

[Cite as *Jones v. Jones*, 2010-Ohio-2235.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
MEIGS COUNTY

DAWN M. JONES, nka DAWN M.
SHULER,

:

Petitioner-Appellant,

:

Case No. 09CA11

vs.

:

CURTIS D. JONES,

:

DECISION AND JUDGMENT ENTRY

Respondent-Appellee.

:

APPEARANCES:

COUNSEL FOR APPELLANT: Christopher E. Tenoglia, 200 East Second Street,
Pomeroy, Ohio 45769

COUNSEL FOR APPELLEE:¹ Trenton J. Cleland, 116 Mulberry Avenue, Pomeroy,
Ohio 45769

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 5-17-10

ABELE, J.

{¶ 1} This is an appeal from a Meigs County Common Pleas Court judgment that denied a Civ.R. 60(B) motion for relief from judgment filed by Dawn M. Jones nka Dawn M. Shuler, petitioner below and appellant herein.

{¶ 2} Appellant raises the following assignments of error for review:

FIRST ASSIGNMENT OF ERROR:

“THE TRIAL COURT ERRED AS A MATTER OF LAW IN
ITS’ [SIC] REVIEW OF THE PLEADINGS IN THIS CASE

¹Appellee Curtis D. Jones did not enter an appearance in this appeal.

WHEN IT STATED THAT NO MATERIAL QUESTIONS OF FACT EXISTED IN THE RECORD AND THAT THE PARTIES SHOULD BE BOUND BY THEIR AGREEMENT, WHEN IT WAS CLEAR FROM THE RECORD THAT MANY FACTUAL DISCREPANCIES REGARDING THE INCOME, INTENT TO DIVIDE PROPERTY AND PARENTING OF THE PARTIES' CHILD HAVE BEEN DISCOVERED, POST DIVORCE, THAT WERE NOT DISCLOSED TO THE PLAINTIFF-APPELLANT AT THE TIME OF THE PARTIES['] FINAL DISSOLUTION HEARING.”

SECOND ASSIGNMENT OF ERROR:

“THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DISMISSED THE CAUSE HEREIN SUMMARILY, WITHOUT SO MUCH AS A MINIMAL EVIDENTIARY HEARING AS SUFFICIENT FACTS WERE PRESENT IN THE AFFIDAVIT AND PLEADING OF THE PLAINTIFF-APPELLANT IN THIS CASE SO AS TO PERMIT EVIDENTIARY HEARING.”

{¶ 3} On December 8, 1999, the parties married. On August 15, 2008, the parties filed a pro se petition to dissolve their marriage and attached a separation agreement that provided that appellant shall be the child's residential parent and legal custodian and appellee shall have shared parenting. The agreement (1) did not require either party to pay child or spousal support; (2) awarded the marital home and another property to appellee; (3) provided that each party keep one vehicle; and (4) provided that each party keep their own retirement accounts. The agreement further stated:

“The parties have incorporated herein their entire understanding. There are not representations, warranties, covenants, or undertakings other than those expressly set forth herein. No oral statements or prior written matter extrinsic to this Agreement shall have any force or effect. Each party acknowledges that he or she fully understands the terms hereof, and each acknowledges that he or she is signing this Agreement freely and voluntarily.”

Both parties acknowledged that they signed the agreement of his or her “own free act and deed.”

{¶ 4} On October 20, 2008, the trial court issued a dissolution decree that incorporated the separation agreement. The decree stated that “both spouses appeared in open court * * * and acknowledge[d] under oath that they voluntarily entered into the Separation Agreement appended to the Petition, that they are still in agreement as to the terms thereof, that there has been a full disclosure by each of the parties of all his or her assets, and that they seek a dissolution of marriage.” A handwritten note on the decree indicates that the parties agreed that “no child support will [be] paid due to equal time with child.” The court found “that the parties have freely and voluntarily entered into the above agreement and that this agreement has been signed and approved by the parties. The agreement is found to be fair and just to all parties and is in the best interest of the children.” Both appellant and appellee signed the decree.

{¶ 5} On April 16, 2009, appellant filed a Civ.R. 60(B) motion to vacate the trial court’s October 20, 2008 judgment that dissolved the parties’ marriage, or, alternatively, to correct the “defective terms” of the judgment. She alleged that the judgment “does not reflect the intent of the parties regarding the division of their assets or the contemplation of parenting time division.” She attached an “amended separation agreement,” an “amended shared parenting plan,” a child support worksheet and her affidavit. Appellant claimed that the amended documents more accurately reflect the parties’ agreement.

{¶ 6} On July 24, 2009, the trial court denied appellant’s motion. The court

noted that the parties entered into a separation agreement that addressed all matters relating to the termination of the parties' marriage. Thus, the court found that appellant failed to allege any facts to entitle her to relief under Civ.R. 60(B). This appeal followed.

{¶ 7} Because appellant's two assignments of error both challenge the trial court's decision to deny her Civ.R. 60(B) motion, we consider them together. In her first assignment of error, appellant asserts that the trial court erred by determining that "no material facts existed" to warrant Civ.R. 60(B) relief. In her second assignment of error, appellant argues that the trial court abused its discretion by dismissing her motion without holding an evidentiary hearing.

{¶ 8} Generally, an appellate court will uphold a trial court's decision regarding a Civ.R. 60(B) motion for relief from judgment if the court did not abuse its discretion. See, e.g., WC Milling, LLC v. Grooms, 164 Ohio App.3d 45, 2005-Ohio-5420, 841 N.E.2d 324, at ¶11, citing State ex rel. Richard v. Seidner (1996), 76 Ohio St.3d 149, 151, 666 N.E.2d 1134; Rose Chevrolet, Inc. v. Adams (1988), 36 Ohio St.3d 17, 20, 520 N.E.2d 564. An abuse of discretion implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140. When applying the abuse-of-discretion standard, a reviewing court is not free to substitute its judgment for that of the trial court. See, e.g., In re Jane Doe I (1991), 57 Ohio St.3d 135, 566 N.E.2d 1181.

{¶ 9} Civ.R. 60(B) permits a trial court to grant a party relief from a final judgment under the following circumstances:

- (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.

To prevail on a motion for relief from judgment under Civ.R. 60(B), a 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, and, where the grounds for 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. See, e.g., GTE Automatic Elec. Inc., v. ARC Industries, Inc. (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, paragraph two of the syllabus. If a movant fails to satisfy any one of these requirements, the trial court should deny the motion. Rose Chevrolet, Inc. v. Adams (1988), 36 Ohio St.3d 17, 20, 520 N.E.2d 564; Svoboda v. Brunswick (1983), 6 Ohio St.3d 348, 351, 453 N.E.2d 648.

{¶ 10} Furthermore, a party who files a Civ.R. 60(B) motion for relief from judgment is not automatically entitled to a hearing on the motion. Instead, the movant bears the burden to demonstrate that he or she is entitled to a hearing on the motion. *Id.* To warrant a hearing on a Civ.R. 60(B) motion, the movant must allege operative facts that would warrant relief under Civ.R. 60(B). Kay v. Marc Glassman, Inc. (1996), 76 Ohio St.3d 18, 19, 665 N.E.2d 1102. Although a movant is not required to submit evidentiary material in support of the motion, a movant must do more than make bare

allegations of entitlement to relief. French v. Taylor (Jan. 2, 2002), Lawrence App. No. 01CA15; see, also, Your Financial Community of Ohio, Inc. v. Emerick (1997), 123 Ohio App.3d 601, 607, 704 N.E.2d 1265, citing Kay v. Marc Glassman, Inc. (1996), 76 Ohio St.3d 18, 20, 665 N.E.2d 1102.

{¶ 11} In the case at bar, appellant did not allege which of the Civ.R. 60(B) grounds entitle her to relief. This fact justifies the trial court's decision to overrule her motion. See Riley v. Riley, Washington App. No. 07CA16, 2008-Ohio-859, at ¶30. Furthermore, appellant did not demonstrate that she would have a meritorious defense if the court were to grant her relief. "[M]utual consent is the cornerstone of [Ohio's] dissolution law." Knapp v. Knapp (1986), 24 Ohio St.3d 141, 144, 493 N.E.2d 1353. As such, "[a]greement between spouses is the linchpin of the procedure," and the petition must incorporate a separation agreement, which "delineate[s] the disposition of all property, set[s] forth the terms and amount of alimony (if any) and, if there are minor children * * * provide for child custody, visitation, and support." In re Adams (1989), 45 Ohio St.3d 219, 220, 543 N.E.2d 797; see, also, R.C. 3105.63.

{¶ 12} Once parties execute a separation agreement, they must appear before the court, verify that each entered into the agreement voluntarily, that both are satisfied with the terms of the agreement, and that they seek dissolution of the marriage. Adams, 45 Ohio St.3d at 220; R.C. 3105.64. A court may validate a dissolution and grant a decree, "[o]nly if both parties are completely in accord" in assenting to the dissolution and the terms of the agreement. See In re Means, Trumbull App. No. 2004-T-0138, 2005-Ohio-6079.

{¶ 13} Because mutual consent is the cornerstone of dissolution law, "[c]ourts

must be wary and ensure that relief under Civ.R. 60(B) is justified, not merely a tool used 'to circumvent the terms of a settlement agreement simply because, with hindsight, [the moving party] has thought better of the agreement which was entered into voluntarily and deliberately.'" McLoughlin v. McLoughlin, Franklin App. No. 05AP-621, 2006-Ohio-1530, at ¶24, quoting Biscardi v. Biscardi (1999), 133 Ohio App.3d 288, 292, 727 N.E.2d 949; see, also, Lewis v. Lewis, Franklin App. No. 09AP-594, 2010-Ohio-1072, at ¶10.

{¶ 14} In the case sub judice, appellant and appellee entered into a separation agreement voluntarily and deliberately. Appellant signed the separation agreement. Appellant appeared before the court and stated that she willingly entered into the agreement. Appellant signed the court's dissolution decree that also recited her acceptance of the separation agreement. At no point did appellant allege that the agreement failed to represent the parties' actual agreement. Instead, she indicated just the opposite. Appellant's Civ.R. 60(B) motion appears to be a result of her unhappiness with her prior decision, and not, as she claims, the agreement's inaccurate recitation of the parties' intentions. Unfortunately for appellant, a "change of heart" is not a sufficient reason to set aside a separation agreement. See Perko v. Perko, Geauga App. Nos. 2001-G-2403, 2002-G-2435, and 2002-G-2436, 2003-Ohio-1877, at ¶27; Thompson v. Dodson-Thompson, Cuyahoga App. No. 90814, 2008-Ohio-4710, at ¶17.

{¶ 15} Moreover, appellant did not appeal the trial court's dissolution decree. Had she believed that the separation agreement that the court incorporated into its

decree failed to accurately set forth the parties' intentions, she could have raised this argument on direct appeal. Appellant cannot use Civ.R. 60(B) as a substitute for appeal. See Elliot v. Smead Mfg. Co., Hocking App. No. 08CA13, at 13; see, also, Fairbanks Capital Corp. v. Richards, Cuyahoga App. No. 86173, 2006-Ohio-102, at ¶5, citing Kelley v. Lane, 103 Ohio St.3d 432, 816 N.E.2d 599, 2004-Ohio-5582, at ¶3. Consequently, the trial court did not abuse its discretion by overruling appellant's Civ.R. 60(B) motion and by declining to hold a hearing.

{¶ 16} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's first and second assignments of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Meigs County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, P.J. & Harsha, J.: Concur in Judgment & Opinion
For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.