[Cite as *Walsh v. Walsh*, 2018-Ohio-2466.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

TODD ANTHONY WALSH,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2017-T-0033**
- vs -	:	
SANDRA ANN WALSH,	:	
Defendant-Appellee.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Domestic Relations Division, Case No. 2014 DR 00028.

Judgment: Affirmed.

Mark Lavelle, 1045 Tiffany South, #3, Youngstown, Ohio, 44514 (For Plaintiff-Appellant).

Thomas A. Will, Thomas A. Will & Associates, Inc., One Gateway Center, Suite 700, 420 Fort Duquesne Boulevard, Pittsburgh, PA 15222 (For Defendant-Appellee).

COLLEEN MARY O'TOOLE, J.

{¶1} Todd A. Walsh appeals from the judgment entry of the Trumbull County Court of Common Pleas, Domestic Relations Division, adopting the decision of its magistrate, and granting his ex-wife Sandra A. Kehler's motion for correction to judgment entry of divorce pursuant to Civ.R. 60(B). At issue is the division of Mr. Walsh's naval pension pursuant to a qualified domestic relations order ("QDRO"). Mr. Walsh contends

the trial court lacked jurisdiction to correct the divorce decree's provisions regarding the QDRO. Finding no reversible error, we affirm.

{¶2} The couple was married August 10, 1994. They have no children. They permanently separated August 7, 2000. January 27, 2014, Mr. Walsh filed for divorce. Ms. Kehler answered March 5, 2014. The parties entered a consent judgment entry of divorce October 30, 2014, which was signed by the trial court December 8, 2014. Relevant to this appeal are paragraphs one and nine of the judgment entry. Paragraph one established the term of the marriage as being August 10, 1994 through August 7, 2000. Paragraph nine established the terms regarding division of Mr. Walsh's naval pension (he served twenty years). The parties were ordered to submit information to QDRO Consultants, LLC, so it could fashion a QDRO. That was to be submitted to the trial court within 45 days. The trial court retained jurisdiction of the QDRO in the judgment entry of divorce.

{¶3} Considerable delay attended preparation of the QDRO. Ms. Kehler blamed Mr. Walsh's failure to submit information to QDRO Consultants. Mr. Walsh blamed Ms. Kehler's failure to pay her half of QDRO Consultants' fee. Following hearing before the magistrate, the issues were resolved by an order he filed January 26, 2016, which was adopted by the trial court that same day.

{¶4} Ms. Kehler moved to modify the divorce decree October 18, 2016. Her counsel had been contacted by QDRO Consultants, and informed that the language in the judgment entry of divorce would not be acceptable to the military authorities. January 9, 2017, Ms. Kehler submitted the motion for correction pursuant to Civ.R. 60(B) subject of this appeal. February 7, 2017, Mr. Walsh opposed the motion.

{¶5} The motion came on for hearing before the magistrate March 3, 2017. Mr. Walsh testified as if on cross examination, and expressed considerable reluctance to part with any of his pension. David Kelley, founder and principal of QDRO Consultants, one of the nation's leading experts in this field, testified for Ms. Kehler. He testified there were two problems with the language in the judgment entry of divorce. First, Ms. Kehler's portion of the pension should have been expressed as a percentage of the disposable monthly pension pay. He identified this as 15%, and testified this would involve no change in Ms. Kehler's portion of the pension as set forth in the formula contained in the judgment entry of divorce. The more serious problem, in Mr. Kelley's view, was the duration of the marriage – six years. He testified that pursuant to the "10/10" rule, the military will not grant an order providing for direct payment of pension benefits to an ex-spouse, unless the duration of the marriage is at least ten years. Otherwise, the ex-spouse must simply rely on the domestic relations courts to enforce payment.

