

[Cite as *Kelly v. Kelly*, 2009-Ohio-6586.]

IN THE COURT OF APPEALS FOR CHAMPAIGN COUNTY, OHIO

NICOLE D. KELLY nka HUFFMAN	:	
Plaintiff-Appellant	:	C.A. CASE NO. 2008 CA 28
v.	:	T.C. NO. 1999 DR 195
JAMES C. KELLY	:	(Civil appeal from Common Pleas Court, Domestic Relations)
Defendant-Appellee	:	
	:	

OPINION

Rendered on the 11th day of December, 2009.

DAVID D. HERIER, Atty. Reg. No. 0068990 and DOUGLAS W. GEYER, Atty. Reg. No. 0022738, 451 Upper Valley Pike, Springfield, Ohio 45504
Attorneys for Plaintiff-Appellant

DOUGLAS B. GREGG, Atty. Reg. No. 0014660, 7929 Washington Woods Drive, Centerville, Ohio 45459
Attorney for Defendant-Appellee

DONOVAN, P.J.

{¶ 1} Plaintiff-appellant Nicole D. Kelly n/k/a Huffman appeals a judgment of the Champaign County Court of Common Pleas adopting in part and modifying in part a

decision of the magistrate which sustained defendant-appellee James C. Kelly's Civ. R. 60(B)(5) motion to modify the qualified domestic relations order (QDRO) and ordered Nicole to return approximately \$33,000.00 that she had incorrectly received as a distribution from James' 401(k) retirement fund.¹ The judgment entry adopting the magistrate's decision was issued by the trial court on September 23, 2008. On October 21, 2008, Nicole filed a timely notice of appeal with this Court.

I

{¶ 2} We initially note that the instant case has already been the subject of an appeal before this Court in *Kelly v. Kelly*, Champaign App. No. 2001CA19, 2002-Ohio-1888 (hereinafter "*Kelly I*"). None of the issues in the present appeal, however, are related to our decision in *Kelly I*.

{¶ 3} James and Nicole were married on May 13, 1995, in the Cayman Islands. No children were born of the marriage. After the couple separated, Nicole filed for divorce on September 13, 1999. The trial court later held that the de facto termination date for the marriage was December 30, 1999, as recognized by our decision in *Kelly I*.

{¶ 4} On November 21, 2000, the parties filed an agreed judgment entry which outlined the terms of the divorce. On February 11, 2003, a QDRO was filed which mirrored the language set forth in ¶ 13 of the judgment entry regarding the distribution of James' 401(k) retirement fund. The QDRO was not signed by either party's attorney before it was filed. The retirement fund in question had been funded by James prior to and during his marriage to Nicole. James also continued contributing to the fund after he and Nicole were

¹For clarity and convenience, the parties are identified by their first names.

divorced. Thus, James' 401(k) was composed of both marital and separate property. It is well-settled under Ohio law that a divorced spouse is not entitled to any division of property accumulated outside the marriage unless the parties have demonstrated a clear intent to do otherwise.

{¶ 5} By the terms of the QDRO, Nicole was to be awarded one-half of the total funds in James' 401(k) account upon distribution. Realizing that an ambiguity existed, James' counsel sent several letters to Nicole's counsel in an effort to rectify the situation by inserting language into the QDRO which correctly entitled Nicole to one-half of the *marital portion* of the 401(k) account, rather than one-half of the total amount of money contained in the account, the majority of which constituted separate property belonging solely to James.

{¶ 6} The changes requested by James' counsel were not implemented, and pursuant to the QDRO, Nicole received a distribution of approximately \$73,908.70, or one-half of the total funds held in the account. Because the parties had only been married for five years out of the thirty years that James had been contributing to the account, Nicole was only entitled to \$33,025.20, that sum reflecting one-half of the marital portion of the funds in the account.

{¶ 7} On November 19, 2004, James filed a motion for relief from judgment pursuant to Civ. R. 60(B)(1), (2), and (5), in which he requested that the court modify the QDRO to properly reflect that Nicole was only entitled to one-half of the marital portion of his 401(k) retirement account. James also sought an order from the court requiring Nicole to pay back the excess funds she incorrectly received as a result of the distribution. A hearing was held before a magistrate on May 25, 2006. On December 26, 2007, the

magistrate found in favor of James and issued a judgment against Nicole for the funds she received from James' 401(k) account in excess of the marital portion to which she was entitled.

{¶ 8} Nicole filed objections to the magistrate's decision, and on September 23, 2008, the trial court adopted in part and modified in part the magistrate's decision, wherein it ordered Nicole to disgorge the excess funds she received from the improper distribution.

{¶ 9} It is from this judgment that Nicole appeals.

II

{¶ 10} Because they are interrelated, Nicole's four assignments of error will be discussed together as follows:

{¶ 11} "WHETHER THE TRIAL COURT ERRED IN ALLOWING DEFENDANT/APPELLEE TO USE CIVIL RULE 60(B)(5) AS A TOOL TO ALTER THE (AGREED) JUDGMENT ENTRY FILED NOVEMBER 21, 2000 AND THE QDRO FILED FEBRUARY 11, 2003 BECAUSE UNDER CIVIL RULE 60(B)(5) THE MOTION MUST BE FILED WITHIN A REASONABLE TIME.

{¶ 12} "WHETHER THE TRIAL COURT ERRED IN ALLOWING DEFENDANT/APPELLEE TO USE CIVIL RULE 60(B)(5) AS A TOOL TO ALTER THE (AGREED) JUDGMENT ENTRY FILED NOVEMBER 21, 2000 AND THE QDRO FILED FEBRUARY 11, 2003 WHEN THE APPROPRIATE SECTION OF THE CIVIL RULE UNDER THE DEFENDANT/APPELLEE'S OWN FACTUAL ACCOUNT IS CIVIL RULE 60(B)(1) AS A MISTAKE OR AS AN APPEAL.

{¶ 13} "WHETHER THE TRIAL COURT ERRED IN ALLOWING

DEFENDANT/APPELLEE TO USE CIVIL RULE 60(B)(5) AS A TOOL TO ALTER THE (AGREED) JUDGMENT ENTRY FILED NOVEMBER 21, 2000 AND THE QDRO FILED FEBRUARY 11, 2003 BY RELYING ON PAROL EVIDENCE TO VARY THE TERMS OF THE PARTIES' WRITTEN AGREEMENT AND WHEN THE COURT DID NOT RESERVE THE RIGHT TO MODIFY THE PROPERTY DIVISION, THEREFORE LACKING SUBJECT MATTER JURISDICTION.

{¶ 14} “WHETHER THE TRIAL COURT ERRED IN ALLOWING DEFENDANT/APPELLEE TO USE CIVIL RULE 60(B)(5) AS A TOOL TO ALTER THE (AGREED) JUDGMENT ENTRY FILED NOVEMBER 21, 2000 AND THE QDRO FILED FEBRUARY 11, 2003 MAKING THE EFFECT OF THAT ENTRY AND QDRO INCONSISTENT WITH ONE ANOTHER AND WHETHER A QDRO IS PROPERLY SUBJECT TO A 60(B) MOTION.”

{¶ 15} In her first assignment of error, Nicole contends that the trial court erred in sustaining James' Civ. R. 60(B)(5) motion for relief from judgment because the motion was not filed within a reasonable amount of time. Nicole also argues that James should have filed his motion for relief from judgment under Civ. R. 60(B)(1), rather than under Civ. R. 60(B)(5), since James claimed that a mistake was made in both the judgment entry and the QDRO in regards to the proper distribution of his 401(k) retirement savings account. In her third assignment, Nicole asserts that the trial court erred when it relied on parol evidence in order to interpret the terms of the judgment entry and QDRO. Additionally, Nicole argues that the trial court lacked subject matter jurisdiction to modify the terms of the judgment entry and QDRO because it did not explicitly reserve the right to do so in either document.

In her final assignment, Nicole asserts that a QDRO is not properly subject to a Civ. R. 60(B) motion for relief from judgment.

{¶ 16} The standard of review of a trial court's decision on a Civ. R. 60(B) motion is an abuse of discretion standard. *Tidwell v. Quaglieri*, Greene App. No. 06-CA-0036, 2007-Ohio-569, _21. "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 (citations omitted).

{¶ 17} To prevail on a motion 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)-(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, 150. Where the grounds for relief are Civ. R. 60(B)(1), (2), or (3), the motion must be made not more than one year after the judgment, order, or proceeding was taken. Civ. R. 60(B); *William H. Rorer, Inc. v. Donges*, Greene App. No. 88 C A82. If any of these requirements are not met, the trial court must overrule the Civ. R. 60(B) motion. *Rose Chevrolet Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20 (citation omitted).

{¶ 18} James sought relief from the QDRO pursuant to Civ. R. 60(B)(1)(2) & (5). In his motion, James argued that he was entitled to relief because the QDRO contained a mistake regarding the distribution of James' 401(k) retirement account. Specifically, James asserted that the QDRO contained language which failed to

differentiate between the marital portion and separate portion of the 401(k) account, instead mistakenly providing Nicole with one-half of the *entire* 401(k) account.

{¶ 19} The QDRO that James sought relief from was filed on February 11, 2003. James did not file his Civ. R. 60(B) motion until November 19, 2004, well outside the one year time limit for motions made pursuant to Civ. R. 60(B)(1), (2), and (3). In light of his failure to file his motion within the one year time limit, James was unable to seek relief under Civ. R. 60(B)(1) or (2).

{¶ 20} By his own admission, James defined the language in the QDRO awarding Nicole one-half of his 401(k) retirement account as an “error” or “mistake.”

The proper avenue under which James could seek relief was, therefore, Civ. R. 60(B)(1) which states that the court may relieve a party from a judgment in the presence of “mistake, inadvertence, surprise, or excusable neglect.” *Id.* James, however, was precluded from seeking relief under Civ. R. 60(B)(1) because he did not file his motion within one year of the filing of the QDRO.

{¶ 21} A party is entitled to relief from judgment under the “catchall” provision if he can demonstrate any other reason not listed in Civ. R. 60(B)(1)-(4) that justified relief being granted. Civ. R. 60(B)(5). But this “catchall” provision is not to be used as a substitute for any other more specific provisions of Civ. R. 60(B)(1)-(4). *Burgess v. Safe Auto*, Montgomery App. No. 20941, 2005-Ohio-6829, _31, citing *Caruso-Ciresi, Inc. v. Lohman* (1983), 5 Ohio St.3d 64, 66, 448 N.E.2d 1365. James did not establish any additional basis upon which the court should grant relief from judgment outside the reasons enumerated in Civ. R. 60(B)(1). We have held, however, that Civ. R. 60(B)(5) is not to be used as a

substitute when the rule's more specific provisions could be utilized. Here, the grounds for relief are clearly proper under Civ. R. 60(B)(1), and James cannot use Civ. R. 60(B)(5) in its place. Thus, the trial court abused its discretion when it vacated the QDRO pursuant to Civ. R. 60(B)(5).

{¶ 22} Our holding in this regard, however, does not require reversal of the trial court's decision. Initially, we note that both the decree of divorce and the QDRO contain provisions which provide the court with ongoing jurisdiction to "interpret and implement" the QDRO, as well as other orders issued in regards to the parties' divorce. The QDRO is an order in aid of the relief granted in the decree, and may not vary from, enlarge, or diminish that relief. *Tarbert v. Tarbert* (Sept. 27, 1996), Clark App. No. 96 CA 0036. More importantly, pursuant to R.C. § 3105.011, the trial court is vested with "full equitable powers and jurisdiction appropriate to the determination of all domestic relations matters." As previously stated, the trial court found that Nicole was only entitled to one-half of the *marital* portion of James' 401(k) retirement account. Acting on the authority conferred upon it by R.C. § 3105.011, the trial court properly ordered Nicole to disgorge the funds to which she was clearly not entitled. The court fashioned this equitable remedy for the protection and vindication of James' rights in regards to the separate property portion of his 401(k) retirement account. The order from which the appeal was taken properly did that, and to that extent, the order is affirmed.

{¶ 23} As a final issue, we note that ¶ 12 of the parties' decree is inconsistent with ¶ 13 of said document. ¶ 12 states in pertinent part:

{¶ 24} "Plaintiff shall be entitled to a portion of the pension and retirement

accounts of Defendant at International Truck and Engine Corporation to be determined pursuant to the following formula: date of the beginning of the marriage on May 1, 1995, until the date of the filing of this entry, divided by the total years of eligibility at the time of retirement, multiplied by one-half of the total monthly payments payable.”

{¶ 25} ¶ 13 states in pertinent part:

{¶ 26} “13. Plaintiff shall be entitled to one-half *** of Defendant’s total 401k savings plan at International Truck and Engine Corporation, effective the date of December 30, 1999.”

{¶ 27} While ¶ 12 awards Nicole only one-half of the marital portion of the 401(k) account, ¶ 13 of the judgment entry entitles Nicole to one-half of the total amount of funds in the same account. These two sections are clearly incompatible with each other. Despite this inconsistency, Nicole’s counsel chose to use the language in ¶ 13 as a basis for the language in the QDRO which inequitably awarded her one-half of the funds in James’ 401(k) account. Thus, the trial court acted appropriately when it reviewed the evidence adduced at the May 25, 2006, hearing before the magistrate and found that the parties did not intend that Nicole’s receive anything more than one-half of the marital portion of the distribution from James’ 401(k) account. Nicole was certainly not entitled to any of the funds determined to be separate property contained in the 401(k) account, and the court did not err by ordering her to return the money to James.

{¶ 28} Nicole’s assignments of error are overruled in their entirety.

{¶ 29} All of Nicole's assignments of error having been overruled, the judgment of the trial court is affirmed.

.....

FAIN, J., concurs in judgment:

{¶ 30} I agree that Civ. R. 60(B)(5) is an inappropriate vehicle to use to correct a mistake, for the reasons set forth in Judge Donovan's opinion for the court. I do not agree that the fact that a domestic relations court has equitable powers permits it to re-visit, and modify, a judgment that has become final.

{¶ 31} Nevertheless, I concur in the judgment because I agree that there is ambiguity in paragraphs 12 and 13 of the divorce decree, and a trial court has the inherent authority to construe ambiguity in its judgments and decrees. Paragraph 12 provides for dividing the marital, or coverture, portion of Mr. Kelly's 401(K) account equally, while Paragraph 13 provides for dividing the entire account equally. The trial court could reasonably conclude that the intent was the equal division of the marital portion, only, so that that is the better construction of the decree. It follows that the QDRO, which merely implements the judgment and decree of divorce, must be modified to reflect the terms of the judgment and decree.

.....

GRADY, J., concurring:

{¶ 32} Seemingly inconsistent provisions in a judgment should be read in pari materia to give full effect to both, and successive provisions should be applied seriatim. Paragraph 12 of the decree of divorce identifies the portion of James's

retirement and pension accounts in which Nicole has a coverture interest, while paragraph 13 awards Nicole one-half the value of her coverture portion identified by paragraph 12. The draftsmanship could have been better, but the court construed both provisions appropriately, because in doubtful cases, the more liberal constructions are to be preferred.

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Copies mailed to:

David D. Herier
Douglas W. Geyer
Douglas B. Gregg
Hon. Roger B. Wilson