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KATHLEEN M. MOYNIHAN, Plaintiff-Petitioner, v. EDWARD J. LYNCH, Defendant-Respondent.	SUPREME COURT OF NEW JERSEY Docket No. 085157 Appellate Division Docket No.: A-4883-18T3 Sat Below: Hon. Joseph L. Yanotti, P.J.A.D. Hon. Michael J. Haas, J.A.D. Hon. Arnold L. Natali, J.A.D

BRIEF OF *AMICUS CURIAE* NEW JERSEY STATE BAR ASSOCIATION

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PRELIMINARY STATEMENT

The goal of the Statute of Frauds has always been to prevent frauds from being committed through the use of uncertain, unreliable and perjured oral testimony. To ensure that a statute designed to prevent a fraud is not used as a sword to perpetrate a fraud, the courts of equity have retained certain equitable powers, including the use of equitable defenses like promissory estoppel and partial performance. This ensures that an oral promise can still be enforced when necessary to avoid an injustice. The amendment to the Statute of Frauds at issue in this matter (N.J.S.A. 25:1-5(h) or 2010 Amendment), providing for certain requirements to be met before a palimony agreement can be enforceable, should not alter those powers.

Defendant in this case candidly admitted that he did not intend to be bound by the notarized Agreement when he signed it, and that his actions were "dishonest because he never informed plaintiff he did not intend to be bound." [Peta9]. Moreover, Plaintiff testified that when she requested that an attorney review the agreement, Defendant replied that "he didn't want to pay a lawyer" because "if I tell you I'm going to do something, I'm going to do it. I'm a man of my word." [Peta9]. Despite this potential evidence that Plaintiff detrimentally relied upon Defendant's admitted fraudulent conduct when entering into the agreement without either party obtaining attorney review and then

subsequently performing thereunder, the Appellate Division rejected Plaintiff's assertion that promissory estoppel and partial performance remain valid defenses to the Statute of Frauds when necessary to avoid an injustice. The Appellate Division, instead, determined under the plain language of the 2010 Amendment that their signed and notarized written palimony agreement was unenforceable as a result of their failure to obtain attorney review.

The New Jersey State Bar Association (NJSBA) submits the Appellate Division's ruling is inconsistent with New Jersey's previous adherence to §139(1) of the Restatement (Second) of Contracts (1981) (Section 139). Section 139 recognizes promissory estoppel may be used as a valid defense to the Statute of Frauds to insure that a statute designed to prevent fraud is not used as an instrument to perpetrate a fraud. Section 139 was previously adopted by the Appellate Division in Mazza v. Scoleri, 304 N.J. Super. 555, 559-560 (App. Div. 1997) and cited to with approval by this Court in Segal v. Lynch, 211 N.J. 230, 253-54 (2012). Similarly, this Court has previously admonished that partial performance of an oral contract can remove it from the Statute of Frauds when to do otherwise would yield an inequity. Klockner v. Green, 54 N.J. 230, 236-37 (1969).

The NJSBA urges this Court to confirm that promissory estoppel and partial performance remain valid defenses to defeat the Statute

of Frauds writing and/or attorney review requirement when necessary to prevent an injustice. To recognize the important public policy rationale behind the creation of the Statute of Frauds, the NJSBA submits that requiring proof of the elements of these two defenses by clear and convincing evidence is a sound means of balancing the competing interests and insuring justice ultimately prevails.

Finally, the NJSBA submits that requiring non-married parties in a personal relationship to seek independent counsel to enter into agreements for support or other consideration violates the Contract Clause and the Equal Protection Clause of the U.S. Constitution and the equal protection guarantees in the New Jersey Constitution. While the NJSBA believes it is prudent for anyone entering into a contract or agreement to consult with independent counsel, requiring such consultation in order for the agreement to be valid is contrary to fundamental notions of fairness, equal application of the laws and access to justice for all persons, especially financially or otherwise disadvantaged litigants.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The NJSBA shall rely upon the Procedural History and Statement of Facts as presented by the parties.

LEGAL ARGUMENT

POINT I

NEW JERSEY COURTS SHOULD CONTINUE TO FOLLOW § 139(1) OF THE RESTATEMENT (SECOND) OF CONTRACTS, WHICH RECOGNIZES THAT A COURT HAS THE EQUITABLE POWER TO UTILIZE PROMISSORY ESTOPPEL TO REMOVE A CASE FROM THE STATUTE OF FRAUDS WHEN NECESSARY TO AVOID AN INJUSTICE; TO BALANCE THE COMPETING PUBLIC POLICY OBJECTIVES, THE COURT SHOULD CONTINUE TO REQUIRE PROOF OF THE ELEMENTS BY CLEAR AND CONVINCING EVIDENCE.

