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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 03/20/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: DLL

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

JUSTIN C., ) No. 1 CA-JV 11-0218  
)  
Appellant, ) DEPARTMENT B  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
ARIZONA DEPARTMENT OF ECONOMIC ) 103(G) Ariz.R.P. Juv.  
SECURITY, J.C., ) Ct.; Rule 28 ARCAP)  
)  
Appellees. )  
)  
)

Appeal from the Superior Court in Maricopa County

Cause No. JD20053

The Honorable Jay R. Adleman, Judge Pro Tempore

**AFFIRMED**

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Thomas C. Horne, Attorney General Phoenix  
By Jamie R. Heller, Assistant Attorney General  
Attorneys for Appellees

Denise Lynn Carroll Scottsdale  
Attorney for Appellant

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**G O U L D**, Judge

¶1 Justin C. ("Father") appeals from the juvenile court's denial of his motion for the return of his three-year-old daughter, J.C. ("Child"), from the custody of the Arizona

Department of Economic Security ("ADES").<sup>1</sup> Father challenges the underlying dependency findings and argues that the juvenile court erred in admitting an affidavit from an expert witness. For the following reasons, we affirm.

***Factual and Procedural Background***

¶2 In February 2011, police responded to a report of domestic violence at Father's residence. Upon arrival, they detected a strong odor of marijuana throughout the home. An investigation revealed chemicals and equipment for growing marijuana along with several marijuana plants, many of which were within Child's reach. In the living room, police found a bong near a child's game and a paper plate containing marijuana residue next to Child's cup. In the room directly next to Child's bedroom, police found a larger marijuana-growing operation with electrical wiring extending from Child's bedroom, where it overloaded the wall sockets.

¶3 Father was booked on marijuana-related offenses and felony-child abuse. Father insisted that he did nothing wrong and that Child was never in danger. Child, who was not home at the time of Father's arrest, later tested negative for marijuana.

¶4 Concerned about unsafe conditions in the home, ADES

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<sup>1</sup> Child's mother is not a party to this appeal.

took temporary custody of Child and placed her with the maternal grandmother. ADES filed a dependency petition in March 2011, alleging that Child was dependent as to both parents due to substance abuse and neglect. Specifically, ADES alleged Father failed to provide an appropriate home for Child:

A significant Marijuana Grow was found in Father's home. Father's cultivation of the marijuana in the home exposed the child to not only the marijuana, but also the chemicals used and the toxins and molds produced in the operation. Father's marijuana growing operation also exposed the child to electrical hazards [because] the child slept in the bedroom next to the operation.

At the time, Child had not yet enrolled as a member of an Indian tribe, so it was unknown whether the Indian Child Welfare Act of 1978 ("ICWA") applied. See 25 U.S.C. §§ 1901 - 1963 (West 2012).<sup>2</sup>

¶15 Father contested dependency. Father actively participated in drug testing, parent-aide services and supervised visitation. Because Father agreed to stop using marijuana "even for medical purposes," he was referred for TERROS substance-abuse education, which he completed. Around that time, he obtained an Arizona medical-marijuana license to cultivate and resumed using marijuana sometime later.

¶16 In June 2011, police returned to Father's home to

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<sup>2</sup> Absent revisions material to this decision, we cite the current Westlaw version of applicable statutes.

arrest both parents for the February incident. After Father's arrest, ADES investigated and found the home in the same condition as it was during the February incident. A strong odor of marijuana permeated the home. Again, Child's items were found near drug paraphernalia, marijuana plants and chemicals used to produce marijuana. Lamps and electrical wiring from the operation created a fire hazard, which was aggravated by the lack of functioning smoke detectors.

¶17 Although Father told police that there was no one else in the home, the police found Child sleeping in the master bedroom. Child later tested positive for marijuana. Father subsequently pled guilty to one count of attempted production of marijuana under two pounds, a class six undesignated felony.

¶18 At a dependency hearing in July 2011, both parents denied the allegations of the petition, waived their rights to a trial, and agreed to submit the issue to the court based on two exhibits: a recent court report with drug assessment and treatment records and Father's medical marijuana license. After advising them of their rights, the juvenile court found that the parents "knowingly, intelligently and voluntarily waived their rights to a trial."

¶19 Because the Indian status of Child had not been confirmed, the court granted Father's request to delay the ruling, noting that ICWA requires additional testimony from a

qualified expert. See 25 U.S.C. § 1912(e). Father's attorney agreed that the record submitted to the court for the dependency determination would also include the anticipated "ICWA testimony."

