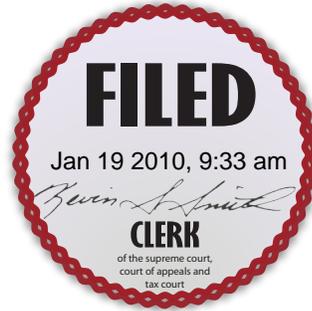


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEY FOR APPELLEE:

APRIL L. BOARD
April L. Board, P.C.
Valparaiso, Indiana

CHRISTINA J. MILLER
Lucas, Holcomb & Medrea, LLP
Merrillville, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

EMILIO D. SORIA,

Appellant-Respondent,

vs.

SWEE KIM LEE,

Appellee-Petitioner.

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No. 45A03-0907-CV-336

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Elizabeth F. Tavitas, Judge
Cause No. 45D03-0704-DR-421

January 19, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Emilio Soria (“Husband”) appeals the trial court’s denial of his motion for relief from judgment. Husband raises two issues, which we revise and restate as:

- I. Whether Husband was denied due process by the trial court’s denial of his motion for continuance and appointment of a guardian ad litem; and
- II. Whether the trial court abused its discretion by denying Husband’s motion for relief from judgment under Ind. Trial Rule 60(B).

We affirm.

The relevant facts follow. Husband, currently a board certified physician in neurology, and Swee Kim Lee (“Wife”) were married on February 18, 1974. On April 19, 2007, Wife filed a Verified Petition for Dissolution of Marriage and Motion for Provisional Orders. At this time, Husband and Wife did not have any minor children.

The trial court scheduled a hearing on Wife’s petition for May 10, 2007. Melanie Sterba filed an appearance for Husband and moved to continue the hearing set for May 10, 2007. Wife did not object, and the provisional hearing was rescheduled for June 11, 2007.

On July 24, 2007, the parties filed Agreed Provisional Orders, which the trial court adopted. The order provided that Husband pay Wife \$700 a month in spousal maintenance. The order also stated that “[t]he parties are hereby enjoined from transferring, encumbering concealing, selling or otherwise disposing of any marital property of the parties, held jointly or individually.” Appellant’s Appendix at 130.

The trial court scheduled a status hearing for August 8, 2007. Husband requested a continuance of the status conference, and Wife did not object. The trial court granted Husband's request and rescheduled the status hearing for September 6, 2007. Sterba moved to withdraw her appearance for Husband, which the trial court granted on September 13, 2007.

At the status hearing, Husband appeared in person and was represented by counsel Thomas Rucinski. As a result of the status conference, the trial court entered an order, which stated in part that Husband "shall complete his financial declaration form and serve same on [Wife]." Id. at 121. The order also stated that "[t]he parties shall exchange their witness list[s] by December 1, 2007, and complete their discovery no later than January 14, 2008. Moreover, the parties shall also exchange their exhibits on or before January 14, 2008." Id. at 121-122. The trial court scheduled the final hearing for February 14, 2008.

On January 18, 2008, Husband filed a motion for continuance. On January 22, 2008, Wife filed an objection to Husband's motion for continuance. On January 31, 2008, the trial court held a telephonic conference with Husband's counsel and Wife's counsel regarding Husband's motion for continuance. On February 22, 2008, the trial court issued an order that granted Husband's motion and rescheduled the final hearing for June 16, 2008. The trial court's order also stated that "[Husband] shall provide a completed Financial Declaration Form to [Wife]'s counsel no later than April 16, 2008. In the event [Husband] fails to provide his Financial Declaration Form as ordered, he

shall be barred from presenting any evidence contradicting the financial evidence presented by [Wife].” Id. at 118.

On April 21, 2008, the trial court granted Rucinski’s motion to withdraw his appearance on behalf of Husband. On May 27, 2008, J.J. Stankiewicz filed an appearance for Husband. On June 10, 2008, Husband filed a Verified Motion to Appoint Financial Guardian Ad Litem, which argued that “[d]ue to medical restrictions and limitations currently imposed on Husband, it is not possible to obtain effective and meaningful interaction and cooperation between attorney and client in this cause, as relates to the presentation of financial records and evidence spanning approximately 15 years.” Id. at 110.

That same day, Husband also filed a Verified Motion to Reset Final Hearing, Extend Deadlines for Mediation and Discovery and to Set Aside Prior Default Sanctions. Husband alleged that he suffered from an “extreme emotional challenged status” and that “this affliction severely restricts his ability to protect himself in these proceedings.” Id. at 103. Husband requested that the final hearing be rescheduled because Husband’s present attorney, Stankiewicz, had a conflict and an extension would allow an “interim appointment of a qualified guardian ad litem(s) to aid counsel and accountant in their preparation of financial evidence” and “time for consultation with and testimony of Husband’s treating physician.” Id. Husband also argued that “a sanction of total default for failure to produce financial discovery documents has been imposed against Husband.” Id. at 102.

On June 16, 2008, the trial court held a dissolution hearing at which Husband failed to appear but was represented by his attorney.¹ Husband's attorney conducted cross examination and submitted exhibits.

In late June or early July 2008, April Board filed a Substitution of Counsel and her Appearance on behalf on Husband. On July 14, 2008, the trial court entered a decree of dissolution which denied Husband's Motion to Reset Final Hearing, Extend Deadlines for Mediation and Discovery and to Set Aside Prior Default Sanctions. The decree also stated that Wife's attorney "is instructed to prepare the decree and findings and submit the findings separate from the decree and under seal."² Id. at 75-76.

On August 13, 2008, Husband filed a motion to correct error and for relief from judgment. Husband attached affidavits from himself, Husband's psychiatrist Suhayl Nasr, Husband's employer Larry Salberg, Board, and Sterba. On August 28, 2008, Wife filed a Statement in Opposition to Motion to Correct Error, Response to Request for Relief from Judgment and Motion to Strike Affidavits of Nasr, Salberg, Husband, and Board.

On December 2, 2008, the trial court held a hearing at which Husband appeared in person and was represented by counsel. The trial court continued the hearing for further

¹ Husband cites to the transcript of the June 16, 2008 hearing, but the record does not contain a complete transcript of this hearing. Wife includes portions of the transcript from this hearing in her Appellee's Appendix.

² The record does not contain a copy of the findings. The table of contents for Appellant's Appendix states that "Findings and Determination of Distribution of Marital Estate(Sealed)" are found at pages 78-82 of the appendix, but these pages are missing.

evidence. On February 18, 2009, the trial court held a hearing on Husband's motion to correct error and for relief from judgment, and Husband appeared and was represented by counsel. The trial court denied Husband's motion to correct error.

The trial court considered the affidavits with respect to Husband's motion for relief from judgment, which the trial court also denied. Specifically, the trial court stated:

[T]his court finds that the final order herein was appropriate considering all matters, and [Husband]'s Motion to Set Aside should fail, that he has failed to meet his burden that there was any fraud or any indication that this Court should exercise its discretion under Trial Rule 60(B)(8).

Appellant's Appendix at 8.

I.

The first issue is whether Husband was denied due process by the trial court's denial of his motion for continuance and motion to appoint a guardian ad litem.³

Husband argues that:

