Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-109

JULY TERM, 2019

In re A.L., Juvenile (M.L., Father*)	} } } } } } }	APPEALED FROM: Superior Court, Caledonia Unit, Family Division DOCKET NO. 56-9-17 Cajv Trial Judge: Howard E. Van Benthuysen

In the above-entitled cause, the Clerk will enter:

Father appeals an order of the superior court, family division, terminating his parental rights with respect to his daughter, A.L. Father and the Defender General's Office, which filed an amicus curiae brief in support of father's brief, contend that father was deprived of effective assistance of counsel in the termination proceeding and that he was prejudiced by the lack of effective representation. Without deciding whether such a claim can be brought in a child-welfare case, how such a claim may be raised, and what standards apply, we conclude that, in light of the family division's unchallenged findings and conclusions, father would not prevail in this appeal on any potential test of ineffective assistance of counsel. Accordingly, we affirm the termination order.

The family division's findings reveal the following facts. A.L. was born in January 2017. On March 25, 2017, father became intoxicated, assaulted mother and a neighbor, and then pointed a handgun at mother while she was holding then two-month-old A.L. As the result of the incident, father pled guilty to aggravated domestic assault, domestic assault, and aggravated assault with a deadly weapon, and was incarcerated from March 2017 until April 2018.

Meanwhile, in September 2017, the family division issued an emergency-care order placing A.L. in the custody of the Department for Children and Families (DCF), which filed a petition alleging that A.L. was a child in need of care or supervision (CHINS). The petition alleged that mother had exposed A.L. to mother's serious drug abuse, including the child spending four days in a crack house, and that mother had left A.L. at the child's daycare for two days before picking her up. Following a contested merits hearing in November 2017, the family court adjudicated A.L. CHINS. The initial case plan set concurrent goals of reunification with mother or adoption. Although the plan did not recommend reunification with father, it contained a list of expectations for father, including participating in a psychosexual evaluation, completing an alcohol-abuse assessment and following up with any recommendations resulting from the assessment, completing the Batterer's Intervention Program (BIP), signing releases for DCF, and following the Department of Corrections' (DOC) rules inside the correctional facility and out in the community. A month later, in December 2017, DCF filed a new case plan calling for adoption

as the sole goal. That same month, DCF filed a petition to terminate father's and mother's parental rights at initial disposition.

Mother voluntarily relinquished her parental rights in September 2018. On March 4, 2019, following an evidentiary hearing that had been held three weeks earlier, the family division terminated father's parental rights. The court concluded that father had failed to take critical steps set forth in DCF's initial case plan and that termination of father's parental rights was in A.L.'s best interests because of the length of time that A.L. had been in state custody, her need for permanency in her life, the absence of any significant relationship between her and father, and father's failure to take steps to demonstrate that he would be able to parent A.L. within a reasonable period of time from the child's perspective.

On appeal, father's sole argument, which was not raised before the family division, is that the termination order cannot stand because his lack of effective representation during the termination proceeding deprived him of due process and prejudiced him.[1] In its amicus curiae brief in support of father's brief, the Defender General's Office argues that: (1) because father's attorney completely failed to act as an advocate for father in the termination proceeding, this Court can address father's claim of ineffective counsel on direct appeal based on the current trial-court record; (2) when ineffective-assistance-of-counsel claims cannot be proven on direct appeal, parties should be able to raise such claims in a motion to reopen the proceeding under Vermont Rule of Civil Procedure 60(b); (3) in considering ineffective-assistance-of-counsel claims in child-welfare cases, this Court should apply a prejudice standard that requires only a showing that the lack of effective counsel "contributed" to the outcome; (4) the Common Benefits Clause of the Vermont Constitution demands a more protective standard in assessing ineffective-assistance-of-counsel claims than the standard provided in criminal cases; and (5) whatever standard this Court chooses to adopt, the termination order must be reversed in this case because the complete lack of advocacy by father's counsel on father's behalf resulted in DCF's petition not being subjected to meaningful adversarial testing.

