NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION III

BRANDON CHASE RYAN,	)	
	)	
Plaintiff/Appellant,	)	
	)	
vs.	)	Case No. 114,375
	)	
COMMISSIONER OF THE DEPARTMENT OF PUBLIC SAFETY, STATE OF OKLAHOMA,	)	
	)	
Defendant/Appellee.	)	

APPEAL FROM THE DISTRICT COURT OF
CANADIAN COUNTY, OKLAHOMA

HONORABLE BARBARA HATFIELD, TRIAL JUDGE

REVERSED AND REMANDED

Todd Kernal,
LAIRD, HAMMONS, LAIRD,
Oklahoma City, Oklahoma, For Plaintiff/Appellant,

Heather M. Poole,
Assistant General Counsel,
Oklahoma City, Oklahoma, For Defendant/Appellee.

Opinion by Wm. C. Hetherington, Jr., Judge:

¶1 Brandon Chase Ryan (Ryan) appeals from an adverse District Court ruling declining to reverse a Department of Public Safety (DPS) administrative revocation of Ryan's driver's license. Ryan challenged the time period of almost fourteen months[1] between his notice of revocation and administrative hearing as being a constitutional denial of his due process rights to a speedy trial. We apply the four factors delineated in *Pierce v. State ex rel. Dept. of Public Safety*, 2014 OK 37, ¶8, 327 P.3d 1197 to the case before us and **reverse** the revocation.

FACTS

¶2 The facts are not in dispute that Ryan was arrested on a DUI suspicion charge April 4, 2014 and refused the blood test. Ryan timely requested an administrative hearing which was acknowledged by DPS on June 3, 2014. Ryan's revocation was stayed and his driver's license returned to him during the appeal process and he again received notice of the pending hearing on March 31, 2015. The hearing was finally set for May 18, 2015 and Ryan's counsel received notice of the hearing on April 14, 2015. Following hearing and evidence taken on May 18th, the hearing examiner sustained the revocation of Ryan's license to drive. Ryan then timely appealed to the

[1] DPS argues their evidence indicated a ten month period between the time Ryan received his hearing request acknowledgment and stay, and the actual hearing date.

District Court. Following *de novo* trial with ruling taken under advisement, the District Court upheld the revocation by Order filed September 22, 2015, finding no due process speedy trial violation. Ryan appeals from that Order.

STANDARD OF REVIEW

¶3 Ryan's appeal challenges the timeliness of the administrative hearing and raises constitutional due process issues. The question of whether or not DPS denied Ryan of procedural due process by the delay in his administrative hearing is a pure question of law reviewed *de novo*. *Pierce v. State ex rel. Dept. of Public Safety*, 2014 OK 37, ¶7, 327 P.3d 530; *In Re Adoption of K.P.M.A.*, 2014 OK 85, ¶12, 341 P.3d 38; *Matter of A.M. and R.W.*, 2000 OK 82, ¶6, 13 P.3d 484. *De novo* review requires an independent, non-deferential re-examination of another tribunal's legal rulings. *Pierce*, 2014 OK 37, ¶7; *In re A.M.*, 2000 OK 82, ¶6; *Neil Acquisition, L.L.C. v. Wingrod Inv. Corp.*, 1996 OK 125, n.1, 932 P.2d 1100.

ANALYSIS

¶4 First, it is clear our Courts recognize a person's claim to a driver's license is a protected property interest entitled to application of due process standards. *Price v. Reed*, 1986 OK 43, ¶11, 725 P.2d 1254 (citing *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 1589 [1971]). We also recognize the state interest in depriving drunk

drivers of permission to continue operating an automobile is particularly strong. *Pierce*, ¶¶18-19.

¶5 We do not agree with DPS that this case is really factually distinguishable from *Pierce v. State ex rel Dept. of Public Safety*, 2014 OK 37, 327 P.3d 530. In *Pierce*, the evidence showed intentional postponements of the administrative hearing for some twenty months because DPS's witness was scheduled to be deployed on military duty, even though the witness was available during the first five months and then on an emergency basis for an additional three months before deployment. The hearing was then set approximately one month after his return. The Supreme Court in vacating the opinion of another division of this Court found: "[U]nder these unique facts, we hold that the driver's right to a speedy hearing, guaranteed by the Okla. Const. Art. 2, §6,[2] was violated and order reinstatement of his driving privileges." *Pierce* ¶24.

¶6 The *Pierce* Court citing *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 2192 (1973), *State of Oklahoma ex rel. Oklahoma Bar Ass'n v. Mothershed*, 2011 OK 84,

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[2] The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay or prejudice.

¶64, 264 P.3d 1197, and *Flandermeyer v. Bonner*, 2006 OK 87, 152 P.3d 195, once again recognized that a licensed driver cited in a civil proceeding has a right to a "speedy and certain remedy without delay," and in determining whether or not a licensed driver has suffered a deprivation of that right in a civil proceeding such as this, we consider four factors: 1) the length of the delay; 2) the reason for the delay; 3) the party's assertion of the right, and; 4) the prejudice to the party occasioned by the delay. *Pierce* ¶8. There is factual dispute if the delay was almost fourteen months or ten months. Ryan, nevertheless, timely asserted his right to an administrative hearing. At issue is the length of the delay and any prejudice.

¶7 Here, we agree with Ryan that the *Pierce* Court focused on the eight month period within which the hearing could have been held and was intentionally delayed. The Court's dicta discussed motive for delay when it said, "[T]he ultimate responsibility for the delay was the Department's deliberate action in postponing the cause. Such a delay weighs heavily against the governmental entity responsible for the same." In Ryan's case, there is no evidence of any reason for the delay and particularly, no evidence of caseload backlog as DPS argues we should consider, all resulting in a deliberate action to postpone the case for some unknown reason for ten to almost fourteen months, a much longer period than criticized in *Pierce*.

¶8 We also find there is evidence Ryan did suffer prejudice by this delay. His testimony indicated there was some thirty day period between the time his "paper" license expired and when he received his "plastic" license back so he could drive.[3] He stated he was a delivery driver but the company made the choice to not allow him to drive anymore. He later testified when asked,

> Q. How many hours a week would you work?
> A. Approximately 40 or 50. ... I do maintenance for the – it's a plastic injection business, and I do anywhere (sic) from grounds maintenance to machine maintenance, fork lifts, machines.

When asked how many hours he now works, he said,

> A. Now, it's approximately 20.

Ryan again attributed his change in employment terms to the cloud over his driver's license.[4]

> Q. Now, how does – how does the pending driver's license action, how did that affect – explain to the Court how that affected your work.
> ....

