[Cite as *In re Marriage of Kline*, 2016-Ohio-7159.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

IN RE: THE MARRIAGE OF EILEEN A. KLINE and JACK A. KLINE.	**:**	**O P I N I O N**
	:	**CASE NO. 2016-L-009**

Civil Appeal from the Lake County Court of Common Pleas, Domestic Relations Division.
Case No. 84 DR 0670.

Judgment: Affirmed.

Eileen A. Kline, pro se, 8200 Pinehurst Drive, Parma, OH 44129 (Appellant).

Gary S. Okin, Dworken & Bernstein Co., L.P.A., 60 South Park Place, Painesville, OH 44077 (For Appellee).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Eileen A. Kline, appeals the judgment of the Lake County Court of Common Pleas, Domestic Relations Division, dismissing her Civ.R. 60(B) motion with prejudice.

{¶2} The present matter originated from a judgment entered on October 30, 1984, by the Lake County Court of Common Pleas, Domestic Relations Division, granting appellant and appellee's petition for dissolution.

{¶3} On August 14, 2015, appellant, through counsel, filed a "60B Motion to Vacate Due to Fraud upon the Court and to Order a Qualified Domestic Relations Order on Undisclosed Pension."

{¶4} On November 12, 2015, appellant released her counsel. On November 13, 2015, appellant appeared on her own behalf at a hearing on her Civ.R. 60(B) motion, which was held before a magistrate. The magistrate took testimony from appellant.

{¶5} The magistrate's decision was released on November 19, 2015, and included the magistrate's findings of fact and conclusions of law. The magistrate's decision recommended that appellant's "60(B) motion should be dismissed with prejudice."

{¶6} On December 4, 2015, fifteen days after the magistrate's decision was filed, appellant filed a document titled "Argument." Appellee did not file any reply in response to appellant's "Argument."

{¶7} On December 17, 2015, the trial court entered judgment on appellant's Civ.R. 60(B) motion, stating it had reviewed the magistrate's decision and adopted the findings of fact and conclusions of law therein. The trial court dismissed appellant's Civ.R. 60(B) motion and stated that "[e]ven if the Court construes Ms. Kline's argument as an objection pursuant to Civil Rule 53, said 'Argument' was not timely filed as required by said rule."

{¶8} On January 15, 2015, appellant filed a pro se notice of appeal from the December 17, 2015 judgment entry. Appellant raises eight assignments of error on appeal.

1. The trial court was in error to deny and to dismiss appellant's rule 60(B) motion based on technicalities rather than on their merit.

2. The trial court was in error to dismiss the case and not award appellant her portion of the pension due to the fact that unvested pensions were not considered marital property until 1988.

3. The trial court erred in not awarding the appellant her portion of the pension and dimissing the case due to the fact no evidence was presented to the court as to whether or not appellee disclosed he had a pension.

4. The trial court was in error to deny and to dismiss the appellant's case by stating that if appellee was asked to disclose all assets that he considered to be marital property, he could have said nothing about his unvested pension and been truthful.

5. The trial court erred in making the statement, 'Based on the assessment of the credibility of the witness,' it recommends that the case be dismissed.

6. The trial court was in error to deny and to dismiss appellant's case stating appellant's argument that appellee's failure to disclose his pension has no merit because the pension was not vested.

7. The trial court erred in denying the case due to their statement, "The allegations do not amount to fraud on the court."

8. The trial court erred in dismissing the case and denying appellant's motion because there was not a waiver presented to the court by the appellee signed by appellant stating a waiver of the pension.

{¶9} We review a trial court's determination to adopt a magistrate's decision for an abuse of discretion. *In re Guardianship of Salaben*, 11th Dist. Ashtabula No. 2008-A-0037, 2008-Ohio-6989, ¶39 (citation omitted). An abuse of discretion implies that the trial court acted in a way that was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983) (citations omitted).

{¶10} The order being appealed is the denial of appellant's Civ.R. 60(B) motion to vacate. The motion requested the trial court to vacate an order, presumably the Decree of Dissolution filed October 30, 1984, wherein both parties were represented by

counsel. The motion to vacate was filed almost 31 years later, on August 14, 2015. We also review a trial court's determination to grant or deny a motion to vacate for an abuse of discretion. *Am. Express Bank, FSB v. Waller*, 11th Dist. Lake No. 2011-L-047, 2012-Ohio-3117, ¶11 (citation omitted).

{¶11} The "Argument" filed by appellant in the trial court addressed the recommendation of the magistrate that the Civ.R. 60(B) motion to vacate be dismissed. Appellant's assignments of error address the procedure and substance of the magistrate's decision released on November 19, 2015. We note that although the trial court ultimately refused to consider appellant's "Argument" because it was untimely filed, the trial court did not acknowledge that it considered appellant's "Argument" as an objection to the magistrate's decision under Civ.R. 53.

{¶12} Civ.R. 53 outlines the requirements and procedures for magistrates' decisions and for filing objections to magistrates' decisions. Civ.R. 53(D)(3)(b)(ii) states that "[a]n objection to a magistrate's decision shall be specific and state with particularity all grounds for objection." "'Under Civ.R. 53(D)(3)(b)(ii), objections must be more than 'indirectly addressed': they must be specific.'" *In re Adoption of K.A.R.*, 11th Dist. Ashtabula No. 2015-A-0055, 2016-Ohio-4595, ¶8, quoting *Ayer v. Ayer*, 1st Dist. Hamilton No. C-990712, 2000 Ohio App. LEXIS 2901, *12 (June 30, 2000). "When an objecting party fails to state an objection with particularity as required under Civ.R. 53(D)(3)(b)(ii), the trial court may affirm the magistrate's decision without considering the merits of the objection." *Wallace v. Willoughby*, 3d. Dist. Shelby No. 17-10-15, 2011-Ohio-3008, ¶20. (citations omitted).

{¶13} In her "Argument," appellant fails to make any specific reference to the findings of fact or conclusions of law in the magistrate's decision. Appellant instead conducts a general review of the facts and presents arguments without making any specific objections to the magistrate's decision. Thus, appellant's "Argument" cannot be considered an objection under Civ.R. 53. The trial court did not abuse its discretion in failing to acknowledge appellant's "Argument" as an objection.

{¶14} Civ.R. 53(D)(3)(b)(iv) provides, in pertinent part:

> [E]xcept for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law * * *, unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b).

Appellant failed to file proper objections to the magistrate's decision. As a result, pursuant to Civ.R. 53(D)(3)(b)(iv), we must review appellant's assignments of error pertaining to the trial court's adoption of the magistrate's factual findings and legal conclusions for plain error.

{¶15} Plain error is "'not favored and may be applied only in the extremely rare case involving exceptional circumstances where error * * * seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.'" *Hoyt v. Heindell*, 191 Ohio App.3d 373, 2010-Ohio-6058 (11th Dist.), ¶29, quoting *Goldfuss v. Davidson*, 79 Ohio St.3d 116 (1997), syllabus. "'Plain error' is often construed to encompass 'error[s] of law or other defect[s] evident on the face of the magistrate's decision,' which prohibit the adoption of a magistrate's decision even in the absence of objections." *DiNunzio v.*

DiNunzio, 11th Dist. Lake No. 2006-L-106, 2007-Ohio-2578, ¶16, quoting Civ.R.53(D)(4)(c).

{¶16} We also note that a transcript of the proceedings before the magistrate was not before the trial court when it adopted the magistrate's decision. Appellant requested that the record be supplemented with a transcript after appellee filed his brief. This court, by magistrate's order, accepted the transcript as part of the record on appeal, but that does not help appellant in this situation. The Tenth District Court of Appeals has addressed this very issue:

> [B]ecause plaintiff failed to file a transcript of the hearing with the trial court, our review is limited to whether the trial court correctly applied the law to the facts set forth in the magistrate's decision. As a result, even though plaintiff attached to her appellate brief the transcript of the proceedings before the magistrate, we are precluded from considering it, as the trial court did not have the opportunity to review it before determining whether to adopt the magistrate's decision.

In *Ross v. Cockburn*, 10th Dist. Franklin No. 07AP-967, 2008-Ohio-3522, ¶6 (citations and internal citations omitted). Thus, on appeal we will not consider the transcript of the proceedings before the magistrate as it was never before the trial court for consideration.

{¶17} Furthermore, in the absence of any objections or proper Civ.R. 53 record of the proceedings, we must accept the magistrate's factual findings. *See Nitschke v. Nitschke*, 11th Dist. Lake No. 2006-L-198, 2007-Ohio-1550, ¶27.

{¶18} Appellant's assignments of error will be discussed out of order for ease of analysis.

{¶19} With regard to her fifth assignment of error, appellant maintains "the court did not present any documentation or witnesses to discredit appellant's credibility."

However, "[a]s a trier of fact, the magistrate was in the best position to hear and observe the witnesses, and to measure their credibility. In that capacity, he 'had the right to either believe or disbelieve the testimony given.'" *Harris v. Transp. Outlet,* 11th Dist. Lake No. 2007-L-188, 2008-Ohio-2917, ¶39, quoting *Brown v. Gabram*, 11th Dist. Geauga No. 2004-G-2605, 2005-Ohio-6416, ¶19. The court has no obligation to produce evidence to discredit an individual's credibility and can determine credibility based on witness testimony alone. Thus, we find no plain error in appellant's fifth assignment of error.

{¶20} Appellant's fifth assignment of error is without merit.

{¶21} Turning to appellant's first assignment of error, she presents two issues for review. First, appellant maintains the trial court should not have declined to consider her "Argument" due to the technical deficiency of it being filed "one day too late." Second, appellant takes issue with the magistrate's factual finding that although appellant cited to Civ.R. 60(B)(5) in her motion, it appeared she was seeking relief under Civ.R. 60(B)(3) based on her allegations.

{¶22} The trial court was under no obligation to consider appellant's "Argument" as an objection pursuant to Civ.R. 53. While it may have had discretion to do so, we determine the trial court did not abuse its discretion in failing to acknowledge appellant's "Argument" as an objection. Therefore, the first issue under appellant's first assignment of error is not well taken.

{¶23} The second issue under appellant's first assignment of error, and appellant's third, fourth, seventh, and eighth assignments of error, pertain to the trial court's adoption of the magistrate's findings of fact. Appellant did not submit proper

objections or file a transcript of the proceedings at the trial court level. Therefore, on appeal we must accept the magistrate's findings of fact. We find no plain error by the trial court as it relates to the second issue of appellant's first assignment of error or to appellant's third, fourth, seventh, and eighth assignments of error.

{¶24} Appellant's first, third, fourth, seventh, and eighth assignments of error are without merit.

{¶25} In her sixth assignment of error, appellant argues that appellee's pension plan was vested after five years of employment. In making her argument, appellant cites to evidence in the transcript, but that was not submitted to the trial court for consideration. As stated above, we cannot consider such evidence.

{¶26} Appellant also maintains that appellee did not testify or present any other evidence that the pension was unvested. However, to prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that there exists "a meritorious defense or claim to present if relief is granted." *GTE Automatic Elec., Inc. v. ARC Indus., Inc.,* 47 Ohio St.2d 146 (1976), paragraph two of the syllabus. Appellant bore the burden of demonstrating she had a meritorious claim if her Civ.R. 60(B) motion was granted. The magistrate found that appellant did not meet her burden. We find no plain error in appellant's sixth assignment of error.

{¶27} Appellant's sixth assignment of error is without merit.

{¶28} Appellant maintains in her second assignment of error that "[t]he statement made in *Lemon* * * * stating there were [sic] not any case laws [sic] awarding unvested pensions before 1988 is irrelevant and incorrect."

{¶29} The magistrate found that appellee's pension was not vested and, therefore, was not marital property at the time of his divorce from appellant in 1984. The magistrate cites to *Lemon v. Lemon*, 42 Ohio App.3d 142 (4th Dist.1988) for the proposition that unvested pensions were not marital property in Ohio until 1988. In *Lemon*, the Fourth District stated, "[t]here is * * * no current Ohio case law on whether an unvested pension plan is a divisible marital asset." *Id.* at 144. The Fourth District, in 1988, ultimately determined that "[a]n unvested pension may be a marital asset pursuant to R.C. 3105.18." *Id.* at paragraph one of the syllabus. As the *Lemon* court noted, almost four years after the dissolution in this case, there were still questions in Ohio as to the status of an unvested pension as it related to marital property. As a result, we find no plain error in the magistrate's decision with regard to appellant's second assignment of error.

{¶30} Appellant's second assignment of error is without merit.

{¶31} For the foregoing reasons, appellant's assignments of error are not well taken. The decision of the Lake County Court of Common Pleas, Domestic Relations Division, is affirmed.

CYNTHIA WESTCOTT RICE, P.J.,

DIANE V. GRENDELL, J.,

concur.