

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 10, 2003

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. 03-0663
03-0664
03-0665**

**Cir. Ct. Nos. 02TP57
02TP58
02TP59**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

No. 03-0663

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

BROWN COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

v.

KATHY M.,

RESPONDENT-APPELLANT.

No. 03-0664

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO
BRE-ANNA M.F., A PERSON UNDER THE AGE OF 18:**

BROWN COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

v.

KATHY M.,

RESPONDENT-APPELLANT.

NO. 03-0665

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

BROWN COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

KATHY M.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Brown County:
RICHARD J. DIETZ, Judge. *Affirmed.*

¶1 PETERSON, J.¹ Kathy M. appeals orders terminating her parental rights to her children. Kathy argues the trial court erroneously exercised its discretion by failing to appoint adversary counsel for her children. We disagree and affirm the orders.

¹ These appeals are decided by one judge pursuant to WIS. STAT. § 752.31. All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

FACTS

¶2 The Brown County Department of Human Services filed petitions on June 13, 2002, to terminate Kathy's parental rights to her children: Keith, age fourteen; and Bre-Anna and Robert, both age twelve.² The grounds for termination were continuing need of protection and services, under WIS. STAT. § 48.415(2). Kathy contested the petitions. A jury trial was conducted on August 13-14, 2002. The jury found that grounds existed to terminate Kathy's parental rights to each child.

¶3 In motions after the verdict, Kathy moved for a mistrial on the grounds that the court should have appointed adversary counsel for her children at trial. She also requested appointment of adversary counsel for her children at the disposition hearing.³ The court determined that there was not enough evidence to show that the guardian ad litem did not adequately represent the children. The court also denied the motion for adversary counsel at the disposition hearing, stating:

[I]t would appear that that motion should be denied at a minimum because it's premature. If at some point [the guardian ad litem] believes that the – that his position is different than the position of the children, he can inform the Court and we can proceed at that time but on the basis of the record at it stands today I'm going to deny that motion as well.

² The County also sought termination of the father's parental rights. He did not contest the petitions.

³ Kathy also requested judgment notwithstanding the verdict and dismissal. She asked the court to change the answer to the verdict question regarding whether she would meet the conditions for the children's return within twelve months. The court denied the motion, stating it did not want to substitute its judgment for the jury's. Kathy did not appeal this issue.

¶4 Kathy's counsel also made a motion for the court to conduct an interview with the children to determine their wishes for disposition.⁴ The court held an in camera interview with the children on October 24, 2002. The guardian ad litem was present. The children all stated that they would like to live with Kathy eventually, but also stated they were happy in their current foster home and would like to stay there until they could live with Kathy.

¶5 A final disposition hearing took place on October 28, 2002. When discussing the children's wishes, the court stated the children were "very circumspect with regard to their wishes concerning the termination" and that "none of the children were willing to express in any substantial terms what their – their feeling was." The court also noted that the children all felt comfortable in their current foster home. The court concluded that, based on the statutory factors, it was in the best interest of the children that Kathy's parental rights be terminated. Kathy appeals.

ANALYSIS

¶6 Whether to grant a mistrial is within the trial court's discretion. *State v. Knighten*, 212 Wis. 2d 833, 844, 569 N.W.2d 770 (Ct. App. 1997). The decision to appoint adversary counsel for children is also within the trial court's discretion. WIS. STAT. § 48.235(3).

⁴ Kathy also requested appointment of a psychologist to evaluate the children while with Kathy to assist the court. Additionally, Kathy requested that the court appoint an independent psychologist to determine the impact severance of ties with their mother would have on the children. Both requests were denied.

¶7 First, we note that Kathy's motion for a mistrial was untimely. A motion for mistrial must be raised before the court accepts the jury's verdict. *State v. Reid*, 166 Wis. 2d 139, 144, 479 N.W.2d 572 (Ct. App. 1991). Consequently, Kathy relinquished this argument by not timely moving for a mistrial.

¶8 Second, both the motions for mistrial and appointment of adversary counsel were properly denied because Kathy did not establish any grounds for them. She simply asserted that the children's wishes and desires should be communicated to the court. However, she offered no proof that the children's positions were different from the position of the guardian ad litem. The grounds for a motion must be proved. WIS. STAT. § 802.01(2)(a). An unsupported allegation does not entitle a moving party to relief.

¶9 Third, even on the merits, the motions failed.⁵ WISCONSIN STAT. § 48.235(3) states the role of the guardian ad litem:

(a) The guardian ad litem shall be an advocate for the best interests of the person or unborn child for whom the appointment is made. The guardian ad litem shall function

⁵ The County argues that Kathy does not have standing to assert that the court erred in not appointing adversary counsel for her children. The County maintains Kathy suffered no threatened or actual injury, and that the right to adversary counsel belongs not to Kathy but to her children. The purpose of WIS. STAT. § 48.235(3) is to ensure that the child has a guardian ad litem who will be concerned only with the interests of the child. However, a parent's interest in the custody of his or her child is cognizable and substantial. *In re T.L.*, 151 Wis. 2d 725, 735, 445 N.W.2d 729 (Ct. App. 1989). The parent, as well as the state or county and the child, has an interest in the fact-finding process. See *In re C.E.W.*, 124 Wis. 2d 47, 64, 368 N.W.2d 47 (1985). The parent, as a party to the proceeding, has standing to raise issues concerning the role of the guardian ad litem. *Id.* at 61, n.9 (county, as a party aggrieved by the final judgment in a termination of parental rights proceeding, may assert an error involving the role of the guardian ad litem that may have affected the outcome). Consequently, Kathy does have standing to raise the issue of adversary counsel for her children.

independently, in the same manner as an attorney for a party to the action, and shall consider, but shall not be bound by, the wishes of that person or the positions of others as to the best interests of that person or unborn child. *If the guardian ad litem determines that the best interests of the person are substantially inconsistent with the wishes of that person, the guardian ad litem shall so inform the court and the court may appoint counsel to represent that person.* The guardian ad litem has none of the rights or duties of a general guardian. (Emphasis added.)

The trial court may also appoint counsel for a child “on its own motion.” WIS. STAT. § 48.23(3).

¶10 Later evidence established that the children’s and guardian ad litem’s positions were not substantially inconsistent. The record shows that the children were confused regarding their placement. The termination of parental rights court report states:

The children have been very confused regarding placement with their parents. At times, the twins will state they want to be with whichever parent doesn’t have their brother Keith and Keith will state he wants to be with whichever parent the twins are not with At other times, the children want to remain in the foster home they are in, as they have expressed that this is where they do the best.

When told of the possibility of a [sic] TPR, Keith stated he was happy about the termination, as there is not the violence and hitting, and he feels safer. He likes the idea of finishing high school at Bayport. Keith has been having delinquency issues. He has stated he feels he can be the most successful staying at his present foster home.

Bre-anna said she feels sad, but happy there is no hitting, screaming, and yelling.

Robert said he was “ok with things and there is less fighting and they are cleaner now,” and he can participate in sports.

All three children also stated it would be hard not to see either one or both of their parents.

These positions are similar to ones the children made in their in camera interview with the court. For example, Keith stated that he would like to live with his mother, but also that he “like[s] living [in the foster home] because I get the -- actually find a school that I like. I can stick with.” Bre-Anna stated, “it wouldn’t bother me if we had to stay [in the foster home] but I’d rather live with my mom ‘cuz I’ll miss her.”

¶11 At the disposition hearing, the court summarized its interview with the children:

The children were very circumspect with regard to their wishes concerning the termination of parental rights. Without coming right out and discussing that I attempted to draw out from them any – any feelings or any preferences that they might have to that.

They certainly were aware that this hearing was going on today and what the result of this hearing might be but none of the children were willing to express in any substantial terms what their – their feeling was.

The children did and each of them did express a – a certain degree of – of comfort level with regard to their current foster situation in my view. I got the impression that they – that they felt safe and secure and that may not have been the case in the past but I – the children did not specifically address what – what their wishes were other than what I could glean from the various comments.

The children’s statements are not substantially inconsistent with the guardian ad litem’s position:

I was present [at the in camera interview] but I think probably in the report on page thirty-two probably the best sentence to summarize the children’s wishes is that first sentence where the children have been very confused regarding placement with their parents and I think that summarizes the interviews I’ve had with the children.

Thus, even on the merits, the court did not err by denying the motions.

By the Court.—Orders affirmed.

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

