NOS. 98-1280
98-1281

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

98-1280
IN RE THE TERMINATION OF PARENTAL RIGHTS OF WILLIE C., A PERSON UNDER THE AGE OF 18:

FILED

August 14, 1998

CLERK OF COURT Of APPEALS OF WISCONSIN

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

CYNTHIA M.,

RESPONDENT-APPELLANT.

98-1281
IN RE THE TERMINATION OF PARENTAL RIGHTS OF TOBY M., A PERSON UNDER THE AGE OF 18:

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

CYNTHIA M.,

RESPONDENT-APPELLANT.

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PLEASE TAKE NOTICE that the attached pages 1 through 24 are to be substituted for pages 1 through 24 in the above-captioned opinion which was released on August 13, 1998.

COURT OF APPEALS
DECISION
DATED AND FILED

August 13, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

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CYNTHIA M.,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: ROBERT R. PEKOWSKY, Judge. *Affirmed.*

VERGERONT, J.[1] Cynthia M. appeals the judgment terminating her parental rights to her children, Willie C. and Toby M.[2] She had previously entered no contest pleas to the petitions alleging grounds for termination of her parental rights to each child. On appeal she contends that the guardian ad litem (GAL) for the children was ineffective, and that she is entitled to a remand to the trial court to take testimony on this. She also contends that she is entitled to a reversal of the judgment because she did not knowingly and intelligently enter her pleas; the trial court lacked the competency to act because the two continuances of the dispositional hearing were inconsistent with her pleas; and the trial court erroneously exercised its discretion in ordering the disposition of termination of her parental rights.

We conclude that Cynthia may not bring a claim of ineffective assistance of counsel against the children's GAL, but, rather, may raise by motion in the trial court any concerns she has about the performance of the GAL. However, having failed to do so, she has waived the right to challenge the GAL's performance on appeal, and there are no compelling reasons to address this issue or to order a remand. We also conclude that her pleas were knowingly and intelligently entered, the trial court did not lose competency to act, and the court

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[1] This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS. This appeal has been expedited. RULE 809.107(6)(e), STATS.

[2] We have consolidated the appeals concerning each child.

properly exercised its discretion in terminating her parental rights to both children. We therefore affirm.

BACKGROUND

The petitions for termination of Cynthia's parental rights to Willie (d/o/b 5/5/89) and Toby (d/o/b 7/15/92) were filed on July 22, 1996.[3] They alleged the following. The children were adjudged to be in need of protection and services and placed outside Cynthia's home by order dated November 24, 1993, and by subsequent orders dated November 16, 1994 and November 22, 1995. The first orders contained conditions that Cynthia had to meet to have the children returned to her home, and the subsequent orders contained similar conditions. The conditions included: successfully participate in parenting classes (demonstrated by the way she managed and cared for her children); successfully engage in alcohol treatment; do not associate with persons using alcohol or drugs; maintain absolute sobriety for a minimum period of six months; maintain a residence for at least six months that meets the approval of the GAL and social worker; participate in employment, education, or training; keep scheduled appointments; demonstrate an ability to mange finances by paying rent, utilities and food costs; and participate in a court-ordered psychological evaluation and any resulting recommendations.

According to the TPR petitions, Dane County Department of Social Services (DCDSS) made a diligent effort to provide the services ordered. However, the petitions alleged that Cynthia failed to make substantial progress toward meeting the conditions. The described failures included, among others:

[3] Toby does not have an adjudicated father and Willie's father is deceased.

delayed participation in parenting classes such that she could not show she had benefited from them; not being able to manage her children's behavior during visits; not being able to maintain a safe residence for her children because of the dangerous and intoxicated persons and the drug activity at her residence; and a demonstrated inability to maintain employment or engage in an educational or training program. The petitions also alleged that there was a substantial likelihood she would not meet the conditions within twelve months following the fact-finding hearing on the petitions.

The court appointed a GAL for the children. Cynthia was represented by an attorney. She entered a denial to the petitions and requested a jury trial. Trial was scheduled for October 28, 1996, and a pretrial was held on October 16, 1996. At the pretrial, the parties presented a written document entitled "Stipulation, No Contest Plea and Waiver" to the trial court, signed by Cynthia and acknowledged in writing by her attorney. The document stated that there were grounds for termination under § 48.415(2), STATS.,[4] and that Cynthia

[4] Section 48.415(2), STATS., provides as follows:

> Grounds for involuntary termination of parental rights.
>
> (2) CONTINUING NEED OF PROTECTION OR SERVICES. Continuing need of protection or services, which shall be established by proving all of the following:
>
> (a) That the child has been adjudged to be in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under s. 48.345, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363 or 938.365 containing the notice required by s. 48.356 (2) or 938.356 (2).
>
> (b) 1. In this paragraph, "diligent effort" means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child, the level of cooperation of the parent and other relevant circumstances of the case.

would enter a no contest plea to the petitions, with the dispositional hearing to be held in eight months. After hearing from the county's attorney, Cynthia's attorney, Cynthia and the GAL, the court accepted the pleas and entered a written order. The order included, among other provisions, a finding that there was good cause to postpone the dispositional hearing beyond the statutory time limits to assess the adoptability of the children and to develop potential adoptive placements and that this was in the children's best interests. Although not included in the written order, an additional reason for the eight-month delay was explained to the court by the county's attorney, Cynthia's attorney and the GAL. They stated that Cynthia felt she was motivated to make significant changes in her life and wanted the chance to persuade the court after eight months that it should not order termination because of the progress she had made.

On June 23, 1997, the county's attorney, the GAL, and Cynthia's attorney appeared before the court and joined in a request to have the court find good cause for extending the dispositional hearing an additional six months. The attorneys explained that Cynthia had met some of the conditions regarding participation in various programs and it was in the children's best interests to allow an additional six months to see if Cynthia would be able to successfully

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> 2. That the agency responsible for the care of the child and the family has made a diligent effort to provide the services ordered by the court.
>
> (c) That the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders; and that the parent has failed to demonstrate substantial progress toward meeting the conditions established for the return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 12-month period following the fact-finding hearing under s. 48.424.

parent her children. The court found good cause to extend the time limits for the dispositional hearing and set it for December 11, 1997.

In late October 1997, the GAL asked for permission to withdraw because she had accepted employment outside the practice of law, and the court appointed Thomas Coaty as GAL on November 5, 1997.

On December 10, 1998, just prior to the dispositional hearing on December 11, 1997,[5] Ronee Bergman, the social worker who had been working with Cynthia since 1995, submitted a report recommending that Cynthia's parental rights to both children be terminated. The report stated that in the prior five months the reunification team had worked with Cynthia and the children to develop a plan to allow unsupervised visits with the children (Cynthia had had supervised visits in the past) and provide intensive services so that the children could be reunited with Cynthia. However, although Cynthia was cooperative, the team found her unable to learn the basic skills needed to provide a safe environment so that she could have unsupervised visits. The team was unable to help Cynthia develop a more substantial relationship with either child. They had to reduce visits with Toby because the visits were having a traumatic effect on him, and he has stated he did not want to see her. While Willie enjoyed the visits because Cynthia was able to play with him, he was not able to develop a parent-child relationship with her either.

The report stated that Willie and Toby had been in foster care since the ages of four years and eighteen months respectively and had no substantial relationship with their mother that would be detrimental to sever. They had

[5] The disposition hearing began on December 11, 1997, and the court continued it for good cause on its own motion until January 7, 1998.

benefited from the stability and nurturing atmosphere of their foster homes and each could stay in his foster home until an adoptive home was found. The likelihood of the children being adopted was good. The report concluded that Cynthia had not yet met the conditions for return of the children, and, given her inability to benefit from the intensive services provided, there was no reason to believe she would be able to do so in the future.

Bergman's testimony elaborated on aspects of her report. She testified that Cynthia had made progress in terms of AODA treatment and maintaining sobriety and that is why Bergman had recommended that the reunification team work with Cynthia to help her develop a relationship with her children. Based on conversations with Willie's therapist, she testified that the increased visits with Cynthia had caused some distress for Willie and an increase in some of his problem behaviors. In her view, Willie would be able to form a bond with an adoptive family. She also testified about the inability of Cynthia to appropriately parent her two older children, who were in foster care.

