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5 **IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

6 **IN THE MATTER OF MARIO F., a child,**

7 **STATE OF NEW MEXICO, ex rel.**

8 **CHILDREN, YOUTH AND FAMILIES DEPARTMENT,**

9 Petitioner-Respondent,

10 v.

NO. 32,545

11 **OCTAVIO F.,**

12 Respondent-Petitioner.

13 **ORIGINAL PROCEEDING ON CERTIORARI**

14 **Monica M. Zamora, District Judge**

15 Caren Ilene Friedman

16 Santa Fe, NM

17 for Petitioner

18 Rebecca J. Liggett

19 Santa Fe, NM

20 for Respondent

21 **DECISION**

1 **Daniels, Chief Justice.**

2 Octavio F. (Father) appeals the district court’s judgment terminating his
3 parental rights to his son, Mario F. (Child), arguing that the judgment should be
4 reversed because Father had complied with his treatment plan and alleviated the
5 causes and conditions of neglect that brought Child into state custody. The
6 Children, Youth and Families Department (CYFD) argues that clear and convincing
7 evidence supports the district court judgment. The Court of Appeals upheld the
8 district court. *See State ex rel. Children, Youth & Families Dep’t v. Octavio F. (In*
9 *re Mario F.)*, No. 29,469, slip op. (N.M. Ct. App. July 22, 2010). We conclude that
10 CYFD presented insufficient evidence at the termination of parental rights hearing
11 to support the district court’s finding that the causes and conditions of neglect were
12 unlikely to change in the foreseeable future. Acting within this Court’s discretion
13 under Rule 12-405(B)(1) NMRA to dispose of a case by unpublished decision rather
14 than formal opinion where the “issues presented have been previously decided” by
15 this Court, we enter this Decision reversing the district court and the Court of
16 Appeals.

17 **Facts and Proceedings Below**

18 Child was taken into custody in September 2005 after police found him
19 wandering near the intersection of Juan Tabo Boulevard and Lomas Boulevard in

1 Albuquerque at approximately 8:00 a.m. Child was four years old at the time and
2 was unable to tell the officers where he lived. After the police had recovered Child,
3 Father flagged them down, explaining that he was looking for his missing son.
4 Initially Father told the officers that Child had climbed out of a window while Father
5 was asleep, but Father later admitted that he had left Child alone when he went to
6 work the night before.

7 CYFD alleged in the Neglect/Abuse Petition that (1) Father left Child home
8 alone while Father went to work, (2) Father's house was dirty, and (3) there was no
9 food in the house. The district court entered a custody order in October 2005,
10 granting legal custody of Child to CYFD and providing that Father should have
11 regular visits with Child. Father entered a plea of no contest to charges of neglect
12 at the November 2005 adjudicatory hearing. The district court ordered Father to
13 participate in a parenting treatment program and undergo mental health, domestic
14 violence, and substance abuse assessments.

15 In December 2005, CYFD filed a "Judicial Review and/or Permanency
16 Hearing Report" stating that Father had "completed all current assessments," was
17 visiting Child three times a week, was meeting his treatment plan objectives, and
18 appeared "extremely bonded with" and "able to parent" Child. "Reunification" was
19 the report's sole recommended permanency plan.

1 CYFD filed a second report in August 2006 stating that although Father had
2 “participated in the majority of his treatment plan items,” CYFD and some of
3 Father’s service providers were concerned that Father had “learned very little from
4 his services, or that he does not/cannot demonstrate the expected positive behavior
5 changes.” The report indicated that Father had been “uncooperative, oppositional,
6 and unpleasant to CYFD personnel and other providers alike.” The report also
7 indicated that Father had “stated, on more than one occasion, that the State has no
8 right to tell him or [Child] what to do because there was no justified reason for
9 [Child] being taken from his custody in the first place.” The report also noted that
10 the frequency of Father’s supervised visits had been reduced to twice weekly, in part
11 because of Father’s “inappropriate behavior with [Child] during visits.” The August
12 2006 report listed reunification as the recommended permanency plan but included
13 adoption as a concurrent permanency plan.

14 CYFD continued to recommend reunification in a third report filed in July
15 2007. According to the report, Father had “been very compliant with his treatment
16 plan items,” had “made significant progress towards the desired outcomes and
17 towards alleviating the causes of placement,” and was “highly motivated to regain
18 custody of” Child. Supervised visits and family therapy sessions were “going well,”
19 and CYFD had “no safety concerns” at that time.

1 Because Father had “proven he can be fairly adept at child rearing with
2 minimal safety concerns,” CYFD decided to schedule a six-month trial home visit
3 beginning in late July 2007. By then, Child had been in CYFD custody for almost
4 two years. On the day after the first overnight home visit, Child ran out into the
5 street. Father spanked Child to discipline him, and the incident resulted in a long
6 scratch on Child’s back, apparently from Father’s attempt to stop Child by grabbing
7 his shirt. When a social worker protested the spanking because Father had done it
8 out of anger, Father responded that he had a right to spank his own child. CYFD
9 ended the trial home visit after this incident, concerned that the spanking
10 demonstrated Father’s inability to put the training he had been receiving into
11 practice.

12 Soon after the July 2007 trial home visit abruptly ended, CYFD changed its
13 recommended permanency plan from reunification to adoption. In November 2007,
14 CYFD reported that Child had become afraid of Father and that adoption would be
15 in Child’s best interest. The district court adopted CYFD’s recommendation and
16 changed the permanency plan from reunification to termination of parental rights
17 and adoption.

18 CYFD moved to terminate Father’s parental rights in May 2008. The
19 termination of parental rights hearing was held on July 10, 2008, and continued on

1 November 21, 2008. Various social workers and other witnesses testified. The
2 evidence indicated that Father had cooperated with CYFD, followed his treatment
3 program, improved his parenting skills, and attended his therapy sessions. A
4 therapist who had worked with Father and Child testified that Father had learned
5 from his mistakes, understood that he could not leave Child alone, and knew why
6 spanking Child during the trial home visit had been wrong. Despite these
7 improvements, however, caseworkers testified that Father had not made the kind of
8 progress CYFD wanted to see at that stage. Some witnesses believed Child should
9 be reunited with Father. Two caseworkers opined that adoption was in Child's best
10 interest.

11 After the parties made their closing remarks at the November portion of the
12 hearing, the court remarked, "This is a difficult one." The court went on to say that,
13 if the hearing had been finished in July, "it wouldn't have been a difficult decision."
14 Although expressing doubts, the court seemed to conclude that Father had made
15 significant progress between July and November. The court was concerned that
16 CYFD had not identified an adoptive family for Child and that Child's "high needs"
17 required finding a family for him soon. The court indicated that it wanted to see
18 how Father would do "in the unstructured setting" of his own home because that
19 would be "indicative of whether or not he can truly make the changes." The court

1 specifically refused to make CYFD's suggested finding that termination was
2 warranted and instead held the entry of judgment in abeyance. The court invited
3 CYFD to provide a status report in the future and promised to hold a hearing if
4 problems arose in the meantime.

5 The court held a "Subsequent Permanency Hearing" on January 28, 2009,
6 which was attended by several social workers, CYFD, Father's attorney, an
7 interpreter, and the guardian ad litem. The court began the hearing before Father
8 arrived because the interpreter was only available for a limited period of time. In its
9 opening remarks, CYFD encouraged the court to issue a decision that day,
10 explaining that "significant events ha[d] transpired" since the last hearing. CYFD
11 had already described these events in a report filed with the court and offered to
12 present witness testimony verifying the statements in that report. CYFD proposed
13 findings of fact and asked the court to terminate Father's parental rights.

14 After hearing CYFD's opening remarks, Father's attorney objected to
15 CYFD's findings of fact and to the conduct of a "full evidentiary hearing" because
16 Father did not have an opportunity to speak to the witnesses, did not have notice of
17 their testimony, had just received CYFD's progress report that day, and had not
18 prepared for any kind of evidentiary hearing. Father's attorney also objected to
19 being unable "to explain to [Father] what we're really going over." Father's

1 attorney renewed her objections when Father arrived, nine minutes into the forty-
2 nine minute hearing. The court responded, “We’re not doing an evidentiary hearing,
3 I just want to know what the progress is. We’re not going to go that far.” Counsel
4 for CYFD interjected, saying “I don’t think the court was contemplating an
5 evidentiary hearing, the evidentiary part of this is over. . . . I think [the court]
6 wanted to hear from providers how things were going in the house.” Father’s
7 attorney objected to CYFD’s proposed presentation of “evidentiary testimony” from
8 service providers without first providing a witness list to Father.

9 Despite Father’s objections, the court allowed CYFD to present
10 “nonevidentiary” testimony by multiple social workers and agency employees who
11 related individual events in which Father had been unsafe or neglectful with Child,
12 and who gave opinions to the effect that Father was not making any progress and
13 should lose his parental rights. Father then made a brief statement expressing his
14 dedication to the reunification process, his desire to improve, and his belief that he
15 could be a good parent. After the presentation of this testimony, the court made
16 findings of fact on the record that Child had been neglected, that CYFD had made
17 reasonable efforts to address the causes and conditions of neglect, and that despite
18 those efforts, Father had not alleviated the causes of neglect. Father’s attorney
19 objected to an order to terminate, arguing that the State finished presenting its case

1 against Father in November and that the January hearing did not afford Father the
2 opportunity to present evidence or cross-examine the witnesses against him.

3 On February 24, 2009, the court entered judgment terminating Father's
4 parental rights and adopting CYFD's proposed findings of fact and conclusions of
5 law as its own. The court's findings of fact included an entire page devoted to
6 information presented only at the January 2009 "nonevidentiary" hearing.
7 Immediately after listing the findings of fact detailing the information brought
8 before the court at that hearing, the court made this additional finding: "The court
9 having heard these reports concluded that [Father's] parental rights should be
10 terminated." This finding confirmed that the court relied on information presented
11 at the January 2009 hearing when it decided to terminate Father's parental rights.

12 The Court of Appeals affirmed the district court's order terminating Father's
13 parental rights, concluding that (1) despite Father's compliance with the treatment
14 plan, he had not changed the conditions and causes of the neglect, and (2) the district
15 court's conclusion was based on clear and convincing evidence justifying the
16 termination of parental rights. *Octavio F.*, No. 29,469, slip op. at 14-15.

17 **Discussion**

18 CYFD had the burden of proving the grounds for terminating Father's
19 parental rights by clear and convincing evidence. NMSA 1978, § 32A-4-29(I)

1 (2005) (amended 2009). “The clear and convincing evidence standard requires
2 proof stronger than a mere ‘preponderance’ and yet something less than ‘beyond a
3 reasonable doubt.’” *Lee v. Lee (In re Adoption of Doe)*, 100 N.M. 764, 767, 676
4 P.2d 1329, 1332 (1984) (internal quotation marks and citation omitted). Clear and
5 convincing evidence is that which “instantly tilt[s] the scales in the affirmative when
6 weighed against the evidence in opposition and the fact finder’s mind is left with an
7 abiding conviction that the evidence is true.” *Id.* (internal quotation marks and
8 citation omitted).

9 “The function of the appellate court is to view the evidence in the light most
10 favorable to the prevailing party, and to determine therefrom if the [district court]
11 could properly have reached an abiding conviction as to the truth of the fact or facts
12 found.” *State ex rel. Children, Youth & Families Dep’t v. Lance K. (In re Emily K.)*,
13 2009-NMCA-054, ¶ 16, 146 N.M. 286, 209 P.3d 778 (internal quotation marks and
14 citation omitted).

15 When determining whether clear and convincing evidence supports the
16 termination of parental rights, the district court must rely on evidence presented at
17 the termination of parental rights hearing. Because parents have a constitutional
18 right to retain custody of their children, termination of parental rights hearings “must
19 be conducted with scrupulous fairness,” *Ronald A. v. State ex rel. Human Servs.*

1 *Dep't (In re Ronald A.)*, 110 N.M. 454, 455, 797 P.2d 243, 244 (1990), and must
2 adhere to the rules of evidence, *see* Rule 10-141 NMRA; Rule 11-1101 NMRA. The
3 parties in a termination proceeding must have “notice of the issues . . . to be
4 determined and opportunity to prepare and present a case on the material issues.”
5 *Ronald A.*, 110 N.M. at 455, 979 P.2d at 244 (internal quotation marks and citation
6 omitted). The parent “has the right under due process to a fair opportunity to be
7 heard and to present a defense,” including an “opportunity for meaningful
8 participation.” *State ex rel. Children, Youth & Families Dep't v. Mafin M. (In re*
9 *Chance M.)*, 2003-NMSC-015, ¶21, 133 N.M. 827, 70 P.3d 1266 (internal quotation
10 marks and citation omitted).

11 The findings of fact the district court made in this case included at least a page
12 of factual information that was brought to the court’s attention on January 28, 2009,
13 at what the court repeatedly confirmed was a nonevidentiary hearing. To the extent
14 that the court relied on information outside the evidentiary record to terminate
15 Father’s parental rights, the district court erred. We will not, however, reverse the
16 district court if sufficient record evidence supports the district court’s judgment
17 terminating Father’s parental rights. *See Normand v. Ray*, 109 N.M. 403, 411, 785
18 P.2d 743, 751 (1990) (“Even where specific findings adopted by the trial court are
19 shown to be erroneous, if they are unnecessary to support the judgment of the court

1 and other valid material findings uphold the trial court’s decision, the trial court’s
2 decision will not be overturned.”); *see also State ex rel. Children, Youth & Families*
3 *Dep’t v. Brandy S. (In re Nicholas S.)*, 2007-NMCA-135, ¶¶ 28, 33, 142 N.M. 705,
4 168 P.3d 1129 (upholding termination of parental rights where the district court’s
5 findings of fact were “independently established by the testimony at the [termination
6 of parental rights] hearing”). Our review of this case will consider only evidence of
7 record presented to the court at the termination of parental rights hearing that
8 concluded on November 21, 2008.

9 In order to terminate Father’s parental rights, the district court needed to make
10 three specific factual findings: (1) that Child “has been . . . neglected or abused,”
11 (2) “that the conditions and causes of the neglect and abuse are unlikely to change
12 in the foreseeable future,” and (3) that CYFD has made “reasonable efforts . . . to
13 assist [Father] in adjusting the conditions that render [Father] unable to properly care
14 for [C]hild.” NMSA 1978, § 32A-4-28(B)(2) (2005); *see State ex rel. Children,*
15 *Youth & Families Dep’t v. Joseph M. (In re Victor M.)*, 2006-NMCA-029, ¶ 17, 139
16 N.M. 137, 130 P.3d 198. Father disputes that the second factual finding was
17 supported by clear and convincing evidence.

18 Father argues that he complied with his treatment plan and alleviated all
19 causes and conditions of neglect specified in the Neglect/Abuse Petition, including

1 leaving Child home alone, having a dirty house, and having no food in the house.
2 A parent’s compliance with a CYFD-crafted treatment program may support a
3 factual finding that the causes and conditions of neglect have changed or are likely
4 to change in the foreseeable future. *See, e.g., Lance K.*, 2009-NMCA-054, ¶¶ 36-37;
5 *Joseph M.*, 2006-NMCA-029, ¶¶ 10-12, 17-18.

6 In *Lance K.*, the Court of Appeals reversed the district court’s order
7 terminating a father’s parental rights to his children, noting his “substantial
8 compliance with his treatment plan and progress toward change.” 2009-NMCA-
9 054, ¶¶ 37, 64. *Lance K.* concluded that the conditions that brought the children into
10 CYFD custody had been resolved prior to the termination of parental rights hearing,
11 *id.* ¶¶ 29, 32, and that CYFD inappropriately relied on evidence of events that had
12 occurred nearly four years before the court terminated the father’s parental rights,
13 *id.* ¶ 32. The Court held that CYFD had not “presented clear and convincing
14 evidence that the causes and conditions of neglect were unlikely to change in the
15 foreseeable future.” *Id.* ¶ 37.

16 In *Joseph M.*, the father followed his treatment plan and made positive
17 progress toward becoming an adequate parent, but the mother made little progress.
18 2006-NMCA-029, ¶¶ 10-11. CYFD argued that the father was not an adequate
19 parent because he failed either to recognize that the mother posed a threat to the

1 children or to remedy the presence of the mother in the home. *Id.* ¶ 19. The Court
2 of Appeals reversed the termination of the father’s parental rights because there was
3 insufficient evidence that Father had “notice that his relationship with [the m]other
4 was a condition and cause of the abuse and neglect of his children which had to end
5 for him to be able to parent his children.” *Id.* ¶¶ 22-23.

6 A parent’s compliance with a treatment plan does not automatically preclude
7 a court from making a factual finding that the causes and conditions of abuse or
8 neglect are unlikely to change. *See, e.g., State ex rel. Children, Youth & Families*
9 *Dep’t v. Athena H. (In re Charles H.)*, 2006-NMCA-113, ¶ 9, 140 N.M. 390, 142
10 P.3d 978. If a parent is unable to make the changes necessary to become an
11 adequate parent despite reasonable efforts to comply with a treatment plan, the
12 district court may appropriately conclude that termination is justified. *Id.* The
13 district court in *Athena H.* concluded that the mother “had given her best effort to
14 comply with the treatment plan,” but the court terminated her parental rights because
15 she had severe unresolved psychological problems and had caused her children
16 severe injury while they were in her care. *Id.* The Court of Appeals upheld the
17 termination of parental rights, explaining that “CYFD was entitled to act in the
18 children’s best interest.” *Id.* ¶ 13 (citing NMSA 1978, § 32A-1-3(A) (1999) (“A
19 child’s health and safety shall be the paramount concern. Permanent separation of

1 a child from the child’s family, however, would especially be considered when the
2 child or another child of the parent has suffered permanent or severe injury or
3 repeated abuse.”)).

4 CYFD argues that although the conditions of neglect specified in the
5 Neglect/Abuse Petition may have been alleviated, Father’s inability to provide a safe
6 and structured environment for Child is the underlying cause of the neglect and is
7 unlikely to change in the foreseeable future. CYFD explains that Child needs a
8 specific type of parenting, and that given Child’s special needs, Father is not an
9 adequate parent. However, Child’s special needs have nothing to do with the
10 conditions of neglect that justified CYFD taking custody of Child to begin with.
11 Father’s parental rights cannot be terminated merely because another family might
12 be better at addressing Child’s special needs. *See Joseph M.*, 2006-NMCA-029, ¶
13 16 (“[A] parent’s rights may not be terminated simply because a child might be
14 better off in a different environment.” (internal quotation marks and citation
15 omitted)). A parent is required to be adequate, not perfect.

16 CYFD also argued that Father should have known not to use physical
17 discipline to correct Child. CYFD concedes that parents have a right to implement
18 reasonable physical discipline in New Mexico but asserts that Father should have
19 realized that spanking this particular child was inappropriate. Significantly,

1 however, a therapist who had worked with Father testified that Father learned that
2 physical discipline was not the appropriate way to correct Child’s behavior. Nothing
3 in the record indicates that Father has physically disciplined Child after being told
4 that CYFD thought spanking this child constituted abuse.

5 It is unclear what specific changes CYFD expected Father to make in order
6 to alleviate the alleged causes of neglect. Father substantially complied with the
7 treatment plan established by CYFD and has continually expressed his interest in
8 raising Child even after five and a half years of separation. The evidence presented
9 at the termination of parental rights hearing did not establish that Father failed to
10 implement expected changes of which Father had notice. *Compare Joseph M.,*
11 *2006-NMCA-029, ¶ 22* (concluding that the father could not have been expected to
12 know “that his relationship with Mother was a condition and cause of the abuse and
13 neglect of his children”), *with Athena H., 2006-NMCA-113, ¶ 5* (finding that further
14 CYFD efforts were unlikely to remedy the mother’s mental health issues, the
15 underlying cause of abuse and neglect).

16 **Conclusion**

17 The evidence of record introduced at the termination of parental rights hearing
18 failed to prove by clear and convincing evidence the required statutory justification
19 for terminating Father’s parental rights. We reverse the judgment terminating

1 Father's parental rights and remand this case to the district court for further
2 appropriate proceedings in accordance with this Decision.

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IT IS SO ORDERED.

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CHARLES W. DANIELS, Chief Justice

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WE CONCUR:

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PATRICIO M. SERNA, Justice

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PETRA JIMENEZ MAES, Justice

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RICHARD C. BOSSON, Justice

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EDWARD L. CHÁVEZ, Justice