IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 12/13/2012
RUTH A. WILLINGHAM, CLERK
BY: mjt

JULIO L.,	)	1 CA-JV 12-0135
	)	
Appellant,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
ARIZONA DEPARTMENT OF ECONOMIC SECURITY, JULISSA L.,	)	Ariz. R.P. Juv. Ct. 103(G); ARCAP 28)
	)	
Appellees.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. JD16998

The Honorable Aimee L. Anderson, Judge

AFFIRMED

Law Office of Anne M. Williams, P.C. — Tempe
By Anne M. Williams
Attorney for Appellant

Thomas C. Horne, Attorney General — Phoenix
By Nicholas Chapman-Hushek,
Assistant Attorney General
Attorneys for Appellees

W I N T H R O P, Chief Judge

¶1 Julio L. ("Father") appeals the juvenile court's order severing his parental rights to Julissa L. ("the child").

Because the child is affiliated with the Hopi tribe, these proceedings are subject to the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. §§ 1901–1963 (West 2012).[1] Father argues the court fundamentally erred in finding that (1) the Arizona Department of Economic Security ("ADES") made active efforts to provide services to him and (2) placing the child in his custody would likely "result in serious emotional or physical harm to the child." For the reasons that follow, we affirm.

BACKGROUND[2]

¶2 The child was born on July 10, 2011. The child's biological mother ("Mother") is an enrolled member of the Hopi tribe; Father is apparently not a tribal member. Mother and Father have a long-standing history of substance abuse, and at the time of the child's birth, both Mother and the child tested positive for cocaine and methamphetamine.

¶3 Soon thereafter, ADES filed a dependency petition, alleging that the parents' custody of the child would be contrary to the child's welfare, due to the parents' unstable living situations (both were allegedly homeless) and established

---

[1] We cite the current version of the statutes unless changes material to our decision have occurred after the relevant date.

[2] We view the evidence in the light most favorable to sustaining the juvenile court's decision. *Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, 82, ¶ 13, 107 P.3d 923, 928 (App. 2005).

history of substance abuse. The child was placed in the legal and physical custody of ADES, and later placed in the physical custody of the maternal grandparents. After both parents waived their right to contest the allegations of the dependency, the court found the allegations were true and the child was dependent as to the parents. The court set a case plan of reunification, with a concurrent plan of severance and adoption. ADES offered Father numerous services, including parent aide services, a psychological consultation, substance abuse testing and treatment, supervised visitation, and transportation.

¶4 The reunification plan continued until the February 2, 2012 report and review hearing, when the court changed the plan to severance and adoption. ADES then moved to terminate the existing parent-child relationships. As to Father, ADES alleged (1) he had abandoned the child and (2) the child had been in an out-of-home placement for a cumulative total period of six months or longer pursuant to court order, and Father had substantially neglected or willfully refused to remedy the circumstances that caused the child to be in the out-of-home placement, including by refusing to participate in reunification services offered by ADES.[3] *See* Ariz. Rev. Stat. ("A.R.S.") §§ 8-533(B)(1), (8)(b).

[3] Mother chose to waive her right to contest the severance, and she is not a party to this appeal.

¶5 At the June 7, 2012 severance hearing, the court heard testimony from Father, a Child Protective Services specialist who acted as ADES's case manager, and a representative of the Hopi tribe. After taking the matter under advisement, the court issued a signed order, filed on June 20, 2012, terminating Father's parental rights after concluding that ADES had proved the six months' out-of-home placement allegation. The court found that ADES had offered Father numerous timely services, the service information was communicated to him, and he was repeatedly encouraged to engage in the services, but he had "failed to actively and consistently participate in services." The court therefore found beyond a reasonable doubt that ADES had made "active, but unsuccessful, efforts . . . to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family." The court also found beyond a reasonable doubt that placing the child in Father's custody would likely "result in serious emotional or physical harm to the child."

¶6 Father timely appealed from the court's order. We have appellate jurisdiction pursuant to A.R.S. §§ 12-2101(A)(1) and 8-235(A).

ANALYSIS

¶7 Father argues that the court erred in its findings under § 1912(d) and (f) of ICWA. *See* 25 U.S.C. § 1912(d), (f).

We will affirm the court's findings "absent an abuse of discretion or unless the court's findings of fact were clearly erroneous." *Maricopa County Juv. Action No. JV-132905*, 186 Ariz. 607, 609, 925 P.2d 748, 750 (App. 1996) (citations omitted). "[T]he juvenile court will be deemed to have made every finding necessary to support the judgment." *Maricopa County Juv. Action No. JS-8287*, 171 Ariz. 104, 111, 828 P.2d 1245, 1252 (App. 1991) (citations omitted).

I. Active Efforts Under § 1912(d)

¶8 Father contends ADES violated § 1912(d) because ADES failed to undergo active efforts to accommodate his employment schedule when his schedule conflicted with available services. Before severing parental rights, the State "has an affirmative duty to make all reasonable efforts to preserve the family relationship." *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 186, ¶ 1, 971 P.2d 1046, 1047 (App. 1999) (citations omitted). ICWA specifically requires a showing "that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 U.S.C. § 1912(d). Although ADES is not required to provide every conceivable service or ensure a parent participates in each service offered, *Maricopa County Juv. Action No. JS-501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (App. 1994), ADES still

must provide the parent "time and opportunity" to participate in the services. *Yvonne L. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 415, 423, ¶ 34, 258 P.3d 233, 241 (App. 2011) (holding that under ICWA, a showing of active efforts does not require "that ADES provide every imaginable service"). We also consider the parent's own effort and participation in determining whether ADES has satisfied the active efforts requirement of § 1912(d). *See id.*; *JS-8287*, 171 Ariz. at 113, 828 P.2d at 1254 (holding that the record supported the trial court's conclusion that ADES made diligent efforts under § 1912(d) because "rehabilitative programs repeatedly were offered . . . yet . . . [the mother] did not take advantage of the programs").

¶9 The record in this case belies Father's contention. On Father's own request, ADES changed the visitation schedule twice to accommodate his conflicting work schedule. Despite these changes, Father rarely showed up for scheduled visits with the child. Father made another request for a schedule change at the severance hearing, but he admitted on cross-examination that he had not asked anyone at ADES, until that moment, to alter the schedule again. Father also failed to follow through with other reunification efforts by ADES, including two separate referrals to parent aide services, mandatory drug testing, and counseling.

¶10 As this court has previously noted, "ADES cannot force a parent to participate in recommended services." *Yvonne L.*,

227 Ariz. at 423, ¶ 34, 258 P.3d at 241. Although ADES was required to offer the time and opportunity for reunification, it was not required to ensure Father's attendance and participation. The record reveals that Father failed to meaningfully or consistently participate in the reunification process, even in light of ADES's scheduling adjustments. *See Pinal County Juv. Action No. S-389*, 151 Ariz. 564, 567, 729 P.2d 918, 921 (App. 1986) (affirming the termination of parental rights when "[a]ttempts to preserve or restore the long-abandoned family unit by measures in which appellant refuses to participate would be futile"). In sum, the record supports the court's finding that ADES provided active efforts to satisfy ICWA.[4]

II. Serious Harm to the Child Under § 1912(f)

¶11 Father next contends the court erred in finding that placing the child in his custody would be "likely to result in serious emotional or physical harm to the child" under 25 U.S.C. § 1912(f).[5] Father argues that the court's only evidence for

---

[4] Father also claims that ADES "attempted to sever his rights as soon as possible" because ADES "believed that reunification with Father was never going to happen." Although Father arguably has waived this issue by failing to provide further argument or evidence to support it, *see* ARCAP 13(a)(6), after reviewing the record, we reject the merits of his claim.

[5] Section 1912(f) provides as follows: "No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable

this determination was brief expert testimony by the former ICWA case manager, who opined that harm was likely to occur "[b]ased on the fact that the Father has not cured any of the issues that took [the child] out of the home . . . [and] services were also provided to him which did not work." However, as our supreme court has stated, "[a]lthough there must be expert testimony addressing the future harm determination, 'ICWA does not require that the experts' testimony provide the sole basis for the court's conclusion; ICWA simply requires that the testimony support that conclusion.'" *Steven H. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 566, 571, ¶ 20, 190 P.3d 180, 185 (2008) (quoting *E.A. v. State*, 46 P.3d 986, 992 (Alaska 2002) (equating the expert testimony provisions of § 1912(e) and (f))). In contrast with Father's argument, a court does not consider expert testimony in isolation; the court is permitted to use the record as a whole. In addition to the ICWA case manager's testimony, the record in this case contains substantial evidence to support the court's findings under § 1912(f). Consequently, the juvenile court did not abuse its discretion in finding beyond a reasonable doubt the likelihood of serious harm to the child.

---

doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."

CONCLUSION

¶12 The juvenile court's order terminating Father's parental rights to the child is affirmed.

_____/S/_____
LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

_____/S/_____
JOHN C. GEMMILL, Presiding Judge

_____/S/_____
MARGARET H. DOWNIE, Judge