It is well settled that the goal of the Statute of Frauds is to prevent frauds from being committed through the use of uncertain, unreliable and perjured oral testimony. See i.e. Moses v. Moses, 140 N.J. Eq. 575, 584 (E. & A. 1947)(Justice Harry Heher writing for the predecessor of this Court, "The primary design. . . of the statute of frauds is to avoid the hazards attending the use of uncertain, unreliable and perjured oral testimony, . . ."); see also Carlsen v. Carlsen, 49 N.J. Super. 130, 134 (App. Div. 1958)(internal citations omitted)(The statute of frauds was specifically designed to prevent "many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury."). Thus, "[t]he concern reflected by the statute is not that agreements within its scope are suspect, but that such agreements are of the type that are susceptible to fraudulent and unreliable methods of proof, thus the necessity for a writing that is signed by the party to be charged." Lahue v. Pio Costa, 263 N.J. Super. 575, 599, (App. Div. 1993).

Accordingly, for over 100 years, both the United States and New Jersey Supreme Courts have been careful to ensure that a statute designed to avoid a fraud is not used as a sword to perpetrate a fraud. See Smithsonian Institution v. Meech, 169 U.S. 398, 408 (1898)("The statute of frauds was designed to prevent frauds, and courts of equity will not permit it to be used to accomplish that which it was designed to prevent"); Cauco v. Galante, 6 N.J. 128, 138 (1951)("Where the statute works the intolerable mischief of operating as a fraud the statute should be no bar to the granting of relief to one who has, in good faith, so performed the parol agreement as to irretrievably change the situation of the parties to the disadvantage of the plaintiff"); Cooper v. Carlisle, 17 N.J. Eq. 525, 529 (E & A 1866).

Section 139 recognizes this long standing legal principle. It states:

> (1) **A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee 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. The remedy granted for breach is to be limited as justice requires.**
>
> (2) In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant:
>
> > (a) the availability and adequacy of other remedies, particularly cancellation and restitution;

> (b) the definite and substantial character of the action or forbearance in relation to the remedy sought;
>
> (c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence;
>
> (d) the reasonableness of the action or forbearance;
>
> (e) the extent to which the action or forbearance was foreseeable by the promisor.

Restatement (Second) of Contracts, Am. Law Inst. §139 (1981) (emphasis added).

Importantly, the Appellate Division previously adopted Section 139. Mazza, 304 N.J. Super. at 559-560. In Mazza, the legal issue before the court was whether the statute of frauds barred an oral agreement modifying the written documents involving the sale of a condominium. The trial court concluded that plaintiffs, in reliance on an oral agreement with defendant, had foregone the opportunity to purchase the unit and that "plaintiffs' conduct in reliance on the oral agreement constituted part performance of the agreement taking it out of the statute of frauds." Id. at 559.

While the Appellate Division agreed with the trial judge's factual findings and legal conclusion that partial performance of the oral agreement took the case out of the statute of frauds, it instead relied on the Restatement (Second) of Contracts §139 (1979), concerning induced reliance:

> While we do not disagree with [the trial judge's] perception [that partial performance took the oral agreement out of the statute of fraud], we are of the view that the more nearly applicable exception is that articulated by *Restatement (Second) of Contracts,* §139 (1979), **which is based on an induced reliance by the promisor that results in action or forbearance on the part of the promisee substantially prejudicing the promisee. . .**
>
> **We think it plain that Judge Winkelstein's factual findings encompass all of the elements of the *Restatement* rule. We are also satisfied that although this section of the *Restatement* does not appear to have been expressly relied on in this jurisdiction, its thesis is not only sound but also consistent with our jurisprudence.** *See, e.g., Carlsen v. Carlsen,* 49 *N.J.Super.* 130, 139 *A.*2d 309 (App.Div.1958). As we noted in *Citibank v. Estate of Simpson,* 290 *N.J.Super.* 519, 530, 676 *A.*2d 172 (App.Div.1996), "New Jersey typically gives considerable weight to *Restatement* views, and has, on occasion, adopted those views as the law of this State when they speak to an issue our courts have not yet considered." **We, therefore, adopt the *Restatement* rule as expressed by §139(1).**

Mazza, 304 N.J.Super. at 560 (emphasis added)(some citations omitted). Accordingly, New Jersey has adopted the restatement view that promissory estoppel can remove an oral agreement from the statute of frauds when necessary to prevent an injustice.[1] Other

[1]In Segal, 211 N.J. at 253-254, this Court noted that the "traditional elements of promissory estoppel require the party to show that there has been '(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'". (internal citations omitted). Those elements are largely taken from §90 of the Restatement (Second) of Contracts, which the Appellate Division previously adopted in Pop's Cones, Inc. v. Resorts Intern. Hotel, Inc., 307 N.J. Super. 461, 471 (App. Div. 1998). As noted in Comment "a" to §139, as well as by this Court in Segal, §139 and §90 of the restatement complement one another. Segal, 211 N.J. at 253.

states, including Alaska, California, Hawaii, Indiana and Iowa have also determined that promissory estoppel can defeat the statute of frauds in order to prevent an injustice, whereas Florida and Ohio have rejected that approach.[2] See Democratic Party v. Rice, 934 P.2d. 1313 (Alaska 1997); Monarco v. Lo Greco, 35 Cal.2d. 621 (1950); McIntosh v. Murphy, 469 P.2d. 177 (Haw. 1970); Brown v. Branch, 758 N.E.2d. 48 (Ind. 2001); Kolkman v. Roth, 656 N.W.2d. 148 (Iowa 2003); DK Arena, Inc. v. EB Acquisitions I, LLC, 112 So.3d. 85 (Fla. 2013) and Olympic Holding Company, LLC v. Ace, 122 Ohio St. 3d. 89 (2009).

The NJSBA urges the Court to apply that same view when analyzing the validity of palimony agreements that would otherwise be subject to the statute of frauds, like the one at issue here. If the Court finds that the agreement in this matter evidences a "'(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'" it should be enforced, as

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[2] Ohio, like New Jersey, has adopted §90 of the Restatement (Second) of Contracts. Although the Ohio Supreme Court determined that a party may not use promissory estoppel to bar the opposing party from asserting the affirmative defense of the Statute of Frauds, when doing so it also held that reliance damages under promissory estoppel could still be awarded for breach of an oral agreement covered by the statute of frauds when the promise needs to be enforced to avoid an injustice. Olympic Holding Company, LLC v. Ace, 122 Ohio St. 3d. 89, 96-97 (2009).

all of the traditional elements of promissory estoppel would be present. Segal, 211 N.J. at 253-254 (internal citations omitted).

In order to recognize the important public policy rationale behind the creation of the statute of frauds, some New Jersey courts have previously required proof of the promise and other elements to be by clear and convincing evidence. See Quigley, Inc. v. Miller Family Farms, Inc., 266 N.J. Super. 283, 295-97 (App. Div. 1993) (Proof of the promise, conduct and reliance should be by clear and convincing evidence in order for promissory estoppel to defeat the Statute of Frauds); see also Aiello v. Knoll Golf Club, 64 N.J. Super. 156, 164 (App. Div. 1961)("conduct and reliance must be of a 'clear and convincing' or 'clear and unequivocal' quality"). It is well settled that evidence is "clear and convincing" if it "enable[s] (the factfinder) to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." In re Samay, 166 N.J. 25, 30 (2001)(internal citations and quotations omitted).

The NJSBA believes that the courts' application of the standard of "clear and convincing" is a sound and reasonable way to allow the statute of frauds to continue meeting its goal of preventing fraud, while at the same time limiting individuals from misusing the statute in circumstances that would perpetrate a fraud.

For the reasons noted above, the NJSBA urges this Court to confirm that promissory estoppel remains a valid defense to the statute of frauds writing and/or attorney review requirement when necessary to prevent an injustice and that it must be proven by clear and convincing evidence.

POINT II

NEW JERSEY COURTS SHOULD RETAIN THE ABILITY TO USE THE EQUITABLE DEFENSE OF PARTIAL PERFORMANCE TO TAKE AN ORAL AGREEMENT OUT OF THE STATUTE OF FRAUDS; TO BALANCE THE COMPETING PUBLIC POLICY OBJECTIVES, THE COURT SHOULD CONTINUE TO REQUIRE PROOF OF THE ELEMENTS BY CLEAR AND CONVINCING EVIDENCE.

