

[Cite as *Polley v. Polley*, 2003-Ohio-3798.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

LARRY RAY POLLEY
Plaintiff-Appellee

-vs-

KAREN E. POLLEY
Defendant-Appellant

JUDGES:
Hon. William B. Hoffman, P.J.
Hon. Sheila G. Farmer, J.
Hon. Julie A. Edwards, J.

Case No. 03COA003

OPINION

CHARACTER OF PROCEEDING: Appeal from the Ashland County Court of
Common Pleas, Case No. 01DIV11235

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: July 11, 2003

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

THOMAS MAST
148 East Liberty Street
Wooster, Ohio 44691

ROBERT W. LETT
273 Sandusky Street
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Hoffman, P. J.

{¶1} Defendant-appellant Karen E. Polley (“wife”) appeals the January 2, 2003 Judgment Entry of the Ashland County Court of Common Pleas, Domestic Relations Division, which overruled her Civ. R. 60(B) motion for relief from judgment and adopted the magistrate’s December 2, 2002 Decision as the order of the court. Plaintiff-appellee is Larry R. Polley (“husband”).

STATEMENT OF THE FACTS AND CASE

{¶2} Husband and wife were married on October 16, 1976, in Smithville, Ohio. Two children were born as issue of said union, both of whom are now emancipated. On May 9, 2001, husband filed a Complaint for Divorce in the Ashland County Court of Common Pleas, Domestic Relations Division. Wife filed a timely answer and counterclaim.

{¶3} Via Pretrial Scheduling Order filed June 13, 2001, the trial court scheduled a pretrial conference for October 5, 2001. The Order advised the parties the conference would be before the magistrate pursuant to Local DR R. 8. The Order instructed the parties to obtain and exchange certain information at least seven days prior to the pretrial. The discovery ordered included pension information from the parties’ respective employers; an itemization of all items of property, tangible or intangible, owned by each or both parties, with a designation as to what is marital and/or separate property; and appraisals of any assets of the parties for which the value is or may be in dispute.

{¶4} Husband filed a pretrial statement on October 1, 2001, stating:

{¶5} “[Husband] has a life insurance policy through Prudential Financial with a cash value of approximately \$5000.00. [Husband] does not know where [wife’s] two life insurance policies [sic] are or what are their values due to [wife] not disclosing the amount to [husband] yet as discovery is in the process. This issue may still be in dispute.” In her pretrial statement, wife reported the existence of a life insurance policy issued by Prudential Insurance Company with a value of approximately \$2,300.

{¶6} Via Pretrial Hearing Order filed October 9, 2001, the trial court ordered the parties to provide opposing counsel or the court with an exhibit list as well as copies of exhibits each intended to utilize during the trial. The matter proceeded to final hearing before the magistrate on February 11, 2002. Via Magistrate’s Decision filed May 23, 2002, the magistrate issued his decision which included a division of marital property and debt. Pursuant to the decision, wife was to transfer full ownership rights of Prudential Life Policy No. 39372618 to husband. Said policy had a value of \$5,000. The magistrate awarded Prudential Life Policy No. 62870983 with a value of \$10,000 to wife. Wife filed objections to the magistrate’s decision. Wife, however, did not object to the distribution of the insurance policies.

{¶7} The trial court issued its Judgment Entry: Decree of Divorce on September 20, 2002. The trial court distributed the life insurance policies as recommended by the magistrate in his May 23, 2002 Decision. Wife did not appeal this judgment entry, but filed a Motion to Correct Error in Previous Decision on September 25, 2002. In that motion, wife advised the trial court policy no. 6287093 awarded to her only had a cash surrender value of only \$251.37, instead of the \$10,000 value the trial court placed on it, and policy no. 39372618 awarded to husband, valued at \$5,000, had a value of

\$2,520.37. Wife requested the trial court correct the value of said awards and require husband to compensate her for the difference. Wife filed an Amended Motion to Correct Error in Previous Decision on September 30, 2002.¹ The matter came for hearing before the magistrate on November 18, 2002. Via Magistrate's Decision filed December 2, 2002, the magistrate determined wife was not entitled to relief from judgment as she had failed to establish her "neglect" was "excusable" within the meaning of Civ. R. 60(B). Wife filed objections to the magistrate's decision, which the trial court overruled. Via Decision and Judgment Entry filed January 2, 2003, the trial court adopted the magistrate's decision as written, and expressly found "excusable neglect [had] not been demonstrated."

{¶8} It is from this judgment entry wife appeals, raising the following assignment of error:

{¶9} "1. IN VIEW OF THE 25 YEAR MARRIAGE OF THESE PARTIES, MARRIAGE DATE BEING OCTOBER 16, 1976, AND THE RAISING OF THEIR TWO CHILDREN, EACH OF WHOM IS NOW ADULT, AND THE MODEST ACCUMULATION OF MARITAL ASSETS, THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING THE APPELLANT'S AMENDED OBJECTION TO THE DECISION FILED PURSUANT TO CIV. R. 60(B)(1) PERMITTING THE TRIAL COURT TO CORRECT THE MISTAKE OF THE TRIAL COURT IN CHARGING TO THE APPELLANT'S SHARE OF THE MARITAL ASSETS, THE VALUE OF A LIFE INSURANCE POLICY IN THE AMOUNT OF \$10,000, WHERE \$10,000 WAS THE DEATH BENEFIT OF THE POLICY, BUT ITS CASH SURRENDER VALUE WAS ONLY

¹ This motion placed a cash surrender value of \$2,642.88 on the life insurance policy awarded to husband. Wife stated husband should pay her \$3,684.07, instead of \$3,622.83 as she initially requested.

SOME OF \$263.30, A MISTAKE OF ALMOST \$9,700.00 WHERE NO EVIDENCE OF THE VALUE OF SAID POLICY WAS OFFERED OR RECEIVED IN EVIDENCE NOR WAS THE POLICY ITSELF OFFERED OR RECEIVED IN EVIDENCE.”

I.

{¶10} Wife maintains the trial court abused its discretion in overruling her motion for relief from judgment. We disagree.

{¶11} A motion for relief from judgment under Civ.R. 60(B) lies in the trial court's sound discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶12} In *GTE Automatic Elec. Inc. v. ARC Indus., Inc.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus, the Ohio Supreme Court held: "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.”

{¶13} The Ohio Supreme Court has defined "excusable neglect" in the negative by stating, " * * * the inaction of a defendant is not 'excusable neglect' if it can be labeled as a 'complete disregard for the judicial system'. " *Kay v. Marc Glassman, Inc.* (1996),

{¶14} Ohio St.3d 18, 20, citing *GTE*, supra, at 153. The term must be liberally construed, keeping in mind ΔCiv.R. 60(B) constitutes an attempt to >strike a proper balance between the conflicting principles that litigation must be brought to an end and justice should be done=.@ *Colley v. Bazell* (1980), 64 Ohio St.2d 243, 248 (Citation omitted). In determining whether a party's actions amount to excusable neglect, courts must look to the facts and circumstances of each case. *D.G.M., Inc. v. Cremeans Concrete & Supply Co., Inc.* (1996), 111 Ohio App.3d 134, 138.

{¶15} Nonetheless, neglect is inexcusable when the movant's inaction exhibits a complete disregard for the judicial system or that of an opposing party. *GTE*, supra at 153. Courts have found a movant establishes excusable neglect when unusual or special circumstances justified the neglect. However, cases generally suggest if the party or his attorney could have controlled or guarded against the happening or circumstance, the neglect is not excusable. *Vanest v. Pillsbury Co.* (1997), 124 Ohio App.3d 525.

{¶16} The record shows the parties were instructed to obtain and exchange itemizations of all items of property and the value of said assets. See, June 13, 2001 Pretrial Scheduling Order. Further, in his request for discovery, husband specifically sought the value of wife=s insurance policies. Upon review of the record in this matter, we find the trial court did not abuse its discretion in finding wife=s neglect in presenting evidence of the cash surrender value of the insurance policies was unexcusable.

{¶17} Wife=s sole assignment of error is overruled.

By: Hoffman, P.J.

Farmer, J. and

Edwards, J. concur

JUDGES

IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

LARRY RAY POLLEY

Plaintiff-Appellee

-vs-

KAREN E. POLLEY

Defendant-Appellant

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JUDGMENT ENTRY

Case No. 03COA003

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Ashland County Court of Common Pleas, Domestic Relations Division is affirmed. Costs assessed to appellant.

JUDGES