[Cite as *Elkins v. Elkins*, 2012-Ohio-1461.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

LILLY B. ELKINS,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-T-0033**
- vs -	:	
CLEO ELKINS, JR.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 2004 DR 266.

Judgment: Reversed and remanded.

Roger R. Bauer, 244 Seneca Avenue, N.E., P.O. Box 4306, Warren, OH 44481-4306 (For Plaintiff-Appellee).

Elise M. Burkey, Burkey, Burkey & Scher Co., L.P.A., 200 Chestnut Avenue, N.E., Warren, OH 44483-5805 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Cleo Elkins, Jr., appeals the judgment of the Trumbull County Court of Common Pleas, Domestic Relations Division, denying his Civ.R. 60(B) motion for relief from judgment ordering him to pay $50,832.80 to appellee. For the reasons that follow, we reverse and remand for further proceedings.

{¶2} Appellant and appellee, Lilly B. Elkins (n.k.a. Austin), were married on August 23, 1993. Both parties worked for General Motors (Delphi), and each were

enrolled in various benefit plans, including stock savings programs. Appellant had worked for General Motors since November 1968, officially retiring on January 1, 1999. In June 2004, appellee filed a complaint in divorce without children. The parties divorced at a hearing in October 2007 after stipulations dividing the marital assets were entered into the record. Specifically relevant to this appeal, the parties stipulated that appellee was to receive half of appellant's ING account, from the date of the marriage in 1993 to the date of appellant's retirement in 1999.[1] The January 2008 divorce judgment and March 2008 nunc pro tunc entry reflects the stipulation:

> **{¶3}** It is further ordered, adjudged and decreed that the parties acknowledge that the Defendant [appellant] at the time of the marriage had money in a Fidelity account which was the old Delphi [stock] savings [plan]. The Fidelity account then has gone to American Fund and then went to ING. The coverture portion of the Defendant's Fidelity account is, again *from the date of the marriage, August 28, 1993, to the date of retirement*, one-half (1/2) to the Plaintiff and one-half (1/2) to the Defendant. The parties agree that they will contact QDRO consultants within the next fifteen (15) days to ensure the division occurs promptly. (Emphasis added.)

{¶4} Appellant surrendered the ING account on December 26, 2007, for the cash value of $186,557.79. Subsequently, appellee filed a motion in contempt against appellant, contending that he failed to abide by the divorce decree because no QDRO

1. Appellant's ING account was one of multiple assets and its division one of many stipulations in the divorce.

was initiated to ensure division of the ING account. A magistrate's hearing on the matter was held. The magistrate, in an October 2009 decision, found the ING account had a value of $84,910.00 at the approximate time the parties became married. The magistrate noted appellant's claim that the premarital figure of the ING account was upwards of $180,000. However, because there was no documentation to substantiate that claim, appellant's estimated figure was not considered. The magistrate also noted appellee's claim that she is entitled to $21,962.00, representing half of an amount taken out of the ING account in 2004, which should be reflected in the equation. However, the magistrate did not consider this 2004 distribution, as it occurred about four years prior to the parties' divorce and had not been addressed in the divorce judgment or the stipulations.

{¶5} Instead, the $84,910.00 premarital figure was deducted from the total amount in the account, $186,557.59, and the remainder was divided by two. The magistrate concluded that appellee was entitled to $50,823.80 from the account after the deduction and the division. In an entry dated October 13, 2009, the trial court adopted the findings and ordered appellant to pay the awarded sum of $50,823.80 within 45 days of the order. The contempt finding was held in abeyance pending compliance of the order.

{¶6} Appellant has continually sought relief from this October 13, 2009 judgment ordering him to pay $50,823.80 to appellee.

{¶7} First, appellant filed objections to the magistrate's decision, which were overruled. The court again ordered appellant to pay $50,823.80 to appellee. An appeal from the denial was initiated to this court but later dismissed.

{¶8} Second, appellant filed a motion in the trial court for set-offs and "60(B) relief," contending that each party should not pay a portion of their accounts when there could be set-offs which would make distribution even and equal. The trial court did not rule on this motion and, on June 28, 2010, found appellant in contempt and issued a sentence. Appellant was given the opportunity to purge the finding by complying with the judgment—paying $50,823.80 to appellee.

{¶9} Third, on July 29, 2010, appellant filed a motion for contempt against appellee and a motion to vacate the October 13, 2009 order which awarded the $50,823.80 sum. In the motion, appellant again contended the premarital amount in the ING account was actually $182,287.40. The court ordered the parties to brief the issues raised in the motion. In his brief, appellant argued the "mutual mistake" and "excusable neglect" prongs of Civ.R. 60(B)(1) provided an outlet for relief. He again raised the contention that the premarital deduction of $84,910.00 from the account was incorrect since he actually had $182,287.42 (two cents more than the figure previously used) in the account prior to his marriage. In using the "correct" premarital figure, his former wife would actually be entitled to $2,135.09 instead of the awarded $50,823.80. Appellant also argued the trial court utilized the wrong valuation date—the date should have been from marriage to appellant's retirement in January 1999. Instead, the date of the trial court's January 2008 divorce decree judgment entry was used.

{¶10} The trial court denied appellant's Civ.R. 60(B) motion and, once again, ordered compliance with the October 13, 2009 judgment awarding appellee $50,823.80.

Appellant now appeals from this denial.[2] The court, making no mention of its prior contempt finding, held that "no contempt finding will be entered at this time," but such a finding would be held in abeyance pending compliance with the judgment.

{¶11} We initially note there is no transcript in the record before this court. Appellant states that a transcript was requested, but the tape was inaudible. Pursuant to App.R. 9, the parties prepared statements of the record in lieu of a transcript. The trial court found these statements to be contradictory and adopted the magistrate's decision in lieu of the transcript. Exhibits which the magistrate relied on and referred to in his decision were filed with this court.

{¶12} Appellant asserts one assignment of error:

{¶13} "The trial court erred in denying defendant-appellant's motion for 60(B) relief."

{¶14} As a preliminary matter, the contempt issue pending in the trial court does not necessarily make an otherwise final, appealable order an interlocutory order. The contempt finding was made in pursuit of satisfying the judgment which is now being appealed. An appellate court reviews only the final order, judgment, or decree sought to be reviewed, while a lower court generally retains jurisdiction as to the remainder of the cause from which the appeal has been perfected. *In re Kurtzhalz*, 141 Ohio St. 432 (1943). Here, the focus of this appeal is solely on the court's denial of appellant's Civ.R. 60(B) motion; appellant has not appealed the portion of any judgment entry concerning a finding of contempt.

2. In the trial court, appellee contended that, if Civ.R. 60(B) relief is appropriate, the awarded sum should actually be $93,278.80, suggesting an equal dissatisfaction with the judgment entry. No cross-appeal or cross-assignment of error was filed with this court, however.

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

{¶16} 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, 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 * * *; (4) the judgment has been satisfied, released or discharged * * *; 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.

{¶17} Thus, Civ.R. 60(B) provides parties with an equitable remedy requiring a court to revisit a final judgment and possibly afford relief from that judgment when in the interest of justice. *In re Edgell*, 11th Dist. No. 2009-L-065, 2010-Ohio-6435, ¶52. It is a curative rule which is to be liberally construed with the focus of reaching a just result. *Hiener v. Moretti*, 11th Dist. No. 2009-A-0001, 2009-Ohio-5060, ¶18. "Moreover, Civ.R. 60(B) has been viewed as a mechanism to create a balance between the need for finality and the need for 'fair and equitable decisions based upon full and accurate information.'" *Id.*, quoting *In re Whitman*, 81 Ohio St.3d 239, 242 (1998). However, Civ.R. 60(B) relief is not to be used as a substitute for direct appeal. *Doe v. Trumbull Cty. Children Services Bd.*, 28 Ohio St.3d 128, paragraph two of the syllabus (1986).

{¶18} The Ohio Supreme Court has set forth a three-prong test which the movant of the motion must meet to prevail on a Civ.R. 60(B) motion: (1) the motion

must be timely, i.e., not more than one year after the judgment or order was entered where the grounds of relief are Civ.R. 60(B)(1)-(3), otherwise the motion must be made within a reasonable time; (2) the party must be entitled to relief under one of the outlets in Civ.R. 60(B)(1)-(5); and (3) the party must have a meritorious defense or claim to raise if relief is granted. *GTE Automatic Elec. v. ARC Industries*, 47 Ohio St.2d 146, paragraph two of the syllabus (1976). A party must satisfy each prong to be entitled to relief. *KMV V Ltd. v. Debolt*, 11th Dist. No. 2010-P-0032, 2011-Ohio-525, ¶24. If one prong is not satisfied, the entire motion must be overruled. *Id.*, quoting *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20 (1988).

{¶19} "The determination of whether relief should be granted [under Civ.R. 60(B)] is addressed to the sound discretion of the trial court." *In re Whitman*, 81 Ohio St.3d 239, 242 (1998), citing *Griffey v. Rajan*, 33 Ohio St.3d 75, 77 (1987). Thus, an appellate court's standard of review is whether the trial court abused its discretion. An abuse of discretion is the trial court's "'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black's Law Dictionary 11 (8th Ed. 2004).

{¶20} As a general matter, "pension or retirement benefits *accumulated during a marriage* are marital assets subject to property division in a divorce action." (Citation omitted and emphasis added.) *Fazenbaker v. Fazenbaker*, 11th Dist. No. 2009-T-0131, 2010-Ohio-5400, ¶25. Several factors in this case make the division of the account extremely difficult: (1) appellant entered the stock savings plan 25 years prior to marrying appellee; (2) appellant retired during the marriage; and (3) the proceeds from the stock savings program were rolled into various other accounts subsequent to

retirement. Notwithstanding these difficulties, the parties clearly intended to have an equal and equitable distribution of the account.

{¶21} Appellant argues that relief can be granted through Civ.R. 60(B)(1) under the "mistake" and "excusable neglect" prongs. Appellant contends the trial court mistakenly used an incorrect valuation date and an incorrect figure in determining the final award. We agree. Appellant, as the movant of the motion, prevails under the three-prong test set forth in *GTE Automatic*.

{¶22} First, appellant's motion is timely. Since appellant seeks relief through Civ.R. 60(B)(1), the motion must be made not more than one year after the final judgment. Appellant's Civ.R. 60(B) motion, which raises both of the aforementioned concerns, was filed on July 29, 2010, less than one year after the October 13, 2009 judgment.

{¶23} Second, appellant is entitled to relief under Civ.R. 60(B)(1) under both the "mistake" and "excusable neglect" prongs. The judgment from which relief is sought ordered an award predicated on a simple equation: $186,557.59 (total amount of cashed-out account) minus $84,910.00 (premarital account amount), divided by two. As a result, the "plaintiff-wife shall be awarded $50,823.80 to be paid by defendant-husband." However, this $50,823.80 was the product of an incorrect date and an incorrect figure.

{¶24} As to the incorrect date, the policy was surrendered on December 26, 2007, for $186,557.59, the figure used by the magistrate. However, the language of the divorce decree clearly and unequivocally states that the "coverture" portion was to be from the date of the marriage to *the date of retirement*, which was January 1999. Since

the divorce decree was based on the stipulations of the parties, both parties agreed that the date of retirement should have been used.

{¶25} While this error alone may or may not change the overall award, the premarital amount is also incorrect. The magistrate used the premarital figure of $84,910. In fact, there is no documentation anywhere in the record which supports this figure. Instead, a statement of the account dated June 30, 1994, before the court as plaintiff's exhibit one, reveals that appellant did *not* have $84,910 in the account, but 84.910 shares of common stock at $1-2/3 par value, trading at $50.25. Moreover, in addition to this stock, there was a savings sum and an income fund sum associated with the account in 1994, neither of which was apparently considered by the magistrate in determining the premarital figure. Additionally, evidence attached to appellant's "motion to vacate order" reveals a June 30, 1993 balance of $91,528.73 and an income fund sum of $90,758.69. Not only is this date closer to the parties' actual date of marriage, but it supports appellant's contention that the premarital figure was much greater than the figure used.

{¶26} Third, appellant has a meritorious claim to present if relief is granted—that the incorrect premarital amount was used by the trial court and an incorrect date was used. Using new figures and new valuation dates would change the award set forth in the judgment entry. Appellee acknowledges that the wrong date was used but contends that, since she is granted growth on the account and appellant no longer contributed to the plan after the date of retirement, the court essentially committed harmless error. Indeed, depending on post-retirement growth, this error may not affect the award set forth in the final judgment. However, this is not the only error made by the trial court.

{¶27} The trial court also erred in the actual monetary figure. Appellee also acknowledges the magistrate used appellant's number of shares as a dollar amount but argues that appellant did not raise this concern and it does not rise to the level of plain error. However, appellant has continually argued that the premarital figure determined by the court was calculated by mistake. While he does not specifically note that the court used the number of shares as a dollar amount, such an issue is necessarily encompassed in his argument that the premarital figure was calculated in error. Further, even supposing a "plain error" analysis was appropriate, using a number of shares as a dollar amount is the essence of plain error.

{¶28} Both parties agree that appellee is entitled to one-half the value of the subject account from the date of marriage to the date of appellant's retirement. Exactly *what that value is* remains a question for the trial court. Relief from judgment is wholly appropriate where the trial court mistakenly used the number of shares as a dollar amount and mistakenly used a valuation date clearly contrary to the instructions of the divorce decree and the stipulations of the parties.

{¶29} Appellant's sole assignment of error has merit. So that a judgment award may be calculated using a correct figure and date, as the parties intended, this case is reversed and remanded for further proceedings.

DIANE V. GRENDELL, J.,

MARY JANE TRAPP, J.,

concur.