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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1110**

In the Matter of the Welfare of the Children of: V. J. J. and R. L. H., Parents

**Filed November 10, 2009
Affirmed
Larkin, Judge**

Blue Earth County District Court
File No. 07-JV-07-151

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Considered and decided by Minge, Presiding Judge; Schellhas, Judge; and Larkin, Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant-mother challenges the termination of her parental rights, arguing that her conduct did not constitute felony neglect of a child, that she did not have actual or

constructive knowledge that substantial bodily harm was inflicted upon her child, and that neither the nature, duration, nor chronicity of her child's injuries demonstrated lack of regard for her child's well-being. We affirm.

FACTS

Appellant V.J.J. (mother) and R.L.H. (father) are the biological parents of three children: daughter Jy.J. born in February 2006, and sons Jo.J. and Ja.J., conjoined twins born prematurely in November 2006. After their births, Jo.J. and Ja.J. were surgically separated and remained hospitalized in a neonatal intensive care unit (NICU) at St. Mary's Hospital in Rochester for an extended period. Jo.J. was discharged from the hospital on January 3, 2007; Ja.J. remained for further treatment. Prior to discharge, Jo.J. was examined by a physician who concluded that Jo.J. was healthy and thriving. V.J.J. testified that she had daily contact with the nurses at the NICU regarding Ja.J.'s condition after Jo.J.'s discharge.

On January 4, 2007, Jo.J. received a comprehensive physical examination during a check-up at Mayo Clinic, which involved vigorous manipulation of his legs and hips. Jo.J. appeared healthy and did not display any symptoms of pain or discomfort during the checkup. The physician, Dr. Allison Hettinger, prescribed several routine immunizations to be administered by injection into Jo.J.'s thighs. Dr. Hettinger informed V.J.J. that minor swelling might occur at the site of the injections and encouraged V.J.J. to contact the clinic if she had any concerns. Jo.J. received the immunizations on January 4 or 5, and a follow-up appointment was scheduled for January 12. After Jo.J. received his vaccinations, the parents returned to their home in Mankato with Jy.J. and Jo.J.

Between January 5 and January 11, Jo.J. sustained severe injuries to his legs and arms, including multiple fractures. According to V.J.J., these injuries manifested themselves as minor swelling and bruising in Jo.J.'s legs. V.J.J. believed that these symptoms were merely reactions to the immunizations. V.J.J. testified that, beginning on January 5, Jo.J.'s pained reactions to having his legs moved were such that V.J.J. adapted her method of changing his diaper so that she would not have to lift his legs. V.J.J. also told a police investigator that at one point Jo.J. lost his voice because he had been "crying too much." V.J.J. also testified that, after leaving Jo.J. in R.L.H.'s care on the weekend of January 6, she noticed that Jo.J. had abrasions on his face.¹ Both parents testified that Jo.J.'s symptoms did not worsen between January 5 and January 11.

On January 7, 2007, V.J.J. called the NICU and spoke with Nurse Mandy Reckward about Ja.J.'s condition. During the conversation, Reckward heard crying in the background, and V.J.J. explained that Jo.J. was "fussy" and that his legs were bruised and swollen because of his immunizations. Reckward asked V.J.J. if she had discussed the symptoms with a doctor or nurse, and V.J.J. replied that she had done so and was told these were common reactions to immunization.² Reckward told V.J.J. that she did not think Jo.J. was experiencing a typical reaction from his immunizations. Despite (1) Nurse Reckward's advice, (2) Jo.J.'s complicated birth and medical history, (3) V.J.J.'s daily contact with the nurses at the NICU regarding Ja.J.'s condition,

¹ V.J.J. testified that at that time, R.L.H. denied harming Jo.J. Three months later, in a telephone conversation between the two while R.L.H. was incarcerated, R.L.H. told V.J.J. that he had fallen asleep with Jo.J. in his arms, and that Jo.J. had fallen to the floor.