Leslie Wilmot, who was a social worker with the reunification team that was assigned to work with Cynthia, testified that the goal when she began working with Cynthia in July 1997 was to return the children to Cynthia's home. She described Willie's and Toby's history and special needs, the progress they were making in their current foster homes, and her visits with Cynthia when the children were at Cynthia's home. She explained that during a five-month time period, she would typically expect that the parent would be able to have unsupervised visitation and the number of those visits would be expanded. That had not happened with Cynthia because she was not able to demonstrate that she could provide a safe environment for the children or manage their behavior. As for Toby in particular, he was distressed by the visits. Wilmot opined that Cynthia

had not made substantial progress in providing Willie and Toby with a safe and nurturing environment, was not capable of doing that, and that termination of Cynthia's parental rights was in the children's best interests. She explained the basis for these opinions. Her recommendation was that Willie, but not Toby, be allowed some contact with Cynthia after the TPR, although she understood the court could not order that.

In Cynthia's testimony, she described the things she did for and with her children when they visited her, her attention to her medical problems, her compliance with her medications, and her efforts to make her home safe for the children. She testified that she had a close mother/son relationship with Willie but she did not know about her bond with Toby. She had not observed any of the problem behaviors in Willie that the social workers said his foster parents and therapist had been addressing, and she did not understand where they came from. She had been sober for over a year and she felt that she was now being responsible. She believed she could be a proper parent to Willie; and believed she could and would benefit from parenting classes and therapy with her children. She did not feel that the reunification team helped her to understand Willie's needs or what the team expected from her.

After the county's attorney and Cynthia's attorney presented closing arguments to the court, the GAL requested that the court terminate Cynthia's parental rights as to both children. In his view, the case for terminating Cynthia's parental rights to Toby was very clear because he had no bond with her. Although the question was more difficult as to Willie, he had concluded that it was in Willie's best interests as well. The GAL explained that during the time Cynthia was using drugs and alcohol and then struggling to recover, Willie grew without

his mother and bonded with other people, and they could now provide Willie with what he needs.

The trial court concluded that termination of Cynthia's parental rights was in the best interests of both children. The court credited Cynthia with recovering from her addictions, describing it as "a major recovery." However, the court found that, according to the closing comments of her own attorney, Cynthia was still in the process of becoming the person she was capable of being, and according to her own testimony, she could learn from parenting classes. The court stated that it would take time before Cynthia was able to parent the children in the way they needed and deserved. It was not in the best interests of the children to wait longer for that to occur because they needed stability and consistency now, while they were growing and developing. The court concluded that it was in Willie's best interests to have an opportunity to continue to know Cynthia. While recognizing the court could not guarantee that would happen, the court was optimistic that it would be incorporated into an adoption. The court entered a written order with detailed findings of fact supporting its decision.

INEFFECTIVNESS OF GAL

Along with her notice of appeal, Cynthia filed a motion for remand asking that we stay the appeal and remand to the circuit court for a hearing on the ineffectiveness of the second GAL, Thomas Coaty. We denied the motion but stated that Cynthia could raise the issue in her appeal. We explained that, as both parties acknowledged, there was no established procedure for resolving such a claim, and a remand for factual findings by the trial court in the absence of an established procedure was premature.

On appeal, Cynthia argues that Coaty was ineffective because he did not meet with either child, discuss parent/child issues with them, or determine their wishes regarding the TPR. The first GAL had never discussed issues relating to the TPR with the children either. These allegations, Cynthia contends, entitle her to a remand to the trial court for an evidentiary hearing on the GAL's performance, as provided in ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908-09 (Ct. App. 1979). She contends that the supreme court's decisions in ***M.D.S. v. State***, 168 Wis.2d 995, 485 N.W.2d 52 (1992), supports her argument. In ***M.D.S.***, the court held that the statutory right of a parent to have counsel in a proceeding for termination of parental rights (TPR) included a right to have effective counsel, and the parent could assert a claim for ineffective trial counsel under the ***Machner*** procedures. ***M.D.S.***, 168 Wis.2d at 1004, 1007, 485 N.W.2d at 55, 56.

We conclude that the procedure in ***Machner*** does not apply when a parent claims that the GAL for her children has been deficient in the performance of his or her duties.

A defendant in a criminal case has a right under the Sixth Amendment to be represented by counsel, and that right encompasses the right to be represented by effective counsel. ***Strickland v. Washington***, 466 U.S. 668, 685-86 (1984). In order to establish a claim of ineffective assistance of counsel, a defendant in a criminal case must show that counsel's performance was deficient and that the deficient performance prejudiced the defendant. ***Strickland*** at 687.

In ***Machner***, we held that when a defendant in a criminal trial claims on appeal that his or her trial counsel was ineffective, in order to preserve that issue for appeal, defendant's postconviction counsel must require trial counsel's

presence at an evidentiary hearing before the trial court. 92 Wis.2d at 804, 285 N.W.2d 908-09. This is necessary, we explained, to permit trial counsel to testify on his or her handling of the case, so that we have a record from which we can determine whether counsel's performance was deficient. ***Id***.

In ***M.D.S.***, the supreme court considered the claim of the parents in a TPR proceeding that their trial counsel was ineffective. The court observed that § 48.23(2)(a), STATS., requires that a parent over eighteen in a contested adoption or involuntary TPR proceeding "shall be represented by counsel," and other provisions provide for the appointment of free counsel when the parent is indigent. ***M.D.S.***, 168 Wis.2d at 1002, 485 N.W.2d at 54. The court considered it self-evident that the right to be represented by counsel was worthless unless it included the right to be represented by effective counsel, and it adopted the ***Strickland*** test for determining when counsel was ineffective. ***M.D.S.***, 168 Wis.2d at 1003, 1005, 485 N.W.2d at 54, 55. It also adopted the procedure we outlined in ***Machner*** for developing a record in the trial court on a claim of ineffective assistance of counsel. ***Id.*** at 1006, 485 N.W.2d at 56.

M.D.S. addressed a parent's statutory right in a TPR proceeding to have effective counsel to represent him or her. It did not address in any way the question of a parent's right to have an effective GAL for the parent's children in that proceeding, or the children's right to have an effective GAL. However, Cynthia points to the statement in ***M.D.S.*** that "where the legislature provides the right to be 'represented by counsel' or represented by 'appointed counsel,' the legislature intended that right to include the *effective* assistance of counsel." ***Id.*** at 1004, 485 N.W.2d at 55. Section 48.235(1)(c), STATS., requires that the court "shall appoint a GAL for any child who is the subject of a proceeding to terminate parental rights." Cynthia argues that, based on this statutory requirement, ***M.D.S.***

supports, if not compels, the relief she seeks. We reject this argument because it overlooks fundamental differences between the role of a GAL representing the best interests of children and the role of an attorney representing an individual.

The supreme court recently discussed the distinctive role of a GAL representing the best interests of a child in ***Paige K.B. v. Molepske***, ___ Wis.2d ___, 580 N.W.2d 289 (1998). The issue presented in that case was whether a GAL appointed by the court under § 767.045, STATS.,[6] to represent the best interests of a child in a custody dispute was entitled to quasi-judicial immunity from liability for negligence in performing his or her statutory duties, and the court decided that it was. ***Paige*** at ___, 580 N.W.2d at 291. In reaching this conclusion, the court first defined the role of the GAL and distinguished this from the role of an attorney representing an individual. The role of the GAL as provided in ch. 767, STATS., is to advocate the best interests of the child. The court stated that this meant the GAL did not represent the child per se and was not bound by the wishes of the child. ***Paige*** at ___, 580 N.W.2d at 293. The statutory function of the GAL, the court next observed, "is intimately related to that of the circuit court," which, like the GAL, is to determine and protect the best interests of the child. ***Id.*** at ___, 580 N.W.2d at 294. The court described the GAL as "essentially

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[6] Section 767.045, STATS., provides in part:

> GAL for minor children.
>
> (1) APPOINTMENT. (a) The court shall appoint a GAL for a minor child in any action affecting the family if any of the following conditions exists:
>
> 1. The court has reason for special concern as to the welfare of a minor child.
>
> 2. The legal custody or physical placement of the child is contested.

function[ing] as an agent or arm of the court." The court decided that immunity was necessary to protect GALs from the "harassment and intimidation that could be brought to bear on GALs by those parents and children who may take issue with any or all of the GAL's actions or recommendations." ***Id.*** at ___, 580 N.W.2d at 296.

The court in ***Paige*** rejected the argument that because a GAL is expected to be an effective and diligent advocate like any other licensed attorney, he or she should be responsible for damages for any negligence. The court also rejected the argument that, without civil liability, there was no mechanism to prevent or remedy the deficient performance or misconduct of a GAL. After mentioning the RULES OF PROFESSIONAL CONDUCT and the fact that the court may reject or modify the GAL's recommendations, the court stated:

> Finally, and most importantly, the appointing court oversees the conduct of the GAL, and may on its own, or at the request of a parent, remove and replace the GAL. *See* Wis. Stat. § 767.045(5). In overseeing the conduct of a GAL, the circuit court plays a vital role, for in a custody dispute, the circuit court must be the vanguard for the best interests of the child. Accordingly, the circuit court must not idly wait for or blindly rely on a GAL's recommendation. Rather, the court, at each stage of the proceeding, should inquire into the method of analysis utilized by the GAL, the time and effort expended by the GAL, and the reasons supporting the GAL's actions and recommendations. In addition, the court may request that the GAL provide additional information necessary for the court to render its decision, or the court may instruct the GAL to take additional measures necessary to protect the best interests of the child. If the circuit court, for any reason, finds a GAL's performance inadequate to protect the best interests of the child, the court should either remove and replace that GAL or take other appropriate action.

Id.

The reasoning of the ***Paige*** court supports the conclusion that a parent may not challenge the performance of a GAL appointed to represent the best interests of his or her child in a TPR proceeding through a claim of ineffective assistance of counsel using the ***Machner*** procedure. We are persuaded that the proper procedure for a parent to use when the parent has a complaint about the performance of the GAL is to raise this by motion in the trial court during the proceedings.

Although the statutory basis for the appointment of the GAL in this case is found in ch. 48, STATS., not ch. 767, STATS., the statutes and case law governing the GAL in this case and in ***Paige*** are similar. The GAL is appointed by the court, § 48.235(1), STATS., and is to advocate for the best interests of the child. *See* § 48.235(3)(a). The GAL "shall consider, but shall not be bound by, the wishes of [the child] or the positions of others as to the best interests of [the child]." Section 48.235(3)(a). In a TPR proceeding, as in a custody dispute, the GAL and the court are both statutorily charged with determining and protecting the best interests of the child. *See* §§ 48.235(3)(a) and 48.426(2), STATS. In both types of cases, the GAL has the duty to assist the court in rendering a decision that is in the best interests of the child.

Because the trial court oversees the performance of a GAL's obligations, *see* ***D.S.L. v. T.L.S.***, 159 Wis.2d 747, 753, 465 N.W.2d 242, 245 (Ct. App. 1990), the court has the authority to remedy any deficiency in the GAL's performance whenever it is brought to the court's attention, thus ensuring that the child's best interests are effectively represented during the trial court proceeding. As noted in ***Paige***, the court may order that the GAL take additional steps, or, when necessary, replace a GAL, and the court may conduct whatever proceedings are necessary to resolve issues raised concerning the performance of the GAL.

These measures adequately protect both the child's statutory right to have their best interests represented and a parent's interest in having their child's best interests represented.

We also observe that a postconviction evidentiary hearing of the type prescribed in ***Machner*** is unnecessary when a parent wishes to challenge the performance of the GAL appointed to represent the child's best interests in a TPR. The parent is not challenging his or her trial counsel, as the criminal defendant is when asserting a claim for ineffective assistance of counsel. There is, therefore, no need to wait until the appointment of postconviction counsel to raise the inadequate performance of trial counsel. There is no conflict presented, and no reason that the parent, through his or her attorney, cannot bring the claimed deficiencies to the attention of the trial court during the proceedings in that court.

Cynthia did not raise before the trial court her claim that the GAL was deficient. The State argues that she has therefore waived the right to raise this on appeal. Cynthia responds that her appellate counsel discovered that the GAL had not spoken to the children, and she did not know this until after the dispositional order was entered. Under these circumstances, she contends, she should be permitted to bring her motion before the trial court, and we should order a remand for that purpose, and a stay of her appeal. We conclude that Cynthia has waived the right to raise the issue of the GAL's performance on appeal, and we see no compelling reasons to grant a stay of the appeal and a remand to the trial court on this issue.

Cynthia was represented by counsel at all relevant times before the trial court. On the first day of the dispositional hearing on December 11, 1997, Coaty told the court that he was new to the case and had not yet had the

opportunity to speak to the children. Cynthia, present with counsel, did not object to the proceeding on that day. The hearing was not completed on that day but was continued to January 7, 1998, and completed on January 8, 1998. During this time period there was ample opportunity for Cynthia, through counsel, to convey her desire that Coaty speak to the children, or to inquire if he had done so, and, if he had not done so, to bring this to the court's attention. Moreover, when Coaty made his recommendation to the court at the close of the testimony on January 8, he summarized the information he had considered:

> Your Honor, I make this request after speaking to Rebecca Greenlee, who's the previous guardian ad litem; reviewing court records; the psychologicals, I believe they are identified as Exhibits 1 through 5; listening to the testimony of Leslie Wilmot, Ronee Bergman, and of the biological mother.

It is evident from these remarks that Coaty himself did not speak to the children. If Cynthia believed that he was remiss not to have done so, she could have and should have brought it to the trial court's attention at that time. Under these circumstances, we conclude that Cynthia has waived the right to raise the adequacy of the GAL's performance on her appeal, including the right to a remand on this issue. *See* ***Evjen v. Evjen***, 171 Wis.2d 677, 688, 492 N.W.2d 361, 365 (Ct. App. 1992) (generally appellate courts do not decide issues not properly raised in the trial court, and this is especially true when factual issues are involved).

Because waiver is a doctrine of judicial administration, we have the authority to address an issue on appeal even if a litigant has waived the right to raise it by failing to present it to the trial court. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 444, 287 N.W.2d 140, 145 (1980). However, we generally do so only in exceptional circumstances, such as where necessary in the interests of justice. *See*

Maclin v. State, 92 Wis.2d 323, 328-29, 284 N.W.2d 661, 664 (1979). We are convinced that the interests of justice do not require a remand to the trial court.

We see nothing in the record of the dispositional hearing that indicates that Coaty was not acting competently and conscientiously. He examined witnesses, bringing out additional information, and, in particular, he probed the nature of the bond between the children and their mother. He was respectful and sensitive in questioning Cynthia. In making his recommendation to the court, he described the information he reviewed and explained in detail the factors he considered in reaching his recommendation.

There is no statutory requirement that a GAL in a TPR proceeding meet with the child or speak to the child about how the child feels about the parent or about termination of parental rights. Cynthia relies on § 48.235(3)(b)1, STATS., which provides that a GAL appointed for a child "who is the subject of a proceeding under s. 48.13 [CHIPS] shall … [u]nless granted leave by the court not to do so, personally, or through a trained designee, meet with the child, assess the appropriateness and safety of the child's environment and, if the child is old enough to communicate, interview the child and determine the child's goals and concerns regarding his or her placement." This statute does not require that the GAL himself or herself speak with the child; "a trained designee" may do so instead. More importantly, this statute plainly applies only in a CHIPS proceeding; there is no similar obligation placed on a GAL in a TPR proceeding.

In this case the social workers presented ample testimony on the nature of the children's relationship with Cynthia and their feelings toward her—observations of Willie and Toby with Cynthia, conversations with the children, and, in Toby's case, conversations with his foster parents and therapist. The GAL

stated that he had also spoken to the previous GAL, who, according to the allegations in the motion for remand, last met with Willie in 1996 before the filing of the TPR; last met with Toby on April 25, 1997; and observed a visit between Cynthia, Toby and Willie on May 22, 1997. At none of these times, did the GAL speak to them about the TPR proceedings. Because the court had sufficient information before it to consider the children's feelings and wishes regarding their mother, there are no compelling reasons to remand to the trial court for it to consider whether Coaty failed to perform his duties by not meeting with the children and ascertaining their feelings and views, as Cynthia claims he should have done.

NO CONTEST PLEA

Cynthia contends the record does not show that her no contest pleas were knowingly and voluntarily entered, and that she is entitled to a remand to determine whether there were actually knowing and voluntary pleas. The reasons her pleas were not knowing and voluntary, she contends, are: she has only an eighth grade education; she was not advised that, unlike the fact-finding to determine whether there were grounds for termination, the rules of evidence do not apply at the dispositional hearing and the standard of proof is not clear and convincing evidence[7]; and there were confusing comments made by the county's attorney and Cynthia's attorney at the plea hearing concerning the purpose of the stipulation. The State responds that the record demonstrates that Cynthia's pleas were knowing and voluntary.

[7] *See* §§ 48.31(1)(a), 48.299(4)(a) and (b), and 48.427, STATS.

Neither party addresses the procedure or the legal standard for a parent's request to withdraw a no contest plea to a TPR petition. We will put aside the question whether Cynthia had to first bring a motion in the trial court, which she did not do, and accept her premise that if the record shows an apparent lack of a knowing and voluntary plea, she is entitled to a remand on this issue. We conclude the record does not show this.

The "Stipulation, No Contest Plea, and Waiver" included the following statements. Cynthia was forty years of age and had completed the eighth grade. She was not using drugs or alcohol to the extent it would interfere with her understanding of the proceedings. In pleading no contest to the allegations of the petition, she understood she was giving up certain rights, which were specified, and which included the right to contest the allegations of the petitions, the right to a jury trial, and the right to have the allegations of the petitions proved by clear, satisfactory and convincing evidence. She understood that in entering that plea, she was "allowing the Court to proceed to a dispositional hearing at which time the Court, upon hearing the evidence, may terminate my parental rights"; and that it was agreed that at the dispositional hearing she "retain[ed] the right to make any argument, including the argument that I have met conditions for return at that point in time." No one had made any threats or promises to her other than the stipulation that the dispositional hearing would not take place for eight months. She understood that "it would not be grounds for appeal that I have changed my mind about the plea, unless the Court has committed a serious error in these proceedings." Finally she stated: "I feel that I am aware of all of my rights. I make this decision to plead no contest to the petition of my own free will after discussing this with my attorney."

At the plea hearing, the county's attorney explained the agreement and the county's reasons for entering into it. The county's attorney specifically stated that, at the dispositional hearing to be held in eight months, Cynthia could "attempt to show the court, although it won't be a jury, that she should not have her rights terminated because of drastic changes in her lifestyle." Cynthia's attorney explained Cynthia's reasons for entering into the plea. Her attorney stated that she and Cynthia had had time to talk and she believed Cynthia "understands all aspects of this agreement." The court then addressed Cynthia personally, asking first if she had any questions; she said no. She answered "yes, I did" to the following questions of the court: "Did you go over this very carefully?"; "Did you have lots of time to discuss it with [your attorney]?"; "[Y]ou've signed the form?"; Do you "know where you stand by entering into this stipulation, no contest plea and waiver?". The court then engaged Cynthia in a dialogue in which she stated her understanding of what the stipulation meant. The GAL then explained her reasons for entering into the agreement.

We do not agree with Cynthia that the comments of the attorneys were confusing or in any way inconsistent with each other or the document Cynthia signed. The county's attorney did state that if adoption placements could be found, it would "be [her] argument most likely, unless Cynthia just changes her lifestyle around" that parental rights be terminated at the dispositional hearing in eight months. She expressed skepticism about Cynthia's ability to "turn it around" in eight months, but was willing to give her the opportunity. There is nothing in the record to indicate that Cynthia felt that any commitment had been made to her, other than that stated in the document she signed. Her own comments were articulate and focused, and do not demonstrate any difficulty in understanding the proceedings or their significance. At the dispositional hearing, one of the primary

issues was whether Cynthia had met the conditions regarding parenting, consistent with the document she signed. Indeed, when Cynthia's attorney asked her to describe how she was different than in October of 1996, the attorney prefaced the question with, "And now Cynthia, you know, we agreed to grounds and since we agreed to grounds in October of `96 you've had this period to try to meet conditions."

In effect, Cynthia is asking us to decide that, as a matter of law, her plea was not knowingly and intelligently entered because the record does not demonstrate that she was informed of the difference in burden of proof and evidentiary rules at the fact-finding hearing and the dispositional hearing. She has provided no authority for this position, and we are aware of none. There is nothing in the record to indicate that Cynthia entered her pleas because of a misunderstanding on the burden of proof or evidentiary rules governing the dispositional hearing. We conclude that the record demonstrates that Cynthia entered her plea knowingly and voluntarily.

CONTINUANCE OF THE DISPOSITIONAL HEARING

In the absence of a finding of good cause under § 48.315(2), STATS., disposition of a termination action must occur within forty-five days of fact-finding. *See §* 48.424(4), STATS. In general, time limits in ch. 48 actions are mandatory, and violations deprive the court of the competency to act, resulting in a dismissal without prejudice. *See* ***Jason B. v. State***, 176 Wis.2d 400, 406, 500 N.W.2d 384, 386 (Ct. App. 1993). Section 48.315(2) provides that "[a] continuance shall be granted by the court only upon a showing of good cause in open court … and only for so long as is necessary, taking into account the request

or consent of the district attorney or the parties and the interest of the public in the prompt disposition of the case." Section 48.315(2).

Cynthia contends that the trial court erred in finding good cause for the first eight-month extension of the dispositional hearing and for the second six-month extension because those extensions are inconsistent with the plea Cynthia entered. According to Cynthia, the stated purpose of these extensions—to give Cynthia additional time to meet the conditions for return of the children—is inconsistent with Cynthia's stipulation to a factual basis for the plea and, specifically, to a factual basis for termination grounds under § 48.415(2), STATS. The petition alleged that Cynthia had not met the grounds for return of the children and that it was substantially unlikely that she would meet those conditions within twelve months.

We are not persuaded by Cynthia's argument. It is not inconsistent to agree that there is a factual basis to prove by clear and convincing evidence that Cynthia was substantially unlikely to meet the conditions for return of the children within twelve months and also to agree that it is in the children's best interests and in Cynthia's interests to allow her some additional time to try to make the changes in her life that would provide evidence to disprove that allegation, and, thus, evidence against termination at a disposition. All interested parties agreed this was desirable, and explained their reasoning to the court. The court's acceptance of those reasons as constituting good cause within the meaning of § 48.315(2), STATS., for both the first and second continuance, was proper.

DISPOSITION

Cynthia contends that the trial court erroneously exercised its discretion in ordering termination of parental rights as a disposition. We disagree.

The disposition at a TPR proceeding is within the trial court's discretion. *See* ***B.L.J. v. Polk County Dep't of Soc. Serv.***, 163 Wis.2d 90, 104, 470 N.W.2d 914, 920 (1991). In reviewing a trial court's discretionary determination, we look to see whether the trial court considered the relevant facts of record, applied the proper legal standard, and reached a reasonable decision using a rational mental process. ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981). The trial court did that here. It considered the evidence presented and the statutory factors.[8] It gave consideration to the efforts Cynthia had made and to her accomplishments, and expressly did not place weight on certain specific incidents recounted by the social workers that Cynthia disputed. The trial court's conclusion that Cynthia was not ready to parent the children on her own and that it was not clear when she would be able to was amply supported by the testimony. Indeed, Cynthia's attorney was not contending that Cynthia had

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[8] Section 48.426(3), STATS., provides in part:

> (3) FACTORS. In considering the best interests of the child under this section the court shall consider but not be limited to the following:
>
> (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.

met the parenting conditions or could do so within any specific period of time; rather she asked the court to allow Cynthia more time to try to reach that goal. Based on the evidence of the history and needs of the children, the services already provided Cynthia, and her progress to date, it was reasonable for the court to conclude that termination of parental rights was in the children's best interests.

By the Court.—Judgment affirmed.

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