



NEW JERSEY LAW REVISION COMMISSION

Tentative Report Regarding the Mandatory Attorney Review Provision in the New Jersey Statute of Frauds, N.J.S. 25:1-5(h)

April 20, 2023

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S. 1:12A-8*.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **June 09, 2023**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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Project Summary

In New Jersey, an action for palimony requires a promise by one party to a non-marital personal relationship to provide support or other consideration to the other during the relationship or after its termination.¹ In 2010, the Legislature amended the Statute of Frauds to require that such arrangements be reduced to writing and signed by the promisor.² The statute further provides that the arrangement is not binding upon the parties “unless it was made with the independent advice of counsel for both parties.”³

In *Moynihan v. Lynch*, the New Jersey Supreme Court was asked to determine the validity of the mandatory attorney-review requirement for palimony agreements.⁴ The Court considered the Plaintiff’s argument that the attorney-review requirement “compels parties entering into a palimony agreement to retain counsel and that forcing counsel on unwilling parties is unconstitutional.”⁵ The Court also considered the Defendant’s argument that the attorney-review requirement served “a significant and legitimate public purpose related to appropriate governmental objectives.”⁶ After the Court examined the legislative history of the palimony statute,⁷ it concluded that the attorney-review requirement was an “arbitrary government restriction that contravenes... [the Plaintiff’s] substantive due process rights.”⁸

Consistent with the New Jersey Supreme Court’s decision in *Moynihan* the Commission proposes modifications to N.J.S. 25:1-5 to clarify that written support agreements between non-marital parties do not require both parties to obtain the independent advice of counsel before entering to such an agreement.

Statute Considered

N.J.S. 25:1-5, provides in relevant part:

No action shall be brought upon any of the following agreements or promises, unless the agreement or promise, upon which such action shall be brought or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized:

...

h. 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

¹ See e.g., *Bayne v. Johnson*, 403 N.J. Super. 125 (App. Div. 2008) *Devaney v. L'Esperance*, 195 N.J. 247, 257 (2008); *In re Estate of Roccamonte*, 174 N.J. 381, 391–92 (2002); *Kozlowski v. Kozlowski*, 80 N.J. 378, 384–86 (1979); *Marvin v. Marvin*, 557 P.2d 106, 122 (1976). N.J. STAT. ANN. § 25:1-5(h) (West 2023).

² N.J. STAT. ANN. § 25:1-5(h) (West 2023).

³ *Id.*

⁴ *Moynihan v. Lynch*, 250 N.J. 60 (2022).

⁵ *Id.* at 79.

⁶ *Id.* at 78.

⁷ *Id.* at 79-81.

⁸ *Id.* at 90.

relationship or after its termination. For the purposes of this subsection, no such written promise is binding unless it was made with the independent advice of counsel for both parties.

Background

In 1997, Kathleen Moynihan (“Moynihan” or “Plaintiff”) met Edward Lynch (“Lynch” or “Defendant”) and a romantic relationship subsequently developed.⁹ By 2000, Moynihan made a down payment on a home for which Lynch largely financed the purchase through a mortgage and the deed for the home was in his name.¹⁰

The relationship between the parties continued, and Lynch became more active in the lives of Moynihan and her children, frequently attending after-school activities for the children and holiday events.¹¹ The parties shared the financial responsibilities associated with maintaining the home they had purchased and, during the course of their relationship, Lynch began to provide Moynihan with money to pay the mortgage and other expenses.¹² In 2007, Lynch placed the title to their home into a revocable trust with Moynihan named as the trust’s beneficiary upon Lynch’s death.¹³ In addition, Moynihan was also made the beneficiary of Lynch’s life insurance policy, 401(k) plan, and a bond account.¹⁴ Further, in 2013, Lynch apparently began to live full-time with Moynihan and he “converted his sole ownership of their home to a joint tenancy with rights of survivorship” and placed Moynihan’s name on the deed.¹⁵

Although the parties discussed marriage, they never wed.¹⁶ A handwritten, prospective property settlement agreement was executed by both parties before a notary at some point between 2012 and 2014.¹⁷ This agreement was, by its terms, intended to finalize Lynch’s obligations to Moynihan in the event that their relationship ended.¹⁸ Neither party consulted with an attorney before signing the agreement.¹⁹

In 2015, the relationship between the parties ended.²⁰ Lynch moved to Florida.²¹ By 2016, Lynch was no longer abiding by any of the terms of the written agreement.²²

After a six-day trial, the Court found credible the testimony that parties had a “marital-style and family-style relationship.”²³ The trial court rejected Moynihan’s claim that the attorney-review

⁹ *Id.* at 68.

¹⁰ *Id.*

¹¹ *Id.* at 69.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 69-70.

¹⁶ *Id.* at 69.

¹⁷ *Id.* at 69-70. Moynihan recalled executing the agreement in 2012; Lynch recalled executing the agreement in 2014.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 73.

provision violated the Federal Constitution.²⁴ In addition, because the parties failed to comply with the attorney review requirement of N.J.S. 25:1-5(h), the Court dismissed her claim of an “enforceable written palimony agreement.”²⁵ The Court did, however, find that Moynihan had “an enforceable written contract *despite* her palimony claims” and enforced the written agreement according to its terms.²⁶ Both parties appealed.²⁷

The Appellate Division determined that the written document entered into by the parties constituted a palimony agreement.²⁸ The Court further determined that “the agreement was unenforceable because the parties failed to comply with the attorney-review requirement” set forth in the statute.²⁹ The Court rejected the Plaintiff’s argument that New Jersey’s palimony statute unconstitutionally impaired the “obligation of contracts”³⁰ and rejected the Plaintiff’s claims for equitable relief, on the basis that she had not satisfied the traditional elements necessary for this relief.³¹

The New Jersey Supreme Court granted the Plaintiff’s petition for certification.³²

Analysis

Under the common law, an unwed couple in a “marital-type relationship” was permitted to enter into either an oral or written agreement in which one party promised to support the other party, generally for life, in return for consideration, such as remaining in the relationship.³³ That changed in 2010 with the amendment of New Jersey’s Statute of Frauds, which represented a decision by the Legislature to abrogate New Jersey’s common law regarding palimony.³⁴ N.J.S.

²⁴ *Id.*

²⁵ *Id.* The Plaintiff also proffered that she and the Defendant had a viable “oral palimony” agreement. The substance of that discussion exceeds the scope of this Memorandum and has therefore been omitted.

²⁶ *Id.* at 73-74. (Emphasis added).

²⁷ *Id.* at 74.

²⁸ *Id.* (finding that “the couple were in a non-marital relationship, the agreement was in writing, and [the promisor] promised to provide support and consideration” to the [promisee].”).

²⁹ *Id.*

³⁰ The Appellate Division rejected the argument that N.J.S. 25:1-5(h)’s attorney-review requirement violated U.S. Const. art. 1, § 10, cl. 1; N.J. Const. art. IV, § 7, ¶ 3 – law impairing the obligation of contracts – because “the attorney review of palimony agreements (1) does not equate to a substantial impairment of a contract, (2) reasonably relates to a significant legitimate public purpose, and (3) advances an appropriate legislative objective – protecting the rights of the parties entering into palimony agreements.” *Id.* at 75 (internal quotations omitted).

³¹ *Id.*

³² 246 N.J. 324 (2021).

³³ *Moynihan*, 250 N.J. at 79-80. Compare *Devaney v. L’Esperance*, 195 N.J. 247, 253-55, 257 (2008) and *In re Estate of Roccamonte*, 174 N.J. 381, 389-90, 392-93 (2002) (enforcing written palimony agreements) with *Maeker v. Ross*, 219 N.J. 565, 576 (2014) (enforcing an oral palimony agreement). See also *Kozlowski v. Kozlowski*, 80 N.J. 378, 387 (1979).

³⁴ See A. Judiciary Comm. Statement to S. 2091 (Dec. 3, 2009); S. Judiciary Comm. Statement to S. 2091 (providing that the purpose of the amendment was to “overturn recent ‘palimony’ decisions by New Jersey courts [such as *Devaney* and *Roccamonte*] by requiring that any such contract be in writing and signed by the person making the promise.”). The modification to the Statute of Frauds does not foreclose equitable actions such as unjust enrichment, constructive trust, promissory estoppel, fraud, misrepresentation, and partition. Mark S. Guralnick, Esq., Ph.D., *Palimony: The Law of Palimony*, N.J. Family Law Ann. A Ch. 2 (Dec. 2022).

25:1-5(h) required that these contracts be in writing and signed by the promisor.³⁵ Unlike any other provision in the Statute of Frauds, subsection (h) mandates that each party to the palimony agreement secure the “independent advice of counsel.”³⁶

“[N]o other law in this state conditions enforceability of an agreement between private parties on attorney review.”³⁷ Among the jurisdictions that enforce palimony agreements, none require that the parties consult with an attorney before entering into such an agreement in order for it to be binding on the parties.³⁸

The New Jersey Supreme Court noted that “[t]he essential aim of the Federal and State Contract Clauses is to restrain a state legislature from passing laws that retrospectively impair preexisting contracts.”³⁹ A statute that retroactively applies to an existing contract may have the effect of disrupting the reasonable expectations of the parties.⁴⁰

Since the relevant amendment to N.J.S. 25:1-5(h) was enacted in 2010,⁴¹ and the parties entered into their written agreement at some point between 2012 and 2014,⁴² the Court explained “[t]hat concern about legislation reaching back to alter an already-existing contract causing fundamental unfairness is not present here.”⁴³

