IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

ANTONIO M.,
Appellant,

v.

CELINA M. AND D.M.,
Appellees.

No. 2 CA-JV 2019-0170
Filed April 20, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f);
Ariz. R. P. Juv. Ct. 103(G).

Appeal from the Superior Court in Pima County
No. S20180169
The Honorable Kathleen Quigley, Judge

AFFIRMED

COUNSEL

Joel Feinman, Pima County Public Defender
By David J. Euchner, Assistant Public Defender, Tucson
Counsel for Appellant

The Reyna Law Firm P.C., Tucson
By Ron Reyna
Counsel for Appellee Celina M.

Pima County Office of Children's Counsel, Tucson
By William L. Jenney V
Counsel for Minor

MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Chief Judge Vásquez and Judge Brearcliffe concurred.

S T A R I N G, Presiding Judge:

¶1 Antonio M. challenges the juvenile court's order of November 22, 2019, terminating his parental rights to his daughter, D.M., born in January 2007, on grounds of abandonment and chronic substance abuse. *See* A.R.S. § 8-533(B)(1), (3). On appeal, Antonio argues that the juvenile court improperly granted Celina's motion for new trial and that the expert who testified as to serious emotional harm to D.M. lacked the qualifications required by the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-1963. We affirm.

¶2 It is undisputed that D.M. is an Indian child and that these proceedings are subject to ICWA. Before it may terminate a parent's rights, a juvenile court must find by clear and convincing evidence that at least one statutory ground for severance exists and must find by a preponderance of the evidence that terminating the parent's rights is in the best interests of the child. *See* A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41 (2005). Additionally, when an "Indian child" is involved,

> [n]o termination of parental rights may be ordered in such proceeding 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). We examine de novo the meaning and application of the relevant provisions of ICWA. *See Michael J., Jr. v. Michael J., Sr.*, 198 Ariz. 154, ¶ 7 (App. 2000). We will affirm an order terminating parental rights unless we must say as a matter of law that no reasonable person could find

those essential elements proven by the applicable evidentiary standard. *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 10 (App. 2009). We view the evidence in the light most favorable to upholding the court's order. *Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, ¶ 2 (App. 2008).

¶3 D.M. was born when Antonio and Celina were in high school. Antonio was at the birth and initially saw D.M. with some regularity. But he was incarcerated when D.M. was approximately five years old, released, and then later incarcerated again, with a release date in July 2020. He did not provide financial support for D.M. and has not seen her since she was approximately five years old. Antonio also "has a longstanding history of substance abuse," including being hospitalized for an overdose and attending inpatient rehabilitation on more than one occasion. His current convictions are for drug-related offenses.

¶4 In July 2018, Celina filed a petition for termination of Antonio's parental rights on the grounds of abandonment and chronic substance abuse, stating that D.M. had not seen Antonio "for most of [her] childhood and [she] wishes to be adopted by [her] stepfather." After a contested severance hearing in April 2019, the juvenile court found the grounds for severance had been established and that severance was in D.M.'s best interests. But the court concluded Celina had not provided "qualified expert witness testimony" as required under ICWA and denied the petition.

¶5 Celina filed a motion for new trial, pursuant to Rule 59(a)(2), Ariz. R. Civ. P., arguing that because the matter had been tried without a jury, the juvenile court could reopen the case to allow her "to present additional expert testimony which c[ould] supplement the testimony" of her first expert. The court granted the motion, and, after hearing testimony from a second expert, Dr. Holly Joubert, granted the petition to terminate Antonio's parental rights.

¶6 On appeal, Antonio does not challenge the grounds for severance, but claims that "[t]he juvenile court abused its discretion in granting Celina's motion for new trial" and that "Celina's second expert failed to satisfy ICWA's qualified-expert-witness requirement." "We review the . . . court's grant of a new trial for an abuse of discretion." *Cal X-Tra v. W.V.S.V. Holdings, L.L.C.*, 229 Ariz. 377, ¶ 88 (App. 2012).

¶7 Pursuant to Rule 59(a)(2), "[a]fter a nonjury trial, the court may, on motion for a new trial, vacate the judgment if one has been entered,

take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment."[1] In *McCutchen v. Hill*, our supreme court addressed the former version of this rule[2] and determined that while a court could not "grant a complete new trial" without one of the grounds enumerated in Rule 59(a) being established, the provision for non-jury trials "provide[d] flexibility." 147 Ariz. 401, 406 (1985). That provision, addressing "reopening in non-jury trials," was not limited to the enumerated grounds for a new trial, but rather allowed reopening to do what "justice and necessity dictate." *Id.* (quoting James W. Moore, *Moore's Federal Practice* § 59.06 at 61 (2d ed. 1985)). The court determined, "The rule draws its force from the inherent power of the courts to do justice, provide equity for parties and control their dockets." *Id.*

¶8 Antonio contends *McCutchen* should not apply in this situation because the evidence added here—testimony from a new ICWA expert—was not an uncontroverted fact, as was the case in *McCutchen*. But our supreme court did not limit a court's discretion to reopen in that manner; instead it explained,

> An application to open judgment and permit the taking of additional testimony with

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[1]"The Arizona Rules of Procedure for the Juvenile Court do not expressly incorporate the Arizona Rules of Civil Procedure . . . ." *William Z. v. Ariz. Dep't of Econ. Sec.*, 192 Ariz. 385, ¶ 7 (App. 1998). No provision of the Juvenile Rules expressly allows a Rule 59 motion. But, Rule 46, Ariz. R. P. Juv. Ct., provides for a motion for rehearing and Rule 6, Ariz. R. P. Juv. Ct., states that proceedings under the juvenile rules, "unless otherwise stated, shall be conducted as informally as the requirements of due process and fairness permit, and shall proceed in a manner similar to the trial of a civil action before the court sitting without a jury." Further, Antonio has not argued that a Rule 59 motion cannot be heard by the juvenile court as a matter of procedural rule. We therefore take no position on the applicability of Rule 59 to juvenile matters generally, deeming any such argument waived. *See Bob H. v. Ariz. Dep't of Econ. Sec.*, 225 Ariz. 279, ¶ 10 (App. 2010).

[2]Rule 59 was amended effective January 1, 2017, as part of a task force project to restyle and update the Rules of Civil Procedure. Ariz. Sup. Ct. Order R-16-0010 (Sept. 2, 2016). Antonio makes no argument that the changes require a departure from our supreme court's decision in *McCutchen*.

> consequent amendment of findings of fact or the making of new findings of fact, necessarily invokes judicial discretion. The [court's ruling] therefore must be upheld on appeal unless there is a clear showing that there was no reasonable basis within the range of discretion for the action taken.

Id. at 407 (quoting *DuPont v. United States*, 385 F.2d 780, 783-84 (3rd Cir. 1967)). In this case, we cannot say the juvenile court abused its broad discretion in granting a motion to reopen evidence to allow an ICWA-compliant expert witness to testify and thereby avoid litigation of the entire matter again upon a new petition for termination.[3]

¶9 Antonio further contends Dr. Joubert, the second expert Celina called to establish serious harm to the child as required by 25 U.S.C. § 1912(f), "failed to satisfy ICWA's qualified-expert-witness requirement." Joubert testified D.M. struggled with identity issues that could cause emotional damage if not resolved and that she was "very distressed" about what would happen if her mother were "unable to take care of her," including the possibility of losing her stepfather and being placed with Antonio. D.M. also "expressed a desire" to be adopted by her stepfather. Joubert opined that if Antonio's rights were not terminated, serious emotional harm to D.M. "would be very likely."

¶10 Relying on *Rachelle S. v. Ariz. Dep't of Econ. Sec.*, 191 Ariz. 518, ¶ 14 (App. 1998), and *Brenda O. v. Ariz. Dep't of Econ. Sec.*, 226 Ariz. 137 (App. 2010), the juvenile court determined Dr. Joubert was not "an expert in Native American culture" and did not "specialize in treating Native American families." But based on Joubert's "education and work experience," including a doctoral degree in psychology, with "advanced training in evaluating the bonds and attachments between children and their parents," she was "a credible and knowledgeable expert qualified to assess emotional damage to a child."

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[3]Counsel alleges courts will "put their thumbs on the scales to help the parties they like and not to help the parties they dislike," and asserts, "No doubt Celina counted on the juvenile court in our case to do this since she is a sympathetic party." Such broad statements reflecting disrespect and unfounded allegations of bias toward the juvenile bench, and in particular the judge in this case, have no place in an appellate brief and serve only to diminish the courts and counsel.

¶11 Antonio attempts to distinguish *Rachelle S. and Brenda O.*, on the ground that "those cases involved issues that clearly did not implicate cultural bias." But he does not explain how cultural bias is implicated here, and instead argues that the harm to D.M. was simply too speculative to support a finding that "D.M. was at any risk." Antonio is essentially asking us to reweigh the evidence of harm likely to occur if Antonio's rights were not severed. We do not reweigh the evidence. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 12 (App. 2002).

¶12 For these reasons, we affirm the juvenile court's order terminating Antonio's parental rights.