

[Cite as *Murphy-Kesling v. Kesling*, 2009-Ohio-2560.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

DEBRA J. MURPHY-KESLING

C. A. No. 24176

Appellant

v.

GERALD M. KESLING

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. 2001-05-01866

Appellee

DECISION AND JOURNAL ENTRY

Dated: June 3, 2009

WHITMORE, Judge.

{¶1} Plaintiff-Appellant, Debra Murphy-Kesling (“Wife”), appeals from the denial of her motion for relief from judgment in the Summit County Court of Common Pleas, Domestic Relations Division. This Court affirms.

I

{¶2} Defendant-Appellee, Gerald Kesling (“Husband”), and Wife were married in August 1983 and had two children together. The parties divorced in August 2002. Throughout their marriage, Wife was employed as a public school teacher and was contributing to her pension through the State Teachers’ Retirement System (“STRS”). At the time of the divorce, Husband’s income was based on Social Security Disability and Veteran’s Administration Disability only. In their divorce decree (the “decree”), Husband waived his right to spousal support and Wife waived her right to child support. The parties agreed that Husband would receive a portion of Wife’s STRS pension and required that they “employ Pension Evaluators to

determine the marital portion [of Wife's STRS pension] and to determine the value of a Social Security offset for [Husband's] right to receive Social Security benefits. The marital portion of said account less said Social Security offset will then be divided equally between the parties." The decree was entered August 21, 2002, and Wife did not appeal its terms.

{¶3} Since that time, however, the parties have had numerous challenges to the enforcement of the decree. In December 2002, Husband filed a post-decree motion compelling, inter alia, Wife to authorize Pension Evaluators to determine the marital portion of her STRS pension, from which the parties could prepare the requisite Division of Property Order ("DOPO") granting Husband a portion of Wife's pension.

{¶4} The magistrate held a hearing on Husband's motion in March 2003, at which both parties were present and represented by counsel. Between the time the motion was filed and the hearing was held, both Husband and Wife had Pension Evaluators prepare a report identifying the marital portion of Wife's STRS pension and the Social Security offset. Wife, however, obtained an evaluation of the value of her hypothetical Social Security benefit, rather than the value of Husband's actual Social Security benefit as provided for in the decree. Husband's report from Pension Evaluator indicated that, after the Social Security offset, his equitable interest in the marital portion of Wife's pension was 45.098%.

{¶5} On July 21, 2003, the magistrate issued her findings, which the trial court adopted in full that same day. There, the magistrate determined that the DOPO prepared by Husband's counsel was "properly prepared pursuant to Revised Code Sections 3105.80 to 3105.90, and correctly allocated the interests of [Husband]" with respect to Wife's STRS pension. Wife did not object to the magistrate's decision, nor did she appeal the trial court's judgment adopting the

same. The DOPO was filed September 15, 2003 without Wife's signature, pursuant to Loc.R. 28.01(B).

{¶6} On September 29, 2003, with the assistance of counsel, Wife filed a motion for relief from judgment under Civ.R. 60(B)(1) asserting that neither the decree, nor the DOPO, reflected her understanding of the parties' agreement relative to the applicable pension offset. She alleged that she only agreed to her pension being divided equally after an offset of her hypothetical Social Security Benefits, which is not what occurred. She further asserted that this surprise and mistake entitled her to relief from the terms of the decree and the DOPO. On October 31, 2003, the trial court denied Wife's motion as untimely.

{¶7} On June 20, 2007, Wife, acting pro se, filed a contempt motion which alleged in part in the caption, that she was seeking a "modification of the DOPO." A hearing was held on Wife's motion on August 28, 2007. On November 1, 2007, the trial court adopted the magistrate's findings that denied Wife's motion to modify the DOPO, specifically noting in its fourth factual finding that "the body of the motion does not address any such claim" and that "no evidence was presented regarding modification of the DOPO."

{¶8} On November 15, 2007, Wife, again acting pro se, filed objections to the trial court's November 1, 2007 order. Specific to the court's fourth finding of fact, she asserted that: (1) because she is eligible for disability, but not retirement, Husband should not be entitled to any portion of her STRS disability payments; and (2) Ohio courts do not consider disability benefits to be marital property unless those benefits are accepted in lieu of age-based retirement benefits.

{¶9} On December 28, 2007, the trial court denied Wife's objections because she failed to file a transcript of the August 28, 2007 hearing. Subsequently, Wife filed the hearing transcript, followed by another pro se motion to reconsider in January 2008.

{¶10} The trial court considered Wife's motion as one to modify the DOPO and set it for hearing on March 14, 2008. At the hearing, Wife appeared pro se, but the trial court permitted her to use the assistance of counsel who appeared with her at the hearing. Husband appeared and was represented by counsel.

{¶11} Following that hearing, the trial court denied Wife's motion as untimely, concluding that Wife was aware, as of September 15, 2003, that the DOPO did not exclude Wife's STRS disability benefits from its terms and it had correctly calculated the offset for Husband's Social Security benefits.

{¶12} Wife now appeals the denial of that motion, asserting six assignments of error for our review. Some of Wife's assignments of error have been rearranged and consolidated for ease of review.

II

Assignment of Error Number Two

“THE TRIAL COURT ERRED BY CHANGING THE MUTUAL AGREEMENT OF THE PARTIES THAT WAS APPROVED AND INCORPORATED BY THE COURT INTO A DIVORCE DECREE AND ALLOWING THE DEFENSE ATTORNEY TO PREPARE THE DOPO OVER THE OBJECTIONS OF THE PLAINTIFF THAT PE PREPARE IT AS AGREED THUS ALLOWING THE INCLUSION OF DISABILITY/SPOUSAL SUPPORT WHICH WAS CLEARLY WAIVED BY BOTH PARTIES AND STATE STATUTE REQUIRES THAT IT BE HANDLED AFTER THE DIVISION OF PROPERTY, NOT INCLUDED IN IT.” (Sic.)

Assignment of Error Number Four

“THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY NOT RECOGNIZING A CASE INVOLVING SERIOUS MENTAL DISORDERS THAT NEEDED PROFESSIONAL COURT INTERVENTION INSTEAD OF COERCING A MUTUAL AGREEMENT BETWEEN PARTIES THAT TOOK 18 MONTHS TO CREATE AND THEN ALLOWING IT TO BE CHANGED FOUR MONTHS LATER ALLOWING CONTINUED ENTANGLEMENT AND CONTROL OF THE FAMILY FOR ANOTHER SEVEN YEARS FINANCIALLY AND EMOTIONALLY DESTROYING EVERY PRINCIPLE OF ‘FAMILY’, ‘MUTUAL AGREEMENT’ AND IGNORING THE SUPREME COURT’S EMPHASIS ON ENDING LITIGATION AND IRRECONCILABLE DIFFERENCES.” (Sic.)

Assignment of Error Number Five

“IT IS A VIOLATION OF PUBLIC EMPLOYEE’S CIVIL RIGHTS THAT BY GOING TO WORK FOR THE STATE THEY CAN BE REQUIRED TO PAY INTO A STATE PENSION PLAN THAT THEY PAY PERSONAL EARNINGS INTO, THAT BELONG TO THEM AT THE TIME OF HER MARRIAGE BUT DURING THE MARRIAGE THE SATE CHANGED THE LAWS AND MADE IT MARITAL PROPERTY, AND NOW HAS LAWS THAT DICTATE TO THE PENSION PLAN WHO THEY CAN INVEST IN , WHO GETS PAID WHAT AND HOW MUCH AND WHEN AND LAWS THAT DISCRIMINATE AGAINST PUBLIC EMPLOYEES AND THE FUNDS THAT THEY PERSONALLY EARNED AS WELL AS THE ACTUAL FORMS THAT DICTATE THE EXPENDITURES WHILE FEDERAL PENSION PLANS ARE EXEMPT FROM PROCEEDINGS IN STATE DIVORCE ACTION.” (Sic.)

Assignment of Error Number Six

“THE TRIAL COURT ERRS AND ABUSES ITS DISCRETION WHEN IT OVERRULES 60B MOTIONS AS UNTIMELY WHEN THE COURT TAKES AN EVEN LONGER TIME TO MAKE AND FILE THEIR ENTRIES.” (Sic.)

{¶13} Initially, we note that Wife’s brief is very disjointed and difficult to comprehend.

While separately captioning six assignments of error, Wife fails to separately assert or develop any argument in support of each alleged error. App.R. 16(A)(7); Loc.R. 7(B)(7). Instead, her brief contains one continuous argument in which she asserts various allegations of error – some of which relate to an assignment, some of which do not – but none of which contain any citation

to the record in accordance with App.R. 16(A)(7) and Loc.R. 7(B)(7). We note that this Court grants pro se litigants:

“[R]easonable leeway such that their motions and pleadings should be liberally construed so as to decide the issues on the merits, as opposed to technicalities. However, a pro se litigant is presumed to have knowledge of the law and correct legal procedures so that he remains subject to the same rules and procedures to which represented litigants are bound. He is not given greater rights than represented parties, and must bear the consequences of his mistakes. This Court, therefore, must hold [pro se appellants] to the same standard as any represented party.” (Internal citations omitted.) *Sherlock v. Myers*, 9th Dist. No. 22071, 2004-Ohio-5178, at ¶3.

Wife filed her brief pro se, but had counsel appear on her behalf at oral argument. This Court’s review, however, is confined to only the arguments and authorities set forth Wife’s brief. See App.R. 16(A); App.R. 21(H).

{¶14} Wife’s second, fourth, fifth, and sixth assignments of error appear to generally challenge the provisions of the DOPO that the trial court entered in 2003 and allege that the trial court erroneously entered the DOPO and then erroneously denied her Civ.R. 60(B) motion challenging its terms.

{¶15} This Court reviews the grant or denial of a Civ.R. 60(B) motion for relief from judgment under an abuse of discretion standard. *Turowski v. Apple Vacations, Inc.*, 9th Dist. No. 21074, 2002-Ohio-6988, at ¶6. An abuse of discretion is more than a mere error of law or judgment, but “implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Appellate courts may not substitute their judgment for that of the trial court when an abuse of discretion standard is applied. *Pons v. Ohio St. Med. Bd.* (1993), 66 Ohio St.3d 619, 621. In order to prevail on a Civ.R. 60(B) motion:

“[T]he 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, Inc.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus.

If any of the above requirements are not met, the Civ.R. 60(B) motion should be overruled by the trial court. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20. Civ.R. 60(B) allows for the trial court to relieve parties from a final judgment 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.”

However, the Supreme Court of Ohio has held that “that Civ.R. 60(B) may not be used as a substitute for appeal.” *Doe v. Trumbull Cty. Children Servs. Bd.* (1986), 28 Ohio St.3d 128, 131. Furthermore, this Court has held that “[e]rrors that could have been corrected by a timely appeal cannot be the predicate for a motion for relief from judgment.” *In re S.J.*, 9th Dist. No. 23199, 2006-Ohio-6381, at ¶24, citing *Ward v. Hengle* (1999), 134 Ohio App.3d 347, 350.

{¶16} In terms of her challenges to the terms of the DOPO, Wife argues that the term “Social Security” as used in the parties’ divorce decree is ambiguous and has multiple meanings, because at the time of the parties’ divorce, Husband was receiving Social Security disability, but not Social Security retirement. She asserts that the trial court has erred in interpreting and applying this term of the parties’ DOPO. Wife further asserts that the trial court erred when it permitted Husband’s version of the DOPO to serve as the basis for the calculation of the percentage of Wife’s retirement that Husband is entitled to receive. Along that same line, Wife asserts that the valuations of the spousal Social Security benefit should be based only on earnings received during the marital period, and should not be based on earnings received from the point

at which they each began paying into Social Security, before they were married. Finally, she alleges that the DOPO impermissibly changed the parties' decree, thus, the trial court's determination to adopt the DOPO proffered by Husband's counsel was an abuse of discretion.

{¶17} The record reveals that the trial court's July 21, 2003 order addressed the terms of the parties' DOPO, finding that it was "properly prepared" and "correctly allocated the interests of [Husband]." Wife did not appeal this order, but did later file a Civ.R. 60(B) motion challenging the terms of the DOPO and the calculations upon which the Husband's interest in her STRS pension were based. Her motion was subsequently denied by the trial court. Wife attempts to now assert those same arguments on appeal to this Court, nearly six years later, though they have been previously decided by the trial court on two different occasions, neither of which she appealed at the time.

{¶18} "The doctrine of res judicata bars all subsequent actions based upon any claim arising out of a transaction or occurrence that was previously decided as a final and valid judgment in a prior action." *Smith v. Smith*, 9th Dist. No. 23278, 2007-Ohio-512 at ¶6, citing *Harris v. Lorain*, 9th Dist. No. 02CA008099, 2003-Ohio-530, at ¶15. Because Wife has failed to appeal any of the trial court's judgments on this issue, these arguments are now barred by res judicata. *Smith* at ¶16. Moreover, many of Wife's arguments were not included in her January 2008 motion for reconsideration. Thus, she has forfeited those arguments for review on appeal. *Ilg v. Ilg*, 9th Dist. No. 23987, 2008-Ohio-6792, at ¶6. Accordingly, Wife's second, fourth, fifth, and sixth assignments of error are overruled.

Assignment of Error Number One

“THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY DENYING 60(B) MOTIONS FOR RELIEF FROM JUDGMENT FILED JANUARY 16, 2008 AND SEPTEMBER 29, 2002 AS UNTIMELY AND FAILING TO VACATE THE DOPO FILED ON SEPTEMBER 15, 2003 AS IT

IS NOT BY THE MUTUAL AGREEMENT OF APRIL 9, 2002 AND JUDGMENT ENTRY/DIVORCE DECREE OF AUGUST 21, 1002 AND RECENT CHANGES OF CIRCUMSTANCES MAKE IT EVEN MORE UNJUST, UNREASONABLE, AND UNCONSCIONABLE.” (Sic.)

Assignment of Error Number Three

“THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT OVERRULED A MOTION 60(B)(4) FOR WHAT OCCURRED IN 2003 WHEN A 60(B)(4) IS CONTINGENT ON RECENT CHANGES IN CIRCUMSTANCES.” (Sic.)

{¶19} In her first and third assignments of error, Wife generally alleges that the terms of the DOPO do not apply to her STRS disability benefits, but only her STRS retirement benefits. She asserts that, though Husband is entitled to a portion of her STRS retirement, he is not entitled to a portion of the temporary disability payments she has been receiving from STRS since April 2007. Wife argues that it is unreasonable to assume that she would have waived her right to spousal support or any portions of Husband’s Veteran’s Disability and Social Security Disability, yet simultaneously permitted him to assert a right to her disability benefits. She also asserts that, if Husband is entitled to a percentage of her disability, she should be entitled to a portion of his disability since the date of the parties’ divorce.

{¶20} Based on the claims set forth in her January 2008 motion for reconsideration, the trial court held a hearing to address the DOPO’s terms as applied to Wife’s STRS benefits. The trial court looked to the terms of both the decree and the DOPO and concluded that neither one excluded STRS disability benefits. Our review of the record convinces us of the same. The DOPO reads, in relevant part, as follows:

“If [Wife] is eligible to receive more than one benefit payment or more than one lump sum payment, please check the benefit or lump sum payment from which payment to [Husband] shall be made. If no benefit or lump sum payment is designated, [Husband] shall receive payment from the first benefit payment or lump sum payment for which [Wife] is eligible to apply and to receive.”

None of the options listed beneath this paragraph, including disability benefits, were designated. Thus, Wife did not exclude her disability benefits from the terms of the DOPO. Additionally, she unequivocally waived any right to spousal support or any access to Husband's Veteran's Administration or Social Security disability pays under the terms of the parties' decree. Though Wife may not have anticipated having to access her STRS disability benefits before accessing her age or service based retirement benefits, it was apparent on the face of the DOPO that Husband had an interest in the "first benefit *** for which [Wife] is eligible *** to receive" from STRS.

{¶21} Given that the DOPO was entered in September 2003 with terms expressly delineating Husband's unconditioned interest in Wife's STRS benefits, the trial court did not abuse its discretion in denying Wife's motion for reconsideration because it was not "made within a reasonable time." *GTE Automatic Elec.*, 47 Ohio St.2d at paragraph two of the syllabus.

{¶22} Finally, Wife alleges the trial court "did not retain jurisdiction over future distributions of [her] STRS pension." Wife does not, however, direct the Court to any evidence in support of this assertion. See App.R. 16(A)(7). Moreover, our review of the record reveals that counsel who assisted her at the hearing on this matter agreed that the trial court *did* properly retain jurisdiction over the decree and the DOPO. Accordingly, Wife's argument is not well taken.

{¶23} Based on the foregoing, we conclude that the trial court did not abuse its discretion in denying Wife's motion for reconsideration. Wife's first and third assignments of error are not well taken. Accordingly, those assignments of error are overruled.

{¶24} Wife's six assignments of error are overruled. The judgment of the Summit County Court of Common Pleas, Domestic Relations Division, is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

CARR, J.
MOORE, P. J.
CONCUR

APPEARANCES:

DEBRA J. MURPHY-KESLING, pro se, Appellant.

LESLIE S. GRASKE, Attorney at Law, for Appellee.