IN THE SUPREME COURT OF THE STATE OF DELAWARE

TAMARA FROST,[1]	§	
	§	No. 373, 2012
Respondent Below,	§	
Appellant,	§	Court Below – Family Court
	§	of the State of Delaware,
v.	§	in and for New Castle County
	§	No. 11-12-01TN
DIVISION OF FAMILY SERVICES,	§	Petition No. 11-36729
	§	
Petitioner Below,	§	
Appellee.	§	

Submitted: February 27, 2013
Decided: March 12, 2013

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

O R D E R

This 12th day of March 2013, it appears to the Court that:

(1) The respondent-appellant, Tamara Frost (the "Mother"), appeals from the Family Court's decision to terminate her parental rights. The Mother raises three claims on appeal: first, that the Family Court erred in terminating the Mother's parental rights, even though she was foreseeably capable of reunification with her children and had substantially completed her case plan; second, that the Family Court erred by not interviewing the

[1] Pseudonyms for the Mother, the Father and the Children have been assigned pursuant to Supreme Court Rule 7(d).

children and/or appointing a *Frazer*[2] attorney to adequately give weight to the children's desires when a) they expressed several times that they wanted to return to Mother and b) the Guardian *ad Litem* supported termination of parental rights; and third, that the Family Court's decision that it is in children's best interest to terminate her parental rights is not sufficiently supported by the record and is not the result of an orderly, logical, and deductive process.

(2) The Mother has four children. The custody of three of those children was in issue at the Termination of Parental Rights ("TPR") hearing: Samantha, born in 2004; Shelly, born in 2006; and Alice, born in 2007 (the "Children"). The Children all share the same biological father (the "Father").

(3) The Mother has had a long history of her children being placed in the custody of the Division of Family Services ("DFS"). In June, 2006, Samantha and Shelly were granted to DFS due to the Mother's drug use, housing trouble, and unemployment. The girls were briefly reunited with the Mother, only to return to foster care after it was determined the Mother was still using drugs and did not have stable housing. Custody was restored back to the Mother and the Father in 2008. In January, 2010, a domestic

[2] *In re Frazer*, 721 A.2d 920, 923 (Del. 1998) (citing *Bellotti v. Baird*, 443 U.S. 622, 633-35 (1979)).

violence incident led DFS to monitor the children again. In December, 2010, DFS took custody of Samantha, Shelley, and Alice.

(4) A DFS treatment worker, Kerri Parise, worked with the Mother to develop a reunification case plan. During a Dispositional Hearing in Family Court in February, 2011, the reunification case plan was reviewed, entered into evidence, and signed by the Mother. The children have continued to live in foster care since December, 2010, because the Mother has failed to complete the conditions of the case plan, which involved the Mother being required to address the following issues: housing, substance abuse, employment, mental health, and domestic violence.

(5) As to her housing, the Mother has been unable to establish stable housing for herself and the children. At the beginning of Parise's interaction with the Mother, mother refused to disclose where she lived. Between December 2010 and August 2011, the Mother lived for a period in a women's shelter and for a period in a motel. At the end of this time, the Mother and the Father found a residence, which the Mother conceded was not appropriate for children. In February, 2012, the Mother and the Father were evicted from this residence.

(6) The Mother now lives in an apartment with the Father. The Father is a Tier II sex offender, and by law, the children cannot live in the

same housing as the Father. Though the Mother remains dependent on the Father's income, she has indicated he would move into a separate apartment if she regained custody of the children.

(7) The Mother has not been able to establish any record of earned income, stating she earns about $200 per week "under the table" running errands and doing chores for an "older gentleman." The Mother receives TANIF and food stamps.

(8) The Mother has a fifteen-year history of cocaine and heroin abuse. Shelley was born drug addicted and the Mother's most recent child—who is not at stake in this litigation—was also born drug addicted in May, 2012. The Mother has sought treatment for her addiction, but has not completed the treatment programs. While in treatment, the Mother has failed at least five drug screenings. The Mother is currently on prescription methadone and Clonidine (a benzodiazepine), two drugs which are contraindicated. The Mother has admitted she did not inform the doctor who proscribed her Clonidine that she was on methadone.

(9) The Mother has been diagnosed with bipolar disorder and depression. The Mother has in the past received mental health treatment but has chosen to not continue. The Mother admits receiving psychotropic

medication from a physician, but claims she does not currently take the medication.

(10) Samantha and Shelley have stated to their foster parents and their therapist that they remember an incident where the Father choked the Mother.

(11) After the children were taken into custody by DFS, they were placed into a foster home. When the children first arrived at the foster home, they expressed anxiety about being fed, and showed hoarding tendencies. The children also showed concern that their mother was not getting enough food to eat, and they fixated on an incident in which they observed the Father choking the Mother.

(12) When first placed in foster care, Alice regularly defecated in her pants. This behavior ended and for eight months, Alice did not have these accidents. However, she defecated in her pants again at the mention of returning to the Mother's care. The Children have expressed a desire to remain living with the foster parents, but have also, at times, shown a desire to return to their Mother. Samantha desires for the Mother to come live with them so that the foster parents can take care of the Mother. After visitation sessions with their Mother and Father, the children would hug their parents and talk about wanting to come home.

(13) Samantha and Shelley continue to see a therapist, who is also a social worker.[3] That therapist states the children show behavior typically exhibited by neglected children and that Samantha shows signs of being a "parentified child" who believes she is her Mother's caretaker. In every therapy session, Shelley expressed concern about the incident in which the Father choked the Mother. Discussion of a returning to the Mother's care renders Samantha anxious, nervous, and agitated.

(14) In 2011, three review hearings were held on the case plan. A Permanency Hearing was held in December, 2011, during which the TPR was initiated. In June, 2012, the Family Court terminated the Mother's parental rights on the grounds of failure to plan under title 13, section 1103(a)(5) of the Delaware Code and a finding that termination was in the best interests of the children. This appeal followed.

(15) When reviewing a Family Court's termination decision, 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.[4] To the extent that the issues on appeal implicate rulings of law, we conduct a *de*

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[3] For ease of reference, the therapist/social worker will be referred to only as therapist.
[4] *Powell v. Dep't of Servs. for Children, Youth, & their Families*, 963 A.2d 724, 730 (Del. 2008) (citing *Solis v. Tea*, 468 A.2d 1276, 1279 (Del. 1983)).

novo review.[5] 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.[6] 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.[7] If the Family Court has correctly applied the law, our review is limited to abuse of discretion.[8]

(16) In Delaware, the Family Court must conduct a two-step analysis when deciding whether or not to terminate parental rights.[9] First, the Family Court examines whether there is clear and convincing proof of at least one of the grounds for termination set forth in title 13, section 1103(a) of the Delaware Code.[10] In this case, the Family Court made a finding under section 1103(a)(5), that the Mother failed to plan. Second, the Family Court

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[5] *Powell v. Dep't of Servs. for Children, Youth and their Families*, 963 A.2d at 730-31 (citing *In re Heller*, 669 A.2d 25, 29 (Del. 1995)).
[6] *Powell v. Dep't of Servs. for Children, Youth and their Families*, 963 A.2d at 731 (citing *In re Stevens*, 652 A.2d 18, 23 (Del. 1995)).
[7] *Id*.
[8] *Powell Dep't of Servs. for Children, Youth and their Families*, 963 A.2d at 731 (citing *Solis v. Tea*, 468 A.2d at 1279).
[9] Del. Code Ann. tit. 13, § 1103; *Powell v. Dep't of Servs. for Children, Youth and their Families*, 963 A.2d at 731.
[10] *Powell v. Dep't of Servs. for Children, Youth and their Families*, 963 A.2d at 731.

must determine whether the decision is in the best interests of the child pursuant to title 13, section 722 of the Delaware Code.[11]

(17) The Mother contends that the Family Court erred in terminating her parental rights even though she was foreseeably capable of reunification with her children and had allegedly substantially completed her case plan elements. Section 1103(a)(5) permits termination for failure to plan when a parent is "not able, or [has] failed, to plan adequately for the child's physical needs or mental and emotional health and development."[12] The Family Court must also find "1 or more" of the following factors are met:

> a. In the case of a child in the care of the Department or a licensed agency:
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> 1. The child has been in the care of the [DFS] or licensed agency for a period of 1 year, or for a period of 6 months in the case of a child who comes into care as an infant, or there is a history of previous placement or placements of this child; or
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> 2. There is a history of neglect, abuse or lack of care of the child or other children by the respondent; or
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> 3. The respondent is incapable of discharging parental responsibilities due to extended or repeated incarceration, except that the Court may consider postconviction conduct of the respondent; or
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> 4. The respondent is not able or willing to assume promptly legal and physical custody of the child, and to

[11] *Id*.
[12] Del. Code Ann. tit. 13, § 1103(a)(5).

> pay for the child's support, in accordance with the respondent's financial means; or
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> 5. Failure to terminate the relationship of parent and child will result in continued emotional instability or physical risk to the child. In making a determination under this paragraph, the Court shall consider all relevant factors. . . .

(18) The Family Court's finding that the Mother failed to complete her case plan, and therefore has failed to plan for the children's potential homecoming, is supported by the record. The Mother does not have stable housing. In the two years prior to the TPR, the Mother has lived in a shelter, with friends, a motel, an address she was evicted from, and an apartment with the Father, a registered sex offender.

(19) The Mother also has failed to complete the employment portion of her case plan. Though she purports to make "roughly $200 a week" by running errands for an "older gentleman," this income cannot be verified by the DFS. The Mother has also failed to address her substance abuse issues. She has tested positive for cocaine at least five times[13] and her substance abuse counselor testified she "seem[ed] to not be ready to discontinue her drug use." The Mother also failed to address her mental health issues, refusing mental health services that were available to her. Based on this

[13] I say "at least" because Mother argues certain other tests which yielded "unable to obtain" results, though considered "positive" results by the testing organization, were flawed and are unreliable.

evidence, it was not an abuse of discretion for the Family Court to find the Mother failed to plan.

(20) The Mother argues the Family Court failed to consider mitigating factors such as the children's positive experience during visits and her promise that the Father would move out of their shared apartment if she regained custody. The Mother argues she has had success with careful use of anti-anxiety medication prescribed by her physician. The Mother also argues the Family Court failed to consider her $220 per week income, the Father's $330 a week in unemployment, and her TANIF and food stamp benefits. While these factors are in the Mother's favor, they do not outweigh the clear and convincing evidence of failure to plan reflected in the record or render the Family Court's decision an abuse of discretion.

(21) In addition to a finding that the Mother failed to plan, the Family Court must also have found she met one of five criteria. One criterion requires that a child "has been in the care of the [DFS] or licensed agency for a period of one year . . . or there [has been] a history of previous placement or placements of this child."[14] The children have been in the custody of the current foster parents for fifteen months and Samantha and Shelley have a history of placement in foster care. There was sufficient

[14] Del. Code Ann. tit. 13, § 1103(a)(5)(a)(1).

evidence to support the Family Court's finding the Mother met this "placement" criterion.

(22) We stated in *In re Frazer*:

> We recognize that a child who is the subject of a termination of parental rights proceeding may not be a party in a formal sense, but there is no doubt the child's vital interests are at stake. To this extent, the child is an interested party and, if of an age that permits the child to express his or her views and to understand the proceedings, the child is entitled, at a minimum, to be heard. As the Supreme Court of the United States has noted, "[a] child, merely on account of his minority, is not beyond the protection of the Constitution." Moreover, "the constitutional rights of children are indistinguishable from those of adults."[15]

We then recognized the need to appoint an attorney to represent the wishes of a child when those wishes contrast with a Guardian *ad Litem*'s recommendation as to the child's best interests.[16] The Family Court is not required to appoint a *Frazer* attorney anytime the Guardian *ad Litem*'s recommendation conflicts with a child's wish. Rather, the Family Court should only make such an appointment if "the child is an interested party," the child is "of an age that permits the child to express his or her views," and the child is able "to understand the proceedings."[17]

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[15] *In re Frazer*, 721 A.2d 920, 923 (Del. 1998) (citing *Bellotti v. Baird*, 443 U.S. 622, 633-35 (1979)).
[16] *In re Frazer*, 721 A.2d at 924.
[17] *Id*. at 923.

(23) The Mother argues this case required the appointment of a *Frazer* attorney to represent the wishes of the children. There is some evidence that the children wished to return to the Mother. The Guardian *ad Litem* in this case stated he favored termination of parental rights. At the time of the proceedings, Samantha was 7, Shelley was 5, and Alice was 4. Whether a child is of an appropriate age to fully understand a TPR hearing and express a preference as to custody is a fact-specific inquiry. Accordingly, we decline to establish a bright line age requirement for appointment of a *Frazer* attorney.

(24) The therapist testified that Samantha has limited understanding of these proceedings and had trouble expressing her views. He also testified that discussing her wishes caused Samantha to experience strong emotions of anxiety, anger, and nervousness. The therapist testified Samantha was "one of the most parentified children [she has] ever seen" and therefore felt an unhealthy sense of loyalty and need to protect her mother. As to Shelley, who was five-years-old at the time of the proceedings, the therapist testified Shelly had only a very limited understanding of the proceedings. Given this evidence, it was not error for the Family Court to determine the children were not of an age to express their views or understand the proceedings.

(25) The Mother argues the Family Court prejudged both whether the children desired to return to the Mother's custody and their motives for such a desire. The Family Court stated, "The Court assumes that most young children love and would prefer to have contact with their biological parents" and therefore chose to not give the children's wishes significant weight. This isolated phrase provides context to the Family Court's ultimate determination that the children were not in a position to understand the proceedings or express a clear preference as to their wishes.

(26) The Mother also argues the Family Court erred in not interviewing the children *in camera* to determine their wishes. The Delaware Code provides that during TPR hearings, "[t]he Court may interview the child in chambers to ascertain the child's wishes as to his or her custodian."[18] The therapist testified that the judge questioning Samantha about her wishes as to custody may cause harm. She testified that Samantha feels that "[s]he has to take care of Mom, so if she speaks with the Judge and the TPR happens, she is going to feel like—Mom no longer loves me." While the therapist did not absolutely object to the judge interviewing Samantha, she expressed clear reservations and concerns about the impact and fruitfulness of such an interview. This evidence, combined with the

[18] Del. Code Ann. tit. 13, § 724(a).

very young age of the other children, render the Family Court's decision to not interview any of the Children to be a proper exercise of discretion.

(27) Finally, the Mother argues the Family Court erred in finding that the interests and desires of the children could be adequately represented by witnesses other than the children. The children's foster mother testified as to her understanding of each child's preference, candidly stating that Shelley never expressed to her any preference and that Samantha would, when angry, state she wishes to return to the Mother. The therapist testified that Samantha wished to remain living with the foster parents and wished Mother could come live with them as well so the foster parents could take care of the Mother. The therapist testified that Shelley had consistently expressed she wanted to remain with the foster parents.

(28) The Mother's attorney had the opportunity to cross examine the foster mother and the therapist as to the children's wishes. Further, the Mother herself testified as to her visits with the Children and what desires and wishes they expressed during such visits. Thus, the record reflects sufficient evidence for the Family Court to conclude the children's wishes were adequately represented during the hearing.

(29) The Mother claims the Family Court's decision that termination was in the best interests of the children was not sufficiently supported by the

record and is not the result of an orderly, logical, and deductive process. In determining the best interests of the child, the Family Court must consider all of the eight factors enumerated in section 722. The Family Court shall consider:

> (1) The wishes of the child's parent or parents as to his or her custody and residential arrangements;
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> (2) The wishes of the child as to his or her custodian or custodians and residential arrangements;
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> (3) The interaction and interrelationship of the child with his or her parents, grandparents, siblings, persons cohabiting in the relationship of husband and wife with a parent of the child, any other residents of the household or persons who may significantly affect the child's best interests;
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> (4) The child's adjustment to his or her home, school, and community;
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> (5) The mental and physical health of all individuals involved;
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> (6) Past and present compliance by both parents with their rights and responsibilities to their child under § 701 of this title;
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> (7) Evidence of domestic violence as provided for in Chapter 7A of this title; and
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> (8) The criminal history of any party or any other resident of the household including whether the criminal history contains pleas of guilty or no contest or a conviction of a criminal offense.[19]

(30) While the Family Court must balance all of the relevant factors, the Family Court may give different weight to different factors.[20] "The

[19] Del. Code Ann. tit. 13, § 722 (a) (1-8).

amount of weight given to one factor or combination of factors will be different in any given proceeding. It is quite possible that the weight of one factor will counterbalance the combined weight of all other factors and be outcome determinative in some situations."[21]

(31) The first factor requires the Family Court to consider the wishes of the parents. The Family Court found this weighed against termination, as the Mother opposes termination. The Mother does not challenge this finding.

(32) The second factor requires the Family Court to consider the wishes of the children. The Family Court found this factor was neutral as the children were too young to comprehend the proceedings. For the same reasons that we concluded the appointment of a *Frazer* attorney was unnecessary, it was not error for the Family Court to find this factor was neutral.

(33) The third factor requires the Family Court to consider the children's interactions with the Mother. The Family Court found this factor favored termination. The children's therapist testified Shelley and Samantha have anxiety about returning to the Mother. She also testified that Samantha

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[20] *Powell v. Dep't of Servs. for Children, Youth and their Families*, 963 A.2d at 735 (citing *Snow v. Richards*, 937 A.2d 140, at *3 (Del. Nov. 6, 2007) (table)).
[21] *Powell v. Dep't of Servs. for Children, Youth and their Families*, 963 A.2d at 735 (citing *Fisher v. Fisher*, 691 A.2d 619, 623 (Del. 1997)).

exhibits signs of being "parentified," or feeling responsible for giving care to the Mother. There is sufficient evidence for the Family Court to have determined this factor favored termination.

(34) The fourth factor the Family Court must consider is the children's adjustment to their home, school, and community. The Family Court found this factor favored termination. The record shows the children have a "secure, healthy bond" with their foster parents. The Mother argues the Family Court failed to consider how the children could have adjusted to living again with her. The Family Court's consideration of the Mother's continued illegal drug use, failure to address her mental health issues, lack of income, lack of stable housing, and strong connection to the foster parents, belie this argument. There is sufficient evidence for the Family Court to have determined this factor favored termination.

(35) The fifth factor the Family Court must consider is the mental and physical health of the parties. The Family Court found this factor favored termination. Mother has a long history of substance abuse. She tested positive for cocaine not long before the TPR hearing. The Mother admitted to taking contraindicated prescription medication, obtained by not disclosing her methadone use to her physician. Her drug counselor testified the Mother "seem[ed] not ready to discontinue her drug use." Mother also

has an extensive history of mental health issues and has refused treatment offered to her. There is sufficient evidence for the Family Court to have determined this factor favored termination.

(36) The sixth factor the Family Court must consider is the Mother's compliance with her rights and responsibilities to the children. The Family Court found this factor favored termination. The Mother has failed to pay child support for the Children. The therapist testified that the children exhibit behavior indicating they had been neglected. There is sufficient evidence for the Family Court to have determined this factor favored termination.

(37) The seventh factor the Family Court must consider is evidence of domestic violence, which the Family Court found favored termination. The record indicates the children are fixated on a specific incidence of domestic violence that occurred when the Father choked the Mother. There is sufficient support for the Family Court to have found this factor favored termination of parental rights.

(38) The eighth factor that the Family Court must consider is the criminal history of the parent. The Family Court found this factor "slightly favored" termination, though also stated this factor alone is fairly insignificant in this case. The Family Court looked to the Father's status as

a Tier-II sex offender, the fact that he currently is living with the Mother, and the fact that the law prohibits a Tier-II sex offender from "primarily resid[ing]" with a child.[22] The Mother herself has an insignificant record and claims Father would move out of the apartment if she regained custody. There is sufficient support for the Family Court to have found this factor slightly favored termination of parental rights.

(39) The Family Court's decision contains a detailed discussion of its factual findings. These findings are set forth in a logical and orderly manner. After making its findings, the Family Court found that termination of Mother's parental rights was in the best interests of the Children and that such a finding was supported by clear and convincing evidence.

(40) This Court will not disturb findings by the Family Court that are supported by the record and are the result of an orderly and logical reasoning process.[23] So long as the Family Court's process may reasonably be considered the product of an orderly and logical process, it is within that court's discretion as to how it presents its decision. The Family Court's opinion in this case presents legal conclusions based upon factual findings that are supported by the record.

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[22] Del. Code Ann. tit. 13, § 724A.
[23] *In re Stevens*, 652 A.2d 18, 23 (Del. 1995).

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

BY THE COURT:

/s/ Randy J. Holland
Justice