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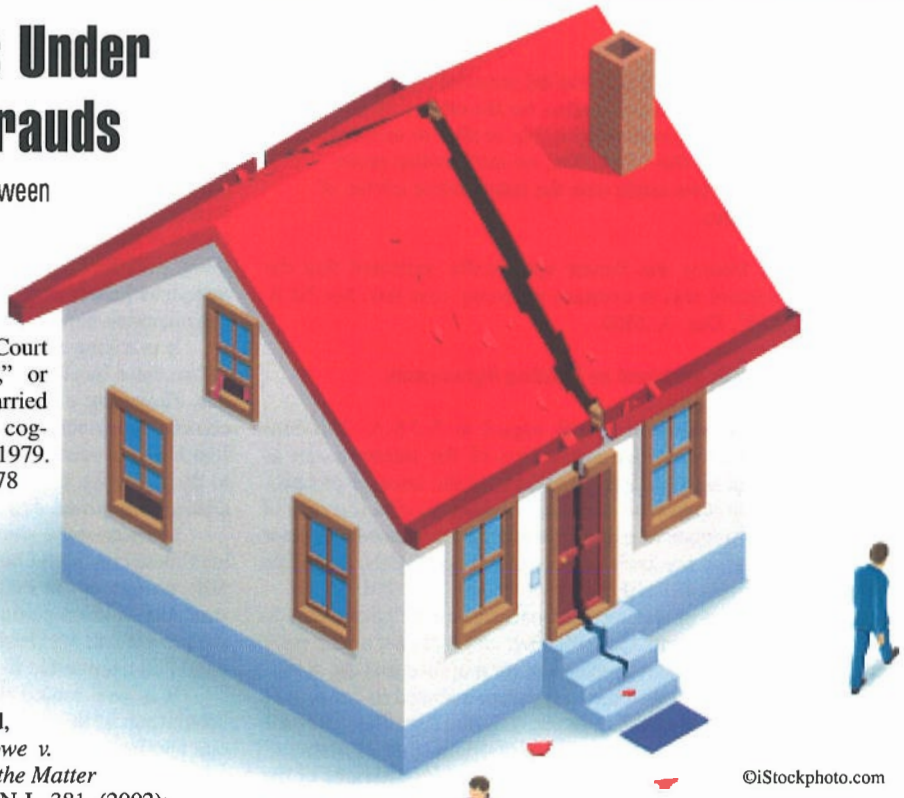
Family Law

Palimony Comes Under The Statute of Frauds

Enforcing agreements for support between unmarried cohabiting adults

By Tracy Julian



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The New Jersey Supreme Court first established "palimony," or support paid from one unmarried cohabitant to another, as a cognizable cause of action in 1979. *Kozlowski v. Kozlowski*, 80 N.J. 378 (1979). In the more than 30 years that followed, our courts consistently recognized a broad range of cohabitation agreements, most typically agreements for future support and/or distribution of property acquired by the parties — express and implied, oral and written — as valid, enforceable contracts. See, e.g., *Crowe v. DeGioia*, 90 N.J. 126, 129 (1982); *In the Matter of the Estate of Roccamonte*, 174 N.J. 381 (2002); *Houseman v. Dare*, 405 N.J. Super. 538 (App. Div. 2009).

Still, despite the vast common law establishing palimony as a valid cause of action, such agreements were not codified until 2010, when the N.J. Legislature amended the statute of frauds to require agreements for future support between unmarried adults to be in writing and reviewed by independent counsel to each party. N.J.S.A. 25:1-5(h).

History and Evolution of Palimony Claims

Prior to 1979, cohabiting relationships between unmarried adults were considered "illicit," and agreements related to the same were typically unenforceable. The Court in *Kozlowski* noted that unmarried cohabitation was once considered "meretricious" and related to prostitution, but society's mores had evolved to accept an unmarried couple's choice to live together, and such relationships were no longer contrary to public policy. Accordingly, the Court found that there was no legal "impediment" to the litigants living together, and thus "any lawful agreement" made between them was enforceable.

In *In re Roccamonte*, the Court further opined that a "marital-type relationship between unmarried persons" may reasonably include an enforceable "promise by one to support another." The Supreme Court had held that such a promise for support would sustain a valid claim for palimony whether the promise was express or implied because the "[p]arties entering this type of relationship usually do not record their understanding in specific legalese." *Kozlowki*, 80 N.J. 384. See also *DeVaney v. L'Esperance*, 195 N.J. 247, 253 (2008).

In 2008, the Appellate Division broadened the scope of palimony agreements in holding that the "marital-type relationship" required to establish palimony is not defined by an affair for a specific duration of time or even necessarily a live-in relationship, but rather by the characteristics of a "marital-type relationship." *Bayne v. Johnson*, 403 N.J. Super. 125, 139 (App. Div. 2008). There, the court reiterated certain traits of a relationship which would qualify it as a "marital-type" relationship for purposes of palimony, including: (1) a commitment foregoing of other liaisons and opportunities; (2) mutual companionship; and (3) an effort to fulfill each other's financial, emotional, physical and social needs "as best as they are able." The court specifically stated that cohabitation was not a requirement for a palimony claim, but rather, a consideration in the overall analysis.

The Palimony Amendment: N.J.S.A. 25:1-5(h)

Until 2010, New Jersey statutes were void of any reference to palimony — all such support agreements were governed exclusively by the common law. In January 2010, however, the New Jersey Legislature enacted N.J.S.A. 25:1-5(h), which amended the statute of frauds to include agreements for support between unmarried adults. Specifically, the statute states:

> No action shall be brought upon any of the following agreements or promises, unless the agreement or promise, upon which such action shall be brought or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized:
>
> . . .
>
> h. A promise by one party to a non-marital personal relationship to provide support or other consideration for the other party, either during the course of such relationship or after its termination. For the purposes of this subsection, no such written promise is binding unless it was made with the independent advice of counsel for both parties.

In the legislative history, the Senate specifically indicated that the intention of the amendment was to overturn palimony case law. *See* NJ S. Comm. State., S.B. 2091, Dec. 3, 2009.

Effect of the Amendment on Existing Agreements

While the legislature's objective with regard to N.J.S.A. 25:1-5(h) may have been clear, the immediate application of the statute is not as straightforward. First, the statute declined to address the issue of prospective versus retroactive enforcement — that is, how does the effective date of the statute (Jan. 18, 2010) relate to palimony agreements entered into prior to that date? That very issue was later addressed at length by the Appellate Division in *Botis v. Kudrick*, 421 N.J. Super. 107 (App. Div. 2011).

In *Botis*, the palimony promissor died one and a half years prior to N.J.S.A. 25:1-5(h), and the plaintiff had filed her claim almost a year prior to its enactment. In that case, the Appellate Division opined that the statute was "unclear as to the date on which the Legislature intended to bar actions based on oral palimony agreements." In its analysis, the Appellate Division noted that New Jersey courts favor "prospective application of statutes." With regard to contracts, the key consideration is the "expectations of the parties." That is, "whether the parties could have expected and, therefore, complied with, the conditions."

In *Botis*, the Appellate Division upheld the trial court's determination that N.J.S.A. 25:1-5 did not apply to the cohabitants' oral support agreement, in part, because the promissor had passed away prior to the enactment and was thus clearly not in a position to comply with the statute's terms. What the Appellate Division found even more compelling than the promissor's death, however, was the fact that, *at the time the agreement was formed*, "case law supported a mutual expectation that their agreement was enforceable without regard to a writing executed after consultation with an attorney." In this regard, the Appellate Division held that the expectations of the parties at issue in these cases are the expectations "*they had at the time of the agreement*" (citing 73 *Am.Jur. 2d Statute of Frauds* § 429 (2010) (emphasis added).

The *American Jurisprudence* treatise cited by the Appellate Division provides that the statute of frauds should not be given retroactive effect so as to "invalidate or render unenforceable contracts entered into prior to its enactment." The consideration for barring the retroactive effect of the statute of frauds concerns constitutional restrictions against the impairment of contracts and the protection of the vested rights of parties to a contract.

In fact, the learned treatise specifically states that the same conclusion should be reached even where the statute provides that "no action shall be brought ...." Thus, under *Botis*, if an oral agreement for support was enforceable at the time the parties entered into the agreement, the subsequent amendment to the statute of frauds would not, ex post facto, render the agreement unenforceable. (But see *Cavalli v. Arena*, 2012 WL 1592155 (N.J. Super. May 1, 2012), finding that the plain language of the statute barred the enforcement of an express but unwritten palimony agreement.)

Palimony, Partial Performance and the Statute of Frauds

In addition to the issue concerning the prospective application of N.J.S.A. 25:1-5(h), the trial judge in *Botis* further noted that partial performance is a valid defense to the statute of frauds — and the Appellate Division found no error in that observation. While the appellate court found that the issue of partial performance had no bearing upon the ultimate conclusion in *Botis*, such a defense to the statute of frauds warrants consideration here.

It is a long-settled principle that the statue of frauds does not apply where there has been a performance of the agreement by one of the parties. *Thompson v. Van Hise*, 133 N.J.L. 524 (1946). In that regard, an oral contract or agreement which might otherwise be barred by the statute of frauds is enforceable where there has been performance by one party, and to do otherwise would work an inequity on the party who has performed. *Graziano v. Grant*, 326 N.J. Super. 328 (App. Div. 1999).

Consequently, where one unmarried cohabitant promises to support his fellow cohabitant but fails to follow the requirements of N.J.S.A. 25:1-5(h), the agreement may nonetheless be enforced where the promisee substantially (or even partially) performs her end of the bargain and relies upon the promise to her detriment such that a failure to enforce the agreement would be inequitable to the promisee.

It is well-settled that New Jersey recognizes the right of unmarried cohabiting adults in a "marital-type" relationship to promise to support one another and contract for the ownership and distribution of assets they acquire during their relationship.

Parties who form a support or "palimony" agreement should comply with the 2010 amendment to the statute of frauds and place their understanding in writing with the independent advice of legal counsel to ensure that the agreement will be enforced in the future. For parties who entered into palimony agreements prior to the 2010 amendment, such contracts should still be enforced based upon the reasonable expectations of the parties at the time they entered into their agreement consistent with the Appellate Division holding in *Botis* and long-founded principles of contract law.

Finally, all parties to such agreements should be aware that even contracts generally subject to the statute of frauds may be enforced in the absence of a writing where one party performs under the agreement and where a failure to enforce the contract would prove inequitable to the promisee. ■