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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000617-MR

CHERYL LYNN MCNEES

APPELLANT

v. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 05-CI-00503

TERRY GEORGE MCNEES

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING AND REMANDING IN PART

** ** * * * * *

BEFORE: ACREE AND VANMETER, JUDGES; HENRY,¹ SENIOR JUDGE.

HENRY, SENIOR JUDGE: Cheryl Lynn McNees (“Sherry”) appeals from the findings of fact, conclusions of law and decree of dissolution of marriage entered by the Whitley Circuit Court on February 2, 2007. The issues which she raises concern the amount and duration of maintenance awarded by the trial court, its

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

division of the marital property, and its refusal to award her attorney's fees and medical expenses.

Sherry married Terry George McNees on August 7, 1999. It was the third marriage for both parties; no children were born of the marriage. They separated six years later on June 27, 2005. At the time of the final hearing, Sherry was forty-seven years of age, and Terry was forty-nine.

Before her marriage to Terry, Sherry worked full-time as a medical technician. She resigned from her job in 1999 when Terry was required by his employer to move to North Carolina. When the couple returned to Kentucky, Sherry resumed working full-time for a short period, and then obtained seasonal employment as a teller at Churchill Downs and Keeneland. In October 2002, Sherry was involved in a traffic accident. While being treated for the injuries she had sustained in the accident, it was discovered that she had a tumor in her femur. Her femur shattered and Sherry subsequently underwent at least ten surgeries. She was also diagnosed with a blood clotting disorder. She has suffered two strokes and lost forty-five percent of the hearing in her left ear. In July 2004, she was declared disabled by the Social Security administration.

Sherry received back pay for her disability of approximately \$12,000.00 to \$15,000.00. This money was used to pay bills, some debt incurred in the purchase of a car and at least \$1,000.00 was put towards the purchase of a \$2,000.00 share in a stock car used for automobile racing. At the time of the final

hearing, Sherry was receiving \$760.00 per month in disability benefits. She has no other source of income.

Terry is employed in the beverage industry. His employment necessitated nine moves while the couple was married. At the time of their separation, Terry was employed as an operations manager for Pepsi, earning a base salary of \$72,000.00 per year, as well as quarterly and yearly bonuses.

After the parties separated, Terry filed a petition in Whitley Circuit Court on July 19, 2005, seeking dissolution of the marriage. Sherry filed a motion and response which requested, among other things, temporary maintenance. No court order was ever entered addressing this issue, but Terry began voluntarily paying temporary maintenance in the amount of \$1,200.00 per month. Terry stopped making these maintenance payments in August 2006. According to Terry, he did so in an effort to speed up the divorce process. On September 18, 2006, Sherry filed a motion seeking to enforce what she claimed was an agreement between them that Terry would pay her \$1,200.00 per month. The motion was denied.

The final hearing was conducted on November 17, 2006. The parties had previously divided the major portion of their marital property and debts; the only matters remaining to be determined by the trial court were maintenance, and the assignment of Sherry's medical bills and some remaining marital property. The trial court entered its findings of fact, conclusions of law and decree of dissolution of marriage on February 2, 2007. It awarded Sherry maintenance in the amount of

\$834.00 per month for a period of five years, and one-half of Terry's 401(k) retirement account from a former employer, Ale 8 One, which totaled approximately \$2,000.00. Sherry did not receive her attorney fees or medical expenses. Terry was awarded, among other things, the \$2,000.00 share in the stock car and a Suzuki motorcycle. Sherry filed a motion to alter, amend or vacate the judgment. The motion was denied on March 8, 2007 and this appeal followed.

Sherry has raised three arguments on appeal: (1) that the trial court's award of maintenance was insufficient in amount and duration, and did not include retroactive maintenance pursuant to the purported agreement between the parties; (2) she was not awarded a just proportion of the marital property; and (3) the trial court erred in failing to award her attorney fees and medical expenses.

The trial court found that Sherry's total living expenses are approximately \$2,800.00 per month, and that she receives Social Security benefits in the amount of \$760.00 per month. It found that Terry earns \$5,997.05 per month. Upon considering the provisions of Kentucky Revised Statutes (KRS) 403.200, the court found that Sherry lacks sufficient property to provide for her reasonable needs and that she is unable to support herself through appropriate employment due to a medical disability. The court set maintenance at \$834.00 per month for a period of five years, or until Sherry's remarriage or death.

Sherry argues that the maintenance award is insufficient because she is permanently disabled, and only forty-seven years of age. Her monthly income

coupled with the maintenance awarded by the court equals \$1,594.00, or \$1206.00 less than her monthly expenses as found by the trial court.

“The amount and duration of maintenance is within the sound discretion of the trial court.” *Russell v. Russell*, 878 S.W.2d 24, 26 (Ky. App. 1994) (citations omitted).

The relevant statute provides that a court may grant a maintenance order 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.

KRS 403.200(1).

In this case, as we have already noted, the trial court made a finding that Sherry lacks sufficient property to provide for her reasonable needs and she is unable to support herself through appropriate employment due to a medical disability.

The second part of the statute then requires the court to consider “all relevant factors” in determining the amount and duration of the maintenance award, including the following:

- (a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently,

including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(c) The standard of living established during the marriage;

(d) The duration of the marriage;

(e) The age, and the physical and emotional condition of the spouse seeking maintenance; and

(f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

KRS 403.200(2).

Unfortunately, the trial court in this case made no findings under any of the factors listed in KRS 403.200(2), or under any other relevant factors. We are unable to ascertain how the trial court arrived at the amount and duration of Sherry's maintenance. In our view, this situation is analogous to that in *Massey v. Massey*, 220 S.W.3d 700 (Ky. App. 2006), in which we found that the trial court had made insufficient findings to support its decision to award maintenance for five years to a woman who was permanently disabled:

We do not believe . . . the family court made sufficient findings to support the duration of the maintenance award for a term of five years. As noted in the court's findings, Lisa alleged she is permanently and totally disabled and otherwise unable to work to support herself. The family court noted in its findings that Lisa has not been employed since an automobile accident in October

2000. Apparently, the court heard evidence regarding Lisa's disability and her ability to obtain future employment. Notwithstanding, the family court made no findings on this issue. We believe the duration of any maintenance award in this case must look to whether Lisa is permanently disabled and whether she can be gainfully employed in the future. The fact that she may have a pending lawsuit pertaining to the injuries sustained in the automobile accident is not sufficient for the family court to make a determination as to the duration of maintenance. In this regard, the family court's findings do not comport with KRS 403.200(2) and, thus, the court abused its discretion in awarding maintenance for a term of five years absent specific findings on the issues of Lisa's disability and future employability.

Massey, 220 S.W.3d at 704.

Terry argues that the amount of the award is justified by the fact that Sherry had failed to make inquiries into the availability of Social Security health insurance, and by the relatively short duration of the marriage. But the court did not state that it had relied on these facts, and we cannot affirm its ruling based upon speculation. We therefore reverse and remand for further findings of fact relating to the statutory factors set forth in KRS 403.200(2) and, if necessary, an adjustment of the amount and/or the duration of Sherry's maintenance.

Sherry next argues that the trial court erred in refusing to enforce the purported oral agreement that Terry would pay \$1200.00 per month in temporary maintenance during the pendency of the dissolution action. Sherry contends that he should be responsible for maintenance arrears dating from August 2006 when he ceased making payments.

In the mandatory case disclosure which he filed on October 31, 2005, Terry stated that his monthly expenses included maintenance support for Sherry in the amount of \$1,200.00 per month. At the final hearing, Terry testified that he stopped making payments because he was “just trying to get [Sherry] to set a court date so we could settle our differences.” He did not testify that there was a binding agreement as to maintenance. Sherry contends that they had an oral contract under which Terry had agreed to pay her \$1,200.00 per month in consideration for her moving out of the marital residence so that it could be sold.

This purported agreement was, in effect, a separation agreement under KRS 403.180(1) which provides as follows:

To promote amicable settlement of disputes between parties to a marriage attendant upon their separation or the dissolution of their marriage, **the parties may enter into a written separation agreement containing provisions for maintenance of either of them, disposition of any property owned by either of them, and custody, support and visitation of their children.**

(Emphasis supplied.)

“KRS 403.180 requires separation agreements be in writing and signed by the parties.” *Bratcher v. Bratcher*, 26 S.W.3d 797, 799 (Ky. App. 2000) citing *Carter v. Carter*, 656 S.W.2d 257, 258 (Ky. App. 1983). In *Bratcher*, we held that an oral agreement that was “neither written nor signed by the parties . . . was not a valid separation agreement under the requirements of KRS 403.180.” 26 S.W.3d at 799. The trial court did not err in refusing to order Terry to pay

maintenance arrears to Sherry, because their agreement was unwritten and therefore unenforceable.

Sherry next argues that the trial court erred in failing to award her a just proportion of the marital property. The specific assets to which she refers are (1) a joint tax refund for 2005; (2) the \$2000.00 interest in the stock car; (3) Terry's retirement account accumulated at his current employer, Pepsi; and (4) a Suzuki motorcycle which had been purchased during the marriage and wrecked by Terry after the separation.

The trial court made no reference to a tax refund in its order. Sherry testified that she had provided financial information to Terry in order to help him prepare their joint 2005 tax return, and that she assumed there had been a refund because they always received one. The record contains no indication that Sherry ever endeavored to obtain Terry's tax records in discovery. Sherry simply failed to present any adequate evidence regarding the existence and amount of the refund. The trial court did not err in disregarding this claim.

Sherry's next claim concerns the share in a stock car purchased during the course of the marriage by Terry. Terry testified that his investment in the vehicle totaled \$2,000.00 of the car's \$10,000.00 value, and acknowledged that at least \$1,000.00 of this amount came from Sherry's disability back pay. The trial court awarded the entire share in the car to Terry, stating that "Terry's interest is a hobby and not a business venture and he does not receive a profit from the stock car."

In dividing marital property, including debts, appurtenant to a divorce, the trial court is guided by Kentucky Revised Statute (KRS) 403.190(1), which requires that division be accomplished in “just proportions.” This does not mean, however, that property must be divided equally It means only that the division should be accomplished without regard to marital misconduct and in “just proportions” considering all relevant factors.

Lawson v. Lawson, 228 S.W.3d 18, 21 (Ky. App. 2007) (citations omitted). These relevant factors include the following:

- (a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;
- (b) Value of the property set apart to each spouse;
- (c) Duration of the marriage; and
- (d) Economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

KRS 403.190 (1).

“[A] trial court has wide discretion in dividing marital property; and we may not disturb the trial court's rulings on property-division issues unless the trial court has abused its discretion.” *Smith v. Smith*, 235 S.W.3d 1, 6 (Ky. App. 2006).

The parties do not dispute that the \$2,000.00 share of the stock car is marital property. *See* KRS 403.190(3). The trial court awarded the entire share to Terry on the grounds that it was a hobby and that he would not derive any ongoing

monetary benefit from it. We fail to see the relevance of this finding. When we consider that Sherry contributed fifty percent to the acquisition of the property in the form of her disability benefit; the minuscule value of the marital property set aside to her; and her economic circumstances at the time of the division, we conclude that the trial court's decision was an abuse of discretion. We therefore reverse and remand for further findings on this issue and if appropriate, a recalculation of Sherry's portion of the share in the stock car.

As to Sherry's claim to a share of Terry's retirement account with his current employer, Pepsi, the record contains no reference in the record to the nature or amount of this account. Sherry did not request this information from Terry, nor was the issue raised in her motion to alter, amend or vacate. We will not, therefore, consider it here.

As to the motorcycle, the court found that it was in Terry's possession and wrecked after the date of separation. The court awarded the motorcycle to Terry, stating that it was "uninsured and has no value." Sherry argues that she should have received some, if not all, of the value of the motorcycle (\$3,000.00 according to Terry) because Terry had dissipated this marital asset by not properly insuring it.

The court may find dissipation when marital property is expended (1) during a period when there is a separation or dissolution impending; and (2) where there is a clear showing of intent to deprive one's spouse of her proportionate share of the marital property.

Brosick v. Brosick, 974 S.W.2d 498, 500 (Ky. App. 1998) (citation omitted).

Sherry made no showing that Terry intended to deprive her of her share of the motorcycle by failing to insure it. The trial court did not abuse its discretion in awarding Terry the motorcycle.

Finally, Sherry argues that the trial court erred in not awarding her attorney fees and costs and by failing to order Terry to pay her medical expenses.

KRS 403.220 provides that

[t]he 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. The court may order that the amount be paid directly to the attorney, who may enforce the order in his name.

We review the court's refusal to award attorney's fees and costs under a highly deferential standard:

KRS 403.220 authorizes a trial court to order one party to a divorce action to pay a "reasonable amount" for the attorney's fees of the other party, but only if there exists a disparity in the relative financial resources of the parties in favor of the payor. But even 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. . . .

If there had ever been any doubt regarding the discretionary authority of the trial court to allocate court costs and award an attorney's fee, KRS 403.220 laid that doubt to rest once and for all. As matters now stand, an allocation of court costs and an award of an attorney's fee are entirely within the discretion of the court.

Neidlinger v. Neidlinger, 52 S.W.3d 513, 519 (Ky. 2001) (citations omitted).

Moreover, the trial court is not required to make findings in support of its decision.

It is a well-known concept that the trial court has great discretionary power in its determination to award or deny attorney fees. Although the court does not mention the financial resources of the appellee in its orders awarding the appellee attorney fees, there is no requirement that it do so. Nowhere does it state a trial court must make specific findings on the parties' financial resources The trial court need only "consider" the parties' financial situation.

Hollingsworth v. Hollingsworth, 798 S.W.2d 145, 147-148 (Ky. App. 1990).

The trial court in this case was not required to explain the reasoning underlying its decision not to award attorney's fees. Employing the deferential standard set forth in our case law, we find the decision was not arbitrary, unreasonable or unfair and therefore affirm as to this issue.

As to the medical expenses, Sherry submitted copies of her bills at the final hearing but they were poorly organized and did not indicate which items had already been paid. Sherry's counsel told the court that she would supplement the record, and thereafter submitted a revised disclosure of the medical bills. This filing appears to have been made after the date of entry of the trial court's findings of fact, conclusions of law and decree. Terry argues that the trial court was therefore not able to consider this new evidence. We note, however, that Sherry's motion to alter, amend or vacate was filed one week after the date of entry of the

revised disclosure documents, and that in denying the motion the court stated that it had considered “the entire record.”

Debts incurred during the marriage are traditionally assigned on the basis of such factors as receipt of benefits and extent of participation; whether the debt was incurred to purchase assets designated as marital property; and whether the debt was necessary to provide for the maintenance and support of the family. Another factor, of course, is the economic circumstances of the parties bearing on their respective abilities to assume the indebtedness. To the extent that *Daniels v. Daniels* [726 S.W.2d 705 (Ky. App. 1986)], and *Underwood v. Underwood* [836 S.W.2d 439 (Ky. App. 1992)], hold that there is a presumption with respect to debts incurred during a marriage, they are overruled. Nor is there any presumption that debts must be divided equally or in the same proportions as the marital property.

As with issues pertaining to the assignment of marital property, issues pertaining to the assignment of debts incurred during the marriage are reviewed under an abuse of discretion standard.

Neidlinger, 52 S.W.3d 513, 523 (citations omitted).

The trial court made no findings regarding Sherry’s medical expenses.

It is not entirely clear whether it refused to do so because the revised disclosures were submitted after the hearing, or whether the court did indeed consider them in arriving at its decision to deny the motion to alter, amend or vacate the decree.

Again, we are unable to review the trial court’s decision for an abuse of discretion because of the absence of findings on this issue. We therefore reverse and remand for further findings as to Sherry’s medical expenses.

For the foregoing reasons, the judgment of the Whitley Circuit Court is affirmed in part, reversed in part, and the case is remanded for further findings of fact and a new award if necessary as to the following issues: (1) the amount and duration of maintenance; (2) the share in the stock car; and (3) Sherry's medical expenses.

ALL CONCUR.

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