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ALERT

IS PALIMONY IN NEW JERSEY OVER AS WE KNEW IT?

By Eric S. Solotoff

Very often, we write about cases for which we have had no involvement. Today, we get to toot our own horn a little and write about one of our cases that made new law. The case is *Maeker v. Ross*, a reported (precedential) opinion decided on February 4, 2013, by the Appellate Division. This case may very well represent the death knell of palimony cases as we knew them.

As we discussed in the past, in 2010, the Legislature passed an amendment to the statute of frauds, which required palimony agreements to be in writing and further stated that no action for palimony shall be brought unless the agreement was in writing. The Appellate Division quite definitively interpreted the legislative intent of the amendment to preclude any palimony suits brought after the amendment unless there was a written agreement that complied with the amendment, even if the relationship and alleged promise for support predated the amendment. The Appellate Division stated:

> ... The motion judge found that plaintiff's complaint was not barred by the 2010 amendment to the Statute of Frauds, N.J.S.A. 25:1-5(h) (Amendment), requiring a writing memorializing palimony agreements and independent advice of counsel for each party in advance of executing any such agreement. We reverse and hold that the Amendment is enforcement legislation that addresses under what circumstances a claimed breach of a palimony agreement may be enforced irrespective of when the purported agreement was entered.

In this case, the parties were in a more than 10 year relationship where they resided together and defendant provided for support and other financial benefits for plaintiff. There was, however, no joint property, joint accounts and nothing other than insignificant joint financial ties. The trial judge allowed the claim for palimony to continue based upon an implied promise of support (palimony).

The Appellate Division made clear that this claim had to be filed before the effective date of the amendment to the statute of frauds. Otherwise, it was barred. However, in this case, the claim did not accrue until after the statute was enacted. The Appellate Division noted:

> Here, the motion judge agreed with plaintiff's contention that her cause of action arose before the effective date of the Amendment, premised upon the judge's apparent view that the cause of action for palimony accrues at the time the agreement is entered, which in this case was prior to the effective date of the Amendment. The judge reasoned that any other interpretation would release a promisor from his or her obligations "based upon the timing of when [the promisor] elected to 'breach the agreement'" allegedly made. We disagree.
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> Palimony is a claim for support between unmarried persons, which our Supreme Court first recognized as a viable cause of action in *Kozlowski v. Kozlowski*, 80 N.J. 378 (1979). Because palimony actions are based upon principles of contract, plaintiff's cause of action accrued at the time defendant is alleged to have breached the agreement, not at the time the promise of lifetime support was purportedly made. See *In re Estate of Roccamonte*, 174 N.J. 381, 398 (2002); see also *Sodora v. Sodora*, 338 N.J. Super. 308, 313 (Ch. Div. 2000); Samuel Williston, A Treatise on the Law of Contracts § 79:14 at 303-04 (Richard A. Lord ed., 4th ed. 2004). To bring a palimony claim, a plaintiff must have a broken promise of continued support.
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> *Bayne v. Johnson*, 403 N.J. Super. 125, 143 (App. Div. 2008), certif. denied, 198 N.J. 312 (2009). As such, plaintiff's cause of action for palimony accrued on July 1, 2011, when defendant, as plaintiff contends, "abandoned" her and broke his promise of lifetime support.

In addition, the Appellate Division rejected the plaintiff's reliance on the Botis case that we previously discussed, noting

that unlike in Botis, where the parties "…could not could reasonably have anticipated the prerequisites to enforcement of a palimony promise during the time when they were in a position to create such a document," because the defendant was dead and the law suit pending when the statute was enacted, that was not the case here. Rather, the complaint here was filed 18 months after the enactment of the statute where the parties remained together and were in a position to execute a written palimony agreement and establish compliance with the Amendment. That never happened. Rather, while defendant did execute a will and power of attorney late in the relationship (and under dubious circumstances not addressed in the opinion), the Appellate Division held that neither document, as a matter of law, evidences any intent or promise of lifetime support.

Equally significant was that plaintiff's equitable claims (she should compensation for unjust enrichment, quantum meruit, quasi contract and equitable estoppel) were also rejected by the Appellate Division after the trial court allowed them to proceed. Specifically, in this case, the claims were based entirely upon the provision of homemaking services and companionship to defendant Plaintiff here did not plead the factual requirements for each equitable claim, which the Appellate Division discussed in some length. As such, in finding that the equitable claims should be dismissed, the Appellate Division noted that "... plaintiff's equitable claims are merely different versions of her underlying palimony claim that is barred."

Finally, some commentators have suggested that partial performance of a contract is a defense to the statute of frauds. The Appellate Division here disagreed.

> Whether an oral promise of lifetime support may be enforced based upon a claim of partial performance, or even full performance, post-amendment is questionable in view of the Legislature's statement that passage of the amendment was intended to overturn recent 'palimony' decisions [*Devaney v. L'Esperance*, 195 N.J. 247 (2008); *Roccamonte*, supra; *Kozlowski*, supra] by New Jersey courts[.]" Senate Judiciary Committee, Statement to S.2091, supra. ...
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> In contrast here, however, the allegation is that the party who has performed in accordance with the alleged oral agreement is defendant, the party against whom enforcement is sought, rather than plaintiff, the party who is seeking equitable relief. Moreover, there was nothing exceptional or peculiar about the services performed by defendant, and plaintiff, as well as her son, already received the full benefit of those services.

Finally because the Appellate Division determined that plaintiff's claim for palimony was barred by the Amendment and her equitable claims lack merit, plaintiff was not entitled to pendent lite support nor an award of counsel fees.

The result was that the trial court decision was reversed and remanded for entry of judgment dismissing plaintiff's complaint with prejudice.

Obviously, we are very proud of this decision and Mr. Ross is very happy, as well. It was a real team effort by the lawyers of Fox Rothschild, which included Sandra Fava, the Justice Virginia Long (ret.), Robert Epstein and our former associate, Lisa Harvey. As plaintiff's counsel has indicated that a Petition for Certification will be filed, this may not be the end of the story. Stay tuned.

If you have questions about this Alert, please contact Eric S. Solotoff, co-chair of Fox Rothschild's Family Law Practice, at 973.994.7501 or esolotoff@foxrothschild.com.