

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

**STATE OF NEW MEXICO ex rel.
CHILDREN, YOUTH & FAMILIES
DEPARTMENT,**

Court of Appeals of New Mexico
Filed 9/25/2026 8:58 AM



Mark Reynolds

Petitioner-Appellee,

v.

No. A-1-CA-43195

TONY C.,

Respondent-Appellant,

and

MARSELLA W.,

Respondent,

**IN THE MATTER OF D'MARRION C.,
a Child.**

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY

Lee A. Kirksey, District Court Judge

Children, Youth and Families Department
Amanda Romero, Chief Children's Court Attorney
Santa Fe, NM
Cynthia Tessman, Appellate Managing Attorney
Albuquerque, NM

for Appellee

Office of Family Representation & Advocacy
Wolfgang Bomgardner
Albuquerque, NM

for Appellant

1 Laura K. Castillo, Attorney at Law
2 Laura K. Castillo
3 Hobbs, NM

4 Guardian Ad Litem

5 **MEMORANDUM OPINION**

6 **HOUGHTON, Judge.**

7 {1} Tony C. (Father) appeals the district court’s judgment adjudicating his son
8 D’Marrion C. (Child) a neglected child, pursuant to NMSA 1978, Section
9 32A-4-2(G)(2) (2023, amended 2025).¹ Father argues the district court’s order was
10 not supported by substantial evidence. For the reasons that follow, we agree and
11 reverse the judgment of the district court.

12 **BACKGROUND²**

13 {2} The adjudicatory hearing was held on October 20, 2025, in the district court.
14 Father and Child attended the hearing remotely. The following evidence was
15 presented through the sole testifying witness, a Children, Youth and Families
16 Department (CYFD) investigator (Investigator). On February 27, 2025, CYFD took
17 custody of Child after an encounter with Child’s mother, Marshella W. (Mother).

¹Although the events at issue occurred before the statute was amended in 2025, the statutory language relevant to this opinion was not changed. For ease of citation, we cite to the current version of the statute throughout.

²Because this is a memorandum opinion and the parties are familiar with the background of the case, we reference only those facts, selected from our complete review of the record, that are necessary for our analysis.

1 On that day, Investigator attempted to contact Father. Investigator also attempted to
2 contact Father seven days later on March 6, 2025, the same day the neglect petition
3 was filed. Investigator testified that Investigator and others attempted “many times”
4 to reach Father by phone including “calling him at different hours.” Investigator also
5 reached out to relatives and asked them to have Father call Investigator, to no avail.

6 {3} Shortly after Child went into CYFD custody, Mother died. Investigator then
7 successfully contacted Father on March 14, 2025, via text message, informing Father
8 that Mother had passed away. Father texted Investigator that he knew Mother had
9 passed but “he was not able to take care of [Child] at this time.” No other evidence
10 regarding Father’s ability to take custody of Child was presented at the hearing.

11 {4} The district court entered an adjudicatory judgment determining Child to be a
12 neglected child as to Father under Section 32A-4-2(G)(2). The district court based
13 this determination on two primary findings. First, that “Father ignored the needs of
14 [C]hild for weeks and did not provide any parental care or control for [C]hild despite
15 repeated requests from CYFD.” And second, the “fairly straightforward admission
16 from Father to [CYFD] that he was not able to take care of [C]hild at the time,”
17 despite knowing that he was Child’s only remaining parent. Father appealed.

18 **DISCUSSION**

19 {5} “Before a child is adjudicated neglected, CYFD must provide clear and
20 convincing evidence that the child is without proper parental care and control.” *State*

1 *ex rel. Child., Youth & Fams. Dep’t v. Heather S.*, 2025-NMSC-002, ¶ 30, 563 P.3d
2 821. “Clear and convincing evidence means evidence that instantly tilts the scales in
3 the affirmative when weighed against the evidence in opposition and the fact finder’s
4 mind is left with an abiding conviction that the evidence is true.” *State ex rel. Child.,*
5 *Youth & Fams. Dep’t v. Keon H.*, 2018-NMSC-033, ¶ 37, 421 P.3d 814 (internal
6 quotation marks and citation omitted). On appeal, “we will uphold the district court’s
7 judgment if, viewing the evidence in the light most favorable to the judgment, a fact
8 finder could properly determine that the clear and convincing standard was met.”
9 *Heather S.*, 2025-NMSC-002, ¶ 43 (alteration, internal quotation marks, and citation
10 omitted). However, we review de novo whether the factual findings support the
11 district court’s conclusion that a child is a neglected child as a matter of law under
12 Section 32A-4-2(G)(2). *Heather S.*, 2025-NMSC-002, ¶ 44.

13 {6} The Abuse and Neglect Act, NMSA 1978, § 34A-4-1 to -35 (1993, as
14 amended through 2025), defines a “neglected child” as one

15 who is without proper parental care and control or subsistence,
16 education, medical or other care or control necessary for the child’s
17 well-being because of the faults or habits of the child’s parent, guardian
18 or custodian or the failure or refusal of the parent, guardian or
19 custodian, when able to do so, to provide them.

20 Section 32A-4-2(G)(2). “[T]wo conditions must be satisfied before a child meets the
21 definition of ‘neglected child.’” *Heather S.*, 2025-NMSC-002, ¶ 29. First, the child
22 must be determined to be “without proper parental care and control . . . necessary

1 for the child’s well-being.” *Id.* (quoting § 32A-4-2(G)(2)). To find that a child is
2 without proper parental care and control necessary for the child’s well-being, “the
3 child must be subjected to circumstances that create a serious risk to the child’s
4 mental or physical health and safety.” *Id.* ¶ 35. A serious risk is “one that is likely to
5 result in important or dangerous consequences for the child.” *Id.* Second, the lack of
6 proper parental care and control must be ““because of the faults or habits of the
7 child’s parent . . . or the failure or refusal of the parent . . . *when able to do so*, to
8 provide them.”” *Id.* ¶ 37 (quoting § 32A-4-2(G)(2)) (emphasis added). The focus of
9 the second element is “on the acts or omissions of the parents in their caretaking
10 function and not on apparent shortcomings of a given parent due to any unfavorable
11 status, poverty being the most common.” *Id.* (alteration, internal quotation marks,
12 and citation omitted). Thus, “the court must have been presented with clear and
13 convincing evidence of [the parent’s] culpability through intentional or negligent
14 disregard of [the child’s] well-being and proper needs.” *State ex rel. Child., Youth*
15 *& Fams. Dep’t v. Michelle B.*, 2001-NMCA-071, ¶ 17, 130 N.M. 781, 32 P.3d 790.

16 {7} Assuming without deciding there was sufficient evidence that Father’s acts
17 and omissions left Child without proper care and control, we hold there was
18 insufficient evidence Father was able to provide such care and control. A parent’s
19 failure or refusal to provide care and control necessary for the well-being of their
20 child “must be ‘when [the parent is] able to do so’ before a child is adjudicated

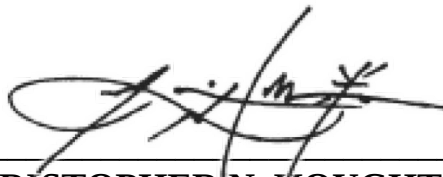
1 neglected.” *Heather S.*, 2025-NMSC-002, ¶ 37 (quoting § 32A-4-2(G)(2)). In a
2 neglect proceeding, it is CYFD’s burden to provide ““clear and convincing evidence
3 to support each specific element of Section 32A-4-2(G)(2).”” *State ex rel. Child.*
4 *Youth & Fams. Dep’t v. Anthony D.*, 2025-NMCA-015, ¶ 36, 584 P.3d 912 (quoting
5 *Heather S.*, 2025-NMSC-002, ¶ 38). Thus, CYFD must offer clear and convincing
6 evidence that the parent was *able* to provide proper parental care and control under
7 the circumstances, not just that they failed to do so. *See Heather S.*, 2025-NMSC-
8 002, ¶ 37.

9 {8} Here, the district court expressly found that when CYFD contacted Father, he
10 responded that “he was not able to take care of [C]hild at that time.” Reviewing the
11 record, we see no evidence to the contrary. Nor is there evidence that CYFD
12 investigated why Father was unable to care for Child. Instead, Investigator testified
13 that after successfully contacting Father Investigator simply asked for Father’s
14 current mailing address, which Father provided. Without evidence that Father had
15 the ability to provide for Child, there was not substantial evidence of a clear and
16 convincing nature to support the district court’s determination that Father was
17 culpable for Child’s neglect. We therefore hold that the district court’s determination
18 that Child was neglected as to Father was not supported by substantial evidence.

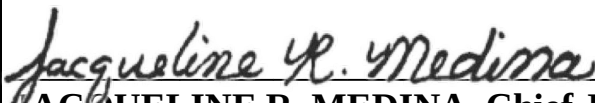
1 **CONCLUSION**

2 {9} We reverse the district court's adjudication of neglect as to Father and remand
3 to the district court for further proceedings consistent with this opinion.

4 {10} **IT IS SO ORDERED.**

5 
6 **KRISTOPHER N. HOUGHTON, Judge**

7 **WE CONCUR:**

8 
9 **JACQUELINE R. MEDINA, Chief Judge**

10 
11 **SHAMMARA H. HENDERSON, Judge**