Order

Michigan Supreme Court
Lansing, Michigan

July 19, 2024

165889

In re D.N. DAILEY, Minor.

SC: 165889
COA: 363164
Wayne CC Family Division:
2019-000790-NA

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On May 8, 2024, the Court heard oral argument on the application for leave to appeal the May 18, 2023 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

WELCH, J. (*dissenting*).

The Court of Appeals affirmed the trial court's decision to terminate respondent-parents' parental rights. Respondent-father applies for leave to appeal. Because I believe that the trial court erred in failing to explore whether a guardianship was in the child's best interests, I respectfully dissent.

I. BACKGROUND

Respondent-parents began their relationship in 2016 while they were residents at halfway homes. Both parents battled addiction to prescription painkillers before turning to street drugs. In 2019, respondent-mother gave birth to DD. At that time, respondent-mother and DD tested positive for opiates and morphine. Following his birth, DD experienced severe withdrawal symptoms, requiring hospital staff to administer morphine.

Child Protective Services (CPS) investigated the matter. During that investigation, respondent-mother admitted to using heroin during her pregnancy and respondent-father tested positive for fentanyl and norfentanyl. One month later, both parents tested positive for opiates, heroin metabolites, morphine, and fentanyl. DD was placed in the care of his maternal grandmother, where he remained for the duration of this litigation.

The Department of Health and Human Services (DHHS) filed a petition requesting that the trial court assume jurisdiction over DD. Respondents entered pleas of admission

and conceded: (1) that DD was born with drugs in his system, (2) that they continued to abuse heroin, and (3) that their drug use impaired their ability to care for DD. The trial court accepted the pleas and assumed jurisdiction over DD. The trial court then ordered respondents to comply with treatment plans designed to address their addictions and improve their parenting skills.

Over the next six months, respondent-father attended substance use therapy, visited DD every day at the maternal grandmother's home, cared for DD during parenting time, and contributed financially to DD's care. However, respondents also continued to consistently test positive for heroin, fentanyl, and morphine.

In 2020, respondents stipulated that statutory grounds existed to support termination of their parental rights under MCL 712A.19b(3)(c)(*i*), (g), and (j). Because of the COVID-19 pandemic, however, the trial court did not hold a best-interests hearing until 2022. At that hearing, respondents asked the trial court to appoint DD's paternal grandmother as his legal guardian, rather than the maternal grandmother with whom the child had been living. Although DD had never lived with the paternal grandmother, respondents expressed a preference for the paternal grandmother over the maternal grandmother because they alleged that the maternal grandmother lived with a drug user.

DD's caseworker testified that DHHS sought termination rather than guardianship because termination offered "permanency." The caseworker further testified that respondent-father's drug use was the "only" reason that DHHS sought to terminate his parental rights.

The trial court terminated respondents' parental rights. The trial court acknowledged at various points throughout the proceedings that the parents cared for and loved DD and that the parents had been consistent in visiting and supporting him. Nevertheless, the trial court determined that the child's maternal grandmother was "the only real parent the child has known." Accordingly, the trial court found that it was in the child's best interests to remain with her. The trial court included in its order, however, that it did not object "to the parents continuing to have supervised contact with" the child, as such an arrangement would be "good for" the child. The Court of Appeals affirmed in an unpublished per curiam opinion. *In re Dailey*, unpublished opinion of the Court of Appeals, issued May 18, 2023 (Docket Nos. 363163 and 363164). This application for leave to appeal followed.

We ordered oral argument on the application. In our order, we directed the parties to address

> whether, when a child is in the care of a relative, the trial court is required to consider and eliminate available alternative remedies short of termination as a matter of: (1) constitutional due process, see generally *Washington v*

> *Glucksberg*, 521 US 702, 721 (1997) (The government may not infringe on fundamental liberty interests "unless the infringement is narrowly tailored to serve a compelling state interest."); or (2) statute, see MCL 712A.19b(5); and (3) whether the trial court erred in this case. [*In re Dailey*, 513 Mich 1002, 1002 (2024)].[1]

II. DISCUSSION

Because the trial court failed to explore whether a guardianship would serve DD's best interests, I believe that its best-interests finding was legally insufficient. For that reason, I would have reversed the Court of Appeals' judgment and remanded the matter to the trial court to consider whether guardianship would be in DD's best interests.

If a trial court "finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." *Id*. The trial court may consider several factors when deciding whether termination of parental rights is in a child's best interests, including "the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *In re Olive/Metts*, 297 Mich App 35, 42 (2012) (citations omitted). The trial court may also consider psychological evaluations, the child's age, continuing domestic violence, and a parent's history. See *In re Jones*, 286 Mich App 126, 131 (2009). As a general matter, "a child's placement with relatives weighs against termination." *In re Mason*, 486 Mich 142, 164 (2010).

"The trial court should weigh *all the evidence available* to determine the children's best interests." *In re White*, 303 Mich App 701, 713 (2014) (emphasis added). In considering the child's best interests, the trial court's focus must be on the child and not the parent. *In re Moss*, 301 Mich App 76, 87 (2013). Whether termination of parental rights is in a child's best interests must be proven by a preponderance of the evidence. *Id*. at 90. This Court reviews for clear error a trial court's finding that termination of parental rights is in a child's best interests. *In re Jones*, 286 Mich App at 129.

The Legislature designed guardianship to be "permanent and self-sustaining." MCL 722.875b. Guardianship is recognized as a permanency planning goal by both the state and federal governments. According to guidance from DHHS, when reunification with a parent is not possible, guardianship may be an appropriate permanency goal rather than adoption when:

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[1] We heard oral argument for this case alongside *In re Bates*, 513 Mich 1001 (2024). For that case, I join Justice CAVANAGH'S dissenting statement in full.

> It is in the child's best interest to maintain the parental rights of the birth parent(s) because the child and parent(s) have a meaningful relationship as evidenced by attachment and regular visitation. However, the parent(s), due to physical, medical, or mental health disabilities is unable to provide day-to-day supervision and care for the child. The guardianship would allow the child to be cared for by the guardian(s) on a permanent basis and maintain a relationship with the birth parent(s). [DHHS, *Child Guardianship Manual*, GDM 600 (August 1, 2022), pp 3-4.]

Research shows, moreover, that guardianships can promote permanency and stability without destroying a parent-child bond. See, e.g., Gupta-Kagan, *The New Permanency*, 19 UC Davis J Juv L & Pol'y 1 (2015); Testa, *The Quality of Permanence—Lasting or Binding? Subsidized Guardianship and Kinship Foster Care as Alternatives to Adoption*, 12 Va J Soc Pol'y & L 499 (2005); Testa, *Disrupting the Foster Care to TPR Pipeline: Making a Case for Kinship Guardianship as the Next Best Alternative for Children Who Can't Be Reunified with Their Parents*, Family Integrity & Justice Quarterly 74 (Winter 2022).

Again, a trial court should only terminate parental rights if doing so is in the child's best interests. MCL 712A.19b(5). In this case, respondents proposed a nontermination option via guardianship. However, the trial court failed to explore guardianship options in any level of depth—either with the paternal or maternal grandmother. Instead, the trial court opted to terminate respondents' parental rights so that DD's maternal grandmother could adopt him. I believe that the trial court was obliged to explore guardianship as an option and determine whether it would have served DD *better* than termination.[2] I have no quarrel with the trial court's determination that placement with the maternal grandmother

[2] It does not seem that respondents ever suggested a guardianship arrangement with DD's maternal grandmother. Nor is it clear that the maternal grandmother would have been willing to participate in such an arrangement.

served DD's interests. But without exploring the potentially viable guardianship options,[3] the trial court could not reliably determine the child's "*best* interests," as the statute requires. MCL 712A.19b(5) (emphasis added).

For that reason, I would have adopted the rule set forth by the Kansas Supreme Court in a case that DHHS cited favorably in its brief. I would have held that trial courts "should carefully consider any particular alternative remedy proposed by an interested party in the case, and if rejected the court should state its reasons for such rejection." *In the Interest of Brooks*, 228 Kan 541, 551 (1980). This rule blends the statutory mandate that a trial court determine a child's best interests with the pragmatic reality that a trial court cannot explore *every possible* option. I would also require trial courts to at least consider guardianship in situations like the one at bar: where a child is in a relative's care and maintains healthy relations with the parents.

Because the trial court's best-interests analysis was incomplete, I respectfully dissent from the Court's denial order.

CAVANAGH, J., joins the statement of WELCH, J.

[3] According to DHHS's own guidance, "[t]he caseworker must explain the differences between adoption and guardianship to the prospective guardian(s) and child using the MDHHS Publication 140, Making the Decision to Become a Child's Permanent Family." DHHS, GDM 600 at 3. As counsel for petitioner acknowledged at oral argument, there is no record evidence in this case that DHHS followed this guidance or that DHHS or the trial court attempted to explain to the maternal grandmother the nature of a guardianship or the differences between a guardianship and adoption.