[Cite as *Chapman v. Chapman*, 2006-Ohio-2328.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

CATHERINE R. CHAPMAN	:	
Plaintiff-Appellee	:	C.A. CASE NO. 21244
v.	:	T.C. NO. 2002 DV 00490
THOMAS L. CHAPMAN	:	(Civil Appeal from Common Pleas Court, Division of Domestic Relations)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 5th day of May, 2006.

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CATHERINE R. CHAPMAN, 84 E. Granville St., Sunbury, Ohio 43074
Plaintiff-Appellee

JENNIFER M. KINSLEY, Atty. Reg. No. 0071629, 105 West Fourth Street, Suite 920, Cincinnati, Ohio 45202
Attorney for Defendant-Appellant

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DONOVAN, J.

{¶ 1} Respondent-appellant Thomas L. Chapman appeals from a decision of the Montgomery County Court of Common Pleas, Domestic Relations Division, overruling his Civ. R. 60(B) motion for relief from judgment filed on August 27, 2004. A hearing was held on said motion on June 29, 2005. On August 10, 2005, the trial court issued a written decision denying the motion. Thomas filed a notice of appeal with this Court on August 29,

2005.

I

{¶ 2} We set forth the history of the case in *Chapman v. Chapman* (May 7, 2004), Montgomery App. No. 19677, 2004-Ohio-2318, and repeat it herein in pertinent part:

{¶ 3} "On May 29, 2002, Catherine [Chapman] sought a civil protection order against Thomas. On June 4, 2002, a hearing was held before a magistrate. During the hearing, Catherine and Thomas testified regarding several incidents during which Thomas allegedly had threatened her.***"

{¶ 4} "On June 26, 2002, the magistrate issued a permanent civil protection order, based on the events in 2000 and 2002. The magistrate, alluding to a 'subjective standard,' granted the order based on Catherine's perception that Thomas' actions represented a threat to her. Thomas filed objections to the magistrate's decision. He argued that the magistrate erred in failing to take into account 'objective' testimony which contradicted Catherine's perception of events."

{¶ 5} "On November 19, 2002, the trial court overruled the objections, finding that the magistrate had competent, credible evidence to support the issuance of the order. The court noted that the magistrate had the best opportunity to evaluate the credibility and demeanor of the witnesses ***."

{¶ 6} On May 7, 2004, we issued our decision in *Chapman* I, supra, wherein we concluded that the issuance of the civil protection order against Thomas was neither an abuse of discretion nor against the manifest weight of the evidence. We affirmed the decision of the trial court and upheld the validity of the civil protection order granted by the magistrate.

{¶ 7} In light of our ruling in *Chapman* I, Thomas filed a Civ. R. 60(B) motion for relief from judgment with the trial court citing the following reasons as grounds for relief: 1) that a mistake occurred during the civil protection hearing rendering the ultimate judgment unfair; 2) that familial circumstances have changed which preclude prospective application of the civil protection order; and 3) that Thomas was deprived of his right to due process because of his counsel's ineffective assistance at the evidentiary hearing. As previously mentioned, the trial court held a hearing on Thomas' Civ. R. 60(B) motion on June 29, 2005, and on August 10, 2005, the trial court issued a written decision denying said motion.

{¶ 8} It is from this judgment that Thomas now appeals.

II

{¶ 9} Thomas' first assignment of error is as follows:

{¶ 10} "THE TRIAL COURT ERRED IN REFUSING TO RELIEVE MR. CHAPMAN FROM THE CIVIL PROTECTION ORDER AGAINST HIM."

{¶ 11} In his only assignment of error, Thomas contends that the trial court abused its discretion when it denied his Civ. R. 60(B) motion for relief from judgment with respect to the civil protection order filed by Catherine in May, 2002. Initially, Thomas argues that he was entitled to relief from the order based on his counsel's failure to enter psychological reports from the divorce proceeding into evidence at the civil protection order hearing. Thomas next asserts that in light of a change in circumstance rendering the civil protection order unnecessary, the trial court erred when it denied his motion for relief from judgment. Lastly, Thomas argues that pursuant to Civ. R. 60(B)(5), his due process rights were violated by his counsel's ineffective assistance at the civil protection order hearing. Since the first and third prongs of Thomas' assignment are interrelated, they will be discussed

together.

{¶ 12} In order to obtain relief from judgment pursuant to Civ. R. 60(B), a movant must demonstrate that (1) the party has a meritorious defense or claim to present if the 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 was made within a reasonable time. *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146,351 N.E.2d 113.

{¶ 13} Civ. R. 60(B) represents an attempt to strike a balance between conflicting principles that litigation must be brought to an end and that justice should be done. *Colley v. Bazell* (1980), 64 Ohio St.2d 243, 416 N.E.2d 605. A motion for relief from judgment is addressed to the sound discretion of the trial court and must not be disturbed by this court absent an abuse of discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 514 N.E.2d 1122. The Supreme Court of Ohio has frequently defined the term abuse of discretion as implying the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶ 14} In the first prong of Thomas' Civ. R. 60(B) motion, he argues that his counsel's "mistake" in failing to properly enter into evidence certain psychological reports at the civil protection hearing precluded him from demonstrating that Catherine has a history of mental illness and emotional instability which seriously undermines her parenting ability. Thomas argues that had he been able to utilize the reports at the hearing, the civil protection order would not have been granted against him.

{¶ 15} In the third prong of his motion, Thomas contends that he is entitled to relief pursuant to Civ. R. 60(B)(5) becuase his due process rights were violated through his counsel's ineffective assistance at the hearing. Examples of his counsel's ineffective

representation include the failure to enter the psychologists' reports into evidence at the hearing, the failure to subpoena the doctors who authored the reports, and the failure to subpoena others who allegedly witnessed Catherine's hostile and irrational behavior towards Thomas and the children. Thomas argues that his counsel's numerous failures compromised his ability to defend himself and "thereby undermined the fundamental fairness of the proceeding."

{¶ 16} Throughout his brief, Thomas uses the terms "mistake" and "excusable neglect" interchangeably to describe the conduct of his trial counsel. For the purposes of this opinion, we will analyze defense counsel's conduct under the standard for excusable neglect as set out in Civ. R. 60(B)(1).

{¶ 17} Generally, the neglect or misconduct of a party's attorney will be imputed to the party for the purposes of Civ. R. 60(B)(1). *Argo Plastic Prods. Co. v. Cleveland* (1984), 15 Ohio St.3d 389, 474 N.E.2d 328. Because parties to a civil action voluntarily choose their own attorneys, they cannot avoid the consequences of the acts or omissions of their freely selected representative. *GTE Automatic Electric*, supra at 152, quoting *Link v. Wabash R.R. Co.* (1962), 370 U.S. 626, 633-634, 82 S.Ct. 1386. "Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer/agent ***." *Id*. If an attorney's representation falls substantially below what is reasonable under the circumstances, the client's remedy is against that attorney in a suit for malpractice. *Id*., quoting *Link*, supra at 634. Any other remedy would amount to "visiting the sins" of the attorney of the moving party upon the innocent party. *Id*. Thus, granting relief from a judgment due to an attorney's misconduct would contradict the purpose of Civ. R. 60(B) – to afford relief in the interests of justice.

Argo Plastic Prods. Co., supra at 393.

{¶ 18} If we are to take Thomas' allegations as true, his counsel at the civil protection hearing neglected to perform the basic duties of his representation. Such conduct is not "excusable" when discussed within the context of a Civ R. 60(B)(1) motion for relief from judgment. See *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St.3d 18, 665 N.E.2d 1102. Thomas' remedy in the instant matter, if any, lies elsewhere.

{¶ 19} Additionally, Thomas' assertion that he is entitled to relief from judgment under Civ. R. 60(B)(5), the catch-all provision, fails for the following reasons. "Civ. R. 60(B)(5) applies only when a more specific provision does not apply." *Strack v. Pelton* (1994), 70 Ohio St.3d 172, 174, 637 N.E.2d 914. Here, Thomas argues that he is entitled to relief under Civ. R. 60(B)(5) in light of the numerous examples of his counsel's incompetence at the hearing on the civil protection order. Because the more specific provision of Civ. R. 60(B)(1) applies to these circumstances, Thomas cannot rely on the catch-all provision of Civ. R. 60(B)(5) as grounds for relief. *Swan v. Swan* (Sept. 6, 2005), Franklin App. No. 04AP-1089, 2005-Ohio-4636. Again, Thomas' remedy lies elsewhere.

{¶ 20} Lastly, Thomas argues that pursuant to Civ. R. 60(B)(4), a change of circumstances has occurred with respect to the instant matter obviating the need for the civil protection order. In his brief, Thomas points out that when the civil protection order was originally put in place, he had custody of his two youngest daughters, K.C. and E.C. Shortly thereafter, Thomas and Catherine entered into an agreement designating Catherine as the custodial parent for K.C. while Thomas remained the custodial parent of E.C. While Thomas still enjoys standard visitation rights with K.C., he complains that the existence of the civil protection order "makes it difficult" to maintain contact with his

daughter. Moreover, Thomas argues that over two years have elapsed without incident since the civil protection order was issued, and the parties exchange the children for visitation at the police station. Thus, Thomas argues that there is no need for an order to protect Catherine from him. We disagree.

{¶ 21} In order for a party to succeed under Civ. R. 60(B)(4), he must show that "*** it is no longer equitable that the judgment should have prospective application." Of importance here are the words "no longer," referring to the change in condition that is required to make continued enforcement of the judgment inequitable. *Crouser v. Crouser* (1988), 39 Ohio St.3d 177, 529 N.E.2d 1251. Moreover, Civ. R. 60(B)(4) was designed to provide relief when those changed circumstances were not foreseeable, and not within the control of the parties. *Id*; See also *Wurzelbacher v. Kroeger* (1974), 40 Ohio St.2d 90, 92, 320 N.E.2d 666, 667-668. "The purpose of Civ. R. 60(B)(4) is to relieve a party from judgment that will clearly result in an inequitable burden to that party because of unforeseen circumstances, and for which inequity there exists no other means of review." *Crouser*, supra.

{¶ 22} After a thorough review of the record in this matter, we fail to see any connection between E.C's change in custody to Thomas and the issuance of the civil protection order. The civil protection order was issued to protect Catherine from further abusive behavior from Thomas. There have never been any allegations that Thomas mistreats his children. Simply put, the custody modification is not the type of change in circumstance contemplated by Civ. R. 60(B)(4). Additionally, the fact that Thomas has been abiding by the terms of the civil protection order issued against him is not a reason to terminate the order. To find otherwise would be tantamount to allowing an individual with a

mandatory two years of probation to be relieved of said burden after only a year merely because he has been abiding by the terms of his release.

{¶ 23} The trial court's judgment overruling Thomas' Civ. R. 60(B)(4) motion, however, is silent with respect to its ultimate reasoning for doing so. Despite this fact, the trial court is entitled to a presumption of correctness and a presumption that the court knew the law and acted accordingly. *Fletcher v. Fletcher* (1994), 68 Oho St.3d 464, 468, 628 N.E.2d 1343. A reviewing court will presume the validity of a judgment so long as there is evidence in the record to support it. *Id*. As already noted above, there is ample evidence in the record to support the trial court's denial of the Civ. R. 60(B)(4) portion of Thomas' motion for relief from judgment. Thus, the trial court did not abuse its discretion when it overruled said motion.

{¶ 24} In the instant case, Thomas did not allege facts to support any Civ. R. 60(B) ground for relief, and on balance, we conclude that the trial court did not abuse its discretion in denying his Civ. R. 60(B) motion.

{¶ 25} Thomas sole assignment of error is overruled.

III

{¶ 26} Thomas' sole assignment of error having been overruled, the judgment of the trial court is affirmed.

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BROGAN, J., concurs

GRADY, P.J., concurring:

{¶ 27} Appellee Catherine Chapman argues that the domestic relations court erred

when it expressly found that Appellant Thomas Chapman's Civ.R. 60(B)(1) motion alleging "mistake" as grounds to vacate the court's prior civil protection order was timely filed. Having found that Thomas Chapman has presented no basis to reverse, and absent a cross-appeal by Catherine Chapman, we are not required to decide Catherine Chapman's timeliness claim. However, in view of the significance of the timeliness issue, and the domestic relations court's resolution of that issue, I believe that we should address the question to clarify the law involved and to avoid endorsing the error which the court committed.

{¶ 28} "Mistake, inadvertence, surprise or excusable neglect" are grounds for relief under Civ.R. 60(B)(1). The rule expressly provides that a motion alleging any of those grounds "shall be made . . . not more than one year after the judgment, order or proceeding was entered or taken." The one year limitation is absolute. *Covington v. P.I.E. Mutual Ins. Co.,* 149 Ohio App.3d. 406, 2002-Ohio-4732; *Austin v. Payne* (1995), 107 Ohio App.3d 818; *Weber v. Weber* (1991), 74 Ohio App.3d 396.

{¶ 29} The domestic relations court entered its civil protection order on November 19, 2002. Thomas filed a Civ.R. 60(B) motion to vacate that order on August 27, 2004, more than one year later. The domestic relations court expressly declined to find the motion was untimely filed with respect to Thomas's contention of mistake, relying on the holding of the Eighth District Court of Appeals in *Wells v. Spirit Fabricating, Ltd.* (1996), 113 Ohio App.3d 282. (Entry and Order, p.2)

{¶ 30} In *Wells*, a Civ.R. 60(B) motion alleging several grounds for relief, including mistake, was filed more than one year after the judgment the motion sought to vacate had been entered, following resolution of an appeal from the judgment that consumed almost a

full year. In rejecting a timeliness challenge, the Eighth District held:

{¶ 31} "Under Ohio law, the pendency of an appeal prevents the trial court from entertaining a Civ.R. 60(B) motion; it necessarily follows that an appeal tolls the one-year time limitation until the appeal is decided. The one-year time limitation did not restart until the journalization of our original decision on September 18, 1995. Since Spirit filed the motion for relief with the trial court on September 19, 1995, we find that the motion was timely filed and does not prevent a review of the merits." *Id*., at 290.

{¶ 32} By its terms, Civ.R. 60(B) can apply only to orders and judgments that are final, which are likewise subject to appellate review. R.C. 2505.02(B). Once an appellate court's jurisdiction is invoked by a notice of appeal, a trial court cannot act to deprive the appellate court of its jurisdiction to review a trial court's final order. *State ex rel. Special Prosecutors v. Judges* (1978), 55 Ohio St. 2d 94. Therefore, pendency of an appeal prevents a trial court from ruling on a Civ.R. 60(B) motion. *Howard v. Catholic Social Services of Cuyahoga County, Inc.*, 70 Ohio St.3d 141, 1994-Ohio-219. However, pendency of an appeal has no effect on when the one-year period for filing a Civ.R. 60(B)(1) motion commences to run. In that connection, the Supreme Court has held that, with respect to Civ.R. 60(B)(1), "the one year provided therein begins to run, not from the date of the last appeal, but from the date on which the 'judgment, order or proceeding was entered or taken.'" *Cotterman v. Cleveland Elective Illuminating Co.* 1987), 34 Ohio St.3f 48, 49. In other words, the discrete event that triggers the time for filing a Civ.R. 60(B) motion is the trial court's act of journalizing an order or judgment which is final, not an appellate court's subsequent resolution of any error assigned in an appeal that was taken from that final judgment or order.

{¶ 33} The holding in *Wells* on which the domestic relations court relied in the present case is contrary to the Supreme Court's pronouncement nine years earlier in *Cotterman*. Therefore, *Wells* was incorrectly decided, and the domestic relations court erred when it followed and applied *Wells*, finding that Thomas's motion was timely filed with respect to his Civ.R. 60(B)(1) claim of mistake. I would reject Thomas Chapman's Civ.R. 60(B)(1) claim of mistake as untimely. I would reject his Civ.R. 60(B)(4) and (5) claims for the reasons stated by Judge Donovan.

Copies mailed to:

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