IN THE SUPREME COURT OF THE STATE OF DELAWARE

AMANDA WILLIAMS ,[1]	§	
	§	
Respondent Below-Appellant,	§	No. 492, 2004
	§	
	§	
v.	§	Court Below—Family Court
	§	of the State of Delaware,
LISA AND DAVIS LONG,	§	in and for New Castle County
	§	File No. 04-05-07TN
Petitioners Below-Appellees.	§	
	§	

Submitted: February 9, 2006
Decided: March 9, 2006

Before **STEELE**, Chief Justice, **JACOBS**, and **RIDGELY**, Justices

ORDER

This 9th day of March 2006, upon consideration of the parties' briefs and the record on appeal, it appears to the Court that:

(1) The appellant, Amanda , filed this appeal from a decision of the Family Court, dated October 21, 2004, terminating her parental rights with respect to her minor daughter and transferring parental rights to the petitioners, Lisa and Davis Long. The Longs, who are Williams' aunt and uncle, filed a petition in May 2004 to terminate Williams' parental rights on

[1] The Court has assigned pseudonyms to the appellant and the appellees pursuant to Supreme Court Rule 7(d).

the ground that Williams had abandoned her daughter and failed to plan adequately for her daughter's needs.

(2) The record reflects that Williams filed an answer in opposition to the Long's petition to terminate her parental rights on June 30, 2004. In her answer, Williams admitted that she had not seen her daughter since August 2003 due, in part, to periods of incarceration.[2] Williams further asserted that the Longs had refused her repeated requests to see her daughter.

(3) On September 1, 2004, Williams filed an affidavit of indigency and motion for the appointment of counsel. In her motion, Williams stated that she had been incarcerated for the past two years, although she did not identify the correctional facility.[3] On September 2, the Family Court found Williams to be indigent but denied her motion for appointed counsel on the sole ground that the petition to terminate Williams' parental rights had not been filed by a State agency.

(4) On September 10, 2004, the Family Court entered an order scheduling the termination hearing for October 21. In the scheduling order, the Family Court acknowledged that Williams had contacted the court,

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[2] Although Williams asserted in paragraph twelve of her answer that she presently was incarcerated, the mailing address she provided to the Family Court was her adoptive mother's home address.

[3] Again, in her motion for appointment of counsel, Williams provided the Family Court with her adoptive mother's home address.

stating that she was incarcerated at the Cecil County Detention Facility and would not be able to appear at the hearing. The Family Court, therefore, noted in its order that it would call Williams at the detention facility on the day of the hearing and permitted her to participate in the hearing by telephone.

(5) The termination hearing went forward as scheduled on October 21, 2004. At the start of the hearing, the transcript reflects the following comments by the trial judge: "For the record, service of process of personal service was made on respondent father or he signed the waiver, but notices were sent to [father] and to [Amanda Willliams]. Ms. [Williams] did file an answer and therefore I've got to say that service by mail would otherwise not have been effective but she did file an answer to the petition which constitutes the entry of appearance. Neither respondent are here at the time set by the court. Are you ready to proceed [counsel for the Longs]?"

(6) The hearing proceeded without any mention of Williams' incarceration and without any attempt by the trial court to telephone the Cecil County Detention Facility, as stated in its September 10 scheduling order.[4] The last witness presented by the Longs was Mrs. Long's sister,

[4] In the two-paragraph argument that is the Long's answering brief, counsel for the Longs states that the Family Court had been informed prior to the hearing that Williams was no longer incarcerated. In support of this statement, the Longs' appendix

Susan, who also is Williams' birth mother. The trial judge questioned her about her contact with Williams. During the course of this questioning, Susan informed the trial judge that she believed Williams was still incarcerated in Cecil County. The trial judge thanked her for her testimony, took a brief recess, and then returned to issue a ruling from the bench terminating Williams' parental rights.

(7) During the course of ruling, the trial judge commented: "[Williams] is not here and as well the evidence presented that suggests that she is incarcerated in another State. [Williams] did not file an answer on her own behalf and has not notified the court that she has since become incarcerated. So the court has no way to clarify that and number two no request for continuance was filed and no arrangements were made for [Williams'] testimony. No request was made for [Williams] to present testimony in some fashion other then [sic] personal appearance."

(8) We find these comments to be contradicted by the record on appeal. First, Williams clearly filed an answer in opposition to the Longs' petition. Moreover, the Family Court's scheduling order of September 10

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includes a photocopy of a Family Court envelope with Williams' name and a blacked-out address. The envelope has a postal stamp dated September 17 and is marked "Return to Sender No Longer Incarcerated." This envelope, and its unidentified contents, are not part of the record filed by the Family Court in this appeal. Accordingly, because this envelope is not part of the Family Court record, we do not consider it. *See Delaware Elec. Co-op., Inc. v. Duphily*, 703 A.2d 1202, 1207 (Del. 1997) (holding that material not found in the trial court record forms no part of the record on appeal).

stated that Williams had contacted the Family Court and informed the court that she was incarcerated in Maryland and would be unable to appear in person at the hearing. The Family Court ordered that arrangements be made to allow Williams to appear by telephone. The record reflects no attempt by the Family Court to allow Williams to appear telephonically. Apparently, the Family Court disregarded the testimony before it and relied upon a return to sender stamp on the notice sent to the Cecil County Detention Center.

(9) A party has a constitutional right to procedural and substantive due process in a termination of parental rights proceeding.[5] In any termination proceeding, due process requires at a minimum that a parent have notice of the termination proceedings and a reasonable opportunity to appear and refute the accusations.[6] We have held that the Family 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."[7] Although an incarcerated parent does not have a constitutional right to be physically present at the termination hearing,[8] due

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[5] *Orville v. Division of Family Serv.*,759 A.2d 595, 597-98 (Del. 2000).

[6] *Orville v. Division of Family Serv.*, 759 A.2d at 598.

[7] *Walker v. Walker*, 2006 Del. LEXIS 81 * 7 (Del. 2006).

[8] *In re Heller*, 669 A.2d 25, 32 (Del. 1995).

process does require that an incarcerated parent have an "opportunity for meaningful participation in the termination process."[9]

(10) We conclude that the Family Court failed to address Williams' application for counsel according to the requirements of *Walker v. Walker*. Because Williams' appeal was pending at the time we decided *Walker*, the holding of that case applies to her.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Family Court is VACATED. This matter is REMANDED to the Family Court for consideration of Williams' application for court-appointed counsel and for a new termination hearing. Jurisdiction is not retained.

BY THE COURT:

/s/ Henry DuPont Ridgely
Justice

[9] *Orville v. Division of Family Serv.*, 759 A.2d at 599.