



**ORIGINAL**

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

**FILED**  
**COURT OF CIVIL APPEALS**  
**STATE OF OKLAHOMA**

DIVISION II

JUN 16 2022

DERRICK R. SCOTT,  
Petitioner/Appellant,

vs.

CANDICE J. FOSTER,<sup>1</sup>  
Respondent/Appellee.

Rec'd (date)	6-16-22
Posted	
Mailed	
Distrib	
Publish	yes <input type="checkbox"/> no <input checked="" type="checkbox"/>

**JOHN D. HADDEN**  
**CLERK**

Case No. 118,267

APPEAL FROM THE DISTRICT COURT OF  
BLAINE COUNTY, OKLAHOMA

HONORABLE PAUL K. WOODWARD, TRIAL JUDGE

**AFFIRMED IN PART AND REVERSED IN PART**

Eric N. Edwards  
ERIC N. EDWARDS, P.C.  
Enid, Oklahoma

For Petitioner/Appellant

Maria Tully Erbar  
MARIA TULLY ERBAR  
ATTORNEY AT LAW, P.C.  
Oklahoma City, Oklahoma

For Respondent/Appellee

PER CURIAM:

Derrick Scott appeals a trial court order granting Candice Foster's motion to dismiss Scott's petition seeking an adjudication of paternity as to Foster's minor child, which the trial court treated as a motion for summary judgment,

<sup>1</sup> Ms. Foster states that her given name is Candice, not Candace. The Clerk of the Appellate Courts is advised of this correction to the caption.

and awarding Foster attorney's fees. Upon review, we agree with the district court that Scott's petition was filed out of time and therefore affirm the grant of judgment in favor of Foster. However, we reverse the award of attorney fees to Foster.

## I. BACKGROUND

Scott and Foster were never married, but they agree that they shared an intimate relationship in the past. Scott alleges that he is the biological father of K.J.F., a minor child born to Foster in 2013. In 2019, Scott filed a petition requesting a decree of paternity, joint custody of the child, and to change the child's surname.

Foster filed a combined answer and motion to dismiss, or, alternatively, for summary judgment. She denied that Scott was the child's father and asserted defenses of statute of limitations and res judicata. Foster included a certified copy of the Acknowledgement of Paternity (AOP) from the Oklahoma Department of Human Services (DHS), signed by the "acknowledged father,"<sup>2</sup> a man other than Scott. The AOP was executed on March 1, 2013. Foster's argument centered on § 7700-609(B) of Oklahoma's version of the Uniform Parentage Act (UPA), which requires that, when a child has an acknowledged father, any party (other than the child itself) who is *not* a signatory to an AOP, but seeks nevertheless to challenge that AOP, "shall commence a proceeding not later than two (2) years after the effective date of the acknowledgment ...." 10 O.S.2011, § 7700-609(B).

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<sup>2</sup> "For purposes of the Uniform Parentage Act ... an '[a]cknowledged father' means a man who has established a father-child relationship by signing an acknowledgment of paternity under Article 3 of the Uniform Parentage Act ...." 10 O.S.Supp.2019, § 7700-102.

Scott responded, claiming that Foster had previously informed him that the acknowledged father was not the child's biological father and that Scott was the only other possible father. Scott further alleged that genetic testing proved that the acknowledged father was not the child's biological father, and that Foster had petitioned that the child's name to be changed to "Foster" because the acknowledged father had provided neither financial support nor been in contact with the child since 2013. Scott demanded a paternity test and argued that the acknowledgement was "void" because genetic testing allegedly proved that the acknowledged father was not the child's biological father. Scott supported this argument by citing the Uniform Parentage Act's "Rules to Adjudicate Paternity of a Child," which indicated that if genetic testing excludes a man as a child's father, such testing may be used as the way to disprove the paternity of an acknowledged father as set forth in the representations on an acknowledgement. 10 O.S.2011, § 7700-631.

Scott further requested to conduct discovery that would "yield records from DHS and show when and where genetic tests were performed and results of same." He additionally attacked the constitutionality of the UPA as to his First and Fourteenth Amendment rights, and claimed that Foster was seeking the "de facto termination" of Scott's parental rights. Scott submitted extenuating facts attempting to excuse his failure to file the suit within the statutory period, including that he "requested/attempted to submit to genetic testing to establish paternity within two years of [Child's] birth, but was denied the right to do so by Petitioner," but never explained why he failed to pursue a paternity action or

challenge the AOP. Finally, Scott requested a court-appointed guardian ad litem to represent the child's interests.

Scott maintained that Foster committed fraud by knowingly letting a man other than the child's biological father sign the AOP, which he argues "allow(s) an unwed mother to commit fraud by having a man whom [sic] is not the biological father sign an [AOP] at birth or shortly thereafter, and thus prohibit the right of the true, biological father to execute a similar [AOP]" because the language in the AOP requires that the signatory swear that the child whose paternity is being acknowledged "does not have another acknowledged or adjudicated father."

The trial court held a hearing on Foster's motion seeking dismissal or summary adjudication at which no evidence was taken. The district court interpreted § 7700-609(B) as a statute of repose which fully barred Scott's cause of action two years from the date the AOP was signed, and thereby entered judgment in favor of Foster.

Foster then filed an application for attorney's fees and related costs for \$21,099.60, as amended. An evidentiary hearing was held at which the only witnesses were Foster and an expert testifying on Foster's behalf. The district court granted \$9,250.00 in fees after determining that "both the Petitioner and the Respondent are responsible in part for the added expenses in this action." Scott appeals both the judgment in Foster's favor on the paternity issue and the award of attorney's fees.<sup>3</sup>

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<sup>3</sup> In June 2020, this matter was stayed pending resolution of Scott's Petition to Vacate and For New Trial. The stay was lifted on March 1, 2022.

## II. STANDARD OF REVIEW

Because the parties presented written evidentiary material to the district court, Foster's motion to dismiss was properly treated as motion for summary judgment. See 12 O.S.2011, § 2012(B).<sup>4</sup> Summary judgment should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Id.* § 2056(C). The applicable standard of review for a summary judgment is *de novo*. *Carmichael v. Beller*, 1996 OK 48, ¶ 2, 914 P.2d 1051.

This case also includes an appeal from an award of attorney's fees. The question of entitlement to attorney's fees is a question of law and also reviewed *de novo*. *Finnell v. Seismic*, 2003 OK 35, ¶ 7, 67 P.3d 339. Because the award of attorney's fees was discretionary, we will review the trial court's award for an abuse of discretion. "To reverse a trial court on the ground of abuse of discretion it must be found that the trial judge made a clearly erroneous conclusion and judgment, against reason and evidence." *Abel v. Tisdale*, 1980 OK 161, ¶ 20, 619 P.2d 608, 612.

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<sup>4</sup> We continue to note that granting a motion for summary judgment—whether styled as such or treated as such pursuant to § 2012(B)—results in a judgment, not an order of dismissal.

### III. ANALYSIS

#### A. 10 O.S.2011, § 7700-609

The first issue on appeal is whether the district court erred in granting Foster's motion to dismiss Scott's petition based on the district court's reading of 10 O.S. § 7700-609(B) as a statute of repose. The statute states:

If a child has an acknowledged father or an adjudicated father, an individual, other than the child, who is neither a signatory to the acknowledgment of paternity nor a party to the adjudication and who seeks an adjudication of paternity of the child shall commence a proceeding not later than two (2) years after the effective date of the acknowledgment or adjudication.

10 O.S.2011, § 7700-609(B).

We join the district court and another division of this Court, *see Paul v. Williamson*, 2014 OK CIV APP 31, ¶ 8, 322 P.3d 1070, in interpreting this statute to cut off completely any ability of a putative father to seek a paternity adjudication more than two years after an AOP is signed, *i.e.*, § 7700-609(B) is a statute of repose as opposed to a statute of limitations. *See Reynolds v. Porter*, 1988 OK 88, ¶¶ 6-7, 760 P.2d 816, 820 (explaining the difference between the two statute types). Because it is undisputed that Scott filed his petition in January 2019, nearly *six years* after the relevant AOP was signed, the trial court properly entered judgment.

Scott's arguments that this statute may be tolled on the basis of fraud, duress, or material mistake of fact are unavailing. First, there is no fraud exception written into the text of 10 O.S. § 7700-609, unlike § 7700-308, on which Scott relies. Section 7700-308 allows a *signatory* to an acknowledgement of paternity to commence proceedings on the basis of fraud in accordance with 10

O.S. § 7700-607. However, Scott was not a signatory of the AOP; thus, this statute has no application to this case.

Scott also argues that the AOP is void under 10 O.S. § 7700-302, because the AOP falsely denies the existence of himself as a presumed, acknowledged, or adjudicated father of the child. However, not only has Scott failed to come forward with any evidence that would support such a claim under § 7700-302, even if he had such evidence, he would still have only two years to press his claim. Simply put, two years after an acknowledgement of paternity is executed, a putative father cannot bring an action seeking an adjudication of paternity of a child with an acknowledged father regardless of the putative father's evidence. The legislature determined that two years was a sufficient time to bring such an action and this Court will not interpret the statute to avoid this clear command.

Scott next urges the legislature's choice to limit his options in this way violated his constitutional rights. Specifically, he argues that the statute, as interpreted above, violates his equal protection and due process rights under the Fifth and Fourteenth Amendments to the United States Constitution.

Equal protection guaranteed by our federal constitution "is essentially a direction that all persons similarly situated should be treated alike." *McLaurin v. Oklahoma Department of Corrections*, 2020 OK CIV APP 42, ¶ 13, 472 P.3d 218 (quoting *Straley v. Utah Bd. Of Pardons*, 582 F.3d 1208, 1215 (10th Cir. 2009)). Additionally, under Oklahoma's constitution, Scott argues that his fundamental right to parent his child has been infringed. *White v. White*, 2007 OK 86, ¶ 12, 173 P.3d 78.

To support his claim that he was impermissibly treated differently than other similarly situated individuals, Scott references several cases in which a statute of limitations was found to violate equal protection rights. Most notably, in *Callison v. Callison*, 1984 OK 7, 687 P.2d 106, the Oklahoma Supreme Court determined that a three-year statute of limitations limiting a father's child-support liability of a child born outside of a marriage was unconstitutional as a denial of equal protection. *Id.* ¶ 11. However, the concern in that case, as in others that Scott cites, was that the *child's* right to support could not be premised on whether the parents of the children were married. *Id.* ¶ 7. The court reasoned that "[t]he state's interest in the litigation of stale claims is undermined by the countervailing state interest in ensuring that genuine claims for child support are satisfied." *Id.* ¶ 11. *See also Gomez v. Perez*, 409 U.S. 535, 538, 93 S. Ct. 872, 875, 35 L. Ed. 2d 56 (1973) ("[T]here is no constitutionally sufficient justification for denying such an essential right *to a child* simply because its natural father has not married its mother." (emphasis supplied)). Simply put, these cases have no application here where Scott does not seek to vindicate the child's rights to support, but his own rights to parent a child he alleges is his own. Scott had no standing to bring any claims on behalf of the child, and, even if he did, failed to do so here. The child in this case has an acknowledged father, and is thus entitled to support. 10 O.S.2011, § 83(A);

Nor does this case concern any classification based on the marital status of the parents of a child, which may require a heightened scrutiny. *Clark v. Jeter*,



486 U.S. 456, 461, 108 S. Ct. 1910, 100 L. Ed. 2d 465 (1988). Rather, the classification is between those children with acknowledged fathers and those without. This classification does not implicate any suspect class, and is therefore subject to rational basis review. *Gladstone v. Bartlesville Independent School Dist. No. 30 (I-30)*, 2003 OK 30, ¶ 9, n. 22, 66 P.3d 442. See also *Michael H. v. Gerald D.*, 491 U.S. 110, 131 109 S. Ct. 2333, 105 L. Ed. 2d 91 (1989) (holding that the “rational relationship’ test” is the proper standard for equal protection challenges of a “presumed father” and his child).

Scott has presented no argument that § 7700-609 fails this lenient test. It is readily apparent, as acknowledged in *Callison*, that the state has a legitimate governmental interest in avoiding the litigation of stale claims. A two-year cut-off of paternity claims from the date of acknowledgment is rationally related to and clearly furthers the state’s legitimate interest.

Scott also claims that he was denied “notice and opportunity” which “lie at the heart of due process,” citing *In re Termination of Parental Rights of Biological Parents of Baby Boy W.*, 1999 OK 74, ¶ 19, 988 P.2d 1270. In that case an adoption agency sought to terminate a natural father’s parental rights after a mother relinquished the child to the agency shortly after birth. *Id.* ¶¶ 5-6. The mother revealed the father’s identity to the agency only after she had given the child up for adoption, and the father only then had notice of the proceedings to terminate his parental rights. *Id.* ¶ 7. The Supreme Court affirmed the trial court’s ruling that the mother and the agency violated the father’s parental-opportunity interest by failing to inform him of the proceedings. *Id.* ¶ 16.

Like *Callison*, however, this case is inapplicable. Here, Scott does not deny knowledge of the birth of the child. He was aware of the child, but only lacked knowledge that there was an acknowledged father. Additionally, the *Baby Boy W* Court specifically found that “Natural Father did everything he could reasonably have done under the circumstances.” *Id.* ¶ 15. In contrast, based on the undisputed facts before the court, Scott firmly believed that he was the biological father when the child was born. Scott had the means to discover whether Foster had indeed committed fraud in 2013, and the ability to bring a lawsuit asserting his claimed paternity at that time. Scott was not deprived of the opportunity to assert his interests much earlier, but chose, for whatever reasons, not to do so. As such, Scott’s parental opportunity interest claim fails.

*B. Attorney’s Fees and Costs*

The final issue that Scott raises on appeal is whether the district court erred in awarding Foster attorney’s fees and costs. The applicable section, 10 O.S.2011 § 7700-636, is not mandatory, but discretionary. Because actions like Scott’s further the public policy of promoting the acknowledgement of paternity so that children will have two parents responsible for their upbringing and support, we should not punish such efforts by the imposition of attorney fees and costs under a discretionary provision. Although Scott was not successful, we will not penalize him for taking action to do the right thing, particularly when the “acknowledged” father disappeared shortly after KJF’s birth and has never supported her.

**AFFIRMED IN PART AND REVERSED IN PART.**

RAPP, J., concurs. WISEMAN, P.J., concurs, except as to Part III.A, in which she concurs in result. BLACKWELL, J., concurs except as to Part III.B, to which he dissents.

June 16, 2022