

Children's Law Center of Indiana



Custody and Parenting Time

2/14/12

In **In Re Marriage of K.Z. and M.H.**, 961 N.E.2d 1023 (Ind. Ct. App. 2012), the Court affirmed the trial court's modification of the parties' dissolution judgment to state that a child had been born of the marriage. The parties were married on June 7, 2009. On January 26, 2011, Mother petitioned for dissolution of the marriage. In her petition, signed under the penalty of perjury, Mother averred: "I am currently six months pregnant; and there will be one minor child born to the marriage, who will be dependent on the parties for support." On March 28, 2011, Mother wrote a letter to the dissolution court expressing a desire to have the marriage terminated before the child's birth. On April 8, 2011, the parties waived final hearing and submitted a proposed final decree, which provided that there were no children born during the marriage, and that Petitioner is now pregnant. The dissolution court approved and adopted the proposed decree and dissolved the marriage on April 8, 2011. On May 26, 2011, Father wrote a letter to the dissolution court claiming that his child had been born and he was denied access to her. On June 1, 2011, Father, by counsel, filed his "Motion to Set Aside Judgment Pursuant to Trial Rule 60." On June 29, 2011, the dissolution court conducted a consolidated hearing to address the Trial Rule 60(B) motion and Mother's petition for a protective order. Mother testified, counsel presented argument, and Father's counsel advised the court that Father was not seeking to have the dissolution decree vacated, but rather was seeking a modification to reflect the parties' child having been born. The trial court entered an order modifying the dissolution decree to reflect the birth of a child born to the parties to the marriage. Mother appealed.

The Court opined that Mother has demonstrated no abuse of discretion in the trial court's decision to modify the decree because the was not against the logic and effect of the facts and circumstances before it and no injustice resulted from the grant of relief. *Id.* at 1026. The Court treated Father's motion as one filed under Indiana Trial Rule 60(B)(8), which provides:

On motion and upon such terms as are just the court may relieve a party or his legal representative from a judgment, including a judgment by default, for the following reasons:

(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).

Noting that the grant or denial of a Trial Rule 60(B) motion for relief from judgment is reviewed under an abuse of discretion standard, the Court said that it will not find an abuse of discretion unless the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or is contrary to law. Id. at 1025. Mother claimed that: (1) the grant of relief is contrary to law because the trial court heard no evidence of Father's paternity; and (2) Father should initiate a paternity action to assert his claim that he is the father of Mother's child. The Court opined that, although it is true neither party testified that Father is the biological parent of the child born to Mother, the paternity of Mother's child is not a disputed fact. Id. The Court observed that: (1) in her petition for dissolution, Mother advised that she was pregnant with a child of the marriage; (2) the dissolution court was entitled to rely upon the presumption of IC 31-14-7-1 that a child conceived during the marriage is a child of the marriage; and (3) the law "indulges every presumption and charity in favor of the legitimacy of children", citing Buchanan v. Buchanan, 256 Ind. 119, 123, 267 N.E.2d 155, 157 (1971). K.Z. at 1025-26. The Court opined that Father should not be compelled to initiate paternity proceedings, as if the child were an out-of-wedlock child. Id. at 1026. The Court said that although the child was not born during the marriage, the child is—according to the parties' affirmative representations to the court and statutory presumption—a child of the marriage. Id.