COURT OF APPEALS
DECISION
DATED AND FILED

April 13, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2015AP1771
2015AP1772

Cir. Ct. No. 2014TP5

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

NO. 2015AP1771

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

DUNN COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

C. R. R.,

RESPONDENT,

M. R.,

RESPONDENT-APPELLANT.

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A PERSON UNDER THE AGE OF 18:

DUNN COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

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RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Dunn County: J. MICHAEL BITNEY, Judge. *Affirmed*.

¶1 STARK, P.J.[1] M.R. and C.R.R. appeal an order terminating their parental rights to their son A.M.R. and orders denying their motions for postdisposition relief.[2] They allege multiple circuit court errors and ineffective

[1] These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Notwithstanding WIS. STAT. RULE 809.107(6)(e), we may extend the time to issue a decision in termination of parental rights cases. *See* ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 694, 530 N.W.2d 34 (Ct. App. 1995). Due to the need to address the number of issues raised by the parties on appeal, on our own motion, we extend the decisional deadline in this appeal to the date of this decision.

[2] M.R. and C.R.R.'s joint motion to consolidate these appeals was granted by an order dated January 28, 2016.

assistance of trial counsel, and appeal to our discretionary reversal authority. We reject their arguments and affirm the orders.

BACKGROUND

¶2 A.M.R. was born to C.R.R. (his mother) and M.R. (his father) in March 2003. On April 24, 2008, A.M.R. was removed from their home due to concerns related to C.R.R.'s and M.R.'s substance abuse issues. In July 2008, A.M.R. was found to be a child in need of protection or services (CHIPS). He returned home in August 2008, and the CHIPS dispositional order was terminated in August 2010.

¶3 In October 2011, the child was again removed from his home following a domestic violence incident between his parents. A.M.R. was in the home during the incident, and both his parents were under the influence of Oxycodone at the time. The County filed a CHIPS petition based on the parents' substance abuse and domestic violence issues. On November 28, 2011, a CHIPS order was again entered. That order was later amended in an "Order for Revision of Dispositional Order," which took effect on January 28, 2013.

¶4 A.M.R. never returned home after his October 2011 removal. In July 2012, he was placed in the foster home of J.P., where he continued to reside. On May 12, 2014, the County filed a petition to terminate C.R.R.'s and M.R.'s parental rights, alleging CHIPS under WIS. STAT. § 48.415(2)(a) as the grounds for termination. C.R.R. and M.R. waived their right to a jury trial and elected to have the matter tried to the court.

¶5 During a final pretrial conference, the circuit court discussed with the parties a motion filed by A.M.R.'s guardian ad litem (GAL) to excuse

A.M.R.'s presence and testimony during the trial.[3] C.R.R.'s counsel indicated that he did not want to preclude A.M.R. from testifying at a disposition hearing, should such hearing occur, but he otherwise did not object to the motion. M.R.'s counsel, in turn, agreed A.M.R. should not be present for the full trial but wanted to reserve M.R.'s right to have A.M.R. testify. The circuit court "tentatively" granted the motion to excuse A.M.R. from being present for the entire fact-finding hearing[4] and further explained, "I also want the parties to be mindful that if one of them intends to call the child to testify, the Court's going to entertain seriously whether or not that has to be in open court or whether that's going to be in chambers ...."

¶6 On the third day of the fact-finding hearing, and before the close of the County's case, M.R.'s counsel asked the circuit court to consider having A.M.R. testify. Counsel explained A.M.R. had expressed a strong desire to speak with the court, and she wanted him to have a voice in the proceedings, although that need not require A.M.R. to testify in open court. C.R.R.'s counsel agreed and indicated it was C.R.R.'s position that the court should speak with A.M.R. in chambers "with the attorneys present, something limited like that[.]" The County and the GAL argued against having A.M.R. testify.

¶7 The circuit court ultimately concluded the appropriate balance would be to speak with A.M.R. separately in chambers with only the GAL present. The

[3] The GAL's motion was based upon the recommendation of A.M.R.'s long-time therapist.

[4] Termination of parental rights proceedings involve a two-step procedure. ***State v. Shirley E.***, 2006 WI 129, ¶26, 298 Wis. 2d 1, 724 N.W.2d 623. The first step, which we refer to as the fact-finding hearing, consists of an evidentiary hearing to determine whether adequate grounds exist to terminate a parent's rights. *See* ***id.***, ¶27. The second step, which we refer to as the disposition hearing, consists of another evidentiary hearing in which the circuit court determines whether termination of parental rights is in the child's best interests. *See* ***id.***, ¶28.

court indicated it was "not going to have this child cross-examined" but stated the parties could submit questions for it to ask A.M.R. The court further clarified:

> And I'm certainly not going to entertain questions about who he wants to live with or if it comes down to it, should it be one versus the other, all or none. This decision is not going to be made by the child, and frankly, whether he wants to go home or not has minimal, if any, relevance or probative value. That's not the issue before the Court at this stage of the proceedings. We're not to the dispositional hearing yet. We haven't even gotten to whether or not the petition should be granted.
>
> So the issues of the child are not of significant value to the Court in terms of relevance or evidentiary value, but I do believe that [M.R.'s counsel]'s point is well taken, that this child would like to be heard, and given the magnitude of the decision that the Court has to render on the petition, I think in all fairness, the child should be given an opportunity to speak his piece and do it in a manner that's as sensitive as possible so as not to traumatize or upset the child.

¶8 M.R. called three witnesses to testify and testified himself. On cross-examination, C.R.R.'s counsel asked M.R. about statements A.M.R. had made to other witnesses, in which A.M.R. had claimed he would still be able to see M.R. if J.P. adopted him. M.R. explained J.P. and the social worker assigned to A.M.R.'s case told him he could see A.M.R. every weekend even if his rights were terminated, and he shared that information with A.M.R. M.R. further explained that after the final pretrial hearing someone had handed him a letter written by J.P., in which J.P. set forth a "Gentlemen's Agreement" and indicated her intent to allow M.R. to have contact with A.M.R. in the event she adopts A.M.R. The letter was admitted into evidence.

¶9 During the fact-finding hearing, the circuit court recessed to meet with A.M.R. and the GAL. The court's meeting with A.M.R. was not reported, but the court provided a brief summary on the record. The court concluded this

summary by stating: "I have accommodated the wishes of the parents and met with the child, and will give whatever weight and credit that I believe his statements are in my decision later this afternoon."

¶10 At the close of the evidence, C.R.R. and M.R. moved to dismiss the termination of parental rights (TPR) petition, arguing no evidence was presented to prove C.R.R. or M.R. received the written TPR warnings required under WIS. STAT. § 48.356(2). The circuit court denied the motion and found grounds existed to terminate C.R.R.'s and M.R.'s parental rights. The court scheduled the disposition hearing for a later date to accommodate M.R.'s and C.R.R.'s request for a bond study. After the fact-finding hearing, but before the disposition hearing, A.M.R. turned twelve years old.

¶11 J.P. was among the witnesses to testify during the disposition hearing. J.P. confirmed her belief that maintaining contact between A.M.R. and M.R. was important, and she stated she would try to maintain contact between A.M.R. and both C.R.R. and M.R. if termination of their parental rights occurred. At the close of the hearing, the circuit court concluded it was in A.M.R.'s best interests to terminate C.R.R.'s and M.R.'s parental rights and entered an order to that effect. C.R.R. and M.R. each filed a motion for postdisposition relief. The circuit court denied the motions following a postdisposition hearing. C.R.R. and M.R. now appeal.

DISCUSSION

I. Sufficiency of the evidence

¶12 C.R.R. and M.R. argue the County failed to prove the court properly provided them with the written TPR warnings required under WIS. STAT.

§ 48.356(2) when it entered the CHIPS order. They do not challenge the sufficiency of the evidence on any other grounds. Indeed, they concede, except for the issue of whether they received the written TPR warnings, that "there were grounds to terminate their parental rights."

¶13 "When considering the sufficiency of the evidence, we apply a highly deferential standard of review." ***Jacobson v. American Tool Cos.***, 222 Wis. 2d 384, 389, 588 N.W.2d 67 (Ct. App. 1998). We will not set aside a circuit court's findings of fact unless we conclude they are clearly erroneous. ***Id.*** at 389-90 (citing WIS. STAT. § 805.17(2)). To establish the continuing-need-of-protection-or-services grounds for termination of M.R.'s and C.R.R.'s parental rights, the County, in part, had to prove by clear and convincing evidence that A.M.R.

> has been adjudged to be a child ... in need of protection or services and placed, or continued in a placement, outside his ... home pursuant to one or more court orders under [WIS. STAT. §§] 48.345, 48.347, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363 or 938.365 containing the notice required by [WIS. STAT. §§] 48.356(2)[5] or 938.356(2).

[5] WISCONSIN STAT. § 48.356 provides:

> **Duty of court to warn. (1)** Whenever the court orders a child to be placed outside his or her home ... and whenever the court reviews a permanency plan under s. 48.38(5m), the court shall orally inform the parent or parents who appear in court ... of any grounds for termination of parental rights under s. 48.415 which may be applicable and of the conditions necessary for the child ... to be returned to the home or for the parent to be granted visitation.
>
> **(2)** In addition to the notice required under sub. (1), any written order which places a child ... outside the home ... shall notify the parent or parents ... of the information specified under sub. (1).

See WIS. STAT. §§ 48.31, 48.415(2)(a)1.

¶14 During the fact-finding hearing, the circuit court received into evidence (1) a certified copy of the November 28, 2011 dispositional order, finding A.M.R. to be a child in need of protection or services and placing him outside the home, and (2) a certified copy of the January 28, 2013 revised dispositional order, which set forth revised conditions for C.R.R. and M.R. to meet and continued A.M.R.'s placement outside the home.[6] Both orders had the requisite written TPR warnings attached.

¶15 C.R.R. and M.R. contend these orders were insufficient to meet the County's burden of proof because "the evidence is that the dispositional order contained unsigned TPR warnings but there was otherwise no evidence presented that the orders were actually provided to the parents or received by them." However, both orders received into evidence state: "The parent(s) who appeared in court have been orally advised of the applicable grounds for termination of parental rights (TPR) and the conditions that are necessary for a safe return to the home or a restoration of visitation rights. *Written TPR Warnings are attached*." (Emphasis added.) Both orders also contain a distribution list identifying the "Parents" as recipients of those orders. C.R.R. and M.R. did not deny that they

[6] The GAL also introduced into evidence the 2008 dispositional order placing A.M.R. outside the home. The written TPR warnings were attached to that order.

were served with the warnings.[7] Therefore, we conclude the circuit court's finding that C.R.R. and M.R. received the written TPR warnings is not clearly erroneous.[8]

II. The circuit court's failure to consider all possible dispositions

¶16 C.R.R. and M.R. claim the circuit court erred as a matter of law in failing to consider all possible dispositional alternatives under WIS. STAT. § 48.427[9] and specifically rule them out on the record. Due to the significant rights affected in a TPR action, C.R.R. and M.R. argue the procedure used by the court on disposition should be analogized to that used in a criminal sentencing. In a criminal case, a court must consider all relevant sentencing *factors* before it imposes a valid sentence. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-43, 270 Wis. 2d 535, 678 N.W.2d 197. As a result, they claim the court in this TPR action had a responsibility to mention and rule out all possible *dispositional alternatives*. We

[7] C.R.R. and M.R. also claim the evidence is insufficient against M.R. because his trial counsel testified during the postdisposition hearing that "she had no reason to believe that M.R. had ever received [the written TPR warnings]." First, C.R.R. and M.R. misstate his trial counsel's testimony. She was asked, "As far as you know, did [M.R.] receive those warnings?" She responded, "I don't know." Second, her testimony occurred during the postdispostion hearing, after the circuit court had already determined grounds to terminate C.R.R.'s and M.R.'s parental rights had been proven during the fact-finding hearing.

[8] C.R.R. and M.R. offer an alternative standard of review, asserting "[t]his court reviews the evidence where the appellant claims of insufficient evidence in the light most favorable to the verdict." Quoting ***Sheboygan County Department of Health & Human Services v. Tanya B.***, 2010 WI 55, ¶49, 325 Wis. 2d 524, 784 N.W.2d 369, they explain "[a] verdict must be sustained 'if there is any credible evidence, when viewed in a light most favorable to the verdict, to support it.'" We reach the same conclusion applying this standard. The written TPR warnings are attached to certified copies of the November 28, 2011 dispositional order and the January 28, 2013 revised dispositional order, and the parents were listed as recipients in the distribution lists on both of those orders. Viewed in the light most favorable to the verdict, this evidence is sufficient to support a conclusion that C.R.R. and M.R. received the written TPR warnings.

[9] Dismissal of the TPR action or termination of the parent's rights and transferring guardianship and custody of the child to other persons or entities are the dispositions available under WIS. STAT. § 48.427. *See* § 48.427.

disagree. In a criminal sentencing, the court must consider the ***Gallion*** factors in fashioning a sentence. However, there is no requirement a court mention every possible sentencing disposition when applying those factors to determine an appropriate sentence. Similarly here, the court should explain the basis for its disposition on the record by considering all of the *factors* in WIS. STAT. § 48.426(3) and any other factors it relies upon to reach its decision. ***Sheboygan Cty. Dep't of Health & Human Servs. v. Julie A.B.***, 2002 WI 95, ¶30, 255 Wis. 2d 170, 648 N.W.2d 402. However, the parents provide no relevant legal authority or developed argument in support of their contention that the court is then required to mention every possible *statutory disposition available*, whether applicable or not, and rule it out on the record.

¶17 C.R.R. and M.R. specifically argue the circuit court erred by failing to consider the option of guardianship, which they assert was the best resolution given the facts of this case. They argue the court could have "respected the child's profound wishes while providing permanence by entry of a guardianship pursuant to [WIS. STAT. §]48.427(3m)(am)[,] (b)[,] or (c)." According to C.R.R. and M.R., guardianship "would not sever the parent's parental rights but ensure that the child would be placed with a responsible caretaker."

¶18 This argument fails for several reasons. Initially, we note that C.R.R. and M.R. failed to ask the circuit court to consider the option of guardianship and presented no evidence in support of that disposition at the hearing. As a result, we conclude they forfeited this argument. *See* ***State v. Huebner***, 2000 WI 59, ¶¶10-12, 235 Wis. 2d 486, 611 N.W.2d 727. In addition, despite their failure to raise guardianship as an option, the court did explain during the postdisposition hearing that it had considered guardianship and determined, in light of all the evidence and testimony it had at its disposal, that guardianship

would likely not have been an appropriate disposition or in A.M.R.'s best interests. The court was aware that A.M.R. had been placed with his paternal grandfather in the past without success, and there was no other viable option for guardianship presented.

¶19 Further, C.R.R. and M.R.'s claim that the circuit court erroneously exercised its discretion because it should have ordered guardianship under WIS. STAT. § 48.427(3m)(am), (b), or (c) instead of terminating their parental rights is misplaced. Subsection 48.427(3m) requires a termination of parental rights before the appointment of a guardian under paragraphs (am), (b), or (c). *See* § 48.427(3m); *see also* ***Brown Cty. Dep't of Human Servs. v. Brenda B.***, 2011 WI 6, ¶¶48-52, 331 Wis. 2d 310, 795 N.W.2d 730. Thus, the court could not have awarded guardianship under these paragraphs in WIS. STAT. § 48.427(3m) without first terminating C.R.R.'s and M.R.'s parental rights.

¶20 C.R.R. and M.R. next argue the court erred in stating at the disposition hearing that termination of their parental rights was the only way it could ensure permanence for A.M.R. and the court therefore failed to consider A.M.R.'s wishes to stay with C.R.R. and M.R. and their substantial relationship with A.M.R. *See* WIS. STAT. § 48.426(3)(c), (d). We will "sustain the circuit court's ultimate determination in a proceeding to terminate parental rights if there is a proper exercise of discretion." ***State v. Margaret H.***, 2000 WI 42, ¶32, 234 Wis. 2d 606, 610 N.W.2d 475. A court properly exercises its discretion "when it examines the relevant facts, applies a proper standard of law and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach." ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). The court must consider the six factors listed in WIS. STAT. § 48.426(3) before determining whether termination of a parent's rights is in the child's best

interests, *see* § 48.426(3), and the factors that the court considers "must be calibrated to the prevailing standard[,]" which is the best interests of the child, ***Julie A.B.***, 255 Wis. 2d 170, ¶30.

¶21 C.R.R. and M.R. correctly observe that two of the six factors the circuit court must consider during disposition phase are (1) the child's wishes, *see* WIS. STAT. § 48.426(3)(d), and (2) whether the child has substantial relationships with the parent or other family members and whether it would be harmful to the child to sever these relationships, *see* § 48.426(3)(c). However, contrary to C.R.R. and M.R.'s assertions, the court did not "discount[] the child's wishes in the interests of establishing permanence[.]"[10] The court acknowledged A.M.R. "really wants to stay" with his parents and "wanted to come home." The court also recognized the substantial relationship A.M.R. had with C.R.R. and M.R. In particular, the court explained that before it read the results of the bond study, "one of the things that [it] struggled with and was most concerned about was ... the factor about the substantial relationship that [A.M.R.] has developed with his mom and dad and the damage that might be occasioned to [A.M.R.] by severing that permanently and legally."

[10] C.R.R. and M.R. also argue the circuit court "wrongly believed that the child's wishes were of minimal relevance or probative value." To support this claim, they cite that portion of the fact-finding hearing transcript in which the court stated, "This decision is not going to be made by the child, and frankly, *whether he wants to go home or not has minimal, if any, relevance or probative value*." (Emphasis added.) C.R.R. and M.R., however, take this statement out of context. The court made this statement during the fact-finding hearing when it was discussing the parameters of the in-chambers conference it planned to have with A.M.R., not during the disposition hearing. As the court explained immediately after making that statement: "That's not the issue before the Court at this stage of the proceedings. We're not to the dispositional hearing yet. We haven't even gotten to whether or not the petition should be granted."

¶22 The circuit court ultimately weighed A.M.R.'s wishes and the depth of A.M.R.'s relationship with his parents against A.M.R.'s need for permanence and stability and decided that the latter was more important. The court emphasized that A.M.R. "deserves stability" and "deserves to get off this roller coaster that he's been on for the last twelve years." The court also explained "the only way to ensure the permanence and stability that [A.M.R.] so desperately needs and wants, is to terminate the parental rights and allow [him] to be adopted by a stable, sober, loving parent." *See* WIS. STAT. § 48.427(3)(f). Additionally, although the court acknowledged severing the parental relationship "may be on the short run or short term difficult for [A.M.R] given his desire to remain with his parents and to go back even under the most chaotic circumstances[,]" it concluded terminating C.R.R.'s and M.R.'s parental rights would not be harmful to A.M.R. in the long run. The court examined the relevant facts, applied the proper standard of law, and, using a demonstrated rational process, determined that termination of C.R.R.'s and M.R.'s parental rights was in A.M.R.'s best interests. C.R.R. and M.R. simply disagree with the court's analysis and decision, but this is insufficient to establish an erroneous exercise of discretion.

III. J.P.'s statements regarding her position on "open" adoption

¶23 C.R.R. and M.R. introduced evidence concerning the foster parent's intent to allow an open adoption,[11] but they now argue we should order a new disposition hearing because the circuit court erred by considering that evidence. C.R.R. and M.R. contend such an arrangement is illusory, and it is wrong, a

[11] C.R.R. and M.R. use the phrase "Open Adoption." We understand their use of this phrase to refer to J.P.'s unenforceable agreement to allow C.R.R. and M.R. to continue contact with A.M.R. if she adopts A.M.R.

violation of due process, and "against public policy for the court to be swayed in any way by a statement that cannot be enforced and that allows the court to disregard its mandated duty to fully and fairly consider the consequences of severing a child's relationship with his father." They also argue J.P.'s statements that she intends to allow visitation to continue are more prejudicial than probative.

¶24 C.R.R. and M.R.'s argument in this regard is unsupported by the law and facts. First, it was not a violation of due process or against public policy for the court to consider evidence of an open adoption arrangement. In ***Margaret H.***, our supreme court stated a circuit court, in its discretion, "may afford due weight to an adoptive parent's stated intent to continue visitation with family members," although "it should not be bound to hinge its determination on that legally unenforceable promise." ***Margaret H.***, 234 Wis. 2d 606, ¶¶29-30. Second, although the circuit court mentioned J.P.'s promise to continue visitation during the disposition hearing,[12] during the postdisposition hearing, the court made clear it in no way relied upon that promise in determining that termination of C.R.R.'s and M.R.'s parental rights was in A.M.R.'s best interests. The court stated it "[knew] full well that if a parent's parental rights are terminated, it is permanent, irrevocable, and a complete severance of all legal rights, period, end of conversation[.]" The court further explained, "I don't think it can be said that it weighed upon the Court's conscious or subconscious to have this information come before the Court in a prejudicial fashion against both or either [M.R.] or

[12] During the disposition hearing, the circuit court, directing its comments to M.R., stated: "I'm not so sure it's in [A.M.R]'s best interests that you continue to have time with him if you don't get your act together. If you don't stop going in and out of jail, if you don't stop drinking, if you don't stop using drugs, I hope [J.P.] cuts you off."

[C.R.R.]." As a result, C.R.R. and M.R. are not entitled to a new disposition hearing due to the introduction of this evidence.

IV. A.M.R.'s testimony

¶25 C.R.R. and M.R. next argue we should reverse the TPR order because the circuit court erred by "[d]isallowing" A.M.R.'s testimony. They contend the court's decision to not allow A.M.R. to testify in open court was contrary to WIS. STAT. § 906.01, which provides that every person is competent to testify, and the court's decision deprived them of their right to present a defense. In particular, M.R. argues A.M.R.'s testimony was important to his defense to refute the claim that he had engaged in "adult talk" with A.M.R., in violation of conditions in the January 28, 2013 revised dispositional order.[13] He also argues "it was important to [the] disposition where the court was required to consider '[t]he wishes of the child[,]'" citing WIS. STAT. § 48.426(3)(d). C.R.R. argues A.M.R.'s testimony was important to her defense because the County alleged she was involved in ongoing, inappropriate conversations with A.M.R. She claims she needed A.M.R. to testify in order to place those conversations in context.

¶26 The record does not support C.R.R.'s and M.R.'s claims. First, C.R.R. and M.R.'s reliance on WIS. STAT. § 906.01 is misplaced.[14] The circuit

[13] The "Guidelines for Supervised Visitation" in the record describe "adult talk" as conversations related to the following topics: adult-only appointments; drugs or alcohol; court, jail, or prison; the other parent; criminal activity or pending charges; finances; physical or emotional violence; violent video games, movies, or songs; prior removal of children from home; the child returning home or moving; and discrediting another person.

[14] WISCONSIN STAT. § 906.01 states: "**General rule of competency.** Every person is competent to be a witness except as provided by [WIS. STAT. §§] 885.16 and 885.17 or as otherwise provided in these rules."

court did not decide A.M.R. was not competent to testify. Rather, the court was concerned that asking A.M.R. to testify in a courtroom "full of strangers and adults asking him difficult questions that may be extremely difficult for him to answer" would cause him additional trauma. The court believed such trauma could be mitigated or avoided by speaking with A.M.R. in chambers with only the GAL present.

¶27 Second, the circuit court did not prohibit A.M.R. from testifying. During the fact-finding hearing, M.R.'s counsel asked the court to consider having A.M.R. testify; however, she confirmed she was not asking A.M.R. to testify in "open court." Counsel for C.R.R. made the same request. Both attorneys stated they were aware of A.M.R.'s strong desire to speak to the court and wanted to be certain he had an opportunity to be heard. However, they did not argue A.M.R. had any relevant evidence to provide in addition to that already presented to the court. The court determined that speaking with A.M.R. in his chambers with the GAL present would give A.M.R. "an opportunity to speak his piece and do it in a manner that's as sensitive as possible so as not to traumatize or upset [him]." C.R.R. and M.R. did not object. On this record, we conclude C.R.R. and M.R. forfeited any objection to the court's in-chambers conference. *See* ***State v. Ndina***, 2009 WI 21, ¶¶29-30, 315 Wis. 2d 653, 761 N.W.2d 612 (the failure to object generally constitutes a forfeiture of the right on appellate review). Moreover, the court found C.R.R.'s and M.R.'s postdisposition claims that they wanted A.M.R. to testify in open court to be incredible. "Where the [circuit] court is the finder of fact and there is conflicting evidence, the [circuit] court is the ultimate arbiter of the credibility of witnesses." ***Fidelity & Deposit Co. v. First Nat'l Bank***, 98 Wis. 2d 474, 485, 297 N.W.2d 46 (Ct. App. 1980).

V. The circuit court's failure to "record" its in-chambers conference with A.M.R.

¶28 C.R.R. and M.R. next contend the circuit court erred as a matter of law by failing to record its in-chambers conference with A.M.R. as required under SCR 71.01.[15] Supreme Court Rule 71.01(2) provides that all proceedings in the circuit court shall be reported except under circumstances inapplicable here. Supreme Court Rule 71.01(1) defines reporting as making a verbatim record. They further argue the County cannot show the court's failure to report the interview was harmless error because there is no recording to rely upon in support.

¶29 Assuming without deciding that the circuit court erred when it failed to report its in-chambers conference with A.M.R., we conclude that reversal of the TPR order is not required because any error was harmless.[16] *See* WIS. STAT. § 805.18(2).[17] We agree with C.R.R. and M.R. that the County, as the beneficiary of the error, had the burden to prove the error was harmless. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985) ("The burden of proving no

[15] When C.R.R. and M.R. use the term "record," we understand their argument to be that the circuit court should have made a verbatim record of the in-chambers conference, based on their reliance on SCR 71.01.

[16] The application of the harmless error rule presents a question of law subject to de novo appellate review. *See* ***Weborg v. Jenny***, 2012 WI 67, ¶43, 341 Wis. 2d 668, 816 N.W.2d 191.

[17] WISCONSIN STAT. § 805.18(2) states,

> No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of selection or misdirection of the jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that 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.

prejudice is on the beneficiary of the error ....”). However, we disagree with C.R.R. and M.R.’s assertion that the County cannot meet its burden simply because it does not have the recording to rely upon.

¶30 Prior to meeting with A.M.R., the circuit court provided the parties with an opportunity to present the court with whatever questions they wanted the court to address in its conference with A.M.R. The record does not reflect that any of the parties submitted questions. After speaking with A.M.R., the court provided a summary of the conference on the record. The court, in part, commented, “This little boy is a blessing, and the words that come to my mind to describe your son are intelligent, strong, insightful, gifted, [and he] loves both of his parents very dearly.” The court also stated A.M.R. had indicated “what his wishes were and the reasons behind those.” Although the court did not specify what A.M.R.’s wishes entailed, it is undisputed that A.M.R. expressed that he wanted to go home with his parents. The GAL, who was present during the in-chambers conference, also did not object to or clarify the court’s summary. Further, neither C.R.R. nor M.R. claimed during the fact-finding hearing that the court failed to address an issue with A.M.R.

