[Cite as *Cleland v. Cleland*, 2004-Ohio-561.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

DENNIS J. CLELAND	)	CASE NO. 03 MA 8
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
CATHERINE A. CLELAND, n.k.a. CATHERINE A. BRADAICK	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from the Court of Common Pleas, Domestic Relations Division, of Mahoning County, Ohio Case No. 01 DR 505
JUDGMENT:	Affirmed.
APPEARANCES:	
For Plaintiff-Appellee:	Atty. Mark A. DeVicchio 3680 Starr Centre Drive Canfield, Ohio 44406
For Defendant-Appellant:	Atty. William R. Biviano 7th Floor, Second National Tower 108 S. Main Avenue Warren, Ohio 44481

JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio

Hon. Joseph J. Vukovich

Dated: February 2, 2004

WAITE, P.J.

{¶1} This timely appeal comes for consideration upon the trial court record and the parties' briefs. Appellant Catherine A. Cleland, n.k.a. Catherine A. Bradaick, appeals the ruling of the Mahoning County Domestic Relations Court's decision of December 10, 2002, adopting the magistrate's decision that terminated Appellant's spousal support.

{¶2} Appellant raises two assignments of error. First, she asserts that the trial court erred in finding that she was cohabitating with an unrelated male, and second, she asserts that the magistrate erred in overruling her request for a directed verdict at the spousal support termination hearing. For the following reasons, the trial court's decision is affirmed.

{¶3} On July 11, 2001, Appellee Dennis J. Cleland filed a complaint for divorce (without children) from Appellant. On August 29, 2001, the magistrate ordered Appellee to pay temporary spousal support to Appellant in the amount of $1,500.00 per month plus a 2 percent processing fee and ordered Appellant to seek employment.

{¶4} Appellee later requested an oral hearing for a modification of spousal support. On October 11, 2001, the magistrate filed her findings of fact and conclusions of law that ordered, in part, that the temporary spousal support be reduced from $1,500 per month to $850 per month based on Appellant's new employment.

{¶5} On November 8, 2001, the parties entered into an oral separation agreement and agreed to submit a written entry to the court in 21 days. The in-court agreement provided that Appellee would pay spousal support to Appellant in the amount of $800 per month for two years with a reservation of jurisdiction to the court to terminate the support based on death, remarriage or cohabitation.

{¶6} Approximately six months later, Appellee filed a post-divorce motion to terminate spousal support and a motion to find Appellant in contempt. As cause, Appellee asserted that Appellant was cohabiting with an unrelated male. The magistrate heard all motions in August of 2002, and issued a decision on September 9, 2002.

{¶7} On September 24, 2002, Appellant filed an unspecified objection fifteen days after the magistrate's decision was filed. Appellant's supplemental objections, when filed with leave of court, consisted of two objections. Appellant's primary objection was that the spousal support agreement was entered into with Appellee's full knowledge that Appellant was to some extent cohabitating with an unrelated male at the time. Secondly, she objected to the magistrate's finding in paragraph 19 of her decision that Appellant and her unrelated male resident were, "living together * * * for a sustained duration," and "sharing expenses." She argued that the findings were

improper and contrary to governing law. The trial court overruled these objections on December 10, 2002.

{¶8} The appropriate standard when reviewing a trial court's determination in a domestic relations case is the abuse of discretion standard. *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144, 541 N.E.2d 1028. A trial court's decision in a domestic relations matter should not be disturbed on appeal unless the alleged error in the decision involves more than an error of judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. The trial court's attitude must be unreasonable, arbitrary or unconscionable. Id.

{¶9} Appellant's first assignment of error states:

{¶10} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY OVERRULING THE OBJECTIONS TO THE MAGISTRATE'S DECISION WHICH WAS RENDERED CONTRARY TO OHIO LAW."

{¶11} Appellant presents two issues for review under this assignment of error. The first asserts that the trial court erred in terminating her spousal support based on its finding that Appellant was cohabitating with an unrelated male.

{¶12} A trial court has broad discretion in determining spousal support. *Moell v. Moell* (1994), 98 Ohio App.3d 748, 753, 649 N.E.2d 880, appeal not allowed (1995),

72 Ohio St.3d 1407, 647 N.E.2d 496, citing *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 67, 554 N.E.2d 83. Determining whether a living arrangement or a lifestyle constitutes "cohabitation," for spousal support purposes, is a factual question for the trial court. *Moell* supra, citing *Dickerson v. Dickerson* (1993), 87 Ohio App.3d 848, 851, 623 N.E.2d 237.

{¶13} The parties and the trial court agree that three key factors, as set forth in *Moell*, 98 Ohio App.3d 748, 649 N.E.2d 880, are usually determinative as to whether a cohabitation clause has been triggered. "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 752, 649 N.E.2d 880.

{¶14} Appellant asserts that there is no evidence supporting the second and third *Moell* factors, and thus, the trial court's termination of spousal support should be reversed.

{¶15} The trial court in *Moell* refused to terminate the spousal support award to the ex-wife despite the fact that she was living with an unrelated male to whom she was engaged. Id. at 749, 649 N.E.2d 880. The ex-wife in *Moell* suffered a stroke, and thereafter she resumed a prior relationship with an unrelated male. Id. The unrelated

male moved in with the ex-wife to assist with her daily and personal needs resulting from the stroke. Id.

{¶16} The Sixth District Court of Appeals in *Moell* initially reviewed the rationale underlying spousal support awards and the reason for cohabitation clauses. Id. at 751-752, 649 N.E.2d 880. *Moell* held:

{¶17} "The purpose of spousal support is to provide for the financial needs of the ex-spouse. * * * If the ex-spouse is living with another person, and that person provides financial support or is supported, then the underlying need for spousal support is reduced or does not exist. * * *

{¶18} "The purpose of a cohabitation clause is to prevent inequity in two situations involving spousal support. The first situation occurs when an ex-spouse would receive support from two sources[.] * * * The second situation arises when the ex-spouse who is receiving spousal support uses such payments to support a nonrelative member of the opposite sex. * * * Cohabitation, in the legal sense, thus implies that 'some sort of monetary support is being provided by the new partner or for the new partner. * * * [.]'" (citations omitted.) Id.

{¶19} Thereafter, *Moell* set forth the "three principal factors" on the issue of cohabitation. *Moell* also set forth other factors a court may use to evaluate whether cohabitation had occurred:

{¶20} "* * * criteria, including both the behavior and the intent of the parties. Whether the parties have assumed obligations, including support, equivalent to those arising from a ceremonial marriage is a highly persuasive factor. * * * Intent to cohabit, while not conclusive, may also be an indicator of cohabitation. * * * Likewise, neither the presence nor the absence of a sexual relationship is dispositive of the issue of cohabitation. * * * Additionally, contemplation of marriage has been considered and found not to be conclusive. * * * Each case must be evaluated on its own particular set of facts to determine whether cohabitation exists." (citations omitted.) Id. at 752.

{¶21} While all interested parties agreed that the *Moell* factors dictate the outcome in this case, it should be noted that these three factors have not been specifically adopted by the Ohio Supreme Court, this Court or statute as the only factors to consider.

{¶22} In the instant case, Appellant asserts that there is no evidence in the record relative to the second and third factors. Appellant is incorrect. To the contrary, the trial judge, in adopting the magistrate's order, addressed each factor individually.

{¶23} First, with regard to "an actual living together," the trial court found that Appellant's friend was residing with her since September, 2001; that he received his mail at that address; that they maintained a sexual relationship; and, that there was no indication that he was expected to move out in the near future. (12/10/02 Judgment Entry, pp. 2, 4.)

{¶24} With regard to the second factor, living together "of a sustained duration," the court found that the cohabitation from September of 2001 until August 21, 2002, was a period of approximately one year. The court also found that there was no evidence that Appellant's friend rotated living between the Appellant's home and his parents' home. (12/10/02 Judgment Entry, pp. 4-5.)

{¶25} Finally, regarding, "shared expenses with respect to financing and day-to-day incidental expenses," the trial court noted Appellant's testimony that she did not share any day-to-day incidental expense with her friend; that they did not incur joint debts; and, that Appellant's expenses had not changed from the time of the divorce. (12/10/02 Judgment Entry, p. 5.) She testified that she paid the same amount of monthly expenses while her friend paid any increase in expenses as a result of the fact that he lived with her: "[f]or example, Defendant testified that if her water bill was previously listed at $10.00, she continues to pay that $10.00 every month; however if

the bill is increased in any manner, then Mr. Mallery pays the increase." (12/10/02 Judgment Entry, p. 5.) Appellant also testified that she paid the mortgage payment and water bill without contribution from her friend, and he paid no rent. (12/10/02 Judgment Entry, pp. 5-6.) The court also noted that there was inconsistent testimony as to whether Appellant's friend consumed any of her food.

{¶26} The trial court held that Appellant was essentially supporting Mr. Mallery with her spousal support payments. In fact, the trial court quoted *Moell* in its entry referring to one purpose of cohabitation clauses in spousal support agreements, i.e., the inequity of an ex-spouse supporting a, "nonrelative member of the opposite sex." (12/10/02 Judgment Entry, p. 5.) *Moell*, supra, at 751-752, 649 N.E.2d 880; see, also, *Nemeth v. Nemeth* (1997), 117 Ohio App.3d 554, 690 N.E.2d 1338.

{¶27} As a result of the trial court's review and analysis of the three key factors, it concluded that Appellant was using her spousal support to support her friend contrary to the rationale underlying the cohabitation clause. Based on the trial court's detailed analysis of this issue which was supported with evidence, there was no abuse of discretion in its finding that Appellant was cohabitating with an unrelated male.

{¶28} Appellant's second argument under her first assignment of error is that Appellee agreed to the spousal support with the knowledge that Appellant was

cohabitating with an unrelated male, and therefore, Appellee should be precluded from seeking termination of the spousal support based on cohabitation.

{¶29} As a foundation for this argument, Appellant relies on the Second Appellate District's decision *Dean-Kitts v. Dean*, 2nd Dist. No. 02CA18, 2002-Ohio-5590. In *Dean-Kitts*, the husband agreed to pay spousal support with full awareness of his wife's cohabitation. Id. at ¶¶7, 16. *Dean-Kitts* found that the husband was estopped from enforcing the cohabitation clause of the divorce decree because of his prior acquiescence. Id. at ¶25. The Second District Court of Appeals held that the husband used the ex-wife's cohabitation as a negotiating tool in exchange for her agreement to forego her one-half interest in the marital residence. Id. at ¶24.

{¶30} The facts in the case at bar are clearly distinguishable from *Dean-Kitts*. At the September 26, 2001, hearing, Appellant testified that an unrelated male was residing with her. On appeal, though, Appellant only presents part of the relevant facts that were before the trial court. The hearing transcript reveals the following exchange between Appellant and Appellee's counsel:

{¶31} "Q: And that is the marital residence that was the property that you've resided in. And with whom do you reside at that location?

{¶32} "A: Myself. At the moment, James Mowery [sic] is staying there. He's about to move out. He has an apartment.

{¶33} "Q: He is living there now, though?

{¶34} "A: It's just a temporary. He's staying between me [sic] and his mother's house.

{¶35} "Q: How long has he resided there?

{¶36} "A: About three or four weeks.

{¶37} "Q: Does he pay rent to you?

{¶38} "A: He has not.

{¶39} "Q: Okay. * * *" (9/26/01 Plaintiff's Tr., pp. 4-5.)

{¶40} The magistrate reduced Appellant's spousal support from $1,500 per month to $850 per month after that hearing. Appellant does not argue that the amount was reduced from $1,500 to $850 because of the "cohabitation," and she agrees with Appellee that this reduction was a result of her new employment.

{¶41} Thereafter, the in-court separation agreement of November 8, 2001, provided that Appellant would receive $800 per month in spousal support. Appellant argues that since her testimony regarding her "cohabitation" occurred in Appellee's

presence *before* the separation agreement, then Appellee must have relied on this information in agreeing to pay $800 per month in spousal support.

