SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2693-20

GLEN SMILEY,

Plaintiff-Appellant,

v.

LAURIE SHEEDY, f/k/a SMILEY,

Defendant-Respondent.

Submitted April 5, 2022 – Decided May 11, 2022

Before Judges Fisher and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Ocean County, Docket No. FM-15-0741-18.

Berse Law, LLC, attorneys for appellant (Samuel J. Berse, on the briefs).

Greenbaum, Rowe, Smith & Davis LLP, attorneys for respondent (Jeanette Russell, of counsel and on the brief).

PER CURIAM

Plaintiff appeals the denial of a motion to terminate the alimony obligation contained in the parties' judgment of divorce on the basis of defendant's involvement in a committed dating relationship. Despite being provided with evidence defendant has been in an exclusive relationship for over six years, the trial court found insufficient evidence of defendant's cohabitation to warrant discovery and a plenary hearing. We find plaintiff established a prima facie case of cohabitation and reverse and remand for discovery consistent with the factors outlined in N.J.S.A. 2A:34-23(n) and a plenary hearing.

The parties were married on April 27, 1995 and divorced pursuant to a Marital Settlement Agreement (MSA) on July 25, 2018. Glen presented evidence Laurie and her romantic partner (Bob)[1] have been dating for a significant period of time, since at least January 2018. Glen provided photos of Bob's car parked at the former marital residence from January to April 2018. The photos demonstrate Bob was at her home when Laurie was at work and when she was away with the parties' daughter in Florida. Bob and Laurie vacation together, post on social media holding themselves out as a couple, and spend at least some holidays together. A notification published by her new

[1] We employ a pseudonym to protect the privacy of defendant's romantic partner, a non-party.

employer states Laurie relocated to South Jersey to "join her boyfriend." The trial court did not address all six factors of the statute and focused almost exclusively on actual cohabitation,[2] although it acknowledged cohabitation is no longer necessary in order to demonstrate an exclusive, committed relationship akin to marriage. The trial judge found although Laurie had cohabited with Bob for a period of time in the past, she was not presently cohabiting and did not intend to in the future.

N.J.S.A. 2A:34-23 allows for alimony awards in appropriate circumstances. In Lepis v. Lepis, 83 N.J. 139 (1980) the Supreme Court recognized an alimony award may be modified or terminated when a moving party presents a prima facie case demonstrating changed circumstances. N.J.S.A. 2A:34-23(n) was amended, effective September 2014, to clarify that evidence of actual cohabitation is no longer required; instead the statute now enumerates six specific factors a court must weigh in determining whether

[2] The terminology used in our caselaw and the 2014 amendments to the statute may present some confusion for trial judges. Despite the statutory amendment, current caselaw and the statute still refer to proof of "cohabitation" in order to terminate or suspend alimony, but cohabitation is only one of six factors the trial court must consider and is not alone dispositive. The statute makes clear that even if the payee spouse does not cohabit, alimony may be suspended or terminated if the payee spouse is in "a mutually supportive, intimate personal relationship . . . in which the participants undertake duties and privileges that are commonly associated with marriage or a civil union." N.J.S.A. 2A:34-23(n).

alimony should be terminated due to the payee spouse's involvement in a committed dating relationship akin to marriage. N.J.S.A. 2A:34-23(n), states as follows:

> 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:
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> 1) Intertwined finances such as bank accounts and other joint holdings or liabilities;
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> 2) Sharing or a joint responsibility for living expenses;
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> 3) Recognition of the relationship in the couple's social and family circle;
>
> 4) Living together, with 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.

There are few published cases following the 2014 amendments. In Quinn v. Quinn, 225 N.J. 34 (2016), our Supreme Court focused on the enforcement of settlement agreements entered into voluntarily between divorced spouses, not the elements of a prima facie case of cohabitation in light of the statutory amendments. The Court explained:

> [w]hen parties to a MSA have agreed to permit termination of alimony on remarriage or cohabitation, they have recognized that each are equivalent events. In each situation, the couple has formed an enduring and committed relationship. In each situation, the couple has combined forces to mutually comfort and assist the other.
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> [Quinn, 225 N.J. at 53-54.]

Laurie concedes the parties' MSA provides for termination of alimony in the event she is cohabiting as defined by the statute. Glen and Laurie's MSA specifically provides that alimony payments would be required unless, among other things, Laurie "cohabit[ed] with another individual of the same or opposite sex, unrelated by blood or marriage, in a relationship similar to that of marriage."

In the recent case of Temple v. Temple, 468 N.J. Super. 364 (App. Div. 2021) we addressed the statutory factors required to make a prima facie case of cohabitation. We specifically found if "a movant must check off all six boxes to meet the burden of presenting a prima facie case, a finding of cohabitation will be as rare as a unicorn. This cannot be what the Legislature had in mind when it codified the meaning of cohabitation . . . ." Id. at 370. "[W]e reject the argument that evidence of all these circumstances must be presented for a movant to establish a prima facie case of cohabitation . . . the statute does not contain the alpha and omega of what ultimately persuades a court that a supported spouse is cohabitating." Ibid.

We also recognized the difficulty movant has in establishing prima facie evidence of some of the statutory factors, particularly those bearing upon the payee spouse's finances:

> People tend to treat financial information as confidential and do not normally volunteer it to others, let alone former spouses obligated to pay them alimony. Information that would be helpful in demonstrating intertwined finances is also not available from financial institutions on a stranger's request. Demonstrating that a former spouse and a paramour are "sharing" or bearing "joint responsibility" for their living expenses is also something a movant is not likely to be able to present without a right to compulsory discovery. Absent an opponent's voluntary turnover, a movant will

> never be able to offer evidence about the financial aspects referred to in N.J.S.A. 2A:34-23(n).
>
> [Temple, 468 N.J. Super. at 370 (emphasis added).]

Given the lack of financial information available to the movant, a trial court must examine the non-financial factors carefully to determine whether a prima facie case exists to warrant discovery.

A party alleging cohabitation must first establish a prima facie case before obtaining discovery and, when warranted, a plenary hearing. Lepis, 83 N.J. at 157. Prima facie is defined as "[s]ufficient to . . . raise a presumption [of cohabitation] unless disproved or rebutted." Black's Law Dictionary 1441 (11th ed. 2019). It is enough that the movant present evidence from which a trier of fact may conclude the supported spouse and another are in a mutually supportive, intimate personal relationship akin to marriage. Temple, 468 N.J. Super. at 371.

Glen's evidence demonstrates a six-year dating relationship that commenced prior to the divorce being finalized, a private investigator's surveillance report, an admission from Laurie that she and Bob physically cohabited for a period of time although they are not physically cohabiting presently, social media posts demonstrating they hold themselves out as a couple and share holidays, and an announcement regarding the motive behind Laurie's

relocation to South Jersey. This evidence supports a prima facie case allowing Glen to obtain additional discovery.

Of course, we are mindful, as noted by the Court in Quinn and as we observed in Temple, that allowing unfettered discovery into a payee spouse's private life may provide opportunities for abuse. Former spouses receiving alimony are entitled to date and participate in monogamous relationships, even long-term ones. Therefore, the trial court should ensure discovery is directed to the payee spouse and limited to the statutory factors, at least initially. If that initial discovery proves fruitful, additional discovery may be warranted, including the depositions of non-parties, before a plenary hearing is held.

Finally, as in Temple, we note the trial judge, confronted with a motion to terminate alimony based on cohabitation, applied an incorrect evidential standard, giving weight to the competing certification of the non-movant to resolve material issues of fact. A movant in a cohabitation motion solely bears the burden of proving the initial prima facie case. "When presented with competing certifications that create a genuine dispute about material facts, a judge is not permitted to resolve the dispute on the papers; the judge must allow for discovery and if, after discovery, the material facts remain in dispute, conduct an evidentiary hearing." Id. at 376. Once there is a rebuttable

presumption of changed circumstances from a prima facie case of cohabitation, the burden of proof, which is ordinarily on the party seeking relief, shifts to the non-movant at the plenary hearing to come forward with proof that cohabitation is not occurring. See Ozolins v. Ozolins, 308 N.J. Super. 243, 249-50 (App. Div. 1998).

We are satisfied from our de novo review[3] of the record that Glen presented a sufficient prima facie case of cohabitation to warrant discovery consistent with the factors outlined in N.J.S.A. 2A:34-23(n).

Reversed and remanded for an order compelling discovery and a plenary hearing.

[3] We review de novo because the trial court made no factual or credibility determinations.