NOT FOR OFFICIAL PUBLICATION
See Okla.Sup.Ct.R. 1.200 before citing.

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

TANYA NASH,

Petitioner/Appellee,

vs.

CHRISTOPHER NASH,

Respondent/Appellant.

Case No. 121,880

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE LYNNE McGUIRE, TRIAL JUDGE

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS

Glenn K. Brown
S. Corey Stone
Julie D. Gragg-Landes
Abbi Slaton
Tyler D. Crowe
Karen L. Pearson
Kassandra Quintela
Matthew A. Fornof
BALL | MORSE | LOWE
Oklahoma City, Oklahoma

For Respondent/Appellant

OPINION BY JANE P. WISEMAN, PRESIDING JUDGE:

In this divorce action, Christopher Nash (Husband) appeals from the trial court's order denying his motion to terminate support alimony and granting his motion to modify child support based on a change in income. After review, we affirm in part, reverse in part, and remand with directions.

FACTS AND PROCEDURAL BACKGROUND

On September 22, 2021, Husband and Wife (Tanya Nash) entered into an agreed decree of divorce. In the decree, Husband agreed to deviate from the standard child support calculation and pay Wife support alimony. These two provisions state:

> XI. That the parties have agreed to deviate from the standard child support calculation and that [Husband] shall be ordered to pay $600/month per minor age child (for a total of $2400 per month) until such time as they turn 18. Once a child is 18 support shall be reduced to $300 per child until such time as they graduate or turn 19, whichever is sooner.
>
> . . . .
>
> XIV. That [Husband] shall pay alimony in the amount of $1800 per month for a period of eight years or until [Wife] remarries.

In May 2022, Husband filed a motion to modify visitation and child support in which he argued that modification of visitation was necessary to allow for "long distance visitation" after he moved to Dallas, Texas, and that his income had substantially changed requiring recalculation of child support based on his new

income. He also filed a motion to terminate support alimony based on earning "considerably less money" than he did at the time the decree was entered.

After a hearing in April 2023 on Husband's two motions, the trial court asked both parties to submit briefs on its authority to terminate or modify alimony pursuant to a consent decree. Husband submitted a brief arguing that "if a decree is silent as to modification of support alimony, a party's statutory rights remain in effect." He also urged that he "showed a substantial and continuing change of circumstances sufficient to modify support alimony." He further asserted the trial court should not consider his veteran's disability pay in determining alimony. Wife also submitted a brief arguing the trial court had no authority to terminate or modify Husband's alimony obligation but agreeing that Husband's child support obligation should be modified according to the Child Support Guidelines.

The trial court issued a "letter ruling" on June 26, 2023, modifying child support but not modifying alimony, finding as follows:

> Based upon the evidence and testimony presented, the child support guidelines are modified based upon a change in the income of the parties. Child Support is ordered, pursuant to the guidelines attached to [Wife's] closing argument, beginning June 1, 2022.
>
> Based upon the evidence and testimony presented, neither condition agreed upon in the decree for termination of support alimony has been met. Not until the closing argument did [Husband] request a modification rather than termination of support alimony—except that in his original motion he cited 43

> O.S. 134 (D), which addresses modification of support alimony.
>
> Based upon the evidence and testimony presented, the Court finds that support alimony shall not be modified. [Wife] continues to have a significant need for support. Despite being a stay at home mom for many years, she has entered the work force and is working full time while raising four (4) children. However, her expenses continue to far exceed her income. The Court finds her expenses are reasonable. For example, [Wife's] rent for her and her children is $1,295 per month. On the other hand, [Husband] has the ability to contribute $2,000 per month *toward* his girlfriend's mortgage. The respective increases (according to what the parties represented to the court in the original agreed decree) in the parties' income does [*sic*] not warrant a modification in support alimony. This Court finds there is no change in circumstances related to [Husband's] ability to pay that is substantial making him unable to pay the court-ordered amount. [Husband's] request to modify or terminate support alimony is hereby DENIED.

A journal entry was subsequently entered incorporating the trial court's letter ruling.[1]

Husband appeals.

STANDARD OF REVIEW

"Proceedings for divorce or dissolution of marriage, including property division, are actions in equity." *Fitzpatrick v. Fitzpatrick*, 2023 OK 81, ¶ 9, 533 P.3d 757. "We will not disturb a trial court's judgment absent an abuse of

[1] The case was reassigned to a different judge between the issuance of the letter ruling in June and the settling and filing in December of the journal entry of judgment from the April hearing.

discretion or unless the finding is clearly against the weight of the evidence." *Id.* Further, an order setting child support "will not be disturbed unless the trial court abused its discretion or unless the court's finding was contrary to the clear weight of the evidence." *Merritt v. Merritt*, 2003 OK 68, ¶ 7, 73 P.3d 878.

"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. Thus, "the trial court's findings are presumed to be correct and a judgment based on the same will not be set aside unless against the clear weight of the evidence." *Id.*

ANALYSIS

Husband appeals the trial court's failure to modify support alimony and failure to recalculate child support correctly.

I. Alimony

Husband asserts the trial court erred in concluding that the support alimony in the consent decree could not be terminated or modified and in considering his veteran's disability benefits to determine whether alimony should be modified based on a change in circumstances.

The divorce decree filed on September 22, 2021, states the following as to support alimony:

> XIV. That [Husband] shall pay alimony in the amount of $1800 per month for a period of eight years or until [Wife] remarries.

Several months later on May 3, 2022, Husband filed his "motion to terminate support alimony" asking the trial court to terminate his support alimony obligation pursuant to 43 O.S. § 134(D) due to a substantial and continuing change in his current income. Section 134(D) provides:

> Except as otherwise provided in subsection C of this section, the provisions of any dissolution of marriage decree pertaining to the payment of alimony as support may be modified upon proof of changed circumstances relating to the need for support or ability to support which are substantial and continuing so as to make the terms of the decree unreasonable to either party. Modification by the court of any dissolution of marriage decree pertaining to the payment of alimony as support, pursuant to the provisions of this subsection, may extend to the terms of the payments and to the total amount awarded; provided however, such modification shall only have prospective application.

43 O.S.2021 § 134(D). In his pretrial conference statement under "Issues to be resolved," Husband specifically states, "Modification of Alimony and Child Support." And pursuant to the "history of the case," Husband asks the court in part to modify child support and alimony based on his change of circumstances and further states, "Child Support should be calculated per the guidelines and support alimony should be terminated."

During the hearing, the following exchange took place between Husband and his counsel:

> Q. All right. Are you asking the Court to terminate support alimony payments?

A. Yes.
Q. Now, you understand that you owe a good amount in back alimony, correct?
A. Yes, I do.
Q. Okay. Would you like a reasonable time period to pay that back?
A. Yes, I would.
Q. Because you understand that the Court can modify your alimony obligation retroactively, correct?
A. I believe so. Correct.

At the end of the hearing, the court asked both parties to submit briefing on its authority to modify alimony in a consent decree:

> Wife's counsel: I just want a little bit of clarification on what you are asking us to do. So you want us to brief to you, to the Court, on the Court's authority to modify the consent decree and then provide our proposed briefs?
>
> The Court: There are lots of cases out there on modification of support alimony and I welcome both sides['] interpretations of that.

Both parties submitted briefs on the question with each relying on *Parham v. Parham*, 2010 OK 24, 236 P.3d 74.

Parham similarly concerned a dispute over the child support and support alimony provisions in a consent decree. *Id.* ¶ 1. The husband filed a motion to modify alimony and child support claiming a change of circumstances. *Id.* The wife opposed the modification arguing:

> (1) the decree was a consent decree that could only be modified by mutual consent and (2) the only modification of support alimony and child support

> allowed under the express language of the decree was termination of the respective obligations.

Id. ¶ 2. The husband responded that if this is "a 'consent decree,' (1) both the support alimony provision and the child support provision contain language that contemplate and allow for modification of these provisions and (2) the parties' express agreements concerning 'termination' of the respective obligations do not preclude 'modification' of the obligations otherwise allowed by law." *Id.* ¶ 3. The trial court determined it was a consent decree and concluded the language in the decree discussing modification and termination of alimony and child support showed the parties' intent was to provide particular circumstances for the termination/modification of the support obligations. *Id.* ¶ 4. The trial court concluded the decree's language only allowed modification or termination with the consent of both parties. *Id.* The husband appealed and the wife asked the Supreme Court to retain the appeal due to a conflict between two of its cases. *Id.* ¶¶ 5-6.

The *Parham* Court first explains how the trial court erred by treating "'termination' and 'modification' as equivalent actions taken by a court with respect to a judgment." *Id.* ¶ 8. It states that although "both involve changing a judgment . . . that is where the similarity ends." *Id.* "'Termination' means to abrogate so much of an obligation as remains unperformed; that is, it ends the unperformed remainder" while "'[m]odification' refers to a process by which new terms are sought to be added to a judgment or old ones changed, even though the

general purpose and legal effect of the decision remain intact." *Id.* ¶ 9. Further, the "distinction between termination and modification of an obligation is also recognized in the statutes that govern support alimony and child support obligations in divorce decrees." *Id.* ¶ 10. It stated the statutory requirements for *termination* of support alimony are located in 43 O.S. § 134(B) and the authority to *modify* alimony is located in 43 O.S. § 134(D). *Id.*

The Court stated that the parties' decree regarding alimony and child support only addressed termination of the obligations, but it "is silent concerning the subject of modification and statutory authority to modify the amount of these obligations." *Id.* ¶ 11. The Supreme Court stated that it "has recently held that a decree remains subject to statutory conditions for changing a support obligation set by decree where 'It contains no language relating to the [statutory conditions] or indicating that the statutorily based . . . conditions . . . are waived.'" *Id.* (quoted citation omitted).

After reviewing the record and law, the *Parham* Court held:

> In the case at hand the decree reflects the parties did agree upon special conditions for the *termination* of support alimony and child support. While those special conditions are not directly at issue, they reflect the parties' express choice concerning termination of the support obligations and, as such, are enforceable in lieu of the statutory conditions. As concerns modification of the amount of these support obligations, the decree does not similarly provide special conditions for their modification or address the statutory conditions

> governing modification of the amount of support alimony and child support. If the parties wished to apply special conditions for modification of support alimony or child support, they could have done so. As a consequence, the decree at issue remains subject to such statutory conditions and it was error for the trial court to grant summary judgment determining the decree could not be modified in this regard.

Id. ¶ 18 (footnote omitted). The Supreme Court reversed the trial court's order granting summary judgment and remanded the case to the trial court to determine the husband's motion to modify. *Id.* ¶ 19.

We believe the analysis and result in *Parham* are equally applicable to the present case. The divorce decree incorporates the parties' agreement as to the "special conditions for the *termination* of support alimony"—*i.e.*, that Husband "shall pay alimony in the amount of $1800 per month for a period of eight years or until [Wife] remarries." The parties agreed to two reasons for terminating alimony: the passage of eight years or Wife's remarriage. And as in *Parham*, these special conditions express the parties' specific choices regarding termination of alimony which are enforceable "in lieu of the statutory conditions."

However, the decree does not similarly provide special conditions for modification, nor does it discuss "statutory conditions governing modification of the amount of support alimony." If the parties had wanted to do so, as in *Parham*, they could or would have. The support alimony provision in the decree thus remains subject to modification.

The trial court in its order states, "Not until the closing argument did [Husband] request a modification rather than termination of support alimony except that in his original [May 3, 2023] motion he cited 43 O.S. [§] 134(D), which addresses modification of alimony."[2] This statement about Husband's timing is not correct: the record shows that Husband in his Pretrial Conference Statement filed on May 20, 2023, shortly after his motion was filed, listed the only issues to be resolved were "Modification of Alimony and Child Support" in paragraph VI, R., p.26. Further, at the conclusion of the hearing on the motion on April 3, 2023, Wife's counsel inquires of the court:

> I just want a little bit of clarification on what you are asking us to do. So you want us to brief to you, to the Court, on the Court's authority to modify the consent decree and then provide our proposed briefs?

Tr., p.75, lines 2-6. The court responds: "There are lots of cases out there on modification of support alimony and I welcome both sides['] interpretation of that." Tr., p.75, lines 7-8. The court also states in its court minute following the hearing that "Counsel to provide brief to the Court [by] 5/1/23 to include Court's authority to terminate/*modify* support alimony . . . ." (Emphasis added.) The parties then submitted their closing briefs on May 1st, but this was not the first

[2] Husband cites only this statute as the basis for his request to change alimony, not § 134(B) pertaining to termination of alimony.

time Husband had raised it, nor the first time the court admittedly was aware that he was also requesting modification.

Despite this incorrect recitation by the trial court, it did proceed to address both termination and modification of support alimony in its order. However, the order clearly shows the court incorrectly determined Husband's gross monthly income by including his veteran's disability pay. The trial court order stated his gross monthly income totals $8,723, which is, despite his decrease in monthly salary since he moved to Dallas, notably *higher* than his gross monthly income originally allocated in the decree at $8,333. Title 43, section 134 states:

> Notwithstanding any other provision of this section, a court shall not consider disability compensation received by a party from the United States Department of Veterans Affairs for service-related injuries for any purpose. Additionally, the court shall not offset any service-related disability income with other assets of the military member. However, if there is an increase in service-related disability income as a result of the veteran having dependents, that increase may be included in divorce calculations.

43 O.S.2021 § 134(K). This provision was in effect when the decree was entered, but the record is silent on whether the parties used this disability income in setting support alimony. Regardless of that absence in the record, we know that in the proceedings surrounding modification of support alimony, Husband cited the statute in arguing for exclusion of his service-related disability income, but the trial court included it in its calculation of Husband's income in deciding this

modification issue, in violation of the applicable statute which prohibits its inclusion "for any purpose."

Husband's most recent paycheck stubs admitted at trial show he grossed $2,884.62 every two weeks. Multiplying $2,884.62 times 26 equals $75,000.12 divided by 12 equals $6,250.01 per month. The trial court added together $6,250.01 and Husband's entire monthly VA disability pay of $2,473.39 arriving at $8,723.40. Pursuant to § 135(K), only $270 of this is attributable to Husband's dependents, meaning only $270 may be used for "divorce calculations." Thus, $6,250.01 plus $270 equals $6,520.01—*i.e.*, Husband's gross monthly income. Because the trial court incorrectly considered all of Husband's veteran's disability pay and attributed more income to him after he moved to Dallas and received reduced monthly salary, we must reverse the trial court's order denying modification of support alimony and on remand direct the trial court to calculate Husband's monthly gross income as set forth in this Opinion and reconsider Husband's argument on this issue and his ability to pay pursuant to 43 O.S. § 134(D).[3]

[3] We note the trial court's order stated that Husband "moved to Dallas to live with his girlfriend and pays $2,000 per month toward her mortgage payments." We are unclear why this is singled out in the order as this is not a gratuitous payment or "contribution"—it represents the equivalent of what he would be paying for rent or a house payment if he did not live with his girlfriend, as Husband testified.

II. Child Support

Husband in the decree agreed to deviate upward from the standard Child Support Guidelines. Although the child support calculations under the Guidelines required Husband to pay $1,633.83, Husband agreed to pay $2,400 a month or $600 per child to Wife. He filed a motion to modify child support based on a material change of circumstances arguing his "gross monthly income ha[d] substantially changed thus requiring a recalculation of the child support obligation pursuant to 43 O.S. §118." The trial court recalculated child support for four children based on a change in income of the parties resulting in Husband now paying $1,698.03 a month.

Husband proposes on appeal that the trial court improperly recalculated his child support obligation for four children rather than three children. During the hearing on April 3, 2023, Husband testified that only three of his children qualified for VA dependent benefits because the benefits terminate at age 18. Because Husband has a 90% disability rating, he receives veteran's disability benefits. Each of his dependents under age 18 therefore receives $90 a month. Husband asserts that the "oldest child still in the home was 18 at the time of the hearing and actually turned 19 before the Journal Entry of Judgment [under review here] was entered."

As previously stated, the divorce decree provides:

> XI. That the parties have agreed to deviate from the standard child support calculation and that [Husband] shall be ordered to pay $600/month per minor age child (for a total of $2400 per month) until such time as they turn 18. Once a child is 18 support shall be reduced to $300 per child until such time as they graduate or turn 19, whichever is sooner.

"A child reaching the age of majority or otherwise ceasing to be entitled to support pursuant to the support order shall constitute a material change in circumstances but shall not automatically serve to modify the order." 43 O.S.2021 § 118I(C).[4] This statute "clearly indicates that child support is not automatically modified as each child reaches majority." *Ward v. Ward*, 2010 OK CIV APP 13, ¶ 11, 231 P.3d 733. "A parent who is paying child support for multiple children may not unilaterally reduce his or her child support payment as each child reaches majority, unless the divorce decree so provides." *Id.* "Absent specific authorizing language in the decree, a party seeking to reduce child support because one or more of his children has reached majority must request a modification hearing." *Id.*

The agreed decree contains specific language authorizing unilateral reduction of each child's support at the age of 18 and termination when the child