¶10 Father filed a Rule 59 motion, Arizona Rule of Juvenile Child Procedure 59, and requested an evidentiary hearing. At the scheduled hearing, the Father's Tribe was still unable to confirm Child's Indian status and did not appear. The parties stipulated to continue the hearing and to the admission of additional exhibits.

¶11 At the hearing in October, the juvenile court confirmed Child's Indian status and proceeded under ICWA. The Tribe's attorney appeared, but the State informed the court that the Tribe's expert witness was unavailable. In lieu of trial testimony, the Tribe offered an expert affidavit by an Indian child services worker. The affidavit stated that the services worker was familiar with the case and did not believe the dependency allegations "reflect any cultural bias against the parents, Indians in general, the Muscogee (Creek) Nation, or their childrearing practices." The affidavit further stated that "continued custody by the natural parents is likely to result in serious physical or emotional damage" and "active efforts are being made to provide remedial and rehabilitative services."

¶12 Father objected, arguing the affidavit violated his right to cross examine the services worker about his knowledge of the case. The Tribe's attorney asserted that she reviewed the case in detail and discussed it with the services worker, prepared the affidavit with him and that it accurately reflected the Tribe's position.

¶13 Finding that Father had already waived his right to examine witnesses by agreeing to submit the matter on the written record, the juvenile court admitted the affidavit for the limited purpose of the dependency hearing. Based on the affidavit and the stipulated exhibits from prior hearings, the juvenile court found clear and convincing evidence that (1) ADES made active efforts to prevent the breakup of the Indian family and those efforts were unsuccessful and (2) continued custody by Father would create a substantial risk of physical or emotional harm to Child. The court determined that Child was dependent as to Father.

¶14 The court then addressed Father's Rule 59 motion for return of Child from ADES's custody. After hearing testimony from both sides, it determined that Father failed to meet his burden of proof under Rule 59(E)(1). The court denied Father's motion, explaining:

It has not been provided to this Court's satisfaction, any evidence suggesting that the home has been made safe for the child or

that the problems involving the child, specifically the positive test in June, as well as the issues that occurred as far back as in February have been remedied.

. . . .

The home is going to need to be made safe for the child. Quite frankly, the easiest way to go about that is not to have any marijuana in the home. I'm not stating that that's absolutely required under Arizona law, but there's going to have to be a sincere and serious demonstration to this Court that that home is made safe for this child. And that demonstration has not even remotely been done at this point in time.

The court then affirmed the dependency findings pursuant to Rule 59(E)(2).

¶15 While noting that this was not a medical-marijuana case, the court further explained that ICWA's requirements were closely related to child-custody rights under the medical-marijuana laws. It found by clear and convincing evidence that both parents' "behavior creates an unreasonable danger of safety to the minor" under Arizona Revised Statutes ("A.R.S.") section 36-2813(D).<sup>3</sup>

¶16 Father timely appealed. We have jurisdiction pursuant to A.R.S. §§ 8-235(A) (2007) and 12-120.21(A)(1) (2003).

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<sup>3</sup> Section 36-2813(C)-(D) prohibit discrimination against medical-marijuana cardholders in child-custody proceedings by negating any presumption of neglect or child endangerment for conduct allowed under the license "unless the person's behavior creates an unreasonable danger to the safety of the minor as established by clear and convincing evidence."

### ***Discussion***

¶17 On appeal, we view the evidence in the light most favorable to sustaining the juvenile court's rulings. See *Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, 235, ¶ 21, 119 P.3d 1034, 1038 (App. 2005). As the finder of fact, the juvenile court "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, 334, ¶ 4, 100 P.3d 943, 945 (App. 2004). Therefore, we do not reweigh the evidence presented at the dependency hearing. *Id.* We will affirm if reasonable evidence supports the juvenile court's findings. *Yvonne L. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 415, 422, ¶ 27, 258 P.3d 233, 240 (App. 2011).

¶18 Father first argues the juvenile court erred in denying his Rule 59 motion because there was insufficient evidence to support the underlying dependency findings. We disagree.

¶19 Because Child is an enrolled member of an Indian tribe, ADES had to prove (1) by clear and convincing evidence that continued custody of Child by Father "is likely to result in serious emotional or physical damage to the child," and (2) "active efforts" were made to provide rehabilitative and remedial services and further efforts would have proven



unsuccessful. Ariz. R.P. Juv. Ct. 55(C). Reasonable evidence supports both findings in this case.

¶120 The record shows that Father's behavior would likely cause serious physical harm to Child. Father's marijuana production created chemical and fire hazards that he did not remedy after these proceedings began. Despite knowing that ADES was concerned that the marijuana production was within reach of Child, Father dismissed those concerns. Instead, Father testified that Child was never in any danger and continued to argue that he used marijuana legally even after tests confirmed that marijuana had entered Child's system.

