FIFTY (OR MORE) WAYS TO SHOW (S)HE’S MORE THAN A LOVER:

FACTS TO PROVE COHABITATION

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For more than forty-five years, New Jersey courts recognized a recipient’s cohabitation impacts alimony. See Garlinger v. Garlinger 129 N.J. Super. 47 (Ch. Div. 1974); Grossman v. Grossman, 128 N.J. Super. 193 (Ch. Div. 1974). The Appellate Division reconciled the divergent approaches taken by the trial judges in these two cases, accepting that cohabitation could result in modification of alimony. Garlinger v. Garlinger,137 N.J. Super 56 (App. Div. 1975). See also Wertlake v. Wertlake, 137 N.J. Super. 476 (App. Div. 1975); Eames v. Eames, 153 N.J. Super. 99 (Ch. Div. 1976).

The New Jersey Supreme Court included cohabitation as a judicially recognized change of circumstances warranting review of an alimony award in Lepis v. Lepis, 83 N.J. 139, 145, 151 (1980). Next, the Court, squarely addressed the issue in Gayet v. Gayet, 92 N.J. 149 (1983), which held cohabitation by divorced spouse constitutes changed circumstances justifying discovery and hearing, but the test for modification of alimony remained whether the relationship reduced the financial needs of dependent former spouse. See also Konzelman v. Konzelman, 158 N.J. 185 (1999) (enforcing marital settlement agreement terminating alimony upon proof of former spouse’s cohabitation). See also Quinn v. Quinn, 225 N.J. 34 (2016).

In 2014, the Legislature amended N.J.S.A. 2A:34:23, adding subsection (n), designed to provide clarity and certainty to the impact of cohabitation on existing alimony awards. The subsection defines cohabitation and identifies factors signifying the defined relationship. Further, the subsection includes remedies available upon proof of cohabitation. Mirroring the Supreme Court’s definition set forth in Konzelman, the statute provides:

Alimony may be suspended or terminated if the payee cohabits with another person. 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.

Further, subsection (n) lists factors “a court shall consider” to discern “whether cohabitation is occurring,” including:

(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 [N.J.S.A.] 25:1-5; and

(7) all other relevant evidence.

Some of these are emotional markers, others are financial. The definition of cohabitation and many factors are extracted from case precedent. See e.g., Quinn; Konzelman (defining cohabitation as “serious and lasting”; Gayet; Reese v. Weis.430 N.J. Super. 552, 570 (App. Div. 2013) (“Cohabitation involves ‘an intimate[,]’ ‘close and enduring’ relationship, requiring ‘more than a common residence’ or mere sexual liaison.”). Each factor does not need to be satisfied. And, the statute does not elevate a couple’s financial entanglements above the facts supporting a marital-like relationship. Yet, as with other sections of N.J.S.A. 2A:34-23, the weight given to any single factor or combination of factors, rests in the discretion of the trial judge.

One appellate panel recognized “the difficulties of developing proofs of things such as intertwined finances, joint bank accounts, shared living expenses and household chores, and recognition of the relationship in the couple's social and family circle, without either invading a former spouse's privacy or taking some discovery on the issue.” Wajda v. Wajda, No. A-3461, (App. Div. 2020). Thus, the challenge for lawyers is how to present sufficient and convincing proof to vault Landau’s prima facie evidence of cohabitation allowing a court to enter an order for discovery.

Indeed, this is a fact sensitive determination and all facts matter. But exactly what evidence shows the examined relationship is more than dating? Here are some suggestions.

**FACTOR 1**: Intertwined Finances. Since 2014, many unpublished Appellate Division cases affirmed a trial court’s denial of a post-judgment motion for review based on cohabitation, reciting a lack of evidence of intertwined finances. See e.g., M.M. v. J.Y., No. A-3910-17 (App. Div. 2019); Mennen v. Mennen, No. A-4345-17 (App. Div. 2019); Robinski v. Robinski, No. A-2818-14 (App Div. 2016). Admittedly, this is one of the most difficult factors to prove without discovery. If you meet your initial burden, and seek discovery, look for some of these.

1. Shared bank accounts.
2. Authorized signer or on bank accounts.
3. ATM withdrawals.
4. Shared investments.
5. Shared credit cards or authorized use of another’s credit card.
6. Lend money.
7. Payment of credit card bills.
8. Co-sign a lease.
9. Co-sign vacation rental leases.
10. Listed as household member on lease.
11. Co-sign for loan.
12. Personal guarantees for loans or leases.
13. Borrowing money from the other’s relatives.
14. Included as authorized driver on car insurance.
15. Payment of traffic or parking tickets.
16. Authorized use on Amazon Prime, Netflix, news, entertainment, or music streaming services.
17. Listed on family gym membership.
18. Owner or beneficiary of life insurance policy.
19. Beneficiary on IRA.
20. Beneficiary in will.

**FACTOR 2**: Sharing Living Expenses. As is the case with intertwined finances, evidence of shared living expenses may rest solely with the putative cohabiting spouse and cohabitor. You need to examine not only whether there are actual shared payments for obvious expenses, but also whether one party is bearing responsibility for the other’s costs when the parties are together.

1. Change in usage of utility bills. This may be evident by a change in usage of utility costs like electricity, cable or internet subscriptions. If the parties suggest they have separate residences, also check for a change in usage in both homes (up and down) over period of alleged cohabitation.
2. Payment for elaborate vacations. Who bears the costs for travel, hotel, meals, other enhancements? Are the parties’ children included and paid for by the cohabitor?
3. Are there other emoluments purchased by the cohabitor that enhance the lifestyle of the former spouse’s household, such as entertainment, dining out, and the like.
4. Payments through Venmo, Paypal, Zelle and similar cash transfer services.
5. Look at what is purchased. For example, are groceries bought for the entire household?

Is there a newspaper or magazine subscription delivered to the former spouse’s residence?

1. Shared use of vehicles or EZ Pass.
2. Shared pets.
3. Buying things for the household. Whether it’s dishes, or a TV, furniture or a kitchen appliance. Also, making home improvements large (new carpet) or small (a new mailbox or basketball hoop).

**FACTOR 3**: Recognition of the relationship in the couples’ social and family circle. This factor is essential in assessing whether the relationship rises to the level of a mutually supportive, intimate personal relationship and whether it is one of stability and permanence. Here are some things to look for.

 1. Have a child(ren) together.

 2. Being engaged.

3. Being present at family events including weddings, baptisms, christenings, Bar and Bat Mitzvahs, family or school reunions, birthday parties, holiday gatherings, or funerals.

4. Being present at children’s events - sporting events or other extracurricular activities, school events, trips or plays, Halloween parades or holiday concerts, field day, parent teacher organizational events; parent teacher conferences, back to school nights, or graduations.

5. Presence on social media - how is the relationship characterized on Facebook, Instagram, Twitter, Snapchat, Tik Tok,or Tumblr. Are there shared mutual friends, friends with each other’s family and friends, “likes” or comments on their family and friends’ posts, pages, or comments or “likes” on each other’s posts.

6. Travel/vacation together.

7. Photographs together.

8. Dining out together.

9. Public displays of affection

10. The relationship is known by neighbors.

11. Exchanging or owning jewelry symbolizing commitment.

12. Meaningful or mutual tattoos.

13. A special identification or label in each other’s phone.

14. Promotion of the other’s business on social media.

15. Attendance at work events or commitments, retreats or conventions.

16. Exercise together - train and run marathons; cross fit training together.

17. Belong to same club or recreational events - photography, painting, hiking clubs, gym memberships.

18. Attend sporting events together; adopt an allegiance to the other’s alma mater or favorite team.

**FACTOR 4**: Living together, the frequency of contact, the duration of the relationship and other indicia of a mutually supportive intimate personal relationship. Prior to the 2014 amendment of the statute, many believed counting overnights was the only way to prove cohabitation. While overnights are relevant, there are many other things to look for in assessing this factor and cohabitation as a whole.

1. Possess keys or the garage code to the other’s residence.
2. Present at residence, when the other is not home.
3. Leaves personal belongings at the other’s house.
4. Owns or shares a pet together or takes care of the other’s pet.
5. Shares a car, car insurance or cell phone plan, listed as a driver on car insurance policy.
6. Renovate or improve the home or living space.
7. Runs errands - grocery store, dry cleaners, drug store.
8. Transports children to school or activities.
9. Stays alone with the other’s children.
10. Attends classes together - CPR class; classes at the gym or other recreational events including studying a foreign language together.
11. Cell phone records showing frequent calls or text messages. Cellular records showing both phones in the same place at frequent and various time-periods, especially overnight.
12. Listed as an emergency contact with children’s school or medical providers.
13. Plays an active role in the children’s schooling or medical care. Communicates with teachers, day care professionals or medical providers.
14. Attends medical appointments for each other and their children.
15. Attends IEP or 504 meetings for the children.
16. Volunteers together for a worthy cause.
17. Receives bills/mail at the other’s residence.
18. Listed as mail recipient or authorized person to discuss issues regarding the other’s bills.
19. Shares intimate holiday or greeting cards.
20. Switches to places of business local to the other’s home (e.g., gas stations, grocery stores, restaurants, pharmacy, dry cleaners, hairdresser).

**FACTOR 5**: Sharing Household Chores. Some of these can be observed, but others, which occur within a home, may not be readily ascertainable, but examined in discovery.

1. Shoveling snow, raking leaves, sweeping steps, power washing, cleaning the garage porch, or washing the car, taking cars to a car wash.
2. Repairing the home or car or waiting for a repair person to arrive.
3. Transports household members (parties’ children, former spouse’s parents or siblings) to events or activities.
4. Walks the dog or taking pets to the vet.
5. Cleans the home or hire and pays a housekeeper.
6. Performs everyday chores, like cooking, dishes, cleaning, or laundry.

**FACTOR 6**: Enforceable Promise pursuant to subsection h of the Statute of Frauds, N.J.S.A. 25:1-5. This factor relates to promises of support, or palimony, which now requires a written agreement. The provision states:

A promise by one party to a non-marital personal relationship to provide support or other consideration for the other party, either during the course of such relationship or after its termination. For the purposes of this subsection, no such written promise is binding unless it was made with the independent advice of counsel for both parties.

This is very circumscribed and self-explanatory.

**FACTOR 7**: All other relevant evidence. This factor was included so to give the practitioner wide berth in crafting arguments and obtaining proof of cohabitation. While factors 1 through 6 are guideposts as to the analysis, they certainly are not all inclusive. The sole analysis in assessing cohabitation is whether the couple is engaged in a mutually supportive, intimate, personal relationship. While the first six factors are considered in evaluating whether this threshold is met, any and all other relevant evidence in each and every particular case must also be considered.

Although not labeled as such, the closing provisions of subsection (n) add two important considerations when evaluating whether cohabitation is occurring and whether alimony should be suspended to terminated. First, the length of the relationship. This suggests it may take some time to gather proofs of the type of “mutually supportive, intimate personal relationship in which the couple has undertaken duties and privileges that are commonly associated with marriage or civil union. . . .” See e.g., Mennen (finding couple together thirty-two of thirty-eight surveillance events “simply wasn’t enough” to show cohabitation as opposed to a romantic relationship); see also Salvatore v. Salvatore No. A-5565-16 (App. Div. 2018) (reversing denial of spouse’s motion to terminate alimony in 2017 because cohabitation continued, even though parties agreed to reduce alimony because of cohabitation in 2011).

Second, and one of the most important changes to the statute, is found in the last sentence of section (n). It provides: “a court may not find an absence of cohabitation solely on grounds that the couple does not live together on a full-time basis.” This provision was inserted as a direct result of the gamesmanship that was occurring with couples obtaining separate or sham residences in an attempt to thwart a cohabitation application by claiming they do not live together as they maintain separate residences. To combat this abuse, the Legislature essentially obliterated the importance of whether a couple is living together or not. As such, cohabitation can still be found even when a couple is not living together full-time.

The case law and treatises written about cohabitation reveal it is a term of art. It is no longer synonymous with living together or counting overnights. It is a holistic review of a couple’s relationship. The facts must show the couple engaged not only in “a mutually supportive, intimate personal relationship,” but also evidence undertaking the “duties and privileges that are commonly associated with marriage or civil union." Although the threshold is high, collecting many facts to show the statutory factors will aid your argument that the threshold is met.

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