

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, SS.

TRIAL COURT DEPARTMENT
JUVENILE COURT DEPARTMENT
TAUNTON DIVISION
DOCKET NO. [REDACTED]

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Care and Protection of [REDACTED], et al.)
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**FATHER’S MOTION AND MEMORANDUM PURSUANT TO RULE 60(b)(5)
FOR PARTIAL RELIEF FROM THE SEPTEMBER 25, 2018 JUDGMENT**

Now comes [REDACTED] (“Father”), the biological father of [REDACTED], and respectfully requests that this Honorable Court exercise its equitable powers pursuant to G.L. c. 218, § 59 as well as its authority pursuant to Massachusetts Rule of Civil Procedure and Domestic Relations Procedure 60(b)(5)¹ (collectively “Rule 60(b)(5)”), to vacate that portion of the September 25, 2018 judgment and decree denying post-termination and post-adoption visitation between Father and [REDACTED] and enter an order instituting post-termination and post-adoption visitation between them.² Father also requests this court vacate the decree terminating his parental rights to [REDACTED]. As reason therefor, Father asserts upon information and belief that material and significant changes in Joell’s circumstances have occurred since the trial concluded, namely : (i) the

¹ “Although neither the Massachusetts Rules of Civil Procedure nor the Massachusetts Rules of Domestic Relations apply to proceedings in the juvenile court,” they “may be used as a cogent standard.” Adoption of Reid, 39 Mass. App. Ct. 338, 341 (1995) (citations omitted); Adoption of Theodore, 36 Mass .App. Ct. 355, 357 n.5 (1994)(court proceeded by analogy to Massachusetts Rules of Domestic Relations Procedure 60(b)(5)).

² The Findings of Fact and Conclusions of Law issued on July 17, 2019.

Department of Children and Families (“DCF”) removed him from his the pre-adoptive home approved by this court and placed him in a residential program due to his ongoing behavioral issues; (ii) the pre-adoptive parents have subsequently withdrawn their interest in adopting [REDACTED]³; and (iii) [REDACTED] no longer has any adult family figure involved in his life nor does he have a viable adoption plan. Furthermore, as Father attests in his accompanying supporting affidavit, his circumstances have markedly improved since he testified at trial. Accordingly, it is no longer equitable that the judgment denying post-termination and/or post-adoption visitation between Father and [REDACTED] and the decree terminating Father’s parental rights to Joell have prospective application. See Rule 60(b)(5). Thus, Father and [REDACTED] should be relieved from that portion of said judgment and decree.⁴ See Rule 60(b).

I. Relevant Factual Background

a. Background

Mother gave birth [REDACTED] on [REDACTED]. [F.2]. On June 13, 2016, DCF filed a care and protection petition and received custody of all three children due to concerns that Mother and her boyfriend neglected and physically abused them. [F.167-179]. Father was incarcerated at the time and did not learn of his children’s removal until he was brought to court in either June or July 2016. [F.157,180]. Mother died of a drug overdose on June 3, 2017. [F.4]. Father remained in prison until his release on parole in February 2018. [F.194].

³ Upon information and belief, the pre-adoptive parents remain interested in adopting [REDACTED] siblings, [REDACTED].

⁴ Father continues to appeal the judgment and decree as it relates to his other children, [REDACTED] and [REDACTED].

b. Visitation

In January or February 2017, the children started asking to visit with Father. [F.210].

██████████ each specifically requested visits with Father. [F.210]. DCF only provided the children with one visit during the care and protection, which occurred on July 31, 2017, at the Plymouth House of Correction. [F.206,215,225]. Father, however, had written letters to his children during his incarceration and after their visit. [F.208,208,213,227].

DCF social worker ██████████ reported the children misbehaved during the ninety-minute ride to the prison and while they waited for the visit to begin. [F.215]. The visit itself lasted only forty minutes. [██████████ Testimony, 02/12/18]. The visit occurred through a glass partition with the children and Father communicating through a single telephone line. [F.217]. The social worker reported the children were not respectful of each other's time or with sharing the phone line. [F.217]. ██████████ testified Father told the children he loved them, he missed them, asked about school, and hoped they were doing well. [██████████ Testimony, 02/12/18]. The visit ended appropriately with Father and the children expressing their love for each other. [██████████ Testimony, 02/12/18]. ██████████ even attempted to return to Father, but ██████████ intercepted him. [██████████ Testimony, 02/12/18].

The children demonstrated some behavioral issues following the visit. [F.225]. ██████████ was very upset and told ██████████ "that he did want to go home and live with his father". [██████████ Testimony, 02/12/18]. ██████████, who were well-aware of their adoption plan, also asked if they would be able to see Father again and how often they could see him. ██████████ Testimony, 02/12/18]. DCF, however, never arranged another visit because "██████████ became

physically aggressive at both the foster home and at school”.⁵ [██████████ Testimony, 02/12/18].

DCF summarily concluded additional visits would not be in the children’s best interest [F.222-225], although DCF never presented any clinical or expert evidence connecting ██████████ behaviors to the actual visit with Father.

The court ultimately concluded post-termination and post-adoption visits between Father and ██████████ not in ██████████ best interest. [C.40]. The court reasoned:

“The Children have not seen father since July 31, 2017, after which both ██████████ and ██████████ exhibited behavioral dysregulation. Both children resumed wetting the bed after five months of remaining accident-free. ██████████ began have [sic] nightmares again, and was afraid to walk around the foster parents’ house by himself. He also began to hear voices that were not present. ██████████ behaviors became severely dysregulated, resulting in him being suspended from school once and summer camp twice, hospitalized multiple times, and placed in CBAT four times.”

Since the trial concluded, the ██████████ circumstances have changed significantly. Upon information and belief, ██████████ regressed in the pre-adoptive home to the point DCF removed him from the home and placed him in St. Ann’s residential program. At that point, it would have been at least over a year since his one and only visit with Father. And unlike before, upon information and belief, the former foster parents, ██████████ do not visit with ██████████. They have recanted their interest in adopting ██████████, essentially leaving him not only without an adoptive home, but also without any parent-like figure in his life. Conversely, Father strongly desires to visit with ██████████ Upon information and belief, ██████████ still wants to visit with Father.

c. Termination and Permanency Plan

DCF’s initial service plan for Father focused entirely on substance disorder treatment although additional tasks, such as individual counseling, were later added. [F.181,182,184]. DCF

⁵ DCF unilaterally and indefinitely suspended visits with Father following the July 31, 2017, visit. Although Father filed an abuse of discretion motion to reinstate visits, the court consolidated his motion with the upcoming trial, effectively tabling any ruling for an additional six months. [Docket at 6].

confirmed Father completed a substance abuse program during his incarceration and participated in AA/NA meetings. [F.193; Exh.54]. As a condition of his parole, Father attended the [REDACTED] [REDACTED] [REDACTED]”) from February 8, 2018, until his graduation on June 4, 2018. [F.194]. The court credited the testimony of Father’s [REDACTED] counselor, [REDACTED]. [F.198]. [REDACTED] testified Father fully participated in the program. [F.198]. He was respectful to staff and other clients. [F.198]. Father did so well in the program that his peers elected him to the leadership position “head houseman”. [F.198]. The court nonetheless concluded Father did not satisfactorily follow his service plan, did not maintain stable housing, only earned \$144.00 per week, and did not consistently attend counseling. [F.51,57; C.24]. The court also concluded Father only minimally cooperated with DCF. [C.26].

As for [REDACTED], he was hospitalized and psychiatrically evaluated several times since his placement in the pre-adoptive home in July 2016. Since August 2017, he was hospitalized twice and placed four times in a Community-Based Acute Treatment (“CBAT”) program. [F.251]. He was first psychiatrically evaluated and placed in CBAT from August 23, 2017, until September 5, 2017. [F.252]. On September 20, 2017, [REDACTED] underwent another psychiatric evaluation that required hospitalization through October 4, 2017. [F.253]. He was then discharged to a CBAT program until October 18, 2017. [F.254]. Two days later, [REDACTED] underwent a third psychiatric evaluation and was hospitalized until October 24, 2017. [F.255]. He was discharged to another CBAT program until November 22, 2017. [F.256]. [REDACTED] was admitted to his fourth CBAT on December 4, 2017, following expressions of suicidal and homicidal ideations, self-injurious behaviors, dysregulation, and physical aggression. [F.258]. [REDACTED] remained in this CBAT until January 5, 2018; thereafter, DCF transitioned him to [REDACTED]. [F.258].

He remained at [REDACTED] until his discharge back to his foster home on February 7, 2018. [F.259]. [REDACTED] did not require any further hospitalization through trial. [F.260].

The court approved DCF's plan of adoption of all three children by [REDACTED]. [C.37]. The court found [REDACTED] expressed an interest in adopting all three children and have been approved as an adoptive resource. [C.37]. The court concluded all three children, including Joell, were thriving in the pre-adoptive home notwithstanding [REDACTED] numerous psychiatric hospitalizations. [C.37].

As for terminating Father's parental right, the court found at the end of trial that:

"Specifically, it is in the best interest of the subject children to terminate the parental rights of Father because of his instability and lack of a stable home for himself and the subject children, his history of substance abuse and criminal activity, and his failure to consistently maintain communication with the Department." [C.35].

Father has made substantial progress since trial, as he attests in his supporting affidavit. He has secured stable housing with his girlfriend and her daughter. He works full-time. He remains drug and alcohol-free. He has not been arrested since his release in February 2018. Father has made significant progress toward addressing the court's concerns and rationale for terminating his parental rights warranting re-consideration and ultimately vacating the decree terminating his parental rights to his son [REDACTED]

II. Argument

Rule 60(b)(5) provides in pertinent part that a court may relieve a party or legal representative from a final judgment if "it is no longer equitable that the judgment should have prospective application". See Rule 60(b)(5). As mentioned supra and discussed in more detail infra, [REDACTED] circumstances have transformed so significantly since the trial concluded that it is no longer equitable or in his best interest to decline post-termination (or adoption) visits or to continue to deprive him of a prospective placement resource like Father. Upon information and

belief, [REDACTED] lacks a parent-like relationship in his life. [REDACTED] prospects for adoption also seem much less a viable or realistic option since the trial concluded. [REDACTED] plan at trial was adoption by the intensive-care foster parents with whom he lived with his siblings since mid-2016. This family weathered multiple hospitalizations and residential admissions during his two-plus-year placement until it could no longer weather them. There is a genuine likelihood [REDACTED] could remain in DCF's permanent care until his eighteenth birthday and beyond. In total, the existing judgment is no longer just or equitable. Correspondingly, resuming post-termination visits between [REDACTED] and Father and re-instating Father's rights so he can attempt to reunify with [REDACTED] serves [REDACTED] best interest. Accordingly, the judgment and decree must be modified to accommodate [REDACTED] current and evolving best interests. See, e.g., Adoption of Pierce, 58 Mass. App. Ct. 342, 349-50 (2003) ("The fluid nature of the best interests of the child standard requires that all evaluations of such nature be made based on the current best interests of the child.").

A. Visitation

In Adoption of Rico, the Supreme Judicial Court ("SJC") astutely observed that when a judge orders (or refuses to order) post-termination and/or post-adoption visitation between a child and his biological parent, the decision is "based on the judge's assessment of the child's best interests *at the time*." Id., 453 Mass. 749, 758 (2009) (emphasis in original). These orders, after all, are provisional orders, and may be subsequently modified due to changed circumstances as they relate to the child's current best interest. See id. In this case, [REDACTED] adoption plan approved at trial totally disintegrated. This alone warrants this court to, at a minimum, reconsider its initial order denying post-termination and post-adoption visitation between [REDACTED] and Father. See, e.g., Adoption of Cesar, 67 Mass. App. Ct. 708, 713 (2006) (order denying visitation

vacated and remanded for further consideration of the visitation issue considering the disruption of the previously proposed adoption placement).

