[Cite as *Pursel v. Pursel*, 2009-Ohio-4708.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91837

**MARIE PURSEL,
NKA BLISCIK**

PLAINTIFF-APPELLEE

vs.

ALBERT PURSEL

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. D-295783

BEFORE: Stewart, J., Kilbane, P.J., and Jones, J.

RELEASED: September 10, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MELODY J. STEWART, J.:

{¶ 1} Marie Pursel and Albert Pursel were divorced according to the terms of an in-court agreement that required Albert to pay child and spousal support. In a later enforcement action for child support arrears, he and Marie agreed that Albert would make additional payments to satisfy those arrears. Albert then filed a motion to vacate both the divorce decree and the agreed judgment entry for support arrears on grounds that he and Marie did not have an actual agreement as to the amount of support that he would pay. The court vacated the divorce decree and agreed judgment entry. Marie then filed her own motion asking the court to vacate its order vacating the divorce decree. The court granted Marie's motion to vacate, finding that its first order to vacate judgment (prepared by Albert) did not conform with its ruling from the bench. The court modified that agreed judgment entry by very slightly reducing the amount of support owed by Albert, but denied the motion in all other respects. Albert appeals.[1]

I

[1]There has been a suggestion that we may lack a final order under Civ.R. 54(B) because the divorce decree deferred ruling on Marie's motion for attorney fees and expenses. Attorney fees may be awarded as part of the division of marital property, *Birath v. Birath* (1988), 53 Ohio App.3d 31, 39, and if so, the failure to determine those fees can affect the finality of the divorce. *Pickens v. Pickens* (Aug. 27, 1992), Meigs App. No. 459. However, there is no indication that the court intended to award attorney fees as part of the division of marital property, so the fees were ancillary to the divorce decree and had no affect on the finality of the divorce.

{¶ 2} The parties were divorced in November 2006. The divorce decree stated that it incorporated "the terms of the parties' in-court agreement[.]" The divorce decree ordered Albert to pay child support of $1,017.88 and spousal support of $510, for a monthly total of $1,527.88.

{¶ 3} Three months after entry of the divorce decree, the Cuyahoga County Support Enforcement Agency filed a motion to show cause against Albert because he did not pay the preceding two support payments. In April 2007, the parties entered into an agreed judgment entry in which they agreed that Albert had been in contempt of court for being $21,460.16 in arrears. The order stated that Albert would continue to pay child support in the amount of $1,017.88 and would pay an additional $313.77 toward his arrears. The agreed judgment entry also stated: "3. Continue to pay $551.00/month (incl. 2%) as current spousal support ($539.98 w/o 2%)." In total, the agreed judgment entry obligated Albert to pay $1,882.65 per month.

{¶ 4} In November 2007, Albert filed a motion to vacate both the divorce decree and the April 2007 agreed judgment entry. He argued that the divorce decree should be vacated because the parties had not reached an agreement on the terms of child and spousal support and that the amounts listed in the divorce decree were not calculated in conformity with the statutory child support guidelines. Albert also sought to have the April 2007 agreed judgment entry vacated on grounds that it contained a clerical

mistake – it ordered him to pay spousal support of $551 per month when the divorce decree ordered him to pay only $510 per month.

{¶ 5} The court conducted a hearing on the motion, but terminated that hearing and ruled that the April 2007 judgment entry relating to spousal support contained a clerical error. It ordered Albert to submit a judgment entry "which accurately reflects the amount of the original spousal support order * * *." The court denied relief from the divorce decree, finding the motion untimely given Albert's agreement to the judgment entry that set forth his arrears based on the divorce decree.

{¶ 6} As instructed, Albert submitted a proposed judgment entry that vacated the April 2007 agreed judgment entry under Civ.R. 60(A) because there had been a clerical error in the amount of spousal support. The proposed entry also stated: "this matter shall be referred back to the Magistrate for calculation of the defendant's arrearages, if any, and any credits the defendant is entitled to for payments made by the defendant prior to the Judgment Entry of divorce of November 17, 2006." The court journalized this entry as prepared on May 15, 2008.

{¶ 7} That same day, Marie objected to Albert's proposed judgment entry. Those objections are not contained in the record on appeal, and were in any event untimely because Marie did not submit them within three days as required by Loc.R. 28(B)(1) of the Cuyahoga County Court of Common

Pleas, Domestic Relations Division. Even without those objections, the court found that the May 15, 2008 judgment entry "does not conform with the Court's ruling and shall be vacated." The court modified the April 2007 agreed judgment entry to reflect Albert's spousal support obligation to be $510 per month (inclusive of poundage) and that his total monthly support order, including payment for arrears, is "$1841.65." The court denied Albert's motion for relief from judgment on all other grounds.

II

{¶ 8} A court may at any time correct clerical mistakes that arise from oversight or omission in judgments, orders or other parts of the record. See Civ.R. 60(A). "Clerical mistakes" are considered mechanical in nature – the so-called "blunders in execution" – as opposed to substantive mistakes that result from an application of discretion or judgment by the court. *State ex rel. Litty v. Leskovyansky* (1996), 77 Ohio St.3d 97, 100; *Kuehn v. Kuehn* (1988), 55 Ohio App.3d 245, 247. We review the court's action for an abuse of discretion, being mindful to consider the nature of the correction, rather than the effect of the correction. *Brush v. Hassertt*, Montgomery App. No. 21687, 2007-Ohio-2419, ¶28.

{¶ 9} The April 2007 agreed judgment entry contained a clerical error – it overstated Albert's spousal obligation. The divorce decree ordered Albert to pay a total of $510 per month, yet the agreed judgment entry stated that

Albert had been ordered to pay a total of $551 per month. The court did not abuse its discretion by amending the April 2007 agreed judgment entry to conform with the divorce decree.

III

{¶ 10} Albert argues that the court abused its discretion by refusing to vacate the November 2007 divorce decree. He maintains that he did not agree to the provisions in the decree and that the decree erroneously awarded permanent spousal support.

{¶ 11} "To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken." *GTE Automatic Elec. v. ARC Industries*, 47 Ohio St.2d 146, paragraph two of the syllabus. If any of these three requirements is not met, the motion should be overruled. *Svoboda v. Brunswick* (1983), 6 Ohio St.3d 348, 351.

{¶ 12} Albert's motion for relief from judgment cited Civ.R. 60(B)(1), (3) and (5) as grounds for the motion. He maintained that he did not agree to the terms of the divorce as indicated by the court, that the court failed to

award child support and spousal support in amounts conforming to the statutory guidelines, and that visitation issues remained pending.

{¶ 13} Although he couched these points under the grounds of "mistake" or "fraud," we find that they could all have been raised on direct appeal from the divorce decree. Civ.R. 60(B) cannot be used as a substitute for a timely appeal. *Key v. Mitchell* (1998), 81 Ohio St.3d 89, 90-91, 1998-Ohio-643. And a mistake in a judgment, without more, is not a basis for relief from judgment under Civ.R. 60(B). See *Orama v. Orama*, Lorain App. No. 09CA009321, 2008-Ohio-5188, ¶7.

{¶ 14} If, as argued by Albert, there had been no agreement on the terms of the divorce, he would have known immediately that the court erred by stating it had incorporated into the divorce decree "the terms of the parties' in-court agreement[.]" Likewise, any errors in the computation of child and spousal support would have been apparent on the face of the divorce decree, as would any alleged omissions relating to visitation. All of the issues raised by Albert in his motion for relief from judgment were obvious at the time the court issued the divorce decree and were appealable errors that should have been raised in a direct appeal from the decree.

{¶ 15} We also agree with the court's conclusion that Albert failed to file the motion within a reasonable time. Albert waited 364 days to file his motion for relief from judgment. Although Civ.R. 60(B)(1) and (3) require a

motion to be filed "not more than one year after the judgment," a Civ.R. 60(B) motion can be untimely, even though filed within a one-year time period allowed by the rule, if it is not filed within a *reasonable* period of time after final judgment. What is reasonable under the circumstances depends on the facts of each case. *Colley v. Bazell* (1980), 64 Ohio St.2d 243, 249-250. When a movant is aware that there are grounds for relief and delays filing the motion, the courts will require the movant to explain the reasons for the delay. See, e.g., *Kaczur v. Decara*, Cuyahoga App. No. 67546, 1995-Ohio-3038 (Civ.R. 60(B) motion untimely filed when movant offered no reasonable explanation for a nine-month delay in filing the motion); *Drongowski v. Salvatore*, Cuyahoga App. No. 61081, 1992-Ohio-5027 (11-month delay in filing Civ.R. 60(B) motion held untimely because movant failed to provide any explanation).

{¶ 16} Albert did not explain why he waited 364 days to seek relief from judgment. And he offered no adequate explanation as to why he entered into the April 2007 agreed judgment entry if he believed that the support amounts contained in the divorce decree were invalid. The terms of that agreement relied on the same child and spousal support obligations that he now claims were improperly computed. He cannot now maintain that he timely filed a motion for relief from judgment based on support obligations that he in essence "ratified" months earlier.

{¶ 17} Albert failed to establish two of the three elements of a motion for relief from judgment: he did not offer proper grounds for the motion and failed to show that he filed his motion within a reasonable time. The court did not abuse its discretion by refusing to grant relief from judgment.

{¶ 18} Judgment affirmed.

It is ordered that appellee recover of appellant her costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas – Domestic Relations Division to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE

MARY EILEEN KILBANE, P.J., and
LARRY A. JONES, J., CONCUR