[Cite as *Shippy v. Shippy*, 2010-Ohio-5332.]

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ROSEMARY SHIPPY	:	JUDGES:
	:	
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 10CA000016
JAMES P. SHIPPY, III	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Guernsey County Court of Common Pleas, Case No. 08-DR-121
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	October 21, 2010

APPEARANCES:

For Appellant:

MARGARET BOYD LAPLANTE
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P.O. Box 640
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For Appellee:

DAVID B. BENNETT
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Delaney, J.

{¶1} Defendant-Appellant, James P. Shippy, III, appeals the March 12, 2010 judgment entry of the Guernsey County Court of Common Pleas denying Appellant's objections to a Magistrate's Decision overruling his motion to terminate spousal support and to modify his parental rights. Plaintiff-Appellee is Rosemary Shippy nka Rosemary Schuler.

STATEMENT OF THE FACTS AND THE CASE

{¶2} Appellant and Appellee were married on August 28, 1983. One child born as issue of the marriage, J.S., remains a minor. He was born on July 28, 1997.

{¶3} Appellee filed a complaint for divorce on February 25, 2008. Appellant filed an answer and counterclaim. A final divorce hearing was held on March 13, 2009 and May 14, 2009 before the magistrate. The nunc pro tunc Magistrate's Decision was filed on June 3, 2009. Appellant filed objections to the divorce decree and the trial court adopted the decision on November 4, 2009.

{¶4} In the Divorce Decree, the magistrate found that Appellee was entitled to spousal support. The court ordered that Appellant pay Appellee spousal support in the amount of $800 per month, plus 2% processing charge, for a term of six years starting on June 2, 2009. Appellant's spousal support obligation would terminate upon the death of either party, remarriage of Appellee, or cohabitation of Appellee. The trial court retained jurisdiction to modify the spousal support order.

{¶5} The trial court also named Appellee as the residential parent of J.S.

{¶6} On November 6, 2009, Appellant filed a Motion to Modify Parental Rights and Responsibilities and a Motion to Terminate Spousal Support. The court held a

hearing before the magistrate on December 22, 2009. In Appellant's motion for termination of spousal support, Appellant alleged that Appellee was cohabitating with Clifford Mattern.[1] Appellant argued in his motion to modify parental rights that he should be named the residential parent of J.S. because Appellee could not provide J.S. stability because she had changed residences a number of times in the summer of 2009. The following evidence was adduced at the hearing.

{¶7} At the time of the divorce, Appellee and J.S. were living in Englewood, Ohio, near Dayton, with Appellee's sister. (T. 110). During the divorce proceedings, Appellee was in a relationship with Clifford Mattern. (T. 28). Appellee testified that she lived with Mattern before her divorce. (T. 115). After the divorce, Appellee testified that she and Mattern were no longer a couple and were just close friends. (T. 115).

{¶8} On June 12, 2009, Appellant received a "separation notice" from his employer, New River Electrical Corporation. (T. 79). At the time of the hearing on Appellant's motions, Appellant was unemployed and receiving unemployment benefits. Appellant was not personally searching for employment; however, he called in monthly to his union to sign the book. (T. 89). Appellant's child support obligation was deducted from his unemployment benefits, but Appellant was in arrears for his spousal support in the amount of $5821.25 through December 2009. (T. 22). Appellant resided with his parents. (T. 88).

[1] In Appellant's motion to terminate spousal support, Appellant only raised the issue of cohabitation. He did not argue that his spousal support obligation should be terminated or reduced due to a change of circumstances not contemplated at the time of divorce.

{¶9} During the summer of 2009, Appellee and J.S. stayed in Guernsey County with family on the weekends while Appellee looked for an apartment and at schools where she could enroll to pursue a nursing degree. (T. 110). Appellee's daughter-in-law, Julie Sears, testified that Appellee and Mattern lived with her for three weeks. (T. 50). J.S. stayed with Appellant for a large part of the summer. (T. 119).

{¶10} In August 2009, Appellee moved to an apartment in Quaker City, Guernsey County, Ohio and executed a lease for $330 per month. (T. 112). Sears testified that she helped Appellee move into that apartment and moved Mattern's personal possessions into the apartment as well. (T. 50). Appellee had applied for subsidized housing and an apartment became available in September 2009. Appellee moved to the Cambridge Village Apartments aka Columbia Court where she pays $38 per month in rent. (T. 112).

{¶11} Appellee denied that she lived with Mattern at any time after her divorce. (T. 115).

{¶12} Mattern testified at the hearing. He testified that he has not lived with Appellee since June 2009. (T. 99). At the time of the hearing, he lived at a house located on Sugar Tree Road, Freeport, Ohio. (T. 98). The home is a large farmhouse and Mattern was permitted to live there rent-free in exchange for his employment at Red Hill Farm. (T. 109). Mattern testified that he permitted Appellee to store multiple items at his home. Appellee moved her washer and dryer to his home because her apartment did not have a washer and dryer hook up. (T. 106). She moved furniture into his home, which included bedroom furniture that was placed in the bedrooms. (T. 106-107). Appellee testified that she moved furniture to Mattern's home because she could not

afford a storage unit. (T. 35). Sears testified that she helped move Appellee's belongings into Mattern's home. (T. 41). Appellee stated that she and J.S. would spend the night at Mattern's home after parties. (T. 123).

{¶13} J.S. kept his dog at Mattern's home because pets were not permitted at his mother's apartment. (T. 104).

{¶14} When Appellee moved back to Guernsey County, she wanted to enroll J.S. in the Buckeye Trail Middle School where J.S. had previously attended school before they moved to Englewood. Appellee testified that she was told that the open enrollment period for Buckeye Trail had closed. (T. 118). Appellee used the Sugar Tree Road address so that J.S. could attend Buckeye Trail Middle School. (T. 118). If Appellee could not pick up J.S. at school, J.S. would ride the bus to Mattern's home. (T. 118).

{¶15} J.S. was successful in school, earning A's and B's. (T. 8). J.S. only missed two and one-half days of school during one grading period. (T. 8).

{¶16} On December 24, 2009, the magistrate issued her decision denying Appellant's motions to terminate spousal support and modify parental rights. Based on the evidence presented at the hearing, the magistrate found that Appellee was not cohabitating with Mattern. The magistrate also found that there had been no change of circumstances to find that Appellant should be named as the residential parent.

{¶17} Appellant filed objections to the magistrate's decision. The trial court adopted the decision of the magistrate on March 12, 2010. It is from this decision Appellant now appeals.

ASSIGNMENTS OF ERROR

{¶18} Appellant raises five Assignments of Error:

{¶19} "I. THE COURT ABUSED ITS DISCRETION IN FINDING THAT THE APPELLEE IS NOT COHABITATING WITH CLIFFORD MATTERN, AND ITS DECISION TO CONTINUE SPOUSAL SUPPORT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶20} "II. THE COURT ABUSED ITS DISCRETION WHEN IT FOUND THAT THERE WAS NO CHANGE IN CIRCUMSTANCES, AND THAT IT WAS NOT IN THE CHILD'S BEST INTEREST FOR THE FATHER TO BE NAMED RESIDENTIAL PARENT AND LEGAL CUSTODIAN.

{¶21} "III. THE COURT ABUSED ITS DISCRETION IN FINDING THAT THE APPELLANT HAD A MORAL OBJECTION TO PAYING SPOUSAL SUPPORT THAT CAUSED HIM NOT TO PAY SPOUSAL SUPPORT.

{¶22} "IV. THE MAGISTRATE ERRED IN FAILING TO ALLOW APPELLANT TO DEVELOP THE TESTIMONY OF JOSH SHIPPY.

{¶23} "V. THE COURT ABUSED ITS DISCRETION IN REFUSING TO ALLOW APPELLANT TO PRESENT REBUTTAL TESTIMONY AFTER APPELLEE HAD TESTIFIED."

I.

{¶24} Appellant argues in his first Assignment of Error that the trial court abused its discretion in denying Appellant's motion to terminate his spousal support obligation on the issue of cohabitation. We disagree.

{¶25} A review of a trial court's decision relative to spousal support is governed by an abuse of discretion standard. *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 421 N.E.2d 1293. We cannot substitute our judgment for that of the trial court unless, when considering the totality of the circumstances, the trial court abused its discretion. *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 541 N.E.2d 597. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶26} Spousal support can be reduced or terminated based on cohabitation. *Yarnell v. Yarnell*, Delaware App. No. 05CAF0064, 2006-Ohio-3929, ¶42 citing *Crissinger v. Crissinger*, Harrison App. No. 05-HA-579, 2006-Ohio-754. In the present case, the Divorce Decree states that Appellant's spousal support obligation will terminate upon the cohabitation of Appellee.

{¶27} This Court examined "whether or not a particular living arrangement rises to the level of a * * * 'cohabitation'" in *Yarnell*, supra. We stated that "cohabitation" is a factual question to be initially determined by the trial court. *Yarnell*, supra, citing *Dickerson v. Dickerson* (1993), 87 Ohio App.3d 848, 851, 623 N.E.2d 237. In determining whether cohabitation exists, we noted the holding in *Moell v. Moell* (1994), 98 Ohio App.3d 748, 649 N.E.2d 880:

{¶28} "Many factors may be considered in deciding whether cohabitation exists in a particular set of facts. We previously addressed the issue of cohabitation in *Dickerson v. Dickerson,* supra. In that case, we noted that 'cohabitation' describes an issue of lifestyle, not a housing arrangement. *Dickerson,* supra, 87 Ohio App.3d at 850,

623 N.E.2d at 239. Further, when considering the evidence, the trial court should look to three principal factors. These factors are '(1) an actual living together; (2) of a sustained duration; and (3) with shared expenses with respect to financing and day-to-day incidental expenses.' Id. at fn. 2, citing *Birthelmer v. Birthelmer* (July 15, 1983), Lucas App. No. L83-046, 1983 WL 6869." Id. at 752.

{¶29} In the case sub judice, the magistrate found the evidence presented at the hearing failed to meet the factors established in *Yarnell*, supra. We agree. Both Appellee and Mattern denied being in a relationship, other than being close friends. Witnesses presented testimony at the hearing regarding their knowledge of Appellee and Mattern's living arrangements. Issues relating to the credibility of witnesses and the weight to be given the evidence are primarily for the trier of fact. As the court explained in *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273:

{¶30} "The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony."

{¶31} The witnesses for Appellant testified that Mattern moved personal possessions into Appellee's home and Appellee moved personal possessions into Mattern's home. The majority of the testimony supporting Appellant's claim of cohabitation involved the location of Appellee's furniture. Missing from the testimony was evidence that Appellee and Mattern lived together, for a sustained duration, and shared expenses with respect to financing and day-to-day incidental expenses.

{¶32} We find, based on the record, the trial court did not abuse its discretion in finding no evidence of cohabitation and therefore denying Appellant's motion to terminate spousal support.

{¶33} Appellant's first Assignment of Error is overruled.

II.

{¶34} Appellant argues in his second Assignment of Error that the trial court erred when it denied Appellant's motion to modify parental rights. We disagree.

{¶35} A motion to modify parental rights is reviewed pursuant to R.C. 3109.04. R.C. 3109.04(E)(1)(a) specifies the change of circumstances and the best interest of the child balancing test:

{¶36} "The court shall not modify a prior decree allocating parental rights and responsibilities for the care of children unless it finds, based on facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child, the child's residential parent, or either of the parents subject to a shared parenting decree, and that the modification is necessary to serve the best interest of the child. In applying these standards, the court shall retain the residential parent designated by the prior decree or the prior shared parenting decree, unless a modification is in the best interest of the child and one of the following applies:

{¶37} "(i) The residential parent agrees to a change in the residential parent or both parents under a shared parenting decree agree to a change in the designation of residential parent.

{¶38} "(ii) The child, with the consent of the residential parent or of both parents under a shared parenting decree, has been integrated into the family of the person seeking to become the residential parent.

{¶39} "(iii) The harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child."

{¶40} The standard of review for a determination of whether there has been a change of circumstances is abuse of discretion. *Davis v. Flickinger* (1997), 77 Ohio St.3d 415. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983) 5 Ohio St.3d 217. When applying this standard, we are not free to substitute our judgment for that of the trial court. *In re Jane Doe 1* (1991), 57 Ohio St.3d 135.

{¶41} Appellant argued to the trial court that it should name Appellant as J.S.'s residential parent because Appellee had moved at least five times between June 2009 and September 2009. Appellant is correct when he states that the evidence showed that Appellee moved a number of times in June 2009 to September 2009. During that time, Appellee was moving back to Guernsey County and trying to obtain affordable housing. At the time of the hearing on December 22, 2009, however, Appellee had been residing at Columbia Court since September 2009.

{¶42} The trial court found it would not be in J.S.'s best interests to modify Appellant's parental rights. J.S.'s principal testified that J.S. was receiving A's and B's in school. He had limited number of absences from school. When Appellee moved back to Guernsey County, Appellant had increased visitation with J.S.

{¶43} We can find no support in the record to find that the trial court abused its discretion when it denied Appellant's motion to modify Appellant's parental rights.

{¶44} Appellant's second Assignment of Error is overruled.

III.

{¶45} Appellant contends in his third Assignment of Error that the trial court abused its discretion when the trial court made the finding of fact that, "[i]t is clear from Husband's testimony that Husband has a moral objection to paying Wife spousal support." (Magistrate's Decision, Dec. 24, 2009).

{¶46} Appellant's motion to terminate spousal support was based on Appellee's alleged cohabitation. In response to why he believed it was in J.S.'s best interests to reside with him, Appellant testified that he felt it was immoral that Appellee was residing with a man she was not married to and she was putting herself out to other men. (T. 77).

{¶47} As a reviewing court, we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there is relevant, competent, and credible evidence upon which the fact finder could base its judgment. *Cross Truck v. Jeffries* (Feb. 10, 1982), Stark App. No. CA-5758.

{¶48} While we find that Appellant's statement regarding immorality went to Appellant's motion to modification of parental rights, we find that the basis of Appellant's motion for termination of spousal support was also related to Appellee's alleged living arrangements with a man she was not married to.

{¶49} Appellant's third Assignment of Error is overruled.

IV. & V.

{¶50} Appellant's fourth and fifth Assignments of Error go to the trial court's rulings as to the breadth of witness testimony. Appellant states that the trial court abused its discretion when it would not permit Appellant to develop the testimony of Josh Shippy or Julie Sears.

{¶51} As to Josh Shippy, the trial court sustained Appellee's objection to Appellant's leading question. (T. 65). Counsel for Appellant asked Appellant's witness, Josh Shippy, the parties' son, on direct examination how often J.S. visited with Appellant at Appellant's home in the summer of 2009. Josh Shippy answered that he was not sure. Counsel asked Josh Shippy, "[w]as it more often than every other weekend?" Counsel for Appellee objected on the grounds that it was leading after Josh Shippy answered that he did not know the answer. (T. 65).

{¶52} Appellant argues the trial court abused its discretion in not permitting Appellant to develop Josh Shippy's testimony on that issue. We disagree.

{¶53} Under Evid.R. 611(C), leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Limitation on the use of leading questions is within the sound discretion of the trial court. *State v. Griffin* (Nov. 1, 1993), Stark App. No. CA-9254. We find the trial court did not abuse its discretion in sustaining Appellee's objection to Appellant's use of a leading question because Josh Shippy answered counsel's question that he was not sure of the answer.

{¶54} Further, both Appellant and Appellee testified that J.S. spent a considerable amount of time with Appellant during the summer of 2009.

{¶55} Appellant's fourth Assignment of Error is overruled.

{¶56} In Appellant's final Assignment of Error, Appellant argues the trial court abused its discretion in preventing Appellant from calling a rebuttal witness. Appellant called Julie Sears, the parties' daughter-in-law, to establish Appellee's cohabitation. Sears testified that she had a close relationship with Appellee that included email communication. (T. 47). Appellee testified that she stopped frequent communication with Sears in October 2009. (T. 125). Appellee stated that when Sears emailed her, Appellee responded to the email. (T. 126). Appellee had emailed Sears in December 2009. (T. 127).

{¶57} At the close of Appellee's case, counsel for Appellant asked that she be permitted to call Sears for rebuttal. (T. 128). While Appellant did not make this argument on the record, Appellant argues on appeal that Appellant wanted to call Sears to rebut the claims against her credibility as raised by issue of the emails between Appellee and Sears. The trial court denied Appellant's request. (T. 128).

{¶58} We find the trial court did not abuse its discretion in denying Appellant's request to call Sears for rebuttal. Sears had testified on direct and cross-examination of her relationship with Appellee and the amount of communication she had with Appellee. She testified as to what she witnessed of Appellee's alleged cohabitation with Mattern. Appellee testified on direct and cross-examination of her relationship with Sears and the amount of communication she had with Sears. We find the details of their relationship was thoroughly developed and the issue of how often the parties emailed each other to be properly limited as per the trial court's discretion.

{¶59} Appellant's fifth Assignment of Error is overruled.

{¶60} The judgment of the Guernsey County Court of Appeals is affirmed.

By: Delaney, J.

Hoffman, P.J. and

Farmer, J. concur.

HON. PATRICIA A. DELANEY

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER

PAD:kgb

[Cite as *Shippy v. Shippy*, 2010-Ohio-5332.]

IN THE COURT OF APPEALS FOR GUERNSEY COUNTY, OHIO

FIFTH APPELLATE DISTRICT

ROSEMARY SHIPPY	:	
	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
JAMES P. SHIPPY, III	:	
	:	Case No. 10CA000016
Defendant-Appellant	:	

For the reasons stated in our accompanying Opinion on file, the judgment of the Guernsey County Court of Common Pleas is AFFIRMED. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER