KATHLEEN M. MOYNIHAN, Plaintiff/Petitioner, v. EDWARD J. LYNCH, Defendant.	SUPREME COURT OF NEW JERSEY, DOCKET NO. A-64-20 APPELLATE DIVISION DOCKET NO. A-4883-18T3 ON CERTIFICATION FROM THE SUPERIOR COURT OF NEW JERSEY CIVIL ACTION SAT BELOW: HON. JOSEPH L. YANOTTI, P.J.A.D. HON. MICHAEL K. HAAS, J.A.D. HON. ARNOLD L. NATALI, JR., J.A.D.

BRIEF AMICUS CURIAE

AMERICAN ACADEMY OF MATRIMONIAL LAWYERS
NEW JERSEY CHAPTER
776 Mountain Boulevard, Suite 202
Watchung, New Jersey 07069
(973) 627-7300
Email: jlawrence@lawlawfirm.com

ON THE BRIEF:

JERALYN L. LAWRENCE, ESQ. (Attorney Id. No. 15211996)
BONNIE C. FROST, ESQ. (Attorney Id. No. 022231984)
CHRISTINE C. FITZGERALD, ESQ, (Attorney Id. No. 027752006)
DINA MIKULKA, ESQ. (Attorney Id. No. 021131999)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Court Rules

Statute

Other Authorities

TABLE OF JUDGMENTS, ORDERS AND RULINGS

PROCEDURAL HISTORY

This matter is before this Court on petition for Certification. The New Jersey Chapter of the American Academy of Matrimonial Lawyers (AAML) has filed a motion requesting to be permitted to appear as amicus curiae.

STATEMENT OF FACTS

The accompanying certification of Jeralyn L. Lawrence, Esq. sets forth the background of the AAML and the reasons AAML believes that its participation in this matter would assist the Court. The New Jersey Chapter of AAML takes no position on the merits of the individual parties' cases.

LEGAL ARGUMENT

POINT ONE

THE NEW JERSEY CHAPTER OF THE AAML HAS AN INTEREST IN THE SUBJECT MATTER OF THIS APPEAL, HAS EXPERTISE IN THE FIELD OF FAMILY LAW AND CAN PROVIDE ASSISTANCE TO THIS COURT IN RESOLVING AN ISSUE OF PUBLIC IMPORTANCE.

Rule 1:13-9 states:

> An application for leave to appear as *amicus curiae* in any court shall be made by motion in the cause stating with specificity the identity of the applicant, the issue intended to be addressed, the nature of the public interest, therein and the nature of the applicant's special interest, involvement or expertise in respect thereof. The court shall grant the motion if it is satisfied under all of the circumstances that the motion is timely, the applicant's participation will assist in the resolution of an issue of public importance, and no party to the litigation will be unduly prejudiced thereby.

[Id.]

An amicus curiae must accept the case before the court as presented by the parties and cannot raise issues that have not been raised by the parties themselves. Tice v. Cramer, 133 N.J. 347, 355 (1993). The application of the New Jersey Chapter of the American Academy of Matrimonial Lawyers (AAML-NJ) satisfies these criteria.

The AAML-NJ is a chapter of a national organization dedicated to the improvement of family law and the preservation of the family. Its Fellows include seasoned matrimonial attorneys in this State who frequently lecture and write on current topics pertaining to family law. The Fellows of AAML-NJ are experienced family law practitioners, who have been practicing for at least ten years, have passed a difficult examination addressing many challenging aspects of family law and have been vetted by its Fellows. AAML-NJ Fellows handle complex family law issues on a daily basis and are seeking to participate as the voice of family law attorneys in this State. Part of the AAML mission is "[t]o encourage the study, improve the practice, elevate the standards and advance the cause of matrimonial law, to the end that the welfare of the family and society be protected."

The Fellows of AAML-NJ have particular knowledge of the day-to-day practice of family law in this State and the impact that an adverse ruling in the field of family law would have upon the

litigants we represent. The AAML-NJ has a particular interest in this case and substantial expertise in the subject matter as part of our mission is to advance and protect the welfare of the family and society. The issues in this matter have an impact of society as it relates to relationships and support of parties who are in a marriage-like relationship. AAML-NJ therefore asserts that its participation here will assist the Supreme Court in the resolution of an issue of public importance and that no party to this litigation will be prejudiced by this participation.

Without action by the Supreme Court, any individual in a long-term relationship, who relied upon an oral and written promise of support over the course of their relationship, would be left without any recourse even when the aggrieved party has relied upon a promise, partially performed aspects of the exchanged promise and/or has relied on that promise to a party's own detriment.

POINT TWO

THE COURT HAS THE EQUITABLE POWERS TO REMOVE A PALIMONY CONTRACT FROM THE STATUTE OF FRAUDS WHEN PROMISSORY ESTOPPEL EXISTS IN ORDER TO PREVENT AN INJUSTICE.

Although the Statute of Frauds requires certain contracts, such as palimony agreements, to be in writing, the writing requirement is not without exceptions. N.J.S.A. 37:2-38; Mazza v. Scoleri, 304 N.J. Super. 555, 560 (App. Div. 1997). Family law matters are determined in a court of equity. Thus, equitable

principles apply, as do equitable exceptions to the Statute of Frauds, such as promissory estoppel. Mazza, 304 N.J. Super. at 560. The Appellate Division, in Mazza, adopted the Restatement (Second) of Contracts, §139(1) (1981) with regard to promissory estoppel, which provides:

> A promise which the promisor should reasonably expect to induce action or forbearance on the art of the promise or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise.
>
> [Mazza, 304 N.J. Super. at 560.]

A court of equity should not permit a rigid principle of law to smother the factual realities to which it is sought to be applied. Graziano v. Grant, 326 N.J. Super. 328, 342 (App. Div. 1999) (citing Grieco v. Grieco, 38 N.J. Super. 593, 598 (App. Div. 1956)). "Equity will not permit a wrong to be suffered without affording the appropriate remedy. [citations omitted]. … [E]quity regards as done that which ought to be done." Graziano, 326 N.J. Super. at 342. "A court of equity will not be foreclosed from acting by lack of precedents nor by uniqueness of the problem, especially when there is no reasonable alternative remedy." Cooper v. Nutley Sun Printing Co., Inc., 36 N.J. 189, 198 (1961); Westinghouse Electric Co. v. United Electrical, & Co., 139 N.J. Eq. 97 (E. & A. 1946). "Indeed, as noted in Westinghouse, [139 N.J. Eq.] at 108, quoting from then Judge Cordozo, 'Let the

hardship be strong enough, and equity will find a way, though many a formula of inaction may seem to bar the path.'" State v. East Shores, Inc., 154 N.J. Super. 57, 64 (Ch. Div. 1977). Further, equity does not allow a person that commits a wrongdoing to enrich himself as a result of his own criminal acts. Jackson v. Prudential Ins. Co. of America, 106 N.J. Super. 61, 68 (Law Div. 1969).

The doctrine of promissory estoppel is an equitable principle designed "to prevent an injustice that is caused when there is an induced reliance by the promisor that results in action or forbearance on the part of the promisee substantially prejudicing the promise." Mazza, 304 N.J. Super. at 560. Promissory estoppel has four elements:

> (1) A clear and definite promise;
> (2) Made with the expectation that the promisee will rely on it;
> (3) Reasonable reliance; and
> (4) Definite and substantial detriment.
>
> [Toll Brothers, Inc. v. Board of Chosen Freeholders of Burlington, 194 N.J. 223, 253 (2008); see also Model Jury Charge (Civil), 4.10K, "Promissory Estoppel" (approved May 1998).]

The focus of the promissory estoppel should be on the reliance on the promise instead of "the classic doctrine of consideration that the promise and the consideration must purport to be the motive each for the other". Friedman v. Tappan Development Corporation, 22 N.J. 523, 536 (1956).

In the context of family law, the concept of estoppel has been used historically. Previously referred to as "true estoppel" is "a situation in which one party induces another to rely to his or her damage upon certain representations." Kazin v. Kazin, 81 N.J. 85, 94 (1979) (quoting The Restatement (Second) of Conflict of Law §74 (1971)). Similarly, the doctrine of unclean hands can also be considered along with estoppel to promote justice and prevent an injustice. Heuer v. Heuer, 152 N.J. 226, 237 (1998) (citing Untermann v. Untermann, 19 N.J. 507, 517 (1955)). As this Court noted in Heuer, estoppel has been "applied successfully in three types of matrimonial cases: (1) to preclude spouses from attacking their own prior divorces; (2) to preclude a party who took an active role in assisting a spouse to obtain an invalid divorce from attacking it; and (3) to preclude a spouse who had a 'relatively passive' role in obtaining the divorce, but who relied on the divorce in marrying, from invoking its invalidity." Heuer, 152 N.J. at 238 (citing Kazin, 81 N.J. at 95).

In cases where an oral agreement or a written agreement, both of which exist in this matter, do not conform to requirements of the Statute of Frauds, any equitable defense that requires the contract to be removed from the Statute of Frauds must be considered. The Statute of Frauds is designed, as stated above, to prevent fraud from occurring where an agreement between parties that was not reduced to writing is determined based on perjury by

a party. It is to be used as a shield against fraud, not to perpetrate the fraud. Equity and justice will not prevail if the Statute of Frauds is used as a sword, rather than a shield. When a promissory estoppel exists, the contract must be removed from the Statute of Frauds to prevent an injustice from occurring.

In a long-term relationship, promises between partners are made and often relied on. Moreover, as is often the case, these parties in marital-like relationships, may voluntarily terminate or surrender their rights to support from former spouses due to a promise from a new partner. Another example occurs when one party has given up their career to care for the other party or their children in common and relies on the other party's promise for financial support. Further, as is often the case, the financially supported party in a relationship will move from their home to the supporting partner's residence. Finally, if the financial provider of the relationship predeceases the supported partner, the party in need of support may be at the mercy of the deceased partners family for their survival, especially when the living partner has given up their alimony, career or home relying on the promise. This would not be equitable.

If oral agreements that meet and satisfy the four prongs of promissory estoppel are not removed from the Statute of Frauds, then the financially dependent parties to these promises are at a significant disadvantage because the Statute of Frauds, designed

to protect against fraudulent agreements, will render otherwise valid oral agreements unenforceable.

As the Supreme Court in Kazin stated, a party who took an active role in assisting a spouse to obtain an invalid divorce is precluded from attacking the invalid divorce. Kazin, 81 N.J. at 98. Likewise, a partner in a long-term committed relationship should be precluded from attacking the invalid agreement for future support when the partner took an active role in obtaining the invalid agreement for future support.

POINT THREE

THE COURT SHOULD ALLOW THE EQUITABLE DEFENSE OF PARTIAL PERFORMANCE TO REMOVE AGREEMENT FROM THE STATUTE OF FRAUDS.

New Jersey's Statute of Frauds requires that certain agreements must be reduced to writing and "signed by the party to be charged." N.J.S.A. 25:1-5. Promises between unmarried individuals in personal relationships are included in this category:

> A promise by one party to a non-marital personal relationship to provide support or other consideration for the other party, either during the course of such relationship or after its termination.
>
> [N.J.S.A. 25:1-5(h)].

That a Statute of Frauds cannot be "used to work a fraud is well settled." Klockner v. Green, 54 N.J. 230, 239 (1969). Concerns of equity impact the enforcement of oral contracts:

> Oral contracts which have been performed by one party are frequently enforced where to do otherwise would work an inequity on the party who has performed. Thus, the cases hold that such performance take the contract out of the Statute of Frauds.
>
> [Klockner, 54 N.J. at 236.]

Equitable defenses such as performance or partial performance should be available in a palimony matter absent a written agreement.

The issue of whether equitable defenses should be permitted to remove palimony cases from the Statute of Frauds has not yet been addressed by this Court since the amendment to N.J.S.A 25:1-5(h), which required that a palimony agreement be in writing. Indeed, in Maeker v. Ross, this Court "chose not to decide whether equitable forms of relief would be available" in the absence of a written palimony agreement. Maeker v. Ross, 219 N.J. 565, 582 (2014), leaving this issue to be addressed in the future.

Historically, family courts in New Jersey have recognized oral agreements between non-married cohabitants when there has been performance of the oral terms, whether for palimony or other forms of relief. After the 2010 amendment, partition of a residence was deemed outside the scope of N.J.S.A. 25:1-5(h):

> in the absence of a writing, partition of a residence remains an equitable remedy among unmarried, cohabitating intimates engaged in a joint venture. For the reasons set forth, the court holds that partition remains a viable remedy in those circumstances.
>
> [C.N. v. S.R., 463 N.J. Super. 213, 216 (Ch. Div. 2020).]

Based on C.N., a claim for partition of property between an unmarried couple is *not* treated as a palimony claim, as palimony and partition both stood on "separate and distinct footing." C.N., 463 N.J. Super. at 219 (citing Kozlowski v. Kozlowski, 80 N.J. 378 (1979)); Connell v. Diehl, 397 N.J. Super. 477 (App. Div. 2008); Bayne v. Johnson, 403 N.J. Super. 125 (App. Div. 2008). As such, partition actions can be removed from the Statute of Frauds when there has been performance.

The trial court in C.N. concluded that the "other consideration" in N.J.S.A. 25:1-5(h) was applicable only to actual palimony claims, not partition, leaving other equitable relief available to unmarried persons who engaged in a joint venture. C.N., 463 N.J. Super. at 218, 220-221; see also Mitchell v. Oksienik, 380 N.J. Super. 119, 127 (App. Div. 2005) (citing Olson v. Stevens, 322 N.J. Super. 119 (App. Div. 1999)).

Pre-2010 cases recognized that palimony and partition were distinct claims and, that partition was not subsumed in palimony. C.N., 436 N.J. Super. at 217-219 (citing Bayne, 403 N.J. Super. at 143-144; Kozlowski, 80 N.J. at 383).

Contrary to C.N., the appellate opinion in the case at bar found that the written agreement in Moynihan v. Lynch was in fact a palimony agreement, albeit unenforceable, although it did not contain a specific promise of support for life.

It is respectfully submitted that partition should remain distinct and separate from palimony based on the reasoning set forth in C.N. If partition or other equitable claims between unmarried partners are treated as palimony by N.J.S.A. 25:1-5(h), the availability of equitable defenses is crucial to ensure fairness.

The denial of equitable relief to non-married intimate partners of "the legal and equitable remedies generally available would be unfair and unwise." Mitchell, 380 N.J. Super. at 128. Prior to 2010, palimony and partition were distinct separate remedies available to unmarried individuals. C.N., 463 N.J. Super. at 219 (citing Bayne, 403 N.J. Super. at 143; Kozlowski, 80 N.J. at 388 (1979)).

Granting equitable relief in situations justifying partition, which can arise in a variety of situations not involving intimate personal relationships, while denying that relief for unwritten palimony agreements is unreasonable. As with partition, performance of an oral agreement by parties takes that oral agreement out of the Statute of Frauds:

> Oral contracts which have been performed by one party are frequently enforced where to do otherwise would work an inequity on the party who has performed. Thus, the cases hold that such performance takes the contract out of the Statute of Frauds.
>
> [Klockner, 54 N.J. at 236.]

The dispute in Klockner was specific performance of an oral contract to bequeath property from a decedent (stepmother / widow) to her stepson and step granddaughter in exchange for the care provided to the decedent in the last years of her life. The enforcement of the contract, which should have been reduced to writing, was not barred. Klockner, 54 N.J. at 233.

A high level of scrutiny is warranted when agreements are not reduced to writing: "Alleged agreements to make a particular disposition of one's estate must be subjected to close scrutiny." Klockner, 54 N.J. at 234-235. Even with a high level of scrutiny, equitable remedies should be available. In Botis v. Estate of Kudrick, 421 N.J. Super. 107, 120 (App. Div. 2011), the appellate panel found "no error" in the trial court's observation that partial performance could be a defense to the Statute of Frauds. Recognizing partial performance as an exception to the Statute of Frauds would permit redress when fundamental fairness and justice demand relief.

Klockner required performance of "an exceptional character," and in Klockner services were provided to an elderly widow three years before her death, accompanied by "*care, affection, society and companionship one would expect from a close blood relative*" (emphasis added). Klockner, 54 N.J. at 20. It is respectfully submitted that partial performance in a palimony case often involves "care, affection, society and companionship in a close,

personal and intimate relationship." It is difficult if not impossible to quantify the value of the non-financial contributions and sacrifices of a party in a mutually supportive, non-marital relationship.

