



Robert Wallace (Husband) and Eileen Wallace (Wife) were divorced in December 2007 after more than twenty-six years of marriage. Almost a year later, Husband filed an Indiana Trial Rule 60(B) motion for relief from judgment pertaining to certain aspects of the dissolution decree. Husband, pro se, appeals the denial of that motion, presenting four issues for review. We address only one of those issues and its related sub-issues, however, because the others pertain to matters that Husband is now time-barred from pursuing. The lone remaining issue is whether the trial court erred in denying Husband's motion for relief from judgment under T.R. 60(B).

We affirm.

The facts favorable to the judgment are that Wife filed a petition for dissolution of marriage on October 3, 2005. Although Wife was represented by counsel from the outset of these proceedings, Husband did not initially seek counsel, "believing that he and Eileen [were] having an amicable separation." *Appellant's Brief* at 2. By December 2006, however, Husband had retained counsel. The matter proceeded to a final hearing on November 16, 2007. Husband and Wife were thereafter divorced via a decree of dissolution entered on December 19, 2007. On January 14, 2008, Husband filed a motion to correct error, claiming: (1) the trial court erred in rejecting his claim that Wife had dissipated certain marital assets during the pendency of the divorce proceedings, (2) the trial court erred in rejecting Husband's claim that he was entitled to credits "for certain expenditures made" during the pendency of the divorce proceedings, *Appellant's Appendix* at 34, (3) the trial court erred in its valuations of a business owned by the parties, the parties' real estate holdings, and their

personal property, and (4) the trial court erred in calculating the amount of the marital debt. Following a hearing, the trial court granted the motion for the limited purpose of reducing the money judgment in favor of Wife from \$492,018.50 to \$461,537.50. The motion to correct error was denied in all other respects. On April 14, 2008, Husband filed a notice of appeal with this court. A short time later, on June 18, 2008, that appeal was dismissed at Husband's request.

On December 9, 2008, Husband filed a pro se Motion For Relief From Judgment Pursuant to Trial Rule 60(B). In it, Husband cited as grounds for his motion excusable neglect, newly discovered evidence, fraud, and "any reason justifying relief from the operation of the judgment, other than those reasons set forth in" T.R. 60(B)(1), (2), (3), and (4). *Id.* at 70. Specifically, he alleged:

3. **Trial Rule 60(B)(1)(2)** allows for this motion to make the necessary corrections as regarding **mistakes**, the mistakes of this judgment are of a grievous magnitude; it was by **surprise** that the defendant lost the expert testimony of his witnesses and against a pre-trial agreement and stipulation between the parties and known and agreed to by the court, he was denied the true values of the assets as appraised by these professionals and it was by **excusable neglect** that, for the defendant, it was not possible for him to understand the fullness of these mistakes by himself to give a timely response for their correction, or the legal avenue for their correction, as he trusted in representation by his counsel and the court, as required by the court.

4. **Trial Rule 60(B)(3)** if the mistake(s), surprise and excusable neglect were committed with knowledge by the court and/or the counsel of either the plaintiff or the defendant, they would be guilty of committing **fraud** upon the defendant.

5. **Trial Rule 60(B)(8)** this claim merits correction as the net assets for division was an unfair and over-inflated net assets created [sic] by the

plaintiff and the court, awarded as an equally unfair judgment by equalization payment of cash bearing the 8% statutory interest rate against Robert E. Wallace. In effect, this awarded to the plaintiff, not 50% of the net marital assets as the court decreed, but in excess of 100% of the net marital assets, the entire equity, by mistake, surprise, excusable neglect and possible fraud given the definition of fraud. The net assets for division was [sic] an unreal creation of the plaintiff and the court and does [sic] not exist. It therefore becomes in excess of the marital pot, an unlawful distribution and an unlawful program of maintenance for the plaintiff to be taken unlawfully from future income of the defendant.

*Id.* at 70-71 (emphasis in original). The trial court denied Husband's motion for relief from judgment on December 22, 2008. Husband appeals that ruling.

Husband contends the trial court erred in denying his motion for relief from judgment under T.R. 60(B).<sup>1</sup> So far as we can tell, Husband claims he is entitled to relief under T.R. 60(B) for four reasons.<sup>2</sup> First, he contends that his failure to pursue a timely challenge is the result of excusable neglect. Second, he contends that he finds himself in this situation because he followed the advice – bad advice, he contends – of his attorney. Third, he contends he was defrauded by everyone else involved – including Wife, his and Wife's

---

<sup>1</sup> We observe here that this is the only ruling that Husband can appeal, as his time to file an appeal of the original decree of dissolution and the denial of his motion to correct error has lapsed. The original decree was amended as a result of his motion to correct error, and thus final, on March 4, 2008. His time to initiate an appeal of the original judgment, as amended, expired thirty days later. *See* Ind. Appellate Rule 9(1). We therefore summarily reject his arguments relating to the valuation and distribution of marital assets in the decree.

<sup>2</sup> Husband also cites a fifth ground based upon T.R. 60(B), i.e., surprise. He explains, "By surprise, Husband lost the expert testimony of his witnesses when Eileen misused the professional appraisals after the parties stipulated to their use." *Appellant's Brief* at 11. Like "excusable neglect" and "mistake" in this rule, the meaning of "surprise" is not susceptible to a specific definition, but instead must "turn upon the unique factual background of each case." *Siebert Oxidermo, Inc. v. Shields*, 446 N.E.2d 332, 340 (Ind. 1983). We need not delve into the specifics of Husband's frankly puzzling contention here because, whatever it means, "surprise" does not refer to the emotional or intellectual response that results when a strategy or course of action undertaken by the movant did not work out as expected.

respective attorneys, and the court. Finally, he contends the court erred in denying his motion without conducting a hearing. We will address each argument in turn.

We remind Husband that a T.R. 60(B) motion for relief from judgment may not be used as a substitute for a direct appeal. *Dillard v. Dillard*, 889 N.E.2d 28 (Ind. Ct. App. 2008). Instead, it “affords relief in extraordinary circumstances which are not the result of any fault or negligence on the part of the movant.” *Id.* at 34 (quoting *Goldsmith v. Jones*, 761 N.E.2d 471, 474 (Ind. Ct. App. 2002)). In deciding whether to grant such a motion, the trial court must balance the need for an efficient judicial system with the judicial preference for deciding disputes on the merits. *Parham v. Parham*, 855 N.E.2d 722 (Ind. Ct. App. 2006). We review the denial of a T.R. 60(B) motion for relief from judgment for abuse of discretion. *Dillard v. Dillard*, 889 N.E.2d 28. An abuse of discretion occurs when the denial is clearly against the logic and effect of the facts and inferences supporting the judgment for relief. *Id.* The movant bears the burden of demonstrating that the relief requested in a T.R. 60(B) motion for relief from judgment is both necessary and just. *Id.*

Husband contends he may avail himself of the “extraordinary relief” afforded under T.R. 60(B), *see Brimhall v. Brewster*, 864 N.E.2d 1148, 1153 (Ind. Ct. App. 2007), because his failure to seek relief in a timely fashion is a result of excusable neglect. Because the facts and circumstances of each case differ, there are no fixed rules or standards for determining what constitutes excusable neglect within the meaning of T.R. 60(B)(1). *Thompson v. Thompson*, 811 N.E.2d 888 (Ind. Ct. App. 2004). In arguing this point, Husband claims, “[i]t

was excusable neglect that Robert did not demand a greater deal of consideration be given to the debts ...” and then proceeds to detail his version of financial and accounting measures he undertook in contemplation of the divorce action. *Appellant’s Brief* at 18. He concludes with the observation that he “put trust in the process, his counsel and the court,” and that he “trusted Eileen to be fair and *expected the court would weigh the evidence* of assets and debts, expenses, and liabilities.” *Id.* (emphasis in original). Whatever else may be said of this discussion, we find in it no attempt to offer a legally cognizable justification for waiting so long to appeal the trial court’s ruling. In other words, we find no evidence or rationale for granting the T.R. 60(B) motion for relief from judgment on grounds of excusable neglect.

Although it is not entirely clear, Husband’s brief might be understood to argue that he is entitled to relief under T.R. 60(B) because his attorney did not provide effective representation. *E.g.*, “but [Husband’s] evidence and testimony was never objected [sic] and he was never prompted by counsel of his own, Eileen or the court to supplement his evidence or testimony”, *id.* at 20; “[i]t was excusable neglect, that while gaining a knowledge of the laws surrounding the division of marital assets in the state [sic] of Indiana, Husband neglected to gain understanding of the process of the law, the procedure to be followed by the counsel of the parties and court.” *Id.* at 17.

Assuming this argument has indeed been made, it is without merit. Generally, the negligence of an attorney is attributable to the client for T.R. 60(B) purposes, and attorney negligence will not support a finding of excusable neglect. There are exceptions to this rule,

but none apply here. *See Thompson v. Thompson*, 811 N.E.2d 888

Husband contends his motion for relief from judgment should be granted on grounds of “deliberate and willful fraud.” *Appellant’s Brief* at 22. What follows in the guise of argument in favor of this contention is a diatribe accusing Wife’s counsel of unethical conduct and accusing the trial court of condoning counsel’s alleged misconduct, and affirmatively committing its own misconduct as well. The following excerpt is representative of the discussion of opposing counsel’s alleged fraudulent behavior:

The trial court abused it’s [sic] discretion by allowing Eileen’s counsel too much freedom to control the outcome and create for Eileen a distribution that would guarantee her an income for the rest of her life. Eileen’s counsel had abused her authority and the court abused it’s [sic] discretion in accepting them [sic]. Mary C. Pierce had no regard for the Judiciary [sic] Rules of Professional Conduct[.]

*Id.* at 23. “For the use of impertinent, intemperate, scandalous, or vituperative language in briefs on appeal impugning or disparaging this court, the trial court, or opposing counsel, we have the plenary power to order a brief stricken from our files and to affirm the trial court without further ado.” *Clark v. Clark*, 578 N.E.2d 747, 748 (Ind. Ct. App. 1991). We conclude that Husband’s *ad hominem* attacks on opposing counsel are serious enough to warrant this extreme sanction.

Even if Husband’s intemperate comments and insinuations concerning Wife’s counsel do not merit this sanction, his comments about the trial court surely do. Husband accuses the trial court of “hav[ing] acted foolishly in this [sic] regards to the estate.” *Appellant’s Brief* at 36. Husband does not stop at characterizing the trial court’s actions as foolish. He goes on

to claim that skullduggery was afoot with respect to collaboration between Wife's counsel and the trial judge, i.e.,

Trial Rule 58 states, "Attorneys may submit suggested forms of judgment to the court, and upon request of the court, shall assist the court in the preparation of a judgment," [sic] While writing orders by counsel is a proper court procedure, in this instance, it has been abused. Eileen's counsel, Mary C. Pierce, Parke County, has office [sic] within feet of Special Judge Sam Swaim and serves as Judge Pro Tem for Parke County. It was not until after Special Judge Sam Swaim, Parke County, had qualified and assumed jurisdiction that Eileen released her first attorney of Vigo County and retained Mary C. Pierce. Eileen has, to date, not had to pay counsel, Mary C. Pierce, but Ms. Pierce is handling this as a lawsuit with payment due upon collection of the judgment.

*Id.* at 23. The meaning of Husband's insinuation is clear, baseless, and entirely inappropriate.<sup>3</sup> The mere fact that Wife's counsel submitted proposed orders and the trial court adopted them is not evidence of collaboration, and neither is the proximity of the offices of the individuals in question. Having said all of this, although grounds exist to strike Husband's brief and dismiss the appeal on this basis, *see Clark v. Clark*, 578 N.E.2d 747, we

---

<sup>3</sup> It may be of benefit to Husband to understand that, in addition to ethical considerations, there is a practical basis for condemning the use of this sort of *ad hominem* attack on opposing counsel and the court. As we have explained:

Such statements are as foolish as they are mischievous. Counsel has need of learning the ethics of [her] profession anew, if [she] believes that vituperation and scurrilous insinuation are useful to [her] or [her] client in presenting [her] case. The mind, conscious of its own integrity, does not respond readily to the goad of insolent, offensive, and impertinent language. It must be made plain that the purpose of a brief is to present to the court in concise form the points and questions in controversy, and by fair argument on the facts and law of the case to assist the court in arriving at a just and proper conclusion. A brief in no case can be used as a vehicle for the conveyance of hatred, contempt, insult, disrespect, or professional discourtesy of any nature for the court of review, trial judge, or opposing counsel. Invectives are not argument, and have no place in legal discussion, but tend only to produce prejudice and discord.

*Clark v. Clark*, 578 N.E.2d at 748-49 (quoting *Pittsburg, etc. R. Co. v. Muncie & P. Traction Co.*, 77 N.E. 941, 942, 166 Ind. 466 (1906)).

address his claims on the merits for purposes of judicial economy, which in this case are best served by clarifying, as we have done above, that his claims are meritless.

Husband's fourth ground for claiming the trial court erred in denying his T.R. 60(B) motion is that the trial court did so without affording him a hearing. T.R. 60(D) generally requires trial courts to hold a hearing on any pertinent evidence before granting relief under subsection (B). *Thompson v. Thompson*, 811 N.E.2d 888. When, as here, there is no pertinent evidence to be heard, a hearing is unnecessary. *Id.*

Finally, we note that Husband has included in his brief a Petition For Change of Venue From Judge. As grounds for the motion, Husband lays bare the accusation alluded to in the thinly veiled insinuation discussed above, i.e., "That Special Judge Sam A. Swaim has collaborated with counsel for plaintiff in said cause, in the deliberate creation of an unfair and fraudulent judgment against the defendant." *Appellant's Brief* at unnumbered page between numbered pages 40 and 41.

Ignoring the inappropriateness of these comments, we note that pursuant to T.R. 76(C), a request for change of judge "shall be filed not later than ten [10] days after the issues are first closed on the merits." That time has long since lapsed. We note also there is an exception to this ten-day limitation for cases in which this court orders a new trial or "otherwise remands a case such that a further hearing and receipt of evidence are required to reconsider all or some of the issues heard during the earlier trial[.]" T.R. 76(C)(3). Our decision in this appeal resolves all outstanding matters and requires nothing further of the

trial court. Therefore, the exception set out in T.R. 76(C)(3) does not apply. The petition for change of judge is denied.

Judgment affirmed.

NAJAM, J., and VAIDIK, J., concur.