---

[3] The record testimony and argument reveals conflicting positions as to when Ryan received his "paper" temporary license good for thirty days and then followed by his receipt of his "hard" plastic license. DPS argues he received his temporary license on April 15, 2014 and then his plastic license on June 3, 2014, which would indicate a possible "limbo" period of approximately fifteen days rather than thirty days Ryan argues.

[4] On DPS examination of Ryan, he testified he had received a prior DUI but that his current driving privilege was not affected by that charge. DPS argued his change of work duties could have been due to that charge.

A. Yes. The employer said it's based on my driver's license. If I don't have a driver's license, then I can't drive a company vehicle, let alone my own.

(Tr. Pg. 61, line 25, pg. 62, lines 1-2)

¶9 Indication of possible prejudice to his defense of the revocation due to delay was also shown in the arresting officer's testimony:

Q. Prior to today's testimony, have you reviewed any our (sic) reports?
A. Yes.
Q. How was your memory about these events prior to reading these reports?
A. I remembered vague details but not everything.
Q. And why is that?
A. Because it's been over a year.
Q. So the passage of time has – has had some effect our (sic) memory?
A. Yes, sir.

(Tr. Pg. 52, lines 12-22)

Further,

Q. Now, during your direct examination, you seemed a little confused on what happened to the Officer's Affidavit that Mr. Ryan signed.
A. Yes.
Q. Do you know what happened to that piece of paper?
A. Not for sure.
Q. And why is that?
A. I – I can't remember.
Q. And why can't you remember?
A. Because it was over a year ago.

(Tr. Pg. 56, lines 10-19)

¶10 We agree delay without motive may be insufficient to demonstrate a deprivation of due process. However, in this case, we find delay did result in due process denial. We find the delay after timely request was not minimal and the evidence does not support a reasonable reason for the delay that did result in prejudice to Ryan.

ADMINISTRATIVE REVOCATION REVERSED, CASE REMANDED

BELL, P.J., concurs; JOPLIN, J., dissents.

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION III

NATHAN SHREWSBURY, Plaintiff/Appellant, vs. TAXSALELISTS.COM LLC and JOHN GALE LANE, Defendants/Appellees.	)	Case No. 114,025

APPEAL FROM THE DISTRICT COURT OF
CLEVELAND COUNTY, OKLAHOMA

HONORABLE THAD BALKMAN, JUDGE

AFFIRMED

Nathan K. Shrewsbury,
Bixby, Oklahoma, For Plaintiff/Appellant,

Nathan E. Clark,
RHODES HIERONYMUS JONES
TUCKER & GABLE, PLLC,
Tulsa, Oklahoma, For Defendants/Appellees.

OPINION BY ROBERT D. BELL, PRESIDING JUDGE:

¶1 Plaintiff/Appellant, Nathan Shrewsbury, appeals from the trial court's dismissal of his action against Defendants/Appellees, Taxsalelists.com LLC and John Gale Lane, to collect an attorney fee. For the reasons set forth below, we affirm.

¶2 Plaintiff, an Oklahoma licensed attorney, sued Defendants in Cleveland County District Court for breach of contract and fraud. In 2011, Plaintiff obtained a judgment against Defendants for $30,505.65, which included an award of attorney fees for Plaintiff's representation of himself. Plaintiff thereafter domesticated his judgment in Colorado. Defendants challenged the judgment, losing both at trial and on appeal. The Colorado Court of Appeals upheld the judgment and awarded Plaintiff an additional $5,738.10 in interest and $1,778.10 in costs, for a total judgment of $38,021.80. The judgment was paid via Defendants' posted supersedeas bond. Plaintiff represented himself throughout the Colorado enforcement proceedings and apparently did not seek attorney fees in either the trial or appellate court.[1]

¶3 In 2013, Plaintiff filed the instant action in Tulsa County District Court seeking his attorney fees incurred in the Colorado litigation. Plaintiff based this admittedly

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[1] In *Hi-Pro Animal Health v. Halverson*, 2002 OK CIV APP 61, 48 P.3d 119, Division II of this Court held that Oklahoma's Uniform Enforcement of Foreign Judgments Act, 12 O.S. §719 *et seq.*, does not provide for attorney fees for the successful defense against challenges to the domestication of a judgment. The Court noted, "Other jurisdictions also deny attorney fees when challenges are offered to the foreign judgment" under the uniform act. *Halverson* at ¶11.

novel action upon the parties' original contract, which Plaintiff argues provides for attorney fees to the prevailing party in any action to enforce the contract. Because he is an attorney and enforced his judgment in the Colorado litigation, Plaintiff contends he should be permitted to maintain this separate action to collect his fees pursuant to the contract.

¶4 Defendants filed a special appearance and motion to dismiss, asserting Plaintiff failed to state a cause of action upon which relief can be granted under 12 O.S. 2011 §2012(B)(6). Specifically, Defendants argued Plaintiff's case was barred by claim preclusion, impermissible splitting of a cause and the law of the case doctrine. The case was thereafter transferred to Cleveland County District Court. After more than a year, Plaintiff moved to strike Defendants' motion to dismiss for failure to present. At a subsequent hearing, the trial court overruled Plaintiff's motion to strike and granted Defendants' motion to dismiss with prejudice. From said judgment, Plaintiff appeals. This matter stands submitted for accelerated appellate review without appellate briefs on the trial court record pursuant to Rule 4(m), *Rules for District Courts*, 12 O.S. Supp. 2013, Ch. 2, App., and Rule 1.36, *Oklahoma Supreme Court Rules*, 12 O.S. Supp. 2013, Ch. 15, App. 1.

¶5 We review the trial court's disposition by dismissal *de novo*. *Darrow v. Integris Health, Inc.*, 2008 OK 1, ¶7, 176 P.3d 1204. "The purpose of a motion to

dismiss is to test the law that governs the claim in litigation, not the underlying facts." *Id.* This Court will sustain an order dismissing an action for failure to state a claim upon which relief may be granted where it appears without doubt that the plaintiff can prove no set of facts in support of the claim for relief. *Id.*

¶6 We first address Defendants' assertion that Plaintiff's cause of action is barred by the doctrine of claim preclusion or the impermissible splitting of claims.

> Under the principle of claim preclusion, a final judgment on the merits of an action precludes the parties from relitigating not only the adjudicated claim, but also any theories or issues that were actually decided, or could have been decided, in that action. The doctrine of claim preclusion is designed to prevent piecemeal litigation through the splitting of a single claim into separate lawsuits.

Miller v. Miller, 1998 OK 24, ¶23, 956 P.2d 887 (citations omitted). Plaintiff's plea for enforcement related attorney fees could have been decided by the Colorado courts, where the enforcement action was tried and appealed. Thus, the doctrine of claim preclusion serves as a bar to Plaintiff's current cause of action.