In response, the State argues that, assuming a parent can claim ineffective-assistance-of-counsel in a termination proceeding, father fails to meet the standard applied in criminal cases. The State urges this Court not to consider amicus curiae's arguments that were not raised by father, but it agrees that, if ineffective-assistance-of-counsel claims are allowed at all in termination proceedings, such claims should be allowed on direct appeal in situations where they may be fairly decided on the record provided, and that Rule 60(b) may be an appropriate vehicle for raising such claims in rare circumstances. The State argues that this Court should assess any such claims under either the standard applied in criminal cases or a similar standard adopted by the Florida Supreme Court, neither of which would offend the Vermont Constitution. The State asserts that, in any event, in this case father has failed to show prejudice, regardless of what standard this Court deems appropriate. A.L.'s appellate attorney joins in the State's brief seeking affirmance of the family division's termination order.

Before considering the parties' arguments, we note that on several occasions in the past this Court has declined to reach the question of whether parties may claim ineffective-assistance-

[1] Father did not seek replacement counsel, and his counsel never filed a motion to withdraw. There is no indication in the record that father complained to the family division about his counsel's representation during the termination proceeding. Nor has father moved to reopen the case for the family division to take evidence on his counsel's alleged ineffectiveness—and we make no determination in this case about whether that avenue was or is open to father.

of-counsel in child-welfare proceedings, concluding in each case that the appellants had failed to satisfy the standard applicable in criminal cases. See In re K.F., 2013 VT 39, ¶¶ 21-22, 194 Vt. 64 (citing past cases in which this Court declined "to address the question of whether an ineffective-assistance-of-counsel claim may be raised to challenge a TPR decision," and declining to decide "whether a parent in a TPR case has a statutory or constitutional right to challenge the effectiveness of counsel because . . . even if such a challenge can be brought, and even accepting for the sake of argument father's allegations about counsel's shortcomings, father in this case cannot meet the Strickland standard" applied in criminal cases).[2]

Here, father argues that the circumstances of this case establish ineffective assistance of counsel, warranting reversal of the termination order under the standard in criminal cases set forth in Strickland v. Washington, 466 U.S. 668 (1984). In Strickland, the U.S. Supreme Court held that in order to obtain a reversal of a criminal conviction based on a claim of ineffective assistance of counsel, a criminal defendant must show by a preponderance of the evidence that (1) the counsel's conduct was "outside the wide range of professionally competent assistance"; and (2) the incompetence was sufficiently prejudicial to create "a reasonable probability" of a different result. 466 U.S. at 690-94. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. In support of his argument, father points out that his trial counsel spoke a total of ninety-nine words at the termination hearing, submitted no exhibits, did not object to the admission of any of the State's exhibits, called no witnesses on father's behalf, did not ask any questions of any of the State's four witnesses, including father, and specifically did not cross-examine father to clarify or expand on issues raised during the State's direct examination of him.

We have serious doubts as to whether on the record in this direct appeal father could show that counsel's conduct fell short of the prevailing standard of a reasonably competent attorney. Although father emphasizes that his counsel was unusually inactive in the termination proceeding, he identifies few specific actions father's counsel should have taken. As reflected in the discussion below, father's specific claims of ineffective assistance on the part of his lawyer relate to matters father believes counsel should have explored further, or matters with respect to which father believes counsel should have cross examined a witness. Father makes no proffer as to what such further exploration or cross-examination would have revealed, and it is not obvious based on the record on appeal that counsel's specified actions, or inactions, were not well-founded tactical decisions rather than ineffective representation. These are not the kinds of failings that are so apparent that they can be readily reviewed on direct appeal. However, we do not base our decision on these considerations, instead relying on the absence of prejudice arising from any of the claimed failures by father's counsel.

Accordingly, in considering father's argument, we presume that father's trial counsel failed to meet the standard of reasonable competence at the termination hearing and instead focus on whether father was prejudiced by his attorney's claimed failings. Cf. In re M.B., 162 Vt. 229, 234 (1994) (assuming, "without deciding, that [father's] counsel failed to meet the standard of reasonable competence in the termination hearing," given "trial counsel's admission to the court that he had serious doubts about the father, and the brevity of the presentation of the father's case"). So far in our decisions we have presumed, without specifically grappling with the issue, that the Strickland standard would apply to claims of ineffective assistance of counsel in a child welfare case. See, e.g., K.F., 2013 VT 39, ¶ 22 (concluding that "father in this case cannot meet the

[2] The Advisory Committee on Rules for Family Proceedings is currently considering "the question of what procedure would apply if we concluded that parents in TPR cases had a legal right to effective counsel." In re K.F., 2013 VT 39, ¶ 22 n.2.

Strickland standard"); M.B., 162 Vt. at 234 (setting forth Strickland standard and stating that "we will reverse for ineffective assistance of counsel only if the father demonstrates a reasonable probability that, absent the prejudicial effect of counsel's representation, his parental rights and responsibilities would not have been terminated"). For his part, father relies on the Strickland standard in claiming prejudice. The State and amicus curiae spar over what prejudice standard should apply in a child-welfare case, with the State advocating for the Strickland standard or a similar standard applied in Florida, and amicus curiae favoring a standard applied in Alaska and Connecticut that hinges on whether counsel's ineffectiveness contributed to the outcome. Both the State and amicus curiae claim that whatever standard is applied, their respective side should prevail.

At the outset, we reject amicus curiae's suggestion that the U.S. Supreme Court's decision in United States v. Cronic, 466 U.S. 648 (1984), which was decided on the same day as Strickland, is applicable here. In Cronic, the Supreme Court reversed a Sixth Circuit decision to vacate a conviction without considering whether the defendant had been prejudiced by his trial counsel's performance based on its conclusion that the circumstances—including defense counsel's lack of experience and minimal time to defend against complicated charges—deprived defendant of his Sixth Amendment right to counsel. 466 U.S. at 649-50, 665-67. The Supreme Court acknowledged in Cronic, however, that certain circumstances could be inherently so prejudicial "that the cost of litigating their effect in a particular case is unjustified," such as where there is a "complete denial of counsel," or counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing" to the point where there is a constructive denial of the Sixth Amendment right to counsel, or the attorney is essentially prevented from providing effective assistance. Id. at 658-61; see Strickland, 466 U.S. at 692-93 (acknowledging that prejudice may be presumed where there is actual or constructive denial of counsel, such as where there is conflict of interest, but concluding that "[c]onflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice"); see also In re L.H., 2018 VT 4, ¶¶ 32-34, 206 Vt. 596 (presuming prejudice in CHINS proceeding where State's attorney had conflict of interest through prior representation of children in proceeding); In re J.B., 159 Vt. 321, 324-26 (1992) (presuming prejudice in delinquency proceeding where juvenile's attorney, in misguided effort to obtain immediate mental-health treatment for juvenile, aided prosecution by allowing juvenile to be interrogated by police unaccompanied by his parents or attorney). As we stated in In re Williams, the U.S. Supreme Court has emphasized that the Cronic exception of presumptive prejudice "is a very narrow one and applies only in cases where counsel completely fails to provide representation." 2014 VT 67, ¶¶ 32-33, 197 Vt. 39 (citing Bell v. Cone, 535 U.S. 685, 696-97 (2002) and rejecting petitioner's argument that his sentencing attorney's limited participation at sentencing hearing was tantamount to non-representation). Father's counsel's participation in this case was plainly minimal, but this case does not involve an actual or constructive denial of counsel controlled by Cronic.

We accordingly conclude that in order to make any potential ineffective assistance of counsel claim, father does have to show prejudice—by some standard. On the record before us, father cannot show prejudice under any of the potentially applicable standards. In examining the statutory best-interest factors and terminating father's parental rights, the family division emphasized that father had no relationship with his daughter, with whom he had had face-to-face contact only one time between his 3/26/17 incarceration, when the child was two months old, and the 2/15/19 termination hearing. The court found that A.L. was closely bonded with her preadoptive foster family, with whom she had spent almost her entire life, and that she needed permanency. See 33 V.S.A. § 5114(a) (setting forth best-interest factors, including child's relationships with parents, foster parents and others; child's adjustment to home and community;

whether parent has played constructive role in child's life; and, most importantly, likelihood that parent will be able to resume parental duties within reasonable period of time); In re N.L., 2019 VT 10, ¶ 26 (noting that this Court has "repeatedly emphasized" that reasonableness of time period for resuming parental duties is measured from child's perspective, which may take into account child's young age or special needs). The court also found that father had failed to meet expectations aimed at increasing his chances of being in a position to parent the child. At the time of the termination hearing, father had not undergone a requested psychosexual evaluation despite his past criminal history; had not participated in an alcohol-assessment program despite his admitted struggles with alcohol and his assault of the child and her mother while under the influence; and had not completed the BIP program, due in part to workplace injuries he had suffered. Significantly, father failed to take steps necessary to begin personal contact with A.L. following his release from prison. In his first interview with supervised visitation staff, father refused to discuss his lengthy, multi-state criminal record. Further, supervised visitation depended upon receipt of father's mental-health evaluation; even though the evaluation was completed in May 2018 shortly after father was released from prison, father did not provide a copy of the evaluation to visitation staff until December 2018 and he did not tell DCF he had done so until January 2019. These were the critical findings supporting the trial court's termination decision, and they were supported by overwhelming evidence.

Father identifies eight specific actions his attorney should have taken to advocate on his behalf: (1) when father testified that he had been in counseling since his release from prison but was awaiting a new therapist, his counsel should have explored father's relationship with his therapist and his goals in therapy; (2) when father testified that he had successfully completed a parenting class during his incarceration, his counsel should have explored what father learned in that class; (3) his counsel should have explained that father's failure to complete the BIP program was due to factors beyond his control; (4) given that father's mental-health evaluation described only past alcohol problems and father testified that he had not drunk alcohol since the assault that led to his incarceration, his counsel should have explained why father prioritized the BIP program over an alcohol-treatment program; (5) regarding father's failure to obtain a psychosexual evaluation, his counsel should have submitted evidence that father had never been convicted of a sexual offense; (6) his counsel should have followed up on father's testimony that the gun he pointed at mother and A.L. was a nonfunctional antique; (7) his counsel should have cross-examined the foster mother regarding her testimony downplaying the telephone contact between father and A.L. when she was a very young child; and (8) regarding testimony about A.L.'s fragile mental state when she came into state custody, his counsel should have suggested that the reason for her fragile state was the manner in which she was taken into state custody—in the middle of the night and waking up in a strange house with strangers.

Even if we concluded that these failings fell below the standard of competent representation, we could not conclude that father was prejudiced by any of the failings. Cf. K.F., 2013 VT 39, ¶ 28 (concluding that none of father's proffers altered family division's findings and conclusions in support of its termination decision). Regarding father's mental-health counseling, father testified that he met with two different therapists for a total of approximately ten sessions, but he had difficulty articulating what he had learned in those sessions. It is not clear what father could have gained by his attorney exploring this subject, or how he was prejudiced by counsel's failure to do so, particularly given that the family division did not base its decision on father's need for mental-health counseling. Nor did the family division rely upon father's lack of parenting skills; hence, we see little that could have been gained by exploring what he learned in his prison parenting class. Regarding the BIP program, the court acknowledged that part of the reason for father not completing the program was because of injuries he sustained at work. As for father's prioritizing participation in the BIP program before obtaining an alcohol assessment, father

explained that his probation officer was focused on his addressing domestic violence, and it is not clear how this testimony could have been expanded in father's favor. Regarding father's suggestion that his attorney could have obtained records showing that he was never convicted of a sexual offense, thereby indicating that he had no need for a psychosexual evaluation, the evidence, as recognized by the family division, was that in Georgia in 2007 defendant was charged with sexual battery and then recharged with child molestation and simple assault before he wound up pleading down to a lesser nonsexual charge. Those facts would not have undermined DCF's expectation that father undergo a psychosexual evaluation. As for father's claim that the gun he pointed at mother and A.L. was a nonfunctional antique, father repeatedly testified to this claim, the family division was aware of the claim, and the court did not rely on the functionality of the gun in making its termination decision. Regarding father's telephone contacts with A.L., there was little to be gained by cross-examining the foster mother on how significant his telephone conversations were with a very young child. Finally, it is difficult to imagine any benefit father could have obtained by his attorney suggesting that A.L.'s fragile state when she came into state custody was the result of the fact that the two-month-old child was taken to her foster home in the middle of the night and woke up among strangers.

In sum, even if a claim for ineffective assistance of counsel exists in these circumstances, which we do not decide, and we were persuaded that father's counsel should have pursued these avenues of inquiry, there is no basis in this record on appeal to support the claim that these failures influenced the trial court's termination decision. That decision was grounded in the trial court's findings about the absence of any meaningful relationship between father and A.L., A.L.'s adjustment to her foster home, and the fact that father would not be in a position to parent A.L. within a reasonable time from A.L.'s perspective. The claimed failings of counsel did not impact these findings.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice