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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001292-MR

PATTY A. JACKSON — APPELLANT

v.

APPEAL FROM OHIO CIRCUIT COURT
HONORABLE EDWIN M. WHITE, SPECIAL JUDGE
ACTION NO. 07-CI-00049

DAN R. JACKSON — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT, AND NICKELL, JUDGES.

CAPERTON, JUDGE: Patty Jackson appeals from the Ohio Circuit Court's July 1, 2009, order whereby the court terminated Dan Jackson's maintenance obligation to Patty due to her cohabitation with a non-relative male. At issue on appeal is whether the parties' separation agreement, which provided for termination of maintenance upon cohabitation by Patty with a non-relative male but failed to define cohabitation, was misinterpreted by the court based on the facts presented.

After our review of the parties' arguments, the record, and the applicable law, we have determined that the trial court erred in its determination that Patty was cohabiting with a non-relative male. Accordingly, we reverse and remand to the trial court for further proceedings not inconsistent with this opinion.

On appeal Patty presents one argument, namely, that the trial court committed reversible error by terminating her maintenance for cohabitation with an unrelated adult male when she did not reside with her boyfriend or co-mingle finances with him. In response, Dan argues that the trial court properly concluded that Patty was cohabitating with her fiancée based on the substantial evidence adduced at the hearing.

The trial court's order of July 1, 2009, set out the relevant facts from the March 2, 2009, hearing. At the hearing, evidence established that Patty and Gerald Ward were engaged in December 2007, and that in every month in 2008, Gerald spent between eight and fifteen nights per month at Patty's residence. Concerning the engagement, Patty contended that the diamond ring was a Christmas present, whereas Gerald testified that the ring was an engagement ring. While Patty wore the ring on her left hand, she did not tell others she and Gerald were engaged. However, Gerald testified that he did tell others he and Patty were engaged. Thereafter, Dan asked Jeremy Nance to investigate the matter.

Nance testified that he observed Patty and Gerald for two periods of time, from January 2008 to April 2008 and then from November 2008 to February 2009. Nance testified that his investigation centered on the time of midnight to

4:00 A.M. According to Nance, a pattern emerged from his reconnaissance that Gerald would stay at Patty's residence Monday through Thursday and that Patty would stay at Gerald's residence Friday and/or Saturday night. While Nance did not watch every night during the investigative time, the pattern testified to by Nance approximated the events on Gerald's calendar and coincided with his testimony.

The court noted that Patty admitted that she spent some weekend nights at Gerald's but denied that it was every weekend. Nance's testimony indicated that she spent more than sporadic weekends at Gerald's. Nance's testimony was that Patty and Gerald spent Sundays at their respective homes. In addition, both Patty and Gerald testified that their relationship was sexual and that they traveled together but paid their own way. Gerald testified that he did not want to interfere with the arrangement that Patty had with Dan.

The court determined that a ring was given and received in December 2007, and thereafter Patty and Gerald spent a considerable time at each other's homes. The court further found that their relationship was monogamous and sexual and that they traveled together and used each other's vehicles. The court then noted that while Patty and Gerald did not spend every night together, they spent more time with each other than either would admit when testifying. The court then determined that while the parties were engaged they did maintain their own homes and finances. Nevertheless, the court opined that this arrangement was followed in part to avoid the termination clause in the property settlement

agreement. Thus, the court concluded that Patty and Gerald were cohabitating, as they lived together but were not married. Accordingly, the court terminated Dan's maintenance obligation to Patty. It is from this order that Patty now appeals.

At the outset we note that this Court must give due deference to the family court's opportunity to judge the credibility of witnesses. Hence, if there is a conflict in the evidence, the family court, not this Court, has the responsibility to decide which evidence to believe. *See Ghali v. Ghali*, 596 S.W.2d 31, 32 (Ky.App. 1980); *Adkins v. Meade*, 246 S.W.2d 980 (Ky. 1952). Thus, we will not set aside the family court's factual findings unless they are clearly erroneous. *See Hunter v. Hunter,* 127 S.W.3d 656, 659 (Ky.App. 2003).

A factual finding is not clearly erroneous if it is supported by substantial evidence. Substantial evidence is evidence, when taken alone or in light of all the evidence, which has sufficient probative value to induce conviction in the mind of a reasonable person. *Id. (Internal citations omitted)*. Questions of law are reviewed *de novo*. *See Western Ky. Coca-Cola Bottling Co. v. Revenue Cabinet*, 80 S.W.3d 787, 790 (Ky.App. 2001). With regard to the trial court's application of law to those facts, this Court will engage in a *de novo* review. *Keeney v. Keeney*, 223 S.W.3d 843, 848-49 (Ky.App. 2007).

Separation agreements, such as the one in the case *sub judice* have long been enforceable contracts. *Block v. Block*, 252 S.W.3d 156, 159-160 (Ky.App. 2007) (citing *Cole v. Waldrop*, 204 Ky. 703, 265 S.W. 274, 275 (1924)).

As such, "[t]he intention of the parties must be gleaned from the words used by them in the agreement." *Cook v. Cook*, 798 S.W.2d 955 (Ky. 1990).

In *Cook, supra,*[1] the Supreme Court of Kentucky noted that the classical definition of cohabitation was "To live together as husband and wife. The mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people, including but not necessarily dependent on sexual relations." *Id.* at 957 (citing Black's Law Dictionary, 5th Edition). The court in *Cook* went on to note that the parties:

> [D]o not live in the same household, and neither of them has assumed an obligation to pay the household bills or personal expenses of the other. They have not moved household furnishings from one house to the other. Although he visits in her home on most evenings, he returns to his own home to spend the night, and they do not engage in sexual relations when her son, who lives with her, is present in the home.

Cook at 957.

Thus, the court in *Cook* determined that there was no cohabitation as "[o]bviously, the parties intended cohabitation to mean living in the same house..." *Id. See also Bennett,* (Court noted that a review of three other dictionaries defined cohabitation as a couple living together and not married to one another).

[1] In *Combs v. Combs,* 787 S.W.2d 260 (Ky. 1990), the Supreme Court of Kentucky enumerated several factors that were to be considered in determining whether cohabitation amounts to a change in circumstances justifying modification of maintenance under KRS 403.250. One such factor was whether the cohabitating spouse is avoiding re-marriage to keep maintenance, which the trial court found was evident in the case *sub judice*. However, in *Bennett v. Bennett*, 133 S.W.3d 487, (Ky. App. 2004), this Court noted that the Supreme Court of Kentucky "determined in the *Cook* case, however, that *Combs* "is not of any relevance" in deciding whether or not conduct between a former spouse and her paramour amounts to cohabitation." Thus, the trial court is not bound by the factors enumerated in *Combs.*

Moreover, in *Bennett, supra*, the court noted:

> The *Cook* case involved a separation agreement between the parties which included language terminating maintenance in the event the former wife cohabitated "with a non-relative adult male." Although the former wife was engaged in an exclusive sexual relationship, had accepted an engagement ring, and shared some financial resources with her paramour, the Court declined to find cohabitation.

Bennett 133 S.W. 3d, 490.

The court in *Bennett* then concluded that because the paramour "began spending every night with Diane in her home and keeping his clothes and personal items there, we decline to find that the trial court erred in fixing the date upon which their cohabitation began." *Id.* at 491.

The issue *sub judice* is whether the paramour and the former spouse exhibited signs of living together in a single residence. Patty and Gerald were engaged and shared vehicles but did not share financial obligations, nor did they reside in the same household.[2] As Patty and Gerald did not live in the same house, as evidenced by their divided time between the two residences, we cannot agree with the trial court that the two were cohabitating.

While it may be distasteful that Patty and Gerald may have attempted to circumvent the separation agreement by maintaining separate residences, we remind the parties that as the separation agreement is a contract, the parties were free to define cohabitation specifically. As noted in *Bennett, "*Looking at the four

[2] There was no evidence that Patty and Gerald commingled their income, shared finances, undertook parental obligations of each other's children, or sought to form a family unit.

corners of the document, there is no indication that the parties intended to invest the term "cohabitation" with any special meaning beyond the ordinary meaning of the word itself." *Id.* at 491. Thus, the trial court erred in its determination that Dan's maintenance obligation to Patty should be terminated as Patty and Gerald were cohabitating.

In light of the foregoing, we reverse the July 1, 2009, decision of the trial court terminating Patty's maintenance and remand for an order of the trial court reinstating Patty's maintenance, and for any further proceedings not inconsistent with this opinion.

NICKELL, JUDGE, CONCURS.

LAMBERT, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

LAMBERT, JUDGE, DISSENTING: I respectfully dissent. In the case at bar, I would adopt the findings of the Adair Circuit Court, Division II, Family Court as enunciated by Special Judge Edwin White. Also, I am persuaded by the language in Bennett v. Bennett, 133 S.W.3d 487, (Ky. App. 2004).

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