

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

JENNIFER A. KEITH,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-12-335
- vs -	:	<u>OPINION</u>
	:	12/19/2011
ERIC S. KEITH,	:	
Defendant-Appellant.	:	

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. DR09-09-1067

Buechner Haffer Meyers & Koenig Co., LPA, Robert J. Meyers, 105 East Fourth Street, Suite 300, Cincinnati, Ohio 45202, for plaintiff-appellee

J. Gregory Howard, 110 Main Street, Hamilton, Ohio 45011, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Eric S. Keith (Husband), appeals from the decision of the Butler County Court of Common Pleas, Domestic Relations Division, establishing his child and spousal support obligations following his divorce from plaintiff-appellee, Jennifer A. Keith (Wife). For the reasons outlined below, we affirm.

{¶2} Husband, an engineer making \$98,000 per year, and Wife, a stay-at-home

mother who was not otherwise employed for the past 13 years, were married on July 11, 1992. The couple has five children, Jacob, born October 28, 1997, Grace, born July 30, 2000, and a set of triplets, Noah, Elliott, and Hope, all of whom were born June 16, 2004. Citing incompatibility, Wife filed for divorce on September 22, 2009.

{¶3} On September 29, 2010, following a two-day divorce hearing, the trial court issued a decision dividing the couple's marital property and ordering Husband to pay Wife \$1,440.71 per month in child support and \$2,000 per month in spousal support. The trial court subsequently incorporated its decision ordering Husband to pay child and spousal support into a final judgment entry and decree of divorce on November 19, 2010.

{¶4} Husband now appeals from the trial court's decision regarding his child and spousal support obligations, raising two assignments of error for review.

{¶5} Assignment of Error No. 1:

{¶6} "THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING SPOUSAL SUPPORT TO THE WIFE BASED UPON WIFE'S COHABITATION DURING THE PENDENCY OF THE PARTIES' DIVORCE."

{¶7} In his first assignment of error, Husband argues that the trial court erred by awarding Wife spousal support. In support of this claim, Husband argues that "where there is competent, credible evidence of cohabitation provided to the trial court, it is an abuse of discretion for the court to award spousal support to the spouse that engages in the cohabitation." We disagree.

{¶8} It is well-established that a trial court has broad discretion in determining whether an award of spousal support is proper based on the facts and circumstances of each case. *Beamer v. Beamer*, Warren App. No. CA2009-08-107, 2010-Ohio-3143, ¶23, citing *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 67. In turn, "absent an abuse of discretion, a spousal support award will not be disturbed on appeal." *Hutchinson v. Hutchinson*, Clermont

App. No. CA2009-03-018, 2010-Ohio-597, ¶16. An abuse of discretion is more than error of law or judgment; it requires a finding that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Anderson v. Anderson*, Warren App. No. CA2009-03-033, 2009-Ohio-5636, ¶11; *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶9} That said, we note that while issues regarding cohabitation generally relate to a trial court's final divorce decree making an award of spousal support terminable upon the recipient's cohabitation with another unrelated adult, a finding of "cohabitation during the pendency of the divorce should logically be a factor to bar an original award of support." See *Ridgeway v. Ridgeway*, Harrison App. No. 04-HA-570, 2005-Ohio-6444, ¶42; *Bernard v. Bernard*, Columbiana App. No. 00 CO 25, 2002-Ohio-552, 2002 WL 206411, *5. However, contrary to Husband's claim, and as this court has stated previously, although a finding of cohabitation may have a direct impact on a trial court's original spousal support award, such a finding does not operate "as an outright bar to spousal support." See *Tomes v. Tomes*, Butler App. No. CA2003-10-264, 2005-Ohio-1619, ¶13-14 (finding trial court erred by refusing to consider the issue of spousal support based solely on its cohabitation finding); *Watson v. Watson*, Franklin App. No. 03AP-104, 2003-Ohio-6350, ¶11-12 (finding trial court erred by refusing to award spousal support based solely on a finding of cohabitation at time of trial); see, e.g., *Patsey v. Patsey* (Dec. 16, 1998), Columbiana App. No. 96 CO 52, 1998 WL 896455, *6 (finding award of spousal support proper despite the trial court's finding spouse had cohabitated with unrelated male during pendency of divorce proceedings). Therefore, based on these principles, we find Husband's claim that "it is an abuse of discretion for the court to award spousal support to the spouse that engages in the cohabitation" to be a mischaracterization of the law.

