



ORIGINAL

FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

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

KATHLEEN ROBERSON,

Appellant,

vs.

STATE OF OKLAHOMA

Appellee.

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STATE OF OKLAHOMA

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

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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OPINION BY JANE P. WISEMAN, PRESIDING JUDGE:

Kathleen Roberson (Mother)¹ appeals a trial court order adjudicating her minor child deprived. Although Mother raises several issues on appeal, we conclude one requires reversal: whether the trial court's finding that State made active efforts to provide remedial and rehabilitative services pursuant to the Indian Child Welfare Act (ICWA) is supported by the record. After review, we conclude the trial court's findings are supported by the evidence and affirm the order 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.

BACKGROUND

On March 23, 2021, State filed an application to take TM into emergency custody alleging that she was in need of immediate protection. A Department of Human Services Specialist stated in an affidavit that DHS received a referral about TM and began an investigation. DHS alleges that, although there was no report of injuries or sexual abuse to TM, who was 13 years-old at the time, there were allegations regarding other children, and TM's parents were "refusing and not allowing [TM] to be forensically interviewed at this time" and "[l]aw enforcement

¹ Kathleen Roberson is the former name of Kathleen Mantooth.

has refused to take the child into protective custody.” The trial court issued an order for DHS to take TM into emergency custody.

On March 23, 2021, State filed a petition to adjudicate TM deprived, alleging she is not receiving proper parental care and guardianship. State claimed:

[TM] is at risk of harm due to recently disclosed allegations made by siblings of this child regarding a long history of physical abuse and inappropriate sexual behavior in the home on the part of the natural father, Richard Brandon Mantooth, as well as allegations of enabling and/or failure to protect by the adoptive mother, Kathleen Michelle Mantooth. The adoptive mother and natural father have been arrested based on these allegations, and they are currently incarcerated and have failed to protect. The natural father also has a history of alcohol abuse.

State further alleged the federal ICWA and the Oklahoma Indian Welfare Act apply because TM is an enrolled member of the Muscogee (Creek) Nation.

At the hearing on the deprived petition on July 16, 2021, Drew Hollowell, a Child Protective Services supervisor with Pottawatomie County Child Welfare, stated that DHS became aware of a pending Shawnee Police Department criminal investigation against Father and Mother “regarding physical abuse of [TM’s] siblings, as well as concerns of sexual abuse against a sibling [A.] and some of their cousins.” TM disclosed that one of her siblings was choked and that Father spanked her sibling and left marks on her. TM disclosed that Mother was aware of the abuse but did nothing to protect them or to correct Father’s behavior.

Hollowell testified that he believes it is in TM's best interests for the court to adjudicate her deprived.

Hollowell testified that a previous report that Father spanked TM's sibling M. was investigated and found to be unsubstantiated. Hollowell said: "It had left injuries but the injuries were not determined to be severe enough given the child's age, is my reading of the D.A. report on that investigation."

During TM's interview, she disclosed that Father choked her sibling B. and punched her sibling C. three times in the face. She also disclosed she did not want to be returned to her parents' home because "she would be the only child left in that home." TM said she is the youngest sibling in the family.

TM testified that Father slammed her brothers B. and C. into walls while she was present and that Father used a belt to spank her once a week "[b]ut he started doing it less." He did not leave a bruise or mark on her, but he did leave them on her sister, M. TM was in a different room when Father spanked M., but she could "hear the belt," and afterwards, TM saw bruises on M. TM also told the court that her brother C. had marks on his face from Father hitting him and that C.'s face was "busted open."

TM testified Father drank almost every night and acted aggressively when he had been drinking which made her "[u]pset and scared." She did not feel safe in her home, and when asked why, she said, "I don't want to be the next target. Get

all that stuff done to me.” She thought that would happen to her “[b]ecause it happened before to [her] siblings.” TM testified that Mother witnessed the abuse more than once. TM is afraid to return to her parents’ house and does not want to go back.

TM testified C. is 19, B. is 19, M. is 18, and A. is also 18. TM agreed that the photographs of M. with bruises on her legs were from 2016. TM was afraid of being in the home in 2016, but she did not leave because she could not leave. She said she saw Father choke B. TM said that when Father spanked her, it was always on her bottom and that Mother spanked her with a spoon.

Steve Wahnee, supervisor for Muscogee (Creek) Nation Indian Child Welfare, testified that in his opinion continued custody of TM by Mother and Father is “likely to cause serious emotional or physical damage to the child.” He believes it is in TM’s best interests for her to be adjudicated deprived. He added that he asked TM “point blank if she was scared to go back home,” and she said she was and did not want to return there.

After the hearing, the court found the following allegations to be supported by the evidence and sustained the petition as to these allegations only: “physical abuse in home, failure to protect, history of alcohol abuse.” The following “[c]onditions causing child(ren) to be deprived” were checked on the order: “physical abuse of child(ren) or failure to protect from physical abuse,” “failure to

protect,” “incarceration due to criminal activity,” “failure to maintain safe and/or sanitary home,” “lack of proper parental care and guardianship,” “threat of harm,” and “Other: lack of ability to meet [children’s] basic physical[,] emotional, developmental, and educational needs.”

The court also found that there was clear and convincing evidence, supported by the testimony of a qualified expert witness, that continued custody of TM by her parents was likely to result in serious emotional or physical damage or harm to TM.

In its order of adjudication, the trial court also found that active efforts had been made “to provide remedial services and rehabilitative programs to prevent the breakup of the Indian Family,” but the court did not detail in the space provided the efforts that were made and did not check the box to find that active efforts were unsuccessful. The court did find that because no ICWA compliant placement exists, placement has not been made pursuant to 25 U.S.C. § 1915’s placement preferences. The court determined that it was in her best interests for TM to be adjudicated and to be made a ward of the court.

Mother appeals.

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 ICWA's requirement 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

Mother asserts State (1) failed to meet its burden to show that TM is a deprived child, (2) failed to meet its burden to show by clear and convincing evidence that TM would suffer serious emotional or physical harm, and (3) DHS failed to make active efforts to provide remedial services and rehabilitative programs to prevent the breakup of this Indian family. After review, we conclude State met its burden under propositions of error (1) and (2) but failed to do so under proposition (3).

I. State met its burden of showing TM is deprived for the 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 said that multiple conditions caused TM to be deprived, including the lack of proper parental care and guardianship. Based on the record presented, State proved at least one of these grounds, the lack of proper parental care and guardianship, by a preponderance of the evidence.

On appeal, Mother asserts, “The State put on no evidence that T.M. had ever been physically abused by [Mother]. The State put on no evidence that [Mother] ever failed to protect T.M. from physical abuse.” Mother further asserts State failed to show TM was neglected or deprived of education, shelter, food, clothing, or left alone or abandoned. She asserts that there was no showing of sexual abuse.

State sought to adjudicate TM deprived because she “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 Mother or Father abused TM, it did find physical abuse in the home, and that could satisfy the requirement of failure to provide proper parental care and guardianship. In its case alleging Mother and Father failed to provide proper care and guardianship, 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 here. When there is a failure to provide proper parental care and guardianship, State was required to step in, such as here when Father decided to engage in “physical altercations” with his other children and those decisions made TM afraid to be in the house.

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 evidence at the adjudication hearing showed by a preponderance of the evidence that abuse was ongoing in TM’s household. Father alludes to “physical confrontations” with his 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.

We conclude that by subjecting TM to ongoing physical abuse and domestic abuse in the home, Mother 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 Mother failed to provide proper parental care and guardianship.

The trial court found all 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.² Competent evidence presented at the hearing supports the trial court's findings that there was ongoing physical abuse in the home, including domestic abuse, that TM lacked proper parental care and guardianship, that TM is deprived, and that it is in TM's best interests to be adjudicated deprived.

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

ICWA requires:

² 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).

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 Mother’s and Father’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 about 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. We see no error in the trial court’s decision on this point.

III. The trial court’s finding that active efforts had 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 found:

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 does not disclose those efforts. The trial court also did not find that those active efforts had proven unsuccessful, *i.e.*, that box is not checked on the order. We must reverse the trial court's order as to the question of active efforts and their success or failure and remand to the trial court to make the required findings.

CONCLUSION

We affirm the trial court's findings as to Mother's failure to provide proper parental care and guardianship and the likelihood of serious emotional or physical harm to TM resulting from Mother's 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