PALIMONY: A NEW APPROACH

Family Law Symposium

January 31, 2009

Frank A. Louis, Esq.

INTRODUCTION

There is perhaps no area of the law as misconstrued and misunderstood as Palimony. That is largely the function of the law having developed through a series of cases that generally involved egregious facts that warranted judicial intervention. Thus, the law evolved from these cases which involved stark facts. Yet, those are not the cases we necessarily as practicing attorneys address, nor should the law solely be governed by cases involving extreme facts. In Palimony, the "lore" emanates from cases involving egregious facts, nevertheless this is not simply a situation where hard facts make bad law. Rather, those cases have created a perception of what the law is which is not necessarily borne out by a careful examination of the precedents. Ask attorneys how Palimony cases are resolved and most will say by a lump sum payment. Quite simply, that is the "lore", but not certainly the law. A lump sum payment is one way cases might be resolved, but it is not the only way either under existing law or under the proposal outlined in this Article. In fact, it should be utilized only in the rarest of instances and only when the terms of the promise are expressed clearly and unequivocally which hardly ever occurs.

This Article will address why the law is misunderstood and analyze Palimony principles from the perspective of what the actual legal principles are and how they logically fit in our

overall body of law. Palimony legal principles should fundamentally be consistent with the overriding public policy in the area of Family Law. This perspective mandates not only a heavy dose of fairness and common sense but economic reality as well.

IMPLIED CONTRACT

This paper has two purposes: (1) to clarify what the law is and eliminate the misconception the only remedy in a Palimony case is a lump sum award; and (2) to propose a different approach where the contract analyses still applies but utilizing Implied Contract as the preferred remedy in most Palimony cases. As will be explained, this approach harmonizes the Supreme Court's applying insistence of contract law with the overriding principles of fairness that permeate our Family Law. It also eliminates the troublesome issue that those who choose not to marry are placed in a Superior legal position than those who do. By using Implied Contract the ultimate issue is fairness which should be the framework for resolution of all Family Part issues. Since the remedy emanates from the facts, this approach harmonizes the Supreme Court's insistence of utilizing contracts with the over riding principles of fairness that permeate Family Law. It would also effectively eliminate the troublesome quandary that those who choose not to marry are placed in a superior legal position than those who do. Utilizing an Implied

Contract analysis allows Courts to focus on what they do best: applying the law to the facts and assuring the end result is fair - both as a matter of economics and fundamental policy.

The Supreme Court cases make it clear under the contractual analysis that the parties' agreement can either be Express or Implied. The contractual approach is clearly not my preference but it can be utilized without sacrificing the true equitable nature of Palimony. As Judge Hayden perceptively and correctly observed in Carino v. O'Malley, III, (Action No. 05 - 5814 (KSH) (filed 3/28/2007) a case heard in the Federal Courts and which is attached by utilizing Implied Contracts our law can focus on the right result, but from a standpoint of fairness and economics and still be intellectually consistent with the precedents. By utilizing Implied Contracts our law can focus on the right result, but from a standpoint of fairness and economics and still be intellectually consistent with the precedents.

EXPRESS AND IMPLIED CONTRACTS

An Express Contract, according to Williston On Contracts, is one whose terms are stated by the parties. In contrast, an Implied Contract is one whose terms are not so stated. Williston On Contracts: A Treatise On The Law Of Contracts, Samuel Williston, 4th Edition by Richard A. Lord, 1990 (Lawyers Cooperative Publishing). ("Williston") In contrast, Williston defines an Implied Contract as:

> "An implied contract refers to that class of obligations which arises from mutual agreement and intent to promise, when the agreement and promise have simply not been expressed in words. Despite the fact that no words of promise or agreement have been used, such transactions are nevertheless true contracts and may properly be called "inferred contracts" or "contracts implied in fact". Williston, Sec. 1.5. (emphasis added)

Williston's notes this view is not different than the Second Restatement On Contracts, which does not speak in terms of either Express or Implied contracts, except in the comments. Rather, the Restatement indicates, according to Williston, a promise may be stated in words or may be inferred wholly in part from conduct. See Williston at Section 1.5 at page 24. Therefore, under traditional contract law agreements between parties can be established not by what people say, but how they act. How people interact with each other provides a more equitable framework for determining their rights, duties and obligations when relationships end. People should be responsible for the consequences of their actions; how they acted in their relationship with each other is a fair standard to determine what they should be required to do for each other when the relationship ends.

Williston notes a contract by conduct is, in essence, an Implied In Fact Contract or as used herein an Implied Contract. Williston, Section 1.4 at page 24. Implied and quasi contracts are sometimes confused. As explained by Williston, quasi

contract is imposed by a Court to achieve a just result without reference to the intention of the parties according to Williston. See Williston, Section 1:6 at page 25. This is in accord with the New Jersey precedents which hold a quasi contract is not truly a contract, but rather an equitable device to avoid injustice.

QUASI CONTRACT

A quasi contract is significantly different from an express contract since quasi contract is more in the form of a remedy the law creates as opposed to an actual agreement and an intent to be bound. In fact, quasi contract, as a concept, does not depend upon the intent of the parties. Rather, the law implies a contract to rectify any unjust enrichment. See G.G. Bogert and G.T. Bogert, Handbook of the Law of Trusts, Sec. 77 at p. 287. As Prof. Simpson explained in his treatise, "the law supplied both the promise and resultant legal remedy for its supposed breach". Simpson, Contracts, Sec. 5 at pg. 5 (West Pub. 1965 Ed.). This view has been adopted in New Jersey. As the Court noted in Callano v. Oakwood Park Homes Corp., 91 N.J. Super. 105, 108 (App. Div. 1966), quasi contracts "rest on legal fiction and are not contract obligations in the true sense". (emphasis added). Thus, an Implied Contract analysis which is firmly rooted in contract law is more appropriate given the need under present law

to do a contractual analysis.

Except in the rarest cases do people who reside together ever make Express Contracts concerning legally binding obligations. It simply is not the nature of these personal relationships for such clear and unequivocal promises be made but at the same time, both as a matter of contract law, policy and fairness, obligations may be created by conduct which help define the impact of the relationship on the parties. How people interact and treat each other determines the economic impact on the parties. That impact, i.e. the result of the relationship helps determine whether there should be obligations when the relationship ends and what those obligations should be. As the Supreme Court said in Roccamonte, "each couple defines its way of life and each party's expected contributions to it in its own way". Thus, the impact of those decisions on the parties should determine the scope of the legal duty when the relationship ends. That is precisely the basis of an Implied Contract which exists not by virtue of what people say but what they do creating an appropriate framework for an analysis of what the remedy should be in a Cohabitation case.

The trio of Supreme Court cases turned primarily on what trial courts found to be an express promise. Yet, how common is that. We need only envision a hypothetical conversation between

two people to illustrate the rarity of such promises. Has anyone had a case where it was undisputed that the one party expressly said that regardless of my future circumstances, I promise to support you for the remainder of your life without regard to my ability and without considering your future financial circumstances or whether or later decide to marry - and by the way I make no promises to you what I will do when our relationship ends and if the result is unfair - then so be it.

The law should be based on a realistic appraisal of these relationships and how people actually live done in the context of policy, while simultaneously assuring, as Justice Pashman emphasized, that at the end of the relationship the parties would treat each other fairly. Kozlowski v. Kozlowski, 80 N.J. 378, 390 (1979) (concurring opinion). As the Supreme Court said in Crowe "to achieve substantial justice in other case, we have adjusted the rights and duties of parties in light of the realities of their relationship." Crowe at 135 citing McGlynn v. Newark Parking Authority, 86 N.J. 551, 559 (1981); State v. Shack, 58 N.J. 297, 307 (1971). Those realities should be significant in determining the result. Each party has an obligation when the relationship ends to be fair to each other. That obligation rests primarily on policy implemented thru the mechanism of Implied Contract. That more than anything should be

the essence of Palimony law. To do less diminishes the respect we as a society should have for such meaningful and personal relationships. Yet, to do more or not make fairness a bilateral obligation has the capacity to create injustice.

As one commentator perceptively noted the fact parties lived together for twenty-one years, held themselves out as spouses and had a child presents "a paradigm case for the presumption that the parties have agreed to treat each other fairly". Note: Family Law: Property Rights Of Unmarried Cohabitants", Minnesota Law Review: Vol. 62 at 465 (1978) (referring to the Minnesota Supreme Court Decision in Carlson v. Olson, 256 N.W. 2d 249 (1977). The note emphasized a central point:

> "Even when intimate parties have not been legally married, other judicial and legislative doctrines have been applied to further the policy of protecting those who, because of a confidential relationship, are not likely to look out for their own interests. When a purported marriage is annulled because of incest or bigamy, legislatures and courts have been willing to impose an equitable property distribution upon the intimate parties despite the absence of a legal spousal relationship".

Support for this more approach based on the Kozlowski principles of fairness can be found in Judge Hayden's decision in Carino v. O'Malley. This was a diversity case heard in the United States District Court, District of New Jersey, by Katherine S. Hayden, who was a former prominent matrimonial

lawyer and a member of the Executive Committee's Family Law Section. Simply put, she knew what she was talking about. Carino involved a seventeen year relationship that began 1988, when Plaintiff was an 18 year old college sophomore and the Defendant, then 55 and divorced was a member of the Board of Directors of a financial brokerage firm in Philadelphia.

O'Malley filed a Summary Judgment motion arguing since the parties never cohabitated the Complaint must be dismissed based on the Levine v. Konvitz, 383 N.J. Super. 1 App. Div. (2006). In Levine the Appellate Division dismissed a Palimony case because it concluded that absent cohabitation there could not be a valid Palimony claim. Ultimately, that case was reversed by the New Jersey Supreme Court in L'Esperance v. Devaney, 195 N.J. 297 (2008) but Carino was written after Levine but prior to L'Esperance. The persuasive reasoning in Carino was only buttressed by her predictive finding the Supreme Court would ultimately reverse Levine and conclude cohabitation was not an indispensable factor in determining the validity of a Palimony claim.

Carino was not only prescient, it was a well reasoned decision with a helpful review of New Jersey Palimony Law. Judge Hayden relied on language that furthers the proposal advanced by this Article. She noted how our Supreme Court in Crowe v. DeGoia, 90 N.J. 126, 129 (1982) ultimately concluded that

Pendente Lite relief could be awarded in a Palimony suit because:

> "To achieve substantial justice in other cases, we have adjusted the rights and duties of the parties in light of the realities of their relationship ... our endeavor is to shape a remedy that will protect the legally cognizable interest of the parties and serve the needs of justice ... equity preserves that flexibility to devise new remedies to meet the requirements of every case, and to satisfy the needs of a progressive social condition in which new primary rights and duties are constantly arising and new kinds of wrongs are constantly committed". Crowe at 135-137.

In rejecting cohabitation as a pre-requisite, Judge Hayden concluded such a bright line test "does not comport with the reasons why Palimony has become a recognized and enforceable claim".

Perhaps it was Judge Hayden's sensitivity and experience with this area of the law that led her, at least in my view, to the correct result. She specifically pointed out the language in Roccamonte that "each couple defines its way of life and each partner's expected contribution to it in its own way" emphasizing that such fact sensitivity was the "hallmark of all the cases" which preceded Levine noting:

> "as well it should be and must be, because the Palimony cause of action arose out of equitable concerns, and has been deemed to belong in the Chancery Division, Family Part, where a fact sensitive approach is the fundamental task for each decision maker".

Her focus on the equitable nature of the claim diverges from the contractually based view of the Supreme Court. Nonetheless, the Implied Contract analysis arguably harmonizes the precedents, Judge Hayden's view, the policies, and the fact that fairness is the pre-eminent goal in the Family Part. Utilizing Implied Contracts allows the law to return to its initial purpose - to assure an "equitable" result. Carino, therefore, is singular support for the approach recommended by this Article.

Thus, an approach that utilizes Implied Contract principles is consistent with contract law and does not require a trial court to ignore the Supreme Court finding cohabitation cases are to be determined not by the parties' relationship but by the parties' promises. In re estate of Roccamonte, 174 N.J. 381, 389 (2002). Since promises in an Implied Contract are not specific, the Courts, as Williston noted, focus on conduct. Thus, how the parties conduct themselves with each other determines their rights, duties and obligations which is most appropriate. Parties who live together for a significant period of time and have a marital family type relationship and inter-dependent economics should have responsibilities to each other when their relationship ends. Parties who create by virtue of their conduct an economic dependency of one to the other should

expect the law to impose a remedy appropriate to their conduct.

THE PALIMONY CASES: A HISTORICAL REVIEW

An examination of Palimony law in New Jersey begins with Judge Polow's trial level decision in Kozlowski v. Kozlowski, 164 N.J. Super. 162 (Ch. Div. 1978) aff'd 80 N.J. 378 (1979). Judge Polow noted there were a few factual disputes between the parties (Kozlowski at pg. 176) but a fundamental one was the denial by Mr. Kozlowski that "he promised to take care" of Ms. Kozlowski for the remainder of her life[1]. Mr. Kozlowski conceded after the break up that he had promised to provide "reasonable, comfortable support as he had provided in the past" but that promise was limited; it would only apply to the period the parties resided together. That hardball litigation position was inconsistent with the obligation to treat each other fairly at the end of the relationship.

After considering the testimony, observing the parties' demeanor and in the type of fact finding typically made by trial court judges, Judge Polow accepted Plaintiff's version of the facts. He found there was a promise by Mr. Kozlowski to take care of Mrs. Kozlowski through the remainder of her

---

[1] (it is one of the ironies of the case that the parties who were not married have the same name)

life. He then rejected all legal defenses to the contract and concluded it was enforceable. He reasoned, in part, in language particularly appropriate here that "this Court could not countenance the unconscionable result" if Ms. Kozlowski was "cast adrift at 63 years of age without means of support and assets and with little hope of developing support opportunities". Kozlowski at 178. Judge Polow did not rule there must be any particular remedy as a result of the cohabitation; rather, he simply made a factual finding (as trial courts do) defining the promise he found on the evidence in that particular case. There was no overriding discussion of policy and how Palimony law should develop. A Judge saw injustice and assured it was remedied.

The Supreme Court certified Kozlowski and the Court ultimately adopted the reasoning of the California Supreme Court in Marvin; a point recently emphasized in Devaney v. L'Esperance, 195 N.J. 247 (2008). The following Marvin excerpt is set forth in L'Esperance:

> "In summary, we believe that the prevalence of nonmarital relationships in modern society and the social acceptance of them, marks this as a time when our courts should by no means apply the doctrine of the unlawfulness of the so-called meretricious relationship to the instant case. As we have explained, the nonenforceability of agreements expressly providing for meretricious conduct rested upon the fact that such conduct, as the word suggests, pertained to and encompassed prostitution. To equate the nonmarital relationship of today to such a subject matter is

> to do violence to an accepted and wholly different practice.
>
> We are aware that many young couples live together without the solemnization of marriage, in order to make sure that they can successfully later undertake marriage. This trial period, preliminary to marriage, serves as some assurance that the marriage will not subsequently end in dissolution to the harm of both parties. We are aware, as we have stated, of the pervasiveness of nonmarital relationships in other situations.
>
> The mores of the society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many.
>
> We conclude that the judicial barriers that may stand in the way of a policy based upon the fulfillment of the reasonable expectations of the parties to a nonmarital relationship should be removed. As we have explained, the courts now hold that express agreements will be enforced unless they rest on an unlawful meretricious consideration.
>
> Id. at 385-86 (quoting Marvin v. Marvin, 557 P.2d 106, 122 (Cal. 1976)). (emphasis added)
>
> Devaney at 254.

As emphasized by L'Esperance, Kozlowski as a matter of policy concluded agreements between adult parties living together are enforceable provided the contract is not predicated on a relationship proscribed by law or on a promise to marry. Reviewing the precise language in Marvin is also helpful. Marvin addressed the responsibility of courts to fulfill "the reasonable expectations of the parties". Importantly, in a statement consistent with my analysis, Marvin emphasized the expectation

was of both "parties". That important observation seemingly has been lost given the egregious fact situations that subsequently arose.

Crowe v. DeGoia, 203 N.J. Super. 22 (1985) was the next time cohabitation was addressed by our courts. Judge, now Justice Long affirmed a trial level decision from Middlesex County. Crowe v. DeGoia, 203 N.J. Super. 22 (1985). As in Kozlowski, Judge Garrenger at trial found an express contract existed and the terms of the contract, as Judge Long characterized it, were that DeGoia "expressly promised to take care of Crowe for the rest of his life". Crowe at 28. In affirming the lower court's decision to award a lump sum to Ms. Crowe, the Court relied on Kozlowski where the court awarded "a sum equal to the present value of the reasonable annual support payable for her life expectancy". In a prior decision involving the same parties, the Supreme Court had affirmed Judge Garrenger's decision that there had been "an express agreement that Mr. Kozlowski would provide for Ms. Kozlowski for the rest of her life" concluding that such agreements were enforceable. Judge Long, as did Judge Polow, rejected Mr. DeGoia's attempts advanced for differing legal reasons that either there was no contract or that the contract was unenforceable. DeGoia did not argue general policy; he sought to avoid his obligation and that egregiously unfair position was rejected. Yet, in that rejection

any balance in the law was seemingly lost.

Thus, Crowe and Kozlowski are premised on the same factual finding of the existence of an enforceable contract; but, each trial Judge determined what the terms of the contract were. Each Judge ultimately concluded, based on the evidence presented in each case, that promises were made for the dependent party to be supported for the rest of her life. Just because there was a "contract" did not mean it was a contract to provide support for the remainder of the other party's life. Interestingly, Judge Garrenger made factual findings concerning what was not included in the contract, i.e. there had not been a promise to equally share the assets that had been acquired, thus emphasizing the critical nature of fact finding in the analysis. A failure to equitably share what the partnership acquired may create unfairness. Thus, there are no automatic givens or mandated remedies merely because people live together: the result of both Crowe and Kozlowski flowed from the trial court's finding each man had made a promise for lifetime support. Critical to the analysis is an understanding what the contract was and, in most cases, it is implied not express, i.e. it arises from conduct not words.

In In re the Estate of Roccamonte, 174 N.J. 381 (2002) a different defense was tried. Mr. Roccamonte's Estate claimed that such a contract could not be enforceable against an Estate.

The Supreme Court made short shrift of that contention but, not surprisingly, the woman in the relationship was in a particularly disadvantageous financial situation, notwithstanding that she had received the proceeds of the life insurance policy. Yet, in critical language Roccamonte emphasized that nothing was automatic. A trial court first had to determine if there was contract and, if so, what were it's terms.

> "We made clear in Kozlowski that the right to support in that situation does not derive from the relationship, but rather is a right created by contract. Because, however, the subject of that contract is intensely personal rather than transactional in a customary sense, special considerations must be taken into account by a court obliged to determine whether such a contract has been entered into and what it's terms are". Roccamonte at 389.

Where the unique circumstances involved such "intensely personal" relationships, the Supreme Court directed trial courts "give special consideration" in determining what the terms of the contract were. Thus, the "lore" that a lump sum payment is automatically the remedy once the Court finds there was either an express or implied contract is eviscerated by an analysis of the precedents since the lump sum is calculated based on damages for breach of a contract - and only when the contract is predicated on a promise of lifetime support - not simply a promise that when our relationship ends I will be fair to you.

THE NECESSITY FOR A BREACH

There are two pre-requisites for a lump sum award. First, there must be a contract i.e. a promise to support for life and, secondly, the contract must be breached. Yet, there is a perception amongst lawyers, i.e. "the lore", that Palimony and lump sums are inextricably intertwined, which upon careful examination the law makes clear is simply untrue.

There is minimal discussion in any of the cases as to what constitutes a breach. Certainly, as in Crowe, Kozlowski and Roccamonte, where the monied cohabitant asserts they have no obligation and refuses to pay anything, existence of a breach is relatively easy to prove. In Roccamonte the Court characterized the contract as "broken" when "support ceases". Roccamonte at 397. But what about the more typical situation where at the end of a relationship, particularly one of long standing duration, payments are made: One side believes they are adequate and the other disagrees. Payments never "cease" - is that a breach? Or is it a run of the mill dispute what the appropriate level of support might be. Yet, if there is no breach, then there are no "damages". If there are no "damages", could it possibly be that the economically dependent cohabitant is left without a remedy or is the contract then specifically enforced? Certainly, no remedy would violate the underlying policy and expressly be contrary to what Justice Pashman intended: that each party would be treated fairly at the end of a relationship.

The ultimate issue must be, since it is keyed to the remedy, what were the mutual promises the cohabitants agreed upon and whether they were express or implied. The terms of the contract determine the result subject to the overriding principle of fairness and specific performance would focus only on one party not both which is unfair. Litigation over whether a breach has occurred is probably as fruitless as litigation over why a marriage ended and in allocating fault. When confronted with that issue, the Supreme Court prudently decided to avoid fault as a factor in equitable distribution. See Chalmers v. Chalmers, 65 N.J. 186, 193 (1974). The Court's time would be better spent on determining the terms of an Implied Contract since that is more appropriately keyed to what is fundamentally fair and ultimately determined by how the parties treated each other and the impact of that treatment. Their conduct determines the result. There should be no ambiguity on one central point: when I use the term "conduct" I am not referring to fault. It is the economic impact that should be determinative.

JOHN PAONE AND THE EQUITABLE CONTRACT

John Paone, in a perceptive article attached to mine, critically observed the analysis utilized by the Court was not necessarily a strict contract interpretation. Rather, he characterized the contract referred to in Roccamonte as a "new form of contract" which he felt more accurately should be

referred to as an "Equitable Contract". Paone at P. 7. His analysis is similar to mine, noting that when the contract terms are not specifically expressed, Roccamonte provides the Court with the ability to determine a result that is fair. While I agree with his point, I might phrase it differently: Rather, in the absence of an express contract, the implied contract between the parties should be, as Justice Pashman observed, that the parties intend to treat each other fairly at the end of their relationship. This belief emanates from the nature of the relationship, i.e. it is implied from how the parties lived, treated each other and the economic impact of these decisions on each party.

Paone's point that the analysis is not simply contractual is emphasized by Zaragoza v. Capriola, 201 N.J. Super. 55 (Ch.Div. 1985). In Zaragoza, the ultimate conclusion was that cohabitation of eleven months was inadequate to establish a palimony obligation, although that is logically inconsistent with a contractual interpretation. A contract is a contract - except apparently when it is unfair to have it enforced. While the Court in Zarogoza concluded that no agreement existed between the parties, either express or implied, it is clear from reading the entire case and the references to the length of time involved in the precedents that the true basis of the decision was that the length of this cohabitation was not sufficient to warrant legal

protection. Nevertheless, if an express promise is made, the law, both in contract and reaffirmed in the palimony cases, is that the inadequacy of consideration does not vitiate the contract. As the Court said in Roccamonte, "the consideration need not be equal to the benefit received". Roccamonte at 392. The Court went on to note that the commitment people make to each other such as relinquishing other relationships, providing companionship and fulfilling needs financially, emotional, physical and social, is sufficient consideration to enable such contracts to be enforced.

This is similar to the Limited Duration Alimony cases involving very short marriages where the parties enjoyed an elevated lifestyle. As I believe, (although it may be argued this is an open question) not all lifestyles are entitled to legal protection. Certainly, not all relationships create legal duties and responsibilities. The point is in actuality the same. Before a Court will impose a legal obligation in this sensitive personal area, there must be some policy justification to do so. In the cohabitant setting, unlike a marriage, the relationship must be of sufficient duration to convince a Court that a legal responsibility exists. Similarly, in a marriage, there must be some policy reason to justify imposing an alimony responsibility on a spouse. Generally, that policy reason is reflective of the marital relationship with one party making economic and non-

economic contributions or, alternatively, sacrifices in furtherance of that relationship. It is what happened during the relationship that determines whether an alimony obligation exists. Similarly, in the Palimony analysis the law should focus on the parties' conduct. In that fashion the result is customized to realities of the parties' relationship and the rights, duties and obligations are created in effect, by what decisions the parties made.

In actuality, Zaragoza was saying the same thing because as previously noted, a contract is a contract. What Zaragoza really meant was that this relationship was not entitled to legal protection which is directly contrary to the Roccamonte language that in a cohabitation setting the legal rights emanate not out of the relationship but rather it is a "right created by contract". Roccamonte at 389. Since the parties' conduct, i.e. the decision they made themselves about their relationship, illustrated by the length of the relationship - did not suggest as a matter of fact, law or policy, that there should not be any legal obligation arising at the end of the relationship.

When a Court refuses to enforce a lifetime obligation to pay support for people who are young and the relationship short, it is effectively holding principals of fairness suggest the parties did not intend for there to be a legal entitlement of the end. The remedy is linked to the nature of the relationship. Both

Kozlowski and Zaragoza cited Hewitt v. Hewitt, 62 Ill. App. 3d 861, 380 N.E. 2d 454 (App. Ct. 1978). Zarogoza in particular relied on the Hewitt observation that before palimony would be imposed, the Plaintiff had to demonstrate existence of a "stable family relationship extending over a long period of time", i.e. examine how the parties conducted themselves. That is logical if the Court is relying on an implied contract; the length of time should not be relevant if it is an express contract. That Hewitt and, more importantly Kozlowski and Zarogoza both required a long period of time to pass before imposing a legal obligation confirms not all contracts would be enforceable as a matter of law in New Jersey. This confirms not all contracts would be enforceable as a matter of law in New Jersey. Yet contracts are contracts; if the promissor makes a bad deal, why is that a ground to avoid liability which is precisely why Paone argues it is an "equitable contract". Yet, if fairness has a role in the Palimony analysis as Justice Pashman suggests, then the issue becomes why shouldn't it become the predominant criteria. Why should the analysis be contractual, when contracts are not sustained when accompanied by evident unfairness but using the Implied Contract analysis the potentially conflicting theories can be harmonized.

SELECTION OF A LEGAL STANDARD SHOULD BE DETERMINED BY POLICY CONSIDERATIONS

Policy considerations have always played a predominant and

determinative role in the development of Family Law principles. Simply put, good law follows sound policy as the following historical analyses reveals. Development of legal principles does not only take place by examining precedent; but, to a significant degree, law generally, and certainly Family Law, develops in response to what Courts believe to be sound public policy. Arguably, there is perhaps no area of the law more sensitive to the relationship between law and public policy than Family Law. In Family Law, the relationship between legal principles, society's interests and concerns is, at least in part, a reflection of societal concerns. Society's interest in its dissolution and its impact upon parents and children and in divorce in the institution of marriage cannot be overstated; that interest has always been and should be reflected in how the law develops. Society's interest in palimony cases and the parties involved should be no different. In every Family Part case, the State has a legitimate interest in <u>how</u> issues are resolved; it must not be different in Palimony cases. Society's interest must therefore be reflected in <u>how</u> issues are resolved.

Contract principles alone are not and have never been deemed determinative in the Family Part but in Palimony cases they have been elevated to be the <u>sine guo non</u>; that is incorrect not only as a matter of law - but as sound policy. While there is a strong interest in permitting parties to freely contract,

society, through the instrumentality of the Courts, will not allow parents to waive child support or to unilaterally terminate parental rights, emphasizing that when policies conflict it is the State's interest that must prevail. There is no better evidence of the societal impact on the development of Family Law than the long standing principle that Courts are only empowered to enforce spousal support agreements that are found to be fair and equitable. Lepis v. Lepis, 83 N.J. 139, 149 (1980). Yet, has that standard been established - or merely forgotten - in Palimony cases? When people marry fairness predominates; if there is no marriage, fairness is seemingly irrelevant since the analysis is entirely contractual.

