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ANALYSIS

Palimony in New York: Does It Exist?

By Theodore Sternklar

Obtaining legal redress and proving your client's case in the context of a cohabitation or personal relationship is a daunting task. Nevertheless, it is not uncommon for a matrimonial practitioner to be contacted by a potential client who has been involved in an intimate, unmarried relationship, and now, after a break-up, seeks redress on the basis of an oral agreement. Too often, the practitioner will take a hefty retainer after hearing the client's story, only to discover that he or she is involved in a losing battle. For while New York courts have long embraced the notion that "an express agreement between unmarried persons living together is as enforceable as if they were not living together," *Morone v. Morone*, 50 N.Y.2d 481 (1980), obtaining reparations and establishing proof remains an arduous process.

Let's start with the *Morone* case. Note the word "express" in the court's definition of the agreement. Implied understandings are simply inadequate, and because virtually all cohabitation cases are based on alleged oral promises, the practitioner is already faced with significant proof problems. *Morone* also makes it clear that "illicit sexual relations" between the parties may not form any "part of the consideration of the contract." *Id.* at 486. This is consistent with the long-standing view in New York. See *Rhodes v. Stone*, 17 N.Y.S. 561 (1892). Indeed, the Court of Appeals has stated, "Where illicit sexual intercourse is the consideration for the payment of money, and the money has been paid, the court will not aid the donor to recover it back, any more than they would enforce in behalf of a woman the unexecuted promise of a man to pay her money in consideration of such intercourse." *Platt v. Elias*, 186 N.Y. 374, 382 (1906).

Until 1966, New Yorkers could obtain a divorce only based on the other's proven adultery. In other words, New York has an extremely strong public policy that encourages marriage and, even today, discourages divorce. In such regard, we represent the last state that does not permit divorce on consent or incompatibility grounds.

Despite the Court of Appeals' apparently more liberal stance in *Morone*, eight years later the First Department, in *Kastil v. Carro*, 145 A.D.2d 388, 389 (1st Dep't 1988), dismissed Ms. Kastil's claims that had been primarily based on an alleged oral agreement arising in a 10-year relationship. The fact that the defendant had been married to another woman during the entire time that he was involved with Ms. Kastil was seemingly fatal to her case. If one reads the decision, it becomes clear that the appellate court was disinclined to enforce an alleged support and property contract

existing between a married man and his mistress—although that word is carefully avoided.

This judicial view has been either expressly or implicitly enunciated in several cases. For example, in the high-profile case *McCall v. Frampton*, 81 A.D. 607, 608 (2d Dep't 1991), which involved rock star Peter Frampton, the court noted:

The general principle is that agreements having an immoral object are unenforceable. . . . Agreements tending to dissolve a marriage or to facilitate adultery are closely scrutinized to determine whether the main objection of the agreement is aimed to produce that result.

And in the recent case of *Reid v. McLeary*, 706 N.Y.S.2d 179, 180 (2d Dep't 2000), a lower court's dismissal of a case seeking to enforce an alleged oral agreement to marry after obtaining a divorce was affirmed. The court ruled that to enforce such an agreement would be "void as against public policy" because the "main objective was to dissolve a marriage and to facilitate a divorce." The primary lesson to be learned from these cases is that if the controversy arises between a couple where one (or both) is married to another, then the courts will have a difficult time ruling that the consideration for the alleged agreement was completely separate from "illegal" sexual conduct.

Sometimes, it seems that New York courts will go out of their way to find "illegal" consideration. See *Rose v. Elias*, 177 A.D.2d 415 (1st Dep't 1991) (affirming dismissal where parties allegedly based the contract to provide an apartment on reciprocal "love and affection," which terms "suggest adultery" and thus constitute "illegal consideration"). In another case, the judge felt compelled to state:

The complex and varied relationships between men and women, when they come to an end, oft leave a bitter residue and a smoldering irritation for which the salve, often the only soothing balm, is cash. It is a poor substitute for love, affection or attention, but for many its satisfactions are longer lasting. *Trimmer v. Van Bomel*, 107 Misc. 2d 201, 201 (N.Y. Sup. Ct. 1980).

Assuming you're not involved in a case where one or both of the parties are married, there still remain some formidable legal obstacles. As previously stated, the Court of Appeals has underscored the requirement that any agreement must be express before it will be judicially enforced. Implied or quasi-contract agreements will not stand up. As it noted in *Morone*:

Absent an express agreement, there is no frame of reference against which to compare the testimony presented and the

character of the evidence that can be presented becomes more evanescent. There is, therefore, substantially greater risk of emotion-laden afterthought, not to mention fraud, in attempting to ascertain by implication what services, if any, were rendered gratuitously and what compensation, if any, the parties intended to be paid. *Morone*, 50 N.Y.2d at 488.

While *Morone* involved two unmarried persons living together, the same analysis has been applied to friends and/or other intimates living separately but involved in a personal relationship. For instance, in *Trimmer*, the court said:

As to personal relationships between unmarried persons living together or unmarried persons whose actions flow out of mutual friendship and reciprocal regard, there is very little difference. An implied contract to compensate for those things, which are ordinarily done by one person for another as a matter of regard and affection should not, under these well established principles, be recognized in this state....An obligation to pay for friendship is not ordinarily to be implied—it is too crass. Friendship, like virtue, must be its own reward. *Trimmer*, 107 Misc. 2d at 206.

When New York courts speak in terms of an express agreement requirement, they mean just that. Oral contracts that are vague or indefinite will not pass muster. Let us not forget that, as practitioners, oral contracts are simple to plead, but hard to prove. As the Appellate Division, First Department has observed:

The primary purpose of a contract is not to serve as a vehicle for litigation, but to document the respective rights and obligations of the parties to a particular transaction....In theory, of course, a parol contract is as enforceable as a written one. As a practical matter, however, for all but the simplest of transactions, the burden of establishing the terms of the verbal contract—which falls to the proponent—presents a formidable obstacle to its enforcement. Before a court will impose a contractual obligation, it must ascertain that a contract was made and that its terms are definite. *Charles Hyman Inc. v. Olsen Industries Inc.*, 227 A.D.2d 275 (1st Dep't 1996).

The Court of Appeals has found the verbal pledge to "take care" of the other party to be "too vague to spell out a meaningful promise." *Dombrowski v. Somers*, 41 N.Y. 2d 858, 859 (1977). Similarly, in *Saunders v. Baryshnikov*, 110 A.D. 2d 511 (1985), the court struck down a "contract" where the assertion was that defendant would "take care" of plaintiff and her "financial needs for the rest of her life."

Finally, the statute of frauds rears its ugly head in situations where individuals are alleged to have made or committed to oral promises. New York General Obligations Law § 5-701(a) requires that a promise must be reduced to writing in order to be legally enforceable if such "agreement, promise or undertaking by its terms is not to be performed within one year from the making thereof." Thus, in *Matter of Kittay*, 118 A.D. 2d 647, 648 (2d Dep't 1986), the court found that the statute of frauds barred the alleged oral contract to become Mr. Kittay's "social and traveling companion and confidante" in return for unspecified "lifetime support."

Moreover, if the alleged promise involves the transfer of real estate, the statute of frauds also becomes a major impediment. Under the statute, real estate transactions must be in writing; that is

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why homes and apartments are obtained through written deeds and leases. Finally, do not forget the obvious. If the defendant is deceased, any promise that was allegedly supposed to survive the decedent's death must be in writing. Oral bequests are not enforceable. That's why individuals have written wills.

While the practitioner may be tempted to take on a so-called cohabitation case, if for no other reason than to get involved in something a bit different, such temptation must necessarily yield a careful pre-retainer analysis. First, you will be up against the general judicial inclination to view alleged promises between cohabitants or involved parties as something akin to illegal or sexually tainted contracts. Second, you will be faced with the formidable task of proving an oral agreement that must be specific and not so vague as to be unenforceable. Finally, look out for the statute of frauds. This will not be a question on a bar exam, but rather an issue that affects a real person's life. Oral agreements that cannot be performed within a year, involve real estate, or are disguised as testamentary bequests will simply not survive your opposing counsel's summary judgment motion.

Collecting Directly From the Employer

Enforcing a support order or collecting on a money judgment can be as time-consuming and costly as divorce litigation itself. Practitioners familiar with income executions for support enforcement can find themselves battling not only a deadbeat spouse, but also a debtor-spouse's employer to enforce the income execution. Lawyers should not overlook their ability to seek redress directly from a recalcitrant employer when there is failure to strictly abide by the statute.

Under CPLR § 5241(c)(v), which appears on the face of the income execution itself, an employer served with an income execution has only a short window of time to implement the order, or be subject to liability directly to the creditor. "The employer...must commence deductions no later than the first pay period that occurs after 14 days following the service of the execution and that payment must be remitted to the Creditor within 10 days of the date that the debtor is paid. Failure to comply may result in the Payor's liability to the Creditor for accrued deductions, interest and reasonable counsel fees."

CPLR § 5241(g)(2)(A), goes on to mandate that "[a]n employer or income payer served with an income execution in accordance with paragraph 1 of the subdivision shall be liable to the creditor for failure to deduct the amount specified. Creditor may commence a proceeding against the employer or income payor for accrued deductions, together with interest and reasonable attorney's fees."

The petition against the employer should be commenced by order to show cause in Supreme Court, even if the amount claimed to be due is less than the Supreme Court monetary threshold. Be sure to reference the divorce action as a "related matter" on the Request for Judicial Interference (RJI).

Once the proceeding is before the matrimonial judge, employers at large companies tend to "pay up" rather than spend the time and money to appear in court. Do not forget to calculate interest on the accrued amount due, to which your client is entitled. CPLR § 5241(g)(2)(A) also authorizes the payment of reasonable legal fees in a proceeding against an employer for accrued deductions. This vehicle is always satisfactory to a client, who will be pleased to learn that he or she will not incur more fees enforcing his or her court-ordered rights.