

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

KOKI FOX 23 NEWS,)
)
 Plaintiff/Appellee,)
)
 and)
)
 WORLD PUBLISHING COMPANY,)
 a/k/a TULSA WORLD,)
)
 Intervener/Appellee,)
)
 vs.)
)
)
 DEPARTMENT OF HUMAN)
 SERVICES,)
)
 Defendant/Appellant.)

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

MAY 25 2012

MICHAEL S. RICHIE
CLERK

Case No. 108,446
(Companion with
Case No. 109,281)

APPEAL FROM THE DISTRICT COURT OF
TULSA COUNTY, OKLAHOMA

HONORABLE LINDA G. MORRISSEY, TRIAL JUDGE

AFFIRMED AS MODIFIED

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OPINION BY JERRY L. GOODMAN, PRESIDING JUDGE:

Department of Human Services (DHS) appeals the trial court's June 3, 2010, judgment ordering DHS to disclose certain records of current and former DHS foster parents in eastern Oklahoma to KOKI Fox 23 News (KOKI) and World Publishing Company a/k/a Tulsa World (Tulsa World) (collectively "Appellees"). Based upon our review of the facts and applicable law, we affirm the court's June 3, 2010, judgment as modified consistent with this opinion.

PROCEDURAL HISTORY

This is the second appeal involving these parties. The first case was appealed in 2007 and resulted in an opinion by the Court of Civil Appeals (COCA), Division II, No. 104,772, *KOKI Fox 23 News v. Department of Human Services (KOKI I)*, which was mandated on November 6, 2008. COCA reversed the trial court's June 11, 2007, judgment which had required DHS to disclose to

KOKI certain records of DHS foster parents in Oklahoma. The case was remanded for further proceedings consistent with the opinion.

The present appeal, No. 108,446, is one of two companion appeals and arises from the trial court's June 3, 2010, entry of judgment in favor of Appellees. The companion appeal, No. 109,281, also decided this date, arises from the trial court's February 24, 2011, order granting Appellees an attorney's fee and costs.¹

FACTS

An extensive recitation of facts is unnecessary to the disposition of this appeal.

Pursuant to the Oklahoma Open Records Act, 51 O.S.2001, § 24A.1 *et seq.*, on September 11, 2006, KOKI submitted a written request to DHS seeking the "records containing the name, birth date and county of residence for all existing and available foster parents for [DHS]."² This request was denied.³ KOKI filed suit seeking an "Order For Disclosure of Records" pursuant to 10 O.S.2001, § 7005-1.2 seeking to compel DHS to release certain records pertaining to all

¹ By order filed on March 24, 2011, the Oklahoma Supreme Court ordered Appeal Nos. 108,446 and 109,281 to be companion cases.

² By agreement of the parties, the scope of the requested information was later limited to those foster parents who served DHS through its regional offices in northeastern Oklahoma.

³ DHS contends the Act did not apply because the records were required by law to be kept confidential. *See* 51 O.S. 2001 and Supp. 2006, § 24A.5(1); 10 O.S.2001, § 7004-1.5(C)(3)(Renumbered as 10A O.S. Supp. 2009, § 1-9-106 by Laws 2009, HB 2028, c. 233, § 298, emerg. eff. May 21, 2009).

foster parents in the State of Oklahoma.⁴ KOKI asserted the information would be used to determine whether a foster child had been placed with a foster parent who was a convicted felon contrary to Oklahoma law.⁵ DHS filed a motion to dismiss, which the trial court denied by order filed on March 6, 2007.

The trial court ultimately held the records should be disclosed. In an order filed on June 11, 2007, the trial court directed DHS to disclose to KOKI “the list of current DHS foster parents.” KOKI’s use of the disclosed records was limited, however, to the sole purpose of checking whether a foster parent had a felony conviction in violation of 10 O.S.2001 and Supp. 2008, § 7003-8.1.⁶ The order also provided KOKI “shall notify all DHS foster parents shown on the list provided by DHS that they have a right to object to any further disclosure of such list by [KOKI] pursuant to 10 O.S. §7005-1.2.” DHS appealed and, in *KOKI I*, this Court reversed the trial court’s order and remanded with directions that proper notice be given to foster parents who are the subject of the § 7005-1.2 filing.

Upon remand, an agreed notice and response forms were mailed to 3,186 current or former foster parents in northeastern Oklahoma.⁷ The notice provided foster parents with the option of appearing at a hearing or mailing in the response

⁴ Renumbered as 10A O.S. § 1-6-102 by Laws 2009, HB 2028, c. 233, § 270, emerg. eff. May 21, 2009.