In the contractual analysis the determination of "damages" focuses on the circumstances of only one party. Critical concepts such as ability to pay or consideration of both parties' circumstances is seemingly irrelevant under present Palimony cases. If IBM breaches a contract to a vendor, IBM's financial circumstances are irrelevant in determining the vendor's damages. That is appropriate in a commercial setting. That is not necessarily so in the Family Part where consideration of the impact on both parties has historically been an integral part of reaching a "fair" result. Determining the result by analyzing the circumstances of only one party is directly contrary to the foundational and bedrock principles of judicial determinations in

the Family Part. Fairness and justice are complex concepts requiring an analysis of all facts - not only the rights of one party - since in the Family Part both parties have rights, duties and obligations which must be harmonized and balanced on the scales of policy and justice.

A dependent spouse may have legitimate and unquestioned needs; yet, courts do not simply enter an Order mandating those needs be met since need is only one of many factors that must be considered. It is complex because the goal in the Family Part is to implement the fundamental - and overriding principle articulated in Miller - assuring that at the end of the relationship the law and the policy upon which it is based, compel each party to treat the other fairly. We seemingly have forgotten Justice Pashman's admonition our goal in cohabitation cases is really no different. In rejecting contract law as a prerequisite for relief in Kozlowski he borrowed language from Marvin v. Marvin, 557 P.2d 106, 121 (Sup. Ct. 1976), and foreshadowed Miller's salutary observation noting, "we should presume the parties intended to deal fairly with each other" when their relationship ended. Kozlowski v. Kozlowski, 80 N.J. 378, 390 (1979) (concurring opinion) When we deviate from that elegant but nonetheless simple proposition, we lose our bearings and let contractual principles triumph over policy and, I believe, simple concepts of fairness. As a compass prevents

travelers from losing their way, fairness directs us to the correct result. Unfortunately, in the context of Palimony cases, we ignore Justice Pashman's elevation of fairness as a sine qua non. We create a dual legal standard to resolve cases in the Family Part which cannot be justified on policy. Consistency is important - provided it is fair and furthers the policy in the area which is precisely what this Article promotes.

There is a logical way to harmonize Palimony principles with fairness and establish clear parameters that satisfy not only the parties' legitimate interests but society's overriding concerns, all within the same governing legal principles and policy. Palimony law should not be aberrational; it should be consistent with the legal principles applied in the Family Part. Enforcing contracts in the Family Part is - and should be - distinctly different than in the commercial settings, where free enterprise concepts only allow the state to intervene if the contract is either unconscionable or void as contrary to public policy. See Vasquez v. Glassboro Service Ass'n Inc., 83 N.J. 86 (1980); Henningsen v. Bloomfield Motors, 32 N.J. 358 (1960); Int'l Tracers of America v. Rinier, 139 N.J. Super. 573 (App. Div. 1976). Given the uniquely personal relationship between parties in a palimony action, shouldn't these cases be treated differently than the typical commercial dispute? Doesn't the state have an interest here?

The intersection of these fundamental principles and the contractual predicate for Palimony claims in New Jersey is particularly significant. Contracts between parties in the Family Part have always been treated with different legal principles than those in the commercial world - except for Palimony. Why shouldn't the same differential treatment be utilized in the analysis of the cohabitation contracts? It would be consistent with sound policy because, as Justice Pashman emphasized in Lepis, "contract principles have little place in the law of domestic relations". Lepis at 148. Justice Pashman's choice of words is instructive - He was not limiting that broad policy statement to an analysis of alimony under N.J.S.A. 2A:34-23. Rather, he used the terms "domestic relations", essentially incorporating all actions now cognizable under Part 5 of our Court Rules - clearly applies to Palimony actions. At present contract principles hold not only a "little place" but the entire place in Palimony cases.

An interesting historical note emanates from the Family Part Practice Committee's Recommendation on Counsel Fees. The Recommendation emanated from a Sub-Committee which I chaired. The Sub-Committee, over my objection, initially recommended Courts would have limited power to award fees, essentially establishing narrow and limited grounds where fees could be ordered in a Cohabitation setting. Chief Justice Wilentz and the

Supreme Court adopted the Minority Report which reflected their view that given the nature of the relationship presented in a cohabitation case, there should be no differentiation in the right of a Court to award counsel fees in a cohabitation case, thus treating cohabitation as all other Part 5 actions were treated. The Court properly rejected a different standard for Palimony when it came to fees because in the Family Part there was no justification for the distinction - yet later the Court did establish a separate legal standard. Of course, the one essential element in the resolution of all legal issues in Part 5 cases is and should be fairness.

It is also anomalous that Justice Pashman and the Supreme Court insisted that Palimony cases be heard in the Family Part. This was not a determination motivated by equalizing case loads throughout the court system. Rather, it is an acknowledgement that Palimony cases involve the same type of intimate personal and inter-related financial issues that Family Courts are trained to address. It is an anomaly to insist Palimony cases be heard in the Family Part while simultaneously establishing legal principles governing Palimony cases which are directly contradictory to those applied in the Family Part and which properly belong in the Law Division. A consistent approach is not simply appropriate because it is fair; it is also appropriate because the respect the law is entitled to receive is enhanced by

a consistent application of legal principles to similar factual situations. It creates disrespect to allow for disparate treatment that is neither warranted by policy, the individual's interest involved or simple concepts of fairness. Palimony "contracts" are inherently different than those contracts that arise in the world of commerce. They arise in the context of intensely personal relationships where judicial remedies are predicated on policy concerns. They are contracts, but contracts that should be governed by Family Law principles. If the issue was one purely of contract there would be no need for these cases to be heard in the Family Part. Contract cases are heard in the Law Division. Rule 5:1-2 governs cases to be heard in the Family Part and a Palimony case, is a matter "unique to and arises out of a family or family type relationship". Thus, logic dictates cases in the Family Part be governed by the same overriding generalized legal principles. Or, as Justice Pashman said - not solely on the basis of contract principles. Kozlowski at 390.

Justice Pashman, as he frequently did, identified the critical policy issue. As noted in his concurring opinion in Kozlowski, he emphasized fairness, the overriding principle central to his analysis in the landmark Lepis decision. See Lepis v. Lepis, 83 N.J. 139 (1980). His presumption "the parties intend to deal fairly with each other when their relationship

ends" emanated from the seminal granddaddy of Palimony cases, Marvin v. Marvin, 557 Pac.2nd. 106, 121 (1976) - the case that provided the genesis for cohabitation law. Fairness provides the prism through which our Palimony law should be analyzed: when principles create unfairness or subvert the policy involved, then I suggest those principles are incorrect.

