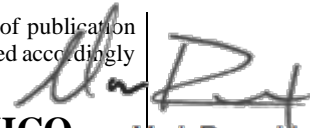


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Mark Reynolds

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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

Petitioner-Appellee,

v.

No. A-1-CA-40593

GERALD H.,

Respondent-Appellant,

and

VIVION H.,

Respondent,

IN THE MATTER OF JEREMY H.,

Child.

APPEAL FROM THE DISTRICT COURT OF LUNA COUNTY

Jarod K. Hofacket, District Court Judge

Mary E. McQueeney, Chief Children's Court Attorney

Santa Fe, NM

Kelly P. O'Neill, Assistant Children's Court Attorney

Albuquerque, NM

for Appellee

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

Nancy L. Simmons

Albuquerque, NM

for Appellant

1 Rio Law Firm
2 Francis J. Rio, III
3 Clovis, NM

4 Guardian Ad Litem

5 **MEMORANDUM OPINION**

6 **IVES, Judge.**

7 {1} Father appeals a district court judgment terminating his parental rights to
8 Child. This Court issued a notice of proposed summary disposition, proposing to
9 affirm. Father responded to our notice with a memorandum in opposition in which
10 he complained about the inadequacy of both the docketing statement and this Court's
11 summary calendar process. We issued an order allowing appellate counsel an
12 extension of time to obtain the audio recording of the termination hearing and to file
13 an amended memorandum in opposition making use, as counsel deemed necessary,
14 of whatever facts that recording contained. Appellate counsel has now filed an
15 amended memorandum in opposition. Having duly considered that memorandum,
16 we remain unpersuaded that error occurred below.

17 {2} This Court's notice proposed that although the termination order on appeal
18 contains some findings consistent with a termination based upon presumptive
19 abandonment, pursuant to NMSA 1978, Section 32A-4-28(B)(3) (2005, amended
20 2022), the dispositive conclusions recited in the termination order parallel the
21 requirements of Subsection (B)(2) of that statute, which authorizes termination

1 based upon abuse or neglect that is unlikely to be remedied in the foreseeable future.
2 [2 RP 448-49] Father’s amended memorandum agrees that the district court did not
3 find a presumptive abandonment. [AMIO 12-18] Father, nonetheless, asserts that by
4 “borrowing findings from [Subsections] (B)(2) and (B)(3) and then mixing them
5 together,” the judgment somehow “fail[ed] to sustain the deterioration of Father’s
6 bond while incarcerated as evidence to support termination pursuant to [Subs]ection
7 (B)(2).” [AMIO 18] It is unclear how this argument is responsive to our proposed
8 disposition, which did not suggest that evidence regarding a “deterioration of
9 Father’s bond while incarcerated” was a necessary element of termination pursuant
10 to Subsection (B)(2). Instead, we explicitly noted that although this finding might
11 have supported a termination pursuant to Subsection (B)(3), the actual termination
12 that occurred in this case relied upon different findings and conclusions, which were
13 consistent with a termination pursuant to Subsection (B)(2). [CN 2] Accordingly,
14 our notice proposed that termination was appropriately based upon abuse or neglect,
15 the causes of which are unlikely to be remedied in the foreseeable future, despite the
16 reasonable efforts of Children, Youth and Families Department (the Department),
17 “rather than a presumptive abandonment pursuant to [S]ubsection (B)(3).” [CN 3]
18 {3} Father’s amended memorandum agrees that a termination pursuant to
19 Subsection (B)(2) requires the Department to establish and the district court to find
20 that:

1 (1) the child was abused or neglected; (2) the conditions and causes of
2 abuse or neglect are unlikely to change in the foreseeable future; and
3 (3) [the Department] has made reasonable efforts to assist the parent in
4 adjusting the causes and conditions which render him or her unable to
5 properly care for the child.

6 [AMIO 19] On appeal, Father does not challenge the district court’s finding of
7 neglect. [2 RP 424; CN 4]

8 {4} With regard to whether the conditions and causes leading to that neglect are
9 likely to change, Father asserts that the Department failed to establish this fact by
10 clear and convincing evidence. [AMIO 20] Of relevance to the likelihood of change,
11 our notice pointed out that Father’s docketing statement did not challenge certain
12 findings made in the district court’s order:

13 That order finds that between May of 2021 and July of 2022, Father
14 corresponded only three times with Child, despite the Department
15 providing addressed and stamped envelopes so that Father could write
16 to Child. [2 RP 428] That order also finds that Father has refused to
17 sign a release of information that would allow the Department to assess
18 his progress and compliance with the treatment plan. [2 RP 437]
19 Apparently as a result of that refusal, there was conflicting evidence
20 regarding whether Father completed a self-control program or a
21 functional literacy program while incarcerated. [2 RP 434]
22 Nonetheless, the district court found that there was no dispute that “he
23 only completed one of the two and neither of them are sufficient in
24 themselves to ready [him] to parent [Child].” [Id.]

25 [CN 5]

26 {5} With regard to Father’s correspondence with Child, Father’s amended
27 memorandum directs our attention to a permanency planning report filed with the
28 district court prior to the termination hearing, which recites he had written “several

1 letters” to Child, including “drawings such as a truck and another of a cartoon.”
2 [AMIO 36; DS 6; 2 RP 279] Father does not assert that this planning report was
3 received in evidence at the hearing, but does assert that it “strongly suggests Father
4 was sending more than three letters, whether [the Department] tracked them or not.”
5 [AMIO 36] We note that a caseworker’s statement that Father sent several letters
6 does not contradict the district court’s finding that he corresponded with Child three
7 times. And, more importantly, Father’s amended memorandum does not assert that
8 the evidence actually received at the termination hearing—testimony that Father sent
9 one letter and two pictures—failed to support the more specific finding made by that
10 court. [AMIO 36-37]

11 {6} With regard to the ambiguous evidence of programs completed while
12 incarcerated, Father’s amended memorandum informs us, based upon a review of
13 the audio transcript, that the testimony “tends to support that Father completed a
14 literacy program.” [AMIO 34] However, as the district court noted, “[w]hether he
15 completed the Functional Literacy class or the Self Control class is not particularly
16 material; it is undisputed he only completed one of the two.” [2 RP 434] Of more
17 significance, Father refused to sign a release of information—as required by his
18 treatment plan—that would have allowed the Department access to this information
19 as well as the results of a psychosocial evaluation that was also required by his
20 treatment plan. [AMIO 28] As a result, it is unclear whether the psychosocial

1 evaluation took place. [Id.] Father’s amended memorandum suggests various ways
2 in which the Department could have made greater efforts to assist Father in obtaining
3 a psychosocial evaluation. [AMIO 28-30] That memorandum, however, does not
4 suggest any way in which the Department could have overcome the obstacle created
5 by Father’s refusal to sign a release that would have allowed access to the results of
6 any such an evaluation.

7 {7} According to Father’s treatment plan, the purpose of that evaluation was to
8 “identify any needs he may have and follow recommendations.” [DS 4] In order for
9 his caseworker to assess Father’s needs, to assess his progress, to make appropriate
10 recommendations, and to “develop a treatment plan directed to assist the parent in
11 his or her specific circumstances and individualized needs” [AMIO 30], it was
12 necessary for Father to execute a release that would have allowed access to what
13 Father, himself, calls “a baseline document—the psychosocial evaluation” [id.] As
14 the district court pointed out: “Such a release is basic and foundational to a treatment
15 plan. It is not a final step that can be completed near the end of a treatment plan. It
16 is the basis for fine tuning treatment and monitoring progress and compliance.” [2
17 RP 468] More than anything else, it appears Father’s refusal to sign a release
18 prevented him from progressing in his treatment plan so that the conditions and
19 causes of Child’s neglect could be addressed. And, ultimately, Father’s amended
20 memorandum does not persuade us that the district court erred by finding that,

1 “[e]ven if [Father] were released from incarceration now, he and the child do not
2 share [a] parent-child bond and he would not have the parenting skills necessary to
3 care for his child who has special needs.” [2 RP 438] On that basis, the district court
4 appropriately concluded that the conditions and causes of Child’s neglect are
5 unlikely to change in the foreseeable future.

6 {8} With regard to the Department’s efforts to assist Father, we note that “[w]hat
7 constitutes reasonable efforts may vary with a number of factors, such as the level
8 of cooperation demonstrated by the parent and the recalcitrance of the problems that
9 render the parent unable to provide adequate parenting.” *State ex rel. Child., Youth*
10 *& Fams. Dep’t v. Patricia H.*, 2002-NMCA-061, ¶ 23, 132 N.M. 299, 47 P.3d 859.
11 In the present case, it is unclear what more the Department could have done to assist
12 Father, largely because Father refused to share basic information about his own
13 needs with the Department. The recalcitrance of Father’s problems is also somewhat
14 unclear to everyone involved in this case, given Father’s refusal to sign a release.
15 What is clear, however, is that Father was not cooperating with the Department in
16 its efforts to provide him with an individualized treatment plan designed to address
17 those problems, whatever they were. We conclude that, given the circumstances of
18 this case, the evidence supported the district court’s finding that the Department
19 made reasonable efforts to assist Father.

1 {9} Finally, to the extent that Father’s counsel continues to object to a resolution
2 of this appeal on this Court’s summary calendar, “without an official transcript of
3 proceedings having been filed” [AMIO 2], we note that counsel has had the benefit
4 of reviewing the entire existing record of this case. As a result, assignment to this
5 Court’s general calendar would not make available any fuller picture of what
6 occurred below, and it appears Father and his counsel have not only been “afforded
7 a record of sufficient completeness to permit proper consideration of [his] claims,”
8 but have had access to the entirety of the existing record. *State v. Ibarra*, 1993-
9 NMCA-040, ¶ 9, 116 N.M. 486, 864 P.2d 302 (internal quotation marks and citation
10 omitted), *cert. granted*, 115 N.M. 602, 856 P.2d 250 (1993), *writ quashed sub nom.*
11 *State v. Rodriguez*, 117 N.M. 744, 877 P.2d 44 (1994).

12 {10} Father’s amended memorandum still does not address many of the extensive
13 factual findings made by the district court, including facts relied upon in our notice.
14 [2 RP 423-450; CN 5-7] Ultimately, we conclude that Father has not met the burden
15 shouldered by every appellant—regardless of their party designation below—to
16 show that the trial court committed error. *See State v. Aragon*, 1999-NMCA-060,
17 ¶ 10, 127 N.M. 393, 981 P.2d 1211 (noting that the party claiming error bears the
18 burden of showing such error); *see also Farmers, Inc. v. Dal Mach. & Fabricating,*
19 *Inc.*, 1990-NMSC-100, ¶ 8, 111 N.M. 6, 800 P.2d 1063 (stating that the burden is on
20 the appellant to clearly demonstrate that the trial court erred). More specifically, in

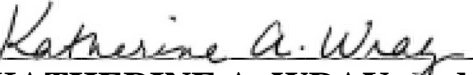
1 the context of our summary calendar, we conclude that Father has not met his burden
2 “to clearly point out errors in fact or law” in our proposed disposition. *Hennessy v.*
3 *Duryea*, 1998-NMCA-036, ¶ 24, 124 N.M. 754, 955 P.2d 683; *State v. Mondragon*,
4 1988-NMCA-027, ¶ 10, 107 N.M. 421, 759 P.2d 1003, *superseded by statute on*
5 *other grounds as stated in State v. Harris*, 2013-NMCA-031, ¶ 3, 297 P.3d 374.
6 Thus, for the reasons stated here and in our notice of proposed summary disposition,
7 we affirm the district court’s judgment terminating parental rights.

8 {11} **IT IS SO ORDERED.**

9
10 
ZACHARY A. IVES, Judge

11 **WE CONCUR:**

12 
13 **MEGAN P. DUFFY, Judge**

14 
15 **KATHERINE A. WRAY, Judge**