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- The Journal wishes to thank Judge Edward Ginsburg for his continuing support and Matthew P. Barach, Barach Law Group LLC, and Christopher Skall, Boston College Law School, *Juris Doctor recipient, July 2016*, for their contributions to this issue of the Journal.

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THE IMPORTANCE OF EXIGENT CIRCUMSTANCES SUPPORTING TEMPORARY ORDERS IN MODIFICATION ACTIONS IN THE PROBATE COURT

By
Attorney Matthew P. Barach, Barach Law Group LLC

A Single Justice of the Appeals Court recently remanded a pending child custody modification temporary order issued by a Trial Judge who failed to issue the required specific findings supporting the decision in accordance with G. L. ch. 208, § 28A.

A change in custody during the pendency of a complaint for modification of a prior custody order must be based on "specific findings of fact. . .which clearly demonstrate the injury, harm or damage that might reasonably be expected to occur if relief pending a judgment of modification is not granted."[1] These specific findings are necessary and required during the pendency of a modification action and cannot be ignored by the court.[2]

An interlocutory appeal to a Single Justice requires the justice to determine whether there was an error of law resulting from the improper application of legal standards or whether there was an abuse of discretion in the entry of the order that is the subject of review.[3]

The Petitioner argued to the Single Justice that by not entering specific findings justifying the ruling the Lower Court committed not only an error of law, but also an abuse of discretion that required reversal.[4] The pertinent facts are as follows:

[1] Rosenthal v. Maney, 51 Mass. App. Ct. 257 (2001).

[2] Rosenthal v. Maney, 51 Mass. App. Ct. 257 (2001).

[3] Jet-Line Services, Inc. v. Selectmen of Stoughton, 25 Mass. App. Ct. 645, 646 (1998).

[4] Heins v. Ledis, 422 Mass. 477, 480-481, 664 N.E.2d 10 (1996); J.S. v. C.C., 454 Mass. 652, 660, 912 N.E.2d 933 (2009); Freedman v. Freedman, 49 Mass. App. Ct. 519, 521, 730 N.E.2d 913 (2000); Rosenthal v. Maney, 51 Mass. App. Ct. 257, 265, 745 N.E.2d 350 (2001); Macri v. Macri, 89 Mass. App. Ct. 1115 (unpublished) (2016).

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The Father filed a Complaint for Modification in the Probate and Family Court, with the primary issue being school choice and a revised parenting plan for the parties' minor child. The Mother had primary physical custody of the parties' child. The parties agreed to an appointment of a Guardian Ad Litem to investigate in which school system the child should be enrolled and whether a new parenting plan was necessary.

The GAL investigated these pending issues and issued recommendations generally favorable to the Mother. A review hearing was held and counsel for the parties argued in front of the court. There was no testimony given by the parties and nor was an evidentiary hearing held by the Trial Judge.

The Lower Court rejected the interim recommendations of the GAL and stated from the bench only that the child would go to school where the Father resided rather than where the Mother resided. The Lower Court then instructed the parties' to reach an agreement pertaining to both the ongoing parenting issues and parenting plan for the child.

As a result of the Court's directive, the parties went outside the courtroom and negotiated for a period of time. These negotiations resulted in a detailed and written stipulation that included a revised parenting plan with the child spending equal time with both parents.

The agreement was initialed and signed by the parties. The stipulation addressed all of the pending issues before the Lower Court and seemed to end the matter, pending a further review. The agreement was filed by the parties at a later date as the courthouse was closed after the parties had reached their agreement.

After the order was passed on to the court for filing only, without any further notice or hearing, the parties received from the Trial Judge an order that struck the portion of the parties' agreed upon stipulation for shared parenting time with the minor child. The order was "silent" as to why the court did not adopt the parties' agreed upon parenting plan.

It was argued to the Single Justice that the Lower Court committed a reversible error of law by unilaterally altering the parties' agreed upon parenting plan during a pending modification of a divorce judgment without issuing written, specific findings articulating the harm that would result without entering such orders. The Petitioner referenced M. G. L. ch. 208, § 28A, which states that "every order entered relative to care and custody shall include specific findings of fact made by the court which clearly demonstrate the injury, harm or damage that might reasonably be expected to occur if relief pending a judgment of modification is not granted." The Trial Judge failed to enter those required findings.

In addition, the Petitioner argued that there was no available evidence to support the type of injury or harm, which would require striking the parties' agreed upon parenting plan.

The best available evidence, the GAL report, recommended the opposite of what the court had indicated regarding school choice for the child and did not recommend a change in physical custody at the present time.

Similarly**,** the Petitioner pointed out there was no evidentiary hearing conducted by the court. Nor was either party seeking a change in custody, as there was no pending motion before the court. The matter was on for review only.

The Petitioner also stressed to the Single Justice the irony that the Lower Court specifically instructed the parties to reach an agreement pertaining to parenting issues and the parenting plan.

Finally, the Petitioner argued that the Lower Court may only enter temporary care and custody orders during a modification action of a divorce judgment without advance notice: "***only if the court finds that an emergency exists, the nature of which requires the court to act before the opposing party or parties can be heard in opposition***."[5]

The Petitioner argued that given the nature of the entry of the orders that she should have been afforded, at a minimum, an opportunity to be heard pursuant to 28A within five days. The statute is clear in this regard: "In all such cases, such order shall be for a period not to exceed five days and written notice of the issuance of any such order and the reasons therefor shall be given to the opposing party or parties together with notice of the date, time and place that a hearing on the continuation of such order will be held."[6]

[5] G.L. ch. 208, § 28A.

[6] G.L. ch. 208, § 28A.

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The Single Justice agreed, in part, with the Petitioner and ordered the matter remanded to the Trial Judge, but only to enter specific findings of fact as required by c.208 sec. 28A to support the provisions of the order striking the parties' agreed upon parenting plan. The Lower Court entered the required specific findings and the Single Justice thereafter denied the Petitioner's request for further relief.

The matter is a stark reminder of the necessity of specific findings prior to the entry of temporary orders in child custody modification actions. Temporary orders to modify a change in custody require specific findings of injury, harm or damage which justify the entry of such orders. The failure of a Trial Judge to enter these findings is reversible using the Single Justice practice in the Appeals Court. Before Counsel gets to that stage, family law attorney's should be prepared to provide the Trial Judge with proposed written orders and a specific rationale that clearly demonstrate injury or harm that is required if a client is seeking to change custody during the pendency of a matter. They must also remind the Trial Judge of the necessity of making specific findings of harm or injury prior to entry of temporary orders altering custody during a modification action.

DO YOU TAKE THESE SUPPORT PAYMENTS TO BE YOUR LAWFUL OBLIGATIONS?: WHY STATES SHOULD REQUIRE WRITTEN AGREEMENTS IN PALIMONY CLAIMS

By
Christopher Skall, Boston College Law School, Juris Doctor recipient, July 2016

Introduction

In 1976, the Supreme Court of California decided *Marvin v. Marvin*, a case that captured the public's attention and popularized the term "palimony."[7] After seven years of cohabitating together, Michelle Triola Marvin sued actor Lee Marvin and sought ongoing support payments based on his alleged promise to attend to her financial needs for the rest of her life.[8] In its decision, the court liberally held that both express and implied financial agreements between unmarried couples could be enforced by the courts.[9]

The *Marvin* case has aptly been labeled as a "landmark" decision by many commentators due to its influence on how courts resolve legal disputes between unmarried parties, as well as its role in influencing "social perception of the legitimacy of non-marital cohabitation."[10] Despite the significant impact of *Marvin*, the case's central holding allowing palimony claims based on implied or express contracts has gained very little traction in the nearly 40 years since the case was decided and the body of cases

[7] *See e.g.*, Marvin v. Marvin, 557 P.2d 106, 110 (Cal. 1976) (en banc), *aff'd*, 176 Cal. Rptr. 555 (Cal. Ct. App. 1981); Paul J. Buser, *Domestic Partner and Non-Marital Claims Against Probate Estates:* Marvin *Theories Put to a Different Use*, 38 Fam. L.Q. 315, 317–18 (2004); Anahad O'Connor, *Michelle Triola Marvin, of Landmark Palimony Suit, Dies at 76*, N.Y. Times (Oct. 30, 2009), http://www.nytimes.com/2009/10/31/us/31marvin.html (*last visited 10/31/16*).

[8] *See Marvin*, 577 P.2d at 110.

[9] *See id.*

[10] *See e.g.*, Brandon Campbell, *Cohabitation Agreements in Massachusetts:* Wilcox v. Trautz *Changes the Rules but not the Results*, 34 New Eng. L. Rev. 485, 499–500 (2000); Marvin M. Mitchelson & William J. Glucksman, *Equal Protection for Unmarried Cohabitors: An Insider's Look at* Marvin v. Marvin, 5 Pepp. L. Rev. 283, 284–85 (1978); Lynn D. Wardle & Laurence C. Nolan, *Cohabitation Without Marriage*, Int'l Encyclopaedia Laws Fam. & Succession L. Ch. 3, § 3 (2014); Brad Reid, *Property and Palimony Law for Unmarried Cohabitating Partners*, Huffington Post (May 12, 2015, 5:28 PM), http://www.huffingtonpost.com/brad-reid/property-and-palimony-law_b_7269314.html (*last visited 10/31/16*).

granting monetary support awards between unmarried parties has remained modest.[11] The majority of courts and legislatures that have actively considered the issue of support payments between unmarried couples have found that a written or express contract is a necessary component of an enforceable palimony agreement.[12]

In light of the continuing rise in unmarried cohabitation in the nearly 40 years since *Marvin*, a question exists as to whether the concerns discussed in *Marvin* have ripened to the point where state courts and legislatures should relax their restrictions for enforcing palimony support agreements.[13] Part I of this article examines and compares the systems of alimony and palimony.[14] Part II then analyzes some of the salient arguments for and against requiring written contracts as a prerequisite to enforcing a palimony support agreement.[15] Finally, Part III comments on how the actual need for palimony awards may be minor and argues that states should require written agreements before awarding palimony support awards in divorce and separation matters.[16]

I. An Overview of Support Payments for Married and Unmarried Couples

When marriages end or parties separate, courts across the United States sometimes order spousal support payments in the form of alimony awards.[17] From a historical prospective, marriage was seen as creating a permanent bond and set of duties between spouses.[18] When divorce or separation did occur, alimony was seen as "the judicial tool for enforcing that obligation during the spouses' separation."[19] In the modern context, one of the strong underlying rationales for alimony awards is the provision of some equitable relief for spouses leaving marriages in disparate financial and professional positions.[20] The specific amount, duration, and conditions of alimony awards are commonly subject to the discretion of judges and are determined based on the individual circumstances and facts of a divorce proceeding.[21] The alimony statute in Florida is illustrative of the numerous factors that judges consider when deciding whether to grant an alimony award.[22] In Florida, judges first look at whether "either party has an actual need for alimony or maintenance" and then consider whether "either party has the ability to pay alimony or maintenance."[23] If this first prong is satisfied, the courts then analyze several factors to determine the amount and duration of an alimony or maintenance award, including the length of the marriage, the

[11] *See* Ann L. Estin, *Ordinary Cohabitation*, 76 Notre Dame L. Rev. 1381, 1382–83 (2001); Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 Fam. L.Q. 309, 322–24 (2008). It is worth noting that in the *Marvin* case itself, the lower court found that Michelle Triola Marvin failed to carry her burden in showing that such a contract for ongoing support existed. *See* Marvin v. Marvin, 176 Cal. Rptr. 555, 556–67 (Cal. Ct. App. 1981). Although the lower court did grant Michelle Triola Marvin an award of $104,000 to be used for her "economic rehabilitation," the Court of Appeal struck this support payment down on the grounds that there was "no equitable or legal basis for the challenged rehabilitative award." *See id*. at 558.

[12] *See e.g.*, Minn. Stat. § 513.075 (2015); Posik v. Layton, 695 So. 2d 759, 762 (Fla. Dist. Ct. App. 1997); Wilcox v. Trautz, 693 N.E.2d 141, 146 (Mass. 1998); Steven K. Berenson, *Should Cohabitation Matter in Family Law?*, 13 J. L. & Fam. Stud. 289, 297 (2000); Wardle, *supra* note 4, § 3.

[13] *Compare* Thomas P. Gallanis, *The Flexible Family in Three Dimensions*, 28 Law & Inequality 291, 293–99 (2010) (arguing that states should do more to "analogize between cohabitation and the historically protected status of marriage"), *with* Berenson, *supra* note 6, at 297 (questioning the "practical impact" of the *Marvin* decision and the wisdom of granting support awards based on implied contracts).

[14] *See infra* notes 11–49 and accompanying text.

[15] *See infra* notes 50–83 and accompanying text.

[16] *See infra* notes 84–104 and accompanying text.

[17] *See e.g.*, Margaret Ryznar, *Alimony's Job Lock*, 49 Akron L. Rev. 91, 91 (2016); John Bordeau et al., *In Action for Divorce or Dissolution of Marriage*, 27B C.J.S. § 592 (2016). Alimony is defined by *Black's Law Dictionary* as "[a] court-ordered allowance that one spouse pays to the other spouse for maintenance and support while they are separated, while they are involved in a matrimonial lawsuit, or after they are divorced. . . ." *Alimony*, Black's Law Dictionary (10th ed. 2014).

[18] *See* Cynthia Lee Starnes, *Alimony Theory*, 45 Fam. L.Q. 271, 276 (2011); Bordeau, *supra* note 11.

[19] *See* Starnes, *supra* note 12, at 276.

[20] *See* Rachel Biscardi, *Dispelling Alimony Myths: The Continuing Need for Alimony and the Alimony Reform Act of 2011*, 36 W. New Eng. L. Rev. 1, 6 (2014); Marshal S. Willick, *A Universal Approach to Alimony: How Alimony Should be Calculated and Why*, 27 J. Am. Acad. of Matrimonial Law. 153, 159 (2015).

[21] *See* Bordeau, *supra* note 11; Judith G. McMullen, *Alimony: What Social Science and Popular Culture Tell Us About Women, Guilt, and Spousal Support After Divorce*, 19 Duke J. of Gender Law & Pol. 41, 42, 43 (2011). For example, under Nevada law, different categories of alimony exist, including alimony aimed at providing temporary maintenance payments and long-term, ongoing spousal support. *See* Nev. Rev. Stat. Ann. § 125.040(1) (West 2015); Nev. Rev. Stat. Ann. § 125.150(1) (West 2015); *see also* Willick, *supra* note 14, at 165.

[22] *See* Fla. Stat. Ann. § 61.08 (West 2016).

[23] *See id*. § 61.08(2); *see also* McMullen, *supra* note 15, at 42 ("Awards of alimony are theoretically ordered when one spouse has greater need, the other spouse has the ability to pay, and payment is deemed to be fair in some sense.").

standard of living of the parties during the marriage, the age and health of the parties, the parenting responsibilities of the parties, and the financial and educational status of the parties.[24]

Over the years, numerous efforts to reform and update alimony laws have emerged in response to concerns regarding the rationale for and fairness of ongoing spousal support orders.[25] One commonly cited criticism of alimony is the hard to predict and varying nature of the awards that are generated by the legal remedy.[26] Another issue that has gained emphasis recently is the perceived unfairness of lifetime alimony awards and the impact these orders have on the employment and retirement decisions of the paying party.[27] These general concerns were reflected in New Jersey's alimony reform legislation from 2014.[28] In an effort to address the issue of lifelong alimony awards, the New Jersey legislature created a "rebuttable presumption that alimony shall terminate upon the obligor spouse or partner attaining full retirement age."[29] With respect to the issue of consistency and predictability, the legislature mandated that the courts must give equal weight to all statutory factors governing alimony awards and must make "specific written findings of fact and conclusions of law" when the court finds that "certain factors are more or less relevant than others."[30]

In the last half-century, the United States has witnessed a dramatic increase in the number of couples cohabitating together without being married.[31] Conduct which was once seen as immoral has now become commonplace and a 2010 census revealed that approximately 12% of cohabitating couples in the United States are not married.[32] In the face of these changing demographics and social norms, several states "have granted a number of rights and protections traditionally accorded exclusively to married couples to unmarried partners."[33] Claims for financial support amongst former unmarried partners, or "palimony" support, is one area of the law that has drawn disparate responses from the courts and legislatures that have considered the issue.[34] Accordingly, the particular remedy available to litigants and the burden of proof they must carry to obtain a support order vary greatly depending on the state where they cohabitated or had a relationship.[35]

[24] *See* Fla. Stat. Ann. § 61.08(2).

[25] *See* Oliva M. Hebenstreit, *Retiring Alimony at Retirement: A Proposal for Alimony Reform*, 33 Quinnipiac L. Rev. 781, 785–86 (2015); Charles P. Kindregan, Jr., *Reforming Alimony: Massachusetts Reconsiders Postdivorce Spousal Support*, 46 Suffolk U. L. Rev. 13, 14–16 (2013); Jeff Landers, *In Many States, Alimony Reform Has Gone Too Far*, Forbes (July 12, 2011, 10:24 AM), http://www.forbes.com/sites/jefflanders/2011/07/12/in-many-states-alimony-reform-has-gone-too-far/#6c7ac15c22d9 (*last visited 10/31/16*).

[26] *See e.g.*, McMullen, *supra* note 15, at 43 (discussing the "subjective, complicated, and unpredictable nature of alimony decisions"); Starnes, *supra* note 12, at 271 ("The broad discretion vested in judges to determine alimony eligibility and quantification, together with the absence of a theory to guide decisionmaking, has produced an alimony regime that is marked by unpredictability, uncertainty, and confusion."); Willick, *supra* note 14, at 160 ("[T]he absence of a coherent theoretical basis for such an award, and the resulting absence of consistency or predictability in such awards, impedes settlement, increases litigation costs, and undermines confidence in the fairness of the judicial system.").

[27] *See* Hebenstreit, *supra* note 19, at 785–87 (commenting on how several states have "either drafted or enacted comprehensive alimony reform that provides for possible modification or termination of alimony upon the payor's retirement."); Ryznar, *supra* note 11, at 103 (describing how courts around the nation have "considered whether the obligor's retirement. . .constitutes a substantial and material change in circumstances to justify modification of an alimony award.").

[28] *See* An Act Concerning Alimony, 2014 N.J. Laws ch. 42, 1–11 (codified as amended at N.J. Stat. 2A:34-23); Matt Friedman, *N.J.'s Alimony Law Gets an Update After Christie Signs Bill*, NJ.com (Sept. 10, 2014, 7:53 PM), http://www.nj.com/politics/index.ssf/2014/09/christie_signs_bill_to_change_njs_alimony_law.html (*last visited 10/31/16*).

[29] *See* 2014 N.J. Laws ch. 42, 6. Also, the legislation made it so that, in cases where the marriage lasts less than 20 years, the total duration of an alimony award cannot exceed the length of the marriage. *See id.* at 3.

[30] *See id*. at 4.

[31] *See e.g.*, Emily Diederich, *'Cause Breaking Up is Hard to Do: The Need for Uniform Enforcement of Cohabitation Agreements in West Virginia*, 113 W. Va. L. Rev. 1073, 1073–74 (2011); Gallanis, *supra* note 7, at 291.

[32] *See* Lauren J. Wolven et al., *Estate Planning for Unmarried Adults*, Am. Law Inst. Continuing Legal Educ. 575, 577 (2012).

[33] Julia L. Cardozo, *Let My Love Open the Door: The Case for Extending Marital Privileges to Unmarried Cohabitants*, 10 U. Md. L.J. Race, Religion, Gender & Class 375, 376 (2010); *see also* Keith K. Hodges, *Palimony: When Lovers Part*, 102 Mil. L. Rev. 85, 95 (1983) ("The courts are increasingly reluctant to view unmarried cohabitation as immoral").

[34] *See e.g.*, Estin, *supra* note 5, at 1392; Elizabeth Hodges, *Will You "Contractually" Marry Me?*, 23 J. Am. Acad. Matrim. Law. 385, 391–93 (2010). Black's Law Dictionary defines palimony as "[a] court's award of post-relationship support or compensation for services, money, and goods contributed during a long-term nonmarital relationship. . . ." *Palimony*, Black's Law Dictionary (10th ed. 2014).

[35] *See infra* notes 31–49.

Historically, the rationale for alimony was rooted in the marital bond and the husband's duty to provide and care for his spouse for life.[36] A couple of states have held onto this strict view of support payments as inseparable from the institution of marriage and accordingly have placed an absolute bar on support awards between unmarried couples.[37] In 2001, the West Virginia legislature explicitly forbade awards of support between unmarried parties.[38] Even before this legislative prohibition, the West Virginia judiciary declined to entertain claims for support between unmarried couples.[39] In 1990, in *Goode v. Goode*, the Supreme Court of Appeals of West Virginia noted that its decision, which involved the allocation of property between a separating unmarried couple, would not provide grounds for future claims for monetary support between unmarried couples.[40] Similarly, in Georgia, the judiciary has found agreements for palimony to be void by applying a state law that invalidates any "contract to do an immoral or illegal thing."[41] In *Samples v. Monroe*,[42] the Court of Appeals of Georgia denied a claim for support between an unmarried couple on the grounds that the relationship was "meretricious" and represented an unenforceable contract due to its immoral nature.

The majority of the states that have actively considered the issue of palimony have taken a moderate approach of allowing support awards between unmarried parties, but only when there is an underlying contractual agreement between the parties that addresses the issue of support.[43] These states differ, however, as to whether an express or implied contract is required to obtain an enforceable support award.[44]

Some states, including Minnesota and Texas, have passed specific "anti-palimony" legislation to prevent parties from filing suit for support payments when there

[36] *See* Hodges, *supra* note 27, at 86.

[37] *See* W. Va. Ann. Code § 48-7-111 (West 2015); Samples v. Monroe, 358 S.E.2d 273, 274 (Ga. Ct. App. 1987); Estin, *supra* note 28, at 1383. In the past, Illinois also denied claims between unmarried cohabitants as "unenforceable for the reason that they contravene the public policy." *See* Hewitt v. Hewitt, 394 N.E.2d 1204, 1211 (Ill. 1979). Specifically, in *Hewitt v. Hewitt*, the Supreme Court of Illinois questioned whether providing equitable relief to unmarried cohabitants would "encourage formation of such relationships and weaken marriage as the foundation of our family based society." *See id*. at 1207. However, in *Blumenthal v. Brewer*, 24 N.E.3d 168, 169–70, 174 (Ill. App. Ct. 2014), the Appellate Court of Illinois abandoned this hardline restriction and allowed an unmarried woman to pursue several common law equitable property claims against her former domestic partner.

[38] *See* W. Va. Ann. Code § 48-7-111; *see also* Porter v. Porter, 575 S.E.2d 292, 295 (W. Va. 2002) ("The statute, in effect, provides that there can be no award of alimony when the parties before the court have not been formally married.").

[39] *See* Goode v. Goode, 396 S.E.2d 430, 439 n.16 (W. Va. 1990).

[40] *See id*. (stating that the state's alimony statute explicitly required a spousal relationship in order to award alimony).

[41] *See* Ga. Code Ann. § 13-8-1 (West 2015); *Samples*, 358 S.E.2d at 274; *see also Does Georgia Recognize Palimony*, Meriwether & Tharp, LLC (Oct. 15, 2014), http://mtlawoffice.com/blog/does-georgia-recognize-palimony (*last visited 10/31/16*) (discussing the state of palimony law in Georgia).

[42] Samples v. Monroe, 358 S.E.2d 273, 274 (Ga. Ct. App. 1987). A similar rationale was applied in 1977 in *Rehak v. Mathis* where the Supreme Court of Georgia denied a claim by an unmarried cohabitant seeking an interest in real estate and a monetary award for housework following the end of an 18 year cohabitation with her former partner. *See* 238 S.E.2d 81, 82 (Ga. 1977). In *Rehak*, the court held that it was "well settled that neither a court of law nor a court of equity will lend its aid to either party to a contract founded upon an illegal or immoral consideration." *See id*.

[43] *See e.g.*, Margaret W. Hickey, *Estate Planning for Cohabitants*, 22 J. Am. Acad. Matrim. Law. 1, 1, 9 (2009) (explaining that the majority of states do not offer unmarried cohabitants the same rights and remedies as are provided to married couples and therefore it unmarried couples must "seek out legal advice and put those protections into place"); Hodges, *supra* note 28, at 391 ("The recent trend has been for courts to enforce these cohabitation agreements under contract law principles, especially when the parties have an express written agreement."). One common caveat to the enforceability of these contracts is that they are not valid if the court determines that the primary consideration involves the exchange of sexual conduct. *See e.g.*, Posik v. Layton, 695 So. 2d 759, 762 (Fla. Dist. Ct. App. 1997); *Wilcox*, 693 N.E.2d at 144; Hodges, *supra* note 27, at 88 ("The major impediment to court-ordered support lies in whether the contract is based in whole or part upon the plaintiff's providing illicit sexual services").

[44] *See* Allison A. Tait, *Divorce Equality*, 90 Wash. L. Rev. 1245, 1300–01 (2015); *infra* notes 39–49.

is no written agreement.[45] In the case of *In re Estate of Eriksen*,[46] the Supreme Court of Minnesota explained that the state legislature's decision to require written agreements for palimony claims was a direct response to the *Marvin* decision. Other states, including Florida and New York, have applied traditional contract principles in finding that there must be an express contract in order for a palimony agreement to be enforceable.[47] In Florida, the District Court of Appeal for the Fifth District in *Posik v. Layton*[48] held that a support agreement between two unmarried individuals was enforceable provided that it was in writing. The court opined that "[e]ven though no legal rights or obligations flow as a matter of law from a non-marital relationship, we see no impediment to the parties to such a relationship agreeing between themselves to provide certain rights and obligations."[49] Using a similar standard, the Court of Appeals of New York in *Morone v. Morone*[50] found an agreement for ongoing support between unmarried cohabitants to be unenforceable as it was based on an implied contract. The court's rationale was that implied contracts between unmarried cohabitants for protections that typically attach to marriage were "so amorphous as practically to defy equitable enforcement."[51]

Unlike states requiring express contracts, a small number of states have concluded that oral and implied contracts between unmarried couples can create enforceable support agreements.[52] In *Suggs v. Norris*, [53] for example, the Court of Appeals of North Carolina stated that "agreements regarding the finances and property of an unmarried but cohabitating couple, whether express or implied, are enforceable." Also, in the wake of *Marvin*, courts in California have continued to hold that implied or express agreements can form the basis for palimony awards.[54] The so-called "*Marvin* approach" involves looking at the facts and circumstances attendant to a couple's relationship in order to determine whether or not an enforceable implied or oral contract exists.[55]

II. The Rationales Against and In Favor of Requiring Written Contracts for Palimony Awards

If the current trend persists and unmarried cohabitation continues to gain in popularity and social acceptance, pressure may increase for states to address the issue of support palimony or to revisit their current approaches.[56] This section analyzes the benefits and downsides of requiring

[45] *See e.g.*, Minn. Stat. Ann. § 513.075 (West 2016) (stating that "a contract between a man and a woman who are living together in this state out of wedlock" must be in writing to be recognized by the courts); Tex. Bus. & Com. Code Ann. § 26.01 (West 2015) (requiring any "agreement made on consideration of marriage or on consideration of nonmarital conjugal cohabitation" to be in writing to be enforceable); William H. Danne, Jr., *"Palimony" Actions for Support Following Termination of Nonmarital Relationships*, 21 A.L.R.6th 351 § 3 (2007); Steven K. Mignogna, *Seven Deadly Claims*, CW001 ALI-CLE 399, *11–12, 13 (2014), *available at* http://ncpj.org/wp-content/uploads/2015/11/Mignogna-Materials_-Seven-Deadly-Claims NCPJ-2015-c.pdf (*last visited 10/31/16*).

[46] In re Estate of Eriksen, 337 N.W.2d 671, 673–74 (Minn. 1983).

[47] *See infra* notes 42–45.

[48] Posik v. Layton, 695 So.2d 759, 761 (Fla. Dist. Ct. App. 1997).

[49] *See id*.; *see also* Poe v. Levy's Estate, 411 So. 2d 254, 255–56 (Fla. 1982) (finding that an express contract for support between two unmarried individuals can be enforceable "as long as it is clear there was valid, lawful consideration").

[50] Morone v. Morone, 413 N.E.2d 1154, 1154–55, 1156 (N.Y. 1980). Specifically, the plaintiff in the case alleged that there was an agreement that the defendant would "support, maintain and provide for plaintiff in accordance with his earning capacity and that defendant further agreed on his part to take care of the plaintiff and do right by her." *See id*. at 1155.

[51] *See id*. at 1154–55, 1156 (N.Y. 1980). Additionally, the court found that enforcing an implied contract in this situation would frustrate the legislature's decision to ban common law marriage in the state. *See id*. at 1154–55.

[52] *See Marvin*, 557 P.2d at 122–23; Suggs v. Norris, 364 S.E.2d 159, 162 (N.C. 1988); *see also* Wardle, *supra* note 6, § 3.

[53] *See* Suggs v. Norris, 364 S.E.2d 159, 162 (N.C. 1988). The court added the common caveat that such contracts are valid provided that the consideration for the agreement is not predicated on the performance of sexual activity. *See id*.

[54] *See e.g.*, Byrne v. Laura, 60 Cal. Rptr. 2d. 908, 913–14 (Cal. Ct. App. 1997); Bergen v. Wood, 18 Cal. Rptr. 2d 75, 77–79 (Cal. Ct. App. 1993); Whorton v. Dillingham, 248 Cal. Rptr. 405, 406–07 (Cal. Ct. App. 1988).

[55] *See Marvin*, 557 P.2d at 122–23 ("The courts may inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract or implied agreement of partnership or joint venture. . .or some other tacit understanding between the parties."); Cochran v. Cochran, 106 Cal. Rptr. 2d 899, 906 (Cal. Ct. App. 2001) (finding that a live issue existed for the jury in a palimony claim due to the fact that "the parties had shared a long-term, stable and significant relationship."); Hickey, *supra* note 37, at 15; Hodges, *supra* note 28, at 392–93; Wardle, *supra* note 6, § 3; *see also* Devaney v. L'Esperance, 949 A.2d 743, 744 (N.J. 2008), *superseded by statute*, Maeker v. Ross, 62 A.3d 310 (N.J. Super. Ct. App. Div. 2013) (noting that, under the old New Jersey palimony schema, a "marital-type relationship" where parties "commit to each other" and commit to "fulfilling each other's needs" was required to find an enforceable promise for support).

[56] *See e.g.*, Cardozo, *supra* note 27, at 376; Gallanis, *supra* note 7, at 291, 293–94.

written contractual agreements prior to enforcing support payments between unmarried spouses.[57]

Perhaps the most compelling argument against requiring written contracts for support agreements between unmarried couples is that, in particular cases, fairness and equity will be subordinated to rigid contract requirements.[58] Concerns with fairness guided the Supreme Court of Mississippi's 1975 ruling in the case of *Taylor v. Taylor* where a man had to pay his former partner 75 dollars a month in "support" for a period of three years.[59] In this pre-*Marvin* decision, the court emphasized how the "parties had lived together in a relation of husband and wife for a long period of time [and] that it would not be fair and equitable for him to walk out and leave her as if she were a perfect stranger."[60] In contrast to *Taylor*, there undoubtedly have been and will continue to be cases where an unmarried party's relationship exhibits many of the circumstances that would cause a court to award alimony, yet palimony support will not be permitted due to the absence of a written contractual agreement.[61] In 2002, in the case of *In re Estate of Roccamonte*,[62] the Supreme Court of New Jersey held that an unmarried cohabitant could obtain a lump-sum support payment based on her deceased partner's oral promise to take care of her for her the rest of her life. In doing so, the court relied on several factors, including the couple's 25 year "marital-like" relationship and the monetary support which the decedent provided to the plaintiff prior to his death.[63] Yet, despite the parties' longstanding and committed relationship, and the fact that the plaintiff relied on the repeated promises of her partner to her own detriment, the plaintiff would not have been able to obtain a support award on the basis of an oral agreement if she had brought her suit in almost any other state besides New Jersey or California.[64]

Another downside of requiring express legal contracts for palimony awards and property divisions is that it has the potential to disproportionately disadvantage individuals with modest means and limited access to legal resources.[65] Compared to married couples, unmarried partners tend to have less money and less formal education.[66] Yet in order to create an express and enforceable contractual agreement, unmarried couples are required to retain legal services to sort out complex questions regarding support agreements.[67] In the absence of a prenuptial agreement, married parties do not specifically contemplate contractual details regarding alimony at the beginning of a marital relationship.[68] Unlike married couples, unmarried partners who enter into a cohabitation agreement that includes support payments have to consider "not only the term and amounts of support, but whether contingencies such as incapacity or disability will affect the obligation to support or be supported."[69] Accordingly, unmarried cohabitants in states that require express contractual agreements may fail to obtain this protection due to a lack of resources or knowledge of the law.[70]

Although the denial of palimony claims might result in injustice in certain individual cases, several discrete concerns exist pertaining to the underlying fairness of palimony support awards based on implied or oral contracts.[71] First, implied and oral contracts for support are by their very nature vague and are therefore susceptible to fraud and unintentional mischaracterization.[72] In the 1980 case of *Morone v. Morone*,[73] the Court of Appeals of New York voiced concern that these types of agreements pose a "substantially greater risk of emotion-laden afterthought,

[57] *See infra* notes 52–83.

[58] *See* Taylor v. Taylor, 317 So.2d 422, 422–23 (Miss. 1975); Campbell, *supra* note 4, at 504 (arguing that requiring a written cohabitation agreement in all cases "would lead to injustice" as many of these agreements are oral or implied).

[59] *See* 317 So.2d at 422–23; *see also* Ashley Frankel, *The Right to Palimony: Why New York Should Change its Law to Enforce Claims Between Unmarried Cohabitants*, 20 Cardozo J.L. & Gender 173, 180 (2013) (discussing the equitable support order in *Taylor*).

[60] *See Taylor*, 317 So. 2d at 422.

[61] *See* In re Estate of Roccamonte, 808 A.2d 838, 847 (N.J. 2002), *superseded by statute*, Maeker v. Ross, 62 A.3d 310 (N.J. Super. Ct. App. Div. 2013); *see also* Berenson, *supra* note 6, at 290 ("To the extent certain non-marital relationships are 'marriage-like,' perhaps it makes sense to extend the legal benefits of marriages to these relationships as well.").

[62] *See* 808 A.2d at 846–47.

[63] *See id*. at 840–41, 847.

[64] *See id*.; Hickey, *supra* note 37, at 1.

[65] *See* Garrison, *supra* note 5, at 322.

[66] *See id*.

[67] *See* Hickey, *supra* note 37, at 1, 12; Reid, *supra* note 4.

[68] *See* McMullen, *supra* note 15, at 77–78.

[69] *See* Hickey, *supra* note 37, at 1, 12.

[70] *See* Garrison, *supra* note 5, at 322. Adding to the cost of obtaining these legal services is the principle that each party in the cohabitating relationship should be advised by their own legal representative during the formation and drafting of a cohabitation agreement. *See* Hickey, *supra* note 37, at 9–10; Reid, *supra* note 4.

[71] *See* Campbell, *supra* note 4, at 504; *infra* notes 66–71.

[72] *See* Campbell, *supra* note 4, at 502, 504; Hodges, *supra* note 27, at 96 ("If courts are allowed to impose palimony based upon unspoken implications, the potential for fraud [is] too great.").

[73] *See* Morone v. Morone, 413 N.E.2d 1154, 1157 (N.Y. 1980).

not to mention fraud" and that there is "too great a risk of error" involved in allowing courts to attempt to decide these claims on the merits. Second, especially in light of the limited case law on the subject, some have argued that awarding support between unmarried couples creates a financial burden that at least one party may genuinely never have considered during the course of the relationship.[74] In 1982, in *Tapley v. Tapley*,[75] the Supreme Court of New Hampshire opined that "[i]t would be incongruous for a court to impose. . .the same consequences of marriage that [the parties] have sought to avoid" by entering into an "unstructured domestic relationship[]."Third, given that the vast majority of states have abandoned common law marriage, an argument can be made that proper notice is not given to unmarried partners that they may be liable for spousal support even if they choose not to marry.[76] In 1981, in *Carnes v. Sheldon*,[77] the Court of Appeals of Michigan wrote that allowing palimony awards between unmarried partners would "resurrect the old common-law marriage doctrine which was specifically abolished by the legislature."

Another strong argument against allowing palimony awards based on implied or oral contracts is the burdensome fact-finding analysis that must be conducted to determine the nature of the parties' relationship and the proper scope of the award.[78] Alimony itself has been described by some attorneys and commentators as a fact intensive and difficult to predict legal concept.[79] Unlike alimony determinations, the very status of the parties' relationship and the obligations they have developed with respect to one another must be explored by the court in a claim for support between unmarried individuals.[80] Further, in the absence of a written contract, a large grant of discretion is given to the courts to evaluate and quantify promises made by unmarried partners to provide support.[81] Allowing support awards to be based on fact-driven analyses of the relationships of unmarried couples may have the result of generating inconsistent and hard to predict results.[82]

In addition to being excessively fact intensive, another argument against palimony support awards based on implied contracts is that there are alternative equitable remedies available to courts that may be easier to apply in a uniform and just manner.[83] Equitable division of property is one alternative remedy that courts have applied to

[74] *See* Wardle, *supra* note 6, § 3 ("The fairness of imposing a marriage-like obligation or duty upon parties who deliberately chose to avoid the formal status of marriage with its bag of legal duties and responsibilities has been questioned."); *see also* Garrison, *supra* note 5, at 324–25.

[75] *See* Tapley v. Tapley, 449 A.2d 1218, 1220 (N.H. 1982).

[76] *See* Jennifer Berhorst, *Unmarried Cohabitating Couples: A Proposal for Inheritance Rights Under Missouri Law*, 76 UMKC L. Rev. 1131, 1144–45 (2008); Tait, *supra* note 38, at 1306.

[77] *See* Carnes v. Sheldon, 311 N.W.2d 747, 753 (Mich. Ct. App. 1981). In doing so, the court specifically challenged the *Marvin* court's assurance that palimony awards did not "resurrect" common law marriage. *See id.*; *see also Marvin*, 557 P.2d at 122 n.24 ("We do not seek to resurrect the doctrine of common law marriage, which was abolished in California by statute in 1895.").

[78] *See e.g.*, Berenson, *supra* note 6, at 291 (pointing out that it would be "unduly invasive, time-consuming, and expensive" to individually consider whether a given cohabitation is substantially akin to marriage and deserving of the protections that typically attend to marriage); Wolven, *supra* note 26, at 600–01 (arguing that palimony awards based on implied contracts or agreements are exceedingly variable and hard to predict).

[79] *See e.g.*, Renee B. Ades & Carol G. Cooper, *Effectively Advising Clients on Alimony*, 42 Md. B.J. 16, 17, 18 (2009); Amy J. Amundsen & Mary L. Wagner, *You've Come a Long Way, Alimony*, 48 Tenn. B.J. 14, 19, 20 (2012); David J. Strachman, *Alimony Awards*, Prac. Guide Divorce Rhode Island § 8.23.1 (2012).

[80] *See* Frankel, *supra* note 53, at 179–81; Hodges, *supra* note 28, at 385.

[81] *See* Frankel, *supra* note 53, at 179 ("Oftentimes, when a couple's contract is not explicitly stated, courts look to other avenues to effectuate fairness—though reliance on the promise must be reasonable."); Ronald R. Volkmer, 27 Estate Planning 134, 135 (2000) (commenting on how unspecified oral promises for support between unmarried partners can be a "slender reed upon which to base an alleged lifetime support contract").

[82] *See* M.V. Lee Badgett & R. Bradley Sears, *Putting a Price on Equality? The Impact of Same Sex-Marriage on California's Budget*, 16 Stan. L. & Pol'y Rev. 197, 219–20 (2005) (arguing that an insufficient body of law exists to fairly resolve palimony claims and that the claims themselves are overly "fact-intensive").

[83] *See e.g.*, Estin, *supra* note 28, at 1383 ("[M]ost states' courts routinely enforce express agreements and recognize various equitable claims between unmarried partners. . ."); Hodges, *supra* note 27, at 94 (discussing alternative theories to recovery beyond palimony support awards); Charles P. Kindregan, Jr. et al., *Non-Marital Cohabitation Distinguished From Marriage*, 2 Mass. Prac., Family Law and Practice § 24:2 n.6 (4th ed. 2015) (describing how the Massachusetts courts have applied equitable principles to separation cases between unmarried couples even though palimony is not recognized).

unmarried couples in several states.[84] In *Carroll v. Lee*,[85] the Supreme Court of Arizona ordered an equitable division of property between an unmarried couple who had lived together for 14 years. The court determined that an implied agreement to jointly acquire the cohabited property existed between the parties and that the plaintiff's housekeeping services amounted to valid consideration for the implied contract.[86] Similarly, in *Kinkenon v. Hue*,[87] the Supreme Court of Nebraska found that an oral promise between a man and his unmarried partner that she could stay in his house "for as long as she wanted" was enforceable. After the unmarried woman was forced to vacate the residence, the court ordered the breeching party to pay the value of the unmarried partner's life estate in the residence.[88] In addition to being easier to apply, equitable division of property may be a more palatable remedy in states that still adhere to the view that support payments are inseparable from the institution of marriage.[89]

III. States Should Reject the *Marvin* Approach and Require Written Contracts

On balance, the more sound and fair approach to palimony is to require a written contract as a prerequisite for an enforceable support agreement between two unmarried individuals.[90] In light of changing social norms, including a per capita increase in cohabitation and decrease in marriage, all states should enforce written cohabitation agreements that expressly address post-separation support.[91] This approach will allow states to honor the right of unmarried couples to create binding contracts with one another while simultaneously minimizing the risks of fraudulent and misrepresented claims, excessive court filings, and the imposition of legal burdens on parties who have not been given adequate notice.[92] It will also serve to provide notice and a degree of certainty to parties about what they can expect in the event of the dissolution of a relationship.[93] While states may encounter the need to more holistically address issues presented by a continued increase in unmarried cohabitation, the response from

[84] *See e.g.*, Cook v. Cook, 691 P.2d 664, 672 (Ariz. 1984); Beal v. Beal, 577 P.2d 507, 511 (Or. 1978). Other equitable remedies include recovery under the theories of quantum meruit and unjust enrichment. *See e.g.*, Green v. Richmond, 337 N.E.2d 691, 694 (Mass. 1975); McGee v. McGee, 648 A.2d 1128, 1134 (N.J. Super. App. Ct. Div. 1994); Tait, *supra* note 38, at 1299–1302; Wardle, *supra* note 6, § 3.

[85] *See* Carroll v. Lee, 712 P.2d 923, 925, 929 (Ariz. 1986).

[86] *See id*. at 927, 929.

[87] *See* Kinkenon v. Hue, 301 N.W.2d 77, 80–81 (Neb. 1981).

[88] *See id*. at 81.

[89] *See* Goode v. Goode, 396 S.E.2d 430, 439 n.16 (W. Va. 1990).

[90] *See* Campbell, *supra* note 4, at 504; Hodges, *supra* note 27, at 96; *supra* notes 65–83 and accompanying text.

[91] *See* Diederich, *supra* note 25, at 1098 (arguing that West Virginia should enforce cohabitation agreements that include provisions on palimony); Frankel, *supra* note 53, at 201 (arguing that written agreements regarding palimony should be enforceable in New York); Gallanis, *supra* note 7, at 291 (commenting on the significant increase in unmarried cohabitation in recent decades); *National Marriage and Divorce Rate Trends*, Ctr. For Disease Control and Prevention (Nov. 23, 2015), http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm (*last visited 10/31/16*) (showing that between 2000 and 2014, the number of marriages per 1,000 people declined from 8.2 to 6.9).

[92] *See Morone*, 413 N.E.2d at 1154–55, 1156; Wolven, *supra* note 26, at 600–01; *supra* notes 65–83 and accompanying text.

[93] *See* Frankel, *supra* note 53, at 200 (arguing that a clear rule on cohabitation agreements in New York would "probably cause some couples to make them who would not ordinarily think to do so"); Hickey, *supra* note 37, at 11 (explaining how a well-constructed cohabitation agreement can serve to clearly establish what will, and will not, happen between unmarried parties in the case of a separation). In light of national legal planning trends, however, it is perhaps questionable to assume that uniform enforcement of written cohabitation agreements will lead to any significant increase in the creation of non-marital cohabitation agreements. *See* Christine Dugas, *Times Change Wills, Yet Many Americans Don't Have One*, USA Today (Apr. 30, 2012), http://usatoday30.usatoday.com/money/perfi/basics/story/2012-04-27/preparing-a-will/54632436/1 (*last visited 10/31/16*) (commenting on how an estimated seventy-one percent of Americans did not have a will as of 2012); Laura Petrecca, *Prenuptial Agreements: Unromantic, But Important*, USA Today (Mar. 11, 2010, 9:42 AM), http://usatoday30.usatoday.com/money/perfi/basics/2010-03-08-prenups08_CV_N.htm (*last visited 10/31/16*) (pointing out that only three percent of engaged and married individuals had prenuptial agreements as of 2010).

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courts and legislatures should not be to allow claims for support based on oral or implied contracts.[94]

By adhering to a moderate approach that requires a written contract for a palimony award, states will also avoid creating confusion and unpredictability in the law.[95] New Jersey is illustrative of the potential legal and policy quagmires that can result from experimentation with the full adoption of the *Marvin* approach to palimony.[96] In the wake of *Marvin*, New Jersey courts proved to be highly receptive to the California approach and began to allow palimony support awards based on implied and express contracts between unmarried couples.[97] Yet in 2010, more than 30 years after the state's first palimony case, the New Jersey legislature passed a law that made palimony support agreements subject to the Statute of Frauds and invalidated decades of state judicial precedent.[98] This change was partly in response to public criticisms of the state's liberal palimony scheme.[99] Four years later, in 2014, the New Jersey Supreme Court in *Maeker v. Ross*[100] addressed the issue of whether the statute was retroactive. After stating that couples who made palimony agreements prior to 2010 had "the right to rely on the law that recognized their personal contracts," the court found that the 2010 statute was not retroactive and that palimony agreements made before 2010 would be enforceable.[101] In 2015, the legislature responded with the New Jersey Senate's passage of Senate Bill 2553, a bill that would have made the 2010 palimony law retroactive.[102] Although the bill died, it did successfully pass the Senate, a move which calls into question whether the New Jersey judiciary's approach to palimony may once again be undermined by the legislature in the future.[103] Even if the Supreme Court's decision to not apply the palimony reform law retroactivity is not challenged again by the legislature, the New Jersey courts will nevertheless be forced to make difficult judicial determinations about whether an alleged support agreement was made before or after the effective date of the 2010 legislation.[104]

While concerns for fairness and equity in individual cases of non-marital dissolution are legitimate and have driven courts in multiple states to grant palimony awards, it appears that the spike in unmarried cohabitation of recent decades is not frequently producing the sort of long-term and financially interwoven relationships that would merit palimony support awards.[105] Indeed, although unmarried cohabitation has increased significantly in recent decades, certain research suggests that these

[94] *See e.g.*, Wendy S. Goffe, *Preparing Effective Cohabitation Agreements for Unmarried Couples*, 34 Estate Planning 7, 9 (2007); Katherine C. Gordon, *The Necessity and Enforcement of Cohabitation Agreements: When Strings Will Attach and How to Prevent Them - A State Survey*, 37 Brandeis L. J. 245, 245, 254–57 (1999); *supra* notes 65–83 and accompanying text.

[95] *See Morone*, 413 N.E.2d at 1154–55, 1156; Berenson, *supra* note 6, at 291; Goffe, *supra* note 88, at 9.

