[Cite as *In re Edgell*, 2010-Ohio-6435.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

IN THE MATTER OF: KEVIN EDGELL,	:	**O P I N I O N**
Petitioner-Appellant,	:	**CASE NO. 2009-L-065**
- and -	:	
DAWN EDGELL,	:	
Petitioner-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 06 DI 000404.

Judgment: Affirmed.

Carl L. DiFranco, Cannon, Aveni & Malchesky Co., L.P.A., 41 East Erie Street, Painesville, OH 44077 (For Petitioner-Appellant).

Mary Joseph Clair, 4132 Erie Street, #202, Willoughby, OH 44094 (For Petitioner-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Kevin Edgell, appeals the judgment of the Lake County Court of Common Pleas, Domestic Relations Division, granting appellee Dawn Edgell's motion to vacate the court's dissolution decree with respect to child support and custody of the parties' daughter Jaime Edgell. For the reasons that follow, the trial court's judgment is affirmed.

{¶2} The parties were first married in 1979. Two children were born as issue of that marriage, Bradley and Brandon. The parties were divorced in 1983. In 1984, Dawn gave birth to a daughter Jaime. Kevin is not Jaime's natural father. Thereafter, on August 11, 1985, the parties remarried. When Jaime was about three years old, she was diagnosed as being mentally retarded. When she was ten years old, Kevin adopted her in proceedings filed in the Lake County Court of Common Pleas, Probate Division.

{¶3} Soon after Jaime turned 18, in 2002, the parties filed an application for guardianship of Jaime in the probate division, alleging that Jaime was incompetent due to her mental retardation. Both parents were appointed Jaime's co-guardians.

{¶4} On June 1, 2006, the parties signed a separation agreement, and later that day they filed a petition for dissolution of their marriage. As of that date, Bradley was 25 years old, Brandon was 24, and Jaime was 21. The separation agreement did not disclose Jaime's disability. During the dissolution hearing, both parties testified that each of their children was over 18 years of age, but they did not disclose that Jaime was disabled. The trial court entered its dissolution decree adopting the parties' separation agreement on August 24, 2006.

{¶5} On March 27, 2008, Dawn filed a motion to vacate the dissolution decree pursuant to Civ.R. 60, arguing that because the court had not been advised that Jaime was disabled and the separation agreement did not provide child support for her, in the interests of justice, the court should vacate the decree.

{¶6} In her affidavit filed in support of the motion, Dawn stated that before Jaime entered kindergarten, she was diagnosed as being mentally retarded. She stated

that as a result, Jaime will never be self-supporting. Dawn said that at the time she signed the separation agreement, she was not represented by counsel and did not realize she should have advised the court of Jaime's disability. She said that Jaime is entitled to child support, but that Kevin has refused to discuss the matter with her, requiring her to retain counsel; move to vacate the dissolution decree; and request child support.

{¶7} At a pretrial, Kevin argued the court could not assert jurisdiction over Dawn's motion because Jaime is over 18. Dawn filed a trial brief arguing that the court had jurisdiction to order child support. Kevin filed a motion to dismiss Dawn's motion to vacate, challenging the court's jurisdiction.

{¶8} On November 26, 2008, the trial court entered judgment addressing its jurisdiction of Dawn's motion to vacate. The court noted that the separation agreement did not identify Jaime as a disabled child or provide child support for her. The court noted, however, that the separation agreement provided: "Should Wife be entitled to any tax benefits for Jaime Edgell as a dependent, she shall receive such benefits and Husband waives any rights therein." The court found that the parties thus represented that Jaime may remain as a dependent of her parents although she was over 18 years old. The court found it had jurisdiction to award child support after Jaime turned 18 because she has a disability that existed before she turned 18.

{¶9} Subsequently, on March 6, 2009, the court held a hearing on Dawn's motion to vacate. Prior to the hearing, the parties stipulated Dawn's motion would be limited to child support. Dawn argued the dissolution decree should be set aside with respect to child support only pursuant to Civ.R. 60(B)(4) or (5).

{¶10} Jeffrey Black, Kevin's attorney for the dissolution, testified that during a break in the dissolution hearing in 2006, Kevin said he would accept financial responsibility for Jaime's care.

{¶11} Dawn testified that when Jaime was about three years old, her doctor told her and Kevin that Jaime was mentally retarded. Dawn said that as of the date of the motion hearing, March 6, 2009, Jaime was 24 years old, but mentally she was six or seven years old and functioning at the level of a first or second grader. Jaime graduated from the local high school's multiple disability program.

{¶12} Dawn testified that just prior to her execution of the separation agreement, the situation at home was "very strained and stressful" due to Kevin's violent temper and verbal abuse. There is a pole barn on the parties' property in which Kevin regularly entertained other women and used drugs. Kevin and Dawn were constantly arguing due to Dawn's belief he was with other woman and using drugs. Dawn wanted Kevin to leave the marital residence because she did not want Jaime exposed to his behavior. Kevin told Dawn he would not leave unless she signed a separation agreement.

{¶13} Dawn testified that during the last week in May 2006, Kevin took her to Mr. Black's office to draft a separation agreement. The topic of Kevin leaving the marital residence was raised, and Mr. Black told Dawn that Kevin did not have to leave until she signed a separation agreement. When discussing division of the parties' property, Dawn asked if she could keep two of the parties' vehicles. Kevin said she was not worth both vehicles. Dawn became upset, started crying and left the office.

{¶14} A few days later, Dawn met with Attorney Mary Bender. She quoted the amount of her retainer. Kevin controlled the parties' money so Dawn asked him for the

money to pay Ms. Bender, but he refused. He said if Dawn wanted a divorce, she would have to do it through his attorney.

{¶15} Kevin and Dawn returned to Mr. Black's office on June 1, 2006, and they both signed the separation agreement. She was given 30 minutes to review the agreement in a room in which Kevin was present. She had not previously seen or been given a copy of the separation agreement. The petition for dissolution and separation agreement were filed later that same day.

{¶16} Dawn testified that within one week after she signed the agreement, Kevin moved out. She said that after the dissolution, it was her understanding that Kevin would continue to support Jaime financially. Kevin kept Jaime on his health insurance plan at work, and reimbursed Dawn for any expenses that were not covered. Then, one year later, in August 2007, without informing Dawn, Kevin took Jaime off his plan and put Jaime on Medicaid. Kevin testified he owns a plumbing business, and he did this to reduce his business health insurance costs, although he kept health insurance in place for some of his employees. Medicaid does not, however, cover 100 per cent of medical expenses, and Dawn testified that Kevin has refused to reimburse her for the uncovered medical expenses she has had to pay out-of-pocket for Jaime.

{¶17} Dawn testified that as a result of Kevin's unilateral decision to drop Jaime from his health insurance plan and his refusal to reimburse Dawn for uncovered expenses, she retained counsel to pursue child support for Jaime. She said that her attorney communicated with Mr. Black several times over the next few months, and he said the parties and their counsel would meet to discuss this issue, but the meeting never occurred. As a result, in March 2008, she filed her motion to vacate.

{¶18} Kevin testified that he presently lives in Chesterland with his new wife in a home he purchased for them that cost $635,000. The property consists of 30 acres. Kevin's annual income is over $150,000. He acknowledged that prior to adopting Jaime, he knew she was disabled. He said he and Dawn set up a guardianship for Jaime because she is mentally retarded. He testified that while the dissolution hearing was in progress in 2006, he agreed to financially support Jaime.

{¶19} Following the hearing, the court entered judgment granting Dawn's motion to vacate, but only with respect to the inclusion of custody and child support in the separation agreement. The court found the dissolution decree and balance of the separation agreement were to remain in effect. The court stated that Dawn's recently-filed motion to establish child support would be set for hearing. Kevin appeals the trial court's judgment, asserting two assignments of error. For his first assigned error, he alleges:

{¶20} "The trial court erred in determining it had jurisdiction over a disabled adult for whom the probate court already had asserted jurisdiction through a guardianship."

{¶21} This court has held that whether a court has jurisdiction of the subject matter of an action is a question of law. *Burns v. Daily* (1996), 114 Ohio App.3d 693, 701. Questions of law are reviewed de novo. *Ohio Bell Tel. v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 145.

{¶22} Kevin argues the trial court lacked jurisdiction to vacate its dissolution decree regarding child support for Jaime for two reasons. First, he contends that because a guardianship had already been established for Jaime in the probate division, that court had exclusive jurisdiction over her. The only case cited by Kevin in support is

In re Constable, 12th Dist. No. CA99-05-039, 2000 Ohio App. LEXIS 2467. However, that case does not support Kevin's argument. In *Constable*, the Twelfth District stated: "Where a matter falls within the exclusive jurisdiction of the probate court, no other court may exercise jurisdiction over the matter. *** Although the domestic relations court has jurisdiction over child custody and support matters, R.C. 3105.011 and 3109.05, Shawn's guardianship is within the exclusive jurisdiction of the probate court. Once Shawn reached the age of eighteen and [the parents] sought guardianship, the probate court was the only court with jurisdiction over Shawn." (Internal citation omitted.) Id. at *4. We note the issue in *Constable* was whether the domestic relations court had jurisdiction with respect to the son's guardianship. The Twelfth District held that while the probate court had exclusive jurisdiction over the son's guardianship, the domestic relations court retained jurisdiction over child support. Id.

{¶23} Further, the Supreme Court of Ohio has held that "[a]lthough the probate court may have exclusive jurisdiction to appoint and remove guardians under R.C. 2101.24(D) ***, the common pleas court, division of domestic relations, is given general jurisdiction of all domestic matters by R.C. 3105.011." *Masitto v. Masitto* (1986), 22 Ohio St.3d 63, 67, n. 3.

{¶24} R.C. 3109.05(A)(1) also provides: "In a divorce, dissolution of marriage, legal separation, or child support proceeding, the [domestic relations] court may order either or both parents to support *** their children ***."

{¶25} Finally, in *In re Guardianship of B.I.C.*, 9th Dist. No. 09CA0002, 2009-Ohio-4800, discretionary appeal not allowed at 2010-Ohio-1557, 2010 Ohio LEXIS 947, the Ninth District held:

{¶26} "*** [T]his Court concludes that the probate court does not have jurisdiction to order parents to pay child support or provide health care coverage for a child who is a ward subject to a guardianship. R.C. 2101.24(A) enumerates thirty-one subject matters over which the probate court has *** jurisdiction ***. The matters of the provision of child support and health care coverage are not specified." *B.I.C.*, supra, at ¶17.

{¶27} In the instant case, the issue before the trial court was whether the court had jurisdiction to consider child support in a dissolution case, not the appointment or conduct of a guardian. Contrary to Kevin's argument, the fact that the probate division had jurisdiction over Jaime for guardianship purposes does not mean the domestic relations division was thereby stripped of its jurisdiction to award Dawn child support pursuant to the parties' dissolution. Kevin has failed to draw our attention to any authority in support of such proposition. For this reason alone, his argument lacks merit. App.R. 16(A)(7). In any event, the foregoing authority defeats Kevin's position.

{¶28} Second, Kevin argues that because Jaime was over 18 at the time the dissolution was granted, the court never asserted jurisdiction over her and the court therefore lacked the power to address child support for her. We do not agree.

{¶29} In *Castle v. Castle* (1984), 15 Ohio St.3d 279, the Supreme Court of Ohio held that "[t]he common-law duty imposed on parents to support their minor children may be found by a court of domestic relations having jurisdiction of the matter, to continue beyond the age of majority if the children are unable to support themselves because of mental or physical disabilities which existed before attaining the age of majority." Id. at paragraph one of the syllabus. The court further held that "[t]he

domestic relations court retains jurisdiction over parties in a divorce, dissolution or separation proceeding to continue or to modify support payments for a mentally or physically disabled child, who was so disabled before he or she attained the statutory age of majority, as if the child were still an infant." Id. at paragraph two of the syllabus.

{¶30} Although the Supreme Court's holding in *Castle* does not address the exact issue before us in that *Castle* addressed the continuing jurisdiction of the domestic relations court, rather than the attachment of jurisdiction after the child reaches age 18, nevertheless the Court's holding in *Castle* is instructive. We find guidance in the following analysis quoted by the Court in *Castle*:

{¶31} "'*** Generally at common law a parent's obligation to support his child ends when the latter becomes of age. But there is an important, widely recognized exception to this rule where the child because of weak body or mind is unable to care for itself upon attaining majority. The obligation to support such a child ceases only when the necessity for support ceases.'" Id., quoting *Davis v. Davis* (1954), 246 Iowa 262. The court further found that "the duty of parents to provide for the maintenance of their children has been described by Blackstone as a 'principle of [the] natural law,' 'an obligation *** laid on them not only by nature herself, but by their own proper act, in bringing them into the world: *** By begetting them, therefore, they have entered into a voluntary obligation to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved.' 1 Blackstone's Commentaries (Lewis Ed. 1897) 419.

{¶32} "In 2 Kent's Commentaries on American Law (1884) 190, it is stated: 'The wants and weaknesses of children render it necessary that some person maintains

them, and the voice of nature has pointed out the parent as the most fit and proper person. The laws and customs of all nations have enforced this plain precept of universal law. The obligation on the part of the parent to maintain the child continues until the latter is in a condition to provide for its own maintenance ***.'

{¶33} "In the case of mentally or physically disabled children there must exist a duty both morally and legally on parents to support and maintain such children." *Castle*, supra, at 282-283.

{¶34} This court adopted the holding in *Castle*, supra, in *Blaner v. Blaner*, 11th Dist. No. 2003-T-0042, 2004-Ohio-3678, at ¶10.

{¶35} Further, we note that R.C. 3109.01, which defines the age of majority, reflects the principle that mentally or physically disabled children should be excepted from a strictly age-based emancipation rule. That section provides: "All persons of the age of eighteen years or more, *who are under no legal disability*, are capable of contracting and are of full age for all purposes." (Emphasis added.) While the term "legal disability" is not defined at R.C. Chapter 3109, we note that R.C. 2131.02, which applies to probate matters, includes in its definition of "legal disability" "persons of unsound mind." R.C. 2131.02(B). Moreover, R.C. 1.02(C) defines the term "of unsound mind" as including "all forms of mental retardation."

{¶36} The same issue raised by Kevin was addressed by the Sixth District in *Wiczynski v. Wiczynski*, 6th Dist. No. L-05-1128, 2006-Ohio-867, discretionary appeal not allowed at 86 Ohio St.3d 1403, 1999 Ohio LEXIS 1810. In that case the parties had a mentally retarded 20-year old son on the date the mother filed her complaint for divorce in which she sought spousal and child support. The trial court found that the

parties' son "is a mentally handicapped child," and "although having reached the age of majority, *** will need custodial care for the rest of his life." The trial court specifically referred to Jeffrey as the "minor" child and concluded that "because of the minor child's mental condition the support payments shall be paid beyond the child's 18th birthday and shall terminate only upon the death of the child, or further order of the court." The father filed a motion to dismiss arguing that because at the time the mother filed for divorce in 1986, Jeffrey was already 18 years old, the issues of Jeffrey's custody and support were never within the jurisdiction of the domestic relations court. The trial court denied the father's motion to dismiss. The Sixth District affirmed, holding:

{¶37} "[W]e find that Jeffrey, as one undisputedly unable to support himself due to his mental retardation, was properly found by the trial court as never having reached the 'age of majority' as defined at R.C. 3109.01. Stated otherwise, Jeffrey, *because of his mental condition (and despite his chronological age), was properly found by the trial court to be a minor*. Cf. *Abbas v. Abbas* (1998), 128 Ohio App.3d 513, (holding that the trial court, in granting custody of 25-year old disabled child to parent [in divorce decree], was essentially asserting that child had not reached the age of majority, and in that way obtained jurisdiction over the child [to later award child support].) As a result, we find that the trial court, which from the beginning has had jurisdiction over Jeffrey and the issues of his custody and support, properly denied [the father's] motion to dismiss." (Emphasis added.) *Wiczynski*, supra, at ¶23.

{¶38} Kevin is therefore incorrect when he states in his brief, "[t]here is absolutely no case on point and no *** authority which addresses this unique fact pattern and confers jurisdiction." While we acknowledge that in *O'Connor v. O'Connor*

(1991), 71 Ohio App.3d 541, cited by Kevin, the Tenth District stated in dicta that a domestic relations court generally has no authority to order child support for a child who was over 18 when the divorce action was filed, that court affirmed the trial court's child support order because the father had agreed to be responsible for his daughter's support. Likewise, here, prior to the entry of the dissolution decree, Kevin agreed to be financially responsible for Jaime's support. To the extent that *O'Connor's* dicta conflicts with the holding in *Wiczynski*, we choose to follow the reasoning of the latter case as being consistent with *Castle*, supra, *Abbas*, supra, and *Blaner*, supra, and the strong public policy of this state requiring parents to be financially responsible for their children who suffer from disabilities prior to reaching the chronological age of majority.

{¶39} Turning to the facts of the instant case, it is undisputed that Jaime is mentally retarded; that she has suffered from such disability since she was three years old; that she will never be self-supporting; that Kevin has been aware of her condition since that early age; that he agreed to financially support her; and that the parties effectively stipulated in their separation agreement that, although Jaime was over 18, she may still be a dependent. We agree with the finding of the trial court that, despite her chronological age, Jaime never reached the age of majority as defined by law and remains a minor. It follows, then, that when the parties filed their petition for dissolution, the court obtained jurisdiction over Jaime to address child support.

{¶40} We therefore hold the trial court did not err in finding it had jurisdiction to consider an award of child support in favor of Dawn for Jaime's benefit.

{¶41} Kevin's first assignment of error is overruled.

{¶42} For his second assigned error, Kevin alleges:

{¶43} "The trial court erred in granting defendant/appellee's motion to vacate."

{¶44} Kevin raises two issues under this assignment of error. First, he argues the court abused its discretion in holding an oral hearing on Dawn's motion to vacate.

{¶45} It is well-settled that a trial court has discretion in deciding whether to hold a hearing before ruling on a motion for relief from judgment. *Doddridge v. Fitzpatrick* (1978), 53 Ohio St.2d 9, syllabus; *U.A.P. Columbus JV326132 v. Plum* (1986), 27 Ohio App.3d 293, 294. Thus, the trial court's decision to hold an oral hearing before ruling on a motion for relief from judgment will not be reversed absent an abuse of discretion. This court has recently stated that the term "abuse of discretion" is one of art, connoting judgment exercised by a court, which does not comport with reason or the record. *Gaul v. Gaul,* 11th Dist. No. 2009-A-0011, 2010-Ohio-2156, at ¶24, citing *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678. The Second Appellate District has also recently adopted this definition of the abuse of discretion standard in *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶65, citing Black's Law Dictionary (4 Ed.Rev.1968) 25 ("A discretion exercised to an end or purpose not justified by and clearly against reason and evidence").

{¶46} Kevin argues that the trial court abused its discretion in holding an oral hearing because, he claims, Dawn's motion did not present sufficient operative facts under Civ.R. 60(B)(1), mistake, or Civ.R. 60(B)(3), fraud. However, we note that while Dawn generally alleged mistake and fraud as grounds for relief from judgment in her initial motion to vacate, her pleading was not confined to Civ.R.60(B)(1) and (3). Further, in Dawn's affidavit she detailed Jaime's disability and Dawn's inadvertent failure to bring the child's disability to the attention of the court. Dawn stated she had

filed her motion to vacate in the interest of justice so that her daughter would receive the financial support she needs. "'[T]he language of the "other reason" clause [of Civ.R. 60(B)(5)] *** vests power in the courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.'" *State ex rel. Gyurcsik, v. Angelotta* (1977), 50 Ohio St.2d 345, 346, quoting *Klapprott v. United States* (1949), 335 U.S. 601, 614-615. Thus, while not specifically referring to Civ.R. 60(B)(5), her initial motion alleged grounds for relief under that section.

{¶47} In addition, prior to the hearing on Dawn's motion to vacate, she advised the court that she would be relying on 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 grounds for relief. In effect, she moved to amend her motion to vacate to specify these grounds in support of her motion, and Kevin did not object to the amendment. The hearing thus proceeded on Dawn's motion as amended. Further, in her post-trial brief, Dawn alleged she was entitled to relief under Civ.R. 60(B)(4) and/or (5), and referenced the evidence and additional authority in support. However, Kevin did not file a post-trial brief or any objection to the amendment. Finally, the trial court in its judgment found that "Mother has satisfied the second prong of *GTE* [*Automatic Electric v. Arc Industries* (1976), 47 Ohio St.2d 146], in that she is entitled to relief pursuant to 60(B)(5), 'any other reason justifying relief from the judgment.'"

{¶48} However, on appeal Kevin ignores the fact that Dawn pursued her motion to vacate under Civ.R. 60(B)(4) and (5) and that the court ruled she had established grounds for relief under Civ.R. 60(B)(5). He therefore does *not* argue that she failed to

allege sufficient operative facts in support of this ground for relief to warrant an oral hearing. For this reason alone, his argument is not well taken. In any event, based on our review of Dawn's initial motion to vacate, her oral motion to amend the motion, and her post-trial brief, we hold she alleged sufficient operative facts to support the trial court's decision to hold an oral hearing on the motion.

{¶49} Next, Kevin argues the trial court's decision to grant Dawn's motion to vacate as to custody and child support was against the manifest weight of the evidence. As a preliminary matter, we note that our review of a trial court's decision on a Civ.R. 60(B) motion to vacate is limited to an abuse of discretion. *Ludlow v. Ludlow*, 11th Dist. No. 2006-G-2686, 2006-Ohio-6864, at ¶24. As noted above, an "abuse of discretion" denotes a judgment comporting with neither the record nor reason. *Gaul*, supra.

{¶50} The Supreme Court of Ohio explained the civil manifest-weight-of-the-evidence standard in *C.E. Morris Co. v. Foley Constr. Co*. (1978), 54 Ohio St.2d 279, in which the Court held: "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." Id. at syllabus.

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

{¶52} "On motion and upon such terms as are just, the court may relieve a party *** from a final judgment *** for the following reasons: (1) mistake ***; (2) newly discovered evidence ***; (3) fraud *** of an adverse party; (4) *** 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. ***"

{¶53} "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 (***).'" *Ludlow v. Ludlow*, 11th Dist. No. 2006-G-2686, 2006-Ohio-6869, at ¶23, quoting *GTE Automatic Electric, Inc.*, supra, at paragraph two of the syllabus.

{¶54} First, Kevin argues that Dawn's motion was limited to child support and did not include custody. He therefore argues that because the court in its judgment also asserted jurisdiction over the custody issue, that finding was against the manifest weight of the evidence. Prior to the hearing, the following exchange took place between court and counsel:

{¶55} "THE COURT: *** Mr. DiFranco, do you have any preliminary matters?

