STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1817

In the Matter of the Welfare of the Child of:
B.T.N. and A.V.D., Parents.

Filed March 17, 2009
Reversed
Bjorkman, Judge

Stearns County District Court
File No. 73-JV-07-2726

Cynthia J. Vermeulen, Vermeulen Law Office, P.A., 26 North 7th Avenue, St. Cloud, MN 56303 (for appellants)

Janelle P. Kendall, Stearns County Attorney, Gayle A. Borchert, Assistant County Attorney, Administration Center, Room 448, 705 Courthouse Square, St. Cloud, MN 56303 (for respondent Stearns County Human Services)

Patricia A. Aanes, Erickson, Pearson & Aanes, 319 South 6th Street, P.O. Box 525, Brainerd, MN 56401 (for guardian ad litem)

Considered and decided by Peterson, Presiding Judge; Klaphake, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

BJORKMAN, Judge

Appellants jointly appeal the termination of their parental rights to their son, arguing that the district court's findings are insufficient and unsupported by the record.

Because the findings are insufficient and the record does not support findings necessary for termination, we reverse.

FACTS

Appellants B.T.N. and A.V.D. are the parents of D.D., born February 6, 2007. On February 13, 2007, Stearns County Human Services (the county) filed a petition alleging that D.D. was a child in need of protection or services because B.T.N. and A.V.D.'s first child, A.D., experienced egregious harm while in their care, resulting in his death. After an emergency protective-care hearing, D.D. was placed in foster care. The county subsequently determined that A.D. had experienced egregious harm while in the care of B.T.N. and A.V.D. On that basis, the county petitioned to terminate the parental rights of B.T.N. and A.V.D. to D.D.

The sole focus of the termination-of-parental-rights (TPR) trial was A.D.'s death. A.D. was nine months old when he was taken to the emergency room on January 11, 2001, after B.T.N. called 911. B.T.N. and A.V.D. told the responders that A.D. had been standing in front of the couch and had suddenly arched his back and fallen backward onto the carpeted floor. A.D. was nonresponsive, and the emergency room doctor who examined him concluded that he had suffered severe head trauma. The doctor ordered a CT scan of A.D.'s head, which revealed a subdural hematoma. A.D. died during brain surgery in the early morning hours of January 12, 2001. An autopsy was performed, and the medical examiner concluded that A.D.'s death was a homicide, caused by blunt trauma to the head, which resulted in a skull fracture and a subdural hematoma.

B.T.N. and A.V.D. were A.D.'s only caretakers. The family had been in a minor car accident on December 16, 2000, but B.T.N. told police that she did not think A.D. had been injured in the accident. A.D. was seen by his pediatrician on January 5, 2001, for a well-child checkup, which revealed no indications of illness or injury. And all medical professionals who subsequently treated or examined A.D. agreed that his fatal injuries were non-accidental and not attributable to the car accident or his fall on January 11. The case of A.D.'s death remains open as a pending investigation within the St. Cloud Police Department; no criminal charges have been filed.

In orders dated November 29, 2007, the district court terminated the parental rights of B.T.N. and A.V.D. based on its determination that a child had experienced egregious harm in their care and that it was in D.D.'s best interests for both parents' parental rights to be terminated. B.T.N. and A.V.D. appealed. We remanded the case to the district court for further findings addressing each parent's responsibility for or knowledge of the egregious harm to A.D., as required by the Minnesota Supreme Court's opinion in *In re Welfare of Child of T.P.*, 747 N.W.2d 356 (Minn. 2008). *In re Welfare of Child of B.T.N.*, No. A07-2425, 2008 WL 3836959, at *2-*3 (Minn. App. Aug. 19, 2008).

On remand in the district court, the parties elected not to submit additional evidence or argument. The district court issued supplemental findings of fact and conclusions of law upholding its original TPR decision on September 17, 2008. This appeal follows.

D E C I S I O N

"[P]arental rights may be terminated only for grave and weighty reasons." *In re Welfare of Child of W.L.P.*, 678 N.W.2d 703, 709 (Minn. App. 2004). Accordingly, "[t]his court exercises great caution in termination proceedings, finding such action proper only when the evidence clearly mandates such a result." *In re Welfare of S.Z.*, 547 N.W.2d 886, 893 (Minn. 1996). We review decisions to terminate parental rights to determine "whether the [district court's] findings address the statutory criteria, whether those findings are supported by substantial evidence, and whether they are clearly erroneous." *In re Welfare of D.D.G.*, 558 N.W.2d 481, 484 (Minn. 1997). "Considerable deference is due to the district court's decision because a district court is in a superior position to assess the credibility of witnesses." *In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996). "[B]ut [we] will closely inquire into the sufficiency of the evidence to determine whether it was clear and convincing." *In re Welfare of J.M.*, 574 N.W.2d 717, 724 (Minn. 1998).

A district court may terminate parental rights based on a determination

> that a child has experienced egregious harm in the parent's care which is of a nature, duration, or chronicity that indicates a lack of regard for the child's well-being, such that a reasonable person would believe it contrary to the best interest of the child or of any child to be in the parent's care.

Minn. Stat. § 260C.301, subd. 1(b)(6) (2008). "'Egregious harm' means the infliction of bodily harm to a child or neglect of a child which demonstrates a grossly inadequate ability to provide minimally adequate parental care." Minn. Stat. § 260C.007, subd. 14 (2008).

The egregious-harm provision permits termination of a parent's rights even when the parent did not inflict the harm. *T.P.*, 747 N.W.2d at 361-62. But knowledge of the egregious harm is a prerequisite to terminating the parental rights of a non-perpetrating parent because permitting termination "where a parent did not know and could not have been expected to know that a child experienced egregious harm would contradict the statutory requirement that the 'nature, duration, or chronicity [of the egregious harm] indicates a lack of regard for the child's well-being.'" *Id.* at 362 (quoting Minn. Stat. § 260C.301, subd. 1(b)(6)) (alteration in original). Therefore, "to terminate the rights of a parent who has not personally inflicted egregious harm on a child, a court must find that the parent either knew or should have known that the child had experienced egregious harm." *Id.* Knowledge of egregious harm "is necessary, but not sufficient, to satisfy the [lack-of-regard] requirement." *Id.* at 362 n.4.

I. The district court's findings are not sufficient to terminate appellants' parental rights.

B.T.N. and A.V.D. contend that the district court's supplemental findings on remand are still insufficient to meet the knowledge standard set forth in *T.P.* We agree.

The district court found that A.D.'s fatal injuries were non-accidental and constitute egregious harm. The district court further found that because B.T.N. and A.V.D. were A.D.'s only caretakers, at least one of them must have caused the egregious harm and that a non-perpetrating parent would have reasonably known of the harm because of A.D.'s "noticeable symptoms." But the finding that a non-perpetrating parent would have observed symptoms is, at most, a finding that the parent knew or should have

known that A.D. was injured. It is not a finding that a non-perpetrating parent would have been reasonably aware that A.D. had sustained egregious harm. The district court did not determine which parent caused the harm, identify the "noticeable symptoms," or find that the symptoms would have reasonably led a non-perpetrating parent to know that A.D.'s injury was the result of "some conduct satisfying the 'egregious harm' definition." *Id.* at 363. Because Minn. Stat. § 260C.301, subd. 1(b)(6), and *T.P.* require a finding that the non-perpetrating parent not only knew of an injury but also knew or should have known that the injury was sustained "as a result of some conduct satisfying the 'egregious harm' definition," the district court's findings with respect to a non-perpetrating parent's knowledge are insufficient. *Id.*

The district court's finding that a parent not present when A.D. experienced the egregious harm "would now know" that the other parent must have caused the harm does not remedy this deficiency. This "would now know" finding presumably references the knowledge B.T.N. and A.V.D. acquired as a result of the medical evidence presented in the TPR proceedings. But nothing in the language of the statute or the caselaw provides that such after-acquired knowledge satisfies the knowledge requirement. Implicit in the *T.P.* decision is the notion that a non-perpetrating parent cannot be held responsible for egregious harm to a child unless the parent, because of actual or reasonable knowledge, had the opportunity to respond to or protect against the harm. It is the non-perpetrating parent's failure to act in response to a known egregious harm that "indicates a lack of regard for the child's well-being" in order to permit termination. Minn. Stat. § 260C.301, subd. 1(b)(6). Knowledge acquired after a child's death does not meet the *T.P.* standard.

II. The record evidence is not sufficient to support the district court's findings of fact.

B.T.N. and A.V.D. also challenge the sufficiency of the evidence supporting the district court's termination decision, arguing that the record is devoid of evidence that either of them "knew or should have known that the child had experienced egregious harm." *T.P.*, 747 N.W.2d at 362.

A.D. was cared for exclusively by his parents. And the record clearly establishes that A.D. died because of non-accidental blunt force trauma to his head. The evidence, therefore, amply supports the district court's findings that A.D. experienced egregious harm while in his parents' care and that at least one of them caused his death. But there is no evidence indicating which parent inflicted the harm or whether both parents acted in concert. Unlike in *T.P.*, we therefore have no basis for distinguishing a non-perpetrating parent from a perpetrating parent. *See id.* at 359-60 (father did not challenge the finding that egregious harm occurred while the child was in his care). Accordingly, the terminations may not be sustained against either B.T.N. or A.V.D. unless there is sufficient evidence that they both knew or should have known A.D. experienced egregious harm.

The district court found that the parent who inflicted the non-accidental egregious harm would have known of the harm. The district court also found that A.D. would have had "noticeable symptoms" and concluded that a non-perpetrating parent should have known of the harm because of these symptoms. But even if evidence of noticeable symptoms were sufficient to establish a non-perpetrating parent's knowledge of

egregious harm, there is insufficient record evidence to support the finding that A.D. had noticeable symptoms.

The district court identified the medical examiner's testimony as the basis for its finding. But the medical examiner testified only that a child with a large subdural hematoma, like A.D., "is going to have symptoms." The medical examiner did not describe what the symptoms would be, and did not specifically indicate that the symptoms would be noticeable. The ophthalmic pathologist testified that a young child who survives an injury like A.D.'s may experience impaired vision, which might cause the child to cry more or have difficulty recognizing faces or picking up food. But this doctor did not testify about the likelihood of vision impairment or the potential symptoms he identified or indicate whether A.D., in particular, would likely have exhibited any of these symptoms. There was no evidence that a lay person would reasonably know that a child has experienced egregious harm when the child exhibits such symptoms. Moreover, the only external sign of A.D.'s fatal injury was a bruise on his head, which was not visible until his head was shaved for surgery. The evidence does not sustain the district court's findings that a non-perpetrating parent knew or should have known that A.D. experienced egregious harm.

We recognize the district court's concern that reversing the terminations seems to "ignore at least one party's act of inflicting non-accidental egregious harm to a child." The circumstances of A.D.'s death are tragic and troubling. But we cannot ignore the requirement that the statutory ground for terminating parental rights be proved "by clear and convincing evidence." Minn. Stat. § 260C.317, subd. 1 (2008). The absence of

evidence indicating which parent caused the harm and that a non-perpetrating parent knew or should have known that A.D. had experienced egregious harm is determinative. Because there is not sufficient evidence to support the termination of B.T.N. and A.V.D.'s parental rights, we reverse both termination decisions.

Reversed.