[Cite as *Wagenbrenner v. Wagenbrenner*, 2011-Ohio-2811.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Julie Ann Wagenbrenner,	:	
Plaintiff-Appellee,	:	
		No. 10AP-933
v.	:	(C.P.C. No. 00DR-09-4003)
Craig Wagenbrenner,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 9, 2011

Sowald, *Sowald*, *Anderson & Hawley*, and *Eric W. Johnson*, for appellee.

Elizabeth N. Gaba, for appellant.

APPEAL from the Franklin County Court of Common Pleas, Division of Domestic Relations.

SADLER, J.

{¶1} Defendant-appellant, Craig Wagenbrenner, appeals from the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, that denied his motion to vacate the Agreed Judgment Entry – Decree of Divorce entered on October 1, 2001.

{¶2} The parties were married on May 11, 1991, and had four children born as issue of the marriage. On September 21, 2000, plaintiff-appellee, Julie Ann Wagenbrenner, filed a complaint for divorce, and on October 11, 2000, appellant filed an answer and counterclaim for divorce. Temporary orders were issued, including a December 13, 2000 Agreed Magistrate's Order indicating that appellant would pay child support in an amount of $600 per month, plus processing charge. This order of December 13, 2000 reflects the parties' agreed-upon downward deviation from the child support obligation of $870.39 per month as reflected on the attached child support computation worksheet.

{¶3} On June 4, 2001, appellee filed a motion to modify the temporary orders seeking an increase in the amount of child support being paid by appellant. On June 26, 2001, an Agreed Magistrate's Order was filed indicating that effective June 4, 2001, the parties agreed that appellant would pay $936.61, including processing charge, per month as child support, and that this amount was in accordance with the incorporated child support computation worksheet.

{¶4} On October 1, 2001, an Agreed Judgment Entry – Decree of Divorce ("Agreed Decree") was filed that incorporated the parties' settlement agreement. As is relevant here, the separation agreement provided that appellant was to pay child support in the amount of $936.61 per month, effective June 4, 2001.

{¶5} Child support was modified again in 2008 at which time appellant was ordered to pay $1,004.55 per month as child support. On July 7, 2008, Franklin County Child Support Enforcement Agency ("FCCSEA") filed a motion for contempt and determination of child support arrearages. On October 8, 2008, the trial court adopted the

magistrate's decision finding appellant in contempt for failure to pay child support and establishing child support arrearages in the amount of $51,072.85 as of August 31, 2008. On October 31, 2008, appellant filed a motion to modify child support asserting a change in circumstances, i.e., a decrease in his income. On December 10, 2008, appellee filed a motion to show cause why appellant should not be held in contempt for failing to comply with prior court orders.

{¶6} After a change of counsel and several continuances, on December 18, 2009, appellant filed a motion to vacate the October 1, 2001 Agreed Decree. The basis for appellant's motion to vacate was that the Agreed Decree was void because it did not contain a child support computation worksheet as required by then-in-effect R.C. 3113.215. On August 30, 2010, the trial court issued a decision denying the motion to vacate. The trial court reasoned that the parties' relied on the child support computation worksheet incorporated in the June 26, 2001 Agreed Magistrate's Order to arrive at the child support amount utilized in their Agreed Decree. Additionally, the trial court awarded appellee $750 in attorney fees pursuant to her motion filed on May 4, 2010.

{¶7} This appeal followed, and appellant brings the following four assignments of error for our review:

> [1.] The trial court erred to the prejudice of Appellant, and abused its discretion, by denying and dismissing Appellant's motion to vacate the Decree and subsequent orders in the case because the Divorce Decree is in violation of then R.C. §3113.215, and present R.C. §3119.022 and other relevant sections of chapter 3119, and is in violation of Franklin County Local Rule 21.
>
> [2.] The trial court erred to the prejudice of Appellant, and abused its discretion, by denying and dismissing Appellant's motion to vacate the Divorce Decree and subsequent orders

> because the Divorce Decree did not fully determine the divorce proceeding as required b R.C. §2505.02 and Civ.R. 75.
>
> [3.] The trial court committed reversible error in not recognizing that it had no jurisdiction to sign a "Withholding/Seek Work Order" at the time of the "Decree", and then to Order child support from the Appellant, when it previously failed to include by attachment, adoption, and incorporation, a child support worksheet with the Divorce Decree.
>
> [4.] The trial court abused its discretion and erred to the prejudice of Appellant in ordering him to pay any of Appellee's attorney fees, and in Ordering him to pay in the amount of $750, without specific explanation.

{¶8} Appellant's first three assignments of error challenge the trial court's denial of his motion to vacate the Agreed Decree of October 1, 2001.

{¶9} Appellate courts review the denial of a motion to vacate under an abuse-of-discretion standard. *Stonehenge Condominium Assn. v. Davis*, 10th Dist. No. 04AP-1103, 2005-Ohio-4637, ¶13, citing *Daniel v. Motorcars Infiniti, Inc*., 8th Dist. No. 85005, 2005-Ohio-3008, ¶8. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶10} The underlying basis for each of the first three assigned errors is the trial court's alleged error in entering the final Agreed Decree that established appellant's child support obligation without attaching or incorporating a child support computation worksheet with the final Agreed Decree. Prior to addressing the merits of appellant's first three assignments of error, however, we must first address whether the trial court had the authority to grant the relief requested by appellant. To determine this, we must first

decide whether the errors alleged by appellant render the October 1, 2001 Agreed Decree void or merely voidable.

{¶11} " 'The distinction between "void" and "voidable" is crucial. If a judgment is deemed void, it is considered a legal nullity which can be attacked collaterally. Conversely, if a judgment is deemed voidable, it will have the effect of a proper legal order unless its propriety is successfully challenged through a direct attack on the merits. * * * ' " *GMAC, LLC v. Greene*, 10th Dist. No. 08AP-295, 2008-Ohio-4461, ¶27, quoting *State v. Montgomery*, 6th Dist. No. H-02-039, 2003-Ohio-4095, ¶10, quoting *Clark v. Wilson* (July 28, 2000), 11th Dist. No. 2000-T-0063. A judgment is void where service of process has not been accomplished or where the court lacks subject-matter jurisdiction. *Deckerd v. Deckerd* (June 24, 1999), 7th Dist. No. 98-CO-59. In contrast, "[a] voidable judgment is one rendered by a court having jurisdiction and although seemingly valid, is irregular and erroneous." *GMAC* at ¶26, quoting *Montgomery* at ¶9, citing Black's Law Dictionary (7 Ed.1999) 848.

{¶12} It is well-settled that a court has the inherent authority to vacate a void judgment and that a void judgment may be challenged at any time. *The Milton Banking Co. v. Dulaney*, 4th Dist. No. 09CA10, 2010-Ohio-1907, ¶26. However, "[a] voidable judgment is subject to direct appeal and to the provisions of Civ.R. 60(B). A Civ.R. 60(B) application for relief must be made to the trial court that rendered the judgment from which relief is sought." *Montgomery* at ¶9 (internal citations omitted). See also *GMAC*; *Deckerd* (exclusive means to challenge a voidable judgment is Civ.R. 60(B)); *Brown v. Brown* (Feb. 5, 1991), 2d Dist. No. 90-CA-41 (because the judgments were voidable and not void the appellant should have sought relief through Civ.R. 60(B)); *McIntyre v.*

Braydich, 11th Dist. No. 96-T-5602 (a court has no inherent authority to vacate voidable judgments); *Evans v. Supreme Court of Ohio*, 10th Dist. No. 02AP-736, 2003-Ohio-959, ¶17 (voidable judgments may only be challenged on direct appeal); *Mayfield Hts. v. N.K.*, 8th Dist. No. 93166, 2010-Ohio-909 (because the judgment was voidable the trial court did not have the authority to vacate it).

{¶13} Based on the foregoing, if the errors alleged by appellant render the Agreed Decree void, then the trial court would possess the inherent authority to vacate the same at any time. If, however, the errors alleged by appellant render the Agreed Decree voidable, then the trial court would not possess inherent authority to vacate the same pursuant to appellant's motion to vacate for voidness, but rather, the Agreed Decree could be challenged only by direct appeal or motion pursuant to Civ.R. 60(B).

{¶14} In *Karnes v. Karnes* (Aug. 8, 1996), 4th Dist. No. 95CA1666, the defendant appealed from a finding of contempt for failure to pay child support. On appeal, the defendant argued that because the 1982 divorce decree did not specify which party had custody of the child or the exact amount of child support due, the original decree was unenforceable as were all subsequent judgments stemming from the decree. The appellate court disagreed, and held that even if the 1982 decree did not contain the appropriate statement of relief, such judgment would be voidable, not void, and, therefore, the alleged errors should have been raised on direct appeal from the final decree of divorce.

{¶15} Similarly, in *Montgomery*, the defendant appealed her conviction and sentence for two counts of nonsupport. After she was sentenced, the defendant filed motions for a new trial and to withdraw her plea. The trial court denied the motions, and

on appeal the defendant argued the underlying child support order giving rise to her convictions was void because it did not contain a child support computation worksheet. The appellate court held, "[a]ppellant's assertion regarding the lack of a child support computation work sheet does not allege a jurisdictional error. Thus, the stipulated judgment entry is *not void but voidable*." Id. at ¶11 (emphasis added). Because the defendant did not challenge the stipulated judgment entry establishing child support on direct appeal, the *Montgomery* court held the voidable judgment was not subject to the collateral attack brought by the defendant.

{¶16} Likewise, in *In re Marriage of Henson*, 11th Dist. No. 2006-T-0065, 2007-Ohio-4376, the appellant challenged the original dissolution decree that adopted the parties' separation agreement on the basis that it failed to contain a child support computation worksheet. The court agreed that the original dissolution decree was flawed because it did not contain a fully completed child support computation worksheet and it failed to set forth factors justifying an upward deviation of child support. However, the court stated, "[a]lthough flawed and erroneous, the original decree of dissolution is not void ab initio, as Mr. Henson contends, but rather, merely voidable." Id. at ¶29. Because Mr. Henson did not appeal the original decree or file a motion to vacate pursuant to Civ.R. 60(B), the court held that "any error in the order cannot now be cured via a motion to modify." Id. at ¶33.

