[Cite as *Burns v. Burns*, 2012-Ohio-2850.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

CHERI BURNS,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-05-050
	:	O P I N I O N
- vs -		6/25/2012
	:	
THOMAS P. BURNS,	:	
Defendant-Appellant.	:	

APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. 05 DR 29699

Fred S. Miller, Baden & Jones Bldg., 246 High Street, Hamilton, Ohio 45011, for plaintiff-appellee

Thomas G. Eagle, 3386 N. State Route 123, Lebanon, Ohio 45036, for defendant-appellant

RINGLAND, J.

{¶ 1} Defendant-appellant, Thomas P. Burns, appeals the decision of the Warren County Court of Common Pleas, Division of Domestic Relations, modifying his spousal and child support obligations to his ex-wife, plaintiff-appellee, Cheri Burns.

{¶ 2} The parties were divorced on June 7, 2007. The court ordered appellant to pay child and spousal support based on an annual income of $163,600. Appellant moved to

modify spousal support and child support on March 17, 2010, and a supplemental motion to modify spousal support on December 8, 2010, on the basis that he had suffered an involuntary reduction in income and that appellee was cohabitating with another unrelated person in a relationship similar to marriage. There were two children yet to be emancipated at the time of the motions.

{¶ 3} In her February 10, 2011 decision, the magistrate averaged appellant's incomes for 2007, 2008 and 2009 and found his new income for purposes of child support and spousal support was $144,555. The magistrate further found that appellee's relationships with other unrelated persons were not the functional equivalents of marriage, and therefore did not terminate or modify spousal support accordingly.

{¶ 4} Appellant timely filed objections to the magistrate's decision. On May 4, 2011, the trial court overruled all of appellant's objections.

{¶ 5} Appellant timely appealed the trial court's decision, raising three assignments of error for our review.

{¶ 6} Assignment of Error No. 1:

{¶ 7} THE TRIAL COURT ERRED IN NOT TERMINATING OR MODIFYING THE SPOUSAL SUPPORT OBLIGATION DUE TO WIFE'S COHABITATION.

{¶ 8} Within this assignment of error, appellant argues that, "[a] trial court errs in not terminating or modifying a spousal support order when the receiving spouse has been, was, or is cohabitating with another by living together, sharing expenses, and benefiting from each other's income, even if only temporarily or partially."

{¶ 9} Within the context of a divorce decree, "cohabitation" contemplates a relationship that approximates, or is the functional equivalent of, a marriage. *Keeley v. Keeley*, 12th Dist. Nos. CA1999-07-075, CA1999-08-080, at 3, 2000 WL 431362 (Apr. 17, 2000), citing *Piscione v. Piscione*, 85 Ohio App.3d 273, 275 (9th Dist.1992). In determining

whether cohabitation exists, courts should look to three principal factors: "(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." *Shippy v. Shippy*, 5th Dist. No. 10CA000016, 2010-Ohio-5332, ¶ 28, quoting *Moell v. Moell*, 98 Ohio App.3d 748, 752 (6th Dist.1994). In turn, cohabitation "requires not only a relationship, sexual or otherwise, of a permanent, continuing nature, but also some sort of monetary support between the spouse and the paramour so as to be the functional equivalent of a marriage." *Cravens v. Cravens*, 12th Dist. No. CA2008-02-033, 2009-Ohio-1733, ¶ 10, quoting *Barrett v. Barrett*, 12th Dist. No. CA95-06-110, at 21, 1996 WL 307236 (June 10, 1996). The pertinent issue, therefore, is whether the alleged cohabitants "assumed obligations equivalent to those arising from a ceremonial marriage." *Taylor v. Taylor*, 11 Ohio App.3d 279, 280 (1st Dist.1983).

{¶ 10} Whether a particular relationship or living arrangement constitutes cohabitation is a question of fact best determined by the trial court on a case-by-case basis. *Marley v. Marley*, 12th Dist. No. CA97-03-072, at 4, 1997 WL 632866 (Oct. 13, 1997); *Guggenbiller v. Guggenbiller*, 9th Dist. No. 10CA009871, 2011-Ohio-3622, ¶ 8. In turn, this court will not overturn a trial court's findings regarding cohabitation so long as the court's decision is supported by some competent, credible evidence. *Moore v. Moore*, 12th Dist. No. CA95-05-013, at 4, 1996 WL 42329 (Feb. 5, 1996); *Austin v. Austin*, 170 Ohio App.3d 132, 2007-Ohio-676, ¶ 6 (9th Dist.). In determining whether competent and credible evidence exists, "[a] reviewing court should be guided by a presumption that the findings of a trial court are correct, since the trial judge is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use those observations in weighing the credibility of the testimony." *Bey v. Bey*, 3rd Dist. No. 10-08-12, 2009-Ohio-300, ¶ 15, quoting *Barkley v. Barkley*, 119 Ohio App.3d 155, 159 (4th Dist.1997).

{¶ 11} The record in the present case indicates that appellee and Mr. James, her

alleged current "paramour," do not live together but instead maintain separate residences. While evidence was introduced that Mr. James' vehicle is frequently at appellee's house, that he often spends the night there, and that they are engaged in a sexual relationship, the evidence did not prove that Mr. James resides there. The record is also devoid of any evidence that Mr. James and appellee shared in their finances or held themselves out as a married couple. Furthermore, we agree with the trial court that there was not, "sufficient evidence to quantify a potential modification of support, other than to speculate on how much Mr. James eats or adds to any other household expense when he is at [appellee's] house for the weekend."

{¶ 12} The evidence regarding the cohabitation of appellee's previous boyfriend, Mr. Perkins, was equally insufficient. According to the record, Mr. Perkins spent the night with appellee on numerous occasions, engaged in a sexual relationship with her, and performed work around the house for her. Once again, these activities do not rise to the level that their relationship could be deemed the functional equivalent of a marriage. Nor did appellant provide sufficient evidence to particularly quantify a modification of support based on appellee's relationship with Mr. Perkins even if it were an ongoing relationship.

{¶ 13} Therefore, while nothing precludes the trial court from finding appellee and Mr. James are cohabitating should their relationship more resemble a marriage in the future, after a thorough review of the record, we find the trial court's decision finding that appellee did not cohabitate with Mr. Perkins in the past and was not cohabitating with Mr. James at the time at the hearing was supported by competent, credible evidence. Accordingly, appellant's first assignment of error is overruled.

{¶ 14} Assignment of Error No. 2:

{¶ 15} THE TRIAL COURT ERRED IN DETERMINING HUSBAND'S INCOME FOR SUPPORT PURPOSES.

{¶ 16} More specifically, appellant argues that, "[a] trial court errs in determining a parent/spouse's income for support purposes by imputing a 'reasonable amount' and by excluding the most recent and current information in favor of the most outdated, and without finding of voluntary unemployment or underemployment by the obligor spouse."

{¶ 17} A trial court has broad discretion in determining a spousal support award, including whether or not to modify an existing award. *Hutchinson v. Hutchinson*, 12th Dist. No. CA2009-03-018, 2010-Ohio-597, ¶ 16, citing *Strain v. Strain*, 12th Dist. No. CA2005-01-008, 2005-Ohio-6035, ¶ 10. Thus, absent an abuse of discretion, a spousal support award will not be disturbed on appeal. *Id*. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Id*.; *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 18} In exercising its discretion to modify a spousal support award, the trial court must determine: "(1) that the divorce decree contained a provision specifically authorizing the court to modify the spousal support, and (2) that the circumstances of either party have changed." *Strain* at ¶ 11; R.C. 3105.18(E). Additionally, the change in circumstances must be substantial, not purposely brought about by the moving party, and not contemplated at the time of the divorce decree. *Mandelbaum v. Mandelbaum*, 121 Ohio St.3d 433, 2009-Ohio-1222, ¶ 31-32. The party seeking to modify a spousal support obligation bears the burden of showing that the modification is warranted. *Hill v. Hill*, 12th Dist. Nos. CA2004-08-066, CA2004-09-069, 2005-Ohio-5370, ¶ 5.

{¶ 19} The trial court heard ample evidence as to the alleged significant decline in income suffered by appellant. Appellant argued that the court should have considered his 2010 base pay ($87,500, which includes a car allowance), when averaging his income for the previous three years. However, the trial court did not find appellant's evidence regarding his income to be credible. The court specifically pointed that for 2010, "no tax return had yet

been prepared. It is obvious that [appellant's] income is more than his salary." The trial judge has the best opportunity to view the demeanor, attitude, and credibility of each witness, and this court will not second-guess its judgment. *Tomes v. Tomes*, 12th Dist. No. CA2003-10-264, 2005-Ohio-1619, ¶ 10.