² The record shows that V.J.J. received this advice on January 5 from her mother, a nurse's aide.

including V.J.J.'s trips to the hospital on January 9 and January 10 to visit Ja.J. while Jo.J. was with R.L.H. at a nearby Ronald McDonald House, and (4) Dr. Hettinger's advice that V.J.J. contact her if V.J.J. had any concerns related to Jo.J.'s immunizations, V.J.J. did not bring Jo.J. to see a doctor or nurse until January 11.

On January 10, V.J.J. called the NICU to check on Ja.J. and to ask about Jo.J.'s swelling, which she described as "a little swelling" in one leg and "a lot" in the other. A nurse instructed V.J.J. to bring Jo.J. in for an examination. On January 11, the parents brought Jo.J. to the emergency room at St. Mary's and told Nurse Lindia Stein that Jo.J.'s thighs were swollen and had been since his immunizations. Nurse Stein testified that Jo.J.'s thighs were extremely swollen and discolored, and his skin in this area was hard to the touch. Other medical professionals who examined Jo.J. on that day testified that Jo.J. was in obvious pain and that his bruising was so severe that it could be seen from across the room. X-rays revealed multiple fractures—24 in total—including fractures to Jo.J.'s femur, lower tibia, and fibula in both legs. The left femur was in an early stage of healing, while the other fractures were more acute, indicating that the injuries had occurred at different times. X-rays also revealed multiple rib and arm fractures. The x-ray reports indicated that, due to the different stages of healing, the injuries were "highly suggestive of non-accidental trauma." Dr. Anthony Stans, a pediatric orthopedic surgeon who examined Jo.J., testified that at least one femur fracture was at least four days old, and that Jo.J. would have been in "considerable pain" for several days prior to appearance at the emergency room.

Jy.J., Jo.J., and Ja.J. were subsequently removed from the parents' custody, and a CHIPS petition was filed on January 17, 2007. The district court placed the children in foster care. The Rochester Police Department investigated the case for possible child abuse, and a police officer interviewed both parents about the events related to Jo.J.'s injuries. Criminal charges stemming from Jo.J.'s injuries were later brought against both parents, and the county petitioned to terminate V.J.J. and R.L.H.'s parental rights to all three children.

The district court granted the county's petition on the basis that Jo.J. was subjected to egregious harm while in his parents' care. The court rejected the parents' theory that Jo.J.'s injuries did not result from abuse, and instead concluded that "[a]t least one of these individuals [V.J.J. and/or R.L.H.] caused the fractures to [Jo.J.], while they both ignored the obvious symptoms of a child in distress, and failed to seek timely and appropriate medical treatment for their child." V.J.J. appealed, and this court reversed and remanded, determining that the district court's findings, though "detailed" and "exemplary," did not address the concerns articulated in the recent supreme court case *In re Welfare of Child of T.P.*, 747 N.W.2d 356, 361-62 (Minn. 2008). *In re Welfare of Children of V.J.J.*, No. A08-0683, 2008 WL 4778057, at *1-2 (Minn. App. Nov. 4, 2008). In particular, this court ruled that the district court failed to find, as required by *T.P.*, whether V.J.J. "knew or should have known about the harm and its cause." *Id.* at *2.

On remand, the district court issued detailed supplemental findings of fact and an order, which incorporated its previous findings and again terminated V.J.J.'s parental rights. The district court stated in its supplemental order that "[t]he evidence is clear and

convincing that both [R.L.H. and V.J.J.] knew or should have known that [Jo.J.] suffered egregious harm while in their joint, as well as, individual care,” and that the egregious harm was “of a nature, duration, or chronicity that indicates that [R.L.H. and V.J.J.] lacked regard for [Jo.J.’s] well-being.” In its attached memorandum, the district court found that both parents inflicted egregious harm “by their inaction and complete disregard of their parental responsibilities to care for the physical health of their child,” regardless of which parent actually caused the injuries. V.J.J. appeals.

