# The *Graev* Condition of the Cohabitation Clause[1]

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Marital agreements frequently include a "dum casta" clause, brief for "dum sola et casta" (while she remains single and chaste). Such a clause, in typical fashion, provides that spousal maintenance continues until (typically) the wife "cohabits" with a male for an identified period of time. Few agreements define or rule out the triggering mechanisms of the clause.

The definition of "cohabitation", and its cognate, "living together", have been challenged. In *Salas v. Salas*,[2] both the majority and the dissenting opinions weighed in regarding the inexplicit meaning of the phrase "living together." The majority said that the phrase "defies precise definition." The dissenter said:

> Living together", though a common expression in the lexicon of both the lawyer and layperson, resists precise definition. Various courts and scholars have grappled with this elusive phrase with mixed results. Although no exact definition emerges from these treatments, certain recurring factors become apparent, and a rough composite emerges from a review of New York case law and that of other jurisdictions.

In *Heller v. Pope*,[3] the Court of Appeals noted:

> Written words may have more than one meaning. The letter killeth but the spirit giveth life. Form should not prevail over substance and a sensible meaning of words should be sought. But plain meanings may not be changed by parol, and the courts will not make a new contract for the parties under the guise of interpreting the writing. The fact that the parties intended their words to bear a certain meaning, would be immaterial were it not for the fact that the words either normally or locally might properly bear such meaning.

It should, therefore, come as no surprise that a layman is similarly incapable of trapping this shifting target. Thus a layman's cry for judicial assistance in deciphering the implementation of a phrase that befuddles the judiciary requires the marshalling of all relevant principles of contract construction. The Appellate Division, First Department, normally known for its brevity, addressed this question in uncustomary length in *Graev v. Graev*.[4] The dissenting opinion is

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[1] N.Y.L.J., April 28, 2008.

[2] Salas v. Salas 128 A.D.2d 849 (2nd Dept.,1987).

[3] Heller v. Pope 250 N.Y. 132 (1928), citing Williston on Contracts, § 613.

[4] Graev v. Graev, --- N.Y.S.2d ----, 2007 WL 4531808, 2007 N.Y. Slip Op. 10466 (1st Dept., 2007).

compelling and similarly extensive. *Graev* offers no easy solutions; it only raises hard questions.

***Graev v. Graev***

The settlement agreement in *Graev* provided that the husband's spousal support obligation would terminate, inter alia, upon "the cohabitation of the wife with an unrelated adult for a period of sixty substantially consecutive days." Arguing ambiguity, the husband sought to introduce evidence, including expert testimony, as to the meaning of the term "cohabitation." *vis à vis* "how usage or custom has affected and influenced the meaning of the term" "in modern society." He also wanted to present evidence showing the circumstances surrounding the dissolution of the marriage because they would be instructive as to the parties' intent when they included the term in their agreement. His application was denied.

*Graev* began by citing a cardinal principle of contract construction and interpretation, including the best evidence of what parties to a written agreement intend is what they say in their writing. Accordingly, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." Ambiguity must be determined by looking within the four corners of the document and not to extrinsic sources; extrinsic evidence cannot be used to create an ambiguity in an agreement, but only to resolve an ambiguity. One party's subjective meaning to a term that differs from the term's plain meaning does not render the term ambiguous.

**A Plain Meaning**

*Graev* capsulized case law as showing that the term "cohabitation" has a plain meaning which contemplates changed economic circumstances "function[ing] as an economic unit"[5], and is more than a romantic relationship or series of nights spent together. This analysis makes sense, *Graev* reasoned, because it gives the underlying question of whether the relationship at issue is the type of "changed circumstances" which would render a support obligation unjust. "Cohabitation" requires the additional showing of an economic relationship akin to a shared possessory interest in one home, such as, evidence that two people keep their personal belongings and receive their mail at the same address. The parties were naturally free to contractually condition support as they pleased or to restrict the recipient's post-divorce intimate relations by ascribing a different meaning to "cohabitation."

Mrs. Graev finally admitted that her relationship with her boyfriend, MP, was romantic and exclusive. According to her, she and MP never discussed living together, did not commingle their finances with no plans to do so, and throughout their relationship, they split the costs of all shared items, such as meals, movies, and travel. She contended that "cohabitation" has

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[5] Clark v. Clark, 33 A.D.3d 836 159 (2006) (the term "cohabitation" entails a relationship where the parties live together in the same residence and share household expenses or "function as an economic unit."); Ciardullo v. Ciardullo 27 A.D.3d 735 (2nd Dept., 2006); Emrich v. Emrich 173 A.D.2d 818 (2nd Dept.,1991); Scharnweber v. Scharnweber, 105 A.D.2d 1080 (4th Dept., 1984), aff'd, 65 N.Y.2d 1016 (1985).

uniformly been construed as synonymous with "living together" as an economic unit.

Ample surveillance established that Mrs. Graev and MP spent in excess of 60 nights together during the relevant period. However, *Graev* did not consider the number of nights that they slept together as determinative because MP had his own home minutes from her home wherein he kept all of his possessions and received mail. There was no evidence that the couple shared household expenses, assets, or functioned as a single economic unit.

*Graev* creates a presumption: "just as it is sensible to presume that when the Legislature amends a statute it is aware of all judicial decisions construing it, it is also sensible to presume that attorneys using a term such as "cohabitation" in a separation agreement are aware of the judicial decisions construing the term." The dissent countered that the only decision cited by the majority regarding the sharing of household expenses as an element of cohabitation, postdated the separation agreement by nine years.

**The Dissent**

In a strong dissent, Justice Joseph Sullivan stated that it was obvious that "cohabitation" meant a sexual relationship and should be enforced as written. That the wife so understood its meaning was clear by the lengths to which she had gone to hide the sexual nature of her relationship. Contrary to her testimony of their respective sexual dysfunctions, MP admitted having refilled his Viagra prescription at least six times. Their lifestyle together was determinative of not a mere friendship but of a continuing sexual relationship in which they represented themselves as a couple and were perceived as such by family members and friends. The surveillance showed that during the entire relevant period, although there were only six days that they were not together for at least part of the day, the wife and MP shared the same bed for 61 substantially consecutive nights, and enjoyed a daily routine together including chores and dining. MP also had access to a key to the wife's Connecticut home.

Noting that "courts often look to the dictionary to determine the ordinary meaning of a disputed term", Justice Sullivan cited three major dictionaries none of which included financial sharing as a component of "cohabitation."[6] The hearing court reliance on the definition Black's Law Dictionary, "The fact or state of living together, especially as partners in life, usually with the suggestion of sexual relations", was of limited value since it embraced the concept of a life partnership, a notion at odds with the agreement's 60-day period of cohabitation. Furthermore, pursuant to Domestic Relations Law § 248, financial sharing is not a statutory standard for terminating maintenance. How and whether they pooled their resources is not dispositive of cohabitation: "It ill behooves any court to impose such a burden on the meaning of cohabitation,

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[6] The New Oxford American Dictionary (2d ed. 2005): "live together and have a sexual relationship without being married." Webster's Third New International Dictionary (2002): "to live together as or as if as husband and wife." Random House Unabridged Dictionary (2d ed. 2001): "1. to live together as husband and wife, usually without legal or religious sanction. 2. to live together in an intimate relationship."

a fairly plain contract term."

The dissent emphasized that it was not advancing a position that financial interdependence is generally irrelevant, only that under the facts in *Graev*, it was not determinative because the hearing court ignored the way in which adults often choose to conduct their exclusive relationships. Finally, the Court of Appeals affirmance of *Scharnweber v. Scharnweber*[7] did not address the question whether the sharing of household expenses or functioning as an economic unit is an element of cohabitation.

**Unanswered Questions**

*Graev* poses difficult questions. The decision began by citing one of the most fundamental principles of contract construction, that an agreement is to be interpreted in accordance with "the plain meaning of its terms."[8] However, this simple principle may not be read in isolation:

- Separation agreements are generally written to serve as guides to future conduct for laymen. For this reason, the words employed in them should be given their natural, ordinary, and familiar meanings.[9]

- The apparent meaning may not be distorted.[10]

- An agreement must be interpreted to assess the parties' intentions not only from the literal language, but also considering "whatever may be reasonably implied from that literal language."[11] It follows that: (a) when interpreting a contract, the court should arrive at a construction which will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized;[12] and (b) the intent, when apparent and not repugnant to any rule of law, will control technical terms, for the intent and not the words is the essence of every

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[7] Scharnweber v. Scharnweber, 65 N.Y.2d 1016 (1985).

[8] Laba v. Carey, 29 N.Y.2d 302 (1971).

[9] Robinson v. Robinson 134 Misc.2d 664 (Sup.Ct. Erie Co. 1987).

[10] Kalousdian v. Kalousdian 35 A.D.3d 669 (2nd Dept., 2006).

[11] See, Slatt v. Slatt 102 A.D.2d 475 (1st Dept.,1984); Blackmon v. Estate of Battcock 78 N.Y.2d 735 (1991).

[12] Fetner v. Fetner, 293 A.D.2d 645 (2nd Dept.,2002); Pellot v. Pellot, 305 A.D.2d 478 (2nd Dept., 2003).

agreement.[13]

- In searching for the probable intent of the parties, lest form swallow substance, the goal must be to accord the words of the contract their fair and reasonable meaning,[14] its meaning should be based on reasonable interpretations of the literal language,[15] and a sensible meaning of words should be sought.[16]

- A court may not write into a contract conditions the parties did not insert by adding or excising terms under the guise of construction or interpretation.[17]

- Contracts are not to be interpreted by giving a strict and rigid meaning to general words or expressions without regard to the surrounding circumstances or the apparent purpose which the parties sought to accomplish. The court should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed so that particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby.[18]

- Effect is to be given to the words, expressions, and provisions which carry out the evident intent of the instrument, rather than those which are inconsistent therewith, and either to reject such others as surplusage or repugnant, or to mold them into consistency with the intent, provided no rule of law is violated in so doing.[19]

The Graevs did what the Court said they were free to do: they conditioned termination of support as a function of "a series of nights together." The court, nevertheless, infused its own

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[13] Clapp v. Byrnes 3 A.D. 284 (2nd Dept.,1896); Richards v. Crocker 242, 20 N.Y.S. 954 (N.Y.Sup.Gen.Term 1892), aff'd, 143 N.Y. 631 (1894).

[14] Sutton v. East River Sav. Bank 55 N.Y.2d 550 (1982).

[15] Albanese v. Consolidated Rail Corp. 245 A.D.2d 475 (2nd Dept.,1997).

[16] Kass v. Kass 91 N.Y.2d 554 (1998).

[17] Nichols v. Nichols 306 N.Y. 490 (1954) (a court "may not now imply a condition which the parties chose not to insert in their contract."); Cohen-Davidson v. Davidson, 291 A.D.2d 474 (2nd Dept.,2002).

[18] William C. Atwater & Co. v. Panama R. Co. 246 N.Y. 519 (1927).

[19] Clapp v. Byrnes 3 A.D. 284 (2nd Dept. 1896).

intent into their agreement and rewrote it. *Parnes v. Parnes*[20] stated: "The issue boils down to whether plaintiff spent the requisite number of nights in the 'same home or place of residence as' her fiancé, regardless of whose home or residence that may be. The provision addresses whether plaintiff stayed in the same place as an unrelated male for a certain number of nights."

Another difficult issue emerges: if the parties did not define "cohabitation", knowledge of a rigid definition imputed to their attorneys (which was likely never explored with the respective clients) will be imputed nunc pro tunc to the clients.

Also, *Graev* presents a conflict of theses. On the one hand, parties may freely terminate contractual support based on "a series of nights together." The competing thesis turns to "the sharing of finances" as the barometer of cohabitation because "the underlying question [is] whether the relationship is the type of 'changed circumstances' which would render a support obligation unjust" thereby converting the application to terminate spousal support to one for a downward modification. Intimate relations do not ipso facto morph into changed financial circumstances – assume both parties are independently wealthy. What if there is no mortgage to be paid, or if the parties are just plain proud and do not want to take from one another, each wishing to pay his or her own fare?

What if the parties married for companionship, irrespective of their ages, and did not want sex, or if a party has untreatable sexual dysfunction? Does that negate cohabitation? Parties in second relationships are also likely to resist giving up the security of their own homes, especially when first deciding to live together. These are factors appropriate for a determination of venue of an action. Is there a presumption that the new love interest's retention of his or her home defeats cohabitation?[21] Do distances between homes have to be measured to support or defeat the presumption? Who determines the cut off line? What is the cut off line?

**Conclusion**

Parties to a civil dispute have the right to chart their own litigation course,[22] the right to make a rule of evidence for their own case.[23] The only solution, therefore, is to double dot the "i" and double strike the "t" by spelling out what factors may or may not be considered in the event a dispute.

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[20] Parnes v. Parnes 41 A.D.3d 934 (3rd Dept.,2007).

[21] See, Famoso v. Famoso, 267 A.D.2d 274 (2nd Dept., 1999); Lefkon v. Drubin 143 A.D.2d 400(2nd Dept.,1988); Emrich v. Emrich 173 A.D.2d 818 (2nd Dept., 1991).

[22] Braithwaite v. Braithwaite 299 A.D.2d 383 (2nd Dept.,2002).

[23] Brady v. Nally, 151 N.Y. 258 (1896).