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Procedural History

Jun 12, 1992 Complaint for Custody filed by Pellettieri, Rabstein, & Altman on behalf of John A. Hartmann III (hereinafter "Plaintiff"). [Da 1 - 3]

Jun 12, 1992 (Simultaneous) Order to Show Cause filed by plaintiff seeking, *inter alia*, an immediate transfer of custody, sole custody of child, eviction of defendant-counterclaimant from her residence. [Da 4 - 7], with supporting Certification. Motion granted by J.S.C. Sullivan.

Jun 12, 1992 Order to Transfer venue from Mercer to Monmouth County signed by Philip S. Carchman, P.J.F.P. [Da 400]

Jun 17, 1992 Answer and Counterclaim for Custody, Child Support, Palimony, Damages, Specific Performance of Transfer of Property, Fees, Costs and Jury Demand filed by Riker, Danzig, Scherer, Hyland, & Perretti on behalf on Defendant-counterclaimant, Janice Marinuzzi (a/k/a Janice Hartmann) (Hereinafter "Defendant-counterclaimant") filed. [Da 22 - 36]

Jul 22, 1992 Order Granting Relief and Transferring Venue from Monmouth County to Somerset County signed by P.J.F.P. Alexander Lehrer. Settled competing orders to show cause filed by both parties. The Order compelled, *inter alia*, plaintiff to pay $200.00 per week for defendant-counterclaimant's support retroactive to July 2, to maintain *status quo* of household, Granted defendant-counterclaimant sole occupancy of the residence. [Da 90 - 93]

Jul 28, 1992 (Out of time) Answer to Counter Claim filed by plaintiff. [Da 94 - 98]

Aug 5, 1992 Two criminal complaints for harassment lodged by defendant-counterclaimant in Ewing Township Municipal Court. [Da 100]

Aug 18, 1992 Criminal complaint for harassment lodged by defendant-counterclaimant in Ewing Township Municipal Court. [Da 101].

Aug 19, 1992 Temporary Restraining Order under Prevention of Domestic Violence Act issued for defendant-counterclaimant. [Da 101 - 104].

Jan 19, 1993	Domestic Violence complaint merged (by consent) into pending palimony and Domestic Torts counterclaim. [Da 105 - 106].
Jul 23, 1993	Riker Danzig withdraws of counsel (nonpayment of legal fees). [Da 113 - 114].
Oct 28, 1993	(Order entered in Hunterdon County. Defendant-counterclaimant has no recollection of what occurred, and does not know what the Order contained).
Nov 23, 1993	Amended Complaint for Partition filed on behalf of plaintiff. **The complaint states that the property was held as "joint tenants".** [Da 107 - 108].
Dec 13, 1993	Trial brief filed on behalf on plaintiff. **Claims that property held as "tenants in common" and suggests partition occur based on this fictitious status.** [Da 128 - 137].
Dec 21, 1993	Hearing held without defendant-counterclaimant present. As more fully described in the Statement of Facts, Ms. Marinuzzi was suffering from severe alcoholism, and in fact was less than a month from beginning the recovery that continues to this day. The trial court dismissed all defendant-counterclaimant's claims, evicted her, required defendant-counterclaimant to execute deed relinquishing interest in home to plaintiff, partitioned home as if it had been held as tenants in common and fixed defendant-counterclaimant's interest in home at $6,000, granted sole legal and physical custody of child to plaintiff, allowed defendant-counterclaimant only telephone visitation. [2T].
Jan 6, 1994	Written Order filed memorializing December 21, 1993 Order. [Da 138 - 141]
Feb 10, 1994	**App. Div.:** Defendant-counterclaimant filed *pro se* Notice of Appeal. [Da 142].
Mar 9, 1994	**Trial Court:** *Pro se* Motion to Reconsider filed at trial level by Defendant-counterclaimant. [Da 147].
Mar 18, 1994	**Trial Court:** *Pro se* Notice of Motion for Stay Pending Appeal filed by Defendant-counterclaimant. Motion requested, *inter alia*, that the plaintiff not be permitted to execute the deed to defendant-counterclaimant's residence. [Da 151]. This Motion was apparently transferred by the trial court *sua*

sponte to the Appellate Division. See Notice of Docketing [Da 158]).

Mar 29, 1994 **App. Div.:** Plaintiff files Cross Motion seeking, *inter alia,* counsel fees and costs, termination of his obligation to pay defendant-counterclaimant the $6,000 Ordered on Dec 21, 1993, and to restrain Defendant-counterclaimant from using the Hartmann name. [Da 159 - 160].

Mar 9, 1994 **App. Div.:** Defendant-counterclaimant files *pro se* motion "for the Appintment of Attorney". [Da 155].

Mar 24, 1994 **Trial Court:** Grace Dennigan, Esq. files appearance for defendant-counterclaimant **for trial level aspects of case only.** [Da 180].

Apr 18, 1994 **App. Div.:** Plaintiff files Notice of Motion to extend time to answer. [Da 181].

Apr 25, 1994 **App. Div.:** Order on (3/18/94) Motion: Grants motion staying portion of judgement requiring defendant-counterclaimant to convey her interest in home and temporarily relinquishes jurisdiction for trial court to consider defendant-counterclaimant's Motion for Reconsideration. [Da 185].

Apr 27, 1994 **Trial Court:** Defendant-counterclaimant (through Grace Dennigan, Esq.) files Supplemental Notice of Motion; converts Motion for Reconsideration into Motion to Vacate Order under R. 4:50-1, with supporting letter brief, certifications. [Da 186 - 202].

May 4, 1994 **App. Div.:** Plaintiff files certification in opposition to defendant-counterclaimant's supplemental motion and in further support of Cross Motion. [Da 202 - 212].

May 10, 1994 **App. Div.:** Defendant-counterclaimant files *pro se* motion "For Extension of Time to File Answer to Cross Motion for Relief" with attached "Certification of *pro se*" in support of Motion. [Da 215].

May 10, 1994 **App. Div.:** Defendant-counterclaimant files *pro se* "Motion to Compel Production of Documents," with supporting Certification. [Da 214].

June 2, 1994 **App. Div.:** Defendant-counterclaimant files *pro se* letter-motion to Appellate Division requesting various

(unclear) forms of relief. [Da 219 - 220].

June 7, 1994 **App. Div.:** Order on Motion: Motion by Defendant-counterclaimant for stay and further relief. Matter was temporarily remanded to the Family Part for ruling on reconsideration motion filed by defendant-counterclaimant. [Da 223].

June 7, 1994 **App. Div.:** Order on Motion: Motion by Plaintiff for further relief. Motion was denied without prejudice. [Da 222].

June 7, 1994 **App. Div.:** Order on Motion: Motion by Defendant-counterclaimant to Compel Production of Documents and Extending Time to Answer Cross Motion. Motions denied. [Da 221].

Aug 5, 1994 **Trial Court:** Grants stay of Order requiring defendant-counterclaimant to execute deed conveying her interest in residence. Reserves decision on defendant-counterclaimant's R. 4:50-1 motion and requires that parties brief the issue of whether defendant-counterclaimant has a reasonable chance of prevailing on merits if 12/21/93 judgement were vacated. [Da 260 - 262].

Sep 9, 1994 **Trial Court:** Defendant-counterclaimant (through Grace Dennigan, Esq) files letter brief outlining meritorious defenses available to defendant-counterclaimant if judgement were re-opened under R. 4:50-1. Includes certifications from two people who witnessed defendant-counterclaimant's severe alcoholism during period of 12/21/93 hearing. [Da 227 - 253].

Sep 12, 1994 **Trial Court:** Plaintiff files letter brief response in opposition to above. [Da 254 - 260].

Feb 23, 1995	**Trial Court:** Court denied the defendant-counterclaimant's R. 4:50-1 motion, holding that alcoholism did not constitute excusable neglect, that she had no meritorious palimony claim, and that enforcement of the 12/21/93 Order would not be unjust. [1T].
Mar 6, 1995	**Trial Court:** Grace Dennigan, Esq., files Substitution of Attorney. (Ends all involvement in case). [Da 264].
Mar 28, 1995	**Trial Court:** J.S.C. Mahon signs Order memorializing Feb 23, 1995 decision which "disposes of all contentions by all parties and closes case." **Ends trial court involvement.** [Da 263].
May 5, 1995	Defendant-counterclaimant filed an Amended Notice of Appeal to include issues raised in the trial court's Mar 28, 1995 Order. [Da 419].
Jun 23, 1995	Defendant-counterclaimant filed Notice of Motion to Extend Time [Da 266] and Notice of Motion to Amend Notice of Appeal and to Relinquish Jurisdiction [Da 270]. Amendment Motion requested that the custody / visitation issues be excluded from the appeal and that the trial court re-evaluate its visitation Order in light of defendant-counterclaimant's 18 months of sobriety.
Jun 30, 1995	Plaintiff filed certification in opposition to above motions, claiming a need for "finality". [Da 273 - 276].
Jul 10, 1995	Defendant-counterclaimant filed a Responsive Certification addressing plaintiff's objections and misrepresentations. [Da 277 - 284].
Jul 11, 1995	Plaintiff wrote a letter to J.A.D. Shebell, claiming Defendant-counterclaimant was being represented by counsel and requesting that the Appellate Division therefore dismiss the appeal. [Da 285 - 289].
Jul 14, 1995	Defendant-counterclaimant wrote responsive letter to J.A.D. Shebell, repeating her June 23, 1995 statement that she is being assisted by a *pro se* support group, and pointing out various misrepresentations made by plaintiff. [Da 290 - 291].

Jul 14, 1995	Defendant-counterclaimant filed a Motion for Leave to File Responsive Certification, requesting that the Appellate Division consider the July 10, 1995, Responsive Certification. [Da 292].
Jul 27, 1995	Order on Motion grants defendant-counterclaimant's Motions to Extend Time and Amend Notice of Appeal to Exclude Custody and Relinquish Jurisdiction of custody and visitation issues.

Statement of Facts

In the spring of 1975, John A. Hartmann III fell in love with his divorce client, Janice Marinuzzi [Da 296]. Mr. Hartmann (hereinafter "John"), a married, successful divorce attorney, wined and dined Ms. Marinuzzi, a divorcing waitress, (hereinafter "Janice") until she eventually returned his affections. Janice was 26.

Through John's skillful negotiations, Janice was awarded custody of her son, child support in the amount of $40.00 per week, alimony in the amount of $35.00 per week, and equitable distribution of approximately $30,000 [Da 300 - 304]. Although John would later deny that he represented Janice during this period, [Da 59, 205], he appears as the attorney of record on Janice's Final Judgement of Divorce [Da 300], although another attorney apparently attended the *pro forma* final hearing.

In the spring of 1977, after seven years of marriage, John left his wife and infant son and rented an apartment with Janice in Plainsboro [Da 60 at ¶7].

At John's insistence, Janice left her evening waitressing job so that she could make dinner and be home for him when he returned from work. Thereafter, John covered all the bills and paid all the living expenses for the couple.

Upon discovering that Janice and John were living together, her ex-husband moved to have his alimony obligation terminated. By a Consent Order dated August 4, 1978, his request was granted [Da 311 - 312].

In discussing the relinquishment of the very alimony that he had

negotiated, John assured Janice that she wouldn't have to worry about it; that he loved her and would take care of her. [Da 29]. Shortly thereafter, John insisted that Janice give up custody of her son so that she could devote more of her attention to him and their relationship. Janice reluctantly agreed, and, by a consent Order entered in 1977, she gave custody of her son to her ex-husband [Da 409].

In 1977, the couple experienced the first crisis of their relationship. Less than six months after she gave up her alimony and child support and began living with John, Janice discovered that he had been having an affair [Da 23 - 24]. Janice became distraught and made a suicide gesture, causing a minor laceration to her wrist. She was admitted to Princeton House for observation [Da 306]. John came by to visit often, and assured her that if she came back, he would never again be unfaithful. [Da 308]. The two reconciled. Janice was discharged after three days, and moved back in with John.

Janice's discharge diagnosis was "passive dependent personality" [Da 308].

John's wife was granted a divorce on grounds of adultery by judgement entered in April 1978.[1] Around this time, Janice unofficially took the surname Hartmann. Although John would later deny that he encouraged her to do this [Da 60 at ¶ 18], he in fact supported her name change, and put her on his health insurance and credit cards as Janice Hartmann [Da 319 - 320].

In the spring of 1978, John left his job at Mason Griffin & Pearson in Princeton and was hired by Pellettieri, Rabstein & Altman

(where today he is a full partner) [Da 418].

1 *See* Mary Ann Hartmann v. John A. Hartmann III, Mercer County Docket No. M-216717-76.

In 1980, the couple's standard of living had improved to the point where they decided to leave their apartment in Hunter's Glen and to purchase a home together. Janice dropped out of Mercer County Community College [Da 389] and began house-hunting full time. Within a year, she discovered a home in an affluent section of West Trenton that had been abandoned while still under construction because the builder had declared bankruptcy. Exhausting most of the proceeds from the equitable distribution received at the end of her marriage, Janice contributed $15,000 to the down payment [Da 148]. John drew from savings and contributed $30,000.[2] They took title as "joint tenants with rights of survivorship and not as tenants in common" [Da 368 - 376 (Deed), Da 377 - 381 (Mortgage)], and obtained a five year mortgage (which was paid off in 1986).[3]

Janice took on the job of supervising a massive landscaping project that included a waterfall, a slate patio, a wrought iron fence, two drywells and an ejector pump. She then decorated the

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2 Because John has consistently refused to produce the closing file, this amount is an estimate based on the conflicting claims he has made on the amount he contributed. *See* Da 168 and Da 60.

3 When testifying on the issue of the mortgage, plaintiff was specifically asked about the mortgage status, and misled the Court by not mentioning that the original mortgage was satisfied in 1986:

> Q (By Ms. Keephart, attorney for plaintiff): Okay, the -- you have a mortgage on that house? And the amount of which is?
>
> A (By Mr. Hartmann): 122,000
>
> Q: Is there a second mortgage for the house?
>
> A: There's a second mortgage for 35,000 a home equity.

[2T 23-24 to 24-3].

interior of the house, selecting all the furniture and art. A few years later, she selected an inground swimming pool, and supervised its construction along with the installation of a stone retaining wall.

She lived the life of the typical suburban homemaker, cooking and cleaning while John continued to build his law practice. One day a week, for four hours, John provided a cleaning service to help with the physically difficult aspects of maintaining the home. She accompanied John to social affairs at the Greenacres Country Club in Princeton, dinner and pool parties held by his law partners, as well as political functions and all other social events John attended during the course of their relationship. John always introduced her as Mrs. Hartmann [Da 10].

The two spoke often of marriage. In 1982, they went so far as obtaining a marriage license and certificate [Da 363 - 364]. Having both been married before, they decided to call off the wedding, but continued to live together with John covering all the expenses of their relationship [Da 60, 2T 24-12 to 24-13]. John told Janice that "I want to come home to you because I want to, and because I love you, not because I have to."

Janice learned early on that John had a temper. As early as 1977, he had assaulted her, causing a gash over her left eye that required stitches. In 1983, he beat her so badly [Da 421] that she temporarily left the residence and stayed with an aunt in Trenton. She filed charges and obtained a Temporary Domestic Violence Restraining Order [Da 419-420]. However, after being separated for

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In reality, the $122,000 is a second or subsequent mortgage.

less than two weeks, John convinced her that he loved her and would never again be physically violent toward her, and convinced her to return to their Montague Avenue home and drop the charges and Restraining Order. The more serious of the subsequent assaults resulted in breaking her nose and ribs in 1991 [Da 313 - 318], as well as various internal injuries.

But the assaults were not constant, and John was always extremely and sincerely remorseful afterward. Janice never reached out for help during these periods, and only sporadically saw therapists in regard to her "passive dependent personality disorder" diagnosis.

In the spring of 1986, Janice worked for a few months as an interior designer, the career path she would have taken had it not been for her relationship with John. Although John would later incorrectly testify that “she has a degree . . . from the New York School for Interior Design” [2T 36-6 to 36-8], she did in fact take some classes on the subject [Da 388], and she designed the entire line for Trenton Home Interior's Spring Show at the Princeton Hyatt [Da 321]. However, John strenuously disapproved of her working outside the home, and insisted he wanted her there for him when he came home from work. Further, with John's salary there was no need for a second income.

On August 15, 1987, Janice gave birth to Brandon Adam Hartmann. Janice's role as homemaker now expanded to include a role as the mother to their son.

By the nature of the work, matrimonial attorneys often anger people. One evening in 1990 John received a death threat when two men pushed their way into his residence and indicated that he "should back off". There was no indication which client (or client's spouse) had

sent the message. Janice expressed her concern, and later asked what would happen if John died before she did and she was left alone to care for Brandon. John responded by increasing the $200,000 life insurance policy he had taken out naming "Janice Marinuzzi, fiancee" as the beneficiary [Da 322] to a $300,000 policy naming "Janice Hartmann, spouse" as the beneficiary [Da 323 - 324].

In 1990, John met Heidi while representing her friend in a divorce [2T 51-2 to 51-3]. The relationship became romantic, and they started dating in November of 1991.[4] Heidi was 28. Janice had just turned 43.

John hid the relationship from Janice for almost six months. During this period, he became more aggressive, and seemed to have "a very short fuse". The physical violence accelerated. John's inability to control his violent temper was shown in other areas of his life as well. In October, 1991, he was charged with an Ethics violation for threatening a female judge in Mercer County [Da 405]. The Judge's complaint (and subsequent DRB hearing) found that John had displayed a hostile demeanor, menacing the judge, waving his arms and yelling in a threatening manner. John's denials, and his implication

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4John has consistently denied that he dated Heidi before he left Janice:

¶ 6. . . . I did not leave Defendant for another woman.

[Da 228 - Certification of John A. Hartmann III].

However, when Heidi testified on the issue, she stated:

MRS. HEIDI HARTMANN: We started dating in November, 1991.

[2T P51 L28-33].

that the Judge was exaggerating, look strangely familiar when compared to his later denials of his treatment of Janice. [Da 406]

Also during this period, Janice began to rely on alcohol on an increasing basis. In early May, she confronted John with her belief that he was seeing someone else. John admitted it, but asked if he could continue to see both of them. Janice told John that she "couldn't live this way anymore", and indicated that John's proposed arrangement would be completely unacceptable. She gave John an ultimatum -- stop the affair with Heidi, or lose his relationship with Janice.

On May 22, 1992, after 15 years of cohabitation, John moved out of the house, leaving Janice and Brandon [Da 14].

On June 12, 1992, John (hereinafter "plaintiff") filed an *ex-parte* Order to Show Cause to gain custody of Brandon [Da 4]. He obtained the transfer of custody by fraudulently representing (both in his certification [Da 14] and by his attorney's statements [3T 2-11 to 2-16]) to the Court that a *status quo* existed in which he had custody. Abandoned by John, and with her son improperly removed from her, Janice's use of alcohol and prescription drugs rapidly accelerated.

Janice (hereinafter "defendant-counterclaimant") sought legal representation from Jan Bernstein, Esq, of Riker, Danzig, Scherer, Hyland, & Perretti. Ms. Bernstein filed an answer and counterclaim, [Da 22 - 36] and, on July 22, 1992, obtained for Defendant-counterclaimant an Order requiring plaintiff to maintain the *status quo*, including giving defendant-counterclaimant sole possession of the residence, and restraining plaintiff from entering the property [Da 90 - 93].

The next year was filled with various court hearings, motions, and cross motions. Hundreds of pages of Certifications emanated from the Plaintiff, who continues to be represented by "Mercer County's Largest Matrimonial Law Firm" [Da 417] at no expense to him. By contrast, the defendant-counterclaimant incurred $22,327.96 in legal fees in the first ***month*** of her representation by Riker Danzig [Da 339].

Interrogatories were propounded by Defendant-counterclaimant, but never answered [Da 407]. Discovery requests were consistently ignored [Da 408]. The plaintiff violated every aspect of the July 22, 1992 Court Order, refusing to pay car insurance and household bills, and interfering with the defendant-counterclaimant's attempts to spend time with her son [Da 344 - 360]. The $200 weekly allowance was paid sporadically if at all. As an experienced attorney, Plaintiff knew exactly how far to push these issues, requiring the defendant-counterclaimant to incur more legal fee debt in enforcement letters, but complying shortly before an enforcement motion was actually filed [Da 344 - 360]. By skillful use of these tactics, the plaintiff successfully intimidated both attorneys who attempted to represent Defendant-counterclaimant in the trial court, leaving her *pro se* and with attorney debts in excess of $40,000 [Da 200 - 202, Da 343].

Further, the plaintiff began a harassment campaign against the defendant-counterclaimant, parking outside her house and noting if anyone entered or left. When the plaintiff discovered that the defendant-counterclaimant had gone on a date with another man, he became enraged. He snuck onto the property at night with a flash camera and took photographs through the window, then submitted the photos to court [Da 390]. Defendant-counterclaimant obtained a

Temporary Restraining Order under the Prevention of Domestic Violence Act on August 19, 1992 [Da 101 - 104].

Defendant-counterclaimant sank deeper into alcoholism, receiving two summonses for Driving While Intoxicated in a four month period (November, 1992 and April, 1993).

By the early fall of 1992, Riker Danzig began to back off the case. Their bill for legal services had now reached $37,309.96 [Da 342] and the lower court had declined to assess legal fees against the plaintiff [Da 90 - 93]. The fact that almost no action was taken on the case is demonstrated by her billing statements. On October 29, 1992, her bill was $37,309.96 [Da 342]. During the next seven months, Riker Danzig performed less than 10 hours of work and her bill grew only $2,480.71, to $39,790.67 [Da 343].

In one of her last actions on the case, Jan Bernstein decided not to litigate the Domestic Violence complaint filed in August 1992, instead agreeing to plaintiff's request to withdraw the Complaint, and to merge the issue into Defendant-counterclaimant's palimony claim. A consent Order for mutual restraints was entered by Judge Mahon on January 19, 1993 [Da 105 - 106].

In April of 1993, the plaintiff married Heidi Hartmann. [2T 52-4 to 52-5].

In July of 1993, Jan Bernstein was granted leave to withdraw as defendant-counterclaimant's counsel, leaving her *pro se* [Da 113 - 114]. Defendant-counterclaimant had no experience in using the court system, and she was painfully aware that Plaintiff, a full partner at Mercer County's largest matrimonial firm [Da 417], was a master at it.

For the first time in her adult life, Defendant-counterclaimant was without personal support. Abandoned by the plaintiff and by her

attorney, she was drinking daily and mentally deteriorating by the late fall. In response to plaintiff's request for sole custody, a Custody Evaluation had been ordered by the Court in the spring of 1993. The report indicated that defendant-counterclaimant was in a serious stage of alcoholism, and was becoming incoherent [Da 329].

A hearing on Defendant-counterclaimant's palimony and custody issues was scheduled for December 21, 1993. On the morning of the hearing, a Probation Officer from Hunterdon County called Defendant-counterclaimant at home and testified that the she was incoherent, and that "[she] started to cry on the telephone, and told me that she couldn't get here, that there is no way she could get here. She had no ride," [2T 12-12 to 12-18], and that, as of 10:30 A.M., "[She] sounded intoxicated, and she was telling me that her cats were starving, and that neighbors -- she didn't have any food. The neighbors wouldn't help her. And various things like that." [2T 14-8 14-13].

Instead of adjourning the hearing, or addressing only those issues that could be considered urgent, Judge Mahon decided to proceed in the defendant-counterclaimant's absence and to address every issue that had been raised in the litigation. Hearing only from the plaintiff, he entered an Order which extinguished defendant-counterclaimant's palimony and domestic torts claims, evicted defendant-counterclaimant from her residence, deprived her of her joint interest in the property and granted her only telephone contact with her son [Da 138 - 141]. Rejecting the plaintiff's claim that the defendant-counterclaimant was indebted to him for $157,170[5], [Da 169]

5 In order to reach his figures, the plaintiff's assessed costs against the defendant-counterclaimant included half the electricity used by the couple for the entire period of their cohabitation ($13,320), as well as half the gardening done ($4,500) [Da 168].

the trial Judge fixed the plaintiff's total obligation to the defendant-counterclaimant at $6,000, and Ordered that it be paid at a rate of $200 per week.

The trial judge was not completely at fault in his partition of the residence. He relied on the integrity of a large law firm and the word of an attorney admitted to the bar since 1969.

The plaintiff knew his opponent was a *pro se* who was in a serious state of alcoholic decay and that there was no real chance that his assertions would be put through any sort of meaningful adversarial testing.

The facts are self-explanatory. In 1981, the plaintiff and defendant-counterclaimant purchased a residence, taking title as "joint tenants with rights of survivorship and not as tenants in common" [Da 368 - 376 (Deed), Da 377 - 381 (Mortgage)].

On November 30, 1993, the plaintiff submitted an Amended Complaint for Partition, noting that the property was held as "joint tenants" [Da 125]. Presumably, the plaintiff then began legal research on partitioning the property to his best advantage.

On December 13, 1993, the plaintiff submitted a trial brief now claiming that the property was held as "tenants in common" [Da 128 - 137], and relied on case law which, while extremely relevant to a tenancy in common, was completely irrelevant to a property purchased as "joint tenants with rights of survivorship and not as tenants in common". The partition made in accordance with this irrelevant case law left the defendant-counterclaimant indebted to the plaintiff, and stripped her of her interest in the home.

Further, the plaintiff claimed that the house was subject to a large ($160,000) mortgage and had built only a small amount ($65,000)

of equity [Da 168]. The defendant-counterclaimant was in no condition to obtain a copy of the actual mortgage, which shows a purchase price of $137,000, and a payoff date of April 1, 1986[6] [Da 377]. The plaintiff failed to disclose to the Court below that the mortgage he referred to in his calculations was not the original mortgage on the home, but a subsequent mortgage that he had taken out. The defendant-counterclaimant never received any funds from any subsequent mortgages.

The trial court relied on the plaintiff's assertions, set Defendant-counterclaimant's equity in the home at $6,000,[7] and gave her ten days to vacate the household. Defendant-counterclaimant left the home on January 16, 1994.

Near death, defendant-counterclaimant entered Princeton House on January 20, 1994 [Da 332 - 338].

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6 Defendant is unaware if a subsequent mortgage was taken out on the home. During the course of her relationship with the plaintiff, he would often present her with papers and say "sign these". Being in love with him, and not being experienced with the law, she rarely read such papers before signing them. In any case, she never received any funds from any subsequent mortgage, and the plaintiff has continually portrayed the outstanding mortgage as the original.

7 $5,400 of this remains unpaid as of this writing.

Defendant-counterclaimant emerged from Princeton House in February, 1994, with only the clothes on her back and her sobriety. Plaintiff, earning approximately $200,000 per year [Da 326 - 330] in salary alone,[8] decided that he was authorized to place a small portion of older furnishings from the home into storage for the defendant-counterclaimant [Da 233], and deducted the storage fees from the pittance he was required to pay defendant-counterclaimant so that she could find a new residence and begin getting her life together. Now living in the couples' luxurious West Trenton home, the plaintiff provided no funds for defendant-counterclaimant to find a new residence (in spite of his promises to the trial court that he would provide her with a new residence[9]), and she became homeless.

Upon re-entering the residence, the plaintiff strew garbage around, took photos, then submitted them to the Court.[10] When he

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8 It is impossible to determine plaintiff's investment income, or even to know for certain if the numbers he provided to the Probation Department were accurate, as there has been no discovery in this case.

9 The following testimony was given by the plaintiff on direct examination by his attorney at the December 21, 1993 hearing:

BY MS. KEEPHART:

Q What you're suggesting is that you would have her in a position where she would be set up in another residence, without any difficulty. She'd have a fairly smooth transition?

A [Mr. Hartmann]: And no expense for household furniture, furnishings.

. . .

Q Okay. And you would pay the $1,000 moving cost assessment?

A Well, either we -- right. It would be --

Q Immediately.

A -- that's what I would have spent, a $1,000 whether I give it to her directly or whether or not we just moved her, or however it was handled. It would be $1,000, it should do it. Plus the deposit that she might need.

[2T 32-6 to 32-24].

10 Photos enclosed as Da 393 - 394. Although Defendant-counterclaimant has never had the opportunity to testify on this issue, we ask that this Court look closely at these photos, which were included as an attachment to one of the Plaintiff's certifications.

Common sense would dictate that, even if defendant-counterclaimant were living in a slovenly manner (which she wasn't), it makes no sense for a full-sized U.S. mailbox to be placed on the kitchen counter. Also, please note that the photos of the bedroom include ***drawers removed from the dresser***; not simply clothes strewn around - again indicative of a set up.

As to all the bizarre sexual items, if defendant is given the opportunity to conduct discovery, she will prove that all these items were purchased by the plaintiff on his credit cards, with receipts ***bearing his signature***.

discovered that the defendant-counterclaimant had removed various items (cooking pots, some paintings, some furniture) before departing from the home on January 16, 1994, Mr. Hartmann called the police and filed a criminal complaint [Da 413]. He waited until the day of the municipal court hearing to drop the charges.

When the plaintiff was specifically asked to live up to his promise to provide housing [2T 32-6 to 32-24], he responded by saying:

> ¶ 35 . . . . [Defendant-counterclaimant] states she was left without money or a place to go. Again, Defendant begs for sympathy, when she really has been given considerably more than she was due.

and

> ¶ 36. I do not have an obligation to provide housing for Defendant. . .

[Da 171, Certification of John A. Hartmann III].

Defendant-counterclaimant ended up sleeping at the houses of friends and A.A. members, then applied for welfare and received an emergency housing allowance [Da 367].

On February 10, 1994, Defendant-counterclaimant filed a *pro se* Notice of Appeal, appealing the Order entered by Judge Mahon on December 21, 1993 [Da 142]. Shortly thereafter, she filed a motion in the trial Court requesting a reconsideration, and a stay of the portion of the Order that required her to sign the deed to the house over to the plaintiff. The Appellate Division relinquished jurisdiction to the trial court to determine whether the judgement should be opened, and granted a stay of Judge Mahon's Order requiring her to sign over her interest in the house [Da 185].

On February 23, 1995, Defendant-counterclaimant's motion to vacate the December, 1993 Order was denied by the trial court

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Again, the plaintiff is a highly skilled matrimonial attorney, admitted to the bar since 1969.

[Da 263]. J.S.C. Mahon ruled that, while defendant-counterclaimant was clearly in an alcoholic state during the period of the hearing, this did not, as a matter of law, constitute excusable neglect, that she had no valid palimony claim, and that enforcement of the earlier Order was not unjust [Da 263, 1T]. Further, Judge Mahon let stand the partition of the plaintiff and defendant-counterclaimant's property, even though it was divided as if it had been a tenancy in common when in fact it is held as joint tenants with rights of survivorship.

Judge Mahon signed an Order memorializing this decision on March 28, 1995. On May 5, Defendant-counterclaimant amended her notice of appeal to include the issues raised by Judge Mahon's denial of her R.4:50-1 motion. [Da 419].

Summary of Argument

This appeal arises from a denial of a R. 4:50-1 motion to open a judgment entered on January 21, 1994. Appellant submits that the trial court's errors were an egregious departure from the standard that controls such motions, and that the lower court must be reversed so that a plenary hearing on the merits of the defendant-counterclaimant's underlying claims can be held.

Every challenge being raised is one that asserts that the trial court made errors in its conclusions of law. Because almost none of the facts found by the trial court during this hearing are contested, this court should apply a standard of *de novo* review throughout this appeal.

The issues are not complex. On December 21, 1993, a final hearing was scheduled to address the defendant-counterclaimant's claims to palimony, child custody, and domestic torts damages. She did not appear. The trial court determined, based on its own experience with the Defendant-counterclaimant and the testimony of a member of the Probation Department who had conversed with her that morning, that the appellant was suffering from severe alcoholism during the period of December 1993. Nonetheless, the Judge went on to rule in the plaintiff's favor on every issue raised in the litigation, and dismissed all the defendant-counterclaimant's claims.

In February, 1994, after the defendant-counterclaimant began her recovery from alcoholism, she brought a *pro se* motion under R.4:50-1 requesting that the trial court vacate the earlier judgment and hold a plenary hearing on her claims. In February, 1995, the trial court again affirmed that the defendant-counterclaimant was suffering from crippling alcoholism at the time of the December, 1993 hearing, but

determined as a matter of law that alcoholism does not constitute excusable neglect. As shown below, this conclusion of law is wholly insupportable. This issue has been visited repeatedly and unambiguously by the Supreme Court of New Jersey, and is covered by State and Federal laws.

As shown below, the trial court also erred in concluding that the appellant had not demonstrated a reasonable probability of succeeding on the merits. The court plainly misread the import of the parties taking title to their residence as joint tenants with rights of survivorship. Ignoring the obvious, the court concluded that, because the joint tenancy status could have been changed by the parties at some future date, the choice to take title as joint tenancy with rights of survivorship was meaningless and did not show an intent on the part of the plaintiff to provide for the defendant-counterclaimant beyond the end of their relationship. In reaching this conclusion, the court violated the basic tenant of the law of contracts that the intent of parties is to be judged as of the moment of the contract's creation, not based on their possible future actions.

Further, the issue of the tenancy status of the party's home was only one facet of what should have been a multi-factor analysis encompassing all the factors the Supreme Court has indicated must be considered in palimony cases. In two recent decisions, the Supreme Court provided very specific criteria to guide the lower Courts on this question. One of the most significant omissions of the lower court in this regard was that, in denying the defendant-counterclaimant's motion to vacate the judgement, it deprived itself of the opportunity to consider the testimony of the defendant-counterclaimant as to the existence of an oral contract.

Instead of considering these factors, the trial court stated that the absence of a writing was a factor in its dismissal of the defendant-counterclaimant's palimony claim, in spite of the fact that every case to visit the issue has specifically held that the statute of frauds is inapplicable in the palimony context.

As shown below, the trial Court also erred in determining that enforcement of the judgment entered below would not result in a manifest injustice. Relying only on statements made by the plaintiff, the appellant will show that she spent a minimum of 15 years living together as husband and wife. The defendant-counterclaimant bore plaintiff's son and acted as a homemaker and mother for a decade and a half, sacrificing her career and educational goals in order to provide the plaintiff with the stable and pleasant home necessary for him to build a successful law practice. The relationship ended when the plaintiff left the defendant-counterclaimant for a woman 21 years his junior. As a result of the judgement entered below, the defendant-counterclaimant, after becoming completely dependent on the plaintiff over a 15 year period, is now accepting public welfare and food stamps in order to survive.

Next, the appellant argues that if this court is to reverse the trial court and revive her palimony claim, the court should exercise original jurisdiction to revive injunctive relief to her in the way of *pendente lite* support pending a resolution of the issues at the trial level, providing her with sufficient resources to afford the necessary legal and expert fees to permit her the opportunity to have her case properly adjudicated.

Finally, defendant-counterclaimant argues that because she was ousted from a property to which she held title as a joint tenant, she

is entitled to half the fair rental value of the property for the period of her ouster. Again, this argument involves no fact finding that would violate the traditional role of the Appellate Division when considering such issues, and falls within the equitable powers of the Court to decide.

LEGAL ARGUMENT

I. THE TRIAL COURT ERRED IN RULING THAT THE DEFENDANT-COUNTERCLAIMANT'S INABILITY TO ATTEND THE DECEMBER 21, 1993 HEARING DID NOT CONSTITUTE EXCUSABLE NEGLECT.

At the hearing below, it was uncontroverted that Ms. Marinuzzi was suffering from serious, advanced alcoholism and was thus incapacitated during the period of the December 21, 1993 hearing. Commenting on this issue, the trial Court found:

> THE COURT: I don't know that there's much discussion that she was in an intoxicated state during that period. The question is whether, I suppose, I don't believe that's disputed, the question is whether that's excusable. It may be neglectful, but is it excusable neglect?

[1T 5-23 to 6-3].

Further, at the December 21, 1993 hearing, the Court took testimony from Teresa LaCosta of the Hunterdon County Probation Department on the issue of the defendant-counterclaimant's nonappearance at the hearing:

> THE WITNESS: When I -- she did not seem to recall who I was, when I first identified myself. And then she started to cry on the telephone, and told me that she couldn't get here, that there is no way she could get here. She had no ride. She had no family. And then just -- she talked about it being the holidays, and being alone, and not having a Christmas tree and her financial situation.

[2T 12-12 to 12-18].

> THE WITNESS: . . . She, today, when I spoke to her, she again found it to be -- well, she was crying, but she sounded intoxicated, and she was telling me that her cats were starving, and that neighbors -- she didn't have any food. The neighbors wouldn't help her. And various things like that.

[2T 14-8 to 14-13].

The first issue presented to this Court for review is whether alcoholism constitutes excusable neglect. Although generally an appeal of a motion brought under R. 4:50-1 is reviewed under an abuse of discretion standard, Court Inv. Co. v. Perillo, 48 N.J. 334, 341, (1966), the factual question of whether Ms. Marinuzzi was suffering

from alcoholism is undisputed, leaving only a question of pure law warranting a *de novo* review from this court. Rova Farms Resort v. Investors Insurance Co., 65 N.J. 474, 483 (1974), Coffin v. Kelly, 133 N.J.L. 252 (E. & A. 1945), Lombardo v. Hoag, 269 N.J. Super. 36, (App. Div. 1993).

In its decision, the court below concluded that alcoholism did not constitute excusable neglect:

> THE COURT: Excusable neglect is neglect in which a reasonable[,] prudent person may have engaged under the circumstances, Tradesman National Bank and Trust Co. v. Cummings, 38 N.J. Super. 1 (App.Div. 1955).
>
> In Bergen Eastern Corp. v. Kaus, 178 N.J. Super. 42 (App.Div. 1981), the Court did find excusable neglect where defendant's untimely response to a -- for a defendant's untimely response to a foreclosure action. In so deciding, the Court reasoned defendant was a 74-year-old widow with a history of serious psychological problems and hospitalizations for mental illness, which obviously she had no or little control over.
>
> Here, I am not satisfied that the excusable neglect advanced by Ms. Marinuzzi is sufficient to meet that standard.
>
> I therefore find that prong of the necessary two prongs is not present.

[1T 16-5 to 16-20].

In addressing the issue of alcoholism, New Jersey courts have reached several firm conclusions. Both the New Jersey Supreme Court and Appellate Division have repeatedly affirmed that alcoholism is both a disease and a handicap. *See, e.g.*, In the Matter of George Hahn, an Attorney at Law, 120 N.J. 691 (1990), Clowes v. Terminix Int'l Inc., 109 N.J. 575, 593, (1988), State v. Scher, 278 N.J. Super. 249, 274 (App.Div.1994), Gimello v. Agency Rent-A-Car Systems, 250 N.J. Super. 338 (App.Div. 1991).

For the purposes of the state Law Against Discrimination (LAD) and federal Americans With Disabilities Act (ADA), alcoholism is classified as a disability. *See* N.J. Stat. Ann. 10:5-4.1 (West 1992), 42 U.S.C.A. § 12114, 28 C.F.R. § 35.131(a)(2)(i)-(iii) (1993), Clowes, 198 N.J. 575. Other statutory provisions in New Jersey have similarly

defined alcoholism. *See*, N.J. Stat. Ann. 3B:1-2 (West 1994) (impairment caused by alcoholism included in definition of mental incompetence), N.J. Stat. Ann. 3B:12-28 (West 1994) (Alcoholics sober over one year considered to have returned to competence), N.J. Stat. Ann. 30:1-12 ([T]he department may at its discretion establish and maintain specialized facilities and services for the . . . care, treatment and rehabilitation of persons who are suffering from chronic mental or neurological disorders, including, but not limited to alcoholism . . .), *cf*. N.J. Stat. Ann. 17:48-6a (West 1994) (Insurance plans cannot discriminate against alcoholism in their in-patient coverage plans).

Both the LAD and ADA were enacted to protect persons with disabilities from the exact type of discrimination visited on the defendant-counterclaimant by the trial court's denial of her R. 4:50-1 motion. In a recent case addressing this issue, the Law Division held that "[t]he ADA is remedial legislation designed to eliminate a long history of discrimination. 42 U.S.C.A. § 12101. Persons with HIV disease, alcoholism, epilepsy and emotional illness are equally covered, although there are unfounded myths associated with those conditions." City of Newark v. J.S., 279 N.J. Super. 178, 196 (Law Div. 1993).

In quoting Bergen Eastern Corp. v. Kaus, the trial judge concluded that the court found excusable neglect in that case because the movant suffered from illnesses "which obviously she had no or little control over" [1T 16-15 16-16]. When Judge Mahon thereafter found that the defendant-counterclaimant's alcoholism did not qualify as such an illness, he was accepting and perpetuating the myth that alcoholics have control over their illness. This holding is plainly

contrary to New Jersey case law, as well as the intent of the legislature as expressed in the Law Against Discrimination and the intent of Congress as expressed in the Americans with Disabilities Act.

Although a willful failure to embrace treatment for alcoholism can lead the courts to reject it as an excuse, In the Matter of Collestar, 126 N.J. 468 (1991), there was no such allegation in the instant case. The defendant-counterclaimant had, through continuing membership in Alcoholics Anonymous, maintained her sobriety since her first in-patient treatment, and at the time of the R. 4:50-1 hearing, had been sober for over a year.[11] Such a "sincere confrontation [of her] alcoholism and commitment to rehabilitation" should warrant deference from this court. Id. at 477.

In another recent case, the Chancery Division prevented a step-parent adoption when it found that the abandonment by the natural father could not be considered “intentional" as the father had been suffering from severe alcoholism. In the Matter of the Adoption of a Child by J.R.D., 246 N.J.Super. 619, 620 (Ch. Div.1990).

Foreign jurisdictions directly considering whether alcoholism constitutes excusable neglect have uniformly held that alcoholism is sufficient to meet the "excusable neglect" standard.

In Clarke v. Clarke, 423 N.W.2d 818 (S.D. 1988), the Supreme Court of South Dakota considered a request for relief from a judgment under a statute that is nearly identical to New Jersey's R. 4:50-1. In Clark, the Court reviewed trial level findings on the legitimacy of

11 As of this writing, the defendant has been sober for over a year and a half. She continues to attend A.A. meetings on a daily basis and has become a temporary sponsor for a newcomer to the program. Also, she is actively participating in out patient therapy.

alcoholism and depression when presented as grounds for excusable neglect. The court held that the existence of this type of relief is "to preserve the delicate balance between the sanctity of final judgments and the incessant command of the court's conscience that justice be done in light of all the facts." Id. at 820.

Like New Jersey courts, the South Dakota Court held that "excusable neglect" must be neglect of a nature "that would cause a reasonable prudent person to act similarly under similar circumstances." Clarke 423 N.W.2d at 821, Tradesman National Bank and Trust Co. v. Cummings, 38 N.J. Super. 1 (App.Div. 1955).

Even without the benefit of guidance from an equivalent to the New Jersey Law Against Discrimination, and before such a holding would have been suggested by the enactment of the Federal Americans with Disabilities Act, the Clarke court held that the defendant's alcoholism and depression clearly constituted excusable neglect. *See also* Iddings v. McBurney, 657 A.2d 550, 553 (R.I. 1995) (Defendant's medically documented disability constituted an extenuating circumstance to render his neglect excusable), U.S.I.F. Wynnewood Corp. v. W. G. Soderquist, 219 S.E.2d 787 (N.C.App. 1975) (Defendant's lack of a sound mind constituted excusable neglect), Sawyer v. Cox, 244 S.E.2d 173 (N.C. App. 1982) (Defendant's alcoholism did not amount to "excusable neglect" **because**, by his own testimony he had not had any alcohol for some time prior to entry of judgment).

It is well established that New Jersey Case Law favors resolving claims on their merits. S.E.W. Friel Company v. N.J. Turnpike Authority, 73 N.J. 107 (1977). Rule 4:50-1 is an embodiment of this policy, and its purpose is to ensure that unjust results are avoided.

> The Rule "`is designed to reconcile the strong interests in finality of judgments and judicial efficiency with the equitable notion that courts should have authority to avoid an unjust result in any given case.'" Baumann v. Marinaro, 95 N.J. 380, 392, (1984) quoting Manning Eng'g, Inc. v. Hudson County Park Comm'n, 74 N.J. 113, 120, (1977) . . . A court should view "the opening of default judgments ... with great liberality," and should tolerate "every reasonable ground for indulgence ... to the end that a just result is reached." Marder v. Realty Constr. Co., 84 N.J.Super. 313, 319, (App.Div.), aff'd, 43 N.J. 508 (1964). **All doubts . . . should be resolved in favor of the parties seeking relief.** Arrow Mfg. Co. v. Levinson, 231 N.J.Super. 527, 534, (App.Div.1989) (emphasis supplied).

In the only case in which New Jersey courts addressed the issue of alcoholism in the palimony context, it was held that it was not an abuse of discretion to exclude testimony concerning alcoholism when considering the existence of a palimony contract. Kozlowski v. Kozlowski, 164 N.J. Super. 162 (Ch.Div.1978), *aff'd* 80 N.J. 378 (1979). "Her end of the agreement was, in general terms, to take care of defendant, his children and his home; to cook and keep house for him, and to help entertain his friends and business associates. There was no indication that the understanding of the parties required plaintiff to abstain from drinking alcoholic beverages." Id. at 388.

Whether alcoholism is viewed by this court as a disability or as a disease, its uncontroverted role in the instant case makes clear that the legal conclusion of the court below that it was "not satisfied that the excusable neglect advanced by Ms. Marinuzzi is sufficient to meet [the] standard" [1T 16-17 to 16-18] was legal error and must be reversed.

II. THE TRIAL COURT ERRED IN HOLDING THAT MS. MARINUZZI WOULD NOT SUCCEED ON THE MERITS OF HER CLAIM; THE UNCONTROVERTED FACTS OF THE CASE DEMONSTRATE THAT SHE WILL SUCCEED ON THE MERITS.

To succeed on a motion to open a judgment under R. 4:50-1, a movant must show not only that her neglect was excusable, but that she has a meritorious defense to the action. Marder v. Realty Construction Co., 84 N.J. Super. 313 (App.Div. 1964), *aff'd*, 43 N.J. 508 (1964), Mancini v. New Jersey Automobile Full Insurance Underwriting Association, 132 N.J. 330 (1993). In ruling on this issue, the court below made a plainly erroneous conclusion of law, again warranting a *de novo* review from this court. Coffin v. Kelly, 133 N.J.L. 252, 44 A.2d 29 (E. & A. 1945), Lombardo v. Hoag, 269 N.J. Super. 36, (App. Div. 1993).

A. The purchase of the co-habitants' home as joint tenants with rights of survivorship clearly indicates an intention on the part of the plaintiff to provide for the defendant-counterclaimant beyond the end of their relationship.

In the sixth year of their 17 year cohabiting relationship, [Da 24] Plaintiff and Defendant-counterclaimant purchased a home together. The plaintiff, a skilled matrimonial attorney admitted to the bar since 1969, chose to take title as joint tenants with rights of survivorship. There are no economic advantages in taking title in this manner. It does not reduce liability, taxes, nor insurance obligations. The only logical reason that a party (especially an attorney, who presumably possesses an in-depth understanding of the law) would take title in this manner is to demonstrate an intent to provide a home in the event of a purchaser's early demise. There is no right of survivorship in tenancy in common as there is in joint tenancy, Weiss v. Cedar Park Cemetery, 240 N.J. Super. 86 (App.Div. 1990), and, as pointed out at the trial level, the grand incident of

joint tenancy is survivorship since upon the death of any joint tenant, title descends to the survivor by operation of law. Black's Law Dictionary, 6th Ed.

While taking title in this manner is not determinative of the palimony issue, it is clearly indicative that the defendant-counterclaimant has a meritorious claim to palimony damages. This may explain why the plaintiff misrepresented that they had purchased the home as tenants in common [Da 129 - 137].

The defendant-counterclaimant resided in this home for nearly 12 years, during which time she raised the plaintiff's son and acted as his wife. Nonetheless, due to the incapacitating disability of the illness from which she began to suffer during this period, she was deprived of the property to which she held title without the opportunity to participate in an accounting or partition.

Although the applicability of Kozlowski v. Kozlowski, 164 N.J. Super. 162 (Ch.Div. 1978), *aff'd* 80 N.J. 378 (1979), is more thoroughly discussed below, it should be noted here that the Appellate Division in Kozlowski specifically held that, in considering whether a partnership has been created for palimony purposes, "common ownership and control of partnership property" is a factor tending to support the existence of such a relationship. Id. at 162.

Instead of denying that joint tenancy with rights of survivorship evinces an intent to provide past the end of the relationship, plaintiff's counsel argued to the lower court that the possibility of terminating the joint tenancy status negated the original intent of the purchasers:

> MS. KEEPHART: Any joint tenant can, at any time, destroy the right of survivorship by severing the joint tenancy. Upon severance, the joint tenancy becomes tenancy in common.

> And in no way does that tenancy indicate that Mr. Hartmann intended to leave her this house.

[1T 13-8 to 13-12]

Amazingly, the Court below accepted this argument:

> THE COURT: As has been pointed out by counsel, that joint tenancy status can be, of course, changed by the parties. I find no law to support the proposition that joint tenancy somehow is indicative of a -- some sort of a promise to leave something upon Mr. Hartmann's death and the like.

[1T 17-3 to 17-9]

Contrary to the holding of the lower Court, it is a basic tenet of contract law that the intent of contracting parties is measured as of the creation of the contract, not based on whether they **could** have been altered by a party at some future date. *See, e.g.* Restatement (Second) of Contracts §§27, 213, (1982 App.), *See also* Weichert Co. Realtors v. Ryan, 128 N.J. 427 (1992), Gross v. Yeskel, 100 N.J. Eq. 293, 134 A. 737 (1926), Moscowitz v. Middlesex Borough Building & Loan Ass'n., 18 N.J. Super. 182 (App. Div. 1952).

For the purpose of clarifying and properly emphasizing this point: Had the plaintiff made out a will leaving Ms. Marinuzzi all his assets, according to the lower court's ruling this also would not have indicated an intent to provide for the defendant-counterclaimant in the event of Mr. Hartmann's death, because, like a joint tenancy, a will may be changed at any time.

Further, the whole of palimony law would fall under an analysis that permits judging a party's intent based upon their possible future actions and intentions. Clearly, Mr. Hartmann's intent toward Ms. Marinuzzi changed dramatically after he left her for a younger woman.

The purchase of the co-habitants' home as "joint tenants with rights of survivorship and not as tenants in common" clearly indicated Plaintiff's intent to provide for the defendant-counterclaimant beyond the end of their relationship. The lower Court's ruling on this issue

was an error of law that must be reversed.

B. The trial court erred in failing to consider the palimony factors announced in Kozlowski v. Kozlowski, and by instead focusing on the legal irrelevancy of the nonexistence of a writing.

The applicability of the palimony test outlined in Kozlowski v. Kozlowski, was raised before the trial court during oral argument and in the trial briefs. However, the trial court ignored the test promulgated by the New Jersey Supreme Court and focused on a factor that had been specifically **excluded** from consideration by at least two Supreme Court cases. Therefore, the trial Court must be reversed.

Where the majority in Kozlowski set the general principles of law concerning palimony, Justice Pashman's concurrence proposed a non-exclusive list of factors for the courts to consider when confronted with a palimony claim. While stressing that a palimony remedy is based in equity and that each case depends on the individual facts and circumstances presented, the court provided a list of factors, none of which were considered by the court below.

The factors that the concurrence directed the lower courts to consider ("as examples only") are: the duration of the relationship, the amount and type of services rendered by each of the parties, the opportunities foregone by either in entering the living arrangement, and the ability of each to earn a living after the relationship has been dissolved. Id. at 910. In the case at bar, the lower Court considered none of these factors.

Although the exact amount of time remains in dispute, the relationship lasted a minimum of 15 years [Da 60 at ¶ 7] and a maximum of 17 [Da 24]. It is undisputed that the parties lived together at 18 Montague Avenue in West Trenton for nearly 12 of those years.

When the couple purchased the home in 1981, it was in an

unfinished state. The plaintiff continued to build his law practice, working approximately 70 hours per week, including most weekends, and rarely (by his own admission) made it home before 7:30 P.M. on weeknights [Da 10]. The defendant-counterclaimant took on the full time supervision of the completion and maintenance of the home. Thereafter, she supervised the installation of a stone retaining wall, two drywells and an ejector pump, an inground pool, and a massive landscaping project that included a waterfall, a slate patio, and a wrought iron fence. She also decorated the interior of the house, utilizing proven professional skills of an undetermined monetary value.[12] In addition, the defendant-counterclaimant maintained the house, cleaned it, prepared meals for the plaintiff, and established a pleasant and stable home environment which permitted the plaintiff to earn an income of nearly a quarter million dollars per year.

It is undisputed that the defendant-counterclaimant became pregnant by the plaintiff in 1986, and bore his son in 1987. From this time onward she acted as a homemaker and mother, as caring for the child took up the vast majority of her waking hours.

The uncontroverted facts show that during the majority of her relationship with the plaintiff, Ms. Marinuzzi acted as a homemaker and companion to the plaintiff, as well as a mother to their child, while he built his law practice.

The opportunities foregone by Defendant-counterclaimant due to her relationship with the plaintiff were explored at length at the trial level. Aside from the $75 per week in combined alimony and

12 During the period of December, 1985 and March, 1986, she returned to work on a part-time basis as an interior designer, during which time she designed and coordinated the entire spring line for the Spring Home Show at the Princeton Hyatt while employed by Trenton Home Fabrics [Da 321]. This was the only employment held by the defendant-counterclaimant since (on his insistence), she quit her job as a waitress when she moved in with the plaintiff.

child support that she received, the defendant-counterclaimant showed promise as an interior designer, taking various classes in the subject [Da 388] and working whenever the plaintiff would permit her to do so.

The capacity of each to earn a living after the relationship has been dissolved is painfully obvious. During the course of her relationship with the plaintiff, Plaintiff was hired at Mercer County's largest matrimonial law firm [Da 417]. Today, he is a partner earning $200,000 per year in salary alone [Da 327]. The defendant-counterclaimant remains on welfare and food stamps, working occasional odd jobs cleaning houses [Da 367].

Moreover, Defendant-counterclaimant continues to insist that the plaintiff made frequent oral promises to take care of her for life [Da 29]. In keeping with these oral promises, the plaintiff fully supported the defendant-counterclaimant throughout their 17 year cohabiting relationship. Further, Defendant-counterclaimant provided a copy of a $300,000 life insurance policy taken out by the plaintiff naming "Janice Hartmann, spouse" [Da 323 - 324] as the beneficiary. In addition, as discussed, they purchased their residence as joint tenants with rights of survivorship.

Finally, the defendant-counterclaimant has not had the benefit of discovery nor has the trial court had the opportunity to assess her demeanor and credibility, and the denial of her R. 4:50-1 motion permanently denied her this opportunity. She continues to assert that the plaintiff left her for another woman (his present wife), who is twenty-one years younger than he is.

The factors set out in Kozlowski v. Kozlowski were raised by the defendant-counterclaimant below (see defendant-counterclaimant's brief, transcripts generally) however, the court declined to consider *any* of

them.

Instead, the court below focused on whether there was a writing between the parties:

> THE COURT: Also the court did entertain proofs as to what would be reasonable compensation for that of what would be present [*sic*]. **The other arguments -- there is no writing advanced on the part of the defendant as to any of her claims.**
>
> I am simply not persuaded that there is a basis after a careful review of her filing that meritorious offense does exist.
>
> The Motion for Reconsideration is therefore denied.

[1T 17-10 to 17-16] (Emphasis supplied).

When the Kozlowski case was first considered in the Chancery Division, the court discussed the statute of frauds at length, holding that "[a]lthough the agreement was oral, it does not violate the statute of frauds . . . [t]his court could not countenance the unconscionable result which would obtain should all relief be denied this plaintiff who was cast adrift at 63 years of age without means of support assets, and with little hope of developing support opportunities." Kozlowski, 164 N.J. Super. at 177, 178. *See also* Eiseman v. Schneider, 60 N.J.L. 291, 37 A. 623 (Sup.Ct. 1897).

The Appellate Division was more concise on this issue. When confronted with a statute of frauds defense in Crowe v. DeGioia, the Court held "a Statute of Frauds should not be used to work a fraud". Crowe v. DeGioia, 203 N.J. Super 22 (1985), (*quoting* Klockner v. Green, 54 N.J. 230 (1969)).

The lower court should have considered whether the defendant-counterclaimant had made a *prima facia* case under the standards announced by the Supreme Court in Kozlowski, and whether, given the opportunity to present all of her proofs[13] and to testify as to the contract that existed between the parties, she would have had a

reasonable chance of success on the merits. Any doubts that the trial court had at this stage concerning the viability of Defendant-counterclaimant's claims should have been resolved in her favor. Arrow Mfg. Co. v. Levinson, 231 N.J.Super. 527, 534 (App.Div.1989).

Instead, the court ignored those factors, and based its decision on the legal irrelevancy of whether a writing existed between the parties.

It is respectfully submitted that the lower court must be reversed on these errors and that the matter should be reversed and remanded for a trial on the merits.

13Again, it must be stressed that the plaintiff simply ignored all requests for discovery [Da 407 - 408].

III. THE TRIAL COURT ERRED IN FAILING TO HOLD THAT ENFORCEMENT OF THE LOWER COURT'S ORDER WOULD BE UNJUST, OPPRESSIVE AND INEQUITABLE

In Quagliato v. Bodner, 115 N.J. Super. 133 (App.Div. 1971), the court set a final requirement that must be met in order for a movant to obtain relief under R. 4:50-1. A movant must show that enforcement of the order would be "unjust, oppressive, or inequitable" Id. at 138.

As demonstrated above, defendant-counterclaimant sacrificed her education and career goals in order to bear and raise the plaintiff's and defendant-counterclaimant's son and provide him with the household which enabled him to build a multi-million dollar law practice. As a result of the lower court's Order, the defendant-counterclaimant is left homeless and living on welfare, while the plaintiff enjoys the couple's home and all the other rewards of the defendant-counterclaimant's sacrifices.

The plaintiff agrees with this result. He has stated clearly that his position is that the defendant-counterclaimant is entitled to "nothing".[14] Incredibly, he noted with disapproval that Ms. Marinuzzi was unsatisfied with a shelter provided by the State while he continues to occupy the couple's suburban West Trenton home.[15] Apparently, the plaintiff believes that Ms. Marinuzzi should somehow gracefully accept the transition from the lifestyle they shared for 12 years in an affluent section of West Trenton to homeless shelters and welfare. If the Court were seeking a definition to the terms "unjust, oppressive, and inequitable," the lower court's Order, which embodies

14 Defendant is totally self-centered and does not recognize her responsibilities. . . Defendant owes me money -- I owe her nothing. [Da 237, ¶ 31. Certification of John A. Hartmann III].

15 Defendant states she cannot "make it" in a facility which the State has provided . . . She has no regard for the value of property and such, and expects that people owe her a life - complete with spending money. This is just not so and I respectfully submit that Defendant's conduct has caused me financial ruin. [Da 234, ¶ 23 Certification of John A. Hartmann III].

the plaintiff's attitude,[16] surely would provide one.

The plaintiff perpetrated a fraud[17] on the lower court by claiming that the couples' residence had been purchased as tenants in common [Da 133] when in fact it had been purchased as "joint tenants with rights of survivorship and not as tenants in common" [368], and by his implication that the original mortgage was still outstanding [Da 168, 2T 23-24 to 24-3], when the original mortgage had in fact been paid off in 1986 [Da 377]. It would be a manifest injustice to permit the division of the property as entered by the trial court to stand.[18]

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16 Plaintiff's attitude toward the defendant was demonstrated early on when, during a June 12, 1992 *ex-parte* hearing attempting to summarily evict her from her residence, the following exchange occurred between his counsel and the Court:

> THE COURT: . . . I am hesitant to[,] you know[,] turn over possession, -- especially in light of her condition at the present time. You know, she might be dead if you put her out on the street.
>
> MS. ROSE: Well, that is true, but she may be . . . destroying everything and herself in the house, in the meantime, that was our concern.

[3T 3-24 to 4-6].

17 Although not raised below, the fraudulent misrepresentation of the plaintiff that the house was held as tenants in common, and his "omission" that the original mortgage had been paid off in 1986, would provide alternate grounds for this Court to reverse the trial court.

18For example, Defendant-counterclaimant asserts that all contributions to the residence (mortgage, taxes, upkeep, etc.) made during the course of their relationship should have been considered as having been made equally by the parties. The trial court, focused on Reitmeier due to the plaintiff's assertion that it controlled, did not consider this issue and fixed the defendant's equity in the house at $6,000 (of which, not incidentally, plaintiff has paid defendant only $600).

In making its calculations, the Court relied on plaintiff's personal (and wildly inaccurate) assertion that Reitmeier v. Kalinoski, 631 F.Supp. 565 (D.N.J. 1986) was controlling[19] [Da 167]. However, the Reitmeier case dealt with a partition between co-tenants where the property had been held as tenants in common. The Reitmeier decision was clearly inapplicable to the case at bar for numerous reasons.

As mentioned, the property in Reitmeier was held as tenants in common, not as joint tenants with rights of survivorship. The only time the Reitmeier Court even *mentions* joint tenancy is to **distinguish it** from the case then being considered. ". . . [T]enants in common are seized *per my et non per tout*, by the part and not by the whole, whereas joint tenants are seized *per tout et per my*, by the part and by the whole . . . " Id. at 575 (footnote 6), (*citing* Newman v. Chase, 70 N.J. 254, 262 n. 5 (1976)), Gery v. Gery, 113 N.J.Eq. 59, 166 A. 108 (Ct.E.&A. 1933). The argument is made in Reitmeier that a tenancy in common is not necessarily a 50 - 50 split; ownership is apportioned amongst its owners, and the estate can be divided according to their contributions. This is not so with a joint tenancy with rights of survivorship, in which the whole is owned equally by both parties.

The tenants in Reitmeier never co-habited, the property was held jointly only for a very short period of time, and the issues of *quantum merit*, unjust enrichment, and detrimental reliance were never even raised. Reitmeier was neither a contract nor a palimony case,

19 ¶ 23. The Court's decision was based upon Reitmeier v. Kalinoski [cite omitted] which summarizes the law of partition in the state of New Jersey [Da 167, Certification of John A. Hartmann III].

and it has no applicability in the case at bar. Clearly, it would be unjust to permit a partition made in accordance with Reitmeier to stand.

Further, in addition to the value of the services defendant-counterclaimant rendered in maintenance and upkeep, she contributed nearly $15,000 to the purchase of the home [Da 148]. The plaintiff has consistently refused to produce the closing file, and has made conflicting claims as to the amount contributed by the defendant-counterclaimant.[20]

As was pointed out by the plaintiff's counsel, the Order entered below technically leaves the defendant-counterclaimant, who had been reduced to homelessness and welfare, indebted to the plaintiff for $157,170 [Da 169], and leaves viable the preposterous argument that the defendant-counterclaimant has been unjustly enriched!

> MS. KEEPHART: Her bottom line comes out to be that she owes Mr. Hartmann well in excess of $150,000 . . .
>
> [1T 14-2 to 14-3]
>
> Unjust enrichment, perhaps, has occurred if the whole concept of quantum meruit is going to be addressed. Unjust enrichment has occurred perhaps on the side of the defendant.
>
> [1T 14-22 to 14-25].

The Domestic Violence aspects of this case present another compelling reason to reverse the trial court, and another reason why

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20 At various times, the plaintiff has alleged the following contributions to the downpayment we made by the defendant-counterclaimant:

$7,500	Da 168 - Certification of John A. Hartmann.
$8,000	2T 20-7, (Testimony of John A. Hartmann).
$9,000	Da 60, ¶ 9 - Certification of John A. Hartmann.
$10,000	Da 131, Plaintiff's Trial Brief.

enforcement of the lower court's Order is a manifest injustice. As was spelled out in the defendant's counter-claim, the Ewing police were first called to the Hartmann residence in 1977. In 1983, he beat her so badly [Da 421] that she temporarily left the residence and stayed with an aunt in Trenton. She filed charges and obtained a Temporary Domestic Violence Restraining Order [Da 419 - 420]. However, after being separated for less than two weeks, John convinced her that he loved her and would never again be physically violent toward her, and convinced her to return to their Montague Avenue home. The more serious of the subsequent assaults resulted in medical reports that show a cut to the defendant-counterclaimant's head requiring six stitches [Da 313 - 315] (defendant-counterclaimant asserted that this was caused by being pushed into a coffee table by the plaintiff), a broken nose and ribs in 1991 [Da 316 - 317] (defendant-counterclaimant asserted that this was caused by a vicious assault by the plaintiff [Da 33]), a history of cuts, bruises, and various internal injuries (defendant-counterclaimant asserted that these were caused by various beatings inflicted by the plaintiff over the course of their relationship [Da 33]).

The defendant-counterclaimant's non-appearance due to her disability deprived her of the opportunity to testify as to the abuse she suffered at the plaintiff's hands. At various pre-trial hearings, she produced medical reports and horrific photographs of bruises inflicted on her by the plaintiff [Da 365 - 366]. Yet, in another outrageous statement, the plaintiff has claimed "I am in reality, <u>the victim!</u>" [Da 231, ¶15, emphasis in original], and "I am clearly the party to this action who has been unfairly burdened and abused" [Da 235].

Defendant-counterclaimant deserves a chance to have the issue of who was victimized by whom determined by a factfinder. Denying her this opportunity means that the plaintiff gets away with what he did to the defendant-counterclaimant, and would clearly be the sort of injustice that the court in Quagliato had in mind when requiring such a showing to open a judgment.

The plaintiff's physical and emotional abuse of the defendant-counterclaimant, followed by his abandonment of her for a woman 21 years his junior, contributed significantly to the defendant-counterclaimant's deterioration after the end of their relationship. This fact strengthens every claim of the defendant-counterclaimant, and makes it even more compelling that this Court reverse the lower court and remand for a trial on the merits. *See*, Clarke v. Clarke, 423 N.W.2d 818 (S.D. 1988).

The trial Court erred in failing to hold that enforcement of the lower Court's judgment would constitute a manifest injustice. This error alone should warrant reversal of the lower Court.

IV. THE APPELLATE DIVISION SHOULD EXERCISE ORIGINAL JURISDICTION TO REDRESS THE FINANCIAL INJUSTICE CAUSED BY THE LOWER COURT'S ERRONEOUS RULING.

Article IV, section V, paragraph 3 of the New Jersey Constitution and R. 2:10-5 permit courts of review to exercise original jurisdiction whenever necessary to the complete determination of any matter on review.

New Jersey Case Law has determined a variety of factors for deciding if an exercise of original jurisdiction in the Appellate Division is appropriate, all of which support Defendant-counterclaimant's request that original jurisdiction be exercised in the instant case.

Undeniably, the defendant-counterclaimant is harmed by the continued existence of the Order under appeal, and the delay inherent in leaving these issue to the trial Court would only exacerbate the damage. This is a factor that the Court should consider when considering whether to exercise original jurisdiction. State v. Tumminello, 70 N.J. 187 (1976). The case at bar has an incredibly protracted history, Anastasia v. Planning Board of West Orange Township, 209 N.J. Super. 499, 518 (1986), and the record (including a 422 page appendix) presented to this Court is very nearly a complete record of every pleading, exhibit, and transcript that was created in the lower Court. *See*, S.S. v. E.S., 243 N.J. Super. 1, 14 (1990) (the paltry record submitted was uninformative and, thus, inadequate for the purpose of exercising original jurisdiction), Margaritondo v. Stauffer Chemical Company, 217 N.J. Super. 560, 564 *reaffrm'd* 217 N.J. Super. 565 (App.Div.1986).

Further, the issues presented for original jurisdiction are purely legal; no purpose would be served by remanding them to the

trial Court for a determination that would be subject to *de novo* review by this court. Bressman v. Gash, 131 N.J. 517, 528 (1993).

Finally, the Appellate Division has held that undefined "other circumstances" could justify an exercise of original jurisdiction, and the equities of this case, where a party has been unfairly reduced to homelessness and welfare, should surely supply justification for an exercise of original jurisdiction. Maisonet v. N.J. Dept. of Human Service, 274 N.J. Super. 228 (1994), *cert granted* 138 N.J. 265 (1994).[21] (there were no "other circumstances" that would warrant jurisdiction *Id*. at 232). *See also* State v. Jarbath, 114 N.J. 394 (1989).

If justice is to be done in this case, it must be noted that the plaintiff practices matrimonial law as a full partner in Mercer County's largest matrimonial law firm. He stated to the custody and visitation investigator that his income is around $200,000 a year. His "large expendable income" [Da 135] permits him to live in an affluent section of West Trenton, and lease a Mercedes Benz.

The defendant-counterclaimant is *pro-se* with only an eleventh grade education. After becoming accustomed to the upper-middle class lifestyle that her support permitted the plaintiff to build, she now subsists on welfare, food stamps, and occasional work cleaning houses. Her housing allowance from welfare is $50 a month less than her rent. Attorney's fees arising out of this litigation have left her nearly

21 The Supreme Court's decision in this case has been digested in the NEW JERSEY LAW JOURNAL, and the high Court's ruling did not adversely affect this portion of the decision.

$50,000 in debt.[22]

In fact, her first attorney (Jan Bernstein of Riker Danzig) withdrew because their legal fees were not being paid. [Da 113 - 114, Da 341]. In response to not being paid, her second attorney became so non-responsive that Ms. Marinuzzi, having no idea what was going on with her case, was eventually forced to dismiss her.

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22 Plaintiff pointed out that "[Defendant] has expended close to $50,000 in legal fees with another law firm and they were unable to prove this to be a palimony case" [Da 202, Certification of John A. Hartmann III]. What the plaintiff neglects to mention is that the majority of these fees were expended on enforcement for non or under payment of the court ordered support, visitation interference and in response to a "paper blizzard" created by the plaintiff, [Da 343 - 360] who continues to receive free representation from "Mercer County's largest matrimonial law firm" [Da 417].

Utilizing his professional skills, the plaintiff managed to delay this matter for almost three years, and, even if this court reverses, the need for pre-trial discovery would probably entail another enormous delay.[23] The plaintiff has one of the state's most powerful law firms litigating for him without charge. He possesses and has demonstrated the capability to "paper the defendant-counterclaimant to death." Without an award of attorney's fees, or a *pendente lite* Order that would permit her to be able to retain an attorney, this case will again devolve into a war of attrition at the trial level, and the plaintiff must eventually prevail on those terms. The Appellate Division should not close its eyes to the tremendous injustice that must inevitably result if this Court does not take action and provide the defendant-counterclaimant with the resources necessary to obtain a fair hearing on her claims.

The plaintiff, who has 26 years experience in matrimonial matters, is already beginning to cry poverty; presumably in anticipation of a negative result on this appeal, he stated the following in response to a motion to enforce payment of the $200.00 per week (to a $6,000 total) that the trial Court compelled him to pay:

> ¶ 15. The bigger problem now, is that I simply do not have the funds to pay her more than $200.00 per week to satisfy the $6,000. . . [Da 202]
>
> ¶ 16. . . . I just do not have the means to put out the lump sum amount at this time. Defendant should have taken it when my attorney offered it the first time [and her request to receive it now should be denied]. [Da 203]

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23 The delay between the defendant filing the motion to vacate the December 21, 1993 order [2/10/94] and the entrance of the Order [3/28/95] under appeal was <u>over a year</u>.

While this is not conclusive evidence that the plaintiff has begun to hide his assets, it is unseemly that an attorney who earns $200,000 per year in salary alone cannot raise the relatively minor sum of the $5,400 still owed to the defendant-counterclaimant from the 12/21/93 Order. Without professional legal assistance and forensic accounting experts, the defendant-counterclaimant's prospects of a just determination are dim indeed, regardless of whether the other claims of error raised in this appeal result in a reversal.

The arguments below establish that Defendant-counterclaimant is entitled to injunctive relief in the way of *pendente lite* support pending a plenary hearing on this matter, and that she is entitled to significant arrearage, both for Orders that were ignored, and for the time period since the entrance of the lower court's Order.

Under the unique facts of this case, the Appellate Division should, in addition, order that the plaintiff pay the defendant-counterclaimant's attorney's fee debt and provide counsel and expert fees for the future trial level proceedings, or provide her with a sufficient level of support so that she can afford to retain an attorney whose abilities approximate those of the plaintiff. Our adversarial system is dependent upon there being a level playing field. No relief short of this will possibly result in a just conclusion to this case.[24]

24Without counsel fees, the plaintiff would be foolish not to continue his paper war on the defendant; it remains his best strategy to wear down his opponent [unless he is paying for the "wearing down"]. A side benefit to him is that, even if the defendant were to win a sizable recovery after a trial on the merits, he would find satisfaction in knowing that most of it wasn't going to Ms. Marinuzzi but to a law firm. Without expert fees (specifically, expert fees for a forensic accountant), the plaintiff may well convince a trial court that he is "without funds". Absent either of these, the plaintiff has no motivation to make a just settlement offer to the defendant.

A. The court should revive *pendente lite* support pending the resolution of the defendant-counterclaimant's claims at the trial level

In the absence of an exercise of original jurisdiction, appellate courts will generally decline to consider questions or issues not presented to the trial court when there was an opportunity to do so. However, appellate courts may consider them if the question is one of important public interest. R. 2:10-2. Further, if an appellate court on its own can interject an issue, it may in its discretion permit a party to do so. *See* Saul v. Midlantic National Bank, 240 N.J. Super. 62 (App.Div.1990), State v. Macon, 57 N.J. 325, 331 (1971), Morin v. Becker, 6 N.J. 457 (1951).

Public policy is clearly implicated in this case. No one should be permitted to foster the total dependence of another human being for 17 years and then abandon them to the welfare rolls, middle aged and stripped of the years during which the most fundamental survival skills otherwise would have been developed. For 17 years, the defendant provided a high standard of living for Janice Marinuzzi, who spent these same years providing the plaintiff with the home, eventually child care for the son she bore him, and all other domestic support necessary to enable him to concentrate on building his own earning power to a significant degree. Then, when she was in her mid-forties, he abandoned her with absolutely no recognition of her contributions to his present life and well-being, for a successor in her twenties.

In the instant case, this Court should use every available resource to unequivocally demonstrate that such behavior is intolerable in this State. The plaintiff's attempt to terminate this relationship with no acknowledgment whatsoever of his obligations to

Janice, simply because their commitment to each other lacked the formality of a marriage ritual, should be summarily rejected. That the plaintiff would use all his legal expertise and skill to walk away while the woman he once promised to love and care for the rest of her life suffers the pain and degradation of homelessness and poverty speaks volumes on both his narcissistic inhumanity and the legitimacy of the defendant-counterclaimant's charges that he was physically, emotionally, verbally, and sexually abusive during their time together.

In addition, that a member of the bar would undertake such morally abhorrent action and abuse of the power of the law in pursuit of such objectives should be especially offensive to this Court. If John A. Hartmann III, Esq., lacks the character and human decency to reach into his very deep pocket and live up to his obvious promise to provide for Janice for the rest of her life, or at least to show a willingness to compensate her for the 17 years during which she gave him her youth, her love, her time, her companionship and a son, then this Court should have no reservations about forcing him to do so.

In addition to the now-exposed fraud in the plaintiff's claims concerning the mortgage and tenancy status of the home, the defendant-counterclaimant continues to insist that she was physically, emotionally, verbally, and sexually battered by this man. This court should not ignore the fact that the plaintiff has spent the last quarter century honing his courtroom skills into a powerful weapon which even today he continues to use against the relatively naive, emotionally-battered middle-aged and impoverished defendant, who despite what she has been through, today is sober in A.A., and desperately, courageously struggling to rebuild her broken life.

If this Court cannot rule, based on the plaintiff's admissions,[25] the eerie similarity between the fact patterns in the case at bar and the Kozlowski facts,[26] and the lack of any other possible explanation for Ms. Marinuzzi's actions, that an oral contract existed between these people, then the Court should at least order substantial relief

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25 The following admissions were made by the plaintiff during the course of this litigation:

1. The parties lived together for 15 years. ("We did not live together until 1977", Certification of John A. Hartmann III, Da 60 at ¶ 7; "I moved out on May 22, 1992", Certification of John A. Hartmann III, Da 14]).

2. The parties jointly purchased a home in 1981 [Certification of John A. Hartmann III, Da 60].

3. The defendant-counterclaimant did not contribute to the expenses of the household [Certification of John A. Hartmann III, Da 166].

4. The parties had a child together. [Certification of John A. Hartmann III, Da 165].

5. The plaintiff now has "a large expendable income" [Da 128 - 137], and the defendant is now on welfare [Da 367].

26 The parties in the instant case and the parties in Kozlowski lived together for 15 years. The male cohabitant was married when the cohabiting relationship began and subsequently married a much younger woman shortly after the cohabiting relationship ended. The man's wealth greatly increased during the course of the relationship as he pursued his career goals, and the woman's wealth and career did not advance, as she provided the household necessary for the wage earner to succeed. In both cases the man paid all the expenses of the relationship during its duration, and the woman, through detrimental reliance, was left without basic survival skills at the end of the relationship. [Da 60, Kozlowski at 381].

The only significant differences between the two cases is that the parties in the instant case had a child together, Ms. Marinuzzi was actually reduced to welfare and homelessness, and Mr. Hartmann is an attorney who specializes in matrimonial law.

pending the resolution of the underlying issues before a factfinder.

This issue can be addressed by this Court as a matter of law by a simple application of the certifications of Mr. Hartmann to the applicable legal standard.

The issue of whether injunctive relief in the way of *pendente lite* support is appropriate in the palimony context is such a matter. In Crowe v. DeGoia, 90 N.J. 126 (1982), the Court held that several factors should be considered in deciding whether injunctive relief should issue.

First, the Supreme Court held that injunctive relief should not issue except when necessary to prevent irreparable harm. Crowe at 132, (*citing* Citizens Coach Co. v. Camden Horse R.R. Co., 29 N.J.Eq. 299, 303 (E. & A. 1878)). The Court noted that "in certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief". Crowe 90 N.J. at 133,(*citing* Hodge v. Giese, 43 N.J.Eq. 342, 350, 11 A. 484 (Ch. 1887)). In Crowe, the plaintiff was seeking support because she was threatened with homelessness and the loss of her only means of support. The Court held that "the trauma of eviction . . . may well justify the intervention of equity. Neither an unwarranted eviction nor reduction to poverty can be compensated adequately by monetary damages awarded after a distant plenary hearing". Crowe, 90 N.J. at 132-133.

In the case at bar, the defendant-counterclaimant was given temporary emergency housing through the Department of Welfare. She has been informed that she must vacate this housing by September 1,

1995. Having become completely dependent on the plaintiff during their 17 year relationship, she is again faced with the prospect of a homeless shelter while he continues to reside with her far-younger replacement in the air conditioned luxury of their suburban home.

The second factor that the Crowe court announced was that temporary relief should be withheld where the underlying legal claim is uncertain. The legal claim in the instant case is the same as the one considered in Crowe, which held "the enforceability of a support agreement between unmarried cohabitants was well settled as a matter of law in Kozlowski v. Kozlowski". Crowe 90 N.J. at 133.

The final factor that the Supreme Court announced was that "preliminary relief should not issue where all material facts are controverted". Id.

Unlike the facts in Crowe, where the economically advantaged co-habitant claimed that he had maintained only a friendly relationship with the plaintiff, the plaintiff in the instant case has admitted a fact pattern that clearly indicates the palimony elements as set forth by the New Jersey Supreme Court in Kozlowski v. Kozlowski and Crowe v. DeGoia. The extensive admissions by the plaintiff preclude any assertion that all the material facts of such a claim are controverted.

By an Order entered on July 22, 1992 by the Honorable Sullivan, J.S.C., the plaintiff was ordered to maintain the *status quo* of their upper-middle class household. She was granted exclusive occupation of the home, use of a Mercedes Benz, and the payment of $200 per week as injunctive relief pending a plenary hearing on her palimony claim [Da

90 - 93].[27]

27 For Plaintiff's estimation of what it cost to maintain the *status quo* (and what amount would therefore constitute appropriate *pendente lite* support should this Court revive the July 22, 1992 Order), see Da 169. It should be noted for this purpose that the plaintiff's amount did not include half the fair rental value of the home.

Considering the plaintiff's demonstrated ability to delay the proceedings of the trial court, should this court see fit to reverse and remand for a trial on the merits, thus reviving her palimony claim, it would be just for this Court to also re-establish the injunctive relief of the July 22, 1992 support order.[28]

It is respectfully requested that this court revive the July 22, 1992 Order requiring the plaintiff to provide *pendente lite* support to the defendant-counterclaimant. If it is not within this Court's equitable powers to award defendant-counterclaimant counsel fees, the fact that she has no realistic chance of a fair adjudication unless she can afford to retain an attorney should move this Court to provide sufficient *pendente lite* support so that she might retain counsel.

B. As the underlying Order improperly deprived the defendant-counterclaimant of her property, she must be considered ousted and is therefore entitled to half the fair rental value of the residence since her removal.

The nature of joint tenancy is that each co-tenant's possessory rights theoretically extend to the entire premises, co-equal with the rights of his co-tenants. Each has the right to utilize the entire property consistent with the right of the co-tenant to do the same. Baird v. Moore, 50 N.J. Super. 156, 166 (App.Div. 1958), (*quoting* 4 Thompson, Real Property (1940), § 1908, p. 431).

If one co-tenant in a joint tenancy prevents the other tenant

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28 With appropriate language indicating that the Order is to be taken seriously. The plaintiff has in the past simply ignored payment Orders that he disagreed with. See Da 343-362 (Enforcement letters regarding *pendente lite* support ordered on July 22, 1992), Da 203 (Certification stating that the $5,400 balance [still] owed on $6,000 payment ordered on 12/21/93 would not be paid), Da 401 (Disciplinary Review Board Complaint - The issuance of an arrest warrant by J.S.C. Lenox was necessitated by Plaintiff's refusal to comply with payment of sanction).

from occupying the residence, an ouster results. Under such circumstances, the occupying tenant is affirmatively accountable for the value of his use and occupation, as such. Baird at 16, (*quoting* Henderson v. Eason, 17 Q.B. 701, 117 Eng.Rep. 1451 (Ex.Ch.1851), Annotation 27 A.L.R. 184, 190, et seq. (1923), *see* Weible, Accountability of Co-tenants, 29 Iowa L.Rev. 558, 560--561 (1944)).

When a co-tenant has been ousted from property to which they hold title as a joint tenant, they are entitled to half the fair rental value of the property. *See, e.g.,* Newman v. Chase, 70 N.J. 254 (1976), Bauer v. Migliaccio, 235 N.J. Super. 127 (App.Div.1994), Crowell v. Danforth, 222 Conn. 150, 609 A.2d 654 (1992), Hall v. Eaton, 258 Ill.App.3d 893, 631 N.E.2d 833, 197 Ill.Dec. 611 (App.Div. 1994), Cunningham, Law of Property, *supra* at §§ 5.8, 5.12. , *cf.* Lohmann v. Lohmann, 50 N.J.Super. 37 (App.Div.1958).

This is not necessarily so if the property is held as tenants in common. See Baker v. Drabik, 224 N.J. Super. 603 (App.Div.1988), Baird v. Moore, 50 N.J. Super. 156.

To determine whether the plaintiff ousted the defendant-counterclaimant we must examine whether the defendant-counterclaimant "left the premises voluntarily and was free to resume possession at any time". Baird, 50 N.J. Super. at 167.

In the case at bar, the defendant-counterclaimant left the property under a court Order (based in part of the plaintiff's fraudulent misrepresentations to the court) that threatened "a warrant of removal" being issued instructing "all constables, police, or sheriff's officers" taking "whatever steps are necessary to dispossess defendant" [Da 139]. The property was then partitioned based totally upon the fraudulent misrepresentation of the plaintiff that title was

held as tenants in common.

In spite of his extensive promises that he would find the defendant-counterclaimant another residence, paying all the necessary expenses including a deposit, the defendant-counterclaimant was cast into homelessness.

In contrast to the July 2, 1992 hearing which awarded the defendant-counterclaimant temporary possession of the residence, the Order under appeal was invalid for the reasons discussed *supra*, and it should then logically follow that the defendant-counterclaimant was improperly deprived of her property, resulting in an ouster.

Accordingly, this Court should remand this issue for an expedited hearing as to what amount constitutes half the fair rental value of the property for the period since she was ousted.

Conclusion

For the foregoing reasons, it is respectfully requested that this Honorable Court reverse the lower court's decision and exercise original jurisdiction to award injunctive relief in the way of *pendente lite* support, retroactive to the date of the lower court's ruling.

To simply reverse the trial Court on the denial of the defendant-counterclaimant's R. 4:50-1 motion and to remand for further proceedings would be to throw the defendant-counterclaimant, *pro se*, back into the plaintiff's element. He has spent better than a quarter century litigating in the trial courts, and is a full partner at Mercer County's largest matrimonial law firm.

As an example of the plaintiff's skill, the judge in this case was talked into accepting the legally insupportable concept that joint tenancy was meaningless because the tenancy status **could** have been changed by the parties at some uncertain point.

If this Court is without authority to award attorney's fees, or *pendente lite* support at a level sufficient for her to retain an equally skilled attorney, and if this Court cannot exercise its original jurisdiction or retain jurisdiction over the matter, the defendant-counterclaimant has little if any chance of ever obtaining a fair hearing on her claims.

Respectfully submitted,

Janice Marinuzzi,
Pro se appellant