’s adjudication was flawed because it “made no
9 findings with regard to any knowledge by Father that Mother would neglect Child or
10 that Child was otherwise in need of his protection.” Using the rubric of Section 32A-
11 4-2(A), we understand his position to be that the absence of such knowledge amounts
12 to “justifiable cause” that negates a determination of abandonment. We are not
13 persuaded. Father identifies no case law that supports such a construction of
14 “justifiable cause,” and considerable authority supports the conclusion that, on the
15 contrary, Section 32A-4-2(A)(2) imposes an affirmative obligation on a parent to act
16 to ensure that the child is receiving necessary care and support. Mere ignorance is not
17 justifiable cause for the failure to provide support for, and communicate with, the
18 child that is the statutory predicate for a determination of abandonment and thus
19 neglect.

20 {29} Under the Children’s Code, “[a] child’s health and safety shall be the

1 paramount concern.” Section 32A-1-3(A). Further, without justifiable cause, Section
2 32A-4-2(A)(2) mandates a finding of abandonment if the parent “[leaves] the child
3 with others, including the other parent or an agency, *without provision for support*
4 *and without communication*” for a specified period of time. (Emphasis added.) We
5 understand this language ordinarily to require a parent, if he or she does not have
6 custody of the child, to take necessary steps to communicate with the child and
7 otherwise verify that the child is being cared for and supported while in the custody
8 of the other person. Father could not simply assume that Mother was properly caring
9 for Child.

10 {30} New Mexico case law buttresses the proposition that a non-custodial parent has
11 a duty to ensure that his or her child is being adequately supported and cared for. In
12 *State ex rel. Children, Youth and Families Department v. Cosme V.*,
13 2009-NMCA-094, ¶¶ 21, 27, 146 N.M. 809, 215 P.3d 747, this Court concluded that
14 the district court reasonably could have concluded that the non-custodial parent
15 neglected his children when he failed to “take any significant role, much less an
16 active one, in regularly *assuring* that the [c]hildren’s well-being and proper needs
17 were met. [The f]ather did very little to fulfill his parental obligations.” (Emphasis
18 added.) (Internal quotation marks and citation omitted.) *See also State ex rel.*
19 *Children, Youth & Families Dep’t v. Alfonso M.-E.*, 2016-NMCA-021, ¶ 31, 366 P.3d

1 282 (“However, despite [the f]ather’s incarceration at the time of the district court’s
2 adjudication, he nevertheless had a continuing legal obligation to provide proper care
3 for [the c]hild.”); *State ex rel. Children, Youth & Families Dep’t v. Benjamin O.*,
4 2009-NMCA-039, ¶¶ 18-23, 146 N.M. 60, 206 P.3d 171 (holding father’s lack of
5 communication with his child for five months constituted abandonment when the
6 child was living with his sister); *cf. In re Guardianship of Ashleigh R.*,
7 2002-NMCA-103, ¶ 22, 132 N.M. 772, 55 P.3d 984 (“A parent’s contact with the
8 children and financial support for the children during their absence will weigh against
9 a finding of abandonment.”).

10 {31} We also reject Father’s argument that we should apply to this case our Supreme
11 Court’s recent construction of NMSA 1978, Section 30-6-1(B) (2009), which defines
12 “criminal child abandonment” in *State v. Stephenson*, 2017-NMSC-002, ¶¶ 13-17,
13 389 P.3d 272. Father contends that we should construe Section 32A-4-2(A)(2)’s
14 definition of abandonment in a manner consistent with our Supreme Court’s holding
15 that criminal abandonment will be found only where doing so “exposes the child to
16 a risk of harm,” and where the abandoning parent is “permanently or temporarily
17 responsible for the custody and control of the child[.]” *Stephenson*, 2017-NMSC-002,
18 ¶ 16. But as CYFD points out, “An abuse and neglect proceeding is not a criminal
19 prosecution.” *State ex rel. Children, Youth & Families Dep’t v. Michael T.*, 2007-

1 NMCA-163, ¶ 11, 143 N.M. 75, 172 P.3d 1287. Further, the paramount concern of
2 the Children’s Code is protecting the health and safety of the child, not punishing
3 conduct that the Legislature has deemed subject to criminal sanction. We therefore
4 do not interpret the definition of abandonment in Section 32A-4-2(A)(2) to
5 incorporate the elements of criminal abandonment under Section 30-6-1(B).

