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

**July 11, 2017**

**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 No. 2016AP2076** **Cir. Ct. No. 2014TP249**

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

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

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**A.S.F.,**

**RESPONDENT-APPELANT.**

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APPEAL from orders of the circuit court for Milwaukee County: DAVID SWANSON and LAURA GRAMLING PEREZ, Judges. *Affirmed*.

¶1 DUGAN, J.[1] A.S.F. appeals the trial court's order terminating her parental rights to her son, J.T.C.,[2] and the postdispositional court's order denying her postdispositional motion alleging that trial counsel was ineffective because she did not object to the foster parent's testimony that promised future contact between J.T.C. and the biological family, if termination were to occur (the "future contact testimony").[3]

¶2 On appeal, A.S.F. argues that (1) trial counsel was ineffective for failing to object to the future contact testimony, and (2) it was error and against public policy for the trial court to consider and rely upon the future contact testimony. She also requests a new trial in the interests of justice.

¶3 For the reasons stated below, we agree with the postdispositional court that A.S.F. has not established that trial counsel was ineffective for failing to object to the future contact testimony because ***Darryl T.-H. v. Margaret H.***, 2000 WI 42, ¶29, 234 Wis. 2d 606, 610 N.W.2d 475, holds that future contact testimony is admissible; therefore, A.S.F. has not shown deficient performance. ***Margaret***

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

[2] J.T.C.'s father, V.C., Jr. also appeals separately from orders terminating his parental rights and denying his postdispositional motion.

[3] The Honorable David Swanson presided over the litigation of the petition for termination of parental rights and entered the order terminating A.S.F.'s parental rights. The Honorable Laura Gramling Perez presided over the postdispositional motion hearing and entered the order denying that motion. For clarity, the court refers to Judge Swanson as the trial court, and Judge Gramling Perez as the postdispositional court.

A.S.F.'s postdispositional motion raised an additional issue, which she is not pursuing on appeal.

***H.*** is also dispositive of A.S.F.'s public policy argument. We also deny the request for a new trial. [4]

## BACKGROUND

¶4 The following background of the case provides context for the issues A.S.F. raises.

¶5 J.T.C. is a five-year-old boy. He was born on August 7, 2012. A.S.F was fifteen years old and V.C. was seventeen years old. A.S.F. was under a Child In Need of Protective Services ("CHIPS") order and living in a group home when J.T.C. was born. For the first six months of J.T.C.'s life, A.S.F. raised him.

¶6 On March 14, 2013, J.T.C. was found to be a Child In Need of Protective Services. A dispositional order placing him outside of his parental home was entered on July 2, 2013. The placement was made because A.S.F. and V.C. displayed diminished protective capacity because they not did not perceive that J.T.C. could be in danger when they physically fought with each other. Several times, V.C. had physically assaulted A.S.F. causing injury to her while J.T.C. had been in the room. Also, J.T.C. needed a strict feeding schedule due to his failure to thrive and A.S.F. and V.C. were not complying with the doctor's requests regarding that strict schedule.

[4] The State does not argue that A.S.F. has forfeited her public policy arguments and her request for a new trial by failing to raise them in her postdispositional motion.

¶7 The Bureau of Milwaukee Child Welfare ("BMCW") made an initial foster care placement. BMCW changed the placement due to issues that the foster parent had with A.S.F. and V.C. In October 2013, BMCW placed J.T.C. with A.S. (the "foster parent"). That placement continued with the foster parent being the adoptive resource as of the March 16, 2016 dispositional hearing.

¶8 A petition to terminate the parental rights of A.S.F. and V.C. was filed on September 22, 2014.[5] The grounds alleged, with respect to A.S.F., were continuing CHIPS, based on the assertion that A.S.F. failed to meet the goals set forth in the July 2, 2013 dispositional order, and the failure to assume parental responsibility.

¶9 At the March 6, 2015 final pretrial conference, the trial court adjourned the grounds trial (the "trial") until July 2015 for good cause because A.S.F. and V.C. were making progress towards reunification. Subsequently, based on the parties' reunification progress, the trial court converted the July 2015 trial date to a proceeding to dismiss the petition to terminate the parental rights and extend the dispositional order. Later, when V.C. was arrested, the trial was rescheduled for October 26, 2015. However, on October 26, 2015, V.C. entered a no-contest plea to the continuing CHIPS ground in the petition to terminate his parental rights.

[5] Wisconsin has a two-part statutory procedure for an involuntary TPR. ***Steven V. v. Kelley H.***, 2004 WI 47, ¶24, 271 Wis. 2d 1, 678 N.W.2d 856. In the grounds phase, the petitioner must prove by clear and convincing evidence that at least one of the twelve grounds enumerated in WIS. STAT. § 48.415 exists. *See* WIS. STAT. § 48.31(1); ***Steven V.***, 271 Wis. 2d 1, ¶¶24-25. In the dispositional phase, the court must decide if it is in the child's best interest that the parent's rights be permanently extinguished. *See* WIS. STAT. § 48.426(2); ***Steven V.***, 271 Wis. 2d 1, ¶27.

¶10 The trial court conducted a five-day court trial regarding A.S.F. At the trial's conclusion on October 30, 2015, the trial court held that there was clear, convincing and satisfactory evidence to support the continuing CHIPS and the failure to assume parental responsibility grounds as to A.S.F., and the trial court found her statutorily unfit as a parent. The matter was set for a dispositional hearing, and time limits were tolled for good cause.

¶11 The trial court held a dispositional hearing for J.T.C. that began on January 8, 2016, and continued on January 22 and March 16, 2016. On March 16, 2016, the trial court found that, taking all of the standards and factors in WIS. STAT. § 48.426 into consideration, it was in the best interests of J.T.C. that A.S.F.'s parental rights be terminated. It entered a written order on March 17, terminating A.S.F.'s parental rights to J.T.C.

¶12 A.S.F. filed a notice of appeal. Subsequently, upon A.S.F.'s request, this court remanded the matter for further proceedings so that A.S.F. could raise an ineffective assistance of counsel claim.

¶13 Upon remand, A.S.F. filed a motion for postdispositional relief. The postdispositional court conducted an evidentiary hearing on February 24, 2017. At the conclusion of the hearing, the postdispositional court denied A.S.F.'s motion in an oral decision. This appeal followed.

## DISCUSSION

### I. Future Contact Testimony is Admissible; Therefore Trial Counsel was not Ineffective.

¶14 A.S.F. contends that trial counsel was ineffective because counsel did not object to future contact testimony at the dispositional hearing. She asserts

that trial counsel's performance was deficient because such statements are inadmissible and that she was prejudiced because the trial court relied on the inadmissible testimony and was able to "avoid its mandated duty to determine if severance of the substantial relationship between A.S.F. and her [child] would be harmful.[6] She also adds that such testimony should never be admitted because it is more prejudicial than probative, citing WIS. STAT. § 904.03, and is against public policy because future contact testimony is illusory and not binding.

¶15 The State argues that pursuant to ***Margaret H.***, 234 Wis. 2d 606, ¶29, future contact testimony is admissible. Therefore, it states that A.S.F. has not shown deficient performance by trial counsel nor prejudice. The State also maintains that it was not error or against public policy for the trial court to consider such testimony because it is admissible.

### A. Standard of Review and Termination of Parental Rights Proceedings.

¶16 "Wisconsin has adopted the United States Supreme Court's two-pronged ***Strickland*** [***v. Washington***, 466 U.S. 668 (1984)] test to analyze claims of ineffective assistance of counsel." ***State v. Williams***, 2015 WI 75, ¶74, 364 Wis. 2d 126, 867 N.W.2d 736, *cert. denied*, 136 S. Ct. 1451 (2016). Wisconsin has extended the ***Strickland*** test to involuntary termination of parental rights proceedings. *See* ***A.S. v. State***, 168 Wis. 2d 995, 1005, 485 N.W.2d 52 (1992).

[6] A.S.F.'s brief refers to "children." However, the court has corrected the typographical error.

¶17 "To prevail under ***Strickland***, a defendant must prove that counsel's representation was both deficient and prejudicial." ***Williams***, 364 Wis. 2d 126, ¶74.

¶18 "The standard of review of the ineffective assistance of counsel components, deficient performance and prejudice, is a mixed question of law and fact." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "Thus, the [postdispositional] court's findings of fact, 'the underlying findings of what happened,' will not be overturned unless clearly erroneous." ***Id.*** (citations omitted). "The ultimate determination of whether counsel's performance was deficient and prejudicial to the defense are questions of law which this court reviews independently." ***Id.*** at 128. "[C]ourts may reverse the order of the two tests or avoid the deficient performance analysis altogether if the defendant has failed to show prejudice." ***Id.***

¶19 As previously stated, at the dispositional phase of a termination of parental rights proceeding, the trial court must determine whether it is in the child's best interests to terminate parental rights. *See* WIS. STAT. § 48.426(2); ***Steven V. v. Kelley H.***, 2004 WI 47, ¶27, 271 Wis. 2d 1, 678 N.W.2d 856. At a minimum, six factors set forth in WIS. STAT. § 48.426(3) must be considered by the trial court in deciding what is in the child's best interests. *See* ***Steven V.***, 271 Wis. 2d 1, ¶27. The only factor that A.S.F. raises as an issue is 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* WIS. STAT. § 48.426(3)(c); ***Steven V.***, 271 Wis. 2d 1, ¶27.

**B. Future Contact Testimony at the Dispositional Hearing.**

¶20 At the January 8, 2016 portion of the dispositional hearing, J.T.C.'s case manager, Donna Mueller, testified regarding several of the foster parent's future contact statements. In addition, the foster parent testified that she was willing to allow J.T.C. to have contact with A.S.F. following adoption so long as the contacts were appropriate. She also stated that it would be important for J.T.C. to maintain a relationship with A.S.F. and his brother.

### C. Because Future Contact Testimony is Admissible Trial Counsel's Failure to Object to the Foster Parent's Future Contact Testimony was not Deficient.

¶21 Given Wisconsin law on the subject, we conclude that A.S.F. has not demonstrated that trial counsel was deficient because counsel did not object to the future contact testimony. The Wisconsin Supreme Court has stated that,

> [WISCONSIN] STAT. § 48.426(3)(c) requires only that the [trial] court examine the impact of a legal severance on the broader relationships existing between a child and his or her family. In its discretion, *the* [*trial*] *court may afford due weight to an adoptive parent's stated intent to continue visitation with family members*, although we cannot mandate the relative weight to be placed on this factor.

***Margaret H.***, 234 Wis. 2d 606, ¶29 (emphasis added). The court further stated that the trial court could "certainly choose to examine the probability that [the foster parent] will be faithful to [that] promise, at the same time bearing in mind that such promises are legally unenforceable once the termination and subsequent adoption are complete." ***Id.***, ¶30.

¶22 ***Margaret H.*** explains what trial courts *must* consider in termination proceedings and what trial courts *may* consider in termination of parental rights proceedings with respect to whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to

sever those relationships. *See* ***id.***, 234 Wis. 2d 606, ¶29. ***Margaret H.*** states that trial courts may consider future contact testimony. Therefore, an objection would have lacked merit. In other words, A.S.F. has not established that trial counsel's performance was deficient. *See* ***State v. Swinson***, 2003 WI App 45, ¶59, 261 Wis. 2d 633, 660 N.W.2d 12 (holding counsel is not deficient for failing to raise a losing objection or bring a meritless motion).

¶23 A.S.F. argues that the following sentence in ***Margaret H.*** is *dicta*: "[i]n its discretion, the [trial] court may afford due weight to an adoptive parent's stated intent to continue visitation with family members, although we cannot mandate the relative weight to be placed on this factor." *See* ***id.***, 234 Wis. 2d 606, ¶29. However, "[t]he supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case." ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). This court cannot dismiss any statements from an opinion by our supreme court on the ground that the statements are *dicta*. *See* ***Zarder v. Humana Ins. Co.***, 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682.

¶24 Based on the foregoing, A.S.F. cannot establish her ineffective assistance of trial counsel claim.

## II. Margaret H. is Also Dispositive of A.S.F.'s Public Policy Argument Regarding Future Contact Testimony.

¶25 A.S.F. asserts that it is against public policy for the trial court to consider and rely on the future contact testimony. Relying on ***Margaret H.***, 234 Wis. 2d 606, ¶29, the State argues that the testimony that A.S.F. complains of is relevant and admissible.

¶26 As we stated above, ***Margaret H.*** allows a trial court to consider future contact testimony when making its dispositional decision. A.S.F. asserts that "[n]o court, not even the Wisconsin Supreme Court in ***Margaret H.***, has ever addressed the issue … [w]hether public policy prohibits a court at disposition from considering information that is not binding and therefore illusory."

¶27 We disagree. The following statement in ***Margaret H.*** shows that our supreme court clearly took into account the fact that representations made by future contact testimony are not legally enforceable:

> [T]he court may certainly choose to examine the probability that [the foster mother] will be faithful to her promise, at the same time bearing in mind that such promises are *legally unenforceable* once the termination and subsequent adoption are complete. The [trial] court may within its discretion consider her good faith promise, but it should not be bound to hinge its determination on that *legally unenforceable promise*.

*See* ***id.***, ¶30 (emphasis added) (citation omitted). Therefore, we reject A.S.F.'s public policy argument as being precluded by ***Margaret H***.

## III. A.S.F. has not Established Any Reason for a New Trial in the Interest of Justice.

¶28 A.S.F. also asserts that this court should order a new trial in the interest of justice. She does not cite any legal authority or present any argument in support of this request. In short, A.S.F. has done no more than to make the assertion without any elaboration. She has not developed or presented an argument telling us why we should order a new trial. We need not address undeveloped arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). A.S.F.'s request for a new trial is denied.

## CONCLUSION

¶29 For the reasons stated above, we conclude that trial counsel was not ineffective by not objecting to the future contact testimony and that A.S.F. has not established that such testimony violates public policy. We also deny her request for a new trial. Therefore, we affirm the trial court and the postdispositional court's orders.

*By the Court*.—Orders affirmed.

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