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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0920-15T3

THERESA ROGUSKIE,

Plaintiff-Appellant,

v.

MICHAEL E. ROGUSKIE,

Defendant-Respondent.

Submitted January 10, 2017 – Decided March 2, 2017

Before Judges Yannotti and Fasciale.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Middlesex
County, Docket No. FM-12-1344-09.

Pomper & Associates, attorneys for appellant
(Neal M. Pomper, on the brief).

Shane & White, LLC, attorneys for respondent
(Kenneth A. White, of counsel; Lauren A.
Miceli, on the brief).

PER CURIAM

Plaintiff appeals from an order entered by the Family Part
on October 9, 2015, which denied her motion for reconsideration
of provisions of an order dated July 28, 2015, and her request for

the recusal of the judge. She also appeals from the Family Part's order of October 16, 2015, which granted defendant's motion to terminate his alimony obligation. We affirm in part, reverse in part, and remand the matter to the trial court for further proceedings.

I.

The parties were married in April 1975, and their marriage was dissolved by a dual final judgment of divorce (FJOD), dated October 15, 2009. The parties' property settlement agreement (PSA) was incorporated into the FJOD. Among other things, the PSA addressed the issue of alimony. It provided that the "parties recognize that [defendant] has an obligation to provide permanent alimony to [plaintiff]" in the amount of \$28,000 annually, or \$538.46 weekly.

The PSA further provided that defendant's alimony obligation shall be terminated on the occurrence of one of several events: (1) defendant's death; (2) plaintiff's death; or (3) plaintiff's remarriage. The PSA also stated that, in the event that plaintiff cohabited with an unrelated male, defendant had the right to file an application with the court to modify his alimony obligation "based on the existing law at that time."

In addition, the PSA stated that, during the negotiations of the agreement, defendant had announced that he intended to retire

in approximately three (3) years when he becomes eligible for full retirement benefits from the Township of Edison. It is understood that such retirement, coupled with [plaintiff's] receipt of her share of [defendant's] Pension upon the same entering pay status, may amount to a "change of circumstance" entitling [defendant] to forward an application to the [c]ourt in order to seek a termination or modification of his alimony obligation.

The PSA also stated:

The parties recognize that [defendant] has amassed Pensions, Profit Sharing and/or Retirement Plans through his employment during the course of the parties' marriage with the Township of Edison and PBGC Eastern Airlines. It is further understood and agreed to between the parties that the Pension Plans, Profit Sharing and Retirement Plans are subject to equitable distribution. Further, it is understood and agreed to between the Parties that the said Pension Plan, Profit Sharing and Retirement Plan benefits are to be divided so that [plaintiff] shall receive [fifty per cent] of that accrued within said Pension Plans, Profit Sharing and Retirement Plans between the date of the parties' marriage, April 12, 1975 and the date the Complaint for Divorce was filed, January 16, 2009.

On June 23, 2015, defendant filed a motion in the Family Part for the termination or downward modification of his alimony obligation. Defendant submitted his Case Information Statement (CIS) from 2009, and an updated CIS which indicated that his gross annual income for the previous year was \$89,000.

In an accompanying certification, defendant noted that three years before filing the motion, he became entitled to retirement benefits but he continued to work because he had no reason not to do so. Defendant asserted, however, that his job had become "increasingly difficult" due to the "intense pressure" of his supervisor and lack of adequate staffing in his department. In addition, defendant said it had become medically necessary for him to retire.

Defendant asserted that, since the divorce, his health had "severely" declined. He stated that he had aches, pains, and short-term memory loss. A doctor had determined that defendant was suffering from certain psychological problems which required medication. The doctor advised defendant to retire.

Defendant asserted that upon his retirement, he will receive a "large pension" from the State's pension system. He noted that, pursuant to the PSA and the Qualified Domestic Relations Order filed by the parties, plaintiff will receive 38.42 per cent of the total monthly benefit defendant would be paid.

In addition, plaintiff will receive 41.17 per cent of the total monthly benefit payable to defendant by his previous employer, Eastern Airlines. Defendant asserted that although his pension would provide him with significant income, it would not

be enough for him to live on and pay plaintiff \$28,000 a year in alimony.

Defendant also stated that plaintiff should be required to pay his attorney's fees. He claimed that he has proceeded in good faith, while plaintiff has not. He suggested that plaintiff had not advised him that she cohabited with an unrelated adult and no longer required alimony. Defendant stated that plaintiff acted in bad faith by withholding information regarding her current financial status.

On July 28, 2015, the judge entered an order denying defendant's motion without prejudice. The judge ordered the parties to engage in discovery. The judge directed plaintiff to submit an updated CIS, and scheduled a plenary hearing on defendant's motion.

On September 1, 2015, plaintiff filed a motion for reconsideration of the court's July 28, 2015 order. She also sought the judge's recusal. In her certification, plaintiff stated that in the PSA, she and defendant had agreed on permanent alimony, and defendant had not presented sufficient evidence to warrant a hearing on defendant's motion.

Plaintiff also denied that she cohabited with anyone since the divorce. She asserted that defendant had not applied for retirement, but merely stated he would do so if the court granted

his motion. Plaintiff also stated that there had been no change in defendant's health since the divorce. She said she is destitute, has no source of income other than alimony, and she would have to sell the trailer in which she lives if alimony is terminated.

It appears that after the divorce, plaintiff relocated to California and later moved to Arizona. In her certification, plaintiff stated that she is "unable to travel to New Jersey for any hearing for health reasons." Plaintiff attached a doctor's note stating that she was "unable to travel and attend her court date due to her significant depression and anxiety."

The note stated that plaintiff's conditions would be "exacerbated by flying." The note also stated that plaintiff had "a history of chronic back pain which has caused her to become disabled." In addition, the note stated that the trip to New Jersey would cause "a financial hardship and [plaintiff] would like to be able to attend a conference call for her court date."

In her certification, plaintiff also stated that the judge's former law clerk is an attorney for the law firm that filed the motion on defendant's behalf. Plaintiff asserted that she did not "feel" the judge could be fair to her. She stated that, "[i]t certainly creates the appearance of impropriety for [the judge] to decide my case [in] which my ex-husband is represented by his

recent former law clerk." Plaintiff said the judge should recuse himself from any further involvement with the case.

Defendant filed a response to plaintiff's motion. Defendant stated that since he filed his initial motion, he had retired, and on August 19, 2015, the Board of Trustees of the Public Employees Retirement System had approved his application for retirement benefits. The Social Security Administration also had informed him that he would be receiving monthly retirement benefits in a specified amount.

Defendant also stated that there was no reason for the judge to recuse himself. He noted that although the judge's former law clerk had filed the motion, she was no longer employed by the law firm handling the matter.

On September 30, 2015, plaintiff's attorney advised the court that plaintiff would not be able to appear for the plenary hearing, which was scheduled for the following day. Counsel requested that plaintiff be permitted to participate by telephone. Counsel provided the court with another copy of the doctor's note dated August 25, 2015.

Plaintiff's attorney also submitted a certification dated October 1, 2015 to the court. He stated that the fact that the judge's former law clerk no longer worked for the firm representing defendant did not make the recusal issue moot. Counsel stated that

the judge's former law clerk filed the motion, and the judge should have recused himself before entering the order of July 28, 2015.

The judge conducted a plenary hearing on October 1, 2015. The judge first denied plaintiff's motion for reconsideration of the July 28, 2015 order, noting that the motion had not been timely filed and there was no basis for reconsideration. The judge also denied the motion for his recusal. He stated that there was no established limitation for appearances by a judge's former law clerk. The judge noted that he had implemented a six-month moratorium on such appearances, and the filing of the motion "was outside the six months." The judge also found that he had no reason to believe he could not be impartial in the matter.

In addition, the judge rejected plaintiff's request to appear by telephone. Plaintiff's counsel informed the judge that plaintiff had recently been hospitalized but she was no longer in the hospital. The judge determined that it was necessary for plaintiff to appear in person because he had to make credibility findings, and he could not do so if plaintiff appeared by phone.

The judge then heard testimony from defendant, the foreman for sanitation and recycling at defendant's former employer, and defendant's medical expert. Plaintiff's attorney cross-examined the witnesses. The attorneys were permitted to submit written summations.

Thereafter, the judge entered an order dated October 9, 2015, denying plaintiff's motion for reconsideration of the July 28, 2015 order, and the motion for his recusal. The judge also entered an order dated October 16, 2015, granting defendant's motion to terminate alimony. The judge attached to his order a written decision setting forth his findings of fact and conclusions of law. This appeal followed.

On appeal, plaintiff argues that the judge erred by: (1) refusing to recuse himself in the matter; (2) refusing to permit plaintiff to participate in the plenary hearing by telephone; (3) applying the recently-enacted changes to New Jersey's alimony statute to the PSA executed in 2009; and (4) relying on medical testimony as to defendant's need to retire based on facts that allegedly were unchanged since the parties' divorce in 2009.

II.

