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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DOREEN J., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and MICHAEL J., Appellees.	2 CA-JV 2009-0038 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 16875700

Honorable Joan L. Wagener, Judge Pro Tempore

AFFIRMED

Child Advocacy Clinic
By Paul D. Bennett, a clinical professor appearing under Rule 38(d), Ariz. R. Sup. Ct.
Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Claudia Acosta Collings
Tucson
Attorneys for Appellee Arizona Department of Economic Security

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E S P I N O S A, Presiding Judge.

¶1 Doreen J. is the mother of Michael J., an "Indian child" within the meaning of the Indian Child Welfare Act, 25 U.S.C. §§ 1901 through 1963, ("ICWA" or the "Act"). *See* 25 U.S.C. § 1903(4). She challenges the juvenile court's order terminating her parental rights to Michael on grounds of chronic substance abuse and length of time in care. *See* A.R.S. § 8-533(B)(3), (8). Although she does not contest the state law grounds for termination, she contends insufficient evidence was presented at the termination hearing to support the court's findings required under ICWA that the Arizona Department of Economic Security (ADES) had made active but unsuccessful efforts to prevent the breakup of her family and that her continued custody of Michael would likely result in serious emotional or physical harm to him. *See* 25 U.S.C. § 1912(d), (f).

¶2 We view the facts in the light most favorable to sustaining the termination order. *See Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, ¶ 12, 153 P.3d 1074, 1078 (App. 2007). When Michael was born in August 2006, Doreen's four older children, who are not parties to this appeal, had already been adjudicated dependent based on allegations that Doreen abused drugs and had neglected them. She had been offered various reunification services in that proceeding since 2004. But she was not in compliance with her case plan for reunification with her older children, and she was still using drugs. She tested positive for cocaine when she was admitted to the hospital to deliver Michael. He was born prematurely and showed symptoms of withdrawal. ADES had not been aware of Doreen's

pregnancy, and she admitted to hospital staff that she had tried to hide it. She had made no preparations for Michael's arrival, and she had received little, if any, prenatal care. Michael was removed from Doreen's custody at the hospital and has never been in her care.

¶3 ADES filed a dependency petition as to Michael and notified the Tohono O'odham Nation, which had already intervened in the proceedings regarding the older children. The juvenile court granted the Nation's subsequent motion to intervene as to Michael. It adjudicated Michael dependent in October 2006, after Doreen admitted the allegations in the dependency petition. In December 2007, after Doreen had failed persistently to comply with ADES's case plan for reunification, the court directed ADES to file a motion to terminate her parental rights to Michael. In the subsequently filed motion, ADES alleged Doreen's chronic substance abuse and Michael's out-of-home placement for both nine and fifteen months as grounds for termination. *See* A.R.S. § 8-533(B)(3); (8)(a), (c).

¶4 The juvenile court granted the motion following a three-day, contested severance hearing conducted between December 4, 2008, and January 30, 2009. It found ADES had proven all of the alleged state statutory grounds for termination by clear and convincing evidence and found by a preponderance of the evidence that termination of Doreen's parental rights was in Michael's best interests. *See Valerie M. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 331, ¶¶ 9, 20-22, 153 P.3d 1203, 1206-08 (2009). As required by ICWA, the court also found beyond a reasonable doubt that "active efforts [had] been made

to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts [had] proven unsuccessful." *See* 25 U.S.C. § 1912(f). Additionally, the court also found beyond a reasonable doubt that Doreen's continued custody of Michael was "likely to result in serious emotional or physical damage to [him]." *See* 25 U.S.C. § 1912(d). The court summarized the evidence presented and made findings of fact that were the bases of its conclusions.

¶5 As noted above, Doreen contests only the sufficiency of the evidence to support the court's ultimate findings under the requirements imposed by ICWA. "In considering a claim of insufficient evidence, '[o]ur duty, on appeal, begins and ends with the inquiry whether the trial court had before it evidence upon which an unprejudiced mind might reasonably have reached the same conclusion'" under "the same evidentiary standard that constrained the [juvenile] court's deliberations." *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 6, 210 P.3d 1263, 1265 (App. 2009), *quoting Murillo v. Hernandez*, 79 Ariz. 1, 9, 281 P.2d 786, 791 (1955) (alteration in *Denise R.*).

¶6 ADES had the burden of proving beyond a reasonable doubt that Doreen's continued custody of Michael would likely result in serious emotional or physical harm to him. 25 U.S.C. § 1912(f). Section 1912(f) requires that there be expert testimony to support this finding and provides as follows:

> No termination of parental rights may be ordered in [a custody proceeding involving an Indian child] 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.

Doreen contends the expert testimony in this case was inadequate to sustain the juvenile court's finding on this issue. She identifies a single expert witness, the Tohono O'odham Nation's case manager, Kathleen Carmen, whom she labels the "ICWA expert" in this case, and appears to contend that, because Carmen's testimony was insufficient, in and of itself, to prove a likelihood of harm, the court's termination order "cannot stand."[1] But her contention is based on an erroneous interpretation of the law. Section 1912(f) neither requires a specifically designated "ICWA expert" nor that the testimony by any one expert alone support the required finding.

¶7 In *Steven H. v. Arizona Department of Economic Security*, 218 Ariz. 566, ¶ 17, 190 P.3d 180, 185 (2008), our supreme court recognized that "[i]n many ICWA cases, expert testimony may be necessary to educate a court about tribal customs and childrearing practices to diminish any risk of cultural bias." The United States Congress has determined that such bias historically has led to "'an alarmingly high percentage of Indian families [being] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies.'" *Id*. at ¶ 11, *quoting* 25 U.S.C. § 1901(4). The courts of this state as well as others have identified

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[1]Initially, Doreen argues that "the evidence—especially the testimony of the ICWA expert" does not support the juvenile court's finding, but she focuses the remainder of her argument on this issue exclusively on Carmen's testimony.

> Congress's "primary reason for requiring qualified expert testimony in ICWA . . . proceedings was to prevent courts from basing their decisions solely upon the testimony of social workers who possessed neither the specialized professional education nor the familiarity with Native culture necessary to distinguish between cultural variations in child-rearing practices and actual abuse or neglect."

Id. at ¶ 17, *quoting L.G. v. State Dep't of Health & Social Servs.*, 14 P.3d 946, 952-53 (Alaska 2000) (emphasis omitted in *Steven H*.). But experts need have no tribal affiliation, nor must their testimony always address native cultural issues. "Expert witnesses who do not possess special knowledge of Indian life may also supply testimony supporting a determination that continued custody will likely result in serious emotional or physical harm to the child." *Id*. ¶ 18. "'[A] professional person with substantial education and experience in the area of his or her specialty may be a qualified expert witness,' depending upon the basis urged for removal." *Id*., *quoting In re N. L.*, 754 P.2d 863, 867 (Okla. 1988). Expert testimony must be "forward looking," addressing the likelihood of future harm, rather than merely an examination of past harm. *Id*. ¶ 19. However, "'ICWA does not require that the experts' testimony provide the sole basis for the court's conclusion [that future harm would likely result from a parent's continued custody]; ICWA simply requires that the expert testimony support that conclusion.'" *Id*. ¶ 20, *quoting E.A. v. State Div. of Family & Youth Servs.*, 46 P.3d 986, 992 (Alaska 2002). Finally, an expert need not "parrot the language of the statute" or "recite [any] specific language" in rendering his or her opinion; "[a]s long as the expert testimony addresses the likelihood of future harm, it will suffice." *Id*. at ¶¶ 22, 29.

¶8 In this case, ADES had alleged Doreen's chronic substance abuse as a ground for termination. And her continued substance abuse had been a primary contributing factor in the length of time Michael had remained in state custody. Psychologist Lorraine Rollins testified that Doreen suffered from "alcohol abuse/dependency and a history of cocaine dependence." She opined that, without substance abuse treatment, Doreen's addiction would "very probabl[y]" continue into the near future, that Doreen was unable to care adequately for her children, and that she likely posed a "significant risk for neglect or some form of abuse of a child in her care." Rollins also opined that Doreen would need to "demonstrate a sustained period of 100 Percent abstinence for nine to twelve months before a child could safely be returned" to her care. As noted above, the termination hearing took place between December 2008 and January 2009. Doreen tested positive for alcohol on December 9, 2008. The preliminary results for a test she took on January 23, 2009, were also positive for alcohol, and she was only in partial compliance with the urinalysis protocol for calling and "dropping when required."

¶9 It is undisputed that the only service in which Doreen consistently engaged throughout the dependency proceedings involving Michael was supervised visitation. The visit supervisor testified, however, that Doreen had failed to benefit from that service. She was concerned about Doreen's ability to parent Michael because Doreen's interaction with Michael was not consistent during visits, and she would often delegate his care to others. She also did not believe Doreen understood Michael's development, and she described an

incident that had occurred about three to four weeks before the termination hearing in which Doreen had given him a piece of hard candy and he had choked. Michael has special needs, and there is no evidence in the record establishing that Doreen understands those needs or is equipped to handle them.

¶10 This evidence, whether considered together with or separately from Carmen's testimony, supports the juvenile court's determination that Michael likely would suffer serious emotional or physical damage should he be returned to Doreen's care. The court's finding is supported by sufficient evidence. And we need not consider Doreen's arguments regarding the "quality" or "particularity" of Carmen's testimony. It was for the court to determine the weight of that testimony, and we presume it did. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002) ("The juvenile court, as the trier of fact in a termination proceeding, is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and make appropriate findings.").

¶11 Next, Doreen contends the evidence at the termination hearing 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 her family. 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.

Neither ICWA nor Arizona case law specifically defines the term "active efforts." Doreen contends such efforts are distinct from passive efforts, such as the mere provision of a case plan, without more. *See*, *e.g.*, *N.A. v. State Div. of Family & Youth Servs.*, 19 P.3d 597, 602-03 (Alaska 2001) ("Active efforts occur 'where the state caseworker takes the client through the steps of the plan rather than requiring that the plan be performed on its own.'"), *quoting A.A. v. State Dep't of Family and Youth Serv's*, 982 P.2d 256, 261 (Alaska 1999) ("Passive efforts are where a plan is drawn up and the client must develop his or her own resources towards bringing it to fruition."); *In re A.N.*, 106 P.3d 556, 560 (Mont. 2005) (term "active effort . . . implies heightened responsibility compared to passive efforts," which includes "[g]iving the parent a treatment plan and waiting for him to complete it"); *see also In re Welfare of Children of S.W.*, 727 N.W.2d 144, 150 (Minn. Ct. App. 2007) (defining "active efforts" as "active, thorough, careful, and culturally appropriate").[2] Doreen suggests the "active efforts" standard requires "something more" than the "diligent" or "reasonable" efforts that may be statutorily or constitutionally required, but she identifies nothing that ADES could have done to facilitate reunification that it had not already done in this case. *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).

[2]Doreen also relies on the Maryland Court of Appeals decision in *In re Nicole B.*, 927 A.2d 1194 (Md. Ct. Spec. App. 2007); however, after Doreen filed her opening brief, that case was reversed by the Maryland Supreme Court. *See In re Nicole B.*, 2009 WL 2224754 (Md. July 28, 2009).

¶12 Doreen contends the reunification efforts ADES made in this case were "precisely the kinds of efforts that the courts of Alaska, Maryland, Minnesota and Montana have found lacking." We disagree. In *A.A.*, the supreme court of Alaska, recognized that "[i]n accordance with other jurisdictions' case-by-case approach, . . .'no pat formula' exists for distinguishing between active and passive efforts." 982 P.2d at 261, *quoting A.M. v. State*, 945 P.2d 296, 306 (Alaska 1997). It also explained the relevance of a parent's willingness to cooperate in determining whether active efforts had been made. *Id*. at 262. And, it determined that sufficient efforts had been made based, in part, on A.A.'s having "demonstrated a lack of willingness to participate in treatment." *Id*. at 262-63.

¶13 In *A.N.*, the Montana Supreme Court also took into account a father's "unavailab[ility]" in determining that the state department of health and human services had made "active efforts" to reunify the father and children in that case. 106 P.3d at 560-61. The court relied, in part, on the Alaska Supreme Court's holding that "a court may consider a parent's demonstrated apathy and indifference to participating in treatment." *Id.*; *see E.A. v. State Div. of Family & Youth Servs.*, 46 P.3d 986, 991 (Alaska 2002). Likewise, in reversing the case on which Doreen relies, the Maryland Supreme Court found that a juvenile court may properly take into account a parent's unwillingness to engage in services that have been offered in determining whether a state agency has made active efforts to reunify parents and children. *In re Nicole B.*, 2009 WL 2224754, 19-20 (Md. July 28, 2009).

¶14 In this case, the CPS case manager testified that ADES offered Doreen multiple services, including "referral to have a substance abuse assessment and education, random urinalysis, visitation, referrals for psychological evaluations, supervised visitation . . . [and] parent aide services." The juvenile court found ADES had offered essentially the same services to Doreen before and after Michael's birth. Except for supervised visitation, which, as explained above, she failed to benefit from, she chose not to engage in any of the offered services until shortly before the termination hearing. Doreen did not object to the juvenile court's numerous findings during the dependency process that ADES had been making active efforts to reunify her family. Nor did she ever suggest, much less insist, that she did not understand the requirements placed on her by the case plan or that she needed additional help in meeting those requirements.

¶15 Furthermore, Doreen unequivocally asserts that Erika Schnapp, the case manager assigned to her case in September 2008, was making active efforts to reunify her with Michael, and she appears to concede ADES had actively attempted to reunify her with her older children before Michael was born. She does not explain, however, how ADES's efforts during the period between Michael's birth and September 2008 differed substantially from the efforts made before and after that time. As stated above, essentially the same services were offered to her before and after Michael's birth, and she continued to have meetings with her case manager on a monthly basis. That she finally decided to engage in services near the time Schnapp was assigned to her case is not evidence that Doreen's

previous case manager had not actively sought her participation. Substantial evidence supports the juvenile court's determination that ADES had made active efforts to prevent the break-up of Doreen's family.

¶16 Because we have determined substantial evidence supports the juvenile court's determination that, beyond a reasonable doubt, ADES made active efforts to reunify the family, we need not address ADES's argument that a lesser standard of proof is required under the Act. Furthermore, given our resolution of this case, we decline to address ADES's contention that the "diligent" reunification efforts required by Arizona statute will always meet the "active" efforts required by ICWA. For the reasons stated, we affirm the juvenile court's order terminating Doreen's parental rights to Michael.

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PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

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JOSEPH W. HOWARD, Chief Judge

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J. WILLIAM BRAMMER, JR., Judge