COURT OF APPEALS
DECISION
DATED AND FILED

August 24, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2906 **Cir. Ct. No. 2008TP145**

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

IN THE INTEREST OF ELIZABETH B., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JESENIA R.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

¶1 FINE, J. Jesenia R. appeals the termination of her parental rights to Elizabeth B., born September 20, 2007. Jesenia R. was born in 1987. She claims that her lawyer gave her ineffective representation in both the grounds phase and the disposition phase. She also claims that the circuit court erroneously exercised

its discretion in finding that termination was in Elizabeth's best interests. We affirm.

I.

¶2 Termination of parental rights is a two-step process. First, a fact-finder decides whether there are facts that justify governmental interference in whatever relationship there is between the birth-parent and his or her child. WIS. STAT. §§ 48.415, 48.424. If there are grounds to terminate a person's parental rights to a child, the trial judge then determines whether those rights should be terminated. WIS. STAT. §§ 48.424(3), (4); 48.426; 48.427. In this case, the circuit court granted the State's motion for summary judgment on the grounds phase, and determined that it was in Elizabeth's best interests that Jesenia R.'s parental rights to her be terminated.

¶3 The petition seeking to terminate Jesenia R.'s parental rights to Elizabeth alleged that:

- Elizabeth had been found by the circuit court to be a child in need of protection or services on December 4, 2007, and was taken from Jesenia R.'s care;

- Jesenia R. had no contact with Elizabeth "since at least November 12, 2007";[1]

[1] Elizabeth was taken from Jesenia R.'s custody on November 8, 2007.

- Jesenia R. abandoned Elizabeth, as that concept is defined by WIS. STAT. § 48.415(1)(a)2;

- Jesenia R. did not assume her parental responsibilities to Elizabeth, as that concept is defined by WIS. STAT. § 48.415(6);

- Jesenia R.'s parental rights to another child, Paul B., who was born in November of 2005, were terminated on November 8, 2007, and, accordingly, the December 4, 2007, finding that Elizabeth was a child in need of protection or services was within three years of the termination of Jesenia R.'s parental rights to Paul. If true, this was a ground under WIS. STAT. § 48.415(10) to terminate Jesenia R.'s parental rights to Elizabeth.[2]

The circuit court granted partial summary judgment to the State on the § 48.415(10) ground, because there was no dispute about the timing of the earlier

[2] Under WIS. STAT. § 48.415(10), the State must prove all of the following to establish a ground to terminate a person's parental rights to a child based on the termination of that person's parental rights to another child:

> (a) That the child who is the subject of the petition has been adjudged to be in need of protection or services under s. 48.13(2), (3) or (10); or that the child who is the subject of the petition was born after the filing of a petition under this subsection whose subject is a sibling of the child.
>
> (b) That, within 3 years prior to the date the court adjudged the child to be in need of protection or services as specified in par. (a) or, in the case of a child born after the filing of a petition as specified in par. (a), within 3 years prior to the date of birth of the child, a court has ordered the termination of parental rights with respect to another child of the person whose parental rights are sought to be terminated on one or more of the grounds specified in this section.

termination order and the order finding Elizabeth to be a child in need of protection or services.

¶4 As we have seen, Elizabeth was taken from Jesenia R. in early November of 2007. On January 17, 2008, she was placed with a foster family that now seeks to adopt her. According to the Record, Jesenia R. was out of Elizabeth's loop until May of 2008. A caseworker with the Bureau of Milwaukee Child Welfare assigned to supervise Elizabeth's case testified that she spoke with Jesenia R. by telephone in early May when Jesenia R. "asked for visitation" with Elizabeth. The social worker said that she told Jesenia R. that they were going to court on Elizabeth's case "later that month" and that Jesenia R. would thus have to wait before she could "do visits." The social worker explained to the circuit court that the delay was because Jesenia R. "hadn't seen the child for a long period of time." The social worker also told the circuit court that Jesenia R. "expressed her desire to be involved in services too, explained [*sic*] to have her child returned." The social worker accordingly agreed to refer Jesenia R. for support services to deal with her substance-abuse problems.

¶5 When the social worker spoke by telephone with Jesenia R. in early May of 2008, the Bureau of Milwaukee Child Welfare was aware that the couple with whom Elizabeth was staying wanted to move to Idaho and take Elizabeth with them. The social worker did not, however, tell Jesenia R. this during that telephone conversation. She testified, though, that she tried to call Jesenia R. two times after that conversation and left messages that were not returned.

¶6 The court date to which the social worker referred was for the initial plea hearing on May 28, 2008. Jesenia R. was at the hearing but without a lawyer. The circuit court arranged to have Jesenia R. referred to the office of the State

Public Defender for the appointment of a lawyer. Before the hearing, the social worker with whom Jesenia R. spoke in early May told Jesenia R. that the foster parents were planning to move to Idaho because of what the social worker testified was a "job situation." The social worker indicated that she explained to Jesenia R. "that it was in the child's best interests to generally stay with one family … throughout the course of these [termination-of-parental-rights] proceedings."

¶7 The parties agree that although the foster family moved with Elizabeth to Idaho, neither the State nor the Bureau of Milwaukee Child Welfare timely notified Jesenia R. or the circuit court. Unless a change in placement is covered by § 48.357(1)(c)1, that is, one that "would change the placement of a child placed in the [parental] home to a placement outside the home," WIS. STAT. § 48.357(1)(am)1 provides, as material, that "the person or agency primarily responsible for implementing the [circuit court's] dispositional order, the district attorney, or the corporation counsel shall cause written notice of the proposed change in placement to be sent to the child, the parent, guardian, and legal custodian of the child, [or] any foster parent."

> The notice shall contain the name and address of the new placement, the reasons for the change in placement, a statement describing why the new placement is preferable to the present placement, and a statement of how the new placement satisfies objectives of the treatment plan ordered by the court.

Ibid. Under § 48.357(1)(am)2, a person receiving the notice "may obtain a hearing on the matter by filing an objection with the court within 10 days after receipt of the notice." Section 48.357(1)(am)3 authorizes the circuit court to "change[] the child's placement from a placement outside the home to another placement outside the home." The social worker testified that based on her discussions with the assistant district attorney handling Elizabeth's termination-of-

parental-rights case and Elizabeth's guardian *ad litem*, they "determined" that they did not have "to file any sort of legal documentation" because "this was just a move one foster home changing addresses to another location." Ultimately, the circuit court disagreed and held that the procedures in § 48.357 should have been followed.

¶8 In a closely reasoned letter-decision, apparently sent out in late May of 2009, the circuit court recognized that moving Elizabeth out of Wisconsin "1617 miles away" not only prevented Jesenia R. "from exercising her right to seek review of the propriety of change of placement before the court," but also "effected a unilateral suspension of visitation rights granted under the original [child-in-need-of-protection-or-services] order and, quite arguably, leveraged the State's position in the pending termination litigation."[3] As a remedy, the circuit court at first rejected directing that Elizabeth be brought back to Wisconsin so Jesenia R. would have more convenient access to her daughter, explaining:

> Elizabeth left for Idaho exactly one year and one day ago. She has resided there ever since. Ordering her back would be visiting the sins of the others on an innocent one[-]year old (and her apparently innocent foster family) and would not serve her immediate best interests. It would be far better for her to remain in her present placement while this court struggles to determine her ultimate best interests under the standards set forth in Wisconsin Statutes sec. 48.426. However, as noted, in effectuating an illegal change of placement, [the Bureau of Milwaukee Child Welfare] has unilaterally suspended visitation authorized under the existing [child-in-need-of-protection-or-services] order and a remedy is both appropriate and necessary.

[3] The letter erroneously gives its date as "May 29, 2008." The parties do not dispute that the year was 2009.

¶9 Ultimately, however, the circuit court ordered "that Elizabeth and presumably one of her foster parents travel here for any three[-]day period prior to the continued [termination-of-parental-rights] hearing" so that Jesenia R. could "visit with Elizabeth under the direct supervision of [the Bureau of Milwaukee Child Welfare] each of those days for a period of not less than two hours and not more than four (depending on [Jesenia R.'s] work schedule and Elizabeth's bed time)---the maximum being the presumption."

¶10 In mid-July of 2009, the circuit court heard testimony to determine whether termination of Jesenia R.'s parental rights to Elizabeth was in her best interests. It concluded that it was. The circuit court explained its rationale in a letter decision issued shortly thereafter, explaining how its consideration of the criteria in WIS. STAT. § 48.426 led to its conclusion:[4]

[4] WISCONSIN STAT. 48.426 provides:

> **(1)** COURT CONSIDERATIONS. In making a decision about the appropriate disposition under s. 48.427, the court shall consider the standard and factors enumerated in this section and any report submitted by an agency under s. 48.425.
>
> **(2)** STANDARD. The best interests of the child shall be the prevailing factor considered by the court in determining the disposition of all proceedings under this subchapter.
>
> **(3)** FACTORS. In considering the best interests of the child under this section the court shall consider but not be limited to the following:
>
> (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)

- "Elizabeth is adoptable and will be adopted."

- The foster parents were the only persons "with whom [Elizabeth] has formed a substantial parental relationship; her bond to their son is clearly a valued and valuable relationship in her young life. The credible evidence establishes that she has been enveloped in the loving and protective embrace of the immediate and extended family of the foster parents."

- The foster "family has provided all the safety, nurturance, stability and commitment to Elizabeth that [Jesenia R.] did not provide between the time of her birth" and Elizabeth's removal from Jesenia R.'s custody. Further, Jesenia R. "demonstrated no capacity or willingness" to give to Elizabeth the kind of care and nurturing "between Elizabeth's birth and late April of 2008" that the foster family gave to her. Indeed, the circuit court opined that "[f]or the first seven months of Elizabeth's life, [Jesenia R.] had wholly

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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.

abdicated her parental responsibilities and, therein, deprived herself of any opportunity to develop a relationship with her daughter."

- Although Elizabeth was in Jesenia R.'s care "from the time of her birth on September 20, 2007," until Elizabeth's removal from Jesenia R.'s custody "on November 8, 2007," the quality of that care "was suspect at best and quite dangerous at worst." The circuit court explained that "Elizabeth had been left in the care of an individual not well known" to Jesenia R., "and in a home that there was a significant reason to believe was a 'drug or crack house.'" Further, Jesenia R. "was high, as confirmed by the urine test administered at the time [Elizabeth was removed from her custody], spoke of very recent suicidal ideation and was homeless."

- Jesenia R. had not made significant attempts to bring her life and, therefore, her ability to properly care for her daughter, into order. Thus, the circuit court noted that "in late March or early April, 2009," Jesenia R. was discharged from substance-abuse treatment "for noncompliance," and that this was "the fourth time in her history with [the Bureau of Milwaukee Child Welfare] that, while on the verge of successful discharge, she falls out of compliance." The circuit court wrote that its "trial notes indicate that her obviously frustrated therapist at that time reaches the conclusion that: 'She does not get it'; and 'she can't make the right decisions.'" The circuit court also noted that in December of 2008, Jesenia R. had "a significant dispute with her present significant other, with police intervention" and was "hospitalized at the Milwaukee Mental Health Center based upon suicide threats."

- The circuit court concluded that in light of the Record, "[t]here simply is not one statutory criteri[on] that does not compelling[ly] support the conclusion that termination and adoption serves Elizabeth's present and future best interests."

¶11 The circuit court then turned to the truncation of Jesenia R.'s chance to have meaningful visitation with Elizabeth once the foster parents took her to Idaho. It concluded that it did not "believe any reasonable view of the entire record supports the conclusion that the misconduct [by not seeking court approval before letting the foster parents take Elizabeth to Idaho] significantly impacted [Jesenia R.]'s ability to establish a substantial parental relationship and to present relevant evidence in that regard." Nevertheless, the circuit court assumed the best scenario if Elizabeth had not been taken to Idaho:

> I determined the most appropriate, fair and reasonable sanction to remedy this issue is to assume that, but for this unilateral deprivation of visitation rights, [Jesenia R.] would have been accorded significant, supervised visitation for a period beginning in May, 2008, and running through the current time; that she would have faithfully attended and acted responsibly and appropriately during those visitations; and that some positive relationship would have developed between her and Elizabeth during that period. Adding those presumed facts to other credible evidence establishing that she has maintained employment and residential stability for the same period and the absence of any substantial indication that she has not maintained sobriety, one might conclude that all the other factors compellingly supporting adoption were overcome and that dismissal [of the termination-of-parental-rights petition] and reinstitution of the [child-in-need-of-protection-or-services] order was appropriate.

Even with these assumptions, however, the circuit court opined that termination was still in Elizabeth's best interests, pointing to Jesenia R.'s dismissal from the substance-abuse treatment program in "March or early April, 2009" "for

noncompliance" and the December of 2008 mental-health hospitalization noted earlier. It opined:

> I have literally no doubt that [the December of 2008] incident, if occurring in the context of ongoing visitation with Elizabeth, would have occasioned, at a minimum, a temporary suspension of visitation. Much more importantly, the two events, in the context of the longstanding nature of substance abuse, mental health and relationship issues in her life, establish beyond any question that there is very significant doubt as to [Jesenia R.]'s present and ongoing ability to provide continuous safe and appropriate parental care for Elizabeth. Given that, leaving aside the governmental misconduct, it would be wholly inappropriate and inconsistent with the "polestar" focus of this [disposition] phase of the proceedings to risk Elizabeth's future physical and emotional safety and development by not allowing her adoption.

II.

A. *Alleged ineffective assistance of counsel.*

¶12 As we have seen, Jesenia R. asserts that her lawyer gave her ineffective representation. Although, not a criminal case, parents in Wisconsin are entitled to effective assistance of counsel when the State tries to terminate their parental rights. ***Oneida County Dep't of Social Servs. v. Nicole W.***, 2007 WI 30, ¶33, 299 Wis. 2d 637, 659, 728 N.W.2d 652, 663. The test is that set out in ***Strickland v. Washington***, 466 U.S. 668 (1984). ***Nicole W.***, 2007 WI 30, ¶33, 299 Wis. 2d at 659, 728 N.W.2d at 663. Thus, to establish that his or her lawyer was ineffective in a termination-of-parental-rights case, a parent must show both (1) deficient representation; and (2) prejudice. *See* ***Strickland***, 466 U.S. at 687. To prove deficient representation, the parent must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." *See* ***id.***, 466 U.S. at 690. To prove prejudice, the parent

must demonstrate that the lawyer's errors were so serious that the parent was deprived of a fair trial and a reliable outcome. *See* ***id.***, 466 U.S. at 687. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, the parent "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." *See* ***id.***, 466 U.S. at 694. This is not, however, "an outcome-determinative test. In decisions following ***Strickland***, the Supreme Court has reaffirmed that the touchstone of the prejudice component is 'whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.'" ***State v. Smith***, 207 Wis. 2d 258, 276, 558 N.W.2d 379, 386 (1997) (citations and quoted source omitted). Further, courts need not address both aspects of the ***Strickland*** test if the parent does not make a sufficient showing on either one. *See* ***Strickland***, 466 U.S. at 697. Finally, our review of an ineffective-assistance-of-counsel claim presents mixed questions of law and fact. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990). A circuit court's findings of fact will not be disturbed unless they are clearly erroneous. ***Ibid.*** Its legal conclusions whether the lawyer's performance was deficient and, if so, prejudicial, are questions of law that we review *de novo.* ***Id.***, 153 Wis. 2d at 128, 449 N.W.2d at 848.

¶13 Jesenia R. complains that her lawyer was ineffective because: (1) he did not timely challenge the foster parents' move to Idaho with Elizabeth; (2) he did not object to the partial grant of summary judgment invoking WIS. STAT. § 48.415(10) because the termination of Jesenia R.'s parental rights to Paul B. was on a default, and, Jesenia R. asserts, her lawyer in that proceeding was ineffective; (3) he did not object to the State's motion for partial summary

judgment under § 48.415(10) because, as phrased by Jesenia R. in her main brief before us, the motion "relied on grounds for termination that were not contained in the warnings required by Wis. Stat. § 48.356."

¶14 The circuit court held a post-termination hearing on Jesenia R.'s contentions that her lawyer was ineffective. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979) (hearing to determine whether lawyer was ineffective) (criminal case). It then sent a letter decision to the parties denying Jesenia R.'s post-termination motion. We address Jesenia R.'s contentions in turn.

1. *Move to Idaho*.

¶15 In its written decision, the circuit court found that the representation by Jesenia R.'s lawyer in the termination-of-parental-rights case involving Elizabeth was deficient "as it relates to the violation of Wisconsin Statute sec. 48.357." Reaching the prejudice aspect of the ***Strickland*** test, the circuit court opined that it was "absolutely convinced that his deficiency in this regard had absolutely no impact on the ultimate resolution of this case and certainly did not and does not undermine confidence in the results of this proceeding." Despite that clear statement, Jesenia R. claims nevertheless that the circuit court applied an outcome-determinative test, in violation of ***Smith***. She argues that the circuit court "concluded that the outcome was appropriate with or without the misconduct [that is, the unlawful move to Idaho], but failed to analyze whether confidence in the outcome was compromised by counsel's deficiencies." On our *de novo* review, we disagree.

¶16 As seen from the excerpt from the circuit court's written decision, it determined that the lawyer's failure to challenge the unlawful move to Idaho "had absolutely no impact on the ultimate resolution." This is hardly an outcome-

determinative test; "no impact" merely relates to whether the ultimate resolution was "reliable." Thus, as we have seen, the circuit court added that the lawyer's failure did "not undermine confidence in the results of this proceeding." The circuit court determined that termination of Jesenia R.'s parental rights to Elizabeth was in her best interests even though it assumed that, contrary to Jesenia R.'s sordid history, she would have used the visitation window that was shut by the Idaho move to comply perfectly with everything that she had to do. This is paradigm lack of prejudice under ***Strickland*** and its progeny, as correctly interpreted by ***Smith***. Given the circuit court's assumptions as to what Jesenia R. would have done if Elizabeth were not taken to Idaho, and its findings of fact relating to Jesenia R.'s history of neglect of Elizabeth and her own significant child-endangering personal and mental-health problems, we agree on our *de novo* review that Jesenia R. has not shown prejudice by her lawyer's failure to timely object to the Idaho move.

2. *Termination of Jesenia R.'s parental rights to Paul B.*

¶17 Jesenia R.'s parental rights with respect to Paul were terminated on her default because she did not appear at the adjourned initial appearance on November 7, 2007, even though she was told by her then lawyer to be there.[5] Jesenia R. claims that her trial lawyer in this case was ineffective because he did not challenge the effectiveness of her lawyer in the Paul matter, contending that not only was her lawyer not prepared for the default on November 7, and the prove-up on November 8, but also that her failure to appear on November 7 was

[5] The initial appearance was adjourned to November 7, 2007, because Jesenia R. was in the hospital giving birth to Elizabeth on the original date.

not sufficiently "egregious" to warrant a default, *see* ***State v. Shirley E.***, 2006 WI 129, ¶13 n.3, 298 Wis. 2d 1, 10–11 n.3, 724 N.W.2d 623, 626–627 n.3.

¶18 The circuit court determined that Jesenia R.'s lawyer in the Paul matter was not deficient. It explained:

> The Paul B. underlying termination order devolved from proceedings in which [Jesenia R.] was afforded full and fair opportunity to appear and contest the proceedings and in which, compliant with all requirements of the applicable statutes, warned that if she did not appear and contest in a timely fashion, her parental rights could be terminated by virtue of her failure to appear and timely contest.

Moreover, Jesenia R. never sought to re-open or appeal the default even though her lawyer immediately wrote to her: "Due to your failure to appear at your court hearings of yesterday and today, [the circuit court] terminated your parental rights … to Paul," and told her to "[p]lease contact me if you would like to discuss any possible postconviction [*sic*] relief concerning your termination of parental rights with respect to Paul."

¶19 Jesenia R.'s lawyer in the Paul matter testified at the ***Machner*** hearing that he was wholly unprepared for the circuit court's finding Jesenia R. in default on November 7, and for the prove-up hearing on the next day: "I wasn't ready for the Prove-up. I wasn't ready for anything." Indeed, he had not even met with Jesenia R. before the default and prove-up, although he did speak with her by telephone when she was in the hospital in connection with Elizabeth's birth. Although he told the circuit court handling the Paul matter that he believed the November 7 date was only for a status proceeding, and that "before we entertain or grant the Default, we should investigate to make sure there isn't a good reason for her absence today," the circuit court entered default nevertheless, telling the

lawyer that if there was an "amazingly good reason why" Jesenia R. was not in court, he could bring a motion to re-open. The lawyer testified at the ***Machner*** hearing that he "felt a little steam-rolled" by what happened.

¶20 The ***Machner***-hearing testimony by Jesenia R.'s lawyer in the Paul matter reveals, on our *de novo* review, that the circuit court's jumping to find Jesenia R. in default and holding the prove-up hearing even though the lawyer was not prepared resulted in Jesenia R. receiving deficient performance.[6] But that does not end the inquiry because, as we have seen, Jesenia R. must also show that she was prejudiced as a result. She has not met that burden. First, she has not shown, by her testimony or otherwise, that she did not acquiesce in the default, as the Record reveals she apparently did. Second, and equally significant, she has not shown that there was a viable defense to either the grounds phase or the disposition phase of the Paul matter. Thus, the lawyer's deficient representation was not *ineffective* representation. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343, 349–350 (Ct. App. 1994) (defendant who alleges that his lawyer was ineffective because the lawyer was deficient in his or her representation must show: (1) what the lawyer should have done, and (2) how not doing it adversely affected the proceeding's reliability).[7] Thus, Jesenia R.'s lawyer in this case was

[6] The circuit court that terminated Jesenia R.'s parental rights to Paul B. was not the circuit court in this case.

[7] We recognize, as argued by the State, that an order terminating a person's parental rights to a child may not, absent extraordinary circumstances, be later challenged once it is final. *See* ***Oneida County Dep't of Social Servs. v. Nicole W.***, 2007 WI 30, ¶22, 299 Wis. 2d 637, 653–654, 728 N.W.2d 652, 660. *See also* WIS. STAT. §§ 48.43(6) & 48.46. Nevertheless, we assume without deciding that where the earlier termination is *the* predicate for a termination under WIS. STAT. § 48.415(10), the validity of that earlier termination is in play.

not ineffective for not challenging the effectiveness of her lawyer in the Paul matter.

3. *Warnings required by WIS. STAT. § 48.356.*

¶21 WISCONSIN STAT. § 48.356 requires the circuit court to warn parents whose children are determined to be in need of protection or services that termination of parental rights is possible if the parent does not comply with the conditions specified in the order. The statute provides, as material:

> **(1)** Whenever the court orders a child to be placed outside his or her home, … or denies a parent visitation because the child … has been adjudged to be in need of protection or services … 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.
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> **(2)** In addition to the notice required under sub. (1), any written order which places a child … outside the home or denies visitation under sub. (1) shall notify the parent or parents … of the information specified under sub. (1).

Jesenia R. claims that her lawyer in Elizabeth's case was ineffective because he did not challenge the motion for partial summary judgment on the ground that Jesenia R. was not told that the termination of her parental rights to Paul could be used as a ground to terminate her rights to Elizabeth. The circuit court disagreed, noting that the purpose of the warnings requirement is to give the parent a chance to adjust his or her future involvement with the child so as to avoid a possible termination of parental rights to that child and that this was not applicable to a termination-of-parental-rights order that had already been entered. This analysis is fully consistent with the case upon which the circuit court relied, ***Winnebago County Department of Social Services v. Darrell A.***, 194 Wis. 2d 627, 644–645,

534 N.W.2d 907, 913–914 (Ct. App 1995), which held that where notice would be superfluous because the act encompassing the notice could not be undone (in that case grounds for termination based on the murder of, or solicitation for the murder of, a parent, *see* WIS. STAT. § 48.415(8)), notice is not required "as a matter of law."[8] Although Jesenia R. argues that an earlier termination order could be undone under some circumstances and that notice might trigger that attempt, we agree with the State that ***Darrell A.*** controls because there, too, a notice could trigger an appeal to undo the conviction in some situations where a parent faced with the loss of his or her children by virtue of § 48.415(8) might not otherwise appeal. Here, of course, the likelihood that a parent would attempt to undo an earlier termination to prevent it from being used as an underlying ground for a subsequent termination is as plausible as a person convicted of the crimes outlined in § 48.415(8) appealing his or her conviction solely because he or she was given a § 48.357 notice. On our *de novo* review, we, as did the circuit court, read ***Darrell A.*** as dispositive.

[8] WISCONSIN STAT. § 48.415(8) provides that the following is a ground to terminate a person's parental rights to his or her child:

> Homicide or solicitation to commit homicide of a parent, which shall be established by proving that a parent of the child has been a victim of first–degree intentional homicide in violation of s. 940.01, first-degree reckless homicide in violation of s. 940.02 or 2nd–degree intentional homicide in violation of s. 940.05 or a crime under federal law or the law of any other state that is comparable to any of those crimes, or has been the intended victim of a solicitation to commit first-degree intentional homicide in violation of s. 939.30 or a crime under federal law or the law of any other state that is comparable to that crime, and that the person whose parental rights are sought to be terminated has been convicted of that intentional or reckless homicide, solicitation or crime under federal law or the law of any other state as evidenced by a final judgment of conviction.

B. *Alleged erroneous exercise of discretion in determining that termination of Jesenia R.'s parental rights to Elizabeth was in her best interests.*

¶22 The crux of Jesenia R.'s contention is that the circuit court did not touch all the bases (factors set out in WIS. STAT. § 48.426) in arriving at the termination home plate. Jesenia R. focuses on the circuit court's presumption that had the visitation window not been closed by the unlawful taking of Elizabeth to Idaho that Jesenia R. would have successfully complied with obligations needed to avoid termination but for the two incidents related by the circuit court in its decision, namely Jesenia R.'s failure to complete her alcohol and drug treatment program and the incident that resulted in her hospitalization at the Milwaukee Mental Health Center. An analysis of the circuit court's rationale, however, reveals that it fully considered all the appropriate factors.

- WIS. STAT. § 48.426(3)(a): "The likelihood of the child's adoption after termination." The circuit court fully considered that factor, as we have already seen.

- § 48.426(3)(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." The circuit court considered both the condition that prompted Elizabeth's removal from Jesenia R.'s custody and her adjustment in the foster family.

- § 48.426(3)(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." The circuit court also noted that Elizabeth had hardly bonded with Jesenia R., and thus severing that relationship would not harm the child.

Significantly, Jesenia R. points to no evidence in the Record to the contrary.

- § 48.426(3)(d): "The wishes of the child." This factor is, of course, not applicable, given Elizabeth's age

- § 48.426(3)(e): "The duration of the separation of the parent from the child." The circuit court considered this factor.

- § 48.426(3)(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 circuit court considered this factor as well.

Jesenia R.'s complaint that the circuit court erroneously exercised its discretion in concluding that termination would be in the best interests of Elizabeth is without merit.

By the Court.—Order affirmed.

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