

Cite as 2023 Ark. App. 540
ARKANSAS COURT OF APPEALS
DIVISION II
No. CV-22-659

DUSTIN FRASER

APPELLANT

V.

EMILY FRASER

APPELLEE

Opinion Delivered November 29, 2023

APPEAL FROM THE WASHINGTON
COUNTY CIRCUIT COURT
[NO. 72DR-18-720]

HONORABLE JOHN C. THREET,
JUDGE

AFFIRMED

BART F. VIRDEN, Judge

Dustin Fraser appeals the Washington County Circuit Court decision denying his request to terminate his spousal-support obligation. We affirm.

I. Relevant Facts

In April 2018, Emily Fraser filed a complaint for divorce from Dustin Fraser after fifteen years of marriage. Emily and Dustin have six children, and at the time of the divorce, they ranged in age from fourteen to three years old.¹ In the complaint, Emily asserted that throughout the marriage, she had been a stay-at-home parent, and she requested primary custody and temporary and permanent alimony. Dustin counterclaimed for divorce, requesting full custody of the children. Through mediation, Emily and Dustin reached an

¹MC1, MC2, MC3, MC4, MC5, and MC6.

agreement that, among other terms, awarded Emily the marital home located in Siloam Springs and required Dustin to quitclaim the property to Emily. Dustin was responsible for the remaining debt on the home and maintenance of the bathrooms. Dustin agreed to pay \$4014 a month in spousal support to Emily for twelve years beginning September 15, 2018, and the parties agreed that alimony would terminate on Emily's "death, remarriage, cohabitation or any other occurrence as set forth in A.C.A. 9-12-312." Emily agreed to oversee the children's education and educational testing as well as speech therapy for MC5. The divorce decree was entered on September 19, and the agreement was incorporated into the decree.

On October 25, 2021, Dustin filed a petition to terminate spousal support. He asserted that on or about September 17, 2021, Emily gave birth to a child (MC7) fathered by her boyfriend, Landis Mayfield, and pursuant to the terms of the agreement, Dustin's alimony obligation should cease.

On November 19, in her response and petition for contempt, Emily responded that Mayfield was not financially supporting her, and she was not cohabiting with him; thus, there was no cause to terminate Dustin's alimony obligation.² Emily asserted that Dustin failed to pay her alimony in November, and she requested that the court cite Dustin for contempt of court. Emily attached to the request screenshots of text conversations between

²During the pendency of the case, both parties filed petitions for contempt against each other regarding other terms of the incorporated agreement that are not at issue in this appeal.

her and Dustin in which Dustin claimed to be having financial difficulties and stated he was unable to pay alimony.

On July 19, 2022, a hearing was held on the parties' petitions for contempt and Dustin's request to end spousal support. Emily testified that according to the terms of the 2018 mediation agreement, alimony terminates upon her death, remarriage, cohabitation, or any other occurrences set forth from Ark. Code Ann. § 9-12-312. Emily stated that Landis Mayfield is MC7's father, but they were not romantically involved and had not been for some time. Emily explained that she and Mayfield began dating in July 2020, and she found out she was pregnant in January 2021. Emily testified that she had occasionally spent the night with Mayfield at his house before she was pregnant but rarely spent the night at his house after she became pregnant, and their sexual and romantic relationship had ended months ago. Emily explained that MC7 was born at home on September 17, 2021, at 11:30 p.m., and Mayfield spent that night at her home and then stayed with her for a couple of days to help with the newborn. Once, before MC7 was born, Emily went on a three-day vacation with his family to Florida, and she and Mayfield shared a room during that vacation. Emily stated that she and Mayfield are friends, and Mayfield comes to her house after work two or three times a week to play with the baby for a couple of hours and does not spend the night. For a short period of time, he borrowed her car to get to work because his was in disrepair, and during that time, he put gas in the tank. Emily stated that Mayfield does not pay her bills or vice versa, and they do not share a joint checking or savings account. Mayfield gives her supplies for the baby anytime she asks but does not give her money. Mayfield

provides health insurance for MC7 through his job at J.B. Hunt. Emily stated that Dustin had not paid spousal support since October 2021, though he paid in December 2021 “so the kids could have Christmas.” Emily testified that she was deep in credit-card debt because of Dustin’s failure to pay spousal support, and she had borrowed \$10,000 from her mother. She testified that her and the children’s lifestyle had drastically changed for the worse since Dustin stopped paying alimony.

Dustin testified that he believed the support should cease because Emily had a baby with Mayfield, and she and Mayfield were cohabiting. He stated that he believed the children had been “left alone on the weekends,” and Emily was having Mayfield spend the night. Dustin testified that once, in 2020, MC1 called Dustin to let him know that one of her brothers had broken his leg, and Emily was “out and about” instead of home with the kids. Dustin testified that he could not recall whether Emily knew Mayfield at that point. Dustin testified that “COVID and the economy” had hurt his cannabis-related businesses, and he had tax and credit-card debt. Dustin also testified that his girlfriend drives a \$60,000 2021 Suburban that he bought, and he pays the insurance on the vehicle. Dustin lives in Oklahoma with his girlfriend and their new baby in a home he purchased after the divorce.

On July 27, the circuit court entered an order denying Dustin’s petition to terminate spousal support and finding him in contempt of court. The circuit court found that before filing his petition to terminate his spousal-support obligation, Dustin had consistently made timely alimony payments as provided by the mediation agreement incorporated into the divorce decree, and because Emily was not cohabiting with Mayfield, there was no cause to

terminate spousal support. The court found that cohabitation requires “consistency and continuity, joint purchases and accounts, spending the night with another 3 to 4 nights per week, keeping property at each other’s residence, using the other’s address for their own.” The court ordered Dustin to continue to pay spousal support, plus an extra \$500 each payment until the eight months of arrearages were repaid. Dustin timely filed his notice of appeal.

II. Discussion

On appeal, Dustin asserts that the circuit court clearly erred in denying his petition to terminate alimony because the incorporated agreement provides that his spousal-support obligation terminates upon Emily’s cohabitation. Dustin argues that Emily has not requested child support from Mayfield because if she received child support for MC7, it would statutorily end his spousal-support obligation, and Emily is “obviously trying to game the system by living as a family unit with Mr. Mayfield, the exception being sleeping arrangements, in a calculated attempt to preserve her alimony.” We find no error and affirm.

We review domestic-relations cases de novo, but we will not reverse a circuit court’s finding of fact unless it is clearly erroneous. *Hunter v. Haunert*, 101 Ark. App. 93, 270 S.W.3d 339 (2007). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that the circuit court has made a mistake. *Id.* In reviewing a circuit court’s findings of fact, we give due deference to the court’s superior position to determine the credibility of the witnesses and the weight to be accorded to their testimony. *Klenakis v. Klenakis*, 2017 Ark. App. 36, 510 S.W.3d 821.

While the above standard applies to findings of fact, appellate courts will not defer to the circuit court on a question of law. *Jones v. Abraham*, 67 Ark. App. 304, 310, 999 S.W.2d 698, 702 (1999). The circuit court’s decision will be reversed if it “erroneously applied the law and the appellant suffered prejudice as a result.” *Id.* A question of law is presented when the facts are “undisputed or unequivocal.” *Sterne, Agee & Leach, Inc. v. Way*, 101 Ark. App. 23, 31, 270 S.W.3d 369, 376 (2007).

A court has no authority to modify an independent contract that is made part of a divorce decree. *Artman v. Hoy*, 370 Ark. 131, 257 S.W.3d 864 (2007). Alimony, in instances where there is an agreement, arises from a contract right, not an equitable right, through the system of justice. *Id.* While the agreement is still subject to judicial interpretation, we must apply the rules of contract construction in interpreting the agreement. *Id.* When a contract is unambiguous, its construction is a question of law for this court. *Id.* When contracting parties express their intention in a written instrument in clear and unambiguous language, it is the court’s duty to construe the writing in accordance with the plain meaning of the language employed. *Id.*

Here, the agreement states that alimony shall terminate upon Emily’s death, remarriage, cohabitation, or any other circumstance provided for in Ark. Code Ann. § 9-12-312 (Repl. 2020).³ Arkansas Code Annotated § 9-12-312(a)(2) provides:

(a)(1) When a decree is entered, the court shall make an order concerning the care of the children, if there are any, and an order concerning alimony, if applicable, as are reasonable from the circumstances of the parties and the nature of the case.

³Neither party asserts that the terms of the incorporated agreement are ambiguous.

(2) Unless otherwise ordered by the court or agreed to by the parties, the liability for alimony shall automatically cease upon the earlier of:

- (A) The date of the remarriage of the person who was awarded the alimony;
- (B) The establishment of a relationship that produces a child or children and results in a court order directing another person to pay support to the recipient of alimony, which circumstances shall be considered the equivalent of remarriage;
- (C) The establishment of a relationship that produces a child or children and results in a court order directing the recipient of alimony to provide support of another person who is not a descendant by birth or adoption of the payor of the alimony, which circumstances shall be considered the equivalent of remarriage;
- (D) The living full time with another person in an intimate, cohabitating relationship;
- (E) The death of either party; or
- (F) Any other contingencies as set forth in the order awarding alimony.

Dustin likens the instant case to *Collins v. Collins*, 2015 Ark. App. 525, at 9, 471 S.W.3d 665, 670, in which this court held that “the focus is living arrangements, with an emphasis upon the existence of a sexual relationship . . . if a couple is living under the same roof and having sex, cohabitation is implicated.” In *Collins*, this court affirmed the circuit court’s finding that the ex-wife was cohabiting with her boyfriend, even though he had a separate apartment and did not help financially with the ex-wife’s utilities or mortgage. The couple shared no joint assets or debt. The circuit court found that the couple was cohabiting, and this court affirmed the circuit court’s decision, relying on two definitions of the term “cohabitation”:

The Oxford English Dictionary defines “cohabitation” as, “1. Dwelling or living together; community of life; 2. Living together as husband and wife (often with the implication of not being married).” 449 (2d ed. 1989). *The American Heritage College Dictionary* defines the term “cohabit” as, “1. To live together as spouses. 2. To live together in a sexual relationship when not legally married.” 271 (3d ed. 1993).

Id. The differences between the instant case and *Collins* are that in *Collins*, the couple testified that they were in a romantic relationship and generally spent two to three nights of each week together. The boyfriend kept clothes at the ex-wife’s house, but he carried his toiletries in a duffle bag from house to house. Unlike the couple in *Collins*, Emily and Mayfield’s romantic relationship had ended months before the hearing, and they did not spend the night together or keep clothes or toiletries at each other’s homes.

Dustin also compares the instant case to *Klenakis, supra*. In *Klenakis*, Andrea Klenakis, the ex-wife, and her boyfriend testified they were in a long-term romantic relationship, saw each other every day, made joint purchases, spent the night together four nights a week, and the boyfriend kept toiletries, clothing, and documents at Andrea’s house. Additionally, he purchased appliances for Andrea’s home and represented her address as his own. As stated above, in the instant case, Emily testified that she and Mayfield did not have a romantic relationship, and their only contact was for a couple of hours in the evening a few days a week when Mayfield came to her home to visit his child. He spent the night only immediately after the home birth to help Emily with the newborn. Mayfield provided diapers and other necessary items for MC7 but did not provide any financial support for Emily, leave any personal items at her house, or sleep at her home. Giving due deference to the circuit court’s superior position to determine the credibility of the witnesses and the weight to be accorded

to their testimony, we are not left with a definite and firm conviction that an error was made and affirm.

Affirmed.

GRUBER and BROWN, JJ., agree.

Garrett Law Firm, PLLC, by: *Earl J. Garrett*, for appellant.

Brett D. Watson, Attorney at Law, PLLC, by: *Brett D. Watson*, for appellee.