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THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
MONMOUTH COUNTY
CHANCERY DIVISION, FAMILY PART
DOCKET NO. FD-13-0928-19

C.N.,

Plaintiff,

v.

S.R.,

Defendant.

APPROVED FOR PUBLICATION

June 9, 2020

COMMITTEE ON OPINIONS

Decided: January 17, 2020

Jenny Berse and Samuel J. Berse, for plaintiff (Berse Law, LLC, attorneys)

Andrew A. Bestafka, for defendant (The Law Office of Andrew A. Bestafka, LLC, attorneys)

ACQUAVIVA, J.S.C.

In 2010, the Legislature extended the Statute of Frauds' writing requirement to any "promise by one party to a non-marital personal relationship to provide support or other consideration for the other party." N.J.S.A. 25:1-5(h) ("Subsection (h)"). This case presents a question of first impression: whether, in the absence of a writing, partition of a residence remains an equitable remedy among unmarried, cohabitating intimates engaged

in a joint venture. For the reasons set forth, the court holds that partition remains a viable remedy in those circumstances.

I.

In 2010, C.N. and S.R.[1] began a romantic relationship, cohabitating soon thereafter. They purchased a home in March 2012 and were engaged in July 2012. They had a child together in 2016. Although they had a destination wedding "ceremony" in 2018 with dozens in attendance, they never legally married. In 2019, the relationship soured, leading S.R. to file a complaint in July 2019 seeking, among other things, a determination of custody and child support. In August 2019, C.N. filed a counterclaim seeking parenting time and financial relief. In September 2019, the court: (1) permitted C.N. to amend his counterclaim to include additional prayers for relief, including partition of the parties' residence; (2) set forth a discovery schedule; and (3) ordered the parties to attend mediation.

Mediation failed, in large part, due to the intractable partition issue. The court bifurcated the matter and scheduled a trial on partition. Following two days of trial, at which only the parties testified, and a review of the

[1] The parties are identified by initials to protect their and their child's confidentiality. R. 1:38-3(d).

voluminous exhibits admitted, the court made the following findings of fact and conclusions of law.

II.

In March 2012, the then-cohabitating parties purchased a home. Although the deed and mortgage were in S.R.'s name only, C.N. was heavily involved in the transaction. He selected and communicated with the realtor. He provided $10,000 of the $15,000 down payment. He chose and paid the inspector. He received the inspection report, which listed him solely as the client. He chose the closing attorney. He negotiated a $10,000 seller's concession. Finally, both C.N. and S.R. were, and remain, named insureds on the homeowners' insurance policy. On closing, C.N. thought he and S.R. "would live there forever."

S.R., conversely, testified that she viewed the home as "her investment." That post-hoc statement, however, did not harmonize with her significant delegation of critical tasks to C.N. The court found her not credible on the point, as when asked about the down payment's source, her answers were evasive.

Again, the parties were soon thereafter engaged and had a wedding "ceremony" in 2018 but were never legally married. S.N.'s case information

statement listed March 2012 as her "Date of Marriage" and enumerated personal property including an engagement ring and two wedding bands.

The mortgage[2] payments were withdrawn monthly from S.R.'s bank account. She solely paid eighty-seven to ninety of the ninety-six monthly payments prior to trial. As to the other months, when S.R. was out of work, C.N. deposited cash into her bank account to cover the monthly payments. In 2019, S.R. took a 401(k) loan and made a $19,600 principal payment to eliminate the PMI and reduce the monthly obligation.

Whereas S.R. paid the mortgage, C.N. paid the large majority of the home's upkeep costs, including gas, electric, water, sewer, security, landscaping services, garbage, and pest control. He purchased furniture and oversaw improvement and maintenance contractors. He worked with a lawyer to appeal a tax assessment.

III.

Premised on contractual principles, "[p]alimony is the enforcement of a broken promise made for future support" made between unmarried parties involved in a marriage-like relationship. Bayne v. Johnson, 403 N.J. Super. 125, 143 (App. Div. 2008) (citing Kozlowski v. Kozlowski, 80 N.J. 378, 388

[2] The mortgage payment included: principal; interest; escrow for homeowners' insurance and property taxes; and private mortgage insurance ("PMI").

(1979)) (emphasis added). First recognized by the Supreme Court in Kozlowski, palimony agreements were enforceable whether express or implied, so long as such agreements were not premised on sexual services. 80 N.J. at 384-85. The concept was expanded in In re Estate of Roccamonte, 174 N.J. 381, 395-96 (2002) (palimony enforceable against estate), and Devaney v. L'Esperance, 195 N.J. 247, 248 (2008) (cohabitation not required).

In Kozlowski, the Court noted that the palimony agreement "was not a partnership or a joint venture entitling plaintiff to a share of defendant's accumulated assets." 80 N.J. at 383. In other words, Kozlowski drew a sharp distinction between partition and palimony.

On the other hand, unmarried cohabitating parties engaged in a joint venture may seek partition of property. See Mitchell v. Oksienik, 380 N.J. Super. 119, 127 (App. Div. 2005) (citing Olson v. Stevens, 322 N.J. Super. 119 (App. Div. 1999)).

As in Kozlowski, partition was considered distinct from palimony in pre-2010 caselaw. For example, Connell v. Diehl was a "quintessential palimony action." 397 N.J. Super. 477, 481 (App. Div. 2008). Nevertheless, after a lengthy palimony discussion, the court – in a separate section of the opinion – addressed partition.

> Generally, a mere promise to provide lifetime support does not extend to a claim against assets owned solely

> by the promissor. However, unmarried cohabitating persons "who have engaged in a joint venture to purchase property in which they reside, are entitled to seek a partition." Joint venturers are entitled to seek a partition of their property when their joint enterprise comes to an end.
>
> [Id. at 500 (citations omitted).]

Bayne similarly treats palimony and partition as separate, distinct concepts. There, the Appellate Division reversed the trial court's finding of entitlement to palimony but affirmed the finding of partition. 403 N.J. Super. 143-44.

Thus, Kozlowski, Connell, and Bayne all demonstrate that prior to 2010, both palimony and partition were available remedies to unmarried cohabitants, but that those remedies stood on separate and distinct footing.[3]

2010 Statutory Amendment

On January 18, 2020, Subsection (h) became effective, expanding the Statute of Frauds' writing requirement to:

> 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 purpose of this subsection, no such written promise is binding

[3] The distinct nature of palimony and partition is reinforced by the distinct natures of the analogous concepts of alimony and equitable distribution. See Steneken v. Steneken, 183 N.J. 290, 298-99 (2005) (discussing the "interrelated" yet "structural[ly] . . . different" purposes of alimony and equitable distribution).

> unless it was made with the independent advice of counsel for both parties.
>
> [N.J.S.A. 25:1-5(h).]

The statutory analysis "begin[s] with the statute's plain language – our polestar in discerning the Legislature's intent." L.W. ex rel. L.G. v. Toms River Reg'l Sch. Bd. of Educ., 189 N.J. 381, 400 (2007). "If the language is plain and clearly reveals the statute's meaning, the [c]ourt's sole function is to enforce the statute according to its terms." Ibid. (quoting Frugis v. Bracigliano, 177 N.J. 250, 280 (2003)).

The phrase "support or other consideration" plainly encompasses palimony agreements. Subsection (h), however, makes no direct reference to partition – a silence that speaks volumes.

Although the phrase "other consideration" may be less than opaque, such cannot be read in a vacuum. Subsection (h) begins with "[a] promise" and, again, in the second sentence requires the "written promise" to be made with advice of counsel. Just two years prior to Subsection (h)'s enactment, the Appellate Division used "promise" to define palimony. Bayne, 403 N.J. Super. at 143. The Legislature is presumed to be aware of such precedential language. See Farmers Mut. Fire Ins. Co. of Salem v. N.J. Prop.-Liab. Ins. Guar. Ass'n, 215 N.J. 522, 543 (2013). Thus, "promise," twice used in a brief statutory amendment, is a strong, plain text indication that the Legislature

intended to require only palimony agreements to be written – not to extend the writing requirement to partition. See DKM Residential Props. Corp. v. Twp. of Montgomery, 182 N.J. 296, 307 (2005) (courts endeavor to give all words meaning and avoid statutory surplusage).

Even if "other consideration" is not plainly illuminated by Subsection (h)'s use of "promise," the legislative history is telling. DiProspero v. Penn, 183 N.J. 477, 492 (2005) (courts should resort to interpretive aids only when language is ambiguous). The synopsis to Senate bill 2091 reads: "Prohibits the enforcement of 'palimony' agreements unless such agreements are in writing." S. 2091 (2008) (emphasis added).

Senate bill 2091 was captioned: "An Act concerning palimony and amending R.S. 25:1-5." Id. at 2. Most telling, however, is the Sponsor's Statement which, after citing Kozlowski, Devaney, and Roccamonte, reads: "This bill is intended to overturn these 'palimony' decisions by requiring that any such contract must be in writing and signed by the person making the promise." Id. at 3.

As introduced, Senate bill 2091 limited its scope to "promise[s]" to provide "support." Id. at 2. Thereafter, the Senate Judiciary Committee added the phrase "or other consideration." Senate Judiciary Comm. Statement to S. 2091 1 (Feb. 9, 2009) (L. 2009, c. 311). The Senate Judiciary Committee

noted that the amendment was designed to "broaden this provision . . . to also refer to a promise to provide other consideration." Ibid. The Senate Judiciary Committee's Statement similarly refers only to palimony – not partition – and, again, cites only to Kozlowski, Devaney, and Roccamonte. Ibid. There is no reference to partition.

Accordingly, even if the plain language of Subsection (h) was not clear, express, and unambiguous, the legislative history leads to the inexorable conclusion that Subsection (h) was not intended to address partition of real property in the absence of a writing among unmarried, cohabitating intimates engaged in a joint venture.

IV.

In recognition of that statutory analysis, this case is governed by Mitchell, 380 N.J. Super. 119. There, an unmarried couple began cohabitating in 1986, had two children together in the early 1990s, and made familial decisions mutually. Id. at 123. In 1996, the parties purchased land from joint savings, titling the property solely in defendant Oksienik's name. Ibid. They constructed and lived in a modular home. Ibid. Oksienik executed a mortgage in his name only. Id. at 124. The parties received a loan from plaintiff Mitchell's parents for the down payment. Ibid. In mid-1997, the parties separated. Ibid.

The Appellate Division affirmed the trial court's finding that partition was appropriate for unmarried cohabitating parties engaged in a joint venture to purchase their residence. Id. at 127. Although the parties had not memorialized an agreement, "formal written agreements are not necessary," as a joint enterprise can be "inferred from conduct of the parties." Id. at 129. Moreover, the court stated that "[i]t is clear . . . that the purchase of property under one unmarried cohabitant's name is 'essentially irrelevant to an equitable action.'" Id. at 130 (quoting Crowe v. De Gioia, 203 N.J. Super. 22, 34 (App. Div. 1985)).

"To deny co-habitating but unmarried persons the legal and equitable remedies generally available would be unfair and unwise." Id. at 128. That inequity was later echoed in Bayne, which, two years prior to Subsection (h)'s enactment, noted that "the [S]tatute of [F]rauds cannot be invoked to work an injustice." 403 N.J. Super. at 144.

The facts here are strikingly similar to Mitchell, commanding an identical result. Here, as there, the parties resided together for a substantial period and had a child in common. The deed and mortgage were titled and recorded in one party's name only. The parties comported their behavior in a manner akin to that of a married couple – cohabitating; sharing household expenses and responsibilities; and co-parenting.

To be sure, the facts here are even more compelling. For example, C.N. contributed $10,000 of the $15,000 down payment for the home. C.N. resided in the home to be partitioned longer than did Mitchell. C.N. negotiated a $10,000 seller's concession. During the purchase, C.N. was primarily responsible for interactions with the realtor, inspector, and closing attorney. C.N. is a named insured on the homeowners' insurance policy. And, although S.R. made the majority of monthly mortgage payments, C.N. made approximately ten percent of such payments and paid the large majority of the home's utilities, maintenance, and security costs, among others.

A joint venture is a limited-purpose partnership. See Fliegel v. Sheeran, 272 N.J. Super. 519, 523-24 (App. Div. 1994). "[S]ome or all of the following elements" are generally present: (1) contribution "of money, property, effort, knowledge, skill, or other asset to a common undertaking"; (2) joint property interest; (3) right of mutual control or management; (4) expectation of profit, or presence of an adventure; (5) right to participate in profits; and (6) "limitation of the objective to a single undertaking." See Wittner v. Metzger, 72 N.J. Super. 438, 444 (App. Div. 1962) (noting joint venture need not contain particular form of expression nor formal execution).

When those principles are analyzed in the context of cohabitating, unmarried parents, the first three factors loom largest. Here, C.N. contributed

substantial money, effort, knowledge, skill, and time to the home's purchase and its on-going upkeep, maintenance, and furnishing, sufficient to create an interest in the singular venture. Such interest is inferred by the parties' conduct here, albeit not memorialized in writing. Moreover, C.N.'s financial and physical responsibilities to the household demonstrate mutual control and management of this undertaking which, at closing, he thought would be his "forever" home. He was a full participant in the adventure – a singular residence of unmarried, cohabitating parents in a relationship tantamount to marriage.

Accordingly, for the foregoing reasons, even in the absence of a writing, C.N. is entitled to partition of the shared residence as this equitable remedy survived the enactment of Subsection (h), for unmarried, cohabitating intimates engaged in a joint venture.[4]

[4] The parties subsequently entered into a consent order resolving all other issues.