MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

In the Matter of the Leonard L. Fox Revocable Trust:

Wendi A. Fox and Joanna Guzman, individually and as beneficiary and successor trustee,

Appellants-Respondents

v.

Benjamin T. Ballou,

Appellee-Petitioner

March 11, 2024

Court of Appeals Case No.
23A-TR-543

Appeal from the Lake Circuit Court

The Honorable Marissa McDermott, Judge

Trial Court Cause No.
45D03-1509-TR-9

Memorandum Decision by Judge Kenworthy

Chief Judge Altice and Judge Weissmann concur.

Kenworthy, Judge.

Case Summary

[1] Joanna Guzman, as successor trustee of the Leonard L. Fox Revocable Trust U/T/D March 5, 2008 ("Trust"), and Wendi A. Fox, as beneficiary and former successor trustee of the Trust, appeal the denial of Guzman's motion for relief under Indiana Trial Rule 60(B) ("Rule 60(B)").[1] Determining the trial court did not abuse its equitable discretion in denying Guzman's motion, we affirm.

Facts and Procedural History

[2] Leonard L. Fox created the Trust in 2008 and amended and restated the Trust in the fall of 2012. Leonard was the initial trustee of the Trust. Pursuant to the terms of the Trust, Leonard's three children—Wendi, Brandon C. Fox, and Travis L. Fox—were the Trust's income beneficiaries. Leonard's friend and power of attorney, Terry P. Eich, was designated successor trustee of the Trust. Relevant to this case, Paragraph 9 of the Trust provided a process through

[1] Indiana Code Section 30-4-6-11(a) provides: "Any person considering [themselves] aggrieved by any decision of a court having jurisdiction in proceedings under this article may prosecute an appeal to the court having jurisdiction of such an appeal." Here Wendi and Guzman filed a joint notice of appeal. Hence, Wendi is a proper party to this appeal, although only Guzman filed the motion for relief with the trial court.

which a majority of the income beneficiaries could remove the trustee or any successor trustee.

[3] In June 2013, Leonard was diagnosed with lung cancer. His medical condition declined over the next year. Following a meeting with Eich and Travis, Leonard executed an amendment to the Trust ("Trust Amendment"). Pertinent here, the Trust Amendment altered Paragraph 9 of the Trust to require the unanimous consent of all beneficiaries to remove a trustee. Leonard passed away about a month after executing the Trust Amendment.

[4] In mid-December 2014, two of the three income beneficiaries attempted to remove Eich as successor trustee of the Trust. But, pursuant to Paragraph 9, as amended by the Trust Amendment, the unanimous consent of the Trust's beneficiaries was required to remove the trustee. Because only two of the three beneficiaries moved to remove Eich, the removal attempt was not effective.

[5] In October 2015, Brandon petitioned to docket the Trust "for the purpose of determining the validity of the [Trust Amendment]." *Appellant's App. Vol. 2* at 23. The trial court docketed the Trust, expanded its jurisdiction over the Trust, and set a February 4, 2016, hearing to determine the validity of the Trust Amendment. The trial court conducted the hearing as scheduled and took the matter under advisement.

[6] On February 9, 2016, Eich—while serving as successor trustee of the Trust—filed his Verified Petition for Allowance of Successor Trustee Fees and Costs and Attorney Fees and Costs ("Fee Petition"). All counsel of record were

served with a copy of the Fee Petition. Then, on March 28, 2016, the trial court found the Trust Amendment null and void because Eich and Travis exerted undue influence upon Leonard. The trial court also determined Leonard had lacked the requisite mental capacity to execute the Trust Amendment. In effect, the trial court's order voided the alteration to Paragraph 9 of the Trust, which required the unanimous consent of the beneficiaries to remove the trustee. A few weeks later, Eich filed a supplement to his Fee Petition. Brandon and Wendi objected to Eich's Fee Petition.

[7] A day before a hearing was set to take place regarding Eich's Fee Petition, Wendi and Brandon—a majority of the Trust beneficiaries—removed Eich as successor trustee of the Trust. In an email to Eich and Eich's attorney Benjamin T. Ballou, Brandon's attorney notified Eich of his removal and informed him of a transition to "the new trustee." *Id.* at 74. Neither the email nor the attached Notice of Removal of Trustee specified who was to succeed Eich as successor trustee of the Trust.

[8] The following day—April 28, 2016—the trial court conducted a contested evidentiary hearing on Eich's Fee Petition. At the hearing, Brandon, Wendi, and Travis—*i.e.,* all the Trust beneficiaries—and Eich appeared in person and by counsel. Whomever was to succeed Eich as successor trustee was not present. The trial court granted Eich's Fee Petition in a September 2016 order ("Fee Order"). Wendi filed a timely Motion to Correct Error. The trial court denied Wendi's motion under Indiana Trial Rule 53.3(A). Neither Wendi, Brandon, nor Travis appealed the Fee Order.

[9] In mid-June 2017, Eich moved for authorization to record the Fee Order as a lien against real estate held by the Trust to "secure payment of his fees and costs as former Successor Trustee of the Trust" ("Motion for Authority"). *Appellee's App. Vol. 2* at 120. By this point, Robert Dave Lane, Jr. and Sherrie Johnson were serving as successor co-trustees of the Trust. Eich served each of the attorneys for the Trust beneficiaries as well as Lane and Johnson with a copy of his Motion for Authority. The trial court set a hearing for August 17, 2017. Among others, Lane and Johnson were provided with notice of the hearing.

[10] A few days before the hearing, Wendi—who by this point had replaced Lane and Johnson as successor trustee of the Trust—moved to continue the hearing. The court denied Wendi's continuance motion and conducted the hearing as scheduled. Attorneys for Eich and Brandon appeared. Neither Wendi, Travis, nor their attorneys appeared. A week after the hearing, the trial court entered an order directing Wendi, as successor trustee of the Trust, to take specified action ("Authority Order").

[11] On September 6, 2022, Guzman—who had been appointed successor trustee of the Trust in February 2022—filed a Motion For Relief From Order ("Motion for Relief") seeking to set aside the Fee Order and Authority Order. Guzman's Motion for Relief did not mention Rule 60(B). Following a hearing during which the trial court heard arguments of counsel and Wendi's testimony, the trial court denied the Motion for Relief. In its order, the trial court explained relief was unwarranted under Rule 60(B)(8) because the Motion for Relief was not filed within a reasonable time and failed to present "extraordinary

circumstances" justifying relief.[2] *Appellant's App. Vol. 2* at 87. Guzman and Wendi filed a Motion to Strike and Reconsider and initiated this appeal. Additional facts are provided when necessary.

1. Waiver of Trial Rule 60(B)(6) Claim

[12] On appeal, Guzman and Wendi assert the Fee Order was void for lack of personal jurisdiction, and so they are entitled to relief under Rule 60(B)(6). Before addressing the merits of their claim, we must first determine whether the issue was properly preserved for appellate review. *See, e.g., Durden v. State*, 99 N.E.3d 645, 651 (Ind. 2018) (describing waiver analysis as a "preliminary inquiry"). "As a general rule, a party cannot argue on appeal an issue that was not properly presented to the trial court." *Newland Res., LLC v. Branham Corp.*, 918 N.E.2d 763, 770 (Ind. Ct. App. 2009); *see also Franklin Bank & Tr. Co. v. Mithoefer*, 563 N.E.2d 551, 553 (Ind. 1990) ("A party cannot change its theory and on appeal argue an issue which was not properly presented to the trial court."). Put simply, a party waives appellate review of an issue not presented before the trial court. *See Newland Res.,* 918 N.E.2d at 770.

[13] This rule exists, in part, because of the different roles trial courts and appellate courts occupy in our judicial structure. On one hand, trial courts "have the authority to hear and weigh evidence, to judge the credibility of witnesses, to

[2] The trial court also briefly explained relief due to "mistake, surprise or excusable neglect"—that is, relief under Rule 60(B)(1)—was not warranted. *See Appellant's App. Vol. 2* at 88–89.

apply the law to the facts found, and to decide questions raised by the parties." *Id.* (quoting *GKC Ind. Theatres, Inc. v. Elk Retail Invs., LLC*, 764 N.E.2d 647, 650 (Ind. Ct. App. 2002)). Appellate courts, on the other hand, have "the authority to review questions of law and to judge the sufficiency of the evidence supporting a decision." *Id.* (quoting *GKC Ind. Theatres*, 764 N.E.2d at 650). Waiver helps preserve these distinct roles by "protect[ing] the integrity of the trial court" because "it cannot be found to have erred as to an issue or argument that it never had an opportunity to consider." *Id.* (quoting *GKC Ind. Theatres*, 764 N.E.2d at 650).

[14] In her Motion for Relief, Guzman did not cite Trial Rule 60, let alone a specific subsection of Rule 60(B). Although Guzman referenced "notice" and "service," she did not argue the Fee Petition was void or that the trial court lacked personal jurisdiction over any of the parties—including the former successor co-trustees, Lane and Johnson. In fact, she did not use the terms "void" or "personal jurisdiction" at all.[3] At the hearing on the Motion for Relief, Guzman and Wendi were only marginally more specific. Their attorneys mentioned Rule 60(B) at various points, but they specifically cited only subsection 60(B)(8).[4]

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[3] In her Motion for Relief, Guzman also attempted to allege a meritorious claim or defense. If seeking relief pursuant to Rule 60(B)(6), Guzman was not required to do so. *See* Ind. Trial Rule 60(B). But a movant is required to do so if claiming relief under subsections (1), (2), (3), (4), or (8). *See id.*

[4] We acknowledge a party's failure to specify the exact subsection of Rule 60(B) under which the party seeks relief will not defeat the request for relief if the party can make an adequate showing there are sufficient

[15] At bottom, Guzman did not argue to the trial court relief was warranted under Rule 60(B)(6) because the Fee Petition was void for lack of personal jurisdiction. Guzman cannot now raise that issue on appeal because she never provided the trial court with the opportunity to consider it. *See Morequity, Inc. v. Keybank, N.A.*, 773 N.E.2d 308, 314–15 (Ind. Ct. App. 2002) (holding a party's failure to argue to the trial court relief was warranted under Rule 60(B)(6) because the judgment was void for lack of personal jurisdiction resulted in waiver of the claim on appeal), *trans. denied*. In other words, Guzman has waived her claim for relief under Rule 60(B)(6). *See Stidham v. Whelchel*, 698 N.E.2d 1152, 1156 (Ind. 1998) (explaining although a judgment that is void for lack of personal jurisdiction "may be collaterally attacked at any time," such a claim can be waived).

2. Relief Under Trial Rule 60(B)(8)

[16] Having determined Guzman waived her Rule 60(B)(6) claim, we now turn to whether relief is warranted under Rule 60(B)(8). Whether relief is justified under Rule 60(B)(8)'s catchall provision is left to the equitable discretion of the trial court. *T.D. v. State*, 219 N.E.3d 719, 724 (Ind. 2023). Accordingly, we review the trial court's decision for an abuse of discretion. *Id.* A trial court

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grounds to support the motion. *See G.H. Skala Constr. Co. v. NPW, Inc.*, 704 N.E.2d 1044, 1047 (Ind. Ct. App. 1998), *trans. denied*. Here, Guzman's failure to specify the exact subsection of Rule 60(B), in tandem with the motion's overall lack of specificity, deprived the trial court of an opportunity to determine whether relief was warranted on Rule 60(B)(6) grounds. Said another way, Guzman's lack of specificity does not defeat her request for relief entirely, just her request for relief pursuant to subsection (B)(6).

abuses its discretion if it misinterprets the law or if its decision "clearly contravenes the logic and effect of the facts and circumstances before it." *Id.*

[17] When deciding how to wield its equitable discretion, a trial court must "balance the alleged injustice suffered by the party moving for relief against the interests of the winning party and society in general in the finality of litigation." *Axelrod v. Anthem, Inc.*, 169 N.E.3d 131, 140 (Ind. Ct. App. 2021) (quoting *Chelovich v. Ruff & Silvian Agency*, 551 N.E.2d 890, 892 (Ind. Ct. App. 1990)). 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. *Indiana Ins. Co. v. Ins. Co. of N. Am.*, 734 N.E.2d 276, 279 (Ind. Ct. App. 2000), *trans. denied*. Ultimately, a Rule 60(B) motion for relief is "not a substitute for a direct appeal" and addresses "only the procedural, equitable grounds justifying relief from the legal finality of a final judgment, not the legal merits of the judgment." *Deutsche Bank Nat'l Tr. Co. v. Harris*, 985 N.E.2d 804, 813 (Ind. Ct. App. 2013).

[18] Rule 60(B)(8) allows a party to obtain relief from judgment for "any reason" other than those set forth under subsections (1)–(4) of Rule 60(B). T.R. 60(B)(8). To be entitled to relief under this rule, the movant must file their motion "within a reasonable time" and "allege a meritorious claim or defense." *Id.* That said, "passage of time alone is not enough to warrant the denial of a motion on the basis of timeliness." *State v. Collier*, 61 N.E.3d 265, 268 (Ind. 2016). "Determining what is a reasonable time period depends on the circumstances of each case, as well as the potential prejudice to the party opposing the motion and the basis for the moving party's delay." *Id.* And

"[a]lleging a meritorious claim or defense 'requires a prima facie showing . . . that will prevail until contradicted and overcome by other evidence.'" *T.D.*, 219 N.E.3d at 728 (quoting *Outback Steakhouse of Fla., Inc. v. Markley*, 856 N.E.2d 65, 73 (Ind. 2006)); *see also Collier*, 61 N.E.3d at 268 (describing, for purposes of Rule 60(B), a meritorious claim or defense is "one that would lead to a different result if the case were tried on the merits") (quotation omitted).

[19] The moving party must also "demonstrate some extraordinary or exceptional circumstances justifying equitable relief." *T.D.*, 219 N.E.3d at 728 (quoting *Collier*, 61 N.E.3d at 268). Such relief, however, is limited to extraordinary circumstances "which are not the result of any fault or negligence on the part of the movant." *Kretschmer v. Bank of Am., N.A.*, 15 N.E.3d 595, 600 (Ind. Ct. App. 2014), *trans. denied*. Thus, to be granted relief, Guzman must show: (1) she brought her claim within a reasonable time given the circumstances of the case; (2) extraordinary or exceptional circumstances justify that relief; and (3) she has alleged a meritorious claim or defense. *See* T.R. 60(B); *Collier*, 61 N.E.3d at 269.

[20] In essence, Guzman and Wendi argue they are entitled to relief under Rule 60(B)(8) because Eich's successors as trustee, Lane and Johnson, were not properly served with Eich's Fee Petition or provided notice of the hearing on

the Fee Petition.[5] Beneficiaries Wendi and Brandon removed Eich as successor trustee the day before the hearing on Eich's Fee Petition. The email informing Eich of his removal did not specify who was to replace him as successor trustee. Rather, it explained there would be a transition to "the new trustee." *Appellant's App. Vol. 2* at 74. Yet it remained unclear who, if anyone, had been appointed as Eich's replacement. Indeed, Wendi's attorney acknowledged, "the fact of the matter is at the time of the hearing [on the Fee Petition] . . . there was no acting trustee." *Tr. Vol. 2* at 21. Even so, in Wendi's view, since Attorney Ballou filed the Fee Petition on Eich's behalf, "[Ballou] was the one that was in the best possible position to know his client had just . . . been removed a day or two prior," therefore, it was Ballou's "obligation to inform the Court that . . . there was no acting trustee" and "to perfect service" of the Fee Petition. *Id.* at 21, 29.

