**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**February 24, 2010**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal Nos. 2009AP1764**
**2009AP1765**
**2009AP1766**
**2009AP1767**

**Cir. Ct. Nos. 2008TP1**
**2008TP2**
**2008TP3**
**2008TP4**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT II**

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**No. 2009AP1764**
**IN RE THE TERMINATION OF PARENTAL RIGHTS TO AYANA J.S.,**
**A PERSON UNDER THE AGE OF 18:**

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

**PETITIONER-RESPONDENT,**

**V.**

**WILVINA S.,**

**RESPONDENT-APPELLANT.**

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**No. 2009AP1765**
**IN RE THE TERMINATION OF PARENTAL RIGHTS TO AVANYA L.S.,**
**A PERSON UNDER THE AGE OF 18:**

**WALWORTH COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,**
**PETITIONER-RESPONDENT,**
**V.**
**WILVINA S.,**
**RESPONDENT-APPELLANT.**

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**No. 2009AP1766**
**IN RE THE TERMINATION OF PARENTAL RIGHTS TO OLIVIA C.S.,**
**A PERSON UNDER THE AGE OF 18:**

**WALWORTH COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,**
**PETITIONER-RESPONDENT,**
**V.**
**WILVINA S.,**
**RESPONDENT-APPELLANT.**

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**No. 2009AP1767**
**IN RE THE TERMINATION OF PARENTAL RIGHTS TO VARNIQUE K.S.,**
**A PERSON UNDER THE AGE OF 18:**

**WALWORTH COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,**
**PETITIONER-RESPONDENT,**
**V.**
**WILVINA S.,**
**RESPONDENT-APPELLANT.**

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APPEAL from orders of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

¶1 NEUBAUER, P.J.[1] Wilvina S. appeals from trial court orders terminating her parental rights to Ayana, Avanya, Olivia, and Varnique, and denying her motion for post termination relief. Wilvina raises two challenges to the trial court's orders. First, Wilvina argues that her stipulations as to the second and third elements of unfitness were not knowing and voluntary and that her waiver of a jury trial as to these elements and a remaining contested element was not knowing, voluntary and intelligent. Second, Wilvina contends that the trial court erred in denying her request for a new dispositional hearing on grounds that new evidence existed as to the children's placement. Based on our review of the record, we conclude that Wilvina's stipulations and waiver of a jury trial were personal, knowing and voluntary, and that the new evidence does not bear upon the advisability of the court's disposition. We affirm the trial court's orders terminating Wilvina's parental rights and denying her motion for post termination relief.

## BACKGROUND

¶2 On January 10, 2008, the Walworth County Department of Health and Human Services filed petitions for the termination of Wilvina's rights to her four children based on a continuing need for protection or services under WIS. STAT. § 48.415(2). The four elements necessary to terminate parental rights on this ground are as follows: (1) the child must have been adjudged to be a child in need of protection or services and placed outside the home for a cumulative period

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

of six months or longer pursuant to court orders containing a termination of parental rights (TPR) notice, (2) the county agency responsible for care of the child has made a reasonable effort to provide the services ordered by the court, (3) the parent failed to meet the conditions established by the order for the safe return of the child to the parent's home, and (4) there is a substantial likelihood that the parent will not meet the conditions for the safe return of the child within the nine-month period following the conclusion of the TPR fact-finding hearing. *See* § 48.415(2); WIS JI—CHILDREN 324. All four children had been removed from Wilvina's home in July 2005 and were adjudicated in need of protection or services by September 2005.

¶3 The trial court held a hearing on the petitions on February 8, 2008. The matter was adjourned so that Wilvina could obtain counsel. That same day, the County filed a motion for summary judgment as to all elements of WIS. STAT. § 48.415(2)(a). A continued hearing was held on February 22, 2008, at which Wilvina denied grounds for termination and invoked her right to a twelve-person jury trial. She subsequently filed an affidavit in opposition to summary judgment on March 6, 2008, stating that the Department had not made reasonable efforts to provide the services ordered by the court, she had met numerous conditions of return, and the County had failed to demonstrate that she had not fulfilled the conditions of return. On March 6, 2008, the trial court granted summary judgment as to § 48.415(2)(a)1., that there had been out-of-home placement and TPR warnings were given. On March 20, 2008, an order was entered to that effect.

