

NOT DESIGNATED FOR PUBLICATION

No. 108,151

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

ERIKA (a/k/a ERICKA) C. WALLER,
Appellee,

v.

JAMES D. WALLER,
Appellant.

MEMORANDUM OPINION

Appeal from Douglas District Court; BARBARA KAY HUFF, judge. Opinion filed June 14, 2013.
Affirmed.

John P. Gerstle, II, of John P. Gerstle II, P.A., of Olathe, and *Brant A. McCoy*, of McCoy Law Firm, LLC, of Olathe, for appellant.

John N. Knox, of Knox Law Firm, Chartered, of Lawrence, for appellee.

Before ATCHESON, P.J., GREEN and MCANANY, JJ.

Per Curiam: James D. Waller appeals the trial court's division of property and maintenance award from the divorce action with his wife Ericka C. Waller. On appeal, James makes the following arguments: (1) that the trial court abused its discretion when it divided their property and debt; (2) that the trial court erred in determining the amount and duration of maintenance; and (3) that he should have been given an offset against his temporary maintenance arrearage based upon his mortgage payment for the marital home while Ericka resided there without him. Finding no error, we affirm.

James and Ericka were married on September 25, 1999. During the course of the marriage, the couple had one child. That child remains a minor. Moreover, Ericka adopted James' two children from a previous marriage, both of whom are now adults. Ericka filed for divorce on August 20, 2010, on the grounds of incompatibility.

During the course of the marriage, James owned or operated three different business entities: (1) StagePro, Inc. (StagePro), StagePro Mobile, LLC (SP Mobile), and Apex, Inc (Apex). James owned 100% of StagePro, 100% of SP Mobile, and 33% of Apex. These business entities provided stages, lighting, sound systems, and roofing for entertainment festivals throughout the country. During the pendency of the couple's divorce proceedings, James maintained that Apex had been dissolved and that its co-owner now owns all of Apex's assets. Even so, James stated that he still was entitled to a commission of \$15,000 for every Apex stage unit that he sells. Although James' financial situation began to soften during the downturn of the economy in 2008, his businesses still produce gross receipts of approximately \$1,500,000 to \$2,000,000 annually.

On the other hand, Ericka worked full time at Corpus Christi Catholic School and part time as a drama director at another school. Both of her jobs produced a combined income of slightly less than \$30,000 annually. Until 2007, Ericka served as bookkeeper for James' business entities.

On December 1, 2010, the trial court entered its temporary order of custody, parenting time, child support, maintenance, and reinstatement of health insurance. The temporary order directed James to pay temporary spousal maintenance in the amount of \$1,116. On October 17, of the following year, the trial court granted the divorce under its written memorandum decision. The trial court's memorandum decision included orders regarding child custody, child support, distribution of property, attorney fees, and maintenance.

James moved to alter or amend judgment or for a new trial. James' motion requested that the trial court either modify or reconsider the portions of its memorandum decision pertaining to maintenance and property division. The trial court held a hearing on James' motion, denied James' motion in part, and amended its journal entry.

Did the trial court abuse its discretion when it divided the couple's property and debt?

A. \$17,000 CREDIT

James first argues that the trial court erred when it failed to award him a \$17,000 credit for his premarital contribution to the home. Ericka disagrees and argues that the trial court did not abuse its discretion when it decided that James was not entitled to an offset for his premarital contribution to the down payment on the marital home.

The trial court has broad discretion in adjusting the property rights of parties involved in a divorce action, and its exercise of that discretion will not be disturbed by an appellate court absent a clear showing of abuse. *In re Marriage of Wherrell*, 274 Kan. 984, 986, 58 P.3d 734 (2002). Under K.S.A. 60-1610(b)(1), the trial court is required to divide the parties' real and personal property, regardless of whether that property was owned by either spouse before their marriage, acquired by either spouse in the spouse's own right while married, or acquired through the spouses' joint efforts. When dividing the property, the trial court shall consider:

"the age of the parties; the duration of the marriage; the property owned by the parties; their present and future earning capacities; the time, source and manner of acquisition of property; family ties and obligations; the allowance of maintenance or lack thereof; dissipation of assets; the tax consequences of the property division upon the respective economic circumstances of the parties; and such other factors as the court considers necessary to make a just and reasonable division of property." K.S.A. 60-1610(b)(1).

Moreover, the trial court does not have to award to each spouse the property he or she inherited during the marriage, but is instead required to make a just and reasonable division of the property. *In re Marriage of Hair*, 40 Kan. App. 2d 475, 480-81, 193 P.3d 504 (2008), *rev. denied* 288 Kan. 831 (2009). Kansas law gives the trial court discretion to consider all the spouses' property, regardless of when acquired, to make a just and reasonable division. *In re Marriage of Rodriguez*, 266 Kan. 347, 353, 969 P.2d 880 (1998). The trial court's division of property does not have to be equal to be just and reasonable. *In re Marriage of Roth*, 28 Kan. App. 2d 45, 49, 11 P.3d 514 (2000). Furthermore, the trial court is vested with discretion to set a valuation date for the property. The trial court can value the marital assets when the parties separate, when the divorce petition is filed, when the divorce hearing is held, or as dictated by the facts of each case. K.S.A. 60-1610(b)(1); *In re Marriage of Cray*, 254 Kan. 376, 387, 867 P.2d 291 (1994).

In this case, the trial court properly did not award James a \$17,000 credit for his premarital contribution to the home. The record shows that the trial court's property division was just and reasonable. In its initial memorandum decision, James was awarded the marital home, and the trial court indicated that it was crediting James "with \$17,000.00 for the down payment of the marital residence." Even so, the trial court did not specifically indicate how the credit was applied in making the equitable division of property and debt. James raised this question in his motion to alter or amend judgment or for a new trial. In particular, James' motion states that "the Court gives [James] a \$17,000 credit representing premarital equity used for the down payment of the marital residence. Is this a credit against any debts set aside to [James]?"

In reexamining James' assertion that he was not credited for the down payment on the home, the trial judge stated the following:

"With respect to the \$17,000 alluded to in ¶ 5 of the Memorandum Decision of October 17, 2011, the Court strikes that sentence from the original order. Initially, at the time of filing this divorce, the marital residence had an equity value. However, the equity in the residence disappeared after [James] further encumbered the marital residence with debt, which loan proceeds he used on his business. He was awarded the business, and he was awarded the marital residence in the decision."

Even though the trial judge changed her mind and decided not to award James a \$17,000 credit for his down payment, James has failed to show that the trial court abused its discretion when it made the property division. In this case, James was awarded a majority of the marital assets and all of the marital debts. The following table shows the breakdown of the trial court's property award.

<u>Assets</u>	<u>Amount</u>	<u>Awarded To</u> <u>James</u>	<u>Awarded To</u> <u>Ericka</u>	<u>Difference</u>
Marital Home	\$265,000	\$265,000		
Business	\$2,409,126	\$2,409,126		
Time Shares	\$36,500	\$24,333.33	\$12,166.67	
RV	\$100,000	\$100,000		
Automobile (Volkswagen Jetta)	\$2,325	\$2,325		
Automobile (Volkswagen Beetle)	\$4,150		\$4,150	
Boat and Trailer	\$7,000		\$7,000	
Total	\$2,824,101	\$2,800,784.33	\$23,316.67	

Debts				
Home Mortgage	\$186,000	\$186,000		
Credit Card Debt	\$37,860.75	\$37,861		
Mortgage on Business Real Estate	\$435,887	\$435,887		
Business Loan (People's Bank)	\$654,682	\$654,682		
Business Loan (Daimler)	\$105,256	\$105,256		
Business Loan (Bank of America)	\$486,479	\$486,479		
Tax Debt	\$163,985.68	\$163,986		
Business Credit Cards	\$109,185.37	\$109,185		
Total Business Debt	\$1,955,475.05	\$1,955,465		
Total Debt	\$2,179,335.80			
Net Value of Marital Estate	\$644,765.20	\$621,448.53	\$23,316.67	\$598,131.86

Here, James received approximately \$600,000 more of the marital estate than Ericka. Although the trial court ultimately decided not to credit James \$17,000 for his

down payment on the marital property, it cannot be said that the trial court's decision was an abuse of discretion. As previously mentioned, the trial court is not required to award each spouse the property that he or she acquired before the marriage, but is required to make a just and reasonable division of the property. See *Hair*, 40 Kan. App. 2d at 480-81. The record supports the conclusion that the trial court's division of property was just and equitable and that James has failed to show that the trial court abused its discretion in making that division. Consequently, the trial court properly did not award him a \$17,000 credit for his premarital contribution to the down payment on the marital home.

B. CREDIT CARD DEBT

James also argues that the trial court erred when it assigned all of the couple's credit card debt to him. Specifically, James notes that Ericka acknowledged that she had acquired at least \$4,000 of the credit card debt before the marriage. James argues that "[t]aking into consideration the large amount of personal debt allocated to [James] pursuant to the trial court's judgment, the court's recognition of and failure to allocate the pre-marital debt of [Ericka] is clearly inequitable.

James' argument is misplaced and fails for the same reasons that his argument concerning the trial court's failure to award him a \$17,000 credit fails. Simply put, Kansas law gives the trial court discretion to consider all the spouses' property and debt, regardless of when acquired, to make a just and reasonable division. *In re Marriage of Rodriguez*, 266 Kan. at 353. Even though Ericka admitted that she had brought at least \$4,000 of the credit card debt into the marriage, it cannot be said that the trial court's division of the couple's property was unjust or unreasonable. In fact, even though James received all of the couple's debt, he did receive all of the business assets, which allowed him to receive approximately \$600,000 more in property than Ericka. James has failed to show that the trial court abused its discretion in making its division of property and debt.

Consequently, the trial court properly allocated all of the couple's credit card debt to James.

Did the trial court err in determining both the amount and duration of maintenance to be paid to Ericka?

Next, James argues that the trial court "erred in determining both the amount of maintenance and the duration of the maintenance to be paid." The essence of James' contention is that he cannot afford to pay maintenance because of his alleged financial difficulties. Ericka counters that James has failed to show an abuse of discretion. In its memorandum decision, the trial court ordered James to pay spousal maintenance in the amount of \$1,000 a month for 60 months. The trial court stated that the maintenance was awarded "in lieu of any value assigned to the business and their assets."

Kansas law gives trial courts wide discretion regarding spousal maintenance, and a judgment awarding maintenance will not be disturbed absent a clear abuse of discretion. Even so, the trial court must comply with the statutes authorizing maintenance, and the failure to do so is reversible error. *Hair*, 40 Kan. App. 2d at 483-84. A judicial action constitutes an abuse of discretion if the action (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact. *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012).

A trial court's award of maintenance must be fair, just, and equitable under all the circumstances. K.S.A. 60-1610(b)(2). Spousal maintenance is intended to provide for the future support of the divorced spouse, and the amount of maintenance awarded is based upon the need of one party and the other party's ability to pay. *Hair*, 40 Kan. App. 2d at 484. When determining the need and amount of maintenance, the trial court may consider the following factors: (1) the age of the parties; (2) the parties' present and prospective earning capacities; (3) the length of the marriage; (4) the property owned by each party;

(5) the needs of the parties; (6) the time, source, and manner of acquisition of property; (7) family ties and obligations; (8) and the overall financial situation of each party. *In re Marriage of Day*, 31 Kan. App. 2d 746, 758, 74 P.3d 46 (2003).

The trial court, however, is not required to explicitly weigh each of the above factors when determining the need or amount of maintenance. Instead, the trial court's decision on maintenance should be affirmed when its findings are supported by substantial competent evidence, even if there is some evidence which may have supported an alternate conclusion. See *Hair*, 40 Kan. App. 2d at 486. Substantial competent evidence is evidence that possesses both relevance and substance and provides a substantial basis of fact from which the issues can be reasonably determined. *Frick Farm Properties v. Kansas Dept. of Agriculture*, 289 Kan. 690, 709, 216 P.3d 170 (2009).

In this case, the trial court properly determined the amount and duration of maintenance for several reasons. First, the trial court expressly stated the factors that it relied on when making its decision. The trial judge declared:

"In making this determination, the Court has taken into consideration the length of this marriage, the age of the parties, the property they own, their present and future earning capacities, and the time, source and manner of acquisition of their property. In these unpalatable circumstances, the Court considers this determination to be fair and equitable."

A review of the record supports the trial judge's statement. Even though James' compensation was limited to a \$60,000 annual salary by a promissory note that he had signed with a bank, James was able to use his businesses to manipulate his income so that his standard of living was much higher. Indeed, the trial court's findings of fact noted the following:

"7. Mr. Waller also received and benefited from a number of personal expenses paid for by his company, including property and vehicle insurance, personal property taxes, cell phones, satellite TV, internet, health insurance, travel with no offset for personal expense, etc. In 2008 and 2009, Christmas gifts for the family were company expenses, and new golf clubs for employees were categorized as 'advertising' expenses. He paid himself as 'contract labor,' in addition to his salary. His company purchased a John Deere Tractor for the home and wheel replacements for his son. Mr. Waller admitted that he had satellite reception at home, paid for by the company since he often worked at home. He had broadband internet service, and his company had 23-26 phone lines, so that free phones became a perk for his employees and himself. Mr. Waller admitted on cross-examination that perhaps he received as much as \$10,000.00 in benefits per year, deducted as business expenses which upped his standard of living. Ms. Waller went through business bank statements and credit card statements and came up with at least double that amount.

