NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

IN THE MATTER OF V.A., an Alleged Deprived Child.

VICKI A.,

Appellant,

vs.

STATE OF OKLAHOMA,

Appellee.

Case No. 105,337

APPEAL FROM THE DISTRICT COURT OF
GARVIN COUNTY, OKLAHOMA

HONORABLE RICHARD A. MILLER, TRIAL JUDGE

REVERSED AND REMANDED WITH DIRECTIONS

D. Michael Haggerty, II
HAGGERTY LAW OFFICE, PLLC
Durant, Oklahoma

For Appellant

Lori Ann Puckett
MCCLAIN COUNTY DISTRICT
ATTORNEY'S OFFICE
Purcell, Oklahoma

For Appellee

Tracy Milner
Purcell, Oklahoma — For Child

Laurence Stephen Balcerak
Pauls Valley, Oklahoma — For Father

OPINION BY DEBORAH B. BARNES, JUDGE:

This is an appeal from the trial court's October 31, 2007, Order of Adjudication, finding the child who is the subject of this action (Child) to be deprived. Child's mother (Mother) argues that the State of Oklahoma (State) produced insufficient evidence to establish a finding of deprivation. After reviewing the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences from the evidence, we agree with Mother and reverse the trial court order with instructions to dismiss the petition and discharge Child from the custody of State.

STANDARD OF REVIEW

State's burden of proof in deprived adjudication proceedings must be met by a preponderance of the evidence establishing that it is in the best interests of the child and the public that the child be made a ward of the court. 10 O.S.2001 § 7003-4.5(A); *see Matter of A.D.W.*, 2000 OK CIV APP 110, ¶ 14, 12 P.3d 972, 976. On appeal from an order declaring a child deprived, we will affirm the trial

court's findings if they are supported by competent evidence reasonably tending to support the trial court's decision that State met its burden of proof. *In the Matter of: J.D.H.*, 2006 OK 5, 130 P.3d 245.

State asserted three allegations of deprivation, all of which the trial court found as fact in its adjudication order. First, State claimed Child's home was inadequate. Second, State claimed that Child had injuries (bruising and diaper rash) that were not consistent with a normal childhood fall, and third, State claimed that Mother committed domestic abuse against Child's biological father (Father) in the presence of Child. Mother asserts the finding of deprivation is unsupported by the evidence.

BACKGROUND FACTS

Mother is married to Mr. A. (Husband). They live on their horse ranch, together with their two sons, who at time of trial in the fall of 2007, were ages nine and thirteen.

Husband was diagnosed with rheumatoid arthritis and fibromyalgia in February 2000. These diseases, both quite painful and debilitating, are treated with various prescription painkillers and other medications. In 2004, Husband was trying experimental drug therapies to help his diseases, but for most of that year, he was "flat on [his] back." The pain and medication caused him not to be able to

work or "function and get around." He was hospitalized in November 2005 for exploratory surgery. His condition started improving in the spring of 2006, continued to greatly improve, and at time of trial, Husband was able to attend and testify. He had, for some time, been sharing equally with Mother in the care of Child, whom, he testified, he began to love when she was six weeks old. He also testified that he intends to be the best stepfather he can be for Child, citing his past positive experience with his own stepfather.

During the time Husband was debilitated by his diseases, the man who would become Child's biological father (Father), an attorney and a friend from the church Husband and Mother attended, was coming out to the ranch each day for several hours to help Mother take care of the forty or fifty horses there. He did this for eleven months in 2004.[1] According to Father, he often spent the night and slept with Mother in her and Husband's house.

Mother and Father conceived Child on or about September 4, 2004.[2] Mother and Father continued to have sexual relations after September 4, 2004, and Father accompanied Mother to her initial obstetrics appointments that fall.

---

[1] Father also represented Mother and Husband in a real estate transaction in the summer of 2004.

[2] Child was sixteen months old at time of trial.

Mother told Husband on December 17, 2004, that she was pregnant with Child and that Father was the biological father.[3] According to Father, Mother decided on December 24 to remain married to Husband, who was in agreement. From that point forward, the interactions among Mother, Husband, and Father regarding Child have been significantly strained.

Child was born June 8, 2005. The antipathy among Mother and Husband and Father increased when Father filed a paternity/custody lawsuit in January 2006, and the parties began accusing each other of all types of undesirable behaviors.[4]

When the paternity test established Father as Child's biological parent in May 2006, he was awarded supervised visitation with Child. Custody remains undecided while the instant case proceeds. The evidence certainly establishes that,

---

[3] Husband testified he found out about the affair from a friend. Then Mother told him about it and the pregnancy, claiming it was rape. Mother told Husband she didn't tell him about the affair and pregnancy sooner because he was sick. Mother continued to use Father as her attorney through December 2004, and Husband testified Father was at their house after the alleged rape about 6 hours a day, every day, until December when the pregnancy was announced. Mother testified she does not remember any of her sexual encounters with Father, yet claims she was raped by Father. She never filed charges and never mentioned this when she obtained a protective order against Father in early 2006 after he filed a paternity/custody lawsuit.

[4] Father accused Mother of being a drug user and Husband of being a drug addict, neither of which was ever substantiated. Mother and Husband accused Father of writing negative letters to their friends and family, which Father admitted writing, but characterized them as containing the truth. Mother's unsubstantiated accusations of rape and child molestation against Father, along with Father's allegations of Mother's child neglect, are discussed further in this opinion.

similar to many parents who divorce, Mother and Father have each been tearing the other down in an effort to prevail in the custody matter; however, the record does not support the trial judge's deprivation findings.

PERTINENT FACTS AND ANALYSIS

In the trial court's Order of Adjudication, the trial court found Child to be adjudged deprived and made a ward of the court by reason of inadequate housing, injuries not consistent with normal childhood falls, and domestic abuse of Father by Mother in front of Child. We address each of these findings below.[5]

A. Alleged Inadequate Housing

Witness Michael Zellner, a law enforcement officer, and witness Sergeant Jim Mullett of the Garvin County Sheriff's office, went to Mother and Husband's ranch to accompany witness Kerri Riley (Riley), a Department of Human Services (DHS) worker, on a May 11, 2007, DHS visit[6] to the ranch and also to execute a

---

[5] Mother raised six issues in the Petition in Error. Only two were briefed – the finding of deprivation and alleged excessive participation of Child's counsel. Issues not briefed are deemed waived on appeal. Rule 1.11(k)(1), Okla. Sup. Ct. Rules, 12 O.S.2001, Ch. 15, App. 1. Because the finding of deprivation is the determinative issue in this matter and because our review of the record indicates no overparticipation by Child's counsel, we reject that ground for reversal. A deprived proceeding is not a criminal prosecution, and the Legislature has not given counsel for a child in a deprived proceeding the same limited role that it has given the court-appointed advocate in criminal cases. 10 O.S.2001 § 7003-8.4(B)(1); *In the Matter of B.C.*, 2000 OK CIV APP 130, ¶ 29, 15 P.3d 8, 14.

[6] Someone had reported to DHS that Child might have suffered physical abuse, the house was dirty, and Husband was abusing drugs.

warrant for Mother on a bounced check. Zellner, Mullett and Riley were at Mother and Husband's ranch home for about twenty to thirty minutes.

Zellner was in the kitchen. He testified the floor needed to be mopped and swept, but he smelled no bad odors. He saw two piles of clothes in the living area, one on the sofa and one on the floor, but did not know if they were clean or dirty.[7]

Witness Mullett, experienced in checking homes and making decisions about whether they are fit for habitation of children, testified that the house had laundry in the living room. Mullett described the kitchen as "a little messy." Outside the house, in a covered, concrete carport/porch area with two walls and a top over it, there was the odor of cats and dogs. Mullett testified that the house "basically just looked like it was lived in." Mullett testified the house was not uninhabitably dirty and that he had no concerns about its habitability.[8]

Before arriving at the ranch house that day, Riley had first gone to visit Mother and Husband's two sons at school and determined they were fine. At the ranch house with Mullett and Zellner, she found adequate food. She testified that walking through the breezeway and into the kitchen, she smelled an odor of cat urine. She did not smell it throughout the house and testified the odor was coming

---

[7] Transcript, Sept. 7, 2007, at pp. 11-12.

[8] Transcript, Sept. 7, 2007, at p. 25.

in from the breezeway area. The living room was cluttered. All the other rooms were clean, and the boys' room was messy. Neither Zellner, Mullett, Riley, nor Spiegle[9] declared the house uninhabitable or removed Child's minor half-brothers from it.

In sum, the evidence regarding inadequate housing consists of animal odors wafting in from outside the house on a working horse ranch, some dirty dishes, two piles of clothes not put away, some messy or cluttered rooms, and a kitchen floor that needed sweeping in a ranch home where five people live, including two active young boys, dogs, cats, and a toddler, and where only one parent, Mother, is physically capable of tending the house. The house, according to Mullett, simply looked lived in, and Child's room was "spotless."

We find no competent evidence to support the trial court's finding of inadequate housing.

B. Alleged Injuries Not Consistent with a Normal Childhood Fall

State's second claim is that Child had bruising that was not consistent with a normal childhood fall while in Mother's care. Tonja Shandy (Shandy), a physician's assistant with twelve years of experience and special training in child

[9] Valerie Spiegle, DHS employee, testified that in early June 2006, she went to see the ranch home, and it was messy with dirty dishes on the counters. There was clothing around the house. Child's room was spotless. She made no allegation about the house at that time.

abuse issues, works at the Purcell Hospital. About seventy percent of the patients she sees are children, and she is called in when there is suspected child abuse or assault.

When Riley left Mother and Husband's home on May 11, 2007, she took Child with her to the Purcell Hospital to be examined. Father attended. Witness Shandy examined Child for physical abuse not consistent with normal childhood falls. At trial, Shandy testified she found no indications of physical abuse.[10] Child's bruises could have been caused by playing, and Shandy unequivocally testified she had no concerns about Child's health, safety, welfare or hygiene.[11]

Witness Heather Lynch, a physician with nine years experience, supervises Shandy's work as a physician's assistant. She reviewed the report of the May 11, 2007, exam done by Shandy on Child. Dr. Lynch testified that there were no indications on Child that day of either abuse or neglect, and that Child's bruises and diaper rash were not inconsistent with accidental trauma.

---

[10] Transcript, Sept. 7, 2007, at p. 71.

[11] However, Riley testified, just four days later, at the May 15, 2007, show cause hearing that Shandy had told her that Child's bruises were not consistent with normal childhood falls. Shandy did not testify at the May 15 show cause hearing, so Riley's testimony was relied on by the court. Riley, whose profession calls her to be accurate about facts involving children's welfare, appears to have misrepresented Shandy's findings to the court at the show cause hearing, as brought out on cross-examination by Mother's counsel at the deprivation hearing.

Child's daycare caregiver for approximately a year, witness Linda Moyer, who runs a DHS-certified day care, testified she never had any reason to report to DHS or to law enforcement any suspicions about Child's safety, health or welfare. Over a five month period, Moyer documented two or three accidental injuries producing bruises on Child while playing at day care. These happened when Child was running and playing in front of Moyer. The only time she ever noticed a bruise or injury to Child that did not occur at day care was when Child came in with a chin scrape Child sustained while in Father's care.

There is simply no competent evidence to sustain the trial court's finding of injuries not consistent with a normal childhood fall.

C. Domestic Abuse of Father by Mother in the Presence of Child

The third ground for a finding of deprivation is domestic abuse by Mother against Father in the presence of Child. There were three incidents upon which testimony was presented.

i. November 20, 2005

Child was born in June 2005. For Child's first five months of life, until November 20, 2005, Father would visit Child for one hour, once a week, in Mother and Husband's home – an inherently stressful arrangement that exploded, and ended, on November 20th.

On that day, Father told Mother he wanted to refer to himself as "daddy" around Child, and Mother did not want this. Husband also had a heated discussion with Father.[12] Mother told Father several times to get off the couch and leave the house. When he would not, she admits she pulled the hair on the back of his head. Only then did Father leave.

The testimony is conflicting after that point. Father claims Mother grabbed Child from his arms, followed him outside, "kicking his ass," and slapping him repeatedly. He also claims Husband threatened his life. Mother denies grabbing Child and denies any physical contact with Father except the hair pulling. She admits yelling and cursing at Father, and claims Child was in the other room with Husband. Husband denies any physical contact with Father or making threats. Father, an attorney, filed no charges based on his allegations and sought no health care for himself. At most, perhaps Child was in the room when Mother pulled Father's hair.[13] No one testified that Child was outside when Mother allegedly

---

[12] Recently, Mother had run into Father in public and had remarked to him that he now had everything he wanted, referring to his paternity and visitation. Father responded by saying that he did not, because he had wanted her, their Child, and her two sons with Husband. Mother related this conversation to Husband, who now realized that Child was not the product of a one-night stand, but rather that Father, his so-called friend from church, intended to take his entire family away from him.

[13] Even if Child were in the room, which is not clear, Child was a five-month-old infant. No evidence was presented to show Child saw, remembers, or even took notice of the hair-pulling or the yelling.

slapped and kicked Father. The disputed evidence regarding this incident does not rise to a level that satisfies State's burden of proof.

ii. Early 2006 at the Maysville Clinic

Although this incident at the Maysville clinic took place between Mother and Father in a public waiting room with other patients sitting there, no other witnesses to the incident appeared in court. Father testified he was at the clinic, getting Child's medical records that he was entitled to have. He states that Mother and Child saw him at the clinic, and Mother loudly accused him of being a child molester and rapist[14] in front of everyone in the public waiting room. Mother admits she yelled at Father to stay away from her and Child but denies calling him names. There is no evidence of any physical contact. Father did not report this incident to any law enforcement or sue for defamation. We find the evidence regarding this incident does not support a finding of deprivation, either.

iii. May 12, 2007

Husband testified that on May 11, 2007, late on a Friday afternoon, his sons arrived home late from school and said that DHS had been to the school to talk to

---

[14] These allegations have never been established as true. *See* footnote 3, *supra.* The record shows there was an investigation into the allegation of molestation against Father, involving one of Mother and Husband's sons, but no crime was found to have occurred.

them. The boys said they were asked if Husband was taking his medications correctly and if they were okay, which they confirmed.[15]

As they were talking, three cars pulled up, driven by Riley, Mullett and Zellner.[16] Riley came in, and in a "shrieky" voice, pointed to a pile of clothes on a chair and on the floor. Husband told her those were clean clothes, gathered from spring cleaning and going to charity. Mother began to get upset. Husband took Riley on a tour of the house and "she deemed that the house was fine." Then one of the officers told Husband that Mother was going with them on a warrant for a bounced check. Husband went outside to calm down Mother, who was angry.

When Husband came back in, Riley told him she was going to call Father to come get Child. Husband asked why and Riley said because he is the biological father. Riley told Husband she was taking his sons, too, because he could not take care of them. Husband told her, "Whoa, whoa, time out. Are you telling me because I have rheumatoid arthritis – and she had mentioned to me that she knew I

---

[15] DHS had visited the boys three other times with the same questions over the past year and a half. Numerous DHS visits, based on reports of a caller, whose identity is protected by law, began after Mother filed a protective order against Father. Husband and Mother testified they suspect that Father was behind the seven DHS visits because on these visits, Husband was always asked detailed questions about his medications. Father, by virtue of his eleven months of daily visits to Husband and Mother's ranch home, had detailed knowledge of Husband's medications and had even gone to the pharmacist to get them for him.

[16] This is the same event discussed under "i. Alleged Inadequate Housing," *supra*.

had that disease. I said, Wait a minute, you're telling me because I have rheumatoid arthritis, you can take my other kids, too?"[17] Husband testified, and told Riley that, prior to May 11, he had been spending the majority of his days with Child, taking care of her, as much as Mother did. Riley then decided to not take the boys. Husband said Riley said that "as soon as your wife is out of jail, that's when [Child] will come back." Husband asked what he had to do. "Just call me," Husband states Riley told him, and she then gave him her business card.

During this visit, as on the others, Riley insisted Husband disclose what medications he was on. Husband told Riley that he had issues with Father and would rather he not take Child, but Riley told him that it was either Father or DHS. Father denies he voluntarily let Child go, but admitted that the lesser of the two evils was to have Father take Child until Mother got home from jail.

Riley decided to take Child from the home until Mother was released, despite the fact that Riley admitted in her testimony that Husband was not debilitated, he was up and moving, not drunk, and was communicating coherently. Riley also admits Husband did not tell her he could not care for Child or that she was too much trouble or that he did not want to care for her. Yet, Riley testified

[17] Transcript, Oct. 3-4, 2007, at p. 174.

that she took Child from the home on the basis that Husband could not care for her while Mother was not present.

Riley then called Father to come get Child. They went together to the Purcell Hospital to be checked.[18] The results of Shandy's physical exam were, as set forth above, that Child was unequivocally not neglected or abused, nor did Child possess any injury not consistent with normal childhood falls.

Approximately an hour and a half after Riley left Husband and Mother's home, Mother was released from jail. It was a Friday, around 5:30 p.m. Mother called a friend to pick her up and then called Husband. Husband told her that Child had been taken and that Riley said they could get Child back as soon as Mother was out of jail. When Husband called Riley to retrieve Child, Riley told him he could not have Child, that there were attorneys involved, as well as another judge, and that now Child was under DHS supervision. When Mother got home, Husband told her about his call with Riley.

Mother testified that, after she heard from Husband that Child was gone, she went to the police department and said they would meet her in front of Father's office to help her get Child back. The police never showed up because no officers

---

[18] This is the same event described in "ii. Alleged Injuries Not Consistent with a Normal Childhood Fall," *supra.*

were available, so Mother went home for the night. Mother contacted Valerie Spiegle, DHS Child Welfare Specialist, who was on call, and yet, who said she could not help Mother with Riley's case.

On the next day, Saturday, May 12, 2007, Mother met her friend and they drove to Father's office. Father was not there. Mother dropped off her friend, drove past some land Father owns, and saw a blue truck there. She stopped to ask the person with the truck how to find Father. Father was there with the truck and inside were Child and two young men. Neither young man appeared as a witness at trial.

Mother admits she was angry and felt like Father stole Child. She admits yelling and cursing at him, grabbing his keys from the truck and throwing them. She denies hitting him. Father called the sheriff, told Mother the matter was in the attorney's hands, and then called Riley, who heard yelling over the phone.

The evidence of what actually happened is disputed because the only two witnesses present who testified are Mother and Father – the two people engaged in a rancorous paternity/custody fight. Reviewing these three incidents, what we are left with is one hair pulling and two incidents of an angry Mother yelling and cursing at Father.

Although State's attorney characterizes the preponderance of the evidence burden of proof as a "very low" one, in fact and in law, it is not. Evidentiary standards range from a scintilla, to substantial, to preponderance, to clear and convincing, and end with the criminal law standard of beyond a reasonable doubt. Preponderance is more than a scintilla and more than even substantial evidence.[19]

All the facts and the circumstances must be considered when determining where the preponderance or the weight of the evidence lies. *DeMoss v. Rule,* 1944 OK 276, ¶ 27, 152 P.2d 594, 600. We look to see if a fact proffered as true by State is more probably true than not true. *Appeal of Tucker*, 1975 OK CIV APP 40, 538 P.2d 626. Preponderance of the evidence is not determined by the number of witnesses called to testify. The testimony of one credible witness may be entitled to more weight than the testimony of any others who may be less credible. *Independent School District No. 4 of Harper County v. Orange*, 1992 OK CIV APP 145, 841 P.2d 1177.

The right of a parent to the companionship, care, custody, and management of a child is a fundamental right protected by both the federal and state

---

[19] The standard definition of substantial evidence is found in *Central Okl. Freight Lines v. Corp. Comm'n,* 1971 OK 57, ¶ 15, 484 P.2d 877, 879, which states that it means something more than a scintilla of evidence and means evidence that possesses something of substance and of relevant consequences such as carries with it fitness to induce conviction, and is such evidence that reasonable men may fairly differ as to whether it establishes a case.

constitutions. *See M. L. B. v. S. L. J.*, 519 U.S. 102, 116, 117 S.Ct. 555, 564; *In re K.C.*, 2002 OK CIV APP 58, 46 P.3d 1289. Deprivation is not a matter to be taken lightly, and State must be held to its burden of proof. The integrity of the parent-child relationship commands the highest protection in our society. Intrusions on that privacy and sanctity of that bond can be justified only upon a demonstration of a compelling state concern that meets evidentiary requirements. *See Davis v. Davis,* 1985 OK 85, 708 P.2d 1102.

We find the evidence fails to even meet the lower standard of substantial evidence and certainly does not meet the burden of a preponderance of the evidence. It should take much more than the evidence in this case to support a finding of deprivation.

Based on the totality of the trial court's comments, we understand why the trial court, in effect, called a "time-out" from the heated conduct and exchange of demeaning accusations and allegations between Child's parents by adjudicating Child deprived. However well-meaning, the trial court's order is not supported by the facts or the law, and it is not in the best interests of Child.

CONCLUSION

_____There being no competent evidence to sustain the order of adjudication, we reverse the trial court's order with instructions to dismiss the petition and discharge Child from State's custody.

REVERSED AND REMANDED WITH DIRECTIONS.

RAPP, C.J., and GABBARD, P.J., concur in result.

October 3, 2008

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

IN THE MATTER OF V.A., an Alleged Deprived Child.	)	
VICKI A.,	)	
Appellant,	)	
vs.	)	Case No. 105,337
STATE OF OKLAHOMA,	)	
Appellee.	)	

ORDER CORRECTING OPINION

The opinion of this Court, issued on October 3, 2008, is hereby corrected as follows:

Page 19, last line,

RAPP, C.J., and GABBARD, P.J., concurs in result.

Should be changed to read:

GABBARD, P.J., concurs, and RAPP, C.J., concurs in result.

SO ORDERED this 7th day of October, 2008.

Keith Rapp

KEITH RAPP, Chief Judge and as
Acting Presiding Judge