[96] *See infra* notes 91–98.

[97] *See e.g.*, Devaney v. L'Esperance, 949 A.2d 743, 744 (2008), *superseded by statute*, Maeker v. Ross, 62 A.3d 310 (N.J. Super. Ct. App. Div. 2013); In re Estate of Roccamonte, 808 A.2d 838, 840–41, 847 (N.J. 2002), *superseded by statute*, Maeker v. Ross, 62 A.3d 310 (N.J. Super. Ct. App. Div. 2013); Kozlowski v. Kozlowski, 403 A.2d 902, 907 (N.J. 1979), *superseded by statute*, Maeker v. Ross, 62 A.3d 310 (N.J. Super. Ct. App. Div. 2013); Mignogna, *supra* note 39, at *8–10.

[98] N.J. Stat. Ann. § 25:1-5(h) (West 2015); *Kozlowski*, 403 A.2d at 907; *Palimony in New Jersey*, Snyder & Sarno LLC (Mar. 27, 2013), http://www.matrimoniallawnj.com/blog/2013/03/27/palimony-in-new-jersey-123832 (*last visited 10/31/16*).

[99] *See* Eric S. Solotoff, *If You Want Palimony, Get it in Writing*, Fox Rothschild LLP (Feb. 28, 2013), http://www.foxrothschild.com/eric-s-solotoff/news/if-you-want-palimony-get-it-in-writing (*last visited 10/31/16*); Carl Soranno et al., *New Jersey Supreme Court Hears Argument on Palimony Claim*, Brach Eichler LLC (May 5, 2014), http://www.bracheichler.com/?p=6455&q=Alimony (*last visited 10/31/16*). Just two years prior to the 2010 law, the Supreme Court of New Jersey further eased requirements for proving a palimony claim by finding that cohabitation was not a necessary component of an enforceable contract for support. *Devaney*, 949 A.2d at 744.

[100] *See* Maeker v. Ross, 99 A.3d 795, 796 (N.J. 2014).

[101] *See id.* at 802–03. (noting that there was no indication that the law was meant to apply retroactively in the plain language of the statute itself or in law's legislative history)

[102] *See* S.B. 2553, 2015 Leg., Reg. Sess. (N.J. 2015); Michael Booth, *NJ Senate Approves Retroactive Palimony Agreement Bill*, New Jersey L. Journal (June 29, 2015), http://www.njlawjournal.com/id=1202730901757/NJ-Senate-Approves-Retroactive-Palimony-Agreement-Bill?slreturn=20160318145511 (*last visited 10/31/16*). New Jersey Senator Nicholas Scutari, a sponsor of Senate Bill 2553, decried the state court's palimony decisions as "court overreach" and "judicial activism." *See Capital Report*, N.J. State Bar Ass'n (July 6, 2015), https://tcms.njsba.com/PersonifyEbusiness/Default.aspx?TabID=3055 (*last visited 10/31/16*).

[103] *See S 2553, New Jersey Senate Bill*, Open States, http://openstates.org/nj/bills/216/S2553 (*last visited 10/31/16*).

[104] *See Maeker*, 99 A.3d at 804–05 (finding that oral and implied agreements for palimony made after the legislature's January 18, 2010 change to the Statute of Frauds will not be enforceable).

[105] *See e.g.*, Taylor v. Taylor, 317 So.2d 422, 422 (Miss. 1975); *Roccamonte*, 808 A.2d at 840–41, 847; Cardozo, *supra* note 27, at 385 (describing how "cohabitating relationships do not have the longevity or stability of marriages"); Estin, *supra* note 28, at 1388.

relationships frequently end in separation or marriage within relatively short periods of time.[106] One study found that the likelihood of an unmarried individual staying in a cohabitating relationship for over five years was sixteen percent among women and thirteen percent among men.[107] Relative to the financial aspect of non-marital cohabiting relationships, research has shown that, "[a]s a group, cohabitants are more likely than married couples to have relatively comparable earnings" and "are much more likely to split expenses instead of pooling their resources."[108] And, although headlines emerge from time to time describing high-profile palimony suits, the actual number of court cases that have granted palimony awards remains low.[109] Accordingly, at least at this time, the issue of support awards between unmarried individuals does not present a sufficiently urgent public policy concern that would merit a shift by the majority of courts away from the moderate approach of requiring a written contract for a palimony claim.[110]

Conclusion

With the 40 year anniversary of the *Marvin* decision approaching at the end of this year, there has yet to be an explosion of non-marital support claims or a significant adoption of the California court's approach. Unquestionably, strict adherence to a standard that requires a written cohabitation agreement may wreak injustice in certain dissolution cases where individuals made substantial personal, and financial promises and commitments to one another, yet never put those commitments into writing and never married. Creating a broad exception for these select cases, however, will have the undesirable effect of inviting complex, fact-intensive legal claims that are vulnerable to fraud and unintentional misrepresentation. Accordingly, unless and until a compelling policy need emerges in favor of enforcing oral or implied contracts for palimony support, states should continue to favor the moderate approach of allowing support payments, but only when a written contract on the issue exists.

[106] *See* Gallanis, *supra* note 7, at 291 (commenting on the dramatic increase in unmarried cohabitation in the United States); Garrison, *supra* note 5, at 322 (noting that "only about 10% of cohabitants who do not marry are still together five years later").

[107] *See* Berenson, *supra* note 6, at 309.

[108] *See* Estin, *supra* note 28, at 1388; Garrison, *supra* note 5, at 322.

[109] *See e.g.*, Berenson, *supra* note 6, at 297; Garrison, *supra* note 5, at 322–23; Robert Lindsey, *Billie Jean King is Sued for Assets Over Alleged Lesbian* Relationship, N.Y. Times (Apr. 30, 1981), http://www.nytimes.com/1981/04/30/us/billie-jean-king-is-sued-for-assets-over-alleged-lesbian-relationship.html (*last visited 10/31/16*); Natalie Pace, *Peter Frampton Lost at Love But Won at Palimony*, Huffington Post (Aug. 24, 2011), http://www.huffingtonpost.com/natalie-pace/peter-frampton-lost-at-lo_b_884214.html (*last visited 10/31/16*); Thomas Zambito, *Sesame Street's Roscoe Orman Loses Palimony Battle with Mother of Their Four Children*, NJ.com (Sept. 24, 2013, 5:39 PM), http://www.nj.com/essex/index.ssf/2013/09/sesame_streets_roscoe_orman_loses_palimony_battle_with_mother_of_their_four_children.html (*last visited 10/31/16*); *Simpson Team Chief is Sued for Palimony*, N.Y. Times (Mar. 22, 1995), http://www.nytimes.com/1995/03/22/us/simpson-team-chief-is-sued-for-palimony.html (*last visited 10/31/16*).

[110] *See e.g.*, Tapley v. Tapley, 449 A.2d 1218, 1220 (N.H. 1982); Garrison, *supra* note 5, at 322–23; Reid, *supra* note 4.