[Cite as *Plummer v. Plummer*, 2010-Ohio-3450.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

MARY LOU PLUMMER	**:**	
Plaintiff-Appellee	**:**	**C.A. CASE NO. 23743**
vs.	**:**	**T.C. CASE NO. 98DR1420**
JOSEPH L. PLUMMER	**:**	**(Civil Appeal from Common Pleas Court)**
Defendant-Appellant	**:**	

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O P I N I O N

Rendered on the 23rd day of July, 2010.

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GRADY, J.:

{¶ 1} This is an appeal from a post-decree final judgment of the domestic relations court that ordered preparation of a new qualified domestic relations order ("QDRO") to conform to a division of retirement benefits in a decree of divorce.

{¶ 2} Joseph and Mary Lou Plummer were divorced in 1999, after

twenty-six years of marriage. Joseph[1] was employed by General Motors Corporation during some or all of that time. Their agreed decree of divorce states, in pertinent part:

{¶ 3} "(Mary Lou) shall receive 50% of the value of (Joseph's) interest in his GM Pension fund under the Survivor Annuity Benefit Pay-Out as of the date of the filing of this final judgment and decree of divorce, and (Mary Lou) shall start receiving her benefits under said plan when (Joseph) starts receiving his benefits or when (Mary Lou) is permitted to elect to receive her benefits under said plan. The parties shall cooperate individually and through counsel in the preparation and execution of a Qualified Domestic Relations Order assigning said value of (Joseph's) retirement benefits to the plan. The parties shall be responsible for paying their own income taxes on that portion of the retirement benefits which they receive."

{¶ 4} A QDRO was prepared and signed by the parties and approved by the court on December 10, 1999. (Dkt. 20). The QDRO was subsequently presented to and accepted by the General Motors Plan Administrator on June 2, 2000.

{¶ 5} On October 1, 2007, Mary Lou filed a motion pursuant to Civ.R. 60(B), asking the court to vacate the QDRO because it

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

"does not reflect the parties agreement and the decree." (Dkt. 52). In an attached affidavit, Mary Lou averred:

{¶ 6} "1. I was to receive 50% of my ex-husband's retirement benefit;

{¶ 7} "2. My ex-husband retired early;

{¶ 8} "3. I only received 15% of his retirement benefits."

{¶ 9} The matter was referred to a magistrate, who found that Mary Lou was entitled to relief pursuant to Civ.R. 60(B)(5). The magistrate found that, per the decree, Mary Lou is entitled to share in supplemental retirement benefits to which Joseph became entitled, and that the QDRO was defective because Mary Lou is not being paid the 50% of those benefits to which she is entitled by the decree.

{¶ 10} Joseph filed objections to the magistrate's decision. The domestic relations court overruled the objections and adopted the magistrate's decision. Joseph appeals.

{¶ 11} App.R. 16(A) sets out what an appellate brief "shall include," by the headings of its sections, the contents of each section, and the order in which those sections of the brief appear. App.R 16(A)(5) requires "[a] statement of the case briefly describing the nature of the case, the course of the proceedings, and the disposition in the court below." App.R. 16(A)(6) requires "[a] statement of facts relevant to the assignments of error

presented for review, with appropriate references to the record in accordance with division (D) of this rule."

{¶ 12} A practice has arisen in the past several years that avoids the distinction between the separate sections required by App.R. 16(A)(5) and (6) by combining the two into a joint "Statement of the Case and Facts." The purported purpose of the practice is to present a more effective argument. But, the argument the brief presents is confined by App.R. 16(A)(7) to the discussion of each particular error assigned. By combining the elements for which App.R. 16(A)(5) and (6) require separate sections, parties tend to shape their discussion of the facts and the course of the proceedings below to suit their arguments. That deprives the appellate court of the neutral narratives regarding the record which is necessary to decide the arguments presented in relation to the error assigned. That result is more likely to disadvantage the party to an appeal who fails to comply with the express requirements App.R. 16(A) impose.

{¶ 13} We strongly urge parties to an appeal to avoid combining the statements of facts and the case for which App.R. 16(A)(5) and (6) require distinct presentations. Both parties in the present case have combined those sections in their briefs, which only clouds our understanding of those matters. For example, neither party identifies just what added benefit Joseph receives,

for which Mary Lou asserts a claim, or how he came to receive it. Perhaps they believe we should know that, because it was revealed to the trial court. But, we were not there, and the appeal is a separate proceeding. It is the obligation of the parties to present such matters in the statement of facts that App.R. 16(A)(6) requires, with appropriate references to the record. It is not the job of the appellate court to search the record for them.

FIRST ASSIGNMENT OF ERROR

{¶ 14} "THE TRIAL COURT ERRED BY FINDING THAT THE QUALIFIED DOMESTIC RELATIONS ORDER FILED ON DECEMBER 10, 1999 WAS NOT IN CONFORMANCE WITH THE LANGUAGE OF THE PARTIES' FINAL JUDGMENT AND DECREE OF DIVORCE FILED ON OCTOBER 28, 1999 AND BY FINDING THAT IT WAS NOT IN CONFORMANCE WITH CASE LAW."

{¶ 15} It appears that Joseph, when he retired from General Motors, was paid an early retirement bonus of some kind. Such bonuses are typically offered to veteran employees, who are more highly-paid, as an inducement to their voluntary retirement. In a defined benefit retirement plan, such as Joseph's plan with General Motors, the form of the inducement is generally an offer to add service credits to the years of service which qualify the employee to receive the pension benefit the plan defines.

{¶ 16} The trial court found that the QDRO it had approved was defective because the QDRO failed to secure for Mary Lou the 50%

of Joseph's retirement benefit to which she is entitled by the decree. Presumably, the portion Mary Lou is paid pursuant to the QDRO does not include any of the supplemental benefit Joseph's early retirement produced. The trial court ordered a new QDRO to correct the defect.

{¶ 17} Joseph argues that the trial court erred when it ordered a new QDRO. He contends that the current QDRO correctly excludes his supplemental early retirement benefit because Mary Lou "is entitled to (a) monthly benefit determined as fifty (sic) person (percent) of (Joseph's) pension benefits accrued as of September 20, 1999 which would otherwise be payable to the participant under the plan" (Brief, p. 9), and does not include the early retirement benefit to which Joseph later became entitled. Therefore, according to Joseph, a different QDRO giving Mary Lou a share of his early retirement benefit constitutes a modification of a prior property division award prohibited by R.C. 3105.171(I).

{¶ 18} We do not agree. The decree of divorce awards Mary Lou "50% of the value of (Joseph's) interest in his GM Pension fund under the Survivor Annuity Benefit Pay-Out as of the date of this final judgment and decree of divorce." The decree does not award Mary Lou a share of only those benefits that had then "accrued," as Joseph argues. Rather, by identifying the date of the decree as the date for division of Joseph's pension benefit, the decree

merely adopts a date other than the date of the final hearing to determine when the marriage ended, for purposes of the court's division of marital property. R.C. 3105.171 (A)(2)(a), (b).

{¶ 19} With respect to the share she was awarded in the decree, Mary Lou is entitled to the benefit of any increase in the value of her unmatured proportionate share after the divorce attributable to Joseph's continued participation in the retirement plan. *Layne v. Layne* (1992), 83 Ohio App.3d 599. Eligibility for early retirement benefits is a function of an employee's participation in the plan. We have held that, unless specifically excluded by the decree, early retirement benefits are properly divisible as marital property when they were earned during the marriage. *Bagley v. Bagley*, 181 Ohio St.3d 141, 2009-Ohio-688, ¶27; *Hale v. Hale*, Montgomery App. No. 21402, 2007-Ohio-867.

{¶ 20} The decree does not exclude early retirement benefits from the percentage of Joseph's pension Mary Lou was awarded. Mary Lou is entitled by the decree to 50% of the early retirement benefit Joseph receives or received which is attributable to Joseph's participation in the retirement plan during their marriage. Because the QDRO fails to produce that benefit for her, the QDRO the court approved on December 10, 1999, is defective. The court was obligated to correct the defect by ordering a new QDRO. A QDRO that conforms to the terms of the decree is not a

modification prohibited by R.C. 3105.171(I).

{¶ 21} The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 22} "THE TRIAL COURT ERRED BY GRANTING APPELLEE RELIEF UNDER CIVIL RULE 60(B) FOR THE REASONS THAT APPELLEE'S MOTION DID NOT CONFORM TO THE REQUIREMENTS OF CIVIL RULE 60(B) AND SAID MOTION WAS UNTIMELY."

{¶ 23} Civ.R. 60(B) authorizes the court to "relieve a party or its legal representative from a final judgment, order or proceeding" for reasons which the rule identifies. Final judgments or orders are defined by R.C. 2505.02.

{¶ 24} "To prevail on a motion brought 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) 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 Electric, Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, at paragraph two of the syllabus.

{¶ 25} Joseph argues that the defect in the QDRO on which Mary Lou relies is, if it exists, a form of "mistake," grounds for relief

pursuant to Civ.R. 60(B)(1), which requires a motion filed within one year from the date the order was issued. The QDRO was approved by the court on December 10, 1999, and Mary Lou's Civ.R. 60(B) motion was filed eight years later.

{¶ 26} The trial court ordered the QDRO vacated pursuant to Civ.R. 60(B)(5), which allows a motion to filed at any reasonable time. However, Civ.R. 60(B)(5) may not be employed to grant the relief on grounds to which another section of Civ.R. 60(B) applies. *Caruso-Ciresi Inc. v. Lohman*, (1983), 5 Ohio St.3d 64.

{¶ 27} "[W]hen a QDRO is inconsistent with the decree, the trial court lacks jurisdiction to issue it, and it is void." *Bagley*, ¶27. Civ.R. 60(B) deals with vacation of voidable judgments. Therefore, authority to vacate a judgment which is void is not derived from or controlled by Civ.R. 60(B), *Ervin v. Patrons Mutual Insurance Co.* (1985), 20 Ohio St.3d 8, but is instead an inherent power of the court. *Patton v. Diemer* (1988), 35 Ohio St.3d 68. A trial court may exercise that inherent power by treating a Civ.R. 60(B) motion as a common-law motion to vacate a void judgment. *CompuServe, Inc. v. Trinofo* (1993), 91 Ohio App.3d 157.

{¶ 28} Having found the QDRO inconsistent with the decree, and therefore void, the court erred in relying on Civ.R. 60(B). The error is nevertheless harmless because the court could reach that same result in an exercise of the court's inherent power to vacate

a void judgment.

{¶ 29} The second assignment of error is overruled. The judgment of the domestic relations court will be affirmed.

BROGAN, J., concurs.

FROELICH, J., concurs in the judgment.

Copies mailed to:

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