

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

MARY T. HUSNI, :
 :
 Plaintiff-Appellee, :
 : No. 111598
 v. :
 :
 JONATHAN L. HUSNI, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 29, 2023

Civil Appeal from the Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. DR-17-368823

Appearances:

Rosenthal Thurman Lane, L.L.C., and Adam J. Thurman,
for appellee.

Taft Stettinius & Hollister LLP, Jill Friedman Helfman,
and Mary Kate McClain, *for appellant.*

LISA B. FORBES, J.:

{¶ 1} Appellant Jonathan L. Husni (“Husni”) appeals the trial court’s order denying his motion to terminate spousal support to appellee Mary Husni, n.k.a.

Mary Wirbel (“Wirbel”). After reviewing the facts of the case and the pertinent law, we affirm.

I. Facts and Procedural History

{¶ 2} Husni and Wirbel divorced on June 20, 2018. Attached to the trial court’s journal entry granting the divorce is the parties’ “Separation and Property Settlement Agreement” (the “Agreement”). Pertinent to this appeal, under the Agreement, Husni “shall owe” Wirbel spousal support and that “spousal support shall immediately and permanently terminate upon the death of husband or wife, or earlier upon wife’s remarriage or cohabitation.”

{¶ 3} Husni filed a motion to terminate spousal support on November 15, 2019, asserting that Wirbel “is and has been cohabitating with her boyfriend” Jesse Kapel (“Kapel”) such that Husni’s “support obligation therefore must be terminated.”

{¶ 4} An evidentiary hearing on Husni’s motion was held before a magistrate on the following five days: September 3, 2020, September 4, 2020, May 20, 2021, May 21, 2021, and May 24, 2021.¹ The magistrate issued a decision on December 2, 2021, denying Husni’s motion to terminate spousal support. Husni filed timely objections to the magistrate’s decision.

{¶ 5} On May 9, 2022, the trial court issued its decision, overruling each of Husni’s objections, adopting the magistrate’s decision in its entirety, concluding that Wirbel and Kapel were not cohabiting, and denying Husni’s motion to terminate

¹ The magistrate heard closing arguments on June 28, 2021.

spousal support. Husni appeals from the trial court's order denying his motion to terminate spousal support raising the following four assignments of error:

I. The trial court erred in finding that Ms. Wirbel and Mr. Kapel were not sharing expenses contrary to overwhelming evidence of the fact.

II. The trial court erred in undertaking a needs-based analysis to determine whether spousal support should be terminated when the underlying divorce decree requires an automatic termination of spousal support where cohabitation exists, without regard to need.

III. The trial court erred in applying a change of circumstances standard to appellant's request to automatically terminate not modify spousal support when a change of circumstances was not required by the unambiguous terms of the divorce decree.

IV. The trial court erred in refusing to consider all other factors that support a finding of cohabitation in this case.

A. Pertinent Hearing Testimony

1. Jesse Kapel

{¶ 6} Kapel testified that during his and Wirbel's relationship, Kapel owned his own home and paid for all of the expenses related to that home. Further, Kapel did not pay any rent to Wirbel, and did not pay for utilities, groceries, or household items for Wirbel's home. Kapel clarified that when he cooked a meal at Wirbel's home, he bought the groceries for that meal. Kapel further testified that he purchased his own personal items, for example, his "own personal soap," that he kept at Wirbel's home. Additionally, at one point Kapel stored one of his cars at Wirbel's house and did not pay any rent for the storage.

{¶ 7} Over the course of the approximately ten years that Kapel has owned his home, various people have lived with him at the home. However, Kapel testified that it was “a fact” that he does not rent his home to anyone.

{¶ 8} Regarding home improvements to Wirbel’s home, Kapel testified that he was “putting some shelves in and [replacing] a sink” in a pantry for Wirbel. He bought all of the supplies for that project as “a birthday gift” for Wirbel.

