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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2013-2014

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Mary Jo Blount

v.

Dale Herrin Blount

Appeal from Madison Circuit Court
(DR-90-901.03)

THOMAS, Judge.

Mary Jo Blount ("the former wife") appeals from a judgment of the Madison Circuit Court ("the trial court") in

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favor of Dale Herrin Blount ("the former husband"). We affirm the judgment of the trial court.

The parties were divorced in September 1990. The divorce judgment, which incorporated an agreement of the parties, ordered the former husband to pay the former wife \$500 per month in periodic alimony.¹ On September 5, 2012, the former wife filed in the trial court a petition for a modification of the divorce judgment in which she alleged that there had been a material change in circumstances and requested that the trial court increase her monthly periodic-alimony award. The former husband filed an answer to the petition on September 25, 2012.

A trial was held on April 23, 2013, at which the trial court heard evidence ore tenus. The trial court entered a judgment on May 3, 2013, in which it found that there had not been a material change in circumstances and denied the former wife's request for a modification of alimony. The former wife filed a timely appeal with this court on May 9, 2013.

In her brief on appeal, the former wife argues that the

¹The record indicates that the divorce judgment was modified once since 1990 in order to resolve an issue involving a life-insurance policy.

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trial court exceeded its discretion by failing to modify her award of periodic alimony and by failing to award her an attorney fee.

"Periodic alimony and its subsequent modification are matters resting within the sound discretion of the trial court, and the trial court's judgment as to those issues will not be reversed absent a showing of an abuse of discretion. Tiongson v. Tiongson, 765 So. 2d 643, 645 (Ala. Civ. App. 1999).

"In Bray v. Bray, 979 So. 2d 798 (Ala. Civ. App. 2007), this court set forth the applicable standard of review as follows:

"Our standard of review when reviewing an appeal from a judgment granting or denying a requested modification of alimony is well settled.

"An obligation to pay alimony may be modified only upon a showing of a material change in circumstances that has occurred since the trial court's previous judgment, and the burden is on the party seeking a modification to make this showing...."

"Glover v. Glover, 730 So. 2d 218, 220 (Ala. Civ. App. 1998) (citation omitted)."

"Ederer v. Ederer, 900 So. 2d 427, 428

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(Ala. Civ. App. 2004).'

"'Where a trial court receives ore tenus evidence, its judgment based on that evidence is entitled to a presumption of correctness on appeal and will not be reversed absent a showing that the trial court abused its discretion or that the judgment is so unsupported by the evidence as to be plainly and palpably wrong."

"'Sellers v. Sellers, 893 So. 2d 456, 457-58 (Ala. Civ. App. 2004).'

"979 So. 2d at 800."

Santiago v. Santiago, 122 So. 3d 1270, 1278 (Ala. Civ. App. 2013).

The former wife was 72 years old at the time of the trial. She testified that when the parties divorced in 1990 she was 50 years old and worked as a receptionist at a hospital earning \$14,172 per year. According to the former wife, she had had difficulty maintaining employment as a receptionist or secretary after the divorce and is no longer qualified to hold those types of positions because, she said, she does not have the necessary computer skills. The former wife further testified that since 2001 she has been working as a substitute teacher and as a child-care worker; she also

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testified that she began teaching ballroom dancing in 2005.

The former wife testified that her yearly taxable income, as shown on her income-tax returns, was \$11,931 in 2008, \$17,031 in 2009, \$11,153 in 2010, \$11,308 in 2011, and \$15,231 in 2012. She specifically testified that her 2012 taxable income was composed of \$6,780 she earned as a substitute teacher, \$6,000 in alimony from the former husband, \$2,436 from distributions from an individual retirement account ("IRA"), and \$14 she earned, after deducting expenses, as a ballroom-dancing instructor. She also testified that she received \$8,766 in Social Security benefits that were not included in her total income because those benefits are not taxed. The former husband's attorney questioned the former wife regarding the expenses she claimed as business deductions from the income she earns as a ballroom-dancing instructor. The former wife testified that she earned \$4,021 teaching ballroom dancing, although she claimed only \$14 as income from that endeavor on her tax return. However, she also admitted that the business expenses that she deducted were not incurred by her but, rather, by Vince Guerin, her dance partner who assists her with the ballroom-dancing instruction. Further,

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in response to questions from the former husband's attorney, the former wife testified that she had made contributions to her IRA in the amounts of \$29,919 in 2010 and \$25,727 in 2011.

