

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 23, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

**Nos. 00-0651, 00-0652,
00-0653, 00-0654**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

No. 00-0651

**IN THE INTEREST OF ASHLEY T.D.,
A CHILD UNDER THE AGE OF 18:**

BROWN COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

CONNIE D.,

RESPONDENT-APPELLANT.

No. 00-0652

**IN THE INTEREST OF JANIKA M. D.,
A CHILD UNDER THE AGE OF 18:**

BROWN COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

CONNIE D.,

RESPONDENT-APPELLANT.

No. 00-0653

**IN THE INTEREST OF CRYSTAL T.M.,
A CHILD UNDER THE AGE OF 18:**

BROWN COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

CONNIE D.,

RESPONDENT-APPELLANT.

No. 00-0654

**IN THE INTEREST OF TATYANA S.M.,
A CHILD UNDER THE AGE OF 18:**

BROWN COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

CONNIE D.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Brown County:
DONALD R. ZUIDMULDER, Judge. *Affirmed.*

¶1 PETERSON, J.¹ Connie D. appeals the termination of her parental rights to her four children.² Connie raises three arguments, each claiming that the trial court erroneously exercised its discretion. She argues that the trial court erred by (1) denying her motion for mistrial; (2) denying her motion for judgment notwithstanding the jury's verdict; and (3) deciding that termination was in the best interests of the children. Because the trial court properly exercised its discretion in each instance, the orders are affirmed.

BACKGROUND

¶2 In September 1999, Brown County Human Services Department brought a termination of parental rights (TPR) petition against Connie involving her four children: Ashley T.D., Janika M.D., Crystal T.M. and Tatyana S.M.³ As grounds for termination, the County alleged that the children were in continuing need of protection or services (CHIPS) pursuant to WIS. STAT. § 48.415(2). The CHIPS order underlying the termination petition was entered in August 1998.

¶3 The circuit court granted the County's motion to temporarily suspend Connie's visitation rights during the termination proceedings. In granting the motion, the court indicated that no evidence regarding the missed visits could be used against Connie. At the jury trial, however, a social worker testified that she worked with Connie until "visits were suspended." Based on that reference,

¹ These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2)(e). All statutory references are to the 1997-98 edition.

² This court has consolidated the appeals for each child.

³ The children's dates of birth are as follows: Ashley T.D., November 23, 1985; Janika M.D., November 28, 1987; Crystal T.M., January 20, 1992; and Tatyana S.M., May 14, 1994. The children have different fathers, whose parental rights were terminated following their default.

Connie moved for a mistrial. The trial court denied her motion, concluding that the reference was brief and collateral. The jury found that grounds existed for termination, and the trial court subsequently concluded that termination was in the best interests of the children.

DISCUSSION

A. Mistrial

¶4 Connie argues that the trial court erred by refusing to grant her motion for a mistrial. The decision to grant a mistrial is vested within the trial court's sound discretion. *See State v. Hampton*, 217 Wis. 2d 614, 621, 579 N.W.2d 260 (Ct. App. 1998). "The trial court must determine, in light of the whole proceeding, whether the basis for the mistrial request is sufficiently prejudicial to warrant a new trial." *State v. Bunch*, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995). This court will not reverse the trial court's decision unless it erroneously exercised its discretion. *See id.* "A trial court properly exercises its discretion when it has examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process." *Id.* at 506-07.

¶5 While acknowledging that the social worker's reference was improper, the trial court explained that, contextually, it was unclear whether the jury could have attached any significance to the reference. The court offered to give a curative instruction, but warned Connie that she might not want the court to "emphasize something to the jury that [was] just a matter of a fairly passing comment in [the] proceedings" Connie decided not to request a curative instruction and now claims that an instruction could not have cured the reference's effects. She does not offer any theory or explanation as to why this single

comment was inherently prejudicial to the entire proceedings or required a mistrial. As the trial court noted, the reference was fleeting and it is clear that any significance attached to the reference could not have been substantial in light of the entire proceedings. Accordingly, this court concludes that the trial court properly exercised its discretion by denying Connie's motion for a mistrial.

B. Judgment Notwithstanding the Verdict

¶6 Connie argues that the trial court erred by denying her motion to enter a verdict in her favor, notwithstanding the jury's verdict finding that grounds existed for terminating her parental rights. Her sole contention on this point is that the jury was not unanimous.⁴ According to WIS. STAT. § 805.09(2), however, "[a] verdict agreed to by five-sixths of the jurors shall be the verdict of the jury." The same ten jurors agreed to each verdict question and found that grounds existed for terminating Connie's parental rights. The verdict was therefore proper under the statute.

C. Best Interests of the Children

¶7 Connie argues that the trial court erroneously determined that termination was in the best interests of the children. The best interests of the children are the prevailing factors the court must consider in deciding whether termination of parental rights is appropriate. *See* WIS. STAT. § 48.426(2). The determination of the best interests of the children is committed to the sound discretion of the trial court. *See David S. v. Laura S.*, 179 Wis. 2d 114, 150, 507

⁴ There were two dissenting jurors on one question. One of the dissenting jurors also dissented on another question.

N.W.2d 94 (1993). The determination will not be upset unless it represents an erroneous exercise of discretion. *See id.*

¶8 Wisconsin statutes provide the factors a trial court must consider in deciding whether to terminate parental rights. *See* WIS. STAT. § 48.426(3). Connie concedes that the court considered the appropriate statutory factors, but challenges the court’s conclusion on one of the factors. Section 48.426(3)(a) requires the court to consider the likelihood of the children’s adoption after termination. She notes that the children vary in age and had behavioral problems. Based on these facts she argues that adoption would be difficult and that it is unlikely the children would be placed together. However, this is only Connie’s opinion. The parties disagreed that the children were not adoptable. For example, the guardian ad litem concluded that “there’s a good chance [the children] would be adoptable.” Moreover, even if Connie is correct that placing all the children in the same adoptive home would be difficult, this factor would not necessarily override the trial court’s determination of the best available option from the standpoint of the interests of the children. In fact, the court placed heavy significance on the needs of the children and the reality that Connie could not provide for them. Connie has not identified any reason that would convince this court that the trial court erroneously exercised its discretion in considering the best interests of the children.

By the Court.—Orders affirmed.

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

