

No. COA05-363

26th Judicial District

NORTH CAROLINA COURT OF APPEALS

IN THE MATTER OF:)	<u>From Mecklenburg County</u>
)	
L.C., and)	01-J-1257, 01-J-1258
A.N.)	
Minor Children)	
)	

BRIEF FOR THE GUARDIAN AD LITEM AS APPELLEE

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STATEMENT OF THE CASE

This is a case of a party who is attempting to re-litigate a matter based upon a claim of ineffective assistance of counsel. On June 1, 2004, a three-judge panel of this Court filed an opinion affirming the trial court's order terminating Appellant/Mother's parental rights to her children, L.C. and A.N. (R. p. 36). This opinion was the culmination of nearly four years of legal proceedings that began when the Mecklenburg County Department of Social Services ("DSS") filed neglect and dependency petitions for both children. (R. p. 17). Despite the apparent finality of the trial court's ruling terminating Respondent/Mother's rights to the children, this case is now before this Court again, in an attempt to circumvent the Court's June 1, 2004 opinion.

STATEMENT OF THE FACTS

At the heart of this case are two little girls, L.C. and A.N. As of the date of this brief, L.C. is now nine years old, and her sister, A.N., is almost five years old. (R. p. 17). These two girls have been in the Mecklenburg County Department of Social Services' ("DSS") custody for more than four (4) years, and the adoption petitions DSS filed on October 11, 2004 have been stayed pending this appeal. (R. p. 14, R. p. 130, Supp. R. p. 17-20). Respondent/Mother's conduct in continuing to litigate this matter has

resulted in additional delays in the permanent placement of these two young children.

STANDARD OF REVIEW

An appeal from a Rule 60 motion is “limited to a determination of whether the court abused its discretion” in denying the movant relief from judgment. *Gentry v. Hill*, 57 N.C. App. 151, 154, 290 S.E.2d 777, 779 (1982). The abuse of discretion standard of review is an exacting one, as this Court has noted:

"[O]ur Supreme Court has indicated that this Court cannot substitute 'what it considers to be its own better judgment' for a discretionary ruling of a trial court, and that this Court should not disturb a discretionary ruling unless it 'probably amounted to a substantial miscarriage of justice.'" *State ex rel. Environmental Management Comm'n v. House of Raeford Farms, Inc.*, 101 N.C. App. 433, 448, 400 S.E.2d 107, 117 (1991)(quoting *Worthington v. Bynum*, 305 N.C. 478, 486-87, 290 S.E.2d 599, 604-05 (1982)). "The findings of fact by the trial court are binding on appeal if supported by competent evidence." *Royal v. Hartle*, 145 N.C. App. 181, 182, 551 S.E.2d 168, 170 (2001).

Surles v. Surles, 154 N.C. App. 170, 174, 571 S.E.2d 676, 678

(2002)(some internal citations omitted). “A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a

reasoned decision.” *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

The trial court’s ruling in this case is the result of a reasoned decision. The trial court correctly held that a Rule 60(b) motion is “not to be used as a substitute for appellate relief” or as a means to “circumvent [an] adverse decision by the North Carolina Court of Appeals.” (*See R. p.* 118). Further, the trial court, within its discretion, properly found that it lacked jurisdiction to hear the merits of a challenge to the original termination proceedings.

ARGUMENT

In its order denying Respondent-Mother’s Rule 60(b) motion, the district court correctly held that a Rule 60(b) motion is not the proper mechanism for achieving review of a duly filed appellate opinion. Further, the district court properly found that it lacked jurisdiction over the subject matter of the Rule 60 motion. The district court also properly refused to admit evidence on the substantive issues from the termination of parental rights hearing underlying the Rule 60 motion because such evidence is not relevant to the issue of the validity of the Rule 60 motion or a motion pursuant to N.C.G.S. § 7B-1113.

Even if this Court were to hold that a litigant may use Rule 60(b) as a means to modify a prior appellate court ruling, Respondent-Mother's Rule 60(b) motion fails because she has not alleged facts or conduct sufficient to justify either a new hearing on the Rule 60 motion or vacating the underlying order terminating parental rights.

**I. THIS COURT SHOULD DISMISS
RESPONDENT/MOTHER'S APPEAL IN THIS CASE
BECAUSE RULE 60 MAY NOT BE USED AS A
SUBSTITUTE FOR APPEAL AND N.C.G.S. § 7B-1113
DOES NOT PROVIDE FOR DISTRICT COURT REVIEW
OF AN ORDER TERMINATING PARENTAL RIGHTS**

**A. North Carolina Courts Have Uniformly Rejected The Use
Of Rule 60(b) As A Substitute For An Appeal.**

In support of its argument, Appellee Guardian ad Litem ("GAL") adopts and incorporates herein the arguments contained in Appellees' Memorandum In Support Of Motion To Dismiss Appellant's Appeal, For An Immediate Ruling And For Sanctions Pursuant To Rule 34 Of The North Carolina Rules Of Civil Procedure ("Motion to Dismiss Appeal"). (See Exhibit A hereto, p. 3-4).

Appellant-Mother, in her brief, argues that Rule 60 of the North Carolina Rules of Civil Procedure "permits the trial court to modify its orders and judgments even after those orders and judgments have been

subjected to appellate review.” (Resp. p. 7-8).¹ This argument is disingenuous. Respondent-Mother cites no North Carolina cases that hold that a trial court may disregard a duly filed opinion of the North Carolina Court of Appeals.

Appellant-Mother does cite the case of *Poston v. Morgan*, 83 N.C. App. 295, 350 S.E. 2d 108 (1986) for the proposition that “the trial court had the authority and obligation to grant the movants relief from a prior trial court order under Rule 60(b)(5).” (Resp. p. 8). What Appellant-Mother fails to mention is that the trial court in *Poston* was addressing a dismissal of four appeals – appeals that no appellate court ever considered. *See id.* at 297, 350 S.E.2d at 109. In the case at bar, this Court entered an opinion affirming the actions of the trial court in entering an order terminating Respondent-Mother’s parental rights. Respondent-Mother cites no case law which addresses the issue of whether a trial court can “overrule” the duly filed opinion of a North Carolina appellate court because no case law so holds.

B. N.C.G.S. § 7B-1113 Cannot Be Used As A Basis To Conduct Additional Hearings Regarding The Validity Of

¹ Appellant-Mother’s appellate brief dated May 6, 2005 is herein referred to as “Resp. p. ____.”

An Order Terminating Parental Rights.

Respondent-Mother argues that N.C.G.S. § 7B-1113 gives the district court authority to modify or vacate the order terminating parental rights in this case. (Resp. p. 10). This statute was, in part, the basis for Respondent-Mother's motion, which is the subject of this appeal. (R. p. 6).

Respondent-Mother's reliance upon this statute is misplaced.

This Court, in *In the Matter of Montgomery*, 77 N.C. App. 709, 336 S.E.2d 136 (1985), affirmed the denial of a motion to modify a judgment in a termination of parental rights under the prior version of N.C.G.S. § 7B-1113.² In *Montgomery*, this Court wrote:

We do not interpret this statute as creating . . . another review proceeding of an order terminating parental rights. Rather, the statute allows the District Court, in its discretion, to modify the original order to reflect any change in circumstances or adjustment *by the child* while the case on appeal was pending.

Id. at 712-13, 336 S.E.2d at 139. (emphasis added).

While N.C.G.S. § 7B-1113 gives the trial court the ability to modify an order pending appellate review in order to affect the best interests of the child, it does not serve as the basis for a parent to challenge an order terminating parental rights.

² That statute, G.S. § 7A-289.34, is substantially the same as the current statute, N.C.G.S. § 7B-1113.

II. THE TRIAL COURT PROPERLY FOUND THAT IT LACKED JURISDICTION TO RULE ON THE MERITS OF RESPONDENT-MOTHER'S RULE 60 MOTION BECAUSE JURISDICTION RESTS WITH THE MECKLENBURG COUNTY SUPERIOR COURT.

The trial court correctly found that a Rule 60(b) motion was inappropriate where an appeal had been duly perfected, and the Court of Appeals had filed its opinion affirming that order. As additional support for its denial of Respondent-Mother's Rule 60 motion, the trial court found that it had no jurisdiction to grant relief because jurisdiction is vested solely in the Superior Court upon filing of the adoption petitions. (R. p. 118-119). The trial court was correct in its assessment of jurisdiction over this case.

Respondent-Mother's argument that the trial court in this case had jurisdiction to hear the Rule 60 motion rests upon N.C.G.S. § 48-2-100(c) and § 48-2-102(b). This argument fails for two reasons: (1) N.C.G.S. § 48-2-100(c) (2004) does not apply to cases in which jurisdiction rests solely with the State of North Carolina; and (2) the trial court waived its limited jurisdiction to hear the Rule 60 motion pursuant to N.C.G.S. § 48-2-102(b) (2004).

N.C.G.S. § 48-2-100(c) is not meant to resolve issues of jurisdiction of courts within the State of North Carolina but, rather, to govern issues of

jurisdiction where several states are involved. N.C.G.S. § 48-2-100(c) provides:

The courts of this State shall not exercise jurisdiction under this Chapter if at the time the petition for adoption is filed, a court *of any other state* is exercising jurisdiction substantially in conformity with the Uniform Child Custody Jurisdiction and Enforcement Act...

Id. (emphasis added). This statutory language is meant to bring North Carolina into compliance with the requirements of the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”), which was enacted to promote uniform enforcement of provisions in interstate visitation and child custody cases. *See, generally*, 9 U.L.A. 657 (1999). The statute was not meant to apply to issues of intrastate jurisdiction.

Respondent-Mother’s argument that N.C.G.S. § 48-2-102(b) requires the trial court to retain jurisdiction also fails. Although this statute allows a district court to retain jurisdiction while an adoption proceeding is pending, the statute specifically provides that “[t]he district court may *waive* jurisdiction for good cause.” *Id.* (emphasis added).

The district court in this case did not explicitly state that it was waiving jurisdiction in its order denying the Rule 60 motion. However, its findings that “Rule 60 is not appropriate for this situation” and that, “Rule 60 grants relief from trial court judgments, not from appellate court

decisions,” indicate that the court felt that “good cause” to relieve itself of jurisdiction over the case existed pursuant to N.C.G.S. § 48-2-102(b). (R. p. 118). For these reasons, the trial court properly found it had no jurisdiction to entertain Respondent-Mother’s motion.

III. THE TRIAL COURT PROPERLY DENIED RESPONDENT-MOTHER THE OPPORTUNITY TO PRESENT EVIDENCE AND TESTIMONY IN SUPPORT OF HER MOTION BECAUSE THAT EVIDENCE IS NOT RELEVANT TO A RULING ON HER MOTION PURSUANT TO N.C.G.S. § 7B-1113.

In this case, the District Court properly declined to hear evidence on Respondent-Mother’s motion pursuant to N.C.G.S. § 7B-1113 (2004). This Court has held that:

When a motion for modification is made, pursuant to [N.C.G.S. § 7B-1113], it is . . . within the discretion of the court to hear, or to decline to hear, evidence in support of the motion. Unless the refusal to take additional evidence amounts to an abuse of discretion, the trial court’s exercise of its discretion in excluding such evidence should not be disturbed on appeal.

Montgomery, 77 N.C. App. at 712-13, 336 S.E.2d at 139.

Here, the trial court properly declined to hear evidence in support of a hearing which, as discussed above in Section I(B) above, was not appropriately brought pursuant to N.C.G.S. § 7B-1113.

IV. ABSENT A PRIMA FACIE SHOWING THAT A RULE 60(b)(6) MOTION IS PROPER, IT IS NOT NECESSARY

**FOR A TRIAL COURT TO HEAR EVIDENCE ON THE
SUBSTANTIVE ISSUES.**

- A. A Rule 60(b)(6) movant must demonstrate that: (1) extraordinary circumstances exist to justify invoking the Rule; (2) justice demands the court grant the motion; and (3) a meritorious defense to the underlying judgment exists.**

In analyzing claims pursuant to Rule 60(b)(6), a movant must show:

(1) that extraordinary circumstances exist to justify invocation of the Rule
(2) that justice demands such extraordinary relief, and (3) the existence of a meritorious defense. *Gibby v. Lindsey*, 149 N.C. App. 470, 474, 560 S.E.2d 589, 592 (2002). *See, e.g., In the Matter of Oxford Plastics*, 74 N.C. App. 256, 259, 328 S.E.2d 7, 9 (1985); *Baylor v. Brown*, 46 N.C. App. 664, 266 S.E. 2d 9 (1980). A demonstration of a meritorious defense involves consideration of “whether the movant has, in good faith, presented by his allegations, *prima facie*, a valid defense.” *Carolina Bank, Inc. v. Northeastern Ins. Fin. Co.*, 25 N.C. App 211, 212, 212 S.E. 2d 552, 553 (1975). The existence of a meritorious defense, therefore, is not dependent upon presentation of evidence. A meritorious defense is determined by reviewing the motion itself to see if, on its face, the motion states a claim for relief pursuant to Rule 60(b)(6).

If all three of the above elements exist to justify modification of the judgment, the reviewing court must also consider:

[T]he general desirability that a final judgment not be lightly disturbed, . . . where relief is sought from a judgment of dismissal or default, the relative interest of deciding cases on the merits and the interest in orderly procedure, . . . the opportunity the movant had to present his claim or defense, and . . . any intervening equities.

Id. See also *Espaillet v. Continental Express, Inc.*, No. 99-CV-6173 CJS, 2003 U.S. Dist. LEXIS 18516, *6 (W.D.N.Y. 2003) (“Properly applied, [Rule 60(b)] preserves a balance between serving the ends of justice and ensuring that litigation reaches an end within a finite period of time.”).³

In the case now before this Court, the trial court properly refused to permit Respondent-Mother to introduce evidence of the underlying termination of parental rights hearing and properly found that Respondent-Mother was not entitled to invoke Rule 60(b)(6).

B. Respondent-Mother has not made a prima facie showing that a Rule 60(b)(6) motion is proper in this case.

Respondent-Mother asserts that her motion invoked the “general, equitable relief afforded by Rule 60(b)(6) of the North Carolina Rules of Civil Procedure.” (Resp. p. 7). Respondent-Mother herself acknowledges the high burden of proof required under this subsection of the Rule.

However, Respondent incorrectly asserts that she is entitled to present

³ All unpublished cases cited herein are attached as Appendix A hereto.

evidence on the underlying, substantive factual issues of the termination of parental rights hearing.

The proof to be presented in support of a Rule 60(b)(6) motion is proof that a legal basis for the motion exists. In this case, Respondent-Mother's entire Rule 60(b)(6) motion hinges upon her claims of ineffective assistance of counsel or negligence on the part of her attorney. Without addressing the issue of negligence or ineffective assistance of counsel, Respondent-Mother's motion contains no basis for demonstrating "extraordinary circumstances," let alone the requirements that "justice demands relief" or that a "meritorious defense" exists. The difficulty with Respondent-Mother's ineffective assistance of counsel argument is that, even if proven, it does not serve as a basis for relief pursuant to Rule 60(b) under any of the Rule's sections.

North Carolina courts have consistently denied parties relief for negligence on the part of counsel, and courts have done so to ensure that a party is "responsible in protecting his own case rather than simply handing the full responsibility over to the attorney." *Henderson v. Wachovia Bank*, 145 N.C. App. 621, 626, 551 S.E.2d 464, 468 (2001). *See, e.g., Briley v. Farabow*, 348 N.C. 537, 501 S.E.2d 649 (1998); *Smith v. Quinn*, 324 N.C. 316, 378 S.E.2d 28 (1989). In *Henderson, supra*, a panel of this Court

refused to grant the movant relief from judgment under Rule 60(b) based upon alleged attorney negligence, which the movant claimed was tantamount to fraud. This Court, citing the North Carolina Supreme Court, wrote that to allow a party relief based upon attorney negligence would encourage litigants to use that alleged negligence as a means of avoiding court rules and deadlines. *See id.* at 626, 551 S.E.2d at 468. This Court went on to write, “It would be too tempting for a party to extricate himself from legal difficulties by claiming insulation from an attorney’s negligence, leading to ‘undesirable results.’” *Id.* (citation omitted).⁴

Notably, the *Henderson* Court affirmed the trial court’s refusal to conduct a full evidentiary hearing on the issue of attorney negligence. *See id.* at 624, 551 S.E.2d at 467. This Court held the trial court was within its discretion in ruling on the Rule 60 motion based upon the motion itself, with attachments. *See id.* at 627, 551 S.E.2d at 469.

Based upon the allegations contained in her Rule 60 motion, Respondent-Mother presented no allegations that would permit the trial court to grant her relief from judgment. This would be the case even if all the allegations in Respondent-Mother’s motion were taken as true.

⁴ On this point, a careful review of the district court record in this case reveals that Respondent/Mother has engaged several attorneys to represent her in the case at bar. (*See* Motion to Dismiss, p. 2, attached as Exhibit A hereto).

V. THIS COURT SHOULD REJECT RESPONDENT MOTHER’S USE OF RULE 60(b) IN THIS CASE, BECAUSE USE OF THE RULE IN THIS MANNER IS CONTRARY TO PUBLIC POLICY.

There are sound public policy concerns that militate against permitting Respondent-Mother to prevail in this appeal. A policy of permitting a litigant to relitigate issues already decided and upheld on appeal would add to the already lengthy delays inherent in the appellate process. Delays in abuse, neglect and dependency proceedings would not be in the best interests of the children the North Carolina courts are sworn to protect. *See, e.g., In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 251 (1984) (“[T]he best interest of the child is the polar star.”).

There is a child, or children, at the root of each abuse, neglect or dependency proceeding. Each child has a right to a safe, permanent placement. *See* N.C.G.S. § 7B-907(a). In *In the Matter of B.N.H.*, ____ N.C. App. ____, 611 S.E.2d 888 (2005), this Court recognized that a party should not be allowed “to frustrate and delay a trial court’s ability to achieve permanency for children by means of endless appeals.” *Id.* at *5, 611 S.E.2d at 890. This Court should now refuse to permit parties to assert ineffective assistance of counsel or similar claims in order to circumvent the authority of this Court

when this Court does not reach the parties' desired result. *See Henderson, supra.*

CONCLUSION

For foregoing reasons, the Guardian ad Litem Attorney Advocate respectfully asks this Court to affirm the order of the trial court denying Respondent-Mother's Motion pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure. The Guardian ad Litem Attorney Advocate also asks this Court to direct the Mecklenburg County Superior Court to lift the stays in the adoption proceedings and allow these two young children to achieve permanency with their adoptive parents.

Respectfully submitted this the _____ day of June, 2005.

By: _____
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the foregoing **BRIEF FOR THE GUARDIAN AD LITEM AS APPELLEE** was served by enclosing the same in an envelope, with postage fully prepaid and by depositing said envelope in a United States Post Office mailbox, addressed to:

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EXHIBIT “A”

APPENDIX “A”