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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FREDDIE H., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and FREDDIE H. JR., Appellees.	2 CA-JV 2012-0044 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 19320900

Honorable Leslie Miller, Judge

AFFIRMED

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H O W A R D, Chief Judge.

¶1 Freddie H. appeals from the juvenile court's April 2, 2012, order terminating his parental rights to his son, Freddie H. Jr., born in July 2008, based on the

ground of length of time in care.[1] *See* A.R.S. § 8-533(B)(8)(c). Because Freddie Jr. is an "Indian child," these proceedings are subject to the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1963. *See* 25 U.S.C. § 1903(4) (defining "Indian child"). Freddie contends there was insufficient evidence to support the court's finding that the Arizona Department of Economic Security (ADES) made active efforts to provide appropriate reunification services. We affirm for the reasons stated below.

¶2 In general, 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); *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). When, as here, ICWA is implicated, it imposes two substantive requirements: that ADES has made active but unsuccessful efforts to provide services to prevent the breakup of the family and that there must be proof beyond a reasonable doubt that continued custody likely will result in serious damage to the child. *See* 25 U.S.C. § 1912(d), (f). Only the first requirement is at issue here.

[1]Freddie Jr.'s mother, whose parental rights were terminated in March 2012, is not a party to this appeal.

¶3 When Child Protective Services (CPS) removed Freddie Jr. from the mother's home in January 2010, Freddie was incarcerated in Texas. ADES filed a dependency petition that same month. Approximately one month after Freddie Jr. was removed from the mother's care, CPS investigator Moniquea Ibarra spoke with Freddie, who was no longer incarcerated, and informed him that he needed to maintain contact with CPS in order to receive services. Freddie nonetheless failed to appear at the initial dependency hearing in March 2010 or at the published dependency hearing in May, when Freddie Jr. was adjudicated dependent as to him. In an effort to implement the case plan goal of family reunification, ADES developed a case plan that offered Freddie various services, including supervised visitation, and parenting, anger-management, and domestic-violence classes. ADES also required that Freddie establish paternity, something he ultimately accomplished in November 2010, ten months after Freddie Jr. was taken into custody.

¶4 Throughout the dependency, Freddie repeatedly told CPS workers he did not want to engage in services and failed to maintain contact with CPS for months at a time. In a September 2010 progress report to the juvenile court, CPS specialist Patricia Tarkington reported that she had "spoken to [Freddie] on several occasions to ascertain his needs and establish paternity." Freddie appeared for the first time at an October 2010 dependency review hearing, nearly ten months after Freddie Jr. had been taken into custody. Tarkington testified that although Freddie had told her "he didn't need any services, and that he wanted the child placed with his mother," she nonetheless met with him to formulate a case plan after he appeared at the October 2010 hearing. She offered

to set up drug testing and parenting classes for him, and did, in fact, schedule supervised visits with Freddie Jr., although she was unable to reach Freddie in order to implement the visits. The court found Freddie was not compliant with the case plan at dependency review hearings in January, April and July 2011.

¶5 In a November 2011 report to the juvenile court, CPS case manager Melinda Ortega reported that Freddie had "not participated in case plan services[, and h]e has stated to this case manager that he would like Freddie [Jr.] placed in the paternal grandmother's care." Ortega also testified that although she had discussed working on parenting skills and helping Freddie establish a relationship with a local agency, he had declined, telling her "he was not stable at that time . . . did not have stable housing, and he was not able to care for his son." Ortega also testified that Freddie had acknowledged to her that Tarkington had spoken with him previously about providing services.

¶6 At a dependency review hearing in December 2011, after hearing the testimony of a tribal social worker, the juvenile court concluded "that active efforts [had] been made to provide remedial services and rehabilitative services designed to prevent the breakup of the Indian family." In January 2012, two years after Freddie Jr. had been removed from the mother's care, the court changed the case plan goal to severance and adoption and ordered ADES to file a motion to terminate the parents' rights to him. As grounds for terminating Freddie's rights to his son, ADES alleged abandonment and length of time in out-of-home care. ADES also asserted that terminating the parents' rights was in Freddie Jr.'s best interests. At a contested severance hearing held in April 2012, the court terminated Freddie's rights based on length of time in care and found that

severance was in Freddie Jr.'s best interests. The court also found by clear and convincing evidence that ADES had made "active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts were unsuccessful."

¶7 In the sole issue raised on appeal, Freddie contends the juvenile court erred in determining ADES had made active but unsuccessful efforts to prevent the breakup of Freddie Jr.'s Indian family, as required by 25 U.S.C. § 1912(d). Specifically, he argues "[a] parent who states to a case manager that he does not want to be provided services should not have the power to trump the duty o[f] the state to make 'active efforts' under ICWA" and although "the state does not have to drag a parent into a case kicking and screaming, certainly CPS still has a duty to create a case plan that lays out what services are recommended for the parent." He essentially asserts that, because ADES failed to provide any services, there was no evidence to support the court's active-efforts finding.

¶8 Although ADES cannot force a parent to participate in suggested services, it nonetheless must "provide parents with the necessary 'time and opportunity to participate in programs designed to help [them] become' effective parents." *Yvonne L. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 415, ¶ 34, 258 P.3d 233, 241 (App. 2011), *quoting Maricopa Cnty. Juv. Action No. JS-501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (App. 1994) (alteration in *Yvonne L.*). However, "neither ICWA nor Arizona law mandates that ADES provide every imaginable service or program designed to prevent the breakup of the Indian family before the court may find that 'active efforts' took place." *Id.*

¶9 Notably, the evidence documents Freddie's continued resistance to the services ADES offered to him. ICWA expert Carmen Juarez testified ADES had made active efforts by offering extensive services and had "worked with the mother" and "tried to work with the father," child, extended family, and tribe. She specifically noted Freddie had stated "that he was not interested in engaging in services." She commended ADES for waiting two years before requesting the case plan goal be changed from family reunification to severance and adoption, noting that its conduct "certainly aligns with [ICWA]," and further opined that ADES "has certainly made energetic attempts to reunify this family."

¶10 There was ample evidence to support the active-efforts finding required under ICWA. As previously noted, ADES offered an array of services to Freddie. He not only failed to take advantage of the proffered services, but he also expressly stated he had no interest in availing himself of them. Notably, Freddie both testified that ADES had offered him services, and that he didn't "feel that [he] need[ed] services." *See Maricopa Cnty. Juv. Action No. JS-8287*, 171 Ariz. 104, 113, 828 P.2d 1245, 1254 (App. 1991) (state made diligent efforts to provide services to Indian parent, even though parent did not take advantage of programs offered).

¶11 It is undisputed that Freddie did not take advantage of the services ADES offered him, despite their persistent efforts to engage him. In fact, as he has acknowledged on appeal, ADES "is not obligated to provide every conceivable service or forcibly make a parent participate in services." *See Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, ¶¶ 34, 37, 971 P.2d 1046, 1053 (App. 1999). In summary, Freddie

has failed to persuade us that the services ADES offered were in any way inadequate or that he would have availed himself of additional services even if they had been offered. In fact, at the severance hearing, the juvenile court correctly stated:

> And I should just note for the record that the Court finds that [Freddie] was offered numerous services, and has spoken with numerous case managers indicating that . . . services would be made available to him; that he had declined services, and, in fact, did not even initiate visitation through the Department; and the Department had no knowledge that he had any contact with the minor throughout the course of the case.
>
> [Freddie] had been present in the court on numerous occasions, and advised of the need to participate in services and maintain contact with the case manager, and failed to do that throughout the course of the case.

¶12 Therefore, we affirm the juvenile court's order terminating Freddie's parental rights to Freddie Jr.

/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