State of New Hampshire
Supreme Court

NO. 2010-0876

2011 TERM

OCTOBER SESSION

In the Matter of Judith Raybeck and Bruce Raybeck

RULE 7 APPEAL OF FINAL DECISION OF
LACONIA FAMILY DIVISION

BRIEF OF PETITIONER/APPELLEE JUDITH RAYBECK

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STATEMENT OF FACTS AND STATEMENT OF THE CASE

The facts are few and undisputed.

Judith Raybeck was married to Bruce Raybeck for 42 years. *Trn*. at 33. They were divorced in Texas in 2005, and the decree was registered in New Hampshire in 2010. *Trn*. at 17; NOTICE OF DECISION (granting registration) (Apr. 14, 2010) (not in appendix). Judith was 66 and Bruce 67 at the time of the hearing. *Trn*. at 20; FINDINGS OF FACT AND RULINGS OF LAW ¶ 16, *Appx.* at 38.

Bruce estimates his non-real-estate investment assets are worth about $700,000, and that his total indebtedness is about $340,000. *Trn*. at 80. *See also* LETTER FROM JUDITH TO KRISTIE AND MARK (Jan. 10, 2010), *Exh. C*, *Appx*. at 14.[1] He continues to have the ability to pay alimony. FINDINGS OF FACT AND RULINGS OF LAW ¶ 22, *Appx.* at 38.

In the divorce settlement, Bruce got real estate in Texas and North Carolina, as well the as retirement and stock accounts that contained the marriage's significant assets. AGREED FINAL DECREE OF DIVORCE (Aug. 19, 2005), *Appx.* at 6, 8. In exchange, Judith got a house in Laconia, New Hampshire, and a lump-sum payment of $100,000. She also got alimony of $25,000 per year for 10 years payable on the first day of each year, until "such time as [Judith] remarries and/or cohabitates with an unrelated adult male." AGREED FINAL DECREE OF DIVORCE (Aug. 19, 2005), *Appx.* at 6, 9; *Trn*. at 18, 33, 66, 85-86.

Judith was aware at the time that the settlement was "a rather poor deal," but accepted it in the interest of family peace. LETTER FROM JUDITH TO KRISTIE AND MARK (Jan. 10, 2010), *Exh. C*, *Appx*. at 15. She did not have separate counsel, however, and thus was not aware until after it was signed of the cohabitation clause Bruce's lawyer included. LETTER FROM JUDITH TO KRISTIE AND

[1]Citations to the appendix refers to the appendix filed with Bruce's brief.

MARK (Jan. 10, 2010), *Exh. C*, *Appx*. at 15; *Trn*. at 50, 81, 88.

Judith's assets are the house in Laconia and her vehicles. FINANCIAL AFFIDAVIT (June 22, 2010), *Appx.* at 49; *Trn*. at 42. She was largely a stay-at-home mother, and has no pension or other deferred compensation. Her monthly income is social security and alimony. FINANCIAL AFFIDAVIT (June 22, 2010), *Appx.* at 49; LETTER FROM JUDITH TO KRISTIE AND MARK (Jan. 10, 2010), *Exh. C*, *Appx*. at 14; *Trn*. at 19. Judith's experience is that maintenance, insurance, and taxes on her Laconia house is more than her income. *Trn*. at 19-20, 41. FINDINGS OF FACT AND RULINGS OF LAW ¶¶ 6-10, 29-30, *Appx.* at 38. She continues to have a need for alimony. FINDINGS OF FACT AND RULINGS OF LAW ¶ 21, *Appx.* at 38.

When Bruce threatened in 2009 to stop alimony due to a decline in the value of his investments, FINDINGS OF FACT AND RULINGS OF LAW ¶ 28, *Appx.* at 38, Judith realized her finances were more shaky than she had believed, and confronted the fact that without the annual payment she could not afford to live alone in her house in Laconia without shortly depleting the remainder of her savings. *Trn*. at 19, 33, 57; LETTER FROM JUDITH TO KRISTIE AND MARK (Jan. 10, 2010), *Exh. C*, *Appx*. at 14.

