

## IN THE MATTER OF THE GRANDPARENTAL VISITATION RIGHTS TO E.R.S.

2023 OK CIV APP 37

Case Number: [120249](#)

Decided: 09/21/2023

Mandate Issued: 10/19/2023

DIVISION II

THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA, DIVISION II



Cite as: 2023 OK CIV APP 37, \_\_ P.3d \_\_

IN THE MATTER OF THE GRANDPARENTAL VISITATION RIGHTS TO E.R.S., a Minor Child,

MATTHEW SMITH and VICKIE SMITH, Petitioners/Appellants,

v.

ASHLEY DURHAM and JACOB WARNER, Respondents/Appellees.

APPEAL FROM THE DISTRICT COURT OF  
POTTAWATOMIE COUNTY, OKLAHOMA

HONORABLE TRACY McDANIEL, TRIAL JUDGE

**AFFIRMED**

Greg Wilson, Shawnee, Oklahoma, for Petitioners/Appellants

Mat Thomas, Shawnee, Oklahoma, for Respondents/Appellees

STACIE L. HIXON, JUDGE:

¶1 Matthew and Vickie Smith (Grandparents, or Grandfather and Grandmother) appeal a journal entry of judgment denying their Petition for Grandparental Visitation Rights, entered February 1, 2022, to which the custodial parent, Ashley Durham (Mother), objected.<sup>1</sup> Grandparents assert they met their burden under [43 O.S.2021, § 109.4](#), by demonstrating their own child, Charles Smith (Smith), was unfit. Alternatively, they asserted they rebutted the presumption Mother was acting in the minor child's best interests by denying visitation. On review of the record, the briefs and the applicable law, we find the trial court did not err in determining Grandparents were required to show *Mother* was unfit and did not abuse its discretion by determining Grandparents had failed to meet their burden by demonstrating E.R.S. would suffer harm or potential harm without grandparental visitation. We affirm the trial court's order of February 1, 2022, denying Grandparents' Petition.

**BACKGROUND**

¶2 E.R.S. is the biological child of Mother and Grandparents' son, Smith.<sup>2</sup> E.R.S. was born in 2014. Mother and Smith never married. Mother was the custodial parent of E.R.S. In April of 2020, Mother's now-husband, Jacob Warner, petitioned to adopt E.R.S. The trial court entered an order on April 5, 2021, finding E.R.S. eligible for adoption without Smith's consent.<sup>3</sup>

¶3 Thereafter, on April 13, 2021, Grandparents filed their Petition for Grandparental Visitation Rights. They alleged E.R.S.'s nuclear family had been disrupted, that there was a strong, continuous grandparental relationship between Grandparents and E.R.S., that E.R.S.'s custodian (Mother) had refused to allow any relationship with E.R.S., and that visitation was in E.R.S.'s best interests. Mother and Warner opposed the Petition.

¶4 The trial court conducted a hearing on Grandparents' Petition on September 9, 2021, the same date on which it considered whether it was in E.R.S.'s best interests to be adopted by Warner. By the time of the hearing, E.R.S. was seven years old. Grandparents testified they had not seen E.R.S. since she was around three. They contended that, once Mother and Smith ceased their relationship, Mother had avoided allowing them visits with E.R.S. Grandparents acknowledged they gave up asking for visits for a few years, until they filed their Petition. Grandparents wanted to re-establish their relationship with E.R.S. through once-monthly visitation and holiday visits.

¶5 In support of their Petition, Grandparents acknowledged Mother is a loving and fit parent, but argued they met statutory requirements to seek visitation because they are able to show that Smith, at the time a non-custodial parent, is unfit. Alternatively, they argued they were entitled to visitation because, though Mother was fit, E.R.S. would suffer harm or potential harm without grandparental visitation.

¶6 The trial court determined Grandparents could not rely upon a showing that Smith was unfit to support their Petition for visitation. The trial court also determined that Grandparents had not presented evidence E.R.S. would suffer harm without grandparental visitation and denied Grandparents' Petition.

¶7 Grandparents appeal.

**STANDARD OF REVIEW**

¶8 Grandparents' right to court-ordered visitation is strictly statutory. *Murrell v. Cox*, [2009 OK 93](#), ¶ 25, [226 P.3d 692](#). Statutory interpretation involves a question of law, which this Court reviews *de novo*. *Stump v. Cheek*, [2007 OK 97](#), ¶ 9, [179 P.3d 606](#). Credibility of witnesses and the weight to be given their testimony are questions of fact resolved by the trial court, as trier of fact. *Robert L. Wheeler, Inc. v. Scott*, [1991 OK 95](#), ¶ 12, [818 P.2d 475](#).

¶9 When reviewing the trial court's determination of grandparental visitation pursuant to the applicable statute, we evaluate for an abuse of discretion. *Murrell*, [2009 OK 93](#), at ¶ 23. We will reverse "only if the trial court's decision is clearly against the evidence or is contrary to a governing principle of law." *Curry v. Streater*, [2009 OK 5](#), ¶ 8, [213 P.3d 550](#).

**ANALYSIS**

¶10 Grandparents argue they met their burden by showing Smith was an unfit parent, or that E.R.S. would suffer harm or potential harm, as required to obtain grandparental visitation pursuant to [43 O.S.2021, § 109.4\(A\)\(1\)\(b\)](#). Therefore, they conclude that the trial court erred by denying them visitation. We disagree with both propositions of error.

¶11 Oklahoma law plainly recognizes a parent's natural right to custody and control of a child based on parental status. See *In re Bomgardner*, [1985 OK 59](#), ¶ 11 n.23, [711 P.2d 92](#). That right is constitutionally protected. *Lehr v. Robertson*, 463 U.S. 248, 257-263 (1983); *In re Herbst*, [1998 OK 100](#), ¶ 12, [971 P.2d 395](#). In contrast with parents' rights, grandparents' rights are limited to those conferred by statute. *Murrell*, [2009 OK 93](#), at ¶ 25. Specifically, the Adoption Code provides grandparents may seek and be granted reasonable rights of visitation to the extent provided by [43 O.S.2021, § 109.4](#). See 10 O.S. 2021, §7505-6.5(C).

¶12 Section 109.4 provides for grandparental visitation rights independent of either parent of the child if:

- a. the district court deems it to be in the best interest of the child pursuant to subsection E of this section, and

b. there is a showing of parental unfitness, or the grandparent has rebutted, by clear and convincing evidence, the presumption that the fit parent is acting in the best interests of the child by showing that the child would suffer harm or potential harm without the granting of visitation rights to the grandparent of the child, and

c. the intact nuclear family has been disrupted in that one or more of the following conditions has occurred:

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(8) except as otherwise provided in subsection D of this section,<sup>4</sup> the grandchild's parents have never been married, are not residing in the same household and there exists a strong, continuous grandparental relationship between the grandparent and the child . . .

¶13 Thus, pursuant to the statute, Grandparents were required to show the following before the trial court could grant visitation: (1) that visitation was in the child's best interests, (2) parental unfitness or rebut the presumption that the fit parent is acting in the child's best interests by showing harm or potential harm if the relationship is not continued, and (3) disruption of the nuclear family, and existence of a strong, continuous relationship with Grandparents. *Birtciel*, 2016 OK 103, at ¶ 10.<sup>5</sup>

¶14 First, Grandparents argue that they demonstrated parental unfitness by showing Smith, their own child, was not a fit parent. Mother argued that Grandparents were required to demonstrate *her* unfitness. We agree with Mother. By its very nature, grandparents petitioning for visitation seek to obtain it against an *objecting* parent. The statute plainly contemplates this scenario and "requires grandparents to prove parental unfitness" or "rebut the presumption that the *fit* parent is acting in the child's best interests by showing harm or potential harm if the relationship is not continued. . . ." (emphasis added). While the statute does not expressly specify which parent must be demonstrated to be unfit, the Court will not read portions of the statute in isolation. See *Anderson v. Eichner*, 1994 OK 136, ¶ 13, 890 P.2d 1329. Subpart (b) in its entirety requires grandparents to show the objecting parent is either unfit or is fit but not acting in the child's best interests by denying visitation. Allowing the non-objecting parent's unfitness to serve as the basis to compel the objecting parent to allow visitation would render the second part of the statute superfluous. Further, under the facts of this case, to hold otherwise would allow the courts to interfere with Mother's natural right as the custodial parent to make decisions for her child without meeting the high burden necessary to justify such interference.

