[Cite as *In re Henson*, 2010-Ohio-704.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

IN RE: THE MARRIAGE OF DORINDA A. HENSON,	:	**O P I N I O N**
Petitioner-Appellee,	:	**CASE NO. 2009-T-0028**
and	:	
RANDY L. HENSON,	:	
Petitioner-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 2002 DS 381.

Judgment: Affirmed.

William R. Biviano, Biviano Law Firm, 700 Huntington Bank Tower, 108 Main Avenue, S.W., Warren, OH 44481-1089 (For Petitioner-Appellee).

Michael A. Partlow, Morganstern, MacAdams & DeVito Co., L.P.A., 623 West St. Clair Avenue, Cleveland, OH 44113-1204 (For Petitioner-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Mr. Randy L. Henson appeals the judgment of the Domestic Relations Division of the Trumbull County Court of Common Pleas, which denied his Civ.R. 60(B) motion for relief from judgment. The trial court found that an unreasonable period of time had passed for the filing of such a motion, and further, that even if the motion had been timely filed in 2004, the court would have issued the same ruling as Mr. Henson failed to allege any operative facts that would warrant relief.

{¶2} Mr. Henson contends the trial court was unreasonable in dismissing his motion, which he filed in 2008, as untimely, asserting there was no reason for him to file a motion for relief from judgment until after the conclusion of the first appeal.

{¶3} We find no abuse of discretion in the trial court's denial of the motion. Not only was the motion untimely, but Mr. Henson offered no operative facts or evidence that would warrant relief from the original dissolution decree incorporating the parties' 2002 separation agreement.

{¶4} Thus, we affirm.

{¶5} **Substantive and Procedural History**

{¶6} The parties' marriage was dissolved on November 7, 2002. The decree incorporated the parties' separation agreement which, inter alia, contained provisions for child support for their only child. Attached to the agreement was an incomplete Child Support Computation Worksheet.

{¶7} At the time of the dissolution, Mr. Henson's child support obligation, per the child support worksheet, would have been $429.20 per month. The parties, however, agreed to an upward deviation of $612 per month without any recitation on the worksheet or in the decree as to the specific facts justifying such a deviation. The parties further agreed that on December 1, 2003, Mr. Henson's obligation would increase to $2,250, in addition to processing fees, as well as 10% of his overtime compensation. Again, no reasons for this extreme deviation were set forth in the decree or on the worksheet.

{¶8} Two years later, Mr. Henson filed a motion for recalculation of child support. The magistrate hearing the motion found that the parties had agreed to the upward deviation because Ms. Henson helped pay Mr. Henson's child support in the

same amount for his two children from a previous marriage. The timing of the upward deviation coincided with the cessation of Mr. Henson's child support obligations for the other children.

{¶9} At the hearing, Mr. Henson claimed he was not aware of the language contained in the separation agreement. A review of the transcript of the dissolution hearing reveals Mr. Henson understood and voluntarily agreed to a deviation from the child support guidelines, but that no factors or reasons were given for the second drastic upward deviation of $600 to $2,250. The magistrate denied his motion for recalculation. After Mr. Henson filed objections and a motion for reconsideration, the court remanded the matter back to a new magistrate for another hearing. In the interim, Mr. Henson filed an appeal in this court, which was dismissed.

{¶10} Nearly a year later, the hearing was held before the new magistrate where Mr. Henson argued the original dissolution decree was void because the upward deviation was not supported by any facts in the record. Although the magistrate dismissed this argument, he still found there was a change of circumstances warranting modification, albeit without citing any facts or evidence of a change of circumstances as required. The court adopted the magistrate's findings, modifying Mr. Henson's monthly child support payments downward to $708.94.

{¶11} Ms. Henson appealed the downward modification in *In re Henson*, 11th Dist. No. 2006-T-0065, 2007-Ohio-4376 (*Henson I*), arguing that the trial court erred in granting Mr. Henson's motion for recalculation of child support as no change of circumstances existed since the increase in income for both parties was, in fact, contemplated at the time of the separation agreement. She further contended that the court erred in ordering the modification retroactively to the time Mr. Henson filed his

motion for recalculation of child support in March of 2004. Finally, she argued that the court arbitrarily reduced her child support even more drastically when it awarded her the right to claim the child as a tax dependency exemption, but set-off the amount from Mr. Henson's obligation.

{¶12} In *Henson* I, we initially noted from the outset that this case has been procedurally flawed as Mr. Henson neither directly appealed the original decree nor filed a motion for relief from judgment pursuant to Civ.R. 60(B). Although we determined the original decree of dissolution was flawed, we did not find this rendered the decree void ab initio, but merely voidable. Because a voidable judgment may not be collaterally attacked, and as it was not directly appealed, we presume the order to be correct.

{¶13} Thus, we explained Mr. Henson could not collaterally attack the initial decree in his motion to recalculate child support and, because he chose not to file a direct appeal or motion for relief at the time of the decree, any error in the original decree has been waived. We reversed the trial court's downward modification of Mr. Henson's child support obligation on the basis that the only issue before the trial court was whether a change of circumstances had occurred that was not contemplated at the time the parties entered into the separation agreement. We also remanded for further proceedings for the trial court to determine the allocation of the tax dependency exemption pursuant to the factors of R.C. 3119.82, which was absent from the record. Mr. Henson's discretionary appeal was not allowed by the Supreme Court of Ohio in *In re Henson*, 2008-Ohio-153.

{¶14} Six months passed, and Mr. Henson then filed a 60(B)(5) motion for relief from judgment in January 2008 to vacate the original dissolution decree as it pertained to child support. Mr. Henson argued that there was no need to file such a motion until

after his appeal was not allowed by the Supreme Court of Ohio. Therefore, five years from the date of judgment should not be deemed an unreasonable time period for the filing of his motion. The trial court dismissed this argument, finding the motion to be untimely. Most importantly, the trial court found that even if Mr. Henson had filed his motion for relief from judgment in 2004 instead of filing a motion to modify child support, Mr. Henson did not support his motion with any legal argument as a basis for the trial court to grant relief.

{¶15} Mr. Henson now appeals, raising one assignment of error for our review:

{¶16} "The trial court erred and abused its discretion by denying appellant's Civ.R. 60(B)(5) motion as not filed within a reasonable time."

{¶17} **"Reasonable Time" for the filing of a Civ.R. 60(B)(5) Motion**

{¶18} "It is well-settled that in order to prevail on a motion for relief from judgment pursuant to Civ.R. 60(B), the movant must demonstrate the following: (1) a meritorious claim or defense if relief is granted; (2) entitlement to the relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) timeliness of the motion." *Cefaratti v. Cefaratti*, 11th Dist. No. 2004-L-091, 2005-Ohio-6895, ¶10, citing *GTE v. Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus.

{¶19} Further, "[t]he decision to grant or deny a motion for relief from judgment is within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion." Id. at ¶11, citing *Griffrey v. Rajan* (1987), 33 Ohio St.3d 75, 77. An abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶20} "Civ.R. 60(B)(5) is a catch-all provision that reflects the inherent power of a court to relieve a person from the unjust operation of a judgment." *In re Brunstetter*, 11th Dist. No. 2002-T-0008, 2002-Ohio-6940, ¶14, citing *Caruso-Ciresi, Inc. v. Lohman* (1983), 5 Ohio St.3d 64, paragraph one of the syllabus. Furthermore, the grounds for relief must be substantial. Thus, "it is to be used only in extraordinary and unusual cases when the interests of justice warrant it." Id., citing *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97. "The provision is not be used as a substitute for any of the more specific provisions of Civ.R. 60(B)." Id., citing *Strack v. Pelton* (1994), 70 Ohio St.3d 172.

{¶21} "Although not subject to the one-year limitation imposed on Civ.R. 60(B)(1)-(3) motions, a Civ.R. 60(B)(5) motion still must be brought within a reasonable period of time. The determination of what is a reasonable time is left to the sound discretion of the trial court. Even unjustified delays of less than a year can be untimely for Civ.R. 60(B) purposes. A movant must offer some operative facts or evidential material demonstrating the timeliness of his or her motion." Id., citing *Shell v. Cryer*, 11th Dist. No. 2001-L-083, 2002-Ohio-848.

{¶22} Mr. Henson argues his motion was timely filed within a reasonable period because he had no need to file a motion for relief from judgment pursuant to Civ.R. 60(B) until after we reversed the trial court's downward modification of his child support obligations in our decision of August 24, 2007, and until after his subsequent discretionary appeal was not allowed by the Supreme Court of Ohio on January 23, 2008.

