

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA 08-1017

HEATHER MICHELLE USSERY
APPELLANT

V.

BUDDY MICHAEL USSERY
APPELLEE

Opinion Delivered JUNE 24, 2009

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
SEVENTEENTH DIVISION
[NO. DR2007-1035]

HONORABLE MACKIE M. PIERCE,
JUDGE

AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Heather Michelle Skipper-Ussery and appellee Buddy Michael Ussery were married on February 10, 2003, and separated on August 12, 2006. The parties have twin sons, who were born on July 24, 2006. The parties lived in Austin, Texas, and Heather relocated with the children to Pulaski County upon the parties' separation.

Heather filed for divorce on March 5, 2007, in Pulaski County Circuit Court.¹ After a temporary hearing, the trial court entered an order on October 11, 2007, awarding temporary custody to Heather and visitation to Buddy. Furthermore, Buddy was ordered

¹Buddy had previously filed for divorce in Texas, but he subsequently answered Heather's complaint and conceded that the Pulaski County Circuit Court had jurisdiction. On September 4, 2007, the Pulaski County Circuit Court entered an order accepting jurisdiction.

to pay temporary monthly child support of \$978 and temporary monthly spousal support of \$500.

The case came for a final hearing on March 27, 2008, and at the hearing the parties agreed for Heather to have custody and stipulated that Buddy would pay \$1379 in monthly child support pursuant to his net income as applied to the family support chart. At the conclusion of the hearing, Heather asked the trial court to assess child support for the period of time between the filing of her divorce complaint and the temporary order, and also to assess child support from the time of the temporary order through the date of the final hearing, such amount to be calculated by taking the difference between what Buddy paid in temporary support and what he should have been paying as agreed by the parties at the final hearing. Heather also requested attorney's fees. The trial court orally denied both Heather's request for retroactive child support and her request for attorney's fees. On May 22, 2008, the trial court entered a divorce decree awarding custody to Heather; awarding visitation to Buddy; ordering Buddy to pay \$1379 in monthly child support; ordering Buddy to pay monthly alimony of \$500 for a period of one year; declining to award any retroactive child support as requested by Heather; and ordering each party to bear their own attorney's fees.

Heather now appeals from the divorce decree, raising two arguments for reversal. First, she argues that the trial court erred in refusing to assess child support retroactively in the correct amount from the date of the filing of the complaint to the date of the final hearing. Next, Heather contends that the trial court erred in failing to grant her motion for attorney's fees. We affirm.

Heather testified at the final hearing. She stated that she is presently unemployed and living with her parents. Heather has a master's degree and has commenced working on her dissertation toward her Ph.D. degree, which she said will take eighteen months to two years to complete. Heather also stated that she has previously worked as a secretary and is capable of earning about 500 dollars per week at that position.

Buddy produced documentation showing his annual gross income to be \$88,500, with a net monthly pay of \$6118. He also demonstrated that he has \$29,000 in personal debt, and that the marital debt was nearly \$100,000. In the divorce decree, the trial court ordered Buddy to service the vast majority of the parties' marital debt, and anticipated that Buddy may file bankruptcy.

In this appeal, Heather first assigns error to the trial court's refusal to enforce its final monthly child-support award of \$1379 retroactive to the filing of her complaint for divorce. She relies on *Pardon v. Pardon*, 30 Ark. App. 91, 782 S.W.2d 379 (1990). In that case, the minor child moved into the home of the mother/appellee sometime after the parties' divorce, and on April 5, 1988, the appellee filed a motion for a change of custody and for child support. After a hearing held January 25, 1989, the trial court awarded the appellee child support retroactive to the filing of appellee's petition. We affirmed, holding that the retroactive award was not an abuse of discretion given that the child had resided with the appellee and had been supported by her since April 5, 1988.

In the present case, similar to *Pardon, supra*, the children have been in the primary custody of their mother since Heather filed for divorce on March 5, 2007, wherein she

specifically prayed for child support. Heather argues that because the parties were separated and she had custody of the children, the correct rule of law should be that the award of child support in the final order is assessed from the date of her complaint through the date of the final hearing, giving credit to Buddy for child support paid pursuant to the temporary order. To the extent that the trial court refused to order retroactive child support because it burdened Buddy with most of the debt and anticipated that he would file bankruptcy, Heather asserts that there was no evidence that he would file bankruptcy and that the debt is irrelevant to the assessment of child support. Heather asks this court to mandate that a final order of child support must accrue from the date of the filing of the divorce complaint, and not leave the issue to the discretion of the trial court.

It is well settled that a parent has a legal duty to support a minor child regardless of the existence of a support order. *Office of Child Support Enforcement v. Goff*, 96 Ark. App. 238, 240 S.W.3d 133 (2006). Moreover, retroactive child support is not illegal, and is often awarded when an initial support order is entered. *Id.* However, contrary to Heather's argument in this appeal, the decision of whether or not to award child support retroactively lies within the discretion of the trial court. *See Heflin v. Bell*, 52 Ark. App. 201, 916 S.W.2d 769 (1996); *Pardon, supra*.

In *Pardon*, we set forth the following considerations as provided by 27C C.J.S. *Divorce* § 684 (1986):

The commencement date of an award of child support is a matter within the discretion of the trial court. It has been held proper to make child support payable from the date of the divorce or dissolution decree or from the date of the order or decree granting child support.

In an appropriate case, it is within the discretion of the court to make an order for child support retroactive to an earlier date where it appears that the need of the child existed as of that date. However, it has been held that child support payments may not be ordered to commence earlier than the date the divorce action was commenced.

Thus, in various instances it has been held proper for the court to fix the effective date of an order of child support from the date of filing of the petition or complaint, or from the date of the trial, or from the date of the parties' separation.

In the present matter, Heather's attorney prepared the October 11, 2007, temporary order that awarded her temporary custody and ordered Buddy to pay temporary monthly child support of \$978, as well as temporary monthly spousal support of \$500. Evidently, Heather did not then object to the amount of temporary child support or request that it be awarded retroactive to the filing of her divorce complaint on March 5, 2007. The temporary hearing is not included in the record on appeal, and it is appellant's burden to bring up a record sufficient to demonstrate that the trial court was in error. *See Junkins v. Duvall*, 97 Ark. App. 260, 248 S.W.3d 492 (2007). Moreover, it is presumed that the discussions during an unrecorded hearing support the trial court's findings. *Id.* Accordingly, Heather has failed to demonstrate that the child-support awarded at the temporary hearing was erroneous, and we assume that the amount was correct. Therefore, we hold that there was no abuse of discretion in the trial court's failure to award any additional child support from the date of the temporary order through the final hearing.

Moreover, the trial court did not err in refusing to award retroactive child support dating back to the date the divorce complaint was filed. As already stated, there is no record that Heather made such a claim for retroactive support at the temporary hearing. Moreover, while we acknowledge that there may be circumstances permitting such a retroactive award

in the trial court's discretion, it was not mandatory as Heather suggests. There was no custody order entered prior to the temporary hearing, and the abstract before this court does not contain evidence requiring a retroactive award. There being no abuse of discretion, we affirm the trial court's decision to award the \$1379 in monthly child support prospectively beginning from the date of the final hearing.

Heather's remaining argument on appeal is that the trial court erred in failing to grant her request for attorney's fees. She asserts that the trial court erroneously failed to exercise its discretion on this matter with the summary conclusion that Buddy was going to file bankruptcy due to his substantial debts. Heather contends that there was no evidence that Buddy was going to file bankruptcy, and submits that even if he did it would increase his ability to pay her attorney's fees. Heather asserts that there was a substantial difference in the earning capacity of the parties, given her status as unemployed and Buddy's net monthly income of \$6118. Under these circumstances, Heather contends that this case should be reversed and remanded for a proper exercise of the trial court's discretion and an award of her attorney's fees.

Arkansas Code Annotated section 9-12-309(a)(2) (Repl. 2008) provides that in the final divorce decree, the trial court may award the wife or husband a reasonable attorney's fee. A trial court has considerable discretion to award attorney's fees in a divorce case. *McKay v. McKay*, 340 Ark. 171, 8 S.W.3d 525 (2000). In determining whether to award attorney's fees, the trial court must consider the relative financial abilities of the parties. *Id.*

We hold that the trial court did not abuse its considerable discretion in denying Heather's request for attorney's fees. We think it evident that the trial court properly exercised its discretion, and the allocation of the vast amount of the parties' substantial debt to Buddy was a factor in assessing his financial ability, whether or not he ultimately files bankruptcy. While Buddy earns a relatively high salary, Heather is highly educated with work experience and plans to secure her Ph.D. degree within two years, which will likely increase her current earning potential. And in addition to paying child support, Buddy was ordered to pay a total of \$6000 in alimony over the next year. Taking into account all of these considerations, we affirm the trial court's decision to make each party responsible for their own attorney's fees.

Finally, we acknowledge that the appellee has prayed for his attorney's fees associated with this appeal. That request is denied.

Affirmed.

GRUBER and BROWN, JJ., agree.