¶7 Moreover, we hold Plaintiff's action is also barred by the merger doctrine.

> The doctrine of merger is a common law principle in which a cause of action is merged into a judgment, extinguishing the underlying cause of action. Under the general rule, the judgment replaces the old debt which ceases to exist and extinguishes all the remedial rights which accompany the underlying claim. Under the rule of

> merger, the judgment does not annihilate the debt and the essential nature of the debt remains intact . . . .
>
> The doctrine of merger is part of the law of res judicata. The doctrine of merger is generally utilized to prevent a second suit from being brought on a claim after judgment has been entered on the claim. The purpose of the rule of merger is to promote justice.

Johnson v. State ex rel. Dep't of Pub. Safety, 2000 OK 7, ¶¶9-10, 2 P.3d 334.

¶8 Plaintiff's petition avers his cause of action is premised upon a clause in the parties' original contract that provides for prevailing party attorney fees in any action to enforce the contract. That underlying contract was the basis for Plaintiff's original contract and fraud action, which culminated in a final judgment. Pursuant to the merger doctrine, Plaintiff's judgment replaced the old debt and extinguished all the remedial rights which accompanied the underlying claim. "As a consequence, the underlying authority for award of an attorney fee also merged into the judgment and ceased to exist, leaving no authority for an attorney fee award." *Hi-Pro Animal Health v. Halverson*, 2002 OK CIV APP 61, ¶21, 48 P.3d 119.

¶9 In *Woodcraft Constr., Inc. v. Hamilton*, 56 Wash.App. 885, 786 P.2d 307, 308 (1990), cited with approval in *Halverson*, the promissory note that authorized attorney fees was merged into a judgment on the debt rendered in Alaska. When the plaintiff enforced the judgment in Washington, the court there denied attorney fees

because the uniform act contains no authority for fees and the underlying authority for fees merged into the judgment.

> [T]he judgment based upon the promissory note extinguished the note and the debtor then became obligated on the judgment. The attorney fee provision of the note merged into the judgment and ceased to exist. Therefore, there was no contractual basis upon which to award attorney fees and costs to either party.

Woodcraft, 786 P.2d at 308.

¶10 On the basis of the foregoing and upon *de novo* review, we hold Plaintiff's petition was correctly dismissed. Accordingly, the judgment of the trial court is affirmed.

¶11 AFFIRMED.

JOPLIN, J., and HETHERINGTON, J., concur.

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION III

LOGAN MILLER,	)	
	)	
Petitioner/Appellant,	)	
	)	
vs.	)	Case No. 114,024
	)	
FORREST DAWN RUPE s/p/a,	)	
FORREST DAWN CLARK and	)	
NATHAN ANDREW CLARK,	)	
	)	
Respondents/Appellees.	)	

APPEAL FROM THE DISTRICT COURT OF
OKMULGEE COUNTY, OKLAHOMA

HONORABLE H. MICHAEL CLAVER, JUDGE

AFFIRMED

Ryan H. Pitts,
Holdenville, Oklahoma, For Petitioner/Appellant,

Luke Gaither,
GAITHER LAW OFFICE,
Henryetta, Oklahoma, For Respondents/Appellees.

OPINION BY ROBERT D. BELL, PRESIDING JUDGE:

¶1 Petitioner/Appellant, Logan Miller, appeals from the trial court's Journal Entry of Judgment dismissing the petition to establish his paternity of N.Z.C. (Child). Child was born to Respondent/Appellee, Forrest Dawn Rupe s/p/a Forrest Dawn Clark (Mother), out of wedlock on October 5, 2010. After *de novo* review, we agree with the trial court's determination that Petitioner's paternity action is barred by the two (2) year limitation period set forth in §7700-609(B) of the Oklahoma Uniform Parentage Act, 10 O.S. 2011 §7700-101 *et seq.* (the Act). Accordingly, the trial court's order dismissing this action is affirmed.

¶2 Mother is the biological parent of Child. On October 6, 2010, one day after Child's birth, Respondent/Appellee, Nathan Andrew Clark (Acknowledged Father), signed an Acknowledgment of Paternity. Acknowledged Father's name is listed as Child's father on the birth certificate. Mother and Acknowledged Father subsequently married.

¶3 Petitioner and Mother engaged in a sexual relationship until Mother was four (4) months pregnant with Child. Petitioner is a military veteran. He was stationed in California while Mother was pregnant. Petitioner asserts he was not aware Mother was pregnant until Mother's sister told him about Child several months after Child was born. According to Petitioner, he attempted to contact Mother to determine

whether he was Child's biological father, but Mother refused to speak to him. After being honorably discharged from the United States Army in February 2013, Petitioner returned to Oklahoma.

¶4 Petitioner contends Mother contacted him in August 2014. Petitioner requested a paternity test and Mother agreed. While the paternity test was not offered into evidence, Petitioner asserts the paternity test proves he is Child's biological father. According to Petitioner, Mother and Child briefly lived with Petitioner. Thereafter, Mother and Child moved out of Petitioner's home to live with Acknowledged Father. Petitioner asserts he paid child support to Mother, which she accepted; Mother allowed Petitioner visitation with Child; and he has maintained a relationship with Mother and Child since August 2014. Petitioner claims he did not learn about the Acknowledgment of Paternity and the birth certificate until December 2014.

¶5 In January 2015, Petitioner filed a petition to establish paternity and custody and an application for emergency custody order. Respondents entered a special appearance and moved to dismiss the petition pursuant to 12 O.S. 2011 §2012(B)(6). Respondents alleged Petitioner lacked standing to challenge the Acknowledgment of Paternity because the petition was filed more than two years after the

Acknowledgment of Paternity was executed.[1] After conducting an evidentiary hearing, the trial court dismissed the action. Petitioner filed this appeal. This matter stands submitted for accelerated appellate review without appellate briefs on the trial court record pursuant to Rule 4(m), *Rules for District Courts*, 12 O.S. Supp. 2013, Ch. 2, App., and Rule 1.36, *Oklahoma Supreme Court Rules*, 12 O.S. Supp. 2013, Ch. 15, App. 1.

¶6 We review the trial court's disposition by dismissal *de novo*. *Darrow v. Integris Health, Inc.*, 2008 OK 1, ¶7, 176 P.3d 1204. "Motions to dismiss are generally viewed with disfavor. The purpose of a motion to dismiss is to test the law that governs the claim in litigation, not the underlying facts." *Id.* This Court will not sustain an order dismissing an action for failure to state a claim upon which relief may be granted unless it should appear without doubt that the petitioner can prove no set of facts in support of the claim for relief. *Id.*

¶7 The issue on appeal is whether the trial court properly dismissed Petitioner's

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[1] As support, Respondents cited to §7700-308. This statute is inapplicable as it pertains to a challenge to paternity lodged by an acknowledged father. The applicable provision under the facts of this case is §7700-609(B). Even if the trial court relied on the incorrect statute to make its decision, we cannot find trial court error. "A correct judgment will stand even if it rests, in part, on erroneous reasoning." *Nickell v. Sumner,* 1997 OK 101, ¶7, 943 P.2d 625. We hold in this manner because both these statutes provide that a challenge to an acknowledgment of paternity must be filed within two (2) years of the execution of the acknowledgment of paternity.

action to establish paternity on the basis that it is barred by the two (2) year limitation period set forth in §7700-609(B). The Act applies in the instant proceeding to determine Petitioner's parentage of Child when there is an acknowledged father. *See* §7700-103(A)(1). Section 7700–102 of the Act defines an "acknowledged father" as "a man who has established a father-child relationship by signing an acknowledgment of paternity." It is undisputed Acknowledged Father (and Mother) signed the Acknowledgment of Paternity on October 6, 2010. Thus, he is an "acknowledged father" under the Act. "An acknowledgment establishes fatherhood in the same manner as an adjudication by the court and confers upon the father all the rights and duties of a parent." *Sprowles v. Thompson*, 2010 OK CIV APP 80, ¶10, 239 P.3d 891. *See also* §7700–305(A).

¶8 In cases where a child has an acknowledged father, the Act provides an action to challenge the acknowledged father's paternity may be brought only within two (2) years of the effective date of the acknowledgment. *See* §7700-609(A). Under the Act, the Acknowledgment of Paternity became effective when Nathan Andrew Clark executed the document on October 6, 2010. *See* §7700-304(C). Here, the record indisputably demonstrates that Petitioner challenged the Acknowledgment of Paternity more than two years after it was signed by Acknowledged Father. In fact, this action was filed over four years after Child's birth date and the execution date of

the Acknowledgment of Paternity. Because this action was not commenced within the Act's two-year restriction, Petitioner's challenge was untimely under the Act. Accordingly, the trial court did not err when it dismissed Petitioner's action.

¶9 In the proceeding below, Petitioner implied his attempted reconciliation with Mother and the paternity test rebutted or rescinded the Acknowledgment of Paternity. We hold the parties' private conduct did not toll or waive the Act's two-year limitations period because public policy and the Legislature's express provisions delineate the circumstances under which a person's acknowledged paternity may be disputed and the specific time within which such dispute must be lodged.

¶10 Next, Petitioner urged the Act's two-year limitations period should be tolled until he discovered Acknowledged Father's name was on the birth certificate and the Acknowledgment of Paternity. Petitioner claims he did not discover these facts until December 2014; therefore, his petition is timely. Oklahoma law does not support Petitioner's claim. Petitioner's actual knowledge is irrelevant under the Act because §7700-609 is a statute of repose. *Sprowles*, 2010 OK CIV APP 80 at ¶14. "It operates to cut off the right to challenge an acknowledgement *[sic]* of paternity two (2) years after the acknowledgement *[sic]* was signed, regardless of whether the cause of action has accrued, i.e., whether the individual has discovered the fraud, duress, or misrepresentation." *Id.* We recognize *Sprowles* addressed the limitation

restriction in §7700-308 when it held in this manner. Notwithstanding, we hold *Sprowles'* determination that the limitation period in §7700-308 is a statute of repose is likewise applicable to the limitation restriction in §7700-609. For the foregoing reasons, we hold the trial court did not err in dismissing Petitioner's petition to establish his paternity.

¶11 AFFIRMED.

JOPLIN, J., and HETHERINGTON, J., concur.

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION III

MULTIPLE INJURY TRUST FUND,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 113,819
	)	
VALERIE L. HARRIS and THE WORKERS' COMPENSATION COURT OF EXISTING CLAIMS,	)	
	)	
Respondents.	)	

PROCEEDING TO REVIEW AN ORDER OF THE WORKERS' COMPENSATION COURT OF EXISTING CLAIMS

HONORABLE DAVID REID, JUDGE

VACATED AND REMANDED
FOR FURTHER PROCEEDINGS

Brandy L. Inman,
LATHAM, WAGNER, STEELE,
LEHMAN, P.C.,
Tulsa, Oklahoma, For Petitioner,

Joe Farnan,
LAW OFFICES OF JOE FARNAN,
Purcell, Oklahoma, For Respondents.

OPINION BY ROBERT D. BELL, PRESIDING JUDGE:

¶1 Petitioner, Multiple Injury Trust Fund (Fund), seeks review of an order of the Workers' Compensation Court of Existing Claims awarding permanent total disability (PTD) benefits to Respondent, Valerie L. Harris (Claimant). For the reasons set forth below, we reverse and remand for further proceedings.

¶2 Claimant was injured on March 11, 2012, in a single event injury arising out of and in the course of her employment with the Oklahoma Department of Corrections (DOC). Claimant and DOC entered into a compromise settlement in which both parties agreed that Claimant sustained disability to her neck and back as a result of her injury. They further agreed Claimant had a preexisting disability unrelated to any injury sustained in the course of her employment with DOC. Those preexisting injuries had not previously been adjudicated.

¶3 Less than one month after entering into the settlement agreement, Claimant filed a request for PTD benefits against Fund on a combination of injuries theory. Fund maintains Claimant's adjudicated injuries cannot be combined to sustain an award of PTD benefits because Claimant lacked any previous adjudications of disability.

¶4 The trial court held that at the time of her latest compensable injury, Claimant was a previously physically impaired person by reason of her preexisting injuries. Specifically, the trial court found Claimant suffered from a preexisting neck injury

(6% to the body as a whole) and preexisting back injury (7% to the body as a whole).[1] Due to Claimant's March 2012 injury in combination with her preexisting injuries and the material increase resulting therefrom, the trial court ruled Claimant is now PTD. The court noted that pursuant to 85 O.S. 2011 §402(A)(4),[2] adjudications of preexisting disability may be combined when the disability is to the same body part injured in the claim being adjudicated. The trial court awarded Claimant PTD benefits. Fund now seeks review by this Court, asserting Claimant does not qualify to receive benefits from Fund pursuant to statutory language and established case.

¶5 In *Ball v. Multiple Injury Trust Fund*, 2015 OK 64, 360 P.3d 499, the Supreme Court held:

> A *Crumby* finding of preexisting disability made simultaneously with an adjudication of an on-the-job injury

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[1] "Such findings are *Crumby* findings and are rated assessments by the Workers' Compensation Court of the amount of preexisting unrelated impairments suffered by a claimant at the time the on-the-job injury occurred." *Ball v. Multiple Injury Trust Fund*, 2015 OK 64, ¶1, 360 P.3d 499, *citing J.C. Penney Co. v. Crumby*, 1978 OK 80, 584 P.2d 1325.