{¶42} However, the evidence does not support Appellant's argument. The in-court settlement agreement of November 8, 2001, included the cohabitation termination language. The record does not mention that Appellant was living with anyone or that Appellant's "cohabitation" was an inducement to enter the agreement:

{¶43} "MR. DEVICCHIO: With regards [sic] to spousal support, Ms. Cleland will receive spousal support in the amount of $800.00 per month for two years. At that time -- the court will retain jurisdiction over that for purposes of death, remarriage, cohabitation.

{¶44} "* * *

{¶45} "THE COURT: Now, with regard to spousal support, there's a sum certain that Mr. Cleland will be paying Mrs. Cleland. Do you understand that that is not modifiable? You can terminate that upon the death of either one of you, upon wife's cohabitation with an unrelated male or her remarriage. Okay. With that in mind, are you satisfied with the length of the spousal support, as well as the amount?

{¶46} "* * *

{¶47} "MRS. CLELAND: Yes." (11/8/01 Tr., pp. 9, 20.)

{¶48} Based on the foregoing, the trial court found that *Dean-Kitts*, supra, was distinguishable. The trial court specifically relied on Appellant's September 26, 2001, testimony in which she testified that her friend was only staying with her temporarily and was about to move out. The court also noted that the record lacked any evidence establishing that Appellant agreed to forego a marital asset in exchange for spousal support.

{¶49} Having addressed both of the subissues, Appellant's first assignment of error is overruled.

{¶50} Appellant's second assignment of error asserts:

{¶51} "THE TRIAL COURT COMMITTED ERROR WHEN IT ALLOWED AND URGED APPELLEE TO PROCEED WITH HIS CASE IN CHIEF AFTER HE RESTED AND AFTER APPELLANT MOVED FOR DISMISSAL."

{¶52} Appellant's second assignment of error concerns the magistrate's denial of her request for a dismissal at the September 21, 2002, motion to terminate spousal support hearing. This issue was not raised as an objection to the magistrate's decision. This procedural issue must be addressed before the substantive aspect of this assignment of error.

{¶53} Civ.R. 53(E)(3)(b) provides:

{¶54} "* * * A party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law unless the party has objected to that finding or conclusion under this rule."

{¶55} The Eighth District Court of Appeals in *Asad v. Asad*, (1999), 131 Ohio App.3d 654, 656, 723 N.E.2d 203, noted:

{¶56} "The Staff Note to Civ.R. 53(E) indicates that '[t]he rule reinforces the finality of trial court proceedings by providing that failure to object constitutes a waiver on appeal of a matter which could have been raised by objection. * * * [A] magistrate's decision to which no objection is made may be adopted unless there is apparent error * * *.'"

{¶57} In *Asad*, the husband did not file any objections to the magistrate's decision denying his counsel's motion for a continuance of a hearing. As a result, the court found that he waived any right to appeal this issue. Id.; see also *Harbeitner v. Harbeitner* (1994), 94 Ohio App.3d 485, 641 N.E.2d 206, appeal not allowed (1994), 70 Ohio St.3d 1465, 640 N.E.2d 527*; Champion v. Dunns Tire And Auto, Inc*. (June 26, 2001), 7th Dist. No. 00 CA 42, 3.

{¶58} In the instant case, Appellant did not object to the magistrate's decision on the ground presented in her second assignment of error. Further, Appellant does

not assert that the judge committed an "apparent error." See *Asad*, supra. As such, Appellant's second assignment of error fails since it was not properly raised on appeal pursuant to Civ.R. 53(E)(3)(b).

{¶59} In conclusion, the trial court appropriately weighed the evidence and the law in upholding the magistrate's decision in finding that Appellant was cohabitating with an unrelated male in breach of the spousal support agreement. The record reflects that this decision was not unreasonable, arbitrary or unconscionable.

{¶60} The trial court's judgment is hereby affirmed.

Judgment affirmed.

Donofrio and Vukovich, JJ., concur.