ORIGINAL

NO.

IN THE SUPREME COURT OF OHIO

18-1073

APPEAL FROM
THE ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO
NO. 2017-T-0033

TODD ANTHONY WALSH,

Plaintiff-Appellant

-vs-

SANDRA WALSH,

Defendant-Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

Counsel for Defendant-Appellee

THOMAS A. WILL, ESQ.
One Gateway Center, Suite 700
Fort Duquesne Boulevard
Pittsburgh, PA 15222
(412) 281-5110
twill@thomasawill.com

Counsel for Plaintiff-Appellant

MARK LAVELLE
Registration No: 0061904
1045 Tiffany South, #3
Youngstown, Ohio 44514
(330) 758-6900
lavellelaw@aol.com

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EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST

A trial court granting one parties' motion for relief from judgment to alter the actual length of marriage, after realizing that the party would be ineligible to receive a portion of pension payments directly from the United States Secretary of Defense as opposed to relying on the court to enforce payments, circumvents the Defense Finance and Accounting Service's 10/10 rule as set forth in 10 U.S.C. 1408(d)(2), and is a blatant manipulation of the factual record and an issue of great public interest.

STATEMENT OF THE CASE

Todd A Walsh appealed from the judgment entry of the Trumbull County Court of Common Pleas, Domestic Relations Division, adopting the decision of its magistrate, and granting his ex-wife Sandra Kehler's motion for correction to judgment entry of divorce pursuant to Civ.R. 60(B). At issue was the division of Mr. Walsh's United States Navy pension pursuant to a qualified domestic relations order ("QDRO"). Mr. Walsh contended the trial court lacked jurisdiction to modify the Consent Judgment Entry of Divorce as the Defendant-Appellee failed to meet any of the permissible requirements of Civ.R. 60(B) and the trial court only retained jurisdiction to enforce the QDRO once it was filed with the court. Finding no reversible error, the Court of Appeals affirmed the trial court without addressing the issues raised on appeal instead finding that the trial court retained jurisdiction over the QDRO and, therefore, could modify the consent decree.

STATEMENT OF FACTS

The couple was married August 10, 1994. They have no children. They permanently separated August 7, 2000. January 27, 2014, Mr. Walsh filed for divorce. Ms. Kehler answered March 5, 2014. The parties entered a consent judgment entry of divorce October 30, 2014, which was signed by the trial court December 8, 2014. Relevant to the appeal are paragraphs one and nine of the judgment entry. Paragraph one established the term of the marriage as being August 10, 1994 through August 7, 2000. Paragraph nine established the terms regarding division of Mr. Walsh's naval pension (he served twenty years). The parties were ordered to submit information to QDRO Consultants, LLC, so it could fashion a QDRO. That was to be submitted to the trial court within 45 days. The trial court retained jurisdiction of the QDRO in the judgment entry of divorce.

Considerable delay attended preparation of the QDRO. Ms. Kehler blamed Mr. Walsh's failure to submit information to QDRO Consultants. Mr. Walsh blamed Ms. Kehler's failure to pay her half of QDRO Consultants' fee. Following hearing before the magistrate, the issues were resolved by an order he filed January 26, 2016, which was adopted by the trial court that same day.

Ms. Kehler moved to modify the divorce decree October 18, 2016. Her counsel had been contacted by QDRO Consultants, and informed that the language in the judgment entry of divorce would not be acceptable to the military authorities. January 9, 2017, Ms. Kehler submitted the motion for correction pursuant to Civ.R. 60(B) subject of this appeal. February 7, 2017, Mr. Walsh opposed the motion. The motion came on for hearing before the magistrate March 3, 2017. Mr. Walsh testified as if on cross examination, and expressed considerable reluctance to part with any of his pension. David Kelley, founder and principal

of QDRO Consultants, one of the nation's leading experts in this field, testified for Ms. Kehler. He testified there were two problems with the language in the judgment entry of divorce. First, Ms. Kehler's portion of the pension should have been expressed as a percentage of the disposable monthly pension pay. He identified this as 15%, and testified this would involve no change in Ms. Kehler's portion of the pension as set forth in the formula contained in the judgment entry of divorce. The more serious problem, in Mr. Kelley's view, was the duration of the marriage - six years. He testified that pursuant to the "10/10" rule, the military will not grant an order providing for direct payment of pension benefits to an ex-spouse, unless the duration of the marriage is at least ten years. Otherwise, the ex-spouse must simply rely on the domestic relations courts to enforce payment.

Following the hearing, the magistrate issued a decision granting the motion to correct; altering the term of the marriage to August 10, 1994 through August 10, 2004; and ordering that Ms. Kehler receive 15% of Mr. Walsh's disposable pension pay per month. The decision was adopted by the trial court March 8, 2017. Mr. Walsh timely appealed, assigning a single error: "The trial court lacked jurisdiction to modify the consent judgment entry of divorce as the defendant-appellant failed to meet any of the permissible requirements of Rule 60(B) of the Ohio Rules of Civil Procedure."

LAW AND ARGUMENT

PROPOSITION OF LAW NO. I

A TRIAL COURT LACKS JURISDICTION TO USE A MOTION FOR RELIEF FROM JUDGMENT TO ESTABLISH A NEW DATE FOR THE TERMINATION OF A MARRIAGE, NOT BASED ON THE ACTUAL DURATION OF THE MARRIAGE, BUT, RATHER, TO CIRCUMVENT THE DEFENSE FINANCE AND ACCOUNTING SERVICE'S 10/10 RULE AS SET FORTH IN 10 U.S.C. 1408(d)(2).

Subject matter jurisdiction is the power a court has, conferred by law, to hear and render a valid enforceable judgment in a case. *Morrison v. Steiner* (1972), 32 Ohio St.2d 86, 87, 290 N.E.2d 841; see *State ex rel. Bush v. Spurlock* (1989), 42 Ohio St.3d 77, 80, 537 N.E.2d 641 (the standard of review for dismissals for want of subject matter jurisdiction is " whether any cause of action cognizable by the forum has been raised in the complaint"). The jurisdiction of the court of common pleas and its divisions is determined by statute. Section 4(B), Article IV, Ohio Constitution. R.C. 3105.011 confers jurisdiction on the court of common pleas, including its domestic relations division, to determine all domestic relations matters. R.C. 3105.171; *Keen v. Keen*, 157 Ohio App.3d 379, 2004-Ohio-2961, 811 N.E.2d 565, at ,110. Subject-matter jurisdiction relates to the proper forum for an entire class of cases, not the particular facts of an individual case. *In re Ohio Bur. Of Support*, 7th Dist. No. 00AP0742, citing *State v. Swiger* (1998), 125 Ohio App.3d 456,462, 708 N.E.2d 1033. *State ex rel. Tubbs Jones*, 84 Ohio St.3d at75, 701 N.E.2d 1002.

The subject-matter jurisdiction of Ohio courts of common pleas, set forth in R.C.3105.011, is very broad, "[t]he court of common pleas including divisions of courts of domestic relations, has full equitable powers and jurisdiction appropriate to the determination of all domestic relations matters. This section is not a determination by the general assembly that such equitable powers and jurisdiction do not exist with respect to any such matter." The discretion exercised by the trial court in considering a Civ.R. 60(B) motion is not unbridled. *Doddridge v. Fitzpatrick* (1978), 53 Ohio St.2d 9, 12, 7 O.O.3d 5, 6-7, 371 N.E.2d 214,217. The court must consider whether the movant has demonstrated three requisite elements for obtaining Civ.R. 60(B) relief:

"(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)(l) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(l), (2), (3), not more than one year after the judgment, order or proceeding was entered or taken." *GTE Automatic Elec. V ARC Industries, Inc* (1976), 47 Ohio St.2d 146, 1 O.O.3d 86, 351 N.E.2d 113, paragraph two of the syllabus. The elements entitling a movant to Civ.R. 60(B) relief "are independent and in the conjunctive; thus, the test is not fulfilled if any one of the requirements is not met." *Strack v. Pelton* (1994), 70 Ohio St.3d 172, 174, 637 N.E.2d 914, 915. "[T]he movant must allege operative facts with enough specificity to allow the court to decide whether it has met that test[.]" *Aurora Loan Servs. Brown*, 2010 Ohio 5426 (Ohio App., 2010) quoting *GTE*, 47 Ohio St.2d at 150-151.

Even though there is no requirement that the movant submit an affidavit or other material with his motion, because he has the burden of proof and is not automatically entitled to a hearing, good legal practice dictates that the movant must do all that he can to present allegations of operative facts to demonstrate that he is filing his motion within a reasonable time; that he is entitled to relief for one of the grounds specified in Civil Rule 60(B)(l) through (5); and that he has a valid defense. *Liberty Nursing Ctr. Of Englewood, Inc., v. Valentine*, 2012 Ohio 1096 (Ohio App., 2012). The rigid procedural requirements of Civil Rule 56 regarding the documents and other material the parties should submit in support of and in opposition to a motion for summary judgment are excellent guides and a commendable procedure to be followed in seeking relief or in opposing relief under Civil Rule 60(B). Id.

Defendant-Appellee's October 18, 2016 Rule 60(B) Motion for Correction to Judgment Entry for Divorce simply states she had "no opportunity to foresee or control" the circumstances that occurred after the Judgment Entry was issued and, therefore, she is entitled to relief under Civ.R. 60(8)(4) and (5) as it is "no longer equitable" for the Judgment Entry to remain uncorrected. (T.d. 17)

1. THE MAGISTRATE'S DECISION FINDS THAT DEFENDANT-APPELLEE WAS ENTITLED TO RELIEF FROM JUDGMENT WITHOUT CONSIDERING WHICH RULE 60(B) FACTOR IS APPLICABLE.

As to the second GTE factor, although a moving party is not required to support a motion with evidentiary materials, the movant must do more than make bare allegations that he or she is entitled to relief under one of the grounds in Civ.R. 60(B). *Kay v. Marc Glassman, Inc.*, (1996), 76 Ohio St.3d 18, 20, 665 N.E. 2d 1102, 1104 (to convince the court that it is in the interests of justice to set aside the judgment, the movant may decide to submit evidentiary materials in support of the motion). The motion must set forth a prima facie showing that justice will be served by setting aside the judgment and contain operative facts that a Civ.R. 60(B) grounds for relief exists. *Rose Chevrolet, Inc., v. Adams* (1988), 36 Ohio St.3d 17, 21, 520 N.E.2d 564, 569.

The Magistrate's March 8, 2017 Decision glosses over what ground that it found Defendant-Appellee relied upon in making her 60(B) motion. The Magistrate' s decision states, in relevant part:

> "The divorce judgment entry provided that deft-wife is entitled to a portion of plaintiff-husband' s military pension, however, the wording of the said judgment entry prohibits a proper military withholding Court Order to be drafted which accurately reflects the intent of the parties and enforcement of this Court's Order. The parties said judgment entry includes a modification clause and equity provides that it should be modified to provide that benefits to which deft- wife is entitled." (T.d. 22)

Nowhere does the Magistrate's Decision make a finding that Defendant-Appellee met her burden of proving that she was entitled to relief under one of the grounds states in Civ.R. 60(B) (1) through (5), but instead makes a general finding under "equity" that the motion should be granted. Regardless of this fact, assuming, arguendo, that the Magistrate did find that the Defendant-Appellee had met her burden, the Magistrate fails to specify which ground it was making its finding under.

2. DEFENDANT-APPELLEE DOES NOT MEET THE CIV.R. 60(B)(4) CRITERIA

Ohio Rules of Civil Procedure, Rule 60(B)(4) states: "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." Civ.R. 60(B)(4) is "designed to provide relief to those who have been prospectively subjected to circumstances which they had no opportunity to foresee or control." *Strack v. Pelton* (1994), 70 Ohio St.3d 172, 637 N.E.2d 914. quoting *Knapp v. Knapp* (1986), 24 Ohio St.3d 141, 24 OBR 362, 493 N.E.2d 1353, paragraph one of the syllabus; *see also Jackson v. Hendrickson*, 2008 Ohio 491 (Ohio App., 2008). However, that is not the case in this matter. In fact, it is just the opposite in this case as the Defendant-Appellee had every opportunity to foresee and control the drafting of the Judgment Entry.

Unquestionably, all parties and counsel prepared, reviewed, approved, signed and submitted the proposed Journal Entry for the Court's review and signature. A key provision of the Journal Entry was determination of the length of the marriage and the preparation of the QDRO. Unfortunately, upon information and belief, the Defendant-Appellee did nothing in preparation for the filing of the Entry. The Defendant-Appellee did not depose the Plaintiff- Appellant, she did not issue subpoenas to the respective military agencies, nor even issue interrogatories and request for production of documents to him for review. It appears

she did not even place a call to QDRO consulting services to determine what language would be critical and necessary to be included in the Journal Entry. Had she done so, however, Defendant-Appellee would have had all of the necessary information to make a determination that the Judgment Entry needed to reflect a ten (10) year marriage for the military to honor the QDRO request.

Because Defendant-Appellee failed to properly investigate, explore, and prepare in this area prior to the Court's finial Judgment Entry she failed to realize or appreciate the fatal flaw which she now claims she had no opportunity to foresee or control. Rules of equity do not provide relief for poor preparation or research on behalf of the Defendant-Appellee or her chosen counsel.

In *Knapp v. Knapp* (1986), 24 Ohio St. 3d 141, 145-46, in finding that it would be unfair to relieve a party from his voluntary, deliberate choice under Civ.R. 60(8)(4), the Ohio Supreme Court made it clear:

> A decision, contrary to the one we make today, would open a veritable Pandora's box of problems. For instance, litigants, armed with knowledge that Civ.R. 60(8)(4) would relieve them of the consequences of their voluntary, deliberate choices, would be encouraged to litigate carelessly.*** [T]his would be a subversion of judicial economy and an opening of the proverbial floodgates, causing Ohio's courts to drown in a sea of duplicative , never-ending litigation.
>
> Id. at 22.

Based on the fact that the Defendant-Appellee had the opportunity to inquire what language needed to be included in the finalized Judgment Entry, she was on notice that she needed to make sure the length of the marriage was at least ten (I 0) years for the military to honor the

QDRO request and her failure to do so was done so deliberately which she had the ability to foresee and control.

3. DEFENDANT-APPELLEE DOES NOT MEET THE CIV.R. 60(B)(5) CRITERA

" Civ.R. 60(B)(5) is intended as a catch-all provision reflecting the inherent power of a court to relieve a person from the unjust operation of a judgment, but it is not to be used as a substitute for any of the other more specific provisions of Civ.R. 60(B)." *Caruso-Ciresi, Inc., v. Lohman* (1983), 5 Ohio St.3d 64, 5 OBR 120, 448 N.E.2d 1365, paragraph one of the syllabus. Civ.R. 60(B)(5) applies only when a more specific provision does not apply. Id. at 66. The requirement that Civ.R. 60(B)(5) may not be used as a substitute for any of the more specific provisions of Civ.R. 60(B) does not preclude the use of Civ.R. 60(B)(5) on the basis of operative facts different from or in addition to those contemplated by the other, more specific provisions. *Cuervo v. Snell*, 131 Ohio App.3d 560, 723 NE 2d 139 (Ohio App., 1998). However, the grounds for invoking said provision should be substantial. *Caruso-Ciresi*, 5 Ohio St.3d at 66; *see also, Cuyahoga Child Support Agency v. Guthrie* (1999), 84 Ohio St.3d 437, 441. Moreover, "[i]t is well-established that the ' other reason' clause of Civ.R 60(B) will not protect a party who ignores its duty to protect its interests." *Mount Olive Baptist Church v. Pipkins Paints* (1979), 64 Ohio App.2d 285, 289. Importantly, the catch-all ground in Civ.R. 60(B)(5) is to be used only in extraordinary and unusual cases when the interests of justice warrant it. *In re Dombroski*, 2014 Ohio 5828 (Ohio App., 2014), citing *Sell v. Brockway*, 7th Dist. No. 11CO030, 2012-Ohio-4552,125.

Examples of reasons justifying relief under Civ.R 60(B) (5) are errors or omissions of the court. See, State ex rel. *Gyurcsik v. Angelotta* (1977), 50 Ohio St.2d 345, 347, 364 N.E. 2d 284, 285. The Ohio Supreme Court has further said that a "judge ' s participation in a case which gives rise to the appearance of impropriety and possible bias could constitute grounds for relief under Civ.R 60(B) (5)." *Volodkevich v. Volodkevich* (1988), 35 Ohio St.3d 152, 154, 518 N.E.2d 1208, 1211. Fraud perpetrated on the court is also a ground for relief under Civ.R 60(B) (5),whereas fraud between parties is properly brought under Civ.R 60(8) (3). See *Hash (Krumm) v. Hash (Krumm)* (May 1, 1998), Montgomery App. No. 16855, 1998 WL 211893, *4-5.

Here, given this unique pedigree of case law in Ohio, it is clear that relief would not be proper under Civ.R 60(8) (5) as previously pointed out the Defendant-Appellee had ample opportunity to investigate, prepare, and participate in the drafting of the Judgment Entry in this matter and had every opportunity to protect her interests.

4. THE TRIAL COURT ONLY RETAINED JURISDICTION OVER THE TO BE ISSUED "QUALIFIED DOMESTIC RELATIONS ORDER" AS IT RELATES TO THE RETIREMENT ACCOUNT.

At the time of the signing and filing of the Judgment Entry of Divorce paragraph nine (9) provided the following:

> "[A] Qualified Domestic Relations Order shall be issued against said Retirement Account and a copy shall be forwarded to Department of Veterans Affairs.***The Court shall retain jurisdiction over said order. The parties shall have said plan prepared by QDRO Consultants, LLC and submitted to the Court as a separate Order within forty-five (45) days of this Final Order. Plaintiff and Defendant shall be equally responsible for preparation and court costs." (T.d.9)

It is clear from the language of the Judgment Entry on its face the Court limited its remaining jurisdiction over this matter to the "separate Order" that was to be filed within forty-five (45) days and considered the Judgment Entry of Divorce to be a Final Order. The Eleventh District Court of Appeals has found CIV.R. 60(8)(3) or (5) to be a proper remedy when an opposing party's counsel submits an "agreed" judgment entry that is "materially and substantially different" from a prior agreement dictated on the record. See, *Lintz v.Lintz*, 11th Dist. Portage No. 90-P-2261, 1992 WL 188354, *2-3 (June 12, 1992). Such conduct by opposing counsel can constitute fraud on a party, fraud on the court, a misrepresentation, or misconduct for purposes of Civ.R. 60(8). Id.; *See also C.B.H., Inc. v. Joseph Ski/ken & Co.*, 11th Dist. Lake No. 93-L-038, 1993 WL 548497, *4 (Dec.17, 1993) {"Therefore, it is clear that Civ.R. 60(8)(5) is a proper avenue for seeking relief from an agreed entry which does not reflect the actual agreement between the parties, as long as the party seeking relief did not submit the entry"); *Randolph Twp. Trustees v. Portage County Agr. Society*, 11th Dist. Portage No. 94-P- 0108, 1995 WL 815507, *2-3 (Dec. 15, 1995) (same).

In the present case there is no allegations of fraud, misrepresentation, or misconduct. Both parties with counsel drafted the agreement, its terms, reviewed it with the court and executed the document after ample time for research and review. The Defendant-Appellee did not realize that the military would not honor a six (6) year marriage when she agreed to the dates of the union to be from August 10, 1994 through August 7, 2000. This is an essential term of the Final Order and the only remedy to modify it would have been showing some sort of fraud on the part of the Plaintiff-Appellant via Civ.R. 60(8)(3) or (5), which they have failed to do, or a direct appeal to this Court.

It is important to note, however, that the Defendant-Appellee would not have been able to pursue the direct appeal due to the fact that she agreed to the terms of the Judgment Entry and the time for appeal had lapsed by the time she discovered her error. It is axiomatic that "a party cannot appeal an agreed judgment entry to which he has consented." *Wingenfeld v. Wingenfeld* , 8th Dist. Cuyahoga No. 63942, 1993 WL 497074, *4 (Dec. 2, 1993). See also *Bissell v. Bissell*, 2016-Ohio-3086.

This case is thus of public or great general interest as it is critical that in granting the appellee's motion for relief from judgment, the court established a new date for the termination of the marriage, not based on the actual duration of the marriage, but, rather, on the desire of one of the parties to circumvent the Defense Finance and Accounting Service's 10/10 Rule. For these reasons, this Court should accept jurisdiction to review this proposition of law.

Respectfully submitted,

MARK LAVELLE (0061904)
1045 Tiffany South, #3 Youngstown, Ohio 44514
(330) 758-6900
lavellelaw@aol.com

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was sent by means of regular U.S. Mail and email this 31st day of July, 2018 to Thomas A. Will, Thomas A. Will & Associates, Inc., One Gateway Center, Suite 700, 420 Fort Duquesne Boulevard, Pittsburgh, PA 15222.

MARK LAVELLE (0061904)
Counsel for Plaintiff-Appellant

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

FILED
COURT OF APPEALS

JUN 25 2018

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

TODD ANTHONY WALSH, :

Plaintiff-Appellant, :

- vs - :

SANDRA ANN WALSH, :

Defendant-Appellee. :

OPINION

CASE NO. 2017-T-0033

Civil Appeal from the Trumbull County Court of Common Pleas, Domestic Relations Division, Case No. 2014 DR 00028.

Judgment: Affirmed.

Mark Lavelle, 1045 Tiffany South, #3, Youngstown, Ohio, 44514 (For Plaintiff-Appellant).

Thomas A. Will, Thomas A. Will & Associates, Inc., One Gateway Center, Suite 700, 420 Fort Duquesne Boulevard, Pittsburgh, PA 15222 (For Defendant-Appellee).

COLLEEN MARY O'TOOLE, J.

{¶1} Todd A. Walsh appeals from the judgment entry of the Trumbull County Court of Common Pleas, Domestic Relations Division, adopting the decision of its magistrate, and granting his ex-wife Sandra A. Kehler's motion for correction to judgment entry of divorce pursuant to Civ.R. 60(B). At issue is the division of Mr. Walsh's naval pension pursuant to a qualified domestic relations order ("QDRO"). Mr. Walsh contends

the trial court lacked jurisdiction to correct the divorce decree's provisions regarding the QDRO. Finding no reversible error, we affirm.

{¶2} The couple was married August 10, 1994. They have no children. They permanently separated August 7, 2000. January 27, 2014, Mr. Walsh filed for divorce. Ms. Kehler answered March 5, 2014. The parties entered a consent judgment entry of divorce October 30, 2014, which was signed by the trial court December 8, 2014. Relevant to this appeal are paragraphs one and nine of the judgment entry. Paragraph one established the term of the marriage as being August 10, 1994 through August 7, 2000. Paragraph nine established the terms regarding division of Mr. Walsh's naval pension (he served twenty years). The parties were ordered to submit information to QDRO Consultants, LLC, so it could fashion a QDRO. That was to be submitted to the trial court within 45 days. The trial court retained jurisdiction of the QDRO in the judgment entry of divorce.

{¶3} Considerable delay attended preparation of the QDRO. Ms. Kehler blamed Mr. Walsh's failure to submit information to QDRO Consultants. Mr. Walsh blamed Ms. Kehler's failure to pay her half of QDRO Consultants' fee. Following hearing before the magistrate, the issues were resolved by an order he filed January 26, 2016, which was adopted by the trial court that same day.

{¶4} Ms. Kehler moved to modify the divorce decree October 18, 2016. Her counsel had been contacted by QDRO Consultants, and informed that the language in the judgment entry of divorce would not be acceptable to the military authorities. January 9, 2017, Ms. Kehler submitted the motion for correction pursuant to Civ.R. 60(B) subject of this appeal. February 7, 2017, Mr. Walsh opposed the motion.

{¶5} The motion came on for hearing before the magistrate March 3, 2017. Mr. Walsh testified as if on cross examination, and expressed considerable reluctance to part with any of his pension. David Kelley, founder and principal of QDRO Consultants, one of the nation's leading experts in this field, testified for Ms. Kehler. He testified there were two problems with the language in the judgment entry of divorce. First, Ms. Kehler's portion of the pension should have been expressed as a percentage of the disposable monthly pension pay. He identified this as 15%, and testified this would involve no change in Ms. Kehler's portion of the pension as set forth in the formula contained in the judgment entry of divorce. The more serious problem, in Mr. Kelley's view, was the duration of the marriage – six years. He testified that pursuant to the "10/10" rule, the military will not grant an order providing for direct payment of pension benefits to an ex-spouse, unless the duration of the marriage is at least ten years. Otherwise, the ex-spouse must simply rely on the domestic relations courts to enforce payment.

{¶6} Following the hearing, the magistrate issued a decision granting the motion to correct; altering the term of the marriage to August 10, 1994 through August 10, 2004; and ordering that Ms. Kehler receive 15% of Mr. Walsh's disposable pension pay per month. The decision was adopted by the trial court March 8, 2017. Mr. Walsh timely appealed, assigning a single error: "The trial court lacked jurisdiction to modify the consent judgment entry of divorce as the defendant-appellant failed to meet any of the permissible requirements of Rule 60(B) of the Ohio Rules of Civil Procedure." Under this assignment of error, he presents a single issue for review: "Did the trial court lack jurisdiction and err in granting the defendant-appellee's relief from judgment pursuant to Rule 60(B)?"

{¶7} We review a trial court's decision to grant or deny a Civ.R. 60(B) motion for abuse of discretion. *Huntington Natl. Bank v. Lomaz*, 11th Dist. Portage Nos. 2008-P-0007, 2008-P-0061, 2010-Ohio-705, ¶27. Regarding this standard, we recall the term "abuse of discretion" is one of art, connoting judgment exercised by a court which neither comports with reason, nor the record. *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). An abuse of discretion may be found when the trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, ¶15 (8th Dist.)

{¶8} Civ.R. 60(B) provides, in pertinent part:

{¶9} "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. * * * "

{¶10} "Civ.R. 60(B) is an equitable remedy that is intended to afford relief in the interest of justice. To prevail on a motion pursuant to Civ.R. 60(B), the movant must

demonstrate: '(* * *)(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 (* * *).' *GTE Automatic Electric, Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, * * *, at paragraph two of the syllabus. These requirements are conjunctive; not disjunctive. *Id.* at 151." *Ludlow v. Ludlow*, 11th Dist. Geauga No. 2006-G-2686, 2006-Ohio-686, ¶23. (Parallel citation omitted.)

{¶11} In the trial court, Ms. Kehler pointed to Civ.R. 60(B)(4) ("it is no longer equitable that the judgment should have prospective application"), and Civ.R. 60(B)(5) ("any other reason justifying relief from the judgment"), as justifying her requested relief. Mr. Walsh argues that neither of these grounds is applicable, since neither justifies granting a party relief from voluntary actions. *Knapp v. Knapp*, 24 Ohio St.3d 141, paragraph two of the syllabus (Civ.R. 60(B)(4) ("Civ.R. 60(B)(4) will not relieve a litigant from the consequences of his voluntary, deliberate choice"); *Mount Olive Baptist Church v. Pipkin Paints*, 64 Ohio App.3d 285, 288 (8th Dist.1989) ("the 'other reason' clause of Civ.R. 60(B) will not protect a party who ignores its duty to take legal steps to protect its interest"). Mr. Walsh notes that Ms. Kehler voluntarily entered the consent judgment of divorce, and argues that she should have contacted the military to discover what it requires to divide a pension.

{¶12} We respectfully conclude that Civ.R. 60(B) jurisprudence is not applicable to this case. Initially we note that the trial court specifically retained jurisdiction of the QDRO issue in that judgment entry, pursuant to local rule. Further, we find the law as set forth in *Gordon v. Gordon*. 144 Ohio App.3d 21 (8th Dist.2001), to be controlling. Wife

moved for relief from judgment when the federal government denied her survivorship benefits under her ex-husband's FBI pension. *Id.* at 22-23. The trial court granted her motion, and modified the QDRO. *Id.* at 23. Husband appealed. *Id.* The Eighth District did not apply a Civ.R. 60(B) analysis. Rather, it reasoned as follows:

{¶13} "A QDRO is an order 'which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefit payable with respect to a participant under a plan (* * *).' Employee Retirement Income Security Act of 1974, Section 206(d)(3)(B)(i)(I). A QDRO is generally not modifiable unless the court has expressly reserved jurisdiction to do so. *Schrader v. Schrader* (1995), 108 Ohio App.3d 25, * * *.

{¶14} "While a trial court does not have continuing jurisdiction to modify a marital property division incident to a divorce or dissolution decree, it has the power to clarify and construe its original property division so as to effectuate its judgment. R.C. 3105.171(I); *Wolfe v. Wolfe* (1976), 46 Ohio St.2d 399, * * *; *Redding v. Redding* (Dec. 20, 1999), Clinton App. No. CA99-06-015, unreported, 1999 WL 1238834, citing *Peterson v. Peterson,* (July 12, 1999), Butler App. No. CA98-07-145, unreported, 1999 WL 527793. Courts have also found ways of granting relief in cases where the results of the finalized QDRO were not in accord with the court's original intent." (Parallel citations omitted.) *Gordon, supra*, at 24.

{¶15} In this case, the trial court retained jurisdiction regarding the QDRO. The intent of the parties had been that Ms. Kehler be paid 15% of Mr. Walsh's pension. The only changes in the judgment entry of divorce merely effectuated this original intent of the parties and the trial court.

{¶16} The assignment of error lacks merit.

{¶17} The judgment of the Trumbull County Court of Common Pleas, Division of Domestic Relations, is affirmed.

THOMAS R. WRIGHT, P.J., concurs in judgment only,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

{¶18} I respectfully dissent and would reverse the decision of the court below. In granting appellee's motion for relief from judgment, the court established a new date for the termination of the marriage, not based on the actual duration of the marriage, but, rather, on the desire of one of the parties to circumvent the Defense Finance and Accounting Service's 10/10 Rule. *See* 10 U.S.C. 1408(d)(2) ("[i]f the spouse or former spouse to whom payments are to be made under this section was not married to the member [of the military] for a period of 10 years or more * * *, payments may not be made under this section").

{¶19} That it would be more convenient for the appellee to receive her portion of appellant's military pension directly from the Secretary is not in dispute, but neither is it relevant nor does it justify the blatant manipulation of the factual record.

{¶20} A trial court's decision to adopt a de facto termination date for the marriage must be based on "***the facts*** and circumstances presented in a particular case."

(Emphasis added.) *Berish v. Berish*, 69 Ohio St.2d 318, 321, 432 N.E.2d 183 (1982). Typically, a court will adopt a de facto termination date "when the parties separate, make no attempt at reconciliation, continually maintain separate residences, separate business activities and/or separate bank accounts." (Citation omitted.) *Marini v. Marini*, 11th Dist. Trumbull Nos. 2005-T-0012 and 2005-T-0059, 2006-Ohio-3775, ¶ 13.

{¶21} Neither the majority nor the appellant has cited any authority for the proposition that circumventing the provisions of the Uniformed Services Former Spouses' Protection Act is a valid factual consideration for adopting a wholly fictional termination of marriage date. In plain terms, the August 10, 2004 termination date is a fabrication.

{¶22} As often happens, deception begets further complications. The August 10, 2004 termination date extends the duration of the marriage by four years, thus securing for the appellee a larger proportion of the retirement pay. (It is an undisputed fact that appellee is entitled to a proportion of appellant's retirement based on 5.99 years of marriage.) To offset this, appellee's QDRO expert explained that her percentage of the retirement could be modified to reflect six years of actual marriage and assured the court that Defense Services would accept the figures without questioning the discrepancy. Trial transcript at 43 ("DFAS will not go back and calculate, oh, jeez, actually it should be 30 percent."). There is no guarantee that the QDRO expert is correct and neither the lower court nor Defense Services is bound by the QDRO expert's opinion. Moreover, what should be questioned is the propriety of any court giving sanction to such a manipulative scheme.

{¶23} Assuming, arguendo, that the convenience of the appellee was a valid equitable consideration in fixing the duration of marriage, such remedy is not necessary

in the present case. If the appellant fails to obey the order to pay the appropriate portion of his retirement, appellee can turn to the court to enforce its judgment – just as the appellee could do if the appellant should fail to cooperate in providing necessary information to QDRO Consultants. This court should not be in the business of creating artificial periods of marriage to circumvent federal law for the convenience of a party.

{¶24} For the foregoing reasons, I respectfully dissent and would reverse the decision of the trial court.

STATE OF OHIO	)	**IN THE COURT OF APPEALS**
	)SS.	
COUNTY OF TRUMBULL	)	**ELEVENTH DISTRICT**

TODD ANTHONY WALSH,

Plaintiff-Appellant,

- vs -

SANDRA ANN WALSH,

Defendant-Appellee.

JUDGMENT ENTRY

CASE NO. 2017-T-0033

For the reasons stated in the Opinion of this court, the assignment of error is without merit. The order of this court is that the judgment of the Trumbull County Court of Common Pleas, Domestic Relations Division, is affirmed.

Costs to be taxed against appellant.

Colleen Mary O'Toole

JUDGE COLLEEN MARY O'TOOLE

THOMAS R. WRIGHT, P.J., concurs in judgment only,

DIANE V. GRENDELL, dissents with a Dissenting Opinion.