

YUDES FAMILY LAW CITATOR

FALL 2021 SUPPLEMENT

CHAPTER 1 – ALIMONY

II. MODIFICATION OF ALIMONY

Temple v. Temple, 2021 N.J. Super. LEXIS 88 (App. Div. 2021)

In this case, the Appellate Division provided guidance as to what constitutes a *prima facie* case in matters involving applications to terminate and/or modify alimony on the basis of a recipient spouse's alleged cohabitation. In so doing, the Appellate Division also clarified the ruling in the case of *Landau vs. Landau*, 461 N.J. Super. 107 (App. Div. 2019), which had been interpreted by many trial courts, including the trial judge in this matter, as suggesting that a movant must provide evidence of all the factors set forth in N.J.S.A. 2A:34-23(n) in order to establish a *prima facie* case. The Appellate Division rejected that interpretation, reversed the order of the trial court which had denied the movant's application, and remanded the matter for further proceedings.

In this matter, the parties were divorced in 2004. In their divorce agreement, the plaintiff agreed to pay permanent alimony to the defendant. In 2020 the plaintiff moved to terminate his alimony obligation alleging that the defendant had either remarried or was cohabitating with a man with whom she had been in a relationship for at least 14 years. Starting at approximately 2 years post-divorce, the plaintiff had noticed the defendant's boyfriend's car at the defendant's residence during parenting time exchanges. However, the plaintiff was not otherwise privy to the nature and extent of the defendant's relationship with this person. Cognizant that the defendant had been maintaining a relationship with this person for years, he ultimately came to observe various social media posts suggesting that the defendant's relationship with this person was more than a dating relationship but rose to the level of co-habitation if not marriage. There were a multitude of social media posts in which the defendant was referred to by this person as his wife. They revealed that they had traveled extensively together and had also participated in various events and activities as well as celebrating holidays and family functions together. There were also many posts reflecting that the defendant was spending a considerable amount of time at this person's home in Spring Lake between 2016 and 2020. The defendant had also sold her home in New Jersey and purchased an apartment in New York City, and that her friend had given up his apartment in New York despite continuing to operate his numerous medical offices on Long Island, suggesting that he was also residing at defendant's New York apartment. Ultimately, the plaintiff retained a private investigator to conduct surveillance of the defendant as a result of which it was established that the defendant was living full time at this person's home in Spring Lake continuously between April and June of 2020. When the plaintiff confronted the defendant as to what he knew of her relationship, the defendant returned to New York and she and her alleged co-habitant scrubbed their social media posts of any information regarding their relationship. Presented with this evidence, the plaintiff made a motion with the trial court seeking to terminate his alimony obligation either on the basis of the defendant's cohabitation and/or marriage. The defendant responded that they were just friends and that she had been staying at his residence in Spring Lake as a means to get out of New York City due to the Covid Pandemic and subsequent race riots. The trial court, accepting of the defendant's explanations and severely scrutinizing the plaintiff's

allegations, denied the plaintiff's motion determining that the plaintiff had not even established a *prima facie* case, and relied on its interpretation of the *Landau* decision in support of its ruling.

The Appellate Division noted that under *Lepis v. Lepis*, 83 NJ 139 (1980) alimony awards may be modified or terminated when a moving party presents a *prima facie* showing changed circumstances. One such change in circumstance would be a payee spouse's cohabitation. The court noted that in denying the plaintiff's motion, the trial court had mistakenly weighed the parties competing sworn statements and accepted as true defendant's explanation if the facts demonstrated by plaintiff's moving papers, and that in fact, the opposite approach should have been taken; namely, that the plaintiff was entitled to an assumption of the truth of his allegations and the benefit of all reasonable inferences to be drawn from the evidence he had marshaled. When presented with competing certifications that create a genuine dispute about material facts, a trial court is not permitted to resolve the dispute on the papers; the trial court must allow for discovery and if, after discovery, the material facts remain in dispute, conduct an evidentiary hearing.

In this matter, the Appellate Division held that all the plaintiff was required to show was a *prima facie* case of cohabitation. While what constitutes that showing has not been precisely defined since the 2014 enactment of *N.J.S.A. 2A:34-23(n)* the Appellate Division rejected what seemed to have been implied in the trial court's decision that evidence favorable to the movant must be presented in all six statutory considerations contained therein. While this statute requires judges to consider the items listed in the statute when determining whether cohabitation has or is occurring, at the motion stage whether a *prima facie* case has been presented should focus more on the essential meaning of cohabitation, not "necessarily" that the supported spouse and another "maintain a single common household", but instead may maintain "a mutually supportive, intimate personal relationship" in which the couple has "undertaken duties and privileges commonly associated with marriage or civil union". The court thereby rejected the argument that all statutory factors must be presented for a movant to establish a *prima facie* case of cohabitation. In so doing, the Appellate court noted that that if that had been the case, one would wonder whether any movant could ever clear that obstacle, and that to check off all six boxes would be as rare as a unicorn. For example, it would be near impossible for a movant to establish that a former spouse and another have "intertwined finances" or that they have been "sharing" or bearing "joint responsibility" for their living expenses given the near impossible access to the movant of such information. Rather, the judicial task in determining if a *prima facie* case has been presented is far less mechanical and it is enough that a movant present evidence from a which a trier of fact could conclude that 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. In this case, the Appellate Division was of the view that the plaintiff had presented an abundance of evidence not only as to whether the defendant was cohabiting, but whether the defendant and her alleged co-habitant were in fact married. The court noted that while there may be non-cohabitation explanations for the information that plaintiff had presented in his motion, the only issue for the trial court was whether enough information had been presented to entitle the movant to discovery and evidentiary hearing. In this case, the Appellate Division was convinced that the plaintiff had presented a *prima facie* case of cohabitation, if not raised a genuine factual dispute of whether the defendant was married which should have been developed through discovery and an evidentiary hearing.