To: New Jersey Law Revision Commission
From: Whitney Schlimbach, Counsel
Re: Termination of Alimony on the Basis of Cohabitation Pursuant to N.J.S. 2A:34-23(n)
Date: November 7, 2022

MEMORANDUM

Project Summary[1]

In New Jersey, the modification, suspension and termination of alimony is governed by N.J.S. 2A:34-23.[2] Alimony may be suspended or terminated "if the payee cohabits with another person."[3] As defined in N.J.S. 2A:34-23(n), "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 household."[4] To determine "whether cohabitation is occurring," the statute instructs that the court "shall consider" the six listed factors and "all other relevant evidence."[5]

In *Temple v. Temple*, the Appellate Division considered what is required to demonstrate a prima facie case of cohabitation.[6] The *Temple* court "reject[ed the implication] in the [lower court]'s decision that evidence favorable to movant must be presented on all six statutory considerations contained in N.J.S.A 2A:34-23(n)."[7] Instead, the court concluded that the determination "whether . . . a prima facie case has been presented focuses more on the essential meaning of cohabitation."[8]

The *Temple* court found that a prima facie showing of cohabitation does not require "a movant [to] check off all six boxes."[9] Subsequent Appellate Division decisions have cited this principle when determining whether a movant has made a prima facie case of cohabitation.[10] In addition, the holdings of several Appellate Division decisions issued prior to *Temple* imply that a prima facie showing of cohabitation does not require evidence on all six statutory factors.[11]

Since New Jersey courts have consistently applied the principle articulated in *Temple* when analyzing a claim of cohabitation, it seems that the trial court's apparent[12] holding that evidence

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[1] Preliminary work on this project was conducted by Thevuni Athalage, during her tenure as Legislative Law Clerk with the New Jersey Law Revision Commission.
[2] N.J. STAT. ANN. § 2A:34-23 (West 2022).
[3] N.J. STAT. ANN. § 2A:34-23(n).
[4] *Id*.
[5] *Id*. ("[i]n evaluating whether cohabitation is occurring and whether alimony should be suspended or terminated, the court shall also consider the length of the relationship").
[6] *Temple v. Temple*, 468 N.J. Super. 364, 368 (App. Div. 2021).
[7] *Id.* at 369.
[8] *Id.*
[9] *Id.* at 370.
[10] *See infra* at p. 8.
[11] *See infra* at p. 5.
[12] The Appellate Division stated the lower court "seems to have held," and that the lower court's decision "seems to . . . impl[y]," that evidence on all six statutory factors is required to make a prima facie showing of cohabitation. *Temple*, 468 N.J. Super at 369 – 70 (emphasis added).

is required on all six statutory factors was an isolated misinterpretation of a longstanding and comprehensive body of law.[13] Adding language to the statute that incorporates a standard applicable to the preliminary stages of a motion to terminate or suspend alimony may engender more confusion than clarity.[14]

Since decisions before and since *Temple* are consistent with its holding that evidence is not required on all six statutory factors to establish a prima facie case of cohabitation, Staff requests guidance from the Commission regarding whether additional work in this area is likely to be of assistance.

Statute Considered

N.J.S. 2A:34-23(n) provides, in relevant part:

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> n. 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 join 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.
>
> In evaluating whether cohabitation is occurring and whether alimony should be suspended or terminated, the court shall also consider the length of the relationship.

[13] *See infra* at p. 5.

[14] A counterargument is that a modification could provide additional guidance to individuals navigating proceedings under N.J. STAT. ANN. § 2A:34-23(n) without counsel.

A court may not find an absence of cohabitation solely on grounds that the couple does not live together on a full-time basis.[15]

Background

In *Temple v. Temple*, the Appellate Division considered whether a movant must present evidence on all six statutory factors in N.J.S. 2A:34-23(n) to establish a prima facie case of cohabitation in the context of a motion to terminate permanent alimony.[16] Plaintiff and Defendant were married in 1986 and divorced in 2004.[17] Following the divorce, Plaintiff was ordered to pay Defendant $5,200 per month in permanent alimony.[18] In 2020, Plaintiff moved to terminate alimony, on the basis that Defendant was either remarried or cohabitating with another individual (Boozan).[19]

In support of the claim of cohabitation, Plaintiff provided evidence of Defendant's fourteen-year relationship with Boozan.[20] Plaintiff "noticed [Boozan]'s car regularly outside the former marital home" about two years after the divorce, and although he "was otherwise unaware of the nature and extent of [Defendant and Boozan]'s relationship for years," he hired a private investigator "after observing social media posts that suggested more than a dating relationship."[21]

In support of the motion to terminate alimony, Plaintiff provided years of social media posts in which Boozan referred to Defendant as his "wife," and also indicating the pair frequently traveled and attended family holidays and functions together.[22] Additionally, Plaintiff provided evidence that Defendant "spent a considerable amount of time [at Boozan's] Spring Lake home," including photos of Defendant "engaging in household responsibilities, . . . using a key or entering the . . . residence through the garage keypad access code."[23] Plaintiff also produced financial records indicating Defendant and Boozan "were together in Spring Lake on the weekends" in 2020, and that Boozan was near Defendant's New York City apartment during the same time period.[24]

After Plaintiff's lawyer demanded that Defendant preserve relevant records in June 2020, Defendant and Boozan cleared their social media of many of the posts submitted by Plaintiff.[25] Defendant also denied she and Boozan were married or cohabiting and asserted they were "only good friends."[26]

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[15] N.J. STAT. ANN. § 2A:34-(n) (emphasis added).
[16] *Temple*, 468 N.J. Super. at 369.
[17] *Id*. at 367.
[18] *Id*.
[19] *Id*. at 367–68 ("the parties' marital settlement agreement recognized [Defendant]'s cohabitation as a reason for terminating or modifying . . . alimony").
[20] *Id*.
[21] *Id*. at 372.
[22] *Id*. at 372–73.
[23] *Id.* at 374.
[24] *Id.* at 373-74 (observing that Defendant sold the former marital home and purchased an apartment in New York City in 2017, and Boozan, whose medical office was located in Long Island, "gave up" his New York City apartment in 2020).
[25] *Id*. at 374-75.
[26] *Id*. at 375.

The lower court denied Plaintiff's motion without allowing discovery or holding a hearing.[27] The Appellate Division described the lower court's holding as "impl[ying]"[28] that Plaintiff failed to make a prima facie showing because he did not "provide evidence on all six specific items to establish a prima facie case."[29] Plaintiff appealed.[30]

Analysis

On appeal, Plaintiff argued that he had presented a prima facie case of cohabitation and was therefore entitled to discovery and an evidentiary hearing.[31] The Appellate Division agreed, finding that Plaintiff demonstrated that Defendant and Boozan "resided together, that they have had a fourteen-year relationship, that they have traveled together extensively, and that there are other 'indicia of a mutually supportive intimate personal relationship.'"[32]

The Appellate Division explained that the trial court "relied extensively on *Landau v. Landau*,"[33] which "held that a movant must present a prima facie case of cohabitation before obtaining discovery."[34] However, the *Temple* court pointed out that *Landau* "did not define what constitutes a prima facie case of cohabitation."[35] The Court expressed concern that requiring a movant to present evidence on all six factors in the statute would make "a finding of cohabitation . . . as rare as a unicorn."[36] The *Temple* Court illustrated this by emphasizing the difficulty of obtaining another person's financial information "[a]bsent . . . voluntary turnover," or discovery.[37]

The Appellate Division concluded that the focus at the motion stage should be on the "essential meaning of cohabitation."[38] In support of this conclusion, the Court relied on the catch-all seventh factor in N.J.S. 2A:34-23(n), requiring courts to consider "all other relevant evidence."[39] According to the *Temple* Court, the inclusion of this factor in the statute demonstrated that the list in the statute is not "the alpha and omega of what ultimately persuade a court that a spouse is cohabiting."[40]

Therefore, the Appellate Division found Plaintiff provided sufficient evidence that "a trier of fact could conclude [that Defendant and Boozan we]re in 'a mutually supportive, intimate

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[27] *Id.* at 367.
[28] *Id.* at 369 ("we reject what seems to be implied in the judge's decision that evidence favorable to movant must be presented on all six statutory considerations contained in N.J.S.A. 2A:34-23(n)") (emphasis added).
[29] *Id.* at 370 ("[i]f – as the motion judge seems to have held – a movant . . . must provide evidence on all six specific items to establish a prima facie case") (emphasis added).
[30] *Id*. at 367.
[31] *Id.*
[32] *Id*. at 371.
[33] 461 N.J. Super. 107 (App. Div. 2019).
[34] *Id.*
[35] *Id.* at 368.
[36] *Id.* at 370 (explaining that "[t]his cannot be what the Legislature had in mind when it codified the meaning of cohabitation sufficient to permit an alternation in an alimony obligation").
[37] *Id. See also* N.J. STAT. ANN. §2A:34-23n.(1) & (2) ("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 . . . ").
[38] *Temple*, 468 N.J. Super. at 369.
[39] *Id.* at 370.
[40] *Id.*

personal relationship' in which they have 'undertaken duties and privileges that are commonly associated with marriage or civil union.'"[41] The Court held Plaintiff "presented a prima facie case of cohabitation," reversing and remanding for discovery and an evidentiary hearing.[42]

Additional Cases

- *Decisions Prior to Temple*

In *Temple*, the Appellate Division cited to two Supreme Court cases that provide foundational principles for determining a motion to terminate alimony on the basis of cohabitation: *Lepis v. Lepis*, 83 N.J. 139 (1980) and *Konzelman v. Konzelman*, 158 N.J. 185 (1999). In addition, the *Temple* Court rejected the lower court's interpretation of the decision in *Landau v. Landau*,[43] which clarified that a movant must make a prima facie showing of cohabitation to warrant discovery.[44]

  - *Lepis v. Lepis*[45]

In *Lepis*, the New Jersey Supreme Court addressed "the standards and procedures for modifying support and maintenance arrangements after a final judgment of divorce."[46] The controversy in *Lepis* was related to a motion to increase spousal and child support based on the "maturation of the children and severe inflation."[47] The *Lepis* Court explained that "alimony and support orders . . . are always subject to review and modification on a showing of changed circumstances."[48] After an in-depth discussion of the meaning of "changed circumstances," which included "the dependent spouse's cohabitation with another,"[49] the Court provided the "proper procedure for courts to follow on modification motions."[50]

The procedure established in *Lepis* placed "the burden of showing . . . 'changed circumstances'" on the moving party.[51] The Court then required that "[a] prima facie showing of changed circumstances must be made before a court will order discovery of an ex-spouse's financial status."[52] The *Lepis* Court further held that "a party must clearly demonstrate the existence of a genuine issue as to a material fact before a hearing is necessary."[53]

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[41] *Id.* at 370.
[42] *Id*. at 376 - 77 (finding also that there was "a genuine factual dispute about whether [Defendant and Boozan we]re married").
[43] 461 N.J. Super. 107 (App. Div. 2019).
[44] *Id.* at 119.
[45] 83 N.J. 139, 143 (1980).
[46] *Lepis*, 83 N.J. at 143.
[47] *Id.* at 149.
[48] *Id.* at 146.
[49] *Id.* at 151.
[50] *Id.* at 157.
[51] *Id.*
[52] *Id.*
[53] *Id.* at 159.

- *Konzelman v. Konzelman*[54]

After establishing the procedures in *Lepis*, the Supreme Court articulated the meaning and requirements of "cohabitation" in *Konzelman*.[55] In that case, the Court addressed the validity of "an agreement between the parties to allow cohabitation to terminate alimony obligations . . . without regard to the economic consequences of that relationship."[56] The Court provided a detailed explanation of what is required to demonstrate "cohabitation," and determined the agreement was enforceable.[57]

The *Konzelman* Court stated that "[a] mere romantic, casual or social relationship is not sufficient," rather the relationship must have "stability, permanency and mutual interdependence."[58] A qualifying relationship was described by the Court as one "whereby two unmarried adults live as husband and wife," and have "undertaken duties and privileges that are commonly associated with marriage."[59] The Court set forth a non-exhaustive list of "duties and privileges," including "living together, intertwined finances such as joint bank accounts, sharing living expenses and household chores, and recognition of the relationship in the couple's social and family circle."[60]

In 2014, the Legislature enacted subsection n., which added cohabitation as a ground for suspending or terminating alimony to N.J.S. 2A:34-23. The Legislature adopted the language employed by the *Konzelman* Court to define the term "cohabitation."[61] Subsection n. also incorporated the factors that a court must consider when making its determination to suspend or terminate alimony on the basis of cohabitation, as set forth in the *Konzelman* opinion.[62]

- *Landau v. Landau*[63]

After the enactment of subsection n., courts continued to follow the procedure set forth in *Lepis* in the context of motions to suspend or terminate alimony. As the *Temple* court noted[64] the decision in *Landau* affirmed that a movant must present prima facie evidence of cohabitation to warrant discovery, or a hearing, on the issue.[65]

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[54] *Konzelman v. Konzelman*, 158 N.J. 185 (1999).
[55] *Konzelman*, 158 N.J. at 202.
[56] *Id.* at 196.
[57] *Id.* at 202.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id*.
[62] N.J. STAT. ANN. § 2A:34-23n.(1)-(7).
[63] *Landau v. Landau*, 461 N.J. Super. 107 (App. Div. 2019).
[64] *Temple*, 468 N.J. Super. at 368 ("In Landau, we held that a movant must present a prima facie case of cohabitation before obtaining discovery, but we did not define what constitutes a prima facie case of cohabitation.").
[65] *Landau*, 461 N.J. Super. at 108 (addressing "whether the changed circumstances standard of *Lepis* . . . , continues to apply to a motion to suspend or terminate alimony based on cohabitation following the 2014 amendments to the alimony statute, N.J.S.A. 2A:34-23(n)").

In *Landau*, the trial court determined that Plaintiff "had made a sufficient showing to warrant limited discovery concerning the *existence of a prima facie cohabitation relationship*," although it stated that "it could not conclude from the evidence proffered by plaintiff that he had made a prima facie case."[66] The Appellate Division reversed the discovery order, holding that, "[b]ecause . . . plaintiff had not established a prima facie case of . . . cohabitation, [he] was plainly not entitled to discovery."[67]

Acknowledging "that a prima facie showing of cohabitation can be difficult to establish," the Appellate Division noted that "is hardly a new problem," and expressed confidence that "the *Lepis* paradigm . . . continues to strike a fair and workable balance between the parties' competing interests" of access to information and privacy.[68] The *Landau* Court found "no indication the Legislature evinced any intention to alter the *Lepis* changed circumstances paradigm when it defined cohabitation and enumerated the factors a court is to consider . . . in the 2014 amendments to N.J.S.A. 2A:34-23."[69]

- *Other Cases*

After the enactment of subsection n., and prior to the decision in *Temple*, the Appellate Division has both implicitly *and* explicitly recognized that prima facie evidence of cohabitation does not require evidence on all of the six factors in N.J.S. 2A:34-23n, when reversing a lower court denial of a motion to terminate alimony.[70]

In *Klyachman v. Garrity*, decided in June 2017, the Appellate Division found that Defendant, who provided evidence that Plaintiff "had an ongoing romantic relationship with her coworker for . . . ten years," that they vacationed together with their respective children, and that they "openly present themselves as husband and wife at social gatherings," had presented prima facie evidence of cohabitation.[71] The *Klyachman* court specifically noted Defendant did not know "whether [Plaintiff and her alleged cohabitor] have 'intertwined their finances,'" but found "the motion judge erred in not affording defendant the opportunity to conduct limited discovery to develop competent evidence to prove his case in a plenary hearing."[72]

Similarly, in *Salvatore v. Salvatore*, decided in 2018, the Appellate Division held that Plaintiff "established a prima facie case that cohabitation was 'tantamount to marriage,'" although Plaintiff did not provide evidence on each of the statutory factors in N.J.S. 2A:34-23(n).[73] Plaintiff submitted that Defendant and her partner ("A.M.") "[represent] themselves to be step-parents to each other's children; the parties' children consider A.M. part of their family unit; defendant has shared parental responsibilities for A.M.'s daughter; A.M. and his daughters were named in

[66] *Id.* at 112 (emphasis added) (internal quotations omitted).
[67] *Id.* at 119.
[68] *Id.* at 118 – 19.
[69] *Id.* at 116.
[70] *Wajda v. Wajda*, 2020 WL 1950772, at *3 (App. Div. Apr. 23, 2020).
[71] 2017 WL 2730239, at *2 (App. Div. June 26, 2017).
[72] *Id.* at *3.
[73] 2018 WL 3149808, at *3 (App. Div. June 28, 2018).

defendant's mother's obituary; and A.M. has spent holidays and vacations with defendant and the children."[74]

In *Goethals v. Goethals*, decided in 2020, the Appellate Division held that "by dismissing the substantial evidence amassed by defendant, and requiring evidence of intertwined finances and the couple living together on a full-time basis to establish prima facie evidence of changed circumstances, the judge misapprehended the express provision of the [marriage settlement agreement] and the factors enumerated in N.J.S.A. 2A:34-23(n)."[75]

Finally, in *Wajda v. Wajda*, also decided in 2020, the lower court denied a motion to terminate alimony based on cohabitation, concluding "plaintiff failed to make a prima facie case that defendant was cohabitating."[76] The Appellate Division recited the evidence submitted by Plaintiff: surveillance indicating that the alleged cohabitant "stayed overnight in defendant's home nearly every night for almost two months[,] kept his dogs [and his car] there [and] remained in the home even when defendant left"; "bank records [showing the alleged cohabitant] was purchasing items and transacting bank business in the same town where defendant resided"; and "shared . . . social media connections."[77]

In analyzing whether Plaintiff had made a prima facie showing, the Appellate Division "recognize[d] the difficulties of developing proofs of things such as intertwined finances, joint bank accounts, shared living expenses and household chores, and recognition of the relationship in the couple's social and family circle, without either invading a former spouse's privacy or taking some discovery on the issue."[78] The *Wajda* court held that, despite the Plaintiff's inability to "demonstrate that defendant and [her alleged cohabitant] shared expenses or intertwined their finances," he had "made a sufficient showing to warrant further discovery."[79]

- *Decisions After Temple*

Since *Temple*, the Appellate Division has issued several opinions that address the sufficiency of a prima facie showing of cohabitation.[80] Each decision has reaffirmed that a movant is not required to provide evidence on every statutory factor set forth in N.J.S. 2A:34-23n. to establish a prima facie showing of cohabitation.[81]

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[74] *Id.*
[75] 2020 WL 64933, at *8 (N.J. Super. Ct. App. Div. Jan. 7, 2020) (emphasis added).
[76] *Wajda*, 2020 WL 1950772, at *2.
[77] *Id.* at *4.
[78] *Id.* at *3.
[79] *Id.* at *4 (emphasis added).
[80] *J.R. v. F.R.*, 2021 WL 4978706 (App. Div. Oct. 27, 2021); *A.W. v. A.C.W.*, 2022 WL 29894 (App. Div. Jan. 4, 2022); *Manley v. Manley*, 2022 WL 128599 (App. Div. Jan. 14, 2022); *Charles v. Charles*, 2022 WL 1420605 (App. Div. May 5, 2022); *Smiley v. Sheedy*, 2022 WL 1487004 (N.J. Super. Ct. App. Div. May 11, 2022); *Meixner v. Meixner*, 2022 WL 1499027 (App. Div. May 12, 2022); *Cardali v. Cardali*, 2022 WL 2297126 (App. Div. June 27, 2022).
[81] *Manley*, 2022 WL 128599, at *7 (reiterating the holding in *Temple* that "a party seeking to terminate alimony based on cohabitation need not 'check off all six boxes . . . to meet the burden of presenting a prima facie case."); *Charles*, 2022 WL 1420605, at *3 ("Recently, this court held a party seeking to terminate alimony based on cohabitation need not 'check off all six boxes [under N.J. STAT. ANN. § 2A:34-23(n)] to meet the burden of presenting a prima facie case, [otherwise] a finding of cohabitation [would] be as rare as a unicorn.'") (internal quotations omitted); *Cardali*,

Although the movants failed to present prima facie evidence of cohabitation in virtually every subsequent Appellate Division decision, many of the opinions cite *Temple* for the proposition that "evidence of all seven factors enumerated in N.J.S.A. 2A:34-23(n) is not required for the moving party to establish a prima facie showing of cohabitation."[82] The Appellate Division also compared the evidence presented in these cases to that provided by the movant in *Temple* and found it lacking.[83]

In *Smiley v. Sheedy*, however, the Appellate Division reversed the lower court's denial of a motion to terminate alimony based on cohabitation.[84] Acknowledging the point made in *Temple* that relevant financial information is rarely available to the moving party,[85] the *Smiley* court instructed that "a trial court must examine the non-financial factors carefully to determine whether a prima facie case exists to warrant discovery."[86] Reiterating that a movant need not "check off all six [statutory] boxes," the Court held that the evidence presented by the *Smiley* movant "supports a prima facie case allowing . . . additional discovery."[87]

Pending Bills

Currently, there are no bills pending concerning N.J.S. 2A:34-23n. as discussed in *Temple v. Temple*.[88]

Conclusion

The principle set forth in *Temple* — that evidence is not required on all six statutory factors to establish a prima facie case of cohabitation — is consistently applied by New Jersey courts in the context of motions to suspend or terminate alimony. As a result, it is not clear that additional work in this area, and the addition of language articulating the prima facie standard to N.J.S. 2A:34-23, is likely to be of assistance.

Staff requests guidance from the Commission regarding whether Staff should continue or conclude its work in this area.

2022 WL 2297126, at *5 ("But as we recently held, even where N.J.S.A. 2A:34-23(n) applies, evidence of all seven factors enumerated in the statute is not required for the moving party to establish a prima facie [showing] of cohabitation.") (internal quotations omitted).

[82] *Cardali*, 2022 WL 2297126, at *5. *See supra* n. -----.

[83] *J.R. v. F.R.*, 2021 WL 4978706, at *10 (App. Div. Oct. 27, 2021); *A.W. v. A.C.W.*, 2022 WL 29894, at *8 (App. Div. Jan. 4, 2022); *Meixner v. Meixner*, 2022 WL 1499027, at *5 (App. Div. May 12, 2022).

[84] *Smiley*, 2022 WL 1487004, at *1.

[85] *Temple*, 468 N.J. Super. at

[86] *Smiley v. Sheedy*, 2022 WL 1487004, at *2 - 3 (N.J. Super. Ct. App. Div. May 11, 2022) ("[Plaintiff]'s evidence demonstrates a six-year dating relationship . . . , an admission from [Defendant] that she and [her alleged cohabitor] 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 [Defendant]'s relocation to South Jersey.").

[87] *Id.* at *3.

[88] A.B. 611, 220th Leg., 2022 Sess. (Jan. 11, 2022) (amending subsection n. to permit modification of alimony on the basis of cohabitation and adding language requiring the court to consider the economic or financial benefit to the payee resulting from cohabitation).