{¶ 9} According to Kapel, Wirbel and Kapel hosted Thanksgiving at Wirbel’s home with “70-80” guests including each of their families. He and Wirbel “split” the cost of the holiday. The couple also “split the bill” if they went to restaurants and the bill was over \$100, anything under that they alternated who paid.

{¶ 10} According to Kapel, he and Wirbel do not provide any financial support to one another. They have separate checking, savings, investment, and retirement accounts. Further, Kapel and Wirbel do not share credit cards, mortgages, loans, or insurance.

2. Mary Wirbel

{¶ 11} Wirbel testified that she moved into her current home in Eastlake in April 2020. She paid cash for the home. Kapel was one of 12-14 people who helped Wirbel move into the Eastlake home. She did not compensate any of these people but did buy lunch for everyone.

{¶ 12} Wirbel testified that Kapel owns his own home and that she has not made any monetary contributions to the maintenance or ownership of that home. Wirbel further testified that she has not paid for any of Kapel's bills.

{¶ 13} According to Wirbel, Kapel stays at her home "[s]everal times a month." Kapel keeps a few personal toiletries at her home, like a toothbrush and body wash, but he pays for those items himself.

{¶ 14} Regarding meals eaten together, Wirbel testified as follows: "If I cook, I pay for groceries; if he cooks, he stops and gets groceries; if we go out, I pay my expenses, he pays his expenses." However, Wirbel clarified that if a meal is under \$50 she had Kapel alternate who pays for the meal and that any meal over \$50, the couple splits the cost.

{¶ 15} According to Wirbel, Kapel has helped her with home projects including making window screens, fixing doors, installing appliances, changing lightbulbs, and gardening. Kapel helped Wirbel fix a door in her home because the door was "sticking." The door was too heavy for Wirbel to lift, so Kapel took it off of the hinges and sanded it. There was no cost associated with this repair. Wirbel testified that she paid for all costs associated with these projects.

{¶ 16} Wirbel owns two vehicles: a white Jeep Cherokee and a burgundy Jeep Cherokee. The white Jeep is Wirbel's daughter Bethany's that is left at Wirbel's house while Bethany is at school in Nashville. Kapel has driven Wirbel's vehicles in the past. At one point, Wirbel asked Kapel to drive the white Jeep because Bethany had been in an accident and it "needed a lot of repairs" and she wanted to ensure the

repairs were “done properly.” Kapel has filled the gas tank of Wirbel’s vehicle “as a thank you” if he drove it.

{¶ 17} Wirbel testified regarding the various trips she and Kapel have taken together. According to Wirbel, the only trip that she paid for was a trip to Santa Fe, New Mexico in which she paid for the airfare and hotel as “a thank you for being a good listener and a good friend.”

{¶ 18} Regarding travel to Florida, Wirbel stated that she and Kapel paid for their own airfare and split the cost of hotels. Wirbel testified that she paid for their hotel room in Miami, and Kapel paid for their hotel room in the Florida Keys. Wirbel’s credit card statement, which was admitted into evidence, showed a charge for \$668.74 at “Hotel Find” and \$285.48 for the “Palms Hotel Miami.” Asked if these two charges were both for hotels rooms she and Kapel stayed in while on their trip to Miami, Wirbel replied “[n]o.” Wirbel explained that the Hotel Find charge was for a hotel room while the Palms Hotel charge was for a manicure and massage that she received.

{¶ 19} The couple traveled to Nashville, Tennessee several times to visit Bethany in college. On these trips, Wirbel paid for their accommodations at various locations.

{¶ 20} Wirbel and Kapel went a mission trip in Tijuana, Mexico with “about 18 people[,]” including Bethany, to build a house. Wirbel testified that she only paid for her and Bethany’s expenses for this trip.

{¶ 21} Wirbel and Kapel also took a vacation together to Peru. “Two of * * * Kapel’s friends invited [them] to hike the Inca trail to Machu Picchu.” Wirbel paid for her portion of the trip and Kapel paid for his portion. These expenses included “Airtfares, hotel — or Airbnb, and * * * passes to go with a guide on the hike.”

{¶ 22} Wirbel was questioned about four charges labeled “Southwest Air, Dallas, Texas” on her credit card statement. Wirbel testified that each of the four charges were for airfare for the trip she took with Kapel and Bethany to New Orleans. She paid for airfare four separate times because, according to Wirbel, her and Bethany’s “flights were booked separately * * *, because [Bethany] returned to Nashville and [Wirbel] returned to Cleveland.” Further, Wirbel explained that the three stayed in a two-room suite in New Orleans for which she paid. Kapel “paid meals [and attractions] up to his portion to even it out.” Portions of Wirbel’s credit card statements admitted into evidence also demonstrated that there were four separate charges for airfare on the same day, two for American Airlines for \$100.50 and two for United Airlines for \$193.30. According to Wirbel, she “was booking one-way tickets, but [she] also around the same time was booking Bethany’s trip home from Thanksgiving.”

{¶ 23} Wirbel testified that she does not know how much money Kapel has in his bank account, whether he has any credit card debt, or how much money he makes a year. Similarly, Kapel does not know how much is in Wirbel’s bank account and has never asked. Further, Kapel is not a cosignor or an authorized user on any of Wirbel’s bank accounts. Asked whether Kapel “does not contribute financially to

any of the expenses of [Wirbel's] home," Wirbel responded, "correct." Further, Wirbel has never asked Kapel for money, nor has he given her any money.

3. Other Testimony

{¶ 24} At the five-day hearing on Husni's motion, five other witnesses testified: three private investigators, a process server, and Husni. Michael A. Lewis testified that he was hired by Husni to conduct a "a cohabitation investigation" as a private investigator. However, he did not look at bank accounts or track financials as part of his investigation. Another private investigator, Ryan Hise, was asked, "What investigation did either you or Mr. Lewis do into whether or not Mr. Kapel was living off of Mr. Husni's money?" He responded, "[n]one." Similarly, none of the other witnesses provided any testimony regarding Wirbel and Kapel's finances or shared expenses, the central issue in this appeal.

II. Law and Analysis

A. Cohabitation

{¶ 25} We will address Husni's first and fourth assignments of error together for ease of discussion. The first assignment of error specifically asserts that the trial court erred in finding that Wirbel and Kapel did not share living expenses, while the fourth asserts that the trial court refused to consider all "other" factors that support a finding of cohabitation. We disagree in both respects.

{¶ 26} This court has applied the test articulated in *Dickerson v. Dickerson*, 87 Ohio App.3d 848, 850, 623 N.E.2d 237 (6th Dist.1993), to determine whether a former spouse is cohabiting with a new partner: "(1) an actual living together; (2) of

a sustained duration; (3) with shared expenses with respect to financing and day-to-day incidental expenses.” *Branden v. Branden*, 8th Dist. Cuyahoga No. 108802, 2020-Ohio-4134, ¶ 25. The *Branden* Court explained, “The *Dickerson* court did not rule out consideration of other factors and did not dictate the relative weight to be afforded each of the three factors.” *Id.*

{¶ 27} “Whether or not a particular arrangement rises to that lifestyle known as ‘cohabiting’ is a factual question to be initially determined by the trial court.” *Dickerson* at 851; *Czalkiewicz v. Czalkiewicz*, 2017-Ohio-747, 85 N.E.3d 1043, ¶ 16 (8th Dist.); *Moell v. Moell*, 98 Ohio App.3d 748, 752, 649 N.E.2d 880 (6th Dist.1994). The trial court’s decision regarding cohabitation cannot be overturned on appeal if it is supported by competent, credible evidence. *Branden* at ¶ 24.

{¶ 28} Here, the trial court found that Wirbel and Kapel had been living together for an extended duration,² but that the two did “not share expenses with respect to financing and day to day incidentals.” Further, the trial court found that Wirbel and Kapel “do not financially support each other even though they are in a relationship * * * they both pay for their own homes, cars, bills, and debts” and that “there is no evidence to indicate that [Wirbel or Kapel] is now or has ever been financially supporting the other and therefore the element of ‘shared expenses’ is not met.”

² Wirbel did not challenge either of the court’s findings that she and Kapel had been living together for an extended duration.

{¶ 29} Upon review, we find that the trial court’s determination that Wirbel and Kapel are not cohabiting in that they do not share financing or day-to-day incidental expenses is supported by competent credible evidence. Further, we find that Husni has not directed this court to any other factors that demonstrate that the trial court erred in finding that Wirbel and Kapel are not cohabiting.

{¶ 30} The testimony presented at the hearing established that both Wirbel and Kapel own homes separately and that they each independently maintain and pay for their respective homes. While Kapel has helped with various odd jobs around Wirbel’s home — installing a dishwasher and air conditioner, sanding doors, gardening, making window frames, and putting up shelves in a pantry — Wirbel has paid the costs associated with these projects, with the exception of the pantry, which was consistently testified to as a gift.

{¶ 31} Wirbel and Kapel each own their own vehicles and pay for those vehicles and for the maintenance of them with their own funds. Testimony established that at times Kapel drives one of Wirbel’s cars and that when he has done so, he has put gas in it as a “thank you.”

{¶ 32} When the couple vacation together, they generally pay their own expenses. On one occasion, however, Wirbel has given a trip as a gift to Kapel. Wirbel also paid for accommodations for both Kapel and herself when visiting her daughter Bethany at school in Nashville.

{¶ 33} Wirbel and Kapel each have their own bank accounts, credit cards, and insurance agreements. Neither Wirbel nor Kapel have access to the other's accounts, nor do they know the particulars of the other person's financial status.

{¶ 34} On appeal, Husni raises various factors that he alleges the trial court failed to consider in determining whether Wirbel and Kapel were cohabiting including consortium, the length of the relationship, "help[ing] one another," "jointly host[ing] parties together," "function[ing] as a family" with Wirbel's daughter Bethany, and attempting to "cover up" their relationship. However, Husni only raised the issue of consortium to the trial court; therefore, it is the only other factor we will consider on appeal. *Spy v. Arbor Park Phase One Assn.*, 8th Dist. Cuyahoga No. 108819, 2020-Ohio-2944, ¶ 16 ("It is well-settled that issues not raised in the trial court may not be raised for the first time on appeal.").

{¶ 35} Regarding consortium, Husni asserts that the court erred when it "refused to consider consortium" because it is undisputed that Wirbel and Kapel "have sex." We note that the trial court's journal entry stated that it "fail[ed] to see how consortium [was] relevant to" the analysis of whether or not Wirbel and Kapel share expenses. However, the trial court also acknowledged that it could consider other factors pursuant to *Dickerson* and that it had already concluded that Wirbel and Kapel "were actually living together for a sustained duration."

{¶ 36} While consortium can be a relevant factor in the cohabitation analysis, we find that the trial court did not err when it found that that consortium was not relevant to its analysis of whether Wirbel and Kapel share financing and

day-to-day living expenses for purposes of determining that Wirbel and Kapel's particular arrangement did not rise to a lifestyle known as "cohabiting." See *Dickerson*, 87 Ohio App.3d at 851, 623 N.E.2d 237.

{¶ 37} Upon review, we find that the trial court's finding that Wirbel and Kapel did "not share expenses with respect to financing and day-to-day incidentals" is supported by competent credible evidence. Further, the trial court did not err in finding that consortium did not alter its factual determination on the issue of cohabitation. Accordingly, Husni's first and fourth assignments of error are overruled.

B. Needs-Based Analysis

{¶ 38} Husni asserts that the trial court erred in conducting a needs-based analysis when it denied his motion to terminate spousal support. We disagree.

{¶ 39} Our review of the trial court's journal entry demonstrates that the court did not conduct a needs-based analysis. Rather it quoted *Gaul v. Gaul*, 11th Dist. Ashtabula No. 2011-A-0033, 2012-Ohio-1673, as follows: "(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." *Gaul* at ¶ 32, quoting *Clark v. Clark*, 168 Ohio App.3d 547, 2006-Ohio-4820, 860 N.E.2d 1080, ¶ 32 (11th Dist.). The trial court explained, "As the ruling in *Gaul* makes clear, in

determining whether [Wirbel and Kapel] share expenses enough to rise to the level of cohabitation, there must be some evidence that there is no longer a need for that support.” As is the case here, the *Gaul* Court was determining whether a former spouse was cohabiting with a new partner, which would result in automatic termination of spousal support under the terms of the parties’ divorce agreement. *Gaul* at ¶ 13.

{¶ 40} We find that the trial court’s passing reference to “need” did not indicate that it conducted a need-based analysis. Rather, our review of the court’s overall analysis and application of the facts to the law, reveals that the court properly applied the three-part test articulated in *Dickerson*, *Branden*, and *Czalkiewicz*. Having found that Wirbel and Kapel had been living together for an extended duration, the trial court focused its attention on the third prong of the analysis: whether Wirbel and Kapel shared expenses with respect to financing and day-to-day incidental expenses and whether support was being provided by Kapel or for Kapel.

{¶ 41} We find that the reference to *Gaul* does not affect the trial court’s finding that Wirbel and Kapel were not sharing expenses with respect to financing and day-to-day expenses, and thus were not cohabiting. Therefore, to the extent the court did reference need when it cited *Gaul*, it did not err because the court found, and as discussed we affirmed, that Wirbel and Kapel were not cohabiting under Ohio law.

{¶ 42} Husni’s second assignment of error is overruled.

C. Change of Circumstances

{¶ 43} Husni claims “the trial court erred in applying a change of circumstances standard to [his] request to automatically terminate (not modify) spousal support * * *.” We disagree.

{¶ 44} The Agreement attached the court’s June 20, 2018 entry granting the parties a divorce states:

Husband’s obligations to pay such spousal support shall immediately and permanently terminate upon the death of husband or wife, or earlier upon wife’s remarriage or cohabitation. On the occurrence of any of these events, husband’s obligation to pay or furnish support shall absolutely and permanently terminate.

The spousal support provisions in this Agreement shall be subject to the jurisdiction of the court for purposes of modification as to amount but not duration *if and only if* there is a substantial change in circumstances of either party * * *.

(Emphasis sic.)

{¶ 45} The trial court found the following in its journal entry: “It is not error to look for changes in circumstances to aid in its determination whether [Wirbel or Kapel] are providing the other with monetary support. * * * Therefore, after relying on established case law, the Court must conclude that there is no cohabitation.”

{¶ 46} The issue of whether the trial court should have conducted a change-in-circumstances analysis is irrelevant to the ultimate conclusion of this case. While cohabitation could be seen as a change in circumstances, the court concluded that Wirbel and Kapel did not cohabit. Further, the parties’ Agreement provided continuing jurisdiction of the trial court to modify the spousal support provision as to amount “*if and only if* there is a substantial change in circumstances of either

party.” Husni’s request to terminate spousal support is, arguably, a modification of spousal support from \$8,000 each month to \$0.

{¶ 47} While we acknowledge that the trial court said that it considered a change in circumstances, it did so against the backdrop of its analysis of whether Wirbel and Kapel were cohabiting to determine whether the automatic-termination provision of the parties’ Agreement had been triggered. The court mentioned it “look[ed] for changes in circumstances” in connection with its overall analysis of whether Wirbel financially supported Kapel or vice versa. Reading the court’s journal entry as a whole, it is apparent that the court applied the law to the competent credible evidence presented, concluding that Wirbel and Kapel do not financially support each other. We find that the trial court did not err in concluding that Wirbel and Kapel do not cohabit.

{¶ 48} Husni’s third assignment of error is overruled.

{¶ 49} Judgment 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.

LISA B. FORBES, JUDGE

ANITA LASTER MAYS, A.J., and
EMANUELLA D. GROVES, J., CONCUR