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. 2019-156

NOVEMBER TERM, 2019

Rita I. Palmer* v. Department for Children & Families	}	APPEALED FROM:
	}	
	}	Superior Court, Franklin Unit,
	}	Family Division
	}	
	}	DOCKET NO. 316-12-18 Frdm
		Trial Judge: John L. Pacht

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

Plaintiff appeals the family court's denial of her motions to reopen her parentage action. We vacate the order entered while this appeal was pending, but otherwise affirm.

On December 31, 2018, plaintiff filed a pro se complaint for establishment of parentage against the Department for Children and Families (DCF). Plaintiff is the biological grandmother of four children, S.S., N.S., S.P., and Z.A., whose parents have had their parental rights terminated.[1] Plaintiff sought to be adjudicated as a de facto parent to the children pursuant to 15C V.S.A. §§ 501-502. On January 4, 2019, the court dismissed the complaint on its own motion because plaintiff had not submitted a verified affidavit alleging facts to support the existence of a de facto parent relationship with the children as required by the statute. The court noted that a petition and affidavit must be served on all legal parents and legal guardians of a child.

On April 5, 2019, plaintiff moved for reconsideration, asserting that the court clerks gave her incorrect instructions about what she needed to file and she had not received the court's dismissal order because the court sent it to the wrong address. On April 11, the court denied her motion on the grounds that plaintiff had not filed the required affidavit or asserted that DCF presently had custody of the children. It further stated that the motion was untimely. Plaintiff filed a notice of appeal.

On April 24, 2019, the day after she filed her notice of appeal, plaintiff filed a second motion for reconsideration with an affidavit asserting that she met the criteria under 15C V.S.A. § 501(a)(1). On April 25, DCF filed a letter stating that it did not have legal custody of plaintiff's grandchildren. On April 26, the court denied the second motion for reconsideration. Plaintiff

[1] The family court's order terminating mother's parental rights to the four children were affirmed by this Court in In re S.S., No. 2017-081, 2017 WL 2962882 (Vt. June 26, 2017) (unpub. mem.), https://www.vermontjudiciary.org/sites/default/files/documents/eo17-081.pdf [https://perma.cc/6S48-9ZPZ].

sought permission to appeal this order as well. In an entry order, this Court indicated that it would review the trial court's April 11 and April 26 decisions.

On appeal, plaintiff argues that the court should have granted her motions for reconsideration because court staff gave her false instructions on how to file the parentage application and sent the January 4, 2019 dismissal order to the wrong address, thereby preventing her from moving for reconsideration in a timely fashion. She asserts that she asked DCF to forward her the information for the children's adoptive parents so that she could file her parentage action against them, but DCF failed to cooperate. She also argues that she did eventually file the required affidavit.

We first note that because plaintiff did not file her motions to reconsider within twenty-eight days after the entry of judgment, neither motion tolled the running of the appeal period with regard to the January 4, 2019 dismissal order. See V.R.A.P. 4(b) (providing that timely Rule 59(e) or Rule 60(b) motion will toll running of appeal period until entry of order disposing of motion). Plaintiff did not otherwise seek to extend or reopen that appeal period, which expired on February 4, 2019. Our review is therefore limited to the court's decisions denying plaintiff's motions to reconsider.[2] Even if we were to consider plaintiff's appeal of the trial court's January 4, 2019 dismissal order on the merits, we would affirm. A party seeking to establish parentage as a de facto parent must include "a verified affidavit alleging facts to support the existence of a de facto parent relationship with the child." 15C V.S.A. § 502(a). Even though plaintiff filed a voluminous pile of papers that she believed supported her parentage claim, her initial petition for a parentage order did not include a sworn statement setting forth facts showing that plaintiff could qualify as a de facto parent under 15C V.S.A. § 501(a)(1). The trial court did not err in dismissing the initial petition and directing plaintiff to the statute.

We likewise conclude that the trial court did not err in its April 11 decision denying plaintiff's motion to reconsider. Because plaintiff's motion was filed more than twenty-eight days after judgment, she was only eligible for relief under Rule 60(b). See V.R.C.P. 59(e) (providing that motion to alter or amend judgment shall be filed "not later than 28 days after entry of the judgment"); V.R.C.P. 60(b) (permitting motion for relief from judgment to be filed within "reasonable time" after judgment); V.R.F.P. 4.0(a) (stating that Rules of Civil Procedure apply in parentage proceedings). The trial court has broad discretion to grant or deny a Rule 60(b) motion and we will not disturb its decision "unless it clearly and affirmatively appears that such discretion has been abused or withheld." Kotz v. Kotz, 134 Vt. 36, 40 (1975).

Significantly, in her April 5 motion asking the court to reconsider its January 4 ruling, plaintiff still did not provide a sworn statement attesting to facts that could establish that she was the children's de facto parent pursuant to 15C V.S.A. § 501. Whether we treat the motion as a motion to alter or amend the judgment pursuant to V.R.C.P. 59 or as a motion for relief from judgment pursuant to V.R.C.P. 60, we conclude that the family court acted within its discretion in denying plaintiff's first motion to reconsider. By the time she filed her first motion to reconsider, plaintiff evidently was aware of the content of the January 4, 2019 order. Yet she did not file an affidavit with the motion and therefore failed to address the deficiency that led to the original dismissal. The trial court had discretion to deny her motion on this basis. See Sandgate Sch. Dist. v. Cate, 2005 VT 88, ¶ 12, 178 Vt. 625 (mem.) (explaining that trial court may deny Rule 60(b) motion without hearing "where the grounds for the motion are frivolous or totally lacking in

[2] We construed plaintiff's brief as seeking a reopening of the time to file an appeal based on lack of notice pursuant to V.R.A.P. 4, and conclude that she is ineligible for this relief because she did not file her motion within 90 days of the entry.

merit"). Even if we assume information provided by court staff was inaccurate, plaintiff by that time had notice that the court had issued an order on January 4. That order explained that the court was dismissing her petition because she had not filed an affidavit alleging necessary facts for the court to determine that she might have a valid claim to parentage. It pointed her to the proper statute and urged her to find out whether DCF was still the custodian of any of the children. In the face of this clear direction from the trial court, we reject plaintiff's claim that her failure to follow the statute's requirements is the fault of court staff. We therefore affirm the family court's April 11 decision.

We turn next to the April 26 decision regarding plaintiff's second motion for reconsideration. The family court lacked authority to decide the second motion because it was filed after plaintiff appealed to this Court and the second motion addressed the same subject matter as the first. See Kotz, 134 Vt. at 39 (holding that once party files notice of appeal, trial court is divested of jurisdiction to decide Rule 60(b) motion absent remand for that purpose). We therefore vacate the April 26, 2019 decision.

However, we do not believe a remand is appropriate in these circumstances. Although the affidavit accompanying plaintiff's April 24 motion contains allegations that might support some of the necessary findings to establish a de facto parent, it still is not legally sufficient in that it does not include evidence that plaintiff assumed full and permanent responsibilities of a parent of the children and held out the children as her own. See 15C V.S.A. § 501(a)(1)(C)-(D).

Plaintiff also argues that this Court should address various alleged errors by DCF and the courts in the termination and guardianship proceedings involving her, her daughter, and her grandchildren. We do not address these arguments because they are beyond the scope of this parentage action.

The family division's April 26, 2019 order is vacated. The matter is otherwise affirmed.

BY THE COURT:

_____
Paul L. Reiber, Chief Justice

_____
Beth Robinson, Associate Justice

_____
Harold E. Eaton, Jr., Associate Justice