SUPERIOR COURT OF NEW JERSEY
Appellate Division
DOCKET NO. A-3727-16T4

Margaret Fattore, Plaintiff-Respondent / Cross-Appellant v. Frank J. Fattore, Defendant-Appellant / Cross-Respondent	Civil Action On Appeal from a Final Judgment of the Superior Court of New Jersey, Chancery Division, Family Part, Mercer County Sat below: Hon. Catherine Fitzpatrick, PJFP

Appellant / Cross-Respondent's Reply Brief

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[1] The appendix in this matter is limited as, during the pendency of the appeal, the Supreme Court of the United States issued a ruling preempting the case law relied on in the trial court's decision. Thus, the majority of the record below is irrelevant to the singular issue before this court.

Reply to plaintiff's Procedural History

Defendant ("Frank") adopts plaintiff's ("Margaret") procedural history with one exception: Frank did not take any action to obtain a military disability pension rather than a retirement pension. This was provided by operation of law when it was determined that Frank was disabled and required to leave the Army (2T 45:13 to 46:8). According to the Defense Finance and Accounting Service, "DFAS will automatically apply the entitlement that is most beneficial to you based on your gross amount of each entitlement." *See* https://www.dfas.mil/retiredmilitary/disability/comparison.html[2] (Last accessed August 29, 2018).

[2] Also available (via link) at www.dpdlaw.com/Fattore

Reply to counter-statement of Facts

The parties agree on the operative facts. They were married in 1962 and divorced in 1997 following a marriage that lasted thirty-four years (3T 9:14).

Margaret was a career nurse, earning $26,500 per year back in 1997 (Pa 98[3], 2T 49:21). Frank served full time in the Army National Guard, earning roughly $40,000 per year. *See* Basic Military Pay Effective 1996, http://www.dpdlaw.com/MilPay1996.pdf (Last Accessed August 29, 2018). Accordingly, both parties permanently waived any right to seek alimony from the other "now and in the future." (Da 6 at ¶1).

Pursuant to the judgment of divorce (Da 5-10), Margaret was entitled to receive (in addition to her own pension benefits, her own social security, and her own retirement savings), 50% of the maritally acquired portion of Frank's military retirement pension (Da 8 at ¶7, 3T 5:20-22, 6:23-24). A Qualified Domestic Relations Order to this effect was filed.[4] He was subsequently injured (2T

[3] Labeled as "Pr 97" in plaintiff's appendix.

[4] Although a QDRO was apparently filed, it was unnecessary to complete one. Because military retirement is a federal entitlement, not a qualified pension plan, no QDRO is necessary. Pursuant to the Uniformed Former Spouse Protection Act (UFSPA), 10 U.S.C. §1408, a retiree need only complete a form (DD Form 2293, Application for Former Spouse Payments from Retired Pay) and submit it with a copy of any State court judgment or order. The judgment of divorce would have sufficed rather than a formal QDRO.

72:3-4) and left the military on disability.[5]

When Frank was deemed disabled, he was awarded a military disability pension. Unlike a retirement pension, a disability pension is immune from equitable distribution via Federal statute. The parties made no provision for this possible occurrence in their judgment and there is no indication it was known to either party at the time.

As Margaret indicates (Pb 4), although the Army was contacted several times, Frank was not advised that there was any issue as to what Margaret was or was not receiving until 2016[6], when she filed a motion in the trial court seeking to receive her expected share of Frank's military retirement benefits. The parties had had essentially no communication beyond the exchange of necessary information relating to their children since the time of their divorce in 1997.[7]

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[5] Although not controlling, the claim Frank's disability is based on gout is incorrect. Frank testified that his disability was primary hip-related and gouty arthritis accounted for only 20% of it (2T 78:11-18). The trial court correctly found as fact that defendant underwent two complete hip replacements which resulted both in his inability to continue to serve in the military and his disability determination (3T 10:6-13, 12:2-6).

[6] Defendant's brief erroneously indicated that this occurred in 2015 (Db at 3). Plaintiff is correct that the motion was filed in 2016 (Pb at 5).

[7] The trial court's retroactive ruling had the effect of financially devastating the defendant's savings as defendant was required to repay plaintiff for benefits received back to the date

Legal Argument

I. THE TRIAL COURT DECISION HAS BEEN DIRECTLY PREEMPTED BY THE RULING OF THE UNITED STATES SUPREME COURT IN HOWELL V. HOWELL AND THUS MUST BE VACATED.

There is no relevant opposition as to this point. Margaret notes that "[i] t is significant that the trial court in reaching its determination as to the modification of the divorce judgment entered in the within matter specifically set forth that the court was not distributing the military disability pension of Frank, but modifying the equitable distribution portion of the original judgment. (2T 25:18)" (Pb at 9).

This is the same scenario that occurred in Howell and is precisely what the Supreme Court unanimously held violates the Congressional intent of 10 U.S.C. §1408(c)(1) and the rule of law set forth in Mansell v. Mansell, 490 U.S. 581 (1989). Military disability pensions are not subject to distribution and State courts cannot "compensate" a spouse for lost disability funds "by modifying the equitable distribution portion of the original judgment." As succinctly stated during oral argument of Howell:

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of his retirement. Had the United States Supreme Court decision in Howell not been handed down during the pendency of this appeal, the focus of defendant's appeal would have been an argument (1) as to laches and (2) as to the trial court's error in basing all its calculations on defendant's current income, which was comprised primarily of post-judgment earnings and retirement contributions. Da 29.

> JUSTICE GINSBURG: ... I think you're saying when he elects the disability ... then the State court can provide an indemnification for her that's equal to the amount that she's losing. But isn't that just an end-run around the Mansell decision? (28:2-7 https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/ 15-1031_6647.PDF[8])
>
> . . .
>
> CHIEF JUSTICE ROBERTS: So you have a law that says ... you can't divide disability pay, and yet, you say it's okay to say, "well, I'm not going to divide it, but I'm just going to award you an amount equal to what it would be if I divided it..." That's the sort of thing that gives ... law a bad name... It makes a charade out of the statute. (42:3-14, https://www.supremecourt.gov/oral_arguments/argument_transcripts/ 2016/ 15-1031_6647.pdf)

In reliance on Whitfield v. Whitfield 373 N.J.Super. 573, 582-83 (App. Div. 2004) and Torwich v. Torwich, 282 N.J.Super. 524, 528 (App. Div. 1995), this is precisely what the trial court below did when it "crafted an equitable remedy specifically indicating that the monies to be paid to Margaret was not a distribution of the military disability pension but a reallocation of the equitable distribution." (Pb at 12).

As those cases have been preempted and the United States Supreme Court has spoken directly to the issue at hand, the trial court's decision must be vacated in its entirety.[9]

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[8] Also available at www.dpdlaw.com/Fattore

[9] Plaintiff provided no opposition to the application to also reverse the counsel fee award, which was premised explicitly

II. THE TRIAL COURT'S DENIAL OF PLAINTIFF'S APPLICATION TO REOPEN THE JUDGMENT OF DIVORCE AND IMPOSE AN ALIMONY OBLIGATION ON THE 76 YEAR OLD DISABLED DEFENDANT SHOULD BE DENIED.

A. The Appellate Division should decline the invitation to exercise original jurisdiction as to this issue.

It is axiomatic that the Appellate Division is a court of review and that, absent narrowly defined and rarely invoked circumstances, does not act as a court of original jurisdiction. *See* NEW JERSEY CONST, ART IV, § V, ¶ 3, R. 2:10-5, State v. Tumminello, 70 N.J. 187 (1976). This rarely invoked authority would be inappropriate here for numerous reasons.

Initially, issues relating the imposition of an alimony obligation are far more factual than legal, an important consideration when an exercise of original jurisdiction is sought. Bressman v. Gash, 131 N.J. 517, 528 (1993).

Second, the record on appeal is extremely limited as the preemption issue should be dispositive. Without a full record, the Appellate Division is not the appropriate forum to litigate the issue of Margaret's entitlement to alimony. *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).

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on plaintiff having prevailed.

B. The Trial Court did not abuse its discretion in denying plaintiff's application to reopen the divorce judgment and award alimony to plaintiff.

Whether imposed by this court or the trial court, reopening the judgment of divorce and awarding spousal support would be unfair and contrary to well-established case law.

The Appellate Division is bound by a trial court's determinations if they are supported by adequate, substantial, and credible evidence. Cesare v. Cesare, 154 N.J. 394, 411-12 (1998) (citing Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974)). The trial court's denial of Margaret's application to reopen alimony was amply supported by the record.

An analysis of whether alimony is appropriate would turn on the marital lifestyle the parties enjoyed back in 1997. Crews v. Crews, 164 N.J. 11 (2000). Their minimal incomes at that time were sufficiently comparable that they agreed to a permanent waiver of alimony "now and in the future." (Da 6 at ¶1). In 1997, Margaret was employed as a career nurse (1T 22:9-13) and Frank was an active duty soldier serving full time in the Army National Guard. Over the past 21 years, the parties have been separate, divorced individuals each responsible for developing their own financial well-being and standard of living. Frank has remarried (3T 14:18) and saved for retirement with his new wife.

Alimony may not be used to enable a dependent spouse to share in the post-divorce earnings and lifestyle of a spouse. Crews at 18, *citing* Zazzo v. Zazzo, 245 N.J.Super. 124, (App.Div.1990),

certif. denied 126 N.J. 321 (1991).

Much of Margaret's argument, and all of the math presented exploring how much Frank has received from his pension include his post-complaint efforts - his income and post-judgment contributions to his retirement accounts. Neither an alimony nor an equitable distribution analysis permits consideration of post-complaint income nor assets. *See* Crews, supra (as to alimony), Brandenburg v. Brandenburg, 83 N.J. 198 (1980) (as to equitable distribution).

Frank is currently a 76 year old fully disabled veteran. Pursuant to N.J.S.A. 2A:34-23, an open durational alimony obligation would have presumptively ended over a decade ago. Margaret's application to impose an alimony obligation on the septuagenarian defendant and benefit from his post-complaint efforts is without basis.

Finally, applications to reopen divorce judgments and impose alimony obligations were not envisioned by the court in Howell. There, the Supreme Court discussed the issue of alimony as related to the calculation or recalculation of an existing obligation. Citing to Rose v. Rose, 481 U.S. 619 (1987), the court held that "a family court, **when it first determines** the value of a family's assets, remains free to take account of the contingency that some military retirement pay might be waived, or, as the petitioner himself recognizes, take account of reductions in value when it **calculates or recalculates** the need for spousal support." Id. at 630-634 (emphasis added). Here, Margaret urges that a 21 year old judgment be reopened and an alimony obligation imposed for the

first time. Nothing in the Supreme Court's decision implies that it intended to throw open the floodgates of litigation and permit every person affected by the Howell decision to return to court.

Moreover, the application to reopen the judgment and assess alimony boils down to a thinly veiled request to provide prohibited reimbursement for the indivisibility of Frank's disability pension. It urges the court to "make a charade out of the statute" via the avenue of alimony, which is just as prohibited as making "adjustments to equitable distribution" to accomplish this goal. Howell could not be more clear that "an order to 'reimburse' or to 'indemnify' rather than an order dividing property, [is] a semantic difference and nothing more. Regardless of their form, such orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress." Howell v. Howell, 581 US at ______, 137 S.Ct. at 1402. To impose an alimony obligation as a direct result of Frank's pension being immune from distribution would be simply another "semantic difference", no different than adjusting equitable distribution for this reason. While a court can (when initially determining or when recalculating spousal support) consider the potential indivisibility of a military pension should a payor later become disabled, it cannot (as Margaret urges) be an avenue to compensate the non-titled spouse by imposing an obligation where there was none or it runs afoul of the rule of law set forth in Howell.

In denying Margaret's application to reopen and award alimony 21 years after it was permanently waived, the trial court correctly

held that is was "denying Margaret's request that, perhaps, the defendant should now be compelled to pay alimony. **Alimony is not compensation for equitable distribution.** The parties waived alimony in this matter. The Court is not going to grant that relief. **This is an equitable distribution only.**" (3T 32:10-15, emphasis added).

The trial court's holding in this regard was based on well-established law distinguishing alimony from equitable distribution. They are not interchangeable and an alimony award cannot be employed to address an equitable distribution loss. *Cf.* Lombardi v. Lombardi, 447 N.J.Super. 26, 38-39 (App. Div. 2016) ("equitable distribution determinations are intended to be in addition to, and not as substitutes for, alimony awards.")

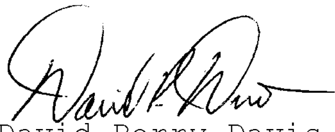
Margaret did not present any basis to reopen the two-decade old judgment of divorce and to disregard the explicit alimony waiver contained therein. That the parties developed different lifestyles over the past 21 years is not a recognized basis under Rule 4:50-1 to reopen.

The trial court was well within its discretion when it denied Margaret's application to impose an alimony obligation. Its decision on this issue should be affirmed.

Conclusion

For the above reasons, this court must reverse the entirety of the trial court's February 25, 2017 order as its underlying rational has been preempted by federal law as clearly articulated by the decision of the United States Supreme Court. Margaret's cross appeal should be denied.

Respectfully submitted,



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Margaret Fattore, Plaintiff-Respondent / Cross-Appellant v. Frank J. Fattore, Defendant-Appellant / Cross-Respondent	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-3727-16T4 Civil Action **PROOF OF SERVICE**

Vimmi Surti, of full age, hereby certifies as follows:

1. I am a paralegal employed by the Law Office of David Perry Davis, attorney for the Plaintiff-Respondent / Cross-Appellant in this matter.

2. On this date, I caused a copy of the enclosed documents (Reply Brief) and this Proof of Service to be served upon the following:

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3. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

DATED: ____________________
Vimmi Surti