In Adoption of Vito, the SJC advised that proposed post-termination and post-adoption contact and visitation between a child and his biological parent is more likely warranted in cases “where no pre-adoptive family has yet been identified, and where a principal, if not the only, parent-child relationship in the child’s life remains with the biological parent”. Id., 431 Mass. 550, 563-64 (2000); see also Adoption of Rico, 453 Mass. at 754. “In those cases, the judge has the equitable authority to ensure that contact in the best interest of the child is maintained during an appropriate transitional period posttermination, or even post adoption.” Id. at 564. The purpose of such contact is not necessarily to strengthen the bonds between the child and his biological parent, “but to assist the child as he negotiates, often at a young age, the tortuous path from one family to another”. Id. at 564-65.

█████ has experienced a saddening downward trajectory since trial. He had already lost his biological mother to a drug overdose in June 2017. DCF permanently removed him from the pre-adoptive home he had lived in for at least the past two years. He is no longer residing with his brother and sister. █████ are no longer interested in adopting him, but they remain committed to adopting his siblings. He is only eleven years old, and those setbacks must be demoralizing.

Compounding █████ disheartening situation is his adoption prospects must appear grim. Upon information and belief, he has no new identified adoptive family. His previous family was a qualified intense foster family, yet they decided they could no longer be a permanent resource despite being his physical custodian for at least two years. This decision came after █████ underwent several hospitalizations and was returned to their care. █████ current challenges

underscore the very real prospect that if his long-term, intensive pre-adoptive family have given up on adopting him, then he may likely remain in DCF's permanent custody for years, possibly until adulthood. "In these circumstances, the court has the authority and responsibility to intervene in █████ best interest." Adoption of Vito, *supra* at 564, n.24. Equally if not more so, DCF has a "heightened responsibility in regard to █████ this juncture." Adoption of Terrence, 57 Mass. App. Ct. 832 92003).

Consequently, █████ changed circumstances since trial unquestionable weigh heavily toward imposing, at a minimum, a court order for post-termination visitation with Father. The evidence at trial demonstrated that █████ had a relationship with Father he sought to preserve. And while █████ and Father's bond was certainly compromised by DCF's unilateral decision to provide only one visit during the pending care and protection, the SJC drew attention in Rico "to the fact considerations beyond bonding may be relevant", such as "the actual personal relationship of the child and the biological parent". *Id.* at 759 citing Adoption of Vito, *supra*. Accordingly, there may indeed be a benefit for post-termination and post-adoption visitation even if the child and birth parent did not have a demonstrably strong bond, particularly where DCF purposeful actions were devised to hinder maintenance of any bond.

For instance, █████ at least lived with Father at times prior to his last removal. [F. 5]. He asked to visit with Father while placed in his pre-adoptive home. The social worker testified █████ requested not only to see Father again following the visit but that he said he wanted to live with him. And while there is evidence █████ regressed behavioral following the visit, there is not a scintilla of clinical or expert evidence connecting the root cause of his behavior to the visit.⁶ The social worker in fact testified that although the visit was not ideal given the setting, it went

⁶ It is noteworthy that Mother died about a month before the visit and maybe this alone, or in combination with other factors, contributed to █████ regression.

appropriately overall. Even if there was a connection, it is just as, and arguably more, plausible his lack of contact with Father pre- and post-visit, rather than the contact itself, caused him to regress. The bottom line is there was no definitive evidence outside of sheer speculation that the one forty-minute group visit with Father had a harmful and lasting impact on [REDACTED]. There is, however, concrete evidence that [REDACTED] wanted to see Father, even at a time when his adoption plan seemed secure. Now that his plan seems insecure and uncertain, visits with his only living biological parent is paramount. Accordingly, this court should modify its judgment by imposing an order for post-termination and post-adoption visitation between [REDACTED] and Father.

B. Termination or Parental Rights

The unforeseen breakdown of [REDACTED] adoption plan obliges this court to reconsider whether termination of Father's parental rights continues to serve [REDACTED] best interests. G.L. c. 210, § 3(c) provides that: "In determining whether the best interests of the child will be served by issuing a decree dispensing with the need for consent as permitted under paragraph (b), the court shall consider ... the plan proposed by the department or other agency initiating the petition." G.L. c. 210, § 3(c). That consideration at the time of trial is not etched in stone and its disruption undermines a critical factor of the termination inquiry made at the time of trial. For example, as the Appeals Court articulated in Adoption of Theodore:

"None of our cases ... should be construed ... as limiting the inquiry to parental fitness at the time of trial. Given the fact that the children have not been placed for adoption, and the mother has finally separated herself from her husband, it is necessary that the judge (whose patience and understanding have been fully demonstrated) provide the mother with an opportunity to demonstrate at an evidentiary hearing that the recent turn of event in her life, which appear to be striking, are sufficient to justify the conclusion that she is fit to parent her children, and if so, that it would be in the children's best interest to be returned to their mother." Id., 36 Mass. App. Ct. 355, 358 (1994).

While appreciating that the unraveling of a proposed adoptive placement does not necessarily preclude the termination of [REDACTED] parents' rights, the emergence of replacing a stable adoptive placement with an uncertain one surely cast doubt over whether termination continues to serve [REDACTED] best interest. See Adoption of Cesar, 67 Mass. App. Ct. at 716. Father submits that it does. Here, Father's improved conditions, the deterioration of [REDACTED] adoption plan, and the lack of identifiable adoptive resources for [REDACTED] shifts the importance of finality to termination proceedings in an abstract sense toward the necessity of opening (or re-opening) all option for his eventual permanency. As for Father, since trial, he attests to the following improvements in areas the court found supported the finding of unfitness at the time of trial:

- “1. I have stable housing. I currently reside at [REDACTED], Massachusetts, with my girlfriend, [REDACTED], and her daughter, [REDACTED]. [REDACTED] and I have been dating and living together for over a year. I assist [REDACTED] with raising her daughter and consider [REDACTED] a support.
2. I recently purchased a mobile home in [REDACTED], which I eventually intend to make my permanent residence. I do not plan to move until December 2020 at the earliest.
3. I am currently unemployed due to the statewide closure of non-essential businesses in response to the COVID-19 pandemic. But prior to that, I worked consistently in maintenance for [REDACTED] for nearly two years. I also worked a second job in landscaping for [REDACTED] in Taunton.
4. I received health insurance through my employer. I am currently enrolled in MassHealth as well. I may be eligible for unemployment due to my current layoffs.
5. I have not been arrested or in trouble with the law since my release from prison in February 2018. I also completed the terms of parole as a condition of my release. My former parole officer is [REDACTED] out of New Bedford.
6. I live a clean lifestyle. I do not smoke. I do not drink alcohol. I have not used any illicit or unprescribed drugs in years. I only take 800 mg of Mortrin (Ibuprofen) as needed for knee pain. I devote my time to work, my girlfriend and her daughter, and maintaining a clean lifestyle through exercise.
7. I am willing to work with DCF as well as directly with [REDACTED] educational, therapeutic, and medical providers to learn of [REDACTED] needs and how to address them. I am willing to

submit to toxicology screens to demonstrate my continued sobriety. I willing to engage in necessary services to reunify with [REDACTED], including family therapy.

8. If I receive custody of [REDACTED], I will strongly support [REDACTED] maintaining contact and visitation with his siblings, [REDACTED].
9. If I receive custody of [REDACTED] I will strongly support [REDACTED] maintaining contact and visitation with Mother's side of the family.
10. I would like the opportunity to visit [REDACTED]. I believe it is important for [REDACTED] to know he is loved, and he is wanted." [Affidavit of Father].

Wherefore, for the reasons stated herein, Father respectfully requests that this court:

- (i) Vacate the order denying post-termination and post-adoption visitation between [REDACTED] and Father;
- (ii) Enter and order for monthly post-termination and post-adoption visits between [REDACTED] and Father; and
- (iii) Vacate the decree terminating Father's parental rights to [REDACTED].

Respectfully Submitted:
[REDACTED], Father,
By his attorney

DATED: April 14, 2020

[REDACTED]