A Review of Cohabitation Law in a Post-Amendment Landscape

by Robert A. Epstein

Since the amended New Jersey alimony statute went into effect on Sept. 10, 2014,[1] much discussion has occurred regarding the law's impact on the issue of cohabitation. While post-amendment case law has focused primarily on whether the amended statute or pre-amendment case law should apply to a given case, the Judiciary has yet to hold in a published decision what should actually happen to a payor's alimony obligation under the statute in the event of a payee's cohabitation. For some jurists and attorneys, the answer lies within the statutory language, while for others the statute is unclear in its terminology and meaning.

This article will review the state of cohabitation law in a post-amendment landscape.

Summary of Pre-Statute Case Law

While alimony was largely a creature of statute prior to Sept. 10, 2014, cohabitation, by contrast, was solely a product of case law. The New Jersey Supreme Court, in its seminal opinion of *Lepis v. Lepis*, held that a dependent spouse's cohabitation is a changed circumstance upon which alimony may be modified.[2] Specifically, the *Lepis* Court commented that alimony should decrease if the initial amount is no longer necessary to "maintain the standard of living reflected in the original decree or agreement."[3]

In *Gayet v. Gayet*,[4] the New Jersey Supreme Court held that the test for modifying alimony is whether the subject "relationship has reduced the financial needs of the dependent former spouse."[5] Adopting the so-called 'economic needs' or 'economic benefits' test developed by the Appellate Division in *Garlinger v. Garlinger*,[6] the *Gayet* Court concluded that an alimony modification should occur "only if one cohabitant supports or subsidizes the other under circumstances sufficient to entitle the supporting spouse to relief."[7]

The specific analysis involves determining whether:

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.[8]

As subsequently echoed by the Supreme Court in *Konzelman v. Konzelman*, "[c]ohabitation constitutes a change of cir-

cumstances only if coupled with economic consequences; the economic benefit enuring to either cohabitor must be sufficiently material to justify relief. Under this economic needs test, the reduction in alimony is granted in proportion to the contribution of the cohabitor to the dependent spouse's needs."[9] Expounding upon the economic benefits test, the *Konzelman* Court enunciated a definition of cohabitation, now ultimately encompassed by the factors outlined in the 2014 statutory amendment:

> A mere romantic, casual or social relationship is not sufficient to justify the enforcement of a settlement agreement provision terminating alimony. Such an agreement must be predicated on a relationship of cohabitation that can be shown to have stability, permanency and mutual interdependence. The Appellate Division expressed that standard by defining cohabitation as a domestic relationship whereby two unmarried adults live as husband and wife. Cohabitation is not defined or measured solely or even essentially by 'sex' or even by gender, as implied by the dissent. The ordinary understanding of cohabitation is based on those factors that make the relationship close and enduring and requires more than a common residence, although that is an important factor. Cohabitation involves an intimate relationship in which the couple has undertaken duties and privileges that are commonly associated with marriage. These can include, but are not limited to, 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.[10]

Upon the payor fulfilling his or her *prima facie* showing of cohabitation, the burden shifts to the payee spouse, who, at a future plenary hearing, must overcome a rebuttable presumption that neither he or she nor the cohabitant receives an economic benefit from the relationship.[11]

On the eve of the statute's enactment, the Appellate Division, in *Reese v. Weis,* held, "the inquiry regarding whether an economic benefit arises in the context of cohabitation must consider not only the actual financial assistance resulting from the new relationship, but also should weigh other enhancements to the dependent spouse's standard of living that directly result from cohabitation."[12] The examination includes a review of the parties' financial arrangements to determine whether the cohabitant "actually pays or contributes toward the dependent spouse's necessary expenses," indirect economic benefits "including the cohabitant's payment of his or her own expenses," and the provision of emoluments that enhance a dependent spouse's lifestyle "above that enjoyed during the marriage."[13]

Cohabitation Statute

The 2014 cohabitation statute provides 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.
>
> 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.[14]

While the statute largely codifies those considerations previously employed by trial courts in addressing cohabitation, it clarifies a prior inconsistency in pre-amendment case law by providing that cohabitation does not require a payee and cohabitant living together on a full-time basis.[15]

The primary questions raised by the amendment that have yet to be definitively answered by case law applying the statute are:

1. Is the economic benefits test still a required component of the cohabitation analysis under the statute?
2. Can a court modify, rather than 'suspend' or 'terminate' an alimony obligation under the statute?

While a handful of subsequent decisions have provided some guidance *in dicta* as to how the statute may be applied, most post-amendment case law concerns which law should apply.

Summary of Post-Statute Case Law

As discussed below, most case law regarding the statute addresses whether the statute or pre-statute law should apply based on a reading of the anti-retroactivity language in the alimony amendment bill, and, often, the language of the subject settlement agreement, should one exist.

In *Spangenberg v. Kolakowski,*[16] the first published decision addressing the cohabitation statute, the Appellate Division held that the statute does not apply to post-judgment orders finalized before the statute's effective date of Sept. 10, 2014. In so holding, the court quoted

that portion of the bill adopting the alimony amendments, providing as follows:

> This act shall take effect immediately and shall not be construed either to modify the duration of alimony ordered or agreed upon or other specifically bargained for contractual provisions that have been incorporated into:
>
> a. a final judgment of divorce or dissolution;
> b. a final order that has concluded post-judgment litigation; or
> c. any enforceable written agreement between the parties.[17]

The court found that such language "signals the legislative recognition of the need to uphold prior agreements executed or final orders filed before adoption of the statutory amendments."[18] It also noted that courts generally enforce newly enacted substantive statutes on a prospective basis, "unless the laws clearly expresse a contrary intent."[19]

On the heels of *Spangenberg*, the Appellate Division, in the unpublished decision of *Robitzski v. Robitzski*,[20] declined to address whether the amended law or pre-amendment law would apply because the payor failed to fulfill his initial burden under either legal standard.[21] The Appellate Division, in *Klemash v. Klemash*,[22] however, applied the statute where the subject judgment of divorce did not include any provision "concerning the modification of alimony or incorporate any agreement between the parties regarding modification of alimony."[23]

In the recently decided *Caso v. Guerrero,*[24] the Appellate Division affirmed the trial court's application of the statute in terminating a payor's alimony obligation based on the language in the parties' pre-statute settlement agreement.[25] The agreement provided, in pertinent part:

> in the event that [plaintiff] cohabits with an unrelated adult male in a relationship tantamount to marriage, and pursuant and subject to the then current New Jersey case law, [defendant] shall have the right to make an application to the [c]ourt for modification and/or termination of the alimony based upon the then-existing facts and then-existing case law.[26]

Notably, the trial court's analysis, as affirmed by the Appellate Division, affirmed an apparent hybrid approach to the cohabitation statute whereby a modification of alimony could occur, short of termination:

> Recognizing that her task was "to determine whether circumstances have rendered all or a portion of the support received unnecessary[,]' Judge Mizdol applied the principles of *Garlinger v. Garlinger*, 137 N.J. Super. 56 (App. Div. 1975) and *Gayet v. Gayet*, 92 N.J. 149 (1983), as well as the amended alimony statute, *N.J.S.A.* 2A:34–23, to conclude that "the evidence presented at the hearing proved overwhelmingly that [p]laintiff was cohabiting with Perez." The judge determined further that plaintiff failed "to prove lack of intertwinement and continued need." Rather, the "proofs unequivocally demonstrate[d] that [p]laintiff has been funding her paramour's lifestyle."[27]

After referencing the statutory factors in affirming the trial court's analysis, the Appellate Division expressly referenced the economic benefits test in finding "modification" as a potentially warranted result:

> Changed circumstances resulting from a dependent spouse's cohabitation warrant modification "when (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." *Gayet*, *supra*, 92 *N.J.* at 153. Simply stated, modification is required "only if one cohabitant supports or subsidizes the other under circumstances sufficient to entitle the supporting spouse to relief." *Id.* at 153–54. "[A] rebuttable presumption of changed circumstances [arises] upon a prima facie showing of cohabitation. The burden of proof, which is ordinarily on the party seeking modification, shifts to the dependent spouse" to "show that there is no actual economic benefit to the spouse or the cohabitant." *Ozolins v. Ozolins*, 308 *N.J. Super.* 243, 245, 248–49 (App. Div. 1998). To rebut the presumption, a dependent spouse must prove he or she remains dependent on the former spouse's support. *Gayet*, *supra*, 92 *N.J.* at 154–55. Here, Judge Mizdol correctly determined that plaintiff failed to meet her burden of proof.[28]

Perhaps the most important decision issued post-amendment was that issued by the New Jersey Supreme Court in *Quinn v. Quinn*,[29] which did not even touch upon the new statute.[30] Rather, the decision concerned whether to apply language in a settlement agreement terminating alimony upon the payee's cohabitation when the cohabitation ends.[31] The decision is consistent with those addressed above, however, regarding the importance of having clear language in an agreement on this issue, as to what law should apply, whether cohabitation is a modifying event,[32] and the like.

The language at issue in *Quinn* provided that "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."[33] The subject cohabitation period ended a month after the husband filed to enforce the terms of the settlement agreement and to terminate alimony.[34] In mandating implementation of the agreement, the Supreme Court held, in pertinent part:

In sum, we reiterate today that an agreement to terminate alimony upon cohabitation entered by fully informed parties, represented by independent counsel, and without any evidence of overreaching, fraud, or coercion is enforceable. It is irrelevant that the cohabitation ceased during trial when that relationship had existed for a considerable period of time. Under those circumstances, when a judge finds that the spouse receiving alimony has cohabited, the obligor spouse is entitled to full enforcement of the parties' agreement. When a court alters an agreement in the absence of a compelling reason, the court eviscerates the certitude the parties thought they had secured, and in the long run undermines this Court's preference for settlement of all, including marital, disputes. Here, there were no compelling reasons to depart from the clear, unambiguous, and mutually understood terms of the PSA. We therefore reverse the judgment of the Appellate Division.[35]

In so holding, the Court disagreed that such agreement language acts as a form of control by the payor over the payee.[36] It also rejected utilization of the 'economic benefits test,' where the parties mutually and voluntarily agreed to terminate alimony in the event of cohabitation.[37]

Conclusion

While post-statute case law has yet to provide much insight into the meaning and application of the statute's terms, it has, if nothing else, stressed the importance of cohabitation language in a settlement agreement. With time, these issues will continue to develop, with each agreement often resting on its own language, facts and circumstances. ⚖

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Endnotes

1. N.J.S.A. 2A:34-23n (2017).
2. 83 N.J. 139, 145 (1980); *Gayet v. Gayet*, 92 N.J. 149, 154 (1983); *Melletz v. Melletz*, 271 N.J. Super. 359, 363 (App. Div. 1994) ("the test for determining whether cohabitation should *reduce* an alimony award has always been based on a theory of economic contribution") (emphasis added).
3. *Id.*
4. *Gayet, supra*, 92 N.J. at 155.
5. *Id.* at 150.
6. 137 N.J. Super. 56, 64 (App. Div. 1975).
7. *Gayet, supra*, 92 N.J. at 153-54.
8. *Id.* (*citing Garlinger, supra*, 137 N.J. Super. at 64); *Reese v. Weis*, 430 N.J. Super. 552, 572-73 (App. Div. 2013); *Melletz v. Melletz*, 271 N.J. Super. 359, 363 (App. Div. 1994) ("the test for determining whether cohabitation should reduce an alimony

award has always been based on a theory of economic contribution.").

9. *Konzelman v. Konzelman*, 158 N.J. 185,196 (1999) (*citing Gayet, supra*, 92 N.J. at 154-55).
10. *Konzelman, supra*, 158 N.J. at 202 (internal citations omitted).
11. *Ozolins v. Ozolins*, 308 N.J. Super. 243, 245 (App. Div. 1998).
12. *Reese, supra*, 430 N.J. Super. at 552.
13. *Id*. at 578.
14. N.J.S.A. 2A:34-23n (2017).
15. *Id*.
16. 442 N.J. Super. 529, (App. Div. 2015).
17. *See id*. at 538.
18. *Id*.
19. *Id*. (because the trial court conducted a review and issued a final order as to the economic effect of the wife's cohabitation prior to the enacted amendments, and alimony was reduced at such time based on the prior legal standard applicable in such matters, the new cohabitation provisions of the amended statute did not apply); *see also Marut v. Marut*, 2017 WL 393934, *3 (App. Div. Jan. 30, 2017) (cohabitation statute could not apply where cohabitation issue was previously resolved by way of consent order); *Chernin v. Chernin*, 2016 WL 799756 (March 2, 2016) (where cohabitation issue was adjudicated pre-amendment, the Appellate Division rejected payor's argument that the "anti-retroactivity provision" applies only to the duration of alimony ordered or agreed upon).
20. 2016 WL 2350466, *1 (App. Div. May 5, 2016).
21. *See id*. at *5 (the subject settlement agreement provided that the ex-husband's obligation for alimony "shall be modified or terminated pursuant to New Jersey statutes and case law" in the event it is proven that the ex-wife cohabits with another person," and did not specify whether the applicable "New Jersey statutes and case law" would be those existing at the time of the divorce in 2004 or those existing at a later time if and when an application was filed by the ex-husband to address his alimony obligation).
22. 2016 WL 3918858, *1 (App. Div. July 21, 2016).
23. *Id*. at *4 (distinguishing from the agreement's language in *Spangenberg, supra*, 442 N.J. Super. at 538).
24. 2017 WL 4021218 (App. Div. Sept. 13, 2017).
25. *See id*. at *5 (Judge Mizdol interpreted the PSA "to mean that [she] should apply the facts, statutory law, and case law in existence at the time the [c]ourt is called upon to make the cohabitation determination."). *But see Sloan v. Sloan*, 2017 WL 1282764, *4 (App. Div. April 6, 2017 (suggesting *in dicta* that the economic benefits test may not apply under the statute).
26. *Id*. at *1.
27. *Id*. at 5.
28. *Id*.
29. 225 N.J. 34 (2016).
30. *See id*. at 65 n. 3 ("On September 10, 2014, the Legislature enacted N.J.S.A. 2A:34–23, which provides that '[a]limony may be suspended or terminated if the payee cohabits with another person.' L. 2014, c. 42, § 1. The Legislature clarified that this law 'shall not be construed either to modify the duration of alimony ordered or agreed upon or other specifically bargained for contractual provisions that have been incorporated into: a. a final judgment of divorce or dissolution; b. a final order that has concluded post-judgment litigation; or c. any enforceable written agreement between the parties.' *Id.* § 2. Because this law was enacted after the PSA was entered, it does not govern this case, and the terms of the PSA apply.").
31. Relying on *Konzelman, supra,* 158 N.J. at 197, which upheld a voluntarily, knowingly and consensually agreed upon provision in a settlement agreement terminating alimony upon the cohabitation of the recipient spouse.
32. *See id.; see also Frick v. Frick*, 2016 WL 7030475 (App. Div. Dec. 2, 2016 (language of agreement prevented modification of alimony based on cohabitation); *see also Caso, supra*, 2017 WL 4021218 at *5.
33. *See id*. at 40.
34. *See id*.
35. *Id*. at 55.
36. *See id*. at 53 ("Finally, we reject the suggestion that enforcement of this cohabitation agreement permits a former spouse to control the post-marital conduct of the other spouse. Such a contention misconstrues the purpose of identifying cohabitation as an alimony-termination event and also misconstrues this record. When parties to a matrimonial settlement agreement have agreed to permit termination of alimony on remarriage or cohabitation, they have recognized that each are equivalent events.").
37. *See id*. ("We also cannot subscribe to the view advanced by our dissenting colleagues that applying the *Gayet* economic reliance or dependence rule is somehow less intrusive in the personal life of the former spouse. There are few exercises more intrusive than the need to identify every expenditure and the source of the funds for each expenditure. Such an inquiry reveals a vast amount of personal information about the daily life of the former spouse that is of no concern to the obligor spouse.").