

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THOMAS BUTLER,	§
	§ No. 282, 2004
Respondent Below,	§
Appellant,	§ Court Below – Family Court
	§ of the State of Delaware,
v.	§ in and for New Castle County
	§ File No. 04-03-03TN
DIVISION OF FAMILY SERVICES,	§
	§
Petitioner Below,	§
Appellee.	§

Submitted: July 13, 2005  
Decided: August 5, 2005

Before **STEELE**, Chief Justice, **HOLLAND** and **BERGER**, Justices.

This 5th day of August 2005, it appears to the Court that:

1) This is a direct appeal by the respondent-appellant, Thomas Butler (the “Father”), from the final judgments in the Family Court that terminated his parental rights over his children. The Father has raised three issues on appeal. First, he contends that he was denied due process of law because of inadequate legal representation at the termination of parental rights (“TPR”) hearing. Second, he argues that he was denied due process of law because of a prior appearance of partiality by the trial judge who presided over the termination of parental rights hearing. Third, the Father submits that the petitioner-appellee, Division of Family Services (“DFS”), failed to take adequate steps to reunify the family or to place the children

with family members. In essence, the Father contends that his attorney at the TPR hearing, the trial judge, and DFS all made mistakes that caused his parental rights to be terminated improperly.

2) We have concluded that none of the Father's arguments are meritorious. The record reflects that the Father's parental rights were properly terminated based upon his own conduct and notwithstanding the efforts made on his behalf by his TPR attorney, the trial judge and DFS. Accordingly, the judgment of the Family Court is affirmed.

3) This initial recitation of facts is taken almost verbatim from the Father's opening brief. The children came into the care and custody of DFS in late July 2003. DFS had opened another case almost one-year earlier for the fourth time. Intensive treatment services were provided to the family in order to maintain the children in the care of their mother or a family member. Despite those efforts, these proceedings started in July 2003 when three of the four children were located alone in the ACME grocery store in University Plaza, Newark, Delaware.

4) The Mother was charged with multiple counts of Endangering the Welfare of a Child. DFS obtained custody of the children on an emergency basis after attempting to place them with their maternal grandmother. The children were placed in foster care because DFS

determined the conditions in the home of the maternal grandmother posed continued and substantial risk to the children.

5) On August 6, 2003, a “preliminary protective hearing” was held on the DFS petition for custody. The children’s mother, Meisha Richardson (the “Mother”), stipulated to the children’s dependency. The Father requested that the Family Court allow Isaiah Richardson, who was then 29 months old, to live with him. The Family Court heard testimony and found that the Father had not had much involvement with the children, had failed to pay support and was not even aware of where Thomas attended school. The Father agreed he was not able to care for the children. The Family Court continued custody with DFS.

6) On October 10, 2003, an “adjudicatory hearing” was held. The Father did not attend this hearing for unknown reasons. He was represented by counsel who stated that the Father preferred that his grandmother care for his eldest child, Thomas, born on May 31, 1998; and that Isaiah, born on February 8, 2001 and Destiny, born on June 11, 2002, be cared for by their maternal grandmother, who had cared for the children since December 2002. Following the hearing, the Family Court continued custody with DFS.

7) On November 19, 2003, a “dispositional hearing” was held. The Father did not attend this hearing because he was incarcerated and there

was insufficient time, according to the Family Court, to have him transported for the hearing. The Father's interests were represented by his court-appointed counsel.

8) A reunification plan for the Father was admitted into evidence at that time. According to Kerri Parise, the DFS social worker assigned to the case, the Father's case plan required "that he had the financial ability to care for his sons and himself, housing to ensure that he has housing to provide for himself and his children, and demonstrate the ability he can maintain housing and you know, pay the needed utilities. I also put on there that [the Father] will have an understanding of Thomas' medical needs and ensure that he can keep the medical appoint [sic]. [The Father] would have to learn how to use the feeding machine, how to check his blood sugar everyday. Also, [the Father] has admitted that he does have a problem with substance abuse. [The Father] needs to go for a substance abuse evaluation and then follow through with whatever recommendations they give him. I had also put on there that [the Father] has had some trouble with legal issues and I want him to have an understanding that if he is constantly in and out of prison that he cannot care for his children if he cannot be there."

9) During the November hearing, Ms. Parise was asked what assistance she had provided to the Father since the case was opened. She

responded that the Father was invited to visits with the children, that she would provide bus tickets for him, that she would schedule him for a substance abuse evaluation and drive him to the appointment. She also provided him with a listing of subsidized and low income housing.

10) Ms. Parise testified that the Father visited the children the week before the November hearing with his mother. The Father suggested that his grandmother, Mildred Butler, would be a resource for the children. According to Ms. Parise, Mildred Butler indicated very strongly she would like one child and possibly a second child.

11) Ms. Parise had previously visited Mildred Butler at her home. She stated that the home was nicely kept. However, at the time of the November 19, 2003 dispositional hearing, Ms. Parise had not completed the full process of determining whether Mildred Butler, “would be appropriate or not.”

12) The Father’s mother had visited with the children two times, the first being on November 5, 2003 with her mother, Mildred Butler. The visit went well. She again visited the children with the Father on November 12, 2003. According to Ms. Parise, the Father and his mother had “glassy eyes” and appeared to be under the influence of drugs, but exhibited no erratic behavior and were generally calm.

13) On February 23, 2004, prior to the first review hearing scheduled for February 26, 2004, DFS filed a “motion to change goal” from “reunification to termination of parental rights and adoption.” The reason was that the Mother and the Father had not been complying with their case plans.”

14) The review hearing occurred on February 26, 2004. The Father did not appear. At the beginning of the hearing, the Family Court allowed the Father’s attorney to withdraw on the grounds that he had not cooperated with his attorney.

15) During the February 2004 hearing, Ms. Parise testified that on December 18, 2003, she transported the children to Mildred Butler’s house for a holiday visit with the Father’s family. Mildred Butler had made dinner for the children, “a very nice dinner.” She baked a cake for them and had a Christmas gift for each of the children. That was the last day that either the Mother or the Father saw the children.

16) According to Ms. Parise, she believed that it was not in the best interests of the children to continue to visit their Mother or the Father because “they continue to have this expectation, when are we going home. When are we going to live together again? When are we going to see our mom and dad?” “At this point I don’t see the children ever going home to

either parent and their lack of interest even the last couple of visits is like I was pulling teeth to actually have them have a visit. And I think in the long run, it will be you know worst for the children. I think if they can just begin to accept that they are not going home and they have to start thinking, you know, how are they going to get on with the rest of their lives with the new family, I think it would be better for them. They could breathe and move on with it. The longer it is drawn out, I think the worse it is for them.”

17) Ms. Parise also discussed the possibility of placing Thomas with Mildred Butler but was concerned about her age and that the persons residing in her house had drug addictions. According to Ms. Parise “I told her that she could definitely be considered but I would much rather see that she would adopt him rather than just have custody of him because of his age.”

18) At the conclusion of the review hearing, the guardian *ad litem* suggested to the Family Court that it waive the thirty-day rule regarding motions to change goal to which the trial judge responded that she “had a more creative way of handling it” “[w]here I can avoid having to be challenged on that.” Based upon the record, the trial judge stated that Ms. Parise had made:

extraordinary efforts to reunify this family and that we’ve got to move these kids on to the thought that these parents are not

going to be involved in their life now. But I have held in the decision that I have issued that the Division does not need to wait to file a TPR petition. My thought would be, let's go ahead and put on the calendar the next review hearing with sufficient time that if you file that petition and get it served, we can hear the TPR petition at that time. And that way we can have a TPR hearing, my thought would be in maybe two or three months. That does make sense to people? Well, I can't schedule a TPR hearing now because it hasn't been filed. But I will schedule a review hearing and say that if the petition is filed and served, we'll turn it into a TPR hearing. How does that sound?

19) The hearing on DFS's petition for termination of parental rights occurred on June 18, 2004. Previously, on May 19, 2004, counsel for the Mother and the Father were appointed by the trial judge. The Father attended and participated at this hearing. At the conclusion of the hearing, the Family Court entered its order terminating the Father's parental rights.

20) DFS accepts the statement of facts set forth in the Father's opening brief with the following exceptions and additions. During the period of time from their entry into foster care until the June 18, 2004 hearing on the DFS TPR petition, the Father did not visit the children as he was permitted to do. In fact, he visited the children only two times during the one-year the children were in the custody of the State. The failure of both the Mother and the Father to appear for scheduled visitations caused substantial emotional harm to the children. The Family Court issued an



order to cease visitation as a result of the harm the parents' non-appearance was causing to the children.

21) DFS provided the Father with a case plan on November 11, 2003, after the Father failed to appear for multiple meetings. By the Father's own testimony, he is an active heroin and cocaine user, and has provided little for the children their entire lives. The Father was regularly incarcerated. The Father has no employment. The Father has no safe and appropriate housing. He lives with his grandmother, Mildred Butler, along with other adult drug users.

22) The Father has not complied with his case plan in any respect. The Father rarely called DFS to inquire about the children. Despite the case plan, the Father continued to use cocaine and heroin and was regularly arrested and incarcerated. Several appointments were made by DFS with the Father, which the Father failed to keep.

23) The Father acknowledged that he is not able to care for the children. The Father does not even want all of the children; he only wants one, Thomas. Thomas is a disabled child, who has been in the care of DFS multiple times since his birth as a result of his parents' failure to provide necessary medical care. The Father acknowledges that he is not able to care for the child, and that he really does not know much about Thomas'

condition and has not been to any doctor's appointments or learned to care for Thomas.

24) The four Richardson/Butler children have remained in two different foster homes since their entry into care in July 2003; with Thomas and Rona placed in one home and Destiny and Isaiah in another. Young Thomas' medical condition has improved substantially since being placed in foster care. The children are all awaiting adoption.

25) The Father's first argument on appeal is that he was denied due process of law because of the Family Court's approval of his attorney's request to withdraw at a crucial stage of the proceedings. An attorney was appointed by the Family Court to represent the Father at the adjudicatory hearing on October 10, 2003 and continued to represent the Father until that attorney was permitted to withdraw on February 26, 2004. The reason for the motion to withdraw was allegedly non-cooperation by the Father.

26) The Father's first argument on appeal is summarized in his opening brief, as follows: "despite the knowledge that a termination of parental rights hearing was to take place shortly thereafter, the Family Court granted the application of [the Father's] attorney who had been present at all of the hearings and adjudications only to appoint another attorney with no knowledge of the prior proceedings less than one month before the TPR

hearing. This deprived [the Father] of adequate representation at the TPR hearing.”

27) In this appeal, the Father has failed to make any specific allegations of inadequate representation by his TPR attorney. The Father simply asserts in a conclusory manner that the Family Court should not have discharged the attorney appointed to represent him in the dependency and neglect stage of the proceedings knowing that a TPR was forthcoming. Conversely, the record reflects overwhelming and uncontradicted specific facts to support the Family Court’s finding that DFS proved the basis for terminating the Father’s parental rights by clear and convincing evidence.

28) The factual basis for terminating the Father’s parental rights was established prior to the TPR hearing, when he failed to cooperate with either DFS or his original court-appointed attorney during the dependency and neglect proceedings. When the Family Court appointed another attorney to represent the Father during the TPR proceeding, the factual basis for terminating the Father’s parental rights was incontrovertible.

29) The Father acknowledged that he could not care for any of his children and only asked the Family Court to give custody of one child to his grandmother. There is no record support for the Father’s conclusory allegation that the attorney appointed to represent him at the TPR hearing

was ineffective. The Father's parental rights were properly terminated because of his drug dependency and incarceration that resulted in his inability to discharge any parental responsibilities.

30) The Father's second argument on appeal is an allegation that his due process rights were violated because of a comment made by the trial judge during one of the final review hearings about the apparent need to change from a permanency plan for reunification to a plan of termination. The Father contends that the comment gives the appearance that the trial judge had already made up her mind to terminate his parental rights. The Father acknowledges there is no record evidence to suggest that the trial judge was not fair and impartial during the TPR hearing or at any prior hearing during the dependency and neglect proceedings.

31) The comment that the Father alleges is inappropriate was the trial judge's response to the DFS suggestion to move the case plan to permanency through a termination rather than reunification, as a result of the parents' continuing failure to either visit their children or appear and cooperate with the DFS or their attorneys. This Court has recognized that the goal of the Adoption and Safe Families Act (ASFA)<sup>1</sup> is to find permanency for children by accelerating the entire welfare process out of a

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<sup>1</sup> Adoption and Safe Families Act, 42 U.S.C. §§ 671(a)(15)(A), 675 (5)(E).

concern “that too many children in [the United States] are spending the most important formative years in a legal limbo.”<sup>2</sup> In this case, the record reflects that the Father and the Mother had stopped attending the hearings and cooperating with either DFS or their counsel.

32) Both attorneys appointed during the dependency stage of the proceedings were permitted to withdraw because of the parents’ non-cooperation. When all efforts at reunification failed, it was apparent to the trial judge that a permanent stable plan for these children was headed toward a termination of parental rights. The judge’s comment was entirely proper in the context of yet another scheduled hearing that neither parent attended.

33) Nevertheless, the record reflects that the trial judge was concerned with assuring that the parents’ constitutional rights were protected. When the Father appeared for the TPR hearing on April 30, 2004, the trial judge continued the matter so that the Father could have new counsel appointed. The trial judge did so over the objection of the guardian *ad litem* and DFS. The record of the entire continuum from the dependency petition through the termination proceedings reflect that the Father received

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<sup>2</sup> *Brown v. Division of Family Services*, 803 A.2d 948, 953-54 (Del. 2002) (quoting Kathleen A. Bailie, *The Other “Neglected” Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 Fordham L. Rev. 2285, 2291-92 (1998)).

entirely fair treatment by an impartial jurist who carefully balanced the Father's constitutional rights with the best interests of the children.

34) The Father's final argument is that DFS did not make an adequate effort to either reunite him with his children or to place them with a family member. This final claim is also without merit. The record reflects that although the Father never asked to be reunited with any of his children and only wanted one child placed with his grandmother, DFS prepared and tried to implement a plan to reunite the Father with his children that included efforts by DFS to assist the Father with drug rehabilitation services.

35) Ms. Parise stated that in December she had "attempted to take [the Father] for a drug and alcohol evaluation and he was not at home" and was back living with his grandmother. Later at the TPR hearing, however, Ms. Parise testified that she had driven the Father to the substance abuse evaluation, but was not home the following day for the second part of the evaluation. The Father eventually had the second part of the evaluation on March 11, 2004, which showed he had been using heroin and cocaine. The Father allegedly told Ms. Parise that the reason he had not visited with the children more often was that he was strung out on heroin.

36) The Father's plan for Thomas is that his grandmother, Mildred Butler, the child's great-grandmother, care for Thomas. Mildred Butler was

provided visitation upon request. Her visits were rare, and on one occasion she fell asleep during the visit. Mildred Butler acknowledged that her grandson, the Father, was an active drug user and not able to provide care for his children. Despite her stated desire to provide care for one of the children, Mildred Butler never followed through with DFS.

37) DFS concluded that Mildred Butler would be unable to properly parent Thomas. DFS also rejected Mildred Butler as a caretaker because several adult drug users, including the Father, live in her house. The record reflects that DFS made a good faith effort to consider the Father's grandmother and properly concluded that was not a viable placement option.

NOW, THEREFORE, IT IS HEREBY ORDERED that the judgments of the Family Court are affirmed.

BY THE COURT:

/s/ Randy J. Holland  
Justice