

DIVISION II

CA07-373

November 7, 2007

KIRBY JOHNSON
APPELLANT

AN APPEAL FROM WASHINGTON COUNTY
CIRCUIT COURT
[NO. DR2006-1157-6]

v.

DONNA JOHNSON
APPELLEE

HONORABLE MARK LINDSAY
CIRCUIT JUDGE

AFFIRMED IN PART; REMANDED
IN PART

Kirby Johnson appeals from a divorce decree awarding appellee Donna Johnson \$5550 per month in alimony for one year and \$2900 per month thereafter. He argues that the trial court erred in calculating his income, in applying two of the factors set out in *Boyles v. Boyles*, 268 Ark. 120, 594 S.W.2d 17 (1980), and in awarding an excessive amount of alimony. We affirm in part and remand in part.

Kirby and Donna were married in 1984. During most of their marriage, they owned and operated Johnson Air, Inc., a heating and air conditioning business, which afforded them a comfortable lifestyle. Kirby's annual salary beginning in 2004 was \$57,200 (about \$4500 per month) and Donna, who kept the books at the business, earned \$32,916 annually. Donna and Kirby also owned the land upon which Johnson Air and other businesses were located and received \$6000 per month in rents. In addition, the business paid several of their

expenses, such as car payments, gas, insurance, maintenance, cell phones, some meals and entertainment, and even clothing.

On June 20, 2006, Donna filed for divorce seeking alimony and a division of marital property. Prior to trial, she and Kirby agreed that, with the exception of a few items, each would receive the personal property in his or her possession; their motor home would be consigned for sale but that Kirby could maintain possession provided he made payments on it; Donna would have the use of their home until it sold; Kirby would receive the business realty, with each party having the option to buy the other out; and Kirby would pay Donna for her interest in Johnson Air, Inc. This arrangement meant that Kirby would continue to own and operate Johnson Air and receive the rents that had been paid on the business property. It also meant that Donna would no longer be employed at the company.

On November 16, 2006, a trial was held to determine the value of the business and Donna's claim for alimony. Based on a report by expert Cheryl Shuffield, the trial court valued the business at \$148,000 and ordered Kirby to pay Donna \$74,000 for her share. That ruling is not at issue on appeal. The court also awarded Donna \$5550 per month in alimony for one year, then \$2900 per month thereafter with termination and modification to be governed by Arkansas case law and Ark. Code Ann. § 9-12-312 (Repl. 2002).¹ Kirby appeals from that order, contending that the court miscalculated his income, erred in applying certain

¹ This statute provides that, unless otherwise ordered by the court or agreed to by the parties, the liability for alimony shall automatically cease upon the recipient's remarriage or establishment of a relationship that produces a child or children under certain conditions.

criteria to be considered in awarding alimony as set forth in *Boyles, supra*, and awarded excessive alimony.

We review domestic relations cases de novo on the record. *Taylor v. Taylor*, 369 Ark. 31, ___ S.W.3d ___ (2007). An award of alimony is a question that addresses itself to the sound discretion of the trial court. *Kuchmas v. Kuchmas*, 368 Ark. 43, ___ S.W.3d ___ (2006). The trial court can make an award of alimony that is reasonable under the circumstances. *Id.* The purpose of alimony is to rectify economic imbalances in earning power and standard of living in light of the particular facts in each case. *Id.* The primary factors that a court should consider in determining whether to award alimony are the financial need of one spouse and the other spouse's ability to pay. *Id.*

Kirby's first argument is that the trial court miscalculated his income for support purposes. The court found that Kirby earned \$7500 per month, based on his \$4500-per-month salary; \$1000 per month in rents; and \$2000 per month in company-paid expenses. Kirby contends that the rents and company-paid expenses should not have been included in the calculation.

The evidence at trial revealed that four separate monthly rental payments were made to Kirby on the business property: \$3700 and \$500 from Johnson Air, Inc.; \$1200 from Johnson Hardware; and \$600 from Smith Two-Way Radio. Kirby testified that, from these rents, he paid the \$3887 mortgage on the business property and the \$988 payment on the motor home (in which he was residing at the time of the hearing). There was also testimony that the \$500 rental payment went toward paying an IRS debt. Kirby further states in his

brief that the \$600 rental payment “will be used to pay off the loan that was required to buy Mrs. Johnson out of the family business,” although he cites no such testimony in the record. Kirby contends that, because virtually all of the rental payments were earmarked for specific purposes, they were not “profit” and should not have been considered income. We disagree.

Of the \$6000 in monthly rentals, only \$1000, or less than twenty percent, was considered by the court to be income to Kirby. The court apparently took into account that part of the rental income went toward paying the \$3887 mortgage on the rental property. *See, e.g., McWhorter v. McWhorter*, 346 Ark. 475, 58 S.W.3d 840 (2001) (allowing, in calculating income for child-support purposes, reduction of income for losses or deductions attributable to the income-producing activity). The court may also have generously made an allowance for Kirby’s \$988-per-month payment on the motor home, given that Donna was using the marital residence and Kirby was living in the motor home, which, under the terms of the decree, obligated him to pay for it. These allowances would have reduced Kirby’s rental income to approximately \$1000, and the fact that the court made no further allowances is not an abuse of discretion. This is especially true in light of the fact that Kirby cites no authority for his proposition on this point and that trial exhibits showed him using the rental account to pay some personal expenses.

Likewise, we do not find an abuse of discretion in the court’s imputing \$2000 in income to Kirby in the form of company-paid expenses. Johnson Air, Inc., paid for Kirby’s use of two vehicles, gasoline, insurance, maintenance, cell phones, life insurance, an IRA contribution, some entertainment and meals, and some clothing. When calculating an award

of alimony, the trial court should consider the total income, from whatever source, of both parties. *See Davis v. Davis*, 79 Ark. App. 178, 84 S.W.3d 447 (2002). Income for support purposes may include company-paid expenses. *See Brown v. Brown*, 76 Ark. App. 494, 68 S.W.3d 316 (2002); *Weir v. Phillips*, 75 Ark. App. 208, 55 S.W.3d 804 (2001) (holding that use of a company vehicle may be considered income for child-support purposes).

Kirby argues that Johnson Air, Inc., is facing financial difficulties and does not have the funds to pay such expenses. However, there was a conflict in the evidence on this point, which was the trial court's prerogative to resolve. *See McNamara v. Bohn*, 69 Ark. App. 337, 13 S.W.3d 185 (2000). Kirby also questions the \$2000 figure used by the court. He refers to a portion of Shuffield's report showing that, as of October 2006, the company had spent far less than \$2000 per month in meals and entertainment expenses, employee-benefits expenses, and miscellaneous expenses. We note that the figures cited by Kirby do not include vehicle expenses, insurance, and telephones, all of which were listed as separate line items on Shuffield's spreadsheet, and the total of these accounts for a large amount of monthly expenses received by Kirby. Moreover, Kirby testified that his income was \$100,000 per year, which indicates that he was receiving approximately \$3500 per month more than his \$57,200 yearly salary. In light of these factors, we find no abuse of discretion in the court's calculation of Kirby's income.

Kirby argues next that, in awarding an increased amount of alimony during the year following the divorce, the trial court erred in the manner it considered Donna's health and her ability to work. A party's health and the ability to earn income are two of several factors

that a trial court may consider in awarding alimony. *Boyles, supra*. The court here found that Donna was forty-seven years old; that she was in an “acute state of anxiety and depression” for which she was taking antidepressants and attending counseling; and that the antidepressants made her sleepy and she was therefore unable to work more than half a day.

Kirby contends first that more attention should have been paid to Donna’s history of using the antidepressant Prozac for thirteen years prior to the divorce, which did not affect her ability to work during that time. However, Donna testified regarding her mental state following the parties’ separation. She said that she and Kirby separated in April 2006 because Kirby had not been coming home or would come home late at night and intoxicated. She stated that she discovered several cell phone calls he made to their next-door neighbor, and after the separation, he began staying with the neighbor. As a result, Donna said, she was “torn up” by the situation. She lost thirty to thirty-five pounds, her hands shook, she cried a lot, and she had difficulty sleeping. Her doctor prescribed two medications to treat her depression and anxiety, and she began attending counseling, which was recommended to continue for at least fourteen sessions. Based on this testimony, the trial court may have concluded that Donna’s depression and anxiety after the separation were more acute than before the separation and therefore had a greater impact on her ability to function. This was a credibility determination to be made by the trial court. *See generally Taylor, supra*.

Kirby also argues that, if Donna’s new medicine was affecting her sleep in such a way that she could not work, she should see her doctor and change her medication. We find no

abuse of discretion in the trial court's refusal to interfere with the decisions of Donna's medical care providers.

Additionally, Kirby notes that, at the time of the hearing, Donna was looking for a part-time job. He further points out that the court, in its letter ruling, stated that Donna was "unable to work more than half a day" and could not "make a significant amount of money for the next three to six months." Kirby interprets this to mean that Donna was capable of working, at least on a part-time basis, far sooner than one year after the divorce. However, the court ultimately found that, *at the conclusion of twelve months*, Donna "should be working and capable of providing some of her own support in an amount equal to what she was earning at Johnson Heat and Air." Obviously, the court did not believe that Donna's desire or limited ability to begin earning part-time income within a three-to-six-month period would rehabilitate her to the point that she could support herself in the manner she was capable of prior to the divorce. The court was in the best position to view the needs of the parties in connection with an alimony award. *See Taylor, supra*.

We also observe that Donna's health and earning ability were only two of several factors considered by the court in making the alimony award. The court also looked to the length of the parties' marriage, their standard of living, Kirby's health and income, the value of the couple's property, and the fact that Kirby would retain an income-producing business while Donna would not. *See Boyles, supra; Mearns v. Mearns*, 58 Ark. App. 42, 946 S.W.2d 188 (1997). All of these factors weighed in favor of the trial court's award.

Additionally, Kirby claims that \$5550 per month was an undue burden on him because it amounted to over seventy percent of his \$7500 income (as calculated by the trial court). However, we adhere to no mathematical formula or bright-line rule in awarding alimony. See *Kuchmas, supra*; *Valetutti v. Valetutti*, 95 Ark. App. 83, ___ S.W.3d ___ (2006). The trial court can make an award of alimony that is reasonable under the circumstances. *Kuchmas, supra*.

The award was reasonable under these circumstances. Using the parties' testimony and their affidavits of financial means, the court calculated Kirby's income as \$7500 per month and his expenses as \$1895 per month, leaving him with expendable income of \$5605 and the ability to pay the alimony award. See *Kuchmas, supra* (holding that, where the alimony obligor was left with \$275 after expenses and child-support obligations, he had the ability to pay a \$100-per-month alimony award). Donna lost her job as the result of the divorce and would not be able to regain her earning power for some time. Yet she had \$5450 in monthly expenses to be met, and the trial court considered her financial need in this regard. As stated previously, the purpose of alimony is to rectify economic imbalances in earning power and standard of living in light of the particular facts in each case. *Id.* Further, the primary factors that a court should consider in determining whether to award alimony are the financial need of one spouse and the other spouse's ability to pay. *Id.* The trial court was properly guided by these factors here. We therefore cannot say that the court abused its discretion in awarding Donna \$5550 per month alimony for one year.

Kirby also contends that, if the percentages listed for support calculations in Administrative Order No. 10 are used, a figure of \$1575 in alimony would result. While the language in some cases has indicated that the trial court should consult the chart amounts in Administrative Order No. 10 in making an alimony award, *see Cole v. Cole*, 82 Ark. App. 47, 110 S.W.3d 310 (2003); *Schumacher v. Schumacher*, 66 Ark. App. 9, 986 S.W.2d 883 (1999), those cases involved alimony paid to custodial parents, which is not the situation here. In the present case, the trial court properly considered the relevant factors listed in *Boyles* and made an award accordingly. We consequently find no abuse of discretion.

The court's award of alimony is affirmed. In reviewing the record, the divorce decree sets out the parties' property-settlement agreement but did not mention three particular items that the parties and their attorneys agreed to divide at trial: an IRA, an annuity, and the cash value of two life insurance policies. We remand for the limited purpose of allowing the trial court to include an appropriate order reflecting the division of these items.

Affirmed in part; remanded in part.

GLOVER and MILLER, JJ., agree.