THE RIGHT TO PALIMONY: WHY NEW YORK SHOULD CHANGE ITS LAW TO ENFORCE CLAIMS BETWEEN UNMARRIED COHABITANTS

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INTRODUCTION

On his final day in office in January 2010, former New Jersey Governor Jon Corzine signed a bill amending the Statute of Frauds to require that only palimony agreements made in writing and with the guidance of an attorney would be enforceable.1 ‘Palimony’—a colloquial term to describe “alimony for pals”2—is a claim by one party to a non-marital relationship against the other for either support or property.3 The state legislature enacted the amendment N.J.S.A. 25:1-5(h) because it was displeased with “more recent court decisions liberally allowing for palimony claims,”4 most notably Devaney v. L’Esperance (2008)5 and In re Estate of Roccamonte (2002).6

In Devaney, the Supreme Court of New Jersey held that cohabitation was not an indispensable element of a successful palimony action.7 While the court acknowledged that cohabitation was “a relevant factor in the analysis of whether a marital-type relationship exists,” it recognized that “[t]here may be circumstances where a couple may hold themselves out to others as if they were married and yet not cohabit.”8 Plaintiff, Helen Mary Devaney, and defendant, Francis A. L’Esperance, were involved in an intimate relationship for twenty years, during

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4 Solotoff, supra note 1.
6 In re Estate of Roccamonte, 808 A.2d 838 (N.J. 2002).
7 Devaney, 949 A.2d at 750 (emphasis added).
8 Id.
which time “defendant, who was married, continued to live with his wife and never cohabited with plaintiff.”\(^9\) According to Devaney, who was just twenty-three-years-old when she met L’Esperance, her then fifty-one-year-old employer, the alleged contract was that he promised to “divorce his wife, marry plaintiff, and have a child with her.”\(^10\) Additionally, she claimed they had an implied agreement for him to provide her with lifetime financial support.\(^11\) In return, “plaintiff provided defendant with companionship and helped with some of his personal and business matters.”\(^12\)

While the court affirmed the lower court’s holding that the parties did not have a “marital-type relationship,” it found that “the promise to support,” whether expressed or implied, “coupled with a marital-type relationship” are the “indispensable elements to support a valid claim for palimony.”\(^13\) The Supreme Court of New Jersey had consistently held that, to present a \textit{prima facie} case for palimony, a plaintiff must offer evidence showing: “(1) that the parties cohabitated; (2) in a marriage-type relationship; (3) that, during this period of cohabitation, defendant promised plaintiff that he/she would support him/her for life; and (4) that this promise was made in exchange for valid consideration.”\(^14\) In declaring that cohabitation was not a requirement, the court effectively overruled years of precedent.\(^15\)

The holding did not go over well amongst New Jersey lawmakers,\(^16\) who likely feared that it would open up the floodgates for frivolous claims. Up until January 2010, New Jersey statutes “were silent on the subject of palimony.”\(^17\) The state’s “statute of frauds identifies various ‘agreements [and] promises’ upon which ‘[n]o action shall be brought . . . unless the agreement or promise, . . . 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.’”\(^18\) The amendment “represent[ed] [New Jersey’s] first, and only, legislative action with respect to the issue,”\(^19\) and added the following to the purview of the statute:

> 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

\(^9\) \textit{Id.} at 743.  
\(^10\) \textit{Id.} at 746.  
\(^11\) \textit{Id.} at 745.  
\(^12\) \textit{Id.}  
\(^13\) Devaney, 949 A.2d at 750.  
\(^15\) \textit{New Jersey Supreme Court sets precedent, ruling that an unmarried couple does not have to live together in order for one partner to sue the other for palimony after a breakup, LAW OFFICE OF DONALD D. VANARELLI BLOG (June 20, 2008), http://www.dvanarelli.com/blog/?p=277.}  
\(^16\) Solotoff, \textit{supra} note 2.  
\(^19\) \textit{Id.} at 979.
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.\textsuperscript{20}

The New Jersey Senate Committee Statement, which says the intent of the bill was “to overturn recent ‘palimony’ decisions by New Jersey courts,” also alludes to the \textit{Roccamonte} case,\textsuperscript{21} where the Supreme Court of New Jersey held that a female cohabitant’s palimony claim was enforceable against her deceased male cohabitant’s estate.\textsuperscript{22} Despite the fact that the new law does not specifically address whether cohabitation is essential or whether a claim is enforceable against one’s estate,\textsuperscript{23} the plaintiffs in \textit{Devaney} and \textit{Roccamonte} would certainly have a more difficult time enforcing their claims today.\textsuperscript{24}

While \textit{Devaney} and \textit{Roccamonte} made headlines in New Jersey, \textit{Marvin v. Marvin},\textsuperscript{25} a California case, is perhaps the most influential case regarding the theory of palimony,\textsuperscript{26} often cited in court opinions, legal treatises, and newspaper and journal articles throughout the country. The plaintiff, Michelle Triola Marvin, sued her former live-in boyfriend, actor Lee Marvin, for $1.8 million—half of the $3.6 million that she estimated he earned during the six years they lived together.\textsuperscript{27} She argued that she “agreed to ‘give up her lucrative career as an entertainer (and) singer’ to ‘devote her full time to defendant . . . as a companion, homemaker, housekeeper and cook’; in return defendant agreed to ‘provide for all of plaintiff’s financial support and needs for the rest of her life.’”\textsuperscript{28} It is from this case that the word ‘palimony’ originated,\textsuperscript{29} though it is unclear whether Marvin Mitchelson, the plaintiff’s attorney, or a \textit{Newsweek} writer who once interviewed him coined the term.\textsuperscript{30}

The California Supreme Court held that Michelle Marvin “and other unmarried people could sue for property division when a relationship ended,”\textsuperscript{31} and that “courts should enforce express or implied contracts between nonmarital partners except when such a contract is inseparably based upon the provision of

\textsuperscript{21} In re Estate of Roccamonte, 808 A.2d 838 (N.J. 2002).
\textsuperscript{24} Solotoff, supra note 1.
\textsuperscript{25} See Marvin v. Marvin, 557 P.2d 106 (Cal. 1976).
\textsuperscript{28} Marvin, 557 P.2d at 110.
\textsuperscript{29} Oliver, supra note 2.
\textsuperscript{31} Woo, supra note 27.
sexual services.”

The court thereby reversed the California Court of Appeals’ ruling, thus finding “that Michelle Marvin was entitled to a trial to prove she had the oral contract she claimed she had.”

It was an extremely significant victory for Mitchelson, who told *Esquire* magazine: “I’ve been waiting for a few years for a case like Michelle Marvin’s. I’ve always been fascinated by the question of why the existence or nonexistence of a marriage license should alter people’s rights. Any two idiots can get a marriage license.”

On remand, the trial court found “there was neither an express nor an implicit contract obligating the actor to share his wealth with her,” but awarded Michelle Marvin $104,000 for “rehabilitative purposes.” Two years later, an appeals court overturned the award. Although she did not receive any money, “the legal principle underlying her court battle was left intact.” The decision “gave California law a new doctrine that provided live-in lovers the legal leverage to share a partner’s property when they separated.”

California, New Jersey, and other jurisdictions, including New York, have enforced contracts between cohabiting parties, either oral or written, resulting in one party having to pay the other palimony. This Note will argue that given the decreasing marriage rate and growing numbers of unmarried cohabitation and births outside of wedlock, New York should adopt a law like that of New Jersey, which enacted an amendment requiring palimony agreements to be in writing and reviewed by an attorney to satisfy the state’s statute of frauds. Alternatively, New York could amend section 236(B)(3) of the Domestic Relations Law, which deals with pre-nuptial and separation agreements between married parties. The law currently states that agreements “made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded.”

The legislature could simply add a section that requires palimony agreements between unmarried, cohabiting parties to adhere to the criteria of these other types of contracts. Not only would this be beneficial to the courts, eliminating a great deal of waste in terms of judicial resources and money spent by litigants, but it would also provide attorneys and potential litigants with a bright-line rule, and encourage unmarried cohabitants to assess the terms of their agreements carefully.

