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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001708-MR

SANDRA GAIL MAYES

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE REED RHORER, JUDGE
CIVIL ACTION NO. 02-CI-01298

THOMAS MIKE MAYES

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM AND McANULTY, JUDGES; PAISLEY, SENIOR JUDGE.¹

PAISLEY, SENIOR JUDGE: Sandra Gail Mayes appeals from the findings of fact, conclusions of law and decree of dissolution of marriage entered by the Franklin Circuit Court, Family Division, on June 8, 2004. The decree dissolved Sandra's marriage to Thomas Mike Mayes. Sandra claims that the circuit court failed properly to designate and award the marital property, erred in not allowing her to present certain medical

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Ky. Rev. Stat. (KRS) 21.580.

evidence, in denying her periodic or permanent maintenance and in failing to award the full amount of her attorney's fees, physicians' fees, deposition and court costs.

Sandra and Mike met in Cookeville, Tennessee, where Sandra was employed as a bookkeeper, and Mike as an administrator at the Cookeville Regional Medical Center. Both were previously divorced. Mike moved into Sandra's residence shortly before they were married on June 14, 1997. Then, in 1998, Mike was discharged from his position at the medical center. He accepted a position as a physician recruiter at Sumner Regional Medical Center in Gallatin, Tennessee. Sandra sold her premarital residence in Cookeville. The net proceeds of the sale, \$56,053.88, were used by the couple to buy a house and farm in Gallatin, where they lived until October 2000 when Mike was discharged from the Sumner Regional Medical Center. Sandra worked throughout this period. In January 2001, Mike was hired to serve as the executive director of the Kentucky Pharmacists' Association. The couple sold the Gallatin property and moved to Franklin County in Kentucky, where they rented a house. Sandra worked at a furniture company, and then at the Franklin County Board of Education as an accounts payable clerk. The couple separated on September 12, 2002. Sandra filed a petition for dissolution of marriage on September 22, 2002. The

couple did not own any real property at the time of the separation.

There was a considerable disparity between the incomes of the parties at the time of the trial. Sandra was earning an average annual salary of approximately \$25,000.00, whereas Mike's annual salary as executive director of the Kentucky Pharmacists' Association was approximately \$100,000.00. He was additionally receiving various retirement benefits.² We note also, however, that Mike was sixty-five years old at time of the trial, and suffered from various health problems. He testified that he was probably going to retire at end of 2004. It appears from the record that Mike's retirement income would consist of approximately \$65,000.00: approximately \$52,000 from two retirement accounts and \$13,000.00 from Social Security.

In November, 2002, Mike was ordered to pay Sandra \$1,000 per month in temporary maintenance. In the period immediately following the filing of the petition for dissolution, Sandra made unauthorized withdrawals from the couple's joint accounts in the amount of \$22,468.47. She also incurred debt on the couple's credit cards during the pendency of the dissolution action totaling approximately \$13,000.00.

² There is some dispute about the amount of the retirement benefits actually being drawn by Mike at the time of the trial. Sandra claims they totaled approximately \$65,000.00 annually, including payments totaling \$42,000.00 annually from the Texoma Medical Center Employees' Pension Plan. In his brief, Mike maintains that there is no evidence that at the time of the trial he was receiving these benefits from the Texoma Plan.

Sandra has various health problems. She suffers from genital herpes, which she claims she contracted from Mike. She also suffers from fibromyalgia, anxiety, depression and a heart murmur.

Extensive evidence of the parties' financial status and Sandra's medical condition was provided to the trial court. After conducting a hearing, the court entered its findings of fact, conclusions of law and decree of dissolution of marriage. The court restored to Mike the bulk of two substantial accounts that were deemed to be non-marital property, and declined to order any additional maintenance payments to Sandra. This appeal by Sandra followed.

Our standard of review on appeal is as follows: CR 52.01 states in part that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01. "A finding of fact is not clearly erroneous if it is supported by substantial evidence." Moore v. Asente, 110 S.W.3d 336 (Ky. 2003). Legal issues will be reviewed de novo and conclusions of law will not be set aside absent an abuse of discretion. Sherfey v. Sherfey, 74 S.W.3d 777 (Ky.App. 2002). An abuse of discretion "implies arbitrary action or capricious disposition under the circumstances, at

least an unreasonable and unfair decision." Sherfey, 74 s.W.3d at 783 (citation omitted).

Sandra's first argument on appeal concerns the court's characterization of two substantial accounts, the Hartford Annuity and the Pershing Account, as non-marital property.

Mike owned the Hartford Annuity at the time of the marriage. The value of the account on the date of the marriage was \$186,770.58. No deposits or withdrawals were made to or from the account during the course of the marriage. The value of the account at the time of the hearing was \$251,457.70.

The trial court concluded that the entire value of the account, including the increase in its value during the course of the marriage, was non-marital property. The court reasoned that the increase in the value of the account during the marriage was not due to the joint efforts of Sandra and Mike.

Sandra argues that she nonetheless should have received some portion of the account, although she does not explain why the court's determination that the property is non-marital is erroneous. KRS 403.190 states in relevant part that marital property "[m]eans all property acquired by either spouse subsequent to the marriage except: . . . The increase in value of property acquired before the marriage to the extent that such increase did not result from the efforts of the parties during the marriage." KRS 403.190(2)(e). Clearly, the initial sum in

the account at the time of marriage was Mike's non-marital property. Sandra claims that Mike played an active role during the marriage in the investment and handling of the account. However, Mike's financial planner, Charles A. Sewell, testified in his deposition that there were no contributions or add-ons to that annuity during the marriage. "[A] mere increase in value of non-marital property remains non-marital property." Daniels v. Daniels, 726 S.W.2d 705, 706 (Ky.App. 1986) overruled on other grounds by Neidlinger v. Neidlinger, 52 S.W.3d 513 (Ky. 2001). The trial court did not therefore abuse its discretion in concluding that the entire amount of the Hartford Annuity is Mike's non-marital property.

At the time of the marriage, Mike also owned the Pershing Account, which contained \$122,072.67. On February 5, 1998, he deposited \$200,000.00 into the account. He received this sum as part of a severance package following the termination of his employment at the Cookeville medical center. On February 6, 1998, Mike changed the account to a joint account with Sandra with survivorship. No other deposits were made into the account during the marriage. Between 1998 and 2000, over \$200,000.00 was withdrawn from the account to pay for joint marital living expenses and renovations to the couple's home. The value of the account is now \$157,960.67.

The court found that the Pershing Account is Mike's non-marital property in the amount of \$122,072.67, the value of the account at the time of the marriage. The court further determined that the increase in the value of the account (\$35,888.00) is marital property because the account increased in value during the marriage at least in part because of the deposit of \$200,000.00 in marital funds. The trial court evenly divided this marital property between Sandra and Mike. Sandra therefore received \$17,944.00.

Sandra argues that the trial court erred in finding that only \$35,888.00 of the Pershing Account constituted marital property, contending that there is no basis in the record or the law for such a finding, and that there is no proof that the funds withdrawn from the Pershing Account were either from the marital or the non-marital side. But Sandra has not indicated any evidence that the remaining \$122,072.67 could possibly constitute marital property, since she herself concedes that the account contained that amount of Mike's non-marital property at the time of the marriage.

Sandra insists nonetheless that the court abused its discretion in not dividing the entire account equally between the parties, especially in light of the fact that she was not awarded the sum realized from the sale of her non-marital residence. The trial court found that Sandra sold her pre-

marital residence for \$56,053.88 on June 24, 1998. The proceeds were deposited into the couple's joint checking account. Within two weeks, over \$58,000.00 was withdrawn from the account, leaving a balance in the account of approximately \$38,000.00. These findings of fact are supported by substantial evidence in the record.

The trial court further noted that Sandra had testified that the down payment on the home and farm the couple bought in Gallatin, Tennessee, was made from the proceeds of her home. The court concluded, however, that those proceeds were not otherwise adequately traced to any specific assets currently owned by the parties.

