COURT OF APPEALS DECISION DATED AND FILED

August 3, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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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. 2010AP2596
2010AP3140

Cir. Ct. No. 2008TP384

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

Appeal No. 2010AP2596

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

EMILIANO M.,

RESPONDENT-APPELLANT,

FRANCINE T.,

RESPONDENT.

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V.

FRANCINE T.,

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RESPONDENT.

APPEAL from orders of the circuit court for Milwaukee County: MARSHALL B. MURRAY, Judge. *Affirmed*.[1]

¶1 BRENNAN, J. Francine T. and Emiliano M. jointly appeal the trial court's orders terminating their parental rights to Marcos M. and denying their postdisposition motions for remand and summary disposition. Francine and Emiliano jointly argue on appeal that the trial court lacked competence to terminate their parental rights because the court did not timely extend the child in

[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.

need of protective services ("CHIPS") dispositional order on which the termination of parental rights petition ("TPR") was based. Emiliano alone argues that: (1) his trial counsel was ineffective in failing to argue that he had complied with the safety plan; and (2) that there was no factual basis for the trial court's finding that Emiliano was unfit.[2]

¶2 We reject Francine and Emiliano's loss-of-competence argument because we conclude that their argument is a collateral attack on a previous final order and is barred. Furthermore, even if the argument was not barred, they lose on the merits because we conclude that the trial court properly extended the original CHIPS dispositional order for thirty days under WIS. STAT. § 48.365(6) (2005-06) and then properly tolled the thirty-day extension under WIS. STAT. § 48.315(1) (2005-06).

¶3 Finally, we conclude that Emiliano's trial counsel was not ineffective because he made a reasonable strategic choice in not limiting his defense strategy to Emiliano's compliance with the safety plan and that there was no reasonable possibility of a different outcome had he done otherwise. Finally, the evidence supports the trial court's findings that Emiliano was unfit. We affirm.

[2] In their brief to the appellate court, Francine and Emiliano appear to argue that they are each appealing all three issues. However, only Emiliano raised all three issues before the trial court, and only Emiliano's rights are affected by all three issues. Consequently, we address all three issues only as to Emiliano.

BACKGROUND

¶4 Marcos was born on April 6, 2006, to Francine. It is undisputed that Emiliano is Marcos's father. Marcos lived with Francine and Emiliano for two months, until June 5, 2006. The Bureau of Milwaukee Child Welfare first received a referral requesting services for Francine and Emiliano on April 24, 2006, after Francine twice called her pediatrician's office reporting that she was unable to care for Marcos because she was not ready to be a mother and that Emiliano was not helping with Marcos's care. On May 5, 2006, Francine told the Bureau that she had been calling Emiliano at his job at McDonalds on a daily basis asking him to come home to help with the baby.

¶5 The Bureau met with Francine and Emiliano on May 8, 2006, and Francine complained that Emiliano failed to help with the parenting. The Bureau worker observed that, when Marcos cried, Francine was unable to soothe him. Francine denied that she needed parenting assistance. Francine called the Bureau worker on May 10, 2006, accusing her neighbor of lying that she was abusing her baby; on May 17, 2006, saying that she was "stressing" and that Emiliano had been drinking and had hit her; and on May 25, 2006, reporting, in a manner the Bureau worker described as "hysterical," that she had awakened to find that Emiliano had taken Marcos to his job at McDonalds.

¶6 The Menomonee Falls police reported to a Bureau worker on May 30, 2006, that they had received several domestic disturbance calls to the McDonalds where Emiliano worked. During one such call on May 17, 2006, they reported that Francine took a cab to McDonalds at six in the morning with Marcos only clothed in a diaper and light blanket. Safety Services then met with Francine and Emiliano on May 30, 2006, and reported that Francine was anxious and

yelling that Emiliano was lying and refused to stay home and help her with Marcos. Emiliano told them that Francine was having trouble taking care of Marcos alone and had tried cutting herself with a knife a month earlier.

¶7 On the morning of June 5, 2006, Francine called the Bureau worker and said that she could not handle it anymore and that she did not want to be a mother and had called an adoption agency. She did not know why Marcos was crying and wished he would "shut up." The worker could hear Marcos crying in the background. Francine said she had called Emiliano at work, but he hung up on her. When the worker arrived at the home, she saw Marcos wearing only a diaper and crying on the edge of Francine's bed. The worker heard Francine twice tell the baby to "shut up." Francine admitted she did not really call an adoption agency but said that because she was upset.

¶8 The Bureau worker observed a full medicine bottle with Marcos's name on it and asked Francine what it was for. Francine said it was for the baby's cough. In fact, the medication was for "thrush" and had been prescribed on May 1, 2006, with directions for three doses a day. Francine claimed she gave it to Marcos, but the worker saw that it was full after having been prescribed over a month earlier. Francine had also missed pediatrician appointments on May 15, 22, 24 and June 5, 2006.

¶9 Marcos was detained on June 5, 2006, and a CHIPS petition was filed in Milwaukee County Circuit Court on June 12, 2006. The CHIPS dispositional hearing took place on October 13, 2006, with the parents and guardian ad litem ("GAL") stipulating to the transfer of Marcos's legal custody to

the Bureau.[3] The resulting CHIPS dispositional order stated that it was based on the facts in the June 12, 2006 petition and a June 28, 2006 court report and found, among other findings, that the parents had failed to provide a safe and suitable living environment for Marcos and had failed to supervise Marcos properly. Among the conditions set for the return of the child were: (1) the parents had to provide a safe, suitable and stable home; (2) the parents had to have regular and successful visits with the child; and (3) the parents must show that they can care for and supervise the child properly. The stated dual goals of the CHIPS dispositional order were reunification and adoption. The order was effective until October 13, 2007.

¶10 On August 17, 2007, the State filed a request to extend the CHIPS dispositional order, and a hearing was set for October 1, 2007. It is undisputed that on October 1, 2007, the court temporarily extended the CHIPS dispositional order for thirty days because the parents needed lawyers and Emiliano needed an interpreter. No party objected to the CHIPS extension. The case was set for further proceedings on November 1, 2007.

¶11 On November 1, 2007, the parties, their lawyers, the child's GAL and an interpreter for Emiliano were all present. The trial court determined that the parents were going to stipulate to the extension of the CHIPS dispositional order beyond the thirty days previously ordered and that the Bureau and the parents were still working on reunification and making progress toward

[3] The Honorable Thomas Cooper presided over all CHIPS proceedings, including entering the dispositional order and all subsequent extensions.

unsupervised visits. The court adjourned the matter for a December 19, 2007 trial, after tolling the time limits with the consent of the child's GAL. Neither parent objected to the adjournment or the tolling of time limits.

¶12 On December 19, 2007, the parents, their lawyers, and the child's GAL were present, but there was no interpreter for Emiliano, so the trial could not proceed. The court adjourned the proceedings for an interpreter, again tolling the time limits for cause and set the matter for status on January 31, 2008. There were no objections to the adjournment by any party.

¶13 On January 31, 2008, all of the parties stipulated to extend the CHIPS dispositional order for one year. The court signed the new order, and it was set to expire on January 31, 2009. The January 31, 2008 extended CHIPS dispositional order contained the same requirements as the original CHIPS dispositional order, requiring the parents to provide a safe, suitable and stable home; to have regular and successful visits with the child; and to show that they can care for and supervise their child properly.

¶14 The January 31, 2008 extended CHIPS dispositional order had an additional section entitled "Other Special Orders" that required Emiliano to implement a safety plan as outlined by a letter he had previously received from a Bureau worker. The order stated that "[i]n order for the father to have placement [h]e must have caregivers that can watch his child when he is not able. The mother can not [sic] independently watch the child." Emiliano submitted his safety plan, dated November 23, 2007, in which he agreed that "my son Marcos won't be left on [sic] the sole care of Francine T[.] but rather I will have Marcos in Day Care or caring [sic] by other certified care giver [sic] while I am away from home during work or for other reasons."

¶15 On November 11, 2008, the State filed a petition to involuntarily terminate Francine's and Emiliano's parental rights to Marcos, alleging the same two grounds against each parent: continuing CHIPS under WIS. STAT. § 48.415(2) (2007-08) and failure to assume parental responsibility under WIS. STAT. § 48.415(6) (2007-08). After a court trial on May 3 through May 6, 2010, the trial court found that the State had proven both grounds for termination as to both parents. After a contested dispositional hearing on May 27, 2010, the court entered an order dated June 2, 2010, involuntarily terminating Francine's and Emiliano's parental rights to Marcos.

¶16 Francine and Emiliano filed postdisposition motions for remand and for summary disposition, arguing the same issues they present on appeal. The trial court denied the motions in an April 14, 2011 order.[4] This appeal followed.

DISCUSSION

I. The trial court never lost competence to proceed.

¶17 Francine and Emiliano argue that the trial court lacked competence[5] to enter the June 2, 2010 TPR order because it did not have competence to enter

[4] The Honorable Marshall B. Murray presided at both the grounds court trial and the dispositional hearing. He also entered the June 2, 2010 order terminating the parents' parental rights and the order denying the parents' postdispositional motions.

[5] Competency has been defined as the court's power to exercise subject matter jurisdiction. ***Kohler Co. v. Wixen***, 204 Wis. 2d 327, 337, 555 N.W.2d 640 (Ct. App. 1996). The concept of competency is narrower than that of subject matter jurisdiction, because while the constitution confers subject matter jurisdiction on the courts, the state legislature may limit the ability of the courts to exercise that power by statute. *See* WIS. CONST. art. VII, § 8; WIS. STAT. § 801.04.

the January 31, 2008 extended CHIPS dispositional order, on which the TPR was based.[6] Essentially, without saying so, Francine and Emiliano collaterally attack the January 31, 2008 extended CHIPS dispositional order. They argue that the original CHIPS dispositional order expired on November 13, 2007, and that the trial court had no authority to extend the order past that date; therefore, the trial court's adjournments on November 1, 2007, and December 19, 2007, failed to lawfully extend the statutory time limits. Consequently, when the parties stipulated to the CHIPS extension on January 31, 2008, the trial court lacked competence to enter the year-long extension order.

¶18 We conclude that Francine and Emiliano are barred from raising this claim because it is a collateral attack on a previous final order of the trial court to which they did not object and which they did not appeal. Furthermore, even if the claim was not barred, they cannot succeed on the merits.

A. The competence challenge is barred as an impermissible collateral attack.

¶19 The State and the GAL respond to the parents' competence claim by arguing that Francine and Emiliano waived their loss-of-competence challenge

[6] The State petitioned for termination of parental rights on two grounds: (1) that Marcos was a child in continuing need of protection or services under WIS. STAT. § 48.415(2) (2007-08); and (2) that Francine and Emiliano had failed to assume parental responsibility under WIS. STAT. § 48.415(6) (2007-08). The continuing-need-of-protection ground required the State to prove "[t]hat the child has been adjudged to be a child … in need of protection or services and placed … outside his … home pursuant to … s. 48.345 … 48.365," *see* § 48.415(2)(a)1. (2007-08), and, among other things, "that the parent has failed to meet the conditions established for the safe return of the child," *see* § 48.415(2)(a)3. (2007-08). Although not developed, we assume the parents are arguing that the loss of competence to enter the CHIPS extension order rendered both grounds invalid because the failure-to-assume ground was based on the parents' failure to meet the CHIPS conditions.

when they failed to object at the time the trial court entered the January 31, 2008 extended CHIPS dispositional order. Francine and Emiliano countered that ***State v. Michael S.***, 2005 WI 82, 282 Wis. 2d 1, 698 N.W.2d 673, clearly holds that a party cannot waive a challenge to a thirty-day extension made pursuant to WIS. STAT. § 48.365(6) (2005-06).

¶20 We think the parties misperceive the issue. We conclude that Francine and Emiliano's competence argument is essentially a collateral attack on an earlier civil proceeding's final order, the January 31, 2008 extended CHIPS dispositional order.[7] Whether a collateral attack is permissible is a question of law that we review independently of the trial court. *See* ***State v. Campbell***, 2006 WI 99, ¶27, 294 Wis. 2d 100, 718 N.W.2d 649. Because we previously held in ***Schoenwald v. M.C.***, 146 Wis. 2d 377, 432 N.W.2d 588 (Ct. App. 1988), a case very similar to this one, that such collateral attacks are prohibited, we conclude that the parents' competence argument is barred. *See* ***id.*** at 396.

¶21 In ***Schoenwald***, the parents challenged a petition to extend a CHIPS dispositional order for the third time, claiming that the second CHIPS extension order had failed to meet the statutory time limits, and therefore, the trial court had lost competence to extend the CHIPS dispositional order in the third extension

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[7] WISCONSIN STAT. ch. 48 proceedings are generally civil in nature: "Section 803.09 applies to chapter 48 proceedings except where a different procedure is prescribed by statute or rule." ***David S. v. Laura S.***, 179 Wis. 2d 114, 143, 507 N.W.2d 94 (1993); *see also* ***Oneida Cnty. DSS v. Nicole W.***, 2007 WI 30, ¶31, 299 Wis. 2d 637, 728 N.W.2d 652 (A termination of parental rights proceeding is civil in nature.). A CHIPS order is a final order. *See* ***Schoenwald v. M.C.***, 146 Wis. 2d 377, 395 n.7, 432 N.W.2d 588 (Ct. App. 1988) (noting that a CHIPS extension order is appealable as of right because it disposes of the entire matter in litigation as to one or more of the parties under WIS. STAT. § 808.03(1)).

proceeding. ***Id.*** at 382-85, 395. However, the parents did not object to the second CHIPS extension at the time it was entered nor did they appeal from that order. ***Id.*** at 395.

¶22 We held that a collateral attack on an earlier CHIPS extension order in a subsequent CHIPS extension proceeding is prohibited unless the party objected to the first extension at the time it was entered or appealed that order. ***Id.*** at 396. Our holding was based upon "[t]he public interest in protecting adoptions" and because "CHIPS orders frequently provide the grounds for involuntary termination of parental rights, such as abandonment under sec. 48.415(1), Stats., or a continuing need of protection or services under sec. 48.415(2), or child abuse under sec. 48.415(5)." ***Id.***

¶23 We conclude that ***Schoenwald*** compels the same result here. Because Francine and Emiliano did not object to the trial court's competence to proceed before the trial court entered the January 31, 2008 extended CHIPS dispositional order or appeal from that order, they are precluded from challenging it now.

¶24 This result is consistent with well-established law that prohibits a collateral attack in a civil case. *See* ***Zrimsek v. American Auto. Ins. Co.***, 8 Wis. 2d 1, 3, 98 N.W.2d 383 (1959) (A collateral attack on a judgment "is an attempt to avoid, evade, or deny the force and effect of a judgment in an indirect manner and not in a direct proceeding prescribed by law and instituted for the purpose of vacating, reviewing, or annulling it."). Wisconsin courts have generally disfavored allowing collateral attacks because "'they disrupt the finality of prior judgments and thereby tend to undermine confidence in the integrity of our procedures and inevitably delay and impair the orderly administration of

justice.'" ***Oneida Cnty. DSS v. Nicole W.***, 2007 WI 30, ¶28, 299 Wis. 2d 637, 728 N.W.2d 652 (citations omitted).

¶25 The Wisconsin Supreme Court recently applied these well-established principles in a TPR case. *See* ***id.*** In ***Nicole W.***, Nicole appealed a TPR order, terminating her parental rights to Brianca on the grounds that Nicole had been the recipient of a prior TPR order with respect to another one of her children. ***Id.***, ¶1. On appeal, Nicole argued that the prior TPR order was invalid and, therefore, could not be grounds for the order terminating her parental rights to Brianca. ***Id.*** The supreme court noted that Nicole's challenge was a collateral attack on the prior TPR order and that collateral attacks are generally prohibited because they disrupt the finality of judgments and undermine confidence in the administration of justice. ***Id.***, ¶¶27-28, 36.

¶26 Here, Francine and Emiliano challenge entry of the January 31, 2008 extended CHIPS dispositional order, a final order in a separate civil proceeding, which they never objected to or appealed from. Additionally, they have made no showing of any basis for an exception to the general prohibition against collateral attacks.[8] Thus, we conclude the collateral attack bar applies.

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[8] The supreme court has permitted very few exceptions to the general rule prohibiting collateral attacks on prior judgments and prior final orders, and then only for "the very limited circumstance of the deprivation of the right to counsel." *See* ***Nicole W.***, 299 Wis. 2d 637, ¶30. The court noted that "allowing a collateral attack due to a violation of the right to counsel has been applied only in the context of criminal proceedings and a termination of parental rights proceeding is civil in nature." ***Id.***, ¶31.

B. WISCONSIN STAT. §§ 48.365(6) (2005-06) and 48.315(1) (2005-06) authorized the trial court to exclude certain delays from the thirty-day extension of the original CHIPS dispositional order.

¶27 Even if we permitted Francine and Emiliano to raise their loss-of-competence argument, and to collaterally attack the trial court's January 31, 2008 extended CHIPS dispositional order, they cannot succeed on the merits of that claim.

¶28 In support of their claim, Francine and Emiliano argue that WIS. STAT. § 48.365(6) (2005-06) only permitted the trial court to grant one thirty-day extension of the CHIPS dispositional order without a hearing, relying on two cases: ***Michael S.***, and ***Green County DHS v. H.N.***, 162 Wis. 2d 635, 469 N.W.2d 845 (1991). They argue that ***Michael S.*** "is controlling" and specifically forbids any extension of time once a CHIPS dispositional order expires and that ***Green County DHS*** specifically prohibits resort to WIS. STAT. § 48.315(1) (2005-06) for justification of any extension beyond the thirty days.

¶29 The State and the GAL counter that it is undisputed that the original CHIPS dispositional order was due to expire on October 13, 2007, and was validly extended pursuant to WIS. STAT. § 48.365 (2005-06) for thirty days so that it was properly set to expire on November 13, 2007. They argue that on November 1, 2007, and again on December 19, 2007, the trial court properly tolled the thirty-day extension, as is permitted by WIS. STAT. § 48.315(1) (2005-06) and § 48.365(6) (2005-06), so that when, on January 31, 2008, all parties stipulated to the extension of the CHIPS dispositional order, the trial court had not lost competence because the thirty-day extension had not yet expired.

¶30 As to the cases relied on by Francine and Emiliano, the State and the GAL argue that ***Michael S.*** is distinguishable because the procedural posture in that case was significantly different, namely, the trial court had let the dispositional order lapse, which is not the case here, and that ***Green County DHS*** is distinguishable because it construed a very different version of WIS. STAT. § 48.365(6), one that did not permit time exclusions under WIS. STAT. § 48.315(1).

¶31 We begin with an examination of WIS. STAT. §§ 48.365(6) and 48.315(1) (2005-06). We review the statutes independently of the trial court to determine whether the trial court lost competence to proceed. *See* ***State v. Aaron D.***, 214 Wis. 2d 56, 60, 571 N.W.2d 399 (Ct. App. 1997). In seeking to discern the legislature's purpose, we examine the plain meaning of the words of the statute, its structure and its context with other related statutes. *See* ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶¶45-46, 271 Wis. 2d 633, 681 N.W.2d 110.

¶32 There has been considerable litigation regarding the WIS. STAT. ch. 48 time limits, and the legislature has amended the statutes in response to the resulting court decisions. Thus, there are a number of different versions of the affected statutes during recent years. We look to the 2005-06 version of WIS. STAT. § 48.365(6), which was in effect when the trial court tolled the thirty-day extension on November 1, 2007, and December 19, 2007, and at the time the parties stipulated to the CHIPS extension on January 31, 2008. That version of the statute reads as follows:

> If a request to extend a dispositional order is made prior to the termination of the order, but the court is unable to conduct a hearing on the request prior to the termination date, the court may extend the order for a period of not

> more than 30 days, *not including any period of delay resulting from any of the circumstances specified in s. 48.315(1).*

§ 48.365(6) (2005-06) (emphasis added).[9] The 2005-06 version of WIS. STAT. § 48.315(1) in effect at the time the trial court tolled the clock states, in relevant part:

> The following time periods shall be excluded in computing time requirements within this chapter:
>
> ….
>
> (b) Any period of delay resulting from a continuance granted at the request of or with the consent of the child and his or her counsel or of the unborn child by the unborn child's guardian ad litem.
>
> ….
>
> (h) Any period of delay resulting from the need to appoint a qualified interpreter.

Id.[10]

¶33 Here, the original CHIPS dispositional order was set to expire on October 13, 2007, but was properly extended for thirty days on October 1, 2007, pursuant to WIS. STAT. § 48.365(6) (2005-06). No party disputes the propriety of that order or the fact that the order extended the original CHIPS dispositional order through November 13, 2007.

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[9] WISCONSIN STAT. § 48.365(6) has since been amended by 2007 Wis. Act 199, § 16, which went into effect on April 11, 2008.

[10] WISCONSIN STAT. § 48.315(1) was amended by 2007 Wis. Act. 199, § 11 and also went into effect on April 11, 2008.

¶34 Francine and Emiliano challenge the continuance of the extended CHIPS dispositional order from November 13, 2007, to January 31, 2008, at which time the parties all stipulated to a full one-year extension of the CHIPS dispositional order. The two court dates within the time period in question are November 1, 2007, and December 19, 2007. A plain reading of WIS. STAT. §§ 48.365(6) and 48.315(1) (2005-06) shows that the trial court never lost competence to enter the extended CHIPS dispositional order.

¶35 On November 1, 2007, the trial court tolled the thirty-day extension to the next court date with the consent of the GAL because the parties were actively working on unsupervised visitation and reunification of the parties. No party objected. This tolling was permitted under WIS. STAT. § 48.365(6) (2005-06) because the statute permitted the trial court to exclude from the thirty-day extension any delay that resulted from the circumstances listed in WIS. STAT. § 48.315(1) (2005-06). Here, under § 48.315(1)(b) (2005-06), the trial court properly excluded the period of delay with the consent of the child through his counsel, the GAL.

