

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 6, 2018

Sheila T. Reiff
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. 2017AP2390
2017AP2391
STATE OF WISCONSIN**

**Cir. Ct. Nos. 2016TP353
2016TP354**

**IN COURT OF APPEALS
DISTRICT I**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO L.D.D., JR., A PERSON
UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

B.D.H.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

B.D.H.,

RESPONDENT-APPELLANT.

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

¶1 BRASH, J.¹ B.D.H. appeals from orders terminating her parental rights for B.M.D. and L.D.D. Jr.² She argues that the trial court erroneously exercised its discretion when it admitted the opinion testimony of a case manager regarding whether B.D.H. would be able to meet the conditions required for the return of the children within the statutory timeframe. B.D.H. therefore seeks to vacate the termination of parental rights orders for the children. We affirm.

BACKGROUND

¶2 B.D.H. is the biological mother of L.D.D., who was born January 7, 2013, and B.M.D., who was born November 1, 2013. The children were born in Illinois. Their adjudicated father is L.D.³; he and B.D.H. were never married.

¶3 In July 2015, B.D.H. moved to Wisconsin. At that time, B.D.H. was living with B.S., who is the father of B.D.H.'s two younger children, M.S. and

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² For clarification purposes, we will refer to L.D.D. Jr. as L.D.D. for the entirety of this opinion.

³ L.D.'s parental rights were also terminated in these proceedings, but he is not a part of this appeal.

P.S.⁴ On October 10, 2015, the Division of Milwaukee Child Protective Services (DMCPS) was informed that B.D.H. was at a Milwaukee hospital because B.S. had pushed B.D.H. while she was holding M.S., who was three months old at the time, causing B.D.H. to drop M.S. DMCPS arranged a protective plan for B.D.H. and her children, which involved staying at a shelter instead of going back to B.S.'s house.

¶4 However, B.D.H. was asked to leave the shelter after three weeks because she was not abiding by the curfew rules. She then took the children to Chicago without notifying DMCPS.

¶5 DMCPS was notified by the shelter that B.D.H. had been asked to leave, and DMCPS made several attempts to contact her. When B.D.H. returned to Milwaukee approximately one week later, she met with a social worker who determined that DMCPS should take custody of the children. The reasons cited were B.D.H.'s failure to follow the protective plan; her failure to follow the rules at the shelter resulted in her being asked to leave, and she then fled Wisconsin without notifying DMCPS. Furthermore, DMCPS believed that the ongoing domestic violence between B.D.H. and B.S. presented a risk of severe harm to the children. Additionally, it had been noted that B.D.H. was not providing basic care for the children, such as food, formula and diapers for the infant, and clean clothes—the children had previously been observed in dirty, urine-soaked clothes.

¶6 L.D.D. and B.M.D. were placed in foster care on October 30, 2015. Children in Need of Protection or Services (CHIPS) petitions were filed shortly

⁴ M.S. and P.S. were not part of these termination proceedings. In fact, P.S. was born in 2016, after the initial incident that led to DMCPS's involvement in this matter.

thereafter, with CHIPS dispositional orders going into effect in April 2016. Those orders set forth conditions that were to be met by B.D.H. before the children could be returned to her, including: participating in domestic violence counseling, managing her mental health needs, meeting the medical needs of the children, and providing the children with a safe, stable home. A visitation plan with the children was also required to be established, and B.D.H. was to consistently follow that schedule.

¶7 B.D.H. failed to meet these conditions. She continued to have a relationship with B.S. in spite of a no-contact order that was in force after he was convicted in 2016 of a different domestic violence incident against her. She did not attend any of the children's medical and therapy appointments. She also failed to attend her own recommended therapy appointments. Additionally, she failed to demonstrate that she had a safe, stable home for the children, instead reporting that she was living with a friend without providing an address. Furthermore, she failed to meet the visitation condition; she did not visit the children regularly, failed to attend some scheduled visits, and at one point did not see them for approximately four months.

¶8 As a result, petitions for the Termination of Parental Rights (TPR) of B.D.H. with regard to L.D.D. and B.M.D. were filed on November 14, 2016. In the petitions, the State alleged two grounds for termination: (1) the continuing need of protection or services, pursuant to WIS. STAT. § 48.415(2); and (2) her failure to assume parental responsibility, pursuant to WIS. STAT. § 48.415(6).

¶9 The matter went to trial before a jury in June 2017. During the trial, the State called Erica Stolarski as a witness, the case manager contracting with DMCPs who was working with B.D.H. In addition to testifying as to her

background and her job duties, Stolarski testified about her work with B.D.H., including discussions she had with B.D.H. regarding the conditions of the CHIPS dispositional orders. Stolarski also described with specificity B.D.H.'s progress with meeting each of those conditions. She summed up her testimony with her opinion that B.D.H. had not met those court-ordered conditions for the return of the children. She further opined that she did not believe that B.D.H. would be able to meet those conditions in the next nine months.⁵

¶10 The jury found that grounds were proven for both the continuing need for protective services and the failure to assume parental responsibility. A dispositional hearing was held July 25, 2017, and the trial court terminated B.D.H.'s parental rights. This appeal follows.

DISCUSSION

¶11 B.D.H. argues that the trial court erred in admitting Stolarski's testimony, specifically with regard to her statement that she did not believe that B.D.H. would be able to meet the conditions of the CHIPS dispositional orders in the nine months following the trial. She argues that Stolarski was an expert witness and, as such, her testimony lacked the proper foundation. She further contends that even if Stolarski was considered a lay witness, her testimony was not properly admitted.

⁵ As part of proving the grounds relating to the continuing need for protective services, the State is required to demonstrate that there is "a substantial likelihood that the parent will not meet [the required] conditions within the 9-month period following the fact-finding hearing." WIS. STAT. § 48.415(2)(a)3.

¶12 The State first argues that this argument is waived because counsel for B.D.H. did not object to Stolarski’s testimony at trial. However, B.D.H. points out that she raised this precise issue in a motion *in limine*. This court has specifically stated that a party who raises an issue in a motion *in limine* “generally preserves the right to appeal on the issue raised by the motion without also objecting at trial. That is the purpose of a motion *in limine*.” *State v. Bergeron*, 162 Wis. 2d 521, 528, 470 N.W.2d 322 (Ct. App. 1991). Thus, we find that B.D.H. sufficiently preserved this issue for appeal.

¶13 We therefore turn to the trial court’s pre-trial determination that Stolarski was a lay witness, as opposed to an expert witness, and that her opinion testimony was admissible. The trial court has “broad discretion in determining the relevance and admissibility of proffered evidence.” *State v. Brecht*, 143 Wis. 2d 297, 320, 421 N.W.2d 96 (1988). We review the trial court’s decision under the erroneous exercise of discretion standard, and will uphold that decision “if the decision has ‘a reasonable basis’ and was made ‘in accordance with accepted legal standards and in accordance with the facts of record.’” *La Crosse County DHS v. Tara P.*, 2002 WI App 84, ¶6, 252 Wis. 2d 179, 643 N.W.2d 194 (citation and one set of quotation marks omitted).

¶14 In Wisconsin, a witness must be qualified as an expert if the proffered opinion testimony involves “scientific, technical, or other specialized knowledge.” WIS. STAT. § 907.02(1). In contrast, opinion testimony as a lay witness is admissible if that opinion testimony is “(1) [r]ationally based on the perception of the witness[;] (2) [h]elpful to a clear understanding of the witness’s testimony or the determination of a fact in issue,” and “(3) [n]ot based on scientific, technical, or other specialized knowledge” as described in § 907.02(1). WIS. STAT. § 907.01.

¶15 In making its rulings on the motions *in limine*, the trial court distributed to the parties a document that provided its rulings. This document included a ruling that a case manager is permitted to offer opinion testimony as a lay witness regarding whether the parent is likely to meet the conditions of the CHIPS dispositional order within the nine-month period following the trial. *See* WIS. STAT. § 48.415(2)(a)3. The trial court noted in this document that the social worker’s opinion, “while informed by their education, experience and training, is primarily based on personal knowledge and interaction with the client,” and is therefore considered to be lay witness testimony. The trial court further stated, during a hearing on the motions *in limine*, that the case manager’s opinion testimony as a lay witness still required proper foundation before it would be admitted.

¶16 We find this to be a reasonable basis for the trial court’s determination. The State elicited testimony from Stolarski regarding her background and her experience, as well as her work with B.D.H., which provided proper foundation for her opinion testimony. Furthermore, we agree with the trial court that this issue falls within the understanding of a reasonable juror, and thus establishing Stolarski as an expert witness was not required.

¶17 Therefore, we find that the trial court’s decision to admit Stolarski’s opinion testimony under the lay witness standard was properly based on accepted legal standards and in accordance with the facts of record. *See Tara P.*, 252 Wis. 2d 179, ¶6. Accordingly, we affirm.

By the Court.—Orders affirmed.

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

