

ARKANSAS COURT OF APPEALS

DIVISION I

No. CV-16-488

DEBRA L. MASON

APPELLANT

V.

CHARLES F. MASON

APPELLEE

Opinion Delivered: December 13, 2017

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT, THIRD
DIVISION
[NO. 60DR-10-1318]

HONORABLE CATHLEEN V. COMPTON,
JUDGE

AFFIRMED IN PART; REVERSED AND
REMANDED IN PART

BART F. VIRDEN, Judge

Debra Mason appeals from several of the Pulaski County Circuit Court's rulings in her divorce from Charles Mason. Her appeal presents issues relating to alimony and property division. We affirm in part and reverse and remand in part.

I. *Background*

In March 2010, Charles filed a complaint for divorce from Debra, his wife of twenty-nine years. Charles served as the financial provider for the family for most of the marriage. He is an emergency-room physician. Debra has an accounting degree, but she never received her CPA license and now requires additional schooling to participate in the exam.

A final divorce hearing on Charles's complaint was held in June 2011. By that time, the parties had agreed to an uncontested divorce and the division of most of their

personal property. The primary issues remaining to be resolved were Debra's request for permanent alimony, the disposition and division of the marital home, the division of the parties' retirement accounts, and debt allocation.

In August 2011, the trial court entered a divorce decree. In the decree, Charles was ordered to pay Debra alimony in the amount of \$3500 a month for thirty-six months and thereafter \$1500 a month for sixty months or upon Debra's remarriage, whichever occurred first. The decree provided that the alimony award was based partially on the assumption that the parties would each receive approximately \$150,000 from the sale of the marital home. Also pertinent to this appeal is a provision of the decree finding that a Scottrade retirement account is Charles's nonmarital property.

Debra timely appealed, challenging the alimony award and the finding that the Scottrade account was Charles's nonmarital property. In June 2012, our court dismissed that appeal for lack of a final order because the court did not make a final disposition of the marital home. See *Mason v. Mason*, 2012 Ark. App. 393.

In October 2012, the trial court entered an order that addressed the disposition of the marital home. The order included a provision stating that

[t]he issues of whether the Plaintiff receives credit for any reduction in the principal of the house and any repairs he has made are reserved. If the home is sold, the parties shall deposit any disputed funds into escrow subject to further orders of this Court. This order is not intended to be a final order as there are issues still outstanding.

The house eventually sold for \$710,000 in January 2014.

In February 2014, Debra filed a motion to modify alimony. She argued she was entitled to an increase in alimony because Charles's income had substantially increased since the divorce was granted and that the award of alimony was based, in part, on the incorrect assumption that the parties would each receive approximately \$150,000 from the sale of the marital home. The sale of the house resulted in each party receiving only \$39,906.68. Charles opposed the modification.

Charles also filed a motion for summary judgment seeking to have his alimony obligation terminated as a matter of law pursuant to Arkansas Code Annotated section 9-12-312(a)(2)(D) (Repl. 2015). This statutory section, enacted in August 2013—two years after the parties' divorce decree had been entered—provides, “[u]nless otherwise ordered by the court or agreed to by the parties, the liability for alimony shall automatically cease upon . . . the living full time with another person in an intimate, cohabiting, relationship.” Ark. Code Ann. § 9-12-312(a)(2)(D). Debra responded by arguing that this statutory section did not require termination of Charles's alimony obligation as a matter of law.

In August 2014, the trial court held a hearing on the pending alimony issues—including Debra's motion to modify alimony and whether Charles's alimony obligation had terminated pursuant to Ark. Code Ann. § 9-12-312(a)(2)(D). Ultimately, the trial court found that Debra was not entitled to an increase in alimony based on changed circumstances and that Charles's alimony obligation terminated as a matter of law pursuant to Ark. Code Ann. § 9-12-312(a)(2)(D).

Debra timely appealed. Again, our court dismissed Debra's appeal for lack of a final order because the trial court's October 2012 order indicated that there were outstanding issues relating to the disposition of the marital home. See *Mason v. Mason*, 2015 Ark. App. 644.

The case returned to the trial court for a third time. The trial court issued an order in February 2016, providing that all issues have been previously resolved, that there are no pending motions before the court, and that the matter is closed and this order finalized all issues in this case.¹ Debra timely appealed.

On appeal, Debra contends that the trial court erred by (1) terminating her alimony award pursuant to Arkansas Code Annotated section 9-12-312(a)(2)(D); (2) initially awarding an improper amount of alimony and by later refusing to modify the alimony award; and (3) determining that the Scottrade account was Charles's nonmarital property.

II. *Alimony*

As a preliminary matter, we address Debra's first point on appeal in which she argues the trial court erred in terminating her alimony pursuant to Arkansas Code Annotated section 9-12-312(a)(2)(D). Our court certified this appeal to the supreme court based on the question of whether Arkansas Code Annotated section 9-12-312(a)(2)(D)

¹Three circuit judges have issued rulings in this case. Judge Vann Smith originally presided over the proceedings. Judge Smith later recused because he had been consulted by the legislature on Ark. Code Ann. § 9-12-312(a)(2)(D), and Judge Christopher Palmer was assigned to the case. Judge Palmer decided the issues relating to the termination and modification of alimony. Judge Cathleen Compton succeeded Judge Palmer on the bench, and she issued the February 2016 order.

applies. The supreme court held that this statutory section does not automatically terminate alimony awards that were entered before the statute was enacted, and thus, it did not automatically terminate Debra's alimony as a matter of law as the trial court had ordered. *Mason v. Mason*, 2017 Ark. 225, 522 S.W.3d 123. Accordingly, we reverse the trial court's order terminating alimony.

With this settled, we turn our attention to Debra's remaining alimony arguments, specifically whether the trial court erred in its initial alimony award and its refusal to increase alimony. The law on alimony in Arkansas is well settled. Our courts have set forth the following guidelines for an award of alimony:

The purpose of alimony is to rectify the economic imbalance in the earning power and standard of living of the divorcing parties, in light of the particular facts of each case. The primary factors to consider are the financial need of one spouse and the other spouse's ability to pay. Other factors include the financial circumstances of both parties; the couple's past standard of living; the value of jointly owned property; the amount and nature of the income, both current and anticipated, of both parties; the extent and nature of the resources and assets of each party; the amount of each party's spendable income; the earning ability and capacity of both parties; the disposition of the homestead or jointly owned property; the condition of health and medical needs of the parties; and the duration of the marriage.

Dozier v. Dozier, 2014 Ark. App. 78, at 4-5, 432 S.W.3d 82, 85. An award of alimony is subject to modification upon application of either party. *Matthews v. Matthews*, 2009 Ark. App. 400, 322 S.W.3d 15. Modification must be based on a change in circumstances, and the party seeking the change bears the burden of showing the change. *Id.*

The decision to award alimony is a matter that lies within the trial court's sound discretion, and an award of alimony will not be reversed absent an abuse of that discretion. *Cummings v. Cummings*, 104 Ark. App. 315, 292 S.W.3d 819 (2009). Abuse of discretion is

a high threshold that does not simply require error in the trial court's decision; it requires that the trial court act improvidently, thoughtlessly, or without due consideration. *Taylor v. Taylor*, 369 Ark. 31, 250 S.W.3d 232 (2007).

First, we consider whether the trial court's initial alimony award amounts to reversible error. Debra requested lifetime alimony from Charles in the amount of \$12,198 a month. The trial court awarded her alimony in the amount of \$3500 a month for thirty-six months and thereafter \$1500 a month for sixty months or upon Debra's remarriage, whichever occurred first. She contends this amounted to an abuse of discretion.

We disagree. At the time of the parties' divorce Debra had recently acquired a job making \$39,000 a year. By contrast, the testimony indicated that Charles had a net monthly income of \$15,000 to \$16,000 at the time of the final hearing. On its face, this award does indicate disparity. However, we are reminded that, during this time, Charles was also making the parties' \$5884 mortgage payment. Additionally, Charles's accountant testified that he was having difficulty meeting his financial obligations.

We hold that the trial court did not abuse its discretion in its initial alimony award. There is evidence to support the trial court's findings, and it is apparent that the trial court did not act thoughtlessly and without due consideration when awarding alimony. *Taylor, supra*. The divorce decree includes detailed findings on its alimony award. The court considered Debra's need for alimony; Charles's ability to pay; the length of the marriage; the incomes and expenses of both parties; the financial circumstances of the parties; the amount and nature of the income, both current and anticipated, of both parties; and the

extent and nature of the resources and assets of both parties. Accordingly, we affirm on this point.

Secondly, we consider whether the trial court's refusal to modify Debra's alimony was reversible error.² In support of her motion for modification of alimony, Debra highlighted evidence that Charles's income significantly decreased around the time of the initial divorce proceedings, increased almost immediately following the entry of the decree, and remained substantially higher than it had been during the divorce proceedings. Debra is dubious of these changes. In addition, the initial alimony award was based partially on the assumption that each party would receive approximately \$150,000 after the sale of the marital home. Instead, each party received only \$39,906.68 from the sale of the marital home. Debra argues that these facts amount to a change in circumstances and support her request for a modification of alimony.

Charles points to several other facts that the trial court could have considered when it denied the motion to modify alimony. For example, although neither party received the anticipated payout from the sale of the marital home, Debra benefited from Charles paying the mortgage on the house for much longer than either party had expected. Additionally, she is in good health, and while not capable of the earning potential of her ex-husband, she has a college degree in accounting. Since the divorce decree was entered, Debra has taken

²Because the trial court terminated alimony pursuant to Arkansas Code Annotated section 9-12-312(a)(2)(D), it is unclear whether the court gave much consideration to Debra's motion to modify alimony. Irrespective of this, the trial court denied her motion.

a job where she earned more money than she did at the time of the entry of the decree—approximately \$72,000 a year.

When evaluating this issue, we are reminded that the purpose of alimony is to rectify the economic imbalance in the earning power and standard of living of the divorcing parties. *Dozier, supra*. And we reverse when a trial court abuses its discretion regarding the modification of alimony. With these standards in mind, we must reverse the trial court's refusal to modify alimony. The evidence demonstrates that Charles's income increased dramatically, and at the same time, his obligations to Debra decreased in that his obligation to make the house payment terminated. Additionally, neither party received the anticipated payoff from the sale of the house—a factor the trial court clearly considered important to the initial alimony determination. Although it is correct that both parties saw their income increase after the divorce, there remains a substantial economic imbalance between the parties that the current alimony award does not sufficiently address. We reverse the trial court's refusal to modify alimony and remand the issue to the trial court for further proceedings.

III. *The Scottrade Account*

The trial court awarded Charles a Scottrade investment account as his nonmarital property, and Debra contends that this is reversible error. The evidence demonstrated that the Scottrade account was funded by Charles with proceeds from an inheritance from his father, but the account was maintained in both parties' names.

Property acquired by inheritance is not ordinarily considered marital property. See Ark. Code Ann. § 9-12-315(b)(1). However, “once property . . . is placed in the names of persons who are husband and wife without specifying the manner in which they take, there is a presumption that they own the property as tenants by the entirety, and clear and convincing evidence is required to overcome that presumption.” *McLain v. McLain*, 36 Ark. App. 197, 199, 820 S.W.2d 295, 296 (1991). Clear and convincing evidence is evidence by a credible witness whose memory of the facts about which he or she testifies is distinct, whose narration of the details is exact and in due order, and whose testimony is so direct, weighty, and convincing as to enable the fact-finder to come to a clear conviction, without hesitation, of the truth of the facts related. *Id.* at 199, 820 S.W.2d at 296-97. Because Charles placed his inherited funds into an account maintained in both parties’ names, the funds were presumed marital and it was his burden to prove otherwise. The relevant inquiry for our review is whether the trial court clearly erred in finding that Charles established by clear and convincing evidence that the Scottrade account was his nonmarital property.

The evidence reflects that Charles funded the Scottrade account with proceeds from an inheritance and that he never contributed any marital funds to the account. Charles testified that he used the funds in this account as his “play” account. Debra provided competing evidence that she handled the parties’ finances and used the account to pay bills during the marriage. She testified that they would use the account to pay for anything that had been purchased if the balance on a certain credit card was too high.

The clear-and-convincing standard is high. That evidence must come from a witness “whose memory of the facts about which he testifies is distinct, whose narration of the details thereof is exact and in due order, and whose testimony is so clear, direct, weighty, and convincing as to enable the fact finder to come to a clear conviction, without hesitation, of the truth of the facts.” *Id.* Here, we hold the trial court clearly erred in finding that Charles met this standard. Charles did not present distinct and detailed information about the account and how it was used. Accordingly, we reverse and remand on this issue for an order consistent with this opinion.

Affirmed in part; reversed and remanded in part.

HARRISON and GLOVER, JJ., agree.

James Law Firm, by: *Bobby R. Digby II*, for appellant.

Hilburn, Calhoun, Harper, Pruniski & Calhoun, Ltd., by: *Sam Hilburn* and *Scott Hilburn*, for appellee.