When addressing the issue of partial performance in Maeker v. Ross, the Appellate Division, citing Klockner, recognized that the performance must be of "such peculiar character that it is impossible to estimate their value by any standard." Maeker, 430 N.J. Super. 79, 94 (App. Div. 2013); rev'd Maeker v. Ross, 219 N.J. 565 (2014), (citing Klockner, 54 N.J. at 237). The appellate opinion in Moynihan provided that "to grant the equitable remedy of specific performance or an oral promise, the performance must, in some respects, be of an exceptional character and it must be obvious that ... the services are of such a peculiar character that it is impossible to estimate the value by any standard." Moynihan, slip op at 10, (citing Maeker, 430 N.J. Super. at 94 (quoting Klockner, 54 N.J. at 237.))

When addressing the questions surrounding unwritten agreements for palimony and other consideration, as well as the equitable remedies such as partial performance, rather than vague notions of the "peculiar character" of the services performed, the approach should be to require the parties to prove the existence of an unwritten agreement, as well as the equitable defenses, by

a clear and convincing standard of proof, thereby satisfying the "close scrutiny" directed in Klockner.

Clear and convincing evidence is "deemed to be evidence that produces in one's mind a firm belief or conviction that the allegations sought to be proved by the evidence are true." In re Purrazzella, 134 N.J. 228 (1993). It is evidence so clear, direct, and weighty in terms of quality and convincing as to cause one to come to a clear conviction of the truth of the precise facts in issue. In re Seaman, 133 N.J. 67 (1993); In Re Registrant R.F., 317 N.J. Super. 379 (App. Div. 1998). This requires that the result shall not be reached by a mere balancing of doubts or probabilities, but rather by clear evidence which causes one to be convinced that the allegations sought to be proved are true.

Requiring the moving party to demonstrate by clear and convincing standard that there were certain oral promises made recognizes the high standard required to seek enforcement of an oral contract and satisfies the "exceptional character" requirement set forth in Klockner:

> [A party's performance] must be in some respects of an exceptional character, and it must be obvious that not only did the parties not intend to measure the services by ordinary pecuniary standards, but that also the services are of such peculiar character that it is impossible to estimate their value by any standard.
>
> [Klockner, 54 N.J. at 237, (citing Cooper v. Colson, 66 N.J. Eq. 328, 332 (E. & A. 1904)).]

Ultimately, when one party "has received the full benefit of her bargain, the policy reasons justifying the development of the part performance exception to the Statute of Frauds have been satisfied." Klockner, 54 N.J. at 237-238.

In situations giving rise to palimony and other claims between unmarried partners, where one partner alleges performance on promises, or has forgone professional or personal opportunities in reliance on the promises made by the other, the value of the services and the losses can be difficult to quantify. Assigning value to contributions of one party to an intimate relationship can lead to subjective outcomes which risk the "paternalism" which the defendant respondent references in his submission. Db18, citing Petal3.

Instead, the focus should be on proving the elements of palimony, as well as other equitable claims such as partition, and equitable defenses such as partial performance, by clear and convincing proof.

POINT FOUR

THE 2010 AMENDMENT TO THE STATUTE OF FRAUDS REQUIRING REVIEW BY INDEPENDENT COUNSEL LIMITS LITIGANTS ACCESS TO JUSTICE.

A written agreement for palimony or "other consideration," is not "binding unless it was made with the independent advice of counsel." N.J.S.A. 25-1-5(h). This provision imposes significant

obligations which bar unrepresented individuals from entering into otherwise valid written palimony agreements.

Our courts have recognized that "[s]elf represented litigants comprise the majority of those filing in the Non-Dissolution docket," the very category into which claims for palimony would fall if litigated. Administrative Directive # 08-11, "Family – Non-Dissolution Matters (FD Docket) – Revised Procedures" (September 2, 2011).

Of the four types of agreements addressed by the Statute of Frauds, two are related to agreements between unmarried relationships: prenuptial and palimony agreements. N.J.S.A. 25:1-5(c) and (h); Uniform Premarital and Pre-Civil Union Agreement Act, N.J.S.A. 37:2-31 to -41. Although independent counsel is required under the Statute of Frauds for palimony agreements, it is not required for prenuptial agreements.

The Premarital Agreement statute states that "a premarital or pre-civil union agreement shall be in writing, with a statement of assets annexed thereto, signed by both parties, and it is enforceable without consideration." N.J.S.A. 37:2-33. In the context of enforcement, although independent counsel is one of the reasons that a prenuptial agreement can be found unconscionable, and therefore, invalid, N.J.S.A. 37:2-38 specifically provides that the parties may expressly waive the right to independent counsel in their prenuptial agreement. Thus, there is no

requirement that parties must have independent counsel to enter into a premarital agreement. N.J.S.A. 37:2-31 to -41.

In the area of divorce and other family law agreements, no other contracts or agreements require the advice of counsel to be valid and enforceable. Individuals do not require the advice of counsel to dismiss final or temporary restraining orders entered under the Prevention of Domestic Violence Act (PDVA) nor is advice of counsel required before parties enter into related agreements. N.J.S.A. 2C:25-17 to -35.

Individuals are not required to have the advice of counsel to enter into binding marital settlement agreements, which implicate issues of custody and parenting time of children and other complex financial issues surrounding the dissolution of marriages.

Although the appellate division in this case noted that the Legislature imposes a requirement that litigants have counsel to enter into certain types of contracts, the example in the decision of lottery winners is not analogous to litigants that enter into palimony agreements. Moynihan, (slip op at 13); N.J.S.A. 5:9-13. When a lottery winner wins the lottery, they receive funds as a result of their lottery win, which creates an ability to pay and retain counsel. The same may not be said of individuals seeking to enter palimony agreements.

Further, the only instances in the family law context, where parties are afforded the right to counsel, are agency and private

adoptions, In re Adoption of J.E.V. and D.G.V., 226 N.J. 90 (2016); In re Adoption of a Child by C.J., 463 N.J. Super. 254 (App. Div. 2020), child abuse, N.J.S.A. 9:6-1, and termination of parental rights matters, N.J.S.A. 30:4C-15.4. Even where the magnitude of the loss has constitutional implications of the loss of one's child by government action, individuals are not forced to pay counsel or even accept appointed counsel.

Although both In re Adoption of J.E.V. and In re Adoption of a Child by C.J. stand for indigent parent's right to have counsel appointed in important matter such as private adoptions, neither case holds that counsel for the parents in these types of matter is required or the adoption is not granted. In re Adoption of J.E.V., 226 N.J. at 94; In re Adoption of a Child by C.J., 463 N.J. Super at 261.

Further, to this point, even in these cases where the consequences are of such significant magnitude, such as contested adoptions, the litigants may waive their right to counsel. This waiver was recognized by this Court when outlining the procedure for such a waiver. In re Adoption of J.E.V., 226 N.J. at 114. Specifically, this Court stated

> In the future, judges should inform a parent of the right to counsel at the first court proceeding. If a parent wishes to proceed pro se, the court should conduct an abbreviated yet meaningful colloquy to ensure the parent understands the nature of the proceedings as well as the problems she may face if she chooses to represent herself.

> [In re Adoption of J.E.V., 226 N.J. at 114 (citing State v. Crisafi, 128 N.J. 499, 511-12 (1992)).]

If, in these cases, where the right of counsel has been deemed invaluable and a due process right, the litigant is permitted to waive the right to counsel, then it follows that a litigant in a palimony agreement should likewise be permitted to waive their right to counsel. While involvement of legal counsel should be encouraged, when reviewing the totality of the circumstances surrounding the terms of, the entry of and the execution of an agreement, the lack of legal counsel should not render an otherwise valid agreement unenforceable.

Moreover, if parties are forced to have independent counsel in order to have an enforceable agreement, the result is an unequal playing field. Financially dependent partners who are often unable to afford legal counsel, will believe that they are protected by an Agreement that they will have financial support, only to find out when they try to enforce the agreement that the agreement is invalid because they did not have the financial ability to retain counsel. Essentially, it is the financially dependent spouse who is denied access to justice as they are prohibited from representing themselves when they cannot afford counsel.

CONCLUSION

For the foregoing reasons, the AAML-NJ respectfully requests that it be permitted to participate as *amicus curiae*, file a brief and present oral argument on the issues presented.

Respectfully submitted,

New Jersey Chapter
American Academy of Matrimonial Lawyers

By: _____
Jeralyn L. Lawrence, Esq.

Dated: August 2, 2021