**[Cite as *Gaul v. Gaul*, 2012-Ohio-1673.]**

**IN THE COURT OF APPEALS**

**ELEVENTH APPELLATE DISTRICT**

**ASHTABULA COUNTY, OHIO**

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| WESLEY J. GAUL, JR., | : | **O P I N I O N** |
| Plaintiff-Appellee, | : | **CASE NO. 2011-A-0033** |
| - vs - | : | |
| DIANA J. GAUL, | : | |
| Defendant-Appellant. | : | |

Civil Appeal from the Ashtabula County Court of Common Pleas, Domestic Relations Division, Case No. 2006 DR 425.

Judgment: Affirmed.

*James R. Skirbunt* and *Sharon A. Skirbunt*, Skirbunt & Skirbunt Co., L.P.A., 3150 One Cleveland Center, 1375 East Ninth Street, Cleveland, OH 44114 (For Plaintiff-Appellee).

*Diana J. Gaul*, pro se, 772 South Spruce Street, Jefferson, OH 44047-8691 (Defendant-Appellant).

THOMAS R. WRIGHT, J.

**{¶1}** The instant appeal is from a final judgment of the Ashtabula County Court of Common Pleas, Domestic Relations Division. Appellant, Diana J. Gaul, contests the merits of the trial court's ruling that she is no longer entitled to receive spousal support because she has been cohabitating with another man. As the primary grounds for the appeal, she maintains that the trial court's underlying factual findings were against the manifest weight of the evidence.

**{¶2}** Appellant and appellee, Wesley John Gaul, Jr. ("Gaul"), were married for approximately thirty years and had three children. During the period of time germane to the "cohabitation" issue, only one of the children, Zachary Bryce, was a minor and lived in the marital residence. That home was constructed by the parties in the early 1990's, and was located at 772 South Spruce Street, Jefferson, Ohio.

**{¶3}** Prior to their divorce, the parties attended Sunday religious services at the Jefferson Church of the Nazarene. In conjunction with his church activities in the mid-1990's, Gaul became re-acquainted with Kenneth Baker, a person he had known during his high school years. When Gaul told Baker that his family was still in the process of completing certain work on their new home, Baker volunteered to help with some of the projects. As a result, Baker continued to come to the Gaul home on a consistent basis for three years.

**{¶4}** At some point in 1999, Baker informed Gaul that he was having problems with his wife. A short time later, Baker told Gaul that he and his wife were separating, and that he had nowhere else to live. In response, Gaul indicated that he was willing to allow Baker to stay in his home's basement. Upon accepting this offer, Baker divorced his wife, and continued to reside with the Gauls for approximately thirty months.

**{¶5}** During this time frame, Baker and appellant began a small "craft" business in the basement. As the business grew, Baker, appellant, and Gaul formed a company, Kountry Décor, and then bought a tract of land and accompanying building to house the business. When these new premises again proved too small, they purchased a second piece of property for the business. Both tracts were located in Jefferson, Ohio, one on South Chestnut Street and one on East Jefferson Street. Moreover, ownership of both

tracts was split between Baker, appellant, and Gaul.

**{¶6}** In late 2001, Gaul requested Baker to leave the Gaul marital residence on South Spruce Street. For approximately the next twelve months, Baker resided with a second family in the Jefferson area. In 2003, Baker then moved into an apartment that was located in the building on the "East Jefferson" property. Initially, he lived in a unit on the main floor of the building. However, after a few years, he moved into a separate unit in the basement of the building.

**{¶7}** Despite the fact that he no longer resided with the Gauls, Baker continued to participate in the operation of Kountry Décor. In addition, Baker continued to visit the Gaul residence on a regular basis. In this respect, the degree of Baker's participation in Gaul family events was virtually the same as it had been during the thirty months that he actually lived at the Gaul home. Furthermore, since Gaul was required to travel outside the state regularly as part of his primary job, Baker was often at the residence with only appellant and Zachary. As a result, some persons outside the household began to view Baker as a second father/husband in the Gaul family.

**{¶8}** In June 2006, Gaul instituted his divorce action against appellant. Before the matter could be set for trial, the two parties were able to negotiate a settlement as to the two "Kountry Décor" properties. Specifically, Gaul agreed to transfer his interest in both tracts to appellant. Hence, ownership of the company and its assets lay solely with Baker and appellant.

**{¶9}** At some point in the mid-2000's, Baker and appellant chose to discontinue the "craft" aspect of Kountry Décor. After that, the main focus of the business became the rental of the two properties for either residential or commercial use. Eventually, the

"East Jefferson" property was modified to have three separate apartments, one of which Baker leased for $500 per month.