¶31 At the postdisposition hearing, the circuit court elaborated on its summary of the discussion it had with A.M.R. The court indicated:

> [A.M.R.’s] answers were very favorable to the parents and I don’t think would have been any different had he been on the stand here in open court; that he loved his mom and dad; he did not want to stay at the foster family’s home; that he wanted to be reunited with his mom and dad; that he had a substantial relationship with them and a bond with them, despite him being physically absent from them, and despite their past failings to meet the reunification standards, that he wanted to go home.

To the extent the court relied on A.M.R.'s statements during either the fact-finding or disposition hearing, A.M.R.'s statements were highly favorable to C.R.R.'s and M.R.'s position. Under these facts, we cannot conclude the court's failure to report its in-chambers conference with A.M.R. undermines our confidence in the outcome of the dispositional phase of the proceedings. *See* ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768 ("If the error at issue is not sufficient to undermine the reviewing court's confidence in the outcome of the proceeding, the error is harmless.").

¶32 Relying on ***State v. Amundson***, 69 Wis. 2d 554, 577-78, 230 N.W.2d 775 (1975), C.R.R. and M.R. insist the failure to record the in-chambers conference, and the resulting inability to know what the court discussed with A.M.R., cannot be construed as harmless error. Although C.R.R. and M.R. concede there is no evidence of bad faith on the part of the County, they contend that because the County opposed A.M.R.'s testimony at trial, it does not have "clean hands," and therefore a new trial is necessary. However, ***Amundson*** is distinguishable. In ***Amundson***, an audiotape in the possession of campus security police was destroyed. *See* ***Amundson***, 69 Wis. 2d at 575-76. The court held the impossibility of proving its contents relieved Amundson from having to prove the tape's contents were exculpatory. ***Id.*** at 578. It then became necessary to assess the good or bad faith on the part of the state to determine if the destruction of the tape was harmless error. *See* ***id.*** at 577-78. Here, the circuit court was the entity to determine if the interview should be reported, and the County did not advocate that the court should not do so. We are therefore not persuaded by C.R.R.'s and M.R.'s bad-faith analysis.

VI. The circuit court's failure to appoint an attorney for A.M.R.

¶33 A.M.R. turned twelve a few weeks before the adjourned disposition hearing. Citing WIS. STAT. § 48.23(1m)(b)2., C.R.R. and M.R. argue the circuit court erred as a matter of law in failing to appoint counsel for A.M.R. once he turned twelve years old. Further, relying upon ***State v. Shirley E.***, 2006 WI 129, 298 Wis. 2d 1, 724 N.W.2d 623, where a parent was denied counsel in a TPR action, *see* ***id.***, ¶3, they contend the court's failure to appoint an attorney to represent A.M.R. was a structural error and therefore per se prejudicial. However, they also argue that, even if we conclude the error was not structural, we should not find the court's failure to appoint counsel to be harmless error because we cannot know what effect the appointment of an adversary counsel versus a guardian ad litem would have had.

¶34 Statutory interpretation presents a question of law that we review de novo. ***Barritt v. Lowe***, 2003 WI App 185, ¶6, 266 Wis. 2d 863, 669 N.W.2d 189. "[S]tatutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (citations omitted). The context and structure of a statute are important to its meaning. *See* ***Noffke v. Bakke***, 2009 WI 10, ¶11, 315 Wis. 2d 350, 760 N.W.2d 156 (citing ***Kalal***, 271 Wis. 2d 633, ¶46). "Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Kalal***, 271 Wis. 2d 633, ¶46.

¶35 As relevant here, WIS. STAT. § 48.23 provides:

> **Right to counsel. (1g)** DEFINITION. In this section, "counsel" means an attorney acting as adversary counsel who shall advance and protect the legal rights of the party represented, and who may not act as guardian ad litem or court-appointed special advocate for any party in the same proceeding.
>
> **(1m)** RIGHT OF CHILDREN TO LEGAL REPRESENTATION. Children subject to proceedings under this chapter shall be afforded legal representation as follows:
>
> ....
>
> (b) 1. If a child is alleged to be in need of protection or services under s. 48.13, the child may be represented by counsel at the discretion of the court. Except as provided in subd. 2., a child 15 years of age or older may waive counsel if the court is satisfied such waiver is knowingly and voluntarily made and the court accepts the waiver.
>
> 2. If the petition is contested, the court may not place the child outside his or her home unless the child is represented by counsel at the fact-finding hearing and subsequent proceedings. If the petition is not contested, the court may not place the child outside his or her home unless the child is represented by counsel at the hearing at which the placement is made. For a child under 12 years of age, the judge may appoint a guardian ad litem instead of counsel.

When we view § 48.23(1m)(b)2. in context, the meaning of the statute is clear. As the County correctly argues, § 48.23(1m)(b)1. and 2. govern the appointment of counsel for children involved in CHIPS proceedings, not TPR proceedings. The petition referenced in § 48.23(1m)(b)2. relates back to the language in § 48.23(1m)(b)1., which refers to allegations that a child is in need of protection or services under WIS. STAT. § 48.13. There is no statutory requirement for the circuit court to have appointed adversary counsel for A.M.R in these termination proceedings under the plain language of § 48.23(1m)(b).

¶36 The legislative history of WIS. STAT. § 48.23 confirms our plain-meaning interpretation. *See* ***Kalal***, 271 Wis. 2d 633, ¶51 ("[A]s a general matter, legislative history need not be and is not consulted except to resolve an ambiguity in the statutory language, although legislative history is sometimes consulted to confirm or verify a plain-meaning interpretation."). The language in WIS. STAT. § 48.23(1)(b)2. (1987-88)[18] is identical to the language in § 48.23(1m)(b)2. upon which C.R.R. and M.R. rely. However, the 1987-88 version of § 48.23(1) contained a paragraph (d), which provided, "Except as provided in par. (e),[19] if a child is the subject of a proceeding involving a contested adoption or the termination of parental rights, the court shall appoint legal counsel or a guardian ad litem for the child." *See* § 48.23(1)(d) (1987-88). If § 48.23(1)(b)2. (1987-88) was intended to encompass TPR proceedings, the language in § 48.23(1)(d) (1987-88) regarding TPR proceedings would have been superfluous. In interpreting a statute, we "give effect to every word so that no portion of the statute is rendered superfluous." ***Marotz v. Hallman***, 2007 WI 89, ¶18, 302 Wis. 2d 428, 734 N.W.2d 411.

¶37 Additionally, effective January 1, 1990, an order of the supreme court repealed WIS. STAT. § 48.23(1)(d) and (e) from the statutes. *See* S. CT. ORDER, 151 Wis. 2d xxv (eff. Jan. 1, 1990). The Judicial Council Note related to the repeal of § 48.23(1)(d) and (e) indicates:

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[18] Subsection 48.23(1) was subsequently renumbered (1m). *See* 2001 Wis. Act 103, § 164.

[19] WISCONSIN STAT. § 48.23(1)(e) (1987-88) states: "If a child is being adopted by his or her stepparent, the court is not required to appoint legal counsel or a guardian ad litem for the child in the adoption proceedings."

> The only substantive change in the authority of the court to appoint counsel or a guardian ad litem is the repeal of s. 48.23(1)(d) and (e). *The committee decided that it was preferable to require the appointment of a guardian ad litem in such situations*. This is accomplished through the amendment to s. 48.235(1)(c).

Judicial Council Note, 1990, WIS. STAT. ANN. § 48.23 (West 2011) (emphasis added). The same supreme court order repealed and recreated WIS. STAT. § 48.235(1)(c) to read, "The court shall appoint a guardian ad litem for any child who is the subject of a proceeding to terminate parental rights, whether voluntary or involuntary, and for a child who is the subject of a contested adoption proceeding." *See* S. CT. ORDER, 151 Wis. 2d xxv, xxvi-xxvii. The Judicial Council Note related to this amendment, in relevant part, explains:

> *Subsection (1)(b) and (c) set forth situations in which a guardian ad litem is required.* While there are situations in which adversary counsel are an alternative to a guardian ad litem or more desirable and therefore required under s. 48.23, *the committee concluded that the best interests of the child must be reflected by a guardian ad litem in the situations enumerated in these paragraphs*.

Judicial Council Note, 1990, WIS. STAT. § 48.235 (emphasis added). WISCONSIN STAT. § 48.235(1)(c), in its current version, still requires the appointment of a guardian ad litem for a child who is the subject of a proceeding to terminate parental rights. *See* § 48.235(1)(c). The plain language of § 48.23(1m)(b) and the legislative history confirm the circuit court did not err in failing to appoint adversary counsel for A.M.R. once he reached the age of twelve.

VII. Ineffective assistance of counsel claims

¶38 The statutory right to counsel in TPR proceedings includes the effective assistance of counsel. ***Oneida Cty. Dep't of Soc. Servs. v. Nicole W.***, 2007 WI 30, ¶33, 299 Wis. 2d 637, 728 N.W.2d 652. To prevail in an ineffective

assistance of counsel claim, C.R.R. and M.R. must demonstrate that their attorneys' performance was deficient and that the deficient performance prejudiced their defenses. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***A.S. v. State***, 168 Wis. 2d 995, 1004-05, 485 N.W.2d 52 (1992) (extending the ***Strickland*** test to involuntary TPR proceedings). To establish deficient performance, C.R.R. and M.R. must show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed to [them] by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. In other words, C.R.R. and M.R. must show their trial attorneys' "representation 'fell below an objective standard of reasonableness' considering all the circumstances." *See* ***State v. Carter***, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695 (quoting ***Strickland***, 466 U.S. at 688). To establish prejudice, they "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694. C.R.R. and M.R. are required to make a sufficient showing on both components of the analysis. *See* ***id.*** at 687. If they make an insufficient showing on one of the components, we are not required to address both components. *See* ***id.*** at 697.

¶39 Whether C.R.R. and M.R. received the ineffective assistance of counsel is a mixed question of law and fact. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We uphold a circuit court's findings of fact unless they are clearly erroneous. *See* ***id.*** at 634. However, whether those facts meet the legal standard for ineffective assistance of counsel is a question of law that we review de novo. *See* ***id.***

A. Trial attorneys' failure to advocate for guardianship

¶40 C.R.R. and M.R. argue their trial counsel were ineffective for failing to advocate for guardianship during the disposition hearing. M.R. argues his trial counsel's performance was deficient because "although she believed guardianship to be the most appropriate disposition she did not recommend it or even request the court consider it." C.R.R., in turn, argues her trial counsel's performance was deficient because "he never considered the possibility of arguing for a guardianship disposition, instead planning only to argue against termination." They next assert, without much explanation, that guardianship was the most appropriate disposition and the only disposition that gave effect to A.M.R.'s best interests. They then summarily claim, "Furthermore, the failure to request a guardianship was prejudicial."

¶41 Assuming without deciding trial counsel for M.R. and C.R.R. were deficient for failing to advocate for guardianship, M.R. and C.R.R. have not shown they suffered prejudice as a result. The burden is on M.R. and C.R.R. to show that there is a reasonable probability that, but for their trial attorneys' claimed error, the results of the proceedings would have been different. *See* ***State v. Moats***, 156 Wis. 2d 74, 100-01, 457 N.W.2d 299 (1990). Their entire argument that they suffered prejudice consists of a single statement that "the failure to request a guardianship was prejudicial." A single conclusory sentence is insufficient to meet their burden. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we will not consider inadequately briefed issues supported by only general statements).

¶42 Moreover, the record suggests the contrary. During the postdisposition hearing, the circuit court indicated it "considered not only with

regards to [M.R.], but also with [C.R.R.] that considering all the evidence and testimony that the Court had at its disposal, guardianship would likely have not been an appropriate alternative disposition, given all that this little boy had been put through for many, many years." Because the record demonstrates the court considered and rejected guardianship as an alternative to termination, C.R.R. and M.R. have not shown they suffered prejudice as a result of their attorneys' failures to advocate for guardianship.

B. Trial attorneys' acquiescence to the circuit court's in-chambers conference with A.M.R. and the court's failure to report the conference

¶43 C.R.R. and M.R. also argue their trial counsel were ineffective for failing to argue that the Wisconsin statutes required that A.M.R. be allowed to testify and that all the proceedings be reported. They assert, generally, that their counsel did not know the relevant law and, in particular, that M.R.'s counsel did not know that all proceedings had to be reported. They further contend, "[s]ince counsel did not know the law they were ineffective and their ineffectiveness made it impossible as a matter of law for the parents to enter a knowing waiver to the claims that A.M.R. should have testified and his in[-]chambers interview with the court should have been recorded." They acknowledge the "County will surely argue that counsel testified that the parents did not want A.M.R. to testify; they wanted him to talk to the judge." However, they argue M.R. clearly testified at the postdisposition hearing that he wanted A.M.R. to testify, and C.R. was repeatedly told A.M.R. could not testify.[20]

[20] C.R.R. and M.R. do not acknowledge or address the circuit court's conclusion during the postdisposition hearing that it did not find their testimony that they wanted A.M.R. up on the stand to be credible.

¶44 Again, assuming without deciding trial counsel for C.R.R. and M.R. were deficient, C.R.R. and M.R. have not shown these claimed errors resulted in prejudice. In fact, they completely fail to address the prejudice component of the analysis in their briefs. As a result, they fail to sustain their burden of proof, and their ineffective assistance claims in this regard fail. *See* ***Pettit***, 171 Wis. 2d at 646.

C. Trial attorneys' failure to object to the foster parent's testimony about an "open" adoption

¶45 C.R.R. and M.R. argue their trial counsel were ineffective for failing to object to the foster parent's letter and testimony that she intended to allow an open adoption. However, their trial counsel did not perform deficiently for failing to object. As stated above, a circuit court is permitted to consider a foster parent's stated intent to continue visitation with family members. *See supra* ¶24; *see also* ***Margaret H.***, 234 Wis. 2d 606, ¶29. Moreover, M.R.'s trial counsel had a reasonable strategic reason for not objecting to J.P.'s testimony and letter. M.R.'s trial counsel testified that she needed J.P.'s testimony to show M.R. had a substantial bond with A.M.R. She explained that, unlike C.R.R., who had attended counseling sessions with A.M.R., M.R. had not been invited into counseling sessions with A.M.R. so "[t]here wasn't somebody that could testify that [M.R.] had a bond." We are "highly deferential" to counsel's strategic decisions. *See* ***Carter***, 324 Wis. 2d 640, ¶22 (quoting ***Strickland***, 466 U.S. at 689). Under the circumstances of this case, we cannot say trial counsel's failure to object to J.P.'s testimony and letter fell outside the wide range of acceptable professional assistance.

D. Trial attorneys' failure to object when the circuit court did not appoint counsel for A.M.R. once he turned twelve years old

¶46 C.R.R. and M.R. argue their trial counsel were "ineffective for failing to object" when the circuit court failed to appoint counsel for A.M.R. when he turned twelve years old. They further argue the court's failure to appoint counsel was per se prejudicial. As we discussed above, WIS. STAT. § 48.23(1m)(b)2. does not require a court to appoint counsel to a child in a TPR proceeding. *See supra* ¶¶35-37. As a result, we conclude trial counsel for M.R. and C.R.R. did not perform deficiently by "failing to object" to the court's failure to appoint adversary counsel for A.M.R.

VIII. C.R.R. and M.R.'s request for a new trial under WIS. STAT. § 752.35

¶47 C.R.R. and M.R. argue that "[e]ven if [we] were to find that some of the errors listed above were not properly preserved," we should reverse the TPR order pursuant to WIS. STAT. § 752.35 because the controversy was not fully and fairly tried. However, C.R.R. and M.R.'s entire analysis consists of a mere recitation of the issues they raised in their brief. Their argument regarding discretionary reversal is therefore undeveloped, and we decline to consider it further. *See* ***Pettit***, 171 Wis. 2d at 646 (we may decline to review inadequately briefed issues).

By the Court.—Orders affirmed.

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