COURT OF APPEALS
DECISION
DATED AND FILED

July 3, 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. 2017AP1785
2017AP1786

Cir. Ct. Nos. 2015TP000328
2015TP000329

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

IN RE THE TERMINATION OF PARENTAL RIGHTS TO K. H.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

M. A. H.,

RESPONDENT-APPELLANT.

IN RE THE TERMINATION OF PARENTAL RIGHTS TO M. H.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

M. A. H.,

RESPONDENT-APPELLANT.

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

¶1 DUGAN, J.[1] M.A.H. appeals from the orders terminating her parental rights to K.H. and M.H. and the orders denying her postdisposition motion.[2] She contends that the no-contest plea agreement that she entered into was inherently coercive, and her plea was not knowing, intelligent, and voluntary. She also asserts that this court should order a new trial in the interest of justice.[3]

¶2 For the reasons stated below, we conclude that M.A.H.'s claim of inherent coercion is not supported by the record, and that the trial court properly determined that M.A.H.'s no-contest plea was knowing, intelligent, and voluntary.

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

Pursuant to WIS. STAT. RULE 809.107(6)(e), this court is required to issue a decision within thirty days after the filing of the reply brief. We may extend the deadline pursuant to WIS. STAT. RULE 809.82(2)(e) upon our own motion or for good cause. ***See Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 694, 530 N.W.2d 34 (Ct. App. 1995). On our own motion, we now extend the decisional deadline through the date of this decision.

[2] In 2013, separate cases for each child were filed. However, the cases proceeded jointly. Multiple judges presided over the proceedings. The Honorable Christopher R. Foley presided over the termination of parental rights and the postdisposition motion proceedings that are at issue on appeal. We refer to the judges collectively as the trial court.

For ease of reading we refer to documents that were filed in the singular, even though a particular document was filed in both cases.

[3] We note that in her postdisposition motion, M.A.H. also contended that trial counsel was ineffective for failing to object to the coercive nature of the plea and for failing to inform her that the duration of the time out of the home was a factor that the trial court must consider at disposition. She does not pursue the claim on appeal.

Furthermore, M.A.H. has not established a basis for a new trial. Therefore, we affirm.[4]

¶3 The following background provides context for the issues in this case. Additional relevant facts are included in the discussion section.

BACKGROUND

¶4 M.A.H. and K.C.H., respectively, are the mother and father of K.H. and M.H. K.H., now seven years old, was born on September 20, 2010 and M.H., now six years old, was born September 5, 2011.

¶5 In April 2010, the Bureau of Milwaukee Child Welfare (BMCW) was notified because K.C.H. shot one of his sons in the face with a BB gun. After the referral to BMCW, criminal charges were filed against K.C.H. BMCW then implemented a safety service plan in the home. However, the plan failed in early January 2011, when K.C.H. slapped one of the children in "a fit of anger" in violation of the safety plan and the conditions of his probation.[5] M.A.H. was aware of K.C.H.'s abuse of the children, but failed to protect them.

¶6 On January 20, 2011, K.H. and two older siblings were removed from the home and placed in out of home care due to concerns of neglect and physical abuse in the home. On April 26, 2011, M.A.H. stipulated that K.H. was a child in need of protection and services (CHIPS). On July 12, 2011, K.H. was

[4] K.C.H. filed a separate appeal challenging the termination of his parental rights. That appeal is also assigned to this court and will be addressed in a separate decision.

[5] This statement is based on the trial court's findings of fact in its April 2017 disposition decision. The decision does not include any facts about the charges against K.C.H., what he was convicted of, or the sentence imposed upon him.

returned to the parental home. Then, on September 23, 2011, a one-year in home CHIPS order of placement was issued; the order was subsequently extended until August 2013.

¶7 However, the trial court found that in April 2013, the home was a "virtually uninhabitable disaster" with multiple cats living there, cat feces on the floor, bedbug infestation, and garbage everywhere. The children were filthy and had been bitten by the bedbugs. While M.A.H. asserted that the "deplorable condition" of the home was due to her health related limitations, this failed to account for K.C.H.'s failure to maintain "a habitable living environment" for his children. The children were temporarily placed with their paternal grandmother on a safety plan and returned when the home was deemed "sufficiently habitable."

¶8 The trial court also found that in June 2013 K.H., then two years old, was found near the parental home wandering unattended and wearing only a diaper. Neither M.A.H. nor K.C.H. noticed she was missing from their home. At that time, the "condition of the home—only some of it attributable to neglect by the landlord—was again overtly concerning."

¶9 On June 24, 2013, K.H., M.H., and two older siblings were removed from the parental home and placed in foster care. All of the children have been placed outside of the home since then. On June 25, 2013, the trial court ordered that K.H. and M.H. have supervised visits twice weekly for two hours. The order also provided that the "*visits can be modified at discretion of* [*BMCW*]." (Emphasis added.) On August 2, 2013, M.A.H. stipulated that M.H. was a child in

need of protection and services, and out of home CHIPS dispositional orders or extensions were entered for both children.[6]

¶10 On or about June 12, 2014, M.H. was placed in the "F" foster home.[7] Both parents initially objected to that placement; however, those objections were withdrawn on September 26, 2014. On November 11, 2014, both parents filed change of placement motions and the trial court conducted a hearing on the motions over several dates between November 2014 and July 2015.

¶11 At a July 21, 2015 permanency plan hearing, BMCW indicated that it planned to place K.H. in the "F" foster home and to allow both children to move to Michigan when the "F" family relocated there. Both parents objected to the children moving to Michigan. At the conclusion of the change in placement hearing, the trial court ruled that both children should remain in the "F" foster home in Michigan. When the two children were in Michigan, BMCW set up a visitation schedule and brought them to Milwaukee for visitation every other weekend for approximately six hours per visit.

¶12 In November 2015, the State filed a petition to terminate the parental rights (TPR) of M.A.H. and K.C.H. to K.H. and M.H.[8] The grounds as to both

[6] Both orders were eventually extended on July 31, 2015.

[7] The parties refer to the foster family as the "F" family to protect its identity. This court adopts that convention in this decision.

[8] Wisconsin has a two-part statutory procedure for an involuntary TPR. ***Steven V. v. Kelley H.***, 2004 WI 47, ¶24, 271 Wis. 2d 1, 678 N.W.2d 856. In the grounds phase, the petitioner must prove by clear and convincing evidence that at least one of the twelve grounds enumerated in WIS. STAT. § 48.415 exists. *See* WIS. STAT. § 48.31(1); ***Steven V.***, 271 Wis. 2d 1, ¶¶24-25. In the dispositional phase, the court must decide if it is in the child's best interest that the parent's rights be permanently extinguished. *See* WIS. STAT. § 48.426(2); ***Steven V.***, 271 Wis. 2d 1, ¶27.

parents were continuing CHIPS and failure to assume parental responsibility. The trial on the grounds phase was scheduled for September 12, 2016, which fell on a Monday. When the trial court convened the proceedings on the September 12, 2016 trial date, the State indicated that it had informed the court's clerk "on Friday" that the parties had resolved the grounds phase and that each parent would plead no-contest to one of the grounds in the TPR petition. Trial counsel for each parent indicated that the no-contest plea would be to the continuing CHIPS ground.

¶13 The State further explained that "[i]n exchange" for those pleas, the parties were requesting a January 2017 contested dispositional hearing, and "[i]n the meantime [the parties] are looking to add therapeutic visitation once a week for [both children]." The State also indicated that such visitation would be "[i]n addition to the once a week visitation … [s]o there will be two visits a week, one therapeutic, one regular."

¶14 The trial court then conducted the required plea colloquy with both parents. The trial court also heard the State's offer of proof. The children's current case manager testified and outlined the entire case history beginning in 2011, and stated that since June 24, 2013, the children had been out of the home continuously. She also described the conditions of return, the parents' inability to meet them, and indicated that she did not expect that they would be able to meet those conditions within the next nine months.

¶15 She further testified that the parents had not met the condition of maintaining a relationship with the children by regularly participating in successful visits because, although they usually came to the visits, both were not always present for the entire visit. Due to the parents' failure to interact

appropriately during visits, BMCW had to impose visit guidelines requiring that they interact with the children, rather than play video games or play on their phones or tablets. The parents also had not shown that they could meet the special needs of K.H. and M.H., who required constant supervision.

