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ARKANSAS COURT OF APPEALS

DIVISION III
No. CA09-962

	Opinion Delivered May 26, 2010
CHERI GREEN APPELLANT V. MARK RANDAL GREEN APPELLEE	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT [NO. DR-2004-2757] HONORABLE VANN SMITH, JUDGE AFFIRMED

JOHN MAUZY PITTMAN, Judge

This is an appeal from an order denying appellant's prayer for her award of temporary alimony to be modified to permanent alimony based on allegations of poor health and declining financial circumstances. The trial judge found no change in circumstances to warrant modification of the prior alimony award and denied her claim for relief. Appellant argues that the trial court erred in failing to find a change of circumstances warranting modification of the alimony award. We find no error, and we affirm.

A decision whether to modify a previously entered alimony award is a matter that lies within the trial court's sound discretion, and on appeal we will not reverse a trial court's decision absent an abuse of that discretion. *Bettis v. Bettis*, 100 Ark. App. 295, 267 S.W.3d 646 (2007). Alimony is intended to rectify any economic imbalance in the earning power and standard of living of the parties in light of the particular facts of the case, *id.*, and the primary

factors to be considered are the financial need of one spouse and the ability of the other spouse to pay. *Bracken v. Bracken*, 302 Ark. 103, 787 S.W.2d 678 (1990).

The record shows that appellant asked for a similar modification of alimony based on declining health in a complaint filed on February 6, 2008; this request was denied in an order entered July 16, 2008. No appeal was taken from that order. The present action arose out of a subsequent complaint filed December 23, 2008, that likewise sought modification of the original decree to award permanent alimony based on appellant's decline in health since the time of the original decree. In essence, rather than appeal the adverse ruling in her first request for modification, appellant simply filed another request for modification five months later.

In denying appellant's request for modification, the trial judge found that there was no significant change in the circumstances of the parties between July 2008 and the date of the hearing on appellant's petition. Appellant argues that the trial court erred in failing to consider all circumstances that may have changed since the initial award of alimony in 2006 because appellee failed to assert the affirmative defense of res judicata in his answer to the complaint of December 2008. In essence, she asserts that, absent a plea of res judicata, the trial court was required to consider all changes in the circumstances of the parties following the initial award without regard to the order denying a similar request for modification only five months before the present petition for modification was filed. We do not agree.

It is true that it is frequently said that the appellate court considers a decree for alimony to be res judicata on the circumstances prevailing at the time of the decree. This formulation, which originated in *Boyles v. Boyles*, 268 Ark. 120, 594 S.W.2d 17 (1980), does not refer to the affirmative defense of res judicata, but instead uses the phrase in the more general sense of "a thing adjudicated." *Black's Law Dictionary* 1336–37 (8th ed. 2004); *compare* definitions 1 and 2. That this is so is clear from reading the phrase in its original context:

> It is true that an award of alimony is neither a final decree, in the sense that an execution may be issued or that it becomes a lien on real estate, nor a final determination of the rights of the parties, in the sense that it prevents review should there be a change in the circumstances of the parties. *Jones v. Jones*, 204 Ark. 654, 163 S.W.2d 528. The chancery court may modify an award of alimony from time to time, but the power is to be exercised to meet changes in the relative circumstances of the parties. *Warren v. Warren*, 215 Ark. 567, 221 S.W.2d 407. If there is no change in the situation of the parties, the court has no power to act. 2A Nelson, *Divorce & Annulment*, 51 and 52, 17.07. Thus, we consider a decree for alimony to be res judicata on the circumstances prevailing at the time of the decree.

Boyles, 268 Ark. at 126, 594 S.W.2d at 21. The focus is on the power of the court to modify an existing decree in a continuing action, and the rule is that the court may do so only upon a showing of a material alteration of circumstances. This doctrine, originating in Ecclesiastical Court, was adopted by the Arkansas Supreme Court in *Bauman v. Bauman*, 18 Ark. 320, 331 (1857). In that same case, the court declared that modification could not be based on errors in the original decree that were not challenged on appeal:

> In so far as this bill seeks any alteration in the original decree, upon the ground that any of the allowances therein made were meagre and inadequate; it is clear enough that no foundation is thereby laid for any relief. Because, if there was any ground for that complaint, the complainant ought to have appealed.

Id. at 330–31. The requirement of a change in circumstances as a basis for modification of an alimony decree is, therefore, based on considerations relating to the finality of judgments. These considerations apply not only to original judgments, but also to subsequent orders regarding modification: only changes in circumstances occurring after the most recent modification order can support a further modification. *Benn v. Benn*, 57 Ark. App. 190, 944 S.W.2d 555 (1997).

The evidence presented in support of appellant's December 2008 request for modification is essentially identical to that considered in the July 2008 order denying her previous request. Although there was additional evidence of appellant's physical ailments, her own witnesses admitted that all of her conditions had been known to them at the time appellant filed her previous petition for modification of alimony in February 2008. Furthermore, while appellant testified that the value of her investments had declined as a result of recent economic downturns, there was no evidence to show that her losses could not be recouped, and appellant admitted that she was not currently using those funds. After reviewing the record, we agree that no material change in appellant's circumstances occurred since the entry of the most recent modification order, and hold that the trial court did not err in denying the present motion for modification of alimony.

Affirmed.

HART and BAKER, JJ., agree.