

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KELLY COLVARD PARSONS,

Petitioner,

v.

RICHARD JEARL PARSONS,

Respondent.

On Petition for Writ of Certiorari
To the Tennessee Supreme Court

PETITION FOR WRIT OF CERTIORARI

Mitchell D. Moskovitz (#279356)
530 Oak Court Drive, Suite 355
Memphis, Tennessee 38117
MMoskovitz@smmlawoffice.com
(901) 821-0044

Attorney for Kelly Colvard Parsons

QUESTIONS PRESENTED

1. Did the Appellate Court of the State of Tennessee err, as a matter of law, when it concluded that Wife did not obtain a vested, nonmodifiable property interest in her share of Husband's marital retirement benefits as of the date of the entry of the parties' Final Decree of Divorce, in direct conflict with longstanding Tennessee Supreme Court case law, Towner v. Towner, 858 S.W.2d 888 (Tenn. 1993) and Johnson v. Johnson, 37 S.W.3d 892 (Tenn. 2001)?
2. Did the Appellate Court of the State of Tennessee err, as a matter of law, when it failed to distinguish between Johnson v. Johnson, 37 S.W.3d 892 (Tenn. 2001), in which the Tennessee Supreme Court held that a nonemployee spouse obtains a vested interest in his or her spouse's retirement benefits as the date of the entry of the parties' divorce decree, which is not subject to modification or termination due to a post-decree change in circumstances unilaterally imposed by the employee spouse, and Howell v. Howell, 137 S. Ct. 1400 (2017), in which the United States Supreme Court held that a state court cannot order a **veteran** to indemnify or reimburse his former spouse for the loss of her share of his **military retirement pay** caused by the receipt of **disability benefits**?
3. Did the Appellate Court of the State of Tennessee err (and thereby compound the error in the first and second issues) when it reversed the trial court's denial of Husband's request for attorney fees and held that Husband is entitled to his reasonable attorney fees at both the trial and appellate level, which ultimately allowed Husband to reap a windfall from his willful obstruction of the parties' Marital

Dissolution Agreement, in spite of the fact that Wife was the prevailing party during the first appeal of the present matter?

PARTIES TO THE PROCEEDING

Petitioner is Kelly Colvard Parsons

Respondent is Richard Jearl Parsons

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OPINIONS BELOW

The opinions of the Tennessee Court of Appeals are unreported and can be found at 2017 WL 119211 (Tenn. Ct. App. Mar. 30, 2017) and 2019 WL 6770520 (Tenn. Ct. App. Dec. 12, 2019).

JURISDICTION

On June 3, 2020, the Tennessee Supreme Court entered its Order Denying Application for Permission to Appeal. Subsequently, on June 18, 2020, the Tennessee Supreme Court declined Wife's Petition for Rule 39 Rehearing of Denial of Application for Permission to Appeal.

CONSTITUTIONAL AND STATUORY PROVISIONS INVOLVED

Pursuant to 10 U.S.C. § 1408, federal law preempts state courts from dividing military retirement pay that a veteran has waived to receive disability benefits. Said federal law is inapplicable to the case at hand, which involves a former employee of the Federal Aviation Administration (hereinafter "FAA") and not a military veteran.

STATEMENT

Husband and Wife were married on March 21, 1992. Two children were born of the parties' marriage, namely Logan Grey Parsons, born on March 8, 1997, and Richard Kelan Parsons, born on May 22, 2001. Wife filed her Complaint for Divorce on November 14, 2013.

During the parties' marriage, Husband was employed by the FAA as an air-traffic controller. In November 2013, seven (7) months prior to the parties' divorce, Husband retired from his job pursuant to a FAA mandate requiring retirement at the

age of fifty-six (56). At the time of Husband's retirement, his retirement benefits were comprised of a Civil Service Annuity totaling \$5,325 a month and a Federal Employees Retirement System (hereinafter "FERS Supplement") totaling \$1,370 a month. To maintain eligibility and continue receiving the FERS Supplement, Husband's earned income could not exceed \$15,120 a year.

