



**ORIGINAL**

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

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

NOV - 3 2022

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

IN THE MATTER OF T.M.,  
Alleged Deprived Child,

RICHARD MANTOOTH,

Appellant,

vs.

STATE OF OKLAHOMA,

Appellee.

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Case No. 120,114  
(Companion to  
Case No. 120,104)

APPEAL FROM THE DISTRICT COURT OF  
POTTAWATOMIE COUNTY, OKLAHOMA

HONORABLE TRACY McDANIEL, TRIAL JUDGE

**AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR  
FURTHER PROCEEDINGS**

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For Appellee

OPINION BY JANE P. WISEMAN, PRESIDING JUDGE:

Richard Mantooth appeals a trial court order adjudicating his minor child deprived. The issues on appeal are whether there is competent evidence to show that State met its burden of proving by a preponderance of the evidence that TM should be adjudicated deprived, whether State met its burden to show by clear and convincing evidence that Father's continued custody would result in serious damage to TM, and whether the trial court's finding that State made active efforts to provide remedial and rehabilitative services is supported by the record. After review, we conclude that, although there is sufficient evidence that State met its burden to show TM is deprived and that Father's continued custody would result in serious damage to TM, the record does not show that "active efforts" have been made, and we therefore reverse the trial court's decision as to this issue and remand for further proceedings consistent with this Opinion.

**BACKGROUND**

This appeal arises from the same order generating the appeal in Case No. 120,104 filed by the minor child's mother, Kathleen Mantooth, in this deprived adjudication case. Case No. 120,104 and the present case were made companion cases by the Supreme Court on July 21, 2022. The background facts and proceedings below are the same in both cases, and for the sake of brevity in the present case, we will not repeat that synopsis but refer to the Opinion in Case No.

120,104 also issued on today's date for the full recitation of those facts and proceedings.

Father and Mother raise the same two issues in these companion appeals: whether State met its burden to show by a preponderance of the evidence that TM should be adjudicated deprived and whether State met its burden to show by clear and convincing evidence that continued custody by either parent would result in serious damage to TM. Mother raised an additional issue which Father did not: whether the trial court's finding that State made active efforts to provide remedial and rehabilitative services is supported by the record.

Although Father did not specifically raise this third issue, we conclude it is fundamental to a parent's constitutional right to the care and custody of his or her child, and in particular, to the intent and protection afforded Indian families by the state and federal Indian Child Welfare Acts, so that we are not at liberty to ignore this issue. We further see no cogent basis on which to treat Father's appeal differently from Mother's on this point.

As we held in the companion case, we conclude that the trial court's findings are supported by the evidence with one exception: the record does not show that "active efforts" have been made or the results of those efforts, and we must reverse this finding and remand for further proceedings consistent with this Opinion.

## STANDARD OF REVIEW

Although, “[t]he State must support the allegations in a petition seeking the adjudication of a child as deprived by a preponderance of the evidence,” we will affirm the trial court’s order declaring a child deprived, if the trial court’s findings are supported by competent evidence. *In re J.D.H.*, 2006 OK 5, ¶ 4, 130 P.3d 245.

This standard of review, however, does not apply to the requirements in the Indian Child Welfare Act (ICWA) regarding emotional or physical damage caused by a parent’s continued custody of an Indian child. In termination of parental rights cases “under the State and Federal Indian Child Welfare Acts, the State must prove beyond a reasonable doubt that continued custody by the parent is likely to result in serious emotional or physical damage to the child.” *In re H.M.W.*, 2013 OK 44, ¶ 6, 304 P.3d 738. “Appellate review of the evidence is thus directed toward assuring the evidence adduced by State, if believed, would support a conclusion by any rational trier of the facts that the State’s evidence demonstrated beyond a reasonable doubt that continued custody by [the parent] would result in serious damage to [the child].” *In re T.L.*, 2003 OK CIV APP 49, ¶ 12, 71 P.3d 43. Rather than the “beyond a reasonable doubt” standard applicable in termination cases, when the issue is one of a child’s placement in foster care, ICWA requires “clear and convincing evidence . . . , 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.A. § 1912(e). Our “review of the evidence is thus directed toward assuring the evidence adduced by State, if believed, would support a conclusion by any rational trier of the facts that the State’s evidence demonstrated” by clear and convincing evidence “that continued custody by [the parent] would result in serious damage to [the child].” *See In re T.L.*, 2003 OK CIV APP 49, ¶ 12.

The “active efforts” requirement is found in 25 U.S.C.A § 1912(d). The Court of Civil Appeals found in *In re T.S.*, 2013 OK CIV APP 108, ¶ 53, 315 P.3d 1030, that “the same ‘clear and convincing’ burden of proof applies to both § 1912(d) and (e) in a foster care placement subject to ICWA.”

### **ANALYSIS**

Father asserts State has failed to meet its burden to show that TM is a deprived child. Although we conclude State met its burden in this regard, ICWA imposes additional requirements for this proceeding. State must additionally show by clear and convincing evidence through a qualified expert that continued custody by Father is likely to result in serious emotional or physical damage to TM and that active efforts have been made to prevent the breakup of the Indian family but were unsuccessful. Although we conclude State met its burden to show TM is deprived and that Father’s continued custody will result in serious emotional or physical damage to TM, the trial court’s findings that active but unsuccessful efforts have

been made to prevent the breakup of the Indian family is not supported by clear and convincing evidence. We will discuss each of these three issues in turn.

- I. *State met its burden of showing TM is deprived due to failure to provide proper parental care and guardianship.*

A court may only adjudicate a child deprived after making the following findings:

1. The factual allegations in a petition filed by the state alleging that a child is deprived are supported by a preponderance of the evidence;
2. Such allegations are sufficient to support a finding that the child is deprived; and
3. It is in the best interests of the child that the child be declared to be a deprived child and made a ward of the court . . . .

10A O.S.2011 § 1-4-603(A). The trial court concluded that the factual evidence supported TM being adjudicated deprived on the grounds of “physical abuse in home, failure to protect, [and] history of alcohol abuse.” The trial court found numerous conditions causing TM to be deprived, including the lack of proper parental care and guardianship. Based on the record under review, State proved at least one of these grounds, the lack of proper parental care and guardianship, by a preponderance of the evidence.

On appeal, Father asserts that TM “was not deprived by physical abuse in the home, failure to protect, or history of alcohol abuse.” Father essentially argues that TM fits none of the definitions of a deprived child found in 10A O.S. § 1-1-

105. Because Father challenges the applicability of these definitions, we will quote this portion of the statute at length:

21. "Deprived child" means a child:
- a. who is for any reason destitute, homeless, or abandoned,
  - b. who does not have the proper parental care or guardianship,
  - c. who has been abused, neglected, or is dependent,
  - d. whose home is an unfit place for the child by reason of depravity on the part of the parent or legal guardian of the child, or other person responsible for the health or welfare of the child,
  - e. who is a child in need of special care and treatment because of the child's physical or mental condition, and the child's parents, legal guardian, or other custodian is unable or willfully fails to provide such special care and treatment. As used in this paragraph, a child in need of special care and treatment includes, but is not limited to, a child who at birth tests positive for alcohol or a controlled dangerous substance and who, pursuant to a drug or alcohol screen of the child and an assessment of the parent, is determined to be at risk of harm or threatened harm to the health or safety of a child,
  - f. who is a child with a disability deprived of the nutrition necessary to sustain life or of the medical treatment necessary to remedy or relieve a life-threatening medical condition in order to cause or allow the death of the child if such nutrition or medical treatment is generally provided to similarly situated children without a disability or children with disabilities; provided that no medical treatment shall be necessary if, in the reasonable medical judgment of the attending physician, such treatment would be futile in saving the life of the child,
  - g. who, due to improper parental care and guardianship, is absent from school as specified in

Section 10-106 of Title 70 of the Oklahoma Statutes, if the child is subject to compulsory school attendance,

h. whose parent, legal guardian or custodian for good cause desires to be relieved of custody,

i. who has been born to a parent whose parental rights to another child have been involuntarily terminated by the court and the conditions which led to the making of the finding, which resulted in the termination of the parental rights of the parent to the other child, have not been corrected, or

j. whose parent, legal guardian, or custodian has subjected another child to abuse or neglect or has allowed another child to be subjected to abuse or neglect and is currently a respondent in a deprived proceeding.

Nothing in the Oklahoma Children's Code shall be construed to mean a child is deprived for the sole reason the parent, legal guardian, or person having custody or control of a child, in good faith, selects and depends upon spiritual means alone through prayer, in accordance with the tenets and practice of a recognized church or religious denomination, for the treatment or cure of disease or remedial care of such child.

Nothing contained in this paragraph shall prevent a court from immediately assuming custody of a child and ordering whatever action may be necessary, including medical treatment, to protect the child's health or welfare;

10A O.S. Supp. 2020 § 1-1-105(21). Father asserts the only two definitions that could apply here are subsections b. and c. Without question, the section subject to analysis here is the one State specifically alleged in its petition, subsection b., which applies where a child "does not have proper parental care or guardianship."

10A O.S. Supp. 2020 § 1-1-105(21)(b).



Although the trial court did not find Father abused TM, it did find physical abuse in the home, a finding that meets the requirement of failure to provide proper parental care and guardianship, a failure which Father acknowledges was alleged in the petition. As to that allegation, State specifically cited the long history of physical abuse in the home. In *In re L.M.A.*, 2020 OK 63, ¶ 48, 466 P.3d 559, the Supreme Court stated:

Adults know that children are by nature, as well by law, incapable of caring for themselves and making those decisions which are vital to their well-being and survival. Parents are given the responsibility to make decisions which provide proper and necessary care for their children. Parental decisions in the form of either an act or an omission to act may be used by the State to show the decisions caused or contributed to a deprived status. The State must step in and become involved in the parent-child relationship when a parental decision causes, or contributes to, a risk of harm to a child which is legally cognizable.

*Id.* (footnotes omitted). This analysis applies in this case on the question of Father's failure to provide proper parental care and guardianship. State was required to step in when Father decided to engage in "physical altercations" with his other children and those decisions made TM afraid to be in the house.

Further, the actions described by the witnesses at the adjudication hearing amount to ongoing domestic abuse. Witnesses testified regarding the physical confrontations spanning several years resulting in injuries that occurred in Father's and Mother's home.

The Protection from Domestic Abuse Act defines “[d]omestic abuse” as “any act of physical harm, or the threat of imminent physical harm which is committed by an adult, emancipated minor, or minor child thirteen (13) years of age or older against another adult, emancipated minor or minor child who is currently or was previously an intimate partner or family or household member.” 22 O.S. Supp. 2019 § 60.1(2). The Act defines “[f]amily or household members” as including the following: “a. parents, including grandparents, stepparents, adoptive parents and foster parents, b. children, including grandchildren, stepchildren, adopted children and foster children, and c. persons otherwise related by blood or marriage living in the same household.” 22 O.S. Supp. 2019 § 60.1(3).

In *Brown v. Brown*, 1993 OK CIV APP 142, ¶ 9, 867 P.2d 477, the Court construed the phrase “ongoing domestic abuse” first with reference to the definition of “domestic abuse” in the Protection from Domestic Abuse Act. The Court stated:

The word “ongoing” adds two connotations to that definition: first, the objectionable conduct must still be occurring or have recently occurred; and, second, at least some suggestion that the abuse is developing or evolving. *See, e.g.*, Webster’s Third New International Dictionary 1576 (1986). We therefore construe the phrase “ongoing domestic abuse” to mean abuse which is still occurring, or has occurred with sufficient frequency and recency to give rise to some *expectation* that it will continue or will recur, and thus will constitute a threat to any child of whom the abusive person is granted custody.

As such, “ongoing domestic abuse” is not merely one or two isolated instances of proscribed behavior.

*Id.* ¶ 10 (emphasis added). We agree with the *Brown* Court’s view of the term “ongoing.” The greater weight of the evidence at the adjudication hearing showed that there was ongoing abuse in TM’s household. Father alludes to “physical confrontations” with adult children. These physical confrontations may be considered acts of physical harm or threats of imminent physical harm by family or household members as domestic abuse is defined in 22 O.S. Supp. 2019 § 60.1.

Father specifically asserts, however:

The Oklahoma Children’s Code does not seem to list exposure to domestic violence as a definition of deprived child. The definition of abuse does not state that exposure to domestic violence is a form of child abuse. There was no evidence presented that there was domestic violence between the Parents. The evidence of physical confrontations between the Father and his adult sons were not in the presence of the Juvenile.

Father contends State therefore failed to meet its burden to show he abused TM or that Mother failed to protect her from such abuse. We disagree.

Father points out that the spanking of M. that resulted in bruises on her leg was determined not to be abuse within the meaning of DHS policy. He notes the allegations of physical confrontations between him and his adults sons, but contends “[m]uch of that testimony was presented without a witness having personal knowledge or observation of the event.” TM, however, testified that

although she did not see these instances of abuse, she either listened while the abuse occurred out of her sight or saw the immediate aftermath of the “physical confrontations.” These incidents may properly be found to constitute a failure by Father to provide proper parental care or guardianship because TM was aware of the abuse or “physical confrontations” and feared she would fall victim to similar treatment.

We conclude that by subjecting TM to the presence of ongoing physical abuse and domestic abuse in the home, Father failed to provide TM with proper parental care and guardianship. The history of physical and domestic abuse in the home must be considered in determining whether Father failed to provide proper parental care or guardianship.

The trial court found all of the elements of 10A O.S.2011 § 1-4-603 to be satisfied, and competent evidence in the record supports the trial court’s decisions as to these findings.<sup>1</sup> Competent evidence at the hearing supports the trial court’s

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<sup>1</sup> To reiterate, a court shall adjudicate a child to be deprived if it finds that:

1. The factual allegations in a petition filed by the state alleging that a child is deprived are supported by a preponderance of the evidence;
2. Such allegations are sufficient to support a finding that the child is deprived; and
3. It is in the best interests of the child that the child be declared to be a deprived child and made a ward of the court . . . .

10A O.S.2011 § 1-4-603(A).

findings that there was ongoing physical abuse in the home, including domestic abuse, and that TM lacked proper parental care and guardianship, that TM is deprived, and that it is in TM's best interest to be adjudicated deprived.

*II. State presented clear and convincing evidence through a qualified expert that Father's continued custody is likely to result in serious emotional or physical damage to TM.*

ICWA requires:

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, 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.A. § 1912(e); *see also In re N.L.*, 1988 OK 39, ¶ 15, 754 P.2d 863 (“A court is required to consider the testimony of a qualified expert witness before placement of an Indian child in foster care.”).

State presented the testimony of Steve Wahnee, supervisor for Muscogee (Creek) Nation Indian Child Welfare, who opined Father's and Mother's continued custody of TM is “likely to cause serious emotional or physical damage to the child.” TM told Wahnee that she was scared to go home. Wahnee's testimony in conjunction with other testimony regarding the violence in the home is sufficient to “support a conclusion by any rational trier of the facts that the State's evidence demonstrated” by clear and convincing evidence “that continued

custody by [the parent] would result in serious damage to [the child].” See *In re T.L.*, 2003 OK CIV APP 49, ¶ 12.

III. *The trial court’s finding that active efforts have been made to prevent the breakup of the Indian family is not supported by clear and convincing evidence.*

Pursuant to 25 U.S.C.A § 1912(d):

Any party seeking to effect a foster care placement of, or 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.

To give guidance on this requirement, 25 C.F.R. § 23.120, instructs:

(a) Prior to ordering an involuntary foster-care placement or termination of parental rights, the court must conclude that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful.

(b) Active efforts must be documented in detail in the record.

State is required to prove active efforts pursuant to 25 U.S.C.A. § 1912(d); *In re T.S.*, 2013 OK CIV APP 108, ¶ 50, 315 P.3d 1030. The Court stated:

The clear and unambiguous language of § 1912(d) requires State to show not only that active efforts were provided but also such efforts “have been proved unsuccessful.” We disagree with the juvenile court’s refusal to make the finding such efforts have not worked based on his interpretation that finding is *only* required in termination proceedings under ICWA.

*Id.* ¶ 62. The *T.S.* Court said:

However, we find such error harmless in light of the clear and convincing evidence supporting the adjudication of the Indian children as deprived and the court's § 1912(e) determination that Father's continued custody would likely result in "serious emotional or physical damage" to the Indian children.

*Id.*

We decline to take that approach here because 25 C.F.R. § 23.120(b) requires that "[a]ctive efforts must be documented in detail in the record." No efforts, active or otherwise, are detailed or documented in the record. In its order, the trial court checked the box that active efforts had been made but the record discloses no such active efforts. And the trial court did not find that such efforts had proven unsuccessful, *i.e.*, that box is not checked on the order. We must reverse the trial court's order on these related issues and remand to the trial court to make the required findings.

### **CONCLUSION**

We affirm the trial court's findings as to Father's failure to provide proper parental care and guardianship and the likelihood of serious emotional or physical harm to TM resulting from his continued custody, but because the trial court's order lacks mandatory findings regarding active efforts, we reverse the order as to this issue and remand to the trial court to make the required findings and document what active efforts, if any, have been made and the results of those efforts.

**AFFIRMED IN PART, REVERSED IN PART AND REMANDED  
FOR FURTHER PROCEEDINGS.**

FISCHER, C.J. (sitting by designation), concurs, and BLACKWELL, J., concurs in part and dissents in part.

BLACKWELL, J., concurring in part and dissenting in part:

I would affirm the order of adjudication in full and therefore respectfully dissent from that portion of the Court's opinion reversing the order appealed and remanding for further proceedings.

November 3, 2022