**{¶10}** Over the years, Baker became the sole person responsible for collecting the rent on behalf of the company. Upon obtaining those funds, including the $500 he paid each month, Baker would deposit the entire amount into a company bank account. He would then transfer a certain percentage of the funds into appellant's personal bank account and a certain percentage into his personal account. In turn, their bank would deduct a monthly mortgage payment from each of the two personal accounts. Appellant was responsible for the mortgage on the "South Chestnut" property, while Baker had the obligation to pay the "East Jefferson" mortgage.

**{¶11}** In February 2008, while the divorce case was still pending at the trial level, a physical altercation between Gaul and appellant occurred at the marital residence. In light of the seriousness of the event, appellant began to fear that Gaul might attack her again or would attempt to intimidate her. Consequently, since Gaul had already moved from the residence, she asked Baker to spend his evenings and nights at the home with her and Zachary. Accordingly, although he still continued to pay rent on the basement apartment at the "East Jefferson" building and maintained the majority of his personal belongings there, Baker stayed almost every night over the next twenty-five months with appellant at the Gaul home.

**{¶12}** During this time frame, Baker's role in the Gaul household was similar to what it had been previously. For example, she and appellant attended church together and would often go out for brunch with other church members after the services. They also went together to many of Zachary's activities, such as his soccer games. Similarly,

Baker assisted at the meetings of a “Bible quiz” club in which Zachary was involved at another church. Moreover, Baker and appellant took a number of out-of-state vacations together over the two-year period, including a trip to Las Vegas and California.

**{¶13}** Ultimately, the final divorce decree was rendered in January 2009. As to the marital residence, the judgment provided that, while appellant would retain exclusive possession of the home, Gaul would continue to pay the monthly mortgage payments until the home could be sold. The judgment further ordered Gaul to pay appellant the sum of $2,000 per month in basic spousal support, plus a distinct sum of approximately $300 each month for “cobra” medical coverage. Thus, given that the monthly mortgage payment was $2,300, Gaul was required to pay a total of $4,600 per month in support of appellant. Finally, the decree expressly indicated that spousal support would terminate upon appellant’s “death, remarriage or cohabitation with an unrelated male.”

**{¶14}** Within two months of the release of the final decree, Gaul moved the trial court to terminate his spousal support obligation on the legal grounds that appellant was presently cohabitating with Baker at the former marital residence. Over the ensuing few months, Gaul and appellant filed a significant number of other post-judgment motions pertaining to various issues. Due to the number of submissions, no action was taken on the motion to terminate over the next year. During that period, the Gaul residence was not sold, and Baker continued to spend almost every night there until March 2010.

**{¶15}** In June 2010, the first evidentiary hearing on the motion to terminate was conducted by the sitting trial judge who had rendered the final divorce decree. Over the next few months, the original judge developed certain health problems which deprived him of the ability to proceed on the motion. As a result, a retired judge was appointed

by the Supreme Court of Ohio to take over the matter. In November 2010, that judge heard additional testimony on the pending motion over a three-day period. In addition, the retired judge had the opportunity to review the transcript of the June 2010 hearing.

**{¶16}** In April 2011, the retired judge released a final judgment granting Gaul's motion to terminate. Upon considering the entire evidentiary intake and making certain findings of fact, the retired judge concluded that appellant and Baker had been living in a "virtual" state of marriage for approximately two years. Regarding the fact that Baker had continued paying rent on the "East Jefferson" apartment, the retired judge held that the fact that he may have had a separate residence was not relevant to whether he and appellant had engaged in cohabitation at the former marital residence. Accordingly, the retired judge, acting on behalf of the trial court, ordered that all aspects of Gaul's support obligation had terminated as of March 2009, and that appellant now owed him the sum of $60,100.76.

**{¶17}** In appealing the "termination" order, appellant has raised the following four assignments of error for review

**{¶18}** "[1.] The trial court erred to the prejudice of the defendant-appellant by not considering the divorce trial hearing facts and findings as indicated by the courts that the judge had read the transcripts and did not want to go over anything that was already said. Particularly, the plaintiff-appellee's testimony frequently differed completely opposite from the fact and findings of the cohabitation hearing presented by the plaintiff and his counsel.

**{¶19}** "[2.] The trial court erred to the prejudice of the defendant-appellant with the judge stating numerous unfounded facts and findings that are nowhere in the

transcripts or part of [the] record. It is evident that the plaintiff's attorney filed his facts and findings on January 13, 2011, and the courts repeated many findings that were not true and that were not part of the trial.

**{¶20}** "[3.] The trial court erred to the prejudice of the defendant-appellant with the judge stating in his fact and findings, numerous findings that are unfounded and irrelevant.

**{¶21}** "[4.] The trial court erred to the prejudice of the defendant-appellant with the Judge Mackey overruling an objection based on his knowledge of the case yet a second judge finished the hearings that did not have the background of knowledge of the case."

**{¶22}** Under her first assignment, appellant asserts that she was denied her right to a fair trial on the motion to terminate because the retired judge did not review the trial transcript of the original divorce proceeding. Specifically, appellant claims that she was prejudiced by the procedure followed by the retired judge because that judge rendered factual findings which conflicted with the evidence presented during the original trial.

**{¶23}** Although appellant states that there are many examples of these types of conflicts, her appellate brief only refers to one. The disputed factual finding pertained to whether appellant had repaid Baker a sum of money that he had paid to settle a debt owed by Kountry Décor. In support of the overall conclusion that, as part of their current relationship, Baker had given appellant money which she had never repaid, the retired judge cited Baker's payment of a state lien for unpaid sales tax stemming from the craft business. According to the retired judge, even though appellant was liable for a portion of the debt as a co-owner of Kountry Décor, Baker never sought total repayment from

her. Before this court, appellant submits that the retired judge's finding conflicted with a prior finding in the original divorce decree that she repaid approximately $20,000 of the delinquent sales tax.

**{¶24}** As to this point, this court would note that, in the following quote from her *pro se* brief, appellant admits that the entire "sales tax" debt to Baker has not been paid:

**{¶25}** "Again the judge erred in stating that I, Diana Gaul never paid Baker back when in fact I had and continued until my spousal support was stayed no fault of mine in September of 2010. The date of the cohabitation trial on August 23, 2010 was postponed due to my lawyer was in the hospital that day and he filed a motion for continuance ***. The plaintiff-appellee filed a motion to stay spousal support *** and was granted for reasons I, Diana Gaul will never understand. That left me with only half of the well money royalties that was awarded as part the divorce decree to live on and raise our son, and therefore could not possibly help pay for any losses at Kountry Décor from there on."

**{¶26}** Regardless of the relative merit of appellant's reason for not continuing to pay her share of the "sales tax" debt, the evidence before the retired judge established that part of the debt was still owed, and that Baker had not taken any new steps to collect on the debt. Hence, the retired judge's finding was not against the manifest weight of the evidence and did not conflict with any prior finding in the original divorce decree.

**{¶27}** As an aside, this court would further note that, in assuming authority over the case following his appointment, the retired judge never stated that he had reviewed the transcript of the original trial on the divorce petition. Instead, he only indicated that

he had read the transcript of the first hearing on the motion to terminate. To this extent, the retired judge based his determination solely upon the evidence presented during the hearings on the pending motion. Moreover, our review of the hearing transcripts shows that the judge did not place any limit upon the time frame of the evidentiary submissions of the parties; rather, he only stated that he would not permit either party to repeat any testimony which had been introduced during the first hearing before the original judge. Therefore, appellant had a complete opportunity to present any relevant evidence, and cannot establish that she was denied a fair trial. For this reason, her first assignment of error is without merit.

**{¶28}** Under her next assignment, appellant challenges the substance of seven factual findings set forth in the retired judge's written judgment. As the primary basis for her challenge, she contends that the findings in question should be rejected because it would appear that the judge copied the findings from a document of proposed findings which was submitted by Gaul's trial counsel after the completion of the motion hearings.

**{¶29}** As an initial point, this court would emphasize that appellant has failed to frame her challenges in the context of the standard which must be met before a finding of cohabitation can be made. In addressing this issue in prior appeals, we have stated that cohabitation consists of three elements: (1) the former spouse and the paramour must actually be residing together; (2) the relationship must be of a sustained duration; and (3) there must be a sharing of day-to-day living expenses and financing. *See*, *e.g.*, *In re Derecskey*, 11th Dist. No. 2008-G-2865, 2009-Ohio-2188, ¶20. In paraphrasing this standard, the *Derecskey* court observed that the existence of a relationship is not sufficient to prove cohabitation; there must also be a showing of monetary support that

results in the functional equivalent of marriage. *Id*.

**{¶30}** In regard to the "monetary support" requirement of the standard, this court has further stated:

**{¶31}** "The underpinning for decisions terminating spousal support rests on the rationale for spousal support itself:

**{¶32}** "'(Spousal support) is provided for the needed support of the ex-spouse and, if the ex-spouse is living with another person to the extent that the other person provides support or is supported, then the underlying need for (spousal support) is reduced or does not exist. Therefore, cohabitation, in the legal sense, implies that some sort of monetary support is being provided by the new partner or for the new partner. Without a showing of support, merely living together is insufficient to permit a termination of (spousal support).'" *Clark v. Clark*, 168 Ohio App.3d 547, 2006-Ohio-4820, ¶21-22 (11th Dist.), quoting *Thomas v. Thomas*, 76 Ohio App.3d 482, 485 (10th Dist.1991).

**{¶33}** In concluding that Gaul had satisfied the standard for cohabitation in this case, the retired judge relied heavily upon this court's prior decision in *Clark*. Under the facts of *Clark*, the paramour built a house in Trumbull County in which he permitted the ex-spouse to live following her divorce. The *Clark* paramour only lived in the house with the ex-spouse on the weekends; during the week, he lived in a separate residence in Columbus, Ohio. The ex-spouse did pay all the utilities for the Trumbull County home and bought all the groceries; however, beyond that, she did not have any monthly bills because, in addition to building the home, the paramour had bought her a new car.

**{¶34}** The trial court in *Clark* held that there was no cohabitation because there

was no sharing of expenses. In concluding that the trial court had abused its discretion in overruling the motion to terminate spousal support, this court found that the functional equivalent of a marriage had existed:

**{¶35}** "Our analysis turns on the sharing of living expenses between [the ex-spouse] and [the paramour]. It is significant that [the paramour] provided [the ex-spouse] with a home and a car. These are 'living expenses.' Without any contribution from her, with the exception that she paid the utility bills, [the ex-spouse] lived in a jointly-owned house that [the paramour] paid for. [The paramour] built the home, he furnished it, and he lives there. By providing a rent-free residence to her, as well as an automobile, he supports [the ex-spouse] and her standard of living.

**{¶36}** "The fact that [the paramour] owns another residence is irrelevant. His situation is like that of a traveling salesman who returns home on weekends. [The paramour] spends his workweek in Columbus, but on the weekends he stays in the house he built, the house that he jointly owns with his fiancé, and that he intends to reside in when he retires.

**{¶37}** "Moreover, [the ex-spouse] is sharing expenses with [the paramour]. The utility bills are shared in the sense that [the paramour] enjoys the benefits of these payments when he lives there on the weekends. ***." *Clark*, 2006-Ohio-4820, ¶33-35.

**{¶38}** Under the *Clark* analysis, the key point is that it is not necessary for both the paramour and the ex-spouse to be making financial contributions in order for there to be a sharing of expenses. Instead, the requisite sharing can occur when one party pays the expenses to the benefit of the second party.

**{¶39}** In the present case, the evidence readily demonstrated that appellant was

maintaining the former marital residence through the money she received each month from Gaul in spousal support. Hence, when Baker came over and spent each night with appellant at the residence, he was benefitting from the various expenditures she was making on such items as the utilities. As to this point, it must be noted that the former marital residence had been appraised at a value of $370,000, and that Baker was only paying $500 per month for his basement apartment. Consequently, Baker's standard of living was improved by staying with appellant.

**{¶40}** Although the *Clark* precedent does not require that there must be mutual sharing of day-to-day expenses, our review of the hearing transcript shows that Baker made some contributions to appellant's household. For example, there was significant evidence from which the retired judge could properly infer that Baker bought groceries for the household and also bought dinner for the family on numerous occasions. Along the same lines, the evidence showed that Baker paid for a number of vacations or trips for appellant, including an Alaskan cruise and separate excursions to Las Vegas and Niagara Falls. Furthermore, it was established that whenever the collected rent money from the two company properties was insufficient to pay any monthly bills, Baker would cover the deficit and not expect appellant to pay her share.

**{¶41}** As was noted above, it was appellant's position that Baker had spent the nights at the former marital residence in order to protect her from Gaul. Baker testified that, after approximately twenty-five months, he was able to stop spending the night at the home when appellant had a surveillance system installed and he bought a firearm for her. However, Baker never explained why it took two full years to find other means to protect appellant. In addition, even though a reference was made to a criminal action

against Gaul based upon the assault, it was also never explained why appellant could not obtain adequate protection through the local police.

**{¶42}** More importantly, it must be noted that, as part of his cross-examination, Baker expressly admitted that he and appellant had become more than just friends over the two-year period. Specifically, he stated that he and appellant had engaged in some romantic behavior, such as kissing and holding hands. As to the latter point, evidence was submitted demonstrating that appellant and Baker had engaged in sexual relations on a limited basis. In addition, Baker admitted that he had twice taken steps to obtain financing to purchase the Gaul residence. Based upon the foregoing, the retired judge could justifiably find that, even if Baker initially started to stay at the residence to merely protect appellant, the nature of their relationship became more akin to a marriage throughout his two-year stay.

**{¶43}** As part of the factual findings in the appealed judgment, the retired judge concluded that Baker and appellant presented themselves to the public as man and wife on many instances. Under the three-prong standard for cohabitation, though, this type of conclusion was not necessary. The evidence before the retired judge demonstrated that Baker and appellant had been living together in the former marital residence, that this relationship had been for a substantial period, and that there had been a sharing of expenses between the two of them. Thus, the retired judge's finding of cohabitation was not against the manifest weight of the evidence.

**{¶44}** Instead of focusing upon the foregoing analysis, appellant has challenged seven factual findings that the retired judge made in regard to certain tangential issues. However, our review of appellant's brief shows that, of the seven findings referenced by

her, six of them pertain to matters which occurred before the twenty-five month period in question. Although testimony regarding events prior to February 2008 was necessary to establish certain background facts, such facts were not controlling as to the ultimate issue of whether cohabitation had taken place. As a result, appellant's arguments as to these six points do not form a valid basis for reversing the decision to terminate Gaul's spousal support obligation.

**{¶45}** Of the seven factual issues cited by appellant under this assignment, only one was relevant to the disputed time frame. This particular issue concerned whether Baker was using Kountry Décor funds to pay the monthly loan payments for his motor vehicle. As to this point, a review of the hearing transcript does confirm that there was no basis for the retired judge's finding that company money was used in that manner; Baker clearly testified that he also deposited his own personal funds into the account to cover his truck payments. Nevertheless, given that there was a considerable amount of other evidence showing that Baker and appellant shared living expenses as part of their arrangement, this error was not prejudicial.

**{¶46}** Finally, as a separate point under her second assignment, appellant states that Gaul's hearing testimony should have been found incredulous in light of his prior testimony at the original divorce trial. Regarding this point, this court would indicate that the finding as to the sharing of expenses in the appellant-Baker relationship could have been predicated entirely upon Baker's own testimony. Moreover, we would indicate that any false testimony Gaul may have previously given concerning when he met his new girlfriend would not have necessarily harmed his credibility as to the issues raised under his motion to terminate. Therefore, since appellant has failed to contest any factual

point which was controlling as to the "cohabitation" question, her second assignment is without merit.

**{¶47}** Under her third assignment, appellant maintains that the retired judge erred in relying upon certain evidence to support his ultimate decision. Essentially, she argues that the disputed evidence should have been rejected because it was not relevant to the question of whether she was cohabitating with Baker in such a manner as to warrant the termination of her spousal support.

**{¶48}** As the basis for this assignment, appellant contends that the retired judge should not have considered evidence concerning the following points: (1) the extent to which Baker was at her residence more after Gaul moved out in 2006; (2) the extent to which Baker helped her with household chores, such as taking out the garbage; (3) the extent to which Baker drove her car and left his at the "East Jefferson" property; (4) the extent to which Baker kept his personal property at her residence; (5) the extent to which she and Baker had become more than friends; (6) the extent to which Baker bought food for use at her home; (7) the extent to which her cell phone is covered under Baker's plan and how the monthly bill is paid; (8) the extent to which they have held themselves out to the local community as a married couple; and (9) the extent to which Baker attended Zachary's sporting events.

**{¶49}** As was stated under the second assignment, a finding of cohabitation is not permissible unless it is proven that the paramour and the ex-spouse are presently residing together. Obviously, to the extent that each of the foregoing nine items would tend to show that Baker and appellant were living together in the Gaul residence, they were relevant to a dispositive issue under the motion to terminate. Moreover, the nature

of the evidence was not such that its probative value was substantially outweighed by the possibility of unfair prejudice to appellant. Accordingly, as appellant has not shown that the retired judge's findings were predicated upon inadmissible evidence pursuant to Evid.R. 402 and 403, her third assignment lacks merit.

**{¶50}** As she did under her first assignment, appellant again claims under her fourth assignment that she was denied a fair trial because, in deciding the merits of the motion to terminate her spousal support, the retired judge was not fully aware of the evidence which had been presented at the original divorce trial. However, in asserting this particular issue again, she has not raised any new arguments for review. Hence, for the reasons stated under the first assignment, appellant's final assignment is not well-taken.

**{¶51}** Since all four of appellant's assignments of error lack merit, it is the order and judgment of this court that the judgment of the Ashtabula County Court of Common Pleas, Domestic Relations Division, is affirmed.

DIANE V. GRENDELL, J.,

MARY JANE TRAPP, J.,

concur.