

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS  
STATE OF MISSOURI

LEONA KAY PELEK, )  
 )  
 Petitioner, ) Cause No. 10SL-DR04769  
 )  
 and )  
 ) Division 43  
 )  
 LEO THOMAS PELEK, )  
 )  
 Respondent. )

**AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW,  
JUDGMENT/ORDER AND DECREE OF DISSOLUTION**

On March 10 and 11, 2011, this cause was called for hearing on Petitioner’s Petition for Dissolution of Marriage, Respondent’s Cross-Petition for Dissolution of Marriage and Respondent’s Motion for Sanctions. Petitioner (hereinafter also referred to as “Wife”) appeared in person and by attorney, Elliot Goldberger. Respondent (hereinafter also referred to as “Husband”) appeared in person and by attorney, Elaine Pudlowski. Evidence was adduced and testimony was heard. The parties thereafter submitted the cause to the Court upon the pleadings, proof, testimony and evidence.

The Court entered its original Findings of Fact, Conclusions of Law, Judgment/Order and Decree of Dissolution on August 16, 2011. Petitioner filed her Motion to Amend, Correct, Set Aside and/or New Trial on August 23, 2011. Respondent filed his Motion to Amend the Judgment and Decree of Dissolution or Marriage, or in the alternative, Motion for New Trial on September 14, 2011. Both parties’ Motions for New Trial are denied. The parties’ respective Motions to Amend are granted in part and denied in part as per this Amended Findings of Fact, Conclusions of Law, Judgment/Order and Decree of Dissolution. Upon this Court’s own motion, the Court takes judicial notice of its file.

This matter having been submitted to the Court on the pleadings and proof, and the Court having considered the record, the evidence, the testimony, and the proposed Findings of Fact and Conclusions of Law and Judgments filed by the parties, the Court now enters its Amended Findings of Facts, Conclusions of Law and Judgment, including findings on 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 May 20, 1995, and said marriage is registered in the County of St. Louis, State of Missouri.

3. The parties separated on or about July 9, 2010.

4. There were no children born to the parties during the marriage.

5. The last four digits of Wife's Social Security Number are XXXX and the last four digits of Husband'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. Wife is currently employed full time by Rose International where she earns, while working 40 hours per week at \$11.78 per hour, the gross sum of \$942.40 semi-monthly. Wife's earnings total the net monthly sum of \$1256.16 from Rose International. Additionally, Wife is reimbursed for some of her work-related expenses at a rate of up to \$70 per pay period and she also receives commissions for placing applicants. Wife currently receives \$776.67 per month in pension benefits from her former employer, Citigroup. Furthermore, Wife receives \$313 per month from her brother as rental income for real estate property located at 1602 Reiner Road, Leasburg, Missouri. Accordingly, Wife's net monthly income is \$2,345.83.

8. Husband is currently employed by Ferrellgas where he earns the gross sum of \$3185.54 bi-weekly, or \$6902 monthly. Husband earns the net monthly sum of \$4970 (Petitioner's Ex. 27, p. 74). Husband has no source of income other than his wages from his employment with Ferrellgas.

9. Wife alleges that Husband engaged in marital misconduct during the marriage by, among other things, irresponsibly overspending, abusing alcohol, having mood swings, being verbally and physically abusive, committing insurance fraud and engaging in extramarital affairs. The Court finds that Husband engaged in marital misconduct during the marriage by irresponsibly overspending and having extramarital affairs. It serves no further purpose to elaborate on the details concerning Husband's misconduct.

10. Husband alleges that Wife has engaged in marital misconduct during the marriage by, among other things, having an inappropriate relationship with her ex-husband; making false

allegations about Husband; and, harassing Husband. The Court finds that Wife has not engaged in marital misconduct during the marriage.

### **Classification and Division of Property and Debt**

11. The parties are possessed of certain marital property which the Court must divide. The parties are also possessed of certain items of separate property. Furthermore, there is also considerable debt. All marital and nonmarital property and approximate net values, as well as all marital debt, are divided and set forth below and in Court's Exhibit #1 or #1A, which are incorporated into and made a part of this Judgment. Court's Exhibit #1 relates to the event that the Catawissa property is sold; Court's Exhibit #1A relates to the event that the Catawissa property is not sold as discussed below. Said division is fair and equitable and the parties are ordered to perform the terms and conditions set forth therein.

12. In dividing the parties' marital property and debt under MO. REV. STAT. Section 452.330.1 (2004), the Court must consider 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....

13. Having considered the above-listed factors, the Court finds that the economic circumstances of the parties and the conduct of the parties are particularly significant in its division of the property and debt. The Court finds that it is appropriate that Wife be awarded a greater division of property due to Husband's superior economic circumstances and Husband's misconduct during the marriage. Moreover, the Court finds that Husband's greater economic circumstances provide him with a better ability to pay the debt.

14. Additionally, in its division of property and debt, the Court determined net values of the property, including but not limited to, real estate. Wife stated that she received the real estate known as 287 Rock Church Road, Catawissa, Missouri (also known as the “Catawissa Property”) in her divorce from her ex-husband, Michael Pingleton. Wife testified that she owned this residence for a period of 9 years prior to her marriage to Husband. Wife testified that in 1999, the parties refinanced the mortgage and placed Husband’s name on the Deed. Wife testified that in June 2001, Husband quitclaimed the residence back to Wife’s name solely. Nevertheless, the Court finds that the Catawissa Property is marital property.

Daton Grote testified on behalf of Wife as to the value of the Catawissa Property. Grote is licensed as a Missouri State Certified Appraiser and has been performing appraisals since 2008. He has performed between 1,200 and 1,300 home appraisals. Grote is also a member of the St. Charles Realtor Association. Grote’s assessment consisted of going to the home and personally inspecting both the interior and exterior of the home, taking photos, researching MLS and various county records, examining comparable properties and sales in the area and performing a market analysis on the property. Mr. Grote prepared a written report which was submitted into evidence as Exhibit 34.

Grote compared the Catawissa Property against several other properties that had been sold and that were listed in the Catawissa area and made adjustments accordingly in order to arrive at the property’s fair market value. Grote did a total of 9 comparisons on the Catawissa Property, including six recent sales in the area and three current listings. Grote made diligent adjustments, accounting for differences between the Catawissa Property and his comparables, making adjustments for those differences using paired data analysis and reconciling their value estimates using a sales comparison approach (i.e. fair market value). After performing a market

analysis, Grote testified that the fair market value of the Catawissa home and property was \$194,000.

In making his residential appraisal summary report, Grote noted that the home was in “average condition”, but that there was physical deterioration and deferred maintenance that needed to be performed to the home, including maintenance to the ceiling drywall in order to repair water damage and roof leaks. Grote also noted that the home had an unstable deck railing. The market conditions in the Catawissa area are such that the value of real estate has declined between 8% - 12% in the last 12 to 30 months, which accounts for a decrease in the value of the Catawissa Property. Court finds that Grote is an experienced appraiser who relied upon documents and evidence sufficient with which to arrive at the fair market value for the Catawissa Property.

Husband presented no evidence as to the value of the Catawissa Property, aside from his own testimony. However, Husband acknowledged that he took out the home equity line, Citibank mortgage #...5206, to pay off two motorcycles and a trailer that he is using.

The Court finds that the value of the Catawissa Property is \$194,000.

15. Wife testified that the property located at 1602 Reiner Road, in Leasburg, Missouri (also known as the “Leasburg Property”) has been in her family for 100 years. Wife testified this was her grandmother’s home and that her Father built the home. Wife testified that she bought the real estate from her Father and later the parties placed Husband on the title with her. Wife testified that her Father gave her \$5,000 as a down payment on this residence. Nevertheless, the Court finds that the Leasburg Property is marital property.

Rosella Aytes had her deposition taken as to the value of the Leasburg Property. Aytes is licensed as a Missouri State Certified Appraiser and has been performing appraisals for over

thirty years. Aytes testified that she has performed “thousands” of real estate and home appraisals during her career, both as an assessor and as a certified real estate appraiser.

Aytes’ assessment consisted of going to the home and personally inspecting both the interior and exterior of the home and property, taking photos, researching MLS and various county records, examining comparable properties and sales in the area and performing a market analysis on the property. Ms. Aytes prepared a written report which was submitted into evidence and her deposition was read into the record at trial as Exhibit 35.

Aytes compared the Leasburg Property against several other properties that had been sold and that were listed in the Leasburg area and made adjustments accordingly in order to arrive at the property’s fair market value. Aytes, after performing a fair market analysis, testified in deposition that the fair market value of the Leasburg home and property was \$46,000.

Aytes stated that the home was in terrible condition. The home had no heating or air-conditioning. The door to the property was broken and had pieces of board nailed across the door because of its condition. The bedroom was in terrible shape and not finished. There was a dump on the property. Aytes testified that the home has no septic system, and that the hole used as backup to the septic system had “backed up” spilling sewage into the basement of the home. The foundation of the home has settled, causing cracks in the basement walls and overlap. There are cracks in the foundation of the home and black mold growing in the cracks in the foundation. Ms. Aytes stated that the roof was also leaking and that the home is missing windows which have simply been covered up with pieces of plastic where there is missing glass and brick. The flue to the home is also leaking into the bathroom ceiling. Ms. Aytes stated that the cost to repair the home would exceed its value as its condition was so dilapidated. The home may also have a problem with termites. Based on the condition of the house, Ms. Aytes determined that the

primary value to the Leasburg Property was the roughly 8 acres of land it is located on as opposed to any value in the home itself. The Court finds that Ms. Aytes is an experienced appraiser who relied upon documents and evidence sufficient with which to arrive at the fair market value for the Leasburg Property.

Husband presented no evidence as to the value of the Leasburg Property, aside from his own testimony.

The court finds that the value of the Leasburg Property is \$46,000.

16. Wife testified that she wanted both pieces of real estate and that there was no equity in either piece of real estate. On the other hand, Husband testified that there was equity in both pieces of real estate. Neither party denied that the loans are in both names. Nevertheless, Wife relies on and receives \$313 per month from her brother as rental income for Leasburg Property. Accordingly, in light of the factors under Section 452.330 discussed *infra*, the Court finds that it is appropriate and reasonable that:

a. Wife is granted sole and exclusive right to occupy the real property (“Property”), located at 287 Rock Church Road, Catawissa, Missouri 63014.

Wife is granted one hundred twenty (120) days from this Judgment to refinance or otherwise remove Husband’s name from the indebtedness on Citibank mortgage #6076.

Husband is ordered to execute and provide any and all deeds, assignments, transfer documents and any other papers that might be necessary in order for Wife to remove Husband’s name from the Citibank mortgage #6076 in the approximate amount of \$156,000.

In the event Wife is unable to remove Husband’s name from the indebtedness on Citibank mortgage #6076, the property shall be placed for sale and the net proceeds therefrom shall be divided equally between Husband and Wife. The net proceeds shall be defined as the

proceeds remaining after payment of all real estate commissions, closing costs and/or costs of sale, all appraisal fees, and the Citibank mortgage #6076, in the approximate amount of \$156,000. In the event there are no net sale proceeds from the sale of the Property and there is a deficiency, the parties shall each be responsible for fifty percent (50%) of the deficiency.

The parties agree that this Property shall be listed for sale by a reputable real estate agent and shall be placed on the market at a listing price recommended by said real estate agent. In the event the parties are not able to agree on a real estate agent they shall each select a real estate agent and the two real estate agents shall determine who shall be the parties' real estate agent.

The parties agree that they will accept any reasonable and bona fide offer if such offer is at least ninety-eight percent (98%) of the then listing price. The parties shall make the property available at reasonable times for inspection by brokers and prospective purchasers.

If the property has not been sold within forty-five (45) days after it is listed for sale, then the parties may elect to reduce the listing price by two percent (2%). Thereafter, if the property does not sell within the subsequent forty-five (45) days, then the parties shall reduce the listing price by another two percent (2%), and so on until the listing price reaches ninety percent (90%) of the original listing price for sale. The parties agree that this agreement may be modified by any future agreement between the parties which is affected by them in writing.

From the date of dissolution until the closing on the sale of this Property, Wife shall make the following payments until the Property is sold: (i) all mortgage payments, homeowner's insurance and utilities (ii) all expenses for normal upkeep and maintenance.

All real estate taxes shall be equally divided between the parties.

To the extent there is an expense required to prepare the house for sale and it is recommended by the real estate agent then the parties shall divide said cost 50% percent to Husband and 50% percent to Wife.

- b. In the event Wife removes Husband's name from Citibank mortgage #6076 on this Property, Wife shall be solely responsible for said first mortgage, real estate taxes, insurance and any current or future indebtedness on the Property, except Citibank mortgage 5206 which is Husband's obligation, and agrees to hold Husband harmless and indemnify him on said debts and on any future debts thereon, including any attorney fees and expenses incurred by Husband in connection with any liability that may be asserted against him as to any said debt, except Citibank mortgage #5206 which is Husband's obligation.
- c. Wife is awarded the Leasburg Property and its rental income, and is allocated its mortgage, Citibank mortgage #...2551; and,
- d. Husband is allocated the debt of the second mortgage, Citibank mortgage #...5206, in the approximate amount of \$30,000. Husband shall be solely responsible for said mortgage, and agrees to hold Wife harmless and indemnify her on said debt, including any attorney fees and expenses incurred by Wife in connection with any liability that may be asserted against her as to said debt.

17. The legal description of the real property or properties divided herein is more fully set forth in Court's Exhibit #2 and #3, respectively, which are incorporated into and made a part of this Judgment.

18. Based upon the appraisal of Daton Grote which this court finds to be credible the fair market value of the Catawissa Property is \$194,000. Based upon the evidence, the Citibank

mortgage #6076 is \$156,853.86. Therefore, the equity in said Property is approximately \$38,000. This court orders that Wife is to pay Husband \$19,000 as his share of the equity in said Property.

19. Based upon the evidence Wife has solely been paying the Citibank mortgage #6076 in the amount of \$1292.39 per month since July 2010. This court orders Husband to pay Wife the sum of \$8,000 as reimbursement as his share of the mortgage since July 2010. The parties also possessed various motor vehicles and motorcycles. Wife testified that the values set forth on her Statement of Property are based upon NADA. Wife introduced exhibits reflecting the NADA values for the various vehicles. The Court finds this evidence credible as to the values of the various vehicles in the parties' possession.

20. Wife argues that the 2003 Harley Davidson and the 2005 Harley Davidson are her separate property. Wife testified that the 2003 Harley Davidson was given to her as an anniversary gift from Husband. Wife testified that the 2005 Harley Davidson was purchased by Husband as a birthday gift to Wife. Wife introduced Exhibit 17, which were photographs of Wife at the dealership with balloons all over the motorcycle and a bow. Wife introduced Exhibit 15 which was the "Sold" tag from the dealer reflecting that Husband purchased this motorcycle for Wife. Wife introduced Exhibit 18 which was a typewritten statement from Husband declaring that Husband purchased the 2003 Harley as a wedding anniversary gift to Wife and the 2005 Harley was a combination birthday and Christmas gift to Wife.

It is undisputed that one spouse may make a gift to the other from marital property or from non-marital property although it requires clear and convincing evidence to establish such a gift. Heineman v. Heineman, 768 S.W.2d 130 (Mo. App. W.D. 1989). A gift is shown by a transfer of title and possession to the donee, including the relinquishment by the donor of all

ownership and control. Id., at 139. Specifically, transfer of ownership of a motor vehicle can be accomplished only by transfer of a certificate of ownership in accordance with statute. Id.

In the present case, both motorcycles were titled in joint names of Husband and Wife at the time of purchase and at the time each motorcycle was presented to Wife. Additionally, neither vehicle was purchased outright and instead, both were purchased on credit and the payments on the motorcycles were made with marital funds. Moreover, the evidence as to whether or not they were even gifts by Husband to Wife is in dispute. Wife attempted to prove that one of the motorcycles was a gift by showing that there were balloons and a sign on the bike from Husband to Wife. Husband testified that he did not add the balloons or card as he was hospitalized at the time the motorcycle was presented to Wife. As to the second motorcycle, Wife testified that the motorcycle was presented to her as an anniversary gift even though the anniversary was not for months. Wife also presented evidence of a magazine article which she claimed was written by Husband to show that the motorcycle was gifts. Husband testified that the article was written by Wife and never published and that the article was simply an advertising piece. The Court finds that there is no clear and convincing evidence to establish a gift of either motorcycle by Husband to Wife. As such, both motorcycles are marital property and are divided as per Court's Exhibit #1 or #1A.

21. Wife testified that the 2010 Harley Davidson was purchased by Husband without conferring with her. Wife testified she received knowledge of the purchase when she received a statement from the insurance company. Husband acknowledged that he did not confer with Wife prior to purchasing the 2010 Harley Davidson. Husband testified that he couldn't recall what funds he used to purchase this vehicle, or what amount he put down to purchase this vehicle. Husband has been making payments on the 2010 motorcycle in the amount of \$479 per month.

22. There was also disputed testimony about a 2004 Harley Davidson FXSTDI Soffttail Deluxe motorcycle that at one time undisputedly belonged to Wife. According to Husband, the motorcycle was purchased with marital funds during the marriage. Wife added her former husband's name, Mike Pingleton, to the motorcycle, so Husband argues that the asset should be awarded to Wife towards her share of marital property. Wife does not dispute that the motorcycle was purchased with marital funds during the marriage but instead claims that she no longer owns the motorcycle as she sold it prior to the filing of the divorce to pay for her attorney fee retainer. According to Wife, she sold the motorcycle to her daughter in Tennessee. Husband argues that, because the transfer was immediately prior to the filing of the divorce, to an immediate blood relative and for less than value, this Court should find that the transfer was fraudulent and should consider the motorcycle to be a marital asset subject to division.

However, Wife testified that Husband and Wife purchased the motorcycle for Pingleton because Husband said he wanted Pingleton to have something to look forward to when he returned home. Wife testified that Husband told Wife to use her 401K plan to purchase the motorcycle. Wife testified that Husband and Pingleton were good friends and that they socialized with each other frequently. Wife testified that they purchased the motorcycle and Wife subsequently sold it for \$3,000. Wife testified that she tried to sell it to other people but they were not interested and that the dealerships would only accept it on consignment. Wife testified that she needed the money because she needed a retainer to hire an attorney. The Court finds Wife's evidence credible and that the motorcycle at issue is not a marital asset now subject to division.

23. The Court finds that the value of the Monterey Boat and Trailer is \$12,000, which is based upon Husband receiving an offer to buy the items for amount.

24. The Courts finds that the household and personal goods as listed on Court's Exhibit #1 or #1A are marital and separate property as indicated based upon the testimony of the parties. To the extent that the Catawissa Property is not sold, the Court finds that the household and personal goods as listed on Court's Exhibit #1A are marital and separate property as indicated based upon the testimony of the parties. The Court finds that there was no credible evidence regarding the values of these items and therefore finds that said values are unknown. The Court divides this property as shown on Court's Exhibit #1 or #1A. Furthermore, the Court awards to Respondent those items listed on Court's Exhibit #4. To the extent that the parties are currently in possession of certain items of property awarded to the other herein, the parties are ordered to exchange said items within 30 days of this Judgment. Said exchange of property shall occur in the presence of law enforcement.

25. Additionally, Husband disputes Wife's current value and use of Wife's Bank of America rollover IRA. Husband complains that Wife improperly withdrew funds from this account to pay, among other things, her attorney's fees. Husband first learned of Wife's withdrawal of these funds at her deposition shortly before trial. Wife testified that she withdrew approximately \$20,000 to pay litigation costs with the bulk of these funds being used for attorney's fees. Husband alleges that Wife spent approximately \$26,000. Both parties acknowledge that this IRA contains both marital and separate components. At the time of her filing of her Petition for Dissolution of Marriage on July 20, 2010, Wife's Statement of Property listed the value of the account at \$37,745.42. With \$11,981.70 currently left in the account, it is clear that Wife spent \$25,763.72.

Wife testified that she was unable to obtain documents going back to the date of her marriage, but that she was in the plan beginning in 1986 and therefore she was in the plan for

approximately 9 years prior to her marriage to Husband. Without evidence identifying her separate portion of this asset, the Court finds it appropriate that Wife be awarded the \$25,763.72 which she already spent. Furthermore, the Court finds that it is appropriate under the circumstances that Wife be awarded the balance of the account, \$11,981.70. Accordingly, the Court awards Wife this rollover IRA and will use the sum total of \$37,745.42 in its division of property and debt.

26. Finally, the Court finds that the parties have significant debt. It is apparent and the Court has already found that Husband spent money excessively during the marriage. Husband had various credit cards and incurred considerable debts on his own. Husband consolidated this debt into a Bank of America account totaling \$33,204.70. Husband frequently spent money without conferring with Wife. For example, Wife testified that she did not know anything about the GM Card or the Chase Credit Card because it was in Husband's name and he refused to allow her to see the statements. The Court finds that it is appropriate under the circumstances and Section 452.330.1 to disproportionately allocate debt as shown on Court's Exhibit #1 or #1A.

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

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

28. All right, title and interest in the marital and separate property of the parties as set forth in Court's Exhibits #1 or #1A, and #4 as allocated to Husband shall be awarded to Husband as his sole and separate property.

29. The debts and liabilities allocated to Wife and owed to the creditors as set forth in Court's Exhibit #1 or #1A 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.

30. The debts and liabilities allocated to Husband and owed to the creditors as set forth in Court's Exhibit #1 or #1A 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.

31. 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 Exhibits #1 or #1A, and #4. To the extent that the parties are currently in possession of certain items of property awarded to the other herein, the parties are ordered to exchange said items within 30 days of this Judgment. Said exchange of property shall occur in the presence of law enforcement.

### **Maintenance**

32. Wife has requested maintenance from Husband. Husband testified Wife is able to support herself.

33. Husband is not requesting maintenance from Wife.

34. 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.

35. 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.

36. 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).

37. The Court finds that Wife is 57 years old and in relatively good health. She has been employed during the marriage for a number of years. She has a high school degree. She is an intelligent, competent and able-bodied person. She has the ability to earn an income and is capable of gainful employment.

38. Wife testified that she is employed by Rose International. Wife testified that she is paid \$11.78 per hour for 40 hours a week and does not receive overtime or bonuses. Wife testified that she is entitled to receive commissions and receives between \$300 and \$1,000 per month in commissions, but that she doesn't always receive commissions. Wife testified that she does not contribute to a retirement plan because she cannot afford it. Wife testified that she does not receive health insurance through Rose International because she cannot afford the premiums. Wife testified from her 2010 W-2 which reflected that in the year 2010 she received the sum of

\$30,270.80 from Rose International. Wife testified that she received a cash advance in the amount of \$3300 from Rose International which she is paying back. Wife testified if you back out the cash advance, she actually received in the year 2010 the sum of \$26,970.08 from Rose International in actual earnings.

39. Prior to being employed by Rose International, she was employed by Citibank as a Mortgage Electronic Registration Coordinator. Wife testified that she was employed by Citibank for approximately 25 years from 1984 until 2009. Wife testified that she was terminated from Citibank due a job discontinuance which resulted in huge layoffs. Wife testified that at the time she left Citibank she was earning approximately \$35,000 annually.

40. Wife holds a license to sell real estate and earned income from selling real estate in 2009 although she did not earn income for selling real estate in 2010. Wife testified that she worked at Coldwell Banker as a real estate agent from March 2009 until December 2009. Wife testified that this job was 100% commission and that she received approximately \$2800 in commission during this time. Wife testified that she also cleaned Husband's offices and received several hundred dollars for this job.

41. Wife reported income of \$53,760 on her 2009 tax return and \$35,855 on her 2008 tax return. Wife has no physical or mental disability preventing her from working full time and earning a substantial wage, and in fact, the Court finds that Wife does earn a substantial wage. Wife testified from her 2008 joint tax return reflecting that she received the sum of \$37,504.08 from Citibank during the year 2008. Wife testified from her 2009 joint tax return and stated that approximately \$38,000 to \$39,000 of the income reflected on the joint tax return reflected severance pay that Wife received as a result of her termination from Citibank.

42. Wife testified from Petitioner's Exhibit 5 which was Wife's First Amended Statement of Income and Expense. Wife testified that she receives \$942.40 gross semi monthly from Rose International and that she receives \$1,256.16 net monthly income from Rose International. Wife testified from page 2 of her Amended Statement of Income and Expense, which reflects \$313 per month she receives from her brother as rent from real estate at 1602 Reiner Road, in Leesburg, Mo. Wife testified that her brother pays the utilities and the maintenance on this residence. Wife testified that the rent she charges is the monthly payment on the loan for the residence and therefore she does not derive a profit from the ownership of this residence. Wife testified that she receives a Pension from Citibank in the amount of \$776.67 per month. Accordingly, her total net monthly income is \$2,032.83.

43. Wife testified that her net monthly expenses are \$6,307.60 per month. However, this amount includes, among other things, \$1,292.39 for the first mortgage and \$349.57 for the second mortgage. As discussed previously in its division of property, Wife will no longer be responsible for the second mortgage and the first mortgage will either be a different amount or non-existent based upon the conditions previously set forth herein.

44. Based upon the credible evidence presented at trial, the Court finds that Wife's reasonable needs for her living expenses total approximately \$2,929 per month. The Court finds that Wife's reasonable expenses include the following: rent or mortgage (\$800), utilities (\$400 including electricity, telephone, trash), auto (\$400 including gas and oil, routine maintenance, taxes and license), auto insurance (\$106), medical insurance (\$100), food (\$400), clothing (\$50), medical/dental care and drugs exclusive of insurance (\$50), cell phone (\$75), recreation and travel (\$83), laundry and cleaning (\$20), beauty shop (\$80), home maintenance (\$100), gifts (\$100), vacations (\$100), professional dues (\$15), and pet care (\$50).

45. Husband testified that he has been employed by Ferrellgas since 2007. Husband is the general manager and manages and maintains 19 propane service units west of St. Louis. In addition to salary, Husband is eligible to receive bonuses. Husband's W-2 for 2010 reflects that he received \$70,953.04 from Ferrellgas. Husband's W-2 for 2009 reflects that he received \$86,563.08 from Ferrellgas, Inc., which included a \$15,000 bonus. Petitioner's Exhibit 27 which is Husband's employment records from Ferrellgas reflects that he received a raise and has been earning the sum of \$3,185.54 biweekly since January 2011. This is \$82,824.04 annually plus eligibility for bonuses. Accordingly, Husband earns the net monthly sum of \$4970. Husband has no source of income other than his wages from his employment with Ferrellgas.

46. Husband testified that his net monthly expenses are \$6,731.28. However, this amount includes, among other things, \$1,292.39 for the first mortgage and the Leasburg Property mortgage. As discussed previously in its division of property, Husband will no longer be responsible for these expenses.

47. Based upon the credible evidence presented at trial, the Court finds that Husband's reasonable needs for his living expenses total approximately \$3,318 per month. The Court finds that Husband's reasonable expenses include the following: rent or mortgage (\$800), utilities (\$400 including electricity, telephone, trash), auto (\$400 including gas and oil, routine maintenance, taxes and license), auto loan (\$500), auto insurance (\$140), medical insurance (\$100), food (\$400), clothing (\$50), medical/dental care and drugs exclusive of insurance (\$50), cell phone (\$75), recreation and travel (\$83), laundry and cleaning (\$20), home maintenance (\$100), gifts (\$100), vacations (\$100). The Court notes that, in light of its division of property and debt, it found the parties' reasonable expenses to be approximately equal except for, among other things, Husband's auto loan, Wife's professional dues and Wife's pet care expenses.

48. Wife's reasonable monthly expenses exceed her monthly income by \$896.17. Husband's monthly income exceeds his reasonable monthly expenses by \$1,652. Although Wife is unable to meet her reasonable needs and Husband's net monthly income exceeds his monthly expenses, the Court finds that maintenance is inappropriate in light of the Court's hugely disproportionate division of property and debt. Here, as stated previously and in Court's Exhibit #1 or #1A, the Court has awarded a greater division of property to Wife and apportioned a significantly larger amount of debt to Husband. Therefore, upon consideration of the factors under Section 452.335, as well as the disproportionate division of property and debt, the Court finds that, Husband would not be able to meet his needs and pay maintenance to Wife.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

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

**Respondent Husband's Motion for Sanctions/Attorney's Fees**

50. Husband filed a motion for sanctions against Wife for her alleged violation of the St. Louis County Automatic Family Court Order Rule 68.3. Specifically, Husband alleges that Wife made a claim against their homeowners insurance policy that was in both names; that she received a check from the homeowners insurance company made payable to Husband and Wife in the amount of \$2,800; that Wife signed Husband's name on the check, without Husband's knowledge and without asking permission from Husband; that Wife deposited the check into her bank account; and, that Wife spent the proceeds. However, Wife testified that her residence was burglarized in October 2010 so she filed an insurance claim. Wife testified that she received the check in the amount of \$2300. Wife testified that she used the proceeds to repair her door, clean up and pay for one month of her Mortgage payment. The Court finds that Wife's testimony was

credible and her use of the insurance proceeds, despite Husband's lack of participation, was appropriate under the circumstances.

Also, as previously discussed, Husband testified that on or about March 2, 2011, at the deposition of Wife, he learned that Wife had withdrawn and spent approximately \$26,000 from a rollover IRA at Bank of America that was held only in her name. Wife does not dispute withdrawing and spending these funds after the filing of the dissolution of marriage action. Wife testified that the bulk of the funds withdrawn were used to pay her attorney fees. It is undisputed by Wife that a significant component of the rollover IRA was marital property; that she did not consult with Husband prior to withdrawing the funds; and that her attorney did not consult with Husband's attorney about the use of these funds.

Wife argues that she has the absolute right to use marital funds as she sees fit so long as what she is using them for is reasonable, in this case attorney fees. The court disagrees. The purpose of putting the rule into effect was to preserve the marital estate. Without the rule, either party is free to dispose of any marital asset so long as they believe what they are using it for is reasonable. The other problematic issue at hand is that the account Wife withdrew from was the only liquid account of any value that the parties owned. This is not a case where there are several cash accounts or even retirement accounts to offset Wife's withdrawal of funds. Here, Wife withdrew from the only sizeable account leaving Husband no ability to withdraw similar funds from anywhere. If the sole question was reasonableness, either party could dissipate a marital asset, to the detriment of the other, so long as they deem it to be reasonable. It is often the case where there are many bills that need to be paid, all of which may be reasonable, yet one party cannot pick and chose which bills they will pay or pay bills only in their name. Such a practice leaves the other party empty handed, one of the things the rule is designed to prevent.

51. Despite Wife's actions, Wife requested that Husband pay her attorney's fees and costs in the amount of \$47,917.55.

52. 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.

53. Husband's attorney's fees and costs total only \$11,074.58.

54. The Court notes the significant disparity in the parties' attorney's fees and costs.

55. 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:

56. The marriage of Wife and Husband is dissolved.

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

58. Since Wife is to pay Husband the sum of \$19,000 as his share of the equity in the real estate known as 287 Rock Church Road, Catawissa, Missouri (“Property”) and Husband is to pay Wife the sum of \$8,000 as reimbursement for the amount Wife has been paying on the Citibank mortgage #6076, this Court orders that instead of both parties paying each other the aforesaid sums due to each other, that Wife pays Husband the sum of \$11,000 as and for a division of property, within thirty days of the date of this Judgment. In the event Wife is unable to remove Husband’s name from the Citibank mortgage #6076 within one hundred twenty (120) days of this Judgment, then Husband is to reimburse Wife the sum of \$19,000 as a further division of property within thirty days of the date that Wife provides notice to Husband that she is unable to remove Husband’s name from the Citibank mortgage #6076. In the event, Wife is unable to remove Husband’s name from the Citibank mortgage #6076 within one hundred twenty (120) days of this Judgment, the parties shall list the Property for sale pursuant to the provisions of this Judgment, and the parties shall divide equally the net proceeds from the sale of the Property. The net proceeds shall be defined as the proceeds remaining after payment of all real estate commissions, closing costs and/or costs of sale, all appraisal fees, and the payment of Citibank mortgage #6076, in the approximate amount of \$156,000. In the event there are no net sale proceeds from the sale of the Property and there is a deficiency, the parties shall each be responsible for fifty percent (50%) of the deficiency.

59. Husband is allocated the debt of the second mortgage, Citibank mortgage #...5206. Husband shall be solely responsible for said mortgage, and agrees to hold Wife harmless and indemnify her on said debt, including any attorney fees and expenses incurred by Wife in connection with any liability that may be asserted against her as to said debt.

60. All right, title and interest in the parties' marital and non-marital property, listed with their approximate net equity values if known, are awarded to and vested in the respective parties as set forth Court's Exhibits #1 or #1A, and #4.

61. Except as may be otherwise expressly provided hereinabove and in Court's Exhibits #1 or #1A, and #4, 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. To the extent that the parties are currently in possession of certain items of property awarded to the other herein, the parties are ordered to exchange said items within 30 days of this Judgment. Said exchange of property shall occur in the presence of law enforcement.

62. Except as may be expressly provided herein and in Court's Exhibits #1 or #1A, and #4 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.

63. In arriving at the division of marital property, the Court has taken into consideration, among other things, the conduct of the parties during the marriage and 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.

64. The debts of the marriage shall be the responsibility of the respective party as set forth in Court's Exhibit #1 or #1A. Unless stated in this Judgment to the contrary, within 30 days of this Judgment, each party shall remove the other's name from those debts apportioned to him.

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

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

67. Respondent's Motion for Sanctions is denied.

68. Petitioner is restored her name, Kay Pingleton.

69. 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.

70. 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