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32 Estate of Shapiro v. U.S., 634 F.3d 1055, 1058 (9th Cir. 2011).
33 Avins, *supra* note 30.
34 *Id.*
35 *Id.*
37 The award was reversed on the grounds that: “the trial court … expressly found that defendant never had any obligation to pay plaintiff … for her maintenance and that the defendant had not been unjustly enriched by reason of the relationship or its termination …” *Id.* at 876.
38 Woo, *supra* note 27.
39 Oliver, *supra* note 2.
relationships. Part I will examine the evolution of cohabitation and palimony in the United States, including suits between same-sex couples. Part II will consider the current state of palimony (from 2000 until the present). Part III will present an overview of palimony in New York State. Part IV will discuss the New Jersey amendment and its effects on subsequent palimony suits. Part V will argue why New York should either adopt a law similar to that of New Jersey or amend its Domestic Relations Law.

I. THE IMPACT OF MARVIN V. MARVIN AND UNMARRIED COHABITATION IN THE UNITED STATES

A. The Rise of Unmarried Cohabitation in the United States

In the decade before Marvin, couples living together without the solemnization of marriage were considered criminals under most states’ laws.\(^{41}\) The California Supreme Court’s decision “underscored the extent to which the sexual revolution of the 1960s had changed American society.”\(^{42}\) The court recognized this revolution in its opinion, writing that the law should not “impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many.”\(^{43}\) Perhaps most importantly, as United States Supreme Court Justice Ruth Bader Ginsburg noted in 1979, when she was a law professor at Columbia University: “[Marvin] illustrates the further breakdown of the legal line between married and unmarried union.”\(^{44}\)

In 2013, it is difficult for us to appreciate the significance of Marvin – “a celebrated case in the 1970s that abandoned the accepted rule that a cohabitant was barred by the illegality doctrine from bringing suit against a partner when the relationship ended.”\(^{45}\) In 1960, an estimated 450,000 unmarried couples lived together in the United States.\(^{46}\) During that time, most jurisdictions criminalized non-marital cohabitation.\(^{47}\) Between 1960 and 1970, the number of unmarried couples living together increased by eight times.\(^{48}\) Marvin forced judges and lawmakers to reexamine the legal rules that had previously applied to unmarried

\(^{41}\) Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation for Opposite Sex Couples*, 7 J.L. & FAM. STUD. 135 (2005) (citing a tentative draft of the Model Penal Code § 207.1 Cmt. at 204-05 (Tentative Draft No. 4 1955)).

\(^{42}\) Woo, *supra* note 27.


\(^{44}\) Woo, *supra* note 27.


\(^{47}\) Mahoney, *supra* note 41.

\(^{48}\) See McCullon v. McCullon, 410 N.Y.S.2d 226, 228 (N.Y. Sup. Ct. 1978). The court is quoting a June 1978 Reader’s Digest Article, which was condensed from Time Magazine.
cohabitants.\textsuperscript{49} Today, “only a handful of jurisdictions, including North Dakota [and Michigan], continue the criminal ban on unmarried cohabitation.”\textsuperscript{50} Moreover, of those that do, the laws “are most likely unconstitutional, under the privacy doctrine established by the United States Supreme Court.”\textsuperscript{51}

Today, more than 7.5 million unmarried couples cohabit—an increase of “more than 1,500 percent in the past half century.”\textsuperscript{52} In 2009, fifty-nine percent of American women who gave birth were married.\textsuperscript{53} More than half of women under the age of thirty who gave birth that year were not married.\textsuperscript{54} Nearly “all of the rise in nonmarital births” has happened among cohabiting couples.\textsuperscript{55} With increasing rates of both unmarried cohabitation and births outside of marriage, marriage has certainly become “a less central legal form for organizing intimate relationships.”\textsuperscript{56}

According to the American Academy of Matrimonial Lawyers, both the number of court battles between former unmarried cohabitants and the number of cohabitation agreements have increased significantly in recent years.\textsuperscript{57} Perhaps unsurprisingly, “[m]ost such agreements (similar to a prenuptial agreement, but with no wedding) are drawn up for unmarried, heterosexual couples . . . while [thirty percent] are for same-sex couples.”\textsuperscript{58} Additionally, “courts generally rely on contract law when they conclude that cohabiting parties may acquire financial obligations to one another that survive their relationship.”\textsuperscript{59} For same-sex couples living together in jurisdictions where there is no right to marry by statute and no

\textsuperscript{49} Oldham, supra note 45.
\textsuperscript{50} Mahoney, supra note 41, at 151; “Cohabitation is still a crime in five states — the four Southern states and Michigan. Yes, no one has been arrested for cohabitation in recent years but there are a few situations in which the fact that it’s criminal can be used against people.” Thomas Rogers, \textit{Live in sin, break the law}, SALON (July 1, 2012), http://www.salon.com/2012/07/01/live_in_sin_break_the_law.
\textsuperscript{51} Mahoney, supra note 42, at 148; “Distinct from the right of publicity protected by state common or statutory law, a broader right of privacy has been inferred in the Constitution. Although not explicitly stated in the text of the Constitution, in 1890 then to be Justice Louis Brandeis extolled ‘a right to be left alone.’ This right has developed into a liberty of personal autonomy protected by the 14th amendment. The 1st, 4th, and 5th Amendments also provide some protection of privacy, although in all cases the right is narrowly defined.” \textit{Right of Privacy: An Overview, LEGAL INFO. INST.} (Aug. 19, 2010, 5:22 PM), http://www.law.cornell.edu/wex/Privacy.
\textsuperscript{52} Jay, supra note 46.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{58} Id.
\textsuperscript{59} AREEN, supra note 56, at 510.
guaranteed right to palimony, the only possible way of getting redress after the dissolution of a relationship is through contract law.\textsuperscript{60}

New York and other jurisdictions, regardless of whether or not they give same-sex couples the right to marry by statute, should enact laws that recognize a legal cause of action for palimony, which explicitly state the requirements for an enforceable claim. Not only would it likely cut down on the number of lawsuits, it might also cause unmarried cohabiting couples to be more up front about the terms of their relationships. While New York courts have “emphatically rejected” the approach of the California court in\textit{Marvin},\textsuperscript{61} they have “long accepted the concept that an\textit{express} agreement between unmarried persons living together is as enforceable as though they were not living together, provided only that illicit sexual relations were not part of the consideration of the contract.”\textsuperscript{62} Still, as one New York practitioner noted, “obtaining reparations [for palimony claims] and establishing proof remains an arduous process.”\textsuperscript{63}

\textbf{B. Important Palimony Cases in Jurisdictions Throughout the United States (Prior to 2000)}

Jurisdictions all throughout the country have enforced palimony claims.\textsuperscript{64} Sometimes, a court’s willingness to do so is contingent on the community’s morals or geographic disparities.\textsuperscript{65} Oftentimes, when a couple’s contract is not explicitly stated, courts look to other avenues to effectuate fairness—though reliance on the promise must be reasonable.\textsuperscript{66} A central concern for every court is that by recognizing these causes of action too quickly, they would open the floodgates for litigation.\textsuperscript{67}

In 1975 — one year before\textit{Marvin}\textsuperscript{68} was decided — the Supreme Court of Mississippi enforced a woman’s claim for support payments from her former spouse, even though the parties did not have a legal marriage.\textsuperscript{69} Although palimony suits typically involve unmarried cohabitants, and this case concerned an invalidly married couple, some of the ideas underlying enforceable palimony

\textsuperscript{60} Interview with Julie Interdonato, Professor of Law, Benjamin N. Cardozo School of Law, in N.Y., N.Y. (Aug. 26, 2012).
\textsuperscript{62} Morone v. Morone, 413 N.E.2d 1154 (N.Y. 1980) (citations omitted) (quoting Matter of Gorden, 8 N.Y.2d 71, 75 (N.Y. 1960) (emphasis added) (quotation marks omitted)).
\textsuperscript{64} Karen Moulding,\textit{Marvin Holdings Throughout the States}, 1 SEXUAL ORIENTATION AND THE LAW § 3:41 (2012).
\textsuperscript{65} Interdonato, \textit{supra} note 60.
\textsuperscript{66} \textit{Id}.
\textsuperscript{67} \textit{Id}.
\textsuperscript{68} Marvin v. Marvin, 557 P.2d 106, 110 (Cal. 1976).
\textsuperscript{69} Taylor v. Taylor, 317 So.2d 422 (Miss. 1975).
claims came to fruition in the court’s opinion. In Taylor v. Taylor, plaintiff, Viola Taylor, was still married to her previous husband when she married defendant, James Taylor. The evidence showed James knew of Viola’s previous marriage when he entered the purported marriage. The parties lived together as husband and wife for eighteen years. Although she was not eligible for alimony, the court found “that it would not be fair and equitable for [defendant] to walk out and leave her as if she were a perfect stranger and that under the circumstances he owed some obligation to her.” The court awarded her seventy-five dollars per month for thirty-six months, but designated the award as support, instead of alimony.

While the court maintained the soundness of the law “that where there has been no valid marriage there is no foundation for the wife’s right to alimony,” the facts and circumstances of this case required the court to have “regard for the sensibilities of humanity.” Similarly, in order to enforce a palimony claim, courts must balance various factors, including: the determination of whether there is a legally cognizable contract, the principles of equity, the parties’ particular circumstances, and the fact that they are dealing with human beings, who are naturally flawed and emotional in their personal relationships.

By contrast, in Rehak v. Mathis, decided nearly a year after Marvin, the Supreme Court of Georgia held that plaintiff, Hazel Rehak, who lived with defendant, Archie Mathis, for eighteen years was not entitled to financial compensation or any of the couple’s property because the parties’ agreement was founded on “immoral consideration,” specifically, cohabitation, which was still illegal under Georgia state law at that time. For the first two years, Hazel “paid all installment payments” on the house the couple lived in throughout their relationship. Thereafter, they each contributed half of the payments. She claimed she “cooked for, cleaned for, and in general cared for the comforts, needs, and pleasures of the [defendant] . . . while they cohabited together.” She also alleged that Archie repeatedly said the house was their joint property and that “he

70 Id.
71 Id. at 424.
72 Id. Viola Taylor’s previous marriage “had never been dissolved by death or divorce.” Id. at 422.
73 Id.
74 Taylor, 317 So.2d at 423.
75 Id. at 422.
76 Id.
77 Id. at 423.
78 Id.
81 Rehak, 238 S.E.2d at 81.
82 Id. at 82.
83 Id.
84 Id. at 81-82 (quotation marks omitted).
would support and take care of her and her financial needs” for the rest of her life.

Perhaps not surprisingly, the state of Georgia is one of two jurisdictions that do not enforce cohabitation agreements and in which “courts refuse recovery of any sort on public policy grounds.” It follows that courts will not enforce a cause of action for palimony. Contracts that are based on “immoral or illegal consideration” are still considered void, which means “one party to a long-term, nonmarital living arrangement [still] cannot recover compensation for services rendered to the other party during the relationship.” In other words, Rehak remains good law. As one Georgia practitioner aptly noted: “[t]he premarital relationship is the most fertile area for development of new law and rejection of dated concepts. The true equities in such relationships may dictate against a strict reliance on concepts such as meretricious relationships and immoral consideration. Remedies for the breach of premarital promises remain problematic.”

In New York, the Erie County Supreme Court, like the Supreme Court of Mississippi in Taylor, enforced the plaintiff’s claim. In McCullon v. McCullon, the plaintiff, Susan McCullon, an alleged common-law wife, sought alimony and child support from defendant, Leonard McCullon. Despite the invalidity of common-law marriage under New York law, the court recognized that the parties “entered into a valid common law marriage resulting from their holding out each other as husband and wife in Pennsylvania,” where they visited over a period of years, for two to four weeks at a time, while maintaining their permanent residence in New York. In contemplating its decision as to whether it should award Susan financial compensation, the court acknowledged that the “changing social mores in our society have given rise to inequities and hardship which arise with the dissolution of non-marital relationships.”

In this case, however, the court concluded it was “not dealing with a new generation free style type of living arrangement,” but rather “a woman in the later years of her life,” whose common-law husband abandoned her and their three

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85 Id. at 82.
86 Elizabeth Hodges, Will You “Contractually” Marry Me?, 23 J. AM. ACAD. MATRIM. LAW 385, 397 (2010). The other state is Illinois. Id.
88 Id.
89 Rehak, 238 S.E.2d at 81.
90 Mayoue, supra note 87.
91 Taylor v. Taylor, 317 So.2d 422 (Miss. 1975).
93 Id.
94 Id.
95 Id. at 226-27.
96 Id. It should be noted that this is also a case of New York recognizing the marriage under principles of comity.
children after twenty-eight years together.\textsuperscript{97} Citing \textit{Marvin},\textsuperscript{98} the court found the “conduct of the plaintiff constituted an implied promise to forbear employment and provide household services for the defendant over [twenty-eight] years in consideration for his implied conduct and promise to provide a home and future support.”\textsuperscript{99} The court awarded her alimony \textit{pendente lite}\textsuperscript{100} in the amount of $50 per week, $50 per week in child support for the parties’ minor child, and $750 in temporary counsel fees.\textsuperscript{101}

While the \textit{McCullon} court did not refer to the plaintiff’s award as ‘palimony,’ it cited \textit{Marvin}\textsuperscript{102} throughout the opinion, and relied on the California Supreme Court’s reasoning in fashioning its outcome.\textsuperscript{103} It seems likely the result would have been the same had the parties never entered a common law marriage in Pennsylvania, but instead lived as unmarried cohabitants for twenty-eight years in New York.\textsuperscript{104} The court, while certainly not approving of every non-marital relationship, recognized “that in certain cases exceptions should be made where circumstances warrant such action.”\textsuperscript{105}

Similarly, in \textit{Kozlowski v. Kozlowski},\textsuperscript{106} the Supreme Court of New Jersey cited the reasoning followed in \textit{Marvin}\textsuperscript{107} as “persuasive.”\textsuperscript{108} The \textit{Kozlowski} court found that while the plaintiff, Irma Kozlowski was not entitled to a share of defendant’s accumulated assets, alimony, or equitable distribution, there was an enforceable express agreement between the parties, and thus, she was “entitled to a one-time lump sum judgment in an amount predicated upon the present value of the reasonable future support defendant promised to provide.”\textsuperscript{109} The parties cohabited for fifteen years, from 1962 until 1977.\textsuperscript{110} In 1968, after a brief separation, defendant, Thaddeus Kozlowski, urged Irma to return to their home and said he would provide for her for the rest of her life.\textsuperscript{111} Irma, in turn, agreed to run

\begin{footnotes}
\item[97] \textit{Id.} at 973.
\item[99] \textit{McCullon}, 410 N.Y.S.2d at 228.
\item[100] Alimony \textit{pendente lite} means alimony “pending litigation” or temporary alimony. \textsc{Black’s Law Dictionary} (9th ed. 2009).
\item[101] \textit{McCullon}, 410 N.Y.S.2d, at 228.
\item[102] \textit{Marvin}, 557 P.2d at 106.
\item[103] \textit{McCullon}, 410 N.Y.S.2d, at 228-231.
\item[104] \textit{Id.} at 229. “Although this Court is not prepared to place its stamp of approval on every non-marital relationship, it is obvious from the review of the court decisions and legislative mandates, that in certain cases exceptions should be made where circumstances warrant such action.” \textit{Id.}
\item[105] \textit{Id.}
\item[107] \textit{Marvin}, 557 P.2d at 106.
\item[108] \textit{Kozlowski}, 403 A.2d at 902. “We conclude that the reasoning followed in Marvin is particularly persuasive upon the allegations here pleaded wherein plaintiff has alleged facts which demonstrate a stable family relationship extending over a long period of time.” \textit{Id.}
\item[109] \textit{Id.}
\item[110] \textit{Id.}
\item[111] \textit{Id.}
\end{footnotes}
the household, providing such services as housekeeping, grocery shopping, acting as mother to his children, and accompanying him to business functions.\textsuperscript{112}

The New Jersey Supreme Court, which, like the courts in California, was known for its liberal enforcement of palimony suits,\textsuperscript{113} commented on the country’s evolving social norms: “[t]he 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.”\textsuperscript{114} While “[p]alimony did not become an example of ‘as California goes, so goes the nation,’” by 1979, the year Kozlowski was decided, appellate courts in states including Oregon, Minnesota, Washington, Illinois, Connecticut, and Michigan recognized contracts between non-marital partners.\textsuperscript{115} Importantly, “cohabitation was still against the law in more than [twenty] states, so it was unlikely their courts would enforce a contract based on an illegal relationship.”\textsuperscript{116}

In Ohio, where cohabitation was neither against the law nor condoned by the judiciary, palimony claims are unenforceable.\textsuperscript{117} Nevertheless, a litigant might still make equitable arguments before a court. In Lauper v. Harold,\textsuperscript{118} the Court of Appeals of Ohio, while unwilling to recognize plaintiff’s claim,\textsuperscript{119} was still able to accomplish what it considered a just result, thereby granting the plaintiff some relief. Plaintiff, Joy Lauper, brought suit against defendant, Neddie Harold, to recover damages—$40,000 in actual damages and $10,000 in putative damages—based on a theory of unjust enrichment.\textsuperscript{120} The parties cohabited for five years, during which time Lauper made mortgage payments on their home, cooked and cleaned for Harold, “paid for all utilities associated with the residence,” and “made approximately ten monthly car payments” on a car they “acquired after moving to the new home.”\textsuperscript{121} The trial court awarded Lauper $3,200: $1,000 for Harold’s car payments; $800 worth of furniture she sold or disposed of before moving in with defendant; and $1,400 for lost wages.\textsuperscript{122} Citing Marvin,\textsuperscript{123} the judge reasoned that

\textsuperscript{112} Id. at 905.
\textsuperscript{113} “In New Jersey, which, along with California, has taken the lead in recognizing the viability of palimony support actions, the courts have recognized that the appropriate forum for such an action is the Family Part of the Superior Court (§ 10).” William H. Danne, Jr., Annotation, “Palimony” Actions for Support Following Termination of Nonmarital Relationships, 21 A.L.R. 6TH § 10 at 351 (2007).
\textsuperscript{114} Kozlowski, 403 A.2d at 902.
\textsuperscript{115} Avins, supra note 30.
\textsuperscript{116} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id. at 474.
\textsuperscript{121} Id.
\textsuperscript{122} Id. at 473. When the parties moved, Lauper requested to be transferred to the office closer to their new home. “Her request was granted, but she was forced to take a ten percent per hour cut in pay. Appellee also asserted that the yearly raises and bonuses were not as high at the Hamilton office as at Golf Manor, and estimated that the job switch cost her approximately $3,000 per year.” Id.
cohabitants’ interests should be “determined according to their contributions of labor and capital,” effectively giving the parties the same relief, as they would receive if they were married.124

The Court of Appeals of Ohio rejected the trial court’s reasoning, claiming Marvin125 and other cases cited in support of its decision “recognize[d] a new legal status” for cohabitants that Ohio did not condone.126 It acknowledged, however, “that in any type of relationship . . . there exists the possibility that one party may become unjustly enriched at the expense of the other,” and evaluated the trial court’s order as though the parties’ contract was “between friends, neighbors, business associates or otherwise.”127 It found that Lauper was not entitled to an award representing the value of the furniture she sold prior to cohabiting with Harold, or the amount of lost wages resulting from her changing jobs, since “both involved decisions [she] made of her own accord.”128 Nevertheless, it affirmed the trial court’s holding that Harold was unjustly enriched by her payments for his car, since he continued possession of it after the parties no longer lived together.129

While the court made clear that it was strongly opposed to granting unmarried cohabitants the same rights as married couples, in this case it chose to overlook that hurdle and allowed Lauper to recover on a basic contract theory of unjust enrichment.130 The fact that she sold her furniture and took a lesser salary to live with the defendant was not grounds for reimbursement,131 and furthermore, was outside the scope of the court’s inquiry. Although it is possible that she did these things because she was acting in accordance with an implied contract, the court plainly stated that such an agreement could not be the basis of a claim for damages.132

In Wilcox v. Trautz,133 the Supreme Judicial Court of Massachusetts was far less explicit, leaving unanswered questions “regarding the enforceability of oral agreements, whether recovery is permissible on implied contracts, and whether recovery by equitable means is possible.”134 The court did, however, hold that cohabitants had the right to recover on written contracts,135 bringing to mind the aforementioned New Jersey amendment enacted some twelve years later.

124 Lauper, 492 N.E.2d at 474.
125 Marvin, 557 P.2d at 106.
126 Lauper, 492 N.E.2d at 472.
127 Id.
128 Id.
129 Id.
130 Id.
131 Id.
132 Lauper, 492 N.E.2d at 475.
135 Wilcox, 693 N.E.2d at 145 (emphasis added).
In *Wilcox*, plaintiff Carol A. Wilcox and defendant John G. Trautz lived together as an unmarried couple for approximately twenty-five years. They resided in two different houses, neither of which Wilcox, who earned less money than Trautz, had title. For most of their relationship, she contributed twenty-five dollars per week “toward general household expenses,” and “some of her income toward the maintenance and improvement of the parties’ home.” Throughout their relationship, she “performed household duties, including all the food and clothes shopping, which she paid for solely from her earnings, as well as all of the cooking, cleaning, and laundry.” Her contributions enabled Trautz to purchase real estate and an airplane.

In March 1989, Trautz sought “legal advice regarding the parties’ rights with respect to the assets acquired during the relationship,” after he learned Wilcox had an affair. His attorney drafted an agreement outlining the parties’ individual rights. Trautz owned the majority of the couple’s properties and bank accounts. Wilcox signed the agreement without first seeking counsel, but fully aware of the principal assets and each of the parties’ financial statuses.

The agreement provided that the she must leave the couple’s home (owned by Trautz) within thirty days after he requested her to do so. In 1992, when he found out she had another affair he gave her thirty days notice. At the end of thirty days, she refused to leave. She filed a complaint in the Probate and Family Court, seeking a declaration that the agreement was invalid, as well as an injunction to prevent him from transferring or encumbering their primary residence. Additionally, she sought palimony in the form of “a constructive trust in a one-half interest in the home, or alternatively, damages on a theory of implied promise or quantum meruit.”

The trial court held “that the contract violated public policy because its sole purpose was to secure the sexual fidelity of the plaintiff” and awarded her

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136 *Id.*
137 *Id.*
138 *Id.*
139 *Id.*
140 *Id.*
141 *Wilcox*, 693 N.E.2d at 143.
142 *Id.*
143 *Id.* at 144.
144 *Id.*
145 *Id.*
146 *Id.*
147 *Wilcox*, 693 N.E.2d at 144
148 *Id.*
149 *Id.*
150 Campbell, *supra* note 134, at 496-97. While the court never referred to “palimony,” for all intents and purposes, that is what plaintiff was seeking. *Id.*
151 *Wilcox*, 693 N.E.2d at 144.
$30,000 on a theory of quantum meruit.\footnote{152} The Supreme Judicial Court of Massachusetts disagreed, finding that while Wilcox’s infidelity is what led Trautz to seek legal advice, “no evidence showed that the only or dominant purpose of the agreement was to secure the plaintiff’s sexual fidelity, or that ‘sexual relations were an inherent aspect of the agreement or a serious and not merely an incidental part of the performance of the agreement’.”\footnote{153} The agreement explicitly stated its intent “to protect and define each other’s rights pertaining to past and future services rendered, earnings, accumulated property and furnishings and other matters that may be contained herein.”\footnote{154} Because the contract was now deemed enforceable, Wilcox was deprived of any recovery.\footnote{155}

Effectively, the court adopted “the view that unmarried cohabitants may lawfully contract concerning property, financial, and other matters relevant to their relationship.”\footnote{156} These contracts would be “subject to the rules of contract law,” and valid even if made in contemplation of cohabitation.\footnote{157} This appears to be the prevailing view in most jurisdictions today. The decision was significant, considering “[h]istorically, many states refused to enforce cohabitation agreements,” including Massachusetts.\footnote{158}

\textit{C. Palimony Suits Between Same-Sex Couples (Prior to 2000)}

Palimony suits can be especially complicated in states that do not recognize same-sex domestic partnerships, let alone same-sex marriages. One such state, Texas, amended its statute of frauds in 1987 to prohibit all unwritten palimony agreements involving relationships that continued after the amendment’s effective date.\footnote{159} The affirmed purpose of the amendment was to end the “abusive use of palimony suits.”\footnote{160}

In \textit{Zaremba v. Cliburn},\footnote{161} plaintiff Thomas E. Zaremba filed suit against renowned pianist Harvey Lavan Cliburn, Jr., better known as Van Cliburn.\footnote{162} The parties lived together for seventeen years and Zaremba alleged that “he, either orally or impliedly, agreed to provide services like shopping, doing the mail, paying the bills, drafting checks, co-managing the household, and dealing with accountants, creditors, and real estate agents in exchange for a share in Cliburn’s

\begin{footnotes}
\footnote{152} Id. at 143.
\footnote{153} Id. at 146-47.
\footnote{154} Id. at 147.
\footnote{155} Id. at 148.
\footnote{156} Id. at 146.
\footnote{157} Wilcox, 693 N.E.2d at 146.
\footnote{158} Campbell, \textit{supra} note 134, at 488.
\footnote{159} See \textit{TEX. BUS. & COM. CODE ANN.} § 26.01(b)(3) (West 2005).
\footnote{160} See 1987 Tex. Sess. Law Serv. 551 (West); see also \textit{Zaremba v. Cliburn}, 949 S.W.2d 822, 826 (Tex. App. 1997).
\footnote{161} \textsl{Zaremba}, 949 S.W.2d at 822.
\footnote{162} Id.
\end{footnotes}
After Cliburn ended their relationship, Zaremba did not receive any partnership assets or income. The trial court dismissed Zaremba’s lawsuit because his claims, which arose from the parties’ implied partnership agreement, were “barred by the statute of frauds.” Zaremba argued that the 1987 amendment should be applied prospectively, since the Texas legislature did not expressly make it retroactive. The Court of Appeals of Texas rejected this argument. The court held that “had [the parties] intended this purported agreement to be enforced, they had seven years after the amendment of the statute of frauds to memorialize it in writing,” since their relationship continued seven years past the date of the statute’s enactment. Other jurisdictions that have created similar amendments, including New Jersey, have chosen to apply them prospectively, based on a general rule of statutory construction. The Texas court further justified its holding “[i]n light of the Legislature’s plain intent to ‘kill palimony,’” as this was “a ‘palimony’ suit by nature.”

Interestingly, the Zaremba court makes no mention of the couple’s sexual orientation in the opinion, instead choosing to base its dismissal of the plaintiff’s claim on contractual principles and a particular theory of statutory interpretation. While, as previously noted, the Texas legislature intended to stop the excessive filing of palimony suits, it is likely that the state’s moral beliefs played some role in the outcome of the decision, considering that “under Texas law there can be no marriage, including common-law marriage, between two persons of the same sex.” Marriages or civil unions between same-sex couples are considered contrary to public policy and void in the state.

Other states, like Florida, which prohibit same-sex marriages and same-sex adoptions, will enforce cohabitation agreements between homosexual couples. In Posik v. Layton, the District Court of Appeals of Florida upheld “a support

163 Id.
164 Id.
165 Id.
166 Id.
167 Zaremba, 949 S.W.2d at 827.
168 Id.
170 Zaremba, 949 S.W.2d at 827.
171 Id. at 826.
172 Id. at 827.
176 Id.
agreement much like a prenuptial agreement” between plaintiff, Emma Posik, and defendant, Nancy L.R. Layton. The agreement was drafted by a lawyer and appropriately witnessed. Posik required the agreement as a condition of her leaving her job and selling her home to relocate with Layton, a doctor, who decided to move her practice to a different county. Layton “agreed that she would provide essentially all of the support for the two, would make a will leaving her entire estate to [Posik], and would maintain bank accounts and other investments” in her name. Posik, in return, agreed to maintain and care for the couple’s home. If Layton violated the terms of the agreement, she agreed to pay Posik $2,500 per month for the rest of her life.

Four years after they moved, Layton breached the agreement when she began a romantic relationship with another woman. Posik sued to enforce the support agreement. While the District Court of Appeal acknowledged that Florida law “creates no legal rights or duties between live-ins,” it held “the State has not denied these individuals their right to either will their property as they see fit nor to privately commit by contract to spend their money as they choose.” In ordering Layton to pay Posik $2,500 in palimony per month, the court made clear it was not “condoning the lifestyles of homosexuals or unmarried live-ins,” but “merely recognizing their constitutional private property and contract rights.”

Florida’s statute of frauds, like all other states’, “requires that contracts made upon consideration of marriage must be in writing.” While the requirement applies to pre-nuptial agreements, the Posik court suggested it also applies “to non-marital, nuptial-like agreements,” between both heterosexual and homosexual couples. Considering that the parties could not have legally married in Florida, nor would their marriage be recognized there if they married in another state, the court could have been hinting that the state should grant unmarried cohabitants greater protections under the law. At the very least, the court was reinforcing the fact that any couple who contracts “for a permanent sharing of, and

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177 Id.
178 Id.
179 Id. at 760.
180 Id.
181 Posik, 695 So.2d at 760.
182 Id.
183 Id.
184 Id.
185 Id. at 761 (quoting Lowry v. Lowry, 512 So.2d 1142 (Fla. Dist. Ct. App. 1987)).
186 Id. (internal quotation marks omitted).
187 Posik, 695 So.2d at 761.
188 FLA. STAT. § 725.01 (2013).
189 Posik, 695 So.2d at 762.
190 Id.
191 In 1997, the Florida Legislature overwhelmingly adopted the Florida Defense of Marriage Act, codified as FLA. STAT. § 741.212 (1997).
participants in, one another’s lives” should not be denied certain rights and obligations.

If New York amends its statute of frauds to require that palimony agreements be written and enforceable only after both parties seek the advice of counsel, or, alternatively, amends section 236(B)(3) of the Domestic Relations Law, the same rules should apply to both heterosexual and same-sex couples. Traditionally, New York courts have “emphatically rejected” the Supreme Court of California’s approach from Marvin in awarding palimony to the plaintiff, but are willing to enforce an unmarried couple’s “express agreement (but not an implied contract) within the normal rules of contract law based on consideration other than sex.”

As it stands now, the law in New York would uphold such contracts for same-sex couples.

For example, in Silver v. Starrett, the Supreme Court of New York County upheld a lesbian couple’s non-marital separation agreement that stipulated the defendant, Barbara Starrett, pay the plaintiff, Ann Silver, palimony for five years. Silver sued Starrett, her former partner of fourteen years, when three years after the termination of their relationship, she stopped making payments. Starrett claimed the agreement was “void and unenforceable for duress and lack of consideration.” The court found that the idea for such an agreement with the payout component came from Starrett, and that she actually drafted the agreement herself. Additionally, “both parties were represented by counsel in the negotiations,” and “the agreement was presented to [plaintiff] on a ‘take it or leave it’ basis.”

The court ultimately found no evidence of duress or lack of consideration and upheld the contract, ordering Starrett to pay Silver for the fourth and fifth years. Furthermore, she was ordered to pay Silver’s attorney’s fees, as per the agreement, which stated “that in the event one party is compelled to commence litigation to enforce the contract,” the prevailing party would be awarded all costs. Significantly, this agreement would have been upheld today under New Jersey’s recently amended statute as the agreement was in writing and both parties sought individual counsel.
II. THE CURRENT STATE OF PALIMONY: CASES FROM 2000 UNTIL THE PRESENT

Recently, “multiple states have concluded that support obligations may be agreed by contract, express or implied. If a support-for-life agreement is violated, money damages are owed, measured by the reasonable actuarially-determined lifetime support needs of the cohabitant.” The public policy reasons behind this could be the same as those behind granting maintenance or alimony—namely, that lawmakers do not want non-moneyed cohabitants to become a public charge and leave people destitute, especially if they previously sacrificed their own careers to stay home and raise children and/or maintain the couple’s home. Additionally, the receiving partner should be able “to maintain to the extent possible the standard of living enjoyed” throughout the relationship. One possible argument is that it is not fair for them to be thrown back into the workforce after having been out of it for a significant period of time. Some states, such as California and New Jersey, prior to the latter legislature’s enactment of N.J.S.A. 25:1-5(h), are considerably liberal in enforcing palimony claims. Additionally, “[m]any jurisdictions, even in states which do not recognize common-law marriage, now enforce express or implied agreements between unmarried cohabitants.”

In the aforementioned New Jersey case, In re Estate of Roccamonte, which was decided before the amendment to the Statute of Frauds was passed, the Supreme Court of New Jersey held that “the entry into [a marital-type] relationship and then conducting oneself in accordance with its unique character is consideration warranting enforcement of a promise of support.” In the previously discussed case of Devaney, decided prior to the amendment, the New Jersey Supreme Court held cohabitation was not a required element for a palimony action, instead stating: “it is the promise to support, expressed or implied, coupled with a marital-type relationship, that are the indispensable elements to support a valid claim for palimony.”

In other states, such as Indiana and Ohio, where the legislatures prohibit common law marriages, and palimony agreements are contrary to public

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204 Id.
205 Danne, supra note 113, at 14. “In New Jersey, which, along with California, has taken the lead in recognizing the viability of palimony support actions…” Id.
207 In re Estate of Roccamonte, 808 A.2d 838 (N.J. 2002).
210 Id.
211 “[Ohio] has steadily retreated from recognizing property interests in romantic relationships. For instance, amatory causes of action were abolished in 1978 through R.C. 2305.29. See also Strock v. Pressnell, 527 N.E.2d 1235 (Ohio 1988), and common-law marriages were prohibited in Ohio by
policy, some courts are still willing to enforce support contracts between unmarried cohabitants. As one practitioner noted, “despite what the law says, there may be other grounds for seeking restitution or righting a situation. The goal is to achieve equity and fairness.”

In *Putz v. Allie*, the Court of Appeals of Indiana enforced a contract the parties entered into “upon the termination of their eleven years of cohabitation,” which “provided in pertinent part that [defendant, Gregory J.] Putz would pay [plaintiff, Debra A.] Allie the sum of forty thousand dollars in installments over six years,” in addition to paying her “health insurance and car payments for one year, and pay[ing] off three charge accounts in [her] name.” Rather than looking at the installment payments as palimony, the appellate court upheld the trial court’s notion that the contract “may be construed as an agreement fixing liquidated damages in lieu of an unjust enrichment claim by Allie.” The parties had pooled their money throughout the course of their relationship, during which time Allie rendered unpaid services in Putz’s jewelry store for three to five days per week. Additionally, they “exerted joint efforts to make the jewelry store a success, and incurred various liabilities (some of which were credit card cash advances on Allie’s cards to increase cash flow into the business).” While the court’s enforcement of the parties’ contract certainly seems like the most just outcome, it is reasonable that one could interpret the agreement as a contract for the payment of palimony, as Allie testified at a hearing that “the contract rested upon no consideration independent of the parties’ relationship.”

In *Williams v. Ormsby*, however, the Supreme Court of Ohio was not willing to carve out such an exception to Ohio’s general aversion to palimony agreements. The court reversed the lower court’s judgment, finding that the former couple’s moving into a home together and maintaining a relationship cannot constitute consideration sufficient to support a contract, as “palimony is not

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213 Id.
214 Id. at 580.
216 Putz, 785 N.E.2d at 577.
217 Id. at 578.
218 Id. at 581.
219 Id.
220 Id.
221 Id. at 579-81.
222 Williams v. Ormsby, 966 N.E.2d 255 (Ohio 2012).
223 Id.
224 Id. at 257.
recognized by Ohio statute or common law, and Ohio does not permit a division of assets or property based on cohabitation.”

III. PALIMONY IN NEW YORK STATE

While the Supreme Court of New York County upheld the parties’ contract for support payments in Silver, New York courts have “emphatically rejected” the approach of the California Supreme Court in Marvin, “award[ing] a non-marital party, on her claim of palimony, an amount of money to enable her to get started again after a breakup.” Courts have, however, “long accepted the concept that an express agreement between unmarried persons living together is as enforceable as though they were not living together, provided only that illicit sexual relations were not part of the consideration of the contract.” In other words, there is no palimony under New York law, but there are equitable arguments one could make based on theories of unjust enrichment, quantum meruit, quasi contract, and equitable estoppel, provided the suit is not based on a meretricious relationship. Nevertheless, considering “implied understandings are simply inadequate” coupled with the fact that “virtually all cohabitation cases are based on alleged oral promises,” New York practitioners face “significant proof problems” when it comes to palimony claims.

In Morone v. Morone, the New York Court of Appeals described the difficulty courts face in trying to find an implied in fact contract between cohabitants:

[Personal services will frequently be rendered by two people living together because they value each other’s company or because they find it a convenient or rewarding thing to do. For courts to attempt through hindsight to sort out the intentions of the parties . . . runs too great a risk of error. . . . There is . . . 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.

Plaintiff, Frances Morone, sued defendant, Frank Morone, to recover for domestic services she performed at the residence they shared for more than twenty years.

225 Id. at 263.
228 Silver, 674 N.Y.S.2d at 915 (quotation marks omitted).
229 Morone v. Morone, 413 N.E.2d 1154 (N.Y. 1980) (citations omitted) (quotation marks omitted)).
230 Sternklar, supra note 63.
231 Morone, 413 N.E.2d at 1154.
233 Morone, 413 N.E.2d at 1157.
234 Id.
The parties “held themselves out to the community as husband and wife” and had two children together. Her first cause of action alleged that throughout their relationship, she “performed domestic duties and business services at the request of defendant with the expectation that she would receive full compensation for them, and that defendant . . . always accepted her services knowing that she expected compensation for them.” Her second cause of action claimed that at the inception of their relationship, “she and the defendant entered into a partnership agreement by which they orally agreed . . . that defendant would support, maintain and provide for plaintiff in accordance with his earning capacity and that defendant further agreed on his part to take care of the plaintiff and do right by her, and that the net profits from the partnership were to be used for and applied to the[ir] equal benefit.”

The court, which held that the first cause of action was properly dismissed in the lower court, found that contracts as to earnings and assets may not be implied in fact from the relationship of an unmarried couple living together. Regarding the second cause of action, however, the court held that the plaintiff should be afforded the opportunity to prove the alleged agreement and the defendant’s breach. The court stated the parties were “free to contract with each other in relation to personal services, including domestic or ‘housewifely’ services,” and there is “no statutory requirement that such a contract . . . be in writing.”

Unlike the Court of Appeals in Morone, in Moors v. Hall, the Second Department Appellate Term was willing to uphold an implied contract between unmarried parties with a romantic relationship. Plaintiff, Mary Moors, sued defendant, Donald Hall, “in quantum meruit to recover the value of domestic services rendered by the plaintiff to the defendant” during the twenty years they were romantically involved. Moors conceded that there was no express contract between them, and did not contest Hall’s argument “that even if such a contract could be established, it would be violative of the Statute of Frauds,” since by its terms, the contract could not be “performed within one year from the making thereof” and was not in writing. She argued, however, that New York courts

\[ \text{Id. at 1155.} \]
\[ \text{Id.} \]
\[ \text{Id. (quotation marks omitted).} \]
\[ \text{Id. at 1158.} \]
\[ \text{Morone, 413 N.E.2d at 1154.} \]
\[ \text{Id. at 1154; see also N.Y. GENERAL OBLIGATIONS LAW § 5-701 (McKinney 2002), subdiv. a, paras. 1, 3.} \]
\[ \text{Morone, 413 N.E.2d at 1154.} \]
\[ \text{Id. (emphasis added).} \]
\[ \text{Id. at 413.} \]
\[ \text{Id. at 414.} \]
\[ \text{See N.Y. GENERAL OBLIGATIONS LAW § 5-701 (McKinney 2002). The purpose of New York’s Statute of Frauds is “to protect people from alleged contractual obligations not supported by written} \]
have recognized “[t]he fact that an express contract is unenforceable because of its failure to comply with the Statute of Frauds does not mean that quasi-contractual recovery for the reasonable value of services rendered is, therefore, necessarily unavailable.”247

The Second Department agreed and found that Moors “presented sufficient evidence for the jury to have found that [she] established her right to . . . recovery.”248 The court reasoned that while the Court of Appeals in Morone249 held that New York “does not recognize the right to receive compensation under an implied contract for domestic services rendered between an unmarried couple who live together,”250 Moors was factually distinguishable because “the parties always maintained separate residences throughout their relationship.”251 Further, the court concluded that “the analysis in Morone . . . clearly indicates that the court’s ruling was limited to unmarried couples who cohabitate” and did not prevent recovery in the case at bar.252

In most decisions following Morone, however, New York courts were not as liberal.253 For instance, in Kastil v. Carro,254 the First Department Appellate Term dismissed Elaine D. Kastil’s claims against Melvin Carro, based mostly on his alleged oral promise “to provide for her economic security for life.”255 The agreement arose from the parties’ ten-year “personal and sexual relationship”256 that “consisted of [plaintiff] primarily acting as his sexual partner, social companion, ‘surrogate mother’ to his mentally disabled daughter, and as his conduit for information about ‘office politics.’”257 Carro paid Kastil $5,000 per month for approximately ten months, but then refused to continue paying, which caused her to commence the action.258

Despite evidence in the form of past payments that there was indeed a contract, the court refused to uphold the alleged agreement.259 Citing Morone,260 the court reasoned that, “illicit sexual relations cannot provide part of the

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248 Id.
250 Moors, 532 N.Y.S.2d at 412.
251 Id.
252 Id.
253 Sternklor, supra note 63.
255 Id.
256 Id.
257 Id.
258 Id. “Mr. Carro paid plaintiff $15,000 in December 1983, $16,000 in February 1984, and, $1,700 in approximately April 1984, and in May 1984, although plaintiff was not employed, Mr. Carro informed her no further payments would be made.” Id.
259 Kastil, 536 N.Y.S.2d at 63.
consideration for a contract." Additionally, the court noted "the general rule is that past consideration is no consideration," and Kastil contended that Carro agreed "to provide payment for [her] past services, performed during the relationship," which ended prior to the formation of the contract. The court pointed out an exception to the general rule in New York’s General Obligations Law § 5-1105, "which provides that a written agreement, which is signed by the promisor and expresses in the writing the past consideration, will not be denied effect as a valid contractual obligation." Nevertheless, even if the parties’ alleged that the contract was in writing, it would likely not have been enforced, due not only to the sexual nature of their relationship, but also, "the fact that the defendant had been married to another woman during the entire time that he was involved with [plaintiff]."

Assuming that neither of the parties is married, there are still difficult legal hurdles the plaintiff must overcome to prove there was a contract. "Oral contracts that are vague or indefinite" will not satisfy the express agreement requirement. In Dombrowski v. Somers, the Court of Appeals of New York held "[t]he words to 'take care of' . . . are too vague to spell out a meaningful promise." Similarly, in Cohn v. Levy, the Second Department Appellate Term found the plaintiff’s testimony that on several occasions defendant had promised to “take care of [her] in a very comfortable way” was too vague to support her contract claim for lifetime maintenance.

IV. NEW JERSEY AMENDMENT AND ITS IMPACT ON SUBSEQUENT PALIMONY SUITS

New Jersey Amendment N.J.S.A. 25:1-5(h), which became effective January 18, 2010, requires palimony agreements, namely “[a] promise by one party...”

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261 Kastil, 536 N.Y.S.2d at 63.
262 Id. (citations omitted) (quotation marks omitted).
263 Id.
264 Sternklar, supra note 64. “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—with the word carefully avoided.” Kastil, 536 N.Y.S.2d at 63.
266 Sternklar, supra note 63.
267 Id.
269 Id.
271 Id.
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,” to be in writing and reviewed by an attorney.273 Previously, “palimony could have been based upon an express promise and also could have been based on conduct—as an implied promise—even though the words were never spoken.”274 The statute essentially “closes a loophole in state law that has allowed palimony claims even when unmarried couples never lived together or did not put their promises of support in writing.”275 Following its enactment, much debate and litigation arose “over whether the law applied to pending palimony claims,” as “courts were split on whether pending claims should continue or whether they should be dismissed.”276

In Botis v. Estate of Kudrick,277 the Superior Court of New Jersey, Appellate Division, “definitively held that the statute was to only be applied prospectively.”278 Botis279 is among the most notable cases to be decided after the amendment was passed. Plaintiff, Barbara A. Botis, and decedent Gary G. Kudrick never married, but cohabited “and shared a life as if they were husband and wife” for most of their thirty-two year relationship.280 When Kudrick died from cancer, Botis “learned that no provision had been made for her in his will and that his entire estate had been left to his daughter and grandchildren, contrary to [his] prior representations to [her].”281 She claimed he “promised [her] that he would always take care of her and that in the event of his death, she would be cared for consistent with the lifestyle that they shared together.”282 She filed suit against Kudrick’s estate for palimony and transfer of title of the couple’s two homes to her.283

The Appellate Division reiterated the notion that unlike New York, “[New Jersey] courts have regarded [palimony] as a cognizable legal claim for over thirty years,” and “the entry into [a marital-type] relationship and then conducting oneself in accordance with its unique character is consideration warranting enforcement of a promise of support.”284 The court found the statute’s “language provides no clear indication as to whether the Legislature intended the amendment to apply to claims that were pending on the date of its enactment,” and that absent such indication, New Jersey courts follow “a general rule of statutory construction that favors

273 Id.
275 Livio, supra note 1.
276 Solotoff, supra note 1.
278 Solotoff, supra note 1.
279 Botis, 22 A.3d at 975.
280 Id. at 977.
281 Id. (quotation marks omitted).
282 Id. (quotation marks omitted).
283 Solotoff, supra note 1.
284 Botis, 22 A.3d at 975.
prospective application of statutes."\textsuperscript{285} The court held that "[n]either plaintiff nor decedent could reasonably have anticipated the prerequisites to enforcement of a palimony promise during the time when they were in a position to create such a document."\textsuperscript{286}

On the other hand, in \textit{Cavalli v. Arena},\textsuperscript{287} another case decided after the statute was enacted, the Superior Court of New Jersey held that the amendment did apply to the plaintiff’s palimony claim.\textsuperscript{288} In this case, however, the complaint was filed after the statute’s effective date, and alleged a breach that occurred after its effective date as well.\textsuperscript{289}

In cases that fall into a grey area, courts have been seemingly determined to effectuate fairness.\textsuperscript{290} For instance, in \textit{Fernandes v. Arantes},\textsuperscript{291} the court awarded the plaintiff, Carlos Fernandes, palimony even though his amended complaint was filed after the statute was passed.\textsuperscript{292} Fernandes originally filed a palimony suit against defendant, Lauro Arantes, prior to the law’s effective date.\textsuperscript{293} He later filed an amended complaint in February 2011.\textsuperscript{294} The trial judge recognized the parties’ “marital-type relationship,” and said, “[p]arties who entered into these kinds of relationships usually do not record their understanding in specific legalese.”\textsuperscript{295}

More recently, in \textit{Maeker v. Ross},\textsuperscript{296} the Superior Court of New Jersey, Appellate Division held that, “[t]he fact that there was an implied promise for support [between the parties], made many years before [the couple split up], didn’t matter.”\textsuperscript{297} The parties lived together for more than ten years, with defendant, William S. Ross, providing plaintiff, Beverly Maeker, with full financial support.\textsuperscript{298} The Appellate Division reversed the trial court’s holding, which granted Maeker \textit{pendente lite} support and allowed her palimony suit to go forward, “reasoning that since the relationship itself began long before 2010, the law didn’t apply.”\textsuperscript{299} Maeker’s attorney appealed to the New Jersey Supreme Court.\textsuperscript{300}

\textsuperscript{285} \textit{Id}. at 977(citations omitted) (quotation marks omitted).
\textsuperscript{286} \textit{Id}. (citations omitted).
\textsuperscript{288} \textit{Id}. at 253.
\textsuperscript{289} \textit{Id}.
\textsuperscript{291} Gialanella, \textit{supra} note 169.
\textsuperscript{292} Fava, \textit{supra} note 290.
\textsuperscript{293} \textit{Id}.
\textsuperscript{294} Gialanella, \textit{supra} note 169.
\textsuperscript{295} \textit{Id}.
\textsuperscript{297} Bowman, \textit{supra} note 274.
\textsuperscript{298} \textit{Maeker}, 62 A.3d at 312.
\textsuperscript{299} Bowman, \textit{supra} note 274.
\textsuperscript{300} \textit{Id}.
Additionally, in August 2013, New Jersey Superior Court Judge Ned Rosenberg held that Roscoe Orman, better known as “Gordon” on “Sesame Street,” must continue paying palimony to Sharon Joiner-Orman, his former partner of 39 years and the mother of his four children. Joiner-Orman maintains Orman made an “unwritten promise to provide for her the rest of her life” long before N.J.S.A. 25:1-5(h) was passed. The parties split in March 2010, approximately two months after its enactment, and “Rosenberg’s ruling is believed to be the first time that a state judge has recognized such an exception to the 2010 amendment to the Statute of Frauds.” Orman’s attorney promised to appeal the decision, claiming that, “[t]o enforce this contract violates the very purpose and language of the statute.”

V. WHY NEW YORK SHOULD AMEND ITS LAW

As one matrimonial practitioner in New York City noted, “[t]he rights and obligations of unmarried partners vary significantly from state to state, and in some cases, mirror the rights and obligations of married spouses.” While in some states, such as New Jersey, courts have been liberal in enforcing palimony claims, the opposite is true in New York. This is somewhat surprising given the geographic proximity of these two states, and that the latter is considered to be among the most liberal states in the country. Courts in both jurisdictions previously looked to the other for guidance based on similar modes of thinking, at least in the matrimonial context. Either there are significant reasons New York continues not to support the enforcement of palimony claims, or the law is simply antiquated.

302 Id.
303 Id.
304 Id.
306 “Courts in several states, including New Jersey, award palimony based on representations sometimes oral, sometimes implied, from one unmarried partner to another, that he or she would be provided for in the future. The obligor partner need not be alive to pay palimony. Unmarried partners have successfully litigated palimony suits against the estates of predeceased partners.” Id.
In New York there is no law “that requires either member of an unmarried relationship to pay alimony after a break up.”309 Furthermore, the state does not provide any straightforward guidelines regarding the rights of non-married, cohabiting couples.310 If one of the parties is “financially disadvantaged,” New York “presently decline[s] to attach legal significance to any relationship not solemnized in marriage.”311 Additionally, “New York courts will not redistribute property acquired during a marital-like relationship or award palimony . . . to an unmarried partner.”312

Given that unmarried cohabitation has become increasingly widespread throughout the United States,313 and that New York appears to be in sync with the nationwide trend, one would expect that the number of cohabitation agreements in New York would also be on the rise. While that proposition has not been proven, in New York, “[j]ust about any arrangement” that a couple decides upon will be enforced, “provided they reflect the free and informed agreement of the parties and contain no illegal terms.”314 Of course, some unmarried couples may be unlikely to enter into these types of agreements if doing so defies the “non-committal” essence of their relationships.315

While New York courts will enforce cohabitation agreements for one party to provide most of the financial consideration,316 case law tells us they are less keen to enforce palimony claims between parties without a cohabitation agreement.317 Given the lack of clear-cut guidelines, coupled with the increasing cohabitation rate318 and the fact that many couples do not have cohabitation agreements, New York should adopt a law similar to that of New Jersey Amendment N.J.S.A. 25:1-5(h). The law could go into the state’s Statute of Frauds, or, alternatively, in section 236(B)(3) of New York’s Domestic Relations Law, which deals with pre-

311 Cohen, supra note 301.
312 Id.
313 “Cohabitation in the United States has increased by more than 1,500 percent in the past half century. In 1960, about 450,000 unmarried couples lived together. Now the number is more than 7.5 million.” Jay, supra note 46.
314 LEININGER, supra note 310.
315 Cohen, supra note 305.
316 See Carnuccio v. Upton, 790 N.Y.S.2d 15 (App. Div. 2005). (“Although the 1983 domestic partnership agreement called for defendant to provide most of the financial consideration, plaintiff was to provide his time and talents in renovating, maintaining and repairing the property, which had been purchased jointly. The parties also agreed to execute wills mutually bequeathing their interest in the property to the other, and the income collected from a rental portion of the property was to be applied to the maintenance charges. Thus, there was sufficient consideration for the agreement.”) Id. at 15.
317 See Sternklar, supra note 63.
318 In 2011, “[t]he latest U.S. Census data available” said “the number of cohabiting couples has reached 7.5 million, an all-time high. That represents a 13% increase in a year’s time, from 6.7 million in 2009.” Jayson, supra note 57.
nuptial and separation agreements. First, having a clearly defined policy with regard to what contracts will and will not be enforced would likely increase the number of cohabitation agreements. Since the law would only enforce palimony agreements made in writing, it would probably cause some couples to make them who would not ordinarily think to do so—for example, couples in which one of the parties is financially dependent on the other.

Implementing a palimony law in New York would also benefit the courts by eliminating a lot of waste in terms of judicial resources. If the plaintiff’s claim clearly does or does not comply with the statute, judges could spend far less time having to scrutinize the facts of every case. While in Morone, the Court of Appeals of New York “held that express contracts between unmarried cohabitants may generally be enforced, but contracts will not be implied from the conduct of the parties,” the proposed law would effectively supersede this by saying that express means in writing, thereby completely disqualifying oral agreements (even if they happen to be express).

The law would be advantageous to matrimonial attorneys and potential litigants. The enactment of a bright-line rule would eliminate a lot of time put into these cases by practitioners because they would have greater certainty as to whether or not their clients’ claims could be enforced. It would also save litigants money, since those who did not have an agreement in writing, made under the guidance of counsel, would know they did not have a valid claim from the outset.

Finally, the law might encourage unmarried cohabiting couples to assess the terms of their relationships. While “[h]aving a cohabitation contract that addresses all possible relationship changes with financial consequences is difficult,” it may be a good way “to move a relationship out of an amorphous, ‘Let’s see what happens’ fantasy into a mutually agreed upon, committed reality.” On the other hand, if a party is unwilling to put an agreement in writing at the request of the other party, it might cause some couples to break up sooner than they would have.

**CONCLUSION**

While the term ‘palimony’ originated after Marvin, the concept and policy reasons behind it existed even earlier in cases like Taylor, where a Mississippi court awarded the plaintiff support, despite the fact that the parties were not married, because it was both fair and equitable under the facts and circumstances of that case. By contrast there are jurisdictions, such as Georgia, that will not acknowledge a palimony claim on any basis for morality purposes. In Rehak,
decided nearly a year after *Marvin*, the Supreme Court of Georgia held that the plaintiff, who lived with the defendant for eighteen years, was not entitled to financial compensation because the parties’ agreement was based on “immoral consideration,” specifically, cohabitation, which was illegal under state law.325 New Jersey, on the other hand, was at one time so liberal in its enforcement of palimony claims that the Supreme Court of New Jersey held cohabitation was not an indispensable element to a palimony suit.326

And then there are jurisdictions like New York, where despite the pervasive aura of liberalism, there are laws that seem especially antiquated.327 In *Morone*, the Court of Appeals of New York “held that express contracts between unmarried cohabitants may generally be enforced, but contracts will not be implied from the conduct of the parties.”328 Still, palimony claims have a difficult time being enforced in New York. Palimony agreements should be upheld provided they are written, express, and not unconscionable. The long-entrenched policy reasons behind denying such claims—i.e., upholding morality by not condoning meretricious relationships—seem particularly weak and outmoded in a state that prides itself on being progressive, and is one of sixteen states that has legalized same-sex marriage.329

The growing class of unmarried cohabitants without clear regulations governing their rights after the relationship ends will likely lead to more palimony suits in New York and elsewhere. Given the changing customs of our society, New York should either amend its statute of frauds, so that support agreements between unmarried cohabitants must be in writing and made under the advisement of counsel, or alternatively, section 236 of New York’s Domestic Relations Law, so that these contracts also have similar requirements as pre-nuptial or separation agreements between married couples.

325 Id. at 82.
327 “In 2010, New York became the last state in the country to pass a no-fault divorce law and eliminate the need for one partner to be held responsible for the end of the marriage.” Sophia Hollander, *Divorces Drag On Even After Reform*, WALL ST. J. (May 6, 2012), http://online.wsj.com/article/SB10001424052702304811304577368110112622548.html.
328 Scheinkman, supra note 320.