

STATE OF OHIO, JEFFERSON COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

ROSEMARIE GRON,)	
)	CASE NO. 07 JE 49
PLAINTIFF-APPELLEE,)	
)	
- VS. -)	OPINION
)	
STANLEY GRON, III,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court,
Case No. 06DR14.

JUDGMENT: Reversed.

APPEARANCES:
For Plaintiff-Appellee:

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For Defendant-Appellant:

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JUDGES:
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro
Hon. Cheryl L. Waite

Dated: September 25, 2008

VUKOVICH, J.

{¶1} Defendant-appellant Stanley Gron, III appeals the decision of the Jefferson County Common Pleas Court, which granted plaintiff-appellee Rosemarie Gron's Civ.R. 60(A) or (B) motion for relief from a portion of the parties' divorce decree. Specifically, the court struck language which provided that spousal support would terminate upon the wife's death and which allowed the court to revisit spousal support upon the wife's remarriage or cohabitation. The wife sought relief from the language because the parties had voiced that they did not wish the court to retain jurisdiction over spousal support at the divorce hearing where the separation agreement was read into the record. On appeal, the husband claims that the wife should have appealed from the divorce decree if such decree did not reflect their agreement and that waiting a year to seek relief was unreasonable. For the following reasons, the judgment of the trial court is reversed.

STATEMENT OF THE CASE

{¶2} The parties were married in 1971 and have two emancipated children. In January 2006, the wife filed a complaint for divorce. The parties each submitted pretrial proposals concerning the division of assets and support. Regarding spousal support, the husband proposed that he pay the wife \$750 per month for nine years. He urged that he not be ordered to provide the wife health insurance through COBRA disclosing that it would cost \$340 per month, that the wife was on Medicare due to disability and that she would be eligible for Medicaid as well. The wife sought \$1,700 in spousal support per month for fifteen years plus COBRA payments for the thirty-six months it is available. She claimed that the majority of her medical expenses would not be covered by Medicare. Neither party's proposal mentioned a reservation of jurisdiction over spousal support.

{¶3} At the July 19, 2006 divorce hearing, the parties disclosed that they had reached a settlement agreement. The wife's attorney explained that the document she would read into the record was her pretrial proposal plus negotiated changes. (Tr. 3). After reciting the property division, counsel stated that the husband would pay spousal support in the amount of \$1,500 per month for eight years and provide COBRA

coverage for thirty-six months. The COBRA payments were to begin immediately, but the commencement of spousal support was delayed since the wife was permitted to live in the marital residence and the husband was ordered to pay all household expenses until the marital residence was sold. (Tr. 12-13).

{¶4} The court then heard testimony from the parties and ensured that they concurred in the agreement that had been read into the record. (Tr. 13-18). Finally, the judge inquired if the court was being asked to retain jurisdiction over the matter of spousal support. Both attorneys responded in the negative. The court then pointed out to the husband that he could not come back and seek a change in spousal support without this reservation of jurisdiction. (Tr. 19). The court orally found the separation agreement recited into the record to be fair and equitable and said that it would order the agreement that had been read into the record to be incorporated into and made a part of the final divorce decree. (Tr. 20-21).

{¶5} On August 7, 2006, the court filed the divorce decree, which was prepared by the husband's counsel and signed by the attorneys for both parties. The decree noted that a settlement agreement had been read into the record. The decree then set forth the orders of the court. For instance, the husband was ordered to pay COBRA for thirty-six months. Paragraph six of the decree provides that the husband shall pay spousal support of \$1,500 per month for eight years to commence when the marital residence is sold and the husband no longer has any responsibility for the mortgage. This paragraph continues:

{¶6} "Spousal support shall terminate if the Wife dies. If the Wife shall remarry or cohabitate with an adult male, the same shall be subject to review by the Court."

{¶7} The decree did not state that the separation agreement was incorporated by reference, and no written separation agreement was attached or filed separately. Neither party appealed from the decree. Over the next few months, various motions were filed by the parties concerning whether they were properly fulfilling their responsibilities in dividing assets and attempting to sell the house.

{¶8} On August 6, 2007, exactly one year after the divorce decree was filed, the wife, armed with new counsel, filed a motion for relief from the divorce decree

under Civ.R. 60(A) and (B). The motion merely stated that the decree did not match the settlement agreement of the parties as recited and as approved by the court at the hearing. The motion did not specify under what branch of Civ.R. 60(B) it was filed and did not disclose what portion of the decree did not match the settlement agreement.