¶36 On the next court date, December 19, 2007, the trial court once again tolled the thirty-day extension, pursuant to WIS. STAT. § 48.365(6) (2005-06), because there was no interpreter available for Emiliano. WISCONSIN STAT. § 48.315(1)(h) (2005-06) expressly mandates the exclusion of a delay to obtain an interpreter.

¶37 Accordingly, the trial court properly excluded the delays from November 1, 2007, to January 31, 2008, from the thirty-day time computation pursuant to WIS. STAT. §§ 48.365(6) and 48.315(1)(b), (h) (2005-06).

¶38 Francine and Emiliano argue that the holdings in ***Michael S.*** and ***Green County DHS*** make clear that there can be no extension of the initial thirty-day extension under WIS. STAT. §§ 48.365(6) and 48.315(1) (2005-06). We do not agree. Both cases are distinguishable from the facts and procedures here and lend no support to the parents' competence arguments.

¶39 In ***Michael S.***, the supreme court was addressing whether the time limits of a delinquency order could be extended under WIS. STAT. § 938.365 (2001-02) *after* the trial court permitted the original order to lapse.[11] ***Michael S.***, 282 Wis. 2d 1, ¶3. When the trial court in ***Michael S.*** realized the prior order had expired the trial court made no attempt to justify the lapse under WIS. STAT. § 48.315(1), but rather based its tardy extension on the parties' waiver. ***Michael S.***, 282 Wis. 2d 1, ¶¶17, 23.

¶40 Here, significantly, the original CHIPS dispositional order never lapsed. The order was properly extended on October 1, 2007, before it expired. At each court appearance thereafter, on November 1, 2007, and December 19, 2007, the trial court properly stated on the record the reasons for tolling the thirty-day extension under WIS. STAT. § 48.315(1) (2005-06). Thus, given the procedural differences, ***Michael S.*** fails to support Francine and Emiliano's argument that the trial court lost competence to proceed.

¶41 Likewise, Francine and Emiliano's reliance on ***Green County DHS*** is misplaced. ***Green County DHS*** was decided in 1991, under the 1987-88

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[11] We note that the statutes in ***State v. Michael S.***, 2005 WI 82, 282 Wis. 2d 1, 698 N.W.2d 673, were those set forth in the Juvenile Justice Code, to wit, WIS. STAT. ch. 938, not the Children's Code, to wit, WIS. STAT. ch. 48 and were from the 2001-02 version of the Statutes.

version of WIS. STAT. § 48.365(6), which differed significantly from the version at issue here. Section 48.365(6) (1987-88) stated:

> If a request to extend a dispositional order is made prior to the termination of the order, but the court is unable to conduct a hearing on the request prior to the termination date, the court may extend the order for a period of not more than 30 days.

Green Cnty. DHS, 162 Wis. 2d at 639-40 n.1.

¶42 Obviously missing from WIS. STAT. § 48.365(6) (1987-88) is the present language that *explicitly permits* the trial court to exclude from the thirty-day CHIPS extension any periods of delay caused by the circumstances listed in WIS. STAT. § 48.315(1). In the absence of that language, the Wisconsin Supreme Court reasoned in ***Green County DHS*** that it could not read into § 48.365(6) (1987-88) the permissible delays set forth in § 48.315(1), as § 48.315(1) was the general statute and § 48.365 (1987-88) was the more specific one. *See* ***Green Cnty. DHS***, 162 Wis. 2d at 641, 649-50.

¶43 After the release of ***Green County DHS***, the legislature amended WIS. STAT. § 48.365(6), adding the language the supreme court found lacking in that case, that is, a specific exclusion of periods of delay that result from any of the circumstances under WIS. STAT. § 48.315(1). *See* 1993 Wis. Act 98, § 62. Thus, ***Green County DHS*** is distinguishable from this case.

¶44 Francine and Emiliano next argue, unsuccessfully, that even if the thirty-day CHIPS extension may be tolled for delays under WIS. STAT. § 48.315(1) (2005-06), none of § 48.315(1)'s exclusions fit the facts here.

¶45 First, they argue that WIS. STAT. § 48.315(1)(b) (2005-06) is inapplicable because it only permits a child's "counsel" to consent to a delay and here the consenter was the child's GAL, arguing that a GAL is not a counsel. However, it is well-established law that a GAL is the advocate for the child's best interest and has all of the responsibilities and authority of counsel for a party. *See* WIS. STAT. § 48.235(3) (2005-06). Indeed, WIS. STAT. ch. 48 requires appointment of a GAL for every child who is the subject of a TPR petition and CHIPS order. *See* WIS. STAT. § 48.235(1)(c) and (e) (2005-06). The qualifications of a GAL require that he or she be an attorney licensed to practice in this state. *See* WIS. STAT. § 48.235(2) (2005-06).

¶46 Second, Francine and Emiliano argue that by not referring to the GAL as such in the already-born child clause of WIS. STAT. § 48.315(1)(b) (2005-06), and by referring to the GAL specifically in the unborn child clause of § 48.315(1)(b) (2005-06), that the legislature intended to exclude the GAL from the right to consent for the already-born child. But this argument fails because it is plainly inconsistent with the legislature's broad grant of powers and responsibilities to GALS. *See* WIS. STAT. §§ 48.235(4)5. and 48.235(4)8. (2005-06) (permitting a GAL in a CHIPS case to "[p]etition for [an] extension of dispositional orders under s. 48.365" and "[p]erform any other duties consistent with this chapter"); *see also* ***State v. Quinsanna D.***, 2002 WI App 318, ¶35, 259 Wis. 2d 429, 655 N.W.2d 752 (where the consent of the GAL for two living children was recognized as adequate to toll the time limits in a TPR case).

¶47 We conclude that the statutes are clear: the child's counsel can consent to tolling of the thirty-day CHIPS extension and the GAL is the child's counsel. There is no logic to giving the GAL authority to consent to delay for an

unborn child and not an already born one. Any other interpretation of the statute would be absurd. *See* ***Teschendorf v. State Farm Ins. Cos.***, 2006 WI 89, ¶15, 293 Wis. 2d 123, 717 N.W.2d 258 (We are to avoid absurd results.). Thus, we conclude that the November 1, 2007 tolling of the continuance time period was properly consented to by the GAL and authorized under WIS. STAT. §§ 48.365(6) and 48.315(1)(b) (2005-06).

II. Emiliano's trial counsel was not ineffective.

¶48 Emiliano argues that his trial counsel was ineffective in two ways: (1) for failing to introduce evidence of Emiliano's safety plan; and (2) for failing to object to the GAL's statements in her closing argument, which Emiliano claims mischaracterized his safety plan and his compliance with it.

¶49 The State and the GAL counter that trial counsel was not deficient because Emiliano's safety plan was accurately introduced during the trial and counsel made a reasonable strategic choice not to seek admission of the *written* safety plan because admission would highlight Emiliano's noncompliance with the plan. They argue that even if failure to introduce the written plan into evidence was deficient representation (which they do not concede) there was ample other evidence in the record to support the continuing-CHIPS and failure-to-assume grounds in that Emiliano failed to provide a safe, suitable and stable home for Marcos; have regular successful visits with Marcos; or show that he could care for and supervise Marcos properly. Therefore, Emiliano suffered no prejudice.

¶50 Additionally, the State and the GAL argue that the GAL's reference in her closing argument to Emiliano's noncompliance with the safety plan was not a reference to Emiliano's written safety plan but rather a reference to the

continuing CHIPS condition that he provide a safe home for Marcos. As such, the reference was not objectionable because it was supported by the evidence; therefore, trial counsel had no reason to object to it.

¶51 Whether trial counsel's representation constitutes ineffective assistance is a matter that we decide independently of the trial court. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). However, we will not overturn the trial court's findings of fact unless clearly erroneous. ***Id.*** at 127.

¶52 Our supreme court has held that parents who are subject to a TPR petition have a statutory right to effective counsel under WIS. STAT. § 48.23(2), stating: "We conclude that where the legislature provides the right to be 'represented by counsel' or represented by 'appointed counsel,' the legislature intended that right to include the *effective* assistance of counsel." ***A.S. v. State***, 168 Wis. 2d 995, 1004-05, 485 N.W.2d 52 (1992). The supreme court further directed that the analysis set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984), should be used to determine whether counsel was ineffective in TPR cases. ***A.S.***, 168 Wis. 2d at 1005.

¶53 Under ***Strickland***, Emiliano must show both that counsel's performance was deficient and that he was prejudiced by counsel's performance. *See* ***id.***, 466 U.S. at 687. Counsel's performance is deficient only if counsel's actions fall outside "the wide range of reasonable professional assistance." ***Id.*** at 689. To establish prejudice, Emiliano must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See* ***id.*** at 694.

¶54 "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." ***Id.*** at 690. With regard to performance, it is well-established that "'[c]ounsel need not be perfect, indeed not even very good, to be constitutionally adequate.'" ***State v. Williquette***, 180 Wis. 2d 589, 605, 510 N.W.2d 708 (Ct. App. 1993) (citation omitted). We conclude that here trial counsel's performance was not deficient; thus, we do not address the prejudice prong. *See* ***Strickland***, 466 U.S. at 687 (a party claiming ineffective assistance of counsel must prove both deficient performance and prejudice).

¶55 The premise of Emiliano's ineffectiveness argument is that if trial counsel had proved that Emiliano complied with his written safety plan, the TPR petition would have been denied. The premise is wrong because the ultimate issues were whether Emiliano complied with the extended CHIPS dispositional order and whether he assumed parental responsibility, not just whether he complied with his written safety plan. Emiliano's written safety plan was but one part of the much larger extended CHIPS dispositional order. The conditions of that order included, as relevant here: that Emiliano provide a safe, suitable and stable home for Marcos; that Emiliano have regular and successful visits with Marcos; and that Emiliano show that he can care for and supervise Marcos properly.

¶56 Emiliano wrote a safety plan to comply with a letter from the Bureau in October 2007. The January 31, 2008 extended CHIPS dispositional order incorporated the requirement from the Bureau's letter, in a section entitled "Other Special Orders," to develop a safety plan, stating: "In order for the father to have

placement [h]e must have caregivers that can watch his child when he is not able. The mother can not [sic] independently watch the child." Emiliano's written safety plan, dated November 23, 2007, stated: "I Emiliano M[.] agree that my son Marcos won't be left on [sic] the sole care of Francine T[.] but rather I will have Marcos in Day Care or caring [sic] by other certified care giver while I am away from home during work or for other reasons." But even if he fulfilled that promise, Emiliano still had to comply with the other conditions and orders, including providing a safe home and proper supervision of Marcos.

¶57 At the postdisposition ***Machner*** hearing,[12] Emiliano's trial counsel testified to a strategic reason for why he did not introduce Emiliano's written safety plan: (1) he knew Emiliano had not complied with the plan; and (2) he knew Emiliano did not believe he needed to comply with the plan because Emiliano believed he could safely leave Marcos with Francine. Trial counsel understood that if he argued that Emiliano complied with the written safety plan, the words would be parsed and he opened his client up to cross-examination on his failure to line up realistic caregivers and on his willingness to leave Francine alone with Marcos. Thus, trial counsel made a reasonable strategic choice. *See* ***Strickland***, 466 U.S. at 690 (counsel's strategic choices made after thorough investigation of law and facts are virtually unchallengeable).

¶58 Trial counsel's beliefs were supported by undisputed evidence that Emiliano had not enrolled Marcos in day care, and although he listed two care

[12] In ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App 1979), we held that it was a prerequisite to an appellate claim of ineffective assistance of counsel that a hearing be held at which time trial counsel could be examined and his or her testimony preserved.

providers in the safety plan, neither could actually care for Marcos. His neighbor testified she was not available due to a health problem, and Emiliano's brother-in-law testified that he was only available on his days off, two days per week. Because Emiliano worked full time at McDonalds, Emiliano failed to comply with his own safety plan as trial counsel believed.

¶59 The record also supports trial counsel's understanding that Emiliano believed that Marcos would be safe in Francine's care even without other caregivers around. Emiliano testified that he believed Francine was capable of being Marcos's caregiver during the workday and that she had not had any trouble for a long time. Emiliano testified that he did not believe Francine had a temper problem or had any need for medication. Thus, because trial counsel's strategic choice to not highlight Emiliano's noncompliance with his own safety plan was reasonable, we conclude that trial counsel was not ineffective.

¶60 Additionally, even if trial counsel had introduced Emiliano's written safety plan and tried to argue that he had complied with it, proof of that fact alone would not have led to a different trial outcome. As we discuss in the following section, there was ample other evidence of Emiliano's failures to fulfill the continuing-CHIPS conditions and to support the trial court's conclusion.

¶61 Emiliano raises a second claim of ineffective assistance, namely, trial counsel's failure to object to the GAL's statement in closing that Emiliano had failed to follow the safety plan when he returned with Marcos to the apartment after being directed not to by Del Carmen. Emiliano contends this was an objectionable statement because it was untrue, arguing that his written safety plan contained no such restriction.

¶62 However, Emiliano misperceives which safety plan the GAL was referring to. It is clear from the context that the GAL was referring to the general CHIPS condition that Emiliano provide a safe home for Marcos, as well as comply with the Bureau's authorized visitation therapist. In that context, there is nothing objectionable about the GAL's statement. Had trial counsel objected, the objection would have been overruled. The outcome would not have been different.

III. The evidence was sufficient to find Emiliano to be an unfit parent.

¶63 Emiliano argues that the evidence was insufficient to support the trial court's unfitness finding, generally contending, without evidentiary support, that the evidence relied upon by the trial court was inaccurate and incorrect. In effect, Emiliano argues that because he "made diligent efforts" to comply with the CHIPS conditions and because, in his view, again without specific support, that he complied with his written safety plan, the unfitness finding is unsupported. Finally, Emiliano cites to ***Tammy W-G. v. Jacob T.***, 2011 WI 30, ___ Wis. 2d ___, 797 N.W.2d 854, for the proposition that because he bonded with Marcos, the record fails to support his unfitness to parent.

¶64 We review a sufficiency-of-the-evidence challenge *de novo*. *See* ***id.***, ¶17. ("We independently review, as a question of law, whether the evidence is sufficient to support the … verdict."). "When reviewing a … verdict, we consider the evidence in the light most favorable to the verdict." ***Id.***, ¶39. In a trial to the court, we will not overturn the trial court's factual findings unless clearly erroneous. *See* WIS. STAT. § 805.17(2).

¶65 Here, the trial court found that the evidence at trial supported both grounds for termination—that is, continuing-CHIPS and failure-to-assume-parental-responsibility—leading to the court's unfitness finding. The trial court based its decision on two very fundamental concerns: (1) that Francine's volatility and noncompliance made her unable to safely care for Marcos; and (2) that Emiliano was never willing to fully accept Francine's threat to Marcos's safety. We conclude that the trial court's factual findings—that Francine and Emiliano had been noncompliant with the CHIPS dispositional orders; that Francine was volatile and unsafe; and that Emiliano failed to fully accept Francine's threat to Marcos's safety—were not clearly erroneous. We independently conclude that the record supports the trial court's ultimate findings of grounds and unfitness.

¶66 There was ample evidence of Francine's noncompliance with the CHIPS dispositional order. She even admitted it. Her trial counsel's strategy was that due to Francine's deficits, the State had to help her more. The record shows that Francine declined to take advantage of the help offered to her. The extended CHIPS dispositional order required her to attend individual therapy, family therapy, anger management, home management, Milwaukee Center for Independence programs, complete the programs recommended in her psychological evaluation and those recommended by her psychiatrist, and cooperate with home management workers and medication management.

¶67 Francine admitted that she had not taken her medication and had cancelled appointments with treatment providers. The record shows that Francine was prescribed mood-altering medication but admitted to extended periods of not taking her medication and skipped medication renewal appointments with her psychiatrist even in the months leading up to trial. Francine refused to attend

Bureau-funded individual psychological therapy, despite it being ordered in the CHIPS dispositional order. Francine admitted that she had not met the conditions for Marcos to be returned to her care.