We turn first to plaintiff's contention that the judge erred by denying her motion for his recusal. Plaintiff contends that the judge was required to recuse himself because his former law clerk filed defendant's initial motion to terminate or modify alimony. We disagree.

The decision on a motion for disqualification rests within the sound discretion of the trial court judge. P.M. v. N.P., 441 N.J. Super. 127, 140 (App. Div. 2015) (citing Chandok v. Chandok,

406 N.J. Super. 595, 603 (App. Div.), certif. denied, 200 N.J. 207 (2009)). Even so, an appellate court reviews de novo whether the judge applied the correct legal standard. Ibid. (citing State v. McCabe, 201 N.J. 34, 45 (2010)).

Rule 1:12-1 provides that a judge shall be disqualified and precluded from sitting on certain matters, including those in which there is "any . . . reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so." R. 1:12-1(g). Under the rule, a judge is disqualified from a matter if an individual, who observes the judge's conduct, would have "a reasonable basis to doubt the judge's integrity and impartiality[.]" In re Reddin, 221 N.J. 221, 223 (2015).

Applying this standard, we conclude the judge did not err by denying plaintiff's motion for his disqualification. Here, the attorney who filed the motion apparently served as the judge's law clerk in the previous court term and ended her service around September 1, 2014. The attorney filed the motion in June 2015. During the law clerk's service, there was no action in this case, and the clerk had no involvement whatsoever in the matter. The former law clerk also left the firm shortly after the motion was filed and had no further involvement in the case. We therefore conclude that an individual, aware of the relevant facts, would

not have a reasonable basis to doubt the judge's integrity or his ability to handle the matter impartially.

We also conclude that the judge did not violate the Code of Judicial Conduct (JCC) by handling the matter. Canon 2 of the JCC, which was in effect in 2015, stated that "[a] judge should avoid impropriety and the appearance of impropriety in all activities." Pressler & Verniero, Current N.J. Court Rules Appendix to Part I at 495 (2015). In addition, Canon 3 of the JCC, which was in effect in 2015, stated, "[a] judge should perform the duties of judicial office impartially and diligently." Ibid.

Furthermore, Canon 3(C)(1) stated that a judge "should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned," and lists the circumstances when disqualification is required. Id. at 498. The JCC in effect in 2015 did not impose any specific period of time before which a judge's former law clerk could appear in a matter before the judge.

The JCC was revised effective September 1, 2016.¹ Canons 2 and 3 of the JCC essentially were unchanged. Pressler & Verniero, Current N.J. Court Rules, Appendix to Part I at 517 (2017).

¹ Omnibus Rule Amendment Order – Adopting New and Amended Court Rules Effective September 1, 2016, N.J. Courts (Aug. 1, 2016), <http://www.judiciary.state.nj.us/notices/2016/n160809a.pdf>.

However, Canon 3.17(B)(4)(e) now provides that a judge shall be disqualified "[i]n proceedings in which the judge's former law clerk is appearing or has signed papers, for a period of six months following termination of the clerkship." Id. at 523.

Even if Canon 3.17(B)(4)(e) had been in effect in 2015 when the judge ruled in this matter, it would not have required the judge's disqualification. The attorney's only involvement with the matter was the filing of the motion, which occurred more than six months after the attorney's service as a law clerk ended. Moreover, the judge would not otherwise have been required to step aside because under the circumstances, his impartiality could not reasonably be questioned.

We therefore reject plaintiff's contention that the judge erred by denying her motion for the judge's disqualification.

III.

Plaintiff next argues that the judge erred by refusing to permit her to participate in the hearing by telephone. As we have explained, plaintiff presented the court with a doctor's note indicating that she could not appear personally for medical reasons. The judge refused to permit plaintiff to testify by phone because he would be required to make credibility findings, and could not do so if plaintiff did not appear personally.

Generally, courts have required "that witnesses deliver testimony in person and in open court." State v. Santos, 210 N.J. 129, 138 (2012). This principle serves two purposes: subjecting "opposing witnesses to rigorous cross-examination" and promoting "the factfinder's all-important function of observing the demeanor and evaluating the credibility of each witness that comes before the court." Id. at 138-39.

In Santos, the Supreme Court noted that the court rules do not preclude or require in-court live testimony, but the preference for such "testimony can be inferred . . . from the existence of rules that specifically permit remote testimony in distinct and carefully defined situations." Id. at 139. The Court stated that, in other matters, the trial court should determine whether to allow remote testimony by telephone by applying a two-part test first enunciated in Aqua Marine Products, Inc. v. Pathe Computer Control Systems Corp., 229 N.J. Super. 264 (App. Div. 1988). Santos, supra, 210 N.J. at 140-42.

The trial court first must determine whether the opposing party has consented to the telephonic testimony and, if not, whether there is any "special circumstance" or "exigency" which requires the taking of testimony by phone. Id. at 141 (quoting Aqua Marine Prods., supra, 229 N.J. Super. at 275). Next, the court must determine whether the witness's "credentials are known

quantities" and whether there is a circumstantial basis to vouch for "the integrity of the testimony." Ibid. (quoting Aqua Marine Prods., supra, 229 N.J. Super. at 275).

We are constrained to conclude the judge mistakenly exercised his discretion by refusing to permit plaintiff to testify by telephone. Plaintiff established a "special circumstance" which precluded her from traveling to New Jersey from Arizona to give in-court live testimony. As noted previously, plaintiff's doctor provided a note which indicated that plaintiff could not travel to New Jersey for health reasons. Defendant has not disputed the veracity of the doctor's assertion.

The judge stated that he would not permit plaintiff to testify by phone because he had to make credibility findings. The judge did not, however, specifically identify the issues on which plaintiff's credibility was a relevant factor. The judge also did not indicate whether the credibility of plaintiff's assertions could not be resolved by reference to documents or other evidence. Even if an assessment of plaintiff's demeanor was required, the judge should have considered allowing plaintiff to testify by video conference call or in some other technically-feasible manner.

We therefore reverse the court's order of October 16, 2015, which granted defendant's motion to terminate alimony, and remand

for further proceedings. On remand, the trial court shall permit plaintiff to testify telephonically, by video conference call, or some other technically-feasible manner. The court shall require plaintiff to submit a completed and updated CIS, and such other documentary evidence the court deems necessary to assess the credibility of her testimony. The court shall permit defendant to respond to plaintiff's testimony and any additional evidence. The court shall then reconsider its decision on defendant's motion.

IV.

Plaintiff argues that the judge erred by applying amendments to the alimony statute enacted in 2014, which identify factors the court should consider when faced with a request to modify alimony. Plaintiff contends that the 2014 amendments should not be applied retroactively because the parties agreed in the PSA that defendant would pay plaintiff permanent alimony.

In New Jersey, terms and considerations regarding alimony are "primarily governed by statute." Gayet v. Gayet, 92 N.J. 149, 150 (1983). N.J.S.A. 2A:34-23 authorizes the Family Part to modify an order awarding alimony, providing that

after judgment of divorce . . . the court may make such order as to the alimony or maintenance of the parties, . . . as the circumstances of the parties and the nature of the case shall render fit, reasonable and just Orders so made may be revised and

altered by the court from time to time as circumstances may require.

[N.J.S.A. 2A:34-23.]

"Our courts have interpreted this statute to require a party who seeks modification to prove 'changed circumstances[.]'" Spangenberg v. Kolakowski, 442 N.J. Super. 529, 536 (2015) (alteration in original) (quoting Lepis v. Lepis, 83 N.J. 139, 157 (1980)). "More specifically, the party moving for modification 'must demonstrate that changed circumstances have substantially impaired the [moving party's] ability to support himself or herself.'" Landers v. Landers, 444 N.J. Super. 315, 320 (2016) (quoting Lepis, supra, 83 N.J. at 157).

Notably, "income reduction resulting from a 'good faith retirement' after age sixty-five is a well-recognized change of circumstances event," which prompts a court to perform "a detailed review of the financial situation facing the parties to evaluate the impact retirement has on a preexisting alimony award." Ibid. (citing Silvan v. Sylvan, 267 N.J. Super. 578, 581 (App. Div. 1993) (identifying factors to be considered in analyzing whether retirement justified alimony modification)).

In September 2014, "the Legislature adopted amendments to N.J.S.A. 2A:34-23 designed to more clearly quantify considerations examined when faced with a request to establish or modify alimony."

Spangenberg, supra, 442 N.J. Super. at 536-37 (citing L. 2014, c. 42, § 1). Among the amendments, the Legislature added subsection (j), "which lists objective considerations a judge must examine and weigh when reviewing an obligor's request to modify or terminate alimony when an obligor retires." Landers, supra, 444 N.J. Super. at 321 (citing L. 2014, c. 42 § 1).

N.J.S.A. 2A:34-23(j)(2) specifically addresses the situation presented in this case, where an individual retires before he attains "full retirement age." That is the age at which the person is entitled to receive full retirement benefits under the federal Social Security Act. N.J.S.A. 2A:34-23 (citing 42 U.S.C.A. § 416).

