COURT OF APPEALS
DECISION
DATED AND FILED

December 7, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1520 **Cir. Ct. No. 2009TP106**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO KENNETH E. III, A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

KENNETH E.,

RESPONDENT-APPELLANT,

LADONNA E.,

RESPONDENT.

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

¶1 FINE, J. Kenneth E. appeals the circuit court's order terminating his parental rights to Kenneth E., III.[1] He contends that: (1) his admission to the grounds supporting a termination of his parental rights was not valid; (2) the circuit court did not establish that there was a factual basis for his admission; and (3) his circuit-court lawyer gave him ineffective representation. Following our remand for a consideration of Mr. E.'s post-order motion, the circuit court heard testimony on his ineffective-assistance-of-counsel contention and denied the motion. Although Mr. E.'s notice of appeal does not reference that order, it is encompassed by his notice of appeal from the order terminating his parental rights. *See* WIS. STAT. § 808.04(8) ("If the record discloses that the judgment or order appealed from was entered after the notice of appeal or intent to appeal was filed, the notice shall be treated as filed after that entry and on the day of the entry."). We affirm.

I.

¶2 Kenneth E., III, was born in July of 2006. In December of 2006, he was removed from his mother's care. In June of 2007, he was found to be a child in need of protection or services. *See* WIS. STAT. § 48.345. The order was extended in May of 2008, *see* WIS. STAT. § 48.365, and was due to expire in May of 2010. Filing of the petition in April of 2009 tolled the order's expiration. *See* WIS. STAT. § 48.368 ("If a petition for termination of parental rights is filed … during the year in which … an extension order under s. 48.365 … is in effect, …

[1] The circuit court also terminated the mother's parental rights to Kenneth E., III. This appeal only concerns the order insofar as it terminated the father's parental rights. A decision on the mother's appeal, appeal number 2010AP1733, is issued herewith.

the … extension order … shall remain in effect until all proceedings related to the filing of the petition or an appeal are concluded.") Mr. E. was adjudicated as Kenneth E., III's father in February of 2007. Mr. E. was born in 1987.

¶3 In January of 2010, Mr. E. appeared before the circuit court and agreed to stipulate that there were grounds on which his parental rights to the boy could be terminated. In light of Mr. E.'s claim that his agreement to stipulate was flawed, we set out the colloquy in some detail.

> JUDGE FOLEY: I was advised by [Mr. E.'s lawyer] earlier in the afternoon, that [Mr. E.] had made a decision to stipulate to the existence of grounds for termination of his parental rights and reserve his right to contest termination at the Dispositional Phase.
>
> True?
>
> [Mr. E.]: Yes.

The circuit court determined from Mr. E. that he was twenty-two years old, had gone to the eleventh grade, and was then working on an equivalency degree. Mr. E. also indicated that he was not taking any drugs and was not under the influence of alcohol. At the time of the hearing, he was incarcerated at a state facility. The circuit court continued:

> JUDGE FOLEY: Do you feel-- Are you comfortable that you understand what's happening in this court today?
>
> [Mr. E.]: Yes.
>
> JUDGE FOLEY: No one can force you to stipulate that grounds exist to involuntarily terminate your parental rights.
>
> Do you understand that?
>
> [Mr. E.]: Yes.

> JUDGE FOLEY: The reason that's true is, if you do not stipulate-- if you did not stipulate, the only way that a reason or a basis to involuntarily terminate your parental rights could be established, is if the State came in to court and proved at a trial that there was a reason or a basis to involuntarily terminate your parental rights. Which is kind of a fancy way of saying that they would have to come in to court and prove at a trial that the facts alleged in this Petition [to terminate Mr. E.'s parental rights] were true or substantially true.
>
> Understand that?
>
> [Mr. E.]: Yes.
>
> JUDGE FOLEY: So in effect, by stipulating that grounds exist, you're giving up your right to make them prove at a trial that these facts were true or substantially true and that there was a reason to involuntarily terminate your parental rights.
>
> Do you understand that?
>
> [Mr. E.]: Yes.