{¶17} In the case sub judice, appellant argues the October 1, 2001 Agreed Decree is void for failure to include a child support computation worksheet. Even if he is correct that the Agreed Decree is flawed and erroneous for failure to include a child support computation worksheet, the Agreed Decree is not void since the trial court

possessed both subject-matter jurisdiction over the divorce and personal jurisdiction over the parties. Instead, the Agreed Decree would be voidable and, therefore, subject to attack by direct appeal or by a motion for relief from judgment pursuant to Civ.R. 60(B), which requires the movant to establish entitlement to relief as well as timeliness of the motion. *Dulaney*; *Deckerd*; *GMAC*; *Evans*. Thus, the trial court did not have the authority to grant the relief requested in appellant's motion to vacate for voidness because the alleged errors in the Agreed Decree would not render it void. Accordingly, there is no abuse of discretion in the trial court's denial of appellant's motion to vacate, and his first three assignments of error are overruled.

{¶18} In his fourth assignment of error, appellant contends the trial court abused its discretion in awarding appellee $750 in attorney fees. R.C. 3105.73(B) provides:

> In any post-decree motion or proceeding that arises out of an action for divorce, dissolution, legal separation, or annulment of marriage or an appeal of that motion or proceeding, the court may award all or part of reasonable attorney's fees and litigation expenses to either party if the court finds the award equitable. In determining whether an award is equitable, the court may consider the parties' income, the conduct of the parties, and any other relevant factors the court deems appropriate, but it may not consider the parties' assets.

{¶19} An award of attorney fees is generally within the sound discretion of the trial court and not to be overturned absent an abuse of discretion. *Shirvani v. Momeni*, 10th Dist. No. 09AP-791, 2010-Ohio-2975, ¶22, citing *Babka v. Babka* (1992), 83 Ohio App.3d 428, 435. Abuse of discretion is more than mere error, but signifies that the trial court's decision is unreasonable, unconscionable or arbitrary. *Blakemore*. The appellate court must not substitute its judgment for that of the trial court when reviewing under an abuse of discretion standard. Id.

{¶20} Appellee filed a motion on May 4, 2010 seeking attorney fees related to the motion to vacate filed by appellant. On June 16, 2010, appellee filed a supplemental memorandum with a supporting affidavit in support of the motion for attorney fees. In the affidavit, appellee's counsel averred appellee incurred attorney fees related to the motion to vacate in the amount of $1,350, that the amount was reasonable, and that it was equitable for appellant to pay the same. Appellee's counsel also averred the motion to vacate was filed to delay the pending motions and hearings related to appellant's alleged failure to comply with prior court orders. Additionally, appellee's counsel stated that though she tried to resolve the matter without filing a response to the motion to vacate, her attempts were to no avail.

{¶21} Though the record reveals appellant filed various other motions and memoranda, appellant did not contest the motion for attorney fees, nor provide any evidence or argument challenging the reasonableness of the fees. In the decision denying the motion to vacate, the trial court awarded appellee $750 of the $1,350 in attorney fees requested.

{¶22} In his assignment of error challenging the award of attorney fees to appellee, appellant does not contend the award was either inequitable or unreasonable. Instead, appellant's counsel contends she had a duty to zealously advocate for her client, and that her client should not be penalized for the same. Additionally, appellant contends the trial court erred in awarding attorney fees without reference to a specific statute or rule.

{¶23} The trial court's decision, however, referenced and granted attorney fees pursuant to appellee's motion that was expressly based on R.C. 3105.73(B); hence, it is

clear the trial court awarded attorney fees pursuant to that statute. As stated in R.C. 3105.72(B), in any post-decree motion or proceeding that arises out of an action for divorce or dissolution, the court may award all or part of reasonable attorney fees and litigation expenses to either party if the court finds the award equitable. In determining whether an award is equitable, the court may consider the parties' income, the conduct of the parties, and any other relevant factors the court deems appropriate, but it may not consider the parties' assets. Id.

{¶24} Here, the trial court was presented with an uncontested request for attorney fees and undisputed evidence of the reasonableness of the fees incurred. In its discretion, the trial court determined that an award of approximately half of the requested fees was equitable. Upon review of the record, we can discern no abuse of that discretion. *Delevie v. Delevie* (Jan. 28, 1997), 10th Dist. No. 96APF06-765; *Ruetz v. Ruetz*, 6th Dist. No. L-02-1153, 2003-Ohio-4091.

{¶25} Accordingly, we overrule appellant's fourth assignment of error.

{¶26} Having overruled all four of appellant's assignments of error, we hereby affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations.

Judgment affirmed.

BRYANT, P.J., and KLATT, J., concur.

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