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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE THE MARRIAGE OF:)
JOHN D. HIZER,)
)
Appellant-Petitioner,)
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)
SONDA J. HIZER,)
)
)
Appellee-Respondent.)

No. 32A01-0605-CV-215

APPEAL FROM THE HENDRICKS CIRCUIT COURT
The Honorable J.V. Boles, Judge
Cause No. 32C01-0406-DR-86

DECEMBER 28, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Petitioner-Appellant John D. Hizer (Husband) appeals the trial court's denial of his motion for relief from judgment following the dissolution of his marriage to Respondent-Appellee Sonda J. Hizer (Wife).

We affirm.

Husband presents one issue for our review, which we restate as: whether the trial court erred by denying Husband's Trial Rule 60(B) motion for relief from judgment.

Husband and Wife were married on April 24, 1976. On June 22, 2004, Husband filed his petition for dissolution of marriage. A final hearing was held on February 9, 2005, at which time the court appointed a commissioner to sell the marital residence. On April 27, 2005, the trial court issued its decree of dissolution and property division, parts of which were challenged by Wife in a motion to correct error. The court granted Wife's motion, in part, and issued its order correcting the decree. On August 18, 2005, the trial court conducted an emergency hearing to entertain the commissioner's request for permission to accept a counter-offer on the sale of the parties' home. The trial court granted the commissioner's request. Subsequently on October 12, 2005, the commissioner filed a petition seeking authority from the trial court to distribute escrowed funds from the sale of the parties' home. The trial court then issued its order releasing the escrowed funds. The following month, Wife filed with the court her motion for order of preparation of QDRO ("qualified domestic relations order"), and the trial court granted her request. Soon after, on November 18, 2005, Husband filed his Trial Rule 60(B)

motion with the trial court. Following a hearing, the trial court denied Husband's motion. It is from this denial that Husband now appeals.

Husband contends that the trial court abused its discretion by denying his T.R. 60(B) motion. Because a T.R. 60(B) motion is addressed to the equitable discretion of the trial court, the denial of such a motion is reviewed on appeal only for an abuse of discretion. *In re the Adoption of T.L.W.*, 835 N.E.2d 598, 600 (Ind. Ct. App. 2005). An abuse of discretion occurs when the trial court's judgment is clearly against the logic and effect of the facts and circumstances before it and the inferences to be drawn therefrom. *Id.* In ruling on such a motion, the trial court must balance the alleged injustice suffered by the moving party against the interests of the non-moving party and society in general in the finality of litigation. *Hoosier Health Systems, Inc. v. St. Francis Hosp. & Health Centers*, 796 N.E.2d 383, 388 (Ind. Ct. App. 2003). In reviewing the evidence, this Court will neither reweigh the evidence nor substitute our judgment for that of the trial court. *T.L.W.*, 835 N.E.2d at 600. A T.R. 60(B) motion neither may be used as a substitute for a direct appeal, nor can it be used to revive the right to an appeal after the time for appeal has expired. *Snider v. Gaddis*, 413 N.E.2d 322, 326 (Ind. Ct. App. 1980). Rather, the rule affords relief only in extraordinary circumstances that are not the result of any fault or negligence on the part of the movant. *Goldsmith v. Jones*, 761 N.E.2d 471, 474 (Ind. Ct. App. 2002), *reh'g denied*. The burden is on the movant to establish grounds for relief. *Id.*

With the foregoing rules in mind, we will examine Husband's T.R. 60(B) motion. Husband's chief complaint in his motion is that the parties' marital residence sold for less

than the amount contemplated in the property settlement. In addition, unexpected expenses related to the residence were deducted from the sale proceeds. Accordingly, all of these circumstances reduced the amount the parties received from the sale of their home. Pursuant to the decree, Wife was to receive a sum certain from the sale of the residence and, in the case of a shortfall, Wife was to receive funds from Husband's personal savings plan through a QDRO. Thus, due to the decrease in the proceeds from the sale of the house, Wife received more funds from Husband's plan than Husband had originally anticipated. The following timeline will aid us in our analysis of the issue in this case:

April 27, 2005	Decree of dissolution and property division entered
May 6, 2005	Wife's motion to correct error filed; Husband ordered to respond to Wife's motion by June 9, 2005
May 23, 2005	Motion to withdraw filed by Husband's attorney; granted by court on May 24, 2005
June 14, 2005	Court granted Wife's motion to correct error, in part; Husband failed to respond to Wife's motion to correct error
August 18, 2005	Court granted commissioner's request for permission to make counter-offer regarding sale of parties' marital residence; parties notified on August 22, 2005
August 22, 2005	Commissioner filed purchase agreement for sale of parties' marital residence
August 30, 2005	Commissioner's deed submitted, approved and made judgment and order of the court

October 13, 2005 Court granted commissioner's petition to release escrowed funds; parties notified on October 14, 2005

November 18, 2005 Husband, by new counsel, filed TR 60(B) motion.

Appellant's Appendix at 5-7.

First, we note that there are two vehicles by which Husband could have raised his concerns over the sale of the house and the ensuing matters prior to filing a T.R. 60(B) motion: a motion to correct error and/or an appeal. Trial Rule 59 provides that a motion to correct error "shall be filed not later than thirty (30) days after the entry of a final judgment or an appealable final order." T.R. 59(C). In addition, Rule 9(A)(1) of the Indiana Rules of Appellate Procedure provides that a party may initiate an appeal by filing a notice of appeal within thirty days after the entry of a final judgment or within thirty days after the trial court's ruling on a party's motion to correct error or thirty days after such motion is deemed denied pursuant to Trial Rule 53.3, whichever comes first. Our review of the materials on appeal reveals that Husband failed to file a motion to correct error or an appeal with regard to this dissolution action. Specifically, we note that Husband did not file a motion to correct error or an appeal with regard to any of the orders concerning the sale of the parties' marital residence or the court's order for the QDRO on behalf of Wife.

At the hearing on the T.R. 60(B) motion, Husband testified that he received a copy of the divorce decree and that he understood he had thirty days to file an appeal. Husband also admitted to receiving a copy of Wife's motion to correct error in addition to the court's order requiring him to file a response. Moreover, Husband stated that he

received notice and that, on or about August 18, 2005, he was aware that the commissioner was seeking permission to sell the marital residence for less than the amount contemplated in the property settlement. He also confirmed that, armed with this knowledge, he did not file anything with the court objecting to the commissioner's request or the reduced price of the residence.

Moreover, Husband sets forth no extraordinary circumstances that would invoke the court's equitable powers under T.R. 60. Husband received notice of the likelihood of a lower sale price of the marital residence than what he had first contemplated, yet he did nothing. Further, Husband does not allege the absence of fault or negligence on his part. Rather, he confirms that although he disagreed with the lower sales price of the marital residence, he did not challenge the lower price of the home. Appellant's Brief at 27. As noted previously, Husband did not file a motion to correct error or initiate an appeal. Instead, Husband waited approximately 90 days after the court's order regarding the sale price of the marital residence and filed his T.R. 60(B) motion. Husband has made no showing of exceptional circumstances that come within the purview of T.R. 60(B).

Other than only a slight mention of T.R. 60(B)(7) for the first time on page 11 of his brief, Husband's motion and argument are based upon T.R. 60(B) subsection 2 which states that relief may be granted on "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." T.R. 60(B)(2). A party who requests relief from a judgment pursuant to T.R. 60(B)(2) has the

burden of proof to establish his or her grounds for relief. *Bowman v. Smoot*, 806 N.E.2d 811, 815 (Ind. Ct. App. 2004).

Our review of the materials on appeal shows that there is no newly discovered evidence. Specifically, at the evidentiary hearing on Husband's T.R. 60(B) motion, Husband testified that he received a copy of the divorce decree and that he understood that he had thirty days to perfect an appeal. The decree sets forth the trial judge's order that Wife was to receive \$150,737.78 from the sale of the house, and, in the event there was a shortage in the house sale proceeds, the funds were to come from Husband's personal savings plan via a QDRO. Subsequently, in response to the Wife's motion to correct error to which the Husband failed to respond, in June 2005 the court entered an order correcting the decree which ordered Wife to receive the corrected sum of \$170,517.45 from the sale of the marital residence and, if needed, Husband's personal savings plan. Further, Husband testified at the hearing that in August 2005 he was aware and had received notice that the commissioner had requested permission to make a counter-offer on the house for \$15,000 less than the amount contemplated in the parties' property settlement but that he did not file anything with the court objecting to the commissioner's request. The certified CCS also shows that in August 2005 the parties were sent notice of the final purchase agreement for the sale of the home. At this time, or at any time prior during the pendency of this divorce, a simple computation would have revealed to Husband the possible results of the sale of the marital residence for less than the amount stated in the decree. Indeed, although the trial court valued the marital home at \$215,000, it did not order that the house be sold for that amount. Moreover, the risk that the home

would sell for less than the amount at which it was valued in the decree was always present. Yet, Husband failed to avail himself of the opportunity to challenge the court's orders regarding the sale of the residence. In addition, the court's order releasing escrow funds on October 12, 2005 reinforced the fact that Wife would be receiving more money from Husband's personal savings plan than originally planned. Husband's T.R. 60(B) motion was filed more than thirty days after the court's escrow order on November 18, 2005. Thus, the fact that the house sold for less than the amount it was valued in the decree and that there would, therefore, be more money taken from Husband's personal savings plan, was not newly discovered evidence as is required by TR 60(B)(2). This case lacks any newly discovered evidence to establish the existence of an injustice outweighing the need for finality of the trial court's judgment.

We briefly address Husband's contention that the trial court lacked jurisdiction to modify its final order. In so alleging, Husband cites Ind. Code § 33-23-2-4, which states that courts retain power and control over their judgments for ninety days after rendering the judgments. Husband argues that the trial court improperly issued orders in this case after the ninety-day period had expired.

When a trial court acquires jurisdiction, it retains jurisdiction until it makes a final disposition of the case. *Chapin v. Hulse*, 599 N.E.2d 217, 219 (Ind. Ct. App. 1992), *trans. denied*. After final judgment, the trial court retains "only such continuing jurisdiction as is permitted by the judgment itself, or as is given the court by statute or rule." *Id.*

In the present case, Husband claims error with the trial court's issuance of orders following entry of the final judgment of dissolution and property settlement. Specifically, Husband asserts that the trial court no longer had jurisdiction over this case when it issued its order releasing escrow funds on October 12, 2005 and the QDRO on November 18, 2005.

The order releasing escrow funds was issued by the trial court to carry out the terms of the decree of dissolution and property settlement. Paragraph 3 of the decree ordered a commissioner to sell the parties' marital residence. Paragraph 12 of the decree ordered the commissioner to pay the fees of selling the residence out of the sale proceeds. The commissioner petitioned the court to escrow funds in order to guarantee payment of costs not collected at closing, and, following closing on the real estate, the court issued its order releasing these funds.

Likewise, Paragraph 12 of the decree ordered the commissioner to pay Wife a sum certain which, if not able to be fulfilled out of the proceeds of the house sale, were to be fulfilled from Husband's personal savings plan through the issuance of a QDRO. The proceeds from the sale of the house fell short of the amount due to Wife, so the court entered a QDRO for the remaining amount. Both of these orders were well within the trial court's continuing jurisdiction as permitted by the judgment (i.e., the decree and property settlement). We find no error.

Finally, we note that there was a period from May 2005 to November 2005 when Husband was not represented by counsel. However, Husband cannot take refuge in the sanctuary of his amateur status during that period. A litigant who chooses to proceed *pro*

se will be held to the same rules of procedure as trained legal counsel and must be prepared to accept the consequences of his action. *Thacker v. Wentzel*, 797 N.E.2d 342, 345 (Ind. Ct. App. 2003).

Based upon the foregoing discussion and authorities, we conclude that the trial court did not err when it denied Husband's T.R. 60(B) motion. As Husband acknowledges, it is generally not permissible "to use a T.R. 60(B) motion to remedy a failure to take an appeal." Appellant's Brief at 13. Moreover, we agree with Husband that a party, such as himself, "cannot sit idly by, let the time for an appeal lapse, and thereafter file a T.R. 60(B) motion and thereby revive his expired remedy of appeal." Appellant's Brief at 17. Therefore, the trial court did not abuse its discretion in this case by denying Husband's T.R. 60(B) motion because the motion was used in place of an appeal or a motion to correct error where neither were filed, there were no extraordinary circumstances present to invoke the court's exercise of its equitable powers, and there was no newly discovered evidence.

Affirmed.

VAIDIK, J., and BAILEY, J., concur.