ATTORNEY FOR APPELLANT

Michael C. Cooley
Allen Wellman McNew Harvey, LLP
Greenfield, Indiana

ATTORNEY FOR APPELLEE

Christopher C. T. Stephen
Stephen Legal Group
Greensburg, Indiana

IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Estate of Edward L. Peters

Tina M. Barnes, Individually and as Personal Representative of the Estate of Edward L. Peters,

Appellant,

v.

Rodney L. Peters,

Appellee.

March 15, 2023

Court of Appeals Case No. 22A-EU-1664

Appeal from the Franklin Circuit Court

The Honorable Clay M. Kellerman, Judge

Trial Court Case No. 24C02-2201-EU-37

Opinion by Senior Judge Najam
Judges Robb and Crone concur.

Najam, Senior Judge.

Statement of the Case

[1] Tina M. Barnes began estate proceedings after her father, Edward L. Peters, died without a will. Barnes told the trial court that she was Edward's sole heir, and she was appointed personal representative of Edward's estate. Rodney L. Peters filed a petition to determine heirship, asking the court to determine that he was also Edward's heir. The court granted Rodney's petition, and Tina appeals. We affirm.

Issues

[2] Tina raises three issues, which we restate as:

I. Whether a 1971 divorce decree between Edward and Rodney's mother is res judicata, has preclusive effect on the issue of Rodney's paternity, and bars his petition to determine heirship.

II. Whether there is sufficient evidence that Edward, the putative father who married Rodney's mother, acknowledged Rodney to be his own.

III. Whether the trial court erred when it denied Tina's joint Motion to Correct Error[] under Trial Rule 59 and Motion for Relief from Judgment under Trial Rule 60(B)(2).

Facts and Procedural History

[3] Rodney[1] was born on March 30, 1966, to Diana K. Peters. Diana and Edward were not married at that time, and the record does not show what surname Diana used when Rodney was born. Rodney's birth certificate states that Edward is his father, and Rodney has used Edward's last name since he was a child. The record does not show when Edward's name was placed on the birth certificate. The official copy of the certificate that was admitted as evidence was issued in 2005, after Rodney had lost his prior copy.

[4] Edward and Diana married in 1968. Tina, who is Edward and Diana's biological child, was born that same year.

[5] Edward and Diana divorced in 1971. During divorce proceedings, Diana requested child support for Rodney and Tina, claiming that both "were born to [Diana] and [Edward.]" Tr. Vol. 3, p. 4. In response, Edward filed an affidavit stating, in relevant part:

> a. That instead of two (2) children being born of this marriage, there was only one (1) child, whose name is Tina Marie Peters, age three (3).
>
> b. That the other child listed in [Diana's] complaint, namely, Rodney Lee Peters, was born March 30, 1966, and was two years old at the time [Edward] married [Diana] on May 31, 1968; that

[1] We refer to the parties and other persons by their first names because many of the persons involved in this case share the same last name.

> further, [Edward] did not know or date [Diana] before said child was born.

Id. at 6. In the dissolution decree, the trial court did not mention Rodney, stating only:

> there was born of [Diana] and [Edward] one (1) child, Tina Marie Peters, born August 24, 1968, and that [Diana] is a fit and proper person to have the custody of said child subject to [Edward's] reasonable visitation, and that [Diana] is entitled to an allowance for the support of said child from defendant.

Id. at 9.

[6] After the divorce, Rodney and Tina lived with Diana. Rodney continued to see Edward during his childhood, sometimes joining Tina at Edward's home when Edward exercised parenting time with her. In addition, Rodney maintained a relationship with Edward's parents and considered them to be his grandparents. He attended Peters family gatherings on occasion.

[7] When Rodney and his partner had a daughter, Edward was present for her birth. In addition, Edward and his then-spouse occasionally sent cards to Rodney. One Christmas, Rodney received a fruit basket from them with a card signed, "love, Sharon and dad." Tr. Vol. 2, p. 9. When asked whether Rodney had ever considered pursuing genetic testing for him and Edward, Rodney replied, "[n]ever needed to. He never denied me." *Id.* at 11.

[8] Edward died intestate on October 18, 2021. A funeral home prepared an obituary using information provided by Tina. The obituary listed Rodney and

Tina as Edward's children, and Rodney's children and grandchild as Edward's heirs.

