

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 15, 2002

Cornelia G. Clark
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. 01-1902-NM, 01-1903-NM,
01-1904-NM, 01-1905**

**Cir. Ct. Nos. 00-TP-126, 00-TP-127,
00-TP-128, 00-TP-129**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

No. 01-1902-NM

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

**BROWN COUNTY DEPARTMENT OF HEALTH & HUMAN
SERVICES,**

PETITIONER-RESPONDENT,

v.

KIMBERLY A.M.,

RESPONDENT-APPELLANT,

LOUIS A.W.,

RESPONDENT-CO-APPELLANT.

No. 01-1903-NM

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

**BROWN COUNTY DEPARTMENT OF HEALTH & HUMAN
SERVICES,**

PETITIONER-RESPONDENT,

v.

KIMBERLY A.M.,

RESPONDENT-APPELLANT,

LOUIS A.W.,

RESPONDENT-CO-APPELLANT.

No. 01-1904-NM

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

**BROWN COUNTY DEPARTMENT OF HEALTH & HUMAN
SERVICES,**

PETITIONER-RESPONDENT,

v.

KIMBERLY A.M.,

RESPONDENT-APPELLANT,

LOUIS A.W.,

RESPONDENT-CO-APPELLANT.

No. 01-1905

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO
JESSE J.V., A PERSON UNDER THE AGE OF 18:**

**BROWN COUNTY DEPARTMENT OF HEALTH & HUMAN
SERVICES,**

PETITIONER-RESPONDENT,

v.

KIMBERLY A.M.,

RESPONDENT-APPELLANT,

HENRY P.W.,

RESPONDENT.

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

¶1 PETERSON, J.¹ Kimberly A.M. appeals orders terminating her parental rights to two of her four children. She argues: (1) she was denied due process because the trial court conducted an in camera interview with the two children outside the presence of Kimberly and her trial counsel; and (2) her trial counsel was ineffective for failing to object to the in camera interview and for failing to seek a new dispositional hearing. We disagree and affirm the orders.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f).

¶2 In consolidated cases, Louis A.W., the father of Amanda, Damien and April, appeals the orders terminating his parental rights. His counsel filed a no merit report. We conclude that the no merit report accurately describes the record and correctly analyzes the issues. Therefore, we affirm the order terminating Louis's parental rights.²

BACKGROUND

¶3 Kimberly is the mother of Amanda, Damien, April, and Jessie. On November 14, 2000, the Brown County Human Services Department petitioned for termination of Kimberly's parental rights on the grounds of continuing need of protection or services. *See* WIS. STAT. § 48.415(2).

¶4 A jury trial was held on February 14-16, 2001. The jury returned a verdict finding that grounds existed for termination of Kimberly's parental rights.

¶5 The case proceeded to the dispositional phase. WIS. STAT. § 48.424(4). Prior to the dispositional hearing, the trial court met with Amanda and Damien in chambers to determine their wishes. WIS. STAT. § 48.426(3)(d). Kimberly chose not to participate in the interview because she wanted the children to be able to have a confidential conversation with the judge. Kimberly's trial counsel did not attend the interview. No record was made.

¶6 During the dispositional hearing, the trial court made a record of the interview with the two older children. The court stated that the children, guardian ad litem and adverse counsel had been present and that the children basically

² The parental rights of Jesse's father are not at issue on these appeals.

confirmed what had already been presented to the court regarding Amanda and Damien's wishes. The court stated that both children did not want Kimberly's parental rights terminated.

¶7 At the conclusion of the dispositional hearing, the trial court terminated Kimberly's parental rights to her four children. Kimberly appealed and moved to remand for fact finding regarding her ineffective assistance of counsel claim. We remanded the case to trial court to conduct a *Machner*³ hearing. At the hearing, the trial court denied Kimberly's ineffective assistance of counsel claim.

DISCUSSION

I. DENIAL OF DUE PROCESS

¶8 Kimberly argues that she was denied due process when the trial court conducted an in camera interview with Amanda and Damien outside the presence of Kimberly and her trial counsel. She contends that she was deprived of her right to know the evidence that was going to be considered by the court and that she was deprived of her opportunity to present evidence through her children in the course of the interview. Therefore, Kimberly concludes that a new dispositional hearing should be held.

¶9 Whether Kimberly's due process rights were violated is a question of law we review independently of the trial court. *Thomas Y. v. St. Croix County*, 175 Wis. 2d 222, 229, 499 N.W.2d 218 (Ct. App. 1993). However, the decision to terminate parental rights once statutory grounds have been proven is a matter

³ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

committed to the trial court's discretion. *B.L.J. v. Polk County DSS*, 163 Wis. 2d 90, 103-04, 470 N.W.2d 914 (1991).

¶10 At the dispositional phase, the trial court must apply the standard and factors set forth in WIS. STAT. § 48.426 to determine whether parental rights are to be terminated. The best interests of the child are paramount. WIS. STAT. § 48.426(2). The court determines the child's best interests by examining, among other things, the likelihood of the child's adoption after termination, the child's age and health, whether the child has substantial relationships with the parent or other family members and if it would be harmful to sever those relationships, the wishes of the child, how long the child has been separated from the parent, and whether a new environment will provide a more stable and permanent family relationship. WIS. STAT. § 48.426(3).

¶11 Here, the trial court conducted an in camera interview with Amanda and Damien to determine their wishes. WIS. STAT. § 48.426(3)(d). It is undisputed that the children expressed to the court that they did not want their mother's parental rights terminated. At the dispositional hearing, the court noted that:

I did meet with two of the children in this case. I met today with Amanda and Damien. Both of them are represented by a guardian ad litem and by adverse counsel who were individually present when I had these interviews, and I will ask the lawyers to confirm that I am satisfied that the state of this record as now made in [the social worker's] report and the testimony of [the psychologist] is essentially the information provided to me in the interviews that I had with the children, that—that in—effect the conversations I had with the children for the benefit of [Kimberly] and [Louis] is representative of the statements made to the various individuals.

¶12 Even if there trial court's in camera interview with Amanda and Damien was in error, that error was harmless.⁴ *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). Kimberly was not deprived of her right to know what evidence the court was going to be considering at the dispositional hearing. The court summarized the interview for the record. The court stated the children conveyed what was already known, namely that they did not want Kimberly's parental rights terminated. That information could only be helpful, not harmful, to Kimberly. Kimberly has not shown that the children said anything other than what was represented by the court.

¶13 Further, Kimberly was not deprived of the right to present evidence through her children. Kimberly does not state what new evidence she would have presented had she or her trial counsel been present at the in camera interview. If there was additional evidence Kimberly wanted to present through her children, she could have called the children to testify at the dispositional hearing. However, she did not request this. We conclude that Kimberly was not denied due process.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

¶14 Kimberly argues that her trial counsel was ineffective by failing to object to the in camera interview and for failing to seek a new dispositional hearing.

⁴ Because it is unnecessary to the disposition of this appeal, we do not determine whether the trial court's in camera interview was proper. There is case law holding that such a procedure may be proper in a divorce custody dispute. *Hughes v. Hughes*, 223 Wis. 2d 111, 132-33, 588 N.W.2d 346 (Ct. App. 1998). However, we observe that substantially more significant interests are at stake in a termination of parental rights proceeding. *Barstad v. Frazier*, 118 Wis. 2d 549, 560-61, 348 N.W.2d 479 (1984).

¶15 To prevail on an ineffective assistance of counsel claim, a defendant must establish that counsel's actions constituted deficient performance and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice, a defendant must demonstrate "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." *Id.* at 694. Whether counsel's actions, if deficient, prejudiced the defense, is a question of law this court reviews independently. *State v. Hubanks*, 173 Wis. 2d 1, 25, 496 N.W.2d 96 (Ct. App. 1992).

¶16 Here, the trial court found that Kimberly's trial counsel had not been deficient. Even if Kimberly's counsel's performance was deficient, failure to object to the in camera interview or request a new dispositional hearing was not prejudicial to Kimberly. As stated above, "wishes of the children" is only one factor the court has to consider.

¶17 Kimberly does not explain how the trial court's decision to terminate her parental rights would have been different had Kimberly, through her attorney, been given the opportunity to cross-examine Amanda and Damien at the in camera interview. There is simply no evidence that the presence of Kimberly's trial counsel at the hearing would have changed the court's decision.

¶18 If there was additional evidence that Kimberly wanted the court to hear through the children, she could have had them testify at the hearing. She did not do so. Kimberly's argument that she was prejudiced by her attorney's deficient performance is without basis.

III. LOUIS A.W.'S APPEAL

¶19 Counsel for Louis A.W. has filed a no merit report concluding that there is no arguable merit to any issue that could be raised on appeal from an order terminating his parental rights to his children. Louis has been informed of his right to respond to the report and has not responded. Upon our independent review of the record, no issues of arguable merit appear.

¶20 Louis is the father of Amanda, Damien and April. The petition alleged as grounds for terminating Louis's parental rights that the children were in need of continuing protection and services. *See* WIS. STAT. § 48.415(2).

¶21 An initial appearance was held on December 12, 2000. Louis did not appear although he had been served with the three petitions. The trial court entered a default judgment against Louis on the issue whether there were grounds for termination of his parental rights to all three children.

¶22 Louis obtained counsel and filed a motion to vacate the default judgments. The trial court denied the motion. However, the court stated that Louis could contest the issue whether his parental rights should be terminated. The no merit report correctly describes the record, and we agree with its conclusion that the court properly entered the default judgment against Louis and that it did not err when it refused to vacate the judgment.

¶23 A dispositional hearing occurred on March 23, 2001, and April 17, 2001. The trial court terminated Louis's parental rights to Amanda, Damien, and April. The record demonstrates that the court considered the factors in WIS. STAT. § 48.426(3) and properly exercised its discretion when it terminated Louis's parental rights. Based upon our review, we are satisfied that the record amply

supports the court's determination and there appears to be no basis for challenging the court's exercise of discretion. The record discloses no potential issues for appeal.

By the Court.—Orders affirmed.

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

