

[Cite as *Bain v. Levinstein*, 2010-Ohio-5596.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94313

CAROL B. BAIN

PLAINTIFF-APPELLANT

vs.

RICHARD F. LEVINSTEIN

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. DR-302316

BEFORE: Rocco, P.J., Stewart, J., and Cooney, J.

RELEASED AND JOURNALIZED: November 18, 2010

ATTORNEYS FOR APPELLANT

Vincent A. Stafford
Anne F. Coan
Stafford & Stafford Co., L.P.A.
The Stafford Building
2105 Ontario Street
Cleveland, Ohio 44115

ATTORNEY FOR APPELLEE

John D. Zoller
Zoller & Biacsi
490 Caxton Building
812 Huron Road
Cleveland, Ohio 44115

KENNETH A. ROCCO, P.J.:

{¶ 1} Plaintiff-appellant, Carol B. Bain, the former wife of defendant-appellee, Richard F. Levinstein, appeals from a domestic relations court decision that terminated appellee's duty to make spousal support payments to her and ordered her to pay a portion of appellee's attorney's fees. Appellant urges that the court's determination that she was cohabiting with an unrelated adult male was against the manifest weight of the evidence, the court abused its discretion by awarding attorney's fees to appellee, and the court erred by

adopting the magistrate's decision without entering its own judgment on the issues. We affirm.

{¶ 2} The parties were divorced pursuant to a decree entered November 17, 2006. The decree required appellee to pay appellant spousal support in accordance with the parties' separation agreement, "subject to further order of court and subject to death of either party or the remarriage or cohabitation of the Plaintiff-wife." The separation agreement stated:

"Effective December 1, 2006, the Defendant-husband shall pay spousal support of \$1600 (sixteen hundred dollars) per month plus \$175 per month, which is the current cost of the Plaintiff-wife's medical insurance, plus \$400 per month on the arrearage [of \$10,240] set forth above, subject to further order of Court and terminable upon either party's death or the Plaintiff-wife's remarriage or cohabitation with an adult male in a relationship tantamount to marriage. * * * "

{¶ 3} Approximately one year later, on December 6, 2007, appellee filed a motion to terminate spousal support and the payment of medical insurance for appellant. The motion asserted that appellant had been cohabiting with another man since November 23, 2007, and had obtained medical insurance from an outside source.

{¶ 4} The parties conducted extensive discovery after which the magistrate heard evidence over four hearing dates in February and March 2009.

On March 26, 2009, the magistrate issued a thorough decision that concluded that appellant was cohabiting with an adult male and that the spousal support order should therefore terminate, effective October 15, 2007. The magistrate

further determined that appellee was entitled to an award of attorney's fees because appellant prolonged discovery by giving "delayed, incomplete, and sometimes evasive" responses to appellee's discovery requests. The magistrate therefore granted appellee's motion to terminate spousal support and medical insurance payments and his motion for attorney's fees, and ordered appellant to pay \$5,000 toward appellee's attorney's fees.

{¶ 5} Appellant objected to the magistrate's decisions on the same grounds asserted in her first two assignments of error here and in almost identical language. The court overruled appellant's objections and adopted the magistrate's decision. Among other things, it granted appellee's motions to terminate alimony and to terminate payment of medical insurance, and ordered the Cuyahoga Support Enforcement Agency to release to the appellee all funds it held. The court further ordered appellant to pay \$5,000 toward appellee's attorney's fees.

{¶ 6} Appellant's third assignment of error potentially questions the finality of the court's order, so we address it first. Appellant urges that "[t]he trial court erred by adopting the magistrate's decision without entering its own judgment on the issues." In fact, the trial court did enter its own judgment on the issues, ruling separately on each motion the magistrate addressed in her decision. Cf. *In re Zinni*, Cuyahoga App. No. 89599, 2008-Ohio-581, ¶16.

{¶ 7} The appellant's true concern is that she believes the court did not conduct its own de novo review of the facts and conclusions contained in the

magistrate's report, as it was required to do by Civ.R. 53(D)(4)(d). The trial court's entry belies this argument. The trial court's entry states: "[a]fter consideration of the pleadings, Magistrate's Decision, exhibits, full transcript[,] and objections, said objections are hereby overruled and the decision of the Magistrate adopted." Appellant has not "ma[d]e an affirmative demonstration that the trial court did not conduct an independent analysis of the issues raised at the evidentiary hearing before the [magistrate]." *Inman v. Inman* (1995), 101 Ohio App.3d 115, 119, 655 N.E.2d 199. Accordingly, we overrule the third assignment of error.

{¶ 8} Appellant's first assignment of error contends that the manifest weight of the evidence does not support the court's determination that she cohabited with an unrelated adult male. In evaluating the weight of the evidence, we are guided by a presumption that the trial court's factual findings were indeed correct. "The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony. The interplay between the presumption of correctness and the ability of an appellate court to reverse a trial court decision based on the manifest weight of the evidence was succinctly set forth in the holding of [the Ohio Supreme Court] in *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279[, 376 N.E.2d 578]: 'Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as

being against the manifest weight of the evidence.” *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.

{¶ 9} The civil manifest weight standard “tends to merge the concepts of weight and sufficiency.” *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶26. Unlike the criminal manifest weight of the evidence standard, the appellate court will not reweigh the evidence on review in a civil matter. *Id.*; *H. Park Partners, L.L.C. v. Frick*, 181 Ohio App.3d 691, 2009-Ohio-1462, 910 N.E.2d 527, ¶20.

{¶ 10} “[C]ohabitation, 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].” *Thomas v. Thomas* (1991), 76 Ohio App.3d 482, 485, 602 N.E.2d 385. When considering the evidence, the trial court 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.” *Dickerson v. Dickerson* (1993), 87 Ohio App.3d 848, 850 fn. 2, 623 N.E.2d 237.

{¶ 11} Appellant argues that she “presented competent, credible evidence at trial that her sole motivation for moving into Mr. Meyer’s home was due to her dire financial situation created by the Appellee’s failure to pay his spousal support obligation.” This may be. However, the question is not whether there is

competent, credible evidence to support the appellant's position, but whether there is competent, credible evidence to support the court's decision.

{¶ 12} Appellant lived with Henry Meyer from October 15, 2007, more than a year before the magistrate conducted her hearing. There was an on-going monogamous relationship between appellant and Meyer that predated the parties' divorce. Appellant contends, however, that Meyer did not voluntarily assume an obligation to support her, but rather that she was forced to move into his home because appellee failed to pay her the full amount of support due to her. The magistrate explicitly rejected this argument, pointing out that, even if appellee had paid appellant the full amount of support due, she would not have been able to meet all of her claimed living expenses: "Unhappily, it is not at all clear that Plaintiff could have afforded her way of living even if Defendant had paid the full support without working more or finding cheaper accommodations." The magistrate further concluded that it was implausible that appellant was suffering severely from appellee's limited support payments yet did not file a motion to enforce his support obligation. We must defer to the trial court's judgment concerning the credibility of appellant's stated reasons for moving in with Meyer.

{¶ 13} Appellant has failed to demonstrate that there is no competent credible evidence to support the court's finding that she cohabited with Meyer. Therefore, the first assignment of error is overruled.

{¶ 14} The second assignment of error asserts that the award of \$5,000 in attorney's fees to appellee was "excessive, contrary to law, and an abuse of discretion." Appellant contends she cannot afford to pay attorney's fees because her health limits her ability to pursue employment. She also contends that it would be inequitable to require her to pay because "[a]ppellee chose to engage in expensive litigation to terminate his spousal support obligation to [appellant] under guise that he could no longer afford the spousal support; however, he incurred over Thirty Thousand Dollars (\$30,000.00) in attorney fees litigating his inability to pay the court-ordered spousal support."

{¶ 15} We review the trial court's decision to award attorney's fees for a clear abuse of discretion. *Szymczak v. Szymczak* (2000), 136 Ohio App.3d 706, 737 N.E.2d 980. The trial court here awarded appellee his attorney's fees because "appellant prolonged this litigation by giving conflicting discovery responses" that were "delayed, incomplete, and sometimes evasive," and this conduct "contributed to the needless expansion of [appellee's] legal fees." The court awarded only those fees "directly or indirectly related to the discovery issues"; it did not award appellee fees for the entire post-judgment proceeding. Because the basis for the award was appellant's own conduct in prolonging the proceedings, we reject appellant's argument that it would be inequitable to award appellee fees for a proceeding he initiated.

{¶ 16} The trial court's decision did not expressly address appellant's ability to pay appellee's attorney's fees, although it is clear from the remainder of the

opinion that the court was mindful of her limited earning capacity. R.C. 3105.73(B) allows but does not require the court to consider the parties' incomes in determining whether to award fees. *Padgett v. Padgett*, Franklin App. No. 08AP-269, 2008-Ohio-6815, ¶13. Given the basis for the award — appellant's multiplication of proceedings through evasive discovery responses — we do not believe the court abused its discretion by not expressly considering her ability to pay.

Affirmed.

It is ordered that appellee recover from appellant 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.

KENNETH A. ROCCO, PRESIDING JUDGE _____

MELODY J. STEWART, J., and
COLLEEN CONWAY COONEY, J., CONCUR