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**Abstract**

In a November, 1983 article published in the Florida Bar Journal, I discussed the issue of continued alimony payments to a recipient cohabiting with a third party.

**KEYWORDS:** life, marriage, legal

# Post-Dissolution Cohabitation of Alimony Recipients: A Legal Fact of Life

**Evan J. Langbein***

In a November, 1983 article published in the Florida Bar Journal, I discussed the issue of continued alimony payments to a recipient cohabiting with a third party.[1] The article concluded with an assessment that the issue "appears here to stay."[2]

A re-examination of legal developments since then persuades me to a more definite conclusion: unmarried cohabitations following a dissolution of marriage is a legal fact of life. Cohabitation is an amorphous legal and social phenomenon. It lacks the legal certainty and consequences of a remarriage, but often reflects an endurance and interpersonal commitment outlasting remarriage.

Because the concept of unwed cohabitation is nebulous, it is not surprising that court decisions dealing with the problem furnish no clear legal doctrines. Traditionally, courts have found less difficulty dealing with *de jure* remarriage of an alimony recipient. The almost automatic legal consequence is termination of alimony payments by the former spouse making payments.[3] This is particularly true when the

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1. Langbein, *Post-Dissolution Cohabitation: "The Best of Both Worlds"?*, 57 FLA. BAR J. 656 (1983).

2. *Id.* at 658.

3. *See* Greene, *Termination of Rehabilitative Alimony Upon Remarriage: Questions, But No Answers*, 60 FLA. BAR J. 25 (Dec. 1986); Duttenhofer v. Duttenhofer, 474 So. 2d 251 (Fla. 3d Dist Ct. App. 1985) *rev. denied*, 482 So. 2d 348 (Fla. 1987); Wright v. Wright, 509 So. 2d 328 (Fla. 3d Dist. Ct. App. 1987), *reh'g granted*, 509 So. 2d 329 (Fla. 3d Dist. Ct. App. 1987), *cause dismissed*, 575 So. 2d 231 (Fla. 1987).

The court has certified its decision in *Wright* to the Florida Supreme Court as one of great public importance. The certified question is:

alimony is characterized as *permanent* or *periodic*, as opposed to *lump sum* or *rehabilitative* alimony payments.[4]

The rationale for this virtually certain result has historic roots. Alimony was an outgrowth of the ecclesiastical courts.[5] A husband held a "duty" to support and maintain his wife which survived divorce from "bed to board." A concomitant "condition" of this obligation to support was the notion that the wife maintain her "chastity." Thus, remarriage meant the termination of both the ex-wife's "chastity" and ex-husband's "duty."

The evolution of more equal roles and legal status for women changed the focus of the post-dissolution "duty." Modern constitutional development of privacy rights would make a decision of continued alimony based on the sexual habits of either a man or woman highly suspect.[6] Today, the import of remarriage is that a new spouse assumes a former spouse's "duty" to support the recipient spouse.[7]

As Professor Oldham observes, people who marry take vows to love one another "for richer and poorer."[8] Therefore, even if a new marital partner does not possess the economic wherewithal of an alimony payor, the alimony recipient remarries "for better or worse",

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May the trial court consider the wife's forfeiture of alimony upon remarriage as a factor in determining "whether alimony will be awarded and the amount of alimony" upon dissolution of the subsequent marriage? Wright v. Wright, 509 So. 2d 329, 334 (Fla. 3d Dist. Ct. App., 1987).

4. *Id.*; Kissinger v. Mason, 436 So. 2d 1049 (Fla. 1st Dist. Ct. App. 1983); Faircloth v. Faircloth, 449 So. 2d 412 (Fla. 2d Dist. Ct. App. 1984); *Compare* Jantzen v. Cotner, 513 So. 2d 683 (Fla. 3d Dist. Ct. App. 1987) and English v. Galbreath, 462 So. 2d 876 (Fla. 2d Dist. Ct. App. 1985).

5. *See* Gottsegan v. Gottsegan, 492 N.E.2d 1133, 1136-38 (Mass. 1986), for an excellent history of the legal development of alimony.

6. *See* Justice Simms' dissent in Roberts v. Roberts, 657 P.2d 153, 158 (Okla. 1983) (Simms, J. dissenting), arguing that modification of alimony payments based on cohabitation is based on impermissible considerations of lifestyle, not economic necessity.

7. Ironically, Florida's Third District Court of Appeal does not believe the new spouse's "duty" is such that upon dissolution of the *second* marriage the "sacrifice" of alimony payments from the original payor should be shifted to the new spouse or even deemed a factor in establishing alimony payments of the second spouse. *See*, Duttenhofer v. Duttenhofer, 444 So. 2d 251 (Fla. 3d Dist. Ct. App. 1985), *rev. denied* 482 So. 2d 398 (Fla. 1987) and Wright v. Wright, 509 So. 2d 328 (Fla. 3d Dist. Ct. App. 1987), *reh'g granted* 509 So. 2d 329 (Fla. 3d Dist. Ct. App. 1987), *cause dismissed*, 515 So. 2d 231 (Fla. 1987).

8. Oldham, *Cohabitation by an Alimony Recipient Revisited*, 20 J. FAM. L. 615 (1981-82).

knowing the consequences.

Some states do not *automatically* terminate alimony upon remarriage, but place the "extraordinary" burden on the recipient to justify continued payments; one such circumstance may be the inability of the subsequent spouse to furnish support.[9] Even in these states, however, the legal consequences of cohabiting outside of wedlock likely are considerably less than remarriage.

First, there are evidentiary problems establishing cohabitation justifying even a modification of alimony payments to the recipient. Those states having statutory provisions terminating alimony to a recipient for cohabitation often require proof that the relationship is "open" or "continuous" or "conjugal."[10] Consequently, proof of a cohabitation case may resurrect the pre-no-fault divorce era of private investigators marshalling evidence of "fault" or "cruelty" or "adultery" or the like. In post-dissolution modification cases the alimony payor must present evidence *both* of changed lifestyle (i.e., the relationship resembles a "de facto" marriage) and changed economic circumstances resulting from cohabitation.

At least two states, California and Tennessee, have statutes which assist the alimony payor by establishing a presumption of changed economic circumstances stemming from an unwed cohabitation relationship.[11] Recent Florida cases contain dicta indicating that "unmarried

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9. *See In re* Marriage of Schober, 379 N.W. 2d 46 (Iowa Ct. App. 1985); Bisig v. Bisig, 469 A. 2d 1348 (N.H. 1983). Query: If the new marriage is a short term one, should the alimony recipient receive reinstatement from the original payor when the support "duty" of the new marital partner is severed by dissolution: Predictably, in Florida such a step in the law would be deemed too radical. In *Duttenhofer*, 474 So. 2d 251, 255 (Fla. 3d Dist. Ct. App. 1985), the court quoted Hanzelik v. Hanzelik, 294 So. 2d 116, 119 (Fla. 4th Dist. Ct. App. 1974): "Life itself is a kaleidoscope of changing position with the expectation of success and happiness and no guarantee of monetary reward." The problem this author has with such a statement in the context of post-dissolution cases is that modification statutes like FLA. STAT. § 61.14 (1985) contemplate increasing or decreasing support payments based on "changed circumstances or the financial ability of the parties." Thus, the public policy demands court consideration of life's "kaleidoscope of changing position[s]." *Id.*

10. *In re* Marriage of Sappington, 106 Ill. 2d 456, 478 N.E.2d 376 (Ill. 1985); Thomas v. Thomas, 440 So. 2d 879 (La. Ct. App. 1983), *cert. denied*, 443 So. 2d 597 (La. 1983).

11. CAL. CIV. CODE § 4801.5(b) (Deering 1984); TENN. CODE ANN. § 36-820(a)(3) (1982 Cum. Supp.); *see also*, Azbill v. Azbill, 661 S.W. 2d 682 (Tenn. Ct. App. 1983).

cohabitation raises a presumption of changed circumstances. . . ."[12] However, another Florida decision refused to terminate alimony payments predicated on evidence the ex-wife was "permanently residing with a non-related adult male."[13] The court observed neither post-dissolution adultery or fornication may formulate a basis for modifying alimony payments, and permanent alimony "may be modified by a showing of the petitioning party of a substantial change of circumstances."[14]

A New York court declared that termination of alimony payments constitutes a "forfeiture"; thus, allegations of cohabitation require even a higher quantum of proof (i.e., clear and convincing evidence) before an equity court should determine a forfeiture of support payments.[15]

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12. DePoorter v. Depoorter, 509 So. 2d 1141, 1144 (Fla. 1st Dist. Ct. App. 1987); Schneider v. Schneider, 467 So. 2d 465 (Fla. 5th Dist. Ct. App. 1985).

The court has raised questions regarding the correctness of its *Schneider* decision. *See*, Lowry v. Lowry, 512 So. 2d 1142 (Fla. 5th Dist. Ct. App. 1987). A split panel in *Lowry* debated whether a "de facto" marriage should be governed by the same "rule of law" governing "de jure" marriages. Judge Sharp opined in her special concurring opinion:

> . . .Whether a former spouse has a boyfriend, girlfriend, or *de facto* spouse is an issue which opens a Pandora's box for speculation at trial, since neither term has any legal definition, nor (prior to this opinion) any legal significance. The law of Florida creates no legal rights or duties between live-ins. Why, then, should a duty (support) created by a lawful marriage be terminated by such a relationship? Must a divorced spouse remain forever celibate or stand to forfeit rights to alimony? The shoe which has not yet been dropped in Florida — palimony — may then have a reason to leap into being, were the family law of this state to be as stated by the majority. The critical factor in this case is that the live-in companion did not economically alter the former wife's situation regarding her level of support or financial status.

*Id.* at 1144. The majority viewpoint in the *Lowry* case is not consistent with decisions of other Florida appellate courts. *See DePoorter v. DePoorter*, 509 So. 2d 1141 (Fla. 1st Dist. Ct. App. 1987); Sheffield v. Sheffield, 310 So. 2d 410 (Fla. 3d Dist. Ct. App. 1975); Stuart v. Stuart, 385 So. 2d 134 (Fla. 4th Dist. Ct. App. 1980), *cert. denied* 328 So. 2d 844 (Fla. 1976). It appears the Florida Supreme Court ultimately may have to provide uniformity and clarity to Florida law relating to post-dissolution cohabitation relationships.

13. Kenyon v. Kenyon, 496 So. 2d 839, 840 (Fla. 2d Dist. Ct. App. 1986), *rev. denied*, 506 So. 2d 1042 (Fla. 1987).

14. *Id.* at 841.

15. Brown v. Brown, 122 Misc. 2d 849, 472 N.Y.S.2d 550 (1984), *modified, remanded*, 122 A.D.2d 762, 505 N.Y.S.2d 648 (1986), *app. dismissed*, 70 N.Y.S.2d 750, 514 N.E. 1374 (1987).

The cases demonstrate nice distinctions by the courts with "elusive" facts to determine sufficient permanence, continuity, commitment and unity to justify fact findings by the court of a cohabitation relationship. One court held that cohabitation is a "question of fact", and the trial court's findings will not be disturbed unless unsupported by the evidence.[16]

The resolution by trial judges of disputed facts (at times involving inferences of private and intimate facts arising from evidence of personal lifestyle) can have significant and varying economic consequences to both alimony payor and recipient. For example, the Illinois Supreme Court terminated alimony payments to the ex-wife in the sum of $750.00 per month because the court found she cohabited "with another person on a resident, continuing conjugal basis" within the meaning of a Draconian Illinois statute mandating termination for such a lifestyle.[17] The marriage had spanned thirty years. The cohabitation lasted approximately two years. The ex-wife's cohabitant testified he was impotent. The court, however, ruled the statute did not require sexual relations, because it "is predicated upon a need for support."[18] If it is true that elimination of continued alimony for cohabitation is based on economic necessity, should not the determination of a modification be based on evidence of reduced need, not irrational *per se* rules of law which conclusively presume there no longer is a "need for support" once a cohabitation relationship exists?

The Illinois decision demonstrates an absence of uniformity among the courts of the precise legal meaning for "cohabitation." Professor Oldham's definition of cohabitation includes a "continuing sexual relationship" with a residential partner.[19] Another court found that where the recipient had "nonexclusive" sexual and social relations with a man, received no support from him and performed no household duties, "cohabitation" did not exist.[20] Still another court determined that the absence of evidence that a man and woman living under the same roof were sharing expenses and the same bed indicated they "do not func-

16. Fuller v. Fuller, 10 Ohio App. 3d 253, 461 N.E.2d 1348 (Ohio Ct. App. 1983).

17. *See* In re Marriage of Sappington, 106 Ill. 2d 456, 478 N.E.2d 376, 378 (1985). A dissenting justice observed that if Mrs. Sappington's marital relationship were similar to her relationship with an impotent companion it was small wonder her marriage of thirty years had ended. *Id.* at 461, 478 N.E.2d at 382.

18. *Id.* at 458, 478 N.E.2d at 378.

19. *See* Oldham, *supra* note 8 at 653.

20. Schloss v. Schloss, 682 S.W. 2d 53 (Mo. App. Ct. 1984).

tion as an economic unit."[21]

In Louisiana, cohabitation is defined by statute as "open concubinage."[22] The term has been defined to mean a "status or relationship" akin to marriage, to-wit: de facto marriage. Consequently, even "habitual relations involving sex" between live-in lovers does not necessarily mean a "verifiable concubinage" exists. Factors such as whether the sex partners share rental payments, maintain separate residences or keep toiletries in the same place may determine whether an alimony recipient's payments continue.

The issue of lifestyle (i.e., whether in fact a cohabitation relationship exists *ab initio*) and the issue of reduced economic necessity are often difficult to separate. This difficulty perhaps accounts for differing and sometimes emotional reactions of individual judges to the cohabitation issue. Thus, the Supreme Court of Massachusetts stated that the court's discretion in reducing alimony payments "is limited to the economic — not the social — circumstances of the parties."[23]

A dissenting judge in Oklahoma opined that even consideration of reduced need arising from cohabitation is pretextual because the court's real concern is punishment for a lifestyle it finds offensive. This judge stated that alimony is not reduced simply because a recipient's economic needs are supplemented by family members or even paramours who do not share the same residence.[24]

Other dissenting judges, however, take issue with their brethren for granting "approbation to an offensive practice pervading our society."[25] A Florida dissenting judge stated, "As a matter of public policy, I do not think persons who legitimize their relationships should be penalized, while persons who do not, are not."[26]

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21. Scharnweber v. Scharnweber, 65 N.Y. 2d 1016, 494 N.Y.S. 2d 100, 484 N.E. 2d 129 (1985).

22. Thomas v. Thomas, 440 So. 2d 879, 880 (La. Ct. App. 1983); LA. CIV. CODE ANN. art. 160.

23. Gottsegan v. Gottsegan, 397 Mass. 617, 492 N.E.2d 1133, 1138 n. 8 (1986); *but see*, Bell v. Bell, 393 Mass. 20, 468 N.E. 2d 859 (1984) (indicating parties by private property settlement agreements may agree post-dissolution cohabitation alone, without considering reduced economic need, may result in termination of support benefits).

24. Roberts v. Roberts, 657 P.2d 153, 158 (Okla. 1980) (Simms, J. dissenting).

25. Lydic v. Lydic, 664 S.W. 2d 941, 943 (Ky. Ct. App. 1983) (Miller, J. dissenting).

26. Schneider v. Schneider, 467 So. 2d 465 at 468 (Fla. 5th Dist. Ct. App. 1985).

A recent Florida decision, *DePoorter v. DePoorter*,[27] reflects a more objective, unemotional and comprehensive approach to the cohabitation issue. The court's analysis in *DePoorter* might serve as a model for analysis of *all* post-dissolution living arrangements whether they be characterized as "de jure" remarriages, "de facto" remarriages or lesser cohabitation arrangements.

In *DePoorter*, the trial court reduced alimony payments from $1,000.00 to $600.00, finding a de facto marriage reduced the ex-wife's financial needs. The ex-husband was a retired Army colonel who upon retirement earned a net income of almost $4,000.00 per month. The marriage had lasted 28 years. A property settlement agreement contemplated permanent periodic alimony of $1,000.00 per month, terminable only if "the Wife dies or remarries."[28] Mrs. DePoorter was living with a man and sharing expenses. Her ex-husband alleged her companion was a man of substantial means. However, the evidence indicated that economic hardship itself contributed to the decision to cohabit with a third party. Mrs. DePoorter terminated working due to poor health since the dissolution and her daughter and grandchildren also were residing with her due to a divorce.

The court emphasized that the property agreement omitted termination of benefits based on cohabitation and that the record did not indicate the trial court had evaluated all factors in reaching its determination that a substantial change in circumstances had been demonstrated. The court said the length of the marriage, the respective contributions to the marriage, the parties' earning capacities (as well as that of any new cohabitant or spouse), the property received in the dissolution, and even the "clean hands" doctrine (i.e., whether the payor is in arrears at the time he or she seeks a modification), all should be considered in determining whether changed circumstances exist. The court reversed and remanded for reconsideration and new findings of fact on all pertinent factors.

The court in *DePoorter* recognized that a permanent alimony sum which the parties deem "reasonable" by agreement — or which the court may deem "reasonable" by its order — is not made "unreasonable" simply by the fact of cohabitation. Many cases recognize that permanent alimony awards should be generous enough to assure that the recipient leaves the marriage able to enjoy a standard of living com-

27. DePoorter v. DePoorter, 509 So. 2d 1141 (Fla. 1st Dist. Ct. App. 1987).
28. *Id.* at 1143.

mensurate with the lifestyle held during the marriage.[29] There is, however, a corollary problem that many times, as a practical matter, "two living separately most likely cannot live as cheaply as two living together."[30]

Therefore, an alimony recipient may turn to third parties, either friends or family members or cohabitants, to supplement his or her income and to enable a lifestyle commensurate with his or her accustomed economic stratum. If that is so, why should the court penalize a recipient because he or she shares the same residence (or the same bedroom) when it would not do so if the third party supplementing a recipient's support resided elsewhere?

The court's emphasis in *DePoorter* was that the test must be much broader than a mere "de facto marriage" test in terminating, reducing or suspending alimony payments for cohabitation. Often an alimony recipient sacrificed his or her earning capacity during the remarriage to assume more (or less) traditional marital roles. If so, economic support from a cohabitant after dissolution may be supplementing a deficient earning ability that even alimony payments are incapable of sustaining.

Another factor is whether there are children's interests which may be directly or indirectly affected by the elimination or reduction in alimony support payments. Still another concern is whether the distribution of property at the time of dissolution may have enabled the recipient to keep pace with his or her needs in the absence of an economic relationship involving cohabitation.

## Conclusion

The case of *DePoorter v. DePoorter* highlights the fact that a cohabitation relationship usually is never so simple that alimony benefits should be modified simply because such a relationship exists. The "new respectability" of cohabitation stems from the fact that it obtained more recent popularity with the middle class; cohabitation had been practiced by the poor well before its heightened social acceptance.[31] Unquestionably, there are social and economic factors encouraging cohabitation by alimony recipients, and it may be far too simplistic simply to condemn such relationships as "discouraging" the institution of

29. *E.g.*, Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980); DeCenzo v. DeCenzo, 433 So. 2d 1316 (Fla. 3d Dist. Ct. App. 1983).

30. Schneider v. Schneider, 467 So. 2d 465, 467 (Fla. 5th Dist. Ct. App. 1985).

31. *See*, Oldham, *supra* note 8 at 618.

marriage, or as a "fraud" on alimony payors.

Certainly there are cases when cohabitation may result not in *maintenance* of economic well-being, but indeed in substantial economic *improvement*. In those cases, the court should be prepared to modify alimony just as it would in any case when the evidence demonstrates improved economic circumstances. It is also true that post-dissolution relationships, whether "de jure" or "de facto" marriages or other forms of cohabitation, may come to end, sometimes rapidly, and the court should retain the flexibility under modification statutes to deal with unanticipated economic diminution when cohabitation relationships terminate.

Equity cases always have required the avoidance of dogmatic approach to any circumstances. The particular circumstances of the case should determine the court's equitable resolution, and not blind legal doctrine or inflexible statutory answers for complex legal and social questions.