

[Cite as *Fitz v. Fitz*, 2009-Ohio-5236.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92535

RUTH M. FITZ

PLAINTIFF-APPELLEE

vs.

GERHART M. FITZ

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. D-293016

BEFORE: Gallagher, P.J., Rocco, J., and Jones, J.

RELEASED: October 1, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

SEAN C. GALLAGHER, P.J.:

{¶ 1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the trial court records and briefs of counsel. Appellant, Gerhart M. Fitz, appeals the judgment of the Cuyahoga County Court of Common Pleas, Division of Domestic Relations, that denied his motion to terminate or modify spousal support. For the reasons stated herein, we reverse the judgment of the trial court and we remand the matter for further proceedings.

{¶ 2} Appellant and appellee, Ruth M. Fitz, were divorced on May 25, 2005. The judgment entry of divorce incorporated a written separation agreement of the parties that was approved by the court. The judgment entry set forth an award of spousal support consistent with the parties' agreement. The terms of spousal support were as follows: "[Gerhart] shall pay [Ruth] the sum of \$500.00 per month plus 2% processing fee as spousal support, *subject to* the death of either party, [Ruth's] remarriage, *[Ruth's] cohabitation with another*, or for 84 months, subject to the terms of the parties' separation agreement." (Emphasis added.) In addition, pursuant to the separation agreement, the parties agreed that "the court shall retain jurisdiction with regard to the amount, but not the duration of the spousal support."

{¶ 3} Relevant to this appeal, on October 30, 2008, Gerhart filed a motion to terminate or modify spousal support and for other equitable relief. Gerhart claimed that Ruth had been residing with a male who was not a family member since midsummer 2007.

{¶ 4} On November 14, 2008, the trial court summarily denied the motion pursuant to Section 11, Article XV of the Ohio Constitution, commonly known as Ohio's defense of marriage amendment. The defense of marriage amendment states: "Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage." *Id.*

{¶ 5} The trial court reasoned that "in order to terminate spousal support on the basis of cohabitation, the Court would have to find cohabitation tantamount to marriage. Such a finding is now prohibited by the Constitution of the State of Ohio."

{¶ 6} Gerhart has appealed the decision of the trial court. He raises two assignments of error for our review that provide as follows:

{¶ 7} "1. The trial court erred as a matter of law in dismissing appellant's motion to modify or terminate spousal support after retaining jurisdiction of the issue."

{¶ 8} “2. The trial court erred as a matter of law in finding that Section 11, Article XV of the Ohio Constitution conflicted with reviewing the issue of spousal support.”

{¶ 9} There is no dispute that the trial court in this matter reserved jurisdiction to modify spousal support. The central issue before us is whether the trial court erred in dismissing a motion to terminate or modify spousal support on the grounds of cohabitation in reliance on the defense of marriage amendment.

{¶ 10} The purpose of the defense of marriage amendment is “to prevent the state, either through legislative, executive, or judicial action, from creating or recognizing a legal status deemed to be the equivalent of a marriage of a man and a woman. The first sentence of the amendment prohibits the recognition of marriage between persons other than one man and one woman. The second sentence of the amendment prohibits the state and its political subdivisions from circumventing the mandate of the first sentence by recognizing a legal status similar to marriage (for example, a civil union).” *State v. Carswell*, 114 Ohio St.3d 210, 213, 871 N.E.2d 547, 2007-Ohio-3723.

{¶ 11} The defense of marriage amendment does not prohibit courts from making a factual determination of cohabitation. “Cohabitation” defines a relationship between people, and the fact that two individuals are

cohabitating does not, in and of itself, confer a legal status tantamount to marriage.

{¶ 12} In considering the defense of marriage amendment in the context of the domestic-violence statute, the Ohio Supreme Court found “the term ‘person living as a spouse’ as defined in R.C. 2919.25 merely identifies a particular class of persons for the purposes of the domestic-violence statutes. It does not create or recognize a legal relationship that approximates the designs, qualities, or significance of marriage as prohibited by Section 11, Article XV of the Ohio Constitution. Persons who satisfy the ‘living as a spouse’ category are not provided any of the rights, benefits, or duties of marriage. A ‘person living as a spouse’ is simply a classification with significance to only domestic-violence statutes. Thus, R.C. 2919.25 is not unconstitutional and does not create a quasi-marital relationship in violation of Section 11, Article XV of the Ohio Constitution.” *Carswell*, supra, at 214.

{¶ 13} In the domestic relations context, it is well established that cohabitation may, under proper circumstances, provide grounds for the termination or modification of spousal support. *Thomas v. Thomas* (1991), 76 Ohio App.3d 482, 485, 602 N.E.2d 385. In this case, Gerhart is seeking to enforce the terms set forth in the separation agreement, which was incorporated into the trial court’s judgment entry of divorce. The trial court

retained jurisdiction with regard to the amount, but not the duration, of the spousal support.

{¶ 14} The act of terminating or modifying spousal support on the grounds of cohabitation does not create or recognize a legal status for individuals who cohabit, nor does the enforcement of a cohabitation restriction on spousal support in a separation agreement.

{¶ 15} In this matter, the trial court retained jurisdiction over issues related to spousal support. Pursuant to the judgment entry of divorce and the separation agreement of the parties, the spousal support award was subject to termination or modification upon Ruth's cohabitation with "a male not a family member." Whether or not a particular living arrangement rises to the level of lifestyle known as "cohabitation" is a factual question to be initially determined by the trial court. *Dickerson v. Dickerson* (1993), 87 Ohio App.3d 848, 851, 623 N.E.2d 237, 239. We find that the trial court abused its discretion in dismissing Gerhart's motion and erred as a matter of law in finding that its review of the motion would be tantamount to finding cohabitation to be the equivalent of marriage.

{¶ 16} Appellant's first and second assignments of error are sustained.

Judgment reversed, case remanded.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, PRESIDING JUDGE

KENNETH A. ROCCO, J., and
LARRY A. JONES, J., CONCUR