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### Cohabitation Without Marriage Does Not Give Rise to Recovery in Implied-in-Law Contract for Personal Services Rendered

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would do well to provide explicitly for the risk of loss in sales contracts so as to avoid gratuitously allowing the purchaser the now-broadened range of statutory remedies.<sup>91</sup>

Jeffrey S. Lichtman

### DEVELOPMENTS IN NEW YORK LAW

#### *Cohabitation without marriage does not give rise to recovery in implied-in-law contract for personal services rendered*

Actions between unmarried cohabiting individuals to recover compensation for personal services rendered pursuant to an express contract generally have been allowed provided that illicit relations do not form any part of the consideration.<sup>92</sup> New York courts, however, consistently have refused to recognize implied contracts for personal services within such a relationship.<sup>93</sup> This position has come under attack in other jurisdictions,<sup>94</sup> most nota-

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<sup>91</sup> Notably, the New York Court of Appeals has held that a contractual clause reiterating the effect of GOL § 5-1311—that the risk of loss by fire is on the seller—serves to take the contract outside the statutory purview and within common-law rules, at least to the extent of the risks for which express provision was made. *See World Exhibit Corp. v. City Bank Farmers Trust Co.*, 270 App. Div. 654, 657-58, 61 N.Y.S.2d 889, 892 (2d Dep't), *aff'd*, 296 N.Y. 586, 68 N.E.2d 876 (1946); *Approved Properties, Inc. v. City of New York*, 52 Misc. 2d 956, 958, 277 N.Y.S.2d 236, 238 (Sup. Ct. Richmond County 1966). A contract provision requiring the purchaser to accept the property "as is," however, will not shift the risk of loss to the purchaser since such provision only refers to a risk of natural deterioration and wear and tear, and does not apply to "intervening acts of destruction." *Id.* at 957-58, 277 N.Y.S.2d at 237-38.

<sup>92</sup> *See In re Gordon*, 8 N.Y.2d 71, 75, 168 N.E.2d 239, 240, 202 N.Y.S.2d 1, 3 (1960); *McCall v. Frampton*, 99 Misc. 2d 159, 415 N.Y.S.2d 752 (Sup. Ct. Westchester County 1979); *Rhodes v. Stone*, 63 Hun 624, 624, 17 N.Y.S. 561, 562 (Sup. Ct. Gen. T. 5th Dep't 1892). The courts' recognition of the validity of express contracts for personal services between cohabiting parties differs sharply from the rule governing married persons. Such contracts between married persons are clearly unenforceable. *In re Callister*, 153 N.Y. 294, 301, 47 N.E. 268, 270 (1897); *In re Paine*, 12 N.Y.S.2d 201, 203 (Sur. Ct. Queens County 1939).

<sup>93</sup> *See In re Gordon*, 8 N.Y.2d 71, 75, 168 N.E.2d 239, 240, 202 N.Y.S.2d 1, 3 (1960); *Vincent v. Morarity*, 31 App. Div. 484, 492, 52 N.Y.S. 519, 525 (2d Dep't 1898); *Rhodes v. Stone*, 63 Hun 624, 624, 17 N.Y.S. 561, 562 (Sup. Ct. Gen. T. 5th Dep't 1892). The rationale behind refusing to recognize an action in implied contract between a cohabiting couple for personal services is that cohabitation belies an intention that such services are being performed for compensation. *See Cooper v. Cooper*, 147 Mass. 370, 17 N.E. 892 (1888). Not all courts, however, subscribe to this reasoning. *See note 96 infra*.

<sup>94</sup> *See, e.g., Levar v. Elkins*, 604 P.2d 602 (Alaska 1980); *Carlson v. Olson*, 256 N.W.2d 249 (Minn. 1977).

bly in California, where, in the leading case of *Marvin v. Marvin*,<sup>95</sup> the Supreme Court of California allowed a plaintiff to invoke a wide range of legal and equitable remedies, and permitted recovery under an implied contractual theory.<sup>96</sup> Recently, however, in *Morone v. Morone*,<sup>97</sup> the New York Court of Appeals, declining to follow the *Marvin* lead, once again refused to recognize an implied-in-law contract for personal services between an unmarried cohabiting couple.<sup>98</sup>

In *Morone*, the plaintiff alleged that she and the defendant, although unmarried, had held themselves out as husband and wife since 1952.<sup>99</sup> Her first cause of action alleged that she had undertaken to perform for the defendant "domestic and business services" expecting to be compensated therefor, that the defendant accepted her services knowing that she expected compensation, and that the defendant had not compensated her.<sup>100</sup> Her second cause of action alleged an express oral partnership agreement, wherein it was agreed that the plaintiff would provide domestic services in return for support commensurate with the defendant's earning capacity, and that the net profits of the partnership would

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<sup>95</sup> 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

<sup>96</sup> *Id.* at 665, 684, 557 P.2d at 110, 122-23, 134 Cal. Rptr. at 819, 831-32. In *Marvin*, the plaintiff lived with the defendant for seven years, devoting her time to providing services as a homemaker. *Id.* at 666, 557 P.2d at 110, 134 Cal. Rptr. at 819. The court upheld her cause of action alleging an express oral contract to pool and share their earnings. *Id.* at 674-75, 557 P.2d at 116, 134 Cal. Rptr. at 825. The court also recognized the plaintiff's right to amend her complaint to allege a cause of action founded upon implied contract or quantum meruit. *Id.* at 685, 557 P.2d at 123, 134 Cal. Rptr. at 832. In allowing the amendment, the court noted the inconsistency between enforcing express contracts between cohabitants upon common-law contract principles and denying a cohabitant a cause of action based on an implied-in-fact contract. *Id.* at 678, 557 P.2d at 118, 134 Cal. Rptr. at 827. Indeed, the court noted, such an approach disregarded the rule that a contract can arise from the conduct of the parties. *Id.* at 678, 557 P.2d at 118, 134 Cal. Rptr. at 827. In the course of its opinion, moreover, the court rejected the presumption that services rendered to a nonmarital partner are performed gratuitously. Rather, the court stated that the better approach would be to presume that the parties intended to deal fairly with one another. *Id.* at 683, 557 P.2d at 121, 134 Cal. Rptr. at 830. Finally, the court indicated its willingness to sanction recovery in quantum meruit for the domestic services rendered if, on remand, the plaintiff could show that she rendered services with the expectation of remuneration. *Id.* at 684, 557 P.2d at 122-123, 134 Cal. Rptr. at 831-32. See generally Kay & Amyx, *Marvin v. Marvin: Preserving the Options*, 65 CAL. L. REV. 937 (1977); Comment, 90 HARV. L. REV. 1708 (1977).

<sup>97</sup> 50 N.Y.2d 481, 407 N.E.2d 438, 429 N.Y.S.2d 592 (1980), *modifying*, 67 App. Div. 2d 780, 412 N.Y.S.2d 684 (3d Dep't 1979).

<sup>98</sup> 50 N.Y.2d at 484, 489, 407 N.E.2d at 439, 442, 429 N.Y.S.2d at 593, 596.

<sup>99</sup> *Id.* at 484, 407 N.E.2d at 439, 429 N.Y.S.2d at 593.

<sup>100</sup> *Id.*

be shared equally between the plaintiff and defendant.<sup>101</sup> The plaintiff averred that the defendant had dishonored this alleged agreement, refused to account for monies received during the partnership, and failed to provide for her support and maintenance.<sup>102</sup> Special term dismissed the complaint, stating that no recovery could be had for "housewifely" duties performed within a marital-type relationship.<sup>103</sup> The Appellate Division, Third Department, affirmed the dismissal on the grounds that the first cause of action failed to allege an express agreement, and that the second cause of action, although alleging an express contract, was "predicated upon the same oral agreement alleged in the first cause of action," and thus was "contextually inadequate to support an action based upon an oral contract."<sup>104</sup>

On appeal, the Court of Appeals sustained the plaintiff's second cause of action based upon an express contract, but affirmed the dismissal of the cause of action in implied contract.<sup>105</sup> Writing for the majority,<sup>106</sup> Judge Meyer acknowledged the long-recognized doctrine that an unmarried cohabiting couple may expressly contract with each other for personal services in accordance with normal contract rules.<sup>107</sup> In dealing with actions alleging an implied contract to perform personal services, however, the majority stated that it is unreasonable to infer the requisite intent to be contractually bound.<sup>108</sup> A contrary holding, according to Judge Meyer, would

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<sup>101</sup> *Id.* at 485, 407 N.E.2d at 439, 429 N.Y.S.2d at 593-94. The plaintiff also alleged that the defendant promised "to take care of the plaintiff and do right by her." *Id.*

<sup>102</sup> *Id.* at 485, 407 N.E.2d at 439, 429 N.Y.S.2d at 594.

<sup>103</sup> *Id.* at 405, 407 N.E.2d at 439-40, 429 N.Y.S.2d at 594.

<sup>104</sup> 67 App. Div. 2d at 781, 412 N.Y.S.2d at 685.

<sup>105</sup> 50 N.Y.2d at 485, 407 N.E.2d at 439, 412 N.Y.S.2d at 593.

<sup>106</sup> Joining Judge Meyer in the majority were Chief Judge Cooke and Judges Gabrielli, Wachtler and Fuchsberg. Judge Jones dissented in a separate opinion in which Judge Jasen concurred.

<sup>107</sup> 50 N.Y.2d at 485, 407 N.E.2d at 439, 412 N.Y.S.2d at 593; see note 92 and accompanying text *supra*. The majority concluded that an express promise to render services in return for a share in the profits from the defendant's business was sufficiently definite to be enforceable, and regarded the allegation that the defendant would "take care of" the plaintiff as mere surplusage. 50 N.Y.2d at 488 n.3, 407 N.E.2d at 441 n.3, 429 N.Y.S.2d at 595 n.3.

<sup>108</sup> 50 N.Y.2d at 488, 407 N.E.2d at 441, 429 N.Y.S.2d at 596. The Court stated that militating against the recognition of an implied contract between cohabiting parties was the unreasonableness of inferring that personal services were rendered other than gratuitously. *Id.* In so stating, the *Morone* Court relied in part on *In re Adam's Estate*, 1 App. Div. 2d 259, 149 N.Y.S.2d 849 (4th Dep't 1956), wherein the court noted:

The rule is that performance and acceptance of services raises the inference of an implied contract to pay the reasonable value thereof. However, such inference may not be drawn "where because of the relationship of the parties, it is natural that

substantially increase the possibility of fraud or error since, absent an express agreement, the evidence presented by the parties with respect to intent becomes more "evanescent."<sup>109</sup> Finally, the Court stated that finding such an implied contract would be "inconsistent with the legislative policy" underlying New York's abolition of common-law marriage.<sup>110</sup>

Judge Jones dissented in part, arguing that not only should the cause of action in implied contract have been dismissed, but that the allegation of an express agreement should have been dismissed as well.<sup>111</sup> Judge Jones concluded that the substance of the purported promise by the defendant to "take care of and do right by" the plaintiff was "on its face patently indefinite and unenforceable."<sup>112</sup> In addition, the defendant's alleged promise to provide support in accordance with his earning capacity was vague, according to the dissent, since no standard of support was enunci-

such services should be rendered without expectation of pay."

*Id.* at 262, 149 N.Y.S.2d at 853 (quoting *Robinson v. Munn*, 238 N.Y. 40, 43, 143 N.E. 784, 785 (1924)). See *In re Cooke's Will*, 45 Misc. 2d 365, 256 N.Y.S.2d 819 (Surr. Ct. Onondaga County 1965); *In re Post's Estate*, 132 N.Y.S.2d 422 (Surr. Ct. Ulster County), *aff'd*, 284 App. Div. 927, 134 N.Y.S.2d 503 (3d Dep't 1954).

<sup>109</sup> 50 N.Y.2d at 488, 407 N.E.2d at 441, 429 N.Y.S.2d at 596.

<sup>110</sup> *Id.* at 489, 407 N.E.2d at 442, 429 N.Y.S.2d at 596. New York abolished common-law marriage in 1933 by amending the Domestic Relations Law, to delineate the means of solemnizing a marriage. Ch. 606, § 1, [1933] N.Y. Laws 1286 (McKinney) (current version at DRL § 11 (1977)); see *Adams v. Adams*, 67 N.Y.S.2d 752 (Sup. Ct. Queens County 1946).

Prior to *Morone*, one New York court, in *McCullon v. McCullon*, 96 Misc. 2d 962, 410 N.Y.S.2d 226 (Sup. Ct. Erie County 1978), drawing extensively from *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976), had indicated in dicta that a plaintiff in a cohabitation suit could recover upon an implied contract. In *McCullon*, the court awarded the plaintiff alimony and child support, finding that the plaintiff and defendant had entered into a valid common-law marriage under the laws of Pennsylvania. 96 Misc. 2d at 965, 410 N.Y.S.2d at 228. The court then went on to state, however, that had no common-law marriage been found, the conduct of the parties would have been sufficient to establish an implied promise by the defendant to support the plaintiff in return for the plaintiff's 28 years of household work and forbearance of employment. 96 Misc. 2d at 974, 410 N.Y.S.2d at 233. The conduct cited by the court as indicative of such an implied promise was that the defendant bought a home and opened a bank account in their joint names, purchased food and clothing for the plaintiff and their children, and paid the property taxes and utility bills. *Id.* at 973-74, 410 N.Y.S.2d at 233. The court also weighed the defendant's promise to always take care of the plaintiff. Notably, however, the court did not acknowledge *Dombrowski v. Somers*, 41 N.Y.2d 858, 362 N.E.2d 257, 393 N.Y.S.2d 706 (1977), which held that a promise to "take care of" the plaintiff was too vague to give rise to a promise of support. *Id.* at 859, 362 N.E.2d at 258, 393 N.Y.S.2d at 707. See also note 107 *supra*.

<sup>111</sup> 50 N.Y.2d at 489, 407 N.E.2d at 442, 429 N.Y.S.2d at 596 (Jones, J., dissenting).

<sup>112</sup> *Id.* at 490, 407 N.E.2d at 442, 429 N.Y.S.2d at 597 (Jones, J., dissenting) (citing *Dombrowski v. Somers*, 41 N.Y.2d 858, 362 N.E.2d 257, 393 N.Y.S.2d 706 (1977)).

ated in the alleged agreement.<sup>113</sup> Finally, Judge Jones stated that a promise to divide the net profits of the alleged partnership was indefinite and hence unenforceable because the defendant did not promise to carry on a profit-making activity.<sup>114</sup>

It is submitted that the Court of Appeals in *Morone* erred in predicating its rejection of implied-in-law agreements between cohabitants on principles applicable solely to agreements implied-in-fact. It is settled that a contract implied-in-law is not a contract at all, but rather an equitable remedy developed to prevent unjust enrichment where there has been no finding of intent to contract.<sup>115</sup> In expressly rejecting implied-in-law remedies, however, the Court focused on the problems of proof involved in discerning the intentions of the parties.<sup>116</sup> Such reasoning, however valid it may be in the context of determining whether to recognize a cause of action based on an implied-in-fact agreement,<sup>117</sup> is of no moment when the issue concerns the propriety of affording equitable

<sup>113</sup> *Id.* (Jones, J., dissenting).

<sup>114</sup> *Id.* at 491, 407 N.E.2d at 443, 429 N.Y.S.2d at 597 (Jones, J., dissenting).

<sup>115</sup> *Bradkin v. Leverton*, 26 N.Y.2d 192, 196, 257 N.E.2d 643, 645, 309 N.Y.S.2d 192, 195 (1970); J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* 19 (2d ed. 1977). Another equitable remedy, the constructive trust, serves to prevent unjust enrichment by impressing a trust relationship on the parties notwithstanding that there was never any intention that such a relationship be created. See Folberg & Buren, *Domestic Partnership: A Proposal for Dividing the Property of Unmarried Families*, 12 WILLAMETTE L.J. 453, 472 (1976). See generally *McCall v. Frampton*, 99 Misc. 2d 159, 165, 415 N.Y.S.2d 752, 759 (Sup. Ct. Westchester County 1979).

<sup>116</sup> 50 N.Y.2d at 488, 407 N.E.2d at 441, 429 N.Y.S.2d at 596. The Court stated: The major difficulty with implying a contract from the rendition of services for one another by persons living together is that *it is not reasonable to infer an agreement to pay for the services rendered* when the relationship of the parties makes it natural that the services were rendered gratuitously. . . . For courts to attempt through hindsight to sort out *the intentions of the parties* and affix jural significance to conduct carried out within an essentially private and generally non-contractual relationship runs too great a risk of error. . . . There is . . . substantially 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*.

*Id.* (emphasis added) (citations omitted).

<sup>117</sup> A contract implied in fact is a true contract. J. CALAMARI & J. PERILLO, *supra* note 115, at 19. Requisite to establishing the existence of such a contract is a finding of mutual assent. 1 S. WILLISTON, *CONTRACTS* § 18, at 31 (3d ed. 1957). See *Shapira v. United Medical Service, Inc.*, 15 N.Y.2d 200, 205 N.E.2d 298-99, 257 N.Y.S.2d 150 (1965); *Adams & Co. Real Estate v. E. & B. Super Markets, Inc.*, 26 App. Div. 2d 365, 274 N.Y.S.2d 776 (1st Dep't 1966). Unlike express contracts which arise when the parties actually agree with each other, implied-in-fact contracts arise when the conduct of the parties clearly evinces their contractual intent. See G. DOUTHWAITE, *UNMARRIED COUPLES AND THE LAW* 171 (1979); J. CALAMARI & J. PERILLO, *supra* note 115, at 19.

relief founded on a quasi-contractual theory.<sup>118</sup>

Despite its flawed analysis, the Court's rejection of implied-in-law remedies as between cohabiting parties is nevertheless justified. Indeed, as the Court's opinion makes evident,<sup>119</sup> the abolition of common-law marriage evinces the legislative intent to keep distinct the concepts of marriage and cohabitation, and to not allow legal rights and obligations to arise from the mere fact that the parties are living together.<sup>120</sup> The essence of a quasi-contractual claim based on cohabitation, however, is that one party has been unjustly enriched by the mutual decision that one party will provide domestic services while the other will be the wage-earner.<sup>121</sup> Recognition of such a claim, therefore, would require a finding of legal obligations arising solely out of the existence of the relationship and, therefore, contravene the overriding policy considerations inherent in the abolition of common-law marriage.

Although the holding in *Morone* expressly rejected only implied-in-law remedies, the Court's reasoning suggests that a cause of action based on an implied-in-fact agreement would also be rejected. It is submitted that the Court's rationale does not present a convincing argument for refusing to recognize such a remedy. By giving effect to express agreements between unmarried persons living together, New York courts have long recognized that while the fact of cohabitation does not give rise to legal rights and obligations, it should not negate the express intentions of the parties.<sup>122</sup> The *Morone* Court's suggestion that a different result should obtain merely because the intent of the parties is manifested by conduct, rather than expressed orally or in writing, violates settled principles of contract law.<sup>123</sup> Indeed, the manner in which intent is evidenced, while bearing upon the nature and quality of proof that

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<sup>118</sup> See *Bradkin v. Leverton*, 26 N.Y.2d 192, 196, 257 N.E.2d 643, 645, 309 N.Y.S.2d 192, 195 (1970).

<sup>119</sup> See 50 N.Y.2d at 489, 407 N.E.2d at 442, 429 N.Y.S.2d at 596.

<sup>120</sup> See *Fearon, Common Law Marriage Abolished*, 5 N.Y. ST. BAR ASS'N BULL. 302, 302-03 (1933). See also Note, *Property Rights of Nonmarital Partners in Meretricious Cohabitation*, 13 NEW ENGLAND L. REV. 453, 472 (1978).

