COURT OF APPEALS
DECISION
DATED AND FILED

December 9, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP573 **Cir. Ct. No. 2009TP113**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO MATTHEW S., A PERSON UNDER THE AGE OF 18:

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

SUSAN P. S.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: DAVID T. FLANAGAN, III, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Susan P.S. appeals an order of the circuit court terminating her parental rights to her child, Matthew S. She argues that the circuit court erred at the dispositional phase when it failed to properly consider the wishes of Matthew. Susan also contends that the court erred in its handling of evidence relating to an adoption letter and certain e-mail messages. She suggests that reversal is merited. I disagree and affirm.

Background

¶2 In August 2008, after an incident leading to Susan's arrest, Susan's child, Matthew, was placed in foster care. Subsequently, in April 2009, Matthew was adjudged to be in need of protection or services. Susan was provided with conditions for his return, including obtaining a psychological evaluation, participating in recommended treatment, and regularly visiting Matthew. In November 2009, the Dane County Department of Human Services filed a petition to terminate Susan's parental rights, alleging that Susan had failed to meet the conditions for the return of Matthew. A hearing on the termination petition was held in December 2009, but Susan failed to appear. The court found that Susan had defaulted, and subsequently made a finding of unfitness.

¶3 At the dispositional hearing, Susan appeared *pro se* and indicated that she did not want an attorney appointed for her, but instead wanted to represent herself. At the conclusion of the dispositional hearing, the court found that

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

termination of Susan's parental rights was in Matthew's best interests and entered a termination order. Susan appeals *pro se*.[2]

Discussion

¶4 Susan's arguments are directed at the dispositional phase of the termination proceedings. "At the dispositional phase, the court determines whether the best interests of the child are served by the termination of the parent's rights." ***Oneida Cnty. Dep't of Soc. Servs. v. Nicole W.***, 2007 WI 30, ¶13, 299 Wis. 2d 637, 728 N.W.2d 652. "[T]he central focus of the court proceeding is now on the best interests of the child"; however, "the parent's rights are not ignored," and a parent "has the right to present evidence and to be heard at the dispositional phase." ***Id.*** The determination of a child's best interests is left to the discretion of the circuit court. ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996).

A. WIS. STAT. § 48.426(3) Factors

¶5 Susan asserts that the circuit court erred because it failed to properly consider the wishes of Matthew as required by WIS. STAT. § 48.426(3)(d). Susan appears to argue that this provision required the circuit court to consider testimony

[2] Susan filed an overly-long reply brief, and I accepted it for filing. Susan then filed a shorter reply brief. I also accept the second reply brief, and have reviewed and considered its contents. After Susan filed her overly-long brief, the County filed a letter stating that portions of the appendix accompanying that brief are not properly before this court. Susan seemingly believes that I may consider copies of e-mails in her appendix because part of her complaint on appeal is that the circuit court erred by failing to admit the e-mails. However, apart from exceptions not applicable here, I lack the authority to consider documents that are not part of the appellate record. Accordingly, I will not consider material in Susan's appendices that is not contained in the appellate record. *See* ***Reznichek v. Grall***, 150 Wis. 2d 752, 754 n.1, 442 N.W.2d 545 (Ct. App. 1989) (stating that "[t]he appendix may not be used to supplement the record").

directly from Matthew relating to his wishes, and she suggests that a remand to the circuit court is necessary so that these wishes can properly "be heard." I disagree.

¶6 WISCONSIN STAT. § 48.426(3) directs the court to consider a list of nonexclusive factors in determining the "best interests of the child." One of the listed factors is the "wishes of the child." *See* § 48.426(3)(d). To the extent Susan suggests that § 48.426(3)(d) required the court to ascertain Matthew's wishes from Matthew directly, she is mistaken. "[W]hile the court is required to consider the wishes of the children, there is no requirement that the children communicate those wishes personally at the dispositional hearing." ***Jerry M. v. Dennis L.M.***, 198 Wis. 2d 10, 22 n.5, 542 N.W.2d 162 (Ct. App. 1995). For example, a guardian ad litem may "inform the court of the children's wishes." *See* ***id.*** at 22. Or, others may provide evidence of the child's wishes. *See* ***id.*** at 22 n.5 (noting that relatives provided "ample evidence" of the children's wishes).

¶7 It is evident that here the court properly addressed the "wishes of the child." At the time of the dispositional hearing, Matthew was less than three years old. Consistent with his age, the social worker assigned to the case submitted a report to the court stating that "Matthew is too young to express his wishes," and she confirmed the accuracy of this report at the dispositional hearing. Further, there was no evidence presented at the hearing contradicting this no-wishes notion. Thus, the evidence before the court was that Matthew did not have a "wish" within the meaning of the statute. Given this evidence, there was nothing more for the court to consider.

¶8 I also observe that implicit in Susan's argument is the assertion that Matthew, if directly consulted, would have expressed a wish to be with her. The record, however, reflects that Matthew was first placed into foster care when he

was fifteen months old and that Susan had not seen him since that time. Consistent with this, Matthew's guardian ad litem stated at the hearing that "it is unlikely that [Matthew] recalls [Susan]." Thus, there is no reason to think that the court failed to consider evidence that favors Susan's implicit assertion that Matthew wished to be placed with her.

¶9 Susan also suggests that the circuit court failed to properly consider the WIS. STAT. § 48.426(3) factors generally. She points to the fact that a checkmark was omitted from the termination order next to the portion of the order setting out the § 48.426(3) factors. But the court's oral findings at the dispositional hearing, which were expressly incorporated into the order, did include a consideration of the factors. Indeed, Susan appears to acknowledge in one of her appellate briefs that the lack of a checkmark was a mere "oversight." *See* ***Nicole W.***, 299 Wis. 2d 637, ¶25 ("Mere clerical errors do not affect the validity of orders.").

¶10 For these reasons, I conclude that Susan's contentions based on WIS. STAT. § 48.426(3) fail.

B. Evidentiary Matters

¶11 Susan also argues that the circuit court erred in two evidentiary matters at the dispositional hearing, and she suggests that this violated her due process rights. First, Susan asserts that the court erred when it did not allow her to see an adoption letter that was entered into evidence. Second, Susan contends that the court erred by rejecting as evidence "100 copies of e-mails" between Susan and a social worker. As the following explains, regardless whether I construe Susan's arguments as based on the evidence code or on due process rights, I reject them.

¶12 Susan refers to a portion of the dispositional hearing where, while questioning a social worker, the County offered into evidence an adoption-related letter from a state agency. As stated on the record, this letter indicated the agency's "willingness to accept guardianship to facilitate adoption in the event of a TPR." The record does not indicate that Susan was shown the letter when it was admitted. Subsequently, Susan cross-examined the social worker. During this cross-examination, Susan asked the judge: "May I please see the letter that was shown to [the social worker]?" Susan did not explain why she wanted to see the letter at this particular moment, nor did she indicate that the letter was relevant to the topics she was pursuing with her questions. The court responded: "No. You are wasting time." Susan then continued with her cross-examination. I find no indication that Susan asked to see the letter at a later time.

¶13 Regarding the e-mail messages, Susan also refers to exchanges during the social worker's testimony. While cross-examining the social worker, Susan asked the circuit court if she could submit as an exhibit the "e-mails that I brought." The court responded that she could, "[i]f they are relevant to the issues before the witness." Susan then gave a nonresponsive answer to the court's implicit question. The court then, evidently attempting to move the questioning forward, indicated that Susan should proceed to ask any questions she might have. A few moments later, Susan then referred to a particular "February 13th" e-mail message showing "an out-of-office reply" from the social worker. The court responded by admitting this e-mail message.

¶14 Susan's assertion that these exchanges violated her rights fails for the following reasons. First, Susan fails to adequately explain what rights were infringed by the letter-related events. She does not explain how not seeing the letter at the moment she requested to see it affected her "right to present evidence

and to be heard" at the dispositional hearing. *See* ***Nicole W.***, 299 Wis. 2d 637, ¶13. Susan does not suggest that this adoption-related letter's contents were misleading or that she otherwise would have presented evidence or elicited testimony related to this letter if only she had been able to see it.

¶15 Second, as to the e-mail messages, Susan does not point to any place in the record where she explained to the court why the e-mails were relevant. Although she asserts on appeal that she intended that all of the e-mails be admitted when she moved to admit the single e-mail, the record does not back up this assertion. Even on appeal, Susan does not explain why the e-mails were relevant. Instead, she suggests only that the e-mails were "proof of my attempt at progress towards reunification with Matthew," a topic with no apparent relevance to the dispositional phase factors.

¶16 Third, even assuming that errors occurred, they were harmless.

¶17 An error is harmless and does not result in reversal unless "'the error complained of has *affected the substantial rights* of the party seeking to reverse or set aside the judgment, or to secure a new trial.'" ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768 (quoting WIS. STAT. § 805.18(2)). "For an error to 'affect the substantial rights' of a party, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." ***Id.***

¶18 The purpose of the dispositional hearing was to address the best interests of Matthew. The adoption letter's contents—establishing that adoption-related services were available for Matthew—related to the "best interests" factors and, in particular, the factor regarding the "likelihood of the child's adoption after termination." *See* WIS. STAT. § 48.426(3)(a). Susan does not suggest any reason

why her *viewing* of the letter, or the lack thereof, would have had any effect on the letter's probative value. I cannot discern any such effect and, therefore, conclude that depriving Susan of the opportunity to view the letter, if error, was harmless error.

¶19 Similarly, Susan does not explain why the contents of any of the e-mails mattered at the dispositional phase. For example, Susan does not explain how the e-mails might demonstrate that Susan had a "substantial relationship[]" with Matthew. *See* WIS. STAT. § 48.426(3)(c). Accordingly, there is no reason to believe that admission of the e-mails would have affected the outcome and, thus, any error was harmless.

¶20 For the reasons stated, I reject Susan's evidentiary arguments.

¶21 Finally, I address a proposition raised by Susan in her reply brief. She asserts that the circuit court transcripts contain errors or omissions. Assuming that Susan has properly raised this issue, I nonetheless conclude that the asserted errors and omissions, even if true, have no effect on this appeal.

¶22 For example, Susan suggests that certain statements were inaccurately transcribed during her attempt to submit her e-mails as evidence. She asserts that she handed a folder of messages to the bailiff and stated, "Give them to the Judge" and "I'll let the Judge decide what to do with them," but that these statements were "inadvertently omitted from the record." I need not address the details of this asserted omission, however, because, as discussed above, any error related to the e-mail messages was harmless.

¶23 Susan also appears to suggest that there are transcript errors related to the adoption-letter events. If this is what Susan means to complain about, I

reject the complaint because, as discussed, any letter-related error was also harmless.

¶24 Other alleged transcript errors are non-substantive. For example, Susan points to the omission of the letter "s" from the word "put" in the phrase "put you in a little bit of a difficult spot." As to this and other possible non-substantive transcription errors, Susan does not explain why they matter. Accordingly, I decline to consider the asserted errors further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to address issues that are inadequately briefed).

¶25 Finally, I decline to address other arguments, and the related alleged transcript errors, that Susan makes for the first time in her reply brief. *See* ***State v. Mechtel***, 176 Wis. 2d 87, 100, 499 N.W.2d 662 (1993).

Conclusion

¶26 For the reasons stated above, I affirm the circuit court.

By the Court.—Order affirmed.

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