

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2010-111

JULY TERM, 2010

In re S.B. and H.B., Juveniles	}	APPEALED FROM:
	}	
	}	Rutland Family Court
	}	
	}	DOCKET NO. 201/203-11-07 Rdjv

Trial Judge: Nancy Corsones

In the above-entitled cause, the Clerk will enter:

Mother appeals from the family court's denial of her motion to vacate an order terminating her parental rights in son H.B. We affirm.

The record indicates the following. The Department for Children and Families (DCF) had been involved with mother and her children for many years. Mother's residual parental rights in three of her children, including H.B., who was born in December 2000, were terminated in February 2009. The family court found by clear and convincing evidence that mother neglected her children, and that she abused them verbally, emotionally, and physically. The court found, among other things, that mother had untreated mental health issues. She used drugs, including crack cocaine, and left her drug paraphernalia in a location accessible to the children. Mother also allowed a convicted sex offender into the home despite the existence of a no-trespass order. After the children were taken into custody, mother was inconsistent in visitation, and, when she did visit, she engaged in inappropriate behavior. In February 2008, mother moved to Arizona, and, with a minor exception, she has had no contact with the children since that date. The children's behavior greatly improved after they were taken into DCF custody.

Based on these and numerous other findings, the family court concluded in 2009 that mother had stagnated in her ability to parent, and that termination of parental rights (TPR) was in the children's best interests. It found that mother had done nothing to ameliorate the conditions that led to the children being taken into custody. To the contrary, she had moved thousands of miles away and had made no effort to reunite with the children. The court found it abundantly clear that mother would not be able to parent the children within a reasonable period of time. In evaluating the statutory best-interest factors, the court noted that H.B. was closely bonded with his foster mother and her household. It also concluded that it would be harmful to H.B. to have contact with mother, and that there was no way of knowing when he might be able to do so safely. The court observed that mother offered no guidance to H.B., nor was she in a position to offer H.B. love and affection, having moved far away from Vermont. For these and other reasons, the court terminated mother's rights. We affirmed the court's decision on appeal. In re K.B., No. 2009-082, 2009 WL 2480125 (Vt. July Term 2009) (unrep. mem.).

Sometime after this Court's decision, the family court learned that in late January 2009, while the TPR hearing was being conducted, H.B. had disclosed to a teacher that his foster brother sexually abused him and H.B. had been removed from the foster home following the disclosure. H.B. was returned to the foster home but he was later removed permanently. The

family court issued a show cause order in September 2009, seeking additional information from DCF. DCF and mother's attorney filed responses, and mother moved for relief from final judgment under Vermont Rule of Civil Procedure 60(b). In her motion, mother questioned whether the children's placement options were in their best interests and whether DCF had minimized the risks of such placements to "expedite the termination" of mother's rights and to achieve permanency for the children. She asked the court to vacate the termination order and reopen the case for further discovery.

In February 2010, the court denied mother's motion. It recounted the following uncontested facts. Sometime in December 2008, H.B. was sexually assaulted by his foster brother. H.B. disclosed the abuse on January 20, 2009, stating that on three occasions his foster brother had shown him pornography on a home computer and that the foster brother had shown H.B. his penis and/or they had rubbed penises together. H.B. was removed from the foster home that night. The foster brother was charged in criminal court in April 2009 and was placed on probation in juvenile court as a youthful offender. H.B. disclosed the abuse shortly before the TPR hearing concluded on January 23, 2009. DCF knew of H.B.'s disclosure and his temporary removal from the foster home, but failed to disclose it to the court or to the parties. The court was particularly concerned by DCF's portrayal at trial of the close relationship between H.B. and his foster brother. The court explained that DCF had elicited testimony from the foster mother, several days before H.B.'s disclosure, about the positive relationship between the two boys, and the foster mother testified that H.B. seemed to be flourishing in his home, school, and community. The court noted that it had made findings in its order about H.B.'s bond with his foster family and his living situation, and that this Court had noted the bond in affirming the TPR order.

