DIVISION ONE
FILED: 09/23/2010
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BRENDA O.,	)	No. 1 CA-JV 10-0073
	)	DEPARTMENT B
Appellant,	)	
	)	**MEMORANDUM DECISION**
v.	)	
	)	(Not for Publication – Ariz. R.P. Juv. Ct. 103(G); ARCAP 28)
ARIZONA DEPARTMENT OF ECONOMIC SECURITY, B.L., and M.L.,	)	
Appellees.	)	

Appeal from the Superior Court in Maricopa County

Cause No. JD 16009

The Honorable Dawn M. Bergin, Judge

AFFIRMED

Gates Law Firm, L.L.C. Phoenix
By S. Marie Gates
Attorneys for Appellant

Terry Goddard, Arizona Attorney General Phoenix
By Michael F. Valenzuela, Assistant Attorney General
Attorneys for Appellee Arizona Department of Economic Security

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J O H N S E N, Judge

¶1 Brenda O. ("Mother") appeals the superior court's order terminating her parental rights to her two minor children. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 The Arizona Department of Economic Security ("ADES") removed B from Mother's care on August 26, 2007, because Mother was too intoxicated to care for her. B was found dependent as to Mother. In September and October 2007, Mother was referred to TERROS, a substance abuse treatment center, but she did not attend either intake session. In April 2008, Mother was incarcerated for a probation violation resulting from an earlier conviction for driving under the influence; she was released in October 2008. Mother's second child, M, was born in October 2008. M was removed from Mother's care in December 2008 after Child Protective Services ("CPS") went to the home and found Mother so intoxicated that she was "unable to stand still, walk straight, or look anyone straight in the eye."

¶3 CPS referred Mother to TERROS again in May 2009. Mother arrived intoxicated for the first two scheduled intake sessions. She finally completed an intake appointment on June 22, 2009, and began attending an intensive outpatient group. Mother arrived intoxicated to several group sessions.

¶4 Mother also arrived to many visits with her children visibly intoxicated; the visit supervisor, Haydee Gardea, testified Mother arrived intoxicated about 60 percent of the time. Gardea further testified that during visits, Mother would go to the bathroom and return with alcohol on her breath.

Mother also was aggressive during visits and used vulgar language to the point that she was no longer allowed to have her visits at the visitation center. Finally, Gardea testified that during visits B would call Mother names, and Mother would not correct her.

¶5 In addition to the TERROS referrals and visitations, Mother was offered urinalysis testing, parent aide services, bus passes, other substance abuse counseling and a psychological evaluation. Mother was required to undergo 56 urinalysis tests but participated in only five such tests. She declined to participate in substance abuse services through Native American Connections and Alcoholics Anonymous and any inpatient program. Parent aide services were discontinued because Mother showed up intoxicated. Mother missed her psychological evaluation appointment in September 2007 and her MMPI appointment in 2008. She finally attended a psychological evaluation in June 2009.

¶6 On May 11, 2009, ADES filed a Motion for Termination of Parent-Child Relationship that alleged Mother's rights should be terminated because she was "unable to discharge [her] parental responsibilities because of a history of chronic abuse of . . . alcohol." With respect to B, ADES also alleged that B had been in out-of-home care for 15 months and that Mother was unable to remedy the circumstances that had brought her into care.

¶7 The court heard testimony on the motion on September 17 and 24, 2009, and January 25, 2010. A TERROS counselor testified that even after the first two days of trial, Mother continued to arrive for sessions intoxicated. TERROS closed her case in October 2009 after an incident in which she did not show up for a session but was found at a bus stop so intoxicated that she was asleep or passed out.

¶8 The court terminated Mother's rights on both alleged grounds. Mother timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 8-235 (2007).

DISCUSSION

¶9 On appeal, Mother does not contest the superior court's findings and conclusions with respect to the state-law grounds on which the court ordered severance; nor does she argue the court incorrectly concluded severance was in the best interests of her children. She argues only that the court erred by terminating her rights in the absence of evidence required by the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901 *et seq.*, "that 'serious emotional or physical damage' is likely to occur" to the children if they are returned to her.[1]

[1] We will affirm an order terminating a parent-child relationship "unless it is clearly erroneous." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002).

¶10 Mother is an enrolled member of the Navajo Nation, so her children are eligible for membership under ICWA, 25 U.S.C. § 1903(4). Pursuant to ICWA, parental rights may not be terminated "in the absence of a determination, supported by evidence beyond a reasonable 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." 25 U.S.C. § 1912(f) (2010). Consistent with that provision, the superior court found that ADES "proved beyond a reasonable doubt that custody of the children by mother is likely to result in serious emotional or physical damage to the children and that this finding is supported by the testimony of a qualified expert witness."

¶11 We interpret statutes *de novo*. *State ex rel. Ariz. Dep't of Revenue v. Capitol Castings, Inc.*, 207 Ariz. 445, 447, ¶ 9, 88 P.3d 159, 161 (2004). "In interpreting a federal statute, our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." *Steven H. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 566, 570, ¶ 14, 190 P.3d 180, 184 (2008) (internal quotation omitted). ICWA is to be interpreted "liberally in favor of the Indians' interest in preserving family units." *Id.*

¶12 The United States Department of the Interior Bureau of Indian Affairs has issued guidelines ("Guidelines") to assist state courts in interpreting ICWA. Though the Guidelines are not mandatory, many Arizona courts have relied upon them. *Rachelle S. v. Ariz. Dep't of Econ. Sec.*, 191 Ariz. 518, 520, ¶ 12, 958 P.2d 459, 461 (App. 1998) (collecting cases). The Guidelines state that the following are "most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings":

> [i.] A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.
>
> [ii.] Any expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.
>
> [iii.] A professional person having substantial education and experience in the area of his or her specialty.

Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, D.4 (1979).

¶13 This court has concluded that "consistent with the Act's overall concern" that state courts were removing children from Indian families because of cultural misconceptions, "distinctive knowledge of Indian culture is necessary only when

cultural mores are involved" in the termination proceedings. *Rachelle S.*, 191 Ariz. at 521, ¶ 14, 958 P.2d at 462. Thus, "depending upon the basis urged for removal," the expert need not be an expert in Indian affairs. *Steven H.*, 218 Ariz. at 571, ¶ 18, 190 P.3d at 185 (quoting *In re N.L.*, 754 P.2d 863, 867 (Okla. 1988)). In *Rachelle S.*, for example, an attending physician qualified as an ICWA expert because he had special knowledge about shaken-baby syndrome, the reason the child had been removed from his parents. 191 Ariz. at 521, ¶ 16, 958 P.2d at 462. The court explained that it had received "no cultural dictate or explanation that could shed any light on" whether physical abuse of the child would continue if he were returned to his parents. *Id.* at ¶ 15.

¶14 Additionally, the *Steven H.* court held that "the statute does not require that the necessary expert testimony recite the specific language of [the statute]; nor need such testimony be expressed in a particular way." 218 Ariz. at 572, ¶ 22, 190 P.3d at 186. "As long as the expert testimony addresses the likelihood of future harm, it will suffice." *Id.* ICWA also "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." *E.A. v. State Div. of Family & Youth Servs.*, 46 P.3d 986, 992 (Alaska 2002).

¶15 In this case, the court heard the testimony of Dr. John DiBacco, the psychologist who performed Mother's psychological evaluation; Mother; the children's father; Gardea; the CPS ICWA unit case manager; the TERROS counselor; and Lily Reed, the Navajo Nation case manager. The court also received in evidence DiBacco's psychological evaluation of Mother. Mother concedes Reed qualifies as an expert under ICWA but argues that her testimony was insufficient to meet the statutory standard. Assuming without deciding that Reed's testimony was insufficient by itself, we conclude that DiBacco's testimony satisfied the ICWA expert witness requirement.[2]

¶16 DiBacco testified that he has "worked with Native Americans [for] most of [his] career" and the issues surrounding Mother's alcohol abuse were not related to her Navajo culture. Instead, he characterized her alcohol dependency as "pathological." As he explained, Mother was "showing up for drug treatment or alcohol treatment intoxicated . . . . So it suggests very strongly that this is uncontrolled consumption at a pathological level." For example, DiBacco's report observed that Mother "tended to greatly minimize reports of her past

[2] Even though the statute refers to "qualified expert witnesses," no more than one qualified expert witness is required. *See D.A.W. v. State of Alaska*, 699 P.2d 340, 342 (1985).

behavior and denied any significant problems including alcohol abuse if not dependence."

¶17 The psychological evaluation DiBacco performed of Mother plainly was within his expertise as a professional psychologist. *See Steven H.*, 218 Ariz. at 571, ¶ 18, 190 P.3d at 185. DiBacco received his doctorate in psychology in 1975 and has practiced since then in Arizona. Therefore, given that Mother offers no evidence that her case implicated tribal culture or social mores, DiBacco satisfies the Guidelines' requirement as "[a] professional person having substantial education and experience in the area of his or her specialty." Guidelines, D.4; *see Rachelle S.*, 191 Ariz. at 520-21, ¶ 14, 958 P.2d at 461-62.

¶18 Moreover, DiBacco's testimony provides the future-looking testimony required by ICWA. He testified that "alcohol impairs judgment and makes the -- or causes the parent to be less available, if not unavailable emotionally and physically. . . . [I]n particular the more vulnerable the children or the child, the more serious the jeopardy." He further testified that Mother would need to remain sober for a minimum of one year before the children could safely be returned to her, and even then she would require follow-up treatment. In the meantime, DiBacco's opinion was that "until [Mother] comes to grips with

her alcohol abuse/dependency issue, she is placing her children at significant risk."

¶19 DiBacco's testimony was supported fully by the other witnesses. Gardea testified that Mother was belligerent and aggressive when drinking and had attempted to prevent Gardea from removing one child from a visit by holding the child's leg. Mother acknowledged she pled guilty to driving while under the influence with her older son in the car, and Reed testified that B had been unable to bond with Mother because of Mother's alcohol abuse.

¶20 The superior court's thorough order terminating Mother's rights reflected a careful consideration of all the evidence. The order stated that Mother "downplayed" the bus stop incident that caused TERROS to close her case. It further acknowledged that "Gardea was afraid for the safety of the girls when mother was intoxicated." Finally, the order concluded that Mother

> has shown up at visits, meetings and at the paternal grandmother's home visibly intoxicated, hostile and verbally abusive. She finally completed a [TERROS] intake in June 2009 and started group sessions, but she has frequently appeared at group sessions intoxicated. She has declined other services to address her problem and, despite all of this and the danger she has placed her children in, she continues to deny that she has a problem. Dr. DiBacco testified that her substance abuse problems

> will continue for a prolonged and indeterminate period of time.

¶21 We conclude ICWA's requirements were satisfied by DiBacco's testimony, along with the other evidence recounted above that supported his conclusions. In sum, the evidence before the court constituted a sufficient basis for its finding that returning the children to Mother's custody "is likely to result in serious emotional or physical damage to the child[ren]." 25 U.S.C. § 1912(f).

CONCLUSION

¶22 For the foregoing reasons, we affirm the superior court's order terminating Mother's parental rights.[3]

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Judge

/s/
JOHN C. GEMMILL, Judge

[3] We amend the caption to refer to the children by their initials.