On April 21, 2014, during Husband's divorce deposition, Husband testified that he procured a part-time "casual job" with Raytheon Corporation, and that his earnings from Raytheon would not exceed the FERS Supplement cap of \$15,000 a year. Specifically, Husband testified that he would be "scheduled to where [he] would probably make about \$15,000 a year, which would be equal to the Social Security cap because [he] receive[s] that what you want to call the FERS benefit."

On July 10, 2014, the parties signed a Marital Dissolution Agreement, which was incorporated into their Final Decree of Divorce entered with the trial court on July 16, 2014. The parties' Marital Dissolution Agreement contains a paragraph titled "Federal Retirement Benefit," which provided, in pertinent part, "Wife is entitled to fifty percent (50%) of Husband's FERS Supplement under the Civil Service Retirement System."

In the parties' Permanent Parenting Plan, entered with the trial court on July 16, 2014, Husband certified that his gross monthly income was \$4,597. Pursuant to the parties' Marital Dissolution Agreement, Husband's income figure included half of Husband's FERS Supplement, or \$685 a month, and half of Husband's Civil Service Annuity, or \$2,662 a month, as Wife was entitled to receive fifty percent (50%) of

Husband's FERS Supplement and Civil Service Annuity. This figure also included Husband's wages of \$1,250 a month, or \$15,000 a year, from his "casual job" with Raytheon Corporation.

The inclusion of \$15,000 a year for Husband's part-time employment was consistent with Husband's deposition testimony that he "would probably make about \$15,000 a year, which would be equal to the [FERS Supplement] cap." When these amounts are added together, they total the exact monthly income figure of \$4,597 contained within the parties' Parenting Plan ($\$2,662 + \$685 + \$1,250 = \$4,597$) used to determine Husband's child support obligation.

On June 22, 2015, Wife filed her Petition for Civil and Criminal Contempt, in which she alleged that Husband failed and refused to pay Wife fifty percent (50%) of his FERS Supplement from December of 2014 to June of 2015 in violation of the parties' Marital Dissolution Agreement, despite the fact that Husband was receiving \$1,370 a month for his FERS Supplement from the Office of Personnel Management.

On July 27, 2015, Husband's counsel sent a letter to Wife's counsel detailing that Husband's FERS Supplement had been reduced to Zero Dollars (\$0) beginning August 1, 2015. The letter also indicated that "because fifty percent (50%) of Zero Dollars (\$0.00) is Zero Dollars (\$0.00), [Wife] will not receive a FERS Annuity Supplement payment beginning August 1, 2015."

In April of 2015, pursuant to the parties' Permanent Parenting Plan, Wife received Husband's 2014 federal income tax return. Despite Husband's testimony on April 21, 2014 that he would only earn \$15,000 a year from Raytheon Corporation,

Husband's income tax return revealed that in 2014, Husband's earned income totaled \$52,309. Husband's earned income of \$52,309 far exceeded the FERS Supplement earnings limit of \$15,120, and what was contemplated in the parties' Martial Dissolution Agreement and Permanent Parenting Plan, and resulted in the reduction of the FERS Supplement from \$1,370 to \$0 a month.

The hearing of Wife's Petition for Civil and Criminal Contempt was conducted before the trial court on March 2, 2016 and March 3, 2016. On March 2, 2016, Wife's counsel conducted his direct examination of Wife, and at the close of said direct examination, Husband's counsel moved to dismiss Wife's Petition for Civil and Criminal Contempt. Husband's oral Motion to Dismiss was heard on March 3, 2016 before Wife closed her proof and was based solely upon Wife's failure to elect whether she was seeking civil or criminal contempt at the outset of the proceedings.

On March 8, 2016, the trial court granted Husband's Motion to Dismiss, during which the trial court incorrectly detailed that the requisite burden of proof for civil contempt was "clear and convincing evidence." On June 16, 2016, Wife timely filed a Notice of Appeal and Appeal Bond.

During Wife's first appeal of the present matter, Wife asserted that the trial court erred when it applied an incorrect legal standard and when it dismissed her Petition prior to the completion of her proof. Parsons v. Parsons, 2017 WL 1192111, at *4-5 (Tenn. Ct. App. March 30, 2017). However, the focus of Wife's argument on appeal was upon the trial court's refusal to address the primary issue of Husband's

failure to pay Wife her share of his FERS Supplement, in violation of Johnson v. Johnson, 37 S.W.3d 892 (Tenn. 2001). Id. at *6.

