[Cite as *Karnes v. Karnes*, 2010-Ohio-4016.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94521

WILLIAM M. KARNES

PLAINTIFF-APPELLEE

vs.

DIANNE E. KARNES

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. D-279271

BEFORE: Rocco, P.J., Blackmon, J., and Sweeney, J.

RELEASED AND JOURNALIZED: August 26, 2010

ATTORNEY FOR APPELLANT

Stanley Morganstern
Morganstern, MacAdams & Devito Co., LPA
623 West St. Clair Avenue
Cleveland, Ohio 44113-1204

FOR APPELLEE

William M. Karnes, pro se
21270 Lorain Road
Fairview Park, Ohio 44126

KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant Dianne E. Karnes appeals from the December 30, 2009 judgment entry of the Cuyahoga County Common Pleas Court, Domestic Relations Division.

{¶ 2} On that date, pursuant to a motion filed by plaintiff-appellee William M. Karnes, Dianne's ex-husband, the lower court issued a correction to its December 10, 2009 judgment entry "nunc pro tunc," that indicated Dianne's May 19, 2009 motion to modify the parties' property division was dismissed "with prejudice," rather than "without prejudice."

{¶ 3} Dianne presents two assignments of error. She argues the lower court lacked jurisdiction to alter the December 10, 2009 judgment entry in such a manner. She further argues that the lower court denied her right to due process of law in correcting the December 10, 2009 judgment entry without first

conducting a hearing.

{¶ 4} Upon a review of the record in this particular case, this court finds Dianne's arguments unpersuasive. Her assignments of error, therefore, are overruled.

{¶ 5} The record reflects William filed a complaint for divorce against Dianne in April 2001. After a lengthy process of motions and trial proceedings, on December 31, 2008 the lower court granted a decree of dissolution to the parties. The lower court noted that certain issues remained to be resolved.

{¶ 6} Within three weeks of the judgment entry of divorce, Dianne filed a motion to "correct" it pursuant to Civ.R. 60(A). She claimed it contained a "mathematical mistake" concerning the proper award of "liquid assets" to each party. William filed a brief in opposition, asserting that the calculations were "basically correct."

{¶ 7} The dispute eventually led the parties to submit to the lower court an agreed judgment entry that was signed by the court and filed on April 21, 2009. In pertinent part, the order divided some existing bank accounts between the parties, indicated William would receive a certain amount of money per month from Dianne's "State Teachers Retirement Fund (STRS)," stated that the lower court would retain jurisdiction "to enter further orders as are necessary to enforce the assignment of benefits," and directed William to prepare and submit to Dianne's attorney a "Division of Property Order (DOPO) within thirty (30) days of

this judgment entry in order to implement its terms and intent."

{¶ 8} William filed the proposed DOPO on April 30, 2009. It contained his signature along with his certification that "counsel for Defendant was served with this DOPO 04/22/09 and has neither signed nor objected to same."

{¶ 9} Within three weeks of the filing of the proposed DOPO, Dianne filed a motion to "modify" it pursuant to Civ.R. 60(B). She asserted that the DOPO did not accurately reflect the terms of the parties' settlement agreement, and that her attorney had raised concerns about it in a letter to William dated April 27, 2009.

{¶ 10} William filed a brief in opposition to the motion. He argued Dianne's concerns were trivial and requested an oral hearing on the motion.

{¶ 11} The lower court's docket reflects that on October 20, 2009, the matter was scheduled for a "full hearing" to be held "before Magistrate Scott D. Kitson" on November 24, 2009; "Notice(s) [were] sent."

{¶ 12} On December 10, 2009, the lower court issued a judgment entry that stated, in pertinent part, as follows: "This matter came on for consideration upon Defendant's Motion for Property Division * * * filed on May 19, 2009. The *Defendant* in the underlined matter voluntarily dismissed her motion without prejudice, *thereby disposing the case*. *It is therefore ordered, adjudged, and decreed that this matter be and is hereby dismissed* without prejudice *at Plaintiff's* costs *for which judgment is rendered*." (Emphasis added.)

{¶ 13} Eleven days later, William filed a motion to correct the judgment

entry "nunc pro tunc." In his affidavit attached to his motion, he stated that, "On 11/24/2009 Defendant's Motion * * * came on for hearing before Magistrate Scott Kitson. At that time, Stanley Morganstern, attorney for Dianne Karnes, advised the magistrate that he was dismissing the motion **with prejudice at Defendant's cost.**" (Emphasis sic.) Thus, William requested the judgment entry to reflect the foregoing.

{¶ 14} Dianne filed a brief in opposition. The motion stated that "[t]he reasons in support * * * are more fully set forth in the Affidavit of Stanley Morganstern, attached hereto and incorporated herein."

{¶ 15} Dianne's attorney averred as follows:

{¶ 16} "2. I attended a hearing in this matter before Magistrate Scott Kitson upon Defendant's Motion to Modify Division of Property Order * * * on November 24, 2009.

{¶ 17} "3. At the hearing, I advised the Magistrate and Plaintiff that we were dismissing our motion without prejudice, contrary to Plaintiff's representation in his Motion to Correct Entry.

{¶ 18} "4. Court costs were not discussed at the hearing. The requirement that Plaintiff pay court costs was apparently a decision of the Court.

{¶ 19} "Further Affiant sayeth naught." (Emphasis sic.)

