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

**May 28, 2008**

**David R. Schanker**
**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. 2008AP37** **Cir. Ct. No. 2006TP25**

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

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

**WALWORTH COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,**

**PETITIONER-RESPONDENT,**

**V.**

**LOLITA V.,**

**RESPONDENT-APPELLANT.**

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APPEAL from orders of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

¶1 ANDERSON, P.J.[1] Lolita V. appeals from an order terminating her parental rights (TPR) to Richard C. III (Ricky). Lolita also appeals from an order denying her postdisposition motion for a new trial based on her allegations that she was denied the effective assistance of counsel because her counsel failed to object to improper evidence.

¶2 The facts are undisputed. Following a four-day jury trial on whether there were grounds for the TPR and a subsequent dispositional hearing on June 26, 2007, Judge John R. Race's order terminating Lolita's parental rights was entered.[2]

¶3 The nearly 1000-page trial transcript contains an enormous amount of evidence in support of finding grounds to terminate Lolita's parental rights to Ricky; for example, Walworth County Social Worker Penny Nevicosi's testimony. Nevicosi, the social worker assigned to Ricky's CHIPS proceeding, testified that Ricky had been in foster care for nineteen of the twenty-three months of his life at the time of trial, with at least six of these months being pursuant to Judge Robert Kennedy's April 13, 2006 CHIPS dispositional order which had TPR warnings attached. Nevicosi testified that Judge Kennedy's CHIPS order incorporated several conditions Lolita must meet in order to have Ricky returned to her. She testified that those conditions included Lolita's demonstration of her ability to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless noted.

[2] On December 28, 2006, the Walworth County Department of Health and Human Services (DHHS) filed a petition for termination of Lolita's parental rights. The petition cites to WIS. STAT. § 48.415(2)(a) as grounds for the TPR and is based on a child in need of protection or services (CHIPS) dispositional order entered by Judge Robert Kennedy on April 13, 2006. Judge Kennedy's order was based on Lolita's admissions to the allegations in the underlying CHIPS petition during a plea hearing on February 27, 2006.

consistently meet Ricky's developmental needs, her demonstration of her ability to have successful family interaction with Ricky, her demonstration of her ability to manage her mental health issues as they related to her ability to safely parent Ricky, her compliance with physician's orders related to taking prescribed medications, and her ability to develop alternate coping strategies to compensate for her cognitive limitations as they related to her ability to safely parent Ricky.

¶4 Nevicosi testified at length about the efforts and services Walworth county had provided to Lolita to assist her in meeting the conditions of return. She testified that despite her detailed explanations and Walworth county's assistance, Lolita had not met any of the conditions of return as of the date the TPR petition was filed or, indeed, by the time of trial. Nevicosi testified that Lolita lacked a clear understanding of basic child development and required prompts from others on how to meet Ricky's needs and keep him safe. She testified that Lolita continued to allow people into her life who would potentially pose a risk to Ricky. She testified that despite a substantial amount of assistance and instruction from Walworth county and its representatives, Lolita still had not been able to graduate to unsupervised visits with Ricky and that she never felt she could safely leave Ricky alone with Lolita. She testified that despite the clear conditions of return related to taking her prescribed medications, Lolita had not consistently taken her medication. (Lolita herself testified that at the time of trial she was off her psychiatric medications without her doctor's approval.) Nevicosi testified that she did not believe Lolita would be able to meet the conditions of return within the

twelve months following the trial.[3] Nevicosi further testified that Lolita had failed to demonstrate the ability to see to Ricky's extensive medical needs.

¶5 We provide the above portion of Nevicosi's testimony by way of example because we cannot repeat here all the evidence in support of termination adduced at the grounds trial. Suffice to say that Lolita does not argue that any of the evidence adduced at the grounds trial was in any way insufficient for the jury to reach the result it did. Rather, Lolita's appeal for a new trial is based on her argument that "the trial court erred in concluding that there was no 'best interests' evidence introduced at the grounds trial" and that "the trial court erred in concluding there was no ineffective assistance of counsel for failing to object to the 'best interests' evidence introduced at the grounds trial."

¶6 The specific evidence Lolita takes issue with are two questions posed to and answers given by Dr. David William Thompson who was employed part-time with the Walworth County DHHS as its deputy director, in addition to being a private practice psychologist at the time. At the request of the DHHS, Dr. Thompson conducted an assessment of Lolita in September 2005; his testimony was based on his findings. Under direct examination, the following exchange took place between Dr. Thompson and the DHHS corporate counsel:

> [DHHS attorney] With Ricky being twenty-three months old, if he were to just be placed back in the home is this—I guess in terms of your knowledge about bonding and attachment—is this something that can easily be done without disrupting Ricky's life?

[3] At the time the TPR petition was filed, the petition was required to demonstrate that there was a substantial likelihood that the parent would not meet the return conditions within twelve months of the fact-finding hearing. Since then the statute has been amended to change the twelve-month period to a nine-month period. *See* WIS. STAT. § 48.415(2)(a)3.

> [Dr. Thompson] Taking a child who has formed an attachment with another caregiver—so, for example, if Ricky was being cared for by somebody else consistently over time, so the same person, and that person was doing the things that I've just described, bonding and establishing a relationship with little Ricky, if little Ricky were taken out of that situation and placed back with—placed with anybody else suddenly that would be damaging. It's very likely to then start to interfere with his ability to develop relationships and to trust other people and that can have some—that's a concept we call attachment and it could have some very important ramifications for little Ricky both emotionally and behaviorally later on so with any child I would be very cautious about changing the relationship once it has been established and certainly doing it suddenly would be very likely harmful.
>
> [DHHS Attorney] In order to I guess change a child Ricky's age from one place to another, does that require some period of time?
>
> [Dr. Thompson] In order to do so successfully without damaging the child, yes, it does.

As already noted, Lolita's trial counsel did not object to the above testimony.[4]

¶7 Lolita filed a notice of appeal, followed by a motion for remand. The motion was granted and led to the filing of a postdisposition motion for a new trial in which Lolita made her ineffective assistance of counsel claim. A motion hearing on the same followed on March 6, 2008.

¶8 At this hearing, Lolita's trial counsel was asked whether he agreed that the portion of the testimony of Dr. Thompson, to which Lolita objected, "would fairly be characterized as best interest evidence." He stated that it "could

[4] We note, however, that right before this part of Dr. Thompson's testimony, the attorney for the DHHS asked Dr. Thompson, "Would you be able to just simply place [Ricky] back with Lolita…?" At which point Lolita's trial counsel did object, stating, "Your Honor, I'm going to object. Doctor Thompson doesn't have any power or responsibility to place children." The court overruled the objection stating that the doctor could "have an opinion."

be characterized that way," however, he further explained why he did not object to the testimony:

> I did not at the time view … that testimony as best interests testimony. I think in context … I viewed that as testimony that the petitioner was eliciting in order to show that sending little Ricky back to Lolita as a parent would be a sensitive and difficult and time consuming issue, and the consumption of time of course I viewed as … a relevant question on the elements, that is[: "C]an [Lolita] meet the conditions of return within so many months[?"], and that's how I took the testimony. I did not take it as best interests, he should never be returned. I took it as this is going to be difficult and it's going to take a lot of time and we don't have enough time to do it.

¶9 Judge Race concluded that Lolita's trial counsel had not been deficient and that, in any event, the evidence Lolita objects to was not prejudicial "in light of the totality of the evidence," given that the evidence against Lolita was so "overwhelming" as to undermine the suggestion that the outcome would have been any different had the evidence been precluded. Judge Race confirmed his ruling in a written order entered on March 14, 2008. Lolita appeals from that order and from Judge Race's original dispositional order of June 29, 2007.

¶10 A termination of parental rights hearing is a bifurcated procedure: The initial stage is a fact-finding hearing which determines whether grounds for terminating parental rights exist. WIS. STAT. §§ 48.424 (3), 48.427. The petitioner must prove the allegations in the petition for termination by "clear and convincing evidence." WIS. STAT. § 48.31(1). If the jury is the fact finder, the jury decides only whether grounds for termination have been proven. Sec. 48.424(3).

¶11 In the second stage of the proceeding, the circuit court decides the disposition of the child. ***Waukesha County Dep't of Soc. Servs. v. C.E.W.***, 124

Wis. 2d 47, 60-61, 368 N.W.2d 47 (1985). Even if the jury finds grounds for termination, the circuit court at the second stage, the dispositional stage, of the proceedings, need not terminate parental rights. ***Id.*** WISCONSIN STAT. § 48.424(3) states that "[t]he court shall decide what disposition is in the best interest of the child." Further, WIS. STAT. § 48.426(2) provides that, in making the dispositional decision, the court shall consider the standard and factors enumerated in the section, which include the standard that "[t]he best interests of the child shall be the prevailing factor considered by the court in determining the disposition of all proceedings under this subchapter." At the fact-finding stage, the fact finder—here the jury—does not consider the best interests of the child standard. ***C.E.W.***, 124 Wis. 2d at 61.

