STATE OF VERMONT
WINDSOR COUNTY, SS.

IN RE PEARSON ADOPTION	:	WINDSOR SUPERIOR COURT
	:	
	:	DOCKET NO. S073-95 WrCa

DECISION RE: MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

On May 10, 1994, Katherine E. McKenney (formerly Katherine Rees Pearson) filed a petition in the probate court, seeking to vacate her adoption which took place in February of 1964 when she was thirteen years old. Petitioner asserts that she was deceived into acquiescing to the adoption. Her explanation for her delay in filing the petition is that she recently discovered the existence and extent of a substantial Pearson family inheritance.[1] The petition is opposed by respondents Teresa Pearson Guay and Hilary Pearson O'Brien, two biological half-sisters of the petitioner who are beneficiaries of the Pearson inheritance.

In February of 1995, the probate court denied the petition, finding that there had been no deception concerning petitioner's eligibility for the inheritance, and that the only misunderstanding concerned the size of the inheritance that might be foregone. *See* In re Adoption of Pearson, Probate Court Docket No. 3679 (Bean, J., February 2, 1995). Petitioner has appealed the matter to the superior court for *de novo* review.

[1] The legal issue of whether or not petitioner's eligibility for a share of the family inheritance would be affected by a change in the status of the adoption is not directly before the court. For present purposes, the court will assume that a vacation of the adoption would affect petitioner's eligibility for the inheritance. This court has already noted the lack of clarity concerning this issue. *See* Opinion and Order regarding motion to dismiss appeal, page 1 note 1 (Fisher, J., May 1, 1996).

HISTORY[2]

Petitioner was born November 10, 1950. Her parents were John W. Pearson Sr. and Mary A. Pearson. The parents divorced in 1953, and subsequently Mary Pearson married Carleton W. Dow. On February 7, 1964, Carleton Dow adopted petitioner, with the consent of both natural parents. Carleton Dow died in 1975.

The inheritance at issue in this case derives from a trust established by the will of petitioner's great grandfather Edward J. Pearson, who died in 1929. One of the beneficiaries of the trust was Lucien Dean Pearson, who was Edward Pearson's son and petitioner's paternal grandfather. Under the terms of the trust, the surviving issue of Edward Pearson became beneficiaries when Lucien Pearson died. Lucien Pearson died in 1988. His son John Pearson died in 1993. The surviving issue of Edward Pearson include petitioner Katherine E. McKenney as well as respondents Teresa Pearson Guay and Hilary Pearson O'Brien (all *via* Lucien Pearson and John Pearson).

On May 10, 1994, more than thirty years after the adoption, petitioner sought to vacate the adoption by filing her petition in the probate court, citing V.R.P.P. 60(b)(6).[3] She alleged that her father and step-father coerced her mother and her into acquiescing to the adoption order. She indicated that she was subjected to the injustice of physical and mental abuse from her adoptive father, and that she was confronting the prospect of further injustice with the deprivation of an inheritance from her natural father's family. Petitioner explained that she did not learn of the true financial aspects of this matter until February of 1994, when she was provided with an accounting by the Probate Court of the District of Hartford Connecticut, where the family trusts are administered. She claims that the adults she had trusted had led her to believe that there was no Pearson family inheritance, but that in 1994 she learned that there were two trusts containing

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[2] Most of the historical facts are undisputed. To the extent there is any dispute over the facts, the court views the evidence and the allegations in the light most favorable to the petitioner, as is appropriate when addressing the respondents' motion to dismiss the case without holding a hearing.

[3] In all pertinent respects, V.R.P.P. 60(b) is virtually identical to V.R.C.P. 60(b).

hundreds of thousands of dollars. Petitioner claimed that by the deceit of adults she trusted, she was unjustly deprived of an opportunity to object to the adoption during the revocation period once she became an adult.[4] On February 2, 1995, following a hearing which had included Teresa Pearson Guay and Hilary Pearson O'Brien as intervening parties, the probate court denied the petition, summarizing its holding in the final paragraph as follows:

> The court recognizes that it has jurisdiction to hear a claim for relief from a judgment where there was fraud, misrepresentation or other misconduct of a party. However the court concludes that there was no deception where everyone understood that the father, John Pearson, Sr., being an alcoholic without steady employment, wanted to unburden himself of the duty of supporting his children and everyone understood that the children would not inherit from him, although they did not know the extent of this deprivation.

In re Adoption of Pearson, Probate Court Docket No. 3679 (Bean, J., February 2, 1995).

On February 21, 1995, petitioner filed a notice of appeal with this court, pursuant to V.R.C.P. 72, seeking *de novo* review of the probate court's denial of her petition. Petitioner's statement of the question for review is as follows:

> **Whether the petitioner's adoption should be revoked because it was procured by deception of the adoptee and one of the adopting parents.**

On May 1, 1996, this court granted a motion by respondents and dismissed the appeal, indicating that the court would adhere to the one-year time limits found in 15 V.S.A. § 454 and in V.R.P.P. 60(b). Opinion and Order (Fisher, J., May 1, 1996). However, the court later narrowed its ruling, on petitioner's motion for reconsideration, holding that (1) petitioner had failed to state a legal claim for relief under Rules 60(b)(1) - (b)(3), because she had failed to allege sufficient grounds to overcome the one-year limitation period, and that (2) Rules 60(b)(4) and (b)(5) were inapplicable on their face, but that (3) respondents were not entitled to dismissal at that time, because there is no one-year limitations period controlling Rule 60(b)(6). The effect of the ruling was that petitioner would be permitted to proceed with the case by alleging and supporting facts that would provide grounds

[4] The referenced revocation period was the one-year period for filing a dissent from the adoption, running from the time the adoptee reached the age of majority, as prescribed by 15 V.S.A. § 454.

for relief under Rule 60(b)(6). The court also suggested that respondents could test the sufficiency of any claim under Rule 60(b)(6) by seeking court review under Rule 56. Entry Regarding Motion (Fisher, J., July 11, 1996).

Respondents then filed a Motion for Determination to be Made. Respondents' apparent intention was for the court to address the sufficiency of petitioner's claim under the standards of Rule 56. However, respondents' argument focused on the one-year limitations, including both the one-year limitation prescribed in 15 V.S.A. § 454 and the one-year limitation on relief from judgment under Rule 60(b)(1) - (b)(3). At that time, respondents did not set forth any argument why they might be entitled to judgment as a matter of law with respect to any claims petitioner might properly pursue under Rule 60(b)(6), which was the only avenue for relief remaining available to petitioner after Judge Fisher's ruling dated July 11, 1996. The court denied respondents' motion by Entry Order dated January 22, 1997. However, it remained unclear whether or not petitioner had articulated sufficient grounds for relief under Rule 60(b)(6).

On April 29, 1997, respondents filed their Motion for Judgment on the Pleadings. This motion focuses on the issue left open by Judge Fisher on July 11, 1996: *i.e.* whether or not petitioner has alleged and supported facts that provide grounds for relief under Rule 60(b)(6). Respondents argue that petitioner's allegations do not support a claim under Rule 60(b)(6) because they fall squarely within a claim for relief under Rule 60(b)(3). Petitioner responds that her claim for relief does not fall within Rule 60(b)(3) because she alleges fraud by her father and her step-father, neither of whom are parties to the action currently before this court.

DISCUSSION

Rule 60(b)(6)

At issue is whether or not petitioner has advanced any claim that might entitle her to relief under Rule 60(b)(6). The following pertinent language appears in V.R.P.P. 60(b):

> **(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1)

> mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to introduce; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of a party; . . . ; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. . . .

The operative language of V.R.P.P. 60(b) is virtually identical to that of V.R.C.P. 60(b).

The Vermont Supreme Court has explained that the grounds for relief under Rule 60(b)(6) are broad, and that the rule must be interpreted liberally to prevent hardship or injustice, but that there are necessarily limits on when relief is available. Courts must be concerned about the certainty and finality of judgments so that litigation can reach an end. Richwagen v. Richwagen, 153 Vt. 1, 4 (1989). The rule should be applied only in "extraordinary circumstances." Olde & Co. v. Boudreau, 150 Vt. 321, 324 (1988). The rule does not provide a substitute for timely appeal. Tetreault v. Tetreault, 148 Vt. 448, 451 (1987). Nor does it provide relief from tactical decisions which in retrospect may seem ill advised. Richwagen at 4.

Rule 60(b)(6) may be invoked only when an alleged ground for relief is not encompassed within any of the first five classes of the rule. Perrott v. Johnston, 151 Vt. 464, 466 (1989); Olde & Co. v. Boudreau, 150 Vt. 321, 323 (1988); Levinsky v. State, 146 Vt. 316, 317-18 (1985); Alexander v. Dupuis, 140 Vt. 122, 124 (1981). Rule 60(b)(6) does not offer an open invitation to reconsider matters concluded at trial, subject only to the court's discretion. Olde & Co. v. Boudreau at 324. In any case a motion for relief from judgment must be filed "within a reasonable time." V.R.P.P. 60(b); Tetreault v. Tetreault, 148 Vt. 448, 450-51 (1987).

In the instant case, petitioner seeks to vacate a final order of adoption that was approved by the probate court in February of 1964. She filed her petition more than thirty years later, in May of 1994. The only substantial ground that she asserts as a basis for reopening the case is that she recently discovered the amount of the inheritance which she apparently gave up by acquiescing to the adoption. She also asserts that her step-father subjected her and her mother to physical and mental

abuse, but she does not claim that the abuse caused her to delay filing the petition. The only alleged deception concerns what petitioner was told about the inheritance by her father and step-father, and the only new evidence concerns her discovery of a substantial Pearson family inheritance.

Petitioner's allegations of deception fall squarely within Rule 60(b)(3), which addresses "fraud, . . . misrepresentation, or other misconduct of a party." Both the natural father and the adoptive father were parties to the adoption, and the nature of their alleged deception has not been changed by their subsequent deaths. Given the applicability of Rule 60(b)(3), petitioner's claim of deception is subject to the one-year limitation, as Judge Fisher has ruled in this case. *See examples:* Perrott v. Johnston, 151 Vt. 464, 466 (1989); Levinsky v. State, 146 Vt. 316, 317-18 (1985); Alexander v. Dupuis, 140 Vt. 122, 124-25 (1981).

Petitioner's argument for an exception to the one-year limitation is not supported by the cases she cites from Oklahoma, Matter of Adoption of Lori Gay W., 589 P.2d 217 (Okla. 1978), and Wade v. Geren, 743 P.2d 1070 (Okla. 1987). Both of those cases involved interpretation of specific Oklahoma statutes and their applicability to cases of adoption fraud, and claims of deception with regard to the parent-child relationship itself; they did not involve peripheral matters such as rights to an inheritance. In Lori Gay W., the mother claimed that the grandmother had deceived her at the time of the adoption by saying she would later relinquish to the mother when the mother married, and then later disclosed that she had always intended to retain custody of the child. The court explained that the specific statute was "intended to bar, within *constitutional limitations*, any proceedings attacking a final adoption decree more than one year after the decree was entered." Lori Gay W., 589 P.2d at 220 (original emphasis). In Lori Gay W., the mother had waited more than one year after learning of the grandmother's original true intentions, and the mother was not permitted to re-open the proceedings, because the court ruled that she was barred from bringing the case after one year from learning of the alleged fraud. The effect of permitting the suit would have opened up the possibility of disturbing the stability of the child's upbringing. The subsequent case of Wade v. Geren involved a claim of fraud upon the court with respect to the natural father's whereabouts and

intentions. The fraud had a direct effect on the father's basic right to develop a relationship with the child, which he had pursued diligently during the seven years the child had been alive. The father filed his claim within the one-year limitation period, and he succeeded in vacating the adoption. In discussing the nature of the fraud, the Court noted the constitutional significance of a biological relationship with the child, which offers the parents "a unique opportunity to develop . . . emotional bonds with their children." Wade v. Geren, 743 P.2d at 1073 (*discussing* Lehr v. Robertson, 463 U.S. 248 (1983)).

The claim of deception in the instant case does not concern the fundamental rights involved in a parent-child relationship. Petitioner alleges that both her natural father and her adoptive father deceived her into foregoing an inheritance. Both of them are now deceased. The rights of inheritance which petitioner seeks are peripheral to the essential nature of an adoption; the alleged deprivation does not implicate the fundamental rights of any parent-child relationship. In short, petitioner has not alleged any exceptional circumstances that would exempt this case from the proper application of the one-year limit under Rule 60(b)(3).

Reasonable Time

Moreover, in any case a motion for relief from judgment must be filed "within a reasonable time." V.R.P.P. 60(b). The petition in the instant case was filed on May 10, 1994, more than thirty years after the adoption on February 7, 1964. Petitioner's explanation for the delay was that she did not learn of the true financial aspects of the adoption until February of 1994. In determining the reasonableness of the delay, the court may consider "all the factors and circumstances of the particular case." Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 149 Vt. 365, 368-69 (1988). In Greenmoss Builders, for example, the delay was reasonable because the intervening time was consumed by appeal to the United States Supreme Court. Id. at 369. However, in other circumstances, the Court has indicated that five and one-half years was not a reasonable time. Tetreault v. Tetreault, 148 Vt. 448, 451 (1987). In light of the time that had elapsed, the other party involved "must have believed that the controversy had been put to rest." Id. As another example, four years was not a reasonable time

in Burroughs v. Burroughs, 132 Vt. 34 (1973). In the instant case thirty years is not a reasonable time, and the alleged deceit does not excuse the delay. Petitioner has not alleged "extraordinary circumstances" sufficient to overcome the need for finality of judgments. *See* Richwagen v. Richwagen, 153 Vt. 1, 4 (1989) (courts must be concerned about finality of judgments so that litigation can reach an end). Granting relief in this case, after thirty years delay, would emphasize the financial aspects of an adoption by giving approval to an adoptee's tactic of waiting to see which family would eventually offer the greater inheritance. *See* Richwagen at 4 (courts will not grant relief from tactical decisions which in retrospect may seem ill advised).

Independent Action Clause

Although petitioner cited and relied upon Rule 60(b)(6) in her petition to the probate court, she also made reference to the independent action clause of Rule 60(b), as the Vermont Supreme Court has interpreted that clause in Levinsky v. State, 146 Vt. 316, 318-320 (1985) (On Motion for Reargument). The independent action clause "preserves the historical authority of the courts of equity to reform judgments in special circumstances." Id. at 318 (*quoting* Carr v. District of Columbia, 543 F.2d 917, 926 (D.C. Cir. 1976)). The essential elements of the independent action are as follows:

> (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law.

Id. at 319. Relief under the independent action clause is not available where the petitioner has failed to demonstrate that mistake, accident, or fraud prevented her from presenting a meritorious defense to the original proceeding. Id. In the instant case, petitioner asserts that she had a good defense to the cause of action on which the judgment is founded (presumably her statutory right to dissent from the adoption under 15 V.S.A. § 454). However, petitioner was not *prevented* from asserting her "defense" merely because she was misled about the value of the Pearson inheritance; certainly she could have asked the probate court to vacate the adoption at an earlier date. She might have done so if her primary concern had to do with her relationship with her father and the rest of the Pearson

family. However, she did not petition the probate court until she learned more about the potential family inheritance - a matter which is peripheral to the central issue of the parent-child relationship. Under the circumstances, petitioner has not alleged special circumstances that would support a conclusion that the judgment "ought not, in equity and good conscience, to be enforced." Levinsky at 319. Petitioner is not entitled to relief under the independent action clause of Rule 60(b).

Hearing

Generally a hearing should precede a decision on a Rule 60(b) petition. However, the court may deny a motion pursuant to this rule without a hearing when the motion lacks merit. Blanchard v. Blanchard, 149 Vt. 534, 537 (1988). No hearing is necessary where the petition sets up facts which, even if proved, would lead to a denial of the requested relief. Alexander v. Dupuis, 140 Vt. 122, 125 (1981). The court must exercise caution when addressing a motion to reopen a dismissal by default, but there may be no need for a hearing where the issues have been fully argued. *Cf.* Goshy v. Morey, 149 Vt. 93, 99 (1987) (reversing denial of motion without hearing, where attorney was never given an opportunity to argue reasons that might have justified relief under Rules 60(b)(1) or 60(b)(6)).

Petitioner has requested a hearing before this court, arguing that the factual aspects of the case are vital, and citing In re Estate of Johnson, 158 Vt. 557 (1992). That case held that Supreme Court review is inappropriate "[w]here factual distinctions could control the resolution of an issue presented from a probate proceeding." Id. at 559. In such a case, the appropriate procedure would be to pursue superior court review, which presumably would include a hearing. Also, as a general matter, a hearing should precede a decision on a motion to set aside a judgment order. Blanchard v. Blanchard, 149 Vt. 534, 537 (1988). On the other hand, the court may deny a motion filed pursuant to Rule 60 without a hearing when it finds the motion lacking in merit. Id. at 537. No hearing is necessary where the petition sets up facts which, even if proved, would lead to a denial of the requested relief. Alexander v. Dupuis, 140 Vt. 122, 125 (1981). In the instant case, the parties have been submitting arguments concerning the sufficiency of the pleadings for well over a year. Petitioner has had both incentive and opportunity to submit allegations, evidence and arguments to show that she has grounds

for relief under Rule 60(b)(6). However, even if the court assumes that petitioner's allegations are true, and gives her the benefit of all reasonable doubt and inferences, she still would not be entitled to Rule 60 relief. Petitioner has not raised any factual distinctions that could control the resolution of the issues, and there would be no point in holding an evidentiary hearing. Under these circumstances, respondents are entitled to judgment as a matter of law.

CONCLUSIONS

Petitioner's claim for relief is not a proper ground for relief under Rule 60(b)(6) because it is encompassed within Rule 60(b)(3). Therefore the claim is barred by the one-year time limits found in 15 V.S.A. § 454 and V.R.P.P. 60(b)(3). Petitioner has not alleged "extraordinary circumstances" sufficient to overcome the one-year limitations, or to provide grounds for relief under Rule 60(b)(6). Furthermore, considering all the circumstances, the petition was not filed "within a reasonable time" as required for any request for relief under Rule 60(b). Petitioner also has failed to allege special circumstances that could support her claim to relief under the "independent action" clause of Rule 60(b). The petition lacks merit even if the court views the allegations in a light favorable to the petitioner. There is no need for a hearing. Respondents are entitled to judgment as a matter of law. The court will dismiss the petition with prejudice.

ORDER

Respondents' motion for judgment on the pleadings is **GRANTED**. Petitioner's appeal is hereby **DISMISSED**, with prejudice.

Dated this 16th day of July, 1997.

Mary Miles Teachout

Hon. Mary Miles Teachout,
Presiding Superior Court Judge

FILED

JUL 16 1997

GAIL F.
WINDSOR COUNTY