

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 16, 2012

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. 2011AP2846

Cir. Ct. No. 2010TP4

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

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

MICHAEL B.,

PETITIONER-RESPONDENT,

v.

MARCY M.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Racine County:
ALLAN B. TORHORST, Judge. *Reversed and cause remanded.*

¶1 GUNDRUM, J.¹ Marcy M. appeals from an order terminating her parental rights to her daughter, Khalasia, for failure to assume parental responsibility. The grounds phase of the termination of parental rights proceeding was decided on summary judgment, to which Marcy’s counsel submitted no opposing evidentiary materials. Marcy alleges ineffective assistance of counsel, arguing that counsel’s failure to submit any affidavit in opposition to summary judgment at the grounds phase was deficient performance that prejudiced her. We agree and reverse.

¶2 Michael B., Khalasia’s father, petitioned to terminate Marcy’s parental rights, alleging in part that Marcy “can’t assume a substantial parental relationship with child because mother is very unstable and resides in and out of prison.” Michael moved for summary judgment on the grounds for termination. Marcy’s counsel wrote a letter to the circuit court in opposition to summary judgment, but did not submit any evidence by testimony or affidavit. The letter in opposition said, in part:

Although primary placement of the child, KHALASIA, was transferred from the respondent-mother to the Petitioner-father ... beginning in August, 2008, the [respondent] mother was granted extended periods of alternate placement (visitation)....

During the first year of KHALASIA’s life the Respondent-mother had primary placement of her child, worked and arranged for child care thru Next Generations Now during her hours of work.... The [respondent] mother exercised primary care-taking responsibilities for her child.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

The letter further informs the circuit court of letters Marcy wrote to Khalasia in 2009 and 2010, while Marcy was incarcerated. It ends with a request that the circuit court deny Michael's motion for summary judgment "as issues of fact have been raised."

¶3 The circuit court granted summary judgment on April 20, 2011, due to Marcy's lack of evidentiary opposition.

To defeat the petitioner's motion for summary judgment a respondent must establish disputed issues of material facts requiring trial....

The Respondent has not submitted any affidavits in evidentiary form which would not only be admissible at trial; but has failed to submit any affidavits opposing the affidavit submitted by the Petitioner. A Respondent may not rely upon allegations in her denial to oppose a summary judgment motion as an answer or denial is not an evidentiary document.

The Court is left without the Respondent's first hand knowledge of evidence in opposition to the motion which must be demonstrated. The Respondent cannot argue ultimate or conclusionary facts evidence, evidence must be set forth in the form of affidavits or sworn testimony in the form of a deposition.

It appears the Petitioner has shown that there is no room for controversy in this case as there is no denial of the material facts presented by the Petitioner's affidavits.

This Court finds itself in a position where there is no genuine issue as to any material fact presented by the Respondent and the moving party is entitled to judgment as a matter of law.

While a Court can, and in some instances should, do independent legal research on issues before the Court; the Court cannot create an affidavit or evidence for the benefit of the Respondent.

The court subsequently held a hearing on disposition, after which it terminated Marcy's parental rights.

¶4 Postdisposition, Marcy raised a claim of ineffective assistance of counsel, arguing that her counsel “fail[ed] to properly and adequately oppose summary judgment at the grounds stage of this termination of parental rights proceeding.” The circuit court conducted a *Machner*² hearing, after which it ruled that counsel was “not ineffective.” Marcy renews this issue on appeal.³

¶5 To establish ineffective assistance of counsel, Marcy must show that her counsel’s performance was deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, she must establish that her counsel’s conduct fell below an objective standard of reasonableness. *State v. Thiel*, 2003 WI 111, ¶¶18-19, 264 Wis. 2d 571, 665 N.W.2d 305. To prove prejudice, she 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.” *Id.*, ¶20 (quoting *Strickland*, 466 U.S. at 694).

¶6 Our review of an ineffective assistance of counsel claim presents a mixed question of fact and law. *State v. McDowell*, 2004 WI 70, ¶31, 272 Wis. 2d 488, 681 N.W.2d 500. We will not disturb the circuit court’s findings of fact unless they are clearly erroneous. *Id.* The ultimate determination of whether

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

³ Marcy also argues that the circuit court erred in granting summary judgment due to the fact-intensive nature of the failure to assume parental responsibility ground for termination of parental rights and that it erred when, in its evaluation of counsel’s performance, it failed to consider Marcy’s relationship with Khalasia during the first year of Khalasia’s life. Because we reverse summary judgment on the grounds herein, we need not address these issues. *See Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (need not address all issues when deciding case on other grounds).

counsel's performance constitutes ineffective assistance of counsel, however, presents a question of law. *Thiel*, 264 Wis. 2d 571, ¶21. We review de novo the legal questions of whether counsel's performance was constitutionally deficient and whether the deficient performance was prejudicial to a level that undermines the reliability of the proceeding. *Id.*, ¶24.

¶7 Marcy claims that her counsel was ineffective because he failed to submit any evidentiary opposition to Michael's motion for summary judgment. We agree. Marcy's counsel opposed summary judgment by submitting an unsworn "letter brief" to the circuit court. In that letter, counsel informed the circuit court that Marcy had primary placement of Khalasia during the first year of Khalasia's life and that Marcy "exercised primary care-taking responsibilities for her child." The letter also stated that Marcy arranged for child care during her hours of work. Counsel's letter further informed the circuit court of Marcy's attempted communication with her child while Marcy was subsequently incarcerated. Counsel did not submit any evidence supporting these assertions; the opposition to summary judgment consisted only of counsel's letter.

¶8 At the *Machner* hearing, the various counsel, including Marcy's postdisposition counsel, and the circuit court examined Marcy's counsel regarding his conduct during the case. When asked why he did not submit any affidavit in opposition to summary judgment, counsel indicated that he had contacted some potential witnesses, but that "[t]he information that they gave me was not consistent with the information that [Marcy] had indicated she thought they would provide." When asked by Marcy's postdisposition counsel whether he ever considered submitting an affidavit signed by Marcy attesting to her relationship with Khalasia, counsel responded, "You know, I don't really know. I can't answer that question. I really don't know." Significantly, when asked by the circuit court

why he did not submit affidavits rather than a letter, counsel said, “I think that I made an error in that respect.” When the circuit court questioned counsel regarding whether Marcy was available to him to provide an affidavit, counsel said she was. When the circuit court asked counsel if he had asked Marcy to provide an affidavit, he responded, “I’m not certain if I did or not, Judge.” Later, counsel concurred with the circuit court’s assessment that he did not provide an affidavit from Marcy because he could not corroborate what she was telling him. Counsel admitted, however, that he was aware the evaluation of credibility is “for the trier of fact.”

¶9 The circuit court concluded that counsel was “not ineffective.” Based on counsel’s testimony, the circuit court believed counsel had determined “that he had no basis that he could ethically present to the Court” to put the ground for termination at issue.

¶10 We disagree that counsel’s performance was “not ineffective.” In the face of summary judgment that would deprive Marcy of a jury determination on her failure to assume parental responsibility, counsel’s failure to submit any evidentiary opposition to the summary judgment motion falls below the deferential yardstick we use to measure counsel’s performance. Counsel’s letter to the circuit court opposing summary judgment contained information about Marcy’s provision of care for and relationship with Khalasia. This information may well have

defeated summary judgment by creating a genuine issue of material fact regarding Marcy's assumption of parental responsibility,⁴ if counsel had submitted it in evidentiary form. Furthermore, counsel admitted at the *Machner* hearing that he knew the response to the summary judgment motion had to be "done in affidavit form or some other similar sworn testimony." Counsel acknowledged that he thought he "made an error" with respect to not opposing summary judgment with an affidavit. We agree. Counsel's performance in failing to submit an affidavit in opposition to summary judgment did not fall within reasonably professional norms.

¶11 Additionally, we conclude that there was a reasonable probability that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Thiel*, 264 Wis. 2d 571, ¶20 (quoting *Strickland*, 466 U.S. at 694). The statements made by the circuit court at the summary judgment

⁴ The statutory standard for failure to assume parental responsibility is set forth in WIS. STAT. § 48.415(6):

(6) FAILURE TO ASSUME PARENTAL RESPONSIBILITY.

(a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have not had a substantial parental relationship with the child.

(b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

hearing indicate that there was a reasonable probability the circuit court would not have granted summary judgment to Michael if it had received an affidavit attesting to Marcy's relationship with and care for Khalasia. As the circuit court further stated at the *Machner* hearing:

Clearly, there was no affidavit in opposition to the request for summary judgment. Summary judgments are properly put before the Court for decision by the presentation of affidavits. My conclusion at the time that the motion was filed was, since there were no affidavits, I granted summary judgment on Phase One.

¶12 The circuit court's grant of summary judgment to Michael on the grounds for termination is reversed due to the ineffective assistance of Marcy's counsel.

By the Court.—Order reversed and cause remanded.

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