COURT OF APPEALS
DECISION
DATED AND FILED

April 17, 2018

Sheila T. Reiff
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. 2017AP2097
2017AP2098

Cir. Ct. Nos. 2016TP000033
2016TP000034

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

S.S.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

S.S.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: LAURA GRAMLING PEREZ, Judge. *Affirmed*.

¶1 DUGAN, J.[1] S.S. appeals from the orders terminating her parental rights to L.F. and G.F. and the orders denying her postdisposition motion. She contends that the trial court erroneously exercised its discretion in considering the factors for determining the best interests of the children. She further asserts that trial counsel was ineffective for failing to ask for a bonding assessment, to call L.F. and G.F. to testify about their wishes and to request an adjournment in order to have the foster mother appear and testify at the dispositional hearing. We affirm.

BACKGROUND

¶2 S.S. and J.F., respectively, are the mother and father of L.F. and G.F. L.F. is an eleven-year-old boy who was born on October 24, 2006, and G.F. is a seven-year-old boy who was born on October 27, 2010. The Division of Milwaukee Child Protective Services (DMCPS) removed L.F. and G.F. from S.S. and J.F.'s care on October 19, 2014, because there was no one to care for the children. S.S. was taken into custody for violating the rules of her probation and J.F. was in a hospital.

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

Pursuant to WIS. STAT. RULE 809.107(6)(e), this court is required to issue a decision within thirty days after the filing of the reply brief. We may extend the deadline pursuant to WIS. STAT. RULE 809.82(2)(e) upon our own motion or for good cause. *See* ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 694, 530 N.W.2d 34 (Ct. App. 1995). On our own motion, we now extend the decisional deadline through the date of this decision.

¶3 On January 28, 2015, L.F. and G.F.[2] were each found to be a child in need of protection and services (CHIPS).[3] The trial court entered a dispositional order setting conditions for return of the children and continuing the children's placement outside of the home. S.S. and J.F. were required to maintain sobriety, manage their mental health, parent their children, cooperate and communicate with the family case manager, protect their children and provide for the children's safety, and visit their children regularly.

¶4 On February 4, 2016, the State filed a petition to terminate S.S.'s parental rights for failure to assume parental responsibility under WIS. STAT. § 48.415(6).[4] The State later filed an amended petition on June 1, 2016, adding the ground that each child was in continuing need of protection or services under § 48.415(2). On September 21, 2016, S.S. failed to appear for the final pretrial conference, the trial court found S.S. in default, that the failure to assume parental rights had been established, and that she was unfit to be a parent. The case was adjourned to October 3, 2016, for a dispositional hearing.

[2] Separate cases were filed for each child. However, in most instances, the parties' papers and court orders in each case were identical, and joint court proceedings were held for both cases. For ease of reading, we refer to documents that were filed in the singular, even though actually a particular document was filed each case.

[3] Wisconsin has a two-part statutory procedure for the involuntary termination of parental rights. ***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.

[4] J.F. died on September 6, 2015, of a drug overdose.

¶5 S.S. appeared at the dispositional hearing and asked for a hearing date for a motion to vacate the default judgment. The trial court adjourned the matter to October 26, 2016, for a hearing on the motion. On the adjourned date, the trial court granted S.S.'s motion and set the matter for a new trial date. At the final pretrial conference on March 16, 2017, S.S. pled no-contest to the failure to assume parental responsibility ground and the dispositional hearing was scheduled for July 5, 2017.

¶6 At the dispositional hearing, the trial court heard testimony from S.S., her therapist, and the case manager and found pursuant to WIS. STAT. § 48.426, that it was in the best interests of the children to terminate S.S.'s parental rights. S.S. filed a notice of appeal on October 20, 2017, and filed a motion for remand to the trial court on November 24, 2017. This court granted the motion, while retaining jurisdiction over the appeal.

¶7 On December 1, 2017, S.S. filed a postdisposition motion for a new dispositional hearing. She contended that she was entitled to a new dispositional hearing because trial counsel was ineffective by failing to ask for a bonding assessment between S.S. and the children, by failing to have the children testify about their wishes, and by failing to ask for an adjournment to arrange to have the foster parent testify. The trial court heard testimony from S.S. and trial counsel and denied the motion in an oral decision.

¶8 On appeal, S.S. raises the same issues she raised before the trial court and also contends that the trial court erroneously exercised its discretion in considering the factors for determining the best interests of the children. We affirm.

I. THE TRIAL COURT DID NOT ERRONEOUSLY EXERCISE ITS DISCRETION IN ITS CONSIDERATION OF THE FACTORS FOR DETERMINING THE BEST INTERESTS OF THE CHILDREN

A. The Standard of Review

¶9 "The ultimate determination of whether to terminate parental rights is discretionary with the [trial] court." ***State v. Margaret H.***, 2000 WI 42, ¶27, 234 Wis. 2d 606, 610 N.W.2d 475. We will uphold the trial court's decision to terminate parental rights "if there is a proper exercise of discretion." *See* ***id.***, ¶32. This requires that the trial court applied the correct standard of law to the facts of the case. ***Id.***

¶10 In making its determination, "the best interests of the child[ren] is the paramount consideration" for the trial court. ***Id.***, ¶33. To establish this, the trial court should reference the factors set forth in WIS. STAT. § 48.426(3), and any other factors it relied upon, in explaining on the record the basis for the disposition. ***Sheboygan Cty. DHHS v. Julie A.B.***, 2002 WI 95, ¶30, 255 Wis. 2d 170, 648 N.W.2d 402.

B. The Trial Court Properly Considered All the Factors in WIS. STAT. § 48.426(3)

¶11 At a termination of parental rights (TPR) dispositional hearing,WIS. STAT. § 48.426 requires the court to determine the child's best interest by considering certain enumerated factors, including the "likelihood of the child's adoption." The factors set forth in § 48.426(3)[5] include:

[5] S.S. does not challenge the trial court's analysis of the second and fifth factors, WIS. STAT. § 48.426(b) and (e). Therefore, we do not analyze those two factors.

(continued)

> (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.
>
> (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.

¶12 Addressing the first factor—the likelihood of the children's adoption after termination—S.S. asserts that the trial "court had absolutely no evidence presented to it *that day* on this factor, since the only person who may have been likely to adopt the two boys" did not appear at the dispositional hearing. (Emphasis added.) Postdispositional counsel is reckless with his words and the record.

¶13 First, the trial court (and presumably postdispositional counsel) was aware that the case manager testified at the dispositional hearing on July 5, 2017, that she had a conversation with the foster mother, M.E., and she asked M.E. if she

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However, we note that with respect to the second factor—the age and health of the children—the trial court found that L.F. and G.F. did not have any significant physical or medical issues and were of an age that they are adoptable, and that this factor weighs in favor of termination of parental rights although somewhat less for L.F. than G.F. The trial court also found that with respect to the fifth factor—the duration of the separation—it was considerable and weighed in favor of termination of parental rights.

was committed to adopting L.F. and G.F. The case manager stated that it was her understanding that M.E. was in fact committed to adopting the children. She also testified that L.F. had been living with M.E. for over two years and G.F. had been living with her for a little over two years. She also stated that M.E. is licensed and approved to adopt both L.F. and G.F. and meets the children's behavioral and medical needs.

¶14 Secondly, the trial court was aware that the case manager testified at the permanency plan review hearing on August 30, 2016. The trial court asked the case manager if the foster home where L.F. and G.F. were placed was a stable placement. The case manager stated,

> It is a very stable placement. [M.E.] and the two brothers here. She is CLC [Community Learning Center] program director at Riley [Elementary School]. So she's—that's where [G.F.] and [L.F.] actually attend after school services. She's very good with the boys. She's very patient with them. *She's willing to keep them together at all costs. She is willing to adopt them. She just really wants to get them the help they need.*

(Emphasis added.)

¶15 That testimony was sufficient for the trial court to find that the likelihood of adoption was "reasonably high" since the boys had remained in this same placement for approximately two years and it "has been a stable placement for them." The trial court also noted that "[i]t is a placement that is licensed and approved for adoption." The trial court also acknowledged that the foster mother was not present to testify that she wanted to adopt the children, but noted that the foster mother would not have gone through the approval process if she did not have an intent to adopt the children. From this comment, S.S. argues that the trial court was merely speculating that M.E. wanted to adopt the children.

¶16 First, as noted above, there was sufficient evidence regarding M.E.'s intentions regarding adopting the boys. Secondly, the plain language of WIS. STAT. § 48.426(3)(a), requires the court to determine one thing: whether the child is *likely to be adopted after termination*. It does not require the court to specifically make a finding or order about a particular adoptive resource. In fact, subsection (f) of the statute uses the plural of placement when it mentions the possibility of there being "*future* placements." (Emphasis added.) Here the trial court properly did just that. It found L.F. and G.F. adoptable and transferred their guardianship and custody to the agency, not a particular person.

¶17 Moreover, the problem with S.S.'s argument is that she mischaracterizes the trial court's statements. The trial court never said that L.F. and G.F.'s adoptability *depended on* M.E. being the adoptive parent. In addition, it is not reasonable to infer that the trial court said the children were adoptable only because it "expected" the adoptive parent to be M.E. The trial court reviewed the evidence of the children's adoptability by examining their adoptive placement with M.E. at that time. From that evidence, the court determined that the children were likely to be adopted—nothing more, nothing less. The court never *conditioned* the adoptability finding on placement with M.E. and, in fact, clearly ordered the children's adoption without specifying adoption by M.E. We conclude that the trial court properly considered the likelihood of L.F. and G.F. being adopted after termination was "reasonably high" and found that this factor "weighs in favor of termination of parental rights."

¶18 With regard to the third factor—whether the child has a substantial relationship with the parent or other family members, and whether it would be harmful to the child to sever these relationships, S.S. only challenges the trial court's finding that she did not have a substantial relationship with L.F. and G.F.

She asserts that the trial court heard the testimony of S.S., the case manager who believed that a substantial relationship existed, and the opinions of the guardian ad litem (GAL) and counsel for the State that a substantial relationship existed, but the trial court either was not listening to that testimony or it chose to ignore all of it.

¶19 S.S. fails to consider the case manager's entire testimony, the GAL's entire statement and other evidence in the record about S.S.'s relationship with the children. The case manager testified that S.S.'s relationship with the children was damaged during the previous two and one-half years due to bad choices and her failure to consistently visit with the children. She explained that in the foster home the boys are safe, it is an appropriate place, they have their needs met on a daily basis, and it provides consistency that the boys need with their anxiety. She summarized that although in the beginning there will likely be harm, the boys will be able to work through it and they will be better off because they would have the stability and consistency.

¶20 Similarly, although the State's counsel stated that S.S. had a substantial relationship with the children, she went on to state that the relationship had been significantly affected by the children having been in care for three years, and having witnessed significant domestic violence and the effects of significant drug use, if not drug use in and of itself. The State's counsel pointed out that the children's father died of a drug overdose. The State's counsel argued that any initial harm in severing the relationship would be outweighed by the fact that the boys would be adopted to a permanent and stable home with stability and permanence.

¶21 Additionally, what the GAL actually said was,

> I think the children have a substantial parental relationship. I have no doubt that they want to return home to their parents based on the testimony and everything we read, mother promising everything to them, from neon fish to cell phones to that they are coming home.

However, the GAL went on to say "but from the mother's point of view, I do not know if [there] is a substantial relationship." The GAL pointed out that the testimony about S.S. focused on her improvement not about how the relationship between S.S. and her children had progressed. The GAL also noted that the children have progressed, they had been in foster care for two and one-half years, and they had gone through the loss of their father. The GAL further stated that the children had gone through a lot of grieving and agreed with S.S. that they had not grieved as a family, but that was not the fault of the children. Moreover, when the children needed S.S. after the death of their father, she was gone for nine months and then moved away. She missed visits with the children, which resulted in bad effects on them. Additionally, the GAL asserted that S.S. had focused mostly on making progress in herself and not on her relationship with the children.

¶22 The trial court began its analysis of this factor by noting that, at the grounds phase of the case, it found that S.S. did not have a substantial relationship with the children over the entirety of their lives. S.S. argues that the trial court only found that S.S. failed to assume parental responsibility—not that she did not have a substantial relationship with the children. However, S.S. ignores that pursuant to WIS. STAT. § 48.415(6)(a) to prove that she failed to assume parental responsibility, the State had to prove that S.S. did not have a substantial parental relationship with the children. The statute defines "substantial parental relationship" as "the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." § 48.415(6)(b). The trial court was referencing its findings of fact that demonstrated that S.S. did

not accept and exercise the significant responsibility for the daily supervision, education, protection, and care of the children. Based upon the lack of a substantial relationship, as defined by the statute during the grounds phase, the trial court concluded that S.S. did not assume parental responsibility.

¶23 In its decision terminating S.S.'s parental rights, the trial court found that S.S. went a significant period of time without having visits with the boys and that, when she did have visits with the boys, the visits were very sporadic. It went on to find that the visits were "not particularly robust." The trial court also noted that S.S.'s visits with the children never progressed to unsupervised visits. It found that S.S. had not had consistent contact with the children's teachers and did not have contact with their therapist or medical providers in a way that would help her to learn about the boys' needs so she could be able to begin caring for their needs. Based upon all the evidence in the record, the trial court found that S.S. did not have a substantial relationship with the children.

¶24 The trial court also considered whether L.F. and G.F. would be harmed by the severance of the relationship. It concluded that although there would be some initial harm to the boys, in the long run, it would not be harmful to the boys to sever the relationship because it did not believe it was a substantial relationship. The trial court held that overall, this factor weighed in favor of termination of S.S.'s parental rights. We conclude that the trial court properly exercised its discretion in analyzing this factor.

¶25 Regarding the fourth factor—the wishes of the children, S.S. argues that the trial court ignored the evidence that both L.F. and G.F. expressed their wish of living with S.S. However, the trial court stated that it heard that L.F. wanted to be reunited with S.S., but it did not think that G.F. had expressed that as

clearly. It went on to note that G.F. was a good deal younger than L.F. and had less understanding of what the case entailed. The trial court then found that in L.F.'s case, this factor weighs very slightly against termination of parental rights. However, it went on to note that L.F. only had a minimal understanding what would be involved in reunification with S.S. and what is involved in termination of parental rights. With respect to G.F., the trial court found that the factor was neutral regarding termination of parental rights. We conclude that the trial court properly exercised its discretion in analyzing this factor.

¶26 The trial court considered the sixth statutory factor—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. S.S. argues that the trial court had no evidence regarding the stability or the family relationships that existed in the foster home because the foster mother did not testify.

¶27 Addressing this factor, the trial court stated that "I find guardedly that [the boys] will." First, it noted that there was no likelihood of a family placement that would allow for a transfer of guardianship. It then considered the testimony of S.S.'s therapist, who opined that it was in the best interest of the boys that they be reunited with S.S. and that S.S. was capable of parenting them. The trial court found the therapist was not credible. The trial court is the ultimate and final arbiter of the credibility of witnesses, and we must accept the trial court's credibility determination. *See* ***Kimberly Area Sch. Dist. v. Zdanovec***, 222 Wis. 2d 27, 50, 586 N.W.2d 41 (Ct. App. 1998)

¶28 The trial court acknowledged that it heard little information about the foster home during the dispositional hearing. However, the trial court noted that it heard testimony that the foster mother was approved for adoption and licensed as a treatment foster parent, she expressed a desire to adopt the children, she is an appropriate caretaker for the children, and that the children are safe and secure in her home where they have lived for two years.

¶29 The trial court then found that overall, that this factor weighed in favor of termination of parental rights, although it would have liked to have heard more testimony about the foster placement. We conclude that the trial court properly exercised its discretion in analyzing this factor.

¶30 The trial court went on to state it was considering all the evidence in light of what was in the best interest of the children. It noted the GAL's opinion that termination of S.S.'s parental rights was in the best interest of the children. The trial court then concluded that it was in the best interest of the children that S.S.'s parental rights be terminated and ordered that they be terminated.

¶31 In summary, we conclude that the trial court properly weighed all of the relevant factors in WIS. STAT. § 48.426(3) in determining the best interest of L.F. and G.F. and reasonably exercised its discretion in terminating S.S.'s parental rights.

II. TRIAL COUNSEL WAS NOT INEFFECTIVE

A. The Standard of Review

¶32 "Under the Sixth and Fourteenth Amendments to the United States Constitution, a criminal defendant is guaranteed the right to effective assistance of counsel." ***State v. Balliette***, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334

(citing ***Strickland v. Washington***, 466 U.S. 668, 686 (1984)). 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).

¶33 A defendant must show two elements to establish that counsel's assistance was constitutionally ineffective: (1) counsel's performance was deficient; and (2) the deficient performance resulted in prejudice to the defense. ***Id.*** As to the second prong of the ineffective assistance of counsel test, prejudice occurs when the attorney's error is of such magnitude that there is a "reasonable probability" that but for the error, the outcome would have been different. ***State v. Erickson***, 227 Wis. 2d 758, 769, 596 N.W.2d 749 (1999). "Stated differently, relief may be granted only where there 'is a probability sufficient to undermine confidence in the outcome,' i.e., there is a 'substantial, not just conceivable, likelihood of a different result.'" ***State v. Starks***, 2013 WI 69, ¶55, 349 Wis. 2d 274, 833 N.W.2d 146 (quoting ***Cullen v. Pinholster***, 563 U.S. 170, 189 (2011)).

¶34 To demonstrate deficient performance, the defendant must show that his counsel's representation "fell below an objective standard of reasonableness" considering all the circumstances. ***Strickland v. Washington***, 466 U.S. 668, 687-88 (1984). In evaluating the reasonableness of counsel's performance, this court must be "highly deferential." ***Id.*** at 689. We must make "every effort ... to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Id.*** Counsel enjoys a "strong presumption" that his conduct "falls within the wide range of reasonable professional assistance." ***Id.*** Indeed, counsel's performance need not be perfect, or even very good, to be constitutionally adequate. ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305.

¶35 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 trial 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.*** "Courts may reverse the order of the two tests or avoid the deficient performance analysis altogether if the defendant has failed to show prejudice." ***Id.*** at 128.

B. Trial Counsel was not Deficient in not Obtaining a Bonding Assessment

¶36 S.S. argues that trial counsel was ineffective in not asking for a bonding assessment. She states that trial counsel testified at the ***Machner*** hearing[6] that he never thought about asking for a bonding assessment and that "had he asked for one in this case *that showed this substantial relationship*, it "would have nailed it on the head." (Emphasis added.) However, trial counsel's testimony about what he could have done is the type of hindsight that ***Strickland*** admonishes courts to make every effort to eliminate. ***Id.***, 466 U.S. at 689.

¶37 The trial court held that trial counsel was not deficient in not asking for a bonding assessment. First, the trial court stated that bonding assessments are not routinely requested or provided in advance of a dispositional hearing. It also found that based on the information in the discovery and the evidence that was introduced during the dispositional hearing, that a bonding assessment would not

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

have been particularly helpful in this case. Moreover, the trial court stated that S.S. did not introduce any evidence that showed a bonding assessment would likely have concluded that she had a strong attachment to the boys and that the boys had a strong attachment with her.

¶38 Further, trial counsel testified that he had been practicing law for approximately twenty-seven years and thirty-five percent of his practice involves TPR cases. Trial counsel testified that he planned on demonstrating that a substantial relationship existed through cross-examination of the State's witnesses and through the testimony of S.S. and her therapist. He also testified that he thought he accomplished that goal at the dispositional hearing. He also stated he does not typically ask for a bonding assessment in TPR cases and he stated that he could not recall if he ever had asked for one.

¶39 S.S. failed to demonstrate that trial counsel's representation fell below an objective standard of reasonableness, considering all the circumstances. As the trial court pointed out, bonding assessments are not routinely requested and S.S. failed to show that the assessment would likely have concluded that she had a strong attachment to the boys and that the boys had a strong attachment with her. We agree with the trial court's conclusion that S.S. failed to show that trial counsel was deficient.[7]

[7] Because we conclude that trial counsel was not deficient we need not address the prejudice prong of ineffective assistance. *See* ***Johnson***, 153 Wis. 2d at 127.

C. Trial Counsel was not Ineffective for Failing to Have the Children Testify

¶40 S.S. argues that trial counsel was ineffective in failing to call L.F. and G.F. to testify at the dispositional hearing. She asserts that trial counsel testified that he had not considered calling the children to testify at the hearing and that he believed that it would have made a difference in the outcome of the hearing had he done so. However, S.S. ignores that trial counsel also stated that in "hindsight it might have been helpful, but I [have] never called the children." Again, trial counsel's statement that it might have been helpful is the hindsight that ***Strickland*** admonishes courts to make every effort to eliminate. *See* ***id.***, 466 U.S. at 689.

¶41 Moreover, S.S. offered no evidence that not having children who are six and ten-years-old testify falls below an objective standard of reasonableness, considering all the circumstances. The trial court stated that in its experience, no counsel for a parent has ever called a six-year-old or ten-year-old child to testify at a dispositional hearing. It then found that it was not deficient not to call the children to testify.

¶42 The trial court also addressed the prejudice prong of an ineffective assistance claim. It found there was no prejudice in not calling the children to testify because it heard testimony at the dispositional hearing regarding the boys' wishes, including testimony that the boys wished to perhaps go and live with S.S. or live somewhere else than the current foster home. The trial court then concluded that no evidence was introduced at the ***Machner*** hearing that would have caused it to make a different decision at the dispositional hearing than it made.

¶43 We agree with the trial court's conclusion that S.S. has failed to show that trial counsel was deficient and that she was prejudiced by the decision not to call the children to testify at the dispositional hearing.

D. Trial Counsel was not Ineffective in not Asking for an Adjournment to have the Foster Mother Testify

¶44 S.S. argues that trial counsel was ineffective for not asking for an adjournment in order to subpoena the foster mother to testify about the conditions of the placement and her alleged interest in adopting the children. She states that "though it might be construed as a strategic decision, [it] was in reality a poor decision and deficient."

¶45 At the outset, we note that for trial counsel's performance to have been deficient, S.S. would need to overcome the strong presumption of reasonableness of trial counsel's trial strategy by demonstrating that trial counsel's decision to not ask for an adjournment so that the foster mother could appear and testify was irrational or based on caprice. *See* ***State v. Breitzman***, 2017 WI 100, ¶65, 378 Wis. 2d 431, 904 N.W.2d 93, *petition for cert. filed*, __U.S.__ (Mar. 1, 2018) (No. 17-8010). As noted, reviewing courts should be highly deferential to counsel's strategic decisions and make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. "This court will not second-guess a reasonable trial strategy … [unless] it was based on an irrational trial tactic or based upon caprice rather than upon judgment." ***State v. Domke***, 2011 WI 95, ¶49, 337 Wis. 2d 268, 805 N.W.2d 364. (Citation and internal quotation marks omitted) Thus, we turn to the question of whether trial counsel's decision not to ask for an adjournment to have the foster mother testify was an irrational trial tactic or based on caprice. It was not.

¶46 The trial court found that trial counsel testified that it was his strategy to call attention to the fact that the foster parent did not attend the hearing and argue that there was no evidence on which the trial court could find that the children would be able to enter into a more stable or permanent family relationship. It found that it was a reasonable strategic decision to make and, therefore, trial counsel's decision was not deficient. As noted in ***Breitzman***, where a trial court determines that trial counsel had a reasonable trial strategy, that strategy "is virtually unassailable in an ineffective assistance of counsel analysis." ***Id.***, 378 Wis. 2d 431, ¶65.

¶47 At the dispositional hearing, trial counsel implemented his strategy. He argued in relation to the sixth factor—whether the children would be able to enter into a more stable and permanent family relationship—that the trial court could not make that finding because the foster mother was not there to testify. Trial counsel asserted that,

> We haven't heard from her. We don't know what her position is. … We don't know how she'll continue the relationship. We don't know what her attitude is about it because she did not come here and testify. We have no reason as to why she can't come here.

S.S. fails to demonstrate that trial counsel's strategic decision was irrational or based on caprice. She merely asserts that it was a poor decision, without explaining why. We will not consider undeveloped arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

¶48 Moreover, the trial court noted it did have some concerns regarding the foster mother and her commitment to adopting the children. It stated that nevertheless, it weighed all the statutory factors and considered all the evidence in light of the best interest of each of the children and notwithstanding the absence of

the foster parent, it made the decision to terminate S.S.'s parental rights. It found that S.S. was not prejudiced by trial counsel's failure to ask for an adjournment so that the foster mother could testify.

¶49 We agree with the trial court's conclusion that S.S. failed to demonstrate that trial counsel's strategic decision was irrational or based on caprice and that S.S. suffered no prejudice from that decision.

CONCLUSION

¶50 We conclude that the trial court properly weighed all of the relevant factors in WIS. STAT. § 48.426(3) in determining the best interest of L.F. and G.F. and reasonably exercised its discretion in terminating S.S.'s parental rights. We also conclude that trial counsel was not ineffective in his representation of S.S.

¶51 Accordingly, we affirm the trial court's orders.

By the Court.—Orders affirmed.

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