Specifically, Wife argued that in accordance with Johnson, her interest in Husband's retirement benefits is a property interest and as such, is non-modifiable. Id. at *2. Further, Wife asserted that pursuant to Johnson, the entry of the parties' Final Decree of Divorce gave her a vested interest in her share of Husband's retirement benefits, and Husband's failure to compensate Wife to the extent of her vested interest was an improper unilateral modification of the parties' Final Decree of Divorce. Id.

Notably, during the oral argument of Wife's first appeal on February 14, 2017, the Western Section Court of Appeals specifically inquired of counsel for Wife, pursuant to both Towner and Johnson, that regardless of the improper contempt standard utilized by the trial court in the original post-divorce hearing in this cause, Husband still appeared to owe Wife certain funds, as Husband's actions effected a reduction in the whole of Wife's retirement benefits, including a reduction in the half in which Wife had a vested interest.

In response, Husband asserted that Wife knew that that his income would exceed the \$15,120 earnings cap prior to the entry of the Final Decree of Divorce. Id. Nevertheless, the Western Section of the Court of Appeals seemingly rejected Husband's argument in its ruling of March 30, 2017 and detailed,

[W]e note that [Husband] signed the permanent parenting plan on July 10, 2014, swearing and affirming that his gross monthly income was only \$4,597 per month, which included his federal retirement benefits and his expected earnings from Raytheon. Id.

Further, the Court detailed that before Husband frustrated the Final Decree and his FERS Supplement was reduced from \$1,370 to \$0 a month, Husband did not pay Wife her fifty percent (50%) share of his FERS Supplement for the months of December 2014 through June 2015, even though Husband was receiving the full FERS Supplement directly from the Office of Personnel Management. Id. at *2.

Ultimately, the Tennessee Court of Appeals declined Wife's invitation to rule upon the "primary issue of non-payment of the FERS Supplement" and pretermitted Wife's remaining issues on appeal. Id. The Tennessee Court of Appeals vacated the trial court's order, remanded the case to the trial court for further proceedings, and assessed the costs of appeal against Husband. Id. In doing so, the Court forced Wife to incur additional attorney fees before the trial court and during the second appeal of this matter, all while Wife sought no more than that which she was entitled to receive upon the entry of the parties' Final Decree of Divorce: one-half of Husband's FERS Supplement, or \$685 a month.

On May 15, 2017, less than two (2) months after the present case was remanded to the trial court for further proceedings, the United States Supreme Court issued its opinion in Howell v. Howell, in which the Court held that a state court cannot order a veteran to indemnify or reimburse his former spouse for the loss of her share of his military retirement pay caused by the receipt of disability benefits, as

pursuant to 10 U.S.C. § 1408, federal law preempts state courts from dividing military retirement pay that a veteran has waived in order to receive disability benefits. Howell, 137 S. Ct. at 1406.

On July 24, 2017, the parties appeared for the remand hearing of Wife's Petition for Civil and Criminal Contempt and Wife's Amended Petition for Civil and Criminal Contempt. However, rather than proceeding with the rehearing, the trial court provided counsel for both parties with a copy of Howell v. Howell and requested additional briefing on the effect that Howell had, if any, on the case at hand.

On July 31, 2017, Wife filed her Supplemental Memorandum in Support of Amended Petition for Civil and Criminal Contempt and in the Alternative, for Breach of Contract, in which Wife alleged that Howell v. Howell has no bearing upon the present case, as Husband's FERS Supplement is not military retirement pay, he did not waive his FERS Supplement to receive disability benefits, and the court's ability to divide Husband's FERS Supplement and enforce the parties' Final Decree of Divorce is not precluded by federal law.

Notably, unlike a retired, disabled veteran whose overall income would be reduced by a division of his disability benefits, in the instant case, Husband is unaffected by the loss of his FERS Supplement. Husband's 2014 earned income of \$52,309 not only exceeded the FERS Supplement earnings limit of \$15,120, it greatly exceeded the amount that Husband could expect to receive for his fifty percent (50%) share of the FERS Supplement, which, at the time of the parties' divorce, totaled \$685

a month, or \$8,220 a year (685×12 months = 8,220). Husband's earned income in 2014, 2015, and 2016 totaled \$52,309, \$34,553, and \$37,301, respectively.

On August 7, 2017, Husband filed his Supplemented Response to Wife's Amended Petition for Civil and Criminal Contempt and in the Alternative, for Breach of Contract, in which Husband alleged that the United States Supreme Court decision in Howell v. Howell directly overturned the Tennessee Supreme Court's holding in Johnson v. Johnson and substantially reinterpreted the concept of vested interest as it had been applied in Johnson and Johnson's predecessors.

On September 12 and 13, 2017, the trial court heard Wife's Amended Petition for Civil and Criminal Contempt and in the Alternative, for Breach of Contract. On November 29, 2017, the trial court issued its oral ruling on Wife's Amended Petition for Civil and Criminal Contempt and in the Alternative, for Breach of Contract. During said oral ruling, the trial court acknowledge both parties' arguments regarding the applicability, or lack thereof, of Howell v. Howell to the case at hand. However, the trial court opined that the parties' arguments regarding Howell amounted to a "distinction without a difference" and ordered Husband to pay Wife \$685 a month in the form of an upward deviation in child support to restore her loss of the FERS Supplement that she would otherwise be receiving.

On December 20, 2017, Husband filed his Motion to Alter, Amend, or Set Aside the Judgment, or in the Alternative Stay the Judgment Pending Appeal, and on March 21, 2018, Wife filed her Response to Husband's Motion to Alter, Amend, or Set Aside the Judgment.

On August 31, 2018, Husband's Motion to Alter, Amend, or Set Aside the Judgment was heard before the trial court. At the conclusion of said hearing, the trial court granted Husband's Motion to Alter, Amend, or Set Aside the Judgment and held that it erred when it awarded Wife \$685 a month in the form of an upward deviation in child support to restore her loss of her share of Husband's FERS Supplement. Additionally, the Court declined to award attorney fees to either party. On October 18, 2018, the Order on [Husband's] Motion to Alter, Amend or Set Aside the Judgment was entered with the trial court, and on November 6, 2018, Wife timely filed her Notice of Appeal with the Tennessee Court of Appeals.

On December 12, 2019, the Western Section of the Tennessee Court of Appeals affirmed the trial court's ruling and held that Husband was not required to compensate Wife for her interest in his retirement benefit after Husband's unilateral actions resulted in the termination of same. Parsons v. Parsons, 2019 WL 6770520, at *5-6 (Tenn. Ct. App. Dec. 12, 2019). Additionally, the Court failed to acknowledge the parties' arguments regarding Johnson and Howell and instead opined, "[T]he benefits at issue in Johnson and Howell are readily distinguishable from the FERS Supplement at issue here. Johnson and Howell concern military retirement benefits, which are not in the nature of a FERS Supplement." Id. at *6 (emphasis added).

Further, the Court held that Husband was "definitively the prevailing party at trial" and on appeal. Id. at *8. Accordingly, the Court held that Husband was entitled to his attorney's fees and expenses at both the trial and appellate level and remanded

the case to the trial court for determination of Husband's reasonable trial and appellate attorney's fees and expenses and for entry of judgment on same. Id.

On February 10, 2020, Wife filed her Application for Permission to Appeal with the Tennessee Supreme Court, and on June 3, 2020, the Tennessee Supreme Court entered its Order Denying Application for Permission to Appeal. Subsequently, on June 12, 2020, Wife filed her Petition for Rule 39 Rehearing of Denial of Application for Permission to Appeal with the Tennessee Supreme Court, and on June 18, 2020, Husband filed his Motion for Assessment of Attorney's Fees and Costs for Appellant's Frivolous Filing with the Tennessee Supreme Court.

Notably, Husband's Motion for Assessment of Attorney's Fees was based solely on Husband's allegation that "Howell v. Howell, 137 S. Ct. 1400 (2017), controls in this matter, and has made the law uniform throughout the United States and Tennessee." On June 18, 2020, the Tennessee Supreme Court entered its Order Denying Wife's Petition for Rule 39 Rehearing.