¶121 Reasonable evidence also supports the finding that ADES made "active efforts" that were ultimately unsuccessful. The social worker testified that ADES provided random urinalysis testing, parent-aide services with supervised visitation and TERROS substance-abuse treatment. Father contends that he successfully completed these services and should have been provided in-home dependency. We disagree.

¶122 ADES removed Child from Father's home because it believed the home was unsafe for Child. Given that Father refused to acknowledge the dangers and failed to make the home safe for Child, ADES was not obligated to provide in-home dependency. See *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 192, 971 P.2d 1046, 1053 (App. 1999) (holding the

State is not obligated to undertake futile rehabilitative measures).

¶23 In addition, the expert affidavit of the Indian services worker stated that the allegations of this case implicated no bias against Father, the Tribe, or Indian child-rearing practices, that "active efforts" had been made to prevent breakup of the Indian family, and that return of Child to Father would result in damage to Child. Because reasonable evidence supports the court's dependency findings, we find no error.

¶24 Turning to Father's Rule 59 motion, Father had to prove "by a preponderance of the evidence, that return of the child would not create a substantial risk of harm to the child's physical, mental or emotional health or safety." Ariz. R.P. Juv. Ct. 59(E)(1). In light of the evidence that Father's behavior exposed Child to marijuana smoke and chemical and fire hazards, Father had to show a change in his behavior or that the home had been otherwise made safe for Child. Father failed to meet that burden.

¶25 The social worker testified that Father kept drug paraphernalia within Child's reach, and that it appeared from the location of Child's belongings that she had been spending time in places where marijuana was used and produced. The social worker further testified that the smoke detectors in the

home were disabled, thus increasing the risk of fire in Child's bedroom, where the electrical wiring for the marijuana operation overloaded the wall sockets. She also testified that Child tested positive for marijuana in June. Father failed to address any of these dangers.

¶26 Instead, Father argued that he had a strong bond with Child and that she was developmentally on track. While Father testified that he did not believe Child was in danger, he presented no evidence that the home was now safe. On these facts, the juvenile court did not abuse its discretion in denying Father's Rule 59 motion.

¶27 Finally, Father argues that the juvenile court abused its discretion by admitting the affidavit of the Tribe's expert, in violation of his right to cross-examine the witness. We disagree.

¶28 "The presentation of evidence at the dependency adjudication hearing shall be as informal as the requirements of due process and fairness permit and shall generally proceed in a manner similar to the trial of a civil action before the court without a jury." Ariz. R.P. Juv. Ct. 55(D). Because Father's dependency proceeding was a civil matter, due process did not automatically include the right to confront the expert. See *In re Appeal in Maricopa County Juv. Action No. JS-7499*, 163 Ariz. 153, 157, 786 P.2d 1004, 1008 (App. 1989) (stating that the

right to confront witnesses "belongs solely to the accused in a criminal prosecution"); *In re Appeal in Maricopa County Juv. Action No. J-75482*, 111 Ariz. 588, 592, 536 P.2d 197, 201 (1975) (holding that a dependency proceeding is a civil matter, so admission of a hearsay report raises no Sixth Amendment confrontation problems).

¶129 Nor was the admission of the affidavit unfair. Father waived his right in the dependency by agreeing to submit the issue of dependency to the court based on the stipulated record, which included the anticipated "ICWA testimony." Father provides no authority that such testimony must be made at trial instead of by affidavit. Indeed, Rule 55(C) requires only "testimony from a qualified expert." The definition of "testimony" includes evidence that a competent witness makes under oath "at trial or in an affidavit." Black's Law Dictionary 1514 (8th ed. 2004) (emphasis added). Because the expert's affidavit was verified, it meets the requisite reliability.

¶130 To the extent Father argues the expert was not competent because he "did not speak with the parties, other than the Department," we also find no error. Arizona Rule of Evidence 703 provides that an expert may rely on facts "perceived by or made known to the expert . . . [i]f of a type reasonably relied upon by experts in the particular field."

(Emphasis added.) The Tribe's attorney explained that she reviewed and discussed the case with the expert. The affidavit also states that the expert's opinions were based on his review of the case documents. Accordingly, we find no error.

**Conclusion**

¶31 For the foregoing reasons, we affirm.

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ANDREW W. GOULD, Judge

CONCURRING:

/S/

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DIANE M. JOHNSEN, Presiding Judge

/S/

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DONN KESSLER, Judge