No. 1-10-1965

SIXTH DIVISION
April 29, 2011

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re THE MARRIAGE OF:	)	Appeal from
	)	the Circuit Court
MEIGAN CAMERON (formerly known as Meigan C. Thiel),	)	of Cook County
Petitioner-Appellee,	)	
	)	03 D 00746
and	)	
	)	Honorable
STUART E. THIEL,	)	Nancy J. Katz,
Respondent-Appellant.	)	Judge Presiding

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Garcia and Justice Cahill concurred in the judgment.

O R D E R

HELD: Former husband petitioned to set aside divorce judgment on grounds court lacked authority to distribute disability insurance benefits as marital property, former wife countered that petition was untimely, trial court dismissed petition and was affirmed.

Meigan Cameron, then known as Meigan C. Thiel, filed a petition on January 23, 2003, for legal separation from Stuart E. Thiel. Meigan was employed as an Episcopal priest in Chicago and Stuart was employed as an associate tax attorney in the Chicago office of Mayer, Brown, Rowe and Maw, but was on disability leave while undergoing outpatient mental health treatment. In February 2003, Stuart began receiving long-term disability benefits from the law firm's insurer, UnumProvident Insurance Company (UNUM). Three months later, Meigan

petitioned to dissolve the marriage. In July 2003, Stuart was discharged from the treatment program and the firm, and joined the faculty of a Chicago university as a full-time professor of economics. The divorce action remained pending for three more years of discovery and motion practice.

On November 8, 2006, Meigan and Stuart entered into a marital settlement agreement which the court incorporated into a judgment for dissolution of marriage ordered that same day. The agreement provided in part that Meigan and Stuart: (a) had the benefit of representation by separate counsel, (b) had "been fully advised as to his or her respective rights and obligations under Illinois law pursuant to the terms and provisions of this Agreement," (c) had "carefully reviewed the terms and provisions *** [and gained] full and complete understanding of the legal consequences," and (d) had "freely and voluntarily agree[d] to each and every term and provision" and "entered into [them] *** without imposition of force, duress, coercion or undue influence from any source." The contract allocated debts and distributed assets such as real estate, motor vehicles, and bank accounts, and also stated:

> "VI.6 **UNUM Monthly Disability Benefit**. Husband presently receives a monthly disability benefit, which supplements his monthly income to an after tax extent of $8,020.00 per month and is considered to be a marital asset to which Wife is entitled to her equal 50% share as long as Husband continues to qualify for and receives this benefit. Accordingly, Husband shall pay directly to Wife the sum of 50% of his monthly disability benefit within two (2) banking days of receipt thereof via a recurring, monthly, electronic transfer into Wife's checking

> account. If Husband's income from employment were to increase, the monthly disability benefit would decrease proportionately on an after tax basis and it shall be Husband's responsibility to immediately provide Wife with a copy of any notification Husband receives concerning any adjustment (increase or decrease) to benefit payments or the termination of same. These payments shall constitute a property allocation to Wife and not maintenance or support and shall not be taxable to Wife. Husband shall also maintain the Wife as the beneficiary of any survivor benefits available under the UNUM policy, and agrees to execute all documents necessary to name the Wife as beneficiary."

Stuart left the college faculty in June 2007 and became a graduate student at a different university in August 2007. He continues to receive the disability payments which began in 2003.

On June 3, 2009, two years and seven months after the divorce, he petitioned *pro se* to "set aside or expunge as void" the part of the judgment "purporting to allocate as property monthly payments received by Stuart by reason of his disability." He contended a disability benefit is not "property," therefore the court "lacked subject matter jurisdiction to allocate it as property," which meant that part of the divorce judgment was void. Meigan motioned to dismiss the petition as untimely pursuant to section 2-619(a)(5) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(5) (West 2008) (Code)), pointing out that although Stuart failed to cite any authority, his petition could be brought only under section 2-1401 of the Code and was filed well after the statute's two-year window closed November 8, 2008. 735 ILCS 5/2-619(a)(5), 2-1401

(West 2008). After full briefing and oral argument, the judge granted the motion to dismiss. The judge also rejected Stuart's motion for reconsideration. For the reasons that follow, we affirm.

Section 2-1401 of the Code allows for the vacatur of a final judgment older than 30 days. 735 ILCS 5/2-1401(a) (West 2008). Section 2-1401(c) of the Code provides, however, that a section 2-1401 petition must be filed no later than two years after the entry of the judgment sought to be vacated. 735 ILCS 5/2-1401(c) (West 2008). The purpose of the statute's time limitation is to provide stability and finality to lawsuits. *Crowell v. Bilandic*, 81 Ill. 2d 422, 427-28, 411 N.E.2d 16, 18 (1980). Section 2-1401(f) states an exception to the two-year time limitation as follows: "Nothing contained in this Section affects any existing right to relief from a void order or judgment, or to employ any existing method to procure that relief." 735 ILCS 5/2-1401(f) (West 2008).

A section 2-1401 petition is filed under the same case number as the judgment it seeks to vacate, however, a section 2-1401 proceeding is not a continuation of the original action. *In re Marriage of Buck*, 318 Ill. App. 3d 489, 493, 742 N.E.2d 378, 381 (2000); 735 ILCS 5/2-1401(b) (West 2008). The petition is actually a new action that is treated like any other civil complaint and it is subject to the usual rules of civil practice. *Buck*, 318 Ill. App. 3d at 493, 742 N.E.2d at 381. Thus, the petitioner must allege facts which entitle him or her to the requested relief and any petition which fails to factually state a cause of action is subject to dismissal. *Buck*, 318 Ill. App. 3d at 493, 742 N.E.2d at 381. A 2-619 motion to dismiss raises a question as to the legal sufficiency of a pleading's allegations. *Buck*, 318 Ill. App. 3d at 493, 742 N.E.2d at 381. To be entitled to relief under section 2-1401, the petitioning party must affirmatively plead specific

facts supporting three elements: (1) the existence of a meritorious defense to the judgment, (2) due diligence in discovering the defense in the original action, and (3) due diligence in seeking relief under section 2-1401. 735 ILCS 2/1401(a)(c) (West 2008); *In re Marriage of Johnson*, 237 Ill. App. 3d 381, 394, 604 N.E.2d 378, 387 (1992). A meritorious defense consists of facts which were unknown when the judgment was entered, and if known, would have altered the judgment. *In re Marriage of Lindjord*, 234 Ill. App. 3d 319, 325, 600 N.E.2d 431, 435 (1992). Due diligence consists of a reasonable excuse for having failed to act within the appropriate time. *Smith v. Airoom*, 114 Ill. 2d 209, 222, 499 N.E.2d 1381, 1386 (1996). Section 2-1401 is not a means for a party to be relieved of the consequences of strategic errors in their divorce action, such as a failure to diligently discover relevant information or the failure to retain independent counsel. *Buck*, 318 Ill. App. 3d 489, 742 N.E.2d 378 (distinguishing between one party's failure to discover available information and the other party's fraudulent concealment of information); *In re Marriage of Broday*, 256 Ill. App. 3d 699, 628 N.E.2d 790 (1993) (affirming 2-1401 ruling where wife could have discovered financial information through her own *pro se* investigation or by hiring independent counsel, was repeatedly advised to seek assistance, and testified at divorce prove-up that she understood nature of the proceedings). When a section 2-1401 petition is dismissed pursuant to section 2-619 of the Code, the matter is considered *de novo* by the appellate court. *Buck*, 318 Ill. App. 3d at 493, 742 N.E.2d at 382; 735 ILCS 5/2-2-619, 2-1401 (West 2008).

If the petition at issue here is subject to subparagraph (c) of section 2-1401 as Meigan has argued, then the pleading was time-barred when filed on June 3, 2009, well after the two-year

anniversary of the Thiel divorce judgement which occurred on November 8, 2008, and the petition was properly dismissed on this basis pursuant to section 2-619(a)(5) of the Code. 735 ILCS 5/2-1401(c), 5/2-619(a)(5) (West 2008). An additional, independent basis for affirming the dismissal is that Stuart's allegations focus strictly on his "property" argument and do not also indicate he was diligent in discovering his defense to the divorce judgment and diligent in filing the petition. *In re Marriage of Murphy*, 359 Ill. App. 3d 289, 300, 834 N.E.2d 56, 65 (2005) (trial court's decision may be affirmed for any reason appearing in the record, regardless of the trial court's reasoning). Stuart addressed only one of the three necessary elements of a petition for relief for judgment governed by section 2-1401(c). 735 ILCS 5/2-1401(c) (West 2008). Stuart's failure to allege what triggered his belief the judgment was assailable and when the necessary information became available to him, makes it appear he could have brought the argument at any point during the four years of legal proceedings that culminated with the marital settlement agreement in 2006. It was Stuart's burden as the petitioning party to allege facts addressing all three prongs of a section 2-1401 petition. We reiterate that a post-judgment petition is not a means for a litigant to be relieved of the consequences of his own negligence or mistake in the initial proceeding. *Smith*, 114 Ill. 2d at 222, 499 N.E.2d at 1386; *Buck*, 318 Ill. App. 3d 489, 742 N.E.2d 378; *Broday*, 256 Ill. App. 3d 699, 628 N.E.2d 790

Stuart argues, however, that treating his disability insurance benefits as marital property was fundamentally incorrect, the trial court lacked subject matter jurisdiction to reach this improper conclusion, the trial court's error resulted in a divorce judgment that is partially void, and, therefore, Stuart's petition for relief from the judgment is governed by subparagraph (f) of

section 2-1401, which has no time constraint. 735 ILCS 5/2-1401(f) (West 2008). See *In re Marriage of Sheetz*, 254 Ill. App. 3d 695, 697, 627 N.E.2d 154, 156 (1993), quoting *People ex rel. the Village of Winnetka v. Dorner*, 181 Ill. App. 3d 25, 27, 536 N.E.2d 856 (1989) ("A judgment is void, in excess of the court's jurisdiction, if the court 'lacks the inherent power to make or enter the particular order involved.' "). More specifically, he contends disability insurance benefits are not marital "property" subject to distribution under section 5/503 of the Illinois Marriage and Dissolution of Marriage Act. 750 ILCS 5/503 (West 2006).

Meigan responds that the basic premise of Stuart's argument is flawed and in conflict with numerous Illinois opinions which treat this type of asset as marital property. She also points out that the trial court did not decide the UNUM monthly disability payments were martial property. Instead, the parties specifically provided in Paragraph VI.6 of their marital settlement agreement that the "monthly disability benefit *** is considered to be a marital asset to which Wife is entitled to her equal 50% share as long as Husband continues to qualify for receives this benefit," and that Stuart's 50% payments to Meigan "shall constitute a property allocation to Wife." She also points out that the Illinois legislature expressly encourages "amicable settlement" of disputes between parties seeking to dissolve their marriage and has provided in the Marriage and Dissolution of Marriage Act that when parties agree to the disposition of property and maintenance, their agreement is binding on the trial court unless the terms are found to be unconscionable. *In re Marriage of Hightower*, 358 Ill. App. 3d 165, 170-71, 830 N.E.2d 862, 867 (2005), citing 750 ILCS 5/502(a),(b) (West 2002). She concludes by pointing out that "the terms of the marital settlement agreement prevail over statutory directions [citation] and permit

the court to enter judgment on agreed provisions for disposition of property and maintenance, *even if the court could not have ordered such dispositions in the absence of the agreement.* [Citation.]" Emphasis added. *Sheetz*, 254 Ill. App. 3d at 697, 627 N.E.2d at 157.

We agree with Meigan's contention that the basic premise of Stuart's position is flawed and contrary to many Illinois opinions which treat this type of asset as marital property. The most analogous case is *In re Marriage of Smith*, 84 Ill. App. 3d 446, 447, 405 N.E.2d 884, 885 (1980), in which the husband was employed during the marriage as a commercial airline pilot, but suffered a heart attack, and was no longer capable of piloting an aircraft. He retired and began receiving a disability pension from the airline, payments from a loss-of-license insurance policy procured by his union, and Social Security benefits. *Smith*, 84 Ill. App. 3d at 447, 405 N.E.2d at 885. He challenged the trial judge's determination that the airline and union benefits were marital property. *Smith*, 84 Ill. App. 3d at 447, 405 N.E.2d at 885. The appellate court rejected his challenge, first noting that section 503 of the Marriage and Dissolution of Marriage Act defines marital property as all property acquired subsequent to the marriage and before dissolution of the marriage, unless it falls into a specific category expressly excepted by the statute. *Smith*, 84 Ill. App. 3d at 448, 405 N.E.2d at 885, citing Ill. Rev. Sat. 1977, ch. 40, par. 503, now found at 750 ILCS 5/503 (West 2006). The statutory exceptions are narrow:

> "a) For purposes of this Act, 'marital property' means all property acquired by either spouse subsequent to the marriage, except the following, which is known as 'non-marital property':
>
> (1) property acquired by gift, legacy or descent;

> (2) property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, legacy or descent;
>
> (3) property acquired by a spouse after a judgment of legal separation;
>
> (4) property excluded by valid agreement of the parties;
>
> (5) any judgment or property obtained by judgment awarded to a spouse from the other spouse; [and]
>
> (6) property acquired before the marriage; ***" 750 ILCS 5/503 (West 2006).

After surveying considerable Illinois and foreign opinions regarding longevity pensions, the appellate court reached the following conclusion regarding the pilot's disability pension:

> "Section 503(a) *** mandates the characterization of all non-excepted property as marital property and, as previously mentioned, longevity pensions constitute marital property in Illinois. The disability pension at bar differs from such longevity pension only in its compensatory element, its mode of inception and possibly its duration. Given the classificatory directive of section 503(a) we hold the disability benefits at bar to similarly constitute marital property." *Smith*, 84 Ill. App. 3d 454-55, 405 N.E.2d at 890.

The court also rejected the husband's contention that the loss-of-license insurance reimbursed him for the loss of a personal right and was thus his nonmarital property. *Smith*, 84 Ill. App. 3d at 455, 405 N.E.2d at 890. The court reasoned:

> "While respondent may be correct in his characterization of the nature of the insurance proceeds, these benefits, as the disability benefits, are not excepted by

> section 503(a) of the Act. [Given the statutory directive,] *** we hold the loss-of-license insurance to be marital property." *Smith*, 84 Ill. App. 3d 455, 405 N.E.2d at 890.

Smith was followed in *In re Marriage of Dettore*, 86 Ill. App. 3d 540, 541, 408 N.E.2d 429, 430 (1980), and characterized there as "a thoughtful and well-researched opinion." The *Dettore* panel determined that a worker's compensation award was marital property even though the claim was not settled until after the marriage had been dissolved. *Dettore*, 86 Ill. App. 3d 541-42, 408 N.E.2d at 431. The dates of the settlement or actual payment were irrelevant. *Dettore*, 86 Ill. App. 3d at 551-42, 408 N.E.2d at 431. The relevant date was the date of injury and whether the parties were married at the time. Because the claim for a compensation award accrued during the marriage, the award was found to be marital property regardless of when the award was actually received. *Dettore*, 86 Ill. App. 3d at 542, 408 N.E.2d at 431.

Smith was influential in *In re Marriage of Burt*, 144 Ill. App. 3d 177, 494 N.E.2d 868 (1986), regarding a personal injury claim that arose while a divorce action was pending.

Also, in *In re Marriage of Hall*, 278 Ill. App. 3d 782, 784, 663 N.E.2d 430, 431 (1996), the court rejected the husband's argument that the part of a workers' compensation settlement which compensated him for future diminished earning capacity should not be treated as marital property. Turning to the controlling statute, the court concluded:

> "[S]ection [503] provides that all property acquired by either spouse after marriage is marital property except for certain enumerated exceptions. None of the listed exceptions make reference to workers' compensation claims. 'It is

> never proper for a court to depart from plain language by reading into a statute exceptions, limitations or conditions which conflict with the clearly expressed legislative intent.' [Citation.]" *Hall*, 278 Ill. App. 3d at 784, 663 N.E.2d at 431.

Thus, Meigan and Stuart's characterization of the disability benefits in their marital settlement agreement was consistent with a well-established line of Illinois precedent treating disability benefits, worker's compensation benefits, and personal injury damages as marital property subject to distribution in a divorce judgment if the injury arose during the marriage.

Stuart contends these cases failed to answer the threshold question of whether the benefits at issue are "property" at all, however, we do not consider it necessary for the courts to first make the simplistic declaration that assets are "property" before declaring them to be "marital property." Stuart's attempt to distinguish these cases with a hyper-technical argument is not persuasive.

Furthermore, we find the case Stuart relies upon, *Abrell*, to be dissimilar from the parties' circumstances. *In re Marriage of Abrell*, 236 Ill. 2d 249, 923 N.E.2d 791 (2010). That case concerned unused vacation and sick days which the husband had accrued prior to the divorce. *Abrell*, 236 Ill. 2d at 267, 923 N.E.2d at 801. It was his employer's policy to pay for unused days when an employee quit or retired. *Abrell*, 236 Ill. 2d at 266-67, 923 N.E.2d at 801. The trial judge found the accumulated days were marital property, calculated their present day value, and awarded a dollar amount to the wife. *Abrell*, 236 Ill. 2d at 254, 923 N.E.2d at 794. Again, section 503(a) of the Marriage and Dissolution of Marriage Act defines marital property as "all property acquired by either spouse subsequent to the marriage" except for certain enumerated

exceptions. 750 ILCS 5/503(a) (West 2006). Because the employee could not receive cash for those days prior to termination or retirement and the employer could change or end its payment policy at any time, the court determined the value of those days was speculative and uncertain until they were actually collected. *Abrell*, 236 Ill. 2d at 267, 923 N.E.2d at 801. However, "when a party has actually received payment for vacation and/or sick days accrued during marriage prior to a judgment for dissolution, the payment for those days is marital property subject to distribution in the marital estate," because "[u]nder that scenario, the vacation and/or sick days have been converted to cash, the value of which is definite and certain." *Abrell*, 236 Ill. 2d at 801, 923 N.E.2d at 267. In contrast to *Abrell*, Stuart became disabled and entitled to the UNUM long-term disability payments during his marriage to Meigan. His claim to that compensation is not in dispute. The benefits are paid in cash every month and their value is not speculative or uncertain.

Accordingly, we reject Stuart's contention that the UNUM benefits are not marital property and we do not reach his additional contentions regarding subject matter jurisdiction and voidness. We find that Stuart's petition for relief from the divorce judgment was subject to section 2-1401(c)'s two-year time limitation, it was filed well after the two-year anniversary of the parties' divorce, and it was properly dismissed as an untimely pleading. 735 ILCS 5/2-1401(c) (West 2006). We also find that the petition was defective because there were no allegations of diligence in asserting the defense to the judgment or in filing the petition for relief from judgment, and that because Stuart's "property" was incorrect, he lacked a meritorious defense to the judgment. Thus, the petition could have been dismissed on these alternate

grounds. For the reasons stated, we affirm the order of dismissal entered by the circuit court.

Affirmed.