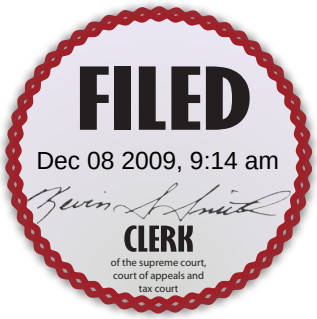

ATTORNEY FOR APPELLANT:

MICHAEL ALLEN
Allen & Troemel
Indianapolis, Indiana

ATTORNEY FOR APPELLEE:

NISSA M. RICAFORT
Broyles Kight & Ricafort, P.C.
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JONI L. LOVELL,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 49A02-0902-CV-143
	)	
JEFFREY D. LOVELL,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Victoria M. Ransberger, Judge Pro Tempore
Cause No. 49D07-9507-DR-1014

December 8, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-respondent Joni L. Lovell appeals the trial court's denial of her motion for relief from judgment pursuant to Indiana Trial Rule 60(B). Joni raises a number of issues, which essentially amount to an argument that she is entitled to retroactive modification of a 1996 child support order. Finding no error, we affirm.

FACTS

Joni and appellee-petitioner Jeffrey D. Lovell were married in September 1980. Three children were born of the marriage: Adrienne, born October 1981, Audrey, born May 1983, and Adam, born December 1986.

On April 14, 1989, Jeffrey filed a petition to dissolve the marriage, and the petition was granted on June 30,1989. On July 22, 1996, the trial court awarded physical custody of the three children to Jeffrey and ordered Joni to pay child support in gross in the amount of $129 per week.

On January 7, 1997, Joni filed an emergency petition for temporary and permanent custody, requesting that she be awarded custody of Adrienne and Audrey and that child support be modified accordingly. On January 10, 1997, the trial court refused to consider the petition, directing that the parties must first comply with previous orders, including an order to submit to mediation. The trial court indicated that Joni's petition would be held pending and that, following compliance with the previous orders, "either party can petition the Court for a hearing to prove said compliance and hear evidence on the pending motions." Appellant's App. p. 192. At the end of May 1998, Jeffrey, Joni, and a mediator reported to the court that the parties had entered into mediation, which was

ultimately unsuccessful. Joni did not, at any point in time, petition for a hearing to prove her compliance with the relevant orders and hear evidence on her pending motion.

On August 28, 2006, all three children were emancipated as a matter of law. Also in August 2006, in a separate proceeding, Joni received a medical malpractice settlement of approximately $100,000, with a future payment due when she turns sixty-five.

The record in this case is silent until January 29, 2007, when Jeffrey filed a petition for contempt. Jeffrey alleged that Joni had failed to make any of the weekly $129 child support payments as ordered by the trial court in July 1996. Jeffrey asked that Joni be ordered to pay over $70,000 in arrearage plus interest and attorney fees.

The trial court held a hearing on Jeffrey's petition on August 16, 2007. The parties dispute where Adrienne and Audrey lived from January 7, 1997, until the time of their emancipation; Joni insists that she took full custody and the girls lived with her, while Jeffrey argues that the evidence does not establish such a conclusion. Joni conceded that Adam lived with Jeffrey for half of the time during the relevant timeframe.

On September 11, 2007, the trial court granted Jeffrey's petition in part, finding as follows:

> 1. Pursuant to this Court's order of July 22, 1996, Mother was ordered to pay child support in the amount of $129.00 per week to Father for the care and support of the parties' three minor children. This order was an "in gross" child support order for all three children.
>
> 2. It is undisputed that Mother has failed to make any child support payments to Father since the Court's order of July 22, 1996.
>
> 3. It is also undisputed that at no point in time did Mother file a petition to modify her child support order.

4. It also is undisputed that at least one of the three minor children continued to reside with Father until August 28, 2006, the date that all three children were emancipated as a matter of law. . . .

5. Mother has asked this Court to consider evidence as to where each of the three children has allegedly resided since the Court's order of July 22, 1996 and to then reduce her child support obligation accordingly. The Court has declined Mother's request, as the Supreme Court of Indiana has specifically prohibited trial courts from considering such evidence for the purpose of a retroactive modification of an in gross child support order. See Whited v. Whited, 859 [N.E.2d] 657 (Ind. 2007).

6. As Mother made no child support payments from July 22, 1996 through August 28, 2006, her total child support arrearage is $68,112.00.

7. The evidence demonstrates that Mother was employed during this time period and that she had the income and means to pay her child support obligation. However, because the parties operated under an apparent verbal agreement between them, Mother did not pay child support and Father did not seek the contempt power of the Court until after Mother received a sizable settlement in a medical malpractice claim. Mother is not in contempt for willful violation of this Court's order.

8. The Court declines to award prejudgment interest given that Father never sought this child support until after all children had been emancipated and Mother received money from a settlement. Both parties benefited from the living arrangements that they made over the years for their children, yet neither sought court assistance to memorialize in court pleadings, the changes agreed upon as the children moved between the two homes.

9. . . . [E]ach party shall be responsible for their own attorney fees.

Appellant's App. p. 22-24. Joni did not file a motion to correct error. On November 21, 2007, she requested permission to file a belated appeal, which we denied; therefore, Joni's appeal was dismissed on April 28, 2008.

On September 11, 2008, Joni filed a motion for relief from judgment pursuant to Trial Rule 60(B), arguing, in part, that her January 1997 petition to modify custody and child support had never been ruled upon and that, because the petition was still pending, she was not technically requesting a retroactive modification. Following an October 9, 2008, hearing, the trial court denied Joni's motion on January 13, 2009, finding as follows:

> 2. [In entering the contempt order, t]his court relied on the Indiana Supreme Court's ruling in Whited v. Whited, 859 N.E.2d 657 (Ind. 2007) and specifically declined Mother's request to hear evidence regarding where each of the parties' three minor children had resided since July 22, 1996 which was over eleven years prior to the hearing in August 2007.
>
> 3. Mother never filed a timely Motion to Correct Errors regarding the September 1, 2007 Order. Mother has not provided this Court with any reason as to why she failed to file a timely Motion to Correct Errors.
>
> ***
>
> 6. Later, on September 30, 2008, Mother filed a Motion to Set [her January 1997] Emergency Petition to Modify for Hearing and a Motion to Stay Proceedings to Enforce Judgment. . . .
>
> 7. Mother's request for relief from judgment is denied because her request is procedurally barred. The court has carefully reviewed the Trial Rule 60 request and there are no new issues denoted that couldn't have been raised by Mother in a timely motion to correct error or a timely direct appeal. . . .
>
> 8. The court has also considered the merit of mother's arguments and finds that given the case law in Indiana, the positions advanced by Mother still fail. . . .
>
> 9. . . . Despite Mother's representations to the contrary, the evidence presented at the August 16, 2007, hearing in this matter did not establish that Mother assumed "full and complete custody" of the parties' two oldest children from January 1997

until the time each child was emancipated and that Mother provided the "daily care, custody and control" of the youngest child. Rather, Mother admitted during the hearing that the parties' youngest child had resided with Father at least fifty percent (50%) of [the] time since the Court's July 22, 1996 custody order until he was emancipated. Mother further admitted that the parties' youngest child had not resided primarily with Mother. Once Mother made these admissions, this Court declined to hear further evidence of where the parties' children had resided or which party had provided care for the children since the Court's July 22, 1996 custody order.

10. Nonetheless, Mother maintains that this Court should allow a retroactive modification of support because Mother, the "obligated" parent, had assumed custody of all three children. The evidence does not bear out this assertion. . . . As explained by the Indiana Supreme Court in Whited: "Where a parent is subject to an order in gross, however, this exception [allowing a retroactive modification of child support] can be applied only where all children subject to the order permanently change custody . . . ." Id. at 663.

11. . . . Mother did not dispute that the parties' youngest son resided primarily with Father since July 22, 1996. Thus, Mother cannot demonstrate that all three children permanently changed custody.

12. Mother also asserts that the Court erred in its September 11, 2007 Order by finding that "at no point in time did Mother file a petition to modify her child support order." Mother maintains that her filing of an "Emergency Petition for Temporary and Permanent Custody" on January 7, 1997, in which she asked for custody of all three children, also included a request to modify child support. . . . Mother further maintains that since the Court has never ruled on this request to modify custody, the request is somehow still pending before the Court and the Court could have heard evidence on the custody modification at the August 16, 2007 contempt hearing in this matter.

13. Although the Court acknowledges that this argument is interesting and creative, it does not change the Court's analysis and ultimate determination. Mother sat on her rights, failed to prosecute her request; in fact failed to follow through in any manner with her "emergency" type motion and now after eleven plus years, attempts to resurrect this matter. All of the children

have been emancipated for well over 2 years. This Court had no jurisdiction to issue an order modifying custody or support of the children.

14. . . . Mother failed to petition this Court for a hearing on her request to modify custody. She cannot now allege that her failure to do so has somehow left open her request to modify custody and that this Court should have addressed her request some ten years after she first filed her petition and after the children are all emancipated.

***

18. Lastly, Mother advances the position that if the Court does not grant relief to her, Father is unjustly enriched. Although Mother does not explain how such alleged unjust enrichment would entitle her to relief under Trial Rule 60, the Court notes that the prior child custody and support order in this matter anticipated that both parties would share time with the minor children. In its July 22, 1996 Order, the Court granted Father primary physical custody of the children. However, the court also specifically noted that the parties had "shared a flexible timesharing arrangement" with the children since the dissolution and the Court specifically found that "[m]odification of the parties' flexible timesharing arrangement is not in the best interests of the minor children." Thus, when the Court issued its order on July 22, 1996 requiring Mother to pay child support to Father in the amount of $129.00 a week, the Court's order anticipated and presumed that the parties would continue to have a flexible time share arrangement with the children, including that Mother would be spending a significant amount of time with the children.

Appellant's App. p. 24-32 (emphasis in original). The trial court denied Joni's motion for relief from judgment and Jeffrey's request for attorney fees. Joni now appeals.

DISCUSSION AND DECISION

Joni argues that the trial court erred by denying her Rule 60(B) motion for relief from judgment. A motion made pursuant to Trial Rule 60(B) is addressed to the trial court's equitable discretion. Ind. Ins. Co. v. Ins. Co. of N. Am., 734 N.E.2d 276, 278

(Ind. Ct. App. 2000). Thus, the grant or denial of such a motion will be reversed only when the trial court has abused its discretion. Id.

I. Rule 60(B)

Trial Rule 60(B) provides, in pertinent part, as follows:

> 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;
>
> (2) any ground for a motion to correct error, including without limitation newly discovered evidence, which by due diligence could not have been discovered in time to move for a motion to correct errors under Rule 59;
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) entry of default or judgment by default was entered against such party who was served only by publication and who was without actual knowledge of the action and judgment, order or proceedings;
>
> ***
>
> (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. . . .

The burden is on the movant to establish grounds for relief. Ind. Ins. Co., 734 N.E.2d at 279. Trial Rule 60(B) "is meant to afford relief from circumstances which could not have

been discovered during the period a motion to correct error could have been filed; it is not meant to be used as a substitute for a direct appeal or to revive an expired attempt to appeal." Id. (citing Snider v. Gaddis, 413 N.E.2d 322, 342 (Ind. Ct. App. 1980)).

Here, Joni has never offered an explanation for her failure to file a motion to correct error and/or a timely appeal from the trial court's original September 11, 2007, order. Nor has she explained why the basis for her Rule 60(B) motion could not have been discovered during the period a motion to correct error could have been filed. To the contrary, it is evident that the arguments made herein are precisely those that would have been made in a motion to correct error and/or timely appeal.

Joni argues that she is entitled to relief pursuant to Rule 60(B)(8), which

> "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)."

In re Paternity of P.S.S., 913 N.E.2d 765, 768 (quoting Brimhall v. Brewster, 864 N.E.2d 1148, 1153 (Ind. Ct. App. 2007), trans. denied) (emphasis added). Here, we cannot conclude that Joni has met her burden of affirmatively establishing the existence of extraordinary circumstances other than those circumstances enumerated in the preceding subsections of the rule. As more fully explored below, we ultimately find that even if Joni were not procedurally barred from raising this argument, she would fail on the merits as well. But inasmuch as she failed to file a timely motion to correct error and/or a

timely appeal and has failed to meet her burden of establishing that she is entitled to relief pursuant to Rule 60(B)(8), we find that the trial court did not err by denying her motion for relief from judgment on procedural grounds.

II. Merits

Procedural bar notwithstanding, we will also address the underlying merits of Joni's claim. She argues, essentially, that (1) her January 1997 motion to modify custody survived for a decade and should now be ruled on; and (2) even if that motion did not survive, she is entitled to a retroactive support modification.

A. Motion to Modify Custody

As for Joni's contention that her January 1997 motion to modify custody survived because the trial court never ruled on it, we observe that the trial court held the motion in abeyance while Joni and Jeffrey attempted to comply with previous court orders. In doing so, the trial court explicitly stated that following compliance with those orders, "either party can petition the Court for a hearing to prove said compliance and hear evidence on the pending motions." Appellant's App. p. 192. Notwithstanding the fact that Joni and Jeffrey entered into mediation, as required by those court orders, Joni did not ever petition the court to hold a hearing on her motion to modify custody. The proverbial ball was in her court but she declined to pick it up for ten years. We cannot find that Joni's unwillingness to be proactive—as requested by the trial court—enabled her to revive the motion ten years later.

Furthermore, we note that, in the meantime, all three of her children became emancipated as a matter of law by August 28, 2006. At that point, the trial court was

without authority to modify the parties' custody arrangement, given that there were no longer any minors over which Joni and Jeffrey had custody. Therefore, at the very latest, Joni's motion to modify the parties' custody arrangement expired in August 2006, over two years before she filed her September 11, 2008, motion for relief from judgment. We cannot agree, therefore, that Joni's motion to modify, which contained within it a request to modify child support, survived a decade and warranted a ruling by the trial court herein.

B. Retroactive Modification

Inasmuch as there was no petition to modify child support pending at the time Jeffrey filed his petition, we must consider whether Joni is entitled to retroactive modification of her child support obligation pursuant to Whited v. Whited, 859 N.E.2d 657 (Ind. 2007).

In Whited, our Supreme Court affirmed the long-standing rule that, in general, "after support obligations have accrued, a court may not retroactively reduce or eliminate such obligations." Id. at 661. Moreover, where, as here,

> a court enters an order in gross, that obligation similarly continues until the order is modified and/or set aside, or all the children are emancipated, or all of the children reach the age of twenty-one. We have prohibited retroactive modification even where one of the several children subject to the order in gross died.

Id. (emphases in original) (internal citations omitted). Therefore, "subject to two narrow exceptions, court orders for child support remain effective until a court changes them." Id. at 662. Our Supreme Court then explained that retroactive modification is permitted only when:

> (1) the parties have agreed to and carried out an alternative method of payment which substantially complies with the spirit of the decree, or (2) the obligated parent takes the child into his or her home, assumes custody, provides necessities, and exercises parental control for such a period of time that a permanent change of custody is exercised.

Id.

As for the first exception, our Supreme Court explained that the standard for alternative arrangements that substantially comply with the spirit of the original decree is rigorous. Thus, "[c]redit for non-conforming payments is recognized when parents informally agree to change the form of payment (e.g., payment directly to the parent as opposed to through the clerk's office), so long as the amount of payment can be verified and there is no reduction of amount." Id. (emphasis added).

Here, Joni argues that the parties' alleged agreement to permit their older two daughters to live with her and the youngest son to split the time between his parents' homes falls under this exception. We cannot agree. See id. (citing Decker v. Decker, 829 N.E.2d 77, 80 (Ind. Ct. App. 2005), for the proposition that provision of "child care did not substantially comply with decree requiring father to pay weekly installments to clerk"). The parties' original agreement bestowed physical custody on Jeffrey, with Joni having extensive visitation rights and a weekly child support obligation of $129. We cannot find that the alleged verbal agreement, pursuant to which Joni assumed custody of two of the children and incurred a reduced weekly support obligation, substantially complies with the spirit of the original decree. These events went much farther than a

mere change in the form of payment. Therefore, no retroactive modification is permitted under this exception.

As for the second exception, when, as here, there is an in gross child support order, the exception may be applied only where all children subject to the order permanently change custody. Whited, 859 N.E.2d at 663 (explicitly noting that, if fewer than all of the children permanently change custody, "the court may deny a 'pro rata reduction' to fully support the remaining children and ease the original custodian's burden"). Joni conceded that Adam did not change custody; instead, he continued to live with Jeffrey for approximately half of the time. Therefore, no retroactive modification is permitted under this exception.

Our Supreme Court made clear that retroactive modification is not permitted, save only for the two narrow exceptions that do not apply herein. Therefore, Joni is not entitled to this relief. Given that she owed $129 per week and failed to pay that amount for a decade, failed to pursue her motion to modify custody in court, failed to file a motion to modify her child support obligation, and failed, at every turn, to protect herself procedurally, we can only find that the trial court did not err by ordering her to pay Jeffrey arrearage in the amount of $68,112.00.

The judgment of the trial court is affirmed.

BAILEY, J., and ROBB, J., concur.