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NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

IN THE MATTER OF THE ADOPTION)
 OF A.J.B., a minor child:)
)
 WILLIAM E. BARNES and HANNAH A.)
 BARNES, husband and wife,)
)
 Appellants,)
)
 vs.)
)
 ZACHARY WAYNE BARBEE,)
)
 Appellee.)

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

JUN 12 2023

JOHN D. HADDEN
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Case No. 120,431

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APPEAL FROM THE DISTRICT COURT OF
BRYAN COUNTY, OKLAHOMA

HONORABLE TRACE C. SHERRILL, TRIAL JUDGE

VACATED AND REMANDED

Jeremy S. Elliot
Durant, Oklahoma

For Appellants

D. Michael Haggerty
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Madill, Oklahoma

For Appellee

OPINION BY GREGORY C. BLACKWELL, PRESIDING JUDGE:

Hannah and William Barnes, the mother and stepfather of the minor child AJB, appeal a decision of the district court denying that AJB was eligible to be adopted without the consent of the child's father, Zachary Barbee. On review, we find that the trial court erred in finding that the Barneses had failed to meet their burden under the relevant statutes to show AJB was eligible for adoption without

consent. Thus, we vacate the order appealed and remand for further proceedings, which must include allowing Mr. Barbee the opportunity to put on any defense.

BACKGROUND

In February 2021, the Barneses,¹ who were married in October 2020, petitioned for an order allowing Mr. Barnes to adopt AJB without the consent of Mr. Barbee on the grounds that he had failed to maintain a substantial relationship with AJB for twelve of the past fourteen months. AJB was approximately two years old at the time of the application. That same day, the Barneses filed an application for an order to determine the child was eligible for adoption without Mr. Barbee's consent. This application added the additional allegation that Mr. Barbee had failed to contribute to the support of AJB for a period of one year. Hearing on the application was set for April 7, 2021.

In March 2021, Mr. Barbee filed a handwritten answer stating that he was incarcerated in Texas but had maintained a relationship with AJB prior to incarceration and had wished to maintain a relationship afterwards; however, Ms. Barnes had moved to Oklahoma, and he was not able to contact her. At the hearing on the application, the court appointed a guardian ad litem for AJB and appointed counsel for Mr. Barbee because he was indigent. The hearing was

¹ As appears typical in stepparent adoptions, the petition requests to establish the parental relations of *both* Hannah and William Barnes. By all accounts, Ms. Barnes is the natural mother of AJB and her legal rights are established.

continued, to be rescheduled on application, and was eventually set for December 15, 2021.

On that day, the matter was rescheduled again because the guardian ad litem had not been sent a copy of the order setting the hearing and did not have the hearing on her calendar. An email in the record further noted that Mr. Barbee had been released from jail sometime prior to December 9, 2021.² R. 19. The hearing was reset for March 16, 2022. This hearing was postponed because the guardian ad litem had not contacted Mr. Barbee by that time.

The court finally held hearing on April 25, 2022. Both parties appeared, and Ms. Barnes and Mr. Barbee each testified. The court ruled that the Barneses' evidence was "insufficient to sustain their application" and therefore granted Mr. Barbee's demurrer at the close of the Barneses' evidence.³ The Barneses appeal.

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. As *In re Adoption of K.L.C.*, 2016 OK CIV APP 26, 371 P.3d 1163, 1164 notes, however, applying this standard is illogical in a case where a

² Mr. Barbee later testified that he was released on September 3, 2021. Tr. (4/25/22), pg. 25-6.

³ On cross-examination Mr. Barbee did present, without objection of opposing counsel and with the blessing of the trial court, some evidence outside the scope of direct. Tr. (4/25/22), pg. 25-6. And, when asked whether he was presenting a case-in-chief, Mr. Barbee's attorney replied that he did "not anticipate presenting any additional evidence." *Id.* at 40. Nevertheless, the trial court was clear that it was "sustain[ing] Mr. Barbee's demurrer to the evidence." *Id.* at 40.

court finds a child is *not eligible* for adoption without consent. In such a case, “we review the record to determine whether [the petitioner] presented clear and convincing evidence and whether the trial court’s findings are contrary to such clear and convincing evidence.” *Id.* n. 2.

ANALYSIS

The Barneses allege two errors by the trial court, each related to the sufficiency of their evidence. The first is that the court should have found AJB was eligible for adoption without consent because Mr. Barbee had “willfully failed, refused, or neglected to contribute to the support” of AJB pursuant to 10 O.S. § 7505-4.2(B). We find no error on this issue. The record does not contain clear and convincing evidence of Mr. Barbee’s *willful* failure to support AJB.⁴

The Barneses’ second allegation of error is that they produced clear and convincing evidence that Mr. Barbee had “fail[ed] to establish and/or maintain a substantial and positive relationship with [AJB] for a period of twelve (12) consecutive months out of the last fourteen (14) months immediately preceding the filing of a petition for adoption” pursuant to 10 O.S. § 7505-4.2(H). Unlike its failure-to-support cousin, this parental consent exception has no willfulness requirement. The fourteen-month period in question spanned from December 8, 2019, to February 8, 2021.

⁴ Contrary to the Barneses’ argument on appeal, the burden is on the party seeking to adopt without consent to show that the statutory requirements for such an adoption are met by clear and convincing evidence. *In re Adoption of C.D.M.*, 2001 OK 103, ¶ 13, 39 P.3d 802, 807. As such, it was the Barneses’ burden to show the statutory element of a *willful failure* to contribute to the support of the minor, not Mr. Barbee’s burden to refute the claim. The Barneses did not do so at trial.

The following facts were elicited from the parties at trial. Mr. Barbee and Ms. Barnes were never married. AJB was born in Texas in September 2018. Mr. Barbee last saw her in November 2019, when she was just over one year old. Mr. Barbee testified that November 2019 was the last time he had an address for Ms. Barnes. Ms. Barnes moved to Oklahoma with AJB without giving Mr. Barbee a forwarding address, and, due to previous hostile interactions, she blocked calls from Mr. Barbee and blocked the social media accounts of Mr. Barbee and several of his relatives. Since her move, Ms. Barnes “actively avoid[ed] and [tried] to stay away from Mr. Barbee” because she is “afraid of him.” Tr. (4/25/22), pg. 16.

In early 2020, Mr. Barbee turned himself in on an outstanding drug warrant. He was incarcerated in Texas in February 2020. He received drug treatment in prison and was released in September 2021. He testified that he did not know where Ms. Barnes or AJB were living after November 2019 and could not contact Ms. Barnes by telephone while incarcerated, although he tried to call her at her prior number just after he was released. *Id.* at 27, 31. Mr. Barbee did not, however, have any contact with AJB. Based on these facts, it was effectively undisputed that that Mr. Barbee failed to establish a substantial relationship with the child during the relevant time frame.

The trial court’s decision states that this evidence was “insufficient to sustain [the] application for adoption without consent.” R. 25, *Journal Entry of Judgment*. Because the Barneses met their burden under 10 O.S. § 7505-4.2(H)(1), the trial court’s decision to grant Mr. Barbee’s demurrer to the evidence was in error. The record contains clear and convincing evidence—and no contrary

evidence—that Mr. Barbee failed to “fail[ed] to establish and/or maintain a substantial and positive relationship with [AJB] for a period of twelve (12) consecutive months out of the last fourteen (14) months immediately preceding the filing of a petition for adoption.” 10 O.S. § 7505-4.2(H)(1).

We see no indication, however, that the proceedings in the trial court went beyond the question of whether the Barneses established a *prima facie* case that AJB was potentially eligible for adoption without consent pursuant to 10 O.S. § 7505-4.2(H)(1). Indeed, as noted above, Mr. Barbee’s demurrer to the evidence was granted at the close of the Barneses’ evidence. As such, we reverse and remand this matter to allow Mr. Barbee to present all available defenses to the *prima facie* case established by the Barneses, including those set forth in the statute. *See* 10 O.S. § 7505-4.2(H)(2).⁵

⁵ On remand, the trial court should be cognizant of the question of whether it must make a finding as to the best interest of the child at the AWOC stage. Under our reading of the clear statutory text, no such finding is required (or warranted) at that stage, as only *eligibility* under the statutes is determined at an AWOC hearing. *Compare* 10 O.S. § 7505-4.1(E) (“At the hearing on an *application to permit adoption without the consent* or relinquishment of a parent, the court may determine whether the minor is eligible for adoption pursuant to Section 7505-4.2 of this title.” (emphasis added)) *with id.* (“At the hearing on an *application to terminate* the parental rights of a putative father, the court may, *if it is in the best interests of the minor*, determine that the consent of the putative father to the adoption of the minor is not required, and terminate any parental rights which the putative father may have, as provided in Section 7505-4.2 of this title.” (emphasis added)). In dicta, however, the Supreme Court has at times indicated a contrary view. *See, e.g., Matter of Adoption of M.A.S.*, 2018 OK 1, ¶ 31, 419 P.3d 204 (“It is incumbent on the trial court to determine whether the adoption would be in the child’s best interests *prior to* declaring the child eligible for adoption.” (emphasis added)). *See also Matter of the Adoption of L.B.L.*, 2023 OK 48, ¶ 12 (stating that the trial court “terminate[d] parental rights” on review of what appears to be an order permitting the adoption to proceed without consent).

CONCLUSION

It was proven by clear and convincing evidence below that Mr. Barbee had no contact with AJB for the requisite statutory period. As such, the Barneses established a *prima facie* case that ABJ was statutorily eligible for adoption without consent. The trial court therefore erred in granting Mr. Barbee's demurrer to the evidence. We thus vacate the order appealed and remand to afford Mr. Barbee the opportunity to put on any evidence he may have in defense.

VACATED AND REMANDED.

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

WISEMAN, J. (sitting by designation), concurring in part and dissenting in part:

I concur with the majority's conclusion on the failure to support issue. But the majority's position on 10 O.S. § 7505-4.2(H) in my view is too stringent and narrow (indeed mandatory), particularly when a parent's constitutional rights are at stake. Mother's efforts to undercut Father's established relationship with his child while he was incarcerated in another state make the likelihood of the requisite legal action by Father all but non-existent.

I would affirm the trial court's decision as not contrary to the clear weight of the evidence and well within its discretion based on its first-hand observation of the witnesses and consideration of the evidence presented. I respectfully dissent to this part of the analysis.

June 2, 2023