6 {32} Father was on notice and acknowledged that he was the father of Child. There
7 is no evidence that Father took any steps to check on and ensure Child’s well-being
8 while Child was in Mother’s care. Under the facts of this case, Father’s lack of
9 knowledge of Mother’s neglect is not justifiable cause for leaving Child with Mother
10 without provision for support and without communication for a period of three
11 months, i.e., it is no defense to a determination that Father neglected Child by
12 abandoning her.

13 **C. Father’s Knowledge That He Was Child’s Father**

14 {33} Father also argues that “a man’s departure from a child who has not been
15 clearly identified”—in particular, by means of DNA testing—“as his biological child
16 cannot be construed as ‘abandonment’ for purposes of a petition for neglect.” In the
17 context of Section 32A-2-4(A)(2), in challenging Findings 4(e) and 4(f) on this
18 second ground, Father effectively is contending that as a matter of law the absence
19 of DNA testing establishing his paternity constituted “justifiable cause” for not

1 providing for Child’s support and for not communicating with her for the first fifteen
2 months of her life. Because there was no such clear and convincing evidence that he
3 had such certain knowledge that he was the father of Child, he urges, the district
4 court’s adjudication of neglect on the basis of abandonment was error. Whether a
5 father must have confirmation by DNA test after he is on notice that he has fathered
6 a child before he can be adjudicated to have neglected the child by abandonment is
7 a matter of first impression.

8 {34} We conclude that the lack of certainty of paternity is not a defense to an
9 adjudication of neglect by abandonment. That is, such uncertainty will not constitute
10 “justifiable cause” for a man who is otherwise on notice that he may have fathered a
11 child to fail to make provision for support of, and communicate with, the child. Under
12 the facts of this case established by clear and convincing evidence, Father had more
13 than sufficient notice that he was the father of Child to give rise to an affirmative
14 obligation to either provide such support and undertake such communication or,
15 alternatively, take steps to establish he was not the father. If he did neither, Father
16 assumed the risk of an adjudication of neglect.

17 **1. Governing Legal Principles**

18 {35} This case does not involve a father who had absolutely no knowledge of his
19 child. On the contrary, Father had notice Mother was pregnant with Child and had

1 acknowledged that he was the father. Therefore, although it arose in the context of
2 an adoption proceeding, *Helen G. v. Mark J.H.*, 2008-NMSC-002, 143 N.M. 246, 175
3 P.3d 914, assists our analysis. There, our Supreme Court considered whether a father,
4 who knew about the mother’s pregnancy but did not act to assert paternity until after
5 another couple filed a petition to adopt the child, could be an “acknowledged” father
6 whose consent was required before the adoption could be finalized. *Id.* ¶¶ 2-6; *see*
7 NMSA 1978, §§ 32A-5-3(F) (2012), -17(A)(5) (2005). *Helen G.* indicates that when
8 a father is on notice that he has fathered a child, if he wishes to preserve his rights as
9 parent, he must act diligently and take affirmative action to qualify as an
10 acknowledged father beyond requesting an adjudication of paternity. 2008-NMSC-
11 002, ¶ 32 (“We conclude that a mere biological connection is insufficient to qualify
12 as a presumed or acknowledged father—it is only the initial step toward
13 acknowledged father status.” (internal quotation marks omitted)). *Helen G.* rejected
14 the proposition that “the language of the [Adoption] Act evinces a clear intent to be
15 . . . indulgent of fathers who appear to be indifferent to their children.” *Id.* ¶ 20. *Helen*
16 *G.* also distinguished between the father who was on notice of his paternity and the
17 father “who [did] not know or who [had] no reason to know that [he had] fathered a
18 child.” *Id.* ¶ 49. We see that difference as instructive.

19 {36} Father relies on *In re Interest of Dylan Z.*, 697 N.W.2d 707 (Neb. Ct. App.

1 2005). In that case, the Nebraska Court of Appeals determined that there was no clear
2 and convincing evidence that the father intentionally abandoned his child because the
3 father's lack of contact with, and support for, the child "was directly attributable to
4 [the father's] lack of knowledge that he was [the child's] father." *Id.* at 718-19. *See*
5 *also State ex rel. Office for Servs. to Children & Families v. Rangel*, 927 P.2d 1118,
6 1120 (Or. Ct. App. 1996) ("[Oregon's termination for abandonment statute]
7 contemplates that a father know of the existence of his child before he can be held to
8 have abandoned the child. . . . [The] father testified under oath that he did not know
9 that he was the father until he was served with the petition to terminate his parental
10 rights."). The key difference between *In re Dylan Z.* and the instant case is that, here,
11 Father had notice he fathered Child. This notice to Father is crucial to our
12 determination that lack of a DNA test does not constitute justifiable cause for leaving
13 Child in Mother's care without support or communication for over three months.

14 {37} *In re Adoption of D.M.M.*, 955 P.2d 618 (Kan. Ct. App. 1997), is more
15 factually similar to the case at bar than *In re Dylan Z.* There, the Kansas Court of
16 Appeals affirmed the trial court's finding that the father had failed to support his
17 child's mother for six months prior to the child's birth and that the father's consent
18 to adoption was not required because he had abandoned his child after having
19 knowledge of the child's birth. *Id.* at 621. According to the *In re D.M.M.* court, "After

1 the baby was born, [the father] did nothing but visit two times.” *Id.* The trial court
2 found, which the *In re D.M.M.* court approved, “The fact that a man knows only that
3 he was a possible father during the pregnancy does not relieve him from the
4 responsibility to support the mother during the pregnancy.” *Id.* (internal quotation
5 marks omitted). The trial court continued, stating that the father “could not just sit
6 back and see what happens until some unknown point in time in the future and do
7 nothing until someone else forces the issue.” *Id.* (internal quotation marks and
8 citation omitted). The *In re D.M.M.* court also stated:

9 Any man should be aware that he may become the father of a child as a
10 result of having sexual intercourse with a woman, regardless of the
11 number of sexual partners she has. If any of those partners wishes to
12 preserve his parental rights in the event of a later adoption, each one will
13 be required to initiate reasonable efforts toward supporting the mother
14 prior to the child’s birth.

15 *Id.* at 622. This consideration is equally relevant in the context of an adjudication for
16 neglect by abandonment.

17 {38} *In re Interest of Chance J.*, 776 N.W.2d 519 (Neb. 2009), also provides useful
18 analysis. There, the Nebraska Supreme Court affirmed the juvenile court’s finding
19 that the father had abandoned his child. *Id.* at 522. *In re Chance J.* involved a child
20 who was born to a married couple while the mother was a prostitute. *Id.* The couple
21 had separated by the time the child was born, but the father was present for the child’s
22 birth. *Id.* The father testified that, when he saw the infant shortly after his birth, the

1 infant had white skin, blue eyes, and red hair, which was “awkward” because the
2 father was African-American. *Id.* (internal quotation marks and citation omitted). The
3 father testified that the mother stated that the child “must have been a trick’s
4 baby[, and that] once he saw [the child], he did not believe that [the child] was his son
5 and made no further effort to try and determine whether he was [the] father.” *Id.*
6 (internal quotation marks omitted).

7 {39} The Nebraska Supreme Court was unpersuaded that the father’s suspicions that
8 someone else fathered the child justified the father’s abandonment of the child,
9 stating:

10 In fact, “just cause or excuse” for a parent’s failure to maintain a
11 relationship with a minor child has generally been confined to
12 circumstances that are, at least in part, beyond the control of the parent.
13 But there is nothing in the record in this case indicating that [the father]
14 did not have the means or opportunity to confirm his suspicions that [the
15 child] was not his child, at the hospital, or anytime thereafter. . . . Only
16 after the [s]tate filed a petition to terminate his rights, nearly [three]
17 years after [the child] was born, did [the father] attempt to take any
18 responsibility for [the child]. The obligations of parenthood cannot be
19 set aside that easily, based on nothing more than mere physical
20 appearance or unconfirmed suspicions. We will not set the bar so low
21 for responsible parental involvement.

22 *Id.* at 527 (footnote omitted).

23 {40} Here, Child’s physical appearance did not suggest that Father was not Child’s
24 father. The procedural posture of *In re Chance J.* and the case at bar also differ in
25 certain respects. The *In re Chance J.* court’s determination that the father had

1 abandoned the child was based in part on its consideration under Nebraska law that
2 “children born to the parties in a marriage are presumed legitimate until proved
3 otherwise[.]” *Id.* Here, Father and Mother were not married to each other when Child
4 was born. However, the case at bar otherwise has parallels to *In re Chance J.* Like the
5 father in *In re Chance J.*, Father had the means and the opportunity to confirm his
6 suspicion that Child was not his child.⁴ Father also did not attempt to take
7 responsibility for Child until after CYFD filed its petition alleging that Father had
8 abandoned Child. We see *In re Chance J.* as instructive for its determination that
9 certainty of knowledge of paternity—in particular, positive DNA testing—is not a
10 condition precedent for a man’s obligation to care for a child to arise. *In re Chance J.*
11 indicates that, where a father is in a position to obtain DNA testing, if he has any
12 questions about his paternity then the onus is on him to obtain DNA testing that will

13 ⁴Under NMSA 1978, Section 40-11A-602(C) (2009) of the New Mexico
14 Uniform Parentage Act, §§ 40-11A-101 to -903 (2009), a man whose paternity of the
15 child is in question may bring a proceeding to adjudicate parentage, and “the district
16 court shall order the child and other designated persons to submit to genetic testing
17 if the request for testing is supported by the sworn statement of a party to the
18 proceeding: (1) alleging paternity and stating facts establishing a reasonable
19 probability of the requisite sexual contact between the persons; or (2) denying
20 paternity and stating facts establishing a possibility that sexual contact between the
21 persons, if any, did not result in the conception of the child.” Section 40-11A-502(A).
22 Father, therefore, could have brought a proceeding to adjudicate his parentage of
23 Child, and if he or Mother had submitted a sworn statement either alleging or denying
24 his paternity, the district court would have been required to order genetic testing.
25 Thus, an alleged or putative father can act to determine his parentage with a DNA
26 test.

1 confirm non-paternity. For these reasons, we reject Father’s argument that, as a matter
2 of law, the lack of certain knowledge of paternity by means of DNA testing is
3 justifiable cause that negates a determination of neglect based on abandonment.

4 **2. Father’s Lack of Certain Knowledge of His Paternity Was Not Justifiable**
5 **Cause for Abandoning Child**

6 {41} Father left Child with Mother without providing for Child’s support and
7 without communicating with Child for a period of more than three months. Father’s
8 ignorance of Mother’s failure to care for Child does not constitute justifiable cause.
9 In addition, under the facts of this case as established by clear and convincing
10 evidence, where Father not only received notice but acknowledged that he was the
11 father of Child, the lack of greater certainty based on DNA testing regarding paternity
12 was not justifiable cause that negates a determination of abandonment. If Father in
13 fact harbored any doubt about Child’s paternity, he bore the burden of taking steps
14 to resolve the question.⁵ Because Father neither established he was not the father nor
15 provided the necessary care to Child, the district court properly found that he had

16 ⁵Father testified that he asked Mother for a DNA test during her pregnancy.
17 This testimony is inconsistent with Father’s other testimony that he did not know
18 about Child or that Child was his until April 2016. But even assuming the statement
19 was truthful, Father never followed up on the request. On the contrary, he proceeded
20 to block communication with Mother on social media. For these reasons, we do not
21 conclude that Mother’s inaction following Father’s claimed request for a DNA test
22 to be justifiable cause for Father leaving Child in the care of others without
23 communication or provision for support.

1 neglected Child based on abandonment. *Cf. Cosme V.*, 2009-NMCA-094, ¶ 34
2 (“Under certain circumstances, parents cannot demand parental rights without
3 pro-actively fulfilling their obligations as parents to care for their children. [The
4 f]ather did not pro-actively fulfill his obligations . . . over a substantial period of time,
5 and there came a point when [CYFD] appropriately intervened, and sought and
6 obtained a neglect adjudication implicating [the f]ather. The neglect determination
7 as to [the f]ather was based on clear and convincing evidence and was proper.”
8 (citation omitted)).⁶

9 **CONCLUSION**

10 {42} We affirm the district court’s adjudication of neglect with respect to Father.

11 {43} **IT IS SO ORDERED.**

12
13

HENRY M. BOHNHOFF, Judge

14

⁶Father also argues that he “is not required to submit to assessments or attend
15 parenting classes *unless and until* he has otherwise been found guilty of neglect[,]”
16 and therefore the district court could not take into account Father’s actions post-
17 petition when finding that he neglected Child. We need not consider this argument
18 because we hold that there was clear and convincing evidence that Father abandoned
19 Child before CYFD filed its abuse and neglect petition.

1 **WE CONCUR:**

2

3 **JONATHAN B. SUTIN, Judge**

4

5 **MICHAEL E. VIGIL, Judge**