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Live-In Lover Complaints: Think Twice Before You File

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Imagine the following scenario: Hubert and Winona decide to divorce after many years of marriage during which Hubert has been the financial breadwinner. Hubert agrees to pay $5,000 per month in alimony to Winona for a period of five years. The parties enter into a written settlement agreement which is adopted by the court and made a part of their divorce decree.

After one year of consistently paying $5,000 each month to Winona, Hubert discovers that Winona has begun dating Beau. Hubert further learns that Beau has been spending the night at Winona's home. Hubert is overjoyed, thinking that his days of paying alimony to Winona are over now that she has found someone new. If Hubert were to come to you seeking legal advice about this situation, however, then you may have to give him some bad news.

Georgia's "live-in lover" statute would give Hubert grounds to modify his alimony payments downward or even terminate them, but only if he can meet a pretty high burden of proof.[1] Hubert will have to be able to show that Winona and Beau are living together openly and continuously *and* that they are either having sex or sharing living expenses. You will also need to warn Hubert that the consequences of filing a "live-in lover complaint" *and losing* are a bit drastic. O.C.G.A. § 19-6-19(b) provides for a mandatory award of the reasonable attorney's fees of the defendant if the plaintiff does not prevail.

Proving Your Case

In order to win his live-in lover complaint, and thus not get stuck with Winona's attorney's fees, Hubert must prove by a preponderance of the evidence:

- an open and continuous cohabitation of Winona with Beau, and
- either sexual intercourse between Winona and Beau or sharing of expenses of cohabitation between Winona and Beau.

Georgia's "live-in lover law," O.C.G.A § 19-6-19(b), provides in part:

> Subsequent to a final judgment of divorce awarding periodic payment of alimony for the support of a spouse, the voluntary cohabitation of such former spouse with a third party in a meretricious relationship shall also be grounds to modify provisions made for periodic payments of permanent alimony for the support of the former spouse. As used in this subsection, the word "cohabitation" means dwelling together continuously and openly in a meretricious relationship with another person, regardless of the sex of the other person. [emphasis added].

As in a typical modification based on changes in financial status or income, the evidence must be from a

period of time after entry of the final judgment. In addition to proving a continuous and open cohabitation, the claimant must also prove the existence of a meretricious relationship. Although the word meretricious connotes a cheap or vulgar relationship, that is not the meaning for this term of art as used in this statute. Rather, Georgia courts have held, that for the purposes of this statute, a meretricious relationship is simply one in which there is either sexual intercourse or a sharing of the expenses of cohabitation.[2]

In *Hathcock v. Hathcock*, 249 Ga. 74, 76, 287 S.E.2d 19 (1982), we construed "meretricious" as used in O.C.G.A. § 19-6-19(b) to define the two situations which would justify the trial court's modification of alimony under that section:

> [U]pon proof of sexual intercourse between the former spouse and the third party although no proof is offered tending to establish that the former spouse received from, gave to, or shared with the third party expenses of their cohabitation. . . . [T]he statute also applies upon proof that the former spouse received from, gave to, or shared with the third party expenses of their cohabitation although no proof is offered tending to establish sexual intercourse between the former spouse and the third party.[3]

Thus, one of these elements, namely sexual intercourse or shared living expenses, must be proven in addition to the element of an open and continuous cohabitation.

Open and Continuous Cohabitation

Cohabitation must be open and continuous, not secret and hidden, and akin to the living arrangements of married people.[4] For the purposes of a live-in lover claim, Georgia courts have considered situations in which there was proof that a former spouse had had the same overnight guest on a number of occasions; in these situations, the courts have held that having the same overnight guest even on multiple occasions is not the equivalent of continuous cohabitation.

> Since the constitutionality of O.C.G.A. § 19-6-19(b) depends upon the meretricious relationship being one similar to marriage, it follows that the cohabitation must go beyond periodic, physical interludes. [emphasis added].[5]

As the cases cited above set forth, periodic physical interludes are not proof of open and continuous cohabitation. The ruling of the trial court in *Donaldson*—that having an unrelated male guest past midnight for more than four nights out of any 30-night period would be tantamount to being in a meretricious relationship—was considered unreasonably intrusive and against the holding in *Hathcock*. So, even if Hubert has airtight evidence that Beau has spent the night with Winona on multiple occasions, that alone will not be enough to meet his burden of proof.

Receiving mail at a given address is not the same as residing at the address continuously.[6] It takes far more than a third party receiving mail at the former spouse's residence to prove that the third party continuously resided at that address.[7] So, even if Hubert can prove that Beau has spent the night with Winona on multiple occasions and that Beau recieves mail at Winona's address, without further evidence, he will not prevail.

Sexual Intercourse or Shared Expenses of Cohabitation

If a former spouse who pays alimony has sufficient evidence of an open and continuous cohabitation by his or her former spouse who receives the alimony, then the second prong of the test examines whether the relationship is "meretricious." In other words, did the former spouse/alimony recipient have sexual intercourse with the third party with whom he or she is openly and continuously cohabiting, or did the former spouse/alimony recipient share the expenses of cohabitation with the third party with whom he or she is cohabiting?

To terminate alimony based on the sexual intercourse element, there must be actual proof of sexual intercourse by a preponderance of the evidence. No reported Georgia case has held that romantic involvement, the opportunity to have sex and/or expressions of love or lust are sufficient to prove that sexual intercourse has occurred. This is obviously difficult to prove without an admission by the alimony-receiving spouse or his/her lover, or the rare case in which the couple in question videotapes themselves in the act, or the even rarer case in which a private investigator or other third party lawfully videotapes sexual intercourse.

The Supreme Court of Georgia has also recognized that, without proof of continuous cohabitation, proof of sexual intercourse alone will not be sufficient to justify termination of alimony under O.C.G.A. § 19-6-19(b). In *Daniels v. Daniels*,[8] the relationship in question had resulted in the birth of a child. The Court held, however:

> [a]lthough the evidence supports a finding of periodic sexual encounters, there is no evidence that the parties dwelled together continuously or openly. Therefore, the relationship fails to meet the standard authorizing a modification of permanent alimony under O.C.G.A. § 19-6-19(b).[9]

In the alternative, if sexual intercourse cannot be proven, a court can terminate alimony if the alimony payor can establish that the alimony recipient shares the expenses of cohabitation (shared payments of rent, mortgage, utilities, yard maintenance, food, etc.) with his or her co-inhabitant. Under *Hathcock*, receiving from, giving to or sharing with the co-inhabitant the expenses of cohabitation will be sufficient to

show the existence of a meretricious relationship. Coupled with proof of open and continuous cohabitation, this would present a valid claim to take before a court to seek termination of the alimony.

Even if Hubert can prove that Winona and Beau are living together openly and continuously and that they are having sex or sharing living expenses, however, there is still a chance that he may not prevail because the ultimate decision is, after all, in the court's total discretion. Below are some additional considerations to be taken into account.

Other Considerations

Even if you are able to establish both prongs of the live-in lover law, there are some other things to consider before bringing an action to modify or terminate alimony under this statute.

The Court Has Discretion

Courts are not required to terminate alimony even if a party proves all of the elements of the live-in lover statute by a preponderance of the evidence. A court may choose not to modify a defendant's alimony even if she/he is cohabiting continuously and openly with someone with whom she/he is having sexual intercourse and/or sharing living expenses. Winona may become disabled and struggle financially, whereas Hubert is financially well heeled. Other family members may be financially dependent on Winona. If these few situations exist, Winona's lawyer could make a compelling argument for keeping the alimony in place, or merely reducing it, instead of terminating it altogether.[10]

Timing

O.C.G.A. § 19-6-19

> (b) *Subsequent to a final judgment of divorce* awarding periodic payment of alimony for the support of a spouse, the voluntary cohabitation of such former spouse with a third party in a meretricious relationship shall also be grounds to modify provisions made for periodic payments of permanent alimony for the support of the former spouse. . . . [emphasis added].

Living in a meretricious relationship with another *prior* to entry of the final divorce decree will not serve to prove the elements of the live-in lover statute, unless of course one proves that the meretricious cohabitation started before entry of the divorce and continued after entry of the final divorce decree. If Hubert were to find out that after he and Winona separated, but before they were divorced, Winona had been living with Beau and was also having sex or sharing living expenses with Beau, this would not be grounds to modify or terminate his alimony under O.C.G.A. § 19-6-19.

No Recoupment of Alimony Already Paid

In an action to terminate alimony under the live-in lover statute, a plaintiff may not recoup any alimony already paid even if the court finds that the defendant cohabited openly and continuously in a meretricious relationship. "Retroactive modification of an alimony obligation would vitiate the finality of the judgment obtained as to each past due installment. . . . [A] judgment modifying an alimony obligation is effective no earlier than the date of the judgment."[11]

In *Hendrix v. Stone*,[12] the Supreme Court of Georgia held that a trial court may not retroactively modify an alimony obligation, reversing a trial court's modification under O.C.G.A. § 19-6-19(b) of alimony in which the modification was to be effective prior to the date of the judgment granting the modification.[13] In *Donaldson*, the trial court held that the former wife had forfeited alimony for four months while she was living with another man.

The trial court found that she was not cohabitating openly, continuously and meretriciously at the time of the hearing, but imposed a self-executing termination of her alimony if at any time in the future she had male company past midnight more than four times per month. The Court of Appeals of Georgia reversed, holding that the trial court could not retroactively terminate alimony during the four months that the wife was meretriciously cohabitating with the third party. The Court held that the self-executing four-night per month limit was unauthorized and not in accordance with prior holdings that require that modification or termination under O.C.G.A. § 19-6-19(b) must be proven by showing open *and* continuous cohabitation and sexual intercourse or shared living expenses. Having occasional overnight guests is not sufficient proof of such a relationship. On remand, the trial court in *Donaldson* was not permitted to order disgorgement by the former wife of alimony she had received while meretriciously cohabitating because that would be an impermissible retroactive modification. Because the trial court found that the wife was not currently in a relationship within the meaning of O.C.G.A. § 19-6-19(b) at the time of the hearing, it did not terminate her right to future alimony either.[14]

Mandatory Award of Attorney's Fees

Attorney's fee awards are not discretionary in an action to terminate alimony under the live-in lover statute in the event the plaintiff does not prevail. O.C.G.A. § 19-6-19(b) provides in pertinent part:

> In the event the petitioner does not prevail in the petition for modification on the ground set forth in this subsection, the petitioner shall be liable for reasonable attorney's fees incurred by the respondent for the defense of the action. [emphasis added].

Even if you can prove continuous cohabitation, unless you have an admission of sexual intercourse or a legally obtained video or photographs, you will need to focus on proof of shared expenses of cohabitation. Do not bring an action under O.C.G.A. § 19-6-19(b) without adequate proof; the consequence is a mandatory award to the former spouse of his or her reasonable attorney's fees, on top of the attorney's fees already paid to the plaintiff's own attorney.

Constitutionality of the Live-in Lover Statute

If you have proof of the necessary elements of an open and continuous meretricious relationship, a constitutional challenge to the live-in lover law is not likely to derail your case. You should be prepared, however, to defend against such a challenge.

In *Sims v. Sims*,[15] the Supreme Court of Georgia held that O.C.G.A. § 19-6-19(b) survived a challenge on equal protection grounds, finding that the "classification of former spouses who have elected voluntarily to cohabit with a third party of a different sex[16] in a meretricious relationship is a rational classification which furthers legitimate governmental objectives." Although Sims is the only known challenge to the constitutionality of O.C.G.A. § 19-6-19(b), cases in which a constitutional challenge has been made to other mandatory fee award statutes have upheld their constitutionality. In *Smith v. Baptiste*,[17] appellant's motion for attorney's fees under O.C.G.A. § 9-11-68(b)(1) was denied by the trial court on the grounds that the statute violated various articles of the Georgia Constitution. The statute mandated an award of reasonable attorney's fees and expenses if a settlement offer was rejected and the judgment was only a certain percent less than the rejected settlement offer, similar to the scheme in O.C.G.A. § 19-6-19(b). The Supreme Court of Georgia reversed the trial court and held O.C.G.A. § 9-11-68(b) to be constitutional.[18]

Tips for Drafting Settlement Agreements

If you represent the alimony-payor spouse, there is really no need to add a provision in your termination of alimony section of a settlement agreement (i.e., alimony terminates on the death of either spouse or the alimony recipient's remarriage) to the effect that alimony also terminates upon a finding by a court of continuous cohabitation in a meretricious relationship. The law allows for such a claim to be filed anyway, regardless of whether the settlement agreement includes such language. It doesn't hurt, however, to add this provision. If you represent the alimony recipient, you will want to make sure that the settlement agreement provides that alimony may terminate only after a court of competent jurisdiction determines that the requirements of 19-6-19(b) have been met and that the court, in its discretion, finds that alimony should be either modified or terminated. The authors are not aware of any Georgia cases in which the court was faced with a live-in lover claim involving a poorly drafted settlement agreement that provided that "alimony ceases upon entry by the alimony-receiving spouse into a meretricious cohabitation with a third party." Such a situation violates the language and requirements of the live-in lover statute in that it leaves the determination of meretricious cohabitation to the alimony payor former spouse. In our hypothetical, if Hubert simply unilaterally stops paying alimony to Winona, Winona would have a successful contempt action; otherwise, the court would be validating an illegal unenforceable settlement provision. So, even if Hubert and Winona's marital settlement agreement provides that Hubert can stop paying alimony if Winona is cohabiting in a meretricious relationship, and does not include language that this must first be determined by a court of competent jurisdiction, Hubert

risks being held in contempt if he stops paying before a court has determined that all of the requisite factors have been proven.

Conclusion

Once you have taken your client through the divorce process and obtained a final judgment and decree of divorce, be aware of the relationships that your client and his or her former spouse have with others. Advise the client of what activities are likely to result in a termination or reduction of alimony so that the client can either govern himself or herself accordingly to avoid a claim for alimony termination, or so that the client can be on the lookout for activities of his/her former spouse that would otherwise unfairly result in alimony continuing to be received by an ex-spouse who has the equivalent of a new spouse, although not formally remarried.

If Hubert and Winona both know exactly what it would take in order for Hubert's alimony to be terminated under the live-in lover statute, they could both be spared some needless bickering or harassment from one another about the issue. Hubert could be spared having to pay Winona's attorney fees for bringing a live-in lover complaint without the proof he needs.

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Endnotes

1. O.C.G.A. § 19-6-19(b).
2. Donaldson v. Donaldson, 262 Ga. 231, 416 S.E.2d 514 (1992).
3. *Id.* at 231
4. Shapiro v. Shapiro, 259 Ga 405 (1989).
5. Reiter v. Reiter, 365 S.E.2d 826, 258 Ga. 101 (1988). *See also* Donaldson, 262 Ga. 231, 416 S.E.2d 514 (holding that trial court's order that alimony would be forfeited for "any thirty-day period during which [former wife] had an unrelated male companion stay with her past midnight for more than four nights" was "unreasonably intrusive," and also "unauthorized, since it is not in accordance with [the standard] of Hathcock v. Hathcock.").
6. Kean v. Marshall, 294 Ga. App. 459, 669 S.E.2d 463 (2008); Johnson v. Woodard, 208 Ga. App. 41, S.E.2d 701 (1993).
7. *See* Dunlap v. Dunlap, 234 Ga. 304, 215 S.E.2d 674 (1975); Rice v. Rice 240 Ga. 272, 240 S.E.2d 29 (1977).
8. 258 Ga. 791, 374 S.E.2d 735 (1989).
9. *Id.* at 736.
10. Hurley v. Hurley, 249 Ga. 220, 290 S.E.2d 70 (1982).
11. Branham v. Branham, 290 Ga. 349, 720 S.E.2d 623 (2012).
12. 261 Ga. 874, 412 S.E.2d 536 (1992).
13. Donaldson v. Donaldson, 416 S.E.2d 514, 262 Ga. 231 (1992).
14. The appellate court does not address whether the trial court could have terminated future alimony based upon a previous live-in lover relationship that was no longer ongoing, but the implication is that this would not have been permissible.
15. 245 Ga. 680, 266 S.E.2d 493 (1980).
16. The live-in lover statute used to apply only to meretricious relationships between persons of the opposite sex. Van Dyck v. Van Dyck, 262 Ga. 720, 425 S.E.2d 853 (1993). The statute was subsequently amended to apply to all meretricious relationships, regardless of the sex of the other person.
17. 287 Ga. 23, 694 S.E.2d 83 (2010).
18. The special concurrence by Justice Nahmias in Smith v. Baptiste rejected the notion that such a statute impedes or chills litigants from filing and pursuing claims out of fear that the litigants will have to pay attorney's fees if they lose. Justice Nahmias went on to state that even with this statute on the books: "[t]hese appellees accessed the court by filing their tort claims. They then pursued those claims vigorously, ignoring a settlement offer, until the claims were fully resolved with a grant of summary judgment against them." *Id.* at 32.