COHABITATION AS AN ESSENTIAL ELEMENT OF PALIMONY CLAIMS
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For almost thirty years, it has been the law of the State of New Jersey that unmarried adult partners may cohabit in a marital-type relationship and enforce a promise of lifetime support (a so-called “palimony” claim). If one of the partners is induced to enter into or remain in the relationship by that promise and consideration is received in exchange, there is an enforceable contract as long as it does not rest upon a consideration of meretricious sexual services.

Historical Perspective

The first court to declare such contracts enforceable was the Supreme Court of California in Marvin v. Marvin, 557 P.2d 106 (Cal. 1976). Only three years later, the New Jersey Supreme Court followed suit in Kozlowski v. Kozlowski, 80 N.J. 378 (1979), when it enforced an agreement between non-married partners whereby plaintiff agreed to live with defendant and run the household, while defendant agreed to provide for plaintiff for the rest of her life. The contract was found enforceable despite the fact defendant remained married to another woman throughout this relationship, in the context where the parties cohabited for fifteen years.

Three years after Kozlowski, the New Jersey Supreme Court decided Crowe v. De Gioia, 90 N.J. 126 (1982). In Crowe, the parties had cohabited for twenty years, and plaintiff brought suit to enforce an alleged agreement made by defendant for lifetime support. In awarding temporary relief to the unmarried cohabitant threatened with the loss of her home of fourteen years and her only means of support, the Court recognized that equity allows the Court the flexibility to devise new remedies protecting the legally cognizable interests of the parties and to serve the needs of justice in a progressive social society. Id. at 135-137.
Fast forward twenty years to the case of *In Re Estate of Roccamonte*, 174 N.J. 381 (2002), a case whose facts are strikingly similar to the facts in *Kozlowski* and *Crowe*, albeit in the context of a twenty-five year cohabitation. The Court in *Roccamonte* defined the marital-type nature of the relationship between unmarried persons which is required to be the consideration for the promise of lifetime support. It requires “an 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 they are able.” *Id.* at 392. 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.” *Id.* at 392-393. Notably, the Court in *Roccamonte* never required cohabitation in the definition of a marital-type relationship, even though the parties there cohabited for twenty-five years.

As of this time, the New Jersey Supreme Court had not yet been faced with a palimony case where the parties did not cohabit. Such a claim came before the Appellate Division, however, four years later in *Levine v. Konvitz*, 383 N.J. Super. 1 (App. Div. 2006), *certif. den.* 186 N.J. 607 (2006), this time against the estate of the promisor. The parties there never lived together, although their romantic relationship spanned over seventy years, consisting of what really amounted to an extramarital affair – throughout which each party married other people, had children with their respective spouses, and otherwise carried on full lives independent of the other. In interpreting *Roccamonte* and what it believed to be the view implicitly and consistently held by the New Jersey Supreme Court, the Appellate Division in *Levine* took the position that consideration in a setting of cohabitation is a predicate requirement for bringing a palimony
claim, and that cohabitation is an implied and indispensable part of the definition of a marital-type relationship as a matter of law. Thus, subsequent to Levine, in order to establish a prima facie case for palimony support, a plaintiff was required to present competent evidence showing: 1) that the parties cohabited; 2) in a marital-type relationship; 3) that during this period of cohabitation, defendant promised plaintiff that he or she would support him or her for life; and 4) that this promise was made in exchange for valid consideration.

In establishing this bright-line cohabitation requirement, the Appellate Division in Levine reasoned that: 1) it would avoid duplicitous manipulation of what defines a marital-type relationship, especially where a claim is made against an estate, and the alleged promisor cannot testify regarding the facts of the relationship; 2) it would give advance notice and warning to both parties to the relationship and any innocent spouse and dependent children involved that defendant has entered into a relationship that may result in legal and financial consequences; and 3) it would provide a physical manifestation of the marital-type relationship as defined in Roccamonte. These concerns take into account a balancing of the competing claims of the plaintiff versus those of other involved parties. Cohabitation would provide concrete proof to support an award of equitable relief to a plaintiff whose devotion, caring, and provision for defendant was significantly induced by a promise of support.

The Appellate Division took this cohabitation requirement a step further in a series of cases beginning in 2006. In McDonald v. Mavety, 383 N.J. Super. 347 (App. Div. 2006), certif. den., 187 N.J. 79 (2006), a case pitting the rights of the claimant against those made by family members of the deceased alleged promisor, the court ruled that such cohabitation must be “for a significant period of time.” Id. at 360. In the case of In Re Matter of the Estate of Sasson, 387 N.J. Super. 459 (App. Div. 2006), certif. den., 189 N.J. 103 (2006), the court found that a
cohabitation period of only two and one-half years prior to the alleged promisor’s death was not a significant enough period of time to establish a marital-type relationship. And in the case of *Crayne v. Marchese*, 2007 W.L. 655446 (*N.J. Super.* A.D. Mar. 6, 2007), the court held that “cohabitation requires living together under the same roof on a regular basis.” Thus, as a result of these cases, the court embellished upon the cohabitation element to add the “significant period of time” and “on a regular basis” requirements.

**Current State of the Law**

The New Jersey Supreme Court has yet to determine whether cohabitation is required to define a marital-type relationship in the context of a palimony claim. As per *Levine*’s reasoning, cohabitation would only be required when: 1) the promisor is either dead or close to dead, the promisor’s estate is disputing that a promise was ever made, and the only witness to the marital-type quality of the relationship is the claimant; or 2) the promisor remains married and/or has innocent children during the relationship, and there are competing claimants whose interests need to be protected vis-a-vis the plaintiff. Query: in circumstances where both parties to the relationship are alive and the promisor can testify as to the marital-type quality of the relationship with proofs and the like, or where the promisor is unmarried and there are no competing claims of a dependent spouse and innocent children, is a bright-line cohabitation requirement really necessary? Could not the court evaluate the marital-type quality of the relationship otherwise? Such a wholesale application of the bright-line cohabitation test as per *Levine* would provide a blanket immunity to a living, unmarried promisor who has not moved in with the plaintiff, regardless of the marital-type quality of the relationship, and actually undermine the equitable reasons for recognizing and enforcing palimony claims in the first place.

Indeed, these facts came before the New Jersey District Court just last year in *Carino v.*
O’Malley, 2007 W.L. 951953 (D.N.J. Mar. 28, 2007), a palimony case where there was no cohabitation, and the promisor - who was divorced throughout - remained alive and well and able to testify to the quality of the parties’ seventeen year, virtually exclusive relationship. Carino involved a relationship which began when plaintiff was an eighteen year old college sophomore and defendant was a fifty-five year old financial executive. The parties spent a considerable amount of their free time together, traveling extensively within the United States and abroad, sometimes for weeks at a time. Defendant provided significant financial support to plaintiff during the course of the relationship. Defendant guaranteed the lease on one of plaintiff’s apartments, provided her with financial assistance to pay rent, helped purchase a condominium, and eventually paid off the entire $345,000.00 mortgage on the condominium. Defendant also regularly gave plaintiff large amounts of cash, paid her credit card, health insurance, and utility bills, and paid for the trips the parties took together. Plaintiff sought palimony from defendant, alleging that defendant promised on numerous occasions to provide for her so that she could continue her lifestyle should he no longer be around to support her. Defendant filed for summary judgment, arguing that under New Jersey law, cohabitation is an absolute prerequisite to a claim for support arising out of a relationship akin to marriage between unmarried persons, and that it was undisputed that the parties never cohabited in the traditional sense.

Under these facts, the New Jersey District Court was faced with the difficult task of determining how New Jersey’s highest court would rule on this point. In denying defendant’s summary judgment motion, the District Court was not persuaded that the New Jersey Supreme Court would impose a bright-line cohabitation requirement under these facts. The alleged promisor was alive to testify as to the marital-type quality of the relationship, there were no competing interests of an innocent spouse and dependent children, and equity would not be
served by imposing a cohabitation requirement. The facts themselves established the significance of the relationship, support, and dependency created by the alleged promisor, and the court could find that there existed a marital-type relationship as per *Roccamonte*. The parties could establish the way of life to which they both contributed through testimony, and the court could ferret out duplicitous manipulation in these circumstances. The equitable concern of protecting plaintiff’s legally cognizable palimony claim was paramount here, and the District Court was reluctant to provide a blanket immunity to the person who made the promises and created the dependency just because he was able to avoid traditional cohabitation throughout the duration of the relationship. *Roccamonte* defined a marital-type relationship without requiring or even mentioning cohabitation, finding that “the formation of a marital-type relationship...may legitimately and enforceably rest upon a promise by one to support the other.” Although it would have been easier to apply a bright-line cohabitation requirement to palimony claims, it would, the District Court believed, thwart the court’s equitable duty to protect the legally cognizable interests of the parties and serve the needs of justice in palimony situations. If applied in *Carino*, it would ignore the financial dependency of plaintiff under those facts, and shield defendant simply because he did not move into plaintiff’s residences. The elements for a palimony claim, the marital-type relationship and promise of support, could be established under the facts, without the necessity for a finding of cohabitation.

**How Will the New Jersey Supreme Court Rule?**

We may soon find out how the New Jersey Supreme Court will rule on this issue. In the case of *L’Esperance v. Devaney*, A-20-07, currently on appeal to the New Jersey Supreme Court from the decision of the Appellate Division, see *Devaney v. L’Esperance*, 391 N.J. Super. 448 (App. Div. 2007), *certif. granted*, 192 N.J. 72 (2007) (decided less than one week after *Carino*),
the issue of whether cohabitation is an essential element of a cause of action for palimony is squarely presented before the Court. *Devaney* involves a palimony claim based upon alleged promises that defendant made to plaintiff during the course of their non-cohabiting, twenty-year relationship. When the parties met in 1983, plaintiff was twenty-three and single; defendant was fifty-one and married with three children. Defendant remained married throughout the course of the parties’ relationship. Defendant paid numerous expenses for plaintiff during the relationship, including one-half of the rent on her Manhattan apartment, vacation expenses for foreign and domestic vacations the parties took together, and plaintiff’s tuition and related expenses for obtaining her college degree. Defendant continued to pay plaintiff’s expenses when she moved to Seattle in 1994, and visited her there on approximately six or seven occasions. In 1997, upon the promise that defendant would buy her a home, provide her with financial support, continue trying to get a divorce, and have a baby with her, plaintiff returned to New Jersey. Defendant thereafter rented an apartment for her in North Bergen, which he ultimately purchased in his own name. Beginning in 2003, the parties attempted, unsuccessfully, to have a child together. Shortly thereafter, defendant told plaintiff that he did not wish to continue these efforts, and did not wish to see her anymore. The relationship then terminated, and defendant filed an ejectment action to obtain possession of the condominium.

Plaintiff’s palimony suit followed, with plaintiff claiming in her argument to the Appellate Division that attempting to have a child together demonstrates that their relationship was sufficiently akin to a marriage as to warrant the enforcement of defendant’s alleged promises. The Appellate Division denied plaintiff’s claim, citing the fact that defendant was married and continued to reside with his wife throughout the parties’ relationship, and pointed to the policy reasons in *Levine* underlying the requirement of cohabitation as a necessary element of
a palimony claim. Here there were the competing interests of defendant’s wife and children.

This case is now before the New Jersey Supreme Court, having been argued to the Court in January of this year. Plaintiff claims that she devoted a large part of her adult life to a man who made repeated promises of marriage to her and that the court should reject the bright-line cohabitation rule under these circumstances, especially where they were attempting to have a child together. The defendant argues that the absence of cohabitation per se precludes a finding that the relationship was marital-type.

The facts of Devaney differ from those in Carino in one important respect. Defendant in Devaney remained married and living with his wife throughout the entire course of his relationship with plaintiff. Thus the policy reasons in Levine underlying the cohabitation prerequisite apply here to address the competing concerns of defendant’s wife and children. However, the New Jersey Supreme Court in Devaney could still reject plaintiff’s palimony claim even without holding that cohabitation is an essential element, finding that plaintiff here has not sufficiently established a marital-type relationship otherwise under these facts. Defendant continually made future promises of marriage which never materialized (since he was already married), and never really made promises of indefinite lifetime support. And it would be difficult to envision a Supreme Court decision making the attempt by a married man to have a child out-of-wedlock with his mistress the new standard for a palimony claim.

Because the defendant in Devaney was married, this is probably not the best test case for a claimant to argue against cohabitation as a requirement for a marital-type relationship, and that the attempt to have a baby should suffice. What the New Jersey Supreme Court will do remains to be seen, although plaintiff in Devaney has an uphill battle in either case. The logical place to argue against a bright-line cohabitation requirement is not a situation where the married
defendant has never left his wife and children, and was attempting to have a child with his paramour. Under these circumstances, it would be very difficult to establish a marital-type relationship - and address the concerns of Levine as well - if cohabitation were not a prerequisite for a palimony claim.

However, in a situation where a defendant is not married, and is alive, as in Carino, it may be that cohabitation should not be the determinative factor and that attempts to have a baby could suffice. These facts are not currently before the New Jersey Supreme Court, though, and it is unlikely that the Court will eliminate the cohabitation requirement under the facts of Devaney.

What Does It All Mean?

As a practical matter, does the current standard provide wholesale immunity from a palimony claim for a married individual who does not move in with a long-term paramour who has been promised lifetime support? Such a rule would fail to provide equitable relief to a plaintiff who was induced by the alleged promisor into a state of dependency, and ultimately gives the alleged promisor the power to avoid such claims simply by failing to move in. It tips the scales in favor of an innocent spouse and dependent children or a deceased obligor’s estate without any consideration of the type of relationship the parties actually had. Presumably there is justification for this result. An innocent spouse with children should not be subject to financial ruin by claims of support from what may be an unknown paramour who had a long-term extramarital affair with the innocent spouse’s husband, especially where the claims are made against the obligor’s estate. On the other hand, the resulting inequity to the long-term paramour who was seduced into a dependent relationship with a much older, financially stable promisor by promises of love, eventual marriage and lifetime support cannot be justified. Should not at least a portion of responsibility fall upon the promisor who induced the extramarital relationship
causing economic dependency? A cohabitation requirement may also ignore the realities of a situation where lovers remain physically separated only because of employment or other unavoidable commitments, which may be the case in a marriage as well. Until the proper facts are presented to the New Jersey Supreme Court, however, it is unlikely the Court will eliminate the current cohabitation requirement, especially under the facts of Devaney.