REASONS FOR GRANTING THE PETITION

Wife submits that in Parsons v. Parsons, 2019 WL 6770520 (Tenn. Ct. App. Dec. 12, 2019), the Tennessee Court of Appeals ignored long standing Tennessee precedent when it held that akin to Howell v. Howell, the Tennessee Supreme Court's holding in Johnson v. Johnson is limited solely to military retirement benefits.

Contrary to the doctrine of *stare decisis*, the Court of Appeals penalized Wife for her reliance upon Johnson, which has been routinely cited in cases that do not involve military retirement benefits, when it refused to hold that in accordance with

Johnson and its progeny, Wife had a vested, non-modifiable interest in the property allocated to her in the parties' Marital Dissolution Agreement and that Husband could not take any action to frustrate Wife's receipt of her vested interest. *See Minor v. Minor*, 2014 WL 356508 (Tenn. Ct. App. Jan. 31, 2014); *Pruitt v. Pruitt*, 293 S.W.3d 537 (Tenn. Ct. App. 2008); *Flowers v. Flowers*, 2007 WL 412302 (Tenn. Ct. App. Feb. 6, 2007); *Elliott v. Elliott*, 149 S.W.3d 77 (Tenn. Ct. App. 2004) (abrogated on other grounds by *Eberbach v. Eberbach*, 535 S.W.3d 467 (Tenn. 2017)).

Wife alleges that the Court compounded its penalization of Wife and her reliance on long standing precedent when it reversed the trial court's denial of Husband's request for attorney fees and held that Husband is entitled to his reasonable attorney fees at both the trial and appellate level, which ultimately allowed Husband to reap a windfall from his willful obstruction of the parties' Marital Dissolution Agreement, in spite of the fact that Wife was the prevailing party during the first appeal of the present matter.

Tennessee courts have long held that the provisions of a marital dissolution agreement pertaining to the division of the parties' marital estate are essentially contractual, even after they have been judicially approved and incorporated into a divorce decree. *See Elliott*, 149 S.W.3d at 84; *Wade v. Wade*, 115 S.W.3d 917, 924 (Tenn. Ct. App. 2002); *Gray v. Estate of Gray*, 993 S.W.2d 59, 63 (Tenn. Ct. App. 1998). The parties may not unilaterally modify a marital dissolution agreement once it has been approved by the trial court. *Elliott*, 149 S.W.3d at 84. In fact, both parties obtain a vested interest in the property allocated to them in the martial dissolution

agreement, and neither party may frustrate the other's receipt of his or her vested interest. Id.

By way of illustration, in Towner v. Towner, 858 S.W.2d at 889, husband agreed to pay wife \$387 a month in the parties' property settlement agreement, which was specifically in consideration of wife's waiver of husband's retirement benefits. When wife remarried, husband discontinued the monthly payment of \$387 and wife filed a petition for contempt. Id.

The Tennessee Supreme Court ultimately held that the provision in the parties' settlement agreement regarding the monthly payments retained its contractual nature because it constituted a division of the parties' marital property. Id. at 890. Accordingly, husband could not unilaterally terminate his monthly payments of \$387 to wife, as the Court concluded, "[T]he payments constitute an integral part of an agreement for the division of marital property, which is not subject to modification by the court." Id. at 892.

Several years later, in Johnson v. Johnson, the Tennessee Supreme Court held that a non-employee spouse's interest in his or her spouse's retirement benefits vests as of the date of the entry of the final decree of divorce and cannot be unilaterally altered. Johnson, 37 S.W.3d at 897 (abrogated on other grounds by Howell, 137 S. Ct. at 1405). In Johnson v. Johnson, the parties' marital dissolution agreement provided that wife would receive one-half of all of husband's military retirement benefits each month upon husband's receipt of the same. Johnson, 37 S.W.3d at 894. Subsequent to the entry of the marital dissolution agreement, husband began

receiving \$2,892 a month in retirement, and wife was paid one-half of this amount in monthly installments. Id. Wife continued to receive \$1,446 of husband's retirement benefit each month for nearly a year. Id.

Subsequently, Husband elected to receive a portion of his retirement pay in tax-free disability benefits. Id. As a result of husband's actions, wife's monthly payments were reduced from \$1,446 to \$1,265, or by \$181 per month. Id. Wife petitioned the court to modify the parties' final decree of divorce, contending that the court should order husband to pay \$181 per month in alimony to avoid frustration of the final decree and impairment of her rights under the marital dissolution agreement. Id.

Ultimately, the Tennessee Supreme Court held that under the parties' marital dissolution agreement,

We find that "retirement benefits" has a usual, natural, and ordinary meaning. In the absence of express definition, limitation, or indication to the contrary in the MDA, the term comprehensively references all amounts to which the retiree would ordinarily be entitled as a result of retirement from the military. Accordingly, we hold that under the MDA, [wife] was entitled to a one-half interest in all amounts [husband] would ordinarily receive as a result of his retirement from the military. We further hold that [wife's] interest in those "retirement benefits" vested as of the date of entry of the court's decree and could not be unilaterally altered. Id. at 896-97 (emphasis added).

The Court opined that wife's characterization of her petition as one seeking "modification" was incorrect, as wife primarily alleged that the parties agreed to a course of action, the trial court ordered that action, and husband failed to perform as

ordered. Id. at 896. Therefore, the Court determined that Wife sought no more than what she originally received at the time of husband's retirement, which was one half of the retirement pay that he was entitled to receive at the time of his retirement. Id. at 896-97.

In opposing wife's petition, husband relied upon Towner v. Towner for the proposition that there can be no post-judgment modification of a marital dissolution agreement. Id. at 897. The Tennessee Supreme Court agreed with husband, holding that this rule of law is the very reason that wife prevailed, detailing,

Once [wife] obtained a vested interest in [husband's] "retirement benefits," [husband] was prohibited from taking any action to frustrate [wife's] receipt of her vested interest. [Husband's] failure to compensate [wife] to the extent of her vested interest in his retirement benefits constituted a unilateral modification of the MDA and the divorce decree in violation of Towner. Id. (emphasis added).

Thus, the Tennessee Supreme Court held that when a marital dissolution agreement divides retirement benefits, the non-employee spouse has "a vested interest in his or her portion of those benefits **as of the date of the court's decree**. That vested interest cannot thereafter be unilaterally diminished by the act of the [employee] spouse." Id. (emphasis added). Such an act constitutes "an impermissible modification of a division of marital property and a violation of the court decree incorporating the MDA." Id. Accordingly, Court remanded the case to the trial court for further proceedings necessary to enforce the parties' final decree of divorce and provide wife with the agreed upon monthly payment of \$1,446. Id. at 898.

Wife notes that the Tennessee Supreme Court's decision in Johnson v. Johnson has been limited by the United States Supreme Court's ruling in Howell v. Howell, which was decided on May 15, 2017, less than two (2) months after the present case was remanded to the trial court following Wife's first appeal. *See Parsons v. Parsons*, 2017 WL 1192111 (Tenn. Ct. App. Mar. 30, 2017). Specifically, in light of Howell, Johnson cannot be cited for the proposition that a **veteran** must reimburse his spouse for the reduction in his spouse's share of **military retirement benefits** caused by the **veteran's receipt of disability**, as pursuant to 10 U.S.C. § 1408, federal law preempts state courts from dividing military retirement pay that a veteran has waived in order to receive disability benefits. Howell, 137 S. Ct. at 1402.

However, unlike Howell, the Tennessee Supreme Court's holding in Johnson is not limited solely to the context of military retirement benefits. Tennessee courts have routinely cited Johnson in cases that do not involve military retirement benefits for the proposition that parties obtain a vested interest in the property allocated to them in their marital dissolution agreement, and neither party may frustrate the other's receipt of his or her vested interest. *See Elliott v. Elliott*, 149 S.W.3d at 84 (in which the Court of Appeals held that husband impermissibly impeded the division of the parties' marital estate when he refused to exercise wife's one-half share of his stock options, as pursuant to Johnson, "[B]oth parties obtain a vested interest in the property allocated to them in the MDA, and neither party may frustrate the other's receipt of his or her vested interest."); Flowers v. Flowers, 2007 WL 412302, at *1 (in which the Court cited Johnson and held that by virtue of the property settlement

