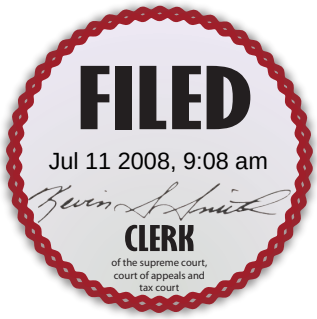

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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL A. WILLIAMSON,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 43A04-0802-CV-53
	)	
PENNY JANE (WILLIAMSON) ROSE,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE KOSCIUSKO CIRCUIT COURT
The Honorable Rex L. Reed, Judge
Cause No. 43C01-9106-DR-409

July 11, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Respondent Michael A. Williamson ("Michael") appeals the denial of his Indiana Trial Rule 60(B) motion to set aside a judgment obtained by his ex-wife Appellee-Petitioner Penny Williamson ("Penny"). We reverse and remand for an evidentiary hearing.

Issue

Michael articulates eight issues. His appellant's brief primarily addresses factual contentions that have apparently not been brought before the trial court, and cannot be resolved by this Court. His Appendix consists largely of documents apparently not submitted to the trial court as evidentiary exhibits.[1] Penny contends that Michael's brief is "replete with various forms of hearsay"[2] and requests that the appeal be dismissed. However, she admits that Michael has not been afforded a hearing in the trial court in response to his motions. We sua sponte raise the following issue: whether the matter must be remanded for an evidentiary hearing on the Trial Rule 60(B) motion.

Facts and Procedural History

Michael and Penny were divorced on August 18, 1992. They had three children, who were born on July 13, 1981, January 12, 1983, and September 19, 1984. Penny was awarded physical custody and Michael was ordered to pay child support.

On December 16, 2003, Michael filed a Motion to Discontinue Child Support alleging that all three children were emancipated. On October 30, 2006, after several continuances,

[1] Michael contends that he mailed certain documents to the trial court, including letters from Florida and Indiana schools, in an attempt to demonstrate that two of the children lived with him during one or more school years.

the trial court rescheduled a hearing for February 8, 2007, indicating as follows:

> In the event the movant, Michael Allen Williamson, fails to appear for hearing on February 8, 2007, his motion will be denied; provided, however, the arrearage then existing will be determined and reduced to money judgment. Additionally, the Court will consider awarding attorney fees as may be deemed appropriate.

(App. 4.) On February 8, 2007, Michael failed to appear in person. His counsel's request for an additional continuance was denied.[3] The trial court, having heard argument of counsel,[4] determined that the parties' youngest child was emancipated as of September 19, 2005, and child support was discontinued as of that date. Child support arrearage was determined to be $45,369.27.[5] Wage garnishment was initiated.

On February 21, 2007, Michael filed a pro-se pleading entitled "Motion for Appeal." (App. 5.) The trial court denied the motion "inasmuch as Mr. Williamson is represented by counsel." (App. 5.) On November 14, 2007, Michael filed a "motion to remove counsel." (App. 5.) On December 13, 2007, Michael filed a pro-se "motion to compel removal of defense counsel." (App. 5.) On December 28, 2007, counsel filed a motion to withdraw his representation of Michael, which the trial court granted.

On January 7, 2008, Michael filed a pro-se pleading entitled "Motion to Set Aside Order/Judgment." (App. 5.) The chronological case summary includes an entry "Motion

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[2] Appellee's Brief at 6.

[3] The record does not reveal whether counsel was present in person.

[4] There is no indication in the record that evidence was submitted.

[5] Mother alleges that the arrearage was accurately calculated because Michael was ordered to pay (in gross) $154.00 weekly for the support of three children, the aggregate award was not modified as the older children attained the age of twenty-one, and thus the aggregate amount continued to accrue until the youngest child

denied" but does not reflect that a hearing took place. (App. 5.) On January 17, 2008, Michael filed a "motion to reconsider motion to set aside order." (App. 6.) Again, the chronological case summary includes an entry "Motion denied" but does not reflect that a hearing took place. (App. 6.) On January 30, 2008, Michael filed his Notice of Appeal.

Discussion and Decision

Michael's arguments distill to the following: he was entitled by the terms of the dissolution decree to abatement of child support for long visitations, he also made non-conforming payments of child support, he had custody of all three children for significant amounts of time during their minority, and each of the three children was out of school and living as an emancipated adult prior to reaching age twenty-one.[6] Penny does not directly dispute Michael's contentions, but observes that Michael relies upon hearsay and that he "has never filed any motion with the court which resulted in a hearing, which is necessary to bring this issue to the trial court's attention." Appellee's Brief at 8.

The clerk's record is sparse. However, it reveals that there was an apparent breakdown in the attorney/client relationship and Williamson was frustrated in both his efforts to bring a direct appeal and a Trial Rule 60(B) motion to set aside the judgment.

T.R. 60(D) provides as follows:

> Hearing and relief granted. In passing upon a motion allowed by subdivision (B) of this rule the court shall hear any pertinent evidence, allow new parties to be served with summons, allow discovery, grant relief as provided under Rule 59 or otherwise as permitted by subdivision (B) of this rule.

(Emphasis added.) Thus, the plain language of the foregoing subdivision requires a hearing.

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reached age twenty-one on September 19, 2005.

Benjamin v. Benjamin, 798 N.E.2d 881, 889 (Ind. Ct. App. 2003). If there is no "pertinent evidence" a hearing is unnecessary. Id. However, Penny does not argue that the trial court properly dispensed with the hearing requirement in this instance because of a lack of "pertinent evidence" to be heard. Indeed, Penny does not dispute Micahel's contention that each child was living as an emancipated adult prior to 2005.

Under Trial Rule 60(B), the burden is upon the movant to establish grounds for relief. Mallard's Pointe Condo. Ass'n, Inc. v. L & L Investors Group, LLC, 859 N.E.2d 360, 365 (Ind. Ct. App. 2006), trans. denied. The rule is meant to afford relief in extraordinary circumstances that are not the result of fault or negligence on the part of the movant. Goldsmith v. Jones, 761 N.E.2d 471, 474 (Ind. Ct. App. 2002). In ruling on a Trial Rule 60(B) motion, the trial court must balance the alleged injustice suffered by the party moving for relief against the interests of the winning party and societal interest in the finality of litigation. Id. To this end, T.R. 60(D) requires a hearing at which pertinent evidence is to be presented. We decline to review the "exhibits" presented by Michael and remand for the development of a factual record in a T.R. 60(D) hearing.

Reversed and remanded.

FRIEDLANDER, J., and KIRSCH, J., concur.

[6] Allegedly, two were married.