The Court noted that the compulsory attorney-review of palimony agreements raises the question whether this requirement is contrary to the substantive due process guarantee of the New Jersey Constitution.⁴⁴ The parties to a premarital agreement may “voluntarily and expressly waive, in writing, the opportunity to consult with independent legal counsel.”⁴⁵ The parties to a divorce action may enter into an agreement regarding custody, parenting time, child support, alimony, or equitable distribution without the advice of counsel.⁴⁶ In addition, parties to a contract are not required to consult with an attorney before purchasing real estate;⁴⁷ entering into a commercial transaction to buy goods;⁴⁸ engaging in a consumer transaction;⁴⁹ creating a will;⁵⁰ or securing life or health insurance.⁵¹

³⁵ *Moynihan*, 250 N.J. at 80. *But see Maeker v. Ross*, 219 N.J. at 581 (finding that in the absence of a clear legislative expression, courts will not retroactively apply a new provision of the Statute of Frauds to void previously formed lawful oral contracts).

³⁶ *Id.*

³⁷ *Id.* at 81.

³⁸ *Id.*

³⁹ *Moynihan*, 250 N.J. at 82 (citing *Cleveland & P.R. Co. v. City of Cleveland*, 235 U.S. 50, 53-54 (1914) and *Berg v. Christie*, 225 N.J. 245, 259 (2016)).

⁴⁰ *Id.* (citing *Energy Rsrvs. Grp., Inc. v. Kan, Power & Light Co.*, 459 U.S. 400 (1983)).

⁴¹ *Id.* at 83.

⁴² *Id.*

⁴³ *Id.* at 82.

⁴⁴ N.J. Const. art. I, ¶ 1

⁴⁵ *Id.* at 86. N.J.S. 37:2-38(c)(4).

⁴⁶ *Id.* at 86. N.J.S. 2A:34-23.1(e).

⁴⁷ See N.J. STAT. ANN § 46:14-2.1.

⁴⁸ See N.J. STAT. ANN § 12A:2-201.

⁴⁹ See N.J. STAT. ANN § 56:12-2.

⁵⁰ See N.J. STAT. ANN § 3B:3-2.

⁵¹ See N.J. STAT. ANN § 17B:25-18.2.

In New Jersey, the constitutional right to individual autonomy provides individuals with the “right to determine how best to pursue [their] personal and financial affairs’ without the interference of an attorney.”⁵²

To determine whether a party to a palimony agreement has a substantive due process liberty interest in entering such an agreement “without the forced involvement of attorneys,” the Court applied a balancing test that weighed three factors – “the nature of the right at stake, the extent to which the challenged statutory scheme restricts that right, and the public need for the statutory restriction.”⁵³

The Court determined that the attorney-review requirement “directly infringes on the right of parties to enter a palimony agreement without retaining an attorney.”⁵⁴ Finally, the Court was unable to ascertain the “public need” for the attorney-review requirement given the lack of such a requirement in other contexts and the absence of legislative history regarding the need for it in this context.⁵⁵

Ultimately, the Court found the requirement to be “an arbitrary government restriction that contravenes [an individual’s] substantive due process rights” and explained that it was constrained to strike down the attorney review requirement in N.J.S. 25:1-5(h).⁵⁶ The palimony agreement between the parties was therefore enforced as written.⁵⁷

Conclusion

The Appendix sets forth a proposed modification to N.J.S. 25:1-5(h) to remove the portion of the statute that requires both parties to a written support agreement to obtain the independent advice of counsel as a condition precedent to its enforcement.

⁵² *Moynihan*, 250 N.J. at 84 (noting the right of competent individuals to represent themselves in civil or criminal cases). See *In re Civ. Commitment of D.Y.*, 218 N.J. 359, 374 (2014) and *State v. Reddish*, 181 N.J. 553, 585 (2004).

⁵³ *Id.* at 88.

⁵⁴ *Id.* at 89.

⁵⁵ *Id.* at 90.

⁵⁶ *Id.*

⁵⁷ *Id.* See *Primmer v. Harrison*, 472 N.J. Super. 173 (App. Div. 2022), *cert. denied*, No. 087204, 2023 WL 1990693 (N.J. Feb. 10, 2023) (affirming *Moynihan*’s holding that the advice of counsel requirement is unconstitutional and applying it retroactively).

Appendix

The relevant text of **N.J.S. 25:1-5**, including proposed modifications (proposed additions are shown with underlining, proposed deletions with ~~striketrough~~), follows:

N.J.S. 25:1-5. Promises or agreements not binding unless in writing.

No action shall be brought upon any of the following agreements or promises, unless the agreement or promise, upon which such action shall be brought or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized:

...

h. 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 purposes of this subsection, no such written promise is binding unless it was made with the independent advice of counsel for both parties.~~

Comment

The proposed modifications are based upon the New Jersey Supreme Court's discussion of support agreements between non-marital parties in *Moynihan v. Lynch*, 250 N.J. 60 (2022).