[Cite as *Brownlee v. Brownlee*, 2010-Ohio-5602.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94494

ELLEN J. BROWNLEE

PLAINTIFF-APPELLEE

vs.

TIMOTHY A. BROWNLEE

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. D-316333

BEFORE: Rocco, P.J., McMonagle, J., and Stewart, J.

RELEASED AND JOURNALIZED: November 18, 2010

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KENNETH A. ROCCO, P.J.:

{¶ 1} This case is before the court on the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, on the record from the lower court, the briefs, and oral arguments of counsel. Appellant argues that the domestic relations court erred by refusing to set aside a qualified domestic relations order ("QDRO") that appellant claims to be in conflict with the judgment entry of divorce. We find the QDRO relating to appellant's retirement savings plan was void because it did not implement the terms of the divorce decree. Therefore, we reverse the domestic

relations court's order, set aside the QDRO relating to the savings plan, and remand for further proceedings consistent with this opinion.

Procedural History

{¶ 2} The domestic relations court entered its final judgment entry of divorce in this case on December 4, 2008. Among other things, the court found that appellant was "a participant in a retirement savings plan and a retirement benefit plan through his employer ABB, Inc.," and ordered that "each of the aforementioned pension and retirement accounts shall be divided by Qualified Domestic Relations Order ('QDRO') based on a coverture fraction using the length of the marriage." The court found that "the parties were married on August 29, 1999 and that in order to reach an equitable distribution of the parties' marital assets[,] the marriage terminates upon the date that this decision is journalized," that is, December 4, 2008. Finally, the court ordered appellee to draft and submit the QDRO to the court and the retirement plan.

{¶ 3} Nine months later, on September 4, 2009, the domestic relations court entered two QDROs relating to the "ABB Cash Balance Pension Plan" and the "Personal Retirement Investment and Savings Management Plan for Employees of ABB Inc." The QDRO relating to the "Cash Plan" stated that the plan would pay appellee:

> "Fifty Percent (50%) of the Marital Portion of the value of the Participant's vested accrued benefit under the Plan as of December 4, 2008. The Marital Portion of the vested accrued benefit shall be determined by multiplying the Participant's vested accrued benefit as of December 4, 2008, by a fraction (less than or equal to 1.0), the

numerator of which is the number of months of the Participant's participation in the Plan (including the prior plan, if any) earned during the marriage (from August 29, 1999 to December 4, 2008), and the denominator of which is the total number of months of the Participant's participation in the Plan as of December 4, 2008." (Emphasis omitted.)

{¶ 4} The QDRO relating to the "Savings Plan," stated:

"*Amount of Assignment:* This order assigns to [appellee] a portion of Participant's Total Account Balance under the Plan in an amount equal to Fifty Three Thousand Two Hundred Sixty Three and 69/100 Dollars ($53,263.69), effective as of June 4, 2008 (or the closest valuation date thereto).

"*Allocation of benefits:* The [appellee's] share of the benefits will be allocated on a "pro rata" basis among all of the Participant's accounts maintained on his behalf under the Plan.

"*Investment Earnings:* The [appellee] shall also be entitled to any interest and investment earnings or losses attributable thereon for periods subsequent to June 4, 2008, until the date of total distribution."

{¶ 5} On December 4, 2009, appellant moved the domestic relations court to set aside the QDRO relating to the savings plan, arguing that the order was not consistent with the judgment entry of divorce. The court denied this motion, without opinion.

Law and Analysis

{¶ 6} "[A] QDRO implements a trial court's decision of how a pension is to be divided incident to divorce or dissolution." *Wilson v. Wilson*, 116 Ohio St.3d 268, 878 N.E.2d 16, 2007-Ohio-6056, ¶7. "A QDRO does not in any way constitute a further adjudication on the merits of the pension division, as its sole purpose is to implement the terms of the divorce decree." Id. at ¶16. "Once a

division of property is established in the divorce decree that decision 'is not subject to future modification by the court.' R.C. 3105.171(I)." *Schneider v. Schneider*, Stark App. No. 2009CA00090, 2010-Ohio-534, ¶9.

{¶ 7} Appellant could have appealed from the QDROs the court entered. *Miller v. Miller*, Medina App. No. 07CA0068-M, 2008-Ohio-2106, ¶15; see, also, *State ex rel. Sullivan v. Ramsey*, 124 Ohio St.3d 355, 2010-Ohio-252, 922 N.E.2d 214, ¶21. He did not. The question thus arises whether his motion to vacate was improperly used as a substitute for an appeal from the QDRO. *Orama v. Orama*, Lorain App. No. 08CA009321, 2008-Ohio-5188, ¶7.

{¶ 8} We find that it was not. Appellant asserted in his motion that the QDROs were not consistent with the divorce decree. A QDRO that fails to implement the divorce decree is void. *Bagley v. Bagley*, 181 Ohio App.3d 141, 2009-Ohio-688, ¶26, 908 N.E.2d 469; *Himes v. Himes*, Tuscarawas App. No. 2004AP020009, 2004-Ohio-4666, ¶20-21; *Doolin v. Doolin* (1999), 123 Ohio App.3d 296, 704 N.E.2d 51. The trial court has the inherent power to vacate a void decree. A party need not comply with Civ.R. 60(B) to vacate a void decree. *Plummer v. Plummer*, Montgomery App. No. 23743, 2010-Ohio-3450, ¶27.

{¶ 9} In this case, the QDRO relating to the savings plan did not implement the terms of the divorce decree. The valuation date of June 4, 2008 that was used in the QDRO does not coincide with the date the divorce decree sets for the termination of the marriage, December 4, 2008. Furthermore, the dollar amount does not reflect 50% of the value accrued during the marriage

pursuant to the formula set forth in the divorce decree. Therefore, we agree with appellant that the domestic relations court erred by failing to set aside the QDRO, because the QDRO was a void attempt to modify the decree. We reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

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

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

CHRISTINE T. McMONAGLE, J., CONCURS
IN JUDGMENT ONLY;
MELODY J. STEWART, J., DISSENTS
(SEE ATTACHED DISSENTING OPINION)

MELODY J. STEWART, J., DISSENTING:

{¶ 10} Although I agree that the majority's decision to reverse the QDRO would yield a fair result if we were to consider the merits of appellant's arguments, I must nonetheless respectfully dissent because I believe any deviation in the QDRO from the terms of the divorce decree was simple error and not void on jurisdictional grounds. That being the case,

appellant did not timely appeal and, in any event, has incorrectly used Civ.R. 60(B) as a substitute for an appeal.

{¶ 11} This court has not, until today, followed precedent making QDROs jurisdictional, and there is good reason not to. As noted by Judge Fain in his concurring opinion in *Bagley v. Bagley*, 181 Ohio App.3d 141, 2009-Ohio-688, 908 N.E.2d 469, there has been a disturbing trend of jurisdictionalizing simple error. Id. at ¶36. A QDRO is an order in aid of execution of judgment that is subject to review for error separate and apart from a divorce decree. See *Wilson v. Wilson*, 116 Ohio St.3d 268, 2007-Ohio-6056, 878 N.E.2d 16, syllabus. Correcting an incorrect QDRO to reflect what the court intended to order does not amount to an improper modification of that order in the absence of a specific reservation of jurisdiction to do so. I agree with Judge Fain — the reservation of jurisdiction to modify the terms of a division of marital property does not implicate subject matter jurisdiction. *Bagley*, 181 Ohio App.3d, at ¶44.

{¶ 12} I would therefore find that the QDRO is not void and appellant could have and should have filed a direct appeal from it. He did not do so in a timely manner, so this court lacks jurisdiction to hear the appeal. See App.R. 4(A). I moreover note that to the extent appellant sought relief from judgment under Civ.R. 60(B), he incorrectly used the rule as a substitute for an appeal, *Doe v. Trumbull Cty. Children Servs. Bd.* (1986), 28 Ohio St.3d

128, 131, 502 N.E.2d 605, because he failed to make any argument on the requisite elements of a motion for relief from judgment as set forth in paragraph two of the syllabus to *GTE Automatic Elec. v. ARC Industries* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113.