[Cite as *Corey v. Corey*, 2021-Ohio-1288.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

KELLY COREY,

Plaintiff-Appellee,

v.

EARL COREY,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 CO 0040

Civil Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2017 DR 157

BEFORE:
Cheryl L. Waite, Carol Ann Robb, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Lynn Sfara Bruno and *Atty. Charles A.J. Strader*, Lynn Sfara Bruno Co., LPA, Inc., 412 Boardman-Canfield Road, Youngstown, Ohio 44512 and *Atty. Christopher Lacich*, Roth, Blair, Roberts, Strasfeld & Lodge, 100 East Federal Street, Suite 600, Youngstown, Ohio 44503, for Plaintiff-Appellee

Atty. Christopher Maruca and *Atty. Anthony Celo*, The Maruca Law Firm, LLC, 201 East Commerce Street, Suite 316, Youngstown, Ohio 44503, for Defendant-Appellant.

Dated: January 29, 2021

WAITE, J.

{¶1} Appellant, Earl Corey, appeals from the September 20, 2019 judgment of the Columbiana County Court of Common Pleas, Domestic Relations Division, adopting a magistrate's decision in a divorce matter between Appellant and Appellee, Kelly Corey. On appeal, Appellant contends the trial court abused its discretion in finding that he was cohabitating and that this finding was against the manifest weight of the evidence. Appellant also argues the trial court erred in terminating his spousal support and abused its discretion in failing to allow Appellant to retrieve certain personal items. For the following reasons, the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} The parties were married on June 25, 1983 in Columbiana County, Ohio. Three children, now emancipated adults, were born as issue of the marriage. On April 10, 2017, Appellee filed a complaint for divorce. Appellant filed an answer and counterclaim a month later and Appellee filed an answer to the counterclaim.

{¶3} A hearing was held before a magistrate on March 8, 2018. The parties were granted a divorce the following day. At the time of the divorce, Appellant was unemployed. Appellee was ordered to pay spousal support in "the sum of $2,000.00 per month, for an indefinite term, based upon the length of the parties' marriage * * * subject to further order[.]" (3/9/18 J.E., p.10.) Spousal support was ordered to "terminate upon the death of either party [or] upon the remarriage or cohabitation by [Appellant] with an

unrelated adult male or female in a relationship similar to marriage." (3/9/18 J.E., p.10.) The court retained jurisdiction over the issue. According to the terms of the divorce decree, Appellee was awarded the marital residence "free and clear of any and all claims" of Appellant. Appellant was to remove his household goods from the marital residence "within thirty (30) days." (3/9/18 J.E., pp. 5, 7.)

{¶4} On April 12, 2018, counsel for Appellee sent a letter to Appellant's counsel stating that Appellant had failed or refused to remove his household goods from the marital residence by April 8, 2018. In the letter, counsel requested that Appellant remove his items from the residence within two weeks in accordance with the final divorce decree "or appropriate action would be taken." (4/12/18 Letter.) On April 16, 2018, Appellant's counsel sent a response indicating that Appellant had been unable to collect his belongings. Appellant filed a motion seeking to extend the time to remove his household items until May 31, 2018. Appellee filed a motion in opposition.

{¶5} On April 30, 2018, Appellant filed a motion in contempt, alleging Appellee did not pay the full amount of spousal support for the month. Appellee filed a motion in opposition. On June 25, 2018, Appellee filed a motion seeking enforcement of the final divorce decree and on September 21, 2018 filed her own motion in contempt and a motion to terminate spousal support. On October 30, 2018, Appellee filed another motion for enforcement of the final divorce decree, a request for immediate relief, and a second motion for contempt. Appellant filed opposition motions as well as his own second motion for contempt.

{¶6} On November 20, 2019, a hearing was held before the magistrate. The only testimony was given by Jessica Nagy, a representative from Huntington Bank. Her testimony, however, was unrelated to the issues on appeal.

{¶7} On March 1, 2019, Appellee filed a motion to terminate spousal support. On March 13, 2019 another hearing was held before the magistrate and both parties testified. According to Appellant's testimony, subsequent to the divorce he rented what he referred to at the hearing as a "carriage house" owned by Vickie Fowler for $500 per month. Ms. Fowler lives in the main house on the same property. Appellant testified that the two structures were on the same property but had separate mailing addresses. Appellee submitted a photo of the property at the hearing in which the "carriage house" and main house share one driveway and appear to be attached, having one contiguous roof. (Plaintiff's Exh. GG.) Appellant testified that he and Ms. Fowler had maintained a long-term friendship and, after he moved on to the property, the two began dating. He testified that they occasionally spent nights together in both the main house and the carriage house, vacationed together, and purchased groceries together. Appellant testified that they did not commingle their financial accounts and did not otherwise share daily living expenses. Appellant testified that he continued to pay rent to Ms. Fowler while they were dating. Importantly, however, Appellant was the sole signatory on a roofing contract for the purchase and installation of a new roof on the main house and the carriage house, totaling $41,981.91. Appellant paid the entire contract. Ms. Fowler did not contribute to this purchase in any way.

{¶8} On April 19, 2019, the magistrate issued an entry deciding, in part, that all of the household items Appellant had failed to remove from the marital home in a timely

manner reverted to Appellee. The magistrate also decided that Appellant and Ms. Fowler, a non-relative female, were cohabitating. Hence, the spousal support was ordered terminated. The magistrate specifically concluded:

> 2. Under the terms of the parties [sic] final divorce decree, the Defendant was to receive certain items of household goods. The Defendant was to schedule a date to retrieve the items specified in Exhibit A within 30 days of March 8, 2018. If the Defendant did not retrieve these items within 30 days Plaintiff's counsel was to send a letter to Defendant's counsel notifying of the failure and giving the Defendant 14 days to retrieve all items, or "all of Husband's designated property shall revert to Wife, if Husband fails to retrieve said items after the final written notice."
>
> 3. On April 12, 2018 [Appellee's counsel] sent notice to [Appellant's counsel] that the Defendant had failed to remove his personal property, and gave the 14-day final written notice (Exhibit L).
>
> 4. On April 18, 2018 the Defendant filed a Motion to extend the deadline.
>
> 5. On April 20, 2019 [sic] the undersigned Magistrate signed an order prohibiting the Plaintiff from disposing of Defendant's personal property, but no extension of time was granted.
>
> 6. The Defendant stated that he went to the former marital residence several times, and received some of the items on his list. He claims that he did not return in a timely fashion because he was intimidated by the

Plaintiff's family. The Court does not find this testimony to be credible. There was no evidence that the Defendant attempted to timely retrieve the rest of his personal property per the Final Decree or that the Plaintiff impeded his ability to retrieve his personal property in a timely fashion.

* * *

10. *** It is not disputed that as of March 13, 2019 the Plaintiff was current with her spousal support payments.

* * *

12. The Final Decree stated that "In addition, spousal support shall terminate upon the remarriage or cohabitation by the recipient with an unrelated adult male or female in a relationship similar to marriage. The Court shall retain jurisdiction as [to] spousal support, and to cohabitation in a relationship similar to marriage, with an unrelated adult male, or female, remarriage, or death of either party."

13. The Plaintiff claims that the Defendant has been cohabitating with Vickie Fowler since the date of the divorce, and perhaps even earlier. The Defendant denies that he is cohabitating with Vickie Fowler.

14. The Court makes the following findings of fact related to the issue of cohabitation:

a. It is undisputed that the Defendant and Vickie Fowler are good friends.

b. It is undisputed that Vickie Fowler is the Defendant's landlord, and that he pays her $500.00 per month in rent.

c. It is undisputed that the Defendant and Vickie Fowler have vacationed and travelled [sic] together since the time of the divorce.

d. It is undisputed that the Defendant resides at 5262 Peace Valley Road, Rogers, Ohio 44455, and that Vickie Fowler has a different mailing address of 5126 Peace Valley Road, Rogers, Ohio 44455. The Defendant resided at this address at the time the parties were divorced.

e. It is undisputed that Vickie Fowler resides in the main residence at the home on Peace Valley Road, and the Defendant resides in the carriage house.

f. It is not disputed that Vickie Fowler is an adult who is unrelated to the Defendant.

g. It is not disputed that the Defendant and Vickie Fowler are in a dating relationship. Deposition of Earl Corey Page 9 Line 10; Deposition of Vickie Fowler Page 22 Line 14.

h. It is undisputed that the main house and the carriage house are in very close proximity to each other. It is disputed whether the main house and the carriage house are actually connected or separated by a breezeway or patio area.

i. It is undisputed that the Defendant and Vickie Fowler have spent nights together in both the main house and the carriage house.

j. It is undisputed that the Defendant and Vickie Fowler have not commingled their financial accounts or shared day-to-day living expenses per se.

k. It is undisputed that on May 8, 2018 the Defendant signed a contract with Groover Roofing & Siding to replace the roof on Vickie Fowler's home located at 5126 Peach Valley Road at the estimated cost of $37,761.71. (Exhibit EE). The Defendant testified that he contacted Groover Roofing & Siding because they had done work for him before, and because the carriage house roof was leaking. It is interesting to note that the estimate states "New roof on the entire house and attached garage," and made no mention of a separate carriage house.

l. It is not disputed that the Defendant paid a total of $41,981.91 to pay for the roof described above.

m. It is not disputed that the Defendant is now in [the] process of purchasing his own residence. The Court finds that this evidence is not particularly relevant to the issue of prior cohabitation.

n. The Defendant is now employed full-time at Brave Industries in East Palestine, Ohio. He is paid at the rate of $17.00 per hour.

Based upon these findings of fact, the Court makes the following conclusions of law and Orders:

A. Defendant's Motion to extend the deadline to retrieve his personal property is OVERRULED. The Defendant had 30 days plus an extra 14 days to retrieve his personal property. Plaintiff's counsel gave the required notice. The Court sees no valid reason not to uphold the agreement of the parties, which was incorporated into a court order. All of the items that the Defendant failed to retrieve in a timely manner have reverted to the Plaintiff.

* * *

D. The Plaintiff filed Motions to either modify or terminate spousal support on the grounds of cohabitation. The Final Decree expressly retained jurisdiction over the issue of spousal support, and specifically states that spousal support shall terminate upon … cohabitation by the recipient with an unrelated adult male or female in a relationship similar to marriage."

* * *

In reviewing the first cohabitation factor, the Court finds that the Defendant and Vickie Fowler have been actually living together. Although they have maintained separate mailing addresses, there is no doubt that they live at the same premises. They have spent nights together both in the main house and at the carriage house. They have traveled and vacationed together. The Court puts no weight in the distinction of whether the main

house and the carriage house are actually connected or separated by a breezeway or a patio area. The Court also puts no weight on the fact that the Defendant pays $500.00 per month to Vickie Fowler to rent the carriage house. These arguments are simply designed to mask the fact that the Defendant and Vickie Fowler are actually living together.

Secondly, the Court further finds that the parties have lived together for a sustained period of time, from at least March 8, 2018 until March 13, 2019.

The third factor is the sharing of expenses with respect to financing and day-to-day incidental expenses. Without proof of regular financial support, "merely living together is insufficient to permit a termination of alimony." Ballas v. Ballas, 7th Dist. Mahoning No. 08 MA 166, 2009-Ohio-49665. The Defendant and Vickie Fowler are not per se sharing day-to-day incidental expenses, and they have not co-mingled their funds. However, the Defendant did pay $41,981.91 to put a new roof on Vickie Fowler's home. This is certainly not an expense that any normal tenant would expect to pay. This payment was beyond the sharing of financial obligations by the Defendant, he assumed Vickie Fowler's financial obligation for which the Defendant had no legal obligation. It was, in reality, regular financial support of Vickie Fowler in a lump sum fashion rather than incrementally, as Courts ordinarily see this type of case. This scenario fits into the second situation described in [Moell v. Moell, 98 Ohio App.3d 748 (6th Dist.1994)] where the ex-spouse who is receiving spousal support uses such payments

> to support a non-relative member of the opposite sex. The Defendant and Vickie Fowler are living a lifestyle of cohabitation.
>
> The Final Decree states that spousal support "shall terminate" upon cohabitation. ***
>
> The Plaintiff's spousal support obligation is terminated effective May 1, 2019.

(4/19/19 Magistrate's Decision, pp. 1-8.)

{¶9} On May 3, 2019, Appellant filed objections to the magistrate's decision. Appellee filed a response to the objections on May 9, 2019. On September 20, 2019, the trial court overruled Appellant's objections and adopted the magistrate's decision, concluding:

> The Magistrate properly denied the Defendant's motion to retrieve household items. The final divorce decree specifically addressed the Defendant retrieving his household items and gave a date certain. The Defendant was notified by the Plaintiff's attorney when he had failed to retrieve the household items within the date certain. Even after being notified, the Defendant failed to retrieve the items * * * [T]he Plaintiff's acts did not hamper or prevent the Defendant from retrieving the household items. * * * [T]he Defendant wished to have an extended period of time to retrieve the items, when clearly a date certain had been agreed to in the final divorce decree. * * *

> The Magistrate properly granted the Plaintiff's motion to terminate spousal support. * * * The Magistrate found the Defendant was residing with an unrelated adult female, Ms. Fowler, regardless as to whether they maintained separate mailing addresses. The Magistrate found the Defendant and Ms. Fowler were attempting to mask the fact they were cohabitating. It was more than merely living together: they went shopping together; vacationed together; and the Defendant purchased a new roof for the residence. * * * Clearly, a lump sum of $41,981.91 is without question financial support.

(9/20/19 J.E., pp. 1-2.)

{¶10} Following the trial court's judgment, Appellant filed this timely appeal.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION BY FINDING THAT APPELLANT AND A THIRD PARTY WERE COHABITATING AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT COMMITTED AN ERROR OF LAW BY MISAPPLYING AND MISINTERPRETING THE APPLICABLE CASE LAW AND IN TERMINATING APPELLANT'S SPOUSAL SUPPORT.

{¶11} Appellant's first and second assignments of error challenge the trial court's judgment using the same factual basis. As they are interrelated, they will be addressed together.

{¶12} An appellate court reviews the trial court's adoption of a magistrate's decision for abuse of discretion. *Proctor v. Proctor,* 48 Ohio App.3d 55, 548 N.E.2d 287 (3d Dist.1988.) A court's determination will not be reversed absent an abuse of discretion. *Kurilla v. Basista Holdings, LLC,* 7th Dist. Mahoning No. 16 MA 0101, 2017-Ohio-9370, ¶ 17. Abuse of discretion implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980); *see also Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Moreover, abuse of discretion describes a judgment neither comporting with the record, nor with reason. *See, e.g., State v. Ferranto*, 112 Ohio St. 667, 676-678, 148 N.E. 362 (1925). An abuse of discretion may be found when the trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, 892 N.E.2d 454, ¶ 15 (8th Dist.). The manifest weight standard in a civil case is the same as it is in a criminal matter. *Eastley v. Volkman,* 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 17. The Supreme Court has explained:

> Weight of the evidence concerns "the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the

> issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*." (Emphasis sic.) *Id*. at ¶ 12, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997).

KB Resources, LLC v. Patriot Energy Partners, LLC, 7th Dist. Columbiana No. 17 CO 0002, 2018-Ohio-2771, ¶ 60.

{¶13} The purpose of spousal support is to provide for the financial needs of an ex-spouse. *Thomas v. Thomas*, 76 Ohio App.3d 482, 485, 602 N.E.2d 385, 387 (10th Dist.1991). If the ex-spouse is living with another person, and that person provides financial support or is being supported by the spousal support recipient, then the underlying need for spousal support is reduced or does not exist. *Id.* Cohabitation by a recipient of spousal support has long been used as a trigger for termination of that support. *Brown v. Bordenkircher,* 7th Dist. Jefferson No. 05 JE 51, 2006-Ohio-3904, ¶ 31.

{¶14} "Cohabitation" has been defined as the sharing of familial or financial responsibilities combined with consortium of the persons involved. *Coe v. Coe,* 9th Dist. Medina No. 03CA0104-M, 2004-Ohio-3845. Hence, the essential elements of cohabitation are (1) sharing of family or financial responsibilities and (2) consortium. *State v. Williams,* 79 Ohio St.3d 459, 465, 683 N.E.2d 1126 (1997). Evidence that tends to demonstrate sharing of financial responsibilities can include provisions for food, shelter, clothing, utilities and/or commingled assets. *Id.* The three factors commonly used to determine whether the case involves a cohabitation are found in *Moell*, relied on by the magistrate. These factors are: (1) actually living together, (2) for a sustained duration, and (3) shared expenses with respect to day-to-day and incidental expenses. Appellant's

own testimony provides evidence on these factors and supports the trial court's determination. Appellant was already involved in a longstanding friendly relationship with Ms. Fowler, which was the reason he was afforded the opportunity to live in her carriage house. The carriage house is a structure located on Ms. Fowler's property. Whether this structure is completely attached to the main house or only partially attached, it shares the same roof. It does have a separate mailing address. Appellant's relationship served as the basis for his move into Ms. Fowler's carriage house, as opposed to Appellant renting an apartment in an arm's length transaction. According to his own testimony, that friendship blossomed into a romantic relationship and Appellant began dating Ms. Fowler while living there. Appellant testified that he paid a monthly rental of $500 to Ms. Fowler. However, he also testified that they bought groceries together, he mowed the lawn, they very frequently vacationed together, and the couple spent nights together in the same house. Appellant lived on the property from March 8, 2018 until at least March 13, 2019. Courts have concluded cohabitation exists when there is evidence of shared grocery expenses, performance of work around the house, and evidence of other activity demonstrating the functional equivalent of a marriage. *Coe v. Coe,* 9th Dist. Medina No. 03CA-0104-M, 2004-Ohio-3845, ¶ 10. Although Appellant attempted to disguise the relationship as that of landlord/tenant, the record demonstrates that the parties were living as a couple, and shared expenses and duties around the home. Thus, the evidence before the trial court established that the first two *Moell* factors were present, as Appellant and Ms. Fowler lived together for a sustained period of time.

{¶15} Regarding the third *Moell* factor, and perhaps the most telling, on May 8, 2018, Appellant entered into a contract with Groover Roofing and Siding for the purchase

and installation of a new roof for Ms. Fowler's entire structure. The contract called for a "New roof on the entire house and attached garage." (Plaintiff's Exh. EE.) No mention was made of a "carriage house" in the contract, and a photograph entered into evidence reveals that the main house and attached garage appear to be one structure. (Plaintiff's Exh. GG.) Hence, the "attached garage" and the "carriage house" are simply two different references for the same space. The total amount of the roofing contract was $41,987.81 and was paid completely by Appellant. Ms. Fowler was not a party to the roofing contract. She did not sign it, nor did she pay any funds towards the replacement of her roof. At trial Appellant was asked why he failed to disclose that he had purchased a new roof for Ms. Fowler's property, or that he had made any large loans or given gifts to Ms. Fowler, in his earlier deposition. Appellant was unable to explain the nature of the roofing purchase at trial. At one point he stated it was not a gift to Ms. Fowler, then later changed his testimony to say that it was a gift. Appellant also testified that he continued to pay Ms. Fowler the monthly rent of $500, even after he made the large expenditure to replace her entire roof. The trial court was clearly not persuaded that Appellant's monthly checks, even if they were in the nature of a rental payment, precluded a finding that he was providing financial support for purposes of cohabitation. Clearly, the total rental for the one year period he lived on the property is far less than the over $41,000 roof purchase. Although as both the magistrate and the trial court noted, Appellant and Ms. Fowler had an arrangement that was not the typical commingling of finances usually seen in cohabitation cases, Appellant's monthly rental payment to Ms. Fowler does not preclude the trial court's finding of financial commingling when there is undisputed evidence of the other indices of cohabitation: grocery payments, staying together under the same roof

for periods of time, performing work around the house, and vacationing together. Finally, and most notably, Appellant entered into a contract for the purchase of a roof for a property in which he had no ownership interest, an expense totaling over $41,000. These facts reveal that Appellant was engaging in more than a landlord/tenant relationship, and more than a casual romantic relationship. These facts support the conclusion that Appellant and Ms. Fowler were a couple cohabitating: living in "the functional equivalent of a marriage." *Coe,* ¶ 10. Moreover, Appellant's ability to provide such a large financial gift indicates that an underlying need for spousal support apparently no longer exists. *Thomas,* 485. The trial court was not persuaded by Appellant's attempts to hide his cohabitation, and properly terminated the spousal support award. This record contains competent, credible evidence of cohabitation on which the trial court properly relied and the decision of the trial court should not be reversed as against the manifest weight of the evidence.

{¶16} Appellant's first and second assignments of error are without merit and are overruled.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION BY ORDERING THAT APPELLANT COULD NOT RETRIEVE THE REMAINDER OF HIS HOUSEHOLD GOODS AND FURNISHINGS AFTER THERE WAS CLEAR TESTIMONY THAT APPELLANT'S MULTIPLE ATTEMPTS WERE MADE AND THWARTED BY THE ACTIONS OF THE APPELLEE.

{¶17} It is axiomatic that a court speaks only through its journal. *In re B.M., A Minor,* 7th Dist. Jefferson No. 19 JE 0006, 2020-Ohio-1150, ¶ 11. There also is clear importance in upholding the finality of a judgment. *Peam v. Daimler Chrysler Corp.,* 148 Ohio App.3d 228, 2002-Ohio-3197, ¶ 40 (9th Dist.). In finalizing their uncontested divorce action in this case, the parties agreed to the final judgment entry of divorce, which provided:

> 7. **MUTUAL RELEASES.**
>
> * * * It is the understanding and agreement of the parties that except as herein provided otherwise, this Final Judgment Entry of Divorce does completely and forever adjust, settle, dispose of, and terminate any right, claim, demand or cause of action each now has or may have, arising out of their marriage or otherwise arising or resulting from any other matter, act, agreement or cause whatsoever.
>
> * * *
>
> 10. **DIVISION OF PROPERTY**
>
> **Household Goods:** Husband shall have all of his personal effects, clothing, jewelry and tools that are currently in his possession free and clear of any and all claims of Wife, in addition to those items that are contained on **Exhibit "A."** * * * Should Husband, not retrieve these items, within thirty (30) days, Wife's counsel shall send a letter to [Husband's counsel] notifying of the failure and giving Husband fourteen (14) days to retrieve all items, or

all of Husband's designated property shall revert to Wife, if Husband fails to retrieve said items after the final written notice.

(3/9/18 Final Judgment Entry of Divorce, pp. 4-5.)

{¶18} Pursuant to the terms of this entry, after Appellant failed to remove his personal items within thirty days, Appellee's counsel sent a notification letter providing Appellant an additional 14 days. This was the course of action agreed to by the parties and ordered by the court. Instead of retrieving his belongings within the agreed period, even as extended pursuant to his divorce decree, Appellant filed a motion asking for even more time, until May 31, 2018, to pick up his items. While Appellant claimed that Appellee and her counsel had thwarted his efforts to collect his property, he acknowledged that he had actually removed some, but not all, of his property. Appellant offered no evidence in support of his claim, and Appellee opposed the motion. Appellant now contends that Appellee prevented him from entering the property to collect his belongings and that the trial court's determination that these items should revert to Appellee is against the manifest weight of the evidence.

{¶19} A review of the record reflects that the terms of the divorce decree were clear, with set deadlines for Appellant to retrieve his personal property. In addition, the decree also provided Appellant an additional two weeks, should he fail to meet his first deadline. Both parties testified regarding the issue. Appellant asserted that Appellee had not cooperated in his efforts to pick up his belongings by failing to give him a time to return to the marital home for him to pick up his goods. Appellant testified on cross-examination that after receiving the 14-day notice, Appellee's counsel suggested to Appellant's

counsel three other dates that were available, but beyond the allotted court deadline, and Appellant refused to take advantage of any of those opportunities.

{¶20} The court, as trier of fact, had the best opportunity to observe the demeanor and judge the credibility of the witnesses and, between the two plausible stories, chose to believe Appellee's version of events. The record thus shows that Appellee complied with the clear and unambiguous terms of the divorce decree and Appellant did not. The trial court did not abuse its discretion in finding that Appellant failed to comply with the terms of the divorce decree. Appellant's third assignment of error is without merit and is overruled.

{¶21} Based on the foregoing, all of Appellant's assignments of error are without merit. The judgment of the trial court is affirmed.

Robb, J., concurs.

D'Apolito, J., concurs in part and dissents in part; see concurring in part and dissenting in part opinion.

D'Apolito, J., concurring in part, dissenting in part opinion.

{¶22} I concur in part and respectfully dissent in part.

{¶23} I agree with the majority, regarding Appellant's third assignment of error, that the trial court did not abuse its discretion in finding that Appellant failed to comply with the terms of the divorce decree pertaining to "Household Goods" and ordering that he could not retrieve the remaining items.

{¶24} The record establishes that Appellant was provided proper notification and given a sufficient allotment of time to retrieve his household goods pursuant to the terms of the divorce decree. *See* (3/9/2018 Final Judgment Entry of Divorce, p. 4-5; 4/12/2018 Appellee's Letter). Appellant did in fact retrieve many items that were listed on Exhibit "A" but failed, however, to retrieve all of his belongings pursuant to the agreed upon 44-day timeframe. Nowhere in the decree does it state that Appellant was able to enlarge the time to retrieve his household items.

{¶25} Thus, I agree with the majority that Appellant's third assignment of error is without merit.

{¶26} However, I respectfully disagree with the majority, regarding Appellant's first and second assignments of error, finding that the trial court did not err in determining that Appellant and Ms. Fowler were cohabitating and thereby terminating his spousal support.

{¶27} "Three key factors, as set forth in *Moell* [*v. Moell,* 98 Ohio App.3d 748 (6th Dist.1994)], are used to determine whether a cohabitation clause has been triggered. 'These factors are "(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."' *Moell* at 752, 649 N.E.2d 880, quoting *Dickerson v. Dickerson* (1993), 87 Ohio App.3d 848, 850, 623 N.E.2d 237." *Ballas v. Ballas*, 7th Dist. Mahoning No. 08 MA 166, 2009-Ohio-4965, ¶ 28.

{¶28} Regarding the first and second cohabitation factors, the evidence does not support that Appellant and Ms. Fowler had been actually living together for a sustained duration. *Moell, supra,* at 752. Appellant paid monthly rent to Ms. Fowler. Ms. Fowler lived in the main house whereas Appellant resided in the carriage house. The parties maintained separate mailing addresses. Like many modern-day, adult dating

relationships, Appellant and Ms. Fowler would occasionally spend nights together. However, the majority of their time was spent apart and they were not dating exclusively. The parties would also occasionally travel together, mainly in Ms. Fowler's motor home, and would occasionally purchase groceries together. However, there is no showing in the record as to which party paid for what. The facts presented fail to meet the first two factors, and thus, fail to trigger the cohabitation clause. *Id.* Therefore, this writer believes the trial court's finding of an "actual living together" for a "sustained duration" is against the manifest weight of the evidence. *Id.*

{¶29} Regarding the third cohabitation factor, the record fails to establish that Appellant and Ms. Fowler shared expenses with respect to financing and day-to-day incidentals, which is required for a finding of cohabitation. *Id*. In fact, the magistrate determined and specifically stated: "It is undisputed that the Defendant and Vickie Fowler have *not* commingled their financial accounts or shared day-to-day living expenses per se [and] [i]t is not disputed that the Defendant is now in [the] process of purchasing his own residence." (Emphasis added.) (4/19/2019 Magistrate's Decision, No. 14 (j) and (m)). The magistrate further indicated: "Without proof of regular financial support, 'merely living together is insufficient to permit a termination of alimony.' *Ballas v. Ballas*, 7th Dist. Mahoning No. 08 MA 166, 2009-Ohio-4965." (*Id*.). The magistrate stated again: "The Defendant and Vickie Fowler are *not* per se sharing day-to-day incidental expenses, and they have *not* co-mingled their funds." (Emphasis added.) (*Id*.). Notwithstanding these facts, the magistrate recommended terminating Appellee's spousal support obligation. I believe it was error for the trial court to adopt the magistrate's decision regarding this issue.

{¶30} The magistrate determined and the trial court agreed that Appellant's payment of $41,981.91 for a new roof for Ms. Fowler's residence constituted regular financial support in a lump sum fashion. The magistrate stated: "This scenario fits into the second situation described in [*Moell v. Moell*, 98 Ohio App.3d 748 (6th Dist.1994)] where the ex-spouse who is receiving spousal support uses such payments to support a non-relative member of the opposite sex." (*Id.*). I disagree.

{¶31} Considering that Appellant was receiving only $2,000 per month in spousal support beginning in March 2018 and the one-time $41,981.91 expenditure in question

was paid in June 2018, it is impossible that Appellant could have used his spousal support to make any meaningful portion of this new roof payment. (*Id.*). This roof expense does not constitute the sharing of a burden, but rather was a one-time gift used with Appellant's own funds. There is a qualitative difference between sharing day-to-day living expenses and buying an expensive, one-time gift, be it a diamond necklace, a car, or in this case, a new roof. There is no requirement for this court to define a functional gift versus a romantic one.

{¶32} After reviewing the record and considering the evidence and reasonable inferences therefrom, this writer concludes that the evidence does not support the trial court's decision. Based on the facts presented in this case, I believe the trial court abused its discretion in finding that Appellant and Ms. Fowler were cohabitating and thereby terminating Appellant's spousal support.

{¶33} Thus, I respectfully disagree with the majority that Appellant's first and second assignments of error are without merit.

{¶34} For the foregoing reasons, this writer finds Appellant's first and second assignments of error with merit and his third assignment of error not well-taken. I believe the judgment of the Columbiana County Court of Common Pleas, Domestic Relations Division, should be affirmed in part, reversed in part, and the matter remanded to the trial court to reinstate its March 9, 2018 spousal support order.

{¶35} Accordingly, I concur in part and respectfully dissent in part.

APPROVED:

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DAVID A. D'APOLITO, JUDGE

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas, of Columbiana County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.