Cite as 2012 Ark. App. 180

# ARKANSAS COURT OF APPEALS

DIVISIONS I & II
No. CA11-471

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| CLAYTON COKER | **Opinion Delivered** February 22, 2012 |
| APPELLANT | APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT, [NO. DR 2010-287-III] |
| V. | |
| SAMANTHA HESS COKER | HONORABLE LYNN WILLIAMS, JUDGE |
| APPELLEE | DISSENTING OPINION ON DENIAL OF REHEARING |

**JOSEPHINE LINKER HART, Judge**

I dissent on denial of rehearing because the opinion handed down on December 7, 2011, contained mistakes of law and fact when it reversed the trial court's grant of a divorce on the ground of general indignities. In so doing, the majority held that even though appellee/wife had established that her husband was publically consorting with another woman, she had neither proved nor corroborated her grounds. [1]

In my view, appellee proved general indignities and clearly established that she was entitled to a divorce. It is important to note that the trial court did not make specific findings of fact with regard to what evidence it relied on in finding that appellee proved her ground and was entitled to a divorce. However, when the trial court fails to make certain findings of fact, the appellate court, under its de novo review, may nonetheless conclude that

[1]Obviously there is a logical inconsistency implicit in this holding—if you have not proved grounds, there is nothing to corroborate.

the evidence supported the decision. *Chastain v. Chastain*, 2012 Ark. App. 73, 388 S.W.3d 495. Both appellant and appellee testified that appellant was publically involved in a long-time, extramarital affair. In fact, appellant confirmed that at the time of the hearing, his paramour had actually stayed overnight in the marital residence. In my view, this clearly qualifies as a general indignity. The rule of law is that

> [i]n order to obtain a divorce on that ground, the plaintiff must show a habitual, continuous, permanent, and plain manifestation of settled hate, alienation, and estrangement on the part of one spouse, sufficient to render the condition of the other intolerable.

*Coker v. Coker*, 2011 Ark. App. 752 (citing *Poore v. Poore*, 76 Ark. App. 99, 61 S.W.3d 912 (2001)). It also correctly notes that "a petition for divorce will not be granted on the testimony of the complainant alone, even if the defendant admits the allegations, but it must be corroborated by other evidence to establish the truth of the assertion." *Id.* (*citing Goodlett v. Goodlett*, 206 Ark. 1048, 178 S.W.2d 666 (1944)). Somehow the majority judges fail to apply the law to the facts in this case. Having an open, ongoing extramarital affair constitutes general indignities. Such an affair is a manifestation of settled hate, alienation, and estrangement that clearly rendered his wife's life intolerable.

Appellee also presented evidence that supported an alternative theory of general indignities: appellant expropriated marital funds to fund his extramarital affair. To prove this assertion, appellee presented testimony and financial documents. Dissipating marital funds has been held to support a finding of general indignities. *Rocconi v. Rocconi*, 88 Ark. App. 175, 196 S.W.3d 499 (2004); *Hodges v. Hodges*, 27 Ark. App. 250, 770 S.W.2d 164 (1989). *Hodges* is of particular note in that the court of appeals, in its de novo review, found evidence

of the wife's spending habits supported the grant of a divorce on the ground of general indignities when the trial court had not made a specific finding as to what conduct it was relying on in finding this ground. The majority in the instant case abdicated its duty as appellate judges in not making a similar review.

The opinion also misapplies the law with regard to corroboration. As the appellee correctly notes, in the instant case, only slight corroboration was necessary. The rule is that

> [i]t is not necessary that the testimony of the complaining spouse be corroborated upon every element or essential of his or her divorce. It has been said that since the object of the requirement as to corroboration is to prevent collusion, where the whole case precludes any possibility of collusion, the corroboration only needs to be very slight.

*Anderson v. Anderson*, 234 Ark. 379, 352 S.W.2d 369 (1962). Here, the appellee notes that her mother, Thyra Lynn Sullivan, testified that appellant was inattentive and uncaring and recounted an instance of rudeness. She also testified that appellant had moved out of the marital residence and into an apartment when the couple lived in Wynne. Both facts are corroborative of alienation and estrangement. Left out of the abstract was Sullivan's observation that her daughter was "extremely nervous" around appellant, which is also corroborative of appellee having suffered indignities that made her life intolerable.

If Sullivan's testimony was not enough to corroborate appellee's grounds, the voluminous financial records evidencing numerous cash withdrawals that she introduced certainly were. The majority opinion is simply wrong when it concludes that this clear evidence was incompetent to prove the dissipation of thousands of dollars in marital funds or that appellant was having an affair. This evidence came into the record without any

limitation as to its purpose. The majority judges has nonetheless decided, sua sponte, to limit its probative value to the issue of property division. The financial records provided corroboration of appellant's extramarital affair in that they showed that appellant made charges to hotels, Victoria's Secret, and an excessive number of cash withdrawals. While the majority views this conduct as failing to establish grounds for divorce, I cannot agree.

Because the opinion contains clear errors of law and fact, the court of appeals erred in not rehearing this case and in not affirming the trial court in a substituted opinion.