[Cite as *Pelton v. Pelton*, 2023-Ohio-2289.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

EARL D. PELTON,

Plaintiff-Appellant,

v.

MELISSA J. PELTON,

Defendant-Appellee.

OPINION AND JUDGMENT ENTRY
Case No. 22 CO 0043

Civil Appeal from the
Court of Common Pleas, Domestic Relations Division
of Columbiana County, Ohio
Case No. 21 DR 426

BEFORE:
Mark A. Hanni, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed.

Earl D. Pelton, *Pro se*, 965 S. Lundy Avenue, Salem, Ohio 44460, Plaintiff-Appellant and

Atty. Kathleen Bartlett and *Atty. Jonathan Giannoutsos,* 542B East State Street, Salem, Ohio 44460, for Defendant-Appellee.

Dated: June 26, 2023

HANNI, J.

{¶1} Plaintiff-Appellant, Earl D. Pelton, appeals from a Columbiana County Common Pleas Court judgment entry decree of divorce. For the following reasons, we affirm the judgment.

{¶2} Appellant and Defendant-Appellee, Melissa J. Pelton, were married on May 19, 2007. They have three minor children.

{¶3} Appellant, through counsel, filed a complaint for legal separation with children on October 19, 2021. Appellee, through counsel, filed an answer and counterclaim for a divorce. The answer and counterclaim contained a certificate of service stating that on November 24, 2021, Appellee's attorney mailed a copy of the answer and counterclaim to Appellant's attorney. The answer and counterclaim were filed with the court on December 1, 2021.

{¶4} On January 28, 2022 Appellant filed a change of address, indicating that as of that date, his address had changed and he identified his new address on the form.

{¶5} On May 23, 2022, Appellant filed a petition for conciliation pursuant to R.C. 3117.05. On May 25, 2022, the Columbiana County Domestic Relations Court magistrate overruled Appellant's petition, explaining that such petitions can be granted only if requested by both parties.

{¶6} On September 19, 2022, the Columbiana County Domestic Relations Court magistrate issued a decision granting Appellee a divorce. The magistrate noted that the parties waived an appearance before the judge and the magistrate held a final hearing on September 15, 2022, with all parties and counsel present. The magistrate further explained that while Appellant was seeking a legal separation based solely on his religious beliefs, more than religious beliefs had to be considered. The magistrate noted that Appellee was seeking a divorce and she testified to irreconcilable differences between she and Appellant, prior attempts at counseling, and prior domestic violence charges that were reduced to disorderly conduct convictions.

{¶7} Upon hearing the testimony, the magistrate found it more appropriate to grant Appellee's counterclaim for divorce because finality was best for the children and compelled marriage would not work. The magistrate granted a divorce on the ground that

the parties had lived separate and apart in excess of one year without cohabitation. The magistrate further approved and adopted the separation agreement and parenting plan submitted by the parties.

{¶8} On the last page of the magistrate's decision, a bold-printed notation in all capital letters stated that the judgment was entered pursuant to Civ. R. 53(B)(4) and objections to the decision had to be filed with the court within 14 days of the magistrate's decision, even if the court had adopted the decision before that time.

{¶9} On September 19, 2022, the Columbiana County Domestic Relations Court judge adopted the magistrate's decision.

{¶10} On October 19, 2022 Appellant filed a notice of appeal. Shortly thereafter, his counsel withdrew from the case and Appellant filed a pro se appellate brief.

{¶11} In his first assignment of error, Appellant asserts:

> **The court erred by granting a Decree of divorce granted [sic], while the appellate [sic] was never served. Further that the court had on file the address hereby, he may have been served. The record shows no effort to serve at the current address filed or of service by publication.**

{¶12} Appellant cites Ohio Rev. Code 3105.06 concerning service by publication, and Ohio appellate court cases concerning service of process. *See Beck v. Beck,* 45 Ohio App. 507, 187 N.E. 366 (5th Dist. 1933); *O'Dell v. O'Dell,* 78 Ohio App. 60, 64 N.E.2d 126 (2d Dist. 1945). He contends that the docket showed a failure of service by Appellee's counsel and no further attempts at service were made once Appellee was notified of the failure of service. He submits that without service at his new address, the domestic relations court lacked jurisdiction.

{¶13} Appellee responds that Appellant failed to object to the magistrate's decision as required by Civ. R. 53(D)(3)(b) and thus he cannot assign as error on appeal any factual finding or legal conclusion adopted by the court. Appellee further asserts that we review the trial court's adoption of a magistrate's decision for abuse of discretion and no abuse of discretion exists here. Appellee cites Civ. R. 5(B)(1), which provides that when a party is represented by counsel, service of process must be made on counsel unless the court directs otherwise. Appellee contends that Appellant was properly served

with the answer and counterclaim for divorce because Appellant was represented by counsel at that time and his counsel was served by mail, as shown by the certificate of mailing.

{¶14} Appellant's first assignment of error lacks merit. Civ.R. 53(D)(3)(b)(i) provides that a party who wishes to object to the magistrate's decision must file written objections within 14 days of the filing of the decision. Civ. R. 53(D)(3)(b)(iv) provides that a party cannot appeal the court's adoption of any factual findings or conclusions of law unless they have filed proper and timely objections, except that they may assert plain error. Appellant did not file objections in this case.

{¶15} In addition, Appellee's attorney served Appellant's counsel with the answer and counterclaim for divorce by mail, as indicated in the certificate of service attached with the document. Civ. R. 5(B)(1) provides that "Whenever a party is not represented by an attorney, service under this rule shall be made upon the party. If a party is represented by an attorney, service under this rule shall be made on the attorney unless the court orders service on the party." Service was made on Appellant's attorney and the court did not order that service had to be made in any other manner.

{¶16} Further, Appellant did not raise the issue of service at the September 15, 2022 hearing before the magistrate. Appellant, Appellee, and their counsel appeared before the magistrate and testimony was taken from both parties as to Appellant's complaint for legal separation and Appellee's counterclaim for divorce. This constitutes waiver since Appellant was aware of the counterclaim for divorce and did not raise the issue when he first had the opportunity to do so.

{¶17} In addition, Appellant was able to prepare for and oppose the granting of the counterclaim for divorce at the hearing, which he did. Thus, even if we would conduct a plain error analysis, it appears that the integrity and fairness of the legal process was not affected, even if a problem with service had existed. The Supreme Court of Ohio has held that:

> *** in appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic

> fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.

Goldfuss v. Davidson, 79 Ohio St.3d 116, 122-123, 679 N.E.2d 1099 (1997). This case does not meet that standard.

{¶18} For these reasons, Appellant's first assignment of error lacks merit and is overruled.

{¶19} In his second assignment of error, Appellant asserts:

> **The court erred by failing to consider the possible exceptions set forth in Dailey v. Dailey as a reasonable basis to apply Tedrow v. Tedrow. The expectations based on health, though raised in testimony at trial, were not addressed by the court in the decree**.

{¶20} Appellant quotes R.C. 3105.01(J), which provides that divorce may be granted when the parties are living separate and apart. He asserts that the court erred in granting the divorce on this basis and failed to consider the exceptions set forth in *Dailey v. Dailey,* 11 Ohio App.3d 121, 463 N.E.2d 427 (2d Dist. 1983) as a reasonable basis to apply *Tedrow v. Tedrow*, 11th Dist. Trumbull No. 2002-T-0064, 2003-Ohio-3693. He contends that the court failed to inquire into the serious nature of his mental illness to determine if separation between the parties was voluntary. He explains that he was incorrectly diagnosed with a mental health condition and placed on heavy medication, which made him incapable of making decisions concerning voluntary separation. He posits that since he has received the correct diagnosis and his medication is regulated, he can now make such decisions. Appellant further asserts that the court erred in its decision by incorrectly identifying the location of the place where Appellant and Appellee were married, which shows that the court was not considering the specific facts of his case and was attempting to place his case into a "cookie cutter" uncontested divorce. He concludes that the grounds for divorce were not demonstrated at the trial.

{¶21} Appellee responds that the court did not abuse its discretion in granting the divorce on the basis of R.C. 3105.01(J) because the testimony of both parties established that they had lived separate and apart without cohabitation for longer than the statutory period of one year. Appellee distinguishes *Dailey*, *supra* by contending that the court in

that case rejected a divorce on the basis that the separation was involuntary because the wife suffered a stroke and had to reside in a nursing home and hospital for a long period of time. Appellee points out that the *Dailey* case was an exception to the policy that living apart from each other for a long period of time was strong evidence that a marriage was broken.

{¶22} Appellee contrasts *Dailey, supra,* with the First District Court of Appeals' decision in *Condit v. Condit,* 190 Ohio App.3d 634, 2010-Ohio-5202, 943 N.E.2d 1041. Appellee explains that the *Condit* Court held that *Dailey, supra* did not apply because the marriage in *Condit* had deteriorated to where the wife would not speak to the husband. Appellee contends that the instant case is similar to *Condit* because Appellee voluntarily left the home due to marriage problems and moved away from Appellant. Appellee also emphasizes her testimony that they had tried counseling, she had no hope of saving the marriage, and things were not going to change.

{¶23} Appellee also offers other bases for the trial court to have granted the divorce, including gross neglect of duty under R.C. 3105.01(F), since Appellant had testified that he could not even function to perform basic tasks.

