

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico
Filed 10/19/2026 11:38 AM

**EMILY DAVIS n/k/a
EMILY GAMMON,**

Petitioner-Appellant,

v.

No. A-1-CA-43097

ZACK VOSS,

Respondent-Appellee

and

**STATE OF NEW MEXICO ex rel.
HUMAN SERVICES DEPARTMENT,**

Intervenor.

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY

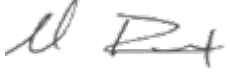
David P. Reeb, District Court Judge

Lauren Joseph Wolongevicz
Albuquerque, NM

for Appellant

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for Appellee



Mark Reynolds

1 **MEMORANDUM OPINION**

2 **HENDERSON, Judge.**

3 {1} Emily Davis, now Emily Gammon (Mother), appeals from an order modifying
4 custody to award primary physical custody of her son (Child) to Zach Voss (Father)
5 if Mother relocates to South Carolina. Specifically, Mother argues that the order
6 should be reversed because the district court: (1) abused its discretion by
7 conditioning custody on relocation instead of the best interests of Child and the
8 required factors under NMSA 1978, Section 40-4-9 (1977) and NMSA 1978,
9 Section 40-4-9.1 (1999); (2) failed to independently evaluate the guardian ad litem's
10 (GAL) recommendation; and (3) infringed on her constitutional right to travel.
11 Following review of the record, we are not persuaded that reversible error occurred
12 and therefore affirm.

13 **BACKGROUND**

14 {2} Mother and Father are the biological parents of Child, born May 25, 2018.
15 The parents were never married, and in 2021 agreed to joint legal custody and a
16 parenting plan for Child, with Mother having primary physical custody during the
17 school year and Father having frequent visitation and increased physical custody
18 during summer breaks.¹ Mother then filed a motion to modify custody in 2025,

¹The State of New Mexico, Human Services Department, Child Support Enforcement Division intervened in this action pursuant to Rule 1-024 NMRA;

1 seeking to relocate with Child from Clovis, New Mexico to South Carolina while
2 keeping the same shared-custody arrangement following her new marriage. Father
3 responded to Mother’s motion with a counterclaim that if Mother relocates, Father
4 should be granted primary physical custody of Child.

5 {3} The district court held a hearing where Mother, Father, Mother’s neighbor,
6 Mother’s husband, Father’s wife, Child’s grandparents, and the appointed GAL
7 testified. The district court found that the relocation was a material change in
8 circumstances and determined that remaining in New Mexico would be in the best
9 interests of Child. The court used a split “Best, Better, Good” decision to establish
10 that the “Best” option for Child is for Mother to remain in Clovis with primary
11 physical custody and to keep the existing custody arrangement as the status quo.
12 However, if Mother relocates to South Carolina, the “Better” option would be for
13 primary physical custody to transfer to Father in Loving, New Mexico with Mother
14 receiving visitation. Finally, if Mother relocates and Father chooses not to act as
15 primary custodian, the “Good” option is for Child to relocate with Mother and for
16 Father to have visitation. The order proposed to adopt the visitation schedule
17 according to the GAL’s recommendations.

NMSA 1978, Section 27-2-27 (2024); and NMSA 1978, Sections 40-11A-101 to -903 (2009), because Mother requested child support.

{4} Mother now appeals from the order. We consider Mother’s arguments below, further developing the factual background as necessary to the disposition of each issue.

DISCUSSION

{5} On appeal, Mother argues that the order modifying custody should be reversed because the district court: (1) abused its discretion by determining custody based on her relocation instead of considering the required best interests of the child factors; (2) failed to independently evaluate whether the GAL’s recommendation was biased or based on incomplete information; and (3) impermissibly infringed on her constitutional right to travel. We address each issue in turn.

I. Custody Determination

{6} Mother first argues that the district court improperly conditioned the custody arrangement on her geographic location rather than considering the required best interests factors, effectively applying a presumption against her as the relocating parent. Father argues that although the district court did not make point-by-point findings corresponding to the statutory factors, it was not required to and the order reflects a careful best-interests evaluation. We agree with Father and explain.

{7} “We review a district court’s child custody determination for abuse of discretion, and we will uphold the district court’s findings if they are supported by substantial evidence.” *Hough v. Brooks*, 2017-NMCA-050, ¶ 18, 399 P.3d 387. “An

1 abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions
2 demanded by the facts and circumstances of the case.” *Id.* (internal quotation marks
3 and citation omitted). The district court has “broad discretion and great flexibility in
4 fashioning a custody arrangement that will serve the best interests of the children,”
5 *Newhouse v. Chavez*, 1988-NMCA-110, ¶ 23, 108 N.M. 319, 772 P.2d 353, but “the
6 failure of a district court to apply the applicable statutory guidelines to order a
7 change of custody will constitute an abuse of discretion.” *Hough*, 2017-NMCA-050,
8 ¶ 18.

9 {8} When a parent seeks to modify an existing custody order because of a
10 proposed relocation, the district court must consider all of the information presented
11 and “decide what new arrangement will serve the child’s best interests.” *Jaramillo*
12 *v. Jaramillo*, 1991-NMSC-101, ¶ 27, 113 N.M. 57, 823 P.2d 299;² *see* § 40-4-9(A)
13 (“In any case in which a judgment or decree will be entered awarding the custody of
14 a minor, the district court shall, if the minor is under the age of fourteen, determine
15 custody in accordance with the best interests of the child.”). In order to determine

²Either parent can seek modification if “a substantial and material change in circumstances affecting the welfare of the child has occurred or is about to occur.” *Jaramillo*, 1991-NMSC-101, ¶ 27. Here, the district court found that “it’s clear there’s a material change in circumstances that’s being forced upon us and that’s a long-distance relocation.” The parties do not contest this finding and we accept it on appeal. *See Hopkins v. Wollaber*, 2019-NMCA-024, ¶ 27, 458 P.3d 583 (explaining that where a parent does not challenge a district court’s findings, the findings “are binding on this Court”).

1 the best interests of a child, the district court must consider the statutorily required
2 factors including, but not limited to:

3 (1) the wishes of the child's parent or parents as to [child's] custody;

4 (2) the wishes of the child as to [their] custodian;

5 (3) the interaction and interrelationship of the child with [their] parents,
6 [their] siblings and any other person who may significantly affect the
7 child's best interest[s];

8 (4) the child's adjustment to [their] home, school and community; and

9 (5) the mental and physical health of all individuals involved.

10 Section 40-4-9(A).

11 {9} In this case, the district court heard testimony from Mother's neighbor,
12 Child's maternal grandparents, Mother's husband, and Mother in support of
13 Mother's motion. In support of Father's motion, the district court heard from Father,
14 Father's wife, and Child's paternal grandmother. Each party testified about their
15 relationship with Child, current employment and living situation, and whether
16 Mother or Father were suitable parents. The GAL also testified and provided a
17 written recommendation to the district court, recommending that Father be the
18 primary custodial parent during the school year while Child lives with Mother in the
19 summer and on breaks. The GAL explained that although Child most recently stated
20 he wanted to move to South Carolina with Mother, the GAL had concerns about

1 Child having changed his mind from previously wanting to stay with Father and that
2 Child may have been coached into saying he wanted to move with Mother.

3 {10} After hearing the evidence presented, the district court weighed various
4 considerations including: “Clovis is probably the best place for [Child] because now
5 finally he’s doing well, really well in school with his current placement”; concerns
6 that Mother does not have her own place in Clovis and lives with relatives; Child is
7 “somewhat familiar with Loving, not familiar with South Carolina”; Father “is more
8 stable; he has a full-time job, his wife has a full-time job, [and] they have their own
9 house,” while “there’s uncertainty surrounding [Mother] and her husband. While
10 [husband] does, sounds like, theoretically have employment, that employment [has]
11 not started. We don’t know how that employment’s going to turn out,” and
12 “[Mother] theoretically has employment with her mother-in-law, but that’s not
13 begun”; “while both parties have grandparents nearby, [Father is] fortunate to have
14 grandparents that live essentially on the same block”; and while “[Child] has a half-
15 sister that might be moving to South Carolina . . . parents have a constitutional right
16 to their children whereas a half-sibling does not.” The district court also noted that
17 the GAL’s opinion “carries significant weight.”

18 {11} The district court determined that the best option for Child was for Mother to
19 remain in Clovis and keep the existing custody arrangement, but that if Mother
20 relocated to South Carolina, the better option would be for Father to have primary

1 physical custody in Loving. In making this determination, the district court
2 acknowledged that this was “a very, very close decision,” but that the proposed plan
3 would be “less disruption” for Child. Notably, Mother does not challenge whether
4 these findings are supported by substantial evidence and clarifies that she is not
5 arguing the district court weighed the evidence incorrectly, but rather that the court
6 applied “the wrong legal framework.” Accordingly, we accept the district court’s
7 findings and focus our analysis on whether the district court failed to apply the
8 statutory factors—thereby abusing its discretion—when it made its custody
9 determination. *See Hopkins v. Wollaber*, 2019-NMCA-024, ¶ 27, 458 P.3d 583
10 (explaining that where a parent does not challenge whether findings are supported
11 by substantial evidence, the findings “are binding on this Court”).

12 {12} Although the district court’s modification order did not include written
13 findings corresponding to each factor listed in Section 40-4-9(A), the oral findings
14 and explanations at the hearing as noted above show that the court clearly considered
15 each factor before making its determination. *See Jeantete v. Jeantete*, 1990-NMCA-
16 138, ¶ 11, 111 N.M. 417, 806 P.2d 66 (explaining that appellate courts “may
17 consider the [district] court’s verbal comments in order to clarify or discern the basis
18 for the order or action of the court below”). Therefore, the record shows that the
19 district court’s decision sufficiently tracked Section 40-4-9(A)’s factors such that it
20 was not an abuse of discretion. *See Hopkins*, 2019-NMCA-024, ¶ 26 (explaining that

1 a district court’s “determination will be affirmed if its order reflects that it considered
2 the relevant [best interests] factors”); *cf. Thomas v. Thomas*, 1999-NMCA-135, ¶ 16,
3 128 N.M. 177, 991 P.2d 7 (declining to reverse a custody order despite the absence
4 of “point-by-point findings” that “correspond[ed] to the statutory factors” for
5 making a determination under Section 40-4-9.1(B) because the record indicated that
6 the district court had considered the factors).

7 {13} Additionally, while Mother argues that the district court abused its discretion
8 because it was required to consider the additional factors listed in Section 40-4-
9 9.1(B) and make a finding that relocation would not be contrary to Child’s welfare,
10 those factors do not apply to this case. “The question of whether the above statute
11 applies to the present situation is an issue of statutory construction that we review
12 de novo.” *Hough*, 2017-NMCA-050, ¶ 21; *see id.* ¶¶ 20-26 (reviewing whether
13 Section 40-4-9.1(A) applied in a custody determination de novo). Section 40-4-9.1
14 defines the standards for granting and terminating joint custody, and requires district
15 courts to consider additional factors from those provided in Section 40-4-9 when
16 “determining whether a joint custody order is in the best interests of the child.”
17 However, “[t]he plain language of Section 40-4-9.1 requires the [district] court to
18 set forth in its decision the basis for its determination *either granting or denying*
19 joint custody.” *Jeantete*, 1990-NMCA-138, ¶ 13. Where a parent is not seeking to
20 be awarded or to terminate joint custody, but only to modify an existing joint custody

1 order as Mother did in this case, consideration of Section 40-4-9.1's factors is not
2 required. *Compare Jeantete*, 1990-NMCA-138, ¶ 13 (holding that Section 40-4-9.1
3 did not apply to a parent's motion for modification that did not seek a grant or denial
4 of joint custody), *and Hopkins*, 2019-NMCA-024, ¶ 21 (explaining that the district
5 court was not required to consider or apply Section 40-4-9.1 where it was modifying,
6 not granting or terminating, an existing joint custody order), *with Hough*, 2017-
7 NMCA-050, ¶¶ 23-26 (holding that the district court was required to apply Section
8 40-9-9.1 where its order granted a change to joint custody from an existing sole
9 custody arrangement).

10 {14} Therefore, the record indicates that the district court considered the necessary
11 factors in determining whether relocation was in the best interests of Child and we
12 conclude that the district court did not abuse its discretion.

13 **II. GAL's Recommendation**

14 {15} Mother next argues that the district court abused its discretion by deferring to
15 the GAL's recommendation without ensuring it was not biased or based on
16 incomplete information. Father responds that the district court gave permissible
17 weight to the GAL's recommendation while independently assessing the evidence
18 and therefore acted within its discretion. We conclude that the district court did not
19 err in considering the GAL's recommendation.

1 {16} “In any proceeding for the disposition of children when custody of minor
2 children is contested by any party, the court may appoint an attorney at law as [GAL]
3 . . . to appear for and represent the minor children.” NMSA 1978, Section 40-4-8(A)
4 (1993); *see* Rule 1-053.3(A) NMRA (allowing the court to appoint a GAL “when
5 custody of a minor child is contested under Chapter 40 [of the New Mexico Statutes
6 Annotated]”). The GAL “serves as an arm of the court and assists the court in
7 discharging its duty to adjudicate the child’s best interests,” Rule 1-053.3(A), and
8 has various duties including interviewing children outside of the presence of parties,
9 interviewing all parties, determining the child’s wishes, and developing a written
10 report and recommendation for the court. *See* Rule 1-053.3(F). Although the district
11 court is not permitted to “delegate the ultimate determination of the child’s best
12 interests” to the GAL, Rule 1-053.3(D), a district court does not improperly
13 “abdicate its decision-making responsibility” if it decides to adopt a GAL’s
14 recommendations as to a child’s custody arrangement. *Thomas*, 1999-NMCA-135,
15 ¶ 25. In fact, the district court has “considerable discretion” in conducting the best
16 interests of the child analysis as long as it is “consistent with the evidence and
17 statutory requirements.” *Hough*, 2017-NMCA-050. ¶ 30 (internal quotation marks
18 and citation omitted).

19 {17} In this case, the GAL was appointed pursuant to Section 40-4-8 and Rule
20 1-053.3. The GAL ultimately recommended that Father be the primary custodial

1 parent for Child, with Mother having reasonable and liberal visitation. At the
2 hearing, the GAL testified that he met with Child three times and noted that there
3 were no major differences in Child when he was staying with either parent. The GAL
4 expressed a concern that Child may have been coached into saying he wanted to
5 move with Mother before their last meeting after previously requesting to stay with
6 his father. The GAL also explained that the schools in Loving could take care of
7 Child's needs with their small class sizes and low teacher to student ratios. However,
8 when asked by Mother's attorney, the GAL admitted that he may be biased towards
9 small class sizes because that was his experience and he thinks it is a good
10 environment, and while he knows the size of Loving schools, he did not investigate
11 South Carolina schools. Regardless, the GAL stated that he believed staying in New
12 Mexico would best serve Child's interests and minimize disruption to Child's daily
13 life by staying in a familiar place and spending time with Father. Although Mother
14 filed a motion objecting to the recommendation, the district court explained:

15 The opinion of the [GAL] carries significant weight with me. I have
16 tremendous respect for [the GAL] in his opinions. He's not one to make
17 a reckless decision. He's very methodical and what's important is he
18 and I arrive generally, I think, at the same decision that again, choosing
19 between Loving and South Carolina, Loving is the better way to go.

20 The district court incorporated the recommendation into its "Better" option of the
21 proposed plan if Mother relocates to South Carolina.

1 {18} As explained above, the district court independently considered the facts
2 presented, best interests factors, and GAL recommendation to ultimately conclude
3 that, of the three possible scenarios, the one that was in the best interests of Child
4 was remaining in Clovis with Mother, but that, as between the other two alternatives,
5 moving to Loving with Father was more in the Child’s best interests, rather than
6 moving to South Carolina with Mother. Even though the GAL admitted he may be
7 biased towards the small class sizes and New Mexico schools based on his own
8 experience, the district court did not “simply defer to a GAL’s recommendation
9 without independent analysis,” as Mother argues.³ The district court clearly
10 explained that it came to a similar determination on its own and although it gave
11 “significant weight” to the GAL, it did not adopt the entire recommendation and
12 instead included it as the “Better” option of its split decision order. *See Thomas*,
13 1999-NMCA-135, ¶ 25 (holding that a court did not abdicate decision-making
14 authority by considering and adopting a GAL’s recommendation); Rule 1-053.3(D)
15 (prohibiting the district court from delegating its determination of a child’s best

³Additionally, although the GAL admitted he did not research South Carolina school rankings or class sizes, Mother provides no rule requiring that a GAL consider certain research or the district court scrutinize the recommendation in that way, and we therefore assume none exists. *See Nguyen v. Bui*, 2023-NMSC-020, ¶ 19, 536 P.3d 482 (assuming that no authority exists when a party cited to no authority supporting an argument).

interests). In fact, the “Best” option in the district court’s order was for Mother to retain primary physical custody in New Mexico, maintaining the status quo.

{19} It was well within the district court’s discretion to give weight to the GAL and consider its recommendation. Therefore, the district court was properly assisted by the GAL in determining Child’s best interests in accordance with Rule 1-053.3(A), and did not abuse its discretion.

III. Right to Travel

{20} Finally, Mother argues that the district court infringed on her constitutional right to travel by conditioning custody on her geographic location instead of the best interests factors, and effectively presumed that relocation was contrary to the child’s best interests. Father asserts that the order does not infringe on her right to travel because a parent’s right to travel is subordinate to the best interests of the child and Mother was not prohibited from moving. Additionally, Father argues that this issue was not preserved. Mother contends that even if not preserved, this Court should review this issue for fundamental error.

{21} We review claims that constitutional rights were infringed upon de novo. *See Pinnell v. Bd. of Cnty. Comm’rs of Santa Fe Cnty.*, 1999-NMCA-074, ¶ 17, 127 N.M. 452, 982 P.2d 503. Initially, we conclude that Mother did not preserve this issue. Rule 12-321(A) NMRA requires that “[t]o preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked.” “We generally

do not consider issues on appeal that are not preserved below.” *Day-Peck v. Little*, 2021-NMCA-034, ¶ 30, 493 P.3d 477 (internal quotation marks and citation omitted). Although Mother argues that this issue was preserved when “the district court specifically considered the parents’ constitutional rights” at the hearing, the district court judge only considered constitutional rights when discussing the relationship between Child and his half sibling. The judge explained that “parents have a constitutional right to their children, whereas [a] half sibling does not,” and did not address a parent’s constitutional right to travel. Additionally, nothing in the record, including Mother’s modification motion, discusses this right that Mother now asserts on appeal. Therefore, this issue was not preserved and we are not required to consider it on appeal. *See id.*

{22} However, this Court can, in its discretion, review unpreserved issues that involve the “fundamental rights of a party.” Rule 12-321(B)(2)(d); *see State ex rel. Child., Youth & Fams. Dep’t v. Ruben C.*, 2022-NMCA-063, ¶ 50, 521 P.3d 431 (exercising this Court’s discretion to review an unpreserved issue where it involved a parent’s fundamental right to parent their child). “In New Mexico, the protection afforded the right to travel in the child-custody context has been explicitly recognized.” *Jaramillo*, 1991-NMSC-101, ¶ 19; *see Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (recognizing that “all citizens [have the right to] be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or

1 regulations which unreasonably burden or restrict this movement”), *overruled in*
2 *part on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974). Therefore, we
3 briefly explain that Mother’s rights were not infringed upon.

4 {23} It is clear that parents have a right to travel with their children. *See Jaramillo*,
5 1991-NMSC-101, ¶ 19. In fact, “the right of a custodial parent to relocate should not
6 be interfered with except where the move would be clearly contrary to the child’s
7 welfare.” *Alfieri v. Alfieri*, 1987-NMCA-003, ¶ 11, 105 N.M. 373, 733 P.2d 4.
8 However, “New Mexico case law establishes that parents’ rights are secondary to
9 the best interests and welfare of the children.” *Ridenour v. Ridenour*, 1995-NMCA-
10 072, ¶ 10, 120 N.M. 352, 901 P.2d 770. When one parent seeks to modify an existing
11 custody arrangement because of a proposed relocation, neither parent has “the
12 burden to show that relocation of the child with the removing parents will be in or
13 contrary to the child’s best interests,” but instead the district court must consider the
14 information before it and adopt the arrangement that promotes the best interests of
15 the child. *Jaramillo*, 1991-NMSC-101, ¶ 27.

16 {24} In this case, as explained above, the district court properly considered the
17 relevant statutory factors required by Section 40-4-9 in determining that remaining
18 in New Mexico was in Child’s best interests. *See Alfieri*, 1987-NMCA-003, ¶ 15
19 (holding that a district court did not abuse its discretion by determining that
20 relocation was not in a child’s best interests when its decision was based upon

findings of the best interests and welfare of the child); *Hough*, 2017-NMCA-050, ¶ 30 (explaining that the district court possesses “considerable discretion” in conducting a best interests analysis so long as its decision is “consistent with the evidence and statutory requirements” (internal quotation marks and citation omitted)). Accordingly, contrary to Mother’s arguments, the district court did not presume that relocation was not in Child’s best interests, but instead the record shows that the district court considered Child’s best interests and welfare in relation to Mother’s proposed relocation.

{25} Additionally, although Mother argues that the court erred by not making a finding that relocation would be contrary to Child’s welfare, it did not have to. *See Garcia v. Garcia*, 1970-NMSC-035, ¶ 7, 81 N.M. 277, 466 P.2d 554 (explaining that although a court “did not render a specific finding to the effect that the removal to [another state]” was in a child’s best interests, the court considered the child’s best interests and “[t]he lack of certain specific phrases of art, which the appellant claims are required, in no way detracts from the support of that judgment”). Further, Mother points to no requirement that the district court make such an explicit finding and we find that none exists. *See id.* ¶ 6 (concluding that nothing more was required of the district court when it found that a custody arrangement was in the best interests of the children); *see also Nguyen*, 2023-NMSC-020, ¶ 19 (assuming that no authority exists when a party cited to no authority supporting an argument).

1 {26} Therefore, the district court's order did not substantially infringe on Mother's
2 right to travel.

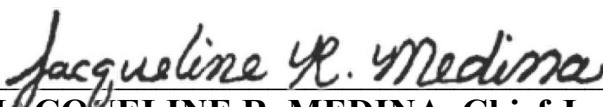
3 **CONCLUSION**

4 {27} For the foregoing reasons, we affirm the district court's order.

5 {28} **IT IS SO ORDERED.**

6
7 
SHAMMARA H. HENDERSON, Judge

8 **WE CONCUR:**

9 
10 JACQUELINE R. MEDINA, Chief Judge

11 
12 ZACHARY A. IVES, Judge