

NEW YORK COURT OF APPEALS

Graev v. Graev

11 N.Y.3d 262, 898 N.E.2d 909 (2008) · Decided October 21, 2008

OPINION

READ, J.

OPINION OF THE COURT Read, J. In 1995, Linda Graev and Lawrence Graev filed separate divorce actions, which were subsequently consolidated. On April 18, 1997, they entered into a settlement agreement that was incorporated, but not merged, into a judgment of divorce entered and filed in June 1997.

As relevant to this appeal, the agreement required Mr. Graev to pay Mrs. Graev spousal support payments in the amount of \$10,000 per month, subject to a *266specified maximum cost-of-living adjustment, until the earlier of August 10, 2009 or the occurrence of any of four “termination events”; namely, the wife’s remarriage or death, the husband’s death, or “[t]he cohabitation of the Wife with an unrelated adult for a period of sixty (60) substantially consecutive days.” The agreement did not define “cohabitation.” On September 7, 2004, Mr. Graev advised Mrs. Graev that her cohabitation with ME] an unrelated adult male, had been “documented and photographed by professionals retained by [his] counsel.” Invoking the settlement agreement’s provision for termination in the event of cohabitation, Mr. Graev therefore ceased making spousal support payments as of September 2004.

On October 13, 2004, Mrs. Graev moved in Supreme Court by order to show cause to enforce the settlement agreement’s maintenance provisions; on October 29, 2004, Mr. Graev cross-moved for summary judgment on the ground that a termination event had occurred. Mr. Graev essentially took the position that Mrs. Graev and MP were cohabiting within the meaning of the settlement agreement because MP had stayed overnight in Mrs. Graev’s vacation home in Connecticut for at least 60 substantially consecutive days during the summer of 2004, as borne out by surveillance.

Further, he contended, there was an “obvious serious relationship” between Mrs. Graev and MI] and MP was Mrs. Graev’s “lover and life partner,” as illustrated by the number of family occasions—weddings, birthdays and the like—they attended as a couple. Mrs. Graev argued that she did not “cohabit” with MP during the summer of 2004 because their relationship had long been platonic, as proven by evidence of MP’s sexual incapacity and her diminished sexual desire caused by prescribed medication.

In Mrs. Graev’s view, “use [of] the word ‘cohabitation’— rather than ‘living together’ or ‘residing’... plainly mean[t] having sexual relations.” In response, Mr. Graev insisted that

“cohabitation could not possibly require ‘sexual relations’ ” under the law and the plain meaning of the settlement agreement, which was intended to be less stringent than section 248 of the Domestic Relations Law.¹ In subsequent dueling submissions to the motion court, Mrs. Graev for the first time pointed to “a body of New York cases *267 where termination of maintenance was not permitted [where] there was no economic unit shown.” For his part, Mr. Graev reprised his argument that “cohabitation [was] not synonymous with, and [did] not require a showing of ‘sexual relations,’ ” but rather encompassed a “variety of factors,” none of which was dispositive.

On February 14, 2005, Supreme Court granted both parties’ motions to the extent of ordering a hearing to determine whether Mrs. Graev’s relationship with MP constituted “cohabitation” within the meaning of the settlement agreement.

The motion court first acknowledged that “the parties[’] agreement relating to ‘cohabitation’ draws from, but is far more expansive than, the language found in section 248 of the Domestic Relations Law” (6 Misc 3d 1024[A], 2005 NY Slip Op 50169[U], *2). Next, the court stated that whether Mrs. Graev was having sexual intercourse with MP was “not conclusive.” (Id.)

Rather, “sexual intimacy may be one of the elements that a court could consider.” (Id.) Given the absence of a definition of “cohabitation” in the settlement agreement, Supreme Court determined that “the plain meaning of’ the word should be examined, as well as various New York cases, none of which “narrowly construed ‘cohabitation’ in the manner [Mrs. Graev] suggested].” (Id.)

The motion court opined that “cohabitation consist[ed] of several elements that [Mr. Graev] must establish by a preponderance of the evidence at a hearing,” but did not identify or suggest how much weight to give any individual element (id. at *3).

The court twice cited *Brown v Brown* (122 AD2d 762, 763, 764 [2d Dept 1986]), which held that the ex-wife was not “liv[ing] with another man” so as to forfeit her support payments under the terms of a stipulation where “the evidence did not establish that [she] and her tenant shared household expenses or a bedroom, or that they functioned as an economic unit.” The court also adverted to *Matter of Watson v Watson* (39 AD2d 660 [1st Dept 1972] [intermittent intimacy with the same male does not fulfill the requirements of Domestic Relations Law § 248]); *Olstein v Olstein* (309 AD2d 697, 698, 699 [1st Dept 2003] [ex-wife “resid(ed)... with a non-relative adult male... for a reasonably continuous period of more than six months” where she admitted to a “romantic” relationship with her male friend, and they shared meals and stayed overnight in the same house for requisite period of time]); *Famoso v Famoso* (267 AD2d 274, 274, 275 [2d Dept 1999] [ex-wife did not “resid(e) with an unre*268lated adult male... for a period of 120 days in any one (1) year” where “resid(e)” was defined in separation agreement as “staying overnight” because husband neither established that ex-wife’s male friend stayed overnight a sufficient number of times during surveillance period, nor, alternatively, actually resided with her in light of evidence that he maintained a separate residence]); *Markhoffv Markhoff* (225 AD2d 1000 [3d

Dept 1996] [applying Domestic Relations Law § 248]); and *Scharnweber v Scharnweber* (105 AD2d 1080 [4th Dept 1984] [concluding that ex-wife was not “living” with an unrelated male at the former marital residence where “the evidence established that they (did) not share household expenses or a bedroom and (did) not function as an economic unit”], *affd* 65 NY2d 1016, 1017 [1985] [holding that a separation agreement may condition a husband’s obligation to support ex-wife “solely on her refraining from living with another man without the necessity for the husband to also prove that she habitually holds herself out as the other man’s wife as Domestic Relations Law § 248 requires”]).

The hearing was held before another Supreme Court Justice. Contending for the first time that the word “cohabitation” was ambiguous, Mr. Graev moved in limine for permission to present extrinsic evidence of the “circumstances surrounding the [settlement] agreement” so as to explain what behavior the parties intended to cover. Mrs. Graev countered that the motion court “was able to define the term cohabitation in accordance with the plain meaning of the term as construed by the case law” cited in its decision (i.e., *Brown*, *Olstein*, *Famoso*, *Markhoff* and *Scharnweber*), thus “removing any question of ambiguity” and establishing the law of the case.

Supreme Court denied the motion on the ground that the motion court’s February 2005 decision held that the word “cohabitation” as used in the settlement agreement was not ambiguous.² By the conclusion of the ensuing trial, Mr. Graev was arguing that Mrs. Graev and MP were cohabiting within the meaning of the settlement agreement because they consistently shared a bed at her summer home in Connecticut during the summer months of 2004; their relationship was, at least at one *269point, admittedly sexual³ and remained romantic and exclusive for over three years; they participated in social activities with friends and family as a couple and split costs when dating; and they performed chores and errands together.

These facts were basically undisputed. For her part, Mrs. Graev contended that she and MP were not “cohabiting” within the meaning of the settlement agreement because the cases relied on by the motion court “define[d] cohabitation as living together[,] with the central element being the maintaining [of] one residence, sharing household expenses and functioning as an economic unit.” And in this case, it was undisputed that MP owned his own home in Connecticut, where he spent considerable time, and did not contribute to the costs of maintaining Mrs. Graev’s summer home.

In a decision and order dated March 10, 2006, Supreme Court, again relying on the motion court’s decision, opined that because “cohabitation” was not defined in the settlement agreement, she had to consider its plain meaning and those few New York cases construing similar termination clauses. She referred to *Black’s Law Dictionary*, which defines “cohabitation” to mean “living together, especially] as partners in life, usu[ally] with the suggestion of sexual relations” (*Black’s Law Dictionary* 277 [8th ed 2004]), but noted that, as the motion court had ruled, “sexual intimacy alone [was] not determinative of... cohabitation.” In any event, Supreme Court credited Mrs.

Graev's and MP's testimony that their relationship ceased to be sexual long before the summer of 2004.

Citing Markhoff and *Matter of Emrich v Emrich* (173 AD2d 818 [2d Dept 1991]), Supreme Court concluded that New York cases "find that an essential element of cohabitation is a shared residence with shared household expenses" and that "the couple functioned as an economic unit," features lacking in the bond between Mrs. Graev and MP, which she likened to "an adult dating relationship." As already mentioned, Markhoff applied Domestic Relations Law § 248.

In *Emrich*, the Appellate Division concluded that the ex-wife was not "residing on a substantially continuous basis" with another male (meaning "for a period not less than sixty [60] days") because of "the evidence that the wife's [male] friend maintained a separate residence and that his contributions to the wife's household expenses were sporadic and minor" (*Emrich*, 173 AD2d at 819, 820). *270 On appeal, Mr. Graev repeated his plea that the word "cohabitation" is ambiguous under New York law.

Mrs. Graev rejoined that New York courts have construed "cohabitation" as synonymous with "living together," which, in turn, the courts have long held to mean sharing a residence, sharing expenses, and functioning as an economic unit.

The Appellate Division affirmed, with two Justices dissenting. The majority acknowledged that parties to a divorce can, by agreement, alter the terms that would otherwise apply under Domestic Relations Law § 248, and observed that these kinds of agreements are "contracts subject to the principles of contract construction and interpretation" (*Graev*, 46 AD3d at 450).

The majority then concluded that "[a] review of New York case law shows that in the context of these types of separation agreements, the term cohabitation has a plain meaning which contemplates changed economic circumstances, and is not ambiguous.... [I]t is... sensible to presume that attorneys using a term such as 'cohabitation' in a separation agreement are aware of the judicial decisions construing the term" (*id.* at 451 [emphasis added]).

According to the majority, New York judicial decisions had consistently interpreted "cohabitation" to mean "more than a romantic relationship or series of nights spent together" and to require "the sharing of finances" or "an economic relationship akin to a shared possessory interest in one home," which could be "proven with evidence that two people keep their personal belongings and receive their mail at the same address" (*id.* at 452, citing *Salas v Salas*, 128 AD2d 849 [2d Dept 1987], lv dismissed 70 NY2d 747 [1987] [ex-wife was not "living together" with another man because they maintained separate residences, frequently slept in their separate residences, and did not share household expenses or otherwise function as an economic unit]).

The majority adduced four cases to support this proposition: *Scharnweber*; *Emrich*; *Matter of Ciardullo v Ciardullo* (27 AD3d 735, 736 [2d Dept 2006] [concluding that ex-wife was not

“habitually living with a man” or “establishing) a residence with a man” because un rebutted evidence showed that her boyfriend “maintained a separate residence in the one-bedroom apartment he rented from (her) and the two did not share household expenses or function as an economic unit”]); and *Clark v Clark* (33 AD3d 836, 837, 838 [2d Dept *2712006] [interpreting “cohabitation of the Wife with an unrelated male,” and citing Ciardullo, Emrich and Scharnweber for the principle that “(a)s interpreted by New York courts, the term cohabitation entails a relationship between a former wife and an unrelated male who live together in the same residence and share household expenses or function as an economic unit” (internal quotation marks omitted)]).

As for this case, the majority found that Mrs. Graev and MP spent more than 60 substantially consecutive nights together during the summer of 2004, and that “their relationship became romantic in January 2003” (Graev, 46 AD3d at 448). These facts were not “decisive” under New York case law, however, because MP owned his own home and there was “absolutely no evidence that the couple shared household expenses or functioned as a single economic unit” (id. at 453).

As a result, the majority concluded that Mrs. Graev’s relationship with MP did not amount to “cohabitation.” The dissent would have awarded Mr. Graev summary judgment terminating his obligation to make spousal support payments. Setting out various dictionary definitions for “cohabitation,” the dissent considered it “obvious” that “in the context of the agreement, cohabitation mean[t] living together in a sexual relationship for a period of 60 substantially consecutive days” (id. at 458), and disbelieved Mrs. Graev’s and MP’s testimony about the absence of sexual intimacy in their romantic relationship after March 2003.

The dissent did not “take the position that financial interdependence [was] irrelevant,” but “merely state[d] that under the terms of this agreement, it [was] not determinative of the issue of cohabitation, as the majority holds” (id. at 459).

We now reverse. We do not agree that “the term cohabitation has a plain meaning which contemplates changed economic circumstances, and is not ambiguous” absent an explicit provision to the contrary in a separation agreement or stipulation (Graev, 46 AD3d at 451), or, put slightly differently, is necessarily determined by whether a “couple share[s] household expenses or function[s] as a single economic unit” (id. at 453).

Rather, the word “cohabitation” is ambiguous as used in this settlement agreement: neither the dictionary nor New York case law supplies an authoritative or “plain” meaning. Similarly, courts in other states have not ascribed a uniform meaning to the word “cohabitation” as used in separation agreements (see Allen, Annotation, Divorced or Separated Spouse’s Living with *272Member of Opposite Sex as Affecting Other Spouse’s Obligation of Alimony or Support Under Separation Agreement, 47 ALR4th 38, §§ 6[a], 6[b]).

In addition to the definition in Black's Law Dictionary, already set out, "cohabit" is variously defined as "[t]o live together as husband and wife: often said distinctively of persons not legally married" (3 Oxford English Dictionary 448 [2d ed 1989]); "live together and have a sexual relationship without being married" (The New Oxford American Dictionary 330 [2d ed 2005]); "to live together as or as if as husband and wife" (Webster's Third New International Dictionary 440 [2002 ed]); "to live together as husband and wife, usually without legal or religious sanction," or "to live together in an intimate relationship" (Random House Webster's Unabridged Dictionary 400 [2d ed 2001]); and "to live together as or as if a married couple" (Merriam Webster's Collegiate Dictionary [10th ed 1997]).

The common element in all these definitions is "to live together," particularly in a relationship or manner resembling or suggestive of marriage, and New York courts have, in fact, used the word "cohabitation" interchangeably with the phrase "living together" (see e.g. Markhoff, 225 AD2d at 1001; Olstein, 309 AD2d at 698; Scharnweber, 65 NY2d at 1017). Ultimately, however, "living together" as if husband and wife is no less opaque than "cohabitation": both bring to mind a variety of physical, emotional and material factors, and therefore might mean any number of things in a separation agreement, where otherwise unexplained in the text, depending on the parties' intent.

For example, the parties here might reasonably have meant "cohabitation" to encompass whether Mrs. Graev engaged in sexual relations with an unrelated adult; whether she and the unrelated adult commingled their finances or—just the opposite—whether she supported the unrelated adult financially; whether she and the unrelated adult shared the same bed; or some combination of these or other factors associated with living together as if husband and wife.

Nor does New York case law establish a distinct meaning— "changed economic circumstances"— for "cohabitation." The argument that it does stems from the Appellate Division's one-paragraph, frequently cited decision in Scharnweber, which we affirmed.

In that case, Supreme Court concluded that an unrelated male was living with Mrs. Scharnweber in the former marital residence, which entitled her ex-husband to cease support payments and required her to pay \$10,000 to discharge a *273second mortgage. There are no facts recited in the Appellate Division's decision.

The record on appeal, however, discloses that Mrs. Scharnweber, who was 43 years old, was having an affair with her daughter's former boyfriend, who was 24 years old. The boyfriend moved into a house 300 yards down the street from the former marital residence, first house-sitting for the absent owner and subsequently renting a room. He gave Mrs. Scharnweber or her teenage daughter (the cook in the family) money to purchase food, and routinely took his meals with Mrs. Scharnweber and her children at the former marital residence; he also occasionally helped her out with car payments.

