LIVING WITH THE CONSEQUENCES: THE NEW JERSEY SUPREME COURT FINDS COHABITATION PROVISIONS ENFORCEABLE

In the area of divorce law, the judiciary in New Jersey has often walked a tightrope, attempting to balance the competing forces of freedom of contract and the need for equity and fairness in the resolution of domestic disputes.[1] This balancing act has been

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[1] This judicial balancing arguably began with *Schlemm v. Schlemm*, 31 N.J. 557, 158 A.2d 508 (1960). In *Schlemm*, the New Jersey Supreme Court recognized the Superior Court's power to order the specific performance of spousal support agreements. *See id.* at 581-82, 158 A.2d at 522. The court averred that such agreements between spouses are "at least as binding as a privately executed written contract between them." *Id.* at 582, 158 A.2d at 522. The *Schlemm* court emphasized, however, that courts should direct the specific performance of support agreements only "to the extent that they are just and equitable." *Id.* Provided with few guidelines regarding how the contract/equity weighing process should be performed following *Schlemm*, courts struggled to apply the rule. *See, e.g.*, Schiff v. Schiff, 116 N.J. Super. 546, 283 A.2d 131 (App. Div. 1971). In *Schiff*, the appellate division, taking a cue from the *Schlemm* court's likening of support agreements to other privately held contracts, drew a sharp distinction between consensual separation agreements and those determined by judicial decree. *See id.* at 560-61, 283 A.2d at 138-39. The *Schiff* court asserted that greater deference should be given to the former and that "[a] far greater showing of changed circumstances must be made" before the court will modify such consensual agreements. *Id.* at 561, 283 A.2d at 139.

The *Schiff* rule was summarily rejected in *Smith v. Smith*, 72 N.J. 350, 360, 371 A.2d 1, 6 (1977). In *Smith*, the New Jersey Supreme Court declared that, in determining the need for modification, courts should treat equally support arrangements arrived at consensually and those imposed by court order. *See id.* The *Smith* court held that "[i]n each case the court must determine what, in the light of all the facts presented to it, is equitable and fair, giving due weight to the strong public policy favoring stability of arrangements." *Id.* The *Smith* court explained that "trial judges should have the utmost leeway and flexibility in determining what is just and equitable in making allocations of marital assets . . . ." *Id.* Three years later, the New Jersey Supreme Court affirmed the rule set down in *Smith*. *See* Lepis v. Lepis, 83 N.J. 139, 148, 416 A.2d 45, 49 (1980). The *Lepis* court opined that

> [i]nitially it might appear that this rule would diminish the advantages of separation and property settlement agreements, since they would provide no greater certainty or stability than a judicial determination. However, granting a greater degree of permanence to negotiated agreements would tend to make them a riskier arrangement for spouses who are likely to be harmed by changed circumstances. Typically, they have been spouses who are economically dependent; they generally have been wives with custody of children. Often consensual agreements would not be in their best interests if only

performed against a backdrop of the liberalization of divorce laws,[2] rising rates of divorce,[3] and dramatic changes in gender and domestic

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> "unconscionable" circumstances would warrant modification. As we recognized in rejecting *Schiff*, contract principles have little place in the law of domestic relations.

Id., 416 A.2d at 49-50.

In 1984, the New Jersey Supreme Court appeared to retreat to a more contract-friendly position. *See* Faherty v. Faherty, 97 N.J. 99, 477 A.2d 1257 (1984). In *Faherty*, the court held that arbitration provisions in settlement agreements are valid and enforceable. *See id.* at 108, 477 A.2d 1262. The court reasoned that, because arbitration is statutorily recognized as a valid means of resolving contract disputes, no policy rationale prevented divorcing couples from arbitrating their disputes. *See id.* at 107, 477 A.2d at 1261-62. While the *Faherty* court discussed equitable considerations in relation to arbitrating child custody and support issues, such considerations were far less prominent in the court's evaluation of the arbitration of alimony disputes. *See id.* at 107-11, 477 A.2d at 1261-63. With respect to arbitration provisions contained in spousal support agreements, the court in *Faherty* declared that "[i]t is fair and reasonable that parties who have agreed to be bound by arbitration in a formal, written separation agreement should be so bound." *Id.* at 107, 477 A.2d at 1262. In contrast, the appellate division held that an anticohabitation provision in a settlement agreement could be unenforceable. *See* Melletz v. Melletz, 271 N.J. Super. 359, 368, 638 A.2d 898, 903 (App. Div. 1994). In reaching this conclusion, the court emphasized that courts should enforce settlement agreements only to the extent that those agreements are fair, equitable, and just. *See id.*; *see also* ROSEMARIE BELLO-TRULAND ET AL., DOMESTIC LAW IN NEW JERSEY 51-61 (1992) (summarizing New Jersey law regarding alimony, maintenance, and child support); Sally Burnett Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399, 1399 (1984) ("Nowhere are the tensions between [the principles of marriage and the principles of the economic marketplace] more obvious than in the continuing attempts of the law to accommodate freedom to contract . . . with restrictions on the ability of spouses to contract with regard to dissolution of marriage.").

[2] *See generally* J. HERBIE DIFONZO, BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA (1997) (tracing the changing culture of divorce in America during the twentieth century by exploring the events and shifts in attitudes leading up to dramatic reforms in divorce law, the no-fault divorce revolution, and its aftermath); *see also* Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773, 783-84 (1996). Ellman argues that remnants of the fault-based divorce system remained even after divorce law reform in many states. *See id.* With respect to the continued presence of fault in alimony and support arrangements, Ellman states that

> [a]limony, in contrast, has undergone no widespread reforms in basic theory analogous to the joint ownership or marital property movement in common law states. Its change of name from alimony, to maintenance or spousal support, was intended by many reformers to signal the law's movement away from divorce laws based on fault and gender roles, but the idea of "need" upon which the reformed support claim was to be based did not always carry enough weight to complete this transition. Unlike marital property, the alimony claim remained largely discretionary in both entitlement and amount. In a system with few bright lines, or even dim ones, it is not surprising that spousal conduct would often be included, along with everything else, among the open-ended list of factors that a court may consider. In that sense,

> fault's continued presence in the alimony law of these states reflects, more than anything else, the primitive state of alimony law generally.

Id.

Moreover, "[j]udgments about individual responsibility within marriage survive in a variety of divorce law contexts, from grounds, to alimony, to property distribution, to the related context of child custody." *See* Barbara Bennett Woodhouse, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Area*, 82 GEO. L.J. 2525, 2532 (1994). Woodhouse observes that, while almost all states allow spouses to divorce without any showing of fault on the part of either party, many jurisdictions consider fault when determining appropriate property division or support obligations. *See id.* Woodhouse also highlights the existence of fault divorce as an option in many states, where fault and no-fault grounds have been combined to create "hedged no-fault" systems. *See id.*

For a critique of the divorce revolution, see Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67 (1993). Starnes laments that the shift to a no-fault divorce scheme "is not good news for approximately sixteen million married women who are not employed outside their homes because they are 'keeping house.'" *Id.* at 70. The women most at risk, according to Starnes, are homemakers or "the heroines of the Betty Crocker Culture." *Id.* Starnes argues that mothers of young children and other women who have assumed the role of primary caretaker also face substantial risk in light of the fact that the women's responsibilities at home have limited their career choices and possibilities for advancement. *See id.* Starnes states that "[i]f their marriages end, these women may learn the true meaning of 'the divorce revolution' as they are judged by divorce courts determined to implement the fashionable rhetoric that men and women are equal." *Id.*; *see also* Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1 (1987). Kay argues that treating men and women differently may be appropriate in the context of "traditional" marriages in which wives are almost wholly dependent on their husbands. *See id.* at 4. The author explains that "[w]omen's dependency upon their husbands for part or all of their support during marriage, together with their willingness to assume their traditional role as caretakers of children, are the social and cultural constraints that give rise to their vulnerability at divorce." *Id.* at 79.

