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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

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

Petitioner-Appellee,

v. **No. A-1-CA-43122**

JENNIFER W.,

Respondent-Appellant,

and

HAUK R.,

Respondent,

IN THE MATTER OF ANNALINNA R., Child.

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY
Jared G. Kallunki, District Court Judge

Children, Youth and Families Department
Cynthia Tessman, Appellate Managing Attorney
Albuquerque, NM

for Appellee

McBryde Law LLC
Deian McBryde
Albuquerque, NM

for Appellant

JulieAnne Hufstedler Leonard, PC
JulieAnne Hufstedler Leonard
Roswell, NM

Guardian Ad Litem

DECISION

BACA, Judge.

{1} Respondent Jennifer W. (Mother) appeals the termination of her parental rights related to A.R. (Child) under NMSA 1978, Section 32A-4-29 (2022). We affirm, because we conclude that (1) the district court did not err in concluding that the Children, Youth and Families Department (the Department) made reasonable efforts to assist Mother; (2) the evidence presented to the district court was sufficient; and (3) any errors stemming from the guardian ad litem's (the GAL) inaction did not cause fundamental error or violate Mother's due process rights.

DISCUSSION

{2} Because this decision is prepared for the benefit of the parties, who are familiar with the factual and procedural background, we omit a background section and leave the discussion of the facts for our analysis of the issues.

I. Sufficiency of the Evidence

{3} Mother challenges the sufficiency of the evidence supporting the termination of her parental rights to Child. To terminate a parent's rights, the Department must establish by clear and convincing evidence that a child has been abused or neglected

and that the "causes of the neglect and abuse are unlikely to change in the foreseeable future despite reasonable efforts by the department or other appropriate agency to assist the parent in adjusting the conditions that render the parent unable to properly care for the child." NMSA 1978, § 32A-4-28(B)(2) (2022); *see also State ex rel. Child., Youth & Fams. Dep't v. Keon H.*, 2018-NMSC-033, ¶ 37, 421 P.3d 814 ("Due process requires that findings necessary to terminate parental rights be supported by clear and convincing evidence.").

{4} Mother argues the district court erroneously found that the Department made reasonable efforts to assist her; because the evidence offered was not sufficient. We review the district court's findings to evaluate whether "viewing the evidence in the light most favorable to the [d]epartment, the fact[-]finder could properly determine that the clear and convincing evidence standard was met." *See Keon H.*, 2018-NMSC-033, ¶ 38 (alteration, internal quotation marks and citation omitted). We first consider the evidence supporting the Department's efforts to assist Mother.

A. Reasonable Efforts to Assist Mother

{5} Because Section 32A-4-28(B)(2) does not list specific acts or services that constitute reasonable efforts, appellate courts "have traditionally considered the totality of the circumstances when reviewing the district court's determination." *Keon H.*, 2018-NMSC-033, ¶ 41. "What constitutes reasonable efforts may vary with a number of factors, such as the level of cooperation demonstrated by the parent and

the recalcitrance of the problems that render the parent unable to provide adequate parenting." *State ex rel. Child., Youth & Fams. Dep't v. Patricia H.*, 2002-NMCA-061, ¶ 23, 132 N.M. 299, 47 P.3d 859. "[O]ur job is not to determine whether [the department] did everything possible; our task is . . . to [determine] whether [the department] complied with the minimum required under law." *Id.* ¶ 28. Importantly, "[o]ur standard of review does not require us to determine whether the district court could have reached a different conclusion." *Keon H.*, 2018-NMSC-033, ¶ 38 (alteration, internal quotation marks, and citation omitted).

{6} In this case, Child was brought into the Department's custody due to "[i]mminent danger of harm due to failure to meet basic needs." After Child was brought into the Department's custody, the Department created a treatment plan for Mother, which contained goals to work toward reunification. During the termination of parental rights (TPR) hearing, Mother testified that she had met with at least two of the caseworkers in 2024 and 2025 and that at least one of those caseworkers reviewed her treatment plan with her.

{7} In support of her argument that the Department did not make reasonable efforts to assist her, Mother points to various discrepancies in the Department's reports. For example, Mother notes that the Department indicated that it was providing Mother with bus passes during a period when the Department knew Mother was incarcerated. Mother further points out that the Department reported

conducting monthly home visits, despite simultaneously reporting that Mother was frequently without housing. But even assuming that the Department's documentation regarding the services it provided Mother was inaccurate at times, we must view the evidence "in a light most favorable to affirming the termination of [the m]other's parental rights," such that "the trial court could properly determine that the clear and convincing standard was met." *See State ex rel. Child., Youth & Fams. Dep't v. Vanessa C.*, 2000-NMCA-025, ¶¶ 24, 128 N.M. 701, 997 P.2d 833.

{8} To help Mother with the goals outlined in the treatment plan, the Department arranged for visitations with Child, referred Mother to services at the Division of Vocational Rehabilitation of the Department of Workforce Solutions, set up meetings with Mother to assist with housing, referred Mother to individual and group therapy and was able to conduct at least one home visit in April 2022. Nevertheless, Mother's housing stability remained consistently in flux throughout the course of the proceedings. The Department was aware of Mother's ongoing struggle to obtain secure housing, and was making efforts to assist Mother. For example, at a permanency hearing in May 2023, a caseworker told the district court that the Department was aware that Mother was living in a hotel, and had arranged to meet with Mother later that week to "discuss everything [the Department] need[s] to do to help [Mother] move forward to get more permanent housing." At the termination hearing, the caseworker testified that an application for housing

assistance had been submitted and Mother "just had to locate . . . an apartment or a home and send it to [the agency] so that they could do their part," but Mother did not follow up.

{9} Considering the totality of the circumstances, we conclude that substantial evidence supports the district court's finding that the Department made reasonable efforts to assist Mother.

B. The Testimony and Evidence Supporting Termination

{10} Mother argues that the Department did not meet its burden and points to the fact that the Department's witnesses—two social workers who handled Mother's case—did not review the file before the hearing, and testified from memory. Mother's arguments suggest that, because the social workers offered such limited testimony, it is unclear whether the district court properly considered the totality of the evidence in determining that the causes and conditions of neglect were unlikely to change. This argument amounts to a challenge to the sufficiency of the witness's testimony to support the termination. In that context we determine whether the testimony was "relevant evidence that a reasonable mind would accept as adequate to support a conclusion." *See Patricia H.*, 2002-NMCA-061, ¶ 22 (internal quotation marks and citation omitted). "On appeal, this Court will not reweigh the evidence or substitute our judgment for that of the trial court on factual matters or on matters of credibility." *State ex rel. Child., Youth & Fams. Dep't v. Alfonso M.-E.*, 2016-

NMCA-021, ¶ 26, 366 P.3d 282 (internal quotation marks and citation omitted). Instead, we must view the evidence "in a light most favorable to affirmance." *Vanessa C.*, 2000-NMCA-025, ¶ 24.

{11} Here, the record supports that the district court was aware of Mother's early successes. For example, in its March 5, 2024 permanency review order, the district court found that Mother has made good faith efforts to work her treatment plan. However, the district court found—and the evidence supported—that Mother remained unhoused, that Mother had not consistently adhered to her treatment plan, and that Mother had not followed through with the resources that the Department provided, such as opportunities for therapy and parenting classes, and did not attend Child's appointments or scheduled visits with Child. It is also undisputed that the Department filed its initial petition in September 2020—five years before the TPR hearing—and Mother acknowledged at the hearing that she was not currently in a position to provide a stable home for Child. As our Supreme Court has instructed, "[w]hen balancing the interests of parents and children, the court is not required to place the children indefinitely in a legal holding pattern, when doing so would be detrimental to the children's interests." *State ex rel. Child., Youth & Fams. Dep't v. Mafin M.*, 2003-NMSC-015, ¶ 24, 133 N.M. 827, 70 P.3d 1266 (internal quotation marks and citation omitted). These facts sustain the district court's findings

supporting termination, that the Department made reasonable efforts, and that the causes and conditions of neglect were unlikely to change.

II. Due Process

{12} Mother's last set of arguments stem from the GAL's compliance with certain mandatory duties under NMSA 1978, Section 32A-1-7(E)(7) (2005), Rule 10-333 NMRA, and Rule 10-325.1 NMRA. In relevant part, Section 32A-1-7(E)(7) requires that "[u]nless a child's circumstances render the following duties and responsibilities unreasonable, a [GAL] shall . . . report to the court on the child's adjustment to placement, the department's and respondent's compliance with prior court orders and treatment plans[,] and the child's degree of participation during visitations." No less than fifteen days before any hearing, a GAL "shall provide written notice" that "(1) the child has been advised, to the maximum extent possible given the child's developmental capacity, of the child's right to attend any hearing . . . ; (2) the child's declared position, if ascertainable given the child's developmental capacity, about whether to attend the upcoming hearing; and (3) the [GAL]'s position about why attendance is or is not in the child's best interest." Rule 10-325.1(A)(1)-(3). Further, no less than fifteen days before a TPR hearing, a GAL "shall disclose and make available to the parties" a number of items, including (1) statements of the child's and the GAL's positions regarding the termination of parental rights; (2) documents or tangible objects that the GAL intends to introduce as evidence or that were

prepared by a witness that the GAL intends to call; and (3) a witness list and any recorded statement made by that witness. Rule 10-333(A). We refer to the statute- and rule-based duties as "the GAL rules."

{13} Mother argues that her due process rights were violated because (1) the GAL consistently failed to file written notice as required by the GAL rules; and (2) the GAL did not participate substantively in the TPR hearing, which, in turn, "denied the district court an independent child-centered assessment." Mother contends that the GAL's performance in this case is analogous to *State ex rel. Children, Youth & Families Department v. Marian M.*, 1998-NMCA-039, ¶ 40, 124 N.M. 735, 995 P.2d 204, where we reversed termination of parental rights in part because the GAL's performance was deemed "materially deficient" when the GAL effectively did not participate in proceedings or offer an opinion as to the child's best interests. Based on the record before us, we disagree and explain.

{14} The parties do not dispute that the GAL did not provide written statements of Child's and the GAL's positions regarding the termination of parental rights. Mother also acknowledges that she did not object either before or during the TPR proceedings, thus, we review for fundamental error. *See State ex rel. Child., Youth & Fams. Dep't v. Paul P., Jr.*, 1999-NMCA-077, ¶ 14, 127 N.M. 492, 938 P.2d 1011 (recognizing that fundamental error, a doctrine ordinarily reserved for criminal cases, can apply to TPR cases). In this context, an error may be fundamental if it

goes "to the foundation of the case, or deprive[s the parent] of rights essential to [their] defense." *State ex rel. Child., Youth & Fams. Dep't v. Josie G.*, 2021-NMCA-063, ¶ 22, 499 P.3d 658 (alterations, internal quotation marks, and citation omitted). For the purposes of this appeal, we assume without deciding that the GAL did not comply with the GAL rules and that error occurred. *See State v. Romero*, 2023-NMSC-014, ¶ 6, 533 P.3d 735 (noting that the first step of the fundamental error analysis is "whether error occurred" (internal quotation marks and citation omitted)). We therefore move on to the second step of the analysis and consider whether the error is fundamental. *See id.* To show that the error is fundamental, Mother must demonstrate "the existence of circumstances that shock the conscience or implicate a fundamental unfairness within the system that would undermine judicial integrity if left unchecked." *See id.* (internal quotation marks and citation omitted).

{15} Here, although we assume that the GAL did not comply with the GAL rules, unlike the GAL in *Marian M.*, she participated in multiple hearings before the TPR hearing. At the TPR hearing, the GAL acknowledged that the Department had "dropped the ball" at some point during the case, that Mother was currently making efforts to alleviate the causes and conditions of neglect, and that there had been "times of some improvement" throughout the pendency of the case. Ultimately, however, the GAL opined that the Department had made reasonable efforts to help Mother, that Mother's inconsistent adherence to her treatment plan led the GAL to

believe that the causes and conditions of neglect would not be alleviated in the foreseeable future, and that it was in the Child's best interest to terminate Mother's parental rights.

{16} To support her claim of fundamental error, Mother asserts that, had the GAL complied with the GAL rules, the GAL "might have offered the district court the specific failures that form the core of the issue." We understand that Mother is pointing to a unique difficultly that arises when trying to prove a negative: how can Mother demonstrate that the outcome would be different when she cannot know what the GAL might have disclosed had the GAL complied with the GAL rules? While we understand the essence of Mother's assertion, we also note that we are reviewing the GAL issues for fundamental error. When this Court determined that *Marian M.*'s GAL's passive efforts did not comply with statutory requirements, that conclusion alone did not require a new proceeding—even though identifiable consequences resulted from the GAL's passive efforts. 1998-NMCA-039, ¶¶ 40-43. Instead, remand was warranted based on myriad insufficiencies in the proceedings. *Id.* ¶ 44. In the present case, the record reveals and Mother asserts no identifiable consequences resulting from the GAL's performance. The fundamental error exception is extremely narrow, and applies "only under exceptional circumstances and only to prevent a miscarriage of justice." *State v. Barber*, 2004-NMSC-019, ¶ 8, 135 N.M. 621, 92 P.3d 633. At its core, Mother's argument is that the GAL's

performance in this case resulted in the district court terminating Mother's parental rights without having the proverbial "full picture" of the circumstances. But, even if this is true, we still are not persuaded that any error was fundamental.

{17} The GAL's recommendation stemmed directly from the same evidence that was available to Mother. Moreover, both Mother and her counsel were present at hearings leading up to the TPR hearing, wherein the GAL indicated to the court that she did not object to the Department moving to terminate Mother's parental rights. And although the docket suggests the GAL had complied with the GAL rules throughout the case, and that the GAL did not object to the Department moving to terminate Mother's parental rights, Mother did not elect to call the GAL as a witness at the TPR hearing or otherwise bring to the attention of the district court that the GAL failed to comply with the requirements of the GAL rules.

{18} Undoubtedly, the district court may have had more information to consider had the record revealed compliance with the GAL rules or more robust participation in the hearing. But to reverse on that fact alone would turn fundamental error from a rare exception to the general rule for appellate review. *Cf. State v. Astorga*, 2016-NMCA-015, ¶ 5, 365 P.3d 53 ("The burden of demonstrating fundamental error is on the party alleging it, and the standard of review for reversal for fundamental error is an exacting one." (internal quotation marks and citations omitted)); *see also State v. Cunningham*, 2000-NMSC-009, ¶ 21, 128 N.M. 711, 998 P.2d 176 ("[T]he

analysis under a reversible error standard is decidedly different than the analysis under a fundamental error standard. The main analytical distinction between a fundamental error analysis and a reversible error analysis is the level of scrutiny afforded to claims of error.").

{19} For these reasons, we conclude that the alleged errors do not go to the foundation of the case, or deprive Mother of rights essential to her defense, and therefore do not constitute fundamental error. *See Josie G.*, 2021-NMCA-063, ¶ 22.

{20} Our determination that no fundamental error occurred also answers Mother's due process argument. In the TPR context, procedural due process

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

State ex rel. Child., Youth & Fams. Dep't v. Ruth Anne E., 1999-NMCA-035, ¶ 26, 126 N.M. 670, 974 P.2d 164 (internal quotation marks and citation omitted). To evaluate whether due process was satisfied when parental rights were terminated, we weigh three factors: "(1) the [parent]'s interest, (2) the risk to the [parent] of an erroneous deprivation through the procedures used and the probable value of additional or substitute procedures as safeguards, and (3) the government's interest." *State ex rel. Child., Youth & Fams. Dep't v. Browind C.*, 2007-NMCA-023, ¶ 31,

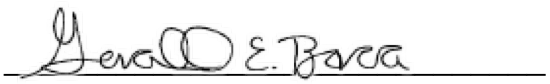
141 N.M. 166, 152 P.3d 153. Applying these factors to this case, we conclude that Mother's interest in retaining a relationship with her child is great, and the government's interest in protecting the child's welfare is equally significant. Thus, our inquiry focuses on the second factor; "whether the procedures used increased the risk of an erroneous deprivation of [m]other's interest and whether additional safeguards would eliminate or lower that risk." *State ex rel. Child., Youth & Fams. Dep't v. Maria C.*, 2004-NMCA-083, ¶ 37, 136 N.M. 53, 94 P.3d 796 (internal quotation marks and citation omitted). "Mother need only demonstrate that there is a reasonable likelihood that the outcome *might* have been different." *Id.*

{21} As we have explained, the GAL's recommendation was based on evidence that was available to Mother. The decision to terminate Mother's parental rights was based on both the Department's and Mother's presented evidence. Because the TPR decision could not have been based on any undisclosed evidence from the GAL, Mother does not demonstrate a reasonable likelihood that the outcome would have been different had the record shown that the GAL complied with the GAL rules or participated more during the TPR hearing. *See id.* (requiring, for due process purposes, a parent to show "a reasonable likelihood that the outcome might have been different." (emphasis omitted)). For these reasons, we conclude that any lack of compliance with the GAL rules did not violate due process protections in this case.

CONCLUSION

{22} For the foregoing reasons, we affirm the district court's judgment terminating Mother's parental rights to Child.

{23} **IT IS SO ORDERED.**



GERALD E. BACA, Judge

WE CONCUR:



J. MILES HANISEE, Judge



KATHERINE A. WRAY, Judge