Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-418

APRIL TERM, 2020

In re T.L. & T.L., Juveniles (S.L., Mother*)	}	APPEALED FROM:
	}	Superior Court, Addison Unit, Family Division
	}	DOCKET NO. 79/80-9-17 Anjv
		Trial Judge: Alison S. Arms

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

Mother appeals from the family division's denial of her motion for relief from a judgment terminating her parental rights. We affirm.

The family division terminated mother's parental rights to her children, T.L. and T.L., in January 2019. This Court affirmed the termination order in June 2019. See In re T.L. & T.L., No. 2019-043, 2019 WL 2374827 (Vt. June 3, 2019) (unpub. mem.), https://www.vermontjudiciary.org/sites/default/files/documents/eo19-043.pdf [https://perma.cc/7K7C-4MCB]. Four days after this Court affirmed the order, mother filed with the family division a lengthy pro se letter, entitled "Rule 60 Letter," seeking relief from the termination order. In the letter, mother asserted, among other things, that the Department for Children and Families (DCF) and the foster mother had conspired against her to take her children and that several of her witnesses had not been allowed to testify at the termination hearing. She also asserted that her attorney was overworked and was either unable or unwilling to present her side of the story. The family division ruled that it lacked jurisdiction to consider mother's request for relief from the termination order. Mother appealed, and this Court remanded the matter for the family division to consider the merits of mother's motion for relief from judgment.

On remand, mother was represented by counsel during an October 25, 2019 evidentiary hearing at which mother and mother's husband testified. Mother's motion attorney argued that mother's termination attorney provided ineffective assistance of counsel and that DCF failed to provide reasonable guidance with respect to a parenting class that the court in its termination order found to be inadequate. The motion attorney indicated that she was making the ineffective-assistance-of-counsel claim pursuant Vermont Rule of Civil Procedure Rule 60(b)(6), which allows relief from judgment in the interests of justice for any reason not specified in the first five subsections.* See Riehle v. Tudhope, 171 Vt. 626, 627 (2000) ("Although the grounds for relief under Rule 60(b)(6) are broadly stated, and the rule must be interpreted liberally to prevent hardship or injustice, interests of finality necessarily limit when relief is available."). Much of the

* Vermont Rule of Civil Procedure 60(b) is applicable to family division proceedings. See V.R.F.P. 4.0(a)(2)(A).

motion hearing concerned the parenting-class claim, but mother's and her husband's brief testimony was directed at the ineffective-assistance-of-counsel claim. They both testified that the termination attorney did not present all the witnesses they wanted her to present and did not ask all the questions they wanted her to ask of the witnesses who did testify.

Following the hearing, the family division denied mother's Rule 60(b) motion in a November 2019 decision. Regarding the ineffective-assistance-of-counsel claim, the court concluded that mother failed to present any evidence or argument that the alleged inadequate or inappropriate conduct testified to in the motion hearing or stated in her Rule 60(b) letter constituted ineffective representation at the termination hearing. The court further concluded that mother had not shown any prejudice with respect to the allegedly faulty advice she received from her termination attorney. The court also rejected mother's parenting-class argument, but mother has not challenged that ruling in this appeal. In the end, the family division was not persuaded that mother had suffered any injustice in the termination proceedings.

On appeal, mother argues that she received ineffective assistance of counsel in the motion proceeding, which compounded the ineffective assistance of counsel she received in the termination proceeding. According to mother, her motion attorney failed to develop a record through lay and expert witnesses demonstrating the specific shortcomings of the termination attorney's representation and the prejudice resulting from that representation. Specifically, mother faults her motion attorney for not eliciting any testimony alleged in her Rule 60(b) letter and for not calling either the termination attorney or an expert as a witness. In response, the State argues that mother failed to meet her burden of showing that the allegedly ineffective assistance of her motion counsel could have reasonably altered the motion court's decision regarding her motion. The State also argues that mother failed to show that she received ineffective assistance from her termination attorney. The State asks this Court, in the event we conclude that ineffective-assistance-of-counsel claims can be raised in termination proceedings, to require that such claims be raised only either on direct appeal or within a limited time period in a Rule 60(b) motion.

On several occasions in the past this Court has declined to reach the question of whether parties may claim ineffective assistance of counsel in child-welfare cases. See In re K.F., 2013 VT 39, ¶¶ 21-22, 194 Vt. 64 (citing past cases in which this Court has declined to address whether ineffective-assistance-of-counsel claims may be raised in termination proceedings because appellants in those cases failed to show that they could have met the test in criminal cases for succeeding on such claims). Moreover, this Court has never decided whether an ineffective-assistance-of-counsel claim may be the basis for a Rule 60(b) challenge to a termination decision. As in past cases, we decline to decide these questions here because we conclude that, even assuming parties can raise ineffective-assistance-of-counsel claims in termination proceedings, including in Rule 60(b) motions seeking relief from termination decisions, mother has failed to satisfy the two-part test for proving such claims in criminal cases, which the parties presume would apply here. See id. ¶ 21 (citing test set forth in Strickland v. Washington, 466 U.S. 668, 694 (1984), requiring showing by preponderance of evidence that attorney's conduct fell below prevailing standard and was sufficiently prejudicial to create reasonable possibility of different outcome).

With respect to mother's ineffective-assistance-of-counsel claim, mother's motion attorney presented the testimony of mother and her husband that mother's termination counsel declined to present all the witnesses mother wanted the attorney to present and failed to ask the witnesses who did testify all the questions mother wanted her to ask. Litigants "must generally defer to the attorney's exercise of professional judgment concerning most of the everyday decisions at trial" involving trial strategy, such as what " 'objections to make, the witnesses to call, and the arguments to advance.' " State v. Tribble, 2012 VT 105, ¶ 54, 193 Vt. 194 (quoting 3 W. LaFave et al.,

Criminal Procedure § 11.6(c), at 796 (3d ed. 2007)). Thus, claims of ineffective assistance of counsel based on the trial attorney's alleged shortcomings in these areas are generally unavailing. See In re K.F., 2013 VT 39, ¶ 30 (relying on Tribble in rejecting father's claim that his termination counsel was ineffective for failing to offer certain evidence at trial, which "was a strategic judgment for the lawyer to make").

Further, mother has not made any proffer, either at the motion hearing or here on appeal, as to what testimony from what witnesses could have impacted the decisions by the termination court or the motion court on remand. Nor has she made any proffer as to what support any expert may have been able to contribute to her ineffective-assistance-of-counsel claim. We find unavailing mother's argument in her reply brief that any such proffers could not have been considered because they would have been outside the record established in the underlying proceedings. In In re K.F., for example, we granted the State's motion to strike information in father's printed case that he submitted on appeal in support of his ineffective-assistance-of-counsel claim but that was not part of the record in the underlying termination proceeding; nevertheless, we rejected the claim after "considering father's submissions as a proffer of the evidence he would muster in support of his ineffective-assistance-of-counsel claim." 2013 VT 39, ¶¶ 26-27. Without relevant proffers, we will not presume that the additional witnesses mother wanted to call would have impacted the termination court's decision or that mother's motion attorney could have found an expert to support that notion or otherwise show that mother's termination attorney was ineffective. In short, mother has failed demonstrate that the court abused its discretion in denying her Rule 60(b) motion. See Callahan v. Callahan, 2008 VT 94, ¶ 9, 184 Vt. 602 (mem.) ("Rulings on motions for relief from judgment are left to the sound discretion of the trial court, and may not be reversed on review absent a showing that the court clearly and affirmatively abused its discretion." (quotation omitted)).

Affirmed.

BY THE COURT:

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice