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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

IONA T., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY, VIRGINIA M., and BIANCA T., Appellees.	2 CA-JV 2009-0025 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. JD 200600158

Honorable Joseph R. Georgini, Judge

AFFIRMED

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B R A M M E R, Judge.

¶1 Iona T. appeals from the juvenile court's November 13, 2008 order terminating her parental rights to her children, Bianca T. and Virginia M., born in 2001 and 2004, respectively, based on the length of time the children had spent in a court-ordered, out-of-home placement.[1] *See* A.R.S. § 8-533(B)(8)(a), (c). Because Bianca and Virginia are "Indian child[ren]," 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"). Although Iona does not challenge the court's termination of her parental rights on the state statutory grounds or the court's finding that termination was in the children's best interests, she contends there was insufficient evidence to support the following findings under ICWA: the Arizona Department of Economic Security (ADES) had made active but unsuccessful efforts to provide services to prevent the breakup of the family, Iona's continued custody of the children would likely result in serious emotional or physical damage to them, and ADES had made sufficient efforts to place the children with family members. *See* 25 U.S.C. §§ 1912(d), (f), 1915.

¶2 We will not disturb a juvenile 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

[1]The children's fathers, whose parental rights were also terminated, are not parties to this appeal.

court's termination order. *See Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, ¶ 13, 107 P.3d 923, 928 (App. 2005). In September 2006, the children's adult sister, Naomi, filed a private dependency petition as to Bianca. Shortly thereafter, ADES substituted itself as the petitioner and subsequently filed a supplemental dependency petition to include Virginia. ADES notified the Gila River Indian Community (the Community), and the court granted the Community's subsequent motion to intervene. At the initial dependency hearing in October 2006, Iona admitted the allegations in the dependency petition as to Virginia, after which both children were adjudicated dependent. The children were placed with Naomi in September 2006, where they remained until June 2007, when they were placed with a foster family, where they still reside. In furtherance of concurrent case plan goals of family reunification and permanent guardianship, Iona was provided with services that included assistance from Arizona Families First, substance abuse screening and treatment, parenting classes, a psychological evaluation, transportation, supervised visitation, and case management services.

¶3 At the permanency planning hearing in October 2007, the case plan goal was changed to severance and adoption with a concurrent goal of permanent guardianship. The juvenile court ordered ADES to file a motion to terminate Iona's rights to the children, which it did one week later. The court conducted a two-day contested severance hearing between July and September 2008. The Community appeared at the first day of the severance hearing but waived its appearance on the second day; the Community did not oppose termination of

Iona's parental rights. At the hearing, Iona conceded that the state statutory grounds for severance had been met[2] and that severance was in the children's best interests but asserted there was insufficient evidence to show ADES had made active but unsuccessful efforts to keep the family together and that her continued custody of the children would likely result in serious emotional or physical damage to them, as required under ICWA.[3]

¶4 At the conclusion of the second day of the termination proceeding, the juvenile court ordered the parties to submit briefs to address the "difference between 'reasonable efforts' and 'active efforts,'" as required under ICWA. At a subsequent hearing on October 27, 2008, the court heard supplemental closing arguments on "active efforts," after which it determined that indeed ADES had "made active efforts to provide remedial services and

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[2]The only grounds for termination alleged in the second amended motion to terminate were out-of-home placement for nine and fifteen months. *See* A.R.S. § 8-533(B)(8)(a), (c).

[3]Section 1912(d) provides:

> Any party seeking to effect a . . . termination of parental rights to[] an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

Section 1912(f) provides:

> No termination of parental rights may be ordered in [a termination] 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.

rehabilitative programs designed to prevent the breakup of the Indian family and these efforts have proven unsuccessful." At a November 12, 2008 hearing, the court reiterated this finding and also ruled that, based on having heard testimony from the ICWA expert and other witnesses and having reviewed the file, it had found beyond a reasonable doubt "that continued custody of the children by these parents would likely result in serious emotional or physical harm to the children." In its December 2008 findings of fact, conclusions of law, and order, the court also found "beyond a reasonable doubt" that the state statutory grounds had been proven and by a preponderance of the evidence that termination of Iona's parental rights was in the children's best interests.

¶5 On appeal, Iona first contends the evidence was inadequate, as a matter of law, to support the juvenile court's determination that ADES had made active but unsuccessful efforts to prevent the breakup of the family. Relying on Dr. Carlos Vega's 2008 opinion that Iona is in "dire need of a long[-]term residential substance abuse program with concomitant intensive psychotherapy and psychotropic medication," she asserts that ADES failed to the make active efforts necessary to carry out Vega's recommendations.

¶6 Neither ICWA nor Arizona case law specifically defines "active efforts." Relying on numerous cases from other states, Iona asserts that active efforts require something more than "reasonable" efforts and, by inference, something more than "diligent" efforts that may be statutorily or constitutionally required. *See* A.R.S. § 8-533(B)(8); *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, ¶ 32, 971 P.2d 1046, 1052-53 (App.

1999). Iona also contends active efforts require something more than passive efforts. *See*, *e.g.*, *In re A.N.*, 106 P.3d 556, 560 (Mont. 2005) (active efforts implies heightened responsibility compared to passive efforts).

¶7 ADES and the Community contend that, under any meaning of "active efforts," the evidence here was sufficient to show that ADES had made such efforts. We agree. Even assuming active does mean not passive and something more than "reasonable," there was overwhelming evidence to support the active-efforts finding required under ICWA. As previously noted, ADES provided an array of services to Iona. She frequently failed to show up for appointments ADES had scheduled for her, or she failed to schedule them in the first instance. In a September 2007 report, Iona's caseworker noted that Iona "continues to abuse drugs and alcohol and . . . remains very depressed and has expressed suicidal thoughts but has continued to refuse mental health services." "[O]n occasion [Iona] would show up to visitations intoxicated" or interact minimally with the children during their visits. As of September 2007, one year after the children had been removed from her care, Iona was partially compliant with the case plan, but she had "failed to demonstrate a change in lifestyle or parenting abilities."

¶8 Additionally, the progress reports from Horizon Human Services (Horizon) noted that Iona either did not call or show up for scheduled appointments or showed no interest in taking advantage of a "higher level of care" to address her substance abuse issues. On numerous occasions, Horizon sent staff members to Iona's home in an attempt to contact

her. They also reminded her of appointments and offered her transportation. Iona told her therapist she was unwilling to be evaluated for "poss[i]ble medications," explaining that she "d[id] not believe in this." During her psychiatric/psychological evaluation in February 2008, Iona reported that, although antidepressants had been prescribed for her in the past, she had never taken them, nor was she willing to take medications at that time.

¶9 ICWA expert Byron Donahue testified at the termination hearing that three of Iona's five children, including Bianca and Virginia, were born substance-exposed, and that Iona had not taken advantage of any substance abuse-related services offered on the reservation because "she didn't think she had a problem and she could handle it on her own." Donahue reviewed the services ADES had offered Iona and opined that ADES had made active efforts to prevent the breakup of Iona's family. Donahue also testified that future efforts to reunify the family would be futile based on Iona's past history, explaining that "many years ha[d] gone by with children being born substance exposed and the denial of the mother that there's a problem."

¶10 Child Protective Services (CPS) case manager Robert Webb testified that Iona had not attended scheduled visits with the children reliably or complied with required drug screening tests and that she had declined inpatient treatment in the past. Webb also testified that one of Iona's providers had reported Iona had declined to participate in residential treatment because "she felt she had nothing . . . more to learn about addiction." Webb further testified he had met regularly with Donahue to ensure ICWA requirements were being met

and specifically to ensure that ADES was making active efforts to keep the family together. Notably, Iona did not object to the juvenile court's repeated findings during the dependency process that ADES had been making active efforts to reunify the family.

¶11 There is abundant evidence, under any definition of active efforts, to support the juvenile court's finding that ADES had made active but unsuccessful efforts to prevent the break-up of the family. Importantly, that evidence specifically documents Iona's continued resistance to drug treatment and therapy, the very services she now claims ADES failed to make active efforts to provide for her. Nor does ICWA suggest that ADES engage in futile efforts. *See Mary Ellen C.*, 193 Ariz. 185, ¶ 34, 971 P.2d at 1053. Thus, we need not decide, as ADES has requested, whether "active efforts," as required by ICWA, is "essentially indistinguishable" from what ADES believes to be the synonymous requirements of "diligent" and "reasonable" efforts required by Arizona law.

¶12 Iona next argues ADES failed to prove beyond a reasonable doubt that her continued custody of the children would likely result in serious emotional or physical damage to them in the future. Iona contends ADES failed to present evidence of prospective danger to the children and suggests Donahue's testimony was ill-informed because he had not had "meaningful contact" with Iona or the children. *See Steven H. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 566, ¶ 19, 190 P.3d 180, 185 (2008) (expert testimony in ICWA case must be "forward looking," addressing the risk of future harm to the child). Although Donahue testified he had met with the children only three times, he nonetheless explained his opinion

was based not only on his observations of the children but also on the reports in the file and his frequent communications with Webb. Webb similarly testified that he "tried to stay in very close communication" with Donahue. "'ICWA 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.'" *Id.* ¶ 20, *quoting E.A. v. State Div. of Family & Youth Servs.*, 46 P.3d 986, 992 (Alaska 2002).

¶13 Donahue testified that he was "concerned" about the children's future with Iona because she had not participated in the services ADES had offered to her; she had left the children unattended; and she had been arrested "for DUI [driving under the influence of an intoxicant], driving on a revoked license, with the child in the car, not in [a] restraint." Webb similarly testified that permitting the children to return to Iona's care would be emotionally and physically harmful to them. Iona herself admitted to Dr. Vega and Dr. Sardev Sidhu that she was still using methamphetamine and marijuana. In addition, she told Vega that she had previous contact with CPS and that she "had her parental rights severed." Vega reported that Iona had been cited for endangering the life and health of a minor and for driving with a suspended license and with liquor in the vehicle. In his 2008 evaluation, Vega opined:

> Iona is utterly incapable of minimally or adequately parenting any child. She, unfortunately, will not be capable of doing so in the foreseeable future. She deludes herself into believing that she has been completely victimized. The first thing that is needed is for her to be able to be clean and sober for one year. My recommendation would be that she be referred to a

> residential treatment program . . . . The prognosis in this case is quite poor, even with treatment. Aside from the risk being astronomically high, I can't imagine the children waiting, at best, one more year on the (highly improbable) outside chance that Iona will begin to exhibit more adaptive behaviors and achieve full and sustained (one year) remission from drugs and alcohol.

It is undisputed that Iona did not take advantage of the services ADES had offered her, despite their persistent efforts to engage her. This evidence, particularly when considered together with Donahue's testimony, supports the juvenile court's determination that the children will likely suffer emotional or physical damage if they are returned to Iona's care.

¶14 Finally, Iona argues that, by placing the children with the foster family, a non-relative, the juvenile court failed to abide by ICWA's preference for priority placement with extended family. *See* 25 U.S.C. § 1915(a), (b). However, Iona no longer has standing to assert this claim. As a parent whose rights were severed precisely because it was *not* in the children's best interests to continue the parental relationship, Iona does not have the legal capacity to assert an argument regarding those very interests. *See* A.R.S. § 8-539 (order terminating parent-child relationship divests parent and child "of all legal rights, privileges, duties and obligations with respect to each other"); *Sands v. Sands*, 157 Ariz. 322, 324, 757 P.2d 126, 128 (App. 1988) (once order severing parental rights was issued, "father's standing as a parent terminated").

¶15 Moreover, even assuming Iona had standing to assert this claim, the evidence showed that Donahue had tried, unsuccessfully, to locate a suitable placement with a family

member when the children could no longer remain with Naomi. The only relative who had been certified for placement, Iona's sister, declined having the children placed with her. To the extent Iona challenges the placement of the children with the foster family, who are members of the Salt River Tribe, rather than the Gila River Community, we likewise reject this argument. Donahue explained that the Salt River Tribe is considered a "sister" community to the Gila "[b]ecause we speak the same language. We're the same people. It's just we live in other part[s] of Arizona." In addition, counsel for the Community described the children's current placement as a "kinship" placement.

¶16 For all of the reasons stated, we affirm the juvenile court's order terminating Iona's parental rights to Virginia and Bianca.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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GARYE L. VÁSQUEZ, Judge