{¶23} The fundamental flaw in Mr. Henson's argument is that he has never alleged any operative facts or offered any evidentiary material that would warrant relief

from judgment pursuant to Civ.R. 60(B), regardless of the timeliness or tardiness of the motion. Quite simply, he was obviously aware of the terms of the settlement agreement at the time of the original dissolution decree, stating on the record that he understood and voluntarily agreed to its terms. He chose not to file a motion for relief from judgment or a direct appeal at that time. Instead, Mr. Henson filed a motion for recalculation of child support four months after the upward deviation to $2,250 went into effect as per the parties' separation agreement. Further, he has never offered evidence that a change of circumstances occurred that was not contemplated by the parties at the time they entered into the original joint separation agreement.

{¶24} In this appeal, Mr. Henson seizes upon our observation in *Henson I* that the appropriate procedural vehicle for challenging the original child support order would have been either a direct appeal or a motion for relief from judgment pursuant to Civ.R. 60(B). We explained that having failed to avail himself of the two procedural vehicles for properly challenging the order, he could not circumvent this requirement and attempt to collaterally attack the original dissolution decree via a motion to modify.

{¶25} As we explained in *Henson I*, citing the Ninth Appellate District Court's decision in *Smith v. Collins* (1995), 107 Ohio App.3d 100, "[a]ny error in the trial court's adoption of the agreed entry, however, *has been waived* because neither party timely appealed that order." (Emphasis added.) Id. at ¶32.

{¶26} Thus, no fair reading of *Henson I* would lead to the conclusion that we *held* that Mr. Henson could or should file a 60(B) motion after his appellate rights had been exhausted. We remind Mr. Henson what we did hold in *Henson I*: "[t]he trial court's initial error is quite simply not properly before the court. Rather, all that is before the court is the sole issue of whether a modification of the child support is warranted

and whether there has been a change of circumstances between the parties that was not contemplated at the time of their original agreement." Id. at ¶33. Any attack of the original decree was waived by the parties as neither filed a direct appeal or a motion for relief from judgment. Mr. Henson cannot now have a second "bite at the apple" by relying on an explanatory statement in *Henson I*.

{¶27} Moreover, "[a]n appellate court generally will not find an abuse of discretion in reviewing a trial court's determination that a Civ.R. 60(B) motion is untimely unless there are evidentiary materials or operative facts in the record showing that the Civ.R. 60(B) motion was filed within a reasonable time." *Brunstetter* at ¶15.

{¶28} Thus, even assuming, arguendo, that Mr. Henson had filed his motion within a reasonable time, his motion would still fail because it was defective in substance as well as form. Not only were no operative facts alleged demonstrating timeliness, quite absent from his motion is a meritorious claim or defense.

{¶29} "A settlement agreement voluntarily accepted by both parties, read into the record and adopted by the court is a binding divorce decree." *Gursky v. Gursky*, 11th Dist. No. 2003-P-0010, 2003-Ohio-5697, ¶25. Most fundamentally, "[r]elief from judgment pursuant to Rule 60(B) is not available as a substitute for an appeal." Id. at ¶19 (internal citations omitted). "When the grounds upon which relief is sought do not concern the merits of the case, however, relief pursuant to Rule 60(B) is appropriate." Id.

{¶30} "In order to obtain relief under Civ.R. 60(B), the movant must file a motion as provided for in Civ.R. 7(B). He may also file a brief or memorandum of fact and law, and affidavits, depositions, answers to interrogatories, exhibits and any other relevant material, but the material submitted must contain operative facts which demonstrate the

timeliness of the motion, the reasons for relief seeking relief, and a meritorious claim or defense." *Joy v. Joy* (Aug. 23, 1996), 11th Dist. No. 96-T-5404, 1996 Ohio App. LEXIS 3559, 9-10, quoting *Adomeit* at 102-103. See, also, *Kasputis v. Blystone* (1990), 11th Dist. No. 88-A-1416, 1990 Ohio App. LEXIS 1494.

{¶31} Thus, we conclude Mr. Henson's assignment of error is without merit. Even if Mr. Henson's motion had been timely filed, the trial court would still have been within its discretion to deny it. We agree with the trial court's observations that "[t]here needs to be finality in this case and Petitioner-Husband has not presented any legal arguments for this Court to grant his Motion," and, therefore, the judgment of the Domestic Relations Division of the Trumbull County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

TIMOTHY P. CANNON, J.,

concur.