{¶19} A hearing was held on August 20, 2007, where the wife's counsel first disclosed that he was complaining about the reservation of jurisdiction in the decree. (Tr. 31). The husband's attorney pointed out that they had a meeting prior to the decree being signed, where the wife's former attorney complained about this exact language as not being part of the negotiated agreement but was informed by the court that this was standard language that would be included. (Tr. 32). Due to the lacking language of the motion for relief from judgment, the court ordered that an amended motion be filed. Upon the request of the wife's counsel, the court stated that the amended motion would relate back to August 6, 2007. (Tr. 32-33).

{¶10} On September 21, 2007, the wife filed her amended motion for relief from judgment under Civ.R. 60(A) and (B), again without specifying the particular subsection of Civ.R. 60(B). The motion cited a portion of the July 19, 2006 divorce hearing transcript dealing with the colloquy on the lack of reservation of jurisdiction over spousal support. The wife's motion concluded that the court should not have included the language in its decree concerning death, remarriage or cohabitation as this was a material change from the settlement agreement approved in open court.

{¶11} On September 24, 2007, without waiting for a response from the husband, the court held a hearing on the wife's motion. At the hearing, the wife stated that a stable spousal support payment which the judge could not modify was a big part of her negotiation of the settlement agreement. (Tr. 76). The husband urged that the motion should be denied because the wife did not show she is entitled to relief from judgment. He pointed out that the wife should have appealed from the decree if she believed the decree varied from the settlement agreement, noting that the language of the decree is plain and clear. (Tr. 56-57). The husband again pointed to the fact that the decree was entered after a conference with the attorneys and that the judge specifically instructed that the standard reservation of jurisdiction and termination on death language should be included in the decree. (Tr. 56, 58). The court admitted

that it remembered this meeting exactly and that the decree was entered after the court instructed counsel to insert the language. (Tr. 59).

{¶12} On October 5, 2007, the trial court granted the wife's motion and struck from the prior decree the language regarding death, remarriage and cohabitation. The husband filed timely notice of appeal from this entry.

GENERAL CIV.R. 60(B) LAW

{¶13} Civ. R. 60(B) states in pertinent part:

{¶14} "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding 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. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation."

{¶15} To prevail on a Civ. R. 60(B) motion, the movant must demonstrate all of the following: (1) a meritorious defense or claim; (2) entitlement to relief under one of the five grounds listed in Civ. R. 60(B); and (3) that the motion is made within a reasonable time, and where the grounds for relief are under one of the first three divisions of Civ.R. 60(B), not more than one year after the judgment was entered. *GTE Automatic Electric Co. v. ARC Indus.* (1976), 47 Ohio St.2d 146.

{¶16} Generally, the standard of review of a trial court's decision on a Civ.R. 60(B) motion is whether the trial court abused its discretion, which entails an arbitrary, unreasonable or unconscionable act. *Strack v. Pelton* (1994), 70 Ohio St.3d 172, 174. But, see, *McLeod v. Mt. Sinai Med. Ctr.*, 166 Ohio App.3d 647, 2006-Ohio-2206, ¶13-15; *Ford Motor Credit Co. v. Cunningham*, 2d Dist. No. 20341, 2004-Ohio-6226, ¶12

(holding that our review is de novo where a pure issue of law is presented such as whether the court improperly allowed the motion to substitute for direct appeal).

ASSIGNMENT OF ERROR

{¶17} The husband's sole assignment of error provides:

{¶18} "IT IS THE POSITION OF APPELLANT THAT THE COURT ERRED IN ORDERING THE LANGUAGE 'SPOUSAL SUPPORT SHALL TERMINATE IF THE WIFE DIES. IF THE WIFE SHALL REMARRY OR COHABITATE WITH AN ADULT MALE, THE SAME SHALL BE SUBJECT FOR REVIEW BY THE COURT' BE STRICKEN IN RELIANCE UPON RULE 60(B) OF THE OHIO RULES OF CIVIL PROCEDURE."

{¶19} The husband urges that since the August 6, 2006 divorce decree was a final appealable order, the wife should have appealed from it if she had a problem with the clear and unambiguous language contained therein. He contends that the wife's motion does not fit under any of the Civ.R. 60(B) divisions. As to division (B)(1), he states that there was no mistake, inadvertence, surprise or excusable neglect as the reservation of jurisdiction language that is now under attack was discussed by counsel and the court prior to the entry of the decree. He concludes that the trial court's act of granting the motion improperly allowed Civ.R. 60(B) relief to substitute for an appeal where the wife's attorney participated in the decree's drafting, voiced a complaint over the language, signed the decree and subsequently failed to appeal from an issue she knew existed.

{¶20} On appeal, the wife still does not mention the particular division of Civ.R. 60(B) under which she believes relief should have been or was granted. She contends that her motion was timely because it was filed within one year of the judgment and because the support obligation had not yet begun due to the problems selling the house. As for a meritorious claim or defense, she states that the language of the decree varies from the language of the separation agreement as read to the court.

{¶21} However, contrary to the wife's characterization, termination on death is not a reservation of jurisdiction. Rather, it can be considered consistent with the parties' agreement since the husband could not actually pay the wife if she were dead.

The termination on death language does not vary from the separation agreement. As such, the wife failed to establish a meritorious claim or defense regarding this termination language.

{¶22} Concerning the reservation of jurisdiction, the language of the decree does vary from the oral separation agreement. Although the divorce decree did not wholly reserve jurisdiction to modify spousal support in the decree for regular changed circumstances, it did reserve jurisdiction to modify support upon the wife's remarriage or cohabitation.

{¶23} Yet, unlike a separation agreement in a dissolution case, it has been stated that the trial court entering a decree in a divorce action has the authority to modify the parties' agreement. *McClain v. McClain* (1984), 15 Ohio St.3d 289, 290; *Bourque v. Bourque* (1986), 34 Ohio App.3d 284, 287. As the trial court admitted, it specifically considered whether to include this language and instructed the parties' attorneys to include it in the decree as it was standard even in the face of objection by the wife's counsel. See *id.* See, also, *Waddell v. Waddell* (Dec. 16, 1996), 12th Dist. No. CA-96-03-56 (court's decree can purposefully vary from spousal support portion of settlement agreement read in open court).

{¶24} Moreover, the court speaks only through its journal, not by oral pronouncement. *State ex rel. Indus. Comm. v. Day* (1940), 136 Ohio St. 477, syllabus ¶1. Thus, a statement from the bench is not the final statement of the court.

{¶25} Next, it must be pointed out that the court's journalized decree did not incorporate the separation agreement by reference. As such, this case is not analogous to those cases where the divorce decree is inconsistent with an attached separation agreement that was specifically incorporated by reference. See, e.g., *Hawthorne v. Hawthorne* (1970), 24 Ohio App.2d 141.

{¶26} Still, notwithstanding the fact that the Supreme Court has held that a court can modify a separation agreement in a divorce, appellate courts have found the meritorious claim or defense prong of the *GTE* test satisfied where a decree does not match the terms of the oral settlement agreement. See, e.g., *Marquis v. Marquis* (Jan. 8, 1999), 6th Dist. No. I-98-1185 (but not revealing whether decree also purported to incorporate the agreement by reference). Thus, we proceed with our analysis.

{¶27} As the husband points out, the wife easily could have appealed from the divorce decree whose language was plain and clear. See *Koontz v. Koontz* (Sept. 27, 1985), 6th Dist. No. WD-85-18 (where appeal was filed from trial court's entry which was inconsistent with the separation agreement orally pronounced on the record at the hearing). A Civ.R. 60(B) motion is not a substitute for a timely appeal. *Doe v. Trumbull Cty. Child. Serv. Bd.* (1986), 28 Ohio St.3d 128, 131; *Colley v. Bazell* (1980), 64 Ohio St.2d 243, 245. By seeking relief from judgment on the grounds of a trial court's mistake, the movant is violating this premise. *Hankinson v. Hankinson*, 7th Dist. No. 03MA7, 2004-Ohio-2480, ¶19.

{¶28} Along these lines, a factual or legal mistake on the part of the trial court is not the type of mistake contemplated by Civ.R. 60(B)(1), which is meant for mistake of a party or his agent. See *id.* at ¶20 (citing various cases in support). Many courts describe the true nature of a motion for relief in cases where it complains about the trial court's mistakes as a motion for reconsideration, which does not exist from final judgments. See *id.* at ¶21, citing *Farmers Prod. Credit Assn. of Ashland v. Johnson* (1986), 24 Ohio St.3d 69, 76 (finding entitlement to relief under one of five grounds not established after agreeing with appellate court which held that a claim that a lawsuit was incorrectly decided is not the kind of mistake or inadvertence contemplated). As we pointed out in *Hankinson*, every party who believes a trial court erred factually or legally (not clerically, which is covered by division (A) of Civ.R. 60), must file a timely appeal in order to obtain judgment in their favor. *Id.* at ¶29. See, also, *Mitchell v. Haynes*, 7th Dist. No. 05MA78, 2006-Ohio-4607, ¶20.

{¶29} Notably, the wife did not specify which of the five subsections of Civ.R. 60(B) applies. It seems hard to agree that one met their burden of alleging entitlement to relief when they do not even disclose which branch their motion fits. It appears she proceeded under (B)(1) because she emphasized the one-year maximum time limit, which only applies to the first three grounds. As set forth supra, (B)(1) is not a tool to seek reconsideration of a trial court's judgment.

{¶30} It is clear that (B)(2) and (B)(3) are inapplicable here: there is no newly discovered evidence; and there are no allegations of fraud, misrepresentation or other misconduct of an adverse party concerning the spousal support reservation of

jurisdiction because the court concedes that counsel included the language upon the court's instruction. Division (B)(4) (requiring it to be no longer equitable that the judgment applies prospectively) does not apply as nothing new has occurred here to change the equitability of prospective application.

{¶31} As for the final catch-all provision in (B)(5), this is to be used sparingly only when the grounds are substantial. *Caruso-Ciresi, Inc. v. Lohman* (1983), 5 Ohio St.3d 64, 66. See, also, Staff Note to Civ.R. 60(B)(5) (providing fraud upon the court as an example; more specifically, the bribing of a juror, not by the adverse party, but by some third person). Considering the prior availability of appeal and the trial court's prior and specific consideration of the wife's objection to this language, the grounds here are not substantial.

{¶32} Besides all of these problems, the wife has also failed to satisfy the timeliness prong of *GTE*. Concerning Civ.R. 60(B)(1), the reference to one year is a merely maximum time limit for filing such motion. The motion is also subject to a reasonableness requirement. The rule clearly states that both elements must be met: within one year and otherwise reasonable. Even a Civ.R. 60(B)(5) motion, which is not subject to the one-year maximum, is still subject to the reasonableness requirement.

{¶33} Here, the wife presented nothing to the court as to why she waited one year to seek relief. On the contrary, the husband presented evidence that the wife's counsel specifically objected to the matter prior to the entry of the decree, lost this argument to the trial court, continued to sign the entry knowing it contained this clear language and then failed to appeal such entry on the grounds now raised. The movant has the burden to justify any delays in submitting the request for relief from judgment and must thus present allegations of operative facts to demonstrate that the motion was within a reasonable period of time. *Kazarinoff v. Kazarinoff*, 9th Dist. No. 22658, 2005-Ohio-6986, ¶14; *McBroom v. McBroom*, 6th Dist. No. L-03-1027, 2003-Ohio-5198, ¶33; *Cooper v. Cooper* (Nov. 4, 1998), 9th Dist. No. 2741-M; *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 103.

{¶34} The failure to demonstrate the reason for the lapse of time here requires denial of the motion for relief from judgment. See *McBroom*, 6th Dist. No. L-03-1027

(court found motion untimely where movant failed to explain delay that was short of one year); *Fouts v. Weiss-Carson* (1991), 77 Ohio App.3d 563, 567 (court found motion untimely where movant failed to explain mere twelve-week delay). In fact, the wife was not even entitled to a hearing due to the paucity of her original motion and the subsequent motion's failure to mention a ground for relief under Civ.R. 60(B) and failure to allege the reason for not filing sooner. *Biancarelli v. Biancarelli*, 7th Dist. No. 04NO325, 2005-Ohio-4470, ¶40, citing *GTE*, 47 Ohio St.2d at 150-151.

{¶35} Furthermore, as the husband points out, it was not as if the wife was unrepresented at the time of the decree. In fact, she remained represented in the months thereafter concerning the parties' disagreements over the sale of the house and transfer of property.

{¶36} Moreover, although the trial court purported to allow the September 21, 2007 amendment of the August 6, 2007 motion to relate back to the August 6, 2007 date, these dates and the contents (or lack thereof) of the original motion can still be factors in the reasonableness evaluation. That is, the wife waited until the last day of the maximum time limit for Civ.R. 60(B)(1) relief and then filed a bare bones motion that fails to specify a subsection of Civ.R. 60(B) and failed to even state where the decree varies from the separation agreement. Thus, the husband was not made aware of the reason for the motion until the August 20 hearing where he was orally advised; this revealing of the specific basis for the motion was more than one year from the entry of judgment as was the amended motion. For all of these reasons, especially the aforementioned failure to even mention to the trial court her reason for the delay, the wife's motion was not filed within a reasonable time or at least she failed to meet her burden of showing that it was so filed.

{¶37} Finally, although the parties do not do so, we shall briefly address Civ.R. 60(A) since the wife's motion asked for relief under Civ.R. 60(A) or (B) and since the trial court failed to specify its reason for granting relief. Civ.R. 60(A) provides in pertinent part:

{¶38} "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any

time on its own initiative or on the motion of any party and after such notice, if any, as the court orders.”

{¶39} Civ.R. 60(A) does not allow substantive changes, and it does not permit the court to modify what it believes was an incorrect judgment. *State ex. rel Letty v. Leskovansky* (1996), 77 Ohio St.3d 97, 100 (non-substantive changes only); *Countrywide Home Loans, Inc. v. Hannaford*, 9th Dist. No. 22000, 2004-Ohio-4317 (trial court’s “inadvertent misunderstanding” is not a clerical error or oversight or omission for purpose of Civ.R. 60(A) relief).

{¶40} Here, the trial court admitted that it specifically ordered the reservation language included at a conference where the wife’s counsel argued that they did not desire reservation language. There is no indication that the alleged error was clerical or a result of oversight or omission. Rather, the only indication here is that the court purposely varied from the parties’ statement that they did not wish the court to retain jurisdiction. The court either wished to vary from the settlement agreement or believed that a reservation for only remarriage or cohabitation was not inconsistent with the parties’ desired lack of retention of jurisdiction over support. Later, upon argument by a different attorney for the wife, it seems the court changed its mind. See *Wardeh v. Altabchi*, 158 Ohio App.3d 325, 2004-Ohio-4423.

{¶41} This situation is distinguishable from any such case using Civ.R. 60(A) where the entry did not match a settlement agreement read into the record because the trial court here conceded that it engaged in the purposeful act of entering a decree at variance from the oral agreement.

{¶42} "The basic distinction between clerical mistakes that can be corrected under Civ.R. 60(A) and substantive mistakes that cannot be corrected is that the former consists of 'blunders in execution' whereas the latter consists of instances where the court changes its mind, either because it made a legal or factual mistake in making its original determination, or because, on second thought, it has decided to exercise its discretion in a different manner." *Kuehn v. Kuehn* (1988), 55 Ohio App.3d 245, 247.

{¶43} Since we have a change of mind here rather than a blunder in execution or a scrivener's error, the use of Civ.R. 60(A) would be improper. Moreover, the wife fails to argue in support of Civ.R. 60(A) in her appellee's brief.

CONCLUSION

{¶44} Evaluating the case pursuant to Civ.R. 60(B), we conclude that the trial court improperly allowed the wife to use a post-judgment motion as a substitute for appeal. Notably, the court's final entry did not wholly adopt the separation agreement as its judgment entry did not incorporate such agreement by reference or otherwise; rather, the court constructed its own entry and specifically decided to include the contested language notwithstanding the parties' statements at the hearing and after considering the wife's pre-entry objections. See *McClain*, 15 Ohio St.3d at 290. Additionally, the wife's motion was untimely and unsupported. Alternatively, analyzing the case under Civ.R. 60(A), the trial court improperly changed its mind as opposed to correcting a scrivener's error.

{¶45} Thus, the trial court's decision cannot be upheld under Civ.R. 60(A) or (B). In conclusion, under the particular facts and circumstances herein, the trial court abused its discretion and erred as a matter of law in striking the language of the decree regarding reservation of jurisdiction for remarriage and cohabitation and especially regarding termination upon death. Accordingly, the judgment of the trial court is reversed and the original decree is reinstated.

DeGenaro, P.J., concurs.

Waite, J., concurs.