⁵ Tulsa World intervened in the matter below.

⁶ Renumbered as 10A O.S. § 1-4-705 by Laws 2009, HB 2028, c. 233, § 247, emerg. eff. May 21, 2009.

⁷ The record alternatively provides that 4,732 agreed notice and response forms were mailed to current and former foster parents.

form, thereby objecting to disclosure of their identification records, to DHS. Of these notices, 216 were returned undelivered and 644 response forms were completed and returned. At the hearing held on November 12, 2009, 13 people appeared, of which 8 objected to disclosure of their records.

After additional briefing and arguments of the parties, the trial court entered judgment in favor of Appellees, finding they had “shown a compelling reason that the inspection, release and disclosure of the Requested Information was necessary for the protection of a legitimate public/private interest” The order provides, in relevant part:

1. [Appellees] may utilize any lawful means to determine whether the Foster Parents had felony convictions in violation of Oklahoma law (Title 10, Oklahoma Statutes, Section 7003-8.1 (Amended and renumbered in 2009 as Title 10A, Oklahoma Statutes, Section 1-4-705)). [Appellees] may utilize any lawful means to determine whether a foster parent has a criminal background in violation of Oklahoma law.

2. In the event [Appellees] discover a Foster Parent had felony convictions in violation of Oklahoma law or a criminal background in violation of Oklahoma law, [Appellees] are permitted to disclose and publish in their respective media, subject to the procedure set forth in Paragraph 3.

3. Should [Appellees] discover a Foster Parent had a felony conviction in violation of Oklahoma law or a criminal background in violation of Oklahoma law, [Appellees] shall notify DHS within three (3) business days ... prior to any publication to allow DHS an opportunity to provide the Foster Parent’s application

date and/or the foster home's closing date, and to comment on the story. After any time period has passed as expressed ..., [Appellees] are free to publish the Foster Parent's name and status as a foster parent.

4. The Foster Parent birthdates and addresses are confidential, and shall not be disclosed by [Appellees] for any purpose except to distinguish individuals with the same name... . [T]he names of Foster Parents are also confidential, and shall not be published ... unless [Appellees] discover a Foster Parent had a felony conviction in violation of Oklahoma law or a criminal background in violation of Oklahoma law... .

DHS appeals.

STANDARD OF REVIEW

This appeal involves a question of law relating to statutory interpretation.

When a question of law is at issue, the standard of review is de novo. *Boston Ave. Management, Inc. v. Associated Resources*, 2007 OK 5, ¶ 10, 152 P.3d 830, 884-85. In de novo review, an appellate court claims for itself plenary, independent, and nondeferential authority to re-examine legal rulings of the court. *Id.*; *Weeks v. Cessna Aircraft Co.*, 1994 OK CIV APP 171, ¶ 5, 895 P.2d 731, 733 (approved for publication by the Oklahoma Supreme Court).

ANALYSIS

For its first proposition of error on appeal, DHS asserts Appellees failed to establish the requested records were subject to disclosure pursuant to 10 O.S.2001, § 7005-1.2(D).⁸ Section 7005-1.2 provides:

D. An order of the court authorizing the inspection, release, disclosure, correction or expungement of confidential records shall be entered by the court only after a review of the records and a determination by a judge of the district court designated pursuant to this subsection, with due regard for the confidentiality of the records and the privacy of persons identified in the records, that a compelling reason exists and such inspection, release or disclosure is necessary for the protection of a legitimate public or private interest.

DHS asserts no compelling reason exists for disclosure of confidential foster parent information to a privately operated television station and newspaper for a news story nor is such disclosure necessary for the protection of a legitimate public or private interest as required by § 7005-1.2(D). Rather, DHS asserts compelling reasons exist for not ordering disclosure, including: 1) disclosure is likely to have a detrimental impact on DHS's efforts to recruit and retain foster parents; 2) if a

⁸ The Oklahoma Children's Code was amended and renumbered after KOKI filed its open records request and the present suit. As a general rule, "statutes are to be applied prospectively only." *Triple D Excavation v. Edwards*, 2003 OK CIV APP 38, ¶ 6, 70 P.3d 884, 885 (citing *Oklahoma Bd. of Med. Licensure & Supervision v. Oklahoma Bd. of Examiners in Optometry*, 1995 OK 13, ¶ 6, 893 P.2d 498, 499). However, the general rule of prospective application does not apply to statutes affecting only procedure, *i.e.*, the manner or mode of protecting or enforcing a substantive right, and statutes which alter or change procedures rather than substantive or vested rights will be given retrospective effect. *Id.* DHS has not asserted the 2009 amendments apply in the present case.

list of foster parents is disclosed, the identities of the children and families involved in the welfare system could also be indirectly disclosed; and 3) the disclosure of this information places foster parents in potential danger from disgruntled biological parents and relatives.

Appellees disagree, asserting DHS is attempting to inject an artificial and inappropriate balancing test not required by § 7005-1.2(D). Appellees contend they demonstrated a compelling reason why the information is necessary for the protection of legitimate public and private interest, *i.e.*, they sought the records because KOKI had information at least two (2) foster children in DHS's custody had been placed in the home of a foster parent with a criminal conviction identified in § 7003-8.1.⁹ Thus, the requested information is necessary to determine whether DHS's placements are proper.

When called on to determine the meaning of a statute, a court's primary goal is to ascertain and then follow the intention of the Legislature. *TRW/Reda Pump v.*

⁹ Title 10 O.S.2001 and Supp. 2008, § 7003-8.1(D) provides: A prospective foster or adoptive parent shall not be an approved placement for a child if the prospective foster or adoptive parent or any other person residing in the home of the prospective foster or adoptive parent has been convicted of any of the following felony offenses:

1. Within the five-year period preceding the application date, physical assault, battery or a drug-related offense;
2. Child abuse or neglect;
3. Domestic abuse;
4. A crime against a child, including, but not limited to, child pornography; and
5. A crime involving violence, including, but not limited to, rape, sexual assault or homicide, but excluding those crimes specified in paragraph 1 of this subsection.

Brewington, 1992 OK 31, ¶ 5, 829 P.2d 15, 18. Legislative intent is ascertained by reviewing the whole act in light of its general purpose and object. *Id.*

The plain meaning of a statute's language is conclusive except in the rare case when literal construction would produce a result demonstrably at odds with legislative intent. Also, a court is duty-bound to give effect to legislative acts, not to amend, repeal or circumvent them. A universally recognized principle in cases when a court is called on to interpret legislative enactments is that the court is without authority to rewrite a statute merely because the legislation does not comport with the court's conception of prudent public policy. *Fulsom [v. Folsom]*, 2003 OK 96, ¶ 7, 81 P.3d [652,] 655. (citations omitted).

Boston Ave. Mgmt., Inc. v. Associated Res., Inc., 2007 OK 5, ¶ 11, 152 P.3d 880, 885.

In the present case, there is no ambiguity and the legislative intent is clear. Although DHS's agency records are confidential, the confidentiality of such records is not absolute.¹⁰ The Legislature, in an effort to protect the confidentiality of the records at issue while also recognizing that inspection or disclosure of the records may be warranted, drafted § 7005-1.2 to set forth the standard under which disclosure is appropriate. Section 7005-1.2(D) provides: with due regard for the confidentiality of the records and privacy of persons identified therein, disclosure is proper where: 1) a compelling reason exists; and 2) such inspection, release or disclosure is necessary for the protection of a legitimate public or private interest.

¹⁰ Title 10 O.S. § 7005-1.2 provides that agency records "are confidential and shall not be open to the general public."

In short, the legislation was drafted to give protection to those covered within an agency record while also enabling others to have access to such information under certain circumstances.

In the present case, with due regard for the confidentiality of the records and privacy of foster parents, we agree with the trial court that Appellees demonstrated a compelling reason and that such inspection, release or disclosure was necessary for the protection of a legitimate public or private interest. Appellees seek to ensure DHS has placed foster children in its custody in appropriate foster homes. In accordance with its statutory mandate, DHS has a responsibility to establish a system of foster care for children in its custody and shall exercise supervision over all foster placements. *See* 10 O.S.2001, § 7204.¹¹ *See generally* the Oklahoma Children's Code, 10 O.S.2001, § 7001-1.1 *et seq.*,¹² and the Oklahoma Foster Care and Out-of-Home Placement Act, 10 O.S.2001, § 7201 *et seq.*¹³ Once a child is placed in DHS custody, DHS is required to determine an appropriate placement. *See* 10 O.S.2001 and Supp. 2002, § 7003-7.1(C)(1) (If the child is placed in the custody of the Department of Human Services, whether in emergency, temporary or permanent custody, the Department shall determine the appropriate placement

¹¹ Renumbered as 10A O.S. § 1-7-108 by Laws 2009, HB 2028, c. 233, § 281, emerg. eff. May 21, 2009.

¹² Renumbered as 10A O.S. § 1-1-101 by Laws 2009, HB 2028, c. 233, § 209, emerg. eff. May 21, 2009.

¹³ Repealed by Laws 2009, HB 2028, c. 233, § 196, emerg. eff. May 21, 2009.

of the child).¹⁴ *See also* 10 O.S.2001, § 7202(5) (Each child shall be assured the care, guidance, and supervision in a permanent home which will serve the best interests of the child's moral, emotional, mental, social, and physical well-being).¹⁵ This duty of placement must be made in accordance with § 7003-8.1 and DHS's overall duty to provide care for deprived children who are committed to its custody and protect them from harm or risk of harm. *See* 10 O.S.2001, § 7002-2.1(A).¹⁶

In the present case, Appellees' request was narrowly tailored to seek only foster parent names and distinguishing information to enable it to review public databases to determine whether a foster parent has a criminal conviction identified in § 7003-8.1.¹⁷ Disclosure of a foster parent's name may only occur if a criminal conviction identified in § 7003-8.1 is discovered and the conditions set forth in the trial court's order are satisfied, including notifying DHS prior to publishing to permit it an opportunity to provide the foster parent's application date and/or the foster home's closing date and to comment on the story. Disclosure of a foster parent's distinguishing information, *i.e.*, birthdates and addresses, is prohibited by the trial court order. DHS has not shown its concerns are anything but speculation.

¹⁴ Renumbered as 10A O.S. § 1-7-101 by Laws 2009, HB 2028, c. 233, § 275, emerg. eff. May 21, 2009.

¹⁵ Renumbered as 10A O.S. § 1-7-106 by Laws 2009, HB 2028, c. 233, § 280, emerg. eff. May 21, 2009.

¹⁶ Renumbered as 10A O.S. § 1-7-102 by Laws 2009, HB 2028, c. 233, § 276, emerg. eff. May 21, 2009.

¹⁷ By agreement of the parties, the scope of the requested information was limited to those foster parents who served DHS through its regional offices in northeastern Oklahoma.

Accordingly, we agree with Appellees that whether children in DHS's custody have been placed with a foster parent who has a criminal conviction identified in § 7003-8.1 is a matter of legitimate public interest and concern and that a compelling reason exists for the inspection and disclosure of the agency records requested. The public has a right to know if DHS has placed foster children with foster parents who have a criminal conviction identified in § 7003-8.1. The courts of this state have a duty to guard with jealous care the interests of minors and to protect infants' rights. *Skrapka v. Bonner*, 2008 OK 30, ¶ 17, 187 P.3d 202, 210-11. Accordingly, we reject this proposition of error.

For their second proposition of error, DHS contends the scope of disclosure ordered by the trial court exceeded that permissible under § 7005-1.2(D). DHS asserts the statute only prohibits it from placing a child with a foster parent who has a felony conviction identified in § 7003-8.1 and that the broad and unlimited language in the court's order goes far beyond searching for those convictions prohibited by § 7003-8.1.

The court's June 3, 2010, order provides, in part, that Appellees are authorized to "utilize any lawful means to determine" whether a foster parent had "felony convictions in violation of Oklahoma law or a criminal background in violation of Oklahoma law." Paragraph 1 of the trial court's order defines "felony conviction in violation of Oklahoma law" as "Title 10, Oklahoma Statutes, Section

7003-8.1 (Amended and renumbered in 2009 as Title 10A, Oklahoma Statutes, Section 1-4-705).” However, paragraph 1 further provides, “[Appellees] may utilize any lawful means to determine whether a foster parent has a *criminal background* in violation of Oklahoma law.” (Emphasis added) This broad language purports to extend using the disclosed information to search beyond those convictions listed in § 7003-8.1 and is a modification of Appellees’ legitimate request. Accordingly, Appellees are limited to utilizing any lawful means to determine whether a foster parent has a felony conviction identified in § 7003-8.1. To the extent the trial court’s June 3, 2010, order permits otherwise, it is modified consistent with this opinion. If a felony conviction identified in § 7003-8.1 is discovered, Appellees may disclose the information pursuant to the trial court’s order.¹⁸

AFFIRMED AS MODIFIED.

RAPP, J., and THORNBRUGH, J., concur.

May 25, 2012

¹⁸ DHS raises several issues for the first time in its reply brief. New arguments may not be raised for the first time in a reply brief. *Cox Oklahoma Telecom, LLC v. State ex rel. Oklahoma Corp. Comm’n*, 2007 OK 55, ¶ 33, 164 P.3d 150, 162-163. Thus, any new factual or legal issues raised by DHS in its reply brief will not be considered.