[21] These circumstances may be atypical, but they are not extraordinary. As revealed by the record, there does not appear to have been a successor trustee appointed by the hearing on the Fee Petition. Wendi's attorney confirmed as much. And it would be impracticable to require Ballou or Eich to perfect service on successor co-trustees whose identities were not shared with them and

[5] In the trial court, Guzman claimed Rule 60(B) relief was warranted due to lack of adequate service and notice related to the Motion for Authority and hearing thereon. On appeal, Guzman and Wendi appear to abandon this argument. The Chronological Case Summary indicates all counsel of record were served with a copy of the Motion for Authority and were given notice of the hearing. *See Appellant's App. Vol. 2* at 76. Wendi also moved to continue the hearing on the Motion for Authority, indicating she was aware of the hearing. *See id.* at 78.

who had not yet accepted appointment. Even though Ballou could have informed the trial court there was no acting trustee, Wendi—or any other party for that matter—could have also done so. But they did not. Another available option was to request a continuance to ensure Lane and Johnson could attend the hearing. Just because the parties did not avail themselves of this option does not mean there are now extraordinary circumstances justifying relief.

[22] And the circumstances alleged to warrant relief could have been—and in fact were—discovered during the period a motion to correct error could have been filed. *See Ind. Ins.,* 734 N.E.2d at 279 (noting 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). Wendi filed a motion to correct error, which the trial court denied. None of the beneficiaries appealed the Fee Order or the denial of Wendi's motion to correct error. *See Harris*, 985 N.E.2d at 813 (explaining a Rule 60(B) motion is "not a substitute for a direct appeal"). In sum, Guzman and Wendi have not shown "extraordinary circumstances" that would warrant relief under Rule 60(B)(8).[6] Accordingly, the trial court did not abuse its discretion in denying such relief.[7]

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[6] Because we conclude Guzman and Wendi did not demonstrate "extraordinary circumstances," we need not determine whether they filed their motion within a reasonable time or alleged a meritorious claim or defense.

[7] Additionally, Guzman and Wendi argue they are entitled to Rule 60(B) relief because the fees awarded under the Fee Order were incurred due to Eich's refusal to resign as successor trustee and his breach of trust. *See Tr. Vol. 2* at 6 (arguing "it is inherently unfair [for Guzman] to be required to fulfill prior orders of this Court when, in fact, she wasn't appointed until . . . February of 2022"); *see also Tr. Vol. 2* at 24 (arguing "it's not equitable and fair to hold [the successor trustee] responsible for charges that are not the cost of

Conclusion

[23] Concluding Guzman waived her claim for relief under Rule 60(B)(6) and the trial court did not abuse its equitable discretion in denying relief under Rule 60(B)(8), we affirm.

[24] Affirmed.

Altice, C.J., and Weissmann, J., concur.

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administration"). This argument is merely an attempt to relitigate the legal merits of the Fee Order. Because a Rule 60(B) motion addresses "only the procedural, equitable grounds justifying relief from the legal finality of a final judgment, not the legal merits of the judgment," this is not a proper basis for relief. *See Harris*, 985 N.E.2d at 813. Further, Guzman and Wendi assert Eich "was effectively removed by operation of" the trial court's judgment declaring the Trust Amendment null and void. *Appellant's Br.* at 17. But on appeal, Guzman and Wendi fail to support their claim with cogent argument or citations to relevant authorities. Thus, they have waived consideration of their contention on appeal. *See* Ind. Appellate Rule 46(A)(8)(a). Regardless, this claim is ultimately another attempt to relitigate the legal merits of the Fee Order, which, as just explained, is not a proper basis for Rule 60(B) relief. *See Harris*, 985 N.E.2d at 813.