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Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1883-15T4

CARL B. GILLE, JR.,

Plaintiff-Appellant,

v.

NADINE S. GILLE,

Defendant-Respondent.

Argued November 15, 2017 – Decided January 9, 2018

Before Judges Alvarez and Currier.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Monmouth
County, Docket No. FM-13-1795-09.

Allan Weinberg argued the cause for appellant.

Kevin M. Mazza argued the cause for respondent
(James P. Yudes, PC, attorneys; Kevin M.
Mazza, on the brief).

PER CURIAM

Plaintiff Carl B. Gille, Jr., appeals a December 16, 2015
order denying his motion to terminate alimony payable to his former
wife, defendant Nadine S. Gille, based on her alleged cohabitation.

The order also awarded defendant \$7062.17 in counsel fees, a portion of the requested amount. We affirm.

The parties engaged in extensive motion practice regarding financial matters while the divorce was pending as well as after the decree was entered on September 26, 2011. They have four sons.

In an April 7, 2015 order, which provides the context for our decision, the judge noted that defendant receives baseline alimony of \$135,000 a year, subject to upward adjustment based on whether plaintiff's annual income exceeds \$500,000 annually. Plaintiff earned \$758,971 in 2013.

Much of the post-judgment litigation, including the two occasions plaintiff was found in violation of the parties' matrimonial settlement agreement (MSA), centered on plaintiff's obligation to provide defendant with his financial records on an annual basis. The obligation was agreed to by the parties so that upward adjustments could be made, when appropriate, to his alimony and child support payments. Plaintiff's earnings in past years have on occasion exceeded \$3 million annually.

Plaintiff was found to have violated the MSA in the April 7, 2015 order, and defendant was awarded \$7200 in legal fees. In the decision, the judge stated that plaintiff had "consistently acted in bad faith" and with "blatant disregard for his [MSA]."

Additionally, the court noted that plaintiff's responses to defendant's request for financial information were "disturb[ing]."

During a ninety-day period from February 9, 2015, to April 4, 2015, plaintiff paid a private detective to watch defendant's home. The detective recorded his observations over twenty-nine days. On thirteen occasions, defendant's boyfriend was present overnight. He was seen retrieving mail, assisting one of the parties' children in clearing a driveway of snow, and entering the home even when defendant or the children were not present.

The judge who decided the cohabitation motion had presided over at least some of the parties' post-judgment litigation and rendered the April decision. During oral argument on this application, she observed that plaintiff had not obtained an update of the investigator's report immediately prior to filing the motion. In the judge's written statement of reasons issued after oral argument, she reiterated that the MSA provided that cohabitation would be a basis for modification or termination of the alimony obligation, "governed by the existing law at the time the application is made." She found that defendant and her boyfriend had no intertwined finances, did not share living expenses, and that although defendant was dating him, they did not refer to themselves in conversation as "boyfriend and girlfriend." The judge also found that the documented instances of defendant's

boyfriend engaging in activities around defendant's house were very limited, and were instances of "chivalry," not the performance of household chores on a continuous basis. She concluded the report established a dating relationship, "but nothing more."

When considering plaintiff's request for reimbursement of his fees for the detective and for counsel fees, and defendant's request for fees, the judge further found that plaintiff earned \$758,971 in 2013, based on his 2013 income tax return, while defendant received a base alimony payment of \$135,000 annually "with payment of additional true up alimony based on [p]laintiff's additional earnings." Plaintiff clearly had the financial ability to contribute to defendant's \$10,593.25 counsel fee. The judge further considered the factors pursuant to Rule 4:42-9(a)(1), N.J.S.A. 2A:34-23, and Rule 5:3-5(c), including plaintiff's good faith in pressing the claim. After weighing those considerations, she ordered plaintiff to pay defendant \$7062.17.

On appeal, plaintiff raises the following points for our consideration:

POINT ONE

THE TRIAL COURT'S DECISION IS NOT SUPPORTED BY COMPETENT CREDIBLE EVIDENCE AND REPRESENTS A SHARP DEPARTURE FROM REASONABLENESS THAT REVERSAL IS REQUIRED.

POINT TWO

THE MOTION COURT IMPROPERLY AND BASELESSLY DETERMINED THAT MR. GILLE IS TO PAY CERTAIN COUNSEL FEES TO DEFENDANT AND NOT RECEIVE COUNSEL [FEES] IN CONNECTION TO HIS MERIT-[BASED] MOTION.

I.

We begin our discussion of the legal issues with the statute.

N.J.S.A. 2A:34-23 provides that:

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.

When assessing whether cohabitation is occurring, the court shall consider the following:

- (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 R.S.25:1-5; and

(7) All other relevant evidence.

[N.J.S.A. 2A:34-23(n).]

Because cohabitation is a form of changed circumstances, establishing a basis for modification or termination, the same standards are applied. Gayet v. Gayet, 92 N.J. 149, 155 (1983); Lepis v. Lepis, 83 N.J. 139, 146 (1980). A finding of cohabitation and termination of alimony rests within the sound discretion of the Family Part judge. Innes v. Innes, 117 N.J. 496, 504 (1990). We do not substitute our judgment for that of the trial court unless a manifest injustice would result. Cesare v. Cesare, 154 N.J. 394, 412 (1998).

We accord substantial deference to fact finding by the family court because of its special jurisdiction and expertise. Id. at 413. In the process of rendering her decision about the facts established in the investigative report and defendant's responses, the judge made determinations regarding whether plaintiff had established a prima facie case under the statute, albeit based on certifications, not testimony.

Awards of counsel fees and costs are also discretionary with the court and will only be disturbed in clear cases of abuse. Yueh v. Yueh, 329 N.J. Super. 447, 450 (App. Div. 2000); Rendine v.

Pantzer, 141 N.J. 292, 317 (1995). "[T]he award of counsel fees and costs in a matrimonial action rests in the discretion of the court." Williams v. Williams, 59 N.J. 229, 233 (1971). The authority for awards of counsel fees in actions for enforcement of interspousal agreements is carved out in Rules 4:42-9(a)(1) and 5:3-5(c). Rule 5:3-5(c) provides, in relevant part:

Subject to the provisions of R. 4:42-9(b), (c), and (d), the court in its discretion may make an allowance, both pendente lite and on final determination, to be paid by any party to the action, including, if deemed to be just, any party successful in the action, on any claim for . . . enforcement of agreements between spouses, . . . and claims relating to family type matters. All applications or motions seeking an award of attorney fees shall include an affidavit of services at the time of initial filing, as required by paragraph (d) of this rule.

The factors to be considered include: (1) the financial circumstances of the parties; (2) the ability of the parties to pay their own fees or to contribute to the fees of the other party; (3) the reasonableness and good faith of the positions advanced by the parties both during and prior to trial; (4) the extent of the fees incurred by both parties; (5) any fees previously awarded; (6) the amount of fees previously paid to counsel by each party; (7) the results obtained; (8) the degree to which fees were incurred to enforce existing orders or to compel discovery; and

(9) any other circumstance bearing on the fairness of an award.
R. 5:3-5(c).

In deciding whether to award counsel fees, the court should also consider "whether the party requesting the fees is in financial need; whether the party against whom the fees are sought has the ability to pay; the good or bad faith of either party . . . the nature and extent of the services rendered; and the reasonableness of the fees." Mani v. Mani, 183 N.J. 70, 94-95 (2005).

II.

Contrary to plaintiff's arguments, the trial court in this case correctly interpreted the language of the MSA, which referred the judge back to the statute. The judge's decision was based on her conclusion that plaintiff's evidence simply did not meet the elements of the statute. N.J.S.A. 2A:34-23. The judge said:

Maybe [the investigator] should have sat for -- maybe he should have made those 13-14 days two weeks in a row, and they would have had a really, really good sense. . . . [I]f he had come in here with the two week thing, and said, look, in two weeks he was there 13 out of 14 nights or, you know, eight out of -- you know, 14 nights. Then we're talking. But he didn't. . . . I have to be honest with you, obviously, and tell you that the totality of the facts of this case do not make me even wonder if he's living there.

She added:

Him plowing the snow, if he didn't, I'd probably be aggravated with him. You know, you -- she -- she pays for snow removal, great, but when the snow comes down, and you're going to get the cars out, or you're leaving for work, and somebody is there, you say, go ahead, you're going to shovel, great. Get out there and do it. That doesn't mean you're performing the -- you know, the -- it's relationship stuff. It's nice, but it's not spousal function

I can appreciate that [plaintiff] says, gee, every time I went over there to pick up the kids, he was there. I got it. But you know what, he has a right to be there every day, just not living there, just not sleeping over every day, and not -- not getting the benefit of the home, and all that. I've got a guy that you acknowledge, yourself, has his own residence. He's got a job. He's up and out. . . . I'm not seeing it.

It was for these express reasons that the judge opined that no prima facie case was established. Of the statutory elements, plaintiff only demonstrated that defendant's boyfriend spent a limited number of nights in the home. The proofs did not even establish that he lived with defendant. N.J.S.A. 2A:34-23(n)(4). If no prima case was established, then no discovery or plenary hearing was warranted. Absent such a prima facie showing, discovery and a plenary hearing are not required in changed circumstance cases. See Larbiq v. Larbiq, 384 N.J. Super. 17, 23 (App. Div. 2006) (citing Lepis, 83 N.J. at 157).


Plaintiff contends that the judge abused her discretion by failing to more fully explain her decision regarding fees. The judge

certainly could have expanded on her application of the statutory factors to the parties' claims, but she clearly considered them in making her decision. She heavily weighed the fact that plaintiff, at a minimum, earned approximately five times defendant's only income – alimony, she considered defendant the prevailing party on the question of cohabitation, and had some reservations regarding plaintiff's good faith. He brought the application when additional motion practice had just ended unfavorably to his position.

Accordingly, we consider the judge's discussion of the relevant factors was sufficient. In light of the disparity in income, plaintiff's inconsistent compliance with prior court orders regarding support, and his lack of success on the application, no abuse of discretion occurred.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION