IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRENDA DARWIN,[1]	§	
	§	Nos. 652, 2010 and
Respondent Below,	§	655, 2010
Appellant,	§	
	§	
and	§	
	§	
ELLIS DARWIN, VAN SOULE and RANDI SOULE-DARWIN,	§	
	§	
	§	Court Below: Family Court
v.	§	of the State of Delaware,
	§	in and for New Castle County
DIVISION OF FAMILY SERVICES,	§	
	§	File No. 10-03-08TN
Petitioner Below,	§	Case No. 10-10328
Appellee,	§	
	§	
and	§	
	§	
OFFICE OF THE CHILD ADVOCATE,	§	
	§	
Appellee.	§	

Submitted: April 20, 2011
Decided: May 10, 2011

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

O R D E R

[1]This Court *sua sponte* assigned pseudonyms to the parties by Order dated October 12, 2010, pursuant to Supreme Court Rule 7(d).

This 10th day of May, 2011, on consideration of the briefs of the parties, it appears to the Court that:

1) Brenda Darwin, and her three children, Ellis, Van, and Randi, appeal from a Family Court decision terminating Darwin's parental rights in her children. Darwin argues that the Family Court: (1) committed plain error by waiting until a few weeks before the termination hearing to appoint a *Frazer* attorney[2] for Ellis and Randi, and by waiting until shortly after the hearing began to appoint a *Frazer* attorney for Van; (2) abused its discretion in failing to find that the children's relationships with each other and with Darwin favored Darwin; (3) abused its discretion in finding that termination is in the children's best interest; and (4) committed plain error by refusing to speak with the children, directly, before making its decision. We find no merit to these arguments and affirm.

(2) The Family Court granted custody of the children to the Division of Family Services (DFS) in February 2009. The DFS petition alleged that Darwin had been hospitalized for substance abuse, and that the non-relative caretakers for Randi and Van were unwilling to file for guardianship. Ellis, who had been under his father's

[2]In *In re Frazer*, 721 A.2d 920 (Del. 1998), this Court held that children who are old enough to express their views on a termination petition are entitled to representation by an attorney who is not conflicted. Thus, where the Guardian *ad litem*'s view as to the child's best interest is not the same as the child's position, a different attorney must be appointed to represent the child.

care, had been severely physically abused. The Family Court appointed a Guardian *ad litem* for all three children.

(3) At hearings held in March, April, May and August 2009, the Family Court continued to find that the children were dependent, and should remain in the custody of DFS. The court adopted a concurrent goal of reunification and termination of parental rights on March 5, 2010. DFS filed a Petition for Termination on March 26, 2010, and the hearing was scheduled to begin on May 21, 2010. At a pre-trial conference held on April 22, 2010, the Family Court addressed the appointment of a *Frazer* attorney, and the fact that the court would not interview the children:

> All parties stipulated to the appointment of a *Frazer* attorney for Ellis and Randi. The *Frazer* attorney shall interview the children to determine if either of them has an opinion regarding the termination of parental rights. If the *Frazer* attorney cannot discern an opinion for or against the Petition on behalf of the child, the *Frazer* attorney may be excused from the proceedings prior to the start of trial.
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> Van has remained consistent in his opinion that he does not want to go home and is therefore not in need of a *Frazer* attorney. Since the Court is appointing a *Frazer* attorney the Court will not interview the children.[3]

(4) On May 14, 2010, the *Frazer* attorney for Ellis and Randi asked the court to appoint her as *Frazer* attorney for Van, as well. On June 2, 2010, after the first day

[3]Appellants' Reply Brief, Exhibit 1.

of the termination hearing, the court entered the requested order. The termination hearing was conducted on May 21, 2010, June 18, 2010, June 30, 2010, and August 10, 2010. The Family Court issued its decision on September 13, 2010.

(5) Darwin complains that the Family Court committed plain error by failing to appoint the *Frazer* attorney until shortly before the termination hearing (as to Ellis and Randi) and until after the first day of the hearing (as to Van). She points out that the *Frazer* attorney was unable to access important medical and other records until the appointment, and she contends that the delay was "serious and fundamental."[4]

(6) Plain error is error that is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[5] The *Frazer* attorney could have moved for a continuance if she believed that she had insufficient time to prepare for the termination hearing and properly represent her clients. She did not. Moreover, since the same attorney was the *Frazer* attorney for all the children, her "late" appointment with respect to Van did not mean that she missed the first day of the hearing. Finally, there is nothing in this record to suggest that the timing of the appointment of the *Frazer* attorney in any way prejudiced Darwin or her children. Thus, we find no plain error.

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[4]Appellants' Opening Brief, p.20.

[5]*Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

(7) Next, Darwin argues that the trial court abused its discretion in finding that one of the statutory "best interest" factors was neutral. Under 13 *Del. C.* § 722(a)(3), the court should consider "[t]he interaction and interrelationship of the child with his or her parents, . . . [and] siblings . . . ." The Family Court considered that factor and concluded that it did not favor Darwin or DFS. In doing so, the court recognized that Darwin interacted well with her children during visits. But the court also noted Darwin's therapist's testimony that Darwin "struggles to acknowledge her role in the children's problems and take responsibility in a consistent manner."[6] In addition, the court noted that Darwin's denial of her addiction could cause Darwin to repeat her destructive behavior, which contributed to the children's problems. These findings are supported by the record. Accordingly, we find no abuse of discretion.

(8) Darwin also argues that the trial court abused its discretion in finding that it was in the children's best interest to terminate Darwin's parental rights. She notes that the court recognized two factors in her favor – Darwin's desire to maintain her parental rights, and two of her children's preference to remain with their mother. Darwin argues that the court did not give enough weight to these factors.

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[6]*Division of Family Services v. Darwin, et al.*, File No. 10-03-08TN, Order at 36 (Del. Fam. Ct. September 13, 2010).

(9) The Family Court carefully reviewed all of the statutory factors in determining the children's best interest. In brief, the trial court found that the children have adjusted well in their foster homes. They all require medication and/or therapy for emotional and mental problems, and they are receiving that care at present. Darwin has continuing mental health problems, and has not been consistent in keeping medical appointments. Darwin has failed to meet the children's financial needs. She has a significant history of domestic violence, and Darwin has a criminal record. The record supports the trial court's findings, which amply demonstrate that the court did not abuse its discretion in concluding that termination is in the children's best interest.

(10) Finally, Darwin argues that the trial court committed plain error by failing to interview the children. But she does not explain what additional information the court would have obtained. The court knew that they wanted to return to their mother. Both the Guardian *ad litem* and the *Frazer* attorney confirmed that information. In addition, the court heard testimony from therapists, case workers and others who described the children's feelings. The children's wishes were considered by the court, but their desire to return to their mother could not overcome the powerful evidence that it was in their best interest to terminate Darwin's parental rights. In sum, there was no plain error.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Family Court be, and the same hereby is, AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger

Justice