

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 27, 2014

Diane M. Fremgen
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. 2013AP2814
2013AP2815
2013AP2816**

**Cir. Ct. Nos. 2012TP29
2012TP30
2012TP31**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

No. 2013AP2814

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

WOOD COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

v.

MELANIE M.,

RESPONDENT-APPELLANT.

No. 2013AP2815

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

WOOD COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

MELANIE M.,

RESPONDENT-APPELLANT.

No. 2013AP2816

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

WOOD COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

MELANIE M.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Wood County:
TODD P. WOLF, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ Melanie M. appeals orders of the circuit court terminating her parental rights to Cayden M., Isaiah M., and Nicholas M. The circuit court terminated her parental rights to the children after a jury found, in the grounds phase of the proceedings, that the children were in continuing need of

¹ These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

protection or services. Melanie M. argues that the circuit court erroneously exercised its discretion by failing to consider the unduly prejudicial effect on the jury of foster parent testimony during the grounds phase. I reject her argument, and affirm.

Background

¶2 Before the grounds phase in front of the jury commenced, Melanie M.’s attorney sought to exclude the children’s foster mother from testifying. Counsel argued that any probative value of the testimony would be outweighed by the prejudicial effect of allowing a foster parent to testify. Specifically, Melanie M.’s attorney explained:

My ... objection is that she is the foster parent, [and] I think it is prejudicial to have the foster parent sit up in the witness stand and testify about my client’s compliance

Counsel for the petitioner, the Wood County Human Services Department, asserted that the foster mother’s testimony would help prove that Melanie M. had failed to meet some of the conditions of return. The circuit court ruled that the foster mother could testify.

¶3 Consistent with the circuit court’s ruling, the Department elicited testimony from the foster mother during the grounds phase. As Melanie M. points out, the foster mother’s testimony included that:

- The children, ages five, seven, and eight, had been with the foster mother since July 2010, or approximately three years.
- The children came to the foster mother in a dirty condition and none of them were “potty trained,” but all three were “potty trained” during the day by the time of trial. This responsibility fell to the foster mother.

- The foster mother initially supervised some of the children’s visits with Melanie M. at the foster mother’s home, but later asked that visits occur elsewhere so the foster mother did not have to deal with “that conflict.”
- During visits that the foster mother supervised, Melanie M. sometimes engaged in inappropriate texting and talked to the foster mother more than to the children.
- Two of the children needed extensive dental care when they came to live with the foster mother, and Melanie M. would not attend dental appointments even though the foster mother would remind Melanie M. about the appointments.
- Melanie M. would not sign a release of information relating to counseling, so “we had to have it brought to the judge.”

In addition, the Department called several other witnesses.

Discussion

¶4 The circuit court’s decision to admit or exclude evidence is discretionary. *Parker v. Wisconsin Patients Comp. Fund*, 2009 WI App 42, ¶22, 317 Wis. 2d 460, 767 N.W.2d 272. This court will reverse the circuit court only if that court erroneously exercised its discretion. *Id.* The circuit court may exclude relevant evidence if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” WIS. STAT. § 904.03.

¶5 Melanie M. argues that the circuit court erroneously exercised its discretion by failing to consider the unduly prejudicial effect on the jury of the foster mother’s testimony during the grounds phase. She makes several supporting arguments, each of which I reject.

¶6 I begin by observing that the only pertinent objection that Melanie M. put before the circuit court was, in effect, that foster parent testimony is per se prejudicial during the grounds phase. And, as I understand her appellate briefing, this is her main supporting argument on appeal.

¶7 Melanie M. bases the argument on a distinction between the grounds phase and the dispositional phase of termination of parental rights proceedings. During the grounds phase, “the parent’s rights are paramount,” while during the dispositional phase, “the best interests of the child are paramount.” *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶¶22-23, 246 Wis. 2d 1, 629 N.W.2d 768. Melanie M. argues that foster parent testimony during the grounds phase risks shifting the focus from the grounds of termination to the best interests of the child. More specifically, she argues that such testimony creates a risk that the jury will reach a verdict by comparing the biological parent to the foster parent.

¶8 I agree with Melanie M. that, during the grounds phase, the fact finder should not be focused on this comparison. I further agree that foster parent testimony during the grounds phase has the potential to create a prejudicial effect based on such a comparison. I disagree, however, that the potential for prejudice justifies excluding foster parent testimony from the grounds phase in all cases. The more sensible approach is for circuit courts to retain discretion to limit such testimony on a case-by-case basis if needed to minimize the risk of prejudice.

¶9 Melanie M. may be arguing that the circuit court failed to recognize its discretion to exclude the foster mother’s testimony under WIS. STAT. § 904.03. She points to the circuit court’s statement, made as part of the court’s ruling, that “the state has the right to call what witnesses they wish to.” However, reading the statement in context provides no reason to conclude that the circuit court failed to

recognize its discretion under § 904.03. The most reasonable reading of the circuit court's ruling as a whole is that the court simply concluded that the foster mother should not be excluded as a witness based solely on her status as a foster parent.

¶10 Melanie M. points out that WIS. STAT. § 48.427 expressly recognizes the right of a foster parent to be heard during the *dispositional* phase. More specifically, § 48.427(1m) provides that the circuit court “shall give the foster parent or other physical custodian ... a right to be heard at the dispositional hearing by permitting the foster parent or other physical custodian to make a written or oral statement.” I am uncertain if Melanie M. is arguing that this statute necessarily implies that foster parent testimony is not permitted during the grounds phase. If that is one of her arguments, she does not show that she preserved this argument by raising it in the circuit court. I therefore consider it forfeited, and reject it on that basis. *See Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶45, 327 Wis. 2d 572, 786 N.W.2d 177.

¶11 Moreover, even if I chose to fully address the argument, I doubt it would persuade me. The pertinent language in WIS. STAT. § 48.427(1m) is logically read as indicating that the legislature granted foster parents a *right* to be heard during the dispositional phase even if no party calls the foster parent as a witness. The statute does not appear to me to imply that foster parents are to be categorically excluded from testifying at the grounds phase.

¶12 Melanie M. next argues that the circuit court should have excluded the foster mother's testimony as cumulative. But this too is a forfeited argument. Prior to trial, Melanie M. sought to prevent the foster mother from testifying based on the foster mother's status as a foster parent. Melanie M.'s argument here is a fact-specific argument that she did not present by means of an offer of proof or by

other means when she made her pretrial objection. She cannot now argue, based on the particular content of the foster mother's testimony, that the circuit court erred in its pretrial ruling.

¶13 My discussion so far demonstrates that Melanie M. fails to show that the circuit court erroneously exercised its discretion in its pretrial ruling. Melanie M. also seems to be arguing that the foster mother's testimony deprived Melanie M. of a fair trial.

¶14 It is unclear to me whether Melanie M. intends this fair-trial argument as a stand-alone argument and, if so, whether Melanie M. preserved it for appeal. Melanie M. does not assert that she renewed or refined her pretrial objection at any point during the grounds phase proceeding. In any event, I am not persuaded that the foster mother's testimony deprived Melanie M. of a fair trial. Even if some of that testimony should not have been admitted, any error in this regard was harmless.

¶15 I acknowledge that some of the foster mother's testimony as set forth in the Background section above suggests an unfavorable comparison between Melanie M.'s parenting and the foster mother's parenting. However, those portions of the foster mother's testimony were relatively brief in the context of the entire three-day trial.

¶16 Other witnesses, including Melanie M.'s case manager, gave damaging testimony showing that Melanie M. had not met court-ordered conditions of return and was not substantially likely to meet those conditions in the next nine months as required. As just one example, Melanie M.'s case manager testified that Melanie M. was unable to maintain a safe home for the

children. Melanie would leave lighters and knives in places accessible to the children. In one instance, a child fell through a hole in the floor of Melanie's home because of a missing grate. Melanie M. declined to testify, and called no witnesses.

¶17 In addition, during closing arguments, neither the Department's attorney nor the children's guardian ad litem drew any comparison between Melanie M. and the children's foster mother. Nor did they single out the foster mother's testimony over other testimony. Among the damaging evidence that the Department highlighted in closing was that Melanie M. sometimes skipped scheduled visits with the children in order to engage in other activities, such as traveling to see out-of-town friends.

¶18 Finally, the jury received standard instructions indicating that the jury's role was limited to deciding whether the Department had proven grounds for termination based on clear and convincing evidence; that the court had the sole responsibility to make the final decision on termination; that the jury must not concern itself with the final result; and that the children's best interests were a matter not for the jury but for the court's consideration in future proceedings.

¶19 Given all of the circumstances, I am convinced that the foster mother's testimony did not affect the outcome.

Conclusion

¶20 In sum, for the reasons stated, I affirm the orders terminating Melanie M.'s parental rights to Cayden M., Isaiah M., and Nicholas M.

By the Court.—Orders affirmed.

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

