

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

KENNETH W. BATCHER

C.A. No. 25314

Appellee

v.

SERENA E. BATCHER

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. 2007-04-1123

Appellant

DECISION AND JOURNAL ENTRY

Dated: March 30, 2011

CARR, Judge.

{¶1} Appellant, Serena Batcher, appeals from a judgment of the Summit County Court of Common Pleas, Domestic Relations Division, that terminated her spousal support. This Court reverses and remands.

I.

{¶2} Serena and Kenneth Batcher were married from July 22, 1995 until they were granted a divorce on April 18, 2008. As part of the divorce decree, pursuant to the parties' separation agreement, Kenneth was ordered to pay spousal support to Serena for 38 months. Their agreement further provided that spousal support would automatically terminate upon the occurrence of several events, including "the remarriage or cohabitation of [Serena.]"

{¶3} On August 19, 2008, Kenneth moved to terminate the order of spousal support, alleging that Serena was cohabiting with another man. Following an evidentiary hearing, the magistrate found that, although Serena was romantically involved with another man with whom

she had “shared some financial and familial responsibilities,” they resided primarily in separate residences and were not cohabiting. Therefore, he denied the motion to terminate spousal support. The trial court immediately adopted the magistrate’s decision and entered judgment, pending the filing of timely objections.

{¶4} On April 16, 2010, Kenneth filed a timely written objection to the magistrate’s decision, challenging specific factual findings and magistrate’s conclusion that Serena had not been cohabiting. Kenneth indicated that he would brief the matter more fully after the transcript of proceedings was prepared. Serena responded in opposition to Kenneth’s objection, but requested that she be granted an extension of time to fully respond to the objection until after the transcript had been filed and Kenneth had filed his supplemental brief in support of his objection.

{¶5} The trial court did not rule on Serena’s request for an extension and the transcript of proceedings was never filed. On February 23, 2010, the trial court sustained Kenneth’s objection, concluding that the magistrate’s failure to find cohabitation was against the manifest weight of the evidence. Serena appeals and raises three assignments of error.

II.

ASSIGNMENT OF ERROR I

“THE TRIAL COURT ERRED BY SUSTAINING KENNETH’S OBJECTIONS TO THE MAGISTRATE’S DECISION WITHOUT THE BENEFIT OF A TRANSCRIPT.”

{¶6} Serena’s first assignment of error is that the trial court erred by sustaining Kenneth’s objection that the magistrate’s decision was against the manifest weight of the evidence because Kenneth had not filed a transcript of proceedings to support the objections. Although the trial court indicated in its judgment that it had reviewed the parties’ exhibits and

the transcript of proceedings, the record reveals that no transcript or exhibits had been filed in this case at the time the trial court ruled on the objections.

{¶7} Although Kenneth has suggested that Serena failed to meet her burden of transmitting a complete record on appeal, there is nothing before us to suggest that the record is missing a transcript that was properly filed in the trial court. On the contrary, the trial court's docket and journal entries, as certified by the Summit County Clerk of Court, demonstrate that no transcript of proceedings was filed while this action was pending in the trial court, nor were the exhibits that were admitted at the hearing before the magistrate. App.R. 9(A) explicitly provides that the record on appeal includes "a certified copy of the docket and journal entries prepared by the clerk of the trial court." It is from that certified docket that an appellate court ascertains whether a transcript was or was not filed in the trial court. See *State v. McGowan* (Nov. 2, 2001), 5th Dist. No. 2001AP06 0052. Kenneth does not even suggest that he did file a transcript or that the clerk's certified docket is inaccurate.

{¶8} Consequently, this Court must determine whether the trial court properly ruled on Kenneth's objection, given that he did not file a transcript of proceedings to support his challenge. Kenneth's objection to the magistrate's decision challenged the magistrate's finding that Serena was not cohabiting with her boyfriend. In support of his objection, he pointed to evidence that, according to him, supported a finding of cohabitation.

{¶9} "Cohabitation,' when used in a divorce decree as a condition for termination of spousal support, is used as a substitute for 'remarriage.'" *Gatto v. Gatto* (July 19, 1995), 9th Dist. No. 17121. Courts typically look to three factors to determine whether a former spouse is cohabiting: "(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.'" *Jenkins v. Jenkins*, 9th

Dist. No. 08CA009324, 2009-Ohio-75, at ¶7, quoting *Moell v. Moell* (1994), 98 Ohio App.3d 748, 752. The question of whether cohabitation exists is a question of fact to be determined on a case-by-case basis. *Dial v. Dial* (1993), 92 Ohio App.3d 513, 514. A reviewing court should not substitute its judgment for that of the fact-finder, but must uphold the finding if it is supported by “some competent, credible evidence.” *Jenkins*, at ¶5.

{¶10} As Kenneth was challenging a factual finding of the magistrate, he was required to support his objection with a transcript of the evidence presented at the hearing before the magistrate. Civ.R. 53(D)(3)(b) provides, in relevant part, that “[a]n objection to a factual finding *** shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding[.]” It further provides that “[t]he objecting party shall file the transcript *** with the court within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause.”

{¶11} Kenneth did not file a transcript within 30 days after filing his objection, nor did he seek or receive leave of the trial court to extend the filing deadline. At the time the trial court issued its ruling on the objections, ten months had elapsed since Kenneth filed his objection and no transcript had been filed in this case. Consequently, in the absence of a transcript, the trial court was required to accept the magistrate’s findings of fact as correct. *Galewood v. Terry Lumber & Supply Co.* (Mar. 6, 2002), 9th Dist. No. 20770.

{¶12} The trial court reviewed the merits of Kenneth’s challenges to the magistrate’s decision and found that his finding that Serena was not cohabiting was against the manifest weight of the evidence. It is clear from the trial court’s decision that it rejected many of the magistrate’s factual findings, including his findings about the extent to which Serena had intertwined her finances and living arrangements with her boyfriend, and the magistrate’s

ultimate conclusion that Serena and her boyfriend were not cohabiting. Because Kenneth had not filed a transcript of the evidence presented at the hearing before the magistrate, the trial court exceeded its authority under Civ.R. 53 by failing to accept the magistrate's factual findings as correct. Because the only objection raised by Kenneth was to the magistrate's underlying factual findings supporting his ultimate finding that Serena was not cohabiting, the trial court should have overruled Kenneth's objections. Serena's first assignment of error is sustained.

ASSIGNMENT OF ERROR II

“THE TRIAL COURT ERRED BY SUSTAINING KENNETH’S OBJECTIONS TO THE MAGISTRATE’S DECISION WITHOUT RULING ON SERENA’S MOTION FOR EXTENSION OF TIME TO FILE A RESPONSE, AND WITHOUT HAVING THE BENEFIT OF RESPONDING TO THE OBJECTIONS.”

ASSIGNMENT OF ERROR III

“THE TRIAL COURT ERRED BY SUSTAINING KENNETH’S OBJECTIONS TO THE MAGISTRATE’S DECISION AND FINDING THAT SERENA AND LARRY PIERCE WERE COHABITATING.”

{¶13} Because Serena's remaining assignments of error have been rendered moot by this Court's disposition of her first assignment of error, they will not be addressed. See App.R. 12(A)(1)(c).

III.

{¶14} The first assignment of error is sustained and the remaining assignments of error were not addressed because they are moot. The judgment of the Summit County Court of Common Pleas, Domestic Relations Division, is reversed and the cause is remanded for proceedings consistent with this opinion.

Judgment reversed and
cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

DONNA J. CARR
FOR THE COURT

BELFANCE, P. J.
WHITMORE, J.
CONCUR

APPEARANCES:

MICHAEL A. PARTLOW, Attorney at Law, for Appellant.

SUSAN K. PRITCHARD, Attorney at Law, for Appellee.