IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| DARLENE A. DAVIS, | § | |
| | § | No. 119, 2005 |
| Respondent Below-<br>Appellant, | § <br>§ | |
| | § | Court Below─Family Court |
| v. | § | of the State of Delaware |
| | § | in and for New Castle County |
| RICHARD M. MARTIN, | § | File No. CN00-08554 |
| | § | Petition No. 01-02632 |
| Petitioner Below-<br>Appellee. | § <br>§ | |

Submitted: September 9, 2005
Decided: November 9, 2005

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices

**O R D E R**[1]

This 9th day of November 2005, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The respondent-appellant, Darlene A. Davis ("Mother"), filed an appeal from the Family Court's February 23, 2005 order denying her motion to reargue the Family Court's denial of her motion to reopen the Family Court's judgment regarding custody and visitation. We find no merit to the appeal. Accordingly, we affirm.

[1] The Court has sua sponte assigned pseudonyms to the parties and their minor children. Supr. Ct. R. 7(d).

(2) Mother is divorced from petitioner-appellee Richard M. Martin ("Father"). The parties have two minor children, Jennie, age 10, and Karen, age 7.[2] The parties have been involved in extensive custody litigation involving their two minor children since at least January 2001. In July 2001, the children were removed from Mother's home by DFS due to the unsanitary condition of the home and Mother's abusive behavior. They have resided with Father since that time. There have been several hearings in this matter, with testimony from mental health experts, representatives of the Delaware Division of Family Services ("DFS"), a guardian ad litem, who was appointed by the Family Court to represent the interests of the children, and witnesses on behalf of both Mother and Father. The children also have been interviewed by the Family Court.

(3) On April 30, 2004, the Family Court held a hearing regarding custody of and visitation with the parties' children. The guardian ad litem testified that she believed it was in the children's best interests for Father to continue to have primary residential custody and for Mother to continue to have visitation with the children at a visitation center rather than at her home. She also testified that the children, especially the older one, are distrustful of Mother in light of their previous experiences with her. Finally,

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[2] The parties also have a son, who is no longer a minor.

she testified that Mother still has a problem with taking responsibility for the problems that developed with her children and that further therapy for Mother is indicated. Following that testimony, the judge discussed with the guardian ad litem, the parties and their counsel some additional issues involving the children, including the possibility of counseling for the older child.

(4) The judge then left the courtroom and the parties, assisted by their counsel, drafted an agreement concerning custody and visitation in light of their previous discussion with the judge. When the judge returned to the courtroom, she helped the parties complete the agreement. The judge then dictated the terms of the agreement for the record, which was subsequently issued as a stipulated order of the Family Court dated April 30, 2004. At no time did Mother voice any objection to the language of the agreement or complain about her counsel's performance.

(5) The stipulated order provides that Mother and Father will continue to share joint legal custody of the children and Father will have primary residential custody. In the event Mother and Father are unable to reach a joint decision concerning the children, Father will have final decision making authority. Mother will continue to have weekend visitation

with the children at a visitation center and additional contact with the children by phone.

(6) In this appeal, Mother claims that: a) the guardian ad litem lacked the necessary credentials to offer her opinion about Mother at the custody hearing; b) Mother's attorney did not provide adequate representation and smelled of alcohol; c) the Family Court's custody/visitation order violates Mother's constitutional rights; d) the Family Court should not have accepted the testimony of Samuel Romirowsky, Ph.D., in one of its prior orders; and e) the Family Court abused its discretion by denying Mother's motion to reopen the Family Court's judgment regarding custody and visitation.

(7) The Family Court may relieve a party from a final judgment pursuant to Family Court Civil Procedure Rule 60(b), which provides:

> . . . the Court may relieve a party . . . from a final judgment . . . for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . .; (2) fraud . . .; (4) the judgment is void; (5) the judgment has been satisfied . . .; or (6) any other reason justifying relief from the operation of the judgment.

The decision whether to reopen a judgment pursuant to Rule 60(b) is left to the discretion of the Family Court.[3] When determining whether there has been an abuse of discretion, this Court considers two questions: a) whether the outcome of the action would be different if relief were granted; and b) whether substantial prejudice would be suffered by the non-moving party if relief were granted.[4]

(8) Mother has failed to address any of the required factors for reopening a judgment. Moreover, the transcript of the hearing reflects clearly that Mother agreed to the terms of the Family Court's custody/visitation order. While Mother appears to blame her counsel for failing to properly represent her at the hearing, the record does not reflect any deficiencies in Mother's counsel's representation and does not reflect that Mother was dissatisfied with any aspect of her counsel's representation at the time of the hearing. There is, moreover, no evidence that the Family Court abused its discretion either by denying Mother's motion to reopen its judgment regarding custody and visitation or by denying Mother's motion to reargue that decision.

[3] *Reynolds v. Reynolds*, 595 A.2d 385, 389 (Del. 1991).
[4] *Harper v. Harper*, 826 A.2d 293, 297 (Del. 2003) (citing *Tsipouras v. Tsipouras*, 677 A.2d 493, 495 (Del. 1996)).

NOW, THEREFORE, IT IS ORDERED that the judgment of the Family Court is AFFIRMED.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice