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DISTRICT IV

December 4, 2025

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You are hereby notified that the Court has entered the following opinion and order:

2025AP30	In re the termination of parental rights to A.L., a person under the age of 18: V.L. v. H.F. (L.C. # 2023TP7)
2025AP31	In re the termination of parental rights to S.L., a person under the age of 18: V.L. v. H.F. (L.C. # 2023TP8)

Before Kloppenburg, J.[1]

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

These are H.F.'s appeals of the circuit court's orders terminating her parental rights to two of her children. Having reviewed the briefs and the record, I conclude that summary disposition is appropriate. *See* WIS. STAT. RULE 809.21(1). Because H.F. did not receive the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2023-24). All references to the Wisconsin Statutes are to the 2023-24 version.

effective assistance of counsel during the grounds phase of the termination of parental rights proceedings, I reverse the orders terminating her parental rights and remand for a new trial on the grounds of unfitness.[2]

V.L., the children's father, filed this action seeking to terminate H.F.'s rights to the children. A jury found that V.L. had proved three grounds of unfitness: physical abuse under WIS. STAT. § 48.415(5)(a); abandonment under § 48.415(1)(a)3.; and failure to assume parental responsibility under § 48.415(6). The circuit court terminated H.F.'s rights and H.F. appealed, alleging ineffective assistance of counsel during the grounds phase of the termination of parental rights proceedings. On H.F.'s motion, this court remanded to the circuit court for fact finding. *See* WIS. STAT. RULE 809.107(6)(am).

At the fact-finding hearing, H.F.'s trial counsel testified, and the circuit court, in a thorough written decision, concluded that H.F. demonstrated that in several respects counsel had performed deficiently under the standard of ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Trial counsel had, in the court's view, fallen below an objective standard of reasonableness by failing to object to opposing counsel's misstatements of law in closing arguments, by failing to object to hearsay, and by failing to contact or present at trial several potential witnesses. The court also concluded that this deficient performance prejudiced H.F. as

[2] Involuntary termination of parental rights cases follow a "two-part statutory procedure." ***Steven V. v. Kelley H.***, 2004 WI 47, ¶24, 271 Wis. 2d 1, 678 N.W.2d 856. "In the first [fact-finding], or 'grounds' phase of the proceeding, the petitioner must prove by clear and convincing evidence that one or more of the statutorily enumerated grounds for termination of parental rights exist." ***Id.***; WIS. STAT. § 48.31(1). If it finds that such grounds exist, the circuit court then proceeds to the second, or "dispositional" phase, in which it decides whether it is in the best interest of the child that the parent's rights be terminated. ***Steven V.***, 271 Wis. 2d 1, ¶27; WIS. STAT. § 48.426(2). These appeals concern the grounds phase only.

to two of the three unfitness grounds the jury had found: physical abuse and abandonment of the children.

However, the circuit court also concluded that H.F.'s counsel's deficient performance did not affect the jury verdict on the ground of failure to assume parental responsibility (generally, the "failure-to-assume ground"). Because the court concluded that there was no prejudice to H.F. as to this ground, it denied H.F.'s postdisposition motion and allowed the termination of H.F.'s parental rights to stand. *See* ***Strickland***, 466 U.S. at 693 (ineffectiveness claimant must demonstrate prejudice).

I reverse because I conclude that H.F. demonstrated that her counsel's deficient performance prejudiced her as to the failure-to-assume ground, such that she received ineffective assistance as to that ground. Because the circuit court concluded that H.F.'s counsel also provided ineffective assistance as to the abandonment and physical abuse grounds, I remand to the circuit court for a new trial on all three grounds.[3]

[3] I follow the lead of the parties' appellate briefing both by not addressing in this order the two grounds as to which the circuit court concluded that counsel provided ineffective assistance, and by remanding with directions that the circuit court hold a new trial as to all three grounds as to which H.F. established that she received ineffective assistance of counsel.

In his respondent's brief, V.L. does not argue that the circuit court erred in concluding that H.F.'s counsel provided ineffective assistance as to the abandonment and physical abuse grounds. *See* ***State v. Kiekhefer***, 212 Wis. 2d 460, 475, 569 N.W.2d 316 (Ct. App. 1997) ("on appeal, the respondent is not barred from asserting any valid grounds to affirm the [circuit] court's ruling"). Although V.L. asserts that he "does not concede" that the circuit court was correct in so concluding, he offers no argument on either of the two grounds. Therefore, V.L. has forfeited, in this court, any claim that the termination of H.F.'s parental rights should stand even if the circuit court's decision on the failure-to-assume ground is reversed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals generally will not consider claims lacking developed arguments or citations to legal authority).

(continued)

The failure-to-assume unfitness ground requires a showing that a parent "[has] not had a substantial parental relationship with the child." WIS. STAT. § 48.415(6)(a). The statute provides a definition of "substantial parental relationship" and a non-exhaustive list of factors relevant to whether one exists:

> "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child ….

§ 48.415(6)(b).

The jury instruction provides that "[s]ubstantial parental relationship is assessed based on the totality of the circumstances throughout the child's entire life." It further informs the jury that the jury "may consider the reasons for the parent's lack of involvement when you assess all of the circumstances throughout the child's entire life." WIS JI—CHILDREN 346.

At the postdisposition motion hearing, H.F. presented testimony from several witnesses, as well as from her trial counsel, who did not identify any strategic reasons for failing to call the witnesses or introduce the evidence discussed below. Much of the testimony and evidence presented at the hearing concerned matters relevant to the two grounds as to which the circuit court determined that counsel provided ineffective assistance. This opinion discusses only that

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In her briefing on appeal, H.F. asks that this court "reverse the termination orders and remand with directions that the circuit court hold a trial as to grounds." V.L. does not in his respondent's brief dispute the remedy requested by H.F. should this court conclude, as I have, that H.F. demonstrated that her counsel's deficient performance prejudiced her as to the failure-to-assume ground, such that she received ineffective assistance of counsel as to that ground.

testimony and evidence pertinent to the disputed ground of failure to assume parental responsibility.

H.F. presented testimony of a therapist who treated her while the termination case was pending. The therapist testified that H.F. had spoken with her about missing the two children who are the subject of this petition; the therapist also signed an affidavit saying that H.F. was an "attentive and caring parent" to her younger children. The therapist further testified that H.F. had successfully completed and followed up after a mental health treatment program during the pendency of this case. H.F. argues on appeal that this testimony had the potential to make a difference because V.L.'s closing argument suggested that H.F. was not truly suffering from or receiving treatment for any mental illness. H.F. also presented testimony from a social worker who had provided her services related to her younger children; that social worker testified that H.F. had successfully fulfilled the conditions to either regain or maintain custody of those children.

At the postdisposition hearing, H.F. also introduced several emails exchanged between her and Attorney Michael Blum, who had served as guardian ad litem for the children earlier in this case. She testified that Blum was to be her contact for setting up visitation with the children. H.F. testified that she had originally been directed to set up visitation through V.L., but "we were having troubles with that" so Blum became an intermediary between the two. H.F. also discussed a motion to change the placement of the children with Blum. The emails demonstrated that H.F. had contacted Blum several times over a period of months seeking to arrange to see or have placement with the children.

H.F. argues that there was a "reasonable probability that, but for" the above discussed "unprofessional errors," the jury would have found that H.F. did have a substantial parental relationship with the two children. ***Strickland***, 466 U.S. at 694. I conclude that H.F. is correct. While H.F. was able to testify at trial about some of her efforts to have a relationship with the children, the additional evidence about the efforts she was making, via the therapist and social worker, to improve her mental health and her home situation such that she could better parent, and via Blum, to directly secure visitation or placement, would have been probative as to the failure-to-assume ground. This is true in part because a witness for V.L. testified that H.F. was "manipulative" and "dishonest," and V.L.'s counsel stressed that testimony in closing argument to the jury. Other witnesses' testimony confirming H.F.'s story would therefore have strengthened her credibility overall.

In addition, some of the evidence that counsel failed to present goes directly to the substantive issues of the failure-to-assume ground. As stated, a jury deciding whether a parent has failed to assume parental responsibility must consider "the totality of the circumstances throughout the child's entire life." WIS JI—CHILDREN 346. This means that even though, as the circuit court observed, the jury heard testimony about H.F.'s failure to meet the conditions V.L. imposed to see the children during certain periods, this failure is not conclusive. The jury was obligated to consider the circumstances throughout the children's lives in deciding whether H.F. had a substantial parental relationship, which required it to consider whether H.F. "expressed concern for or interest in the support, care or well-being of the child[ren], [and] whether [H.F.] has neglected or refused to provide care or support for the child[ren]." Id. What is more, the jury was properly instructed to consider "the reasons for [H.F.'s] lack of involvement." Id. Evidence of her efforts to become involved cannot be disentangled from this consideration.

Due to H.F.'s counsel's failure to secure and present the evidence discussed above, the jury did not hear evidence going to the "totality of the circumstances" of the children's lives, including some of "the reasons for" H.F.'s lack of involvement. *See* WIS JI—CHILDREN 346. In the postdisposition proceedings, H.F. was required to show a "reasonable probability" that counsel's failings affected the outcome of the trial. This is a lower burden than the "more likely than not" civil burden; it required H.F. only to demonstrate "a probability sufficient to undermine confidence in the outcome" of the trial. ***Strickland***, 466 U.S. at 693-94. The circuit court, in its decision denying H.F.'s postdisposition motion, recognized that she demonstrated a reasonable probability that these errors—along with the failure to present evidence that H.F. had established an appropriate home and completed treatment, counseling, and parenting classes, and that she talked about the two children regularly—affected the jury's verdicts as to physical abuse and abandonment, sufficient to undermine confidence in those verdicts. For the reasons just given, I conclude that H.F. also demonstrated a reasonable probability that counsel's errors affected the jury's verdict that H.F. had failed to form a substantial parental relationship with the children, sufficient to undermine confidence in that verdict as well.

In its decision, the circuit court relied heavily on the fact that the jury was unanimous on the failure-to-assume ground, while there were two dissenters out of twelve jurors as to the other two grounds. Implicit in the court's reliance on the existence of the dissents as to the other two grounds is that H.F. would only have needed to convince one additional juror to avoid a verdict against her as to these grounds. *See* WIS. STAT. § 805.09(2) ("A verdict agreed to by five-sixths of the jurors shall be the verdict of the jury."). But the existence or absence of dissents as to any of the three grounds does not support a conclusion about what might have happened if H.F.'s counsel had performed adequately. Rather, as explained above, the law requires that we look at

the probability of a different outcome based on the absence of trial counsel's errors, not based on how close the verdict was with those errors. That is because we cannot know the reasoning employed by the jurors, or what was (or would have been) persuasive to some or all of them. Unanimity, while it may be relevant to the question of prejudice, is far from dispositive; after all, any time a criminal jury verdict is reversed for ineffective assistance, the court is necessarily reversing a unanimous jury verdict. *See* ***State v. Baldwin***, 101 Wis. 2d 441, 446 n.3, 304 N.W.2d 742 (1981) (Wisconsin criminal jury-trial right includes the right to unanimity.)

Because I conclude that H.F. received ineffective assistance of counsel as to the failure-to-assume ground, and the circuit court concluded that H.F. received the ineffective assistance of counsel as to the abandonment and physical abuse grounds, I reverse the termination of H.F.'s rights to the two children and remand to the circuit court for a new trial.

IT IS ORDERED that the orders appealed from are summarily reversed pursuant to WIS. STAT. RULE 809.21, and the causes are remanded for a new trial.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals