

SUPREME COURT OF NEW JERSEY

No. 085157

KATHLEEN MOYNIHAN,
Plaintiff-Petitioner

RESPONDENT'S OPPOSITION
TO PETITION FOR CERTIFICATION
TO THE SUPREME COURT

APPELLATE DIVISION
DOCKET NUMBER: A-4883-18T3

V.

EDWARD J. LYNCH,
Defendant-Respondent

SAT BELOW:
HON. JOSEPH L. YANNOTTI, P.J.A.D.
HON. MICHAEL J. HAAS, J.A.D.
HON. ARNOLD L. NATALI, Jr, J.A.D.

**OPPOSITION TO PETITION FOR CERTIFICATION
ON BEHALF OF DEFENDANT-RESPONDENT**

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF JUDGMENTS, ORDERS AND RULING	ii
TABLE OF AUTHORITIES	ii
STATEMENT OF FACTS/PROCEDURE	1
STANDARD OF REVIEW	6
QUESTIONS PRESENTED	7
1. Appellate Division did not err in failing to declare that portion of the Amendment [to the State of Frauds] requiring the independent advice of of counsel for both parties unconstitutional	7
2. Equity will not suffer the use of the Statute of Frauds as an instrument of fraud	16
3. Plaintiff and Defendant entered into a binding oral palimony agreement prior to the Amendment	17
CONCLUSION	19

TABLE OF JUDGMENTS, ORDERS AND RULINGS

	<u>PAGE</u>
Notice of Petition for Certification	Peta 1
KATHLEEN M. MOYNIHAN V. EDWARD J. LYNCH, Appellate Division Opinion, November 12, 2020 Docket No. A-4883-18T3	Peta2-38

TABLE OF AUTHORITIES

<u>U. S. Const.</u> art. 1 Sec. 10, cl. 1	7
<u>N.J. Const.</u> art. IV, Sec. 7 para. 3.	7

CASES

<u>Berg v. Christie</u> , 225 N.J. 245 (2016).	7,8
<u>Borough of Seaside Park v. Comm. of N.J. Dept. of Educ.</u> , 432 N.J. Super. 167 (App. Div.), cert. denied, 216 N.J. 367 (2013).	7,13
<u>Botis v. Estate of Kudrick</u> , 421 N.J. Super. 107 (App. Div. 2011)	12
<u>Cesare v. Cesare</u> , 154 N.J. 394(1998)	17
<u>In re C.V.S. Pharmacy Wayne</u> , 116 N.J. 490, 497 (1989) cert. denied, 493 U.S. 1045, 110 S. Ct. 841 (1990)	7
<u>Klockner v. Green</u> , 54 N.J. 230 (1969)	16
<u>Kozlowski v. Kozlowski</u> , 80 N.J. 378 (1979)	11
<u>Lee v. Kim</u> , 654 Fed. App'x. 64 (3d Cir. 2016) cert. denied <u>Lee v. Kim</u> __U.S.__, 137 S. Ct. 1098 (2017)	10
<u>Maeker v. Ross</u> , 219 N.J. 565 (2014).	9,11,13
<u>Sook Hee Lee v. Kim</u> , 2018 N.J. Super. Unpub. LEXIS 454, 12 (2018)	10,14

	<u>PAGE</u>
<u>State v. Bianco</u> , 103 N.J. 383 (1986)	10,14
<u>State Farm Mut. Auto Ins. Co. v. State</u> , 124 N.J. 367 (2013)	8,13
<u>U.S. Trust Co.</u> , supra, 431 U.S. at 25, 97 S. Ct. At 1519	13
 <u>RULES</u>	
R. 2:12-4	6
R. 4::9-2	17
 <u>STATUTES</u>	
<u>N.J.S.A. 5:9-13</u>	14
<u>N.J.S.A. 25:1-5</u>	7,9,11 12

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**Respondent's Opposition to
Petition for Certification**

STATEMENT OF FACTS/PROCEDURE

Plaintiff and Defendant met and began a relationship in 1997 (Peta4). Plaintiff was married and going through a divorce at the beginning of the relationship (Peta4). The Defendant was not married and had been previously divorced (Peta4). Plaintiff was divorced in July of 2000. As part of her divorce, Plaintiff was awarded permanent alimony which was terminated by Consent Order in 2011 after

Plaintiff's ex-husband filed a motion to terminate alimony (Peta5).

On July 19, 2000, Defendant purchased 2 Andover Court, Bordentown, New Jersey (Peta5). Plaintiff had lost her home to foreclosure during her lengthy divorce and the Bordentown townhouse was purchased so the Plaintiff would have a place to live with her children (Peta5). However, at the time of the purchase, the Deed and the mortgage to the house were in Defendant's name alone (Peta5). There were various changes made by the Defendant and at times the house was placed in trust for the Plaintiff's benefit (Peta6). Approximately two years after the termination of Plaintiff's alimony, in April of 2013, Plaintiff was added to the Deed of the townhouse at 2 Andover Court, Bordentown (Peta6). Her relationship with the Defendant ended in 2014 (Peta10).

The Trial Court found that during the relevant time period, from 2000 to 2010, the Defendant made no express or implied promises to support the Plaintiff for life (Peta15). The only written agreement is referred to as P64 or the Agreement throughout the proceedings (Peta16). It was written by the Defendant. It was signed by both parties. It reads as follows:

In the event that Kathleen Moynihan and Edward Lynch terminate their relationship I agree to the following terms:

1. The home at 2 Andover Ct in Bordentown NJ will be paid off within five years after Mr. Lynch vacates the property
2. After paying off the mortgage note Mr. Lynch will sign the Deed over to Ms. Moynihan thereby giving her sole ownership of said property
3. Until the mortgage is satisfied Mr. Lynch will pay the monthly mortgage payment.
4. Mr. Lynch will pay the property tax at 2 Andover Ct Bordentown NJ for two years after his departure
5. Mr. Lynch will pay Kathleen Moynihan a sum of \$100,000 dollars by the end of a five year period starting when Mr. Lynch vacates the property at 2 Andover Ct.

This agreement finalizes all obligations of Mr. Lynch to Ms. Moynihan.

Signed Edward J. Lynch
Agreed Kathleen M Moynihan (Peta9)

It was not in dispute that the Agreement has no date but there was no dispute that the agreement was entered after the 2010 amendment to the Statute of Frauds (Peta16). Neither party had or consulted an attorney as required by the Statute of Frauds at the time the Agreement was drafted and signed (Peta9). Count 1 of Plaintiff's complaint seeking to enforce P64 as a written palimony agreement was dismissed with prejudice at the close of Plaintiff's evidence by the Trial Court (Peta 14).

The Trial Court, however, did find that the Agreement was "simply a contract between the [] parties" (Petal2). To allow the Agreement to be enforced since it was not executed in compliance with the Statute of Frauds, the Trial Court had to find that it was something other than a contract for palimony (Petal7). The Trial Court found that the Agreement was an enforceable contract signed in 2014 requiring only an offer, acceptance, and consideration and that the consideration for the contract was when Plaintiff, three years prior, gave up her alimony in 2011 (Petal7). Although stating that the agreement provided for what is going to happen if the relationship terminates (the very definition of a palimony agreement), the Trial Court found that the Agreement is not a palimony agreement but rather is a contract for the distribution of property (Petal6). The Trial Court found that the Agreement was akin to an order for orderly removal, a type of contract seen in landlord/tenant court (Petal7). The Trial Court enforced the written contract under Count 2 of the Complaint (Petal8).

Defendant appealed to the Appellate Division on the following substantive grounds:

2. The trial court erred in failing to dismiss Count 2 as all contracts for support at the termination

of a non-marital personal relation are governed by the Statute of Frauds as a matter of law.

3. The trial court erred in ruling that the written agreement, P64, was a legally enforceable contract other than a palimony agreement.

4. The trial court erred in holding that the written document, P64, was akin to a landlord/tenant Order for orderly removal.

5. The trial court erred in dismissing defendant's counterclaim for partition depriving him of his rightful interest as a joint tenant

6. The trial court erred in continuing the temporary restraint placed on defendant's bank account following the court's entry of a monetary award. (Peta18)

The Appellate Division reversed as to the enforceability of the Agreement as a written contract finding that:

...the Agreement was a promise by one party to a non-marital personal relationship to provide support of other consideration for the other party, either during the course of such relationship or after its termination it was necessary that it not only be memorialized in a written document but made with the independent advice of counsel for both parties as unambiguously required by the 2010 amendment to the Statute of Frauds (Peta3).

The Appellate Division also reversed and remanded the dismissal of Defendant's counterclaim for partition of the townhouse and dissolved the restraints placed on Defendant's bank account (Peta4).

Plaintiff's Notice of Petition for Certification to the Supreme Court follows on November 20, 2020 (Petal).

STANDARD OF REVIEW

Certification to the Supreme Court should be denied because Plaintiff/Petitioner has not asserted a basis or proper grounds upon which the Supreme Court to exercise jurisdiction pursuant to New Jersey Rule 2:12-4. Rule 2:12-4 requires that certification be granted,

"only if the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court or is similar to a question presented on another appeal to the Supreme Court; if the decision under review is in conflict with any other decision of the same or a higher court or calls for an exercise of the Supreme Court's supervision and in other matters if the interest of justice requires. Certification will not be allowed on final judgments of the Appellate Division except for special reasons.

As no such special reasons have been offered and no question of general public interest not already addressed clearly by the Statute of Frauds is asserted, Certification should be denied.

QUESTIONS PRESENTED

1. **Appellate Division did not err in failing to declare that portion of the Amendment [to the Statute of Frauds] requiring the independent advice of counsel for both parties unconstitutional.**

The Contract Clause of the United States Constitution provides that “[n]o State shall ... pass any ... Law impairing the Obligation of Contracts.” U. S. Const. art. 1 Sec. 10, cl. 1. Similarly, the New Jersey Constitution states: “The Legislature shall not pass any ... law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made.” N.J. Const. art. IV, Sec. 7 para. 3. See Berg v. Christie, 225 N.J. 245, 258-59 (2016) Berg, supra 225 N.J. at 278; In re C.V.S. Pharmacy Wayne, 116 N.J. 490, 497 (1989) cert. denied, 493 U.S. 1045, 110 S. Ct. 841 (1990); State v. Bianco, 103 N.J. 383, 394 (1986); Borough of Seaside Park v. Comm. of N.J. Dept. of Educ., 432 N.J. Super. 167, 217 (App. Div.), certif. denied, 216 N.J. 367 (2013).

The Statute of Frauds details certain requirements or criteria for specific contracts to be enforceable. Palimony is included in the Statute of Frauds, specifically at N.J.S.A. 25:1-5(h). Statutes are presumed constitutional, therefore the Statute of Frauds enjoys a

presumption of constitutionality and any party asserting the claim that the statute is unconstitutional bears a heavy burden to rebut that presumption.

As the New Jersey Supreme Court held in State Farm Mut. Auto. Ins. Co. v. State, 124 N.J. 32, 45-46 (1991), “[i]n considering the constitutionality of legislation, courts do not weigh its efficacy or wisdom. Moreover, legislative enactments ‘are presumed to be valid and the burden on the proponent of invalidity is a heavy one.’” (citations omitted)

Our Supreme Court in Berg held that a contract impairment claim brought under either the Federal or State constitutional provision, “entail an analysis that first examines whether a change in state law results in the substantial impairment of a contractual relationship and, if so, then reviews whether the impairment nevertheless is ‘reasonable and necessary to serve an important public purpose’”. Berg, supra 225 N.J. at 259 (quoting U.S. Tr. Co. of N.Y. v. New Jersey, 431 U.S. 1, 25, 97 S. Ct. 1505, 1519 (1977)).

The 2010 Amendment to the Statute of Frauds does not limit any individual from entering in to a palimony contract. Parties are free to enter in to palimony agreements, however that written agreement will not be

binding unless both parties seek independent advice from counsel.

In this case, the Appellate Division held that "requiring a lawyer to review palimony agreements is not a substantial impairment, the Legislature routinely imposes additional costs on parties who seek to enter contractual relationships" (Peta36).

However, even if such an impairment exists, it must also be determined that the impairment lacks a significant and legitimate purpose and the impairment is based upon unreasonable conditions unrelated to governmental objections" for the Court to overturn a law enacted by the legislature.

It is worth noting, that of the four types of agreements specifically subject to the Statute of Frauds, two of the four pertain to agreements between parties in a personal relationship; a prenuptial agreement (25:1-5(c)) and a palimony agreement (25:1-5(h)). The agreements reached between parties in an interpersonal relationship are not simply business contracts. The courts have consistently recognized that support agreements are "susceptible to fraudulent and unreliable methods of proof" that dictate the need to be reduced to writing as so governed by the Statute of Frauds Maeker, 219 NJ at 578.

In this case, the Appellate Division definitively states, "The Agreement [P64] is precisely the type of written contract encompassed by the Amendment and for which attorney review is required. Absent compliance with the Amendment, the Agreement is not an enforceable contract" (Peta24).

The Statute of Frauds does not infringe upon the Petitioner's right to enter in to a contract. The palimony law only requires a plaintiff to memorialize an agreement with the advice of counsel if she wishes to enforce the agreement in a New Jersey court. Similarly, our Appellate Court observed in Sook Hee Lee v. Kim, 2018 N.J. Super. Unpub. LEXIS 454, 12 (2018), that the Amendment to the Statute of Frauds "... does not restrict the right to contract." The Amendment does not leave plaintiff "without adequate recourse". Rather, as the Federal Court observed in Lee v. Kim, 654 Fed. App'x. 64, 69 (3d Cir. 2016) cert. denied Lee v. Kim, ___ U.S. ___, 137 S. Ct. 1098 (2017), the plaintiff "is still free to enter into any palimony arrangement she desires, on whatever terms she and the other party agree."

There is nothing flawed or vague about the review conducted by the Appellate Division when analyzing the 2010

amendment to the Statute of Frauds and the purpose of the amendment:

“The legislative history of the Amendment makes clear that the Legislature “intended to overturn recent ‘palimony’ decisions by New Jersey courts” (Peta22).

It was the express intention of the legislature to change the law with the 2010 amendment. And this is consistent with the holding in Maeker v. Ross, 219 N.J. 565, 576-77 (2014) where the New Jersey Supreme Court indicated that the Amendment represents “a sea change in the law” clearly overturning palimony decisions by New Jersey courts enforcing agreements where one party induces another party to enter or remain in the relationship by an oral or written promise of support. The Supreme Court in Maeker stated that “Kozlowski and its progeny were the law until January 18, 2010”, the date the Amendment took effect. Id. at 577. From that date on “[n]o action shall be brought’ to enforce a palimony agreement unless the agreement is in writing and unless the parties ‘made’ the agreement ‘with the independent advise of counsel.’” Id. at 581 (quoting N.J.S.A. 25:1-5(h)). The Court recognized that the Legislature may reverse a decision of the New Jersey Supreme Court, as was the clear intent in the enactment of the Amendment to the Statute of Frauds. Id.;

Botis v. Estate of Kudrick, 421 N.J. Super. 107, 118-119
(App. Div. 2011).

The Legislature's decision to enact N.J.S.A. 25:1-5(h) does not constitute a substantial impairment of the contractual rights of unmarried individuals who wish to enter into a palimony arrangement. As to this plaintiff in particular, her individual right to enter into a contract was not impaired. In fact, plaintiff entered into a written agreement and while she had the actual means and opportunity to retain independent counsel, as evidenced at trial by the fact that she sought counsel of an attorney when she agreed to the termination of her permanent alimony by Consent Order in 2011, despite the clear language of the Statute of Frauds, she chose not to comply. Plaintiff chose to ignore the clear and unambiguous statutory scheme necessary for enforcement of a palimony agreement in a New Jersey court. Plaintiff assumed the risk of non-compliance with the Amendment.

Importantly, even if this court was to conclude that the Amendment constitutes a substantial impairment of a contractual relationship, the Amendment nonetheless does not violate the constitutional Contract Clause, "if the governmental action has a significant and legitimate public purpose' and is based upon reasonable conditions, and is

related to 'appropriate governmental objectives'". Borough of Seaside Park, supra, 432 N.J. Super. at 216. (quoting State Farm Mut. Auto. Ins. Co., supra, 124 N.J. at 64). As the U.S. Supreme Court held, a State's impairment of a contract "may be constitutional if it is reasonable and necessary to serve an important public purpose." U.S. Trust Co., supra, 431 U.S. at 25, 97 S. Ct. at 1519.

Petitioner asserts that the requirement in the Amendment to the Statute of Frauds that a written promise of support be made with independent advice of counsel lacks a significant and legitimate public purpose. To support this position, Petitioner argues that the requirement prohibits parties who cannot afford to retain counsel and those who "choose not to pay, retain, or otherwise be involved with counsel" from entering into an enforceable agreement. Petitioner further argues that almost every other agreement can be entered into without consulting legal counsel as proof that the statutory requirement is unconstitutional.

The Amendment to the Statute of Frauds challenged by the Petitioner as unconstitutional serves a significant and legitimate public purpose already addressed by the Court. The New Jersey Supreme Court in Maeker, supra, 219 N.J. at 576-77, held that "the purpose of the Amendment is to

overturn recent palimony decisions in New Jersey courts” by requiring that any agreement for support or other consideration be in writing and the parties have independent advice of counsel. The Court further observed that a review of the Statute of Frauds gives insight into the Legislature’s purpose in enacting the Amendment noting that “[t]he Statute of Frauds recognizes that certain agreements may be ‘susceptible to fraudulent and unreliable methods of proof’ and therefore insists that those agreements be reduced to writing and signed.” Id. at 578. As our Supreme Court observed, it has long been held that the primary purpose of the Statute of Frauds is “to avoid the hazards attending the use of uncertain, unreliable and perjured oral testimony ...” Id. (citations omitted). Additionally, as the Appellate Court astutely reasoned: “given the safeguards of the Statute of Frauds, the Legislature’s inclusion of palimony within the statute is protective of an individual’s right to contract ...” Sook Hee Lee v. Kim, 2018 N.J. Super. Unpub. LEXIS 454, 8 (2018) (Ra 137)

Petitioner references the State Lottery Statute, N.J.S.A. 5:9-13, as the only other example of a situation where the Legislature requires the independent advice of counsel. The legitimate public purpose being to “insulate

lottery winners from their own human frailties" but then argues that no such concern of human frailty exist within the confines of a personal relationship. But the purpose is in fact quite similar; nowhere is human frailty on display more than within the context of a personal relationship.

Finally, Petitioner's assertion that the requirement in the Amendment of independent legal counsel prohibits parties who cannot afford to retain counsel from entering into support agreements is erroneous, speculative and misplaced in this case as it was found at trial that Petitioner in fact had access to a family law attorney during her lengthy divorce ending in 2000 and again in 2011 when she entered in to a post-judgement Consent Order termination her alimony. Accordingly, Petitioner fails to establish either the second or third prong of the analysis and her constitutional claim must fail.

As to repeated references to the non-binding statements made by then Governor Corzine expressing his personal wishes (not the legislative intent) that the requirement for the services of an attorney be removed, those personal statements made in 2010 when the amendments were signed in to law amount to nothing more than dicta. Certainly, Petitioner is not the party for whom then

Governor Corzine showed concern as she can afford to retain an attorney but opted not to do so. Moreover, a person's choice not to pay, retain or otherwise be involved with counsel is not a protected right nor does it usurp the Legislature's function of enacting statutes and amendments. As the Appellate Division notes in its holding in this case, "no such modifying amendment was ever enacted by the Legislature" (Peta23).

2. Equity will not suffer the use of the Statute of Frauds as an instrument of fraud.

Petitioner's assertion that equity demands that the law not apply in this case and that the requirements of the Statute of Frauds be ignored when a party has partially performed on the terms of an agreement must fail. Contrary to the argument advanced by Petitioner that the trial court did not consider whether either Plaintiff's or Defendant's partial performance removed the written agreement from the Statute of Frauds, the trial court did in fact go to great lengths to state that the Plaintiff in this case did in fact performed her duties. Nevertheless, as the Appellate Division also states, citing Klockner v. Green, 54 NJ 230, 236-37 (1969), "a plaintiff alleging partial performance as an exception to the Statute of Frauds must base their claim

on their own performance, not the defendant's.... Even if we considered the amended complaint to conform to the proofs as permitted by Rule 4:9-2, we also reject plaintiff's argument because her claim for partial performance are not exceptional in character" (Peta26).

The Appellate Division addressed this argument and rightfully held that allowing a plaintiff to assert partial performance as a defense to the requirements of the Statute of Frauds in a palimony case, "would essentially permit the enforcement of contracts the Legislature has expressly prohibited" (Peta26).

Partition is the equitable remedy available to these parties and the reverse and remand for consideration on the question of partition by the Appellate Division adequately addresses and provides for this equitable remedy (Peta27).

3. Plaintiff and Defendant entered into a binding oral palimony agreement prior to the Amendment.

The Trial Court is afforded substantial deference on Family Part factual findings because of its "special jurisdiction and expertise." Cesare v. Cesare at 413. As the Appellate Division already considered and held, Petitioner has provided no reason to deviate from that standard of review (Peta33).

Even after an express acknowledgment by the Trial Court that the plaintiff "was generally more credible than the defendant, the fact finder still found that the Defendant did not tell plaintiff that he would take care of [her] for the rest of [her] life in 2000 (Peta15).

Petitioner's assertion that "it is inconceivable to conclude that Plaintiff would spend 18 years of her life in a relationship without a promise being made to her" is not consistent with the testimony at Trial and it does not afford the appropriate deference to those findings of facts by the Trial court and examined and adopted by Appellate Court. This assertion by Petitioner as the sole basis for asking this Court to act contrary to the standard of review and to reject the factual findings of the lower courts is not based on any sound legal rationale. To quote the Trial Court (as referenced by the Appellate Division) it smacks of paternalism (Peta13).

CONCLUSION

It is respectfully submitted that the decision of the Appellate Division is correct as a matter of law and no proper basis for review in the Supreme Court has been offered by Petitioner; therefore, this Court should deny review of questions 1, 2, and 3 of Plaintiff's Petition for Certification.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Allison M. Roberts", is written over a horizontal line.

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Dated: January 12, 2021