¶16 Another condition of return that the parents had not met required demonstrating they could keep a safe and a habitable house—the home was cluttered and often dirty, and the bedbug issue identified in April 2016 remained unresolved. M.A.H. also had not met the condition for return by demonstrating that she understood and was managing any mental health issues that she might have so they did not interfere with her parenting. In the past year, she had only seen her individual psychological therapist once, and she had not undergone a recommended psychiatric evaluation for depression. Thus, the case manager's testimony at the change of plea proceeding reflected that it was not likely that M.A.H. would have prevailed at an immediate trial on the dispositional phase.

¶17 Based on the plea colloquy and the evidence offered by the State, the trial court found that each parent's plea and waiver of trial rights was knowingly and voluntarily offered, and ruled that each parent was unfit. The trial court also noted that, by stipulation, the time limits for the dispositional hearing would be tolled until January 10, 2017.

¶18 The trial court conducted the dispositional hearing over several dates commencing on January 10, 2017 and concluding on April 5, 2017. On March 22, 2017, the family case worker testified that since November 2016, she had not seen any behavioral changes in M.A.H. or K.C.H., with respect to their attendance at, compliance with, or the consistency of their supervised visits with K.H. and M.H. She stated that the situation was unchanged despite her numerous discussions with

the parents about visitation being most important, and explaining what needed to happen and what needed to change. Neither M.A.H. nor K.C.H. expressed interest in support services she offered to them.

¶19 On April 12, 2017, the trial court issued a detailed five-page single-spaced written decision finding that the petition to terminate the parental rights of each of the parents should be granted. An order terminating the parental rights followed.

¶20 The trial court held, in part, that M.A.H., as well as K.C.H., "cannot safely parent [K.H.] and [M.H.]. The history of this case establishes that the children's significant need for structure and nurturance—a product of the chaos experienced in the parental home—*is unquestionably beyond the highly limited parental capacities and emotional limitations of their parents*." (Emphasis added.) The trial court also held that

> [*K.C.H.*] *and* [*M.A.H.*] *are the antithesis of vigilant, emotionally balanced, patient and understanding caregivers.* K.C.H.'s impulsivity and uncontrolled anger have been a primary safety concern throughout the history of the case and it is clear—*sometimes even in the court setting*—those concerns persist. Multiple mental health professionals have opined he is in need of ADHD [attention deficit hyperactivity disorder] or other medication to address mental health concerns. The record is not clear as to whether he presently is or is not; his continued problematic behaviors in this regard are strongly suggestive that he is not and those issues continue to present a serious threat to the safety of his children. That threat is heightened by virtue of the challenging behaviors the children do and would present. *While* [*M.A.H.*] *is a much more affectionate and caring parent, she is also far less engaged as she struggles to maintain employment to support the family. She clearly lacks the capacity to act independently of her husband in protecting and nurturing the children. In all regards, their parenting limitations and emotional variability in conjunction with the challenges their children's behavior present is a dangerous and toxic mix despite years of intervention and rehabilitative efforts.*

(Emphasis added.)

¶21 M.A.H. filed a notice of intent to pursue postdisposition relief and subsequently filed a notice of appeal. Later, the parents filed a joint motion to remand to the trial court. This court granted the motion while retaining jurisdiction on appeal.

¶22 On December 6, 2017, the parents filed a joint postdisposition motion requesting an evidentiary hearing to allow each of them to withdraw their no-contest pleas. As germane to this appeal, M.A.H. contended that (1) her no-contest plea was not voluntary because she did not know that the promise that the State would allow greater visitation in exchange for a plea was void and violated due process because it improperly induced her plea; and (2) she should be allowed to withdraw the plea because it was not knowing, voluntary, and intelligent because she did not understand that the delay that she was agreeing to as a part of the plea could be used against her. The trial court heard testimony from each parent and each parent's trial counsel and denied the motion in an oral decision. A brief written order followed. M.A.H. appeals.

DISCUSSION

I. M.A.H. Entered Her Plea Knowingly, Voluntarily, and Intelligently

A. M.A.H. Made a Strategic Decision to Enter into the Plea Agreement—She Was Not Coerced

¶23 M.A.H. maintains that in this case, her plea was induced by the withholding of additional visitation and the promise to allow additional visitation following the entry of a plea. She contends that the plea agreement was "inherently coercive" and that any plea agreement involving additional visitation

rights for a parent should not be allowed as a matter of public policy.[9] Our review of the record establishes that M.A.H.'s contention lacks factual support, that the trial court properly found that M.A.H. made a strategic decision to accept the plea agreement, and that she freely, voluntarily, and intelligently entered her plea.

¶24 At the outset, we note that as our Supreme Court stated in ***Armstrong v. State***,

> a plea otherwise valid is not involuntary because induced or motivated by the defendant's desire to get the lesser penalty. A voluntary and intelligent choice always involves two or more alternatives, each having some compelling power of acceptance. The fact that a defendant must make a choice between two reasonable alternatives and take the consequences is not coercive of the choice finally made. *The distinction between a motivation which induces and a force which compels the human mind to act must always be kept in focus.*

See ***id.***, 55 Wis. 2d 282, 288, 198 N.W.2d 357 (1972) (emphasis added; citation omitted).

¶25 Here, M.A.H. had a choice between proceeding to trial at the grounds phase of this TPR, followed immediately by the dispositional phase, if necessary, or entering a plea at the grounds phase and adjourning the dispositional hearing. As will be discussed below, trial counsel focused on prevailing at the dispositional phase and M.A.H. and K.C.H.'s need for more frequent visitation

[9] We also note that although M.A.H. asserts that it is *per se* coercive to offer additional visitation as a part of a plea agreement, she cites no legal authority. Thus, we may properly decline to further consider the assertion. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). Although M.A.H. alleges that the State withheld visitation with the children from her, there is nothing in the record to support that allegation. Rather, the family's visitation worker testified that the parents consistently missed or cancelled scheduled visits with the children.

with the children and M.A.H.'s need to develop a substantial relationship with the children by attending all visits. Trial counsel believed that it was in M.A.H.'s best interest to adjourn the dispositional hearing to give M.A.H. the time to develop a substantial relationship with the children. In light of those facts, M.A.H. made a strategic decision not to proceed to trial, but rather, entered into the plea agreement and jointly requested an adjournment of the dispositional hearing. As held in ***Armstrong***, "The fact that a defendant must make a choice between two reasonable alternatives and take the consequences is not coercive of the choice finally made." ***Id.***

The Plea Hearing Demonstrates that M.A.H. Was Not Coerced into Entering Her Plea

¶26 In analyzing whether M.A.H. was coerced into entering her plea, we begin with the plea hearing. The record reflects that the trial court's plea colloquy with M.A.H. was thorough and searching. The trial court established that M.A.H. (1) had discussed the plea agreement with trial counsel; (2) understood the issues involved in the TPR proceedings; (3) understood that no one could force her to plead no-contest to the grounds; (4) understood that by pleading no-contest that she was giving up her right to a trial and to present evidence opposing the grounds to terminate her parental rights; (5) understood she was giving up her right to force the State to prove the grounds to a reasonable certainty by clear, satisfactory; and convincing evidence; (6) understood that, if the trial court found that the State met its burden of proof, the trial court was required to find her unfit as a parent; and (7) understood that at the dispositional hearing, which would be heard by the trial court and not a jury, the only issue to be decided was what was in the best interest of her children.

¶27 M.A.H. stated that no one made any promises, other than the terms of the plea agreement, or threats to her to get her to plead no-contest to the grounds for TPR. She also stated that she talked with trial counsel about everything the trial court asked her about, that trial counsel answered all her questions, and that she was satisfied with the information trial counsel provided to her. The trial court concluded the plea colloquy with the following questions:

> [Trial Court] Do you have any additional questions based upon the discussion that you had with me either for [trial counsel] or of me?
>
> [M.A.H.] No.
>
> [Trial Court] .... Are you comfortable and confident you understood everything that we talked about in court this morning?
>
> [M.A.H.] Yes.

¶28 Moreover, the questions that the trial court asked M.A.H. during the plea colloquy afforded her an opportunity to reveal any problems related to the plea negotiations. M.A.H. did not tell the trial court about any problem with the plea process—that silence speaks volumes. Further, trial counsel stated that she was confident that M.A.H. knowingly and voluntarily waived her rights to a trial. The record of the plea hearing supports the trial court's finding that M.A.H. was not coerced into entering her plea.

¶29 In her argument, M.A.H. depicts the plea hearing in a different light, relying on her postdisposition testimony that she only recalls learning about the plea agreement the day she entered the plea, and that she did not recall telephone calls with trial counsel during which the plea agreement was discussed. M.A.H. also relies upon K.C.H.'s testimony at the postdisposition hearing that on the day of the plea hearing,

> [w]e were met by what I would assume would be the [assistant district attorney (DA)] as we were leaving court … And we were told about this deal. And we were given a little time to think about it before returning back to this room to say, yes we'll do it.

K.C.H. said that they had the lunchtime to think about the plea. He also stated that "[i]t was explained more like a threat. It was, you want more time with your daughters? We're willing to give you more time. You plead no[-]contest, we'll give you these therapeutic visits. They'll add one visit to your already[]sparse schedule."

¶30 However, the testimony of both trial counsel at the postdisposition hearing refutes M.A.H and K.C.H.'s depictions of how the plea agreement developed. During her testimony at the hearing, M.A.H.'s trial counsel stated that after she received the DA's email regarding the plea offer, she had "phone conversations" with M.A.H. She, K.C.H.'s trial counsel, M.A.H., and K.C.H. all met to discuss the plea offer. She stated that the meeting occurred prior to the trial date. K.C.H.'s trial counsel testified that he received an email from the DA on September 9, 2016—the Friday before the Monday scheduled trial date. The email reflected that the DA had discussions with M.A.H.'s trial counsel about resolving the grounds phase of the case with a plea. Trial counsel stated that he talked with K.C.H. shortly after he received the email because the DA was pushing for an answer before the end of the week. He went on to testify that he was not sure if he communicated with K.C.H. before the trial date, but that he, along with M.A.H.'s trial counsel, K.C.H., and M.A.H. had a long conversation about the plea agreement before the case was called on the day of trial.

¶31 This testimony clearly contradicts M.A.H. and K.C.H.'s testimony at the hearing. Moreover, the trial court found that, contrary to M.A.H. and K.C.H.'s

testimony, "it is very clear that there had been electronic communications between the lawyers on a resolution on this case prior to—in the week prior to the trial date" and that the trial court "sincerely doubt[ed]" that trial counsel for either parent would have advised the trial court's clerk that the case was resolved, without having communicated with the parent. "Where the trial court is the finder of fact and there is conflicting evidence, the trial court is the ultimate arbiter of the credibility of witnesses." ***Fidelity & Deposit Co. v. First Nat'l Bank***, 98 Wis. 2d 474, 485, 297 N.W.2d 46 (Ct. App. 1980).

¶32 The testimony of M.A.H.'s trial counsel also refutes K.C.H.'s assertion that the plea agreement was a threat. She testified that the DA first proposed the plea agreement and raised extending the time for disposition if the parents pled no-contest. Trial counsel further explained that after the DA raised the plea agreement, she and K.C.H.'s trial counsel discussed obtaining additional visitation and that she might have been the one who spoke to the DA about adding the additional visitation. The State did not offer additional visitation if the parents entered pleas—it was trial counsel who requested that additional visitation be part of the plea agreement. This testimony refutes M.A.H.'s argument that the State coerced her into entering her plea by offering more visitation.

Trial Counsel Testified that M.A.H. Made a Strategic Decision to Enter Her Plea—She Was Not Coerced

¶33 The testimony of trial counsel at the postdisposition motion hearing supported the trial court's finding that M.A.H. and her trial counsel made a strategic decision to enter her plea and jointly request that the dispositional hearing be adjourned so that she could have more time to prove that she had a substantial relationship with the children before the hearing was held. Trial counsel testified that she told M.A.H. the plea agreement would be beneficial to her because

> [S]he wasn't having as much visitation with the kids … she could create a better relationship with the children by going to all the visits.
>
> She had changed a job or was working with a different work schedule, so we tried to work the visits around that schedule at the time so that she could really create that substantial relationship with the children that was lacking[.]

During the meeting with M.A.H. regarding the plea, trial counsel explained that they were concerned about her relationship with the children and were trying to develop a substantial relationship between M.A.H. and the children. M.A.H.'s trial counsel also testified that if M.A.H. went to trial, the DA wanted to go to trial immediately. Furthermore, trial counsel went over the plea agreement and her trial rights with M.A.H. She also told M.A.H. that she could accept the plea or she could proceed to the trial, but it was M.A.H.'s decision to make.

¶34 K.C.H's trial counsel also testified that at the time of the plea, there was evidence that neither of the parents met the conditions for return of the children. She also stated that if they had gone to trial, the State and the guardian *ad litem* (GAL) would have pushed to go to disposition immediately.

¶35 The record reflects that the State had strong evidence in support of the grounds phase of the case. Trial counsel and M.A.H. understood that fact. They realized that the best chance M.A.H. had to prevail at the dispositional hearing and not have her parental rights terminated was to develop a substantial relationship the children. They knew that the State and the GAL would have pushed to proceed with the dispositional hearing immediately after the trial, if they went to trial, and the only way M.A.H. could strengthen her relationship with the children was to delay the dispositional hearing. Not only did M.A.H. join in the request to adjourn the dispositional hearing—she, along with K.C.H., asked for additional visitation. It was not the State dangling additional visitation before

M.A.H. in exchange for her plea—it was M.A.H., along with K.C.H., asking for additional visitation, in hope of renewing her bond with the children.

¶36 We conclude that trial counsel's testimony supports the trial court's finding that M.A.H. made a strategic decision not to proceed to trial, but rather, freely and voluntarily entered into the plea agreement and jointly asked for an adjournment of the dispositional hearing.

The Trial Court Appropriately Found that M.A.H. Made a Strategic Decision to Enter Her Plea—M.A.H. Was Not Coerced

¶37 Based upon the testimony at the postdisposition motion hearing, the trial court found that M.A.H. had stipulated to grounds, pled no-contest, and then obtained an adjournment:

> longer than normally would be anticipated so that [M.A.H.] can have the opportunity to demonstrate through that extended time and through the increased visitation that the safety problems that prevent [M.A.H.] from adequately parenting [her] children have been resolved and this [c]ourt should not order termination of parental rights[.]

The trial court went on to find that the plea agreement involved "a plea negotiation offering [the parents] the opportunity to show to [the trial court's] side of the room that there's a better alternative to termination of parental rights." The trial court further found that the agreement was "a sincere attempt to get, even at that last stage, a sense of whether there's a legitimate reason not to pull the plug on this relationship."

¶38 The trial court made the additional factual finding that the only reason M.A.H. was now asserting that "I never should have done this, it's an unconscionable plea" was because she did not prevail at the dispositional hearing

and her parental rights were terminated. The trial court held that this was a matter of "buyer's remorse"; M.A.H. pled no-contest and in exchange, got additional time and increased visitation so she could strengthen her case at the dispositional hearing that her parental rights should not be terminated, and she was disappointed in the ultimate outcome. Such circumstances do not invalidate a plea. *See* ***State v. Hudson***, 2013 WI App 120, ¶25, 351 Wis. 2d 73, 839 N.W.2d 147.

¶39 Thus, the trial court found that M.A.H.'s decision to enter her plea was motivated by her hope that with additional time before the dispositional hearing was held, she could strengthen her relationship with the children and convince the trial court that it should not terminate her parental rights. That motivation is not improper. *See* ***Armstrong***, 55 Wis. 2d at 288. The factual findings of the trial court must be accepted by this court, unless shown to be clearly erroneous. *See* WIS. STAT. § 805.17(2). M.A.H. has not made that showing.

¶40 We agree with the trial court's conclusion that the plea agreement was not coercive. It was a sincere attempt to give M.A.H. an opportunity in the last stage of the TPR procedure to demonstrate that she had a substantial relationship with the children, and that it was in the children's best interest that the trial court not terminate her parental rights.[10]

[10] M.A.H. also argues that the plea agreement violated due process and is fundamentally unfair because the agreement violated WIS. STAT. § 48.424(4), which provides that the trial court must schedule the dispositional hearing within forty-five days following the determination of the grounds. First, M.A.H. does not develop her constitutional argument. We need not address undeveloped arguments. *See* ***Pettit***, 171 Wis. 2d at 646-47. Second, her argument ignores WIS. STAT. § 48.315(2), which permits continuances upon a showing of good cause. Here, given that the parties all agreed to adjourn the dispositional hearing and that the delay was the result of the parents' desire to improve the relationship and bond with the children, the continuance was supported by good cause.

(continued)

B. The Trial Court's Plea Colloquy Complied with *Bangert*[11] and WIS. STAT. § 48.422(7)

¶41 M.A.H. contends that her no-contest plea was not knowing, intelligent, and voluntary because neither the trial court nor trial counsel explained to her that the additional time the children would remain out of the home as a result of the adjournment of the dispositional hearing was a factor that the court "had to consider at disposition." She asserts that had she known that fact, she would have not entered a plea. Citing ***Waukesha County v. Steven H.***, 2000 WI 28, ¶42, 233 Wis. 2d 344, 607 N.W.2d 607, M.A.H. states that when a parent alleges a plea was not knowingly and intelligently made, the analysis of ***Bangert*** applies. She further states that under that analysis, the parent must make a *prima facie* showing that the trial court violated its mandatory duties and must allege that the parent did not know or understand the information that should have been provided. M.A.H. goes on to argue that she should be allowed to withdraw her plea because the trial court failed to inform her that the delay in the dispositional hearing that she had negotiated, could be used against her at the dispositional hearing.

M.A.H. also argues that the State breached the plea agreement because the therapeutic visitations did not comply with the terms of the plea agreement. However, at the plea hearing, the State summarized the terms of the plea agreement relating to the additional visits as follows: "in the meantime [the parties] are looking to add therapeutic visitations once per week for [both children]." M.A.H. did not object to the State's summary of the plea agreement. Moreover, she does not contend that therapeutic visitations were not added to the visitation schedule. Rather, she argues that the visitations did not meet her expectations. Even if the additional visitation was a term of the plea agreement, a fact that is not established by the record, M.A.H. has not established a breach of that agreement.

[11] ***State v. Bangert***, 131 Wis. 2d 246, 260-61, 389 N.W.2d 12 (1986).

¶42 As will be further explained, our analysis under the ***Bangert*** framework establishes that the plea was voluntarily, knowingly, and intelligently entered and the trial court's colloquy complied with the provisions in WIS. STAT. § 48.422(7). To be constitutionally sound, a plea must be entered voluntarily, knowingly, and intelligently. ***Kenosha Cty. DHS v. Jodie W.***, 2006 WI 93, ¶24, 293 Wis. 2d 530, 716 N.W.2d 845. In termination of parental rights proceedings, Wisconsin law further requires the trial court to undertake a personal colloquy with the parent in accordance with § 48.422(7).

¶43 In any challenge to a no-contest plea in a TPR proceeding, the party must make a *prima facie* showing that the trial court violated its mandatory duties of informing the party of his or her rights, and the party must allege that the party, in fact, did not know or understand the rights that he or she was waiving. ***Steven H.***, 233 Wis. 2d 344, ¶42. If the party successfully makes a *prima facie* showing, the burden shifts to the State to establish by clear and convincing evidence that the parent "knowingly, voluntarily and intelligently waived the right to contest the allegations in the petition." *See* ***id.***

¶44 Whether M.A.H.'s no-contest plea was made voluntarily and with an understanding of the nature of the acts alleged in the petition and the potential dispositions is, therefore, a question of constitutional fact. *See* ***State v. Bangert***, 131 Wis. 2d 246, 283, 389 N.W.2d 12 (1986). "We will uphold the [trial] court's findings of evidentiary or historical facts unless the findings are 'contrary to the great weight and clear preponderance of the evidence.'" ***Jodie W.***, 293 Wis. 2d 530, ¶28 (citation omitted). Whether the party has presented a *prima facie* case by pointing to deficiencies in the plea colloquy and sufficiently alleging she did not know or understand information that should have been provided in the colloquy, is a question of law we review independently. *See* ***id.***, ¶7.

¶45 M.A.H. has not met her burden of establishing a *prima facie* showing that the trial court violated any of its mandatory duties when accepting her plea. M.A.H. fails to cite any authority in support of her argument that during the plea hearing the trial court is required to provide information about the factors that the trial court considers at the dispositional phase of the case. She merely argues that, although WIS. STAT. § 48.422(7) does not specifically require such information, this court should require it.

¶46 In support of her argument, M.A.H. cites ***Oneida County Department of Social Services v. Therese S.***, 2008 WI App 159, ¶22, 314 Wis. 2d 493, 762 N.W.2d 122. In ***Therese S.***, we interpreted the requirement of WIS. STAT. § 48.422(7)(a) that the court must engage the parent in a personal colloquy to "determine that the admission is made voluntarily with understanding of … the potential dispositions." *See* ***Therese S.***, 314 Wis. 2d 493, ¶5. We held that trial courts must inform the parent that at the second step of the process, the court will hear evidence related to the disposition and then will either terminate the parent's rights or dismiss the petition if the evidence does not warrant termination. *See* ***id.***, ¶16. We also held that in order for the trial court's explanation of potential dispositions to be meaningful to the parent, the parent must be informed of the statutory standard the court will apply at the second stage—the trial court must inform the parent that "[t]he best interests of the child shall be the prevailing factor considered by the court in determining the disposition." *See* ***id.*** (citation omitted). However, we declined to adopt the expansive approach suggested by ***Therese S.*** that would have required trial courts to inform parents in detail of all potential outcomes, including all alternatives to termination, because it would be "unduly burdensome." *See* ***id.***, ¶17.

¶47 ***Therese S.*** is a three-judge published opinion in which we interpreted the requirement of WIS. STAT. § 48.422(7)(a) to "determine that the admission is made voluntarily with understanding of … the potential dispositions[.]" *See* ***Therese S.***, 314 Wis. 2d 493, ¶5. Now, M.A.H. asks us to expand this court's holding to require a trial court to advise a parent that when the dispositional hearing is adjourned and the child remains out of the parents' home during the time of the adjournment, that additional time is a factor that the court has to consider at disposition. However,

> if the court of appeals is to be a unitary court, it must speak with a unified voice. If the constitution and statutes were interpreted to allow it to overrule, modify or withdraw language from its prior published decisions, its unified voice would become fractured, threatening the principles of predictability, certainty and finality relied upon by litigants, counsel and the [trial] courts.

Cook v. Cook, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). Thus, for that reason alone, we may not modify the ***Therese S.*** holding.

¶48 Additionally, we note that the time that a child has been out of the home is only one of a list of six nonexhaustive factors that the trial court is to consider at disposition. *See* WIS. STAT. § 48.426. M.A.H. provides no reason for treating that factor differently from the other factors. She also does not develop the argument why this court should add an arguably burdensome requirement to plea proceedings that is not found in the statute or the controlling case law—***Therese S.***

¶49 Based on our independent consideration, we conclude that analysis under the ***Bangert*** framework establishes that M.A.H.'s plea was voluntarily, knowingly, and intelligently entered. We also conclude that the plea colloquy fully complied with WIS. STAT. § 48.422(7) and ***Therese S.***

II. M.A.H. Has Not Established Exceptional Circumstances

¶50 M.A.H. also asserts that this court should grant her a new trial in the interest of justice because the controversy was not fully and fairly tried. *See* WIS. STAT. § 752.35. That statute affords this court discretion to "reverse the judgment or order appealed from" and "direct the entry of the proper judgment or remit the case to the trial court ... as [is] necessary to accomplish the ends of justice." *See* sec. 752.35. "The power to grant a new trial when it appears the real controversy has not been fully tried 'is formidable, and should be exercised sparingly and with great caution.'" ***State v. Sugden***, 2010 WI App 166, ¶37, 330 Wis. 2d 628, 795 N.W.2d 456 (citation omitted). We only exercise our power to grant a discretionary reversal in exceptional cases. ***Id.***

¶51 As grounds for such relief, M.A.H. states that allowing the children to move to Michigan created a fundamentally unfair situation and kept this case from being fully and fairly tried and that, because she did not know the negative consequences at disposition stemming from her no-contest plea, she was coerced into accepting the plea and did not receive the full benefit of her agreement. M.A.H. does not develop her argument regarding the move to Michigan, and we decline to address it further. For the reasons previously stated, we also are not persuaded by her arguments regarding the no-contest plea. Therefore, M.A.H. has not provided any basis for a new trial in the interest of justice.

CONCLUSION

¶52 We conclude that the no-contest plea agreement did not violate due process or public policy, and that M.A.H.'s no-contest pleas were knowing, intelligent, and voluntary. Furthermore, M.A.H. has not established a basis for a new trial in the interest of justice. Accordingly, we affirm the trial court's orders.

By the Court.—Orders affirmed.

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