³ Husband phrases the issue as whether Husband was denied due process "in the Trial Court's denial of his Motion for Continuance; Appointment of a Guardian ad Litem; and Request to Set Aside Default Sanctions[.]" Appellant's Brief at 7. While Husband references the trial court's denial of his "Request to Set Aside Default Sanctions," Husband does not address this denial in his argument section. Therefore, Husband's argument that his constitutional rights were violated based upon the trial court's denial of his "Request to Set Aside Default Sanctions" is waived. See, e.g., Loomis v. Ameritech Corp., 764 N.E.2d 658, 668 (Ind. Ct. App. 2002) (holding argument waived for failure to cite authority or provide cogent argument), reh'g denied, trans. denied. In his reply brief, Husband raises the issue of whether the trial court abused its discretion in entering the discovery sanction. This issue is waived because Husband raised it for the first time in his reply brief. See Monroe Guar. Ins. Co. v. Magwerks Corp., 829 N.E.2d 968, 977 (Ind. 2005) ("The law is well settled that grounds for error may only be framed in an appellant's initial brief and if addressed for the first time in the reply brief, they are waived."); Ind. Appellate Rule 46(C) ("No new issues shall be raised in the reply brief.").

In the argument section of his brief, Husband states that he was denied due process by "the denial of any expert witnesses to siphon through the years of documents which had been solely in Wife's control." Appellant's Brief at 9. Husband does not develop a cogent argument. Therefore, Husband's

Husband through his involuntary inability to effectively participate in his case, namely due to his complete ignorance of his financial affairs during the entirety of the marriage and his mental incapacity related to depression was deprived through the denial of the request for continuance, the denial of an appointment of a [guardian ad litem]

Appellant’s Brief at 9. Husband argues that his “loss of his property interests invoked his constitutional rights to be heard.” Id. Husband also argues that “the trial court’s denial of these requests was an abuse of discretion as it resulted in violations of [his] procedural due process rights protected by our constitution.” Id.

As to Husband’s argument regarding the trial court’s denial of his request for a continuance and denial of his motion to appoint a guardian ad litem, “[t]he Due Process Clause of the U.S. Constitution and the Due Course of Law Clause of the Indiana Constitution prohibit state action that deprives a person of life, liberty, or property without a fair proceeding.” In re M.G.S., 756 N.E.2d 990, 1004 (Ind. Ct. App. 2001), trans. denied. Husband appears to focus on his rights to be heard and to “present evidence that was accurate.” Appellant’s Brief at 9.

To the extent that Husband suggests that his due process rights were violated because the trial court did not appoint a financial guardian ad litem, Husband does not cite to authority requiring the trial court to appoint a financial guardian ad litem. Also, Husband does not argue that he could not have hired an accountant to assist him.

argument that his constitutional rights were violated regarding expert witnesses is waived. See, e.g., Loomis, 764 N.E.2d at 668 (holding argument waived for failure to cite authority or provide cogent argument).

Regarding the denial of Husband's motion for a continuance, Husband submitted an affidavit with his motion for relief from judgment which stated that he did not know the date of the final hearing in the case. However, at the hearing on Husband's motion for relief from judgment, the trial court noted that Husband's counsel stated at the dissolution hearing that Husband did have notice of the final hearing. Further, the following exchange occurred at the hearing during the direct examination of Husband:

Q . . . Did you discuss what court it was pending in and when the trial was?

A He told me the thing that was almost certain that the date was going to be postponed.

Transcript at 39. The trial court ultimately concluded:

What is very clear to me is the fact that [Husband] knew of these proceedings. Had the wherewithal to hire attorneys to represent him. That he has the wherewithal to continue to be employed as a physician. And for whatever reason, has failed to follow through with representing his best interests through his attorneys.

* * * * *

This is simply, in my opinion, a man who has been irresponsible in his action.

Id. at 56. The record also reveals that Husband was represented by an attorney at the dissolution hearing and that the attorney conducted cross examination and submitted exhibits at the hearing on behalf of Husband. Under the circumstances, we cannot say that Husband's due process rights were violated. See Goossens v. Goossens, 829 N.E.2d 36, 43 (Ind. Ct. App. 2005) (rejecting husband's argument that he was denied due process

of law where husband had fifty days in which to obtain representation or better prepare himself for the hearing).

II.

The next issue is whether the trial court abused its discretion by denying Husband's motion for relief from judgment under Ind. Trial Rule 60(B).⁴ A grant of equitable relief under Ind. Trial Rule 60 is within the discretion of the trial court. We review a trial court's ruling on Rule 60 motions for abuse of discretion. Outback Steakhouse of Florida, Inc. v. Markley, 856 N.E.2d 65, 72 (Ind. 2006). "An abuse of discretion occurs when the trial court's judgment is clearly against the logic and effect of the facts and inferences supporting the judgment for relief." Ford Motor Co. v. Ammerman, 705 N.E.2d 539, 558 (Ind. Ct. App. 1999), reh'g denied, trans. denied, cert. denied, 529 U.S. 1021, 120 S. Ct. 1424 (2000). When reviewing the trial court's determination, we will not reweigh the evidence. Zwiebel v. Zwiebel, 689 N.E.2d 746, 748 (Ind. Ct. App. 1997), reh'g denied, trans. denied.

Ind. Trial Rule 60(B) "affords relief in extraordinary circumstances which are not the result of any fault or negligence on the part of the movant." Dillard v. Dillard, 889 N.E.2d 28, 34 (Ind. Ct. App. 2008) (quoting Goldsmith v. Jones, 761 N.E.2d 471, 474 (Ind. Ct. App. 2002), reh'g denied). "On a motion for relief from judgment, the burden is on the movant to demonstrate that relief is both necessary and just." Id. at 33 (quoting G.B. v. State, 715 N.E.2d 951, 953 (Ind. Ct. App. 1999)). A trial court must balance the

⁴ Husband does not appeal the trial court's denial of his motion to correct error.

alleged injustice suffered by the moving party against the interests of the party who prevailed and society's interest in the finality of judgment. Showalter v. Brubaker, 650 N.E.2d 693, 698 (Ind. Ct. App. 1995).

Husband's motion for relief from judgment does not specify which of the eight subsections of Ind. Trial Rule 60(B) form the basis of his motion. On appeal, Husband argues that Wife transferred funds for a number of years and that he was unable to attend the final hearing due to psychological reasons. Husband argues that "there was no negligence or fault on the part of Husband in his failure to participate in his case, he simply was unable to do so due to his financial illiteracy throughout the marriage and his psychiatric condition during the divorce." Appellant's Brief at 11. The trial court found that Husband "failed to meet his burden that there was any fraud or any indication that this Court should exercise its discretion under Trial Rule 60(B)(8)." Appellant's Appendix at 9.

Based upon Husband's arguments, the relevant portions of Ind. Trial Rule 60(B) appear to be subsections (1), (3), and (8), which provide:⁵

(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 an entry of default, final order, or final judgment, including a judgment by default, for the following reasons:

(1) mistake, surprise, or excusable neglect;

* * * * *

⁵ We note that Ind. Trial Rule 60(B) was subsequently amended effective January 1, 2009.

- (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

* * * * *

- (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), and (4). A movant filing a motion for reasons (1), (2), (3), (4), and (8) must allege a meritorious claim or defense.

To the extent that Husband argues that Ind. Trial Rule 60(B)(3) applies and that Wife committed fraud, misrepresentation, or other misconduct, we disagree. A party making such a claim must demonstrate that: (1) the opposing party knew or should have known from information available to him that his statements were false; and (2) the misrepresentation was made as to a material fact which would change the trial court's judgment. Otto v. Park Garden Associates, 612 N.E.2d 135, 142 (Ind. Ct. App. 1993), reh'g denied, trans. denied.

On appeal, Husband argues that Wife transferred money to their daughter in 2007 and that the record contains: "discrepancies as to where the money went from the sale of a home in 2000;" "unreliable values of accounts and assets from various valuation dates from 2002 through 2008;" "unreliable opinion testimony as to the value of the marital home and the loan on said home;" and "missing monies from the Fidelity Account which wife withdrew in 2005, some two years after she left the home without any explanation as

to where these monies went.” Appellant’s Brief at 11. Husband argues that “[t]hese issues alone raise over \$250,000 in discrepancies and unaccounted for monies in an estate that Wife valued at approximately 1.3 million dollars.” Id.

Husband does not point to evidence that Wife misled Husband. We cannot say that there was actionable fraud, that is, a false and material representation regarding a past or existing fact, made with knowledge or recklessness so as to produce a detrimental reliance. Covalt v. Covalt, 171 Ind. App. 37, 45 n.12, 354 N.E.2d 766, 771 n.12 (1976). We cannot say that Husband pointed to evidence of fraud, misrepresentation or other misconduct of Wife. See In re Marriage of Bradach, 422 N.E.2d 342, 350 (Ind. Ct. App. 1981) (holding that the resulting situation did not necessarily lead to the conclusion that wife was defrauded where she did not utilize her own attorney or other experts to investigate her suspicions or substantiate her claims); In re Marriage of Bates, 474 N.E.2d 140, 143 (Ind. Ct. App. 1985) (rejecting wife’s argument that her failure to appear to contest the divorce was excusable due to fraud by husband where wife was aware of final hearing and did not appear). Thus, we cannot say that the trial court abused its discretion by denying Husband’s motion for relief from judgment under Ind. Trial Rule 60(B) on this basis.

Husband also appears to suggest that Ind. Trial Rule 60(B)(1) or (8) are applicable in arguing that “there was no negligence or fault on [his part] in his failure to participate in his case, he simply was unable to do so due to his financial illiteracy throughout the marriage and his psychiatric condition during the divorce.” Appellant’s Brief at 11.

Wife points to the fact that Husband appeared in person at hearings before and after the dissolution hearing on June 16, 2008. Specifically, Husband appeared at the status hearing in September 2007, the hearing in December 2008, and the hearing in February 2009. We also note that at the hearing on his motion for relief from judgment, Husband testified that he reviews sleep studies at the Northern Indiana Neurological Institute.

Husband attached his own affidavit to his motion for relief from judgment, which stated: “I did not know that the final hearing in my case was to be held on June 16, 2008. I did not receive any messages to this effect from my attorney prior to this date.” Appellant’s Appendix at 27. This portion of Husband’s affidavit was addressed during the February 18, 2009 hearing when the following exchange occurred:

[Husband’s Attorney]: . . . Exhibit A, paragraph two says that he did not know his final hearing was to be held on June 16, 2008. That does tell the Court why he was not here.

THE COURT: And that conflicts with what I received at the time of the final hearing and it is up to this Court to determine who and what I believe. I have to assume that when an attorney appears in Court, without a client, and vehemently requests – aggressively, I guess the word is zealously, requests a continuance and cites everything that can be found to grant a continuance to the Court that no attorney would do that unless the attorney – and the attorney also stated that [Husband] did have notice of the hearing, the final hearing.

Transcript at 20-21.

Finally, we note that e-mails from Husband to Wife were admitted for the limited purpose to show that Husband intended to make the dissolution process difficult. One of Husband's e-mails stated, in part:

If you are expecting gracious behavior from me I think you are f----- crazy. Be aware that I will do anything in my hand for you to pay for what you have done to me. My lawyers will continue with you as long as I can pay their bills. If I am left with no money I don't care, I always will have my MD diploma to support myself. I have already told you many times that I do not care much for money, and if all I own goes to the lawyer's pocket just to make your life difficult it will be my pleasure expending it this way.

Exhibit 2.

Based upon the record, we cannot say that the trial court abused its discretion by denying Husband's motion for relief from judgment under Ind. Trial Rule 60(B)(1) or (8). Under the circumstances, we cannot say that the trial court's denial of Husband's motion under Ind. Trial Rule 60(B) constituted an abuse of discretion. See Showalter, 650 N.E.2d at 698-699 (holding that the trial court did not abuse its discretion by denying wife's motion for relief from judgment).

For the foregoing reasons, we affirm the trial court's denial of Husband's motion for relief from judgment.

Affirmed.

MATHIAS, J., and BARNES, J., concur.