Nonetheless, the court found no basis to vacate its 2009 decision terminating mother's rights. Mother claimed in her Rule 60 motion that DCF had been anxious to preserve H.B.'s placement in the foster home at all costs while the TPR was pending. She noted DCF's efforts to reintegrate H.B. back into the foster home following his disclosure of abuse. Given H.B.'s overriding need for security and stability due to his chaotic life while in mother's care, the court found that DCF was justified in making substantial efforts to preserve H.B.'s long-term foster placement if it could be done safely. The court thus concluded that mother's argument missed the mark of a potential Rule 60 issue. The court expressed its frustration that DCF had failed to timely provide this information, but reasoned that counsel's lack of candor, when balanced against the strong weight of the evidence of mother's unfitness, the unassailable fact that mother could not resume parental duties to H.B. within a reasonable period of time, and the fact that mother had not played a constructive role, nor had she provided personal contact or emotional support and affection for H.B. for a very long period prior to the TPR hearing, compelled the conclusion that the case should not be reopened. The evidence against mother at the TPR hearing was overwhelming, the court explained, and DCF's nondisclosure and the actual abuse of H.B. in the foster home did not outweigh the other, very compelling, evidence that termination of mother's rights was in H.B.'s best interests. Mother appealed from this order.

Mother argues that the court erred in denying her motion. She maintains that the court should not have focused only on H.B.'s disclosure of abuse and his removal from the foster home but should have also reconsidered DCF's evidence more generally. She suggests there may be some link between the court's finding that H.B. had bonded with his foster family and its conclusion that she was unable to parent H.B. Finally, mother argues that the court overlooked its obligation to base its decision on "the current circumstances of the family." According to mother, when the court became aware of H.B.'s disclosure of abuse, it should have reopened the proceedings to receive and assess accurate information regarding H.B.'s current circumstances.

We find no error. Rule 60(b) allows the trial court to relieve a party from a final judgment for a variety of reasons. The trial court has wide discretion in ruling on such motions, and we will affirm the court's denial of such motion "unless the moving party shows that the court abused its discretion." John A. Russell Corp. v. Bohlig, 170 Vt. 12, 24 (1999). As we have emphasized, "[t]he rule is not an open invitation to reconsider matters concluded at trial, but should be applied only in extraordinary circumstances." Id. (quotation omitted). Mother fails to demonstrate an abuse of discretion here.

The family court explained in detail why DCF's failure to disclose H.B.'s abuse did not undermine the court's earlier conclusion regarding mother's parental shortcomings. We reject mother's generalized assertion that DCF's action somehow draws in question all of the evidence presented at the TPR hearing. In denying the motion to reopen, the family court specifically found the evidence presented at the TPR hearing regarding mother's parental unfitness to be strong and unassailable. Mother identifies no specific evidence regarding her behavior that should be considered suspect as a result of DCF's failure to report H.B.'s disclosure of abuse. Indeed, we note that mother failed to challenge the majority of the family court's factual findings in her appeal of the TPR decision. See In re K.B., 2009 WL 2480125. We recognized in that case the extensive unchallenged evidence showing that mother had exposed the children to domestic violence, drug abuse, and violent individuals, and that she had physically abused the children and chronically neglected them. The family court's termination decision did not rest on its finding that H.B. shared a bond with his foster family, and that finding has no bearing on the court's conclusion that mother could not parent H.B. As the family court stated in denying mother's Rule 60 motion, the evidence of mother's parental unfitness is overwhelming. Finally, we reject mother's contention that the court failed to base its decision on H.B.'s "current circumstances." In re C.B., 162 Vt. 614, 614 (1994). Mother does not appear to have raised this specific argument below. In any event, the record shows that when additional information about H.B.'s foster home was brought to the family court's attention, the court evaluated that information and determined that it in no way called into question its earlier decision that termination of mother's rights was in H.B.'s best interests. We find no error in the court's decision.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Brian L. Burgess, Associate Justice