The 1990 divorce judgment was not included in the record. The testimony of both parties was that the former wife had received approximately \$40,000 from her share of the equity in the marital residence. The former wife also had received 100 acres the parties had owned in Indiana; the former husband had received 140 acres, also in Indiana.² The former wife sold her 100 acres for \$125,000 in 1993; according to her, the rent that she had received from the 100 acres was less than the taxes and other maintenance costs related to that property. The former husband testified that the 140 acres he still owned was currently worth approximately \$1,000,000. The former wife further testified that she had been awarded her IRA that was worth approximately \$20,000 at the time of the divorce judgment, \$75,000 as her share of the parties' investments, and \$14,000 from another retirement account; the IRA, she testified, was worth approximately \$73,000 at the time of the

²The former wife testified that the 1990 divorce judgment ordered the parties to sell all the real property in Indiana, but, according to the former wife, the former husband had refused to sell the property.

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trial.

The former wife testified that she suffers from reflux esophagitis, irritable-bowel syndrome, insomnia, vertigo, lumbar scoliosis, arthritis, osteoporosis, and sciatic-nerve issues. She also introduced a list of her actual expenses from 2009 through 2012. She testified that she could not afford a computer, a cellular telephone, or cable television. She also testified that her house was in need of significant repairs, such as to repair termite damage, that she could not afford; she testified that she estimated that it would cost \$16,287 to make the necessary repairs. In all, the former wife testified that her total monthly expenses for basic needs and repairs was \$3,295. She asked the trial court to increase her monthly alimony award from \$500 to \$1,500.

The former husband testified that he is retired from NASA and that he receives civil-service retirement benefits.³ The former husband's 2012 income-tax return indicated that his total income for that year was \$75,134. He testified that his monthly expenses were \$4,925, which included gifts for the

³The former wife was not awarded any portion of the former husband's retirement benefits in the 1990 divorce judgment; retirement benefits were not considered a marital asset subject to division at that time.

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parties' children and grandchildren. The former husband testified that, in addition to his civil-service retirement benefits, he has a Scott Trade IRA worth \$280,256, a Scott Trade stock account worth \$153,000, a Merrill Lynch account worth \$101,489, an Edward Jones account worth \$98,741, and an additional Edward Jones account ("the second Edward Jones account") worth \$32,000. The record indicates that the former wife is the beneficiary of the second Edward Jones account. The former husband also testified that he has two bank accounts containing \$25,521 and \$51,864, respectively. Additionally, the former husband testified to having investments in silver and gold worth \$206,365 combined. The former husband also testified that he is 76 years old and that he suffers from acid reflux, a low thyroid, and diabetes, that he had had open-heart surgery, and that he had been diagnosed with non-Hodgkin's lymphoma.

"At trial, the party seeking to modify a trial court's judgment regarding alimony must make a showing that, since the trial court's previous judgment, there has been a 'material change in the circumstances of the parties.' Posey[v. Posey], 634 So. 2d [571,] 572 [(Ala. Civ. App. 1994)] (citing Garthright v. Garthright, 456 So. 2d 825 (Ala. Civ. App. 1984)). "Thus, the moving party must show a material change in the financial needs of the payee spouse and in the financial ability of the payor

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spouse to respond to those needs.'" Sosebee v. Sosebee, 896 So. 2d 557, 560 (Ala. Civ. App. 2004) (quoting Glover v. Glover, 730 So. 2d 218, 220 (Ala. Civ. App. 1998))."

Newsome v. Newsome, 984 So. 2d 463, 465-66 (Ala. Civ. App. 2007).

Because the former husband was receiving more income at the time of the alimony-modification proceeding than he was receiving at the time of the parties' divorce, there was evidence in the record indicating that the former husband's financial ability to support the former wife had increased. There was no evidence, however, indicating that the former wife's corresponding financial needs had increased. See Sosebee, supra. The former wife testified she could not afford \$368 per month, or \$4,416 per year, of necessary expenses; however, the former husband pointed out that she deducted a little over \$4,000 in business expenses that she did not personally incur from her total income.