¶4 On July 18, 2008, the court held a permanency plan hearing. The parties informed the court that they had reached a stipulation on several issues and

presented a written stipulation to the court, which it approved. As part of the stipulation, which bears Wilvina's signature, she and the County agreed that (1) the Department made a reasonable effort to provide the court-ordered services and the elements of WIS. STAT. § 48.415(2)(a)2.b. were satisfied and (2) Wilvina failed to meet the conditions established for the safe return of the children and that element of § 48.415(2)(a) was satisfied. Wilvina stated that she "freely voluntarily, knowingly and upon the advice of counsel" waived her right to a jury trial on those issues. Finally, the parties stipulated that "the only remaining issue for trial is whether or not there is a substantial likelihood that Wilvina [] will not meet the conditions for return … in the next 9 months." The stipulation stated that Wilvina "freely, voluntarily, knowingly and upon the advice of counsel waives her right to a jury trial on that issue" as well, and the parties requested that the "remaining issue … be set for a fact finding hearing in a trial to the Court … at a date to be set approximately 90 days from July 21, 2008." In the intervening ninety days Wilvina agreed to:

> Obtain an AODA assessment and follow all recommendations for treatment, consistent with condition 9 of the October 2006 court orders ….
>
> Engage in individual therapy/counseling consistent with conditions 7 and 8 of the October 2006 court orders … and keep all therapy appointments;
>
> Visit regularly with the children, consistent with condition 2 of the October 2006 court order … including a minimum of 2 weekly phone calls to the children and weekend visits.

On its part, the County agreed to assist Wilvina in paying for the AODA assessment, in obtaining affordable counseling through the Department and with transportation to and from visits.

¶5 The transcript of the July 18, 2008 hearing indicates that the court reviewed the stipulation and discussed it in detail with counsel, including Walworth County's counsel, Dianne Soffa, Wilvina's counsel, Monika Schmieden, and guardian ad litem, Carol Under-Keizer. The court then addressed Wilvina.

> The Court: All right. Ms. Soffa, I have just now been handed a fax copy of a stipulation. What does the stipulation do?
>
> [Walworth County]: Your Honor, this stipulation essentially takes care of two of the three remaining issues for fact—for the fact finding trial. First it provides a stipulation that the department has made reasonable efforts to provide the services ordered by the Court in these files. A stipulation that [Wilvina] has not met the conditions for return and sets over for a court trial the issue of whether or not she'll meet the conditions for return within the next nine months. So there is a jury trial waiver as a component of the stipulation and request that the Court set the matter over for ninety days for a court trial. It is my understanding that the guardian ad litem will ask the Court to make a good cause finding to set the matter over pursuant to the terms of the stipulation. I would ask that the Court approve the stipulation and then as part of this I will be making a request that you set over—I'm sorry, that you cancel the trial for Monday and Tuesday.
>
> The Court: Now this is across the board with respect to all four children then and with respect to the mother Wilvina S.?
>
> [Walworth County]: Yes.
>
> The Court: And she is withdrawing her request for jury trial on the issues then?
>
> [Walworth County]: Yes.
>
> The Court: Now does that leave the disposition up—or is there an issue for the Court to decide or at least what is the issue for the Court to decide?

[Walworth County]: There's a remaining issue the Court must engage in fact finding as to whether or not [Wilvina] will meet the conditions for return in the next nine months.

….

The Court: Earlier we did have a summary judgment motion and I answered that yes.

[Walworth County]: Correct.

The Court: Question number two, did the department of human services—health and human services make a reasonable effort. Is that resolved by the stipulation?

[Walworth County]: Yes.

The Court: That's answered yes by the—in effect by the—either the stip or by the summary judgment.

[Walworth County]: By the stip.

The Court: Then the third question, has Wilvina S. failed to meet the conditions for return. What's going to happen to question three?

….

The Court: Question three.

[Walworth County]: Yes, that she has failed to meet the conditions for the safe return and it is answered in the affirmative in the stipulation leaving question four only.

The Court: So the stip will answer that question yes.

[Walworth County]: It will. It does.

The Court: Okay. Now final question number four then is, is there a likelihood that Wilvina S. will not meet these conditions within the next nine months and that then will be the question for a fact finding hearing before the Court alone; is that correct, Ms. Soffa?

[Walworth County]: Yes.

The Court: All right. And then of course what remains after that is if there is a finding as to question four, yes, then there will be—we must then have a disposition.

[Walworth County]: If you answer that yes, then we would proceed to disposition.

The Court: Then the disposition will deal with the issues that the children should be terminated [sic] if she should continue with their placement; those will be determined at a dispositional hearing to be set down the road.

[Walworth County]: Yes.

The Court: That's your understanding then?

[Walworth County]: It is.

The Court: And that's across the board with four children then and all with respect to [Wilvina S.].

[Walworth County]: Yes.

The Court: All right. Let's see if the guardian ad litem agrees.

[Guardian ad litem]: I do agree, Your Honor. And I believe that the stipulation is in the children's best interest. I believe that the mother has reviewed this information and I would ask that the Court ask her directly that she has waived her right to a jury trial on those particular issues and that she is voluntarily doing that so that we can have a complete record on that. And the request from the corporation counsel that this matter be set down for ninety days I believe is also in the children's best interests and would ask the Court find good cause for that. The mother appears as to have made some progress and I believe that we should afford her that opportunity and that it is in the children's best interest to exhaust all possible outcomes before termination.

The Court: All right. We'll then turn to Ms. Schmieden. Does this stipulation then along with the summary judgment disposition of the three issues that Ms. Soffa and I discussed from the special verdict.

[Wilvina's counsel]: It does, Your Honor, everything that was stated in court is accurate. It does dispose of those

three issues and the remaining issue for fact finding hearing is whether or not [Wilvina] will be able to meet the conditions of return in the next nine months.

The Court: I then turn to [Wilvina]. [Wilvina], have you understood what the attorneys and I have been discussing?

….

[Wilvina]: Yes, I understand everything that's going on now.

The Court: [D]id you have a chance this morning or yesterday to talk to [your attorney] about the effect of this agreement?

[Wilvina]: Yes, Your Honor.

The Court: And do you understand that you—I have been told that you're going to voluntarily give up or waive your right to have a jury trial?

[Wilvina]: Yes, Your Honor.

The Court: And do you understand we would deal with the issue of did human services make a reasonable effort to provide services to your children, have you failed to meet the conditions of return, and have the children been out of your home for more than nine months.

[Walworth County]: Six.

The Court: Or six months.

[Walworth County]: And would she meet the conditions for return in the next nine months.

The Court: And then what remains for trial is whether you will turn around and meet the conditions of return within the next nine months, but that remains to be tried. But do you understand we are not going to have a trial on the three things that were set for Monday morning and that was have the children been out of the home, have they attempted to restore those children to your home, and have you failed to meet the conditions.

> [Walworth County]: And the last one would be tried Monday, too, whether she would meet the conditions in the next nine months.
>
> ….
>
> The Court: [S]he has preserved her right to have a trial on issue four, that is to say, will you within the next nine months meet those conditions and that will be a trial before the Court later on. Do you understand that's what we're doing?
>
> [Wilvina]: Yes, Your Honor.
>
> The Court: Now, you have given up your right to a jury trial although you have asked for one. Do you understand that?
>
> [Wilvina]: Yes.
>
> The Court: Have you talked to [your attorney] about that and are you satisfied with her representation of you?
>
> [Wilvina]: Yes, Your Honor.
>
> The Court: Do you have any questions of [your attorney]?
>
> [Wilvina]: No, Your Honor.
>
> The Court: [Addressing Wilvina's counsel] Ms. Schmieden, do you believe your client has freely and voluntarily waived her right to a jury trial on those issues that we just discussed?
>
> [Wilvina's counsel]: I do, Your Honor. We have discussed it in-depth on the phone and we had a meeting in my office and we went over the stipulation and including the issue of the waiver of the right to a jury trial. And while it is rather reluctantly agreed to[,] I believe that she is knowingly and voluntarily and freely and willingly waiving that right and … she fully understands that.

¶6 On August 18, 2008, the court entered an order finding that Wilvina's waiver of her right to a jury trial was done freely, voluntarily and knowingly, and that the only remaining issue for trial on October 28, 2008, was

whether or not there was a substantial likelihood that Wilvina would not meet the conditions of return of the children in the next nine months. A second stipulation, dated October 27, 2008, and bearing Wilvina's signature, iterated that "the only remaining issue for trial is whether or not there is a substantial likelihood that Wilvina S. will not meet the conditions for return of the children in the next 9 months" and set forth the parties' agreement to postpone the court trial an additional ninety days.

¶7 The court held a fact-finding hearing on March 2, 2009, as to the fourth element. Wilvina testified, as did Walworth County social workers, Jennifer O'Reilly and Paula Hocking, and service providers, Elizabeth Duessler and Carlo Nevicosi. At the close of the hearing, the court found that Wilvina would not meet the conditions of return within the nine months following disposition and that the County had carried its burden of establishing that Wilvina is an unfit parent.

¶8 The trial court terminated Wilvina's rights following a dispositional hearing on March 27, 2009. In doing so, the court adopted the dispositional report and found that the best interests of the children would be served through their adoption by Wilvina's cousin, Thomasina. The court stated:

> There is an adoptive resource waiting, Thomasina, and obviously with these … four sisters are bonded together … they want to be together … and we found an adoptive resource where they can be together. Therefore, adoption is … possible here. Wilvina[']s] rights are terminated, legal custody and guardianship of the four girls then will be transferred to the State of Wisconsin and there will be a prospective adoptive placement with Thomasina.

Shortly thereafter, in May 2009, the children were removed from Thomasina's home.

¶9 On September 1, 2009, Wilvina filed a post termination motion requesting that the court vacate the TPR orders and grant a new fact-finding hearing or, in the alternative, a new dispositional hearing, on the grounds that (1) the court failed to ascertain that Wilvina's stipulations were knowingly, intelligently and voluntarily entered and (2) pursuant to WIS. STAT. § 48.46, new evidence existed entitling Wilvina to relief from the TPR orders, namely the children's removal from Thomasina's home. After a hearing on November 2, 2009, the trial court denied Wilvina's motion based on its finding that the colloquy was sufficient and that the newly discovered evidence "affects the placement [of the children] but not the disposition." Wilvina appeals.

## DISCUSSION

¶10 Wisconsin has a two-part statutory procedure for the involuntary termination of parental rights. ***Steven V. v. Kelly H.***, 2004 WI 47, ¶24, 271 Wis. 2d 1, 678 N.W.2d 856. In the first, or "grounds" phase of the proceeding, the petitioner must prove by clear and convincing evidence that one or more of the twelve statutorily enumerated grounds for termination of parental rights exist. ***Id.***, ¶¶24-25 (citing WIS. STAT. § 48.31(1)). In the second, or dispositional phase, the court is called upon to decide whether it is in the best interest of the child that the parent's rights be permanently extinguished. ***Steven V.***, 271 Wis. 2d 1, ¶27 (citing WIS. STAT. § 48.426(2)).

*1. Stipulation as to Certain Elements and Withdrawal of Jury Demand*

¶11 Under WIS. STAT. §§ 48.422(4) and 48.31(2), a parent in a TPR proceeding may demand a jury trial, and Wilvina did so in this case. However, summary judgment was granted on the first element under WIS. STAT. § 48.415(2), and Wilvina stipulated that the County had met its burden as to two of the three remaining elements, thereby waiving her right to a jury determination. As to the final element, Wilvina also waived her right to a jury trial, instead agreeing to have the determination made by the trial court. Wilvina contends on appeal that the trial court "never ensured that [her] admissions or withdrawal of her jury-trial demand passed statutory or constitutional muster." Whether a trial court erred in failing to personally engage a parent in a colloquy to determine whether a withdrawal of the demand for a jury trial on an element was knowing and voluntary is a question of law which we review de novo. *See* ***Walworth County DHHS v. Andrea L.O.***, 2008 WI 46, ¶18, 309 Wis. 2d 161, 749 N.W.2d 168.

