

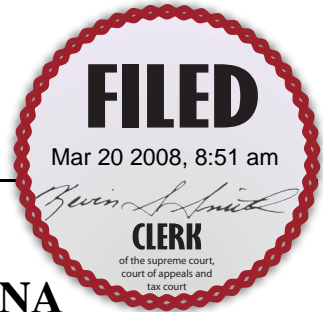
Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

MARK S. LENYO
South Bend, Indiana

ATTORNEY FOR APPELLEES:

RYAN P. RAY
Hains Law Firm, LLP
South Bend, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE)
ADOPTION OF E.W.)

JEREMY BEHAN,)

Appellant-Respondent,)

vs.)

AMANDA WAWOK and BRIAN WAWOK,)

Appellees-Petitioners.)

No. 71A04-0708-CV-446

APPEAL FROM THE ST. JOSEPH PROBATE COURT
The Honorable Eric Smithburn, Senior Judge
Cause No. 71J01-0611-AD-151

March 20, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Respondent, Jeremy Beahan (Jeremy), appeals the trial court's denial of his Motion for Relief of Judgment pursuant to Ind. Trial Rule 60(B), affirming its Order approving Adoption in favor of Appellees-Petitioners, Amanda Wawok (Amanda) and Brian Wawok (Brian).

We affirm.

ISSUE

Jeremy raises one issue on appeal, which we restate as follows: Whether the trial court abused its discretion in finding that Jeremy validly consented to the adoption of his minor child by Brian.

FACTS AND PROCEDURAL HISTORY

On November 14, 2004, Amanda, then Amanda Brown, gave birth to a daughter, E.W. At the time of the birth, Amanda was not married to E.W.'s biological father, Jeremy. Jeremy lived with his parents in Michigan City, Indiana. He graduated from high school and was employed at Sullair. Jeremy has fathered two children: E.W. and A.B., from his marriage to Odessa Burton.

Amanda and E.W. moved to Texas when E.W. was four months old. While they were in Texas, Jeremy filed a Petition to Establish Paternity and was declared to be the child's biological father. On November 30, 2005, after Amanda returned to Michigan City, Indiana, the trial court granted Amanda and Jeremy joint legal custody of their daughter, with Amanda receiving primary physical custody. Jeremy exercised regular visitation with E.W., visiting her two nights every other week and one night every week.

On July 26, 2006, Amanda married Brian. During that summer, Jeremy was planning a trip to the Philippines to visit friends. Before Jeremy left, Amanda contacted him asking his consent to allow Brian to adopt E.W. On August 31, 2006, Jeremy met Amanda at a local bank to sign a Consent and Waiver by Parent, in the presence of a notary public. After Jeremy read the documents and understood their content, the notary stamped and dated them. Amanda advised Jeremy that she would allow him sixty days to reconsider before filing the documents with the trial court.

On November 2, 2006, Amanda and Brian filed a Petition for Adoption and a Consent and Waiver by Parent, as well as a Joint Petition for Adoption by Stepparent. On November 17, 2006, the trial court entered an Order approving the Petition for Adoption of E.W. by Brian. Thereafter, on December 15, 2006, Jeremy filed a Motion for Relief of Judgment and a Motion to Withdraw Consent and to Contest Adoption. Four days later, on December 19, 2006, Jeremy filed a Motion to Correct Error.

On May 30, 2007, the trial court conducted a hearing on Jeremy's motions. On June 6, 2007, the trial court entered Orders, denying his motions. Specifically, the trial court's Order Denying Relief from Judgment states, in pertinent part:

1. Father, [Jeremy], executed a written Consent and Waiver by Parent, in the presence of a notary public on 8-31-06.
2. The Petition for Adoption was filed by Mother, [Amanda], and Stepfather, [Brian], on 11-2-06.
3. The [c]ourt entered its Order Approving Petition for Adoption on 11-17-06.
4. On 8-31-06, Jeremy was provided the three-page Consent and Waiver document [] and Jeremy, with full knowledge and understanding,

signed [the document] on both the second and third pages, in the presence of a notary public.

5. [The Consent and Waiver document] was not procured by fraud of Amanda or anyone else.
6. [The Consent and Waiver document] is the valid consent of Jeremy to the adoption of [E.W.] by the child's stepfather, [Brian].
7. [The Consent and Waiver document] was properly notarized.
8. The [c]ourt's 11-17-06 Order Approving Petition for Adoption was not procured by fraud.
9. Jeremy knowingly consented to E.W.'s adoption.
10. Jeremy has no other valid or meritorious defense.
11. Jeremy's Motion for Relief of Judgment ought to be and hereby is DENIED.

(Appellant's App. p. A-34).

Jeremy now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Jeremy contends that the trial court abused its discretion by denying his Motion for Relief from Judgment pursuant to T.R. 60(B)(3). Specifically, he claims that Amanda misrepresented the nature of the documents and the time period in which he could withdraw his consent to the adoption, thereby essentially committing fraud on the court.

Because a T.R. 60(B) motion is addressed to the equitable discretion of the trial court, we will review a trial court's ruling on a T.R. 60 motion for abuse of discretion. *Outback Steakhouse of Florida, Inc. v. Markley*, 856 N.E.2d 65, 72 (Ind. 2006). We will not reweigh the evidence and we give the trial court's order substantial deference. *Hartig v. Stratman*,

760 N.E.2d 668, 671 (Ind. Ct. App. 2002), *trans. denied*. We will reverse only if the trial court's conclusion was clearly against the logic and effect of the evidence presented or the trial court misinterpreted the law. *Id.*

Indiana Trial Rule 60(B)(3) enables a court to grant relief from an otherwise final judgment for “fraud, misrepresentation, or misconduct” of an adverse party. The rule creates a limited exception to the general rule of finality of judgments. *Outback Steakhouse of Florida, Inc.*, 856 N.E.2d at 73. If a party cannot show that the fraud, misrepresentation, or misconduct substantially prejudiced the party's presentation of the party's case, a court should not set aside an otherwise final judgment. *Id.* To assert a claim of fraud, a party must establish that an unconscionable plan or scheme was used to improperly influence the court's decision and that such acts prevented the losing party from fully and fairly presenting its case. *Stonger v. Sorrell*, 776 N.E.2d 353, 357 (Ind. 1994). To demonstrate actionable misrepresentation, the party moving for relief must establish that (1) the opposing party knew or should have known from the available information that the representation made was false, and (2) the misrepresentation was made with respect to a material fact which would change the trial court's judgment. *Zwiebel v. Zwiebel*, 689 N.E.2d 746, 748 (Ind. Ct. App. 1997), *reh'g denied, trans. denied*.

Additionally, T.R. 60(B)(3) expressly requires a party moving for relief for “fraud, misrepresentation, or misconduct” to show a “meritorious claim or defense.” This requires a showing that “vacating the judgment will not be an empty exercise.” *Outback Steakhouse of Florida, Inc.*, 856 N.E.2d at 73. Thus, in order for Jeremy to obtain relief under T.R. 60(B)(3), he must show that (1) Amanda's statements amounted to misrepresentation or fraud

upon the court; (2) the misrepresentation or fraud prevented him from fully and fairly presenting his case at trial; and (3) he has made a *prima facie* showing of a meritorious defense. *See id.* at 74.

Here, Jeremy first asserts that Amanda misrepresented the Consent and Waiver by Parent form. At trial, he testified that, when requested to sign the document at the bank, Amanda only presented him with pages 2 and 3. He stated he never read the first page of the waiver which clarifies that he is consenting to the adoption and waiving his parental rights to E.W. Jeremy testified that he only signed the paperwork because of Amanda's threat to withhold visitation of E.W. with Jeremy's parents while he was in the Philippines. Alleging a second instance of misrepresentation, Jeremy states that Amanda told him that he would have thirty days to withdraw his consent once he returned from his overseas trip. He testified that he relied on Amanda's statement and intended to rescind his consent after returning to Michigan City. However, the Consent and Waiver by Parent was filed on November 2, 2006, with the trial court granting E.W.'s adoption by Brian on November 17, 2006. Jeremy did not return from the Philippines until the end of 2006.

At trial, Amanda testified to both purported misrepresentations. She stated that all pages of the Consent and Waiver by Parent were given to Jeremy prior to signing and he retained a copy. In the presence of the notary public, Jeremy read through the document and appeared to understand its content. He signed on pages 2 and 3 and his signature was affirmed by the notary, who dated and time-stamped the Consent and Waiver by Parent. Amanda testified she did not threaten to deny grandparent visitation to coerce Jeremy to sign the documents. With regard to the time period to rescind consent, Amanda told the trial court

that she advised Jeremy that she would allow him sixty days to contact her if he did not wish to proceed with the adoption and that she would not file the paperwork until that time had expired. She clarified that she never heard from Jeremy.

Jeremy presented the evidence supporting his claims to the trial court; nevertheless, after an evidentiary hearing, the trial court found in favor of Amanda and Brian. Jeremy is now requesting us to reweigh the evidence. We decline his invitation and conclude that the trial court did not abuse its discretion in finding that Jeremy validly consented to the adoption of his minor child by Brian.

CONCLUSION¹

Based on the foregoing, we conclude that the trial court properly denied Jeremy's Motion for Relief of Judgment pursuant to Ind. Trial rule 60(B).

Affirmed.

KIRSCH, J., and MAY, J., concur.

¹ We hereby deny Amanda and Brian's request for damages pursuant to Ind. Appellate Rule 66(E). We do not find that Jeremy's appeal amounts to the level of meritlessness, bad faith, frivolity, harassment, vexatiousness or delay that would allow us to award damages under App. R. 66(E). *See Helmuth v. Distance Learning Systems Indiana, Inc.*, 837 N.E.2d 1085, 1094 (Ind. Ct. App. 2005).