Cite as 2009 Ark. App. 640

ARKANSAS COURT OF APPEALS

DIVISION III
No. CA 08-1423

JACK C. MITCHELL APPELLANT V. MARTHA A. BASS APPELLEE	**Opinion Delivered** SEPTEMBER 30, 2009 APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT [NO. E96-1643-5] HONORABLE GARY L. CARSON, JUDGE AFFIRMED ON DIRECT AND CROSS-APPEAL

WAYMOND M. BROWN, Judge

Jack Mitchell recently petitioned the circuit court for termination of his alimony obligation to his ex-wife, Martha Bass. After a hearing, the circuit court reduced alimony to $1000 per month. Both parties appeal from the order. Mitchell argues that the circuit court erred in not terminating, or at least further reducing, the alimony obligation, while Bass contends that the circuit court should not have modified alimony at all. We affirm both the direct and the cross-appeal.

The parties were divorced on April 24, 1997, and after an appeal, Mitchell was obligated to pay Bass $2100 in alimony per month. *See Mitchell v. Mitchell*, 61 Ark. App. 88, 964 S.W.2d 411 (1998). The parties also divided approximately $400,000 in assets. At that time, Mitchell was working as an assistant administrator at Washington Regional Medical Center and earning over

$120,000 a year. Bass was essentially unemployed, earning less than $2000 a year selling beauty supplies. On December 11, 2007, Mitchell petitioned the court for a modification in alimony, citing an increase in Bass's income. The court held a hearing on the motion on July 8, 2008.

According to the hearing testimony, Mitchell worked at Washington Regional until he was laid off. He then became an administrator for Saline Memorial Regional Hospital, where he earned an annual salary of $150,000. Twenty months later, he returned to northwest Arkansas to work for Ozark Radiology. Washington Regional later purchased Ozark Radiology and eliminated his position, leaving him unemployed. Before his position was eliminated, he was making $200,000 annually. After a job search, he was hired at the Heart and Vascular Center at an annual salary of $80,000. Mitchell has remarried, and he has three stepchildren, two of whom are minors. His current wife earns $40,000 annually. In addition, Mitchell receives $6000 annually from interest on savings. He and his wife have $240,000 in savings, and he owns $24,500 in bonds. He listed $8158 in expenses on his affidavit of financial means.

At the time of the divorce, Bass was making little income, though she had a master's degree in foods and nutrition. Since that time, she has earned a Ph.D. in health science in 2002 and a position at Sam Houston State University with a $60,000 annual salary. Bass recently accepted a position at the University of Mississippi, where her annual salary will be $58,000. Because Mississippi has state income taxes and Texas does not, her take-home pay may be lower after the move. She plans to sell her home in Texas and expects to make $60,000 from that sale. In addition, she will receive $750 from her ex-husband's pension when she turns sixty-two. The

record contains two affidavits of financial means from Bass: one dated February 24, 2008, where she claimed $3403 in monthly expenses; and a second dated July 8, 2008, wherein she stated $4052 in monthly expenses.

The court entered an order on September 5, 2008, reducing Mitchell's alimony obligation to $1000 per month. This appeal followed.

Before reaching the merits, we must address a preliminary issue. In his brief, Mitchell informed us that, during the pendency of this appeal, he obtained a position that provides an annual salary of $157,500. The parties disagree as to whether we should consider the increased salary. Mitchell urges us to rely solely on the record, while Bass asks us to consider it in our de novo review. It is well settled that we do not consider matters outside of the record. *See Peterson v. Dean*, 102 Ark. App. 215, 283 S.W.3d 610 (2008). Mitchell's recent salary increase is not part of the record; therefore, we are without the power to consider it.

Both parties appeal from the order modifying alimony. Mitchell argues that the trial court erred in not terminating alimony or in not at least reducing it further. In so arguing, he relies on Bass's increased income and his decreased ability to pay. He also contends that the division of assets in the divorce case should not be factored by the court. Bass contends that the circuit court erred in reducing alimony. She asserts that there is an economic imbalance between the parties and that the reduction of alimony operates to exacerbate that imbalance.

In reviewing cases that traditionally sound in equity, such as domestic-relations proceedings, we perform a de novo review of the record, but we will not reverse the circuit

court's findings unless they are clearly erroneous or clearly against the preponderance of the evidence. *Alphin v. Alphin*, 364 Ark. 332, 219 S.W.3d 160 (2005). A finding of fact is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been committed. *Ford v. Ford*, 347 Ark. 485, 65 S.W.3d 432 (2002). In reviewing the lower court's findings, due deference is given to the circuit judge's superior position to determine the credibility of the witnesses and the weight to be accorded to their testimony. *Hunt v. Hunt*, 341 Ark. 173, 15 S.W.3d 334 (2000). While the circuit court's findings of fact are not reversed unless they are clearly erroneous or clearly against the preponderance of the evidence, we do not reverse an award of alimony in absence of an abuse of discretion by the circuit court. *Hiett v. Hiett*, 86 Ark. App. 31, 158 S.W.3d 720 (2004).

Alimony can be modified upon a showing of a change in circumstances; the burden of showing a change of circumstances lies on the party seeking the change. *Bettis v. Bettis*, 100 Ark. App. 295, 267 S.W.3d 646 (2007). The purpose of alimony in a divorce action is to rectify the economic imbalance in parties' earning power and standard of living in light of the particular facts of each case. *Ellis v. Ellis*, 75 Ark. App. 173, 57 S.W.3d 220 (2001). The primary considerations for any award of alimony are one spouse's financial need and other spouse's ability to pay. *Kuchmas v. Kuchmas*, 368 Ark. 43, 243 S.W.3d 270 (2006). In determining the amount of alimony, a court may consider a number of factors, including (1) the financial circumstances of both parties; (2) the couple's past standard of living; (3) the value of jointly owned property; (4) the amount and nature of the income, both current and anticipated, of both

husband and wife; (5) the extent and nature of the resources and assets of each of the parties; (6) the amount of income of each that is "spendable," available to each of the parties for the payment of living expenses; (7) the earning ability and capacity of both husband and wife; (8) property awarded or given to one of the parties, either by the court or the other party; (9) the disposition made of the homestead or jointly owned property; (10) the condition of health and medical needs of both husband and wife; (11) the duration of the marriage; and (12) the amount of child support. *Johnson v. Cotton-Johnson*, 88 Ark. App. 67, 194 S.W.3d 806 (2004). The factors named are not all those that may properly be considered, but they are illustrative of the fact that there is an interrelationship among all the issues in a divorce. *Boyles v. Boyles*, 268 Ark. 120, 594 S.W.2d 17 (1980).

With these standards in mind, we affirm both the direct and the cross appeal. In urging us to reverse, Mitchell relies on our decision in *Parker v. Parker*, 97 Ark. App. 298, 248 S.W.3d 523 (2007), which also involved a former dependent spouse whose income increased dramatically after she earned a postgraduate degree. We affirmed an order that reduced alimony for a period of one year before ultimately terminating it. Mitchell argues by analogy that termination is appropriate in this case as well. In relying on *Parker*, he ignores a key statement made by us in that case: "Each case is to be judged upon its own facts." *Id.* at 305, 248 S.W.3d at 529 (citing *Bracken v. Bracken*, 302 Ark. 103, 787 S.W.2d 678 (1990)). In other words, the fact that we affirmed an eventual termination of alimony in *Parker* does not automatically mean that alimony should be terminated here. Despite the increase in Bass's income and decrease in

Mitchell's, there is still an economic imbalance between the parties, justifying an award of alimony. And on this record, there is no abuse of discretion in setting that amount at $1000.

In her argument for reversal, Bass asks us to impute Mitchell's previous income in light of the circumstances. She also urges us to consider Mitchell's other sources of income and the fact that she makes far less than he does. First, Bass identifies no evidence upon which a court could find that it would be appropriate to impute any income. The record lacks any evidence showing that Mitchell was intentionally working below his capacity to earn in an effort to have his alimony obligation reduced. *Compare Grady v. Grady*, 295 Ark. 94, 98, 747 S.W.2d 77, 79 (1988) (imputing income in the calculation of the child-support obligation, stating that "[a] supporting spouse does not have total discretion in making decisions which affect the welfare of the family, if the minor children have to suffer at the expense of those decisions."). Second, Bass ignores her own increase in income. While Mitchell's reliance on *Parker* is misplaced for the purposes of the direct appeal, it is helpful in addressing Bass's cross-appeal. The support recipient there increased her earning capacity after receiving additional education, and her alimony was reduced accordingly. Similarly, Bass went from having virtually no income on her own to making almost $60,000, and she expects to make money from the sale of her home when she moves to Mississippi. After the divorce, she earned $25,200 in alimony annually. Today, she had a job where she makes far more than that amount, and she will still receive an additional $12,000 a year in alimony. Thus, we cannot say that the circuit court abused its discretion in reducing alimony.

The circuit court did not abuse its discretion in reducing alimony to $1000 per month. Accordingly, we affirm both Mitchell's appeal and Bass's cross-appeal.

Affirmed on direct and cross-appeal.

PITTMAN and KINARD, JJ., agree.