

[Cite as *Minear v. Palkovic*, 2009-Ohio-6752.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

MARGARET MINEAR

fka PALKOVIC,

PLAINTIFF-APPELLEE,

VS.

PAUL ANTHONY PALKOVIC,

DEFENDANT-APPELLANT.

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CASE NO. 09-MA-61

OPINION

CHARACTER OF PROCEEDINGS:

Civil Appeal from Court of Common
Pleas, Domestic Relations Division of
Mahoning County, Ohio
Case No. 93DR804

JUDGMENT:

Reversed and Remanded

APPEARANCES:

For Plaintiff-Appellee

Attorney Jennifer R. Robbins
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For Defendant-Appellant

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JUDGES:

Hon. Gene Donofrio

Hon. Joseph J. Vukovich

Hon. Cheryl L. Waite

Dated: December 15, 2009

[Cite as *Minear v. Palkovic*, 2009-Ohio-6752.]
DONOFRIO, J.

{¶1} Defendant-appellant, Paul Palkovic, appeals from a Mahoning County Court of Common Pleas domestic relations division decision denying his motion to set aside a judgment ordering him to pay plaintiff-appellee, Margaret Minear, \$500 per month in spousal support.

{¶2} The parties were granted a divorce on September 13, 1994. The trial court reserved jurisdiction to modify the spousal support award of \$485 per month. The parties modified the award by agreed entry on July 30, 2004, from \$485 per month to \$300 per month.

{¶3} On May 25, 2007, appellant filed a motion to reduce or terminate spousal support stating that his income had decreased and appellee's income had increased. Appellee subsequently filed a motion to increase spousal support alleging that her living expenses had increased, appellant was receiving benefits from two companies, appellant shared living expenses with his new spouse, and appellant had new employment.

{¶4} The trial court held a hearing where it heard evidence from both parties. It then made the following findings. Appellee's 2006 gross income including spousal support was \$12,927 and her 2007 gross income including spousal support was projected at \$14,500. Appellee is 64 years old and has retired. Considering her current physical and mental condition, she is employed at capacity. She has no savings or assets besides her home. Appellant is 66 years old and is also retired. Considering his age and current physical and mental condition, he too is employed at capacity. Appellant's 2006 income was \$44,382, made up of his pensions and social security benefits. He has \$11,000 in savings and owns a home. He also participates in his wife's USA Today distributorship, from which he testified that he receives approximately \$2,400 per year in income.

{¶5} Based on these finding, the court granted appellee's motion for an increase in spousal support and ordered appellant to pay appellee \$500 per month. It denied appellant's motion to reduce or terminate spousal support.

{¶16} Next, appellant filed a Civ.R. 60(B) motion to set aside the judgment. He asserted that either no evidence was presented of appellee's social security income or the trial court did not consider such evidence in rendering its decision.

{¶17} Instead of expressly ruling on the merits of appellant's Civ.R. 60(B) motion, the trial court simply entered another judgment that repeats, almost verbatim, its original judgment ordering appellant to pay appellee \$500 spousal support per month. It is from this judgment that appellant filed a timely notice of appeal.

{¶18} Initially, it should be noted that appellee has failed to file a brief in this matter. Therefore, we may consider appellant's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain such action. App.R. 18(C).

{¶19} Appellant raises only one assignment of error, which states:

{¶110} "THE TRIAL COURT ERRED IN DENYING HUSBAND'S MOTION TO SET ASIDE THE JULY 25, 2008 ENTRY WHICH FAILED TO INCORPORATE WIFE'S SOCIAL SECURITY INCOME WITHIN THE STATUTORY ANALYSIS OF INCOME AND EXPENSES FOR SPOUSAL SUPPORT ADJUDICATION."

{¶111} Appellant argues that the trial court should have granted his Civ.R. 60(B) motion and set aside the judgment increasing spousal support to \$500 per month. He contends that the trial court failed to consider appellee's social security income in determining her annual income and her ability to meet her living expenses.

{¶112} The Ohio Supreme Court set out the controlling test for Civ.R. 60(B) motions in *GTE Automatic Elec., Inc. v. Arc Industries, Inc.* (1976), 47 Ohio St.2d 146, at paragraph two of the syllabus:

{¶113} "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."

{¶14} The standard of review used to evaluate the trial court's decision to grant or deny a Civ.R. 60(B) motion is abuse of discretion. *Preferred Capital, Inc. v. Rock N Horse, Inc.*, 9th Dist. No. 21703, 2004-Ohio-2122, at ¶9. Abuse of discretion connotes more than an error in judgment; it implies that the trial court's judgment is arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶15} The first GTE element is satisfied if the party requesting a Civ.R. 60(B) motion alleges a meritorious claim or defense if relief is granted. The moving party does not have to prove that he will prevail on that claim or defense. *Syphard v. Vrable* (2001), 141 Ohio App.3d 460, 463. But he must present operative facts with enough specificity that the trial court can determine whether he has met that test. *Id.*

{¶16} In his motion, appellant alleged that appellee received social security benefits and that the court should have considered those benefits in determining whether a modification in spousal support was appropriate.

{¶17} R.C. 3105.18(C) provides a list of factors that a court must consider "in determining the nature, amount, and terms of payment, and duration of spousal support," including, "(a) The income of the parties, from all sources." A court should consider social security benefits when determining whether spousal support is correct. *Beyer v. Beyer* (1979), 64 Ohio App.2d 280, 284.

{¶18} Thus, if appellee did in fact receive social security benefits, the trial court should have considered them in its analysis of income and expenses for determining appropriate spousal support.

{¶19} The second element of the *GTE* test requires that the moving party be entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5). The grounds for relief under the second *GTE* element are:

{¶20} "(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.” Civ.R. 60(B).

{¶21} Appellant specifically sought relief under Civ.R. 60(B)(1), (3), and (5). Relief cannot be granted under Civ.R. 60(B)(1). Appellant argues that the trial court mistakenly overlooked evidence that was in the record that appellee received social security benefits in 2007. However, the “mistake” or “inadvertence” referred to in Civ.R. 60(B)(1) is a mistake of a party, not a mistake by the court. *Peltz v. Peltz* (June 27, 1997), 11th Dist. No. 96-G-2026, overruled on other grounds as recognized in *Vitantonio v. Baxter*, 11th Dist. No. 2005-L-004, 2006-Ohio-1685. Therefore, the error alleged by appellant does not satisfy Civ.R. 60(B)(1).

{¶22} Appellant also sought relief under Civ.R. 60(B)(3). However, appellant did not allege any instance of fraud, misrepresentation, or other misconduct on appellee’s part. Moreover, no evidence of fraud, misrepresentation, or misconduct is apparent on the record. Therefore, there are no grounds for granting relief pursuant to Civ. R. 60(B)(3).

{¶23} Appellant also sought relief from the judgment under Civ.R. 60(B)(5).

{¶24} Appellant contends that the trial court failed to consider appellee’s social security benefits in determining her income. The exhibits introduced at the hearing included copies of appellee’s 2004, 2005, and 2006 tax returns. There was no copy of appellee’s 2007 tax return, presumably because the hearing took place in November 2007, before she would have prepared her 2007 tax return.

{¶25} Appellee’s 2004 tax return indicated that she received no social security benefits that year. (Defendant’s Ex. 1). Appellee’s 2005 tax return indicated that she received \$1,953 in social security benefits that year. (Defendant’s Ex. 2). And appellee’s 2006 tax return indicated that she received \$8,169 in social security benefits that year. (Defendant’s Ex. 3). Appellee testified that 2005 was her last year of working at JC Penney’s (Tr. 9), which would explain why she received no social

security benefits in 2004, minimal benefits in 2005, and more substantial benefits in 2006.

{¶26} In its judgment entry the court noted the parties' income sources. It specifically stated that appellant's income included pensions and social security benefits. It did not make such a finding as to appellee's income. And the court found that appellee's 2006 income was \$12,927, which was her adjusted gross income for tax purposes. (See Defendant's Ex. 3). It could have only reached this conclusion if it considered appellee's taxable income and not her non-taxable social security income which was listed at \$8,169. (See Defendant's Ex. 3).

{¶27} When determining a party's income for spousal support purposes, a trial court must consider both parties' income derived from retirement benefits. *Duvall v. Duvall*, 7th Dist. No. 04-BE-41, 2005-Ohio-4685, ¶56. Social security income is a retirement benefit that the trial court is to consider when determining spousal support issues. *Harris v. Harris*, 6th Dist. No. L-08-1152, 2009-Ohio-3913, at ¶33; *Friesen v. Friesen*, 10th Dist. No. 07AP-110, 2002-Ohio-952, at ¶47

{¶28} Here the trial court, although considering appellant's social security benefits, failed to consider appellee's social security benefits. Its failure to do so was error justifying appellant in relief from the judgment. Thus, appellant satisfied the second GTE element under Civ.R. 60(B)(5).

{¶29} As to the third GTE element, the motion was timely filed. The trial court entered its judgment on July 25, 2008. Appellant filed his motion on August 18, 2008, less than one month later.

{¶30} Because appellant satisfied all three GTE requirements, the trial court should have granted his motion to set aside the judgment. The court should have then taken appellee's social security income into consideration in fashioning its spousal support modification award. Accordingly, appellant's sole assignment of error has merit.

{¶31} For the reasons stated above, the trial court's judgment is hereby reversed and the matter is remanded for further proceedings. On remand, the trial

court is to reconsider its spousal support modification award while also taking into account appellee's social security income as set out above.

Vukovich, P.J., concurs.

Waite, J., concurs.