<sup>121</sup> See *Casad, Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again*, 77 MICH. L. REV. 47, 55-56 (1978). As noted by Casad, "To allow a knowingly unmarried party, in the name of unjust enrichment, the same right allowed a real or putative spouse to claim property acquired by the other (in the absence of an express or implied-in-fact agreement) is to recognize [a] new 'common law status'. . . ." *Id.* at 61.

<sup>122</sup> *E.g., In re Gorden*, 8 N.Y.2d 71, 75, 168 N.E.2d 239, 240, 202 N.Y.S.2d 1, 3 (1960); *Rhodes v. Stone*, 63 Hun 624, 624, 17 N.Y.S. 561, 562 (Sup. Ct. Gen. T. 5th Dep't 1892).

<sup>123</sup> See note 117 *supra*.

may be adduced, should be irrelevant to the viability of the cause of action. Thus, it is submitted, as between cohabiting parties, *Morone* should not be read to preclude the assertion of a cause of action in implied-in-fact contract to recover for personal services rendered.<sup>124</sup>

*Joseph J. Tesoriero*

*Evidence of prior uncharged criminal acts admissible to rebut defendant's claim of legal insanity*

In order to reduce the possibility that a defendant in a criminal prosecution will be convicted on the basis of his criminal propensity, evidence of prior uncharged criminal acts generally is excluded.<sup>125</sup> Nevertheless, in limited circumstances, the prosecutor may introduce evidence of the defendant's prior criminal acts provided that the evidence is relevant<sup>126</sup> to a material issue in the

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<sup>124</sup> In *Levar v. Elkins*, 604 P.2d 602 (Alaska 1980), the Supreme Court of Alaska affirmed the trial court's denial of a motion to dismiss the plaintiff's case against her former live-in partner based on an express or implied-in-fact agreement. *Id.* at 603. On appeal, the court remarked that since the woman had abandoned her claim in quantum meruit at trial and relied only upon an express or implied contractual theory of recovery, there would be no need to address the "questions" raised by *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). *Levar v. Elkins*, 604 P.2d at 603 & n.2. It is submitted that the tacit refusal by the court to distinguish between express and implied-in-fact agreements, notwithstanding that the parties to the agreement were cohabitants, evinces the recognition that the fact of cohabitation should not preclude the application of general principles of contract law. See generally *Adams & Co. Real Estate v. E. & B. Super Markets, Inc.*, 26 App. Div. 2d 365, 366, 274 N.Y.S.2d 776, 778 (1st Dep't 1966); Note, *Property Rights of Nonmarital Partners in Meretricious Cohabitation*, 13 NEW ENGLAND L. REV. 453, 472 (1978).

<sup>125</sup> The general rule excluding from the trier of fact evidence of prior criminal acts of the defendant is based on the recognition that

[t]he deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of Court.

J. WIGMORE, EVIDENCE § 57, at 456 (Chadbourn rev. ed. 1970). This "exclusionary rule" is "universally recognized" and "firmly established." *People v. Molineux*, 168 N.Y. 264, 191-93, 61 N.E. 286, 293-94 (1901); see, e.g., *People v. Allweiss*, 48 N.Y.2d 40, 46, 396 N.E.2d 735, 738, 421 N.Y.S.2d 341, 344 (1979); *People v. Fiore*, 34 N.Y.2d 81, 84, 312 N.E.2d 174, 176, 356 N.Y.S.2d 38, 41 (1974); *People v. Dales*, 309 N.Y. 97, 101, 127 N.E.2d 829, 830-31 (1955); *People v. Shea*, 147 N.Y. 78, 99, 41 N.E. 505, 511 (1895); *People v. Sharp*, 107 N.Y. 427, 460, 14 N.E. 319, 340 (1887); *Coleman v. People* 55 N.Y. 81, 90 (1873).

<sup>126</sup> The relevancy of evidence has been described as "the tendency of the evidence to