¶12 A party asserting ineffective assistance of counsel must show that his or her counsel's representation fell below an objective standard of reasonable care; this requires proving both that counsel's performance was deficient and that the deficient performance prejudiced his or her case. ***Strickland v. Washington***, 466 U.S. 668, 687-88, 692 (1984); *see also* ***A.S. v. State***, 168 Wis. 2d 995, 1005-06, 485 N.W.2d 52 (1992) (extending ***Strickland*** requirement to TPR cases). If a party fails to demonstrate one prong, we need not review the other prong. ***Strickland***, 466 U.S. at 697.

¶13 Ineffective assistance of counsel claims raise mixed questions of fact and law. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990) (citing ***Strickland***, 466 U.S. at 698). In reviewing such claims, we defer to a circuit court's findings of fact, but we review de novo questions of whether counsel's performance was deficient and prejudicial. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985); WIS. STAT. § 805.17(2) (we will not reverse findings of fact unless "clearly erroneous").

¶14 Judicial scrutiny of counsel's performance must be highly deferential. ***Strickland***, 466 U.S. at 689. It is all too tempting for a party to second-guess counsel's assistance after an adverse decision, and it is all too easy for a court, examining counsel's arguments after they have proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *See* ***id.*** "A fair assessment of attorney performance requires that every effort be made 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.*** Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the complaining party must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." ***Id.***

¶15 In other words, the proper standard for attorney performance is that of reasonably effective assistance. ***Id.*** at 687. When a party complains of the ineffectiveness of counsel's assistance, the party must show that the counsel's representation fell below an objective standard of reasonableness. ***Id.*** at 687-88. Trial counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. ***Id.*** at 690.

¶16 After review of the record, we hold that the trial court did not err in concluding that the disputed testimony was not "best interests" evidence. Moreover, we conclude that even if it was "best interests" evidence, its introduction was harmless due to the other "overwhelming" evidence in support of termination of Lolita's parental rights.

¶17 Turning to Lolita's ineffective assistance of counsel claim, we hold that Lolita's trial counsel was not deficient. Lolita has not overcome the presumption that, under the circumstances, the action (or non-action) she challenges as deficient "might be considered sound trial strategy." *See* ***Strickland***, 466 U.S. at 689. In so holding, we discuss only the deficiency prong of the ***Strickland*** test. *See* ***id.*** at 697 (If a party fails to demonstrate one prong, we need not review the other prong.).

¶18 Lolita claims her trial counsel was deficient in failing to object to two questions and answers that came in the middle of the lengthy testimony of Dr. Thompson. Lolita's argument is that the objected-to questions and answers are so clearly representative of improper "best interests" evidence that her trial counsel should have objected. We do not agree.

¶19 Rather, we agree with the DHHS and hold that an impartial review of the questions and answers at issue supports the presumption that trial counsel performed adequately. Lolita's trial counsel explained that, at the time, he declined to object to the disputed questions and answers because he believed that the evidence was relevant to an element of the case, namely whether there was a "substantial likelihood" that Lolita would not meet "the conditions established for the safe return of the child to the home" within twelve months following the trial. *See* WIS. STAT. §48.415(2)(a)3; *supra* note 3.

¶20 Our review of the record, including the motion hearing on ineffective assistance of counsel, does nothing to dismantle our strong presumption that Lolita's trial counsel provided adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *See*

***Strickland***, 466 U.S. at 690. Trial counsel's decision to not object was reasonable under all the circumstances, and he well explained it at the motion hearing:

> I viewed that as testimony that the petitioner was eliciting in order to show that sending little Ricky back to Lolita as a parent would be a sensitive and difficult and time consuming issue, *and the consumption of time of course I viewed as … a relevant question on the elements, that is*[: *"C]an [Lolita] meet the conditions of return within so many months[?"], and that's how I took the testimony*. I did not take it as best interests, he should never be returned. I took it as this is going to be difficult and it's going to take a lot of time and we don't have enough time to do it. (Emphasis added.)

¶21 Judge Race appropriately did not allow for the "distorting effects of hindsight," to bolster Lolita's unpersuasive arguments for a new trial. *See* ***id.*** at 689.

*By the Court.*—Orders affirmed.

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