

YUDES FAMILY LAW CITATOR

FALL 2019 SUPPLEMENT

CHAPTER 1 – ALIMONY

I. GENERAL ALIMONY CASES

Fattore v. Fattore, 458 N.J. Super. 75 (App. Div. 2019)

The parties were married for 35 years and divorced in 1997 when both were 55 years old. Pursuant to the dual judgment of divorce, both parties waived alimony. The judgment distributed marital assets, including their pensions. Plaintiff had a small pension from a hospital where she worked as a nurse. The parties agreed that Defendant's 50% interest in the marital coverture portion of the pension would be offset against the equity in the marital home.

Defendant had a military pension through his full-time work in the Army National Guard. The divorce judgment provided that the Plaintiff would receive 50% of the pension that was accumulated during the marriage via QDRO but she was not entitled to any post-judgment, pre-retirement cost of living increases to the pension. A QDRO was completed in 1999. Defendant continued to serve in the army until he became disabled in 2002 and began collecting disability benefits and social security.

The parties had little communication after the divorce. Plaintiff never asked Defendant if his pension went into pay status, and Defendant assumed Plaintiff was receiving her share of the pension. When Plaintiff contacted the plan administrator, she was told that there was nothing left to divide after the disability amount was deducted from defendant's pension payments pursuant to the USFSPA (Uniformed Services Former Spouses Protection Act). In 2016 Plaintiff filed a motion to compel Defendant to compensate her for her share of the military pension. Defendant was receiving \$3,400/mo. in non-taxable military disability benefits, \$3,100/mo. in non-taxable VA disability benefits and \$1,800 in taxable social security benefits. Defendant had also remarried and his wife worked.

The trial court found that Defendant had not intentionally deprived Plaintiff of her share of the pension by seeking disability benefits because neither he nor the plaintiff knew about the USFSPA, but the Court found the result nonetheless unfair. The Plaintiff retired in 2013, had to move to a more affordable area and was on a bare bones budget, but still did not have enough income to meet her reduced needs of \$39,540 per year. The Defendant had a budget of \$74,436 per year, for which he had tax free income of over \$80,000 per year plus his wife's earned income to meet expenses.

The trial court appointed a pension appraiser to determine the value of Plaintiff's coverture interest in the Defendant's military pension at the time that the divorce judgment was signed and directed Defendant to pay that amount to Plaintiff from another asset of his. The trial court relied on Whitfield v. Whitfield, 373 N.J. Super. 573 (App. Div. 20004), which affirmed a post-judgment order that required a spouse to compensate his ex-wife directly for the decrease in his military

pension caused by his voluntary election of disability benefits after the divorce. The court denied the Plaintiff's request for alimony, but awarded her \$10,000 in legal fees.

The Appellate Division reversed based on the decision of the U.S. Supreme Court in Howell v. Howell, 173 S.Ct. 1400 (2017), which was decided three months after the trial court's decision here. In Howell, an air force pension was equitably distributed in a divorce, but 13 years later the Husband became disabled, began receiving disability benefits, and waived the commensurate retirement pay. This reduced his former wife's share of his military pension. The Supreme Court held that the USFSPA preempts state court orders that permit equitable distribution of disability benefits. A military pension is not a vested right but a contingent benefit where the pension is reduced as a result of a veteran's disability. The existence of that contingency meant that the value of the wife's share of the military retirement pay was possibly worth less than she and others thought at the time of the divorce. States cannot overcome Congress' intent to omit disability benefits from disposable retirement pay.

Despite that reversal, the Appellate Division agreed that the disability was a substantial and permanent change in circumstance warranting consideration of a post-judgment award of alimony to the Plaintiff and that in a circumstance such as this, upholding the alimony waiver would not be equitable. The Plaintiff gave valuable consideration by waiving alimony, believing that she would share in the Defendant's future military pension. The unforeseeable loss of the bargained for pension benefit was a substantial and permanent change in circumstance that rendered the Plaintiff's waiver of alimony invalid.

Finally, the Appellate Division also reversed the award of counsel fees because it was based on the trial court's mistaken interpretation of federal law and its decision was superseded by Howell v. Howell. However, the trial would be permitted on remand to consider an award of counsel fees for the Plaintiff to pursue an alimony claim.

II. MODIFICATION OF ALIMONY

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