In KRS 403.190(2)(b), marital property is defined, in part, as "all property acquired by either spouse subsequent to the marriage except: . . . (b) Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise or descent." Subsection (3) of KRS 403.190 creates a presumption that all property acquired during the marriage is marital property, but permits this presumption to be overcome by proof that the property was acquired as in subsection (2) of the statute. Numerous decisions of this Court and the Court of Appeals have construed this statutory provision and from these decisions there has emerged the concept of "tracing" although this term is nowhere found in the statute.

Chenault v. Chenault, 799 S.W.2d 575, 578 (Ky. 1990).

Although we recognize that the Kentucky Supreme Court in Chenault relaxed some of "the draconian requirements laid down in earlier cases," it nonetheless reiterated that Kentucky will "adhere to the general requirement that nonmarital assets be traced into assets owned at the time of dissolution[.]" Id. at 579. There was no evidence offered to trace the assets beyond Sandra's own testimony that the money from the sale of her premarital residence had been used as a down payment on the Gallatin farm. That farm had been sold by the time the dissolution proceedings were instituted, and no evidence was offered to trace the assets any farther. The court did not therefore abuse its discretion in concluding that Sandra was not entitled to a larger share of the Pershing Account to make up for the proceeds of the sale of her house.

The next contested asset consists of several quarter horses. Mike owned one horse at the time of the marriage, and the couple purchased seven more during the course of the marriage. The horses have an estimated value of \$16,450.00. Mike testified that the market for such horses is very weak at the present time and it was unlikely they could get that much if they were sold. Mike has control over the horses, and he spent \$3,315.00 in 2002 and \$11,705.00 in 2003 for their food and board. He is currently paying approximately \$1,200.00 per month for upkeep of the horses. The court determined that the seven

horses acquired by the parties during the marriage were marital property. The court further concluded that Mike had expended amounts of money in excess of the total value of the horses on their upkeep while the dissolution action was pending. Sandra argues that Mike had the opportunity to manage the use of the horses; to enjoy their benefits; and negotiate for their sale and the purchase of other horses during the pendency of the action. This appears to be a purely speculative contention. Substantial evidence in the record supports the court's findings, and it did not abuse its discretion in awarding the horses to Mike.

Sandra also makes the general argument that the disparity between what she received and what Mike received in the property division is so great as to be erroneous on its face. She claims that her award totaled \$16,000.00 as opposed to Mike's \$291,000.00. We note that if the Hartford Annuity and the non-marital portion of the Pershing Account are subtracted from Mike's total award, we are left with approximately \$12,000.00. Furthermore, as the trial court noted, Sandra withdrew large sums of money from the marital accounts during the pendency of the action, and also received \$18,000 in maintenance payments during that period. The property division was not therefore so unjust as to constitute an abuse of discretion.

The second argument is that the trial court erred in excluding testimony pertaining to Sandra's alleged contraction of genital herpes from Mike. Sandra states that during pre-trial discovery, Mike would not admit that he gave Sandra the disease or that she had contracted it during their marriage. She further states that she attempted to introduce "testimony on other documentary evidence at trial that Mike admitted orally and in writing that her condition arose during the marriage and was caused by him." Appellant's brief at 10. There is no citation to the record in the appellant's brief. Mike has argued that this issue was not preserved for our review; certainly, the "appellant fails to cite with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." Forester v. Forester, 979 S.W.2d 928, 931 (Ky.App. 1998).

More significantly, we fail to see how evidence that Mike gave Sandra genital herpes could be a factor in determining whether she was entitled to a higher amount of maintenance. Sandra maintains that it was necessary to have this information introduced, since otherwise the court would be left with the unanswered question as to when her disabling condition arose. The record shows that the court did admit the depositions of three physicians and a counselor who testified regarding Sandra's health and mental condition. Dr. Tony Dotson

specifically testified that the onset of the genital herpes occurred in November 1997 (well after Sandra's marriage to Mike) and described her condition and symptoms fully. He also opined that Sandra had contracted the disease from Mike. The court was therefore made fully aware that Sandra may have contracted herpes from Mike during their marriage. The court concluded that Sandra is "presently in relatively poor health by reason of her genital herpes, fibromyalgia, heart murmur, depression, and sleep apnea. In spite of the condition of her health Ms. Mayes testified that she has missed only three or four days of work because of her health in the last 18 months. And none of her doctors place any restrictions on her activities because of her health problems." We do not see how further evidence of Mike's alleged culpability in this matter could permissibly have influenced the court's decision.

Sandra next argues that the court abused its discretion in failing to award her any future maintenance.

KRS 403.200 states in relevant part as follows:

(1) In a proceeding for dissolution of marriage or legal separation . . . the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:

(a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and

(b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

Sandra contends that she is entitled to receive future maintenance because her marriage to Mike thrust her into financial instability, with no home and insufficient income to meet her needs. She maintains that if she had not married Mike, her home in Cookeville, Tennessee, would have been paid off by now, and she would have kept her good job there. In her present situation, she does not own her home, and her monthly expenses of \$3,748.94 exceed her net monthly income of \$1,589.64. Sandra has provided evidence that she requires expensive topical medicine and counseling to treat her herpes; she argues that the court failed to recognize this in refusing to grant her any further maintenance.

The trial court concluded as follows on the issue of maintenance:

By reason of the marital personalty which has been awarded to Ms. Mayes herein, and by reason of the joint debts that Mr. Mayes paid during the pendency of this action, and by reason of the numerous unilateral withdrawals Ms. Mayes made from marital funds during the pendency of this action, and by reason of the substantial payments of temporary maintenance that Mr. Mayes made to Ms. Mayes during the pendency of this action, the Court declines to order that

additional maintenance shall be awarded to Ms. Mayes.

The decision to award maintenance is within the sound discretion of the trial court. We may disturb that ruling only if the trial court abused its discretion or made its ruling based on clearly erroneous findings of fact. Powell v. Powell, 107 S.W.3d 222, 224 (Ky. 2003). Although Sandra has correctly stated that her current income is considerably lower than Mike's, and has also stated that her expenses are far greater than her current income, she fails to explain how she was able to manage before her marriage, when presumably her expenses were similar and she was also paying a mortgage on her house. The trial court noted Mike's testimony as to his health problems and his plans potentially to retire at the end of 2004. In the light of this testimony, the decision to award maintenance could not be based on the assumption that Mike would continue to work as executive director of the Kentucky Pharmacists' Association into the indefinite future. The record indicates that such a retirement would have the effect of reducing Mike's income by more than half, to approximately \$65,000.00, thereby considerably narrowing the gap between his and Sandra's incomes. The trial court was also clearly influenced in its decision by Sandra's unauthorized withdrawal of large sums of money from various marital accounts during the pendency of the action. We

cannot say that the trial court abused its discretion in refusing to award Sandra any further maintenance, especially in light of the relatively short duration of the marriage.

Finally, Sandra argues that the trial court erred in failing to award her the full amount of her fees and costs.

KRS 403.220 allows a court to award attorney's fees in a divorce action. It states in relevant part as follows:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment.

Although our case law supports an award of fees if there is a gross imbalance or significant inequality in the financial resources of the parties, see Sexton v. Sexton, 125 S.W.3d 258, 273 (Ky. 2004); Beckner v. Beckner, 903 S.W.2d 528, 530 (Ky.App. 1995), the ultimate determination remains within the broad discretion of the court.

[E]ven if a disparity exists, whether to make such an assignment and, if so, the amount to be assigned is within the discretion of the trial judge. There is nothing mandatory about it. Thus, a trial court's ruling on attorney fees is subject to review only for an abuse of discretion. The test for abuse of discretion is whether the trial judge's decision was arbitrary,

unreasonable, unfair, or unsupported by sound legal principles.

Id. at 272 (citations omitted).

The total sum of Sandra's expenses, which include her legal fees, court costs, and deposition fees, is \$16,052.70. The court ordered Mike to reimburse her in the amount of \$5,000.00. The court also noted that Mike had already paid deposition fees and related costs in the amount of \$3,082.60, pursuant to an earlier order. The trial court also found that Sandra had paid some of her attorney's fees with marital funds. Under these circumstances, we do not believe that it was unreasonable or unfair of the court to order Mike to pay only a portion of Sandra's fees.

For the foregoing reasons, the findings of fact, conclusions of law and decree of dissolution of marriage entered by the Franklin Circuit Court, Family Division, are affirmed.

ALL CONCUR.

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