

#### ISSUE IV

##### HOW SHOULD PRE-MARITAL COHABITATION BE CONSIDERED IN THE ALIMONY ANALYSIS?

An issue that arises frequently is where parties live together and thereafter marry. Simply put, what is the impact of that pre-marital cohabitation on the alimony issue? There is law concerning the impact of pre-marital cohabitation on equitable distribution. For example, a marital home acquired during cohabitation, but in contemplation of marriage, was addressed in Weiss v. Weiss, 226 N.J. Super. 281, 287-288 (App. Div. 1988) cert. den'd. 114 N.J. 287 (1989). Additionally, the cut-off date was changed on the unique facts of Berrie v. Berrie, 252 N.J. Super. 635, 645-647 (App. Div. 1991) because of the Husband's pre-marital cohabitation. Yet, Berrie, while directly involving cohabitation, turned not so much on cohabitation but how Mr. Berrie, in the midst of his first divorce, characterized his cohabitation as being equivalent to a marriage. As he said, "he was married "morally and spiritually" to his cohabitant." Berrie at 639. The Appellate Division then held him to his word and deemed his cohabitation to be marital. While not the topic of this article, Berrie seems more an aberrational decision with the potential to create uncertainty where the Supreme Court ultimately wanted certainty relating to valuation dates and equitable distribution. The same result could have been reached by using the remedial device of a constructive trust without

doing damage to statutory integrity. There is no case specifically dealing with the impact of pre-marital cohabitation on alimony. For discussion, assume the following: the parties lived together for seven years, then marry and lived together for another seven years. Thus, the total time they were residing together was 14 years. The wife argues this was a committed relationship for 14 years with all the attributes of marriage but for the ceremony. She then reasons based on the length of this marital type relationship (14 years), she was entitled to permanent alimony. She claims this should be viewed as a 14 year marriage and argues based on duration, she is clearly entitled to a permanent award.

In response, the husband argues alimony is a creature of statute - and the legislature never contemplated and certainly never authorized cohabitation without the sanctity of marriage to be a statutory factor in N.J.S.A. 2A:34-23. Marriage, he further notes, is a bedrock societal principle and a reflection of our values. Societal Judgments reflected by our law are made legislatively; they should not be engrafted on a statute in an exercise of social engineering by courts. He further contends it is not the province of courts to rewrite statutes to reflect a court's perception of fairness; rather, courts should interpret the law the legislature makes. He concludes by asserting courts should not make law the legislature never intended or wanted.

The wife, in response to that argument, points out that the overriding public policy in Family Law is to assure, as the Supreme Court said in Miller, that at the end of a marriage that parties treat each other fairly. Miller v. Miller, 160 N.J. 408, 418 (1999). She further points out the same principle applies, once again according to the Supreme Court, to people who never marry; yet, they are required by our law to treat each other fairly at the end of a relationship. See Kozlowski v. Kozlowski, 80 N.J. 378, 390 (1979) (Concurring Opinion). Besides, she finally argues, the alimony statute provides courts with discretion since Factor 10 allows "any other factor which the court may deem relevant" to be considered.

Most of the cases addressing the issue in New Jersey deal with property not alimony. In Mangone v. Mangone, 202 N.J. Super. 505 (Ch. Div. 1985), the parties resided together prior to the marriage. The Court deemed the marriage to form a new contract which superceded any pre-marital contract, noting "when the parties married each other, whatever contractual rights existed before the wedding merged into the greater contract of marriage". Mangone at 50. (emphasis added) The trial court relied on general legal principles that a second contract covering the same parties and subject matter extinguished the prior contract. Mangone at 509.

Judge Fall in Rolle v. Rolle, 219 N.J. Super. 528 (Ch. Div.

1987), a case in which I was involved, criticized Mangone as creating a harsh result but also concluded N.J.S.A. 2A:34-23 does not permit equitable distribution of property legally or beneficially acquired by a party prior to the marriage, noting it was a "simple and definitive rule". Rolle at 535. Of course, the only simple and definitive rule in matrimonial cases, viewed from the perspective of over a quarter of a century since the 1971 Amendments, is that there is no simple and definitive rule.

Judge Fall believed Mrs. Rolle could be treated fairly by pursuing equitable claims, such as constructive or resulting trusts which were not extinguished by the marital contract. Such equitable claims, he pointed out, were not contractual in nature; rather, they were created by the parties conduct. Rolle at 536. Judge Fall was correct not only in that observation but in his approach to statutory construction since the Equitable Distribution Statute is specific that assets to be distributed are only those acquired during the marriage<sup>6</sup>. He used the existing law to require the parties to be fair; he did not engage in judicial legislating creating future problems.

The alimony statute does not contain language that is, in

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<sup>6</sup> In my view, the more appropriate result in Berrie, a case where the valuation date was changed, would not have been to disregard the statute but provide Mrs. Berrie with the same equitable remedies Judge Fall advised Mrs. Rolle she had. In that way, fairness would have been achieved but the intellectual integrity of the statute preserved. Berrie v. Berrie, 252 N.J. Super. 635 (App. Div. 1991).

Judge Fall's term, so simple and definitive. N.J.S.A. 2A:34-23 provides a court with power in a divorce action to award different types of alimony but only after considering various factors; one is the generalized Factor X ("any other factor"). Additionally, cohabitation that occurs before marriage may directly affect other alimony statutory factors such as the impact on the marriage on the parties' earning capacities and the non-economic contributions people make to an economic partnership. Thus, in dealing with cohabitation, there is a blurring of the cohabitation into the statutory factors.

A case that potentially sheds some light on the issue is McGee v. McGee, 277 N.J. Super. 1 (App. Div. 1994). In New Jersey's historical jurisprudence, Dr. McGee was one of the more reprehensible characters. A review of the opinion makes it clear his conduct clearly effected the decision. Dr. and Mrs. McGee commenced their relationship, in 1981 and were married in 1989. The opinion relates a series of instances where Dr. McGee took economic advantage of his wife to the extent that at trial, she was a 57 year old woman with limited employment prospects, health problems, and who had severely been disadvantaged by the relationship and the marriage. Justice (then Judge) Long, focused on the Supreme Court's policy statement in Lynn as to the nature of alimony that "it was not duration of the marriage, but the actual extent of the economic dependency that determines both

the duration of alimony as well as the amounts". Lynn v. Lynn, 91 N.J. 510, 517-518 (1982) (emphasis added). Mrs. McGee, as early as 1981, (eight years before they married) was financially dependent on her husband and was clearly dependent upon him at the divorce. As Justice Long noted: She relinquished her job "if not because Dr. McGee asked her to do so, at least because he was willing to support her". McGee at 14.

It is clear that Justice Long, was affected by what happened to Mrs. McGee during the course of the relationship. She concluded, without necessarily specifying it was both unfair and inequitable to base alimony solely on the length of the marriage, that given what happened to Mrs. McGee during the course of the relationship permanent alimony was appropriate. The opinion cites the alimony factors, and while not expressly relying on the additional generalized factor, ("any other factor"), McGee clearly stands for the right of a trial court to consider the impact of pre-marital cohabitation on alimony when warranted by the facts.

In speaking about this topic with Judge Fall, he agreed not only with that generalized principle but suggested when people reside together before the marriage in a marital type relationship, creating an economic dependency and then marry, what the parties have done is effectively ratify their circumstances by the marital contract. Ratification is in and of

itself a legal term, but Judge Fall's instincts are correct; while people may not consider the legal ramifications, when they do marry after residing together, it does appear they are acknowledging what happened between them during their cohabitation; by marrying, they are ratifying the facts and circumstances in existence as of the marriage. Dr. McGee accepted or ratified the economic depreciation suffered by Mrs. McGee before they married by marrying her. Had their relationship ended then without a marriage under Kozlowski, he still would have had to treat her fairly as a result of what transpired during their relationship. Kozlowski at 390 (Concurring Opinion).

The concept of ratification is inherently contractual; it is not a concept frequently utilized in the Family Part. In Thermo Contractor, Corp. v. Bank of New Jersey, 69 N.J. 352 (1976) the Supreme Court discussed the term. In its opinion, the Court relied on Section 82 of the Restatement of Agency 2d. 1957, noting "ratification is the affirmance by a person of a prior act". While noting ratification may be express or implied, it does require intent, citing Passaic-Bergen Lumber Co. v. United States Trust Co., 110 N.J.L. 315 (E&A 1933). The Appellate Division in Martin Glen & Ing. v. First Fidelity Bank, N.A., 279 N.J. Super. 48 (App. Div. 1995), relying on Thermo, noted the essence of ratification is the affirmance by a person of a prior

act.

Thus, it logically follows that ratification as a concept, suggests that by marrying, people are intentionally affirming, accepting or acquiescing to the impact of their pre-existing relationship on each other as of the time of their marriage. While not referring to Dr. McGee's conduct, Mrs. McGee did not pursue development of her earning capacity as a consequence of either the direct or indirect actions of her husband. Phrased another way, as a consequence of the relationship, her earning capacity was adversely effected and the consequences were accepted or affirmed by Dr. McGee when he and Mrs. McGee married. At the time of their marriage, he knew she had relinquished, as a result of their relationship, development of her own earning capacity. When that relationship ended, it was only fair and appropriate that he should bear the consequences of the conduct he not only created, but accepted. Whether one views this as ratification, acceptance, or affirmance, it is neither unreasonable, unfair, nor violative of any fundamental public policy, to recognize the economic reality of their relationship. In fact, the public policy demands a recognition of the impact of conduct on each parties' economic circumstances. To suggest when people without the benefit of marriage live together must treat each other fairly as Kozlowski holds, but people who live together and then marry, not minimally be held to the same legal



standard is neither logically consistent and certainly unfair.

The statute suggests alimony is subject to modification. See N.J.S.A. 2A:34-23. What the statute does not expressly state is the legal standard alimony awards are enforceable only to the extent they are fair and equitable. That is a judicial construct engrafted upon the alimony statute. It was done for reasons of policy and not statutory construction; assuring that alimony is paid only when it is fair and equitable, is not only appropriate but consistent with the role of a Court in it's enforcement. Thus, it is appropriate to suggest a Court consider what happened during a period of cohabitation followed by a marriage in determining alimony. It logically follows, if Justice Pashman's admonition that it was the fundamental public policy of this state to assure that parties, even those who do not marry, treat each other fairly, then certainly if they marry can the standard be lessened? The Supreme Court in Miller was correct in emphasizing that same point; Justice Pashman captured the essence of this practice as he frequently did and his policy-driven view must be part of our law.

What ultimately dooms the husband's argument is not simply that the Court is exercising discretion under the generalized Factor 10; rather, it is that the court is conducting its analysis under the literal language of the Statute. Lawyers tend to focus far too much on duration, which is only one factor.

They analyze the issue as whether the period of cohabitation can somehow be pigeon-holed within the statutory factor concerning duration which specifically relates to duration of the marriage. Yet, other factors are not necessarily limited to the marital period. Factor 5 addresses the earning capacity, educational level, vocational skills, and employability of the parties; Factor 6 addresses the length of absence from the job market and the custodial responsibilities of the parties seeking maintenance, as well as the actual need and ability of the parties to pay. Factor 1 addresses the age, physical, and emotional health of the parties. Unlike duration, or the standard of living which are both statutorily linked to marriage, these are factors that bear on the fairness of any alimony award. The remaining statutory factors effectively require a court consider a period of cohabitation; none of them are linked by the actual language of the statute to the marital relationship.

A court may consider pre-marital cohabitation under N.J.S.A. 2A:84-23(b) without doing violence to the actual language of the statute. Both "duration of the marriage" and the "standard of living established in the marriage" refer to marriage. See N.J.S.A. 2A:34-23(b)(2) + (4). Yet, the other eight statutory factors never mention "marriage". In reality, the issue is not whether seven years of pre-marital cohabitation is added to the seven years of marriage to create a "marriage" of 14 years;

instead, it is what is the impact of the pre-marital cohabitation on the other eight factors that are not statutorily limited to the marital period. In utilizing this approach, a court follows the dictates of the legislature without doing violence to the clear language of the statute.

Certainly, a court would consider in the alimony analysis a person's disability creating an inability to work even if that disability occurred before the marriage or even after filing of the Complaint. Thus, logically disability would be considered even if there had not been premarital cohabitation under N.J.S.A. 34-23 (b) (3) under "health" or "earning capacity" (b) (5). Each of the remaining eight statutory factors should be considered even if the factor (5) occurred after filing. While a court should not consider a standard of living (a marital statutory component) established post-filing in order to justify a higher alimony award, it should consider post-filing events that relate to the remaining eight factors.

These non-marital statutory factors directly bear on the status of the parties at the end of their marriage and at trial. These factors legitimately bear on the issue of alimony. Just as a court would consider the fact a supporting spouse knew when they married their spouse was disabled and that the disability impacted their earning capacity, a court should also consider the marriage ratified, affirmed, or minimally represented an

acknowledgment by the parties of their circumstances in existence as of the marriage. We accept the person we marry with all the advantages and disadvantages they have. Just as the person who marries someone with a disability, people who marry understand the economic circumstances of the person they marry, and accept them for who they are. This analysis is firmly rooted in the case law as Dr. McGee appropriately bore the consequences of Mrs. McGee's economic dependence upon him created during cohabitation and before marriage. McGee at 14. To the extent such circumstances are the product of their joint decisions there is nothing inappropriate considering the impact of the circumstances they, themselves, created.

Thus, considering premarital cohabitation as a factor bearing on the fairness of any alimony award is not, as the husband argued, a judicial usurpation of a legislative prerogative; rather, it is a recognition of the fundamental nature of marriage and an application of specific statutory provision. Spouses have responsibilities and the statutory factors help a court implement those obligations. The extent of responsibility in the alimony context is inherently fact-sensitive. In our hypothetical viewing, a seven year relationship solely as a seven year marriage ignores what the parties themselves recognized when they married. Such a restrictive view would eliminate, if not rewrite, substantial

portions of the Alimony statute and do the very violence to the statute the Husband claimed he sought to prevent. Even more fundamentally, it ignores the economic reality created by the personal decisions the parties made; it potentially undermines the central most important element in the alimony analysis recognized by the Supreme Court in Miller. The ultimate responsibility emanating from a marriage is that when it ends, spouses must treat each other fairly and that fairness must recognize the decisions the parties, themselves, made. Miller at 418. As Justice Long emphasized, "it is the complete factual scenario surrounding the parties' lengthy relationship which should have been considered here and was not". McGee at 12.

There is precedent outside of New Jersey holding it is perfectly appropriate for courts to consider the impact of pre-marital cohabitation on alimony. In the marriage of Lind v. Lind, 139 P.3d, 1032; 207 Or. App. 56 (2006), the Oregon Court of Appeals rejected a husband's argument that premarital cohabitation could not be considered because the Statute "plainly" referred to duration of the marriage. The Appellate Court noted that Trial Courts had "broad discretion" to consider other factors by virtue of the expansive provision, comparable to Factor 10 (N.J.S.A. 2A:34-23(b)(10)) in New Jersey, that permitted an Oregon trial court to consider "any other factors the court deems just and equitable". In considering premarital

cohabitation, the court considered its length and that during cohabitation the wife contributed all her earnings to household expenses. The court also considered that the parties did not view their financial relationship as merely sharing expenses; rather, they "recognized that they were a family and eventually that they would marry". The court also considered the fact they "conducted themselves as a married couple". Lind at 1040. Importantly for the New Jersey analysis, the court emphasized what is also the law in New Jersey; "that no one factor is dispositive", emphasizing the importance of a factual analysis as opposed to a bright line rule relating to cohabitation. Lind also noted, during the marriage, the parties had a much higher standard of living than they did during the period of cohabitation; this diminished in their view the importance of the cohabitation.

On somewhat unique facts, the Supreme Court of New Hampshire, in Hoffman v. Hoffman, 143 N.H. 514, 727 A.2d 1003 (1999), considered the parties cohabitation in determining that the Wife was entitled to alimony for a period of seven (7) years. In Hoffman, the parties had been married for twelve (12) years and had lived together for five (5) years before that. It is clear that the court in this particular case considered the length of the relationship and the fact that the wife's total monthly income would only be approximately \$3,895.00 per month.

Apparently, however, since she was "younger" and had the "potential to increase her earnings over time", they felt that seven (7) years was appropriate. The results in New Jersey might well have been different but, nonetheless, the importance is the court considered pre-marital cohabitation in determining both the amount and length of alimony.

In Harrelson v. Harrelson, 932 P. 2d 247 (1997) the Alaska Supreme Court while recognizing the State did not acknowledge common law marriages reaffirmed the view under Alaskan law a trial court is free to consider the parties' entire relationship including periods of premarital cohabitation. While Hoffman had more to do with division of property, the court noted the parties filed joint income tax returns for six (6) years of the twelve (12) years they lived together, raised and supported each other's children and before marrying, bought and sold a home together. Thus, in Alaska holding oneself out as being married may be significant. Yet, interestingly, Hoffman reversed the trial court because it made inconsistent findings as to the length of the marital, as opposed to the non-marital relationship. The Appellate Court wanted clarification of that point. However, it emphasized in its remand that the trial court was free to consider the parties' entire relationship, including premarital cohabitation and whether there was a "joint economic enterprise". Harrelson at 255.

A similar case was Moriarity v. Stone 668 N.E. 2d 1338, 41 Mass. App. Ct. 151 (1996), (relying on Liebson v. Liebson 412 Mass. 431, 432-433 (1992)), holding a Massachusetts court may consider in determining alimony the parties' circumstances prior to the marriage and specifically, "the parties' contributions during the period of cohabitation". While Liebson appears to have involved assets, this quote is found in the portion of the opinion concerning alimony. Since the parties lived and built a business together during the substantial premarital cohabitation, it had to be considered in the alimony analysis.

Conversely, there are several cases who have held precisely the opposite. In Hebbring v. Hebbring, 207 Cal. App. 3d 1260, 255 Cal. Rptr. 488 (1989), a California Appellate Court found in a nineteen (19) month marriage that it was improper to "tack on" the premarital cohabitation period, relying on a 1986 California case In Re. Marriage of Bukaty, 180 Cal. App. 3d, 143, 255 Cal Rptr. 492 (1986). A Connecticut Appellate Court in Loughlin v. Loughlin, 93 Conn. App. 618, 889 A. 2d 902 (2006), also indicated it was improper to consider the parties' six (6) years of cohabitation prior to the marriage. The Husband argued that the court's award of twelve (12) years of alimony, "effectively recognized cohabitation as a marital status" and the court found that it cannot reasonably argue that cohabitation is within the plain meaning of "marriage". The Court went through an analysis



of Connecticut cases and concluded it was Connecticut's policy "to draw a clear distinction between marriage and cohabitation even when that cohabitation was preceded by or ultimately led to a marital relationship" citing Bukatay from California and Murray v. Murray 374 So. 2D 622, 623, (Fl. App. 1979) and In re Marriage of Goldstein 97 Ill. App. 3d 1023, 1028, 423 NE 2d, 1201 (1981). Yet, the court that recognized In re Matter of Long 159 Or. App. 471, 475, 978 P. 2d, 410 (1999), rev. den'd 994 P. 2d 130 (2000) an Oregon Appellate Division Court decision found courts may consider the "entire length of the relationship", including cohabitation prior to the marriage using language quite similar to that found in McGee.

These out-of-state cases are not dispositive since under my construct consideration of pre-marital cohabitation would not be in the statutory sections relating to "duration of the marriage" or the "standard of living established during the marriage". Rather, it would be in the remainder of the statute. The out-of-state cases took a simplistic approach that if one considered pre-marital cohabitation, it had to be in "duration"; thus, they rejected expansion of the statutory term to include the pre-marital period which these courts felt violated the "unambiguous" statute. See for example Loughlin at 627. The issue is not whether you add the seven years of cohabitation to the seven years of marriage; rather, it is the impact of the seven on the

non-marital statutory factors. Differentiating between the marital and non-marital parts of the statute balances the need in this sensitive area of personal relationships and enables decisions to be made on the actual facts and circumstances of the parties while simultaneously respecting the legislative role in setting policy through statutory enactment. Courts are then interpreting, not making, law.

#### CONCLUSION

Thus, considering the impact of pre-marital cohabitation is light of the non-marital statutory factors in N.J.S.A. 2A:34-23(b) is not a judicial usurpation of legislative authority. It is an implementation of fundamental societal values through the legislative expression of policy contained in the statute thus assuring that at the end of a relationship the parties actually do treat each other fairly.