STATE OF MICHIGAN

COURT OF APPEALS

In re LONG, Minors.

UNPUBLISHED
October 18, 2016

No. 330755
St. Clair Circuit Court
Family Division
LC No. 15-000274-NA

Before: GADOLA, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

Respondent appeals as of right from an order terminating her parental rights to the children under MCL 712A.19b(3)(b)(*i*) (parent caused physical injury to child or sibling), (j) (reasonable likelihood child will be harmed if returned to parent's home), and (k)(*v*) (parent abused child or sibling and abuse included life-threatening injury). We affirm.

Respondent first argues that the trial court made clearly erroneous findings of fact in determining that the statutory grounds for termination were proven by clear and convincing evidence. We disagree. The trial court's finding that a statutory ground for termination has been established by clear and convincing evidence is reviewed under the clearly erroneous standard. MCR 3.977(K); *In re Laster*, 303 Mich App 485, 491; 845 NW2d 540 (2013). "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).

First, respondent argues that the trial court erred in finding that the children's brother, 16-month-old LL, died from an overdose of Benadryl given to him by respondent where there was conflicting evidence regarding the level of Benadryl in LL's blood and where respondent's husband could not recall whether he had given Benadryl to LL the night before his death. We disagree.

Dr. Spitz, the medical examiner and forensic pathologist who performed the autopsy on LL, and Dr. Cassin, who testified for respondent and was qualified as an expert in forensic pathology, agreed that LL died from intoxication from Benadryl. While respondent reported that she gave LL only one teaspoon of Benadryl on the morning of his death, the toxicology report indicated that the level of Benadryl in LL's blood was 710 nanograms per milliliter. Dr. Cassin testified that within a reasonable degree of medical certainty this highly elevated level of Benadryl could have been the result of post-mortem redistribution of blood that occurred in the two days after the death. Dr. Cassin opined that post-mortem distribution could have caused the

Benadryl level at the time of the autopsy to be one and a half to two times greater than the amount actually circulating at the time of death. According to Dr. Cassin, normal Benadryl levels "usually don't exceed about 300." Dr. Spitz testified that, even assuming that post-mortem redistribution occurred, somebody taking Benadryl as prescribed would have had levels "significantly lower than 710 and significantly lower than 355." Given the evidence that both Dr. Spitz and Dr. Cassin agreed that LL died from an overdose of Benadryl, and the evidence that the level of Benadryl in LL's system was elevated above a normal dose even considering post-mortem distribution, the trial court did not clearly err in finding that LL died of an overdose of Benadryl.

Furthermore, we find no clear error in the trial court's finding that respondent gave LL the overdose of Benadryl. Respondent admitted that she gave LL Benadryl in his bottle on the morning of his death. While respondent's husband could not recall whether he had given LL Benadryl the night before the death, he testified that he was "almost positive" that respondent would have given the Benadryl because he had been busy doing projects around the house. Respondent's husband denied giving Benadryl to the children on the morning of LL's death. He further testified that, whenever he gave the children medication, he measured the dose with the measuring cup that came with the medication. Given this evidence, we find no clear error in the trial court's finding that respondent gave LL the overdose of Benadryl.

Next, respondent argues that the trial court clearly erred in finding that the label on a bottle of Benadryl does not provide doses for children under two years old. Specifically, the trial court stated as follows:

> The child in this case, [LL], died. There's no question that he died as a result of an overdose of Benadryl. There is also no question that the level of Benadryl in his body was significantly, significantly elevated over what a normal dose would be. *I'm not unaware, Benadryl is a very common over the counter drug, and I'm not unaware that there are labels all over bottles of that nature that say you should not give this to a child under the age of two. So I don't know what the normal dose for a child under the age of two would be when they're suggesting, when it's suggested that a child that age should not have it at all.*

This Court agrees that where there was no evidence in the record indicating that the Benadryl label did not provide doses for children under two years old, the trial court's statement was not supported by the evidence. Nevertheless, when the trial court's findings are read as a whole, its comments regarding the Benadryl label were not the basis of its ultimate finding that the statutory grounds for termination had been proven. The trial court repeatedly noted that the level of Benadryl in LL's blood was significantly elevated, and it was this finding, rather than the court's apparent belief that Benadryl should not be given to children under two years of age that led the court to find that respondent was responsible for LL's death. Furthermore, while respondent argues that the trial court's finding that Benadryl should not have been given to a child LL's age was improper where her husband testified that a doctor had given LL medication the week before his death, there was no evidence that the medication given by the doctor was Benadryl.

Respondent next argues that the trial court clearly erred in finding that she was in a "drug-induced stupor" on the day of LL's death. We disagree.

Respondent notes that the toxicology expert testified that the opioids in respondent's saliva sample were within therapeutic levels. In addition, respondent's husband testified that respondent sounded awake and alert when he called the home on the morning of LL's death. Nevertheless, other evidence in the record supports the trial court's finding that respondent was in a "drug-induced stupor" on the day of LL's death. We note that the import of this finding was that the respondent was in a physical state that rendered her unable to effectively monitor the children. To that extent it is not crucial that her physical state was occasioned by a voluntary over use of drugs or the consumption of medications in accordance with physicians orders. The result was that she was not oriented sufficiently to care for the children including giving them appropriate medicines. In addition, there was substantial evidence that respondent appeared "groggy," and that she frequently fell asleep during the day, sometimes while standing. Lieutenant Koach testified that respondent fell asleep during the police interview on the day of LL's death with her head down "almost under the table," for "quite a period of time." There was evidence to support a finding that the lack of orientation was due to abuse of prescription medication. Additionally, there was also evidence shown that respondent was abusing prescription medication contemporaneous with LL's death. The police found a bottle of Oxycodone pills at the house that was missing 37 pills even though respondent had refilled the prescription only two days before. Respondent's doctor testified that she was supposed to be taking one pill every six hours but respondent admitted to Children's Protective Services specialist Rory Ayotte that she had taken four to six Vicodin pills that day. Given the evidence that respondent was abusing prescription medications in the months leading up to LL's death, admitted to taking more than the prescribed amount of Vicodin on the day of the death, and had a long-standing inability to stay awake and alert, the trial court did not clearly err in finding that respondent was in a "drug-induced stupor" on the day of LL's death.

Finally, respondent argues that the trial court erred in finding that termination was in the children's best interests where there was evidence that respondent was the children's primary caregiver and knew more about their medical needs than her husband. We disagree. A trial court's findings regarding a child's best interests are reviewed for clear error. MCR 3.977(K); *In re Laster,* 303 Mich App at 496.

As respondent notes, the evidence indicated that respondent was the children's primary caregiver in that she stayed home with the children while her husband worked outside the home. In addition, respondent's husband indicated that respondent knew more about the children's medical needs than he did. There was other evidence, however, that despite her love and affection for them that the bond between respondent and her children was strained. By way of example, respondent's father-in-law, who supervised respondent's visits with the children after LL's death, testified that respondent greeted the children, but usually fell asleep while watching television with them during the visits. During one visit, the older child went upstairs to play video games after becoming frustrated at having to wake respondent up twice while he was trying to speak to her.

Furthermore, even if there was a bond between respondent and the children, other factors indicated that termination was in the children's best interests. Charles Dobat, a clinical social

worker with the Marysville Schools, testified that respondent's older child expressed concerns about his mother's inability to remain alert and awake and indicated that he felt partly responsible for caring for his younger siblings and picking up around the house when he was living with respondent. Other evidence showed that the older child had to wake his mother up to get him ready for school in the morning, and that respondent frequently forgot to send this child's medication to school with him. The school principal indicated that it was "a challenge" to resolve the medication issue because respondent would not answer the telephone, later indicating that she had been sleeping.

The trial court's best-interest determination was supported by other evidence that applied to both surviving children. In sum, the evidence presented at the hearing indicated that, while physically present in the home with the children, respondent's long-standing abuse of prescription medication prevented her from providing proper care and supervision. Under these circumstances, respondent has not shown that the trial court clearly erred in finding that termination of her parental rights was in the best interests of the children.

We therefore affirm the trial court's order terminating respondent's parental rights to the children.

Affirmed.

/s/ Michael F. Gadola
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens