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Estate Planning

Palimony Claims Are Not Reserved for the Living

Nonmarital relationships can alter an otherwise carefully created estate plan

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In *In re Estate of Roccamonte*, 174 N.J. 381 (2002), a palimony claim asserted by an unmarried cohabitant was upheld against the estate of her deceased lover — this despite the fact that he was married to another woman. *Roccamonte* should serve as a wake-up call to trust and estate lawyers throughout the state to consider the impact that nonmarital relationships may have on an otherwise carefully and thoughtfully created estate plan.

It is not unusual to deal with clients involved in romantic relationships other than of the marital variety. Sometimes, these relationships occur while one or more of the parties is married to another individual. Sometimes, the relationship is between two single people. Sometimes, as in same-sex relationships, the law does not permit a marriage.

What impact, if any, does such a relationship have on estate planning? Should an executor of an estate be concerned about such potential relationships when administering an estate? As a result of *Roccamonte*, these issues have become the concerns of trust and estate practitioners.

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Divided Allegiances

Arthur Roccamonte and Mary Sopko met in the 1950s. Mary was married with a daughter and Arthur was married with two children. Arthur owned and operated a trucking business. Arthur pursued Mary and they embarked on a relationship that continued for the rest of Arthur's life.

At one point during the relationship, Mary moved to California for the purpose of terminating the relationship because Arthur refused to end his marriage and marry her. Arthur, ever eager to bring Mary back, telephoned her repeatedly and promised that if she returned he would divorce his wife and marry Mary. Mary also gave testimony that Arthur promised that if she returned, he would provide for her financially for the rest of her life. Mary, relying upon Arthur's promise, returned to New Jersey and divorced her husband.

During their continuing relationship, Arthur provided Mary with an affluent lifestyle. They resided together in a cooperative apartment, which Arthur purchased, until Arthur's death.

Though Arthur never divorced his wife (apparently out of fear that it would place his business in jeopardy) and continued to support his wife and children generously, he and Mary maintained a marital-like relationship. Mary testified that upon expressing increasing concerns about her future financial security in the event that Arthur predeceased her, he repeatedly reassured her that she had no cause for worry as he would see to it that she was provided for during her life. Ultimately, however, Arthur died intestate, having made no specific provisions for Mary other than life insurance proceeds in the amount of $18,000 and a certificate of deposit in the amount of $10,000.

Approximately seven months after Arthur's death, Mary commenced a palimony action against Arthur's estate. In her complaint, Mary sought a lump-sum support award. For two years the only issue before the court was whether the action belonged in the Family Part or the Probate Part.

Against Mary's objection, the matter ultimately wound up in the Probate Part, where Arthur's estate moved for and was granted summary judgment, dismissing the complaint based upon the judge's perception that Mary had failed to make a prima facie showing of a valid contract to make a testamentary disposition.

The Appellate Division reversed the summary judgment, pointing out that the issue was fact-sensitive and summary judgment was thus precluded. *In re Estate of Roccamonte,* 324 N.J. Super. 357 (App. Div. 1999)(*Roccamonte I*). The Appellate

Division also ruled that the trial court had failed to consider her entitlement to support on a "palimony theory," as an independent ground for the relief sought.

The case was remanded back to the Probate Part for an evidentiary hearing. The trial court found that the verbal promise by Arthur did not entitle Mary to support on a theory of express or implied contract, unjust enrichment, a contract to make a will or even palimony. The Appellate Division, in *In re Estate of Roccamonte,* 346 N.J. Super. 107 (App. Div. 2001), (*Roccamonte II)*, ruled that the trial judge erred in denying Mary's claim of palimony. The estate appealed to the Supreme Court.

In October 2002, the New Jersey Supreme Court, in affirming the decision of the Appellate Division, relied on its prior ruling in *Kozlowski v. Kozlowski*, 80 N.J. 378 (1979), wherein palimony was awarded to an unmarried cohabitant. The Court held that where one party is induced to cohabit with another party by a promise of support from the other, that promise will be enforced by the Court. The facts in *Kozlowski* and *Roccamonte* are very similar except in one important regard. In *Kozlowski*, the claim was made against a living defendant. In *Roccamonte*, the defendant was the estate of a deceased party, Arthur. The *Roccamonte* decision stands for the following:

• the plaintiff's marital-type relationship with the other cohabitant and the plaintiff's conduct in accordance with such relationship can constitute consideration for the other cohabitant's alleged oral promise to support the plaintiff for life;

• the promise of support for life is enforceable against the promisor's estate as it is conceptually no different from any other contract made by a decedent during his lifetime. The duty to provide support to the promisee for the promisee's life is not discharged by the promisor's death;

• a palimony contract may be enforced even though it is oral and not reduced to writing;

• complete economic dependency of the plaintiff cohabitant upon the other cohabitant is not required for a valid palimony agreement to exist;

• a promise of support (and a contract as such) may be found to exist even if the contract is not express, but is implied by the conduct of the parties; and

• palimony claims, even against an estate, belong in the Family Part.

Impact of *Roccamonte*

The holding in *Roccamonte* raises a number of significant concerns. The fact that the Court relied so heavily on its ruling in *Kozlowski,* which was issued in 1979, simply indicates that we probably should have been concerned about these issues already. Contemplating the Court's decision, the following questions come to mind.

• *Doesn't* Roccamonte *put a paramour in a better position than a spouse?*

In New Jersey, a surviving spouse has very limited rights in the estate of his or her deceased spouse. With respect to intestacy, the surviving spouse may be entitled to as little as one-half of the decedent's estate. N.J.S.A. 3B:5-3.

Roccamonte should serve as a wake-up call to trust and estate lawyers throughout the state.

When a surviving spouse is disinherited, N.J.S.A. 3B:8-1 et seq. provides such surviving spouse with the right to claim an elective share against the estate of the deceased spouse. This right allows the surviving spouse to claim an amount equal to one-third of the augmented estate (which include, not only the assets of the deceased spouse, but also the assets of the surviving spouse). However, in determining the value of the elective share, the claim is reduced to the extent that the surviving spouse owns assets of his or her own. Therefore, in many cases, the value of a surviving spouse's elective share claim is often negligible or nonexistent.

The different treatment of a spouse and a palimony claimant is illustrated in the following examples.

In the first example, assume that Harold (75) and Patty (60) are unmarried, but have been cohabiting for many years. Harold's net worth is $1,000,000, and Patty's net worth is approximately $250,000.

On an annual basis, Harold contributes approximately $100,000 to maintaining their lifestyle. Harold promises to take care of Patty for the rest of her life and Patty relies upon this promise, even though they never marry. Harold dies and Patty makes a claim for palimony against Harold's estate. Based upon Patty's age, the value of the palimony claim may be as much as $700,000 (based on annual support of $50,000 per year for Patty's lifetime).

In example 2, assume the same facts as example 1, except that Harold and Patty are married and Harold has a will that leaves his entire estate to his son from a prior marriage.

The value of Patty's elective share is $166,667, computed as follows: Harold's estate of $1,000,000, plus Patty's estate of $250,000, equals the augmented estate — $1,250,000, which results in an elective share of $416,667 (when divided by three). When you subtract Patty's estate from the elective share, you are left with a net elective share of $166,667.

Therefore, Patty may be entitled to more of Harold's estate if she remains his unmarried paramour than if she becomes his wife.

In example 3, assume the same facts as example 1, except that Harold is married, but not to Patty. Assume Harold is married to Wendy (whose net worth is zero), and has been for 30 years. He has one child from a prior marriage, who is the sole beneficiary under Harold's will.

Wendy had hoped that Harold would return to the marriage, but he has been living with Patty for the past five

years. Assuming Patty's palimony claim is valid, Harold's estate will be distributed as follows: Patty gets $700,000, the palimony claim as set forth in example 1; the son gets $300,000, which is the residuary estate; and Wendy gets $0, which is the elective share. (Wendy is not entitled to an elective share under N.J.S.A. 3B:8-1, as she was not living together with Harold at the time of Harold's death.)

Obviously, many examples can be conceived to contort the holding of *Roccamonte*. Unfortunately, however, many of these examples may not be so unusual in today's society.

• *Can a spouse make a claim for palimony against the estate of a deceased spouse?*

Roccamonte and *Kozlowski* dealt with palimony claims by unmarried cohabitants. However, the Court relied on general contract principles in granting palimony. In *Roccamonte*, the Court specifically stated that "a general promise of support for life, broadly expressed, made by one party to the other with some form of consideration given by the other, will suffice to form a contract." *Roccamonte*, 174 N.J. at 389-390 (2002), citing *Kozlowski,* 80 N.J. at 384 (1979).

Therefore, couldn't a spouse make a contract claim against another spouse? If a husband, during the marriage, promises to take care of the wife for the rest of her life, and the wife relies on this promise, under the holdings of *Kozlowski* and *Roccamonte,* couldn't she make a palimony claim against his estate?

This claim could be significantly more valuable than an elective share or an intestate share. Or does the relief provided in N.J.S.A. 2A:34-23 (alimony) and 2A:34-23.1 (equitable distribution) preclude a spouse from making a claim for palimony?

• *What impact does the holding of* Roccamonte *have on same-sex relationships?*

Though no case directly on point exists, the holdings in *Kozlowski* and *Roccamonte* lead to the logical conclusion that if a party to a homosexual relationship promises to support the other party, either expressly or impliedly, the court could award palimony to the other party.

In *Roccamonte*, the Court viewed the claim of palimony on simple contract theory. Arthur promised to take care of Mary for the rest of her life if she returned to New Jersey to live with him. Based on this promise, she returned and continued the relationship, making a home for Arthur, cooking for him and acting as his social companion.

The Court thus held that a contract existed between Arthur and Mary. One could easily envision a relationship between two parties of the same sex wherein similar promises and consideration could be exchanged. As such, the holding of *Roccamonte* would likely apply to homosexual relationships as well.

• *How does the holding in* Roccamonte *affect the manner in which estate planning is conducted?*

Typically, husbands and wives will work together with one attorney to develop their estate plan. Often the goals of the parties are similar and the joint representation is the most efficient way to accomplish these goals. However, what happens if the attorney who is representing both parties learns of information about one of the parties that may impact on the other party?

For example, what obligation does an attorney, who has worked with a husband and wife regarding their estate planning, have if he learns that the wife has been carrying on a relationship with another man for several years, and the relationship could result in a potential palimony claim as in *Roccamonte*?

This issue is similar to the issue in *A. v. B.,* 158 N.J. 51 (1999), where the Court considered whether the restriction against disclosure of confidential client information known to the attorney prohibited the attorney from disclosing a known illegitimate child of the husband to his wife, where nondisclosure might affect her intended testamentary disposition as set forth in an estate plan implemented by the attorney.

The Court was required to consider the attorney's obligations in light of R.P.C. 1.6, which provides:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out representation, and except as stated in paragraphs (b) and (c).
>
> (b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client (1) from committing a ... fraudulent act that the lawyer reasonably believes is likely to result in ... substantial financial interest or property of another.
>
> (c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary: (1) to rectify the consequences of a client's ... fraudulent act in the furtherance of which the lawyer's services had been used.

The *A. v. B.* Court held that the possible inheritance of the wife's estate by the husband's illegitimate child was too remote to constitute "substantial injury to the financial interest or property of another" within the meaning of R.P.C. 1.6(b).

However, the Court, relying on R.P.C. 1.6(c) — which permits, (though doesn't require) disclosure to the extent that the attorney believes that it is necessary to rectify the consequences of a client's fraudulent act in furtherance of which the lawyer's services had been used — held that the law firm had been used to commit a fraud upon the wife, and the firm's voluntary disclosure was permissible.

In the situation where an estate planning attorney discovers that a paramour exists and assets have been transferred between spouses in such a way that they may become subject to a palimony claim, is the attorney required to disclose the relationship and, if not, is he prohibited from doing so? The answer is unclear.

As the Court in *A. v. B.* intimates, these issues can be avoided by having clients execute a "disclosure agreement" authorizing the attorney to disclose to a party confidential information concerning one co-client, that impacts

on the other co-client.

• *Can cohabiting parties enter into an agreement to waive palimony claims?*

While premarital agreements are specifically authorized under N.J.S.A. 37:2-31 et seq., there is no such statutory provision for the waiver of palimony claims. However, since the *Kozlowski* and the *Roccamonte* palimony claims were based on general contract principles, presumably the parties should be able to waive any rights to palimony by contract.

In preparing such an agreement, the parties should specifically waive any and all claims of support that they may otherwise have, regardless of any representations that may have previously been made by either party.

When executing a premarital agreement, N.J.S.A. 37:2-33 requires certain formalities. Specifically, the agreement must provide that a statement of the parties' assets be annexed.

Is such a formality required in an agreement waiving a palimony claim? Is consideration, and the reasonableness of consideration, important? The answers to these questions will need to be addressed over time.

• *What are the tax implications of the* Roccamonte *decision?*

Depending on which party is asking the question, there are two taxes to be concerned about — estate taxes and income taxes.

Is the estate entitled to a deduction for estate tax purposes for palimony claims? Section 2053(a) of the Internal Revenue Code of 1986, as amended, provides that "the value of the taxable estate shall be determined by deducting from the value of the gross estate such amounts ... (3) for claims against the estate ... as are allowable by the laws of the jurisdiction, whether within or without the United States under which the estate is being administered."

The deduction under §2053(a) is limited to the extent that the claim was based on a bona fide contract and was for adequate and full consideration in money or money's worth. See Treasury Regulation 20.2053-4.

Where an estate can show that the recipient of assets included in the decedent's estate had a claim to those assets, which claim was founded on a bona fide agreement and for a full and adequate consideration in money or money's worth — regardless of the fact that the nature of the claim was based on her contributions to an extramarital relationship with the married decedent — the estate is entitled to a deduction under §2053 of the IRC. See *Carlson v. United States,* 54 A.F.T.R.2d (RIA) 6451, 84-1 U.S.Tax Cas. (CCH) ¶13,570 (D. Minn. 1983).

It would, therefore, appear that Mr. Roccamonte's estate ought to be entitled to a deduction equal to the value of Mary's claim at the time of Arthur's death. In theory, wouldn't this mimic a marital deduction in the case of a palimony claim brought by a person in a same-sex relationship?

As far as income taxes are concerned, how is the receipt of payments on palimony claims treated by the recipient for tax purposes? Section 61 of the IRC provides that "gross income means all income from whatever source derived, including ... compensation for services, including fees, commissions, fringe benefits, and similar items."

Where an unmarried cohabitant — in settlement of a suit against the estate of her deceased cohabitant, with whom she had carried on a romantic marital-like relationship for nine years — receives proceeds for the value of services rendered to the deceased cohabitant, such proceeds were taxable income to the recipient under §61 of the IRC. See *Green v. Commissioner*, T.C. Memo. 1987-503. But in *Pascarelli v. Commissioner*, 55 T.C. 1082 (1971), aff'd, 485 F.2d 681 (3d Cir. 1973), the court held that lifetime transfers between unmarried cohabitants were gifts and were motivated by detached and disinterested generosity and were, therefore, not included in the income of the recipient.

The payment to Mary (when it is received) should be considered as compensation for services. This amount should, therefore, be considered gross income to her.

Roccamonte certainly appears to raise more questions than it answers. Perhaps, upon reviewing the holding in *Kozlowski*, we should have already been concerned about this issue. The fall-out from these palimony cases may not be known for several years. ■