IN THE SUPREME COURT OF THE STATE OF DELAWARE

KATIE ROGERS,¹ §

Ş

Respondent Below, § No. 410, 2013

Appellant,

8

v. § Court Below—Family Court

§ of the State of Delaware,

DIVISION OF FAMILY § in and for New Castle County

SERVICES, § File No. 12-10-05TN

§ Petition No. 12-33251

Petitioner Below, § Appellee. §

Submitted: December 24, 2013 Decided: February 6, 2014

Before BERGER, JACOBS, and RIDGELY, Justices.

ORDER

This 6th day of February 2014, upon consideration of the appellant's brief filed pursuant to Supreme Court Rule 26.1(c), her attorney's motion to withdraw, and the responses filed by the Division of Family Services ("DFS") and the Court Appointed Special Advocate ("CASA"), it appears to the Court that:

(1) The Family Court terminated the parental rights of respondentappellant, Katie Rogers ("Mother"), in her two minor children² by order

¹ The Court previously assigned a pseudonym to the appellant pursuant to Supreme Court Rule 7(d).

dated July 1, 2013. This is Mother's appeal from the termination of her parental rights.³

- (2) Mother's appointed counsel on appeal has filed an opening brief and a motion to withdraw pursuant to Supreme Court Rule 26.1(c). Counsel asserts that she reviewed respondent-appellant's argument, the record, and the Family Court's opinion, and has determined that no arguable claim for appeal exists. By letter, Mother's counsel informed her of the provisions of Rule 26.1(c) and provided her with a copy of the motion to withdraw and accompanying brief. Mother has raised several points for the Court's consideration on appeal. DFS and CASA have filed responses to counsel's Rule 26.1 brief, as well as to the points raised by Mother, and have moved to affirm the Family Court's judgment.
- (3) The record reflects that, on June 28, 2005, DFS received an urgent referral by a caller who alleged severe physical neglect of the children by Mother. The children initially entered the care and custody of DFS pursuant to Emergency *Ex Parte* Order dated June 29, 2005. Following a preliminary protective hearing, the Family Court issued an Order dated

² The children, a boy and a girl, were born on April 27, 2003 and June 18, 2004, respectively.

³ Father's parental rights were terminated in accordance 13 *Del. C.* § 1103(a)(1) on the grounds that Father voluntarily consented to the termination of his parental rights in the children.

July 7, 2005, which determined that it was in the best interest of the children to remain in the custody of DFS. The order stated that the evidence supported a finding that Mother actively abused opiates/pills, and that Father had not abided by a "no contact" Order with Mother and had been abusing marijuana—both of which rendered both parents unable to provide adequate care. The children remained in the custody of DFS until August 4, 2005, at which time the Family Court found that continuing the children's residence in Father's home was not contrary to their welfare and that it was in the children's best interest for custody to be returned to their parents' jointly with primary residence with Father.

(4) By 2007, Mother and Father were again living together with the children. Later that same year, the parties entered into a consent Protection from Abuse ("PFA") order that granted Mother primary residential placement of the children. In May 2010, the children re-entered the care and custody of DFS pursuant to a Dependency/Neglect Petition for Custody of the children and an Emergency *Ex Parte* Order. The petition was filed by DFS after a report was received that Mother had left the children home alone. Mother also apparently owed a debt to a local drug dealer who kicked in the front door of the residence where Mother and the children resided.

Both parents stipulated to the children's dependency due to Mother's drug problems and Father's lack of appropriate housing.

- (5) After a dispositional hearing was held on July 6, 2010, the Family Court found that the children remained dependent and DFS had made reasonable efforts to reunify the family. By a written order dated July 7, 2010, the Family Court approved DFS' case plan for reunification with Mother. The elements of Mother's case plan included obtaining appropriate living conditions, having adequate employment and the ability to financially support the children, completing a parent education course, addressing the children's educational needs, acquiring no new criminal charges, engaging in a substance abuse treatment program, completing a mental health evaluation, and following all recommendations for treatment.
- (6) Over the course of the next year and a half, the Family Court held several review hearings. As to Mother, the evidence reflected some progress toward her reunification goals but, at other times, reflected her relapse. As to Father, by January 2012, he had made substantial progress on his case plan, and the children were transitioned back into his home. At the February 2012 review hearing, the evidence reflected that Mother had relapsed with her drug issues, was struggling with mental health issues, and had been reincarcerated. By April 2012, the children were removed from Father's

home because he had left them home alone. His visitation was thereafter suspended after he threatened the children's foster parents.

- (7) On August 27, 2012, the Family Court held a permanency review hearing and approved a change of permanency goal to termination of parental rights and adoption. The Family Court found that Mother had not made satisfactory progress on her case plan based on her repeated and current incarceration, lack of cooperation in planning for reunification, and inconsistent conduct regarding her substance abuse and mental health treatment. Father ultimately consented to termination of his rights.
- (8) The termination of parental rights hearing was held on December 18, 2012, January 2, 2013, and May 24, 2013. The Family Court heard the testimony of multiple witnesses, including the children's therapist, the children's adoption worker, a DFS therapist, Mother's DFS caseworker, a DFS permanency worker, several counselors with the Department of Correction, the CASA, a Treatment Access Center case manager, and Mother. The Court also conducted a tape-recorded *in camera* interview of the children on December 28, 2012. The children told the trial judge that they wished to remain with their foster parents and did not desire to visit with Mother. The testimony of the State's witnesses established that Mother had failed to make significant progress towards completion of her case plan:

Mother's visitation with children was inconsistent, she failed to maintain her sobriety, and she incurred new criminal charges.

(9) At the conclusion of the TPR hearing, the Family Court found clear and convincing evidence that DFS made reasonable efforts to reunify Mother with the children, that Mother failed to plan for the children, and that termination of Mother's parental rights was in the children's best interest.⁴ Among other things, the Family Court found that the children had been in DFS' care for more than one year,⁵ that Mother was incapable of discharging her parental responsibilities due to repeated incarceration,⁶ and that Mother was unable to assume custody of the children and to support them financially.⁷

(10) In her written submission on appeal, Mother expresses her desire for reunification with her two children. Her issues generally challenge the accuracy and veracity of some of the State's evidence. She also contends that, contrary to the Family Court's finding, she did substantially comply with her case plan. Finally, she asserts that she presently is sober, mentally

⁴ DEL. CODE ANN. tit. 13, § 1103(a)(5) (2009).

⁵ *Id.* § 1103(a)(5)a1.

⁶ *Id.* § 1103(a)(5)a3.

⁷ *Id.* § 1103(a)(5)a4.

stable, employed, and able to care for her children. She argues that her children would have a desire to be reunified with her if they knew she was currently sober, mentally stable, and employed.

(11) On appellate review of a termination of parental rights, this Court is required to consider the facts and the law as well as the inferences and deductions made by the Family Court.⁸ We review legal rulings *de novo*.⁹ We conduct a limited review of the factual findings of the trial court to assure that they are sufficiently supported by the record and are not clearly wrong.¹⁰ If the trial judge has correctly applied the law, our review is limited to abuse of discretion.¹¹

(12) The statutory procedure for terminating parental rights involves two separate inquires. ¹² First, the court must determine whether the evidence presented meets one of the statutory grounds for termination. ¹³ Second, the court must determine whether termination of parental rights is in

⁸ Scott v. DSCYF, Del. Supr., No 528, 2011, Steele, C.J. (Feb. 27, 2012) (citing Wilson v. Div. of Fam. Services, 988 A.2d 435, 439-40 (Del. 2010)).

⁹ Wilson v. Div. of Fam. Services, 988 A.2d 435, 440 (Del. 2010).

¹⁰ *Id*.

¹¹ Powell v. DSCYF, 963 A.2d 724, 731 (Del. 2008).

¹² Shepherd v. Clemens, 752 A.2d 533, 536-37 (Del. 2000).

¹³ *Id.* at 537. *See also* DEL. CODE ANN. tit. 13, § 1103(a)(1-8) (listing the grounds for termination of parental rights).

the best interest of the child.¹⁴ When the statutory basis for termination of parental rights is failure to plan adequately for the child's physical, mental, or emotional needs,¹⁵ there must be proof of a least one additional statutory factor¹⁶ and proof that DFS made *bona fide* reasonable efforts to reunify the family and preserve the family unit.¹⁷ These requirements must all be established by clear and convincing evidence.¹⁸

(13) In this case, the Family Court found by clear and convincing evidence that Mother's parental rights should be terminated on the statutory basis of failure to plan adequately for the children's needs. ¹⁹ This Court has carefully reviewed the record, including the entire termination of parental rights hearing transcript, the Family Court decision, and the positions of the parties. Contrary to Mother's contentions on appeal, the record contains sufficient evidence to support the Family Court's findings that Mother failed to make adequate progress on her case plan due to her repeated incarceration

¹⁴ DEL. CODE ANN. tit. 13, § 722(a)(1-8) (listing factors to be considered when determining the best interest of the child).

¹⁵ Del. Code Ann. tit. 13, § 1103(a)(5).

 $^{^{16}\,}$ Del. Code Ann. tit. 13, § 1103(a)(5) (a)-(b) (listing additional factors).

¹⁷ D.F.S. v. N.S. and R.T., 2009 WL 5206720, at *18 (Del. Fam. Dec. 11, 2009).

¹⁸ Powell v. DSCYF, 963 A.2d 724, 731 (Del. 2008).

¹⁹ Del. Code Ann. tit. 13, § 1103(a)(5).

and her drug use and that she lacked the ability to financially provide for her

children. We conclude there is ample evidence of record to support the

Family Court's termination of Mother's parental rights on the statutory basis

that she failed to plan for the children and that termination was in the

children's best interest. We find no abuse of discretion in the Family

Court's factual findings, and no error in its application of the law to the

facts.

NOW, THEREFORE, IT IS ORDERED that the judgment of the

Family Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Jack B. Jacobs

Justice

9