{¶ 20} While evidence was introduced that appellant's company could not afford to pay him any more than his base salary, there was also contradictory evidence that indicated suspicious behavior on the part of appellant. For instance, appellant contended that he repaid the company for $15,000 in legal fees, yet only a $10,000 check was introduced as evidence, and even then the check was made payable to another officer of the company rather than the company itself. In addition, the accountant who testified as to the company's ability to pay appellant any more than his base salary also testified that she was unaware he had spent the previous year in prison, that she ignored a significant increase in deferred income due to her method of analysis, and that she could not account for significant increases in the company's expenses. In light of the foregoing, we cannot find that the trial court erred in failing to consider appellant's alleged 2010 salary when calculating the three-year average of his income.

{¶ 21} We are aware that the trial court has retained jurisdiction to modify the amount and duration of the spousal support award. Thus, nothing about this decision will preclude appellant from seeking a modification of the award if he is able prove a "change of circumstances" in the future. R.C. 3105.18(E)(1); see *Sheehy v. Sheehy*, 12th Dist. No. CA2010-01-007, 2010-Ohio-2967.

{¶ 22} Appellant's second assignment of error is overruled.

{¶ 23} Assignment of Error No. 3:

{¶ 24} THE TRIAL COURT ERRED IN AWARDING THE TAX EXEMPTION TO THE WIFE.

{¶ 25} Appellant argues that, "[a] [c]ourt errs in awarding a tax exemption for a minor child to a parent with little or no earned income instead of the parent with a substantially higher earned income."

{¶ 26} An appellate court reviews a trial court's decision allocating tax exemptions for dependents under an abuse of discretion standard. *Rainey v. Rainey*, 12th Dist. No. CA2010-10-083, 2011-Ohio-4343, ¶ 38. However, this discretion is both guided and limited by the statutory requirements of R.C. 3119.82. *Pahls v. Pahls*, 12th Dist. No. CA2009-01-005, 2009-Ohio-6923, ¶ 21.

> R.C. 3119.82 states, in pertinent part, that whenever a court issues, modifies, or reviews a court child support order, it shall designate which parent may claim the child who is the subject of the support order as a dependent for federal income tax purposes.
>
> If the parties do not agree which parent should claim the child as a dependent, the court may permit the parent who is not the residential parent to claim the child as a dependent for federal income tax purposes only if the court determines that this furthers the best interest of the child and the payments for child support are substantially current as ordered by the court for the year in which the child will be claimed as a dependent. R.C. 3119.82.
>
> In cases in which the parties do not agree which parent may claim the child as a dependent, the court shall consider, in making its determination, any net tax savings, the relative financial circumstances and needs of the parents and child, the amount of time the child spends with each parent, the eligibility of either or both parents for the federal earned income tax credit or other state or federal tax credit, and any other relevant factor concerning the best interest of the child. *Id*.

In re A.E.G.-D., 12th Dist. No. CA2011-04-031, 2012-Ohio-547, ¶ 5-7.

{¶ 27} The Internal Revenue Code creates a presumption in favor of the custodial parent in the allocation of the federal income tax dependency exemption. *See Pahls at* ¶ 22. If there is a disagreement as to which parent should claim a child as a dependent, "the burden is on the nonresidential parent to produce competent and credible evidence to show

that allocating the dependency exemption to the nonresidential parent would be in the best interests of the child." *Maessick v. Maessick*, 171 Ohio App.3d 492, 2006-Ohio-6245, ¶ 15 (7th Dist.). In the present case, appellant failed to introduce any evidence that it was in the best interests of the children to reallocate which parent may claim them as dependents. The sole basis for his argument is that he has a higher income, and therefore he should receive the tax exemption.

{¶ 28} Appellant is incorrect in asserting that taxable income alone is determinative of which parent should receive the tax dependency exemption. As stated above, that determination is based upon numerous factors, including any net tax savings, the relative financial circumstances and needs of the parents and child, the amount of time the child spends with each parent, the eligibility of either or both parents for the federal earned income tax credit or other state or federal tax credit, and any other relevant factor concerning the best interest of the child. R.C. 3119.82. In addition to his failure to provide any evidence as to the factors listed above, appellant failed to prove that it would be in the best interest of the children that he be allocated the exemptions even if he had proven that he would receive the greater tax benefit.

{¶ 29} In light of the foregoing, having found that appellant failed to carry his burden in providing competent and credible evidence that awarding him the tax dependency exemption would be in the best interests of the children, appellant's third assignment of error is overruled.

{¶ 30} Judgment affirmed.

HENDRICKSON, P.J., and PIPER, J., concur.