[9] On January 31, 2022, Tina petitioned to be appointed personal representative of Edward's unsupervised estate. She stated that she was Edward's "sole heir-at-law." Appellant's App. Vol. 2, p. 14. The trial court granted her petition.

[10] On February 2, 2022, Rodney filed three pleadings: (1) a Verified Claim and Petition to Determine Heirship, which is the subject of this appeal; (2) a Petition for Removal of Personal Representative; and (3) a Motion to Restrain Dissipation of Assets. On April 4, 2022, the trial court held an evidentiary hearing on Rodney's heirship petition. The court subsequently issued an order granting the petition, determining Rodney "is an heir of Edward L. Peters and is entitled to take pursuant to the laws of [intestate] succession." *Id.* at 11. The court made the following findings:

> 1. The Petitioner, Rodney L. Peters, was born on March 30, 1966, and his birth certificate (Respondent's Exhibit A), which was prepared on March 31, 1966 indicates that Edward L. Peters, the decedent herein, is the father of Rodney L. Peters. Diana Kay Peters is Rodney L. Peters' mother.
>
> 2. On May 31, 1968, the decedent, Edward L. Peters, married Diana Kay Peters. The parties lived together for several years until they eventually divorced in December of 1971. During the marriage, Edward L. Peters supported Rodney L. Peters and held him out as his son.
>
> 3. The court has taken Judicial Notice of the case of Diana K. Peters vs. Edward Lee Peters, Cause No. 15878, which is the divorce filed in 1971. In that matter, the Decree and Judgment of Dissolution (Petitioner's Exhibit 4), determined that one child

> was born of the marriage, namely, Tina Marie Peters, born on August 24, 1968. Rodney L. Peters was not mentioned in the Decree and Judgment of Dissolution.
>
> 4. No evidence was presented that any genetic testing was ever done to determine the paternity of Rodney L. Peters.
>
> 5. After the dissolution of marriage, Rodney L. Peters continued his relationship with Edward L. Peters and never knew or considered anyone else to be his father. Rodney L. Peters was treated as the child of Edward L. Peters by the Peters family and Rodney L. Peters routinely received birthday cards and gifts from Edward L. Peters.
>
> 6. Edward L. Peters died on October 18, 2021. Tina Barnes made the funeral arrangements for Edward L. Peters and provided the information for his obituary (Respondent's Exhibit B) which lists Rodney L. Peters as being a surviving child of Edward L. Peters.

Id. at 11. The court noted that it would consider Rodney's other pleadings at a later time.

[11] Next, Tina filed a Motion to Correct Error[] or Alternatively for Relief From Order. She attached to the motion an affidavit from Diana, who had not testified at the evidentiary hearing. Diana stated in the affidavit that Edward was not Rodney's biological father and that Rodney has known the identity of his biological father since he was ten years old. The trial court denied Tina's motion without explanation. This appeal followed. The trial court subsequently amended its April 4, 2022 and June 21, 2022 orders to state that they were final, appealable judgments pursuant to Indiana Trial Rule 54(B).

Discussion and Decision

I. Res Judicata

[12] In its order determining heirship, the trial court concluded, in effect, that the 1971 divorce decree did not determine Rodney's paternity. Tina disagrees and maintains that the divorce case litigated and established that Rodney is not Edward's child. She further claims the issue of Rodney's paternity is res judicata and that the trial court erred when it did not give preclusive effect to the decree. By preclusive effect, Tina means that the divorce decree determined that Edward was not Rodney's biological father, a finding that she contends would preclude Rodney's heirship.

[13] The doctrine of res judicata prevents the repetitious litigation of disputes that are essentially the same. *Indianapolis Downs, LLC v. Herr*, 834 N.E.2d 699, 703 (Ind. Ct. App. 2005), *trans. denied*. There are two branches of res judicata: claim preclusion and issue preclusion, also referred to as collateral estoppel. *Id.* Tina's claim is based on collateral estoppel. Appellant's Br. p. 15. This Court has explained:

> Collateral estoppel bars the subsequent litigation of a fact or issue that was necessarily adjudicated in a former lawsuit if the same fact or issue is presented in the subsequent lawsuit. Where collateral estoppel is applicable, the former adjudication will be conclusive in the subsequent action even if the two actions are on different claims. *However, the former adjudication will only be conclusive as to those issues that were actually litigated and determined therein*. Collateral estoppel does not extend to matters that were not expressly adjudicated and can be inferred only by argument.

Id. at 704 (emphasis added) (citations omitted). When a trial court disallows "the defensive use of collateral estoppel," through which a party seeks to prevent another party from raising a claim or issue based on past litigation, we review the trial court's decision for an abuse of discretion. *Taylor v. St. Vincent Salem Hosp., Inc.*, 180 N.E.3d 278, 286 (Ind. Ct. App. 2021).

[14] It is first necessary that we consider the distinct, but related, concepts of: (1) determining whether a child is a child of the marriage; and (2) determining paternity of a child or adult. For purposes of determining child custody, support, and parenting time in divorce cases, a child of the marriage includes "[c]hildren born out of wedlock to the parties . . . [and] [c]hildren born or adopted during the marriage of the parties." Ind. Code § 31-9-2-13 (2019). In *Russell v. Russell,* 682 N.E.2d 513, 515 (Ind. 1997), our Supreme Court acknowledged when it considered a predecessor to Indiana Code section 31-9-2-13 that "[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 at issue is a 'child of the marriage,'" that is, a child of both parties to the marriage.

[15] The *Russell* Court then discussed the numerous ways that a child-of-the-marriage determination can be made. 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. *Id.* at 518. In other cases, the issue of whether a child is a child of the marriage may be "vigorously contested." *Id*. And there

will also be cases where the divorcing husband and wife will attempt to stipulate or otherwise agree that a child is not a child of the marriage. *Id.*

[16] In contrast, in paternity proceedings, the inquiry is whether a particular man is the child's biological father. *Id.* at 517. A concern with biological parentage is not necessarily an issue in a determination of whether a child is a child of the marriage. Indiana Code section 31-9-2-13 does not require that a biological relationship be determined in order for a child to be deemed a child of the marriage. Accordingly, in *In re Paternity of J.G.*, 149 N.E.3d 1192, 1198 (Ind. Ct. App. 2020), *trans. denied*, we explained:

> Had the legislature intended for paternity of a child to be 'established' simply because of a husband's marriage to the child's mother, it could have said so. But it did not. Rather, it explicitly provided that *a husband's marriage only creates a rebuttable presumption of paternity*. *See* I.C. 31-14-7-1(1).
>
> Indeed, it is well settled that the fact that a child was born while his mother was married 'does *not* establish that the child was born during wedlock.' *K.S. v. R.S.*, 669 N.E.2d 399, 402 (Ind. 1996) (emphasis added). And our Supreme Court has observed that the presumption of fatherhood created by Indiana Code Section 31-14-7-1(1) 'is not conclusive[.]' *Fairrow v. Fairrow*, 559 N.E.2d 597, 600 (Ind. 1990). On the contrary, that presumption of paternity 'can be rebutted[.]' *T.M. v. L.D.* (*In re I.J.*), 39 N.E.3d 1184, 1188 (Ind. Ct. App. 2015).

(emphasis added).

[17] In *Russell*, the Indiana Supreme Court further stated:

> A determination as to whether a child is a child of the marriage in a dissolution proceeding is not necessarily a determination that the divorcing husband is the biological father of the child. However, there are some circumstances in which a determination in a dissolution proceeding as to whether a child is a child of the marriage is equivalent to a paternity determination, i.e., determination that the divorcing husband is or is not the child's biological father.

682 N.E.2d at 518.

[18] For example, in those cases where the issue of whether the child is a child of the marriage is vigorously contested, this Court has concluded that the divorce court has the authority to follow appropriate procedures for making paternity determinations, including authority to order blood testing during the dissolution proceeding to determine the biological father. *See Cooper v. Cooper*, 608 N.E.2d 1386, 1388 (Ind. Ct. App. 1993) (divorce court did not abuse its discretion in ordering blood testing to establish paternity; wife had told husband he was not the biological father of child that was born while they were married).

[19] This brings us to the potential application of collateral estoppel to child-of-the-marriage and paternity determinations. The *Russell* Court explained that in cases where the parties "stipulate or otherwise explicitly or implicitly agree that the child is a child of the marriage," the trial court's determination "is the legal equivalent of a paternity determination in the sense that the parties to the dissolution—the divorcing husband and wife—will be precluded from later challenging that determination, except in extraordinary circumstances." 682 N.E.2d at 518. However, a child or a putative father is not precluded by the

dissolution court's finding from filing a separate action in juvenile court to establish paternity at a later time. Id.

[20] In contrast, where the parties contest whether a child is a child of the marriage, and the trial court issues a decision "based upon and consistent with the results of . . . blood or genetic testing," then in those circumstances the determination:

> (i) in addition to having the preclusive effect on the divorcing husband and wife described in the preceding paragraph, (ii) will constitute a determination in all but the most extraordinary circumstances that the divorcing husband is or is not the biological father of the child, precluding a child, putative father, or other person from challenging that determination in subsequent or collateral proceedings.

Russell, 682 N.E.2d at 518 (citations omitted).

[21] In a companion case to *Russell*, *In re the Paternity of J.W.L.*, 682 N.E.2d 519, 520 (Ind. 1997), a mother filed a paternity action, but the alleged father argued mother's paternity claim was barred by res judicata because, in a previous divorce case involving the mother and another man, the dissolution court determined the child in question was the child of the divorcing husband and wife. The Indiana Supreme Court summarily affirmed the Court of Appeals' determination that the dissolution decision should not be given preclusive effect in the paternity case, noting that paternity had not been fully litigated in the divorce action.

[22] In sum, a determination that a child is or is not a child of the marriage for the purposes of custody, parenting time, and support is not *per se* a paternity

determination. While a judicial determination that a child either is or is not a child of the marriage supports an inference that the husband is or is not the biological father of the child, where paternity is actually contested, more evidence than a presumption or an inference is required to establish paternity as a matter of law. *Russell*, 682 N.E.2d at 518. The holding in *Russell* is consistent with general principles of collateral estoppel, specifically that "[c]ollateral estoppel does not extend to matters that were not expressly adjudicated and can be inferred only by argument." *Indianapolis Downs*, 834 N.E.2d at 704.

[23] In this case, on the record presented we can say that the question of whether Rodney was a child of Edward and Diana's marriage was contested in their divorce case. The divorce court explicitly concluded Tina was a child of the marriage and implicitly concluded that Rodney was not a child of the marriage. We can also say that Edward denied he was Rodney's biological father during the divorce proceedings. However, we cannot say with any certainty that Rodney's paternity was fully litigated in order for the 1971 divorce decree to have preclusive effect. The decree contains a generic recitation that the case was submitted to the court for trial and that the court heard evidence, but it does not mention Rodney, does not include Rodney as a child of the marriage in its custody, visitation, and support order, and does not make a paternity determination. Thus, we cannot say from this record that there was an actual adjudication which established or disestablished Edward's paternity of Rodney.

[24] Further, Rodney was not a party to Edward and Diana's divorce proceedings. A dissolution decree alone is not res judicata on the issue of paternity as to a

non-party to the marital dissolution. *In re the Paternity of J.W.L.*, 672 N.E.2d 966, 968 (Ind. Ct. App. 1996), *summarily affirmed*, 682 N.E.2d 519, 520 (Ind. 2018). In *Paternity of J.W.L.*, we followed our Supreme Court's opinion in *In re S.R.I.,* 602 N.E.2d 1014 (Ind. 1992), and our opinion in *Hood v. G.D.H. by Elliott*, 599 N.E.2d 537 (Ind. Ct. App. 1992). We cited *In re S.R.I.* for the principles that a dissolution decree alone which found a child to be a child of the marriage would not be res judicata on the issue of paternity, that "dissolution findings are binding on the *parties* to the dissolution" and that "when the child is not a party to the action," the decree amounts to no more than a finding that the child was born to the mother during the marriage. *Paternity of J.W.L.*, 672 N.E. 2d at 968 (quoting *In re S.R.I.*, 602 N.E.2d at 1016-1017). And we also relied upon *Hood*, where we considered the "precise issue" of "the preclusive effect of a child-parent determination in a dissolution proceeding, to which the child was not a party" and concluded that where "[the child] was neither a party nor privy to the prior dissolution proceedings . . . [the child] was not barred from bringing [a] paternity action." *Id.* (quoting *Hood*, 599 N.E.2d at 240).

[25] In *Russell*, our Supreme Court determined that a dissolution decree may have a preclusive effect on a subsequent paternity case brought by a child, but only "[w]hen a dissolution court makes its determination as to whether the child is or is not a child of the marriage under such circumstances and based upon and consistent with the results of the blood or genetic testing . . . ." 682 N.E.2d at 518. Otherwise, as stated in *Paternity of J.W.L.*, 682 N.E.2d at 520-21, where a

child was not named as a party to the dissolution, the dissolution decree will not have preclusive effect in subsequent or collateral proceedings in the absence of "full and fair" litigation of the child's paternity.

[26] The trial court found that in the 1971 divorce action, no evidence was presented that any genetic testing was ever done to determine Rodney's paternity, and Tina points to no such evidence. Neither was Rodney a party to the 1971 divorce proceedings. We conclude the trial court did not abuse its discretion when it held, in effect, that the 1971 divorce decree did not determine Rodney's paternity and does not bar Rodney's heirship petition.

II. Sufficiency of the Evidence

[27] Tina next argues that the trial court's determination that Rodney is Edward's heir lacks sufficient evidentiary support. When reviewing challenges to the sufficiency of the evidence, it is axiomatic that we cannot reweigh the evidence or judge the credibility of the witnesses. *Green v. Estate of Green*, 724 N.E.2d 260, 264 (Ind. Ct. Ap. 2000). We examine only the evidence and reasonable inferences favorable to the judgment. *Id.* We will not set aside a judgment based upon insufficient evidence so long as there is substantial evidence of probative value to sustain the judgment. *Id.* If there is sufficient evidence to sustain the trial court's determination, we will not intercede and substitute our judgment for that of the trial court. *In re Marriage of Richardson*, 622 N.E.2d 178, 179 (Ind. 1993).

[28] For purposes of the parties' dispute, "heirs" are defined as "those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the real and personal property of a decedent on the decedent's death intestate, unless otherwise defined or limited by the will." Ind. Code § 29-1-1-3(a)(14) (2021). The General Assembly has explained how heirship may be determined in cases involving children born out of wedlock:

> (b) For the purpose of inheritance (on the paternal side) to, through, and from a child born out of wedlock, the child shall be treated as if the child's father were married to the child's mother at the time of the child's birth, if one (1) of the following requirements is met:
>
> (1) The paternity of a child who was at least twenty (20) years of age when the father died has been established by law in a cause of action that is filed during the father's lifetime.
>
> (2) The paternity of a child who was less than twenty (20) years of age when the father died has been established by law in a cause of action that is filed:
>
> (A) during the father's lifetime; or
>
> (B) within five (5) months after the father's death.
>
> (3) The paternity of a child born after the father died has been established by law in a cause of action that is filed within eleven (11) months after the father's death.
>
> (4) *The putative father marries the mother of the child and acknowledges the child to be his own*.
>
> (5) The putative father executed a paternity affidavit in accordance with IC 31-6-6.1-9(b) (before its repeal).
>
> (6) The putative father executes a paternity affidavit as set forth in IC 16-37-2-2.1.

Ind. Code § 29-1-2-7 (2016) (emphasis added).

[29] The dispositive question here is whether, after Edward married Rodney's mother, he acknowledged Rodney, a child born out of wedlock, to be his own for purposes of Indiana Code section 29-1-2-7(b)(4). The parties emphasize *Thurman v. Skinner*, 53 N.E.3d 1220, 1222-23 (Ind. Ct. App. 2016), a case in which Kimberly proved heirship as to her putative father, Lloyd, under subsection (b)(4). The Estate contends that the quantum of evidence in the current case falls far short of the robust evidence present in *Thurman* and that this case can be distinguished on its facts from *Thurman*.

[30] In *Thurman*, we described a trial court's task in determining heirship as follows:

> The burden of proof rests on the child seeking to inherit from a putative father. *Regalado v. Estate of Regalado*, 933 N.E.2d 512, 519 (Ind. Ct. App. 2010). *This inquiry is a factually sensitive one that is evaluated on a case-by-case basis. See id.*, 933 N.E.2d at 520 (finding that oral statements of acknowledgement of a child born out of wedlock were sufficient to meet the 'acknowledgement' burden); *Green*, 724 N.E.2d at 265 (finding that evidence including affidavit, life insurance application, dissolution petition, and medical expense plan enrollment listing out-of-wedlock child as decedent's child was sufficient to meet 'acknowledgement' burden).

53 N.E.2d at 1223 (emphasis added).

[31] The *Thurman* Court found the case "replete with evidence supporting the trial court's conclusion that Lloyd acknowledged Kimberly as his own daughter." *Id.* at 1223. Lloyd executed two affidavits attesting to his parentage, including an affidavit requesting that his name be placed on the child's birth certificate as her father. As a result, Lloyd's name was placed on Kimberly's birth certificate.

In addition, Kimberly lived with Lloyd for eight years, until he divorced her mother. There was also evidence that Lloyd had paid for Kimberly's medical care and had introduced her to others as his daughter.

[32] In the current case, Rodney was five years old when Diana and Edward were divorced, and he was fifty-five years old when Edward died. The disposition of Rodney's petition to determine heirship turns on the nature of the relationship between Edward and Rodney during the fifty-year interval between the 1971 divorce and Edward's death in 2021. Rodney testified that Edward was the only father he had ever known. This testimony need not be taken literally. It does not necessarily mean that Rodney did not know the name of his biological father. Rather, Rodney's statement means that, according to Rodney, Edward was the only man with whom Rodney had a father-son relationship. Still, of course, the question is not whether Rodney considered Edward to be his father but whether Edward acknowledged Rodney to be his son.

[33] We agree that Rodney's testimony is somewhat vague and imprecise. He had little to say about his actual relationship with Edward during the fifty years following the divorce until Edward's death. Rodney's testimony suggests that his relationship with Edward was a casual and intermittent relationship. He testified that after the divorce he would visit Edward along with his sister, Tina, that he would attend family reunions, and that Edward was present for his daughter's birth. Rodney further states that Edward on occasion sent him cards and gifts, signing at least one of them as "Dad."

[34] While Rodney's testimony was imprecise and suggests that his contacts with Edward were infrequent, those facts go to the weight of the evidence. Irregular contacts among family members are not that unusual, and those patterns without more would not defeat a paternity claim. Rodney's burden of proof is only a preponderance of the evidence. *See Bonnell v. Sabbagh*, 670 N.E.2d 69, 71 (Ind. Ct. App. 1996) ("The general rule in Indiana is that, in civil actions, the rights of the parties are to be determined by a preponderance of the evidence"). It was for the trial court to determine whether Rodney's testimony was credible or was discredited upon his cross-examination or by Tina's testimony.

[35] In the current case, unlike in *Thurman*, Edward's affidavit from the 1971 divorce case explicitly disavowed paternity of Rodney. Even so, the issue of paternity was not fully litigated by the divorce court. And Edward's affidavit must be balanced against evidence of his subsequent conduct acknowledging Rodney as his son.

[36] In addition, as noted above, in this case the trial court made six findings of fact in support of the conclusion that Rodney "met his burden," Appellant's App. Vol. 2, p. 11, to establish that he is an heir of Edward. The evidence is sufficient to support each of the findings. Among other evidence, Edward lived with Rodney during his marriage to Diana, and it was undisputed that, as Rodney testified, he has "been a Peters" his whole life. Tr. Vol. 2, p. 9. Rodney's lifelong use of Edward's surname supports an inference that Edward acknowledged Rodney as his own, as does Edward's obituary that was prepared with information provided by Tina. As a result, there is sufficient evidence in

the record to support the trial court's findings and, thus, the heirship determination.

[37] In her affidavit submitted in support of the Estate's Motion to Correct Error[] or Alternatively for Relief From Order, Diana states that Rodney has known the identity of his biological father since he was approximately ten (10) years of age. Diana explains that she made the affidavit, in part, because she believed the trial court's order determining heirship "might have been based upon a finding that Edward was Rodney's biological father." *Id.* at 28. While a child's biological paternity is relevant when considering a petition to determine heirship, here, the trial court did not determine Rodney's biological paternity, and neither did the 1971 divorce decree. Instead, in its order the court addressed the single dispositive question, namely, whether Edward, the putative father, had married Diana and acknowledged Rodney to be his own. There is sufficient evidence to sustain the trial court's determination.

III. Motion to Correct Error

[38] In her Motion to Correct Error[] or Alternatively for Relief From Order, Tina asserted that the trial court's findings are "based upon an incomplete factual record, which lacked evidence from the most relevant witness–Rodney's mother, Diana." Appellant's App. Vol. 2, pp. 19-20. On the merits, Tina further asserted that Diana's testimony would establish that Edward "never acknowledged Rodney to be his own child for purposes of his marriage, divorce, adoption, or otherwise." *Id.* at 21. Tina explained, "Diana admits that she did not come forward before or during trial because she was not aware that

Rodney's heirship or status as Decedent's son was at issue." *Id.* at 22. And Tina contended that if Diana had been called as a witness at the hearing on Rodney's petition, her testimony "would have refuted everything Rodney said" and that if Diana's testimony were presented at another hearing it would rebut Rodney's testimony and should produce a different result. *Id.* at 20 and 22.