It is established that the doctrine of partial performance may take an oral agreement out of the Statute of Frauds. Lahue, 263 N.J.Super. at 599 (Plaintiff's partial performance and reliance on parties' oral settlement agreement led to the plaintiff's dismissal of litigation and, therefore, removed agreement from statute of frauds); Crowe v. DeGioia, 203 N.J. Super. 22 (App. Div. 1985), aff'd 102 N.J. 50 (1986) (Where evidence established the existence of a partially performed palimony agreement between parties, the Statute of Frauds did not bar an oral agreement regarding conveyance of the parties' residence to plaintiff); Klockner v. Green, 54 N.J. 230 (1969)(Statute of frauds did not bar specific performance of decedent's contract to make a will because decedent received the full benefit of the bargain).

In Klockner, a stepson and step-granddaughter alleged that the decedent intended to leave her estate to them in exchange for the overwhelming services they had provided and affections they had shown her. In support of their assertion, the stepson and step-granddaughter produced evidence establishing that during her lifetime, the decedent instructed her advisor to prepare a will to carry out her intent, but that her superstition prevented her from executing the will which would have implemented her intent. Ultimately, the decedent passed without an executed will. The lower courts held for the defendants (the decedent's surviving next of kin) in part because the Statute of Frauds barred enforcement of the alleged oral contract between the decedent and the plaintiffs. In reversing this decision, this Court admonished:

> The rule that a statute of frauds should not be used to work a fraud is well settled. 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.

Id. at 236. Accordingly, in Klockner, this Court recognized that New Jersey courts have long held that the statute of frauds "should not be used to work a fraud," and that courts have the equitable power to use the doctrine of partial performance to remove an oral agreement from the Statute of Frauds when necessary to avoid an injustice. Id.

Similarly, Crowe is also instructive, especially as it is also a palimony case. DeGioia argued that enforcement of an alleged oral agreement to transfer real estate violated the statute of frauds. Citing Klockner, the Appellate Division noted that Crowe had "fully performed her end of the agreement" and, as such, refused to permit DeGioia to use the statute of frauds to bar relief where enforcement of the writing requirement would have resulted in an injustice. Crowe, 203 N.J. Super. at 34.

In the instant matter, the Appellate Division rejected Plaintiff's attempt to utilize partial performance as a defense to Defendant's assertion the Statute of Frauds barred enforcement of the parties' signed and notarized agreement finding as follows:

> Plaintiff's claim of partial performance is contrary to the clear terms of the Amendment. Indeed, plaintiff's theory of relief is of the type that was specifically intended to be barred by the Amendment. As noted, the Amendment was enacted by the Legislature in direct response to recent decisions that found implied in fact agreements. A contract implied in fact is created by the conduct of the parties. Plaintiff's assertion that the Agreement should be enforced based on her alleged partial performance of an oral agreement between the parties, would essentially permit enforcement of a contract the Legislature has expressly prohibited. [Peta26].

The Appellate Division's decision posits that, as a result of the 2010 Amendment, New Jersey courts no longer have the equitable power to utilize partial performance to remove a palimony agreement from the Statute of Frauds when necessary to prevent an injustice. The NJSBA respectfully disagrees. There is nothing in the 2010

Amendment that demonstrates the legislative intent was to eliminate that well-established common law power of the New Jersey courts. To the contrary, Governor Corzine's statement upon this legislation that such agreements would be binding when they are "mutual" and "in writing" serve as indications that the intent was to require palimony agreements to be in writing and therefore place them into the purview of the statute of frauds, presumably with all of the equitable defenses available under the statute of frauds to appropriately enforce such agreements.

Use of this common law doctrine in New Jersey courts can be traced to the 1800s. See Brown v. Brown, 33 N.J. Eq. 650, 651 (N.J. Err & App. 1881) ("In order to enforce the performance of a contract within the statute of frauds, on the ground of part performance, (1) the parol agreement relied on must be certain and definite in its terms; (2) the acts proved in part performance must refer to, result from, or be made in pursuance of the agreement proved; (3) the agreement must have been so far executed that a refusal of full execution would operate as a fraud upon the party, and place him in a situation which does not lie in compensation.") If, as the Appellate Division surmised, the Legislature was attempting to divest New Jersey courts of a common law power through its amendment to the statute of frauds then the Legislature should adopt a statute that expressly specifies such an intent. See N.J. Const., Article XI, Par. 3 ("[a]ll law, statutory and otherwise,

all rules and regulations of administrative bodies and all rules of courts in force at the time this Constitution or any Article thereof takes effect shall remain in full force until they expire or are superseded, altered or repealed by this Constitution or otherwise.") and State v. Byrd, 198 N.J. 319, 358 (2009)(LaVecchia, concurring).

The NJSBA urges the New Jersey Supreme Court to confirm that the common law defense of partial performance remains available to overcome the Statute of Frauds when necessary. Similar to the standard applied with promissory estoppel, a litigant should be required to prove the elements of partial performance by clear and convincing evidence to insure that justice prevails. See Young v. Sabol, 4 N.J. 309, 312 (1950)(applying the "clear, cogent and convincing evidence" standard to an oral agreement where part performance was asserted).

POINT III

THE STATUTE OF FRAUDS AMENDMENT MANDATING BOTH PARTIES IN A NON-MARITAL RELATIONSHIP HAVE INDEPENDENT ADVICE OF COUNSEL FOR PROMISES OF SUPPORT OR OTHER CONSIDERATION TO BE BINDING, WHILE PRUDENT, RAISES CONSTITUTIONAL ISSUES AND SHOULD NOT BE PERMITTED TO BAR ENFORCEMENT OF AN OTHERWISE VALID AGREEMENT.

The Statute of Frauds requires that specific "agreements or promises ... be in writing and signed by the party to be charged therewith." N.J.S.A. 25:1-5. On Jan. 18, 2010, the Legislature amended the Statute of Frauds to require that palimony agreements be in writing and entered with the advice of counsel. Id. (L. 2009, c. 311, § 1, eff. Jan. 18, 2010). Specifically, the Amendment in subsection (h) provides that an agreement must be in writing where there is:

> A promise by one party to a non-marital personal relationship to provide support or other consideration for the other party, either during the course of such relationship or after its termination. **For the purposes of this subsection, no such written promise is binding unless it was made with the independent advice of counsel for both parties.**

Id. (emphasis added).

The NJSBA submits that, while seeking legal counsel is prudent in most situations, requiring non-married parties to seek independent counsel to enter into agreements for support or other consideration violates the Contract Clause and the Equal Protection Clause of the U.S. Constitution and the equal protection guarantees in the New Jersey Constitution.

A. The Statute of Frauds Amendment Requiring Independent Advice of Counsel Violates the Contract Clause.

The Contract Clause of the U.S. Constitution states: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. 1, § 10, cl. 1. Similarly, New Jersey's Constitution guarantees: "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, § 7, para. 3; see, *e.g.*, Berg v. Christie, 225 N.J. 245, 258-59 (2016); Burgos v. State, 222 N.J. 175, 193 (2015). "Contract impairment claims brought under either 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, 225 N.J. at 259 (quoting U.S. Tr. Co. of N.Y. v. New Jersey, 431 U.S. 1, 25 (1977)).

This inquiry involves a three-pronged analysis. Berg, 225 N.J. at 259. "Legislation unconstitutionally impairs a contract when it (1) 'substantially impair[s] a contractual relationship,' (2) 'lack[s] a significant and legitimate public purpose,' and (3) is 'based upon unreasonable conditions and ... unrelated to appropriate governmental objectives.'" Burgos, 222 N.J. at 193-

94 (quoting Farmers Mut. Fire Ins. Co. of Salem v. N.J. Prop.-Liab. Ins. Guar. Ass'n, 215 N.J. 522, 546-47 (2013)).

First, requiring a lawyer to review agreements for support between non-married partners imposes a substantial hurdle for the individual who is receiving the support or consideration. Palimony agreements typically benefit partners in relationships who have become financially or otherwise dependent upon the other by affording them certain protections or benefits if the relationship ends. Requiring these individuals to obtain independent advice of counsel for their agreement to be enforceable may not benefit the dependent partner. Instead, it makes it more difficult for the dependent partner to procure a binding agreement and opens the door to exploiting the unequal relationship to the detriment of the dependent partner.

The Appellate Division here contends that the Legislature routinely imposes additional costs on parties who enter into contracts; however, the only example cited was the requirement for independent legal counsel if a lottery winner seeks to assign their winnings. See N.J.S.A. 5:9-13(d)(15). Requiring a recipient of lottery winnings to seek counsel before assigning lottery winnings is distinguishable because of the State's *parens patriae* interest in insulating lottery winners from their human frailties. No similar justification exists in the context of agreements between non-married partners. While the NJSBA agrees that the best outcome

is for both parties to consult with independent counsel, such consultation should not be required; at a minimum, the parties should be able to make a clear and unambiguous waiver of the attorney review requirement. See Atalese v. U.S. Legal Services, L.P., 219 N.J. 430, 444 (2014)(This Court recognizing that a statutory right may be waived and that "no particular form of words is necessary to accomplish a clear and unambiguous waiver of rights.") and In re Opinion 26 of the Committee on the Unauthorized Practice of Law, 139 N.J. 323, 326-27 (1995)(This Court ruling, in the context of real estate transactions, that preserving the public's right to proceed without counsel outweighed the mandate to consult with an attorney before entering into a real estate agreement).

Indeed, every other agreement in a family law setting, whether married or unmarried, can be entered into without independent advice of counsel. That includes areas of magnitude such as agreements to: pay child support, assign responsibility for medical expenses, allocate college expenses for children, determine custody and parenting time, divide assets acquired and liabilities incurred as part of their joint venture. Even premarital agreements under the Uniform Premarital and Pre-Civil Union Agreement Act, the only other family-type agreement governed by statute, permits parties to "voluntarily and expressly waive, in writing, the opportunity to consult with independent legal

counsel." N.J.S.A. 37:2-38. Yet, the 2010 Amendment affords no opportunity for a person in a non-marital personal relationship to waive independent advice of counsel for promises of support or other consideration.

Further, the 2010 Amendment lacks any significant and legitimate public purpose. With regard to the latter, the Appellate Division stated below:

> Moreover, the Amendment's conditions reasonably relate to a significant and legitimate public purpose. The Statute of Frauds exists because the Legislature has found agreements within its scope "susceptible to fraudulent and unreliable methods of proof." Lahue v. Pio Costa, 263 N.J. Super. 575, 599 (App. Div. 1993). With regard to the Amendment specifically, we noted that the Legislature was concerned with the burden of proof difficulties in establishing valid palimony agreements. While independent attorney review is not required in other provisions of the Statute of Frauds or other family law agreements, the Legislature has required so for palimony agreements with the very purpose of protecting the rights of contracting parties. The Amendment is one legitimate way of addressing this significant issue and is reasonably related to appropriate legislative objectives.

The Legislature noted that the 2010 Amendment sought to overturn recent palimony decisions the New Jersey courts issued by requiring these contracts to be in writing and signed by the party making the promise. Maeker v. Ross, 219 N.J. 565, 577-78 (2014)(quoting both the Assembly and Senate Judiciary Committee statements to S2019, the bill leading to the 2010 Amendment). Yet, there is no specific legislative history to explain why mandatory independent advice of counsel is necessary to advance that purpose.

The Governor's statement upon signing S2901 into law was equally clear that "representations by legislative leadership and the bill sponsors" were that such agreements would be binding "when they are mutual, in writing, and notarized **as opposed to mandating this involvement or services of an attorney.**" (emphasis added). There does not appear to be any legitimate public purpose to imposing a stringent, non-waivable requirement for non-married partners to seek independent advice of counsel, when such a requirement does not apply to any other family-type agreement.

If the purpose is to protect the rights of each of the contracting parties, it is unclear how the requirement to seek independent advice of counsel achieves that purpose. In fact, it appears to create an impediment to same for the dependent partner. The very nature of these agreements is for one unmarried partner to agree to provide support or other consideration to the other partner. There is no defensible purpose in making it harder to enter into such an agreement when other more weighty family-type agreements do not require independent legal advice as a condition of enforceability.

Finally, for the same reasons set forth above relating to the first and second prong, the 2010 Amendment is grounded in unreasonable conditions and is unrelated to appropriate government objectives.

The Appellate Division points out that Plaintiff conceded that she chose not to see a lawyer about the Agreement and the trial court found there was no evidence presented that she could not afford an attorney. However, affordability is only one concern. Even if Plaintiff could afford an attorney, as long as the Defendant refused to seek independent legal advice, the notarized written agreement would be unenforceable as the statute requires both parties to seek independent legal advice. In other words, the empowered partner can refuse to seek independent legal advice, thereby nullifying any agreement, regardless of whether the dependent partner seeks legal advice, which is extremely troubling if the empowered partner induces the dependent partner to continue performing through false assurances they have a valid contract. Cf. Hagrish v. Olson, 254 N.J. Super. 133, 138 (App. Div. 1992) ("A contracting party is bound by the apparent intention he or she outwardly manifests to the other party. It is immaterial that he or she has a different, secret intention from that outwardly manifested.")

Attorney review should not be permitted to be used as a means to bar enforcement of an otherwise valid agreement.

B. The Statute of Frauds Amendment Requiring Independent Advice of Counsel Violates the Equal Protection Clause and Guarantees.

The Equal Protection Clause under the Fourteenth Amendment to the U.S. Constitution provides that "[n]o State shall make or

enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws." "The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.'" Plyer v. Doe, 457 U.S. 202, 216 (1982) (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)). "The essence of the Equal Protection Clause of the Fourteenth Amendment, as well as the sometimes even more demanding equal protection guarantees implied in our State Constitution, is that persons situated alike shall be treated alike." ADA Financial Service Corp. v. State, 174 N.J. Super. 337, 347 (1979).

Both the state and federal guarantees seek to safeguard equality by prohibiting arbitrary discrimination between similarly situated persons. Id. (citing Robinson v. Cahill, 62 N.J. 473 (1973), certif. den. 414 U.S. 976, (1973), Schmidt v. Newark Bd. of Adj., 9 N.J. 405 (1952)). These state equal protection guarantees do not require the state to treat all persons identically. ADA Financial Service Corp., 174 N.J. Super. at 347-48. (citing Shepard v. Woodland Tp. Comm. and Planning Bd., 71 N.J. 230 (1976)). However, disparate treatment requires the legislative classification to be rationally related to the achievement of a legitimate governmental interest. Barone v. Dep't of Human Servs., 107 N.J. 355, 369 (1987).

When engaging in an equal protection analysis, courts determine whether the classifications drawn in a statute are "reasonable in light of its purpose." ADA Financial Svc. Corp., 174 N.J. Super. at 348 (quoting McLaughlin v. Florida, 379 U.S. 184 (1964)). In determining whether a classification is reasonably related to the legislation's basic objective or to a relevant consideration of public policy, the court must consider "the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." Id. at 348. A court is required to determine the reasonableness of the classification even if no suspect classifications have been drawn and there has been no infringement of fundamental interests. Id. As this Court highlighted in Barone:

> The crucial issue in each case is "whether there is an appropriate governmental interest suitably furthered by the differential treatment" involved. "In striking the balance, we have considered the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction."

Barone, 107 N.J. at 368 (internal citations omitted).

In Barone, two non-married partners who sought to enter into a contract for support or for other financial consideration are being treated differently than other non-married individuals without a rational basis. Two individuals in a non-dating relationship, such as two business partners, or friends, or

siblings, signing the same exact agreement as the parties in this case would have a binding and enforceable contract. There is no rational governmental interest in such disparate treatment in the two identical instances, especially when one considers that the non-waivable requirement for non-married partners to seek independent advice of counsel does not apply to any other family-type agreement.

Accordingly, while the notion of waiving attorney review is discouraged, the NJSBA recognizes that mandating it raises constitutional concerns and could place unequal parties in a position to exploit or be exploited by virtue of this mandate.

CONCLUSION

In summary, for the reasons outlined above, the NJSBA urges this Court to:

(1) Continue New Jersey's tradition of following §139(1) of the Restatement (Second) of Contracts, and confirm that promissory estoppel can continue to be utilized to defeat the Statute of Frauds writing or attorney review requirement when enforcement of the oral promise is necessary to prevent an injustice, and require proof of the elements by clear and convincing evidence to insure justice prevails;

(2) Clarify that the common law defense of partial performance, which New Jersey courts have utilized since the 1800s, remains available to defeat the Statute of Frauds writing

requirement when necessary to avoid an injustice, and require proof of the elements by clear and convincing evidence to insure justice prevails; and

(3) Declare that the mandatory attorney consultation requirement in the 2010 Amendment cannot be a bar to enforcement of an otherwise enforceable agreement; or, in the alternative, clarify that parties to such an agreement may waive the attorney review requirement.

The NJSBA believes that the above proposed holdings are consistent with the provisions of the New Jersey Constitution, with long standing New Jersey precedent, and with general notions of fairness and equity. Accordingly, the NJSBA urges the Court to adopt them.

Respectfully submitted,

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