{¶10} Regardless, even if we were to agree with Husband's claim, which we do not, we nevertheless find no error in the trial court's decision finding Wife was not cohabitating

with Jeffrey Hudson, her alleged "paramour," as such a finding was supported by competent, credible evidence.

{¶11} Within the context of a divorce decree, "cohabitation" contemplates a relationship that approximates, or is the functional equivalent of, a marriage. *Keeley v. Keeley* (Apr. 17, 2000), Clermont App. Nos. CA1999-07-075, CA1999-08-080, at 3, citing *Piscione v. Piscione* (1992), 85 Ohio App.3d 273, 275. 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*, Guernsey App. No. 10CA000016, 2010-Ohio-5332, ¶28, quoting *Moell v. Moell* (1994), 98 Ohio App.3d 748, 752. 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*, Warren App. No. CA2008-02-033, 2009-Ohio-1733, ¶10, quoting *Barrett v. Barrett* (June 10, 1996), Butler App. No. CA95-06-110, at 21. The pertinent issue, therefore, is whether the alleged cohabitants "assumed obligations equivalent to those arising from a ceremonial marriage." *Taylor v. Taylor* (1983), 11 Ohio App.3d 279, 280.

{¶12} 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* (Oct. 13, 1997), Butler App. No. CA97-03-072, at 4; *Guggenbiller v. Guggenbiller*, Lorain App. 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* (Feb. 5, 1996), Fayette App. No. CA95-05-013, at 4; *Austin v. Austin*, 170 Ohio App.3d 132, 2007-Ohio-676, ¶6. 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*, Mercer App. No. 10-08-12, 2009-Ohio-300, ¶15, quoting *Barkley v. Barkley* (1997), 119 Ohio App.3d 155, 159.

{¶13} In this case, the record indicates that Wife and Hudson, who she classifies as a "friend" for whom she had known for over 20 years, do not live together, but instead, maintain separate residences in Ohio and California. In addition, just as the trial court found, and with which we agree, although Hudson may have provided Wife with money to cover her rent, travel and education expenses, as well as attorney fees during these prolonged divorce proceedings, "[t]here was no evidence that [Hudson] is paying a significant portion of [Wife's] living expenses." In fact, as Wife testified, "[Hudson] has, at times, loaned me money to cover my expenses," but that any such assistance was "[o]n a temporary basis." While Husband may find Wife's testimony disingenuous, it is the trial court, and not this court, that is in the best position to view Wife's demeanor and weigh her credibility. See *Cravens*, 2009-Ohio-1733 at ¶17; *Tomes*, 2005-Ohio-1619 at ¶10. Therefore, while nothing precludes the trial court from finding Wife and Hudson 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 Wife was not cohabitating with Hudson at this time was supported by competent, credible evidence. See, e.g., *Schrader v. Schrader* (Jan. 21, 1998), Medina App. No. 2664-M, 1998 WL 46757, *8 (finding competent, credible evidence supported trial court's finding spouse was not cohabitating with another man making an award of spousal support proper). Accordingly, Husband's first assignment of error is overruled.

{¶14} Assignment of Error No. 2:

{¶15} "THE TRIAL COURT ERRED BY NOT DEVIATING FROM THE STANDARD CHILD SUPPORT GUIDELINES DUE TO THE FACT THAT [HUSBAND] HAS EXTENDED

PARENTING TIME UNDER THE PARTIES' SHARED PARENTING PLAN MORE THAN THE COURT'S STANDARD ORDER, DR610."

{¶16} In his second assignment of error, Husband argues that the trial court erred by "not deviating from the standard child support guidelines based upon the amount of time [he] actually has his children in his possession." According to Husband, by refusing to deviate from the standard child support guidelines, the trial court abused its discretion by "ignor[ing] the extra costs" he incurs as a result of his extended parenting time. We disagree.

{¶17} "The purpose of the child support system is to protect the child and his best interest." *Kauza v. Kauza*, Clermont App. No. CA2008-02-014, 2008-Ohio-5668, ¶10, quoting *Richardson v. Ballard* (1996), 113 Ohio App.3d 552, 555. It is well-established, therefore, that "[t]he trial court possesses considerable discretion in child support matters." *Pahls v. Pahls*, Butler App. No. CA2009-01-005, 2009-Ohio-6923, ¶10, quoting *Murray v. Murray* (1999), 128 Ohio App.3d 662, 666. As a result, "[m]atters involving child support are reviewed under the abuse-of-discretion standard." *Van Osdell v. Van Osdell*, Warren App. No. CA2007-10-123, 2008-Ohio-5843, ¶20. As noted above, an abuse of discretion is more than an error of law or judgment; it requires a finding that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Anderson*, 2009-Ohio-5636 at ¶11; *Blakemore*, 5 Ohio St.3d at 219.

{¶18} Pursuant to R.C. 3119.22, the trial court may order an amount of child support that deviates from the amount that would otherwise result from the use of the basic child support guidelines, if, after considering the factors and criteria set forth in R.C. 3119.23, the court determines that amount "would be unjust or inappropriate and would not be in the best interest of the child." *Ossai-Charles v. Charles*, Warren App. Nos. CA2010-12-129, CA2011-01-007, 2011-Ohio-3766, ¶68; *Zollar v. Zollar*, Butler App. No. CA2008-03-065, 2009-Ohio-1008, ¶22. "Extended parenting time," which generally contemplates something more than

parenting time during the standard visitation schedule, is one of the many factors that the trial court may consider in determining whether a deviation is appropriate. See R.C. 3119.23(D); *Pahl v. Haugh*, Hancock App. No. 5-10-27, 2011-Ohio-1302, ¶39; *Walker v. Walker*, Lake App. No. 2010-L-025, 2010-Ohio-5798, ¶30. However, although the trial court is permitted to deviate from the standard child support worksheet upon finding one or more of the factors listed in R.C. 3119.23 are present, "[o]ne is not automatically entitled to a downward deviation merely because a factor is present." *Mitchell v. Mitchell*, Lake App. No. 2009-L-124, 2010-Ohio-2680, ¶28; *Borer v. Borer*, Seneca App. No. 13-09-24, 2009-Ohio-6522, ¶24.

{¶19} In this case, the trial court refused to deviate from the standard child support guidelines based on the couple's "time allocation in the shared parenting plan." We find no abuse of discretion in the trial court's decision. This is particularly true considering the great income disparity between Husband, an engineer making \$98,000 per year, and Wife, a stay-at-home mother who was not otherwise employed for the past 13 years. See, e.g., *Preece v. Stern*, Madison App. Nos. CA2008-09-024, CA2008-12-029, 2009-Ohio-2519, ¶38 (finding no error in the trial court's decision to follow the standard child support guidelines despite father's additional parenting time where there existed a "large income disparity between the parties"); *Stauffer v. Stauffer*, Geauga App. No. 2008-G-2860, 2009-Ohio-998, ¶23 (finding no error in the trial court's decision to adhere to the standard child support guidelines even though father had extended parenting time due to the parties' great income disparity); *Lopez v. Coleson*, Putnam App. No. 12-05-24, 2006-Ohio-5389, ¶9 (finding no error in trial court's decision to follow the standard child support guidelines despite father being awarded additional visitation time "[g]iven the differences in household income"). Therefore, having found no error in the trial court's decision to not deviate from the standard child support guidelines, Husband's second assignment of error is overruled.

{¶20} Judgment affirmed.

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