

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JASON WATERS, <sup>1</sup>	§	
	§	No. 161, 2006
Petitioner Below,	§	
Appellant,	§	Court Below--Family Court of
	§	the State of Delaware, in and
v.	§	Kent County
	§	
DIVISION OF FAMILY SERVICES	§	
and CASA,	§	
	§	File No. 04-05-1TK; Pet No.
Respondents Below,	§	04-15719
Appellees.	§	

Submitted: October 13, 2006

Decided: December 12, 2006

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

**ORDER**

This 12<sup>th</sup> day of December 2006, upon consideration of the parties' briefs<sup>2</sup> on appeal and the Family Court record, it appears to the Court that:

(1) On March 29, 2006, the appellant, Jason Waters ("Waters"), filed a notice of appeal from a Family Court order docketed on January 27, 2006. The order denied Waters' motion under Family Court Civil Rule 60(b) ("Rule

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<sup>1</sup>The caption reflects a pseudonym previously assigned by the Court. Del. Supr. Ct. R. 7(d) (2006).

<sup>2</sup>CASA adopted the answering brief filed by the Division of Family Services.

60(b)”) for relief from a prior order dated July 27, 2004, which had terminated Waters’ alleged parental rights in a child born on May 31, 2003 (“the Child”).<sup>3</sup>

(2) On March 30, 2006, the Clerk issued a notice directing that Waters show cause why the appeal should not be dismissed for his failure to file the notice of appeal within the thirty-day appeal period.<sup>4</sup> Waters filed a response opposing a dismissal. CASA and the Division of Family Services (DFS) each filed an answer supporting a dismissal of the appeal as untimely filed.

(3) By letter dated May 24, 2006, the Clerk discharged the notice to show cause and issued a filing deadline for Waters’ opening brief and appendix. The Clerk’s letter did not state why the notice to show cause was discharged.

(4) “Time is a jurisdictional requirement.”<sup>5</sup> Under Delaware law and procedure, a notice of appeal must be received by the Clerk of this Court within the applicable time period.<sup>6</sup> Unless an appellant can demonstrate that the

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<sup>3</sup>See Del. Fam. Ct. Civ. R. 60(b) (2006) (providing for relief from a final judgment on the basis of mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, etc.).

<sup>4</sup>See Del. Supr. Ct. R. 6(a) (2006) (providing that notice of appeal must be filed within thirty days of decision on appeal).

<sup>5</sup>*David v. Nestor*, 2006 WL 3353421 (Del. Supr.) (quoting *Carr v. State*, 554 A.2d 778, 779 (Del. 1989)).

<sup>6</sup>*Id.* (citing Del. Supr. Ct. R. 10(a)).

failure to file a timely notice of appeal is attributable to court-related personnel, the untimely appeal cannot be considered.<sup>7</sup>

(5) In this appeal, the Clerk improvidently discharged the notice to show cause. Waters' response to the notice to show cause did not demonstrate that his failure to file a timely notice of appeal is attributable to court-related personnel.<sup>8</sup> As a result, Waters' case does not fall within the exception to the general rule that mandates the timely filing of a notice of appeal. Nonetheless, in view of the court-related nature of the error, the Court has proceeded as if the notice of appeal was timely filed and has reviewed the merit of the appeal.<sup>9</sup>

(6) The Family Court's July 27, 2004 order terminating Waters' alleged parental rights made a number of factual findings upon which this Court relies. The order reflects that the Child tested positive for cocaine at birth on May 31, 2003 and within days was placed in foster care where he remained until his adoption in 2005. According to the Family Court, the Child's biological mother ("Mother") was arrested at the hospital on a violation of

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<sup>7</sup>*Id.* (citing *Bey v. State*, 402 A.2d 362, 363 (Del. 1979)).

<sup>8</sup>Instead, Waters' response to the notice to show cause argued the merit of his unsuccessful Rule 60(b) motion.

<sup>9</sup>*Cf. Riggs v. Riggs*, 539 A.2d 163, 164 (Del. 1988) (excusing untimely appeal when court in possession of appeal papers proceeded as if appeal had been properly filed).

probation (“VOP”) and was “sent to work release,” *i.e.*, the VOP Center in Georgetown.

(7) Mother had five visits with the Child at the VOP Center and signed a case plan with DFS that was designed to take effect upon her release. Once released, however, Mother had no further contact with DFS and no further contact with the Child.

(8) On March 30, 2004, Waters contacted DFS. Waters told DFS that he had engaged in sexual relations with Mother on one occasion, and that Mother had informed him that he might be the biological father of the Child. DFS advised Waters that it planned to seek termination of parental rights (“TPR”) and urged him to take immediate steps to petition for paternity testing through the Family Court. Waters did not file a petition for paternity testing or otherwise contact the Family Court regarding the Child, and DFS heard nothing further from him.

(9) On May 4, 2004, DFS filed a petition to terminate Mother’s parental rights and Waters’ alleged parental rights. By order dated June 3, 2004, the Family Court scheduled a TPR hearing for July 27, 2004. The TPR petition, notice of hearing, and notice of an indigent respondent’s right to court-appointed counsel, were mailed to Waters at his mother’s address in Dover, the

mailing address that Waters had provided to DFS on March 30, 2004. On July 18, 2004, Waters was served when a process server delivered the papers to Waters' mother's address, and they were accepted by Waters' sister who resided there.

(10) Waters contends that he first heard of the TPR petition and hearing from his mother in a June 2004 telephone conversation. Apparently, Waters spoke to his mother from the VOP Center in Georgetown where he had been incarcerated since sometime in April 2004. According to Waters, his mother told him that he was "due in court on July 27, 2004," and he instructed his mother to inform the Family Court that he was incarcerated.

(11) Neither Waters nor the Child's Mother, who was represented by counsel, appeared at the TPR hearing on July 27, 2004.<sup>10</sup> By order dated July 27, 2004, the Family Court terminated Waters' alleged parental rights and the parental rights of Mother. The Family Court sent the order to Waters at his last known address, *i.e.*, his mother's address in Dover. Waters did not file an appeal from the July 27, 2004 order.

(12) At the July 27, 2004 hearing, the Family Court granted leave to amend the TPR petition to add "Unknown Father" as a party to the proceeding.

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<sup>10</sup>At the outset of the hearing, the Family Court allowed Mother's counsel to withdraw on the basis that counsel had not had any contact with Mother.

DFS filed the amended petition in August 2004. Service of the amended petition on Unknown Father was made by publication; however, no one claiming to be the unknown father responded.<sup>11</sup>

(13) By amended order dated January 20, 2005, the Family Court terminated the parental rights of Unknown Father and Mother and the alleged parental rights of Waters. A copy of the amended order was mailed to Waters at his mother's address. Waters did not file an appeal from the amended order.

(14) In March 2005, the foster parents filed a petition to adopt the Child. By order dated May 12, 2005, the petition was granted.

(15) On September 29, 2005, Waters filed a "motion for parental rights." Waters alleged that he not been properly served with notice of the July 27, 2004 TPR proceeding. By order dated October 17, 2005, the Family Court denied Waters' motion. Waters did not file an appeal from that order.

(16) On or about January 26, 2006, Waters filed a motion for relief under Rule 60(b) requesting that the Family Court reopen the TPR proceeding on the basis of "excusable neglect."<sup>12</sup> Waters argued that his failure to appear at the July 27, 2004 TPR hearing was excusable because he was incarcerated

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<sup>11</sup>Del. Code Ann. tit. 13, § 1107A(c) (Supp. 2004).

<sup>12</sup>Del. Fam Ct. Civ. R. 60(b)(1) (2006).

in the VOP Center on that date and had not been properly served with notice of the hearing.

(17) By order docketed on January 27, 2006, the Family Court denied Waters' motion under Rule 60(b). The Court concluded that Waters had not informed the Family Court of a change in his mailing address, and that he had waited too long to challenge the TPR. This appeal followed.

(18) This Court's review of the Family Court's denial of a motion under Rule 60(b) is for an abuse of discretion.<sup>13</sup> In this case, the Court has considered whether the Family Court abused its discretion when it concluded that Waters' Rule 60(b) motion was untimely.<sup>14</sup> The Court has considered Waters' argument that he should be permitted to reopen the TPR under Rule 60(b)(1) on the basis of "excusable neglect"<sup>15</sup> and has considered whether Waters is entitled under Rule 60(b)(6) to reopen the TPR "for any other reason" due to "extraordinary circumstances."<sup>16</sup> Finally, the Court has considered the

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<sup>13</sup>*Hoffman v. Hoffman*, 616 A.2d 294, 297 (Del. 1992).

<sup>14</sup>*See Subolefsky v. Palese*, 2003 WL 194404 (Del. Supr.) (providing that Rule 60(b) relief has no time limit, but movant is required to act without "unreasonable delay" (quoting *Shremp v. Marvel*, 405 A.2d 119, 120 (Del. 1979))).

<sup>15</sup>Del. Fam. Civ. Ct. R. 60(b)(1)(2006). *See Brannon v. Lamaina*, 1993 WL 61680 (Del. Supr.) (defining "excusable neglect" as neglect by a reasonably prudent person under the circumstances).

<sup>16</sup>*Bachtle v. Bachtle*, 494 A.2d 1253, 1256 (Del. 1985) (citing *Jewell v. Div. of Family Serv.*, 401 A.2d 88, 90 (Del. 1979)).

likelihood of a different outcome, and whether any other party would have suffered substantial prejudice, had the Family Court granted the Rule 60(b) motion.<sup>17</sup>

(19) Having thoroughly reviewed the record and the parties' positions on appeal, we can discern no basis upon which to disturb the Family Court's denial of Waters' motion to reopen under Rule 60(b). Waters was properly served with notice of the TPR hearing.<sup>18</sup> He failed to apply for paternity testing and then failed to exercise his right to appeal. Under these circumstances, Waters' inaction does not constitute "excusable neglect," and he has not otherwise demonstrated "extraordinary circumstances" that would justify relief from the TPR "for any another reason."

(20) Under all of the circumstances, including Waters' "extensive criminal history" alluded to by the Family Court, the Court concludes that Waters has not demonstrated, and the record does not suggest, a basis upon which to conclude that he would have prevailed had the Family Court reopened

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<sup>17</sup>*Reynolds v. Reynolds*, 595 A.2d 385, 389 (Del. 1991) (citing *Battaglia v. Wilmington Sav. Fund Soc'y*, 379 A.2d 1132 (Del. 1977)).

<sup>18</sup>Service of process on Waters was effective and complete when the papers were received by his sister at his "last known address." Del. Code Ann. tit. 13, § 1107A (Supp. 2004); Del. Fam. Ct. Civ. R. 4(d)(1), 5(c) (2006). *Cf. Dickens v. State*, 1996 WL 539804 (Del. Supr.) (concluding that court's use of defendant's address in one action did not serve to inform court or opposing counsel of same defendant's address in different action).



the TPR proceeding. Moreover, in view of the successful foster placement of the Child as a newborn, the foster parents' subsequent adoption of the Child, and that Waters alleged parental rights were questionable at best, the Court concludes that reopening the TPR proceeding would have caused substantial prejudice to another party.<sup>19</sup>

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

BY THE COURT:

/s/ Carolyn Berger  
Justice

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<sup>19</sup>*Cf. Farley v. Dept. of Serv. for Children, Youth and their Families*, 2000 WL 1862231 (Del. Supr.) (remanding for entry of new order terminating parental rights to allow for appeal when there had been no substantial change in the children's circumstances, such as adoption).