COURT OF APPEALS
DECISION
DATED AND FILED

April 23, 2010

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 Nos. 2009AP2487
2009AP2488

Cir. Ct. Nos. 2008TP37
2008TP38

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

NO. 2009AP2487

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

PETER H.,

PETITIONER-RESPONDENT,

V.

KERI H.,

RESPONDENT-APPELLANT.

NO. 2009AP2488

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

PETER H.,

PETITIONER-RESPONDENT,

V.

KERI H.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Outagamie County: MITCHELL J. METROPULOS, Judge. *Affirmed*.

¶1 BRUNNER, J.[1] Keri H. appeals orders terminating her parental rights to Marissa H. and Karley H. She argues she received ineffective assistance of counsel and requests a new dispositional hearing. She also asserts the order terminating her rights to Marissa must be reversed as moot because Marissa reached the age of majority after its entry. We reject Keri's ineffective assistance claim because Keri has not demonstrated her attorney performed deficiently. We conclude Keri's reliance on the mootness doctrine is misplaced.

BACKGROUND

¶2 Marissa and Karley were born on September 3, 1991, and September 30, 1993, respectively. The children were placed with Keri when she and their father, Peter H., divorced in 2001. On June 12, 2002, Peter received a phone call from Marissa, who did not know where Keri was. The children expressed concern for their safety, relating instances in which Karley observed Keri abusing drugs and their encounters with strangers in the home. Since the

[1] These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

2002 incident, the children have resided primarily with Peter and have had minimal contact with their mother.

¶3 Peter petitioned to terminate Keri's parental rights on September 30, 2008, alleging continuing denials of periods of physical placement pursuant to a court order.[2] The circuit court found Keri unfit and granted summary judgment for Peter, noting a February 20, 2007, court order suspending Keri's placement rights. Keri's parental rights to Marissa and Karley were terminated on July 8, 2009, following dispositional hearings.

¶4 Keri filed a postdisposition motion for a new trial, alleging she received ineffective assistance of counsel. Keri also asserted Marissa's case was moot because Marissa turned eighteen after entry of the order terminating Keri's parental rights. The court held a ***Machner*** hearing on Keri's motion.[3]

¶5 At the hearing, Keri's trial cournsel testified about his pretrial activities and strategy. In response to Keri's concern about his lack of preparation, trial counsel explained he had difficulty obtaining the case file from Keri's previous attorneys and requested adjournment of the summary judgment hearing because of the delay. He also addressed Keri's allegations of inadequate

[2] Continuing denial of periods of physical placement or visitation is a ground for termination of parental rights. WIS. STAT. § 48.415(4). As relevant here, it is established by proving: (1) the parent has been denied physical placement by court order in an action affecting the family; and (2) the order has continued in force for at least one year without modification. ***Id.***

Peter previously filed termination of parental rights petitions alleging the same ground on March 28, 2005. We reversed a summary judgment in those cases because no court order denying placement for a year or more existed at the time of the petitions' filing. *See* ***Peter D. H. v. Keri L. H.***, Nos. 2006AP2343, 2006AP2344, unpublished slip op. (WI App Nov. 28, 2006).

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

communication, acknowledging he failed to advise her of the initial appearance date in time for her to attend. Counsel stated he frequently spoke with Keri about potential witnesses and together they developed a theory of defense which acknowledged her past problems but focused on her recent progress in treatment. He testified he discussed with Keri what testimony she would offer and what she should be prepared for on cross-examination. In response to alleged deficiencies in his preparation of other witnesses, counsel asserted he "had discussions with every witness in advance," with the nature of the expected testimony determining the length of the conversation.

¶6 Trial counsel acknowledged Keri was dissatisfied with his conduct during dispositional hearings held before the court. He testified Keri was discontent with his questioning of witnesses and requested new counsel during the hearings. Counsel indicated he empathized with Keri at the time of her request because cross-examination the day before was "particularly difficult." To resolve Keri's criticisms about his examination of witnesses, counsel began asking Keri on the record whether all questions she wanted answered were asked. Counsel believed the witnesses testified as expected, the sole exception being one witness who testified she observed Keri drinking in 2008.

¶7 The circuit court denied Keri's postdisposition motion. It determined the mootness doctrine did not apply and concluded trial counsel provided competent representation. It found counsel had significant contact with Keri, citing in-person conferences, telephone calls, and letters. Although the court determined counsel should have notified Keri of the initial hearing sooner, it concluded her absence had "absolutely no impact on the ultimate disposition of the case." The court found trial counsel's strategy reasonable and noted it was "the only tactic that could have been taken[] given the history here." It also found

counsel's witness preparation efforts reasonable because the testimony was relatively routine and he possessed records indicating the content of the anticipated testimony. Finally, it determined that extensive witness preparation efforts were unnecessary because earlier events were largely undisputed and counsel's "legal tactic was to present [Keri] as she is now."

DISCUSSION

1. Ineffective Assistance of Counsel

¶8 The statutory provision for appointed counsel in a termination of parental rights case includes the right to effective counsel. ***A.S. v. State***, 168 Wis. 2d 995, 1003-05, 485 N.W.2d 52 (1992). A respondent challenging his or her attorney's effectiveness must make two showings. First, the respondent must demonstrate that counsel's performance was deficient by showing "errors so serious that counsel was not functioning as the 'counsel' guaranteed the [respondent] by the Sixth Amendment." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Second, the respondent must show the deficient performance was so prejudicial that it undermined the fairness and reliability of the proceedings. ***Id.*** We need not address both components if the respondent has made an insufficient showing on one. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990) (quotation omitted).

¶9 "The standard of review of the ineffective assistance of counsel components of performance and prejudice is a mixed question of law and fact." ***Id.*** at 127. We will not overturn the trial court's factual findings unless they are clearly erroneous. ***Id.*** However, whether counsel's performance was deficient and prejudicial are questions of law we review independently. ***Id.*** at 128.

¶10 The critical question in the performance inquiry is whether counsel's assistance was reasonable considering all the circumstances. ***Strickland***, 466 U.S. at 688. Because of the retrospective nature of our analysis, we indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. ***Id.*** at 689-90. A respondent must identify the acts or omissions allegedly constituting unreasonable professional judgment. ***Id.*** at 690. In determining whether those acts or omissions fall outside the range of competent representation, we must be mindful that counsel's function is to make the adversarial process work in a particular case. ***Id.***

¶11 Keri alleges numerous deficiencies in her attorney's performance. First, Keri argues he failed to adequately prepare her to testify at the dispositional hearings. As a result, she claims she had difficulty remembering the sequence of events leading up to, and testimony presented at, the hearings on Peter's earlier termination petitions. Counsel's testimony, accepted by the circuit court, refutes this allegation. After lengthy discussions, Keri and her attorney settled on a defense theory in which Keri acknowledged her past problems but emphasized her progress in treatment. Counsel prepared Keri to testify consistent with this theory. He also identified events likely to be raised on cross-examination, but did not believe focusing on Keri's history would be of great value. As counsel stated, "It was my conscious choice to try to focus on the here and now and the present and the great progress that she had made ...." The decision not to emphasize events preceding the current termination petitions was a reasonable strategic choice and does not constitute ineffective assistance of counsel. *See* ***Strickland***, 466 U.S. at 690-91.

¶12 Keri also argues her attorney inadequately prepared other witnesses to testify at the dispositional hearing. Counsel believed all witnesses he called were adequately prepared:

> I believe that I had discussions with every witness in advance. Although, the length of the conversation would have been, I think, dependent on what was expected to be the testimony. For example, some witnesses, friends, who may have been character witnesses, by nature of character evidence, there is not a whole lot you can go into. We discussed the fact that the character witnesses will not go back to the day one of the history of the relationship, but their testimony is narrow and focused. On the other hand, an expert … who [has] been working with Keri and who had been developing a file would have been talked to at greater length.

With all prospective witnesses, counsel sought to identify the content of their testimony, the facts or inferences that testimony would establish, and issues that might arise on cross-examination. Keri does not identify what more her attorney should have done to prepare the witnesses, nor does she suggest any witness had difficulty answering questions. Consequently, we conclude trial counsel's witness preparation efforts were reasonable.

¶13 Keri also contends her attorney failed to timely obtain her file following his appointment by the public defender's office. The record demonstrates counsel acted reasonably. The public defender's office failed to provide Keri's file when counsel was appointed in October of 2008. Her attorney tried to piece the file together from Keri's documents, but Keri could provide only some briefs, the summons and petition, and a 2007 court order. Counsel then contacted three previous attorneys, but apparently none had any documents. Five days before the scheduled fact-finding hearing, counsel finally obtained documents and transcripts from a fourth attorney. He was unable to complete his review before that time and filed a motion to adjourn. The circuit court,

"concerned that a reviewing court down the line would not find that she has received effective counsel," granted the motion. We cannot conclude trial counsel acted unreasonably in obtaining Keri's file and delaying her case until his review was complete.

¶14 Finally, Keri suggests her attorney was deficient because he failed to timely notify her of the initial appearance on January 6, 2009. Counsel attended the hearing, but Keri did not. Counsel explained he notified Keri of the hearing by letter, which she received after the hearing concluded on January 6. Her attorney expected her to attend and entered a denial on her behalf when she failed to appear. We reject the notion that counsel's failure to ensure Keri's receipt of the letter prior to her hearing was an error "so serious that counsel was not functioning as the 'counsel' guaranteed … by the Sixth Amendment." *See* ***Strickland***, 466 U.S. at 687. Regardless, trial counsel's error was not prejudicial, as the circuit court recognized. We therefore reject Keri's ineffective assistance claim.

2. Mootness

¶15 Keri contends that because Marissa reached the age of majority after entry of the order terminating her rights, the order has become moot and must be reversed.[4] An issue is moot when its resolution will have no practical effect on the underlying controversy. ***PRN Assocs. LLC v. DOA***, 2009 WI 53, ¶25, 317 Wis. 2d 656, 766 N.W.2d 559. Mootness is a question of law we review independently of the circuit court. ***Id.***

[4] Marissa turned eighteen on September 3, 2009.

¶16 Keri's assertion of the mootness doctrine is improper in this case. Keri uses the mootness doctrine as a sword to attack the order below, arguing changed circumstances have rendered the order irrelevant. However, the mootness doctrine is one of judicial abstention, not appellate action. "Generally, if a question becomes moot through a change in circumstances, it will not be determined by the reviewing court." ***State v. Seymour***, 24 Wis. 2d 258, 261, 128 N.W.2d 680 (1964). Thus, even if we agreed with Keri that Marissa's case has become moot by Marissa reaching the age of majority—a holding that would require us to ignore both the effect of the termination on Keri and Marissa's inheritance rights under WIS. STAT. § 852.01, *see* ***Black v. Pamanet***, 46 Wis. 2d 514, 516, 175 N.W.2d 234 (1970), and the fact that the order was entered when Marissa was still a minor—we would dismiss her appeal, not reverse the order. Keri is not entitled to the remedy she seeks and, having already reached the merits of Keri's appeal, we affirm.

By the Court.—Orders affirmed.

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