COURT OF APPEALS
DECISION
DATED AND FILED

August 18, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP176 **Cir. Ct. No. 2007TP101**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

IN RE THE TERMINATION OF PARENTAL RIGHTS TO EMILIE R. B., A PERSON UNDER THE AGE OF 18:

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

TERESA A. T.,

RESPONDENT-APPELLANT,

KEITH B.,

RESPONDENT.

APPEAL from orders of the circuit court for Brown County: JOHN D. MCKAY, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Teresa A.T. appeals orders terminating her parental rights to her daughter, Emilie R.B., and denying her postdisposition motion. Teresa argues: the court erred by interviewing Emilie off the record, and with only the guardian ad litem present; her attorney provided ineffective assistance by failing to present certain evidence concerning abandonment and failing to argue equitable estoppel; the evidence of abandonment was insufficient; and the court erroneously excluded relevant evidence at the disposition hearing. We reject Teresa's arguments and affirm the orders.

BACKGROUND

¶2 Emilie was born in January 1999. She was placed in a foster home pursuant to a CHIPS order in August 2003, returned to her mother's home in January 2005, and removed again in March 2005. On February 1, 2006, Teresa called the department, while intoxicated, and indicated she wished to voluntarily stop visits with Emilie. Teresa testified she did so because the case worker convinced her she was not a good mother and that Emilie was better off where she was. Teresa testified she asked to restart visits "a couple of months later[,]" but less than ninety days later, after having time to think about her decision.

¶3 The department filed a petition for involuntary termination of parental rights on April 11, 2006, but then withdrew the petition on August 4, 2006. The department later filed a new termination petition on September 17, 2007. The department alleged grounds existed based on two different periods of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes and Supreme Court Rules are to the 2007-08 version unless otherwise noted.

abandonment, February 1, 2006 through May 1, 2006, and May 18, 2007 through August 18, 2007.[2] Following a trial, the jury found abandonment.

¶4 At the outset of the two-day disposition hearing, the court announced it would interview Emilie in chambers with only the guardian ad litem present. Teresa objected to the exclusion of her counsel and to conducting the inquiry off the record. She argued the interview was part of the disposition hearing and therefore had to be recorded pursuant to WIS. STAT. § 757.55 and SCR 71.01. The court concluded the interview did not constitute testimony and, therefore, there was no authority requiring it to make a record of Emilie's statements.

¶5 At the close of evidence on the second day, the court granted Teresa's request to reveal what Emilie told the court in chambers. The court stated:

> In a very brief discussion with Emilie in chambers concerning what she wanted and what her feelings were, she told me that she wanted [Teresa] to let her go. That she was happy where she was and she wanted to stay where she was. And that's all she said.
>
> We looked at the fish in the fish tank, and I explained to her what the fish were. ....
>
> And then I said, was there anything else you wanted to say to me? And she said, no, and we came back out here.

Later, discussing the statutory disposition factors before announcing its decision, the court indicated:

[2] The petition originally alleged continuing CHIPS placement outside the home, but was later amended to also allege abandonment and a continuing denial of periods of placement or visitation. The department relied only on the abandonment grounds at trial.

> I talked to Emilie. I've seen evidence of what Emilie believes or feels.
>
> Emilie's perception in her own little sort of way is that if mom really loves me-- ....
>
> ….
>
> And she just doesn't understand why someone who really loves her wouldn't let her go. That's what she doesn't understand.
>
> And it wasn't my job nor my responsibility to explain that to her. That will come as she grows up and as she better understands the circumstances. But she definitely expressed her wishes.

Ultimately, the court concluded it was in Emilie's best interests to terminate Teresa's parental rights. Following remand for a postdisposition motion hearing, Teresa appeals.

DISCUSSION

¶6 Teresa first argues the circuit court's unrecorded, ex parte discussion with Emilie entitles Teresa to a new disposition hearing. Teresa contends the court violated WIS. STAT. § 906.14, which entitles the parties to cross-examine witnesses called by a court; violated SCR 71.01, which requires that all circuit court proceedings be reported;[3] and denied her due process and the right to counsel.[4] Teresa further argues the circuit court failed to even comply with the procedure discussed in ***Haugen v. Haugen***, 82 Wis. 2d 411, 262 N.W.2d 769 (1978), and ***Seelandt v. Seelandt***, 24 Wis. 2d 73, 128 N.W.2d 66 (1964), where

[3] Supreme Court Rule 71.01(1) defines reporting as "making a verbatim record."

[4] Teresa also suggests the court could have ordered a videotape deposition of Emilie pursuant to WIS. STAT. § 967.04(7).

our supreme court approved off the record interviews with children in custody cases. Finally, she argues ***Haugen*** and ***Seelandt*** should not be applied to termination of parental rights proceedings because of the greater protections required in these cases, citing ***Brown County v. Shannon R.***, 2005 WI 160, ¶¶57, 59, 286 Wis. 2d 278, 706 N.W.2d 269.

¶7 Given the stronger protections demanded in termination proceedings and the fact ***Haugen*** and ***Seelandt*** predate the adoption of SCR 71.01, with which the cases arguably conflict,[5] we strongly question whether those cases permit the procedure utilized by the circuit court in this case.[6] However, we need not resolve the issue because we conclude any error was harmless. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (cases should be decided on the narrowest possible grounds).

¶8 Teresa argues the error was not harmless because "Emilie had previously vacillated on whether or not she wanted to remain with her mother." Teresa's assertion, however, is not supported by any citation to the record. She further contends a former foster mother believed Emilie's current foster mother coerced Emilie. That testimony, however, was not offered until the postdisposition motion hearing and Teresa does not argue on appeal that her counsel was ineffective for failing to present it at the disposition hearing. Finally, Teresa states she believes Emilie was coerced by the foster mother. Again, she

[5] *See* ***State v. Ruiz-Velez***, 2008 WI App 169, ¶6 n.6, 314 Wis. 2d 724, 762 N.W.2d 449 (Supreme Court Rule 71.01(2)'s all-encompassing command has the force of a statute).

[6] We further observe the supreme court recognized the statutory right to cross-examination of the child in ***Haugen v. Haugen***, 82 Wis. 2d 411, 417, 262 N.W.2d 769 (1978), although the right was waived in that case.

provides no citation indicating she presented this belief to the circuit court at disposition or identifying the basis for her belief.

¶9 The circuit court's unreported, ex parte examination of Emilie is harmless in further respects. Teresa never attempted to call Emilie as a witness.[7] Because she forfeited her right to cross-examine Emilie, Teresa cannot now argue Emilie would have either testified to any attempted coercion or waivered in her desire for termination of Teresa's parental rights.

¶10 Further, the child's wishes constitute just one of six factors circuit courts must consider at disposition. *See* WIS. STAT. § 48.426(3). While the court considered the factor, it does not appear the court attributed a great amount of weight to it. Setting forth the reasons for its disposition, the court first acknowledged Teresa had made "an incredible and remarkable turnaround," but observed there remained a chance of relapse. Next discussing the statutory factors, the court concluded: adoption would be "a certainty;" Emilie was in good health and well cared for in her current placement; given Emilie's young age, she had been placed outside the home for a major portion of her cognitive life; Emilie had a substantial relationship with her great-grandmother that the court expected would likely continue even after termination; Emilie had a relationship with Theresa, but it was not very substantial following Emilie's placement in foster care; Emilie was separated from her parents since she was an infant, and this

[7] During the course of Teresa's objection to the court's procedure, both Teresa's counsel and the circuit court mentioned the possibility of calling Emilie as a witness; the court never stated it would preclude Teresa from doing so. Although Teresa claims she was deprived of the right to cross-examine Emily, Teresa provides no record citation indicating she attempted to call her as a witness. We will not search the record in support of her argument. *See* ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463.

factor was "a major consideration;" and Emilie would be able to enter into a more stable family relationship as a result of termination. Because all of the other statutory factors were neutral or weighed in favor of termination, and the court did not emphasize any other factors weighing strongly against termination, we are satisfied Emilie's wishes did not substantially affect the outcome. This is further evidenced by the circuit court's comment when discussing her wishes, indicating Emilie did not fully comprehend the circumstances due to her age.

¶11 Teresa next argues her attorney was ineffective for failing to introduce available evidence that she claims was essential to disprove the department's abandonment claims. Teresa must demonstrate that counsel's performance was deficient and that counsel's deficient performance prejudiced her defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 688 (1984). Teresa's first assertions of error pertain to the first period of abandonment, February 1 to May 1, 2006. Teresa claims the jury should have heard that, prior to her request to terminate visits, the foster mother had complained Teresa's phone calls were bothering Emilie; that the case worker's February 8, 2006 case notes state "no more calling—upset Emil[ie]"; and that Teresa would have been prohibited from visiting Emilie beginning April 11, 2006, when the department filed the petition for involuntary termination of parental rights.

¶12 We fail to see the relevance of the first two pieces of evidence. Teresa voluntarily ceased visits with Emilie, regardless of whether it was suggested or mandated that Teresa not call her. Regarding the alleged prohibition on visitation commencing April 11, Teresa was not told of any such prohibition until her meeting with the case worker on May 22, 2006. By that time, the period of abandonment already extended beyond three months. Further, the abandonment statute applies when a parent has failed to visit or communicate with the child.

See WIS. STAT. § 48.415(1)(a)2. Even if Teresa was prevented from calling or visiting Emilie, she does not explain why she could not have maintained communication by sending cards or letters. We therefore conclude counsel's performance was neither deficient nor prejudicial.

¶13 Teresa also argues her counsel was ineffective for failing to introduce evidence relevant to the second period of abandonment. We need not address that argument, however, because the department was only required to demonstrate one three-month period of abandonment. *See* ***id.***

¶14 Teresa next argues there was insufficient evidence of abandonment during both periods. Regarding the first period, she asserts the social workers prohibited visitation. This argument is resolved by our previous discussion. Teresa was not told visitation was prohibited until after three months of abandonment had elapsed and, regardless, nothing prevented her from writing Emilie. Teresa also asserts the evidence is insufficient because she testified she did make efforts to contact Emilie. The jury apparently rejected that testimony. "It is the function of the trier of fact, and not of an appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990). Teresa also asserts the evidence of abandonment during the second period was insufficient. Again, we need not address the second period of abandonment.

¶15 Teresa next claims counsel was ineffective for arguing that laches, rather than equitable estoppel, precluded a finding of abandonment for the first period. This argument is not adequately developed to be susceptible to appellate review. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App.

1994). To the extent we can discern her argument, it simply does not support a claim of equitable estoppel. Further, Teresa presents no authority indicating the department could not pursue a second termination proceeding after having dismissed an earlier petition.

¶16 Finally, Teresa argues the circuit court denied her due process right to present a complete defense by precluding her from presenting evidence at disposition that she was successfully raising another child. This might be a compelling legal argument if supported by the record. As laid out extensively in the department's response brief, however, Teresa was allowed to present evidence, through multiple witnesses, of her ability to adequately raise and care for her other daughter.

¶17 Further, the excluded evidence was not offered to demonstrate she was successfully raising another child. Merely saying it was does not make it so. Indeed, nowhere in her four-page argument does Teresa set forth the question the circuit court disallowed or her argument in support of the evidence. At the disposition hearing, Teresa argued the evidence, regarding a consent decree concerning her other daughter, was relevant to (1) whether that other relationship had been fostered or hampered by the department and (2) whether there were additional services that could be offered to assist with successful reunification of Emilie. Teresa did not, however, assert the evidence related to her ability to successfully parent.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.