¶12 The supreme court in ***Andrea L.O.*** addressed the trial court's duties when a parent's stipulation to an element under WIS. STAT. ch. 48 results in the withdrawal of his or her jury demand. In ***Andrea L.O.***, the County had filed a petition to terminate Andrea's right to her child on grounds of continuing need of protection or services. ***Andrea L.O.***, 309 Wis. 2d 161, ¶5. On the morning of trial, Andrea's attorney stipulated to the first element, which required the County to prove that the child had been adjudged in need of protection or services and had been placed outside the home for a cumulative period of six months or longer, pursuant to an order containing a TPR notice as required by law. ***Id.***, ¶8. Andrea was also asked personally whether she understood the issue and whether she was

willing to stipulate; she responded affirmatively. ***Id.***, ¶9. Despite the stipulation in ***Andrea L.O.***, the verdict form submitted to the jury nevertheless had a space for the jury to indicate its finding on the first element. ***Id.***, ¶16 & n.4. The jury answered the verdict question "yes," and the court later terminated Andrea's parental rights. ***Id.***, ¶16.

¶13 Because the jury had answered the verdict question, the ***Andrea L.O.*** court determined that the stipulation in that case did not constitute a withdrawal of Andrea's jury demand on that element. However, the court went on to address the issue of whether a valid stipulation as to an element of proof and the withdrawal of a jury demand requires the court to conduct a personal colloquy "in order to provide guidance to courts and litigants." ***Andrea L.O.*** provides such guidance here.

¶14 The ***Andrea L.O.*** court began by observing that the right to a jury trial in a TPR case is statutory, not constitutional, and there is no procedure under WIS. STAT. ch. 48 for withdrawing a jury demand. ***Andrea L.O.***, 309 Wis. 2d 161, ¶29 (citing ***Steven V.***, 271 Wis. 2d 1, ¶4). The court noted that in ***S.B. v. Racine County***, 138 Wis. 2d 409, 406 N.W.2d 408 (1987), "we determined that because the statute required the individual to be involved with the decision to demand a jury trial, it also required that the individual be involved with the decision to withdraw the demand." ***Andrea L.O.***, 309 Wis. 2d 161, ¶33. The court distinguished the two cases relied upon by Andrea—***S.B.*** (a WIS. STAT. ch. 51 involuntary commitment case) and ***N.E. v. DHSS***, 122 Wis. 2d 198, 361 N.W.2d 693 (1985) (a juvenile delinquency case)—in support of her contention that the trial court must engage the parent in a personal colloquy to determine that a

stipulation and the withdrawal of a jury demand on an element is knowing and voluntary. ***Andrea L.O.***, 309 Wis. 2d 161, ¶¶30, 34. The court noted that in each of those cases, the party's attorney withdrew a prior demand for a jury trial while the defendant was not present, whereas in ***Andrea L.O.***, the stipulation took place in Andrea's presence and her attorney asked her in open court whether she understood the issue and whether she was willing to stipulate to the element. ***Id.***, ¶34. On this issue, the case at bar is akin to ***Andrea L.O.*** Wilvina was present when her attorney stipulated to the elements at issue, both in signing the written stipulations and again in open court when she was questioned by the trial court.

¶15 The ***Andrea L.O.*** court also distinguished ***S.B.*** and ***N.E.*** on grounds that those cases involved a complete withdrawal of the demand for a jury trial, rather than a withdrawal on a single element. ***Andrea L.O.***, 309 Wis. 2d 161, ¶35. While here Wilvina withdrew her request for a jury on all remaining elements, we are satisfied that the concerns in ***S.B.*** are nevertheless alleviated by the procedure in this case. In ***S.B.***, the court held that "because S.B. did not participate in the attorney's withdrawal of the jury demand and objected to the withdrawal, the trial to the bench violated her statutory right to a jury trial." ***S.B.***, 138 Wis. 2d at 415. The court held:

> [I]f a valid demand for a jury trial has been made, the attorney may withdraw the demand if the attorney files in court the individual's written consent to the withdrawal or if the individual consents to the withdrawal personally in open court. The writing must state that the individual has made the decision to withdraw the demand knowingly and voluntarily after receiving the advice of counsel. If the individual consents to withdrawing the demand personally in open court, the court must address the individual personally, on the record, to insure that the withdrawal of the jury demand is knowing and voluntary.

***Id.*** at 415-16. Here, Wilvina never objected to the withdrawal of the jury demand until after the disposition. To the contrary, consistent with ***S.B.***, Wilvina's attorney filed Wilvina's written consent to the waiver of a jury trial as part and parcel of the first stipulation which bears Wilvina's signature. In addition to her agreement that the second and third elements were "satisfied," the stipulation states three separate times with respect to each element, including the remaining contested element: "Wilvina [] freely, voluntarily, knowingly and upon the advice of counsel hereby waives her right to a jury trial on that issue." Indeed in a second stipulation filed approximately ninety days later, she again stipulated to a court trial on "the only remaining issue" of whether she would meet the conditions of return.

¶16 In addition to her two written consents, the trial court addressed Wilvina personally, in open court and on the record, as to her stipulation on the second and third elements and the waiver of a jury trial on the second, third and fourth elements. After counsel discussed the stipulation and waiver with the court, the court asked Wilvina if she understood that she was preserving her right to a trial on the fourth element, but waiving her right to a jury trial on all of the remaining elements. Wilvina answered that she understood. The court then asked: "Now, you have given up your right to a jury trial although you have asked for one. Do you understand that?" Wilvina replied, "Yes." The trial court then asked Wilvina whether she had the opportunity to discuss the waiver with her attorney and whether she had any questions for her attorney. After ascertaining that she had discussed the matter with her attorney and had no questions regarding it, the court then confirmed with Wilvina's attorney that Wilvina's waiver was freely and voluntarily made. Her attorney confirmed that it was, and that she had

discussed the stipulation and waiver "in-depth" with Wilvina both on the phone and in person. Based on our review of the record, we are satisfied that the trial court fulfilled its duties of ascertaining that Wilvina's stipulation and withdrawal of her jury demand was personal, knowing and voluntary.

¶17 Finally, we recognize that the parties also argue this issue within the framework of a plea colloquy under ***State v. Bangert***, 131 Wis. 2d 246, 274-75, 389 N.W.2d 12 (1986), interpreting WIS. STAT. § 971.08(1), the criminal code's analogue to WIS. STAT. § 48.422(7)(a). *See*, *e.g.*, ***Waukesha County v. Steven H.***, 2000 WI 28, ¶¶42-51, 233 Wis. 2d 344, 607 N.W.2d 607.[2] Section 48.422(7)(a) requires the court, before accepting an admission of the alleged facts in a TPR petition, to address the parties present and determine that the admission is made voluntarily and with an understanding of the nature of the acts alleged in the petition and potential dispositions. The court must also establish whether any promises or threats were made to the parties to elicit an admission and "[m]ake such inquiries as satisfactorily establish that there is a factual basis for the admission."[3] Sec. 48.422(7)(b) and (c).

[2] Recognizing that this is not a no contest plea, Wilvina nevertheless argues that the stipulation to certain elements only is "akin to an admission of the petition." We assume without deciding that Wilvina's stipulation to two elements requires a colloquy pursuant to WIS. STAT § 48.422(7). *But see* ***Walworth County DHHS v. Andrea L.O.***, 2008 WI 46, 309 Wis. 2d 161, 749 N.W.2d 168 (no discussion of § 48.422(7) colloquy requirements involving stipulation to a "paper element").

[3] While Wilvina's brief on appeal mentions the trial court's duty to ascertain a factual basis for the admission, she did not raise any issue as to WIS. STAT. § 48.422(7)(c) before the trial court nor does she develop any argument as to this issue on appeal. *See* ***Reiman Assocs. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (an issue raised but not briefed or argued is deemed abandoned).

¶18 When a parent alleges a plea was not knowingly and intelligently made, the ***Bangert*** analysis applies. ***Oneida County DSS v. Therese S.***, 2008 WI App 159, ¶6, 314 Wis. 2d 493, 762 N.W.2d 122. Under that analysis, the parent must make a prima facie showing that the trial court violated its mandatory duties and must allege the parent did not know or understand the information that should have been provided at the hearing. ***Id.*** If a prima facie showing is made, the matter proceeds to the second stage of ***Bangert*** with the burden then shifting to the County to demonstrate by clear and convincing evidence that the parent knowingly and intelligently waived the right to contest the allegations in the petition. ***Therese S.***, 314 Wis. 2d 493, ¶¶6, 19. We will examine the record de novo to determine whether her admissions were voluntary and knowing; however, we will uphold the trial court's findings of fact unless clearly erroneous. *See* ***Kenosha County DHS v. Jodie W.***, 2006 WI 93, ¶28, 293 Wis. 2d 530, 716 N.W.2d 845; *see also* ***Bangert***, 131 Wis. 2d at 283-84.

¶19 Here, the County assumes for purposes of appeal that Wilvina made a prima facie showing and, based on the fact that she was afforded a fact-finding hearing, we make the same assumption.[4] Turning to the post termination motion hearing, Wilvina informed the court that she was "relying on the record in its entirety to state that the colloquy was inadequate." The County then relied on both stipulations signed by Wilvina and on the transcript of the July 18, 2008 hearing at which the court reviewed the initial stipulation with counsel in detail

[4] Indeed, an order issued by this court on August 20, 2009, granted Wilvina's motion for "remand to the circuit court for the purpose of raising claims that require fact-finding." ***DHSS v. Wilvina S.***, unpublished order (Nos. 2009AP1764, 2009AP1765, 2009AP1766, 2009AP1767) (WI App Aug. 20, 2009).

and personally addressed Wilvina. Based on Wilvina's own statements in the initial stipulation by which she stipulated and agreed that the second and third elements were satisfied and her repeated statement that she was "freely, voluntarily, knowingly, and upon the advice of counsel" waiving her right to a jury trial on those elements, the County argued that "[i]t was understood by [Wilvina], she signed the document, she was advised by counsel." Evident in the transcript of the July 18 hearing is the court's repeated discussion of the elements, the procedure and the potential disposition in Wilvina's presence. When questioned personally and repeatedly by the court, Wilvina acknowledged her understanding clearly, repeatedly, and without equivocation. Further, Wilvina then entered into a second stipulation in which she personally acknowledged that there was only one remaining issue for trial and that that issue would be tried to the court.

¶20 Although Wilvina was present at the post termination fact-finding hearing, she presented no testimony to refute her own prior repeated acknowledgement that the stipulations were entered into "freely, voluntarily, knowingly, and upon the advice of counsel." The County met its burden of proof to establish by clear and convincing evidence that she essentially failed to provide any basis to establish that the stipulations were not knowing or voluntary such as evidence of duress, promises, confusion, or ineffective assistance of counsel (given that her counsel represented that she had reviewed the stipulation and waiver with Wilvina at length). Further, there is no suggestion that there was no factual basis for the stipulations to these elements. We therefore conclude that insofar as Wilvina's stipulations to certain elements falls within the purview of

WIS. STAT. § 48.422(7), the stipulation was voluntarily and knowingly entered and the trial court properly denied Wilvina's motion for a new hearing on this ground.

*2. New Evidence*

¶21 Wilvina next contends that the trial court erred in denying her post termination motion for relief from the TPR judgment on grounds of new evidence. Wilvina argues that the post termination developments involving the adoptive placement of her children constitute new evidence affecting the advisability of the court's original adjudication. Specifically, Wilvina argues that the children's removal from her cousin Thomasina's home "affects every aspect of the evidence presented and determinations made at the dispositional hearing."

¶22 Pursuant to WIS. STAT. § 48.46(1), the parent of a child whose status is adjudicated by the court "may at any time within one year after the entering of the court's order petition the court for a rehearing on the ground that new evidence has been discovered affecting the advisability of the court's original adjudication. Upon a showing that such evidence does exist, the court shall order a new hearing." Therefore, a petitioner under § 48.46(1) must meet two requirements: "(1) There must be shown the existence of newly discovered evidence, and (2) the evidence must be of such a character as to affect the advisability of the original adjudication." ***Schroud v. Milwaukee County Dep't of Pub. Welfare***, 53 Wis. 2d 650, 654, 193 N.W.2d 671 (1972). The "granting of a new trial on the ground of newly discovered evidence rests in the sound discretion of the trial court." ***Id.*** Thus, our review is limited to determining whether the trial court properly

exercised its discretion and whether new evidence was provided that would affect the trial court's original disposition.[5]

¶23 In arriving at a disposition, "[t]he best interests of the child shall be the prevailing factor considered by the court." WIS. STAT. § 48.426(2). The factors to be considered at the dispositional hearing are set forth in § 48.426(3) and include:

> (a) The likelihood of the child's adoption after termination.
>
> (b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.
>
> (c) Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.
>
> (d) The wishes of the child.
>
> (e) The duration of the separation of the parent from the child.
>
> (f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements.

[5] At the post termination hearing, the trial court stated its belief that the new evidence had to exist at the time of the disposition orders, but remained unknown to the parties. Wilvina disagrees, arguing that the plain language of WIS. STAT. § 48.46 contemplates events occurring after adjudication. We need not resolve this dispute for purposes of this appeal. The trial court's decision clearly rests on its determination that the new evidence did not affect the advisability of its adjudication.

Here, Wilvina fails to demonstrate that the information regarding a change in adoptive resource affects the advisability of the trial court's adjudication.

¶24 Based on the evidence presented, the trial court found that grounds existed to terminate Wilvina's parental rights—"the children could not be safely returned to her home" and the Department did render services. At the dispositional hearing, both the children's Walworth County social worker and the children's guardian ad litem recommended the termination of Wilvina's parental rights. While Wilvina argues that the removal of the children from Thomasina's home is "new evidence" affecting the advisability of the court's adjudication, we disagree. Instead, we agree with the State's contention that this is simply a change of circumstances during the course of the adoption. It was understood by the court at the time of the disposition that the children's adoption by Thomasina was "prospective" and "possible." The court's statement at the dispositional hearing with respect to adoption was that "simple justice requires that [the children] be together and we found an adoptive resource where they can be together." In fact, the testimony at the post termination hearing by the special needs adoption social worker indicated that the children were still adoptable and had been placed together with another family member, Wilvina's sister, as an adoptive resource.[6]

¶25 We conclude that the trial court did not erroneously exercise its discretion when it denied Wilvina's WIS. STAT. § 48.46 motion for a rehearing

[6] The special needs adoption social worker testified that Thomasina would have adopted only three of the four children, whereas the new adoptive resource, Wilvina's sister, would be adopting all four children. When asked whether the new adoptive resource "could be deemed to be an even more appropriate placement," the social worker responded, "Yes."

based on new evidence. There simply is no indication that the change in adoptive resource affected the advisability of the trial court's adjudication terminating Wilvina's parental rights. The court clarified at the post termination hearing that its adjudication addressed the children's best interests and the termination of Wilvina's parental rights based on its finding that Wilvina is an unfit mother who would not meet the conditions of return within the next nine months. The court recognized that it had also made a placement determination for the children, namely an "[a]doptive resource." However, as the trial court stated in denying Wilvina's motion, "I have not heard any newly discovered evidence that affects the disposition. It affects the placement, but not the disposition."

## CONCLUSION

¶26 We conclude that Wilvina's stipulations and waiver of her jury demand were personal, knowing and voluntary. As to the children's removal from their prospective adoptive placement, Wilvina failed to establish that this constituted new evidence affecting the advisability of the trial court's determination. The facts underpinning the trial court's adjudication remained unchanged. We therefore affirm the trial court's orders terminating Wilvina's parental rights and denying her motion for post termination relief.

*By the Court.*—Orders affirmed.

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