DECISION

“[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). A court may order termination of parental rights when it finds that at least one of the nine conditions listed in Minn. Stat. § 260C.301, subd. 1(b) (2008), exists. One of these conditions is 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) (emphasis added). “Egregious harm” is defined in Minn. Stat. § 260C.007, subd. 14 (2008), as “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.” This subdivision provides a nonexclusive list of conduct that constitutes egregious harm, including the two forms of egregious harm that the district court identified in its supplemental order: (1) the infliction of substantial bodily harm as

defined in Minn. Stat. § 609.02, subd. 7a (2008); and (2) felony neglect or endangerment under Minn. Stat. § 609.378 (2008). Minn. Stat. § 260C.007, subd. 14(2), (5).

“An order terminating parental rights is reviewed to determine whether the district court’s findings address the statutory criteria and whether those findings are supported by substantial evidence and are not clearly erroneous.” *In re Children of T.A.A.*, 702 N.W.2d 703, 708 (Minn. 2005) (quotation omitted). “Termination of parental rights will be affirmed as long as at least one statutory ground for termination is supported by clear and convincing evidence and termination is in the child’s best interests.” *In re Welfare of Children of R.W.*, 678 N.W.2d 49, 55 (Minn. 2004). On review, “[c]onsiderable 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). This court will review the record in the light most favorable to the district court’s factual findings, which this court will set aside only if a review of the entire record leaves the “definite and firm conviction that a mistake has been made.” *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000) (quotations omitted).

I

V.J.J. challenges the district court’s conclusion that she subjected Jo.J. to egregious harm in the form of neglect while Jo.J. was in her care, on the ground that her conduct did not satisfy the elements of felony neglect of a child. A parent commits felony neglect of a child when that parent “willfully deprives a child of necessary . . . health care . . . when the parent . . . is reasonably able to make the necessary provisions and the deprivation harms or is likely to substantially harm the child’s physical, mental,

or emotional health.” Minn. Stat. § 609.378. V.J.J. argues that “willfully” in this section means “intentionally,” and that the district court failed to determine that she intentionally deprived Jo.J. of medical care. *See State v. Cyrette*, 636 N.W.2d 343, 348 (Minn. App. 2001) (“[W]e find nothing in the legislative history of [section 609.378] to suggest that the legislature intended ‘willfully’ to mean anything other than ‘intentionally.’”), *review denied* (Minn. Feb. 19, 2002).

But neglect of a child need not rise to the level of felony neglect to satisfy the statutory definition of egregious harm. Section 260C.007, subdivision 14, provides that egregious harm can take the form of “neglect of a child,” and that egregious harm “includes, but is not limited to” felony neglect. Therefore, child neglect that does not rise to the level of felony neglect may constitute egregious harm if the child neglect demonstrates “a grossly inadequate ability to provide minimally adequate parental care.” In its supplemental order and memorandum, the district court found that Jo.J. exhibited the symptoms of his multiple fractures for “many days,” and that both V.J.J. and R.L.H. “inflicted egregious harm upon [Jo.J.] by their inaction and complete disregard of their parental responsibilities to care for the physical health of their child.” The district court also found that V.J.J.’s delay in seeking treatment for Jo.J. “demonstrates her inability to protect any of her children from harm.” These findings are supported by clear and convincing evidence and demonstrate “a grossly inadequate ability to provide minimally adequate parental care.” Minn. Stat. § 260C.007, subd. 14.

Moreover, in its supplemental order, the district court explicitly determined that V.J.J. “knowingly concealed the true extent of [Jo.J.’s] injuries” and that V.J.J.’s

“intentional delay in seeking treatment resulted in further injury and pain to” Jo.J. This determination is supported by the district court’s findings that, despite having daily access to nurses at the NICU and having “specific information” of Jo.J.’s symptoms, V.J.J. “never described the severe bruising, swelling, and pain” that Jo.J. was suffering, and that V.J.J. provided “implausible and inconsistent” explanations of Jo.J.’s injuries to medical staff during her time in the emergency room with Jo.J. on January 11 and to the investigating police officer. Given that Jo.J.’s injuries were several days old when Jo.J. was finally brought to the emergency room, and the extent of their visibility as described by health-care providers, there is clear and convincing proof that V.J.J.’s intentional delay in seeking treatment constituted an intentional deprivation of medical care.

The district court’s findings are supported by clear and convincing evidence in the record. The record establishes that on January 7, Nurse Reckward told V.J.J. that Jo.J.’s symptoms were not typical reactions to vaccination and advised V.J.J. to talk to a doctor or nurse about Jo.J.’s symptoms, but V.J.J. did not do so until the evening of January 10. Although V.J.J. visited the NICU on both January 9 and on the afternoon of January 10 to check on Ja.J., she did not recall discussing Jo.J.’s condition with any of the nurses. Additionally, before the nurse administered Jo.J.’s vaccinations, Dr. Hettinger gave V.J.J. her card and instructed V.J.J. to call her “if there [were] any problems,” but V.J.J. never did so.

The record further establishes that V.J.J. was consistently misleading in her descriptions of Jo.J.’s symptoms. In her conversation on Sunday, January 7, with Nurse Reckward, V.J.J. described Jo.J. only as being “fussy” and as having bruised and swollen

legs. Both parents testified that Jo.J.'s symptoms did not worsen between January 5 and 11. Nurse Stein, who examined Jo.J. in the emergency room on January 11, was told by V.J.J. and R.L.H. only that Jo.J.'s thighs were "very swollen" and had been since he'd received his immunizations, and that his ileostomy appliance did not fit well. But Nurse Stein personally observed that Jo.J.'s thighs, aside from being "extremely swollen," were "discolored" and "purplish" and that the skin was "very hard to touch." Dr. Broughton testified that when Jo.J. was brought into the emergency room, his symptoms were "extreme" and that "the physicians and the nurses involved were all very upset at how much discomfort this child was in." Moreover, while V.J.J. acknowledged that she modified her method of changing Jo.J.'s diapers as early as January 5, she did not inform any of the nurses she talked to that Jo.J. cried in pain when she tried to change him.

On the whole, the record demonstrates that despite V.J.J.'s attempt to minimize the extent of Jo.J.'s symptoms between January 5 and January 11, Jo.J. exhibited considerable pain and extreme swelling and bruising during most or all of that time. Reviewing the record as a whole, we are unconvinced that the district court erred in its findings. *See Vangsness*, 607 N.W.2d at 472 (stating that this court reviews the record in the light most favorable to the district court's findings and will not reverse them absent a "definite and firm conviction that a mistake has been made" (quotations omitted)). To the extent that the district court's findings differ from V.J.J.'s testimony, the findings are due "[c]onsiderable deference . . . because a district court is in a superior position to assess the credibility of witnesses." *L.A.F.*, 554 N.W.2d at 396. We therefore uphold the district court's conclusion that V.J.J.'s failure to seek medical attention before January 11

constituted an “intentional delay in seeking treatment” and that V.J.J.’s conduct constituted egregious harm in the form of felony neglect of a child in satisfaction of Minn. Stat. § 609.378, or in the alternative, constituted neglect demonstrating V.J.J.’s grossly inadequate ability to provide minimally adequate parental care.

II

V.J.J. also challenges the district court’s decision to base its termination of her parental rights on the substantial bodily harm that Jo.J. suffered. Section 260C.007, subdivision 14, defines “egregious harm” to include the infliction of substantial bodily harm, which section 609.02, subd. 7a, defines as “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member.” V.J.J. does not dispute that Jo.J. suffered substantial bodily harm. The district court did not find that V.J.J. inflicted Jo.J.’s injuries; rather, it found that “at least one of these individuals [V.J.J. and/or R.L.H.] caused the fractures to [Jo.J.].” Where the district court does not find that a parent caused the substantial bodily harm, the district court still may find that the egregious-harm standard is satisfied as to that parent if the parent knew or should have known of the egregious harm. *T.P.*, 747 N.W.2d at 362. A finding that a parent knew or should have known of the egregious harm must be supported by clear and convincing evidence. *Id.*

V.J.J. claims that the district court’s supplemental findings and order do not satisfy the requirements of *T.P.* because they do not state that V.J.J. knew or should have known of the cause of Jo.J.’s injuries. As the supreme court stated in *T.P.*, “it is difficult to

conceive how the ‘nature, duration, or chronicity’ of that harm could indicate that parent’s lack of regard for the well-being of the child unless that parent were somehow aware of the harm *and its cause.*” *Id.* (emphasis added). Furthermore, the supreme court remanded *T.P.* to the district court with instructions “to address whether there is clear and convincing evidence that [the mother] knew or should have known that the bruising and the fractures [the child] sustained occurred *as a result of some conduct satisfying the ‘egregious harm’ definition.*” *Id.* at 363 (emphasis added). Accordingly, when this court remanded this case to the district court, we noted that the district court failed to find whether V.J.J. “knew or should have known about the harm *and its cause.*” *V.J.J.*, 2008 WL 4778057, at *2 (emphasis added). From this, V.J.J. argues that she cannot be held responsible for her inaction absent proof that she knew the actual cause of Jo.J.’s injuries.

But *T.P.* does not require that a parent have detailed knowledge of the cause of the harm. Rather, *T.P.* requires that the parent knew or should have known that the harm was caused by some conduct satisfying Minn. Stat. § 260C.007, subd. 14. 747 N.W.2d at 362. Here, direct evidence showed that V.J.J. was aware of the pronounced bruising and swelling on Jo.J.’s legs, Jo.J.’s discomfort, and the abrasions to Jo.J.’s face. In addition, the district court found that, “[g]iven the severity of the injuries, there would have been evidence of trauma that [was] absolutely known or seen and where the child would have reacted in significant pain.” The court concluded that Jo.J.’s injuries were “obvious and horrific” and determined that Jo.J.’s symptoms “would have led a reasonable person to believe [Jo.J.] was subjected to egregious harm.”

Clear and convincing evidence in the record shows that V.J.J. should have known that substantial bodily harm was inflicted upon Jo.J. The record here indicates that the symptoms of Jo.J.'s trauma were more extreme and obvious than the bruising and marks noticed by the mother in *T.P.* V.J.J.'s mother described Jo.J.'s bruises to a police investigator as "huge marks" that looked as though someone had grabbed Jo.J.'s legs "hard to hold them down." The nurse who examined Jo.J., observed that his legs were extremely swollen and discolored. One of the doctors who examined Jo.J. on January 11 testified that his bruises could be seen from across the room; another testified that Jo.J. would have been in considerable pain for several days prior to January 11. V.J.J.'s own expert witness testified that Jo.J. would have experienced pain that was "excruciating," "exquisite," "agonizing," and "horrible" as a result of his injuries, and V.J.J. reported to a police investigator that at one point Jo.J. had cried until he lost his voice. Given these symptoms, a reasonable person in V.J.J.'s position should have known that substantial bodily harm had been inflicted upon Jo.J. in some form.

V.J.J.'s description of Jo.J.'s symptoms stands in stark contrast to the evidence described above. V.J.J. testified that, immediately following the immunization, she observed only one inch of bruising and swelling on Jo.J.'s left thigh and no noticeable injury to his right thigh. Both V.J.J. and R.L.H. testified that Jo.J.'s condition remained unchanged throughout the week, and V.J.J. testified that she could not recall any time when Jo.J. appeared to be in pain or screamed in pain. In addition, V.J.J. qualified her January 11 statement to police, claiming that she meant that Jo.J. cried an inordinate amount only during the first night in Mankato, after which he cried "like a normal baby."

The record supports the district court's finding that V.J.J.'s descriptions of Jo.J.'s symptoms during the period from January 5 through January 11 were misleading and inconsistent with the extent of Jo.J.'s injuries, especially in light of the testimony of several medical professionals that Jo.J.'s injuries were four days old on January 11 and that Jo.J. was in extreme pain during that time. The district court reasonably inferred that V.J.J.'s efforts to downplay the extent of Jo.J.'s symptoms were a knowing attempt to conceal the extent to which she was or should have been aware of his injuries.

The district court was also influenced by V.J.J.'s interaction with Jo.J. in the hospital on January 11. Nurse Stein noticed that the parents exhibited unusual behavior in that they did not stand near Jo.J. during the examination and were reluctant to accompany him to radiology. Dr. Lloyd also noted that the parents remained separated from Jo.J. during the examination, and although it was obvious that Jo.J. was uncomfortable, the parents made no effort to console him. When Dr. Lloyd informed V.J.J. and R.L.H. of the x-ray results, they were unemotional and had little response; R.L.H. responded, "Oh, okay," and V.J.J. nodded her head and looked down. Neither parent offered any explanation for the injuries. The district court's findings reflect an implicit determination that V.J.J.'s reactions upon learning the extent of Jo.J.'s injuries were inconsistent with the behavior of a mother who truly believed that her child was merely having a reaction to immunizations.

Clear and convincing evidence in the record, both direct and circumstantial, supports the district court's conclusion that V.J.J. knew or should have known that Jo.J.

suffered egregious harm in the form of substantial bodily harm. Therefore, we also uphold this basis for the district court's egregious harm finding.

III

Finally, V.J.J. argues that the district court's finding that the egregious harm to Jo.J. was "of a nature, duration, or chronicity" that indicates a lack of regard for Jo.J.'s well-being is not supported by clear and convincing evidence. *See* Minn. Stat. § 260C.301, subd. 1(b)(6) (requiring egregious harm to be "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"). The plain language of Minn. Stat. § 260C.301, subd. 1(b)(6), indicates that only one of the three elements—nature, duration, or chronicity—must be satisfied.

As to "nature," V.J.J. argues that Jo.J.'s symptoms were consistent with his vaccinations and the advice V.J.J. received from others about them. But the district court rejected this theory, and its rejection finds clear and convincing support in the record. The record indicates that V.J.J. should have been aware that Jo.J.'s symptoms were not typical reactions to vaccinations, and that V.J.J. knowingly concealed the extent of Jo.J.'s symptoms during the week of January 11, 2007. Considering that Jo.J. was an infant who was only recently surgically separated from his conjoined twin, that Jo.J. suffered 24 fractures over the course of a week in the care of his parents, that at least one of the fractures was four days old when Jo.J. was finally brought to a hospital, and that Jo.J. would have been in considerable pain for days before he was treated, we are convinced

that the nature of both the bodily harm to Jo.J. and V.J.J.'s delay in seeking medical treatment demonstrated a lack of regard for Jo.J.'s well-being.

While the nature of the egregious harm alone justifies the termination of parental rights in this case, we also reject V.J.J.'s argument that the egregious harm was not of a duration that demonstrated a lack of regard for Jo.J.'s well-being. The record shows that Jo.J. sustained a fractured femur at least four days before he received any medical treatment for it and would have displayed considerable pain during that time. We affirm the district court's determination that a four-day delay in obtaining medical care for an infant in Jo.J.'s condition constitutes egregious harm of a duration that demonstrates a lack of regard for a child's well-being. We affirm the termination of V.J.J.'s parental rights.

Affirmed.

Dated:

Judge Michelle A. Larkin