REBECCA NATION-BAILEY *v.* ADRIAN PETER BAILEY
(AC 34606)

Bear, Sheldon and Borden, Js.

Argued April 8—officially released July 23, 2013

(Appeal from Superior Court, judicial district of Stamford-Norwalk, Novack, J. [dissolution judgment]; Malone, J. [motions to modify, for contempt].)

Adrian P. Bailey, self-represented, the appellant (defendant).

David N. Rubin, for the appellee (plaintiff).

Opinion

BEAR, J. The defendant, Adrian Peter Bailey, appeals from the judgment of the trial court modifying his unallocated alimony and child support payments to the plaintiff, Rebecca Nation-Bailey, and finding him in contempt. On appeal, the defendant claims that the court improperly (1) modified, rather than terminated, his alimony payments upon the plaintiff's cohabitation pursuant to the parties' separation agreement (agreement), which was incorporated into the judgment dissolving their marriage and contained a self-executing provision terminating alimony in the event of cohabitation, and (2) found him in contempt. We agree that the termination provision was self-executing and that alimony terminated when the plaintiff began cohabiting. Accordingly, we reverse the judgment of the trial court.

The following facts inform our review. The parties intermarried on July 4, 1999, and one child was born of their union. On February 21, 2007, the court, incorporating by reference the terms of the agreement, entered a judgment dissolving the parties' marriage. The relevant portions of the agreement are as follows.

Section 3 (B) provides in relevant part: "Unallocated alimony and child support shall be paid until the death of either party, the [plaintiff's] remarriage or cohabitation as defined by Conn. General Statutes § 46b-86 (b), or until August 1, 2011."

Section 3 (F) provides: "In the event of the termination of the alimony payments during the minority of the child, the parties shall determine the amount of child support to be paid by the [defendant] during his lifetime to the [plaintiff] for the support of child and in the event they are unable to agree, the amount of such child support payments shall be determined by a court of competent jurisdiction. Said amount shall be paid retroactive to the date of the termination of alimony."

On May 25, 2010, the defendant filed a postjudgment motion for modification of unallocated support, medical and other expenses. On November 24, 2010, the plaintiff filed a motion for contempt, alleging, in part, that the defendant was in wilful contempt for failing to pay unallocated alimony and child support as ordered in the dissolution judgment. On April 21, 2011, the defendant filed a motion to "enforce termination of unallocated support and for other relief," arguing that, by virtue of the self-executing language of § 3 (B) of the agreement, the unallocated alimony and child support obligation had terminated in December, 2007, because the plaintiff, at that time, was cohabiting, as defined by § 46b-86 (b). On July 7, 2011, the plaintiff filed a postjudgment motion for child support, requesting that the court enter child support orders if it found that the unallocated alimony and child support order had

been terminated.

On April 17, 2012, following a hearing, the court found that there had been a substantial change in circumstances warranting a reduction in the defendant's unallocated alimony and child support obligation, and the court ordered the defendant to pay $200 per week to the plaintiff in such unallocated alimony and support. The substantial change in circumstances was that the plaintiff and her then fiancé, Steven Cooper, had executed a lease together and that they had cohabited from December, 2007, through late March, 2008, with Cooper sharing some of the plaintiff's living expenses during that period, thus altering her financial needs. The court substantively applied § 46b-86 (b) and ordered that the defendant's unallocated support obligations were suspended during the time of the plaintiff's cohabitation, but that, otherwise, he continued to owe her unallocated alimony and child support. Further, the court found that the defendant was in contempt for not having paid such unallocated support to the plaintiff for a six month period prior to his filing the May 24, 2010 motion for modification. This appeal followed.

"The well settled standard of review in domestic relations cases is that this court will not disturb trial court orders unless the trial court has abused its legal discretion or its findings have no reasonable basis in the facts. . . . As has often been explained, the foundation for this standard is that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case . . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Notwithstanding the great deference accorded the trial court in dissolution proceedings, a trial court's ruling . . . may be reversed if, in the exercise of its discretion, the trial court applies the wrong standard of law." (Citations omitted; internal quotation marks omitted.) *Tuckman* v. *Tuckman*, 308 Conn. 194, 200, 61 A.3d 449 (2013)

On appeal, the defendant claims that the court, having improperly applied the substantive terms of § 46b-86 (b), modified the judgment by suspending his unallocated alimony and support payments for four months, rather than, as required by § 3 (B) of the agreement, terminating such payments upon the plaintiff's cohabitation in December, 2007. We agree.

"Section 46b-86 (b), known as the 'cohabitation statute,' provides in pertinent part that a court may 'modify such judgment and suspend, reduce or terminate the payment of periodic alimony upon a showing that the party receiving the periodic alimony is living with another person under circumstances which the court finds should result in the modification, [suspension, reduction or termination] . . . of alimony because the

living arrangements cause such a change of circumstances as to alter the financial needs of that party.' " *D'Ascanio* v. *D'Ascanio*, 237 Conn. 481, 485–86, 678 A.2d 469 (1996). Therefore, in order to find that the plaintiff was cohabiting with Cooper, the defendant had to prove that (1) the plaintiff was living with Cooper, and (2) the living arrangement with Cooper caused a change of circumstances so as to alter the financial needs of the plaintiff. See id., 486.

In this case, there is no dispute that the court found that the plaintiff had cohabited with Cooper, causing a change of circumstances so as to alter the plaintiff's financial needs, for a four month period, beginning in December, 2007, thus satisfying the requirements for cohabitation contained in § 46b-86 (b).[1] Because the agreement clearly provides that alimony terminates upon death of either party, the remarriage or cohabitation of the plaintiff as defined in § 46b-86 (b), or on August 1, 2011,[2] we conclude that the court improperly modified the unallocated alimony and child support order by applying § 46b-86 (b) instead of terminating such order as of the initial date of the plaintiff's cohabitation, as required by § 3 (B) of the agreement incorporated by reference in the judgment. We further conclude that the court failed to make findings concerning child support for the period beginning after the date of cohabitation and to enter any necessary orders related thereto.

The plaintiff argues that the court's decision was correct and the agreement was not self-executing because it specifically referenced § 46b-86 (b) and that, therefore, the court had the authority to "suspend, reduce or terminate the payment of periodic alimony"; General Statutes § 46b-86 (b); as is contemplated by the statute. The plaintiff relies on two cases, namely, *Krichko* v. *Krichko*, 108 Conn. App. 644, 948 A.2d 1092, cert. granted, 289 Conn. 913, 957 A.2d 877 (2008) (appeal withdrawn May 19, 2009), and *Mihalyak* v. *Mihalyak*, 30 Conn. App. 516, 620 A.2d 1327 (1993), to support her argument that because the agreement references § 46b-86 (b), the alimony award is not terminated upon cohabitation, although that is the sole remedy set forth in the agreement. She argues that any reference to § 46b-86 (b) in the agreement means that the court has the authority in the event of cohabitation to modify the amount of, to suspend or to terminate alimony, despite any limitation of or delineation of a remedy in the agreement. We disagree.

The cases relied on by the plaintiff do not stand for the proposition for which she argues. In *Krichko*, this court held that the trial court improperly had "failed to conclude that the plaintiff's alimony obligation terminated as of the date the defendant began cohabiting, pursuant to the separation agreement"; *Krichko* v. *Krichko*, supra, 108 Conn. App. 652; but, instead, had

relied on § 46b-86 despite the fact that the agreement did not reference § 46b-86 and the plaintiff had not relied on § 46b-86 in his motion for modification. See id., 649–52. In *Mihalyak*, as in *Krichko*, neither the separation agreement nor the plaintiff's motion to modify alimony referenced § 46b-86 (b). *Mihalyak* v. *Mihalyak*, supra, 30 Conn. App. 520–21. We held in *Mihalyak* that under such circumstances, the provisions of § 46b-86 are inapplicable and that the clear terms of the agreement govern. Id., 521. Additionally, neither *Mihalyak* nor *Krichko* discussed whether a reference to § 46b-86 (b) in an agreement, specifically to define the meaning of cohabitation, would have an impact on the analysis set forth in each of those opinions.

