STATE OF MICHIGAN

COURT OF APPEALS

In re GLASPIE, Minors

UNPUBLISHED
June 24, 2021

No. 354880
Jackson Circuit Court
Family Division
LC No. 19-002306-NA

Before: JANSEN, P.J., and RONAYNE KRAUSE and GADOLA, JJ.

RONAYNE KRAUSE, J. *(dissenting)*

I respectfully dissent. I would vacate the trial court's order terminating respondent's parental rights as premature and insufficiently justified on this record.

I. BACKGROUND

This matter concerns the termination of respondent's parental rights to his two older children, JG and JG, then approximately six and three years old; based on the death of his younger child, TG, then approximately two months old. At approximately 8:00 p.m. on June 8, 2019, TG's mother dropped TG off at respondent's house. TG's mother was TG's primary caregiver, although TG had also been recently cared for by several other individuals, including TG's maternal grandparents or great-grandparents. By all accounts, TG was "fussy" at the time, but not in any other apparent distress. TG's mother had prepared milk for TG, but according to respondent, TG only took a few milliliters before falling asleep. Respondent placed TG in the middle of his bed, sat on the same bed and watched television for half an hour to an hour, and then noticed TG to be in distress. He discovered that TG was short of breath, and then not breathing at all. Respondent called TG's mother, and then just after 10:00 p.m., he called 911. Respondent performed CPR, coached by the dispatcher, until emergency medical services arrived. TG was taken to the hospital, never regained consciousness, and died on June 11, 2019. No other adults were present for the two hours TG was in respondent's care. Inexplicably, although TG's mother was subpoenaed as a witness and showed up to the courtroom, she was not called to testify.

Subsequent medical examination revealed that TG had died of severe trauma to his head, which resulted in a skull fracture and extensive bleeding around his brain. It was also revealed that TG had also sustained extensive non-fatal injuries, including numerous broken ribs, severe spinal injuries that included some nerve necrosis, and possibly fractures to bones in his legs. Some

of those injuries were recent; others were in various stages of healing and would have been at least ten to fourteen days old. Furthermore, although some of them could be explained by the performance of CPR, most of them could not have occurred without intentional infliction of extreme violence and would not typically be seen even in an automobile accident. TG also had substantial bruising to his abdomen.

Importantly, two of the prosecution's expert witnesses opined that TG's non-fatal injuries would likely not have been apparent to outside observers, and although they would have been painful, any symptoms of those injuries could have been subtle or easily mistaken for something else. One of the experts opined that the bruising might have been obscured by TG's dark skin. Indeed, TG had been to a wellness exam with his primary care pediatrician only a few days earlier, on June 6, 2019, and the pediatrician apparently noticed nothing amiss.[1] Critically, however, all three of the prosecution's expert witnesses agreed that the *fatal* injuries, i.e., the severe trauma to TG's head, would have resulted in some degree of immediate symptoms, including difficulty breathing and loss of consciousness.

The petition to terminate respondent's parental rights to JG and JG was filed immediately upon TG's death pursuant to a mandatory policy by DHHS. Petitioner admitted to having no knowledge of any concrete concerns regarding JG and JG, and provided an evasive non-answer when asked whether that meant the petition was essentially speculative. DHHS had no contact with TG's mother after TG's death because she had no other children. Respondent had no criminal history or CPS history, and he was polite and cooperative. There were no allegations of any abuse or neglect perpetrated by respondent against JG or JG. Indeed, their mother testified that respondent had been present at their births, had been an amazing father since "day one," had never displayed any violent or aggressive behaviors, was supportive and caring, and had strong bonds with the children. Respondent's parents provided similarly glowing descriptions of respondent's parenting of JG and JG. The lawyer-guardian ad litem (LGAL) argued that the evidence was speculative whether respondent perpetrated the abuse against TG, that at a minimum the termination proceedings should be postponed until the conclusion of his ongoing criminal prosecution,[2] and petitioner appeared to be pursuing termination for the purpose of vengeance and punishment rather than protecting JG and JG.

The trial court found the statutory grounds for termination established as noted above, and it found termination to be in JG and JG's best interests, largely citing the fact that TG had been "so horrifically abused." This appeal followed.

II. STANDARD OF REVIEW AND LEGAL STANDARDS

Although respondent argues that the trial court erred in finding it proven that he was the person who inflicted TG's injuries, respondent does not challenge whether statutory grounds for

[1] The trial court concluded that the pediatrician must therefore have been incompetent, a conclusion that I find improper under the circumstances as contrary to the experts' opinions that TG's earlier injuries would not have been outwardly apparent.

[2] Insofar as I can discern, criminal proceedings against respondent remain pending.

termination were established. Rather, respondent solely argues that termination of his rights to the older children was not in the older children's best interests. "Once a statutory basis for termination has been shown by clear and convincing evidence, the court must determine whether termination is in the child's best interests." *In re LaFrance*, 306 Mich App 713, 732-733; 858 NW2d 143 (2014), citing MCL 712A.19(b)(5). "[T]he focus at the best-interest stage has always been on the child, not the parent." *In re Moss*, 301 Mich App 76, 87; 836 NW2d 182 (2013). "In assessing whether termination of parental rights is in a child's best interests, the trial court should weigh all evidence available to it." *In re Payne/Pumphrey/Forston*, 311 Mich App 49, 63; 874 NW2d 205(2015). "[W]hether termination of parental rights is in the best interests of the child must be proved by a preponderance of the evidence." *In re Moss*, 301 Mich App at 90. The findings need not be extensive; "brief, definite, and pertinent findings and conclusions on contested matters are sufficient." MCR 3.977(I)(1).

We review a trial court's ruling regarding best interests for clear error. *In re Schadler*, 315 Mich App 406, 408; 890 NW2d 676 (2016). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004). A finding is clearly erroneous if it is so lacking in evidentiary support that this court is definitely and firmly convinced the trial court made a mistake despite that deference, but the clear error standard also recognizes that the evidence may have supported more than one proper conclusion. See *Hill v City of Warren*, 276 Mich App 299, 308-309; 740 NW2d 706 (2007). Clear error cannot be founded on mere doubt or ambiguity, especially where the credibility or demeanor of anyone who appeared before the trial court is relevant. See *McGonegal v McGonegal*, 46 Mich 66, 67; 8 NW 724 (1881). However, to the extent credibility is not at issue, somewhat less deference to the trial court is required. See *Sparks v Sparks*, 440 Mich 141, 146-148; 485 NW2d 893 (1992).

III. ANALYSIS

Notably, there is no evidence whatsoever of who inflicted TG's non-fatal injuries. TG's mother was TG's primary caregiver, along with TG's maternal grandparents and great-grandparents, and possibly other individuals. Importantly, the evidence overwhelmingly showed that TG's non-fatal injuries would not have been outwardly apparent, even to medical experts. The evidence also suggests that respondent and TG's mother did not share much, if any, simultaneous parenting of TG. Therefore, anyone who had not inflicted those injuries could not be expected to know about them, much less act on them or take steps to prevent further such injuries. This Court has upheld terminations of parental rights as to both parents, despite a lack of evidence of which parent perpetrated abuse against a child, where the parents were joint caretakers and, even if only one of the parents committed the abuse, the other must have known about the abuse and could have prevented that abuse. *In re VanDalen*, 293 Mich App 120, 139-141; 809 NW2d 412 (2011); *In re Ellis*, 294 Mich App 30, 31, 33-36; 817 NW2d 111 (2011). The facts in this matter differ drastically. Here, the evidence is that if TG's non-fatal injuries were inflicted by respondent, then TG's mother would have no reason to know of them; conversely, if they were inflicted by TG's mother, then respondent would have no reason to know of them. Indeed, if the injuries were inflicted by one of the grandparents or other caretakers, then neither respondent nor TG's mother would necessarily have had any reason to know of them.

In short, the evidence is insufficient to find that respondent was the person who inflicted TG's non-fatal injuries, and it was clearly erroneous to find, on this record, that respondent did inflict those injuries.

Conversely, the medical experts uniformly agreed that TG's fatal injuries would have resulted in immediate symptoms, including loss of consciousness and shortness of breath. However, I am unpersuaded that respondent necessarily must have therefore inflicted TG's fatal injuries. For example, it is not clear whether those symptoms would start with any particular degree of severity, it is not clear what it meant for TG to be "fussy," it is not clear whether it was unusual for TG to take only a few milliliters of milk, it is not clear whether TG's other injuries might make it expected for TG to appear uncomfortable, and it is not clear whether two hours is a long or a short time for symptoms to build in severity. Thus, it is *possible* that TG received his fatal injuries shortly before being dropped off with respondent. However, as noted, clear error cannot be founded upon mere doubt, or upon the mere possibility that another conclusion would have also been supportable by the evidence. On this record, I am therefore unable to conclude that I am definitely and firmly convinced that the trial court made a mistake in finding that TG received his fatal injuries while in respondent's care. Because there were no other adults present at that time, there is more than a mere possibility that respondent inflicted the injuries.

Nevertheless, "[t]he purpose of child protective proceedings is the protection of the child, while criminal cases focus on the determination of the guilt or innocence of the defendant." *In re Brock*, 442 Mich 101, 107-108; 499 NW2d 752, 756 (1993). Thus, the fact that respondent was found to have committed a horrific act of abuse does not, standing alone, establish that he poses a danger to JG or JG. It is well-established that a parent's treatment of one child can be indicative of how that parent will treat other children, but it is equally well-established that such evidence is not conclusive, and its probative value may be significantly weakened where the children are dissimilarly situated. *In re Kellogg*, 331 Mich App 249, 259-261; 952 NW2d 544 (2020); *Matter of Kantola*, 139 Mich App 23, 28-29; 361 NW2d 20 (1984). The trial court's focus on the horrifying nature of TG's injuries was not unwarranted, but the trial court's ruling seems to have missed the essential question of whether, if respondent did indeed inflict TG's injuries, respondent was in any way dangerous to JG and JG.

Respondent contends that the trial court's best-interest determination was clearly erroneous because the children's mother and the paternal grandparents testified that respondent was an amazing father to the children and that they opposed terminating his parental rights. It is undisputed that respondent did not have a criminal record or any prior history of abuse, neglect, aggression, domestic violence, or mental health or substances abuse issues. Moreover, respondent was an active father and appeared to have a bonded relationship with JG and JG. The trial court was unimpressed, finding that, despite testimony indicating respondent's appearance of being an ideal father, there was a darker side that flared, seemingly without warning, that resulted in the children's sibling's horrific death. The trial court concluded that the placing the children in his care was too grave a risk to their safety and that this risk outweighed the children's bond with respondent.

The trial court's ruling thus failed to consider that JG and JG are differently situated from TG. I am particularly concerned that the trial court also ignored the LGAL's pleas not to terminate respondent's parental rights. The trial court appears to have entirely ignored the possibility that

respondent simply treated his older children differently; perhaps due to their ages, perhaps due to his relationships with their different mothers, perhaps due to simple favoritism, or perhaps due to any number of other factors. I also note that the petition in this matter was automatically filed pursuant to policy, and petitioner did not offer a helpful response when asked whether it was essentially speculative. JG and JG are no longer infants, and for whatever reason, respondent was apparently involved in their care when they were infants and did not harm them at that time. The trial court also unambiguously disregarded the possibility of psychological harm to JG and JG, nor did it attempt to assess the *likelihood* that respondent might physically harm them.

After reviewing the record as a whole, I find the trial court's finding that termination was in JG and JG's best interests to be insufficiently supported. Although I cannot find clear error in the trial court's finding that respondent committed the injuries that caused TG's death, the record does not support a finding of who committed TG's older injuries. Importantly, the trial court erred by failing to analyze the likelihood that respondent would harm JG and JG, and by failing to balance that likelihood against the likelihood that JG and JG would be harmed by the termination of respondent's parental rights. I further share the LGAL's suspicion that the petition in this matter seeks to punish respondent more than to protect JG and JG. The fact that TG's injuries were horrifying is certainly not irrelevant, nor is it disputed; but standing alone, it is not sufficient. I would not hold that termination is necessarily improper, because such a conclusion would be equally premature. Rather, I would hold only that on this record and on the trial court's reasoning, it has not been adequately established that termination was in the best interests of JG and JG. I would remand until the criminal case against respondent is resolved.

/s/ Amy Ronayne Krause