**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**June 6, 2017**

**Diane M. Fremgen**
**Clerk of Court of Appeals**

**NOTICE**

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**Appeal Nos. 2016AP2369**
**2016AP2370**

**Cir. Ct. Nos. 2016TP2**
**2016TP3**

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

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**NO. 2016AP2369**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO B. L. V.,**
**A PERSON UNDER THE AGE OF 18:**

**TAYLOR COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,**

**PETITIONER-RESPONDENT,**

**V.**

**S. A. L.,**

**RESPONDENT-APPELLANT,**

**T. A. V.,**

**RESPONDENT.**

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**NO. 2016AP2370**

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

**TAYLOR COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,**

**PETITIONER-RESPONDENT,**

**V.**

**S. A. L.,**

**RESPONDENT-APPELLANT,**

**T. A. V.,**

**RESPONDENT.**

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APPEALS from orders of the circuit court for Taylor County: PATRICK J. MADDEN, Judge. *Affirmed*.

¶1 STARK, P.J.[1] S.A.L. appeals orders terminating her parental rights to her children B.L.V. and A.A.V. She argues she received ineffective assistance during the fact-finding hearing when her trial counsel failed to object during the testimony of two social workers and during the closing argument of the guardian ad litem (GAL). She also argues the circuit court failed to properly exercise its discretion in considering the necessary statutory factors before it entered the

[1] These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

orders terminating her parental rights at the dispositional hearing. We reject her arguments and affirm the orders.

## BACKGROUND

¶2 On February 25, 2016, the Taylor County Department of Health and Human Services filed termination of parental rights (TPR) petitions to B.L.V. and A.A.V., alleging grounds for termination existed under WIS. STAT. § 48.415(2), continuing need for protection or services (continuing CHIPS), and § 48.415(6), failure to assume parental responsibility. The petitions alleged that S.A.L. left the children in voluntary foster care in October 2012 prior to serving a jail sentence. After the children were placed in foster care, S.A.L. failed to report on schedule to serve her jail sentence and tested positive for illegal drugs once she finally did. B.L.V. and A.A.V. were also discovered to be behind on immunizations. The children were subsequently adjudged as children in need of protection or services in December 2012. Conditions were imposed for the children's return, which the petitions alleged S.A.L. failed to meet. S.A.L. contested the petitions and proceeded to trial.[2]

¶3 To prove grounds for continuing CHIPS, the County was required to show: (1) the children were adjudged to be in need of protection and services, and they were placed outside of S.A.L.'s home for six months or longer pursuant to one or more court orders containing required termination warnings; (2) the relevant agency made reasonable efforts to provide court-ordered services; (3) S.A.L. failed to meet the conditions for the children's safe return to the home;

[2] T.A.V., the children's father, did not contest the petition and consented to termination of his parental rights.

and (4) there was a substantial likelihood that S.A.L. would not meet the conditions for return within nine months of the fact-finding hearing.[3] *See* WIS. STAT. § 48.415(2)(a)1.-3.; *see also* WIS JI—CHILDREN 324 (2015). To prove a failure to assume parental responsibility the County was required to show that S.A.L. did not have a substantial parental relationship with her children. *See* WIS. STAT. § 48.415(6)(a)-(b); *see also* WIS JI—CHILDREN 346 (2015).

¶4 Social workers Liza Daleiden and Kylie Fitzgerald testified at trial. Fitzgerald was S.A.L.'s primary caseworker and "author[ed]" the dispositional CHIPS orders for the children. Daleiden, who had twenty-six years of experience as a social worker, supervised Fitzgerald's case, kept close contact with S.A.L., and was involved in developing the conditions for return of S.A.L.'s children.

¶5 Both Daleiden and Fitzgerald testified that in their "professional opinion[s]" it was unlikely S.A.L. would be able to complete the conditions ordered for the children's return and maintain sobriety within the allotted time. In support of their opinions, Daleiden and Fitzgerald cited S.A.L.'s inability to meet conditions and engage in the relevant services provided by the County for the "last four years" or "44 months" prior to the fact-finding hearing. Trial counsel objected to Daleiden's opinion as "speculation," which the circuit court overruled. Trial counsel did not object to Fitzgerald's opinion.

[3] S.A.L. stipulated to the first element, which the circuit court answered in the affirmative rather than the jury. S.A.L.'s fact-finding hearing also proceeded under the assumption that S.A.L. had twelve months to meet the conditions for return under the fourth element rather than nine. This difference does not affect our decision as it would make the County's burden to prove grounds for continuing CHIPS more difficult.

¶6 The circuit court instructed the jury on weighing expert testimony. The circuit court also instructed the jury that any statements the attorneys made during closing argument were not to be considered as evidence. Trial counsel did not object to the GAL's closing argument at any point. The jury unanimously found grounds for termination under both continuing CHIPS and failure to assume parental responsibility.

¶7 The case proceeded to the dispositional hearing, where the circuit court determined it was in the best interests of the children to terminate S.A.L.'s parental rights. It stated its conclusion as follows:

> This Court is satisfied upon the files, the records, the testimony, that the Court's presiding over the trial related to this action, the Court heard the testimony of witnesses, the arguments of counsel, the Court finds that it's in the best interests of the children that the rights of the parents be terminated.
>
> I find that pursuant to Section 48.415(6)(b) that there has, in fact, been an expressed concern by the mother in words but not in action, and nothing that has been said has been realized to these children's benefit. I believe that it's appropriate that these children find a substantial, stable place in which to grow and to be nourished, and I believe that it has been shown that they are fit and appropriate children to be adopted.
>
> So the Court finds from the totality of circumstances that [S.A.L.] and [T.A.V.] are unfit parents, and that the Court adopts the recommendation of [the County] and accepts their recommendation to terminate the parental rights, and the Court does so.

TPR orders were entered for both children.

¶8 S.A.L. appealed the TPR orders. We granted her motion to consolidate the appeals and retain appellate jurisdiction while remanding for the circuit court to hear and decide issues of ineffective assistance of counsel and the

circuit court's failure to consider the mandatory factors under WIS. STAT. § 48.426(3) in terminating her parental rights. After a ***Machner***[4] hearing, the court denied S.A.L.'s postdispositional motions. Additional facts are discussed below.

## DISCUSSION

¶9 TPR proceedings involve both a fact-finding hearing on grounds for unfitness and a dispositional hearing to determine the best interests of the child after grounds are determined. *See* ***Steven V. v. Kelley H.***, 2004 WI 47, ¶¶24, 27, 271 Wis. 2d 1, 678 N.W.2d 856. S.A.L. raises challenges involving both hearings.

### I. Ineffective Assistance of Counsel

¶10 S.A.L. argues her trial counsel provided ineffective assistance in the grounds phase in two respects. Parents in TPR proceedings have a right to effective assistance of counsel under WIS. STAT. § 48.23(2), which follows the standard set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). ***A.S. v. State***, 168 Wis. 2d 995, 1004-05, 485 N.W.2d 52 (1992). In order to prove ineffective assistance of counsel, a parent must show both that counsel's performance was deficient and that this deficient performance caused prejudice. *See* ***Strickland***, 466 U.S. at 687. To establish deficiency, the parent must show trial counsel's level of representation "fell below an objective standard of reasonableness." *See* ***id.*** at 688. We "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and we will not second guess reasonable strategic decisions. ***Id.*** at 689. To establish

[4] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

prejudice, a parent has the burden to show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See* ***id.*** at 694. "[A] reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** If a parent fails to make a sufficient showing on one prong of the test, we need not address the other. *See* ***id.*** at 697.

¶11 The standard of review for ineffective assistance of counsel is a mixed question of fact and law. ***State v. Jenkins***, 2014 WI 59, ¶38, 355 Wis. 2d 180, 848 N.W.2d 786. The circuit court's findings of historical fact, including the circumstances of the case and the conduct and strategy of counsel, are upheld unless clearly erroneous. ***Id.*** Whether counsel's performance was constitutionally adequate and whether prejudice resulted are questions of law reviewed independent of the circuit court's conclusions. ***Id.***

*A. Failure to object to "unqualified expert testimony"*

¶12 S.A.L. first claims her trial counsel performed deficiently because counsel failed to object to what S.A.L. alleges was testimony from Daleiden and Fitzgerald that "struck at the heart of her case."[5] S.A.L. asserts that an opinion

[5] The County argues this issue is moot because the social workers' opinions are relevant only to the continuing CHIPS ground and not to the failure to assume parental responsibility ground the jury also found, which supported a finding of unfitness. It claims S.A.L. "fails to explain how predicting S.A.L.'s behavior *after* trial has any bearing on whether she failed to assume parental responsibility *before* trial." (Emphasis in original.) S.A.L. replies that the two grounds "were inextricably linked" because the social workers' opinions that she could not meet conditions were based on her past addictions and inability to stay out of jail, despite her claim that she was the primary caregiver for the children before she was incarcerated.

(continued)

regarding a parent's ability to meet conditions of return is expert testimony that is subject to qualification under WIS. STAT. § 907.02. She argues that neither Daleiden nor Fitzgerald could be qualified under that standard because they lacked expertise in understanding human behavior or addiction, and their opinions were not shown to be based upon reliable methods or data.[6] In response, the County contends both social workers were qualified to give expert opinions or, in the alternative, lay opinions on this topic under WIS. STAT. § 907.01. However, we need not address whether trial counsel was deficient for not objecting to the social workers' opinions. *See* ***Strickland***, 466 U.S. at 697. Rather, we agree with the County that S.A.L. has not satisfied her burden to show there was a reasonable probability that but for admission of the social workers' opinions, the jury would not have found the continuing CHIPS ground existed here. ***Id.*** at 694.

¶13 Under the CHIPS orders entered into evidence in this case, S.A.L. was required to resolve her current criminal charges, to not have further legal violations, to maintain sobriety, to complete substance abuse treatment, to submit to random drug screenings and to maintain a stable, clean and safe home environment for the children. S.A.L. acknowledges the ultimate issue during the grounds phase was whether she could refrain from illegal drug use and incarceration in the future and thus meet her conditions for return. *See* WIS. STAT. § 48.415(2)(a)3. S.A.L. claims this was a "close case" because there was evidence

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We are skeptical of S.A.L.'s reply on this point, but we are also mindful that TPR proceedings "are among the most consequential of judicial acts." ***Steven V. v. Kelley H.***, 2004 WI 47, ¶21, 271 Wis. 2d 1, 678 N.W.2d 856. With an abundance of caution, we shall assume the social workers' opinion testimony affected both grounds in this case and address S.A.L.'s arguments on the merits.

[6] *See generally* ***Daubert v. Merrell Dow Pharm. Inc.***, 509 U.S. 579 (1993).

she made efforts to improve her parenting skills and confront her addictions once she was incarcerated. She emphasizes the testimony of a prison psychologist who acknowledged she has "actively sought" voluntary treatment and her own testimony that she believed her perspectives and ability to remain sober have changed for the better since being incarcerated. She also notes she "at times" attempted to comply with these conditions, despite her addictions, by procuring housing, treatment and employment.

¶14 Contrary to S.A.L.'s argument, this was not a close case. Simply put, the evidence was overwhelming that S.A.L. could not comply with her conditions of return within at least nine months, despite the services the County provided. S.A.L. spent three and one-half years prior to trial without substantially completing any conditions for return, and Daleiden testified S.A.L. complied with the CHIPS orders for "maybe two months" at most during that period. Substance abuse played a large role in S.A.L.'s noncompliance. Fitzgerald testified that S.A.L. admitted to methamphetamine use "a couple different times" while under the CHIPS orders. During two and one-half years of probation, S.A.L. had seven positive drug screens for methamphetamine and opiates. She failed on several occasions to provide a urine specimen when requested to do so.

¶15 S.A.L.'s record of participating in the services provided by the County for her addiction and mental health issues was also poor. Daleiden testified that S.A.L. declined entering a ninety-day substance treatment program in May 2014. Her attendance with her mandatory once-weekly substance abuse counseling provided by the County was, as one counselor termed it, "sporadic" at best. S.A.L.'s substance abuse counselors opined that she made "no progress" in the short or long term in maintaining her treatment goals. S.A.L. was only able to maintain housing for a few months in 2014, which was cut short because she used

drugs and was incarcerated. Because of her drug use, S.A.L. was also unable long-term to remain in housing programs the County provided or maintain employment.

¶16 S.A.L. also had a number of legal violations. Her probation was revoked three times during this three-and-a-half year period, mostly due to drug use, but also due to unlawful possession of prescription drugs and one instance of what her probation supervisor termed "assaultive behavior." Fitzgerald testified S.A.L. had been in and out of jail "nine times" while under the CHIPS orders. After S.A.L. was incarcerated in Taycheedah Correctional Institution in May 2015, she was cited for several major conduct infractions, including selling her own prescription drugs to other inmates on two separate occasions. S.A.L. had not provided for the daily care of the children since 2012, and because she had been placed in the prison segregation unit as a result of her infractions, she had not been able to have face-to-face visits with them since August 2015. S.A.L. herself admitted she "didn't completely take advantage" of the County's services and that she used drugs "on and off" while she was under the CHIPS orders.

¶17 Ultimately, the jury heard the same evidence upon which Daleiden and Fitzgerald relied in forming their opinions, and it was perfectly capable of drawing the same conclusion as the social workers. *See* ***State v. Jensen***, 147 Wis. 2d 240, 256, 432 N.W.2d 913 (1988) ("The jury may be able to draw the requisite inferences [from behavior patterns] itself without the assistance of an expert."). Accordingly, regardless of the lack of an objection to the social

workers' opinions, S.A.L. has not satisfied her burden to show trial counsel's failure to object prejudiced her case.[7]

*B. Failure to object during the GAL's closing argument*

¶18 S.A.L. claims her trial counsel provided ineffective assistance by failing to object at three separate instances during the GAL's closing argument at the conclusion of the fact-finding hearing. She argues the "severity and frequency" of these objectionable statements denied her due process and rendered the trial's result unfair.

¶19 S.A.L. initially argues trial counsel performed deficiently by failing to object when the G.A.L., on two occasions during closing argument, told the jury to consider the best interests of the children. "[A]t the fact-finding stage, the best interests of the child are not to be considered." ***Door Cty. D.H.F.S. v. Scott S.***, 230 Wis. 2d 460, 468, 602 N.W.2d 167 (Ct. App. 1999).

¶20 First, the GAL stated during closing that "[w]e know for the last three and a half years [the children] *have been properly taken care of* because they've been in a *good* foster home." (Emphasis added.) S.A.L. argues there was no evidence of these characterizations of the foster home in the record and that this improperly called attention to the children's current living situation. However,

[7] S.A.L. also argues she is entitled to a new trial in the interests of justice because "the jury heard unqualified expert testimony that it should not have heard." This adds nothing beyond her ineffective assistance claim, and S.A.L. offers no other reason why the real controversy was not fully tried. S.A.L. does not argue this is an "exceptional case[ ]," and we decline to exercise our "formidable" power of discretionary reversal. *See* ***State v. Sugden***, 2010 WI App 166, ¶37, 330 Wis. 2d 628, 795 N.W.2d 456.

when the GAL's argument is viewed in context it is clear counsel had no basis to object. The GAL more fully stated:

> As the Court will tell you in the jury instructions, you can consider the reasons for the lack of involvement when you accept or assess all the circumstances, and that's throughout the children's entire lives. [S.A.L.] testified she was the primary caretaker for the children prior to putting them voluntarily in placement in October of 2012. Yet, her own sister contradicted her and said, oh, no. I actually took care of the children for a couple months. I was the primary caretaker. So, obviously, we're not sure who's been taking care of these children. We know for the last three and a half years they've been properly taken care of because they've been in a good foster home. Beyond that, we don't know what happened. I believe that there's overwhelming evidence that both grounds have been met[.]

¶21 The GAL was commenting on the evidence regarding whether S.A.L. established a substantial parental relationship under WIS. STAT. § 48.415(6), rather than attempting to draw the jury's attention to the children's current living conditions. *See* ***State v. Mayo***, 2007 WI 78, ¶43, 301 Wis. 2d 642, 734 N.W.2d 115 (parties may comment on evidence and argue the jury should reach a conclusion from it in closing argument). In addition, as trial counsel noted at the ***Machner*** hearing, because the jury already heard this statement, a successful objection would have been difficult and any objection at that point would have highlighted for the jury S.A.L.'s lack of contact with her children. We will not second guess trial counsel's reasonable tactical decision. ***Strickland***, 466 U.S. at 687.

¶22 Second, at the end of her closing argument, the GAL stated "as an advocate for the best interests of the children, I believe the grounds have been met, and … I'd ask that you answer yes to the questions on the verdict form." S.A.L. argues this was a direct invocation of the best interests standard. She is incorrect.

In ***Scott S.***, the guardian ad litem told the jury during closing argument at the conclusion of the grounds phase that "I am here because my mission is to try to protect [the child's] ... best interests, to try and help you understand what is in the best interests of [the child] …." ***Scott S.***, 230 Wis. 2d at 468. We determined this statement was not prejudicial because "[o]nly when the court or the [guardian ad litem] instruct[s] the jury that it should consider the best interests of the child is there reversible error." ***Id.*** at 469. Here, the GAL merely described her role in the trial as the advocate for the children's best interest and stated that based upon the evidence in this case, she believed grounds for termination had been met. She did not instruct the jury to consider the best interests of the children. Based upon our decision in ***Scott S.***, we conclude that even if the GAL's comments were somehow objectionable, they were not prejudicial.

¶23 S.A.L. next argues that her trial counsel preformed deficiently by failing to object when the GAL improperly "vouched" for Daleiden's credibility during closing. At trial, S.A.L.'s sister Samantha testified that she contacted the County "anywhere from a few times a day to a couple times a week" to request more assistance with S.A.L.'s drug use. Samantha also testified that she attempted to call Daleiden multiple times but that Daleiden would "ignore" her phone calls and, at best, she "would not hear back from [Daleiden] for weeks and months at a time." On the County's cross-examination, Samantha was provided with a "case worker note" to refresh her recollection, after which she testified she did not remember calling social services regarding the children's immunizations or if she spoke with Daleiden on that topic.

¶24 During closing, the GAL stated the following regarding this testimony:

> Samantha [ ] has said, oh, I've asked Ms. Daleiden numerous times, and she's ignored me. From all the evidence here, I see no ignoring from the last report about Samantha [ ] talking … about the immunizations. So if Ms. Daleiden is going to make a detailed, half-page report on a conversation about immunizations, you think she's going to ignore any other request for [alcohol and drug] assessment? *She's not going to*. [The drug addiction counselors] made it clear what [S.A.L.] could do. … Every one of them, she just ignored.

(Emphasis added.) S.A.L. argues that because Daleiden never testified about any interaction with Samantha during the trial, the GAL's statement that Daleiden is "not going to" ignore an assessment request was improper vouching and invited the jury to consider facts outside the evidence, to which her trial counsel should have objected.

¶25 The GAL did not improperly vouch for Daleiden as she did not rely upon facts outside of the evidence in asserting Daleiden did not ignore Samantha's calls. *See* ***State v. Smith***, 2003 WI App 234, ¶¶25-26, 268 Wis. 2d 138, 671 N.W.2d 854 (prosecutor stating that "[I] knew these officers" and that "[t]hey work hard" and "do a tough job" regarding officer's credibility unfairly referenced matters not in evidence at trial). Instead, the GAL argued that based upon Samantha's cross-examination, the jury could infer Samantha was not credible when she claimed her multiple attempts to contact Daleiden were ignored. *See* ***Mayo***, 301 Wis. 2d 642, ¶43. Trial counsel was not deficient for failing to object to this argument. *See* ***Strickland***, 466 U.S. at 687.

¶26 S.A.L. finally asserts her trial counsel performed deficiently by failing to object to the GAL's misstatement of "key evidence" during closing argument. She claims the GAL "incorrectly argued that the testimony showed that [S.A.L.] used drugs while she was in prison, when there was no such evidence presented." She also claims the GAL erroneously stated she was not complying

with drug counseling, when Mike Sanderson, one of the three substance abuse counselors who testified at trial, stated [S.A.L.] presented as "quite good" and did not testify about any non-compliance prior to S.A.L.'s transfer to other counselors.

¶27 In closing, the GAL did incorrectly state S.A.L. used drugs in prison.

> [Trial counsel] says, well, now [S.A.L.] can be clean. … and, I guess, yes, there's drugs that are in prison, and she's decided not to take them. She did when she first got into prison, but then she's been clean now. That is not an indication of how she's done, because an entire 15 months that she's been in prison … we've got a total of, I think, five major and minor conduct violations that resulted in at least the imposition without good time of 330 days of segregation[.]

¶28 At the ***Machner*** hearing, trial counsel could not recall considering whether to object to this misstatement. However, S.A.L. cannot show trial counsel's failure to object resulted in prejudice here. The evidence presented during the grounds phase showed S.A.L. frequently used illegal drugs, tested positive for illegal substances after she reported to prison, and improperly sold her prescription drugs while serving her prison sentence, in addition to her other ongoing violations of the CHIPS orders. Taking this evidence into account, the GAL's misstatement was minor at most. Furthermore, per the circuit court's instruction, *see supra* ¶6, the jury was not allowed to consider the GAL's claim as evidence. Accordingly, there is no reasonable probability the outcome would have been different had trial counsel objected to the error and called it to the jury's attention. ***Strickland***, 466 U.S. at 694.

¶29 Regarding "noncompliance" with drug counseling, the GAL specifically stated that Sanderson "recommended outpatient drug counseling one time a week. She wasn't complying with that." S.A.L. construes this as an assertion that she was non-compliant with Sanderson during her three brief

sessions with him prior to her transfer to another counselor. However, the GAL was clearly focusing on S.A.L.'s later failure to comply with Sanderson's *recommendation* of once-weekly sessions. Testimony from S.A.L.'s two subsequent substance counselors indicated she struggled with session attendance and making progress toward any goals. The GAL's argument was supported by the evidence. *See* ***Mayo***, 301 Wis. 2d 642, ¶43. There was no basis for trial counsel to object.

¶30 In addition to claiming her trial counsel performed deficiently by failing to object during the GAL's closing argument, S.A.L. also asserts trial counsel "should have requested a mistrial because the jury was irreparably tainted by the GAL's unfair arguments." S.A.L. fails to support her assertion with citation to legal authority or develop an argument that a mistrial was necessary, and we shall not address her claim further. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

## II. Dispositional Hearing

¶31 S.A.L. argues the circuit court erroneously exercised its discretion in terminating her parental rights. During the disposition phase, the best interests of the child are the primary concern.[8] WIS. STAT. § 48.426(2). Initially, citing ***State***

[8] Under WIS. STAT. § 48.426(3), "the court shall consider but not be limited to the following" when considering the best interests of the child:

> (a) The likelihood of the child's adoption after termination.
>
> (b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.

(continued)

***v. Margaret H.***, 2000 WI 42, ¶31, 234 Wis. 2d 606, 610 N.W.2d 475, S.A.L. contends we must remand for a new dispositional hearing because the circuit court failed to consider all of these factors before it determined termination was in the children's best interests. S.A.L. notes that the factors under paragraphs (a) and (f) of WIS. STAT. § 48.426(3) were arguably considered, but both parties agree the record does not reflect the court considered paragraphs (b), (c), (d) and (e) at the dispositional hearing.

¶32 At the postdispositional hearing, the circuit court stated the WIS. STAT. § 48.426(3) factors "were recognized at the time of disposition," but it acknowledged it never expressly stated those factors on record. On the County's suggestion, and over S.A.L.'s objection, the court summarized the factors:

> The Court was satisfied by all of the information in its possession that all six of those standards were met. Specifically, the Court was aware … the children were likely to be adopted.
>
> The Court was aware of the age and health of the children, both at the time of the disposition and the time the children were removed from home, and the Court knew they were healthy.

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> (c) 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.
>
> (d) The wishes of the child.
>
> (e) The duration of the separation of the parent from the child.
>
> (f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements.

> The Court was aware of whether there was a substantial relationship with the parent and family members, and whether it would be harmful to the child to sever these relationships. The Court determined that antic [sic] relationships, given the nature of the lack of contact with the mother, that the Court found that severing of relationships was appropriate.
>
> The Court was unaware of the wishes of the child but was aware by testimony that was reliable that the children were pleased with where they were and wished to remain there.
>
> The Court was aware the duration of the separation was substantial.
>
> The Court was also aware that the children were able to enter a more stable and permanent family relationship as a result of the termination, and the Court took into account the conditions of the child's current placement, the likelihood of future placement and the result of prior [at the dispositional hearing,] placement.

¶33 S.A.L. concedes the court remedied its error at the postdispositional hearing by specifically considering each factor on the record.[9] She instead challenges the court's exercise of discretion, claiming "the court did not demonstrate a familiarity with the facts in this case" at the postdispositional hearing when it addressed WIS. STAT. § 48.426(3).

¶34 The ultimate determination of whether to terminate parental rights is discretionary with the circuit court. ***Margaret H.***, 234 Wis. 2d 606, ¶27. A circuit court properly exercises its discretion when it examines the relevant facts, applies the proper legal standard, and uses a demonstrated rational process to reach a

[9] For the first time in her reply brief, S.A.L. vaguely claims that procedural due process was not satisfied because the circuit court did not consider the statutory factors on the record at the dispositional hearing. We will not address arguments raised for the first time in reply, *see* ***State v. Mata***, 230 Wis. 2d 567, 576 n.4, 602 N.W.2d 158 (Ct. App. 1999), or arguments that are undeveloped, *see* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

reasonable conclusion. ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996).

¶35 S.A.L. asserts the circuit court erroneously exercised its discretion by finding a lack of contact between S.A.L. and the children. However, we will uphold a court's findings of fact unless clearly erroneous. WIS. STAT. § 805.17(2). S.A.L. does not argue that here. She merely argues the record affirmatively established she "remained in close contact with her daughters and the County's social workers" as relevant to WIS. STAT. § 48.426(3)(c). Testimony from the dispositional hearing, however, supports the court's factual finding that the children lacked substantial relationships with S.A.L. or her family. The court placed great weight on the fact that the children had not lived with S.A.L. since October 2012 and had not personally seen her since December 2014, rather than the fact that S.A.L. wrote the children letters or maintained phone contact. While the court is required to consider whether a substantial relationship existed, it may weigh the evidence however it sees fit in determining the children's best interests. *See* ***Margaret H.***, 234 Wis. 2d 606, ¶¶34-35.

¶36 S.A.L. also argues there was no evidence in the record regarding the children's wishes under WIS. STAT. § 48.426(3)(d) and that none could exist since the children, who were eight and nine at the time of disposition, were able to express their wishes but did not testify at the hearing. The circuit court acknowledged that it did not hear testimony about the children's wishes and it made no finding regarding the wishes of the children. However, the court noted that it had considered "in detail" a report prepared by Fitzgerald and entered into evidence at the dispositional hearing. As the court noted, this report stated the children were pleased where they were and wanted to remain with their paternal grandmother, who was their foster parent.

¶37 The record before us reflects that the circuit court considered the proper factors and the children's best interests as a whole based upon the evidence presented. Accordingly, we conclude the court properly exercised its discretion in terminating S.A.L.'s parental rights.

*By the Court.*—Orders affirmed.

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