

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

2 Opinion Number: _____

3 Filing Date: May 8, 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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13 Guardian Ad Litem

1 **OPINION**

2 **VIGIL, Judge.**

3 {1} Father appeals from a judgment terminating his parental rights to Child for
4 neglect pursuant to NMSA 1978, Section 32A-4-28(B)(2) (2005). The sole issue
5 presented is whether the district court erred in concluding that termination is in
6 Child's best interests on the basis of substantial, admissible evidence. We affirm.

7 **BACKGROUND**

8 {2} Child was placed in the custody of the New Mexico Children, Youth and
9 Families Department (CYFD) on August 14, 2013, when Child was eight years old,
10 and the causes and conditions that brought Child into CYFD custody were for
11 physical abuse, medical neglect, emotional abuse, and substance abuse by Mother.
12 Mother's parental rights were also terminated, but she has not appealed. We discuss
13 facts and circumstances related to Mother's termination only insofar as they relate to
14 Father's appeal.

15 {3} At all times during the case, Child needed intensive mental health treatment,
16 medication, and services. Since being taken into CYFD custody, Child went back and
17 forth from the Peak Psychiatric Residential Treatment Facility (Peak), and Bonem
18 Home Facility (Bonem), a mental health residential treatment center. The only
19 exceptions were for one week when Child was placed in a foster home and when

1 Child briefly lived with Father in October 2013.

2 {4} Father began serving a federal prison term in 2010, and in July 2013, shortly
3 before Child was taken into CYFD custody, Father was released on probation. In
4 October 2013, Child was released from Peak and temporarily placed with Father.
5 During that time, Father had great difficulty attending to Child's needs. While living
6 with Father and his paternal grandparents, Child punched his grandparents, tried to
7 punch and bite Father, and needed to be physically restrained by Father to prevent
8 Child from Child banging his head on the floor. Father testified that he felt Child
9 needed a higher level of care, and that he also needed training on how to meet Child's
10 needs. On November 2, 2013, Father was arrested on new state charges, and CYFD
11 took Child back into custody. Father remained incarcerated and had no further contact
12 with Child.

13 {5} On November 13, 2013, Mother pled no contest to neglect of Child, and
14 Mother was ordered to participate in a treatment plan. Child remained in CYFD
15 custody for 2014 while CYFD worked with Mother; however, Mother failed to
16 comply with the treatment plan.

17 {6} Father was facing a ten-year potential penitentiary sentence on the state charges
18 stemming from his November 2013 arrest, and on this basis, Father stipulated to a
19 finding that reunification with Child was futile on February 19, 2015. The district

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

12 {7} CYFD filed its motion to terminate parental rights as to both Mother and Father
13 on June 5, 2015, on the basis of neglect. At the time of the termination of parental
14 rights (TPR) hearing on January 22, 2016, Child was residing at Bonem, and had been
15 there for approximately five months.

16 {8} Shasta Rael, Child’s therapist at Bonem, was responsible for Child’s individual
17 therapy and weekly family therapy sessions, which mother participated in by phone.
18 Under cross-examination by Child’s guardian ad litem (GAL), Rael was asked her
19 opinion about Child’s demeanor after the family therapy sessions, and Rael answered

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

18 {9} At the end of the TPR hearing, the district court noted that "June in [Child's]
19 life is still really far away" and said it could not make the case go on any longer. The

1 district court also specifically ruled “that the confusion in Child’s life is leading him
2 to self-harm and Child’s continued limbo caused the Child confusion.” Father asked
3 if this finding regarding Child’s self-harm was based on Rael’s testimony, and the
4 district court answered, “Yes, that his being in limbo is causing him confusion and
5 is causing him self-harm.” Consistent with its answer, the district court’s written
6 findings include a finding that “The [C]hild’s confusion about what is happening is
7 having continued negative consequences on him and the longer he is in legal limbo
8 the longer and more pronounced these negative consequences are.”

9 {10} The judgment terminating parental rights on the basis of neglect was filed on
10 April 26, 2016. In the judgment terminating parental rights, the district court found:
11 “Giving primary consideration to the physical, mental, and emotional welfare and
12 needs of [C]hild, including the likelihood of adoption if rights are terminated, CYFD
13 has demonstrated by clear and convincing evidence that [C]hild’s best interests
14 require that the parental rights of [Father] should be terminated”). Father appeals.

15 **DISCUSSION**

16 {11} Father’s sole contention on appeal is that the district court’s finding on the
17 central issue in this case—that child’s best interests required prompt termination of
18 Father’s parental rights—is based on the testimony objected to, which was
19 erroneously admitted. For the following reasons, we disagree.

1 **Standard of Review**

2 {12} Section 32A-4-28(A) directs, “In proceedings to terminate parental rights, the
3 court shall give primary consideration to the physical, mental and emotional welfare
4 and needs of the child, including the likelihood of the child being adopted if parental
5 rights are terminated.” We have no New Mexico authority directly on point
6 specifying our standard of review. However, we are persuaded by the logic and
7 reasoning of *In re Adoption of Randolph*, 227 N.W.2d 634, 637 (Wis. 1975), an
8 adoption case. *Randolph* states:

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

22 *Id.*

23 {13} In our review of the district court’s finding of Child’s best interests as a mixed
24 question of law and fact, we engage in a two-step process. We therefore engage in a
25 two-step analysis. First, we determine whether substantial evidence supports the

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

13 **Analysis**

14 {14} There is no dispute that CYFD established the statutory grounds for
15 termination of parental rights on the basis of neglect. Under Section 32A-4-28(B)(2),
16 parental rights “shall” be terminated if “the child has been a neglected or abused child
17 as defined in the Abuse and Neglect Act and the court finds that the conditions and
18 causes of the neglect and abuse are unlikely to change in the foreseeable future
19 despite reasonable efforts by the department or other appropriate agency to assist the

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

1 {15} However, a determination that a child is neglected under Section 32A-4-
2 28(B)(2) does not end the case. As we have already observed, Section 32A-4-28(A)
3 directs, “In proceedings to terminate parental rights, the court shall give primary
4 consideration to the physical, mental and emotional welfare and needs of the child,
5 including the likelihood of the child being adopted if parental rights are terminated.”
6 In this case, the termination of Father’s parental rights hinges on whether CYFD
7 proved that termination was in Child’s best interests. We therefore turn to Father’s
8 arguments.

9 {16} Father vigorously contends that the testimony objected to was only admissible
10 through a properly qualified expert, and that the district court erred in admitting the
11 testimony as lay opinion testimony. CYFD concedes that the testimony objected to
12 was inadmissible as lay opinion testimony. We therefore assume, without deciding,
13 that the testimony objected to was not admissible. We further assume that the district
14 court’s finding that Child’s “confusion about what is happening is having continued
15 negative consequences on him and the longer he is in legal limbo the longer and more
16 pronounced these negative consequences are” is based only on the testimony objected
17 to. We therefore proceed to determine whether the district court’s finding of Child’s
18 best interests is otherwise supported by admissible evidence.¹

19 ¹CYFD argues that Father only preserved an objection to the testimony
20 objected to, and that we can consider the balance of Rael’s testimony in determining

1 {17} In pertinent part, the district made findings that family therapy with Mother and
2 Child was scheduled by the therapist to occur on a weekly basis, but Mother's
3 participation was sparse and inconsistent, and outside of therapy, Mother only had
4 some contact with Child by telephone. This inconsistent contact led Child "to be
5 confused and he lacks understanding what is in his future, being reunification with
6 his parents or adoption" and the consequences of this inconsistent contact were that
7 Child "became more emotionally volatile, demonstrated self-harm and low tolerance
8 regarding conflict with his peers." When Father was released from prison and Child
9 was placed with him in October 2013, for two or three weeks, "[C]hild experienced
10 aggressive and violent behaviors." Father was then arrested on November 2, 2013 on
11 new criminal charges, and has had no contact with Child. Father was scheduled to be
12 paroled in June 2016, five months after the TPR hearing. However, since Father had
13 not participated in family therapy, it was not currently in Child's best interests to have
14 contact with Father, and Father had not been able to participate in any classes due to

15 whether the district court finding of Child's best interests is supported by substantial
16 evidence. We agree. "If a proper objection is not made, the evidence may be
17 considered in the same manner as any other relevant evidence and has sufficient
18 probative value to support a finding. . . . Failure to object to the admission of
19 evidence operates as a waiver." *N.M. Att'y Gen. v. N.M. Pub. Serv. Comm'n*,
20 1984-NMSC-081, ¶ 10, 101 N.M. 549, 685 P.2d 957 (citations omitted).

1 his maximum security classification, and being on lockdown at the penitentiary. The
2 time period from the date of the TPR hearing to Father’s anticipated parole date six
3 months later, was “really far away” for Child, in Child’s experience. Finally, and
4 importantly, the district court found that Father had “shown an inability to follow the
5 laws of the State of New Mexico and it is uncertain that inability would change.”

6 {18} The foregoing findings, which do not rely on the testimony objected to, support
7 the district court’s finding that it was in Child’s best interests to terminate Father’s
8 parental rights. This case spans over three years of Mother’s inconsistent participation
9 in her treatment plan and Child’s therapy, Father’s incarceration and lack of
10 communication with Child, and Child’s continued residency in psychiatric and
11 residential facilities. It was not in Child’s best interests to make Child wait five more
12 months for a placement that might be temporary given Father’s recidivism and
13 inability to attend to Child’s special needs. Child would have to wait five months for
14 Father to be released from the penitentiary, and then wait for an additional
15 indeterminate period of time for Father to receive training that might or might not
16 succeed, in the face of possible reoffending by Father. Child waited for over three
17 years for his parents to remedy the causes of his neglect, and “the court is not required
18 to place the [Child] indefinitely in a legal holding pattern, when doing so would be
19 detrimental to the [Child’s] interests.” *State ex rel. Children, Youth & Families Dep’t*

1 v. *Mafin M.*, 2003-NMSC-015, ¶ 24, 133 N.M. 827, 70 P.3d 1266 (internal quotation
2 marks and citation omitted).

3 **CONCLUSION**

4 {19} The judgment terminating Father’s parental rights is affirmed.

5 {20} **IT IS SO ORDERED.**

6
7

MICHAEL E. VIGIL, Judge

8 **WE CONCUR:**

9
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JAMES J. WECHSLER, Judge

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12

STEPHEN G. FRENCH, Judge