Both Mrs. Scharnweber and her boyfriend testified that he did not sleep overnight with her in the marital residence (he worked a night shift; she worked during the day). The Appellate Division reversed, concluding that “the evidence established that [Mrs. Scharnweber and her boyfriend did] not share household expenses or a bedroom and [did] not function as an economic unit” despite the boyfriend’s financial contributions for food and transportation (Scharnweber, 105 AD2d at 1080).

In our memorandum decision, we stated that the facts in the case, which we did not describe, “more nearly comport[ed] with the Appellate Division’s view” than with Supreme Court’s, and so the ex-husband “failed to establish the cohabitation required by the agreement” (Scharnweber, 65 NY2d at 1017).

We did not equate the word “cohabitation” with “changed economic circumstances” alone. Indeed, the Appellate Division in Scharnweber indicated that whether Mrs. Scharnweber and her boyfriend shared a bedroom (unlike Mrs. Graev and MI] they did not) was also a relevant factor (see also Brown, 122 AD2d at 764). While more recent Appellate Division decisions—particularly Ciardullo and Clark—may be read to imply, as the Appellate Division held in this case, that there can be no “cohabitation” without changed economic circumstances, we have never taken this position and decline to do so now.

In addition, as Mr. Graev points out, Ciardullo and Clark were handed down long after the drafters of the settlement agreement in this case had finished their work, and so could not have influenced it. The ambiguity of the word “cohabitation” in this settlement agreement is illustrated by the shape-shifting “plain” meanings and positions advanced by the parties over the course of the litigation.

Initially, Mr. Graev claimed that Mrs. Graev and MP were cohabiting because MP stayed overnight in Mrs. Graev’s house for 60 substantially consecutive days, and shared a close *274social, familial-like relationship. Mrs. Graev objected that “cohabitation” did not mean “living together,” and “plainly” meant only “having sexual relations.” After the motion court ruled that “cohabitation” encompassed many different elements, and not just sexual intimacy, Mr. Graev argued that the word “cohabitation” was, in fact, ambiguous, and therefore extrinsic evidence was required to flesh out its meaning for these parties.

Mrs. Graev then tacked about, contending that “cohabitation” was, after all, synonymous with “living together,” and that the “plain meaning of [cohabitation] as construed by the case law” entailed a shared residence, shared household expenses and living together as an economic unit.

Having won below on this basis, Mrs. Graev makes the same assertions here. For his part, Mr. Graev insists—in line with the dissent in the Appellate Division—that “cohabitation” plainly contemplates solely a series of 60 more-or-less consecutive nights spent together.

In short, the word “cohabitation” does not have a “plain” meaning in this settlement agreement. Without extrinsic evidence as to the parties’ intent, there is no way to assess the particular factors inherent in the dictionary meanings or case law discussions of “cohabitation” the parties may have meant to embrace or emphasize.⁴ Accordingly, the order of the Appellate Division should be reversed, without costs, and the case remitted to Supreme Court for further proceedings in accordance with this opinion..

This provision vests trial judges with discretion to annul support payments “upon proof that the wife is habitually living with another man and holding herself out as his wife” (Domestic Relations Law § 248 [emphasis added])..

As the majority in the Appellate Division subsequently noted, however, the motion court’s ruling “did not explicitly state that the term ‘cohabitation’ was unambiguous, but instead that the term had not been construed in the narrow manner that Mrs. Graev suggested” initially; i.e., having sexual relations (Graev v Graev, 46 AD3d 445, 447 [1st Dept 2007]).. According to Mrs. Graev and MI] they started dating in October 2002, but were sexually intimate only from January to March 2003..

The dissent complains that our resolution of this appeal “creates uncertainty, making it difficult for parties to understand their obligations and responsibilities’ ’; and that “[t]he wiser choice is to articulate a clear rule of law” (dissenting op at 280). But the uncertainty stems principally from parties’ use of a word sufficiently ambiguous to have been interpreted so variously by the courts.

Moreover, the dissent’s purportedly “clear rule of law” is hardly fair to those who may have used the word “cohabitation” in an extant separation agreement, intending the meaning ascribed to it by those Appellate Division cases requiring financial interdependence.

The wisest rule, of course, is for parties in the future to make their intention clear by more careful drafting.