{¶56} "MR. DIFRANCO: Yes, your Honor.

{¶57} "First, with regard to the motion to vacate that has been filed, I know we talked about this at the last hearing. *** My understanding with relationship to this particular motion is that we're limited to the issue of child support as it relates to Jaime and not to the property issues we talked about last time.

{¶58} "THE COURT: That is my understanding.

{¶59} "Is that correct, Ms. Clair?

{¶60} "MS. CLAIR: That is my understanding, your Honor. Although the original motion does contain other allegations, we've limited it solely to the support issues.

{¶61} "THE COURT: So it would be fair to say that counsel has stipulated that wife's motion relates only to child support issues for Jaime.

{¶62} "MR. DIFRANCO: Yes.

{¶63} "MS. CLAIR: My understanding, Judge, is that the property issues, income issues, and division is only in relation to the concept of the – an equal bargaining power. Some of that testimony may come in but we're not asking for that part to be vacated."

{¶64} Based on the foregoing discussion, the parties agreed that Dawn's motion would be limited to child support issues as opposed to property issues. Because the issue of custody is related to child support, we do not agree with Kevin's argument that the trial court's assertion of jurisdiction over the custody issue was against the manifest weight of the evidence.

{¶65} Next, Kevin argues the trial court's decision to grant Dawn's motion to vacate with respect to child support was against the manifest weight of the evidence because she failed to present evidence in support of the three requirements for relief from judgment under Civ.R. 60(B). First, he argues Dawn failed to prove she had a meritorious claim if relief from judgment was granted. However, Kevin's argument is once again premised on his contention that because Jaime was 21 when the dissolution was granted, jurisdiction could not attach. Based on our holding above that Jaime

remains a child in the eyes of the law entitled to continued child support, the evidence supported the court's finding that Dawn had a meritorious claim if relief was granted.

{¶66} Second, Kevin argues Dawn failed to demonstrate any of the grounds for relief at Civ.R. 60(B)(1)-(5). Since Dawn chose not to proceed on (B)(1), mistake, or (B)(3), fraud, and the trial court found that Dawn had demonstrated grounds for relief under Civ.R. 60(B)(5), the issue presented is whether Dawn presented evidence of "any other reason justifying relief from judgment."

{¶67} It has been held that relief under Civil Rule 60(B)(5) is available where it appears that the circumstances call for such relief under the court's inherent power over its own judgments and where the best interest of a child is of primary importance. *In re Dissolution of Marriage of Watson* (1983), 13 Ohio App.3d 344, 346. In that case the husband and wife obtained a dissolution of marriage from the trial court while the wife was pregnant with the parties' second child. However, the wife had concealed the pregnancy from the trial court and the husband during the proceedings. After the child was born, the parties reconciled and lived together as a family for a few years in another state. When they again separated, the husband filed a motion with the trial court pursuant to Civ.R. 60(B) asking that the trial court reopen its dissolution decree so as to make an order providing for the custody and support of the child as well as for visitation rights of the non-custodial parent. The trial court found that the wife's concealed pregnancy and the birth of the child justified the relief sought under Rule 60(B)(5) and granted the husband's motion. The Ninth District affirmed, holding that, notwithstanding the strict limitations of Rule 60(B)'s "catch-all" provision, there were substantial grounds for relief under Rule 60(B)(5). Id. at 347. The appellate court also held that the four-

year delay of the husband in filing his motion for relief was outweighed by the need to consider the best interests of the child. Id.

{¶68} In the case at bar, the trial court noted that R.C. 3105.63 provides that a separation agreement must include provision for child support for the parties' minor children. The court found that both parties had failed to disclose at the dissolution hearing that Jaime has been suffering from a disability since she was a toddler. As such, she will never attain the age of majority and remains a minor under the law. The court also found that because the separation agreement did not reference the guardianship that had been established due to Jaime's disability, the agreement did not comply with R.C. 3105.63.

{¶69} The court also found that Dawn was pressured into signing the separation agreement. The court noted that, although Dawn wanted counsel to represent her in the dissolution, Kevin held the purse strings and refused to pay for separate counsel for her. The court also found that Kevin refused to move out until Dawn signed the separation agreement and that Dawn did not want Jaime to be exposed to Kevin's cavorting and drug usage at the marital residence. We agree with the trial court's finding that Dawn presented evidence in support of grounds for relief under Civ.R. 30(B)(5).

{¶70} Third, Kevin argues that Dawn failed to prove her motion to vacate was timely filed. He admits that Dawn's motion would have been timely if it had been filed under 60(B)(5), which merely requires the motion to be filed in a reasonable time. He claims, however, that because her motion asserted grounds for relief under Civ.R. 60(B)(1) or (B)(3), it had to be filed within one year of the judgment. However, because

Dawn amended her motion to vacate as being based on Civ.R. 60(B)(5) and presented evidence in support of that ground for relief, she was not required to file her motion within one year. She was simply required to file her motion in a reasonable time.

{¶71} Here, the testimony was undisputed that Dawn discovered in August 2007 that Kevin unilaterally dropped Jaime from his health insurance plan and put her on Medicaid. Thereafter, he refused to reimburse Dawn for Jaime's medical expenses that were not covered by Medicaid. Dawn retained counsel at that time to address child support issues. Dawn's attorney engaged in a series of communications with Kevin's counsel in 2007 and early 2008 aimed at reaching an agreement on child support. Based on the representations of Kevin's counsel, Dawn understood a meeting was to be held among the parties and their counsel to address child support. After such meeting never occurred, Dawn filed her motion in March 2008. The evidence supported the trial court's finding that Dawn filed her motion in a reasonable time.

{¶72} In view of the foregoing analysis, we hold the trial court did not abuse its discretion in granting Dawn's motion to vacate the dissolution decree as to child support only.

{¶73} Kevin's second assignment of error is overruled.

{¶74} For the reasons stated in the Opinion of this court, the assignments of error are overruled. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas, Domestic Relations Division, is affirmed.

COLLEEN MARY O'TOOLE, J., concurs,

DIANE V. GRENDELL, J., concurs in part, and dissents in part, with a Concurring/Dissenting Opinion.

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DIANE V. GRENDELL, J., concurs in part, and dissents in part, with a Concurring/Dissenting Opinion.

{¶75} I concur with the majority as to the lower court's ruling granting Rule 60(B) relief with respect to the child support issue.

{¶76} However, I disagree with the majority's affirmance of the lower court's decision to expand its Rule 60(B) ruling to include the issue of custody.

{¶77} The parties stipulated that the scope of the lower court's proceedings would be limited to the issue of "child support." Cf. *Aulizia v. Westfield Natl. Ins. Co.*, 11th Dist. No. 2006-T-0057, 2007-Ohio-3017, at ¶14 fn. 2 ("courts are ordinarily bound by the factual stipulations of litigants").

{¶78} Moreover, any action by the domestic relations court with respect to custody would conflict with the existing probate court guardianship order. *Keith v. Bringardner*, 10th Dist. No. 07AP-666, 2008-Ohio-950, at ¶8 ("a probate court has exclusive jurisdiction to 'appoint and remove guardians, conservators, and testamentary trustees, direct and control their conduct, and settle their accounts'") (citation omitted). Unless that probate court order is vacated, a conflict between courts of equal jurisdiction would result from any custody action taken by the lower court in this case. Cf. *In re Constable*, 12th Dist. No. CA99-05-039, 2000 Ohio App. LEXIS 2467, at *4.

{¶79} Therefore, I dissent as to the majority's decision with respect to custody, but would affirm as to the issue of support.