[4] Although we cite the most recent version of this statute, the quoted material was identical to the previous version of the statute in effect when the decree was entered.

either graduates from high school or turns 19, but that is not the issue before us. Husband for the first time on appeal specifically raises this provision as a basis for reducing child support. When he filed his motion to modify child support, he did not argue a change in circumstances involving one of his children soon reaching majority, and we do not see it mentioned during the modification proceedings although his daughter was then 18, soon to turn 19. Rather, the child support modification request was focused on his change in income. And although the oldest child's age was discussed at the hearing in connection with whether she qualified to receive dependent veteran's benefits and Wife confirmed the ages of their children during the hearing, Husband still did not urge his daughter's age as a reason to modify child support. And, the trial court specifically states in the journal entry that modification of child support was "based upon a change in the income of the parties," and the "child support computation" form indicated it was based on four children.

As a result, although it was raised on appeal, the trial court did not have the opportunity to consider and decide this issue in the first instance, and we cannot address it for the first time on appeal. "Matters not first presented to the trial court are generally excluded from consideration by an appellate forum." *Jernigan v. Jernigan*, 2006 OK 22, ¶ 26, 138 P.3d 539. This does not, however, preclude

Husband from seeking relief through a new motion to modify child support on this basis.

CONCLUSION

We reverse the trial court's order regarding Husband's motion to modify alimony and remand for the trial court to consider Husband's motion in light of and consistent with the directions in this Opinion. We affirm the trial court's ruling regarding Husband's request to recalculate child support.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS.

FISCHER, J., concurs, and BLACKWELL, J., concurs in part and dissents in part.

BLACKWELL, J., concurring in part and dissenting in part:

I agree with the Court's opinion as to the child support issue; however, I respectfully dissent on the alimony question. While I agree that the trial court was able, pursuant to *Parham v. Parham*, 2010 OK 24, 236 P.3d 74, to modify the alimony payments even given the delinquency of Mr. Nash's request, I cannot agree that the trial court's decision was clearly contrary to the weight of the evidence. The evidence supports the conclusion that both Mr. Nash's decrease in

income and his increase in expenses (if any) were voluntary.[1] Mr. Nash was, of course, permitted to make the choices that led to his changed circumstances. His choices, however, should not relieve him of his legally binding commitment to "pay alimony in the amount of $1,800 per monthly for a period of eight years . . . ."

Additionally, the majority errs in considering 43 O.S. § 134(K) when evaluating whether modification is warranted in the first instance. The relevant question is whether the circumstances have changed. Nothing in this record suggests Mr. Nash's disability income is any different than it was at the time of the divorce. While that statute must of course be considered on remand, neither law nor equity require that we consider it here. As to equity, the statute was in existence at the time of the original decree when Mr. Nash agreed to pay $1,800 a month for eight years. Whether and to the extent Mr. Nash considered his disability income when agreeing to pay alimony is immaterial. As to law, even if the decree had preceded the statute, a change in law cannot serve as a material

[1] On direct examination, Mr. Nash, was quite candid regarding his income. When asked, "Did something happen during this time period to reduce your income?" he answered, "Yes, sir, I decided to leave my job." Tr. (April 3, 2023), 11. He also testified that during that same period, November 2021, he decided to move to Dallas to stay with his girlfriend and "kind of get [his] head right," and "those life changes started to reflect in [his] financials . . . ." *Id.* at 14. As to his expenses, he testified that he had only begun "recently" (the hearing was in April 2023) reimbursing his girlfriend for household expenses, *id.* at 29, and part of that reimbursement was to contribute $2,000 a month to her more than $4,000 monthly mortgage. *Id.* at 22, 27. He made the payment because his girlfriend "started a new position where she didn't make as much as the old one and she needed help." *Id.* at 29. Finally, although on redirect Mr. Nash testified that he didn't "*feel* like [he] had a choice" in moving to Dallas, *id.* at 32 (emphasis supplied), on recross, he agreed it was "[his] choice to move to Texas . . . ." *Id.* at 33-34.

change in circumstances warranting modification of support alimony. *Messenger v. Messenger*, 1992 OK 27, ¶ 14, 827 P.2d 865, 871 ("Property interests represented by a divorce decree's support alimony award are vested rights embodied in a judgment. They are constitutionally insulated by § 54 from legislative interference by after-enacted statutes.").

For these reasons, I would affirm the trial court's judgment in full.

May 9, 2025