¶15 The Court's decision in *Craig v. Craig*, 2011 OK 27, 253 P.3d 57, is instructive. In that case, grandparents filed a motion in their son's divorce proceeding seeking visitation with their grandchild. Their son, the non-custodial parent, did not exercise his right of visitation with the child. Grandparents did not argue their son was the unfit parent, as in this case. Rather, they argued section 109.4 was not applicable, in that they essentially sought to exercise father's right of visitation. *Id.* at ¶ 22. The Court found that a natural parent's visitation right was not transferrable or alienable, such that an Oklahoma court is required to recognize and enforce it against the custodial parent.

¶16 As is relevant here, the Court explained:

A legal "right" possessed by one person does not exist "in the air," but exists only with a corresponding legal "duty" possessed and required by another. The forensic contest herein is one pitting a custodial and biological parent against paternal grandparents as non-parent third parties. Grandparents claim a judicially cognizable "right" to visitation and thereby seek to impose a "duty" upon the custodial parent in her relationship with Grandparents. A non-custodial father with visitation rights and a custodial parent may agree to grandparent visitation during the father's exercise of his visitation, and such may be judicially enforceable. *Ingram v. Knippers*, 2003 OK 58, ¶¶ 13-14, 72 P.3d 17, 21. An order memorializing such visitation possesses a quality of being judicially enforceable because it is based upon the underlying custodial parent's exercise of parental discretion and parental consent. *Id.*

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The legal duty Grandparents seek to impose on Mother is not based upon her consent, but upon an exercise of the power of the State in altering a parent's constitutional right to the custody and control of the parent's child. When the State imposes a duty upon a custodial parent to compel the parent's conduct in matters pertaining to custody and control of that parent's child, that parent is entitled to certain protections guaranteed by our federal and state constitutions.

2011 OK 27, at ¶¶ 18, 20. Thus, the Court held that grandparents' right to visitation required a demonstration of the elements set forth in section 109.4, and that "[t]hese are the only circumstances in which 'the [grandparent visitation] statute clearly divests parents of the right to decide what is in their child's best interest and gives that determination to the district court. . . ." *Id.* at ¶ 22 (quoting *Murrell*, 2009 OK 93, ¶ 26). The Court further stated that, consistent with previous decisions, "we again hold that a non-custodial non-parent third-party may not use the power of the State to compel a custodial parent to relinquish custody and control over that parent's child and submit to court-ordered visitation without satisfying the non-parent's burden of showing harm or potential harm in the absence of such visitation." *Id.* at ¶ 25.

¶17 Applied here, Grandparents acknowledge Mother is a fit parent. To suggest that Grandparents may circumvent Mother's natural and constitutional right to custody and control of her child and impose a duty upon her to facilitate visitation by demonstrating the other parent is unfit contravenes constitutional principles and the plain language and intent of the statute. Thus, Grandparents were obligated to rebut the presumption Mother acted in E.R.S.'s best interests by demonstrating by clear and convincing evidence that harm or a potential harm would result if visitation were allowed.

¶18 In their attempt to show harm, Grandparents presented testimony that, when E.R.S. was born in February 2014, Mother and Smith were still together, living in Louisiana. Grandparents lived about an hour and a half away in Texarkana. Grandparents visited E.R.S. at the hospital when she born. Grandmother testified that while Mother and Smith were together, Grandparents tried to see E.R.S. as much as they could, which she described at various points in her testimony as several times a year, a few times a year, every couple of months and on holidays, or eight times a year. Mother and Smith separated when E.R.S. was around two. Grandmother testified visits became more difficult because Smith did not get E.R.S. often.

¶19 Grandparents last saw E.R.S. in 2017. Grandmother testified Mother moved to California for about six months in early 2017 when E.R.S. was about three, and then to Oklahoma. Grandmother testified that after Mother moved, she attempted to see E.R.S., but felt that Mother was looking for reasons not to allow E.R.S. to see Grandparents. Mother cancelled a visit during the fall of 2017.<sup>6</sup> Grandmother believes she had attempted to arrange a visit to E.R.S. once or twice before that event.

¶20 After that, Grandmother became "fed up" and stopped talking to Mother, but testified Grandfather kept up with Mother. Grandfather testified he attempted to keep the lines of communication open with Mother until 2018, but eventually gave up a few years before filing the Petition for visitation in 2021. Grandmother testified she did not ask for visits between the years 2018 and 2021 and petitioned for visitation only after Smith lost the hearing on E.R.S.'s adoption without his consent.<sup>7</sup> Grandmother acknowledged she does not think E.R.S. knows Grandparents. She testified Grandparents wanted to re-establish their relationship with E.R.S.

¶21 For her part, Mother disputed that Grandparents saw E.R.S. as often as they testified, though she acknowledged that they saw E.R.S. a reasonable amount of time before she moved to California and then Oklahoma. Mother testified that she has resided in the same place for five years. Since that time, E.R.S. received no gifts, no cards, no gestures, and Grandparents made no contact from 2019 through the filing of their Petition in 2021.<sup>8</sup> Mother contended that E.R.S. does not know Grandparents and already has an established life in Oklahoma, including extended family. In her opinion, visitation would be disruptive and that at seven years old, requiring E.R.S. to visit people she does not know would be unsettling. She also expressed concern that Grandparents would be unable to have a relationship with E.R.S. separate from Smith.

¶22 Ultimately, though Grandparents and Mother disagreed as to the frequency of visits during E.R.S.'s early life and whether Mother discouraged visitation thereafter, the evidence was undisputed that Grandparents no longer had a relationship with E.R.S., and she did not know them. Grandparents generally argued that it would be in E.R.S.'s best interests to know them and her other relatives. However, "a vague generalization about the positive influence many grandparents have upon their grandchildren falls far short of the necessary showing of harm which would warrant the state's interference with this parental decision regarding who may see a child." *In re Herbst*, 1998 OK 100, at ¶ 16.

¶23 Grandparents also argued that Mother's testimony that E.R.S. sees a counselor for separation anxiety from an unidentified cause was evidence of potential harm. However, they presented no evidence that E.R.S.'s anxiety was related to her lack of relationship with them, which ceased when she was only three years old. Mother testified she was not sure of the source of E.R.S.'s anxiety, but believed it likely related to Mother and not to separation from Grandparents, whom she did not know and with whom she had had little contact during her early

life. The trial court was entitled, as the finder of fact, to determine what reasonable inferences to take from such testimony, which apparently did not include an inference that E.R.S.'s anxiety related to her Grandparents.

¶24 The trial court's determination that Grandparents failed to show harm or potential harm is not contrary to the evidence presented. Absent such a showing, Grandparents were not entitled to court-ordered visitation under the provisions of the statute. The trial court did not abuse its discretion in denying Grandparents' Petition.

### CONCLUSION

¶25 As the trial court noted at the hearing on Grandparents' Petition, the issue in this case is not whether Grandparents love E.R.S. or whether a relationship with extended family is beneficial. The issue is whether Grandparents met their burden under the statute to demonstrate they are eligible and entitled to an order compelling visitation and overriding a fit parent's constitutional right to care and control of her child. Grandparents did not meet their burden. As a matter of law, the trial court did not err in its interpretation of the statute to require that Grandparents show *Mother* was unfit or rebut the presumption she acted in E.R.S.'s best interest by denying visitation. The trial court's determination that Grandparents failed to demonstrate harm or potential harm to E.R.S. if visitation was not granted is supported by the evidence. Thus, the trial court did not abuse its discretion in denying visitation. The trial court's order of February 1, 2022 is affirmed.

¶26 **AFFIRMED.**

BARNES, V.C.J., and WISEMAN, P.J., concur.

### FOOTNOTES

STACIE L. HIXON, JUDGE:

<sup>1</sup> This matter is a companion case to another appeal, Case No. 119,909, *In the Matter of Adoption of E.R.S. (Smith I)*. That action affirmed the final decree of adoption of the minor child by her stepfather without Smith's consent. Though Grandparents' Petition for Visitation was heard earlier on the same day as the best interests hearing on the adoption, the order on the Grandparents' Petition for Visitation was not entered until five months after the adoption decree was filed, and well after appeal of that decree was filed. These matters were not made companion cases until after the record and briefing in Case No. 119,909 were complete and the case was assigned to this Court for disposition. The Court considered and issued its opinion in *Smith I* separately to avoid protracted delay and uncertainty in a matter concerning parental rights and a minor child. See, e.g., Okla. S. Ct. R. 1.27 ("When related appeals are inappropriate for consolidation they may be treated as companion appeals by the appellate court if no delay in decision would result. Companion appeals each contain separate records, are briefed separately, and are assigned to the same court for decision.").

Meanwhile, Grandparents' appeal was significantly delayed. They failed to timely serve the Petition in Error and later failed to timely file their Brief in Chief. Additionally, the record transmitted to the Oklahoma Supreme Court was missing designated materials, leading to further delay. Though the Oklahoma Supreme Court directed the record be supplemented in March 2023, it was not. Grandparents do not appear to have taken any steps to ensure supplementation of the record. See Okla S.Ct. R. 1.33(c) ("The appellant has the burden of monitoring the preparation of the appellate record and seeking relief from the trial court for its timely completion."). Ultimately, this matter was not transmitted to this Court for disposition until over a year after the appeal of the adoption decree was initially assigned to this Court. This Court once again directed the record be supplemented with the hearing transcript on Grandparents' Petition for Visitation, which was not received until August 28, 2023.

<sup>2</sup> Grandmother is actually Smith's stepmother. However, since Grandparents filed as a unit, we need not address whether the grandparental visitation statute applies to step-grandparents, and no party has raised this issue.

<sup>3</sup> Our affirmation of the adoption decree in *Smith I* did not resolve or destroy Grandparents' standing to pursue visitation because at the time the trial court considered Grandparents' Petition, E.R.S. had not yet been adopted. See generally *Birtciel v. Jones*, 2016 OK 103, ¶ 19, 382 P.3d 1041.

<sup>4</sup> Subsection D does not apply here. It addresses a situation in which a child is born out of wedlock and the father's rights have been terminated. Though E.R.S. was born out of wedlock, Smith's rights had not been terminated when Grandparents sought visitation. See *In the Matter of A.N.K.*, 2000 OK CIV APP 94, 55 P.3d 1093.

<sup>5</sup> The evidence at trial focused on the requirement of showing harm or potential harm without granting visitation. Though Mother challenged Grandparents' Petition which alleged harm, Grandparents had no existing relationship with E.R.S. Mother did not expressly argue at trial that Grandparents failed to demonstrate disruption of the nuclear family under subsection (c)(8), which required showing a strong, continuous relationship between grandparent and child. The trial court appeared to assume disruption of the nuclear family at trial. Neither party addressed this issue on appeal, and we affirm the trial court's order for other reasons. Therefore, we do not address it here.

<sup>6</sup> Mother testified there were only two times Grandparents asked to see E.R.S., and that one visit was cancelled because E.R.S. had the flu. Though Mother testified she was okay with the visitation and denied she deliberately avoided visitation, she also testified she eventually did not think visitation was a good idea because she learned that Grandparents were sharing information with Smith, which she did not believe was in E.R.S.'s best interests. Mother testified that Smith was not part of E.R.S.'s life at that point and did not know him. She also testified that Smith was physically violent at times, had a substance abuse problem, is aggressive and is not a good person to be in E.R.S.'s life.

<sup>7</sup> Grandmother testified she had initially researched on the internet and believed Grandparents' rights were unavailable in Oklahoma.

<sup>8</sup> Grandfather testified he attempted to obtain an address in 2017 to send a Christmas gift but received no response.

### Citationizer® Summary of Documents Citing This Document

Cite Name Level

None Found.

### Citationizer: Table of Authority

Cite Name	Level
<b>Oklahoma Court of Civil Appeals Cases</b>	
Cite	Name
2000 OK CIV APP 94, 55 P.3d 1093, 71 OBJ 2313.	IN RE: A.N.K.
	Discussed
<b>Oklahoma Supreme Court Cases</b>	
Cite	Name
1991 OK 95, 818 P.2d 475, 62 OBJ 2882.	Robert L. Wheeler, Inc. v. Scott
	Discussed
1994 OK 136, 890 P.2d 1329, 65 OBJ 4037.	Anderson v. Eichner
	Discussed
2003 OK 58, 72 P.3d 17.	INGRAM v. KNIPPERS
	Discussed
2007 OK 97, 179 P.3d 606.	STUMP v. CHEEK
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2009 OK 5, 213 P.3d 550.	CURRY v. STREATER
	Discussed
2009 OK 93, 226 P.3d 692.	MURRELL v. COX
	Discussed at Length
2011 OK 27, 253 P.3d 57.	CRAIG v. CRAIG
	Discussed at Length
2016 OK 103, 382 P.3d 1041.	BIRTCIEL v. JONES
	Discussed at Length
1998 OK 100, 971 P.2d 395, 69 OBJ 3508.	In the Matter of the Application of Herbst
	Discussed at Length

**Cite Name**

1985 OK 59, 711 P.2d 92.

**Level**

Bomgardner, In re

Discussed

**Title 43. Marriage**

Cite

43 O.S. 109.4.

Name

Visitation Rights of Grandparent of Unmarried Minor

Level

Discussed at Length