Cohabitation Frustration: A Primer on 'Prima Facie'

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United States Supreme Court Justice Potter Stewart described obscenity as: “I know it when I see it.” That indefinable standard is akin to the obstacle attorneys face when determining whether a payor spouse has evidence sufficient to make a “prima facie” showing of cohabitation. The purpose of this article is to provide clarity and direction to get past the prima facie hurdle in cohabitation cases.

Cohabitation litigation continues to flood the courts. This appears to be so for two reasons. First, “cohabitation” remains one of the few areas subject to the prima facie standard of changed circumstances established in *Lepis v. Lepis*, 183 N.J. 139, 157 (1980), for which there is little published guidance regarding the evidence needed to meet the prima facie standard. Second, the lack of guidance is compounded by many courts’ misapplication of “prima facie.” Often, courts require a payor who files a cohabitation motion to meet a seemingly higher initial burden. Consequently, the prima facie showing is more challenging in cohabitation matters because the payor often cannot access direct evidence of, for example, “intertwined finances,” without discovery. Yet, remarkably, trial courts rely upon “credible evidence in the record”—dueling certifications *without* a plenary hearing—to dispose of cohabitation motions at the embryonic stage. Notwithstanding the frequent misapplication of the standard, prima facie is by definition a low burden; it is evidence “[s]ufficient to establish a fact or raise a presumption unless disproved or rebutted; based on what seems to be true on first examination, even though it may later be proved to be untrue ….” Black’s Law Dictionary (11th ed. 2019). Indeed, a movant is only required to certify to facts that outline the basis of an allegation and/or provide circumstantial evidence. *Stamberg v. Stamberg*, 302 N.J. Super. 35, 44 (App. Div. 1997).

The first step of any cohabitation case is to discern what *type* of cohabitation case you must prove:

1. Do you have an "economic benefit" case arising under *Garlinger v. Garlinger*, 137 N.J. Super. 56 (App. Div. 1975), and *Gayet v. Gayet*, 92 N.J. 149, 153 (1983) (holding that a change in circumstances based upon cohabitation results 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.").
2. Do you have "statutory cohabitation" under N.J.S.A. 2A:34-23(n)?
3. Do you have an agreement arising under *Konzelman v. Konzelman*, 158 N.J. 185 (1999), and/or *Quinn v. Quinn*, 225 N.J. 34, 49-50 (2016), which serves to terminate alimony if cohabitation exists *without* regard to "economic benefit?"

The second step of a cohabitation case is "fact gathering" to make the prima facie showing. The evidence often depends upon the type of cohabitation case you must prove. However, even if you believe there is evidence to meet the prima facie burden in *your* case, courts have complicated matters by interchangeably citing *Gayet/Garlinger* "economic benefit" principles in cases involving *Konzelman/Quinn* agreements—and now with additional references to N.J.S.A. 2A:34-23(n). The post-N.J.S.A. 2A:34-23(n) unpublished Appellate Division decisions reinforce the need for clearer guidance.

In *Fringo v. Fringo,* A-0687-13T1 (App. Div. April 2, 2015), the payor filed a cohabitation motion. Payor submitted a certification and investigative report that established the payee's boyfriend lived with payee for four months. Payor did not provide any direct evidence of economic benefit. In response, payee confirmed the boyfriend "temporarily stayed" with her for eight months. She claimed that she did not receive any financial benefit. Payee submitted a CIS, which indicated she paid her monthly expenses. She also provided evidence that she did not have joint accounts with her boyfriend. The boyfriend submitted a certification along with his W-2 statement and paystub; he confirmed they did not have joint accounts. The trial court analyzed the motions under *Garlinger/Gayet* and suspended payor's alimony obligation for nine months. The Appellate Division upheld the trial court's decision because payee and her boyfriend admitted that they lived together and, therefore, payee failed to rebut the presumption of cohabitation.

The Appellate Division reached a different conclusion in *Mennen v. Mennen*, A-4345-17T1 (App. Div. Apr. 2, 2019), *cert. denied*, 238 N.J. 486 (2019), another *Garlinger/Gayet* case. Payor filed a cohabitation motion, which included a private investigative report. Payor alleged payee's significant other, J.K.: was at payee's home 88% of the time surveilled; had a garage door opener; used payee's mailing address; shared four credit cards with payee; did not own or rent property in New Jersey; and provided social

media evidence J.K. was "enmeshed in [payee's] everyday life, including the daughter's wedding." The Appellate Division upheld the trial court's decision to deny payor's request for discovery and a plenary hearing due to payor's failure to satisfy a prima facie burden "[r]egardless of whether the criteria expressed in prior case law or codified in subsection (n) are applied." The Appellate Division held that payor "presented no proof whatsoever" of economic dependency.

In *Smith-Barrett v. Snyder*, A-3279-18T3 (App. Div. Feb. 5, 2020), a *Konzelman* case, the Appellate Division affirmed that a payor failed to make a prima facie showing of cohabitation. Payor presented evidence that payee and his significant other, K.R., vacationed together; publicized their relationship on social media; and engaged in holiday activities together. However, a private investigator only established intermittent overnights between payee and K.R. The Appellate Division concluded: "the report did not indicate that the investigator saw [payee] or K.R. enter or exit each other's home and did not provide evidence of any daily activities conducted together."

In *Goethals v. Goethals*, No. A-0513-18T2 (App. Div. Jan. 7, 2020), a "statutory" case, the payor presented evidence of payee's cohabitation with her significant other, which included their engagement; time spent together; their blended families; adoption of a dog; vacations; and shared iCloud account. The trial court rejected payor's application, concluding that the engagement, while relevant, was "not dispositive considering the absence of economic support." The Appellate Division reversed and held that the court should have ordered discovery and a hearing.

In *Wajda v. Wajda*, A-3461-18T3 (App. Div. Apr. 23, 2020), another "statutory" case, the payor provided evidence that payee's boyfriend stayed overnight in payee's home nearly every night for two months; kept his dogs and car at payee's home; and remained in payee's home when payee was absent. Payor submitted an investigative report which "demonstrated that [the boyfriend] and payee shared some social media connections." The trial court ruled that payor failed to demonstrate a prima facie showing of cohabitation, which was reversed on appeal. The Appellate Division fittingly recognized: "[c]ertainly, without any discovery, payor could not demonstrate that payee and [payee's boyfriend] shared expenses or intertwined their finances."

Finally, there is the decision in *Logan v. Brown*, No. A-3554-18T1 (App. Div. Oct. 22, 2020). Although the Appellate Division rightfully affirmed a trial court's termination of alimony based on substantial proofs of cohabitation (evidence of engagement; vacations; financial support; substantial overnights), the decision is notable because the panel suggested in the decision that a movant must satisfy the *Gayet* "economic benefit" standard for cohabitation when relying upon N.J.S.A. 2A:34-23(n). The legislative history of N.J.S.A. 2A:34-23(n) does not support that conclusion; it reveals that two Assembly versions and one Senate version of "cohabitation" allowed a court to "*modify*, suspend, or terminate" alimony if the "*economic benefit* inuring to the payee is sufficiently material to constitute a change of circumstances." On the other hand, one Assembly version and one Senate version mirrored what became law; each listed, as *a* factor: "sharing or joint legal responsibility for living expenses[.]" Accordingly, when the legislative history of N.J.S.A. 2A:34-23(n) is compared with *Garlinger*/*Gayet* and the final version of N.J.S.A. 2A:34-23(n), the legislature clearly considered—and rejected—a strict application of *Gayet*'s principles.

Due to varying case law, it is often difficult to ascertain if enough facts exist to satisfy the prima facie standard. Below is a non-exhaustive list of cohabitation "evidence" that should provide sufficient proof to satisfy the prima facie threshold:

- A private investigator to conduct live surveillance or install a stationary camera in a public area outside of the payee's home. Generally, this surveillance should occur on consecutive days and nights for an extensive period (i.e., months, not weeks). If the payee and significant other stay together in each other's homes (as opposed to one home), surveillance should be conducted on both homes. This surveillance should provide evidence of access to each other's homes; use of each other's vehicles; engage/share in household chores (grocery shopping, lawn/yard maintenance, etc.).
- Third-party witnesses who have first-hand knowledge of the relationship and can certify (and later testify) to the nature, duration, and scope of relationship (e.g., friends and/or family members).
- Social media, which may reveal the duration of the relationship; relationship milestones (e.g., moving in together, engagement); vacations together; holidays together; integrated or shared family units (including children and extended family); and/or joint pet/household responsibilities.
- "Trash pulls," while intrusive, can provide information related to joint finances (e.g., credit card mailings and bills) and a common residence for shipping. The "trash" must be abandoned (i.e., do not trespass to obtain the information).
- Lavish spending by a payee may be indicative of joint/shared finances (purchase/use of luxury vehicles, boats, homes, vacations, etc.). Certainly, a payor knows how much alimony is paid;

he/she may also know the payee's income/expenses. Through inductive reasoning, atypical spending by the payee may help connect the cohabitation dots.

- Admissions from the payee (e-mail, text message, audio recording) of the nature and duration of relationship.

Although cohabitation cases are fact-sensitive, we are hopeful that a published decision will elucidate the modicum of proofs required to meet the prima facie standards.

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