[39] Tina's motion, which cited both Indiana Trial Rule 59 (governing motions to correct error) and Trial Rule 60(B)(2) (governing motions for relief from judgment) for support, was filed within thirty days of the trial court's entry of judgment. Trial Rule 59 requires that a motion to correct error be filed within thirty days after the entry of a final judgment. In contrast, Trial Rule 60(B)(2) states that a person may seek relief from judgment under "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 error[] under Rule 59." Because Tina submitted her alleged newly-discovered evidence within the time limit for a motion to correct error, it appears her claim under Rule 60(B)(2) is surplusage, and we will consider her claim solely under Trial Rule 59.

[40] We review the denial of a motion to correct error for an abuse of discretion. *Wortkoetter v. Wortkoetter*, 971 N.E.2d 685, 687 (Ind. Ct. App. 2012). An abuse of discretion occurs when the decision is clearly against the logic and effect of the facts and circumstances before the court, including any reasonable inferences therefrom. *Id*. The trial court's decision on a motion to correct error comes to us cloaked with a presumption of correctness, and the appellant has

the burden of showing an abuse of discretion. *Cox v. Matthews*, 901 N.E.2d 14, 21 (Ind. Ct. App. 2009), *trans. dismissed*.

[41] Among other grounds for a motion to correct error, a litigant may present "[n]ewly discovered material evidence, including alleged jury misconduct, capable of production within thirty (30) days of final judgment which, with reasonable diligence, could not have been discovered and produced at trial." Tr. Rule 59(A)(1). Tina correctly cites this Court's opinion in *Bunch v. State*, 964 N.E.2d 274, 283 (Ind. Ct. App. 2012), *trans. denied*, where we enumerated the nine requirements for obtaining a new trial based on newly-discovered evidence:

> (1) the evidence has been discovered since the trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced upon a retrial of the case; and (9) it will probably produce a different result at retrial.

[42] We need not address all of these requirements, because Tina's motion fails as to requirement six: whether due diligence was used to discover the testimony in Diana's affidavit in time for trial. "'Due' diligence is a relative term." *Speedway SuperAmerica, LLC v. Holmes*, 885 N.E.2d 1265, 1272 (Ind. 2008). The element of due diligence requires the proponent to set out facts showing the exercise thereof; the bare assertion of due diligence is insufficient. *Greasel v. Troy*, 690 N.E.2d 298, 303-04 (Ind. Ct. App. 1997).

[43] As Edward's former spouse, Diana has no interest in Edward's estate and is not a party to the heirship proceedings. Tina, however, is both a beneficiary and the personal representative of Edward's estate, and she was aware of the issues raised by Rodney's heirship petition, including Rodney's contention that Edward held Rodney "out as his own child and son throughout the course of his life, up to and including the date of his death," Appellant's App. Vol. 2, p. 16, a contention which is at the heart of Rodney's petition to determine heirship. Thus, it was not Diana's burden to be "aware" of Rodney's petition and to "come forward" as Tina suggests. Instead, it was incumbent on Tina to obtain Diana's testimony. And the record fails to demonstrate why Tina was unaware of her mother's knowledge and could not have obtained her testimony in time for the hearing.

[44] Further, Rodney subpoenaed Diana, but she was later advised under circumstances not explained in the record that she need not appear for the hearing. At least initially, Rodney considered his mother to be a relevant witness who was available to testify. Tina offers no explanation for why she did not also consider Diana to be a relevant witness before the hearing.

[45] Tina contends that the trial court held the evidentiary hearing "a mere 49 days" after Rodney's petition was filed, which she claims was inadequate time for her "to engage in discovery or understand the nature of Rodney's position." Appellant's Br. p. 19. While she states she needed additional time, Tina does not explain why she did not request a continuance to conduct discovery and prepare for the hearing. Further, the "nature of Rodney's position" is

succinctly and unambiguously stated and readily apparent on the face of his petition to determine heirship.

[46] The trial court acted within its discretion in denying Tina's motion to correct error because she made no showing that with reasonable diligence she could not have discovered and produced Diana's testimony at the hearing on Rodney's petition. Indeed, as the mother of both Tina and Rodney, Diana was not only an obvious witness, but Tina described Diana as the "most relevant witness." Appellant's App. Vol. 2, p. 20.

Conclusion

[47] For the reasons stated above, we affirm the judgment of the trial court.

[48] Affirmed.

Robb, J., and Crone, J., concur.