[2] Title 85 O.S. 2011 §402(A), which was in effect at the time of Claimant's injury, stated in relevant part that a "physically impaired person" is a person who, as a result of accident or other cause, has suffered:

> 4. Any previous adjudications of disability adjudged and determined by the Workers' Compensation Court or any disability resulting from separately adjudicated injuries and adjudicated occupational diseases even though arising at the same time. Provided, that any adjudication of preexisting disability to a part of the body shall not be combinable for purposes of the Multiple Injury Trust Fund unless that part of the body was deemed to have been injured in the claim being adjudicated.

Although this section was repealed by Laws 2013, c. 208, §171, eff. Feb. 1, 2014, a substantially similar provision currently exists in 85A O.S. Supp. 2014 §30(A)(4) .

> may not be combined with that adjudicated injury to render the Claimant a physically impaired person under 85 O.S. Supp. 2005 § 171.

Ball, 2015 OK 64 at ¶17.

¶6 At issue in *Ball* was the definition of a physically impaired person as set forth in 85 O.S. Supp. 2005 §171, the predecessor of 85 O.S. 2011 §402, the statute at issue in the present case.[3] In relevant part, §171 defined a "physically impaired person" as including any person who has "previous adjudications of disability adjudged and determined by the Workers' Compensation Court . . . ." *See also Ball* at ¶13, n.23. Section 402 contains the identical key language of §171 analyzed by the Supreme Court in *Ball*.

¶7 On the basis of the foregoing and as dictated by *Ball*, we hold a *Crumby* finding of preexisting disability made simultaneously with an adjudication of an on-the-job injury may not be combined with that adjudicated injury to render the Claimant a physically impaired person under 85 O.S. 2011 §402. Accordingly, the order of the trial court is vacated and this cause is remanded for further proceedings not inconsistent with this Opinion.

¶8 VACATED AND REMANDED FOR FURTHER PROCEEDINGS.

JOPLIN, J., and HETHERINGTON, J., concur.

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[3] Section 85 O.S. Supp. 2005 §171 was repealed by Laws 2011, c. 318, §87.

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION III

IN THE MATTER OF A.K., DEPRIVED CHILD:	)	
	)	
DOMINIC UHEGWU,	)	
	)	
Appellant,	)	
	)	
vs.	)	Case No. 113,788
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE LISA DAVIS, JUDGE

AFFIRMED

Linque Hilton Gillett,
Oklahoma City, Oklahoma, For Appellant,

Jane A. Brown,
Assistant District Attorney,
Oklahoma City, Oklahoma, For Appellee.

Opinion by Larry Joplin, Judge:

¶1 Dominic Uhegwu, Father/Appellant, seeks review of the trial court's May 6, 2015 Amended Journal Entry of Judgment terminating Uhegwu's parental rights to A.K., born April 16, 2012. Father raises three propositions of error on appeal. First, Father argues there was not sufficient evidence to support the jury's verdict terminating his parental rights and the State failed to prove by clear and convincing evidence that Father failed to correct the conditions that led to A.K.'s deprived adjudication. Father's second proposition of error alleges he was not given an appropriate amount of time to correct the deprived conditions due to his incarceration and he should be given an Individualized Service Plan (ISP) that can accommodate an incarcerated parent. Finally, Father asserts there was insufficient evidence that termination of his parental rights was in the best interests of A.K.

¶2 On March 29, 2013, the State sought an emergency custody order for A.K. and her older brother, A.S., born June 30, 2007, after the children's mother came to the hospital emergency room with lacerations and bruises to her entire body, having jumped out of a moving car being driven by her boyfriend, the Appellant.[1] The children's mother said Appellant had threatened her and that the children were in the car at the time the incident occurred. Father testified Mother jumped from the car of

[1] Mother continued to have parental rights with respect to both A.S. and A.K. at the time of Father's termination trial, February 10-11, 2015. Father/Appellant is not the biological father of A.S. and the parental rights of A.S. were not at issue in these proceedings.

her own volition and that the children were not in the car when the incident happened. The children were placed with a family member shortly after being taken into emergency custody.

¶3 Father's first ISP was filed in June 2013, with a recommendation that A.K. be reunited with her parents. Father was directed to complete a domestic violence offender's program, a domestic violence inventory assessment, a substance abuse assessment, individual counseling, complete parenting classes, attend visitation with A.K., and maintain a safe and stable home where the child's basic needs could be met. In April 2014, DHS reported Father had made no progress on his ISP goals or permanency plan. In the year since his daughter had been taken into custody, Father had paid the fee to begin a program at Family Builders. Father testified he attended a number of the classes at Family Builders, perhaps as many as eight. The State said Father had not begun the program according to Family Builders' records. Father had failed to report to the referral center even though DHS had arranged four different appointments for him. Visitation with A.K. was similarly problematic. DHS recorded two visits between Father and A.K. in the first year A.K. was in DHS custody. Father says he saw his daughter more than twice and visited during some of Mother's visitation. DHS records indicate the visits Father attended were successful and his interaction with A.K. was age appropriate and nurturing, but the infrequency of the visitation was problematic, as it meant A.K. was initially uncomfortable with Father and it took longer for the two to truly interact.

¶4 A.K. was adjudicated deprived with respect to Father by order on September 30, 2013, after Father had failed to appear in court for a second time. Father's visitation was suspended in December 2013, due to his repeated failure to appear for visitation and failure to communicate with respect to scheduling visitation. The second amended petition seeking the termination of Father's parental rights to A.K. was filed July 25, 2014. A new DHS case worker took over A.K.'s file in September 2014. The latest case worker met Father once in court shortly before Father was incarcerated, but otherwise made no attempt to communicate with Father.

¶5 In July 2014, Father was jailed for domestic violence charges, drug charges and violation of his probation. Several months later, he received a total of eleven years in a blind plea sentencing, distributed as a four year sentence and two three year sentences, each sentence running consecutively. Father testified he signed up for programs in prison in an effort to make progress toward his ISP goals, but was on a wait list and had not begun any ISP relevant programs at the time of trial. At the time of trial, Father was still in Department of Corrections custody.

¶6 "Appellate courts must aid in enforcing the *Santosky*-mandated federal constitutional standard of persuasion by canvassing the record on review to ascertain whether [the] fact findings [at the trial court] rest on clear-and-convincing proof. If a lower standard of review were to be adopted for scrutiny of these critical findings, the courts of first instance would remain free to disregard the clear mandate of *Santosky[v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599,] by allowing an

impermissibly low burden of persuasion to govern at trial." *In re S.B.C.*, 2002 OK 83, ¶6, 64 P.3d 1080, 1082.