{¶6} Following the hearing, the magistrate issued a decision granting the motion to correct; altering the term of the marriage to August 10, 1994 through August 10, 2004; and ordering that Ms. Kehler receive 15% of Mr. Walsh's disposable pension pay per month. The decision was adopted by the trial court March 8, 2017. Mr. Walsh timely appealed, assigning a single error: "The trial court lacked jurisdiction to modify the consent judgment entry of divorce as the defendant-appellant failed to meet any of the permissible requirements of Rule 60(B) of the Ohio Rules of Civil Procedure." Under this assignment of error, he presents a single issue for review: "Did the trial court lack jurisdiction and err in granting the defendant-appellee's relief from judgment pursuant to Rule 60(B)?"

{¶7} We review a trial court's decision to grant or deny a Civ.R. 60(B) motion for abuse of discretion. *Huntington Natl. Bank v. Lomaz*, 11th Dist. Portage Nos. 2008-P-0007, 2008-P-0061, 2010-Ohio-705, ¶27. Regarding this standard, we recall the term "abuse of discretion" is one of art, connoting judgment exercised by a court which neither comports with reason, nor the record. *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). An abuse of discretion may be found when the trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, ¶15 (8th Dist.)

{¶8} Civ.R. 60(B) provides, in pertinent part:

{¶9} "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. * * * "

{¶10} "Civ.R. 60(B) is an equitable remedy that is intended to afford relief in the interest of justice. To prevail on a motion pursuant to Civ.R. 60(B), the movant must

demonstrate: '(* * *)(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 (* * *).' *GTE Automatic Electric, Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, * * *, at paragraph two of the syllabus. These requirements are conjunctive; not disjunctive. *Id.* at 151." *Ludlow v. Ludlow*, 11th Dist. Geauga No. 2006-G-2686, 2006-Ohio-686, ¶23. (Parallel citation omitted.)

{¶11} In the trial court, Ms. Kehler pointed to Civ.R. 60(B)(4) ("it is no longer equitable that the judgment should have prospective application"), and Civ.R. 60(B)(5) ("any other reason justifying relief from the judgment"), as justifying her requested relief. Mr. Walsh argues that neither of these grounds is applicable, since neither justifies granting a party relief from voluntary actions. *Knapp v. Knapp*, 24 Ohio St.3d 141, paragraph two of the syllabus (Civ.R. 60(B)(4) ("Civ.R. 60(B)(4) will not relieve a litigant from the consequences of his voluntary, deliberate choice"); *Mount Olive Baptist Church v. Pipkin Paints*, 64 Ohio App.3d 285, 288 (8th Dist.1989) ("the 'other reason' clause of Civ.R. 60(B) will not protect a party who ignores its duty to take legal steps to protect its interest"). Mr. Walsh notes that Ms. Kehler voluntarily entered the consent judgment of divorce, and argues that she should have contacted the military to discover what it requires to divide a pension.

{¶12} We respectfully conclude that Civ.R. 60(B) jurisprudence is not applicable to this case. Initially we note that the trial court specifically retained jurisdiction of the QDRO issue in that judgment entry, pursuant to local rule. Further, we find the law as set forth in *Gordon v. Gordon*. 144 Ohio App.3d 21 (8th Dist.2001), to be controlling. Wife

moved for relief from judgment when the federal government denied her survivorship benefits under her ex-husband's FBI pension. *Id.* at 22-23. The trial court granted her motion, and modified the QDRO. *Id.* at 23. Husband appealed. *Id.* The Eighth District did not apply a Civ.R. 60(B) analysis. Rather, it reasoned as follows:

{¶13} "A QDRO is an order 'which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefit payable with respect to a participant under a plan (* * *).' Employee Retirement Income Security Act of 1974, Section 206(d)(3)(B)(i)(I). A QDRO is generally not modifiable unless the court has expressly reserved jurisdiction to do so. *Schrader v. Schrader* (1995), 108 Ohio App.3d 25, * * *.

