



ORIGINAL

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

OCT - 7 2022

JOHN D. HADDEN
CLERK

IN THE MARRIAGE OF:)
)
AUDREY BROWN,)
)
Petitioner/Appellee/Counter-)
Appellant,)
)
vs.)
)
STEVEN J. BROWN,)
)
Respondent/Appellant/Counter-)
Appellee.)

Case No. 119,698

APPEAL FROM THE DISTRICT COURT OF
CLEVELAND COUNTY, OKLAHOMA

HONORABLE JEFF VIRGIN, TRIAL JUDGE

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AFFIRMED

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OPINION BY GREGORY C. BLACKWELL, JUDGE:

Steven J. Brown appeals the trial court's denial of his motion to modify support alimony owed to his former wife, Audrey Brown, after the court found that there had been no material change of circumstances permitting a

modification. Audrey appeals the award of support alimony as inadequate under the circumstances. Upon review, we affirm both decisions of the trial court.

BACKGROUND

The parties were married in 1979 and divorced in 2018. The trial court initially refused to award Audrey support alimony. She appealed in Case No. 117,959. Division I of this Court found the trial court had erred on the issue of alimony and remanded the matter with instructions to “enter an alimony award consistent with this opinion.” In an unusual procedural maneuver that we discuss further below, Steven filed a motion to “modify” the alimony award—citing cohabitation and inability to pay—*before* the trial court had actually made any award on remand. The trial court held a hearing, awarded Audrey alimony, and then denied Steven’s motion to modify. Steven appealed the denial of his motion to modify. Audrey counter-appealed, arguing that the alimony awarded was inadequate.

STANDARD OF REVIEW

“An award of support alimony and hence its modification are matters of equitable cognizance.” *Wilson v. Wilson*, 1999 OK 65, ¶3, 987 P.2d 1210. We will affirm the trial court’s decision unless it is against the clear weight of the evidence or an abuse of discretion. *Id.*

ANALYSIS

This case presents a potential procedural puzzle. The trial court originally refused to order alimony. The appellate court reversed on this issue and instructed the trial court to calculate an appropriate award. Steven then filed a

motion to “modify” the award *before* it was made. On November 17, 2020, the court ordered alimony of \$160,000 at \$5,000 per month for twenty-four months “dating back to the entry of the decree,” but stayed “any and all support alimony payments” pending resolution of Steven’s motion to modify.

Audrey first argues that any change in the alimony award effective before the date of the motion to modify would constitute a prohibited retroactive modification, and hence our review is limited to the question of a change in monthly payments due *after* the motion to modify was filed.¹ Had the trial court granted Steven’s motion to modify, the effective date of any modification would be an issue. It does not become so, however, unless we first determine that there *should have been* a modification.

Before we can reach even this simpler question, however, we must first address Audrey’s argument that the court did not have “subject matter jurisdiction” to consider the motion to modify in the first instance, because it was filed *before* the district court made its alimony order. The question is certainly not one of *subject matter* jurisdiction. The subject matter jurisdiction of a domestic court to consider an alimony adjustment is clear. The courts of Oklahoma have unlimited original jurisdiction in *justiciable matters*. *Puckett v. Cook*, 1978 OK 108, 586 P.2d 721, 723. Audrey’s argument is actually one of

¹ The period of alimony was twenty-four months. The original decree was made in April 2019; the later alimony award was effective from that date and would terminate after the April 2021 payment. The motion to modify was filed at the end of October 2020.

“no injury” *i.e.*, no standing or justiciable injury at the time of filing, because a modifiable alimony award had yet to be made.

The district court properly refused to be drawn into this procedural maze, and ruled first on the award of alimony, and then on the motion to modify. The modification claim was justiciable at the time it was ruled on, and, in any event, injury as the basis of a justiciable question may be actual or *imminent*. *Indep. Sch. Dist. No. 5 of Tulsa Cnty. v. Spry*, 2012 OK 98, ¶ 2, 292 P.3d 19, 20. We find that the trial court had the power to consider all questions of alimony it was confronted with below.

STEVEN’S APPEAL

We now return to the central questions of Steven’s appeal: did the trial court err in finding that Steven had not presented sufficient evidence to establish either a substantial change in Audrey’s circumstances such that her need for support had lessened or disappeared entirely, or a substantial change in his own circumstances such that he had no ability to pay alimony even if needed?

Steven’s Income

Steven first argues that he is unable to pay alimony because his “business income” has fallen by half since the original decree. He stated that it is undisputed that “income from [his] business has dropped by over 50%,” that he is now sixty-four-years old and his earning potential is likely to further decline. In her brief, Audrey characterized the same reduction as one of only “\$1,000 in total annual profit.” These figures appear hard to square.

Examining the testimony regarding income that Steven gave during the hearing on the motion to modify, both claims have some numerical basis, but neither is of much value in determining Steven's income. Indeed, Steven's actual income appears to remain as much of a mystery now as it did to Division I in Appeal No. 117,595.² Steven testified, with the aid of business tax returns, that the "gross receipts minus returns and allowances" of "Brown Equipment Company" were \$598,290 in 2017, but only \$246,883 in 2020. Tr. (June 1, 2021), pg. 86-88. This is evidently the income that has "fallen by half." On cross-examination, he also admitted his business tax returns showed "business income" of only \$1,387 in 2017, and \$120 in 2020. This is evidently the \$1,000 drop in profit Audrey refers to. Steven's personal taxes for 2020 were not produced, and at no time in the record does he present evidence of his actual income.

This Court noted in the previous appeal that, because of Steven's "unique beliefs and financial practices," his net worth and income "are difficult to ascertain from the record." Nothing has changed since then. As the party seeking to establish a newly developed inability to pay, Steven had the burden to produce credible evidence of his claimed fall in actual income. He did not do so. We find no error in the amount of income imputed by the trial court.

² There the Court noted that Steven's personal income tax returns indicated an individual income of only \$30,000 when he filed separately in 2015, and similar incomes in other years, but that he had submitted a monthly budget claiming needs of \$12,000 a month, *i.e.*, that his necessary spending was \$114,000 a year above his income. Division I indicated that an imputed income as high as \$160,000 would be appropriate. The trial court imputed this amount on remand.

Audrey's Demonstrated Need

Steven's central argument is that Audrey has been in a relationship with another man since the first two months after the decree and that this relationship makes up for the financial shortfall found during the original examination of demonstrated need. Hence, he argues, his alimony payments should have been restricted to two months only, not the twenty-four months ordered by the trial court.

Although the facts here are not substantially disputed, the parties interpret them to reach opposite conclusions. Steven argues that Audrey is living with another man in his house, and this removes her need for any expenses associated with housing. At trial, he raised the issue that the man allows her to use his truck, impliedly reducing her transportation expenses. He even argued at trial that the couple might be considered common-law married, and implied that this might give Audrey some right to the man's property, disability payments, and pensions, all improving her financial position to a degree where she does not need transitional support.

Audrey does not deny a relationship with the man, although she states that she also functions as the man's caregiver, and also states that she did not wish to move in with him but has been unable to afford to live on her own since the divorce because of the court's initial refusal to award alimony. She states she moved in with the man only because she fell out with a friend she was living with after the divorce and had nowhere else to go. She denied any financial support from the man.

The factual implication the trial judge drew from this testimony was that there had been no material change of circumstances. We will not disturb the trial court's judgment unless it was against the clear weight of the evidence. It was not so here.

AUDREY'S APPEAL

Audrey argues that the award of \$5,000 per month for twenty-four months was inadequate. She raises no further argument in her appellate brief but refers us to her second proposition argued in Case No. 117,959. That proposition contains an argument that the trial court erred in failing to award *any* alimony but does not indicate that \$5,000 per month would be inadequate or that a period of twenty-four months would be too short. We find no abuse of discretion in the award.

CONCLUSION

Finding no error in the challenged decisions of the trial court pursuant to our standard of review, we affirm.

AFFIRMED.

WISEMAN, P.J., and BARNES, J. (sitting by designation), concur.

October 7, 2022