¶7 Father's first proposition of error alleges there was not sufficient evidence to support the jury's verdict terminating his parental rights and the State failed to prove Father did not correct the conditions that led to A.K.'s deprived adjudication. The court may terminate parental rights to the child, if the child has been adjudicated deprived, the parent has failed to correct the conditions leading to the deprived adjudication, and the parent has been given at least three months to correct the conditions that led to the deprived adjudication. 10A O.S. Supp.2009 §1-4-904(B)(5). It must also be determined that termination is in the child's best interests. 10A O.S. Supp.2009 §1-4-904(A)(2).

¶8 "The ISP [Individualized Service Plan] serves as the mechanism for guiding the parent in correcting the condition in order to provide the child with a safe home. 10A O.S. Supp.2009 §1–4–704. Failure to comply with the ISP, in itself, is not grounds for termination. *In re K.C.*, 2002 OK CIV APP 58, 46 P.3d 1289, 1291. Conversely, compliance with the ISP is not in itself sufficient to regain custody of the child. Termination of parental rights under 10A O.S.Supp.2009 §1–4–904(B)(5) requires a finding the parent has failed to correct the condition, not a finding the parent failed to comply with the ISP." *In re B.C.*, 2010 OK CIV APP 103, ¶9, 242 P.3d 589, 592.

¶9 The jury found Father failed to correct the condition of making the home free of domestic violence and that the home was unfit due to substance abuse. With respect to the issue of domestic violence, Father admitted he hit and slapped Mother, although he minimized the significance of assaulting her and continued to deny he was in any way responsible for Mother jumping from the car prior to her being admitted to the emergency room. Father also failed to schedule and conduct the domestic violence inventory assessment and did not attend any domestic violence offender's program as he was directed to do under the terms of his ISP. As a result, there was no apparent or measurable progress made with respect to Father's domestic violence issues, in addition to Father's general denial that domestic violence was an issue for his family, despite considerable evidence to the contrary, including domestic violence criminal charges.

¶10 The foster mother, Mother's sister, testified A.S. was very frightened of Father. The foster mother also testified she was frightened of Father as well, having received a number of threatening phone calls early in her custody of A.S. and A.K. The foster mother was aware of her sister being bloodied and bruised on three or four occasions by Father, so she felt he was potentially dangerous and capable of assault. She was not aware of Father harming the children, but A.S. received trauma therapy as a result of his witnessing multiple violent incidences between Father and Mother.

¶11 With respect to substance abuse. Father denied consuming any illicit drugs, despite having drug related charges. Father denied these charges were legitimate, but

admitted he pleaded guilty to drug charges. Father admitted occasionally being intoxicated around A.S., although he said he was never intoxicated around A.K. Father did not submit to any substance abuse assessment prior to his 2014 incarceration and did not engage in any substance abuse counseling prior to the termination trial. Father admitted he was guilty of public intoxication as he had been charged, but denied any substance abuse problems and did not believe he should have to attend classes and "jump through hoops" because Mother had jumped out of his car and appeared at the emergency room.

¶12 In all, the State demonstrated Father had a complete lack of accountability for both the pervasive nature of domestic violence within the household and the primary role he played in that violence, as well as failure to admit his use of alcohol or other substances contributed to the children being deemed deprived. Father saw himself as a good father who needed no DHS intervention. As a result, he was completely unwilling to engage in DHS oversight and simply failed to cooperate at virtually every step in the process. The order of the trial court upon the jury's verdict, finding Father had failed to correct the conditions of domestic violence and substance abuse leading to A.K.'s deprived status, was supported by clear and convincing evidence.

¶13 Father argues in his second proposition of error that he was not provided the same opportunity to correct the deprived conditions existing with respect to A.K., because of his incarceration. And Father should be given an ISP that allows him to work toward his ISP objectives while in prison.

¶14 A parent must be provided notice of the minimum standards of conduct which he is expected to follow in order to reclaim his unencumbered standing as a parent. *In the Matter of C.G.*, 1981 OK 131, 637 P.2d 66, 68. The parent must be given adequate time to meet the standards of conduct; the statute provides a parent must be given "at least three (3) months to correct the condition[s.]" 10A O.S. Supp.2009 §1-4-904(B)(5)(b).

¶15 The record reveals Father was not incarcerated until July 2014, over a year after A.K. and her brother were removed to DHS custody. The record also reveals Father did virtually nothing in the fourteen months that he was not incarcerated to progress toward reunification of the family. Father argues in his appellate brief that the State did not prove his incarceration would harm A.K. However, Father's rights were not terminated due to his incarceration, but for his failure to correct the conditions leading to A.K.'s deprived status, namely, Father's role in the domestic violence of the household and substance abuse.

¶16 DHS records indicate Father never reported to the referral center to begin coordination of domestic violence and substance abuse services and counseling, despite the fact DHS made four appointments for him in May and June 2013. Father says he did report to the referral center, but "never got started." Father repeatedly failed to communicate with DHS in scheduling visitation with A.K. to the point that his visitation was suspended in December 2013. In the year prior to his incarceration, DHS recorded only two visits between A.K. and Father, although Father argues this

number was inaccurate. Father paid for the Family Builders program, but failed to attend. The record shows Father completed no programs or counseling in an attempt to reach the ISP objectives. Instead, Father's testimony complains that he was made to jump through useless hoops, because A.K.'s mother decided to jump out of his car.

¶17 Importantly, this is not the case of a father who diligently worked toward the correction of his child's deprived status, while maintaining visitation to preserve the parent-child relationship, who then found himself incarcerated and asked to continue his program from prison. The statute states the parent must be given three months to correct conditions. 10A O.S. Supp.2009 §1-4-904(B)(5)(b). Here, Father's incarceration was not a factor in his failure to correct conditions, because he had more than a year prior to his incarceration in 2014 to show an interest in making progress to alleviate A.K.'s deprived conditions and chose to do nothing. He also chose to do virtually nothing to maintain a relationship with his daughter, seeing her only twice. Upon the record provided, there is no evidence a more accommodating ISP might have led to Father correcting the conditions of A.K.'s deprived status and no relief is warranted on this proposition of error.

¶18 Father's final proposition of error alleges there was not sufficient evidence to support the jury's verdict that termination of Father's rights was in A.K.'s best interests. It is presumed the child's best interests are aligned with maintaining the integrity of the family. *In re A.L.F.*, 2010 OK 59, ¶6, 237 P.3d 217, 219. The State must overcome this presumption. "In parental termination cases, the State must show

by clear and convincing evidence that the child's best interest is served by the termination of parental rights. *In the Matter of C.G.*, 1981 OK 131, ¶17, 637 P.2d 66, 70–71." *In re C.D.P.F.*, 2010 OK 81, ¶5, 243 P.3d 21, 23.

¶19 The record is filled with Father's domestic violence history and evidence of his substance abuse, as well as how those elements of family life have traumatized A.S., A.K.'s older brother. At the same time, the record established Father denied abuse was an issue in the household and denied the use of any substances other than alcohol. Father admitted to being drunk in A.S.'s presence, but denied this was a real problem. Compounding this denial was Father's refusal to seek counseling and programs that might have led to some understanding of the damage he was doing to A.S. and A.K. The State established Father endangered the children and had no understanding or regard for the damaging effects of his actions. The fact findings of the jury regarding A.K.'s best interests were supported by clear and convincing evidence.

¶20 The order of the trial court, upon the jury's verdict, is AFFIRMED.

BELL, P.J., and HETHERINGTON, J., concur.

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION III

IN THE MATTER OF J.P., and J.P., ADJUDICATED DEPRIVED CHILDREN:	)	
ERIKA PRUIETT,	)	
Appellant,	)	
vs.	)	Case No. 113,311
STATE of OKLAHOMA,	)	
Appellee.	)	

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE JOHN M. JACOBSEN, JUDGE

AFFIRMED

Linque Hilton Gillett,
Oklahoma City, Oklahoma, For Appellant,

Jennifer Brannon,
Assistant District Attorney,
Oklahoma City, Oklahoma, For Appellee.

Osmun Latrobe,
Norman, Oklahoma, For the Children.

Opinion by Larry Joplin, Judge:

¶1 Erika Pruiett, Mother/Appellant, seeks review of the trial court's September 3, 2014 decision and corresponding order adjudicating her children J.P., born October 12, 2011, and J.P., born November 13, 2012, to be deprived. Mother raises three issues of error on appeal. First, Mother argues the trial court abused its discretion in adjudicating the children to be deprived, as she alleges the record does not support the trial court's finding "beyond" a preponderance of the evidence that the children were deprived under 10A O.S. Supp.2009 §1-4-603. Second, Mother alleges there was not sufficient evidence presented to support the trial court's finding that it was in the children's best interests to be adjudicated deprived and be made wards of the court. Third, the trial court wrongfully admitted improper evidence throughout the trial proceedings.

¶2 On December 27, 2012, the State filed a petition alleging J.P. and J.P to be deprived and sought termination of the parental rights of Erika Pruiett and the putative fathers of J.P. and J.P.[1] Days earlier, on December 15, 2012, Mother brought the younger, one month old, J.P. to the hospital as he was presenting with seizures.

[1] Neither the parental rights of the father of J.P., born October 12, 2011, nor the parental rights of the father of J.P., born November 13, 2012, are at issue in these proceedings.

The baby was then transferred to Oklahoma Children's Hospital, where his injuries were examined in greater detail. At Children's Hospital, the medical team found the baby had sustained two subdural hematomas of different ages; the doctors concluded two non-accidental injuries to his brain had occurred less than a week prior to J.P.'s admission to the hospital. J.P. also had swelling of the brain, as evidenced by separation of the sutures of the skull. These brain injuries were determined by the medical team to be the cause of J.P.'s seizures. J.P. had extensive retinal hemorrhages in both eyes. The medical experts agreed these injuries appeared to be consistent with aggressively shaking the baby and were not accidental. J.P. also presented with four metaphyseal fractures in both his right and left legs, which the doctors said were likely the result of jerking and twisting his legs. The Children's Hospital physicians determined the leg injuries to be less than a week old and were not caused by accident. Doctors also testified the assemblage of injuries occurred in at least two separate events of abuse.

¶3 Mother denied having abused J.P. and did not initially believe her then-boyfriend abused the child, either. However, she came to believe her then-boyfriend inflicted J.P.'s injuries and ceased contact with him. The State argued Mother either abused J.P. or failed to protect him from abuse inflicted by the boyfriend. Although the State argued Mother was the direct perpetrator of J.P.'s abuse, it argued alternatively that Mother failed to protect J.P., in either event the child could be deemed deprived. 10A §1-4-904(B)(9).

¶4 No injuries were alleged to have been inflicted on J.P., born October 12, 2011. His deprived adjudication and parental rights termination were sought on the basis of the injuries to his younger brother and the danger posed by the abuse in the household and failure to protect.

¶5 The deprived adjudication proceedings were consolidated with the parental rights termination proceedings.[2] The jury trial seeking to terminate Mother's parental rights began on August 25, 2014 and ended in the jury's verdict not to terminate Mother's parental rights on September 4, 2014. The trial court had adjudicated the children to be deprived and made them wards of the court at the close of evidence on September 3, 2014, with the appealed from adjudication order issued on October 9, 2014.

¶6 In a deprived child hearing, the "burden of proof is on the State to demonstrate the basis for the deprived-status adjudication by a preponderance of the evidence." *In re K.U.*, 2006 OK CIV APP 88, ¶10, 140 P.3d 568, 572. The relevant statute is 10A O.S. Supp.2009 §1-4-603.

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[2] Due to the heinous and shocking abuse allegations, the State sought termination without attempting reconciliation of the children with their Mother. And the court's January 28, 2013 order states that "reasonable efforts to reunite" the children with the family are "unnecessary pursuant to 10 O.S. § 7003-4.6." In the court's March 10, 2014 order the court said reasonable efforts "have been made to finalize the permanency plan[.]" The record shows the State sought only termination as a permanency plan throughout the course of the deprived and termination proceedings and did not provide or craft an ISP or visitation with a goal to reunify Mother with the children.

¶7 Appellant/Mother's first proposition of error alleged the trial court abused its discretion in adjudicating the children to be deprived, as the evidence offered did not support the court's findings "beyond a preponderance of the evidence" that the children were deprived under 10A O.S. §1-4-603. The court determined the State met its burden of showing the children to be deprived by a preponderance of the evidence, reciting the following in its October 9, 2014 order:

> That the children have not had the proper parental care and guardianship necessary for their physical and mental well-being;
>
> That the home of the Mother is unfit due to physical abuse of [J.P];
>
> That [J.P.] presented to Children's Hospital with multiple injuries that are consistent with abuse, which include but are not limited to, two subdural hematomas, bilateral multi-layered retinal hemorrhages, fractures on both legs, and lack of blood flow to certain parts of the brain;
>
> That CHO-25 was filed indicating that the injuries to the child are non-accidental in nature and are the result of trauma to the child;
>
> That the Mother has been unable to provide an explanation as to the injuries that occurred to her child;
>
> That the Mother has previously made statements concerning a fear that she may harm her children;
>
> That the Mother has been diagnosed with post-partum depression and PTSD to which the Mother was given a prescription;
>
> That the Mother was not properly taking her prescription to treat post-partum depression and PTSD[.]

This language corresponded to the State's allegations in the December 27, 2012 petition, as well as the second amended petition filed on April 22, 2014.

¶8 Mother argues there was no evidence the children had not received proper parental care and guardianship for their physical and mental well-being. The preponderance of the evidence standard employed by the court in deciding the issue of deprived adjudication is lower than the "clear and convincing" evidence required to terminate parental rights, because at this pre-termination proceeding "the health and safety of the child should not be put at risk by an unnecessarily high burden of proof." *In re A.D.W.*, 2000 OK CIV APP 110, ¶8, 12 P.3D 972, 975. Under this lower standard, the State sought the deprived adjudication by demonstrating improper parental care of J.P., providing medical testimony and evidence of how seriously, extensively and violently J.P. was abused, while also providing evidence of Mother's proximity to the child when the injuries likely occurred. Mother's claim that no evidence of improper parental care existed is misplaced in light of the physical evidence to the contrary.

¶9 In further support of this first proposition, Mother argues the CHO-25 report was irrelevant because it did not state whether Mother committed the abuse or whether Mother had reason to believe the abuse occurred. It appears from the record the CHO-25 was provided in conjunction with the testimony of the medical experts to help illustrate the care team's process and support the testimony that J.P.'s injuries were not the result of an accident, but rather abuse. Mother has cited no authority that

would require the CHO-25 to contain an explanation of Mother's role in the abusive behavior in order for it to be relevant evidence in an adjudication proceeding, nor does she offer any citation to the record where her counsel objected to the admission of the CHO-25.

¶10 Mother also takes issue with the court's finding that she provided no explanation of J.P.'s injuries. The earliest reports indicate Mother was unable to explain how or at whose hands J.P. was injured. Although the record indicates she was cooperative when questioned by authorities and various medical personnel at the hospital, she did not explain how the abuse happened and denied hurting J.P. Whether Mother did not provide details of J.P.'s abuse because she did not know such information, or whether, as the State claims, she was not forthcoming, the statement in the order is consistent with the evidence provided in the record, particularly with respect to the earliest period of the investigation in December 2012.

¶11 Mother denies there was credible evidence that she said she would hurt her child and the court's finding was improper. Two D.H.S. workers provided testimony regarding Mother's concern that she had thoughts of harming her oldest child as well as herself. The testimony of the first D.H.S. witness was objected to on the grounds of hearsay, to which the State said it was not offered for the truth of the matter asserted. However, the testimony of the second D.H.S. worker was not met with an objection, and the error was therefore waived. *In the Matter of M.A.G.*, 1996 OK CIV APP 103, 924 P.2d 795, 796.

¶12 Still arguing in support of her first proposition of error, Mother says the trial court erred in finding that Mother was diagnosed with post-partum depression and PTSD. Mother testified affirmatively to receiving both these mental diagnoses. She testified she had issues with post-partum depression after the birth of J.P. in 2011 and she was prescribed an antidepressant after J.P.'s birth in 2012. Mother also admitted she had not taken all the prescribed antidepressants in 2012, because she did not know if the medication was acceptable to take while breast-feeding. The State did not address Mother's current, 2014, mental health status and the trial court did not make any findings regarding Mother's current mental health or the status of her medication in the year and a half since the petition had been filed. However, in that the order speaks to partial use of Mother's 2012 prescription for antidepressants and her post-partum mental health issues in 2011 and 2012, we do not find the trial court's order is in error. Based on the record presented to the trial court, the court's order containing its findings which related directly to the circumstances of J.P.'s December 2012 hospitalization for multiple injuries resulting from child abuse is not in error.

¶13 Mother's second proposition of error argues there was not sufficient evidence in the record to support the trial court's finding that it was in the children's best interests to be declared deprived and made wards of the court. Mother argues the State failed to overcome its burden that a child's best interests are presumably served

by leaving the child in the care and custody of his natural parents. *In the Matter of the Guardianship of M.R.S.*, 1998 OK 38, ¶14, 960 P.2d 357, 361.

¶14 Title 10A O.S. Supp.2009 §1-4-603(A) requires the following in order to sustain the State's deprived petition, adjudicate the children deprived and make them wards of the court:

> A. If the court 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,*
>
> then the court shall sustain the petition, and shall make an order of adjudication finding the child to be deprived and shall adjudge the child as a ward of the court.

10A O.S. §1-4-603(A) (emphasis added).

¶15 The trial court made the best interests finding during the adjudication proceeding on September 3, 2014. The court did not elaborate on its best interests finding and did not provide further details of the finding in the October 9, 2014 order. However, in consideration of the serious injuries to J.P. and the weakened family bond between Mother and the children as the State sought termination without reunification, which provided Mother relatively little contact with the boys for almost

two years, we do not find the court's best interests determination to be in error as the evidence existed on September 3, 2014.

¶16 Mother's third proposition of error alleges the trial court improperly admitted evidence throughout the trial. The first such wrongfully admitted evidence Mother claims was the admission of her youthful offender guilty plea for assault when Mother was a minor, for which she served probation and received a deferred sentence, never resulting in a conviction. State's counsel said it offered the evidence not as character evidence to show Mother's previous assault as a conforming behavior similar to the assault on J.P., but rather to explain where Mother met her boyfriend who may have perpetrated the injuries upon J.P., as both Mother and boyfriend had been in juvenile detention. However, the State continued to question Mother about the nature of the charges and the injuries caused to the assault victim. This line of questioning was over the objection of Mother's attorney, based on the provisions of 12 O.S. 2001 §2404(B), as the State offered no permissible "other purpose" for the admission of this evidence.

¶17 Regardless of the propriety of this evidence, "[i]t is well settled that where a party seeks the reversal of a judgment obtained against him on the ground of admission of incompetent evidence, he has the burden of showing that such evidence so admitted over his objection was not only incompetent, but prejudicial, and on his failure to do so, this court will not reverse the judgment on such assignment of error." *Carraco Oil Co. v. Roberts*, 1964 OK 194, 397 P.2d 126, 130. Mother has shown no

prejudice resulted from the admission of this testimony, especially in light of the jury's decision *not* to revoke her parental rights and the jury's question asking whether it was charged with providing the guidance and support to be offered in Mother's transition to regaining custody of J.P. and J.P. We must make a similar finding with respect to Mother's transcript citations to hearsay admitted during the course of trial. Her citations to the record for objections made during trial do not include any supporting argument or evidence to explain in what way these admissions prejudiced Mother's case.

¶18 For the reasons provided herein, the order of the trial court is AFFIRMED.

BELL, P.J., and HETHERINGTON, J., concur.