

LACHES



Oakland County Bar Association

Casual Romantic Interlude Or Quasi-Marital Arrangement?

The Impact of Cohabitation on Alimony Payments

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Periodic alimony is a continuing support obligation terminable upon the occurrence of one or more contingencies. The death or remarriage of the recipient spouse are the contingencies frequently identified in judgments of divorce as events which will trigger the modification or termination of the alimony award. Periodic alimony may be modified both as to duration and amount. Either party may petition the court for modification. MCL 552.28.

Where a judgment of divorce is silent as to the impact of remarriage on a periodic alimony obligation, there is statutory authority in Michigan to terminate alimony as of the date of the recipient's marriage. MCL 552.13(2). The assumption is that the payor has been relieved from the continuing duty to contribute to the recipient's support because the new spouse has undertaken that support obligation. The permissive language of the statute ("may be terminated") allows the court to exercise discretion in terminating the award. In those cases in which the circumstances of the remarriage do not affect the pre-existing duty to support the recipient, the court may order the alimony to continue.

In addition to any contingencies listed in the judgment and the statutory ground for modification in the case of remarriage, periodic alimony may also be modified upon a showing of a change in circumstances. *Dresser v Dresser*, 130 Mich App 130 (1983). This change in circumstances must reflect new facts arising after the divorce. *Aussie v Aussie*, 182 Mich App 454 (1990). The party seeking modification has the burden of showing sufficiently changed circumstances to warrant the modification. *Graybiel v Graybiel*, 99 Mich App 30 (1980).

As expected, recipients of periodic alimony have sometimes cohabited to avoid triggering

the remarriage contingency. Cohabitation appears to have increased in frequency in the last fifteen years. It has shed most of its moral stigma and achieved some degree of social acceptance. Cohabitation embraces a broad spectrum of conduct ranging from casual romantic interludes to full-fledged, quasi-marital arrangements. For the purposes of this inquiry "cohabitation" will refer to a person who lives in a sexual relationship with another person.

The alimony recipient's cohabitation continues to motivate payors of periodic alimony to petition the court for termination or modification of the periodic alimony award. Rightly or wrongly, the payor spouse views cohabitation as an economic double-dip and a transparent attempt by the recipient to avoid the termination of alimony. In the payor's mind, both the payor and the paramour contribute to the recipient's support. Payors have argued that cohabitation is a de facto remarriage.

Cohabitation is distinguishable from common law marriage. In a common law marriage the parties hold themselves out to the public as husband and wife. In those states which still recognize common law marriages, the parties must evidence their intent to live together as husband and wife. As a general proposition, mere cohabitation does not evidence such an intent. Michigan has recognized only "licensed" marriages as legal marriages since January 1, 1957. Although comity may compel Michigan to recognize common law marriages from those states in which it is still possible to contract a common law marriage, Michigan courts have been adamant in their refusal to accept the proposition that a "de facto marital relationship" arising in this state is the equivalent of a legal marriage.

This was the historical background when, in 1985, the Michigan Court of Appeals decided three cases brought, directly or indirectly, by payors of alimony. The payors had urged the trial courts to equate the alimony recipient's cohabitation with remarriage, thus justifying a modification or termination of the alimony obligations. In each of these cases, the former wife was cohabiting with another man.

In *Crouse v Crouse*, 140 Mich App 234 (1985), the defendant wife and an adult male began cohabiting in the marital home with the defendant's minor children before entry of the judgment of divorce. The ex-husband had "reluctantly acquiesced" in this unusual arrangement in the hopes that his ex-wife would spend more time with the children if she and her male companion lived in the marital home rather than if he lived elsewhere. The judgment specifically provided that the alimony payment would continue until the "occurrence of the marriage or demise" of the ex-wife. She and her cohabitee, Mr. Shuck, lived together in Michigan, Colorado, and later in California. Three and a half years after the entry of the judgment the plaintiff stopped making his monthly alimony payments. The defendant show caused him; he moved to amend the judgment to include "permanent or quasi-permanent" live-in relationships with men as additional events which would trigger the termination of his alimony obligation.

The Court of Appeals noted that the ex-wife's cohabitation arrangement was known to the plaintiff at the time that the judgment of divorce was entered into. It also observed that this was a consent judgment of divorce drafted by the payor's attorney, that the recipient had not been represented by counsel, that the payor

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and recipient's intention at the time of their agreement was clear from the words they used in the judgment, and that her current financial needs appeared to be substantially the same as they were at the time the judgment was entered. Under these circumstances, the court declined to find that the recipient's cohabitation with Mr. Shuck was the equivalent of the "occurrence of marriage" contingency that was contained in the judgment.

The second case involved a ten year alimony award of \$1,000.00 per month. The payor ex-husband, in *Kersten v Kersten*, 141 Mich App 182 (1985), contended that his former wife was cohabiting with another man. He argued that her cohabitation was the equivalent of a remarriage and that his alimony obligation should terminate. Again, the court declined the invitation to equate cohabitation with remarriage. However, it did observe that the plaintiff had pleaded in his petition that the recipient's economic well-being had improved due to her "meretricious relationship" and if these allegations were proven, they could constitute a change of circumstances justifying revision of the alimony obligation. The court directed that the payor be afforded the opportunity to carry his burden of proof and remanded the matter to the trial court for an evidentiary hearing.

In *Pettish v Pettish*, 144 Mich App 319 (1985), the ex-husband was under an obligation to pay alimony to his ex-wife for "three years or until the defendant remarried, whichever occurred first". At the time of the divorce she was unemployed. She remained unemployed throughout the post-trial proceedings covered by the appeal. One month after the judgment of divorce was entered, she and her minor children began living with an adult male. Echoing *Crouse*, the court declined to equate her cohabitation with remarriage and refused to modify the payor's alimony obligation.

The issues of cohabitation and change in circumstances were revisited in a recent Michigan Court of Appeals decision. In *Ianitelli v Ianitelli*, 199 Mich App 641 (1993), the Court of Appeals reaffirmed that the change of circumstances upon which the payor relies for modification of the alimony obligation must arise after the entry of the divorce. When a recipient's cohabitation is known to the payor at the time of the entry of the judgment it will not constitute a change in circumstances sufficient to warrant modification.

Whether ordered by the court at the conclusion of a contested trial or negotiated by the parties, drafted by counsel and incorporated in a judgment of divorce, an alimony award presumably reflects a synthesis of all factors enumerated in *Demman v Demman*, 195 Mich App 109 (1992). The alimony factors listed in *Demman* and the predecessor cases include the

length of the marriage, the parties' ability to pay, their past relations and conduct, their ages, needs, ability to work, health, and fault, if any. Any alimony provision will be predicated on an evaluation of the factors as they exist at the time of the parties' agreement or the entry of the judgment. The weight given by the parties or the court to each of them in fashioning the award may be unknown. Rarely will the parties be inclined to disclose the individual analyses prompting them to their negotiated settlement. Although the trial court is urged to "state briefly" the findings which are the basis of its decision, *Jacobs v Jacobs*, 118 Mich App 16 (1982), it appears that it is not required to do so. Counseling a client on the degree of a change in any one of these circumstances necessary to modify the alimony obligation remains more an art than a science. Of the eight areas of inquiry listed as factors for the court to consider, only five, ability to pay, age, needs, ability to work and health, appear to be susceptible to post-judgment change.

Consideration should also be given to the possibility that cohabitation may not improve the economic position of the recipient of alimony. The cohabitation arrangement typically lacks solemnization and formalization. Neither party undertakes a legal duty to financially support the other. While some cohabiting couples may formalize their relationship with a written agreement specifying the manner in which they intend to share their common economic needs, it is far more likely that a cohabiting couple's working agreement will remain informal, unwritten and, more importantly, terminable at will. This may be the case even when they temporarily share housing, utility, grocery and other day-to-day expenses.

Anticipating the likelihood of post-judgment cohabitation, the historical facts or circumstances known at the time of the entry of the judgment should be documented. This will provide a base from which to measure the quantum of change. In this regard, the recipient's answers to interrogatories, deposition and trial testimony are helpful. Where counsel has failed to document the facts or circumstances existing at the time of the entry of the judgment, resort may be had to the recipient's historical costs of housing, utilities, groceries, entertainment, clothing, etc., during the marriage. Given the likelihood that these historical records may have been lost, misplaced or even destroyed after entry of the judgment, prudent counsel should, during the pendency of the case, assemble this base of information for the client's future use.

Where the retrieval or reconstruction of the historical data proves impossible or too costly, a moving party may still be able to show that a recipient's economic well-being has been significantly enhanced by cohabitation. Evidence

that the paramour is paying all or a significant portion of the recipient's expenses should create a presumption of changed circumstances and shift to the recipient the burden of going forward. Although the court may lack the historical base from which to measure the extent of the change, it may still make the logical inference that whatever the recipient's needs were, they have been reduced to the extent of the paramour's contribution.

As the domestic relations bar has been admonished in *Pettish* to anticipate cohabitation in periodic alimony situations, counsel for the payor spouse may consider including cohabitation in the judgment as one of the events which would terminate the payor's obligation. When "cohabitation" has not been defined in the judgment, cohabitation may present a less onerous burden of proof for the payor than a change in circumstances.

Of course, the interests of a prospective recipient will lie in vigorously resisting any efforts to include any reference to cohabitation in the judgment. Failing that, the recipient spouse and counsel should make every effort to narrowly define the kind of behavior which may, in the future, reduce or eliminate the payor's continuing alimony obligation. The recipient spouse should argue the inclusion of cohabitation in the judgment as a triggering event is an unwarranted intrusion upon and interference with the recipient's constitutional rights of privacy and association. These temporary relationships can be terminated at will and any financial support that has been tendered in the past to the recipient withdrawn without prior notice.

While these cohabitation arrangements tend to be informal and frequently amount to no more than casual romantic interludes, from time to time such a relationship may bloom into a full-fledged, quasi-marital situation. In *Crouse*, the recipient actually maintained a continuous live-in relationship with Mr. Shuck for seven years, a fact which prompted a vigorous dissent by one member of the court panel. When the cohabitation is of significant duration, a court is likely to share with the payor the perception that the recipient has circumvented the remarriage contingency. If the court is thus persuaded, it may look to the other "circumstances" to justify a reduction or termination of the alimony award and give the payor the benefit of any inference that can be reasonably drawn from that evidence. Here, it is important to remember that a trial court's findings of fact regarding the existence of a change in circumstances will not be reversed unless they are clearly erroneous. *Beason v Beason*, 435 Mich App 791 (1990).

When cohabitation is identified in a judgment as a triggering event, the courts have been called upon to determine whether the recipient's conduct should result in a reduction or termination of support. In Michigan, a court may be called upon to clarify a term or to enforce it where a judgment is ambiguous or uncertain. *Vigil v Vigil*, 118 Mich App 194 (1982). The trial court may clarify and construe a divorce judgment as long as it effects no change in the substantive rights of the parties. *Ettinger v Ettinger*, 368 Mich App 426 (1962). If the judgment is the product of the court's decision-making process, then the court will have broad discretion to construe the provision. *Vigil*, supra. Where the disputed or ambiguous provision is the product of the parties' negotiations and draftsmanship, the court will ascertain the parties' intent as expressed in the language they selected. Rules of contract interpretation and construction are customarily used to ascertain the parties' intent and give effect to their agreement.

Exercise caution when offered the opportunity to define cohabitation in the judgment. All definitions limit the scope of application. The use of the word "cohabitation" without any additional clarifying language will probably admit to the greatest number of possible constructions. Any attempt to define "cohabitation" with additional language will suggest to the recipient how the contingency may be avoided. Instructive in this regard is the Connecticut case of *Klein v Klein*, 3 Con App 421 (1985). There, the parties' separation agreement was incorporated in the judgment of divorce. The draftsman had provided that the

husband's alimony obligation would terminate upon remarriage and defined remarriage

...to mean cohabitation by the Wife with an unrelated male after and for four continuous months in the same residence so that the Superior Court at Stamford concludes the Wife and said male are living together.

It was uncontroverted that the ex-wife had, following the divorce, taken up with a "Frenchman". The ex-wife and her Frenchman sojourned together intermittently for periods of two to three weeks, both in Connecticut and in France. When the payor ex-husband insisted that the conduct of his ex-wife was "cohabitation" within the meaning of the judgment, the court disagreed. The court reasoned that the payor and recipient had specifically defined cohabitation in their judgment, that they had done this by way of voluntary agreement, and that while it sympathized with the ex-husband, the recipient's conduct did not meet the conduct described by the precise language the parties had selected and incorporated in the judgment. In parting, the court wryly observed that by actively participating in defining the kind of cohabitation proscribed, the hapless payor had "made his bed and he cannot be heard to complain."

Mindful of the potential for modification of periodic alimony, counsel for the recipient will caution the client that although the mere fact of cohabitation will not, in and of itself, terminate periodic alimony, it may provide the emotional impetus for a payor to petition the court to

modify or terminate alimony. Counsel for the payor of alimony will caution the client on the danger of unilaterally terminating alimony payments. An arrearage will continue to accumulate on the account. The alimony obligation may only be modified retroactive to the date of the notice to the recipient of the pending petition for modification. MCL 552.603(3). When it appears that there are sufficient grounds to warrant a modification or termination the payor should file a petition for modification and immediately give notice to the recipient. Where possible, the payor should seek to have alimony payments escrowed during the proceedings. Failing that, payor's counsel should, while the petition is pending, insist upon the recipient giving adequate security for repayment in the event that the payor prevails.

Periodic alimony remains modifiable upon a proper showing of change of circumstances. Absent an express agreement contained in the divorce judgment, Michigan courts will not equate the recipient's cohabitation with remarriage, even when the cohabitation is of long duration. Cohabitation may improve the economic circumstances of the recipient. The fact of cohabitation may signal a change in circumstances sufficient to warrant modification of the award. While cohabitation has become a popular alternative lifestyle, a periodic alimony recipient would do well to weigh the value of that arrangement against the risk that the court may find a change in circumstances sufficient to warrant a reduction or termination of the award. The costs and expenses attendant to a successful defense should deter all but the most amorous clients.