Judith knew she had to make a change: "had to do something to survive." *Trn*. at 19; FINDINGS OF FACT AND RULINGS OF LAW ¶ 6, *Appx.* at 38. Given the real estate market, Judith found "it wouldn't be practical" to sell her Laconia property. *Trn*. at 42. She determined that living with her sister would not be possible due to family commitments and space limitations. *Trn*. at 62.

Meanwhile, on her daughter's suggestion Judith had joined the dating website eHarmony, *Trn*. at 52-54, 58, where she met Paul Sansoucie, a widower living alone in Plymouth. *Trn*. at 21, 23. They went out together, grew "fond of each other," and sometimes exchange small gifts. LETTER

FROM JUDITH TO KRISTIE AND MARK (Jan. 10, 2010), *Exh. C*, *Appx*. at 14; *Trn*. at 59-60. Judith calls Paul her "best friend," *Trn*. at 59, and the relationship is not exclusive. *Trn*. at 59.

Thus in 2009, when she saw an opportunity to rent her Laconia property for $1,600 per month, Paul suggested she move to his home in Plymouth. *Trn*. at 17, 21; FINANCIAL AFFIDAVIT (June 22, 2010), *Appx.* at 49; *Trn*. at 42.

Paul owns a three-level house in Plymouth. Paul lives on the first floor, which has a bedroom and bathroom. Judith lives on the third floor, which also has a bedroom and bathroom. They share the middle floor, which contains the kitchen and computer room. *Trn*. at 21-22, 50-51. Paul and Judith have not entered a written lease. *Trn*. at 62-63. Their arrangement is that Judith pays for food, which runs about $300 per month, cooks, and helps with household chores. Paul maintains the house and does the yardwork. *Trn*. at 22, 60.

Since becoming friends and housemates, Judith and Paul have traveled together, visiting their respective adult children and families. *Trn*. at 54. Although they each pay their own travel expenses, *Trn*. at 54, they have out of necessity on some occasions shared a room. *Trn*. at 54-55.

Judith and Paul are not romantically involved, and deny a sexual relationship. *Trn*. at 23, 58-59. Although her son-in-law referred to Paul as Judith's "boyfriend," Judith declines the descriptive. *Trn*. at 62. Similarly, when her children have inquired about her interest in re-marriage, Judith has made clear that is not a consideration. *Trn*. at 55 ("I had had one marriage and I did not feel I wanted to remarry."), 58; LETTER FROM JUDITH TO KRISTIE AND MARK (Jan. 10, 2010), *Exh. C*, *Appx*. at 15-16 ("As I felt I would never to marry again, I figured the cohabitation stipulation would not be a problem and said no more about it.").

When Bruce learned Judith was living at Paul's house in Plymouth, he ceased paying alimony

beginning with the January 2010 installment. *Trn*. at 18, 31-32, 69, 83. Judith registered their Texas decree and requested the Laconia Family Division enforce it. NOTICE OF DECISION (granting registration) (Apr. 14, 2010) (not in appendix); PETITION TO ENFORCE FINAL DECREE OF DIVORCE (Mar. 12, 2010) (not in appendix). The court (*Michael Garner*, MM; *Lucinda Sadler*, J.) held an evidentiary hearing in June 2010 regarding a variety of issues, including whether alimony should be discontinued due to alleged cohabitation, and issued an order. ORDER ON PENDING MOTIONS (Oct. 4, 2010), *Appx.* at 25.

The court noted that "cohabitation" is not authoritatively defined in New Hampshire law, but after a review of various sources suggested it "involves some personal commitment to a relationship beyond just living together" and also includes some "personal feature of the relationship." ORDER ON PENDING MOTIONS at 5.

> The Court concludes, therefore, that evidence of a sexual relationship is admissible, but not necessarily required, for a finding of cohabitation, but also that there must be more to the relationship than just occupying the same living area or sharing some or all of the expenses incurred by both parties. The evidence should reflect a common and mutual purpose to manage expenses and make decisions together about common and personal goals, and a common purpose to make mutual financial and personal progress toward those goals.

ORDER ON PENDING MOTIONS 6, *Appx.* at 31.

The court then reviewed the evidence, and found that although there are both personal and financial aspects to Judith's relationship with Paul, they are not so significant as to terminate an alimony obligation. ORDER ON PENDING MOTIONS at 7. The court ruled on other issues not being appealed, and ordered Bruce pay alimony for the duration specified in the original decree. ORDER ON PENDING MOTIONS at 11. After Bruce's motion for reconsideration was denied he appealed.

SUMMARY OF ARGUMENT

After reviewing some of the historical reasons and modern implications of decrees terminating alimony upon cohabitation, Judith Raybeck attempts a summary of the enormous jurisprudence regarding its meaning. She then notes the scant evidence offered by Bruce Raybeck to support his allegation that she was cohabitating such that her alimony should be terminated, and suggests the trial court was correct in its decree holding that it should not.

ARGUMENT

I. Historical and Modern Morality

Although novel in New Hampshire, the law regarding the presence and meaning of "cohabitation" in divorce decrees spans hundreds of years. Nineteenth century English cases are concerned with whether "*dum sola et casta vixerit*" clauses ("as long as she has lived alone and chaste") should be judicially inserted into alimony decrees:

> [O]n the one hand, … it is unjust to make an allowance cease on marriage, and not on illicit intercourse, yet, on the other hand, it is an insult to any woman of spotless character to provide against the contingency of her sinking so low as to render such a provision necessary. This view of the question is quite as important as the other.

Wood v. Wood [1891] Prob 272 – CA.[2] One court:

> determined that the period of payment should be subject to her continuing unmarried and chaste, since it would be unreasonable to call upon the former husband to maintain her if she should become guilty of immorality or if she should marry again.

Fisher v. Fisher (1861) 2 Swabey & T. 410, 164 Eng Reprint 1055. Another court wrote:

> "[I]t is material that the "dum casta" clause should be inserted. The wife should know and should be made to feel that her livelihood depends on her leading a chaste life in the future. In cases where the wife has not been proved to have committed adultery I should be slow to insert the "dum casta" clause. But, where the wife is proved guilty of adultery, I am of opinion that the strongest pressure ought to be put upon her not to lapse again into sin. I cannot bring myself to believe that [earlier precedent] could have intended … that a husband should be called on to support a wife who was leading a life of prostitution.

Squire v. Squire [1905] Prob 4.

In the United States, and as no-fault divorce statutes have become prevalent, the cases have lost their moral tone. The moral implications, however, have not disappeared:

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[2]The English cases are collected in, and their citations are copied from, Annotation, *Propriety and Effect of Anticipatory Provision in Decree for Alimony in Respect of Remarriage or Other Change of Circumstances*, 155 A.L.R. 609 (1945).

In recent years, as the number of couples who cohabit without marriage has increased, some ex-husbands have sought to terminate alimony on the ground that their ex-wives, although not remarried, were cohabiting with men. Courts and legislatures have taken a variety of approaches when considering whether or how alimony should be affected by that event. In some states, legislation specifically provides that alimony must terminate. In the absence of legislation, courts have taken a variety of positions and offered a variety of rationales. Some courts simply terminate alimony, but a majority apply a "needs" test in which the question is whether or not, in light of the cohabitation, the wife still has a need for her ex-husband's financial support.

Clearly the rationale for terminating alimony upon remarriage – that a new spouse has undertaken a legal duty of support – cannot justify terminating alimony where there is no actual remarriage. It could be argued, however, that termination or modification of alimony where there is cohabitation is justified based on an assumption that either the new partner is supporting the alimony recipient (although he has no legal obligation to do so), or that the alimony recipient is using the ex-spouse's money to support the new partner. Both of these rationales for modifying alimony are still solidly based on the doctrine of support. The focus remains on the issue of money – how much is needed, and how it might be spent. However, a strong argument can be made that the duty of services is as least as important as the duty of support in the decision as to whether alimony will be terminated or reduced when an ex-spouse cohabits.

We know that the duty of services is relevant because the inquiry into whether or not the ex-wife's alimony should be cut off or reduced is usually triggered only when she is cohabiting with a person – presumably a man – with whom there is an assumption she is having sexual relations. The link between the duty of services and the alimony decision becomes more clear if we ask whether an alimony recipient's money would be cut off if she moved back in with her mother or with her elderly parents. In such a case, it may very well be that the ex-wife is receiving support from her parents, or it may be that she is using a part of her ex-husband's money to support them. However, a court would be unlikely to inquire into the matter. An ex-husband's protest that his ex-wife is living with her sister, or even with her best friend would also likely fall on deaf ears. The fact is that the inquiry as to whether an ex-wife still "needs" the alimony is usually only triggered in the event that she begins to live with a member of the opposite sex to whom the court assumes that she is now providing marital-type services. The sexual access that was a part of the duty of services she once owed to her husband is now being provided to another man. An ex-wife cannot keep receiving money from her ex-husband while she is presumably performing household tasks for and engaging in sex with another man, even if she is divorced.

This examination of the impact of the duty of support and services on alimony

> modification demonstrates how deeply the doctrine of support and services is intertwined with gender hierarchy and male policing of women's sexuality. In the world of alimony, a woman who, at least for public purposes, appears not to be having sex with anyone receives better treatment under the law than a woman who appears to have found a new sexual partner. The underlying view seems to be that if a woman is having sex with a new man, the new man should support her financially – an ex-husband should not have to continue to pay money to his former wife under such circumstances.
>
> The law thus reflects an assumption that women essentially trade sexual services for financial support in their relationships with men. The law also seems to imply or suggest that, even after divorce, a husband retains some kind of a proprietary interest in his ex-wife's body. The structure of the law protects the male ego – a man would be considered a cuckold if he were still sending checks to a woman who is now living with, caring for, and presumably having sex with someone else. Finally, it is very clear that to the extent that the law governing alimony and post-divorce relationships constricts choice, women suffer a disproportionate disadvantage since the vast majority of alimony recipients are women.

Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 Yale J.L. & Feminism 1, 26-28 (2003) (footnotes omitted); *see also*, Annotation, *Divorced Woman's Subsequent Sexual Relations or Misconduct as Warranting, Alone or with Other Circumstances, Modification of Alimony Decree*, 98 A.L.R.3d 453.

II. Enormous Jurisprudence Summarized

Various aspects of whether alimony should be modified or terminated upon cohabitation-type conditions has been decided in most states. *See* Annotation, *Propriety and Effect of Anticipatory Provision in Decree for Alimony in Respect of Remarriage or Other Change of Circumstances*, 155 A.L.R. 609 (1945) (collecting cases); Annotation, *Divorced or Separated Spouse's Living with Member of Opposite Sex as Affecting Other Spouse's Obligation of Alimony or Support under Separation Agreement*, 47 A.L.R.4th 38 (collecting cases). Aspects of the issue have been addressed in both New Hampshire, *see Bisig v. Bisig*, 124 N.H. 372, 375 (1983) (cohabitation alone insufficient to terminate alimony); *Williams v. Williams*, 129 N.H. 710 (1987) (remarriage alone insufficient to terminate alimony), and in Texas. *Evans v. Evans*, 50 S.W.2d 842 (Tex. Civ. App. 1932); *Housewright v. Housewright*, 41 S.W.2d 1071 (Tex. Civ. App. 1931).

Some states have statutes requiring termination of spousal support on proof of cohabitation. *See e.g.*, *Capper v Capper*, 451 So. 2d 359 (Ala.App. 1984); *In re Support of Halford*, 388 N.E.2d 1131 (Ill.App. 1979); *Thomas v. Thomas*, 440 So. 2d 879 (La.App. 1983). Other states have statutes allowing modification upon cohabitation. *VanKirk v. VanKirk*, 485 A.2d 1194 (Pa. Super. 1984). *See e.g.*, *In re Marriage of Thweatt*, 157 Cal. Rptr. 826 (Cal.App. 1979); *Kaplan v. Kaplan*, 441 A.2d 629 (Conn. 1982); *Sims v. Sims*, 266 S.E.2d 493 (Ga. 1980); *Matter of Anonymous*, 395 N.Y.S.2d 1000 (N.Y.Fam.Ct. 1977); *Nantz v. Nantz*, 749 P.2d 1137(Okla. 1988); *Azbill v. Azbill*, 661 S.W.2d 682 (Tenn.App. 1983). Some states, such as New Hampshire, are statutorily silent.

Some courts have found "the word 'cohabit' has a commonly accepted meaning." *In re Marriage of Molloy*, 635 P.2d 928, 929 (Colo.App. 1981). Others have found it frustratingly "elusive." *Husband B.W.D. v. Wife B.A.D.*, 436 A.2d 1263, 1265 (Del. 1981).

Consequently there is an enormous jurisprudence on the matter, and an equally large library of commentary, involving public policy considerations,[3] particular issues in alimony-cohabitation controversies,[4] individual cases and the law of particular jurisdictions,[5] statutory construction,[6]

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[3]Sara Z. Moghadam, *Dismissing the Purpose and Public Policy Surrounding Spousal Support*, 56 MD. L. REV. 927 (1997); Steven K. Berenson, *Should Cohabitation Matter in Family Law?*, 13 J. L. & FAM. STUD. 289, 292 (2011); Jennifer L. McCoy, *Spousal Support Disorder: An Overview of Problems in Current Alimony Law*, 33 FLA. ST. U. L. REV. 501, 519 (2005); Oldham, *Cohabitation by an Alimony Recipient Revisited*, 20 J. FAM. L. 615 (1982).

[4]Annotation, *Divorced Woman's Subsequent Sexual Relations or Misconduct as Warranting, Alone or with Other Circumstances, Modification of Alimony Decree*, 98 A.L.R.3d 453; Jill Bornstein, *At A Cross-Road: Anti-Same-Sex Marriage Policies and Principles of Equity: The Effect of Same-Sex Cohabitation on Alimony Payments to an Ex-Spouse*, 84 CHI.-KENT L. REV. 1027 (2010); Philip M. Longmeyer, *Look on the Bright Side: The Prospect of Modifying or Terminating Maintenance Obligations Upon the Homosexual Cohabitation of Your Former Spouse*, 36 BRANDEIS J. FAM. L. 53 (1998).

[5]Cynthia L. Ciancio, Jamie L. Rutten, *Modifying or Terminating Maintenance Based on Cohabitation*, 2009 COLO. LAW. 45 (June 2009) (Colorado); Evan J. Langbein, *Post-Dissolution Cohabitation of Alimony Recipients: A Legal Fact of Life*, 12 NOVA L. REV. 787 (1988) (Florida); Allan L. Karnes, *Terminating Maintenance Payments When an Ex-Spouse Cohabitates in Illinois: When Is Enough Enough?*, 41 J. MARSHALL L. REV. 435 (2008) (Illinois); Sara Z. Moghadam, *Dismissing the Purpose and Public Policy Surrounding Spousal Support*, 56 MD. L. REV. 927 (1997) (Maryland); David A. Hardy, *Nevada Alimony: An Important Policy in Need of A Coherent Policy Purpose*, 9 NEV. L.J. 325, 339-40 (2009) (Nevada); Jennifer Mara, *Living with the Consequences: The New Jersey Supreme Court Finds Cohabitation Provisions Enforceable*, 30 SETON HALL L. REV. 1255 (2000) (New Jersey); Carolyn Sievers Reed, *Alimony Modification and Cohabitation in North Carolina*, 63 N.C. L. REV. 794 (1985) (North Carolina); Note, *The Effect of Third Party Cohabitation on Alimony Payments*, 15 TULSA L.J., 772 (1980) (Oklahoma); J. Mark Taylor, *Alimony Termination How Significant Is Your "Other?,"* 2006 S.C. LAW. (March 2006) (South Carolina); Nicole C. Evans, *Hill v. Hill: Factors That Influence Alimony Termination*, 2 J. L. & FAM. STUD. 35 (2000) (Utah); Note, *Defining Cohabitation with 'Any Person.. Analogous to Marriage,'* 21 AM. J. FAM. L. 162 (2008) (Virginia). *See generally*, Annotation, *Divorced or Separated Spouse's Living with Member of Opposite Sex as Affecting Other Spouse's Obligation of Alimony or Support under Separation Agreement* §§ 6[a][b], 47 A.L.R.4th 38. *See also*, TJAGSA Practice Notes, *Debt Collection Assistance Officers: A New Tool for Legal Assistance Attorneys*, 2000-Nov Army Law. 31 (Nov. 2000) (military context); Anna Stepien-Sporek & Margaret Ryznar, *The Legal Treatment of Cohabitation in Poland and the United States*, 79 UMKC L. Rev. 373 (2010) (Poland).

[6]Peter L. Gladstone & Andrea E. Goldstein, *Codifying Cohabitation As A Ground for Modification or Termination of Alimony - So What's New?*, 2006 FLA. B.J. 45 (March 2006); David M. Cotter, *Same-sex Cohabitation as a Basis to Modify or Terminate Spousal Support*, 17 NO. 6 DIVORCE LITIG. 99 (June 2005); Philip M. Longmeyer, *Look on the Bright Side: The Prospect of Modifying or Terminating Maintenance Obligations Upon the Homosexual Cohabitation of Your Former Spouse*, 36 BRANDEIS J. FAM. L. 53, 54 (1998); Wendy Ricketts, *The Relevance of Premarital and Postmarital Cohabitation in Awarding Spousal Support*, 7 DIVORCE LITIG. 150 (July 1995).

factors defining cohabitation[7], and whether modification or termination of alimony upon cohabitation should be analyzed under contract law, tort law, law and economics, partnership law, or other analysis.[8]

Tying alimony to cohabitation in divorce is so apparently common that there is simply too much law and commentary in the field to rationally advocate for a particular formulation or list of elements. It appears, however, the numerous cases summarize into several general considerations:

> [T]he operative cohabitation is one in which the couple reside together on a continuing conjugal basis[9] or hold themselves out as man and wife[10] and assume marital rights and duties,[11] such as providing financial support.[12] Although there is

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[7]Jill Bornstein, *At A Cross-Road: Anti-Same-Sex Marriage Policies and Principles of Equity: The Effect of Same-Sex Cohabitation on Alimony Payments to an Ex-Spouse*, 84 CHI.-KENT L. REV. 1027 (2010); Evan J. Langbein, *Post-Dissolution Cohabitation of Alimony Recipients: A Legal Fact of Life*, 12 NOVA L. REV. 787 (1988). *See generally*, Annotation, *Divorced or Separated Spouse's Living with Member of Opposite Sex as Affecting Other Spouse's Obligation of Alimony or Support under Separation Agreement* §§ 6[a][b], 47 A.L.R.4th 38.

[8]Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1, 26 (2003); Tammy L. Lewis, *Standing in the Shadows: Honoring the Contractual Obligations of Cohabitants for Support*, 15 U. PUGET SOUND L. REV. 171, 172 (1991); Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539, 578 (1990).

[9]*Richardson v. Hunte*, 435 So. 2d 1315 (Ala.App. 1983); *Hathcock v. Hathcock*, 287 S.E.2d 19 (Ga. 1982); *In re Marriage of Morse*, 607 N.E.2d 632 (Ill.App.1993). Holding selves out as spouses not necessary: *In re Marriage of Thweatt*, 96 Cal. App. 3d 530, 157 Cal. Rptr. 826 (1979).

[10]*Smith v. Smith*, 88 A.D.2d 658, 450 N.Y.S.2d 524 (1982); *Barvitskie v. Barvitskie*, 1 Pa. D. & C.4th 331, 1987 WL 61953 (C.P. 1987). No claim of marital relationship: Fact that ex-wife was living with another man did not eliminate husband's obligation to make alimony payments, as there was no proof that wife had by word or deed ever claimed to be wife of man with whom she was living. *Miklowitz v. Miklowitz*, 79 A.D.2d 795, 435 N.Y.S.2d 116 (1980). Open concubinage: (1) The term "open concubinage" as a basis for obtaining a reduction or termination of permanent alimony means that there is a relationship of sexual conduct in which man and woman live together as husband and wife in a state of affairs approximating marriage and that there is an avowal by the parties of that relationship by words or conduct. *Gray v. Gray*, 451 So. 2d 579 (La.App.1984); (2) The requirement of openness for a concubinage that warrants a reduction or termination of permanent alimony may be satisfied by the mere absence of concealment, by the parties, of the illicit relationship. *Gray v. Gray*, 451 So. 2d 579 (La.App. 1984).

[11]*Barvitskie v. Barvitskie*, 1 Pa. D. & C.4th 331, 1987 WL 61953 (C.P. 1987).

[12]*Pellegrin v. Pellegrin*, 525 S.E.2d 611 (Va.App. 2000).

> authority to the contrary,[13] a sexual element to the relationship is usually essential to establishing the requisite cohabitation,[14] and a mere sharing of a dwelling or residence does not constitute cohabitation.[15] Cohabitation also requires some degree of permanency in the relationship, with more than just occasional sexual activity,[16] but need not rise to the level of a common-law marriage.[17] The mere establishment of a common residence with an unrelated person of the opposite sex is not cohabitation.[18]

27B CORPUS JURIS SECUNDUM *Divorce* § 656 (*Cohabitation by Recipient Spouse*) (footnotes in original, renumbered and reformatted). *C.f.*, *Bell v. Bell*, 468 N.E.2d 859 (Mass. 1984).

Here the Family Court's understanding of "cohabitation" was in accord with the encyclopedia summary:

> [E]vidence of a sexual relationship is admissible, but not necessarily required, for a finding of cohabitation, but also that there must be more to the relationship than just occupying the same living area or sharing some or all of the expenses incurred by both parties. The evidence should reflect a common and mutual purpose to manage expenses and make decisions together about common and personal goals, and a common purpose to make mutual financial and personal progress toward those goals.

ORDER ON PENDING MOTIONS at 6, *Appx.* at 31.

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[13] *Pellegrin v. Pellegrin*, 525 S.E.2d 611 (Va.App. 2000).

[14] *In re Marriage of Thweatt*, 96 Cal. App. 3d 530, 157 Cal. Rptr. 826 (1979); *Donaldson v. Donaldson*, 416 S.E.2d 514 (Ga. 1992); *Cohenour v. Cohenour*, 428 N.E.2d 195 (Ill.App. 1981). Sexual inability: Proof of inability to perform sexual intercourse does not negate a determination of "living openly or cohabiting" within statute concerning forfeiture of right to alimony, but it is a fact which may be considered in making such determination. *Ethridge v. Ethridge*, 379 So. 2d 87 (Ala.App. 1979).

[15] *Gray v. Gray*, 451 So. 2d 579 (La.App. 1984); *Scharnweber v. Scharnweber*, 105 A.D.2d 1080, 482 N.Y.S.2d 187 (1984), *judgment aff'd*, 65 N.Y.2d 1016, 494 N.Y.S.2d 100, 484 N.E.2d 129 (1985); *Pellegrin v. Pellegrin*, 525 S.E.2d 611 (Va.App. 2000).

[16] *McNatt v. McNatt*, 2005 WL 78300 (Ala.App. 2005); *Quisenberry v. Quisenberry*, 449 A.2d 274 (Del.Fam.Ct. 1982); *Pellegrin v. Pellegrin*, 525 S.E.2d 611 (Va.App.2000). Status or relationship: It is crucial to definition of "open concubinage" to note that it depicts status or relationship, rather than act or series of acts. *Thomas v. Thomas*, 440 So. 2d 879 (La.App. 1983).

[17] *Capper v. Capper*, 451 So. 2d 359 (Ala.App. 1984); *Fuller v. Fuller*, 461 N.E.2d 1348 (Ohio App. 1983).

[18] *Gordon v. Gordon*, 675 A.2d 540 (Md. 1996).

III. Scant Evidence of Cohabitation

Here there is no evidence of a sexual relationship between Judith and Paul, or even that they have acted affectionate toward each other. There was no attempt to show any shared aspirations, or pledges of mutual support. *See*, *Bisig v. Bisig*, 124 N.H. 372, 375 (1983) (cohabitation not sufficient reason to terminate alimony "because unmarried cohabitants are under no legal obligation to support each other."). There was no evidence that they intend to continue their arrangement – however it is characterized – into the future.

There was no evidence of commingling financial resources or obligations, or of any financial cooperation for costs of real estate repairs, improvements, insurance, or taxes. *C.f.*, *In re Marriage of Weisbruch*, 710 N.E.2d 439, 445 (Ill.App. 1999) (cohabiting couple intertwined financially, including joint checking account, mutual wills, beneficiaries of the other's retirement plans and insurance policies).

Each has their own bedroom and bathroom on separate storeys, and there was no evidence that Paul has access to Judith's portion of the house, or she to his. There was no evidence that any of Judith's furniture, appliances, or personal property has been moved into or stored at Paul's house. There was no evidence that they have any access or permission to the other's personal possessions, or even that they share a single household item.

There was no evidence that Judith has made Paul's Plymouth address hers for purposes of registering her car, voting, or receiving mail. There was no evidence they share a phone or a phone number, or have access to each other's email accounts or other personal information.

There was no evidence that Judith and Paul socialize together or have any mutual friends. There was no evidence of how they hold themselves out to neighbors or acquaintances, nor what

such people might know, believe, or assume about them.

Bruce did not show cohabitation. At most he proved an informal landlord/tenant arrangement, with Judith contributing groceries and cooking in exchange for shelter. *See* RSA 540-B:1, I ("A 'shared facility' means real property rented for residential purposes which has separate sleeping areas for each occupant and in which each occupant has access to and shares with the owner of the facility one or more significant portions of the facility in common, such as kitchen, dining area, bathroom, or bathing area, for which the occupant has no rented right of sole personal use.").

Whether a former spouse is cohabitating is a question of fact for the trial court. *Bisig v. Bisig*, 124 N.H. 372, 376 (1983) ("The evidence supports the master's recommendation and, consequently, we cannot say that the master abused his discretion."). Here the Family Court found, on the scant facts offered, that Judith was not cohabitating. Nothing in the record suggests the court erred, and thus its judgment must be upheld.

CONCLUSION

In light of the forgoing, Judith Raybeck request this Honorable Court leave undisturbed the findings of the Laconia Family Court.

Respectfully submitted,

Judith Raybeck
By her Attorney,

Law Office of Joshua L. Gordon

Dated: October 18, 2011

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Judith Raybeck requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the issue raised in this case is novel in this jurisdiction.

I hereby certify that on October 18, 2011, copies of the foregoing will be forwarded to Gregory A. Kalpakgian, Esq.

Dated: October 18, 2011

Joshua L. Gordon, Esq.