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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

HENRY M., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and GAGE A., Appellees.	2 CA-JV 2011-0146 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. JD192918

Honorable Stephen Rubin, Judge Pro Tempore
Honorable Geoffrey Ferlan, Judge Pro Tempore

AFFIRMED

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H O W A R D, Chief Judge.

¶1 Gage A., born in 2006, is the child of Henry M., a member of the Cherokee Nation (the Nation). Henry appeals from the juvenile court's December 19, 2011, order

terminating his parental rights to Gage based on the grounds of mental illness or history of chronic substance abuse and length of time in care.[1] *See* A.R.S. § 8-533(B)(3), (8)(a). Because Gage is an "Indian child," these proceedings are subject to the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901 through 1963. *See* 25 U.S.C. § 1903(4) (defining "Indian child"). On appeal, Henry contends the court did not comply with ICWA and asks that we vacate the order terminating his parental rights to Gage. For the reasons set forth below, we affirm.

¶2 A juvenile court may terminate a parent's rights only if it finds by clear and convincing evidence that a statutory ground for severance exists and finds by a preponderance of the evidence that severance is in the child's best interests. A.R.S. §§ 8-533(B), 8-537(B); *see Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). We will not disturb a court's severance order unless the factual findings upon which it is based "are clearly erroneous, that is, unless there is no reasonable evidence to support them." *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, ¶ 2, 982 P.2d 1290, 1291 (App. 1998). We view the facts in the light most favorable to sustaining the court's order. *See Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, ¶ 13, 107 P.3d 923, 928 (App. 2005). Where, as here, ICWA is implicated, it imposes the following requirements: that the Department of Economic Security (ADES) has made active but unsuccessful efforts to provide services to prevent the breakup of the family and that

[1]The mother, whose parental rights to Gage were also terminated, is not a party to this appeal.

there must be proof beyond a reasonable doubt, supported by "testimony of qualified expert witnesses," that continued custody will likely result in serious damage to the child. *See* 25 U.S.C. § 1912(d), (f). However, ICWA does not require the higher standard of proof—beyond a reasonable doubt—for state-law findings. *Valerie M. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 331, ¶ 20, 198 P.3d 1203, 1207 (2009).

¶3 On December 8, 2009, ADES filed a dependency petition alleging three-year-old Gage was dependent as to his parents because his mother, whose whereabouts were unknown, had a history of mental illness and substance abuse, and Henry, who also had a history of substance abuse, was incarcerated. Based on representations made by his maternal grandmother, it was believed Gage was not an Indian child. However, the minute entry from the preliminary protective hearing held on December 15, indicates the juvenile court was advised "ICWA is applicable." One month later, on January 19, 2010, Henry admitted the allegations in the first amended dependency petition, which stated that Gage "is not an Indian child," and Gage was adjudicated dependent as to him. Additionally, there was no reference to ICWA or Gage's status as an Indian child at the three subsequent dependency review hearings held in March, July, and September 2010. Henry appeared telephonically from prison at the first and third hearings, but he did not appear at the second one, although his attorney did. At a December 8, 2010, permanency hearing, one year after ADES had filed the first dependency petition, the court invoked the provisions of ICWA; ADES provided notice to the Nation later that month and filed a third amended dependency petition, stating Henry is a member of the Nation.

¶4 In January 2011, ADES filed a memorandum regarding the applicability of ICWA, explaining that based on a clerical error, it had assumed Gage did not qualify as an Indian child, thus resulting in the juvenile court having adjudicated him dependent without notice to the Nation, without findings that active efforts had been made to provide services to prevent the breakup of the family, and in the absence of expert testimony that continued custody would result in serious damage to Gage. *See* § 1912(d), (f). Concluding that the dependency adjudication was therefore "vulnerable" under ICWA, ADES asked the juvenile court to re-adjudicate Gage dependent in compliance with ICWA. The court continued the permanency hearing held just a few days later in order to give the Nation "an opportunity to be heard" at the upcoming initial dependency hearing.

¶5 At the initial dependency hearing held on January 28, 2011, Cherokee Nation caseworker Kristi Crawford informed the juvenile court that, although not yet registered, Gage was eligible for enrollment in the Nation. The court thus granted ADES's request to defer ICWA testimony to the upcoming permanency hearing in February 2011. The Nation intervened, and Crawford testified as an ICWA expert at the February 15 hearing, telling the court that active efforts had been made to provide services to the parents and that the current placement with the maternal aunt was ICWA-compliant. However, because Crawford had not yet received the information ADES had sent regarding Gage's special needs, the court deferred addressing the pending permanency and visitation issues, and set a continued permanency hearing to address

additional ICWA issues. At the April 26, 2011, permanency hearing, the court concluded, based on Crawford's testimony, that ADES had made "active efforts to prevent the break up of the Indian family and that in spite of the provision of those active efforts the child cannot be safely returned to the father today without a substantial risk of harm." The court ordered ADES to file a motion to terminate the parents' rights to Gage, making no mention of ADES's previous request to re-adjudicate Gage dependent. ADES filed a motion to terminate on May 5, 2011, and notified the Nation of the motion on the same date.

¶6 On July 8, 2011, five months after the Nation had intervened and two months after ADES had filed the motion to terminate, Henry filed a motion to dismiss or invalidate proceedings pursuant to 25 U.S.C. § 1914,[2] arguing the juvenile court had failed to re-adjudicate Gage as a dependent minor despite ADES's request that it do so.[3] Concluding the current foster placement should not have been ordered in light of the dependency adjudication that did not comply with ICWA, Henry asserted he was entitled

[2]Section 1914 provides a parent "may petition any court of competent jurisdiction to invalidate [a foster care placement or termination] upon a showing that such action violated any provision of sections 1911, 1912, and 1913."

[3]Henry filed the motion to invalidate in the juvenile court, which is a "court of competent jurisdiction" within the meaning of § 1914. *See Jonathon S. v. Tiffany S.*, 28 Cal. Rptr. 3d 495, 500-501 (Ct. App. 2005) (invalidation petition in open dependency proceeding must be filed in juvenile court); *Slone v. Inyo Cnty. Juv. Court*, 230 Cal. Rptr. 126, 126 (Ct. App. 1991) (while dependency matter is before juvenile court, invalidation proceeding must be brought in that court). We thus need not address the state's apparent suggestion that this court is not a "court of competent jurisdiction" within the meaning of § 1914.

to additional time to reunify with Gage and the motion to sever was accordingly premature. He asked the court to "invalidate or dismiss the proceedings currently pending." The parties argued the motion to invalidate on the first day of the contested severance hearing in July 2011, after which the court took the motion under advisement and proceeded with the severance hearing over Henry's objection.[4]

¶7 During the pendency of the severance hearing, which spanned three days in July and October 2011, the court conducted an additional dependency review hearing in October 2011, in which Crawford participated. The court concluded by clear and convincing evidence that ADES had made active but unsuccessful efforts to provide services to prevent the breakup of the family and that Gage could not be returned to Henry without risk of harm. Crawford also testified at the severance hearing and affirmed that, based on the records documenting the entire case, including the year before the Nation had intervened, ADES had made active efforts to prevent the breakup of the family. She also confirmed that she had previously opined that Gage would be at risk of harm if returned to Henry, and that she believed termination of Henry's parental rights to be in Gage's best interests and was unaware of any additional services ADES could have provided for Henry.

¶8 On September 9, 2011, the juvenile court denied Henry's motion to invalidate the dependency adjudication in a signed order. Henry did not appeal from that

[4]The judge who conducted the severance hearing and heard argument on the motion to invalidate was not the same judge who had presided over the dependency adjudication proceedings.

order. Subsequently, on December 19, 2011, in a written under advisement ruling, the juvenile court found ADES had proved the asserted grounds for severance by clear and convincing evidence and severance was in Gage's best interests by proof beyond a reasonable doubt. The appeal now before us is taken from that December 19 order.

¶9 Asserting he was entitled to invalidate the dependency adjudication under § 1914, Henry argues on appeal that "[a] finding by the [Juvenile] Court that the requirements of ICWA were met over a year after the filing of the dependency should not be permitted to justify a dependency adjudication that was accomplished in violation of the Act." In support of his argument the juvenile court should have invalidated the dependency adjudication, Henry points out that pursuant to 25 U.S.C. § 1912(a) and (e), no foster care placement proceeding can take place "until at least ten days" after the tribe received notice of commencement of proceedings involving an Indian child and that foster care placement orders require "a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses" that continued custody is likely to result in damage to the child. He argues all of these findings were lacking when Gage was adjudicated dependent in January 2010. Henry further asserts Crawford's testimony should be discounted because she was not involved in the case from the beginning. He asks that we "reverse" the termination order and "remand the matter to the Juvenile Court," instructing it that "under no reasonable interpretation of [ICWA] can the required findings of the Act be made 14 months after the removal of an Indian child."

We review de novo the court's application of a federal statute. *Jared P. v. Glade T.*, 221 Ariz. 21, ¶ 17, 209 P.3d 157, 160 (App. 2009).

¶10 Henry has appealed solely from the juvenile court's December 19, 2011, order terminating his parental rights to Gage. But, he challenges neither the statutory grounds for termination nor the court's best-interests determination on the merits. Rather, he seems to challenge the court's September 9, 2011, ruling denying his motion to invalidate the dependency adjudication, an order not mentioned in his notice of appeal. He asserts that because the dependency adjudication, which he claims did not comply with ICWA, was invalid, the termination ruling also was invalid. However, our jurisdiction is limited to reviewing that which is specified in the notice of appeal, which must "designate the judgment or part thereof appealed from." Ariz. R. Civ. App. P. 8(c); *see also Lee v. Lee*, 133 Ariz. 118, 124, 649 P.2d 997, 1003 (App. 1982) (court of appeals lacks jurisdiction to review matters not contained in notice of appeal). Because Henry has appealed solely from the severance order, a ruling he does not challenge on the merits on appeal, we have no basis for disturbing that order.

¶11 Additionally, Henry did not appeal timely from the order denying his motion to invalidate the dependency adjudication for failure to comply with ICWA. *See In re Enrique P. v. Shannon P.*, 709 N.W.2d 676, 684 (Neb. Ct. App. 2006) (juvenile court's order denying petition to invalidate final, appealable order); *see also* A.R.S. § 8-235(A) (aggrieved party in juvenile court proceeding may appeal final order of juvenile court); Ariz. R. P. Juv. Ct. 103(A) (same). "A notice of appeal shall be filed with the

clerk of the superior court no later than 15 days after the final order is filed with the clerk." Ariz. R. P. Juv. Ct. 104(A); *see also In re Adoption of T.N.F.*, 781 P.2d 973, 978-80 (Alaska 1989) (concluding Congress intended for state statutes of limitations to apply in actions brought under § 1914). We find the motion to invalidate analogous to Rule 46(E), Ariz. R. P. Juv. Ct., which, like a motion to set aside judgment under Rule 60(c)(1), Ariz. R. Civ. P., is a final, appealable order. *See Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, ¶ 1, 173 P.3d 463, 465 (App. 2007) (direct appeal from denial of motion to set aside entry of default and default judgment terminating parental rights); c*f. Jared P.*, 221 Ariz. 21, ¶¶ 29-30, 209 P.3d at 163 (putative father who failed to appeal from order not final for purposes of appeal entitled to participate in adoption). Because Henry failed to appeal from the juvenile court's denial of his motion to invalidate within the fifteen-day statutory period, we lack jurisdiction to review the court's denial of that motion.

¶12 Finally, we note that the severance order was entered after proceedings in which the Nation had ample opportunity to participate, and did, in fact, participate. Other than noting Crawford had become involved after the juvenile court adjudicated Gage dependent, Henry has not criticized the substance of Crawford's testimony. *See E.A. v. State Div. of Family and Youth Servs.*, 46 P.3d 986, 992 (Alaska 2002) (in absence of argument contradicting experts' opinions in ICWA case, one-year lapse between witnesses' formulation of opinions and testimony at trial did not render testimony unreliable or insufficient).

¶13 For all of the reasons set forth above, we affirm the juvenile court's order terminating Henry's parental rights to Gage.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge