

Alimony: Cohabitation is All About Money After All

North Carolina law long has provided that court-ordered alimony terminates upon the death of either the supporting or dependent spouse and upon the remarriage of the dependent spouse. Since 1995, the law provides that even if the dependent spouse does not remarry, alimony also will terminate if the receiver engages in cohabitation. Our appellate courts have struggled to provide clear guidance regarding how to determine when a relationship amounts to cohabitation. Last December, in [Setzler v. Setzler](#), 781 SE2d 64 (NC App., 2015), the court of appeals told us that the primary purpose of the cohabitation rule is to discourage “bad faith” decisions not to remarry and provided the clearest statement to date that cohabitation is proven by showing a relationship that provides economic benefits to the dependent spouse similar to those that would be provided by marriage.

Cohabitation

[GS 50-16.9\(b\)](#) provides defines cohabitation as:

The act of two adults dwelling together continuously and habitually in a private heterosexual relationship, even if the relationship is not solemnized by marriage, or a private homosexual relationship. Cohabitation is evidence by the voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people, and which include, but are not necessarily dependent on, sexual relations.

In *Craddock v. Craddock*, 188 NC App 806 (2008), the court of appeals explained the cohabitation statute by quoting Professor Suzanne Reynolds:

The statute reflects several of the goals of the “live-in lover statutes,” terminating alimony in relationships that probably have an economic impact, preventing a recipient from avoiding in bad faith the termination that would occur at remarriage, but not the goal of imposing some kind of sexual fidelity on the recipient as the condition of continued alimony. The first sentence reflects the goal of terminating alimony in a relationship that probably has an economic impact. “Continuous and habitual” connotes a relationship of some duration and suggests that the relationship must be exclusive and monogamous as well. All of these factors increase the likelihood that the relationship has an economic impact on the recipient spouse.

2 Suzanne Reynolds, *Lee’s North Carolina Family Law* § 9.85, at 493-94 (5th ed.1999).

A few years later in *Smallwood v. Smallwood*, 742 SE2d 814 (NC App., 2013), the court again stressed the need to find that a relationship has a financial impact on the receiving spouse to support the conclusion that cohabitation has occurred. In affirming the trial court’s conclusion that the former wife was not cohabitating with her boyfriend even though the boyfriend slept at her

house five to seven nights each week, the court of appeals said:

While the court did determine that plaintiff and [her boyfriend] have engaged in some domestic activities, it did not find an assumption of marital rights and duties extending beyond those found in an intimate friendship—such as, for example, joint financial obligations, sharing of a home, combining of finances, pooling of resources, or consistent merging of families.

Bird v. Bird

But when the Supreme Court was presented with the opportunity to define cohabitation, it did not mention anything at all about the importance of finding that the relationship has a financial impact, raising a question about whether the Supreme Court shares the Court of Appeal's view of the purpose of the statute. In *Bird v. Bird*, 363 NC 774 (2009), the court reversed the trial court decision to grant summary judgment in favor of dependent wife after concluding she was not cohabitating. The Supreme Court held that because there was conflicting evidence about whether the couple maintained separate residences, the trial court was required to consider the subjective intent of the couple regarding whether they intended to cohabit. The court did not say the financial nature of the relationship was not important; it simply made no mention of that issue being significant.

[Setzler](#)

The Court of Appeals made it clear in [Setzler](#) that *Bird* does not change the focus of the analysis from that set out by in *Craddock* and *Smallwood*. In [Setzler](#), the trial court denied former husband's motion to terminate alimony based on cohabitation after concluding that while wife and her boyfriend spent almost every night together, they did not assume those rights and responsibilities usually manifested by married people. The two maintained separate houses and neither kept clothes or personal items at the house of the other. The man did regularly pay living expenses and other bills of the wife, but wife repaid him entirely when she received her property settlement from husband.

The court of appeals affirmed the trial court decision. Significantly, the court of appeals stated that “the primary intent in making cohabitation grounds for termination of alimony was to evaluate the economic impact of a relationship on a dependent spouse and, consequently, avoid bad faith receipts of alimony;” bad faith meaning a dependent spouse avoiding remarriage for the sole purpose of continuing to receive alimony. So if the relationship is such that one would expect the parties to be married, the assumption is the only reason they are not married is the desire to avoid the termination of alimony.

The court held that there are two prongs to the definition of cohabitation found in [GS 50-16.9\(b\)](#). First the trial court must determine there is “a dwelling together continuously and habitually.” According to the court, this first prong reflects the goals of “live-in-lover statutes” discussed by Professor Reynolds in the quote above. The statute is not intended to allow a court to terminate

alimony simply because a recipient engages in a sexual relationship but recognizes that a continuous, habitual, monogamous and exclusive relationship usually results in an economic impact on the dependent spouse. In [Setzler](#), the trial court concluded that wife and the man did dwell together continuously and habitually, had a monogamous and exclusive relationship, and the relationship had a financial impact on wife because man paid for all of their expenses when they traveled, had dinner out or cooked for both of them at home.

However, the second prong of the statutory definition requires that the court find that the couple “voluntarily assumes those marital rights, duties, and obligations usually manifested by married people” based upon the totality of the circumstances. In this case, the trial court supported its conclusion that the parties did not meet this prong with findings that the two maintained separate residences, did not combine their finances, did not maintain each other’s homes, and did not refer to themselves as married. While the regular payment of living expenses by one for the other would support a conclusion that this prong exists, the payments do not establish this type of relationship if they are loans only, as they were in this case.