

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

Court of Appeals of New Mexico
Filed 1/24/2023 9:31 AM

2 **YVONNE GOTT,**

3 Petitioner-Appellant,

4 v.

5 **ROBERT EDWARD GOTT,**

6 Respondent-Appellee.



Mark Reynolds

No. A-1-CA-39243

7 **APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY**

8 **Sylvia LaMar, District Court Judge**

9 Hans Voss
10 Santa Fe, NM

11 for Appellant

12 The Elion Law Firm, P.C.
13 Gary D. Elion
14 Santa Fe, NM

15 for Appellee

16 **MEMORANDUM OPINION**

17 **YOHALEM, Judge.**

18 {1} Petitioner Yvonne Gott (Mother) appeals from the district court's order
19 denying her motion to relocate from Santa Fe, New Mexico to Ramah, New Mexico
20 with the parties' seven-year-old daughter (Child). At Mother's request, the district
21 court ordered an advisory consultation and adopted the advisory consultant's
22 recommendation to transfer primary physical custody of Child to Robert Edward

1 Gott (Father), who planned to remain in Santa Fe if Mother moved to Ramah. If
2 Mother chose instead to stay in Santa Fe, where Father and Mother had resided with
3 Child for many years before and after their divorce, the district court order
4 maintained the near-equal division of physical custody between the parties. The
5 district court order did not change the parents' joint legal custody of Child.

6 {2} Mother contends on appeal (1) the district court's failure to hold a hearing on
7 Mother's written objections to the advisory consultant's recommendations denied
8 Mother due process; and (2) the district court improperly delegated judicial authority
9 to a therapist, a doctor, and the advisory consultant in its parenting order. Finding no
10 error, we affirm.

11 **BACKGROUND**

12 {3} This is a memorandum opinion. Because the parties are familiar with the
13 particulars of the case, and this memorandum opinion is written solely for their
14 benefit, and because we resolve this case based on failure to preserve the issues
15 raised and inadequate briefing without reaching the merits of the issues raised, we
16 do not review the complex procedural history of Mother's request to relocate to
17 Ramah, which led to this appeal.¹

¹We note that although this procedural background is important to Mother's due process argument, her brief fails to provide this Court with this information.

1 **DISCUSSION**

2 **I. Mother Failed to Preserve Her Claim That She Was Denied Due Process**

3 {4} “Due process claims are not exempt from the fundamental requirement of
4 preservation.” *Moody v. Stribling*, 1999-NMCA-094, ¶ 45, 127 N.M. 630, 985 P.2d
5 1210. Mother acknowledges that she failed to preserve this issue in the district court.
6 She argues, however, that her failure to preserve is excused because she was
7 “unaware that the court would not hold a hearing on [her] objections” before ruling
8 and that she “had no procedural avenue to raise this due process issue to the court
9 after the subject order was filed.”

10 {5} We do not agree that Mother’s due process claim satisfies any of the
11 exceptions to preservation set forth in our Rules of Appellate Procedure. *See* Rule
12 12-321(A) NMRA. Rule 12-321(A) creates a narrow exception to the requirement
13 of preservation for review when “a party has no opportunity to object to a ruling or
14 order at the time it is made.” *Id.* The circumstances here do not satisfy this
15 requirement. Mother was informed by the district court before she prepared and filed
16 her written objections to the advisory consultant’s recommendations that written
17 objections were likely to be her only opportunity to challenge the advisory
18 consultant’s recommendations. The notice, which accompanied the
19 recommendations, stated clearly that a hearing on any objections made by the parties
20 would be allowed only where the district court found such a hearing necessary to

1 reach its decision. This notice gave Mother the opportunity to request a hearing and
2 to explain to the court why, under the circumstances of this case, due process
3 required such a hearing. *State ex rel. Child., Youth & Fams. Dep't v. Lorena R.*,
4 1999-NMCA-035, ¶ 17, 126 N.M. 670, 974 P.2d 164 (“[P]rocedural due process is
5 a flexible right and the amount of process due depends on the particular
6 circumstances of each case.”). Mother did not do so.

7 {6} After the district court entered its order, Mother again had an opportunity
8 under the district court’s Rules of Civil Procedure, Rule 1-059 NMRA, to file a
9 motion to reconsider, requesting a hearing, and explaining why, in her view, a
10 hearing was required to afford her due process. Mother filed a motion to reconsider,
11 successfully requesting a hearing, when the district court previously ruled on her
12 motion to relocate. Her failure to do so following this ruling, therefore, cannot be
13 explained by a lack of opportunity to object, since she has demonstrated her
14 knowledge of this procedure earlier.

15 {7} Preservation is not a mere formality—it allows the district court to correct any
16 potential error, avoiding the need for appeal. *See Madrid v. Roybal*, 1991-NMCA-
17 068, ¶ 7, 112 N.M. 354, 815 P.2d 650. Preservation ensures that the opposing party
18 has an opportunity to meet and defend against the objection raised. *See State v. Bell*,
19 2015-NMCA-028, ¶ 2, 345 P.3d 342. Finally, preservation ensures that a sufficient
20 record is created to allow this Court to review the district court’s decision for error.

1 *See Morga v. Fedex Ground Package Sys., Inc.*, 2018-NMCA-039, ¶ 39, 420 P.3d
2 586 (noting that one of the purposes of the preservation rule is “to create a record
3 sufficient to allow this Court to make an informed decision regarding the contested
4 issue”).

5 {8} In this case, lack of preservation impairs our ability to evaluate whether the
6 denial of a hearing substantially increased the probability of an erroneous ruling: one
7 of the elements of a due process claim. *See Mills v. N.M. State Bd. of Psych. Exam’rs*,
8 1997-NMSC-028, ¶ 19, 123 N.M. 421, 941 P.2d 502 (“Procedural due process
9 requirements are not static, and the extent of the hearing required is determined on
10 a case by case basis. . . . by weighing: (1) the private interest that will be affected by
11 the action; (2) the risk of an erroneous deprivation of such interest through the
12 procedures used and the value of additional safeguards; and (3) the governmental
13 interest in imposing the burdens of the procedure at issue.”).

14 {9} Because Mother was required to preserve her due process claim for review by
15 this Court and did not do so, we will not address her due process argument on appeal.
16 *See State v. Druktenis*, 2004-NMCA-032, ¶ 77, 135 N.M. 223, 86 P.3d 1050
17 (“[G]enerally, [we] will [not] address issues not preserved below and raised for the
18 first time on appeal.”).

1 **II. Mother Has Failed to Support Her Improper Delegation Claim With a**
2 **Developed Argument**

3 {10} Mother next argues that four provisions of the district court’s order improperly
4 delegate judicial decision-making authority either to a professional or to the advisory
5 consultant. The first challenged provision mandates that “[n]either parent terminate
6 [the child’s therapy] without the approval of the [a]dvisory [c]onsultant and/or the
7 therapist.” The second challenged provision authorizes the advisory consultant to
8 select a new therapist should Child’s current therapist be unable to complete the
9 necessary therapy. The third challenged provision restates the second provision.
10 Finally, Mother challenges the provision requiring parents to consult Child’s
11 oncologist if there are concerns about her learning process and directing that parents
12 follow the doctor’s recommendations, including a “referral for a
13 [n]europsychological exam.”

14 {11} Mother acknowledges that these issues were not raised in the district court.
15 She asks this Court to address them under the fundamental error exception to our
16 preservation requirements. *See* Rule 12-321(A). Mother’s argument on fundamental
17 error consists of a list of authorities from other jurisdictions and the United States
18 Supreme Court stating the general proposition that the relationship between a parent
19 and child is a constitutionally protected liberty interest under the due process clause
20 of the Fourteenth Amendment to the United States Constitution. *See* U.S. Const.
21 amend. XIV, § 1.

1 {12} Although we agree that the parent-child relationship is constitutionally
2 protected, this list of authorities fails to help us resolve the issue on appeal. Mother
3 presents no argument explaining why she believes the district court’s order requiring
4 parents to follow the recommendations of professionals working with Child and
5 vetted by the district court’s advisory consultant invade parents’ Fourteenth
6 Amendment substantive due process rights. “While it is true that case law recognizes
7 parents’ fundamental constitutional right to raise their children, case law also
8 establishes that parents’ right to raise their children is not beyond regulation in the
9 public interest.” *Hopkins v. Wollaber*, 2019-NMCA-024, ¶ 34, 458 P.3d 583
10 (alteration, internal quotation marks, and citation omitted). “New Mexico case law
11 establishes that parents’ rights are secondary to the best interests and welfare of the
12 children.” *Ridenour v. Ridenour*, 1995-NMCA-072, ¶ 10, 120 N.M. 352, 901 P.2d
13 770.

14 {13} The district court’s order here was based on the best interests of the child. The
15 provisions challenged did not terminate Mother’s parental rights or remove the legal
16 custody of Child she shared with Father. A minimally adequate argument on
17 substantive due process requires an explanation, in the context of the facts and
18 circumstances of this case, of why Mother believes the district court’s authorization
19 of a choice of a therapist or of an anticipated medical decision to professionals is
20 entitled to the same substantive due process protections as a decision to terminate

1 parental rights, take a child into state custody, or change legal custody. *See* Rule 12-
2 318(A)(4) NMRA (requiring an argument applying the law to the facts in a brief on
3 appeal).

4 {14} Mother provides a second list of out-of-state authorities holding that custody
5 and visitation decisions must be made by a court and cannot be delegated to a
6 professional. While citing many cases, Mother again offers no explanation for why
7 she believes that the choice of a therapist for a child or a medical decision that a
8 neuropsychological examination is necessary, which is not contested by parents, are
9 entitled to the same substantive due process protections as a denial of visitation or
10 custody. Nor does Mother explain whether or how her argument is supported by
11 New Mexico precedent.

12 {15} We remind Mother that the New Mexico Rules of Appellate Procedure require
13 that the parties adequately brief all appellate issues. *See Elane Photography, LLC v.*
14 *Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53 (“To present an issue on appeal for
15 review, an appellant must submit argument and authority as required by rule.”
16 (alteration, internal quotation marks, and citation omitted)); *see also* Rule 12-
17 318(A) (4) NMRA (requiring argument and authority in a brief). Only in a docketing
18 statement do our rules authorize a list of authorities without accompanying argument
19 applying the authorities to the facts and circumstances of the case. *See* Rule 12-
20 208(D)(5) NMRA. In a brief on appeal, “it is the appellant’s burden to demonstrate,

1 by providing well-supported and clear arguments[] that the district court has erred.”
2 *Premier Tr. of Nev., Inc. v. City of Albuquerque*, 2021-NMCA-004, ¶ 10, 482 P.3d
3 1261. Absent any argument applying the relevant law to the particular facts and
4 circumstances and explaining why the district court erred, we apply our presumption
5 of correctness and affirm. *See State v. Oppenheimer & Co.*, 2019-NMCA-045, ¶ 8,
6 447 P.3d 1159. “It is of no benefit either to the parties or to future litigants for this
7 Court to promulgate case law based on our own speculation rather than the parties’
8 carefully considered arguments.” *Elane Photography, LLC*, 2013-NMSC-040, ¶ 70.
9 The risk of error is simply too great. *See id.*


10 **CONCLUSION**

11 {16} For the foregoing reasons, we affirm the district court’s judgment in all
12 respects.

13 {17} **IT IS SO ORDERED.**

14 
15 **JANE B. YOHALEM, Judge**

16 **WE CONCUR:**

17 
18 **SHAMMARA H. MENDERSON, Judge**

19 
20 **GERALD E. BACA, Judge**