"8. In addition to all those enumerated company expenses, in 2008, Mr. Waller's petty cash fund at the company totaled \$79,349.85. Mr. Waller conceded that this amount looked bad, but said petty cash was used primarily for unrecorded business expenses. His explanation about when and why he resorted to a petty cash categorization for this amount of money was not persuasive. Furthermore, he admitted that personal items such as clothing and family meals at restaurants came from 'petty cash.' In 2010, the 'petty cash' fund had fallen, but it still constituted \$15,390.13."

Second, even with the alleged business financial difficulties asserted by James, the businesses still have brought in annual gross receipts of \$1,500,000 to \$2,000,000. The number of gross receipts produced by James' business entities coupled with his access to those funds supports the amount of maintenance awarded by the trial court. The same reasoning applies to James' argument that the trial court erred in determining the length of the maintenance award. Indeed, the length of maintenance awarded is only half of the statutory maximum of 121 months under K.S.A. 60-1610(b)(2). Moreover, the duration of the maintenance is less than half the duration of the marriage, which lasted for more than a decade. Under these circumstances, James has failed to show that the trial court's

award of 60 months' maintenance at \$1,000 per month was arbitrary, capricious, or unreasonable. Accordingly, James' argument fails.

Did the trial court err in not granting James an offset against his temporary maintenance requirement that was in arrearage based on his prior payment of the mortgage?

Finally, James argues that the trial court "erred in not granting [him] an offset against his maintenance arrearage based upon [his] payment of the mortgage on the marital home during the time in which [Ericka] resided at the home without [him]." As previously mentioned, Kansas law gives trial courts wide discretion regarding spousal maintenance and a judgment awarding maintenance will not be disturbed absent a clear abuse of discretion. The trial court, however, must comply with the statutes authorizing maintenance, and the failure to do so is reversible error. *Hair*, 40 Kan. App. 2d at 483-84. A judicial action constitutes an abuse of discretion if the action (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact. *Ward*, 292 Kan. at 550.

James' argument concerning the offset of his temporary maintenance arrearage is misplaced. Paragraph 12 of the trial court's memorandum decision granted Ericka a judgment for unpaid temporary maintenance from December 1, 2010, to May 31, 2011. The memorandum decision also gave James "an offset credit for the December mortgage payment he made directly to the bank." The trial court's April 6, 2012, order "Denying Motion To Reconsider In Part And Amending Journal Entry," however, expressly reversed paragraph 12 of its memorandum decision. The trial judge stated the following:

"Paragraph 12 awarding a judgment for six months temporary maintenance is reversed. The Court typically credits temporary maintenance payments toward permanent maintenance and will follow that practice in this case. Accordingly, Mr. Waller owes 60 months maintenance at \$1,000.00 per month, and is given credit for the \$5,001.00 which

was the net value of the liquidated 401(k) account, which results in 55 months of maintenance payments remaining, less \$1.00."

Here, the trial court's April 6, 2012, order did not include an award regarding the temporary maintenance that was in arrearage but instead credited James \$5,001 towards the permanent maintenance award. Because the trial court amended its journal entry and awarded James a \$5,001 credit towards the final maintenance that he was required to pay, it did not err by failing to allocate an offset against his temporary maintenance arrearage. In fact, James' argument concerning his temporary maintenance arrearage seems to be moot because he was not ordered to pay temporary maintenance, but instead was given a credit towards his permanent maintenance requirement. The only reference to the offset credit was in paragraph 12 of the trial court's memorandum decision, but this paragraph was reversed in the trial court's April 6, 2012, order.

Even if James had been required to pay the temporary maintenance that was in arrears along with permanent maintenance, it still would not have been an abuse of discretion to deny an offset based on James' prior mortgage payments. Kansas law gives trial courts wide discretion regarding spousal maintenance, and a judgment awarding maintenance will not be disturbed absent a clear abuse of discretion. Under this standard, the trial court must comply with the statutes authorizing maintenance, and the failure to do so is reversible error. *Hair*, 40 Kan. App. 2d at 483-84. The trial court's decision here regarding maintenance complies with the statutes authorizing maintenance and is not arbitrary, fanciful, or unreasonable. As a result, James has failed to meet his burden to show that the trial court abused its discretion, and the trial court properly allocated an offset against James' temporary maintenance arrearage.

Affirmed.