Although the amendments to N.J.S.A. 2A:34-23 do not specifically indicate whether they should be applied prospectively, the legislation provides as follows:

This act shall take effect immediately and shall not be construed either to modify the duration of alimony ordered or agreed upon or other specifically bargained for contractual provisions that have been incorporated into:

- a. a final judgment of divorce or dissolution;
- b. a final order that has concluded post-judgment litigation; or
- c. any enforceable written agreement between the parties.

[L. 2014, c. 42, § 2.]

"This additional statement signals the legislative recognition of the need to uphold prior agreements executed or final orders filed before adoption of the statutory amendments." Spangenberg, supra, 442 N.J. Super. at 538; see also Landers, supra, 444 N.J. Super. at 323.

Here, the PSA specifically contemplated that upon his anticipated retirement, defendant could make an application to the court to terminate or modify alimony. The PSA stated that three years after the agreement was executed, defendant would be eligible to retire from his employment with the Township of Edison. The PSA stated that such retirement, along with plaintiff's receipt of her share of defendant's pension benefits, could constitute changed circumstances which would allow defendant to file an application seeking to terminate or modify alimony.

The 2014 amendments to the alimony statute provide in pertinent part that where, as here, defendant retires before attaining his full social security retirement benefits, he has the burden of establishing, by a preponderance of evidence, "that the prospective or actual retirement is reasonable and made in good faith." N.J.S.A. 2A:34-23(j)(2).

In determining whether the obligor has met this burden, the court is required to consider the following factors:

- (a) The age and health of the parties at the time of the application;
- (b) The obligor's field of employment and the generally accepted age of retirement for those in that field;
- (c) The age when the obligor becomes eligible for retirement at the obligor's place of employment, including mandatory retirement dates or the dates upon which continued employment would no longer increase retirement benefits;
- (d) The obligor's motives in retiring, including any pressures to retire applied by the obligor's employer or incentive plans offered by the obligor's employer;
- (e) The reasonable expectations of the parties regarding retirement during the marriage or civil union and at the time of the divorce or dissolution;
- (f) The ability of the obligor to maintain support payments following retirement, including whether the obligor will continue to be employed part-time or work reduced hours;
- (g) The obligee's level of financial independence and the financial impact of the obligor's retirement upon the obligee; and
- (h) Any other relevant factors affecting the obligor's decision to retire and the parties' respective financial positions.

[Ibid.]

In this case, the judge did not err by considering these factors, and should do so again on remand. Application of this provision of the 2014 amendments would not be contrary to the

Legislature's directive regarding application of the amendments to agreements made before their effective date. This is so because in the PSA, plaintiff and defendant expressly contemplated that, upon his anticipated retirement, defendant could file a motion to terminate or modify alimony based on changed circumstances.

As we noted previously, under the law in effect before the 2014 amendments, a good faith retirement with its attendant reduction in income was a recognized change of circumstance that could justify termination or modification of alimony. Landers, supra, 444 N.J. Super. at 320 (citing Silvan, supra, 267 N.J. Super. at 581). The factors identified in N.J.S.A. 2A:34-23(j)(2) merely serve as a guide for the trial court to determine if an obligor's prospective or actual retirement before becoming eligible for full social security retirement benefits "is reasonable and made in good faith."

We note that, prior to the effective date of the 2014 amendments, a court could have considered these same factors in determining whether to terminate or modify alimony as a result of a retirement. We therefore conclude that, in this case, the trial court did not err by considering the factors in N.J.S.A. 2A:34-23(j) in deciding defendant's motion.

Plaintiff further argues that the judge erred by giving undue weight to the testimony of defendant's medical expert. She contends

that defendant's mental and physical conditions have not changed since 2009, when the PSA was executed. She argues that the judge improperly relied upon this testimony in determining that defendant's decision to retire was reasonable and made in good faith.

This argument is without sufficient merit to warrant extended discussion. R. 2:11-3(e)(1)(E). We note, however, that in determining whether defendant made a reasonable and good faith decision to retire, the judge properly considered defendant's mental and physical health. In his certification and testimony, defendant stated that his retirement was prompted in part by his deteriorating mental and physical conditions.

At the hearing, defendant's treating doctor testified that he had diagnosed defendant with anxiety disorder and major depression, and that he needed to retire because "he was being traumatized by continuing to work." The judge did not abuse his discretion as fact-finder in considering and giving weight to this testimony, and may do so again on remand.

Affirmed in part, reversed in part, and remanded to the trial court for further proceedings in conformity with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION