

Children's Law Center of Indiana



Paternity Establishment

5/31/16

In **Varble v. Varble**, 55 N.E.3d 879 (Ind. Ct. App. 2016), the Court affirmed the circuit court's denial of Alleged Father's motion for relief from judgment which he had filed in the dissolution case of Mother and Legal Father. *Id.* at 887. The marriage of Mother and Legal Father was dissolved on December 8, 2009. The Settlement Agreement and Dissolution Decree stated that there were two children born of the marriage, one of whom is A.C. Mother and Legal Father agreed to share joint legal and joint physical custody, with A.C. and their other child spending fifty per cent of their time in each parent's home. Four years later, on June 16, 2014, Alleged Father filed a Verified Petition to Establish Paternity of A.C. and Determine Custody, Parenting Time, and Support. The paternity petition was filed under a paternity cause number in the same court which had jurisdiction over the dissolution of Mother's and Legal Father's marriage. Alleged Father did not join Legal Father as a party to the paternity case and did not give Legal Father notice of the paternity case. In his paternity petition, Alleged Father stated that he and Mother were married on January 11, 2011, and requested an order: (1) finding that he is the father of A.C.; (2) determining A.C.'s custody and parenting time; and (3) changing A.C.'s last name to Alleged Father's last name. The Agreed Order of Paternity provided in part that: Alleged Father and Mother had good cause to believe that: (1) Legal Father underwent a vasectomy prior to the conception of A.C.; (2) Legal Father should have been on notice that A.C. was not his biological child; (3) DNA testing conducted in November of 2010 revealed that Alleged Father is A.C.'s biological father. On June 17, 2014, the trial court signed the Agreed Order of Paternity.

On August 12, 2014, Alleged Father filed motions in the dissolution case to: (1) intervene; (2) terminate Legal Father's parenting time with A.C.; and (3) request relief from Mother's and Legal Father's December 2009 Settlement Agreement and decree, citing Trial Rule 60(B)(1) and (8). Alleged Father requested that the Settlement Agreement and Dissolution decree be modified to exclude A.C. as a child of Mother's marriage to Legal Father. On August 13, 2014, the trial court granted Alleged Father's motions to intervene and for a hearing, but denied his motion for immediate termination of Legal Father's parenting time. On August 29, 2014, Legal Father filed a number of motions in the paternity case, including objections and responses to Alleged Father's motions for relief from judgment and termination of Legal Father's parenting time. Legal Father argued that A.C. had known Legal Father as his father for A.C.'s entire life, A.C. had been held out by all parties as Legal Father's child for A.C.'s entire life, that Alleged Father's substantially delayed motion was not in A.C.'s best interests, and that A.C. was in Legal

Father's physical custody for at least fifty percent of the time. Among other motions, Legal Father filed a motion to intervene in the paternity case and a motion to dismiss the paternity case, arguing that: (1) Alleged Father failed to join Legal Father as a necessary party; (2) Alleged Father failed to give notice of the paternity proceeding to Legal Father; (3) paternity and custody were under the continuing jurisdiction of the dissolution court; and (4) pendency in another cause is cause for dismissal and justified setting aside the paternity order as void. A Special Judge was appointed in both the dissolution and paternity cases, and the court held a hearing in June 2015. The trial court denied Alleged Father's motion for relief from judgment filed in the dissolution case, denied Legal Father's motion to dismiss filed in the paternity case, and granted Legal Father's motion to set aside the paternity order, finding the order to be voidable. Alleged Father argued on appeal that the trial court abused its discretion when it denied his motion for relief from judgment in the dissolution case.

The Court said that the grant of a motion for equitable relief under Ind. Trial Rule 60 is reviewed for abuse of discretion. *Id.* at 883. Citing Wagler v. West Boggs Sewer Dist., Inc., 980 N.E.2d 363, 371-72 (Ind. Ct. App. 2012), *trans. denied, cert. denied*, 134 S. Ct. 952 (2014), the Court noted that: (1) a grant of equitable relief under Ind. Trial Rule 60 is within the trial court's discretion; (2) an abuse of discretion occurs when the trial court's judgment is clearly against the logic and effect of the facts and inferences supporting the judgment for relief; (3) T.R. 60(B) affords relief in extraordinary circumstances which are not the result of any fault or negligence on the part of the movant. Varble at 883. The Court looked to T.R. 60(B), which provides that the court may relieve a party from a judgment because of mistake, surprise, excusable neglect, fraud, misrepresentation, or other misconduct of an adverse party, because the judgment is void, or for any other reason justifying relief from the operation of the judgment other than the reasons set out at T.R. 60(B) (1), (2), (3), and (4). *Id.* The Court noted that the motion must be filed within a reasonable time for reasons (6) and (8), not more than one year after the judgment for reasons (1) and (3), and a motion for reasons (1), (3), and (8) must allege a meritorious claim or defense. *Id.*

The Court concluded that the trial court did not abuse its discretion in denying Alleged Father's motion for relief from judgment in the dissolution case. *Id.* at 887. Alleged Father argued that a child who is not the child of both parties to a dissolution is not a child born of the marriage, that a dissolution court does not have subject matter jurisdiction over that child, and that orders issued without subject matter jurisdiction are void. Legal Father maintained that a dissolution decree in which a child is stipulated to be a child of the marriage has the effect of establishing legal paternity, and that such orders are not void but are voidable and retain their legal force and effect until successfully challenged or reversed. The Court looked to Russell v. Russell, 682 N.E.2d 513, 517-18 (Ind. 1997), in which the Indiana Supreme Court stated: (1) "[b]efore the dissolution court may make a child custody or support determination, it must first determine whether it has jurisdiction to do so, i.e., whether the child is a 'child of the marriage'"; (2) in many cases, the parties to the dissolution will stipulate or otherwise explicitly or implicitly agree that the child is a child of the marriage; in such cases, the determination is the legal equivalent of a paternity determination; (3) when the divorcing parties stipulate or agree that the divorcing husband is the child's father, they will be precluded from later challenging that

determination except in extraordinary circumstances; (4) a child or a putative father is not precluded from filing a separate action to establish paternity at a later time. Varble at 884. The Court also reviewed Marriage of Huss, 888 N.E.2d 1238 (Ind. 2008), in which: (1) husband and wife declared in their dissolution case that there were four children born of their marriage and each requested custody of the children; (2) while the dissolution was pending, wife initiated a separate paternity action in another county and obtained an order establishing that another man was the father of one of the children and granting wife custody of that child; (3) the Court found that, because the subject of child custody was first properly before the dissolution court, the court of another county in the subsequently filed paternity action was precluded from making a custody determination regarding the same child; (4) the Court opined that Russell “did not involve a non-biological ‘father’s’ request for custody predicated on the child’s best interest”; (5) such a determination was the ultimate basis for the trial court’s decision to award husband custody of the child, and further evaluation of the applicability of Russell was not warranted. Varble at 884-85.

The Court noted that the circuit court set aside Alleged Father’s agreed order of paternity, there was no order in effect finding that Alleged Father is A.C.’s legal father, and Alleged Father had not appealed that ruling. Id. at 886. The Court noted that the dissolution court’s decree was entered on December 8, 2009, and Alleged Father filed his petition to establish paternity over four and one-half years later. Id. Although Alleged Father argued that the dissolution court did not have subject matter jurisdiction over A.C., the Court observed that the dissolution and the paternity action were both before the same circuit court and that IC 33-28-1-2 provides in part that “all circuit courts have...original and concurrent jurisdiction in all civil cases.” Id. Finding the Indiana Supreme Court’s opinion in Huss, 888 N.E.2d at 1241-2 instructive, the Court concluded that the matter of the custody of A.C. was before the dissolution court from the inception of the dissolution action between Mother and Legal Father. Varble at 886. To the extent Alleged Father cited Russell in asserting the dissolution court did not have jurisdiction over A.C. when it entered the December 8, 2009 decree, the Court observed that the parties did not dispute at the time of the dissolution that the court had authority to enter the decree containing terms of custody, parenting time, and support of A.C. Varble at 886. The Court noted that Mother and Legal Father expressly agreed that it was in A.C.’s best interest that they share joint legal and physical custody, and the that A.C. spend fifty per cent of his time in each of their homes. Id. The Court held that the dissolution court was not precluded from determining the issue of A.C.’s custody based on his best interest at the time of the dissolution decree. Id. at 887.