DIVISION IV

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
LARRY D. VAUGHT, Judge

CA06-339

November 29, 2006

LYNDA SHIPP APPELLANT	AN APPEAL FROM UNION COUNTY CIRCUIT COURT [NO. E-1991-0475-2]
v.	
TERRY SHIPP APPELLEE	HONORABLE MICHAEL LANDERS, CIRCUIT JUDGE
	AFFIRMED

In this divorce case, appellant Lynda Shipp appeals from a post-decree order awarding her $2127 in unpaid alimony, a $500 attorney's fee, and declaring that her former husband, appellee Terry Shipp, was required to pay her $780 per month in alimony upon his retirement. Appellant argues that each of these awards is insufficient and that the trial court erred in determining *sua sponte* that she could not recover for unpaid alimony that accrued prior to 2000. We affirm.

The parties were divorced in 1991, and they executed a property-settlement agreement that obligated appellee to pay $1300 per month alimony, to be paid in semi-monthly installments. They agreed that the payments would be adjusted upward by the "same

percentage as [appellee] receives merit increases to his current base salary" and that the payments would be adjusted downward upon appellee's retirement.

Appellee began making alimony payments in August 1991. He received a raise in October 1991 and increased his payments accordingly to $1380 per month. Thereafter, between 1992 and 2000, appellee received fairly regular pay raises and made concomitant increases in his alimony payments (although there is some dispute over whether he did so in 1998). However, between 2000 and 2004, he passed along no increases in alimony, despite having received four raises during that period. Upon his retirement in November 2004, he began receiving retirement benefits that were less than half of the salary he had been earning, so he reduced his alimony payments, which at that point were $1740 per month, to $780 per month.

None of appellee's actions were met with a formal objection by appellant until appellee filed a "Petition to Modify Spousal Support" on January 25, 2005. In the petition, appellee stated that his monthly payment should be reduced to $400 because he experienced a material change of circumstances when he began supporting his mother. He further asked the court to reimburse him for $6414 in overpayments, claiming that he had incorrectly increased appellant's alimony in certain years when he had not received true "merit increases," as provided in the property-settlement agreement. Appellant responded that the trial court had no power to modify the monthly alimony award because it was established by the parties' independent agreement. She additionally sought judgment for past-due alimony

resulting from appellee's failure to increase monthly payments upon receiving raises in 1998 and 2000–04.

These disputes were presented to the trial court in a hearing held October 13, 2005. Appellant submitted an exhibit showing that, as a result of appellee's delay in implementing certain alimony increases and his outright failure to pay others, an arrearage of approximately $15,000 existed. She also testified that, based on her calculations, appellee should have begun paying her $853 per month upon his retirement rather than $780. She asked the court to alter appellee's monthly payment amount, award her judgment for the arrearage, and award her a $3000 attorney's fee.

Appellee testified that, while he admittedly failed to increase appellant's alimony in certain years when he received pay raises, on the whole, he had overpaid appellant because he increased her alimony in some years when he was not required to do so. As explained by Clifton Vaughan, the chief financial officer of appellee's employer, Deltic Timber, the company awarded its employees three different types of raises: merit raises, which were cost-of-living increases; rate adjustments, which were increases given after comparing the employee's salary with that of other companies and other Deltic workers; and promotional raises, which were given in connection with a change in position. Appellee testified that, at the time an employee received a raise, his superiors did not explain what type of raise was being given but only informed the employee of the amount of the raise. As a result, he said, he did not realize how his raises were categorized until his retirement in 2004, when he received certain salary-history documents from Deltic. Upon reviewing those documents, he

observed that his 1991 raise was described as a "rate increase," his 1997 raise was described as a "merit/promotion," and his 1999 and 2001 raises were denoted "merit/adjustment." He then concluded that, in those years, the increases he had paid to appellant were not warranted. He presented the court with an exhibit showing that, if his 1991 and 1997 raises were excluded and his alimony obligation re-calculated accordingly, he had overpaid appellant $6414.[1]

On October 18, 2005, the trial court entered an order that neither awarded appellant the $15,000 arrearage she claimed nor awarded appellee the $6414 overpayment he sought. Instead, the court re-calculated appellee's alimony obligation based on its findings that 1) the parties' claims for underpayments or overpayments occurring prior to January 1, 2000, were barred based upon the equitable principles of waiver and statute of limitations, and 2) appellant failed to prove that appellee's raises in 1991 and 1997 were increases in merit pay.[2] As a result, the court disregarded the 1991 and 1997 raises, computed the amount that appellee should have been paying as of January 1, 2000, and determined that appellant was owed $2127 in unpaid alimony. The court also noted that, based on its calculations, appellee should pay $780 alimony per month upon his retirement. Finally, the court awarded appellant a $500 attorney's fee. Appellant now appeals from that order.

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[1] Appellee's exhibit made no attempt to redact the 1999 and 2001 raises; moreover, the trial court made no ruling regarding those raises, and they are not at issue on appeal. We will therefore confine our attention to the 1991 and 1997 raises.

[2] The court's order mentioned two raises in 1997, but there was only one, on September 8, 1997; the January 1, 1997 "raise" referred to by the court was merely an address change.

We review domestic-relations decisions de novo on the record; however, we will not reverse a trial court's finding of fact unless it is clearly erroneous. *Scott v. Scott*, 86 Ark. App. 120, 161 S.W.3d 307 (2004). A trial court's finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Id*. Because the question of whether the trial court's findings are clearly erroneous turns largely on the credibility of witnesses, we give special deference to the superior position of the trial judge to evaluate the witnesses and their testimony. *See Martin v. Scharbor*, ___ Ark. App. ___, ___ S.W.3d ___ (Apr. 12, 2006).

Appellant first challenges the trial court's finding that she failed to prove that either the 1991 or 1997 raise was a "merit increase," which, under the terms of the property-settlement agreement, was the only type of raise that warranted an adjustment in alimony. Appellant claims that "the trial court's conclusions on the raises in 1991 and 1997 are simply not supported by the evidence." She points to the fact that appellee, despite his current protestations that he was not required to do so, voluntarily increased her payments in those years. However, appellee testified that Deltic was not in the habit of explaining the type of raise an employee was receiving, and appellee did not realize until he saw his salary-history forms in 2004 that he had made a mistake paying increases in 1991 and 1997. Appellant also claims that the salary-history forms themselves indicate that the 1991 and 1997 raises were merit increases. She states that "every time [Deltic's] forms reflect a 'merit' increase the number '18' appears in the 'type change' box on the company form." It is true that several

forms that reflect undisputed merit increases bear the number "18" and that the number "18" likewise appears on the 1991 and 1997 raises. However, forms displaying merit raises in other years do not contain the number 18. Thus, appellant is incorrect that each merit raise is marked by that number. Further, Deltic CFO Clifton Vaughan testified that he did not know what the number "18" meant as used on the forms, and no other witness offered evidence as to its meaning.

Additionally, appellant contends that the 1997 salary increase must have represented at least a partial merit raise because it is designated "merit/promotion." Further, she testified that appellee raised her alimony that year by a portion of the 5.7% increase (a fact disputed by appellee, who said he mistakenly gave appellant the full 5.7% increase). Appellant also cites Clifton Vaughan's testimony that appellee's raise that year was "mostly promotion." However, Vaughan also testified that the 1997 raise was "really a promotional raise," and he stated that appellee was promoted in 1997.

In reviewing the above, we recognize that there is some evidence to support appellant's arguments on appeal. However, there is also evidence to support the trial court's finding that the 1991 and 1997 raises were not merit increases as contemplated by the parties' agreement. When the evidence is conflicting or evenly poised, or nearly so, the judgment of the trial court on the question of where the preponderance of the evidence lies is persuasive. *Belcher v. Stone*, 67 Ark. App. 256, 998 S.W.2d 759 (1999). On the whole, we are not left

with a definite and firm conviction that the trial court committed a mistake in its findings on this point. We therefore decline to hold that the court's findings were clearly erroneous.[3]

The next point to be addressed is whether the trial court erred in awarding appellant a $500 attorney's fee. At trial, appellant asked the court for a $3000 fee; however, no fee petition was submitted by appellant or her attorney. Nevertheless, appellant contends that the court's fee award was too low.

Arkansas Code Annotated section 9-12-309(b) (Repl. 2002) provides that a trial court "may" allow either party to a divorce an additional attorney's fee for the enforcement of alimony provided for in the decree. Arkansas Code Annotated section 16-22-308 (Repl. 1999) provides that a court "may" award a reasonable attorney's fee to the prevailing party in a contract action. The property-settlement agreement in this case provides that "any wrongful and groundless refusal by one party to comply with the provisions of this agreement necessitating legal expenses by the other party shall result in the party wrongfully refusing compliance being responsible for said legal expenses." Appellant maintains that, by virtue of these statutes and the parties' contract, she is entitled to the "reasonable" fee amount of $3000.

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[3] Appellant also appears to argue that the trial court improperly modified the parties' independent property-settlement agreement. However, we believe the court merely interpreted and enforced the agreement, which it has the authority to do. *See Surratt v. Surratt*, 85 Ark. App. 267, 148 S.W.3d 761 (2004). We also take this opportunity to note that appellant articulates no argument that the trial court erred in retroactively modifying an accrued alimony arrearage. *See, e.g., Rogers v. Rogers*, 90 Ark. App. 321, ___ S.W.3d ___ (2005). We therefore do not address that issue. *See Mitchell v. Lincoln*, __ Ark. ___, ___ S.W.3d __ (June 22, 2006).

The trial judge has considerable discretion to award attorney's fees in a divorce case, and we will not disturb the trial court's award absent a clear abuse of that discretion. *See Anderson v. Anderson*, 60 Ark. App. 221, 963 S.W.2d 604 (1998). In the present case, appellant recovered only a fraction of the amount she sought as an arrearage, and she did not prevail in any respect on her contention that appellee's current monthly payments should be increased to $853. It is therefore not surprising that the trial court awarded her only a portion of the fees she requested. We further reject appellant's argument that, "considering the pleadings filed, the discovery undertaken by both sides, the requirement that detailed financial information be provided to the court, and a trial on the merits was held" the $500 reward should be declared an abuse of discretion "as a matter of law." It is well settled that a trial judge is in a better position to evaluate counsel's services than an appellate court. *Crawford & Lewis v. Boatmen's Trust Co.*, 338 Ark. 679, 1 S.W.3d 417 (1999). Moreover, appellant's citation to *Anderson*, *supra*, in which a $4000 fee was awarded, does not persuade. In that case, we accorded due deference to the trial court and affirmed its fee award, holding, as we do here, that no abuse of discretion occurred.

Appellant's final argument is that the trial court erred in barring her claim for a pre-2000 arrearage of $1499 based on the "equitable principles of waiver and statute of limitations." She points out that the court made this determination despite the fact that appellee did not plead these affirmative defenses or urge them at trial. *See* Ark. R. Civ. P. 8(c) (2006).

Appellant is correct that the trial court erred in applying these defenses *sua sponte*. Defenses enumerated in Ark. R. Civ. P. 8(c), which include waiver and the statute of limitations, must be specifically pled to be considered by the trial court. *See State Office of Child Support Enforcement v. Morgan*, 364 Ark. 358, __ S.W.3d ___ (2005). When they are not pled, the trial court errs in considering them. *Id*. However, the trial court's mistake in this case results in no reversible error. Appellant's trial exhibit, previously mentioned, contained meticulous calculations showing that appellee, primarily due to lateness in passing along his 1991 to 1999 salary increases, underpaid alimony by $1499 in those years. Appellant's claim for these years presupposes that appellee received raises in 1991 and 1997 upon which she was entitled to receive an increase. However, in the first point of this appeal, we upheld the trial court's ruling that appellee's 1991 and 1997 raises were not merit raises and were thus excludable from the alimony arrearage calculation. When those raises are disregarded, the resulting figures show that appellant was owed no money above and beyond what she received between 1991 and 1999. The trial court's error was thus harmless, and there is nothing to be served by reversing on this issue.

Based on the foregoing, we affirm the trial court's order. In closing, we briefly address an argument made by appellee that the trial court erred in finding that a valid contract existed between the parties. Because we affirm on the grounds previously stated, appellee's argument is moot. To the extent that appellee seeks additional affirmative relief, we decline to address this point because the record contains no notice of cross-appeal filed by appellee. *See Slaton v. Slaton*, 336 Ark. 211, 983 S.W.2d 951 (1999).

Affirmed.

HART and BAKER, JJ., agree.