Contract Law - Implied Agreements - Unmarried Cohabitants

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CONTRACT LAW—IMPLIED AGREEMENTS—UNMARRIED COHABITANTS—The New Jersey Supreme Court has held that unmarried cohabitation will not bar an otherwise valid agreement between parties.


Irma Kozlowski and Thaddeus Kozlowski began living together out of wedlock in 1962 and, except for two brief separations, lived together continuously for fifteen years. During this period Irma provided domestic services while Thaddeus financially supported the couple. In 1968 the Kozlowskis had a serious disagreement which resulted in separation. Within a week Thaddeus pleaded for Irma to return to him and resume her domestic duties in exchange for his promise to take care of her for her lifetime. Irma acquiesced to this request. In 1977 Thaddeus began to pursue other romantic interests which eventually led to the dissolution of their living arrangements.

In 1978 Irma instituted an action in the New Jersey Superior Court, Chancery Division, to recover a share of the assets that Thaddeus had accumulated during the fifteen years that they had lived together, the reasonable value of her services, and future support. In returning a verdict for the plaintiff, the trial court held that one who expressly contracts to receive compensation for domestic services will not be denied the right to enforce this contract even though the parties have engaged in a meretricious relationship. The Supreme Court of New Jersey certified the appeal then pending in the appellate division and,  

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1. Kozlowski v. Kozlowski, 80 N.J. 378, 381-82, 403 A.2d 902, 904 (1979). The surnames of Irma and Thaddeus are coincidentally the same. Id.
2. The domestic services that Irma provided were housekeeping, shopping, acting as mother to both parties' children from previous marriages, escorting and accompanying Thaddeus as he desired, and serving as hostess when necessary for his customers and business associates. Id. at 382, 403 A.2d at 904.
3. Id. Irma knew little about Thaddeus' business dealings. The title to all of his assets, including their residence, remained solely in his name. Irma was completely dependant upon Thaddeus for her financial needs. Id. at 381, 403 A.2d at 904.
4. Before the parties separated, Thaddeus had Irma sign a release which stated that she was to receive $5,000 in full satisfaction of all claims that she might have against him. Id. at 382, 403 A.2d at 904.
5. Id. at 382, 403 A.2d at 904-05.
7. Id. at 173, 395 A.2d at 918. A meretricious spouse is "[o]ne who cohabits with another knowing that the relationship does not constitute a valid marriage . . . ." Comment, 50 CALIF. L. REV. 866, 873 (1962).
in an opinion written by Judge Halpern, affirmed the trial court's decision. Judge Halpern examined the theories of recovery potentially available to the plaintiff. The arrangement entered into by the Kozlowskis in 1962 under a promise of marriage was neither a partnership nor a joint venture. Furthermore, a New Jersey statute precluded agreements based on a promise of marriage. The court also noted that alimony and equitable distribution were not available to the plaintiff because such awards are only available in divorce or annulment actions. Therefore, the court determined that the appropriate theory of recovery was a contract action based on an express agreement between the parties.

Recognizing that parties entering into unmarried cohabitation usually do not record their understanding in any legal fashion, the court discussed what evidence should be considered in a determination of their intent. The terms of their agreement are to be found in the parties' versions of the agreement, and their acts and conduct in light of the subject matter and the surrounding circumstances.

Citing Marvin v. Marvin, the court held that an agreement between nonmarital partners that is not explicitly and inseparably based on sexual services is enforceable. The court recognized that because the mores of society have changed so drastically, unmarried cohabitation should no longer act as a judicial barrier to the fulfillment of the reasonable expectations of the parties. The removal of this barrier was determined not to be contrary to New Jersey public policy. The court indicated that State v. Saunders had established that the cohabitation of unmarried parties was a private matter and, therefore, no longer a crime under New Jersey law. The Kozlowski court concluded that, in light of Saunders, cohabitation by nonmarried parties could not

9. Judge Halpern was the presiding judge of the Appellate Division, and was temporarily assigned to the New Jersey Supreme Court. 80 N.J. at 380, 403 A.2d at 904.
10. Id. at 389, 403 A.2d at 908.
11. Id. at 383, 403 A.2d at 905.
13. 80 N.J. at 383, 403 A.2d at 905.
15. 80 N.J. at 384-85, 403 A.2d at 906.
16. Id. at 384, 403 A.2d at 906.
17. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976) (unmarried cohabitation does not invalidate agreement between parties).
18. 80 N.J. at 387, 403 A.2d at 907.
19. Id.
be termed meretricious. Thus, any lawful agreement made by the parties was deemed by the court to be enforceable.\textsuperscript{21}

Finally, the court determined that, although damages could not be determined with exactitude, the uncertainty would not preclude recovery.\textsuperscript{22} Therefore, the plaintiff was entitled to receive a one-time lump sum judgment that was to be calculated by determining the present value of the reasonable future support that was promised to her by the defendant.\textsuperscript{23}

Justice Pashman, although concurring fully in Judge Halpern’s majority opinion, wrote separately to emphasize that quasi-contractual and equitable remedies should be available to the parties upon the dissolution of their relationship.\textsuperscript{24} Justice Pashman reasoned that because most parties give no thought to the legal consequences of their relationship, it would be unreasonable to require that an express contract be a prerequisite to relief. The intent of the parties must be construed from their explicit language or from their conduct and actions interpreted in light of all the surrounding circumstances.\textsuperscript{25} According to Justice Pashman, a court should presume that the parties intended to deal fairly with one another, and afford equitable relief to effectuate their intent.\textsuperscript{26} Justice Pashman noted that trial courts should consider the duration of the relationship, the amount of services rendered by each party, the opportunities sacrificed by each in entering the living arrangement, and the ability of each to earn a living after the relationship has been dissolved, in determining remedies. Finally, the concurring justice stated that these remedies may be cumulative or exclusive.\textsuperscript{27}

Traditionally, unmarried sexual cohabitation has been deemed to be contrary to public policy and a bar to the enforcement of any agreement between the parties.\textit{Kozlowski}, the first major decision to reject this concept entirely,\textsuperscript{28} is a major step in the evolution of judicial

\textsuperscript{21} 80 N.J. at 387, 403 A.2d at 907. The court emphasized that the decision was not a judicial revival of common law marriage which had been previously abolished by the New Jersey legislature. \textit{Id.} N.J. STAT. ANN. § 37:1-10 (West 1968) states that no marriage celebrated after 1939 is valid unless the parties have obtained a marriage license.

\textsuperscript{22} 80 N.J. at 388, 403 A.2d at 908. See \textit{Albemarle Paper Co. v. Moody}, 422 U.S. 405 (1975) (compensation shall be equal to the injury); \textit{Tessmar v. Grosner}, 23 N.J. 193, 203, 128 A.2d 467, 472 (1957) (evidence of damages is sufficient when it affords a basis for estimating the damages with reasonable certainty).

\textsuperscript{23} 80 N.J. at 388, 403 A.2d at 908.

\textsuperscript{24} \textit{Id.} at 389, 403 A.2d at 909 (Pashman, J., concurring).

\textsuperscript{25} \textit{Id.}

\textsuperscript{26} \textit{Id.}

\textsuperscript{27} \textit{Id.} at 390-91, 403 A.2d at 909-10 (Pashman, J., concurring).

\textsuperscript{28} The California Supreme Court in \textit{Marvin v. Marvin}, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976), held an agreement between unmarried cohabitants to be valid, but only if valid consideration is separable from the meretricious relationship. \textit{Id.} at 669, 557 P.2d at 113, 134 Cal. Rptr. at 821.
noninterference.29 Various concepts have limited the rule that a meretricious relationship bars enforcement of agreements between unmarried cohabitants. For example, common law marriages30 afforded cohabitating couples who had agreed to marry the same rights enjoyed by legally married couples.31 Legal recognition of putative relationships has also protected the agreements of some unmarried cohabitants. A putative relationship exists when at least one of the parties has a good faith belief in the validity of a void or a voidable marriage.32 The putative spouse has been accorded rights that are similar to those of a legally married spouse. Upon termination of the relationship, the accumulated property is divided as property would be divided upon dissolution of a valid marriage.33 This recovery prevents unjust enrichment of the spouse who has received the value of the other's services which would not have been performed but for the mistaken belief that they were legally married.34 A California court, in In re Marriage of Cary,35 expanded the applicability of the concept by affording a meretricious relationship the same status as a putative relationship. The Cary court, like the Kozlowski court, recognized the need for the law to adapt to the increase in long-term nonmarital cohabitation.36 Because the Cary court's decision was based on a liberal interpretation of California's community property statute,37 the court's reasoning has limited applicability.38


30. A common law marriage is "[o]ne not solemnized in the ordinary way, but created by an agreement to marry, followed by cohabitation; a consummated agreement to marry, between persons legally capable of making marriage contract, per verba de praesenti, followed by cohabitation." BLACK'S LAW DICTIONARY 346 (rev. 4th ed. 1968).


33. Id.

34. See Sanguinetti v. Sanguinetti, 9 Cal. 2d 95, 102, 69 P.2d 845, 848 (1937).


A more direct circumvention of the harsh rule applied to agreements between meretricious couples was espoused by the California Supreme Court in *Trutalli v. Meraviglia*.\(^9\) *Trutalli* established that living together in an unlawful meretricious relationship did not preclude a lawful agreement if the immoral relationship was not contemplated to be the consideration for the agreement.\(^{10}\) Although this rule provided relief for some, it allowed the frustration of many agreements because the court retained discretion to determine whether the agreement was made in contemplation of sexual services.\(^{11}\) Seeking to solidify this nebulous\(^{12}\) rule, the California Supreme Court in *Marvin* held that agreements that are not exclusively based on sexual services are valid. The rule established in *Marvin* allows the parties relief even though the meretricious relationship forms part of the consideration, provided it does not represent the exclusive consideration upon which the agreement was made.\(^{13}\)

The *Kozlowski* court stated that it accepted the rule established in *Marvin*. Although the express agreements were upheld in both cases, the means to the end were different. The *Marvin* court held that although unmarried cohabitation is meretricious, the sexual service aspect of the relationship may be separated from valid consideration to enable an otherwise valid agreement to take effect.\(^{14}\) The *Kozlowski* court refused to consider unmarried cohabitation to be meretricious. Finding that public attitudes as well as court decisions no longer hold unmarried cohabitation to be against public policy, the *Kozlowski* court believed the more honest approach to be the abolition of any rule that would defeat the fulfillment of the reasonable expectations of the parties.\(^{15}\)

Although the agreements in *Marvin* and *Kozlowski* were considered to be express, both courts found it necessary to encompass implied-in-fact agreements in their decisions. Because parties entering into unmarrried cohabitation usually do not record their understanding in any

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40. 215 Cal. at 698-99, 12 P.2d at 430-31. See Lytle v. Newall, 24 Ky. 188, 68 S.W. 118 (1902) (contract is valid unless made in contemplation of an illicit relationship); In re Gordon's Estate, 8 N.Y.2d 71, 75, 168 N.E.2d 139, 140, 202 N.Y.S.2d 1, 3 (1960) (express agreements are enforceable as long as sexual relations were not part of the consideration).
42. The court in *Marvin* stated that "the past decisions hover over the issue in the somewhat wispy form of the figures of a Chagall painting." 18 Cal. 3d at 669, 557 P.2d at 113, 134 Cal. Rptr. at 822.
43. Id. Contracts which include distinct and separable obligations, some of which are legal and some prohibited, are nevertheless enforceable. Id. See Mannion v. Greenbrook Hotel, Inc., 138 N.J. Eq. 518, 520, 48 A.2d 888, 889 (Ct. Err. & App. 1946).
44. 18 Cal. 3d at 669, 557 P.2d at 113, 134 Cal. Rptr. at 821.
45. 80 N.J. at 387, 403 A.2d at 907.
legal fashion, expansion of relief to implied agreements was necessary to give the decisions wider effect. Remedies for both implied-in-fact and express agreements are based upon the intention of the parties; they differ only in the degree of proof required. Although the Marvin court did not specify the factors to be considered in ascertaining the intent of the parties, the Kozlowski court did. The terms of the parties' agreement are to be found in their respective versions of the agreement, and their acts and conduct in light of the subject matter and the surrounding circumstances. These guidelines direct the courts' inquiry to the objective manifestations of the parties, while allowing flexibility for case-by-case application.

Although Kozlowski opens the door for recovery based on an express or implied-in-fact agreement between unmarried cohabitants, the question of whether implied-in-law remedies will be available to such parties remains. Implied-in-law remedies go a step beyond implied-in-fact remedies in attempting to prevent unjust enrichment by not requiring manifestations of assent. The Kozlowski court did not specify whether implied-in-law as well as implied-in-fact contracts are included in its general reference to implied contracts. However, the cases that the court cited to support its concept of implied contracts show that an implied contract is to be considered in the narrower context of implied-in-fact contracts. Although the majority in Marvin stated that a party to a meretricious relationship may recover based on equitable principles, the concurring and dissenting opinion criticized the majority for affording little guidance in shaping these equitable remedies.

46. Id.
47. See Note, 90 Harv. L. Rev. 1708, 1715 (1977).
48. 80 N.J. at 384, 403 A.2d at 906. See 1 A. Corbin, Corbin on Contracts § 18, at 41 (1963).
50. A. Corbin, Contracts § 19, at 27 (1952).
52. 18 Cal. 3d at 685, 557 P.2d at 123, 18 Cal. Rptr. at 685 (Clark, J., concurring and dissenting). See Morone v. Morone, 6 Fam. L. Rep. (BNA) 3043 (1980) (rejects application of equitable remedies citing concurring and dissenting opinion in Marvin).
fails to establish what circumstances would permit recovery, as well as what limitations would be imposed upon recovery, or whether the different remedies available for express, implied-in-fact, and implied-in-law agreements would be cumulative or exclusive.\textsuperscript{53}

The concurring opinion in \textit{Kozlowski} directly responds to this problem by setting out specific factors that courts might look to in determining application of equitable remedies.\textsuperscript{54} These factors include the duration of the relationship, the amount and types of services rendered by each of the parties, the opportunities foregone in entering the living arrangement, and the ability of each to earn a living after the relationship has been dissolved.\textsuperscript{55} The concurring justice also recognized that the remedies may be cumulative or exclusive.\textsuperscript{56}

As societal attitudes change, so must the laws that govern society change. This is especially true when the individual's reasonable expectations are frustrated because of a law that no longer reflects the prevailing morality. Laws do not change abruptly to meet a change in attitudes, but evolve with exceptions and circumventions of basic principles. The \textit{Kozlowski} court has adopted a position of neutrality in nonmarital relationships. The evolution, however, may not be complete. The courts began by denying recovery based on express agreements between unmarried cohabitants; \textit{Kozlowski} departed from this harsh approach and proclaimed a policy of noninterference. The question remains whether the courts will complete the evolution by affording unmarried parties protection through implied-in-law remedies.

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\textsuperscript{53} 18 Cal. 3d at 685, 557 P.2d at 123, 134 Cal. Rptr. at 685.
\textsuperscript{54} 80 N.J. at 390, 403 A.2d at 909 (Pashman, J., concurring). Justice Pashman appears to be responding to Justice Clark's concurrence and dissent in \textit{Marvin}.
\textsuperscript{55} \textit{Id}.
\textsuperscript{56} \textit{Id}. at 909-10 (Pashman, J., concurring).