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ARKANSAS COURT OF APPEALS

DIVISION I
No. CV-21-404

SCOTTY HOWELL APPELLANT V. KIMBERLY HOWELL APPELLEE	**Opinion Delivered** October 26, 2022 APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT [NO. 26DR-17-578] HONORABLE RALPH C. OHM, JUDGE AFFIRMED IN PART; DISMISSED IN PART

ROBERT J. GLADWIN, Judge

Scotty Howell appeals the December 27, 2019 order of the Garland County Circuit Court and argues that the trial court erred in (1) modifying the parties' child-custody property-settlement agreement (PSA) without clear and convincing evidence of fraud; (2) modifying child support and awarding back child support; and (3) awarding attorney's fees.[1] Also before the court is appellee Kimberly Howell's November 30, 2021 motion to partially dismiss Scotty's appeal in regard to the PSA and attorney's-fees issues. We hereby grant Kimberly's partial-dismissal motion; thus, we affirm in part and dismiss in part.

[1]This is the second time Scotty's appeal has been before the court—we dismissed without prejudice his first appeal because the appealed order did not contain a ruling on Kimberly's contempt motion nor did it mention the parties' stipulations regarding the parties' Davis Drive property and health insurance costs. *Howell v. Howell*, 2021 Ark. App. 97. After remand, the trial court filed an agreed order addressing these finality issues, and this appeal followed.

I. *Facts and Procedural History*

The parties were divorced by decree filed August 23, 2017. The decree incorporated the PSA, which provides for joint custody of the parties' now nine-year-old daughter, (Minor Child), and requires that she remain within Garland County, Arkansas. Any move by either parent outside of Garland County would constitute a material change in circumstances. The parent remaining within Garland County would assume full custody, and visitation would switch to a schedule agreed to by the parties.

The PSA also provides under the heading "Child Support" that the parties had created an account in which Scotty would deposit $120 a month and Kimberly would deposit $100 a month "to cover each of their ½ respective amounts payable towards the minor child's Health, Dental, School, Clothing, and Extracurricular activities." Further, the parties agreed to create a credit union account in which each would deposit $50 biweekly "for the benefit of the minor child by mutual agreement of the parties." Under the PSA's "Miscellaneous" section in the paragraph addressing personal-property division, the parties agreed that "[a]ll retirement accounts, 401ks, IRA's and Credit Union Accounts shall remain with the respective party creating said account with the minor child listed as the beneficiary of same."

On July 9, 2018, Kimberly filed a motion to set child support and modify the PSA. She asked that (1) the PSA be modified to allow either party to move within a sixty-mile radius of Garland County; (2) child support be ordered "by both parties paying the other while the minor child is in their custody and based upon their separate incomes"; (3) in light of her recent discovery that Scotty "may have had multiple accounts that were not disclosed

to her," both parties be required to purchase a $250,000 life insurance policy for the child's benefit; (4) the Davis Drive home be placed in a trust for the benefit of Minor Child in order to reflect the intent behind the PSA; and (5) Scotty be ordered to "immediately reimburse" her for half of all sums she has paid for Minor Child's health insurance.

On August 7, 2018, Scotty filed a motion to dismiss based on Rule 12(b)(6) of the Arkansas Rules of Civil Procedure. He argued in the incorporated brief that Kimberly's motion was nothing more than an afterthought to their PSA and that Rule 60 of the Arkansas Rules of Civil Procedure is inapplicable. He claimed that the only change in circumstance since the entry of the decree and PSA is that he remarried, which is an insufficient basis for modification of their custody agreement.

Kimberly amended her motion on August 16, and on October 30, a hearing was held on Scotty's dismissal motion. The trial court denied the motion and directed Kimberly to file a new petition incorporating all of her claims. On November 5, Kimberly filed a "Second Amended Motion to Set Child Support; Modify Child Custody Property Settlement Agreement; Determine the Enforceability and Consider Any Ambiguities Contained in the Terms Set Out Therein." She asked that (1) the PSA be modified to allow either party to move within a sixty-mile radius of Garland County and to continue the PSA terms of custody; (2) child support be set pursuant to a change in circumstances; (3) "[t]he court . . . consider the terms of the [PSA] in light of [Scotty's] failure to disclose all of his assets and liabilities at the time that [Kimberly] was induced to accept the agreement," and the court should apply Rule 60(4)(c); and (4) the Davis Drive home be placed into a trust

for the benefit of Minor Child "to give effect to their intent regarding the home[.]" Kimberly also asked for an award of attorney's fees and costs.

On November 6, Kimberly filed an amended affidavit stating, in part, that she had asked Scotty about his retirement before the divorce, and he told her that their retirement amounts were essentially equal. She stated that she had received copies of Scotty's 401(k) statements and that the value is substantially more than the value of her retirement account "when you consider the amount from the date of marriage through the date of the Divorce Decree." She stated that had she known he had not disclosed the value of his accounts "accurately," she would have never signed the PSA.

A hearing was held on September 20, 2019, and the parties stipulated that they had placed the Davis Drive property into a trust to benefit the child, and a quitclaim deed and trust documents were executed by Scotty and provided to Kimberly in open court. The issues remaining to be tried were in regard to the parties' 401(k) accounts; the PSA's restriction on moving outside Garland County; the custodial schedule, which included a contempt motion Kimberly had filed; and child support.

Regarding child support, Kimberly testified that she contributes $100 biweekly into the joint account, and Scotty contributes either $100 or $120 biweekly. She said that the decree provides for those amounts to be paid monthly, but they learned rather quickly that they needed to deposit more. She said that the original intent was to pay all of Minor Child's expenses from that account, but now they use that account strictly for after-school care, summer camps, swim team, and the dog's expenses. She said that they have each paid for clothing and other expenses themselves and that she buys Minor Child tennis shoes to go

with every outfit, clothing, facials, massages, "mani/pedis," and makeup. She asked that the court "even the burden."

Scotty said that they both buy clothes and things for Minor Child while she is in their respective care. He said that the account in lieu of child support is for extraordinary expenses and that he understood that their three-day/four-day custody arrangement was supposed to be the "minimum." He said that since they had separate homes, Minor Child has gone back and forth, and she has been with him on Monday, Wednesday, Friday, and every other Saturday. He said that they had never followed the four-day/three-day schedule, and he believes it is in Minor Child's best interest to continue to exchange on a daily basis.

The circuit court issued a letter opinion on October 17, 2019, in which the court generally ruled on the issues. The court found that Kimberly was opting to enforce the PSA on the issue of split custody and that she was within her right to do that. The court granted Kimberly relief from the provisions in the PSA that prohibited her relocation outside of Garland County. The court ruled that the retirement accounts "should be equalized as of the date of the divorce." It found that the preponderance of the evidence was that "both parties thought the retirement accounts were roughly equivalent. That is not the case. The agreement provides that both parties have made full disclosure of all assets, and I find that this was not done." The court also ruled, "I think the law is well settled that in joint custody cases, the income of both parties is assessed, support is set, and one-half of the difference will follow the child."

Kimberly filed a motion for attorney's fees on December 2. She asked for $5,822.50 on the basis of the trial court's inherent power to award attorney's fees in domestic-relations

proceedings. On December 16, Scotty filed a motion to strike, arguing that under Rule 54(e)(2) of the Arkansas Rules of Civil Procedure, Kimberly's motion for fees was premature and unripe. In a letter ruling on December 17, the trial court awarded Kimberly $2,500 in attorney's fees.

On December 27, the trial court issued its order and referenced its letter ruling. The order sets forth a custodial chart for the parties to follow; grants Kimberly relief from the provisions in the PSA that prohibit her relocation outside of Garland County; and orders that the retirement accounts shall be equalized as of the date of the divorce. The order states, "The parties agree that the Plaintiff, Scotty Howell, shall transfer $50,000.00 to the Defendant, Kimberly Howell." Finally, the order establishes the parties' respective incomes and child-support obligations and reflects that Scotty's child-support obligation is $45.32 biweekly more than Kimberly's, and Scotty was ordered to pay that amount as well as $1,631.52 in retroactive child support from the date of the July 8, 2018 motion through October 17, 2019. Finally, Scotty was ordered to pay $2,500 in attorney's fees and costs within 180 days of the entry of the order.

Scotty filed a timely notice of appeal in January 2020, *see Howell*, *supra*, and during the pendency of the appeal, on May 26, 2020, Kimberly filed a contempt motion alleging that Scotty had failed to pay child support from October 17, 2019, through December 27, 2019, in the amount of $181.28 and had failed to pay the ordered retroactive child support of $1,631.52 within 120 days of the December 27, 2019 order. She claimed that he had not filed a motion to stay the appeal, and none had been granted.

On June 22, Scotty moved for a continuance, claiming that he was in the process of securing an appeal bond and that it might be another couple of days before it could be secured. He attached to his motion a copy of prospective filings in the Arkansas Court of Appeals—application for supersedeas; supersedeas bond; and order for supersedeas; however, these were never filed. On June 23, the court entered a qualified domestic relations order (QDRO) that transferred $50,000 from Scotty's retirement account to Kimberly.

On April 5, 2021, this court issued the mandate dismissing Scotty's first appeal without prejudice. On May 6, the parties filed an agreed order wherein Kimberly dismissed her May 26, 2020 contempt motion, alleging that Scotty had "satisfied these issues," and withdrew her September 4, 2019 request that Scotty be held in contempt, acknowledging that the December 27, 2019 order resolved the issue, along with the Davis Drive property issue. Finally, the order states that Scotty had reimbursed Kimberly for the health-insurance costs and dismissed any claim in that regard. On May 26, Scotty filed a notice of appeal, which includes the May 6, 2021 and December 27, 2019 orders.

II. *Motion for Partial Dismissal of Appeal*

On November 21, Kimberly filed in the Arkansas Court of Appeals a motion to dismiss alleging that Scotty had voluntarily paid two of the three monetary judgments on appeal, making those issues moot. Scotty responded, admitting that he had paid the attorney's fees and that the issue should be dismissed. Accordingly, Scotty's appeal on the issue of attorney's fees is dismissed. *Paschal Heating & Air Conditioning Co., Inc. v. Zotti*, 2021 Ark. App. 372 (attorney's-fee issue on appeal held moot because fees voluntarily paid pending appeal).

However, Scotty denied that the $50,000 transfer of retirement funds was voluntary and claimed that the transfer was due to the actions of the circuit court. This court has held,

> [I]f appellant's payment was voluntary, then the case is moot, but if the payment was involuntary, this appeal is not precluded. In applying this rule to the facts at bar, we must determine whether the payment made by appellant was voluntary or involuntary. In doing so, we believe that one of the most important factors to be considered is whether appellant was able to post a supersedeas bond at the time he satisfied the judgment. The record supports the conclusion that he could have done so.

DeHaven v. T&D Dev., Inc., 50 Ark. App. 193, 197, 901 S.W.2d 30, 32–33 (1995); *see also Smith v. Smith*, 51 Ark. App. 20, 907 S.W.2d 755 (1995) (voluntary payment of a judgment amount is inconsistent with a subsequent appeal so as to render any subsequent appeal moot); *Shepherd v. State Auto Prop. & Cas. Ins. Co.*, 312 Ark. 502, 850 S.W.2d 324 (1993) (in the absence of any attempt to post a supersedeas bond, payment is regarded as voluntary).

In *City of Little Rock v. Circuit Court of Pulaski County*, 2017 Ark. 219, at 4–5, 521 S.W.3d 113, 116, the supreme court stated,

> If the payment of a judgment is voluntary, the case is moot, but if the payment is involuntary, the appeal is not precluded. *Reynolds Health Care Servs., Inc. v. HMNH, Inc.*, 364 Ark. 168, 217 S.W.3d 797 (2005). In determining whether a payment was voluntary or involuntary, one of the most important factors to consider is whether the payor was able to file a supersedeas bond at the time the judgment was satisfied. *Id.* Here, the City filed a motion to stay the sanctions while the motion to set aside was under consideration. Once the motion to reconsider was denied, the City never requested a supersedeas pending an appeal of the April 25 order. Instead, the City paid the sanction on May 12, without ever requesting that the circuit court issue a supersedeas, hold the check pending resolution of an appeal of the April 25 order, or anything else. It simply paid the penalty. It is evident that the payment was intended as a resolution of the matter, as the City, immediately upon making the payment, requested that the circuit court cancel the show-cause hearing as moot. The City voluntarily paid the penalty in order to avoid a contempt finding; however, the attempt was unsuccessful. In sum, the payment by the City was voluntary, and the appeal from the April 25, 2016 order is accordingly dismissed as moot.

We hold that Scotty could have obtained a supersedeas bond and failed to do so. He filed a pleading in circuit court stating that he was applying to this court for a supersedeas bond to stay the appeal, but the record does not show that any pleading was filed herein. Accordingly, Scotty voluntarily paid the $50,000 pursuant to the QDRO, making an appeal moot. Thus, we grant Kimberly's partial-dismissal motion.

III. *Child Support*

This court has recently stated,

> Our standard of review for an appeal from a child-support order is de novo on the record, and we will not reverse a finding of fact by the circuit court unless it is clearly erroneous. *Morgan v. Morgan*, 2018 Ark. App. 316, at 6, 552 S.W.3d 10, 15 (citing *Hall v. Hall*, 2013 Ark. 330, 429 S.W.3d 219). In reviewing a circuit court's findings, we give due deference to that court's superior position to determine the credibility of the witnesses and the weight to be accorded to their testimony. *Id.*, 552 S.W.3d at 15. As a rule, when the amount of child support is at issue, we will not reverse the circuit court absent an abuse of discretion. *Id.* at 6–7, 552 S.W.3d at 15. However, a circuit court's conclusion of law is given no deference on appeal. *Id.* at 7, 552 S.W.3d at 15.
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> In determining a reasonable amount of child support, the court shall refer to the most recent revision of the family-support chart. Ark. Code Ann. § 9-12-312(a)(3)(A) (Repl. 2015). It shall be a rebuttable presumption that the amount contained in the family-support chart is the correct amount of child support to be awarded. Ark. Code Ann. § 9-12-312(a)(3)(B). Only upon a written finding or a specific finding on the record that the application of the family-support chart would be unjust or inappropriate, as determined under established criteria set forth in the family-support chart, shall the presumption be rebutted. Ark. Code Ann. § 9-12-312(a)(3)(C). All orders granting or modifying child support (including agreed orders) shall contain the court's determination of the payor's income, recite the amount of support required under the guidelines, and recite whether the court deviated from the family-support chart. Ark. Sup. Ct. Admin. Order No. 10(I). If the order varies from the guidelines, it shall include a justification of why the order varies as may be permitted under section V hereinafter.
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> It is axiomatic that a change in circumstances must be shown before a court can modify an order for child support. *Morgan*, 2018 Ark. App. 316, at 16–17, 552 S.W.3d at 9. In addition, the party seeking modification has the burden of showing a change in circumstances. *Id.* at 17, 552 S.W.3d at 9. In determining whether there

> has been a change in circumstances to warrant an adjustment in support, the court should consider remarriage of the parties, a minor reaching majority, change in the income and financial conditions of the parties, relocation, change in custody, debts of the parties, financial conditions of the parties and families, ability to meet current and future obligations, and the child-support chart. *Id.*, 552 S.W.3d at 9. We have made it clear that a finding that a material change in circumstances has occurred is subject to a clearly erroneous standard of review. *Id.*, 552 S.W.3d at 9.

Higdon v. Roberts, 2020 Ark. App. 59, at 4–6, 595 S.W.3d 19, 23–24.

Scotty argues that the trial court erred in modifying child support and asserts that a change in circumstances must be proved. *Evans v. Tillery*, 361 Ark. 63, 204 S.W.3d 547 (2005). The PSA required monthly and biweekly deposits into accounts for the benefit of the child, and Scotty argues that these amounts were intended for child support. He contends that, although each party submitted an affidavit of financial means, there was no evidence presented of the parties' income at the time of the divorce. Thus, he claims that there is no evidence of any material change of circumstances in the parties' incomes and that Kimberly's stated reason for child support—that the child is older, requiring more shopping and girlfriend entertainment, which includes clothing, facials, massages, "mani/pedis," and makeup—is not a material change in circumstances. He points out that Kimberly filed her motion for child support only ten months after the divorce was filed, and he asserts that the ten-month age increase of the child was not a material change.

Kimberly argues that the trial court did not err in ordering Scotty to pay child support. First, she asserts that Scotty failed to argue below that she had not established a change of circumstances; therefore, she contends that he cannot argue it on appeal. *Pannell v. Pannell*, 64 Ark. App. 262, 981 S.W.2d 531 (1998). However, Scotty's responsive pleading denies that a material change in circumstances occurred.

Next, Kimberly claims that she did not have to prove a material change of circumstances because of the trial court's inherent power and continuing jurisdiction to interpret, clarify, and enforce a divorce decree, citing *Abbott v. Abbot*, 79 Ark. App. 413, at 420–21, 90 S.W.3d 10, 15. She argues that the PSA is unclear about whether the expense accounts were substitutes for support under Administrative Order No. 10. Accordingly, she asserts that the court's order on appeal is the first instance of child support being ordered, and it was not necessary to prove a change of circumstances. We agree.

We note that the trial court did not find a change in circumstances that warranted a modification of support; instead, the court made an initial determination of child support appropriate in a joint-custody arrangement. Although the PSA contains a provision for the parties to pay certain amounts into an account to benefit Minor Child, the account was jointly held and funded as part of the joint-custody arrangement and did not establish the parties' incomes or obligations under the family-support chart. Accordingly, we hold that the court's order establishing child support under the chart was not an abuse of discretion. *Higdon*, *supra* (when the amount of child support is at issue, we will not reverse the circuit court absent an abuse of discretion).

IV. *Retroactive Child Support*

Second, Scotty contends that the trial court did not take into consideration that he was paying an extra $20 a month into the child-support account when it awarded Kimberly $1,631.52 in back child support. Nor, he argues, did the court consider the additional amount he paid during the time the parties lived together after the divorce. He maintains that there is no justification for the award of back child support.

However, Scotty did not raise any argument below that the trial court should consider money paid into the expense account or money he paid while the parties lived together. It is well settled that in order to preserve an argument for appeal, the issue must first be raised at the trial court level. *Chastain v. Chastain*, 2012 Ark. App. 73, at 7, 388 S.W.3d 495, 500. Further, modifications in child support are typically retroactive to the date of the filed motion. *Yell v. Yell*, 56 Ark. App. 176, 939 S.W.2d 860 (1997).

Affirmed in part; dismissed in part.

GRUBER and BARRETT, JJ., agree.

Worsham Law Firm, P.A., by: *Richard E. Worsham*, for appellant.

Brett D. Watson, Attorney at Law, PLLC, by: *Brett D. Watson*; and *Sherry Burnett*, for appellee.