Neither Marvin, nor Justice Pashman in Kozlowski, said that in this most personal of relationships the single most important thing we must ignore is fairness and instead focus on strict contract principles which must be applied, regardless of their impact. Fairness and contract principles in the seminal cases that developed Palimony law essentially went hand in hand; thus, on first glance, given the unique facts involved there was no anomaly created. Yet, given the vast permutations of human relationships, applying straight contract law as the guiding principle in determining what the parties' rights, duties and obligations at the end of a relationship had the effect of vitiating the central tenent of Family Law Justice Pashman identified: the need at the end of a relationship for each party to be fair to the other. That always must be the test and the principles designed to achieve that goal which involves a factual examination of both parties' situations.

The proposed approach has yet another advantage to the lump sum payment which is predicated on specific enforcement of an

express promise for support for life. A careful examination of the remedy of specific performance emphasizes that the contract analysis in a Court of Equity is not absolute. Specific performance itself is an equitable remedy firmly rooted in our common law. There is a reason specific performance cases are heard in General Equity because that Court retains the power to decline specific performance.

As the Appellate Division noted as to Specific Performance in the Family setting, an analysis was required of all the circumstances. See Schiff v. Schiff, 116 N.J. Super. 546, 560 (App. Div. 1971); see also Keppler v. Terhune, 88 N.J. Super. 455, 465 (App. Div. 1965); Stehr v. Sawyer, 73 N.J. Super. 394, 404 (App. Div. 1949). Thus, it is arguable that a Court of Equity would not enforce a contract unless it found that the terms were fair and equitable, independent of Justice Pashman's observations in Kozlowski. It should not be arguable that Family Part Courts do not enforce contracts which are unfair. See generally Kilarjian v. Vastola, 379 N.J. 284 (Ch. Div. 2004) citing an 1875 case, emphasizing the long standing nature of this principle makes it well established in our jurisprudence. See also Plummer v. Keppler, 25 N.J. Eq. 481 (1875). It is a general equitable principle that specific enforcement of a contract must "operate without injustice or oppression to either party" and the Court beings to operate without. See K&J Clayton Holding Corp.

v. Keuffel and Essex Co., 113 N.J. Super. 50, 55 (Ch. Div. 1971). See also Fleischer v. James Drug Store, 1 N.J. 138, 149 (1948).

Another Appellate Division case emphasizes the caution how contracts in the Family Part should be interpreted. In Hogbin v. Hogbin-DeLurentis, (Docket No. A-0575-07T3) the actual opinion is attached to the Reply Memorandum. In Hogbin v. Hogbin-DeLurentis, (Docket No. A-0575-07T3), an unreported Appellate Division Opinion written by two former Family Part Judges (Judges Grall and Fischer) noted Trial Courts were "obligated to consider the context in which this dispute arose". (emphasis added) They noted this "wasn't just any contract dispute" and cited an earlier Opinion how contracts in Family Law are interpreted.

> "The law grants particular leniency to agreements made in the domestic arena, and likewise allows judges greater discretion when interpreting such agreements. Such discretion lies in the principle that although marital agreements are contractual in nature, contract principles have little place in the law of domestic relations. Guglielmo v. Guglielmo, 253 N.J. Super. 531, 542 (App. Div. 1992) (internal quotes omitted). (emphasis added)

This approach fits nicely with Implied Contracts and is consistent with the overall body of Family Law interpreting agreements. The legal standard must be linked to policy and when a standard creates unfairness as opposed to assuring fairness it is both poor policy and bad law. The State's

interest is to assure fairness at the end of a relationship - not to guarantee a rigid inflexible contractual analysis that has nothing to do with fairness at all.

TRADITIONALLY FAMILY PRINCIPLES DETERMINE THE RESULT IN FAMILY LAW.

This section appears in most of my articles since policy should determine the result. There is a well-defined jurisprudential basis for resolution of unique judicial issues which is predicated on policy. The one consistent strain in development of law in New Jersey, is that our law evolves in response to what Courts perceive to be sound public policy. The genesis of this developmental principle might well have been Oliver Wendell Holmes' ("Holmes") landmark work "The Common Law" where he linked public policy and development of the law. Holmes, "The Common Law" (1881). According to Holmes, the law was constantly evolving in response to the developing social and economic environment. Recognizing this, he noted in a now famous observation the "life of the law has not been logic: it has been experience". This flexible view of legal principles being responsive to changing social economic climates and mores is the perfect prism through which to view the development of Family Law principles. This is a principle our Supreme Court acknowledged when Kozlowski was decided establishing, as a matter of policy, cohabitation rights in New Jersey.

Yet, it is not only in Family Law that Holmes' view of the law has predominated. New Jersey has always found a relationship between public policy, concepts of justice and development of new legal principles.

An excellent example is Falcone v. Middlesex Co. Medical Society, 34 N.J. 582 (1961). Falcone involved a doctor's admission to a County Medical Society. Justice Jacobs went back to Holmes, emphasizing, "the vital part played by public policy considerations in the never ending growth and development of a common law". Falcone at 589. Holmes had noted, and it was cited by Justice Jacobs, that:

> "every important principle which is developed by litigation is in fact and at bottom the result of more or less definitively or definitely understood views of public policy". Holmes, "The Common Law", 35 (1881) cited in Falcone at 589.

In his analysis, Justice Jacobs concluded the "dominant factor" in development of our common law is the "common law principles" which "soundly serve the public welfare and the true interest of justice" citing Collopy v. Newark Eye and Ear Infirmary, 27 N.J. 29 (1959); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358 (1960); Cardozo, The Nature of the Judicial Process, 10 (1921); Columbia Broadcast Syst. v. Melody Recordings, 134 N.J. Super. 368, 382 (App. Div. 1975); State v. Hand, 101 N.J. Super. 43, 54 (Cty. Ct. 1968).

Our Supreme Court has followed Holmes' linkage of public policy and the development of law. In Shackil v. Lederle Laboratories, 116 N.J. 155, 177 (1989) the Supreme Court rejected the market share liability theory advanced by certain Plaintiff's concerning childhood vaccinations reasoning it would frustrate the public policy of development of safer vaccines. Similarly, in Kelly v. Gwinnell, 96 N.J. 538, 545 (1984) the Court, to reduce the number of drunken drivers, concluded imposing social host liability would advance that salutary public policy. Kelly relied on the famous Palsgraff v. Long Island R.R. Co., 248 N.Y. 399 (1928) for the proposition that in determining whether a duty of reasonable care existed the answer depended upon "an analysis of public policy". Kelly at 544. Further support for the proposition that unique legal questions are determined on public policy considerations can also be found in cases decided by our Supreme Court in matrimonial law. In Kinsella v. Kinsella, 150 N.J. 276 the Court found the doctor/ client privilege was not absolute:

> "considerations of public policy and concern for proper judicial administration have led the legislature and the courts to fashion limited exceptions to the privilege. These exceptions attempt to limit the privilege to the purposes for which it exists." Kinsella at 298. emphasis added)

Justice Stein later noted courts should be mindful of

the public policy considerations behind the psychologist/patient privilege concluding, in some respects, it was even more compelling than the attorney/client privilege. Kinsella at 329-330. Such reasoning reveals how Courts in determining unique legal issues mirror Holmes' perceptive reasoning and decide issues on public policy considerations. By analyzing new legal issues in context of policy, their resolution will more likely than not then be consistent with the legislative intent memorialized by the statute. Parties should be required to show why their position advances and does not reject the policies embodied in N.J.S.A. 2A:34-23.1 and N.J.S.A. 2A:34-23. Another example of law following policy was the Appellate Division's rejection, on policy grounds, of permitting a position taken at a settlement conference to satisfy the "further acts" requirement of a malicious abuse of process claim. Baglini v. Lauletta, 338 N.J. Super. 282, 296 (App. Div. 2001).

EXAMPLES IN FAMILY LAW

A good example of policy predominating in a Family Law context is Goldman v. Goldman, 248 N.J. Super. 10 (1991) aff'd. 275 N.J. Super. 452 (App. Div. 1994) where Judge Glickman was confronted with a unique situation involving valuation changes post filing. Goldman at 248. In distributing interest in a car dealership which had

significant value as of the valuation date but virtually none at trial, he not only analyzed the issue in the context of the existing law but the public policy considerations. He reached his result by implementing the policy reflected by N.J.S.A. 2A:34-.23.1. As the Appellate Division noted in affirming his decision:

> "...the Trial Court here correctly recognized that he was confronted with the unique situation and that application of a rigid categorical analysis would have only hindered him in fulfilling his ultimate obligation to effectuate a distribution of marital assets which overall was equitable to both parties". Goldman at 457. (emphasis added)

There is no greater evidence of the primacy of policy in Family Law than in examining the instances where Courts have addressed conflicts between accounting principles and Family Law principles and issues. Both legislatively and judicially, government has recognized that abstract, but nonetheless, legitimate and market based accounting principles, must nevertheless give way when they conflict with implementing the broader policy considerations predicated on one simply fact: fairness is the sine qua non in Family cases.

For example, it is a general accounting principle that when assets are sold, a taxable event occurs creating a liability for payment of capital gains taxes by the selling

party. Yet, that broad based principle was not applied to divorces. The policy determination was made that it is inappropriate to tax people who are selling assets to each other "incident to a divorce". To implement this societal determination that people should not be taxed when they divide their assets in a divorce, Section 1041 of the Internal Revenue Code was adopted. That provision provides that sales, denominated as "transfers", between spouses are not taxable events so long as they are "incident to a divorce". This emphasized the principle that as long as the sale or transfer between spouses was related ("or incident to") to divorce, public policy considerations precluded treating such transactions as taxable events. Thus, if a transaction between former spouses occurs, even if it is the by product of a divorce, but nonetheless was not "incident to the divorce" the safe harbor provisions of Section 1041 do not apply. Certain time limits were established which were quite liberal to distinguish between transactions "incident to" or merely which might occur between former spouses. If the transfer occurs within six years it is presumed to be "incident to". See TEMP. TREAS.REG. SECTION 1.1041-1T; Q/A 7. If the transfer is more than six years after the divorce, it is presumed not to be related to the cessation of the marriage, or presumption rebutted only by

showing that (a) the transfer was not made within the time provided because of factors which hampered an earlier transfer of the property (i.e. legal or business impediments) and (b) the transfer is effected promptly after the impediment to transfer is removed. Id.

This policy determination was implemented in the Deficit Reduction Act of 1984 where Congress over-ruled the 1962 Supreme Court Decision in the United States v. Davis, 370 U.S. 64 (1962). Davis had held that transfers of property from one spouse to another incident to a divorce required recognition of gain or loss. By enacting Section 1041 of the Internal Revenue Code as part of the 1984 amendments, Congress made clear that for income tax purposes, no gain or loss will be recognized by the parties when there was a transfer of properties "incident to a divorce". The policy determination to provide spouses special treatment is also exemplified by gift law, which is philosophically related to the Section 1041 transfers; in each instance spouses may make unlimited gifts to each other without gift tax consequences. Even children are not treated so liberally since parental gifts are subject to gift tax rules. Only spouses have the unrestricted freedom to do as they please, a determination flowing from the status of marriage as a fundamental societal institution.

Another illustration of Family Law trumping accounting principles was the provision in the regulations relating to Section 71 of the Internal Revenue Code ("IRC") permitting parties to designate otherwise taxable income, i.e. alimony, as non-taxable income. As with divorce related property transfers, the determination was made that in transactions involving spouses, there was no public policy reason to have a bright line rule that alimony must be deductible by the payor and includable in the recipient's income. This distinction is particularly significant; it emphasizes that divorce related transactions have traditionally been treated differently than other accounting transactions. For example, even if a person was an employee of a charitable organization, e.g. Mother Theresa, regardless of the societal benefits of the employer, the employee must report their salary as part of their gross taxable income. Only if people marry do they have the right to designate income as tax free income. See Reg. 1.71(T) Q8. A related, but different, area is child support income. It is an obvious policy determination to designate that cash flow to be tax free.

In fact, the alimony deduction itself is yet another example of policy dictating law. Until 1942, alimony was neither taxable to the recipient nor deductible by the

payor. Gould v. Gould, 245 U.S. 151 (1917). In that year to relieve the financial hardship imposed on the payor of paying alimony with after-tax income Congress amended the Revenue Act to provide for deductibility. This provision was ultimately embodied in IRC Sec. 71 (215). Policy and the fairness it reflected, dictated the result.

Similarly, there are a substantial difference when addressing issues of depreciation. For tax purposes, a commercial real estate investment property, for example, may have it's book value decreased because the owners utilize depreciation, which reduces the book value. Yet, in a divorce case, where the goal is to fairly compensate spouses who acquire assets during a marriage, the depreciated value is not binding; rather, it is the actual value. Thus, the same asset may for tax purposes have it's value decreased; yet, for marital purposes, it's value increases, once again linking the policy implicit in N.J.S.A. 2A:34-23.1 with a result directly contrary to the result when applying strict accounting principles.

Yet, the best evidence of divorce policy trumping all else is Brown v. Brown, 348 N.J. Super. 466, 489 (App. Div. 2002) where the Court rejected an otherwise valid marketability discount since the "theoretical divorce sale" did not affect the value of the asset to the owners. Since

the business was going "to continue under the same ownership" there was no reason to consider economic principles affecting value but which are linked to a sale that was not going to occur. Brown at 488. The policy of N.J.S.A. 2A:34-23.1 had to be implemented and theories unrelated to the facts would not impede that goal.

Having linked the issue of policy to the development of law, the next issue is what is the policy? Certainly, as Justice Pashman made clear, it is not the strict, rigid specific enforcement of a contract regardless of it's terms or the impact on the parties since that would be directly contrary to the very essence of our law: that at the end of a relationship, the parties must treat each other fairly. That has conclusively been established in the nascent development of Family Law by none other than Justice Pashman, whose symmetry of analysis is particularly persuasive, when comparing his comments in Lepis and Kozlowski. In his a concurring opinion in Kozlowski, he re-emphasized the importance of fairness. He perceptively identified the policy: "we should presume that the parties intended to deal fairly with each other" when their relationship ends, relying on similar language in Marvin v. Marvin, 557 P.2d 106, 121 (1976), the case that started cohabitation law.

Justice Pashman noted the law must assure that neither party was either unjustly enriched or unjustly impoverished by the end result. This is the same policy the Supreme Court identified in Miller v. Miller, 160 N.J. 410, 418 (1999) when they, in simple yet elegant terms, crystalized the essential public policy when people divorce. The Supreme Court, in interpreting a contract between parties in a Property Settlement Agreement, found:

> "The agreement must reflect the strong public and statutory purpose of ensuring fairness and equity in the dissolution of marriages." Miller at 418.

THE STANDARD OF LIVING: WHAT IS IT'S ROLE IN THE PALIMONY ANALYSIS?

There remains the important question in the Palimony analysis, seemingly answered in a somewhat harsh fashion by the Appellate Division in Connell v. Diehl, 397 N.J. Super. 477 (App. Div. 2008), whether the lifestyle enjoyed by the cohabitants should be the basis for a judicial determination. Certainly, in a marriage, the statute makes lifestyle an important factor. In the language of Crews it is the "goal" to be achieved. The lifestyle analysis is relevant when the contract to be enforced is express which requires, under present law, the calculation of a lump sum benefit. It is also relevant if the framework is Implied Contract. In the latter, there would be contract payments

to be made by one party to the other which would not be deemed alimony; and thus they would not be deductible under Section 71 of the Internal Revenue Code.

Interestingly, in Connell the Appellate Division remanded because the Judge "made no findings with respect to the effective potential liability for payment of State and Federal taxes". Connell at 499. Connell involved a lump sum payment but the issue seems relatively clear: in either event payments made in a cohabitation setting are not periodic payments within Section 71 of the Internal Revenue Code; hence, they are neither deductible by the payor nor includable as income by on the part of the payee. Clearly, the tax consequence of any payments would have to be a consideration and would require a quantum leap in the change of thinking because lawyers and Judges tend to think of periodic payments as being taxable - not tax free. Equally important is my belief that transfers made incident to a Cohabitation Agreement or Decree are not transfers made under Section 1041 of the Internal Revenue Code. Thus, they are not deemed tax free transfers to be made without tax consequence. Therefore, it is a critical practice point to understand that if the parties acquired a jointly owned home, a transfer from one party to the other raises tax questions, as would, and this is of particular significance,

division of a pension. A Qualified Domestic Relations Order ("QDRO") allowing for tax free transfers to an IRA of a Qualified ERISA Plan is highly problematical in a cohabitation setting. The entire area of taxes, while not the scope of this Article, must be considered as the Appellate Division noted in Connell, in the fairness of any settlement or judicial determination.

It is sometimes difficult to define a clear legal standard from an affirmance of a trial court's discretionary decision. In Connell, for example, the Appellate Division found "no error in the exercise of the Judge's discretion in using Connell's post separation lifestyle as the base of her palimony award". The standard apparently was that support had to be "reasonably adequate and did not leave Connell reliant on public assistance, such as food stamps". Connell at 498-499. In language that was particularly significant, the Appellate Division noted that the case law "does not require that Connell be able to live just as before". Rather, the award need only provide reasonable support sufficient to meet "her minimal needs and prevent the necessity of her seeking public welfare" citing Crowe v. DeGoia. Yet, is that the correct legal standard or simply a situation where an Appellate Court simply found a trial Judge made a reasonable decision within the wide range of

their discretion. Compare DeVita v. DeVita, 145 N.J. Super. 120 (App. Div. 1976) with Kelly v. Kelly, 217 N.J. Super. 147 (Ch. Div. 1986). DeVita is the most miscited case in New Jersey jurisprudence. The only thing that occurred in DeVita was an Appellate Court found a trial court made a decision within it's discretion, yet the decision has become the "lore": "DeVita Restraints" are alleged to be necessary. Kelly says the exact opposite - the result is determined by a "best interest" standard. Kelly at 153.

This issue was discussed in In re Roccamonte where the Supreme Court concluded Mr. Roccamonte was concerned for what the Court characterized as Plaintiff's "economic well being" because they concluded he had provided for her "lavishly" and that it was highly unlikely "he intended to leave her in an impoverished old age". The Court reasoned that promise, if not express, was clearly "implied" and that the standard was that she be "adequately provided for during her lifetime". Roccamonte at 395. There was no further discussion what the term "adequate" meant. In Crowe v. DeGoia, 90 N.J. (1982) the Court noted that "she shouldn't not be rewarded for cohabiting but at the same time should not be penalized" and that the Court's role was to "shape a remedy that will protect the legally cognizable interest of the parties and serve the needs of justice". Crowe at 136.

Once again, that was an ill defined standard which Connell in a potentially misleading statement affirming a discretionary ruling by a trial court, referred to as not leaving the economically dependent cohabitant "relying on public assistance, such as food stamps". Connell at p. 499. Connell's language, depending on the facts, might be unduly harsh and restrictive. It is also contrary to the proposed standard which determines the result based upon the parties' conduct, i.e. the Implied Contract.

I would suggest that in the typical case that should not be the standard but certainly under present law, that was a conclusion a fact finder could reach and it was within the broad discretion afforded trial courts. I would prefer a multi-factorial approach which requires consideration of the following issues:

1. Length of the relationship;
2. Did the parties have children;
3. The degree to which the dependent party sacrificed their earning capacity;
4. Enjoyment of an elevated lifestyle (this factor does not create a right to enjoy it; rather it is a factor that diminishes any entitlement);
5. Sharing of assets by virtue of titling them

in joint names;

6. Each parties' non-economic contribution to the relationship;
7. Age and physical conditions of the parties;
8. Each party's overall economic circumstances at the end of a relationship and the degree to which the monied party would or would not have those assets but for the relationship;
9. Fault should not be a consideration.

This is a perfect departure point to differentiate the rights of people who choose not to get married and those who do. One of the constant and I believe correct criticisms of existing Palimony law is the belief, based particularly on the "lore" of the lump sum requirement, that people who live together and choose not to marry are treated differently and better than those who select marriage. A melding of the Connell language with Implied Contract would suggest the standard of living enjoyed by the parties during their relationship should be a factor, but it was not automatically one entitled to legal protection. If the parties wanted the standard of living to constitute a measure of how they lived that would ultimately afford legal protection, they had the right to marry. It is an

elementary principle acknowledged by many commentators that the very reason people choose not to marry is to avoid the legal obligations imposed by the statutory framework governing marriage. It never made sense to me to impose upon people who choose not to marry to avoid obligations, greater obligations than they would have, had they married. If marriage is central to our societal values, the bedrock of our institutions, then logic, if not the vitality of those values, suggests people who marry should have superior rights to those who do not.

The approach suggested in this Article strikes an appropriate balance between the policy Justice Pashman outlined in Kozlowski, the overriding concept of fairness which is the standard in the Family Part, while reasonably making a distinction between obligations emanating from a marriage and a non-marital relationship. It restores a sense of balance to the law while simultaneously implementing the broad based policy that defines the respect our legal system is entitled to receive.

F/FAL/Symposiumarticle.Jan2009