LESLEY LOVEY,
Plaintiff-Appellant
v.
ESTATE OF LESTER LOVELL
Defendant - Respondent

A-02-1234-T3

Superior Court, Appellate Division

Submitted May 2, 2002 - Decided May 29, 2002

Before Judges GRIM, REAPER and MERCY.

DEREK FISHER, Shaquille, O'Neal, Kobe & Bryant L.L.P., attorneys for the plaintiff-appellant (Mr. Fisher, of counsel and on the brief).

JASON KIDD, Kidd Martin MacCulloch & Kittles, for the defendant-respondent (Mr. Kidd, of counsel and on the brief).

REAPER, J.A.D. joined by GRIM, J.A.D.

This case arises out of the December 10, 2001, decision of the Superior Court, Chancery Division, Probate Part, Essex County, to grant summary judgment to the respondent on the plaintiff-appellant's claim for lifetime support from the defendant estate. The plaintiff's complaint sets forth two counts: palimony action and a contract to make a will.

We hold that the trial court appropriately granted summary judgment as to plaintiff's palimony action. First, the plaintiff is not entitled to raise the palimony action because, under New Jersey law, palimony does not survive the death of the promisor. Second, even if a palimony claim may be brought after the death of the promisor, there is insufficient evidence to prove the existence of any contract between the plaintiff and the decedent. We also hold that the trial court appropriately granted the summary judgment as to the plaintiff's claim of a contract to make a will. The record simply did not warrant a finding that statutory requirements for a contract to make a will had been satisfied.

The trial court decision, therefore, is affirmed.

The Facts

The decedent, Lester Lovell, was a successful businessman. He died of a sudden heart attack on December 4, 2000. Lester's will left the vast bulk of his dry-cleaning

fortune to his son Lester Lovell Jr. His alleged longtime cohabitant, Lesley Lovey, is claiming life support from his estate. Steven Mooney is the administrator of Lester's estate.

Taking, as we must, the facts as alleged by the plaintiff, the relevant facts underlying this claim as as follows:

For reasons related to securing an inheritance from his parents, Lester Lovell ("Lester") contracted an "in-name-only" marriage with Mary Parvatrao ("Mary"), a protege of his parents in their dry-cleaning business, in 1980. The marriage was never consummated. The couple lived together in Princeton in a home held as tenants by the entireties and worked with Lester's parents in the family business.

In January 1983, Mary became pregnant by another man and gave birth to a son later that year. Lester did not terminate the "in-name-only" marriage and allowed Mary to give the child the name Lester Jr. He held the child out to his parents as his son.

In 1983, Lester went alone to Hawaii on vacation. There, he met the plaintiff, Lesley Lovey, then an unemployed artist who had been married for five years and had no children. She and Lester fell in love but both understood that Lester could not divorce Mary without jeopardizing his inheritance from his parents. Nonetheless, they sought to devise a way to live together and conducted their own private wedding ceremony on the beach, at which time Lester presented plaintiff with a ring.

Upon Lester's request, plaintiff quickly divorced, leaving her ex-husband with all of their marital assets. In October 1983, the plaintiff moved in with Lester and Mary in Princeton. To the general public, she was a live-in nanny to help out Lester and Mary with the new baby, Lester Jr. In addition to caring for the child, plaintiff rendered services as a companion, housekeeper, and cook. She was paid $500 to $1,000 weekly ($500 per week from 1983-1992 and $1,000 per week thereafter) until Lester's death. She paid taxes on this income and Lester paid the so-called "nanny tax" (social security and other taxes).

According to plaintiff, unknown to the world at large, Lester and plaintiff lived as husband and wife. Lester insisted that she was his "only true wife" and claimed that "a marriage license [was] only a piece of paper." Lester repeatedly assured the plaintiff that she had "nothing to worry about for the rest of [her] life" and that he would marry her as soon as he was free to divorce Mary or if Mary were to die. Plaintiff asserts that she and Lester had a full sexual relationship.

Lester's mother and father died in 1994 and in 1995, respectively. Lester inherited all their assets, including the family business. Nonetheless, Lester and Mary continued to manage the family business together. They filed joint tax returns for the tax years 1980-2000.

In January 2000, Mary died in a car accident. At that time, according to plaintiff, Lester suggested that plaintiff move out of the house to a nearby apartment in order to keep her "good name" in public. Plaintiff agreed to do so, although she continued spending most of her time in the house rendering services as a housekeeper and cook. There is a dispute as to who paid the rent on the apartment: plaintiff claims Lester did; the estate claims that plaintiff did; the landlord can confirm only that it was paid in cash in an envelope received on the first of every month.

During the period between January 2000 and December 4, 2000, the plaintiff and Lester planned their legal marriage, tentatively scheduled for June of 2001. Lester told her they needed to wait at least a year after Mary's death. According to plaintiff, Lester repeatedly told her that he would "take care" of her. He also told her that she would be taken care of in his will and that she had "nothing to worry about."

On December 4, 2000, Lester suffered his fatal heart attack and died. His will left $100,000 to plaintiff "in recognition of services rendered." The bulk of his estate, worth more than $5,000,000, was devised to Lester Jr.

On April 10, 2001, plaintiff filed suit against Lester's estate claiming a right to support for life based on a palimony theory and on a contract-to-make-a-will theory, in Superior Court, Chancery Division, Probate Part, Essex County. After full discovery by both sides, the administrator of Lester's estate, Steven Mooney, moved on October 19, 2001, alternatively to dismiss the palimony claim and for summary judgment on both claims. He argued, first, that the palimony claim should be dismissed because New Jersey does not recognize a palimony claim after the death of the promisor. He argued, second, that even if plaintiff's claim was legally sufficient, there is insufficient evidence to prove any contract between the plaintiff and the decedent and the record could not support a finding that the statutory requirements for a contract to make a will had been met.

The motion was argued before the Honorable Keith Van Horn on November 14, 2001, and granted on December 19, 2001. The motions judge held both that palimony could not be sought after the death of the promisor and that the defendant estate was entitled to summary judgment on both counts of plaintiff's complaint. The plaintiff appeals.

Discussion

Plaintiff urges us to find that the trial court committed error when it granted summary judgment to the defendant estate. We decline to do so on both counts.

I. Legal Sufficiency of Plaintiff's Palimony Claim.

This case presents us with an issue of first impression: may a person asserting a right to palimony bring such an action after the death of the alleged partner? We agree with the trial court that, as a matter of law, the answer to that question is in the negative and, thus, plaintiff's palimony claim cannot stand.

There are, in our view, two essential reasons why any right to palimony that may exist should terminate with the death of the party who promised to pay it. First, to hold otherwise would put an unmarried cohabitant in a better position than one who had been a legal spouse. Second, allowing such claims after the death of the promisor poses insurmountable evidentiary barriers to the estate forced to defend against them.

As to our first concern, New Jersey law does not recognize common law marriage and does not accept the claim of an unmarried cohabitant to the accoutrements of the marital state. Thus, New Jersey law does not provide unmarried cohabitants with the same rights as married cohabitants. Spouses may seek alimony and equitable distribution of the property accumulated during the marriage upon divorce or statutory or elective shares of the spouse's estate upon death. Unmarried partners, however, cannot seek any of these.

There is good reason for this distinction. The family, built on the cornerstone of legal marriage, has been the genesis of our society since the birth of civilization, and the laws of inheritance are and have long been intended to buttress the stability and continuance of the family unit. The preservation of familial law is so essential that, where questions of inheritance, property, legitimacy of offspring and the like are involved, an adherence to conventional doctrine is demanded. Dawson v. Hatfield Wire & Cable Co., 59 N.J. 190, 197 (1971); see also Sykes v. Propane Power Corp., 224 N.J.Super. 686 (App. Div. 1988) (holding that preclusion of unmarried cohabitants from recovering under the Wrongful Death Act does not offend the state or federal constitution).

The lawful spouse of a decedent does not have an open-ended right to “lifetime support” from the estate of that decedent. He or she has only the right to the statutory share of an intestate estate or to either what is devised in a will or, alternatively, an elective share of the deceased spouse's estate. N.J.S.A. 3B:8-1 et seq. Where a marriage has been terminated by divorce, the divorced spouse does not have an open-ended right to “lifetime support” either: our law makes it clear that “[a]limony shall terminate upon the death of the payer spouse”. N.J.S.A. 2A:34-25. This court sees no reason to put one who merely cohabited with a decedent in a better position than one who entered into a legal marriage with a decedent.

As to our second concern, it is fundamentally unfair to permit a cause of action where any statement made by the decedent that supports the plaintiff's point of view would be admissible on plaintiff's case as an exception to the hearsay rule as a statement against interest, yet any statement by decedent that undermines it would be inadmissible hearsay. Indeed, taking the secrecy of the arrangement alleged by plaintiff at full face value, the only witness who could contradict plaintiff's claim is now dead. Such an imbalance of proofs cannot be permitted.

II. Sufficiency of Evidence of Palimony Contract.

Second, even if a claim for contractual palimony can survive the death of the promisor generally, there is in this case insufficient evidence to permit a trier of fact to find the

existence of any expressed or implied contract between the plaintiff and the decedent for lifetime support.

The standard for deciding a motion for summary judgment is whether all the evidence presented, when viewed in the light most favorable to the nonmoving party, is sufficient to permit a rational factfinder to resolve any alleged disputed issue in favor of the nonmoving party, and entitle that party to judgment. R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 523 (1995).

Here, of course, the plaintiff has produced no written instrument that purports to be a contract to support her palimony claim. There is no question that no express contract for plaintiff's services rendered to the decedent exists. Thus, the sole question is whether she has come forward with enough evidence to permit a rational factfinder to conclude that there is an implied oral contract between the plaintiff and the decedent. Generally speaking, "the terms of [cohabitants'] agreement are to be found in their respective versions of the agreement, and their acts and conduct in the light of the subject matter and the surrounding circumstances." Kozlowski v. Kozlowski, 80 N.J. 378, 384 (1979). Taking all of the evidence as a whole, our answer to this key question must be in the negative. The record before us is insufficient to support a finding of any implied agreement.

Plaintiff alleges that Lester called her his "only true wife" and assured her that she had "nothing to worry about for the rest of [her] life". She further alleges that he promised to marry her if Mary were to die and indeed that, after Mary died and during the last year of Lester's life, they planned to marry. She asserts that Lester repeatedly told her that he would "take care" of her, that provision would be made for her in his will and that she had "nothing to worry about." She contends that she lived up to her end of the bargain, cooking, cleaning and caring for Lester's family, but that Lester failed to live up to his.

Our first problem with this evidence is that we cannot see how it establishes any contract for lifetime support. The only statement that remotely approached such a promise on Lester's part is the assertion by plaintiff that he said she had "nothing to worry about for the rest of [her] life". In light of all the other evidence in this case, that statement is simply too vague to spell out a meaningful promise.

Here, the uncontradicted evidence shows that the decedent was lawfully married for 20 years, lived with his wife and child in a house owned as tenants by the entireties, worked with his wife in the family business, and filed joint tax returns with his wife until her death. These facts hardly advance plaintiff's "wife in name only" claim and offer nothing to show a meeting of the minds between the parties. Indeed, plaintiff's claim that there was a real promise by decedent is undermined by her claim, on one hand, that he promised to marry her as soon as he was free to divorce Mary and the fact, on the other hand, that his parents -- the presumed barriers to divorce -- had been dead for five and six years at the time of Mary's death and that decedent did nothing during those years to terminate his relationship with his wife. Without such proof of a meeting of the minds, or mutual assent, there can be no contract. 2 Williston on Contracts § 6:17 (Lord ed., 4th

ed. 1991); Ridgefield Park v. New York, Susquehanna & Western RR, 318 N.J. Super. 385 (App. Div. 1999); Driscoll v. State, Dep't of Treasury, 265 N.J. Super. 503, 519 (Law Div. 1993) (“It is elementary that a contract cannot be made absent a `meeting of the minds' as to the exchange”).

Even if decedent's statements were not fatally vague, in the context of the facts presented, it is clear that whatever enforceable promise there was has been kept. Plaintiff was a highly paid live-in nanny who rendered additional services as a housekeeper and cook. To the extent she makes a claim as to those services, she has been paid: $500 per week at first and then $1,000 per week for the last nine years she was so employed. This is hardly an unreasonable sum for what is essentially unskilled labor. To the extent she makes a claim as to any sexual services, we disregard it: such services can never be consideration underlying an enforceable agreement. See Marvin v. Marvin, 18 Cal. 3d 660, 669, 134 Cal. Rptr. 815, 557 P.2d 106 (1976).

Finally, decedent's statements are legally insufficient to support a finding by a rational factfinder that there was a contract to compensate plaintiff during her lifetime rather than one to do so by marriage when possible or by bequest. Neither of those types of promises is a basis for relief here. As to a promise to marry, our statutes are clear that there is no relief available in our courts from such promise broken. N.J.S.A. 2A:23-1 et seq. As to a promise to make a bequest, we note, first, that a bequest -- and a substantial one -- was made and, second, that the requisite statutory elements of such a promise do not exist. See III, below.

Summary judgment was therefore properly granted on the palimony claim, assuming, of course, that the claim was not already subject to dismissal as we set out in I, above.

III. Sufficiency of Evidence on Contract to Make a Will.

Finally, it is clear to us that the proofs offered by plaintiff in this case cannot support a finding that the requirements for a contract to make a will had been satisfied and, therefore, that the defendant estate is entitled to summary judgment on that count.

Under N.J.S.A. 3B:1-4, a contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after September 1, 1978, can be established only by (1) provisions of a will stating material provisions of the contract; (2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract.

All of plaintiff's proofs are oral. Her claims that the decedent told her that he would write a will in her favor, that she had “nothing to worry about” and that he would “take care” of her simply do not comply with the mandates of the statute. Mere oral representations do not and cannot constitute a contract to make a will.

Therefore, the plaintiff did not provide sufficient evidence that the requirements for a contract to make a will had been satisfied. Summary judgment was thus appropriately granted.

For these reasons, we affirm the trial court's rulings in all respects.

MERCY, J.A.D., dissenting

While I concur with the conclusion of the majority that the defendant estate is entitled to summary judgment on the plaintiff's claim of a contract to make a will, I respectfully disagree with my colleagues as to the palimony claim . I would reverse the dismissal and summary judgment on the plaintiff's palimony action and, therefore, remand this case for trial.

First, I cannot agree that plaintiff's cause of action is barred by the death of the promisor.

Although I have no basic quarrel with the notion that there is no reason to put one who seeks palimony in a better position than a lawful spouse, neither should we go out of our way to put one who seeks palimony in a worse position based solely on the absence of a lawful marriage.

An unmarried cohabitant is already under substantial disadvantages vis-a-vis the lawful spouse. As noted by my colleagues of the majority, only a spouse may seek alimony or equitable distribution of property accumulated by the partners during their relationship. Only a spouse may sue for wrongful death. Only a spouse has a statutory right to all or a substantial part of a decedent's intestate estate. Only a spouse may take against the will in an elective share.

The justification for limiting remedies is based on traditional concepts of the prototypical family in American life. However, since the 1960s, the shrinking role that marriage plays in family life and the pervasive change in society's attitudes toward sex, marriage and divorce call for the expanding the legal recognition of family beyond the legal mechanism of marriage. Given the growing number of people who choose not to marry, the realization that the family is that climate that one comes home to and it is this network of sharing and commitments that most accurately describes the family unit is extremely important. Accordingly, all relationships that exhibit this type of dedication should be equally recognized in the law.

To provide consistency and fairness to all people in family-type relationships, legal change is necessary to promote stability among families and communities. The two types of relationships, unmarried cohabitants and married cohabitants, may have identical commitment, stability and social utility, and should not be treated unequally under current New Jersey law. The Legislature and courts of this state should act to

better protect the financial and property rights of those in relationships not currently recognized by the legal mechanism of marriage. For a society in need of respect for its disparate components, such action would strengthen us all.

In fact, recent legislative enactments have tended to create a symmetry between married and unmarried partners in a few limited circumstances despite judicial and statutory barriers to substantive relief, The amended New Jersey court rules provide that all family matters, including support actions between unmarried cohabiting adults, are to be decided in the Family Part of the Chancery Division. Crowe v. DeGioia (II), 102 N.J. 50, 52-53 (1986) (Stein. J., concurring in part and dissenting in part); see also Pressler, CURRENT N.J. COURT RULES, Comment to R. 5:1-2. The inclusion of unmarried cohabitants within the class of individuals who are entitled to bring their complaints before the Family Part represents the belief that actions involving cohabitants arise out of a family or family-type relationship. Such recognition reinforces the conclusion that actions involving unmarried cohabitants are analogous to matrimonial litigation and that the need for protecting the financial and property rights of unmarried partners is just as compelling as it is in most matrimonial cases.

An additional indication that the Legislature has determined that unmarried cohabitants may comprise a family unit is the protection afforded to them by the recently revised Prevention of Domestic Violence Act of 1991. N.J.S.A. 2C: 25-17, et seq. The legislation protects victims of violence in “family-like” settings and does not predicate relief on marital status. N.J.S.A. 2C: 25-18. Given the broad scope of the Domestic Violence Act and the liberal interpretations of the term “household member,” Bryant v. Burnett, 264 N.J. Super. 222, 226 (App. Div. 1993); Desiato v. Abbott, 261 N.J. Super. 30 (Ch. Div. 1992), it seems inconsistent and unjustified for the Legislature to physically, but not financially, protect unmarried cohabitants.

Second, and perhaps more compelling legally, I see no reason that this type of contract right cannot survive the death of the promisor. As with any other contract right not involving personal services, United States Credit Sys. Co. v. Rosenbaum, 60 N.J.L. 294, 304 (Sup. Ct. 1897), rev'd on other grounds, 61 N.J.L. 543 (E. & A. 1898), the claim for damages may be asserted against the promisor's estate as his successor in interest. So when neither the plaintiff nor the decedent saw their relationship as a service arrangement -- a fact uncontroverted in the record before us, the agreement between them should survive the decedent.

Moreover, it would be fundamentally unfair for a survivor to be disqualified from any cause of action because a decedent is the only witness who can refute the survivor. There is no need to do injustice to the survivor in order to protect the decedent estate. While it may be more difficult for the proponent of a hearsay statement in one's own favor to have such statement admitted into evidence, it is hardly impossible. Indeed, N.J.R.E. 804(b)(6) would seem tailor made for such a case. And the mere fact that the survivor is the only witness does not guarantee that the survivor will be believed. A finder of fact is always free to disbelieve any witness. See generally Gallo v. Gallo, 66 N.J. Super. 1, 5, 168 A.2d 228 (App. Div. 1961).

Second, I cannot agree that the grant of summary judgment on the palimony claim was appropriate. In this regard, it bears noting that certain key facts bearing on plaintiff's claim were utterly disregarded by the majority. Among those key facts are the facts that plaintiff and decedent alone or with only Lester Jr. took annual vacations every year from 1983 to 2000; gifts were made by decedent to plaintiff in an aggregate amount of $175,000 in cash, jewels, clothing and bonds between 1990 and 2000; plaintiff and decedent each had the other's name tattooed on their bodies in 1994; plaintiff had both a medical power of attorney and a financial power of attorney as to the decedent starting in 1994; decedent obtained a credit card and an ATM card for plaintiff in 1987 and paid all bills on the credit card account until his death. The majority mentions but fails to take cognizance of the significance of the fact that plaintiff was induced to leave her husband and abandon all claims she had to a share of property then.

Clearly, this was more than a mere live-in nanny being highly paid for child care and housework. Clearly, there is a genuine issue of material fact as to an issue that, if resolved in plaintiff's favor, entitles her to judgment and thus warrants submission to a finder of fact. R. 4:46-2(c).

Indeed, it should be clear that plaintiff's testimony as to the decedent's statements, by itself, should be enough to warrant a trial on the merits. “[O]ur courts are especially reluctant to deprive a trier of fact of the opportunity to pass upon the credibility of an alleged transaction with a person who is now deceased.” D'Amato v. D'Amato, 305 N.J.Super. 109, 115 (1997). There need be no fear that her testimony will be accepted, willy-nilly, at face value. “It is a well established and obviously salutary rule in this State that the testimony of a witness need not be believed when the only person who could have contradicted the witness is dead.” In re Perrone's Estate, 5 N.J. 514, 521-22.

The present case is very similar to that of Kozlowski v. Kozlowski, 80 N.J. 378 (1979). There, as here, the plaintiff agreed to live with defendant and run his household and defendant agreed to provide for plaintiff for the rest of her life. That the parties here did not hold themselves out as husband and wife is not fatal to the claim. So long as a palimony contract between unmarried cohabitants is not based on a relationship proscribed by law, or on a promise to marry, such an agreement between cohabitants is enforceable, irrespective of how the cohabitants presented their relationship to the world. Crowe v. De Gioia, 203 N.J. Super. 22, 32 (App. Div. 1985), aff'd 102 N.J. 50 (1986).

Therefore, in my view, the evidence of decedent's promise to take care of the plaintiff for the rest of her life entitled the plaintiff to a trial on the merits on the theory of contractual palimony. The trial judge inappropriately held that the palimony claim was subject either to dismissal as legally insufficient or to summary judgment as factually insufficient.

I dissent.

IN THE SUPREME COURT
OF THE STATE OF NEW JERSEY

A-02-522

LESLEY LOVEY, Plaintiff-Appellant. v. ESTATE OF LESTER LOVELL, Defendant-Appellant.	:	**ORDER**

Notice of appeal having been filed with the Court on May 31, 2002, by the plaintiff-appellant, it is, on this 3rd day of June, 2002, hereby docketed as to all appropriate issues. Simultaneous briefing is directed and both parties are to file briefs with this Court on or before July 16, 2002.

STEPHEN W. TOWNSEND, Clerk
For the Court