¶68 The evidence supports the trial court's finding that Francine was too volatile to safely care for Marcos. In addition to the incidents that led to the issuance of the TPR petition, such as, Francine's calls for someone to take Marcos, her statements she could not care for him or make him stop crying, her anger at Emiliano for not taking care of Marcos, her trips to Emiliano's job at McDonalds and the domestic disturbance police calls that resulted, her failure to give Marcos his thrush medicine and then her denial of the same, there were other incidents of similar problems up to the time of trial.

¶69 Child welfare professionals testified that Francine became emotional and explosive when not taking her medication. Shortly before trial, Francine walked out of a meeting with her psychiatrist. Her family therapist came to calm her down. In another incident, an at-home visitation worker testified to a visit where Francine became abruptly angry and tried to wrestle Marcos and his stroller away from the worker and then threw the stroller to the ground.

¶70 In September 2008, Francine flew into a rage while on a supervised visit in the presence of family therapist Del Carmen. Emiliano was also present. Originally, the parents had an appointment with Del Carmen (part of the CHIPS ordered conditions). Francine did not feel like meeting with Del Carmen, so she attempted to cancel the appointment. Del Carmen testified that when Francine tried to cancel the appointment, she decided to stop by: "[w]hen a client doesn't want to be in therapy, it sort of gives me some flags so I just dropped by and that aggravated it more."

¶71 Under the prearranged safety plan,[13] Emiliano was required to remove Marcos when Francine becomes upset. When he did not do so on his own, Del Carmen told Emiliano to remove Marcos. Del Carmen told Emiliano he had two choices, either to keep Marcos and Francine separate for the rest of the night, or to return Marcos to the foster home. He chose the former, and Francine agreed to go to her grandmother's house for the rest of the night. However, Francine immediately came back from her grandmother's home and Emiliano let her into the house with Marcos, in clear contradiction of the therapist's directions.

¶72 This incident demonstrates both Francine's volatility and Emiliano's failure to comply with the CHIPS condition to cooperate with the treatment and visitation workers. It also shows Emiliano's refusal to accept the threat Francine poses to Marcos's safety.

¶73 In April 2008, Francine and Emiliano were supposed to return Marcos from an unsupervised visit to a hotel where the foster parents were hosting a party. When Francine and Emiliano did not show up at the arranged time, the foster mother called and Francine said they were late and lost. While the foster mother was on the phone with Francine, giving directions, she heard Francine almost crying and threatening Emiliano that if he did not stop the car she would call the police. He finally stopped and Francine got out and the foster mother picked her up. Francine told the foster mother that she got out of the car because

[13] There are several different safety plans referenced in this case. The first is the safety plan Emiliano was required to execute under the "Other Special Orders" section of the extended CHIPS dispositional order. The second is a reference to the conditions of return in the CHIPS dispositional order and extended order that require Francine and Emiliano to provide Marcos with a safe, suitable and stable home.

Emiliano was driving dangerously and she was scared of his driving. Marcos was still in the car with Emiliano and it was one hour after the pre-arranged drop-off time.

¶74 Approximately one hour later (two hours after the prearranged time of drop-off), Emiliano dropped off Marcos at the hotel. Marcos had no coat, although it was cold and windy. Emiliano never spoke to the foster parents about this incident.

¶75 No one disputes that Emiliano loves Marcos and wants to live with Francine and go to work while she takes care of Marcos. But wanting to comply with CHIPS conditions and actually complying with them are two different things. The record supports the trial court's finding that Emiliano did not understand or accept Francine's risk to Marcos's safety. One Bureau worker testified that Emiliano did not understand Francine's condition and was not able to protect Marcos. Emiliano described Francine as "calm" in an incident where the worker described Francine making a middle finger gesture and yelling "bitch" at a neighbor. In the Del Carmen incident, Del Carmen stopped by because she could hear in Francine's voice over the phone that she was agitated. Emiliano was present and seemed unaware and unconcerned about Francine's mental health treatment and her medication regime. He testified that he thought it was safe to leave Marcos with her now. His acknowledgment that he could not do so without Bureau approval does not negate his lack of understanding of Francine's threat to Marcos's safety.

¶76 Emiliano also attempts to minimize the Del Carmen incident by arguing that he had permission to allow Francine to return to the home that night from a different Bureau worker who happened to "drop-in" after Del Carmen left

and after Francine returned home. However, the "drop-in" worker did not know the extent of what had transpired in Del Carmen's presence. Del Carmen had been clear that Francine and Marcos were to be separated all night, and Emiliano's disregard for that direction reveals a willingness to risk Marcos's safety. After this incident, the Bureau discontinued unsupervised visits and they were never restarted.

¶77 Finally, Emiliano's reliance on ***Tammy W-G.*** is misplaced. In that case, the supreme court addressed the test courts should apply to determine whether a parent has established a "substantial parental relationship" with a child under WIS. STAT. § 48.415(6) (the failure-to-assume ground) and the relevant time frame a court can consider in determining whether such a relationship has been developed. *See* ***Tammy W-G.***, 2011 WI 30, ¶1. The court "conclude[d] that a fact-finder should consider a parent's actions throughout the entirety of the child's life when determining whether [a parent] has assumed parental responsibility." ***Id.***, ¶23. That is precisely what the trial court did here. It looked at the totality of the circumstances, which included many things besides Emiliano's written safety plan. The trial court held that among the relevant circumstances to be considered were whether Francine and Emiliano exposed Marcos to a hazardous living environment. Contrary to Emiliano's assertion here, ***Tammy W-G.*** compels our conclusion that the trial court properly found that he failed to assume parental responsibility.

By the Court.—Orders affirmed.

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