

September 13, 2017

Superior Court of New Jersey
Appellate Division
Hughes Justice Complex
25 West Market Street
PO Box 006
Trenton, NJ 08625-0006

RE: Fattore v. Fattore
Docket No. A-003727-16 T04

Dear Judges:

Please accept this letter memorandum in opposition to the Notice of Motion filed by the Defendant, Frank J Fattore, relative to the Defendant's request for a stay and remand.

It is submitted that nowhere in the decision of the United States Supreme Court and cited by the Defendant in Howell v. Howell ___ U.S. ___, 137 S.Ct.1400 (2017) is there any specific reference to Whitfield v. Whitfield 373N. J. Super. 573 (App. Div.2004). The Appellate Division in Whitfield specifically allowed a trial court to formulate an equitable resolution where a party has opted for a military disability pension as is the case at bar. Similarly, there is no citation of overruling the case of Torwich v Torwich 282 NJ Super 524 (App. Div 1995).

Significantly, the trial court specifically states that the court denied Plaintiff's application seeking entitlement to the Defendant's military pension. T1:p26:l-3. The trial judge found that since the military disability pension was not available that the court in making its decision was determining an amount deemed fair and equitable which the court specifically stated was not income from the Defendant's military disability pension but rather from Defendant's Social Security payments. T1: P. 25; L3.

This case is distinguishable from Howell v. Howell where the Arizona court attempted to make the nonparticipant pension party whole by awarding her ongoing periodic payments. The

trial judge in the within matter specifically rejected Plaintiff's argument that she was entitled to recoup the total of the periodic payments that she would have received from the time that the Defendant's pension commenced. The court specifically stated that the Plaintiff was to receive monies from other assets and not the military disability pension of Defendant.

It should be noted that the trial court chose not to grant Plaintiff's application for alimony based upon the substantial change of economic circumstances in this matter in reaching its equitable decision. However, the Court does discuss in detail the difficult economic circumstances of the Plaintiff, Margaret Fattore, who is 74 years of age and whose sole income is social security and a small pension totaling approximately \$19,000.00 per year compared to the Defendant's income of approximately \$80,000.00 which is tax-free and over \$21,000.00 from Social Security.

It is submitted that under the laws of the State of New Jersey in accordance with both Lepis v Lepis, 83 N.J. 139 (1980) and Crews v Crews, 164 N.J. 11 (2000) the trial court was asked to award alimony. Although the trial judge did not award alimony as an equitable relief, if the court were to grant the application of the Defendant, the trial court should be able to consider the award of alimony under the specific circumstances of this case, where there is a great disparity between the incomes of the parties and the clear inability of the Plaintiff, Margaret Fattore to sustain herself under all the circumstances for which the court can consider even in accordance with Howell v. Howell, ___ U.S. ___, 137 S.Ct.1400 (2017), the award of alimony.

It is submitted that even if the Court were to consider staying the payments currently ordered by the trial court it is submitted that it is appropriate for the award of spousal support under all of the circumstances of this case. The trial court has already found in its decision that Plaintiff, Margaret Fattore, during the year she was not receiving pension payments could not

even afford to hire an attorney to proceed with an enforcement action relative to the judgment of divorce regardless of whether she regardless of whether she was entitled to share in the pension or not.

For the reasons aforesaid, it is respectfully requested that the court deny the relief sought by the Defendant but if the court is does grant the same the and remands the matter to the trial court that the trial court should have the authority to award spousal support at this time.

Respectfully submitted,

Howard L. Felsenfeld

HLF:la

cc: David Davis, Esquire
Ms. Margaret Fattore

CITATION OF CASES

1. Howell v. Howell ___ U.S. ___, 137 S.Ct.1400 (2017)1
2. Whitfield v. Whitfield 373N. J. Super. 573 (App. Div.2004)..... 1
3. Torwich v Torwich 282 NJ Super 524 (App. Div 1995).....1
4. Lepis v Lepis , 83 N.J. 139 (1980).....2
5. Crews v Crews, 164 N.J. 11 (2000).....2