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

2 Opinion Number: _____

Court of Appeals of New Mexico
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3 Filing Date: September 14, 2023



Mark Reynolds

4 **No. A-1-CA-40576**

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

8 Petitioner-Appellee,

9 v.

10 **BRIAN F.,**

11 Respondent-Appellant,

12 and

13 **ASHLEY F. a/k/a ASHLEY D., DAVID S.,**
14 **SANTEZ P., KEVIN S., and VERONICA S.,**

15 Respondents,

16 and

17 **KENDALL K.,**

18 Interested Party,

19 **IN THE MATTER OF JAXXON P., JOSHUWA**
20 **S., MAXINE F., and AUSTIN F.,**

21 Children.

22 **APPEAL FROM THE DISTRICT COURT OF LEA COUNTY**

23 **Lee A. Kirksey, District Court Judge**

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13 Guardian Ad Litem

1 **OPINION**

2 **MEDINA, Judge.**

3 {1} In this case we address whether a parent may appeal from a judgment
4 terminating their parental rights to the children when the rights of unrelated parents
5 and the children remain pending in the same district court action and where the
6 district court has not certified the judgment as immediately appealable under Rule
7 1-054(B) NMRA. Concluding that permitting such an appeal comports with the
8 legislative mandate to hear such appeals “at the earliest practical time[,]” *see* NMSA
9 1978, § 32A-1-17(B) (1999), we hold that the judgment terminating Appellant Brian
10 F. (Father)’s parental rights is a final and appealable order. We also affirm the
11 termination of Father’s parental rights.

12 **BACKGROUND**

13 {2} Appellant is the Father of Maxine F., born March 1, 2013, and Austin F., born
14 March 17, 2012 (collectively, Children). According to an affidavit for an ex parte
15 custody order, the Children, Youth and Families Department (CYFD) took Children
16 into custody in February 2021 on allegations of an unsanitary home, drug use by
17 Father and Ashley F., Children’s stepmother, and Ashley F. having abandoned
18 Children at a housing shelter. CYFD placed Children in nonrelative foster care. The
19 district court later joined Children’s biological mother as an interested party, and for

1 a period of time Children were placed with her in California. Mother died, and
2 Children were later returned to nonrelative foster care in New Mexico.

3 {3} On February 26, 2021, CYFD filed an abuse and neglect petition (Petition) in
4 the district court, alleging, in relevant part, that Children were neglected as defined
5 in NMSA 1978, Section 32A-4-2(G)(2) (2018).

6 {4} “Father relocated to California soon after the case began.” On March 8, 2021,
7 after a hearing in which Father appeared telephonically and represented by counsel,
8 the district court ordered that Children should remain in CYFD custody pending an
9 adjudicatory hearing. The district court ordered Father to, among other things,
10 undergo psychological evaluations, drug and alcohol assessment and testing, birth
11 parent orientation, and to maintain regular communication with his attorney and
12 CYFD caseworker. The district court also accepted and implemented CYFD’s initial
13 assessment and treatment plan.

14 {5} CYFD’s assessment plan reflected that Father’s homelessness was a barrier to
15 implementing visitation and indicated that CYFD would work with Father to
16 establish a location and phone number where he could be reached. Father’s treatment
17 plan required Father to complete the following: (1) submit to random drug tests and
18 hair analysis; (2) complete a psychological evaluation, a drug and alcohol
19 assessment, and follow the recommendations of the assessments; (3) learn how to
20 parent and supervise Children by participating in parenting classes at the Guidance

1 Center; (4) participate in counseling with a licensed counselor; (5) obtain sobriety
2 and attend a drug treatment program; (6) financially provide for Children, maintain
3 employment, and provide check stubs as proof of income from every paycheck.

4 {6} CYFD referred Father to the following agencies in Modesto, California where
5 he was living; the Department of Workforce Development, New Hope Recovery for
6 substance abuse, the Center for Human Services, the Parenting Resources Center,
7 Haven’s Women’s Center for domestic violence classes, and Family Time Visitation
8 Center to facilitate Zoom visits with Children. CYFD also provided Father with a
9 phone number to call or text, an email to contact his caseworker, and an online
10 service for a psychological evaluation.

11 {7} On August 16, 2021, after a trial on the merits, the district court found that
12 there was clear and convincing evidence that Father neglected Children as defined
13 by the Children’s Code, pursuant to Section 32A-4-2(G)(2). The district court
14 therefore entered an adjudicatory judgment and disposition as to Father. The district
15 court concluded that Father “allowed . . . Children to live in an unsanitary and
16 unhealthy home”; allowed Children “to be subjected to verbal and physical abuse”
17 from their stepmother; “purchased and used meth[amphetamine] instead of securing
18 safe, permanent housing” for Children; allowed Children to “live in [Father’s] car
19 for [two] weeks”; “knew [stepmother] was using meth[amphetamine] and left
20 [C]hildren with her”; and “violated the restraining order between [Father] and

1 [stepmother].” Additionally, “Father could not be located when [stepmother]
2 abandoned [C]hildren at a [domestic violence] shelter.”

3 {8} The district court ordered Father to complete the new treatment plan. The
4 treatment plan, among other things, required Father to (1) obtain safe and stable
5 housing, (2) maintain weekly contact with CYFD, (3) obtain and maintain
6 employment, (4) demonstrate proof of his ability to financially provide for Children,
7 (5) attend parenting classes, (6) maintain a parental bond with Children by regularly
8 visiting, (7) attend individual counseling, and (8) undergo a psychological
9 evaluation.

10 {9} In March 2022, CYFD moved to terminate Father’s parental rights, alleging
11 that the causes and conditions of the neglect were unlikely to change in the
12 foreseeable future despite CYFD’s reasonable efforts to assist Father in adjusting to
13 the conditions, which rendered him unable to care for Children, pursuant NMSA
14 1978, Section 32A-4-28(B)(2) (2005, amended 2022). The district court held a
15 termination of parental rights hearing, at which several witnesses, including Father,
16 testified. At the conclusion of the hearing, the district court terminated Father’s
17 parental rights, concluding it to be unlikely that Father’s inability to parent Children
18 would change in the foreseeable future despite CYFD’s reasonable efforts to assist
19 Father.

1 **DISCUSSION**

2 **I. Appellate Jurisdiction**

3 {10} In our notice of assignment to the general calendar we directed the parties to
4 address “whether a parent is sufficiently aggrieved such that they should be
5 permitted an immediate appeal from an order terminating parental rights when the
6 rights of other parents and children remain pending in the district court action and
7 the district court has not certified the order as immediately appealable under Rule 1-
8 054(B).” Whether this Court has jurisdiction to hear an appeal is a legal question
9 that we review de novo. *See State v. Heinsen*, 2005-NMSC-035, ¶ 6, 138 N.M. 441,
10 121 P.3d 1040.

11 {11} In cases governed by the Rules of Civil Procedure, Rule 1-054 provides the
12 standard for determining when a judgment is final if there are multiple parties and
13 the judgment does not resolve all claims or all issues for each party. However,
14 termination of parental rights cases are not governed by the Rules of Civil Procedure,
15 but instead by the children’s court rules. *Compare* Rule 10-101(A)(1)(a)(iv) NMRA
16 (“[T]he [c]hildren’s [c]ourt [r]ules govern procedure in the children’s courts of New
17 Mexico in . . . all matters involving children alleged by the state . . . to be abused or
18 neglected as defined in the Abuse and Neglect Act including proceedings to
19 terminate parental rights which are filed under the Abuse and Neglect Act.”), *with*
20 Rule 10-101(A)(5) (“[T]he Children’s Code and the Rules of Civil Procedure for the

1 [d]istrict [c]ourts govern the procedure *in all other proceedings* under the Children’s
2 Code. In case of a conflict between the Children’s Code and Rules of Civil Procedure
3 for the [d]istrict [c]ourt, the Children’s Code shall control.” (emphasis added)); *see*
4 *also State ex rel. Child., Youth & Fams. Dep’t v. Djamila B.*, 2015-NMSC-003, ¶ 39,
5 342 P.3d 698 (declining to apply Rule 1-019 NMRA to an abuse and neglect case
6 because it was a Rule of Civil Procedure and as such did not apply to these types of
7 proceedings under Rule 10-101); *State ex rel. Child., Youth & Fams. Dep’t v. Steve*
8 *C.*, 2012-NMCA-045, ¶ 9, 277 P.3d 484 (stating that Rule 1-015 NMRA did not
9 apply to an adjudication of abuse and neglect because the children’s court rules—
10 and not the Rules of Civil Procedure—applied). The children’s court rules do not
11 contain an analogous provision to Rule 1-054 pertaining to finality of a judgment or
12 order. As such, we turn to general principles governing finality of judgments to guide
13 our analysis.

