

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

2 Opinion Number: _____

3 Filing Date: June 15, 2017

4 **NO. 35,616**

5 **STATE OF NEW MEXICO ex rel.**
6 **CHILDREN, YOUTH AND FAMILIES**
7 **DEPARTMENT,**

8 Petitioner-Appellee,

9 v.

10 **RAYMOND D.,**

11 Respondent-Appellant,

12 and

13 **ALMA F.,**

14 Respondent,

15 and

16 **IN THE MATTER OF ADRIAN F.,**

17 a Child.

18 **APPEAL FROM THE DISTRICT COURT OF LUNA COUNTY**

19 **Jennifer E. DeLaney, District Judge**

1 Children, Youth & Families Department
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5 for Appellee

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9 for Appellant

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13 Guardian Ad Litem

1 **OPINION**

2 **VIGIL, Judge.**

3 {1} The joint motion for rehearing filed by the parties is granted. The formal
4 opinion filed in this case on May 8, 2017, is hereby withdrawn, and this opinion is
5 substituted in its place.

6 {2} Father appeals from a judgment terminating his parental rights to Child for
7 neglect pursuant to NMSA 1978, Section 32A-4-28(B)(2) (2005). The sole issue
8 presented is whether the district court erred in concluding that termination is in
9 Child’s best interests on the basis of substantial, admissible evidence. We affirm.

10 **BACKGROUND**

11 {3} Child was placed in the custody of the New Mexico Children, Youth and
12 Families Department (CYFD) on August 14, 2013, when Child was eight years old,
13 and the causes and conditions that brought Child into CYFD custody were for
14 physical abuse, medical neglect, emotional abuse, and substance abuse by Mother.
15 Mother’s parental rights were also terminated, but she has not appealed. We discuss
16 facts and circumstances related to Mother’s termination only insofar as they relate to
17 Father’s appeal.

18 {4} At all times during the case, Child needed intensive mental health treatment,
19 medication, and services. Since being taken into CYFD custody, Child went back and

1 forth from the Peak Psychiatric Residential Treatment Facility (Peak), and Bonem
2 Home Facility (Bonem), a mental health residential treatment center. The only
3 exceptions were for one week when Child was placed in a foster home and when
4 Child briefly lived with Father in October 2013.

5 {5} Father began serving a federal prison term in 2010, and in July 2013, shortly
6 before Child was taken into CYFD custody, Father was released on probation. In
7 October 2013, Child was released from Peak and temporarily placed with Father.
8 During that time, Father had great difficulty attending to Child's needs. While living
9 with Father and his paternal grandparents, Child punched his grandparents, tried to
10 punch and bite Father, and needed to be physically restrained by Father to prevent
11 Child from Child banging his head on the floor. Father testified that he felt Child
12 needed a higher level of care, and that he also needed training on how to meet Child's
13 needs. On November 2, 2013, Father was arrested on new state charges, and CYFD
14 took Child back into custody. Father remained incarcerated and had no further contact
15 with Child.

16 {6} On November 13, 2013, Mother pled no contest to neglect of Child, and
17 Mother was ordered to participate in a treatment plan. Child remained in CYFD
18 custody for 2014 while CYFD worked with Mother; however, Mother failed to
19 comply with the treatment plan.

1 {7} Father was facing a ten-year potential penitentiary sentence on the state charges
2 stemming from his November 2013 arrest, and on this basis, Father stipulated to a
3 finding that reunification with Child was futile on February 19, 2015. The district
4 court accepted the stipulation, made a finding that reunification was likely futile, and
5 ordered that CYFD was relieved of providing treatment services to Father. *See*
6 NMSA 1978, § 32A-4-22(C)(1) (2016) (providing that the district court may
7 determine that reasonable efforts at reunification are not required to be made when
8 it finds that the efforts would be futile). On the same day, Father also pled no contest
9 to neglect of child due to his incarceration. *See* NMSA 1978, § 32A-4-2(E)(4) (2009,
10 recodified by 2017 N.M. Laws, ch. 64, § 2, as § 32A-4-2(F)(4)) (defining a neglected
11 child in part as a child whose parent “is unable to discharge that person’s
12 responsibilities to and for the child because of incarceration[.]”). On April 13, 2015,
13 Father unexpectedly received a sentence of two-and-one-half years instead of ten
14 years on the pending state charges, with a scheduled parole date of June 2016.

15 {8} CYFD filed its motion to terminate parental rights as to both Mother and Father
16 on June 5, 2015, on the basis of neglect. At the time of the termination of parental
17 rights (TPR) hearing on January 22, 2016, Child was residing at Bonem, and had been
18 there for approximately five months.

19 {9} Shasta Rael, Child’s therapist at Bonem, was responsible for Child’s individual

1 therapy and weekly family therapy sessions, which Mother participated in by phone.
2 Under cross-examination by Child’s guardian ad litem (GAL), Rael was asked her
3 opinion about Child’s demeanor after the family therapy sessions, and Rael answered
4 that Child was usually calm, but confused about whether he would be reunited with
5 his parents or be adopted. Having testified on direct examination, that Mother’s
6 participation in the weekly family therapy sessions had been inconsistent, Rael added
7 in the GAL’s cross-examination that when there is inconsistency in his family therapy
8 sessions, Child becomes emotionally volatile, he demonstrates self-harm, and he has
9 conflicts with his peers. The GAL then asked Rael whether it would be in Child’s best
10 interests to continue family therapy with his Mother, and Father objected on the basis
11 that this was not a proper question for lay opinion testimony, and that no foundation
12 was laid to qualify Rael as an expert to answer the question. The GAL responded that
13 he was only asking for her opinion as a layperson, which went to the weight of her
14 testimony and not its admissibility. The district court overruled Father’s objection.
15 Rael then testified that Child is confused about his future and what the future holds
16 for him, and that family therapy was dependent on the outcome of the district court’s
17 decision. Hereinafter, we refer to this statement as the “testimony objected to.” In
18 Father’s cross-examination that followed, Rael testified that it was her therapeutic
19 recommendation that it was in Child’s best interests that he temporarily not have

1 contact with Father.

2 {10} At the end of the TPR hearing, the district court noted that “June in [Child’s]
3 life is still really far away” and said it could not make the case go on any longer. The
4 district court also specifically ruled “that the confusion in Child’s life is leading him
5 to self-harm and Child’s continued limbo caused the Child confusion.” Father asked
6 if this finding regarding Child’s self-harm was based on Rael’s testimony, and the
7 district court answered, “Yes, that his being in limbo is causing him confusion and
8 is causing him self-harm.” Consistent with its answer, the district court’s written
9 findings include a finding that “The [C]hild’s confusion about what is happening is
10 having continued negative consequences on him and the longer he is in legal limbo
11 the longer and more pronounced these negative consequences are.”

12 {11} The judgment terminating parental rights on the basis of neglect was filed on
13 April 26, 2016. In the judgment terminating parental rights, the district court found:
14 “Giving primary consideration to the physical, mental, and emotional welfare and
15 needs of [C]hild, including the likelihood of adoption if rights are terminated, CYFD
16 has demonstrated by clear and convincing evidence that [C]hild’s best interests
17 require that the parental rights of [Father] should be terminated”). Father appeals.

18 **DISCUSSION**

19 {12} Father’s sole contention on appeal is that the district court’s finding on the

1 central issue in this case—that child’s best interests required prompt termination of
2 Father’s parental rights—is based on the testimony objected to, which was
3 erroneously admitted. For the following reasons, we disagree.

4 **Standard of Review**

5 {13} Section 32A-4-28(A) directs, “In proceedings to terminate parental rights, the
6 court shall give primary consideration to the physical, mental and emotional welfare
7 and needs of the child, including the likelihood of the child being adopted if parental
8 rights are terminated.” We have no New Mexico authority directly on point
9 specifying our standard of review. However, we are persuaded by the logic and
10 reasoning of *In re Adoption of Randolph*, 227 N.W.2d 634, 637 (Wis. 1975), an
11 adoption case. *Randolph* states:

12 The finding [of best interests] is a mixed question of fact
13 and law. There are certain determinations of historical facts
14 which must be sustained unless they are clearly against the
15 great weight and clear preponderance of the evidence. The
16 determination of where the best interests of the children lie
17 is thus a question of fact in the sense that precise
18 determinations must be made about specific factors such as
19 age, finances of the parties, discipline questions, and
20 psychological factors. The application of the correct
21 standards for determining the best interests of the child and
22 the ultimate conclusion of where the best interests of the
23 children lie is a matter for legal determination by the trial
24 court, reviewable as such on appeal.

25 *Id.*

1 {14} In our review of the district court’s finding of Child’s best interests as a mixed
2 question of law and fact, we engage in a two-step analysis. First, we determine
3 whether substantial evidence supports the district court’s findings of fact. *See State*
4 *ex rel. Children, Youth & Families Dep’t v. Patricia H.*, 2002-NMCA-061, ¶ 22, 132
5 N.M. 299, 47 P.3d 859 (stating that in our appellate review, we determine whether
6 substantial evidence supports the district court’s decision). “Substantial evidence is
7 relevant evidence that a reasonable mind would accept as adequate to support a
8 conclusion.” *Id.* (internal quotation marks and citation omitted). In determining
9 whether substantial evidence supports the district court’s finding, we view the
10 evidence in the light most favorable to the judgment. *Id.* Second, we determine
11 whether that evidence supports a finding of best interests, a question of law which we
12 review de novo. *See Stanley J. v. Cliff L.*, 2014-NMCA-029, ¶ 8, 319 P.3d 662
13 (stating that in applying the facts to determine whether “extraordinary circumstances”
14 exist under the Kinship Guardian Act, we are presented with a question of law, and
15 our standard of review is de novo).

16 **Analysis**

17 {15} Under Section 32A-4-28(B)(2), parental rights “shall” be terminated if “the
18 child has been a neglected or abused child as defined in the Abuse and Neglect Act
19 and the court finds that the conditions and causes of the neglect and abuse are

1 unlikely to change in the foreseeable future despite reasonable efforts by the
2 department or other appropriate agency to assist the parent in adjusting the conditions
3 that render the parent unable to properly care for the child.” The elements to be
4 proven here are that: (1) Child was neglected; (2) the conditions and causes of Child’s
5 neglect were unlikely to change in the foreseeable future; and (3) CYFD made
6 reasonable efforts to assist Father in adjusting the conditions that rendered Father
7 unable to properly care for Child. *See State, ex rel. Children, Youth & Families Dep’t*
8 *v. Nathan H.*, 2016-NMCA-043, ¶ 32, 370 P.3d 782, *cert. denied*, 2016-NMCERT-
9 ____ (May 3, 2016). Father’s no contest plea satisfied the first element. *See State ex*
10 *rel. Children, Youth and Families Dep’t v. Melvin C.*, 2015-NMCA-067, ¶ 13, 350
11 P.3d 1251 (stating that the court may make a determination of neglect on the basis of
12 a valid admission). In addition, when Father stipulated to a finding of futility, CYFD
13 was not required to make reasonable efforts to assist Father in adjusting the
14 conditions that rendered Father unable to care for Child. *See State ex rel. Children,*
15 *Youth & Families Dep’t v. Vanessa C.*, 2000-NMCA-025, ¶ 14, 128 N.M. 701, 997
16 P.2d 833 (recognizing that a finding of futility results in the removal of a person’s
17 expectation to the department’s reasonable assistance).

18 {16} The appeal before us centers on whether CYFD proved that prompt termination
19 of Father’s parental rights was in Child’s best interests. If this question is answered

1 affirmatively in the circumstances of this case, the second element required to
2 terminate Father’s parental rights was likewise satisfied. As we have already
3 observed, Section 32A-4-28(A) directs, “In proceedings to terminate parental rights,
4 the court shall give primary consideration to the physical, mental and emotional
5 welfare and needs of the child, including the likelihood of the child being adopted if
6 parental rights are terminated.” In this case, proof of Child’s best interests hinges on
7 resolution of factual questions, namely: (1) whether Father could remedy the
8 conditions of neglect quickly enough in the future to meet Child’s needs; and (2) the
9 related question of whether Father should have been allowed more time to attempt to
10 remedy the causes and conditions of neglect. We therefore turn to Father’s arguments.

11 {17} Father vigorously contends that the testimony objected to was only admissible
12 through a properly qualified expert, and that the district court erred in admitting the
13 testimony as lay opinion testimony. CYFD concedes that the testimony objected to
14 was inadmissible as lay opinion testimony. We therefore assume, without deciding,
15 that the testimony objected to was not admissible. We further assume that the district
16 court’s finding that Child’s “confusion about what is happening is having continued
17 negative consequences on him and the longer he is in legal limbo the longer and more
18 pronounced these negative consequences are” is based only on the testimony objected
19 to. We therefore proceed to determine whether the district court’s finding of Child’s

1 best interests is otherwise supported by admissible evidence.¹

2 {18} In pertinent part, the district made findings that family therapy with Mother and
3 Child was scheduled by the therapist to occur on a weekly basis, but Mother’s
4 participation was sparse and inconsistent, and outside of therapy, Mother only had
5 some contact with Child by telephone. This inconsistent contact led Child “to be
6 confused and he lacks understanding what is in his future, being reunification with
7 his parents or adoption” and the consequences of this inconsistent contact were that
8 Child “became more emotionally volatile, demonstrated self-harm and low tolerance
9 regarding conflict with his peers.” When Father was released from prison and Child
10 was placed with him in October 2013, for two or three weeks, “[C]hild experienced
11 aggressive and violent behaviors.” Father was then arrested on November 2, 2013 on
12 new criminal charges, and has had no contact with Child. Father was scheduled to be
13 paroled in June 2016, five months after the TPR hearing. However, since Father had
14 not participated in family therapy, it was not currently in Child’s best interests to have

15 ¹CYFD argues that Father only preserved an objection to the testimony
16 objected to, and that we can consider the balance of Rael’s testimony in determining
17 whether the district court finding of Child’s best interests is supported by substantial
18 evidence. We agree. “If a proper objection is not made, the evidence may be
19 considered in the same manner as any other relevant evidence and has sufficient
20 probative value to support a finding. . . . Failure to object to the admission of
21 evidence operates as a waiver.” *N.M. Att’y Gen. v. N.M. Pub. Serv. Comm’n*,
22 1984-NMSC-081, ¶ 10, 101 N.M. 549, 685 P.2d 957 (citations omitted).

1 contact with Father, and Father had not been able to participate in any classes due to
2 his maximum security classification, and being on lockdown at the penitentiary. The
3 time period from the date of the TPR hearing to Father’s anticipated parole date six
4 months later, was “really far away” for Child, in Child’s experience. Finally, and
5 importantly, the district court found that Father had “shown an inability to follow the
6 laws of the State of New Mexico and it is uncertain that inability would change.”

7 {19} The foregoing findings, which do not rely on the testimony objected to, support
8 the district court’s finding that it was in Child’s best interests to terminate Father’s
9 parental rights. This case spans over three years of Mother’s inconsistent participation
10 in her treatment plan and Child’s therapy, Father’s incarceration and lack of
11 communication with Child, and Child’s continued residency in psychiatric and
12 residential facilities. It was not in Child’s best interests to make Child wait five more
13 months for a placement that might be temporary given Father’s recidivism and
14 inability to attend to Child’s special needs. Child would have to wait five months for
15 Father to be released from the penitentiary, and then wait for an additional
16 indeterminate period of time for Father to receive training that might or might not
17 succeed, in the face of possible reoffending by Father. Child waited for over three
18 years for his parents to remedy the causes of his neglect, and “the court is not required
19 to place the [Child] indefinitely in a legal holding pattern, when doing so would be

1 detrimental to the [Child's] interests." *State ex rel. Children, Youth & Families Dep't*
2 *v. Mafin M.*, 2003-NMSC-015, ¶ 24, 133 N.M. 827, 70 P.3d 1266 (internal quotation
3 marks and citation omitted).

4 **CONCLUSION**

5 {20} The judgment terminating Father's parental rights is affirmed.

6 {21} **IT IS SO ORDERED.**

7

8

MICHAEL E. VIGIL, Judge

9 **WE CONCUR:**

10

JAMES J. WECHSLER, Judge

12

STEPHEN G. FRENCH, Judge

13