Furthermore, the former wife presented no evidence to indicate that her increased expenses constituted a "material change" so as to warrant an alimony modification. See Posey, supra. Rather, the former wife essentially testified that her need for increased alimony was based upon the increase in the

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cost of living over 22 years. Based on the totality of the evidence, the trial court could have found that the former wife's monthly obligations had increased from 1990 to 2012. However, increased living expenses alone, without additional justification, do not constitute a "material change in circumstances" so as to warrant the modification a previous alimony judgment. See Webb v. Webb, 780 So. 2d 698 (Ala. Civ. App. 2000); and Stewart v. Stewart, 536 So. 2d 91, 92 (Ala. Civ. App. 1988). "The trial court may also consider the fact that the divorce [judgment] was based on an agreement between the parties. Such a [judgment] should be modified only for clear and sufficient reasons after a thorough investigation." Stewart, 536 So. 2d at 93 (citing Vines v. Vines, 409 So. 2d 839 (Ala. Civ. App. 1981)).

The former wife also argues on appeal that the trial court exceeded its discretion in failing to award her attorney fees. "'Whether to award an attorney fee in a domestic relations case is within the sound discretion of the trial court and, absent an abuse of that discretion, its ruling on that question will not be reversed.'" Lackey v. Lackey, 18 So. 3d 393, 402 (Ala. Civ. App. 2009) (quoting Glover v. Glover,

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678 So. 2d 174, 176 (Ala. Civ. App. 1996)).

The former wife argues that because of her limited income, and the former husband's ability to pay, the trial court exceeded its discretion by not awarding her attorney fees. We disagree. The trial court, based on the evidence presented, could have determined that the former wife had earned more income than she presented on her income-tax returns. Therefore, we do not conclude that the trial court erred to reversal by not awarding the former wife attorney fees.

The trial court found no clear and sufficient reasons to modify the divorce judgment. After a careful review of the record, we cannot say that it exceeded its discretion by doing so. Therefore, the judgment of the trial court is due to be affirmed.

The former wife's request for an attorney fee on appeal is denied.

AFFIRMED.

Pittman and Donaldson, JJ., concur.

Moore, J., dissents, with writing, which Thompson, P.J., joins.

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MOORE, Judge, dissenting.

On appeal, Mary Jo Blount ("the former wife") argues that the Madison Circuit Court ("the trial court") erred in failing to increase the amount of her periodic alimony. Because I agree with the former wife that the trial court exceeded its discretion in failing to increase the amount of periodic alimony awarded to her based on her having shown that there has been a material change in circumstances meriting such an increase, I respectfully dissent.

In Shewbart v. Shewbart, [Ms. 2120331, Oct. 11, 2013] ___ So. 3d ___, ___ (Ala. Civ. App. 2013), this court determined that, because the former wife in that case had established both a need for financial support and her former husband's financial ability to contribute to her support, the Franklin Circuit Court had exceeded its discretion in denying her petition for periodic alimony. In the present case, the former wife sought an increase in the amount of periodic alimony paid to her by Dale Herrin Blount ("the former husband"). As stated in Shewbart:

"In order to obtain periodic alimony, the former wife first had to establish that a material change in circumstances had occurred since the original reservation of the right to award that benefit. See

Crenshaw v. Crenshaw, 816 So. 2d 1046, 1048 (Ala. Civ. App. 2001). 'The obligation to pay periodic alimony may be modified when there has been a material change in the financial or economic needs of the payee spouse and the ability of the payor spouse to respond to those needs.' McKenzie v. McKenzie, 568 So. 2d 819, 820-21 (Ala. Civ. App. 1990). The burden of proving the existence of a material change in circumstances is upon the moving party. Boudreaux v. Boudreaux, 550 So. 2d 1030, 1031 (Ala. Civ. App. 1989). The decision to modify periodic alimony lies within the discretion of the trial court and will not be set aside on appeal unless a palpable abuse of that discretion is shown. Thomas v. Thomas, 532 So. 2d 1043, 1044 (Ala. Civ. App. 1988)."

___ So. 3d at ___.

In the present case, the former wife presented evidence indicating that the parties had enjoyed a comfortable lifestyle during the marriage, during which, among other things, they largely paid for and refurnished a marital residence, acquired other significant real-estate holdings, invested savings, ate out routinely, and employed a maid for housework. See Vajner v. Vajner, 98 So. 3d 24, 29 (Ala. Civ. App. 2012) (discussing caselaw observing that the former marital standard of living is to be considered when deciding whether a modification of periodic alimony is warranted). When they divorced on September 19, 1990, the parties

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basically divided their marital property equally,⁴ with the former wife receiving assets worth approximately \$270,000 and the former husband agreeing to pay her periodic alimony of \$500 per month out of his gross earnings of approximately \$50,000 per year. The former wife was 50 years old at the time of the divorce and worked as a receptionist earning approximately \$12,000 to 14,000 per year, although she had been primarily a homemaker during the parties' marriage.

Following the divorce, the former wife purchased a home for \$121,900, making a \$40,000 down payment. In 1993, the wife sold farmland she had acquired in the divorce for \$125,000, realizing a \$25,000 profit. The former wife deposited her cash assets into an investment account. The former wife obtained various employment throughout the next 20 plus years, never receiving income of more than approximately \$32,000 in any given year, and averaging far less than that in earned income.

At the time of the trial on the former wife's petition to modify, the former wife, who is now 72 years old, was working

⁴Because of the state of Alabama law at the time, the former wife did not receive any interest in the former husband's retirement benefits.

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as a ballroom-dance instructor and substitute teacher. In 2012, she reported \$28,951 in gross income. In addition to \$6,000 in periodic alimony, the former wife also received Social Security retirement benefits of approximately \$8,500. Due to aging, multiple health problems, and a lack of current computer skills, the former wife could not find more lucrative employment. The former wife testified that, at the time of the trial, she owed \$30,000 on her home and paid \$860 per month on her mortgage. According to undisputed testimony, the condition of the former wife's home had deteriorated and the home needs substantial and costly repairs. The former wife testified that, despite the fact that she lived a modest lifestyle, without lawn-care service, cable television, an operable cellular telephone, a home-security system, a long-term health-insurance plan, a burial plot, a working computer, or money to eat out, her savings had dwindled over the years to \$73,000. The former husband acknowledged during the trial that the former wife was not enjoying the same standard of living she had enjoyed during the parties' marriage. Nevertheless, her financial statements indicated that she had consumed more than she was able to save in 2012. That

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evidence showed, without dispute, that the former wife needs additional financial support in order to even approximate the standard of living she enjoyed during the parties' marriage.

The former wife also presented evidence indicating that the cost of living since the initial award of periodic alimony in 1990 had contributed to her increased need. In Howard v. Howard, 53 Ala. App. 426, 428, 301 So. 2d 191, 193 (Civ. App. 1974), and Jones v. Jones, 53 Ala. App. 309, 311, 299 So. 2d 751, 753 (Civ. App. 1974), this court approved increases in child-support awards after taking notice of the increased cost of living due to inflation. See also Snow v. Snow, 393 So. 2d 1020, 1021 (Ala. Civ. App. 1981) (observing that inflation without an increase in alimony had affected the wife's standard of living). We did not hold that inflation could not constitute a material change in circumstances in Webb v. Webb, 780 So. 2d 698 (Ala. Civ. App. 2000), and Stewart v. Stewart, 536 So. 2d 91, 92 (Ala. Civ. App. 1988), both of which involved increases in post-marital living costs due to voluntary expenditures, not inflation.

In this case, the trial court denied the former wife's petition on the sole ground that she had failed to prove a

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material change of circumstances. However, the undisputed evidence in this case clearly shows a material change of circumstances, namely the increased need of the former wife for support as a result of numerous factors affecting her ability to maintain her former standard of living, including, but not limited to, inflation, her decreased earning capacity, and the decline of her income-producing assets. At trial, the former husband admitted that he is capable of paying increased periodic alimony to the former wife. Thus, on this record, the trial court had no grounds for denying the former wife's petition. Because I would reverse the trial court's judgment on that issue and remand the case, leaving the issue of attorney fees for the trial court to address on remand, I respectfully dissent.

Thompson, P.J., concurs.