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. 2018-163

OCTOBER TERM, 2018

In re M.P., Juvenile (S.P., Mother* & D.P., Father*)	} }	APPEALED FROM:
	} }	Superior Court, Orange Unit, Family Division
	} }	DOCKET NO. 40-7-16 Oejv
		Trial Judge: Michael J. Harris

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

Mother and father appeal the family court's denial of their motion to vacate a previous order terminating their parental rights to two-year-old daughter M.P. We affirm.

M.P. was born in April 2016 and was adjudicated a child in need of care or supervision in July 2016. In February 2017, the Department for Children and Families filed petitions to terminate mother's and father's parental rights.

At a hearing on May 18, 2017, mother and father voluntarily relinquished their parental rights after entering into post-adoption contact agreements (PACAs) pursuant to 33 V.S.A. § 5124. The termination agreements, the affidavits in support of those agreements, and the PACAs were admitted into evidence at the hearing. The PACAs were signed by mother, father, the intended adoptive parents, the DCF social worker, the child's guardian ad litem, and the child's attorney. The PACAs provided that mother and father would have one supervised two-hour visit with M.P. every other month and that the intended adoptive parents—father's adult daughter E.H. and/or her husband J.H.—would be present during those visits. Each PACA stated that (1) it would not become enforceable until after the parent signing the agreement voluntarily surrendered parental rights for the child, the family court approved the PACA, and the child was legally adopted by the adoptive parents who signed the PACA, and (2) termination of parental rights could not be undone and remained permanent even if the intended adoption did not occur.

At the May 2017 hearing, mother acknowledged that she had gone over the agreement to voluntarily relinquish her parental rights with her attorney, that no one twisted her arm to sign it or made promises outside of the PACA, and that she understood once she signed the termination agreement, she had no right to participate in further hearings or appeal. The attorney for the State showed mother the PACA and explained that "this sets forth certain things—a minimum of what you're going to be able to do." The attorney then explained that although everyone expected that E.H. and J.H. would adopt M.P., but if "something terrible happened, they're in a plane crash and they're not around," there was "no going back" and the PACA would not be binding on anyone else. The attorney asked mother if she understood. Mother made an inaudible response. Mother then acknowledged that she was familiar with the terms and conditions of the PACA and that she

went through the PACA with her attorney. She indicated that she understood that by voluntarily relinquishing her rights, the State did not have the burden to prove that termination was in M.P.'s best interests.

Father took the stand next. He acknowledged that he was voluntarily relinquishing his parental rights and agreed it was in M.P.'s best interests to do so. He agreed that the only promise made to him about his rights after termination was the PACA, and that he had reviewed that document with his attorney. The State's attorney then repeated that although everyone expected that M.P. would continue to live with E.H., "if there was some kind of freak accident and your daughter is no longer around, that agreement doesn't survive her demise." It asked father if there was anything clouding his judgment such as alcohol or drugs, and he said no. Father agreed that by voluntarily relinquishing his rights, he was relieving the State of its burden to prove termination was in M.P.'s best interests. At the close of the hearing, the court entered an order terminating both parents' rights to M.P.

After the May 2017 hearing, M.P. remained in DCF custody but was placed with the intended adoptive parents, E.H. and J.H. In mid-September 2017, DCF learned that E.H. and J.H. were allowing mother and father substantial unsupervised visitation time with M.P. at mother and father's home. It removed M.P. from E.H. and J.H.'s home and placed M.P. with a non-kin foster family, partly out of concern that father was pressuring family members to allow him and mother unsupervised contact with M.P.

In November 2017, mother and father filed a pro se "Motion to Vacate Adoption Agreement," arguing that DCF had acted in bad faith by failing to carry out its alleged promise to place M.P. within father's family. The family court interpreted the motion as seeking to vacate the termination order under Vermont Rule of Civil Procedure 60(b), and held an evidentiary hearing in April 2018. Both parents attended and were represented by counsel. Mother testified but father did not.

The court found that prior to the termination hearing, in April 2017, E.H. contacted the DCF social worker and reported that she and her husband could not complete the adoption because they were in danger of foreclosure. Mother and father were aware at the time that E.H. and J.H. were wavering on whether they would adopt M.P., based on direct conversations they had with E.H. At E.H.'s suggestion, the DCF social worker contacted other family members to see if they were interested in adopting M.P. Father's sister expressed her desire to keep M.P. within the family. The DCF worker gave her an application to fill out to be approved as a foster parent but told her not to fill it out yet. A few days later, E.H. contacted the DCF worker again and said that they were no longer going to lose their home because she was receiving financial assistance from her mother. She reported that she felt pressured by father, who kept asking her how she was spending money she received for M.P. Toward the end of the conversation, E.H. stated her intent to complete the adoption. At the time of the May 2017 hearing, E.H. and J.H. were expressing their desire and intent to complete the adoption, and DCF was willing to recommend them as ongoing foster and adoptive parents.

The court rejected parents' argument that they were entitled to relief from the termination order under Rule 60(b)(3) because DCF engaged in fraud or bad faith. The court found no evidence that DCF pressured E.H. and J.H. to agree to adopt M.P. in order to induce relinquishment, knew that they would be inappropriate foster or adoptive parents, or caused them to become ineligible as foster parents. The court noted that E.H. and J.H. lost eligibility due to their failure to abide by reasonable visitation contact limits while they were foster parents, and the precipitating factor for their being removed from consideration as adoptive parents was the mother and father's own

intentional conduct in having unsupervised contact with M.P. It further found that DCF made no promises to place M.P. with other family members if E.H. and J.H. were unable to adopt. It found that the fact that DCF gave father's sister a foster parent application to fill out in case E.H. and J.H. decided to stop acting as foster parents did not give father's sister or parents reason to expect that M.P. would be placed with father's sister or another family member. The court also found that DCF did not act fraudulently or in bad faith by failing to investigate another kinship placement where DCF had information that father was pressuring family members to allow unsupervised contact despite DCF's safety concerns.

The court concluded that relief was likewise unavailable under Rule 60(b)(1), as there was no basis for a finding of mistake. Given parents' continuous representation by counsel, prior discussions regarding relinquishment and adoption, the content of the agreements, and parents' testimony at the May 2017 termination hearing, the court did not find credible mother's assertions that she did not understand the nature of the documents she was signing or that the PACA rights were contingent on final approval of E.H. and J.H. as adoptive parents. It noted that the parties had multiple discussions prior to May 2017 regarding adoption and that as late as April 2017, mother knew that E.H. was wavering about whether to adopt M.P. However, she sought no information or assurances that another member of father's family would be approved as "backup" foster/adoptive parents, and DCF did not make any promises to that effect. The court further found that there was no basis to disturb the termination order based on newly discovered evidence under Rule 60(b)(3) or under Rule 60(b)(6).

On appeal, parents first argue that their relinquishments were not knowing and voluntary because they were not told at the termination hearing that something besides a catastrophic event such as the death of the intended adoptive parents could render the PACAs ineffective. They argue that mother made no audible response when asked if she understood the State's attorney's explanation of the PACAs, and the attorney did not ask father for a response.

Parents' argument fails under our decision in In re P.K., 2017 VT 3, 204 Vt. 102. In that case, we affirmed the family court's denial of the mother's motion to vacate a termination order and PACA after the child was removed from the care of the intended adoptive parent. Id. ¶ 1. The mother had acknowledged at the termination hearing that she was knowingly and voluntarily relinquishing her parental rights and that the termination was final, and had signed a PACA containing conditions and qualifications identical to the ones in this case. Based on these facts, we held that "this is not a situation where mother entered into the [PACA] under any mistaken belief. At the time she signed the agreement, the paternal grandmother was the preadoptive parent, and mother confirmed her understanding that the termination of her parental rights could not be undone even if the anticipated adoption did not occur." Id. ¶ 13. We further held that "[b]ecause of the concern for certainty and finality of judgments, Rule 60(b)(6) does not provide relief from tactical decisions which in retrospect may seem ill advised." Id. (quotation omitted).

Likewise, in this case mother and father both clearly stated at the termination hearing that they had reviewed the termination agreements with counsel, understood they were permanently giving up their parental rights, and had not been pressured to do so. They each agreed that they had reviewed the PACAs and were aware of their terms. As in P.K., each parent signed a PACA stating that it was only enforceable if certain conditions were met, including the completion of the legal adoption process, and that each parent understood that the termination of parental rights could not be undone and remained permanent even if the intended adoption did not happen. We therefore reject parents' argument that their relinquishments were not knowing and voluntary.

Parents further argue that they were induced to enter into the termination agreements and PACAs by fraud or misrepresentation, because DCF told them that the adoption would be going through and did not warn them that M.P. could be removed from the intended adoptive parents. The trial court did not err in rejecting this argument. The record supports its finding that at the time of the termination hearing, DCF believed in good faith that M.P. would be adopted by E.H. and J.H. Parents were aware prior to the termination hearing that E.H. and J.H. were wavering as to whether they could adopt M.P., yet they sought no assurances from DCF that she would be placed with another family member, and there is no evidence that DCF made them any promises to that effect. As noted above, each PACA warned that it was unenforceable until all conditions were met, including the completion of the adoption process, and that termination was final even if the adoption did not go through. Further, as the court family court noted, the intended adoptive parents' loss of eligibility was due to the actions of mother and father, not DCF.

Parents also claim that the family court erred in stating that they had to prove fraud by clear and convincing evidence to be entitled to relief under Rule 60(b)(3). They are incorrect. It is well-settled that "[i]n all cases where fraud is alleged, it must be proved by clear and convincing evidence." Bardill Land & Lumber, Inc. v. Davis, 135 Vt. 81, 82 (1977) (addressing appeal from denial of V.R.C.P. 60(b)(3) motion); see also Gavala v. Claassen, 2003 VT 16, ¶ 5, 175 Vt. 487 (mem.) (explaining that party seeking relief under V.R.C.P. 60(b)(3) in family court was required to demonstrate fraud by clear and convincing evidence). The family court applied the correct standard.

Finally, parents argue that there was no proof that they violated any restrictions by having unsupervised visitation with M.P. because the PACAs gave E.H. and J.H. discretion to allow them such contact. They rely on provisions in each PACA allowing the former parents and the adoptive parents to agree to change the terms of the agreement. This claim is without merit. By their plain language and under 33 V.S.A. § 5124(f), the PACAs did not take effect until the adoption was complete. DCF remained as the legal custodian until that occurred. The DCF social worker testified that E.H. and J.H. were required to supervise parents' contact with M.P. due to safety concerns. Father's sister likewise testified that she understood visits were supposed to be supervised. There is no evidence that the intended adoptive parents had discretion to modify this restriction during the preadoptive period.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Beth Robinson, Associate Justice