

such controverted fact issues as have been specified by the parties pursuant to Rule 73.01. All fact issues upon which no specific findings are made shall be considered as having been found in accordance with the results reached. Rule 73.01(a)(2). Any finding of fact herein equally applicable as a conclusion of law is adopted as such, and any conclusion of law herein equally applicable as a finding of fact is adopted as such.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Court finds that both parties have been residents of the State of Missouri for ninety (90) days next preceding the commencement of this action and that thirty (30) days have elapsed since the filing of the petition; the Court further finds that there remains no reasonable likelihood that the marriage between the parties can be preserved and the marriage, therefore, is irretrievably broken.

2. Husband and Wife were married on April 28, 1984 and the marriage is registered in St. Louis County, State of Missouri.

3. There was one child born of the marriage who is now emancipated: Janet Nelson (born July 26, 1986).

4. Husband and Wife separated on or about April 15, 2010.

5. The last four digits of Husband's Social Security Number are XXXX, and the last four digits of Wife's Social Security Number are XXXX.

6. Wife is not now pregnant and neither party is a member of the Armed Forces of the United States nor its allies.

7. This court has jurisdiction over the subject matter and the parties in this action.

8. Husband has made no claim of maintenance from Wife.

9. Wife is seeking maintenance from Husband.

10. Wife is not currently working, is disabled and is receiving Social Security Disability benefits in the amount of \$1,140.00. Wife also receives, as sole beneficiary, an average of approximately \$1,500.00 per month from The Susan Rose Abrams Irrevocable Trust.

11. Husband is employed as a laborer and earns an income at a gross monthly wage of approximately \$2,400.00.

12. Wife alleges that Husband engaged in marital misconduct during the marriage by, among other things, verbally abusing Wife and overspending. The Court finds that Husband did not engage in marital misconduct during the marriage.

Classification and Division of Property and Debt

13. The parties are possessed of certain marital property which the Court must divide. The parties are also possessed of significant nonmarital property. There is also other property at issue. Furthermore, there is debt. All marital and nonmarital property and approximate net values, as well as all debt, are divided and set forth below and in Court's Exhibit #1, which is incorporated into and made a part of this Judgment. Said division is fair and equitable and the parties are ordered to perform to the terms and conditions set forth therein.

14. In dividing the parties' marital property and debt under MO. REV. STAT. Section 452.330.1 (2004), the Court considered all relevant factors including the following:

(1)[t]he economic circumstances of each spouse at the time the division of property is to become effective...; (2) [t]he contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker; (3) [t]he value of the nonmarital property set apart to each spouse; [and,] (4) [t]he conduct of the parties during the marriage....

15. The Court exercised its broad discretion in dividing the marital property and attached "...the amount of weight to each of these [factors] it deem[ed] appropriate." Seggelke v. Seggelke, 319 S.W.3d 461, 465 (Mo. App. E.D. 2010) *citing* Skaggs v. Skaggs, 301 S.W.3d 72, 76 (Mo. App. S.D. 2009) (quoting Shepard v. Shepard, 47 S.W.3d 412, 417 (Mo. App. S.D. 2001)). In the case at bar, the Court finds as most significant the parties' economic circumstances at the time the division of property is to become effective. Missouri courts have broadly interpreted parties' "economic circumstances" to include, among other things, their age, health, educational background, work history, previous earnings, current income, earning capacity, and non-marital property and debt. *See* Long v. Long, 135 S.W.3d 538 (Mo. App. S.D. 2004); *see also* Featherstone v. Featherstone, 710 S.W.2d 288 (Mo. App. E.D. 1986); *see also* Stratman v. Stratman, 948 S.W.2d 230 (Mo. App. W.D. 1982); *see also* In re Marriage of Gilmore, 943 S.W.2d 866 (Mo. App. S.D. 1997). Moreover, Missouri courts have held that a trial court can also consider Social Security benefits or potential benefits as economic factors in the disposition of marital property, even though the benefits are not assignable as marital or separate property. Rudden v. Rudden, 765 S.W.2d 719, 720 (Mo. App. E.D. 1989).

16. Having considered the above-listed factors, the Court finds that the economic circumstances of the parties are particularly significant in its division of the property and debt. The Court finds that it is appropriate that Husband be awarded a greater division of property due to Wife's superior economic circumstances. Moreover, the Court finds that it is appropriate under the circumstances to disproportionately allocate debt.

17. Here, Husband's economic circumstances are considerably inferior to Wife's economic circumstances. While Husband is currently employed and earning the gross

monthly income of approximately \$2400.00, he is deaf and nearing retirement. Like Wife, he is in his early to mid-60s. Although his ability to work is better than Wife's, it is likely that he will be able to work only a few more years as a laborer.

Nevertheless, Husband is possessed of separate, non-marital property. At all relevant times prior to and subsequent to the marriage with Wife, Husband has been employed by Western Plastics Company, where he has a Pension Plan for Union Employees of Greenstreak Group Inc. Husband acquired some of the benefits from that Pension prior to his marriage to Wife. The Court finds that on July 1, 2013, Husband will be eligible for Pension benefits of a lump sum payment in the amount of \$203,510.48, or a monthly payment at his normal retirement date of \$1,525.75. The parties agree that the present full value of the Plan is \$200,650.20. The present value of the marital interest in Husband's Pension plan, through the calculation of the accountants, is \$150,286.16. Therefore, Husband's separate portion of his Pension is \$50,364.10.

In addition to Husband's interest in his Pension plan, Husband had, in 1995, settled a worker's compensation case wherein he was awarded \$21,413.87. Wife testified at the time of trial that she was unaware of the receipt of those proceeds, and did not have any knowledge as to how Husband spent those proceeds. Notwithstanding a letter from his attorney advising him to maintain these funds as separate property, Husband credibly testified that he used the proceeds to pay marital bills. Accordingly, the Court finds that, as Husband commingled these proceeds with the marital estate, these proceeds are marital property.

18. For her part, Wife is unemployed, deaf, disabled, and suffers from a variety of health issues. She is 63 years old. She receives monthly Social Security Disability

benefits in the amount of \$1,140.00. However, Wife has significantly superior economic circumstances than Husband. Wife is the sole income beneficiary of The Susan Rose Abrams Irrevocable Trust and receives an average of approximately \$1,500.00 per month from said trust. Wife has filed her taxes each year personally claiming all of the trust's income, expenses and capital gain as her income. Wife's brother, Gary Abrams, is the sole Trustee of the Irrevocable Trust.

The Irrevocable Trust was executed on December 5, 1983, and was funded with proceeds from a different trust, hereinafter referred to as the "Testamentary Trust," which was created pursuant to the November 9, 1973 Last Will and Testament of Wife's deceased father, Milton Abrams. The Testamentary Trust was probated in Adams County, Mississippi and the corpus of that trust consisted of one-half of the assets of Milton Abrams. The transfer to the Irrevocable Trust was approved by the Circuit Court of Adams County, Mississippi on or about December 9, 1988. The proceeds of the Testamentary Trust at the time of transfer to the Irrevocable Trust totaled \$403,794.04.

Gary Abrams became Trustee of the Irrevocable Trust and was the Successor Trustee of the Testamentary Trust from Wife's uncles, George Abrams and Lawrence Abrams. The Court finds that the Irrevocable Trust is a discretionary trust and provides in pertinent part,

Distributions by the trustee to the beneficiary shall be made at such times and in such amounts as is, in the sole discretion of said trustee in the best interest of said beneficiary. Trustee shall have sole discretion and authority to invade corpus when deemed to be necessary for the comfort, support and well being of the beneficiary....

The Court finds that the assets of the Trust, at the time of trial, totaled \$420,666.00. The Court finds that the value of the Trust, in principal, is approximately the same as when

the Irrevocable Trust was funded in 1988. The Trustee's administration of the Irrevocable Trust and his distributions to Wife over the course of time have been prudent. The Court finds as credible the Trustee's testimony that he would continue to administer the trust in the future in a similarly prudent manner and supplement Wife's income with the Trust's distributions as needed. Accordingly, as Wife's economic circumstances are substantially greater than Husband's economic circumstances due to her position as the sole beneficiary of the Irrevocable Trust, the Court finds as fair and equitable the division of all property and debt as shown on Court's Exhibit #1.

19. Nonetheless, under Section 456.5-504.1 (2006) of the Missouri Uniform Trust Code, although Wife is the sole beneficiary of the Irrevocable Trust, the Court finds that the trust is not her separate property and she does not have a property interest in said trust. Section 456.5-504.1 (2006) provides in pertinent part,

A beneficiary's interest in a trust that is subject to the trustee's discretion *does not constitute an interest in property or an enforceable right* even if the discretion is expressed in the form of a standard of distribution or the beneficiary is then serving as a trustee or cotrustee....

The Missouri Comment on this section explains that “discretionary interests in trusts are not property for any purposes, including...dissolution of marriage....” *See* Missouri Bar Trust and Probate Committee, Chapter 456 Missouri Revised Statutes Including the Missouri Uniform Trust Code with the 2006 Technical Corrections and the Repeal of the Doctrine of Worthier Title and Amendments to Section 475.092 (The Red Book) 173 (2006); *see also* Herman, How to Protect Trust Assets From a Beneficiary's Divorce, 63 J.Mo.B 228 (Sept-Oct., 2007).

In this case, Wife's interest is clearly subject to the Trustee's discretion. The Trustee makes only those distributions to her “at such times and in such amounts as is, in

[his] sole discretion...in the best interest of [Wife].” Wife has no property interest in the Irrevocable Trust or any enforceable right to said trust. Therefore, while the Irrevocable Trust is relevant to the Court’s determination of the economic circumstances of the parties, the trust is not Wife’s separate property.

20. Additionally, the Court has reviewed Moore v. Moore, 111 S.W.3d 530 (Mo. App. S.D. 2003) (hereinafter “Moore I”), and Moore v. Moore, 189 S.W.3d 627 (Mo. App. W.D. 2006) (hereinafter “Moore II”) and finds that those cases do not apply here. In Moore I, Husband was the sole settler and sole beneficiary of the trust at issue. Moore, 111 S.W.3d at 532. He had the option to terminate the trust after he reached the age of 35. Id. The Court found this particular characteristic of that trust determinative and distinguishable from other trusts where the beneficiaries had no control over the distribution of trust assets. Id. at 534. The Court found that Husband there constructively received the trust assets when he reached the age of 35 and, accordingly, any trust income generated after that date until the date of the dissolution of marriage was marital property. Id. at 535.

In Moore II, Wife was the sole beneficiary and sole trustee. Moore, 189 S.W.3d at 631. Like the Court in Moore I, the Court noted that the fundamental nature of a trust is that the trustee has legal title while the beneficiary has equitable title. Id. at 637. While the Court stated that Wife’s equitable interest as beneficiary was property subject to classification and division, the Court’s opinion, citing Husband’s right to revoke the trust in Moore I, wholly turned on Wife’s ability as Trustee to pay herself as beneficiary. Id. The Court concluded that the trust distributions to Wife were marital property, as income received from separate property. Id.

Here, on the other hand, Wife's position as sole beneficiary of the Irrevocable Trust is completely different from Husband in Moore I and Wife in Moore II. Wife has no option to terminate the trust and demand distribution. She has no legal title. She has no control over the trust whatsoever. Her equitable interest, although pertinent to her economic circumstances as stated above, is not subject to classification and division in light of MO. REV. STAT. Section 456.5-504.1 (2006). Nevertheless, in light of Wife's significantly superior economic circumstances as sole beneficiary of the Irrevocable Trust, the Court finds as fair and equitable the division of all property and debt as shown on Court's Exhibit #1.

21. Moreover, citing In re Marriage of Herr, 705 S.W.2d 619 (Mo. App. S.D. 1986), Wife claims that her \$20,000 down payment for the purchase of the marital home at 383 Genoa, St. Louis, Missouri 63121, should be set aside as her separate property. The Court finds that Herr does not apply to the case at bar. Instead, the Court finds that this case is similar to the case of In re Marriage of Smith, 785 S.W.2d 764 (Mo. App. E.D. 1990). In Smith, 785 S.W.2d at 765, the husband bought a residence prior to marriage using \$36,000 of his own money as downpayment. He originally titled the home in only his name but subsequent to the marriage he titled the home jointly with his wife. Id. Citing Kramer v. Kramer, 709 S.W.2d 157, 159 (Mo. App. E.D. 1986), the Court rejected the husband's argument that his downpayment should be set aside as his separate property and held that the execution of the deed in joint names represents evidence of a donative intent to create a gift to the marital estate. Id. at 766. Similarly, in the case at bar, while Wife used her separate property for the purchase of the parties' home, her titling of the residence jointly with Husband represents evidence of a donative intent to create a gift to

the marital estate. Therefore, the Court denies Wife's request and finds Wife's \$20,000 downpayment to be marital property.

22. The Court is especially mindful of the age of the parties and Wife's disability. Both parties are deaf and use alternative communication methods. Husband is ready to retire and it is unlikely that either party will be able to work much more in the future. Wife testified that she wants to stay in the marital home, and she currently resides there with the parties' daughter. Husband does not wish to reside in the marital home. Therefore, the Court awards Wife the marital home, and Husband shall quitclaim to Wife his interest in the home. The Court's award of property should be sufficient that Husband can buy a home for himself and support himself through his Social Security benefits and his pension. Wife will be able to live in the house and support herself from her trust and her social security benefits. Wife shall be responsible for and pay the home equity mortgage at US Bank, and shall indemnify and hold harmless from same, including any attorney's fees or costs of collection.

23. The legal description of the real property or properties divided herein is more fully set forth in Court's Exhibit 2 which is incorporated into and made a part of this Judgment.

24. The Court finds that the parties presented no evidence regarding the values of household and personal items they have in their possession. Therefore, the Court finds that said values are unknown and divides this property as set forth below.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the property and debts of the parties be divided as follows:

25. All right, title and interest in the marital and separate property of the parties as set forth in Court's Exhibit #1 as allocated to Husband shall be awarded to Husband as his sole and separate property.

26. All right, title and interest in the marital and separate property of the parties as set forth in Court's Exhibit #1 as allocated to Wife shall be awarded to Wife as her sole and separate property.

27. The debts and liabilities allocated to Husband and owed to the creditors as set forth in Court's Exhibit #1 are to be assumed and paid by Husband, and he is to hold Wife harmless and shall indemnify Wife for any payments made by her thereon.

28. The debts and liabilities allocated to Wife and owed to the creditors as set forth in Court's Exhibit #1 are to be assumed and paid by Wife, and she is to hold Husband harmless and shall indemnify Husband for any payments made by him thereon.

29. Each party is awarded the personal property they now have in their respective possessions as their sole and separate property except as specifically stated on Court's Exhibit #1.

Maintenance

30. Wife, by her pleading, has requested maintenance from Husband. However, Wife conceded at trial that she would have sufficient income to meet her reasonable needs from the trust income and the Social Security benefits that she receives. Husband testified that Wife is able to support herself.

31. Husband is not requesting maintenance from Wife.

32. Under MO. REV. STAT. Section 452.335.1(2004), maintenance is appropriate only if "the spouse seeking maintenance: (1) [l]acks sufficient property, including marital

property apportioned to him, to provide for his reasonable needs; and (2) [i]s unable to support himself through appropriate employment....” The term “reasonable needs” is a relative term and does not automatically equal the standard of living established during the marriage. The court is required to recognize the expenses and needs of the spouse and may use other factors to consider.

33. Under MO. REV. STAT. Section 452.335.2 (2004), the Court determines the amount and time period of maintenance after considering the following factors:

- (1) [t]he financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently...;
- (2) [t]he time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
- (3) [t]he comparative earning capacity of each spouse;
- (4) [t]he standard of living established during the marriage;
- (5) [t]he obligations and assets, including the marital property apportioned to him and the separate property of each party;
- (6) [t]he duration of the marriage;
- (7) [t]he age, and the physical and emotional condition of the spouse seeking maintenance;
- (8) [t]he ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance;
- (9) [t]he conduct of the parties during the marriage; and
- (10) [a]ny other relevant factors.

34. The Court has discretion in awarding maintenance and is not required to award maintenance that would meet all of the needs of the receiving spouse. Hoffmann v. Hoffmann, 676 S.W.2d 817 (Mo. Banc 1984).

35. The Court has considered Husband’s annual salary. The Court has also considered the fact that “[a]ll resources available to a party, not just salary, should be considered when determining a party’s ability to pay maintenance and child support; nothing is exempt from consideration. Jung v. Jung, 886 S.W.2d 737, 741 (Mo. App. E.D. 1994).

36. As previously stated, while Husband is currently employed and earning the gross monthly income of approximately \$2400.00, he is deaf and nearing retirement. Like Wife, he is in his early to mid-60s. Although his ability to work is better than Wife's, it is likely that he will be able to work only a few more years as a laborer.

37. For her part, Wife is unemployed, deaf, disabled, and suffers from a variety of health issues. She is 63 years old. She receives monthly Social Security Disability benefits in the amount of \$1,140.00. However, Wife has significantly superior economic circumstances than Husband. Wife is the sole income beneficiary of The Susan Rose Abrams Irrevocable Trust and receives an average of approximately \$1,500.00 per month from said trust.

38. Other than filing their respective First Amended Statement of Income and Expense and Statement of Income and Expense, the parties did not present specific evidence regarding their monthly expenses. Nevertheless, neither party contested the other's expenses and reasonable needs, and Wife conceded that she would have sufficient income to meet her reasonable needs from the trust income and the Social Security benefits that she receives.

39. Furthermore, the Court finds that Husband is not able to pay his reasonable expenses and also pay maintenance to Wife.

40. Accordingly, the Court finds that Wife is able to meet her reasonable needs from the Social Security benefits that she receives and the trust income. She is the only beneficiary of the trust and the trust's current value is close to \$420,000.00 per the current trustee, Wife's brother.

41. Moreover, the Court finds that, although Wife has pled a request for maintenance, Wife did not demand maintenance at trial in expectation that she will continue to receive trust income of \$1,500.00 per month.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

42. Wife is not awarded maintenance from Husband. Said order is not subject to modification.

Attorney's Fees

43. Husband and Wife each requested an order requiring the other to pay his/her attorney's fees and costs.

44. The Court has authority to order the payment of attorney's fees and costs under MO. REV. STAT. Section 452.355.1(2004), which provides:

Unless otherwise indicated, the court from time to time after considering all relevant factors including the financial resources of both parties, the merits of the case and the actions of the parties during the pendency of the action, may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding pursuant to sections 452.300 to 452.415 and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding and after entry of a final judgment. The court may order that the amount be paid directly to the attorney, who may enforce the order in the attorney's name.

45. Upon considering of the testimony of the parties, their exhibits and evidence, as well as the factors set forth in Section 452.355.1, the Court finds as fair and reasonable that the payment of attorney's fees shall be the responsibility of the parties to their respective attorney.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the payment of attorney's fees shall be the responsibility of the parties to their respective attorney.

JUDGMENT/ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court as follows:

46. The marriage of Wife and Husband is dissolved.

47. Neither party is awarded maintenance from the other party; said order is not subject to modification.

48. All right, title and interest in the parties' marital property, listed with their approximate net equity values if known, are awarded to and vested in the respective parties as set forth in Court's Exhibit #1.

49. Husband is to quitclaim his interest in the marital home to Wife within 30 days after the date of this judgment. The legal description of the home is as follows: Lot 276 of Sorrento Plat No. 3, a subdivision in St. Louis County, Missouri as per the plat thereof recorded in Plat Book 125 pages 4 and 5 of the St. Louis County Records. Together with all improvements known as and numbered 383 Genoa Drive. (See attached Court's Exhibit #2).

50. Except as may be otherwise expressly provided hereinabove and in Court's Exhibit #1, all other personal property of the parties shall be the sole and exclusive property of the party presently in the possession, custody or control of the same or in whose name the same may be titled or denominated.

51. The debts of the marriage shall be the responsibility of the respective party as set forth in Court's Exhibit #1. Within 30 days of this Judgment, each party shall remove the other's name from those debts apportioned to him.

52. Except as may be expressly provided herein and in Court's Exhibit #1 to the contrary, each party shall defend, indemnify and hold harmless the other from any and all debts, loans, mortgages, obligations, and expenses in any manner arising from, related to or connected with, any item of property, real or personal, respectively received by each under the provisions of this Judgment.

53. In arriving at the division of marital property, the Court has taken into consideration, among other things, the economic circumstances of each of the parties. The Court has not intended to set off the marital property into approximately equal shares as previously stated herein.

54. Each party is directed to execute all deeds, titles, documents and other instruments necessary to effectuate fully the provisions and intent of this Judgment.

55. No award of attorney fees is awarded to either party and each shall be responsible for the payment of their respective attorney fees.

56. The costs of Court shall be paid from the cost deposit previously posted except that the costs of depositions and Trial subpoena shall not be included in costs.

57. The Circuit Clerk is ordered to prepare and forward to the attorneys of record a certified copy of this judgment which shall be taxed as costs.

SO ORDERED:

JOSEPH S. DUEKER
ASSOCIATE CIRCUIT JUDGE
DIVISION 43
ST. LOUIS COUNTY CIRCUIT COURT

DATED: _____

CC: Attorneys of Record