14 {12} NMSA 1978, Section 39-3-2 (1966) states that “[w]ithin thirty days from the
15 entry of any final judgment or decision . . . in any civil action in the district court,
16 any party aggrieved may appeal” to either our Supreme Court or this Court as
17 jurisdictionally appropriate. “Whether an order is a ‘final order’ within the meaning
18 of the statute is a jurisdictional question that an appellate court is required to raise
19 on its own motion.” *Khalsa v. Levinson*, 1998-NMCA-110, ¶ 12, 125 N.M. 680, 964
20 P.2d 844.

1 {13} “The general rule in New Mexico for determining the finality of a judgment
2 is that an order or judgment is not considered final unless all issues of law and fact
3 have been determined and the case disposed of by the [district] court to the fullest
4 extent possible.” *Zuni Indian Tribe v. McKinley Cnty. Bd. of Cnty. Comm’rs*, 2013-
5 NMCA-041, ¶ 16, 300 P.3d 133 (internal quotation marks and citation omitted).
6 However, “[t]he term ‘finality’ is to be given a practical, rather than a technical,
7 construction.” *Massengill v. Fisher Sand & Gravel Co.*, 2013-NMCA-103, ¶ 16, 311
8 P.3d 1231 (internal quotation marks and citation omitted). “Where a judgment
9 declares the rights and liabilities of the parties to the underlying controversy, a
10 question remaining to be decided thereafter will not prevent the judgment from being
11 final if resolution of that question will not alter the judgment or moot or revise
12 decisions embodied therein.” *Kelly Inn No. 102, Inc. v. Kapnison*, 1992-NMSC-005,
13 ¶ 21, 113 N.M. 231, 824 P.2d 1033.

14 {14} This case presents the question of whether the pending proceedings in district
15 court related to the stepmother’s children and their fathers and grandparents render
16 the order terminating Father’s parental rights nonfinal. Stated differently, the
17 question we resolve is whether a case that includes unrelated parents and unrelated
18 children must be fully resolved before a parent may avail themselves of their right
19 to appeal. Under this circumstance, both Father and CYFD agree that the order is a
20 final order within the meaning of Section 39-3-2. While we are not bound by the

1 parties' agreement on this issue, *see State v. Comitz*, 2019-NMSC-011, ¶ 25, 443
2 P.3d 1130, we hold that the order terminating Father's parental rights is final and
3 appealable.

4 {15} Here, the district court has resolved all issues with respect to Father and
5 Children. The issues remaining below involve other children who are unrelated to
6 Father. In addition, Children's biological mother has died and is no longer involved
7 in these proceedings. Consequently, any factual finding or legal conclusion left to
8 be made in this case will not alter, moot, or revise any portion of the district court's
9 order terminating Father's parental rights. *See Kelly Inn No. 102, Inc.*, 1992-NMSC-
10 005, ¶ 21.

11 {16} We acknowledge the often cited policy of disfavoring piecemeal appeals, but
12 forcing Father to wait to appeal until all parties and claims are resolved in the
13 underlying case would not meaningfully serve this purpose. *See id.* ¶ 26
14 (acknowledging the policy disfavoring piecemeal appeals but stating that
15 countervailing policy considerations are also relevant when determining the finality
16 of an order or judgment). Rather, allowing an immediate appeal will "promote the
17 equally important policy of facilitating meaningful appellate review of cases in
18 which the aggrieved party exercises the constitutional right to an appeal." *Id.* ¶ 27;
19 *see also* N.M. Const. art. VI, § 2 (providing that "an aggrieved party shall have an
20 absolute right to one appeal"); *Govich v. N. Am. Sys.*, 1991-NMSC-061, ¶ 12, 112

1 N.M. 226, 814 P.2d 94 (stating that New Mexico has a strong policy “that courts
2 should facilitate, rather than hinder, the right to one appeal”); *see also In re Esther*
3 *V.*, 2011-NMSC-005, ¶ 37, 149 N.M. 315, 248 P.3d 863 (“Parents have a
4 fundamental liberty interest in the care and custody of their children; due process of
5 law is required before parents can be deprived of that right.”). And in this context
6 specifically, our Legislature has expressed an intention to prioritize these appeals.
7 *See* § 32A-1-17(B) (“If the order appealed from grants the legal custody of the child
8 to or withholds it from one or more of the parties to the appeal, the appeal shall be
9 heard at the earliest practicable time.”). Finally, the priority assigned by our
10 Legislature to the interests of the child favors an immediate appeal. *See* NMSA 1978,
11 § 32A-1-3(A) (2009) (stating that “the care, protection and wholesome mental and
12 physical development of children . . . [are] the paramount concern”). Given
13 Children’s biological mother’s death, the termination of Father’s parental rights
14 finally resolved all parental rights to Children. Prompt resolution of Father’s appeal
15 supports their interests.

16 {17} Considering all of the foregoing, and giving the term “finality” a “practical,
17 not technical, construction” we hold that this case is sufficiently final to permit
18 immediate appeal. *See Kelly Inn No. 102, Inc.*, 1992-NMSC-005, ¶ 12. We caution
19 that nothing in this opinion should be read to hold that Father would be sufficiently
20 aggrieved to permit an immediate appeal if the case against Children’s biological

1 mother was pending before the district court because that question is not before us
2 at this time.

3 {18} Having determined that this Court has jurisdiction over Father’s appeal, we
4 now turn to the merits of his claim that CYFD failed to show by clear and convincing
5 evidence that it made reasonable efforts to assist Father in adjusting the conditions
6 that rendered him unable to properly care for Children.

7 **II. CYFD Made Reasonable Efforts to Assist Father**

8 {19} Father contends that CYFD did not make reasonable efforts to assist him in
9 adjusting the conditions that rendered him unable to properly care for Children
10 because CYFD did not provide him with specific contact information or direction to
11 the services he was referred to in California and because he was not given sufficient
12 time to “work the case plan.” We disagree.

13 {20} “The standard of proof in cases involving the termination of parental rights is
14 clear and convincing evidence.” *State ex rel. Child., Youth & Fams. Dep’t v. Vanessa*
15 *C.*, 2000-NMCA-025, ¶ 24, 128 N.M. 701, 997 P.2d 833. On appeal, we do not
16 reweigh the evidence; rather, we view the evidence in the light most favorable to the
17 prevailing party. *See State ex rel. Child., Youth & Fams. Dep’t v. Amanda H.*, 2007-
18 *NMCA-029*, ¶ 19, 141 N.M. 299, 154 P.3d 674. “We indulge all reasonable
19 inferences in support of the district court’s decision and disregard all inferences or
20 evidence to the contrary.” *State ex rel. Child., Youth & Fams. Dep’t v. Cosme V.*,

1 2009-NMCA-094, ¶ 19, 146 N.M. 809, 215 P.3d 747 (alterations, internal quotation
2 marks, and citation omitted). To the extent Father directs this Court to evidence that
3 might support the opposite determination, we note that when this Court is presented
4 with conflicting evidence, we defer to the district court’s determinations of ultimate
5 fact. *See Skeen v. Boyles*, 2009-NMCA-080, ¶ 37, 146 N.M. 627, 213 P.3d 531.

6 {21} Section 32A-4-28(B)(2) provides that the district court shall terminate
7 parental rights when

8 the child has been a neglected or abused child as defined in the Abuse
9 and Neglect Act and the court finds that the conditions and causes of
10 the neglect and abuse are unlikely to change in the foreseeable future
11 despite reasonable efforts by [CYFD] . . . to assist the parent in
12 adjusting the conditions that render the parent unable to properly care
13 for the child.

14 “In proceedings to terminate parental rights, the court shall give primary
15 consideration to the physical, mental and emotional welfare and needs of the child,
16 including the likelihood of the child being adopted if parental rights are terminated.”

17 Section 32A-4-28(A).

18 {22} The district court found, in relevant part, (1) “CYFD made reasonable efforts
19 to assist Father in adjusting the conditions which render Father unable to care for . . .
20 Children properly”; (2) “Father did not even minimally engage in his case plan over
21 the fourteen months that this case was pending”; and (3) “[t]here was no evidence
22 produced that Father is currently making or intends to soon make efforts to change

1 the causes and conditions of his neglect of . . . Children.” As such, “Father is unable
2 or unwilling to provide proper parental care or control for . . . Children” and “[t]he
3 causes and conditions of the neglect of . . . Children by Father are unlikely to change
4 in the foreseeable future.”

5 {23} Father argues that CYFD did not make reasonable efforts to assist him in
6 alleviating the causes and conditions that brought Children into custody, particularly
7 in light of the fact that he was living in California and suffered from addiction. After
8 careful review, we conclude that the district court’s finding is supported by clear and
9 convincing evidence.

10 {24} Here, CYFD attempted to assist Father repeatedly during the pendency of his
11 case below. Racquel Leyva, Father’s initial Permanency Planning Worker (PPW)
12 testified that she assisted by developing Father’s case plan; went over the case plan
13 with Father at least ten times; mailed Father a copy of the case plan by certified mail;
14 provided a copy of the plan to Father through email and text message; and that she
15 set up a Zoom virtual meeting during which she shared her computer screen with
16 Father as she went over the terms of his case plan with him. She testified that Father
17 understood the case plan.

18 {25} In an effort to implement the case plan, Leyva testified that she made referrals
19 for parenting classes, domestic violence classes, visitations with Father’s Children
20 at the Family Time visitation center, referred Father to Work Force Solutions where

1 Father was residing, made a referral for individual therapy, and made a referral for
2 a psychological evaluation with Dr. Moor who performs evaluations through
3 telehealth for remote clients. Leyva also asked Father to participate in virtual home
4 visits and attempted to do so at least once a month but Father refused to participate.
5 As a result of Father's refusal to participate in virtual home visits, Leyva was unable
6 to determine whether the location where Father was staying was safe and
7 appropriate.

8 {26} Leyva testified that she also held a Zoom virtual meeting with Father during
9 which she made referrals to service providers for Father, called the providers on his
10 behalf, and attempted to schedule appointments for Father while he was in the Zoom
11 meeting with her. Leyva also referred Father to a New Mexico visitation center that
12 would conduct virtual visits between Father and Children. However, according to
13 Leyva, Father was "not interested" in doing an intake for visitation. Leyva testified
14 that all of the services offered to Father were either free of charge, covered by
15 Father's Medicaid plan, or would be paid by CYFD.

16 {27} Joshua Paine testified that he was Father's PPW from September 2021
17 through December 2021. Paine tried contacting Father almost every two weeks.
18 Father did not return Paine's phone calls until October 20, 2021. Paine attempted to
19 go over Father's case plan with him, but received a text message from Father stating
20 that he was not going to work with anyone.

1 {28} Father does not contest that any of the foregoing efforts were made. Rather,
2 Father argues that we should view his situation of living in California as akin to a
3 situation where a parent is incarcerated, requiring more individualized support given
4 the restrictions on freedom caused by incarceration. *See, e.g., State ex rel. Child.,*
5 *Youth & Fams. Dep't v. Hector C.*, 2008-NMCA-079, ¶ 25, 144 N.M. 222, 185 P.3d
6 1072 (considering the effects of incarceration on a parent's ability to work a
7 treatment plan). We are not persuaded that living outside of New Mexico presents
8 the same limitations on parental ability to comply with the requirements of a
9 treatment plan as incarceration. CYFD's efforts show that it took Father's out-of-
10 state living situation into account by referring him to providers who were local to
11 him and to a provider that would provide services virtually. In addition, Father's first
12 PPW attempted to schedule appointments for Father with those providers during a
13 Zoom meeting. Accordingly, we see no merit to Father's complaint that CYFD did
14 not provide assistance that was sufficiently tailored to Father's needs. *See State ex*
15 *rel. Child., Youth & Fams. Dep't v. Patricia H.*, 2002-NMCA-061, ¶¶ 27-28, 132
16 N.M. 299, 47 P.3d 859 (stating that "CYFD is only required to make reasonable
17 efforts, not efforts subject to conditions unilaterally imposed by the parent" and on
18 appeal "our job is not to determine whether CYFD did everything possible; our task
19 is limited by our statutory scope of review to whether CYFD complied with the
20 minimum required under law"). To the extent that Father argues he was not given

1 sufficient time to work his treatment plan, this contention is undeveloped, and we
2 decline to consider it further. *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-
3 045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (“We will not review unclear arguments, or
4 guess at what [a party’s] arguments might be.”).

5 {29} It is well established that “[w]hat constitutes reasonable efforts may vary with
6 a number of factors, such as the level of cooperation demonstrated by the parent and
7 the recalcitrance of the problems that render the parent unable to provide adequate
8 parenting.” *Patricia H.*, 2002-NMCA-061, ¶ 23. Our review shows Father
9 repeatedly demonstrated an unwillingness to engage with his treatment plan. Father
10 never participated in a psychological evaluation. When Leyva asked Father about it,
11 Father responded that he would “get to it.” Father later told Leyva that he was not
12 interested in working his case plan because he felt like he had done nothing wrong
13 and that CYFD was the one that failed him and Children. Father missed 20 percent
14 of all scheduled visitation and refused to acknowledge the circumstances that
15 brought Children into custody. Father never demonstrated proof that he participated
16 in any services in California, and only provided a single paystub. Father was also
17 hostile towards his second and third PPWs, and at one point threatened to sue or get
18 them fired. Father did not maintain regular contact with CYFD, nor did Father
19 demonstrate that he had obtained safe and stable housing as required by his treatment

1 plan. When Father’s third PPW attempted to discuss substance abuse treatment with
2 him, Father stated that he was “five days sober” from methamphetamine use.

3 {30} Father argues for the first time in his reply brief that Father’s status as an
4 addict explains his difficult behavior and may have been the sole reason his rights
5 were terminated. Although Father’s addiction status may have contributed to his
6 inability or unwillingness to make the necessary changes to properly remedy the
7 causes and conditions that brought Children into custody, the status itself was not
8 the sole evidence presented to demonstrate this point. *See Cosme V.*, 2009-NMCA-
9 094, ¶ 16 (stating that parents have a “continuing legal duty to care” for the children
10 and failure to do so may support an adjudication of neglect); *see also State ex rel.*
11 *Child., Youth & Fams. Dep’t v. Mafin M.*, 2003-NMSC-015, ¶ 24, 133 N.M. 827, 70
12 P.3d 1266 (“When balancing the interests of parents and children, the court is not
13 required to place the children indefinitely in a legal holding pattern, when doing so
14 would be detrimental to the children’s interests.” (internal quotation marks and
15 citation omitted)).

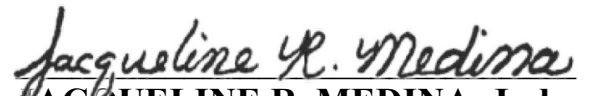
16 {31} Based on the ample efforts made by CYFD to provide referrals, set up
17 appointments and assistance for Father to work his treatment plan, along with
18 Father’s own failure to make any meaningful attempt to work his treatment plan as
19 ordered, we conclude that the district court’s finding that CYFD made reasonable
20 efforts to assist Father in this case is supported by clear and convincing evidence.

1 *See State ex rel. Child., Youth & Fams. Dep't v. Keon H.*, 2018-NMSC-033, ¶ 48,
2 421 P.3d 814 (“Both [CYFD] and [the parent] are responsible for making efforts
3 toward reunification of the family.”).

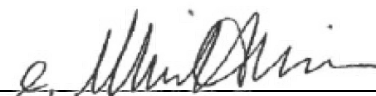
4 **CONCLUSION**

5 {32} For the foregoing reasons, we hold that this Court has jurisdiction over
6 Father’s appeal and that the district court’s order terminating Father’s parental rights
7 is supported by clear and convincing evidence. Accordingly, we affirm the district
8 court’s order terminating Father’s parental rights.

9 {33} **IT IS SO ORDERED.**

10 
11 **JACQUELINE R. MEDINA, Judge**

12 **WE CONCUR:**

13 
14 **J. MILES HANISEE, Judge**

15 
16 **JANE B. YOHALEM, Judge**