{¶14} "While a trial court does not have continuing jurisdiction to modify a marital property division incident to a divorce or dissolution decree, it has the power to clarify and construe its original property division so as to effectuate its judgment. R.C. 3105.171(I); *Wolfe v. Wolfe* (1976), 46 Ohio St.2d 399, * * *; *Redding v. Redding* (Dec. 20, 1999), Clinton App. No. CA99-06-015, unreported, 1999 WL 1238834, citing *Peterson v. Peterson,* (July 12, 1999), Butler App. No. CA98-07-145, unreported, 1999 WL 527793. Courts have also found ways of granting relief in cases where the results of the finalized QDRO were not in accord with the court's original intent." (Parallel citations omitted.) *Gordon*, *supra*, at 24.

{¶15} In this case, the trial court retained jurisdiction regarding the QDRO. The intent of the parties had been that Ms. Kehler be paid 15% of Mr. Walsh's pension. The only changes in the judgment entry of divorce merely effectuated this original intent of the parties and the trial court.

{¶16} The assignment of error lacks merit.

{¶17} The judgment of the Trumbull County Court of Common Pleas, Division of Domestic Relations, is affirmed.

THOMAS R. WRIGHT, P.J., concurs in judgment only,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

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{¶18} I respectfully dissent and would reverse the decision of the court below. In granting appellee's motion for relief from judgment, the court established a new date for the termination of the marriage, not based on the actual duration of the marriage, but, rather, on the desire of one of the parties to circumvent the Defense Finance and Accounting Service's 10/10 Rule. *See* 10 U.S.C. 1408(d)(2) ("[i]f the spouse or former spouse to whom payments are to be made under this section was not married to the member [of the military] for a period of 10 years or more * * *, payments may not be made under this section").

{¶19} That it would be more convenient for the appellee to receive her portion of appellant's military pension directly from the Secretary is not in dispute, but neither is it relevant nor does it justify the blatant manipulation of the factual record.

{¶20} A trial court's decision to adopt a de facto termination date for the marriage must be based on "***the facts*** and circumstances presented in a particular case."

(Emphasis added.) *Berish v. Berish*, 69 Ohio St.2d 318, 321, 432 N.E.2d 183 (1982). Typically, a court will adopt a de facto termination date "when the parties separate, make no attempt at reconciliation, continually maintain separate residences, separate business activities and/or separate bank accounts." (Citation omitted.) *Marini v. Marini*, 11th Dist. Trumbull Nos. 2005-T-0012 and 2005-T-0059, 2006-Ohio-3775, ¶ 13.

{¶21} Neither the majority nor the appellant has cited any authority for the proposition that circumventing the provisions of the Uniformed Services Former Spouses' Protection Act is a valid factual consideration for adopting a wholly fictional termination of marriage date. In plain terms, the August 10, 2004 termination date is a fabrication.

{¶22} As often happens, deception begets further complications. The August 10, 2004 termination date extends the duration of the marriage by four years, thus securing for the appellee a larger proportion of the retirement pay. (It is an undisputed fact that appellee is entitled to a proportion of appellant's retirement based on 5.99 years of marriage.) To offset this, appellee's QDRO expert explained that her percentage of the retirement could be modified to reflect six years of actual marriage and assured the court that Defense Services would accept the figures without questioning the discrepancy. Trial transcript at 43 ("DFAS will not go back and calculate, oh, jeez, actually it should be 30 percent."). There is no guarantee that the QDRO expert is correct and neither the lower court nor Defense Services is bound by the QDRO expert's opinion. Moreover, what should be questioned is the propriety of any court giving sanction to such a manipulative scheme.

{¶23} Assuming, arguendo, that the convenience of the appellee was a valid equitable consideration in fixing the duration of marriage, such remedy is not necessary

in the present case. If the appellant fails to obey the order to pay the appropriate portion of his retirement, appellee can turn to the court to enforce its judgment – just as the appellee could do if the appellant should fail to cooperate in providing necessary information to QDRO Consultants. This court should not be in the business of creating artificial periods of marriage to circumvent federal law for the convenience of a party.

{¶24} For the foregoing reasons, I respectfully dissent and would reverse the decision of the trial court.