

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

MICHAEL CHEERVA
Avery & Cheerva LLP
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

RAYMOND K. HALEY,)
)
 Appellant-Petitioner,)
)
 vs.) No. 32A04-1009-DR-541
)
 DALANA K. HALEY,)
)
 Appellee-Respondent.)

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable David H. Coleman, Judge
Cause No. 32D01-1101-DR-31

March 17, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Petitioner Raymond K. Haley (“Husband”) appeals from the trial court’s grant of the motion of Appellee-Respondent Dalana Haley (“Wife”) for relief from judgment pursuant to Indiana Trial Rule 60(B)(8). We reverse.

FACTS AND PROCEDURAL HISTORY

On February 11, 2008, Husband filed a petition for dissolution of his marriage to Wife. On September 23, 2008, the trial court issued a decree of dissolution. The trial court found, *inter alia*, that Husband’s disability income was not a marital asset. Wife neither filed a motion to correct error nor appealed from the dissolution decree. On February 4, 2010, Wife filed a motion for relief from judgment, alleging that the trial court had erroneously failed to include Husband’s military retirement income, which all seem to agree is the same income previously identified as disability income. Wife noted in her motion that neither of the attorneys who represented her during the relevant time period filed a motion to correct error or pursued an appeal and argued that she was entitled to relief pursuant to Indiana Trial Rule 60(B)(8). At a hearing, Wife testified that she retained one of her attorneys to file a motion to correct error, but that it was not done. On July 1, 2010, the trial court granted Wife’s motion for relief from judgment and ordered that she receive \$441.55 per month out of Husband’s retirement income. On August 9, 2010, the trial court denied Husband’s motion to correct error and clarified that Wife was to receive \$220.77 per month and that Husband would be required to pay Wife an arrearage of \$4856.94.

DISCUSSION AND DECISION

At the outset, we note that Wife has not filed an Appellee’s brief. In such cases, we do not need to develop an argument for Wife, and we apply a less stringent standard of review. *Fowler v. Perry*, 830 N.E.2d 97, 102 (Ind. Ct. App. 2005). We may reverse the trial court if Husband is able to establish prima facie error, which is error at first sight, on first appearance, or on the face of it. *Id.* Husband contends that the trial court abused its discretion in granting Wife’s motion for relief from judgment pursuant to Rule 60(B)(8). Husband contends that Wife’s claim should instead be governed by Rule 60(B)(1), which governs allegations of mistake, surprise, or excusable neglect. Rule 60(B)(1) requires that the motion for reinstatement be made within one year of the judgment, and Wife moved for reinstatement well over one year following the dissolution decree. Rule 60(B)(8) motions, however, need only be filed within a “reasonable time[.]”

The question we must answer is whether the trial court abused its discretion in concluding that Rule 60(B)(8) governed this case. Rule 60(B) provides in relevant part as follows:

(B) Mistake—Excusable neglect—Newly discovered evidence—Fraud, etc. On motion and upon such terms as are just the court may relieve a party or his legal representative from a judgment, including a judgment by default, for the following reasons:

(1) mistake, surprise, or excusable neglect;

(8) any reason justifying relief from the operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4).

The motion shall be filed within a reasonable time for reasons (5), (6), (7), and (8), and not more than one year after the judgment, order or proceeding was entered or taken for reasons (1), (2), (3), (4). A movant filing a motion for reasons (1), (2), (3), (4), and (8) must allege a meritorious claim or defense.

“Trial Rule 60(B)(8) allows the trial court to set aside a judgment within a reasonable time for any reason justifying relief ‘other than those reasons set forth in subparagraphs (1), (2), (3), and (4).’” *Brimhall v. Brewster*, 864 N.E.2d 1148, 1153 (Ind. Ct. App. 2007) (quoting T.R. 60(B)(8)), *trans. denied*. The trial court’s residual powers under subsection (8) may only be invoked upon a showing of exceptional circumstances justifying extraordinary relief. *Id.* Among other things, exceptional circumstances do not include mistake, surprise, or excusable neglect, which are set out in Rule 60(B)(1). *Id.* Attempting to frame a claim as arising under Rule 60(B)(8) in order to avoid the one-year limitation of the more specific rules is unacceptable. *H & A, Inc., v. Gilmore*, 172 Ind. App. 10, 13, 359 N.E.2d 259, 261 (1977).

Trial Rule 60(B)(8) has in the past been distinguished on the following grounds:

[Trial Rule] 60(B)(8) is an omnibus provision which gives broad equitable power to the trial court in the exercise of its discretion and imposes a time limit based only on reasonableness. Nevertheless, under T.R. 60(B)(8), the party seeking relief from the judgment must show that its failure to act was not merely due to an omission involving the mistake, surprise or excusable neglect. Rather some extraordinary circumstances must be demonstrated affirmatively. This circumstance must be other than those circumstances enumerated in the preceding subsections of T.R. 60(B).

Id. (quoting *Ind. Ins. Co. v. Ins. Co. of N. Am.*, 734 N.E.2d 276, 279-80) (Ind. Ct. App. 2000)).

Wife’s claim here was that her attorneys failed to timely file a motion to correct error or pursue an appeal from the dissolution decree. This claim, if true, is clearly covered by Trial Rule 60(B)(1). *See, e.g., Summit Account & Computer Serv. v. Hogge*, 608 N.E.2d 1003, 1006 (Ind. Ct. App. 1993) (“Hogge contends that he was not

represented by counsel; he was unaware of his legal rights; and he was misled as to his legal rights. Hogge's motion more appropriately asserts allegations under T.R. 60(B)(1) for mistake, surprise, or excusable neglect, or possibly T.R. 60(B)(3) for misrepresentation." Wife has failed to demonstrate any extraordinary circumstances beyond the alleged excusable neglect. Consequently, Wife's claim is subject to Rule 60(B)(1)'s one-year requirement, rendering her motion to set aside default judgment untimely. *See id.* ("Hogge cannot now circumvent the time limitations of T.R. 60(B)(1) or (3) by attempting to rely on T.R. 60(B)(8)."). The trial court therefore abused its discretion in granting Wife's motion for relief from judgment.

The judgment of the trial court is reversed.

KIRSCH, J., and CRONE, J., concur.