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Chair's Column

Four Technological Issues Facing Attorneys at the Beginning of 2023

By Derek M. Freed

Many have argued that the pandemic resulted in lawyers having to move ahead 10 years from a technological perspective in 10 days. In order to continue to practice during periods of lockdown and social distancing, attorneys needed to learn how to use the "cloud," as well as videoconferencing platforms such as Microsoft Teams, Webex, and Zoom. As we move to a different phase of the pandemic, the reality is that many of us still rely on the cloud, as well as videoconferencing platforms, to handle our cases. Mediations and some court appearances remain virtual. Documents, evidence, and pleadings are now often stored on a secure, cloud-based document management system that can be accessed anywhere and through virtually any device. Finally, email has truly become ubiquitous and the preferred way of communication for many attorneys.[1]

In the past several weeks, I have encountered four different technological issues facing attorneys, which I believe we will need to address collectively as a profession. I will address each issue in this column.

Issue #1: 'Reply All' in Email Communications

On Nov. 2, 2022, the American Bar Association's Formal Committee on Ethics and Professional Responsibility issued Formal Opinion 503.[2] In the opinion, the ABA addressed a scenario in which an attorney copies their client ("the sending attorney") on an email communication to another attorney ("the receiving attorney") and whether, by copying his client on the email, the sending attorney has "impliedly consented" to the receiving attorney using the "reply all" response to the email (and thereby copying the sending attorney's client

with their response to the email). The problem created with the "reply all" response is that the receiving attorney would then potentially be violating R.P.C. 4.2 of the ABA Model Rules of Professional Conduct, which generally prohibits a lawyer from communicating with a person who is known to be represented by counsel, unless consent has been given by counsel.

Formal Opinion 503 determined that the sending attorney "impliedly consents" to their client receiving a "reply all" response from the receiving attorney when they copy their client on the outgoing email with a few exceptions.[3] This conclusion is consistent with New Jersey's position, as articulated in Ethics Opinion 739, which stated, "While under *RPC* 4.2 it would be improper for another lawyer to initiate communication directly with a client without consent, by email or otherwise, nevertheless when the client's own lawyer affirmatively includes the client in an email thread by inserting the client's email address in the 'to' or 'cc' field, we think the natural assumption by others is that the lawyer intends and consents to the client receiving subsequent communications in that thread."[4]

The ABA noted that the resolution is "simpler" for the sending attorney. Specifically, if the sending attorney didn't want their client copied on the receiving attorney's response, the sending attorney shouldn't copy their client on the outgoing email. Instead, the attorney should forward the "sent" email to their client.

Given the ABA's Formal Opinion, as well as New Jersey's Ethics Opinion 739, attorneys must understand that they are generally inviting a "reply all" response when they copy their client on a communication to the adversary. These types of "reply all" scenarios can be particularly concerning in family law context, especially involving matters of parenting time and/or in cases in which one of the parties is self-represented. A "reply all" that the client receives directly from opposing counsel may cause upset or concern, especially when it was not preceded with any explanation.

If an attorney does not wish to consent to a "reply all" from the adversary, a separate email at the outset of the matter advising the adversary of this fact may be appropriate. Alternatively, the attorney should be conscious not to copy their client on an outgoing email and, instead, forward their "sent" email to their client to apprise them of the communication. Finally, the attorney may wish to advise their client of the possibility of a "reply all" communication, such that the client is not surprised when it occurs.

Issue #2: Zoom Waiting Rooms for Court Appearances and Retainer Agreements

Virtual waiting rooms are a reality of virtual court appearances. Even if courts are able to stagger start times for appearances, it is highly likely that at least some time during a court appearance will be spent in a Zoom waiting room. This is no different than when we would appear at a courthouse and wait to be heard on a particular matter. Simply because we have a precise time for the start of the Zoom meeting (or the physical court appearance) does not mean that the appearance will start on time. While it is uncommon, colleagues of mine have experienced waiting several hours for their Zoom appearance to commence. Recently, a colleague indicated that their client questioned whether they would be billed for time that was spent in the Zoom waiting room. When the attorney indicated that the client would be billed for time spent in the Zoom waiting room, the client went so far as to suggest that the attorney log out of the meeting to work on other matters and that the client would then call the attorney when the Court was ready to hear the matter. The attorney politely declined the client's suggestion.

In the context of discussing this particular interaction between an attorney and client, I began to wonder whether retainer agreements were in need of being updated to explicitly address these modern circumstances. Many prior retainer agreements advised clients that they would be billed "portal to portal" for the work that their attorney performed when a "court appearance" was required. This generally meant that the client was billed from the time the attorney left their office until the time the attorney returned to their office. Court "appearances" also generally meant appearing in person, as before the pandemic very few appearances were via videoconference.

What is the equivalent of "portal to portal" for virtual appearances? Is it the time at which you log in to the computer until the time that you log out of the computer after the meeting has ended? Is it the time that the meeting was supposed to commence until the time at which the meeting actually ends?

Should attorneys consider updating their retainer agreements to address the different types of appearances that may occur in a case, i.e., in-person, telephonic, videoconference? Do changes in technology warrant attorneys potentially updating their retainer agreements? These are complicated questions, with nuanced answers.

Moreover, as attorneys are in a "customer service" type industry, we may need to make these determinations from a client management perspective, as well as from an evaluation of the Rules of Professional Conduct.

Issue #3: DocuSign/E-Signature Verification Programs

During the pandemic, in-person client meetings were rarities. However, attorneys still needed to obtain client signatures on documents. As such, we generally continued our practice of obtaining electronic signatures. Often times, this meant sending a PDF of a document to the client to print, sign, and then scan back to us. As the pandemic continued, many attorneys began to use DocuSign, Adobe Sign, and other E-Signature verification programs. This allowed for clients to sign electronically through their phones and tablets, and generally made obtaining electronic signatures easier. Additionally, e-signature verification programs would provide an "audit" of the signature, confirming that the document was sent to a particular email address (or IP address) and was opened at a particular time. These programs were meant to increase the likelihood that a signature was genuine and belonged to the client. As the pandemic progressed, I began to see provisions in consent orders and marital settlement agreements that indicated that the document may be signed electronically via DocuSign, Adobe Sign, or any other e-signature program given the COVID-19 pandemic.

As we work our way through this phase of the pandemic, should we continue to include verbiage in our draft agreements and draft consent orders that specifically permit signature via an e-signature program? Should the language be broader and simply indicate that an electronic signature is permitted under any circumstance? Should the language be narrower? Is an electronic signature via DocuSign more likely to be genuine than a signature that appears on a document that was printed, signed, and scanned? Arguments can be made in both directions. Ultimately, depending on the nature of the case and the document to be signed, an attorney may simply contend that unless the document is signed in the presence of a notary who provides their seal, the signature is unacceptable, regardless of the level of verification.

I raise this issue for several reasons. First, depending on your school of thought, certain attorneys may wish to revise their marital settlement agreement and/or consent order templates to address whether e-signatures are acceptable and if so, under what circumstances they may be used. Second, it may be wise to discuss the concept of an e-signature with your adversary. If both attorneys believe an e-signature to be sufficient, a communication confirming this fact may be appropriate. This communication will then prevent a litigant from making a future claim that they never agreed with the concept of an e-signature and as such, the document was void and/or unsigned. Third, offices may wish to develop internal policies as to when e-signatures may be permitted (if at all) versus when in-person signatures should be used. These types of policies may avoid ad hoc determinations and overall confusion.

Issue #4: 'Squeezing in a Quick Zoom'

Our NJSBA President, Jeralyn Lawrence, is leading an effort to gain as much statistical data as possible on attorney wellness. Many of us have taken a questionnaire to provide information on our stress levels, as well as regarding our overall state of mind and feelings about the profession of being a lawyer. One concept that I believe is adversely affecting attorney wellness is what I call "squeezing in a quick Zoom." The concept looks like this:

It is Friday. We have a complicated motion argument scheduled at 9 a.m. and an intensive settlement conference scheduled at 1:30 p.m. Prior to the pandemic, both of those appearances would be in person. If the morning and afternoon appearance were in the same courthouse, depending on the distance of the courthouse from our office, we may have simply chosen to stay at the courthouse after the motion argument concluded. We may have reached out to a colleague in the area for lunch, or brought our laptop, or even gone to a local Starbucks for a coffee. However, we usually attempted to build in downtime between the end of the motion argument and the commencement of the settlement conference.

Presently, if both the motion argument and the settlement conference are virtual, many of my colleagues (and I) will tend to schedule a "quick Zoom" for the time between the end of the motion argument and the beginning of the settlement conference. We may even schedule a second "quick Zoom" for the time period after the end of the settlement conference. This practice effectively removes any downtime from our day, even though we are still using the same amount of mental energy to argue the motion and advocate for our client during the settlement conference. Additionally, instead of transitioning from one case in the morning to another case in the afternoon

(with lunchtime serving as a nature break), we are now transitioning between four difference cases throughout the day (with virtually no breaks in between).

Sometimes, these scheduling issues arise by our personal choices. Other times, these scheduling issues are foisted upon us. I write simply to encourage attorneys to consider building downtime into their schedules and think twice about the practice of "squeezing in a quick Zoom." We need to keep at least some focus on our own wellness. Downtime can be very beneficial and allow us to think more deeply about our cases in a non-rushed manner. We can also use downtime to also reflect on our office staff, our professional colleagues, and our families. I would encourage each attorney to carefully scrutinize their scheduling practices and evaluate whether downtime has been sufficiently considered. If it has not been considered, perhaps blocking time on one's calendar for a daily lunch break, or for a daily review at 4:30 p.m. may be helpful. The practice of blocking time may help to avoid at least some of the "quick Zooms" that tend to appear. ■

Endnotes

1. Present company excluded.
2. americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-503.pdf
3. Formal Opinion 503 at page 2.
4. N.J. Advisory Committee on Professional Ethics, Opinion 739 (2021).

Inside this issue

Executive Editor's Column

Were All of Us Unwitting Accomplices to Unreasonable Searches and Seizures During the Pandemic?

By Ronald Lieberman

Do practitioners remember the "old days" during COVID and Zoom court when we would handle virtual plenary hearing and trials and the judge would *sua sponte* or after prompting by one party or the other direct the witnesses or litigants to use their cameras to show their surroundings, even if it occurred in their homes? The judge may have directed such a scan to make sure there was no witness interference or that the witness did not have notes or other papers in front of them. Perhaps the practitioner asked the judge for such a scan to occur. But did anyone ever give thought to the fact such scans of a home may have violated the party or the witness's Fourth Amendment rights against "unreasonable searches and seizures" under the U.S. Constitution? This author would venture to say that thought never crossed anyone's mind. In a closely followed case out of the Northern District of Ohio, Eastern Division decided on Aug. 22, 2022, a U.S. District Judge ruled the mandatory virtual scan of a college student's dormitory room by a virtual proctor at a university constituted such an unconstitutional search.[1] That case appears to be the first of its kind in the nation. It is not likely to be the last one.

By way of a brief background on that case, a chemistry student enrolled at Cleveland State University (CSU) sitting for a test in his dorm room was asked by the virtual proctor to show his bedroom to preserve the integrity of the test. That student complied. The data was stored by one of the school's third-party proctoring tools. After the test, the student sued CSU alleging that the room scan violated his 4th Amendment Rights against unreasonable searches and seizures.[2] CSU denied the allegation and responded by stating that room scans would not be searches because they were limited in scope, conducted to ensure academic fairness and exam integrity, and not to discover crimes.[3] The District Court judge ruled in the student's favor finding that privacy interest in his dorm room outweighed any interest by the school in scanning his room.[4] That ruling occurred even though the student never objected to the scan and the scan of the student's room did not last for more than a minute and could have been as brief as 10 seconds.[5] The room scans allowed a government actor, in this case the proctor, to go where they could not go without a warrant and just because the technology was in general public use did not mean it was not an actual search.[6]

That case is instructive because just about everything that occurred with the student meaning a brief scan to ensure integrity of the process, in the scan occurring in a person's home, and a scan done pursuant to a government actor likely occurred during hearings or trials in the pandemic. Oftentimes, a judge would order an impromptu scan of a witnesses or party's home either *sua sponte* or at the request of one of the attorneys. The judge was certainly acting in their role as a state actor thus bringing the action under the 4th Amendment.[7]

Could there have been a permissible reason such as "special needs" for a judge to have ordered a scan before or during a hearing or trial held during the pandemic?[8] The answer is likely "no." But even a suspicionless search needs to meet four factors before it could be constitutional.[9] The District Court judge in *Ogletree* applied those four factors to determine whether a special need exception applied: (1) did the nature of the privacy interest outweigh the intrusion; (2) what was the character of the intrusion; (3) the nature of the governmental concern involved; and (4) how efficient was the intrusion to the governmental concerned involved.[10] Other than finding the intrusion was minor and the need to preserve testing integrity was admirable, the District Court judge ruled the factors weighed against a determination of any special need permitting a warrantless search.[11]

So, *Ogletree* would be instructive as to what would happen when a litigant or even a client was directed by a judge to perform a scan of their room before or during a hearing or trial. It was a search of someone's home done without a warrant and there was no special need to do so, even if it was to preserve integrity. What is a practitioner to do with this case from of the Northern District of Ohio? We should immediately stop asking for room scans prior to a plenary hearing or trial. More importantly, however, if such a scan occurred perhaps the practitioner needs to advise the client of their right to speak to a lawyer who practices this type of civil litigation. An attorney may have an obligation under RPC 1.4(c) to explain a matter to the extent reasonably necessary to allow their client to make an informed decision which in this situation may require the attorney to tell the client to consult with someone who practices in that area of the law.

Sometimes even the best of intentions can have negative consequences. What seemed innocent or even clever by asking a judge to order a scan of a witness's room can cause future litigation. The lesson here is that the pandemic continues to teach all practitioners some lessons in ways foreseen and unforeseen. ■

Endnotes

1. *Ogletree v. Cleveland State University*, Case No.: 1-21-cv-00500-JPC, Filed 08/22/22.
2. *Ibid.*
3. *Ibid.*
4. *Ibid.*
5. *Ibid.*
6. *Ibid.*
7. *Andrews v. Hickman County, Tennessee*, 700 F. 3d 845, 859 (6th Cir. 2012).
8. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987).
9. *Ibid.*
10. *Vernonia Sch. Dist. 47 J v. Acton*, 515 U.S. 646, 654-64 (1995).
11. *Ogletree, supra*.

Survey of Post-2014 Amendment New Jersey Cohabitation Cases

By Barry S. Sobel

Predictability ... the desire of every client. They want to know the outcome of their case before it even begins. As all lawyers know (but only some confirm), we cannot predict the future. What we can do, however, is research and understand how courts apply legal principles to facts and then use that analysis to effectively advise our clients. As we approach the eight-year anniversary to the reformative statutory alimony amendments, I researched how our courts across the state have adjudicated cohabitation – a legal issue drowning in subjective analysis – and its impact upon alimony. As these cases appear more prevalent, it is important to understand how our courts are applying the law – and whether they are applying it uniformly – so that we, as practitioners, can counsel our clients appropriately. The following chart is a compilation of post-amendment cohabitation litigations and provides a condensed analysis of each litigation. For each litigation, the chart identifies if there is a settlement agreement and the terms of that agreement regarding alimony, if the amended statute was applied, and the ruling and rationale from the court. For a more macro perspective, here are my top six observations:

1. **Consistency:** Courts consistently apply pre-amendment law to applications that pre-date the statutory effective date or when parties expressly and/or contractually agree to use pre-amendment law in their property settlement agreement. Conversely, courts consistently apply post-amendment law to applications filed after the effective date that are silent on the issue (even if the underlying divorce litigation was adjudicated prior to the effective date) or when parties expressly and/or contractually agree to use current law at the time the application was filed.
2. **More Than a Dating Relationship:** A payor seeking to modify their obligation must establish more than a dating relationship. Even being engaged may not necessarily be controlling.[1]
3. **Cash is King but is Neither Mandatory Nor Indispensable:** The statute enumerates seven factors courts are required to consider when analyzing an application to modify/terminate alimony based on cohabitation; however, it does not require all factors be present or that any one factor is more important than another. That being said, it appears courts place greater weight on financial intertwining (or lack thereof) than any other factor when adjudicating an application based on cohabitation. In reviewing post-amendment litigations, courts often denied applications based on the lack of financial relationship/intertwining. Nevertheless, financial intertwinement is not an indispensable factor. Trial courts have found *prima facie evidence even* absent financial intertwining – especially given the difficulty in obtaining financial records before an application is filed – so long as there is credible evidence under other statutory factors.[2] The issues now at the forefront are (a) whether financial intertwining alone without evidence of any additional factor equates to automatic *prima facie* evidence and (b) whether, after a final hearing on the merits, evidence of financial intertwining alone permits permanent modification. Moreover, although courts have found *prima facie* evidence of cohabitation without financial intertwining warranting further discovery, and a presumption can therefore be extrapolated that cohabitation can be found after a final hearing on the merits without the financial intertwinement, this too is an issue ripe for adjudication.
4. **Temple is the New Barometer:** Although the definition of what constitutes *prima facie* evidence of cohabitation has not changed post-amendment from pre-amendment, it appears that *Temple v. Temple*[3] has now supplanted *Gayet v. Gayet,*[4] *Lepis v. Lepis*[5] and their progeny as the benchmark for adjudicating *prima facie* evidence. In virtually every litigation after Temple, courts analyze if modification is warranted under the penumbra of Temple.

5. **Cohabitation Without Sex:** One question that remains is whether cohabitation can occur absent a sexual relationship. In *Waldorf v. Waldorf,*[6] the trail court opined that absence a sexual relationship there can be no cohabitation. The Appellate Division affirmed the trial court's denial of the alimony payor's application to terminate (based on an analysis of the statutory factors not the lack of sexual relationship); however, the trial court's comment went unchallenged, leaving ambiguity. Although litigants can freely negotiate definitions of cohabitation and eliminate any sexual relationship requirement, in matters/agreements silent on the issue and/or adjudicated under the amended statute, it remains unclear if cohabitation without sex can exist. Given the morphing of relationships in culture today, the express statutory language providing that a single common household is not required to establish cohabitation,[7] and the lack of statutorily language requiring the presence of a sexual relationship, this too is an issue ripe for discussion.

6. **One Residence Under All is Not Required:** The amended statute expressly provides that cohabitation "involves a mutually supportive, intimate personal relationship ... but does not necessarily [obligate maintaining] a single common household."[8] After enumerating the factors, courts must consider when assessing whether cohabitation is present, the statute provides courts "may not find an absence of cohabitation solely on the grounds that the couple does not live together on a full-time basis.[9]" Certainly, this was to reflect the morphing of familial relationships, as the definition of what constitutes a nuclear family does not exist today as it did in the past. Accordingly, courts frequently found *prima facie* evidence of cohabitation despite the fact that the spouse and purported paramour do not reside together full time. ■

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Endnotes

1. *Charles v. Charles, 2022 WL 1420605 (App. Div. May 5, 2022) (holding an engagement to marry is not the equivalent of cohabitation and denying an application to terminate based on the failure to proffer any evidence of marriage-like activities); see also Pagan v. Pagan, 2019 WL 4858302 (App. Div. Oct. 2, 2019).*
2. *Goethals v. Goethals, 2020 WL 64933 (App. Div. Jan 7, 2020); Wajda v. Wajda, 2020 WL 1950772 (App. Div. Apr. 23, 2020); Temple v. Temple, 468 N.J. Super. 364 (App. Div. 2021); and Kowal v. Hartman, 2021 WL 5997252 (App. Div. Dec. 20, 2021).*
3. 468 N.J. Super. 364 (App. Div. 2021).
4. 92 N.J. 149 (1983).
5. 83 N.J. 139 (1980).
6. *See 2018 WL 2186644 (App. Div. May 14, 2018).*
7. *N.J.S.A. 2A:34-23(n).*
8. *N.J.S.A. 2A:34-23(n).*
9. *N.J.S.A. 2A:34-23(n).*

Analysis of Cohabitation Cases Post-September 10, 2014

Case	Date of MSA / JOD	Date of Application	What does MSA/ JOD provide?	Was Amended Statute Applied?	Ruling	Rationale / Key Facts
Schlumpf v. Schlumpf, 2014 WL 7891589 (App. Div. Feb. 19, 2015)	June 2005 (MSA)	Summer 2012	Alimony to be modified or terminated upon a showing of cohabitation pursuant to *Gayet* and *Garlinger.*	No	App. Div. reversed and remanded termination of alimony, concluding alimony should have been terminated 4 months prior	Husband sought to terminate alimony as of 12/1/2012. Wife agreed she was cohabiting but sought to terminate as of 4/1/2013. App. Div. held that proper termination date was 12/1/2012 (date cohabitation began) because once husband established cohabitation burden shifted to wife who failed to rebut presumption of receiving economic benefit
G.M. v. A.M., 2014 WL 7954507 (App. Div. Mar. 4, 2015)	October 2009 (JOD)	June 15, 2010	Alimony to be terminated upon Defendant's cohabitation with an unrelated adult in a relationship similar to marriage	No	App. Div. affirmed trial court's denial of application to terminate	Although Defendant admitted to having an intermittent dating relationship, Plaintiff failed to present any evidence that she had a relationship akin to marriage and pursuant to *Konzelman v. Konzelman*, 158 N.J. 185 (1999)
Fringo v. Fringo, 2014 WL 8390328 (App. Div. April 2, 2015)	August 2011 (MSA)	April 2013	Cohabitation shall constitute a substantial changed circumstance" pursuant to NJ law	No	App. Div. affirmed trial court's 9 month suspension of alimony	Wife admitted to living with her boyfriend for 9 months, but argued it was a temporary stay and relationship was no longer active. Trial court held that wife and boyfriend were in relationship akin to marriage and failed to satisfy her burden that she did not receive economic benefit.
Wachtell v. Wachtell, 2015 WL 1511181 (App. Div. Apr. 6, 2015)	October 2009 (MSA)	January 2014	Permanent alimony terminated upon cohabitation with a male unrelated by blood/marriage in relationship akin to marriage without the need to prove any economic dependency	No	App. Div. vacated trial court's order of termination	Admission by ex-wife and her paramour that they spent 2-3 nights/ week together is insufficient to establish cohabitation. Frequency of overnights coupled with vacations and attending functions together is also insufficient to establish cohabitation.
Kundro v. Kundro, 2015 WL 2416367 (App. Div. May 22, 2015)	March 2011 (JOD)	August 2013	Alimony terminates on the death of either party, remarriage, or cohabitation of wife	No	App. Div. affirmed trial court's denial of termination	Trial court held that husband failed to meet *prima facie* burden of establishing cohabitation or show that wife derived any economic benefit. Husband failed to provide any proof in support of allegation of cohabitation. Husband's PI investigation revealed few overnights and no evidence of living together.

Case	Date of MSA / JOD	Date of Application	What does MSA/ JOD provide?	Was Amended Statute Applied?	Ruling	Rationale / Key Facts
Coshland v. Coshland, 2015 WL 9700652 (App. Div. Aug. 28, 2015)	March 2011 (PSA)	Pre-Effective Statutory Date August 2013 – March 2014	Alimony terminated upon plaintiff's "residing with an unrelated person . . . or where plaintiff is receiving an economic benefit" for a period of 30 consecutive days	No	Affirmed trial court's denial of motion to terminate	Despite the fact the alleged cohabitant stayed at plaintiff's residence (where the alleged cohabitant use to live) 2-5 nights/ week, the trial court found no cohabitation and no economic benefit as there was no evidence plaintiff and alleged cohabitant shared finances.
***Spangenberg v. Kolakowski*, 442 N.J. Super. 529 (App. Div. 2015)**	**June 2012 (MSA)**	**December 2013**	**Cohabitation triggers review of alimony obligation consistent with *Gayet* and evolving case law**	**No**	**Order reducing alimony obligation based on cohabitation was not issue on appeal** **App. Div. reversed trial court's denial of application to modify alimony on other grounds**	**Amendments to statute not applicable because the post-judgment order became final before the statutory amendment effective date.** **Plaintiff conceded she began cohabiting with her paramour on August 31, 2013. Accordingly, trial court reduced alimony based on economic benefit received by Plaintiff.**
Canal v. Canal, 2015 WL 5944174 (App. Div. Oct. 13, 2015)	2010 (MSA)	November 2013 (Date of Application)	Husband could move to seek relief from alimony obligation if he established cohabitation "pursuant to New Jersey law"	No	App. Div. affirmed trial court's reduction of alimony	Trial court concluded cohabitation based on: PI observing wife staying overnight with paramour 12/31 days in a month; low electricity usage at paramour's PA home; paramour's frequent attendance at gym near Wife's home showed he frequently went between 5-6am
Chernin v. Chernin, 2016 WL 799756 (App. Div. Mar. 2, 2016)	1992 (MSA)	1st Application filed in 1996 2nd Application filed post-statutory effective date	MSA provided for permanent alimony without any express language mandating termination upon cohabitation	No	App. Div. reversed trial court's order terminating alimony based on 2014 amendments	After plenary hearing in 1996, Defendant found to have cohabitated and Plaintiff's alimony obligation lowered. Plaintiff subsequently moved for relief based on same relationship post-amendment. Trial court erred by utilizing amended statute in pre-amendment case and not implementing anti-retroactivity provision.

*Reported cases are marked with bold text.

Case	Date of MSA / JOD	Date of Application	What does MSA/ JOD provide?	Was Amended Statute Applied?	Ruling	Rationale / Key Facts
Quinn v. Quinn, 225 N.J. 24 (2016)	January 2006 (MSA)	March 2010	"[Permanent] alimony shall terminate upon the Wife's death, the Husband's death, the Wife's remarriage, or the Wife's cohabitation, per case or statutory law, whichever event shall first occur."	No Parties agreed the facts would be evaluated under the definition of cohabitation in *Konzelman v. Konzelman*, 158 N.J. 185 (1999)	Supreme Court reversed the trial court's suspending alimony, holding wife's cessation of cohabitation one month after husband moved to terminate did not warrant a departure from MSA that expressly stated alimony terminates upon cohabitation	Trial court found that wife and boyfriend had a 2+ year intimate and exclusive relationship, that the boyfriend lived in her home for over 2 years (despite him having his own home), the boyfriend used the wife's address as his own, made phone calls from the home, was consistently at the home even when the wife was absent, the relationship was recognized by their family and social circles, and that they acted akin to a husband and wife. Trial court suspended alimony for the period of cohabitation but declined to terminate. Supreme Court held termination was proper as the MSA did not provide for suspension in the case of cohabitation – it only provided for termination
Robitzski v. Robitzski, 2016 WL 2350466 (App. Div. May 5, 2016)	2004	November 2014	Alimony to be modified/terminated in accordance with New Jersey statutes and case law in event of cohabitation	Unclear The trial court held the amended statute did not apply; the App. Div. did not opine on the issue, finding that the husband failed to meet his PF burden regardless	App. Div. affirmed trial court's denial of application for further discovery relating to cohabitation	Wife with significant, long-standing relationship with paramour; trial court concluded husband failed to meet *prima facie* burden to warrant further discovery. Wife only spent 100 nights each year with paramour; Facebook posts insufficient; no financial intertwining; no promises of support; no economic dependence
Ponzetto v. Barbetti, 2015 WL 11090338 (App. Div. June 28, 2016)	September 2011 (JOD)	January 2014	N/A	No	App. Div. reversed trial court's order terminating alimony	Issue had already been adjudicated by prior motion practice where different judge ruled no cohabitation existed based on no shared bank accounts, household expenses and/or intertwined finances
Klemash v. Klemash, 2016 WL 3918858 (App. Div. July 21, 2016)	December 2012 (JOD)	September 2014	N/A	Yes	App. Div. reversed and remanded trial court's order denying motion to reduce or terminate alimony	Application really concerned motion to modify based on decrease of income. Regarding cohabitation, on remand, trial court was instructed that cohabitation qualified as changed circumstance and ordered court to make findings of fact pursuant to amended statute

Case	Date of MSA / JOD	Date of Application	What does MSA/ JOD provide?	Was Amended Statute Applied?	Ruling	Rationale / Key Facts
Knox v. Knox, 2016 WL 3943386 (App. Div. July 22, 2016)	April 2008 (JOD)	Late 2012	N/A	No	App. Div. affirmed trial court's order retroactively reducing and then terminating alimony	Trial judge found that wife and boyfriend spent time together in her home during 36-month period in question, but each maintained own residence. Boyfriend only gave wife money when husband stopped paying alimony. Court retroactively credited alimony payor ex-husband and terminated alimony obligation as of date wife married boyfriend
Verga v. Verga, 2016 WL 4367331 (App. Div. Aug. 16, 2016)	July 2004 (JOD)	August 2014	N/A	No	App. Div. affirmed termination of alimony	Date of termination was the date of application – was not retroactive (to date of circumstantial evidence) because alimony payor failed to provide essential financial information to give complete financial picture prior thereto.
Islam v. Davis, 2016 WL 6543640 (App. Div. Nov. 4, 2016)	August 2001 (MSA)	December 2014	Permanent alimony to expire upon the death of either party or if Wife remarried – silent on issue of cohabitation	Yes	App. Div. reversed trial court's denial of application to terminate and remanded for hearing	Defendant conceded that paramour resided with her in her home from October 2011 to February 2015. Defendant admitted paramour contributed to some expenses while he resided in her home (mortgage payments, cable, and utilities), the extent of which should be subject to discovery. Defendant also acknowledged paramour has attended various family functions. "Although defendant insisted that she and [her paramour] did not hold themselves out as married, a fact-finder might reach a different conclusion."
Frick v. Frick, 2016 WL 7030475 (App. Div. Dec. 2, 2016)	September 2009 (PSA)	Motion to terminate filed PRIOR to effective date	N/A	No	App. Div. reversed trial court's order terminating alimony and reinstated the alimony obligation	App. Div. held termination based on cohabitation was waived as PSA only terminated alimony upon death or remarriage of wife. All other scenarios (i.e., cohabitation were foreseeable). Court also statutory amendments were inapplicable given date of execution of the PSA
Kinee v. Kinee, 2017 WL 542019 (App. Div. Feb. 10, 2017)	1997 (JOD)	July 2014	N/A	No	App. Div. affirmed order terminating alimony	Trial court found wife was cohabiting since 1999. Notwithstanding that knowledge, husband did not file for relief until 2014. Based on that knowledge, court held alimony terminated as 2014 and was not retroactive to 1999

Case	Date of MSA / JOD	Date of Application	What does MSA/ JOD provide?	Was Amended Statute Applied?	Ruling	Rationale / Key Facts
Sloan v. Sloan, 2017 WL 1282764 (App. Div. April 6, 2017)	June 2014 (MSA)	January 2016	Permanent alimony governed by existing NJ statutory and decisional law as of December 17, 2013. Husband's remarriage would release Wife from alimony obligation	No	App. Div. reversed order terminating alimony obligation	Plaintiff and his girlfriend participated in "civil commitment ceremony" but did not obtain a marriage license and were never married. They referred to each other as husband/wife on social media. App. Div. held that because parties were not married, termination of alimony was inappropriate; however, nothing prevented the court from considering if modification was appropriate based on cohabitation or changed circumstances as there was no anti-Lepis clause
Klyachman v. Garrity, 2017 WL 2730239 (App. Div. June 26, 2017)	July 2012 (PSA)	July 2015	Alimony terminates if wife cohabits with an unrelated person in accordance with applicable NJ law	Yes	App. Div. reversed trial court's denial of application to terminate and permitted limited discovery	Court found cohabitation existed based on the alimony recipient wife being in long term romantic relationship with paramour; resided in same residence; vacation together; present themselves as married in social settings.
T.L.H. v. M.H., 2017 WL 5478488 (App. Div. Nov. 14, 2017)	July 2013 (JOD) August 2013 (Amended JOD)	Post-October 2015	Alimony terminates upon cohabitation of plaintiff, which shall include residing with any family members (other than the children of the parties) or friends.	No	App. Div. affirmed trial court's order terminating alimony	Plaintiff was forced out of the former marital home due to sheriff sale and moved in with her sister. Plaintiff paid her sister $800/month to live with her sister. Pursuant to terms of MSA, termination was appropriate because plaintiff admitted to living with sister.
CC v. RC, 2017 WL 6577480 (App. Div. Dec. 26, 2017)	2004 (PSA)	April 2013	N/A	Yes	App. Div. affirmed trial court's denial of application to terminate	Even though PSA and application filed pre-amendment, Court analyzed application under both *Konzelman* and amended statutory factors and found no evidence of financial support; no mutually supportive relationship, no social recognition
Kafader v. Navas, 2018 WL 481785 (App. Div. Jan. 18, 2018)	August 2000 (PSA)	June 2016	Permanent alimony until the death of either party or Wife's remarriage. PSA silent on issue of cohabitation.	Unclear	App. Div. reversed trial court's conclusion that because PSA was silent on issue of cohabitation, it did not constitute a changed circumstance permitting review; remanded on other grounds	Trial court erred by inferring PSA silence on issue of cohabitation required denial. Nevertheless, the court correctly rejected the application as Defendant did not demonstrate any actual evidence – only hearsay statements attributed to unidentified third-parties, and a few pictures showing plaintiff and her alleged paramour together. He offered no competent evidence showing plaintiff was cohabiting and therefore failed to satisfy his burden of making a *prima facie* showing of changed circumstances