We look to our Supreme Court's opinion in *D'Ascanio* v. *D'Ascanio*, supra, 237 Conn. 481, for guidance on the issue of whether the agreement's self-executing provision terminating alimony in the event of cohabitation should have been enforced by the court after it found that the plaintiff had cohabited as defined in § 46b-86 (b). In *D'Ascanio*, the relevant term of the parties' modification agreement, which was incorporated into the judgment of dissolution, provided that the plaintiff's alimony obligation would be reduced to $350 per week in the event that the defendant "remarries or cohabitates, as defined by statute . . . ." (Emphasis omitted.) Id., 484. The trial court concluded, despite the language of the agreement, that it had the authority to modify the plaintiff's alimony obligation to an amount that it concluded was equitable. Id., 485, 488. On appeal, our Supreme Court concluded that because the modification agreement defined cohabitation by reference to § 46b-86 (b); id., 485; once the trial court found that the defendant had cohabited as defined in § 46b-86 (b), "the court should have enforced the terms of the modification agreement . . . ." Id., 489–90. Accordingly, it reversed the judgment of the trial court and remanded the case with direction to that court to render judgment reducing the plaintiff's weekly alimony payment, in accordance with the terms of the modification agreement, from $700 to $350, retroactive to the date the defendant began cohabiting. Id., 490.

The language of the modification agreement in *D'Ascanio* is similar to the language in the present case, in that it defines cohabitation by reference to § 46b-86 (b). In *D'Ascanio*, the modification agreement provided that alimony was not modifiable by either party "except that in the event that the defendant *remarries or cohabitates*, *as defined by statute*, the alimony shall be reduced by one half ($350)." (Emphasis added; internal quotation marks omitted.) Id., 483 n.1. In the present case, the agreement provides that the defendant shall pay unallocated alimony and child support "*until* the death of either party, the [plaintiff's] remarriage or *cohabitation as defined by Conn. General Statutes § 46b-86 (b)*, or until August 1, 2011." (Emphasis

added.) We therefore conclude that *D'Ascanio* governs this case and that the court improperly modified the defendant's alimony obligation pursuant to the remedies available in § 46b-86 (b), rather than terminating the plaintiff's alimony as of the initial date of cohabitation as required by § 3 (B) of the agreement, which was incorporated by reference in the judgment.[3] See also *DeMaria* v. *DeMaria*, 247 Conn. 715, 722, 724 A.2d 1088 (1999) (both requirements for cohabitation set forth in § 46b-86 [b] apply to judgment even when judgment does not define cohabitation or reference statute); but see *Remillard* v. *Remillard*, 297 Conn. 345, 356–57, 999 A.2d 713 (2010) (trial court's construction of ambiguous term " 'cohabitation' " in separation agreement as requiring romantic or sexual relationship was not clearly erroneous, it having been supported by ample evidence in record, including testimonial evidence as well as other language in separation agreement).

We next must consider the issue of child support following the termination of alimony, as of the initial date of cohabitation, pursuant to § 3 (F) of the agreement, which provides in part that in the "event of the termination of the alimony payments during the minority of the child, the parties shall determine the amount of child support to be paid by the [defendant] during his lifetime to the [plaintiff] for the support of the child and in the event they are unable to agree, the amount of such child support payments shall be determined by a court of competent jurisdiction. Said amount shall be paid retroactive to the date of the termination of alimony." We also are aware that the parties have resided in California since 2007[4] and that the parties have represented that there has been a change in custody of their child granted by the court in California.[5] In his appellate brief and during oral argument before this court, the defendant stated that child support is not an issue in this appeal and that it would be handled in California, retroactive to the date alimony terminated. He also argued the same before the trial court, and the plaintiff did not contest his representations. Additionally, the defendant argues that California, not Connecticut, has jurisdiction over child support pursuant to the Uniform Interstate Family Support Act, General Statutes § 46b-212h (a), because both parties would have to agree to permit Connecticut to consider the issue, and he has not agreed.

Section 46b-212h (a) provides: "The Family Support Magistrate Division or the Superior Court that has issued a support order consistent with the law of this state has and shall exercise continuing exclusive jurisdiction to modify its child support order if such order is the controlling support order and: (1) At the time of the filing of a request for modification this state is the residence of the obligor, the individual obligee or the child for whose benefit the support order is issued; or (2) if this state is not the residence of the obligor, the

individual obligee, or the child for whose benefit the support order is issued, the parties consent in a record or in open court that the Family Support Magistrate Division or the Superior Court may continue to exercise jurisdiction to modify its order."

In this case, the defendant filed a motion for modification of the unallocated alimony and child support order on May 25, 2010, and a motion to terminate unallocated alimony and child support on April 21, 2011. Both of these motions implicate child support. See generally *Tomlinson* v. *Tomlinson*, 305 Conn. 539, 558–61, 46 A.3d 112 (2012); id., 558 ("[e]ven though an unallocated order incorporates alimony and child support without delineating specific amounts for each component, the unallocated order, along with other financial orders, necessarily includes a portion attributable to child support in an amount sufficient to satisfy the guidelines"). To argue that he did not agree to Connecticut's continuing jurisdiction over child support is disingenuous. Certainly the automatic termination of his alimony obligation upon the plaintiff's cohabitation would not terminate his child support obligation. See generally id. Additionally, the plaintiff filed a motion for child support on July 7, 2011, thereby also agreeing to Connecticut's jurisdiction over the issue of child support. Furthermore, there is nothing in the record that establishes that the unallocated alimony and child support order is not the "controlling support order" for purposes of child support under § 46b-212h (a). We conclude that additional findings on issues relating to child support are necessary and that the trial court on remand should make such findings and establish any necessary orders.

The judgment is reversed and the case is remanded with direction to render judgment terminating the defendant's alimony obligation as of the initial date of the plaintiff's cohabitation, and for further proceedings consistent with this opinion on the defendant's child support obligation and on the plaintiff's motion for contempt.

In this opinion SHELDON, J., concurred.

[1] Although the court determined that the plaintiff and Cooper signed their lease on December 9, 2007, the court may need to determine the exact date they began cohabiting.

[2] "Black's Law Dictionary (4th Ed. 1968) defines . . . 'until' in pertinent part as '[a] word of limitation, used ordinarily to restrict that which precedes to what immediately follows it, and its office is to fix some point of time or some event upon the arrival or occurrence of which what precedes will cease to exist.' " *Harbour Pointe, LLC* v. *Harbour Landing Condominium Assn., Inc.*, 300 Conn. 254, 285, 14 A.3d 284 (2011) (*Vertefeuille, J.*, dissenting). Therefore, the use of such term in the second sentence of § 3 (B) of the agreement, which provides that "[u]nallocated alimony and child support shall be paid until the death of either party, the [plaintiff's] remarriage or cohabitation as defined by Conn. General Statutes § 46b-86 (b), or until August 1, 2011", delineates four events, the occurrence of any one of which causes the immediate termination of such unallocated alimony and child support. The phrase "cohabitation as defined by . . . § 46b-86 (b)" has been interpreted by our Supreme Court to require that (1) the former spouse was living with a third party, and (2) the living arrangement with the third party caused a change of circumstances so as to alter the financial

needs of the former spouse. See *D'Ascanio* v. *D'Ascanio*, supra, 237 Conn. 486. The use of such phrase in a separation agreement incorporated into a judgment does not give the court the authority to utilize any and all of the remedies, e.g., suspension, modification or termination, set forth in § 46b-86 (b), when a party moves to modify pursuant to the provisions of such agreement. See id., 489–90.

[3] In light of our conclusion that the court improperly modified the defendant's alimony obligation rather than terminating it as of the initial date of cohabitation, we also conclude that the trial court on remand must conduct a new hearing on the plaintiff's motion for contempt.

[4] It is uncontested that the parties moved to California shortly after the dissolution of their marriage in 2007.

[5] The defendant testified before the trial court that there have been fifty-six "hearings in California mostly related to custody issues, since the dissolution. We've had two custody evaluations; the result of which is that I now have sole, legal custody of my son." The plaintiff also acknowledged that the defendant was granted sole legal custody of the child, with shared physical custody to the parties, on November 1, 2010.