The circuit court then ensured that Mr. E. understood what would happen at a trial if he wanted one, either before a jury or before the court. Mr. E. said that he understood that if the State did not prove "to a reasonable certainty by facts that were clear, satisfactory and convincing," which the circuit court told him was "just below" the "'beyond a reasonable doubt'" standard in criminal cases, "the Petition would have to be dismissed and your parental rights could not be terminated." Mr. E. also said that he understood that "by stipulating that grounds exist, you're giving up your right to have either a Judge or a Jury decide whether they [the State] proved their case at trial." The circuit court also explained:

> JUDGE FOLEY: By stipulating that grounds exist to involuntarily terminate your parental rights, you are not agreeing that your parental rights should be terminated. You are preserving your right to fight against the termination of your parental rights, but only at the Dispositional Hearing.

> And there are two things you need to understand about that.
>
> Once you stipulate that grounds exist to involuntarily terminate your parental rights, I am required by law to find you "Unfit". It's a requirement of the law. It's, actually, a Constitutional requirement. And then we move to this contested Dispositional Hearing.
>
> But the only issue at the contested Dispositional Hearing, is whether it's in Kenneth's best interest to terminate your parental rights and allow Kenneth to be adopted or is it in Kenneth's best interest to pursue some other alternative. [(1)] Dismiss the Petition. [(2)] Return Kenneth to your care immediately-- which is not a practical solution or alternative at this point because of your [incarceration] circumstances. Although I don't know how long you're going to be in custody. [(3)] Leave Kenneth in his present placement. [(4)] Order the Bureau [of Milwaukee Child Welfare] to continue to work with you to attempt to resolve the issues that prevent you from safely and appropriately parenting him, anticipating some future return to your care. [(5)] Identifying a relative as a potential guardian. Appointing a relative, a guardian, which puts them in position of a parent for all intents and purposes. They make all the parental decisions. They have custody, et cetera, but you would still be a legally-recognized parent. You would have the-- presumably, a right to visit, a duty to support. And, at some future point, the potential of returning to court and seeking to restore your guardianship rights and having Kenneth return to your care.
>
> But at the Dispositional Hearing, the sole issue is, what's best for your son, adoption or one of those other alternatives.
>
> Understand that?
>
> [Mr. E.]: Yes.

Mr. E. then told the circuit court that he had discussed the matter with his lawyer and that he did not "have any further questions based upon the discussions that we've had today?" Additionally, Mr. E.'s lawyer said that she was satisfied that Mr. E.'s decision to stipulate to the grounds was knowing and voluntary.

¶4 The petition alleged three bases that, if true, would be grounds to terminate Mr. E's parental rights to the boy: (1) Mr. E. had not assumed his parental responsibility, *see* WIS. STAT. § 48.415(6); (2) the boy was a child in continuing need for protection or services, *see* WIS. STAT. § 48.415(2); and (3) Mr. E. abandoned the boy, *see* WIS. STAT. § 48.415(1)(a)2. When told that Mr. E. was going to stipulate that Kenneth E. was a child in continuing need of protection or services, the circuit court made sure that Mr. E. understood what the State would have to prove at any trial:

> JUDGE FOLEY: This is what they would have to prove, either to a Jury or a Judge, in order to prove "Continuing Need of Protection or Services". That Kenneth was placed outside your care under a Children's Court Order that directed his placement there and told you you had to do certain things to have him safely returned to your care, and warned you if you did not do those things or could not do those things, that your parental rights could be terminated. And that he's been in that placement for six or more continuous months.
>
> That's the first thing they'd have to prove.
>
> Then they'd have to prove that you did not or could not meet the Conditions that the Judge established for the safe return of Kenneth to your care, but you couldn't do that despite the fact [the] Bureau's provided reasonable efforts to help you and provided the services for the safe return.
>
> Do you understand that?
>
> [Mr. E.] Yeah.
>
> JUDGE FOLEY: Giving up your right to make them prove those facts at a trial by stipulating.
>
> Understood?
>
> [Mr. E.]: Yes.

¶5 The circuit court then heard from the case manager assigned to the case about the facts underlying the child-in-continuing-need-of-protection-or-services ground. She told the circuit court that:

- the child had been outside of the parental home since December of 2006;
- he was found to be in need of protection or services in June of 2007;
- a dispositional order was entered establishing the conditions the parents had to meet before the child could be returned;
- the child-in-need-of-protection-or-services order warned that failure to comply with the conditions of return could be the basis to terminate the parents' parental rights;
- the child-in-need-of-protection-or-services order was still in effect;
- Mr. E. had not met the conditions of return;
- the Bureau helped him to meet those conditions of return but the help was unavailing because:
  - none of the visits with Kenneth E. that the Bureau tried to arrange "were successfully completed";
  - Mr. E. interfered with those efforts by escaping from a work-release placement; and
  - although the Bureau tried to provide the court-ordered services to Mr. E. before he was locked up, he had a "pattern

of not cooperating with court-ordered services" when he was not in custody;

- the social worker did not believe that Mr. E. would be able to meet the conditions of return in the forthcoming nine months because he was on a waiting list for services and would not be released from custody within the nine-month period, and, based on Mr. E.'s history of not cooperating, she did not believe he would be able to meet the conditions of return even if he were not incarcerated.

II.

¶6 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, and the birth parent has no special claim to the child. ***Richard D. v. Rebecca G.***, 228 Wis. 2d 658, 672–673, 599 N.W.2d 90, 97 (Ct. App. 1999). Here, at the disposition phase, the circuit court determined that it was in the boy's best interest to have "stability and permanence" in his life, and thus that termination was in the boy's best interests because it would permit the boy's maternal aunt, with whom the boy was living since early January of 2008, to adopt him. Mr. E. had wanted the boy's maternal aunt to be appointed guardian instead. Although the maternal aunt's testimony at the disposition hearing is less than clear as to her understanding of what a guardianship rather than an adoption would entail, it was clear from her testimony that she wanted her relationship with the boy to be permanent and that she wanted

to adopt him. As she said during the hearing, "it's not about me, [the boy's mother], or Kenneth's father; it's about little Kenny. That he needs to be … stable."

¶7 As we have seen, Mr. E. raises three issues on this appeal. We address each in turn.

A. *Knowing and voluntary stipulation to the first phase of the termination-of-parental-rights proceeding.*

¶8 The parties agree that before the circuit court could accept Mr. E.'s stipulation to the first phase of the termination-of-parental-rights proceeding, it had to see whether Mr. E.'s stipulation was made "voluntarily and understandingly." *See* WIS. STAT. § 48.422(7)(a); ***Kenosha County Dep't. of Human Servs. v. Jodie W.***, 2006 WI 93, ¶¶25–26, 293 Wis. 2d 530, 546–548, 716 N.W.2d 845, 853–854. The crux of Mr. E.'s complaint is that he was misled by the circuit court's assertion that if the termination-of-parental-rights petition was dismissed at the disposition phase, it could appoint "a relative as a potential guardian" for Kenneth E., III, if it was "in Kenneth's best interest to pursue some other alternative" to termination. He contends that such an appointment would be legally impossible and, also, that when the circuit court accepted Mr. E.'s stipulation there was no evidence that a relative would agree to a guardianship. A look at the applicable statutes shows that Mr. E.'s contentions are without merit.

¶9 The circuit court, as it told Mr. E., could have dismissed the termination-of-parental-rights petition at the disposition phase if that was in the child's best interests. *See* WIS. STAT. § 48.427(2). Mr. E. contends that this would have made it legally impossible for the circuit court to appoint as guardian the child's maternal aunt with whom the child was living and who wanted to adopt

him, and points to the prerequisites in WIS. STAT. § 48.977(2) to such an appointment.[2] This is how Mr. E.'s brief frames his argument:

[2] WISCONSIN STAT. § 48.977(2) reads:

> (a) That the child has been adjudged to be in need of protection or services under s. 48.13 (1), (2), (3), (3m), (4), (4m), (5), (8), (9), (10), (10m), (11), or (11m) or 938.13(4) and been placed, or continued in a placement, outside of his or her home pursuant to one or more court orders under s. 48.345, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363, or 938.365 or that the child has been so adjudged and placement of the child in the home of a guardian under this section has been recommended under s. 48.33(1) or 938.33(1).
>
> (b) That the person nominated as the guardian of the child is a person with whom the child has been placed or in whose home placement of the child is recommended under par. (a) and that it is likely that the child will continue to be placed with that person for an extended period of time or until the child attains the age of 18 years.
>
> (c) That, if appointed, it is likely that the person would be willing and able to serve as the child's guardian for an extended period of time or until the child attains the age of 18 years.
>
> (d) That it is not in the best interests of the child that a petition to terminate parental rights be filed with respect to the child.
>
> (e) That the child's parent is neglecting, refusing or unable to carry out the duties of a guardian or, if the child has 2 parents, both parents are neglecting, refusing or unable to carry out the duties of a guardian.
>
> (f) That the agency primarily responsible for providing services to the child under a court order has made reasonable efforts to make it possible for the child to return to his or her home, while assuring that the child's health and safety are the paramount concerns, but that reunification of the child with the child's parent or parents is unlikely or contrary to the best interests of the child and that further reunification efforts are unlikely to be made or are contrary to the best interests of the child or that the agency primarily responsible for providing services to the child under a court order has made reasonable

(continued)

> The trial court lacked the authority to appoint [the maternal aunt], the guardian of Kenneth E., III, at the dispositional hearing because: (1) the petition to terminate parental rights had already been filed, (2) there was no evidence that [the maternal aunt] was willing to serve as guardian, (3) there was insufficient evidence to show that the [Bureau of Milwaukee Child Welfare] had made reasonable efforts toward reunification, and (4) Wis. Stat. §48.427 prohibited the court from appointing a guardian at the dispositional hearing unless it first entered an order terminating parental rights. Wis. Stat §§ 48.977(2) and 48.427(3m).

We disagree.

¶10 First, as seen, WIS. STAT. § 48.977(2)(d) sets as a prerequisite to the appointment of a guardian under § 48.977 "[t]hat it is not in the best interests of the child that a petition to terminate parental rights be filed with respect to the child." Of course, if the circuit court exercised its discretion and *dismissed* the petition to terminate Mr. E.'s parental rights to the boy, there would not then be a *pending* petition, and the circuit court could, in compliance with § 48.977(2)(d) make a finding that it would not be in the boy's best interests to file a new petition. This is not only a literal and logical reading of § 48.977(2)(d) but, as the circuit

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> efforts to prevent the removal of the child from his or her home, while assuring the child's health and safety, but that continued placement of the child in the home would be contrary to the welfare of the child, except that the court is not required to find that the agency has made those reasonable efforts with respect to a parent of the child if any of the circumstances specified in s. 48.355(2d)(b)1. to 5. applies to that parent. The court shall make the findings specified in this paragraph on a case-by-case basis based on circumstances specific to the child and shall document or reference the specific information on which those findings are based in the guardianship order. A guardianship order that merely references this paragraph without documenting or referencing that specific information in the order or an amended guardianship order that retroactively corrects an earlier guardianship order that does not comply with this paragraph is not sufficient to comply with this paragraph.

court pointed out in its written decision, is consistent with the legislature's command that the best interests of the children subject to WIS. STAT. ch. 48 are "paramount." *See* WIS. STAT. §§ 48.01(1), 48.426(2) ("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."); ***Evelyn C. R. v. Tykila S.***, 2001 WI 110, ¶23, 246 Wis. 2d 1, 17, 629 N.W.2d 768, 775. Thus, the contention set out in "(1)" of the excerpt from Mr. E.'s brief is without merit.

¶11 Second, the contentions set out in "(2)" and "(3)" of the excerpt from Mr. E.'s brief are also without merit because the time to determine whether the maternal aunt would be willing to serve as the child's guardian was at the disposition hearing, and whether the agency had in fact fulfilled its responsibilities to help Mr. E. keep the boy would have been a matter for the State to prove at a trial on the grounds phase, which, as we have seen, Mr. E. bypassed. All the circuit court was obligated to do at the plea hearing was to give to Mr. E. a picture of the consequences of his plea, and, as discussed below, to determine whether there was a sufficient factual basis for Mr. E.'s stipulation. That it did.

¶12 Third, the contention set out in "(4)" of the excerpt from Mr. E.'s brief is a "brook too broad for leaping." *See* A.E. Housman, *A Shropshire Lad*, canto 54 (1932). Contrary to Kenneth E.'s contention, WIS. STAT. § 48.427(3m) does *not* "*prohibit*[] the court from appointing a guardian at the dispositional hearing unless it first entered an order terminating parental rights." (Emphasis added.) Rather, it *permits* the circuit court to do so following the entry of a termination order. Thus, § 48.427(3m) provides, as material: "If the rights of both parents … are terminated … and if a guardian has not been appointed under s. 48.977, the court shall do one of the following: … (c) Appoint a guardian under s. 48.977 and transfer guardianship and custody of the child to the guardian."

¶13 In sum, Mr. E.'s argument that the circuit court "improperly advised him of the potential dispositions in this case" fails. He has not made the requisite "*prima facie* showing that the circuit court violated its mandatory duties" in accepting Mr. E.'s stipulation to the continuing-need-of-protection-or-services ground. *See* ***Jodie W.***, 2006 WI 93, ¶26, 293 Wis. 2d at 548, 716 N.W.2d at 854

B. *Factual basis.*

¶14 Mr. E. also argues that he should be able to withdraw his stipulation to the continuing-need-of-protection-or-services ground in the first phase because he never specifically admitted that the Bureau of Milwaukee Child Welfare had made the required efforts to help him regain custody of his child. We disagree.

¶15 In termination-of-parental-rights cases, acceptance of a parent's stipulation to a ground in the first phase is governed by WIS. STAT. § 48.422. ***Waukesha County v. Steven H.***, 2000 WI 28, ¶39, 233 Wis. 2d 344, 363, 607 N.W.2d 607, 616–617:

> Section 48.422(7) imposes four obligations on the circuit court before accepting an admission of the alleged facts in a petition. The circuit court shall: (a) address the parties present and determine that the admission is made voluntarily and understandingly; (b) establish whether any promises or threats were made to elicit an admission; (c) establish whether a proposed adoptive parent of the child has been identified; and (d) make such inquiries as satisfactorily establish a factual basis for the admission.

Pertinent to Mr. E.'s contention, § 48.422(7)(c) requires that the circuit court "[m]ake such inquiries as satisfactorily establish that there is a factual basis for the admission." Moreover, § 48.422(3) provides that "[i]f the petition is not contested the court shall hear testimony in support of the allegations in the petition, including testimony as required in sub. (7)." Neither § 48.422(7)(c) nor

§ 48.422(3) requires that the parent or his or her lawyer recite the evidence that supports the required factual basis; it merely requires that the circuit court get testimony from someone sufficient to support a factual basis for the stipulation. ***Steven H.***, 2000 WI 28, ¶¶53–58, 233 Wis. 2d at 368–370, 607 N.W.2d at 619–620. As we have seen, the circuit court heard from the case manager that the Bureau of Milwaukee Child Welfare had tried to fulfill its responsibilities to help Mr. E. reunite with his child but that he did not cooperate. Moreover, at the plea hearing Mr. E. said that he understood that he was giving up the right to make the State "prove that you did not or could not meet the Conditions that the Judge established for the safe return of Kenneth to your care, but you couldn't do that *despite the fact [the] Bureau's provided reasonable efforts to help you and provided the services for the safe return*." (Emphasis added.)

¶16 Significantly, the circuit court's establishment of a factual basis for Mr. E.'s stipulation in connection with the Bureau's efforts to help him get custody of his son, passes muster even under the standard applicable in criminal cases. Indeed, the very decision on which Mr. E. relies, ***State v. Thomas***, 2000 WI 13, 232 Wis. 2d 714, 605 N.W.2d 836, makes this clear. There, the defendant contended that there was an inadequate factual basis for his guilty plea. ***Id.***, 2000 WI 13, ¶¶10, 18, 232 Wis. 2d at 723, 727, 605 N.W.2d at 841, 843. Holding that "a defendant does not need to admit to the factual basis in his or her own words," ***id.***, 2000 WI 13, ¶18, 232 Wis. 2d at 727, 605 N.W.2d at 843, ***Thomas*** recognized that "witnesses' testimony" would suffice, ***id.***, 2000 WI 13, ¶21, 232 Wis. 2d at 729, 605 N.W.2d at 844. Thus, "a judge may establish the factual basis as he or she sees fit, as long as the judge guarantees that the defendant is aware of the elements of the crime." ***Id.***, 2000 WI 13, ¶22, 232 Wis. 2d at 730, 605 N.W.2d at

844. Substitute, "elements of the ground" for "elements of the crime" and it is clear that the circuit court here fully complied with WIS. STAT. § 48.422(3) & (7).

C. *Alleged ineffective assistance of counsel.*

¶17 Parents 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.

¶18 Mr. E. complains that his lawyer was ineffective because she "advised Kenneth E. to admit to grounds for the termination of his parental rights and to argue for guardianship at the dispositional hearing." At the post-order evidentiary hearing, Mr. E.'s lawyer testified that he and she "talked about" asking the circuit court at the disposition hearing to appoint the child's maternal aunt as guardian "every time we talked about his options and what could take place at the dispositional hearing." Mr. E. claims that this was ineffective assistance because, he argues: (1) the circuit court did not have the legal authority to appoint a guardian at the disposition hearing; (2) the maternal aunt was not willing to be appointed a guardian and that Mr. E.'s circuit-court lawyer did not ascertain that before advising or allowing him to stipulate to the child-in-continuing-need-of-protection-or-services ground in the first phase. He says that he "was prejudiced because, but for trial counsel's error in advising him that the court could appoint [the boy's maternal aunt] guardian at the disposition hearing without terminating his parental rights, Kenneth E. would not have admitted to grounds and would have insisted on a jury trial." On our *de novo* review of the circuit court's legal analysis, we agree with the circuit court that Mr. E.'s argument is without merit.

¶19 First, as we have already pointed out why, contrary to Mr. E.'s contention, the circuit court *did* have the legal authority to appoint a guardian if it

dismissed the termination-of-parental-rights petition at the disposition phase. Thus, Mr. E.'s circuit-court lawyer did not give him deficient representation under the first aspect of the two-fold ***Strickland*** analysis.

¶20 Second, assuming, but not deciding, that Mr. E.'s circuit-court lawyer was deficient for not adequately exploring before Mr. E. agreed to not contest the first phase whether the boy's maternal aunt would have agreed to being the boy's guardian rather than adopting him, Mr. E. has not shown ***Strickland*** prejudice; that is, he has not demonstrated that had he: (1) known that the boy's maternal aunt would not agree to a guardianship, and that, as a result (2) he would have opted for a jury trial on the three grounds alleged in the petition, and, had he so opted, "the result of the proceeding would have been different." *See* ***Strickland***, 466 U.S. at 694. Stated another way, he has not indicated beyond mere assertion that "confidence in" the end result of the proceedings: (1) termination of his parental rights and (2) the projected adoption of Kenneth E., III, by the boy's maternal aunt was "undermine[d]," *see* ***ibid.***, because he has not even contended, no-less shown, that he would have prevailed at a first-phase trial on all of the grounds alleged in the petition.

¶21 Accordingly, Mr. E. has not shown under the ***Strickland*** analysis that his circuit-court lawyer was ineffective.

By the Court.—Orders affirmed.

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