IN THE APPELLATE COURT OF THE CHOCTAW NATION

In the Matter of K.I., S.I., and B.I., minor children.	)	Nos. AC-23-6; 23-7
	)	District Court No. FA-22-23

OPINION

The questions presented in this case are: (1) whether the trial court's order declaring K.I., S.I., and B.I. (minor children) eligible for adoption without the natural mother's or father's consent was supported by clear and convincing evidence; (2) whether the guardians were required to notify the minor children's Indian tribe of this adoption action. We find that the trial court's order was supported by clear and convincing evidence. We also find no notice requirement applicable to this action in tribal, state, or federal law. The district court order is AFFIRMED.

I. Background and procedural history

A. State-court guardianship

The record shows that the prospective adoptive parents received guardianship of the three minor children in August 2016 in state court proceedings in Bryan County, Oklahoma. Tr. 10, 23. The record does not demonstrate whether the minor children's Indian tribe, the Chickasaw Nation, received notice of the state-court guardianship proceeding or intervened in that action. That guardianship has remained in place ever since.

The minor children have remained in the custody of the adoptive parents since August 2016. The state court has conducted periodic guardianship reviews, but the natural parents have not attended any of the guardianship review hearings. Tr. 14. The last time the natural parents saw the minor children was in 2016. *Id.* at 9. Neither natural parent has spoken with the minor children since at least 2017. *Id.* The record also shows that the state court entered an order of support to the natural father, but not to the natural mother. Tr. 94, 115.

B. Adoption without consent proceeding

On October 18, 2022, the prospective adoptive parents filed an adoption petition in the court below. On that same date, Petitioners filed applications for orders determining the minor children eligible for adoption without consent of the natural parents.

The district court conducted a hearing on June 29, 2023 at which the Petitioners and the natural parents appeared. All parties were represented by counsel. The natural parents objected to the adoption without consent. The court heard testimony from the Petitioners and the natural parents. The court also allowed counsel to file briefs following the hearing making any legal or equitable arguments against a finding that the minor children could be found eligible for adoption without consent. Attorneys for both natural parents filed briefs.

On August 31, 2023, the district court entered an order finding, among other things: (a) the minor children reside with the Petitioners within the Choctaw reservation; (b) the relevant period for considering the failure of the natural parents to financially support the minor children was August 18, 2021 through October 18, 2022; (c) undisputed evidence that neither natural parent had any personal contact with the minor children during the relevant period; and (d) undisputed evidence that neither natural parent provided financial support to the Petitioners during the relevant period. The district court determined by clear and convincing evidence that the natural parents failed to establish and/or maintain a substantial and positive relationship with the minor children during the relevant period. The district court also determined by clear and convincing evidence that the natural parents willfully failed, refused, or neglected to contribute to the support of the minor children. Based on the foregoing, the district court granted the Petitioners' application for a determination that the minor children were eligible for adoption without consent and granted the Petitioners' application for adoption without consent.

The natural parents each appealed, resulting in two appellate cases before us today: No. AC-23-06 (natural mother) and No. AC-23-07 (natural father). We ORDER these cases consolidated for purposes of this appeal.

II. Standard of Review

We adopt the Oklahoma Supreme Court's view that adoption statutes allowing adoption without consent of the natural parents must be strictly construed in favor of the natural parents. *See, e.g., Matter of Adoption of M.A.S.*, 2018 OK 1, ¶ 29. We also adopt the Oklahoma Supreme Court's views on burden of proof and standard of proof. "The burden rests on the party seeking to destroy the parental bond to show why consent may be dispensed with." *Matter of Adoption of A.J.B.*, 2023 OK 122, ¶ 8. "The standard of proof necessary to establish any of the grounds to permit adoption without consent, or for termination of parental rights, is clear and convincing evidence" *Id.* at ¶ 9.

"Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegation sought to be established." *In re Adoption of L.D.S., 2006 OK 80, ¶ 11, as supplemented on reh'g (Mar. 6, 2007).* We accept the facts as determined by the district court and we will only reverse the court below in an adoption without consent case if the district court abused its discretion or if its order failed to rest on clear and convincing evidence. We review issues of law using a de novo standard.

III. Analysis

A. Adoption without consent under the Choctaw Nation Adoption Code

The Adoption Code provides the only means by which prospective adoptive parents may adopt minor children without the consent of the natural parents. In this case, the district court's decision finding the minor children eligible for adoption without consent rests on two independent bases for adoption without consent. First, the district court found, by clear and

convincing evidence, that the natural parents had failed to establish and/or maintain a substantial and positive relationship with the minor children during the relevant period under Section 5-4.2(H) of the Adoption Code. Second, the district court found, by clear and convincing evidence, that the natural parents had willfully failed, refused, or neglected to contribute to the support of the minor children under Section 5-4.2(B) of the Adoption Code. We examine these bases in turn.

1. Failure to establish and/or maintain a substantial and positive relationship

The district court found that both natural parents failed to establish and/or maintain a substantial and positive relationship with the minor children during the relevant period making the minor children eligible for adoption without consent. Adoption Code § 5-4.2(H)(1). The Adoption Code defines "fail[ure] to establish and/or maintain a substantial and positive relationship" as a situation where the parent "has not maintained frequent and regular contact with the minor through frequent and regular visitation or frequent and regular communication to or with the minor", or as a situation where the parent "has not exercised parental rights and responsibilities." *Id.* at § 5-4.2(H)(3).

The natural father testified that during the relevant period he had no physical contact with the minor children. Tr. 115–116. He also testified that during that period he did not speak to the minor children. *Id.* at 116. These admissions satisfy the test for establishing that the minor children are eligible for adoption without consent under Section 5-4.2(H)(1). The clear and convincing evidence shows that the natural father failed to establish and/or maintain a substantial and positive relationship with the minor children.

The natural father, however, claims the prospective adoptive parents prevented him from establishing or maintaining a positive relationship with the minor children. Transcript 119–120. The Adoption Code provides for a defense of this sort by natural parents facing an adoption of their minor children without their consent.

The Adoption Code provides that if the minor children's custodian has denied the natural parent an opportunity to establish and/or maintain a substantial and positive relationship with his or minor children, the natural parent may overcome that failure by having taken sufficient legal action to establish and/or maintain such a relationship. Adoption Code § 5-4.2(H)(2).

> In any case where a parent of a minor claims that prior to the receipt of notice of the hearing provided for in Sections 5-2.1 and 5-4.1. of this Title, such parent had been denied the opportunity to establish and/or maintain a substantial and positive relationship with the minor by the custodian of the minor, such parent shall prove to the satisfaction of the court that he or she has taken sufficient legal action to establish and/or maintain a substantial and positive relationship with the minor prior to the receipt of such notice.

Id.

It does appear from the record that the adoptive parents blocked the natural father from communicating with them on social media. Tr. 119. And, although the natural father had the telephone numbers of the adoptive parents, he claims that the adoptive parents would not return his calls or messages during the relevant period. Tr. 120. As contemplated by the Adoption Code, the natural father's efforts should not have ended here. He could have potentially blocked an adoption without consent if he had taken sufficient legal action as required by Section 5-4.2(H)(2).

By definition, taking sufficient legal action requires taking legal action. The natural father could have filed a motion in the state-court guardianship proceeding. He could have filed a new action in state or tribal court. He could have simply appeared at one of the guardianship hearings in state court to object to his lack of visitation or to the custodians' prevention of his attempted communications with his children. While he testified that he could not afford an attorney during this period, Tr. 121–124,[1] he could have filed pro se in either state or tribal court. He did not do so.

Oklahoma courts have considered the meaning of "sufficient legal action" in this context. In *Matter of Adoption of M.A.S.*, 2018 OK 1, ¶ 28, the Oklahoma Supreme Court found a natural father's filing of a motion to modify custody and a motion to enforce visitation sufficient legal action to block an adoption without consent. In another case where the natural parent filed nothing in court during the relevant period, the Oklahoma Supreme Court held that such failure could not satisfy the court that the natural parent had taken sufficient legal action. *In re Adoption of G.D.J.*, 2011 OK 77, ¶¶ 27–29. The facts of *G.D.J.* are much more similar to the case before us than the facts of *M.A.S.*

The Adoption Code clearly requires the natural father's defense (that the adoptive parents prevented him from establishing and/or maintaining a substantial and positive relationship with the minor children) to be followed with proof of the natural father taking sufficient legal action to establish and/or maintain a substantial and positive relationship with the minor children. There is no evidence that the natural father took any legal action at all. Whatever the definition of legal action, the natural father's limited actions of attempting to contact the adoptive parents by telephone or text message does not rise to the level of sufficient legal action required by the Adoption Code. The district court did not abuse its discretion in finding, by clear and convincing evidence, the natural father failed to establish and/or maintain a substantial and positive relationship with the minor children.

The natural mother asserts a similar defense. Her defense is stronger than the natural father's. According to testimony, the adoptive mother led her to believe that she was communicating regularly with the minor children during the relevant period over text messages. Tr. 66–74, 97–100, 110. This was based on an agreement between her and the adoptive mother that would allow her to begin speaking to the minor children once she could show regularity and consistency in text communications with the minor children. The natural mother believed her texts were being shown to the minor children for four months during the relevant period. *Id.* at 100.

[1] He did manage to afford an attorney for his DUI case. Tr. 118.

In fact, the natural mother's text messages to the minor children were sent to the adoptive mother only. And the adoptive mother never shared the messages with the minor children. Tr. 99–100. In addition to consistent communication, the natural mother agreed to stay in counseling and stay sober in exchange for the adoptive mother agreeing to allow her to speak with the minor children. The natural mother did in fact stay in counseling and offered drug tests to the adoptive mother, hoping to begin speaking to the minor children. *Id.* at 96–97. The adoptive mother declined the drug tests. In May 2022, after months of communications between the two in anticipation of the natural mother being allowed to speak with the minor children, the adoptive mother told the natural mother that she would not allow such communication until after a counselling session with each of them present, which was to be scheduled in September 2022 and which never happened. *Id.* at 98.

Unfortunately for the natural mother, the Adoption Code required more than the adoptive mother preventing her from establishing and/or maintaining a substantial and positive relationship with the minor children. It also required the natural mother to take sufficient legal action in response. The record provides no evidence of any legal action taken by the natural mother prior to this action being filed. The natural mother admitted she did not take legal action, but only "threatened legal" action, at which point the adoptive parents filed this action. Tr. 98.

The natural mother's attorney points to *Steltzlen v. Fritz*, 2006 OK 20 for support of her argument that the adoptive mother's stonewalling could satisfy the Adoption Code's requirement that the natural mother take sufficient legal action in response. *Fritz* does not help the natural mother. In that case, which involved an adoption without consent, the mother had kept the knowledge of the child's paternity from the natural father. *Id.* at ¶ 19. The court found the "natural Mother's actions constituted specific denial of knowledge of the child and offered a complete defense to the termination of father's parental rights." *Id.* at ¶ 16. The sufficient legal action standard was not directly at issue in *Fritz*. Here, the natural mother was not unaware of her parental ties to the minor children. The Adoption Code requires sufficient legal action and, as the natural mother testified, the only action she took in this regard was to threaten legal action. Tr. 98.

Without some legal action, whether it be attending a guardianship hearing, filing a motion in the guardianship case, or filing a separate action in state or tribal court, the natural mother cannot satisfy the requirement of taking sufficient legal action in response to the stonewalling by the adoptive mother. We find that the district court did not abuse its discretion in finding, by clear and convincing evidence, the minor children eligible for adoption without the consent of the natural mother under Section 5-4.2(H).

2. Willful failure, refusal, or neglect to contribute to support

The record demonstrates that neither natural parent contributed in any way to the support of the minor children during the relevant period. The only question presented here is whether this failure, refusal, or negligence to provide support was willful. Adoption Code § 5-4.2(B).

The Adoption Code sets out the requirements for adoption without consent where a parent has willfully failed, refused, or neglected to contribute to the support of their minor children.

> Consent to adoption is not required from a parent who, 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 a child or a petition to terminate parental rights pursuant to Section 5-2.1 of this Title, has willfully failed, refused, or neglected to contribute to the support of such minor:
>
> 1. In substantial compliance with an order entered by a court of competent jurisdiction adjudicating the duty, amount, and manner of support; or
>
> 2. According to such parent's financial ability to contribute to such minor's support if no provision for support is provided in an order. For the purposes of this section, support for the minor shall benefit the minor by providing a necessity. Payments that shall not be considered support shall include, but are not limited to:
>
> a. genetic and drug testing,
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> b. supervised visitation,
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> c. counseling for any person other than the minor,
>
> d. court fees and costs,
>
> e. restitution payments, and
>
> f. transportation costs for any person other than the minor, unless such transportation expenses are specifically ordered in lieu of support in a court order.
>
> The incarceration of a parent in and of itself shall not prevent the adoption of a minor without consent.

Id.

The Oklahoma Supreme Court has interpreted similar statutory language. It described the test in the following terms.

> A parent's financial ability to pay a support obligation is relevant in determining whether the parent "willfully" failed, refused, or neglected to pay child support. A parent, financially responsible for

> child support then, may not be in substantial compliance; but, at the same time, not willfully so. This Court has held previously that the willfuness requirement of the statute is intended to prevent an arbitrary application of the statute and a parent's inability to comply with a support order would always be relevant to show an absence of willfulness

Matter of Adoption of M.A.S., 2018 OK 1, ¶ 16 (internal citations and quotations omitted). Further, the term "willfully" is understood to modify each verb following it. *See id.* at ¶ 16 ("The term "willfully" is understood to modify all verbs in the series that follow the term."). "Whether the requisite willfulness exists is a fact question to be determined on a case by case basis." *Id.*

Here, the natural father was under a court order in the state-court guardianship action to pay child support. He testified that he complied with the court-ordered support until 2019. The record demonstrates that during the relevant period the natural father did not contribute at all to the support of the minor children. The district court determined this failure was willful.

During the relevant period, the natural father was largely unemployed. He performed small jobs as a sole proprietor. Tr. 113. He served two stints in jail during the relevant period, one for having received a DUI charge in October 2022. *Id.* He was also homeless, during the relevant period, staying with his brother or a girlfriend. *Id.* at 115. He testified that he earned between $600 and $800 dollars a month doing odd jobs during the relevant period, which he spent on food, cigarettes, alcohol, and an attorney for his DUI case. Tr. 117 –118, 122, 125. In addition, his friends and family helped him out with funds from time to time. Tr. 117. Nothing in the record demonstrates any effort by the natural father to find gainful employment.

The natural father's income during the relevant period was certainly limited, but it did not prevent him from contributing something to the support of the minor children. He chose to spend his money on other things. Because the record demonstrates no effort to even attempt to comply with his duty to provide court-ordered child support, a willful failure to contribute to the support of the minor children has been shown by clear and convincing evidence. The district court did not abuse its discretion in finding, by clear and convincing evidence, the minor children eligible for adoption without the consent of the natural father under Section 5-4.2(B)(1).

The natural mother was not under a court order to provide child support. The Adoption Code, nevertheless, allows an adoption without consent to move forward if the prospective adoptive parents can show, by clear and convincing evidence, a willful failure to contribute to the support of the minor children. Adoption Code § 5-4.2(B)(2).

The natural mother was employed by the Chickasaw Nation throughout the relevant period. Tr. 88. She earns approximately $1,800 per month. *Id.* at 101. During this period, she paid tithes to her church and made donations to charity. *Id.* at 91. Together with her husband, her household brings in over $5,000 per month. *Id.* at 105. However, as she testified, she did not do anything to attempt to contribute to the support of the minor children. *Id.* at 106. She did not open a bank account or college savings plan in the minor children's names. *Id.*

The record demonstrates that the natural mother, even though she had the financial ability, did not attempt to provide some contribution to the support of the minor children during the relevant period. Because the natural mother was gainfully employed during the relevant period, had sufficient resources at her disposal, and knew how to open a savings account or mail checks to the custodians of her minor children, her failure can be found willful. The district court did not abuse its discretion in finding, by clear and convincing evidence, the minor children eligible for adoption without the consent of the natural mother under Section 5-4.2(B)(2).

B. Notification of the minor children's Indian tribe

On appeal, both natural parents have challenged the failure of the Petitioners to notify the minor children's tribe, the Chickasaw Nation, of this adoption proceeding. Specifically, the natural parents argue that federal law, state law, and tribal law each require such notice. While it may be reasonable to suppose that a child's Indian tribe should be notified of an adoption proceeding in the Choctaw Nation's courts, nothing in federal law or tribal law requires such notice. To the extent that Oklahoma requires such notice in state court proceedings, that law is not applicable to the Choctaw Nation or its courts.

1. Tribal law

One of the purposes of the Choctaw Nation Adoption Code is "[t]o protect the interest of Choctaw Nation in preserving and promoting the heritage, culture, tradition and values of the Choctaw Nation for its children." Adoption Code § 1-1.2(A)(4). The Adoption Code does not refer to a purpose of protecting the interests of other tribes whose minor children may be subject to an adoption action in Choctaw Nation courts.

The Adoption Code is not limited to adoption proceedings of Choctaw minor children. The Adoption Code extends the Choctaw Nation courts' jurisdiction to adoptions of any Indian children residing within the Choctaw reservation. "The Choctaw Nation shall have concurrent jurisdiction over . . . any Indian Person or Indian Child who resides or is Domiciled within the Territorial Boundaries of the Choctaw Nation." *Id.* at § 2-1.1(B)(2). The Adoption Code defines "Indian Child" as "an unmarried child who is either a) a member of a federally recognized Indian tribe or b) is eligible for membership in a federally recognized Indian tribe *and* is the natural child of a citizen of an Indian tribe." Id. at § 2-1.1(C)(3) (emphasis in original). The record reflects that each of the three minor children are members in the Chickasaw Nation. The district court, therefore, had jurisdiction over this adoption proceeding, which no party has directly challenged. The challenge at issue here is to the failure of the Petitioners to notify the Chickasaw Nation of this proceeding.

Nothing in the Adoption Code, however, requires notification to other Indian tribes whose minor children are subject to adoption in Choctaw Nation courts. The Appellants have not identified, and this Court has not located, any provision in any other Choctaw Nation law requiring notice to other Indian tribes when their minor children are subject to adoptions in Choctaw Nation courts.

While we may view the concept of notifying other tribes when their minor children are subject to adoption in our courts in a favorable light, no such notice requirement appears in Choctaw Nation law. The Choctaw Nation Tribal Council makes law for the Nation. Choctaw Nation Const. art. IX, § 4. This Court lacks the authority to impose a notice requirement where the applicable statue is silent. Our job is to interpret the law, not to make it. We must therefore reject the Appellants' view that tribal law required notice to the Chickasaw Nation of this adoption proceeding.

2. *State law*

The Oklahoma Indian Child Welfare Act "applies to all state voluntary and involuntary child custody court proceedings involving Indian children," with limited exceptions not relevant here. 10 Okla. Stat. § 40.3. The Act plainly requires notice of Indian child custody proceedings be sent "to the tribe that is or may be the tribe of the Indian child . . . ." *Id.* at § 40.4(A). Further, notice of each review hearing in an Indian child custody proceeding must be sent to the child's tribe. *Id.* at § 40.4(B).

The natural parents argue that these state requirements apply to this proceeding. But it is unclear how that could be so. The State of Oklahoma is a separate and distinct sovereign whose law does not apply to the Choctaw Nation. *See, e.g.*, *State Laws and Indian Tribes*, 1 Treatise on Const. L. § 4.2(e) ("State and local governments have no jurisdiction over Indian tribes unless they specifically have been granted such jurisdiction by Congress.").

Of course, it is true that we routinely reference court decisions from Oklahoma courts (and from other state and federal courts) as potentially persuasive authority. Being persuaded by another sovereign's common law or judicial reasoning, however, is entirely different than applying another sovereign's statutory requirement to the Choctaw Nation. When a state court requires notice to an Indian tribe based on the Oklahoma Indian Child Welfare Act it is simply applying the law of a sovereign to proceedings in its own courts. The statutory requirement cannot be incorporated into Choctaw Nation law unless and until the Tribal Council passes a law containing the requirement under the Choctaw Nation constitution's law-making process. The Oklahoma Indian Child Welfare Act notice requirement simply does not apply to the Choctaw Nation or to its courts. Appellant has not provided a theory explaining how things could be otherwise.

This brings us to another issue not resolved by the record below. The guardianship which originally gave the prospective adoptive parents custody of the minor children, occurred in state court. Under the Oklahoma Indian Child Welfare Act, notice of that guardianship proceeding should have been given to the Chickasaw Nation. In fact, notice of every review hearing in the guardianship case should have been given to the Chickasaw Nation. It is unclear from the record below whether any such notice was ever given. If it were given, then the Chickasaw Nation has known the prospective adoptive parents have had custody of these minor children for years without taking any action to challenge the placement. If notice was not given to the Chickasaw Nation, that can have no effect on the outcome of this appeal because, as discussed above, the Oklahoma Indian Welfare Act does not apply to the Choctaw Nation or its courts.

3. Federal law

Appellants argue that the federal Indian Child Welfare Act required notice of this adoption proceeding be given to the Chickasaw Nation because the minor children are members of that tribe. As both Congress and the Supreme Court have explained, the Act was written as bulwark against *state* government overreach into the affairs of Indian tribes. *See*, *e.g.*, *Haaland v. Brackeen*, 599 U.S. 255, 265 (2023) ("Congress found that many of these children were being placed in non-Indian foster and adoptive homes and institutions, and that *the States* had contributed to the problem by fail[ing] to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.") (internal quotations omitted); *see also id.* at 297–318 (Gorsuch, J. concurring).

It should not be surprising, then, that Congress did not apply the Act's notice requirements to Indian tribes. Congress simply did not consider or legislate on situations where one tribe takes custody of another tribe's minor children or a tribal court grants adoptions or guardianships of another tribe's minor children. The Act's text is plain. The relevant portions of the Act apply to states, not to Indian tribes. The Act's notice requirement does not apply to the Choctaw Nation. It only applies to proceedings in state courts.

> In any involuntary proceeding *in a State court*, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian *and the Indian child's tribe* . . . ."

25 U.S.C. § 1912 (emphases added). In sum, the Indian Child Welfare Act did not require notice of this proceeding to be given to the Chickasaw Nation. The Petitioners' failure to give such notice did not violate federal, state, or tribal law.

IV. Conclusion

The district court did not abuse its discretion in holding that clear and convincing evidence showed the natural parents failed to establish and/or maintain a substantial and positive relationship with the minor children during the relevant period. The district court did not abuse its discretion in holding that clear and convincing evidence showed the natural parents willfully failed, refused, or neglected to contribute to the support of the minor children during the relevant period. When the courts of the Choctaw Nation otherwise have proper jurisdiction over an adoption proceeding involving minor children belonging to other tribes, notice to the other tribe is not required by tribal, state, or federal law. The district court order is AFFIRMED.

Per Curiam.