{¶ 20} On December 30, 2009, the lower court issued its judgment entry. It stated, "Whereas Plaintiff William M. Karnes has moved this Court to correct its

journal entry of 12/10/2009 nunc pro tunc with supporting affidavit and shown good cause for same:

{¶ 21} "It is therefore ordered, adjudged, and decreed that this Court's entry of 12/10/2009 is hereby corrected to read:

{¶ 22} "This matter is hereby dismissed with prejudice at defendant's costs. Final. * * *"

{¶ 23} This judgment entry was signed by the trial judge and also signed as "Approved" by Magistrate Scott Kitson.

{¶ 24} Dianne appeals from the foregoing order and presents the following two assignments of error.

{¶ 25} "I. The trial court exceeded its jurisdiction and erred as a matter of law in this post-decree divorce proceeding when it entered a Civil Rule 60(A) order modifying an entry of voluntary dismissal made pursuant to Civil Rule 41(A)(1)(a).

{¶ 26} "II. The trial court abused its discretion when it entered a Civil Rule 60(A) nunc pro tunc order that altered the substantive rights of the appellant."

{¶ 27} Dianne argues the lower court lacked jurisdiction to alter the December 10, 2009 judgment entry in such a manner. She further argues that the lower court denied her right to due process of law in correcting the December 10, 2009 judgment entry without first conducting a hearing. On the peculiar facts

of this case, this court disagrees.

{¶ 28} Civ.R. 53(C)(1)(a) provides that a court of record may appoint a magistrate to determine "any motion in any case." The magistrate is authorized to conduct the proceeding "as if by the court." Civ.R. 53(C)(2). When the proceeding concludes, the magistrate's "decision may be general unless findings of fact and conclusions of law are timely requested by a party * * *." Civ.R. 53(D)(3)(a)(ii).

{¶ 29} Civ.R. 53(D)(3)(b)(iii) also requires that, if a party has any objection to a magistrate's factual finding, "whether or not specifically designated as a finding of fact * * * [the objection to the factual finding] shall be supported by * * * an affidavit of that evidence if a transcript is not available. * * *." The objection must be made within fourteen days. Civ.R. 53(D)(3)(b)(I).

{¶ 30} The rule permits the trial court to adopt the magistrate's decision without modification. Civ.R. 53(D)(4)(b). However, if a party files timely objections, the court must "undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues * * *"; the court is not required to conduct a new hearing. Civ.R. 53(D)(4)(d). The trial court must, at any event, enter a judgment on the matter. Civ.R. 53(D)(4)(e).

{¶ 31} According to the record in this case, when the parties appeared at the November 24, 2009 "full" hearing, Dianne decided to dismiss her motion to

modify the DOPO. The magistrate informed the trial judge of this decision, and the magistrate's information, i.e., the "finding," became the December 10, 2009 judgment entry.

{¶ 32} In a timely manner, although not specifically styled as such, William filed an "objection" to the trial court's entry of judgment on the magistrate's finding, accompanied by his affidavit of what the record truly should reflect. Dianne filed an opposition brief; she attached her attorney's affidavit. Since the two affidavits conflicted, Civ.R. 53(D)(4)(d) permitted the lower court to resolve the matter simply by asking the magistrate who conducted the hearing to review the two affidavits.

{¶ 33} Once the magistrate informed the lower court which affidavit more accurately reflected what had occurred at the November 24, 2009 hearing, the court could correct the final judgment entry accordingly. The correction, under the circumstances of this case, merely "serve[d] to have the record speak the truth." *Oliva v. Maurer* (May 2, 1991), Cuyahoga App. No. 60298.

{¶ 34} "The common law rule giving courts the power to enter nunc pro tunc orders has been codified by Civ.R. 60(A)." *Norris v. Ohio Dept. of Rehab. & Corr.*, Franklin App. No. 05AP762, 2006-Ohio-1750, at ¶12. Civ.R. 60(A) provides that, "[c]lerical 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."

{¶ 35} According to the Ohio Supreme Court, "Civ.R. 60(A) permits a trial court, in its discretion, to correct clerical mistakes which are apparent on the record, but does not authorize a trial court to make substantive changes in judgments." *State ex rel. Litty v. Leskovyansky*, 77 Ohio St.3d 97, 100, 1996-Ohio-340, 671 N.E.2d 236. "The term 'clerical mistake' refers to a mistake or omission, mechanical in nature and apparent on the record which does not involve a legal decision or judgment." Id.

{¶ 36} "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, 564 N.E.2d 97 (citation omitted).

{¶ 37} A review of the language of the December 10, 2009 judgment entry supports a conclusion that it contained blunders in execution. *Wood v. Wood*, Portage App. No. 2009-P-0076, 2010-Ohio-2155. It indicated Dianne was dismissing her motion, thereby "disposing of the case," and permitting judgment in the action to be "rendered." Such language made no sense if she were dismissing it "without" prejudice. Furthermore, since Dianne made the decision

to dismiss her motion, the judgment entry's imposition of costs for the motion on William also made no sense.

{¶ 38} Civ.R. 60(A) granted authority to the lower court to issue a corrected judgment entry in this case. *Binder v. Binder*, Cuyahoga App. No. 88468, 2007-Ohio-4038. Moreover, Civ.R. 53(D) did not require the lower court to conduct a hearing before issuing the corrected order.

{¶ 39} Dianne's assignments of error, therefore, are overruled.

{¶ 40} The judgment entry of December 30, 2009 is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

_____

KENNETH A. ROCCO, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
JAMES J. SWEENEY, J., CONCUR