



ORIGINAL

FE

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

IN THE MATTER OF THE)
ADOPTION OF W.R., V.R., and D.R.,)
Minors:)
))
ALECIA DAWN ROSS and)
TIMOTHY DEWAYNE ROSS,)
))
Appellants,)
))
vs.)
))
WESLEY KENNETH ROUSE,)
))
Appellee.)

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

OCT 18 2021

JOHN D. HADDEN
CLERK

Case No. 119,119

APPEAL FROM THE DISTRICT COURT OF
CLEVELAND COUNTY, OKLAHOMA

HONORABLE MICHAEL TUPPER, TRIAL JUDGE

AFFIRMED

Rec'd (date)	10-18-21
Posted	_____
Mailed	_____
Distrib	_____
Publish	yes <input checked="" type="checkbox"/> no <input type="checkbox"/>

Greg Wilson
WILSON LAW FIRM PLLC
Shawnee, Oklahoma

For Appellants

Julie M. Fulton
Oklahoma City, Oklahoma

For Appellee

OPINION BY GREGORY C. BLACKWELL, JUDGE:

The appellants, Alecia Dawn Ross and Timothy Dewayne Ross, are the mother and stepfather of the minor children at issue. They appeal a decision of the district court denying their request to allow the adoption of the children without the consent of their father, the appellee, Kenneth Rouse. For the reasons

stated below, we affirm the trial court's decision denying the adoption without consent, albeit for a different reason than given by the court below.

BACKGROUND

Ms. Ross and Mr. Rouse were divorced in April 2019. In a decree that appears on its face to have been consented to by both parties, Ms. Ross was given sole custody of the parties' three minor children, now ages 4, 8, and 10. Mr. Rouse was permitted supervised visitation only. The decree is notably indefinite on when and how that visitation was to occur, stating only the following: "[Mr. Rouse] is awarded supervised visitation, at a minimum of once a week, through a supervisor approved by the parties." Just three weeks after the divorce decree was filed, Mr. Rouse filed a motion to vacate the decree in its entirety, stating that he had not, in fact, agreed to its terms. In those proceedings, he seeks joint custody, or alternatively, unsupervised visitation on a more definite schedule. In January 2020, the Lincoln County court indicated it would treat the motion to vacate as motion to modify the decree, including on the issues of child custody and visitation. A hearing date was set for April 3, 2020.¹

On March 19, 2020, Mr. and Ms. Ross filed—in Cleveland County, where they resided—a petition seeking to allow Mr. Ross to adopt the minor children without paternal consent. Their stated statutory ground was that the father had failed to maintain a substantial and positive relationship with the children for twelve consecutive months of the prior fourteen months, thereby making the

¹ This hearing was postponed due to the COVID-19 pandemic. The resolution of the matter is not clear from the record, but it is clear that the request had not been heard as of the date of the adoption without consent hearing.

children eligible for adoption without parental consent. 10 O.S. § 7505-4.2(H)(1). The father appeared and opposed the non-consent adoption. After an in-person hearing at which both he and the mother testified, the district court denied the request to allow the adoption without the father's consent. The mother and step-father appealed.

STANDARD OF REVIEW

When reviewing a trial court's decision declaring a child eligible for adoption without the consent of the biological parent, this Court reviews issues of fact under a "clear and convincing standard." *In re Adoption of G.D.J.*, 2011 OK 77, ¶ 17, 261 P.3d 1159. "The burden is on the party seeking to adopt without consent to prove such adoption is warranted by clear and convincing evidence." We may not reverse the trial court unless its decision "fails to rest on clear and convincing evidence." *Id.* As to questions of law, however, we review the trial court's judgment *de novo*. *Id.* Statutory interpretation presents a question of law. *In re A.N.O.*, 2004 OK 33, ¶ 3, 91 P.3d 646.

ANALYSIS

The appellants first note that the order appealed² recites law that no longer exists under our statutes. Indeed, the order states that the appellants failed to

² The order appealed in this case is typed on a "summary order" form. In *Moore v. Haley*, 2021 OK 37, ___ P.3d ___, the Supreme Court held that "[p]rospectively, we will not recognize a filed Summary Order as a final judgment under 12 O.S.2011 § 696.3." *Id.* at ¶ 4. *Moore* was issued on June 21, 2021, however, and the order under appeal was submitted on October 8, 2020, and assigned by the Supreme Court to this Division on May 19, 2021. As *Moore* was clear that its decision was only prospective in application, and the order appealed otherwise complies with the strictures of § 696.3, we find the order suitable for appeal.

prove the father “**willfully failed** to maintain a substantial and positive relationship with said minors.” R. 6 (emphasis added). However, the statute allowing adoption without consent due to a failure to maintain a substantial and positive relationship was amended in 2001, and the willfulness requirement was specifically removed. The statute previously read:

Consent to adoption is not required from a parent **who willfully fails** to maintain a significant relationship with a minor through visitation or communication for a period of twelve (12) consecutive months out of the last fourteen (14) months immediately preceding the filing of a petition for adoption of the child.

10 O.S. Supp.2000 § 7505-4.2(H) (emphasis added). In 2001, however, the willfulness requirement was removed, and the statute now reads:

Consent to adoption is not required from a parent **who fails** to establish and/or maintain a substantial and positive relationship with a minor for a period of twelve (12) consecutive months out of the last fourteen (14) months immediately preceding the filing of a petition for adoption of the child.

10 O.S. § 7505-4.2(H) (emphasis added). Thus, the court below clearly erred in applying a willfulness standard in its decision.³

³ Moreover, we note that the trial court did not simply recite the wrong standard and apply the correct one, as the father argues. Rather, it is clear from the court’s written order that its decision was based, at least in part, on a finding of a failure to prove willfulness. For example, the trial judge stated that the father’s failure to maintain a relationship with the children was “due in large part to the mutual conduct of the parties, lack of a meaningful, specific visitation schedule in the parties’ Lincoln County divorce decree, lack of communication between the parties, [and] ongoing litigation following the parties’ divorce in Lincoln County.” These are exculpatory findings that the father’s conduct was *not* willful, *i.e.*, that there were external reasons beyond the father’s control as to why he had not exercised his right to visitation.

We further note that it was the *appellants* that first introduced the obsolete “willful” standard. They recited the willfulness standard as the governing law in both their petition to adopt and their application to proceed without the father’s consent. The mother’s attorney’s also stated that as the standard in her opening statement. Because we affirm the trial court’s decision on other grounds, however, we need not consider whether the appellants should be estopped from arguing against the application of the very standard they invited the court to use in the first instance, which is generally impermissible. See *Union Texas Petroleum v. Corporation Comm’n of*

However, this does not end our inquiry. As noted above, our standard of review will not permit us to reverse unless the trial court's judgment fails to rest on clear and convincing evidence. Furthermore, "[a] legally correct judgment will not be reversed because of the judge's faulty reasoning, erroneous fact finding or consideration of an immaterial issue." *Brashier v. Farmers Ins. Co., Inc.*, 1996 OK 86, ¶ 20 925 P.2d 20. Here, the applicable law provides an alternative basis for the trial court's decision that is free from error.

Simultaneous with its removal of the willfulness requirement under subsection (H), the legislature further amended § 7502-4.2 to provide that a parent may defend against a claim of failure to establish or maintain a substantial and positive relationship with a child by showing that the parent was denied the opportunity to do so by the acts of the custodial parent and that the parent "has taken sufficient legal action to establish and/or maintain a substantial and positive relationship with the minor" prior to the receipt of a notice of adoption. 10 O.S § 7502-4.2(H)(2).

Having reviewed the full record, we find that the father's effort to vacate the Lincoln County decree, which occurred during the relevant fourteen-month period, was "sufficient legal action" under the defense provided for in subsection (H)(2) that intervened to stop the running of the statutory clock. With his motion to vacate, the father sought to completely undo the decree, including what he saw as a restrictive and amorphous visitation provision that assisted the mother

the State of Oklahoma, 1981 OK 86, ¶ 36, 651 P.2d 652 ("Parties to an action on appeal are not permitted to secure a reversal of a judgment upon error which they have invited and acquiesced in, or to assume an inconsistent position from that taken in the trial court.").

in unilaterally denying him visitation. Although the father may have been wiser to have also filed a motion to enforce that provision in Lincoln County, the language of the statute requires “sufficient legal action,” not “a motion to enforce” or any other specific legal pleading. Indeed, the Supreme Court has held that a motion to enforce an existing visitation provision is not required to invoke the defense. *Matter of Adoption of M.A.S.*, 2018 OK 1, ¶ 27, 419 P.3d 204, 213, (finding that it was “patently clear” that a motion to modify custody was an “attempt[] to resume visitation.”). Further, “[a]doption statutes in derogation of a biological parent’s rights must be strictly construed in favor of the biological parent.” *Id.* at ¶ 11.

The record unequivocally supports a finding that the motion to vacate was filed in an effort to resume regular visitation, or even gain custody of the parties’ children. The father testified that the purpose of the motion to vacate was “to get joint custody and visitation rights,” and he believed that the filing of the Lincoln County request to vacate would ultimately settle the question of custody and visitation. Although the trial court’s use of the willfulness standard was in error, we find that, on this record, the father took “sufficient legal action to establish and/or maintain a substantial and positive relationship” with his children such that the trial court’s denial of the application to proceed without the father’s consent was proper.

AFFIRMED.

WISEMAN, P.J., and BARNES, J., concur.

October 18, 2021