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DRL § 248: Cohabitation Alone Not Sufficient to Authorize Termination of Alimony Payments

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tigating unrelated charges and question the defendant on one of the charges with knowledge that he is represented on the other. Such an interpretation, however, would be inconsistent with the line of decisions which have recognized an exception to the unrelated charge rule only where the defendant is questioned after being detained on a contrived charge.[158]

In the final analysis, the *Ermo* decision is probably best interpreted as an indication that the courts will scrutinize police procedures closely in instances where a defendant is interrogated by the same team of law enforcement agents in connection with unrelated charges. In such instances, the possibility of police misconduct in the absence of the defendant's attorney is sufficiently serious to justify heightened judicial suspicion. Thus, when police misconduct does not fit within one of the traditional legal theories that would mandate suppression, the courts may nevertheless intervene when the misconduct violates fundamental notions of fairness.

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DOMESTIC RELATIONS LAW

DRL § 248: Cohabitation alone not sufficient to authorize termination of alimony payments

Section 248 of the Domestic Relations Law empowers a court, in its discretion, to terminate a wife's alimony[159] upon proof that she

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[158] *See* note 133 *supra*. The *Ermo* court could not rely on the "pretext" exception to suppress the confessions since the assault charge was legitimate and not a mere contrivance with which to detain the defendant for further questioning on the unrelated murder charge.

[159] Generally, only a wife may receive an alimony award in a matrimonial action. *See* DRL § 236; FAM. CT. ACT § 412 (McKinney 1975). Under normal circumstances, the husband has no equivalent right to support. The husband may be entitled to receive support from his wife, however, if he becomes a recipient of public assistance before the marriage is dissolved. *Id.* § 415 (McKinney Supp. 1977-1978). The statutory obligation of a husband to provide support is based upon a legislative assumption that a wife may suffer severe economic hardship as a result of a divorce. The statutory alimony provisions were intended to protect the wife and prevent her from becoming a ward of the community. *See* Phillips v. Phillips, 1 App. Div. 2d 393, 150 N.Y.S.2d 646 (1st Dep't), *aff'd mem.*, 2 N.Y.2d 742, 138 N.E.2d 738, 157 N.Y.S.2d 378 (1956); Kolmer v. Kolmer, 19 Misc. 2d 298, 305, 191 N.Y.S.2d 324, 331 (Sup. Ct. N.Y. County 1959). Under DRL § 236, the court may award alimony to a woman in any matrimonial action. FAM. CT. ACT § 412 provides that "[a] husband is chargeable with the support of his wife and . . . may be required to pay . . . a fair and reasonable sum, as the court may determine . . . ." A wife is not entitled to alimony, however, if she is found guilty of misconduct which "would itself constitute grounds for separation or divorce." DRL § 236.

DRL § 236 provides that, in making an alimony award, the court may consider such factors as the "length . . . of the marriage, [and] the ability of the wife to be self-supporting . . . ." In addition, DRL § 236 and FAM. CT. ACT. § 466 (McKinney 1975) permit the court to modify a prior support order if the parties' circumstances have changed significantly. *See*

is "habitually living with another man and holding herself out as his wife . . . ."[160] Recently, in *Northrup v. Northrup*,[161] the Court of Appeals interpreted this provision narrowly and held that sharing by an ex-wife of residence, bedroom, household expenses and use of her car with a paramour for more than six months was insufficient as a matter of law to constitute the requisite "holding out" so as to permit relief pursuant to section 248.[162]

In an earlier action, plaintiff Anna Northrup was granted a divorce and the right to receive monthly alimony payments from defendant Ray Northrup.[163] When the defendant failed to make the required payments, the plaintiff initiated an action to recover arrears.[164] Contending that his ex-wife was living openly with another man, the defendant cross-moved to have the alimony provisions in the divorce decree stricken pursuant to DRL § 248.[165] Upon a hearing of the defendant's motion, the Supreme Court, Monroe County, found that, for approximately six months, the plaintiff had lived with another man, shared his bedroom, cooked his meals, did his

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Fisher v. Fisher, 56 App. Div. 2d 547, 391 N.Y.S.2d 598 (1st Dep't 1977) (mem.); Berry v. Berry, 56 App. Div. 2d 522, 391 N.Y.S.2d 120 (1st Dep't 1977). Further, under DRL § 246(1), if the husband is financially unable to provide the court ordered support payments, he may apply to the court for temporary or permanent relief and thereby avoid a contempt citation. In New York, a former wife's right to receive alimony is purely statutory; no equivalent common law right exists. *See* Weintraub v. Weintraub, 302 N.Y. 104, 96 N.E.2d 724 (1951); Querze v. Querze, 290 N.Y. 13, 47 N.E.2d 423 (1943); Leitman v. Leitman, 21 Misc. 2d 653, 655, 190 N.Y.S.2d 188, 191 (Sup. Ct. Kings County), *aff'd mem.*, 9 App. Div. 2d 682, 192 N.Y.S.2d 490 (2d Dep't 1959). Thus, in determining whether to award alimony or modify an existing support award, the courts are guided solely by the provisions of the relevant statutes. *See, e.g.*, Waddey v. Waddey, 290 N.Y. 251, 49 N.E.2d 8 (1943); Hayes v. Hayes, 220 N.Y. 596, 115 N.E. 1040 (1917) (mem.).

[160] DRL § 248 provides in pertinent part:

> The court in its discretion upon application of the husband on notice, upon proof that the wife is habitually living with another man and holding herself out as his wife, although not married to such man, may modify such final judgment and any orders made with respect thereto by annulling the provisions of such final judgment or orders or of both, directing payment of money for the support of such wife.

In the event of the former wife's remarriage, however, the court has no discretionary powers. Upon application by the husband, the court "must modify" the decree by eliminating any alimony provisions. DRL § 248. *See, e.g.*, Reichel v. Sollazzo, 38 Misc. 2d 217, 238 N.Y.S.2d 140 (Sup. Ct. Nassau County 1963). *See generally* 2 H. FOSTER & D. FREED, LAW AND THE FAMILY § 26:6 (1966). For a review of the legislative history of DRL § 248, see notes 181-184 *infra*.

[161] 43 N.Y.2d 566, 373 N.E.2d 1221, 402 N.Y.S.2d 997 (1978), *rev'g* 52 App. Div. 2d 1093, 384 N.Y.S.2d 319 (4th Dep't 1976) (mem.).

[162] *Id.* at 572, 373 N.E.2d at 1224, 402 N.Y.S.2d at 1000.

[163] *Id.* at 569, 373 N.E.2d at 1222, 402 N.Y.S.2d at 998. The defendant was ordered to pay plaintiff $160 per month for her support.

[164] *Id.* The defendant defaulted on the alimony order after having made two payments.

[165] *Id.*

laundry, furnished him use of her car and shared household expenses.[166] After concluding that the evidence established that the plaintiff was habitually living with another man, the trial court interpreted the "holding out" provision of DRL § 248 to include conduct which would lead people to believe that the parties were husband and wife.[167] Finding that the plaintiff's actions satisfied this test, although she had never publicly represented the relationship as a marriage,[168] the court terminated the alimony provision.[169] The Appellate Division, Fourth Department, unanimously affirmed, holding that living together "in what might reasonably be considered a marital relationship" was sufficient to constitute "holding out" under section 248.[170] In the appellate division's view, DRL § 248 "does not require the husband to prove that his former wife made affirmative representations to third parties that she and her paramour were married."[171]

On appeal, the Court of Appeals reversed, holding that the facts were insufficient as a matter of law to constitute "holding out" within the meaning of DRL § 248.[172] Writing for the majority,[173] Judge Cooke stated that the issue was "purely one of statutory construction," since modification of an alimony provision is not permitted absent the type of conduct contemplated by the statute.[174] Observing that the two-part test of DRL § 248 requires both habitual cohabitation and "holding out," the *Northrup* Court was unwilling to apply the provisions of the statute where only cohabitation had been shown.[175] Although Judge Cooke acknowledged that "holding out" does not require oral proclamations by a former wife with respect to her marital status, he indicated that some form of affirmative representation is necessary to satisfy the conditions set

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[166] *Id.*, 373 N.E.2d at 1222-23, 402 N.Y.S.2d at 998.

[167] *Id.* at 570, 373 N.E.2d at 1223, 402 N.Y.S.2d at 998.

[168] *Id.*

[169] The supreme court, however, held defendant in contempt for his prior failure to make the alimony payments. *Id.*

[170] 52 App. Div. 2d at 1093, 384 N.Y.S.2d at 320.

[171] *Id.*

[172] 43 N.Y.2d at 572, 373 N.E.2d at 1224, 402 N.Y.S.2d at 1000.

[173] Chief Judge Breitel and Judges Fuchsberg, Jasen and Jones concurred in the majority opinion.

[174] 43 N.Y.2d at 570, 373 N.E.2d at 1223, 402 N.Y.S.2d at 999 (citing Hayes v. Hayes, 220 N.Y. 596, 115 N.E. 1040 (1917) (mem.)). *See also* Leffler v. Leffler, 50 App. Div. 2d 93, 376 N.Y.S.2d 176 (1st Dep't 1975), *aff'd mem.*, 40 N.Y.2d 1036, 360 N.E.2d 355, 391 N.Y.S.2d 855 (1976); Wechter v. Wechter, 50 App. Div. 2d 826, 376 N.Y.S.2d 180 (2d Dep't 1975), *aff'd*, 40 N.Y.2d 964, 359 N.E.2d 428, 390 N.Y.S.2d 920 (1976).

[175] 43 N.Y.2d at 571-72, 373 N.E.2d at 1224, 402 N.Y.S.2d at 1000; *see* Rosenberg v. Rosenberg, 46 Misc. 2d 693, 260 N.Y.S.2d 508 (Sup. Ct. App. T. 1st Dep't 1965).

forth in the statute.[176] The Court conceded that under this rule, a former wife who is cohabiting could "avoid the loss of her alimony by tailoring her conduct," but concluded that a solution to the problem would have to come from the legislature.[177]

Judge Wachtler, writing for the dissent,[178] refused to interpret DRL § 248 "in such a narrow, technical and unrealistic manner."[179]

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[176] 43 N.Y.2d at 571, 373 N.E.2d at 1223, 402 N.Y.S.2d at 999. The Court gave two examples of the type of conduct by an ex-wife that would be sufficient to establish a "holding out": "(1) applying for a telephone, designating [the paramour] as her spouse and asking that she be listed in the directory with his surname; and (2) changing the names on their joint checking account so that she uses [her paramour's] surname." *Id.* (citing Lang v. Superior Court, 53 Cal. App. 3d 852, 126 Cal. Rptr. 122 (1975)). Although the *Northrup* Court stated that these examples were "not meant to suggest a limitation," they do demonstrate the Court's adherence to a literal interpretation of the "holding out" requirement. 43 N.Y.2d at 571, 373 N.E.2d at 1224, 402 N.Y.S.2d at 999. *See also* note 184 *infra*.

The Court cited with approval the meaning given to "holding out" in Stern v. Stern, 88 Misc. 2d 860, 389 N.Y.S.2d 265 (Sup. Ct. Nassau County 1976), which was decided after the fourth department's affirmance of the trial court's decision in *Northrup*. 43 N.Y.2d at 571, 373 N.E.2d at 1224, 402 N.Y.S.2d at 999. In *Stern* the defendant husband established that the plaintiff wife and her paramour resided together and shared the same bedroom for at least one year, shared all household expenses, registered on two occasions in hotels as husband and wife, visited their respective families together, visited the plaintiff's daughter at summer camp and went on several vacations together. The supreme court found this conduct did not meet the requirements necessary to terminate alimony under DRL § 248 because the plaintiff and her paramour were "always careful not to hold themselves out or refer to themselves as Mr. and Mrs. Rowen." 88 Misc. 2d at 861-63, 389 N.Y.S.2d at 266-67. The hotel registrations were viewed by the *Stern* court as "isolated incidents." *Id.* at 862, 389 N.Y.S.2d at 267. The *Stern* court distinguished the appellate division decision in *Northrup*, noting that "there the court apparently used the fact that the former wife was living with another man as the basis for a presumption that she had made affirmative representations to third parties that she and her paramour were married." No such presumption was available in *Stern*, since the ex-wife and paramour in that case "went to great lengths to inform the world that they were not husband and wife." *Id.* at 864, 389 N.Y.S.2d at 268.

[177] 43 N.Y.2d at 572, 373 N.E.2d at 1224, 402 N.Y.S.2d at 1000. In its brief review of the legislative history of DRL § 248, the *Northrup* majority simply noted that "[t]he forerunner to the present statute was specifically enacted to counteract a situation where a woman, who represented that she was married to the man with whom she was living, was held entitled to alimony because she had not, in fact, remarried." 43 N.Y.2d at 571, 373 N.E.2d at 1224, 402 N.Y.S.2d at 999.

[178] 43 N.Y.2d at 572, 373 N.E.2d at 1224, 402 N.Y.S.2d at 1000 (Wachtler, J., dissenting). Judge Gabrielli joined in the dissenting opinion.

[179] *Id.* (Wachtler, J., dissenting). While conceding that the courts can not rewrite a statute, Judge Wachtler stated that the legislature "intended the courts to recognize current social realities in applying the statute." *Id.* at 573, 373 N.E.2d at 1225, 402 N.Y.S.2d at 1000 (Wachtler, J., dissenting). In support of this view, Judge Wachtler cited N.Y. STATUTES §§ 143-144 (McKinney 1971). Section 143 provides: "The courts should strive to avoid a construction which would make a statute unreasonable, or lead to unreasonable results." Section 144 states: "A construction which would render a statute ineffective must be avoided, and as between two constructions of an act, one of which renders it practically nugatory and the other enables the evident purposes of the Legislature to be effectuated, the latter is preferred." N.Y. STATUTES § 144 (McKinney 1971).

Such an interpretation, the dissent contended, represented a failure to recognize current social norms and the legislative history of DRL § 248.[180] As originally enacted, the statute permitted termination of an alimony order only upon the wife's remarriage.[181] Following a lower court's ruling that the effect of the statute was limited to situations in which the ex-wife entered into a ceremonial marriage, and thus did not encompass conduct resembling common law marriage,[182] the legislature amended the statute[183] to include habitual living together and "holding out."[184] The *Northrup* majority's narrow reading of the statute, in the dissent's view, renders the liberalizing provisions of DRL § 248 a "dead letter" by setting an unrealistic standard of proof for establishing the requisite holding out.[185] According to Judge Wachtler, the statute should be interpreted so as to give effect to the underlying legislative purpose of permitting "the courts to consider the extent of the wife's new relationship without respect to formalities."[186]

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[180] 43 N.Y.2d at 573, 373 N.E.2d at 1225, 402 N.Y.S.2d at 1000 (Wachtler, J., dissenting).

[181] *See* CPA, ch. 220, § 1, [1934] N.Y. Laws 703.

[182] *See* Waddey v. Waddey, 168 Misc. 904, 6 N.Y.S.2d 163 (Sup. Ct. Kings County 1938), *aff'd mem.*, 259 App. Div. 852, 20 N.Y.S.2d 406 (2d Dep't 1940), *rev'd on other grounds*, 290 N.Y. 251, 49 N.E.2d 8 (1943). In *Waddey*, the court held that an ex-wife who was living with a man without being formally married, was entitled to continued alimony payments under the existing statute. 168 Misc. at 907, 6 N.Y.S.2d at 165; CPA, ch. 220, § 1, [1934] N.Y. Laws 703. The language presently contained in DRL § 248 was adopted in response to the controversy engendered by the *Waddey* decision. For a detailed discussion of the events leading to the 1938 amendment, see Citron v. Citron, 91 Misc. 2d 785, 789-91, 398 N.Y.S.2d 624, 626-28 (Sup. Ct. Nassau County 1977).

[183] Ch. 161, § 1, [1938] N.Y. Laws 682.

[184] *See* Stern v. Stern, 88 Misc. 2d 860, 389 N.Y.S.2d 265 (Sup. Ct. Nassau County 1976). Common law marriage, which was abolished by statute in New York, *see* ch. 606, [1933] N.Y. Laws 1268, generally was established by proof of cohabitation, mutual agreement to be married and holding out. *See* Graham v. Graham, 211 App. Div. 580, 207 N.Y.S. 195 (2d Dep't 1924); Dodge v. Campbell, 135 Misc. 644, 238 N.Y.S. 666 (Sup. Ct. Rensselaer County 1929), *aff'd*, 229 App. Div. 534, 242 N.Y.S. 534 (3d Dep't 1930), *aff'd*, 255 N.Y. 622, 175 N.E. 340 (1931). Since the essence of common law marriage was the intention of the parties, proof of cohabitation and community reputation was not alone sufficient to establish that a man and woman were husband and wife. *See* 211 App. Div. at 584, 207 N.Y.S. at 198. Moreover, a couple's failure to publicly represent themselves as husband and wife was strong evidence that they did not intend to be bound in a marital relationship. *See, e.g., In re* Anderson's Estate, 263 App. Div. 838, 31 N.Y.S.2d 552 (Sur. Ct. Erie County 1941); *In re* Heitman, 154 Misc. 838, 279 N.Y.S. 108 (Sur. Ct. Niagara County 1935), *aff'd*, 247 App. Div. 855, 288 N.Y.S. 876 (4th Dep't), *aff'd* 272 N.Y. 533, 4 N.E.2d 435 (1936). It is submitted that the *Northrup* majority may have had this test in mind when it construed the "holding out" requirement of DRL § 248. *See* note 176 and accompanying text *supra*.

[185] 43 N.Y.2d at 573, 373 N.E.2d at 1225, 402 N.Y.S.2d at 1000 (Wachtler, J., dissenting).

[186] *Id.* (Wachtler, J., dissenting). Judge Wachtler stressed that where the wife has not entered into a ceremonial marriage, the ex-husband has no *automatic* right to be relieved of his obligation. In his view, DRL § 248 gives the court discretion to eliminate an alimony award

It is submitted that the Court of Appeals has unnecessarily construed DRL § 248 to require a standard of proof which is inconsistent with the policy considerations underlying the statute.[187] An alimony order is originally granted by a court because of the financial need of the former wife.[188] When this need no longer exists, the objective justification for the payments is at an end. Since the courts have been given broad discretion to include provisions for alimony in matrimonial judgments,[189] similar power should be recognized for terminating payments under the provisions of DRL § 248.

It is suggested that the discretionary provision of DRL § 248 can be applied, so as to advance the interests it seeks to protect,[190] without predicating termination on the affirmative representations of the benefited party.[191] By holding that, as a matter of law, conduct

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where there has been no remarriage if the circumstances indicate that such a result would avoid injustice. 43 N.Y.2d at 573, 373 N.E.2d at 1225, 402 N.Y.S.2d at 1001 (Wachtler, J., dissenting) (emphasis added).

[187] *See* note 159 *supra.* In *In re* Anonymous, 90 Misc. 2d 801, 395 N.Y.S.2d 1000 (Family Ct. Nassau County 1977), plaintiff wife brought suit to enforce the support provision of her divorce decree. Her ex-husband cross-petitioned pursuant to DRL § 248 and established that the wife and paramour resided together, socialized as a couple, and shared the food shopping and routine household chores. *Id.* at 804, 395 N.Y.S.2d at 1004. The court concluded that the life style of the wife and paramour reasonably led to an inference that a marital relationship existed. *Id.* The majority in *Northrup,* however, specifically disapproved this holding and rejected the relevance of "life style" evidence in establishing "holding out." 43 N.Y.2d at 571, 373 N.E.2d at 1223, 402 N.Y.S.2d at 999.

Despite the Court's assertion to the contrary, this rejection of "life style" evidence seems to indicate that the *Northrup* decision requires that the ex-husband show some affirmative representations by the wife in order to prove "holding out." It is submitted that this is exactly the type of formality that the legislature was trying to minimize when it enacted the 1938 amendment. *See* notes 179-183 and accompanying text *supra.*

[188] *See* note 159 *supra.*

[189] *See, e.g.,* Berlin v. Berlin, 36 App. Div. 2d 763, 321 N.Y.S.2d 511 (2d Dep't), *appeal dismissed,* 28 N.Y.2d 986, 272 N.E.2d 339, 323 N.Y.S.2d 840 (1971); Brownstein v. Brownstein, 25 App. Div. 2d 205, 268 N.Y.S.2d 115 (1st Dep't 1966). *See also* Tornese v. Tornese, 55 App. Div. 2d 602, 389 N.Y.S.2d 385 (2d Dep't 1976).

[190] Under DRL § 248, the court should be able to examine the quality of the ex-wife's new relationship and make a determination regarding its stability. If the court finds that a marital relationship exists it should be able to use its discretionary powers and annul the alimony provision.

[191] In view of the uproar following the *Waddey* decision, *see* note 182 *supra,* it is possible to argue that, if the *Northrup* case had arisen forty years ago, the husband would have been granted the requested relief under the amended version of CPA § 1159. In 1938, marriage was a rigidly observed norm and conduct resembling a marital relationship was likely to be deemed a "holding out" as husband and wife. In 1978, however, society has begun to recognize a broad variety of life styles. The courts are thus less likely to infer that a de facto marriage exists when a man and woman share a bedroom and household expenses. It is submitted that this change in social mores has made it more difficult for an ex-husband to show the requisite "holding out" and thereby obtain relief under DRL § 248, despite the fact that his ex-wife may no longer need the alimony payments.

evincing a marital relationship is not sufficient to constitute "holding out" under DRL § 248, the *Northrup* Court has effectively placed a bar to the use of judicial discretion in cases where injustice may result.

Unfortunately, the problem raised by the *Northrup* holding does not lend itself readily to legislative solution. While the legislature can act to amend the statutory language requiring "holding out,"[192] it would be impossible to provide detailed standards to be utilized in determining whether a particular relationship justifies invocation of the relief provisions of DRL § 248. Such standards can be developed only on a case by case basis. It is therefore suggested that, in deciding future cases arising under DRL § 248, the courts should give the broadest possible effect to the concession of the *Northrup* majority that "conduct may constitute a holding out."[193]

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WORKER'S COMPENSATION LAW

WCL § 29: 1975 amendments to Worker's Compensation Law held applicable to actions accruing or commenced prior to effective date

Section 29 of the Worker's Compensation Law[194] allows an injured employee to claim compensation benefits without forfeiting the right to bring an action against a nonemployee tortfeasor.[195]

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[192] 43 N.Y.2d at 573, 373 N.E.2d at 1225, 402 N.Y.S.2d at 1001 (Wachtler, J., dissenting). One month after *Northrup* was decided, the New York State Senate unanimously passed a bill which would allow courts to eliminate alimony even though the former wife had not represented herself to be married to her paramour. N.Y. Times, March 19, 1978, at 45, col. 5. Similar legislation was introduced in the Assembly, but did not receive sufficient support for passage.

[193] 43 N.Y.2d at 571, 373 N.E.2d at 1223, 402 N.Y.S.2d at 999; *see* note 177 *supra*.

[194] The New York Legislature recently amended the short title of the Workmen's Compensation Law to read "Worker's Compensation Law." Ch. 79, [1978] N.Y. Laws 253 (McKinney).

[195] N.Y. WORK. COMP. LAW § 29(1) (McKinney Supp. 1977-1978) provides in pertinent part:

> If an employee entitled to compensation . . . be injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, need not elect whether to take compensation and medical benefits under [workmen's compensation] or to pursue his remedy against such other but may take such compensation and medical benefits and . . . pursue his remedy against such other subject to the provisions of this chapter . . . . [T]he state insurance fund . . . or insurance carrier liable for the payment of . . . compensation . . . shall have a lien on the proceeds of any recovery . . . whether by judgment, settlement or otherwise, after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery, to