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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico

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Mark Reynolds

Petitioner-Appellee,

V.

No. A-1-CA-42785

VALERIE E. a/k/a VALARIE E..

Respondent-Appellant,

10 IN THE MATTER OF ASTORIA L., a Child.

11 **APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY**
12 **Grace B. Duran, District Court Judge**

13 Children, Youth & Families Department
14 Andrea D. Romero, Chief Children's Court Attorney
15 Santa Fe, NM
16 Cynthia Tessman, Children's Court Attorney
17 Albuquerque, NM

18 for Appellee

19 McBryde Law LLC
20 Deian McBryde
21 Albuquerque, NM

22 for Appellant

23 Jennifer L. Munson
24 Las Cruces, NM

25 || Guardian Ad Litem

DECISION¹

2 WRAY, Judge.

3 {1} Mother appeals the termination of her parental rights related to Child under
4 NMSA 1978, Section 32A-4-29 (2022). We affirm, because we conclude that (1) the
5 absence of a pretermination report or testimony from the guardian ad litem (the
6 GAL) did not cause fundamental error or violate Mother’s due process rights; and
7 (2) the district court did not exclude “evidence necessary for Mother’s defense.”

8 | DISCUSSION

9 {2} Because this decision is prepared for the benefit of the parties, who are
10 familiar with the factual and procedural background, we reserve discussion of the
11 facts to those that are necessary for the analysis. Mother argues that this Court should
12 reverse the termination of her parental rights because (1) the GAL did not comply
13 with mandatory duties to report and disclose; (2) Mother did not receive due process
14 based on the GAL’s lack of compliance; (3) the district court improperly excluded
15 evidence from the April 2025 termination of parental rights (TPR) hearing even
16 though the evidence had been admitted at an earlier hearing; and (4) the exclusion
17 of the evidence violated Mother’s due process rights. We consider the GAL’s duties
18 before turning to the evidentiary issues.

¹This case is disposed by nonprecedential decision pursuant to Rule 12-405(B) NMRA, having been considered on the expedited bench calendar under *In re Court of Appeals Caseload*, Misc. Order No. 01-57 (Sept. 1, 2016).

1 **I. The GAL's Duties**

2 {3} Mother's first set of arguments stem from the GAL's compliance with certain
3 mandatory duties under NMSA 1978, Section 32A-1-7(E)(7) (2005) and Rule
4 10-333 NMRA. In relevant part, Section 32A-1-7(E)(7) includes the following
5 requirement: "Unless a child's circumstances render the following duties and
6 responsibilities unreasonable, a guardian ad litem shall . . . report to the court on the
7 child's adjustment to placement, the department's and respondent's compliance with
8 prior court orders and treatment plans and the child's degree of participation during
9 visitations." No less than fifteen days before a TPR hearing, a guardian ad litem
10 "shall disclose and make available to the parties" a number of items, including (1)
11 statements of the child's and the guardian ad litem's positions regarding the
12 termination of parental rights; (2) documents or tangible objects that the guardian ad
13 litem intends to introduce as evidence or that were prepared by a witness that the
14 guardian ad litem intends to call; and (3) a witness list and any recorded statement
15 made by that witness. Rule 10-333(A). We refer to the statute- and rule-based duties
16 as "the GAL rules." Mother argues that (1) the inactions of the GAL and the district
17 court before the TPR hearing caused fundamental error and violated due process
18 protections; and (2) the proposed findings of fact and conclusions of law filed by the
19 GAL after the TPR hearing also violated due process protections. As we explain,
20 based on the record before us, we disagree.

1 {4} The parties do not dispute that the GAL did not provide written statements of
2 Child's and the guardian ad litem's positions regarding the termination of parental
3 rights, and Mother acknowledges that she did not object prior to or during the TPR
4 proceedings.² In the absence of an objection, we review for fundamental error. *See*
5 *State ex rel. Child., Youth & Fams. Dep't v. Paul P., Jr.*, 1999-NMCA-077, ¶ 14,
6 127 N.M. 492, 938 P.2d 1011 (recognizing that fundamental error, a doctrine
7 ordinarily reserved for criminal cases, can apply in a TPR proceeding). In this
8 context, an error may be fundamental if it goes “to the foundation of the case, or
9 deprive[s the parent] of rights essential to [their] defense.” *State ex rel. Child., Youth*
10 *& Fams. Dep't v. Josie G.*, 2021-NMCA-063, ¶ 22, 499 P.3d 658 (alterations,
11 internal quotation marks, and citation omitted). For the purposes of this appeal, we
12 assume that the GAL did not comply with the GAL rules and that error occurred.
13 *See State v. Romero*, 2023-NMSC-014, ¶ 6, 533 P.3d 735 (noting that the first step
14 of the fundamental error analysis is “whether error occurred” (internal quotation
15 marks and citation omitted)).³ We therefore move onto the second step of the two-
16 part fundamental error analysis. *See id.* (explaining that the second step requires a

²In the notice of assignment to the general calendar, this Court directed Mother to brief the issues related to the GAL's performance.

³The parties dispute whether if the GAL had no position on the termination of parental rights, a written disclosure to that effect is required under Rule 10-333(A)(2). We need not resolve the dispute but observe that the disclosure of no position before the TPR hearing would be helpful to all parties to the proceeding.

1 showing that the error is fundamental by demonstrating “the existence of
2 circumstances that shock the conscience or implicate a fundamental unfairness
3 within the system that would undermine judicial integrity if left unchecked” (internal
4 quotation marks and citation omitted)). To do that, we first take note of the dual roles
5 of a guardian ad litem in a TPR proceeding.

6 {5} A guardian ad litem’s role during a TPR proceeding includes: “(1) acting as
7 an extension of the court by performing the quasi-judicial functions of investigating
8 the facts and reporting to the court what placement was in the child’s best interests,
9 and (2) acting as an advocate for [their] client’s position in the same way as does
10 any other attorney for a client—advancing the interests of the client, not discharging
11 (or assisting in the discharge of) the duties of the court.” *State ex rel. Child., Youth*
12 & Fams. Dep’t v. George F.

, 1998-NMCA-119, ¶ 12, 125 N.M. 597, 964 P.2d 158
13 (alterations, internal quotation marks, and citation omitted). A guardian ad litem acts
14 as an arm of the court when performing investigative duties. *Id.* ¶¶ 12-13. The
15 purpose of a guardian ad litem’s investigatory duties “has been said to have
16 developed from a concern that children who have been abused by their parents or
17 caretakers, have also been abused by the system designed to protect them.” *Id.* ¶ 15
18 (internal quotation marks and citation omitted). The GAL rules, Section 32A-1-
19 7(E)(7) and Rule 10-333, establish procedures for how a guardian ad litem can

1 present the evidence of the investigation and any resulting opinion, while also giving
2 the other parties notice and an opportunity to be heard on that evidence and opinion.

3 {6} The GAL’s failure to comply with the GAL rules does not, as we explain,
4 automatically cause the GAL’s performance to be materially deficient, without
5 inquiry into the proceedings as a whole. The GAL rules provide remedies for failure
6 to comply but make no mention of a new TPR proceeding. *See* Rule 10-333(E) (“If
7 the child’s guardian ad litem or attorney fails to comply with any of the provisions
8 of this rule, the court may enter any order pursuant to Rule 10-137 NMRA or Rule
9 10-165 NMRA.”); *see also* Rule 10-137(B) (setting forth remedies for failure to
10 comply with the rules); Rule 10-165(D) (same). Instead, this Court has considered a
11 guardian ad litem’s performance to be “materially deficient” when the GAL “failed
12 to actively participate in the proceedings . . . , did not present to the [district] court
13 her findings or position concerning the child’s best interests, or the position of the
14 child,” which resulted in “passive representation of the child.” *State ex rel. Child.,*
15 *Youth & Fams. Dep’t v. Marian M.*, 1998-NMCA-039, ¶ 40, 124 N.M. 735, 955
16 P.2d 204. Similarly, this Court determined that the guardian ad litem’s representation
17 was adequate when she exercised her judgment not to advance the child’s revised
18 story in the proceedings, because no evidence demonstrated “any level of personal
19 conflict or inappropriate agenda that would raise a serious question about the
20 guardian ad litem’s ability to advance independent and rational positions to the court

1 and to give independent and rational advice to" the child. *State ex rel. Child., Youth*
2 & Fams. Dep't v. Patricia N., 2000-NMCA-035, ¶¶ 31-32, 128 N.M. 813, 999 P.2d
3 1045. In the present case, the GAL's failure to comply with the GAL rules did not
4 result in what Mother argues was a "lack of meaningful participation, reports, and
5 positions from the GAL."

6 {7} The GAL actively participated in the TPR proceedings. Although the record
7 does not show that the GAL complied with the GAL rules, she participated in
8 multiple hearings before the TPR hearing. During the TPR hearing, she cross-
9 examined multiple witnesses, including Mother, and gave her the chance to tell the
10 district court anything that she "would like to tell the judge." In response to that
11 question, Mother took the chance to tell the district court why her parental rights
12 should not have been terminated. In this way, the GAL performed one of the dual
13 roles of a guardian ad litem in TPR proceedings and her representation was more
14 than the "passive representation" that this Court has criticized. *See Marion M.*, 1998-
15 NMCA-039, ¶ 40.

16 {8} For similar reasons, lack of a record of compliance with the GAL rules did
17 not result in fundamental error. The GAL did not generate evidence or offer an
18 opinion on that evidence at the TPR hearing, and Mother did not call the GAL as a
19 witness. As a result, the lack of notice of any such evidence or opinion did not
20 deprive Mother of the opportunity to fully prepare for the TPR hearing, rebut the

1 evidence presented by the Children, Youth & Families Department (the
2 Department), or present her own evidence to support her position. Because any
3 failure to comply with the GAL rules did not impact Mother's defense, fundamental
4 error did not arise. *See Josie G.*, 2021-NMCA-063, ¶ 22 (discerning no fundamental
5 error "because the alleged error does not go to the foundation of the case, or deprive
6 [the parent] of rights essential to [their] defense" (alterations, internal quotation
7 marks, and citation omitted)).

8 {9} Our determination that no fundamental error occurred also answers Mother's
9 due process argument. A "[m]other's right to her legal relationship with her children
10 is fundamental" and "proceedings affecting this relationship must also protect her
11 right to due process." *State ex rel. Child., Youth & Fams. Dep't v. Stella P.*, 1999-
12 NMCA-100, ¶ 14, 127 N.M. 699, 986 P.2d 495. In the TPR context, procedural due
13 process

14 includes notice to the person whose right is affected by a proceeding,
15 that is, timely notice reasonably calculated to inform the person
16 concerning the subject and issues involved in the proceeding; a
17 reasonable opportunity to refute or defend against a charge or
18 accusation; a reasonable opportunity to confront and cross-examine
19 adverse witnesses and present evidence on the charge or accusation;
20 representation by counsel, when such representation is required by
21 constitution or statute; and a hearing before an impartial decisionmaker.

22 *State ex rel. Child., Youth & Fams. Dep't v. Ruth Anne E.*, 1999-NMCA-035, ¶ 26,
23 126 N.M. 670, 974 P.2d 164. Reviewing the question of due process de novo, *id.*
24 ¶ 22, we conclude that Mother's interest in the GAL adhering to the GAL rules

1 outweighed any interest in *not* doing so. *See State ex rel. Child., Youth & Fams.*
2 *Dep’t v. Browind C.*, 2007-NMCA-023, ¶ 31, 141 N.M. 166, 152 P.3d 153 (outlining
3 the three-factor due process balancing test that weighs “(1) the mother’s interest, (2)
4 the risk to the mother of an erroneous deprivation through the procedures used and
5 the probable value of additional or substitute procedures as safeguards, and (3) the
6 government’s interest”). Nevertheless, the risk that the GAL’s noncompliance would
7 result in the erroneous deprivation of Mother’s rights was minimal, *see id.*, because
8 there was “no realistic possibility” of a different outcome under the circumstances
9 of the present case, *see id.* ¶ 36. As we have explained, the GAL offered no
10 undisclosed evidence or testimony. The decision to terminate Mother’s parental
11 rights was based on both the Department’s and Mother’s presented evidence.
12 Because the TPR decision could not have been based on any undisclosed evidence
13 from the GAL, Mother does not demonstrate a reasonable likelihood that the
14 outcome would have been different had the GAL complied with the GAL rules
15 before the TPR hearing. *See id.* ¶ 38 (requiring, for due process purposes, a parent
16 to show “a reasonable likelihood that the outcome might have been different.”
17 (emphasis, internal quotation marks, and citation omitted)). Under these
18 circumstances, any lack of compliance with the GAL rules before the TPR hearing
19 did not violate due process protections. *See State ex rel. Child., Youth and Fams.*
20 *Dep’t v. Brandy S.*, 2007-NMCA-135, ¶ 31, 142 N.M. 705, 168 P.3d 1129.

1 {10} Mother also suggests that she had no meaningful opportunity to respond to
2 the GAL's proposed findings of fact and conclusions of law that were filed after the
3 TPR hearing. The GAL's proposed findings of fact and conclusions of law were
4 based solely on the evidence presented by the other parties at the TPR hearing. The
5 GAL's proposed conclusions of law—set forth without argument in four numbered
6 paragraphs—stemmed directly from the same evidence that was available to Mother.
7 Mother therefore had the opportunity to use and rebut the evidence that the GAL
8 used. Even if additional information had been presented by the GAL, Mother does
9 not demonstrate how she would have changed her defense if she had access to the
10 information contained in the GAL's findings before the TPR hearing. *See id.*
11 (requiring a showing that the “outcome of the case *might* have been different”
12 (alteration, internal quotation marks, and citation omitted)). As a result, under these
13 circumstances, the GAL's proposed findings of fact and conclusions of law did not
14 deprive Mother of a meaningful opportunity to respond to the evidence presented.
15 *See Browind C.*, 2007-NMCA-023, ¶ 38.

16 {11} Mother also broadly argues that the district court's failure to enforce the GAL
17 rules caused fundamental error. We agree that “[t]he [district] court had a duty to
18 elicit the guardian ad litem's position on substantive issues throughout the course of
19 the abuse and neglect proceeding in fulfilling its affirmative duty of protecting the
20 best interests of the child.” *Marion S.*, 1998-NMCA-039, ¶ 42. As we have noted,

1 however, the district court had the benefit of the GAL's participation at both the TPR
2 hearing and earlier hearings, and we are unpersuaded that fundamental error or a due
3 process violation resulted from the GAL's particular lapse in the present case.
4 Nevertheless, we have observed before that even when no fundamental error resulted
5 in the particular case, under different circumstances, the failure to comply with the
6 GAL rules could amount to fundamental error. *See Brandy S.*, 2007-NMCA-135,
7 ¶ 20 (noting that the fact-based conclusion in that case that the proceedings were not
8 fundamentally unfair "does not foreclose the possibility" that under different
9 circumstances, the procedures used "could amount to structural error"). Similarly,
10 this Court has cautioned that a fact-based finding that no due process violation
11 occurred under particular circumstances did not mean that the procedures used did
12 not raise "grave concerns" for future cases. *Id.* ¶ 32. Though the circumstances in
13 the present case do not support reversal, "due process requires that respondents have
14 notice and an opportunity to challenge factual assertions" and the failure to follow
15 the GAL rules combined with evidence presented by the GAL could result in a due
16 process violation or fundamental error. *Id.*

17 **II. The Drug Test Evidence**

18 {12} Mother argues that the district court abused its discretion by excluding
19 evidence from the TPR hearing and that the exclusion of evidence prejudiced her
20 defense and violated due process protections. This Court reviews the exclusion of

1 evidence for abuse of discretion. *State ex rel. Child., Youth & Fams. Dep’t v. Jerry*
2 *K.*, 2015-NMCA-047, ¶24, 347 P.3d 724. First, we summarize the relevant
3 proceedings.

4 {13} At a January 2024 hearing, the Department reported to the district court that
5 Child had tested positive for methamphetamine in November 2024 and Mother
6 tested positive for methamphetamine in December 2024. Mother offered a medical
7 witness to dispute that Child’s methamphetamine exposure was attributable to
8 Mother. The district court directed Mother to file a motion so that the matter could
9 be heard with notice to all parties, including the GAL, who indicated that she had
10 not received Mother’s witness list. After the hearing, Mother filed two motions to
11 dismiss the petition, based on statutory timelines and allegations that Child was
12 exposed to methamphetamine while in the Department’s care. The Department
13 responded and filed a witness list with a medical witness identified. On January 8,
14 2025, Mother again tested positive for methamphetamine.

15 {14} At the motion hearing (the February hearing), the parties stipulated to the
16 admission of six exhibits that reflected drug test results, including Exhibit 6. Exhibit
17 6 contained the test results for an independent drug test that Mother obtained on
18 January 20, 2025 (the independent drug test). Mother testified that the independent
19 drug test was negative for methamphetamine but positive for marijuana. Mother did
20 not call the medical witness. The district court reserved ruling about the motion to

1 dismiss related to the methamphetamine exposure, and the hearing shifted to a
2 permanency hearing. *See* NMSA 1978, § 32A-4-25.1 (2016) (establishing the
3 parameters for a permanency hearing).

4 {15} At the TPR hearing held in April, Mother again raised the independent drug
5 test. During the testimony of an expert witness, Mother attempted to ask about the
6 negative drug test result that had been reflected in Exhibit 6. After some discussion
7 about the admission of Exhibit 6 during the February hearing, during which the
8 Department pointed out that no negative drug test was in evidence at the TPR
9 hearing, the district court sustained the objection and asked Mother to “go on to
10 something else.” When cross-examining the Department caseworker, Mother asked,
11 “You’re aware—or you saw in our last hearing the negative drug results?” The
12 Department caseworker responded, “I was made aware of it.” In her testimony,
13 Mother was not asked about taking the independent drug test, and Mother did not
14 offer Exhibit 6 into evidence or provide any other testimony related to the
15 independent drug test.

16 {16} On appeal, Mother contends that the district court “incorrectly rule[d] that
17 evidence admitted during a previous evidentiary hearing was ineligible for reference
18 during a TPR hearing.” Mother notes that Exhibit 6 was admitted at the portion of
19 the February hearing dedicated to her motions and not the permanency portion of
20 the hearing. For that reason, Mother maintains that Exhibit 6 was generally admitted

1 during an evidentiary hearing, which was governed by the New Mexico Rules of
2 Evidence, and as a result, Exhibit 6 “should have been available for use during the
3 TPR hearing.” *See* Rule 10-141 NMRA (providing that that “[t]he New Mexico
4 Rules of Evidence shall govern all proceedings in the [district]court, except as
5 otherwise provided by law”); Rule 11-1101(D)(3)(g)(iii) NMRA (excepting from
6 the Rules of Evidence permanency hearings in abuse and neglect proceedings). The
7 district court, however, did not exclude Exhibit 6, or related test results, from the
8 TPR hearing.

9 {17} The district court did not permit Mother to refer to the contents of Exhibit 6—
10 which had been admitted by stipulation at a prior hearing on Mother’s motions and
11 had not been offered or admitted at the TPR hearing—with the particular witness.
12 No authority suggests that an exhibit admitted at an earlier evidentiary hearing need
13 not be offered and admitted at a subsequent TPR hearing. *See Brandy S.*, 2007-
14 NMCA-135, ¶ 20 (noting the possibility that structural error could result from “the
15 exercise of judicial notice in TPR proceedings”). And as we have explained, the
16 exhibit was not offered at the TPR hearing. Nor was testimony about the independent
17 drug test excluded—the Department caseworker was asked about the test and
18 Mother was not questioned about it. The district court, in its findings and
19 conclusions, noted both (1) that Mother tested positive for a THC metabolite,
20 codeine, and methamphetamine on January 8, 2025; and (2) the substantially

1 different results from the independent drug test that was given soon after—that on
2 January 20, 2025, Mother “tested positive for marijuana.” This finding demonstrates
3 that Mother made her point with the evidence—that a Department test was positive
4 for methamphetamine and soon thereafter an independent test was negative for
5 methamphetamine. For these reasons, we conclude that Exhibit 6 and the
6 independent drug test were not excluded but instead were not permitted to be used
7 in the manner that Mother first attempted. In holding to the strictures of a TPR
8 hearing, we discern no abuse of discretion or due process violation. *See Brandy S.*,
9 2007-NMCA-135, ¶¶ 31-32.

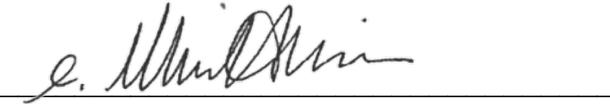
10 **CONCLUSION**

11 {18} We affirm.

12 {19} **IT IS SO ORDERED.**

13 
14 KATHERINE A. WRAY, Judge

15 **WE CONCUR:**

16 
17 **J. MILES HANISEE, Judge**

18 
19 **ZACHARY A. IVES, Judge**