IN THE SUPREME COURT OF THE STATE OF DELAWARE

HEATHER SCOTT,	§	
	§	No. 378, 2011
Respondent Below-Appellant,	§	
	§	Court Below: Family Court of the State of Delaware in and for New Castle County
v.	§	
	§	
ELIZABETH FRANK,	§	File No. CN08-03938
	§	CPI No. 10-39035
Petitioner Below-Appellee.	§	

Submitted: November 23, 2011
Decided: February 6, 2012

Before **BERGER**, **JACOBS**, and **RIDGELY**, Justices.

O R D E R

This 6th day of February 2012, it appears to the Court that:

(1) Respondent-Below/Appellant Heather Scott[1] ("Mother") appeals from a decision of the Family Court granting permanent guardianship of fourteen-year-old child Chance Hayes ("Chance") to Chance's maternal great aunt, Petitioner-Below/Appellee Elizabeth Frank ("Aunt"). Mother raises three arguments on appeal. First, Mother contends that the Family Court erred as a matter of law in determining that Aunt met her burden of proof as to Unintentional Abandonment. Second, Mother contends that the Family Court violated Mother's procedural due

[1] The Court *sua sponte* assigned pseudonyms to the parties by Order dated July 28, 2011. Supr. Ct. R. 7(d).

process rights by taking judicial notice of a prior order based on hearing where Mother lacked counsel. Third, Mother contends that the Family Court erred when it found that Aunt met the clear and convincing standard for a Petition for Permanent Guardianship. We find no merit to Mother's appeal and affirm.

(2) On August 18, 2009, Aunt filed a Petition for Guardianship in Family Court. On November 13, 2009, the Family Court held a pre-trial hearing on that petition at which Mother appeared *pro se*. The Family Court did not find Mother to be indigent at that time and advised her that she could retain counsel at her own expense. At a January 10, 2010 hearing on the petition, Mother again appeared *pro se* and testified on her own behalf. By Order dated February 2, 2010, the Family Court granted Aunt interim guardianship of Chance, and granted Mother visitation on alternating Sundays. The Order was based on the January 2010 hearing and the Family Court's private interview with Chance.

(3) Aunt then filed a Petition for Permanent Guardianship of Chance, citing Unintentional Abandonment as a statutory ground. The Family Court found Mother to be indigent at that time and appointed her counsel. During its May 12, 2011 hearing on the petition, the Family Court heard testimony from witnesses, including the Mother and the Aunt, and accepted exhibits. The Family Court also ruled that it would take judicial notice of any findings and conclusions in its

February 2010 Order, which was based on the hearing at which Mother appeared *pro se*.

(4) The Family Court issued an order granting the Aunt's Petition for Permanent Guardianship. It overruled Mother's objection to judicial notice of the February 2010 Order, explaining that Mother was determined not to be indigent at the time and had the opportunity to retain counsel for the hearing. This appeal followed.

(5) When reviewing a Family Court order, our standard and scope of review involves a review of the facts and law, as well as the inferences and deductions that the Family Court has made.[2] To the extent that the issues on appeal implicate rulings of law, we conduct a *de novo* review.[3] To the extent that the issues on appeal implicate rulings of fact, we conduct a limited review of the factual findings of the Family Court to assure that they are sufficiently supported by the record and are not clearly wrong.[4] We will not disturb inferences and deductions that are supported by the record and that are the product of an orderly and logical deductive process."[5] If the Family Court has correctly applied the law, our review is limited to abuse of discretion.[6]

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[2] *Powell v. Dep't of Servs. for Children, Youth, & Their Families*, 963 A.2d 724, 730 (Del. 2008); *Solis v. Tea*, 468 A.2d 1276, 1279 (Del. 1983).
[3] *Powell*, 963 A.2d at 730–31; *In re Heller*, 669 A.2d 25, 29 (Del. 1995).
[4] *Powell*, 963 A.2d at 731; *In re Stevens*, 652 A.2d 18, 23 (Del. 1995).
[5] *Id.*
[6] *Powell*, 963 A.2d at 731.

(6) In her first and third claims on appeal, Mother argues that the Family Court erred as a matter of law by finding that Aunt showed Unintentional Abandonment by clear and convincing evidence. Title 13, section 2353(a) of the Delaware Code provides that "the Court shall grant a permanent guardianship if it finds by clear and convincing evidence that: (1) One of the statutory grounds for termination of parental rights as set forth in § 1103(a) of this title has been met; . . ." Those statutory grounds include Intentional/Unintentional Abandonment and Failure to Plan,[7] both of which were alleged here. Each element must be shown by clear and convincing evidence.[8] If the Family Court finds that section 1103(a) has been satisfied, it then must determine the nature and extent of any contact in accordance with the best interests of the child standard.[9]

(7) Here, the Family Court found that an alternative statutory factor, Failure to Plan, was met as to Mother by clear and convincing evidence. The Family Court also found that granting the Petition for Permanent Guardianship was in Chance's best interests. Thus, the Family Court found alternative grounds under section 2353 for granting the Petition. Because Mother failed to brief this issue on

[7] 13 *Del. C.* § 1103(a)(2), (5).
[8] *Shepherd v. Clemens*, 752 A.2d 533, 537 (Del. 2000).
[9] 13 *Del. C.* § 2353(b).

appeal, it is deemed waived.[10] We need not address the merits of her first and third claims because they will have no effect on the outcome of the case.

(8) Mother also contends that her due process rights were violated when the Family Court took judicial notice of its prior order, which in turn relied on evidence from a hearing at which Mother appeared *pro se*. The parties do not dispute that parentage is a fundamental right. We have held that a party is entitled to due process in a termination of parental rights proceeding, because the proceeding involves the termination of a parent's protected interest in maintaining a relationship with his or her child.[11] We have also recognized due process rights in dependency and neglect proceedings, as such proceedings are often followed by termination proceedings.[12]

(9) Here, Mother challenges a Petition for Permanent Guardianship. Unlike a Petition for Termination, this petition does not threaten to completely sever the parent-child relationship. "Permanent guardianship is intended to create a relationship between a child and caretaker which is permanent and self-sustaining, and which creates a permanent family for the child without complete

[10] *See* Supr. Ct. R. 14(b)(vi)(3) ("The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal."); *Roca v. E.I. du Pont de Nemours and Co.*, 842 A.2d 1238, 1242 (Del. 2004).
[11] *See Orville v. Division of Family Services*, 759 A.2d 595, 597–98 (Del. 2000).
[12] *See Watson v. Division of Public Services*, 813 A.2d at 1106.

severance of the biological bond."[13] The cases cited by Mother to support her due process claim all involve termination proceedings.[14] The interest at stake in this case appears less compelling because a complete severance of the parent-child bond is not at stake. Our decision in *Walker* also suggests that the due process analysis would differ as between a permanent guardianship proceeding and a termination hearing.[15]

(10) But even if we find the interests at stake in this case as strong, Mother has failed to show a violation of due process. When assessing a due process claim, the Court applies the factors established by the U.S. Supreme Court in *Mathews v. Eldrige*:

> (1) the private interest that will be affected by the official action; (2) the risk that there will be an erroneous deprivation of the interest through the procedures used and the probable value of any additional or substitute procedural safeguards; and (3) the government interest involved, including the added and fiscal and administrative burdens that additional or substitute procedures would require.[16]

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[13] 13 *Del. C.* § 2350.

[14] *See, e.g., Walker v. Walker*, 892 A.2d 1053, 1055 (Del. 2006) (recognizing application of due process in parent termination hearings and holding that "trial court must advise parents of their right to seek court-appointed counsel and must determine whether to appoint counsel, if requested, in *all* termination proceedings"); *Watson v. Division of Family Services*, 813 A.2d 1101 (Del. 2002)

[15] *See Walker*, 892 A.2d at 1056 (reversing termination of father's rights on due process grounds where father appeared *pro se* and separately noting question of whether permanent guardianship would have been more appropriate disposition).

[16] *Mathews v. Eldridge*, 424 U.S. 319, 321, 96 S.Ct. 893, 896, 47 L.Ed.2d 18 (1976).

This Court has held that procedural due process entails, *inter alia*, representation by counsel.[17] In *Watson v. Division of Public Services*, we held that the U.S. Constitution and the Delaware Constitution require the Family Court to determine, on a case-by-case basis, whether indigent parents have a right to be represented by counsel in certain Family Court proceedings.[18] In *Walker*, we held that "the trial court must advise parents of their right to seek court-appointed counsel and must determine whether to appoint counsel, *if requested*, in all termination proceedings."[19]

(11) There, the Family Court made an express finding at the November 2009 hearing that Mother was not indigent and advised her of her right to retain counsel. At the January 2010 hearing where she appeared *pro se*, Mother also testified that she had been financially secure for the past seventeen years and currently worked as a cocktail waitress. There is no basis to conclude that the Family Court erred when it permitted her appearance *pro se* at that time.[20] Moreover, Mother was represented by counsel at the May 2011 proceeding that gave rise to the challenged order. Counsel presumably reviewed the transcript

[17] *Orville*, 759 A.2d at 598 (citing *In re L.V.*, 240 Neb. 404, 482 N.W.2d 250, 257 (1992) (citing *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972))).
[18] *Watson*, 813 A.2d at 1103.
[19] *Walker*, 892 A.2d at 1055 (emphasis added).
[20] *See id.* at 1053 (explaining that, while Delaware courts routinely grant indigents' requests for counsel, "a parent has no absolute right to the appointment of counsel").

from the January 2010 proceeding, and had the opportunity to undermine the evidence presented during that proceeding at the May 2011 hearing.

(12) Finally, Mother has failed to show that the Family Court caused her prejudice by taking judicial notice of its own orders, or would have ruled in her favor had she been represented at the earlier proceeding. In its order granting permanent guardianship, the Family Court repeatedly relied on testimony from the later proceeding in which Mother was represented. The Family Court's decision to take judicial notice of a proceeding in which Mother lacked counsel did not deny her meaningful participation in the process so as to violate her due process rights.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Family Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice