EQUITABLE AND OTHER REMEDIES IN THE WAKE OF THE NEW PALIMONY STATUTE

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INTRODUCTION

It has been nearly thirty years since the New Jersey Supreme Court noted that, "Increasing numbers of unmarried couples live together. … Although plaintiff need not be rewarded for cohabiting with defendant, she should not be penalized simply because she lived with him in consideration of a promise for support."[1] Indeed, common experience tells us that the numbers of unmarried cohabitants has increased over the years. The Supreme Court noted that the court's role is to endeavor to shape the legally cognizable interests of the parties and serve the needs of justice.[2]

That said, in a clear backlash to Supreme Court rulings which the legislature believed liberalized palimony[3], including the determination that cohabitation was not a prerequisite to palimony[4], a new provision was added to the Statute of Frauds requiring palimony agreements to be in writing.[5]

Many questions abound by the enactment of this statute. Will the statute have retroactive application to relationships commenced/promises made before the enactment of the statute? How will the enactment of the statute affect pending palimony litigation? Will courts strictly apply the statute to deny all relief or will equitable remedies be imposed to provide relief to the disadvantaged partner?

In the past, when filing a palimony action, better practice was to add additional claims for equitable relief. That said, most of the focus in the reported and unreported palimony cases, and in personal experience, dealt with the palimony issue while the equitable claims plead were really given short shrift. While some have argued that these equitable remedies were actually

really extensions of palimony instead of their own separate causes of action, given the new statute, clearly more attention will have to be paid to any available equitable and legal remedies that may provide a cohabitant with some relief and compensation for sacrifices made during a long, committed, though not legalized relationship.

As noted above, remedies related to these long term but un-married relationships was acknowledged by our Supreme Court almost 30 years ago. In some cases, the cohabitant, "…committed herself to her relationship with Roccamonte, conducting herself in private and in public as a loyal and devoted wife." [6] In affirming the granting of palimony, the Supreme Court has held that:

> The principle we recognized and accepted is that the formation of a marital-type relationship between unmarried persons may, legitimately and enforceably, rest upon a promise by one to support the other. A marital-type relationship is no more exclusively dependent upon one partner's providing maid service than it is upon sexual accommodation. It is, rather, the undertaking of a way of life in which two people commit to each other, foregoing other liaisons and opportunities, doing for each other whatever each is capable of doing, providing companionship, and fulfilling each other's needs, financial, emotional, physical, and social, as best as they are able. And each couple defines its way of life and each partner's expected contribution to it in its own way. Whatever other consideration may be involved, the entry into such a relationship and then conducting oneself in accordance with its unique character is consideration in full measure….[7]

The Supreme Court further defined the relationship as follows:

> the undertaking of a way of life **in which two people commit to each other, foregoing other liaisons and opportunities, doing for each other whatever each is capable of doing, providing companionship, and fulfilling each other's needs, financial, emotional, physical, and social, as best as they are able**. (emphasis added).[8]

Considered under these terms, will a court allow someone to be precluded from relief simply because their "deal" was not in writing?

CASE LAW IMPLICATING RIGHTS UPON COHABITATION

The equitable remedies incident to cohabitation were thoughtfully set out by the Supreme Court in Kozlowski in a concurring opinion written by Justice Pashman[9]. Therein, he wrote that because unwed persons choose to cohabit do not generally anticipate the financial consequences of their situation:

> It would be unwise to require some form of contract as a prerequisite to relief in the court. Rather, we should presume "that the parties intended to deal fairly with each other" upon dissolution of the relationship. (citations omitted). Consequently, in the absence of an agreement, or employ the doctrine of quantum meruit or equitable remedies such as construction resulting trusts in order to insure that one party has not been unjustly enriched and the other party unjustly impoverished on account of their dealings. (citations omitted). Since such remedies are grounded in equity, their applicability would depend upon the facts and circumstances of each particular case. The factors to be weighed by a trial judge would includes, as examples only, the duration of the relationship, the amount and types of services rendered by each of the parties, the opportunities foregone by either in entering the living arrangement, and the ability of each to earn a living after the relationship has been resolved. These remedies may be cumulative or exclusive. Decisions concerning the complexities that might arise upon application of these principals must be determined on a case by case basis.[10]

The Berrie case is another example of these rights being potentially conferred upon cohabitation.[11] In Berrie, the parties began living together "some time between early 1980 and mid-1981" and married on December 29, 1983, some 2 ½ to 4 years later.[12] The wife sought equitable distribution or other equitable remedies and discovery relative thereto from the date the cohabitation commenced. The husband filed a motion in limine in an attempt to prevent the wife from amending her divorce Complaint to include demands for equitable relief and for discovery relative to the period of cohabitation. The trial court ruled in limine that a premarital period of cohabitation did not extend the time for equitable distribution purposes and, any increase in

value of defendant's stock in his corporation during any premarital period of cohabitation was not subject to equitable distribution. Additionally, the trial court denied the wife's ability to obtain discovery with regard to that period of time. The wife filed an interlocutory appeal.

The Appellate Division reversed and remanded to the trial court to determine whether all or any part of the premarital cohabitation period could be considered in determining the base from which any increase of the stock could be measured. The Appellate Division also held that the wife was entitled to the requested discovery from the period of cohabitation to pursue her equitable claims.

In Berrie, the Appellate Division found that the Weiss[13] case, which held that a house purchase prior to a marriage with the intention that it would become the marital home was not exempt from equitable distribution, was not merely limited to the issue of the purchase of a marital home. The Appellate Division also reversed the trial court's ruling denying inclusion by the wife of equitable counts such as resulting trusts, constructive trusts, quantum meruit recovery, unjust enrichment, quasi-contractual recovery, transmutation, implied contract and express contract with regard to the property. The Appellate Division concluded that even if some theory of equitable distribution was not viable, they saw no reason why the wife could be precluded from presenting her various equitable alternatives to recovery.[14] Additionally, the Appellate Division found that the trial court erred in not allowing discovery regarding this premarital period as "both parties were entitled to have all issues fully explored."[15]

As previously stated, the Appellate Division relied on the case of Weiss to find that the period of cohabitation preceding marriage was included in the definition of "during the marriage". In Weiss, the court was presented with the issue of determining whether a house held in the husband's name purchased four months prior to the marriage ceremony, with the intention

that it would become the marital home, was eligible for equitable distribution. In holding that it was distributable.[16] Judge Skillman noted that:

> The appellate court decision in interpreting the phrase "during the marriage" in N.J.S.A. 2A:23-34 have all been concerned with establishing the terminal point of marriage. … None of these decisions have involved a determination of when a marriage commences for the purposes of establishing which assets are subject to equitable distribution.[17]

Judge Skillman reviewed prior Supreme Court decisions dealing with terminal points of a marriage[18] as a guide to determine whether a commencement point may exist prior to the marriage and found that it can:

> [T]he court has rejected a literal interpretation of the phrase "during the marriage" in N.J.S.A. 2A:34-23 in favor of an interpretation which is administratively workable and also in furtherance of the underlying policies of equitable distribution. The automatic recognition of the date of the marriage ceremony as the commencement date of the marriage for purpose of equitable distribution would be the easiest rule to apply. Moreover, there is dictum in Painter that "[o]bviously the time period intended by the words 'during the marriage commences' as soon as the marriage ceremony has taken place." … However, the court in Painter further indicated that its comments should not be understood to "provide certain and ready answers to all questions which may arise as to whether particular property is eligible for distribution" and that "[i]ndividual problems must be solved as they arise, within the context of particular cases." … Furthermore, the cases decided since Painter have recognized that N.J.S.A. 2A:34-23 should be construed to the extent feasible to effectuate the public policy underlying the equitable distribution law, which was to recognize that marriage is "a shared enterprise, a joint undertaking, that in many ways...is akin to a partnership." … We conclude that the court's approach to the interpretation of N.J.S.A. 2A:34-23 in Painter and it progeny supports the conclusion that a date prior to the marriage ceremony can in appropriate circumstances, qualify as a date of the commencement of the marriage for the purposes of deciding whether property is a marital asset subject to equitable distribution. Just as the Painter line of cases has recognized that the marital partnership may terminate prior to the entry of the Judgment of Divorce, we believe that for the purposes of triggering a right of equitable distribution a marital partnership may be found

> to have commenced prior to the marriage ceremony, for the parties who have adequately expressed that intention and have acquired assets and specific contemplation of assets. This conclusion recognizes that the "shared enterprise" of marriage may begin even before the actual marriage ceremony through a purchase of a major marital asset such as the house and substantial improvements to that asset.[19]

The "intention" described in Weiss is not an intention to marry, but rather to create "a marital partnership…prior to the marriage ceremony with respect to the particular equivalent of a business partnership."[20] The theory that the shared enterprise of marriage may begin before the ceremonial act or as one in which equitable remedies such as constructive plus trust, quasi contract or quantum meruit are invocable for equitable reasons, has been upheld by the Appellate Division.[21]

Similarly, in Coney, the parties began cohabitating while they were still married to other persons.[22] Some time after the wife's divorce became final during the period of cohabitation, the parties purchased a home in the wife's name. Seven years later, the parties married. The wife claimed that because the home was in her name only and acquired prior the marriage, the home should not be subject to equitable distribution. The court disagreed holding that the home was used for thirteen years as a joint household and was indeed subject to equitable distribution.[23]

Further, in Raspa, the husband purchased a home in his name four days prior to his wedding. [24] Further, the parties selected the home together with the intention that it would be their marital home as it was for thirteen years. The court refused to apply a literal interpretation of N.J.S.A. 2A:34-23 and held that equity requires that an asset purchased in contemplation of marriage for the purposes of the marital enterprise should not be immune from equitable distribution.

In a recent unreported Appellate Division case, the court noted that it was permitted to add periods of cohabitation when determining the duration of the marital relationship, if one spouse was economically dependent upon the other during the period of cohabitation.[25]

EQUITABLE REMEDIES

In general, the reason that equitable remedies are sought is that there are no written contracts. In fact, the case law suggests that equitable remedies may be unavailable if there is an express contract which under the law usually bars such relief.

UNJUST ENRICHMENT, Unjust enrichment is the foundation for most of the equitable remedies available to unmarried cohabitants. In order to succeed upon an unjust enrichment claim, a plaintiff "must show both that defendant received a benefit and that retention of that benefit without payment would be unjust."[26] In order to establish that unjust enrichment has occurred, it is critical to consider; 1) adverse impact upon a party; 2) how that impact would be unfair if no remedy was provided by the court; and 3) how the party seeking to show unjust enrichment helped create the other party's asset or enhance its value.[27] The "remedy turns on an absence of compensation."[28]

RESULTING TRUSTS: A resulting trust, essentially, is a situation where one party holds legal title for the benefit of another. A resulting trust is a reversionary equitable interest implied by law in property that is held by the transferee, in whole or in part, as the trustee for the transferor.[29] A resulting trust is available to one party where the parties had entered into express or implied contracts to share in the distribution of property acquired during cohabitation.[30] A type of resulting trust which may be created by unmarried cohabitants could be a purchase money resulting trust which would arise when one person provides all or part of the consideration for the purchase of property which is taken or held in the other person's name.[31]

CONSTRUCTIVE TRUSTS: A constructive trust is a trust created by operation of law to remedy a situation where a party, through some improper conduct or questionable means, acquires title to property that he should not hold. "A constructive trust is a remedial device of equity. It is used to recover property which the holder of the legal title has no beneficial interest in and either acquired it lawfully but is not using it for the purposes for which it was given, or acquired it by improper means."[32] All that is required to impose a constructive trust is a finding that there was some wrongful act, including but not limited to, fraud, mistake, duress, undue influence, and the like which has resulted in a transfer of property.[33]

In New Jersey, constructive trusts are invoked to prevent unjust enrichment or fraud.[34]. The Supreme Court, in Carr, defined it as follows:"[w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee."[35] As such, constructive trusts, are not a reflection of the intention of the parties, but rather a remedial device the court will use to ensure that one party has not been unjustly enriched at the other party's expense.[36] The New Jersey Supreme Court has held that a constructive trust will be imposed in any case where to fail to do so will result in unjust enrichment.[37]

The New Jersey Superior Court applied a constructive trust to an unmarried cohabitant in Kozlowski.[38] In Kozlowski, the court determined that "unjust enrichment of one party at the expense of the other will not be tolerated" and equitable remedies such as the constructive trust should be used to provide relief when unjust enrichment occurs.[39] A constructive trust was imposed in this case because the court found that the man in the case had expressly promised the woman he lived with for fifteen years that he would provide for her for the rest of her life. In this case, the woman was a Polish immigrant who spoke little English and the man was a savvy

businessman. In Kozlowski, the Court held that that the man would be unjustly enriched if he were not required to compensate the woman for fifteen years of exclusively caring for the man and their home.

A constructive trust is "the most flexible equitable remedy available," has no pre-conditions, and the statute of frauds cannot be used as a defense.[40]

QUASI-CONTRACT: A *quasi*-contract, also known as a contract implied-in-law, "is wholly unlike an express or implied-in-fact contract in that it is 'imposed by the law for the purpose of bringing about justice without reference to the intention of the parties.'"[41] In New Jersey, implicit in quasi-contract cases is the concept of payment for services or the expectation of remuneration.[42]

In order to assert a quasi-contract claim, "the plaintiff must prove: a) what services were rendered; b) what the value of those services were; and c) that the plaintiff entered the relationship with the expectation that there would be remuneration for services."[43]

QUANTUM MERUIT: Quantum meruit means, literally, "as much as he deserves. Quantum meruit is one type *quasi*-contractual recovery which rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another.[44] It is a principal where the court may find a contract implied-in-law and may allow the performing party to recoup the reasonable value of services rendered.[45] The recovery is available even though there was no actual contract. However, quantum meruit is not applied to situations where the services were gratuitous, such as in family situations.[46]

IMPLIED CONTRACT: An implied contract consists of an obligation arising from a mutual agreement and intent to promise, but where the agreement and promise have not been

expressed in words.[47] Note that in many of the palimony cases, the promise of support could be express implied.[48]

TRANSMUTATION: According to the theory of transmutation "property that was once classified as separate or non-marital can be transmuted into marital property when the spouse with title represents to the other spouse that the property will be shared."[49] Transmutation can take place through the conversion of the separate ownership of separate property into a form of common ownership or through the commingling of separate property within joint property where there is unrestricted use of the property by both parties or when a party expends joint funds to preserve or repair separate items.

EQUITABLE LIEN: An equitable lien is a remedy whereby a court will place a lien on one party's property in order to benefit another party. A common example of when an equitable lien would be utilized is in a case where a couple lives in a house together but only one party holds title. If the non-owning party contributed to the home via financial contributions and/or housekeeping and maintenance, a court might impose an equitable lien granting the non-owning party an interest in the property when the relationship dissolves.[50] In order to impose an equitable lien between unmarried cohabitants, one party must have perpetrated a fraud upon the other.[51] As such, an equitable lien is therefore a very similar to the remedy of a constructive trust.

PARTITION: An action in the Chancery Division to divide property owned by tenants in common or as joint tenants.[52]

OTHER POTENTIAL LEGAL REMEDIES TO CONSIDER

1. Express or Implied Contract[53]
2. Action to Quiet Title[54]
3. Breach of Fiduciary Duty
4. Bailment, Constructive Bailment
5. Battered Person Syndrome[55]
6. Fraud
7. Deceit/Malicious Misrepresentation Causing Harm[56]
8. Negligent/Intentional Infliction Of Emotional Distress[57]
9. Equitable Estoppel[58]
10. Promissory Estoppel[59]
11. Equitable Fraud[60]
12. Retaliatory Eviction
13. Negligent Misrepresentation Causing Harm[61]
14. Detrimental Reliance

CONCLUSION

As noted above, the Supreme Court noted that the court's role is to endeavor to shape the legally cognizable interests of the parties and serve the needs of justice.[62] It seems clear that the de facto abolition of palimony by requiring palimony agreements to be in writing will force the Courts to consider other legal and equitable claims. While the palimony remedy was arguably imperfect, the Legislature may see the "law of unintended consequences" at play if equity requires the granting of the type of relief that the Legislature sought to abolish, in the form of these other remedies.

[1] Crowe v. DeGioia, 90 N.J. 126, 135 (1982).
[2] Id.
[3] In re Estate of Roccamonte, 174 N.J. 381 (2002).
[4] Devaney v. L'Eperance, 195 N.J. 247 (2008)
[5] N.J.S.A. 25:1-5(h)
[6] Roccamonte, supra., 174 N.J. at 387.
[7] Id., at 392-393.
[8] Id. at 392
[9] Kozlowski v. Kozlowski, 80 N.J. 378, 389 (1979)
[10] Id., at 390-391.
[11] Berrie v. Berrie, 252 N.J. Super 635 (App. Div. 1991).
[12] Id. at 639.
[13] Id., at 646-647 (Citing Weiss v. Weiss, 226 N.J. Super 281 (App. Div. 1998)).
[14] Id. at 648.
[15] Id. at 649.
[16] Weiss, supra, at 226 N.J. Super at 285-286.
[17] Id.
[18] Painter, supra and Bednar v. Bednar, 193 N.J. Super 330 (App. Div. 1984) which held termination to be the date the Complaint is filed; Smith v. Smith, 72 N.J. 350 (1974) which held the commencement date to be the date the parties entered into the Property Settlement Agreement; DiGiacomo v. DiGiacomo, 80 N.J. 155 (1979) which held the commencement date to be the date the parties orally agreed to divide marital property.
[19] 226 N.J. Super. at 285-87 (citations omitted.)
[20] Berrie, supra at 252 N.J. Super. at 647.
[21] See McGee v. McGee, 277 N.J. Super 1, 13 (App. Div. 1994).
[22] Coney v. Coney, 207 N.J. Super 63 (Ch. Div. 1995); see also Rolle v. Rolle, 219 N.J. Super. 528 (1987).
[23] Coney, supra. 207 N.J. Super at 73.
[24] Raspa v. Raspa, 207 N.J. Super 371 (Ch. Div. 1985)
[25] Christopher v. Christopher, A-6444-06T3 (May 5, 2009)(citing McGee v. McGee, 277 N.J. Super. 1, 14 (App. Div. 1994)).
[26] See V.R.G. Corp. v. GKN Realty Corp., 135 N.J. 539 (1994).
[27] Frank A. Louis, Equitable Remedies in Family Law, 1990 NJFL 69, 71 (1990) (Citing Watts v. Watts, 405 N.W.2d. 303 (9187).
[28] Id. at 72.
[29] In re Pemaquid Underwriting Brokerage, Inc., 319 B.R. 824 (D.N.J. 2005) (citing Restatement (Third) of Trusts, §7.
[30] See Rolle, supra.
[31] Cause Of Action By Unmarried Cohabitant To Enforce Agreement Or Understanding Regarding Support Or Division Of Property, 8 Causes of Action 2d 1 (1995).
[32] Trustees of Clients' Sec. Fund of Bar of New Jersey v. Yucht, 243 N.J. Super. 97, 132 (Ch. Div. 1990); see also, Stewart v. Harris Structural Steel Co., Inc.. 198 N.J. Super 255 (App. Div. 1994).
[33] D'ippolito, et al., v. Castoro, et al., 51 N.J. 584, 589 (1968)
[34] Carr v. Carr,.120 N.J. 336 (1990).

[35] Id.
[36] . Stretch v. Watson, 6 N.J. Super. 456 (App. Div 1949).
[37] D'ippolito, supra.
[38] Kozlowski v. Kozlowski, 164 N.J. Super. 162, 172 (Ch. Div. 1978), aff'd 80 N.J. 378 (1979)
[39] Id., at 172.
[40] See Frank A. Louis, Equitable Remedies in Family Law, 1990 NJFL 69, 71 (1990) (Citing Stark v. Reingold, 18 N.J. 251, 268 (1955).
[41] Saint Barnabas Medical Ctr. v. County of Essex, 11 N.J. 67, 79 (1998) (quoting Saint Paul Fire & Marine, Ins. Co. v. Indemnity Ins. Co., 32 N.J. 17, 22 (1960).
[42] . Callano v. Oakwood Park Homes Corp., 91 N.J. Super. 105, 109 (App. Div. 1956); Shapiro v. Solomon, 42 N.J. Super. 377 (App. Div. 1956)..
[43] Frank A. Louis, Equitable Remedies in Family Law, 1990 NJFL 69, 71 (1990) (Citing Stark v. Reingold, 18 N.J. 251, 268 (1955).
[44] Goldberger, Selighsohn & Shinrod, 378 N.J. Super. 244 (App. Div. 2005).
[45] Weichert Co. Realtors v. Ryan, 178 N.J. 427, 437-438 (1992).
[46] See Doby v. Williams, 53 N.J. Super. 548, 555 (Law Div. 1959) (which held that the general rule is that services are to be compensated, "but where the services are rendered by members of a family, living as a household, to each other, there will be no such implication").
[47] Borough of West Caldwell v. Borough of Caldwell, 26 N.J. 9 (1958).
[48] See e.g. Roccamonte, supra. 174 N.J. at 392
[49] Coney v. Coney, 207 N.J. Super 63, 75 (Ch. Div. 1995)
[50] See Winn v. Wiggins. 47 N.J. Super. 215 (1957).
[51] Id.
[52] N.J.S.A. 2A:56-1, *et seq.* Hanson v. Hanson, 141 N.J. Eq. 103 (Ch. Ct. 1947):
[53] A contract is an express contract if the agreement is manifested by written or spoken words and can be a contract implied in fact if the agreement is manifested by other conduct . See Wanaque Borough Sewage Authority v. Township of West Milford, 144 N.J. 564 (1996).
[54] An action to establish title to land by bringing the adverse party into court to establish his or her claim. However, would have to have been some legal (as opposed to) claim as a prerequisite so this will likely have little application in these cases.
[55] Cusseaux v. Pickett, 279 N.J. Super. 335, 344 (Law Div. 1994); Brennan v. Orban, 145 N.J. 282, 290 (1996)
[56] The Supreme Court of New Jersey has stated that, in its most general terms, "every fraud in its most general and fundamental conception consists of the obtaining of an undue advantage by means of some act or omission that is unconscientious or a violation of good faith." Jewish Ctr. Of Sussex Cty. v. Wale, 86 N.J. 619, 624 (1981) Furthermore, it is well settled that actual fraud is "any incorrect statement, misrepresentation", Union Ink Co. Inc. v. AT&T Corp., 352 N.J. Super 617, 645 (App. Div, 2002), or concealment of a material fact knowingly made by one party and which is relied upon by the other to his or her detriment, *cf.*, Simon v. Depford Tp., 272 N.J. Super. 21, 29 (App. Div. 1994).
[57] Ruprecht v. Ruprecht, 252 N.J. Super 230 (Ch. Div. 1991).
[58] Reliance on another's conduct. See Carlsen v. Masters, Mates & Pilots Pension Trust, 80 N.J. 334, 339 (1979).
[59] Malaker Corp. Stockholders Protective Comm. v. First Jersey Nat'l Bank, 163 N.J. Super. 463, 479 (App. Div. 1978), certif. denied, 79 N.J. 488 (1978). Four separate factual elements must be

proved prima facie to justify application of the doctrine. They are: (1) a clear and definite promise by the promisor; (2) the promise must be made with the expectation that the promisee will rely thereon; (3) the promisee must in fact reasonably rely on the promise, and (4) detriment of a definite and substantial nature must be incurred in reliance on the promise.

[60] See Foont-Freedenfeld Corp. v. Electro-Protective Corp., 126 N.J. Super. 254, 257 (App. Div. 1973), aff'd 64 N.J. 197 (1974).

[61] Reynolds v. Lancaster County Prison, 325 N.J. Super. 298, 214 (App Div. 1999) certif. denied. 163 N.J. 394 (2000).

[62] Roccamonte, supra., 174 N.J. at 392-393.