Case	Date of MSA / JOD	Date of Application	What does MSA/ JOD provide?	Was Amended Statute Applied?	Ruling	Rationale / Key Facts
JS v. JM, 2018 WL 1597961 (App. Div. Apr. 3, 2018)	2010 (PSA)	September 2015	Alimony terminate upon wife's cohabitation with unrelated male in lieu of marriage for 30+ days	No	App. Div. affirmed trial court's denial of application to terminate	A dating relationship does not constitute cohabitation; evidence demonstrated that wife would only spend 1-2 nights per week with paramour and there was no economic intertwine
Waldorf v. Waldorf, 2018 WL 2186644 (App. Div. May 14, 2018)	December 2011 (JOD)	January 2015	N/A Judgment of divorce provided that alimony shall terminate as defined by law	Unclear; trial court applied, but App. Div. "unsure" if applicable as the JOD predated the 2014 amendments App. Div. side-stepped saying the statutory factors mirror *Konzelman*	App. Div. affirmed trial court's denial of application to terminate	Trial judge opined that absence a sexual relationship there can be no cohabitation – comment goes unchallenged by App. Div. though noted that trial court analyzed correct factors (whether case law or statutory), concluding there was no comingling money or financial relationship between party and alleged cohabitant
Schmitt v. Lupo-Schmitt, 2018 WL 2223750 (App. Div. May 16, 2018)	October 2014 (MSA)	May 2016	Alimony terminates if the wife cohabits with a person of opposite sex	Yes	App. Div. affirmed trial court's denial of application to terminate	No evidence presented; court noted that even though the trial judge afforded limited discovery, husband was unable to demonstrate proof; allegation concerned brother of a friend wife had for 40+ years – court noted it put the friendship into perspective
Salvatore v. Salvatore, 2018 WL 3149808 (App. Div. June 28, 2018)	February 2011 (MSA)	May 2017	Cohabitation with an unrelated adult in a relationship akin to marriage is a re-evaluation event. Parties entered into an addendum (2011) based on defendant advising plaintiff of planned cohabitation, temporarily reducing alimony during cohabitation and stipulating alimony would return if ended	No	App. Div. reversed trial court's denial of termination, holding plaintiff established *prima facie* to warrant termination	Plaintiff sufficiently established *prima facie* evidence of a relationship akin to marriage warranting a hearing – i.e., defendant and her paramour represented themselves to be step-parents of each other's children, the parties' children consider the boyfriend to be part of their family unit, the defendant shared responsibilities for the boyfriend's daughter, and that the boyfriend and his daughter were named in the wife's mother's obituary
Leonard v. Leonard, 2018 WL 5316097 (App. Div. Oct. 29, 2018)	2013 (MSA)	January 2017	Alimony terminated upon remarriage of wife or death of either party	No	App. Div. affirmed trial court's denial of application to terminate	MSA did not provide for any review of alimony based on cohabitation. Given Husband's concerns during underlying divorce that Wife was cohabiting, Court concluded agreement intended to be silent on issue and denied application.

Case	Date of MSA / JOD	Date of Application	What does MSA/ JOD provide?	Was Amended Statute Applied?	Ruling	Rationale / Key Facts
Gille v. Gille, 2018 WL 333486 (App. Div. Jan 9, 2018)	September 2011 (MSA)	April 2015	Cohabitation is a basis for modification or termination and is governed by the law at the time the application is made	Yes	App. Div. affirmed order denying application to terminate	Of the statutory elements, the plaintiff only demonstrated that the defendant's paramour spent a limited number of nights in the home. No demonstration that he lived with defendant.
L.R. v. R.R., 2019 WL 437954 (App. Div. Feb. 5, 2019)	2013 (MSA)	June 2015	Cohabitation with unrelated person as defined by Garlinger and *Gayet* for 6 months shall be a change of circumstances warranting review	No	App. Div. affirmed trial court's alimony termination	Termination was warranted based on Wife's cohabitation with paramour for 6+ months (concluding they cohabited even before the JOD and through the present), intertwined finances, shared household chores, vacations together and recognition amongst family
M.D. v. M.D., 2019 WL 980648 (App. Div. Feb. 27, 2019)	September 2008 (PSA)	2017	Alimony shall terminate upon Defendant's cohabitation with another man subject to *Gayet*.	No	App. Div. affirmed trial court's denial of motion to terminate	Trial court concluded that Plaintiff was aware Defendant had begun cohabiting with another man prior to finalizing their divorce. Therefore, no changed circumstance occurred
Mennen v. Mennen, 2019 WL 1468745 (App. Div. Apr. 2, 2019)	January 2004 (PSA)	Post-effective statutory date	In the event of cohabitation with an unrelated person in a relationship akin to marriage, alimony may be revisited pursuant to *Gayet* and its progeny	Yes	App. Div. affirmed trial court's denial of application to terminate	Evidence reflected wife and paramour engaged in social and familial activities together and with families, but no evidence of intertwined finances or dependency
Wood v. Wood, 2019 WL 2152584 (App. Div. May 16, 2019)	September 2016 (PSA)	December 2017	Alimony can be modified or terminated in accordance with existing case law	Yes	App. Div. affirmed trial court's denial of application to terminate	Insufficient evidence presented. Movant only demonstrated a common residence – no financial intertwinement; no recognition of relationship in family or social setting
MM. v. JY, 2019 WL 2476630 (App. Div. June 13, 2019)	February 2013 (JOD)	Post-August 2016	N/A	Yes	App. Div. affirmed trial court's denial of application to terminate	No sharing household chores; no promises of support; no co-mingling or intertwining finances; no social recognition. Court noted living together does not automatically constitute cohabitation
Peters v. Peters, 2019 WL 2896229 (App. Div. July 5, 2019)	July 2010 (JOD) May 2011 (MSA)	May 2018	Wife's cohabitation with an unrelated adult in a relationship akin to marriage for 9 months constituted an alimony termination event	No; decided under *Konzelman* – cohabitation does not require residing together	App. Div. reversed trial court's denial of application to terminate	Court found sufficient *prima facie* evidence of cohabitation based on intertwined finances; frequent observation together/overnights; wore ring akin to engagement ring; significant time away together

Case	Date of MSA / JOD	Date of Application	What does MSA/ JOD provide?	Was Amended Statute Applied?	Ruling	Rationale / Key Facts
Dalton v. Dalton, 2019 WL 3244526 App. Div. July 19, 2019	December 2008 (MSA)	May 2018	Alimony may be modified or terminated upon defendant's cohabitation with an unrelated person pursuant to the cases *Gayet* and *Ozolin*	No	Appellate Division affirmed trial court's denial of application for further discovery	Movant failed to establish *prima facie* evidence – only demonstrated 1 overnight stay in 2018 and 4 in 2016; no financial dependency; wife and paramour had completely separate living arrangements.
Landau v. Landau, 461 N.J. Super. 107 (App. Div. 2019)		**December 2017**	**Wife's cohabitation as defined by then-current statutory and case law shall be a basis for the husband to seek modification, suspension, or termination of his alimony obligation**	**Yes**	**App. Div. reversed the trial court's determination that a litigant need not establish prima facie evidence of cohabitation to warrant further discovery, concluding prima facie evidence was still required**	**The amendments did not render prior case law – which required prima facie evidence of cohabitation to warrant discovery – moot, as the "Lepis paradigm requiring the party seeking modification to establish a prima facie evidence of changed circumstance . . . before a court will order discovery of an ex-spouse's financial status, continues to strike a fair and workable balance between the parties' competing interests."** **Because Husband had not established prima facie evidence of changed circumstance of cohabitation, he was not entitled to discovery.** **NOTE: whether Husband actually established prima facie evidence of cohabitation was not an issue on appeal**
B.S. v. A.S., 2019 WL 4567486 (App. Div. Sept. 20, 2019)	February 2018 (JOD)	N/A Cohabitation arose in context of initial divorce proceedings	N/A	Yes	App. Div. affirmed the trial court's rejection of cohabitation allegation	Evidence stablished that alleged paramour spent some overnights, assisted in caring for the parties' children and provided limited household assistance, but actions did not equate to cohabitation
Pagan v. Pagan, 2019 WL 4858302 (App. Div. Oct. 2, 2019)	2006 (MSA)	September 2018	Alimony terminates upon cohabitation with an unrelated member of opposite sex for 60+ days, irrespective of financial contribution	No	App. Div. affirmed order denying motion to terminate	Defendant's presentation of Facebook pictures purporting to show Plaintiff's engagement party proved neither the 60-day period of cohabitation nor remarriage. Even unopposed claims must make a *prima facie* showing of cohabitation
Watkins v. Howard, 2019 WL 5302858 (App. Div. Oct. 21, 2019)	1993 (MSA)	2018	Alimony shall continue until the death of either party, the wife's remarriage or the wife's "entry into a relationship tantamount to marriage"	No	App. Div. affirmed the trial court's denial of application to terminate	Evidence presented (which mirrored evidence submitted in previously denied application to terminate based on cohabitation in 2009) failed to establish *prima facie* showing of either physical cohabitation or financial interrelationship demonstrating a lack of need for continued alimony, and no evidence of a relationship tantamount to marriage.

Case	Date of MSA / JOD	Date of Application	What does MSA/ JOD provide?	Was Amended Statute Applied?	Ruling	Rationale / Key Facts
Rosenberg v. Rosenberg, 2019 WL 7116147 (App. Div. Dec. 23, 2019)	May 2012 (MSA)	August 2018	MSA had anti-Lepis provision barring modification or termination based on cohabitation or changed circumstance	No	App. Div. affirmed trial court's denial of application to terminate	Request to terminate alimony based on cohabitation or other changed circumstances was prohibited by the anti-Lepis provision of the PSA. In addition, the court found alleged proofs (unsworn, conclusory, out of court statements by 3rd parties) did not establish either cohabitation or any basis for further proceedings.
Goethals v. Goethals, 2020 WL 64933 (App. Div. Jan 7, 2020)	2016 (MSA)	May 2017	Cohabitation in an intimate, mutually supportive, personal relationship shall be considered a change of circumstance warranting a review	Yes	App. Div. reversed trial court's denial of application to terminate finding sufficient evidence existed warranting discovery	Trial court misapplied law by dismissing the substantial evidenced amassed by defendant (overnights, private investigator work, evidence of engagement, social media posts) and requiring evidence of intertwined finances and living together on a full-time basis to establish *prima facie* evidence, which was improper
Smith-Barrett v. Snyder, 2020 WL 563468 (App. Div. Feb. 5, 2020)	November 2007 (PSA)	Post-June 2018	Alimony shall terminate upon wife's cohabitation with an unrelated female	Yes	App. Div. affirmed trial court's denial of application to terminate	Movant only demonstrated evidence of a romantic relationship. Movant failed to demonstrate economic intertwining or any other evidence of possible cohabitation
Garcia-Travieso v. Garcia-Travieso, 2020 WL 1866939 (App. Div. Apr. 14, 2020)	April 21, 2014 (MSA)	2018/2019	Alimony may be modified or terminated upon the cohabitation pursuant to the then-law at that time	Yes	App. Div. affirmed trial court's denial of application to terminate	Court concluded no cohabitation based on no financial dependence; the boyfriend lived elsewhere (with lease); most of the boyfriend and wife's time together was on weekends and boyfriend brought his own items; no changed circumstances present
Wajda v. Wajda, 2020 WL 1950772 (App. Div. Apr. 23, 2020)	February 2018 (MSA)	December 2018	Alimony would terminate in the event of defendant's remarriage or cohabitation with another person	Yes	App. Div. reversed trial court's denial of application to terminate	Although husband failed to show that defendant and her paramour had intertwined finances, shared living expenses, or their relationship was recognized in social circle, wife's paramour stayed overnight at her home every night for 2 months and made numerous purchases in same town where wife resided, which constituted *prima facie* evidence warranting further discovery
Kelly v. Brannin, 2020 WL 3980398 (App. Div. July 15, 2020)	2005 (MSA)	July 2017	Alimony to cease based on cohabitation or remarriage of alimony recipient.	No The Appellate Court stated both parties agreed that analysis under *Konzelman* was appropriate	App. Div. affirmed trial court's order terminating alimony retroactively	Defendant and her paramour rented apartment in North Carolina together, living there for 21 months. Thereafter, they moved back to NJ and lived together in that home for an additional 21 months, sharing one bathroom and all living expenses. Trial court terminated alimony

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Chernin v. Chernin, 2020 WL 4723344 (App. Div. Aug. 14, 2020)	1992 (MSA)	3rd application to terminate alimony based on cohabitation filed POST-Amendment effective date	N/A *See Chernin v. Chernin*, 2016 WL 799756 (App. Div. March 2, 2016) and *Chernin v. Chernin*, 2018 WL 2922054 (App. Div. June 5, 2018)	No	App. Div. affirmed trial court's denial of application to terminate	3rd application to terminate based on alleged cohabitation Cannot prevail on changed circumstance application based on same facts previously denied given anti-retroactivity of statute
Logan v. Brown, 2020 WL 6166087 (App. Div. Oct. 22, 2020)	2012 (PSA)	Application to terminate alimony based on cohabitation filed POST-Amendment effective date	Wife's cohabitation with an unrelated adult may constitute a changed circumstance consistent with the law then in effect	Yes	App. Div. affirmed the trial court terminating alimony	Court held that Wife was perpetuating a fraud that she lived elsewhere, as evidence demonstrated she lived with boyfriend. Further evidence of cohabitation included: social media pictures; wearing rings; being engaged (despite alleged no intention to marry); boyfriend paying for house renovations without receiving compensation; article referred to boyfriend as fiancé
Campton v. Campton, 2020 WL 6852595 (App. Div. Nov. 23, 2020)	October 2011 (MSA)	June 2017	Permanent alimony "will terminate [upon] Defendant's cohabitation with an unrelated adult in a relationship tantamount to marriage consistent with the decision of *Konzelman v. Konzelman*, 158 N.J. 185 (1999)	No	App. Div. affirmed order terminating alimony	Testimony from the parties and private investigator showed Defendant and paramour had a long, stable, mutually supportive relationship akin to marriage. The evidence demonstrated they resided together, the paramour performed tasks for her/her family and shared resources. Social media posts further showed they were a part of each other's family and social circles and held themselves out as a couple. Economic dependence (Defendant failed to provide financial documents in discovery) was not required
Clemas v. Clemas, 2021 WL 1084487 (App. Div. Mar. 22, 2021)	January 2013 (JOD)	April 2019	N/A	Yes	App. Div. affirmed trial court's denial of Defendant's application to terminate	Defendant failed to establish *prima facie* case of cohabitation – no evidence of intertwined finances, joint responsibility for living expenses, or promises of support. No indication of social circle recognition.

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Temple v. Temple, 468 N.J. Super. 364 (App. Div. 2021)	January 2004 (MSA)	July 2020 (Date of Application)	N/A Court noted that the factual record has not been developed to allow for any clear determination as to whether the parties intended the *Konzelman* standard apply or law at time of cohabitation	Yes The MSA preceded the amendment, but allegations focus on events after enactment. The Court did not expressly opine as to whether the prior law or statute applied, but analyzed the facts pursuant to amended statutory factors	App. Div. reversed and remanded trial court's finding, concluding Husband established *prima facie* evidence warranting discovery and evidentiary hearing	To establish *prima facie* evidence of cohabitation, a movant does not need to provide evidence of all 6 factors listed in the statute – just that the supported spouse and another are in a mutually supportive intimate relationship and have undertaken duties associated with marriage. Husband presented evidence: (a) that wife and paramour resided together; (b) were in a 14+ year relationship, (c) traveled together, (d) were in 7 social media posts over 5 years where the paramour referred to wife as his wife; and (e) spent holidays together. The Court held not that this was *prima facie* evidence, but that it was sufficient to warrant discovery.
R.J.E. v. R.I.E., 2021 WL 3730966 (App. Div. Aug. 24, 2021)	March 2020 (JOD) July 2020 (Amended JOD)	N/A Allegation of cohabitation arose in initial divorce proceedings	N/A	Unclear, but court analyzed statutory factors	App. Div. affirmed trial court's awarding of alimony	Defendant did not demonstrate plaintiff cohabited, and neglected to utilize the discovery tools available (she was permitted to depose the alleged cohabitant, but forewent same), court not compelled to accept bare allegations
J.R. v. F.R., 2021 WL 4978706 (App. Div. Oct. 4, 2021)	October 2017 (MSA) January 2018 (JOD)	January 2020	Alimony subject to review upon wife's cohabitation, as defined by NJ law, to determine whether to terminate, irrevocably terminate, suspend or modify (if modification is a remedy provided by NJ law at the time of filing of the application)	Yes	App. Div. affirmed trial court's denial of motion to terminate	Unlike in Temple, the movant provided no third-party certification, submitted only one social media post (not made by the couple), and produced a few photos depicting the occasional household responsibilities. Court noted there were no evidence of intertwined finances, no evidence of share responsibilities, no evidence of living together on full-time basis, they maintain separate households, no sharing household chores, and no promise of support
Kowal v. Hartman, 2021 WL 5997252 (App. Div. Dec. 20, 2021)	2005 (MSA)	2016	Defendant's cohabitation shall be an event subjecting alimony to review consistent with existing case law	No	App. Div. affirmed trial court's order terminating alimony	Cohabitation existed based on social media posts and that Defendant received economic benefit (payment of expenses by paramour) that was 3x-4x more than her alimony she received from Plaintiff.
A.W. v. A.C.W., 2022 WL 29894 (App. Div. Jan. 4, 2022)	October 2017 (JOD)	July 2020	N/A	Yes	App. Div. affirmed trial court's denial of motion to terminate	Husband provided no evidence on any statutory factor – relied only on a private investigator's limited surveillance (the wife and paramour lived in same apartment building but separate apartments)

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Manley v. Manley, 2022 WL 128599 (App. Div. Jan. 14, 2022)	2016 (MSA)	2020	Alimony shall irrevocably terminate upon wife's cohabitation with someone in the manner of husband/ wife for 3 months, regardless of financial contribution	Yes	App. Div. affirmed trial court's denial of termination	Wife and alleged paramour did not live under same roof, maintained separate finances and held different households. Husband presented evidence on only 2 of 7 factors, but court concluded evidence showed adult-dating relationship, not cohabitation.
Charles v. Charles, 2022 WL 1420605 (App. Div. May 5, 2022)	February 2014 (MSA)	February 2021	Wife's cohabitation with an unrelated adult in a relationship akin to marriage shall be a change of circumstance warranting review pursuant to New Jersey case law. Husband would be entitled to a plenary hearing on that issue unless the Court determines to reduce or eliminate alimony in a manner acceptable to Wife without the need for a hearing	Yes	App. Div. affirmed trial court's denial of motion to terminate	Husband only presented "scant evidence" of cohabitation and for only two of the seven statutory factors. Husband did not retain a private investigator or present evidence of any marriage-like activities (attending events, vacationing, performing house chores) nor did he proffer any third-party certification describing a mutually supportive, intimate personal relationship tantamount to marriage. The fact that Wife became engaged to the boyfriend was not controlling, as the trial court noted "an engagement to marry is not the equivalent of cohabitation." Wife and boyfriend did not share expenses or residences.
Smiley v. Sheedy, 2022 WL 1487004 (App. Div. May 11, 2022	July 2018 (MSA)	N/A	Termination of alimony in the event wife is cohabiting as defined by the amended statute. Alimony terminates upon wife's cohabitation with another individual of the same or opposite sex, unrelated by blood or marriage, in a relationship similar to that of marriage.	Yes	App. Div. reversed trial court's denial of motion to terminate and remanded for discovery	Husband's evidence demonstrates a 6-year dating relationship that commenced prior to the divorce being finalized, a private investigator surveillance report detailing the boyfriend at Wife's home when Wife was at work/vacation, an admission from Wife that she and her boyfriend previously cohabited for a period of time, social media posts demonstrating they hold themselves as a couple and shared holidays constitutes *prima facie* evidence. Court did not permit unfettered discovery, limiting discovery to the payee spouse. Only if that was fruitful would further discovery, including depositions of non-parties (i.e., the boyfriend) be permitted

Case	Date of MSA / JOD	Date of Application	What does MSA/ JOD provide?	Was Amended Statute Applied?	Ruling	Rationale / Key Facts
Meixner v. Meixner, 2022 WL 1499027 (App. Div. May 12, 2022)	Approx. 2015 (MSA)	April 2020	Alimony terminates upon Wife's cohabitation with an unrelated adult in a relationship tantamount to marriage in accordance with the New Jersey case law at the time	Yes	App. Div. affirmed trial court's denial of motion to terminate	Dating relationship was not disputed by Wife. While the boyfriend spent time at the Wife's home, including overnights, he maintained his own residence. There is no evidence of financial intertwining. The minimal photographic evidence (pictures of boyfriend in Wife's home), and evidence of spending holiday and vacations together is insignificant and not indicative of a relationship tantamount to marriage.
Cardali v. Cardali, 2022 WL 2297126 (App. Div. June 27, 2022)	October 2006 (MSA)	December 2020	Alimony terminates upon cohabitation as defined by NJ law	Yes	App. Div. affirmed trial court's denial of motion to terminate	Evidence only established dating relationship, which was not disputed. Despite having independent access to the home of the other and social recognition of relationship, no financial entanglement and the spouse and paramour kept separate residences

Suspension of Alimony in Cohabitation Cases: When is Suspension an Appropriate Remedy?

By Thomas A. Roberto

Applications to terminate or modify alimony based on a former spouse's cohabitation are commonplace in the practice of New Jersey Family Law, particularly since the 2014 amendments to our alimony statute. A litigant files a motion with the court seeking to terminate, modify, and/or suspend alimony based on a former spouse's cohabitation. The former spouse cross-moves denying they are cohabitating and arguing the moving party failed to meet the burden necessary to justify a period of discovery or a plenary hearing. The court is then faced with the task of deciding whether the moving party has established a *prima facie* showing of changed circumstances (specifically cohabitation) sufficient to justify discovery and a plenary hearing.[1]

But what about the unique, if not unusual, situation where the alleged cohabitating spouse does not deny cohabitation and instead seeks relief under the suspension component of subsection (n) of the alimony statute?[2] I was recently made aware of a trial court case where one party moved to terminate alimony based on the former spouse's alleged cohabitation. The former spouse cross-moved admitting to cohabitation, but took the position the court should simply suspend alimony in the event the current relationship (and current cohabitation) ended. The argument in opposition to this request was, in part, that suspending alimony indefinitely pending the outcome of the cohabitation relationship, was not the intent of the statute.[3]

The moving party's argument continued, permitting alimony to merely be suspended pending the cohabitation relationship, particularly in the face of an acknowledgment of cohabitation as was the case here, would effectively put the supported spouse in full control of all aspects of the proceedings since the resumption or termination of alimony would seemingly depend entirely upon the continuation of the cohabitation, and would permit the supported spouse to essentially "relationship hop," going from relationship to relationship (whether with the same cohabitant or not) with alimony potentially being subject to restoration in the interim. The court in this particular case ultimately agreed with the moving party, denied the request for suspension, and terminated alimony outright.

This particular case did, however, lead this author to consider a number of questions, including but not limited to whether, under the circumstances, a court has authority to suspend alimony indefinitely, regardless of whether same is consistent with the intent of the statute. Other considerations include what conditions would be imposed in the event suspension were granted, to what extent does the length of the relationship (and/or any other pertinent facts pertaining to the cohabitation relationship) plays a factor in determining whether suspension is an appropriate remedy[4] and, if so, is a period of discovery necessary to flush out the relevant facts. Perhaps more importantly, when would the suspension end under these circumstances? If alimony is restored, would it be restored effective as of the date of the cross-motion, the date the cohabitation ends, or other date determined by the court? The problematic nature of an indefinite suspension of alimony is readily apparent.

It is the opinion of this author that none of the above questions merit in-depth discussion since, while perhaps interesting from an academic perspective, the statutory intent does not appear designed to permit an indefinite suspension of alimony pending the viability of a cohabitation relationship. In other words, it would be inappropriate, and one might submit a perversion of the statutory intent, to suspend alimony indefinitely while the parties essentially "wait and see" if the cohabitation relationship ends. The more pressing question which forms the impetus for this article, however, is straightforward: When is suspension of alimony an appropriate remedy in cohabitation cases?

The appropriate starting point would be the statute itself. The term "suspension" first appears in our alimony statute in subsection (m), which provides: "When assess-

ing a temporary remedy, the court may temporarily suspend support, or reduce support on terms; direct that support be paid in some amount from assets pending further proceedings; direct a periodic review; or enter any other order the court finds appropriate to assure fairness and equity to both parties."[5] (emphasis added).

The only other mention of "suspension" in the statute is in subsection (n), as quoted above with regard to cohabitation. So, a literal reading of the statute would seem to support the notion that suspension is designed as a temporary, interim remedy. Within the context of a cohabitation case specifically, such an interim remedy may be appropriate – for example – in a matter where the Court has found a *prima face* showing of cohabitation and schedules the matter for discovery and/or a plenary hearing. In such a case, suspending alimony may be appropriate pending completion of discovery and/or the outcome of a plenary hearing, with the effective date for termination or modification of alimony (if determined to be warranted as borne out by discovery and/or trial) being preserved.

This would seem to be in line with our Supreme Court's holding in *Quinn v. Quinn*.[6] In *Quinn*, the parties entered into a marital settlement agreement providing in pertinent part that alimony would terminate upon the cohabitation of the dependent spouse.[7] The parties in *Quinn* had entered into a marital settlement agreement providing in part that alimony would terminate upon the cohabitation of the dependent spouse.[8] The trial court determined the dependent spouse had cohabited for 28 months, with the cohabitation ending while the post-judgment litigation was pending and suspended the supporting spouse's alimony obligation for a 28-month period rather than terminating alimony outright.[9] The trial court decision was affirmed on appeal.[10] In reversing the lower court's decision, our Supreme Court held that under these facts, where the marital settlement agreement provides for termination of alimony in the event of cohabitation, once cohabitation is proven the inquiry (and the alimony obligation) ends.[11] The Court determined that the dependent spouse's cohabitation required termination of alimony, rather than suspension, pursuant to the express terms of the parties' agreement.[12]

One of the key facts in *Quinn* was the existence of a settlement agreement which specifically provided for termination of alimony upon the dependent spouse's cohabitation. The Supreme Court's decision was in pertinent part to uphold and enforce the terms of the parties' agreement in this regard. Perhaps the Court's decision would have been different if the Quinns had a settlement agreement which was silent as to the impact of cohabitation upon alimony. Under those circumstances, with an agreement silent as to the impact of cohabitation upon alimony, would suspension have been an appropriate remedy as the trial court initially determined?

Compare that to the pre-statutory amendment case of *Garlinger*.[13] In *Garlinger*, the dependent spouse admitted she cohabited for a period of several months following the parties' divorce; counsel for the parties stipulated specifically the dependent spouse's cohabitation lasted for a two-month period.[14] The trial court suspended alimony indefinitely, pending further order, and the Appellate Division modified the trial court's decision holding: "the interests of justice will be adequately served if the suspension of alimony payments is limited to the two-month period of cohabitation."[15] *Garlinger*, however, was decided well before the amendments to our alimony statute. The *Garlinger* opinion also does not reveal whether the parties had a settlement agreement which addressed the impact of cohabitation upon alimony specifically.

At its core, the intent of the Appellate Division in *Garlinger* was, in pertinent part, to compensate the supporting spouse for the period of time during which the dependent spouse was cohabitating. Assuming there is no contrary provision in the parties' MSA, this was arguably a reasonable remedy to the paying party considering the Garlingers, through counsel, stipulated to a specific time period for the dependent spouse's cohabitation. If the Garlinger case were being litigated today, it is unlikely that such a stipulation would be entered given the significant and limiting impact it would have on the payor's claim for termination, modification, or suspension.

Quinn and *Garlinger* also merit discussion within the context of this article because there is no post-statutory amendment case law, or other authority, in New Jersey directly on point with regard to the issue of precisely when suspension is an appropriate remedy in cohabitation cases. There is more clarity about this found in the alimony statutes of neighboring jurisdictions.

The Pennsylvania alimony statute does not address the impact of post-divorce cohabitation on alimony specifically.[16] The statute does provide for "suspension" of alimony as a remedy in the event of changed circumstances (including but not limited to cohabitation), but gives courts several options in deciding how to fashion an appropriate remedy; those options include suspension, modification,

termination, or restitution of alimony.[17] Interestingly, and by comparison, Pennsylvania law does expressly provide that a party who cohabitates "subsequent to the divorce pursuant to which alimony is being sought" is not "entitled to receive an award of alimony" at all.[18]

The applicable statute in New York also provides the Court with discretion on the remedy to be applied in the event of cohabitation, providing specifically:

> The court in its discretion upon application of the payor on notice, upon proof that the payee is habitually living with another person and holding himself or herself out as the spouse of such other person, although not married to such other person, may modify such final judgment and any orders made with respect thereto by annulling the provisions of such final judgment or orders or of both, directing payment of money for the support of such payee.[19]

So, under New York law, termination of alimony would seem to be the *only* appropriate remedy in the event of cohabitation.

The law in Delaware is more specific. The applicable Delaware statute provides that alimony is subject to outright termination – not modification or suspension – in the event of a dependent spouse's cohabitation.[20] The Delaware statute also imposes an affirmative obligation upon the dependent spouse to "notify the other party of his or her remarriage or cohabitation."[21] The word "suspension," however, does not appear in the Delaware alimony statute and is not an available avenue of relief in the event of cohabitation. Termination is identified as the only appropriate remedy upon cohabitation of the dependent spouse.[22]

While a comparison of other jurisdictions is perhaps informative, it provides little guidance as to the intent of our statute regarding suspension of alimony in cohabitation cases. Given the absence of case law directly on point with this issue, the most appropriate approach may be to treat relief in cohabitation cases the same as relief that would be afforded in the event of remarriage. If the legislative intent behind permitting termination, suspension, or modification of alimony in the event of cohabitation is to compensate the paying spouse for the period of time in which the supported spouse was cohabitating, and receiving or conferring an economic benefit upon their cohabitant, as occurred in *Garlinger*, then suspending the alimony obligation during the period of cohabitation may indeed be appropriate. But this would be inconsistent with the statute and plethora of case law which analogize cohabitation to marriage.

Borrowing from pre-amendment case law, subsection (n) of the statute specifically defines cohabitation as follows: "Cohabitation involves a mutually supportive, intimate personal relationship in which a couple has undertaken duties and privileges that are commonly associated with marriage or civil union but does not necessarily maintain a single common household."[23] Remarriage of a dependent spouse is, of course, a bright line termination event for alimony effective as of the date of remarriage.[24] Once a dependent spouse remarries, they irrevocably lose any entitlement to continued support from a prior spouse. There is no statutorily defined right to termination in the event of cohabitation, despite the similarities between cohabitation and remarriage and the similar treatment of these relationships in our case law.

Despite their similarities, remarriage and cohabitation remain two distinctly different concepts under our statute and case law. Often, remarriage and cohabitation are also given disparate treatment in marital settlement agreements. Many settlement agreements identify remarriage as an automatic termination event for alimony, while identifying cohabitation as a ground upon which termination or modification (or suspension) of alimony can be sought by the paying party. The distinction here seems to be that termination of alimony is a statutorily prescribed remedy in the event of remarriage, which is not the case for cohabitation.

Still, if cohabitation is akin to marriage, as indicated in the statute and case law, it follows logically that the same remedy (termination) should apply in both instances.[25] That would seemingly render suspension of alimony as an appropriate remedy only in limited instances, such as on a temporary basis pending completion of discovery and/or a plenary hearing. The law regarding the impact of cohabitation on alimony is, however, continuing to evolve and the remedy of suspension is one area of the law in particular which would benefit from clarification.

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Endnotes

1. *Landau v. Landau*, 461 *N.J. Super.* 107, 118-119 (App. Div. 2019).
2. *N.J.S.A.* 2A:34-23(n).
3. *Id.*
4. The statute itself confirms the length of the relationship is a factor to be considered in determining whether to suspend or terminate alimony, which would seem to signal that the longer the cohabitation the more likely termination of alimony would be appropriate. See *N.J.S.A.* 2A:34-23(n) (providing in part: "In evaluating whether cohabitation is occurring and whether alimony should be suspended or terminated, the court shall also consider the length of the relationship").
5. *N.J.S.A.* 2A:34-23(m).
6. 225 *N.J.* 34, 38 (2016).
7. *Id.* at 41.
8. *Id.* at 38.
9. *Id.* at 38-39.
10. Id.
11. *Id.* at 53-54.
12. *Id.* at 53-55 (stating in part: "When the facts support no conclusion other than that the relationship has all the hallmarks of a marriage, the lack of official recognition offers no principled basis to treat cohabitation differently from an alimony terminating event").
13. 137 *N.J. Super.* 56, 64 (App. Div. 1975).
14. *Id.* at 59.
15. *Id.*
16. 23 *Pa.C.S.* 3701.
17. *Id.*
18. 23 *Pa.C.S.* 3706.
19. *N.Y. Dom. Rel. Law* 248.
20. 66 *Del. Laws* c. 414, 1 ("Unless the parties agree otherwise in writing, the obligation to pay future alimony is terminated upon the death of either party or the remarriage or cohabitation of the party receiving alimony. As used in this section, 'cohabitation' means regularly residing with an adult of the same or opposite sex, if the parties hold themselves out as a couple, and regardless of whether the relationship confers a financial benefit on the party receiving alimony. Proof of sexual relations is admissible but not required to prove cohabitation. A party receiving alimony shall promptly notify the other party of his or her remarriage or cohabitation.")
21. *Id.*
22. *Id.*
23. *N.J.S.A.* 2A:34-23(n). *See also Konzelman v. Konzelman*, 158 *N.J.* 185, 202, (1999) (defining cohabitation as "an intimate relationship in which the couple has undertaken duties and privileges that are commonly associated with marriage").
24. *N.J.S.A.* 2A:34-25.

Cohabitation and Alimony: From Then to Now into the Future

By Samuel J. Berse and Jenny Berse

Among the most complicated and unresolved issues family law practitioners regularly encounter is: what constitutes "cohabitation" sufficient to suspend or terminate a payor's alimony obligation? This article explores the evolution of this underdeveloped area of the law as well as our view on where it is headed.

A History of Cohabitation Written in Dissents

Some of the most often overlooked cohabitation principles are found in New Jersey Supreme Court Associate Justice Barry T. Albin's dissent in *Quinn*.[1] The holding of *Quinn* is that "when the parties have outlined the circumstances that will terminate the alimony obligation [the court] will enforce voluntary agreements to terminate alimony upon cohabitation, even if cohabitation does not result in any changed financial circumstances."[2] Justice Albin eloquently captured the net effect of the majority's opinion, and how in his view the legal framework of alimony and cohabitation, especially in the context of marital settlement agreements, is patently wrong.

To begin, "[a]limony is an 'economic right that arises out of the marital relationship and provides the dependent spouse with "a level of support and standard of living generally commensurate with the quality of economic life that existed during the marriage."'"[3] In *Gayet v. Gayet*, the Court held that a husband ordered to pay alimony as part of a divorce decree was not entitled to a modification of his alimony merely because his ex-wife cohabited with an individual.[4] Traditionally, "the test for modification of alimony is whether the relationship has reduced the financial needs of the dependent former spouse."[5] The Court adopted an economic-needs test to determine whether an alimony award should be modified as a result of cohabitation.[6] Thus, a modification of alimony based on changed circumstances for cohabitation is permitted "only if one cohabitant supports or subsidizes the other under circumstances sufficient to entitle the supporting spouse to relief."[7] That approach, the Court concluded, "best balances the interests of personal freedom and economic support and comports with the principles of" our jurisprudence and statutory law.[8] The Court recognized that "[t]he extent of actual economic dependency, not one's conduct as a cohabitant, must determine the duration of support as well as its amount."[9]

In Justice Albin's view, in the next case in this lineage, *Konzelman*, "the Court took a wrong turn when it concluded that the parties could contract away the fundamental principles animating *Gayet*."[10] The Court in *Konzelman* enforced a provision in a property settlement agreement that conditioned the receipt of alimony on an ex-wife not cohabiting with an unrelated male.[11] The anti-cohabitation clause was upheld despite the absence of any change in the economic circumstances of the ex-wife.[12] Per Justice Albin, "[a]nti-cohabitation clauses under *Konzelman* permit the forfeiture of the right to alimony even if the cohabiting ex-spouse receives no financial support from the person with whom she resides."[13]

As further poignantly noted by Justice Albin, in an observation that is perhaps more true that ever: "In a dissent joined by Justice Stein, Justice O'Hern correctly concluded that *Konzelman* abandoned *Gayet*'s financial-needs test, encouraged unwarranted interference in the personal affairs of the ex-wife, and exalted the right to contract above public policy."[14] In explaining the wrongness of the *Konzelman* decision, Justice O'Hern made the point that legitimizing an anti-cohabitation clause untethered to a change in economic circumstances "(1) permits a spouse 'to exert unjust and inappropriate control over the [alimony] recipient's personal life'; (2) allows money to be used as a negotiating tool to 'buy a woman's right to choose her companions'; and (3) 'force[s] attorneys and parties to bargain over the fair value' of a clause that has no purpose other than 'to retain control over the divorced spouse.'"[15]

Justice O'Hern noted that economic need and dependency underpins an alimony obligation.[16] He concluded that it was "manifestly unfair to relieve Mr. Konzelman

of all alimony obligations based upon Mrs. Konzelman's choice of companionship with another man," without requiring him to demonstrate that his ex-wife's "financial status is any better because of her new relationship."[17] He lamented that the majority ruling in *Konzelman* would result in "tasteless inquiries into the private lives of divorced women."[18] Justice O'Hern observed that enforcement of the anti-cohabitation clause permitted Mr. Konzelman "to reap the benefits of an increased earning capacity built up during the marriage" while "casting [his] partner of twenty-seven years into poverty" for the "sin" of entering into a loving relationship with another man.[19] Justice Albin opined that Justice O'Hern's "discerning dissent spoke to the realities of his day, and our day, and of a court's obligation not to enforce an unreasonable, unfair, and overbearing provision of a property settlement agreement."[20]

Additionally, Justice Albin, in perhaps the precise location where his logic diverges from the majority thereby fundamentally resulting in his dissent, viewed the recent amendments to the alimony statute, *N.J.S.A.* 2A:34-23, as the Legislature signaling that it did not intend to conflate cohabitation with marriage. Justice Albin opined that the new statute provides that "[a]limony *may* be suspended or terminated if the payee cohabits with another person[,]" where in contrast, when "a former spouse shall remarry . . . permanent and limited duration alimony *shall* terminate as of the date of remarriage."[21] Thus in his view, the permissive language in *N.J.S.A.* 2A:34-23(n), unlike the mandatory language in *N.J.S.A.* 2A:34-25, indicates that the Legislature did not intend alimony to terminate, or even be modified, automatically in the event of cohabitation.[22] "The permissive language requires our family courts to equitably exercise discretion. In doing so, undoubtedly, *in the absence of a property settlement agreement*, our courts will look to the guiding principles of *Gayet*'s economic-needs test. Clearly, the Legislature intended courts to treat marriage and cohabitation differently in determining when to terminate or modify alimony."[23]

In closing, Justice Albin opined that the majority reached not the inevitable, but the inequitable result, and that the majority's adherence to *Konzelman* has led to an unjust outcome in *Quinn*. Justice Albin would have held that an anti-cohabitation clause, untethered to economic needs, is contrary to public policy and unenforceable. Further critiquing the majority, he felt the Court is

> not bound to follow a decision whose principles are unsound and when considered reflection counsels that we should take a different, more just course. The passage of time has not dimmed the logical force of Justice O'Hern's dissent in *Konzelman*. Denying a divorced woman her right to alimony merely because she has pursued happiness and cohabits advances no legitimate interest when her economic circumstances remain unchanged. The wrong here is not made right becausethe anti-cohabitation clause is contained in a property settlement agreement.[24]

Alimony and Cohabitation Post-Quinn

Since *Quinn*, jurisprudence has not in any way leaned in a different direction. *Landau v. Landau* was decided three years after *Quinn*, and its holding is quite narrow in essentially just upholding *Lepis* following the 2014 alimony statute amendments.[25] It was not for another two years, which was seven years after the 2014 alimony statute amendments, when the Appellate Division was finally squarely presented with the question of what constitutes a prima facie case of cohabitation in *Temple v. Temple*.[26] These two opinions comprise essentially the only binding jurisprudence in this area, and the import of this factual reality is that the Appellate Division (in a published opinion) and Supreme Court have not yet spoken on the subject of weighing the statutory factors in deciding alimony suspension or termination due to cohabitation following discovery and a plenary hearing.

Assessing the statutory framework for alimony termination due to cohabitation, the appellate panel in *Temple* noted almost at the outset of its analysis that "the Legislature has determined that cohabitation does not 'necessarily' mean that the supported spouse and another 'maintain a single common household.'"[27] In stark contrast to the concepts illustrated as the underpinning of Justice Albin's *Quinn* dissent, the court upheld the notion that the Legislature defined cohabitation as "a mutually supportive, intimate personal relationship" in which the couple "has undertaken duties and privileges that are commonly associated with marriage or civil union."[28] The court "reject[ed] the argument that evidence of all these circumstances must be presented for a movant to establish a prima facie case of cohabitation."[29]

Continuing, "[w]hen presented with competing certifications that create a genuine dispute about material facts, a judge is not permitted to resolve the dispute on the papers; the judge must allow for discovery and if, after discovery, the material facts remain in dispute, conduct an evidentiary hearing."[30]

The court opined that "absent an opponent's voluntary turnover, a movant will never be able to offer evidence about the financial aspects referred to in *N.J.S.A.* 2A:34-23(n). And so, if, . . . a movant must check off all six boxes to meet the burden of presenting a prima facie case, a finding of cohabitation will be as rare as a unicorn. This cannot be what the Legislature had in mind when it codified the meaning of cohabitation sufficient to permit an alteration in an alimony obligation." In so stating truisms, *Temple* nonetheless signals a radical shift in the cohabitation framework, or so it was thought.

To date, *Temple* has been cited in eight unpublished appellate division opinions. One of those did not concern cohabitation, and for six of the remaining seven opinions, the appellate panels upheld the trial courts' determinations that insufficient evidence had been presented for a prima facie showing of cohabitation. Only in one case so far, *Smiley v. Sheedy*, was the denial of discovery reversed based on the instructions of *Temple*.[31] As this case is still pending on remand, we shall save additional commentary for another time.[32] However, *Smiley* extends the legal analysis one step further, with the added language that: "[o]nce there is a rebuttable presumption of changed circumstances from a prima facie case of cohabitation, the burden of proof, which is ordinarily on the party seeking relief, shifts to the non-movant at the plenary hearing to come forward with proof that cohabitation is not occurring."[33]

The Future

In our view, Justice Albin's *Quinn* dissent six years ago has forecasted the future. Arguably, the meaning of an enhanced economic benefit from cohabitation is nearly meaningless. Whether the law and the courts are "right" or "wrong," finances mean less than ever in the cohabitation calculus, both with respect to the prima facie motion stage as well as the point of final determination.

Temple is clear, and blunt, that "if 'a movant must check off all six boxes to meet the burden of presenting a prima facie case, a finding of cohabitation will be as rare as a unicorn. This cannot be what the Legislature had in mind when it codified the meaning of cohabitation . . . .' [W]e reject the argument that evidence of all these circumstances must be presented for a movant to establish a prima facie case of cohabitation . . . the statute does not contain the alpha and omega of what ultimately persuades a court that a supported spouse is cohabitating."

What we believe to be most important aspect of *Temple* that permeated into *Smiley* in answering the question or what the future holds is the quote that: "[o]nce there is a rebuttable presumption of changed circumstances from a prima facie case of cohabitation, the burden of proof, which is ordinarily on the party seeking relief, shifts to the non-movant at the plenary hearing to come forward with proof that cohabitation is not occurring."[34] Although *Ozolins* cited in *Smiley* for this proposition is not cited in *Temple*, this nearly 25-year-old precedent appears unassailable at this juncture.

Temple discusses how "the Legislature has determined that cohabitation does not 'necessarily' mean that the supported spouse and another 'maintain a single common household.' Instead, the Legislature defined cohabitation as 'a mutually supportive, intimate personal relationship' in which the couple 'has undertaken duties and privileges that are commonly associated with marriage or civil union[,]'" and notes that evidence of cohabitation include the following:

1. Intertwined finances such as joint bank accounts and other joint holdings or liabilities;
2. Sharing or joint responsibility for living expenses;
3. Recognition of the relationship in the couple's social and family circles;
4. Living together, the frequency of contact, the duration of the relationship, and other indicia of a mutually supportive intimate personal relationship;
5. Sharing household chores;
6. Whether the recipient of alimony has received an enforceable promise of support from another person within the meaning of [N.J.S.A. 25:1-5].[35]

In a hypothetical scenario whereby factors 3 through 5 have been shown at the motion stage in order to get to the discovery/plenary hearing stage – (3) recognition of the relationship in the couple's social and family circles; (4) living together, the frequency of contact, the duration of the relationship, and other indicia of a mutually supportive intimate personal relationship; and (5) sharing household chores – what residual significance is there to intertwined finances as set forth in factors (1) and (2) and how can an alleged cohabitant actually disprove cohabitation? Since "[i]ntertwined finances such as joint bank accounts and other joint holdings or liabilities" is only one factor, we believe the net effect of *Temple* is that it will have reduced importance in future court considerations and in no way effectively disproves cohabitation. By acknowledging that proof of factor (1), "intertwined finances," is not a requisite consideration at the prima

facie motion stage, we would even go so far as to surmise that more requests at the motion stage to terminate alimony due to cohabitation will be flat out granted resulting in alimony being outright terminated without discovery and a hearing. As to factor (2) "sharing or joint responsibility for living expenses," we question whether this factor still has any relevance whatsoever.

With the ultimate question hinging on the existence of "a mutually supportive, intimate personal relationship," it is difficult to imagine that an alleged cohabitant proving the absence of shared or joint living expenses would weigh in favor of an ultimate finding of no statutory cohabitation if factors (3), (4), and (5) were all met. To that end, if factors (3), (4), and (5) did not weigh substantially in favor of a finding of cohabitation, then the prima facie burden would not even have been met to lead to discovery into finances, assuming such information was not provided at the motion stage as same would likely not be available without discovery.[36]

In conclusion, we believe factor (4), living together, the frequency of contact, the durationof the relationship, and other indicia of a mutually supportive intimate personal relationship, is the most important consideration as to whether alimony should be suspended or modified due to cohabitation. The remaining factors are auxiliary, which we posit is the logical result, but which we imagine Justice Albin would feel is an abomination since it confirms his dissatisfaction with the legal framework of alimony suspending/terminating/modifying due to cohabitation with no economic or marital benefit.[37] Justice Albin had written that "[d]enying a divorced woman her right to alimony merely because she has pursued happiness and cohabits advances no legitimate interest when her economic circumstances remain unchanged."[38] But this is the alimony statute and jurisprudence as it subsists through today since cohabitation is defined as "a mutually supportive, intimate personal relationship" in which the couple "has undertaken duties and privileges that are commonly associated with marriage or civil union" and the statue provides only for alimony suspension or termination, not modification.[39] This statutory definition represents a significant evolution from the economic benefit analysis of *Gayet*, and in conjunction with the burden shifting paradigm of *Temple*, financial considerations appear to be less relevant than ever. ■

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Endnotes

1. 225 N.J. 34, 55-65 (2016).
2. *Id.* at 38. See also *N.J.S.A.* 2A:34-23(n) ("Alimony may be suspended or terminated if the payee cohabits with another person.").
3. *Id.* at 48 (quoting *Mani v. Mani*, 183 N.J. 70, 80 (2005)).
4. 92 N.J. 149 (1983).
5. *Id.* at 150.
6. *Id.* at 153-54.
7. *Ibid.*
8. *Id.* at 154.
9. *Ibid.*
10. *Quinn v. Quinn*, 225 N.J. at 59-60 (citing *Konzelman v. Konzelman*, 158 N.J. 185 (1999)).
11. *Id.* at 60 (citing *Konzelman*, 158 N.J. at 191, 203).
12. *Ibid.* (citing *Konzelman*, 158 N.J. at 196).
13. *Ibid.* (citing *Konzelman*, 158 N.J. at 196).
14. *Id.* (citing *Konzelman*,158 N.J. at 204, 209 (O'Hern, J. dissenting)).
15. *Id.* (citing *Konzelman*, 158 N.J. at 206-07, 210).
16. *Konzelman*, 158 N.J. at 208.
17. *Id.* at 208-09.
18. *Id.* at 210.
19. *Id.* at 209.

20. *Quinn*, 225 N.J. at 61 (citing *ibid.*; *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (Stare decisis is an important doctrine to promote stability in our jurisprudence, but it is not a command to perpetuate the mistakes of the past when the wrongness of a past decision is revealed in the fullness of time.)).
21. *N.J.S.A.* 2A:34-23(n) (emphasis added); *N.J.S.A.* 2A:34-25 (emphasis added).
22. Quinn, 225 N.J. at 64.
23. *Ibid.* (emphasis added).
24. *Id.* at 64-65.
25. 461 N.J. Super. 107, 118 (App. Div. 2019) ("The question presented by this appeal . . . is whether the changed circumstances standard of *Lepis v. Lepis*, 83 N.J. 139, 157 (1980), continues to apply to a motion to suspend or terminate alimony based on cohabitation following the 2014 amendments to the alimony statute, *N.J.S.A.* 2A:34-23(n). We determine the party seeking modification still has the burden of showing the changed circumstance of cohabitation so as to warrant relief from an alimony obligation, see *Martindell v. Martindell*, 21 N.J. 341, 353 (1956), and hold the 2014 amendments to the alimony statute did not alter the requirement that '[a] prima facie showing of changed circumstances must be made before a court will order discovery of an ex-spouse's financial status.' *Lepis*, 83 N.J. at 157.").
26. *Temple v. Temple*, 468 N.J. Super. 364 (App. Div. 2021).
27. *Id.* at 369 (quoting *N.J.S.A.* 2A:34-23(n)).
28. *Ibid.*; *Quinn*, 225 N.J. at 63-64 ("Marriage is more than a solemn exchange of vows. The law confers on married couples -- not cohabiting partners -- considerable economic and other benefits. See, e.g., *N.J.S.A.* 2A:84A-22 (marital privilege limited to spouse or civil union partner); *N.J.S.A.* 3B:5-3 (spouse eligible for share of intestate estate); *N.J.S.A.* 3B:5-15 (spouse or domestic partner has right to intestate share of decedent's estate when decedent's will written before marriage or domestic partnership); *N.J.S.A.* 3B:8-1 (only surviving spouses and domestic partners qualify for right to elective share of decedent's estate); *N.J.S.A.* 18A:62-25 (spouse of member of New Jersey National Guard killed while performing duties eligible for post-secondary education tuition benefits); *N.J.S.A.* 18A:71-78.1 (spouse of volunteer firefighter eligible for post-secondary education tuition benefits); *N.J.S.A.* 34:11-4.5 (wages due to deceased employee may be paid to spouse); *N.J.S.A.* 34:11B-3(j) (defining family member as "a child, parent, spouse, or one partner in a civil union couple" for purposes of Family Leave Act); N.J.S.A. 34:15-13 (spouse of deceased eligible for death benefits under workers compensation law); *N.J.S.A.* 46:3-17.2 (spouses may hold property by tenancy by entirety); *N.J.S.A.* 46:15-10 (spouses exempt from realty transfer fee); *N.J.S.A.* 54A:2-1(a) (determination of taxable income affected by marital status); *N.J.S.A.* 54A:3-3 (spouse's medical expenses may be partially deducted from taxable gross income)).
29. *Temple*, 468 N.J. Super. at 370.
30. *Id.* at 369-70 (citations omitted).
31. *Smiley v. Sheedy* (App. Div. May 11, 2022).
32. Trial following discovery had originally been slated to commence September 2022. However, the trial moratorium in Ocean County has delayed that from occurring.
33. *Smiley*, slip op. at 7-8 (citing *Ozolins v. Ozolins*, 308 N.J. Super. 243, 249-50 (App. Div. 1998) ("There is a rebuttable presumption of changed circumstances arising upon a prima facie showing of cohabitation. The burden of proof, which is ordinarily on the party seeking modification, shifts to the dependent spouse.").
34. *Ibid.*
35. *Temple*, 468 N.J. Super. at 369 (quoting *N.J.S.A.* 2A:34-23(n)).
36. *Id. at* 370, 376.
37. See *supra* note 28.
38. *Quinn*, 225 N.J. at 64-65.
39. *N.J.S.A.* 2A:34-23(n).

Temple of Doom: The Prima Facie Showing of Cohabitation Remains a Mystery

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This is not an article about the titular star of Steven Spielberg's *Indiana Jones*, but maybe it should be. Only Harrison Ford's character would be able to navigate the patchwork of decisions that incorrectly and inconsistently construe the *prima facie* burden needed to establish cohabitation under N.J.S.A. 2A:34-23(n). Indeed, notwithstanding the opinion in *Temple v. Temple*, 468 N.J. Super. 364 (App. Div. 2021), courts continue to misapply N.J.S.A. 2A:34-23(n) when determining whether a litigant presented a *prima facie* showing of cohabitation. This showing is the first hurdle for spouses who seek termination or suspension of alimony based upon cohabitation. Unfortunately, the post-*Temple* decisions continue to misapply N.J.S.A. 2A:34-23(n) by setting an artificially high *prima facie* burden and ignoring the crux of *Temple*'s holding: that the *prima facie* burden should not be an insurmountable obstacle akin to *Indiana*'s travails.

To fully understand "cohabitation," a brief history is required. In 1975, the Appellate Division decided *Garlinger v. Garlinger*, 137 N.J. Super. 56 (App. Div. 1975). There, the alimony-payee acknowledged that she had been residing with a man, post-divorce, for a period of two months prior to the payor's motion. The court held that if it is shown that:

> the wife is being supported in whole or in part by the paramour, the former husband may come into court for a determination of whether the alimony should be terminated or reduced. Similarly, if the paramour resides in the wife's home without contributing anything toward the purchase of food or the payment of normal household bills, then there may be a reasonable inference that the wife's alimony is being used, at least in part, for the benefit of the paramour, in which case it could be argued with force that the amount thereof should be modified accordingly.

Id. at 66; *cf. Lepis v. Lepis*, 83 N.J. 139, 151 (1980) (citing decisions that recognized "cohabitation" as potential "changed circumstances" that may warrant relief).

Thereafter, the Supreme Court decided *Gayet v. Gayet*, 92 N.J. 149 (1983). The Court held that the test to determine whether cohabitation may modify alimony is whether "the relationship has reduced the financial needs of the dependent former spouse." *Ibid.* The Court further added that the change in circumstances could result if: "(1) the third party contributes to the dependent spouse's support, or (2) the third party resides in the dependent spouse's home without contributing anything toward the household expenses." *Id.* at 153.

Sixteen years later, the Court decided *Konzelman v. Konzelman*, 158 N.J. 185, 202 (1999), a case that included an agreement with a cohabitation-termination provision. The Court held: "[c]ohabitation involves an intimate relationship in which the couple has undertaken duties and privileges that are commonly associated with marriage. These can include . . . living together, intertwined finances such as joint bank accounts, sharing living expenses and household chores, and recognition of the relationship in the couple's social and family circle." *Id.* at 202. Later, in *Quinn v. Quinn*, 225 N.J. 34, 49-50 (2016), the Court held that once alimony is terminated pursuant to a *Konzelman* provision, it may not be reinstated. Notably, in dissent, Justice Albin wrote: "Anti-cohabitation clauses under *Konzelman* permit the forfeiture of the right to alimony even if the cohabiting ex-spouse receives *no financial support from the person with whom she resides*." *Id.* at 60 (emphasis added); *cf Melletz v. Melletz*, 271 N.J. Super. 359, 367 (App. Div. 1994) (finding as problematic, on policy grounds, anti-*Gayet* language in a marital settlement agreement).

In September 2014—after *Konzelman*, but before *Quinn*—the Legislature enacted N.J.S.A. 2A:34–23(n), which provides, in part:

> When assessing whether cohabitation is occurring, the court shall consider the following:
>
> (1) Intertwined finances such as joint bank accounts and other joint holdings or liabilities;
>
> (2) Sharing or joint responsibility for living expenses;
>
> (3) Recognition of the relationship in the couple's social and family circle;
>
> (4) Living together, the frequency of contact, the duration of the relationship, and other indicia of a mutually supportive intimate personal relationship;
>
> (5) Sharing household chores;
>
> (6) Whether the recipient of alimony has received an enforceable promise of support from another person within the meaning of subsection h. of R.S.25:1-5; and
>
> (7) All other relevant evidence.
>
> In evaluating whether cohabitation is occurring and whether alimony should be suspended or terminated, the court shall also consider the length of the relationship. A court may not find an absence of cohabitation solely on grounds that the couple does not live together on a full-time basis.

The legislative history to N.J.S.A. 2A:34-23(n) supports a conclusion that the statute is based on *Konzelman*. That history reveals two competing pending bills that were proposed. The bill adopted by the Legislature mirrors the *Konzelman* factors. The other bill, which included two Assembly proposals, (A845 and A971); and one Senate proposal, (S488), provided that alimony would "modify, suspend, or terminate" alimony "only if . . . the economic benefit inuring to the payee is sufficiently material to constitute a change of circumstances. That later bill—*the one that did not make it into law*—more closely tracks *Gayet*.

In 2019, the court decided *Landau v. Landau*, 461 N.J. Super. 107 (App. Div. 2019). The core holding of *Landau* is correct: a movant must present a *prima facie* showing of cohabitation before a court can order discovery. *Id.* 118. However, the court added: "there is no question but that a *prima facie* showing of cohabitation can be difficult to establish[,]" *ibid.*, which has spawned three-plus years of cohabitation cases that are saddled with an impossible *prima facie* hurdle. The Panel cited *Konzelman* in support of the preceding quote (about the difficulty to establish cohabitation), which ignores that the 127 days of surveillance in *Konzelman* resulted in discovery and a thirteen-day trial, which included twenty-six witnesses and overwhelming evidence—most of which stemmed from discovery and the trial.

In an effort to temper the reach of *Landau*'s holding, the court decided *Temple*, 468 N.J. Super. at 370-71, where it held: (i) "[i]t is enough that the movant present evidence from which a trier of fact could conclude the supported spouse and another are in "a mutually supportive, intimate personal relationship" in which they have "undertaken duties and privileges that are commonly associated with marriage or civil union"; (ii) "if . . . a movant must check off all six boxes to meet the burden of presenting a prima facie case, a finding of cohabitation will be as rare as a unicorn"; and (iii) "[a]bsent an opponent's voluntary turnover, a movant will never be able to offer evidence about the financial aspects referred to in N.J.S.A. 2A:34-23(n)."

Against that backdrop and accepting that the statute is based on *Konzelman*; that *Konzelman* did not hinge on the actual economic benefits to the payee spouse; and with the precedent established by *Temple*, the following post-*Temple* decisions are flawed in their assessment of the required *prima facie* showing. In *Manley v. Manley*, No. A-0408-20 (App. Div. Jan. 14, 2022), the court accepted the following facts:

> plaintiff provided evidence of defendant's use of [her paramour]'s wholesale club card and country club membership card. Plaintiff also submitted photographs of defendant bringing groceries to [her paramour]'s home. [P]laintiff provided Facebook postings showing defendant and their children travelling with [her paramour] and his daughter, as well as photographs of [her paramour] attending sporting events for plaintiff's children. Plaintiff also certified that defendant brought [her paramour] to family reunions and other family events. Defendant's paramour also moved to the same town as defendant and their family/friends recognized their relationship, as did their social media accounts.

The trial court initially concluded that plaintiff presented "a showing of recognition of the relationship . . . as well as frequent contact" and granted plaintiff the

right to proceed with discovery. However, defendant filed a motion for reconsideration and the trial court reversed its decision. The trial court acknowledged, in reversing its prior decision, that a movant need not "check off all six boxes" to meet *the prima facie* burden, but the trial court concluded that there was no evidence "of intertwined finances, joint living expenses, sharing of household chores, or an enforceable promise of support." The Appellate Division affirmed, noting that the "evidence in the matter on appeal is very different from the evidence presented in *Temple*. Here, plaintiff failed to present 'an abundance of evidence' that defendant and [her paramour] were cohabitating." The Panel's reliance on the reference to an "abundance of evidence" from *Temple* misconstrues the core holding from *Temple*, and incorrectly assumes the legal reasoning of *Temple* hinged on "abundant" *pre-discovery* facts.

In *Charles v. Charles*, No. A-2412-20 (App. Div. May 5, 2022), the court failed to find a *prima facie* showing because the movant had a "lack of evidence as to the financial factors. . . [,]" notwithstanding the plaintiff admitted that she had been dating her paramour since 2014 and *became engaged in 2019. Charles,* at *3. In affirming the decision, the Appellate Division noted that the payee and her fiancé maintained separate households, ignoring that N.J.S.A. 2A:34-23(n) provides that a court "may not find an absence of cohabitation solely on the grounds that the couple does not live together on a full-time basis" and also discounted the proofs because the movant failed to provide a private investigator's report. The Panel also, like in *Manley*, noted the lack of "overwhelming evidence" of cohabitation. *Charles* represents another case in which the court ignored the crux of *Temple*'s legal reasoning (i.e. that a *prima facie* showing is not so difficult to make it as rare as a "unicorn"). The Supreme Court did not grant Certification. It bears mentioning that the American Academy of Matrimonial Lawyers submitted an *Amicus Brief* in support of the Petition for Certification.

In *Meixner v. Meixner*, No. A-0551-20 (App. Div. May 12, 2022), the trial court focused on the lack of financial proofs when it failed to find a prima facie showing of cohabitation. *Id.* at *2. It found that the payor failed to produce evidence of intertwined finances, joint bank accounts or other holdings or liabilities, and sharing or joint responsibility for living expenses. It also noted that "while not dispositive, the evidence produced . . . indicates the parties maintain separate residences . . . ." *Ibid.* The record showed that the payee acknowledged: she was in a dating relationship; her paramour spent time at her home, including overnights; they had frequent contact, and had for several years; they spent holidays and vacations together, including with the paramour's children; the payee had framed pictures of her paramour in her home; he kept clothing at her home; their friends and families recognize that they are in a committed relationship; and the paramour received mail at her home. *Ibid.* The court also found evidence of sharing in household chores and that the paramour occasionally drove one of the payee's children to school. *Id.* at *3. Notwithstanding these facts, the trial court concluded that "the record contains no evidence of *any financial entanglement between the two*" and they maintain separate residences. *Id.* at *5. Excluding the financial proofs, which are impossible to obtain without discovery, it is unclear what additional evidence the trial court would have needed to find *prima facie* cohabitation. In affirming the decision, the Appellate Division noted that "[t]his evidence is *far less significant* than that submitted by the moving party in *Temple*. . . ." Ibid. It is unclear why the Appellate Division continues to rely on the facts from *Temple* as the baseline proofs as opposed to *legal reasoning* of *Temple*.

In *Cardali v. Cardali*, No. A-1624-20 (App. Div. June 27, 2022), the defendant demonstrated that plaintiff was in an *eight-year*, committed relationship that included: attending family functions; family photos; holding themselves out as a couple; vacationing together; accessing each other's residences; grocery shopping; doing laundry in each other's homes; being together on each of the days that the private investigator observed them; and spending the night together on more than half of those days. The court, *citing Landau*, 461 N.J. Super. at 118, affirmed the trial court's denial of the defendant's motion. The panel ignored that the decision in *Temple* substantially tempered *Landau*'s impact on cohabitation motions. In doing so, the court concluded: "defendant provided no evidence *to counter plaintiff's assertion there was no financial entanglement between the two* and that [the boyfriend] maintained his own residence. The record also was devoid of evidence [the boyfriend] made any enforceable promise of support to plaintiff." *Cardali*, at *16-17 (emphasis added). In summary, the decision hinged on the absence of proofs to which the movant did not have access and are not required under *Temple*. The AAML has submitted an *Amicus Brief* in support of a pending Petition for Certification.

In fact, it appears that (other than *Temple*) only one cohabitation decision opted for the right approach. In *Smiley v. Sheedy*, No. A-2693-20 (App. Div. May 11, 2022), the record established:

> a six-year dating relationship . . , a private investigator's surveillance report, an admission from [the payee] that she and [her paramour] physically cohabited for a period of time . . . , social media posts demonstrating they hold themselves out as a couple and share holidays, and an announcement regarding the motive behind [the payee]'s relocation to South Jersey.

While the trial court declined to find a *prima facie* showing of cohabitation, the Appellate Division appropriately reversed and remanded for discovery and a plenary hearing. The approach by the *Smiley* panel (and *Temple*) is how all cohabitation motions should be decided at the initial stage.

Conclusion

The Family Bar shared a collective "sigh" of relief with publication of the *Temple* decision. In practice, that decision has done little to cure the problem created by *Landau*. Courts continue to cite the absence of financial proof in the movant's motion and even the *Landau* decision itself for the notion that cohabitation is difficult to prove. Courts also interchangeably cite *Konzelman* and *Gayet* without appreciating the difference in the opinions' legal analysis. In addition, some courts discount private investigative reports, while others credit them and, in fact, deny motions for failure of the movant to have such a report. Some courts provide weight to a marital engagement, while others ignore it. Some courts give weight to the cohabitants' access to each other's homes, while others ignore it. Some courts understand the gravity of a paramour's mail service being re-routed to a payee's home, while others ignore it. Some courts appreciate that "casual dating" does not include shared holidays with family and children, while others consider it "modern dating" (a phrase that does not appear in N.J.S.A. 2A:34-23(n)).

Perhaps worst of all, courts now look at *Temple*—the overwhelming facts from *Temple*—as the minimum proof needed to establish a *prima facie* showing of cohabitation. The authors of this article hope that the Supreme Court provides clarity because in the absence of that guidance we will continue to receive conflicting decisions and litigants are likely to engage in more intrusive behavior to obtain proofs to establish a *heightened prima facie* standard that is almost impossible to meet. This result cannot be what the Legislature envisioned or our courts desire.

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The Kids are Not Alright: Therapeutic Privilege and the Treatment of Minors

By Alix Claps

It may be anecdotal, or it may be a byproduct of the stresses and strains of the pandemic, but it seems like more and more children whose parents are in the midst of litigation are undergoing therapy. As a result, there are issues that need to be addressed which do not have clear guidance under New Jersey case law.

As an initial consideration, post-pandemic therapy is now frequently conducted virtually. In 2018, fewer than half of psychologists were conducting online therapeutic appointments, but that shifted significantly as a result of the pandemic, likely due to more individuals seeking therapy in addition to limitations on physical access to space.[1] While virtual therapy eliminates the problem of which parent will be driving a child to therapy, in situations when one or both of the parents is part of the reason the child needs therapy, how can the therapy be effective when that parent is potentially within earshot, either deliberately or inadvertently?

In cases where there are claims of alienation or abuse, it is important that the child can express their concerns to the therapist without having to worry about the parent on the other side of the door. In such cases, it would be beneficial to the success of the therapy to have clear rules incorporated into an order. These rules could require that the therapy alternate between homes so the therapist can observe any change in dynamic or behavior in the child. The rules should also require that the child is provided complete privacy for the sessions. Some therapists who work with older children can incorporate code words into their therapy to signal when there may be an issue regarding privacy.[2] However, with younger children that may not be practical. Other useful suggestions may be for the child to have music or a fan on in the room with them to prevent eavesdropping, as well as having the therapist do a "room scan" during video sessions so the therapist can see that the child is alone.[3]

While the purpose of the therapy is to provide therapeutic assistance to the child, family law practitioners must still consider the impact of therapy on litigation. Regardless of whether therapy is in person or virtual, the question regarding therapy and litigation remains the same: to what degree and in what context do the details of a child's therapy belong in a courtroom?

Statutory and case law make clear that communications between a therapist and the patient are confidential and protected.[4] "The nature of the psychotherapeutic process is such that full disclosure to the therapist of the patient's most intimate emotions, fears and fantasies is required. The patient rightfully expects that his personal revelations will not generally be subject to public scrutiny or exposure."[5]

Although there is not yet any New Jersey law directly addressing a parent's access to a child's confidential communications in a therapeutic setting, other jurisdictions have sided against disclosure. This is particularly applicable in cases where the parent seeking disclosure appears to be doing so for their own interests, and not in the interest of the child. A court in Florida, for example, determined a child has a statutory privilege of confidentiality with her therapist which cannot be waived by her parents.[6] In 2001, the Court of Appeals addressed a case in which a 17-year-old, through her attorney ad litem, sought to quash an order granting a custody evaluator and court-appointed psychologist access to her mental health records in a custody case in which there were allegations of sexual abuse by the child's father. At the lower level, both the custody evaluator and court-appointed psychologist testified it was in the best interest of the child to obtain all of the records to evaluate the custody issues in the case. Both parents agreed to waive the child's therapeutic privilege.

Despite the parents' consent to release the records and the evaluator's and court-appointed psychologist's testimony that such release would be in the best interest of the child, the Court of Appels determined that the minor child had a privilege not to disclose the records

of her therapist. Part of this decision rested on the fact that although a minor, at age 17, the child was able to seek and obtain her own mental health treatment and had sufficient mental capacity to assert the privilege. "Where the parents are involved in litigation themselves over the best interest of the child, the parents may not either assert or waive the privilege on their child's behalf . . . Our conclusion that the child has a privilege which can be asserted, and which the parents cannot waive or assert for the child is limited to the facts of the case before us. Here, the parents are engaged in litigation, and each has a personal interest that could be in conflict with the child's interest in asserting the privilege."[7] Among the considerations of the court is whether the child is of sufficient emotional and intellectual maturity to make the decision on their own, and if so, the court should appoint an attorney ad litem to assert the child's position.

The Supreme Court of Missouri, sitting *en banc*, addressed a similar issue in 1996 in the context of a medical malpractice suit. The defense sought access to the medical records of the non-party siblings of the plaintiff child. The defense argued that the mother, also a party, waived the siblings' privilege by mentioning their medical conditions in interrogatory answers, her deposition, and an exhibit. However, under the Missouri statutes, only a patient can waive their physician-patient privilege by placing their conditions in issue through court pleadings. A party cannot waive a non-party's privilege by making references in court pleadings.

Although the privilege for the plaintiff child was necessarily waived as the result of the nature of the action, that did not open the siblings' medical history for review without demonstrating relevance to the underlying claim and providing adequate safeguards to protect the non-party children.[8] The Court acknowledged that the privilege is not absolute, but in order for the discovery to be ordered, the medical information would have to be relevant to the claim at issue. "[A] parent, as natural guardian, would have the right to *claim* the privilege on behalf of his child when it would be to the best interest of the minor to do so."[9]

The question remains, however, who in a litigation is in the proper position to assert the privilege on behalf of the minor?

Maryland, for example, requires the court to appoint a guardian to act in the best interests of the child when a parent seeks waiver of therapeutic privilege. In a custody case, the Court of Appeals of Maryland clarified that a child (in the specific case, under the age of 10) fell under the statutory scheme that required the appointment of a guardian to act for a child who is incompetent to assert or waive their therapeutic privilege. The court felt that "it is inappropriate in a continuing custody 'battle' for the custodial parent to control the assertion or waiver of the privilege of nondisclosure . . . Furthermore, the appointment of a neutral third party would eliminate the very real possibility, as may exist in this case, of one of two warring parents exercising the power of veto for reasons unconnected to the polestar rule of 'the best interest of the child.'"[10] It is easy to see, too, where a parent seeking the disclosure of medical records may be doing so other than in the best interest of the child.

Likewise, California agrees that "a minor child is entitled to the privacy granted by the privilege." While the state has statutory law providing that a noncustodial parent will not be denied access to a child's records or information simply because they are the noncustodial parent, at the same time that law does not provide a parent with the right to demand disclosure of confidential records of a minor child's therapist.[11] In one California case, the father was accused of molesting his minor child, and wanted access to the child's therapeutic records which he claimed would exonerate him based on the theory that the long-term relationship between the child and therapist would result in more accurate information than that which was elicited during an evaluation. The court did not permit the release of the records to the father based on his attempt to waive the child's privilege, noting:

> We believe that in a case such as this, where the father is accused of child molest, and the child is in therapy, presumably to deal with the emotional aftermath of the alleged molest, the accused parent should not be entitled to access to the communications made by the child to the therapist. The child has at stake a substantial privacy interest, and we can foresee substantial emotional harm to the child from a forced disclosure in these circumstances. For example, the child may fear the parent and consequently refuse to be open with the therapist for fear of disclosure to the parent.[12]

New Hampshire has found that the court has the authority to determine if it would be in a child's best interest to have their therapy records released (or to appoint a guardian ad litem to address the issue), even in the face of a parent's fundamental right to raise their children.[13] "There is a serious risk that permitting parents unconditional access to the therapy records of their children would have a chilling effect on the therapist-client relationship, thus denying the children access to productive and effective therapeutic treatment."[14] The court noted this in the context of a post-judgment parental alienation case. The court observed that it is not possible to assume a parent will act solely in the best interest of a child when the action comes amid a custody and parenting time proceeding.

The *parens patriae* jurisdiction of the court to avoid harm to the child requires the court to balance the need for the disclosure of the child's statements against the potential damage to the child. The court must, therefore, consider any requests made by litigants for discovery related to a child's therapy within the greater context of the litigation: Is the request made relative to a domestic violence claim? An alienation claim? A request for relocation?

This is not dissimilar from the balancing a court does when considering release of a report from the Division of Child Protection & Permanency (DCPP) to parties during litigation. Pursuant to *Rule* 5:3-3(f), when a report by an expert is submitted to the court, the parties are to be provided a reasonable opportunity to conduct discovery related to same. This includes DCPP findings as well as court-appointed evaluators or other experts.

While traditionally counsel or *pro se* parties would have reviewed a DCPP file at the courthouse, during the height of the pandemic, when such access was restricted, it became more common for reports or files to be released to counsel under the constraints of a protective order. Such protective orders often prohibit the actual documents from being reviewed with the parents, or at minimum, prohibit a copy of the documents from being provided to the parents. This is most common in FM or FD matters in which custody and parenting time are major components of the litigation. However, in FV matters, or emergent applications, in practice, the court may review DCPP reports or speak with caseworkers without providing access to the source material by the litigants or attorneys.

When information such as a DCPP report is involved in a custody and parenting time matter that involves a best interest evaluation(s), custody experts are routinely given access to the DCPP files under a protective order of a similar nature. This can lead to the expert's report needing to be partially redacted before being provided to the parties. It would, therefore, seem reasonable for an expert to be permitted to review a therapeutic file or speak with a child's therapist while limiting the information that is released to the parents. While New Jersey may not have specific laws, at present, guiding whether the parent holds the privilege and can waive that privilege over their child's therapeutic records, what is clear is that the court must make any decision related to the release of a minor's therapeutic records with the best interest of the child at the forefront, despite the impact that decision may have on a parent litigant.

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Endnotes

1. vice.com/en/article/8899b4/parents-are-listening-to-their-kids-virtual-therapy-sessions-during-pandemic
2. *Id.*
3. *Id.*
4. *N.J.S.A.* 458B-29; *N.J.R.E.* 505, 518; *see Runyon v. Smith*, 163 *N.J.* 439 (2000); *Kinsella v. Kinsella*, 150 *N.J.* 276 (1997).
5. *Arena v. Saphier*, 201 *N.J.Super.* 79, 86 (App.Div. 1985).

6. *Attorney ad Litem for D.K. v. Parents of D.K.*, 780 *So.2d* 301 (2001)
7. *Id.* at 307-08
8. *State ex rel Wilfong v. Schaeperkoetter*, 933 *S.W.2d* 407, 409 (Mo. 1996).
9. *Id., quoting In Re M.P.S.*, 342 *S.W.2d* 277, 283 (Mo.App. 1961).
10. *Nagle v. Hooks*, 296 *Md.* 123, 127-28 (1983).
11. *In re Daniel C.H.*, 269 *Cal.Rptr.* 624, 630 (1990).
12. *Id.* at 631.
13. *In re Berg*, 152 *N.H.* 658 (2005) (*citing Kinsella, supra*).
14. *In re Berg* at 665.

Evaluating Matrimonial Agreements in the Context of *Pacelli*

By Diana N. Fredericks and Sofia Ucles

This article takes a closer look at three types of agreements – prenuptial agreements, mid-marriage agreements (or reconciliation agreements), and marital settlement agreements. When can I use them? Are they binding? What should I be wary of? Although 23 years old, the case of *Pacelli v. Pacelli*[1] provides insight into the differences of these agreements and is something every family law practitioner needs to be aware of when advising clients. This article examines *Pacelli* and the few cases touching on these topics that have been issued in recent history.

Prenuptial Agreements

"A pre-nuptial agreement, however, is reached when the parties are not adversaries, 'when the relationship is at its closest, when the parties are least likely to be cautious in dealing with each other.'"[2] In 2013, New Jersey amended the statute governing prenuptial agreements, making it more difficult for a party to set aside an agreement at the time of enforcement.[3] For a prenuptial agreement to be enforceable, the agreement must be: (1) entered into voluntarily; and (2) the agreement also must be conscionable at the time of execution.[4] To set aside a prenuptial agreement based upon unconscionability, a moving party must show by clear and convincing evidence that they:

1. Were not provided full and fair disclosure of the earnings, property, and financial obligations of the other party;
2. Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or the financial obligations of the other party beyond the disclosure provided;
3. Did not have, or reasonably could not have had, an adequate knowledge of the property or the financial obligations of the other party; or
4. Did not consult with independent legal counsel and did not voluntarily and expressly waive, in writing, the opportunity to consult with independent legal counsel.[5]

What can we do as practitioners to ensure that the above requirements are met?

- Attach copies of the documents exchanged as exhibits to the prenuptial agreement. While the statute only requires a statement of assets to be attached,[6] this makes it more difficult for a party to claim they did not receive certain information related to the other party's income, assets, or liabilities. In other words, even if it makes the agreement ridiculously lengthy, it will potentially save a lot of time and money if we attach everything as schedules to the prenuptial agreement. Too many times clients seek out another attorney, sometimes decades after a prenuptial agreement was executed, files have been destroyed and the referenced documents are lost which can present a huge problem for both sides. Bottom line: attach everything.
- Add footnotes to your client's schedules. For example, if a statement evidencing the value of a retirement asset is not available and this information was disclosed the other party, and the other party is waiving the right to obtain further documentation, this should be noted specifically in the agreement such that the other party cannot later assert that documentation was requested and never received. You can also note this for appraisals of real estate or pensions.
- If the other party is not obtaining independent counsel, make sure you indicate *in writing* you do not represent the other party's interest. For example, when you notify Party "A" that you represent Party "B," be clear you do *not* represent Party "A"'s interest and Party "A" should retain their own counsel to negotiate or review the prenuptial agreement. The agreement also must make sure to reference that the self-represented party had ample time and access to obtain their own counsel and are voluntarily waiving that right. When representing the monied future spouse, I encourage them to offer to pay for the other party's attorney fees, for an attorney of their choosing at a dollar amount equal to that of my retainer, and I make this offer in writing so that in the even that they choose to remain self-represented, they

cannot later claim they did not have the time or funds for counsel as to the prenuptial agreement.

What is a Mid-Marriage Agreement?

The primary case dealing with mid-marriage Agreements is *Pacelli v. Pacelli*7. Mid-marriage agreements occur at a unique time for the parties – when one party wishes for the marriage to stay intact and the other party wishes for the marriage to stay intact provided certain terms are met.[8] Unlike a divorce, the parties are *not* negotiating at arm's length – the purpose of the mid-marriage agreement (and the reconciliation agreement) is to *restore* the marriage based upon the satisfaction of certain terms.[9] And unlike a prenuptial agreement, the parties cannot just walk away from the marriage if they do not agree to the terms of the mid-marriage agreement.[10] The question is – when is it appropriate to enter into a mid-marriage agreement? Should practitioners engage in negotiating and drafting the terms of these types of agreements?

Mid-marriage agreements are difficult to enforce as the agreements are "inherently coercive."[11] If a party wants to negotiate a mid-marriage agreement, there should be evidence of a breakdown of the marital relationship, such as a complaint for divorce filed.[12] However, courts will view these types of agreements with heightened scrutiny.[13] Practitioners need to be wary of drafting these agreements.

A reconciliation agreement, that is fair and equitable and is supported by adequate consideration, may be enforceable where the consideration consists of one spouse promising to resume marital relations when the "marital relationship has deteriorated at least to the brink of an indefinite separation or a suit for divorce."[14] The court must make a finding that the "marital rift was substantial" to find that the promise of reconciliation is adequate consideration.[15]

Mid-marriage agreements closely resemble reconciliation agreements, not pre-nuptial agreements.[16] Before a mid-marriage agreement is enforced, the court must determine whether the promise to resume marital relations was made when the marital rift was substantial.[17]

In *Nicholson*, the Court held, "we must proceed with care" when enforcing reconciliation agreements "where the consideration for a spousal promise is said to be the willingness of the other spouse to continue the marriage."[18]

They also identified six factors for courts to consider when deciding whether to enforce reconciliation agreements:

1. whether the marital rift was substantial when the promise to reconcile was made;
2. whether the agreement complied with the statute of frauds;
3. whether the circumstances under which the agreement was entered into were fair to the party charged;
4. whether the agreement's terms were conscionable when it was made;
5. whether the party seeking enforcement acted in good faith; and
6. whether changed circumstances rendered literal enforcement inequitable.[19]

In the recent case of *Kriss*, the Appellate Division voided a reconciliation agreement finding it was void due to its unconscionable terms.[20] In this case, the husband filed for divorce in 1998 but withdrew his complaint and thereafter decided that he and wife should become "financially separated."[21] In 2003, the husband filed a second complaint for divorce. The wife begged the husband stay in the marriage and the husband indicated he would do so if they signed an agreement.

In the agreement, drafted by the husband's attorney, the wife relinquished her interest in their family business as condition for maintaining the marriage and required a future waiver of alimony if there was a later divorce. The wife signed the agreement against the advice of her attorney and without fully reading it. In 2011, the husband again filed for divorce and sought to enforce the reconciliation agreement. The Court found that the terms of the agreement were unconscionable, that the wife was intimidated by the husband, and that the wife signed the agreement under duress as she testified, she "would have done anything to save the marriage." In total, the husband was ordered to pay the wife's legal fees of more than $120,000. The Appellate Division agreed.

Reconciliation and mid-marriage agreements are extremely complex and require not only the advice of good counsel but also assurances that the factors set forth above are thoroughly contemplated and addressed by both parties to the agreement. The consequences of failing to do so can be severe and quite expensive.

Recently, the Appellate Division issued a published decision, *Steele v. Steele*,[22] which addressed the aforementioned types of marital agreements: prenuptial agreements, mid-marriage agreements, and property settlement agreements. Notably, the Appellate Division determined that a marital agreement "deserves the heightened scrutiny we have applied to mid-marriage agreements, as in *Pacelli*. Much like other agreements between partners or

spouses, the [marital agreement] need not bear a specific label for us to address its enforceability."[23]

Ordinarily, "[p]re-nuptial agreements[24] establishing post-divorce obligations and rights should be held valid and enforceable."[25] Such agreements made in contemplation of marriage are enforceable if they are fair and just.[26] The public policy supporting enforcement of a pre-nuptial, as opposed to a post-nuptial, agreement is that one party remains free to walk away before the marriage takes place.

Conversely, mid-marriage agreements are generally unenforceable as they are "inherently coercive."[27] A mid-marriage agreement is "entered into before the marriage [has] lost all of its vitality and when at least one of the parties, without reservation, want[s] the marriage to survive."[28] Such agreements are carefully reviewed because they are "pregnant with the opportunity for one party to use the threat of dissolution 'to bargain themselves into positions of advantage.'"[29]

Property settlement agreements generally are enforceable, so long as they are "fair and equitable," as they assume the parties stand in adversarial positions and negotiate in their own self-interest.[30] Property settlement agreements are prepared in contemplation of divorce, "when relations have already deteriorated. Discovery is available, parties usually deal at arm's length and the proceeding - almost by definition is adversarial."[31]

In the *Steele* case, the parties did not negotiate a premarital agreement, but rather, after they were married and while the wife was pregnant with their child, they negotiated a marital agreement. Even though neither party was threatened with divorce or separation to prompt the signing of the agreement, the wife was married, left her job, and had given birth "a mere few weeks prior to signing the MA."[32] The wife testified that the husband asked her to sign three weeks after the birth of their daughter which felt, "a little confrontational and opportunistic."[33] The wife believed there would be consequences to not signing the MA and felt vulnerable, pressured, and concerned that the husband would "never [] let it go" if she did not sign.[34] These statements, coupled with the questions about the husband's financial disclosure, were significant to the Appellate Court and erroneously overlooked by the trial court, so much so that this case was remanded (sent back to the trial court) to be heard by a new judge.

Based on the foregoing, the Appellate Division had little difficulty concluding that the *Steele* MA was akin to a mid-marriage agreement and deserved the heightened scrutiny as in *Pacelli*. Importantly, the court noted that the wife was "not free to just walk away."[35] The Court found that the trial court improperly compared the *Steele* agreement to a premarital agreement, but that was erroneous not only because they were married when they signed, but for the reasons set forth in this article.

Despite their differences, an MA, mid-marriage agreement, prenuptial or property settlement agreement is not enforceable if it is not fair and equitable; however, the distinction noted in *Steele* is that the court should, "not approach the question of whether a mid-marriage is enforceable with a predisposition in favor of its enforceability, given the 'inherently coercive' nature of mid-marriage agreements."[36] This is the takeaway from this decision and noteworthy to clients and practitioners in consulting, drafting, and negotiating these types of agreements. There is also a larger question to ponder: should attorneys be involved in mid-marriage agreements at all and if so, how can they do so to meet the standards set forth in this decision and the law.

But any marital agreement that is unconscionable or the product of fraud or overreaching, particularly where it exploits the confidential relationship between spouses, may be set aside.[37] Further, a settlement agreement "will be reformed . . . where a party demonstrates that the agreement is plagued by 'unconscionability, fraud, or overreaching in the negotiations of the settlement.'"[38] Accordingly, a trial court has a "duty to scrutinize marital agreements for fairness."[39]

These concepts are crucial to fairly and equitably representing clients in the preparation, negotiation, and settlement of these types of agreements. ■

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Endnotes

1. 319 *N.J. Super.* 185, 190-91 (App. Div. 1999).
2. *Pacelli*, 319 *N.J. Super.* at 190 (quoting *Marschall v. Marschall*, 195 *N.J. Super.* 16, 29 (Ch. Div. 1984)).
3. *See N.J.S.A.* 37:2-31 et. seq.
4. *N.J.S.A.* 37:2-38 (emphasis added).
5. *N.J.S.A.* 37:2-38(c) (1-4).
6. *N.J.S.A.* 37:2-33(2).
7. 319 *N.J. Super.* 185 (App. Div. 1999)
8. *Pacelli*, 319 *N.J. Super.* at 190.
9. *See Id.* at 193 (citing 17 *C.J.S. Contracts* § 236 (1963)).
10. *Steele v. Steele*, 467 *N.J. Super.* 414, 436 (App. Div. 2021) (citing *Pacelli*, 319 *N.J. Super.* at 189-90).
11. *Id.*, at 436 (citing *Pacelli*, 319 *N.J. Super.* at 191).
12. *See id.* at 438.
13. *Id.* at 437.
14. *Nicholson v. Nicholson*, 199 *N.J. Super.* 525, 531 (App. Div. 1985).
15. *Id.* at 532.
16. *Compare N.J.S.A.* 37:2-31 et. seq. and *Pacelli*, 319 *N.J. Super.* 185.
17. *Pacelli*, 319 *N.J. Super.* 185 (App. Div. 1999).
18. *Ibid.*
19. *Id.* at 532.
20. *Kriss v. Kriss*, No. A-3255-15T3, 2018 WL 1145753 (N.J. App. Div. Mar. 5, 2018).
21. *Id.* at *1.
22. *Steele*, 467 *N.J. Super.* 414 (App. Div. 2021).
23. *Id.* at 436.
24. In 1988, New Jersey enacted its version of The Uniform Premarital Agreement Act (UPAA). In 2013, the New Jersey State Legislature amended the Premarital Agreement Statute which in essence, makes it more difficult to vacate such agreement at the time of enforcement. The new statute provides that in order to set aside a premarital agreement, the party seeking to set aside the agreement must prove by clear and convincing evidence that (a) they executed the agreement involuntarily, (b) the agreement was unconscionable when it was executed because (1) they were not provided with a full and fair disclosure of the earnings, property and financial obligations of the other party, (2) did not voluntarily and expressly waive in writing the right to disclosure of the property or financial obligations of the other party beyond that disclosed at the time, (3) did not have adequate knowledge of the property or financial obligations of the other party, or (4) did not consult with independent legal counsel and did not voluntarily and expressly waive in writing the opportunity to consult with independent legal counsel. In the prior statute, in addition to the above reasons, a premarital agreement could be set aside if it was determined by a Court that the agreement was unconscionable at the time of enforcement.
25. *Hawxhurst v. Hawxhurst*, 318 *N.J. Super.* 72, 80 (App. Div. 1998) (citing *Marschall v. Marschall*, 195 *N.J. Super.* 16, 27 (Ch. Div. 1984))
26. *Pacelli*, 319 *N.J. Super.* at 189. *See also DeLorean v. DeLorean*, 211 N.J. Super. 432, 435 (Ch. Div. 1986); *Marschall*, 195 *N.J. Super.* at 28, 31.
27. *Pacelli*, 319 *N.J. Super.* at 191.
28. *Id.* at 190.
29. *Id.* at 195 (quoting *Mathie v. Mathie*, 363 P.2d 779, 783 (Utah 1961)).
30. *Lepis v. Lepis*, 83 *N.J.* 139, 148-49 (1980).
31. *Pacelli*, 319 *N.J. Super.* at 190 (quoting *Marschall v. Marschall*, 195 *N.J. Super.* 16, 29 (Ch. Div. 1984)).
32. *Steele v. Steele*, 467 *N.J. Super.* 414, 439 (App. Div. 2021).
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 440.
37. *Massar v. Massar*, 279 *N.J. Super.* 89, 93 (App. Div. 1995); *Guglielmo v. Guglielmo*, 253 *N.J. Super.* 531, 541 (App. Div. 1992).
38. *Weishaus v. Weishaus*, 180 *N.J.* 131, 143-44 (2004) (quoting *Miller v. Miller*, 160 N.J. 408, 419 (1999))
39. *Dworkin v. Dworkin*, 217 *N.J. Super.* 518, 523 (App. Div. 1987).

Fighting over Fido: Pet Custody Disputes in New Jersey

By Emerald E. Sheay and Marisa Lepore Hovanec

In 2018, the divorce of Jennifer Aniston and Justin Theroux made headlines when they allegedly agreed to a "shared custody" schedule of their marital dogs. It is no surprise to pet owners that dogs often feel like a member of the family during a breakup. With an increase in dog adoptions, the simultaneous increase in disputes over dogs in breakups and divorces is a reality seen by family attorneys across the country. Pet ownership boomed during the pandemic, with recent estimates suggesting that over 23 million American households adopted a pet since March 2020.[1] The role of animals in the law is changing as well. As just one example, a pending bill in the New Jersey Legislature would allow lawyers to advocate on behalf of pets in cruelty cases.[2] As the role of pets in the family continues to expand in importance, so does litigation over their ownership.

How do Disputes Over Pets Arise?

Disagreements over animals can take shape in many different scenarios. First, pets are commonly a part of the divorce process, with parties deciding how to "divide" the family pet as just another part of the marital estate. The issue also commonly comes up post-judgment. If issues related to the pet were not addressed in any marital settlement agreement, issues can arise over how veterinarian expenses are paid, making medical decisions for the pet, or disagreements around one partner moving away with the animal.

Outside the matrimonial docket, non-married couples may have disputes over pets they shared during their relationship. This can be difficult to remedy, as unlike in the matrimonial docket, these disputes often arise outside of an ongoing court case. Additionally, pets may be an issue in domestic violence matters, if a party fears their abuser may harm the animal as a method of abuse or retaliation (or, when the abuser has already done so).

What is the Appropriate Venue for Pet Custody Disputes?

Determining where to file a complaint or motion for possession of a pet can be tricky. However, *R.* 4:31(a)(4)(E) offers guidance. This rule provides that if the ownership interest in personal property, "including pets," is the only relief sought, then the matter is filed in the Law Division, Civil Part, or the Law Division, Special Civil Part. These applications are typically writs of replevin, as allowed under *R.* 4:61 ("[a] writ of replevin shall issue only upon court order on motion of a party claiming the right to possession of chattels"). If there are any other types of relief sought along with the pet dispute which involve the family relationship, such as divorce, child support, parenting time, property distribution, or other similar relief, this rule directs parties to file the dispute in the Chancery Division, Family Part.

In the case of domestic violence, as of 2021 New Jersey is one of several states allowing the domestic violence court to include pets in restraining orders. *N.J.S.A.* 2C:25-26 specifies that "[t]he court may also enter an order prohibiting the defendant from having any contact with any animal owned, possessed, leased, kept, or held by either party or a minor child residing in the household." The court can also enter an order specifying possession of the animal, and a presumption is in place in favor of possession by the non-abusive party.[3] Notably, domestic violence often involves a link to animal abuse.[4] The domestic violence docket may therefore be appropriate in cases where the dispute involves abuse between the parties.

Outside of court, some owners may choose to file a police report for stolen property if an ex-partner takes off with the family pet. However, police typically treat these disputes as a civil matter, and rarely get involved in returning the animal unless or until a court order is entered providing for the animal to be returned. While this may vary by township, ultimately the most efficient

way to get the animal returned would still be through the court system, rather than relying on police intervention.

How are Pet Custody Disputes Decided?

Under New Jersey law, as in all 50 states, domestic companion animals are classified as property.[5] As such, custody disputes over pets are still typically regarded as disputes over ownership of chattel. However, existing case law, such as the case of *Houseman v. Dare*, does recognize that pets have a "special subjective value" beyond that of typical property.[6] *Houseman* involved an argument between former fiancés over which of them should receive possession of the dog they acquired during their relationship.[7] The decision is a landmark case for pet custody disputes in New Jersey and offers guidance into how such a dispute should be resolved.

At the outset, the Appellate Division in *Houseman* rejected the use of a "best interests" test to decide who should get ownership of the dog.[8] In many ways this is unsurprising, as such a test could be difficult for the court to apply, may warrant experts, and could make these disputes very time-consuming to manage. Nonetheless, a best interests test for pet custody disputes has been adopted in New York.[9] As of October 2021, the court in New York must consider the best interests of the companion animal as the standard for awarding possession in a dispute. However, the relevant statute does not define what the best interest of the animal is or what factors should be used in the analysis.

Unlike the New York courts, the Appellate Division in *Houseman* held that the judge should examine whether the assertion to the pet is sincere, as opposed to "greed, ill-will, or other sentiment or motive similarly unworthy of protection in a court of equity."[10] Further, New Jersey courts are directed to consider whether there is an oral agreement as to the possession of the pet, and if so, if specific performance of the agreement's terms is appropriate.[11] As an additional note of relevant case law, the Supreme Court of New Jersey has also denied any right of pet owners to recover emotional distress damages arising from the loss of their pets.[12] Such an argument from one side or the other in a pet custody dispute would therefore be unfounded.

In the eyes of a jurist, a dispute over a companion animal likely still comes down to pure property ownership, with the purported owner providing proof of purchase receipts, veterinary records, and other evidence demonstrating ownership. But, in the case of a pet acquired during a relationship, assertions can be made by either side that an oral agreement was in place to permanently share the animal. Further, if that is the case, the court has the power to enforce a "shared custody" schedule of the pet if the circumstances allow.[13]

Mediation as a Solution

Of course, the parties to a pet custody dispute always have the power to discuss and agree on the best outcome for their pet outside of the court system. To that end, a growing number of mediators specialize in companion animal disputes. Unlike in court, an agreement between the litigants themselves can consider the best interests of the animal. The agreement should be comprehensive in its terms. Some common terms to include in a pet custody agreement are the time-sharing schedule, vacation time, sharing of expenses, a procedure for making medical decisions, rights of first refusal, and many other provisions which might also appear in child custody agreements. If the litigants are able to continue an amicable relationship, such an agreement may very well be in the best interests of all involved ("Fido" included).

Conclusion

In sum, custody disputes over animals are challenging, and some may consider the prevailing law on the issue to be non-reflective of the important role pets play in our families and everyday lives. For example, based on the current state of the law many jurists will be unwilling to "split the baby" by ordering a shared-custody schedule, and will instead feel compelled to decide on all-or-nothing possession. However, it is becoming increasingly common for shared pet arrangements to make their way into marital settlement agreements and independent agreements between separating couples. Accepting creative, nontraditional solutions when it comes to disputes over companion animals will serve clients, and their beloved pets, well. ■

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Endnotes

1. Jacob Bogage, *Americans adopted millions of dogs during the pandemic. Now what do we do with them?*, Washington Post, Jan. 7, 2022.
2. S. 2868, 219 Legis. (2020).
3. *N.J.S.A.* 2C:25-27.
4. Emerald Sheay, *People Who Hurt Animals Don't Stop with Animals: The Use of Cross-Checking Domestic Violence and Animal Abuse Registries in New Jersey to Protect the Vulnerable*, Animal Law 26, no. 2 (2020); 445-474.
5. *N.J.S.A.* 2C:20–1.
6. 405 N.J. Super. 538 (App. Div. 2009).
7. *Id.* at 540.
8. *Id.* at 540.
9. N.Y. Dom. Rel. 236.
10. *Id.* (citing *to Burr v. Bloomsburg*, 101 N.J. Eq. 615, 626 (Ct. Ch. 1927).).
11. *Id.* at 544 – 45.
12. 211 N.J. 203 (2012).
13. *See* Houseman, 405 N.J. Super. at 545 ("We conclude that the trial court erred by declining to consider the relevance of the oral agreement alleged on the ground that a pet is property. Agreements about property jointly held by cohabitants are material in actions concerning its division.")