IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 42179

IN THE MATTER OF THE TERMINATION OF THE PARENTAL RIGHTS OF JANE (2014-13) DOE.	)	
IDAHO DEPARTMENT OF HEALTH & WELFARE,	)	**2014 Unpublished Opinion No. 780**
Petitioner-Respondent,	)	**Filed: October 22, 2014**
v.	)	**Stephen W. Kenyon, Clerk**
JANE (2014-13) DOE,	)	**THIS IS AN UNPUBLISHED OPINION AND SHALL NOT BE CITED AS AUTHORITY**
Respondent-Appellant.	)	

Appeal from the Magistrate Division of the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Cathleen MacGregor-Irby, Magistrate.

Amended judgment denying motion to set aside default judgment and reinstate answer, affirmed.

Ellsworth Kallas & DeFranco, PLLC; Joseph L. Ellsworth, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Mary Jo Beig, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Chief Judge

Jane (2014-13) Doe appeals from the judgment of the magistrate denying her motion to set aside the default judgment and reinstate her answer. For the reasons that follow, we affirm.

I.
FACTS AND PROCEDURE

Jane Doe (Mother) was arrested on charges of felony injury to child, felony driving under the influence, felony aggravated assault on a police officer, and felony eluding. Mother's then four-and-one-half-year-old child (the child), who was in the vehicle with Mother during the commission of the alleged crimes and with Mother when she was arrested, was declared to be in imminent danger and placed in foster care. During the pendency of the Child Protective Act proceedings, Mother pled guilty to felony operating a motor vehicle while under the influence,

felony eluding a peace officer, and misdemeanor injury to children. Mother was sentenced to a combined, unified sentence of fifteen years, with three years determinate.

In the Child Protective Act proceedings, Mother and the child's father stipulated to the child being placed in the legal custody of the Idaho Department of Health and Welfare (the Department). The child's father later signed a form voluntarily consenting to termination of his parental rights. Eventually, the State moved the court to place the child with the child's out-of-state maternal uncle and his wife; no party objected, and the court granted the motion. Subsequently, the State petitioned for a permanency hearing. At the permanency hearing, the State recommended that Mother's parental rights be terminated and that the child be adopted. The court entered an order permitting the Department to petition to terminate Mother's parental rights and approving adoption as the permanent plan. The State then filed a petition for termination of Mother's parental rights and scheduled a hearing, and Mother filed an answer.

Approximately two weeks before the termination hearing, Mother's attorney informed Mother that the out-of-state uncle no longer wished to accept the child--the child had not yet been moved out of state and was still in foster care in Idaho. Mother then filed a motion to amend the permanent plan, requesting that the court extend foster care or grant guardianship. In that motion, Mother recalled that the Department's recommendation of termination was based upon the maternal uncle's interest in adopting the child. At the termination hearing, Mother's attorney first addressed the motion to amend the permanent plan, but the magistrate denied the motion. Mother's attorney then informed the court that Mother wished to withdraw her answer and proceed by default, but he also informed the court that Mother wished to give a statement. Mother then made a statement to the court and read a letter that her mother wrote. The magistrate withdrew Mother's answer and excused Mother from the courtroom. Relying on a report submitted by the Department, the magistrate found two statutory grounds for terminating Mother's parental rights, Idaho Code § 16-2005(1)(d) and (e), had been shown by clear and convincing evidence and determined, by clear and convincing evidence, that it would in the best interest of the child to terminate Mother's parental rights. The magistrate subsequently entered findings of fact and conclusions of law, along with an order terminating Mother's parental rights.

Nearly six months after the termination hearing, Mother filed an Idaho Rule of Civil Procedure 60(b) motion to set aside the default judgment and reinstate the answer, citing I.R.C.P. 55(c) and 60(b). Although the magistrate initially denied the motion, Mother later filed a

memorandum and an affidavit in support of her motion. The magistrate set aside the denial of Mother's Rule 60(b) motion and scheduled a hearing at which she testified. Following the hearing, the magistrate issued a memorandum decision and order denying Mother's Rule 60(b) motion. Mother appeals.

II.

ANALYSIS

Mother argues that the magistrate abused its discretion by denying Mother's Rule 60(b) motion. Specifically, Mother contends that she was entitled to relief under I.R.C.P. 60(b)(1), 60(b)(2), and 60(b)(6), which provide:

> [A] court may relieve a party or his legal representative 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 move for a new trial under Rule 59(b); . . . or (6) any other reason justifying relief from the operation of the judgment.

Furthermore, our case law instructs that a party seeking relief must also plead or present evidence of facts which, if established, would constitute a meritorious defense to the action. *Maynard v. Nguyen*, 152 Idaho 724, 726, 274 P.3d 589, 591 (2011); *Ponderosa Paint Mfg., Inc. v. Yack*, 125 Idaho 310, 317, 870 P.2d 663, 670 (Ct. App. 1994).

A Rule 60(b) motion is not a substitute for an appeal, and the decision on a Rule 60(b) motion is committed to the discretion of the trial court. *In re Jane Doe, I*, 145 Idaho 650, 651, 182 P.3d 707, 708 (2008). Accordingly, we review a trial court's decision whether to grant relief under Rule 60(b) for an abuse of discretion. *Id.* When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the court reached its decision by an exercise of reason. *Id.*; *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

A. Relief Under Rule 60(b)(1)

Mother contends that the magistrate abused its discretion by denying Mother's Rule 60(b) motion because her attorney at the termination hearing committed excusable neglect. A trial

court may relieve a party from a final judgment on the ground of excusable neglect. I.R.C.P. 60(b)(1); *Suitts v. Nix*, 141 Idaho 706, 708-09, 117 P.3d 120, 122-23 (2005). "The conduct constituting excusable neglect must be that which would be expected of a reasonably prudent person under the same circumstances." *Suitts*, 141 Idaho at 709, 117 P.3d at 123.

In her memorandum in support of her Rule 60(b) motion, Mother contended that her attorney was "surprised" by the placement disruption and thus failed to seek a continuance of the termination trial. According to Mother, this failure to seek a continuance was excusable neglect. The magistrate disagreed, explaining that Mother's testimony at the termination hearing demonstrated that her attorney knew of the disrupted placement "at least two weeks before trial." Furthermore, the magistrate found that Mother's attorney did not commit neglect but rather, implemented a strategy to seek a change to the permanency plan that, if granted, would have ended the need for a termination hearing.

On appeal, Mother reiterates that her attorney was surprised by the placement disruption and did nothing to prepare for or continue the termination hearing.[1] The State asserts that the magistrate did not abuse its discretion by denying the motion because Mother's own testimony was that she and her attorney discussed the placement disruption weeks before the termination hearing. Moreover, the State notes that Mother's attorney, consistent with his legal strategy, filed a motion to amend the permanent placement decision.

The information submitted by Mother and her attorney in support of the motion to withdraw her answer, as well as her testimony in support of setting aside the default judgment, does not support Mother's contention that her attorney was surprised by the placement disruption. Mother's testimony at the hearing on her Rule 60(b) motion was that her attorney informed her of the placement disruption at least fourteen days before the termination hearing. Therefore, Mother's attorney knew of the placement disruption at least fourteen days before the termination hearing. As to Mother's contention that her attorney was unprepared for the termination hearing, Mother's attorney informed the court at the termination hearing that Mother's decision to withdraw her answer and allow a default judgment was "a decision that the

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[1] Mother also invites this Court to consider the voluntariness of Mother's consent to termination in light of the excusable neglect, an issue she did not raise below. We do not consider this issue because, generally, issues not raised below may not be considered for the first time on appeal. *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991).

mother and I have been in consultation about for several weeks now." In addition, the attorney noted there were "[s]everal jail visits, several hours of time, either visiting in person or over the phone discussing this and discussing the pros and cons of her circumstances and her relationship." Mother also informed the court at the termination hearing that she was "choosing the default option." These statements were seemingly credited by the magistrate in initially granting Mother's motion to withdraw her answer, given the magistrate's analysis in the memorandum decision denying Mother's Rule 60(b) motion. The magistrate discredited contradictory statements in Mother's testimony at the Rule 60(b) hearing. On appeal, we are cognizant that it is "the province of the trier of fact to weigh conflicting evidence and testimony and to judge the credibility of witnesses." *Sun Valley Shamrock Res., Inc. v. Travelers Leasing Corp.*, 118 Idaho 116, 118, 794 P.2d 1389, 1391 (1990). Finally, as to Mother's contention that her attorney did nothing to continue the termination hearing, the record reveals that her attorney utilized a different strategy with the placement disruption. Mother's attorney filed a motion to amend the permanent plan, discussing the placement disruption and moving the court to grant a short extension of foster care or to grant guardianship. As the magistrate noted, a change in the permanency plan from termination to guardianship would have removed the need for a termination hearing. In sum, the magistrate did not abuse its discretion by finding that Mother's attorney had not committed neglect and thus had not satisfied the Rule 60(b)(1) requirement of excusable neglect.

B. Relief Under Rule 60(b)(2)

Mother further contends that the magistrate abused its discretion by denying Mother's Rule 60(b) motion because of newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial. A trial court may relieve a party from a final judgment on the ground of newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial. *Foster v. Kootenai Med. Ctr.*, 143 Idaho 425, 428, 146 P.3d 691, 694 (Ct. App. 2006). The party seeking relief on this basis must show that the proffered information is material to the outcome of the case. *Id.* That is, "the newly discovered evidence must be able to produce a different result at trial." *Doe, I*, 145 Idaho at 652, 182 P.3d at 709.

In her memorandum in support of her Rule 60(b) motion, Mother contended that the newly discovered evidence was the "change of placement ten days prior to [the termination

hearing], and, accordingly, [Mother] should have been afforded an opportunity to prepare for a termination trial." The magistrate determined that the placement disruption was known by Mother and her attorney prior to the termination hearing and was not material to the outcome of the hearing because the information was irrelevant to the issue of whether Mother's parental rights should be terminated. On appeal, Mother contends that the information of the placement disruption "had a direct bearing on her decision to consent to termination, or try the case." The State maintains that the magistrate did not abuse its discretion by denying Mother relief under Rule 60(b)(2) because the evidence was known by Mother and her attorney well before the termination hearing, and the State, citing *Doe, I*, contends that the information is immaterial.

In this case, based on Mother's own testimony, the placement disruption information was "discovered" by Mother at least two weeks *before* the termination hearing. Therefore, the placement disruption information would not qualify as newly discovered evidence and would not satisfy the requirements of Rule 60(b)(2). *See Roberts v. Bonneville Cnty.*, 125 Idaho 588, 592, 873 P.2d 842, 846 (1994) (explaining that a Rule 60(b)(2) motion has certain factors that must be met, including that the evidence be discovered *since* the trial).

Even if the information on the placement disruption was newly discovered evidence, it is not material to the outcome of the termination hearing. The Idaho Supreme Court encountered a similar claim of certain information being material to a termination hearing in *Doe, I*. In *Doe, I*, Jane Doe's rights were terminated. After her parental rights were terminated, Jane Doe discovered that the foster license of the foster placement family had been revoked. The foster license was revoked due to an alleged (and later substantiated) claim of child abuse on a child in the foster home, but not her own child. After Jane Doe filed a motion to reinstate her parental rights due to newly discovered evidence, the court conducted a hearing and denied the motion. The magistrate in that case determined that the alleged new evidence did not materially change the finding that it was in the child's best interest to terminate Jane Doe's parental rights. On appeal, the Idaho Supreme Court discussed Jane Doe's argument that the information was material:

> Jane Doe has not made a showing that the physical abuse on another child in the foster family is relevant to the issue of her own character and fitness as a parent. The trial court expressly stated that it was in [the child's] best interest for Jane Doe's parental rights to be terminated. The character and fitness of the foster family goes towards the issue of whether they are fit to adopt [the child], but does not weigh on Jane Doe's fitness as a parent.

Doe, I, 145 Idaho at 652, 182 P.3d at 709. Similarly unavailing is Mother's claim that the information about the placement disruption is material. The child's placement is not a factor for the court to consider when determining if grounds for termination have been shown. *See* I.C. § 16-2005. Although Mother attempts to extend her argument beyond the purview of *Doe, I*, by purporting that the information of the placement disruption would have impacted Mother's decision to consent to termination, the alleged newly discovered evidence does not go to the relevant issues of whether Mother was unable to discharge parental responsibility and whether termination was in the best interest of the child. Again, she knew of this information two weeks before the scheduled termination hearing and discussed the information at length with her attorney. In sum, the magistrate did not abuse its discretion by denying Mother relief under I.R.C.P. 60(b)(2) upon finding that information of the placement disruption was not newly discovered evidence and was immaterial to the termination action.

C. Relief Under Rule 60(b)(6)

Finally, Mother submits that the magistrate abused its discretion by denying Mother's Rule 60(b) motion because she was incarcerated during the course of the proceeding, making it difficult for her to access the court system. A trial court may grant relief from a judgment for "any other reason justifying relief from the operation of the judgment." I.R.C.P. 60(b)(6). In order to grant relief, the party seeking relief must show unique and compelling circumstances. *Profits Plus Capital Mgmt., LLC v. Podesta*, 156 Idaho 873, 886, 332 P.3d 785, 798 (2014).

In her memorandum in support of her Rule 60(b) motion, Mother argued that her ability to access the court system through her attorney was limited to brief contact with the attorney. Mother argued that this, in conjunction with the placement disruption, "pressured [her] into consenting to a default termination trial." The magistrate determined that Mother was not pressured into default, finding that Mother's attorney was with her at every stage of the proceeding, that the attorney met with her in person and by phone before the termination hearing, and that the attorney was with Mother when she voluntarily consented to withdraw her answer and allow the termination to proceed by default. After listing many statements made by Mother at the termination hearing, the magistrate noted that the statements "clearly show that the Mother knew she was proceeding by default and as a result her rights would be terminated." The magistrate also addressed statements made by Mother at the Rule 60(b) hearing concerning

Mother's perception that she was being pressured by the Department not to proceed with a termination hearing because the Department would place the child with strangers. The magistrate found nothing in the record to support Mother's perception and found that the record contained evidence and testimony demonstrating that the Department would look at her family and fictive kin as adoptive placements regardless of whether she proceeded to a termination hearing or withdrew her answer and permitted the termination to proceed by default.

On appeal, Mother reiterates that because of the limited contact with her attorney due to her incarceration, and because of the placement disruption, she was pressured into consenting to default.[2] The State maintains that the magistrate did not abuse its discretion by denying relief because the magistrate considered the record and Mother's testimony before ruling on the matter; in short, the State notes that the record is devoid of any showing of unique and compelling circumstances.

As discussed above, Mother's attorney was present with Mother at the termination hearing. Mother's attorney informed the court, in support of the motion to withdraw her answer, that Mother's decision to withdraw her answer and allow a default judgment was "a decision that the mother and I have been in consultation about for several weeks now." In addition, the attorney noted there were "[s]everal jail visits, several hours of time, either visiting in person or over the phone discussing this and discussing the pros and cons of her circumstances and her relationship." Accordingly, Mother failed to demonstrate unique and compelling circumstances that would justify relief under Rule 60(b)(6), and the magistrate did not abuse its discretion by denying Mother relief under Rule 60(b)(6).

D. Meritorious Defense

As noted above, our case law requires that a party plead or present evidence of facts which, if established, would constitute a meritorious defense to the action (the termination of Mother's parental rights). *McLean v. Cheyovich Family Trust*, 153 Idaho 425, 429-30, 283 P.3d 742, 746-47 (2012). The meritorious defense requirement is a pleading requirement and not a

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[2] In her appellate brief, Mother avers, "the magistrate completely ignored the due process concerns of the mother despite the lack of any evidence offered by the state or guardian in response to her motion." Mother continues with an argument that due process was not afforded to Mother and that Mother did not receive a fair trial. These issues were not raised before the magistrate, and therefore, we will not consider them on appeal. *Sanchez*, 120 Idaho at 322, 815 P.2d at 1062.

burden of proof. *Idaho State Police ex rel. Russell v. Real Property Situated in the Cnty. of Cassia*, 144 Idaho 60, 63, 156 P.3d 561, 564 (2007). Nevertheless, factual details supporting a meritorious defense must be pled with particularity. *Id.*

It is not apparent from the memorandum submitted in support of Mother's Rule 60(b) motion that Mother pled or presented evidence of facts that would constitute a meritorious defense to the termination action. Rather, Mother appears to have addressed the applicable grounds for relief by themselves without particularly articulating a meritorious defense. Mother, however, did file an affidavit with her memorandum and does recite in her brief some contentions from this affidavit. Following the hearing on the Rule 60(b) motion, the magistrate's memorandum decision addressed six arguments, apparently discerned from Mother's affidavit, that the magistrate attributed to Mother as asserting a meritorious defense.[3] The magistrate determined that each of the six arguments did not assert a meritorious defense. The State contends that the magistrate did not abuse its discretion by denying relief to Mother because Mother failed to present a meritorious defense.

Even though Mother's memorandum and briefing fail to articulate a meritorious defense, we turn to the affidavit filed by Mother. *See Fisher v. Crest Corp.*, 112 Idaho 741, 746, 735 P.2d 1052, 1057 (Ct. App. 1987) ("As we have noted, a party moving to set aside a default judgment must show that he has a meritorious defense. The defense, whether set forth in an affidavit or proposed responsive pleading, must go beyond the mere notice requirements that would be sufficient if pled before default."). Three statements in Mother's affidavit are remotely relevant to a meritorious defense in the termination action. First, Mother asserted that her attorney failed to call Mother's mother and other witnesses. Although her affidavit fails to state with particularity the names of the witnesses and what they would have testified to, Mother's testimony at the hearing on the Rule 60(b) motion indicated that these witnesses would testify to Mother's personality and sober period several years before the underlying event that led to the

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[3] Mother's reply brief suggests that there is "new evidence of the witnesses she could have called, her testimony as to the inaccuracies supplied to the court, her success on probation, and her prospects for rehabilitation and treatment." To the extent that Mother is attempting to raise new evidentiary claims, we need not consider this argument on appeal. *See Suitts v. Nix*, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005) ("A reviewing court looks only to the initial brief on appeal for the issues presented because those are the arguments and authority to which the respondent has an opportunity to respond in the respondent's brief.").

child being placed in protective custody. However, this information would not present a meritorious defense to the grounds upon which termination was sought. Second, Mother also claimed in her affidavit that her attorney made no effort to correct or comment upon inaccuracies, presumably in reports prepared by the Department that were part of the record in the termination hearing. Mother did not plead with particularity what inaccuracies existed and how they would have impacted her termination hearing.

Finally, and most relevant to the issue of a meritorious defense, Mother asserted that she believed her parental rights were terminated on the sole basis of her incarceration. However, relying upon a report from the Department, the magistrate determined that there were two statutory grounds in conjunction with the determination that it would be in the best interest of the child to terminate Mother's parental rights. The first statutory ground, Idaho Code § 16-2005(1)(e), provides, "The parent has been incarcerated and is likely to remain incarcerated for a substantial period of time during the child's minority." The second statutory ground, Idaho Code § 16-2005(1)(d) states, "The parent is unable to discharge parental responsibilities and such inability will continue for a prolonged indeterminate period and will be injurious to the health, morals or well-being of the child." Specific to the second ground, the magistrate noted that it had found clear and convincing evidence based upon the fact that Mother "is and will be incarcerated for at least two years and even if released in June, 2015, will have outstanding substance abuse and/or mental health issues that will need to be appropriately addressed before a safe reunification with the child could occur" and "this prolonged, indeterminate period will be injurious to the child's health, morals, or wellbeing." Accordingly, incarceration was not the sole basis for terminating the parent-child relationship, and thus Mother has failed to plead facts that would constitute a meritorious defense to the action.

In summary, Mother did not plead with particularity or present evidence of facts which, if established, would constitute a meritorious defense to the action (the termination of Mother's parental rights). Thus, the magistrate did not abuse its discretion when it determined that Mother failed to present a meritorious defense to her termination action. The magistrate's judgment denying Mother's Rule 60(b) motion is affirmed.

III.

CONCLUSION

The magistrate did not abuse its discretion by denying Mother relief from the default judgment under Rule 60(b)(1), 60(b)(2), or 60(b)(6). Accordingly, the magistrate's amended judgment denying Mother's motion to set aside the default judgment and reinstate Mother's answer is affirmed.

Judge LANSING and Judge GRATTON, **CONCUR.**