agreement, ex-wife's "interest in [husband's] retirement benefits and the IRAs were vested as of that date and could not be unilaterally altered."); Pruitt v. Pruitt, 293 S.W.3d at 542 (in which the Court cited Johnson and held that pursuant to the parties' marital dissolution agreement, wife was entitled to forty percent (40%) of husband's non-military retirement benefits accrued up to the date of execution of the agreement, and that once a final decree of divorce becomes a final, non-appealable judgment, it is no longer subject to modification); Minor v. Minor, 2014 WL 356508, at *5 (in which the Court cited Johnson and Elliott for the proposition that a "court should not permit a party to avoid his lawful support obligation by wrongfully causing the circumstance that might otherwise justify termination of the obligation," as "neither party may frustrate the other's receipt of his or her vested interest"). Id. at *8 (emphasis added).

Wife notes that following the U.S. Supreme Court's decision in Howell v. Howell on May 15, 2017, the Tennessee Court of Appeals has continued to cite Johnson v. Johnson in cases that do not involve military retirement benefits. *See Hassler v. Hassler*, 2018 WL 4697012, at *2 (Tenn. Ct. App. Oct. 1, 2018) ("A marital dissolution agreement is a contract and thus is generally subject to the rules governing construction of contracts." Johnson, 37 S.W.3d at 896); Jones v. Jones, 2018 WL 3844335, at *3 (Tenn. Ct. App. Aug. 13, 2018) ("[Final judgments] distributing marital property are not subject to modification." Johnson, 37 S.W.3d at 895); Ramsey v. Reso, 2018 WL 1747991, at *2 (Tenn. Ct. App. Apr. 11, 2018) ("Marital

dissolution agreements are contracts and are to be treated as such.” Johnson, 37 S.W.3d at 896).

Wife submits that Towner, Johnson, and their progeny are controlling in the present case, as Husband’s payments of one-half (1/2) of his gross FERS Supplement, or \$685 a month, “constitute an integral part of [the parties’] agreement for the division of marital property, which is not subject to modification by the court.” Towner, 858 S.W.2d at 892. Pursuant to Towner and the above-cited cases, Wife obtained a vested interest in fifty percent (50%) of Husband’s gross FERS Supplement, calculated as of July 16, 2014, the date of the entry of the parties’ Final Decree of Divorce, or \$685 a month. Once Wife obtained a vested interest in Husband’s FERS Supplement, Husband “was prohibited from taking any action to frustrate [Wife’s] receipt of her vested interest.” Johnson, 37 S.W.3d at 897. Although Husband certainly had the legal right to earn income of \$52,309 a year, his doing so effected a reduction of the whole of his retirement benefits, including a reduction in the half in which Wife had a vested interest.

Further, allowing Husband to reap a windfall from his willful obstruction of the parties’ Marital Dissolution Agreement is unwise policy and contrary to the well-settled principals of contract construction. Minor, 2014 WL 356508, at *7. In Minor, the Court refused to interpret the parties’ marital dissolution agreement in a way that would permit husband to benefit from his own contemptuous conduct. Id. at *8. The Court detailed that the words of a contract should be given a reasonable construction, rather than an unreasonable one, and a court should endeavor to give

a construction most equitable to the parties that will not give one party an unfair or unreasonable advantage over the other. Id. at *7.

In the case at hand, Husband deliberately frustrated the Final Decree of Divorce when he earned income of \$52,309 in 2014, far in excess of the FERS Supplement cap of \$15,120 a year, and failed to pay Wife for her vested interest in his FERS Supplement. Although Husband certainly had the legal right to earn income of \$52,309 a year, his doing so effected a reduction of the whole of his retirement benefits, including a reduction in the half in which Wife had a vested interest.

Wife submits that Husband is unaffected by the loss of his FERS Supplement. Husband's 2014 earned income of \$52,309 not only exceeded the FERS Supplement earnings limit of \$15,120, it greatly exceeded the amount that Husband could expect to receive for his share of the FERS Supplement. To the contrary, Wife's monthly income was reduced by \$685 a month due to the loss of her share of the Supplement.

Akin to Minor, it would be inequitable to allow Husband to impede the division of the parties' estate by virtue of his own misconduct. Minor, 2014 WL 356508, at *7. Doing so would give Husband an "unfair or unreasonable advantage over [Wife]" and allow Husband to "reap a windfall from his willful failure to pay" Wife her share of his gross FERS Supplement. Id. at *7.

Therefore, just as a parent should not be allowed to avoid his support obligation by becoming willfully underemployed, Husband should not be permitted to benefit from his receipt of earned income so far in excess of what was contemplated by the

parties' Agreement that Wife's rights to receive the benefit of the Marital Dissolution Agreement were destroyed. Id. at *7-8. Allowing Husband to benefit from this conduct would be contrary to policy and the well-settled principles of contract construction. Id. at *7.

Based on all of the foregoing, in accordance with long-standing Tennessee Supreme Court case law, Wife obtained a vested interest in fifty percent (50%) of Husband's gross FERS Supplement, calculated as of July 16, 2014, the date of the entry of the parties' Final Decree of Divorce, or \$685 a month. Once Wife obtained a vested interest in Husband's FERS Supplement, Husband "was prohibited from taking any action to frustrate [Wife's] receipt of her vested interest." Johnson, 37 S.W.3d at 897.

Accordingly, Wife respectfully submits that the parties' Final Decree of Divorce should be enforced and Husband should be ordered to pay Wife one-half of the original value of Husband's FERS Supplement, totaling \$685 a month, plus any arrearages that accumulated due to Husband's failure to pay this amount.

CONCLUSION

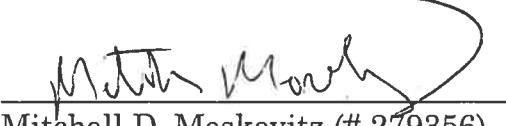
Based on all of the foregoing, Wife submits that this Honorable Court should grant Wife's Petition for Writ of Certiorari, as the Western Section of the Appellate Court of the State of Tennessee erred, as a matter of law, when it concluded that Wife did not obtain a vested, nonmodifiable property interest in her share of Husband's marital retirement benefits as of the date of the entry of the parties' Final Decree of

Divorce, in direct conflict with longstanding Tennessee case law, Towner v. Towner, 858 S.W.2d 888 (Tenn. 1993) and Johnson v. Johnson, 37 S.W.3d 892 (Tenn. 2001).

The Western Section of the Appellate Court of the State of Tennessee additionally erred, as a matter of law, when it failed to distinguish between Johnson v. Johnson, 37 S.W.3d 892 (Tenn. 2001), in which the Tennessee Supreme Court held that a nonemployee spouse obtains a vested interest in his or her spouse's retirement benefits as the date of the entry of the parties' divorce decree, which is not subject to modification or termination due to a post-decree change in circumstances unilaterally imposed by the employee spouse, and Howell v. Howell, 137 S. Ct. 1400 (2017), in which the United States Supreme Court held that a state court cannot order a veteran to indemnify or reimburse his former spouse for the loss of her share of his military retirement pay caused by the receipt of disability benefits.

The Appellate Court of the State of Tennessee further erred, and thereby compounded the error in the first and second issues, when it reversed the trial court's denial of Husband's request for attorney fees and held that Husband is entitled to his reasonable attorney fees at both the trial and appellate level, which ultimately allowed Husband to reap a windfall from his willful obstruction of the parties' Marital Dissolution Agreement, in spite of the fact that Wife was the prevailing party during the first appeal of the present matter.

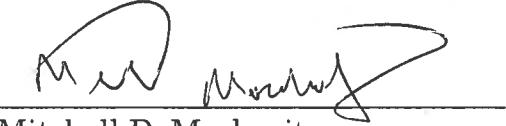
Respectfully submitted,



Mitchell D. Moskovitz (# 279356)
530 Oak Court Drive, Suite 355
Memphis, TN 38117
MMoskovitz@smmlawoffice.com
(901) 821-0044
Attorney for Kelly Colvard Parsons

CERTIFICATE OF SERVICE

The undersigned certifies that a true and exact copy of the foregoing document has been forwarded to United States Supreme Court, Clerk's Office, 1 First Street, NE, Washington, DC 20543, via prepaid FedEx overnight; and to Larry Rice and Erin O'Dea, Attorneys for Appellee, 275 Jefferson Avenue, Memphis, Tennessee 38103, via regular U.S. Mail, postage prepaid, this 1st day of October, 2020.



Mitchell D. Moskovitz