{¶24} "A trial court has broad discretion in determining the proper grounds for divorce, and a reviewing court will not reverse that determination absent an abuse of discretion." *Gould v. Gould*, 2021-Ohio-3493, ¶ 8, 10th Dist. Franklin No. 20AP-3, quoting *Galloway v. Khan*, 10th Dist. No. 06AP-140, 2006-Ohio-6637, ¶ 71. "The term 'abuse of discretion' implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151, 157 (1980).

{¶25} R.C. 3105.01(J) provides that the court may grant a divorce for numerous reasons including "[o]n the application of either party, when husband and wife have, without interruption for one year, lived separate and apart without cohabitation." R.C. 3105.01(J) contains no qualifications and "nothing requires both parties to consent to living separate and apart." *Harding v. Harding*, 8th Dist. Cuyahoga No. 85022, 2005-Ohio-3010, at ¶ 15, citing *Sproull v. Sproull,* 1st Dist. No. C-76911, 1978 Ohio App. LEXIS 10942, 1978 WL 216393, (Mar. 8, 1979).

{¶26} Appellant correctly points out that in *Dailey*, 11 Ohio App.3d. 121, 463 N.E.2d 427, the Second District Court of Appeals upheld the domestic relations court's finding that the wife's conduct did not constitute "living separate and apart without cohabitation" under R.C. 3105.01(J). The wife had suffered a stroke and was admitted to the hospital, subsequently transferred to a nursing home, and then to a health center, which showed that she was not living in the marital home for over two years. The court acknowledged that "Ohio's 'living apart' statute is based upon the theory that living apart for a long period of time is the best evidence that a marriage has broken down. Norris, Divorce Reform: Ohio's Alternative to No Fault (1975), 48 State Govt. 52, 54." *Dailey, supra* at 122. However, the court held that the couple were living apart because of the wife's illness and no evidence existed that "the marriage has broken apart." *Id.* The Second District found that "'[w]hile the parties were living apart in a limited sense, they were not living separately in a marital sense. *See Bennington v. Bennington* (1978), 56 Ohio App.2d 201, 381 N.E.2d 1355 [10 O.O.3d 201].'" *Dailey, supra*, at 122.

{¶27} The instant case is distinguishable from the facts of *Dailey, supra*. Rather, as Appellee notes, the *Condit* case, 190 Ohio App.3d 634, 2010-Ohio-5202, 943 N.E.2d 1041, is more on point. In *Condit*, *supra*, the wife wanted a divorce, no longer spoke to her husband, and the couple were voluntarily living separate and apart. The *Condit* court held that "[R.C. 3105.01(J)] provides that people who cannot live together should not be compelled to remain married if either party wishes to end the marriage, and it does not require both parties to consent to living separate and apart." *Condit, supra,* at 643 (citing cases).

{¶28} Similarly here, Appellee testified that she left the marital home due to problems in the marriage. (Tr. at 19). She testified that she had no hope for saving the marriage and no amount of counseling would save it. (Tr. at 19). She testified that she had not observed any change in Appellant and she had exhausted all options to save the marriage. (Tr. at 20). Appellee had relocated to Kansas. (Tr. at 15).

{¶29} Based upon the testimony presented at the hearing, the trial court did not abuse its discretion in finding that the parties were living separate and apart without interruption for one year without cohabitation. The court reviewed the testimony of both parties, and gave more credence to Appellee's testimony. Citing Appellee's testimony,

the court held that compelling the marriage would not work and finality was in the best interests of the children.

{¶30} The record establishes that the parties lived separate and apart for over one year and Appellee voluntarily chose to live separate and apart from Appellant. Further, Appellant did not have to consent to the separation or the divorce. Thus, the trial court's decision was reasonable.

{¶31} Appellant also asserts that the trial court failed to conduct due diligence and was "oblivious to the testimony offered" because the final divorce decree stated that Appellee and Appellant were married in Sebring, Ohio, when they were actually married in Greenville, Pennsylvania. He asserts that this shows that the court was trying to mold the case into a non-contested divorce case and did not pay attention to the testimony offered.

{¶32} Appellant is correct that he testified that they were married in Greenville, Pennsylvania and the judgment decree of divorce stated that they were married in Sebring, Ohio. However, there is no evidence that this was anything more than a simple mistake. There is no evidence that the court was "oblivious to the testimony offered" or that the court was trying to mold the case into one that was non-contested. The court asked relevant questions at the hearing and the judgment entry reflects proper consideration of the testimony and evidence.

{¶33} Accordingly, Appellant's second assignment of error lacks merit and is overruled.

{¶34} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas, Division of Domestic Relations, of Columbiana County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.