[3] While the divorce rate in the United States has been stable since 1988, it rose steadily from 2.5 divorces per 1000 persons in 1966 to a high of 5.3 in 1979 and 1981. *See* 43 NATIONAL CENTER FOR HEALTH STATISTICS, ADVANCE REPORT OF FINAL DIVORCE STATISTICS, 1989 and 1990, MONTHLY VITAL STATISTICS REPORT 9, Supplement (1995). In 1993, the latest date for which data are available, the rate was 4.6. *See id.* For a comparison of divorce trends among nations, see generally WILLIAM J. GOODE, WORLD CHANGES IN DIVORCE PATTERNS (1993). For an economic perspective on the interplay between legal rights and divorce rates, see Simon Clark, *Law, Property, and Marital Dissolution*, 109 ECON. J. C41 (1999). Clark asserts that "[h]ow assets and resources are allocated within a marriage, and on dissolution, plays a central role in the analysis [of divorce law]. These two branches of the law define resource rights that determine the gains and losses from divorce, and these rights are also important in determining whether divorce occurs." *Id.* at C42. Clark concludes that divorce law reform and property law reform must be considered concurrently in order for legislators to avoid unintended, negative policy consequences. *See id.* at C53. For an interesting discussion of the evolution of divorce in a distinctively broader context, see RODERICK PHILLIPS, PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY (1988). Commenting on the connection between reforms in divorce law and increased levels of divorce, Phillips notes that

roles during the past forty years.[4] The resulting, sometimes disharmonious, patchwork quilt of decisions is hardly surprising.[5]

In New Jersey, there has long been a strong public policy favoring voluntary agreements to resolve marital conflicts.[6] Likewise,

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> divorce law reforms had little or nothing to do with setting off the most recent divorce rate increases. In almost all countries divorce rates had begun to rise before legal reforms were enacted or came into force, and the widespread introduction of no-fault divorce legislation during the 1970s was partly a response to increasing divorce, not a cause of it.

Id. at 620. In contrast, Phillips cites the entrance of women into the workforce as a key factor in the upswing in divorce rates. *See id.* In connecting women's increased presence in the labor market and rising divorce rates, Phillips remarks that, "[a]lthough the directions of influence or causality between the two trends must remain speculative at the social level, the suggested links are convincing enough." *Id.* at 622.

[4] *See generally* DIFONZO, *supra* note 2 (chronicling the evolution of divorce law in the twentieth century).

[5] *See* Gayet v. Gayet, 92 N.J. 149, 153-55, 456 A.2d 102, 104-05 (1983) (holding that cohabitation by a dependent spouse constitutes changed circumstances as an initial showing for a modification of alimony, but that the test for modification is the economic need of the dependent spouse); Mahoney v. Mahoney, 91 N.J. 488, 501, 453 A.2d 527, 534 (1982) (recognizing the concept of reimbursement alimony when one spouse during the marriage financially contributed to the other's attainment of a professional degree); Crowe v. De Gioia, 90 N.J. 126, 133, 447 A.2d 173, 177 (1982) (holding that support agreements between unmarried cohabitants are enforceable); Petersen v. Petersen, 85 N.J. 638, 643-44, 428 A.2d 1301, 1303-04 (1981) (declaring that escalation clauses contained in support agreements were not invalid per se, but were subject to an inquiry into whether enforcement would be fair and equitable); Lepis v. Lepis, 83 N.J. 139, 149, 416 A.2d 45, 50 (1980) ("The equitable authority of a court to modify support obligations in response to changed circumstances, regardless of their source, cannot be restricted."); Smith v. Smith, 72 N.J. 350, 358, 371 A.2d 1, 5 (1977) (finding that when equitable distribution is sought pursuant to a new statute concerning alimony, an earlier settlement agreement will be a bar to the extent that it is a "property agreement" and is shown to be fair and equitable); Berkowitz v. Berkowitz, 55 N.J. 564, 569, 264 A.2d 49, 52 (1970) (holding that courts have discretion to modify settlement agreements "upon a showing of changed circumstances"); *Schlemm*, 31 N.J. at 581-82, 158 A.2d at 522 (1960) (ruling that settlement agreements are specifically enforceable to the extent that they are fair and equitable); *Melletz*, 271 N.J. Super. at 368, 638 A.2d at 903 (finding anticohabitation provisions of settlement agreements unenforceable to the extent that they stray from economic standards); Garlinger v. Garlinger, 137 N.J. Super. 56, 64, 347 A.2d 799, 803 (App. Div. 1975) (holding that, if it can be shown that a former spouse is being financially supported in whole or in part by a cohabitant, the supporting spouse may ask the court to reduce or extinguish support obligations).

[6] *See, e.g.*, Smith v. Smith, 72 N.J. 350, 358, 371 A.2d 1, 5 (1977). In *Smith*, the court declared that "fair and definitive arrangements arrived at by mutual consent should not be unnecessarily or lightly disturbed." *Id.*; *see also* Faherty v. Faherty, 97 N.J. 99, 477 A.2d 1257 (1984). In *Faherty*, the New Jersey Supreme Court concluded that arbitration clauses in separation agreements are enforceable. *See id.* at 107, 477 A.2d at 1262. The court noted that the "[e]nforcement of arbitration clauses pertaining to alimony . . . is a logical extension of the view . . . that parties should be granted as much autonomy as possible in the ordering of their personal lives." *Id.*

a policy supporting the "stability of arrangements" in the marital area has also developed in the state.[7] Furthermore, New Jersey courts have held that divorce settlement agreements are specifically enforceable in equity.[8]

Tempering the "hands-off" approach to divorce settlement, title 2A, section 34-23 of the New Jersey Statutes requires that a dependent spouse receive alimony to maintain his or her standard of living and also reserves for the judiciary the right to modify such alimony awards.[9] Moreover, the New Jersey Legislature deemed a new

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[7] *See Smith*, 72 N.J. at 360, 371 A.2d at 6. The *Smith* court stated that "[i]n each case the court must determine what, in the light of all the facts presented to it, is equitable and fair, giving due weight to the strong public policy favoring stability of arrangements." *Id.*; *see also* Petersen v. Petersen, 85 N.J. 638, 428 A.2d 1301 (1981). The *Petersen* court observed that

> [i]t would be shortsighted and unwise for courts to reject out of hand consensual solutions to vexatious personal matrimonial problems that have been advanced by the parties themselves. Voluntary accommodations regarding matrimonial differences are highly desirable and make a major contribution to the fulfillment of "the strong public policy favoring stability of arrangements."

Id. at 645, 428 A.2d at 1304 (citations omitted).

[8] *See* Schlemm v. Schlemm, 31 N.J. 557, 581-82, 158 A.2d 508, 522 (1960) (recognizing the court's "power to direct the specific performance of the terms of husband-wife support agreements to the extent that they are just and equitable"). The term "equity" is defined as:

> Fairness; impartiality; evenhanded dealing . . . . The body of principles constituting what is fair and right; natural law . . . . The recourse to principles of justice to correct or supplement the law as applied to particular circumstances . . . . The system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law . . . .

BLACK'S LAW DICTIONARY 560 (7th ed. 1999).

[9] *See* N.J. STAT. ANN. § 2A:34-23 (West 1987). The statute states in part that

> [p]ending any matrimonial action brought in this State or elsewhere, or after judgment of divorce or maintenance, whether obtained in this State or elsewhere, the court may make such order as to the alimony or maintenance of the parties . . . as the circumstances of the parties and the nature of the case shall render fit, reasonable and just . . . .

Id. The statute also lists the factors to be considered when determining the appropriate amount of alimony to be awarded, including:

> (1) The actual need and ability of the parties to pay; (2) The duration of the marriage; (3) The age, physical and emotional health of the parties; (4) The standard of living established in the marriage and the likelihood that each party can maintain a reasonably comparable standard of living; (5) The earning capacities, educational levels, vocational skills, and employability of the parties; (6) The length of absence from the job market of the party seeking maintenance; (7) The parental responsibilities for the children; (8) The time and expense necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, the

marriage by the dependent party so significant a change in life circumstances as to require automatic termination of alimony.[10]

Recently, the New Jersey Supreme Court was confronted with the issue of whether cohabitation,[11] like marriage, should trigger the

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availability of the training and employment, and the opportunity for future acquisitions of capital assets and income; (9) The history of the financial or non-financial contributions to the marriage by each party including contributions to the care and education of the children and interruption of personal careers or educational opportunities; (10) The equitable distribution of property ordered and any payouts on equitable distribution, directly or indirectly, out of current income, to the extent this consideration is reasonable, just and fair; and (11) Any other factors which the court may deem relevant.

N.J. STAT. ANN. § 2A:34-23 (West Supp. 1999). Finally, and perhaps most significantly, the code contains the following passage with regard to modification of an alimony award:

> An award of rehabilitative alimony may be modified based either upon changed circumstances, or upon the nonoccurrence of circumstances that the court found would occur at the time of the rehabilitative award. This section is not intended to preclude a court from modifying permanent alimony awards based upon the law.

Id. New Jersey courts have recognized both rehabilitative alimony and reimbursement alimony. *See* BELLO-TRULAND, *supra* note 1, at 54. The authors explain that "[t]he purpose of rehabilitative alimony is to permit the enhancement and improvement of the earning capacity of the supported spouse." *Id.* Reimbursement alimony, on the other hand, may be appropriate "where one spouse has financially supported the other's efforts to obtain a professional degree or license." *Id.*; *see also* Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527 (1982). In *Mahoney*, the court introduced the concept of reimbursement alimony by explaining "that regardless of the appropriateness of permanent alimony or the presence or absence of marital property to be equitably distributed, there will be circumstances where a supporting spouse should be reimbursed for the financial contributions he or she made to the spouse's successful professional training." *Id.* at 501, 453 A.2d at 534. The court noted that reimbursement alimony consisted of "all financial contributions towards the former spouse's education, including household expenses, educational costs, school travel expenses and any other contributions used by the supported spouse in obtaining his or her degree or license." *Id.*

[10] *See* N.J. STAT. ANN. § 2A:34-25 (West Supp. 1999). The statute provides in relevant part:

> If after the judgment of divorce a former spouse shall remarry, permanent alimony shall terminate as of the date of remarriage except that any arrearages that have accrued prior to the date of remarriage shall not be vacated or annulled. A former spouse who remarries shall promptly so inform the spouse paying permanent alimony as well as the collecting agency, if any.

Id.

[11] While the term is defined in a variety of ways, "cohabitation [is] [t]he fact or state of living together, esp[ecially] as partners in life, usu[ually] with the suggestion of sexual relations." BLACK'S LAW DICTIONARY 254 (7th ed. 1999); *see also* DAVID B. LARSON ET AL., THE COSTLY CONSEQUENCES OF DIVORCE: ASSESSING THE CLINICAL, ECONOMIC, AND PUBLIC HEALTH IMPACT OF MARITAL DISRUPTION IN THE UNITED STATES 31 (1995) (defining cohabitation as "the sharing of living quarters with a sexual

termination of alimony payments when a settlement agreement between divorcing spouses provides for such a termination.[12] In *Konzelman v. Konzelman*, the New Jersey Supreme Court held that cohabitation provisions of divorce settlement agreements are enforceable if found to be mutual, voluntary, and fair.[13]

Upon their divorce, Kathleen and Lawrence Konzelman, each with the benefit of counsel, entered into a property settlement agreement that contained a cohabitation provision.[14] The agreement provided that if Mrs. Konzelman cohabited with an unrelated male for a span of four continuous months, Mr. Konzelman's support obligation would end.[15] Approximately a year and a half after the divorce, Mr. Konzelman retained the services of Noel J. Kirkwood, a

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partner without a formal marriage agreement"). Larson and his co-authors note a marked increase in cohabitation, pointing out that "the proportion of first marriages that were preceded by cohabitation increased from 8 percent . . . in the late 1960's to 25 percent . . . by the late 1980's . . . . In 1992 the U.S. Census Bureau estimated that there were slightly more than 6 million unmarried, opposite-sex partners that were living together." *Id.* at 16 (citations omitted). Citing a 1991 study, the authors also state that "nearly half of women 25 to 34 years of age had cohabitated. The majority of women who had cohabitated had done so before marriage. Almost all of the younger women had cohabited before marriage, whereas more of the older women had cohabitated later (i.e., after a divorce or separation)." *Id.* at 18. In addition, the authors assert that, in terms of attitudes, cohabitation has enjoyed a consistently high acceptance rate throughout the eighties and nineties. *See id.* at 31. According to these authors, negative feelings toward cohabitation appear to be declining. *See id.* The authors found that "in 1992, only 4 percent of women agreed . . . that 'a man and a woman living together without being married are living in a way that could be destructive to society.' In contrast, more than twice this amount of women (9 percent) agreed with this statement in 1980." *Id.* (citations omitted).

Not surprisingly, courts in other jurisdictions have been confronted with similar issues of cohabitation and alimony. *See, e.g.*, Sara Z. Moghadam, Survey, *Dismissing the Purpose and Public Policy Surrounding Spousal Support*, 56 MD. L. REV. 927 (1997). Moghadam criticizes the Maryland Court of Appeals for failing "to acknowledge the purpose of spousal support and the numerous ways in which a spouse can use it to exert unjust and inappropriate control over the recipient's personal life." *Id.* at 927. The author argues that "[t]he court's failure to apply these policy considerations to its interpretation of the term 'cohabitation' will likely result in the disparate adjudication of future cases concerning the termination of spousal support." *Id.*; *see also* Sally Burnett Sharp, *Step by Step: The Development of the Distributive Consequences of Divorce in North Carolina*, 76 N.C. L. REV. 2017 (1998). Sharp describes a state statute in North Carolina that provides that spousal support will terminate if the dependent spouse is cohabiting. *See id.* at 2099. Commenting on the law, Sharp averred that "[t]o suggest that the legislature has opened a Pandora's box of remarkable and unfortunate proportions is to state the matter mildly." *Id.*

[12] *See* Konzelman v. Konzelman, 158 N.J. 185, 191, 729 A.2d 7, 10 (1999).

[13] *See id.* at 198, 729 A.2d at 14.

[14] *See id.* at 191, 729 A.2d at 10.

[15] *See id.* The agreement required Mr. Konzelman to pay Mrs. Konzelman $700 a month in support and maintenance. *See id.*

private investigator, to determine if Mrs. Konzelman was cohabiting with anyone.[16] The investigator observed Mrs. Konzelman's home for 127 days and reported that an "unrelated adult male," Roger Liput, appeared to be residing with Mrs. Konzelman.[17] Pursuant to the investigator's findings, Mr. Konzelman stopped making alimony payments.[18]

Mrs. Konzelman filed a Notice of Motion and certification that denied cohabitation and demanded that Mr. Konzelman resume paying alimony.[19] Mr. Konzelman responded by filing a cross-motion in which he sought to extinguish his support obligations.[20] Although Mr. Konzelman successfully established his ex-wife's cohabitation with Mr. Liput, the trial court held that the cohabitation provision in the settlement agreement, which called for termination of alimony, was invalid.[21] The trial court then conducted a plenary hearing to estimate the amount of financial support Liput was either providing to, or gaining from, Mrs. Konzelman.[22] As a result of this hearing, Mr. Konzelman's alimony payments were reduced by $170 per week.[23]

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[16] *See id.* In addition to Mr. Kirkwood, Mr. Konzelman hired L.S. Stephens, Inc., a private agency specializing in investigation. *See id.* L.S. Stephens, Inc. performed surveillance of Mrs. Konzelman's residence during the last week that Kirkwood monitored the home. *See id.*

[17] *See id.* Kirkwood observed Liput coming and going from the residence on a regular basis. *See id.* Liput was also observed performing chores on the property, answering the door at the house, using the garage door to gain access to the garage, and parking his car in the garage. *See id.* at 191-92, 729 A.2d at 10. Kirkwood also reported that Liput "picked up the newspaper on a regular basis" and "used Mrs. Konzelman's number as a contact number for members of his softball team." *Id.* at 192, 729 A.2d at 10. Mrs. Konzelman and Liput admitted that they had "a close, exclusive, 'romantic relationship'" and that they had spent at least thirty weekends a year and weekday nights together. *See* Konzelman v. Konzelman, 307 N.J. Super. 150, 154, 704 A.2d 591, 592-93 (1998).

[18] *See Konzelman*, 158 N.J. at 192, 729 A.2d at 10.

[19] *See id.* Mrs. Konzelman also demanded payment of arrearages. *See id.*

[20] *See id.* In support of his cross-motion, Mr. Konzelman supplied the court with certifications from four private investigators attesting to Mrs. Konzelman's cohabitation with Liput. *See id.* Mrs. Konzelman responded with certifications rebutting the statements of the private detectives. *See id.*

[21] *See id.*, 729 A.2d at 11. During the plenary hearing regarding the issue of cohabitation, which included 26 witnesses and lasted 13 days, Mr. Konzelman presented evidence that Mrs. Konzelman and Liput vacationed together, with Liput paying for most of the vacation expenses, that the couple spent holidays together, and that they shared a joint savings account. *See id.*, 729 A.2d at 10. In addition, Mr. Konzelman established that, although Liput did not possess a key to Mrs. Konzelman's home, he did perform numerous household chores and knew the code to disengage the household alarm system. *See id.*, 729 A.2d at 11.

[22] *See id.* at 192-93, 729 A.2d at 11.

[23] *See id.* at 193, 729 A.2d at 11. The trial court found that Mrs. Konzelman was receiving approximately $170 weekly from unidentified sources. *See id.* The court

Mr. Konzelman appealed, contesting the trial court's judgment regarding the validity of the cohabitation provision contained in the couple's settlement agreement.[24] Mrs. Konzelman cross-appealed, challenging the trial court's finding of cohabitation as well as the reduction in alimony.[25] Reversing the trial court's judgment, the appellate division found the cohabitation provision enforceable.[26]

The New Jersey Supreme Court granted Mrs. Konzelman's petition for certification.[27] The court found that the policy considerations that permit the discontinuation of alimony payments upon remarriage also allow for the termination of alimony upon cohabitation when both parties have agreed to such an arrangement.[28] Thus, the court held that a cohabitation provision in a divorce settlement agreement is not repugnant to public policy and stands as a valid basis for ending alimony obligations regardless of the economic impact of the new, "cohabitative" relationship.[29]

For the past forty years, New Jersey courts have wrestled with the competing interests of equity and freedom of contract in the area of divorce law.[30] In 1960, the New Jersey Supreme Court held in *Schlemm v. Schlemm*[31] that spousal agreements are specifically enforceable in equity to the extent that they are fair and just.[32] In *Schlemm*, a New Jersey couple who had been married for twenty years filed for divorce.[33] During the proceedings, they decided to enter into a mutual and voluntary agreement regarding division of property and

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attributed this support to Liput. *See id.* Reviewing the trial court's decision, the appellate division noted that "[t]here was substantial evidence in the record to support the court's finding that Mr. Liput was contributing at least $170 a week toward Ms. Konzelman's financial support." *Konzelman*, 307 N.J. Super. at 155, 704 A.2d at 593.

[24] *See Konzelman*, 158 N.J. at 193, 729 A.2d at 11.

[25] *See id.*, 729 A.2d at 11-12.

[26] *See Konzelman*, 307 N.J. Super. at 161, 704 A.2d at 597. The court held "that a provision of a property settlement agreement, freely entered into, which causes permanent alimony to terminate if the dependent spouse enters into a new relationship which has all the indicia of marriage except a license is enforceable." *Id.*

[27] *See* Konzelman v. Konzelman, 153 N.J. 405, 709 A.2d 798 (1998).

[28] *See Konzelman*, 158 N.J. at 196, 729 A.2d at 13.

[29] *See id.*, 158 N.J. at 197, 729 A.2d at 13.

[30] *See supra* note 1 and accompanying text (discussing the New Jersey judiciary's approach to equity and contract law in the divorce context).

[31] 31 N.J. 557, 158 A.2d 508 (1960).

[32] *See id.* at 581-82, 158 A.2d at 522. In so holding, the court declared that "apart from its statutory authority, the Superior Court has power to direct the specific performance of the terms of husband-wife support agreements to the extent that they are just and equitable." *Id.* (citations omitted).

[33] *See id.* at 560, 158 A.2d at 510.

maintenance payments to be made by Mr. Schlemm to Mrs. Schlemm.[34] The chancery division, recognizing the parties' amicable agreement, issued an order dismissing the complaint and counter-claim without prejudice.[35] Shortly thereafter, Mr. Schlemm traveled to Nevada, where he instituted divorce proceedings, and a Nevada court entered a formal decree of divorce.[36] Approximately four years after the divorce proceedings in both New Jersey and Nevada were finalized, Mrs. Schlemm brought an action claiming that Mr. Schlemm had failed to fulfill his support and maintenance obligations under the settlement agreement,[37] while Mr. Schlemm argued that he was under no obligation to support Mrs. Schlemm.[38]

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[34] *See id.* at 560-61, 158 A.2d at 510. The agreement stated in part that Mr. Schlemm

> agreed to provide for the wife to maintain the properties and upkeep and further carrying charges just in the manner that he has been doing up to the present date so that she will be provided for in the same manner and to the same degree as she has been provided for by him up to this time.

Id. at 561, 158 A.2d at 510. The settlement also provided for the dismissal of Mrs. Schlemm's complaint for divorce and Mr. Schlemm's counter-claim for divorce. *See id.* at 560, 158 A.2d at 510.

[35] *See id.* at 561, 158 A.2d at 510. Shortly thereafter, the Schlemms apportioned the communal property and assets pursuant to the agreement. *See id.* at 561, 158 A.2d at 510-11.

[36] *See id.* at 563, 158 A.2d at 511. Mrs. Schlemm agreed to convey power of attorney to a Reno lawyer in order for him to act on her behalf at the divorce proceedings. *See id.* at 561-62, 158 A.2d at 511. Mrs. Schlemm agreed to go along with the Nevada divorce proceedings so long as Mr. Schlemm settled with her regarding a $20,000 insurance policy. *See id.* at 562, 158 A.2d at 511. Mrs. Schlemm's stepson then delivered to her $50,000 in cash, which had been left in the stepson's care by Mr. Schlemm. *See id.* After the divorce decree was entered, Mr. Schlemm returned to New Jersey. *See id.*

[37] *See Schlemm*, 31 N.J. at 563, 158 A.2d at 512. With respect to the issue of the specific enforceability of the couple's agreement, the chancery court sided with Mrs. Schlemm and found the contract to be specifically enforceable. *See id.* at 564-65, 158 A.2d at 512-13. Mrs. Schlemm also requested that the court declare "the Nevada divorce to be of no force." *Id.* at 563-64, 158 A.2d at 512. The chancery court found the Nevada divorce valid and in effect, and the New Jersey Supreme Court affirmed. *See id.* at 564, 571, 158 A.2d at 512, 516. The dissent in *Schlemm*, however, sharply criticized the court's recognition of the divorce, pointing to the $50,000 payment to Mrs. Schlemm as the purchase price for the divorce. *See id.* at 586, 158 A.2d at 524 (Francis, J., dissenting in part). The dissent lamented that "[t]o sanction the destruction of marriage when it is accomplished by sickening sham is to ignore a malignancy eating at the vitals of our country." *Id.* at 585, 158 A.2d at 524 (Francis, J., dissenting in part).

[38] *See id.* at 564, 158 A.2d at 512. In addition, Mr. Schlemm maintained that the Nevada divorce should be given "full faith and credit" by the New Jersey courts. *See id.*

In *Schlemm*, the New Jersey Supreme Court noted that the court has an inherent power to specifically enforce settlement agreements between former spouses to the extent that they are just and equitable.[39] The court held that the Schlemms' agreement was specifically enforceable.[40] In so holding, the court reasoned that, because the parties and their counsel properly presented the agreement in open court, with adequate consideration, the settlement was at least as binding as any privately executed contract between the parties.[41] Thus, the court validated the lower court's conclusion that the agreement was fair and in full force and effect.[42]

Expanding on the rule established in *Schlemm*, the New Jersey Supreme Court in *Berkowitz v. Berkowitz*[43] announced that the judiciary has the power to modify divorce agreements based on a showing of "changed circumstances."[44] In *Berkowitz*, an ex-husband petitioned the court to modify his divorce settlement agreement in order to reduce his child support payments to his ex-wife, who had since remarried.[45] The *Berkowitz* court recognized the right of the court to modify settlement agreements in order to comport with fairness and equity when there has been a change in circumstances.[46] While the court declined to modify the Berkowitz's agreement based on the fact that such changed circumstances had been contemplated and accounted for at the time of drafting, the court took the opportunity to assert its discretion to do so in an appropriate situation.[47]

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[39] *See id.* at 581-82, 158 A.2d at 522.

[40] *See id.* at 582, 158 A.2d at 522.

[41] *See id.* The court stated that "[t]he deliberate stipulation in court was a proper one, was based on adequate consideration, was participated in by both parties and their counsel, and was at least as binding as a privately executed written contract between them." *Id.*

[42] *See id.* The court noted that "[t]he trial court . . . found that there was a binding agreement . . . which was 'fair and just' and in 'full force and effect' and we see no reason for disturbing its finding." *Id.*

[43] 55 N.J. 564, 264 A.2d 49 (1970).

[44] *See id.* at 569, 264 A.2d at 52.

[45] *See id.* at 568, 264 A.2d at 51. After the couple's two sons left home for college, Mr. Berkowitz filed a motion to modify the support provision of the couple's settlement agreement from $100 per week to a $40 payment while the couple's daughter still resided with Mrs. Berkowitz. *See id.*

[46] *See id.* at 569, 264 A.2d at 52.

[47] *See id.* at 569-70, 264 A.2d at 52. Referring to the agreement between Mr. and Mrs. Berkowitz, the court commented that "the parties contemplated . . . remarriage by the wife and provided that in such event plaintiff would convey his interest in the residence to defendant in return for cancellation of his obligations regarding the property. They made no provision, however, for reducing the children's support payments because of such remarriage." *Id.* Accordingly, the court explained that all of the "changed circumstances" were contemplated by the parties and provided for

A few years later, in *Smith v. Smith*,[48] the New Jersey Supreme Court acknowledged the judiciary's flexibility to modify settlement agreements by virtue of state statute and also recognized the state's policy that favored the stability of arrangements in the matrimonial area.[49] In *Smith*, a couple entered into a separation agreement in 1965.[50] Approximately six years later, after significant amendments were made to state divorce law, Mr. Smith filed for divorce, seeking the court's recognition of the earlier agreement.[51]

The *Smith* court drew a distinction between agreements that are property settlements and those that involve support arrangements.[52] The New Jersey Supreme Court declared that those contracts falling into the former category are a bar to judicially constructed statutory equitable distribution to the extent that they are fair and equitable.[53]

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in their agreement. *See id.* at 570, 264 A.2d at 52. Finally, the court noted that, "[a]bsent evidence of either plaintiff's inability to meet his financial obligations under the Agreement or other unforeseen changes in circumstances, reduction of the support payments in the instant case was unjustified." *Id.*

[48] 72 N.J. 350, 371 A.2d 1 (1977).

[49] *See id.* at 360, 371 A.2d at 6. The court announced that

> the extent of the change in circumstances, whether urged by plaintiff or defendant, shall be the same, regardless of whether the support payments being questioned were determined consensually or by judicial decree. In each case, the court must determine what, in the light of all the facts presented to it, is equitable and fair, giving due weight to the strong public policy favoring stability of arrangements.

Id.

[50] *See id.* at 354, 371 A.2d at 3. The agreement was described by Mrs. Smith as a "separation agreement"; Mr. Smith characterized it as a "property settlement agreement." *See id.* The instrument declared that "'[t]he Parties have agreed to live separate and apart and desire by this Agreement to settle their property rights and obligations.'" *Id.* The agreement also required Mr. Smith to provide certain benefits and support for Mrs. Smith and the couple's child. *See id.*

[51] *See id.* at 353, 371 A.2d at 2. In her counterclaim, Mrs. Smith sought that the agreement be declared invalid and that an equitable distribution of the assets and determination of Mr. Smith's support obligation pursuant to the recently enacted amendments to state divorce statutes be performed. *See id.*

[52] *See id.* at 357, 371 A.2d at 4. According to the court, separation agreements, when analyzed with respect to property rights, "appear to be essentially of two types, and may conveniently be referred to as support agreements and property settlement agreements." *Id.* In discussing agreements entered prior to the reform of the state's divorce laws, the court described support agreements as those that provide for "support payments to the wife for herself and for any minor children in her custody. They often contained provisions dividing tangible personalty, as well as any jointly owned assets, including real estate held by husband and wife as tenants by the entirety." *Id.*, 371 A.2d at 5. Property settlement agreements, in contrast, were characterized by the court as those that go further and "often provided for substantial transfers of assets—generally from husband to wife—often, but not always, taking the form of transfers in trust." *Id.* at 357-58, 371 A.2d at 5.

[53] *See id.* at 358, 371 A.2d at 5. The court held "that where equitable distribution

The court held that those agreements that are rightly characterized as support contracts, however, stand as no obstacle to court-fashioned equitable distribution.[54]

In 1980, the fairness-versus-contract dilemma resurfaced in *Lepis v. Lepis*.[55] In *Lepis*, the court announced that settlement agreements are not controlled strictly by the principles of contract law and that such agreements may be modified upon a showing of "changed circumstances."[56] Four years after the Lepises' divorce was finalized, Mrs. Lepis moved for modification of the settlement agreement, seeking increased support for her and her children.[57] The New Jersey Supreme Court's analysis in *Lepis* first focused on the effect of the consensual agreement on the court's power to modify the contract by highlighting title 2A, section 34-23 of the New Jersey Statutes, which specifically recognizes the judiciary's ability to adjust support orders at any time.[58] Relying upon *Schlemm*, the court observed that specific enforceability of settlement agreements is predicated upon the flexibility of equity in ensuring that such agreements are just.[59] In

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is sought pursuant to N.J.S.A. 2A:34-23, an earlier separation agreement will be a bar to such relief only if, and to the extent that, it can qualify as a property settlement, and can likewise be shown to have been fair and equitable." *Id.* The court stressed that "[o]nly then can it be said to be the substantial equivalent of an equitable distribution of marital assets, sufficient to justify denial of such relief." *Id.*

[54] *See Smith*, 72 N.J. at 358, 371 A.2d at 5. The court concluded that the arrangement between the Smiths was a support agreement and had "none of the characteristics of a property settlement agreement." *Id.* Rejecting Mr. Smith's assertion that the agreement was a property settlement, the court observed that such an argument was "unimpressive since by this transaction the wife received only what was hers already; in effect, the husband bought out his wife's interest in the residence held by them as tenants by the entirety." *Id.* at 358-59, 371 A.2d at 5.

[55] 83 N.J. 139, 416 A.2d 45 (1980).

[56] *See id.* at 146, 416 A.2d at 48. The court held that "alimony and support orders define only the present obligations of the former spouses. Those duties are always subject to review and modification on a showing of 'changed circumstances.'" *Id.*

[57] *See id.* at 144, 416 A.2d at 47-48. Upon their divorce, Mr. and Mrs. Lepis entered into a detailed settlement agreement regarding alimony, child custody and support, and property division. *See id.* at 143, 416 A.2d at 47. The agreement also contained a provision barring future modification absent mutual consent. *See id.* at 144, 416 A.2d at 47. Without requiring Mr. Lepis to disclose his actual earnings, the trial court denied Mrs. Lepis's motion. *See id.*, 416 A.2d at 48. Reversing the lower court's decision and remanding the case, the appellate division held that discovery was necessary before making such a determination regarding modification of the agreement. *See id.* The appellate court asserted that the lower court's refusal to allow discovery of Mr. Lepis's income denied Mrs. Lepis the chance to demonstrate "changed circumstances." *See id.* at 145, 416 A.2d at 48.

[58] *See id.* The court noted that "[t]he equitable power of the courts to modify alimony and support orders at any time is specifically recognized by N.J.S.A. 2A:34-23 . . . ." *Id.*

[59] *See id.* at 146, 416 A.2d at 49 (citing *Schlemm*, 31 N.J. at 581-82, 158 A.2d at 522).

ruling that the nonmodification provision of the Lepises' agreement was not a bar to judicial modification, the court stated that "the equitable authority of a court to modify support obligations in response to changed circumstances, regardless of their source, cannot be restricted."[60]

Confronted with the issue of cohabitation, as in the case in which a dependent spouse is living with a member of the opposite sex, the New Jersey Supreme Court in *Gayet v. Gayet*[61] again sought to balance the competing interests of fairness and certainty in contract. The court held that, while proof of cohabitation qualifies as an *initial* showing of a "changed circumstance," such proof standing alone falls short of what is required to carry a motion to extinguish alimony obligations.[62] The court explained that cohabitation must be coupled with a changed financial situation for modification to be allowed.[63] In *Gayet*, the couple's divorce settlement required Mr. Gayet to pay

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The court referred to *Schlemm*'s rejection of the rule against specific enforceability and recognized the court's ability to utilize "its 'highly flexible' remedial powers to enforce the terms of interspousal support agreements 'to the extent that they are just and equitable.'" *Id.* (citations omitted).

[60] *Id.* at 149, 416 A.2d at 51. The court found that the appellate division correctly reversed the trial court's denial of Mrs. Lepis's motion. *See id.* at 159, 416 A.2d at 55. The court determined that "[p]laintiff has alleged with specificity the increases in her own and her children's needs caused by substantial inflation and the rising cost of supporting growing children." *Id.* The court recognized that such changed circumstances were likely to continue and, therefore, the lower court should inquire whether Mrs. Lepis's ability to support herself and her children had been substantially impaired. *See id.* Examining when modification would be appropriate, the court listed a variety of situations that may satisfactorily signal "changed circumstances." *See id.* at 151, 416 A.2d at 51. The court described such instances as including:

> an increase in the cost of living . . (an) increase or decrease in the supporting spouse's income . . . (an) illness, disability or infirmity arising after the original judgment . . . the dependent spouse's loss of a house or apartment . . . *the dependent spouse's cohabitation with another* . . . subsequent employment by the dependent spouse . . . (or) changes in federal income tax law . . . .

Id. (citations omitted) (emphasis added).

[61] 92 N.J. 149, 456 A.2d 102 (1983).

[62] *See id.* at 153-55, 456 A.2d at 104-05. In so holding, the court stated that "[s]ince one of the procedural prerequisites to discovery and a hearing in a modification proceeding under *Lepis* is an initial showing of changed circumstances, we hold that cohabitation shall constitute such changed circumstances." *Id.* at 154-55, 456 A.2d at 105.

[63] *See id.* at 153-54, 456 A.2d at 104. The court declared that such a "scheme permits modification for changed circumstances resulting from cohabitation only if one cohabitant supports or subsidizes the other under circumstances sufficient to entitle the supporting spouse to relief." *Id.*

alimony and child support for his two children.[64] Two years after the divorce judgment, Mr. Gayet moved to terminate alimony based on his ex-wife's living with another man as husband and wife.[65]

The New Jersey Supreme Court in *Gayet* set forth two policies that must be balanced to resolve the issue of cohabitation: the state statutory provision requiring termination of alimony upon the dependent spouse's remarriage and the state policy that ensures personal privacy and autonomy.[66] To resolve this conflict, the court concluded that an economic needs test, as set forth in *Garlinger v. Garlinger*,[67] best balanced the interests at stake.[68] The court observed that the *Garlinger* test permits modification upon a showing that the dependent spouse is financially supported by the third party, but also

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[64] *See id.* at 150, 456 A.2d at 102.

[65] *See id.* The parties stipulated that Mrs. Gayet cohabited four nights a week for a period of approximately four months. *See id.* After considering additional evidence, the trial court determined that at the time of the hearing, Mrs. Gayet was "living together" with another man. *See id.* Accordingly, the trial court reduced Mrs. Gayet's alimony award retroactively for the period of cohabitation and terminated Mr. Gayet's obligation after a stipulated date. *See id.* Subsequently, the appellate division reversed the lower court's decision. *See id.*

[66] *See id.* at 151, 456 A.2d at 103. The court noted that the dictates of state statutory law that require alimony to terminate upon remarriage "can conflict with another state policy that guarantees individual privacy, autonomy, and the right to develop personal relationships free from governmental sanctions." *Id.* (citations omitted).

[67] 137 N.J. Super. 56, 347 A.2d 799 (App. Div. 1975). In *Garlinger*, the court opined:

> [W]here a former wife chooses to cohabit with a paramour, whether in her abode or his, or otherwise consorts with him, the issue may well arise whether, in the circumstances, she had further need for the alimony. If it is shown that the wife is being supported in whole or in part by the paramour, the former husband may come into court for a determination of whether the alimony should be terminated or reduced. Similarly, if the paramour resides in the wife's home without contributing anything toward the purchase of food or the payment of normal household bills, then there may be a reasonable inference that the wife's alimony is being used, at least in part, for the benefit of the paramour, in which case it could be argued with force that the amount thereof should be modified accordingly. In short, the inquiry is whether the former wife's illicit relationship with another man, apart from the misconduct per se, has produced a change of circumstances sufficient to entitle the former husband to relief.

Id. at 64, 347 A.2d at 803.

[68] *See Gayet*, 92 N.J. at 153-54, 456 A.2d at 104. In approving the *Garlinger* test, the court announced that "[w]e believe that this test best balances the interests of personal freedom and economic support . . . . 'The law must be concerned with the economic realities of contemporary married life, not a model of domestic relations that provided women with security in exchange for economic dependence and discrimination.'" *Id.* at 154, 456 A.2d at 104 (quoting *Lepis*, 83 N.J. at 156, 416 A.2d at 45).

permits adjustment when the third party derives financial support from the dependent spouse.[69] In summary, the court stated definitively that the economic realities of the situation should determine the ultimate result in modification cases.[70]

In an important 1994 appellate division case, *Melletz v. Melletz*,[71] the appellate court held that the withdrawal of alimony payments may not be used to control the social activities of a former spouse.[72] In *Melletz*, the couple's divorce settlement contained a provision allowing for the suspension of Mr. Melletz's alimony obligation when his ex-wife cohabited "with a male unrelated to her by blood or marriage."[73] After placing his ex-wife's home under surveillance for some time, Mr. Melletz moved to terminate his alimony obligation based on his wife's cohabiting with an unrelated male.[74]

In affirming the lower court's decision in *Melletz*, the appellate division announced that, although both parties admitted to negotiating specifically for the cohabitation provision and to bargaining freely for the agreement in general, the provision failed because it attempted to regulate a dependent spouse's otherwise legal behavior.[75] Citing *Gayet* approvingly, the court declared that

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[69] *See id.* at 153, 456 A.2d at 104. The court asserted that modification was appropriate when "the third party contributed to the dependent spouse's support or . . . the third party resides in the dependent spouse's home without contributing anything toward the household expenses." *Id.*

[70] *See id.* at 154, 456 A.2d at 105. The court declared that "economic realities should dictate the result." *Id.*

[71] 271 N.J. Super. 359, 638 A.2d 898 (App. Div. 1994).

[72] *See id.* at 367, 638 A.2d at 902. In support of this holding, the appellate court declared that "apart from the economic impact upon either need or the ability to pay recognized in *Gayet v. Gayet* . . . or other matters of recognized mutual concern, the payor spouse may not through loss or suspension of statutory alimony control the social activities of the payee." *Id.* The appellate court conceded the parties were permitted to agree "on generally-recognized standards of social behavior" if a disputed issue involved conduct that was legal but might have a negative impact on the children living in the household. *Id.* The court emphasized, however, that such issues "are non-economic and cannot be used for economic coercion." *Id.*

[73] *Id.* at 361, 638 A.2d at 899.

[74] *See id.* at 361-62, 638 A.2d at 900. Mr. Melletz testified that he was aware of Mrs. Melletz's relationship with another man before the support agreement was negotiated and that the cohabitation provision was included "'to stop what [was] going on.'" *Id.* The trial court denied Mr. Melletz's motion to terminate his alimony obligation, and Mr. Melletz appealed. *See id.* at 361, 638 A.2d at 899.

[75] *See id.* at 368, 638 A.2d at 902. Reflecting upon the policy considerations of such a clause, the court professed that

> [m]atters of personal preference, residence, or occupation, insofar as they do not reflect changes in income or expenses or other matters of recognized mutual concern, simply are not the business of a former spouse. They do not relate to the payee's right to adequate support.

economic coercion may not be exerted to control the noneconomic activities of a dependent spouse.[76]

In *Konzelman v. Konzelman*,[77] the New Jersey Supreme Court declared that cohabitation provisions of property settlement agreements are enforceable if found to be mutual, voluntary, and fair.[78] Justice Handler, writing for a majority of five justices, averred that because remarriage of a dependent spouse is grounds for automatic suspension of alimony payments under New Jersey statutory law, the termination of alimony obligations based on an ex-spouse's cohabitative, marriage-like relationship with a member of the opposite sex comports with public policy.[79] Thus, the majority concluded that courts should defer to freely bargained-for agreements containing cohabitation provisions.[80]

In reaching this conclusion, the court addressed the following issues: whether a former spouse's new relationship, established as one of cohabitation, qualifies as a "change in circumstances" and whether a voluntary agreement containing a cohabitation provision allowing for the termination of alimony is valid.[81]

In determining the answer to the first question, the majority followed the precedent established in *Gayet*.[82] The court yielded to *Gayet*'s economic needs test in ruling that cohabitation alone does not constitute a change in circumstances.[83] The court concluded that

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> Nor in the usual case are the courts inclined to apply precious resources to the enforcement of or adjudicating the breach of such agreements. So too with matters of cohabitation. It is enough that we must monitor the economic impact of cohabitation allegations or resolve other matters of the parties' continuing mutual concern.

Id. at 366-67, 638 A.2d at 902.

[76] *See id.* at 367, 638 A.2d at 902.

[77] 158 N.J. 185, 729 A.2d 7 (1999).

[78] *See id.* at 198, 729 A.2d at 14 ("We conclude that based on minimum standards to assure their mutuality, voluntariness and fairness, cohabitation agreements may be enforced.").

[79] *See id.* at 196, 729 A.2d at 13. The court indicated that the policy considerations that authorize termination of alimony upon a dependent spouse's remarriage also support the termination upon cohabitation. *See id.* Specifically, the court recognized that "[t]he enforcement of a cohabitation agreement terminating alimony comports generally with the legislative and public policy of our matrimonial laws." *Id.*

[80] *See id.* at 197, 729 A.2d at 13. The court acknowledged that deference was appropriate "where the parties have agreed that cohabitation will constitute a material changed circumstance, and that agreement has been judged fair and equitable . . . ." *Id.*

[81] *See id.* at 195-96, 729 A.2d at 12-13.

[82] *See id.* at 196, 729 A.2d at 12-13.

[83] *See Konzelman*, 158 N.J. at 196, 729 A.2d at 12. The majority stated that

alimony should be reduced only in proportion to the contribution made by the third party to the dependent spouse's support.[84]

Turning to the second, and more significant, issue at hand, the court held that an inquiry into the dependent spouse's economic situation is not necessary if there exists a new relationship that has all of the characteristics of marriage and the settlement agreement contains a cohabitation provision.[85] The majority opined that, because under New Jersey statutory law[86] a new marriage automatically ends a former spouse's support obligation, when a new marriage-like relationship is established under an instrument containing a cohabitation provision, alimony payments may be discontinued.[87] Thus, the court surmised that cohabitation provisions do not contravene the state's public policy.[88] Accordingly, the court concluded that when such agreements are deemed fair and equitable, the court should defer to such contracts.[89]

"[c]ohabitation constitutes a change of circumstances only if coupled with economic consequences; the economic benefit enuring to either cohabitor must be sufficiently material to justify relief." *Id.* (citations omitted).

[84] *See id.*, 729 A.2d at 12-13. Applying the economic needs test, the court determined that "the reduction in alimony is granted in proportion to the contribution of the cohabitor to the dependent spouse's needs." *Id.*

[85] *See id.* at 196-97, 729 A.2d at 13. The court concluded that "where the dependent spouse has entered into a new marriage-like relationship, the court need not delve into the economic needs of the dependent former spouse." *Id.* at 197, 729 A.2d at 13.

[86] *See supra* note 9 and accompanying text (detailing New Jersey's statutory law regarding the termination of alimony obligations upon the remarriage of a dependent spouse).

[87] *See Konzelman*, 158 N.J. at 196-97, 729 A.2d at 13. The court concurred with the appellate division's statement that

> there are no considerations of public policy which should prevent competent parties to a divorce from freely agreeing that if the dependent spouse enters into a new relationship which, but for the license, is tantamount to a marriage, the economic consequences of the new relationship will be the same as those of remarriage.

Id. at 197, 729 A.2d at 13 (citations omitted).

[88] *See id.* at 196, 729 A.2d at 13. The court announced that "[t]he contractual termination of alimony upon cohabitation is not violative of either statutory or public policy." *Id.*

[89] *See id.* at 197, 729 A.2d at 13. The court emphasized that such agreements to terminate alimony contingent upon cohabitation "must be voluntary and consensual, based on assurances that [the] undertakings are fully informed, knowingly assumed, and fair and equitable." *Id.* at 198, 729 A.2d at 14. The court acknowledged that the fairness of modifying or eliminating alimony upon cohabitation must be considered in view of all material circumstances and required a case-by-case analysis. *See id.* The court also reasoned that fairness in this context demanded that counsel represent each party, that each party fully comprehend the agreement, and that a court review and approve the agreement. *See id.* at 199, 729 A.2d at 14.

While acknowledging the potential for uneven bargaining power between the spouses,[90] Justice Handler determined that the court's holding was nevertheless necessary in order to encourage consensual agreements to resolve matrimonial controversies.[91] Similarly, conceding that concerns about privacy have merit in this context,[92] the majority maintained that judicial supervision over divorce settlements will serve as a check on unfair provisions.[93] Furthermore,

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[90] *See id.* at 200, 729 A.2d at 15. The court noted that "[i]n considering the enforceability of cohabitation agreements, concerns regarding inequality of bargaining power are genuine and . . . may arise not only from economic dependence but also the psychological and emotional factors in the relationship between the former spouses." *Id.* (citations omitted). Accordingly, the court stressed that courts must ensure the fairness and voluntariness of such agreements prior to enforcement. *See id.*

[91] *See id.* The court remarked that "[w]hile we are aware of the potential for unfairness and inequity, the importance of settlement agreements in the amicable resolution of the disharmonies that surround the demise of a marriage should be preserved." *Id.* Moreover, the court suggested that such consensual arrangements should be encouraged so long as the provisions reflect the parties' mutual wishes. *See id.*

[92] *See id.* The court acknowledged that "a contractual provision terminating alimony in the event of cohabitation potentially conflicts with the privacy interests of the dependent spouse." *Id.* Specifically, the court admitted that cohabitation agreements might encourage a financially dominant spouse to interfere in the life of his former spouse. *See id.* Moreover, the court recognized that "[t]he policy that ends alimony on the formation of a new legal bond is in derogation of the dependent spouse's individual privacy, autonomy and the right to develop personal relationships free from interference from either a supporting spouse or the state." *Id.* (citations omitted). Furthermore, the court conceded that a cohabitation provision provides an incentive for the supporting party to investigate the former spouse's private life, but minimized the impact of such an incentive by observing that such a provision is comparable to "the incentive that any potential changed circumstance may provide a paying spouse for ascertaining the current economic status of the dependent spouse." *Id.* at 201, 729 A.2d at 15.

[93] *See Konzelman*, 158 N.J. at 201, 729 A.2d at 15. The court opined that "[p]rivacy concerns may be addressed and mitigated by judicial supervision over agreements." *Id.* Deferring to traditional concepts of contract and refuting concerns over privacy rights, the court further declared that "[w]hile such an agreement may influence the conduct of the parties, they will have knowingly entered into such agreements, understanding what the provisions entail and, presumably, anticipating the extent to which their freedom of action may be affected." *Id.* The majority asserted that

> [a] cohabitation provision cannot become an instrument for vindictive, vengeful, or oppressive actions on the part of the supporting spouse nor can it be allowed to serve as punishment for post-divorce unchastity on the part of a dependent spouse; it must be predicated on the mutual wishes of the parties and reflect the economic realities that usually flow from an intimate committed relationship.

Id.

the court stressed that the judiciary would continue to monitor the fairness of such divorce agreements.[94]

The majority then described the type of relationship that is sufficient to enforce a cohabitation provision.[95] The court observed that a qualifying relationship must be marked by stability and mutual dependence and must also be serious and lasting.[96] The court listed key, nonexhaustive potential indicators of a marriage-like relationship, including living together, shared finances and joint bank accounts, acknowledgment of the relationship by the couple's family, and shared household duties and living expenses.[97] Finally, given the fact that cohabitation was found by the lower courts and that the agreement between the Konzelmans was considered fair, voluntary, knowing, and consensual, the court affirmed the judgment below, thereby terminating Mr. Konzelman's alimony obligation.[98]

Writing for the dissent, Justice O'Hern charged that many of the issues raised by the instant case had been settled by previous decisions and that the majority's opinion was regressive.[99] The dissent countered the majority's position by reminding the court that the law should not be concerned with the private lives of divorcees.[100] In addition, Justice O'Hern stressed that the economic needs of divorced women *are* the concern of the court and that the judiciary had traveled a long and bumpy road in recognizing those needs.[101]

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[94] *See id.* The majority reiterated that "in enforcing cohabitation provisions, the court does not abrogate its equitable jurisdiction over divorce arrangements and its responsibility to assure fairness in the implementation of such arrangements." *Id.*

[95] *See id.* at 202-03, 729 A.2d at 16. The court noted that "[a] mere romantic, casual or social relationship is not sufficient to justify the enforcement of a settlement agreement provision terminating alimony." *Id.* at 202, 729 A.2d at 16.

[96] *See id.* The court rejected the dissent's assertion that cohabitation was defined or measured only by "sex" or gender. *See id.*

[97] *See id.* at 202, 729 A.2d at 16. Addressing the issue of cohabitation, the court observed that

> [t]he ordinary understanding of cohabitation is based on those factors that make the relationship close and enduring and requires more than a common residence, although that is an important factor. Cohabitation involves an intimate relationship in which the couple has undertaken duties and privileges that are commonly associated with marriage.

Id.

[98] *See id.* at 202-03, 729 A.2d at 16-17.

[99] *See Konzelman*, 158 N.J. at 204, 729 A.2d at 17 (O'Hern, J., dissenting). The dissent claimed that the court's opinion "turns back the clock on years of efforts to improve the economic and social status of divorced women." *Id.*

[100] *See id.* The dissent declared that "[t]he private lives of divorced women are no business of the law. We have enough to do without inquiring into such matters." *Id.*

[101] *See id.*

Thus, urged the dissent, the financial needs of both spouses should be considered when the court supervises a divorce settlement.[102] The dissent also emphasized that a court can properly execute its supervisory role only by remaining sensitive to the rights of women, who often take the subordinate economic role in marriage.[103]

Moreover, Justice O'Hern suggested that *Konzelman*, at its core, was about sex and not merely about the freedom of contract and the voluntariness of divorce agreements as posited by the majority.[104] In furtherance of this point, the dissent challenged the majority's position by questioning why cohabitation with someone of the same sex is allowed without a reduction in alimony.[105] Cautioning that certain issues, namely personal freedom and privacy, should not be allowed to be bargained away,[106] Justice O'Hern concluded that the long-standing "economic needs" test should have been followed.[107]

The disagreement between the majority and the dissent in *Konzelman* appears to mirror a larger debate that takes place whenever historical gender or race inequalities come into play in policy development. Participants ask how much, if at all, should gender be taken into account.[108] On one side are those who argue

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[102] *See id.* The dissent argued that "[w]hen the marriage partnership is over, we do the best that we can to recognize the economic needs of the partners." *Id.*

[103] *See id.* Justice O'Hern asserted that women frequently assume a subordinate economic position in the marriage by filling child-rearing or non-income-generating roles. *See id.* Accordingly, the dissent suggested that "[w]omen are at a particular economic disadvantage in divorce because they typically do not control family assets at the end of a marriage." *Id.* at 205, 729 A.2d at 17 (O'Hern, J., dissenting).

[104] *See Konzelman*, 158 N.J. at 205, 729 A.2d at 18 (O'Hern, J., dissenting). The dissent observed that "[w]hen viewed through the Gaussian filter employed by the Court, the anti-cohabitation clause appears as a pleasant piece of bargaining between equals." *Id.* at 205, 729 A.2d at 17 (O'Hern, J., dissenting).

[105] *Id.* The dissent commented that "[i]f the clause were not about sex, why then is cohabitation with another person of the same sex permitted without a reduction in support?" *Id.*

[106] *See id.* at 206-07, 729 A.2d at 18 (O'Hern, J., dissenting). Quoting Chief Justice Wilentz, the dissent stated that "'[t]here are, in a civilized society, some things that money cannot buy.'" *Id.* at 206, 729 A.2d at 18 (O'Hern, J., dissenting) (quoting *In re* Baby M., 109 N.J. 396, 440, 537 A.2d 1227, 1250 (1988)). The dissent continued by asserting that "[i]n a civilized society, money cannot buy a woman's right to choose her companions. A husband should not be able to demand an exchange of that freedom as a bargaining tool." *Id.* at 206-07, 729 A.2d at 18 (O'Hern, J., dissenting).

[107] *See id.* at 207-08, 729 A.2d at 18-19 (O'Hern, J., dissenting). The dissent declared that "the test for support should be based upon economic circumstances because that standard 'best balances the interests of personal freedom and economic support . . . .'" *Id.* at 207, 729 A.2d at 19 (O'Hern, J., dissenting) (quoting *Gayet*, 92 N.J. at 154, 456 A.2d at 104).

[108] *See* SONDRA FARGANIS, SITUATING FEMINISM: FROM THOUGHT TO ACTION 14-49 (1994) (discussing the spectrum of viewpoints with regard to gender).

that sex inequalities are so entrenched in American society that they inevitably impact outcomes and must be taken into account in the name of justice and in the true spirit of equality.[109] On the other side are those who claim that policies taking gender inequities into account are patronizing, violate the principle of strict equality, and reinforce the very attitudes their proponents claim to oppose.[110] While the matter may be one more of politics[111] than science, the former position is more convincing in the instant case. Here, the facts go beyond mere prejudices or attitudinal components—the matter is not merely about perceptions of women not being strong enough or shrewd enough to make a contract. The core issue is that only women bear children, and, therefore, families structure their lives around that biological reality. As a result, married women often sacrifice educational and job opportunities, or interrupt careers for childbirth, and thus are often dependent on husbands, and later ex-husbands, for support.[112] Thus, while women may be more financially independent today than in the past, the possible coercive effect of a cohabitation provision remains enormous.[113]

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[109] *See* SUSAN M. OKIN, JUSTICE, GENDER AND THE FAMILY 173 (1989) (asserting that in the marriage context, the principle of freedom to contract "takes insufficient account of the history of gender in our culture . . . [and] of the present substantive inequalities between the sexes").

[110] *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 101-10 (1990) (criticizing the Burger and Rehnquist Courts for straying from the standard of formal equality in dealing with race and gender).

[111] For an interesting discourse concerning the interplay between philosophy and democracy and the ways in which judges are influenced by political philosophy, see Michael Walzer, *Philosophy and Democracy*, POLITICAL THEORY, AUGUST 1981, at 379.

[112] *See* ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 134-35 (1996). Koppelman opines that

> [t]he most pressing sex equality issue the nation faces today is the massive impoverishment of single (usually divorced) women with children. The project of eliminating "stereotypes" from the law has not only prevented the law from addressing this state of affairs but threatens to make it worse if pushed to its logical conclusions. By eschewing old notions of female dependency (thus eliminating normative stereotypes) and presuming that men and women are equally capable of supporting themselves after divorce (thus eliminating empirical stereotypes), courts have ignored ways marriage itself economically disables women, since wives rather than husbands tend to forgo educational and career opportunities for the sake of child-rearing.

Id.

[113] *See* OKIN, *supra* note 109, at 170-86. Okin writes:

> Some who are critical of the present structure and practices of marriage have suggested that men and women simply be made free to make their own agreements about family life, contracting with each other, much as business contracts are made. But this takes insufficient

Even if a swing in the "equity/contract" pendulum were in order, something less drastic than the sweeping change effectuated by the decision in *Konzelman* would have been a more appropriate first move. In *Gayet v. Gayet*,[114] the dissent proposed judicial recognition of a "rebuttable presumption that alimony is no longer justifiable" where it has satisfactorily been shown that the dependent spouse is cohabiting with someone.[115] Under this plan, the dependent spouse would bear the burden of showing that she has a continuing need for support.[116] The dissent in *Gayet* reasoned that as it was the dependent spouse who altered the circumstances, it would not be unreasonable or "unduly onerous" to ask her to shoulder the burden of proving continued financial need.[117] Similarly, when a cohabitation provision is contained in a settlement agreement, as in *Konzelman*, a court should consider adopting a comparable approach, recognizing such clauses to the extent that they create a presumption that may be rebutted by the dependent spouse upon a showing that there is an ongoing financial need. Even this compromise is problematic, however, because its unavoidable starting position is that courts will recognize cohabitation provisions. Thus, it poses a significant threat to privacy rights by encouraging, and maybe even requiring, intrusive surveillance of the dependent spouse in order to prove cohabitation. Moreover, under the compromise stance, dependent spouses' freedom and autonomy remain items to be bargained for, or away, during the settlement process. Upon final analysis, the middle position proposed by the dissent in *Gayet* stands as a more just and reasoned option than that adopted by the majority

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> account of the history of gender in our culture and our own psychologies, of the present substantive inequalities between the sexes, and, most important, of the well-being of the children who result from the relationship. As has long been recognized in the realm of labor relations, justice is by no means always enhanced by the maximization of freedom of contract, if the individuals involved are in unequal positions to start with. Some have even suggested that it is consistent with justice to leave spouses to work out their own divorce settlement. By this time, however, the two people ending a marriage are likely to be far *more* unequal. Such a practice would be even more catastrophic for most women and children than is the present system. Wives in any but the rare cases in which they as individuals have remained their husbands' socioeconomic equals could hardly be expected to reach a just solution if left "free" to "bargain" the terms of financial support or child custody. What would they have to bargain *with*?

Id. at 173 (emphasis in original).

[114] 92 N.J. 149, 456 A.2d 102 (1983).

[115] *See id.* at 156, 456 A.2d at 105 (Schreiber, J., dissenting).

[116] *See id.*, 456 A.2d at 105-06.

[117] *See id.*, 456 A.2d at 106.

in *Konzelman*, yet falls short of ensuring that the basic rights of both spouses will be protected throughout the process.

The economic needs test stands as the best method of matching financial need to alimony obligation while safeguarding the fairness and equity concerns so paramount in family law. The New Jersey Supreme Court in *Konzelman* should have taken the opportunity to reinforce the *Gayet* rule that anti-cohabitation provisions in divorce agreements are unenforceable.

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