

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 23, 2011

A. John Voelker
Acting 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. 2009AP2954
2009AP2955
2009AP2956**

**Cir. Ct. Nos. 2009TP8
2009TP9
2009TP10**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

No. 2009AP2954

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO CELSO G.-J., A PERSON
UNDER THE AGE OF 18:**

WINNEBAGO COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JENNY L. G.-J.,

RESPONDENT-APPELLANT.

No. 2009AP2955

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO JUAN G.-J., A PERSON
UNDER THE AGE OF 18:**

WINNEBAGO COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JENNY L. G.-J.,

RESPONDENT-APPELLANT.

No. 2009AP2956

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO JOSE M. Q.-R., A PERSON
UNDER THE AGE OF 18:**

WINNEBAGO COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JENNY L. G.-J.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Winnebago County:
BARBARA H. KEY, Judge. *Affirmed.*

¶1 REILLY, J.¹ Jenny L. G.-J. appeals from orders of the circuit court terminating her parental rights to her three children. Jenny argues that she received ineffective assistance of counsel because her trial attorney failed to object to the testimony of a family therapist who testified about the therapy sessions with Jenny and one of her children. Jenny argues that the therapist's testimony revealed privileged information and was therefore inadmissible. We hold that as a family therapist's testimony in a TPR proceeding provides an exception to the family therapist-patient privilege, the therapist's testimony was admissible. As Jenny did not receive ineffective assistance of counsel, the orders of the circuit court are affirmed.

FACTS

¶2 Jenny is the mother of three children. In the fall of 2007, her children were removed from her custody after Jenny violated the terms of her probation and was incarcerated. A child in need of protective services (CHIPS) order was subsequently entered on March 13, 2008, and her three children were placed in foster care. In the CHIPS order, the circuit court listed eleven conditions for Jenny to abide by in order to get her children back. In April of 2009, Winnebago County determined that Jenny did not satisfy these conditions and moved to terminate her parental rights.

¶3 A guardian ad litem (GAL) was appointed to represent the interests of Jenny's children. During the trial there was testimony from Donna Depis, who is a family therapist with the Winnebago County Department of Human Services.

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.

Depis provided therapy to Jenny's son Jose while Jose was in foster care. Depis's testimony portrayed Jenny in a negative light. For example, Depis stated that the sessions between Jenny and Jose were detrimental to Jose and that Jose's behavior in school improved when he did not visit Jenny.

¶4 The jury found that there were grounds to terminate Jenny's parental rights. At a subsequent disposition hearing, the circuit court entered orders terminating the parental rights of Jenny.

¶5 Jenny appeals, arguing that she received ineffective assistance of counsel. Jenny argues that her trial attorney should have objected to Depis's testimony because Depis was providing therapy to Jose and thus her observations were privileged under WIS. STAT. § 905.04(1)(b). As we hold that a family therapist's testimony in a TPR proceeding provides an exception to the family therapist-patient privilege, we affirm the circuit court's orders.

STANDARD OF REVIEW

¶6 Whether a defendant received ineffective assistance of counsel is a two-part test. *State v. Carter*, 2010 WI 40, ¶21, 324 Wis. 2d 640, 782 N.W.2d 695. First, the defendant must prove that his counsel's performance was deficient. *Id.* To demonstrate deficient performance, the defendant must show that his counsel's performance fell below an objective standard of reasonableness given the circumstances. *Id.*, ¶22. If the defense counsel's performance was deficient, the defendant must prove that he was prejudiced by his counsel's performance. *Id.*, ¶21.

¶7 We must also determine if Depis's testimony was privileged. Although the decision of whether to admit or exclude evidence generally lies

within the discretion of the circuit court, when an evidentiary issue requires construction or application of a statute to a set of facts a question of law is presented and our review is de novo. *State v. Richard G.B.*, 259 Wis. 2d 730, 737, 656 N.W.2d 469 (Ct. App. 2002).

DISCUSSION

¶8 WISCONSIN STAT. § 905.04(1)(b) provides:

A communication or information is “confidential” if not intended to be disclosed to 3rd persons other than those present to further the interest of the patient in the consultation, examination, or interview, to persons reasonably necessary for the transmission of the communication or information, or to persons who are participating in the diagnosis and treatment under the direction of the physician, podiatrist, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor, including the members of the patient’s family.

As Depis is a family therapist, her testimony about Jose is confidential. *See* § 905.04(1)(bm).

¶9 There is a factual question as to how much of Depis’s testimony Jenny could claim was privileged. WISCONSIN STAT. § 905.04(3) states that “[t]he privilege may be claimed by the patient, by the patient’s guardian or conservator, or by the personal representative of a deceased patient.” “Patient” is defined as “an individual, couple, family or group of individuals who consults with or is examined or interviewed by a ... family therapist.” Section 905.04(1)(c). While Jenny cannot exercise the privilege on behalf of Jose—as the GAL and not Jenny was Jose’s guardian during the trial—she can exercise the privilege on behalf of herself. Depis testified that she provided therapy sessions to Jenny and Jose

jointly, and separate sessions to Jose individually. Jenny could therefore claim that the joint therapy sessions were privileged, but not the individual sessions. It is unclear from the record how much of Depis's testimony related to individual sessions versus joint sessions. We will therefore assume without deciding that Jenny could assert the family therapist-patient privilege as to all of Depis's testimony.

¶10 Our analysis does not end at this point. For while observations made by a family therapist are normally privileged between the therapist and the patient, there are several exceptions. WISCONSIN STAT. § 905.04(4)(i) states that “[t]here is no privilege regarding information obtained by ... dispositional staff in the provision of services under [WIS. STAT. § 48.069].” The statute goes on to state that a “dispositional staff member may disclose information obtained while providing services under [§ 48.069] only as provided in [WIS. STAT. §] 48.78.” Section 905.04(4)(i). We must therefore determine whether Depis is a dispositional staffer, and if so, whether there is a statutory exception that allowed her to testify.

¶11 WISCONSIN STAT. § 48.069(1) defines a dispositional staffer as a member of “[t]he staff of the department [of children and families], the court, a county department or a licensed child welfare agency designated by the court to carry out the objectives and provisions of [the Children's Code]” Dispositional staffers have the power to “[o]ffer individual and family counseling.” Section 48.069(1)(b). As Depis is a family therapist with the Winnebago County Department of Human Services, she falls within the statutory definition of a dispositional staffer under § 48.069.

¶12 Having determined that Depis is a dispositional staffer, we must answer whether her testimony was admissible. WISCONSIN STAT. § 905.04(4)(i) states that information obtained by a dispositional staffer is not privileged and may be disclosed pursuant to one of the exceptions listed under WIS. STAT. § 48.78. Section 48.78(2)(a) lists WIS. STAT. § 48.981(7) as one of the exceptions. Section 48.981(7)(a)10. states that reports and records may be disclosed to a court conducting proceedings related to a petition under WIS. STAT. § 48.42, which governs TPR proceedings. As Depis's testimony came during a TPR proceeding, it was admissible.

CONCLUSION

¶13 Given that Depis's testimony was admissible, there was no reason for Jenny's trial attorney to object. Jenny did not receive ineffective assistance of counsel and her request for a new trial is denied.

By the court.—Orders affirmed.

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

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